


6-9-2015

The Georgia State University Copyright Case after the Appeal: Is It More Appealing?

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Recommended Citation

Strain, Judson L., "The Georgia State University Copyright Case after the Appeal: Is It More Appealing?" (2015). *Faculty Scholarship – Library Science*. 17.

https://digitalcommons.olivet.edu/lsci_facp/17

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The Georgia State University
copyright case after the appeal
– is it more appealing?

Or

I love that dirty water

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

Full case citation –

- ▣ *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir.2014)

GSU case on appeal

Appellate Court

- ▣ Takes a red pen to Trial Court decision, rejects the “10% or one Chapter” rule among other “corrections”, but...
- ▣ Strengthens Fair Use by affirming many of the Trial Court’s rulings, but...
- ▣ Rejects Trial Court’s method of weighing the four Fair Use factors
- ▣ ‘Concurring’ opinion really a dissent – rejects Fair Use for educational use.

“Swimming in muddy waters”

“...we thought we had a rule, even if many of us didn't like it – 10% or one chapter was the amount Judge Evans said was ‘decidedly small’ The bad news is that we no longer have that rule. The good news is that we no longer have that rule.

*...the situation is not much different than we have always known it to be, there is just a **little more mud in the water.**”*

Kevin Smith, (from his blog, SCHOLARLY COMMUNICATIONS @ DUKE on 10/30/2014)

What we will learn

- ▣ Updated history of the case
- ▣ What the Appeals Court decided
- ▣ “Four Factors of Fair Use” review
- ▣ How the Court used the Four Factors

We will also ask

- ▣ Can you use the decision to stay within the bounds of Fair Use?
- ▣ Implications of the decision

But first, a personal story...

How I first hit the copyright wall

- ▣ Jury Trial: Copying three medical illustrations from a book to use before a jury
- ▣ Kinko's smacks me down
- ▣ Limits me to *One* blow-up copy(!!)

Fast forward to a professor teaching a class

- ▣ Prof owns a book -- wants to use a portion of it in his class
- ▣ Options
 - Pass the book around to each student to read
 - Have each student purchase the book
 - Each student purchases a portion of the book
 - Allow the prof. to copy & distribute a *reasonably small portion* of the book

THE LEAST YOU NEED TO KNOW:

What is a reasonably small portion? (per GSU appeal)

We don't know.

Per The GSU trial court: A reasonably small portion is:

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

Per the Appeals Court:

- ▣ “The District Court’s blanket 10 percent-or-one-chapter benchmark was improper.” (*Patton*, 769 F.3d at 1271)
- ▣ “We must ... eschew a rigid, bright-line approach to fair use.” (*Id.* at 1271)

- ▣ Was the “10 percent-or-one-chapter benchmark” too much?

-- No.

- ▣ Was the “10 percent-or-one-chapter benchmark” too little?

-- No.

Immediate Criticism:

“Why We Need Bright Lines”

“...the celebrated district court opinion in the (GSU) case ... opened up the possibility of teaching faculty how to properly make fair use of material using *plain terms* and *easy-to-understand concepts* while the appeals court returns us to the days of case-by-case holistic analysis and detailed exceptions, loopholes, and caveats.”

- ▣ “When intellectual property law experts cannot agree, we should not expect our history and math faculty to do justice to the fair use analysis each time. Instead, faculty will divide into two camps. One group will “throw caution to the wind” and use whatever content they wish in whatever form they desire, hoping never to raise the ire of the publishing companies. The other, out of an abundance of caution, will self-censor, and fail to make fair use of content for fear that they might step over a line they cannot possibly identify, and can never be certain of until a judge rules one way or the other. Either way, our students and the publishers lose out.”

- ▣ “The Constitution teaches that the purpose of copyright is to “promote the Progress of Science and useful Arts.” The district court opinion found that small excerpts available to students “would further the spread of knowledge.”
- ▣ Arming faculty with clear rules and standards to properly balance fair use of content would go a long way toward achieving this goal.”

Joseph Stortch, *Inside Higher Ed*, Oct. 20, 2014

What are we going to do without our “Bright Line” standard?

- ▣ We are going to craft a new standard from the Appellate Court’s decision that will allow us to stay within the bounds of Fair Use.

Towards a 3rd factor standard: Amount used

- ▣ “A book reviewer who copies snippets from a book is likely to increase demand for the book, but...”
- ▣ “were a book reviewer to quote the entire book in his review, or so much of the book as to make the review substitute for the book itself, he would be cutting into the publisher’s market, and the defense of fair use would fail.”

