

**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

PLAINTIFFS' POST-TRIAL CONCLUSIONS OF LAW

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I. DEFENDANTS' INFRINGING CONDUCT THREATENS THE VIABILITY OF PLAINTIFFS' PUBLISHING BUSINESSES

A. Introduction

1. This lawsuit was brought by three leading academic publishers to stop conduct at Georgia State University (GSU) that poses a direct threat to the viability of their businesses: the ongoing, pervasive, copying, display, and distribution of substantial portions of their books to entire classes of students without permission or payment. GSU has taken the unsupported and insupportable position that its status as a not-for-profit educational institution trumps Plaintiffs' copyright rights and that, as a result, an expansive fair use privilege attaches to GSU's use of book excerpts in digital form – even though it concedes that it needs to obtain permission to include the same material in paper form and obtains journal articles in digital form by subscribing to licensed databases.

2. The Eleventh Circuit has made clear that copyright law is “media neutral,” *Greenberg v. Nat'l Geographic Soc'y*, 533 F.3d 1244, 1257 (11th Cir. 2008), yet GSU has adopted a policy that places on a unique fair-use pedestal digital book excerpts provided as course readings. The anomalous consequences of this policy include one professor's belief, based on her application of the policy's Fair Use Checklist, that it was fair use to post seven chapters of *The SAGE Handbook of Qualitative Research* on ERes for free even though, she

acknowledged, permissions would have had to be paid to put the same material in a coursepack. *See* Trial Transcript Volume 5, May 23, 2011, Docket No. 403 (“5/23 Tr.”) 124:19-125:14 (Kaufmann).

3. GSU’s overriding assumption that all manner of postings of book excerpts on ERes and uLearn are protected fair uses was captured in President Becker’s testimony explaining why GSU has made no provision for permissions fees for ERes and uLearn postings that exceed fair use: “I would be shocked if we actually had a budget for things that are not covered by fair use. The items that we put on the Ereserve system are for fair use We don’t carry a budget for items not covered for that.” Deposition of Mark P. Becker, dated April 22, 2011, filed at Docket No. 316, trial record excerpts at Docket No. 358 (“Becker Dep.”) 65:5-10. This institutional mindset – that digital book excerpts are free for the taking – has been a persistent one. This was the practice at GSU that gave rise to this lawsuit, and the advent of the 2009 copyright policy, it is now clear, has done little to modify that practice. In fact, since at least May 2003, neither GSU nor any GSU employee has made a single payment for the right to place excerpts of Plaintiffs’ or any other copyrighted books on ERes or uLearn.

4. The trial record makes clear the likely adverse consequences to Plaintiffs (and, ultimately, to the process of higher education) if this officially-

sanctioned infringement were allowed to continue. Plaintiffs' core business is the publication of high-caliber scholarly books aimed specifically at colleges and universities like GSU. It is stipulated that Plaintiffs spend tens of millions of dollars annually to generate the works that GSU faculty provide to their students. Stipulated Fact 11 (attached as Exhibit E to the Consolidated Pretrial Order, entered May 2, 2011, Docket No. 280). It is further stipulated that Plaintiffs rely on revenue from the sales and licensing of their works to the academic market to sustain these publishing efforts. Stipulated Facts 12, 15. As Plaintiffs' witnesses testified, if GSU – and the thousands of other schools across the country that also use online course reading systems – were allowed to avoid paying for the right to provide their students with personal copies of one or more chapters from Plaintiffs' books, Plaintiffs would be forced to curtail or suspend their publishing activities.

5. Neither the statute nor a single fair use decision supports Defendants' position that, as a non-profit educational institution, GSU has the unfettered ability to engage in such wholesale unauthorized copying. The inappropriateness of such conduct is only underscored by the fact that *these free copies serve the sole function of superseding purchases (or licensing) or the original works*. Faculty member after faculty member testified as to the importance of Plaintiffs' works to their pedagogical purpose. However, instead of requiring students to purchase

these foundational works, and rather than securing reasonably priced licenses for the use of excerpts from them, Defendants have instituted a policy that, ironically, will deprive academic institutions of these very reading materials by denying the publishers a fair return on their investment in creating them. The fair use doctrine has never been successfully invoked in such copyright-destructive circumstances.

B. Foundations of Copyright Law

6. The ultimate purpose of copyright law is to “promote the Progress of Science and useful Arts by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.” U.S. Const. art. 1, § 8. Copyright law protects Plaintiffs’ right to be compensated for the copying, display, and distribution of their works, whether in digital or paper form and thereby “suppli[es] the economic incentive to create and disseminate ideas,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985), including in the form of scholarly works. It “rewards the individual author in order to benefit the public.” *Id.* at 546 (citation omitted). By “establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Id.*

7. Without the “limited monopoly” conferred by copyright law, 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). The publishers’ role in the creation and dissemination of their books is no less a concern of copyright law than the creative labor of authors. As the Sixth Circuit stated in *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1391 (6th Cir. 1996), “It is the publishers who hold the copyrights . . . and the publishers obviously need economic incentives to publish scholarly works, even if the scholars do not need direct economic incentives to write such works.”¹

C. Defendants’ Conduct Undermines Fundamental Copyright Interests

8. The widespread infringement occurring at GSU poses a clear threat to the economic incentives guaranteed by copyright law on which each of the Plaintiffs – whether for-profit (SAGE) or not-for-profit (Cambridge and Oxford) – depends. No business can long survive if its customers decide to take its products for free. Plaintiffs are no exception to this rule simply because they happen to publish nonfiction works targeted at the academic market.

¹ See also *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 927 (2d Cir. 1994) (noting that the potential financial rewards conferred by copyright protection “serve to motivate publishers to produce journals, which provide the conventional and often exclusive means for disseminating [the] articles. It is the prospect of such dissemination that contributes to the motivation of the[] authors.”).

9. Although Plaintiffs respect and themselves rely upon fair use in their own publications, current practice at GSU goes far beyond any defensible conception of fair use. As Cambridge's Frank Smith testified, "We just can't give it away because people want to take it." Trial Transcript Volume 1, May 17, 2011, Docket No. 399 ("5/17/11 Tr.") 78:4-5.

10. Plaintiffs have made significant investments to ensure that their copyrighted works are accessible to the academic market in forms that reflect evolving technology and consumer reading preference. *See, e.g.*, Trial Transcript Volume 3, May 19, 2011, Docket No. 401 ("5/19 Tr.") 48:24-55:7 (Pfund). Plaintiffs have erected no legal, technological, or economic barriers to the use of their books as course reading materials via digital platforms in lieu of in hardcopy format; to the contrary, they each have actively sought to *facilitate* digital access. It is Defendants who have *arbitrarily* changed the rules by determining that book purchases and the licensing of book excerpts can be circumvented through the use of ERes and uLearn. This practice deprives Plaintiffs not only of revenue necessary to support the creation of scholarly works that are critical to higher education but also of revenue needed to fund the development of electronic offerings tailored to meet the demand exemplified by Defendants' unauthorized uses.

11. The trial record makes abundantly clear that GSU's 2009 copyright policy is not a serious effort to correct an imbalance between fair use and copyright enforcement. Although the new 2009 policy was ostensibly adopted to remedy the rampant infringement that led 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.

12. Through faulty guidance (principally the badly flawed Fair Use Checklist), inadequate or non-existent training, and a total lack of supervisory oversight, the 2009 policy, as implemented, has perpetuated, rather than eradicated, the systematic infringement of Plaintiffs' copyright rights at GSU. Defendants have created an environment in which the faculty have been led to believe that posting virtually any reading they decide will serve their pedagogical needs on ERes or uLearn is fair use. They have delegated a complex legal analysis to faculty who are largely unfamiliar with copyright law, providing them only with a Fair Use Checklist that is both misleading and opaque.

13. Rather than instructing copyright novices in fundamentals of the fair use doctrine as they apply to online course readings, the Fair Use Checklist – with its unexplained and, in many respects, inaccurate list of fair use criteria – has instead instilled in them fundamental *misunderstandings* of basic copyright and

fair use concepts – the primary misconception being that copying tailored to an educational purpose is fair use. Defendants’ failure to impose appropriate constraints on faculty fair use determinations is reflected in, *inter alia*: the view that it is “not reasonable” for students to pay a licensing fee to access digital excerpts of Plaintiffs’ books (Trial Transcript Volume 10, May 31, 2011, Docket No. 393 (“5/31 Tr.”) 49:8-9 (Kruger)); the defiant attitude of one professor that she “do[esn’t] want to spend one cent” to make entire chapters of seminal scholarly works available to her students, (Deposition of Patricia Dixon, dated February 2, 2011, filed at Docket No. 318, trial record excerpts at Docket No. 355 (“2/2 Dixon Dep.”) 123:18; the use of arbitrary quantitative limits (*see, e.g.*, Trial Transcript Volume 8, May 26, 2011, Docket No. 406 (“5/26 Tr.”) 118:6-11 (Hankla); Trial Transcript Volume 9, June 1, 2011, Docket No. 394 (“6/1 Tr.”) 55:18-21 (Murphy) (applying the 20 percent guideline from the old GSU policy); 5/25 Tr. 72:3-16 (Professor Orr testifying that he tries to “keep it around 10 percent” but made an exception for “a particularly excellent treatment of the subject”); and faulty assumptions about the availability and cost of securing permissions for the works involved (*see, e.g.*, Trial Transcript Volume 9, May 27, 2011, Docket No. 407 (“5/27 Tr.”) 9:24-10:1 (Professor Gabler-Hover testifying that she assumed licensing was not available); 5/26 Tr. 121:18-122:14 (Professor Hankla testifying

he believes he checked “licensing or permission unavailable” based on prior experience with coursepacks).

14. To make matters worse, no university or departmental budget for permissions fees exists to cover situation in which a contemplated course reading flunks the fair use test. Finally, there is no oversight or enforcement procedures to detect and address violations of the policy. Thus, even professors (e.g., Kaufmann, Dixon) whose conduct was specifically identified in the Amended Complaint as infringing and who were subsequently singled out for special training in advance of their depositions continued thereafter to engage in the very same unlawful conduct – apparently assured by their training and by the Fair Use Checklist that in doing so they were engaging in fair use and never being advised otherwise by anyone at GSU.

15. The cumulative impact of the foregoing has been a blatant disregard for Plaintiffs’ copyright rights: takings of up to seven chapters (151 pages) of Plaintiffs’ books without permission or payment; unlicensed takings ranging from more than 5,500 to 100,000 words (five to more than 100 times the limit prescribed by the Classroom Copying Guidelines); and the assignment of Plaintiffs’ works along with similarly unlicensed takings from other publishers to create course readings representing a substantial part – and sometimes the entirety – of the

assigned readings for any given course. *See* Plaintiffs’ Post-Trial Findings of Fact (“Pl. PFF”) ¶ 170.

16. Against the serious threat posed by this conduct to Plaintiffs’ businesses, Defendants have mounted a meritless fair use defense centered on the propositions that (i) all of this conduct has occurred in an educational setting and (ii) all of it assertedly has been undertaken in good faith. As a matter of law, neither proposition justifies the systematic unauthorized copying the record reflects.

17. The legal significance of the educational purpose in this context – not copying for personal study but systematic, institution-wide, nontransformative copying for entire classes of significant amounts of material that is readily available for purchase or licensing – is quite limited. When weighed in the balance with the other fair use factors, it is apparent that an educational purpose does not trump these other considerations but, rather, is “only one element of the first factor enquiry.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

18. In turn, good faith is neither a defense to copyright infringement nor a basis for limiting Plaintiffs’ entitlement to injunctive relief. Section 504(a) of the Copyright Act, on which Defendants have relied, is a limitation on damages that is completely inapposite here.

II. PLAINTIFFS' PRIMA FACIE CASE OF COPYRIGHT INFRINGEMENT

19. To establish copyright infringement, the plaintiff must demonstrate that (i) it owns a valid copyright in the allegedly infringed work(s) and (ii) the defendant copied protected elements of the work(s). *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1300 (11th Cir. 2008). Plaintiffs have satisfied both of these elements.

A. Plaintiffs Own Valid Copyrights

20. Each of the works listed on Plaintiffs' Filing of Alleged Infringements, Docket No. 361 (the "Representative Infringement List"), is an original work of authorship, the exclusive copyright rights to which are owned by, or exclusively licensed to, one of the Plaintiffs.² *See* Pl. PFF ¶ 167 & Appendix A.

21. Each work on the Representative Infringement List is registered with the U.S. Copyright Office or is protected under U.S. copyright law as a work first published in a country that is a signatory to the Berne Convention.³

² Docket No. 361 reflects Plaintiffs' revisions to the Joint Filing (JX5) in light of the Court's *in limine* rulings.

³ The Berne Convention is "the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto." 17 U.S.C. § 101. The United States acceded to the Berne Convention effective March 1, 1989. *See* Berne Convention Implementation Act of 1988 (BCIA), March 1, 1989, Pub. L. 100-568. When the

Section 104(b)(2) of the Copyright Act grants “protection under this title” to works “first published in . . . a foreign nation that, on the date of first publication, is a treaty party.” 17 U.S.C. § 104(b)(2). The United Kingdom, as a signatory to the Berne Convention, is a “treaty party.” *See* 17 U.S.C. § 101 (defining treaty party as “a country . . . other than the United States that is a party to an international agreement,” including the Berne Convention); United States Copyright Office, International Copyright Relations of the United States (Circular 38A), at 10 & n.3 (identifying the United Kingdom as signatory to Berne Convention); *see also* 2 NIMMER ON COPYRIGHT § 7.16[B][1][b][ii] (2010) (explaining that “the claimant of a copyright in any [non-United States] work may file suit in a United States district court without first trying to register the work in the Copyright Office”).

22. There is no merit to Defendants’ contention that the copyrightability of any of Plaintiffs’ works is open to question. The legal standard for copyright originality is an extremely modest one; any suggestion that works of the quality published by Plaintiffs fail to meet that threshold is frivolous. That some of the allegedly infringed works are not entitled to a statutory presumption of

United States joined the Berne Convention, Title 17 was revised to provide that works published in countries that do not require formalities such as copyright registration will not lose copyright protection in the United States for that reason. *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][1][b][ii] (2010); 4 NIMMER ON COPYRIGHT at § 17.01[C][2][b].

copyrightability, either because they were not registered within five years of first publication or are foreign works not registered in the United States is not relevant. In short, as the Court appears already to have recognized (*see* Trial Transcript Volume 15, June 7, 2011, Docket No. 398 (“6/7 Tr.”) 7:11-12, there is no legitimate issue as to the copyrightability of any of Plaintiffs’ works.

