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**United States Court of Appeals**  
*for the*  
**Eleventh Circuit**

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CAMBRIDGE UNIVERSITY PRESS, et al.,

*Plaintiffs/Appellants,*

v.

J. L. ALBERT, et al.,

*Defendants/Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
CASE NO: 1:08-cv-01425-ODE  
(Hon. Orinda D. Evans)

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**BRIEF OF *AMICUS CURIAE* AUTHORS ALLIANCE  
SUPPORTING DEFENDANTS/APPELLEES AND  
AFFIRMANCE**

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Jennifer M. Urban  
SAMUELSON LAW, TECHNOLOGY  
& PUBLIC POLICY CLINIC  
University of California, Berkeley,  
School of Law  
342 Boalt Hall (North Addition)  
Berkeley, California 94720  
(510) 642-7338

*Counsel for Amicus Curiae*

*On the Brief:*

Pamela Samuelson  
President, Authors Alliance

Brianna L. Schofield  
Executive Director, Authors Alliance

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. Proc. 26.1, *amicus curiae* Authors Alliance states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

In compliance with 11th Cir. R. 28-1(b) & 26.1-1, the following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations are known to have an interest in the outcome of this appeal:

- Albert, J. L.
- Alford, C. Dean
- Askew, Anthony B., counsel for Appellees
- Association of American Publishers, Inc.
- Authors Alliance, *amicus curiae*
- The Authors Guild, *amicus curiae*
- Baker & Hostetler, 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
- Carter, Hugh A., Jr.
- Cleveland, William H.
- Copyright Alliance, *amicus curiae*
- Copyright Clearance Center, Inc.
- Cooper, Frederick E.

*Cambridge University Press, et al. v. J. L. Albert, et al.*

- 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
- 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
- Larson, Todd D., counsel for Appellants
- Leebern, Donald M., Jr.
- McMillan, Eldridge
- Meunier Carlin & Curfman, LLC, counsel for Appellees
- NeSmith, William, Jr.
- 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
- Rich, R. Bruce, counsel for Appellants

*Cambridge University Press, et al. v. J. L. Albert, et al.*

- Rodwell, Wanda Yancey
- SAGE Publications, Inc.
- Samuelson Law, Technology & Public Policy Clinic, University of California, Berkeley, School of Law, counsel for *amicus curiae* Authors Alliance
- Samuelson, Pamela, president of *amicus curiae* Authors Alliance
- Schaetzel, Stephen M., counsel for Appellees
- Schofield, Brianna L., executive director of *amicus curiae* Authors Alliance
- Seamans, Nancy
- Sholder, Scott, counsel for *amicus curiae* The Authors Guild
- 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
- Warren, Sarah Hawkins, counsel for Appellees
- Weil Gotshal & Manges LLP, counsel for Appellants
- Wilheit, Philip A., Sr.
- Wolff, Nancy, counsel for *amicus curiae* The Authors Guild
- Urban, Jennifer M., counsel for *amicus curiae* Authors Alliance

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Authors Alliance is a 501(c)(3) nonprofit organization that promotes authorship for the public good by supporting authors who write to be read. Authors Alliance’s mission is to further the public interest in facilitating widespread access to works of authorship by assisting and representing authors who want to disseminate knowledge and products of the imagination broadly. Authors Alliance provides information and tools to help authors better understand and manage authorship in the digital age, and gives a voice to authors in legal and policy discussions that might promote or inhibit the broad dissemination they seek.

Authors Alliance has more than 1,000 members, many of them academic authors. Many Authors Alliance members have authored works published by the appellants, and one of our members is the author of a work on which appellants have based their infringement claims. Authors Alliance’s interest in this case stems from its members’ desire to see their works reach the largest possible audience and have the greatest possible impact and use, especially by users at educational institutions like Georgia State University (“GSU”). When their scholarly works reach broad audiences, academic authors benefit by realizing their goals of promoting the progress of knowledge and enhancing their own scholarly

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<sup>1</sup> All parties have consented 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.

reputations. A ruling that restricts the reuse of scholarly works would frustrate these objectives.

### **STATEMENT OF THE ISSUES**

1. Did the district court correctly find that academic author incentives to create scholarly book chapters would not be harmed by its fair use rulings?
2. Did the district court give appropriate weight to the fact-, theory-, method-, and research-intensive nature of scholarly book chapters in considering the nature-of-work factor?
3. Should the district court have given some weight to changes in the scholarly publishing ecosystem that affect nonprofit educational uses of scholarly book chapters in ways that are consistent with the fair use rulings?

