

GSU E-RESERVES LAWSUIT: DOES THIS SHED LIGHT ON THE ROAD AHEAD?



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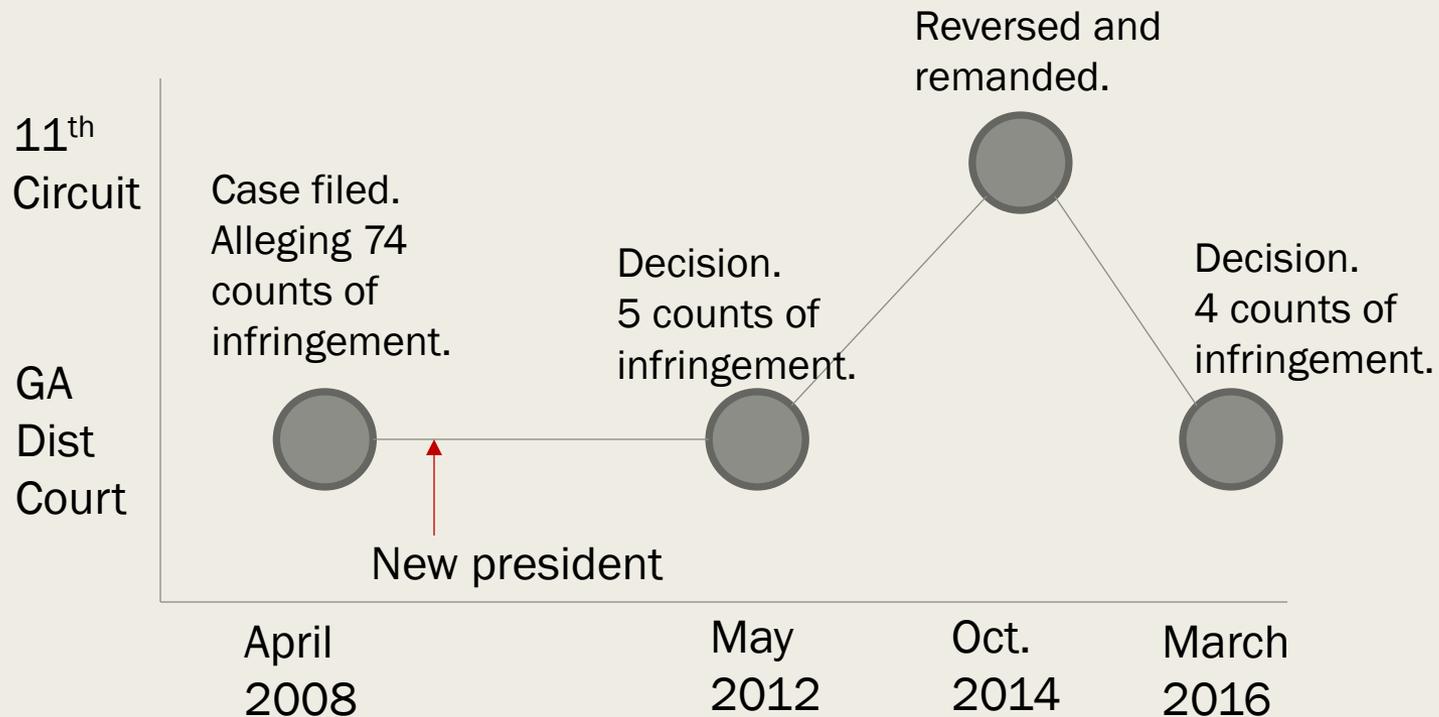
**Cambridge University Press v.
Becker, et al.
Georgia District Court
Appealed to 11th Circuit (AL, GA, FL)**

- **Fair Use Defense in e-Reserves**

Cambridge University Press v. Becker, et al.