23. Plaintiff Oxford holds the right to exercise the exclusive prerogatives of copyright ownership in those Oxford works at issue that were published in the United Kingdom. *See* Pl. PFF ¶ 9. Under U.K. law, an exclusive licensee has the same copyright rights as an assignee, including the right to sue for infringement. *See* Copyright, Designs and Patents Act 1988 (as amended), ¶ 101(1); COPINGER AND SKONE JAMES ON COPYRIGHT ¶¶ 22-20 (15th ed. Sweet & Maxwell, London 2005). An exclusive licensee includes an exclusive importer or distributor. *Biotrading & Financial Oy v. Biohit Ltd* [1998] F.S.R. 109. Insofar as Oxford is the exclusive U.S. distributor of Oxford works published in the U.K., *see* PX 509 (exclusive distribution agreement); 5/19 Tr. 31:23-32:5 (Pfund), Oxford has the right to sue for infringement of such works in the United States.

B. Defendants Have Copied, Displayed, and Distributed Protected Elements of Plaintiffs’ Works

24. Among the exclusive statutory rights held by a copyright owner are the rights to reproduce the copyrighted work, to distribute copies of the work, and

to display the copyrighted work publicly. 17 U.S.C. §§ 106(1), (3), (5).

25. The Copyright Act defines “copies” as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101. This indisputably includes the digital copies made at GSU in connection with ERes and uLearn.

26. Copyright law is “media neutral.” *Greenberg*, 533 F.3d at 1257. That is, an original work of authorship is entitled to the same copyright protection regardless of whether it is published in paper or in digital form, and the same remedies are available whether the unauthorized copies are digital or paper. *See* Trial Transcript Volume 12, June 2, 2011, Docket No. 395 (“6/2 Tr.”) 109:17-22 (Dean of Libraries Nancy Seamans agreeing that it is “immaterial what form . . . coursepacks might take [–] paper versus electronic [–] in terms of permission requirements”).

27. It is stipulated that ordinary usage of the ERes system results in a variety of acts by GSU employees on the GSU computer system that constitute acts of copying, display, and distribution. *See* Stipulated Facts 53-57.

28. Specifically, in order to send students copies of files through the ERes system, unauthorized digital copies are created and stored in the memory of a computer server owned by GSU and operated by GSU information technology staff. Copies are then distributed to each student in the class who accesses the reading. Thereafter, students who access the readings have the ability to view, download, and print copies. Stipulated Facts 53-56.

29. The display of Plaintiffs' copyrighted works to students by means of the ERes and uLearn systems is a public display even if access to readings posted on those systems is limited to students enrolled in the course for which the material is posted. Displaying a work "publicly" includes "transmit[ting a] . . . display of the work . . . by means of any device or process, whether the members of the public capable of receiving the . . . display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. The transmission of course readings to GSU students via ERes and uLearn so that students can display them on their computers clearly falls within the statutory definition.

30. It is uncontested that acts of copying, display, and distribution have taken place with respect to each of the works on the Representative Infringement List – a list that reflects infringements of Plaintiffs' works solely during the three

academic terms the Court determined were to serve as representative of current, *i.e.*, ongoing, practice at GSU. *See* November 5, 2010 Hearing Transcript, Docket No. 261 (“ 11/5 Hearing Tr.”), at 13-14.

III. THE COPYING, DISPLAY, AND DISTRIBUTION OF PLAINTIFFS’ WORKS ON THE ERES AND ULEARN SYSTEMS AT GSU IS NOT FAIR USE

31. Unless Defendants are able to demonstrate that the 75 representative unauthorized acts of copying, display, and distribution that took place under the 2009 policy are protected as fair use, these acts constitute copyright infringement warranting appropriate injunctive relief. Defendants have failed to carry their burden on this affirmative defense. As we demonstrate, all relevant legal authority points decisively away from the conclusion that the nontransformative copying and subsequent display and distribution of any of Plaintiffs’ works is fair use. That this activity is occurring in a nonprofit educational setting does not alter this conclusion.

A. Overview of Fair Use

32. Fair use, codified in section 107 of the Copyright Act, 17 U.S.C. § 107, is a judicially crafted privilege built into the fabric of copyright law that “permits courts to avoid rigid application of the copyright statute when, *on occasion*, it would stifle the very creativity which that law is designed to foster.”

Campbell, 510 U.S. at 577 (citation omitted) (emphasis added). The fair use privilege is a *limited exception* to the exclusive rights of copyright owners.

33. As an exception to the exclusive rights of the copyright owner, fair use is an affirmative defense as to which the defendant bears the burden of proof. *See Campbell*, 510 U.S. at 590; *SunTrust Bank*, 268 F.3d at 1275 and n.31; *Letterese*, 533 F.3d at 1307 n.21.

34. Because the ultimate purpose of copyright law is to “promote the Progress of Science and useful Arts,” U.S. Const. art. 1, § 8, by providing an incentive for the creation and dissemination of new works of authorship, fair use must be construed in a manner consistent with the advancement of this constitutionally grounded objective.

35. Notably, the preamble to section 107 provides that “*fair use*” – not “*any use*” – for one of the enumerated uses (criticism, comment, news reporting, teaching, scholarship) is not infringement. Consistent with this statutory language, the Supreme Court has disavowed reliance on “categories of presumptively fair use.” *Letterese*, 533 F.3d at 1309 (quoting *Campbell*, 510 U.S. at 584); *Harper & Row*, 471 U.S. at 561 (“The drafters resisted pressures from special interest groups to create presumptive categories of fair use. . . .”). Therefore, the fact that unauthorized copying is done in connection with news reporting or, as here,

classroom teaching, represents only the beginning of the analysis; it does not by itself dictate a finding of fair use or even give rise to a presumption that the copying is a fair use. Were the law otherwise, it would create a gaping hole in the protections afforded to authors and publishers by copyright law by allowing excessive takings of copyrighted materials to be legitimized as fair use simply by virtue of the nature of the claimed use, e.g., criticism or classroom teaching.

36. Thus, section 107 goes on to state that the *actual* fair use evaluation of a use arguably falling within one of the illustrative fair use categories must be based on application of the four enumerated fair use criteria.

37. Fair use is an “equitable rule of reason,” *Letterese*, 533 F.3d at 1308, under which the four statutory factors as applied to the facts of the case are to be examined and weighed “in light of the purposes of copyright.” *Id.* (quoting *Campbell*, 510 U.S. at 578). *See also SunTrust Bank*, 268 F.3d at 1268. Contrary to Defendants’ position that each statutory factor is entitled to equal weight (*see* 6/7 Tr. 51:6-7), the cases make clear that this “rule of reason” accords more weight to some factors than others in certain circumstances, as discussed below.

38. In this case, at least three and arguably all four of the statutory fair use factors weigh against fair use as to each of the works in issue. The law, however, establishes that Factors 1 (nature and character of the use) and 4 (prospect of

market harm) – both of which one-sidedly favor Plaintiffs – are to be given greater weight in a case where, as here, systematic nontransformative copying is involved. As the Sixth Circuit stated in *Princeton University Press*: “In the context of nontransformative uses, at least, and except insofar as they touch on the fourth factor, the other statutory factors seem *considerably less important*.” 99 F.3d at 1388 (emphasis added). *See also Texaco*, 60 F.3d at 931 (concluding, in a case involving unauthorized photocopying of journal articles, that three of the four statutory factors “including the important first and . . . fourth factors,” favored the plaintiffs).

39. The Eleventh Circuit has explained that the first and the fourth factors interrelate in cases involving nontransformative copying because “a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original,” whereas “a transformative work is less likely to do so.” *SunTrust Bank*, 268 F.3d at 1274 n.28 (citation omitted).

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

1. Affording GSU students exact, unaltered, digitized copies of Plaintiffs’ works represents concededly untransformative copying that undermines the goal of copyright law

40. Fair use is designed to accommodate “transformative” uses that serve a different purpose than the copyrighted original, as opposed to merely supplanting

or superseding it. Contrary to Defendants' contention that educational uses lie "at the heart" of fair use (*see* 5/23 Tr. 61:1-5), it is actually *transformative* works that "lie at the heart" of fair use. *Campbell*, 510 U.S. at 579. *See also Texaco*, 60 F.3d at 923. Accordingly, the "central purpose" of the first-factor inquiry into the "purpose and character of the use" is to determine "whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"; it is to determine "whether and to what extent the new work is 'transformative.'" *Campbell*, 510 U.S. at 579 (citations omitted). By generating value that "goes beyond the value that inheres in the original," *Texaco*, 60 F.3d at 923, the goal of copyright "is generally furthered" by transformative works. *Campbell*, 510 U.S. at 579.

41. By contrast, an unauthorized taking that is not transformative – such as the exact digital reproduction at issue in this case – serves as a market substitute for a lawfully acquired copy of the plaintiff's work, thereby depriving the plaintiff of compensation to which it is entitled. Nontransformative copying is the quintessential *unfair* use because the exact duplication of an original "mak[es] it likely that cognizable market harm to the original will occur." *Campbell*, 510 U.S. at 591.

42. Whereas a transformative work furthers the purposes of copyright, “an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use.” *Texaco*, 60 F.3d at 923. *See also Letterese*, 533 F.3d at 1310 (“[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”) (citation omitted); *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (“where, as here, appellee’s use [of appellant’s academic article] is for the same purpose as [appellant’s] . . . such use seriously weakens a claimed fair use”).

43. Defendants’ witnesses have acknowledged that GSU’s use of Plaintiffs’ copyrighted works is not transformative (*see, e.g.*, 6/2 Tr. 142:8-13, 143:11 (Seamans); 5/23 Tr. 83:8-12 (Kaufmann); 5/31 Tr. 22:19-21 (Kruger); Deposition of Daphne Greenberg, dated April 21, 2011, filed at Docket No. 324, trial record excerpts at Docket No. 381 (“Greenberg Dep.”) 42:14-19). Indeed, Defendants conceded that most of the alleged infringements were nontransformative. *Id.* 53:23-25.

44. Photocopying or other exact reproduction is a paradigmatic nontransformative use. In *Princeton University Press*, the leading fair use decision involving university course readings, the court stated:

[T]he degree to which the challenged use has transformed the original copyrighted works . . . is virtually indiscernible. If you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much – even if you juxtaposed them to excerpts from other works and package everything conveniently. This kind of mechanical “transformation” bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case.

99 F.3d at 1389.

45. In a case in which Texaco scientists were photocopying and archiving scientific journal articles, the Second Circuit observed that the photocopying “merely transforms *the material object* embodying the intangible article that is the copyrighted original work. . . . Texaco’s making of copies cannot properly be regarded as a transformative use of the copyrighted material.” 60 F.3d at 923 (emphasis in original).

46. Similarly, selecting materials for a compilation of reproductions is not transformative, especially where the copies serve the same purpose as the original. In *Princeton University Press*, for example, the court found that even though coursepack anthologies allowed professors to create readings perfectly tailored to their courses, the anthologies nevertheless were not transformative. 99 F.3d at 1384.

47. Similarly, in *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), the court held that including a copyrighted work in a

coursepack was not transformative: “The excerpts in suit were merely copied, bound into a new form, and sold.” *Id.* at 1531. The copying in question “had productive value only to the extent that it put an entire semester’s resources in one bound volume for students.” *Id.*

48. These observations by the courts in *Basic Books* and *Princeton University Press* as to the pernicious effect on copyright owners of using unauthorized nontransformative copying to supply students with course reading materials apply equally whether the copying is done by a commercial copyshop or, as in this case, by GSU employees.

49. Nor is simply translating a work into a new medium or making it more accessible in the same medium transformative. *See Pac. & S. Co., Inc. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (holding that TV news clipping service was “neither productive nor creative in any way”); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (holding that an unaltered retransmission of radio broadcasts was not transformative); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (noting that the reproduction of audio CDs in MP3 format “simply repackages those recordings to facilitate their transmission through another medium”). *See also Greenberg*, 533 F.3d at 1257 (noting that copyright law is “media neutral”).

50. These decisions are consistent with Justice Story’s observation that fair use involves “real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.” *Folsom v. Marsh*, 9 F. Cas. 345 (quoted in *Campbell*, 510 U.S. at 578-79).

51. The lack of transformative value weighs heavily against fair use. *See, e.g., Weissmann*, 868 F.2d at 1324 (explaining that nontransformative copying – even for a teaching purpose – “seriously weakens a claimed fair use”).

2. The Classroom Guidelines constrain the scope of fair use for classroom copying

52. Defendants seek to minimize the significance of the nontransformative nature of their unauthorized copying of Plaintiffs’ works by pointing to the footnoted observation in *Campbell* that “[t]he obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.” *Campbell*, 510 U.S. at 579 n.11. But Defendants give far too much emphasis to this single passing reference in an otherwise factually inapt opinion. Viewed in its full statutory context, the reference in section 107 to multiple classroom copies provides no support to Defendants’ effort to justify ongoing, systematic, nontransformative copying as fair use. Defendants’ reliance on the *Campbell* parody decision rather than on the

directly relevant Classroom Copying Guidelines is telling.

53. With the Classroom Guidelines, Congress indicated very clearly the limited latitude it envisioned for classroom copying under section 107. Rather than giving *carte blanche* to educators to engage in unrestricted copying of copyrighted materials without regard to the impact of the copying on the publishers, the same Congress that passed section 107 was led by the clear threat of direct substitution posed by unconstrained reproduction for classroom teaching to “accept as part of their understanding of fair use” the Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with respect to books and periodicals. H.R. Conf. Rep. No. 1733, 94th Cong. 2d Sess. at 70 (1976).⁴

54. Indeed, the Classroom Guidelines were “necessitated by the widespread availability of reprographic technology which eliminated much of the

⁴ The Classroom Guidelines set forth several criteria for permissible unauthorized copying for classroom use, including: (i) brevity (1,000 words); (ii) spontaneity (decision to use the material is too close to time of use to reasonably expect to obtain timely permission); (iii) limited copying (no more than nine instances of multiple copying during a term, only a limited number of copies from works by one author or from any one collective work); and (iv) non-substitution (copying does not substitute for purchase of books, publishers’ reprints, or periodicals). The Guidelines further state that the unauthorized creation of “anthologies, compilations or collective works” is not allowed and that the copying shall not “be repeated with respect to the same item by the same teacher from term to term.” H.R. Rep. No. 1476 at 69. Plaintiffs have not included a spontaneity requirement in their proposed injunction. *See* Docket No. 300, Exhibit 1.

copyright owner's control over the reproduction of his work." *Basic Books*, 758 F. Supp. at 1535 (quoting Wm. F. Patry, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* viii (1985)). The 1967 House Report (endorsed in the 1976 House Report), expressing concern that this enhanced copying capability was likely to cause market harm, stated that "[w]here the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection." H.R. Rep. No. 90-83, 90th Cong., 1st Sess. at 35 (1967) (cited approvingly in H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 67 (1976)).

