IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DOCKET NO. 16-15726-C

CAMBRIDGE UNIVERSITY PRESS, ET AL.,

Plaintiffs-Appellants,

v.

J. L. ALBERT, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
D.C. NO. 1:08-CV-1425 (Evans, J.)

BRIEF FOR AMICUS CURIAE THE COPYRIGHT ALLIANCE IN SUPPORT OF APPELLANTS CAMBRIDGE UNIVERSITY PRESS, OXFORD UNIVERSITY PRESS, INC., AND SAGE PUBLICATIONS, INC. AND SUPPORTING REVERSAL

Ronald G. Dove, Jr.
Robert N. Hunziker, Jr.
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-5685

December 9, 2016

Case No. 16-15726-C
Cambridge University Press, et al. v. J. L. Albert, et al.

AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this case or appeal:

- Albert, J. L.
- Alford, C. Dean
- Askew, Anthony B., counsel for Appellees
- Association of American Publishers, Inc.
- The Authors Guild, *amicus curiae* (added)
- Baker Hostetler, counsel for Appellees
- Ballard Spahr, LLP, counsel for Appellees
- Banks, W. Wright, Jr., counsel for Appellees
- Bates, Mary Katherine, counsel for Appellees
- Becker, Mark P.
- Bernard, Kenneth R., Jr.
- Bishop, James A.
- Bloom, Jonathan, counsel for Appellants
- The Board of Regents of the University System of Georgia

- Bondurant, Mixson & Elmore, LLP, counsel for Appellants
- Cambridge University Press
- Carr, Christopher M., counsel for Appellees (added)
- Carter, Hugh A., Jr.
- Cleveland, William H.
- Copyright Clearance Center, Inc.
- **Copyright Alliance, *amicus curiae***
- Cooper, Frederick E.
- **Covington & Burling LLP, counsel for *amicus curiae* Copyright Alliance**
- Cowan, DeBaets, Abrahams & Sheppard LLP, counsel for *amicus curiae* the Authors Guild
- **Dove, Ronald G., Jr., counsel for *amicus curiae* Copyright Alliance**
- Ellis, Larry R.
- Evans, Hon. Orinda D., United States District Judge
- Gentry, Robin L., counsel for Appellees
- Georgia State University
- Griffin, Rutledge A., Jr.

- Harbin, John Weldon, counsel for Appellees
- Hatcher, Robert F.
- Henry, Ronald
- Hopkins, C. Thomas, Jr.
- **Hunziker, Robert N., Jr., counsel for *amicus curiae* Copyright Alliance**
- Hurt, Charlene
- Jennings, W. Mansfield, Jr.
- Jolly, James R.
- Krugman, Edward B., counsel for Appellants
- Lackman, Eleanor, counsel for *amicus curiae* the Authors Guild (added)
- Larson, Todd D., counsel for Appellants
- Leebern, Donald M., Jr.
- Lerer, R.O., retired counsel for Appellees
- Levie, Walter Hill, III, counsel for Appellees
- Lynn, Kristen A., counsel for Appellees
- McMillan, Eldridge
- Meunier Carlin & Curfman, LLC, counsel for Appellees
- Miller, Richard William, counsel for Appellees

- NeSmith, William, Jr.
- Olens, Samuel S., counsel for Appellees
- Oxford University Press, Inc.
- Oxford University Press, LLC
- Oxford University Press USA
- Palm, Risa
- Patton, Carl. V.
- Pavento, Lisa C., counsel for Appellees
- Poitevint, Doreen Stiles
- Potts, Willis J., Jr.
- Pruitt, Neil L., Jr.
- Quicker, Katrina M., counsel for Appellees
- Rains, John H., IV, counsel for Appellants
- Rasenberger, Mary E., executive director for *amicus curiae* the Authors Guild (added)
- Rich, R. Bruce, counsel for Appellants
- Rodwell, Wanda Yancey
- SAGE Publications, Inc.

- Seamans, Nancy
- Schaetzel, Stephen M., counsel for Appellees
- Sholder, Scott, counsel for *amicus curiae* the Authors Guild (added)
- Singer, Randi W., counsel for Appellants
- State of Georgia
- Stelling, Kessel, Jr.
- Tarbutton, Benjamin J., III
- Tucker, Richard L.
- The Chancellor, Masters and Scholars of the University of Oxford
- Vigil, Allan
- Volkert, Mary Josephine Leddy, counsel for Appellees
- Walker, Larry
- Weil Gotshal & Manges LLP, counsel for Appellants
- Whiting-Pack, Denise E., counsel for Appellees
- Wilheit, Philip A., Sr.
- Wolff, Nancy, counsel for *amicus curiae* the Authors Guild (added)

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the Copyright Alliance states that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page(s)

TABLE OF CITATIONS

Page(s)

Cases

Statutes and Rules

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Copyright Alliance is a non-profit, non-partisan, public interest, and educational organization representing the copyright interests of over 1.8 million individual creators and over 13,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators.

