

A CASE FOR FAIR USE: THE GEORGIA STATE DECISION

On Friday, May 11, 2012, the [opinion](#) in the long-awaited Georgia State University (GSU) e-reserves copyright infringement case was released. The case was a challenge by three academic publishers (Cambridge University Press, Oxford University Press, and Sage Publications) against Georgia State's e-reserves policy. The publishers sued in April 2008, in a lawsuit funded by the [Association of American Publishers](#) and the [Copyright Clearance Center](#) (CCC) (the CCC sells licenses to universities that want to use copyrighted material in courses), claiming that the e-reserves policy went far beyond the bounds of fair use.

Note: The opinion is both lengthy (350 pages) and complex. Over two thirds of the opinion, issued by U.S. District Judge Orinda Evans, is dedicated to a methodical test of copyright ownership, infringement, and fair use analysis of seventy-five separate claims of infringement, using standard templates and repetitive language. Several experts have written about the case in depth, and recommended reading should include analyses by New York Law School's [James Grimmelmann](#), Duke University's [Kevin Smith](#), and [Brandon Butler](#) from the Association of Research Libraries (ARL).

At the time of the suit's filing, GSU's e-reserves policy was fairly liberal. However, in 2009 it changed its policy to include an extensive fair use checklist for professors to use when placing materials on e-reserves for class. With this change, GSU was successful in convincing the court that only uses made under the new 2009 policy should be subject to any legal action. The judge asked the publishers (i.e., plaintiffs) to submit a list of excerpts from their works in order to determine the effect of the policy. The plaintiffs submitted 99 excerpts. In the judge's final analysis, 94 of the 99 excerpts challenged by the publishers were rejected by the court with the publishers prevailing on just five counts of infringement. Over a third of the claims did not even make it to the fair use stage, which was central to the case. In many cases, the publishers were unable to prove to the court's satisfaction that they owned the copyright in the portions of the books that were copied and uploaded. Further, the judge found that the GSU copyright guidelines were in fact a "good faith effort" to help faculty interpret copyright law, despite some shortcomings that the judge addressed in her ruling. Publishers had argued the guidelines were flawed and favored fair use findings.

Judge Evans dug deep into the questions surrounding fair use and concluded—after thorough analysis—that copyright was meant to promote the writing of more books. She wrote, "There is no reason to believe that allowing unpaid, nonprofit academic use of small excerpts in controlled circumstances would diminish creation of academic works." This is a positive outcome for the higher education enterprise.

THE FAIR USE ANALYSIS

The [U.S. Copyright Law](#) codifies fair use in Section 107, where it also lists four factors to help determine “whether the use made of a work in any particular case is a fair use.” The opinion speaks to each of these factors.

Factor One: The Purpose and Character of the Use

The excerpts in question were used for teaching and scholarship, and by nonprofit educational institutions, all of which are heavily in favor of a fair use finding. The judge mentions the Section 107 reference to “multiple copies for classroom use” and she did not employ a “transformational” approach.

Factor Two: The Nature of the Copyrighted Work

The judge found that the second factor also favors fair use since all of the works at issue were non-fiction and educational in nature.

Factor Three: Amount and Substantiality of the Portion Used

The third factor could go either way, depending on whether or not the excerpt is less than 10% or a single chapter. On the third factor, the amount copied, the Judge Evans repudiated the CCC’s [Classroom Guidelines](#), calling them “not compatible with the language and intent of § 107.” The judge noted that the numerical limits in the *Guidelines* are so stringent that not one of the excerpts at issue in the case would fit within them. The court was particularly explicit in the *Guidelines*’ position that copying not “be repeated with respect to the same item by the same teacher from term to term,” which the court described as “an impractical, unnecessary limitation.” This is a key point since many faculty members have been unable to repost materials in sequential semesters since the *Guidelines* advised that this would be a fair use violation.

Instead, the court devised its own quantitative test. For books of nine or fewer chapters, the court set a threshold of 10% of the total page count; for books of ten chapters or more, the threshold was a single complete chapter. Copying of any amount under this threshold, the court held, would be treated as “decidedly small.” In practical terms, this ended up being a rule of thumb: copying less than 10% or one chapter always ended in fair use for GSU.

Factor Four: The Effect of the Use Upon the Potential Market:

The fourth factor favored the publishers in cases where CCC offered a digital license for access to excerpts of the book in question, and favored GSU when there was “no evidence in the record to show that digital excerpts from this book were available for licensing” as of the date of infringement. In short, if no digital license was available the court found in favor of GSU. Since neither the authors nor the publishers profit much from licensing, the judge concluded that the existence of e-reserves does little to harm the market for their works and provides no disincentive to create. Generally, this point turned on whether the book made significant revenues via licensing: if so, the use was unfair. The judge found nothing compelling about the argument that publishers were threatened by fair use (in fact, the court

calculated the lost revenue from the five infringements to total only \$750.), but did imply that the fourth factor weighed more heavily if paying fees were made easy for the user.

WHAT THIS MEANS FOR CAMPUSES

The opinion represents a victory for GSU, a defeat for the three publishers, and a strong statement in support of fair use. The key operational aspect here for universities is that e-reserves use is likely to be considered fair use if the amount comprises less than 10% of a book, and, for cases where over 10% of the book is used, the book is either not available for digital licensing or the book is available for digital licensing but does not make significant revenues through licensing. As Grimmelmann [writes](#), “This third prong is almost never going to be something that professors or librarians can evaluate, so in practice, I expect to see fair-use e-reserves codes that treat under 10% as presumptively okay, and amounts over 10% but less than some ill-defined maximum as presumptively okay if it has been confirmed that a license to make digital copies of excerpts from the book is not available.” Still, copyright and fair use can be murky, and Judge Evans found no bad faith on the school’s part, concluding, “The truth is that fair use principles are notoriously difficult to apply.”

In the next phase, the judge has asked the plaintiffs to craft a potential injunction to address the five counts of infringement, with GSU to have a chance to object to any drafts. The publishers have until May 30, 2012 to file for such an injunction. In a [statement](#), the AAP said it intends to do so.

Georgia State University does not plan to change its policy on electronic reserves, [said](#) Nancy Seamans, director of libraries. “Professors will have to be educated and vigilant when it comes to making decisions about what to put on e-reserve, but the university does not plan to take that prerogative out of their hands. It doesn’t change a whole lot for us,” Seamans said, “but does provide some structure that hasn’t been in place previously.”

EDUCAUSE will continue to monitor and to report on this issue.

This Policy Brief was prepared by Joan Cheverie, EDUCAUSE Policy Specialist, May 15, 2011.