

Georgia State University

ScholarWorks @ Georgia State University

University Library Faculty Publications

Georgia State University Library

1-2020

Copyright and Libraries: Georgia State Copyright Lawsuit

Laura Burtle

Georgia State University, lburtle@gsu.edu

Follow this and additional works at: https://scholarworks.gsu.edu/univ_lib_facpub



Part of the [Education Law Commons](#), [Intellectual Property Law Commons](#), and the [Library and Information Science Commons](#)

Recommended Citation

Burtle, Laura. "Copyright and Libraries: Georgia State Copyright Lawsuit." Dukelow, Ruth, and Michael Robak. *Legal Issues in Libraries and Archives*. mlpp.pressbooks.pub, <https://mlpp.pressbooks.pub/librarylaw/chapter/copyright-library-reserves/>.

This Book Chapter is brought to you for free and open access by the Georgia State University Library at ScholarWorks @ Georgia State University. It has been accepted for inclusion in University Library Faculty Publications by an authorized administrator of ScholarWorks @ Georgia State University. For more information, please contact scholarworks@gsu.edu.

4 Copyright and Libraries: Georgia State Copyright Lawsuit

Case Law

Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1237, 1255–58 (11th Cir. 2014)

Three publishing houses, Cambridge University Press, Oxford University Press, and Sage Publications, Inc. (collectively, “Plaintiffs”) allege that members of the Board of Regents of the University System of Georgia and officials at Georgia State University (“GSU”) (collectively, “Defendants”) infringed Plaintiffs’ copyrights by maintaining a policy which allows GSU professors to make digital copies of excerpts of Plaintiffs’ books available to students without paying Plaintiffs. Plaintiffs alleged seventy-four individual instances of infringement, which took place during three academic terms in 2009. The District Court issued an order finding that Plaintiffs failed to establish a prima facie case of infringement in twenty-six instances, that the fair use defense applied in forty-three instances, and that Defendants had infringed Plaintiffs’ copyrights in the remaining five instances.

Finding that GSU’s policy caused the five instances of infringement, the District Court granted declaratory and injunctive relief to Plaintiffs. Nevertheless, the District Court found that Defendants were the prevailing party and awarded them costs and attorneys’ fees. Because we find that the District Court’s fair use analysis was in part erroneous, we reverse the District Court’s judgment; vacate the injunction, declaratory relief, and award of costs and fees; and remand for further proceedings consistent with this opinion.

[...]

The Copyright Clause of the U.S. Constitution provides that Congress shall have the power “[t]o promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings....” U.S. Const., Art. I, § 8, cl. 8. As the Supreme Court has explained, “the economic philosophy behind the clause empowering Congress to grant copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare [by promoting the creation and dissemination of ideas] through the talents of authors.” *Mazer v. Stein*, 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954).

Promoting the creation and dissemination of ideas has been the goal driving Anglo–American copyright law since the enactment of the first English copyright statute to explicitly vest copyright in a work’s creator, the Statute of Anne of 1710, which declared that it was “[a]n Act

for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors ... during the Times therein mentioned.” 8 Ann., c. 19 (1710); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105 (1990) (describing the Statute of Anne and its influence on early U.S. copyright law and the fair use doctrine). Thus, in our tradition, “copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.” *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir.2013) (quoting Leval, *supra*, at 1107); see also *Aiken*, 422 U.S. at 156, 95 S.Ct. at 2044 (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

The Copyright Act furthers this purpose by granting authors a bundle of “exclusive rights,” 17 U.S.C. § 106, “in original works of authorship fixed in any tangible medium of expression,” *id.* § 102, for a limited time, *id.* §§ 302–305. While an author holds a copyright in his or her work, the author may control, for example, reproduction of the work or distribution of the work to the public. *Id.* § 106(1), (3).

