Case Nos. 12-14676 (FF) & 12-15147(FF)
(Consolidated Appeals)

United States Court Of Appeals

for the

Eleventh Circuit

CAMBRIDGE UNIVERSITY PRESS, *et al.*,

Plaintiffs-Appellants,

v.

MARK P. BECKER, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NO. 1:08-cv-01425-ODE (Evans, J.)

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, AND THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES IN SUPPORT OF APPELLEES MARK P. BECKER, *ET AL.*, AND AFFIRMANCE

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April 25, 2013

Case Nos. 12-14676-FF & 12-15147-FF
Cambridge University Press, et al. v. Mark P. Becker, et al.

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Amici American Council on Education, Association of American Universities, Association of Public and Land-Grant Universities, American Association of State Colleges and Universities, American Association of Community Colleges, and the National Association of Independent Colleges and Universities each states that it is a non-profit association, with no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

In addition to those identified in prior briefs filed in this case, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this appeal:

Ablin, Karyn K.

American Association of Community Colleges

American Association of State Colleges and Universities

American Council on Education

Association of American Universities

Association of Public and Land-Grant Universities

Chapman, Floyd B.

Joseph, Bruce G

Meloy, Ada

National Association of Independent Colleges and Universities

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STATEMENT OF ISSUES

Did the district court correctly conclude that the non-profit educational use of relatively small excerpts of academic books as e-reserves to enrich learning and classroom teaching were fair use, when the use furthered the constitutional goal of "promot[ing] the Progress of Science" and would not meaningfully impair the creation or publication of academic works?

INTEREST OF *AMICI*

The American Council on Education, Association of American Universities, Association of Public and Land-grant Universities, American Association of Community Colleges, American Association of State Colleges and Universities, and National Association of Independent Colleges and Universities submit this brief as *amici curiae* in support of appellees.[1] *Amici* are six non-profit associations whose members include the great majority of U.S.-based public and private colleges and universities. The associations represent all sectors of higher education – public and private, large and small. They regularly submit amicus briefs in cases raising legal issues important to higher education and seek to foster high standards in higher education, believing that a strong higher education system is the cornerstone of a democratic society.

[1] No party's counsel authored this brief in whole or in part. No party or its counsel or anyone other than *amici*, their members and their counsel, contributed money intended to fund preparation or submission of this brief.

The issues of academic fair use presented here have a profound effect on the public-interest mission of *amici* and their members, a mission that the Supreme Court has described as one of "supreme importance." The publishers' attempt to distort the copyright fair use doctrine into a "narrow exception" (Br. at 5) that does not encompass the non-profit educational activities of Georgia State University would greatly impede teaching, learning, research, and scholarship – the very "Progress of Science" that copyright law must promote – and would deprive students of a rich array of critical thinking. *Amici* have a fundamental interest in protecting the higher education system against such a result.

Amici offer this brief to present the fair use doctrine in its proper context, as an integral tool for achieving the Constitution's goal in granting Congress the power to enact copyright laws, and to amplify the university defendants' presentation of three of the four statutory fair use factors.[2] All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Constitution grants Congress the power to enact copyright laws for a specific purpose – "to promote the Progress of Science." The term "the Progress

[2] *Amici* will not add to the defendants' discussion of the third fair use factor – "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." *See* Br. of Appellees 46-56.

of Science" is understood to refer broadly to the creation and spread of knowledge and learning.

It is well-settled that the rights granted by Congress to accomplish this purpose are granted to serve the public interest, not the copyright owner's private gain. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, 68 S.Ct. 915, 929 (1948). Thus, copyright rights are carefully limited, and those limitations are a structural part of the statutory balance necessary to accomplish copyright's constitutional purpose. The fair use doctrine is one such important limitation, long recognized as an essential means of: (i) ensuring that copyright law does not stifle the very learning that it should promote; (ii) promoting the public interest; and (iii) securing First Amendment rights.

Given its importance, the fair use doctrine embodied in section 107 of the Copyright Act, 17 U.S.C. § 107, is not properly viewed as a "narrow exception" to exclusive property rights; rather, it is an integral part of copyright law and one means by which that law serves the public interest by promoting the spread of learning. The doctrine must be construed in light of that role.

