

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

CAMBRIDGE UNIVERSITY PRESS,
OXFORD UNIVERSITY PRESS, INC.,
and SAGE PUBLICATIONS, INC.,

Plaintiffs,

- v. -

MARK P. BECKER, in his official
capacity as Georgia State University
President, et al.,

Defendants.

Civil Action No. 1:08-CV-1425-ODE

REDACTED VERSION

**EXECUTIVE SUMMARY AND PLAINTIFFS' POST-TRIAL
PROPOSED FINDINGS OF FACT**

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I. EXECUTIVE SUMMARY

Overview

Cambridge, Oxford, and SAGE (collectively “Plaintiffs”), three leading academic publishers, brought this copyright infringement lawsuit to stop conduct at Georgia State University (GSU) that poses a direct threat to the viability of their businesses. That conduct involves ongoing, institution-wide, unauthorized copying, display, and distribution in electronic form of substantial portions of Plaintiffs’ books to entire classes of GSU students. GSU has attempted to defend its legally insupportable conduct by asserting that its status as a not-for-profit educational institution somehow entitles it to unprecedented leeway in invoking copyright law’s fair use privilege. The result of this legal misconception has been extensive digital copying of one or more chapters of books by Plaintiffs and other publishers in courses across a broad range of academic disciplines without payment or permission. When the same types of materials are assigned in paper, as opposed to electronic, format, however, or when the material is a journal article rather than a book excerpt, GSU recognizes its obligation either to require students to purchase the books or to pay license fees to distribute the material with permission of the copyright owners. Nothing either in the nature of the assigned readings or in the pedagogical purpose they serve justifies the disparate treatment

of Plaintiffs' works.

Copyright law protects Plaintiffs' right to be compensated for the copying, display, and distribution of their works, whether in digital or paper form. *See Greenberg v. Nat'l Geographic Soc'y*, 533 F.3d 1244, 1257 (11th Cir. 2008) (copyright law is "media neutral"). Without the "limited monopoly" conferred by the exclusive rights under section 106 of the Copyright Act, 17 U.S.C § 106, which secures these exclusive rights, authors "would have little economic incentive to create and publish their work." *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001).

Although GSU has historically respected Plaintiffs' and other publishers' copyright rights when it comes to paper copies of assigned readings, GSU's growing reliance on disseminating course reading materials in digital form, without compensating the copyright owners, is undermining those rights. By using the migration to digital course readings as a premise for circumventing Plaintiffs' copyright rights, Defendants are fostering and condoning practices that pose a serious threat to the long-term viability of academic publishing.

The stipulated facts alone establish both the central role publishers like Plaintiffs play in furthering the goals of copyright law and the risk to the

“economic incentive to create and publish” posed by GSU’s unlawful activities.

To wit:

- Academic publishers such as Plaintiffs play an important role in higher education (Stipulated Fact 7*);
- Plaintiffs expend tens of millions of dollars a year developing and marketing books to their largest market: colleges and universities (Stipulated Facts 11, 12);
- Plaintiffs’ publications are offered for sale through a variety of print and electronic formats (Stipulated Fact 13);
- Plaintiffs rely on sales of their works across all of these formats to enable them to be able to continue to publish works of high quality (Stipulated Fact 12);
- Plaintiffs also offer professors, students and others licenses (“permissions”) to photocopy or digitally reproduce portions of their works for a fee (Stipulated Fact 14);
- Such permissions can be obtained either directly from the Plaintiffs or through the Copyright Clearance Center (“CCC”) (Stipulated Fact 17); and
- Permissions represent a significant revenue stream for Plaintiffs (Stipulated Fact 15).

GSU’s digital expropriation of Plaintiffs’ works deprives Plaintiffs of *any* compensation from classroom uses in their primary market. Were GSU’s practices to be adopted nationwide at the thousands of schools that also use digital

* Facts stipulated by the parties in Attachment E to the Consolidated Pretrial Order, entered May 2, 2011, Docket No. 280, admitted by the Court at Trial Transcript Volume 1, May 17, 2011, Docket No. 399 (“5/17 Tr.”) 48:12-13.

distribution platforms for course readings, Plaintiffs' sales and permissions income would erode to the point where they could not stay in business – to the detriment, ultimately, of GSU and colleges and universities across the country.

The trial record makes abundantly clear that GSU's 2009 copyright policy does not strike a reasonable balance between fair use and compliance with Plaintiffs' copyright rights. Even though the 2009 policy ostensibly was adopted to remedy the rampant infringement that gave rise to this action, it has, in practice, simply replaced one copyright policy that “just said ‘yes’ to everything,” Trial Transcript Volume 13, June 3, 2011, Docket No. 396 (“6/3 Tr.”), 82:9-12 (Crews), with another.

Plaintiffs Have Made a Prima Facie Showing of Copyright Infringement

In a copyright infringement case, the plaintiff has the burden of proving that (1) it owns a valid copyright and (2) that the defendant has copied protectable portions of the copyrighted work. Plaintiffs have made this showing for each of the representative works in suit.

First, Plaintiffs have proved that they own a valid copyright – or are the exclusive licensee of the copyright rights – in each of the representative works set forth in Plaintiffs' June 1, 2011 filing (Docket No. 361). For each work, the record contains either a valid copyright registration certificate or evidence that the work

was first published outside the United States and that, under section 104(b)(2) of the Copyright Act, no copyright registration is necessary as a prerequisite to suit.

Second, it is stipulated that GSU employees have engaged in the copying and distribution of Plaintiffs' copyrighted works through ERes and uLearn. *See* DX 111, Stipulated Facts 53-57 (ERes), 74, 76, 78-81 (uLearn). These activities implicate Plaintiffs' exclusive rights under section 106 of the Copyright Act. It is also uncontested that those acts occurred without Plaintiffs' authorization.

There is no merit to any of Defendants' asserted technical challenges. Plaintiffs have proved either ownership or an exclusive license for each work with work-made-for-hire agreements or with agreements with editors and/or authors assigning or licensing the copyright rights to the publisher. And there is no question that each work is sufficiently original to be entitled to copyright protection, whether or not it discusses or cites third-party materials. Thus, it is irrelevant that some of the works were first published outside the United States and not registered in the United States or that some copyright registration certificates were not obtained until more than five years after the initial publication, as Plaintiffs need not and do not rely on a presumption of copyright validity arising from registration within five years of publication to establish copyrightability.

Even were Defendants able to demonstrate one or even several technical deficiencies from among the 75 instances of infringements from 64 separate works set forth in Docket No. 361, this should not be material to the Court's assessment of either liability or relief. In keeping with well-established precedent, this case was brought based on a representative sample of infringements from among Plaintiffs' works. The Court subsequently ordered that the case be tried based on claimed infringements during three academic terms in 2009, with the understanding that these uses would be deemed representative of current practice at GSU. This snapshot of Defendants' conduct – a far larger sample than typically has been at issue in comparable cases – is more than adequate to permit the Court to evaluate the legality Defendants' conduct and to fashion an appropriate injunction.

Because Plaintiffs have established a prima facie case of copyright infringement, the burden rests with Defendants to defend these takings as fair use. They have not even come close to carrying this burden. Indeed, they have focused primarily not on defending the accuracy of the faculty fair use determinations but rather on seeking to absolve themselves of legal accountability for them.

The Sovereign Immunity Defense

Defendants have sought to cloak themselves in Eleventh Amendment immunity and have expressly sought to pin any liability on faculty members and administrators. However, as the Court held in its summary judgment ruling, Defendants cannot claim immunity for the implementation of the 2009 copyright policy, which they are responsible for overseeing. In the Court's words, Defendants "cannot encourage instructors to make these difficult, fact-based legal decisions and then claim themselves to be immune from liability for the resultant fair use decisions." Order, dated September 30, 2010, Docket No. 235, at 17.

In ruling on Defendants' renewed motion to dismiss, the Court clarified its application of the *Ex parte Young* doctrine to this case as follows: "If the policy caused violations and the violations are or were ongoing and continuous within the timeframe established, then I believe that the Court could enter injunctive relief under the *Ex parte Young* line of cases." Trial Transcript Volume 8, May 26, 2011, Docket No. 406 ("5/26 Tr.") 91:1-5. The record makes abundantly clear that the policy did in fact cause the ongoing violations of Plaintiffs' copyright rights by delegating fair use determinations entirely to untrained and unsupervised faculty members without making any provision for oversight of those determinations. The policy put in place a crude "tool" for faculty to use – a slanted Fair Use Checklist filled with terms and concepts alien to copyright-novice professors. Defendants

undertook no investigation of how the policy would work in practice; disbanded the committee that promulgated the policy long before actual practice under it could be gauged; established no education, supervision, or enforcement protocols; and gave no consideration to the effect that a lack of a permissions budget might have on faculty fair use determinations.

The predictable results speak for themselves: every one of the 73 completed checklists in the trial record (whether original or “recreated”) lopsidedly found fair use; indeed, no faculty member found that *even a single fair use factor* weighed against fair use. Among a long list of aberrant faculty interpretations of fair use under the 2009 policy, takings of more than 150 pages and of seven chapters from a single work were deemed not to be “large”; repeated use of the same copyrighted materials for the same course in multiple semesters was deemed not to be “repetitive”; and only one checklist indicated that licensing was available, notwithstanding a uniform failure to investigate that issue.

This record plainly suffices to hold Defendants liable for prospective injunctive relief under *Ex parte Young*.

The Fair Use Defense

Defendants’ asserted fair use defense also has no merit. There is not a single reported decision that suggests, let alone holds, that copying as extensive and

systematic as that which has occurred at GSU is fair use. The copying is nontransformative: the exact digital reproductions posted on ERes and uLearn serve exactly the same purpose as do the copyrighted originals (whether purchased books or licensed excerpts) and thus directly supplant sales or licenses of those originals. A straightforward analysis under section 107 of the Copyright Act dictates the conclusion that the alleged infringements are not fair use.

Section 107 sets forth four nonexclusive factors to be considered in the fair use analysis. It is plain that at least three of those factors heavily favor Plaintiffs, including the two most important factors in the context of nontransformative uses: Factors 1 and 4; the fourth factor – Factor 2 – is either a tie or also favors Plaintiffs.

The two most important factors

Factor 1 examines the purpose and character of the use. The “central purpose” of the first-factor inquiry is not whether the use is for teaching or some other socially desirable purpose; it is instead whether the use is transformative. As the Eleventh Circuit has explained the interplay between the first and fourth factors, “[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. . . .” *Peter Letterese & Assoc. v. World Instit. of*

Scientology Enters., Int'l, 533 F.3d 1287, 1310 (11th Cir. 2008) (citation omitted); *SunTrust Bank*, 268 F.3d at 1274 n.28 (noting that a transformative work is less likely to supplant the original). There is no dispute that the copying in question is not transformative; the digital copies add no value to the originals.

Defendants' reliance on the educational purpose of the copying is wrong as a matter of law. Both Supreme Court and Eleventh Circuit authority make clear that whereas transformativeness is central to Factor 1, the nonprofit educational purpose of the use is "only one element of the first factor enquiry." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994). The "mere fact that a use is educational and not for profit *does not insulate it from a finding of infringement.*" *Id.*

Similarly unavailing is Defendants' effort to give virtually dispositive weight to the fact that the preamble to section 107 lists "teaching (including multiple copies for classroom use)" among the illustrative fair uses. Defendants' own expert, Dr. Crews, correctly debunked as a "myth" the notion that nonprofit educational uses are presumptively fair. The preamble language does not excuse Defendants from their obligation to make their fair use case through application of

all of the fair use factors to the challenged conduct. As the trial record makes clear, they have failed to do so.*

Factor 4 – the effect of the use on the potential market for the Plaintiffs’ works – also strongly favors Plaintiffs. Factor 4 requires the court to consider “not only the extent of market harm caused by the particular actions of the alleged infringer” but also “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590 (citation omitted). It is stipulated that Plaintiffs rely on sales of their works in a variety of formats to enable them to be able to continue to publish works of high quality and that permissions represent a significant revenue stream for them. *See* Stipulated Facts 12, 15.

The record makes clear that the effect of GSU’s and uLearn practices is that a single lawfully acquired copy of one of Plaintiffs’ works, whether owned by the GSU library or by an individual faculty member, fulfills the demand for the work

* Defendants’ undue reliance on the preamble language is further undermined by Congress’ recognition that the nontransformative nature of classroom copying warranted imposing narrow limits on such copying. This concern was embodied in the Classroom Guidelines that, although to this day cited as useful fair use guidance in GSU’s Faculty Handbook, *see* PX 1002 at Sec. 313.01, Defendants go to great lengths to disparage.

of an entire class of students. Were this conduct to be replicated at colleges and universities nationwide, the inevitable impact would be to deprive Plaintiffs of both sales of their books and per-student permissions fees on a scale that would seriously impair, if not cripple altogether, their publishing activities.

The two less important factors

Factor 2 focuses on the nature of copyrighted work (not the nature of the defendants' *use* of the copyrighted work). The law of this Circuit, as elsewhere, accords weight under Factor 2 to nonfiction works, such as those at issue, that contain creative elements and are not simply factual compilations. *See Letterese*, 533 F.3d at 1312. In *Pacific & Southern Co., Inc. v. Duncan*, 744 F.2d 1490 (1994), the Eleventh Circuit expressly disapproved of allowing too wide a berth for fair use with respect to factual works, noting that courts should “take care not to discourage authors from addressing important topics for fear of losing their copyright protections.” *Id.* at 1497. *See also Princeton Univ. Press v. Michigan Doc. Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (noting that excerpts copied from scholarly books for coursepacks “contained creative material, or ‘expression’” and concluding that the second factor cut against fair use). The record establishes the creativity in Plaintiffs’ scholarly works. This factor therefore either weighs against fair use or, at a minimum, favors neither party.

Factor 3, which examines the amount and substantiality of the taking, weighs heavily against fair use. The record demonstrates copying that is substantial in both the quantitative and qualitative senses. The vast majority of the takings consist of one or more (and as many as seven) full chapters; most exceed 5 percent of the entire book; the majority exceed 10 percent; 8 exceed 20 percent; and one is just under 30 percent. *See* Docket No. 361. The excessive amount of the takings is especially clear if separately authored chapters in edited volumes are properly treated as “works” unto themselves, such that copying an entire chapter in works such as *The SAGE Handbook of Qualitative Research* or Cambridge’s *A History of Feminist Literary Criticism* constitutes a taking of 100 percent – and, by definition, the heart – of the author’s work. Notably, all of the takings at issue that comprise less than 5 percent of the entire book consist of at least a full chapter of an edited volume. That the takings are also qualitatively significant is attested to by the fact that they were chosen as assigned readings and that the faculty invariably identified them as “[i]mportant” and “necessary” to achieve their educational purpose. Factor 3 clearly favors Plaintiffs.

For all these reasons, the overall fair use analysis decisively favors Plaintiffs. This explains why Defendants’ trial presentation focused on the supposed good faith of the faculty in wrestling with the Fair Use Checklist rather than on whether

the results of that struggle were lawful. But however well-meaning these hapless efforts may have been, they are irrelevant: good faith is not a defense to copyright infringement. *See Letterese*, 533 F.3d at 1312 (“good faith does not insulate a defendant from liability”).

Neither does the record support Defendants’ less-than-subtle suggestion that to enforce Plaintiffs’ copyright rights would somehow diminish the quality of the educational process. As revealed by GSU’s own distinct practice with respect to readings in paper format as well as electronic journals, for which obtaining permissions is the norm, there is no fundamental incompatibility between students’ access to a rich body of reading materials and a university complying with its copyright obligations. Coupled with the record as to Plaintiffs’ eminently reasonable permissions charges, and as to CCC’s efficient licensing mechanisms, Defendants’ contention that the only feasible options for GSU faculty are either to disseminate copies of Plaintiffs’ works to entire classes of students for free or not at all rings hollow. GSU has demonstrated its ability to secure funding to support a wide range of academic and non-academic activities. The notion that the modest incremental expense that would be incurred either by GSU itself or by individual students to obtain lawful digital access to Plaintiffs’ works would be uniquely disruptive of GSU’s operations has absolutely no basis in the record.

Prospective Injunctive Relief

As plaintiffs have proved their entitlement to prospective injunctive relief, it is appropriate for that relief to extend to all of Plaintiffs' works, including those yet to be created. *See Princeton Univ. Press*, 99 F.3d at 1392-93 ("The weight of authority supports the extension of injunctive relief to future works."); *Pac. & S. Co. v. Duncan*, 618 F. Supp. 469, 471 (N.D. Ga. 1985) (Evans, J.) (enjoining the copying of any of the plaintiff's broadcast news programs). Plaintiffs' proposed injunction, modeled on the Classroom Guidelines, sets forth clear and reasonable parameters for permissible unauthorized copying that are intended to be workable on a university-wide basis in connection with online course reading systems at GSU. Under the terms of the proposed injunction, GSU need not modify the reading materials faculty supply to students via ERes and uLearn. It simply needs to secure readily available permissions for those uses that exceed the fair-use boundaries set forth therein.

