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Brief of Amicus Curiae Academic Authors and
Legal Scholars in Support of Defendants Appellees
and Affirmance, Nos. 12-14676-FF, 12-15147-FF
(April 25, 2013)

David R. Hansen
University of California - Berkeley School of Law

Peter A. Jazsi
American university - Washington College of Law

Pamela Samuelson
University of California - Berkeley School of Law

Jason Schultz
University of California - Berkeley School of Law

Rebecca Tushnet
Georgetown University Law Center, rlt26@law.georgetown.edu

Docket No. 12-14676-FF, 12-15147-FF

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Case Nos. 12-14676-FF and 12-15147-FF
(Consolidated Appeals)

In the
United States Court of Appeals
for the
Eleventh Circuit

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

Plaintiffs-Appellants,

v.

MARK P. BECKER,
in his official capacity as Georgia State University President, et al.,

Defendants-Appellees.

*On Appeal from the United States District Court for the Northern District of Georgia,
Atlanta Division · D.C. No. 1:08-cv-01425-ODE (Evans, J.)*

**BRIEF OF AMICUS CURIAE ACADEMIC AUTHORS AND LEGAL SCHOLARS
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

JASON M. SCHULTZ, ESQ.
Counsel of Record
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
396 Simon Hall
Berkeley, California 94720
(510) 642-6332 Telephone
(510) 643-4625 Facsimile
Email: jschultz@law.berkeley.edu

*Attorney for Amicus Curiae,
Academic Authors and Legal Scholars*



**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Amici are not corporate entities and are therefore not subject to the corporate disclosure statement requirements in Fed. R. App. Proc. 26(1).

In compliance with Fed. R. App. Proc. 29(c)(5), *amici curiae* hereby state that none of the parties to this case nor their counsel authored this brief in whole or in part; no party or any party's counsel contributed money intended to fund preparing or submitting the brief; and no one else other than *amici* and their counsel contributed money that was intended to fund preparing or submitting this brief.

In compliance with 11th Cir. R. 28-1(b) & 26.1-1, in addition to the list of interested persons contained in Defendant-Appellee Becker et al.'s principal brief, the following is a list of additional interested trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, and other identifiable legal entities related to a party:

- Academic Authors and Legal Scholars *amici* signers listed in Appendix A of this brief
- Jason M. Schultz

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STATEMENT OF INTEREST OF AMICI

Amici are authors and scholars who write, teach, and research with scholarly works like the ones at issue in this case. Academic Author *amici*'s interest in this case stems from a strong desire to see their works reach the largest possible audience and have the greatest possible impact and use, especially by users at educational institutions like Georgia State University ("GSU") in order to promote scholarly exchange and further research. A ruling that restricts reuse of scholarly works would frustrate these objectives. Many Academic Author *amici* have authored works published by Cambridge University Press, Oxford University Press and Sage Publications ("Publishers"). At least one signer, Professor Lyle F. Bachman, is the original creator of two works on which Publishers have based their infringement claims in this case.

Legal Scholars *amici* share the same values and concerns, and have an additional interest in the sound development of intellectual property law. Educational uses of copyrighted works are at the core of what the fair use doctrine is designed to protect. The resolution of this case will have a profound impact on the continued ability of fair use to foster these and other uses that support the Constitutional mission of copyright, "to promote the progress of science and useful arts." U.S. CONST., art. 1, § 8, cl. 8. Appendix A contains the full list of *amici*.

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that GSU's use of Publishers' copyrighted works is a fair use under 17 U.S.C. § 107?

2. Did the district court incorrectly conclude that the use of existing scholarship for the new purpose of educating students was not a transformative use?

SUMMARY OF THE ARGUMENT

For centuries, scholars and educators have excerpted the works of their colleagues, transforming them from individual, static monographs into dynamic pedagogical and intellectual tools for classroom learning. Such transformations reside at the heart of fair use, a core copyright law doctrine established to protect socially beneficial uses of works that increase public access and promote the progress of human understanding.

In this case, Plaintiff Publishers accuse GSU and its faculty of violating their copyrights through this practice. But, as the district court correctly found, such uses are fair, especially because they primarily use factual information to promote the purposes of education and teaching, the amount taken was reasonable in light of its purpose, and because Plaintiffs' evidence of a cognizable copyright market harm was speculative at best. However, the district court erred when it incorrectly concluded that these uses are not transformative. Using an unduly narrow

definition of the concept, it failed to consider how educators repurpose scholarly works in productive ways that bring new meaning to and understanding of the works used.

As scholars and educators who produce and repurpose such works, *amici* urge this Court to affirm that these uses constitute a transformative use under the first fair use factor, and to reaffirm the findings under the other factors that these uses are fair. A finding of fair use in this case not only furthers the underlying goals of scholarship and education—access to knowledge—but also the very purposes of the Copyright Act itself.

ARGUMENT

I. Educational Uses of Excerpts from Copyrighted Material on Course-related E-reserves Sites Are Examples of Productive, Transformative Fair Use

Educational uses of copyrighted material are routinely productive and transformative in precisely the way contemplated by the fair use doctrine because they put the works to new and different purposes than those for which they were originally created. Consider a college instructor teaching “Trends in Central European Political History” who uses scholarly articles and book chapters written over the past 70 years to illustrate and provoke class discussion of shifting historiographical trends in writing about the fall of the Austro-Hungarian Empire. These were writings produced and intended to be read in an academic setting. But

whereas they were originally designed to provide authoritative specialist accounts of various features of the Dual Monarchy in decline, they are being employed here for another, *independently valuable* educational purpose: to display the ways in which thinking and writing about the subject have changed over time.¹ Set in context, each excerpt informs and contextualizes the others, giving students a perspective that they could not gain from the individual works. This standard instructional practice, in which excerpts of existing scholarship are turned to the new purpose of teaching the next generation of students to read, think and write critically, represents a significant, new “transformative” use of copyrighted material.

