Case No. 16-15726

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

J. L. Albert, *et al*.,

Defendants-Appellees.

On Appeal From the United States District Court for the Northern District of Georgia, Atlanta Division, D.C. No. 1:08-cv-1425 ODE

BRIEF OF AMICI CURIAE AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES, AND ASSOCIATION OF RESEARCH LIBRARIES IN SUPPORT OF AFFIRMANCE

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February 13, 2017

CCERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

- Albert, J. L.
- Alford, C. Dean
- Askew, Anthony B., counsel for Appellees
- **American Library Association, *amicus curiae***
- The American Society of Journalists and Authors, *amicus curiae*
- Association of American Publishers, Inc.
- **Association of College and Research Libraries, *amicus curiae***
- **Association of Research Libraries, *amicus curiae***
- The Association for Garden Communications, *amicus curiae*
- The Authors Guild, *amicus curiae*
- Baker Hostetler, counsel for Appellees
- Ballard Spahr, LLP, counsel for Appellees
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- The Board of Regents of the University System of Georgia
- Bondurant, Mixson & Elmore, LLP, counsel for Appellants
- Cambridge University Press
- Carr, Christopher M., counsel for Appellees
- Carter, Hugh A., Jr.
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- Copyright Clearance Center, Inc.
- Copyright Alliance, *amicus curiae*
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Pursuant to Fed. R. App. P. 26.1, *amici curiae* makes the following disclosures:

Amici are nonprofit associations or organizations that have no parent corporation, and no publicly held corporation owns 10 percent or more of their respective stock.

Dated: February 13, 2017

Respectfully submitted,

s/ Mitchell L. Stoltz

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INTEREST OF AMICI[1]

The American Library Association ("ALA"), established in 1876, is a nonprofit professional organization of more than 57,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of College and Research Libraries ("ACRL"), the largest division of the ALA, is a professional association of academic and research librarians and other interested individuals. It is dedicated to enhancing the ability of academic library and information professionals to serve the information needs of the higher education community and to improve learning, teaching, and research.

The Association of Research Libraries ("ARL") is an association of 124 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching and research.

Collectively, these three library associations represent more than 100,000 libraries and 350,000 librarians and other personnel that serve the needs of their

[1] All parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part, and neither any party, nor any party's counsel, contributed money towards the preparation of this brief. No person other than amici, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

patrons in the digital age. As a result, the associations share a strong interest in the balanced application of copyright law to new digital dissemination technologies.

Many of the libraries represented by amici library associations offer e-reserves systems similar to the one maintained by Georgia State University ("GSU").[2] Librarians represented by amici library associations operate these e-reserves systems. Accordingly, the people and entities amici represent would be adversely affected by a reversal of the district court's decision.

[2] In this brief, "GSU" is used to refer collectively to all Appellees.

STATEMENT OF ISSUES

1. Did the district correctly apply this Court's guidance that Defendants-Appellees' use of the majority of works at issue was a lawful fair use?

2. Did the district court err in concluding that the Second Factor disfavored fair use in some instances?

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Publishers ("Publishers") and their amici don't know when to quit. Publishers could have declared victory in 2009, when GSU modified its e-reserves policy in response to the initiation of this lawsuit. Publishers could have declared victory in 2014 after this Court reversed the district court's 2012 decision and provided detailed guidance on how fair use principles should be applied to e-reserves. Publishers could have concluded this litigation after the district court refused to re-open the record on remand. Instead, Publishers doggedly pursue their claims concerning excerpts used in three school terms, eight years ago. The students who took those classes have long graduated. Many of the courses are probably no longer being taught at GSU, and likely some of the instructors have retired or moved to other institutions of higher education. Indeed, it may well be that none of the excerpts at issue are still in use at GSU. And Publishers cannot be awarded damages.

So why do Publishers persevere? We fear the most likely explanation is that they (and the organizations funding the litigation[3]) seek to undermine this Court's 2014 decision. When they brought this case, Publishers hoped to land a knockout

[3] The district court found at trial that the Association of American Publishers ("AAP"), together with the Copyright Clearance Center ("CCC"), had "organized the litigation and recruited the three plaintiffs to participate." *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190,1213 (N.D. Ga. 2012) ("*Becker*"). AAP and CCC are also funding the cost of the litigation.

blow to e-reserves systems nationwide. Although this Court found errors in some aspects of the district court's analysis, this Court in effect held that fair use could allow implementation of an e-reserves system without the payment of license fees in many cases. More specifically, this Court found that an educational purpose could tilt the first factor in favor of fair use, even if the use was non-transformative. This Court also found that the unavailability of a license for a digital excerpt weighed in favor of fair use under the fourth factor.

