

CAMBRIDGE UNIVERSITY PRESS, et al v. MARK P. BECKER, et al., Defendants.

CIVIL ACTION NO. 1:08-CV-1425-ODE

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

2012 U.S. Dist. LEXIS 78123

May 11, 2012, Decided

ORINDA D. EVANS, UNITED STATES DISTRICT JUDGE

This copyright infringement case brought under 17 U.S.C. § 101 et seq. is before the Court for findings of fact and conclusions of law following a non-jury trial from May 17 through June 7, 2011.

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I. Case History

The original Complaint was filed on April 15, 2008. It alleged that Defendants, officials of Georgia State University in Atlanta, Georgia, had infringed copyrights held by Plaintiffs, publishing houses, by allowing unlicensed portions of Plaintiffs' copyrighted books to be posted electronically and made available electronically to students. . . . Defendants filed an Answer which denied infringement, [and] claimed the defense of fair use.

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On March 15, 2011, the parties filed a joint document detailing alleged infringements in the 2009 Maymester, the summer 2009 semester and the fall 2009 semester [Doc. 266]. Ninety nine alleged infringements were listed. This joint filing included Plaintiffs' specification of the name of the copyrighted work, the infringements, and Defendants' objections of various types to each claim of infringement. . . . For the 99 excerpts identified in this filing, the excerpted portions on average represented 9.6% of the pages in the copyrighted books (Defendants' calculations). The majority of the excerpts were one chapter of a multichapter book. On average these books contained eighteen chapters. . . .

On June 1, 2011, Plaintiffs voluntarily and unilaterally filed with the Clerk of Court a revised list of 75 claimed infringements [Doc. 361]. This list dropped 25 of the claimed infringements from the March 15 joint list and added one new claim. This list also offered certain information concerning the 75 claimed infringements. The remaining 75 claimed infringements are those which were addressed during the trial.

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III. Copyright Infringement and the Fair Use Defense

The next step is to examine how Georgia State's 2009 Copyright Policy operated in relation to the requirements of copyright law during the three 2009 academic terms. This is a challenging process on at least two levels. By far the most fundamental difficulty is the very fluid framework for resolving fair use issues which is established by copyright law. To determine when a particular use is a "fair use," four statutory factors must be considered. These factors are: (1) the purpose and character of the use; (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. 17 U.S.C. § 107. This does not exclude consideration of other factors. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 588, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985). It is hornbook law that there is no across the board rule for what weight should be given to each factor or how the factors should be applied. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994); *Harper & Row*, 471 U.S. at 588. This determination is made after a fact-intensive, value-laden review in each case of claimed infringement. In *Campbell*, the Supreme Court's last fair use decision, the Court reaffirmed that fair use does not rest on "bright-line rules" and must be done on a case-by-case basis. *Campbell*, 510 U.S. at 577 (quoting *Harper & Row*, 471 U.S. at 560). The Supreme Court then added, "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 578.

Another difficulty is that there is no precedent on all fours for how the factors should be applied where excerpts of copyrighted works are copied by a nonprofit college or university for a nonprofit educational purpose. Thus, assuming that there is some efficacy in having a "fair use checklist" that professors must fill out before using a copyrighted excerpt, what should be in it may be open to debate. The Court believes that the best way to proceed is first to decide how the four fair use factors should be applied in a case such as this one (unpaid copying of excerpts of copyrighted material by a nonprofit college or university for nonprofit educational use in graduate or upper level college courses). Also, the Court will consider whether any other factor or consideration should be taken into account. This will be based on the facts of record in the instant case. Once this decision is made, each of the 75 claimed infringements will be addressed individually. . . .