“[Copyright law] reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Providing access to excerpts of specially chosen selections so that an instructor can knit together an overall educational message develops students’

¹ See, e.g., Poetry Foundation, *Code of Best Practices in Fair Use for Poetry* (2010), www.poetryfoundation.org/foundation/bestpractices (addressing the transformative use of copyrighted poetry in teaching (Principle Four)); Assoc. Res. Libr., *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf> (addressing issues such as the on-line availability of selections of copyrighted material in support of college and university courses (Principle One)).

capacity to understand, interpret, and subsequently contribute to the world of ideas—the purpose of copyright, and of fair use.² The educational purpose of a use, particularly when undertaken in a non-profit institution of higher education, therefore deserves special consideration in any fair use analysis.

Certain productive, “transformative” uses were specifically enumerated by Congress in the preamble to § 107: criticism, comment, news reporting, teaching (with specific reference to multiple copies for classroom use), scholarship, or research. These enumerated uses, according to the legislative history, were “the sorts of copying that courts and Congress most commonly had found to be fair uses.” *Campbell v. Acuff-Rose-Music, Inc.*, 510 U.S. 569, 577-78 (1994) (citations omitted). “There is a strong presumption that the use of a copyrighted work is transformative when the allegedly infringing work falls within one of several categories described in Section 107.” *Hofheinz v. Discovery Communications, Inc.*, 60 U.S.P.Q. 2d 1845, 1848 (S.D.N.Y. 2001) (citing *New Era Publications Int'l ApS*

² See Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1816 (2000) (noting the connection and potential temporal gap between access and new creative works); Rebecca Tushnet, *Copy This Essay*, 114 YALE L.J. 535, 565 (2004) (“Copying promotes democracy by literally putting information in citizens’ hands.... Access . . . was a precondition of any further response to or use of those works. When Paul Goldstein writes that uses in schools and libraries ‘advance copyright’s general aim of promoting cultural and political discourse,’ he is also invoking the value of access, which can sometimes only be had if the copyright owner’s price need not be paid.” (citations omitted)); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and BARTNICKI, 40 HOUS. L. REV. 697, 726 (2003).

v. Carol Pub. Group, 904 F.2d 152, 156 (2d Cir. 1990) (if the new use constitutes criticism, scholarship or research, “the assessment of the first fair use factor should be at an end”). In other words, the Copyright Act means what it says when it specifically identifies “teaching,” including “multiple copies for classroom use,” as an illustrative example of fair use.

A. Considerations of Transformative “Purpose” Favor the Educational Uses at Stake in this Case

The presence of a new, expressive *purpose* qualifies a use as transformative and thus likely fair and non-infringing.³ Few activities are closer to the heart of the protected zone of expression than the efforts of a graduate-level instructor to engage students in critical reading and discussion of both primary source materials and prior scholarly communications. The goal of such efforts, as Ann Bartow has explained, is “to expose students to a variety of viewpoints, which are arguably

³ Anthony Reese has identified trends in fair use case law emphasizing that transformative *purpose* outweighs change in the material form—identical copying has been protected as fair use in several significant cases covering large sectors of the economy where it serves the purpose of increasing access. See R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 484-85 (2008) (“In assessing transformativeness, the courts generally emphasize the transformativeness of the defendant’s purpose in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the content of the underlying work.”). See also Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L.REV. 2537 (2009); Michael J. Madison, *Madisonian Fair Use*, 30 CARDOZO ARTS & ENT. L.J.101 (2012).

most pedagogically useful when unadulterated.”⁴ Instructors’ transformative purposes are fulfilled through both the contrasts between selected excerpts and their incorporation into a broader context: a change in meaning occurs when the works are placed in dialogue with one another, just as there can be transformation when multiple works are used in search engines⁵ or collages.⁶

Transformativeness in this form allows learning and critique that cannot otherwise occur. It prevents instructors’ decisions about what excerpts to use from being distorted by owners’ refusals to grant permission or by payment demands; without fair use as a safety valve, the resulting educational materials may be biased. This would interfere with the congressionally favored educational purpose.⁷

This is not a theoretical concern. Fair use is critical to educational institutions, whose societal role is centered on learning and critique, and whose

⁴ Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 178 (1998) (noting that instructors compiling excerpts for course support “inevitably make editorial” choices in the process).

⁵ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁶ See *Blanch v. Koons*, 467 F.3d 244 (2d. Cir. 2006).

⁷ See Tushnet, *supra* note 2, at 565-66 (“Copyright’s prohibition on copying can create differential access in precisely the way some First Amendment theorists fear government regulation can subtly distort debate. For example, *Who Built America?* is an award-winning historical CD-ROM series for high school and college students that uses numerous primary sources. Owners of the sources’ copyrights often wanted large payments for use of historically significant works, payments the authors couldn’t afford. They substituted federal government and public domain works, altering the way students will understand the past; the materials now overemphasize the federal government’s role in Depression-era society and culture.”) (citation omitted).

limited resources do not allow them to license every excerpt. But the fair use right involved here is one that belongs to all instructors, and benefits all students, regardless of their economic situation. Deborah Gerhardt and Madelyn Wessel document vast disparities in access to content, even among relatively well-resourced institutions; the situation is much more dire for smaller institutions, community colleges, and the like.⁸

Giving special weight to educational uses recognizes that such uses have positive externalities, conferring benefits on society for which neither nonprofit educational institutions nor their students can practically internalize—a classic market failure of the kind that fair use was designed to avoid.⁹ The uses enumerated in the preamble to Section 107 “provide external societal benefits far beyond the benefits to the individual who . . . is making the criticism, the comment, the news report or the individual who is doing the teaching, the

⁸ Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J. L. & TECH. 461, 482 (2010) (“A legal position that payment is always required in contravention of this explicit authorization [of ‘multiple copies for classroom use’] exacerbates these fundamental disparities in access to information and removes an important remedial mechanism available by law.”).