### **SUMMARY OF THE ARGUMENT**

Authors Alliance respectfully submits this brief *amicus curiae* to explain why academic authorial incentives to write scholarly book chapters will not be harmed, and may even be enhanced, by this Court's affirmance of the district court's decision that the limited uses of individual scholarly book chapters by GSU faculty and students for nonprofit educational purposes is fair use. Three points support this argument.

First, Authors Alliance agrees with the district court's assessment that academic authors' primary motivation to write scholarly works is grounded in their

desire to share and advance knowledge, and that academic authors' incentives to write scholarly book chapters would not be undermined by the fair use ruling. As the district court recognized, the primary motivation of academic authors to write scholarly book chapters, whether in edited collections or in sole- or co-authored books, is generally to share the knowledge and insights they have attained. These authors wish to contribute to the ongoing "progress of Science and useful Arts" in keeping with constitutional purposes that the Founders sought to achieve through authorizing Congress to grant exclusive rights to authors in their writings for limited times.

Moreover, academic authors are rarely financially compensated for producing scholarly book chapters and will rarely, if ever, be financially compensated for any nonprofit educational uses of their book chapters whether or not appellants prevail in this lawsuit. The kind of reward that academic authors have generally sought and hoped to attain through writing scholarly book chapters is enhancement of their reputations arising from the contributions the chapters make to their fields. Judicial assessment of the market for and value of scholarly book chapters should take into account the reputational benefits to authors from nonprofit educational uses of their works. Academic authorial goals of sharing knowledge and insights, as well as of enhancing their reputations, will be

furthered, not harmed, by allowing GSU faculty and students to use scholarly book chapters as teaching materials in nonprofit educational settings.

Second, while this Court properly criticized the district court's first fair use ruling for giving too much weight to the factual nature of the scholarly book chapters as favoring fair use, this Court should acknowledge that scholarly book chapters generally enjoy a thinner scope of copyright protection and a broader scope of fair use than highly expressive works, such as novels, poetry, and illustrations. The reason for the thin copyright and broad scope of fair use is that scholarly book chapters contain higher quanta of unprotectable elements than highly expressive works. Much of the originality of scholarly book chapters lies in the ideas and facts that the chapters convey, as well as in the research on which they report, the theories or hypotheses they test and prove or disprove, the criticisms they levy against prior scholarly works, and the research methods and scientific results they explain and elucidate. Such chapters can, of course, be highly expressive, but for the most part, they are more formal and didactic in character as well as fact-, theory-, and method-intensive.

The originality of the research, theories, hypotheses, criticism, historical information, methods, and scientific results are what makes these works valuable contributions to scholarship. Yet no matter how original these elements of scholarly works may be, they are not within the scope of copyright protection.

When GSU faculty assign scholarly book chapters as readings because of the valuable ideas, theories, methods, or other unprotectable elements they convey, rather than on account of the works' expressiveness, that should tip in favor of fair use.

Third, equitable considerations weigh in favor of the fair use ruling. When the scholarly book chapters at issue in this case were written, their authors did not have access to the expanded array of publishing options that exist in today's scholarly communications landscape. Had the option been more available, many of the academic authors with works at issue in this case may have opted to disseminate their works with fewer barriers to access, in line with their goals to contribute to follow-on knowledge creation and to have faculty, students and other researchers be able to find and access their works. Moreover, as more academic authors do indeed opt to make their scholarship openly accessible, faculty increasingly have openly available alternatives they can choose from when assigning course materials. Authors of works created prior to the growing availability of open access options will be disadvantaged if fair use does not permit academic faculty and students to make limited use of book chapters that predate the growing availability of open options. As such, the district court's fair use ruling means that the scholarly book chapters at issue in this case will continue to be read

and the academic authors' contributions to knowledge will continue to be recognized.

## ARGUMENT

### **I. Incentives to Write and Publish Scholarly Book Chapters Will Not Be Impaired by a Ruling that the Nonprofit Educational Uses of These Chapters Is Fair Use.**

Several hundred Authors Alliance members are academic authors who have written books and contributed book chapters to edited volumes. Our members' experiences accord with the uncontradicted evidence in the record that led the district court to conclude that academic authorial incentives to create scholarly book chapters would not be impaired by a ruling that the limited nonprofit educational uses being made of scholarly book chapters by GSU faculty and students was fair use. Dkt#423 at 81-82. The court observed that

academic authors as a group value publication as an enhancement to professional reputation and achievement and, the Court infers, as a contribution to academic knowledge. ... There is no reason to believe that allowing unpaid, nonprofit academic use of small excerpts in controlled circumstances would diminish creation of academic works.