A. Findings of Fact

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The Excerpts at Issue in this Case

Almost all of the 75 excerpts at issue were assigned as supplemental readings in graduate level or upper level undergraduate courses. By "supplemental" the Court does not

necessarily mean optional; in many cases the excerpts were required reading. All of the courses were in the social science or language fields. Professors specified on the course syllabus that certain books were required to be purchased; in addition, the students were directed to the listed excerpts which were posted on ERES. The supplemental readings are all from books which are properly classified as informational. None are fiction. They all address topics which lend themselves to incorporation into the social science and language courses involved in this case. Most of the books are not textbooks in that they are not specifically intended for student instruction. They all address topics which would be of interest to an educator in the subject area addressed by the book. Some of the books would be of interest both within and beyond the academic community. The edited books are "in the halfway house between textbooks and monographs". The single author books tend to be small books with a narrow, in-depth focus, averaging 366 pages per book.

The excerpts are extra readings which supplement the purchased books so as to provide a fuller, richer course curriculum at a lesser cost than would be the case if the students had to buy extra books or pay permissions fees for the excerpts.

Seventy five excerpts from 64 books will be examined in this Order. The excerpts were selected by 23 professors for 29 courses in three semesters in 2009. On average these excerpts were 10.1% of the pages in the copyrighted books. Fifty six of the excerpts were comprised of one chapter or less from 54 of the books. On average these books have sixteen chapters. Fifteen of the excerpts are two or more chapters of a multichapter book, with the ratios of chapters used to total chapters being 2/25, 2/9, 2/8, 2/10, 3/12, 2/10, 3/9, 2/15, 4/44, 7/44, 3/36, 2/36, 2/30, 2/10, 2/15. The remaining four excerpts are from books that are not divided into chapters.

* * *

Students access the digital materials on ERES by going to its website [Tr. Vol. 4 at 112]. Once on the ERES website, a student accesses course reading materials by inputting the pass code obtained from the professor for the course [Tr. Vol. 4 at 112-113]. A student may only access the readings for the courses in which she is enrolled [Tr. Vol. 4 at 112]. The student must acknowledge and agree to respect the copyrighted nature of the materials. The student may access a reading as often as desired and is not prohibited from downloading, printing or saving the reading to her hard drive; however, once the semester for which that particular reading was assigned has ended, students can no longer access that reading through the ERES course page.

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The trial evidence showed that unlicensed copying of excerpts of copyrighted books at colleges and universities is a widespread practice in the United States. As Defendants' witness Dr. Kenneth Crews testified, many schools' copyright policies allow more liberal unlicensed copying than does Georgia State's 2009 Copyright Policy.

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B. Conclusions of Law

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2. The Fair Use Defense

Defendants contend that all of Plaintiffs' infringement claims are barred by the doctrine of fair use, pursuant to 17 U.S.C. § 107. Fair use is a defense that may be considered once a prima facie case of infringement has been established. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1546 n.28 (11th Cir. 1996). 17 U.S.C. § 107 states:

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 [*74] the potential market for or value of the copyrighted work.

Defendants bear the burden of proving that each use was a fair use under the statute. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1307 n.21 (11th Cir. 2008). The analysis of the fair use defense must be done on a case-by-case basis, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985), and "All [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268 (11th Cir. 2001).

The Supreme Court's most recent and most important fair use opinion is *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994). In *Campbell*, a

rap group created a commercial rap parody of a rock song. The owner of the copyright in the song brought suit, and the district court granted summary judgment to the defendants on the basis of fair use. The Court of Appeals reversed. In a unanimous opinion, the Supreme Court discussed the four fair use factors and remanded the case due to errors of law as well as remaining issues of material fact as to factor four which precluded summary judgment. Although Campbell was a commercial parody case, its reasoning guides this Court's analysis in the instant case.

Factor 1: Purpose and Character of the Use, including whether such use is of a commercial character or is for nonprofit educational purposes

The language of § 107 itself and the Supreme Court's opinion in Campbell compel the decision that the first fair use factor favors Defendants. This case involves making copies of excerpts of copyrighted works for teaching students and for scholarship, as specified in the preamble of § 107. The use is for strictly nonprofit educational purposes as specified in § 107(1). The fact that the copying is done by a nonprofit educational institution leaves no doubt on this point.

