What’s Fair about Fair Use? The Battle over E-Reserves at GSU

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Accessibility
Introduction

On April 15, 2008, Georgia State University (GSU) Attorney Kerry Heyward received notice that three publishers had filed suit against university officials. Cambridge University Press, SAGE Publications, and Oxford University Press alleged that 6,700 electronic course materials at GSU infringed copyright, exceeding reasonable standards of educational fair use. If GSU lost the suit, it would be legally unable to provide the e-reserve system that sustained its courses.

The copyright statute of fair use is intentionally flexible, designed to judge each situation in its own right. But, through the years, academics and publishers have disagreed about what uses are fair to their respective communities, and attempts to standardize fair use guidelines have created rifts in the scholarly community. Now, the disagreements had become cannibalistic: publishing arms of universities suing universities.

The discretion for how to proceed fell to Heyward and her colleagues. Was GSU actually in the wrong? If not, was it worth the fight? A trial would be costly in time and resources; no university to date had defended an e-reserves suit in court. A settlement would minimize the potential legal costs, but could cement a copyright philosophy that many educational institutions considered restrictive. Heyward had to decide if the precedents, many of them extralegal, gave GSU a fighting chance in court.

Family Feud

It is no coincidence that two of the plaintiffs are not-for-profit university presses and the third is an academic publisher, each an important participant in the system of scholarly communication. When the suit was filed, a few librarians asked, “How could they?”—an indication of the underlying strength of the broad, interconnected educational community that we publishers, our library customers, our faculty authors, their students, and our parent institutions all inhabit. We are family. And, however reluctantly, sometimes family members end up on opposite sides in a courtroom.1

—Kate Douglas Torrey, Director of the University of North Carolina Press

In the business of disseminating information, university presses have always held a unique position between the for-profit publishing world and the non-profit academy. Academic publishers were originally created as extensions of universities themselves, with the express purpose of disseminating academic scholarship.

They have played an invaluable role, because few, if any, for-profit publishers would take on the risky and capital-intensive task of acquiring, preparing, and manufacturing a manuscript destined for such a small market.

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For academic publishers, however, this mission heightens the financial risk of publication. Peter Givler, the former Executive Director of the Association of American University Publishers (AAUP), explains:

The capital requirements and financial ebbs and flows of the publishing business may seem unruly and unpredictable within the context of the more stable and settled financial structure of a university budget... Publishing for small markets means that all costs have to be recovered from the sale of a small number of copies, creating razor-thin margins for error. The sale of as few as fifty copies can spell the difference between financial success and failure.2

“University presses used to be agents of the university, and were similarly insulated from the illogic of the marketplace,” said Siva Vaidhyanathan, professor of media studies and law at the University of Virginia.3 But the academic climate of the Cold War set universities and their presses on different financial paths.4 In the 1970s, the federal government curtailed and redirected its funding for higher education, emphasizing scientific research. University libraries began acquiring more scientific serials and fewer monographs in the humanities and social sciences. In turn, universities reduced the subsidies to their publishing arms, prodding university presses further into the commercial fray.

The publishing houses, seeing their university life rafts fast deflating, cast about for new markets and products to keep them afloat. By the twenty-first century, most academic publishers also printed local interest publications, textbooks and anthologies, reference materials, and trade titles that commercial publishers have taken out of print. But even these new markets were not enough. The Internet made dissemination accessible to the masses, flooding the market with published—and often free—content. Most publishers had to rely on donations from foundations and private donors who were committed to keeping boutique academic publishing alive. In attempts to update the traditional business model, university presses also started exploring e-books sales; free online editions that marketed print editions; and open access models for distributing works at no cost, using alternative funding streams such as fees incurred by the author.5

Classrooms felt the tremors of a shaky market. Because each syllabus or piece of scholarship calls upon dozens, even hundreds, of academic works to make a point, institutions and their members faced exorbitant costs for course materials and scholarly references.6 In choosing whether to have students individually purchase a course material, professors would weigh its cost against its educational value, which might come from a small excerpt. These tradeoffs stood to inhibit intellectual pursuits.

Furthermore, “obtaining [permission to use or reproduce materials] is often a difficult and time-consuming process,” said Robert Kasunic, Associate Register of Copyrights at the U.S.
Copyright Office. “The time involved may frustrate the educator’s desire to provide current and relevant material to students and consequently may detract from the professor’s educational goals.”

Were scholars to make intellectual concessions for logistical reasons, high-quality academic publications might never see their intended markets. Free, accessible, possibly second-rate content would prevail.

University libraries commonly kept a “limited number of physical copies” of course materials for students to individually borrow for a few hours’ time. The first sale doctrine, 17 U.S.C. §109(a), permits libraries, to lend, sell, or dispose of the copies of copyrighted works they have purchased. So long as the reserve materials were not photocopies or reproductions, no additional permissions or fees were required. However, students and professors would need to photocopy these materials in order to use them in the classroom—this the first sale doctrine could not provide.

The copyright doctrine of fair use specifically addressed this need, intending to reconcile the competing needs and financial interests of copyright holders and users.

**Fair Use**

Outlined in Section 107 of the Copyright Act of 1976, the fair use statute allows users, in some cases, to reproduce copyrighted works without express permission or licensing (see Exhibit 1). The statute lists “teaching (including multiple copies for classroom use), scholarship, [and] research” as acceptable circumstances for invoking the doctrine. The law states four factors to consider when determining if a use is fair:

1. the “purpose and character of the use” (i.e., non-profit, educational, or commercial);
2. the “nature of the copyrighted work” (i.e. factual, creative, or consumable);
3. the “amount and substantiality” of the excerpt (i.e. does the excerpt comprise the “heart of the work,” and thus substitute for the entire work?);
4. and the market outcomes of the use.

These factors are not exhaustive, weighted, or quantitatively defined. The U.S. Copyright Office states that “the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute... Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” Unlike related copyright laws, Section 107 is not constructed as a checklist; rather, the American Library Association (ALA) explains, “librarians balance their own interests with the copyright owners’ interests.”
Users are responsible for determining, absent any discrete parameters, whether their use is fair. However, Section 504 of the Copyright Act protects good faith interpretations by non-profit institutions, libraries, and their employees. In the event a lawsuit finds their use unfair, these institutions and their employees do not have to pay statutory damages. Furthermore, the ALA explains, “the law builds in tolerance for risk-taking”: institutions can adopt fair use interpretations with which they feel comfortable.

But this means that fair use is, at best, an educated guess. The system of copyright is still rife with inefficiency: in some interpretations, copyright users are needlessly inhibited; in others, copyright holders are shortchanged. Competing interpretations of fair use have resulted in decades of contention, both inside and outside of the courtroom. Heyward would have to decide how much of this history informed the suit against GSU.

**Extralegal Precedents in Fair Use**

**Fair Use Guidelines**

The fair use statute was contentious long before it was legally cast in stone. Fair use in the United States began as a judicially defined concept, originating in the 1841 court opinion from *Folsom v. Marsh*. In House Committee hearings throughout the 1960s, opponents to Section 107 called fair use “violations… made legal.” Authors and publishers noted that academia was the only market for academic publishing; they worried that textbooks and published anthologies would not generate income if teachers could “prepare and reproduce their own anthologies.”

In 1973, with the House hearings ongoing, the case of *Williams & Wilkins Co. v. United States* articulated a position on the fair use of entire works. A medical journal publisher sued the National Institute of Health and the National Library of Medicine for photocopying and distributing journal articles in their entirety to researchers that requested them. Because “medical science would be seriously hurt if such library photocopying were stopped” and “no purchases of the author’s work [were] displaced under these circumstances,” the court ruled that the defendants’ use was fair. Judge Davis stated in the majority opinion: “It has sometimes been suggested that the copying of an entire copyrighted work, any such work, cannot ever be ‘fair use,’ but this is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice.”

The House Committee also declined to articulate generalizations of fair use. Instead, in June 1975, the Judiciary Subcommittee encouraged the Authors League of America, the Association of American Publishers (AAP), and thirty-three educational associations to “independently… achieve a meeting of the minds as to permissible educational uses of copyrighted material.” On March 19, 1976, the parties announced the “Agreement on Guidelines for Classroom
Copying in Not-For-Profit Educational Institutions with respect to books and periodicals,” known as the Classroom Guidelines (available in full in Exhibit 2).

The guidelines outlined three tests that would satisfy the use of multiple copies in the classroom: the “brevity” of the excerpt, the “spontaneity” of the decision to teach it, and the “cumulative effect” of the use within an institution, a class term, and an educator’s career. The guidelines also quantifiably limited the amount of material that could be excerpted and copied, and prohibited the production of unlicensed anthologies, because they might compete with published collections. The parties’ introductory letter declared, “The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use.”

The letter was included in the legislative history of the Copyright Act. It did not appear in the final text of the bill.