55. The importance of the Classroom Guidelines as an expression of Congress' intent concerning the permissible scope of classroom copying is indicated by the fact that Congress "chose to incorporate the guidelines into the legislative history" of the 1976 revision of the Copyright Act. *Princeton University Press*, 99 F.3d at 1391.

56. The fact that the Guidelines are not codified in the statute does not diminish their value as an interpretive guidepost. The Supreme Court has looked to the legislative history of the Copyright Act in all three of its post-1976 Act fair use cases for assistance in ascertaining the scope of fair use. *See Harper & Row*, 471 U.S. at 549-54, 561; *Campbell*, 510 U.S. at 574-78; and *Sony Corp. of Am. v.*

Universal City Studios, Inc., 464 U.S. 417, 448 n.31 (1984).

57. The two most relevant precedents addressing classroom copying in the college/university setting both recognized the relevance of the Classroom Guidelines to determining the parameters of fair use. In *Princeton University Press*, *supra*, decided in 1996 – after *Campbell*, which Defendants have suggested somehow diminished the relevance of the Classroom Guidelines (*see* 5/17 Tr. 27:12-24 – the Sixth Circuit stated that the Guidelines provide “general guidance” as to the “type of educational copying Congress had in mind,” 99 F.3d at 1390, and that the statute “does not provide blanket immunity for ‘multiple copies for classroom use.’” *Id.* at 1385. The court in *Basic Books*, decided in 1991, stated that the Guidelines indicate that Congress “saw the maelstrom [i.e., the “widespread availability of reprographic technology”] beginning to churn and *sought to clarify, through broad mandate, its intentions.*” 758 F. Supp. at 1535 (emphasis added).

58. Although the Classroom Guidelines were not intended to serve as hard-and-fast rules, they “evoke a general idea, at least, of the type of educational copying Congress had in mind.” *Princeton Univ. Press*, 99 F.3d at 1391. Based on this premise, the courts in *Princeton University Press* and *Basic Books* both found that the deviation of the systematic coursepack copying at issue from the

Guidelines weighed against fair use. *See Basic Books*, 758 F. Supp. at 1536 (finding that copying of scholarly books in coursepacks “clearly deviates from the letter and spirit of the Guidelines”); *Princeton Univ. Press*, 99 F.3d at 1390 (finding that coursepack copying of scholarly books “goes well beyond anything envisioned by the Congress”).⁵ Notably, the discussions of the intent underlying the Classroom Guidelines in *Basic Books* and *Princeton University Press* was focused on how the use of scholarly books in the classroom would impact the plaintiffs, without reference to the identity or commercial or non-commercial motives of the party who did the copying.

59. In short, the Classroom Guidelines are an indication of the narrow scope of fair use Congress had in mind with respect to reproduction for classroom teaching. Congress’s intent is entitled to considerable weight, as in the area of

⁵ The Guidelines reflect the collaborative efforts of educators, authors, and publishers coming together to craft them. The long and distinguished list of educational groups who were signatories to the Guidelines (*see* PX 1014, Trial Transcript Volume 14, June 6, 2011, Docket No. 397 (“6/6 Tr.”) 54:24-58:5 (Crews)) refutes any suggestion that they somehow lack legitimacy because they represent a negotiated agreement rather than statutory language. In addition, the fact that the Classroom Guidelines are incorporated into the copyright policies at a number of colleges and universities (*see* 6/6 Tr. 58:21-24 (Crews)), and that they appear in the GSU faculty handbook (*see* PX 1002 at Sec. 313.01), is further evidence of their recognized relevance to university teaching. *See also* 6/3 Tr. 102:21-25 (Crews) (noting that Classroom Guidelines appear on the Columbia University website).

copyright, the courts must “defer substantially to Congress.” *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).⁶

60. Even viewing the Classroom Guidelines as minimum standards, it is apparent that the challenged copying at GSU is “light years away” from the directional parameters the Guidelines lay out for classroom copying such as that for which ERes and uLearn are being used. *Princeton Univ. Press*, 99 F.3d at 1391.⁷ See Pl. PFF ¶¶ 169-72.

⁶ See also *Sony Corp. of Am.*, 464 U.S. at 429 (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . .”).

⁷ That the regular, systematic, and extensive unauthorized copying of course materials – even by a nonprofit institution – is contrary to Congress’s understanding of fair use is confirmed by the strict limits placed on unauthorized copying by libraries under section 108 of the Copyright Act. Except to preserve unpublished works or to replace damaged, lost, stolen, or deteriorating copies (in which case three copies may be made), section 108 permits libraries to make or distribute “no more than one copy” of a work so long as it is done “without any purpose of direct or indirect commercial advantage,” and the library is open to the public or to persons not affiliated with the library of institution of which it is a part. 17 U.S.C. § 108(a)(1). Section 108 expressly prohibits “systematic reproduction or distribution” of single or multiple copies or “related or concerted reproduction or distribution of multiple copies . . . of the same material.” 17 U.S.C. § 108(g). The same principle – that mechanical copying by a nonprofit public institution for private educational use must be limited to avoid interfering with the market for the copyrighted work – precludes a finding of fair use with respect to the practices challenged here.

3. The nonprofit educational purpose of the copying is of limited significance

61. Just as Defendants exaggerate the significance of the statutory reference to “teaching (including multiple copies for classroom use),” they urge the Court to place undue weight on the reference to “nonprofit educational purposes” under Factor 1. The law does not support Defendants’ argument.

62. The Supreme Court has cautioned that “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.” *Campbell*, 510 U.S. at 584. Far from being a dispositive consideration, the nonprofit educational purpose of a claimed fair use is “only one element of the first factor enquiry.” *Id.* Even Defendants’ expert Dr. Crews characterized the belief that just because a use is for education it is a fair use as a “common myth[.]” and “wrong.” 6/3 Tr. 47:1-5 (Crews).

63. Notwithstanding the binding judicial authority, Defendants argue that the nonprofit educational purpose of the alleged infringements in this case should have controlling significance. But the Eleventh Circuit did not find fair use in *Letterese*, which involved the incorporation of the plaintiff’s book into instructional materials by two Scientology entities. Similarly, there was no fair use found in *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (holding that church’s free distribution of plaintiff’s book to

church members and potential members not fair use), or even in *Weissman*, 868 F.2d 1313 (holding that professor's unauthorized use of plaintiff's academic article for classroom teaching not fair use). Instead, in each case the courts found infringement notwithstanding the nonprofit educational character of the defendants and the nonprofit educational purpose of the copying.

64. Defendants' assertion that its nonprofit educational use of Plaintiffs' works is entitled to broad fair-use latitude ignores the Classroom Guidelines and overlooks the fact that copyright law is concerned primarily with the dissemination of knowledge *through new works of authorship*, not with the dissemination of knowledge in general. As the Second Circuit explained in *Texaco*, the illustrative fair uses listed in section 107 "refer primarily to *the work of authorship alleged to be a fair use*, not to the activity in which the alleged infringer is engaged." 60 F.3d at 924 (emphasis added). The court observed that schools engaged in teaching could not supply faculty members "with personal photocopies of books on educational techniques or substantive fields. Whatever benefit copying and reading such books might contribute to the process of 'teaching' would not for that reason satisfy the test of a 'teaching' purpose." *Id.*

65. Where the asserted "new work" constitutes nothing other than a slavish copy of the original that adds no new meaning or purpose, its supply to

students in a classroom may promote education, but it is potentially destructive of the purposes of copyright. It is for this reason that multiple copying in the classroom setting does *not* occupy a favored status under copyright law except to the limited extent indicated by the Classroom Guidelines.

4. The copyshop cases are not meaningfully distinguishable

66. Given the limited significance of the nonprofit educational purpose of the copying at GSU, GSU's nonprofit educational status does not, by itself, make systematic nontransformative copying of Plaintiffs' works fair use. That is, GSU cannot avoid copyright liability by moving in-house and digitizing the same copying for which it recognizes a commercial copy shop would need a license. Allowing it to do so would elevate form (non-profit status) over substance (large-scale nontransformative copying).

67. Because the act of nontransformative copying is the same, the ultimate purpose (classroom teaching) is the same, and the impact on the copyright owners of the unauthorized copying is the same, the similarities between this case and the copyshop cases are far more important to the fair use analysis than the sole

difference: the commercial character of the copyshop defendants.⁸

68. The user need not profit financially for the use to be disfavored under section 107; the “absence of a dollars and cents profit does not inevitably lead to a finding of fair use.” *Weissman*, 868 F.2d at 1324. In *Weissman*, the Second Circuit rejected as clearly erroneous the trial court’s holding that the unauthorized inclusion of the plaintiff’s article in the readings for a course the defendant was teaching was fair use because it was “entirely for non-profit purposes.” *Id.* The court of appeals found instead that that the first factor weighed against fair use based, in part, on the private professional benefits the defendant professor sought by using the article. *Id.*

69. Benefits obtained by nonprofit institutions from unauthorized copying also have been held to weigh against fair use. In *Worldwide Church of God*, for example, the court found that the Philadelphia Church of God’s unauthorized distribution to its followers of verbatim copies of copyrighted book *Mystery of Ages* “unquestionably profits PCG by providing it at no cost with the core text essential to its members’ religious observance, by attracting . . . new members who

⁸ In *Princeton University Press*, although the commercial nature of the defendant copyshop figured in the court’s analysis of Factor 1, it was not outcome-determinative. To the contrary, the court observed that it was “by no means free from doubt” that it would have been fair use for students or professors to make their own copies. 99 F.3d at 1389.

tithe ten percent of their income to PCG, and by enabling the ministry's growth").
227 F.3d at 1118.

70. Courts have found the requisite benefit to be shown where unauthorized copies were made to save the expense of purchasing authorized ones. *See, e.g., Wall Data, Inc. v. L.A. County Sheriff's Dep't*, 447 F.3d 769, 779 (9th Cir. 2006) ("the purpose and character of the Sheriff Department's use was commercial, because the copies were made to save the expense of purchasing authorized copies, or at least the expense of a more flexible license").

71. GSU likewise benefits from making digital course reading materials available to thousands of students without paying for them. As Mr. Palmour testified, GSU's students are its "customers," Deposition of James Palmour, dated April 23, 2009, filed at Docket No. 167, trial excerpts at Docket No. 349, 144:25-145:5, and several of the professors testified that sparing students the expense of paying for course readings motivated their reliance on ERes. *See, e.g.,* 5/31 Tr. 75:5-11 (Professor 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 (Professor Moloney testifying that she tries to "find ways for [the students] to be in class and to get what they need without paying any extra money that they don't have to"); 6/1 Tr.

107:20-23 (Professor Duffield testifying he stopped using coursepacks because he was “concerned” that as a result of the cost students “might have been deterred from purchasing coursepacks and as a result not doing readings”); 5/27 Tr. 22:21-23:5 (Professor Gabler-Hover testifying that providing assigned readings to students in a coursepack “would have been prohibitively expensive” for the students).

72. As in *Wall Data*, 447 F.3d at 779, the unauthorized copies of Plaintiffs’ works were made to save the expense of purchasing licensed copies, and, as in *Worldwide Church of God*, unauthorized copying in connection with ERes and uLearn benefits GSU by “providing it at no cost” with texts “essential to its [students’ education].” 227 F.3d at 1118.

73. These cases highlight the fallacy of drawing a rigid distinction between nonprofit and commercial entities in the context of institution-wide copying done without permission to save the expense of compensating the copyright owner.

C. Factor Two: The Nature of the Copyrighted Work

74. The second statutory fair use factor – which should be given less weight overall in the Court’s fair use determination, *see supra* ¶ 38 – considers the nature of the plaintiffs’ copyrighted work (not the nature of the defendant’s use of

it). 17 U.S.C. § 107(2). The more creative the copied work, the more legal protection it is afforded. Nonfiction works that are not simply selections or arrangements of factual material (e.g., statistical compilations or encyclopedias) are entitled to weigh under the second factor analysis. *See Letterese*, 533 F.3d at 1312; *Princeton Univ. Press*, 99 F.3d at 1389 (noting with respect to university coursepacks that it was “certainly not telephone book listings that the defendants were reproducing”).

75. In *Pacific & Southern Co.*, 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.” 744 F.2d at 1497. In *Weissman*, similarly, the Second Circuit noted “the danger that allowing wholesale appropriation of scientific works presents.” 868 F.2d at 1325. Observing that copyright protection provided the plaintiff with “an incentive to continue research,” the court stated:

[W]hile recognizing that fair use finds greater application in a factual scientific context, that recognition should not blind a court to the need to uphold those incentives necessary to the creation of works such as [the plaintiff’s article].

*Id.*⁹

76. In *Letterese*, which concerned the non-fiction book *Big League Sales Closing Techniques*, the Eleventh Circuit noted that “[n]otwithstanding its informational nature [it] contains a significant ‘proportion of fact and fancy,’ and not merely in the subjective selection and arrangement of sales techniques; [the author] utilizes original expression that surpasses the bare facts necessary to communicate the underlying technique.” 533 F.3d at 1312. See also *SCQuARE Int’l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347, 1363 (N.D. Ga. 2006) (finding that an instructional manual embodying a technique for solving business problems was not a “factual compilation” but concededly contained “some creative elements” and that Factor 2 therefore weighed against fair use).

77. Courts have found that the creative elements of scholarly works tip Factor 2 in favor of fair use. In *Princeton University Press*, for example, the Sixth Circuit noted that the excerpts copied from non-fiction scholarly books for coursepacks “contained creative material, or ‘expression’” and concluded that the second factor cut against fair use. 99 F.3d at 1389.

⁹ Leading copyright expert William Patry likewise has argued that “a broad rule permitting more generous fair use of all factual works than of all fictional works should be avoided.” PATRY ON COPYRIGHT § 10:138 (March 2008).

78. The Court has recognized that Plaintiffs' works, although nonfiction, are creative, original works of analysis and expression that reflect qualitative choices by the author. *See* 6/7 Tr. 57:4-8. *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 it's not creative"). As Oxford's Niko Pfund stated, "Major league box scores are fact based. 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 . . ."). 5/19 Tr. 45:15-19 (Pfund).

79. GSU professors also acknowledged the creative elements in the works at issue – even where the material contained and discussed third-party research or public domain material. *See, e.g.*, Trial Transcript Volume 7, May 25, 2011, Docket No. 405 ("5/25 Tr.") 37:9-40:20 (Kim); 5/25 Tr. 71:11-14 (Orr).