To support their argument that factor one weighs against fair use, Plaintiffs rely heavily on *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996); and *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 919 (2d Cir. 1994). However, *Kinko's* and *Michigan Document Services* involved commercial copiers that produced printed coursepacks and sought unsuccessfully to characterize their use of copyrighted materials as noncommercial, nonprofit uses. *Texaco* involved a for-profit corporation making unpaid copies for purposes of scientific research, which the Second Circuit characterized as an "intermediate use." *Texaco*, 60 F.3d at 921. Because Georgia State is a purely nonprofit, educational institution and the excerpts at issue were used for purely nonprofit, educational purposes, this case is distinguishable from *Kinko's*, *Michigan Document Services*, and *Texaco*.

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Factor 2: Nature of the Copyrighted Work

Copyright protects original works of authorship. 17 U.S.C. § 102(a). Copyright protects expression. *Palmer v. Braun*, 287 F.3d 1325 (11th Cir. 2002). It does not protect ideas. 17 U.S.C. § 102(b). A work is considered original to the author and qualifies for copyright protection if the work is independently created by the author and possesses some minimal degree of creativity. *Feist*, 499 U.S. at 345. The vast majority of the books involved here meet the independent creation requirement. The level of creativity required for copyrightability is extremely low and the work satisfies that requirement so long as it "possess[es] some creative spark, 'no matter how crude, humble or obvious it might be.'" Originality does not signify novelty . . ." *Feist*, 499 U.S. at 345 (quoting *Nimmer on Copyright* § 1.08[C][1]) (internal citations omitted).

All of the books at issue in this case meet the creativity standard set by Feist for copyrightability. Defendants do not claim otherwise. The second fair use factor, "nature of the use," requires the Court to look beyond the standard acknowledged in Feist to examine the relative degree of creativity in the works at issue. In *Campbell*, the Supreme Court stated: "This factor [the second factor] calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586. It is generally recognized that "Under [the second] factor, the more creative a work, the more protection it should be accorded from copying; correlatively, the more informational or functional the plaintiff's work, the broader should be the scope of the fair use defense." 4-13 Nimmer on Copyright, § 13.05[A][2][a].

As previously stated, none of the books at issue are fictional. All of them are intended to inform and educate.

Some of the books are not merely descriptive; they contain material of an evaluative nature, giving the authors' perspectives and opinions. To the extent that this is a comment about the author's mode of expression (as opposed to the substance of her perspectives and opinions), one could argue that this type of work merits a finding of a greater degree of creativity, disfavoring fair use. Countering this argument, however, is that § 107 itself recognizes "criticism and comment" as deserving of more public exposure, not less and hence works of this nature more likely will be protected by fair use. See 17 U.S.C. § 107. On consideration, the books involved in this case are properly classified as informational in nature, within the spectrum of factual materials and hence favoring fair use.

Another issue is whether the scholarly nature of some of the works at issue may give them more protection; that is, incline against fair use. In this regard, the Court credits the testimony [*81] of Plaintiffs' witnesses who testified to the tremendous amount of effort and expense which goes into creating high quality works of scholarship. Also, the Court observed during the trial that a high quality research effort inevitably involves some amount of creativity; the researcher is required to make qualitative judgments in the course of the research effort. However, upon review of the precedent, the Court concludes that the cost, effort, and level of creativity required to produce the work are not relevant to the factor two analysis. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), the Supreme Court considered and rejected the "sweat of the brow" doctrine (that copyright is intended to protect an author's investment in creating the work) as being inconsistent with Supreme Court precedent. *Feist*, 499 U.S. at 359-60.

* * *

Factor 3: Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Factor three requires consideration of both the quantity and the value of the amount copied in relation to the overall book. The portion used must be reasonable in relation to the work from which it was taken and the purpose for which it was used. *Campbell*, 510 U.S. at 586.

