

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' MOTION TO DISMISS OR CONSOLIDATE

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 12, 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.

Appellees (“GSU”) request that the Court dismiss this appeal for lack of subject matter jurisdiction or in the alternative consolidate it with the second appeal filed in this case, Appeal No. 12-15147-FF.¹ The Court lacks subject matter jurisdiction over this appeal because the district court’s final judgment entered on September 30, 2012 divested the Court of jurisdiction of this interlocutory appeal concerning an injunction taken pursuant to 28 U.S.C. § 1292. Alternatively, GSU respectfully requests that the Court consolidate this appeal with the appeal noticed by Appellants on October 2, 2012 relating to the same Orders that are the subject of the instant appeal.

I. FACTUAL BACKGROUND

This Appeal was taken from a non-final order of the district court granting interlocutory injunctive relief. In their September 10, 2012 Notice of Appeal (the “First Appeal”), Appellants stated that they appealed from the district court’s August 10, 2010 Order and sought review of a number of other orders entered by

¹ Appellants have proposed a joint motion to consolidate the two appeals but do not agree to dismissal of the First Appeal. Appellees seek merely to comply with proper procedure. The district court’s August 10, 2012 Order, while initially appealable under 28 U.S.C. §1292, is at least potentially “finalized” by the district court’s September 30, 2012 final judgment. Assuming that to be the case, the September Order has stripped this Court of jurisdiction of the First Appeal. *See Birmingham Fire Fighters Ass’n v. City of Birmingham*, 603 F.3d 1248, 1254 (11th Cir. 2010) and discussion below. Appellees respectfully submit that they cannot consent to consolidation of a proper appeal from the September Order with a now improper appeal from the August Order and thus file the instant motion to dismiss or consolidate.

the district court. *See* Exhibit A, First Notice of Appeal. The Appellants' Civil Appeal Statement, filed on September 26, 2012, identified the following eight (8) issues:

1. The district court's clearly erroneous and legally incorrect ruling regarding the ownership of certain of Appellant's copyrights.
2. The district court's misinterpretation and misapplication of the fair use doctrine.
3. The district court's failure to recognize that copyright law is media neutral.
4. The district court's exclusion of evidence relevant to the proper consideration of fair use.
5. The district court's erroneous finding that 'the 2009 copyright policy significantly reduced the unlicensed copying of Plaintiffs' works (and by inference, the works of other publishers).'
6. The district court's failure to order appropriate injunctive relief.
7. The district court's erroneous determination that Appellees were entitled to reasonable attorney's fees and costs.
8. The district court's erroneous findings on contributory copyright liability.

Exhibit C, Appellants' Civil Appeal Statement.

Appellants stated in the First Appeal that the August 10, 2012 Order was a "final, appealable order." Exhibit A at 1. As explained by the district court in its

Order of September 30, 2012 “[t]he Court did not intend its Order of August 10, 2012 to be a final order.” Exhibit D, Order of September 30, 2012, Dkt. No. 462 at 4 n.2. Accordingly, the district court entered its final order subsequently on September 30, 2012 and the clerk entered judgment on the same day. *See id.* at 11-12.

The Court’s September 30 Order directed the district court clerk to enter final judgment as follows:

2. Injunctive relief is entered as follows: Defendants are hereby ORDERED and DIRECTED to maintain copyright policies for Georgia State University which are not inconsistent with the Court's Orders of May 11, 2012 and August 10, 2012. Defendants are ORDERED and DIRECTED to disseminate to faculty and relevant staff at Georgia State the essential points of this Court's aforesaid rulings. The Court will retain jurisdiction for the sole purpose of enforcing these Orders.

Exhibit D at 12. As ordered by the district court, the Judgment contained this injunction. Exhibit F, Final Judgment entered by Clerk of the District Court, Dkt. No. 463 at 2. This injunction incorporates the same relief as the injunction entered in the Court’s non-final August 10 Order:

August 10 Injunction	September 30 Injunction
Defendants are hereby ORDERED AND DIRECTED to maintain copyright policies for Georgia State University which are not inconsistent with the Court's Order of	Defendants are hereby ORDERED and DIRECTED to maintain copyright policies for Georgia State University which are not inconsistent with the Court's Orders of

<p>May 11, 2012 and this [August 10, 2012] Order. Defendants are <u>also</u> ORDERED AND DIRECTED to disseminate to faculty and relevant staff at Georgia State the essential points of this Court's rulings. The Court will retain jurisdiction for the sole purpose of enforcing these Orders.</p>	<p>May 11, 2012 and August 10, 2012. Defendants are ORDERED and DIRECTED to disseminate to faculty and relevant staff at Georgia State the essential points of this Court's <u>aforesaid</u> rulings. The Court will retain jurisdiction for the sole purpose of enforcing these Orders.</p>
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Exhibit B, Order of August 10, 2012, Dkt. No. 441 at 11, and Exhibit D at 11 (underlining and brackets showing differences).