The individual creators and organizations that we represent span a diverse range of creators, including writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers, software developers, and game designers, as well as small businesses. What unites these individuals and organizations is their reliance on copyright law to protect their freedom to pursue a livelihood and career based on creativity and innovation and to protect their investment in the creation and dissemination of copyrighted works for the public to enjoy. This requires a predictable and appropriately refined fair use analysis that furthers the purposes of

[1] All parties have given written consent to the submission of amicus briefs. This brief was not authored in whole or in part by counsel for any party to this appeal, nor was it funded by such party or any party's counsel. No person other than the *amicus curiae*, its members, or its counsel contributed money intended to fund this brief.

copyright law, including the rights of authors to control the reproduction and distribution of their works as the markets for those works continue to evolve.

The Copyright Alliance supports fair use, and is dedicated to ensuring that the balance Congress struck in providing robust copyright protections to authors and meaningful exceptions for fair use is maintained. The Copyright Alliance is concerned that the district court's judgment disrupts this balance by improperly discounting the effect that widespread adoption of its analysis would have on potential or emerging markets for copyrighted works—not only for excerpts of scholarly and educational books and journals, but also for a wide range of other highly creative and separately copyrightable works, including musical compositions and sound recordings, films, videogames, illustrations, photographs, graphic designs, and other works of visual art. The Copyright Alliance submits this brief to ensure that, as technology continues to fuel rapid shifts in how copyrighted works are disseminated and enjoyed, independent authors and small businesses—many of modest means—continue to have incentives to create works that are vital to our nation's cultural, scientific, and technological progress.

STATEMENT OF THE ISSUE

Does the district court's approach to the fourth fair use factor undermine copyright's incentives for creating expressive works by allowing substantial, non-transformative copying that, if widespread, would supplant established or potential licensing markets?

INTRODUCTION AND SUMMARY OF ARGUMENT

The copyright protections afforded to creators by the Constitution and the Copyright Act are crucial to those who produce the expressive works so central to our nation's cultural and scientific heritage and development. In enacting the Copyright Act, Congress recognized that authors are incentivized to create when given control over the copying and distribution of their work. The fair use defense was intended to allow limited forms of copying and distribution that serve the underlying goals of copyright and do not threaten the author's legitimate interests. The fourth fair use factor—the effect of the use upon the potential market for or value of the copyrighted work—is meant to preserve copyright's incentive to create by preventing market substitution masquerading as fair use.

The decision below undermines the functioning of the copyright system by allowing third parties to systematically usurp portions of the market for works where the demand is deemed small or the portion of the market supplanted deemed slight. The markets for distribution of content of all types are rapidly evolving, with rights holders—including members of the Copyright Alliance—increasingly relying on online and digital redistribution of their content, and other alternative licensing streams. Permitting entities to expropriate or interfere with those markets will harm content creators and content owners of all shapes and sizes, and will lead to negative consequences across the entire spectrum of copyright.

By improperly framing and applying the market substitution analysis, the district court's reasoning could do serious damage to independent creators in particular, who may not have the funding or technological capability to provide licenses in every conceivable format. It may also prevent important markets from developing naturally to fit changing demand as technology continues to evolve, hindering the progress of science and the useful arts.

ARGUMENT

I. THE FOURTH FAIR USE FACTOR—THE RISK OF MARKET SUBSTITUTION—PRESERVES COPYRIGHT'S CENTRAL GOAL OF ENCOURAGING CREATION.

A. Copyright Achieves its Goal of Promoting Creativity and Innovation by Providing an Incentive to Produce Expressive Works.

The Constitution and our nation's copyright laws affirm the principle that providing individual creators robust protections and exclusive control over their works is vital to developing our society's rich cultural heritage, scientific knowledge, and technological progress. By enshrining in the Constitution the power of Congress to "Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," the Framers acknowledged that authors would be more likely to produce and disseminate expressive works if granted the right to protect those works. U.S. Const. art. I, § 8; *Harper & Row, Pubs., Inc. v.*

Nation Enters., 471 U.S. 539, 546, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."). The establishment of this economic incentive was central to realizing the goals of promoting creativity and innovation—as well as free expression.