The Copyright Clearance Center (CCC), a licensing service that partly funded the suit against GSU, suggests the guidelines “may be helpful in determining Congress’s intent in interpreting fair use.” The guidelines, however, did not directly clarify or recapitulate the law. According to copyright scholar and librarian Kenneth Crews, “the Classroom Guidelines not only blatantly diverge from the four factors in the fair-use statute and replace them with three different mandates, but also add blanket prohibitions that cannot be overcome by any balancing of factors or equities.”

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1 In 1978, Commission on New Technological Uses of Copyrighted Works [CONTU] developed guidelines for libraries to interpret Section 108 of the Copyright Act, involving copies for interlibrary loan. These guidelines did not address the doctrine of fair use, but were significant in the history of copyright law and theory. CONTU took cues from the Classroom Guidelines by quantifying the bounds of acceptable practices. Nonetheless, CONTU produced the first guidelines based in legal precedent (Williams & Wilkins Co. v. United States) and the only guidelines drafted by Congressional commission rather than copyright stakeholders. See Kenneth D. Crews, “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” Ohio State Law Journal 62 no. 2 (2001). Another set of guidelines, the American Library Association’s Model Policy Concerning College and University Photocopying for Classroom, Research and Library Reserve Use, was released in 1982. The guidelines permitted libraries to photocopy full articles, book chapters, or poems for reserve, and suggested that permission be sought for most anthologies, “consumable works,” and materials used over multiple courses or years. However, this policy never gained institutional footing, and the ALA has since abandoned its policy. See Expert Report of Kenneth D. Crews, J.D., Ph.D. (Exhibit B of Filing 104) at 23, Cambridge University Press v. Becker, 863 F.Supp.2d 1190 (N.D. Ga. 2012) (No. 1:08-CV-1425-ODE), http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/104/1.pdf.

2 The Copyright Clearance Center holds not-for-profit status in the State of New York; however, its federal 501(c)(3) income tax exemption was revoked in 1982. See Copyright Clearance Center v. Commissioner, 79 T.C. 793 (1982).
Vaidhyanathan notes, “[In the Copyright Act of 1976] Congress did not exempt ‘portions of copies for classroom use.’ It did not exempt ‘one-time, minimal numbers of copies for classroom use.’ It did not exempt ‘1,000 words for classroom use.’ It exempted ‘multiple copies for classroom use.’”

It was this discrepancy—between the Classroom Guidelines and Section 107 of the Copyright Act—that would unravel in the courtroom for decades to come.

**Guidelines Rule in Copyright Suits**

The influence of the Classroom Guidelines in the courtroom first surfaced in 1978. In *Encyclopedia Britannica v. Crooks*, the court deemed that the defendant, a public school cooperative in New York, could not copy or distribute entire audiovisual works to its member institutions, because such activity affected the primary market for those works. The court invoked the Classroom Guidelines’ language of “spontaneity” and “cumulative effect,” even though the infringement did not involve photocopies and occurred before the Classroom Guidelines were written.iii

*Marcus v. Rowley* (1983) was the first case to directly address the Classroom Guidelines.25 Eloise Marcus, the plaintiff, was an adult-education instructor who wrote a course booklet on cake decorating; Shirley Rowley, the defendant, was Marcus’s student. Rowley began teaching her own classes, and directly copied pages from Marcus’ booklet without attribution.26 Although a district court favored Rowley, upon appeal Rowley’s use was deemed an infringement. The court used the Classroom Guidelines to reinforce its fair use analysis rather than to primarily inform its ruling;27 nonetheless, in doing so the court held the defendant accountable to the Classroom Guidelines.iv The Classroom Guidelines had become legally authoritative.

**Coursepack Crackdown: Publishers Assert Their Rights**


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iii The court did not refer to an arguably more relevant agreement, the Off-Air Guidelines for videotaping published in 1977.

iv The ruling also erroneously suggested that Congress “approved” the Guidelines. Marcus v. Rowley, 695 F.2nd 1171, 1178 (9th Circuit, 1983).
save students the hassle of jockeying for access to reserve copies. Neither the schools nor the copy shops paid permissions for these materials. The copy shops, however, were turning a profit on these educational orders. Profitable uses typically weighed against the first factor, regarding the “purpose and character” of the use, but the use in this case was also educational.

Because the non-profit purpose was questionable, the defendants folded quickly, with both cases settling out of court. Under the settled terms, the copy shops would need to seek permission from the copyright holders unless the coursepack materials complied with the Classroom Guidelines.

Soon after, publishers took their complaints directly to the universities. In 1983, Addison-Wesley and eight other publishers filed suit against New York University [NYU], nine NYU faculty members, and Unique Copy Center. The publishers agreed to drop their claims if NYU instituted a new copyright policy, outlining photocopying practices that did not require express permission from copyright holders. The policy resembled the Classroom Guidelines, but lacked the introductory language about minimum standards. In light of earlier court decisions, the university too decided to settle out of court. For the first time, the Classroom Guidelines represented the maximum limit of fair use.

Soon, other universities adopted similar copyright policies,\(^2\) to publicly demonstrate a good faith commitment to fair use.\(^3\) With just one case, the “minimum standard” of fair use had become the gold standard in higher education.

Basic Books v. Kinko’s (1991) confirmed the fears that had pushed other copy shops to settle.\(^4\) Kinko’s, like Gnomon and Tyco, printed coursepacks without obtaining copyright permissions; Kinko’s postured itself as an agent of a non-profit institution to invoke the fair use doctrine.\(^5\) Nonetheless, the court found that Kinko’s infringed copyright according to the four factors in Section 107, particularly because Kinko’s did not demonstrate a “good faith” effort to understand and respect copyright law.\(^6\) Afterwards, the court examined the Classroom Guidelines—not to confirm the court’s opinion, but to question the applicability of the

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\(^1\) American Geophysical Union v. Texaco (1994), a copyright infringement suit against a for-profit corporation, also chilled fair use copying in the 1990s. A scientist at Texaco had photocopied articles from dozens of journals, in an “institutional, systematic” way. The court deemed that although Texaco was unlikely to purchase subscriptions to the journals in question, it could have purchased licenses. Said the court, “our opinion does not decide the case that would arise if Chickering [the copier] were a professor or an independent scientist engaged in copying and creating files of independent research.” 60 F.3d 916, 35 U.S.P.Q. 2d (BNA) (2nd Cir. 1994).

\(^2\) Six years prior, in 1985, the Supreme Court articulated the meaning of for-profit use. “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” Harper & Row v. Nation Enterprises 471 U.S. 539, 562 (1985).

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guidelines. Although the Classroom Guidelines, in this case, did uphold the court’s understanding of fair use, the court resisted the blanket prohibition on anthologies in the Classroom Guidelines.\textsuperscript{31} The court also refused to endorse the Classroom Guidelines as the infallible, “bright-line” delineator between fair and unfair use.

After Kinko’s, infringement warnings from publishers took on precise conceptions of unfair use. One letter, from the Association of American Publishers, asked a Maryland copy shop to “cease and desist from copying, without permission, multipage excerpts of copyrighted works for sale to students.”\textsuperscript{32}

Five years later, another case affirmed the Kinko’s decision, albeit with dissent among the judges. Princeton University Press v. Michigan Document Service (1996) found that the commercial copying of university coursepacks did not constitute fair use. The court called the Guidelines a “safe harbor,” but one dissenting judge cautioned against citing the Guidelines, which only appeared in the legislative history of the bill: “legislative history is irrelevant and inappropriate to consider except to clarify ambiguity in the text of a statute.”\textsuperscript{33}

In reality, these rulings provided users neither safe harbors nor definitive standards of fair use.\textsuperscript{vii} Crews explains, “Until the prospective plaintiffs—particularly the commercial publishers and authors—unequivocally give the guidelines an identity as a zone of safety, the guidelines may never attain the degree of assurance necessary to attract broad-based consensus for the standards.” At that time, NYU had been the only non-profit defendant in a photocopying case, leaving no doubt as to the purpose of its uses, and had backed out before facing the court of law.

Unable to bring litigation against rightsholders, educators would always be the defendants in copyright suits. Only a sympathetic court could advance the law in the educators’ favor.

**The Rise of E-Reserves: Educators’ New Tool**

While the copy shop cases barreled through the university landscape, razing coursepack practices, a new technology for disseminating course materials bloomed: electronic reserves, or e-reserves.

Libraries began scanning print resources into digital files during the 1980s, to facilitate access to materials and reduce damage, loss, and the need for storage space.\textsuperscript{34} Professors took advantage of these digital collections for their course websites, directing students to electronic versions of copyrighted course materials as well as works that did not require

\textsuperscript{vii} Crews notes that guidelines are neither agreements not to sue nor agreements between parties, because they are non-binding and attempt to address the actions of outside parties. See Crews, “The Law of Fair Use,” 674-677.
copyright permission, such as links to databases that generate traffic to the original source, materials licensed through Creative Commons, statutes and court decisions, and photographed or photocopied ephemera. As of 1999, over half of libraries in the Association of Research Libraries had e-reserves, and most others were developing them.