II. THE PLAINTIFFS

A. Cambridge University Press

1. *Plaintiff Cambridge University Press ("Cambridge") is the not-for-profit publishing house of the University of Cambridge. It has 53 offices*

*throughout the world, including in New York, which is the headquarters for the Americas branch. Stipulated Facts ¶ 1.**

2. *Cambridge has published scholarly works for the past 425 years and currently publishes academic books, textbooks, monographs, reference works, professional books, electronic products, and over 240 journals. Stipulated Facts ¶ 2.*

3. Cambridge's mission is to publish works of learning and scholarship. 5/17 Tr. 53:13-19 (Smith).

4. Cambridge publishes approximately 1,000 new books each year in virtually every academic subject taught in universities. 5/17 Tr. 53:5, 54:2-6 (Smith). Cambridge books routinely garner critical acclaim and awards, including Nobel Prizes. 5/17 Tr. 53:6-12 (Smith).

5. Cambridge also offers eight electronic platforms for books to which institutions can subscribe, including Cambridge Books Online, Cambridge Companions Online, and Cambridge Histories Online. Some of the Cambridge

* Facts stipulated by the parties in Attachment E to the Consolidated Pretrial Order, entered May 2, 2011, Docket No. 280, admitted by the Court at Trial Transcript Volume 1, May 17, 2011, Docket No. 399 ("5/17 Tr.") 48:12-13, are included here verbatim, and displayed in italic type.

works listed at issue in the litigation (e.g., *The Cambridge History of China*) are available through a subscription to these products. 5/17 Tr. 67:7-22 (Smith).

B. Oxford University Press

6. *Plaintiff Oxford University Press, Inc. (“Oxford” or “OUP”) is a not-for-profit corporation headquartered in New York and associated with Oxford University Press in Oxford, England, which is the oldest and largest continuously operating university press in the world. Stipulated Facts ¶ 3.*

7. *Oxford publishes scholarly works including schoolbooks, textbooks, and reference books, as well as scholarly monographs and non-fiction books of interest to general readers in the humanities, social sciences, and the physical and life sciences, and over 200 academic and research journals. Stipulated Facts ¶ 4.*

8. Oxford’s mission is to publish works that further Oxford University’s objectives in research, scholarship, and education. Trial Transcript Volume 3, May 19, 2011, Docket No. 401 (“5/19 Tr.”) 32:6-10 (Pfund).

9. Oxford and Oxford University Press in the UK (Oxford’s affiliate in England) have a reciprocally exclusive distribution agreement under which they each enjoy the exclusive right to promote, market, and sell the works of the other. 5/19 Tr. 31:23-32:5 (Pfund); PX 509. Pursuant to this agreement,

Oxford can pursue a claim for the copyright infringement of its UK affiliate's products. PX 509 ¶ 2.4.[†]

10. Oxford publishes approximately 1,000 new titles per year and currently has approximately 30,000 books in print and 103,000 books available for licensing (i.e., even if out of print). 5/19 Tr. 35:15-25 (Pfund); *see also id.* 69:9-

11. Many Oxford works have received Pulitzer, Bancroft, and other prizes. *Id.* 48:6-19.

11. Oxford publishes various digital products, including an electronic online database of its research monographs, Oxford Scholarship Online (OSO), which is organized by discipline and sold primarily to academic institutions. Among other Oxford digital products, Oxford has also developed other electronic academic research products (e.g., Biblical Studies Online, the African American Studies Center, and Islamic Studies Online), as well as e-books. Oxford has flexible pricing arrangements for its online products so that subscribers pay based on the number of users that can use the product at the same time (what is known as a “concurrent user model”). 5/19 Tr. 49:18-54:24 (Pfund).

[†] Plaintiffs' Exhibits, Defendants' Exhibits, and Joint Exhibits are identified herein as PX, DX, and JX, respectively.

12. Oxford licenses its content for use in other publishers' custom publications – specifically created compilations produced at the request of a particular user. 5/19 Tr. 49:18-53:7; 53:8-54:24, 66:17- 68:9 (Pfund).

C. SAGE Publications

13. *Plaintiff SAGE Publications (“SAGE”) is a Delaware corporation headquartered in Thousand Oaks, California, with offices in Los Angeles, London, New Delhi, Singapore, and Washington, D.C. Stipulated Facts ¶ 5.*

14. SAGE was founded 45 years ago and is a privately-owned company, owned primarily by one of its founders, Sara McCune. SAGE has a division named CQ Press that publishes mostly works on government-related subjects, as well as an imprint, Pine Forge Press, and another division, Corwin Press, which publishes books for teacher training. Trial Transcript Volume 2, May 18, 2011, Docket No. 400 (“5/18 Tr.”) 59:2-60:3 (Richman).

15. SAGE's stated corporate vision is to engage in scholarship by thinking creatively about the needs of the academic market and developing tools that can be used globally for educational purposes. 5/18 Tr. 58:15-21 (Richman).

16. *SAGE currently publishes books and textbooks in over 20 subject areas and more than 560 journals in business, humanities, social sciences, science, technology, and medicine. Stipulated Facts ¶ 6.*

17. SAGE publishes over 500 books each year. 5/18 Tr. 58:22-23 (Richman).

D. The Role and Importance of Academic Publishing

1. Academic Publishers Play an Important Role in Higher Education

18. *Academic publishers play an important role in higher education. Stipulated Facts ¶ 7.*

19. Academic publishers exist in an “ecosystem” with the academic community whereby each component is an essential part of the educational system and each contributes to the success of the other. 5/19 56:21-57:20 (Pfund).
Scholars (who are often professors) generate content that publishers edit, structure persuasively, make more broadly understandable, and publish for use by other professors to use in their courses. 5/19 Tr. 56:21-57:20, 58:2-23 (Pfund).

20. Cambridge, Oxford, and SAGE (collectively “Plaintiffs”) are academic publishers. The target market for their works is academic institutions, professors, and students. 5/19 Tr. 33:2-3 (Pfund); 5/17 Tr. 54:17-55:5 (Smith);

5/18 Tr. 58:13-14, 68:25-69:6 (Richman). Half of Cambridge's market is composed of sales to libraries and the remainder is made up of sales to individual scholars, professors, and students. The majority (80%) of SAGE's sales are directly to students and the rest to libraries. 5/17 Tr. 54:17-55:5 (Smith); 5/18 Tr. 68:25-69:6 (Richman).

21. *Instructors rely on academic publishers to produce scholarship that can be used in the classroom and keep them abreast of what is happening in their field of study. Stipulated Facts ¶ 8.*

22. The academic publishing process is interactive, for example in the sense that publishers will create textbooks in response to perceived demand in the academy. 5/19 Tr. 38:5-9, 39:9-40:11 (Pfund). Oxford, for instance, will invite people from the academic community to their offices specifically to have them talk about how they are using Oxford books and what they would like to see in a different textbook. *Id.* 39:23-40:6.

23. If professors did not have access to Plaintiffs' publications, it would diminish their ability to teach students. Trial Transcript Volume 5, May 23, 2011, Docket No. 403 ("5/23 Tr.") 38:17-39:1 (Kaufmann). Plaintiffs' academic works are deeply influential works, as evidenced by their print runs, the way in which the scholarly community has engaged with them, their longevity, and their

continued relevance. It would be difficult to find like substitutes for these books, which have had a tremendous impact on the development and advancement of academic disciplines. 5/17 Tr. 57:15-25 (Smith); 5/19 Tr. 85:8-21 (Pfund); Trial Transcript Volume 7, May 25, 2011, Docket No. 405 (“5/25 Tr.”) 126:11-14 (Davis); Trial Transcript Volume 9, May 27, 2011, Docket No. 407 (“5/27 Tr.”) 14:4-9 (Gabler-Hover).

24. Indeed, GSU professors testified that Plaintiffs’ books are “necessary” to their educational purposes (and that those purposes would be compromised without the books); the professors expect students to read the assigned excerpts prior to class and to come to class with questions and comments about the readings, and they often structure class sessions and writing assignments around discussion of the readings. Trial Transcript Volume 6, May 24, 2011, Docket No. 404 (“5/24 Tr.”) 111:7-112:17 (Kim); *id.* 148:5-9; 5/25 Tr. 57:12-58:1 (Orr); *id.* 106:12-108:4 (Davis); Trial Transcript Volume 10, May 31, 2011, Docket No. 393 (“5/31 Tr.”) 15:25-16:11, 22:4-10, 43:1-12 (Kruger). The primary purpose of many of the courses included in this case is to introduce students to the “literature” in a given field of study, including works by Plaintiffs. 5/31 Tr. 9:13-10:10 (Kruger).

25. Professors and faculty members personally benefit from academic publishing as well because the publication of scholarly work is generally a significant factor in the career advancement of college and university faculty members. 5/17 Tr. 58:10-59:1 (Smith); 5/23 Tr. 39:20-22 (Kaufmann); 5/25 Tr. 125:2-11 (Davis). Those responsible for tenure decisions within a university rely in part on the imprimatur of the publishing house as an indicator of the quality of a professor's work. 5/17 Tr. 58:1-59:1 (Smith); 5/27 Tr. 47:2-8 (Hartwig); Trial Transcript Volume 11, June 1, 2011, Docket No. 394 ("6/1 Tr.") 93:4-94:3 (Duffield). Thus, professors depend on the continued existence of academic publishers, not necessarily for the royalty payments they receive from publishing, but because academic publishers serve a credentialing function that has a direct impact on tenure and promotion decisions. 5/17 Tr. 58:10-16 (Smith); 5/23 Tr. 39:20-41:6 (Kaufmann); 6/1 Tr. 92:22-93:3 (Duffield); Trial Transcript Volume 8, May 26, 2011, Docket No. 406 ("5/26 Tr.") 141:6-23 (Hankla); 5/26 Tr. 166:3-20, 5/27 Tr. 13:1-6 (Gabler-Hover); 5/31 Tr. 6:10-13 (Kruger).

2. The Quality of Academic Publishers' Scholarship is Directly Related to Their Massive Investment in the Publishing Process

26. *The high quality of Plaintiffs' academic works is directly attributable to their involvement in all aspects of the publishing process, from*

selecting manuscripts for publication to the editing, design, sales, marketing, licensing, and distribution of the works. Stipulated Facts ¶ 9.

27. *Plaintiffs' operating expenses are in the tens of millions of dollars a year each. Stipulated Facts ¶ 11.*

28. Publishing a scholarly work is a costly multi-step process that typically takes three to five years from the time a book goes under contract until its publication. 5/17 Tr. 59:2-66:8 (Smith); 5/18 Tr. 62:10-70:24 (Richman); 5/19 Tr. 37:16- 39:8, 59:4-66:2 (Pfund).

29. First, the publisher solicits or selects a manuscript and signs a contract with the author(s) and/or editors. 5/17 Tr. 63:23-64:1 (Smith); 5/18 Tr. 64:5-10 (Richman). The publishers generally obtain an assignment of all rights in the works – including exclusive rights to reproduce, sell and distribute the works; without these rights, the publisher would not publish the works. 5/17 Tr. 64:8-22 (Smith); 5/18 Tr. 64:11-65:17 (Richman). In the case of compilations, Plaintiffs also typically obtain an exclusive license or full ownership of the copyright to the contributions from contributing authors. 5/18 Tr. 64:11-65:3 (Richman).

30. After a contract with the author is signed, Plaintiffs' books undergo several rounds of significant editing. Plaintiffs employ editors who are substantive experts in their fields to work with authors – often over a period of

years – to develop manuscripts. 5/17 Tr. 59:2-60:14, 62:13-25 (Smith); 5/18 Tr. 62:13-63:15 (Richman); 5/19 Tr. 59:15-23, 62:19-70:12 (Pfund).

31. Virtually everything published by each Plaintiff is subject to peer review. 5/17 Tr. 61:12-14 (Smith); 5/18 Tr. 66:13-14 (Richman); 5/19 Tr. 59:24-60:7 (Pfund). Plaintiffs send out manuscripts for peer review by academic experts who work in the subject area to provide objective, knowledgeable opinions on a host of things, including whether the proposed work takes account of the latest research, is convincing, is well organized, and will make an important contribution to learning and scholarship. 5/18 Tr. 66:5-12 (Richman); 5/19 Tr. 59:4-23 (Pfund); 5/17 Tr. 60:9-61:11 (Smith).

32. Works published by Cambridge and Oxford receive an additional layer of review by the Syndicates and Delegates, respectively, who are leading scholars in their fields. 5/17 Tr. 63:15-22 (Smith); 5/19 Tr. 60:3-16 (Pfund).

33. After the editing and peer review processes are complete, a book proceeds into production, where tables, graphics and illustrations (each having been permissioned as necessary) are added, the book is copyedited, typeset and proofread, and indices and appendices are created. This production process at

SAGE, for example, can take up to 210 days. 5/17 Tr. 64:23-65:8 (Smith); 5/18 Tr. 67:11-68:19 (Richman).

34. *The development of textbooks is especially costly and resource-consuming. A publisher may employ between 100 and 300 paid outside reviewers to vet and edit a single work, design and create art, illustrations, tables, and graphics, and conduct focus groups to test the utility of a particular work.*

Stipulated Facts ¶ 10.

35. Another of the most significant expenses for Plaintiffs each year is royalties paid to authors. 5/17 Tr. 70:25-71:3 (Smith). For example, in FY 2009, Cambridge paid \$ million in royalties to its authors. PX 1. SAGE and Oxford also both pay a substantial amount in royalties to authors each year. *See, e.g., PX 198, 342.*

36. Plaintiffs also devote substantial resources to the promotion, marketing, and sales of their scholarly works. 5/17 Tr. 65:9-66:13 (Smith); 5/18 Tr. 70:11-22 (Richman). Cambridge, for example, promotes its books all over the world. 5/17 Tr. 65:11-13 (Smith). And Oxford's sales representatives are constantly traveling to promote Oxford's works. 5/19 Tr. 40:7-11 (Pfund).

E. The Market for Sales of Plaintiffs' Works

37. *Plaintiffs rely on income from sales of their books and journals,*

particularly at colleges and universities – which constitute the largest market for their works – to enable them to continue to publish high-quality scholarly works. Stipulated Facts ¶ 12.

38. *Plaintiffs also offer their works for sale through electronic platforms, including e-books (digital versions of published books) and databases, and through custom publishing programs that allow professors to create customized anthologies by combining content from several different works from a single publisher. Stipulated Facts ¶ 13; see also 5/17 Tr. 66:14-67:22 (Smith); 5/18 Tr. 73:1-74:15 (Richman); 5/19 Tr. 48:24-55:7 (Pfund).*

39. Oxford believes that sales through its electronic offerings may become the single most important part of its business in the future. Oxford thus increasingly takes a format neutral position: it is willing to explore different kinds of delivery to figure out ways to get content to potential customers. 5/19 Tr. 54:25-55:7, 68:18-25 (Pfund).

40. Plaintiffs' business is defined by small print runs. 5/19 Tr. 37:16-38:4 (Pfund). At Cambridge, the average first print run for monographs is 400 copies, for other works, including textbooks, 800 to 5,000 copies, and for reference books, 1,000 to 3,000 copies. 5/17 Tr. 66:9-13 (Smith). At SAGE, the typical print run for a book is 3,000 copies. 5/18 Tr. 70:25-71:2 (Richman).

41. In light of the small print runs, Plaintiffs also derive income from book sales through print-on-demand programs that allow them to create a digital file for a book and then print that book in response to a request from a customer, ensuring “eternal life” for a book without always having a copy of the book “in print” in the traditional sense. 5/19 Tr. 36:1-37:1 (Pfund); *see also* 5/17 Tr. 66:14-67:6 (Smith); 5/18 Tr. 72:24-73:10 (Richman).

42. The custom publishing division at SAGE also creates customized compilations of excerpts from various SAGE works for professors who wish to offer them to their students. 5/18 Tr. 74:2-11 (Richman). Many of the SAGE works at issue in the litigation[‡] are available through SAGE’s custom publishing programs. PX 516; Trial Transcript Volume 15, June 17, 2011, Docket No. 398 (“6/7 Tr.”) 22:11-23:1 (custom publishing publication produced for Professor Kaufmann’s Maymester 2009 course EPRS8500).

F. Licensing and “Permissions” for Plaintiffs’ Works Directly and Through Copyright Clearance Center (CCC)

43. *As an alternative to purchasing an entire book or journal, Plaintiffs also offer users (e.g., professors and students) one-time, excerpt-specific*

[‡] *See infra* Section IV.A and Appendix A.

licenses known as “permissions” to photocopy or digitally reproduce portions of their works in exchange for a fee. Stipulated Facts ¶ 14.

44. *Permissions represent a significant revenue stream for Plaintiffs. Stipulated Facts ¶ 15.*

45. *The permissions market for Plaintiffs’ works includes the copying and distribution of excerpts of Plaintiffs’ works in both hardcopy and digital format, including coursepacks and through systems like GSU’s ERes and uLearn systems. Stipulated Facts ¶ 16.*

46. *Permissions to use portions of Plaintiffs’ works can be obtained either directly from the Plaintiffs or through Copyright Clearance Center (CCC) on Plaintiffs’ behalf. [Stipulated Facts ¶ 17.*

47. All three Plaintiffs participate in various CCC licensing programs, and each Plaintiff work at issue in the litigation is available for licensing directly through CCC. Trial Transcript Volume 4, May 20, 2011, Docket No. 402 (“5/20 Tr.”) 13:13-15 (Armstrong); *see* Appendix A (identifying the per-page, per-student, and per-course fee had GSU chosen to license each infringed work via CCC); *see also* Docket No. 361; 5/18 Tr. 90:2-18 (Richman); 5/19 Tr. 69:1-70:12, 72:22-73:1 (Pfund); 5/17 Tr. 67:24-69:13, 69:22-70:3 (Smith).