At the same time, the means of augmenting the supply of expressive works (the protection of exclusive rights) should not subsume copyright's ends (promoting the progress of science and the useful arts). The Copyright Alliance is a staunch supporter of fair use principles, which allow for copyright to achieve its purpose without undermining the incentive to create. Its members regularly rely on these principles to create new, expressive, and transformative works, consistent with the Copyright Act's inherent purpose. Yet, if the fair use doctrine is misconstrued to allow users to systematically redistribute and exploit the copyrighted works of others, it will undermine the very incentive considered necessary by the Framers and Congress to spur authors to create expressive works in the first place. *See Campbell v*. *Acuff-Rose Music*, *Inc*., 510 U.S. 569, 599 (1994) (Kennedy, J., concurring) ("underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create"). It is therefore vital that fair use be properly scoped to advance the goals of copyright.

B. By Guarding against Market Substitution, the Fourth Fair Use Factor Preserves Authors' Rights.

The fourth fair use factor instructs courts to consider "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). It is aimed squarely at ensuring that the incentive to create is not undermined by the devaluation of an author's work through unchecked substitution for that work in the marketplace through systematic copying. Although no one factor is dispositive, in cases involving non-transformative uses, the centrality of copyright's intrinsic economic incentive gives the fourth fair use factor considerable weight. *See Princeton Univ. Press. v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385-88 (6th Cir. 1996), *cert. denied*, 520 U.S. 1156 (1997); *see also Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 n.31 (11th Cir. 2014) ("[B]ecause Defendants' use of Plaintiff's works is nontransformative and hence the threat of market substitution is severe, it is appropriate in this instance to afford relatively great weight to the fourth factor.").

Analysis of the fourth factor requires a broad inquiry. It "must take account not only of harm to the original but also of harm to the market for derivative works." *Campbell*, 510 U.S. at 590 (quotation marks and citation omitted). Importantly, it also requires consideration of "not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort . . . would result in a substantially

adverse impact on the potential market for the original." *Id*. (quotation marks and citation omitted). If it were otherwise, copyright's incentive to create would inevitably succumb to death by a thousand cuts.

Courts have recognized limits to the threats presented under the fourth factor "by considering only traditional, reasonable, or likely to be developed markets." *Am*. *Geophysical Union v*. *Texaco, Inc*., 60 F.3d 913, 929-930 (2d Cir. 1994). In this way, market substitution may be prevented where there is "use that supplants any part of the *normal* market for a copyrighted work." *Harper & Row*, 471 U.S. at 568 (emphasis added). Traditional markets for a copyrighted work, such as sales of books to students, are easily handled under the fourth factor analysis, and unpaid copying that usurps such sales is easily categorized as unlawful market substitution. *See, e.g*., *Princeton Univ*. *Press*, 99 F.3d at 1388 ("A licensing market already exists here . . . . [T]he potential for destruction of this market by widespread circumvention of the plaintiffs' permission fee system is enough, under the *Harper & Row* test, to negate fair use."). "Likely to be developed markets," on the other hand, are more readily defined by what they do not include: markets or licensing opportunities where the ability to protect a work is not likely to motivate authors to enter those markets.

In parody, for example, "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such

uses from the very notion of a potential licensing market." *Campbell*, 510 U.S. at 592. Copyright's protections alone are unlikely to spur authors to develop the market for parodies of their own original works for various reasons, not least of which are a natural reluctance to criticize one's own labors and the ability of a successful parody to suppress market demand for the original work. *See id*. at 591-92. On the other hand it may make sense for a third party, such as a critic, to skewer an original work; but despite potential damage to the market for the original, fair use permits such critical parodies because the "parody and the original usually serve different market functions." *Id*. at 591. The parodist fulfills a distinct market demand (that was not "likely to be developed" by the original author) rather than supplanting the market for the original. *See Fisher v*. *Dees*, 794 F.2d 432, 438 (9th Cir. 1986) ("Biting criticism suppresses demand; copyright infringement usurps it.").