The portions taken averaged about ten percent of the original (though some were considerably more and some were considerably less). The precise purpose for which each excerpt was used varied, but generally the purpose was to enrich and add depth to the course curriculum. Also, the Court must consider whether the amount taken is reasonable given the likelihood of market substitution. Peter Letterese, 533 F.3d at 1314 n.30. The fact that the excerpts were mirror-image copies favors market substitution (thus leaning against fair use), but this tendency is reduced when the excerpt is small. Ultimately a decision as to what amount of copying is permissible as fair use requires consideration of fair use factor three in conjunction with factors one and four.

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b. Amount of the Portion Used in Relation to the Copyrighted Work as a Whole

Before beginning this analysis, it is appropriate to note that copying a de minimis part of a copyrighted work is not an infringement at all. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 n.34, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984). Therefore, by definition fair use must look beyond de minimis copying.

The number of pages in a book

For each claimed infringement, the amount of the portion used in relation to the copyrighted book as a whole is calculated by dividing the number of pages in the copied excerpt by the number of pages in the book. The parties initially disagree about how many pages are in each book. Plaintiffs contend that the calculation should be based on the number of pages that comprise the text of the book, within the chapters. Defendants contend that the page count should also include material such as the table of contents, acknowledgments, the preface or foreword, an afterword, and indices. . . . The Court agrees with Defendants that the material appearing before and after the chapter text of the book comprises part of the work as a whole. Material such as dedications and acknowledgments are written expression by the author or editor, and introductory remarks included in a foreword or preface are certainly original expression protected by the copyright for the work. In addition, the Court believes the pages in the index should be counted in the total page count; in most of the works, the index is comprised of whole numbered pages, and the decision on what terms to include in the index constitutes copyrightable expression. Thus, for the works at issue here, the Court will accept (with some noted exceptions) the Defendants' contention of the number of pages in each work and will calculate the percent copied based on that page count.

Determining what is "the copyrighted work"

To calculate the percent amount of the work that was copied by Defendants, it is also necessary to first determine what the excerpt will be measured against. In their post-trial Proposed Findings of Fact and Conclusions of Law filed July 22, 2011 and also in their reply brief filed July 30, 2011, Plaintiffs argue that Defendants' copying of a whole chapter of an edited book amounts to a forbidden 100% taking because each of the chapters has a

separate author, each addresses a distinct subject and each was originally conceived as a separate work. Therefore, Plaintiffs argue, it does not matter that the particular chapter comprised only a minuscule portion of the overall book, because Defendants copied 100% of the chapter in question. To win this argument Plaintiffs must contend that under § 107(3) the chapters are "the copyrighted works," not the books. Plaintiffs take their cue for this argument from the Second Circuit's opinion in *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994 amended 1995). The Court rejects Plaintiffs' argument because it was raised too late in the proceedings.

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What amount is small enough?

Having determined that the amount taken will be calculated as a percentage of the entire book, the Court will now discuss what percentage of the whole book is a sufficiently small amount—that is, what amount of copying will shift factor three in favor of either Defendants or Plaintiffs.

Congress intended that use of a smaller portion would be more apt to be acceptable than use of a larger portion. Taking into account the fact that this case involves only mirror-image, nontransformative uses, the amount used must be decidedly small to qualify as fair use. Also, other factors must be considered in making this determination. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1314, n.30 (11th Cir. 2008).

To frame the discussion of this issue, the Court will review the most relevant precedent, noting at the outset that neither case is binding and neither is completely analogous.

In *Kinko's*, the fact that seven of the excerpts were 5% to 14% of the whole "weigh[ed] against defendant." 758 F. Supp. at 1527-28. The court found that the copying of five other excerpts, ranging from 16% to 28% of the whole "weigh[ed] heavily against defendant." *Id.*

The Sixth Circuit, in *Michigan Document Services*, also noted the quantity of pages that had been copied to form the coursepack excerpts. Six different works had been excerpted without permission. In addressing "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," the Court stated: "[T]he larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner and the less likely that a taking will qualify as a fair use." *Mich. Document Servs.*, 99 F.3d at 1389 (quoting *Pierre N. Leval, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1122 (1990)). The Court did state that the 95 page, 30% copying was more troubling than the 17 page, 5% copying previously referenced. It nonetheless held that the defendants had failed to carry their burden of proof on fair use factor three with respect to all six of the works.

