Case Nos. 12-14676 and 12-15147 (Consolidated Appeals)

United States Court of Appeals

for the

Eleventh Circuit

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

Plaintiffs-Appellants,

–v.–

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1:08-CV-1425 (EVANS, J.)

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF SOUTHEASTERN RESEARCH LIBRARIES

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CERTIFICATE OF INTERESTED PERSONS
Case Nos. 12-14676 and 12-15147 (Consolidated Appeals)

In accordance with Rule 26.1-1 of the Eleventh Circuit Rules, *amicus curiae* The Association of Southeastern Research Libraries, Inc., by and through its undersigned counsel, certifies that in addition to the persons and entities identified by the parties and their *amici curiae*, the following persons and entities have an interest in the outcome of this case:

The Association of Southeastern Research Libraries, Inc. and its member libraries at the following institutions:

Air University

Auburn University

Clemson University

College of William and Mary

Duke University

East Carolina University

Emory University

Florida International University

Florida State University

George Mason University

Georgia Institute of Technology

Georgia State University

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Case Nos. 12-14676 and 12-15147 (Consolidated Appeals)
(Continued)

Johns Hopkins University

Louisiana State University

Mississippi State University

North Carolina State University

The Library of Virginia

Tulane University

University of Alabama

University of Alabama-Birmingham

University of Central Florida

University of Florida

University of Georgia

University of Kentucky

University of Louisville

University of Maryland

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University of Miami

University of Mississippi

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Case Nos. 12-14676 and 12-15147 (Consolidated Appeals)
(Continued)

University of North Carolina at Charlotte

University of North Carolina at Greensboro

University of South Carolina

University of South Florida

University of Tennessee-Knoxville

University of Virginia

Vanderbilt University

Virginia Commonwealth University

Virginia Polytechnic Institute and State University

Wake Forest University

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* The Association of Southeastern Research Libraries, Inc., by and through its undersigned counsel, certifies that it has no parent corporation and that it has not issued any stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Amicus curiae The Association of Southeastern Research Libraries, Inc. ("ASERL") respectfully submits this brief in support of Defendants-Appellees Mark P. Becker, in his official capacity as Georgia State University President, et al. (collectively, "GSU") and affirmance of the District Court's decision below finding fair use for the majority of GSU's uses for which Plaintiffs-Appellants (collectively, the "Publishers") established a *prima facie* case of infringement.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae ASERL, a Georgia nonprofit association with member libraries at forty institutions throughout the Southeast, is the largest regional research library consortium in the United States. ASERL was founded more than fifty years ago to advance the educational and research success of students and faculty at its member libraries by facilitating the sharing of information, expertise, and technology resources. Among other services offered to its member libraries, ASERL coordinates programs and meetings to keep its member libraries abreast of emerging issues affecting university research libraries and leads discussions on strategies for addressing these issues.

ASERL does not typically file amicus briefs (indeed, in its over fifty-year existence, ASERL is not aware of any prior instance where it has submitted or signed onto an amicus brief). This case, however, is far from typical. It involves issues of first impression regarding the scope of fair use in electronic reserves

services ("e-reserves") made available to students and faculty at countless university libraries across the country. As discussed *infra*, most of the ASERL member libraries, fourteen of which reside in states within the Eleventh Circuit (including GSU), offer e-reserves similar to the one offered by GSU that is the subject of this appeal. ASERL has a substantial interest in the outcome of this case because this Court's decision will significantly affect its member libraries' ability to continue offering e-reserves in the future. ASERL believes that e-reserves are a tremendous benefit to students and greatly enhance teaching at universities.

ASERL received consent from the parties to file this brief. This brief was not authored in whole or in part by counsel for the parties, and ASERL alone contributed money to fund preparing and submitting this brief.

STATEMENT OF THE ISSUES

Whether the District Court was correct to find that making short excerpts of copyrighted works available to students on academic library e-reserves for the purpose of facilitating classroom teaching is a fair use.

SUMMARY OF THE ARGUMENT

As explained below, library e-reserves benefit academic learning in many irrefutable ways. The Publishers' stance that all but the most minor amount of copying for e-reserves requires a license would, if adopted, mean that many uses of e-reserves would simply disappear, as would the benefits of these uses to teaching.

Fortunately for students in higher education, fair use "is not an infringement of copyright," 17 U.S.C. § 107, and does not require a license. The District Court was right to conclude that the vast majority of GSU's unlicensed uses of short excerpts on e-reserves were fair uses.