Having failed to strike a knockout blow, Publishers now seek death by a thousand cuts. They quibble with how the district court applied this Court's holding to individual excerpts, demanding a complex market harm analysis reliant on publisher information a library could not possibly obtain and assess. By doing so, they also send a message to other libraries that they will use their deep pockets to attack e-reserve programs.

This Court should not allow it. A finding of copyright infringement here would contravene the fundamental purposes of copyright, the public interest, and the interests of the authors whose works Publishers seek to license.

This brief addresses three issues. First we explain, as we did in the first appeal, that GSU's 2009 Copyright Policy is consistent with a code of best practices for fair use established in early 2012 by a broad consensus of libraries. Similar codes are being used by a variety of communities that rely on fair use as

part of their everyday practice. These codes help them anticipate and avoid legal risk so that they can continue to serve the public, create and distribute new works, and share research without fear of crushing copyright liability. We urge the Court to resist the publishers' invitation to upend the consensus GSU's policy reflects.

Second, we suggest that the district court's analysis of the second fair use factor failed to adequately account for the specific context of these works. The "nature of the work" analysis should consider not just on whether the work is factual or fictional, or contained opinion, but whether the work is the kind of expression that required copyright incentives for its creation. Every work at issue here was written by an academic author, who was likely far more interested in recognition than royalties.

Third, we address the district court's analysis of the fourth fair use factor, and explain how a fair use finding in this case serves the public interest. The Supreme Court has stressed that the fair use analysis must "be mindful of the extent to which a use promotes the purposes of copyright and serves the interests of the public." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)); *see Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556-57 (1985). Libraries are already investing as aggressively as they can in support of scholarship, and scholars are more prolific than ever, with new models emerging to

support even broader access to information. A ruling against fair use in this case will create a net loss to the public by suppressing educational uses, diverting scarce resources away from valuable educational investments, or both. This loss will not be balanced by any new incentive for creative activity. Such an outcome would surely disserve the public interest.

ARGUMENT

I. GSU's E-Reserves Policy Embodies Widespread and Well-Established Best Practices for Fair Use

Publishers filed this suit in 2008 to challenge what they saw as an inappropriate copyright policy. But since 2009 GSU has followed a different and stricter copyright policy that is modeled on the practices of peer institutions. GSU Br. at 20. Publishers now complain that the 2009 policy is "useless," Publishers Br. at 23, but in fact it is very similar to guidelines drafted *jointly* by Cornell University and AAP, including a checklist used by Cornell and other institutions whose policies AAP has praised,[4] and that the CCC has endorsed as "an important

[4] In 2008, AAP announced that it had reached agreement with several universities concerning copyright guidelines for e-reserves. The AAP press release stated that it had worked with the universities to develop these guidelines, which were "similar to those adopted by Cornell University," and which the AAP hoped would "serve as as models for other colleges and universities." *See* http://digital-scholarship.org/digitalkoans/2008/01/17/aap-reaches-agreement-with-three-academic-libraries-about-e-reserves-guidelines/; Cornell University, *Checklist for Conducting a Fair Use Analysis Before Using Copyrighted Materials*, *available at* http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf;

means for recording your fair use analysis."[5] Moreover, the district court found in 2012 that the policy has "significantly reduced the unlicensed copying of Plaintiffs' works . . . at Georgia State." *Becker*, 863 F. Supp. 2d 1219.

Appellants assert that GSU's e-reserves practices fall outside the bounds of fair use. In fact, GSU's e-reserves practices are consistent with a widespread fair use consensus among libraries, as embodied in the Association of Research Libraries' *Code of Best Practices in Fair Use for Academic and Research Libraries*. Association of Research Libraries, *et al*., *Code of Best Practices in Fair Use for Academic and Research Libraries* ("ARL Code") (2012).[6]

The development of the Code was prompted by Professor Michael Madison's insight (following a review of numerous fair use decisions) that U.S. courts were:

> implicitly or explicitly, asking about habit, custom, and social context of the use, using what Madison termed a "pattern-oriented" approach to fair-use reasoning. If the use was normal in a community, and you

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Hofstra University, Fair Use Checklist, *available at* http://www.hofstra.edu/pdf/library/lib_fair_use_checklist.pdf.

