

Case No. 12-14676-FF

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CAMBRIDGE UNIVERSITY PRESS, et al.,

Plaintiffs-Appellants,

v.

MARK P. BECKER, et al.,

Defendants-Appellees.

*Appeal From The United States District Court
For The Northern District Of Georgia
Case No. 1:08-cv-1425-ODE*

**APPELLEES' RESPONSE TO APPELLANTS' MOTION
FOR AN ENLARGEMENT OF THE PERMITTED
WORDS FOR APPELLANTS' OPENING BRIEF**

Anthony B. Askew
Stephen M. Schaetzel
Robin L. Gentry
Walter Hill Levie, III
McKeon, Meunier, Carlin & Curfman, LLC
817 W. Peachtree Street, Suite 500
Atlanta, Georgia 30308
Tel: (404) 645-7700
Fax: (404) 645-7707

Counsel for Defendants-Appellees

October 10, 2012

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

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

Board of Regents of the University System of Georgia

Bondurant, Mixson & Elmore, LLP, counsel for Appellants

Cambridge University Press

Carter, Hugh A., Jr.

Cleveland, William H.

Cooper, Frederick E.

Copyright Clearance Center

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.

Hurt, Charlene

Jennings, W. Mansfield, Jr.

Jolly, James R.

King & Spalding, LLP, counsel for Appellees

Krugman, Edward B., counsel for Appellants

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

McKeon Meunier Carlin & Curfman, LLC, counsel for Appellees

McMillan, Eldridge

Miller, Richard William, counsel for Appellees

Moffit, Natasha Horne, counsel for Appellees

NeSmith, William, Jr.

Olens, Samuel S., counsel for Appellees

Oxford University Press USA

Oxford University Press, Inc.

Oxford University Press, LLC

Palm, Risa

Patton, Carl V.

Poitevint, Doreen Stiles

Potts, Willis J., Jr.

Pruitt, Neil L., Jr.

Quicker, Katrina M., counsel for Appellees

Rains, John H., IV, counsel for Appellants

Rich, R. Bruce, counsel for Appellants

Rodwell, Wanda Yancey

SAGE Publications, Inc.

Schaetzel, Stephen M., counsel for Appellees

Seamans, Nancy

Singer, Randi W, counsel for Appellants

State of Georgia

Stelling, Kessel, Jr.

Tarbutton, Benjamin J., III

The Chancellor, Masters and Scholars of the University of Oxford

Tucker, Richard L.

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.

Defendants-Appellees (“Appellees”), by and through their undersigned counsel, request that the Court deny Appellants’ motion for a four-thousand word enlargement of the permitted words for Appellants’ opening brief.

According to 11th Cir. R. 27-1(c)(13), a moving party must show “extraordinary circumstances” for filing briefs in excess of the page and type-volume limitations set forth in Fed. R. App. P. 32(a)(7). Further, the Court of Appeals for the Eleventh Circuit “looks with disfavor upon such motions and will only grant such a motion for *extraordinary and compelling reasons*.” 11th Cir. R. 32-4 (emphasis added). Appellants have failed to offer any extraordinary and compelling reasons for the requested enlargement. Appellees respectfully submit that the motion should be denied.

Although the subject litigation extended over several years, the issues on appeal are finite and do not require an enlargement of permitted words for briefing. In support of the instant motion, Appellants argue that a motion for summary judgment, various motions *in limine*, and a Defendants’ motion for directed verdict were filed and decided by the district court. *See* Appellants’ Motion for Enlargement of the Permitted Words for Their Opening Brief, filed Oct. 3, 2012, at 1-2 (hereinafter referred to as “Appellants’ Motion for Enlargement”).¹ Appellants

¹ At trial, the Defendants made various motions for judgment on partial findings. Since this was a bench trial, there was technically no motion for a directed verdict. *See* Fed. R. Civ. P. 52(c).

further offer that “numerous oral evidentiary rulings” were made at trial and are now at issue on appeal. *Id.* at 2. Such events and rulings do not constitute extraordinary circumstances. Instead, these events and rulings are typical and ordinary during the pendency of any lawsuit or trial.

Appellants do correctly observe that the district court’s order following the bench trial in this case was 340 pages in length. *Id.* at 2; *see also* Order, Dkt. No. 423 (May 11, 2012). However, a review of the substance of that order demonstrates that an enlargement of permitted words is unnecessary. During the bench trial in this case, appellants alleged 74 instances of copyright infringement against appellees. Before addressing each individual allegation of copyright infringement, the district court first set forth the elements necessary to establish a *prima facie* case of copyright infringement. *See* Dkt. No. 423 at 42-47. The district court then analyzed the fair use defense under the Copyright Act and discussed the four-factor test for such a defense in the context of electronic reserves at non-profit colleges and universities. *Id.* at 47-89; *see also id.* at 337-39. This discussion of the *prima facie* elements necessary to establish a case of copyright infringement and the fair use defense constituted approximately 52 pages (15%) of the 340-page order. In essence, this discussion formed the basis for the vast majority of the remainder of the order as the district court then applied the

prima facie elements and its fair use analysis to the allegations of copyright infringement.

