ASSOCIATION OF RESEARCH LIBRARIES

ISSUE BRIEF
GSU Fair Use Decision Recap and Implications

Prepared by Brandon C. Butler
Director of Public Policy Initiatives

On Friday, May 11, 2012, Judge Orinda Evans released her 350-page opinion in the copyright infringement lawsuit against Georgia State University. This memo summarizes the key rulings in the case and discusses some possible consequences for libraries generally.[1]

Executive Summary
The case concerns the use at Georgia State University (GSU) of electronic course reserves and electronic course sites to make excerpts from academic books available online to students enrolled in particular courses. The named plaintiffs in the case are three academic publishers (Oxford University Press, Cambridge University Press, and Sage), but an early filing in the case confirmed that the lawsuit was in fact being funded 50% by the Copyright Clearance Center (CCC) and 50% by the Association of American Publishers (AAP). The plaintiffs argued that the unlicensed posting of digital excerpts for student access almost always exceeded fair use and should require a license.

Although the decision is certainly not perfect (the use of bright line rules for appropriate amount under factor 3 is particularly troubling), Judge Evans has written a thorough and thoughtful analysis of the issues, and her opinion represents an overwhelming victory for Georgia State individually, a major defeat for the plaintiff publishers and for the AAP and CCC, and overall a positive development for libraries generally. The substance of the opinion is not ideal, but it is far more generous than the publishers have sought, it establishes a very comfortable safe harbor for fair use of books on e-reserve, and libraries remain free to take more progressive steps.

Background
According to Judge Evans' opinion, "CCC and its counsel did the initial fact gathering" for this case, and the Judge "infers that CCC and AAP organized the litigation and recruited the three plaintiffs to participate."[2] This lawsuit is the

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[1] So far two copyright experts have already published substantial analyses of the decision, which may be helpful to you. See Kevin Smith, The GSU decision—not an easy road for anyone, http://blogs.library.duke.edu/scholcomm/2012/05/12/the-gsu-decision-not-an-easy-road-for-anyone/ (May 12, 2012); James Grimmelmann, Inside the Georgia State Opinion, http://laboratorium.net/archive/2012/05/13/inside_the_georgia_state_opinion (May 13, 2012).

[2] See pp. 24-25 of the opinion.

culmination of years of effort by CCC and AAP to clamp down on educational fair use on electronic platforms. The suit was filed in April 2008. The named defendants are officers and employees of GSU.[3] GSU had a fairly liberal policy on the use of e-reserves and course sites at the time the suit was first filed, but it substantially changed its policy in early 2009, adopting a fair use checklist as a way to guide professors' decisions about what material to share with students under fair use. The checklist did not include specific percentages or page limits.

The publishers initially brought three claims of infringement against GSU, but two of these claims were dismissed early on. Ultimately, the case turned on whether the 2009 GSU copyright policy had caused infringement of the plaintiff publishers' copyrights. To determine the effect of the GSU policy, the judge asked the parties to assemble a list of the excerpts of plaintiffs' works which had been posted on electronic reserves or course sites during two semesters following adoption of the new policy. The parties put together an initial list of 99 excerpts, but the publishers "voluntarily and unilaterally" submitted only 75 of the excerpts for the judge's evaluation.[4]

The opinion can be divided into two core parts: the judge's general framework for determining fair use in the e-reserves/course site context, and the application of that framework to the 75 individual GSU uses. The balance of this memo will describe the judge's analysis and some of the potential consequences of the decision for ARL member libraries.

The Court's Fair Use Framework

Before determining whether particular uses were fair, the court describes in some detail how the fair use doctrine ought to apply in the context of course reserves and course sites generally. The discussion is largely quite helpful for libraries, especially considering how much better it is than the plaintiffs' proposed framework. In brief, nonprofit educational users of nonfiction works win the first two factors (the purpose of the use and the nature of the work used) every time, and if they win either the third or fourth factor, the use is fair. The court recognizes that these are precisely the circumstances where fair use should apply and sets the calculus strongly in favor of fair use at the outset.

De Minimus Non Curat Lex – ***If Nobody Reads It, No Infringement.***

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[3] GSU as an institution is immune from suit under the 11th Amendment to the US Constitution, but under a case called *Ex Parte Young*, individual officers of state institutions can be sued and ordered by the court to cease ongoing violations of federal law. In its May 11 decision, the court held that *Ex Parte Young* applies in this case.

[4] See p. 8 of the opinion. It's hard to know for sure how the parties determined the 99 excerpts to be used, but we can infer that the 75 works submitted were the ones with the largest excerpts taken. The court says that the average excerpt length for the 99 excerpts was 9.6% of the whole work (p. 6), while the average for the 75 submitted was 10.1% (p. 37). The omitted works were, in other words, the publishers' weakest cases.