[5] *See* The Campus Guide to Copyright Compliance, *available at* http://web.archive.org/web/20130531201210/http://www.copyright.com/Services/copyrightoncampus/basics/fairuse_list.html) (accessed by searching copyright.com in the Internet Archive Index).

[6] The Code has been endorsed by amici ALA and ACRL, as well as the Arts Libraries Society of North America, the College Art Association, the Visual Resources Association, and the Music Library Association. *See* http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf.

> could understand how it was different from the original market use, then judges typically decided for the user.

Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use* 71 (2011). Based on this insight, numerous communities have developed codes of fair use best practices in order to make fair use analysis more predictable for their members.[7]

Indeed, the need for predictability in the application of fair use has grown more acute during the information revolution over the past three decades. Digital technology invariably involves making copies, and it is the fair use doctrine that has enabled the copyright law to accommodate the rapid pace of innovation. More people rely on fair use for more activities than ever before.

To help make fair use more predictable, the Association of Research Libraries set out to "document[] the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself." ARL Code at 3. The resulting *Code of Best Practices* identified "situations that represent the library community's current consensus about acceptable practices for the fair use of copyrighted materials." *Id.*

One of the Code's principles addresses e-reserves directly: "It is fair use to make appropriately tailored course-related content available to enrolled students

[7] Codes of fair use best practices have been developed *inter alia* for OpenCourseWare, Documentary Filmmakers, Journalism, and Film and Media Educators. *See* American University Center for Social Media, *Best Practices*, *available at* http://cmsimpact.org/codes-of-best-practices/.

via digital networks." ARL Code at 14. Explaining the background of this principle, the Code observes that:

> Academic and research libraries have a long, and largely noncontroversial, history of supporting classroom instruction by providing students with access to reading materials, especially via physical on-site reserves. Teachers, in turn, have depended on libraries to provide this important service. Today, students and teachers alike strongly prefer electronic equivalents (e-reserves for text, streaming for audio and video) to the old-media approaches to course support.

Id. at 13. The Code goes on to identify several reasons why e-reserves can be considered fair uses, including: (1) This form of course support occurs in a nonprofit educational environment; and (2) It is a form of noncommercial "space-shifting."[8]

After concluding that it is fair use to make appropriately tailored course-related content available to enrolled students via digital networks, the Code lists steps that institutions should take to ensure the strongest possible fair use argument, each of which is reflected in GSU's policy:

- Closer scrutiny should be applied to uses of content created and

[8] In a decision involving streaming video of libraries' lawfully-owned DVDs to students enrolled in relevant courses, a district court found "compelling" the analogy to "time shifting" of television programs blessed by the Supreme Court. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984). *See Ass'n for Info. Media and Equip. v. Regents of the Univ. of Cal.*, No. 2:10-CV-09378-CBM, 2012 WL 7683452, at *6 (C.D. Cal. Nov. 20, 2012) (citing *Sony Corp.*, 464 U.S. 417, 449-50).

marketed primarily for use in courses such as the one at issue (*e.g.*, a textbook, workbook, or anthology designed for the course).[9]

- The availability of materials should be coextensive with the duration of the course or other time-limited use (*e.g.*, a research project) for which they have been made available at an instructor's direction.[10]
- Only eligible students and other qualified persons (*e.g.*, professors' graduate assistants) should have access to materials.[11]
- Materials should be made available only when, and only to the extent that, there is a clear articulable nexus between the instructor's pedagogical purpose and the kind and amount of content involved.[12]
- Libraries should provide instructors with useful information about the nature and the scope of fair use, in order to help them make

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[9] University System of Georgia, *Fair Use Checklist* 2, *available at* http://www.usg.edu/assets/usg/docs/copyright_docs/fair_use_checklist.pdf. (On fair use checklist, "Consumable work (workbook, test)" weighs against fair use under second factor).

[10] "Access should be terminated as soon as the student has completed the course. . . . Library reserves staff should delete materials available on electronic reserves at the conclusion of each semester." *Additional Guidelines for Electronic Reserves*, USG Copyright Policy (Oct. 21, 2009) *available at* http://www.usg.edu/copyright/additional_guidelines_for_electronic_reserves.