Non-profit educational uses are strongly favored in fair use analysis. Indeed, it is difficult to imagine a type of use more closely linked to the constitutional goal of spreading knowledge and learning. The public interest in higher education is

undeniable – "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627 (1923). Education is the foundation of citizenship and democracy, and the source of enormous benefits for society, the economy, and the individual. Moreover, the academic freedom to present and examine a broad array of thought is an essential constitutional right protected by the First Amendment. The fair use doctrine a primary means by which copyright law protects First Amendment interests.

The e-reserve system at GSU is used by faculty to enrich the educational experience and expose students to diverse sources of thought to which they would not otherwise be exposed. It is a use that fosters learning, promotes the strong public interest in higher education, and advances the First Amendment interest in academic freedom and diversity of thought. The first statutory fair use factor – the purpose and character of the use – strongly favors the challenged use.

The second statutory factor – the nature of the copyrighted work – likewise strongly favors fair use. In addition to the district court's reasoning, the works were created by professors as part of their ongoing participation in the academic enterprise. Academic authors value broad educational use of their works. In other

words, the authors' interests in creating their works coincide with the educational interests promoted by GSU's e-reserve system.

The fourth statutory factor – the effect of the use on the market for and value of the copyrighted work – also strongly favors fair use. Viewed in light of copyright law's goal of inducing authors to create, this finding is unassailable. The district court found that academic authors are not motivated by royalties. Dkt#423 at 81-82. They engage in academic writing to advance knowledge and enhance their reputation. They would write even without copyright royalties. In the academic context, then, the bar of inducement is considerably lower than in other contexts. Authors do not require copyright inducement to write; the only inducement necessary is the inducement of publishers to publish. That inducement, the court found, was not, and would not be, harmed by the challenged use, even were it widespread.

ARGUMENT

I. FAIR USE IS INTEGRAL TO COPYRIGHT'S PUBLIC INTEREST GOAL OF PROMOTING THE PROGRESS OF SCIENCE – UNDERSTOOD TO MEAN LEARNING AND KNOWLEDGE – AND THE FAIR USE FACTORS MUST BE ANALYZED IN LIGHT OF THIS PURPOSE.

As this Court explained in one of its leading fair use decisions, it is important "[t]o approach [fair use] issues in the proper framework." *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 (11th Cir. 2001). To understand that

framework, the Court examined the history and purpose of the Constitution's Copyright Clause. *Id*. at 1260-63. The Court found that "copyright laws have been enacted to achieve three main goals: the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author." *Id*. at 1261. It then applied the fair use factors in light of those goals. *Id*. at 1267-68.

Consideration of the underlying framework and goals of copyright law is similarly important to guide the fair use analysis here. The core constitutional purpose of copyright law is to promote learning. It is difficult to imagine a use of copyrighted works that is closer to that core purpose than the use at issue here – excerpting scholarly writings as supplemental reading in higher education.

A. The Constitution Grants Congress the Power To Enact Copyright Laws for the Public Purpose of Promoting Learning, Not for the Private Benefit of Authors.

Article I, Section 8, clause 8 of the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8 (emphasis added). Thus, the power to enact copyright laws exists for a specific purpose – "to promote the Progress of Science."[3]

[3] "Perhaps counterintuitively for the contemporary reader, Congress' copyright authority is tied to the progress of science; its patent authority, to the progress of

The "'Progress of Science' ... refers broadly to 'the creation and spread of knowledge and learning.'" *Golan*, 132 S.Ct. at 888; *accord Eldred v. Ashcroft*, 537 U.S. 186, 245, 123 S.Ct. 769, 802 (2002) (Breyer, J., dissenting) (describing "the basic Clause objective" as "'promot[ing] the Progress of Science,' i.e., knowledge and learning"); Orrin Hatch & Thomas Lee, *"To Promote the Progress of Science"; The Copyright Clause and Congress's Power To Extend Copyrights*, 16 Harv. J.L. & Tech. 1, 7 (2002) ("Everyone agrees that the notion of 'science' in the founding era referred generally to all forms of knowledge and learning.").[4]

The Supreme Court consistently has emphasized that the ultimate goal of copyright is to serve the public interest, not the author's private interest:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429, 104 S.Ct. 774, 782 (1984); *accord Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526, 114 S.Ct. 1023, 1029 (1994) ("[T]he monopoly privileges that Congress has authorized ... must ultimately serve the public good."). Indeed, "[t]he copyright law, like the patent

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(Continued . . .)
the useful arts." *Golan v. Holder*, 132 S.Ct. 873, 888 (2012). This is clear from the parallel structure of the clause.

