

# EXHIBIT D

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

SEP 30 2012

James N. [unclear], Clerk  
By: *AMC* [unclear]  
Deputy Clerk

CAMBRIDGE UNIVERSITY PRESS;  
OXFORD UNIVERSITY PRESS, INC.;  
SAGE PUBLICATIONS, INC.,

Plaintiffs,

v.

CIVIL ACTION NO.  
1:08-CV-1425-ODE

MARK P. BECKER, in his official capacity as President of Georgia State University; RISA PALM, in her official capacity as Senior Vice President for Academic Affairs and Provost of Georgia State University; J.L. ALBERT, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology; NANCY SEAMANS, in her official capacity as Dean of Libraries at Georgia State University; ROBERT F. HATCHER, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia; KENNETH R. BERNARD, JR., LARRY R. ELLIS, W. MANSFIELD JENNINGS, JR., JAMES R. JOLLY, DONALD M. LEEBERN, JR., WILLIAM NESMITH, JR., DOREEN STILES POITEVINT, WILLIS J. POTTS, JR., C. DEAN ALFORD, KESSEL STELLING, JR., BENJAMIN J. TARBUTTON, III, RICHARD L. TUCKER, LARRY WALKER, RUTLEDGE A. GRIFFIN, JR., C. THOMAS HOPKINS, JR., NEIL L. PRUITT, JR., and PHILIP A. WILHEIT, SR., in their official capacities as members of the Board of Regents of the University System of Georgia,

Defendants.

ORDER

This copyright infringement case is currently before the Court on Defendants' Motion for Leave to Supplement the Detailed Request for Attorneys' Fees and Other Costs [Doc. 455] and for a determination of attorneys' fees and costs following this Court's August 10, 2012 Order, which found Defendants are entitled to reasonable attorneys' fees and costs [Doc. 441]. On August 24, 2012, Defendants filed their Memorandum in Support of Defendants' Detailed Request for an Award of Attorneys' Fees and Other Costs [Doc. 444]. Defendants subsequently filed three supplemental statements [Doc. 446; Doc. 448; Doc. 453]. Plaintiffs filed objections to Defendants' request on September 10, 2012 [Doc. 451]. As of September 11, 2012, Defendants request a total of \$3,039,240.10 -- \$2,953,493.71 in attorneys' fees and \$85,746.39 in costs [Doc. 453 at 3].<sup>1</sup> The Court held a hearing on this matter on September 14, 2012. At this hearing, Defendants moved to submit a supplemental filing, to which Plaintiffs objected. The Court delayed ruling on this matter, and instructed Defendants to file a motion. On September 17, Defendants filed their Motion for Leave to Supplement the Detailed Request for

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<sup>1</sup>In Defendants' third supplemental filing [Doc. 453], Defendants agreed with one of Plaintiffs' objections [Doc. 451 at 10] and withdrew their request for attorneys' fees in the amount of \$16,577.25 [Doc. 453 at 2]. This amount represented additional time entries related to Defendants' sovereign immunity defense [Id.]. Because both parties agree this amount should be withdrawn, the Court grants Defendants' request, and recognizes that Defendants now request \$2,953,493.71 in attorneys' fees and \$85,746.39 in costs [Id. at 3].

Attorneys' Fees and Other Costs [Doc. 455]. Plaintiffs filed a response on September 27, 2012 [Doc. 458], opposing the motion.

The Court, as set forth below, GRANTS Defendants' Motion for Leave to Supplement the Detailed Request for Attorneys' Fees and Other Costs [Doc. 455], and AWARDS Defendants \$2,861,348.71 in attorneys' fees and \$85,746.39 in costs.

I. Defendants' Motion for Leave to Supplement

Despite Plaintiffs' objections [Doc. 458], the Court grants Defendants' Motion for Leave to Supplement the Detailed Request for Attorneys' Fees and Other Costs [Doc. 455]. Through this motion, Defendants seek to file an invoice for the fees and costs incurred from August 4, 2008 through March 31, 2009 [Doc. 455-3]. Unlike prior exhibits for the same time frame, this invoice shows the number of hours billed for each billing entry [Doc. 455 at 2; e.g., Doc. 455-3 at 2], not just the descriptions of the work, the dollar amount billed for the work and the identity of the billing attorney. Defendants inadvertently omitted this exhibit from prior filings [Doc. 455 at 3].

