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Law 17 – Legal Writing

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## Federal Statutes & Cases on Fair Use in Nonprofit Institutions

### Introduction

Federal statutes such as Section 107 and Section 108 of the Copyright Act, and previous court rulings such as *Williams & Wilkins Co. v. U.S.* tend to favor nonprofit institutions (i.e. libraries, archives, research institutions and educational institutions) when it involves copyright infringement lawsuits.<sup>1</sup> However, despite most wins, nonprofit institutions should not assume their use of copyright work is fair use just because it is for educational purposes. Cases such as *Encyclopedia Britannica Educational Corp. v. Crooks* and *Cambridge University Press v. Patton* has shown that the courts carefully weigh all four fair use guidelines in determining fair use and does not always rule in favor of nonprofit institutions.<sup>2 3</sup> More importantly, these case rulings are costly and may have repercussions that impacts other nonprofit institutions' usage of copyright works.

### Background: Copyright, Copyright Infringement, & Section 107 Section 108

#### *Copyright*

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<sup>1</sup> Carrie Russell, "Fair Use and Electronic Reserve," *Advocacy, Legislation, & Issue: Copyright: Fair use*, American Library Association ( <http://www.ala.org/advocacy/copyright/fairuse/fairuseandelectronicreserves> , n.d.), Accessed 11 May 2015.

<sup>2</sup> [Encyclopedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156, 1982 U.S. Dist. LEXIS 13080, 214 U.S.P.Q. \(BNA\) 697, Copy. L. Rep. \(CCH\) P25,443 \(W.D.N.Y. 1982\)](#)

<sup>3</sup> [Cambridge Univ. Press v. Patton, 769 F.3d 1232, 2014 U.S. App. LEXIS 19978, 112 U.S.P.Q.2D \(BNA\) 1697, Copy. L. Rep. \(CCH\) P30,675, 25 Fla. L. Weekly Fed. C 547 \(11th Cir. Ga. 2014\)](#)

Copyright is a federal law that protects "...original works of authorship fixed in a tangible medium of expression."<sup>4</sup> Copyright gives authors, or creators legal rights over their work for a period of time. This allows creators and or owners of that particular work control over how their work can be used. For example, an author published a book this year; the author has legal rights over his work his entire lifetime plus an additional 70 years after his death.<sup>5</sup> That means, other people, will need the author's permission if they want to use part of his book. If the authors pass away this year, the work is still copyrighted until the year 2085.

Additionally, copyright also promotes the sciences, creativity, and progress. This was important enough for the forefathers to include a copyright provision in Article 1, Section 8 of the U.S. Constitution.<sup>6</sup> The forefathers wanted there to be growth, and progress in the sciences and "useful arts" for the advancement of the nation. One means of doing this was to ensure thinkers, creators, and authors that their work would be protected and that they had a say over what they created.

### *Copyright Infringement*

Copyright infringement occurs when someone uses a copyrighted material without the owner's permission. The U.S. Copyright Office goes into further details and explains that "...copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the

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<sup>4</sup> U.S. Copyright Office, "Definitions," *FAQs* (<http://www.copyright.gov/help/faq/faq-definitions.html> , n.d.), Accessed 05 May 2015.

<sup>5</sup> U.S. Copyright Office, "How Long Does Copyright Protection Last?," *Frequently Asked Questions about Copyright, continued* (<http://www.copyright.gov/help/faq/faq-duration.html> , n.d.), Accessed 07 May 2015.

<sup>6</sup> U.S. Copyright Office, "United State Copyright Office: A Brief Introduction and History," *Information Circular, Circular 1A* ( <http://www.copyright.gov/circs/circ1a.html>, n.d.), Accessed 02 May 2015.

copyright owner.” If copyright infringement does occur, the copyright owner can legally sue for damages.

### *Section 107 and Section 108*

The law makes it illegal for someone to use copyrighted work without the copyrighted owner’s knowledge and permission. This is usually true, however, the Copyright Act of 1976 did allow for some exceptions. Two of the most widely used exceptions are Section 107 and Section 108 of the Copyright Act known as the “Fair Use” and “Reproduction by Libraries and Archives” doctrine.

The “Fair Use” doctrine provides a defense against copyright infringement. It does not permit or allow copyright infringement; however, it does allow the use of a copyrighted work without the copyright owner’s permission or knowledge if it meets all of the four “fair use” guidelines. If the court examined the claim of copyright infringement and it meets all four of the “fair use” guidelines then usually the court will dismiss the copyright infringement lawsuit and rule that it was within “fair use.” The four “fair use” guidelines are as follows:

- The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes.
- The nature of the copyrighted work.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
- The effect of the use upon the potential market for, or value of, the copyrighted work.<sup>7</sup>

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<sup>7</sup> U.S. Copyright Office, "Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code: Section 107: Limitations on Exclusives Rights: Fair Use," *Information Circular*, Circular 92 (<http://www.copyright.gov/title17/92chap1.html#107> , n.d.), Accessed 05 May 2015.