*Id.*<sup>2</sup>

In reviewing the district court's ruling, this Court agreed that "whether the limited unpaid copying of excerpts will deter academic authors from *creating* is

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<sup>2</sup> See also *Princeton Univ. Press v. Michigan Document Service*, 99 F.3d 1381, 1410 (6th Cir. 1996) (Ryan, J., dissenting) (no evidence of negative impacts on authorial incentives for copy-shop to make copies of excerpts for coursepacks).

relevant” to the fair use determination. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1282 (11th Cir. 2014). This Court directed the district court to consider authorial incentives to create scholarly book chapters as part of the purpose and character of the use factor. *Id.* On this appeal, Authors Alliance explains why academic author incentives to create scholarly book chapters will not be harmed if the fair use ruling is affirmed.

As this Court has recognized, “[n]onprofit educational uses are more likely to be fair because they promote the ultimate aims of copyright—the creation and dissemination of knowledge.” *Id.*<sup>3</sup> This is also the aim of academic authors who have written book chapters such as those at issue in the case. In fact, several authors of book chapters appellants have charged as infringements in this case have expressed support for the GSU fair use defense. For example, Lyle Bachman, Professor Emeritus of Applied Linguistics at UCLA, wrote “I think it’s perfectly fair for educational institutions to use book chapters for use by students in their courses.” Email communication to Pamela Samuelson, Jan. 10, 2017. Some authors with works at issue in this case referenced the benefit of fair use to their goal of reaching readers and contributing to academic discourse. For example, Norma Mertz, Professor of Higher Education Administration at University of

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<sup>3</sup> See generally Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149 (1998) (arguing that nonprofit educational purposes favor fair use and further constitutional goals).

Tennessee, Knoxville, wrote “I have no objection to the fair use of chapters from my books. Indeed, I find the suit to prevent use of such chapters a serious hindrance to the advancement of knowledge.” Email communication to Pamela Samuelson, Jan. 5, 2017. Sara T. Cushing, Professor of Applied Linguistics, Georgia State University, wrote “I am happy when someone uses a book chapter of mine in a course.... As academics our goal is to spread knowledge, not accumulate wealth (ha ha) from our writing.” Email communication to Pamela Samuelson, Jan. 5, 2017. Carolyn Ellis, Professor of Communication at University of South Florida and an Authors Alliance member, wrote “I want my work to be read as widely as possible. I have no trouble with articles or individual chapters of my book being copied for use in the classroom. In fact, I welcome it.” Email communication to Pamela Samuelson, Jan. 6, 2017. Another author of a work at issue in this case pointed out the benefits of publishing academic works. Douglas Harper, Professor Emeritus of Sociology at Duquesne University, wrote “There is reputational benefit...to doing this work. ... The point of this work is to share it! ... I don’t think that the authors of the chapters being shared expect or even deserve remuneration; it’s just not the point.” Email communication to Pamela Samuelson, Jan. 5, 2017.

Authors Alliance agrees with these sentiments and our members can also attest to several propositions that are relevant to whether academic author incentives to create the kinds of works at issue in this case will be harmed or



helped by a fair use ruling. First, the primary motivation of academic authors in writing scholarly book chapters is to share the knowledge and insights gained in their research projects with other scholars, as well as with others who may be interested in the advance of knowledge within their fields. Second, academic authors rarely, if ever, receive payments for creating these works.<sup>4</sup> Academic authors who write chapters for edited collections typically receive no financial compensation for their chapters, either initially or over time. Academic authors who write sole- or co-authored works may enjoy royalties from sales of books, but have rarely contracted to share in any permissions income that publishers might derive from licensing future uses of those chapters. Third, academic authors have historically assigned copyrights to publishers as a condition of the latter's willingness to publish these chapters.<sup>5</sup> Fourth, the reward that academic authors hope to obtain from publication of scholarly book chapters is an advance in reputation for the valuable contributions their works are making to the ongoing progress of knowledge in their fields.