Plaintiffs complain that Defendants have already supplemented their filings three prior times. However, Plaintiffs put too much emphasis on the number of supplements, and not enough on their contents. Two of these prior filings were actually in Plaintiffs' favor, in that Defendants withdrew their request for certain fees [Doc. 448; Doc. 453]. The Court is not persuaded that Defendants' motion to supplement should be denied just because this will be the fourth supplemental filing. Likewise, the Court is not persuaded by

Plaintiffs' various other arguments that granting the motion to supplement would be unfair in relation to prior rulings disallowing parts of Plaintiffs' arguments in certain motions in limine. Accordingly, the Court grants Defendants' Motion for Leave to Supplement the Detailed Request for Attorneys' Fees and Other Costs [Doc. 455].

II. Defendants' Award of Attorneys' Fees and Other Costs

The Court proceeds with awarding attorneys' fees and other costs to Defendants, even though a notice of appeal has been filed in this case.<sup>2</sup> See Advisory Committee Notes to the 1993 Amendment to Fed. R. Civ. P. 54(d)(2) ("If an appeal on the merits of the case is taken, *the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice . . . .*") (emphasis added). Because the details in this voluminous case are still fresh, it is appropriate to deny Plaintiffs' request for a delayed ruling on this matter [Doc. 451]. Anheuser-Busch, Inc. v. Schnorf, No. 10-CV-1601, 2011 WL 9798, at \*2 (N.D. Ill. Jan. 3, 2011) ("[P]rompt adjudication of attorneys' fees motions is preferable, while the district court is still familiar with 'the merits of the parties' positions, the reasonableness of the attorneys' time sheets, the competence of the attorneys, etc.'" (quoting Terket v. Lund, 623 F.2d

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<sup>2</sup>The Court did not intend its Order of August 10, 2012 [Doc. 441] to be a final order. Regardless, it is appropriate to adjudicate the request for an award of attorneys' fees at this time.

29, 34 (7th Cir. 1980))). Accordingly, the Court will address Plaintiffs' objections [Doc. 451]<sup>3</sup> to Defendants' request [Doc. 444].

**A. Pre-February 17, 2009 Work**

This lawsuit was filed on April 15, 2008. Plaintiffs object to awarding Defendants the fees and costs incurred between that date and the effective date of the Defendants' new copyright policy, which was effective February 17, 2009. Plaintiffs state that "Defendants clearly are not prevailing parties in relation to a policy they scrapped during the litigation. The trial concerned the legality of the 2009 policy and the practices pursuant to that policy . . . ." [Doc. 451 at 6]. Plaintiffs seek a reduction in Defendants' request of 82.9% which is the percentage of the request covering the period up through February 17, 2009, in relation to the entire request. Thus Plaintiffs argue Defendants should get 17.1% of their requested amount. Plaintiffs assert that this methodology would reduce Defendants' fee award by \$333,519.09.

As previously held, Defendants are the prevailing parties in this litigation. Only one side can be a prevailing party. The Court does believe, however, that it is appropriate to consider whether some of the work done by defense counsel did not assist in bringing about the favorable outcome. In the Court's view that would include the work done on formulating the new policy. This would not exclude all work done before February 17, 2009, however, because counsel

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<sup>3</sup>Plaintiffs do not argue that defense counsel's hourly rates or hours expended are unreasonable. Hensley v. Eckerhart, 461 U.S. 424, 433 (1993) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.").

performed considerable work before then which was pertinent to the eventual outcome.

After reviewing Defendants' supplemental filing [Doc. 455-3], the Court concludes that Defendants' fees should be reduced by \$62,145 for time spent formulating the 2009 copyright policy. Also, the Court estimates that some small amount of time was for work which had no value once the claims under the old policy dropped out of the case. Most of the hours worked had carry-over value, for example, filing the answer to the complaint, preparation of the discovery plan (the preliminary report and scheduling order), and the first round of paper discovery. The Court estimates the dollar value of the time which did not carry forward at \$30,000. Hence, Defendants' fee request of \$2,953,493.71 is reduced by \$92,145.