[4] The English Statute of Anne, which "[t]he Framers of the U.S. Constitution relied on ... when drafting the Copyright Clause of our Constitution," was "introduced as '[a]n act for the encouragement of learning.'" *Suntrust*, 268 F.3d 1257, 1260 & n.4.

statutes, makes reward to the owner a secondary consideration." *Paramount Pictures*, 334 U.S. at 158, 68 S.Ct. at 929; *accord Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 111 S.Ct. 1282, 1290 (1991) (observing that "[t]he primary objective of copyright is not to reward the labors of authors").

Copyright rights are granted to authors to induce them to create and to disseminate their creations. *See, e.g.*, *Paramount Pictures*, 334 U.S. at 158, 68 S.Ct. at 929 ("[R]eward to the author or artist serves to induce release to the public of the products of his creative genius."); *Fogerty*, 510 U.S. at 526, 114 S.Ct. at 1029 (copyright is "intended to motivate the creative activity of authors"). "But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S.Ct. 2040, 2044 (1975). Moreover, "[e]vidence from the founding ... suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science." *Golan*, 132 S.Ct. at 888 (emphasis in original).

B. Congress Implemented the Public Purpose of Copyright by Creating Significantly Circumscribed Rights, Subject to Important Limitations.

Congress has exercised its constitutional power to promote knowledge and learning by creating carefully circumscribed copyright rights. The rights are not absolute property rights but statutory creations subject to important limitations that

further the constitutional goal. *E.g.*, 17 U.S.C. §§ 102(b), 107-122. "The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature." *Aiken*, 422 U.S. at 154-56, 95 S. Ct. at 2044.

From the beginning, the Supreme Court has consistently held that copyright is not grounded in any theory of the author's natural right. It is solely a creature of statute, and the scope of the right is strictly limited by the statutory grant. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659-64, 667-68 (1834); *Sony Corp.*, 464 U.S. at 429, 104 S.Ct. at 782 (noting that copyright law "'is not based upon any natural right'" of the author and describing the balance between the benefit to the public from "'stimulat[ing] the producer'" and the detriment to the public from "'the evils of the temporary monopoly'" (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909))). This Court has agreed, observing that "[t]he copyright is not a natural right inherent in authorship." *Suntrust Bank*, 268 F.3d at 1262-63.

In other words, the exceptions and limitations in the Copyright Act do not contravene any natural order or property right. Rather they are a structural part of the balanced means by which Congress fulfills its constitutional mandate to

promote learning. They should be construed on equal footing with, and as broadly as, the underlying rights.

C. Fair Use Is an Integral Part of Copyright Law, Essential To Fulfilling the Constitution's Purpose of Promoting Learning.

One of the most important limitations in copyright law is the fair use doctrine, on which this case turns. "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose … ." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575, 114 S.Ct. 1164, 1169 (1994). According to Judge Leval, "Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law." Pierre Leval, Commentary, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990). In response to the rhetorical question "why allow fair use," Judge Leval explains:

> First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stands on the building blocks fashioned by prior thinkers. Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday's theses.
>
> Monopoly protection of intellectual property that impeded referential analysis and the development of new ideas out of old would strangle the creative process.

Id. at 1109.

D. The Fair Use Doctrine Should Be Construed To Advance Copyright's Public Purposes.

It follows from the foregoing that fair use should be analyzed, and the fair use factors applied, to advance the specific goal of fostering learning and the general public interest. "All [of the statutory factors] are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578, 114 S.Ct. at 1171.

This Court has agreed, noting the need "to approach these issues in the proper framework" in the context of "the Constitution's Copyright Clause." *Suntrust*, 268 F.3d at 1260; Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 Colum. J.L. & Arts 529, 544 (2008) ("The fair use analysis is ... an examination of the interrelationships of the facts and the factors, while keeping in mind the primary purpose of copyright.").