In part because copyright is not grounded in authors’ natural rights but rather meant to provide maximal public benefit, the Copyright Act’s grant to authors of a monopoly over the use of their works is limited in several important ways beyond its finite duration. *Golan v. Holder*, — U.S. —, 132 S.Ct. 873, 890–91, 181 L.Ed.2d 835 (2012). For example, “[c]opyright cannot protect an idea, only the expression of that idea.” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir.2001); see 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). Thus, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Feist*, 499 U.S. at 349–50, 111 S.Ct. at 1290.

The fair use doctrine also critically limits the scope of the monopoly granted to authors under the Copyright Act in order to promote the public benefit copyright is intended to achieve. See *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 1169, 127 L.Ed.2d 500 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science....’” (quoting U.S. Const., Art. I, § 8, cl. 8.)). In other words, fair use provides necessary “breathing space within the confines of copyright.” *Id.* at 579, 114 S.Ct. at 1171. By allowing for the limited use of copyrighted works without the permission of the copyright holder by members of the public in certain circumstances, fair use “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Id.* at 577, 114 S.Ct. at 1170 (alteration in original) (quoting *Stewart v. Abend*, 495 U.S. 207, 236, 110 S.Ct. 1750, 1767, 109 L.Ed.2d 184 (1990)).

In a sense, the grant to an author of copyright in a work is predicated upon a reciprocal grant to the public by the work’s author of an implied license for fair use of the work. See *Harper & Row*, 471 U.S. at 549, 105 S.Ct. at 2225 (“[T]he author’s consent to a reasonable use of his

copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science ... since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus ... frustrate the very ends sought to be attained.” (quoting H. Ball, *Law of Copyright and Literary Property* 260 (1944))). Thus, in order to promote the creation of new works, our laws contemplate that some secondary users—those implied licensees making fair use of copyrighted works—will be allowed to make use of original authors’ works. At the same time, a secondary user who takes overmuch in the name of fair use operates outside the bounds of his or her implied-by-law license.

How much unpaid use should be allowed is the bailiwick of the fair use doctrine. To further the purpose of copyright, we must provide for some fair use taking of copyrighted material. This may be viewed as a transaction cost, incidental to the business of authorship. But if we set this transaction cost too high by allowing too much taking, we run the risk of eliminating the economic incentive for the creation of original works that is at the core of copyright and—by driving creators out of the market—killing the proverbial goose that laid the golden egg.

Thus, the proper scope of the fair use doctrine in a given case boils down to an evidentiary question. As a conceptual matter, in making fair use determinations, we must conjure up a hypothetical perfect market for the work in question, consisting of the whole universe of those who might buy it, in which everyone involved has perfect knowledge of the value of the work to its author and to potential buyers, and excluding for the moment any potential fair uses of the work. Then, keeping in mind the purposes animating copyright law—the fostering of learning and the creation of new works—we must determine how much of that value the implied licensee-fair users can capture before the value of the remaining market is so diminished that it no longer makes economic sense for the author—or a subsequent holder of the copyright—to propagate the work in the first place.

In most instances, licensors (authors and copyright holders) and licensees (both paying licensees, and implied-by-law fair use licensees) will independently perform some version of this analysis in order to reach a mutually equitable arrangement. Ideally, a copyright holder will sell his or her works to buyers who pay the price that the market will bear and will routinely tolerate secondary uses which do not adversely impact that market. However, in the event of a disagreement, the copyright holder can file an infringement suit and the secondary user may invoke the fair use defense. In so doing, the parties essentially turn to a court to make a determination for them as to the appropriate boundaries of the secondary user’s implied license.

Commentary

Fair Use 17 U.S.C. §107

Under U.S. Copyright Law, authors and other creators obtain copyright automatically when an original work is fixed in a tangible medium of expression, 17 U.S.C. §102. The rights granted

under copyright are expansive, 17 U.S.C. §106 and long-lasting, 17 U.S.C. §302-305. Currently, copyright duration is the life of the author plus 70 years. 17 U.S.C. §302.