- Not: Fair use for criticism, comment, news reporting
- Not: Transformative use
- Not: Music, videos, poetry, film, highly creative materials

A Little Background: Cambridge University Press v. Becker



Before Becker*

- Fair Use is a defense. 17 U.S.C. 107
- Fair Use analysis
 - *Purpose and character of use*
 - *Nature of the original work*
 - *Amount and substantiality of copying*
 - *Effect on potential market or value of work*
- E-Reserves Policies Based on Classroom Guidelines
 - *Brevity (10%)*
 - *Spontaneity*
 - *Cumulative effect*

* *Cambridge University Press v Becker*

Judge Evans: First decision

- Factor One: nonprofit educational purposes favored fair use.
- Factor Two: the books were informational in nature, favoring fair use.
- Factor Three: How much is permissible? (10% or one chapter of 10+ benchmark)
- Factor Four: Consider whether licenses to digital excerpts are available. If not, weighs in favor of fair use. If available in a convenient format for a reasonable price, then an individual analysis is required to determine the effect on publisher's incentive to publish.

11th Circuit: big picture takeaways

- The purpose of copyright law is to promote the creation of new works for the public good by providing authors and other creators with an **economic incentive to create.**
- “Congress devoted extensive effort to ensure that **fair use would allow for educational copying** under the proper circumstances...”
- “the fact that [publishers] have made paying easier does not automatically dictate a right to payment.”

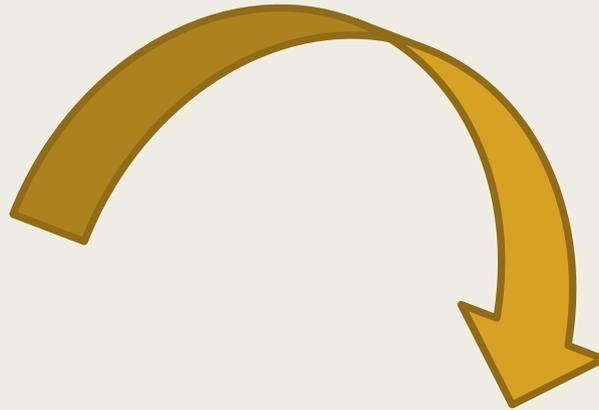
11th Circuit: big picture takeaways

- Nonprofit educational use favors a finding of fair use despite the nontransformative nature.
- There is no easy categorical approach. Each and every claimed infringement must be reviewed using 4 factors of fair use.
- When the threat of market substitution is severe, the fourth fair use factor should be afforded more significant weight in the overall fair use analysis.

11th Circuit Fair Use Analysis

- Fair Use analysis
 - *Purpose and character of use.*
Agreed with District Court. Favors fair use.
 - *Nature of the original work.*
Disagreed with District Court. However, relatively little importance in this case.
 - *Amount and substantiality of copying.*
Disagreed with District Court. Should consider if taking was excessive for each instance.
 - *Effect on potential market or value of work*
Agreed with District Court in its application of the fourth factor, but should have afforded more weight to the fourth factor.

Back to the District Court



Judge Evans on remand: applied the fair use analysis to remaining 48 claims of infringement.

Factor One

Purpose and Character of the Use

“use for teaching purposes by a nonprofit, educational institution such as Defendants’ favors a finding of fair use under the first factor, despite the nontransformative nature of the use.”

Judge Evans on remand: Fair use factor one favored fair use in this case despite the nontransformative use.

Factor Two

Nature of the Copyrighted Work

“the second fair use factor is of relatively little importance in this case.”

- where excerpts contained **evaluative, analytical or subjectively descriptive materials** that surpasses the bare facts necessary to communicate information, or derives from the author’s experiences or opinions, this factor is neutral or against fair use.

Judge Evans on remand: Fair use factor two was neutral or disfavored fair use in this case, but of relatively little importance in the analysis.

Factor Three

Amount and Substantiality

- Consider quantity and quality
- Court rejects the inflexible “Classroom Guidelines” and hard evidentiary presumptions.
- District Court properly considered whether the amount copied was excessive in relation to GSU’s pedagogical purpose.
- Amount taken is in relation to entire book.

Judge Evans on remand: Fair use factor three was reviewed based on the quantity, quality and importance for each instance.

Factor Four

Effect upon the potential market

- Extent of the market harm caused by particular actions;
- Whether widespread use would cause **substantial economic harm** such that it would **frustrate the purposes of copyright by impairing incentive to publish the work.**

11th Circuit: Licensing poses a particular threat that the fair use analysis will become circular. May not argue that every potential licensing opportunity represents a potential market.