More generally, courts have recognized that the public interest in a challenged use deserves strong consideration in fair use analysis. *See Sundeman v. Seejay Soc'y, Inc.*, 142 F.3d 194, 203-04 (4th Cir. 1998) (considering the public benefit resulting from the challenged use in connection with "the development of art, science and industry"); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1993) (reasoning that "we are free to consider the public benefit resulting from a particular use" and that "[p]ublic benefit need not be direct or tangible, but may arise because the challenged use serves a public interest").

Simply put, the challenged uses should be evaluated under the fair use doctrine in light of the inherent public benefit and constitutional goal of promoting learning. In that light, they are fair use.

II. FACTOR ONE HEAVILY FAVORS FAIR USE – EDUCATION IS A CORE PUBLIC INTEREST THAT IS SYNONYMOUS WITH THE PROMOTION OF KNOWLEDGE AND LEARNING.

Education is, of course, a primary means by which society promotes learning and knowledge. Webster's Third New International Dictionary 723 (1981) (defining "education" as, *inter alia*, "a process or course of learning, instruction, or training" and "educate" as, *inter alia*, "to develop ... by fostering to varying degrees the growth or expansion of knowledge"). Similarly, plaintiff Oxford University Press' Online Dictionary defines "learning" as "knowledge acquired through experience, study, or being taught." Oxford Dictionaries, *available at* http://oxforddictionaries.com/us/definition/american_english/learning. The link between education and the promotion of learning and the expansion of knowledge cannot be denied. Nor can the overarching public benefit of education.

Given this context, it is unsurprising that education is a primary objective of the fair use doctrine. Indeed, "the development of fair use as a judicial doctrine was catalyzed by the importance of permitting non-profit educational institutions to utilize portions of a copyrighted work," among other reasons. *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 880 (S.D. Fla. 1978).

As the Supreme Court observed, "[t]he fair use defense affords considerable 'latitude for scholarship and comment.'" *Eldred*, 537 U.S. at 220, 123 S.Ct. at 789.

A. The Copyright Act Expressly Favors the Challenged Use.

Section 107 itself establishes the importance of educational uses in the fair use calculus. The preamble of the section identifies three educational activities as prototypical examples of favored uses, including the use at issue here – "teaching (including multiple copies for classroom use), scholarship, [and] research." 17 U.S.C. § 107; *see* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][1], at 13-160 (2012) (acknowledging that "'nonprofit educational'" uses "will tend to render a given use 'fair'" and that "the preamble to Section 107 does enumerate certain purposes that are most appropriate for a finding of fair use: 'criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research'").

Moreover, in the first of the four factors that Congress ordered courts to consider in assessing whether a particular use of a copyrighted work constitutes fair use – "the purpose and character of the use" – the only use that Congress mandated that courts consider favorably is "whether such use is ... for nonprofit educational purposes." 17 U.S.C. § 107(1).

Congress' explicit inclusion of multiple educational uses in the preamble and in factor one is a strong indication that factor one favors the challenged uses. *See Campbell*, 510 U.S. at 579, 114 S.Ct. at 1171 ("The enquiry here [under factor 1] may be guided by the examples given in the preamble to § 107."). "Moreover, there is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107. '[I]f a book falls into one of these categories [i.e., criticism, scholarship or research], assessment of the first fair use factor should be at an end.'" *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (alterations in original).[5]

B. The Public Has a Strong Interest in Fostering Higher Education, and the Educational Use Challenged in this Case Confers Fundamental Public Benefits Central to the Purpose of the Copyright Clause and the First Amendment.

1. The Public's Vital Interest in Higher Education Is an American Article of Faith.

The importance of education to society and to the individual is so self-evident as to be a truism. It was recognized by the Founders and has long been recognized by the Supreme Court and the Executive. As the Supreme Court observed, "[t]he American people have always regarded education and acquisition

[5] The *amicus* brief of Marybeth Peters *et al.* attacks a straw man. The district court did not "create a broad copyright exemption for nonprofit uses in education." Br. at 6. Rather, the court followed Congress' express instruction to treat nonprofit educational uses as favored uses under the first fair use factor, and then carefully considered all of the other factors. Although Congress rejected a specific educational exemption in 1976, it explicitly directed courts to account for the public interest in education as part of fair use.

of knowledge as matters of supreme importance which should be diligently promoted." *See, e.g.*, *Meyer*, 262 U.S. at 400, 43 S.Ct. at 627; *accord Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2397 (1982).