⁹ See Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1640 (1982) (teaching uses create positive externalities because “all of society benefits [by] having an educated citizenry and advances in knowledge”).

scholarship or the research. But these societal benefits are impossible to internalize in any bargained-for exchange between the copyright owner and the user.”¹⁰

1. The First Fair Use Factor Recognizes and Promotes Expressive Uses of Copyrighted Content

The first fair use factor (“the purpose and character of the use...” 17 U.S.C. § 107(1) (2006)) is capacious enough to recognize these needs. Transformativeness is a dynamic concept that has been applied to diverse uses, as a way of recognizing the speech and speech-related functions that copyright exists to promote and defend.¹¹ In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007), the Ninth Circuit concluded that use of copyrighted images in a thumbnail search index was “highly transformative,” even though there was no argument that the search tool itself was a new work. In *A.V. ex rel. Vanderhuyse v. iParadigms*

¹⁰ Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 50 (1997). (“The fact that a copyright owner has been able to convince others to pay the fee demanded and therefore now can claim to have a ‘workable’ permission system should not change the analysis. The Court’s refusal to recognize a mere desire to be paid as evidence of market harm when a defendant does not meet that desire with cash emphasizes the fundamental role that fair use plays in the scheme of copyright law—permitting certain kinds of uses that can have significant, diffuse, external benefits in society regardless of whether the copyright owner would permit such a use or would like to be paid for such a use.” (citations omitted)).

¹¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) and *Golan v. Holder*, 132 S.Ct. 873, 890-91 (2012). Cf. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) (“[T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security” (citation omitted)).

LLC, 562 F.3d 630 (4th Cir. 2009), a case involving the use of student papers to create a database facilitating the detection of plagiarism, the Fourth Circuit approvingly noted the trial judge’s determination that the database was “‘highly transformative,’ ... and ‘provides a substantial public benefit through the network of [participating] educational institutions.’” *Id.* at 638.¹² Recently, the General Counsel of the U.S. Patent and Trademark Office concluded that copying journal articles for the purpose of allowing applicants and patent examiners to understand “prior art” was a transformative fair use, notwithstanding the existence of an established licensing market for such reproductions. USPTO, *Position on Fair Use of Copies of NPL Made in Patent Examination* (January 19, 2012), www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf.

The case law thus clearly rejects any suggestion that transformativeness requires physical modification or the creation of a new, copyrightable work. Transformative use also can occur when a work is meaningfully recontextualized to serve the user’s new purpose.¹³ That is, uses can be favored under the first factor because of the way in which they are given context by the

¹² See also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1351, 1353-57 (Ct. Cl. 1973) (upholding copying of entire articles by library for research purposes as fair use even if the material is not “crucial” as long as it is “stimulating or helpful”), *aff’d by an equally divided Court*, 420 U.S. 376 (1975).

¹³ See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

user, and that context need not be a physical collage. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-20 (9th Cir. 2003); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22-23 (1st Cir. 2000).

2. The District Court’s Refusal to Consider the Eligibility of the Challenged Educational Practices as Transformative Uses Was Based on Several Misplaced Concerns

The district court declined to characterize GSU’s uses as transformative because they did not meet one form of the concept—to reach a different audience. However, *Campbell* has defined the term “transformative” to include different purposes, *Campbell* 510 U.S. at 579, and so the fact that the district court failed to so find should not preclude this Court from deciding that the uses were transformative whenever assigned for a different purpose from the original intended audience for the work. The district court strayed from this principle by focusing on two misplaced concerns:

First, the district court focused on the apparently straightforward proposition that the “purpose” of material from a monograph does not change when it is excerpted for students’ on-line use: material that was designed for reading is being presented anew with the expectation that it will be read. This argument misses the mark by focusing on the “mechanical” aspects of information consumption rather than on the expressive purposes of the use. On this logic, repurposing a photograph as an emblem of consumer culture in an iconoclastic painting could not be a

transformative use because both photographer and painter intended their work to be viewed.¹⁴ Nor could a parody of a bestseller be seen as a transformative use if the parodist also aspired to sell books to the general reading public.¹⁵ More appropriately, a decision-maker in a case about e-reserves should compare the “discursive” purpose of the original text, on the one hand, with the goals of the instructor who has posted it for his or her class to read, discuss, criticize, and incorporate into a broader context. It is this new purpose that controls, not the overlap in audiences.

Second, the district court was concerned with dictum in footnote 11 of *Campbell*, which states that “[t]he obvious statutory exception to th[e general] focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.” *Campbell*, 510 U.S. at 579. The point is an important one: not all fair uses necessarily need be transformative. An elementary school teacher who hands out photocopies—for example, a poem about spring at springtime, or a news article following up on an issue discussed in class—may not have a transformative purpose, even though the use is one specifically approved in Section 107. But the Court’s language cannot fairly be read to mean that all efforts by instructors at all levels are categorically “non-transformative.” The Supreme Court’s language roughly paraphrases the preamble to Section 107 but introduces a

¹⁴ See *Blanch v. Koons*, 467 F.3d 244 (2d. Cir. 2006).

¹⁵ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

significant new qualifier, “straight,”¹⁶ whose only apposite dictionary definition is “undiluted, unmixed [as in] *straight whiskey*.” RANDOM HOUSE WEBSTER’S COLLEGIATE DICTIONARY 1208 (2001) (sense 15). “Straight reproduction” cannot, however, describe the use of excerpts from monographs in e-reserves for graduate courses. No competent instructor would ever offer such material without providing an explanation for its appearance in relation to the goals of the course, whether on the e-reserves site, in other course materials (such as a syllabus), or in classroom discussion.

II. Scholarly Works Are Factual and Informative in Nature; the Second Factor Weighs in Favor of the Use

Campbell tells us that the fair use factors are interrelated and must be weighted together. *Campbell* 510 U.S. at 578. When the first factor is transformative, this has spillover effects for the other factors; given the transformative educational purpose here, the question is whether each of the other factors is reasonable in light of that.

The second fair use factor requires an examination of “the nature of the copyrighted work.” 17 U.S.C. § 107, recognizing that “there is a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations.” *Suntrust Bank v.*

¹⁶ This is on the assumption that e-reserves are functionally equivalent to the distribution of paper copies.

Houghton Mifflin Co., 268 F. 3d 1257, 1271 (11th Cir. 2001). This is so because copyright protects creative expressions, not ideas or facts, no matter how creative or how much effort was expended to compile them. *Palmer v. Braun*, 287 F. 3d 1325 (11th Cir. 2002).