In addressing those allegations, the district court first discussed whether appellants had established a *prima facie* case of copyright infringement for each particular copyright in suit. *See generally id.* at 89-337. Where the district court found that appellants had established a *prima facie* case, the district court then discussed whether the fair use defense applied to Appellees' use of the respective work that was the subject of the copyright in suit. *Id.* Applying the fair use defense required an application of the four factors, as discussed by the district court earlier in its order. *See id.* at 47-89. The district court performed these same analyses for each of the 74 allegations of copyright infringement. *See generally id.* at 89-337. In all, the district court spent approximately 249 pages (73%) of its order applying the *prima facie* elements of a claim of copyright infringement and the fair use defense to each claim of infringement for the copyrights in the various works at issue. Thus, on appeal, the parties will most likely focus more on the district court's fair use analysis rather than on the specifics of the individual infringement allegations.

In Appellants' Motion for Enlargement, Appellants correctly observe that the bench trial in this case lasted almost four weeks and included testimony from almost thirty witnesses. *See Appellants' Motion for Enlargement* at 2. Conducting

a bench trial, however, is ordinary and does not rise to the level of an extraordinary circumstance. Analogous to the district court’s order, discussed *supra*, much of the trial was devoted to Appellants’ efforts to establish a *prima facie* case of copyright infringement for each allegation of infringement, and Appellees’ evidence in support of their fair use defense. Appellants have also argued in their Motion for Enlargement that the award of attorneys’ fees and costs to Appellees in this case justifies enlarging the number of permitted words. However, the determination of a “prevailing party” and an award of attorneys’ fees and costs in a copyright infringement action are ordinary. Such determinations do not provide extraordinary and compelling reasons for permitting an enlargement of permitted words for briefing. Again, these events are typical and occur in the ordinary course of copyright litigation.

This appeal does not present extraordinary circumstances under which an enlargement is necessary. Appellees acknowledge that this case is one of first impression for this Circuit.² However, Appellees submit that simply because a case is one of first impression does not present “extraordinary and compelling reasons” for the enlargement of permitted words, as required under the Local Rules for the Eleventh Circuit. *See* 11th Cir. R. 32-4. The issues on appeal can be adequately briefed by all parties in the page limits set forth by the Court under its

² Appellants argue that the holding in this case is actually in conflict with another Circuit, with which Appellees disagree.

applicable rules. Accordingly, Appellants have not shown any compelling or extraordinary reasons for an enlargement of the permitted words, thus making such an enlargement unnecessary.

Accordingly, Appellees request that the Court deny Appellants' motion for a four-thousand word enlargement of the permitted words for Appellants' opening brief.

RESPECTFULLY SUBMITTED this 10th day of October 2012.

SAMUEL S. OLENS
Georgia Bar No. 551540
Attorney General

W. WRIGHT BANKS, JR.
Georgia Bar No. 036156
Deputy Attorney General

DENISE E. WHITING-PACK
Georgia Bar No. 558559
Senior Assistant Attorney General

MARY JO VOLKERT
Georgia Bar No. 728755
Senior Assistant Attorney General

MCKEON, MEUNIER, CARLIN &
CURFMAN, LLC

/s/ Anthony B. Askew
Anthony B. Askew
Georgia Bar No. 025300
Special Assistant Attorney General
Stephen M. Schaezel
Special Assitant Attorney General

Georgia Bar No. 628653
Robin L. Gentry
Georgia Bar No. 289899
Walter Hill Levie, III
Georgia Bar No. 415569
McKeon, Meunier, Carlin & Curfman, LLC
817 W. Peachtree Street, N.W., Suite 500
Atlanta, Georgia 30308
Phone: (404) 645-7700
Fax: (404) 645-7707
Email: taskew@m2iplaw.com
sschaetzel@m2iplaw.com
rgentry@m2iplaw.com
tlevie@m2iplaw.com

Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 10th day of October 2012, I have served a true and correct copy of the **APPELLEES' RESPONSE TO APPELLANTS' MOTION FOR AN ENLARGEMENT OF THE PERMITTED WORDS FOR APPELLANTS' OPENING BRIEF** by United States mail on the following attorneys of record:

Edward B. Krugman
krugman@bmelaw.com
Georgia Bar No. 429927
John H. Rains IV
Georgia Bar No. 556052
BONDURANT, MIXSON & ELMORE, LLP
1201 West Peachtree Street NW, Suite 3900
Atlanta, GA 30309
Telephone: (404) 881-4100
Facsimile: (404) 881-4111

R. Bruce Rich
Jonathan Bloom
Randi Singer
Todd D. Larson
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

/s/ Anthony B. Askew
Anthony B. Askew
Georgia Bar No. 025300
McKeon, Meunier, Carlin & Curfman, LLC
817 W. Peachtree Street, N.W., Suite 500
Atlanta, Georgia 30308

Phone: (404) 645-7700
Fax: (404) 645-7707
Email: taskew@m2iplaw.com