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# The Georgia State University Copyright Case (Cambridge University Press v. Becker) and What It Means for Librarians

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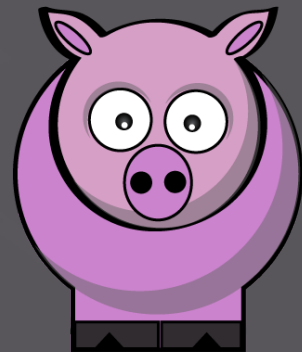
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The Georgia State University  
copyright case (*Cambridge  
University Press v Becker*) and  
what it means for librarians.

Or

Bulls make money, Bears make money,  
Pigs get slaughtered

Dr. Judson L. Strain, J.D., M.L.I.S.





# What we will learn

- ▣ History of the case
- ▣ What the Court decided
- ▣ The “Four Factors of Fair Use”
- ▣ How the Court used the Four Factors

## *Also learn*

- ▣ How a library can use the decision to stay within the bounds of Fair Use
- ▣ Implications of the decision

# What you need to know (at least)

If you are copying excerpts from a scholarly, informational book, excerpts must be *no larger* than:

- ▣ 10% of the book – if it is 0–9 chapters; or
- ▣ 1 chapter (or its equivalent) – if it is 10 or more chapters long

**WARNING:** Gross oversimplification!

# Excerpts at Issue

- ▣ 75 excerpts from 64 Books (not journal articles)
- ▣ All for courses in Social Sciences or Language fields
- ▣ All informational – no fiction or poetry.
- ▣ All are scholarly monographs or edited books
- ▣ NO TEXTBOOKS (i.e., specifically written to guide the instruction of a classroom of students)
- ▣ All books owed by GSU library or professor

# Copying Procedure

- ▣ Library scans excerpt to digital (.pdf) file
- ▣ Uploads digital file to Electronic Reserves system
- ▣ Placed on a password-protected course page
- ▣ Student accesses via pass code from prof.
- ▣ Student must acknowledge and agree to respect copyrighted nature of the materials
- ▣ After semester is over, students can no longer access the excerpts

# Story of the Case

## Main parties:

- Plaintiffs

- Cambridge University Press (“Cambridge”)
- Oxford University Press, Inc., (“Oxford”)
- Sage Publications, Inc. (“Sage”)

### Also

- Association of American Publishers (“AAP”)
- Copyright Clearance Center (“CCC”)

- Defendants

- Mark P. Becker, as President of GSU,
- et. al. (and others)



# Who is CCC?

(corporations are people, too!)

- ▣ CCC (a not-for-profit corp.) is a *reproduction rights organization*: it licenses the copying of excerpts of copyrighted works for a fee
- ▣ Cambridge, Oxford & Sage (“The Publishers”) all use CCC as a licensing agent
- ▣ The Publishers have all chosen to make excerpts of *some* works available for copying through CCC.
- ▣ Not all excerpts are available for copying
- ▣ 2010 Gross revenues of \$215,000,000.

# What is AAP?

- ▣ The Association of American Publishers
- ▣ A Professional Association that represents publishers' interests
- ▣ All three publishers pay membership dues to the AAP

# What else does/did CCC do?

- ▣ “Coordinates and supports litigation” against “perceived infringers” (Court Order of May 11, p. 24)
- ▣ “In this case, CCC ... did the initial fact gathering concerning unlicensed copying of excerpts in the higher education community” (*Id.* at p. 24)
- ▣ CCC and AAP organized the litigation vs. GSU and recruited the three publishers to file suit. (*Id.* at p. 25)
- ▣ CCC and AAP also paid ½ of the Publisher’s litigation expenses, incl. attorneys’ fees. (*Id.* at p. 25)

# Progression of the Case in a Nutshell:

126

99

74

48

5

2,860,000



## *Case Timeline:*

- ▣ April 15, 2008 -- suit is filed vs. GSU
- ▣ February 17, 2009 – GSU modifies copyright policy
- ▣ Aug. 20, 2010 – Publishers claim 126 infringements under *new* policy
- ▣ May 17, 2011 – Trial begins – Publishers now claim 99 violations (drops 27 claims)
- ▣ Publishers present their case in chief
- ▣ After the close of Publishers' case, they drop 25 claims – now claim 74 violations

## *Case Timeline (cont.):*

- ▣ GSU presents their case
- ▣ Order of May 11, 2012 -- The Court rules on the 74 claims
  - 27 claims “thrown out” – no *prima facie* case (Publishers’ proof fails before a defense is mounted)
  - 43 claims are Fair Use – no violation of copyright by GSU
  - 5 claims are upheld – GSU went beyond Fair Use boundaries
  - In total, less than 4% of the original 126 claims of copyright violation (5 out of 126) are upheld

## *Case Timeline (cont.):*

- ▣ Judge asks Publishers to propose an Order for Relief (*what do you want?*)
- ▣ Publishers demand:
  - 3 years access to GSU's course management system
  - GSU keep extensive records on each excerpt posted, incl. documentation of the Fair Use investigation performed for each document
  - Require GSU provost to certify for 3 years all efforts taken to ensure no copyright violations.