We agree with the district court that the scholarly works used in this case are “informational in nature, within the spectrum of factual materials and hence favoring fair use.” Dkt#423 at 52. While the district court recognized that scholarly works require a tremendous amount of effort and expense to create, *id.*, and that it “inevitably involves some amount of creativity,” *id.*, the court understood that such effort and creativity is focused on non-copyrightable elements: ideas and facts. The district court rightly weighed the second factor in favor of the use.

In addition, this Court should recognize that the second factor is sensitive to the purposes for which scholars write and for which instructors provide students with excerpts. Robert Kasunic and Judge Pierre Leval have reminded us that a complete second factor analysis includes many elements, including an inquiry into “whether copyright might have reasonably encouraged or provided an incentive for an author to create the work.” Robert Kasunic, *Is That All There Is? Reflections on the Second Fair Use Factor*, 31 COLUMBIA J. L. & ARTS 529, 540 (2008); *see also* Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1118-19 (1990). As discussed above, publication and broad access generally are key goals

for academic authors, who “want recognition for their theories and analysis, and also want their works to be as widely read as possible.” Kasunic, *supra*, at 540. Given these goals, the nature of the works counsels in favor of freely allowing exactly the sort of discursive repurposing in which the instructors involved in this case engaged.

III. The Amount and Substantiality Used by GSU Faculty Was Reasonable

The third fair use factor looks at “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” The third factor inquiry “partly functions as a heuristic to determine the impact on the market for the original.” *Peter Letterese & Associates, Inc. v. World Inst. of Scientology Enters. Int’l*, 533 F.3d 1287, 1314 (11th Cir. 2008). In terms of transformative uses, the test is whether “the quantity and value of the material used . . . are reasonable in relation to the purpose of the use.” *Campbell*, 510 U.S. at 586. The standard is reasonableness, not (as sometimes is suggested) necessity, and any instructor who relies on fair use to justify the inclusion of excerpts from published works on e-reserves should be prepared to explain the rationale for both the choice of material and the amount employed. No numerical metric or “rule of thumb,” whether stated in absolute or proportional terms, can substitute effectively for this assessment.

Publishers criticize the district court’s work-by-work analysis as “rigid,” Appellants’ Br. at 46, yet at the same time suggest that the court should have instead followed a set of prescriptive, 1970s-era Classroom Guidelines created for photocopying uses.¹⁷ *Id.* at 63. The district court was correct that application of the Classroom Guidelines as a presumptive maximum would cripple the ability of GSU and institutions like it to make many undisputedly legitimate fair uses of scholarly works. Dkt#423 at 70-71. Furthermore, such an inflexible rule would cut against the very heart of what the district court correctly described as the “fact-intensive, value-laden review” that fair use requires. *Id.* at 19. Publishers reject that level of analysis because, as explained below, it requires evidence of likely harm that they cannot produce.

IV. Educational Use of the Works at Issue Benefits the Public and Publishers Have Not Shown Evidence of Actual Harm to a Relevant Market

The fourth fair use factor asks the court to examine “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107.

Two key factors central to this case and at the heart of *amici*’s role in the university

¹⁷ Although we reject the notion that the 1976 Classroom Guidelines are relevant at all to the present case, to the extent that the Court does consider them it should recognize their intended purpose. Publishers assert that the Classroom Guidelines “place strict limits on nonprofit educational copying.” Appellants’ Br. at 63. That is incorrect. The Guidelines drafters warned, in the *very first sentence* of the document, that “[t]he purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under 107.” H.R. REP. NO. 94-1476 at 68-71, 94th Cong., 2d Sess. (1976).

context are important to analyzing market effect: (1) public interest and (2) academic freedom. *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (fair use serves as a First Amendment accommodation that provides for “considerable latitude for scholarship and comment”) (citation omitted); *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (“[A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment.”); *Williams & Wilkins Co. v. U. S.*, 487 F.2d 1345, 1352 (Ct. Cl. 1973) (courts must sometimes “subordinate the copyright holder’s interest in a maximum financial return to the greater public interest” to fulfill copyright’s Constitutional purpose), *aff’d by an equally divided Court.*, 420 U.S. 376 (1975).

With these in mind, the fourth factor requires an examination of “(1) ‘the extent of the market harm caused by the particular actions of the alleged infringer,’ and (2) ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant [] would result in a substantially adverse impact on the potential market.’ ” *Peter Letterese & Assoc. Inc.*, 533 F. 3d at 1315 (citing *Campbell*, 510 U.S. at 590).

A. Publishers Have Failed to Prove That Faculty Uses of Excerpts in this Case Will Harm Any Relevant Markets

In this inquiry, the Court should carefully scrutinize whether Publishers (1) have identified a relevant and proper market and (2) shown their claims of

harm to that market, specifically. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (transformative markets are improper markets to consider under the fourth factor); *Williams & Wilkins Co. v. U.S.*, 487 F. 2d at 1357 (rejecting studies that have “assumed, without real proof, that the journal publishers have been and will be injured” by educational photocopying). A high burden of proof on both elements is appropriate given the educational, nonprofit context of the use. *See Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir.1996) (“The burden of proof as to market effect rests with the copyright holder if the challenged use is of a ‘noncommercial’ nature.”); *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.”); *Suntrust Bank*, 268 F.3d at 1275 (“[E]vidence of harm to the potential market for or value of the original copyright is crucial to a fair use determination.”).¹⁸ They have failed to do either.

¹⁸ Citing to *Campbell*, the district court incorrectly distinguished this rule and held instead that the burden rests on the Defendant to prove that “any harm from the infringing use is insubstantial.” Dkt#423 at 72 & n.43 (citing *Campbell*, 510 U.S. at 590). While the Supreme Court did reject “hard evidentiary presumptions” about harm, it did so in the context of commercial uses, explaining that the district court in that case incorrectly made “a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.” *Campbell*, 510 U.S. at 591.

First, as the section above explains, many of the educational uses of the kind made by GSU faculty are transformative. Because transformative uses do not substitute for or supersede the original, courts in other circuits have made clear that “copyright owners may not preempt exploitation of transformative markets” through proposed licensing regimes. *Bill Graham Archives*, 448 F.3d at 615; *Castle Rock Entm’t v. Carol Publ’g Grp.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998)(“[B]y developing or licensing a market for . . . educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.”); *iParadigms*, 562 F.3d at 644 (harm caused by transformative use “is not of the kind protected against by copyright law”). These fair use markets are therefore not proper for consideration of market harm under the fourth factor.