The first guideline states that if it is for nonprofit educational purposes then it is “fair use.” Nonprofit institutions such as libraries and schools usually have no problem meeting this guideline. The second guideline states that depending on the nature of the copyrighted work and whether it is published or not it may fall under “fair use.” Copyrighted works that are non-fiction and or intended for education (i.e. chapter of a textbook) usually falls under “fair use.” However, creative works (i.e. plays, paintings, photographs and etc.) and unpublished works are more protected by court and requires further examination and evaluation by the court to determine whether or not it falls under “fair use.”<sup>8</sup> The third guideline states that amount and or the substantiality of the work used may fall under “fair use.” For example, a chapter in a book might fall under “fair use.” However, if that chapter is the most significant chapter or the essence of the work itself then it might not fall under “fair use.” The fourth and last guideline states that the “effect of use” should not harm the copyright owner’s income or potential market or value of the work. For example, mass sharing of an e-textbook amongst classmates is not considered “fair use” because it most likely decreases the copyright owner’s income and decreases the work’s market. As mentioned above, if the use of the copyrighted work pass these four guidelines, then usually the court would rule that it was within “fair use,” and therefore is not a copyright infringement.

The “Reproduction by Libraries and Archives” doctrine also known as Section 108 of the Copyright Act is an exception libraries and archives use when they copy, and or distribute the copyrighted work without gaining the copyright owner’s permission.<sup>9</sup> It is not as widely known

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<sup>8</sup> Kenneth D. Crews, "What is fair use?" *Copyright Advisory Office*, Columbia University Libraries/Information Services (<http://copyright.columbia.edu/copyright/fair-use/what-is-fair-use> , 14 Aug 2009), Accessed 15 Apr 2015.

<sup>9</sup> U.S. Copyright Office, "Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code: Section 108: Limitations on Exclusives Rights: Reproduction by Libraries and

as the “fair use” doctrine because it is intended for archives, public libraries and academic libraries that allow outside researchers and scholars the use of their materials with little or no charge. Section 108 also assumes that the purpose of the reproduction is for educational pursuits, scholarship, research and or preservation.

Section 108 allows library staff or library users (if there is a public access copy machine) to copy a small portion of the copyrighted work if the work cannot be circulated (i.e. reference material). Section 108 also allows libraries to copy an entire work per another library request on behalf of a library user, if the library can determine that the material is not easily accessible and cannot be obtained for a reasonable price. This does not occur often and when it does occur the library receiving the request can choose to decline the request based on their library policies and procedures.<sup>10</sup> Lastly, Section 108 allows libraries and archives to make up to 3 copies of an entire work for the sake of preservation. If it is being preserved digitally, it may only be accessed in the library (i.e. viewed on a computer or equipment in the library).<sup>11</sup>

In sum, copyright is a federal law that protects original works. Copyright infringement occurs when a copyrighted work is being used without the permission of the copyright owner. The copyright owner can sue for damages if copyright infringement occurs. However, there are exceptions or defenses to claims of copyright infringement. Two of the widely used exceptions are the “fair use” and “reproduction by libraries and archives” exceptions.

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Archives," *Information Circular*, Circular 92 (<http://www.copyright.gov/title17/92chap1.html#108> , n.d.), Accessed 05 May 2015.

<sup>10</sup> Camtu Cao, Kolap Samel, interviewer, Unpublished Interview with Inter-Library Loan Technician, Long Beach California, May 2015.

<sup>11</sup> Copyright Clearance Center, Inc., "Copyright Basics: Fair Use: Exceptions for Libraries and Archives," ([http://www.copyright.com/Services/copyrighthoncampus/basics/fairuse\\_archive.html](http://www.copyright.com/Services/copyrighthoncampus/basics/fairuse_archive.html) , 2008), Accessed 05 May 2015.

## Copyright Infringement Cases

As mentioned above, copyright is a federal law that originated in the United States Constitution. It was important enough to our nation that the forefathers included it in the Constitution, and it continues to be important as more laws and statutes were made regarding copyright such as the Copyright Act of 1934, Copyright Act of 1976, Copyright Act of 1996, Digital Millennium Copyright Act and etc. For the most part, these laws and statutes protect original works and give copyright owners the right to sue for damages if copyright infringement occurs. That is if the use of the copyrighted work did not fall under the “fair use” and or under the “reproduction by libraries and archives” exceptions. To better understand copyright infringement and the exceptions to it, certain cases that involved claims of copyright infringement and the defense of “fair use” or the “reproduction by libraries and archives” were examined below.

### *Williams & Wilkins Co. v. U.S. (1973)*

This case occurred before the Copyright Act of 1976; therefore, there was no Section 107 or Section 108 to assist the courts in their ruling. However, the final decision is reflective of the Copyright Act and its exceptions to copyright infringement. In *Williams & Wilkins Co. v. U.S.*, Williams & Wilkins Company, a medicine journal publisher, sued the National Institute of Health (NIH) and its library, the National Library Medicine (NLM) for copyright infringement. Both the NIH and NLM are national institutions; therefore, were represented by the United States.<sup>12</sup> The plaintiff sued the NIH and NLM because they made copies of medical journal articles upon individual researchers and other libraries’ request without the publishers’ permission and it prevented the plaintiff from receiving the potential income that the

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<sup>12</sup> [Williams & Wilkins Co. v. United States, 203 Ct. Cl. 74, 487 F.2d 1345, 1973 U.S. Ct. Cl. LEXIS 154, 180 U.S.P.Q. \(BNA\) 49, 21 A.L.R. Fed. 151 \(Ct. Cl. 1973\)](#)

subscriptions to the journals would have generated. The initial trial court ruled that copyright infringement did occur because photocopying prevented the publishers from receiving income from potential subscriptions and licensing fees.

