No. 16-15726

United States Court of Appeals

for the

Eleventh Circuit

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

Plaintiffs-Appellants,

– v. –

CARL V. PATTON, in his official capacity as Georgia State University President, *et al*.,

Defendants,

J. L. ALBERT, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology, KENNETH R. BERNARD, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, ROBERT F. HATCHER, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia, W. MANSFIELD JENNINGS, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, JAMES R. JOLLY, *et al*., in his official capacity as member of the Board of Regents of the University System of Georgia,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA IN CASE NO. 1:08-CV-01425-ODE
HONORABLE ORINDA D. EVANS

BRIEF FOR *AMICI CURIAE* THE AUTHORS GUILD *ET AL.* IN SUPPORT OF APPELLANTS

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ADDENDUM: IDENTITY OF AMICI CURIAE

American Society of Journalists and Authors, Inc.: Founded in 1948, the American Society of Journalists and Authors is the nation's leading professional organization of independent nonfiction writers. ASJA's membership consists of more than 1,100 outstanding freelance writers of magazine articles, trade books, and many other forms of nonfiction writing, each of whom has met ASJA's exacting standards of professional achievement. ASJA offers extensive benefits and services focusing on professional development, including regular confidential market information, meetings with editors and others in the field, an exclusive referral service, seminars and workshops, discount services and, above all, the opportunity for members to explore professional issues and concerns with their peers. ASJA is a primary voice in representing freelancers' interests, serving as spokesman for their right to control and profit from uses of their work in the new media and otherwise. Visit www.asja.org for more details.

The Association for Garden Communicators: The Association for Garden Communicators (formerly the Garden Writers Association) provides leadership and opportunities for education, recognition, career development and a forum for diverse interactions for professionals in the field of gardening communications.

The Authors Guild, Inc.: Founded in 1912, the Authors Guild, Inc. is a national non-profit association of more than 8,200 professional, published writers of all

genres. The Guild counts historians, biographers, academicians, journalists and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interest of authors in various areas, including copyright, freedom of expression, and taxation. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business and other areas; they are frequent contributors to the most influential and well-respected publications in every field. In the copyright area, the Guild has fought to procure satisfactory domestic and international copyright protection and to secure fair payment of royalties, license fees, and non-monetary compensation for authors' work. Guild attorneys annually help hundreds of authors negotiate and enforce their publishing contracts.

The Dramatists Guild, Inc.: The Dramatists Guild is the professional trade association of playwrights, composers, lyricists, and librettists writing for the American stage. Established over one hundred years ago for the purpose of aiding dramatists in protecting both the artistic and economic integrity of their work, the Guild continues to educate and advocate on behalf of its over 7,000 members. The Guild is governed by an elected council that currently includes such artists as Marsha Norman (The Color Purple, 'Night, Mother), Stephen Sondheim (Sweeney Todd, Company), John Guare (House of Blue Leaves, Six Degrees of Separation), current president Doug Wright (I Am My Own Wife, War Paint) and past

presidents Stephen Schwartz (Wicked, Godspell) and John Weidman (Assassins, Pacific Overtures). Other past Guild presidents have included Peter Stone, Frank Gilroy, Robert Anderson, Robert Sherwood, Richard Rodgers, Moss Hart, Oscar Hammerstein, and Alan Jan Lerner, and among the Guild's other past members are such luminaries as Eugene O'Neill, George S. Kaufman, Tennessee Williams, Arthur Miller, Lillian Hellman, Arthur Laurents, Wendy Wasserstein, Frederick Loewe and Edward Albee.

Horror Writers Association: Horror Writers Associationis a nonprofit trade association for writers of horror and dark fiction, whose mission is to assist the career development of its members by providing educational and networking opportunities while promoting the genre and literacy as a whole through its advocacy work.

Mystery Writers of America: Mystery Writers of America, an association of mystery writers, was founded in 1945 and is an independent New York 501-c-3 corporation. We have about 2800 members, 1500 of whom are published mystery writers (both fiction and non fiction such as true crime). Many of our 1300 associated members are also published but not in our genre. In addition to the Edgars, which are the Oscar of the mystery writer, we provide courses on the craft and business of mystery writing.

National Association of Science Writers: Established in 1934, the National Association of Science Writers, Inc. is dedicated to fostering the dissemination of accurate scientific information. NASW's members are professional science writers (including book authors and journalists); instructors of science writing; and science writing students. With over 2,600 members, NASW is the largest organization of science writers in the world.

National Press Photographers Association, Inc.: The National Press Photographers Association is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

National Writers Union: The National Writers Union promotes and protects the rights, interests and economic advancement of our members. We organize writers to improve our professional working conditions through collective action, and we provide professional services to our members. We represent the full range of writers in the US, in all genres, media and platforms. This includes writers of

diverse cultures, ethnicity, politics, religion, racial identities, ages, sexual/gender orientation, disabilities and all levels of economic and commercial success.

Romance Writers of America, Inc.: Romance Writers of America is a nonprofit trade association, with a membership of more than 10,000 romance writers and related industry professionals, whose mission is to advance the professional and common business interests of career-focused romance writers through networking and advocacy.