To protect the progress of science and the useful arts, the Copyright Act includes several limitations and exceptions to copyright holders' exclusive rights. 17 U.S.C. §107-122. One important exception is Fair Use. 17 U.S.C. §107.

The Fair Use Statute is short and open to interpretation and has been the subject of extensive litigation. (Library of Congress Fair Use Index). (Library of Congress "U.S. Copyright Office Fair Use Index" 139)

17 U.S. Code § 107 – Limitations on exclusive rights: Fair use

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

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

For more on Fair Use, see the Copyright and Libraries: Fair Use Chapter in this textbook at <https://mlpp.pressbooks.pub/librarylaw/chapter/copyright-fair-use/>

Cambridge Univ. Press v. Becker, known as the Georgia State Copyright Case, was a rare fair use case that directly addressed the question of fair use in a nonprofit, educational context. Specifically, whether digitizing portions of books for use in academic course reserves could be considered fair use. Previous fair use case law touched on similar circumstances but differed in key points. The "copy shop cases" involved course reading, but in a commercial context. The Texaco case involved copying articles for scientists in a commercial setting and introduced licensing as a key component of fair use analysis. Several cases were influenced by a failed negotiation during the development of the 1976 copyright legislation known as the Classroom Copying Guidelines.

The Classroom Copying Guidelines

The “Agreement on Guidelines for Classroom Copying in Not–For–Profit Educational Institutions with Respect to Books and Periodicals,” is commonly referred to as the “Classroom Copying Guidelines.” Because it is not law, it is located in H.R. REP. No. 1476 at 68–71, 94th Cong., 2d Sess. (1976), 1976 U.S.C.C.A.N. 5659, 5681–5685.

The Guidelines were the outgrowth of a long period of negotiation between publishers and academics who were concerned about the scope of fair use which might be offered in proposed fair use legislation, particularly concerning educational uses. The negotiations were supervised by the Register of Copyrights and by some members of Congress who exhorted the referenced interest groups to produce some understandings about fair use which, potentially, Congress could adopt. Litman Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L.Rev. 857, 862, 865–67 (1987). The hoped-for understanding did not materialize. *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1228 (N.D. Ga. 2012).

The guidelines set out a minimum, “safe harbor” for classroom copying within the bounds of fair use. This could include a single book chapter, one article from a periodical issue, a poem if less than 250 words, a prose excerpt of 2500 words or less, or a single illustration from a book, for example. Brevity, spontaneity, and cumulative effect are all required considerations. While the Classroom Guidelines do provide some certainty about what would be allowed under fair use, they do not balance the four fair use factors in the statute, and instead, replace them with three different mandates. (Crews “The Law of Fair Use” 618).

Publishers and courts have regularly treated the classroom guidelines with more deference than might be implied by a document that resulted from a failed negotiation read into legislative history. They are repeated in full in the Copyright Office’s Circular 21: Reproduction of Copyrighted Works by Educators and Librarians (Library of Congress 6). Courts considering educational fair use cases reference the guidelines (Keller and Vats 182). Publisher-plaintiffs ask courts to treat the guidelines as a maximum, not minimum standards, and courts have often considered the guidelines when considering cases involving copying of educational materials, in both commercial and non-commercial contexts. (Crews “The Law of Fair Use” 664–674); *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1227–1229 (N.D. Ga. 2012).

The Copy Shop Cases

In *Basic Books, Inc. v. Kinko’s Graphics Corp.*, several publishers sued Kinko’s, a commercial copy shop, for copyright infringement. Kinko’s created and sold course packs for profit. Kinko’s created the coursepacks by copying excerpts from books whose copyrights were held by the publishers. They did not obtain permission or pay permission fees to the publishers. Kinko’s claimed their use of the excerpts was fair use, specifically provided for in § 107 of the Copyright Act. *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991). See also *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996).