Because Section 107 addressed physical reproduction and distribution, the application of fair use to e-reserves was unclear. The sale of a copy did not apply to digital formats, which could be easily transmitted and virtually reproduced. Some licenses for electronic resources included the permission to use them in e-reserves. Digitizing a physical copyrighted work required making a single copy of a work that was previously purchased; according to Section 107 and the Classroom Guidelines, this is ostensibly a non-infringing act. Some educators argued that an e-reserve reading list was not analogous to a coursepack or “digital anthology,” because the reserves were intended to virtually replicate the library reserve shelves, not to permanently aggregate materials in a particular order. The fair use policies of many institutions expressly prohibited digitizing coursepacks for e-reserves.

Still, the dawn of this technology begged for best practices. Without the proper controls, digital “copies” could be distributed widely, and the rightsholders might never know.

**The Conference on Fair Use: Failure to Compromise**

In 1994, sensing the uncertainty that technology had brought to existing copyright law, President Clinton’s Working Group on Intellectual Property Rights in the Electronic Environment set out to clarify fair use of electronic materials for nonprofit educational use. The resulting Conference on Fair Use [CONFU] addressed five areas: distance learning, multimedia, electronic reserves, interlibrary loan, and image collections. A representative from the U.S. Patent and Trademark Office presided over the meetings; publishers, educational organizations, and library associations were among the attendees.

Beginning in September 1994, the conference met nearly every month, but a status report from the fall of 1995 suggested that the negotiations had been temporarily tabled and no agreement had been reached. Crews, who participated in CONFU, reported that the electronic reserves group could not “draft a formal statement identifying issues that remained unresolved, or even... issue a statement indicating that agreement was not possible at that time.” Publishers refused to approve full articles or book chapters for e-reserves, a sticking point for librarians and educators.

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viii Creative Commons offers copyright “licenses [that] let you easily change your copyright terms from the default of ‘all rights reserved’ to ‘some rights reserved,’ so that others can “share and use [the copyright holder’s] creative work.” See http://creativecommons.org/about.
Following this hiatus, a subset of the electronic reserves group, largely comprised of academics, librarians, and scholarly publishers, continued their own policy talks. Only three months later, the subgroup proposed e-reserves guidelines. According to the proposal, e-reserves:

- could include short works or excerpts of long works;
- “should not include any material unless the instructor, the library, or another unit of the educational institution possesses a lawfully obtained copy”;
- required copyright notices and proper citations;
- could not directly cost students money to use;
- could not, under fair use provisions, upload coursepacks, for which permissions are typically secured;
- could only include a fraction of course materials under fair use provisions; and
- required copyright permission for materials “to be reused in a subsequent academic term for the same course offered by the same instructor.”

These developments gained the support of the Association of American University Presses and other organizations, but ostracized two major groups: the Association of American Publishers and the Association of Research Libraries. According to the ALA, “library and higher education associations did not endorse the CONFU discussions because the draft e-reserves guidelines were both highly proscriptive and did not provide the necessary flexibility characteristic of fair use.” When CONFU resumed in early 1996, proposed revisions to the e-reserves policy frustrated initial supporters. By May 1996, the electronic reserves group was the first to report a stalemate.

In 1997, final guideline proposals for multimedia, digital images, and distance learning were offered up for public comment. Publishers largely assented; libraries and educational institutions largely did not.

CONFU’s Final Report, issued in November 1998, stated: “While acknowledging that some institutions may feel free to adopt and implement them, it was decided at the CONFU session on November 25, 1996, that the proffered guidelines for electronic reserve systems would not be disseminated as a formal work product of CONFU.” In the end, the other CONFU subgroups met the same fate.

**New Guidelines Emerge: E-Reserves under Fire**
In the absence of national guidelines, Crews pioneered a fair use checklist at Indiana University in 1997, offering an easy way for institutions to document and standardize fair use analysis. Universities nationwide readily adopted their own versions. However, according to Kevin Smith, Director of Copyright and Scholarly Communication at Duke University, checklists were not the easy solution they appeared to be. Misused, checklists stood to discourage active reasoning and distort the fair use factors to one's favor.

Meanwhile, publishers still pushed for consensus. In 2006, Cornell and the Association of American Publishers reached an e-reserves agreement that held print and electronic resources to the same standards of copyright permission and that discouraged scanning new digital copies when legal versions were already available on the web.

Peter Givler, former Executive Director of the Association of American University Presses, rejoiced:

Hooray for Cornell and the publishers! This is a wonderful example of what can be accomplished when people who disagree agree to listen to each other and talk it out. As for the guidelines themselves, they’re built on a brilliantly simple principle: if you would have had to clear permission to use copyrighted work in the world of printed coursepacks, you need to clear permission to use it in the new world of electronic reserves and course management systems. That’s logical, it’s easy to understand, and it clarifies a basic rule of the road for everybody... [The Cornell guidelines] should be the national standard.

Cornell librarian Sarah Thomas had a different take. The guidelines were made, said Thomas, “in response to a complaint from the Association of American Publishers alleging copyright infringement.” Since the 2006 policy change, Cornell saw a 70% decline in the use of its e-reserves.

In 2008, Hofstra, Marquette, and Syracuse also reached similar agreements with the AAP, with one institution anonymously reporting that it agreed under duress. Over time, Syracuse saw a 54% drop in e-reserves requests and a 35% drop in the number of faculty using e-reserves. Eventually, Syracuse Libraries abandoned electronic reserves services altogether, suggesting instead that faculty link to pre-existing online content or scan their own print resources.

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By 2008, it seemed every university had its own policy on fair use in e-reserves. Some institutions restricted by the percentage of a given work; others by chapters or articles; still others by interpreting the fair use factors. All used different quantitative limits.59

**Fair Use at GSU**

The Georgia State University e-reserves (ERes) policy reflected standards of the University System of Georgia, outlined in 1997 in “The Regents Guide to Understanding Copyright and Educational Fair Use.” The guide discounted the Classroom Guidelines as extralegal and Kinko’s and MDS as concerning commercial uses. The guide ascertained principles of fair use from Section 107, among them the following: “The location of the line between fair use and infringing use is determined by the market factor, that is, the extent to which the copy becomes a substitute for the purchase of the work.... One who copies—or makes another use of—a work for a non-market purpose (such as teaching, scholarship, or research) uses the work; one who copies—or makes another of us—a work for the market uses the copyright.”60

“Since the method of distribution is not one of the statutory factors,” the guide adds, “it follows that the distribution of material by electronic rather than print media is not the decisive issue [in determining fair use].”61

The Regents guide advises on two scenarios regarding electronic course materials: first, that it is fair to post a book chapter “if access to the system is limited to students enrolled in the class”; second, that fair use analysis must be performed if a book chapter, still in print and “readily available,” is used in multiple terms.62

In 2009, Georgia State budgeted $11 million for its library system, $4 million of which was used to license electronic materials and journals (see Exhibit 3 for additional financial statistics).63 Georgia State paid permissions fees for all printed coursepacks, “even though copying and distribution of any individual excerpt in a given course may, outside of the printed coursepack environment, constitute a fair use.”64 E-reserves, however, were not automatically licensed as a rule.

The current situation came about when the publishers were able to access ERes without a password and saw how GSU used copyrighted works.65 Over the years, the CCC and AAP sent GSU multiple cease-and-desist notifications, but GSU did not change its fair use policies. Later on, GSU’s e-reserves were password-protected, “the effect of which,” said the publishers, “was to stymie the publishers’ ability to continue viewing... the massive infringement.”66

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A Decisive Battle? The Stakes of the GSU Case

Cambridge and Oxford University Presses, along with the for-profit SAGE Publications, realized that only in the courtroom could GSU’s policy be changed. The resulting copyright infringement suit, funded in part by the Copyright Clearance Center and the Association of American Publishers, named as defendants four administrators in their official capacities; the university itself, as a state institution, was sheltered from federal suit under the doctrine of sovereign immunity.

The Plaintiffs alleged that GSU engaged in “systematic, widespread, and unauthorized copying and distribution” of 6,700 works on electronic reserve and had, in most cases, failed to pay the “customary licensing fees due to copyright holders under well-established judicial authority.” The ERes system, described by the Plaintiffs as a “digital coursepack,” was “directly substituting both for student purchases of copyrighted books and for paper ‘coursepacks’… the copying of which occurs pursuant to licenses obtained by bookstores and copy shops according to long-settled copyright law.” The Plaintiffs sought injunctive relief, and asked the court to consider the Classroom Guidelines’ brevity and cumulative effect tests as the maximum limit of fair use. See Exhibit 4 for excerpts of the Complaint.