Authors Alliance member experiences with publishing scholarly book chapters are supported by a report on a survey of tenured, tenure-track, adjunct and emeritus faculty that found “academic authors are not primarily motivated by

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<sup>4</sup> See, e.g., MARY RENCK JALONGO & OLIVIA N. SARACHO, *WRITING FOR PUBLICATION: TRANSITIONS AND TOOLS THAT SUPPORT SCHOLARS' SUCCESS* 207 (2016).

<sup>5</sup> *Id.*

monetary rewards when they write/create works. . . . Academic authors who are motivated in this context write/create . . . to get appreciation, to get acknowledgement, to gain recognition and popularity, and to leave an intellectual legacy to others.” Ahmad Zaidi Adruce, *Academic Authors’ Perception on Copyright Protection*, 149-50 (Mar. 11, 2004) (Ph.D. Dissertation, Syracuse University) (available via ProQuest).

Another important consideration weighing in favor of fair use is that scholarly book chapters, unlike scholarly books and journal articles, are generally not indexed by libraries or other aggregators of scholarly materials. Because of this, it is far more difficult for students and other prospective readers to find important scholarly works in their fields that were published as book chapters. When faculty at nonprofit educational institutions such as GSU assign scholarly book chapters as readings for courses or seminars, students can become familiar with works that their professors deem to be useful contributions to their fields. Student readers can then appreciate and give credit to academic authors of scholarly book chapters for their contributions to knowledge. Moreover, graduate student familiarity with book chapters assigned in GSU courses and seminars may well lead to more purchases of books insofar as these students aim to become academic researchers teaching in the same fields.

The overwhelming majority of scholarly book chapters at issue in this case were written by academic authors, including a member of Authors Alliance. Unlike most members of the Authors Guild and other *amici* organizations who joined the Guild's brief, academic authors generally do not expect to earn revenues from licensing of book chapters.<sup>6</sup> The scholarly book chapters at issue here are not excerpts from best-selling textbooks or from highly expressive works—novels, poetry, illustrations, and the like—created by popular independent authors or artists. Beyond their scholarly nature, many chapters assigned were also from older books for which current sales were low and permissions income over time had been quite modest.<sup>7</sup> Almost all of the excerpts were taken from highly specialized books that were assigned in highly specialized courses and seminars.

Based on our academic author members' experiences, Authors Alliance strongly disagrees with assertions by appellants and the *amici* who support the

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<sup>6</sup> The Authors Guild does a commendable job representing the interests of independent authors who make (or aim to make) significant income from commercial exploitations of their works. This case is, however, not the first case in which they have inadequately represented the interests of academic authors. *See, e.g., Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666, 673, 679-80 (S.D.N.Y. 2011) (holding that the Authors Guild had inadequately represented the interests of academic authors in negotiating the proposed Google Book Search settlement which would have allowed Google to commercialize in-copyright, but out-of-commerce books from research library collections because the Guild did not support open access preferences of academic authors).

<sup>7</sup> *Cf. Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1313 (11th Cir. 2008) (characterizing out-of-print works as the types of works that are worthy of broader fair use consideration due to their lack of availability).

current appeal who argue that the district court's fair use ruling will have negative impacts on academic authors' authorial incentives to create.<sup>8</sup> *See* Appellants Br. 3; Authors Guild Br. 1, 5; Copyright Alliance Br. 15, 28. These assertions do implicitly acknowledge that authorial incentives to write scholarly book chapters are and should be relevant considerations in resolving the fair use dispute in this case. But appellants are mistaken in their assessment of those authorial incentives.

Authors Alliance believes that appellants' incentives will similarly not be impaired by the fair use ruling in this case. Publishers expect to and do make the overwhelming majority of revenues from sales of entire scholarly books rather than excerpts, as the district court's findings of fact in this case attest. *See, e.g.*, Dkt#510 at 23-24, 28, 90-91. For example, the district court found that had Oxford University Press (OUP) or the Copyright Clearance Center (CCC) licensed the use of 11 pages from a sole-authored book (just over 6% of its contents) for a small seminar—a use at issue in this case—this would have yielded at most \$14.89 in revenues for the publisher, compared to the more than \$86,000 OUP had earned from sales of the book. Dkt#510 at 20-24. Because the evidence showed that there had been little or no permissions income from this chapter since 1998, there was little likelihood that allowing this use of the chapter would cause more than a

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<sup>8</sup> Appellants, for instance, characterized this lawsuit as an “important test lawsuit, of great consequence for *authors* and publishers nationwide.” Appellants Br. at 8 (emphasis added).

