

Colleges Shouldn't Have to Deal With Copyright Monitoring

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Commentary



Gwenda Kaczor for The Chronicle

By Pamela Samuelson May 17, 2016

Colleges have a big stake in the outcome of the lawsuit that three publishers, Cambridge University Press, Oxford University Press, and Sage Publications, brought against Georgia State University officials for copyright infringement. [The lawsuit](#), now in its eighth year, challenged GSU's policy that allowed faculty members to upload excerpts (mainly chapters) of in-copyright books for students to read and download from online course repositories.

Four years ago, a trial court held that 70 of the 75 challenged uses [were fair uses](#). Two years ago, an appellate court sent the case back for a reassessment under a revised fair-use standard. The trial court has [just recently ruled](#) that of the 48 claims remaining in the case, only four uses, each involving multiple chapters, infringed. The question now is, What should be the remedy for those four infringements?

Sage was the only publisher that prevailed at all, and it lost more infringement claims than it won. Cambridge and Oxford came away empty-handed. Despite the narrowness of Sage's win, all three publishers have asked the court for a permanent injunction that would impose many new duties on GSU and require close monitoring of all faculty uploads to online course repositories.

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This would apply not just to Sage publications, but to every use of in-copyright books on online course websites. The requirements would be too onerous and costly for colleges, given that such a small percentage of uses were found to infringe on copyright.

The publishers' request for a very broad injunction is not really a surprise. The plaintiffs always intended for the GSU case to establish a precedent that publishers could use to persuade colleges to pay for digital licenses from a company they work with, the Copyright Clearance Center.

This collecting society has long issued licenses for photocopied course packs for college classes. The publishers and the Copyright Clearance Center view online course repositories as the digital equivalents of course packs. Indeed, the clearance center and the Association of American Publishers are financing the litigation as a test case from which all publishers would benefit if it succeeds.

Under the proposed injunction, GSU faculty members would first have to determine whether digital licenses were available for excerpts they wanted to use. If so, they would have to decide whether to license that material or determine that uploading parts of in-copyright books would be fair use. Faculty members would have to assess whether their uses of the relevant materials were narrowly tailored to serve their pedagogical purposes, were not excessive in quantity, and were not the "heart" of the book. And faculty members would have to consider how much harm their use would cause to the publisher if other faculty members teaching similar courses made the same uses of the book chapter.

The proposed injunction would also require university personnel to confirm that every excerpt uploaded to course websites met the fair-use criteria.

The proposed injunction would also require university personnel to confirm that every excerpt uploaded to course websites met the fair-use criteria and to keep track of information about the book, which parts were used, the number of total pages, the sources that were consulted to determine whether digital permissions were available, the date of the investigation, the number of students enrolled in the course, and the name of the professor. The university would have to maintain those records for three years.

As if that were not enough, the publishers want the court to require GSU to provide them with access to the university's online course system and to relevant records so the publishers could confirm that the university had complied with the record-keeping and monitoring obligations. The publishers have asked the court to retain jurisdiction so that they could later ask it to reopen and modify the court order concerning GSU compliance measures.

The proposed injunction contrasts with the trial court's 2012 injunction, which directed GSU to change its copyright policy to conform with the court's order about what uses were fair and unfair, and to tell the faculty about the changed policy. The court wisely declined to impose burdensome and expensive record-keeping obligations on the university when first asked to do so.

Given that the trial court found less infringement on remand than it had initially, the new order will probably look like the one issued four years ago. Because the court considers GSU to be the prevailing party, a narrow injunction is to be expected. The publishers will appeal, of course. Their main challenge will focus on the trial court's analysis and fact-finding as to 44 uses that the court ruled were fair.

Appellate courts generally defer to lower-court fact-finding, especially when the findings are as extensive as in the GSU case. As an author of book chapters (for which I have never been paid, but which I would like students to read) and as a faculty member who posts some in-copyright materials on course websites, I'm rooting for GSU on the coming appeal. If the overwhelming majority of the university's uses were fair, it doesn't make sense to impose substantial and costly compliance measures on it. Colleges, students, faculty members, and academic-book--

chapter authors will win if the publishers lose once again.

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