Frank Smith of Cambridge University Press estimated that the company’s profit margin ranged from 2 to 5 percent, and that permissions fees accounted for “roughly 3 to 5 percent” of revenues—a correlation that could tip the scales between profit and loss if permissions revenue vanished. Yet financial reports entered into the court record state that permissions fees accounted for nine-tenths of a percent of the Plaintiffs’ revenues. Academic book and journal permissions accounted for less than one-quarter of one percent of revenues. See Exhibit 5 for publisher-plaintiff financial statistics.

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xi The case was originally filed as Cambridge University Press et al. v. Patton; when Mark P. Becker assumed the presidency of GSU in 2009, the case became known as Cambridge University Press et al. v. Becker.

xii Carl V. Patton, President of GSU; Ron Henry, Provost; Charlene Hurt, Dean of Libraries; and J.L. Albert, Associate Provost for Information Services and Technology and Chief Information Officer.

xiii The Eleventh Amendment to the U.S. Constitution upholds the principle of state sovereign immunity: because states retain their sovereignty that preceded the ratification of the Constitution, “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The ex parte Young doctrine is an exception to state sovereign immunity, permitting lawsuits against officials that act “on behalf of a state when they are alleged to be in violation of federal laws and constitutional guarantees.” Kathleen Poe Ross, “The Precedent,” Georgia State University Magazine, September 2012, accessed July 1, 2014, http://magazine.gsu.edu/2012/09/precedent/.

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The solution for GSU, said the publisher-plaintiffs, was licensing. Licenses amount to rented copies with potential restrictions on use: the first sale doctrine does not automatically apply, and institutions must bear the costs and administrative burdens of paying per user.70

The Copyright Clearance Center estimated that Georgia State could implement an annual licensing program for “$114,000 per year plus a 20% start up fee to subscribe”; alternatively, the CCC offered licenses on a pay-per-use basis, some of which were “pre-cleared” to grant permission automatically. However, the Annual Academic Copyright License was far from a panacea: the program did not offer licenses from every publisher, and did not account for potential fair uses.71 Barbara Fister, academic librarian at Gustavus Adolphus College, said, “I worry that... fear of lawsuits like this... will result in institutions paying for uses that should not cost anything.”72

Some institutions had already found licensing costs to be extremely high. For instance, Duke University paid “$12 per student to gain access to less than a fifth of a work that sells for $35 retail.”73 Pennsylvania State University found that permissions fees averaged $3.00 per student per reading, “resulting in potentially hundreds of dollars in royalty fees per student each semester”74 that the institution would not have incurred had the student photocopied the print reserve material.

When libraries and departments cannot afford licensing fees, said Crews, “the students do not get the benefit of the materials, and the copyright owners do not get any revenue at all from this possible use of the works.”75

Crews concluded, “Because the CCC does not offer licenses for all works, cannot license electronic uses of many works, and because its fixed prices often exceed budgets, the CCC cannot be viewed as the solution for all copyright needs of E-Reserves.”76

However, Kate Douglas Torrey, Director of the University of North Carolina Press, considered this stance a loophole, intellectually flawed. “It is important to note that Georgia State pays permissions to use copyrighted material in traditional course packs, and that other universities pay for digital use,” said Douglas Torrey. “So what does Georgia State claim is different? The purpose is the same: education. The permissions mechanism is the same... The only difference is format—educational material delivered online instead of on paper. In essence, Georgia State claims that this difference constitutes fair use.”77

But Kevin Smith warned, “If the publishers who brought the case succeed in getting something close to the proposed injunction they have requested, there will be catastrophic consequences. Either higher education will get much more expensive, or options for exposing students to diverse materials will become extremely limited.”78
Smith speculated that the publishers too would suffer losses. “That money [for e-reserves permissions] will come out of most libraries’ collection funds, so there will be less money available to buy new monographs. That undoubted fact will disproportionately harm university presses, many of which depend on publishing specialized monographs, which will be the first things cut (as they usually are).”

Ultimately, Smith presaged the fall of the academic publishing model:

For a great many years, scholars have given the works they produce to academic publishers, without remuneration, in the belief that the scholarly-communication system was mutually beneficial. Authors receive benefits for their work from their universities and participate in a system in which all the financial gain is reaped by publishers, because the authors assume that all parties are working for the advancement of scholarship and education... If those [educational] uses become impossible or exponentially more expensive, which today is the same thing, academic authors will need to reconsider whether they are receiving sufficient benefits for the free labor they contribute to scholarly publishing.

To Nancy Sims, copyright librarian at the University of Minnesota, the system was already doomed: “If the court were to impose this injunction on Georgia State, you can bet that publishers would bring lawsuits against other universities, colleges, and educational institutions pointing to the Georgia State decision as precedent. But even if ... this injunction is never granted, the simple fact that it was requested, by academic publishers, is a graphic indication that these particular publishers and the Copyright Clearance Center are in no way interested in fostering research, teaching, and scholarship.”

**Deal or No Deal?**

As Heyward and her colleagues prepared to respond to the initial complaint, Heyward received notice of a settlement offer, off the record. It looked much like the Classroom Guidelines, albeit without the preface about minimum limits of fair use. (See Exhibit 6 for the offer in full.)

Heyward had two options: settle and arrange to license ERes materials, or contest the suit in court. Either option would drain the university’s coffers; the latter would injure its dignity. She considered whether her team—three associate general counsels, three assistant general counsels, a paralegal, and an administrative coordinator—could handle the task.

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xv This hypothetical settlement offer is adapted for educational purposes from the proposed injunctive order of May 11, 2011. Public record does not indicate any settlement terms offered to GSU.
Would the tide of publisher litigation ever change? Would GSU be the ones to do it?
Exhibit 1: Section 107 of the Copyright Act of 1976

7 U.S. Code § 107 - Limitations on exclusive rights: Fair use

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

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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

Exhibit 2: Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to books and periodicals

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under § 107 of H.R. 2233. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in § 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

Guidelines

I. Single Copying for Teachers

A single copy of the following items may be made for a teacher's scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book.

B. An article from a periodical or newspaper.

C. A short story, short essay or short poem, whether or not from a collective work.

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed more than one copy per pupil in a course) may be made by or for a teacher giving a course for classroom use or discussion, provided that:

A. The copying meets the tests of brevity and spontaneity as defined below and,

B. Meets the cumulative effect test as defined below and,

C. Each copy includes a notice of copyright.
Exhibit 2 (cont.): Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to books and periodicals

Definitions

Brevity

1. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) an excerpt of not more than 250 words from a longer poem.

2. Prose: (a) Either a complete article, story or essay of less than 2,500 words or (b) an excerpt from any prose work provided the excerpt is not more than 1,000 words or 10% of the work, whichever is less, and a minimum of 500 words. (Each of the numerical limits stated in “I” and “ii” above may be expanded to permit the completion of an unfinished line of a poem or an unfinished prose paragraph.)

3. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

4. “Special” works: Certain works in poetry, prose or “poetic prose” which often combine language with illustrations and are intended for children and/or a more general audience fall short of 2,500 words in length. Such “special works” may not be reproduced in their entirety. However, an excerpt comprising not more than two of the published pages and not more than 10% of the words found in the text may be reproduced.

Spontaneity

1. The copying is at the instance and inspiration of the individual teacher, and

2. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

1. The copying of the material is for only one course in the school in which the copies are made.
2. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

3. There shall not be more than nine instances of such multiple copying for one course during one class term.

Exhibit 2 (cont.): Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to books and periodicals

(The limitations stated in “ii” and “iii” above shall not apply to current news periodicals, newspapers and current news sections of other periodicals.)

III.  

Prohibitions as to I and II above

A. Copying shall not be used to create, replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or are reproduced and used separately.

B. There shall be no copying of or from works intended to be “consumable” in the course of study or teaching – such as workbooks, exercises, standardized tests, test booklets and answer sheets.

C. Copying shall not:

a. substitute for the purchase of books, publisher’s reprints or periodicals;

b. be directed by higher authority;

c. be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed March 19, 1976.
Ad Hoc Committee on Copyright Law Revision:
   By Sheldon Elliott Steinbach.
Author-Publisher Group:
Authors League of America:
   By Irwin Karp, Counsel.

What’s Fair about Fair Use? The Battle Over E-Reserves at GSU (A)

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Association of American Publishers, Inc.:
By Alexander C. Hoffman,
Chairman, Copyright Committee.