“tiny” market harm. *Id.* The recent success of open access academic publishing (discussed in detail in Section III) also suggests that publisher incentives do not require compensation for every act of reproduction. Furthermore, because publishers almost always get scholarly book chapters from academic authors without compensating those authors, they will still have ample incentives to publish scholarly books if this Court affirms the district court’s fair use ruling. For these reasons, the district court correctly found “no persuasive evidence that Plaintiffs’ ability to publish high quality scholarly books would be appreciably diminished by the modest relief from academic permissions payments.” Dkt#423 at 86.<sup>9</sup>

**II. When Nonprofit Educators Assign Scholarly Book Chapters Based on the Unprotectable Ideas, Theses, Research, Data, and Methods They Embody, This Should Tip in Favor of Fair Use.**

GSU faculty appear to have often assigned the scholarly book chapters at issue so that students would learn certain methods or theories that were important tools in their fields. *See, e.g.*, Dkt#510 at 20-21 (excerpts from book on qualitative methods on how to conduct qualitative research and steps for developing research questions), 29-30 (setting forth social theories and guiding principles of symbolic

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<sup>9</sup> In the context of photocopying, researchers have similarly tried in vain to identify evidence of negative effects on publishers’ markets. *See* Diane Leenheer Zimmermann, *Modern Technology, Leaky Copyrights, and Claims of Harm: Insights from the Curious History of Photocopying*, 61 J. Copyright Soc’y USA 1, 30 (2013).

interactionism for sociology course). Because of the method- and theory-intensive nature of these works and the pedagogical goal of teaching students these methods and theories, the scope of copyright protection in scholarly works is “thinner” and the scope of fair use is broader than in highly expressive works. Indeed, it stands to reason that the characteristic “thinness” of copyright in many scholarly and fact-intensive works is among the factors motivating Section 107’s highlighting of “teaching (including multiple copies for classroom use), scholarship, or research” as exemplary fair uses. 17 U.S.C. § 107. Insofar as GSU faculty assigned scholarly book chapters at issue in this case to students enrolled in their courses or seminars because of the original ideas, facts, theories, and methods they contain, the nature-of-work factor should cut in favor of fair use.<sup>10</sup>

**A. Scholarly Book Chapters Are Generally Fact-, Method- and Theory-Intensive.**

Among the most valued contributions to knowledge that academic authors typically aspire to make in their fields are the ideas, concepts, theories, hypotheses, and discoveries of scientific principles or laws of nature about which they write in their scholarly works. Reputations in scholarly fields, as well as tenure, other advancements, awards, and honors depend heavily on the originality of these types of scholarly contributions to knowledge. The more original the ideas, theories,

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<sup>10</sup> See also Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529 (2008) (recommending ways in which closer scrutiny of the nature-of-work factor can aid fair use analyses).

discoveries, etc. in academic authors' works, the greater will be the scholarly acclaim and esteem that academic authors will enjoy for their contributions to advancing knowledge in their fields.<sup>11</sup>

Other important contributions that academic authors make to their fields include generating data that supports, confirms, or disproves their hypotheses, conducting research about past developments in their fields, offering new or refined interpretations of important milestones in the fields, and contextualizing significant discoveries made by scholars in the past. Academic authors also regularly develop and explain methodological advances, some of which may become foundational in their fields for conducting future research. As with their ideas, theories, and discoveries, academic authors' scholarly reputations are built upon the originality of their data sets, research, interpretations, and methods much more than on the originality of the expression they use to explicate their contributions to knowledge.

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<sup>11</sup> Authors Alliance agrees with the Authors Guild about the importance of originality of scholarly works to enhance a scholar's reputation and justify tenure, and other advancements. *See* Authors Guild Br. 24-25. That brief mistakenly conflates the originality of ideas, theories, methods and other unprotectable elements with originality in expression. Copyright only protects original expression, not original ideas, theories, methods, and the like. The award of tenure and other advancements generally depend on originality in ideas, etc., not in the elegance of expression.

**B. Copyright Protection for Scholarly Book Chapters Does Not Extend to Ideas, Facts, Theories, Methods, and Other Unprotectable Elements.**

Copyright law honors the significance of original ideas, concepts, theories, hypotheses, discoveries, research, interpretations, and methods in scholarly works by deeming them so important to the ongoing progress of knowledge that these types of original creations lie beyond the scope of protection that copyright offers to academic authored works, such as the book chapters at issue in this case.