1. Copyright Clearance Center, Inc. (CCC)

48. *CCC is a not-for-profit corporation established in 1977 that acts as a centralized clearinghouse for the granting of reproduction rights for books, journals, newspapers, and other text, non-text, and multimedia works. Stipulated Facts ¶ 18.*

49. CCC was formed after Congress urged the appropriate constituencies to come together with an appropriate response to the then-new technology of photocopying, which was creating concerns among copyright holders. CCC's board of directors was then and is still composed of authors, publishers and users, which facilitates its balanced approach to licensing that constantly considers the needs of both users and rightsholders 5/20 Tr. 7:19-10:4 (Armstrong); *see also* S. Rep. No. 473, at 85 (1975).

50. *CCC has the nonexclusive right to issue licenses and grant permissions on behalf of tens of thousands of authors and publishers. Stipulated Facts ¶ 19.*

51. CCC's participating rightsholders include, in addition to the Plaintiffs, commercial publishers, all significant academic publishers, non-profit publishers, university presses, and multi-national publishers across many fields of

publishing, in addition to individual authors and their estates. 5/20 Tr. 12:4-15 (Armstrong).

52. Tens of millions of works are covered by the various licenses offered by CCC. CCC continues to develop new licensing solutions and products for both its rightsholders and its users (e.g., academic institutions, professors, teaching assistants, and department heads, as well as businesses and other types of non-academic organizations and individuals) as content consumption preferences change and digital publishing evolves. 5/20 Tr. 7:1-3, 7:15-18, 11:19-12:3, 13:20-14:14 (Armstrong.)

53. As a not-for-profit organization, CCC's primary objective is not to maximize revenue. 5/20 Tr. 10:5-6 (Armstrong). Rather, CCC acts as a solutions provider that serves as a marketplace for the exchange of rights between rightsholders and the users of copyrighted content, providing a balanced middle ground between them. 5/20 Tr. 6:22-7:6, 10:5-14 (Armstrong).

54. All of the royalty revenue that CCC collects is paid out to various rightsholders net of authorized service fees; in addition, there are modest user fees that help fund the operation of the company and the development of its new licensing programs. 5/20 11:10-18 (Armstrong).

55. Since the inception of the pay-per-use Academic Permissions Service in 1991 and Electronic Course Content Service in 1997 (both described below), CCC has distributed to its rightsholders approximately \$230 million in license royalties attributable to these programs. 5/20 35:23-36:2 (Armstrong).

2. CCC's Academic Permissions Service (APS) and Electronic Course Content Service (ECCS)

56. *CCC offers two types of transactional, i.e., pay-per-use, licenses to users in the academic community: the Academic Permissions Service (APS) and the Electronic Course Content Service (ECCS). Stipulated Facts ¶ 20.*

57. Approximately 1,000 U.S. academic institutions (colleges and universities) currently utilize CCC'S APS and ECCS services for licensing course reading materials. That number includes public and private colleges and universities of all sizes and types (from major multi-campus state universities to small liberal arts and community colleges to specialized professional, theological and research institutions. 5/20 Tr. 36:3-13 (Armstrong).

58. *APS permits users to obtain permission, on a work-by-work basis, to photocopy and distribute physical copies of text-based copyrighted works, including books and journal articles. Stipulated Facts ¶ 21.*

59. *APS covers print uses on the academic campus, including use in coursepacks and classroom handouts. The APS repertory contains almost 2.5 million works, including many of the Plaintiffs' works. Stipulated Facts ¶ 22.*

60. The stipulated APS repertory of almost 2.5 million works only reflects its domestic titles, and does not include millions more works placed into the service from reproduction rights organizations around the world on behalf of foreign rightsholders. 5/20 Tr. 25:23-25 (Armstrong). Notably, CCC defines the term “title” to refer to “main titles,” such that, for example, a single book constitutes a “main title,” but so does the *New York Times* – meaning that all articles and issues of that newspaper from its founding to today are counted as just one of the 2.5 million titles. *Id.* 26:1-9.

61. Rightsholders can set limits on the amount of material that can be cleared for permission through APS and ECCS at any one time. 5/20 Tr. 18:20-19:23, 28:23-29:2 (Armstrong); 5/17 Tr. 68:14-23 (Smith); 5/19 Tr. 70:15-71:7 (Pfund). Although publishers can set their own limits, as a default CCC limits the amount of material that is automatically allowed to be copied under these programs from a work to 25% or two chapters of a work, whichever is greater. Requests for more are not necessarily denied, but are referred to the publisher. 5/20 Tr. 18:20-19:4, 28:23-29:2 (Armstrong); ¶ 74, *infra*.

62. *In Fiscal Year 2009, CCC processed approximately 250,000 APS permission requests. Stipulated Facts ¶ 32.*

63. *Georgia State University (“GSU”) has used APS to request permissions for use in coursepacks. Stipulated Facts ¶ 24.*

64. *CCC’s Electronic Course Content Service (ECCS) covers uses of excerpts in electronic format, e.g., electronic “coursepacks,” course management systems, faculty intranet sites, and systems comparable to GSU’s electronic reserves system. Stipulated Facts ¶ 25.*

65. *CCC developed the ECCS in response to demand from libraries and their users. 5/20 Tr. 27:17-28:15 (Armstrong).*

66. *CCC’S ECCS repertory contains approximately two million works that are available for licensing. Stipulated Facts ¶ 26*

67. *In Fiscal Year 2009, CCC processed approximately 45,000 ECCS requests. Stipulated Facts ¶ 32.*

3. The Ease and Speed of Permissions Via CCC

68. *CCC has processed millions of permission requests for academic uses in the past five years. Stipulated Facts ¶ 27.*

69. *Permissions requests to CCC typically are processed through its website at www.copyright.com. Much of CCC's permissions process is automated. Stipulated Facts ¶ 28.*

70. CCC's website, www.copyright.com, enables users to search for a work to be used in connection with classroom teaching. Users simply need to enter the title of the work, the class it will be used in, the number of students enrolled in the course, and the number of pages requested for use. 5/20 Tr. 21:2-25 (Armstrong).

71. For the vast majority of academic permissions requests – close to 90% – the user is given an answer (whether yes or no) immediately. 5/20 Tr. 22:1-8, 25:7-10 (Armstrong).

72. *Approximately 85-90% of APS requests and about 70% of ECCS permissions requests are granted. Stipulated Facts ¶ 29.*

73. When CCC is unable to grant permission immediately, for instance because the size of a request exceeds the limits of CCC's authorization, CCC typically contacts the publisher directly to attempt to secure permission on behalf of the customer (what is referred to as a "special order") or provides contact information for the user to request permission directly from the publisher. 5/20 Tr. 19:24-20:21, 23:3-24:1 (Armstrong); 5/17 Tr. 69:15-21 (Smith); 5/19 Tr. 70:15-

71:16, 72:5-21 (Pfund). More than 80% of those special order requests are ultimately fulfilled. 5/20 Tr. 24:7-12, 25:10-16 (Armstrong).

74. *CCC charges in the range of 10-25 cents for each page copied for academic use. Stipulated Facts ¶ 30.*

75. All APS and ECCS prices that CCC charges are set by the applicable rightsholder, usually on a “price per page” basis. Occasionally, rightsholders will set prices by article or by the size of the class. 5/20 Tr. 28:19-22, 29:11-23 (Armstrong); 5/19 Tr. 73:16-23 (Pfund).

76. Cambridge offers its works for permission to academic users through CCC at 11 cents per page for photocopying and 15 cents per page for digital reproduction. 5/17 Tr. 70:13-19 (Smith).

77. SAGE charges fourteen cents per page for permissions to academic users to use its works through CCC. 5/18 Tr. 80:12-14 (Richman).

78. Oxford has authorized CCC to charge 12 cents per page for academic uses of its works within CCC’s repertory. 5/19 Tr. 73:24-74:2 (Pfund).

79. CCC’s delayed billing cycle for APS and ECCS permissions requests allows professors or their institutions to adjust the number of students in a given course if class enrollment changes so that professors or their institutions will

not be charged if fewer students enroll in a class than first anticipated. 5/20 Tr. 86:5-87:1 (Armstrong).

80. CCC also offers Application Programming Interfaces (APIs) that incorporate CCC's licensing functionality into software programs (including Docutek, the software GSU uses for its ERes); with these APIs, GSU's ERes and uLearn software can communicate directly with CCC's licensing system and process licensing transactions from within the software application – i.e., without having to “leave” the application and visit copyright.com. 5/20 Tr. 47:3-49:6 (Armstrong).

81. CCC's academic licensing programs accommodate fair use. 5/20 Tr. 49:7-18, 50:6-24, 66:15-67:9 (Armstrong); DX 68 (contract for CCC academic annual license stating that license fees set forth “are net of all factors that might otherwise be considered deductions therefrom, including fair use”).

82. In addition to the rightsholder-set royalty charge, CCC currently charges a user fee of \$3.50 on each APS and ECCS transaction, which helps it to cover its costs. At the time of the 2009 Maymester, Summer, and Fall 2009 terms, had an instructor at GSU sought permission from CCC, the service fee would have been \$3.00 per transaction. *See* 5/20 Tr. 11:10-13, 34:9-35:12 (Armstrong).

4. CCC's Academic Annual Copyright License (AACL)

83. *CCC 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 "blanket" fee annually to make unlimited print and digital reproductions of the covered works across all of its academic activities, without the need to secure separate permission for each work copied. Stipulated Facts ¶ 35.*

84. *The AACL covers distribution in coursepacks (hard copy and digital), classroom handouts, course management systems, electronic reserves, and other systems. Stipulated Facts ¶ 36.*

85. *The AACL allows individuals within an institution covered by the license to access content by means of any device, including, for example, tablets, phones, and laptops. 5/20 Tr. 38:3-8 (Armstrong).*

86. *The AACL covers the copying activities of faculty, students, deans, provosts, and any other individuals within the academic institution. Academic institutions can also add within the coverage of the license certain otherwise-outside users that provide relevant services to the institution, such as on-campus or off-campus copyshops producing coursepacks for the institution's students. 5/20 Tr. 37:14-20, 38:17-39:2 (Armstrong).*

87. The AACL accelerates the ability of an institution to use and share information without the burden of determining how each unit of covered material is being used. 5/20 Tr. 66:15-67:2 (Armstrong).

88. The AACL was developed in response to the demands of the market. 5/20 Tr. 40:10-20 (Armstrong).

89. *The AACL repertory contains over 1.3 million works. SAGE's works and Oxford's works are available for license through the AACL. Stipulated Facts ¶ 37.*

90. The AACL is not intended to replace a purchase or subscription to a work, but rather covers subsequent copying of the work for distribution within the institution. 5/20 Tr. 69:21-70:21 (Armstrong).

91. The AACL can be supplemented with APS and ECCS permissions requests for works that are not covered under the AACL. 5/20 Tr. 55:22-56:9 (Armstrong).

92. The AACL is a newer service – first launched in 2007 – that continues to grow. [5/27 57:15-22 (Armstrong). *Currently, 110 institutions, including both private colleges and public universities, have signed up for the AACL. Stipulated Facts ¶ 39.*

93. The University of Massachusetts Medical School, the University of Texas, and Middlebury College are among the schools that have signed up for the AACL. 5/20 Tr. 42:9-17 (Armstrong).

94. Pricing for the AACL is set on a per-student basis, with the exact price for an institution depending upon factors such as fulltime equivalent (FTE) student enrollment and the relative proportion of graduate to undergraduate degrees. 5/20 Tr. 16:14-19, 39:3-40:9 (Armstrong).

95. The estimated annual cost for the AACL at GSU would be \$114,000 (about \$3.75 per fulltime student) based on GSU's enrollment profile, GSU's enrollment of 30,400 (the latest number available from the U.S. Department of Education), and the current size and scope of the AACL repertory. 5/20 Tr. 42:18-43:4 (Armstrong).

96. The only additional fee associated with an AACL license is a one time user fee of 20% of the annual royalty fee (which CCC charges in the first year only) to help cover CCC's cost in operating the program. Subscribers to the AACL can, on a case-by-case basis, sign a multi-year license. 5/20 Tr. 43:8-20, 45:6-46:14 (Armstrong).

III. THE DEFENDANTS

A. Defendants' Authority for Ensuring Copyright Compliance and Responsibility for the Complained of Infringements

97. *Georgia State University, located in Atlanta, Georgia, is a public university and is a unit of the Board of Regents of the University System of Georgia (USG). Stipulated Facts ¶ 40.*

98. *GSU President Mark P. Becker is the head of GSU and is its chief administrative officer, with supervisory authority over the administrators of the GSU library and the GSU Information Systems and Technology Department. Stipulated Facts ¶ 41.*

99. President Becker is responsible for ensuring that the library and the use of the electronic reserves system complies with federal copyright law. Deposition of Mark P. Becker, Docket Nos. 316, 358 (“Becker Dep.”) 26:15-27:6 (videotaped deposition played in Court on 5/26/2011, Tr. p. 8); PX 975, Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Admission (“RFA”) Nos. 3-9.

100. *The GSU Provost (currently Risa Palm) is responsible for monitoring the functions and officials of the University’s academic administration,*

including correcting noncompliance with federal copyright law. Stipulated Facts ¶ 42.

101. *GSU Associate Provost for Information Systems and Technology J. L. Albert is responsible for the technical operation and maintenance of the ERes system at GSU and has supervisory authority over the GSU staff who support use of the uLearn course management system at GSU. Stipulated Facts ¶ 44.*

102. *Defendant Nancy Seamans, the Dean of Libraries at GSU, has supervisory authority over the library staff responsible for the ERes system and is responsible for ensuring that the ERes system complies with policies of the Board of Regents and GSU. Stipulated Facts ¶ 45.*

103. *The Board of Regents of USG has supervisory authority over GSU and elects the President of GSU. Stipulated Facts ¶ 46.*

104. The members of the Board of Regents have the authority in their official capacities for ensuring that copyrighted works may be distributed electronically at GSU only if done so in compliance with a court-ordered injunction. RFA No. 60.

105. *Defendants have the authority to order that copyrighted works may be distributed electronically at GSU only if done in compliance with policies*

set by (a) the State of Georgia Board of Regents, (b) Georgia State University, or (c) a court-ordered injunction. Stipulated Facts ¶ 47.

106. *GSU employees administer and maintain the ERes servers and software, and can remove and/or block access to specific course materials on the ERes system. Stipulated Facts ¶ 48.*

107. *Defendants have the authority to direct library staff to block access to or remove specific materials or specific course pages on the ERes system, and have the authority to order that library personnel produce reports of ERes and uLearn activities for a specific time period, including if so ordered by the Court in order to monitor compliance with any court-ordered injunction. Stipulated Facts ¶ 49.*

108. *If a course reading were determined to infringe the copyright of the owner, President Becker would order it to be removed. Becker Dep. 88:10-15 (by video, see 5/26 Tr. 8).*

109. *GSU instructors acknowledge that they would remove a course reading excerpt from ERes and uLearn immediately and without question if instructed to do so by President Becker, Provost Palm, the Board of Regents, or the Dean of Libraries. See, e.g., 5/24 Tr. 79:1-15 (Esposito); 5/25 Tr. 115:11-23 (Davis).*

110. If the Court determined that one or more aspects of the GSU copyright policy in fact violated copyright law and required remediation, Dean Seamans and her library staff would do whatever is necessary to remediate it. Trial Transcript Volume 12, June 12, 2011, Docket No. 395 (“6/2 Tr.”) 149:3-8 (Seamans).

B. Defendants’ Budgetary Responsibilities

111. The named Defendants are responsible for preparing the University budget, library budget, and Information Systems & Technology budget, which includes funds for books, equipment, salaries, and the hardware and software used to distribute course material electronically to students. RFA Nos. 13, 21, 47; 6/2 Tr. 86:15-24 (Seamans).

112. In 2009, the GSU library budget was approximately \$11 million, about half of which was devoted to the materials budget, with half of that budget being devoted to licensing of electronic databases and electronic journals. While some of the works on ERes were from the licensed databases or electronic journals, about 40-50 percent of the materials on ERes are not from licensed sources. 6/1 Tr. 146:8-147:14 (Burtle).

113. Of the GSU library’s \$5 million collections budget, approximately \$4 million was spent on electronic materials and \$1 million on

monographs. 6/2 Tr. 86:25-87:6, 88:12-17 (Seamans).

114. Total student assessment fees at GSU currently run around \$800 per student per semester. Becker Dep. 10:14-18 (by video, *see* 5/26 Tr. 8-9). Among the GSU student assessment fees for each semester are a \$35 library fee, an \$85 technology fee, and a recently-added \$90 fee to support GSU's new football program on which it has spent over \$8 million in the past two years. 6/2 Tr. 117:17-119:23 (Seamans); Becker Dep. at 58:12-59:2 (by video, *see* 5/26 Tr. 8); Mike Tierney, "Georgia State Hoping Football Builds Community in a Football Town," *The New York Times* (Apr. 19, 2009).

115. It is possible for GSU to levy a similar student fee to cover copyright permissions, including a fee of approximately \$3.75 per student for CCC's annual academic license, although to date it has not done so. 6/2 Tr. 117:13-16 (Seamans); Becker Dep. 64:16-67:16 (by video, *see* 5/26 Tr. 8).

IV. GSU'S PROVISION OF COURSE READING MATERIALS TO STUDENTS

A. The ERes System

1. The Process for Posting Course Reading Material to ERes

116. "*ERes*" is the electronic course content portion of the third-party software that GSU uses to offer digitized copies of course reading material to

students. Stipulated Facts ¶ 43.