Second, even for uses that are not transformative in the classic sense, the fair use doctrine especially supports educational uses including “teaching . . . , scholarship, or research.” 17 U.S.C § 107. Congress identified these activities for protection because of their clear public benefit and a recognition that they are very likely to be fair. Without careful scrutiny of the Publishers’ assertions of harm, the

Court runs the risk of restricting socially valuable uses that fulfill one of the key constitutional purposes of copyright, namely increasing access to knowledge.¹⁹

Publishers argue, for example, that their market for book sales is harmed by the use of short excerpts by GSU faculty. The district court rejected this simplistic assumption on logical grounds. “[T]he 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 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.” Dkt#423 at 74. But beyond Publishers’ poor logic is also their lack of proof. The record contains no evidence to suggest that faculty excerpts made for the purposes of teaching, and for enhancing and encouraging student research and scholarship, have ever harmed the market for sales of complete books. Moreover, if anyone had such evidence, it would be the Publishers who have all the relevant sales data. If book sales dropped due to faculty excerpting, Publishers could easily demonstrate

¹⁹ Due in part to such concerns, even in the context of a finding of intellectual property infringement, several courts have held that plaintiffs must show evidence of actual harm for injunctive relief purposes; presumptions are not enough. *See Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010) (“courts must not presume irreparable harm”); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (in the patent context, “plaintiff must demonstrate . . . that it has suffered an irreparable injury” and (among other things) “that the public interest would not be disserved” for an injunction to issue).

this with a timeline of book sales mapped to courses taught using excerpts from those books. But no such evidence is anywhere to be found, reinforcing the longstanding experience that academic excerpts do not cause harm to a relevant copyright market under the fourth factor.

Lacking actual evidence, Publishers urge the Court instead to adopt the reasoning and conclusions about market harm found in a few “coursepack” cases, with little regard for the differences between the pure educational uses here and the reproductions by commercial intermediaries there. *See, e.g.*, Appellants’ Br. at 69 (citing *Princeton Univ. Press*, 99 F.3d at 1387; *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991)).

Publishers’ market harm argument based on the availability of licensed excerpts is similarly superficial. Again, presenting no actual evidence, Publishers instead ask the Court to assume harm simply because they have made licenses available for some of the excerpts at issue. Appellants’ Br. at 79. But the mere availability of a license is not proof of harm, nor should it be enough to create any presumption thereof. *See* Mark Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROB. 185 (2007). Market harm comes from actual, not presumed, substitution.

B. Publishers Have Failed To Prove That Educational Use of Their Works Has Any Impact on Author, or Even Publisher, Incentives to Create or Disseminate Works

Next, Publishers and their *amici* argue that, unless the Court finds educational use of their works infringing, academic authors and publishers will no longer have sufficient incentives to create or disseminate academic work. This argument is both purely speculative, and belied by academic authors' rapidly growing adoption of open access practices and technologies.²⁰ Publishers again offer no evidence of potential adverse impacts. Appellants' Br. at 79 (citing instead what they describe as "predictable" adverse impacts on their business).²¹ Similarly, Publishers' *amici* suggest that "the district court's decision, if upheld, is likely to have a direct impact on the copyright incentives to disseminate works that are specifically intended to further human knowledge." Text and Academic Authors Association and the Authors Guild Amicus Br. at 14-15.²² Yet behind these bold

²⁰ The district court correctly concluded that there was "no persuasive evidence that Plaintiffs' ability to publish high quality scholarly books would be appreciably diminished by the modest relief from academic permissions payments." Dkt#423 at 86.

²¹ Similarly, in the context of photocopying, researchers have tried in vain to identify evidence of negative effects on publishers' markets. See Diane Zimmermann, *Modern Technology, Leaky Copyrights and Claims of Harm: Insights from the Curious History of Photocopying* (NYU Law & Economics Working Paper #12-22, 2012), <http://ssrn.com/abstract=2129458>.

²² Text and Academic Authors Association and the Authors Guild *amici* also suggest that "[s]alary increases and merit pay in most research institutions are tied directly to the professors' publishing record. In some cases, there are very direct economic benefits to academics from publishing scholarly works." Text and

assertions are no citations to actual evidence that scholarly publishing or human knowledge are actually at risk. Rather, these assertions ignore several important developments in the scholarly publishing ecosystem that undermine these arguments.

First, Publishers ignore the reasons why many of the materials in question were produced in the first place. They fail to acknowledge that many if not most academic authors write primarily for reasons unrelated to the profitability of any particular work, instead focusing on reaching the widest possible audience and making the greatest possible contributions to their field. *See* ALMA SWAN & SHERIDAN BROWN, OPEN ACCESS SELF-ARCHIVING: AN AUTHOR STUDY 10 (2005), http://www.jisc.ac.uk/uploaded_documents/Open%20Access%20Self%20Archiving-an%20author%20study.pdf (explaining that “[t]he principle of free access for all readers” was the most oft-cited reason indicated by academic author survey-respondent as to why they publish in open access journals); *see also* Shahren

Academic Authors Assoc. and the Authors Guild Amicus Br. at 14-15. *Amici* cite to the University of California, Academic Personnel Policy, *available at* <http://www.ucop.edu/academic-personnel/academic-personnel-policy/>, to support the contention that “University of California provides a promotion that comes with an approximately \$5,000 salary increase for each book published.”

Several signatories to this brief are University of California faculty and are familiar with its academic personnel policies. None of us—nor our contacts at the University of California Office of the President—have been able to confirm the existence of this policy. The University typically awards promotion or tenure only after an in-depth review of a candidate’s performance. This would include an assessment of the publishing record but also many other factors.