However, the appellate court reversed this ruling and held that the NIH and NLM (nonprofit institutions) copying of journal articles upon individual or library's request for research was "fair use." Judge Davis explained that the "...type and context of use..." by the NIH and NLM were not for profit, the photocopying was for research and contributed to the field of medicine and science, and that the plaintiff did not provide convincing evidence that there income was detrimentally harmed by the NIH and NLM photocopying. Moreover, the court also noted that the NIH and NLM did have a photocopying policy that limited photocopying "...within appropriate confines..." It was because of these reasoning that the higher court reversed the rulings of the trial court.

This case was significant in that it established photocopying for research was "fair use." More importantly, the court seemed to rule that research or the progress in the sciences was more important than the potential harm in income a copyrighted owner might experience. This is illustrated when the court stated that the field of science would be, "...seriously hurt if such library photocopying were stopped."<sup>13</sup>

*Encyclopedia Britannica Education Corp. v Crooks (1982)*

In this case, Encyclopedia Britannica Education Corp. sued the Board of Educational Services of Erie County, New York over copy infringement.<sup>14</sup> The Board of Educational Services is a state funded organization that provides educational media to various school districts in Erie County, New York; C.N. Crooks is one of the main people associated with the Board of

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<sup>13</sup> Ibid.

<sup>14</sup> [Encyclopedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156, 1982 U.S. Dist. LEXIS 13080, 214 U.S.P.Q. \(BNA\) 697, Copy. L. Rep. \(CCH\) P25,443 \(W.D.N.Y. 1982\)](#)

Educational Services and therefore is named as the first defendant to the case. The plaintiff claimed that Board of Educational Services recorded their TV programs and distributed copies of it to various school districts in Erie County, New York without their permission; therefore, committing copyright infringement.

The defendants claimed it was within “fair use” but, the Western District New York court ruled otherwise. The court used the “fair use” guidelines to determine whether or not the defendants were within fair use. Under the “purpose and character” guideline, the court found that the defendant’s recording and distributing of the copies of plaintiff’s TV programs was for educational uses, however, it was not reasonable. The court explained that the defendants recorded the TV programs for the districts’ convenience as opposed to an actual teacher’s request for their lesson. The court stated that convenience does not fulfill the “reasonable” criteria for the “purpose and character” guideline. Under the “nature” guideline, the court had to examine the type of work used and “...whether distribution would serve the public interest...”The court determined that it was for educational purposes but, the court also reasoned that access to the work itself was not difficult to come by as the work was intended for schools and districts to purchase. Therefore, it did not justify the amount of copies the defendant distributed to the various schools; which meant the defendants’ “use” was not within the “nature” guideline. Under the “amount and substantiality” guideline the court found that defendant went well over what was considered a reasonable amount. The defendant copied entire programs and kept some of these recorded programs as long as 10 years. The defendant’s uses did not fall within the “amount and substantiality” guideline. Lastly, under the “income and market effect” guideline, the court found that the extensive distribution of copied recordings did have an adverse impact to the plaintiff’s income and work’s market. The mass copies affected the plaintiff’s ability to sell



and or license the recorded programs to schools. In sum, the court found that the defendant's uses of the plaintiff's work(s) did not meet any of the "fair use" guidelines; which meant that the defendant did infringe on the plaintiff's copyright.

This case is significant in that the court used the "fair use" guidelines to evaluate a nonprofit organization's uses of a copyright work and found it not within "fair use." The case's ruling established that a nonprofit organization's use of copyright work had to meet all the "fair use" guidelines to be considered within "fair use." Although, the defendant somewhat met the educational uses guideline, their uses did not meet the other fair use guidelines such as the purpose and character, amount and substantiality, and effect to the copyright owner's income.

*American Geophysical Union v. Texaco Inc. (1994)*

In this case, the American Geographical Union sued Texaco for copyright infringement.<sup>15</sup> Texaco is an American Oil Corporation. The plaintiff claimed that the defendant's research scientists were photocopying entire journal articles and distributing it to other scientists in the corporation without their permission or paying a licensed fee; thereby infringing on their copyright.