Science Fiction and Fantasy Writers of America: Science Fiction and Fantasy Writers of America is a professional organization for authors of science fiction, fantasy and related genres. Founded in 1965, esteemed past members include Ray Bradbury, Isaac Asimov, Anne McCaffrey, and Andre Norton. Today, SFWA is home to over 1800 authors, artists, and allied professionals, and is widely recognized as one of the most effective non-profit writers' organizations in existence. Each year the organization presents the prestigious Nebula Awards® for the year's best literary and dramatic works of speculative fiction. SFWA joins this brief as part of its dedicated effort to inform, support, promote, defend and advocate for its members.

The Songwriter's Guild of America: SGA is the oldest and largest U.S. national organization run exclusively by and for the creators of musical compositions and their heirs, with approximately five thousand members nationwide and over eighty

years of experience in advocating for music creator rights on the federal, state and local levels, and throughout the Executive, Legislative and Judicial branches of government. SGA's membership is comprised of songwriters, lyricists, composers and the estates of deceased members. The organization also provides a variety of administrative services to its members, including contract analysis, copyright registration and renewal filings, termination rights notices, and royalty collection and auditing, to ensure that members receive fair and accurate compensation for the use of their works.

The Textbook and Academic Authors Association: The Textbook & Academic Authors Association is the only nonprofit membership association dedicated solely to assisting authors of scholarly books, textbooks, and journal articles. Formed in 1987, the TAA has over 2,000 members, primarily consisting of authors or aspiring authors of scholarly books, textbooks, and academic articles. Many of the TAA's members serve on college or university faculties. TAA's mission is to support textbook and academic authors in the creation of top-quality educational and scholarly works that stimulate the love of learning and foster the pursuit of knowledge. TAA's activities including: organizing writing workshops on campuses throughout the US; holding an Annual Authoring Conference; publishing a newsletter; running webinars; and maintaining a website and other resources to provide members with information on tax, copyright, and royalty

matters. TAA also works to foster greater public appreciation of the importance of scholarly authors to education and to the advancement of knowledge.

Appeal No.: 16-15726
CAMBRIDGE UNIVERSITY PRESS, *et al.* v. J. ALBERT, *et al.*

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the American Society of Journalists and Authors, Inc., The Association for Garden Communications, The Authors Guild, Inc., The Dramatists Guild, Inc., Horror Writers Association, Mystery Writers of America, National Association of Science Writers, National Press Photographers Association, Inc., National Writers Union, Romance Writers of America, Inc., Science Fiction and Fantasy Writers of America, The Songwriter's Guild of America, and the Textbook and Academic Authors Association, hereby state that each does not have a parent corporation, and that no publically held corporation owns 10% or more of their stock. Further, pursuant to Rule 26.1-1 of the Eleventh Circuit Rules, counsel for *amici curiae* certifies that in addition to the persons and entities identified in the Certificate of Interested Parties and Corporate Disclosure Statement provided by the Authors Guild in its motion for an extension of time to file this brief, the following persons and entities have an interest in the outcome of this case:

- The American Society of Journalists and Authors
- The Association for Garden Communications
- The Dramatists Guild, Inc.

- ⌡ Horror Writers Association
- ⌡ Mystery Writers of America
- ⌡ National Association of Science Writers
- ⌡ National Press Photographers Association, Inc.
- ⌡ National Writers Union
- ⌡ Romance Writers of America, Inc.
- ⌡ Science Fiction and Fantasy Writers of America
- ⌡ The Songwriter’s Guild of America
- ⌡ Textbook and Academic Authors Association

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Constitutions, Statutes & Rules

Other Authorities

Pursuant to Federal Rule of Appellate Procedure 29(b), *amici curiae* respectfully submit this brief in support of the appeal of Plaintiffs/Appellants Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc. (collectively, "Appellants"). This brief is filed with the consent of all parties. This brief was authored entirely by counsel for *amici curiae*, not in any part by counsel for the parties. *Amici curiae* and their counsel alone contributed money to fund preparing and submitting this brief. *See* Fed. R. App. P. 29(c)(5).

INTEREST OF THE *AMICI CURIAE*

Amici are concerned that the district court's decision will significantly harm the nation's book authors and publishers, particularly those who produce materials that serve a critical role in higher education. Royalties and permissions income are essential to authors' and publishers' ability to produce and disseminate the works that constitute the backbone of higher education curricula.[1] The erosion of permissions income will force presses to reduce the number of works they publish, and the amount of compensation they can provide to authors, which poses a significant threat to *amici*'s members' opportunities to produce and disseminate their copyrighted works. By refusing to consider then-potential (now existent)

[1] Though we sometimes refer to these works in this brief as "scholarly" or "academic" works, we note that the types of works used in higher education courses include novels, plays, poetry, creative and historical nonfiction, and fiction, as well as anthologies, annual review or conference proceedings books, literary journals, reference works, handbooks, and monographs (published dissertations and theses).

markets, and the impact of every higher education institution adopting the same policies, the district court drastically underestimated the harm to the value of the works.

The district court also ignored the fact that the types of works used in higher education are highly expressive and creative, focusing instead on ad hoc factors unrelated to whether a work is, at its heart, factual or creative. Academic works that are used in the classroom are chosen precisely because of their original, expressive content. Moreover, while many of these classroom uses do not utilize entire works, but rather focus on discrete chapters or articles, the district court also overlooked an important nuance. By focusing only on entire books or collections, the district court myopically disregarded the growing market for shorter works that have significant economic value, particularly for higher education. *Amici* therefore file this brief to address the practical impact of this case on their members.

