

# Fair Use Analysis for E-Reserves and Course Management Systems

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On Friday, May 11, 2012, the long-awaited decision in **Cambridge University Press v. Becker et al.** was released by Judge Orinda Evans. In that case, several academic publishers sued four administrators at Georgia State University over the practice of putting class readings on electronic reserve and course management systems. The administrators did not seek permission or pay fees to the publishers after claiming a “**fair use**” **exemption from copyright law**. In the past, professors would often make a small number of physical copies of articles or book chapters available for students in the library, and the copies were made with permission from the publishers for a reproduction fee. Alternatively, the professor would create a “course pack” of articles and excerpts, which also required obtaining permission from each publisher and paying a fee. This important decision provides a clear test to determine fair use under copyright law in the digital age.

The decision has been considered a major win for Georgia State specifically, and for libraries more generally, providing a type of safe harbor for fair use of books on e-reserve. Judge Evans used the four statutory fair use factors as the framework of her analysis and applied that to each of the challenged postings. Notably, over one-third of the postings did not make it to the fair use analysis because either (1) the publishers were unable to prove that they owned the copyright in the challenged readings; or (2) Judge Evans found that merely putting infringing material in a system, without proof of use (i.e. student downloads), is not enough to establish liability.

Before evaluating each of the challenged uses, Judge Evans provided a general analysis of the application of each of the four fair use factors to the e-reserve or course management system context. It is this analysis that is gaining the most attention from the decision as it weighs in favor of the institution and will likely be used by other institutions in the future. Judge Evans’ analysis was as follows:

**Factor One:** Purpose and Character of the Use will strongly favor libraries and non-profit educational users in every analysis because it is the type of use intended to be covered by the fair use provisions of the Copyright Act.

**Factor Two:** Nature of Copyrighted Work will generally favor the university in each instance because the works at issue were scholarly non-fiction which, the Judge noted, is more informational than creative and thus has a broader scope of fair use.

**Factor Three:** Amount and Substantiality of the Portion Used favors the university only if they used no more than 10% of works with ten chapters or less, or one chapter for books with more than ten chapters, and the portion is not “the heart of the work”.

**Factor Four:** Effect of the Use on the Potential Market for or Value of the Copyrighted Work will strongly favor the publisher in every analysis as long as there is a reasonably priced, readily available license specifically for digital excerpts, though Judge Evans noted that permissions fees are not a significant part of a publisher’s overall revenue.

Since the first two factors will always weigh in favor of nonprofit educational users of non-fiction works, if the institution can win on either of the other two factors, the use will be fair.

While Judge Evans has yet to order any relief, asking both parties to suggest appropriate relief, including language for an injunction, it can be expected that the publishers will appeal this ruling.

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