ARGUMENT

I. This Court's Ruling Will Have Broad Implications for Libraries in the Eleventh Circuit and Elsewhere Throughout the Southeast.

A. E-Reserves Enhance Teaching at Universities.

Many ASERL libraries, like GSU, offer e-reserves to their students and faculty. E-reserves provide limited electronic access to materials identified by professors as reading for a particular course. Professors select these materials, often excerpts from books and journals that the library has paid significant sums to include in its collections, because they believe the materials will further learning in the class. As the District Court recognized, e-reserves materials supplement other materials assigned in the class to "provide a fuller, richer course curriculum." (Order with Findings of Fact and Conclusions of Law (Dkt#423) at 37.)

This enriched curriculum does not come at the expense of textbooks. Whereas textbooks generally cover a broad range of topics at a high level, the excerpts placed on e-reserves primarily are intended to provide students with a deeper perspective on a particular issue. For example, professors often assign these materials because of the way in which an excerpt articulates an argument or

demonstrates a concept. Other times the excerpt provides background information that helps students understand the broader context of the lecture. Other times the e-reserves materials cover a topic that is too current or controversial to make it into a general-purpose textbook written for a broad audience. And still other times, for example, the professor has a created a unique interdisciplinary course that crosses two divergent subjects (e.g., economics and art history) for which there are no suitable textbooks available.

Academic libraries restrict access to e-reserves to prevent use of the materials outside these limited educational purposes. First, access to e-reserves typically is limited to students of the university who are enrolled in the course and who already have access to the same materials through the library. Second, e-reserves are password protected with authentication features that meet or exceed industry best practices. Finally, the materials are usually deleted at the end of the semester to prevent other uses of the materials. (*Cf.* Dkt#423 at 40-41 (describing the access restrictions on GSU's e-reserves).)

Print reserves, which have been a mainstay at universities for decades, are the analog equivalent of e-reserves. With print reserves, a photocopy of a journal article or an excerpt from a book is placed at the front desk of the library rather than on e-reserves. Print reserves, however, impose barriers to access that make it less likely that students will read the reserve materials. Students must come to the

library and check out the reserve copy at the front desk. Usually the copy can only be checked out for a restricted period of time to allow other students the opportunity to read the reserve material. And students cannot retain a copy to study and annotate unless they create a photocopy of the reserve materials for themselves (which some invariably do).

Even though there are limitations to print reserves that make them less desirable to students, print reserves are not even an option for a growing number of distance-learning classes. These students attend class remotely and cannot check a copy out of the library or come to the library to read it. Distance learning opens the door for universities to provide education to an expanded body of students, many of whom would be unable to enroll at these schools because they live in a rural area too far away to attend classes; or because they are working parents who cannot make it to daytime classes; or because they are low-income students who cannot afford a traditional educational experience. E-reserves allow these students to read materials that they would otherwise be able to read if they were a traditional student on campus.

Providing electronic access to reserve materials instead of print reserves also has the potential to enhance accessibility to students with print disabilities (who would otherwise be able to access these materials but for their disability). As assistive technology continues to improve and faculty members become more

cognizant of the formats that are compatible with these technologies, universities can take a step closer to truly equal access in higher education. *See* Kathy Konicek, et al., *Electronic Reserves:The Promise and Challenge to Increase Accessibility*, 21 Library Hi Tech, No. 1, 102 (2003), *available at* http://www.uvm.edu/~bnelson/computer/accessibility/electronicreserveaccessibility.pdf; *cf. Authors Guild v. HathiTrust*, No. 11 CV 6351, 2012 WL 4808939, at *12 (S.D.N.Y. Oct. 10, 2012) (noting that university libraries' "use of digital copies to facilitate access for print-disabled persons is [a] transformative [fair use]").

B. GSU's E-Reserves Practices are Consistent With Other ASERL Libraries.

GSU's e-reserves policy is based upon the copyright policy developed by the University System of Georgia (the "USG Copyright Policy"), which also governs e-reserves of ASERL member libraries at the University of Georgia and The Georgia Institute of Technology (among other schools). Since this case was first filed, the Publishers have repeatedly suggested that GSU's e-reserves practices and the USG Copyright Policy are outliers among major universities. In fact, the USG Copyright Policy and GSU's implementation of this policy are consistent with the practices at most other university libraries, including ASERL member libraries in the Eleventh Circuit and throughout the Southeast.