Exhibit 3: Financial Statistics, Georgia State University
### Georgia State University
#### Summary of Functions by Fund Source
#### Original Budget
#### Fiscal Year 2009

<table>
<thead>
<tr>
<th>Function</th>
<th>General Operations</th>
<th>Research Consortium</th>
<th>Special Funding Initiatives</th>
<th>Departmental Sales &amp; Services</th>
<th>Sponsored Operations</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instruction</td>
<td>$ 166,667,877</td>
<td>$ 184,929</td>
<td>$ -</td>
<td>$ 9,791,564</td>
<td>$ 4,392,878</td>
<td>$ 181,037,248</td>
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<tr>
<td>Research</td>
<td>$ 53,287,195</td>
<td>$ 16,354,132</td>
<td>$ 151,589</td>
<td>$ 545,135</td>
<td>$ 76,556,287</td>
<td>$ 146,894,338</td>
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<td>Public Service</td>
<td>$ 1,737,272</td>
<td>$ 16,087,799</td>
<td>$ -</td>
<td>$ 1,215,000</td>
<td>$ 12,542,718</td>
<td>$ 31,582,789</td>
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<tr>
<td>Academic Support</td>
<td>$ 61,733,910</td>
<td>$ -</td>
<td>$ -</td>
<td>$ 6,979,366</td>
<td>$ 151,896</td>
<td>$ 68,865,172</td>
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<tr>
<td>Student Services</td>
<td>$ 20,170,141</td>
<td>$ -</td>
<td>$ -</td>
<td>$ 225,595</td>
<td>$ 41,114</td>
<td>$ 20,436,850</td>
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<td>Institutional Support</td>
<td>$ 27,076,951</td>
<td>$ -</td>
<td>$ -</td>
<td>$ 212,604</td>
<td>$ 1,365,107</td>
<td>$ 28,654,662</td>
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<tr>
<td>Operation and Maintenance of Plant</td>
<td>$ 53,216,623</td>
<td>$ -</td>
<td>$ -</td>
<td>$ 1,030,736</td>
<td>$ -</td>
<td>$ 54,247,359</td>
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<tr>
<td>Scholarships and Fellowships</td>
<td>$ -</td>
<td>$ -</td>
<td>$ -</td>
<td>$ -</td>
<td>$ 9,950,000</td>
<td>$ 9,950,000</td>
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<tr>
<td><strong>Sub-Total</strong></td>
<td><strong>$ 383,889,969</strong></td>
<td><strong>$ 32,626,860</strong></td>
<td><strong>$ 151,589</strong></td>
<td><strong>$ 20,000,000</strong></td>
<td><strong>$ 105,000,000</strong></td>
<td><strong>$ 541,668,418</strong></td>
</tr>
<tr>
<td>Unassigned Balance (If applicable)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Lapse Estimate (If applicable)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total Budget</strong></td>
<td><strong>$ 383,889,969</strong></td>
<td><strong>$ 32,626,860</strong></td>
<td><strong>$ 151,589</strong></td>
<td><strong>$ 20,000,000</strong></td>
<td><strong>$ 105,000,000</strong></td>
<td><strong>$ 541,668,418</strong></td>
</tr>
</tbody>
</table>
Exhibit 3 (cont.): Financial Statistics, Georgia State University

Library: FY 2009 Budget Allocations

<table>
<thead>
<tr>
<th>Category</th>
<th>Amount</th>
</tr>
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<tbody>
<tr>
<td>Acquisitions</td>
<td>$4,427,065</td>
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<tr>
<td>Personal Services</td>
<td>$5,454,811</td>
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<td>Operations</td>
<td>$476,192</td>
</tr>
<tr>
<td>Total</td>
<td>$10,358,068</td>
</tr>
</tbody>
</table>

Price Trends in Periodical Subscriptions

2010  Increase of ~4.4%*
2009  Increase of ~7.6%**
2008  Increase of ~9-10%
2007  Increase of ~7.8%
2006  Increase of ~7.8%
2005  Increase of ~8%
2004  Increase of ~9%
2003  Increase of ~8%
2002  Increase of ~8%
2001  Increase of ~9%

* The FY10 increase appears to be low for college and university libraries. The authors acknowledge that their data are limited to prepriced print titles as of January 2010. The projections were for higher increases, particularly for titles not billed in U.S. dollars.

** Periodical subscriptions accounted for 67% of state materials budget for GSU Library.
### Exhibit 3 (cont.): Financial Statistics, Georgia State University

National Center for Education Statistics (NCES) Per Capita Library Expenditures for Selected Association of Southeastern Research Libraries (ASERL) Members: Fiscal Year 2008

<table>
<thead>
<tr>
<th>Institution</th>
<th>Per Capita Expenditures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vanderbilt University</td>
<td>2,386.60</td>
</tr>
<tr>
<td>Duke University</td>
<td>2,294.02</td>
</tr>
<tr>
<td>Emory University</td>
<td>2,200.24</td>
</tr>
<tr>
<td>Wake Forest University</td>
<td>1,893.24</td>
</tr>
<tr>
<td>University of Miami</td>
<td>1,823.29</td>
</tr>
<tr>
<td>University of North Carolina at Chapel Hill</td>
<td>1,668.77</td>
</tr>
<tr>
<td>University of Virginia</td>
<td>1,507.25</td>
</tr>
<tr>
<td>Tulane University</td>
<td>1,304.22</td>
</tr>
<tr>
<td>College of William and Mary</td>
<td>1,284.54</td>
</tr>
<tr>
<td>University of Louisville</td>
<td>1,124.07</td>
</tr>
<tr>
<td>University of Kentucky</td>
<td>926.19</td>
</tr>
<tr>
<td>North Carolina State University</td>
<td>900.73</td>
</tr>
<tr>
<td>East Carolina University</td>
<td>880.91</td>
</tr>
<tr>
<td>University of Tennessee-Knoxville</td>
<td>852.41</td>
</tr>
<tr>
<td>University of South Carolina</td>
<td>807.50</td>
</tr>
<tr>
<td>University of North Carolina at Greensboro</td>
<td>797.25</td>
</tr>
<tr>
<td>University of Alabama – Birmingham</td>
<td>775.19</td>
</tr>
<tr>
<td>Mississippi State University</td>
<td>765.76</td>
</tr>
<tr>
<td>University of Georgia</td>
<td>739.17</td>
</tr>
<tr>
<td>University of Alabama</td>
<td>723.66</td>
</tr>
<tr>
<td>Clemson University</td>
<td>711.82</td>
</tr>
<tr>
<td>George Mason University</td>
<td>696.23</td>
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<tr>
<td>University of Mississippi</td>
<td>691.87</td>
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<tr>
<td><strong>Georgia Institute of Technology</strong></td>
<td><strong>663.43</strong></td>
</tr>
<tr>
<td>Florida State University</td>
<td>638.33</td>
</tr>
<tr>
<td>Virginia Commonwealth University</td>
<td>569.77</td>
</tr>
</tbody>
</table>


*What's Fair about Fair Use? The Battle Over E-Reserves at GSU (A)*

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Exhibit 4: Complaint, excerpted

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

CAMBRIDGE UNIVERSITY PRESS,
OXFORD UNIVERSITY PRESS, INC.,
and SAGE PUBLICATIONS, INC.,

Plaintiffs,

- vs. -

CARL V. PATTON, in his official
capacity as Georgia State University
President, RON HENRY, in his official
capacity as Georgia State University
Provost, CHARLENE HURT, in her
official capacity as Georgia State
University Dean of Libraries, and J.L.
ALBERT, in his official capacity as
Georgia State University Associate
Provost for Information Systems and
Technology.

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

Plaintiffs Cambridge University Press, Oxford University Press, Inc.,
and SAGE Publications, Inc. (collectively, “Plaintiffs”), by and through their

What’s Fair about Fair Use? The Battle Over E-Reserves at GSU (A)
attorneys, Weil, Gotshal & Manges LLP, and Bondurant, Mixson, & Elmore, LLP, for their complaint, allege, on information and belief, the following against defendants Carl V. Patton, in his official capacity as Georgia State University President, Ron Henry, in his official capacity as Georgia State University Provost, Charlene Hurt, in her official capacity as Georgia State University Dean of Libraries, and J.L. Albert, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology (collectively, “Georgia State,” “the University,” or “Defendants”):

**NATURE OF THIS ACTION**

1. This action for declaratory and injunctive relief arises from Georgia State’s systematic, widespread, and unauthorized copying and distribution of a vast amount of copyrighted works, including those owned or controlled by Plaintiffs, through a variety of online systems and outlets utilized and hosted by the University for the digital distribution of course reading material. Georgia State has facilitated, enabled, encouraged, and induced Georgia State professors to upload and post to these systems – and Georgia State students simultaneously to download, view, print, copy, and distribute – many, if not all, of the assigned readings for a particular course without limitation,
Exhibit 4 (cont.): Complaint, excerpted
without oversight, and without the requisite authorization and appropriate compensation to the copyright owners of such materials.

2. The unauthorized digital distribution of copyrighted course readings at Georgia State is pervasive, flagrant, and ongoing. It has continued unabated in the face of notice and repeated attempts by Plaintiffs to reach an amicable and mutually acceptable solution without the need for litigation. All such efforts have been flatly rebuffed by Georgia State, which continues to offer digitized course offerings through the Georgia State Library electronic course reserves service, through Georgia State’s Blackboard/WebCT Vista electronic course management system, and through Georgia State departmental web pages and hyperlinked online syllabi available on websites and computer servers controlled by Georgia State. By digitally distributing course reading materials – often in compilations of digital excerpts containing an entire semester’s worth of reading – Georgia State provides its students (and until recently, the general public) the ability to view, download, and print without authorization a number and range of copyrighted works that vastly exceeds the amount and type of copying that might credibly be justified as fair use in an educational setting.