The Kinko’s court evaluated the case under both the fair use statute and the “Agreement on Guidelines for Classroom Copying in Not–For–Profit Educational Institutions” (“Classroom Guidelines”).

The court found that Kinko's was infringing copyrights when it photocopied book chapters for sale to students as "coursepacks" for their university classes. Since Kinko's did the copying, it was for commercial, not educational purposes. The court characterized the use as non-transformational, mere repackaging. The works in question were mostly factual in nature, weighing in favor of fair use. The court analyzed the percentage of each work, finding that 5% to 28% of the original full book was excessive. And the court found that Kinko's copying unfavorably impacted the Plaintiffs' sales of their books and collection of permissions fees.

American Geophysical Union v. Texaco, Inc. (2nd Cir. 1994)

Several publishers sued Texaco for copyright infringement for its practice of making copies of articles published in scientific and technical journals for use by the company's scientists. To support its research activities, Texaco subscribed to numerous scientific and technical journals, and maintained large libraries. Texaco scientists regularly made or requested copies to be read, kept in their personal files, and used in the laboratory in the course of their research work. *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 4 (S.D.N.Y. 1992).

The court found in favor of the publishers. Like in the copy shop cases, the court found the use to be commercial under the first factor, despite the purpose being research. Texaco's commercial nature persuaded the court the ultimate purpose was commercial, and the use was nontransformative and not fair. The nature of the works was factual, and the use was fair under the second factor. The use of the full article was not fair under the third factor.

The fourth factor analysis solidified the importance of licensing in the market analysis. Texaco argued that it would not meet the scientists' needs by purchasing back issues or back volumes or by enormously enlarging its subscriptions. However, article licensing was not an established business model at the time but was in development, and the Copyright Clearance Center had begun licensing articles.

"Despite Texaco's claims to the contrary, it is not unsound to conclude 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. This notion is not inherently troubling: it is sensible that a particular unauthorized use should be considered "more fair" when there is no ready market or means to pay for the use, while such an unauthorized use should be considered "less fair" when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use."

Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930–31 (2d Cir. 1994).

On balance, with only the second factor weighing in favor of fair use, the court found Texaco's practice of providing journal copies to its scientists without paying license fees to be infringing the publishers' copyrights.

The Georgia State Case

In 2008 Cambridge University Press, Oxford University Press, and Sage Publications, Inc. sued Georgia State University (GSU) for copyright infringement for making works available on its electronic reserve system without paying permissions or licensing fees. The American Association of Publishers and the Copyright Clearance Center funded the plaintiffs' lawsuit. Among other defenses, GSU, a unit of the University System of Georgia (USG), claimed fair use. (Crews *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions* 139)

The case was filed in the United States District Court, Northern District of Georgia, and the first opinion was issued in 2012. *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (cited below as Cambridge I). The plaintiffs appealed the District Court opinion to the Eleventh Circuit Court of Appeals, which reversed and remanded the case back to the District Court. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, (11th Cir. 2014) (Cambridge II). The case was re-decided in *Cambridge Univ. Press v. Becker*, 371 F.Supp.3d 1218, (N.D. Ga. 2016) (Cambridge III). It was appealed again and reversed and remanded in *Cambridge Univ. Press v. Albert*, 906 F.3d 1290, (11th Cir. 2018) (Cambridge IV). The final opinion came in *Cambridge Univ. Press v. Becker*, 446 F.Supp.3d 1145, (N.D. Ga. 2020) (Cambridge V).

In 2009, the USG developed and implemented a Copyright Policy (University System of Georgia) for the University System of Georgia schools, including Georgia State. Under that policy, professors completed a fair use checklist, included as part of the 2009 Copyright Policy. The court limited the proceedings to works published by the Plaintiffs and used during the Spring, Summer, and Fall semesters of 2009.