117. GSU faculty submit requests to GSU library staff to make course reading materials available via ERes. 5/20 Tr. 96:6-11 (Dimsdale).

118. *GSU library personnel post the requested material to ERes by scanning it (thereby creating a copy on a GSU computer) and then uploading the material to a computer server owned by GSU. Stipulated Facts ¶ 53; DX 111, Stipulations of Fact Regarding ERes and uLearn Usage at GSU, Docket No. 118 ¶ 2; see also 5/20 Tr. 94:25-95:5, 104:24-105:22 (Dimsdale).*

2. The Provision of Course Reading Material via ERes Entails the Distribution of Multiple Copies of Copyrighted Works

119. *Students in a given course access the posted digital copies via a web page with the ERes web interface that is dedicated to the specific course (a “course page”). Stipulated Facts ¶ 54.*

120. *Electronic course reading materials accessed via ERes can be printed and downloaded and/or saved by the ERes user to his or her hard drive. Stipulated Facts ¶ 55.*

121. *Multiple copies of copyrighted works are made every time a GSU student accesses course reading via ERes: one copy when a student views the*

work, another copy if the student saves the material, and yet another copy if the student prints the material. Stipulated Facts ¶ 57.

122. *Students are able to, and sometimes do, view, download, and print copies of course reading material posted on ERes. Stipulated Facts ¶ 56.*

123. GSU students commonly print course reading materials from ERes and bring them to class. 5/23 Tr. 78:7-16 (Kaufmann); 5/24 Tr. 61:10-16 (Esposito); 5/25 Tr. 108:5-109:18 (Davis) (students required to print and bring to class copies of ERes readings); 5/26 Tr. 171:16-172:10 (Gabler-Hover) (same); 5/27 Tr. 148:14-24 (Moloney); Deposition of Daphne Greenberg, Docket Nos. 390, 381 (“Greenberg Dep.”) 32:19-33:5 (videotaped deposition played in Court on 6/2 Tr. 40); Deposition of Jennifer McCoy, Docket No. 329 (hereinafter “McCoy Dep.”) at 29:20-22 (videotaped deposition played in Court on 6/2 Tr. 37).

124. There are no technical restrictions on students’ ability to save, print, copy, or email the material posted to ERes. 5/20 Tr. 115:4-6 (Dimsdale).

125. If a student prints course reading material from ERes on a university printer, GSU itself charges the student a per-page charge for that printing, but does not charge the student (or pay a fee to the publisher) for permission to copy the underlying work. 5/20 Tr. 117:3-17 (Dimsdale).

3. Defendants Distribute *Required* (Not Merely Optional) Course Reading Materials via ERes and uLearn Without Permission or Payment

126. In 2009, immediately following her service on the Select Committee on Copyright that promulgated the new copyright policy, Dean of Libraries Nancy Seamans testified that ERes was intended to provide students access only to non-required readings, as opposed to required readings. 6/2 Tr. 104:16-105:18 (Seamans). Dean Seamans was also of the view that required course readings, however they are assembled or collected, require permission from the copyright owner to be utilized as course readings. 6/2 Tr. at 108:15-110:3 (Seamans).

127. In fact, GSU professors make required readings available to students through the ERes system, and that required reading is distributed via ERes without permission from or payment to the copyright owner. *See, e.g.*, 5/24 Tr. 53:3-6, 53:9-16, 55:17-19, 57:2-5, 58:14-16, 62:20-22 (Esposito); 5/25 Tr. 56:25-57:11, 59:7-11, 85:15-86:7, 86:11-25 (Orr); 5/25 Tr. 112:19-113:4, 114:7-9 (Davis); 5/26 Tr. 122:23-123:3, 148:22-149:8 (Hankla); 5/27 Tr. 46:19-47:1 (Hartwig); 5/27 Tr. 16:3-19 (Gabler-Hover); 5/27 Tr. 135:25-136:4, 154:17-155:2 (Moloney); 5/31 Tr. 138:18-24, 81:7-24 (Murphy); 6/1 Tr. 87:18-20, 95:6-12, 96:18-21 (Duffield); Deposition of Patricia Dixon, Docket Nos. 318, 355 (“Dixon

Dep.”) (videotaped deposition played in Court on 5/25 at Tr. 169) 34:24-35:4, 120:20-25; McCoy Dep. 42:6-11 (by video, *see* 6/2 Tr. 37).

128. Indeed, in some cases, the required reading on ERes constitutes the complete set of readings for the course. *See, e.g.*, PX 537 (Professor Lasner’s PERS2001 syllabus indicating 37 works posted to ERes and no required text); PX 524 (Professor Orr’s MUS8840 syllabus indicating over 30 reading excerpts posted to ERes and no required text); PX 553 (Professor Kruger’s EPY7090 syllabus indicating 15 book excerpts posted to ERes); 5/31 Tr. 56:19-57:24, 70:7-9 (Kruger) (confirming count of ERes readings and that no text was required for purchase).

129. The library does not obtain permission for book excerpts that are scanned and posted to ERes, even if they are required reading. 5/20 Tr. 111:11-112:1 (Dimsdale); 6/1 Tr. 152:1-6 (Burtle).

130. *The GSU library staff is aware that the ERes software offers copyright compliance features, but it does not utilize these features. Stipulated Facts ¶ 58.*

131. Defendants have not produced any evidence of fees paid for posting course reading material on ERes since 2003. Deposition of James Palmour, Docket Nos. 167, 349 (videotaped deposition played in Court on

5/23/2011 at Tr. 33-34) (“Palmour Dep.”) at 153:5-154:4; 5/20 Tr. 111:11-112:1 (Dimsdale); 6/2 Tr. 114:16-115:17 (Seamans).

132. *GSU has not budgeted for, does not intend to budget for, and has not established any procedures for obtaining licenses or permission to post electronic course material, including on ERes. Stipulated Facts ¶ 59.*

B. The uLearn System at GSU

133. *uLearn is the electronic course management system that USG [the University System of Georgia] licenses from third-party vendor Blackboard/WebCT. Stipulated Facts ¶ 72.*

134. *uLearn resides on a server that is owned and maintained by USG. GSU pays USG a license fee of more than \$250,000 for use of the uLearn software. Stipulated Facts ¶ 73.*

135. *Instructors at GSU may post electronic course reading materials on uLearn. Stipulated Facts ¶ 74.*

136. *GSU encourages instructors to post reading materials on uLearn for distribution to students. Stipulated Facts ¶ 75.*

137. *Instructors’ use of uLearn increased in the five years preceding this litigation. 5/23 Tr. 12:8-13:8 (Christopher).*

138. In 2009, there were approximately 2,500 active course pages on the uLearn system, approximately 150,000 total course pages, and more than 22,939 unique users with access to the uLearn system. 5/23 Tr. 7:8-22 (Christopher).

139. GSU offers seminars to help faculty learn how to use uLearn and offers instructional design help. 5/23 Tr. 12:4-7 (Christopher).

140. *As part of the process of posting electronic course materials to uLearn, instructors at GSU or their authorized representatives save copies of the materials to their computers to facilitate the upload of these files to the uLearn system. Stipulated Facts ¶ 76.*

141. *The only limitation on the quantity of material that can be posted to uLearn is a limit on the size of each individual digital file. Stipulated Facts ¶ 77.*

142. *Large digital files can be split into multiple PDF files and posted to uLearn. Stipulated Facts ¶ 78.* There is no limit on the number of files that GSU professors can upload to their uLearn pages. 5/23 Tr. 16:6-8 (Christopher).

143. GSU instructors post required course reading materials on uLearn, without payment to the copyright owner. 5/25 Tr. 117:2-118:10 (Davis).

In the Fall 2009 Semester, for example, Professor Kim posted 24 required course readings to uLearn, including many unauthorized excerpts of Plaintiffs' copyrighted works. PX 519 (syllabus); 5/24 Tr. 96:14-97:8, 98:8-10 (Kim).

144. *GSU students enrolled in a specified course may use uLearn to access electronic course materials made available for that course. Such access is tracked and listed on the uLearn reports. Stipulated Facts ¶ 79.*

145. *Reading materials distributed through uLearn generally are in the PDF format, and copies of the material are made every time a student accesses material via uLearn. Stipulated Facts ¶ 80.*

146. *Electronic course materials accessed via uLearn can be printed and/or downloaded and/or saved by the uLearn user to his or her hard drive. Stipulated Facts ¶ 81.*

147. *GSU students pay a fee to the university for printing provided by GSU. Stipulated Facts ¶ 82.*

148. Although the GSU copyright policy applies with equal force to ERes and uLearn, there is no review of what GSU instructors upload to uLearn, and GSU instructors can upload material to uLearn themselves without ever looking at a copyright policy. 5/23 Tr. 16:9-20, 18:24-19:3, 19:21-24, 29:15-22 (Christopher); 5/25 Tr. 117:2-118:10 (Davis); 6/2 Tr. at 129:21-130:19 (Seamans).

149. There are no procedures (and GSU does not plan to institute procedures) to ensure that instructors comply with GSU's copyright policy with regard to their use of uLearn. 5/23 Tr. 19:25-20:11 (Christopher).

150. Licenses to make digital copies of excerpts of Plaintiffs' works available electronically to students can easily be obtained (*see* 5/26 Tr. at 10:2-11:3; *see* ¶¶ II.F.68-II.F.82), however, should anyone at GSU decide that a license is necessary, there is no budget to pay for licenses to post electronic course material to uLearn. 5/23 Tr. 19:4-15 (Christopher).

151. *GSU has access to various data regarding usage of uLearn, including which course materials a student has accessed, and the uLearn software has the ability to create reports ("uLearn Reports") that depict information regarding those files made available on uLearn to authorized student users enrolled in the course for which the files were posted, including any electronic course reading material. Stipulated Facts ¶¶ 83, 84.*

152. However, files containing electronic course reading material posted to uLearn are named individually by instructors in a manner that often makes it impossible for Plaintiffs (or GSU administrators, if they were actually monitoring it) to identify the material associated with each file. 5/23 Tr. 18:18-23 (Christopher).

153. Plaintiffs had limited access to uLearn only between February and April 2009. Despite requests to Defendants for access after that time period (and contrary to the erroneous claim made by Defendants' counsel at closing), Plaintiffs were *denied* access to uLearn subsequent to April 2009, and thus were precluded from reviewing reports for the 2009 Maymester, 2009 summer and 2009 fall terms at issue in this litigation. *See* 5/23 Tr. 8:24-9:7 (Christopher); 6/7 Tr. 84:7-10.

C. **Digital Course Readings Distributed Via ERes and uLearn are Analogous to (and Substitutes for) Coursepacks, Not Print Reserves**

1. **Coursepacks**

154. *Coursepacks are 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. Stipulated Facts ¶ 50.*

155. *At GSU, coursepacks are printed and bound together and sold as units through the GSU Bookstore. Stipulated Facts ¶ 51.*

156. The testimony of numerous GSU witnesses established the equivalent purpose and function of electronic course readings distributed via ERes/uLearn and paper coursepacks, and that the only meaningful difference between

the two from the standpoint of students in the class is that coursepacks include paper copies of the underlying work and ERes excerpts, at least initially, provide digital copies of the same works – although students often convert these into printed paper copies. For example:

- Professor Greenberg testified that there is no distinction from the student’s perspective between coursepacks and ERes other than one being paper and one being digital. Greenberg Dep. 51:1-15 (by video, *see* 6/2 Tr. 40).
- Professor Gabler-Hover’s syllabus instructs students that “[M]any 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.
- Professor Duffield, when asked if there was “any difference to you in terms of your educational objectives if the student gets a chapter in a coursepack as opposed to getting that same chapter through EReserves?,” answered that it would not make a difference to him. 6/1 Tr. 108:12-17 (Duffield).

- Professor Davis testified that other than the fact that the coursepack is bound, there is no difference between coursepacks and ERes. 5/25 Tr. 115:24-116:17 (Davis).
- Professor Dixon testified that the only difference is that money is charged for coursepacks whereas EReserves is free. Dixon Dep. at 67:10-13 (by video, *see* 5/25 Tr. 169).
- Professor Orr testified that he could have made the same excerpts for each of the classes that he posted to ERes available to students in a bound physical coursepack, but that he instead placed them on ERes so students could access them for free. 5/25 Tr. 91:2-9 (Orr).

157. GSU Administrators likewise questioned the distinction between printed coursepacks and the same course reading material offered in electronic form. Dean of Libraries Nancy Seamans agreed – consistent with the copyright policies cited by Defendants’ own expert, Dr. Crews – that it is “immaterial what form those coursepacks might take, paper versus electronic, in terms of permission requirements.” Trial Transcript Volume 14, June 6, 2011, Docket No. 397 (“6/6 Tr.”) 53:11-54:4, 109:7-22 (Crews).

158. Students can download, save, and print material from ERes at any point during the semester – essentially creating their own permanent

coursepacks – and keep the material indefinitely even if access to ERes course pages is disabled at the end of a semester. The library does not collect copies of the material back from students or otherwise require students to purge the readings from their computers. 5/20 Tr. 113:20-114:15, 115:7-14 (Dimsdale); 6/1 Tr. 106:22-107:5 (Duffield); 6/1 Tr. 144:14-25 (Burtle).

159. *GSU pays permissions fees when copyrighted content is used in hardcopy coursepacks. Stipulated Facts ¶ 52.* However, when that very same copyrighted material is distributed electronically, no fee is paid. Palmour Dep. 128:25-129:25, 135:5-7, 139:1-9 (by video, *see* 5/23 Tr. 33-34).

160. GSU has encouraged faculty members to make course materials available via digital distribution rather than coursepacks to avoid paying the copyright royalties associated with hardcopy coursepacks. Palmour Dep. 128:25-129:12; 135:1-7 (by video, *see* 5/23 Tr. 33-34); PX 675.

161. As a result, coursepack usage by GSU faculty has declined in recent years, while there has been an increase in the use of ERes; for example, during the Spring 2009 term, coursepacks for only approximately 15 courses were offered for sale, more than 300 courses made reading material available on ERes. Palmour Dep. 128:16-23 (by video, *see* 5/23 Tr. at 33-34).

2. Print (or “Hard Copy”) Reserves

162. “Print reserves” (also called “hard-copy” reserves) refers to the practice where a copy of a book is placed on a shelf in the library and students are allowed to check out that copy for a limited period of time. As Dean Seamans testified, GSU’s policy has for years limited the use of print reserves to non-required reading only. 6/2 Tr. 106:13-107:2 (Seamans); PX 749 at 3. This fact alone disposes of any attempted analogy between ERes (which GSU professors routinely use to distribute required readings) and print reserves.

163. Print reserves also operate differently and serve very different purposes for professors and students than the distribution of readings to students via ERes or uLearn. For example, print reserves are not available twenty-four hours a day; students need to come to the library in person when the reserve desk is open to read the copy of a book placed on print reserves. 5/20 Tr. 99:11-24 (Dimsdale); 6/2 Tr. 84:24-86:7 (Seamans).

164. In addition, only a single copy of the book is made available on print reserves, and students must check that single copy out one user at a time, often for a period of two hours – and must wait for its return if another student has the copy checked out. 5/20 Tr. 99:21-100:9 (Dimsdale); 5/25 Tr. 35:3-14 (Kim); 6/1 Tr. 106:11-15 (Duffield); Trial Transcript Volume 13, June 13, 2011, Docket

No. 396 (“6/3 Tr.”) 63:15-21(Crews). GSU instructors acknowledged that they generally do not use hard-copy reserves for required readings not only because it is discouraged by GSU policy, *see supra* ¶ 162, but because of this “one at a time” limitation – i.e., because all the students in the class would not have the opportunity to get to the library and access the single copy of the reading prior to class – or would choose not to do so. 5/25 Tr. 35:15-36:10 (Kim); 5/25 Tr. 76:3-11 (Orr).

165. ERes and uLearn, by contrast, offer each and every student in a course unlimited access to course reading material at any time of the day or night and from any location (such as their dorm rooms or apartments) where they have a computer with internet access. 5/20 Tr. 112:2-113:1 (Dimsdale).

166. On ERes and uLearn, each and every student can access the reading simultaneously, and each can get his/her own copy of the reading (5/25 Tr. 36:7-10 (Kim); 5/20 Tr. 112:21-113:1, 115:15-117:2 (Dimsdale); 6/1 Tr. 106:16-18 (Duffield)), as opposed to one copy on reserve accessed one student at a time, a separate copy is distributed to each student in the class who obtains the reading via ERes or ULearn. *Stipulated Facts* ¶ 57; *see also supra* ¶ 11 (describing the premium paid by universities for “concurrent” access to licensed materials – i.e., access by more than one student at a time). 5/25 Tr. 36:7-10 (Kim).

V. PLAINTIFFS HAVE ESTABLISHED A PRIMA FACIE CASE OF COPYRIGHT INFRINGEMENT

A. Plaintiffs' Ownership and Registration of the Copyrighted Works at Issue in the Litigation

167. Plaintiffs are the owners or exclusive licensees of the copyright in each work identified in the Amended Complaint (Docket No. 39) and the Revised Filing Concerning Plaintiff Works Alleged to Be Infringed at GSU During the 2009 Maymester, Summer 2009, and Fall 2009 Academic Terms (June 1, 2011) (Docket No. 361) (“Revised Infringement List”).[§] Specific details on the ownership of each of the works at issue, with accompanying citations to the record, are set forth at Appendix A.