Many other fair use findings rest on similar principles. It is unlikely that a copyright holder would write a review of her own work, *see*, *e.g*., *Harper & Row*, 471 U.S. at 584, fill a niche that the copyright holder simply has "no interest in occupying," *Twin Peaks Prods*., *Inc*. *v*. *Publ'ns Int'l*. *Ltd*., 996 F. 2d 1366, 1377 (2nd Cir. 1993), or write a new analysis of certain data from an opposing perspective, *see*, *e.g*., *Maxtone-Graham v*. *Burtchaell*, 803 F.2d 1253, 1264 (2d Cir. 1986) (concluding that "two works served fundamentally different functions,

by virtue both of their opposing viewpoints and disparate editorial formats"). But the common thread of these decisions is that—be it because the principles for creating the works differ, the works serve different market functions, or otherwise—these markets are categorically different from the markets that the original authors are likely to develop. *See Texaco*, 60 F.3d 913, 929-930. Thus, with no significant likelihood that the creator or rights holder might eventually choose to enter the market, the risk of substitution in that otherwise nonexistent market is quite low and fair use may come into play to correct the inherent market failure. *See Harper & Row*, 471 U.S. at 566 n.9.

What the fourth factor protects is the author's "*opportunity*" to enter the "'potential market' for the copyrighted work." *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (quoting 17 U.S.C. § 107(4)). There are many perfectly valid reasons why an author may decline to make a work available in particular formats or distribution channels. The reason may be artistic. *See Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) ("It would not serve the ends of the Copyright Act—*i.e.*, to advance the arts—if artists were denied their monopoly over derivative versions of their creative works merely because they made the artistic decision not to saturate those markets with variations of their original.") (internal punctuation, quotation marks, and citation omitted). The reason may also be economic, such as controlling the timing and

manner of a work's release. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1182 (9th Cir. 2012) ("There is no analytical difference between destroying the market for a copyrighted work by producing and selling cheap copies and destroying the subsequent years' market for a work by blowing its cover.") (internal punctuation, quotation marks, and citation omitted). But it is not for the courts to second guess how authors choose to exercise those rights granted to them by the Copyright Act. *See BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005) (cautioning courts not to "second-guess the market . . . if they think that authors err in understanding their own economic interests").

Proper application of the fourth fair use factor, then, requires a focus on whether, given copyright's incentive structure, the market for the copied work would likely be developed by the author or rights holder of the original work. If the original author or rights holder is unlikely to enter the new market, the threat of market substitution is unlikely and the fourth factor may favor fair use. If, however, the original author or rights holder might reasonably enter the new market, the threat of market substitution would undermine copyright's goal of encouraging further creation by depriving the author or rights holder of the opportunity to develop that potential market.

II. THE DISTRICT COURT'S APPROACH TO MARKET SUBSTITUTION UNDERMINES COPYRIGHT'S INCENTIVE TO PRODUCE CREATIVE WORKS.

A. The District Court's Market Substitution Analysis Conflicts with Longstanding Precedent.

In analyzing the risk of market substitution under the fourth fair use factor, the district court began by acknowledging that the nontransformative nature of the use in this case creates a severe threat of market harm. *See* Dkt#510 at 6. It added that, under the fourth factor, market substitution occurs where there is "use that supplants any part of the normal market for a copyrighted work." *Id*. at 7. Yet despite acknowledging that widespread adoption of Defendants' excerpt program "could cause substantial harm to the potential market for or the value of the copyrighted work," *see, e.g*., *id*. at 9, 58, the district court held that Defendants' copying could be justified if "the portion of the market captured by unpaid use is so slight that it would have had no effect on the author's or the Plaintiffs' decision to propagate the work in the first place," or if "the demand for excerpts of a particular copyrighted work was so limited that repetitive unpaid copying of excerpts from that work would have been unlikely." *Id*. at 12-13.

This approach fundamentally misapprehends how the fourth fair use factor has been shaped to preserve authors' incentive to create. This is not a case where the market for electronic excerpts is "categorically different" from the markets that have already developed for whole works in print, electronic whole works, and

excerpts of whole works reproduced in paper coursepacks, such that the rights holders would be unlikely to enter the market for electronic excerpts. *See Texaco*, 60 F.3d 913, 929-930; *see also Cambridge Univ. Press*, 769 F.3d at 1287-88 (Vinson, J., concurring) ("The digital format is merely another way of displaying *the same paginated materials* as in a paper format and *for the same underlying use*."). Indeed, Plaintiffs here had already made an entrance into the market for electronic excerpts. *See, e.g.*, Dkt#276 SF17; Dkt#423 at 24 (permissions to use portions of Plaintiffs' works may be readily obtained through Plaintiffs or the Copyright Clearance Center).

Rather than focus on a potential market failure due to a fundamental incompatibility with copyright's incentives for authorizing derivative works—such as in parody, critique, or counterpoint—the district court fashioned a new category of market not "likely to be developed," namely those markets that are too small to impact the decision to create the work or where demand for the work is limited.