The importance of higher education in particular is similarly well-established. The Supreme Court has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S.Ct. 2325, 2339 (2003). Higher education is so important that the Supreme Court has found that it should be universally available. *See id.* at 331, 123 S.Ct. at 2340 (observing that "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals"). Indeed, "[p]olls show that three out of four Americans believe 'in order to get ahead in life these days, it is necessary to get a college education.'" Remarks of U.S. Secretary of Education Arne Duncan at the TIME Higher Education Summit (Oct. 18, 2012), *available at* http://www.ed.gov/news/speeches/remarks-us-secretary-education-arne-duncan-time-higher-education-summit.

An educated public provides innumerable societal benefits. Perhaps most fundamentally, an educated citizenry is the predicate of a thriving democracy. *Mueller v. Allen*, 463 U.S. 388, 395, 103 S.Ct. 3062, 3067 (1983) (observing that

"[a]n educated populace is essential to the political and economic health of any community"). "Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs ... ." *Bd. of Educ. v. Pico*, 457 U.S. 853, 876, 102 S.Ct. 2799, 2813 (1982) (Blackmun, J., concurring). As James Madison observed, "[k]nowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *The Writings of James Madison* (Gaillard Hunt ed.), *available at* http://www.justice.gov/oip/foiapost/2008foiapost12.htm.

Education "is the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954); *accord Plyler*, 457 U.S. at 223, 102 S.Ct. at 2398. "'[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.'" *Id.* at 222, 102 S.Ct. at 2397. Inculcating not only "an ability" but also "an inclination" "to serve mankind, one's country, friends and family" is "the great Aim and End of all learning." Benjamin Franklin, *Proposals Relating to the Education of Youth in Pennsylvania* (1749), *available at* http://www.archives.upenn.edu/primdocs/1749proposals.html. The Supreme Court has:

> repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society.

Grutter, 539 U.S. at 331, 123 S.Ct. at 2340.

Government statistics confirm the positive influence of an education on a person's sense of civic duty. "Higher levels of education are correlated with higher levels of civic participations, including volunteer work, voting, and blood donation, as well as with greater levels of openness to the opinions of others." Sandy Baum and Jennifer Ma, *Education Pays: The Benefits of Higher Education for Individuals and Society*, 2, 25-28 (2007) (based on data from the Bureau of Labor Statistics, National Center for Health Statistics, the U.S. Census Bureau, and the National Opinion Research Center), *available at* http://www.collegeboard.com/prod_downloads/about/news_info/trends/ed_pays_2007.pdf. Education also contributes to lower crime rates, air and water pollution rates, and health and prison costs. *See* Walter McMahon, Higher Learning, Greater Good: The Private Social Benefits of Higher Education 217-23, 232-35, 238-39 (2009).

In addition to the obvious civic benefits fostered by an education, higher education contributes to tangible economic benefits in the form of higher earnings, lower unemployment, and higher tax revenues to the public fisc:

> Higher levels of education correspond to lower unemployment and poverty rates. So, in addition to contributing more to tax revenues than others do, adults with higher levels of education are less likely to depend on social safety-net programs, generating decreased demand on public budgets.

Baum and Ma, *supra* at 2, 18-19 (based on U.S. Census Bureau data); *see also id.* ("There is a positive correlation between higher levels of education and higher earnings for all racial/ethnic groups and for both men and women."); McMahon, *supra*, at 238 (observing that higher education contributes to higher tax receipts). In short, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler*, 457 U.S. at 221, 102 S.Ct. at 2397.

President Obama has repeatedly recognized the economic benefits of an educated populace, emphasizing that "in this economy, there is no greater predictor of individual success than a good education." Remarks by the President on College Affordability, Ann Arbor, Michigan, University of Michigan (Jan. 27, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/01/27/remarks-president-college-affordability-ann-arbor-michigan. He observed that:

> Today, the unemployment rate for Americans with a college degree or more is about half the national average. Their incomes are twice as high as those who don't have a high school diploma. College is the single most important investment you can make in your future.

Id. He further asserted in his most recent State of the Union address that "[i]t's a simple fact the more education you've got, the more likely you are to have a good job and work your way into the middle class." President Barack Obama, State of

the Union Address (Feb. 12, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address.

The President has stressed the duty of society to ensure that a good education is accessible to all:

> The single most important thing we can do is to make sure we've got a world-class education system for everybody. That is a prerequisite for prosperity. It is an obligation that we have for the next generation.