[11] "Access to course material on electronic reserves should be restricted by password to students and instructors enrolled in and responsible for the course." *Id.*

[12] "Instructors are responsible for evaluating, on a case by case basis, whether the use of a copyrighted work on electronic reserves requires permission or qualifies as a fair use. . . . Inclusion of materials on electronic reserves will be at the request of the instructor for his or her educational needs." *Id*.

informed requests.[13]

- Students should also be given information about their rights and responsibilities regarding their own use of course materials.[14]
- Full attribution, in a form satisfactory to scholars in the field, should be provided for each work included or excerpted.[15]

Id. at 14.

GSU has thus made every effort to ensure that its e-reserve activities fall squarely within the mainstream of practice at educational institutions in the United States, as reflected in the ARL Code.[16] That practice reflects, in turn, widespread understanding of the contours of fair use for libraries and educational institutions, upon which these institutions rely to provide services that benefit the public. A finding by this Court that GSU nonetheless violated copyright would mean upending well-established practice and expectations, thereby thwarting the public interest. We urge the Court not to take that step.

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[13] *See* "Policy on the Use of Copyrighted Works in Education and Research," USG Copyright Policy (Oct. 21, 2009), http://www.usg.edu/copyright.
[14] *Id*.
[15] "Materials made available on electronic reserves should include a citation to the original source of publication and a form of copyright notice." *Additional Guidelines for Electronic Reserves*.
[16] Indeed, the district court found that "many schools' copyright policies allow more liberal unlicensed copying that does Georgia State's 2009 Copyright Policy." *Becker*, 683 F. Supp. 2d at 1221.

II. The Second Factor Favors Fair Use in Every Instance at Issue Here.

GSU has explained in detail why the district court correctly concluded that fair use shelters its activities, and amici will not replicate that argument here. Rather, amici will focus on how the specific context of the uses in question – scholarship – should shape the fair uses analysis. Research and educational uses are not exempt from copyright claims, but it is no accident that Congress specifically called out such uses as potentially lawful fair uses in Section 107.[17]

The district court erred in two related ways with respect to the second statutory fair use factor, the nature of the copyrighted work. First, it gave too little weight to the second factor, arbitrarily assigning it just 5% of the total or "insubstantial weight."[18] Slip. op. at 24. Second, the court's second factor analysis improperly focused only on whether or not the work was "creative," *e.g.*, whether it contained "humorous" or "fanciful" elements. Both errors were informed by this Court's conclusion that "the second factor is of comparatively little weight in the case, particularly because the works at issue are neither fictional nor unpublished" and its distinction between "bare facts necessary to communicate information" and

[17] Education is directly referenced twice in Section 107: once in the list of favored purposes ("teaching (including multiple copies for classroom use") and once in the first factor ("nonprofit educational purposes"). Four of the other favored purposes in Section 107 are integral to the educational enterprise: "criticism," "comment," "scholarship," and "research."

[18] While it is not the focus of our brief, we do not endorse the district court's approach of initially assigning blanket numeric values to the fair use factors.

those which "derive[] from the author's experiences or opinions." *Cambridge University Press et al v. Patton*, 769 F.3d 1232, 1270 & n.28 (11th Cir. 2014) ("*Patton*").

At this stage, we urge the Court to clarify its own analysis of the second factor to focus on its core purpose: to ascertain whether copyright was needed to incentivize creation and, by extension, whether or not a fair use finding helps serve the purposes of copyright. *See id.* at 1238. Properly understood, the factual/fictional distinction is shorthand for a more fundamental question: whether the work is "closer to the core of intended copyright protection." *See Campbell,* 510 U.S. at 586. Part of that inquiry should look at where a work sits in the continuum between idea and expression, but if the purpose of copyright is fundamentally utilitarian, *Patton*, 769 F.3d at 1238, the second factor is also the best vehicle for considering "whether copyright might have reasonably encouraged or provided an incentive for an author to create the work." Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529, 540 (2008). A rigorous second factor analysis should look at the class of work at issue, which will lead to useful information about the context of its creation and use. *Id*. at 552–53.

> Once we understand the work and the reasonable and customary expectations of authors for that type of material, we can better understand how various uses might affect the incentive to create such works.