The District Court's findings of fact outline the various components of the USG Copyright Policy (*see* Dkt#423 at 38-41), and each component is an

important factor in determining that GSU's uses are fair uses and were made in good faith. Without diminishing the importance of these other features of the USG Copyright Policy (e.g., limiting access to students in the class and posting copyright warnings to students who access e-reserves), which are largely consistent across universities, ASERL would like to highlight two components of the USG Copyright Policy and its implementation in particular for purposes of comparison.

First, the District Court found that the average length of the excerpts at issue in the case, which were made under the USG Copyright Policy, was approximately 10% of the source work. (Dkt#423 at 66.) Second, the USG Copyright Policy incorporates a "fair-use checklist" that allows professors to individually assess fair use based on a particular use. Both elements of the USG Copyright Policy and its implementation have been criticized by the Publishers but are entirely consistent with practices of other universities in general, and of ASERL libraries in particular.

1. Limitations on the Length of E-Reserves Excerpts.

GSU's implementation of the USG Copyright Policy to allow copying of 10% of the work comports with the typical amount allowed by other universities in their e-reserves policies. An independent study cited by GSU's expert, Dr. Kenneth Crews, in his expert report submitted to the District Court found that 80% of the libraries surveyed used some form of a quantity limit in their copyright policy. (Dkt#104-1 at 29 (citing Thomas H.P. Gould, et al., *Copyright Policies and the*

Deciphering of Fair Use in the Creation of Reserves at University Libraries, 31 Journal of Academic Librarianship 182 (May 2005)).) Where this limit was expressed as a percentage of the work, the percentage ranged from 10% to 25%.

This is similar to ASERL's own findings. In informal polling, ASERL found that none of the member libraries it contacted had a fair-use policy that limited e-reserves to less than 10% of the work or one chapter. This also is consistent with ASERL's polling of research libraries nationwide, which similarly report policies that are no more restrictive than 10% of the work or one chapter. ASERL is not aware of any university that has expanded the scope of permissible use in response to the District Court's decision. On the other hand, several universities have indicated that they have modified their policy to be more restrictive in response to the District Court's decision.

2. Fair-Use Checklists.

A "fair-use checklist" also is a common component of library e-reserves policies. The purpose of a "fair-use checklist" is to allow professors to evaluate the factors that weigh for and against fair use. The instructions for the checklist often emphasize, consistent with fair-use case law, that no single factor is determinative and refer professors to various resources that can assist them with their understanding of fair use. (*See* Dkt#423 at 39 (explaining the operation of the checklist incorporated as part of the USG Copyright Policy).)

Many ASERL libraries, like GSU, incorporate a "fair-use checklist" as part of their copyright policy to assist instructors with making fair use determinations. For example, Duke University uses a checklist (available at http://www.library.duke.edu/about/depts/scholcomm/copyright-and-fair-use.pdf) that incorporates many of the same elements contained in the checklist used by GSU. The checklists adopted by the university libraries at Florida State University (available at http://guides.lib.fsu.edu/content.php?pid=73946&sid=558766), University of Tennessee-Knoxville (available at http://www.lib.utk.edu/copyright/fairuse.html), and Louisiana State University (available at http://www.lib.lsu.edu/admin/copyright/checklist.html), are only a handful of other published examples of checklists at ASERL libraries.

Although the Publishers criticize the use of a checklist, their central licensing arm, the Copyright Clearance Center ("CCC"), which is funding fifty percent of this litigation, in fact previously endorsed the use of a similar checklist and it still is available on CCC's website, http://www.copyright.com/Services/copyrightoncampus/basics/fairuse_list.html. Although CCC has since abandoned the checklist, it obviously recognized at the time that the checklist can be an effective tool for allowing professors to make reasoned judgments about fair use.

C. The Licensing Practices of CCC and Publishers Serve as a Significant Impediment to Teaching.

The Publishers paint the picture that there is a one-size-fits-all license that would have allowed GSU to make all of the excerpts on its e-reserves available to its students. That is simply not true. There are a variety of limitations in the licenses offered by CCC and individual publishers that restrict, or in some cases prevent, teachers from using materials for their classes.