Kinko's and *Michigan Document Services* are helpful as a beginning point in the factor three analysis in the instant case. However, unlike the instant case, they did not involve

nonprofit educational uses by a nonprofit educational institution. Here, fair use factor one strongly favors Defendants and tends to push the amount of permissible copying toward a greater amount than the under 5% amount which Kinko's and Michigan Document Services did not specifically reject, and into the 5%-14% range which Kinko's found weighed against, but did not "weigh heavily against" fair use. Kinko's, 758 F. Supp. at 1527.

Defendants presented evidence at trial that numerous colleges and universities have copyright policies which allow more liberal unpaid copying than the 10.1% average uses which occurred at Georgia State in 2009. This evidence is not entitled to any weight in determining the permissible extent of fair use. In the absence of judicial precedent concerning the limits of fair use for nonprofit educational uses, colleges and universities have been guessing about the permissible extent of fair use.

c. Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The great majority of the excerpts used in this case were a chapter or less from a multi-chapter book. Some of these excerpts came from edited books, in which each chapter is written by a different author.

The word "substantiality" as used in § 107(3) means "value." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994) (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 348, F. Cas. No. 4901 (C.C. D. Mass. 1841)). The substantiality test under factor three involves the degree to which the excerpts are qualitatively significant "in relation to the copyrighted work as a whole." 17 U.S.C. § 107. Of the excerpts involved in this case, including excerpts made up of one or more chapters, almost none have notable qualitative significance or value "in relation to the work as a whole." That is because the subject matter addressed by the relevant chapters is not a substantively dominant part of the book. Almost none of the chapters which were used from either the single author works or the edited volumes are "the heart of the book," *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985), or a "critical part" of the book, Kinko's, 758 F. Supp. at 1533; almost none bear an unusually striking relationship to the book as a whole. The chapters in both the edited books and the single author books cover distinct, separately titled subtopics, so that almost none has a dominant relationship to the substance of the work as a whole.

In Kinko's, the District Court rejected as unfair the copying of twelve different excerpts. It found that the excerpts met the "substantiality" test of factor three because the portions copied were "critical parts of the books" which was "the likely reason the college professors used them in their classes." Kinko's, 758 F. Supp. at 1533.

In Michigan Document Services, the Sixth Circuit, in addition to noting that the amount of copying involved was "not insubstantial," also stated that the substantiality or "value" of the excerpted materials in relation to the entire work was shown by the fact that the professors had made them required reading. *Mich. Document Servs.*, 99 F.3d at 1389. The Sixth Circuit did consider that fact in determining that the third factor favored plaintiffs.

While this Court has no knowledge of whether the excerpts in Kinko's and Michigan Document Services were "critical parts" of the books, it disagrees with the suggestion that a professor's selection of an excerpt means that the excerpt is a critical part of the book. It is at least equally likely that the excerpt was selected because it filled a need within the course curriculum. A chapter of an academic book is a unit which, in all likelihood, covers a particular theory or topic, so as to make it suitable for use in a course which covers a broader, related overall subject matter. Because this case does involve strictly educational, nonprofit uses, it is relevant that selection of a whole chapter of a book (either from a typical, single author chapter book or from an edited book) likely will serve a more valuable educational purpose than an excerpt containing a few isolated paragraphs. Professors want students to absorb ideas and useful, context-based information. This can be accomplished better through chapter assignments than through truncated paragraphs. However, the selected excerpt must fill a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose.

* * *

Most of the professors who selected the excerpts in this case testified and explained why they selected the particular chapter or other excerpt for the course. The Court finds that all of the selections indeed did further the legitimate educational purposes of the course curriculum. Most were narrowly tailored to accomplish that purpose.

Before determining what amount of copying is appropriate for fair use on the facts of this case, the Court will evaluate fair use factor four and certain additional considerations discussed below. The amount allowed to be excerpted will be determined in the overall fair use assessment thereafter.