80. Plaintiffs' books are comparable in nature to those at issue in *Princeton University Press, Letterese*, and *SCQuARE*, where the courts counted Factor 2 as weighing against fair use. Accordingly, Factor 2 should at worst be neutral and arguably should weigh in Plaintiffs' favor to account for the taking of original scholarly analysis.

D. Factor Three: The Amount and Substantiality of the Use

81. The third fair use factor looks at the amount and substantiality of the portion used in relation to the copyrighted work as a whole. 17 U.S.C. § 107(3). In applying the third factor, courts “evaluate the qualitative aspects as well as the quantity of material copied.” *Basic Books*, 758 F. Supp. at 1533.

82. This factor, like the second, is “considerably less important” to the overall fair use assessment than the first and fourth factors, given the nontransformative nature of the copying. *See Princeton University Press*, 99 F.3d at 1389. Nonetheless, it too clearly favors Plaintiffs.

83. With regard to evaluating the quantitative aspect of the takings, the restrictions in the Classroom Guidelines provide important guidance. In addition to the length limits proposed for individual takings (which Plaintiffs’ proposed injunction incorporates), the Guidelines caution against a myopic focus only on each discrete act of copying. As stated in the 1967 House Report (and as endorsed in the 1976 House Report): “Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.” H.R. Rep. No. 90-83, 90th Cong., 1st Sess. (1967), at 35 (cited approvingly in H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), at 67).

84. A threshold issue in relation to many of the alleged infringements is the proper treatment of separately authored contributions in edited volumes. Of the 22 takings on the Representative Infringement List that are less than 5 percent of the entire book, all consist of at least one complete separately authored chapter in a compilation and range from 14 to 41 pages. *See* Pl. PFF ¶ 243. The small percentages on which Defendants rely are misleading; the copying of the entirety of an author’s contribution to a compilation such as the *SAGE Handbook of Qualitative Research* is not “minor” in either a quantitative or qualitative sense.

85. It is wrong as a matter of law, moreover, to treat a separately authored essay or article collected in an edited volume as a small percentage of the entire book rather than as a work in its own right. These chapters are distinct works of authorship – independent creations. *See Texaco*, 60 F.3d at 926 (“each of the eight articles in *Catalysis* was separately authored and constitutes a discrete ‘original work[] of authorship’”).

86. Similarly, the separately authored chapters in Plaintiffs’ books, whose authors have assigned or transferred the copyright rights to the publisher,¹⁰ should

¹⁰ The fact that GSU pays for access to journal articles through licensed subscription databases, which allow professors to provide students with authorized access to the articles through links posted on ERes or uLearn (*see, e.g.*, 6/2 Tr. 110:10-16 (Seamans); 5/26 Tr. 104:19-105:5 (Hankla); 5/31 Tr. 54:5-8 (Kruger); 6/1 Tr. 91:6-21 (Duffield), while paying nothing to post chapters from Plaintiffs’

be treated as “works” for purposes of Factor 3. The record evidence supporting this conclusion includes: (1) several professors referred to chapters in edited volumes as “articles” (*see, e.g.*, Trial transcript Volume 6, May 24, 2011, Docket No. 404 (“5/24 Tr.”) 55:6-11 (Esposito); 5/26 Tr. 112: 4-6 (Hankla); 5/27 Tr. 143:7, 144:15, 168:18-21 (Moloney), thereby highlighting the substantive equivalence of the chapters to journal articles; (2) articles and book chapters were acknowledged to be “functionally equivalent,” 6/1 Tr. 96:25-97:7 (Duffield); (3) Professor Kaufmann assigned a chapter from *The Handbook of Feminist Research* without even having read the entire book (5/23 Tr. 185:8-14 (Kaufmann)) – again showing the freestanding significance of the contribution; and (4) one chapter from Professor Davis’ forthcoming book has already been published in a journal, while another will appear in a collection of essays (*see* 5/25/11 Tr. 125:18-126:24 (Davis)).¹¹

87. Accordingly, the copying of an entire chapter in a compilation should

books in reliance on fair use, *see* 5/23 Tr. 74:16-75:3 (Kaufmann), highlights the lack of a rational basis for Defendants’ fair use defense, as does the disparate treatment of ERes/uLearn postings and coursepacks.

¹¹ The Columbia University website (*see* PX 1012) 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. 110:17-24 (Crews).

be treated as 100 percent of the work – by definition a large portion of the whole.

88. Even putting aside the failure to treat separately authored contributions to edited compilations as “works,” the portions of Plaintiffs’ work copied by GSU professors as a percentage of the entire book are comparable to those found to be “over the line” in both *Princeton University Press* and *Basic Books*. In *Basic Books*, the takings ranged from 14 pages to 110 pages or 5.2 percent to 25.1 percent of the work – closely comparable to the takings here – and the court found that the amounts weighed against fair use. *See* 758 F. Supp. at 1533. In *Princeton University Press*, the Sixth Circuit found that book excerpts the shortest of which was 8,000 words were “not insubstantial.” 99 F.3d at 1389. In this case, 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. *See* Docket No. 361; Pl. PFF ¶ 242. The takings here range from 11 to 151 pages and 5,500 to 100,000 words. Pl. PFF ¶ 170. As in *Princeton University Press*, the copying went “well beyond anything envisioned by Congress” and was “light years away from the safe harbor of the guidelines.” 99 F.3d at 1391.¹²

¹² In calculating the percentage of the work copied, the parties disagreed as to whether denominator of the calculation properly should include every page in the book or only the text, i.e., not the tables of contents, indices, and other front and back matter. Although the distinction between these two approaches in terms of the resulting percentages should be immaterial to the Court’s fair use

89. Moreover, courts have viewed verbatim copying as “evidence of the qualitative value of the copied material.” *Harper & Row*, 471 U.S. at 565. In *Basic Books* the court found that that “the portions copied were critical parts of the books copied, since that is the likely reason the college professors used them in their classes.” 758 F. Supp. at 1533.

90. Similarly, in *Princeton University Press* the court found that “the fact that the professors thought the excerpts sufficiently important to make them required reading strikes us as fairly convincing ‘evidence of the qualitative value of the copied material.’” 99 F.3d at 1389 (citing *Harper & Row*, 471 U.S. at 565).¹³

91. The qualitative significance of the excerpts copied from Plaintiffs’ books is confirmed by the fact that, in completing the Checklist (whether actually or mentally), GSU professors determined that the selected readings were, in almost

determination, especially if the Court treats separately authored contributions to compilations as complete works, as a matter of law only the “copyrighted words” or the “copyrighted materials in the book,” not mechanically compiled front and back matter containing no copyrightable expression, should be included. *See New Era Publications Int’l v. Carol Publ’g Group*, 729 F. Supp. 992, 1000 and n.9 (S.D.N.Y.), *aff’d*, 904 F.2d 152 (2d Cir. 1990).

¹³ In addition, as discussed below (*see* ¶ 158), the cases do not support the proposition (reflected on the Checklist) that it weighs *in favor* of fair use if a taking does *not* constitute the heart or center of the copyrighted work.

every case, “necessary” to achieve their “intended educational purpose” and “Important to [their] educational objectives,” as the fact of their having been assigned – in some cases repeatedly, semester after semester – demonstrates. *See, e.g.,* 5/31 Tr. 22:4-10 (Professor Kruger testifying that chapter assigned from *Understanding Trauma* “advanced a unique argument that I wanted and found necessary for students to understand”); 5/24 Tr. 84:21-85:7 (Esposito) (explaining that article assigned from *The SAGE Handbook of Qualitative Research* is “considered seminal in the field”); 5/23 Tr. 79:18-21 (Kaufmann) (agreeing that works taken from *The SAGE Handbook of Qualitative Research* have been a “staple” of her course teaching since she started teaching EPRS 8500 at GSU).

92. In sum, the verbatim copying of Plaintiffs’ works at GSU is substantial in both the quantitative and qualitative senses. Consequently, the third factor weighs heavily in Plaintiffs’ favor.

E. Factor Four: The Effect of the Use on the Potential Market for or Value of the Copyrighted Works

1. Market harm is an inevitable consequence of GSU’s nontransformative copying

93. The fourth and final statutory fair use factor requires an assessment of “the effect of [Defendants’] use upon the *potential* market for or value of the copyrighted work.” 17 U.S.C. ¶ 107(4) (emphasis added). The “adverse effect

with which fair use is primarily concerned is that of market substitution.”

Letterese, 533 F.3d at 1315. As noted, market substitution is likeliest where the challenged use is nontransformative, as “a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original,” whereas “a transformative work is less likely to do so.” *SunTrust Bank*, 268 F.3d at 1274 n.28 (citation omitted). The exact duplication of an original serves as a market replacement for it, “making it likely that cognizable market harm to the original will occur.” *Campbell*, 510 U.S. at 591.

94. The fourth factor 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 (quoting *Harper & Row*, 471 U.S. at 569). The court must consider the likely “precedential” effect of a ruling in the defendant’s favor.

95. In *Princeton University Press*, the Sixth Circuit addressed the potential impact if the photocopying at issue were widely replicated:

[M]ost of the copyshops that compete with MDS in the sale of coursepacks pay permission fees for the privilege of duplicating and selling excerpts from copyrighted works. . . . If copyshops across the nation *were to start doing* what the defendants have been doing here,

this revenue stream would shrivel and the potential value of the copyrighted works of scholarship published by the plaintiffs would be diminished accordingly.

99 F.3d at 1387 (emphasis added). *See also Basic Books*, 758 F. Supp. at 1534 (concluding that the defendant’s nationwide business of “usurping plaintiffs’ copyrights and profits” could not be sustained because it would frustrate the intent of copyright law to encourage creative expression); *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (D. Mass. 2007) (finding that if unauthorized use of plaintiff’s photograph in television program were fair use, all similar uses would be fair use, destroying the only potential market for the photographs).

96. The Eleventh Circuit reached a similar conclusion in *Letterese*, observing: “The unrestricted and widespread dissemination of the Sales Course – a use that is not transformative of the book and may be regarded as appropriating ‘the heart’ of its expression – . . . *may well usurp* the potential market for *Big League Sales* and derivative works.” 533 F.3d at 1317-18 (emphasis added).

97. As these cases indicate, the Factor 4 market harm inquiry (unlike a damages analysis) does not require the plaintiff to identify specific lost sales or other lost revenue. Instead, the plaintiff must merely identify a viable market or markets for the copyrighted work that would likely be adversely impacted if the defendant’s conduct were allowed to continue and to become widespread.

98. It suffices to show – as Plaintiffs have – that they offer academic users a range of viable options for making their works available to their students (traditional books, e-books, online products such as Oxford Scholarship Online,¹⁴ custom-published books,¹⁵ licensed third-party anthologies,¹⁶ licensed coursepacks, permissioned digital book excerpts) – and that GSU professors took advantage of none of them, instead offering ERes and uLearn readings comprising a significant portion of the readings for many courses to students for free.

99. The trial record reveals not a single permission request from anyone at GSU to CCC in connection with ERes or uLearn – in 2009 or any other time. *See, e.g.*, 6/2 Tr. 114:16-115:12, 116:10-14 (Seamans). Indeed, the subject of how to fund permissions fees for course readings found not to be fair use was not even discussed by Defendants or the committee that adopted the new policy. *Id.* 117:2-6; *see also* Becker Dep. 64:25-65:10 (President Becker testifying that he “would be shocked” if there were a budget for items not covered by fair use).

100. Plaintiffs, in conjunction with CCC, have worked hard to make their books available in accessible formats and for reasonable cost for use in connection

¹⁴ *See* 5/19 Tr. 49:18-50:6 (Pfund).

¹⁵ *See* 5/19 Tr. 66:17-67:21 (Pfund); 5/18 Tr. 208:21-209:15 (Richman).

¹⁶ *See id.* 66:17-67:21 (Pfund).

with college and university teaching. For example, Niko Pfund testified that Oxford has “moved from being a print publisher to being a mixed media printing online publisher,” 5/19 Tr. 55:5-7 (Pfund), and that Oxford is seeking increasingly to “take a format neutral position where if people want our content we try to figure out a way to get it to them in a way that works for everyone.” *Id.* 68:18-21 (Pfund). Pfund testified at length as to the range of Oxford’s online products. *See* 5/19 Tr. 53:8-55:7 (Pfund). Cambridge offers a proprietary e-book platform, Cambridge Books Online, to sell e-books to institutions, and offers a number of other electronic products (*see* 5/17 Tr. 67:7-22 (Smith)), and SAGE has developed a custom publishing product to accommodate customers who want to access SAGE content electronically. 5/18 Tr. 73:21-74:15 (Richman).

101. Plaintiffs, in short, have embraced digital formats and, working with CCC, have made obtaining permission for digital copying for systems such as ERes and uLearn easy and affordable, with both per-use (ECCS) and (for Oxford and SAGE) blanket (AAFL) license options offered. There is plainly a functioning market to meet GSU’s need for digital copies of Plaintiffs’ works. Accordingly, GSU cannot justify its policy of relying on an expansive interpretation of fair use rather than paying the customary fees for using Plaintiffs’ works.

102. If institutions of higher education purchased only a single library copy of Plaintiffs' works or if faculty purchased solely one copy (or received a complimentary review copy) of such works and then distribute significant excerpts of these works to entire classes of students with no further compensation to Plaintiffs, Plaintiffs could not long stay in business.

103. The bottom line is that Plaintiffs exist to publish the very types of works GSU has decided to use for free – and which its professors rely on every day. Each Plaintiff spends millions of dollars and takes great risks creating academic works of the type relied on at GSU, and they cannot continue to do so without adequate compensation.

104. Plaintiffs have demonstrated an adverse impact on two markets: book sales, their primary market in terms of revenues, and the permissions market, which is stipulated to constitute a significant revenue stream for Plaintiffs that “often permits Plaintiffs to continue to publish books that otherwise might be unprofitable.” *See* Stipulated Facts 11, 15, 97.

2. Plaintiffs are losing book sales

105. The primary market for Plaintiffs' works in terms of revenue is book sales. *See* Stipulated Facts 91-94, 98-99. For example, 80 percent of Cambridge's revenue is derived from sales of books. 5/17 Tr. 51:11-18, 73:3-5 (Smith). It is

stipulated that Plaintiffs rely on income from sales of their books and journals to enable them to continue to publish high-quality scholarly works and that colleges and universities are the largest market for Plaintiffs' works. Stipulated Fact 12.