First, while CCC provides an efficient (but often expensive) licensing solution for some works, CCC does not license all of the works that a teacher might want to use on e-reserves. For example, Plaintiff Cambridge University Press admitted that it only allows CCC to license a portion of its books. (Trial Test. of Frank Smith, Director of Digital Publ'g Global of Cambridge Univ. Press (Dkt#399, Tr.1/69:25-70:11).) In these instances, without fair use, the university is required to seek a license directly from the individual publisher. Sometimes the current rights holder cannot be located or does not respond; sometimes ownership is divided or unclear; and sometimes a license is simply denied.

Even when there is a clear rights holder willing to extend a limited license for educational use, the significant time and expense of negotiating and securing a license directly from a publisher often results in the faculty member not using the material. An instructor may approach the course-reserves department a month or longer before materials are needed in a particular class only to find out that there

still is insufficient time to secure a license because a publisher has failed to respond promptly to requests for permission. If the students in the class are fortunate, the instructor will still be able to find substitute materials. But often in these situations, students are deprived altogether of materials that could further their education.

In other instances, the publisher quotes an exorbitant fee. For example, one ASERL member library relayed a situation where a professor wanted to use less than 25% of a book in his class of 25 students. The publisher quoted permission fees for one semester of more than $4,000, or more than $160 per student. It is likely that the school could have purchased each student a copy of the book for less than the permission fees, except for the fact that the book was out of print and unavailable for purchase. Indeed, if a book is out of print—The Authors Guild, a professional society that represents thousands of book authors, estimates that "75% of the Books in United States libraries are out-of-print and have ceased earning any income," Mem. of Law in Supp. of Pls.' Mot. For Prelim. Settlement Approval at 27, *The Authors Guild, Inc. v. Google Inc.*, No. 05-cv-8136 (S.D.N.Y. Oct. 28, 2008)—the only real option is e-reserves. If the cost is prohibitive, the instructor will simply not use the materials.

Even for those works licensable for some uses by CCC, many are not licensable for e-reserves because the publisher that controls the rights refuses to

license digital uses. (*See* Dkt#423 at 25 (noting that only 12% of the works that were available on a per-use basis were available for license in digital format).) As a result, the many benefits of e-reserves to students are only available because the teacher exercises the right of fair use.

In other instances, the publisher has refused to license enough content to be of use. For example, even though an instructor or the university may be willing to pay a per-page rate for 25% of the book, the publisher may not be willing to license more than 15%. As a result, the professor is forced to modify the lecture or find substitute materials.[1]

CCC licenses, which are offered on a per-use and an annual basis, also do not completely overlap. For example, a particular work that is licensed on a per-use basis might not be included in the annual license, and vice versa. As a result, a library would need to secure both types of licenses just to cover the works CCC has the right to license. These licenses also do not account for a library's existing subscriptions that may already license the use for e-reserves and do not account for fair uses, which obviously do not require a license. (*See* Dkt#423 at 30 (noting that "the licensing fees do not take fair use into account" and "CCC does not furnish

[1] These limitations are consistent with the District Court's finding that "[t]he lesser availability of digital excerpts is attributable to the following: (1) some publishers are concerned that they may not have the right to authorize distribution in digital as opposed to print format; (2) some publishers are reluctant to place digital copies of their works in the stream of commerce; and (3) sometimes publishers, for whatever reason, simply prefer limiting sales to the whole book." (Dkt#423 at 28-29.)

advice to users concerning whether a particular use is a fair use.").) As a result, universities end up paying more than they should for permissions fees.

D. Reversing the District Court's Order Would Harm Education.

The Publishers argue that e-reserves excerpts should be limited to 1,000 words (or approximately, two or three pages), but the District Court properly recognized that the Publishers' approach is "so restrictive [it] undermines the teaching objective favored by § 107." (Dkt#423 at 71.) Indeed, a ruling in favor of the Publishers requiring a license for virtually any use on e-reserves would require each of these institutions to abandon their current educational practices, turning instead to one of several equally unacceptable alternatives.

First, ASERL believes some schools would shut down their e-reserves altogether, particularly smaller institutions that are even more cash-strapped than larger universities. In some cases, this will simply mean that professors using e-reserves will go back to using print reserves, and the limits that accompany that format. Namely, students will be forced to wait in line for a reserve copy because it has been checked out by another student and, when it reaches their turn, they will need to photocopy the reserve material if they want to be able to refer to it in class. Unfortunately, some percentage of students would simply find the hassle too great to read the print-reserve materials and would forego reading the materials

completely. And as noted above, distance-learning students would not even have that choice because they are not on campus to check out print-reserve materials.