STATEMENT OF THE ISSUES

1. Did the district court fail to sufficiently consider the current and potential excerpt markets for higher educational use of the works at issue under the fourth fair use factor?

2. Did the district court err in neglecting to analyze the expressive nature of the works at issue under the second fair use factor?

3. Did the district court err in failing to attribute significance to the self-standing articles and chapters that represent the "heart" of copyrighted works under the third fair use factor?

SUMMARY OF THE ARGUMENT

The district court committed several key errors in analyzing the fourth "market harm" fair use factor, all of which stem from the court's misapprehension of the actual market affected by Appellees' unlicensed uses of excerpts from copyrighted works.

First, the court failed to sufficiently consider the potential excerpt markets for higher education use, including the growing market for excerpts that already existed in 2009. Its analysis renders the word "potential" in Section 107(4) of the Copyright Act superfluous. Moreover, rather than consider the potential adverse impact of unrestricted, widespread conduct similar to that of Georgia State University ("GSU") on the writing and publishing markets and, in turn, on authors and publishers in general, the district court narrowly focused on the potential losses of each individual use. As a result, the court trivializes rightsholders' losses from infringement as "negligible, " overlooking the fact losses the court deems slight may represent a significant portion of potential profits in the low-profitmarkets that exist for many of the works at issue.

Moreover, the court's holding that a directly substitutive use for digital excerpts is fair use exhibits a format-bias inconsistent with the law. The court essentially treats digital excerpts as less deserving of copyright protection than their print counterparts, an error that will negatively affect the market for excerpt use.

Second, the district court erred in analyzing the second fair use factor – the nature of the copyrighted works. The court analyzed various factors in assessing the nature of the 48 works on review, including whether each work contained formal language, subjective analysis, or opinion or commentary, but overlooked the extensive creative expressiveness of works used in classrooms. Expressiveness is the key to the second factor: professors assign these works precisely because of the interpretive insight and richness they contain. The district court ignored the second factor's lynchpin even in its dissection of the substance and style of each work.

Finally, the district court erred in applying the third factor – the amount of the copyrighted work appropriated – because it failed to attribute significance to the self-standing articles and chapters that represent the "heart" of copyrighted works.

Of particular concern to *amici* is that, even after a second opportunity to fully assess and understand the facts on a full record, the district court perpetuates

its erroneous views as to the relevant markets in this case. The court's skewed perspective ensures that the fair use analysis was not, in fact, fair to Appellants, and all but ensures a substantial loss of incentives for authors to write and disseminate the types of books used in higher education – exactly the type of works that most further learning. These are precisely the works that the Founders incentivized by including copyright in the Constitution, *see* U.S. Const. Art. I § 8 cl. 8, and they are in need of protection from even minor losses from higher education use, as this is the very market they are intended for. Authors whose works are used for higher education are entitled to the same copyright incentives as bestselling writers.

ARGUMENT

The district court's ruling, if left standing, creates a dangerous precedent for authors, particularly those who write books used for educational purposes. Affirmance of the district court's analysis would mean that these copyright owners essentially have no copyright rights and no control over the use of their works unless their works already bear a robust licensing history for excerpts at the time of use and a large portion of a full book is taken without permission. The district court's methods, and the outcome it reaches, are inconsistent with the law of fair use and should be reversed.

I. THE DISTRICT COURT MISAPPREHENDED THE "MARKET" AFFECTED BY GSU'S UNAUTHORIZED USE UNDER THE FOURTH FACTOR

The fourth fair use factor directs a court to look at "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). As the Supreme Court explained in *Campbell v. Acuff-Rose Music, Inc.*, under the fourth factor, a court should consider "whether unrestricted widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market." 510 U.S. 569, 590 (1994). *Campbell* further explained that where the copies at issue are merely non-transformative duplicates it is likely they will serve as market replacements and "cognizable market harm to the original will occur." *Id.* at 591. *See also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1316 n.31 (11th Cir. 2008); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1279 (11th Cir. 2001). The district court's approach to the fourth factor on remand ignores the existence of the potential market for excerpt use and the overall impact of widespread and unrestricted use; if affirmed, it will have serious implications for authors.

A. The District Court Committed Legal Error in Ignoring "Potential" Markets and the Potential for Widespread Use, and in Analyzing the Market for Individual Works As Opposed to the Market in General

The district court committed a critical error in failing to consider *potential* markets for excerpt uses. The Copyright Act plainly states that a court must look at "the effect of the use [on] the *potential* market," 17 U.S.C. § 107(4) (emphasis added), which calls for an evaluation of the "potential licensing revenues for [a] traditional, reasonable, or likely to be developed market[]." *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1995). *See also Sony*, 464 U.S. at 451 ("[a]ctual present harm need not be shown" under fourth factor; **"**such a requirement would leave the copyright holder with no defense against predictable damage"). The exception is where the potential market is purely speculative, which was not the situation here. *Cf. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (hypothetical market for cell phone downloads of thumbnail images not considered in fair use analysis because too speculative).