Id. at 540. That understanding, in turn, can inform the balancing test Section 107 requires.[19]

Such an approach is especially valuable where, as here, the works at issue here are all academic works. Amicus Authors Guild attempts to lump academic authors into the same pool as "professional writers" such as T.J. Stiles and insists, without citation, that "excerpt income contributes significantly to academic authors' incentives to create their works." Authors Guild Br. at 14. But the analogy does not hold. Like lawyers, academics write a great deal, but they are not "professional writers" and, like lawyers, do not look to royalties to motivate their work.

Instead, as explained in a special report co-sponsored by ARL, the Association of American Universities, and the Pew Higher Education Roundtable, the scholarly community is still a "gift culture," with authors writing and publishing not for compensation but in the hopes of contributing to the common pool of knowledge, and not incidentally, earning the regard of their peers. In this context, scholars expect that

[19] The starting point for Robert Kasunic's analysis is Judge Pierre Leval's seminal law review article concerning fair use. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). With respect to the second factor, Kasunic explains that Judge Leval "recognized the need to distinguish between authors of works for whom copyright provided an incentive to create and those authors who were incidental beneficiaries of copyright." 31 COLUM. J.L. & ARTS at 539.

> any personal gains from the publication of research are the result of the positive esteem an article or book receives in its field of inquiry. Superior achievement is gauged not by the volume of sales but by the number of research citations, the approbation of peer review, and the prestige of the journal in which an article appears. The personal rewards of significant accomplishment accrue indirectly in the form of promotion and tenure within one's home institution, the awarding of grants and fellowships, or the appearance of attractive offers from other institutions."

To Publish and Perish, 7 Policy Perspectives 1, 3 (1998).[20] As Professor James Swan put it with respect to his own article:

> This essay of mine, though it will be added to the inventory of my own intellectual capital, my curriculum vitae, and hopefully will count toward enhancing my academic status and income—it is still a gift, to be consumed and circulated in the gift culture of research and scholarship; no one will pay me for writing it and I will not sell it.

James Swan, "Touching Words, Helen Keller, Plagiarism and Authorship," in *The Construction of Authorship: Textual Appropriation in Law and Literature* 75 n.61 (Martha Woodmansee & Peter Jaszi ed., 1994).

Judge Richard Posner of the Seventh Circuit, a prolific author on intellectual property matters, agrees that academic works require little to no copyright protection to encourage their creation. Judge Posner suggested that "modern action movies often costing hundreds of millions of dollars to make, yet copiable almost instantaneously and able to be both copied and distributed almost costlessly," may require strong copyright protection to ensure their creation. Richard Posner, *Do*

[20] *Available at* http://www.arl.org/storage/documents/publications/to-publish-and-perish-mar98.pdf.

patent and copyright law restrict competition and creativity excessively?, The Becker-Posner Blog (Sept. 30, 2012).[21] At the other end of the spectrum, Judge Posner observed, are:

> academic books and articles (apart from textbooks), which are produced as a byproduct of academic research that the author must conduct in order to preserve his professional reputation and that would continue to be produced even if not copyrightable at all. It is doubtful that there is any social benefit to the copyrighting of academic work other than textbooks . . . .

Id.

We do not suggest that scholarly works should receive no copyright protection. But we do agree with Judge Posner that copyright-based incentives are less necessary in the context of many academic works to serve copyright's own fundamental goal: to further the progress of science.[22] Because scholarly works require "thinner" copyright protection to ensure their production, the second factor

[21] *Available at* http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html.

[22] The Authors Guild complains that the district court did not appreciate the creativity and originality reflected in academic writings. The Authors Guild, however, repeatedly confuses originality of expression, which warrants copyright protection, with originality of ideas, which does not. *See, e.g.*, Authors Guild Br. at 24 ("scholarly writings are assessed based on their originality"). Academic authors' priority is to develop and disseminate original ideas. Instructors assign excerpts from academic monographs so that students can be exposed to these original ideas. Thus, the educational purpose under the first factor and the academic nature of the works under the second factor reinforce one another. In other words, when presenting students with excerpts from monographs, it's all about the ideas, not the expression.

strongly favors a fair use finding with respect to all of the works at issue here.[23]

III. The District Court Properly Discounted Immaterial Harms.

A. The District Court Properly Considered Whether GSU's Use Would Cause Substantial Harm

Contrary to the claims of Publishers and their amici, the district court did not err in following this Court's guidance by considering the *absence* of an available license relevant to the fourth factor analysis and focusing on whether a use supplants part of the "normal market for a copyrighted work." Slip op. at 7 (quoting *Patton,* 769 F.3d at 1275). Nor did it err in focusing, again in keeping with this Court's guidance, on whether GSU's actions could cause "substantial harm" to an actual or potential market.