Second, ASERL can foresee some schools might try to impose a new across-the-board fee for access to e-reserves, further adding to the escalating costs of higher education. This clearly is the preferred result of the Publishers. But as GSU pointed out below, GSU requires approval from both students and faculty to increase student fees. (Trial Test. of Nancy Seamans, Dean of Libraries at Georgia State University (Dkt#395, Tr.12/150:3-14).) This is consistent with other ASERL member libraries. For example, in the state university system of Florida, "[t]he Board of Governors must authorize all fees assessed to students." Board of Governors Regulation 7.003(1), *available at* http://www.flbog.edu/documents_regulations/regulations/7-003Fees-fines-penaltiesregulationFINAL11-08-12.pdf. As the District Court noted, on the other hand, "[i]f individual students had to pay the cost of excerpts, the total of all permissions payments could be significant for an individual student of modest means" (Dkt#423 at 33), especially in view of the rising costs of textbooks, *see* http://www.theatlantic.com/business/archive/2013/01/why-are-college-textbooks-so-absurdly-expensive/266801/.

Third, if the District Court's decision is reversed or meaningfully limited, some schools would be forced to use money from their book-acquisition budgets to pay for new licenses. This reallocation of limited resources away from new

educational content toward legacy collections hardly serves to incentivize the creation of new works, one of the purposes of copyright. On the other hand, as the District Court determined based on the evidence at trial, "[t]here is no reason to believe that allowing unpaid, nonprofit academic use of small excerpts in controlled circumstances would diminish creation of academic works." (Dkt#423 at 82.)

Finally, the most likely result would be that many professors would simply stop using these materials in class, in which case students will lose out on the "fuller, richer course curriculum" that these materials could have provided.

II. The Publisher's Mischaracterize the Law of Fair Use.

GSU has addressed the Publishers' misstatements of fair use in its response brief, and ASERL will not readdress most of them here. There are, however, a couple issues that are particularly important to ASERL's member libraries that ASERL would like to touch on briefly.

A. Libraries Differ from Commercial Copyshops in Important Ways.

The Publishers rely extensively upon two cases from the 1990s, *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) and *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996), to justify their restrictive view of fair use. (Appellants' Br. at 14, 44-46.) The District Court correctly held that *Basic Books* and *Princeton University Press*

are readily distinguishable from GSU's e-reserves practices and those of other ASERL libraries because the commercial nature and purpose of the defendants' uses in those cases are entirely different than the nonprofit educational purposes of library e-reserves. (Dkt#423 at 49.)

In *Basic Books*, the defendant Kinko's was a commercial copyshop that printed and sold "coursepacks" to students for profit. Coursepacks are a collection of excerpts that are bound together into a single volume. With this business model, it is possible for the costs of labor and materials and the licensing fees to be absorbed by the copyshop and passed on to students in the price of the coursepack.

At the time of the lawsuit, there were 200 Kinko's stores nationwide that offered these coursepack services. *Basic Books*, 758 F. Supp. at 1534. The court held that the first factor, the purpose and character of the use, weighed "strongly in favor" of the publishers because of Kinko's commercial purpose. *Id.* at 1532. The commercial nature of Kinko's business was so predominant that the court tacked it on again as an "important additional factor" in its fair-use analysis. *Id.* at 1534. Although not explicit in the court's decision, it appears that the court also applied a "presumption" that commercial uses are unfair, *see id.* at 1530 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)), a presumption

that the Supreme Court has since rejected, *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-85 (1994).[2]

The court in *Basic Books* specifically noted that "[t]his commercial copying can be contrasted to library copying," citing *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, *aff'd by equally divided panel*, 420 U.S. 376 (1975). *Id.* at 1536. In *Williams & Wilkins*, the library at the National Institute of Health ("NIH") copied portions of journal articles to which it had subscriptions for its' researchers' personal use. In determining that this copying was fair use, the court emphasized the purely noncommercial and educational nature of the use:

> On both sides–library and requester–scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research. This is important because it is settled that, in general, the law gives copying for scientific purposes a wide scope.

Id. at 1354 (citations omitted).[3] By citing *Williams & Wilkins*, the court in *Basic Books* was acknowledging that the copying done by libraries was distinguishable from the copying done by commercial copyshops.