The district court reads the word "potential" out of the statute by focusing on the digital excerpt marketplace during a particular period seven years ago, *see generally* Dkt#510, when digital excerpt licensing was in its infancy, without considering predictable future markets or market expansion. The district court continues to look at the fourth fair use factor as a measure of damages,

disregarding the established, forward-looking meaning of "potential market," and erroneously holds that if a book was not available for electronic excerpt permissions in 2009, then there can be no market harm because there was no market. But the record below establishes an existing market for excerpt use which has been growing for years.

Moreover, the fact that a given work may not yet have been available through a Copyright Clearance Center license for electronic excerpt use, *see, e.g.*, Dkt#510 at 72, 87, is merely emblematic of the copyright owner's fundamental right to *exclude*, *i.e.*, to decline to license, or to decline to license for use in a particular manner (such as in digital format). *See Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 681 (S.D.N.Y. 2011) ("A copyright owner's right to exclude others from using his property is fundamental and beyond dispute.") (citing *Fox Film Corp v. Doyal*, 286 U.S. 123, 127 (1932) (stating a copyright owner "may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property")).[2] Exercise of that right cannot be

[2] An author may decide not to license a work in digital form for many reasons: greater infringement risks or additional costs, for example. Or the author may want to take advantage of one of the many new digital self-publishing platforms to distribute the work herself; many members of *amici* have released digital excerpts on these platforms or on their own websites. For these reasons, some authors have held back digital rights from their publishers. To require an owner to offer a specific format to users is akin to a compulsory license, which is Congress' role, not the courts'. *See Authors Guild*, 770 F. Supp. 2d at 686. *See also American Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 404 (S.D.N.Y. 2012) (rejecting

used to punish that publisher or author, but this is precisely the effect of the district court's disregard of the importance of "potential" markets: setting a precedent that fair use can be a vehicle for denying copyright owners their fundamental exclusionary right. *See Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) (the need to assess the effect on the market is not lessened by the fact that a copyright owner has not entered a specific market because "copyright law must respect that creative and economic choice"); *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1242 (D. Colo. 2006) (similar).

Because the district court disregarded potential markets for excerpt use, it also inherently failed to consider the effects of potential widespread and unrestricted use on those markets. The relevant inquiry under the fourth factor is not simply whether GSU is engaging in unlicensed uses of copyrighted works, but rather, what would happen if every university decided that fair use excused the need for payment. *See Campbell*, 510 U.S. at 590-91. The district court paid lip service to the inquiry of widespread use, assuming for purposes of its analysis that "everbody" in GSU's position engaged in unlicensed use, *see, e.g.*, Dkt#510 at 12, 23, 28, 33, 45, 59, but only in the context of works which were available for

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argument that public has any interest in accessing content via a specific method where "there are numerous other methods through which the public can lawfully access Plaintiffs' content"), *rev'd and remanded on other grounds*, 134 S.Ct. 2498189 (2014).

electronic excerpt permissions in 2009, again disregarding potential markets and contradicting the rule that actual present harm need not be shown under the fourth factor. Actually, many books taught in higher education are used in excerpt form only, *see infra* Section III, and are now delivered to students through online systems, meaning that books whose primary market is higher education may lose much of their potential revenue.

Finally, as a matter of policy, the relevant question in analyzing potential markets should not focus on whether the loss in revenue affects the incentive to write that particular work; rather, the proper way to view the loss of incentive is whether there is enough copyright incentive *generally* to be a professional writer (or publisher) of these kinds of works. In a statement to the Authors Guild, Pulitzer Prize-winning historian and Authors Guild Council member T.J. Stiles provides the following context:

> If I am denied income from my work, I will stop writing. I am not a dilettante, a hobbyist, an amateur, nor am I a kept man, with a patron who finds it amusing to support me in my work. I am a professional. If my profession is destroyed by the courts, then the public will get the very limited bounty of being able to read my existing work for free—which it can already do at any public or academic library—but it will get no further works from me.

In deciding whether to become a professional writer as opposed to, say, a lawyer or a teacher, one does not only consider the copyright incentives in writing one particular work, but whether there are enough overall financial and professional

incentives to choose writing as a career. Indeed, the case law suggests that the proper approach in analyzing the relevant market is to look at the market for the applicable copyrighted works "in general." *See, e.g.*, *Castle Rock Entm't, Inc.*, 150 F.3d at 145 ("[t]he fourth factor must also 'take account . . . of harm to the market for derivative works,' defined as those markets 'that creators of original works would *in general* develop or license others to develop.'") (quoting *Campbell*, 510 U.S. at 592 (emphasis added)). But the district court lost the forest for the trees, ignoring the general copyright incentives in favor of a narrow inquiry as to whether the value of the individual copyrighted work is damaged, and whether the writer loses the incentive to write or publish *that particular work*.

In the district court's view, if a work does not have a robust excerpt licensing history as of the date a suit is brought, its excerpts should be free, leaving such free excerpts to compete with excerpts that users would pay for. As a result, the free work would substitute for the works for which users must pay. The court's approach is not only legally incorrect, but it is factually misguided and if allowed to stand would significantly harm the authors of works used in higher education.