Factor Four

Effect upon the potential market

- Were permissions available? If so, initially favor copyright holders.
- Defendants may show the demand for excerpts was so limited that repetitive copying would have been unlikely to impact incentive to publish.
- May also show that actions did not substantially affect the value of the copyrighted work.
 - *May show records of permissions sales for excerpts*

Judge Evans on remand: Fair use factor four was reviewed based on the impact on the value of the copyrighted work, taking into account book sales and permissions revenue.

More Factor Four

“Defendants bear the burden of proving that the potential loss of permissions sales to [publisher] is insubstantial, such that it would not impair [publisher]’s willingness to publish the [work].”

Factor four weighs heavily in Plaintiffs' favor when permissions for digital excerpts are readily available. However, if it is unlikely that loss of permissions income would cause publisher to discontinue publishing the work, it favors fair use.

Judge Evans: 4 instances of infringement of 48.

For Example:

The Sage Handbook of Qualitative Research (Third Edition) Maymester 2009

- Factor 1: favors fair use
- Factor 2: disfavors fair use.
 - *Author opinion, subjective description and evaluative expression.*
- Factor 3: disfavors fair use.
 - *4 whole chapters of 44, and 102 pages.*
- Factor 4: disfavors fair use.
 - *Permissions for digital excerpts available.*
 - *Defendants conceded it could cause substantial damage to value of the work.*

Judge Evans: 4 instances of infringement of 48.

For Example:

Utilization-Focused Evaluation (Third Edition) Fall 2009

- Factor 1: favors fair use
- Factor 2: neutral.
- Factor 3: disfavors fair use.
 - *Two complete chapters, 37 pages (8.28%).*
- Factor 4: disfavors fair use.
 - *Permissions for digital excerpts available.*
 - *Book sales for 3rd edition ended in 2008.*
 - *Permissions sales continued in 2009 and 2010.*
 - *Value in 2009 and 2010 was due to actual and potential permissions.*

Judge Evans: fair use

For Example:

Handbook of Feminist Research: Theory and Praxis.
Maymester 2009.

- Factor 1: favors fair use
- Factor 2: neutral. Author opinion and analysis do not dominate.
- Factor 3: favors fair use.
 - *One full chapter, 20 pages (2.61%). Not the heart of the book.*
- Factor 4: favors fair use.
 - *Permissions for digital excerpts available.*
 - *Actual but tiny damage (\$31.30)*
 - *Book sales ('06-'10) = \$94,085.88*
 - *Permissions ('06-'10) = \$983.46*

Judge Evans: fair use

Conclusion: unlikely that unpaid excerpts substantially damaged the value of the work of the potential market (book sales and digital permissions sales) such that publisher would lose its incentive to publish.

Final Order signed by Judge Evans

- Publishers are entitled to propose injunctive or declaratory relief with respect to four claims of infringement.
- Defendants are the prevailing side, and are entitled to an award of costs and attorney's fees.

A (mostly) Resounding Victory for Georgia State and Educational Fair Use

- Court did not revisit prima facie infringement. Must prove copyright ownership and show students accessed the excerpt (26 instances of 74).
- Nontransformative use doesn't automatically weigh against fair use.
- Court requires plaintiffs to show they actually licensed sales of excerpts to support their market harm claims.
- Even with evidence of a permissions market, Court allows Defendants to show that it is unlikely that widespread unpaid use of excerpts will substantially harm the market for the work such that the publisher will lose incentive to publish.
- Court deemed Defendants the prevailing party and awarded costs and attorneys' fees.

Next steps

- Potential for appeal.
- Review our current policies for alignment with the court's guidance.
- Make careful fair use determinations on a case-by-case basis. Do not pay for licenses if there is a strong fair use justification.
- Offer clear copyright training: pay attention to guidance on amounts, purpose, and permissions market.
- Don't forget what wasn't covered (highly creative materials, transformative use).

E-Reserves Strategies After Georgia State

- Campus course reserves policy
 - *Use of checklists?*
- Other Strategies
 - *Asserting institutional copyRIGHTS*
 - *Buying Licenses*
 - *Creating attractive institutional repositories for faculty and student works*

Does this shed light on the road ahead?



*Questions &
Discussion*