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[2] *Campbell*'s rejection of an evidentiary presumption was limited to commercial uses, *see Campbell*, 510 U.S. at 591 (noting that the lower court had applied "a presumption about the effect of commercial use, a presumption which as applied here we hold to be error"), and thus did not upset *Sony*'s directive that copyright holders must show a "meaningful likelihood of future harm" under the fourth factor for non-commercial uses, *Sony*, 464 U.S. at 449.

The commercial nature of the copying by the copyshop in *Princeton University Press*, which the court noted "was performed on a profit-making basis by a commercial enterprise," 99 F.3d at 1389, similarly distinguishes that case from the facts here. And like *Basic Books*, the court held that the defendants had a burden to rebut "a presumption of unfairness" because the uses were commercial, *id.* at 1386, which again is no longer good law after *Campbell*. Even though the court went on to note that the publishers had satisfied their burden irrespective of a presumption against the copyshop, it is nonetheless evident that the commercial nature of the copyshop heavily influenced the court's decision. The court explicitly did not reach the issue of copying by nonprofit libraries. *Id.* at 1389.

Because library e-reserves are for nonprofit, educational purposes, *Basic Books* and *Princeton University Press* are inapposite.

B. Many Uses of Library E-Reserves are Transformative.

The District Court determined that the particular uses by GSU at issue in this case were not transformative. (Dkt#423 at 49.) Whether or not the District Court's finding on this point was correct,[4] this Court should not extend this conclusion to

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[3] Although this case was decided under common-law fair use that governed the 1909 Copyright Act, the predecessor to the current Act, the statutory recognition of fair use in Section 107 of the Copyright Act did not "change, narrow, or enlarge it in any way." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976).

[4] ASERL takes no position on whether this aspect of the District Court's opinion was supported by the evidence.

all uses of library e-reserves. Many uses of library e-reserves, in fact, are transformative.

A "transformative use" is one that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579 (citation omitted). Recent decisions have focused on whether the new use is for a "different purpose," irrespective of whether any changes have been made to the work itself. *See, e.g.*, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608-11 (2d Cir. 2006).

There are many uses of e-reserves that serve a very different purpose than the original work and thus are plainly transformative. For example:

- A professor at Emory University's medical school might use an excerpt from a book detailing the well-accepted (at the time) need for radical mastectomies in all cases of malignant breast cancer not for the original purpose of conveying information about the standard procedure for this diagnosis, which has since largely been abandoned, but rather for the different purpose of demonstrating how mistakes were made by doctors in recommending this procedure.

- A writing instructor at The University of Alabama might assign an excerpt from a book on politics in the South not for the original purpose of conveying information about this topic but for the different purpose of demonstrating writing techniques in non-fiction writing.

- An art history teacher at the University of Florida might use an excerpt from a book criticizing hyperrealism as a genre of painting not for the purpose of condoning the author's views but instead for the purpose of rebuking them by analogizing to early disparagement of impressionism.

- A psychology professor at Auburn University might assign an excerpt on the history of the civil rights movement by an author from Alabama and a similar excerpt by an author from New York not for the original purpose of conveying "facts" about these events but rather for the different purpose of discussing possible writer bias in the differing accounts of the events.

Of course, these are only a handful of countless possible examples of transformative uses of library e-reserves. A ruling by this Court that prohibits less transformative uses could have a chilling effect on these transformative uses and others. Some professors would err on the side of seeking a license and forego using the materials if the publisher cannot be reached or the cost is prohibitive. Some professors would stop using e-reserves altogether for fear of making an incorrect assessment of fair use. And some schools may shut down their e-reserves, making it more difficult for these transformative uses to take place.

C. Educational Fair Use Extends Beyond Transformative Uses.

Even if particular uses of library e-reserves are not transformative, they still are fair uses. Appellants stridently argue that factor one—the purpose and

character of the use—cannot favor fair use in this case because GSU's uses are not transformative. (Appellants' Br. at 49-55.) But while transformative use has proven determinative in many cases (largely involving commercial actors), the Supreme Court in *Campbell* made clear that transformative use is not "necessary for a finding of fair use." *Campbell*, 510 U.S. at 579. And the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), similarly recognized that a first-factor label (there "productive" use) "may be helpful in calibrating the balance, but it cannot be wholly determinative."[5] *Id.* at 455 n.40.