Following entry of the Final Judgment, Appellants filed a second notice of appeal on October 2, 2012 (the “Second Appeal”) appealing the district court’s “September 30, 2012 Order and Final Judgment [Exhibits D and F], as well as any and all prior orders in this case, including but not limited to the orders identified” in the First Appeal. Exhibit E, Second Notice of Appeal at 1. As of the filing of this Motion, GSU has not received Appellant’s Civil Appeal Statement.

II. ARGUMENT AND CITATION TO AUTHORITIES

A. This Court Lacks Subject Matter Jurisdiction Over this Appeal.

The Court’s September 30 Order divested this Court of subject matter jurisdiction over the instant appeal. “[W]hen a final injunction incorporates the same relief as an interlocutory injunction, an appeal is properly taken only from the

final order.” *Id.*, citing *Burton v. Georgia*, 953 F.2d 1266, 1272 n.9 (11th Cir. 1992) (“once a final judgment is rendered, the appeal is properly taken from the final judgment, not the preliminary injunction.”); *SEC v. First Fin. Group of Tex.*, 645 F.2d 429, 433 (5th Cir. 1981) (“Once an order of permanent injunction is entered . . . , the order of preliminary injunction is merged with it, and appeal is proper only from the order of permanent injunction.”).

The First Appeal was from an Order granting only interlocutory injunctive relief; it was not a final order as Appellants incorrectly stated in their First Notice of Appeal. *See* Exhibit A at 1. The August 10 Order, referenced in Appellants’ First Notice of Appeal, granted declaratory and injunctive relief as well as awarding attorneys’ fees and costs to GSU. A final judgment was not entered until after the district court entered an order determining the amount of attorneys’ fees and costs. Accordingly, this Court did not have jurisdiction under 28 U.S.C. § 1291, which requires a final judgment.

Even though this Court did not originally have jurisdiction pursuant to 28 U.S.C. § 1291, it did have subject matter jurisdiction over the First Appeal pursuant to 28 U.S.C. § 1292 which provides an exception to § 1291’s final-judgment rule. Pursuant to § 1292 a federal circuit court may hear appeals from “[i]nterlocutory orders of the district courts of the United States . . . granting,

continuing, modifying, refusing, or dissolving injunctions” 28 U.S.C. § 1292(a)(1).

However, the Second Appeal has divested this Court of subject matter jurisdiction over the First Appeal. The district court’s September 30 injunction incorporates the same relief as the injunction contained in the August 10 Order. Moreover, the September 30 Order was a final order: the district court explicitly found that “there are no remaining issues to be decided” and directed the clerk to enter final judgment. Exhibit D at 10-11. The September Order and Judgment therefore finalized the August 10 injunction and “stripped this Court of its jurisdiction.” *Birmingham Fire Fighters Asso’c 117 v. City of Birmingham*, 603 F.3d 1248, 1254 (11th Cir. 2010).

B. Alternatively, This Appeal Should be Consolidated with the Appeal Noticed by Appellants on October 2, 2012.

The orders and issues in this First Appeal overlap those in the Second Appeal. The difference between the two Notices of Appeal is that the Second Notice of Appeal includes the district court’s September 30, 2012 attorneys’ fees and costs order and the Final Judgment. In fact, the Second Notice of Appeal specifically states that Appellants are seeking review of every order contained in their First Notice of Appeal. *See* Exhibit E.

This Court routinely consolidates appeals brought by different parties concerning the same case. *See* Fed. Rule App. Procedure 3(b)(2). This Court also routinely grants motions to consolidate appeals of the same case brought by the same party. *See, e.g., Santhuff v. Seitz*, 285 Fed. App'x. 939, 943 (11th Cir. 2010) (granting motion to consolidate appeals brought by same party); *Nicholson v. Shafe*, 558 F.3d 1266, 1270 (11th Cir. 2009). Consolidation will conserve the resources of both this Court and the parties. Accordingly, consolidation is appropriate because Appellant's Second Appeal completely encompasses the orders Appellants seek to be reviewed in the First Appeal.

III. CONCLUSION

For the foregoing reasons, GSU requests that this Court dismiss the First Appeal or consolidate it with the Second Appeal.

Respectfully submitted this 12th 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

MARY JO VOLKERT
Georgia Bar No. 728755
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. Schaetzel

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 12th day of October 2012, I have served a true and correct copy of the **APPELLEES' MOTION TO DISMISS OR CONSOLIDATE** 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