As this Court correctly observed, "the central question under the fourth factor is not" whether a copyright owner might "lose some potential revenue." *Patton*, 769 F.3d at 1276. Instead, it is whether the use "taking into account the damage that might occur if 'everybody did it'—would cause *substantial* economic harm such that allowing it would frustrate the purposes of copyright by materially impairing" the incentive to publish the work. *Id.* (emphasis in original). A use that has a slight but immaterial effect on a potential or even an actual market is unlikely to disturb that incentives—and it is certainly not going to spark a "fair use death

[23] A publisher's incentive to disseminate a work is considered in the context of the fourth fair use factor, discussed in the next section.

spiral." Publishers Br. at 60. *See also* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4] (Matthew Bender, Rev. Ed.) (fourth factor poses the question of whether unrestricted and widespread conduct of the sort engage in by defendant "would result in a *substantially* adverse impact") (emphasis added).

Indeed, as we noted in 2013, the record in the case shows that obtaining a license for use of digital excerpts is often difficult or impossible, sometimes by design.[24] The gaps in blanket licenses like the one offered by the CCC are also well known in the library community,[25] and the difficulty of obtaining a la carte licenses for educational uses is well documented.[26] Because educational uses serve the public interest, and "[t]he ultimate test of fair use is whether the copyright law's

[24] *See Becker,* 863 F. Supp. 2d at 1215, 1238 (noting that "sometimes publishers, for whatever reason, simply prefer limiting sales to the whole book," that "Cambridge did not and does not participate" in the CCC excerpt licensing program, and that "the record affirmatively shows that Cambridge has been quite skeptical of granting licenses to create digital excerpts of its works").

[25] *See, e.g.,* Peter Hirtle, *Why You Might Want to Avoid the CCC's Annual License*, LibraryLaw Blog (July 5, 2007), *available at* http://blog.librarylaw.com/librarylaw/2007/07/why-you-might-w.html ("The bookstore manager at Cornell has told me that CCC can provide fewer than 50% of the permissions he needs for course packs, and the annual license covers only a subset of CCC publishers.").

[26] *See, e.g.*, J. Christopher Holobar & Andrew Marshall, *E-Reserves Permissions and the Copyright Clearance Center: Process, Efficiency, and Cost*, Portal 11.1: Libraries and the Academy 517, 518 *available at* https://scholarsphere.psu.edu/downloads/9k41zd523 (Sixty-four percent overall success rate seeking a la carte permissions from CCC, but only 45 percent of permissions granted quickly).

goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it," *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006)(citing *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 141 (2d Cir. 1998), it makes sense to weigh the fourth factor in favor of fairness where the rights holder has made little effort to serve the relevant market effectively. Put another way, rightholders cannot credibly claim market harm based solely on whether they are "entitled to exploit" a market where they have made no effort to actually do so. *See* Publishers Br. at 48.

To the extent that a court does consider the impact of a use on *potential* licensing revenues, it should examine not only the existence of an effective *mechanism* for licensing the works, but also whether the license is a likely option. *See Ass'n for Info. Media and Equip.*2012 WL 7683452, at *6 (fourth factor weighs in favor of finding fair use because a student "is no more likely to purchase a DVD" if she could not stream the work on her computer). Evidence entered at trial suggests that licensing was not a likely option at GSU. *See* GSU Br. at 28 ("Many professors testified that they would not have used any excerpt if students were required to pay a licensing fee."). Instead, a professor (with the able assistance of a research librarian) would find substitutes, such as material distributed under a Creative Commons or other open license, or articles in journals the university already licenses. Alternatively, since the excerpts are supplemental

reading, the professor might leave the excerpts out of e-reserves altogether, and just place a few photocopies on physical reserve in the library.[27]

B. Placing Licensing in Context: Library Budgets and the Public Interest

The market harm analysis calls on courts to strike a balance between "the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied." *MCA v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981). As noted, the district court correctly found any adverse impact to be minimal in most cases. At the same time, the public benefit of allowing the use at issue here is substantial.