## *Case Timeline (cont.):*

- ▣ Order of Aug. 10, 2012 -- Court rejects Publisher's proposed relief
  - “The Court is convinced that Defendants did try to comply with the copyright law; this is demonstrated by the fact that there were only five successful infringement claims.” (Court Order of Aug. 11, p. 11)
  - Requires GSU to modify copyright policy to conform to the Court's decision
  - Disseminate essential points of the ruling to faculty & relevant staff



## *Case Timeline (cont.):*

- ▣ Court declares GSU the “prevailing party” and requires Publishers to pay GSU’s attorneys’ fees and costs
- ▣ Order of Sept. 30, 2012 – GSU awarded \$2.86 million in attorneys’ fees and \$85.7 thousand in costs. (Court Order of Sept. 30, p. 10)

# Copyright Primer

- ▣ Any Original work with a “modicum of creativity” that is “fixed” in a tangible medium of expression is subject to copyright.
- ▣ Owner of the copyright – has the *sole right* to sell, copy, reproduce and/or publicly perform or display that work.
- ▣ Exception: Fair Use

# Fair Use

- ▣ Purpose (Commercial vs. Non-profit Educational)
- ▣ Nature (Creative vs. Factual)
- ▣ Amount (Substantial vs. Decidedly Small)
- ▣ Effect on Marketplace (Harm sale of Original?)

Tim Gritten, et. al., "Georgia State University, Copyright, and Your Library" (ALA Webinar of 7/25/2012)

# Purpose (Commercial vs. Non-profit teaching)

- ▣ Statute 17 U.S.C. sec 107 Preamble – “[T]he fair use of a copyrighted work ... for *purposes* such as criticism, comment, news reporting, *teaching* (including multiple copies for classroom use), *scholarship*, or research, is not an infringement of copyright.”
- ▣ Here, “Non-profit teaching” = strongly favors GSU
- ▣ *Contrast* – Kinko’s Coursepacks (sale for profit) vs. copies for college class (non-profit teaching)

## *Issues*

- ▣ *For-profit schools (e.g., University of Phoenix)*

# Nature (Creative vs. factual)

## ▣ Poetry – Telephone directory

Court followed *Kinko's* decision (*Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y.1991) – Scholarly biographies, reviews, criticism and commentaries are “informational” in nature, i.e. Factual.

## ▣ “Factual” = Favors GSU

### *Issues*

#### ▣ *Music scores*

#### ▣ *Movie clips*

# Amount (Substantial vs. Decidedly Small)

Court defines “decidedly small”

- ▣ Book < 10 chapters = up to 10%
- ▣ Book > 10 chapters = No more than 1 chapter (or its equivalent)
  
- ▣ **Court *rejects* Classroom Guidelines**

# Classroom Guidelines detour

- ▣ 1976 *minimum* Fair Use “Safe Harbor”
- ▣ Publishing Industry’s idea of Fair Use

Is a complicated, headache-inducing document

# 1976 Classroom Guidelines

## *Requires*

### ▣ Brevity –

- For prose items, “Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.”

### ▣ Spontaneity –

- The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.



## 1976 Classroom Guidelines, (cont.)

### ▣ One Time Only –

- “Copying shall not ... be repeated with respect to the same item by the same teacher from term to term.”

Publishers lobbied for these as *Maximum* Fair Use requirements

**Court rejected each one**

# Effect on Marketplace (Harm sale of Original?)

- ▣ Excerpt permissions readily available = Strongly favors Publishers
- ▣ Excerpt permissions *not* readily available = favors GSU

# Order of Proof

- ▣ Prima Facie case – Publishers must prove
  - Own a valid copyright
  - Violation of copyright
- ▣ Fair Use defense – GSU must prove 4 factors weigh in their favor

# Publishers failure of proof

- ▣ Publishers fail to present a case on 27 claims
  - Fail to prove owned valid copyright in 17 cases (shades of Mortgage companies robo-signing of documents)
  - Fail to prove violation of copyright in 10 cases
    - ▣ Students didn't read the excerpts – only a “de minimus violation” – therefore, no violation of copyright
    - ▣ If a tree falls in the forest and no one is there to hear it, does it make a sound?
    - ▣ School posts a copy – students don't read it – NO COPYRIGHT VIOLATION