**B. Fees and Costs Associated with Dr. Crews**

Plaintiffs object to Defendants' request for fees incurred by defense counsel's work with and use of Dr. Kenneth Crews, an expert witness called by Defendants at trial. Plaintiffs argue Defendants' award should be reduced by a total of \$194,944.94 -- \$142,038.54 for Dr. Crews' fees and \$52,906.40 for related attorneys' fees and costs [Doc. 451 at 8-9]. For the reasons set forth below, the Court overrules Plaintiffs' objections.

Section 505 of the Copyright Act provides:

In any civil action under this title, the court in its discretion may allow the recovery of *full costs* by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, *the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.*

17 U.S.C. § 505 (emphasis added).

Courts have held that an award under 17 U.S.C. § 505 includes "litigation costs," such as "reasonable out-of-pocket expenses incurred by the attorney and which are normally charged to fee-paying clients, so long as these costs are *incidental and necessary* to the litigation." Lil' Joe Wein Music, Inc. v. Jackson, No. 06-20079-CIV, 2008 WL 2688117, at \*14 (S.D. Fla. July 1, 2008) (emphasis added); see also Arthur Kaplan Co. v. Panaria Int'l, Inc., No. 96CIV.7973(HB), 1999 WL 253646, at \*2 (S.D.N.Y. Apr. 29, 1999) ("[W]hen a court makes an award of attorney's fees, it can also award the prevailing party 'reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients,' so long as these costs are 'incidental and necessary to the litigation.'" (quoting Reichman v. Bonsignore, Brignati & Mazzota P.C., 818 F.2d 278, 283 (2d Cir. 1987))). In other words, the award of attorneys' fees can include necessary, out-of-pocket costs, which are incidental to the litigation. See generally Lil' Joe Wein Music, Inc., 2008 WL 2688117.

The Court finds all costs associated with Dr. Crews, including defense counsel's related fees and costs, were incidental and necessary to the litigation, and thus can be included as part of the award of attorneys' fees. "The fair use doctrine [wa]s . . . at issue in this case" [Doc. 121 at 2; see also id. at 3], and Dr. Crews, through his report and testimony, dealt with this issue and also provided "a review of the history and development of university electronic reserves systems and a discussion of copyright policies at other universities" [Id. at 4]. Thus, as the Court has previously



stated, Dr. Crews' testimony was helpful in this copyright infringement case [see, e.g., id. (noting, in an Order denying Plaintiffs' motion to exclude the expert testimony of Dr. Crews, "[t]his information will be helpful to the Court in understanding the evidence presented, determining the facts, and crafting relief, if appropriate"); Doc. 234 at 6 (stating, in an Order denying Plaintiffs' motion to exclude the testimony of Dr. Crews, "[t]hese qualifications are more than sufficient to establish that Dr. Crews has useful knowledge and experience that will assist the Court in evaluating the issues in this case"); see also Doc. 423 at 42, 109 (citing Dr. Crews' testimony)].

It is fair to say that the Court did not accept all of Dr. Crews' testimony. For example, the part of Dr. Crews' "Fair Use Checklist" which calls for professors to estimate the effect of use of a copyrighted excerpt on the potential market value of a work is unworkable. Also, correct outcomes using the checklist are certainly not a lead pipe cinch. Nonetheless, his testimony was helpful and defense counsel's work with Dr. Crews was also clearly necessary, as consulting with an expert witness and preparing him for trial and/or depositions are naturally part of litigation. Lastly, there is no doubt that the fees defense counsel incurred by working with Dr. Crews were out-of-pocket expenses, generally charged to the client -- defense counsel even included these costs in an invoice sent to Defendants [e.g., Doc. 444-1 at 63-71, 81-92]. See Lil' Joe Wein Music, Inc., 2008 WL 2688117, at \*14 (holding the award of attorneys' fees to include litigation expenses, while noting "[d]efendants have

included these expenses in their bills to clients"). Because of the content of Dr. Crews' testimony, his costs and the associated attorneys' fees were not only necessary, but incidental to the trial, and thus are included as part of the Defendants' award of attorneys' fees.