In summary, factor three may favor either Plaintiffs or Defendants, depending on the amount taken from each book.

Factor 4: The Effect of the Use on the Potential Market for or Value of the Copyrighted Work

Factor four focuses on whether Defendants' (the professors' and the students') use of excerpts of Plaintiffs' copyrighted works adversely affected the potential market for or value of the copyrighted work in question.

Factor four should weigh against defendant only when the harm is significant, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994); however, because Defendants have the burden of proof on all elements of the fair use defense, a helpful restatement is: to prevail on factor four, Defendants have the burden of proving that any harm from the infringing use is insubstantial. See *Campbell*, 510 U.S. at 590; *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1307 n.21 (11th Cir. 2008). The factor four analysis calls for determination of whether Defendants' unpaid uses of the excerpts caused or will cause harm to the "potential market for or value of the copyrighted work"; i.e., harm to the marketability of the copyrighted

work or the value of the copyrighted work. 17 U.S.C. § 107.

The copyrighted works at issue here are books of which the excerpts are parts. In general, Plaintiffs have the exclusive right to reproduce the books in whole or in part because they own the copyrights, 17 U.S.C. § 106(2)(3) or, by contract, have the exclusive right to reproduce all parts of the books. Although copyright protection extends to derivative works, 17 U.S.C. § 103(a), the excerpts of the copyrighted books are not derivative works. Rather the excerpts are verbatim copies of parts of the copyrighted books.

The adverse market effect with which fair use is primarily concerned is that of market substitution. Peter Letterese, 533 F.3d at 1315. Where the copyrighted original work and defendant's infringing copy are identical, defendant's infringing copy substitutes directly for the copyrighted original. This impacts the marketability of the original and reduces its value, causing harm to the copyright owner. This case involves excerpts from whole original works. In general, the larger the excerpt, the greater the potential harm; a large excerpt comes closer to substituting for the whole book. It is relevant here that the excerpts were generally a small part (averaging around 10%) of the whole copyrighted work. Such a small excerpt does not substitute for the book as a whole. The Court is required to consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market [for the original]." Campbell, 510 U.S. 569, 590, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994) (citations omitted); see also Sony, 464 U.S. at 451. Thus, if a professor used an excerpt representing 10% of the copyrighted work, and this was repeated by others many times, would it cause substantial damage to the potential market for the copyrighted work? The answer is no, because the 10% excerpt would not substitute for the original, no matter how many copies were made. In short, Defendants' use of small excerpts did not affect Plaintiffs' actual or potential sales of books.

Plaintiffs' argument that factor four tilts in their favor is based primarily on American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994, amended 1995). The Second Circuit found that CCC is "a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying." Id. at 930. The court also said, ". . . it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such use is made easier." Id. at 930-31. In Texaco, an employee of Texaco had made photocopies of certain articles from a scientific journal to which Texaco subscribed. Other employees of Texaco had made photocopies as well. The Second Circuit found that Texaco should have paid license fees to CCC for the photocopies of the articles. Its failure to have done so cost the publisher-plaintiff licensing revenues; hence, "the publishers have demonstrated a substantial harm to the value of their copyrights through [Texaco's] copying." Id. at 931 (internal quotation marks and citation omitted).

This Court agrees with Texaco that where excerpts are reasonably available, at a reasonable price, it is only fair for this fact to be considered in determining whether Defendants' unpaid uses of excerpts constitutes a fair use. Fair use is an equitable doctrine. Peter Letterese, 533 F.3d at 1308. For loss of potential license revenue to cut against fair use, the evidence must

show that licenses for excerpts of the works at issue are easily accessible, reasonably priced, and that they offer excerpts in a format which is reasonably convenient for users. Cf. William F. Patry, PATRY ON FAIR USE § 6:8 (2011) ("easy, inexpensive licensing"); see also *Texaco*, 60 F.3d at 931 ("[I]t 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.").