3. With the University’s encouragement, hundreds of professors employed by Georgia State have compiled thousands of copyrighted works,
Exhibit 4 (cont.): Complaint, excerpted

made them available for electronic distribution, and invited students to
download, view, and print such materials without permission from the copyright
owners. As of February 19, 2008, the Georgia State Library’s electronic course
reserves system listed over 6700 total works available for some 600-plus
courses. Upon information and belief, much (and likely most) of this extensive
copying and distribution has been performed without authorization of the
hundreds of publishers whose materials are present on the system (and certainly
without the permission of Plaintiffs in this action), and thus without payment of
the customary licensing fees due to copyright holders under well-established
judicial authority.

4. Georgia State’s ongoing unauthorized digital distribution of
Plaintiffs’ copyrighted materials is directly substituting both for student
purchases of copyrighted books and for paper “coursepacks” or “copy packs” –
collections of course-related readings assigned by professors and purchased by
students, the copying of which occurs pursuant to licenses obtained by
bookstores and copy shops according to long-settled copyright law (including
1381 (6th Cir. 1996)). Many Georgia State students are now able to obtain, with

What’s Fair about Fair Use? The Battle Over E-Reserves at GSU (A)
the encouragement of their professors and the University at large, unlicensed
digital compilations containing many of the required readings for a given course
without setting foot in a bookstore or expending a single cent on the copyrighted
materials that lie at the heart of the educational experience. Those students could
easily obtain the same copyrighted materials for use in their courses, either
through purchase of the original works or by the University’s utilization of
existing permissions and licensing systems designed to fairly and efficiently
compensate copyright owners for licensed excerpts of their works.

5. Unless Georgia State’s infringing digital distribution practices
are enjoined, Plaintiffs, authors, and the publishing community at large will
continue to face a certain, substantial, and continuing threat of loss of revenue,
which will in turn threaten Plaintiffs’ incentive to continue supporting and
publishing the cutting-edge scholarship upon which the academic enterprise
depends. Requiring the payment of permission fees in the context of the
practices described will not jeopardize legitimate exercises of fair use, which
Plaintiffs acknowledge and respect, or prevent Georgia State or its students from
accessing or benefiting from publishers’ works; to the contrary, it will in fact
ensure that those works continue to be produced and available to current and
future generations of students.
Georgia State’s Digital Distribution of Course Reading Materials

20. On information and belief, over numerous academic terms, hundreds of faculty employed by Georgia State have afforded their students access to copies of thousands of articles, book chapters and other copyrighted works through Georgia State’s electronic course reserves listings. Each of these

Exhibit 4 (cont.): Complaint, excerpted
copied works is available to students for downloading, viewing, and printing. Many such works remain on the library's system and are offered to students semester after semester.

21. A search of the Georgia State Library system conducted by Plaintiffs during the spring 2008 semester revealed over 6700 total works available. Although some of these listings identify traditional hard-copy reserve materials, the vast majority provide direct access to electronic excerpts. Plaintiffs believe that the volume of digital distribution at Georgia State significantly exceeds the amount of material that Plaintiffs have been able to review to date.

22. Many Georgia State courses utilizing Georgia State’s digital distribution capabilities provide students with copies of copyrighted works (each available for downloading, viewing and printing) owned or controlled by Plaintiffs in this action, but as to which no permission for such activities has been obtained. In many cases, the distributed excerpts constitute the very heart of the work at issue. And in many instances, these excerpts are compiled together with numerous other readings to create for students a “digital coursepack” not unlike the collections and anthologies offered for sale by the Plaintiffs themselves or the hard-copy coursepacks students once would have
Exhibit 4 (cont.): Complaint, excerpted

purchased at the campus bookstore or copy center. For example, students in the Spring 2007 term of Professor Belcher’s course “Qualitative Research” (AL8961) received, along with more than 20 other digital excerpts from other works, five unlicensed digital excerpts from the second edition of the Handbook of Qualitative Research, edited by Norman Denzin and Yvonna S. Lincoln and published by Plaintiff SAGE Publications. The SAGE Handbook excerpts included “Paradigmatic Controversies, Contradictions, and Emerging Confluences” (Ch. 6) by Yvonna S. Lincoln & Egon G. Guba, “Case Studies” (Ch. 16) by Robert Stake, “Ethnography and Ethnographic Representation” (Ch. 17) by Barbara Tedlock, “Grounded Theory: Objectivist and Constructivist Methods” (Ch. 19) by Kathy Charmaz, and “The Interview: From Structured Questions to Negotiated Text” (Ch. 24) by Andrea Fontana & James H. Frey – over 130 pages in total – all distributed without permission from or compensation to SAGE or the editors and authors.
28. Georgia State’s general copyright primer, entitled the “Regents Guide to Understanding Copyright & Educational Fair Use” and available at http://www.usg.edu/legal/copyright, affords “fair use” parameters – that is, guidelines as to allowable copying without permission – that plainly exceed legal boundaries. The same is true with respect to Georgia State’s copyright policy specifically governing the sharing of copyrighted works via the Library's electronic course reserves system, and via Georgia State’s use of digital distribution technologies more generally, which endorses the unlicensed copying of up to twenty percent of a work – a benchmark that would countenance unlicensed excerpts of dozens or even hundreds of pages from a given work.

29. The impermissibly wide berth afforded by Georgia State to individual takings from Plaintiffs’ and other publishers’ works is only exacerbated by systematic bundling and digital distribution of numerous works so copied into what is effectively an electronic compilation or anthology of readings for a given course. For example, students in the course “Social and Personality Development” (EPY8220), offered during the fall 2006 semester, were provided with more than 80 digital reading excerpts, a compilation of
material surpassing even the thickest coursepack or anthology. Students in the same course during the spring 2007 semester were given 72 electronic readings, while students in “Qualitative Research” (AL8961) received 34. Georgia State’s Regents Guide explicitly endorses this practice of anthologizing, in direct contravention of governing precedent.

30. What is more, Georgia State’s policies are not enforced. Georgia State’s electronic course reserves system contains numerous examples of works that violate even the University’s own lax policies, including many of the works identified in paragraphs 22 through 27 above.

The Electronic Course Reserves Functionality at Georgia State

31. The Georgia State University Libraries operate a central Internet website (at http://www.library.gsu.edu/) accessible to both Georgia State students and the general public. This site includes a hyperlink called “Course Reserves.” Clicking this link takes the website visitor to a new web page with prominent hyperlinks that visitors can click to “Search Reserves” or view an “Instructors Online Submission Form.” (See sample screen shots attached at Exhibit 2, pp. 1-2.) Clicking the “Search Reserves” link leads viewers to a web page headlined “ERes/electronic reserves system,” where visitors can search the Library database for course reserve listings. (See Exhibit 2, p. 3.)
Exhibit 4 (cont.): Complaint, excerpted

32. On the “ERes” page, visitors have several options for searching electronic reserve material. First, they can “Search for Course Reserve Pages” by entering search text, selecting from a dropdown menu one of several database fields within which to search (Course Number, Course Name, Section Number, Department, or Instructor), and clicking the “Search” button; the Library database then displays, on a new page, a list of courses that contain the entered search terms in the specified field(s). (See Exhibit 2, p. 4.) The Course Number for each entry in the search-results list is an active hyperlink; when clicked, the viewer is taken first to an interim copyright policy page (see Exhibit 2, p. 5), where the user must click an “accept” button before being delivered to the Course Reserves Page.

33. Course Reserves Pages (see Exhibit 3) include a list of all the electronic reserve readings for the particular course and (if used by the professor) hard-copy reserve materials and the location on campus where such materials are held. Each electronic reading listed on the Course Reserves Page contains a hyperlink; when one of these hyperlinks is clicked, Adobe Reader (a document viewing software program) is launched and the requested work is displayed for the user, in a new “browser window,” in portable document format (pdf). The work can be printed, saved to the user’s local computer, and further redistributed.
in printed form or through electronic transmission, even to people outside
Georgia State, thereby competing with the publisher's own sales to other people
as well.

34. When Plaintiffs first visited the Georgia State “ERes” website, no password was required to view the Course Reserves Pages described above. However, after Plaintiffs complained to Georgia State about its unlicensed activities on the website, Georgia State reacted by requiring students to enter a password on the copyright policy page before being delivered to the Course Reserves Page, the effect of which was to stymie the publishers’ ability to continue viewing, at a course-by-course level, the massive infringement of their own works taking place on the site. Despite this change, the system has remained open enough for Plaintiffs to identify the ongoing and systematic infringement identified in this complaint.