106. GSU's infringing activities undermine Plaintiffs' ability to continue to publish high-quality scholarly works by substituting directly for the purchase of Plaintiffs' books. *See* 5/17 Tr. 51:2-10 (Smith); 5/18 Tr. 83:11-84:1 (Richman). Whenever GSU students are provided with unauthorized excerpts of one of Plaintiffs' books, the students did not purchase a copy of the book, and the Plaintiffs did not receive the corresponding sales revenue. *See* 5/17 Tr. at 74:10, 75:4-11 (Smith). For example, had Professor Harvey required the 16 students in her course "Social Theory" (SOCI8030) 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 at C-19.

107. Plaintiffs' sales revenues surely would decline if the current practices at GSU were to become widespread. *See* 5/17 Tr. 75:4-11 (Smith). Decreases in sales revenue jeopardize Plaintiffs' ability to operate. *See* 5/19 Tr. 28:24-29:7, 75:1-76:18 (Pfund); 5/18 Tr. 82:20-24 (Richman); 5/17 Tr. 75:24-76:2 (Smith).

108. Plaintiffs need not prove that if particular takings were not fair use, the professor instead would have required students to purchase the book rather than licensing relevant chapters, but the magnitude of some of the takings suggests substitution for book sales rather than permissions fees. *See* 5/19 Tr. 139:24-140:9 (Oxford's Pfund explaining that the more of a book that is used, the more likely it is that the alternative to the unauthorized taking would have been a book purchase). As a specific illustration of the potential sales substitution effect, SAGE's Carol Richman described the advent of custom publishing, which allows the publisher to create customized anthologies of material exactly like what GSU professors are providing student for free via ERes (thereby substituting for sales of such customized anthologies). 5/18 Tr. 73:21-80:2. The availability of the custom-publishing option means that Professor Kaufmann's takings of 235 pages of SAGE books for EPRS 8500 directly substituted for purchases of a custom anthology, which would have cost students \$28 each. *Id.* 79:19-80:2 (Richman).

109. The fact that some professors relied entirely on ERes postings and assigned no textbooks, *see* ¶ 129, *infra*, also strongly suggests displacement of textbook sales.

3. Plaintiffs are losing permissions fees

110. Lost permissions fees are another important aspect of Plaintiffs'

market harm in this case. It is stipulated that permissions are a significant revenue stream for Plaintiffs. Stipulated Fact 15. Courts readily recognize harm to a licensing market where (as here) the copyright holder is already successfully exploiting the market. *See Princeton Univ. Press*, 99 F.3d at 1387. *See also Texaco*, 60 F.3d at 930 (“since there currently exists a viable market for licensing these rights for individual journal articles, it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis”); *Harper & Row*, 471 U.S. at 569 (considering harm to marketability of first serialization rights); *DC Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (“one of the benefits of ownership of copyrighted material is the right to license its use for a fee”).

111. The Second Circuit, discussing the relevance of an established licensing market, explained that “the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier.” *Texaco*, 60 F.3d at 930-31.

Unauthorized use “should be considered ‘less fair,’” the court explained, “when there is a ready market or means to pay for the use.” *Id.* at 931.

112. In *Princeton University Press*, the Sixth Circuit noted the existence of a working licensing market for the coursepacks created by the defendant:

The potential uses of the copyrighted works at issue in the case before us clearly include the selling of permission to reproduce portions of the works for inclusion in coursepacks – and the likelihood that publishers actually will license such reproduction is a demonstrated fact. A licensing market already exists here

99 F.3d at 1388 (internal citations omitted); *see also Princeton Univ. Press v.*

Michigan Document Servs., Inc., 855 F. Supp. 905, 908 (E.D. Mich. 1994)

(describing the “clear and relatively simple procedures in place” for copyshops to seek permissions). The Sixth Circuit further noted that “[t]he three plaintiffs together have been collecting permission fees at a rate approaching \$500,000 a year.” *Princeton Univ. Press*, 99 F.3d at 1387.

113. The *Princeton University Press* court made the commonsense observation that the loss of the publishers’ permissions revenue stream could “only have a deleterious effect upon the incentive to publish academic writings.” 99 F.3d at 1391. “If publishers cannot look forward to receiving permission fees,” the court asked rhetorically, “why should they continue publishing marginally profitable books at all?” *Id.* “[H]ow,” the court continued, “will artistic creativity be stimulated if the diminution of economic incentives for publishers to publish academic works means that fewer academic works will be published?” *Id.*

114. The Second Circuit in *Texaco* likewise pointed to the ready availability of permissions as justifying the inclusion of evidence of the licensing

of excerpts in the factor-four analysis:

[T]he publishers . . . have created, primarily through the CCC, a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying. The District Court found that many major corporations now subscribe to the CCC systems for photocopying licenses. Indeed, it appears from the pleadings, especially Texaco's counterclaim, that Texaco itself has been paying royalties to the CCC. Since the Copyright Act explicitly provides that copyright holders have the "exclusive rights" to "reproduce" and "distribute copies" of their works, and since there currently exists a viable market for licensing these rights for individual journal articles, it is appropriate that potential licensing revenues for photocopying be considered in a fair use analysis.

60 F.3d at 930.

115. The Second Circuit further found that

if Texaco's unauthorized photocopying was not permitted as fair use, the publishers' revenues would increase significantly since Texaco would (1) obtain articles from document delivery services (which pay royalties to publishers for the right to photocopy articles), (2) negotiate photocopying licenses directly with individual publishers, and/or (3) acquire some form of photocopying license from the Copyright Clearance Center Inc. ("CCC").

Texaco, 60 F.3d at 929.

116. In *Basic Books*, the court found that the plaintiffs "derive[d] a significant part of their income from textbook sales and permissions" and that "Kinko's copying unfavorably impacts upon plaintiffs' sales of their books and collections and permissions fees." 758 F. Supp. at 1534.

117. The existence of a fully functioning licensing market for the books at issue in this case has been clearly established; it is not, as Defendants' counsel suggested, a "pretty new idea." 5/26 Tr. 67:18. Among the stipulated facts are that CCC: (1) was established in 1977 and acts on behalf of tens of thousands of authors and publishers, Stipulated Facts 18, 19; (2) GSU has used CCC's Academic Permissions Service (APS) to request permission to use works in coursepacks (*id.* 24); (3) CCC's Electronic Course Content Service (ECCS) covers uses of book excerpts in electronic formats (*id.* 25); (4) CCC's ECCS repertory contains approximately two million works (*id.* 26); (5) CCC has processed "millions of permission requests for academic uses in the past five years," *id.* 27; and (6) much of CCC's permissions process is automated, with charges ranging from 10 to 25 cents per page for academic use (*id.* 28, 30).¹⁷ Indeed, GSU's copyright policy itself recognizes that CCC "can grant permission[s] for thousands of works, many instantly online." JX 4 at 15.

118. Plaintiffs each license a substantial percentage of their academic works through CCC; each of the works on the Representative Infringement List

¹⁷ The permissions charge for digital copying through CCC is 14 cents per page for SAGE works, 5/18 Tr. 80:12-14 (Richman); 15 cents per page for Cambridge works, 5/17 Tr. 70:13-17 (Smith); and 12 cents per page for Oxford works. 5/19 Tr. 73:24-74:2 (Pfund).

(Docket No. 361) is available for licensing through CCC for a modest per-page per-student fee through CCC's Electronic Course Content Service (ECCS). Trial Transcript Volume 4, May 20, 2011, Docket No. 402 ("5/20 Tr.") 26:23-27:16, 29:24-30:1 (Armstrong). In fact, there is even a software application for ERes that allows for a direct connection to the CCC database so that permissions requests can be made without having to first go to the CCC website. 5/20 Tr. 48:4-49:6 (Armstrong); 6/1 Tr. 152:1-6 (Burtle).

119. The ECCS was designed specifically to accommodate the desire of academic institutions for a way to facilitate the licensing of electronic coursepacks for classroom purposes. 5/20 Tr. 26:23-28:15 (Armstrong). Approximately two million U.S. titles are available through ECCS, 5/20 Tr. 35:14-18 (Armstrong), and approximately one thousand U.S. colleges and universities use CCC's Academic Permission Service (APS) and ECCS for licensed course reading materials. *Id.* 36:3-7 (Armstrong).

120. CCC's Academic Annual Copyright License (AACL) offers an even more cost-effective, administratively simple option for an institution such as GSU. *See* 5/20 Tr. 36:17-38:8 (Armstrong); 6/1 Tr. 178:24-182:2 (Mariniello). The AACL allows academic institutions to pay a single "blanket" fee to make unlimited print and digital copies of works in the repertory. Stipulated Fact 35.

Like the ECCS, the AACL was developed in response to user demand. 5/20 Tr. 40:10-24 (Armstrong). Although a relatively new service, it already includes some two million titles, *id.* 41:5-9, including SAGE and Oxford works. Stipulated Fact 37. Some 110 institutions, including both private colleges and public universities, have signed up for the AACL to date, and that number is growing. Stipulated Fact 39; 5/20 Tr. 57:15-22 (Armstrong).

121. An AACL license for GSU would cost only \$114,000 per year (approximately \$3.75 per student) plus a one-time 20 percent initiation fee in the first year. 5/20 Tr. 42:18-43:13 (Armstrong).

4. Plaintiffs have identified likely market harm

122. The harm to Plaintiffs arising from Defendants' failure either to require students to purchase Plaintiffs' books or to utilize any of these licensing options for the posting of excerpts of the books on ERes or uLearn is self-evident. Plaintiffs' witnesses each testified that academic institutions are their primary market (*see* 5/17 Tr. 54:17-22 (Smith); 5/18 Tr. 91:8-10 (Richman); 5/19 Tr. 33:2-3 (Pfund)), and they each described the serious adverse impact on their businesses if the unauthorized posting of substantial excerpts from their books on online course reading systems like ERes and uLearn were to continue and become widespread.

123. Cambridge’s Frank Smith explained that because Cambridge “must be self-sustaining” notwithstanding its not-for-profit status, 5/17 Tr. 63:11-12 (Smith), Cambridge must have “some assurance [it’s] going to get back some of [the] money” it invests in its publishing program. *Id.* 63:12-14. Smith expressed particular concern with the “pattern as well as the scale” of GSU’s conduct – i.e., copying in repeated semesters that suggests it is becoming the “custom and practice for how students obtain their readings,” which could jeopardize Cambridge’s business. *Id.* 75:4-11.

124. Smith testified that Cambridge’s annual “profit” margin ranges from 2 to 5 percent, 5/17 Tr. 56:24-57:3, and that approximately 3 to 5 percent of its annual revenues typically comes from permissions fees. *Id.* 71:15-17.¹⁸ If those permissions fees were to dry up, Smith testified, it “would be very deleterious to our business given that we have a very small operating margin” (*id.* 71:18-72:24).

125. SAGE’s Carol Richman testified that should the practices at GSU become widespread, it would threaten SAGE’s ability to continue to publish high-quality works for use in the educational environment. 5/18 Tr. 58:3-7; *see also id.* 82:20-24, 83:11-20 (describing concern with GSU’s practices occurring at

¹⁸ In 2009, permissions fees comprised just over 1 percent of Cambridge’s overall revenue. 5/18 Tr. 35:20-25 (Smith) (referring to PX 184).

thousands of academic institutions, year after year, semester after semester).

126. Pfund explained that with an increased focus on digital publishing, Oxford has oriented itself less toward book sales and more toward “usage” – “usage is becoming the new sale,” as Pfund put it (5/19 Tr. 51:17) – and it will damage Oxford’s business if revenue is lost to digital uses for which Oxford is not paid. *Id.* 75:8-18. Every dollar of permissions income is “heavy,” he stated, because it drops right to the bottom line, and such “heavy” money is the equivalent of many multiples of sales dollars, particularly in a thin-margin business. *Id.* 83:17-22.

127. Pfund testified that Oxford is attempting to accommodate the desire of teachers to tailor their pedagogy by offering them options for using “smaller chunks of information” but that if “there is no means of our recovering the revenue that we’ve traditionally recovered in different forms, then it will actually have a really damaging [e]ffect on our ability to continue to operate.” 5/19 Tr. 75:8-18 (Pfund).

5. The anthological nature of the takings is harmful

128. As noted previously, Congress was aware of the potential competitive harm from the aggregation of even small takings into compilations that could substitute for textbooks. Those concerns are reflected in the Classroom Guidelines

and other model policies. The Sixth Circuit in *Princeton University Press*, with reference to the Classroom Guidelines, specifically identified the “systemic character” and “anthological content” of the unlicensed coursepack takings as key elements in its finding of no fair use. *See* 99 F.3d at 1390 (“In its systematic and premeditated character, its magnitude, its anthological content . . . the copying done by MDS goes well beyond anything envisioned” by Congress).

129. The record here shows many GSU professors relying on the aggregation of unauthorized book excerpts and other materials to comprise all or a significant portion of the readings for their courses. *See, e.g.*, 5/31 Tr. 57:11-17 (Kruger); 6/1 Tr. 94:11-22 (Duffield); PX 537 (Lasner). For his course POLS8470 in the Fall 2009 semester, for example, Professor Duffield did not require students to purchase a single book, instead relying solely on ERes postings and electronic journals. 6/1 Tr. 94:11-18 (Duffield). Prior to the advent of ERes, it is reasonable to assume that many of these readings would have been compiled into licensed coursepacks, *see, e.g.*, 6/1 Tr. 107:6-108:17 (Duffield); *see also, e.g.*, Greenberg Dep. 37:14-17; 5/27 Tr. 22:21-24:6 (Gabler-Hover), for which permission fees would have been paid. *See* 6/2 Tr. 108:15-109:12 (Seamans) (testifying that a coursepack, like a textbook, is required reading material and that “you must get copyright permission to make the copies and sell them”).

130. Numerous professors testified to the functional equivalence of coursepacks and ERes postings, *see, e.g.*, Greenberg Dep. 51:1-15; Deposition of Jennifer McCoy, dated February 3, 2011, filed at Docket No. 329 (“McCoy Dep.”) 32:18-35:11; Deposition of Jennifer Esposito, dated February 3, 2011, filed at Docket No. 321, trial record excerpts at Docket No. 373 (“Esposito Dep.”) 62:10-14; 6/1 Tr. 108:12-17 (Duffield); 5/25 Tr. 116:12-17 (Davis). Professor Gabler-Hover’s syllabus for ENG4200 in the Fall 2009 semester made the interchangeability of ERes postings and coursepacks explicit, instructing students: “Although I will provide several of my own handouts, many of the prose and fiction items you will need for the course are on library e-reserve for you to print out immediately, *forming a course packet for yourself.*” PX 534 at 1 (emphasis added).