* * *

With respect to Defendants' uses of excerpts where digital permissions were not shown to be available, the Court finds that the unpaid use of the excerpts caused no actual or potential damage to the value of the books' copyrights. The evidence in this case shows that Defendants' uses (i.e., the professors' and the students' uses) of the materials were under carefully monitored circumstances. A pass code is required for the students in the class to access the materials; at the end of the semester access terminates. This is quite different from *Campbell*, where the parodied version of plaintiff's work was publicly performed and therefore made available to a wide audience. It is unlikely that the use of excerpts by professors and students resulted in the exposure of the copyrighted materials to people other than the class participants. For this additional reason, there is little risk of widespread market substitution of the Defendants' copy for the Plaintiffs' original.

In those cases in which digital permissions were available, the Court finds that Defendants' own unpaid uses (the Georgia State professors' and students' uses) of individual excerpts caused extremely small, though actual, damage to the value of the books' copyrights. A book's ability to command payment of permissions fees has a relationship to the value of the copyrighted book, i.e., to the value of the copyright. If available permissions are not paid, the value of the copyright is less than it otherwise would be.

Were the fair use analysis to end here, Defendants would prevail as to all of Plaintiffs' infringement claims because the uses of the excerpts by students and professors at Georgia State did not cause substantial harm to Plaintiffs' copyrights. However, two additional considerations weigh against Defendants' position. The first is the Supreme Court's holding in *Campbell* that courts must consider not only the harm caused by the defendant's own actions, but also what harm would ensue from "widespread conduct of the sort engaged in by the defendant." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994). Second, fair use is an equitable doctrine. The fair use analysis would be deficient if the Court were not to take into account Plaintiffs' right, as owners of the copyrights, to collect fees for use of excerpts from their books. This is a powerful argument countering fair use, which counsels against Defendants' position when excerpts are readily available, in a convenient format, for a reasonable fee, and the fees are not paid. This consideration could be treated as a separate fair use factor; the Court includes it as part of the factor four analysis because it pertains to nonpayment of permissions fees, the same as the rest of the factor four analysis. Taking into account these considerations, factor four weighs heavily in Plaintiffs' favor when permissions for digital excerpts are readily available. If excerpts are not readily available as stated, factor four weighs in Defendants'

favor.

Judges and scholars have noted that there is a circularity problem in evaluating the extent of potential harm or loss of value under the fourth fair use factor. *Peter Letterese*, 533 F.3d at 1319 n.37; *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994). Specifically, it is understood that plaintiff will suffer some harm from defendant's use of the copyrighted item when fair use applies. The objective of the fair use analysis is to determine whether fair use applies. To say that fair use does not apply because Defendants have made some unpaid use of the copyrighted item is circular reasoning. There is no ideal solution to this problem. The approach that will be taken in evaluating individual claims of infringement here will be that all fair use factors will be evaluated independently, without regard to consideration of circularity. If overall resolution of the fair use issue is close or inconclusive, further analysis will be undertaken.

Additional Considerations

a. Limited unpaid copying of excerpts will not deter academic authors from creating new academic works.

The Constitution itself gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. Therefore, a primary consideration must be whether use of small unpaid excerpts, which will slightly limit the amount of permissions income paid to authors and external editors of copyrighted books, would discourage authorship of new academic books. Plaintiffs do not make the argument that it would, and the evidence does not support it.

* * *

b. The slight limitation of permissions income caused by the fair use authorized by this Order will not appreciably diminish Plaintiffs' ability to publish scholarly works and will promote the spread of knowledge.

* * *

Plaintiffs first argue that reduction in permissions payments could cripple them financially, potentially causing them to cease to exist [Doc. 412 at 113-14]. Alternatively, Plaintiffs argue they might be forced to reduce publication of high quality scholarly works [Doc. 412 at 113-14]. The argument that Plaintiffs might be forced out of business is glib. It is unsupported by evidence. The argument that Plaintiffs might be forced to cut back on scholarly publications is speculative and unpersuasive on this record. . . . In summary, there is no persuasive evidence that Plaintiffs' ability to publish high quality scholarly books would be appreciably diminished by the modest relief from academic permissions payments which is at issue in this case. There certainly is no evidence that a modest reduction would impact the desire or the ability of academic authors to publish new works. Making small free excerpts available to students would further the spread of knowledge.