This expansion of the fair use doctrine finds no basis in precedent. The question is not whether the copying at issue might have any negative effect on the demand for the original work—fair use may tolerate suppressed demand. *See, e.g.*, *Campbell*, 510 U.S. at 592 ("[T]he role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.") (internal punctuation, quotation marks, and citation omitted). The size

of the revenue stream or level of consumer demand for a work at a particular point in time do not define the author's opportunity to market a work. Rather, the Supreme Court has emphasized that the relevant inquiry is whether the copying in question "*supplants* any part of the normal market for a copyrighted work." *Harper & Row*, 471 U.S. at 568 (emphasis added).

Here, the district court's analysis turns on its conclusion that the market for electronic excerpts is "slight." Dkt#510 at 13. By the district court's own conception, then, the copying in question supplants some "part of the normal market for a copyrighted work." *Harper & Row*, 471 U.S. at 568. That should have been the end of the inquiry. Instead, the district court's analysis focused on the extent to which the excerpt system would diminish the authors' and publishers' markets. *See* Dkt#510 at 12-13 (asking whether "the demand for excerpts of a particular copyrighted work was so limited that repetitive unpaid copying of excerpts from that work would have been unlikely"). As other courts have acknowledged, this approach is erroneous because the effect "with which we are concerned is not its potential to destroy or diminish the market for the original . . . but rather whether it *fulfills the demand* for the original." *Fisher*, 794 F.2d at 437-38. As a result of this error, the district court's approach, in effect, blesses the usurpation of such a potential market so long as the copier enters the market before the copyright holder has had a chance to fully develop its own presence.

B. The District Court's Approach to the Fourth Factor Undermines Copyright's Purposes to the Detriment of Creators.

By focusing the fourth factor analysis on a snapshot of the market at the specific time of infringement, the district court's approach will allow secondary users to permanently usurp potential or emerging markets. This, in turn, would greatly threaten creativity and innovation by undermining the incentive for creators and rights holders to develop new works and markets, particularly in an era where technology is fueling rapid shifts in how creative works are disseminated and enjoyed. Creators and rights holders would be forced to prioritize expansion into all available distribution channels over the creation of valuable works. Further, by engrafting a requirement to quantitatively assess a developing market's importance at a set time, the district court's approach does not properly account for the natural development of new markets. This injures creators in two ways: it punishes creators for failing to rush into new markets, and it discounts their efforts when they do.

1) The District Court's Analysis Punishes Creators for Failing to Immediately Enter All Possible Markets for Their Works, Preventing the Natural Development of Those Markets.

The district court's approach poses insurmountable challenges to independent creators and small businesses who do not have the financial resources or technical ability to immediately implement costly, sophisticated licensing

management systems for excerpts of their works in myriad new and evolving formats. For these creators, fulfilling requests for different formats in order to avoid unauthorized copying could divert them from the creation of new works, greatly undermining the purpose of copyright protection. Further, although the individual creator members we represent are often on the forefront of exploring new models for distributing and exploiting their works, the district court's approach undermines their ability to embrace new technologies and business models that make sense for their particular works by requiring instead a focus on universal availability across formats, all to the detriment of the public. With their creative energies diverted to formatting, authors would be unable to produce as many new works for the public to enjoy.

Compounding the issue, the district court's approach frustrates and interferes with the development of legitimate authorized markets for the licensing and distribution of copyrighted works. History has shown that when there is a need or demand for certain content, a market-based solution that is fair to both users and rights holders will emerge, often in the form of a clearinghouse that pays royalties to copyright owners, such as BMI and ASCAP with respect to music performance rights, *see, e.g.*, *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 5 (1979), or the Copyright Clearance Center with respect to academic and other works

(including movie clips), *see, e.g.*, *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 7 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994).

Similarly, agencies like Getty Images provide a valuable service by providing the public access to a massive library of properly licensed photographs, illustrations, and film footage. Many of the Copyright Alliance's members operate such clearinghouses and agencies, or rely on them for licensing revenues. If companies or institutions are permitted to systematically disseminate copyrighted content to third parties, under the guise of fair use, legitimate clearinghouses that actually compensate copyright owners for the use of their works will be unable to compete with companies that take such works for free. *See Princeton Univ. Press*, 99 F.3d at 1384, 1386; *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013).

2) Even Where Creators Have Entered the Market, the District Court's Analysis Punishes Them Through an Unprincipled Examination of the Extent of Their Efforts as of a Certain Date.