Texaco claimed their uses of the articles fell within fair use because it was for scientific purposes. The U.S. 2<sup>nd</sup> Circuit Court of Appeals disagreed and found that Texaco did infringe the plaintiff's copyright. The court went through the "fair use" guidelines to determine whether or not the defendant's use was "fair use." Under the "purpose and character" guideline, the court found that the article was used for commercial use and was a weak argument for "fair use." Under the "nature" guideline the court did agree that non-fiction work such as the journal article usually fell under "fair use." Under the "amount and substantially" guideline the court found that

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<sup>15</sup> [American Geophysical Union v. Texaco Inc., 1994 U.S. App. LEXIS 30437, 37 F.3d 881, 32 U.S.P.Q.2D \(BNA\) 1545, Copy. L. Rep. \(CCH\) P27,312 \(2d Cir. N.Y. 1994\)](#)

the scientists were copying entire journal articles and “systematically” distributing the copies to other scientist therefore it was not “fair use.” Under the “effect” guideline the court found that the defendant’s photocopying and distributing it to other scientists in Texaco did compete with the plaintiff’s ability to collect license fees therefore their use was not “fair use.” Based on the fact that the defendant did not pass the “purpose and character,” “amount and substantially,” and “effect” guideline, the court ruled that the defendant’s uses of the article was not within “fair use.”

This case ruling illustrates that private or for-profit organization must also meet “fair use” guidelines if they use copyright work without the copyright owner’s permission and is trying to claim it as “fair use.” The court found that defendant’s uses only met one of the four “fair use” guidelines, in which the “nature” of the journal article fell under “fair use.” As a result of this reasoning, the court found the defendant’s uses of the article was copyright infringement.

*Princeton University Press v. Michigan Document Services, Inc. (1996)*

In this case, Princeton University Press sued Michigan Document Services, Inc. over copyright infringement.<sup>16</sup> Michigan Document Services, Inc. is a copy shop that photocopied, bound, and sold “coursepacks” to students at University of Michigan. A coursepack is “...a collection of materials used in the classroom, distributed either in book format or as class handouts.”<sup>17</sup> The plaintiff claimed that Michigan Document Services, Inc. photocopied their copyright work without their permission and or paying the established license fees; therefore, committing copyright infringement.

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<sup>16</sup> [Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1996 U.S. App. LEXIS 29132, 1996 FED App. 0357P \(6th Cir.\), 40 U.S.P.Q.2D \(BNA\) 1641, Copy. L. Rep. \(CCH\) P27,579 \(6th Cir. Mich. 1996\)](#)

<sup>17</sup> Richard Stim, "Academic Coursepacks," *Copyright & Fair Use: Overview: Academic & Educational Permissions*, Stanford University Libraries, (<http://fairuse.stanford.edu/overview/academic-and-educational-permissions/academic-coursepacks/> , Oct 2010), Accessed 05 May 2015.

The defendant claimed “fair use,” because it was for university students to use for their academic pursuits. However, the U.S. 6th Circuit Court of Appeals disagreed and ruled that Michigan Document Services, Inc. did infringe the copyrights of the plaintiff. As with the previous case, the court used the “fair use” guideline to determine whether or not the defendant’s uses were within “fair use.” Under the “purpose and character” guideline, the copy shop copied the coursepack for commercial gain and it was not transformative, therefore, it was not within “fair use.” For the “nature” guideline, the court did agree that many of the works were non-fiction material and usually material of that nature fell under “fair use.” Under the “amount and substantially” guideline the court found that the copy shop copied “5 to 30 percent” of each work the plaintiff claimed was copyright infringement. The court found that this was not within “fair use.” Lastly, for the “effect of the copyright owner’s income” guideline, the court found that the defendant had reasonable knowledge or opportunities to contact the plaintiff and pay the licensing fees for the copyright work but they chose not to and adversely impacted the income the plaintiff would have received from the licensing fees. The court did not find the defendant’s uses within “fair use.”

This case is another example that for-profit organizations must also abide by the “fair use” guideline in order for their uses of copyright work to be considered “fair use.” As mentioned above, Michigan Document Services sold the course packs for a profit without paying the established license fee. The court found this to be not within “fair use.” Therefore the defendant met some but not all “fair use” guidelines and was found guilty of copyright infringement.

#### Analysis of the Cases

The cases and statutes mentioned above established precedents rules for copyright infringement cases that followed it. Cases such as *Williams & Wilkins Co. v. U.S.* and

*Encyclopedia Britannica Education Corp. v. Crooks* demonstrate that the courts acknowledged the importance of research and progress when a defendant uses the “fair use” defense in a copyright infringement cases. However, the cases also illustrates that after the Copyright Act of 1976 passed, the court began to integrate Section 107’s (Fair Use) four guidelines to evaluate whether or not the defendant’s uses was within “fair use.”

The “fair use” guidelines and rulings suggest that it favors nonprofit organization and or institutions. This is evident in the fact that the “purpose and character” guideline, which usually translate as nonprofit uses for education and or research, is usually met when it pertains to nonprofit institutions such as libraries and educational institutions. Moreover, Section 108 provides libraries another defense against copyright infringement when library staff are photocopying, distributing, and or preserving a copy of the copyright work without the copyright owner’s permission.

The cases also suggest that the statutes and courts usually do not rule in favor of for-profit organizations that uses copyright work without the copyright owner’s permission.<sup>18</sup> This is because “for-profit” usually weighs against Section 107’s “purpose and character” and “effect” guidelines. When “for-profit” uses copyright material for profit or commercial gain and it adversely affects the copyright’s owner income or work’s market then their uses does not meet the guidelines; therefore, their use is not within “fair use.”