In practical terms, there is still no real licensing market for including these kinds of excerpts in e-reserves. That is because academic libraries simply do not have the budget to participate in any "new" licensing market.[28] Their only alternative is to divert scarce funds from some other area. Thus, Appellants are effectively asking this Court to require libraries to reorganize their budget priorities

[27] Further underscoring the small likelihood of GSU paying license fees for the use of these excerpts is their low utilization rate. As Publishers noted in the first appeal, the 1,000 excerpts posted on GSU's electronic course system were accessed a total of 4,000 times. First Publishers Br. at 23, filed January 23, 2014, *Cambridge Univ v. Becker*, Nos. 12-14676-FF, 12-15147-FF. Each excerpt was accessed just four times.

[28] Unlike with course packs, where the cost of license fees can be passed on to the student purchasing the course pack, the library would have to absorb the cost of e-reserve licenses because students have free access to e-reserves.

in order to benefit some rights holders at the expense of others—or simply decline to continue including excerpts in e-reserves.

Amici suspect most libraries will be forced to take the latter path. Like the rest of the economy, research library budgets have contracted since the economic crisis of 2008. Sara Hebel, *State Cuts Are Pushing Public Colleges into Peril*, Chron. of Higher Educ. (Mar. 14, 2010). A 2015 report found that 55% percent of libraries reported flat or decreasing budgets.[29] Moreover, it is unlikely that many library budgets, particularly those in state institutions, will recover any time soon. Funding for higher education is still below 2008 levels when adjusted for inflation. *Id.* Furthermore, library expenditures as a percentage of total university expenditures has decreased from a high of 3.7% in 1984 to 1.8% in 2011 (with that trend line predictably falling).[30] One result: libraries reduced their staff by 11% between 1986 and 2012.[31]

At the same time, other library costs have increased dramatically. For example, between 1986 and 2015, ongoing research expenditures in research libraries, which include expenditures for print and electronic academic journals,

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[29] Stephen Bosch & Kittie Henderson, *Periodicals Survey 2015*, Library Journal (Apr. 23, 2015) *available at* http://lj.libraryjournal.com/2015/04/publishing/whole-lotta-shakin-goin-on-periodicals-price-survey-2015/.

[30] Association of Research Libraries, *Library Expenditure As % of Total University Expenditure*, 2013, *available at* http://www.arl.org/storage/documents/eg_2.pdf.

[31] Association of Research Libraries, *Service Trends in ARL Libraries, 1991-2012, available at* http://www.arl.org/storage/documents/service-trends.pdf.

increased 521 percent, more than double the rate of overall library expenditures.[32] Depending on the discipline, subscription prices for serials can reach an average of more than $5000 per title per year.[33]

And, of course, journal costs are only the tip of the iceberg that is threatening library budgets. In short, libraries do not have the resources to pay additional license fees for the "right" to include excerpts in e-reserves.

Moreover, even assuming *arguendo* that libraries could pay such fees, requiring this would thwart the purpose of copyright by undermining the overall market for scholarship. Given libraries' stagnant or shrinking budgets, any new spending for licenses must be reallocated from existing expenditures, and the most likely source of reallocated funds is the budget for collections. As one librarian pointed out at a meeting of the American Association of University Presses, "[W]e pay six figures each year to CCC, and that money is reallocated from our collections budget. . . . So that's new content we're not buying." Steve Kolowich, *Mending Fences*, Inside Higher Ed (June 21, 2012).[34] As the website of a preeminent medical research university noted, "since about 85% of our collections

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[32] Association of Research Libraries, *Expenditure Trends in ARL Libraries, 1986-2015,* forthcoming Spring 2017 (copy on file with author).
[33] Stephen Bosch & Kittie Henderson, *Periodicals Survey 2016*, Library Journal (Apr. 21, 2016) http://lj.libraryjournal.com/2016/04/publishing/fracking-the-ecosystem-periodicals-price-survey-2016/.
[34] *Available at* http://www.insidehighered.com/news/2012/06/21/university-presses-debate-how-reconcile-libraries-wake-georgia-state-copyright.

budget goes towards journal subscriptions, price increases stymie our ability to add new resources to support [our] teaching, research, and clinical care needs."[35] An excerpt license requirement thus will *harm* the market for new scholarly works and works by new scholars, as the works assigned for student reading are likely to be more established pieces written by well-known academics.[36] Libraries' total investment in scholarship will be the same but resources will be diverted away from new works to redundant payments for existing ones, in direct contradiction of copyright's purpose of "promot[ing] progress." U.S. CONST. Art. I, § 8, cl. 8.