In *Sony*, for example, the Supreme Court held that private copying of television broadcasts to view at a later time (i.e., "time shifting") was a fair use even though the copyrighted works were being used for the identical, expressive purpose. *Id.* at 447-55; *see also Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg LP*, 861 F. Supp. 2d 336, 340-41 (S.D.N.Y. 2012) (posting full versions of earnings calls, while not transformative, was nonetheless a fair use because it advanced the public interest of disseminating financial news). Likewise, the preamble of Section 107, 17 U.S.C. § 107, illustrates the types of uses courts traditionally deemed fair uses, and includes, perfectly matching GSU's uses here, an "obvious statutory

[5] The Court in *Sony* was discussing the lower court's overemphasis on productive uses. The concept of productive use, which was applied by courts prior to *Campbell*, is similar (if not the same) as transformative use.

exception to this focus on transformative uses [:] the straight reproduction of multiple copies for classroom distribution." *Campbell*, 510 U.S. 579 n.11.

The transformative-use requirement the Publishers seek to impose on educational uses stems from a misguided and unduly restrictive view of fair use. Fair use is not a rarely-used "exception" to a copyright holder's rights (Appellants' Br. at 37) that should only be applied "on occasion" (*id.* at 42). Rather, fair use is viewed by courts as "necessary to fulfill copyright's very purpose." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). Indeed, courts and commentators alike have recognized that fair use "should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly." Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

Fair use is necessary, in part, because "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science . . . .'" *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. Const. Art. I § 8, cl. 8). And for this reason, following direction from Article III of the Constitution, the District Court was correct to apply fair use "in a way that promotes the dissemination of knowledge, and not simply its creation." (Dkt#423 at 83.) *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad

public availability of literature, music, and the other arts.") (emphasis added and footnote omitted).

Another reason fair use cannot be viewed as an ordinary "exception" to copyright holders' rights is because fair use serves as one of copyright law's "built-in First Amendment accommodations." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *see also Golan v. Holder*, 132 S. Ct. 873, 890 (2012). As a result, courts must remain cognizant of the First Amendment implications of any restriction on a particular use.[6] *See Eldred*, 537 U.S. at 221 n.24 ("[I]t is appropriate to construe copyright's internal safeguards to accommodate First Amendment concerns."); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (considering First Amendment implications of the use in the fair use analysis). The First Amendment guards not only speech critical of a particular work but also the

[6] As one commentator has noted:

> Copyright . . . doesn't come from the laws of nature, it comes from the laws of man. It is not, like freedom of expression, antecedent to the law, but entirely dependent on it. . . . [This] means that when these two great forces come into conflict with one another . . . we know where we stand. We have our thumb on the scales on the side of free speech; we need to be vigilant and alert to circumstances where copyright law is not serving the cause of free expression, where it is interfering with our right to speak and communicate with one another, and we need to adjust it accordingly.

David G. Post, *The Continuing Saga of Thomas Jefferson and the Internet* (October 14, 2011).

right to receive ideas, a necessary predicate to free speech. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982).

Fair use can serve its First Amendment function and further the purposes of copyright law regardless of whether the uses on library e-reserves are transformative. These uses are favored examples in the preamble: "criticism," "comment," "teaching (including multiple copies for classroom use)," and "scholarship." A preamble purpose by itself can tilt factor one in favor of fair use. *See NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004) ("Where the defendants' use is for the purposes of 'criticism, comment . . . scholarship, or research,' 17 U.S.C. § 107, factor one will normally tilt in the defendants' favor."); *cf. Campbell*, 510 U.S. at 578-79 (noting that these examples "guide" the first-factor analysis). The fact that library e-reserves also are for "nonprofit educational purposes," which are juxtaposed with commercial purposes in Section 107, further supports a finding of fair use under factor one. The District Court therefore was correct to hold: "Because the facts of this case so clearly meet the criteria of (1) the preamble to fair use factor one, (2) factor one itself, and because (3) Georgia State is a nonprofit educational institution, factor one strongly favors [GSU]." (Dkt#423 at 50.)

CONCLUSION

The District Court below struck the appropriate balance between incentivizing authors to create new works and the ultimate objective of copyright law to promote the Progress of Science by enabling uses that benefit teaching and the public. ASERL respectfully submits that the District Court's well-reasoned decision on fair use should be affirmed.

Dated: April 25, 2013
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 6250 words, excluding the parts of the brief exempted by Fed. R. Civ. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief was prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

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