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Ruling in Georgia State Copyright Case is Mostly Good News for Libraries

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Ruling in Georgia State Copyright Case is Mostly Good News for Libraries

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In April 2008, Cambridge University Press, Oxford University Press, and SAGE Publications sued Georgia State University officials in federal district court for copyright infringement after the publishers found small excerpts and chapters from their books posted on Georgia State's e-reserves. Instructors at Georgia State had posted the excerpts as supplemental readings for students, sometimes relying on fair use instead of obtaining permission. Because of sovereign immunity, the publishers did not seek damages, but they sought an injunction ordering Georgia State to change its practices. Georgia State's dean of libraries was one of the named defendants.

Before the case went to trial, Georgia State revised its copyright policy and practices, but not to the publishers' satisfaction. The court held a bench trial in May and June 2011 to consider 99 alleged instances of infringement that occurred under Georgia State's revised copyright policy. All of the alleged infringements involved chapters and other excerpts from nonfiction books posted on Georgia State's e-reserves, with access limited to students enrolled in the applicable courses. Before the trial was over, the plaintiffs voluntarily reduced their allegations of infringement to 75 instances. On May 11, 2012, the court issued a [350-page ruling](#) that was mostly favorable to Georgia State. Here's the good news for libraries:

- Out of the 75 alleged instances of infringement, the court sided with the publishers only five times.
- The court held that the limits on the amount of copying suggested by the 1976 *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions* (the "Classroom Guidelines") were too restrictive. The *Classroom Guidelines* have long been criticized for their narrow interpretation of fair use.
- The court declined to follow the *Classroom Guidelines*' suggestion that fair use copying should be permitted only when it's spontaneous and not repeated.
- Works that were uploaded on e-reserves but not actually downloaded by users were held to be *de minimis* instances of copying, which the court dismissed without even reaching the question of fair use.
- The court found no evidence that the plaintiffs suffered any loss of book sales, reasoning that short excerpts posted on e-reserves could not substitute for entire books and would not have led anyone to forego purchasing the books.

To decide whether Georgia State infringed the plaintiffs' copyrights, the court applied the four-factor fair use test set forth in section 107 of the Copyright Act (17 U.S.C. § 107). The four factors are (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) effect of the use on the potential market or value of the copyrighted work. The court found that the first and second factors always favored Georgia State because the copying was done for nonprofit educational purposes and all the works copied were nonfiction. (Works that are more creative, such as novels and poems, receive heightened protection under the second factor.)

On the third factor (amount and substantiality of the portion used), the court held that copying not more than 10 percent of a book or, in books with 10 or more chapters, not more than one chapter, would favor fair use. The court's limits are much more generous than those set by the *Classroom Guidelines*, and most of Georgia State's copying fell within the court's limit of 10 percent or one chapter. The court's decision to set specific limits has already generated criticism from some commentators who argue that the flexibility of the fair use test does not allow for any bright-line rules. But the court made it clear that its 10 percent-or-one-chapter limit was specific to the facts of this case, and it did not automatically find infringement where Georgia State exceeded the limits. Our only concern with respect to the third factor is that the court glossed over the "substantiality" aspect and put too much emphasis on page count alone.

As for the fourth factor (effect on potential market or value), the court found that the plaintiffs had not lost any book sales as a result of the copying and only a very small amount of permissions revenue. Nonetheless, the court held that if a digital license for an excerpted work was readily available and reasonably priced, the fourth factor would favor the publishers. In this case, digital licenses typically were not readily available, and so the fourth factor usually favored

Georgia State. But if courts apply the same reasoning in future cases, the result might not be so happy for libraries. If the availability of fair use depends on the unavailability of appropriate licensing mechanisms, then copyright owners can limit fair use simply by supplying those licensing mechanisms. We don't think that fair use should work this way. In our view, it would be better to focus on the court's finding that publishers enjoy a healthy market for their book sales, which is not affected by the short excerpts posted on e-reserves. We think that's enough to favor Georgia State under the fourth factor.

Because the court held that the first and second factors always favored Georgia State, and the third and fourth factors usually did too, the court held that nearly all the instances of copying in this case were fair uses. The court's rejection of the *Classroom Guidelines* and its skepticism about the publishers' lost sales were the key to Georgia State's win.

What can we expect next in this case? The publishers have until May 31 to propose an injunction, and Georgia State will have 15 days to respond. Of course, in view of the court's ruling, we can expect the injunction to be limited. Once final judgment is entered, the publishers may appeal to the U.S. Court of Appeals.

What are the broader implications of this case? That's still unclear. Even if there's no appeal, the court's decision won't be binding as precedent in any other court because this is only a trial court opinion. But it's safe to assume that publishers and libraries will heed this highly anticipated case, which is the first and only opinion from a U.S. court that addresses fair use copying in e-reserves. We can expect publishers to offer more digital licenses for excerpts to their books, which will strengthen their position under factor four of the fair use test. We might also expect publishers to take a more restrained approach to litigation and cease-and-desist letters, considering they have spent millions to litigate a case that seriously weakened their bargaining position. Of course, this could all change dramatically on appeal.

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