Lastly, the cases and statutes also help defined what “fair use” is and what copyright infringement is. It presents a clearer and concrete idea of what is within “fair use.” Cases such as *Williams & Wilkin v. United States* and statutes such as Section 107 and 108 illustrates that nonprofit organization that uses the copyright work for educational, research, and or preservation

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<sup>18</sup> In regards to the ruling of *Encyclopedia Britannica Education Corp. v. Crooks* (1982), *American Geophysical Union v. Texaco Inc.* (1994), and *Princeton University Press v. Michigan Document Services, Inc.* (1996) that ruled in favor of the copyright owner.

purposes are usually within “fair use.” The cases that followed in the 1980’s and 1990’s demonstrate that in order to be considered “fair use” the users had to meet or be within the “fair use” guidelines. It also meant that nonprofit institutions cannot assume it is “fair use” just because it is for educational purposes. This has helped users, copyright owners, and courts understand what acceptable and or unacceptable under “fair use.”

However, this has also meant that what was questionable is now concrete, and sometimes this may not always work in one’s favor. For example, in the ruling of *Encyclopedia Britannica Education Corp. v. Crooks*, nonprofit organizations uses must also pass all Section 107’s guidelines in order to be considered within “fair use.” Prior to that case ruling, the *Williams & Wilkin v. United States* was what helped courts interpret what was fair use in nonprofit educational institutions. This case ruling emphasized more on the importance of the “purpose,” “nature,” and “amount and substantially” guideline and did not place too much emphasis on the “effect” of the copyright owner’s income or work’s market value. This changed with the passing of the Copyright Act of 1976 and the ruling of the *Encyclopedia Britannica Education Corp v. Crooks*. For some, the additional guideline or requirement meant one more restriction that nonprofit institutions had to follow.

### **Current Copyright Infringement Cases in Nonprofits (Libraries & Universities)**

For the past 20 years the world has grown through a major information revolution with the aid of technological advances such as the computers, internet, high speed connections, and telecommunications. This revolution and advances has impacted practically everything that is done in the world, including the uses of copyright work. Copyright work can now be stored electronically, preserved, and or digitized. It can also be accessed or distributed to anyone and anywhere as long as there is internet connection. This is especially true in nonprofit institutions

such as libraries and universities. The ease of access and distribution of this copyright work has caused some concerns for copyright owners and has led to recent copyright infringement cases involving nonprofit institutions such as libraries and universities. Below will be an examination of two recent copyright infringement cases that reflects the issue of technological advances, copyright infringement, and “fair use” in nonprofit institutions.

*Cambridge University Press v. Patton (2014)*

### **Cambridge University Press v. Becker (2012)**

In *Cambridge University Press v. Becker*, major publishers such as Cambridge University Press claimed that George State University (GSU) infringed on their copyright materials and the Northern District Court of Georgia ruled, for the most part, GSU was within fair use.<sup>19</sup> The District Court used Section 107 guidelines to evaluate whether or not GSU uses of the copyright work fell within “fair use.” Under the “purpose and character” and “nature” guideline, the court found that GSU was within it since the use was for nonprofit educational and or research purposes and the nature or content that was being used were factual and informational. These qualities or factors make a strong case for “fair use.” Under the “amount and substantially” guideline, the court found most of the digitized e-Reserves were 10% or less of the copyright work, and believe that these “narrowly tailored” excerpts was reasonable to “further the legitimate educational purposes of the course curriculum,” ; therefore, the “amount and substantially” GSU used were within “fair use.”<sup>20</sup> Under the “effect” on the work’s market, the court also found that excerpts of 10% or less “...did not affect Plaintiffs' actual or potential sales

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<sup>19</sup> Cambridge University Press v. Becker. No. 863 F. Supp. 2d 1190 . Dist. Court, ND Georgia . 11 May 2012.

<sup>20</sup> Ibid.

of books.”<sup>21</sup> Therefore stating that GSU uses, for the most part, was within the “effect” on work’s market guideline. However, the court did note that works that had a reasonable “readily available” license fee for its excerpt was entitled to the fees it charged.<sup>22</sup>

The case was significant in that the rulings impacted libraries and educational institutions’ uses of licensed and unlicensed content. The court found, for the most part, under Section 107 guidelines that GSU’s e-Reserves were within “fair use.” The ruling also set forth certain rules or suggestions for what was “fair use” and what was not for e-Reserves. For example, the ruling suggests that copying or uploading 10% of the copyright work or 1 chapter from a book that has 10 or more chapters is within “fair use.” The court also stated that works that had “readily available” license fees for its excerpts were entitled to its license fees

### **Appeal**

The publishers appealed the District Court ruling in *Cambridge University Press v. Becker* (2012). On October 17, 2014, in *Cambridge University Press v. Patton*, the Eleventh Circuit Court found that the District Court erred in the analysis of GSU’s fair use.<sup>23</sup> As a result the Circuit Court reversed the judgment, “vacate[d] the injunction, declaratory relief, and award of costs and fees...” and remanded the decision to the lower court.<sup>24</sup> Justice Tjoflat wrote, “...the District Court did err by giving each of the four fair use factors equal weight, and by treating the

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> [Cambridge Univ. Press v. Patton, 769 F.3d 1232, 2014 U.S. App. LEXIS 19978, 112 U.S.P.Q.2D \(BNA\) 1697, Copy. L. Rep. \(CCH\) P30,675, 25 Fla. L. Weekly Fed. C 547 \(11th Cir. Ga. 2014\).](#)

<sup>24</sup> Ibid.

four factors mechanistically.”<sup>25</sup> He explains that the District Court should have used a holistic analysis as opposed to a mechanical analysis of the four fair use factors.