In applying relevant fourth factor precedent, there is no place for the courts to make subjective judgments about whether a revenue stream is "significant" enough to be deserving of protection; all income is desirable for copyright holders, and "*some* impairment of the market" is enough to discourage creation. *Salinger v. Random House, Inc.*, 811 F.2d at 99 (emphasis added). Requiring the revenue stream to be "significant" has the undesirable effect of undervaluing works created

by small, independent authors who are unlikely to garner high fees for the use of their works, and may also penalize large entities if the revenue stream associated with the secondary use is considered "insignificant" in relation to their entire revenue stream.

The district court's framework and analysis deprives the copyright holder of the right to decide when and if to license its works for use and reproduction, and on what terms. Moreover, just because derivative markets may have accounted for a relatively small percentage of total revenues at the time of the district court's opinion does not mean that this will be the case in the future. Secondary users should not be given the imprimatur of lawfulness merely because they entered the picture at a critical early juncture, before digital and other alternative forms of distribution have fully overtaken traditional distribution models.

Furthermore, the district court's narrow focus on the extent to which the creator has made a work available across formats—including the technical format, and the amount of a work that is licensable—as of a certain date imposes a high cost on independent authors because the systematic reproduction and public distribution of popular excerpts where on-demand, multi-format licensing is unavailable will be replicated by institutions across the country and will not be limited to scholarly or informational books. Emboldened by the district court's articulation of the fair use defense and taken to its [il]logical conclusion,

organizations nationwide could stop purchasing multiple copies of, for example, musical scores where only a particular movement or part is desired and assert that they are entitled to make "fair use" copies because only entire musical scores typically are made available for purchase or license. The revenue stream for individual composers would be devastated.

Similarly, a college art history professor could distribute numerous reprints of original pieces of artwork published in art history textbooks, arguing that textbook publishers typically do not offer a license for the specific page of the book on which the artwork appears—often because the publisher does not itself have the rights to offer such a license. Permitting this type of conduct directly undermines the directive of the Constitution and the copyright laws to "reward[] the individual author in order to benefit the public." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984).

Adding to this undue burden, the author would lose the right to seek license fees if he or she failed to meet the demand for the excerpt in a particular format more "reasonably convenient" to the requesting institution, even if the author makes excerpts available for license in another format. For example, if a documentary filmmaker licenses excerpts in the MPEG-2 format used for DVDs, under the district court's reasoning, an institution could avoid having to pay the

documentary filmmaker a license fee simply by requesting the excerpt in the H.264 format used for Blu-ray discs.

By punishing individual, independent authors who are not immediately able to provide on-demand, multi-format licensing, the district court's decision undermines copyright's incentives to create. Authors of original works are put at a competitive disadvantage in the market unless they can distribute a work in every conceivable format. Instead of benefiting from their creation, creators are left helpless to stop free riders from usurping the fruits of their labors merely by finding some medium that the original author has not yet implemented. Such a system plainly does not "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

C. Broad Application of the District Court's Approach Would Frustrate the Ability of a Wide Range of Authors and Copyright Holders to Continue to Create Expressive Works.

The lower court's misapplication of the fourth factor threatens to undermine the purposes of copyright and innovation far beyond the factual scenario of this particular case. The problem is not limited to educational publishers or by the nature of the copyrighted works here; it affects all types of creators, including all Copyright Alliance members—and in particular individual creators. The district court's misapplication of the fourth fair use factor hurts copyright owners and

authors of all types by undermining their ability to embrace new technologies and business models. It would be particularly harmful to the many individual creator members we represent, given that they are often on the forefront of exploring and developing new models for distributing and exploiting their works.

The following includes examples of the types of new uses that would be jeopardized under the district court's analysis to help this Court understand the negative effects affirmation would have on the broader creative industries.

Growth of Digital Music. For much of its history, the recorded music industry has relied on sales of physical copies as its primary source of revenue. The shift from physical to digital did not happen overnight. It took the good part of a decade from the emergence of the digital audio file for the online market of sound recordings to become significant. In 1999, Napster brought (unauthorized copies of) digital music files to the masses. Apple's iTunes store, the first commercially successful digital retailer, was not launched until 2003. And the digital market in the U.S. did not overtake the physical market until 2012. *See* Josh Halliday, *Digital Downloads Overtake Physical Music Sales in the US for First Time*, The Guardian (Jan. 6, 2012, 11:17 AM), https://www.theguardian.com/media/2012/jan/06/downloads-physical-sales-us. Starting in 2014, the streaming of music began to replace digital downloads, and streaming music now represents the majority of the music market.