The court dismissed several of the infringement allegations without even engaging in a four-factor analysis. If statistics from the reserves platform showed that no students had actually accessed the excerpt, the court held that there was no real harm to the copyright and so no need to inquire about fair use. As James Grimmelmann has observed,[5] this version of the *de minimis* doctrine could be quite useful to the HathiTrust and its partner institutions, as it suggests that copying and distribution without any actual reader access doesn't rise to the level of infringement, regardless of quantity used, the availability of a license, or any other factor.

Factor One: Purpose and Character of the Use – ***Strongly Favors Non-Profit Educational Users.***
The court made several useful rulings in this section, ultimately finding that *factor one strongly favors libraries every time in this context.* The court rejected plaintiffs' attempt to invoke the coursepack cases, saying libraries are not analogous to for-profit copy shops.[6] Although she agreed with the publishers that copying excerpts into a reserve system is not "transformative," a category that courts have strongly favored in recent years, the court said the use was so obviously of the kind intended to be covered by both the text of factor one and the preamble of the fair use statute that it had to be strongly favored.

Factor Two: Nature of the Copyrighted Work – ***Favors Users of Non-Fiction.***
Here the court relied on the fact that most of the works at issue were scholarly non-fiction, and were therefore more informational than creative in nature. Because the works are less creative, the scope for fair use is broader. The judge found that *factor two favors libraries in this context when they are using scholarly non-fiction works.* Plaintiffs objected that compiling scholarly work can be quite difficult, perhaps moreso than writing creative work, but the court rejected that argument, saying that creativity, not effort, is what copyright is intended to protect. Fair use promotes broad dissemination of facts and ideas, and thus should be stronger where informational material is at issue.

As you can see, the first two factors will favor libraries in almost every typical use. Factor One will favor them "strongly," while Factor Two merely "favors."

Factor Three: Amount and Substantiality of the Portion Used – ***Favors users if they use no more than 10% of works with 10 chapters or less; one chapter for books more than 10 chapters; and the portion used is not "the heart of the work." Otherwise, favors publishers.***
This is perhaps the most controversial and regrettable aspect of the opinion, in that it draws a bright line where fair use has always been a flexible doctrine.

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[5] See James Grimmelmann, Inside the Georgia State Opinion, http://laboratorium.net/archive/2012/05/13/inside_the_georgia_state_opinion (May 13, 2012).
[6] The court also rejected the plaintiffs' reference to *American Geophysical Union v. Texaco*, a case that involved a for-profit laboratory copying research articles in support of its business.

Nevertheless, there are some very helpful things in this part of the opinion, as well.

First, the court roundly rejects the publishers' claim that the 1976 Classroom Guidelines should be used to define the maximum amount of copying allowable under fair use. The court rightly recognizes that the Guidelines represent an agreement reached between private interest groups at that time which was meant to represent a minimum (and "very restrictive") safe harbor. The Guidelines are not the law, and they should not be. The court refuses to make the Guidelines' minimum into a maximum.

Second, the court made several favorable rulings about how to count which pages constitute "the copyrighted work." Judge Evans agrees with GSU that every page in the book, including acknowledgements and indexes, for example, should be counted as part of the copyrighted work, and that individual chapters should not count as separate works, even when each chapter in a book is contributed by a different author, and may have been conceived originally as a distinct work. The court's language here was particularly strong:

> Plaintiffs have no incentive to assert the rights of the authors of the chapters in the edited books in this context, except to seek to choke out nonprofit educational use of the chapter as a fair use. The Court will not allow this to happen.[7]

Third, in determining whether an excerpt is "the heart of the work," the court rejects the argument that an excerpt should be considered the "heart" merely because a professor has chosen it as the assigned portion of the work. The court rightly recognizes that these selections can be made for a multitude of reasons, and such circularity would unnecessarily gut the fair use argument in this context.

Fourth, the court also rejects the idea that repeated use of the same excerpt across multiple semesters should count against fair use, calling it "an impractical, unnecessary limitation."

Ultimately, the court concludes that because the use is not "transformative," the amount must be "decidedly small" in order to favor fair use. The 10% or one chapter rule is an effort to quantify this criterion. It is important to note, however, that unlike the Classroom Guidelines, this numerical limit is not absolute and does not trump the other factors. It applies only to the analysis of the third factor, and the extent to which the user exceeds the limit is also weighed, not binary. Going slightly over 10% is not weighed the same as taking 50%, and even uses that take more than 10% can be fair if the other factors come out in favor of fair use. So, while the court's use of bright lines is troubling, it is not on par with the Classroom Guidelines or its ilk.

[7] See p. 69 of the opinion.