Not “the heart of the work”

- ▣ However, cannot use “the most interesting and moving parts of the entire manuscript” or “the heart of the book” even where the defendants only copied approx. 300 words out of the 200,000 words in the plaintiff's work.” See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)

But now, back to the case...

GSU case: 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

Case Timeline:

- ▣ April 15, 2008 -- suit is filed vs. GSU
- ▣ February 17, 2009 – GSU modifies copyright policy – institutes a checklist
- ▣ Aug. 20, 2010 – Publishers claim 126 infringements under *new* policy – claims “massive” infringements
- ▣ 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.):

- ▣ Order of Aug. 10, 2012 --
 - “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 factors:

- ▣ 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 – *Appellate Court Agrees*
- ▣ *Contrast* – Kinko’s Coursepacks (sale for profit) vs. copies for college class (non-profit teaching)

Nature (Creative vs. factual)

▣ Poetry – Telephone directory

Trial 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.

▣ These were “factual” = Favors GSU: **Appellate Court Disagrees, but says 2nd factor was “of relatively little importance to this case”.**

Amount (Substantial vs. Decidedly Small)

District Court defines “decidedly small”

- ▣ Book < 10 chapters = up to 10%
- ▣ Book > 10 chapters = No more than 1 chapter (or its equivalent) – **Appellate Court rejects “Bright Line” approach.**

- ▣ District Court *rejects* Classroom Guidelines – **Appellate Court agrees.**

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

District Court rejected each one – **as did the Appellate Court.**

Effect on Marketplace (Harm sale of Original?)

- ▣ Excerpt permissions readily available = Strongly favors Publishers -- **Appellate Court agrees**
- ▣ Excerpt permissions *not* readily available = favors GSU – **Appellate Court agrees:**
- ▣ **BUT – Appellate Court says District Court erred by not giving 4th factor additional weight in its overall fair use analysis.**

Trial Court's Fair Use Analysis Applied to the remainder

- Purpose (Commercial vs. Non-profit Educational)
 - Strongly favors GSU – Upheld by Appellate Court
- Nature (Creative vs. Factual)
 - Favors GSU – Appellate Court – Neutral or favors Publishers – but give little weight
- Amount (Substantial vs. Decidedly Small)
 - Favors GSU if Decidedly Small (< 1ch./10%) (*see above*)
 - Favors Publishers if larger – Appellate Court rejects
- Effect on Marketplace (Harm sale of Original?)
 - Strongly favors Publishers – if excerpt permissions readily available – Appellate Court agrees
 - Favors GSU – if no excerpt permissions readily available – Appellate Court agrees – but Trial Court should give more weight to 4th factor

Trial Court's "mechanical" analysis

- ▣ 3 GSU vs. 1 Publishers = Fair Use (GSU wins)
- ▣ 2 GSU vs. 2 Publishers = Danger Zone – Court does further analysis
 - ▣ Publishers won five of six 2-2 "ties"

Appellate Court rejects "mechanistic" analysis

Appellate Court mandates “holistic” balancing

- ▣ “the District Court did err by giving each of the four factors equal weight, and by treating the four factors mechanistically. The District Court should have undertaken holistic analysis which carefully balanced the four factors in the manner we have explained.” (769 F.3d at 1283)

Appellate Court vacates the Attorneys' fees award

- ▣ Trial Court's "Fair Use" analysis was erroneous, as described above.
- ▣ Trial Court's designation of GSU as the "prevailing party" (and the award of attorneys' fees) was predicated on its Fair Use analysis.
- ▣ Accordingly, the award of attorneys' fees and costs is vacated.

Summary of main points of Appellate Court's decision

- ▣ *Factor 1:* Non-profit educational use **favours Fair Use** (Trial Court was correct)
- ▣ *Factor 2:* Nature of the work – Consider the factual vs. creative content within the work – (Trial Court erred, but give it little weight)
- ▣ *Factor 3:* No Bright Line Rules! (Trial Court erred)
- ▣ *Factor 4:* Excerpt license availability is main factor to consider (Trial Court was correct)

Summary of main points of Appellate Court's decision (cont.)

- ▣ Holistic analysis required (Trial Court erred in “mathematical” and “mechanistic” weighing of 4 factors)
- ▣ 4th factor should be given additional weight
- ▣ Classroom Guidelines ARE NOT Fair Use limits
- ▣ Coursepack cases do not apply
- ▣ Case-by-case analysis does apply – no “categorical infringement”

How will the District Court decide on remand?

- ▣ We don't know. The District Court may apply the Appellate Court's standards and still end up with the same result (including award of attorneys' fees)

Where does this leave librarians making copyright decisions?