Plaintiffs argue that the United States Court of Appeals for the Eleventh Circuit's ruling in Artisan Contractors Ass'n of America, Inc. v. Frontier Insurance Co., dictates a denial of such costs and fees. 275 F.3d 1038 (11th Cir. 2001). However, Plaintiffs have misconstrued this case. In Artisan, the Court of Appeals held: "costs that may be assessed to reimburse a prevailing party for its expert witness fees are limited to the \$40 limit provided for in 28 U.S.C. § 1821." Id. at 1040. However, there was no award of attorneys' fees involved in Artisan. Instead, the Court of Appeals was discussing an award under 28 U.S.C. § 1821. Section 1821 concerns travel expenses, subsistence allowances, attendance fees, and the like. At issue in this case, are the costs associated with an expert witness preparing a report and preparing for depositions and trial, and attorneys' fees that naturally flow from the use of an expert witness. The costs at issue here thus are different from those discussed in Artisan. Because the costs and fees Defendants seek are necessary and incidental, and are part of the "full costs" of the case, the Court finds they are compensable, as part of the award of attorneys' fees. Thus, the Court denies Plaintiffs' request for a reduction of the costs and fees associated with defense counsel's use of Dr. Crews as an expert witness.

**C. Order Compliance Fees**

Plaintiffs also object to three time entries totaling \$2,317.50 [Doc. 451 at 9]. These entries, included in the invoice dated September 5, 2012 [Doc. 451-4], correspond to defense counsel's consultation with Defendants on how to comply with this Court's prior Order. Specifically, in their invoice, defense counsel describes the activities at issue as: "[r]eview decision and consider outline of injunction to be adopted by [Georgia State University]"; "[r]eview orders and consider notices to faculty and administrators to comply"; and "[r]eview court orders regarding notices to faculty and administrators; conference call with Ms. Heyward and Ms. Spratt" [Doc. 451-4]. Plaintiffs argue that this \$2,317.50 is not compensable because it "do[es] not relate to Defendants' fee application" [Doc. 451 at 9]. The Court disagrees with Plaintiffs. The Court finds that instructing clients on how to comply with a court ordered injunction is a necessary activity, incidental to litigation. Finding otherwise, and thus discouraging such efforts, would defeat the purpose of issuing such an order. The Court overrules Plaintiffs' objection, and will not reduce Defendants' award by \$2,317.50 as requested by Plaintiffs.

**III. Conclusion**

For the reasons set forth above, the Court GRANTS Defendants' Motion for Leave to Supplement the Detailed Request for Attorneys' Fees and Costs [Doc. 455]. Pursuant to 17 U.S.C. § 505, the Court awards Defendants \$2,861,348.71 in attorneys' fees and \$85,746.39 in costs. The Court finds there are no remaining issues to be decided.

In accordance with the foregoing, the Court DIRECTS the Clerk to enter final judgment, as follows:


1. As is more fully detailed in this Court's Orders entered May 11, 2012 [Doc. 423] and August 10, 2012 [Doc. 441], Plaintiff Oxford University Press, Inc. shall have judgment in its favor on its claim that Defendants infringed its copyright in *The Power Elite*; Plaintiff Sage Publications, Inc. shall have judgment in its favor on its claims that Defendant infringed its copyrights in *The Sage Handbook of Qualitative Research (Second Edition)*, *The Sage Handbook of Qualitative Research (Third Edition)* and *Utilization-Focused Evaluation: The New Century Text (Third Edition)*. As to all of Plaintiffs' other claimed copyright infringements, as are referenced in the Court's Order of May 11, 2012, judgment shall be entered in Defendants' favor.
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.

3. Declaratory relief is entered as follows:

- (1) The requirement that excerpts be "decidedly small" to tip factor three in Defendants' favor applies to the aggregate of all excerpts from a book which are assigned during the term of the course;
- (2) The holdings of this case do not apply to books intended solely for instruction of students enrolled in a class. These books would need to be evaluated by a different fair use analysis;
- (3) The fair use protection outlined in the Court's Order of May 11, 2012 is conditioned on strict reliance with measures calculated to protect copyright of excerpts from unwarranted distribution; and
- (4) Although in limited fact situations fair use may apply even where an unpaid excerpt is not "decidedly small," as explained in the Order of August 10, 2012, significant caution is called for before determining that such a use is fair use.

Defendants, as prevailing parties, are AWARDED their reasonable attorneys' fees in the amount of \$2,861,348.71 and costs in the amount of \$85,746.39.

SO ORDERED, this 30th day of September, 2012.

  
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ORINDA D. EVANS  
UNITED STATES DISTRICT JUDGE