# “De Minimus” examples

- ▣ No Chapters – 16.98% (#1)
- ▣ No Chapters – 26.11% (#2)
- ▣ No Chapters – 19.66% (#5)
- ▣ 2 Chapters – 25.24% (#45)

# Fair Use Analysis Applied to the remainder

- ▣ Purpose (Commercial vs. Non-profit Educational)
  - Strongly favors GSU
- ▣ Nature (Creative vs. Factual)
  - Favors GSU
- ▣ Amount (Substantial vs. Decidedly Small)
  - Favors GSU if Decidedly Small (< 1ch./10%) (*see above*)
  - Favors Publishers if larger
- ▣ Effect on Marketplace (Harm sale of Original?)
  - Strongly favors Publishers – if excerpt permissions readily available
  - Favors GSU – if no excerpt permissions readily available

# The 5 Infringing Excerpts

- ▣ 4 Chapters – 8.38% (#11)
- ▣ 2 Chapters – 3.01% (#16)
- ▣ 7 Chapters – 12.29% (#22)
- ▣ 2 Chapters – 12.5% (#72)
- ▣ 2 Chapters – 8.28% (#74)

Tim Gritten, et. al., (*Ibid*)

# Some Fair Use Excerpts

- ▣ 2 Chapters – 5.98% (#13)
- ▣ 3 Chapters – 9.64% (#20)
- ▣ 1 Chapter – 18.52% (#32)
- ▣ 2 Chapters -- “over 20%” (#51)



- ▣ 3 GSU vs. 1 Publishers = **Fair Use (GSU wins)**
- ▣ 2 GSU vs. 2 Publishers = **Danger Zone** – Court does further analysis
  - Shifts in favor of Publishers if excerpt is very large (e.g., 7 chapters (12.29%) copied), or
  - Shifts in favor of Publishers if there is “significant excerpts income” from the book
  
- ▣ Here, Publishers won five of six 2–2 “ties”
- ▣ You cannot tell if a Publisher has “significant excerpts income”. Avoid the 2 – 2 “tie”

## WARNING –

- ▣ Too high of an Amount can defeat Fair Use, even if other three factors weigh in favor of the defendant.

Court – 18.2% of work is “likely” close to the upper limit of “Fair Use” protection, even when digital permissions are *NOT* available. (Court Order of Aug. 10, p. 10)

- ▣ *But note:* two excerpts of 18.52% (#32) and “over 20%” (#51) were found “Fair Use”

- ▣ “Equivalent” of 1 chapter (#63) = Two excerpts of different chapters (totaling 13 pages) were copied from a 10 chapter, 365 pg. book. Avg. chapter length for book was 29 pages, so 13 total pages of excerpts was within the “1 chapter” limitation.

# Implications

- ▣ Only ONE District court in ONE circuit
  - Three levels: District (trial), Circuit (regional), Supreme (national)
  - 11<sup>th</sup> Circuit is AL, FL & GA

## *HOWEVER:*

- ▣ First Impression Case – will be a model
  - Other courts WILL follow or respond
  - Schools have already followed

# Implications (cont.)

- ▣ Is on appeal – keep lookout for appellate court decision

# Things to Remember:

- ▣ School was
  - Not-for-profit (*contra* University of Phoenix, Kinko's)
  - State University (money damages NOT available)
- ▣ Involved Scholarly Books
  - Informational, not fiction, poetry, music or film
  - Not textbooks (Judge specifically excluded)
  - Not journal articles (contrast *Texaco* case -- *American Geophysical Union V. Texaco Inc.*, 60 F.3d 913 (2nd Cir. 1994))
- ▣ No need to get permission for a second use of material (unlike 1976 Classroom Guidelines)

# Bibliography

## Cases

- ▣ *American Geophysical Union V. Texaco Inc.*, 60 F.3d 913 (2nd Cir. 1994)
- ▣ *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y.1991)
- ▣ *Cambridge University Press v. Becker*, 863 F.Supp.2d 1190 (N.D.Ga., 2012)

# Bibliography (cont.)

## GSU Court Orders:

- ▣ Order of May 11, 2012 –  
<http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/423/>
- ▣ Order of Aug. 10, 2012 –  
<http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/441/>
- ▣ Order of Sept. 30, 2012 –  
<http://docs.justia.com/cases/federal/district-courts/georgia/gandce/1:2008cv01425/150651/462/>



# Bibliography (cont.)

## Webinar

- ▣ Tim Gritten, et. al., "Georgia State University, Copyright, and Your Library" (ALA Webinar of 7/25/2012)

## Other

- ▣ Classroom Guidelines (1976)  
<http://louisville.edu/copyright/resources/classroom-guidelines-1976.html>

# Recommended

Web blog

- ▣ Kevin Smith's *Scholarly Communications @ Duke*,  
*<http://blogs.library.duke.edu/scholcomm/>*