This transition was slowed by a number of factors. First, the rights labels have are acquired through contracts written before the emergence of digital formats and online markets. It may be unclear how existing provisions apply in this new context—for example, whether digital music downloads are considered "copies" and governed by one royalty rate, or "master licenses" and governed by a different royalty rate—or whether labels even have rights to enter into the market at all under the agreement. This issue is compounded by the fact that label agreements are far from standardized. Second, development of the market itself took time, requiring a shift in consumer demand, the creation of retail outlets to serve new markets, and the design and manufacture of new devices for new formats.

Copyright owners have to make many business decisions guided only by predictions or speculation. As the Seventh Circuit cautioned, courts should not "second-guess the market . . . if they think that authors err in understanding their own economic interests." *BMG Music v. Gonzalez*, 430 F.3d at 891.

The shift from analog copies to digital copies was not unique to sound recordings—most industries saw a similar shift, including book publishers, news and magazine publishers, film and television producers, and photographers.

Streaming Video. The emergence of streaming video as a market—where consumers pay for access to works rather than acquisition of copies—is another recent phenomenon. Netflix, founded originally to offer DVD rentals by mail, first

began offering video on demand in February 2007. It was joined by Hulu in August 2007, and Amazon Prime in 2011. But by 2015, more U.S. consumers preferred watching television programs and movies through video-streaming services over traditional television. *See* Todd Spangler, *Streaming Overtakes Live TV Among Consumer Viewing Preferences: Study*, Variety (Apr. 22, 2015, 5:21 AM), http://variety.com/2015/digital/news/streaming-overtakes-live-tv-among-consumer-viewing-preferences-study-1201477318/.

Despite this rapid growth, there are issues that may slow the ability of individual copyright owners and distributors to enter the market. For one, there is always a risk that new distribution channels may cannibalize existing ones, leading to lower overall revenues to copyright owners. *See* Thomas Friedrich et al., *When Streams Come True: Estimating the Impact of Free Streaming Availability on EST Sales*, AIS Electronic Library, http://aisel.aisnet.org/icis2016/EBusiness/Presentations/7/. Additionally, copyright owners may have existing distribution agreements in place that prevent exploitation of works through new types of services until those agreements expire or are renegotiated. Technological protection measures that secure copyrighted works against piracy risks may need to be developed, improved or adjusted to account for new business models. There may be risks of cannibalizing existing revenue streams by moving into new services where revenue may be unproven or

speculative. Television programs and films also typically incorporate independent copyrighted works like sound recordings, and may not necessarily have the rights to exploit those incorporated works by new means—requiring new agreements to be negotiated. Finally, copyright owners of television programs and films have to take into consideration the collective bargaining agreements that govern deferred payments to union members involved in the production of works. New markets and methods of exploiting works raises uncertainties as to how these collective bargaining agreements apply.

Scholarly Publishing Databases. Online research databases provide tremendous opportunities for accessing knowledge regardless of location, but they are not created overnight. Scholarly publisher Elsevier began development of its online publishing platform, ScienceDirect, in 1995, beta tested it in 1997-1998, and finally rolled it out in 1999—a period of four years. The company invested $26 million in initial development costs and made an initial investment of $46 million to create digital archives. Since then it has spent hundreds of millions of dollars shifting to digital production and publication of journals. This includes paying developers to code, scan, and beta test platforms, purchasing hardware and machinery, R&D, and ongoing maintenance and enhancements. Currently, Elsevier maintains over 14 million articles and over 90 terabytes of digital storage capacity from which an average of 12 million active users from 120 different

countries download nearly 900 million articles per year. About 2.5 million articles in science, technical, and medical fields were published in 2015 alone by publishers. *See* Adam Mossoff, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, 2015 Mich. St. L. Rev. 955 (2015), http://digitalcommons.law.msu.edu/lr/vol2015/iss3/2. Yet, this kind of extensive investment in a socially beneficial system may never have occurred if there were no assurance that free riders would be prevented from copying digitized works at an early stage of development.

Lyric Websites. Although song lyrics are elements of authorship in musical works, for a long time they have not been exploited independently of songs. *See* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §§ 101, 802.3 (3d ed. 2014). In recent years, however, websites and mobile application developers found that offering lyrics online or via download draws a significant amount of traffic, resulting in the ability to generate revenue from advertising. Music publishers began to license these sites and applications and threaten legal action against those who failed to acquire licenses. *See, e.g.*, *NMPA Files Suits Against Two Unlicensed Lyric Sites*, NMPA (May 21, 2014), http://nmpa.org/press_release/nmpa-files-suits-against-two-unlicensed-lyric-sites/. As one researcher wrote, "Based on the popularity of lyric searches, it is possible that unlike the sound recording business, the lyric business may be more valuable

in the Internet age." Alex Pham, *NMPA Targets Unlicensed Lyric Sites, Rap Genius Among 50 Sent Take-Down Notices*, Billboard (Nov. 11, 2013, 1:30 PM), http://www.billboard.com/biz/articles/news/legal-and-management/5785701/nmpa-targets-unlicensed-lyric-sites-rap-genius-among.