To succeed, the court said that the Plaintiffs needed to “show that the new policy resulted in ongoing and continuing misuse of the fair use defense. To do so, Plaintiffs must put forth evidence of a sufficient number of instances of infringement of Plaintiffs’ copyrights to show such ongoing and continuous misuse. Defendants will have the burden of showing that each specified instance of 2009 Copyright Policy infringement was a fair use.” *Cambridge I*, 1203.

In the opinion, the judge examined “how Georgia State’s 2009 Copyright Policy operated in relation to the requirements of copyright law during the three 2009 academic terms.” *Cambridge I*, 1210.

First Factor

Beginning with the first factor, the purpose and character of the use, the court explained that “[b]ecause Georgia State is a purely nonprofit, educational institution and the excerpts at issue were used for purely nonprofit, educational purposes, this case is distinguishable from Kinko’s, Michigan Document Services, and Texaco.” *Cambridge I*, 1224. The court also rejected the Plaintiffs’ argument that the nontransformative nature of the excerpts meant that the first fair use factor must weigh against fair use, noting that “[t]he obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.”

(citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 n. 11). *Cambridge I*, 1224–25. The appellate court agreed that the non-profit, educational purpose weighed in favor of fair use under the first factor. *Cambridge II*, 1267.

Second Factor

The second factor in the fair use analysis considers the nature of the copyrighted work. More creative works tend to get more protection under this factor than do fact-based works. (Library of Congress “More Information on Fair Use”) The court noted that none of the works used were fictional, but they were not merely descriptive since they include the authors’ perspectives and opinions. *Cambridge I*, 1225-26.

The 11th Circuit objected to the District Court’s lack of a case-by-case analysis of each work under the second factor analysis.

“Where the excerpts of Plaintiffs’ works contained evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author’s experiences or opinions, the District Court should have held (and subsequently did) that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material. That being said, the second fair use factor is of relatively little importance in this case.”

Cambridge II, 1270. (author parenthetical).

Third Factor

The third factor looks at the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The portion used must be reasonable in relation to the work from which it was taken and the purpose for which it was used. *Campbell*, 510 U.S. at 586. Generally, a decidedly small portion of the work is more likely to be fair, especially when the excerpt is a mirror-image copy, and the purpose is nontransformative. *Id.*

Under the third factor, no bright-line rules apply. In *Cambridge I*, the judge used a 10%/1-chapter rubric. The 11th Circuit reversed this approach, noting that “fair use analysis must be performed on a case-by-case/work-by-work basis.” *Cambridge II*, 1271–72 (citing *Campbell*, 510 U.S. at 577 at 1170).

The 11th Circuit similarly affirmed the District Court’s disapproval of the Classroom Guidelines. “Plaintiffs assert that the Court should enforce, through an injunctive order, the safe harbor limitations of the Guidelines as maximum permissible use” *Cambridge I*, 1228. “To treat the Classroom Guidelines as indicative of what is allowable would be to create the type of “hard evidentiary presumption” that the Supreme Court has cautioned against.” *Cambridge II*, 1273 (citing *Campbell* 510 U.S. at 584).

Fourth Factor

The fourth factor considers the effect of the use upon the potential market for or value of the copyrighted work. “It requires courts 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*, at 1177.

In *GSU*, the court emphasized that there are two markets to consider. The first is the market for the original work. When considering the entire work, if a small amount is used, it is unlikely to significantly damage the market for the entire book. The second market to consider is the market for the license for the excerpt. If a license is available for the excerpt, there is market damage if it is not purchased. *Cambridge I*, 1237.

The amount used in the alleged infringements in the *GSU* case averaged around 10%, “[t]herefore] this case [now] concerns not the market for Plaintiffs’ original works themselves or for derivative works based upon those works, but rather a market for licenses to use Plaintiffs’ works in a particular way.” *Cambridge III*, 1233.