Factor Four: Effect of the Use on the Potential Market for or Value of the Copyrighted Work – ***Strongly favors publisher if there is a reasonably priced, readily available license for digital excerpts; otherwise, favors libraries (unless the amount is so great as to harm the market for the entire book).***

Here, again, the court treads into territory that should give libraries pause, as we have long rejected the idea that making a license available trumps fair use. As in Factor Three, however, the court does not find that an available license is a trump in itself, but only that it tilts Factor Four strongly in favor of the rightsholder. It is also important to note that the work must be **readily available** *and* **reasonably priced**. And the work must be available for license specifically in the context of digital excerpts; the availability of a photocopying license, or a license to access the entire work, will not be sufficient to turn this factor in favor of publishers. This ensures that fair use remains available even when publishers try to force users to license only the entire work, which the court points out both Cambridge and Oxford routinely do.

The court also asks whether the excerpt chosen is so large that it harms the market for purchase of the entire book. If so, the publisher will win this factor even though a license for digital use is not available. None of the works at issue triggered this analysis, so the court never specifies a percentage or chapter threshold that would threaten this market. This wrinkle in the analysis highlights a seeming redundancy in the opinion, as Judge Evans seems to be asking about market harm under both the third and the fourth factors.

Additional Considerations
In addition to the statutory factors, courts are required to consider how a proposed fair use serves or disserves the purpose of copyright, which is to encourage the creation and dissemination of creative works. The judge's reasoning here is perhaps the most compelling and shows that she took into account some key facts about the academic publishing market that are often overlooked in these discussions. Based on testimony from GSU professors, the judge finds that academic authors and editors are motivated by professional reputation and achievement and the advancement of knowledge, not royalty payments, and that any diminution in royalty payments due to unlicensed course reserves would have no effect on their motivation to produce scholarship.[8] Indeed, because the authors of such works are also the primary users of course reserve systems, they would experience a net benefit from fair use in that context. The court emphasizes that publishers receive so little income from licensing excerpts as a percentage of their overall business that the slight diminution caused by allowing unlicensed posting to course reserves would have no cognizable effect on their will or ability to publish new works. Unfortunately, these additional considerations do not enter into the individual determinations. Rather, the court finds that any uses that stay within her framework will serve the purposes of copyright, and those that stray beyond it will disserve them.

[8] See pp. 81 ff. of the opinion.

Doing the Math
Where three factors favor one party (and this can only happen in favor of libraries, as the first two factors favor them every time), that party wins, regardless of which factors they are or what the outcome of the remaining factor. So, even where the library took more than 10%/one chapter, if there was no market to license digital excerpts, the court found the use was fair. And, by the same token, if the library took less than 10%/one chapter, the use was fair, even if there was a ready licensing market. No single factor trumped the other three.

Breaking Ties
With Factor One always strongly favoring libraries, and Factor Two almost always favoring them, the fair use battle under this framework will typically be fought in the third and fourth factors. It is interesting to note, however, that even in the publishers' best case scenario, where the library takes too much (Factor Three favors publishers) and a license is readily and cheaply available (Factor Four strongly favors publishers), the outcome is a tie, with each side having one favorable factor and one strongly favorable factor. In these tie cases, the court revisits factors three and four. For Factor Three, the court asks how far the amount taken exceeds the "decidedly small" threshold of 10%/one chapter. If it greatly exceeds the threshold, that *strongly* favors the publisher, tilting the overall calculus in its favor.

The Analysis of Factor Four is trickier. Here, in tie cases, the court took a closer look at the licensing market for the work to determine whether revenue from licensing was genuinely a significant part of the value of the copyright. In at least one case, the court found that although there was a license readily available, and the professor requested more than the threshold amount, licenses for excerpts of the work are not very popular, and hence the slight harm to that work's market posed by unlicensed course reserves did not significantly harm the overall value of the work. The tie in that case went to the library.

Unanswered Questions
The framework in this case gives a remarkably predictable, even mechanical method for assessing fair use in certain contexts. However, there are some significant open questions. The GSU case dealt only with use of excerpts from books. Its criteria for Factor Three are tailored to works in that medium. This leaves open the question of what happens with respect to images, musical works, journal articles, poems, films, and other works that are typically shorter or assigned in their entirety. There were also some tie scenarios that were not encountered. We never saw a request that was far in excess of 10% but where there was no licensing available, so we don't know what threshold the court might have for allowing a win on three factors to trump even a dramatic loss on one.