This core principle is reflected in the U.S. copyright statute which provides: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.” 17 U.S.C. § 102(b). Applying this principle, other courts of appeals have rejected claims of copyright in original research, theories, and hypotheses. *See, e.g., Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981) (reversing lower court decision based on jury instruction that research was protectable under copyright); *A. A. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) (theories and research in nonfiction book not protectable by copyright law); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (research not protectable by copyright law). Among the other creative elements that courts have held unprotectable are mathematical models,



equations, and associated figures. *See, e.g., Ho v. Taflove*, 648 F.3d 489, (7th Cir. 2011).

A related principle is that copyright protection is unavailable to facts and data, as the Supreme Court held in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991). The unprotectability of facts, said the Court:

is not “some unforeseen byproduct of a statutory scheme.” *Harper & Row*, 471 U.S., at 589 (dissenting opinion). It is, rather, “the essence of copyright,” *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.” Art. I, § 8, cl. 8. Accord, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. *Harper & Row, supra*, 471 U.S. at 556-557. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.

*Id.* at 349-50. All that subsequent authors must do is express those facts, as well as ideas, theories, and other unprotectable elements, in their own words.

Two important implications follow from these core principles of copyright law. First, the scope of copyright protection in scholarly works is “thinner” than in highly expressive works such as novels and plays. The reason is because scholarly works are typically fact-, theory-, or method-intensive or otherwise contain high quanta of unprotectable elements. *See, e.g., Compaq Computer Corp. v. Ergonome, Inc.*, 387 F.3d 403, 410 (5th Cir. 2004) (factual nature of textual work on repetitive

stress injuries favored fair use); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 711-12 (2d Cir. 1992) (scope of protection in computer programs is thin because of high quantum of utilitarian elements). Data compilations are far from the only types of works that enjoy “thin” protection from copyright law on account of the predominance of unprotectable elements (i.e., facts) they contain.

Second, the scope of fair use is broader for fact- and theory-intensive works, such as scholarly book chapters, insofar as they are reproduced for the facts, theories, or other unprotectable elements they contain. *See, e.g., American Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A.*, 2013 WL 4666330 at \*16 (D. Minn. 2013); *American Inst. of Physics v. Winstead PC*, 2013 WL 6242843 at \*9 (N.D. Tex. 2013) (fair use for patent lawyers to copy and distribute copies of scientific and technical journal articles to the Patent & Trademark Office for purposes of revealing prior art in connection with patent applications for clients). *See also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153-54 (9th Cir. 1986) (fair use broader in cases involving fact-intensive works).

This Court properly criticized the district court’s first fair use decision for its across-the-board conclusion that the nature-of-work factor favored fair use as to all

challenged uses simply because of the fact-intensive nature of the book chapters at issue. *Patton*, 769 F.3d at 1269-70. It is, of course, sometimes appropriate to consider the nature-of-work factor as neutral when a work has value both for its factual and expressive character, *see, e.g., World Inst. of Scientology Enters.*, 533 F.3d at 1312-13, or as disfavoring fair use when a work is highly expressive. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 237-38 (1990). To the extent this Court was suggesting that whenever a work was more creative than a fact compilation, however, the nature-of-work factor should be either neutral or disfavoring fair use, *Patton*, 769 F.3d at 1270, n.27, Authors Alliance thinks this is too narrow a view of the nature-of-work factor. This Court should confirm that the nature-of-work factor can favor fair use when the scholarly book chapters at issue are fact-, theory-, or method-intensive and were assigned more to teach these elements rather than for their expressive qualities.

### **III. Changes in Scholarly Communications Ecosystem Favor the Fair Use Ruling.**

The scholarly communications landscape is evolving rapidly, exposing two equitable considerations that favor fair use. First, at the time the authors wrote the scholarly book chapters at issue in this case, authors did not have access to the expanded array of dissemination options that exist in today's publishing

ecosystem.<sup>12</sup> Had these options been available at the time the chapters were published, these authors might well have opted to disseminate their works with fewer barriers to access. This would be consistent with academic authors' motivations to reach readers, contribute to the advancement of knowledge, and enhance their scholarly reputations. Second, as more academic authors are making their scholarship openly accessible, teaching faculty increasingly have the option to assign freely available academic works. Authors of works created prior to the growing availability of open access options will be disadvantaged if fair use does not permit teaching faculty and students to make limited use of book chapters that predate the growing availability of open options. These equitable considerations weigh in favor of the district court's fair use rulings.