168. Each of the Plaintiff works at issue in the litigation is an original work of authorship registered with the U.S. Copyright Office or first published in the United Kingdom protected under U.S. copyright law under the Berne Convention. *See* Appendix A (providing work-by-work detail); *see also* 5/19 Tr. 45:7-19 (Pfund); 5/17 Tr. 52:2-17, 111:14-112:1 (Smith).

[§] Plaintiffs’ Revised Infringement List updated the information reflected on the parties’ Joint Filing of Alleged Infringements (Docket No. 266, submitted March 15, 2011) to reflect this Court’s various *in limine* rulings and those alleged infringements for which Plaintiffs presented evidence for during trial and continue to maintain claims.

B. It is Undisputed that Defendants Have Copied, Displayed, and Distributed Plaintiffs' Works Without Payment or Permission

169. Defendants are engaged in the unauthorized copying, display, and distribution of Plaintiffs' copyrighted works. Plaintiffs' June 1, 2011 Revised Infringement List (incorporated by reference herein) sets forth 75 instances of infringements at GSU during the 2009 Maymester, Summer 2009 term, and Fall 2009 term. Under the Court's orders, these infringements (which involve 64 different Plaintiff works) are to be taken as representative of ongoing activity at GSU. The evidence supporting Plaintiffs' allegations as to those infringements – including ERes reports (JX 1-3), syllabi for each course, and trial testimony from GSU instructors – is detailed at Appendix A, which provides a work-by-work summary of the pages distributed, course title, professor, semester, and other data for each of the 75 alleged infringements.

170. Although only one of the three terms (Fall 2009) was a full academic term, and although the Plaintiffs represent only a small percentage of the total academic publishing market (*see, e.g.*, 5/19 Tr. 33:2-34:1 (Pfund)) the takings detailed in Appendix A are significant by any measure. By Defendants' own math, the takings average nearly 10%, and they range from range from 11 to 151 pages, 5500 to 100,000 words (five to one-hundred times the limit allowed by the

Classroom Guidelines), and to as many as seven chapters – all from works that are important (if not canonical) works of scholarship in their fields. Trial Transcript Volume 15, June 7, 2011, Docket No. 398 (“6/7 Tr.”) 69:24-70:5 (Schaetzel); Docket No. 361. For example:

- During the Fall 2009 academic term, Professor McCoy posted three excerpts of *Regimes and Democracy in Latin America* to ERes for her POLS8250 course. JX 3.
- During the Fall 2009 academic term, Professor Kim posted three chapters of *Language Testing in Practice*, two chapters of *Assessing Grammar*, two chapters of *Assessing Speaking*, and two chapters of *Assessing Writing* to uLearn for her AL8550 course. PX 519.
- During the Fall 2009 academic term, Professor Harvey posted two chapters of *The Power Elite* to ERes for her SOCI8030 course. JX 3.
- During the Fall 2009 academic term, Professor Kaufmann posted seven chapters from the third edition of *The SAGE Handbook of Qualitative Research* and one chapter from the second edition of the same book (comprising 187 pages in total)

to ERes for her EPS8500 class. JX 3; *see also infra* ¶ 290 (noting Professor Kaufmann’s use of the same chapters in repeated semesters).

- During the Fall 2009 academic term, Professor Ohmer posted two chapters of *Utilization Focused Evaluation* to ERes for her SW8200 course. JX 3.
- During the Fall 2009 academic term, Professor Lasner posted 37 excerpts (32 book chapters) to ERes for his course “Comparative Culture” (PERS2001), a course with 114 students and no text required for purchase. JX 3; JX 5; PX 537. The Oxford work on that list was accessed 238 *times*, while others were accessed over 500 *times*. JX 3
- During the Summer 2009 academic term, Professor Kruger posted 15 book excerpts to ERes (PX 553) for her course “Learning and the Learner” (EPY7090), and did not require her students to purchase a text for this course. 5/31 Tr. 56:19-58:3, (Kruger); *see also infra* ¶ 290 (noting Professor Kruger’s use of Plaintiffs’ work in repeated semesters of EPY7090).

171. Defendants do not dispute that GSU instructors provided the excerpts identified in Revised Infringement List. (In some instances Defendants do question the specific page range related to a claimed infringement, and have challenged Plaintiffs' ownership to certain of the works.) Nor do they dispute that they did not obtain a license or otherwise seek permission to copy and distribute any of the 75 infringing excerpts, and have not paid any license or permission fees for doing so. JX 5; Stipulated Facts ¶ 59; ¶¶ IV.A.129-IV.A.131.

172. The ERes reports for the Maymester 2009, Summer 2009 term, and Fall 2009 term (JX 1-3) also provide undisputed evidence of Defendants' extensive distribution of copyrighted material more generally via ERes during these academic terms – including the number of times each of the works on the report was accessed (or “hit”) during the term:

- During the three weeks of classes in May 2009 (“2009 Maymester”), over 500 unlicensed course materials were posted to ERes. These postings (which exclude links to licensed copies of journal articles and ERes entries that merely reference call numbers for a book in hardcopy library reserves) were accessed over 3,000 times. *See* JX 1.

- During the Summer 2009 semester, more than 400 unlicensed course materials were posted to ERes. These postings (which exclude links to licensed copies of journal articles and entries referencing hard-copy course reserves) were accessed over 6,000 times. *See* JX 2.
- During the Fall 2009 semester, approximately 1,000 unlicensed course materials were posted to ERes – including 44 excerpts posted to ERes for the course “Advanced Developmental Psychology” (EPY8220) alone, and 37 excerpts for the course “Comparative Culture” (PERS2001). These materials (which exclude links to licensed copies of journal articles and entries referencing hard-copy course reserves) were accessed nearly 4,000 times. *See* JX 3.

173. A number of background facts regarding the 2009 ERes Reports (JX 1-3) – most of them stipulated – are contained in Appendix E. (These reports, of course, captured only activity taking place on ERes, not uLearn.)

VI. GSU’S POLICY REGARDING ELECTRONIC COURSE MATERIAL DISTRIBUTION HAS CAUSED AND ENCOURAGED THE ONGOING INFRINGEMENT OF PLAINTIFFS’ WORKS

A. GSU’s Current Copyright Policy

174. Defendants' expert Dr. Kenneth Crews reviewed the GSU copyright policy that was in place prior to February 2009 at the time of its promulgation in 1997 and characterized it as one "that just says yes to everything." 6/3 Tr. 81:12-82:16 (Crews). Under the pre-2009 guidelines, thousands of copyrighted works were placed on ERes each semester without authorization of the copyright owners. Plaintiffs' First Amended Complaint, Docket No. 39 ("Compl.").

175. *The Board of Regents introduced a new copyright policy for USG schools on February 17, 2009. Stipulated Facts ¶ 86.*

176. *The policy was the result of efforts by the Board of Regents Select Committee on Copyright, which convened in late December 2008, eight months after the commencement of this lawsuit. Stipulated Facts ¶ 87.*

177. *Plaintiffs were first advised about the new copyright policy in February 2009, following public announcement of the new policy. Stipulated Facts ¶ 88.*

1. Background: The Select Committee on Copyright

178. The Select Committee on Copyright (the "Committee") was convened in response to the advent of this litigation. 6/2 Tr. 130:20-131:25 (Seamans); PX 1004; DX 128.

179. Defendant Nancy Seamans, Dean of Libraries, was a member of the Board of Regents Select Committee on Copyright. 6/2 Tr. 49:18-50:1, 102:17-21 (Seamans); DX 145.

180. William Potter, Dean of Libraries at University of Georgia, was the chair of the Select Committee; he had also chaired the committee that developed the prior copyright policy. 6/6 Tr. 91:24-92:10, 116:22-117:2 (Potter). Dr. Potter has no legal training and is not an expert in copyright law. 6/6 Tr. 118:8-14 (Potter). In fact, during his tenure at the University of Georgia (UGA), he routinely delegated matters relating to copyright policy to other administrators. *Id.* 118:15-18 (Potter). Dr. Potter has only vague knowledge of the workings of CCC, is not familiar with UGA's practices with respect to seeking or obtaining publisher permission for creation and dissemination of coursepacks (indeed, he is not himself familiar with the concept of a coursepack (*id.* 118:19-22), and has not addressed a copyright policy issue relating to the ERes system. *Id.* 120:2-12, 120:24-121:4 (Potter).

181. Counsel for the Defendants in this litigation, King & Spalding, played an important advisory role as counsel for the Committee – they attended all meetings and were the principal drafters of GSU's new copyright policy. 6/6 Tr. 96:6-10, 124:25-125:24 (Potter).

182. Defendants' expert, Kenneth Crews, was also retained to consult on aspects of the new policy documents developed by the Committee, including the Fair Use Checklist. 6/3 Tr. 90:19-91:19 (Crews).

183. The Committee completed its work in roughly 60 days, as compared to the seven or eight months it took to develop the prior copyright policy. 6/6 Tr. 96:23-25, 125:25-126:5 (Potter); 6/2 Tr. 54:4-10, 130:20-131:8 (Seamans).

184. The Committee did not conduct any tests or trials to assess the use of unauthorized materials on ERes or uLearn, or how the new policy it put in place would impact or mitigate such unauthorized uses. Nor, despite placing the entire responsibility for fair use determinations for electronic uses of course materials in the hands of faculty members, did the Committee (a) get input or feedback from individual faculty about how they would apply the checklist in practice and the results it would allow, or (b) make plans to evaluate ongoing practice under the new policy after its launch. 6/2 Tr. 135:11-136:9 (Seamans); 6/6 Tr. 131:9-16, 132:13-15 (Potter).

185. The Committee also did not discuss how to fund licensing for works found to exceed fair use under the new policy, and did not establish procedures for facilitating and paying for permissions for faculty posting electronic

course content. 6/2 Tr. 117:2-12 (Seamans). The Committee failed to consider that the lack of a budget for permissions might create incentives for faculty to apply the checklist in a fashion that would not put them in a position of having to pay permissions out of pocket. 6/6 Tr. 133:14-23 (Potter).

186. The Committee disbanded immediately after it concluded its formulation of the new policy, without attempting to determine how the process it had put in place was working in practice. 6/6 Tr. 134:15-21 (Potter); 6/2 Tr. 65:5-8, 126:17-127:2 (Seamans).

2. Implementation of the New Copyright Policy at GSU

187. *The new copyright policy was implemented at GSU to some extent during the 2009 Maymester and more fully during the 2009 Summer semester. Stipulated Facts ¶ 89.*

188. *The new policy makes the instructor responsible for evaluating whether a particular reading posted on ERes is fair use by completing a “fair use checklist” form (the “checklist”). Stipulated Facts ¶ 90.*

189. In contrast to other disciplinary mechanisms intended to avoid violations of the law and university policy, there is no enforcement mechanism to ensure that the GSU copyright policy is carried out appropriately and that faculty

have not blatantly infringed copyright. 6/2 Tr. 75:7-13, 127:10-19 (Seamans); DX 325.

190. Defendants' own expert, Dr. Crews, testified that an active and robust review process by the library serves as an important check on faculty fair use determinations – and praised the GSU policy for assertedly having such a procedure in place. 6/3 Tr. 134:20-135:17 (Crews). However, when asked whether a review process that was demonstrated by the record to be limited to flagging huge pieces of a book would be consistent with a meaningful library review, Crews responded “no.” *Id.* at 135:4-138:4.

191. Moreover, Dean Seamans disclaimed any monitoring role by GSU librarians of faculty fair use determinations under the new policy, testifying: “We do not check to see that they [faculty] have done anything, we just assume they have gone through all of the forms and have done what they are supposed to do.” 6/2 Tr. 75:7-13, 127:10-19 (Seamans); *see also* 6/1 Tr. 121:23-122:1 (Burtle). From the GSU library's perspective, the entire premise is to place fair use responsibility in the hand of the faculty and, as Dean Seamans acknowledged, “let the fair use chips fall where they may.” 6/2 Tr. 136:10-14 (Seamans).

192. Apart from attending a short training session with legal affairs, GSU library personnel involved in processing faculty ERes requests do not have

particular training in copyright law, and in some instances have only a high-school degree. 5/20 Tr. 104:2-12 (Dimsdale); 6/2 Tr. 122:24-125:16 (Seamans).

193. At most, GSU library personnel suggested that they will review a professor's ERes selection if it raises a "red flag." This *ad hoc* check, however, is not defined in the policy, nor are there any standards for it. 6/2 Tr. 151:3-6 (Seamans). GSU library witnesses could only cite use of "an entire book" as something that might raise a red flag. In addition, despite one witness claiming to have "red flagged" numerous works, the only example that GSU witnesses could recall "red flagging" during the 2009 Maymester and Summer 2009 terms was an audio file (obviously not at issue in this case). 5/20 Tr. 103:10-24, 127:16-21, 134:11-14, 135:10-136:16 (Dimsdale); 6/1 Tr. 121:23-122:1 (Burtle); 6/2 Tr. 122:6-16, 123:22-124:1 (Seamans).

194. In the Fall 2009 academic term, despite her initial claim to the contrary, library reserves administrator Marjorie Denise Dimsdale was unable to recall a single item red-flagged as excessive, and admitted that much of what was flagged was related to the library's review of whether the material was from a journal to which the university has a license, whether the material was in the public domain, or questions concerning permissions – not, as originally suggested, questions of fair use. 5/20 Tr. 97:5-16, 103:13-34, 128:21-129:15 (Dimsdale); DX

160. Associate Dean Laura Burtle, for her part, testified that fair use claims would only be flagged if “huge” portions were used. 6/1 Tr. 123:2-124:24 (Burtle).

195. The “red flag” process, even to the extent it exists, is completely ineffectual: the library allowed all 75 excerpts appearing on the Revised Infringement List to be copied and distributed, including the posting of eight excerpts from *The SAGE Handbook of Qualitative Research* that Professor Kaufmann used in her course “Qualitative / Interpretive Research in Education I” (EPRS8500). 5/20 Tr. 129:13-15, 136:17-137:10 (Dimsdale); JX 5 at C-9; *see also* 6/2 Tr. 124:2-7 (Seamans) (agreeing that red flag review is “not all that important at the end of the day” in light of responsibility reposed in faculty to make fair-use determinations).

3. The “Fair Use Checklist”

196. The sole tool from the new GSU policy that GSU faculty rely on in making fair use decisions is the Fair Use Checklist 6/6 Tr. 129:20-131:8 (Potter); JX 4. Defendants’ expert, Professor Crews, testified that while a checklist is a useful tool, it should be “but one of . . . a series of support mechanisms” for faculty members, and that he “would never recommend” using the checklist as the “litmus test” for fair use determinations. 6/3 Tr. 104:25-105:14 (Crews).

197. The Fair Use Checklist lists the four nonexclusive statutory fair use factors. Under each factor, it lists some possible characteristics of the proposed use of the course material under a “weighs in favor of fair use” column and a “weighs against fair use” column. JX 4 at 7-8. As discussed in Plaintiffs’ Proposed Conclusions of Law, the listing of these characteristics on the checklist does not accurately reflect fair use case law in numerous respects.

198. The checklist does not provide any description or instructions related to the specific factors or sub-factors, what they mean, or how the professor should decide whether or not to check a box. JX 4 at 7-8; 5/24 Tr. 113:9-17 (Kim).

199. The GSU policy calls for the instructor to fill out the checklist for each work he or she proposes to digitally distribute and to retain a copy. Instructors are to review each of the listed characteristics and indicate which ones apply to the proposed use by marking the corresponding boxes. The instructor is then required to add up the checks in each column for each of the four factors. If there are more checks in the “weighs in favor of fair use” column than in the “weighs against fair use” column, the factor is deemed to favor fair use. JX 4 at 7-8; 6/6 Tr. 134:25-135:11 (Potter); 6/2 Tr. 127:10-12 (Seamans).

200. Although GSU’s own expert testified that proper application of the fair use doctrine requires consideration of all four factors, if three of the four

factors on the checklist weigh in favor of fair use, the checklist states that “reliance on fair use is justified” – *i.e.*, the faculty member may properly conclude that he/she can make a fair use of the material without even considering the fourth factor. JX 4 at 7-8; 6/6 Tr. 135:22-137:1 (Potter); 6/3 Tr. 90:4-7, 6/6 Tr. 36:6-37:16 (Crews).

201. Likewise, under the GSU policy, each statutory factor and each of the listed criteria under each statutory factor on the checklist is improperly given equal weight – another aspect of the checklist at odds with the view of GSU’s own expert. JX 4 at 7-8 (sample checklist); 6/3 Tr. 114:14-115:16 (Crews); PCL ¶ 36.

B. GSU’s New Copyright Policy Has Not Been Properly Followed Or Enforced

1. Professors Were Not Properly Trained

202. Although the Committee determined that some form of educational effort in connection with the implementation of the new copyright policy was appropriate, it made no recommendations to the Chancellor as to the nature of those efforts, did not mandate training, and did not make a faculty member’s use of the ERes and uLearn systems conditional on receiving training. 6/6 Tr. 114:13-20, 131:5-132:2, 134:4-24 (Potter); 6/2 Tr. 121:13-122:5 (Seamans).