In the 129 page opinion, the Circuit Court analyzed the District Court’s analysis of GSU’s use of copyright work, and agreed somewhat and disagreed somewhat with the District Court’s findings on whether or not GSU use of copyright material met all four fair use factors. For the first factor, the “purpose and character of uses” of copyright work, the Circuit Court agreed with the District Court that GSU uses of the copyright work favors fair use because it was for nonprofit and educational purposes. Both the District Court and Circuit Court agreed that although, GSU’s use of the copyright material was “...nontransformative it was also for nonprofit educational purposes, which are favored under the fair use statute.”<sup>26</sup> This illustrates that the courts interprets the use of copyright work for nonprofit educational purpose as fair use.

However, the Circuit Court disagreed with the District Court analysis regarding the “nature of the copyrighted work” that non-fiction material tended to be fair use. Justice Tjoflat stated, “...the District Court should have held that the second factor was neutral, or even weighed against fair use...That being said, the second fair use factor is of relatively little importance in this case.”<sup>27</sup> Although, the Circuit Court disagreed with this analysis, they also wrote that it was not important to the case.

The Circuit Court also disagreed with the District Court analysis regarding the “amount or substantiality portion used” when it established a fixed quantity as an amount to measure fair use. The Circuit Court stated “...the District Court erred in setting a 10 percent-or-one-chapter

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid

<sup>27</sup> Ibid.



benchmark. The District Court should have performed this analysis on a work-by-work basis, taking into account whether the amount taken — qualitatively and quantitatively — was reasonable...<sup>28</sup> The Circuit Court disagreed with the District Court simple quantitative method of measuring fair use and stated that the District Court need to examine each copyrighted work individually for the amount, and substantiality used.

Lastly, the Circuit Court agreed with the District Court analysis that most of GSU's use of the copyrighted material did not affect or harm the market value of it. Justice Tjoflat wrote "We find that the District Court's analysis under the fourth factor was correct, and that the District Court properly took license availability into account in determining whether the fourth factor weighted for or against fair use."<sup>29</sup> The Circuit Court agreed with the District Court reasoning that because there were no digital licensing for the copyrighted work, there were no harm to the copyright work's market value, making GSU uses of the copyrighted material within fair use. As a result of the Circuit Court's disagreement with the District Court's analysis on two of the four fair use factors ("nature of the copyrighted work" and "amount and substantiality portion used"), the Circuit Court reversed the District Court's judgment, and remanded it to the lower court.

The case is significant in that it reaffirms some ideas about fair use, establishes that fair use must be examined as a work-by-work basis, and touches upon the topic of licensing for digitized content. The case reaffirms that use of copyright work for nonprofit educational purposes will be considered fair use even if it was nontransformative. It also reversed the District Court's attempt to establish a fixed analysis in quantifying 10% or 1 chapter benchmark as an amount within fair use. The Circuit Court declared each copyright infringement claim must be

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

examined individually both quantitatively and qualitatively to determine if the amount of substantiality used was within fair use.<sup>30</sup> Lastly, the Circuit Court also agreed with the District Court that the lack of digital licenses for the copyright work meant that there was no harm in the copyright's owner income or market. Therefore, the copyright owners cannot argue there was market harm if they do not have a digital license for that content.<sup>31</sup>

*Authors Guild, Inc. v. HathiTrust (2014)*

### **Authors Guild, Inc. v. HathiTrust (2012)**

In this case, the Authors Guild, Inc. sued HathiTrust over copyright infringement and the Southern District of New York ruled in favor of HathiTrust.<sup>32</sup> HathiTrust is a partnership of major research institutions, university libraries, and Google, Inc. working together toward digitizing and preserving certain collection of books from the research institutions and libraries. The plaintiff claimed that digitizing the works that were copyrighted infringed on the owner's copyright.

The defendant, HathiTrust claimed it was within "fair use." The Southern District of New York court agreed with the defendant that HathiTrust use was within "fair use." The court used the "fair use" guidelines to determine whether or not HathiTrust uses were within "fair use." Under "purposes and character" the court found that HathiTrust uses were for nonprofit, educational, and research purposes. Moreover, the court also noted that the digitization of the books was transformative in that it provided access for disabled people and "superior search

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 - Dist. Court, SD New York 2012

capabilities rather than actual access to copyrighted material.”<sup>33</sup> Under the “nature” guideline the court did acknowledge that some of the content were published fiction or creative work which is usually considered not “fair use,” however, due to its transformative uses (mentioned prior) the court evaluated this to be “not dispositive” for the case.<sup>34</sup> Under the “amount and substantially” guideline the court also noted that digitizing entire works was necessary in its transformative uses as a search tool and in providing access to disabled people.<sup>35</sup> Lastly, under the “effect” to the work’s market, the judge ruled that the plaintiff failed to show that the defendant’s uses quantifiable harmed the works’ market. As a result of these reasoning, the court found that HathiTrust uses were within “fair use.” In fact, the court even stated that HathiTrust’s digitization is an “...invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA.”<sup>36</sup>