131. The obligation to pay permissions fees does not disappear simply because the aggregation of course readings has become digital rather than physical – a collection of separate digital files on the ERes course page rather than a bound volume sold in the bookstore. As Professor Gabler-Hover’s advice to students to download and print copies of the ERes readings indicates, even the physical distinction between digital ERes files and coursepacks could be, and often was, erased because students download and print copies of materials posted on ERes

and bring them to class. *See, e.g.*, 5/25 Tr. 91:16-22 (Orr); 5/25 Tr. 108:8-109:15 (Davis); 5/24 Tr. 61:14-16 (Esposito). *See also* 6/1 Tr. 144:14-25 (Burtle) (Associate Librarian responsible for digital library services testifying that if students download copies from ERes they can retain them).

132. When unauthorized ERes postings are incorrectly determined to be fair use under GSU's copyright policy, it allows professors to meet all or a significant part of their students' reading needs without any compensation to book publishers, whether in the form of book sales that otherwise would have been made or permission fees that otherwise would have been paid. Publishers like Plaintiffs are adversely impacted whether the acts of copying and distribution occur at the corner copyshop, as was the case in *Basic Books* and *Princeton University Press*, or at the library reserve desk, as has occurred at GSU.¹⁹

¹⁹ Defendants' effort to deny the clear actual and potential market harm caused by their failure to pay for the use of excerpts from Plaintiffs' books have no merit. To take one example, the speculation articulated by a number of professors that assigning portions of Plaintiffs' books would stimulate sales of the books is not a cognizable justification for copyright infringement, for obvious reasons: the same rationale could be used to justify almost any infringement. What is more, Defendants' claim was not supported by any evidence of purchases of any of the works at issue as a result of the work having been assigned during the relevant 2009 terms. *See, e.g.*, 5/27 Tr. 44:19-22, 49:22-50:1 (Hartwig); 5/27 Tr. 77:4-11, 90:18-91:1 (Dixon); 5/27 Tr. 121:11-23 (Gainty); 5/27 Tr. 144:1-13 (Moloney); 5/31 Tr. 26:9-19 (Kruger); 5/31 Tr. 90:15-91:11 (Murphy); 5/25 Tr. 43:7-21 (Kim); 5/23 Tr. 100:17-20 (Kaufmann); 5/26 Tr. 164:4-9 (Hankla).

133. For all the foregoing reasons, the fourth factor weighs heavily against fair use. *See Basic Books*, 758 F. Supp. at 1522 (“Kinko’s copying unfavorably impacts upon plaintiffs’ sales of their books and collections of permissions fees This factor weighs heavily against defendant.”).

F. Good Faith Does Not Excuse Infringing Conduct

134. Defendants’ trial presentation reflected heavy reliance not on whether the acts of copying reflected on the list of representative infringements actually complied with copyright law but instead on Defendants’ asserted good faith in *trying to comply*. However, good-faith effort, even if proven, is irrelevant as a matter of law.

135. Whether the 2009 policy was promulgated in good faith and whether the professors attempting to implement the policy acted in good faith should have no bearing on the Court’s fair use analysis. As the Eleventh Circuit noted in *Letterese*, good faith “does not insulate a defendant from liability,” 533 F.3d at 1312; rather, good faith constitutes “merely a ‘presupposition’ of a defendant’s claim to the [fair use] defense.” *Id.* at 1312 n.27. *See also Harper & Row*, 471 U.S. at 562 (noting that fair use presupposes good faith and fair dealing).

136. The absence of good faith can *invalidate* a claim of fair use, but its presence does not override the outcome of the four-factor analysis.

137. Nothing in section 504 of the Copyright Act, 17 U.S.C. § 504, to which Defendants have cited repeatedly, alters this conclusion. The plain language makes clear that the provision has potential application only in cases involving damages. It has no bearing whatsoever on liability determinations or to the imposition of injunctive relief.

G. The Overall Fair Use Assessment Clearly Favors Plaintiffs

138. Consideration of all four of the statutory fair use factors, with due weight as prescribed by the cases, leads inescapably to the conclusion that Defendants have failed to carry their burden of establishing that the alleged infringements of Plaintiffs' works are fair use. This conclusion applies to all of the representative works at issue because: (i) the copying is not transformative; (ii) the works all contain some degree of creativity; (iii) the unauthorized takings are substantial quantitatively and qualitatively; and (iv) the unauthorized takings would, if widespread, clearly have a serious adverse impact on the potential sales and permissions markets for the works by substituting directly for lawfully

acquired copies.²⁰

IV. DEFENDANTS ARE LIABLE UNDER *EX PARTE YOUNG*

139. In its summary judgment ruling, the Court held that 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 (“9/30 Order”) at 17. Yet that is precisely what Defendants have attempted to do.

A. Defendants Have Sought to Avoid Responsibility for Copyright Compliance

140. In paragraph 62 of their Proposed Conclusions of Law, Defendants stated: “In February of 2009, the Defendants developed and adopted the Policy. By doing so, the Defendants effectively addressed the ‘wrong’ identified in the Complaint.” Defendants’ Conclusions of Law, filed May 17, 2011, Docket No. 343, ¶ 62. They contended that any ongoing acts of unlawful copying were “performed by professors and library staff, not by members of the Board of Regents or GSU administrators,” *id.* ¶ 61, and they claimed that they “are not

²⁰ With respect to those works at issue that were posted to ERes at the direction of faculty members whom Defendants did not offer as trial witnesses (Angorro, Barker, Freeman, Harvey-Wingfield, Lasner, McCombie, Ohmner, and Whitten), Defendants necessarily have failed to make a showing that the copying, display, and distribution of portions of those works by means of ERes or uLearn constituted fair use.

responsible for determining whether the use of a subject excerpt is appropriate in a given class setting such that its provision to students is a ‘fair use.’” *Id.* ¶ 62.

141. Defendants’ effort to transfer all legal responsibility for ongoing infringements to GSU faculty and administrators is unavailing. As the Court ruled on summary judgment: “[T]hose Defendants who formulated the Current Policy are also responsible for overseeing its implementation.” 9/30 Order at 29. And as the Court ruled from the bench in denying Defendants’ renewed motion to dismiss on sovereign immunity grounds: “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.” 5/26 Tr. 91:1-5.

142. There is, in fact, ample record evidence of a link between the ongoing infringement established at trial and the copyright policy Defendants adopted and for which they are responsible. Specifically, the record shows that:

- the policy delegates to unsupervised faculty the sole responsibility for making fair use determinations (*see* 6/2 Tr. 59:1-60:5, 75:7-13 (Seamans); 6/6 Tr. 129:10-19 (Potter));
- in making those determination, the faculty are encouraged to rely – and, the evidence shows, do rely – solely on a Fair Use Checklist that

is skewed decisively toward producing erroneous affirmative fair use determinations for virtually any reading a GSU professor decides to assign (*see* 6/6 Tr. 129:20-131:4 (Potter); Stipulated Fact 90 (“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”));

- Defendants failed to train faculty members adequately in the law of fair use or in proper use of the Checklist, not even requiring attendance at a single training session prior to having copyrighted materials placed on ERes or uLearn (*see* 6/2 Tr. 124:8-22, 125:18-126:4 (Seamans); 5/26 Tr. 142:19-21 (Professor Hankla testifying that he understood attending a training session was not mandatory)).²¹
- Defendants put in place (i) no procedures for monitoring faculty compliance with the policy (e.g., whether they complete and retain checklists) or whether their fair use determinations comport with copyright law (*see* 6/2 Tr. 121:18-24, 126:24-127:2 (Seamans); 6/6

²¹ Fewer than one-third of the testifying faculty members attended a training session, and the principal educational outreach by the Office of Legal Affairs was directed toward faculty members whose depositions were scheduled to be taken in this case. *See* Pl. PFF ¶ 203.

Tr. 132:13-15 (Potter)); (ii) no enforcement procedures to encourage compliance with the policy, correct erroneous fair use determinations, or punish willful failure to comply with the policy (*see* 6/2 Tr. 127:24-128:1 (Seamans)); and (iii) no means of funding permissions fees for ERes or uLearn postings that are not fair use (6/2 Tr. 114:11-15 (Seamans); *see also* 6/6 Tr. 133:14-23 (Potter)).

143. All of the foregoing makes clear that the infringing conduct established at trial was the predictable and, indeed, inevitable result of a policy that – deliberately or not – was built to fail by off-loading responsibility for copyright compliance entirely to faculty who were and are ill-equipped, ill-trained, and unsupervised in undertaking fair use assessments. It is clear, in short, that the policy “improperly regulates the fair use defense so as to cause violations to occur.” 5/26 Tr. 75:20-21.

144. This built-to-fail policy was adopted by the Select Committee on Copyright convened by the Board of Regents in response to this lawsuit. 6/2 Tr. 131:22-25 (Seamans); DX 145; Stipulated Fact 87. Yet after the Board of Regents announced the new copyright policy on Feb 17, 2009 (Stipulated Fact 86), the Select Committee was “immediately disbanded” (6/2 Tr. 126:17-20 (Seamans); *see also* 6/6 Tr. 134:15-17 (Potter)), without, as noted, having put in place any

mechanisms for oversight of faculty fair use decisions (6/2 Tr. 126:24-127:19 (Seamans)) or any enforcement mechanisms (*id.* 127:24-128:1, 129:4-7 (Seamans)) and without providing any means of paying permissions for postings found to exceed the bounds of fair use (*id.* 114:11-15, 115:13-17 (Seamans)).

145. In the words of William Potter, Chairman of the Select Committee: “We have to have faith in our faculty to do the right thing given the right tools and the right information.” 6/6 Tr. 129:15-19 (Potter). Clearly, however, a big part of the problem is that the faculty were *not* given the right tools or the right information. Instead, Defendants have shirked the responsibility the Court found they bear for overseeing implementation of the policy they adopted. *See* 9/30 Order at 18, 30 n.8.

B. The Fair Use Checklist Is Skewed to Produce Erroneous Affirmative Fair Use Determinations

146. As Dr. Crews testified, under the Columbia University copyright policy, faculty are provided with a suite of resources to help them work through fair use issues, of which a checklist is but one. He “would never recommend” the use of only the checklist. *See* 6/3 Tr. 105:9-14 (Crews). At GSU, by contrast, the Fair Use Checklist (JX 4 at 7-8) – accompanied by perfunctory discussion of the fair-use factors (*see* JX 4 at 4-5) – is the only fair-use tool provided to the faculty (*see* 6/6 Tr. 129:20-131:2 (Potter); Stipulated Fact 90), and, in practice, it is the

only one they use. *See, e.g.*, 6/1 Tr. 23:7-12 (Murphy). Hence, the flaws in the Checklist led directly to the flawed fair use determinations shown at trial, thus establishing a clear link between policy and practice.

147. The Checklist is designed in a manner that makes affirmative fair use determinations for contemplated ERes and uLearn course readings inevitable, whether the proposed reading is 5 pages or 150 pages long. Structurally, the Checklist engineers fair use findings by reducing fair use to an arithmetic exercise whereby the factor-by-factor fair use tally is dictated by the array of criteria in the “Weighs in Favor” and “Weighs Against” columns (*see* 6/6 Tr. 22:10-24:3 (Crews)), none of which are explained anywhere on the Checklist or in the accompanying materials. *See, e.g.*, 5/24 Tr. 113:12-24 (Professor Kim testifying that she had to guess as to what certain Factor 1 criteria meant because the Checklist contained no description of them); 5/25 Tr. 31:2-6 (Professor Kim testifying that she left some factors blank because she “didn’t know what to do”); *id.* 69:5-12 (Professor Orr agreeing that he “puzzled over” whether a digital copy was nontransformative in the absence of any instruction on that issue).

148. At the same time that it leaves faculty to puzzle over legal terms of art such as “transformative” and “market harm,” the Checklist is designed to make the fair use exercise appear simple and straightforward, thus leading professors whose

testimony revealed numerous fundamental misconceptions regarding fair use to believe they could complete the Checklist without any instruction. *See* 5/26 Tr. 143:1-5 (Hankla); 5/25 Tr. 61:4-11 (Orr).

149. After filling out the checklist, the user is instructed 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 cuts in favor of fair use. *See* 6/6 Tr. 134:25-136:8 (Potter); 5/23 Tr. 66:7-11 (Professor Kaufmann agreeing with statement that “you would look at the number of boxes that had been checked to determine whether the use was permissible or not”); 5/27 Tr. 120:6-19 (Professor Gainty explaining that he found Factor 4 weighed in favor of fair use because he checked three “Weighs in Favor” factors and one “Weighs Against” factor, and “three is greater than one”). Where “the factors favoring fair use outnumber those against it,” instructors are told that “reliance on fair use is justified,” such that they can use the work in question without permission. JX 4 at 7.

150. As a result of this structure, if the first three factors are found to weigh in favor of fair use – as they were by every professor who testified – then the fourth (and arguably most important) factor becomes arithmetically irrelevant. *See* 6/6 Tr. 135:17-136:8, 137:9-138:1 (Potter). *See also* 5/23 Tr. 114:8-19 (Professor

Kaufmann agreeing that failure to complete Factor 3 on PX 578 was irrelevant to overall fair use determination because the three other factors weighed in favor of fair use).

151. The Checklist is also riddled with substantive flaws. For example, under **Factor 1**, although as a matter of law a nonprofit educational purpose is merely *a* consideration, *see, e.g., Campbell*, 510 U.S. at 584 (stating that a nonprofit educational purpose is “only one element of the first factor enquiry”), the Checklist effectively makes it dispositive, something even Dr. Crews conceded was “wrong.” 6/3 Tr. 47:1-5 (Crews). It does so by including at least three subfactors – “Nonprofit educational,” “Teaching,” and “Use is necessary to achieve your intended educational purpose” – that apply virtually by definition to any reading assigned by a GSU professor. *See, e.g.,* 5/24 Tr. 116:8-12 (Kim); *id.* 67:11-68:13 (Esposito); 6/1 Tr. 101:22-102:4 (Duffield). The Checklist thereby propagates amongst faculty with little or no independent knowledge of copyright law the “myth” that whatever material they decide they need for their pedagogical purposes is a fair use.