Consequences
Plaintiffs Suffered a High-Profile Defeat After A Long And Expensive Campaign
Aside from setting up a framework that generally favors libraries, the decision was a major defeat for the CCC and AAP, an anticlimax after years of intimidation and litigation. The court found only five infringements out of an

original universe of 99 supposedly infringing works. According to the court, the total lost licensing revenue for the publishers from the five infringements was around $750. For CCC, which makes around $5 in processing fees per transaction, it was around $25. Not only did the CCC and AAP fail to stomp out fair use in the electronic arena, but they wasted a lot of time and resources over what turns out to have been pocket change in terms of actual harm in a typical semester. The decision is quite harsh on this point, calling the publishers' dire warnings about going out of business due to lost income "glib," and concluding that the publishers would still be "in the black" even if they received no income whatsoever from licensing excerpts.[9] The court further embarrassed the publishers by documenting their repeated inability to prove that they even owned a copyright interest in some of the works they alleged were infringing. More than one third of the claims were thrown out for this reason. It is clear that the court had no sympathy for the publishers' claims of harm from unlicensed use of course reserves.

A New and Useful Data Point for Libraries

The court's opinion is not binding on other libraries, but it does provide an example of what one federal judge found fair in a very thorough and meticulous decision. Other judges are also not bound by this opinion, but they are not likely to want to start from scratch. Judge Evans' opinion could be the beginning of the analysis in future copyright cases concerning educational uses. It provides at least a safe harbor beyond which libraries may nevertheless choose to sail according to their own priorities and tolerance for risk.

Narrower Than the Code, But Not Inconsistent

The reasoning in the GSU decision is clearly narrower in some ways than what librarians arrived at in Principle One of the ARL Code of Best Practices. Quantitative bright lines were anathema to the groups we spoke with, for example. Moreover, the court's approach to fair use in general is more mechanical than the Code. This may be attributable to the nature of the GSU policy, which was based on a checklist. The court framed her analysis in terms of formulating a workable checklist, which can be very practical, but inevitably places an emphasis on the quantitative rather than the qualitative aspects of fair use.

Nevertheless, there is some significant overlap. Like the Code, the decision emphasizes the legitimacy and centrality to fair use of the non-profit educational mission, and distinguishes library use from for-profit coursepack printers. Both documents stress the importance of limiting access to enrolled students in the relevant course. The Code advises users not to copy and distribute items that are

[9] See p. 84 of the opinion. The court eviscerates this argument, saying, "In fact, permissions income is not a significant percentage of Plaintiffs' overall revenues. Plaintiffs' 2009 rights and permissions income from all sources (including corporate and other commercial uses) was nine-tenths of one percent of Plaintiffs' average 2009 revenues of $169,268,000. Plaintiffs' 2009 permissions income [for academic uses] was only .0024—less than one quarter of one percent—of revenues."

designed specifically for use in the relevant course, which is very similar to the court's reasoning that factor four will not favor libraries if the publisher relies on licensing digital excerpts to educational users as a significant part of the value of the copyright. Indeed, it could be said that Judge Evans' framework is more liberal than the Code in that it allows posting up to 10% or one chapter of any work, even a textbook, whereas the Code counsels generally against using more than "a brief excerpt" of works designed for classroom use. Some of the differences in analysis may also be attributable to the GSU decision's focus on chapters from books, whereas the Code is meant to apply to all media, including popular film or music, where a transformative argument may be more obvious.

Finally, it was dismaying to see Judge Evans take a dismissive attitude toward current community practice around fair use. In response to the suggestion that many libraries allow course reserve posting in excess of 10%, Judge Evans claims that libraries are just "guessing" at what fair use allows, as there has been no case law on this specific subject until now. It seems that Judge Evans did not follow the general trend of inquiring and deferring to community practice, but it may be that no one presented her with an argument that she should. Unfortunately, the Code was not published until after the trial was over and Judge Evans was already well into her deliberations on this case.

A Significant Area For Library Fair Use

As the community prepares to discuss whether to open the Copyright Act up for new revisions, one key issue will likely be whether libraries can reasonably rely on fair use to accommodate emerging practices and the use of new technology. Some have suggested that revisions to Section 108 are the best way, or the only way, to make such accommodations. In its suit against the HathiTrust and its partners, the Authors Guild tries to minimize the scope of fair use copying allowed for libraries, arguing that Section 108 defines the universe of library rights to copy for preservation and user request fulfillment. In each of these discussions it should be helpful to have a substantial decision affirming the rights of libraries under fair use to use new digital technology to facilitate even large-scale and ongoing copying and distribution in support of library mission.

Next Steps in the Litigation

The court did not rule on what relief it will order or whether either party will be required to pay the other party's costs and attorneys' fees. The court has asked both parties to suggest what relief should be ordered, including proposed language for an injunction. It seems likely that any order will embody the framework that Judge Evans applied in this case, but the parties are free to argue that more or less guidance is appropriate. For example, the court could order GSU to include in its policy additional discussion of how the third and fourth factors should be evaluated. Any party may appeal the decision, and it is hard to predict whether anyone will. Not surprisingly, the statements of the publishers and of the AAP and CCC express disappointment, but they have not yet announced a determination to challenge the ruling.

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