



ISSUE BRIEF Fair Use Decision Making Post-*Georgia State*

On October 17, 2014, the Court of Appeals for the Eleventh Circuit released its opinion in the Georgia State University (GSU) electronic course reserves (e-reserves) case, *Cambridge v. Patton*. The Eleventh Circuit rejected the publishers' efforts to undermine e-reserve services¹ and rejected bright line rules, finding that fair use is a flexible doctrine. Fair use decisions must be made on a case-by-case basis.

While the Eleventh Circuit reversed and remanded the decision to the district court, the court did *not* rule that GSU exceeded fair use in its e-reserve system. Instead, the Eleventh Circuit found the district court's application of the four fair use factors to be flawed and gave guidance as to how these factors should be applied. Notably, the Eleventh Circuit largely affirmed the district court's analysis for the first (purpose of the use) and fourth (market effect) fair use factors.

However, the court directed the district court to take a more nuanced view in consideration of the second (nature of the work used) and third (amount used) factors, as well as how all four factors should be weighed together. The court found that a fair use factor may be more or less important in a given case and that an "arithmetic approach" (where the district court found that if three factors favored fair use, the use was fair) was improper. The Eleventh Circuit rejected bright line rules, such as the district court's formulation that where less than ten-percent or one chapter of a work was put into the e-reserves, fair use was favored. Following the Eleventh Circuit's guidelines on a more nuanced approach to fair use, the district court may ultimately reach the same fair use conclusion with respect to most or all of the excerpts at issue.

The *Code of Best Practices in Fair Use for Academic and Research Libraries*² provides important guidance, entirely consistent with and reinforced by the Eleventh Circuit decision in *GSU*, on the use of copyrighted works in e-reserves. Individuals can continue to make fair use determinations with the assistance of the *Code of Best Practices*.

Looking at ways to support teaching and learning via digital technologies, the first principle in the *Code of Best Practices* reads

It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.

¹ The publishers advanced several arguments in an effort to undermine the use of e-reserves, all of which were rejected by the Eleventh Circuit. The Eleventh Circuit found that the Classroom Copying Guidelines did not carry the force of law or serve as a basis for fair use; fair use must be determined on a case-by-case basis and multiple uses of copyrighted works could not be aggregated; the first statutory fair use factor examining the purpose and character of a use favors a non-profit educational institution even in the context of verbatim copying; the "coursepack" cases were not binding on e-reserves; and consideration of the availability of licenses for a specific use was relevant in considering the fourth fair use factor on market harm.

² <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>

The Code then continues with a number of limitations and enhancements, which strengthen the argument for fair use. For example, the Code notes that:

Closer scrutiny should be applied to uses of content created and marketed primarily for use in courses such as the one at issue (e.g., a textbook, workbook, or anthology designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.

Another limitation regarding digital networks reads:

Materials should be made available only when, and only to the extent that, there is a clear articulable nexus between the instructor's pedagogical purpose and the kind and amount of content involved.

Similarly, a fair use argument is strengthened:

[W]hen libraries prompt instructors, who are most likely to understand the educational purpose and transformative nature of the use, to indicate briefly in writing why particular material is requested, and why the amount requested is appropriate to that pedagogical purpose. An instructor's justification can be expressed via standardized forms that provide a balanced menu of common or recurring fair use rationales.

Each of these points, from the high level principle to the limitations and enhancements, was reinforced by the Eleventh Circuit. Despite efforts by the publishers to undermine the use of e-reserves, the Eleventh Circuit did not reject the use of e-reserves as exceeding fair use. The court did, however, note that use of works that are created or designed for educational purposes may warrant greater scrutiny because of the lack of transformativeness (though in this particular scenario, the fact that the use was non-commercial and for educational purpose resulted in a finding that the first factor favored fair use). The converse of this ruling, of course, is that use of a work that was not created or marketed for educational purpose is more likely to be transformative, strengthening the case for fair use.

The Eleventh Circuit also emphasized the pedagogical purpose, noting that "educational purpose may increase the amount of permissible copying." It is thus important that materials placed on e-reserves have a nexus between the pedagogical purpose and the kind and amount of the content.

Institutions that employ checklists that assist individuals in making fair use determinations may consider reviewing their checklists and ensuring that these checklists are not employed mechanically. Arithmetic approaches, such as where a checklist advises that if more factors favor fair use than disfavor fair use then the use is fair, should not be relied upon. The Eleventh Circuit decision emphasizes the importance of case-by-case decision-making in fair use, and individuals should look holistically at the particular use before making a fair use determination. In creating or

revising fair use checklists as well as in reviewing e-reserves policies, institutions should consider the limitations and enhancements listed above, as well as the additional limitations and enhancements found in the *Code of Best Practices*.

Although the Eleventh Circuit decision addressed only the issue of the use of copyrighted works in e-reserves, the *Code of Best Practices* provides guidance on fair use in a number of other areas. Members of academic and research institutions can use the *Code of Best Practices* to guide in decisions on using selections from collection materials to publicize a library's activities or creating physical and virtual exhibitions; digitizing to preserve at-risk items; creating digital collections of archival and special collections materials; producing material for use by disabled students, faculty, staff and other users; maintaining integrity of works deposited in institutional repositories; creating databases to facilitate non-consumptive research use, including search; and collecting material posted on the Internet and making it available. In each of these areas, the *Code of Best Practices* provides guidance to users of copyrighted works in making fair use determinations, noting the limitations on these uses as well as actions that can enhance the case for fair use.

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