Until quite recently, academic authors typically assigned copyrights in book chapters for edited collections, as well as in sole- or co-authored books, to their publishers. Indeed, publishers typically insisted on this as a condition of publication. This practice is changing. A growing number of high-quality academic publishers now support making scholarly works freely available. For example, the

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<sup>12</sup> The majority of the works at issue in this case were published in the 1990s and 2000s, just as the Internet was enabling budding, innovative ways to deliver information, including the open access (OA) model. *See, e.g.,* Mikael Laakso et al., *The Development of Open Access Journal Publishing from 1993 to 2009*, 6 PLOS ONE 1 (2011), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0020961> (characterizing 1993-99 as the "Pioneering years" and 2000-2004 as the "Innovation years" of OA journal publishing).

University of California Press recently launched an open access publishing program for books. LUMINOS, University of California Open Press, <http://www.luminosoa.org> (last visited Feb. 2, 2017). And more than 40 college libraries recently joined together to found Lever Press, which publishes open access books. LEVER PRESS, <http://leverpress.org> (last visited Feb. 2, 2017); *see also*, OPEN HUMANITIES PRESS, <http://openhumanitiespress.org/index.html> (last visited Feb. 2, 2017) (publisher of open access monographs).

Academic authors are widely embracing the availability of open options. Some academic authors have successfully negotiated with conventional publishers to make their books available on an open access basis. For example, Authors Alliance member Don Herzog wanted his book, *Household Politics*, to be widely available, so he conditioned its publication with Yale University Press on the ongoing availability of an openly accessible version of his book. LEXI RUBOW ET AL., UNDERSTANDING OPEN ACCESS 96-97 (2015). And some faculty members have even banded together at their respective institutions to develop university open access policies that grant their universities the right to make their works freely available in institutional repositories. *See, e.g., Open Access Policy for the Academic Senate of the University of California*, UC Off. of Scholarly Commc'n. (July 24, 2013), <http://osc.universityofcalifornia.edu/open-access-policy/policy-text/>; *Harvard Faculty of Arts and Sciences Open Access Policy*, Harvard Libr.

Off. for Scholarly Commc'n. (Feb. 12, 2008),

<https://osc.hul.harvard.edu/policies/fas/>. Because of the growing availability of open options, academic authors in a wide variety of fields can now choose make their books and other works available without cost or permission barriers. Among our membership, interest in these open access options has been significant enough to merit the creation of resources to provide guidance in navigating the options and processes involved in open access publishing. *See* AUTHORS ALLIANCE, OPEN ACCESS PORTAL, <http://www.authorsalliance.org/resources/open-access-portal/> (last visited Feb. 2, 2017).

It is unsurprising that many academic authors favor open access alternatives to conventional publishing because it expands the audience for their ideas and research findings, facilitates the progression of knowledge, and enhances authorial reputation. Open access enables authors to reach a wider audience, including those who would not otherwise be able to find or afford access to these works.<sup>13</sup>

According to Authors Alliance member Shawn Martin, “Opening up access can allow audiences you never intended to find value in your work, and in my view that’s a great thing.” RUBOW ET AL., *supra*, at 25.

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<sup>13</sup> *See* ALMA SWAN & SHERIDAN BROWN, OPEN ACCESS SELF-ARCHIVING: AN AUTHOR STUDY 10 (2005), [http://www.jisc.ac.uk/uploaded\\_documents/Open%20Access%20Self%20Archiving-an%20author%20study.pdf](http://www.jisc.ac.uk/uploaded_documents/Open%20Access%20Self%20Archiving-an%20author%20study.pdf) (explaining that “[t]he principle of free access for all readers” was the most oft-cited reason indicated by academic author survey-respondents as to why they publish in open access journals).

Moreover, some studies have shown that open access may lead to a greater number of citations. *See* Steve Hitchcock, *The Effect of Open Access and Downloads ('Hits') on Citation Impact: A Bibliography of Studies*, The Open Citation Project, <http://opcit.eprints.org/oacitation-biblio.html> (last visited Feb. 2, 2017). These citations can enhance an academic author's reputation. Authors Alliance member Jessie Daniels found that by making her scholarship openly accessible, it not only boosted her scholarly reputation, but also “made collaboration and the development of whole new areas of study possible.” RUBOW ET AL., *supra*, at 29. In this way, open access accelerates the spread of ideas and advances the progression of knowledge—the very motivations that incentivize academic authors to create.