Remarks by the President on Higher Education and the Economy at the University of Texas at Austin (Aug. 09, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/08/09/remarks-president-higher-education-and-economy-university-texas-austin.

Other Presidents similarly have recognized the strong public interest in education. *See*, *e.g.*, President George H.W. Bush, State of the Union Address (Jan. 28, 1992), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=20544 ("The workplace of the future will demand more highly skilled workers than ever, more people who are computer-literate, highly educated. We must be the world's leader in education."); President George W. Bush, The Third Bush-Kerry Presidential Debate (Oct. 13, 2004), *available at* http://www.debates.org/index.php?page=october-13-2004-debate-transcript ("But perhaps the best way to keep jobs here in America and to keep this economy growing is to make sure our education system works. ...

Education is how to make sure we've got a workforce that's productive and competitive.").

2. Academic Freedom To Present and Examine a Broad Array of Ideas Is an Essential Right Protected by the First Amendment and, Therefore, by Fair Use.

The benefits of a vigorous educational system are not merely abstract goals to be pursued when convenient; the academic freedom necessary to secure these benefits is an essential constitutional right protected by the First Amendment. It therefore deserves special consideration under the fair use doctrine.

The Supreme Court has emphasized the importance to the First Amendment of academic freedom and diversity of thought:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ... The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."

Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603, 87 S.Ct. 675, 684 (1967). It similarly wrote that:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new

> discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. ... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211-12 (1957); *accord Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 98 S.Ct. 2733, 2759-60 (1978) ("Academic freedom ... long has been viewed as a special concern of the First Amendment."); *id.*, 98 S.Ct. at 2760 (observing that two of the "four essential freedoms" of a university are to determine "what may be taught" and "how it shall be taught").

The Court also has long recognized that the Fourteenth Amendment Due Process clause "denotes not merely freedom from bodily restraint but also the right of the individual ... to acquire useful knowledge." *Meyer*, 262 U.S. at 399, 43 S.Ct. at 626. This right to receive "follows ineluctably from the sender's First Amendment right" and "is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Pico*, 457 U.S. at 867, 102 S.Ct. at 2808. For that reason, it is well-established that "'the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.'" *Id.*

First Amendment rights, of course, are protected in the Copyright Act by the fair use doctrine. *See, e.g.*, *Golan*, 132 S.Ct. at 890 (observing that fair use serves

as a "built-in First Amendment accommodation[]" and "affords considerable latitude for scholarship and comment"); *Eldred*, 537 U.S. at 219-20, 123 S.Ct. at 789 (same). Fair use should be applied to protect these essential rights.

3. GSU's e-Reserves Are Instrumental in Fulfilling These Core Public Values and Are too Important To Subject to Narrow, Limited Private Interests.

GSU's e-reserve system promotes the public interest in learning that is central to the Copyright Clause's purpose and fulfills the core First Amendment interest in fostering diversity of thought. Specifically, the materials at issue in this case were placed on that e-reserve system to enrich the educational process by expanding the range of ideas available to students for consideration and classroom discussion. The system enables professors to make available to their students a richer body of knowledge and more diverse streams of thought than would otherwise be communicated in works that the students could reasonably be expected to purchase.

The public interest would be significantly harmed if publishers could restrain education in the name of profit, control, convenience, or an incorrect, absolutist view of "exclusive rights." The beneficial uses at issue should not be subject to the whim of the copyright owner, whether that owner is willing to grant digital licenses, chooses to license on reasonable or unreasonable terms, directly or through a collective agent. The uses should not turn on whether the copyright

owner is responsive to licensing requests, responds slowly (after the professors need to decide what to provide to their students), or simply ignores them. That is particularly true here, where the district court rejected as "speculative and unpersuasive on this record" the publishers' claims that uncompensated e-reserve use would force them to reduce their scholarly publishing. Dkt#423 at 84.

C. Appellants Are Incorrect in Their Effort To Limit Factor One to Consideration of Whether a Use Is Transformative.

Appellants' attempt to twist factor one exclusively into an inquiry of whether the use is "transformative" is badly misplaced. Appellants' Br. at 49-55. Appellants quote selectively from cases that dealt with non-educational, commercial uses. *Id*. Thus, those cases understandably focused on other means by which the works were claimed to promote "the Progress of Science."

