

**Nos. 12-14676-FF**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Cambridge University Press,  
Oxford University Press, Inc.,  
and Sage Publications, Inc.,

Plaintiffs-Appellants,

v.

Mark P. Becker, in his official capacity as  
Georgia State University President, et al.,

Defendants-Appellees.

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On Appeal from the United States District Court  
for the Northern District of Georgia  
D.C. No. 1:08-cv-1425 (Evans, J.)

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**APPELLANTS' PARTIAL OPPOSITION  
TO APPELLEES' MOTION TO DISMISS OR CONSOLIDATE**

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**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
- Banks, W. Wright, Jr., counsel for Appellees
- Bates, Mary Katherine, counsel for Appellees
- Ballard Spahr, LLP, 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
- Carter, Hugh A., Jr.

- Cleveland, William H.
- Copyright Clearance Center
- Cooper, Frederick E.
- Ellis, Larry R.
- Eskow, Lisa R., counsel for Appellants
- 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
- 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, Inc.
- Oxford University Press, LLC
- Oxford University Press USA
- 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.
- Seamans, Nancy
- Schaetzel, Stephen M., counsel for Appellees
- 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
- Walker, Larry
- Weil Gotshal & Manges, LLP, counsel for Appellants
- Whiting-Pack, Denise E., counsel for Appellees
- Wilheit, Philip A., Sr.
- Vigil, Allan
- Volkert, Mary Josephine Leddy, counsel for Appellees

Plaintiffs-Appellants, Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc. (“Appellants” or “the publishers”), oppose Appellees’ Motion to Dismiss or Consolidate (the “Motion”) to the extent it seeks dismissal of the above-captioned appeal (No. 12-14676-FF). Appellants do not oppose, and in fact support, Appellees’ alternative request to consolidate this appeal with a second appeal in this matter (No. 12-15147-FF).

As further discussed below, this Court has jurisdiction over both appeals, which concern a permanent injunction and award of attorneys’ fees and costs issued in connection with a suit brought by the publishers against several GSU officials and members of the Board of Regents of the University System of Georgia in their official capacities, alleging unauthorized copying and distribution of copyrighted academic works through a variety of university-controlled online systems. Consolidation of the two appeals will serve all parties’ best interests and will promote efficiency for the Court with one set of comprehensive briefs on both the merits and the attorneys’ fees and costs issues.

### **PROCEDURAL BACKGROUND**

On May 11, 2012, the Northern District of Georgia entered a 340-page opinion granting in part and denying in part the injunctive and declaratory relief sought by the publishers and directing the parties to submit briefing on the proposed text of declaratory and injunctive relief and their respective requests for

attorneys' fees and costs. Dkt. No. 423. On August 10, 2012, the district court issued its order on declaratory and injunctive relief, which also determined that the GSU officials were prevailing parties entitled to an award of attorneys' fees and costs. Dkt. No. 441 (Motion Ex. B). The only remaining issue was the amount of fees and costs. *See id.*

The publishers filed a notice of appeal on September 10, 2012. That appeal was docketed in this Court as No. 12-14676-FF, and, on October 9, 2012, the Court extended the deadline for Appellants' brief to November 21, 2012. The Court also granted Appellants' Motion for Enlargement of the Permitted Words for Appellants Opening Brief (filed October 3, 2012), setting a word limit of 18,000 for Appellants' opening brief, 18,000 for Appellees' brief, and 9,000 for Appellants' reply brief. *See Order*, dated October 11, 2012, in No. 12-14676.

On September 30, 2012, the district court signed an order determining the amount of attorneys' fees and costs to be awarded to the GSU officials and directed the clerk to enter final judgment reflecting its prior declaratory- and injunctive-relief rulings, as well as the court's determination of attorneys' fees and costs. Dkt. Nos. 462, 463 (Motion Exs. D, F).<sup>1</sup> On October 2, 2012, the publishers

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<sup>1</sup> In its September 30, 2012 order calculating the amount of attorneys' fees and costs to be awarded to Appellees, the district court stated that it "did not intend" its August 10, 2012 order to be an appealable order and, regardless, would proceed with awarding fees and costs notwithstanding the publishers' prior notice of appeal. Dkt. No. 462 at 4 n.2. Although the district court retained jurisdiction to

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filed a second notice of appeal from the September 30, 2012 order and judgment, as well as from prior orders in the case including those listed in the publishers' September 10, 2012 notice of appeal. Dkt. No. 465. The second appeal has been docketed in this Court as No. 12-15147-FF, and the opening brief in that appeal currently is due on November 14, 2012.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION OVER BOTH APPEALS.