While the availability of open access options is a promising development for the dissemination of scholarship, these options have only recently become more readily available. Among the equitable considerations that cut in favor of fair use is the fact that at the time the authors of the scholarly book chapters at issue wrote them and made arrangements with appellants to publish them, open access options were not as available as they are now.<sup>14</sup> The fair use ruling in this case gives academic authors of older scholarly book chapters—authors who in today's publishing ecosystem might have instead opted to make their works openly

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<sup>14</sup> *See supra* note 12.

accessible—new hope that their works will be used to teach students the knowledge and insights that the authors intended to share with readers and new hope that students will become familiar with the authors’ works. In this way, the fair use ruling in this case also supports the “market” for and “value” of scholarly writings: reputation enhancement.

The fair use ruling in this case also mitigates the troubling possibility that, in the absence of certainty as to whether limited nonprofit educational uses of scholarly book chapters is fair use, faculty will distort their pedagogical choices in order to rely entirely on increasingly available public domain and openly licensed readings instead of the types of works at issue in this case. Faculty now have a wide array of options for openly accessible reading materials. *See* DIRECTORY OF OPEN ACCESS BOOKS, <http://www.doabooks.org/> (last visited Feb. 2, 2017) (listing 5,748 academic peer-reviewed books available for free); DIRECTORY OF OPEN ACCESS JOURNALS, <http://www.doaj.org/> (last visited Feb. 2, 2017) (listing 2,432,693 freely available journal articles). Faced with the choice to either pay to license course materials or select materials that are freely available, it is reasonable to assume that faculty would simply turn to openly available alternatives. Consequently, authors of works that predate the move towards open scholarly publishing will be harmed if fair use does not permit faculty and students to make limited use of their works for nonprofit educational purposes.



The Court should heed these equitable considerations that favor fair use and are of great concern to academic authors. Works published in previous decades may still be subject to assignments of rights to publishers, but the district court's fair use ruling means that academic authors of scholarly book chapters can rest assured that their works remain available for limited nonprofit educational purposes, such as those that GSU faculty and students have done under the GSU 2009 copyright policy.

### **CONCLUSION**

Authors Alliance urges this Court to affirm the district court's ruling that the overwhelming majority of the limited uses that GSU faculty and students have made of scholarly book chapters for educational purposes is fair use. This ruling will not harm, and may even enhance, academic authors' incentives to create and distribute scholarly works. It promotes their goals of advancing the progress of knowledge, builds reputational capital, and increases the impact of their works.

Insofar as the scholarly book chapters have been assigned for the facts, theories, ideas, and methods the chapters embody, and not for the expressiveness of the prose in which they are written, the nature-of-work factor should favor fair use.

Finally, the scholarly communications ecosystem has changed in recent years, and the equitable considerations that follow from these changes support the fair use ruling in this case.

Respectfully submitted,

/s/ Jennifer M. Urban

Jennifer M. Urban  
SAMUELSON LAW,  
TECHNOLOGY  
& PUBLIC POLICY CLINIC  
University of California, Berkeley,  
School of Law  
342 Boalt Hall (North Addition)  
Berkeley, California 94720  
(510) 642-7338

*Counsel for Amicus Curiae*

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Weil Gotshal & Manges, LLP  
Jonathan Bloom  
767 5TH AVE 3341  
NEW YORK NY 10153-0119

Meunier Carlin & Curfman, LLC  
Anthony B. Askew  
Mary Katherine Bates  
John W. Harbin  
Lisa Pavento  
999 PEACHTREE ST NE  
STE 1300  
ATLANTA GA 30309

Baker & Hostetler LLP  
Katrina M. Quicker  
1180 PEACHTREE ST NE  
STE 1800  
ATLANTA GA 30309-7512

Attorney General's Office  
William Wright Banks Jr.  
40 CAPITOL SQ SW  
ATLANTA GA 30334

Cowan DeBaets Abrahams & Sheppard  
Nancy Evelyn Wolff  
Mary Eleanor Rasenberger  
Scott Jonathan Sholder  
41 MADISON AVE  
STE 34 38TH FL  
NEW YORK NY 10533

Covington & Burling, LLP  
Ronald Gene Dove Jr.  
Robert Newton Hunziker Jr.  
850 10TH ST NW  
WASHINGTON DC 20001

/s/ Catherine B. Simpson  
Counsel Press  
1011 East Main Street  
Richmond, VA 23219  
(804) 648-3664

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