152. As a result of this distortion of the law in favor of fair use, even if the professor recognizes that the ERes or uLearn posting is nontransformative, that “Weighs Against” factor – which, as shown above, should be central not just to

Factor 1 but to the overall fair use analysis – is outweighed by the three automatic checks in the “Weighs in Favor” column, thus nullifying the significance of transformative value (or the lack thereof).²² *See, e.g.*, 5/31 Tr. 22: 14-23:3 (Professor Kruger testifying that even if she had checked “Nontransformative” it would not have affected her conclusion that Factor 1 weighed against fair use based on the number of “Weighs in Favor” checks); 5/23 Tr. 84:13-22 (Professor Kaufmann testifying that Factor 1 weighed in favor of fair use even though she checked “Nontransformative” because she checked “Teaching” and “Nonprofit educational” in the “Weighs in Favor” column); 5/24 Tr. 67:1-69:6 (Professor Esposito testifying that Factor 1 would have weighed in favor of fair use even if she had checked “Nontransformative”). Indeed, Professor Kaufmann testified that she could not conceive of a situation where Factor 1 would not weigh in favor of fair use for a work used in her teaching at Georgia State. 5/23 Tr. 85:5-9. *See also*

²² Compounding the problem, because most of the professors were not instructed (either on the Checklist or otherwise) that straight digital copying is not transformative, several of them erroneously believed their use was, or might be, transformative based on how the work was used in the classroom. *See, e.g.*, 5/27 Tr. 6:14-21 (Gabler-Hover); 5/26 Tr. 114:21-116:11 (Hankla). Others had no idea and did not check either “Transformative” or “Nontransformative.” 5/27 Tr. 128:22-129:7 (Gainty); 6/1 Tr. 54:19-55:8 (Murphy); 5/24 Tr. 114:7-25 (Kim). Still others recognized their copying was nontransformative but nonetheless failed to acknowledge that fact on the Checklist. *See, e.g.*, 5/31 Tr. 22:11-21 (Kruger); Greenberg Dep. 42:14-22; 5/24 Tr. 67:8-10 (Esposito).

5/25 Tr. 69:24-70:4 (Professor Orr agreeing that “Nonprofit educational,” “Teaching,” and “Use is necessary to achieve your intended educational purpose” would apply to any reading he decided was appropriate for his class at GSU); 5/24 Tr. 116:8-12 (Kim) (same).

153. The Checklist further ensures a fair use determination under Factor 1 by including “Research or Scholarship” and “Criticism, Comment, News Reporting or Parody” as “weighs in favor” criteria under Factor 1 even though these are *examples* of transformative uses and thus are cumulative of the “Transformative” criterion. The inclusion of these terms on the Checklist, without any indication that they do not apply as a matter of law to ERes or uLearn postings, misled some professors into checking them. *See* 5/25 Tr. 68:8-17 (Orr); 5/24 Tr. 116:21-117:4 (Kim); 5/27 Tr. 142:18-24 (Moloney).

154. The Checklist distorts the **Factor 2** analysis in favor of fair use in several ways. The most glaring is the false dichotomy between “Factual or nonfiction,” on the one hand, and “Highly creative work (art, music, novels, films, plays, poetry, fiction),” on the other. This exaggerated choice offers no way to account for the admittedly creative elements of Plaintiffs’ nonfiction works. *See* 5/31 Tr. 63:5-21 (Kruger). Instead, works of scholarship are given no greater protection than telephone books, contrary to established law. *See Princeton Univ.*

Press, 99 F.3d at 1389 (finding that Factor 2 weighed against fair use of scholarly books and noting that it “was certainly not telephone book listings that the defendants were reproducing”). This false choice contributed to the absence of a single “Weighs Against” check under Factor 2 on any of the checklists in evidence despite the acknowledged degree of creativity in Plaintiffs’ works. *See* Pl. PFF ¶¶ 238-40.

155. The Checklist is also skewed inappropriately toward fair use under Factor 2 by counting in favor of fair use the fact that a work is published – which is true of all of Plaintiffs’ works – indeed, of all academic books. The Supreme Court held in *Harper & Row* that the taking of an unpublished work weighed strongly against fair use. 471 U.S. at 553-54. But the fact that use of an *unpublished* work weighs against fair use does not support the converse proposition: that use of a *published* work weighs *in favor of* fair use.

156. To further stack the deck in favor of fair use under Factor 2, the Checklist includes another “Weighs in Favor” subfactor – “Important to educational objectives” – that (i) applies by definition to any assigned course reading and (ii) has nothing to do with the nature of the copyrighted work. The only apparent purpose of this subfactor is to reinforce the erroneous premise that the pedagogical use of the material is necessarily a fair use.

157. Not surprising, in light of the foregoing, there was *not a single* “*Weighs Against*” check under Factor 2 on any of the Checklists in evidence. See Pl. PFF ¶ 238.

158. Under **Factor 3**, although the Checklist indicates correctly that it weighs against fair use if the portion copied without authorization is the “heart” of the work, *see Harper & Row*, 471 U.S. at 565-66, neither *Harper & Row* nor any other case stands for the inverse proposition that if the portion taken is *not* “central” to the work, as the Checklist puts it, it weighs *in favor of* fair use. The inclusion of this criterion on the “Weighs in Favor” column, together with the inevitably checked “Amount taken is narrowly tailored to educational purpose” – outweighs what should be the key consideration under Factor 3: whether a large portion of the work is being used.

159. Further, the Checklist provides no guidance as to how the assessment of whether the portion used is large or small should be made (*see* 5/24 Tr. 118:24-119:1 (Kim)), and fails to instruct that an essay in a compilation should be treated as an entire work.²³

²³ Where professors determined that contemplated readings were too long to be fair use, they did so based not on the Checklist (which includes no length limits or guidelines) but on a wide variety of other standards, including the 20 percent rule from the old GSU policy, 5/26 Tr. 118:4-11 (Hankla); 6/1 Tr. 55:18-21 (Murphy); a 12 percent rule, 5/25 Tr. 96:17-97:4 (Davis); a 10 percent rule, 5/27 Tr. 43:14-20

160. As with Factor 2, there was *not a single* “*Weighs Against*” check under Factor 3 on any of the Checklists in evidence, despite takings that routinely consisted of one or more full chapters (and as many as seven chapters) of Plaintiffs’ books.

161. The lopsided manner in which the professors concluded that **Factor 4** weighed in favor of fair use followed from the misleading menu of criteria presented on the Checklist under that factor. In the absence of any guidance as to the relative weight they are to be given, legally immaterial or duplicative factors, taken together, outweigh the single most important factor – “Significantly impairs market or potential market for copyrighted work” – which in this context should tip Factor 4 heavily against fair use. Thus, as was shown during Dr. Crews’ testimony, checking the last two “weighs in favor” boxes – indicating that the user owns a lawfully acquired copy and that access is nominally restricted – would outweigh a finding that the use significantly impairs the market or potential market for the copyrighted work or derivative (which, in any event, not a single professor

(Hartwig); 6/1 Tr. 74:4-10, 78:22-79:10 (Duffield); personal intuition that more than a certain amount was too much, 5/26 Tr. 174:21-175:1 (Gabler-Hover); 5/31 Tr. 25:2-4 (Kruger), or invented criteria that included consideration of the excerpt being necessary for purposes of the course, 5/24 Tr. 118:22-119:4 (Kim). Dean Seamans conceded that reliance on a strict quantitative limit was contrary to GSU’s policy. 6/2 Tr. 144:5-145:21 (Seamans).

checked). *See* 6/6 Tr. 24:4-23 (Crews). Under the arithmetic exercise the Checklist requires, two irrelevant factors thus outweigh a legally dispositive one (at least as to Factor 4).

162. This outcome is ensured by the way the “Weighs in Favor of Fair Use” column is filled with inappropriate criteria. For example, the Checklist includes “Use stimulates market for original work” in the “Weighs in Favor” column, but this factor will usually be duplicative of “No significant effect on market or potential market.” Yet the Checklist effectively double-counts in favor of fair use by giving each of these criteria its own “Weighs in Favor” box.

163. Another unwarranted “Weighs in Favor” subfactor under Factor 4 is “No similar product [is] marketed by the copyright holder.” Counting this as weighing in favor of fair use misses the obvious fact that the unauthorized ERes copying competes with the sale or licensing of *the original work* marketed by the copyright owner – which is the source of potential substitution and resulting market harm. Moreover, a work that is unique deserves, if anything, *more* copyright protection, not less.

164. The Checklist also errs in providing fair-use credit under Factor 4 if the book is “No longer in print.” This ignores the fact that this consideration has been largely mooted by print-on-demand technology and by the development of a

robust licensing market that allows instructors to obtain inexpensive licenses to copy and distribute excerpts of out-of-print books. *See* 5/17 Tr. 66:14-22 (Smith); 5/19 Tr. 36:1-37:1 (Pfund). As *Harper & Row* made clear, the key consideration is whether the original is available “through normal channels.” 471 U.S. at 553; *see also Texaco*, 60 F.3d at 929. Therefore, so long as the desired excerpt is available for licensing – as all of the works in issue are – an infringer should not be entitled to fair use credit simply because the original hardcopy book happens to be out of print.

165. Another of the Checklist’s “failure to provide necessary information” flaws is the omission of a clear and prominent indication that licensing is readily available for book excerpts through CCC. Instead, reference to CCC is buried on page 15 of the written policy. *See* JX 4 at 15. This well-hidden mention of CCC had little effect, as none of the professors – including those who had attended training – checked with CCC to determine whether the excerpt in question could be licensed through CCC. *See, e.g.*, 5/23 Tr. 98:1-22 (Kaufmann). In fact, most professors (whether trained or not) had not even *heard* of CCC (*see, e.g.*, Greenberg Dep. 40:25-41:3; 5/24 Tr. 73:19-22 (Esposito); 5/25 Tr. 104:15-18 (Davis); 5/24 Tr. 120:20-121-2 (Kim)), and all of them analyzed the potential market impact only on potential book sales, ignoring the permissions market

entirely. *See, e.g.*, 5/27 Tr. 162:12-165:10 (Moloney); 5/31 Tr. 68:11-24 (Kruger); 5/25 Tr. 167:10-24 (Davis). As several professors explained, they did not think they needed to investigate the availability of permissions because they had already determined that the use was a fair use – thereby reading one of the most important “Weighs Against” factors out of the analysis entirely. *See, e.g.*, 5/27 Tr. 49:11-15 (Hartwig); 5/23 Tr. 94:19-98:15 (Kaufmann); 5/24 Tr. 72:16-25 (Esposito); 5/27 Tr. 89:2-12 (Dixon).²⁴ As Professor Kaufmann explained, “[I]f I complete the checklist, I’m not going to make extra work for myself and go find out [if] licensing is available when that’s not necessary.” 5/23 Tr. 96:9-23.

166. As the Court confirmed with the witness, Professor Kaufmann failed to consider the potential effect of her use of Chapter 1 of the *SAGE Handbook of Qualitative Research* (3d ed.) on the permissions market even though she attended a training session with Cynthia Hall of the Office of Legal Affairs before filling out the checklist (PX 576). *See* 5/23 Tr. 98:16-99:5.

167. Another unwarranted Factor 4 “Weighs in Favor” factor is “User owns lawfully acquired or purchased copy of original work.” Whether the infringer owns the copy from which copies are made and distributed has no bearing

²⁴ Professor Gabler-Hover assumed licensing was not available but conceded she “didn’t understand what [licensing] actually meant.” 5/27 Tr. 9:24-10:1.

on the market impact of the unauthorized copies made from the owned original.

168. Finally, the Checklist counts as favoring fair use under Factor 4 the fact that access to the work is restricted to students in the class or some other small group. But there is no “It could be worse” exception in copyright law.

169. The fair use determinations that resulted from application of the Checklist are stark proof that it is anything but a balanced and accurate guidepost to fair use. The trial record is replete with consistently lopsided tallies in favor of fair use, the most balanced being 12-3 in favor by a professor who strove to take a conservative approach (*see* 6/1 Tr. 103:20-105:17 (Duffield)), with tallies such as 12-1, 14-1, 16-0, and even 20-0 being more common. *See* Pl. PFF ¶ 220 & Appendix C. Strikingly, the record contains not a single checklist on which the contemplated use was found not to be fair. In fact, on not a single checklist was *a single statutory fair use factor* found to weigh against fair use, despite the nontransformative nature of the takings, the substantial number of pages copied (typically one or more full chapters), and the obvious market displacement of book sales or licensed excerpts.

C. Defendants’ “Hands-Off” Approach Has Enabled the Ongoing Infringement

170. The indefensibly skewed fair use determinations produced by the new policy without fail easily could have been predicted and taken into account had the

new policy been carefully designed to actually remedy the rampant infringement Plaintiffs identified in their Complaint. Yet the Select Committee (i) gathered no empirical data on then-current copying activity across the University System of Georgia; (ii) did nothing to test how the new policy would be applied by faculty; (iii) did not consult with any faculty outside the committee; and (iv), as noted, put in place no procedures for evaluating practice under the policy. *See* 6/6 Tr. 131:9-132:15 (Potter).

171. This aggressively “hands off” approach, which Defendants have unabashedly touted as both a central virtue of their new policy and a centerpiece of their defense, is captured in Dean Seamans’ admission that “there really is no form of active supervision or auditing or other review by the library staff of these fair use determinations for their reasonableness.” 6/2 Tr. 121:18-24 (Seamans); instead, the policy is an “honor system.” *Id.* 127:13-14. Faculty are not required to submit completed checklists (and if they did they would be refused). 6/2 Tr. 75:14-20, 127:3-9 (Seamans), and there are no procedures for detecting or correcting violations of the policy.

172. Asked to describe the role the library plays in faculty fair use determinations, Dean Seamans answered “None.” *Id.* 59:25-60:5. *See also* 5/20 Tr. 103:17-24 (Dimsdale) (library assistant Denise Dimsdale testifying she does

not determine copyright compliance); 5/23 Tr. 19-20:17 (Christopher). It is thus not surprising that many of the testifying professors never bothered to complete a checklist prior to having Plaintiffs' works posted on ERes or uLearn. *See* Pl. PFF ¶ 211.

173. The only semblance of substantive oversight over faculty use of ERes is a virtually nonexistent "red flag" review that, as Ms. Burtle testified, resulted in only one "huge excerpt" of a book being flagged in all of 2009. 6/1 Tr. 124:12-24 (Burtle). Dean Seamans acknowledged that "red flag" review was "not something that is actually a policy," 6/2 Tr. 151:3-13 (Seamans), and she agreed that the "red flag" process "is not all that important . . . insofar as . . . it really is the faculty members' responsibility to know how the material is being used in the course." 6/2 Tr. 124:2-7 (Seamans).

174. There is no oversight at all – not even "red flag" review – over faculty use of uLearn. 6/2 Tr. 129:21-130:19 (Seamans); 5/25 Tr. 117:8-10 (Davis).