203. Not surprisingly, many GSU instructors – including some named in Plaintiffs’ Complaint – skipped the voluntary training sessions related to the new copyright policy and did not otherwise receive training on how to fill out the fair-use checklist. Fewer than a third of the faculty who testified at trial (5 out of 16) attended a training session. *See, e.g.*, 5/25 Tr. 61:17-19, 23-25 (Orr); 5/25 Tr. 98:18-99:9 (Davis); 5/26 Tr. 142:15-21, 143:1-5 (Hankla); 5/27 Tr. 46:16-18 (Hartwig); 5/31 Tr. 51:15-23 (Kruger); 5/31 Tr. 135:15-18, 6/1 Tr. 54:12-13 (Murphy); Deposition of Dennis Gainty, Docket Nos. 323, 380 (“Gainty Dep.”) (videotaped deposition played in Court, 5/27 Tr. 96); PX 1005; McCoy Dep. 18 (by video, *see* 6/2 Tr. 37). Other faculty members received only a brief introduction to the policy during their faculty orientation. 5/24 Tr. 113:25-114:3 (Kim).

204. Despite the widespread lack of training, GSU instructors have not sought guidance from legal affairs in filling out checklists, even when they have encountered difficulties in deciding what to check. 5/24 Tr. 114:22-25 (Kim). Numerous professors simply guessed as to the intended meaning of certain boxes; others left them blank because they did not know what was intended. *See, e.g.*, 5/24 Tr. 113:18-24, 5/25 Tr. 31:2-6 (Kim); *see also* 5/27 Tr. 9:24-10:1, 24:9-18 (Gabler-Hover) (did not check whether licensing or permission was reasonably

available because she did not know what the box meant); *see also infra* ¶¶ 284-286.

205. Defendants' expert testified that it would be challenging to implement the copyright policy if only a distinct minority of faculty availed themselves of training, as the faculty would be less informed than they could have been, which could also give rise to a greater prospect of infringement. 6/3 Tr. 133:20-134:19 (Crews).

206. Other professors felt the checklist was perfectly self-explanatory – i.e., it led so clearly to a fair use conclusion that they saw no need to seek guidance. 5/25 Tr. 61:4-22 (Orr); Dixon Dep. 23:4-10 (by video, *see* 5/25 Tr. 169); McCoy Dep. 19:22-21:1 (by video, *see* 6/2 Tr. 37).

207. Some GSU instructors did not read, and could not identify, the new policy, and others just skimmed it. *See, e.g.*, 5/25 Tr. 60:15-17 (Orr); 6/1 Tr. 99:22-100:4 (Duffield).

2. Professors Failed to Complete and Retain Checklists As Required

208. GSU instructors are instructed to print and save a copy of the completed checklist for their records. DX 160 at 1; JX 4 at 4, 7; 6/2 Tr. 127:10-12 (Seamans). The Committee believed that it was important for faculty to fill out

and retain the checklist and did not contemplate that the obligation to fill out the checklist would be fulfilled by performing a fair use “mentally.” 6/6 Tr. 133:6-13 (Potter).

209. In addition, the library does not collect Fair Use Checklists or check that a professor has actually completed a checklist. 5/20 Tr. 98:8-10 (Dimsdale); 6/2 Tr. 127:3-19 (Seamans). In fact, under the new policy, it is possible to make an ERes request without actually printing out and saving a copy of the checklist, without physically filling out the checklist, or without even looking at the checklist. 6/1 Tr. 149:13-150:8 (Burtle); 6/2 Tr. 127:3-128:11 (Seamans); *see also infra* ¶¶ 211-212 (describing professors that did not complete and retain checklists).

210. Professors who did not actually print out and retain the checklist thus violated the GSU copyright policy. 6/1 Tr. 150:10-22 (Burtle); Becker Dep. 75:15-77:7 (by video, *see* 5/26 Tr. 8).

211. Many GSU instructors acknowledged that they did not fill out checklists prior to placing materials on ERes or uLearn. 5/24 Tr. 112:18-24 (Kim); 5/25 Tr. 30:15-22 (Kim cont.); 5/25 Tr. 103:18-23, 114:4-6, 118:6-10 (Davis); Gainty Dep. 47:13-15, 20 (by video, *see* 5/27 Tr. 96).

212. Other professors claimed that they filled the checklists out “mentally,” but did not fill out the form and retain it as required by the GSU policy. 5/25 Tr. 62:8-15 (Orr); 5/26 Tr. 150:7-151:9 (Hankla); 5/31 Tr. 131:4-134:11 (Murphy). Defendants concede that some professors did not comply with the checklist retention requirements of the GSU copyright policy. Def. Mem. in Opposition to Pl. Motion in Limine to Preclude the Admission of Recently Created Fair Use Checklist, Docket No. 290 at 4.

213. Indeed, most of the checklists produced in the litigation were not checklists completed and retained according to the policy, but so-called “recreated” checklists completed, at the request of counsel, in late 2010 or early 2011. *See, e.g.*, PX 629, 647-653, 656-662, 938; DX 346-348, 428-429, 473-474, 480-481; Dixon Dep. 83:7-18 (by video, *see* 5/25 Tr. 169); 5/31 Tr. 17:16-18:1, 36:3-10 (Kruger); 5/31 Tr. 108:9-16, 130:17-131:3 (Murphy); *see* Appendix C (chart summarizing GSU professors’ compliance with the copyright policy, including whether they physically filled out and retained checklists, or created recreated checklists).

214. Where no checklist was created in the first instance, the supposed “recreations” were not recreations at all, but simply a reflection of the instructors’ analysis as of 2010 or 2011. 5/24 Tr. 126:9-21 (Kim).

215. Even where a checklist purportedly was created in 2009 prior to posting the material to ERes or uLearn (whether mentally or physically), the GSU professors admitted they could not be certain that the “recreations” were identical to what was done in 2009. 5/24 Tr. 125:13-126:8 (Kim); Dixon Dep. 113:13-17 (by video, *see* 5/25 Tr. 169); 5/31 Tr. 59:19-60:2 (Kruger).

216. Professor Dixon, for example, filled out two recreated checklists for the same excerpt within one week, and even those two checklists differed from each other, meaning that at least one of them is not the same as the original completed in 2009. DX 428, 429; Dixon Dep. 113:13-17, 135:7-12 (by video, *see* 5/25 Tr. 169). Professor Kruger, for her part, identified at least three errors in her recreated checklists, leaving it unclear whether the errors were present in the original versions she claimed to have completed (i.e., she filled the checklist out incorrectly the first time) or whether she failed in her effort at re-creation. 5/31 Tr. 22:14-21, 44:2-12 (failed to check non-transformative); 27:13-19, 47:8-10, 48:10-19 (reading was required not supplemental); 38:1-11 (only half of chapter’s pages listed).

217. Only *three* of the professors who testified at trial (live or by deposition) were actually in compliance with the GSU copyright policy, having attended training, physically filled out checklists, and retained copies of their

checklists. *See* Appendix C (chart summarizing GSU professors' compliance with the copyright policy).

C. The GSU Checklist, in both Design and Application by GSU Faculty, Inevitably Leads to Fair Use Determinations

218. The GSU checklists preordain a fair use finding, and are tremendously slanted in favor of fair use. Defendants did not produce a single checklist on which even a *single statutory factor* was found to weigh against fair use. PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, 429, 473, 474, 480, 481..

219. Of the 73 checklists in evidence, 32 did not contain *any* checks in the “weighs against fair use” column; most of the remaining checklists contained only one or two checks in the “weighs against fair use” column. PX 558, 564-567, 570, 595-599, 602, 603, 608, 639, 643, 647-655; DX 473, 474, 428, 429, 346-348.

220. Not surprisingly, each and every checklist that GSU produced found that the proposed reading was fair use. PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 386, 428,429, 464, 473, 474, 480, 481. More specifically:

- Professor Kim’s ten checklists had between 16 and 20 “checks” in the “weighs in favor of fair use” column, and *not a single check*, across all ten checklists, in the weighs against fair use column. 5/25 Tr. 29:7-30:14; PX 595, 596, 647-655; Appendix C (summary of GSU professors’ compliance with the copyright policy, including tally of checks in the “weighs in favor” and “weighs against” columns).
- Professor Kruger’s two checklists likewise had an identical 16 checks in favor of fair use and zero against. PX 597-599, 5/31 Tr. 58:24-59:3 (Kruger).
- Similarly, Professor Hartwig checked 14 factors in the “weighs in favor of fair use” column and also did not have a single check in the “weighs against fair use” column. 5/27 Tr. 47:12-16 (Hartwig); PX 570.
- Professors Dixon and Esposito both checked more than 10 boxes in the “weighs in favor” column and none against. PX 564-567, 639, 643; DX 428-429, 346-348.

- Professors Gainty, Greenberg, and Hankla all checked more than 10 boxes in the “weighs in favor” column and only one box in the “weighs against” column for required classroom reading. PX 938; DX 464, 480, 481.
- Professor McCoy had 8 checks in the “weighs in favor of fair use” column and only one check in the “weighs against fair use” column for “required classroom reading”. PX 606; DX 386; McCoy Dep. 74:5-8 (by video, *see* 6/2 Tr. 37).
- The most “balanced” checklist was 12-3 in favor of fair use, and that was where the instructor, Professor Duffield, took a purposely “conservative” approach where he checked as many against fair-use as he could imagine. 6/1 Tr. 104:1-105:17 (Duffield).

221. The bias extends to specific sub-factors as well. For example:

- Despite the fact that GSU instructors acknowledge that photocopying a work for teaching purposes is not transformative, only two professors checked “non-transformative.” *See infra* ¶ 232.
- GSU did not produce a single checklist on which “large portion or entire work used” was marked under Factor 3, even where the

checklist reflected the proposed use of excerpts of as many as 151 pages. *See infra* ¶ 247.

- Not a single instructor identified the excerpt at issue as the comprising the “heart” of the work – even where the excerpt comprised an entire article. *See* Appendix C.
- GSU did not produce a single checklist on which “significantly impairs market or potential market for copyrighted work or derivative work” was marked. *See infra* ¶ 282.
- On more than 85 percent of the checklists produced by GSU, the instructor did not check the box under Factor 4 indicating the availability of a license/permission. *See infra* ¶ 284; Appendix C.

A summary of the total tally for each checklist is provided at Appendix [C].

Appendix [D] summarizes, for each sub-factor on the checklists, the percentage of checklists that contain a check for the particular sub-factor. Additional details regarding the specific factor-by-factor shortcomings of the GSU Fair Use Checklist are also contained in Section VI.

222. Although Defendants contend that faculty members are the individuals in the best position to fill out the checklist for a particular work, in practice, work-by-work determinations were rarely made; instructor after instructor

acknowledged that every checklist they filled out not only was lopsided in favor of fair use, but was *identical* as to particular factors, regardless of the work. *See, e.g.*, 5/24 Tr. 74:20-75:13 (Esposito); 5/25 Tr. 70:13-16, 71:4-7, 75:8-11 (Orr); PX 656-662 (Murphy checklists).

- Professor Moloney went so far as to fill out one checklist, photocopy it for the other readings she planned to use, and then ask her administrative assistant to fill out the top section of the photocopied checklists with the name of the author and work of each reading. 5/27 Tr. 140:6-141:14 (Moloney). She also testified that she did not even consider checking boxes on the “weighs against fair use” side where she already had an overwhelming preponderance of checks on the “weighs in favor” side. 5/27 Tr. 160:3-19 (Moloney).

VII. DEFENDANTS’ INFRINGEMENTS OF PLAINTIFFS’ WORKS ARE NOT FAIR USE

223. Plaintiffs’ Post-Trial Conclusions of Law discuss and apply the governing fair-use law to GSU’s use of Plaintiffs’ works to demonstrate that the infringements cannot be excused as fair uses. PCL ¶¶ 31-144. The following

facts, in addition to those elsewhere in this document, are germane to that legal conclusion.

A. Factor 1: The Purpose and Character of the Use

1. Defendants' Distribution of Plaintiffs' Works Via ERes and uLearn Is Non-Transformative and Commercial

224. When GSU instructors copy and distribute excerpts of Plaintiffs' works to students, those copies are exact reproductions of the original, only in digital rather than printed format. *See supra* ¶ IV.A.118; *Stipulated Facts* ¶ 53.

They do not alter the copyrighted content of the original work. The copies are used by students in the same fashion as the printed original: to read and learn about a particular topic in advance of a class session devoted to that topic. In sum, these copies supersede use of the original works. *See* PCL ¶¶ 40-50.

225. Dean Seamans – a defendant and member of the Committee – conceded that such rote photocopying for teaching purposes is *not* transformative. 6/2 Tr. 142:8-13 (Seamans); *see also* 6/6 Tr. 10:7-15 (Crews).

226. GSU instructors likewise conceded (nearly unanimously) that their distribution of digital copies to students was not transformative. *See, e.g.,*

5/24 Tr. 67:1-7 (Esposito); 5/24 Tr. 114:4-6 (Kim); 5/26 Tr. 115:3-10 (Hankla); 5/31 Tr. 22:19-21 (Kruger); 6/1 Tr. 54:19-21 (Murphy).

227. In each of the 75 complained-of infringements, GSU instructors provided the reading excerpt to students via ERes or uLearn without permission and without making the customary payment to the publisher (whether for sale of the book or for licensing the excerpt on a fee-per-page basis). GSU instructors using ERes and uLearn thus avoid making the payments that they or students otherwise would have need to make to obtain access to the materials – the essence of a “commercial” use under factor one. *See* Plaintiffs’ PCL ¶¶ 68-73.

228. GSU and its instructors benefit from providing materials essential to students’ educations at no cost. As Mr. Palmour testified, GSU’s students are its “customers,” and those customers are better served by saving them money and making access to the readings more convenient). Palmour Dep. 144:25-145:5 (by video, *see* 5/23 Tr. 33:1-34:5); *see also* 5/31 Tr. 75:5-11 (Kruger) (explaining her unwillingness to incur permissions fees for her students by stating “I try to make the graduate experience as comfortable and doable for them as possible”); 5/27 Tr. 166:16-19 (Moloney) (testifying that she tries to “find ways for [the students] to be in class and get what they need without paying any extra money that they don’t have to”); 6/1 Tr. 107:20-23 (Duffield) (testifying

with respect to the cost that he stopped using coursepacks because he “was concerned that the students might have been deterred from purchasing coursepacks and as a result not doing readings”).

229. Although the Plaintiffs are academic publishers, and two of the three operate on a not-for-profit basis, each of the Plaintiff publishers sell and license their works in the educational market – a prototypical “commercial” activity. Their not-for-profit status does not mean that they do not depend on sales and licensing activity to fund their activities, that they do not seek to maximize their sales, or that they are not harmed by unlicensed takings of their works that substitute for paid sales and/or licenses. *See infra* ¶¶ 256-281.

2. When Completing the GSU checklist, GSU Instructors Nonetheless Invariably Find that Factor 1 Weighs in Favor of Fair Use

230. On every checklist submitted into evidence, the GSU instructor found that Factor 1 weighed in favor of fair use. PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346-348, 386, 428-429, 464, 473-474, 480-481.

231. Despite the fact that GSU instructors acknowledge that photocopying a work for teaching purposes is not transformative, in completing the checklist, GSU instructors rarely check the box (in the “weighs against fair-use

column”) for “non-transformative.” 5/23 Tr. 83:9-23 (Kaufmann); 5/24 Tr. 114:4-19 (Kim); Greenberg Dep. 42:14-22 (by video, *see* 6/2 Tr. 40:23-24); Dixon Dep. 89:25-90:9 (by video, *see* 5/25 Tr. 169:23); PX 558-624, 631-652, 654-664, 881.

232. Indeed, only professors Kaufmann and Lasner checked “non-transformative,” and not one instructor checked “commercial activity.” PX 571-575, 578-581, 583-592, 594, 600-601, 629.

- Professor Murphy did not check either transformative or non-transformative because he was not sure what either one of the terms meant in the context of the checklist. 6/1 Tr. 54:19-24 (Murphy); *see also* 5/24 Tr. 114:4-19 (Kim).
- Professor Gabler-Hover, on the other hand, found that her proposed use was “transformative,” not based on her proposed distribution of course reading material via ERes, but because she thought that students would take ideas from the material and apply it to their own lives. 5/27 Tr. 6:14-21 (Gabler-Hover).

233. Even if a professor properly checked “non-transformative” or “commercial activity,” Factor 1 would still invariably tip in favor of fair use according to the checklist because instructors virtually always find at least two, and usually three, checks in favor of fair use: “Nonprofit educational” and “Teaching,”

as well as “Use is necessary to achieve your intended educational purpose.” *See, e.g.,* 5/24 Tr. 67:8-69:6 (Esposito); 5/24 Tr. 115:1-116:20 (Kim); 5/25 Tr. 69:24-70:4 (Orr); 5/31 Tr. 20:21-24 (Kruger); 6/1 Tr. 101:1-102:4 (Duffield); 5/27 Tr. 41:22-25 (Hartwig) (checked “use is necessary to achieve educational purpose” even where the reading was not required); PX 570. These redundant sub-factors are highly duplicative and essentially indistinguishable – each standing merely for the proposition that the instructor chose to use the work in a college classroom. *See, e.g.,* 5/24 Tr. 116:17-20 (Kim) 5/25 Tr. 69:17-23 (Orr); 5/31 Tr. 22:14-23:2, 44:13-17 (Kruger); *see also* Appendix D (summarizing how many times each factor was checked).

234. GSU instructors misunderstood and misapplied other sub-factors under Factor 1 on the GSU checklist:

- For example, Professor Kim checked “research and scholarship” under “weighs in favor of fair use” not because she was incorporating aspects of the work at issue into her own scholarship (a transformative use), but because some of the students in the course might use the work for their final project; i.e., she did not apply the factor to *her distribution* of the work to students *to read and discuss in class*. 5/24 Tr. 116:21-25 (Kim).