- ▣ “How does one swim in water that is this muddy?”
- ▣ “At this point, my best advice is to keep on doing what we have been doing, thinking carefully about each situation and making a responsible decision. I would recommend a somewhat more conservative approach, perhaps, than I would have done (before the Appellate Court decision), especially when a license for a digital excerpt is available. *But the bottom line is that the situation is not much different than we have always known it to be, there is just a little more mud in the water.*”

-- Kevin Smith, *Swimming in Muddy Waters*

We Can Do Better Than That!

- ▣ Factor 3: Replace “Bright Line” rule (10%/1 chapter) with evaluative principles

Use the Appellate Court’s language:

- “Helped themselves overmuch”

or

- Is the amount is appropriate in the light and character of the use?
- Is the amount used more likely to stimulate interest in the book and increase the demand for it

or

- does it use so much of the book/work as to make it substitute for the work itself?

My Observations

Keep in mind that people may buy a book for several chapters but less than the whole work. One shouldn't use so much of the work to defeat that customary use of a book.

I would still note what percent was used *but not* make a “bright line” rule about it.

Irony: The result of my proposed Factor 3 analysis may be similar to the Trial Court's Bright Line formula – 10% or One chapter – but the standard used is different.

Heart of the Work?

- ▣ Gerald Ford Memoirs case (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985))
- ▣ The Nation “scoops” Time, publishes 300-400 words from unpublished memoirs in advance of publication regarding the pardoning of Nixon.
- ▣ Time magazine cancelled deal to pay \$\$ for right to first publish excerpts
- ▣ Total work ~200,000 words

- ▣ Factor 1: Note any transformative (i.e., different) use of the copyrighted material
 - Is the work being criticized or commented on? Ex. – L. Ron Hubbard’s books were extensively quoted in order to subject the books and their author to criticism (*New Era Pub., Internat’l v. Carol Publishing Group*, 904 F.2d 152 (2d Cir.1990))
 - Consider whether your faculty is teaching about the work rather than just using it as a textbook substitute.

- ▣ Is the work being used for a different purpose than the original? E.g., is it being presented as an example of scholarship in that field of study? (Historiography class showing articles that give a different take of the reasons for the American Revolution)

See Brandon Butler's *Transformative Teaching and Educational Fair Use After Georgia State* (soon to be published in the Connecticut Law Review -- <http://brandonbutler.info/post/112054748430/transformative-teaching-and-educational-fair-use>)

- *Note: Finding of Transformational Use allows use of large amounts up to the full work as Fair Use.*

- ▣ Consider using a “Fair Use Checklist”, adding new evaluative principles to Factor 3 and noting transformative and/or differing purpose uses in Factor 1

See, e.g., GSU Fair Use Checklist at

http://www.usg.edu/images/copyright_docs/fair_use_checklist.pdf

New “Fair Use” Analysis

- ▣ Factor 1 – Purpose: (For profit vs. non-profit educational use? Note: See also, Transformative Use)
- ▣ Factor 2 – Nature: (Nuanced – Creative vs. Factual)
- ▣ Factor 3 – Amount: (Substantial vs. Decidedly Small)
 - (Helped overmuch vs. appropriate in context?)
 - (Amount stimulate interest vs. substitutes for original?)
 - (Heart of the work; e.g., Gerald Ford Memoirs?)
- ▣ Factor 4 – Effect on Market: (Harm sale of Original?)
 - Excerpt licensing available?
- ▣ Notes on Balancing: Less weight to Factor 2, more to Factor 4 – But much more likely to be Fair Use if Transformational Use is shown.

Implications

- ▣ Publishers consider the appeal a loss
 - Asked for rehearing of appeal – denied.
 - Wanted to reshape, i.e., strangle “Fair Use” and failed
- ▣ Won’t REALLY know exactly what it means until after retrial
 - Trial Court must re-weigh factors using Appellate Court’s instructions. Didn’t tell how (or if) the different *process* should change the *results*.
- ▣ Could have been much worse – see Appellate Court “concurring” opinion which obliterates “Fair Use”

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- ▣ Order of Aug. 10, 2012 –
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- ▣ GSU Fair Use Checklist at
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- ▣ Kevin Smith's blog Scholarly Communications @ Duke <http://blogs.library.duke.edu/scholcomm/2014/10/30/swimming-muddy-waters/>
- ▣ Joseph Stortch, Inside Higher Ed, Oct. 20, 2014 <https://www.insidehighered.com/views/2014/10/20/ruling-copyright-fair-use-will-hurt-professors-students-and-publishers-essay>

Recommended

Web blog

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