B. The District Court's Finding of Fair Use Based on a Misguided Market Analysis, If Affirmed, Could Severely Damage the Valuable Market for Excerpts of Works Used in Higher Education

Excerpt use is common in higher education, and has been since photocopying enabled the provision of excerpted chapters to students. The

Copyright Act acknowledges the licensing market for excerpt use by explicitly removing from the live teaching exemption "activities that use" works such as "course packs . . . copies . . . of which are typically purchased or acquired by the students in higher education for their independent use and retention . . . ." 17 U.S.C. § 110(2).

In particular, the nature of scholarly works (which the district court also did not consider) lends itself to excerpt use. These types of works are well-suited to classroom use on a chapter-by-chapter basis. Many of the books at issue, for example, are collections of stand-alone articles, often authored by different individuals. *See* Dkt#423, Attachment pg. 1. Others are scholarly works by one or two authors for which there is frequently one key chapter that represents the heart of the work and most of the book's value. It is common for professors to assign only the key chapter in such works and, accordingly, professors often distribute or provide access to the assigned excerpt rather than require students to purchase the whole book. But scholarly works are not the only works impacted; other works written by non-academics—biographies, historical fictions, and even fictional novels—are often assigned as mandatory reading, and professors often will only require students to read certain excerpts or chapters.

Even in 2009, it was clear that the licensing market for excerpts of works in higher education was strong. But now, the widespread unlicensed use of such

works is becoming the status quo, and members of *amici* report that they are seeing greatly decreased income from higher education uses. The district court's insistence on looking solely at one historical market snapshot, if affirmed, will contribute to the evisceration of the excerpts market. *Cf. A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) ("[L]ack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the work.").

1. The district court's view concerning the magnitude of harm to authors and publishers is unsupported

The district court acknowledged that at least some copyright owners have lost income as a result of GSU's practices, but characterized those losses, in almost every case, as negligible. *See, e.g.*, Dkt#510 at 23, 24, 35, 112, 121, 153. The district court overlooked a key fact: the principal market for many of the works at issue in this case is comprised of academic institutions like GSU, *see* Dkt#276, 5/17 Tr. 54:17-22 (Smith); 5/18 Tr. 91:8-10 (Richman); 5/19 Tr. 33:2-3 (Pfund),[3] and excerpt use represents a significant part of that market.

The nature of this marketplace compels particular care because, by its nature, it rests on thin margins are sustained by classroom use—the type of use that GSU's programs exemplify. The low profitability of most of these works is

[3] This is true whether such works are written by academic authors or non-fiction (and even some fiction) trade authors outside of academia, and equally applies to not-for-profit academic presses and commercial publishing houses.

directly tied to their purpose, which is to further research and learning for the public good, not to make a substantial profit by entertaining and appealing to the mass-market consumer. An author whose work is primarily used in higher education may not earn what a popular mass market author earns on a best seller, but excerpt income contributes significantly to academic authors' incentives to create their works. What may appear as a small loss is, in many cases, the difference between being able to keep writing or publishing, or not. Moreover, the true value of a work used in higher education may not be apparent when it is first published; many scholarly works may not become widely cited or reviewed by peers or students—and therefore more valuable—until years later. The district court appears to have been unaware of, or at very least, unconcerned with these facts.

Indeed, even the court's analysis of the nature and character of GSU's uses under the first fair use factor overemphasizes the educational nature of GSU's uses, causing the district court to stray even farther from the correct market analysis. The court assumed, for all 48 works it analyzed, that the first fair use factor weighed in favor of GSU simply because the unlicensed uses of excerpts were educational and purportedly non-profit. Dkt#510 at 18. But where the primary market for many of the works at issue consists almost entirely of higher-education institutions, allowing free use by those institutions and their students simply

because the purpose (and use) of the publications is to educate is to eradicate the excerpt market.[4] If this Court finds that an educational market for excerpts should be devalued merely because the works are, by their nature, educational and likely to be excerpted for an academic setting, then this significant excerpt market, and eventually the works as a whole, could be destroyed.

As it stands, due to economic pressures, commercial publishers and not-for-profit presses alike are increasingly forced to publish only those books that have a reasonable chance of recouping their costs. Even small income reductions affect whether a publisher can recoup its publishing costs, and will determine whether the publisher can afford to publish a particular book and offer it to the academic community.[5] A loss in excerpt permissions fees could take a book from breaking even or being profitable to becoming unpublishable.

Even so, it is not the Court's place to say if a certain dollar amount lost is or is not significant to an author's decision about the financial feasibility of

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[4] Moreover, most books contain some inherent educational elements, and to use that beneficial purpose as a thumb on the fair use side of the scale would cut into copyright rights for all books and publishing markets.

[5] Highly specialized books are particularly at risk here. Even when a book is likely to contribute enormously to scholarship in the field, publishers are unable to justify its publication if the book cannot pay for itself. *See* Dkt#399, Tr. 1/55-56 ("[W]e cannot publish books just to make money, and we quite regularly decline to publish books that we know would make money but which we judge are not necessarily valuable works in scholarship and learning….").

continuing to write. The district court found that almost all of the unlicensed uses of excerpts caused "tiny" or "very small" amounts of damages. *See, e.g.*, Dkt#510 at 26, 59. On this basis, the district court concluded (without citing any authority) that such "small" unlicensed uses would not disincentivize Appellants from publishing books. *See, e.g.*, *id.* at 28, 33, 46. This conclusion is based on legal error and is unprecedented. The law is settled that a plaintiff need not show great harm, or even any pecuniary harm, in the fair use context. *See Sony*, 464 U.S. at 451 (stating that for a copyright holder to prevail on the fourth fair use factor, "[a]ctual present harm need not be shown); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (plaintiff need not show effect on actual market for use at issue in the case). Indeed, courts have rejected attempts to minimize the effect on the market where copyrighted works generate only a "small" amount of income, or no income at all: such an argument improperly "confuses lack of one item of specific damages with lack of adverse impact on a potential market." *Ringgold*, 126 F.3d at 81.