- Professor Kim also checked “Criticism, comment, news reporting or parody” because she and students were commenting on the issues raised by the readings in her class – not because she was incorporating excerpts of Plaintiffs’ works into separate works of criticism or commentary. 5/24 Tr. 117:1-4 (Kim).
- Professor Orr checked “research and scholarship” and “Criticism, comment, news reporting or parody” because the Plaintiffs’ works themselves – as opposed to *his use* of them as course reading material – are examples of research, scholarship, and criticism. 5/25 Tr. 68:11-21 (Orr).
- Professors Kruger, Murphy, and Hartwig checked “personal study” – Professors Kruger and Murphy because the students would each read the assigned excerpts privately, and Professor Hartwig because she used the materials personally to put her lectures together; none applied the factor properly to his/her distribution of multiple copies of the work to students in the class, an activity that is, by definition, not “personal.” 5/27 Tr. 41:20-21 (Hartwig); 5/31 Tr. 114:15-17 (Murphy); 5/31 Tr. 20:25-21:4, 42:20-25 (Kruger).

B. Factor 2: The Nature of the Copyright Work

1. Plaintiffs' Works are Creative

235. GSU instructors acknowledge that the scholarly works they assign, including Plaintiffs' works, are not purely factual compilations, but are original, useful, often quite creative, and in many cases unique in their approach. *See, e.g.*, 5/24 Tr. 117:16-23 (Kim); 5/27 Tr. 49:1-10 (Hartwig); 5/31 Tr. 23:14-20, 61:15-25 (Kruger); 6/1 Tr. 97:18-98:16 (Duffield) (describing value of author's analysis and synthesis of subject matter); *see also* 5/17 Tr. 29:13-17 (Court 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"); 6/7 Tr. 57:4-8; 5/19 Tr. 45:15-19 (Pfund) ("We are looking for books that are more than fact based [–] that are taking the facts and actually combining them in a way . . . that serves to enlighten . . .").

236. Along the same lines, the instructors testified more generally that nonfiction works can be creative, and that nonfiction and creativity are not "mutually exclusive" or "either-or" as presented in the GSU Fair Use Checklist. 5/24 Tr. 69:19-70:23 (Esposito); 5/25 Tr. 71:8-14, 78:20-22, 81:8-10, 83:12-14, 89:4-6 (Orr); 5/25 Tr. 122:18-21 (Davis).

237. This understanding is emphasized in the consideration of the instructors' own nonfiction publications, which they testified are not simply recitations of facts, but original works of creative expression and analysis. *See, e.g.,* 5/23 Tr. 41:13-24 (Kaufmann); McCoy Dep. 11:14-21 (by video, *see* 6/2 Tr. 37:5-6). This understanding prevails even where the professors cite, describe, and/or summarize the scholarship of others. 5/31 Tr. 54:9-23 (Kruger).

2. When Completing the GSU checklist, Instructors Wrongly Conclude that the Factual Nature of Plaintiffs' Published Works Weighs in Favor of Fair Use under Factor 2

238. On every checklist submitted into evidence, the GSU instructor found that Factor 2 weighed in favor of fair use. PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, DX 429, 473, DX 474, 480, 481, 386, 464. In fact, not a single checklist had a check in the "weighs against fair use" column under Factor 2. *Id.*; *see also* Appendix D.

239. Despite acknowledging the potential creativity and other unique aspects of non-fictional works, GSU instructors invariably find that Factor 2 of the GSU checklist weighs in favor of fair use because they use published, non-fiction works in their course, and thus get two "checks" in favor of fair use. PX 558, 563-

567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, DX 429, 473, 474, 480, 481, 386, 464.

240. By setting up a forced choice between nonfiction and “highly creative” (which GSU professors interpret as referring to poems, plays, and other types of imaginative fictional works) the GSU checklist fails to register the unique and creative aspects of the nonfiction excerpts used by GSU professors – e.g., where they provide especially useful arguments, analysis, summaries of a topic, prior research, etc. – that properly should weigh *against* a finding of fair use. *See, e.g.,* 5/31 Tr. 61:15-62:17, 63:2-18) (Kruger); *see also* PCL ¶ 160.

241. Factor 2 also tipped in favor of fair use on every checklist because professors invariably checked that the work was “important to educational objectives” – a determination that (a) is irrelevant to Factor 2 (which focuses on the nature of *the copyrighted work*, not the importance of its use); and (b) is merely reflective of the fact that the instructor decided to choose the reading for his/her students (essentially the same reason that the professors checked “necessary to achieve your educational purposes” under Factor 1). 5/24 Tr. 117:24-118:5 (Kim); 5/25 Tr. 70:24-71:3 (Orr); 5/31 Tr. 24:10-18 (Kruger); 6/1 Tr. 102:10-24 (Duffield).

C. Factor 3: Amount and Substantiality of the Portion Used

1. The 75 Infringements Represent Substantial Takings, Often Involving the Heart of the Work

242. As detailed above and in Appendix A (which lists the page range of each of the 75 alleged infringements), each of the infringing excerpts was unquestionably “substantial,” ranging from 11 to 151 pages, from one to seven chapters, and from 5500 to over 100,000 words. The vast majority of the takings exceed 5 percent of the entire book: 19 are between 10 percent and 20 percent; 8 exceed 20 percent; and one is just under 30 percent.

243. Of the 22 takings on the Revised Infringement List that constitute *less* than 5% of the entire book, all consist of at least one complete, separately authored chapter in a compilation – i.e., 100% of that author’s work. *See* Appendix A. In such an instance, the taking is by definition substantial and, by definition, constitutes the “heart” of the work. The Columbia University website maintained by Dr. Crews (PX 1012 at 16) 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.” 6/3 Tr. 110:17-111:10 (Crews); *see also* 6/1 Tr. 96:25-97:7 (Duffield) (noting that articles and book chapters are “functionally equivalent”); 5/25 Tr.

125:18-126:24 (Davis) (noting that one chapter from Professor Davis' forthcoming book has already been published in a journal as a standalone article while another will be included in a collection of essays).

244. The fact that an infringing excerpt constitutes what may appear to be a relatively small percentage of the entire work is misleading not only because it that excerpt may be a full chapter, but for another reason as well: it often results merely because the work from which the excerpt was taken happens to be very large. For example, although Professor Esposito distributed “only” 3% of the Second Edition of the *SAGE Handbook of Qualitative Research* in EPSF 8280, the excerpt comprised a full 32-page chapter – a “substantial” amount by any measure, and one that cannot be disregarded because the compilation from which it was taken happened to have over one thousand pages. PX 265; *See* Appendix A p. 38.

245. Even where the excerpts did not constitute standalone chapters, nearly every GSU instructor claimed that the excerpts they provided nonetheless were “necessary” and “important” to their teaching purpose, and “narrowly tailored” to provide students solely with that particular portion of the work the instructor found most useful – a clear sign of their qualitative importance to the professor. *See supra* ¶¶ 233, 241; *infra* ¶ 254.

2. Despite the Size of the Takings, When Completing the GSU Checklist GSU Instructors Uniformly Find Factor 3 Weighs in Favor of Fair Use

246. GSU instructors virtually always find that Factor 3 weighed in favor of fair use. PX 558, 563-567, 570-577, 579-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, 429, 473, 474, 480, 481, 386, 464. In fact, not a single checklist had a check in the “weighs against fair use” column under Factor 3. *Id.*; *see also* Appendix D.

(a) Instructors identify every excerpt as a “small” excerpt

247. GSU Professors were given no basis for determining whether the excerpts they were assigning were “large” or “small” for purposes of the checklist; without such guidance, *all* checked “small” (or left both boxes blank) *every time*. 5/24 Tr. 71:20-24 (Esposito); 5/24 Tr. 118:19-119:11 (Kim); 5/31 Tr. 25:2-4, 64:1-5 (Kruger).

248. Correspondingly, GSU did not produce a single checklist on which “large portion or entire work used” was marked under Factor 3, even where the checklist reflected the proposed use of excerpts of as many as 74, 80, and 151 pages, or one or more complete chapters constituting, in many cases, entire works of a contributing author to a compilation. 5/24 Tr. 122:11-19 (Kim); 5/27 Tr.

143:10-20 (Moloney); PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, DX 429, 473, DX 474, 480, 481, 386, 464.

249. So lacking in guidance was the checklist in this regard that numerous professors resorted to a separate metric of their own devising:

- Professor Orr limits himself to 10% (5/25 Tr. 72:3-11)
- Professor Davis uses a 12% limit (5/25 Tr. 96:17-19)
- Professor Hankla follows a “strict 20% rule” (5/26 Tr. 118:4-11, 132:11-18)
- Professor Hartwig tries to stay below 10% (5/27 Tr. 43:11-20)
- Professor Duffield utilizes a 10% limit (6/1 Tr. 78:22-79:21, 83:24-84:2, 106:3-5)
- Professor Murphy has a 20% test (6/1 Tr. 55:18-25)
- Professor Dixon (tries to stay at 1 chapter) (Dixon Dep. 93:8-22 (by video, *see* 5/25 Tr. 169:23))

250. The notion of a percentage limit being a legal safe harbor was repudiated by the Committee that promulgated GSU’s copyright policy. 6/2 Tr. 144:1-4 (Seamans); 6/6 Tr. 15:21-24 (Crews); DX 140.

(b) GSU Instructors do not recognize entire, separately authored chapters in compilations as works in themselves

251. When assigning a full, separately authored chapter/article from a compilation of articles by different authors, GSU instructors compare the length of the article to *the entire book* when determining that the excerpt was a small and non-central portion for purposes of the checklist; *i.e.*, they did not consider the fact that they were distributing an entire, separately authored, article or chapter. 5/25 Tr. 78:15-19 (Orr); 5/31 Tr. 25:15-22 (Kruger); 5/24 Tr. 53:23-54:9 (Esposito) (clarifying that chapter from *The SAGE Handbook of Qualitative Research* (2d ed.) was the entire “article” by the contributor); 5/25 Tr. 125:18-22 (Davis) (acknowledging that one of the chapters in her forthcoming book was previously published as a freestanding article in a journal); 5/20 Tr. 12:7-20 (Armstrong) (noting that authors themselves sometimes separately register individual chapters from compilations for licensing via CCC).

252. In completing the checklist, GSU instructors also consider it impossible or unlikely that any chapter in an edited compilation of independent articles could represent “the heart of the work” under Factor 3, even where an entire article is used (thus including the “heart” by definition), or when multiple articles from such a compilation are used in their entirety. Deposition of Jodi

Kaufmann, Docket No. 173, 373 at 80:13-81:3 (videotaped deposition played in Court on 5/23 Tr. 95:13-19); Dixon Dep. 97:8-24 (by video, *see* 5/25 Tr. 169:23); 5/27 Tr. 68:1-7 (Dixon); McCoy Dep. 59:22-60:3 (by video, *see* 6/2 Tr. 37:5-6); 5/27 Tr. 7:20-8:10 (Gabler-Hover).

253. Moreover, despite the fact that GSU properly pays fees for journal articles contained in licensed electronic journal databases, if those same journal articles later appears as book chapters, the GSU faculty's implementation of current copyright policy uniformly has resulted in their making those same articles available to students via ERes *without* authorization from or payment to the rightsholder. 5/25 Tr. 126:2-129:7 (Davis).

**(c) Mere selection of the work for use in class tips
Factor 3 in favor of fair use according to the
checklist**

254. Factor 3 also tipped in favor of fair use on every checklist because professors invariably checked that the work was “narrowly tailored to educational purpose” – a determination that is both completely irrelevant to Factor 3 and which reflects the simple fact that the instructor decided to choose the reading for his/her students and assigned only the portions he or she felt necessary. 5/24 Tr. 119:14-21 (Kim); 6/1 Tr. 102:25-103:7 (Duffield); Dixon Dep. 98:16-100:7 (by video, *see* 5/25 Tr. 169:23).

255. GSU instructors checked “amount taken is narrowly tailored” even where the proposed use reflected the use of multiple chapters. PX 558, 563-567, 570-577, 579-603, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, 429, 473, 474, 480, 481, 464.

D. Factor 4: Plaintiffs’ Markets are Harmed by GSU’s Activities

1. Plaintiffs have been deprived of sales revenue for the works at issue

256. *The market for Plaintiffs’ works include sales of copies of the original works. Stipulated Facts ¶ 91.*

257. *Plaintiffs rely on income from sales of their books and journals, particularly at colleges and universities – which constitute the largest market for their works – to enable them to continue to publish high-quality scholarly works. Stipulated Facts ¶ 12.*

258. GSU’s infringing activities substitute directly for the purchase of the Plaintiffs’ books (or, as detailed elsewhere, licensing of excerpts of the books). 5/17 Tr. 51:2-10 (Smith); *see* 5/18 Tr. 57:11-58:7 (Richman). In every instance in which GSU provided students with excerpts of digital course reading materials free of charge, the students did not have to purchase a copy of the book

from which the excerpt was taken, and the Plaintiffs did not receive the sales revenue. See 5/17 Tr. 74:10, 75:4-11 (Smith).

259. For example, had Professor Harvey required the 16 students in her course “Social Theory” (SOC18030) to purchase *The Power Elite* by C. Wright Mills at its retail list price of \$19.95, instead of using the work without permission, Oxford would have received revenue from 16 sales (\$319.20). See 5/19 Tr. 78:9-79:5 (Pfund); JX 5. See Appendix A (providing retail list price for all infringed Plaintiff works).

260. *Cambridge’s Americas Branch had net income in 2009 of approximately \$ (on net sales revenue of \$). Stipulated Facts ¶ 92.* 80% of Cambridge’s revenue is derived from sales of books. 5/17 Tr. 73:3-5 (Smith).

261. *Oxford’s annual operating profit in fiscal year 2009 was \$ (on net sales revenue of \$). Its net income in fiscal year 2008 (on net sales revenue of \$) was \$. Stipulated Facts ¶ 93.*

262. *SAGE’s net income in 2009 was \$ (on sales revenue of \$). Stipulated Facts ¶ 94.*

263. The above-described sales revenues of each of the Plaintiffs are less than they would have been had the GSU professors required students to purchase the Plaintiffs' original books rather than providing free digital excerpts via ERes or uLearn. *See supra* ¶ 257; 5/17 Tr. 51:2-10, 74:10, 75:4-11 (Smith); 5/18 Tr. 83:21-23, 84:1, 84:6-21 (Richman); 5/19 Tr. 78:9-25 (Pfund).

264. In addition, the sales revenue of each Plaintiff would significantly decline should the activities at GSU become widespread. *See* 5/17 Tr. 75:4-11 (Smith). Decreases in sales revenue jeopardize Plaintiffs' business model and make it difficult for them to support their operating expenses and to continue to publish high quality scholarly works. 5/19 Tr. 28:24-29:7, 75:1-76:18 (Pfund); 5/18 Tr. 82:20-24 (Richman); 5/17 Tr. 75:24-75:2 (Smith).

2. GSU's Activities Directly Substitute for Revenue from Licenses and/or Permissions to Copy Excerpts of Plaintiffs' Works

265. *The market for Plaintiffs' works also includes "permissions," i.e., licenses to make and distribute copies of excerpts of the works, including to students. Stipulated Facts ¶ 95.*

266. *The permissions market for Plaintiffs' works includes the copying and distribution of excerpts of Plaintiffs' works in both hardcopy and*

digital format, including in coursepacks and through systems such as GSU's ERes and uLearn systems. *Stipulated Facts* ¶ 96.

267. *Permissions represent a significant revenue stream for Plaintiffs. Stipulated Facts* ¶ 15. *Permissions income often permits Plaintiffs to continue to publish books that otherwise might be unprofitable. Stipulated Facts* ¶ 97.

268. Revenue from permissions is a crucial supplement to income from sales of the Plaintiffs' works, even more so when the works become older, fall out of print, are replaced by newer editions, and as usage migrates from print to online and from books to smaller chunks of information. 5/18 Tr. 73:11-20 (Richman); 5/19 Tr. 75:1-14 (Pfund); *see also* 5/17 Tr. 71:15-20, 72:18-73:1 (discussing the importance of permissions income).

269. *Since 2007, CCC has paid royalties related to its APS and ECCS (i.e., those services specifically covering print and digital copies in the U.S. academic setting) of more than \$ [REDACTED] to Cambridge, over \$ [REDACTED] to Oxford, and over \$ [REDACTED] to SAGE. Stipulated Facts* ¶ 31.

270. Oxford earned approximately \$ [REDACTED] in permissions revenue in fiscal year 2009 and a little under \$ [REDACTED] in fiscal year 2010. 5/19 Tr. 80:15-22 (Pfund); PX 342 (identifying other publishing income, of which

permissions is a subset). CCC paid royalties of \$ [redacted] to Oxford in Fiscal Year 2009** and [redacted] in Fiscal Year 2010. Stipulated Facts ¶¶ 33, 34; PX 346, 347 (identifying CCC distributions to Oxford, including payments for academic permissions in addition to other licensing services).

271. Oxford refers to permissions revenue as “heavy money” because it drops to the bottom line, i.e., none of the cost of goods (royalties, operating expenses, and indirect overhead) that come out of a dollar of book revenue is subtracted from permissions revenue. 5/19 Tr. 83:5-22 (Pfund).