Summary of Fair Use Assessment

This case involves unlicensed copying of 75 excerpts from Plaintiffs' copyrighted books for nonprofit educational use by professors and students at Georgia State University in 2009. The question whether this constitutes a permissible fair use is resolved primarily by reference to 17 U.S.C. § 107 and the Supreme Court's decision in *Campbell* [*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)]. The Court must consider all of the statutory elements of § 107; none may be overlooked. However, other factors may be considered. There is no precise manner in which the elements must be weighed in relation to each other; however, it is paramount that all factors be weighed and considered "in light of the purposes of copyright." *Campbell*, 510 U.S. at 578.

Because (1) the excerpts were used for the purpose of teaching (including multiple copies for classroom use) and scholarship, as described in the preamble to § 107, (2) the use was for a noncommercial, nonprofit educational use, as described in § 107(1) and (3) Georgia State is a nonprofit educational institution, fair use factor one weighs heavily in Defendants' favor.

Because all of the excerpts are informational and educational in nature and none are fictional, fair use factor two weighs in favor of Defendants.

With respect to fair use factor three, the amount of the copying as a percentage of the book varies from book to book. In determining what percentage of a book may be copied, the Court looks first to the relationship between the length of the excerpt and the length of the book as a whole. Then, the relationship between the value of the excerpt in relation to the value of the book is examined. The Court also considers the value of a chapter in itself (rather than just a few paragraphs). In the case of extra long books with a large number of chapters, a limit on the number of chapters which may be copied is appropriate. Professors may well have a legitimate educational reason for wanting to use a chapter of a book; it is more apt to contain a complete treatment of a particular topic or subtopic than would a few isolated paragraphs. However, the convenience of using whole chapters from an over-length book may lead to an undue amount of unpaid copying in absolute terms.

Taking into account the foregoing considerations in relation to the books involved in this case, the factor three conclusions are: Where a book is not divided into chapters or contains fewer than ten chapters, unpaid copying of no more than 10% of the pages in the book is permissible under factor three. The pages are counted as previously set forth in this Order. In practical effect, this will allow copying of about one chapter or its equivalent. Where a book contains ten or more chapters, the unpaid copying of up to but no more than one chapter (or its equivalent) will be permissible under fair use factor three. Excerpts which fall within these limits are decidedly small, and allowable as such under factor three. Access shall be limited only to the students who are enrolled in the course in question, and then only for the term of the course. Students must be reminded of the limitations of the copyright laws and must be prohibited by policy from distributing copies to others. The chapter or other excerpt must fill a demonstrated, legitimate purpose in the course

curriculum and must be narrowly tailored to accomplish that purpose. Where the foregoing limitations are met factor three will favor fair use, i.e., will favor Defendants. Otherwise factor three will favor Plaintiffs.

The Court must also consider, under fair use factor four, the effect of the use in question on the potential market for or value of the copyrighted book. Unpaid use of a decidedly small excerpt (as defined under factor three) in itself will not cause harm to the potential market for the copyrighted book. That is because a decidedly small excerpt does not substitute for the book. However, where permissions are readily available from CCC or the publisher for a copy of a small excerpt of a copyrighted book, at a reasonable price, and in a convenient format (in this case, permissions for digital excerpts), and permissions are not paid, factor four weighs heavily in Plaintiffs' favor. Factor four weighs in Defendants' favor when such permissions are not readily available.

The Court has considered whether unlicensed copying of small excerpts as contemplated by this Order would disserve the purposes of the copyright laws, namely, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. Because the unpaid use of small excerpts will not discourage academic authors from creating new works, will have no appreciable effect on Plaintiffs' ability to publish scholarly works, and will promote the spread of knowledge, the Court concludes that it would not.

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