Nonetheless, the district court was incorrect to assume that excerpt permissions income in 2009 was an insignificant portion of overall income. *See generally* Dkt#510. In *amici*'s members' experience, permissions fees are essential to authors' and publishers' incomes. Moreover, the district court ignored the pass-through of permissions revenue to authors, a revenue stream that is

typically shared 50/50. Permissions revenue for some authors represents "a healthy portion of their income." *See Authors Guild v. Google*, 05-Civ-8136, Dkt#488, August 31, 2009 Letter from Stuart Bernstein, at 2 (S.D.N.Y.) ("Before copying or publishing copyrighted materials, a legitimate author, institution or publisher is required to make a formal request to a rights holder seeking *permission* to use a work protected by copyright, with the rights holder dictating the terms and, in many cases, the fee for such use. Many authors rely on these uses of copyrighted works for a healthy portion of their income.").

2. The district court's unprecedented ruling will have a severe negative impact on the market for educational excerpt use

The practices the district court has excused as fair have led, and will continue to lead, to a decline in income and a reduction of copyright incentives for authors of the types of books used in higher education.

The district court's opinion creates an inconsistency in fair use jurisprudence that, left unresolved, will allow the types of purportedly fair uses at issue in this case to completely usurp the market for paid excerpt use. Under prior fair use precedent, paper course packs are not fair use and must be paid for, *see Princeton Univ. Press*, 99 F.3d at 1383, but under the district court's broader fair-use rubric for digital works, students should not have to pay for electronic excerpts. The introduction of electronic reserve systems like GSU's ERes and online course management systems like GSU's uLearn has essentially obviated the old practice

of providing excerpts in paper course packs or by placing copies of the book or photocopies on reserve. As a result, a robust market has developed to license and readily deliver excerpts in many electronic formats and combinations at reasonable costs, in many cases catered specifically to users' requests, including the very types of uses at issue here. *See* Appellants' Br. at 6.

GSU's directly substitutive use demonstrates that the district court's decision, if affirmed, will have a severe negative impact on this excerpt market. A decision making it acceptable to post online unlimited excerpts for a course under the rubric of fair use will incentivize universities—especially those under budgetary constraints, as are many public colleges and universities—to encourage professors to assign more digital excerpts because they will be free, rather than require students to purchase books, physical reprints, or hard copy (or digital) course packets. The effect will be fewer purchases of books and course packets for classroom use. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991) ("While it is possible that reading the [course] packets whets the appetite of students for more information from the authors, it is more likely that purchase of the packets obviates purchase of the full texts.").

The district court effectively created a broad categorical educational or non-profit fair use exemption from copyright infringement. When the use becomes "widespread," any individual or institution in GSU's position will no longer need

to license excerpts, and the excerpt market will fail for all but particularly long excerpts. *See* 4 Nimmer, *supra* § 13.05(E)(1) (explaining that "if every school room or library may, by purchasing a single copy, supply a demand for numerous copies through photocopying, or similar devices, the market for copyrighted educational materials would be almost completely obliterated"). This is precisely what consideration of the fourth factor is intended to prevent, *see, e.g.*, *Harper & Row Pubs., Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841), and this case illustrates why courts have declined to create such bright-line exemptions in the nonprofit or educational context: to prevent the fair use exception from swallowing the rule of copyright protection.

The impact of exempting the excerpt market from copyright is a loss of a necessary revenue source that may well remove the incentives for certain authors to write. For academic authors, publishing with a scholarly press is the principal way for scholars in most fields secure tenure and promotion, as well as gain valuable exposure and share their work with the public. Salary increases and merit pay in most research institutions are also tied directly to a professor's publishing record.[6] In some cases, there are direct economic benefits to academics from

[6] *See* University of California, Academic Personnel Policy, *available at* http://www.ucop.edu/academic-personnel/academic-personnel-policy/.

publishing scholarly works.[7] The ability to "sell" one's work, for example, to an established publisher has immediate financial benefits for most academic authors. Indeed, *amici*'s academic members report that publishing in scholarly presses is the single most important factor to career advancement in academia. The reduction in the publication of scholarly works will have the greatest impact on young professors who are still seeking promotion and tenure. *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 927 (2d Cir. 1995) (citing *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (noting that in academia, recognition "so often influences professional advancement and academic tenure")).