Ahmad Zaidi Adruce, *Academic Authors' Perception on Copyright Protection*, 149-50 (March 11, 2004) (Ph.D Dissertation, Syracuse University) (available via ProQuest) (in a survey of tenured, tenure-track, adjunct and emeritus faculty, concluding that “academic authors are not primarily motivated by monetary rewards when they write/create works. . . . Academic authors who are motivated in this context write/create . . . to get appreciation, to get acknowledgement, to gain recognition and popularity, and to leave an intellectual legacy to others.”).

If anything, a fair use rule that allows for the uses made in this case promotes academic authors' interests and enhances their incentive to create and distribute scholarly works because it increases access to their works in educational settings, one of the most important markets to academics in terms of building reputational capital and increasing the impact of their work.

These motivations are now supported by a growing number of new, high quality academic publishers who support making scholarly works openly and freely available. *See, e.g.*, OPEN HUMANITIES PRESS, <http://openhumanitiespress.org/index.html> (last visited April 23, 2013)(publisher of open access monographs); DIRECTORY OF OPEN ACCESS BOOKS, <http://www.doabooks.org/> (last visited April 23, 2013) (listing 1,410 academic peer-reviewed books available for free); DIRECTORY OF OPEN ACCESS JOURNALS, <http://www.doaj.org/> (last visited April 23, 2013) (listing 9,006 freely available

academic journals). Many open access publishing platforms offer faculty a simple process for uploading their works directly, *see* SOCIAL SCIENCE RESEARCH NETWORK, <http://www.ssrn.com/> (last visited April 23, 2013), thus allowing the creation and dissemination of more academic works with a few simple clicks of a mouse, and at no cost to the author. The recent development of these high quality publishing outlets means that academic authors can now publish in forums that allow for far more permissive uses than those contemplated by the district court's fair use ruling.

Publishers' narrative about market harm and aggregate effect also fails to account for serious market failures. Educational users often cannot license access to Publishers' works even if they wanted to. Digital licenses were available in only 44 of the 75 claimed instances of infringements in this case, and those 75 claims were hand-picked by Publishers as presumably their best cases. Dkt#441 at 14 (district court order explaining Publishers' selection of claims). Looking at widespread use, the likelihood of harm is small because so few works are actually available in the markets in which users can participate while still fulfilling the learning and discussion goals described above. Recognizing this, the district court correctly concluded that "[f]or 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.” Dkt#423 at 75.

Indeed, in many instances it is unlikely that Publishers can offer licenses at all because they do not own the necessary rights to the work in digital formats; instead, those rights belong to academic authors like *amici*. See *Random House, Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613 (S.D.N.Y. 2001) (author retained digital rights because contract with publisher to publish “in book form” did not cover electronic versions);²³ Dkt#441 at 14 (Publishers could not establish a prima facie claim of infringement in 26 of 75 claimed instances of infringement, in part because of an inability to prove ownership).

Despite this, Publishers’ proposed injunctive relief would require GSU to either license access or comply with a rigid set of guidelines that do not match the flexible case-by-case analysis that fair use requires or academics need. Dkt#426, Exhibit A (Plaintiffs’ proposed injunction). While some digital licenses may be available through collective management organizations like the Copyright Clearance Center (“CCC”), the use of those services raise other risks. CCC admits, for example, that its licenses are “net of fair use,” meaning their license fees do not

²³ For many other works, educational users face market failure because they confront the problem of “orphan works”—i.e. copyrighted works whose owners cannot be located—and therefore are unable to seek permission. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), <http://www.copyright.gov/orphan/orphan-report.pdf>.

take into account fair use. Dkt#423 at 30. Without taking fair use into account, these licenses become blunt tools that charge for, and therefore discourage, legitimate educational uses of the kind that fair use is meant to foster.²⁴ Further, requiring licensing that practically would flow through clearinghouses like the CCC could concentrate the market and undermine the development of other competing models that better support academics' needs.²⁵

While licensing regimes and rigid use guidelines—along with Publishers' more general unsupported assumptions about market harm—would benefit *Publishers*, they do not match the evidence in this case. Acceptance of these

²⁴ In countries where licensing for educational uses are the norm, overaggressive licensing regimes have quickly smothered educational copyright exceptions and have led to abusive pricing practices even when they are supposedly regulated. *See* Submission of Copyright Advisory Group –Schools to Australian Law Reform Commission Consultation of Copyright and the Digital Economy 5, 58 (Nov. 2012), http://www.alrc.gov.au/sites/default/files/subs/231.org_thecopyrightadvisorygroup_schools.pdf (reporting for educational uses a steady and significant increase in licensing fees over time, from AU\$9,756,254 in 1998 to over AU\$80 million in 2011); Jonathan Band, *Cautionary Tales About Collective Rights Organizations 1* (unpublished manuscript, Sept. 2012), <http://ssrn.com/abstract=2149036> (review of licensing organizations “reveals a long history of corruption, mismanagement, confiscation of funds, [and the aggressive pursuit of] fees to which they were not legally entitled”); *see also Resnick v. Copyright Clearance Center, Inc.*, 422 F. Supp.2d 252, 257 (D. Mass. 2006) (CCC is aware that it licenses (and therefore collects fees for) works for which it has no rights); Ariel Katz, *The GSU Copyright Case: Some Canadian Perspectives* ARIELKATZ.ORG, May 14, 2012 <http://arielkatz.org/the-gsu-copyright-case-some-canadian-perspectives/>

²⁵ CCC presents a special risk because, as the district court found, “CCC is the only reproduction rights organization in the United States, and is the world’s largest licensing organization for text licensing. It has no real competitors in that arena.” Dkt#423 at 24 (citations omitted).

assertions would prevent a large number of socially beneficial educational uses. Publishers have failed to prove a genuine likelihood of harm to a relevant market, and therefore the fourth fair use factor should weigh in favor of the use by GSU.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision below and to affirm the transformative nature of the educational uses made by GSU faculty.

Dated: April 25, 2013

/s/ Jason Schultz

Counsel of Record
University of California, Berkeley,
School of Law
396 Simon Hall
Berkeley, CA 94720
Telephone: 510-642-6332
Fax: 510-643-4625
Email: jschultz@law.berkeley.edu

*Attorney for Amici Curiae Academic
Authors and Legal Scholars*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains **6,973** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

/s/ Jason Schultz
*Attorney for Amici Curiae Academic
Authors and Legal Scholars*

Dated: April 25, 2013

APPENDIX A
List of Amici Curiae Academic Authors and Legal Scholars

Affiliation is provided for identification purposes only. The views stated here are those of the signers and do not reflect the position, if any, of the named institutions.