Where, as here, noncommercial educational uses for teaching and in the classroom are at issue, the transformative use inquiry is far less important, as the Supreme Court made clear in the very case in which it first discussed the relevance of the transformative use inquiry: "The 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, 114 S.Ct. at 1171 n.11.[6] Similarly,

[6] The uses at issue arguably are "transformative" within the meaning of relevant precedent, as the works-in-suit were not created specifically for classroom use. *Cf. A.V. ex rel. Vanderhye v. iParadigms LLC*, 562 F.3d 630 (4th Cir. 2009) (verbatim copying of student papers to create a plagiarism detection database deemed transformative). Although the district court did not rely on this argument below, it forms another basis for affirming the decision.

in *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1995), Judge Leval observed that "Secondary users have succeeded in winning the first factor by reason of either (1) transformative (or productive) nonsuperseding use of the original, or (2) noncommercial use, generally for a socially beneficial or widely accepted purpose." *Id*. at 12.[7] It is difficult to imagine a use that is closer to copyright's core goal, or more socially beneficial, than the educational uses such as those at issue here.

III. FACTOR TWO HEAVILY FAVORS FAIR USE – THE WORKS IN SUIT ARE ACADEMIC WORKS CREATED WITH THE AUTHOR'S EXPECTATION THAT THEY WILL BE WIDELY DISSEMINATED AND DISCUSSED FOR THE PURPOSE OF SCHOLARSHIP.

The district court correctly found that the second fair use factor – the nature of the copyrighted work – favored fair use because the works at issue were factual in nature. Dkt#423 at 50-54. Beyond that attribute, however, there is more about the nature of the works in suit that strongly supports a finding of fair use here.

The district court correctly reasoned that, in light of the purpose of copyright, "a primary consideration must be whether use of small unpaid excerpts ... would discourage authorship of new academic books." *Id*. at 81. The court found that it would not. *Id*. at 81-82. Although the court discussed this issue

[7] The court of appeals' decision on which the publishers here rely deemed this discussion "insightful" and recognized that "courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest." *Texaco*, 60 F.3d at 921-22.

under the heading "Additional Considerations," *id.* at 81, it is equally at home as a consideration relevant to the "nature of the works," which, among other things, properly considers the effect of copyright on the incentive to create particular types of works. *See*, *e.g.*, Kasunic, *supra*, at 530 ("In particular, the second factor provides a means of assessing how copyright provided the author of the original work with the incentive to create the work."); *id*. at 113 ("What is important [in analysis of the second factor] is not whether the type of work created is valued, but what motivations lie behind the act of creation.").

Absent testimony from the authors of the allegedly infringed works, the court credited the testimony of GSU professors that "royalties are not an important incentive for academic writers." Dkt#423 at 81-82. The court correctly concluded that professors, in their role as authors, "value education" and "value publication as an enhancement to professional reputation and achievement" and "as a contribution to academic knowledge." *Id*. at 82. In other words, academic writers are part of the learning ecosystem. As a general rule, they want their works widely read and discussed, particularly in the very type of academic setting at issue in this case. That is an important method by which academic writing promotes the "Progress of Science."

Institutions of higher learning, such as GSU, provide the environment and critical support for the process of academic writing. Research and writing are

commonly performed as part of a professor's employment, using university resources. Publishing works of research and scholarship is commonly a key standard for faculty members' achievement of tenure. Faculty members' teaching loads are frequently calibrated to enable them to undertake significant scholarly publishing. Further, faculty salaries are not based solely upon teaching but also reflect publishing of the research and scholarship expected of them. These institutional contributions are all part of the accepted ecosystem by which learning is advanced. And faculty and the institutions themselves have a reasonable expectation that they may use at least parts of the fruit of that ecosystem to which they contribute in order to further the spread of learning.

These factors have led one noted jurist to question whether there is any justification for copyright protection for academic books and articles, because they "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." Richard Posner, The Becker-Posner Blog, September 30, 2012, *available at* http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html. Judge Posner comments that "[i]t is doubtful that there is any social benefit to the copyrighting of academic work other than textbooks." *Id*. As discussed in Part IV below, there is some social benefit to

inducing publishers to publish academic books and articles, and the law grants copyright protection to academic writing. These characteristics of academic books and articles, however, are properly considered in connection with the fair use analysis of educational uses of such works.