For authors who do not have university jobs to support them—which is the case for most of the authors who would be impacted by this decision—or for authors of non-fiction and even fictional works used in higher education curricula, a small reduction in income can be the difference between being able to keep writing or not. The world the district court envisions is one where no one writes non-fiction other than established academics, but such an ecosystem is not sustainable. In that world, there would be no incentive to create works of non-fiction that may have a different flavor (and often more mass appeal) when written by non-academics, or works of fiction that may serve as valuable learning tools in

[7] For instance, the University of California provides a promotion that comes with an approximately $5,000 salary increase for each book published. That adds up to substantial compensation over a professor's career. *See id.*

college classrooms. We would risk losing a truly independent class of authors, unbeholden to patronage of any kind, including that of academia, if the district court's decision is upheld. For instance, in his statement to the Guild, Mr. Stiles explains:

> The scholarly as well as expressive value of my writing from an independent position has been established. Each of my three books has one major awards, both literary and scholarly. I am a member of the prestigious Society of American Historians and the recipient of two major fellowships, including the Guggenheim. Yet I have undertaken projects that have not been fashionable in academia: Jesse James, Cornelius Vanderbilt, and George Armstrong Custer. My biography of Vanderbilt was the first attempt at a comprehensive biography of the man, even though he was one of the most important capitalists in world history. The previous serious biography of Vanderbilt was published in 1942. Clearly the incentives and concerns of university-based historians were insufficient.

Ultimately, the inability to publish will heavily dilute the overarching copyright incentives for authors to write and publish works that further human knowledge—the type of works the Founders had in mind in securing copyright protection in the Constitution—simply because they yield low or no profits. *See* 4 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.05(E)(1) (allowing excerpt use as fair use "could well discourage authors from creating works of a scientific or educational nature"); *Princeton Univ. Press*, 99 F.3d at 1391 (finding loss of licensing revenue could have a "deleterious effect upon the incentive to publish academic writings"). Eventually, it will impoverish our literature at its most sophisticated, and revenue-sensitive, margins.

II. THE DISTRICT COURT FAILED TO CONSIDER EXPRESSIVENESS AS AN INSEPARABLE PART OF THE NATURE OF THE COPYRIGHTED WORKS

The district court parsed of each of the 48 copyrighted works before it, often in painstaking detail; but its analysis missed the mark in the context of the second fair use factor. The district court's main areas of focus were whether each chapter or excerpt contained objective or subjective analysis; was written in formal or conversational style; included any humorous aspects; or included author opinion or commentary. This approach missed the key inquiry: is the work *expressive*? The district court should have analyzed the difference between purely factual publications and those expressive publications that exhibit creativity beyond the mere recitation of facts.

The district court's analysis ignores the originality and creative value of scholarly, academic, or other non-fiction writing in particular, and is contrary to case law finding that such works are sufficiently original or expressive such that the second factor would weigh in favor of the Appellants (or at worst would be neutral). *See, e.g.*, *Princeton Univ. Press*, 99 F.3d at 1389 (scholarly works found to contain "creative material, or 'expression,'" which disfavored fair use); *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (cake decorating booklet contained "both informational and creative aspects," and thus second fair use factor was

neutral); *Weissmann*, 868 F.2d at 1325 (second fair use factor favored neither party in case involving claim of infringement of copyright in medical research article).

Non-fiction works that "inform and educate" are generally highly creative and expressive.[8] For instance, scholarship does not report on facts or acknowledged discoveries like the news does; it analyzes prior scholarship or facts and reframes and adds to prior learning through interpretation and clear original expression. Much scholarly writing attempts to resolve issues and convincingly advocates for and persuadse readers of a point of view.[9] Likewise, when considering a pile of books on the same topic, a reader will reach for those in which the author has organized and presented the material with clarity and grace. Doing this requires a high degree of originality and expressive writing. Non-expressive writing, such as a mere recitation of facts or data, by contrast, does not persuade and it does not teach. For these reasons, expressive writing is not limited to fiction and includes the types of works at issue here. As an example, one could list the known facts of Shakespeare's life on the back of an envelope, yet there are

[8] Works of fiction are, of course, by their nature creative and expressive, but the district court did not analyze any such works in its opinion.

[9] That a work is educational does not make it any more "functional" than something that is fictional. While educational works may contain real information as opposed to fictional information, their functionality arises from the goal of educating, just like a fictional work's function may be to entertain. *Cf.* Dkt#423 at 51-52 (distinguishing educational works from fictional works). Even so, fictional stories are used in the classroom too; for example, professors often assign readings comprised of entire fictional short stories.

thousands of scholarly works on Shakespeare and his life. None of these numerous, and in some cases voluminous, works contains the same expressive elements.[10] Entire careers of extremely successful writers like Mr. Stiles have been based upon the premise that a nonfiction work may combine literary and scholarly values; according to Mr. Stiles, "the value of the work is enhanced by intertwining literary art and rigorous scholarship"[11] and "the artful presentation of a narrative and the insight into the human condition required for a literary narrative depends upon the humane and artistic vision of the author."

Also, scholarly writings are assessed based on their originality as well as their quality, and are often assigned by professors based on expressive content of the works. *Amici*'s academic members attest that originality is the most important factor that peer reviewers assess when reviewing scholarly articles and books for publication. A work will not get published if it is not original. Even the research

[10] Professor Stephen Greenblatt, for example, wrote a 448 page biography of Shakespeare and yet, when asked to write down all the facts known about Shakespeare, produced a 13 page paper. *See, e.g.*, Stephen Greenblatt, Will in the World: How Shakespeare Became Shakespeare (W. W. Norton 2005); Stephen Greenblatt, *The Traces of Shakespeare's Life*, *in* The New Cambridge Companion to Shakespeare 1-13 (Margreta de Grazia & Stanley Wells eds., Cambridge University Press, 2nd ed. 2010).