35. Students or other visitors to the Georgia State ERes website can also search for all Course Reserves Pages offered within a given department or taught by a given instructor (selected from dropdown menus), or by using keywords to search for specific documents (as described above) by author or title (see Exhibit 2, p. 3).
Exhibit 4 (cont.): Complaint, excerpted
36. Upon information and belief, the electronic reserve copies that are distributed to students in the manner described above are copied and digitized by either the professor, a person working under the professor’s direction, or a library staff member, and are stored on a Georgia State computer server with the Library’s knowledge and participation.

37. In addition to the course reserves system on the Georgia State University Library gateway, syllabi for various Georgia State courses are publicly available on web pages within the Georgia State University domain. Such syllabi contain reading lists with references to reading assignment materials stored on the library’s electronic course reserves listings, as described above. Some syllabi contain active hyperlinks which students can click to directly view and print unlicensed electronic versions of the reading materials stored on Georgia State servers.

38. Upon information and belief, faculty at Georgia State also have posted and distributed electronic copies of Plaintiffs’ copyrighted course materials on Blackboard/WebCT Vista, the University’s online course management system, which offers centralized and individualized online forums for all Georgia State classes where students can, among other activities, download course readings, get updates on news for the course and view syllabi,
Exhibit 4 (cont.): Complaint, excerpted

and post electronic messages to a course bulletin board. A key feature of these systems, as described in the tutorials available to faculty and students on the Georgia State website, is the easy ability of instructors to “upload” electronic files to a centralized course “content file,” including a “media library” of course content for students to view, download, and save to their own computers.

The Longstanding Permissions Market for Paper Coursepacks and Distribution of Electronic Copies

39. Georgia State’s ability to distribute reading materials electronically in substitution for student acquisitions of hard-copy books and coursepacks should not be confused with permission to do so; nor does it justify the massive, unauthorized giveaway that is taking place at the expense of Plaintiffs, their authors, and the publishing community at large. If allowed to continue, Georgia State’s conduct will cause the publishing industry to incur further and substantial damages. Particularly given the presence of readily accessible, efficient, and economical licensing mechanisms specifically designed by the publishing community to foster innovative distribution formats (including electronic reserves) without sacrificing a fair return to the publishers who bring such works to the public at a substantial cost to these publishers, Georgia State’s conduct is indefensible.
Exhibit 4 (cont.): Complaint, excerpted

40. Efficient and user-friendly mechanisms for the licensing of copyrighted materials for use in paper coursepacks and electronic distribution systems have long been available. Each Plaintiff offers academic users an easy and efficient mechanism for obtaining photocopy (i.e., coursepack) and electronic-use licenses directly from the publisher.

41. In addition, Copyright Clearance Center, Inc. (CCC), a not-for-profit corporation established in 1977 by authors, publishers, and users at the suggestion of Congress, provides the academic community (including professors, faculty, librarians, and coursepack vendors) with an efficient, centralized source for licenses for a broad and extensive repertory of millions of copyrighted works from nearly ten-thousand publishers and hundreds of thousands of authors.

42. For example, through its Academic Permissions Service (APS), CCC offers professors, library personnel and other licensees a convenient mechanism for obtaining per-use copyright permission to photocopy, for coursepacks and classroom handouts, content from books, journals, magazines and other materials – including those of Plaintiffs in this action. Users can access APS through the CCC website (or by phone, fax, or mail), establish an account, search for requested works by title, publisher, or ISBN number, enter information about the course for which permission is requested, and obtain rate
Exhibit 4 (cont.): Complaint, excerpted
quotes for use of a work, all with no charge. For over 1.2 million “pre-cleared”
titles, users can obtain on-the-spot permission to include the work in a
coursepack, while other requests are forwarded to the rightsholder of record for
clearance.

43. CCC’s Electronic Course Content Service (ECCS) offers users
an essentially identical mechanism for obtaining per-use copyright permission to
share books, journals, magazines and other materials via electronic reserves, e-
coursepacks, and other electronic formats. For over 620,000 “pre-cleared” titles,
including those of Plaintiffs in this action, users can obtain on-the-spot
permission for electronic use, while other requests are forwarded to the
rightsholder of record for clearance.

44. CCC also offers a new Annual Copyright License for
Academic Institutions which provides for the campus-wide use and reuse of
publishers’ materials in hard-copy or electronic formats (coursepacks, classroom
handouts, library reserves, electronic course content, etc.), for a single annual fee
rather than on a pay-per-use basis. Plaintiff SAGE Publications has already
signed on to participate in this convenient new offering.

45. CCC has partnered with leading application vendors to
incorporate its permission services directly into the leading library-automation,
Exhibit 4 (cont.): Complaint, excerpted

coursepack- production, and course-management systems. As a result, librarians
can secure copyright permissions for many works directly from their own library
software applications while working within those applications (including
Docutek ERes, the system used at Georgia State), making the permission and
compliance process even easier.

46. Despite the presence of these efficient licensing mechanisms –
and despite Georgia State’s widespread use of digital course reading distribution
methods as detailed above – electronic licensing fees actually paid by Georgia
State are minuscule.
### Exhibit 5: Financial Statistics, Publisher-Plaintiffs

**APS, ECCS, and AACL Permissions Paid by CCC to Plaintiffs**

Twelve Months Ending June 30, 2009  
(Plaintiffs’ Exhibits 3, 199, 346)

<table>
<thead>
<tr>
<th></th>
<th>Cambridge Americas Branch</th>
<th>Oxford</th>
<th>Sage</th>
</tr>
</thead>
<tbody>
<tr>
<td>APS</td>
<td>$322,823.55</td>
<td>$410,136.66</td>
<td>$267,098.93</td>
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<tr>
<td>ECCS</td>
<td>$81,671.35</td>
<td>$70,485.81</td>
<td>$85,660.91</td>
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<tr>
<td>Total</td>
<td>$404,494.90</td>
<td>$480,622.47</td>
<td>$352,759.84</td>
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Twelve Months Ending June 30, 2010  
(Plaintiffs’ Exhibits 4, 200, 347)

<table>
<thead>
<tr>
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<th>Cambridge Americas Branch</th>
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<th>Sage</th>
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</thead>
<tbody>
<tr>
<td>APS</td>
<td>$313,008.39</td>
<td>$377,938.05</td>
<td>$273,040.81</td>
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<tr>
<td>ECCS</td>
<td>$95,406.38</td>
<td>$96,940.75</td>
<td>$124,860.17</td>
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<tr>
<td>AACL</td>
<td></td>
<td>$11,592.54</td>
<td>$55,995.83</td>
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<tr>
<td>Total</td>
<td>$408,414.77</td>
<td>$486,471.34</td>
<td>$453,896.81</td>
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</table>

**Royalties from CCC 2009 (Excerpt Market)**

<table>
<thead>
<tr>
<th></th>
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<th>Sage</th>
</tr>
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<tbody>
<tr>
<td>APS</td>
<td>$935,450.35</td>
<td>$1,650,323.00</td>
<td>$2,136,912.89</td>
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</tbody>
</table>

**Average Permissions Revenue**

- **From APS and ECCS (academic books and journals)**  
  - Per Plaintiff: $412,625.73  
  - Percentage of Average Net Revenue: .0024

- **From ECCS only**  
  - Per Plaintiff: $79,272  
  - Percentage of Average Net Revenue: .00046

- **From permissions of all kinds**  
  - Percentage of Average Net Revenue: .0093
### Exhibit 5 (cont.): Financial Statistics, Publisher-Plaintiffs

**Revenues**

<table>
<thead>
<tr>
<th>Net Income FY 2009</th>
<th>Cambridge Americas Branch</th>
<th>$3.9 million</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Oxford</td>
<td>$11.4 million</td>
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<tr>
<td></td>
<td></td>
<td>$1.267 million</td>
</tr>
<tr>
<td></td>
<td></td>
<td>“operating profit”</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$4.128 million</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(“operating profit” plus distribution/ fulfillment income)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Net Sales Revenues FY 2009</th>
<th>All Plaintiffs</th>
<th>$507,804,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per Plaintiff</td>
<td></td>
<td>$169,268,000.00</td>
</tr>
</tbody>
</table>

Exhibit 6: Settlement Offer [Hypothetical]

Note: the settlement offer below is hypothetical, adapted for educational purposes from the proposed injunctive order of May 11, 2011. Public record does not indicate any settlement terms offered to GSU.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CAMBRIDGE UNIVERSITY PRESS,
et al,
Plaintiffs,

-vs.-

MARK P. BECKER, in his official
capacity as Georgia State University
President, et al,
Defendants.

[PROPOSED] SETTLEMENT

EVANS, District Judge.

It is ORDERED AND ADJUDGED that:

I. As used in this Order:

A. The term “GSU” includes each and every Defendant, and all their agents, servants, employees, representatives, and successors, all other persons acting under their direction, control, or supervision, including all part-time or full-time faculty employed by, and students enrolled at, GSU, and all those in active concert or participation with them.

