

A Post-Mortem on the GSU e-Reserves Lawsuit: What Happened & Lessons Learned

Laura Burtle
Georgia State University





What was the Issue?

Can digitized portions of books used for electronic reserves be fair use, or is a license required?



What were the publishers seeking?

To establish a license market in a non-profit, educational setting

Establish a blanket license default?



What did GSU Argue?

Electronic reserves can be fair use

The availability of a license does not mean that it is required

Using small portions of works does not harm the market for the book



The works at issue

The court limited the works to those used in 2009

- Testing the Copyright Policy introduced by the University System of Georgia in early 2009

Sovereign Immunity

Injunctive relief



Timeline

- **2008:** Cambridge Univ. Press, Oxford Univ. Press and Sage Publishers sued GSU for “pervasive, flagrant and ongoing unauthorized distribution of copyrighted materials” through the library’s e-reserve system.
- **2009:** University System of Georgia revised its policies for electronic resources. The trial considered the effectiveness of this policy.
- **2012:** First opinion. District Court found copyright violations in only 5 of 99 excerpts and found the university’s policy had been a good faith interpretation of the fair use provision in copyright law.



Timeline continued

- The District Court of Northern Georgia's ruling was appealed by the Oxford University Press to the Eleventh Circuit Court of Appeals.
- **2014:** the Eleventh Circuit Court of Appeals reversed and remanded the District Court decision and found in favor of the publisher appellants.
- **2016:** the District Court issued its second opinion after reanalyzing the allegedly infringing works according to the direction of the Court of Appeals. The Court found **4** cases of infringement among 48 works and designated Georgia State the prevailing party.



Timeline, continues

- **2016:** the Plaintiffs filed a Notice of Appeal.
- **2018:** the 11th Circuit issued their second ruling, finding error in the District Court's opinion, and remanding the case back to the District Court.



Timeline, **CONCLUDES**

- **March 2, 2020:**, the District Court issued its third opinion on remand. After re-analyzing the 48 works the court found **10** infringing uses and the rest to be fair uses.
- **September 29, 2020:** the District Court issued a Final Order.
 - Georgia State the prevailing party,
 - Judge did not award Georgia state attorney's fees.
 - Plaintiffs were awarded declaratory relief on ten copyright infringement claims.
 - Georgia State prevailed on the remaining claims.
 - The court entered an injunction directing Georgia State to maintain copyright policies which are not inconsistent with the rulings of the United States Court of Appeals for the Eleventh Circuit in the case.
 - Georgia State was also ordered to inform all professors and other instructors in writing of these rulings.



Fair Use Analysis

- Case by case
- Electronic course reserves
- In a non-profit, educational institution



Fair use analysis

First factor (Purpose and character of the use)

- Use for teaching purposes by a nonprofit, educational institution such favors a finding of fair use under the first factor, despite the nontransformative nature of the use.

Second factor (Nature of the work)

- For works deriving from the author's experiences or opinions – 2nd factor is neutral or weighs against when the excerpt is dominated by such material.
- But given little weight



Fair use analysis

Third Factor (amount and substantiality of the portion used)

- Consider in light of the pedagogical purpose (1st factor) and the impact on the market (4th factor)
- Unless the heart of the work is used, a small amount does not impact the market for the book, only the market for the excerpt.

Fourth Factor (Impact on the Market)

- Factor Four weighs heavily in Plaintiff's favor when permissions for excerpts are readily available



Final District Court Opinion (2020)

- 10 of 48 works found to be infringing
- 17 of 38 non-infringing works did not have a license available
 - None had enough used under the third factor to compete with book sales
- Most outcomes were based on permissions revenue

So, What Did 12 Years Accomplish?



GeorgiaState
University® | UNIVERSITY
LIBRARY



What did publishers accomplish?

Publishers wanted to establish the viability of the license market – did they succeed? Yes, but –

“the ability to license does not demand a finding against fair use. Nevertheless, “it is sensible that a particular unauthorized use should be considered ‘more fair’ when there is no ready market or means to pay for the use, while such an unauthorized use should be considered ‘less fair’ when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use...”



What did libraries learn?

Classroom Copying Guidelines are not law and are not applicable to electronic course reserves

- We note that the Classroom Guidelines, although part of the legislative history of the Copyright Act, do not carry force of law.
- Furthermore, although Plaintiffs characterize the amounts set forth in the Classroom Guidelines as “limits,” the Classroom Guidelines were intended to suggest a minimum, not maximum, amount of allowable educational copying that might be fair use and were not intended to limit fair use in any way.



Copy Shop cases are not good precedent for non-profit, educational uses

- Because the four factors must be “weighed together” and not “treated in isolation,” it is appropriate for the District Court to take the educational purpose of the use into consideration when analyzing how much copying is permissible under the third factor.



One chapter or a small excerpt does not compete with an entire work

- We agree with the District Court that the small excerpts Defendants used do not substitute for the full books from which they were drawn. “Plaintiffs offered no trial testimony or evidence showing that they lost any book sales in or after 2009 on account of any actions by anyone at Georgia State.”



Licenses are a legitimate market, but do not trump fair use

- The fact that Plaintiffs have made paying easier does not automatically dictate a right to payment.
- Nevertheless, “it is sensible that a particular unauthorized use should be considered ‘more fair’ when there is no ready market or means to pay for the use, while such an unauthorized use should be considered ‘less fair’ when there is a ready market or means to pay for the use”



Who Won?

The LAWYERS!



Where does fair use stand in the area of electronic reserves?

- Licenses for digital content are now a well-established market.
- E-book licenses impact on electronic reserves
- Impact of COVID shutdown



Thank you for supporting GSU during this lawsuit!

http://www.aserl.org/wp-content/uploads/2013/04/ASERL_Amicus_Brief_GSU.pdf