[11] For instance, the Society of American Historians has the stated purpose "to encourage literary distinction in the writing of history and biography." (See https://sah.columbia.edu/.)

requirement guidelines at many, if not most, research institutions specifically refer to the need to author "original" and "creative" publications.[12]

If the works at issue here were not expressive, then the professors would just teach the facts and ideas from the works rather than assign the works to the students to read via ERes or uLearn. Yet they do not. Certain of *amici*'s members, who are teachers as well as academic authors, report that they assign readings for their classes based on the expressive content of the works. These works are no less deserving of copyright protection than works of fiction and should not be automatically categorized as less deserving because they serve an educational function.

Works utilized for teaching in the context of higher education are the very types of works that the Founders and first Congresses had in mind when shaping our copyright laws. The Constitution's Copyright Clause uses the term "Progress of Science" to refer to copyright because the Founders were concerned with

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[12] *See e.g.*, Carlson School of Management, *Promotion and Tenure Code, 7.12 Statement*, at 4 ("Research achievements will be judged primarily on the basis of *the creativity of the work*, quality of implementation, validity of results, importance of the findings, and influence on the candidate's field…. The written work is *examined for evidence of originality* and importance ….") (emphasis added); University of Colorado Denver, Communication Department, *Department By-Laws*, October 2011, at 43-44, 48 ("For promotion … candidates must demonstrate a sustained record of high-quality research.… [T]he following six criteria will be used by the Department to assess research: … 4. The *degree of creativity and originality* of the research"; "All scholarly work will be evaluated based upon its quality (prestige, significance, programmatic nature, *creativity*, growth, etc.) as well quantity.") (emphasis added).

encouraging the production of works of authorship from which people could learn and spread knowledge.[13] This Court should consider the far-reaching impact that affirmance would have on authors if other institutions follow the district court's lead and use the decision below to claim broad fair use over works used in higher education without regard to the highly expressive nature of those works.

III. THE DISTRICT COURT'S ASSESSMENT UNDER THE THIRD FACTOR UNDERVALUED THE SIGNIFICANCE OF CHAPTERS AND THE "HEART" OF A WORK

In the case of each excerpt that it analyzed, the district court compared the excerpt to the book as a whole from which it was excerpted. But in many cases, that is not the correct measure, as the chapter or excerpt may be a self-standing work. The relevant market—and therefore the relevant subject for the court's quantitative and qualitative analysis under fair use factor three—is not a market for books, but rather is a market for articles, chapters, and other excerpts *from* books.

The district court's opinion is internally inconsistent; the court was willing to analyze excerpts as the relevant market under the fourth factor, yet analyzed the market for entire books under the third factor. The former analysis was the correct one because a single chapter or article, even of short length, may be considered a work in and of itself. This is especially true in the academic world, where teachers often use excerpts from books, anthologies and other larger compilations or

[13] U.S. CONST. art. 1, § 8, cl. 8. *See also Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).

collections (which may contain chapters from various publications) to assign discrete key reading materials.

This nuance is particularly important now, when point-of-sale self-publishing platforms allow authors to publish and sell secondary editions—or updates or new versions—of their works, including articles and individual chapters through the authors' own websites.[14] Relatedly, there is also a growing market for short-form works in digital format, such as Amazon's Kindle Singles program. Allowing unauthorized use of these shorter-form works on the justification that, as compared to a whole compilation or an entire book, the taking is small, unduly minimizes the importance of the third-factor analysis and will ultimately undercut all of these burgeoning markets. The district court did not inquire at all into the likely trajectory of the growth curve of these new secondary markets, or the total potential market over the life of the copyright of these works.

The district court also engaged in a merely superficial review of whether each excerpt or chapter was the "heart" of the work—a critical consideration under the third factor. In the three instances where the district court found that the "heart" of a work was taken without permission, the district court still uniformly held that those uses were fair. *See* Dkt#510 at 86, 97, 199. Regardless of the shorter length of the taking, the appropriation of the "heart" of a work should

[14] This strategy is particularly relevant in the context of out-of-print materials.

strongly weigh against fair use even in the face of other factors favoring fair use, and the district court's approach is contrary to the Supreme Court's admonition to accord proper weight to the "qualitative importance of the quoted passages of original expression." *See Nation Enters.*, 471 U.S. at 564-65, 569.

Finally, the district court often justified the percentage taken by referencing the pedagogical purpose and general educational nature for which a particular professor used a work. Like many other aspects of the court's analysis, this one is also unprecedented, and improperly conflates the first and third factors, compounding the district court's error and further obscuring the real issues —legal and factual—that will significantly impact authors like the members of *amici*.

CONCLUSION

For the reasons set forth above, and for those set forth in Appellants' brief, *amici curiae* respectfully request that the decision below be reversed and remanded with respect to the district court's 41 findings of fair use.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2010, the word processing software used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 9th day of December, 2016, I electronically filed the foregoing **BRIEF FOR *AMICI CURIAE* THE AUTHORS GUILD *ET AL.* IN SUPPORT OF APPELLANTS** with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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