Appellees' motion to dismiss rests on the false premise that the district court's August 10, 2012 order provided only interlocutory, preliminary injunctive relief and therefore was subsumed in the final judgment issued on September 30, 2012, which incorporated the district court's prior rulings. *See* Motion at 4-6 (citing cases discussing the effect of a permanent injunction on an appeal of a preliminary injunction). The district court's August 10 order, however, granted in part and denied in part a *permanent injunction* following a nearly four-week trial.<sup>2</sup> The August 10 order disposed of all issues on the merits and even determined that Appellees were the prevailing parties in the litigation (notwithstanding the fact that

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assess fees and costs, it had no jurisdiction over merits issues concerning its August 10 order.

<sup>2</sup> As this Court has explained, a preliminary injunction is relief awarded "before the entire case is fully and fairly heard," whereas a permanent injunction is relief awarded after trial on the merits. *Alabama v. United States Army Corp. of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005). It is undisputed that the injunction set forth in the August 10, 2012 order was awarded after a full trial on the merits.

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the district court enjoined their infringement of the publishers' copyrights).

Accordingly, no preliminary or interlocutory injunctive relief is at issue in the publishers' appeal from the August 10 order, which challenges the limited scope of the permanent injunction issued by the district court. Indeed, the only issue left open by the August 10 order was the amount of fees and costs to be assessed against the publishers.

It is well-established that an order that disposes of the merits in their entirety and leaves open only a determination of attorneys' fees and costs is a final and appealable order in its own right. *See, e.g. Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200, 202-03 (1988) (“[A] decision on the merits is a ‘final decision’ for purposes of [28 U.S.C.] § 1291 whether or not there remains for adjudication a request for attorneys’ fees attributable to the case”); *In re Atlas*, 210 F.3d 1305, 1307 (11th Cir. 2000) (“[T]he Supreme Court has determined that attorney’s fees issues are collateral to the merits, and therefore, a decision on the merits is a ‘final judgment’ whether or not the assessment of attorney’s fees remains to be resolved”) (citing *Budinich*, 486 U.S. at 200, 202-03); *see also, e.g., Gnesys, Inc. v. Greene*, 437 F.3d 482, 487-88 (6th Cir. 2005) (reaffirming that a determination of attorneys’ fees is not part of the merits for purposes of determining whether prior orders on compensatory damages and contempt were final and appealable and dismissing appeals from prior orders as untimely when

taken within 30 days after the attorneys' fees order but more than 30 days after the prior orders on damages and contempt). Accordingly, this Court has jurisdiction over the publishers' appeal from the August 10 order.

Appellees' motion to dismiss is not only unsupported by law, but also of no practical consequence. Appellees concede that dismissal of the publishers' first appeal would not substantively alter the issues before this Court, because the September 30, 2012 order and judgment incorporated the district court's prior rulings from the August 10 order. *See* Motion at 6; *see also* Dkt. 462 at 11-12. The September 30 order and judgment did not alter or supplement any prior rulings on the merits but included a new ruling solely on the amount of fees and costs awarded to Appellees. *See Budinich*, 486 U.S. at 199 ("A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order."); *compare* Dkt. 441, *with* Dkt. 462. Appellees' motion to dismiss, therefore, asks this Court to expend resources on an empty exercise.

## **II. THE COURT SHOULD CONSOLIDATE BOTH APPEALS.**

Appellants join in Appellees' alternative request to consolidate briefing on the two appeals so that the Court receives one set of comprehensive briefs on both the merits and the attorneys' fees and costs issues. *See* Motion at 6-7. Appellants propose that they brief all of the merits and attorneys' fees-and-costs issues raised

in both appeals by the November 21, 2012 deadline for their opening brief in the first appeal.<sup>3</sup> Additionally, if the Court orders consolidated briefing, Appellants further agree to brief all issues from both appeals within the extended, 18,000-word limit the Court has set for Appellants' opening brief in the first appeal.

Respectfully submitted this 22nd day of October, 2012.

/s/ John H. Rains IV

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<sup>3</sup> Although the deadline for Appellants' opening brief in the second appeal is November 14, 2012, the Clerk has authority to grant an extension of 7 days, which would create a deadline of November 21, 2012 in the second appeal. *See* 11TH CIR. R. 31-2.

## CERTIFICATE OF SERVICE

I certify that I have this day caused a true and correct copy of  
**APPELLANTS' PARTIAL OPPOSITION TO APPELLEES' MOTION TO  
DISMISS OR CONSOLIDATE** to be served by United States mail on the  
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This 22nd day of October, 2012.

*/s/ John H. Rains IV*  
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