Julie Ahrens

Director of Copyright and Fair Use
Center for Internet and Society
Stanford Law School

Mike Ananny, PhD

Assistant Professor
Annenberg School for Communication & Journalism
University of Southern California

Howard C. Anawalt

Professor Emeritus
Santa Clara University Law School

Jane Anderson

Assistant Professor
Department of Anthropology
University of Massachusetts Amherst

Timothy K. Armstrong

Professor of Law
University of Cincinnati College of Law

Jonathan Askin

Founder/Director
Brooklyn Law Incubator & Policy Clinic
Brooklyn Law School

Pat Aufderheide

University Professor and Director
Center for Social Media, School of Communication
American University

Lyle F. Bachman
Professor Emeritus
Department of Applied Linguistics
University of California, Los Angeles

Margo A. Bagley
Professor of Law
University of Virginia School of Law

Eric Baković
Professor of Linguistics
UC San Diego

Ann Bartow
Professor of Law
Pace Law School

Steven W. Bender
Professor
Seattle University School of Law

John Beverley
Distinguished Professor of Hispanic Languages and Literatures
University of Pittsburgh

Joye Bowman
Professor and Chair
Department of History
University of Massachusetts Amherst

Annemarie Bridy
Associate Professor
College of Law
University of Idaho

Laura Briggs
Professor and Chair, Women, Gender, Sexuality Studies
University of Massachusetts Amherst

Dan L. Burk
Chancellor's Professor of Law
University of California, Irvine

Dr. Irene Calboli
Professor of Law
Marquette University Law School
Visiting Professor, Faculty of Law
National University of Singapore

Michael A. Carrier
Professor of Law
Rutgers Law School – Camden

Michael W. Carroll
Professor of Law
Director, Program on Information Justice and Intellectual Property
American University, Washington College of Law

Bernard Chao
Assistant Professor
University of Denver Sturm College of Law

Margaret Chon
Donald & Lynda Horowitz Professor for the Pursuit of Justice
Seattle University School of Law

Danielle Keats Citron
Lois K. Macht Research Professor and Professor of Law
University of Maryland School of Law

Ralph D. Clifford
Professor of Law
University of Massachusetts School of Law

Julie E. Cohen
Professor of Law
Georgetown Law

Danielle M. Conway

Michael J. Marks Distinguished Professor of Business Law &
Director, University of Hawai`i Procurement Institute

Robert Cooter

Herman Selvin Professor of Law
Co-Director of Law and Economics Program
University of California, Berkeley, School of Law

Paul N. Courant

Harold T. Shapiro Professor of Public Policy
Arthur F. Thurnau Professor
Professor of Economics and Professor of Information
The University of Michigan

Kate Crawford

Associate Professor
University of New South Wales
Visiting Professor
MIT Center for Civic Media

Benjamin G. Davis

Associate Professor of Law
University of Toledo College of Law

Joseph Donohue

Professor Emeritus of English
University of Massachusetts Amherst

Peter DiCola

Associate Professor
Northwestern University School of Law

Paul Duguid

Adjunct Full Professor
School of Information
University of California, Berkeley

Edward Feigenbaum
Kumagai Professor of Computer Science Emeritus
Stanford University

Kristelia A. Garcia
Frank H. Marks Fellow in Intellectual Property and
Visiting Associate Professor
The George Washington University Law School

Deborah R. Gerhardt
Assistant Professor of Law
UNC School of Law

Llewellyn Joseph Gibbons
Associate Professor
University of Toledo College of Law

James Gibson
Professor of Law
Director, Intellectual Property Institute
University of Richmond

Robert J. Glushko
School of Information
University of California, Berkeley

Mary L. Gray
Senior Researcher,
Microsoft Research New England, Cambridge MA
Associate Professor, Communication and Culture
Adjunct Faculty, American Studies; Anthropology; Gender Studies
Indiana University, Bloomington

Lawrence Grossberg
Morris Davis Distinguished Professor of Communication Studies
University of North Carolina at Chapel Hill

David Hansen
Digital Library Fellow
University of California, Berkeley, School of Law

James A. Harrell, Ph.D.
Professor Emeritus of Geology
University of Toledo

Carla Hesse
Peder Sather Professor History
Dean of Social Sciences
University of California, Berkeley

Harry Hochheiser
Assistant Professor
University of Pittsburgh

Philip N. Howard
Professor
University of Washington

P. Bernt Hugenholtz
Professor of Copyright Law
Director, Institute for Information Law
University of Amsterdam

Alan Hyde
Distinguished Professor and Sidney Reitman Scholar
Rutgers University School of Law

Lewis Hyde
Thomas Professor of Creative Writing
Kenyon College

Judith Innes
Professor Emerita
City and Regional Planning
University of California Berkeley

Colleen Jankovic
Visiting Instructor, English Department Liaison to the College of General Studies
PhD, English Department
University of Pittsburgh

Peter Jaszi

Professor of Law

American University, Washington College of Law

Henry Jenkins

Provost's Professor of Communication, Journalism, Cinematic Art, and Education
University of Southern California

Matthew L. Jockers

Assistant Professor of English

University of Nebraska-Lincoln

Douglas W. Jones

Associate Professor of Computer Science

University of Iowa

Faye E. Jones

Director and Professor

College of Law Research Center

The Florida State University

Dan Jurafsky

Professor

Linguistics Department

Stanford University

Dennis S. Karjala

Jack E. Brown Professor of Law

Sandra Day O'Connor College of Law

Arizona State University

Ariel Katz

Associate Professor

Innovation Chair in Electronic Commerce

Faculty of Law

University of Toronto

Deidre A. Keller
Assistant Professor of Law
Ohio Northern University

Minjeong Kim, Ph.D.
Associate Professor
Department of Journalism and Technical Communication
Colorado State University