Broader doomsday predictions by Publishers' amici that the district court's ruling will have a "severe negative impact" on the market for excerpts, Authors Guild Br. at 17, are even less credible. In fact, the scholarly communications market is undergoing a renaissance that is enabling more publications to disseminate more scholarly writings to more students and experts than ever before.

This renaissance is based on open access publishing. Historically, publishers of scholarly communications performed critical and costly functions: coordination of the peer-review process, and the printing, marketing, and distribution of the

[35] *Journals Cost How Much?* UCSF Library, https://www.library.ucsf.edu/open-access/journals-costs.

[36] The impact on young scholars seeking tenure, then, will be exactly the opposite of what amici Authors Guild, *et al*., suggest. Authors Guild Br. at 19.

copies of the journals or monographs.[37] The publishers needed strong copyright protection to ensure that they would recover their investment in the production and distribution of the copies, even though they received the content itself at no cost from the academic authors.

The Internet has dramatically changed the economics of scholarly communications. Email and software have reduced the cost of coordinating the peer-review process, and the Internet has cut printing and distribution costs. These reduced costs have enabled the emergence of open access business models, where readers can obtain online access to the writings for free. Given the restrictive licensing terms and conditions and the skyrocketing cost of science, technology, and medical journals discussed above, researchers and scientists are highly motivated to embrace these new models. Additionally, scholars are attracted to the functionality open access models permit, including the linking of databases and journal literature, and the mining and manipulation of these resources.

An academic author typically grants the open access publisher a non-exclusive copyright license to distribute the writing to the public at no charge. The open access publisher covers its costs by charging the author a fee for publishing the article or monograph or by receiving funding from another source, such as a

[37] Although publishers coordinate the peer-review process, they do not pay the peer reviewers. Members of the academic community donate their time to peer-review activities as part of their contribution to the scholarly enterprise.

granting agency or the institution that hosts the publication.[38]

Over the past fifteen years, the number of open access publishers has increased dramatically, as has the number of materials they have published. The Directory of Open Access Journals (DOAJ), a quality-controlled listing of open access scholarly journals has grown from 34 journals in 2002 to 9,484 today, with 6,720 searchable at the article-level. Directory of Open Access Journals, https://doaj.org/ (last visited Feb. 8, 2017). Members of the Open Access Scholarly Publications Association (OASPA) published 250,000 articles under open licenses between 2000 and 2012, including over 80,000 in 2012 alone. Claire Redhead, *Growth in the use of the CC-BY license*, OASPA (Mar. 8, 2013).[39] The Directory of Open Access Books, created in 2012, now lists 5,912 academic peer-reviewed books from 168 publishers. Directory of Open Access Books, http://www.doabooks.org/ (last visited Feb. 9, 2017). The demand for open access publishing among academic authors and readers is so strong that even highly profitable publishers such as Appellants Oxford and SAGE have open access publications and are members of OASPA.

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[38] Many granting agencies now include extra funds in grant awards to cover the cost of publication in an open access format. And unlike educational funding in general, state and federal funding for the creation of *open* educational resources has increased. *See* Jonathan Band, *The Changing Textbook Industry*, DISRUPTIVE COMPETITION PROJECT, http://www.project-disco.org/competition/112113-the-changing-textbook-industry.

[39] *Available at* http://oaspa.org/growth-in-use-of-the-cc-by-license-2/.

Placed in this context, it is clear that the public benefit of e-reserve practices such as GSU's far outweighs any potential cost to publishers. Although some academic publishers may have difficulty adjusting to the digital environment, predictions of the devastating impact the decision below would have on the evolving scholarly communications ecosystem are complete fiction.

CONCLUSION

For the foregoing reasons, we urge this Court to affirm the decision below. At the same time, this Court should clarify that the second factor favors fair use with respect to all of the works at issue.

Dated: February 13, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,273 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify, that on February 13, 2017, a true and correct copy of the foregoing Brief of Amici Curiae American Library Association, Association of College and Research Libraries, and Association of Research Libraries was timely filed in accordance with FRAP 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

Dated: February 13, 2017

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