B. The term “Work” includes any work of authorship for which Plaintiffs hold or may hereafter hold a copyright, whether said work has been heretofore published or shall,
in the future, be published, and whether a registration of the copyright thereto has been heretofore granted or shall in the future be granted.

Exhibit 6 (cont.): Settlement Offer [Hypothetical]

II. Subject only to the provisions of Paragraph III hereof, GSU shall be and is permanently enjoined and restrained from creating, reproducing, transmitting, selling, or in any manner distributing, or assisting, participating in, soliciting, encouraging, or facilitating the creation, reproduction, download, display, sale, or distribution in any manner of, copies, whether in hard copy format, digital or electronic computer files, or any other format, of any and all Works without permission.

III. Nothing in this Order shall be deemed to enjoin or restrain GSU from making or distributing copies of any Works or portions thereof, including, without limitation, by uploading, downloading and/or creating digital copies, where:

A. GSU or the individual faculty member or instructor has obtained permission or authorization to make and distribute such copies from the owner or owner’s authorized agent (such as the Copyright Clearance Center, Inc.) of the appropriate rights of copyright; or

B. Notwithstanding the absence of permission or authorization pursuant to paragraph III.A hereof:

1. The copies are made or distributed by, or at the request of, a faculty member or instructor who certifies that the copies to be made or distributed are in full compliance with the conditions of brevity and cumulative effect set forth in Paragraph II and the provisions of Paragraph III (A)-(C) of the March 19, 1976 “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals,” H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 68-70, reprinted in [1976] U.S. Code Cong. & Ad. News 5659, 5682-83 (the “Guidelines for Educational Fair Use”) (the relevant portions of which are annexed hereto as Exhibit A), it being understood that condition (iii) relating to cumulative effect and the provisions of Paragraph III (A)-(C) shall be construed in conjunction with GSU’s uses of other copyrighted works of authorship; and

2. The copies, whether in hard copy format, digital or electronic computer files, or any other format, that are made or distributed without permission or authorization do not, when combined with other copyrighted works of
authorship, collectively comprise more than 10% of the total reading (whether assigned, required, suggested, supplemental, or otherwise) for a particular course.

C. All certifications required by Paragraph III.B.1 shall be in the form set forth in Exhibit B and shall be collected by designated GSU representatives before copies are made or distributed and stored by GSU for at least two years.

Exhibit 6 (cont.): Settlement Offer [Hypothetical]

IV. Unless otherwise agreed to by the parties or ordered by the Court, any copying, posting, uploading, downloading, or other distribution done on EReserves, uLearn, faculty websites, course websites, or any other system now in existence or hereinafter developed on any computer or system owned or controlled by GSU, whether in hard copy format, digital or electronic computer files, or any other format, and whether done by Defendants or by any other person, shall be attributed to and be considered done by GSU and shall be subject to the proscriptions herein and to the provisions of the copyright law.

V. GSU shall promptly provide a copy of this Order and relevant portions of the Guidelines for Educational Fair Use to all faculty and instructors, as well as to all other administrative and technical personnel who have to date been, or may in the future be, involved in the development, operation, or maintenance of EReserves, uLearn, faculty websites, course websites, or any other system now in existence or hereinafter developed on any computer or system owned or controlled by GSU. In addition:

A. Whether in conjunction with such communication or otherwise, GSU shall make clear the importance of compliance with the terms of the Order and that violations will be subject to disciplinary sanctions; and

B. GSU shall post the Order and relevant portions of the Guidelines for Educational Fair Use on the GSU website in an appropriately prominent manner, including but not limited to causing the provisions of the Order to appear before a faculty member, library employee, or other GSU personnel is able to upload, post, or otherwise make available any copyrighted material via EReserves, uLearn, faculty webpages, course webpages, or any other system now in existence or hereinafter developed on any computer or system owned or controlled by GSU; and

C. GSU shall incorporate reference to this Order, including either by reproducing its text or otherwise providing advice on how the reader can easily locate it, in all university-wide handbooks or the like setting forth codes of faculty, student, or employee conduct.
VI. GSU shall develop and promptly implement appropriate educational programs for the purpose of promoting compliance with the terms of the Order and shall designate one or more university personnel with appropriate training in copyright to be reasonably available to answer questions and to provide guidance about complying with the Order.

VII. GSU shall take all appropriate steps either to ensure that existing copyright policies, including checklists, governing the activities of GSU comport with all aspects of this Order or to discontinue use of and reliance on such policies.

Exhibit 6 (cont.): Settlement Offer [Hypothetical]

VIII. Within forty-five (45) days of the entry of the Order, GSU shall certify to the Court, and shall serve on plaintiffs, a report detailing the measures it has taken to comply with the Order. Said report shall include a certification, signed by the president of GSU, that all Works that heretofore have been resident on one or more computer systems operated by GSU and that are subject to the other terms of the Order have been brought into compliance with this Order. In addition, for each academic term for three (3) years following the effective date of this Order, GSU’s Provost shall certify to the Court, with a copy to plaintiffs’ counsel, that based on diligent monitoring efforts, GSU is in compliance with the terms of the Order, including but not limited to, with respect to the ERes and uLearn systems or their equivalents.

A. Such certification shall be accompanied by a standard ERes report (or the report from any equivalent system) listing all reading materials present on the ERes system during that semester, the course-reserves page for which the materials are listed, and the number of “hits” for each reading materials during that semester.

B. Upon request made no more frequently than once each semester, GSU shall provide such access to its computer systems, including the uLearn system (or its equivalent), and to the certifications referred to in Paragraph III(C) above to a designated representative of Plaintiffs as will enable Plaintiffs to ascertain GSU’s compliance with the terms of the Order. Access shall be afforded at reasonable times during GSU’s business hours upon fifteen (15) days’ advance notice.

IX. The Court shall retain jurisdiction of this case and over judgment compliance issues and shall entertain such requests for modification of its terms as may be warranted based upon technological or other future developments.

SO ORDERED this ____ day of ____, 2008.
EXHIBIT A

Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Book and Periodicals

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem, whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

A. The copying meets the tests of brevity and spontaneity as defined below; and,

B. Meets the cumulative effect test as defined below; and,

C. Each copy includes a notice of copyright

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

---

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in “i” and “ii” above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

Exhibit 6 (cont.): Settlement Offer [Hypothetical]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety.

Paragraph “ii” above notwithstanding such “special works” may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in “ii” and “iii” above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]
III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

Exhibit 6 (cont.): Settlement Offer [Hypothetical]

(B) There shall be no copying of or from works intended to be “consumable” in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers’ reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.
Exhibit 6 (cont.): Settlement Offer [Hypothetical]

EXHIBIT B

FACULTY/INSTRUCTOR CERTIFICATION CONCERNING ELECTRONIC COURSE MATERIAL

Name: _____________________________________________________________

Date: ______________________________________________________________

Course and Term: ____________________________________________________

Title of Copyrighted Work: _____________________________________________

Author and Publisher: _________________________________________________

Portion(s) to be used (e.g., pages, chapters): _______________________________

Conditions of brevity and cumulative effect set forth in the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals”:

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in “i” and “ii” above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) “Special” works: Certain works in poetry, prose or in “poetic prose” which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety.
Paragraph “ii” above notwithstanding such “special works” may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

**Exhibit 6 (cont.): Settlement Offer [Hypothetical]**

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in “ii” and “iii” above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

I hereby certify that, with respect to the work or portion(s) thereof described above:

- I have written permission or authorization from the owner of the appropriate copyright or the owner’s authorized agent to make or distribute such copies (whether in print or in digital form). [attach copy of written permission or authorization]

- I have reviewed the conditions of brevity and cumulative effect set forth above and the copies of the copyrighted work to be made or distributed in print or in digital form are in full compliance with both the condition of brevity and the condition of cumulative effect.

Signed: ______________________________
Date: _______________________________

3. “What’s at Stake.”
6. “What’s at Stake.”
14. Ibid.
15. Ibid.
20. Ibid.
21. Ibid.
24. “What’s at Stake.”
26. Ibid.

What’s Fair about Fair Use? The Battle Over E-Reserves at GSU (A)
30. Ibid., 680.
39. Albanese, “A Failure to Communicate.”
45. Ibid.
47. Harper, “Confu.”

What’s Fair about Fair Use? The Battle Over E-Reserves at GSU (A)
What’s Fair about Fair Use? The Battle Over E-Reserves at GSU (A)


61. Ibid., 276.

62. Ibid., 269.


66. Ibid.


70. Palfrey, “Why We Miss the First Sale Doctrine.”


73. Albanese, “A Failure to Communicate.”


77. “What’s at Stake.”

78. Ibid.

79. Smith, “Licenses, Prices.”

80. “What’s at Stake.”