The *Texaco* decision weighed heavily on the court. “The fact that Plaintiffs have made paying easier does not automatically dictate a right to payment.” *Cambridge II*, 1276. (11th Cir. 2014). Nevertheless, “it is sensible that a particular unauthorized use should be considered ‘more fair’ when there is no ready market or means to pay for the use, while such an unauthorized use should be considered ‘less fair’ when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use.” *Id.* at 1277 (quoting *Texaco*, 60 F.3d at 931).

However, since the “goal of copyright is to stimulate the creation of new works, not to furnish copyright holders with control over all markets. Accordingly, the ability to license does not demand a finding against fair use.” *Cambridge II*, 1276. (11th Cir. 2014). How does this goal of copyright help in balancing the factors?

Balancing the Factors

In the initial District Court opinion, the court weighted all four factors evenly. The appellate court made it clear that method is incorrect. “[T]he Supreme Court has explained that “the four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” (internal citation removed). In keeping with this approach, a given factor may be more or less important in determining whether a particular use should be considered fair under the specific circumstances of the case.” *Cambridge II*, 1260.

So how should the factors be balanced? In *Cambridge V*, the court summarized (1160-1162). Factor one favors fair use for a nonprofit educational purpose by a nonprofit educational institution, even if the use is nontransformative.

Under the second factor, when works have evaluative material or derive from the author's own experiences or opinions, the factor is neutral or even weighs against fair use. However, it has relatively little weight.

Factor three is intertwined with factor one and also with factor four in that it “partly functions as a heuristic to determine the impact on the market for the original.” *Cambridge II* at 1271. The amount used must be considered in light of the pedagogical purpose and the impact on the market. Unless the heart of the work is used, a small amount does not impact the market for the book, only the market for the excerpt.

Factor four counts more than any of the other factors where the use is nontransformative and the works are used for one of the purposes for which they are marketed. The adverse impact is primarily that of market substitution. *Id.* at 1275. “The importance of the fourth factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.” *Id.* at 1275.

The fourth factor analysis challenge in the GSU case was that the fourth factor's weight depended on the demand for the license. Where no license was available, anyone could reasonably determine so by searching the publicly available information. However, the court noted that “[w]here the evidence shows there is no significant demand for an excerpt, the likelihood of repetitive use is diminished.” *Id.* at 1279.

The only way to know where there was significant demand for an excerpt was to examine the records of publishers and the Copyright Clearance Center for data on license sales. That is not publicly accessible information, so an instructor wanting to make a fair use analysis cannot fully determine the market impact of not purchasing a license.

Outcome

The District Court ruled three times over twelve years. Each time, the Court found Georgia State the prevailing party. But, since the alleged copyright infringements were considered on a case-by-case basis, a number of infringing uses were established in each ruling, and the Court issued an accompanying injunction against Georgia State. [Since GSU is a state entity, it was not sued for monetary damages, and an injunction was the equitable relief granted by the court]. In the first ruling, the court found five instances of infringement, four in the second, and the final opinion, ten. In most cases where there was infringement, there was a strong demand for the license. Usually, although not always, this was paired with a factor three finding against fair use.

“The Court is convinced that in creating and applying its 2009 Copyright Policy, Georgia State tried to comply with the copyright laws. After this lawsuit was filed in 2008 Georgia State revamped its then existing copyright policy in an attempt to formalize the process of determining when fair use applies.” *Cambridge Univ. Press v. Becker*, 1:08—CV—1425—ODE Doc. 583, 9 (N.D. Ga. 2020). But the Court recognized that the unsettled state of the law made the policy difficult to fashion.

The injunction following each ruling was the same – to maintain copyright policies that are not inconsistent with the United States Court of Appeals’ rulings for the Eleventh Circuit in the case and to inform all Georgia State professors and other instructors in writing of these rulings. *Id.* at 13.