272. CCC paid royalties of \$ [redacted] to SAGE in Fiscal Year 2009 and \$ [redacted] to SAGE in Fiscal Year 2010. Stipulated Facts ¶¶ 33, 34.

273. Cambridge earned \$ [redacted] in permissions revenue in fiscal year 2009, \$ [redacted] in fiscal year 2008, and \$ [redacted] in fiscal year 2007. Stipulated Facts ¶ 98. CCC paid royalties of \$ [redacted] to Cambridge in Fiscal Year 2009 and \$ [redacted] in 2010. Stipulated Facts ¶¶ 33, 34.

274. In Fiscal Year 2010, CCC paid royalties of \$ [redacted] to Oxford and \$ [redacted] to SAGE attributable to the AACL program. Stipulated

** CCC’s fiscal year runs from July 1 – June 30. Thus, FY 2009 covers the period July 1, 2008 – June 30, 2009 and FY 2010 covers the period July 1, 2009 – June 30, 2010.

Facts ¶ 38.

275. The permissions revenues of each of the Plaintiffs, although demonstrating the existence of a functioning permissions market, are less than they would have been had GSU paid the requisite permissions fee rather than providing free digital excerpts via ERes or uLearn, as no permissions fees were paid to Plaintiffs, either directly or through CCC, in connection with any of the uses of the Plaintiffs' works appearing on JX 5. 5/19 Tr. 83:23-84:5 (Pfund); 5/18 Tr. 90:19-24 (Richman).

276. Although GSU professors might not require students to purchase entire books where they wish to assign only an excerpt of the book for class reading, unlicensed uses like those occurring at GSU still substitute for the payment of permissions fees for those excerpts distributed without authorization. In every instance in which GSU provided students with excerpts of digital course reading materials free of charge, Plaintiffs did not receive a permissions fee. *See* 5/17 Tr. 51:14-18, 75:4-11 (Smith); 5/19 Tr. 80:4-13 (Pfund); 5/23 Tr. 74:23-75:3 (Kaufmann); Palmour Dep. 136:13-139:9 (by video, *see* 5/23 Tr. at 33:2-34:5) (explaining that "free" ERes readings *compete* with licensed coursepacks); Appendix A (identifying licensing fees Plaintiffs lost as a result of unauthorized use by GSU instructors).

277. For example, SAGE could have created a custom publishing order for the 235 pages of SAGE works that Professor Kaufmann used in her EPRS8500 course during the Summer 2009 academic term at a cost of \$0.12 per page (even less than SAGE's typical per-page charge of \$0.14), or \$28 per student. PX 516; 5/18 Tr. 74:21-75:2, 79:19-80:2 (Richman); 6/7 Tr. 22:11-23:1.

278. GSU instructors' contention at trial that they would not use the reading if they or their students had to pay a per-student licensing fee as low as even \$3 or \$4 – and that there was therefore no harm to Plaintiffs – was not credible. That after-the-fact testimony is not only legally irrelevant, but squarely contradicted by the fact that the instructors checked “use is necessary to achieve your intended educational purpose” on their checklists, and identified Plaintiffs' works as “unique” and in many cases not replaceable by other works, *See, e.g.*, 5/24 Tr. 60:22-25 (Esposito); 5/27 Tr. 90:1-10 (Dixon); 5/27 Tr. 161:21-162:7, 166:4-167:1, 167:5-10 (Moloney); 5/31 Tr. 49:8-13, 70:10-20 (Kruger); 6/1 Tr. 109:12-16 (Duffield) (acknowledging that he was not opposed in principal to students paying a modest permissions fee). It is also undercut by the instructors' testimony that they in fact require their students to purchase texts that, by their own admission, can cost hundreds of dollars in total, as well as their argument (however unfounded) that students will be “stimulated” to purchase entire books that are *not*

required. *See* 5/27 Tr. 11:4-8, 23:23-25 (Gabler-Hover); 5/23 Tr. 100:5-20 (Kaufmann); 5/25 Tr. 27:17-28:18 (Kim); 72:22-73:3, 76:15-20 (Orr); 5/26 Tr. 120:17-23, 163:22-164:9 (Hankla); 5/27 Tr. 49:16-50:1 (Hartwig); *id.* 77:4-11 (Dixon); *id.* 121:11-23 (Gainty). Finally, it also overlooks the fact that, as noted above, GSU itself could pay a mere \$3.75 per student – a tiny sliver of other student fees charged for other, less essential services – for access to CCC’s annual repertory license. *See supra* ¶ 95.

279. Over the last few years, Cambridge’s and SAGE’s permissions income has declined about 10 percent overall. 5/17 Tr. 79:9-10, 79:17-20 (Smith); 5/18 Tr. 83:11-14 (Richman).

280. In sum, if the practices at GSU continue and become even more widespread – i.e., if it were acceptable for the 4000 or so institutions of higher education to purchase only one copy of Plaintiffs’ work and then distribute electronic copies to students without permission and without payment – Plaintiffs’ ability to continue to publish high-quality scholarly works for use in the educational environment (not to mention the ability of others publishers whose works would also be free for the taking) would be severely threatened. 5/17 Tr. 71:15-17, 72:18-73:1, 75:4-11 (Smith); 5/19 Tr. 28:24-29:7, 75:19-76:18 (Pfund); 5/18 Tr. 58:3-7 (Richman). As Mr. Smith of Cambridge testified, if Cambridge’s

annual permissions revenue income dried up (putting aside the lost *sales* caused by unlicensed digital distribution), it would do serious damage to Cambridge's business and likely cause Cambridge to publish fewer books. 5/17 Tr. 71:15-17; 72:18-73:1 (Smith). Although a not-for-profit company, Cambridge must make enough money to sustain itself; if it were to consistently lose money, the University of Cambridge would likely sell off its assets and shut it down. 5/17 Tr. 55:19-56:22 (Smith).

3. When Completing the GSU Checklist, GSU Instructors Misunderstood, Misinterpreted, or Simply Ignored Relevant Aspects of the Factor 4 Analysis

281. On every checklist in evidence, the GSU instructor found that Factor 4 weighed in favor of fair use. PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, DX 429, 473, DX 474, 480, 481, 386, 464.

282. GSU did not produce a single checklist on which "significantly impairs market or potential market for copyrighted work or derivative" work was checked. PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, DX 429, 473, DX 474, 480, 481, 386, 464.

(a) GSU Instructors Ignore the Availability of Licensing

283. If GSU instructors considered the impact of their use at all, instructors, with very few exceptions, they considered only the impact of their use on the market for *sales* of Plaintiffs' books, not the well-developed market for licenses or "permissions" to copy and distribute excerpts of the books. 5/24 Tr. 72:12-15 (Esposito); 5/24 Tr. 120:1-12 (Kim); 5/25 Tr. 167:19-22 (Davis); 5/26 Tr. 120:9-16, 159:7-10 (Hankla); 5/27 Tr. 162:12-19, 163:24-164:13 (Moloney); 5/31 Tr. 26:13-15, 68:11-15 (Kruger); 6/1 Tr. 56:6-20 (Murphy); 6/2 Tr. 148:11-17 (Seamans); Greenberg Dep. 56:2-11 (by video, *see* 6/2 Tr. 40:23-24); Dixon Dep. 99:13-100:7 (by video, *see* 5/25 Tr. 169:23); McCoy Dep. 67:17-68:9 (by video, *see* 6/2 Tr. 37:5-6).

284. On more than 85 percent of the checklists in evidence, the instructor did not check the box under Factor 4 indicating that a license/permission was available. PX 588, 564-567, 570-599, 602, 603, 606, 608, 613, 629, 639, 643, 647-652, 654, 655, 938; DX 346-348, 428, 429, 473, 474, 480, 481. Notably, this was not because a license is not actually available (it is), but rather because not a single GSU instructor (even including those two who did check the box) bothered to inquire or investigate the issue, and thus did not know. 5/24 Tr. 120:13-23 (Kim); 5/25 Tr. 73:4-23 (Orr); 5/25 Tr. 167:10-18 (Davis); 5/26 Tr. 162:9-19 (Hankla); 5/27 Tr. 9:24-10:1, 24:7-18 (Gabler-Hover) (did not actually understand

what the box meant); 5/27 Tr. 164:14-165:4 (Moloney); Dixon Dep. 101:13-24, 102:22-103:1 (by video, *see* 5/25 Tr. at 169:23); McCoy Dep. 69:12-70:17 (by video, *see* 6/2 Tr. 37:5-6); 5/31 Tr. 68:16-24 (Kruger).

285. In many cases, the instructors acknowledged that they skipped the licensing box because the checklist already had so many checks in favor of fair use that checking the “licensing or permission reasonably available” would have had no meaningful effect on their bottom-line fair use determination (or that they would only have to investigate if they determined their use was not fair use). 5/24 Tr. 72:16-73:18 (Esposito); Esposito Dep. 88:8-89:11 (videotaped deposition played in Court on 5/24 at Tr. 73:14-15); 5/25 Tr. 73:11-15 (Orr); Dixon Dep. 101:13-24 (by video, *see* 5/25 Tr. at 169:23); 5/23 Tr. 94:19-96:23, Kaufmann Dep. 65:23-66:8 (by video, *see* 5/23 Tr. 95:13). This practice stands in contrast to the policy promulgated by Dr. Crews at Columbia, which states that “Materials placed online should not include works that are reasonably available and affordable for students to purchase – whether as a book, as a coursepack, or in other format,” and urges professors to “consider using coursepacks . . . if permission is available.” PX 1012 at 28.

286. Professors who checked “licensing or permission unavailable” sometimes based that decision on experience from years ago or attempts to get

permission to include third-party works in their own writings, and some wrongfully assumed they would need to write letters to the publishers to get permission. 5/26 Tr. 121:18-122:14 (Hankla); 5/27 Tr. 9:24-10:1, (Gabler Hover) (assumed licensing was unavailable); 5/27 Tr. 88:23-89:18 (Dixon) (did not investigate whether permission was available because she didn't want to know).

287. Very few GSU instructors had ever even heard of Copyright Clearance Center (despite the fact that it is identified by name in the GSU Policy) or, if they had, knew what CCC does. *See, e.g.*, 5/24 Tr. 73:19-22 (Esposito); 5/24 Tr. 120:24-121:2 (Kim); 5/25 Tr. 73:16-19 (Orr); 5/25 Tr. 104:15-24 (Davis); Greenberg Dep. at 40:24-41:3 (by video, *see* 6/2 Tr. at 40:23-24); Dixon Dep. at 58:22-59:15 (by video, *see* 5/25 Tr. at 169:23).

(b) GSU Instructors Fail to Acknowledge their Repeated Use of the Plaintiffs' Works

288. GSU did not produce a single checklist on which "Repeated or long-term use that demonstrably affects the market for the work" was checked even where the proposed use is of course reading material that has been used repeatedly semester after semester. PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, 429, 473, 474, 480,

481, 386, 464; 5/27 Tr. 93:22-25 (Dixon); Dixon Dep. at 45:13-23, 107:23-108:13 (by video, *see* 5/25 Tr. at 169:23); *see also* Appendix D.

- For instance, even though Professor Esposito acknowledged using a Plaintiff work in prior semesters, she did not check this box based on the legally irrelevant fact that the students in the prior semesters were different. 5/24 Tr. 74:9-14 (Esposito).
- Professor Dixon had a similar understanding, and even after clarifying in her trial testimony that repeated use had to do with her own use, she still stated that she would not check that “repeated or long term use” that demonstrably affects the market for the work because she did not think her repeated use would have an effect on the market. Dixon Dep. at 107:23-108:16 (by video, *see* 5/25 Tr. 169:23).

289. Several of Plaintiffs’ works distributed to GSU students in the 2009 semesters were also identified in Exhibit 1 to the Plaintiffs’ Amended Complaint and demonstrate instructors’ repeated use of those works without permission from Plaintiffs or CCC semester after semester, even after the promulgation of GSU’s new copyright policy. Compl. ¶ 22.; Answer, Docket No. 42 ¶ 22.

- For example, GSU professors have continued to place excerpts of John Blassingame’s *The Slave Community* on ERes. GSU Answer ¶ 27; JX 3; Appendix A at 52.
 - GSU Professor Patricia Dixon has taught the courses “African-American Male/Female Relationships” (AAS4030) and “African-American Family” (AAS3000) on various occasions over the past few years. Professor Dixon placed Chapters 4 and 7 (a total of 78 pages) from *The Slave Community* on ERes for the students enrolled in these courses during the Spring 2007, Fall 2007, Spring 2008, Fall 2008, and Spring 2009 semesters. Compl.; Dixon Dep. 45:13-23 (by video, *see* 5/25 Tr. 169:23).
 - Professor Dixon placed Chapter 7 of *The Slave Community* on ERes for students in her course “African American Family” (AAS3000) during the Fall 2009 semester. *Stipulated Facts* ¶ 85.
 - GSU Professor Ann Kruger placed Chapter 6 (39 pages) of Laura Berk’s *Awakening Children’s Minds: How Parents and Teachers Can Make a Difference* on ERes for the eighteen students enrolled in her course “Psychology of Learning:

Young Children” (EPY7090) during the Fall 2007 semester.

GSU Answer ¶ 27. Professor Kruger placed the same chapter on ERes for her course EPY7090 during the Summer 2009 and Fall 2009 academic terms. JX 2; JX 3; *see* Appendix A at p. 41, 103.

- Various GSU professors have placed excerpts of *The SAGE Handbook of Qualitative Research* (second and third editions) on ERes, both before and after the adoption of GSU’s new copyright policy. Compl. ¶¶ 22-23; GSU Answer ¶¶ 22-23; (by video, *see* 5/23 Tr. 33-34).
- GSU Professor Jodi Kaufmann placed several chapters totaling approximately 150 pages of *The Handbook of Qualitative Research* on ERes for the ten students enrolled in her course “Interpretive Inquiry in Education” (EPSF9280) during the Fall 2006 semester.
- Professor Kaufman placed the following portions of *The SAGE Handbook of Qualitative Research* (3d ed.) on ERes for her course “Qualitative/Interpretive Research in Education I” (EPS8500) during the Fall 2007 semester and “Qualitative

Research in Education II” (EPRS8510) during the Spring 2008 semester:

- Chapter 5, “Freeing Ourselves from Neocolonial Domination in Research” (pages 109-138), by Russell Bishop
- Chapter 12, “Rethinking Critical Theory and Qualitative Research” (pages 303-341), by Joe L. Kincheloe & Peter McLaren (Fall 2007 only)
- Chapter 14, “Critical Humanism and Queer Theory: Living With the Tensions” (pages 357-373), by Kenneth Plummer
- Chapter 17 “Qualitative Case Studies” (Pages 443-465), by Robert Stake
- Chapter 22, “Testimonio, Subalternity, and Narrative Authority” (pages 547-557), by John Beverly
- Chapter 25, “Narrative Inquiry” (Pages 651-679), by Susan Chase

- Chapter 36, “Relativism, Criteria, and Politics” (pages 915-932), by John Smith & Phil Hodkinson.
- Chapter 38, “Writing: A Method of Inquiry” (pages 959-978), by Laurel Richardson & Elizabeth Adams St. Pierre (Spring 2008 only)

Compl. ¶ 23; GSU Answer ¶ 23. None of these instructors checked the box for “repeated use” when they distributed these same excerpts in 2009.

(c) Other Factor 4 misconceptions fostered by the GSU checklist

290. GSU instructors checked “use simulates market for the original” based on their own irrelevant experience as graduate students at other schools, their experience in prior courses, or merely their hope that students might purchase the book – not evidence that any students actually did so. 5/25 Tr. 27:17-28:20 (Kim); 5/23 Tr. 181:16-20 (Kaufmann); 5/31 Tr. 47:18-48:3 (Kruger); 5/26 Tr. 163:22-164:9 (Hankla); 5/27 Tr. 90:18-91:1 (Dixon); 5/27 Tr. 49:16-50:1 (Hartwig).

291. Some GSU instructors incorrectly considered the posting of a copyrighted work on ERes or uLearn to constitute the making of a single copy rather than a distribution of multiple copies, even though as many as 30, 48, or 59

students were enrolled in a given course. Only three of the checklists associated with works at issue in checked “numerous copies made or distributed.” PX 563, 600, 601 (checklists); 5/27 Tr. 10:2-3 (Gabler- Hover); *Stipulated Facts* ¶ 57 (acknowledging that multiple copies are made); JX 5 (providing number of students in each course); Appendix C (summary of professors’ compliance with GSU copyright policy).

292. Many GSU instructors failed to check “required reading” even when the reading was in fact required. 5/24 Tr. 121:9-122:1 (Kim); 5/31 Tr. 27:13-19 (Kruger). Some GSU instructors checked “supplemental” reading (weighing in favor of fair use) even when the reading was required reading because they understood “supplemental” to mean “in addition to a textbook,” not “optional” or “non-required.” 5/24 Tr. 121:3-14 (Kim); 5/25 Tr. 73:24-74:2 (Orr); 5/31 Tr. 26:6-8, 27:13-19 (Kruger).

293. In completing the checklist, GSU instructors have considered the distribution of a copyrighted work to all students enrolled in a course not be a “public distribution.” PX 558, 563-567, 570-603, 606, 608, 613, 629, 639, 643, 647-652, 654-662, 938; DX 346, 347, 348, 428, 429, 473, 474, 480, 481, 386, 464.

Respectfully submitted this 22nd day of July, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **PLAINTIFFS'**
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This 22nd day of July, 2011.

A handwritten signature in black ink, appearing to read "JHR", written over a horizontal line.

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