175. The manner in which GSU administrators, including Dean Seamans, deliberately walled themselves off from any involvement in how the faculty went about implementing the new policy accounts for the fact that ERes and uLearn²⁵ are used routinely for required readings, despite the fact that shortly after the

²⁵ *See, e.g.*, 5/24 Tr. 104:10-105:1 (Kim).

policy was adopted Dean Seamans stated her understanding that the policy contemplated that these systems would be used strictly for supplemental readings, akin to library reserves. *See* 6/2 Tr. 105:2-106:19 (Seamans).

* * *

176. The foregoing acts and omissions by Defendants – who each concededly is responsible for ensuring copyright compliance in connection with GSU’s online course reading systems (*see* Stipulated Facts 41, 42, 45, 49; Becker Dep. 26:15-27:6, 88:6-15) – have resulted in a perpetuation of the systematic copyright infringement that the new policy was nominally intended to redress. Defendants simply handed the GSU faculty a “tool” – the deeply flawed Fair Use Checklist – and “let the fair use chips fall where they may.” 6/2 Tr. 136:10-14 (Seamans). As the Court has seen, the result of this deliberate abdication of supervisory responsibility is that arbitrary, idiosyncratic, and uniformly inaccurate fair use decisions have been made, without supervision, by faculty members as unfamiliar with basic principles of copyright law after implementation of the new policy as before.

177. Under *Ex parte Young* the Court should find Defendants liable for the acts of infringement committed by GSU professors and library personnel.

V. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

178. The Court is authorized to grant an injunction “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a).

179. As a matter of substantive copyright law, “an injunction is appropriate when there is ‘a past infringement and a substantial likelihood of future infringement.’” *New World Music Co. v. Tampa Bay Downs, Inc.*, No. 8:07-CV-398-T-33TBM, 2009 WL 35184 at *9 (M.D. Fla. Jan. 6, 2009) (quoting *Pac. & S. Co.*, 744 F.2d at 1499).

180. As shown above, Defendants are legally responsible for the ongoing infringing conduct by GSU employees – faculty and library staff responsible for the selection, copying, and distribution of electronic course materials – and such conduct, exemplified by the takings listed on Docket No. 361, is not fair use for the reasons set forth above. The specific titles identified on the Representative Infringement List do not represent the limit of Defendants’ liability or define the scope of potential injunctive relief. To the contrary, the undisputed facts confirm the “substantial threat” of continued infringement of Plaintiffs’ works, and the case law makes clear that an injunction that covers all of Plaintiffs’ works is necessary and appropriate.

181. Courts routinely grant injunctive relief in copyright actions when a plaintiff has demonstrated (i) infringement of a representative sample of works emblematic of a pattern of unlawful practice and (ii) a likelihood that the infringement will continue absent an injunction.²⁶

182. Defendants' current policies and practices present a "threat of continuing violation," *Basic Books*, 758 F. Supp. at 1542, sufficient to warrant an injunction that covers existing and future works owned or controlled by Plaintiffs.

183. Such relief is regularly afforded by the courts. For example, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007), a group of record-company and movie-studio plaintiffs appended to their complaint – exactly as Plaintiffs did here – exhibits identifying certain of their works found on the file-sharing systems of Grokster, StreamCast, and the other defendants, as representative of the "massive" infringement taking place on those systems. *See Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster, Ltd., et al.*,

²⁶ It is "standard practice" for plaintiffs prosecuting suits involving infringing systems such as those utilized at GSU to identify a limited number of representative infringements as evidence of a larger pattern of ongoing violations. *See, e.g., Texaco*, 60 F.3d at 915 (explaining that parties agreed to try case based on copying of eight articles by a single Texaco scientist); *Princeton University Press*, 99 F.3d at 1384-85 (plaintiffs alleged infringement of six representative scholarly books); *Basic Books*, 758 F. Supp. at 1526 (twelve instances of infringement alleged); *Arista Records, Inc. v. Beker Enters., Inc.*, 298 F. Supp. 2d 1310, 1315 (S.D. Fla. 2003).

Complaint for Damages and Injunctive Relief for Copyright Infringement (C.D. Cal., filed Oct. 2, 2001) at 13. The court (after a remand from the Supreme Court) entered an injunction covering “all of Plaintiffs’ copyrighted works whether now in existence or later created.” *Grokster*, 518 F. Supp. 2d at 1229.²⁷

184. This approach is also typical in the Eleventh Circuit. In *Pacific & Southern Co.*, 744 F.2d 1490 – one of the cases cited in *Grokster* – a television station owner sued over the infringement of a single newscast but sought to enjoin the defendant from infringing any of its other newscasts. The Eleventh Circuit rejected the defendant’s argument that the injunction could not sweep more broadly than the single work named in the suit and upheld this Court’s authority to issue an injunction addressing all plaintiff works, including “unregistered works” and “works that have not been created.” *Id.* at 1499 n.17; *Pac. & S. Co., Inc. v. Duncan*, 618 F. Supp. 469, 471 (N.D. Ga. 1985) (Evans, J.), *aff’d*, 792 F.2d 1013 (11th Cir. 1986) (enjoining the copying of any of the plaintiff’s broadcast news programs). The issue arose again in *Cable News Network v. Video Monitoring Servs. of America*, 940 F.2d 1471 (11th Cir. 1991), where the panel overturned an

²⁷ See also *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2001 U.S. Dist. LEXIS 2186, at *4 (N.D. Cal. Mar. 5, 2001), *aff’d*, 284 F.3d 1091 (9th Cir. 2002) (extending the injunction beyond the specific works identified in the complaint to all of the plaintiffs’ works present on the Napster peer-to-peer file-sharing system).

injunction preventing the copying of any of CNN's daily newscasts in addition to the lone work identified in the complaint. *Id.* at 1486. The Eleventh Circuit, sitting en banc, vacated the panel decision, *see Cable News Network v. Video Monitoring Servs. of Am.*, 949 F.2d 378 (11th Cir. 1991), after which the district court reinstated the injunction covering all of the plaintiff's newscasts. *See Cable News Network v. Video Monitoring Servs. of Am.*, 959 F.2d 188 (11th Cir. 1992).

185. District courts in this Circuit have followed suit, issuing broad prospective injunctions covering all of the plaintiffs' works. In *Elektra Entm't Group, Inc. v. Jensen*, No. 1:07-CV-0054-JOF, 2007 U.S. Dist. LEXIS 60073, at *8-*9 (N.D. Ga. Aug. 16, 2007), for example, the court stated: "In cases where there is such a history and threat of continued infringement, a district court ought not only to issue a broad permanent injunction protecting present works, but can protect works not yet created." (citations omitted). *See also, e.g., Warner Bros. Records Inc. v. Tait*, No.: 3:07-cv-134-J16-HTS, 2008 U.S. Dist. LEXIS 46034, at *9 (M.D. Fla. June 12, 2008) (enjoining the defendant from infringing, inter alia, "any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs"); *Sony BMG Music Entm't v. Villarreal*, No. 5:06-CV-323(CAR), 2007 U.S. Dist. LEXIS 883, *10 (M.D. Ga. Jan. 5, 2007) (enjoining defendant from "infringing upon all of Plaintiffs' copyrighted recordings, and not

just those eight recordings listed herein”); *Arista Records, LLC v. Butler*, No: 8:07-cv-3-T-23EAJ, 2007 U.S. Dist. LEXIS 93807, at *12 (M.D. Fla. Dec. 21, 2007) (enjoining defendant from “further infringement of the [plaintiff’s] sound recordings, whether now in existence or later created”); *Elektra Entm’t Group Inc. v. Brimley*, No. CV-205-134, 2006 U.S. Dist. LEXIS 56798, at *11 (S.D. Ga. Aug. 15, 2006) (same).

186. In *Basic Books* the court entered an injunction covering “any work in which plaintiffs or any of them now own or hereafter acquire a copyright or exclusive right under copyright in the material copied.” 1991 WL 311892, at *1 (S.D.N.Y. Oct. 16, 1991).

187. As the *Arista Records* court explained, “[B]ecause Plaintiffs continually create new works – works that would be vulnerable to infringement if the injunction were limited to existing works, and that would require new litigation to redress each future infringement – the requested injunction follows standard practice in copyright cases by covering works to be created in the future.” 298 F. Supp. 2d at 1315; *see also Villarreal*, 2007 U.S. Dist. LEXIS 883, at *10 (same); *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 686 (S.D.N.Y. 1979) (“[I]t would be inequitable to grant the copyright owner . . . judgment on the issue of liability without enjoining the infringement of future registered works.”).

188. Plaintiffs' proposed injunction, Docket No. 300, represents a reasonable modification of the Classroom Guidelines in recognition of the need for clear, institution-wide criteria for online course reading materials based on guidelines developed by a consortium of educators, librarians, and publishers that was endorsed by Congress as embodying its understanding of fair use in the context of reproduction for classroom copying. *See supra* ¶¶ 53-59 & n.5. The Court has suggested there might be a need for "some objective criterion or criteria which by its nature could be regulated by the . . . defendants," 5/26 Tr. 78:17-21 (Court); *see also* 6/7 Tr. 36:1-4 (Court: "[T]here really need to be some type of limitation factored in on the amount that can be copied."), and that is what Plaintiffs have proposed. To be sure, the trial record documents the undesirable consequences of delegating too much discretion to the faculty to make fair use determinations without any objective guideposts.

189. Plaintiffs note that their proposed remedial decree is less restrictive than the relief ordered in analogous cases. *See* Docket No. 300, Exhibits 2, 3. Moreover, it only defines the scope of fair use; it does not foreclose the authorized use of more extensive portions of Plaintiffs' works.

VI. PLAINTIFFS ARE ENTITLED TO COSTS AND ATTORNEY'S FEES

190. Section 505 of the Copyright Act, 17 U.S.C. § 505, provides: "In any

civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. . . . [T]he court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”

191. An award of attorney’s fees “ancillary to prospective relief” is “not subject to the strictures of the Eleventh Amendment.” *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989).

192. The “only preconditions to an award of fees is that the party receiving the fee be the ‘prevailing party’ and that the fee be reasonable.” *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 198 F.3d 840, 842 (11th Cir. 1999) (citation omitted).

193. The factors courts take into consideration in determining the appropriateness of an award of attorney’s fees include “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy*, 510 U.S. 517, 534 n.19 (1994). *See also MiTek*, 198 F.3d at 842.

194. The foregoing factors – only one of which is compensation to the plaintiff – must be applied in a manner “faithful to the purposes of the Copyright Act.” *MiTek*, 198 F.3d at 842 (quoting *Fogerty*, 510 U.S. at 534 n.19). There is no

authority for the proposition that a fee award is not warranted on the ground that the plaintiffs did not pay their attorney's fees out of pocket. Denying an award on that ground would elevate compensation above all of the other relevant considerations and would deter the funding of meritorious litigation, even if the deterrent effect might be somewhat less severe than in a self-funding situation. In another statutory fee award context, the Eleventh Circuit has held that a fee award in civil rights actions under 42 U.S.C. § 1988 – which is essentially identical to section 505 of the Copyright Act – cannot be denied on the ground that the prevailing plaintiff is not actually required to pay his or her lawyer. *See Duncan v. Poythress*, 777 F.2d 1508, 1511 (11th Cir. 1985); *Martin v. Heckler*, 773 F.2d 1145, 1152 (11th Cir. 1985); *Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205, 1210 (11th Cir. 1983) (“an award of attorney's fees should not be reduced simply because counsel is receiving some compensation from third parties”).

195. A showing of bad faith on the part of the defendant is not a prerequisite to an award of attorney's fees. *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 832 (11th Cir. 1982) (quoted in *MiTek*, 198 F.3d at 842); *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 822 F.2d 1031, 1034 (11th Cir. 1987). Nor does a finding of good faith on the part of the losing party mandate a

denial of attorney's fees to the prevailing party. *Sherry Mfg. Co.*, 822 F.2d at 1035.

196. Prosecution of copyright infringement defenses (including fair use) in the face of contrary prior decisions involving closely analogous facts has been held to be "objectively unreasonable" under Fogerty. *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 330 (S.D.N.Y. 2010), *rev'd on other grounds*, 2011 WL 2437554 (2d Cir. June 20, 2011).

197. Defendants' insistence on litigating through trial a fair use defense that: is unsupported by any judicial precedent; is irreconcilable with Congressional intent as embodied in the Classroom Guidelines; is invoked to justify taking for free in digital form the same material Defendants acknowledge would be infringing in paper (coursepack) form; and is predicated on the unilateral promulgation of a new copyright policy in the middle of the lawsuit that has demonstrably failed to rein in the widespread unauthorized takings of Plaintiff' copyrighted works that prompted this suit is objectively unreasonable.

198. An award of attorney's fees in these circumstances would further the purpose of the Copyright Act by discouraging GSU and other schools from treating the migration from paper to digital copying as an opportunity to engage in widespread unauthorized copying of significant portions of copyrighted books,

thereby depriving the publishers of revenue from their primary market on which their business models depend.

Respectfully submitted this 22nd day of July, 2011.

/s/ John H. Rains IV

Edward B. Krugman
krugman@bmelaw.com
Georgia Bar No. 429927
John H. Rains IV
rains@bmelaw.com
Georgia Bar No. 556052

BONDURANT, MIXSON & ELMORE, LLP
1201 West Peachtree Street NW
Suite 3900
Atlanta, Georgia 30309
Telephone: (404) 881-4100
Facsimile: (404) 881-4111

R. Bruce Rich (*pro hac vice*)
Randi Singer (*pro hac vice*)
Jonathan Bloom (*pro hac vice*)
Todd D. Larson (*pro hac vice*)

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **PLAINTIFFS’
PROPOSED CONCLUSIONS OF LAW** with the Clerk of Court using the
CM/ECF filing system which will send e-mail notification of such filing to
opposing counsel as follows:

Stephen M. Schaezel, Esq.
Natasha H. Moffitt, Esq.
John W. Harbin, Esq.
Kristen A. Swift, Esq.
C. Suzanne Johnson, Esq.
Mary Katherine Bates, Esq.
KING & SPALDING
1180 Peachtree Street
Atlanta, Georgia 30309

Katrina M. Quicker, Esq.
Richard W. Miller, Esq.
BALLARD SPAHR, LLP
999 Peachtree Street, Suite 1000
Atlanta, Georgia 30309

Anthony B. Askew, Esq.
McKeon, Meunier, Carlin & Curfman, LLC
817 W. Peachtree Street, Suite 900
Atlanta, Georgia 30308

Mary Jo Volkert, Esq.
Assistant S. Attorney General
40 Capitol Square
Atlanta, Georgia 30334

This 22nd day of July, 2011.

/s/ John H. Rains IV
John H. Rains IV
Georgia Bar No. 556052