IV. FACTOR FOUR HEAVILY FAVORS FAIR USE – ACADEMIC AUTHORS DO NOT REQUIRE THE ECONOMIC INCENTIVES OF COPYRIGHT PROTECTION TO INDUCE THEM TO CREATE, AND THE CHALLENGED USE DOES NOT MEANINGFULLY REDUCE PUBLISHER INCENTIVES.

Part I demonstrates that the four statutory fair use factors should be evaluated in the context of the purpose of copyright. The fourth factor – the effect on the "market for or value of the copyrighted work" – looks to the extent to which a use may reduce the incentive necessary to induce the creation and dissemination of the copyrighted work that is used. The significance of the effect of a use under the fourth factor should, therefore, be evaluated in that context. Will the use interfere with the inducement of creation and dissemination of scholarly writing?

As discussed above, and as the district court found, academic authors typically do not need market incentives to create scholarly writing. *Supra* Part III. They are most often motivated by the prospect of enhanced reputation, institutional expectations, and the desire to contribute to the advance of knowledge and learning. In fact, the importance of scholarly writing to the advancement of knowledge is measured more meaningfully by the number of citations to it in the

respected literature, not by the royalties paid to the author – in the rare instance any are paid. Thus, academic uses of the type at issue in this case will not adversely affect the inducement of creation.

If anything, the academic community is exploring ways to enhance the availability of scholarly works, even at no charge, to the reading public. Digital dissemination is virtually costless, and the "open access" movement – "the worldwide movement to disseminate scientific and scholarly research literature online, free of charge, and free of unnecessary licensing restrictions" – is gaining in popularity. *See* SPARC Open Access Newsletter & Form, *available at* http://www.sparc.arl.org/publications/soan/ (accessed Apr. 23, 2013); *see also* Modern Language Association, *MLA Journals Adopt New Open-Access-Friendly Author Agreements* (June 5, 2012), *available at* http://www.mla.org/news_from_mla/news_topic&topic=596. Similarly, use of the Creative Commons "CC-BY" license, which permits the "unrestricted reuse of content, subject only to the requirement that the source work is appropriately attributed," has increased dramatically. *See* Open Access Scholarly Publishers Association, FAQ, *Why does OASPA encourage use of the CC-BY license in*

particular?, *available at* http://oaspa.org/information-resources/frequently-asked-questions/#FAQ3 (accessed Apr. 23, 2013).[8]

Given that authors do not require economic inducement to create, it follows that the only economic inducement that may be needed to maintain the flow of scholarly works is an adequate return to the publishers to induce them to publish. In evaluating that return, it is important to remember that the publisher pays nothing or next to nothing for the intellectual content of their publications. The thinking and writing are provided by the author; other resources are provided by the institution.

Publishers play a significant role in the scholarly publishing system, but given the considerable contributions made by professors and their institutions, the bar that must be met to provide adequate return to induce publication is low.[9] The district court correctly found that the publishers' claims that they "might be forced to cut back on scholarly publications is speculative and unpersuasive on this record." Dkt#423 at 84.

[8] Almost no articles were published under this license in 2000. That number increased to approximately 10,000 in 2006 and to 80,000-plus in 2012. *See* Claire Redhead, Open Access Scholarly Publishers Association, *Growth in Use of the CC-BY License* (Mar. 8, 2013), *available at* http://oaspa.org/growth-in-use-of-the-cc-by-license-2/.

[9] The proper question is not whether there is a licensing market for the challenged use, but whether the incremental revenue from any such market is necessary to serve copyright's purposes.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 6,962 words.

2. This brief has been prepared in proportionally spaced 14-point font typeface using Microsoft Office Word 2010 in Times New Roman typeface.

/s/ Floyd Chapman

April 25, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of April, 2013, the Brief of *Amici Curiae* American Council on Education, Association of American Universities, Association of Public and Land-Grant Universities, American Association of State Colleges and Universities, American Association of Community Colleges, and the National Association of Independent Colleges and Universities in Support of Appellees Mark P. Becker, *et al.*, and Affirmance was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will automatically send e-mail notification of such filing to all attorneys of record. In addition, a copy of the Brief was served via First Class mail, postage prepaid, upon the counsel for the parties listed below:

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