To date, copyright owners have licensed over 100 different websites and mobile applications that offer lyrics, leading to a new source of revenue for songwriters, composers, and music publishers. Among the sites currently licensed is Rap Genius, which had initially appeared to take the stance that their reproduction and display of lyrics would be protected by fair use. *See* Aisha Harris, *Is Rap Genius Illegal?*, Slate (Nov. 13, 2013, 3:28 PM), http://www.slate.com/blogs/browbeat/2013/11/13/rap_genius_copyright_lawsuit_national_music_publishers_association_threatens.html. Many lyrics are licensed through lyrics licensing aggregators like LyricFind and MusiXmatch. LyricFind alone "has 4,000 publishers and more than 1 [million] lyrics licensed legally in eight languages" and "pays millions to lyrics publishers each year." *Lyric-Sharing Deals Aim to Support Songwriters*, The Economist (Nov. 22, 2016), http://www.economist.com/blogs/prospero/2016/11/instrumental.

Image/Photograph Embeds. In March 2014, Getty Images, one of the world's largest creators and licensors of photographs, announced a new tool that would allow its images to be used for non-commercial purposes on websites,

blogs, and social media channels—at no cost to the licensee. *See* Russell Brandom, *The World's Largest Photo Service Just Made Its Pictures Free to Use*, The Verge (Mar. 5, 2014, 5:59 PM), http://www.theverge.com/2014/3/5/5475202/getty-images-made-its-pictures-free-to-use. While Getty Images does not derive direct revenue from the licensee, the embed tool does allow for subsequent advertising revenue and provides valuable data on image use, as well as branding for Getty Images, attribution for the photographers, and links back to the Getty Images website. This new distribution model will likely benefit the public, licensees, and Getty Images, but without copyright's protection of Getty Images's photographs, the model may never have been able to develop.

Each example above demonstrates that copyright owners must make challenging and complex business decisions before entering into new markets or embracing new distribution models. And even when they do make those decisions, the examples above show that enormous time, expense, and risks are often involved. In most cases, copiers would not face those same costs or risks, so they could enter into new markets much more quickly. The district court's static interpretation of market harm under the fourth fair use factor would legitimize such conduct by copiers, essentially allowing them to usurp these markets from the

copyright owners themselves. The result would run contrary to the goals of copyright law, to the detriment of the public.

CONCLUSION

As the Framers of the Constitution recognized, the public benefits when authors are rewarded for their creative endeavors. While the Copyright Alliance fully supports the *proper* application of fair use and recognizes its role in supporting the underlying goals of copyright, the district court's approach to the fourth fair use factor undermines the copyright system by permitting significant and systematic reproduction of copyrighted works based on a snapshot of the market at a single point in time, denying authors licensing revenues that spur the creation of new works. For all these reasons and those stated in Appellants' brief, the Copyright Alliance respectfully asks that this Court reverse the opinion of the district court.

Respectfully submitted,

s/ Ronald G. Dove, Jr.

Ronald G. Dove, Jr.
Robert N. Hunziker, Jr.
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-5685

Counsel for Amicus Curiae Copyright Alliance

December 9, 2016

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 6,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2010, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2010, Times New Roman, 14 point.

s/ Robert N. Hunziker, Jr.
Robert N. Hunziker, Jr.
Counsel for Amicus Curiae
December 9, 2016

CERTIFICATE OF SERVICE

I certify that on December 9, 2016, I electronically filed the foregoing **BRIEF FOR AMICUS CURIAE THE COPYRIGHT ALLIANCE IN SUPPORT OF APPELLANTS CAMBRIDGE UNIVERSITY PRESS, OXFORD UNIVERSITY PRESS, INC., AND SAGE PUBLICATIONS, INC. AND SUPPORTING REVERSAL** with the Clerk of the Court using the CM/ECF system, which I understand will automatically send an e-mail notification of such filing to the counsel of record for this matter.

s/ Robert N. Hunziker, Jr.
Robert N. Hunziker, Jr.