There are important outcomes that are generally applicable that result from the lengthy litigation. The 1976 Classroom Guidelines are not law, and publishers’ attempts to use them in litigation should cease. Additionally, schools that treat them as maximum allowable limits are shortchanging opportunities to make fair use of content. The course pack cases do not apply to nonprofit educational uses. Using a small excerpt or a single chapter does not compete with the market for an entire book. The difficulty of applying the fourth factor analysis using license sales in the court’s manner is problematic. Still, if there is no available license, the fourth factor gets little weight. (Butler)

Scenarios

Scenario 1:

In March 2020, campuses around the US and the world suddenly shut down as COVID rapidly spread. Many students did not have time to retrieve their books. Libraries had to close, and students who relied on print or media reserves for their course materials no longer had access. In response, a group of copyright librarians released a *Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research* <<https://tinyurl.com/tvnty3a>>. Do you think this was necessary? Is the fourth factor less important in a public health emergency?

Scenario 2:

Download the current version of the *Fair Use Basics* <<https://universityattorney.gsu.edu/files/2020/11/Fair-Use-Basics-2020-final.pdf>> and *Fair Use Checklist* <<https://universityattorney.gsu.edu/files/2020/11/Fair-Use-Checklist-2020-final.pdf>> provided to GSU faculty as part of the University System of Georgia Copyright Policy. Librarians are often asked to provide faculty and students instruction on how to stay within the bounds of fair use when teaching. Using these documents, how would you develop a basic workshop on using copyrighted materials in instruction?

Works Consulted

Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012). [Cambridge I]

Cambridge Univ. Press v. Patton, 769 F.3d 1232, (11th Cir. 2014). [Cambridge II]

Cambridge Univ. Press v. Becker, 371 F.Supp.3d 1218, (N.D. Ga. 2016). [Cambridge III]

Cambridge Univ. Press v. Albert, 906 F.3d 1290, (11th Cir. 2018). [Cambridge IV]

Cambridge Univ. Press v. Becker, 446 F.Supp.3d 1145, (N.D. Ga. 2020). [Cambridge V]

Cambridge University Press v. Becker, Slip Op., 2020, Sept. 29, 2020. Order, scholarworks.gsu.edu/univ_lib_copyrightlawsuit/12/.

Butler, Brandon (bc_butler) Twitter, twitter.com/bc_butler/status/1311691529141059584, October 1, 2020.

Crews, Kenneth D. *Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions*. 4th edition, ALA Editions, 2020.

—. “The Law of Fair Use and the Illusion of Fair-Use Guidelines Symposium: The Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property.” *Ohio State Law Journal*, 2001, pp. 599-702.

Keller, Deidre A. and Anjali S. Vats. “Centering Education in the Next Great Copyright Act: A Response to Professor Jaszi.” *Duquesne Law Review*, vol. 54, no. 1, 2016, pp. 173-195.

Library of Congress, Copyright Office. “More Information on Fair Use.” Library of Congress www.copyright.gov/fair-use/more-info.html.

—. “Reproduction of Copyrighted Works by Educators and Librarians. Circular 21. .” Library of Congress, 2014. ERIC, www.copyright.gov/circs/circ21.pdf.

—. “U.S. Copyright Office Fair Use Index.” copyright.gov/fair-use/index.html.

Litman, Jessica D. “Copyright Compromise and Legislative History ” *Cornell Law Review*, vol. 72, no. 5, 1987, pp. 857-904.

University System of Georgia. “Copyright Policy: Policy on the Use of Copyrighted Works in Education and Research.” usg.edu/copyright.

Author

Laura Burtle, M.S.L.S., J.D., is an Associate Dean in the Georgia State University Library, with responsibility over collections, resource acquisitions, digital library services, and scholarly communications. She provides copyright guidance to students and faculty, including teaching about fair use and permissions as well as understanding publication contracts and open access. She has a Master’s degree in Library Science from the University of North Carolina Chapel Hill and a J.D. from Georgia State University with a certificate in Intellectual Property Law.

[Legal Issues in Libraries and Archives](#) by Ruth Dukelow and Michael Robak is licensed under a [Creative Commons Attribution 4.0 International License](#), except where otherwise noted.