This case is significant in that it clearly illustrates copyright’s other purpose which is to promote the science, creativity, and “useful arts” for the benefit of the nation. The judge ruled in favor of defendant due to the transformative uses the digitization project provided such as an efficient search tool and providing access to disabled people. The court believed the HathiTrust uses did do what was intended of copyright, which was to benefit the nation. Scholars, researchers, and disabled people benefited from this digitization process. Judge Baer even wrote that “...the totality of the fair-use factors suggest that copyright law’s ‘goal of promoting the Progress of Science...would be better served by allowing the use than by preventing it.’”<sup>37</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

Therefore despite the fact that some would say HathiTrust uses did not meet all the “fair use” guidelines, the court ruled that overall, the benefit to the nation made it “fair use.”

### **Appeal**

The Authors Guild appealed the District Court’s ruling in *Authors Guild, Inc. v. HathiTrust*. On June 10, 2014, the Second Circuit Court, released their opinion of the District Court’s judgment and affirmed in part, vacated in part, and remanded the case back to the lower court.<sup>38</sup> The Circuit Court began their opinion by explaining that fair use is one of the few defenses against copyright infringement and that there are four factors used to determine fair use. The Circuit Court analyzed the District Court decision’s based on the four factors of fair use, and found the District Court did not err by ruling that HathiTrust’s creation of a “full-text search database” and “access for print-disabled ” to be within fair use.<sup>39</sup> The Circuit Court found that HathiTrust’s “full-text search database” and “access for print-disabled” was both transformative and met all four factor of fair use.

However, the Circuit Court vacated the District Court ruling on HathiTrust’s preservation endeavors. The Circuit Court did not have an opinion on whether or not preserving the books digitally were fair use because under Section 501 of the Copyright act, third parties such as the Authors Guild, Inc., are not permitted to bring suit on behalf of their members.<sup>40</sup> As a result, the Circuit Court remanded the issue of preservation to the lower court. The District Court must decide whether or not the Author Guild, Inc. could bring suit against HathiTrust for copyright

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<sup>37</sup> Ibid.

<sup>38</sup> Authors Guild, Inc., Inc. v. HathiTrust, 755 F. 3d 87 - Court of Appeals, 2nd Circuit 2014.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid, Section 501 of the Copyright Act does not allow copyright holders to bring in third parties to see on their behalf.

infringement regarding HathiTrust preservation endeavors.<sup>41</sup> Overall, the Circuit Court affirmed the District Court's ruling that HathiTrust's mass digitization project for "full-text search database" and "access for print-disabled" to be within fair use.

### Settlement

On January 06, 2015, the Authors Guild, Inc. and HathiTrust reached a settlement regarding HathiTrust's preservation endeavors. HathiTrust agreed that it will continue to comply with Section 108(c), and for a period of 5 years if HathiTrust does not comply with Section 108(c), they will notify the Authors Guild, Inc. of their infringement.<sup>42</sup> Section 108(c) is the Reproduction by Libraries and Archives doctrine established under the Copyright Act of 1976. It allows libraries and archives to reproduce copyrighted work if their original copy is damaged, destroyed, stolen, or lost and if it cannot be obtained at a fair price.<sup>43</sup> If HathiTrust do not abide by these established stipulations then it will notify the Authors Guild, Inc. of their wrong doing. Although, it was not decided at the federal courts on whether or not HathiTrust's preservation endeavors were within fair use, the plaintiffs did settle and dropped their suit that HathiTrust's preservation endeavors infringed on their copyright.

This case is significant in that it affirmed mass digitization for transformative uses such as "full-text search database" and "access for print-disabled" is within fair use. This means that nonprofits could basically digitized all their print collection, store it in a database structure, and it

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<sup>41</sup> Ibid.

<sup>42</sup> HathiTrust Digital Library, "Statement on the Resolution of Authors Guild v HathiTrust," *News and Publications: Press Releases and Announcements*, ([http://www.hathitrust.org/resolution\\_authors\\_guild\\_hathitrust](http://www.hathitrust.org/resolution_authors_guild_hathitrust) , 8 Jan 2015), Accessed on 13 May 2015.

<sup>43</sup> U.S. Copyright Office, "Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code: Section 108: Limitations on Exclusives Rights: Reproduction by Libraries and Archives," *Information Circular*, Circular 92 (<http://www.copyright.gov/title17/92chap1.html#108> , n.d.), Accessed 05 May 2015.

would be within fair use as long as there is full-text search capability and accessible for the print-disabled. Additionally, the Authors Guild, Inc. settlement with HathiTrust also shows that libraries and archives can digitized an item in their collection for preservation sake without having to worry about the Authors Guild, Inc. claiming copyright infringement.