Sapna Kumar
Assistant Professor of Law
University of Houston Law Center

Yolanda M. King
Assistant Professor
Northern Illinois University College of Law

Lawrence Lessig
Roy L. Furman Professor of Law and Leadership
Harvard Law School

Yvette Joy Liebesman
Assistant Professor of Law
Saint Louis University School of Law

Jessica Litman
John F. Nickoll Professor of Law
University of Michigan

Lyn H. Lofland
Research Professor of Sociology (Emerita title)
University of California, Davis

Lydia Pallas Loren
Kay Kitagawa & Andy Johnson-Laird Intellectual Property Faculty Scholar &
Professor of Law
Lewis & Clark Law School

Glynn S. Lunney, Jr.
McGlinchey Stafford Professor of Law
Tulane University School of Law

Michael J. Madison
Professor of Law
Faculty Director, Innovation Practice Institute
University of Pittsburgh

Dr. Daniel D. Martin
Associate Professor
Department of Sociology & Anthropology
University of Minnesota Duluth

Donald J. Mastronarde
Melpomene Professor of Classics
University of California
Editorial Board Chair, California Classical Studies (a peer-reviewed open-access monograph series)

Jerome McGann
The John Stewart Bryan University Professor
University of Virginia

Stephen McJohn
Professor
Suffolk University Law School

Mark McKenna
Professor of Law
Notre Dame Presidential Fellow
University of Notre Dame Law School

Tara McPherson
Associate Professor
USC School of Cinematic Arts

Joseph Scott Miller
Professor
University of Georgia Law School

Viva R. Moffat

Associate Professor
University of Denver Sturm College of Law

Opal Moore

Associate Professor, English Department
Director, Honors Program
Spelman College

Lateef Mtima

Professor of Law and Director
Institute for Intellectual Property and Social Justice
Howard University School of Law

Ira Steven Nathenson

Associate Professor of Law
St. Thomas University School of Law

Mary Beth Norton

Mary Donlon Alger Professor of American History &
Stephen H. Weiss Presidential Fellow
History Department
Cornell University

Dr. Bethany Nowviskie

President, Association for Computers and the Humanities
Director of Digital Research and Scholarship
University of Virginia Library and Scholarly Communication Institute

Tyler T. Ochoa

High Tech Law Institute
Santa Clara University School of Law

David W. Opderbeck

Seton Hall University School of Law
Professor of Law
Director, Gibbons Institute of Law, Science & Technology
Livingston Baker Research Fellow

Aaron Perzanowski
Associate Professor
Case Western Reserve University
School of Law

Eric E. Poehler
Assistant Professor
Classics Department
University of Massachusetts Amherst

David G. Post
Professor of Law
Beasley School of Law, Temple University

Laura Quilter
Copyright and Information Policy Librarian
University of Massachusetts, Amherst

Stephen Ramsay
Associate Professor of English
University of Nebraska-Lincoln

Jerome H. Reichman
Bunyan S. Womble Professor of Law
Duke Law

Michael Risch
Associate Professor of Law
Villanova University School of Law

Jacob H. Rooksby
Assistant Professor of Law
Duquesne University School of Law

Elizabeth Rosenblatt
Assistant Professor and Director, Center for Intellectual Property Law
Whittier Law School

Matthew Sag
Associate Professor
Loyola University Chicago Law School

Joshua D. Sarnoff
Professor of Law and
Director, Center for Intellectual Property Law and Information Technology
DePaul University College of Law

Pamela Samuelson
Richard M. Sherman Distinguished Professor
University of California, Berkeley, School of Law

Sharon K. Sandeen, J.D., LL.M.
Professor of Law
Hamline University School of Law

Howard T. Senzel
Public Services Coordinator
University of Massachusetts School of Law Library

Lea Shaver
Associate Professor
Indiana University
Robert H. McKinney School of Law

Jessica Silbey
Professor of Law
Suffolk University Law School

Brenda Simon
Associate Professor
Thomas Jefferson School of Law

Eugene H. Spafford
Professor
Purdue University

Philip B. Stark

Professor of Statistics
University of California, Berkeley

Katherine J. Strandburg

Professor of Law
New York University

Peter Suber

Director, Harvard Open Access Project
Faculty Fellow, Berkman Center for Internet & Society, Harvard University
Senior Researcher, Scholarly Publishing and Academic Resources Coalition
Research Professor of Philosophy, Earlham College

Kara W. Swanson, J.D., Ph.D.

Associate Professor
Northeastern University School of Law

Stefan Tanaka

Professor of Communication
Director, Center for the Humanities
University of California, San Diego

Dr. Elizabeth Townsend Gard

Jill H. and Avram A. Glazer Professor in Social Entrepreneurship Associate
Professor in Law Co-Founder and Co-Director, Tulane Center for IP Law and
Culture Co-Inventor and Director, Durationator(r) Copyright Experiment
Tulane University

Samuel E. Trosow

Associate Professor
University of Western Ontario
Faculty of Information & Media Studies / Faculty of Law

Tisha Turk

Associate Professor of English
University of Minnesota, Morris

Rebecca Tushnet
Professor of Law
Georgetown Law

Deborah Tussey
Professor
Oklahoma City University School of Law

Ted Underwood
Associate Professor of English
University of Illinois, Urbana-Champaign

Jennifer M. Urban
Assistant Clinical Professor of Law
University of California, Berkeley, School of Law

Siva Vaidhyanathan
Chair, Department of Media Studies
Robertson Professor
Department of Media Studies
& School of Law
University of Virginia

Dan S. Wallach
Professor, Department of Computer Science and
Rice Scholar, Baker Institute for Public Policy
Rice University

Sarah K. Wiant
Professor of Law
Washington and Lee University School of Law

Matthew Wilkens
Assistant Professor of English
University of Notre Dame

John Willinsky
Khosla Family Professor of Education
Stanford University

Jane K. Winn

Charles I. Stone Professor

Asian Law Center

Law, Technology & Arts Group

University of Washington School of Law

Terry Winograd

Professor Emeritus of Computer Science

Stanford University

Jonathan Zittrain

Professor of Law

Harvard Law School and

Professor of Computer Science

Harvard School of Engineering and Applied Sciences

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore