

Cambridge University Press v. Patton: Who Really Won? re: Fair Use

Article By:

Meng Zhong

Cambridge University Press v. Patton^[1] is a recent opinion from the Eleventh Circuit Court of Appeals regarding fair use. In a nutshell, **the case involved the nation's premier text-book publishers** Cambridge University Press, Oxford University Press, and Sage Publications, Inc. (collectively "publishers"), **who brought suit against the Board of Regents and other officials at the Georgia State University** ("GSU") for **copyright infringement and related claims**.

Like many universities across the United States, GSU allowed its professors to make available excerpts of copyrighted textbooks to students through either an online library reserve system or a course-specific website. The publishers sued, arguing that GSU providing excerpts of the publishers' copyrighted texts to students without obtaining a license from the publishers (or their agents) was copyright infringement. Among other defenses, GSU responded that providing excerpts digitally constituted fair use.

In an opinion that was over three hundred pages long, the district court agreed with GSU on the vast majority of the instances of infringement, and awarded GSU nearly \$3 million in attorneys' fees. In a one hundred and twenty-nine page opinion, however, the Eleventh Circuit Court of Appeals reversed, finding the district court erred in its fair use analysis, vacated the fees award, and remanded the case for further proceedings.

But do not judge this book by its cover. The opinion is much more pro-university and pro-fair use than the holding would otherwise suggest. This is most aptly demonstrated by the court of appeals' discussion regarding the lack of market harm that would result to the publishers if GSU were allowed to continue to digitally distribute excerpts without the publisher's permission.

First, a brief overview of fair use. Fair use is effectively a sanctioned form of copyright infringement based on grounds of public policy. An often-cited example of fair use is the book reviewer who reproduces an excerpt of a book in his reviews. The reviewer does not need the permission of the book's copyright holders to reproduce the excerpt because he is making "fair use" of the book.

Fair use is statutorily guaranteed under the Copyright Act and lists examples such as use for criticism, comment, news reporting, teaching, scholarship, or research.^[2] The Copyright Act also provides four non-exhaustive factors that the court shall consider in addressing whether any

particular use is considered fair use: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the copying, and (4) the effect of the use on the potential market or value of the copyrighted work.^[3] While the *Patton* Court addressed each of these factors in its opinion, in the end, the Court deemed the last factor, the effect on the market, as having a large effect on the overall fair use analysis.^[4]

One would think the publishers had the upper hand here. Before digital distribution became commonplace, professors who wanted to distribute excerpts of various copyrighted texts to students would use a paper coursepack, usually created by private copiers (like Kinko's) or campus bookstores. There is a well-established system for licensing rights in connection with paper coursepacks. When the bookstores or copiers create the coursepacks, they pay the publishers a small licensing fee for "permission" to reproduce any included excerpts.

Digital distribution, however, skips the involvement by bookstores or copiers. Consequently, no one pays the publishers for "permission." It is not hard to see that the digital distribution employed by GSU professors can effectively replace paper coursepacks, and thus extinguish the market for licensing of excerpts in paper form. Therefore, the market effect of allowing educational institutions to digitally distribute excerpts without permission is arguably huge.

The *Patton* Court disagreed. The Court noted that while publishers may have a system for licensing of paper excerpts, they did not always have one for digital excerpts. This, accordingly to the Court, was enough to infer that there was no market for licensing of digital excerpts. Therefore, allowing GSU professors to distribute excerpts digitally caused little market harm:

With regard to the works for which digital permissions were unavailable, Plaintiffs choose to enter those works into some markets—print copies of the whole work, or perhaps licenses for paper copies of excerpts—but not the digital permission market. This tells us that Plaintiffs likely anticipated that there would be little to no demand for digital excerpts of the excluded works and thus saw the value of that market as de minimis or zero. If the market for digital excerpts were in fact de minimis or zero, then neither Defendants' particular use nor a widespread use of similar kind would be likely to cause significant market harm.^[5]

Surprisingly, however, even when a publisher did have a system established for licensing of digital excerpts, the Court held that market harm was still not automatically shown. "We note that it is not determinative that programs exist through which universities may license excerpts of Plaintiffs' works. In other words, the fact that Plaintiffs have made paying easier does not automatically dictate a right to payment."^[6]

Ultimately, *Patton* stands as an opinion that truly gives with one hand and takes with the other. While the publishers received another "bite at the apple" by the *Patton* Court's reversal and remand to the district court, the Court also re-weighted the fair use factors in a manner that is likely very favorable to GSU and its fair use argument.

^[1] 769 F.3d 1232, 1267 (11th Cir. 2014).

^[2] 17 U.S.C. § 107.

^[3] *Id.*

^[4] *Patton*, 769 F.3d at 1275 ("[t]he threat of market substitution here is great and thus the fourth factor looms large in the overall fair use analysis...").

[5] *Patton*, 769 F.3d at 1278.

[6] *Id.* at 1276.

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