### *Analysis of the Current Cases*

The two cases above illustrate that the court rulings tend to favor nonprofit uses of copyright work if there is a copyright infringement lawsuit involved. This is especially true in regards to digitization efforts of libraries and major research institutions. Although, this is considered a positive thing for nonprofit institutions such as libraries and research institutions, there may also be cost to these lawsuits. As mentioned above, “fair use” concepts or principles have become more defined when before it was still vague or up to a work-by-work interpretation. For example, in *Cambridge University Press v. Becker*, the District Court quantitatively defined 10 percent or 1 chapter of a book as an amount that is fair use.<sup>44</sup> This meant that professor were only allowed to upload 1 chapter of book or the maximum of 10 percent of a copyright work on e-reserve. This might have inconvenienced and caused hardships for the educational and library community. Fortunately, the Circuit Court say the error in this quantitative benchmark and reversed the District Court’s decision.<sup>45</sup> However, if the Circuit Court did not reverse this decision, this would have been a great cost to the library and educational community; especially, in the promotion of providing accessible resources to students and scholars and possible advancement of our nation.

### **Significance**

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<sup>44</sup> Cambridge University Press v. Becker (2012).

<sup>45</sup> Cambridge University Press v. Patton (2014).

Examining these cases has demonstrated that the statutes and court rulings tend to favor nonprofit institutions in copyright infringement cases. However, despite the victories in these lawsuits, nonprofit institutions such as libraries and higher educations must also pay a cost. These costs goes beyond the simple monetary terms, it also encompasses “copyright” policies and or procedures that was once considered permissible or reasonable.

Most of the nonprofit intuitions such as libraries and or academic institutions do not need the added burden of legal fees to their already limited budget. A lawsuit adds another cost that most of the institutions cannot afford. For example, regarding *Authors Guild, Inc. v. HathiTrust*, the plaintiff sued in the district court in 2011, appealed it in the circuit court when they were not satisfied with the verdict in 2013, and settled on the issue of HathiTrust’s preservation endeavors in 2015. That is roughly 4 years of costly litigation. The legal cost alone is daunting for a nonprofit organization such as a library and or public higher education.

Moreover, both plaintiffs in *Cambridge University Press v. Patton*, and *Authors’ Guild v. HathiTrust* may appeal the Circuit Court rulings and this may mean more legal cost for both GSU and HathiTrust in the future. The legal cost is already astounding coupled this with the possibility that the higher courts might rule in favor of the plaintiffs makes the cost even more exorbitant.

The cases has also defined what is allowed and or what is allowed as “fair use.” For some this is great because it provides clear boundaries to follow. However, for others, these rulings have meant restrictions or limitations on what was once considered permissible. This is illustrated in *Encyclopedia Britannica Education Corp. v. Crooks* which established nonprofit organizations uses of copyright work must also pass all four fair use guidelines of the 1976

Copyright Act in order to be considered within “fair use.”<sup>46</sup> Nonprofit institutions can no longer assume their use of copyright material is within fair use just because it falls under educational purposes. Fair use cases (concerning nonprofit institutions) since *Encyclopedia Britannica Educational Corp. v. Crooks* such as *Cambridge University Press v. Patton* and *Authors Guild, Inc. v HathiTrust* demonstrates that the courts carefully weighed all four fair use guidelines to determine whether or not the defendants’ use of the copyright work is within fair use.<sup>47</sup> Additionally, Judge Evans’ ruling that quantitatively measures fair use (the amount and substantiality portion), is another example that demonstrates court rulings may lead to new restrictions and or limitations that might not be favorable for nonprofit institutions.<sup>48</sup> Fortunately, the Circuit Court reversed this ruling soon after.<sup>49</sup>

Therefore, it is correct that the courts and statutes do tend to favor nonprofit institutions when a copyright infringement suit occurs. However, the costs of these lawsuits are burdensome for nonprofit institutions and it can lead to a restrictions on the usage of copyright works for nonprofit institutions. Consequently, it would behoove nonprofit institutions to avoid future copyright infringement lawsuits altogether, or they will risk more costly legal fees and more restrictions on the uses of copyright works; making sure their use of copyright works meets all four fair use guidelines is one method nonprofit institutions should follow to minimize copyright infringement lawsuits.

## **Conclusion**

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<sup>46</sup> *Encyclopedia Britannica Educational Corp. v. Crooks* (1982).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Cambridge University Press v. Becker* (2012).

<sup>49</sup> *Cambridge Univ. Press v. Patton* (2014).



The examinations of the Copyright Act, especially, Section 107 (Fair Use) and Section 108, along with various copyright infringement cases have demonstrated that legal policies and the court interpretations of it have been very generous to nonprofit institutions' uses of copyright works. This examinations has also demonstrated that nonprofit institutions should not assume their use of copyright works is fair use just because its purposes is educational. The 1976 Copyright Act and current fair use cases have shown that the court weighs all four fair use guidelines carefully in determining whether or not the use of a copyright work is within fair use. Moreover, the rulings of these copyright lawsuits be it in the plaintiff and or defendant's favor has also resulted in high costs for nonprofit institutions. Those that do not adhere to the copyright rules and regulations runs the risks of an expensive lawsuit, something most nonprofit institutions cannot afford, and possible constraints or limitation on what nonprofits considered "fair use".