

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

CAMBRIDGE UNIVERSITY PRESS, et al.,

Plaintiffs,

-vs.-

MARK P. BECKER, in his official capacity as
Georgia State University President, et al.,
Defendants.

Civil Action No.
1:08-CV-1425-ODE

**DEFENDANTS' STATEMENT OF ADDITIONAL FACTS IN SUPPORT
OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Defendants Mark P. Becker, in his official capacity as Georgia State University President, et al. (collectively, "Defendants") hereby submit their Statement of Additional Facts in Support of Defendants' Response to Plaintiffs' Motion for Summary Judgment.

II. STATEMENT OF UNDISPUTED FACTS

1. The USG Policy on Copyright and Fair Use has changed the way members of the university community make decisions regarding using works and their understanding of fair use analysis. *See, e.g.*, Ex. A, Dixon Decl. ¶¶ 2, 4; Ex.

B., Esposito Decl. ¶¶ 2, 4-5; Ex. C, Kaufmann Decl. ¶¶ 2, 5-6; Ex. D, Kruger Decl. ¶¶ 2, 5-6; Ex. E, Meyers Decl. ¶¶ 2, 4-5.

2. Following adoption of the USG Policy on Copyright and Fair Use, professors have completed fair use checklists in accordance with the Policy for course reading assignments made available on electronic reserves. *See, e.g.,* Ex. A, Dixon Decl. ¶¶ 2, 4; Ex. B., Esposito Decl. ¶ 2; Ex. C, Kaufmann Decl. ¶ 2, 5; Ex. D, Kruger Decl. ¶¶ 2-3, 5-6; Ex. E, Meyers Decl. ¶ 2.
3. Use of the fair use checklist has changed professors' decisions about what constitutes a fair use, leading them to: reduce the amount of a particular work that they use for a given course, reduce the amount of a work placed on eReserves, place works on physical reserve instead of eReserves, and not use certain works at all. Ex. A, Dixon Decl. ¶ 4; Ex. B., Esposito Decl. ¶ 5; Ex. C, Kaufmann Decl. ¶ 6; Ex. D, Kruger Decl. ¶¶ 5-6; Ex. E, Meyers Decl. ¶ 4.
4. Professors' use of the fair use checklist that is part of the USG Policy on Copyright and Fair Use has led them to only post materials on eReserves that they deem are fair uses. *See, e.g.,* Ex. A, Dixon Decl. ¶¶ 2, 4; Ex. B.,

Esposito Decl. ¶¶ 2, 5, Ex. A (demonstrating that each use was determined to be a fair use); Ex. C, Kaufmann Decl. ¶¶ 2, 5, Ex. A (demonstrating that each use was determined to be a fair use); Ex. D, Kruger Decl. ¶ 2; Ex. E, Meyers Decl. ¶ 2.

5. The fair use checklist adopted as part of the USG Policy on Copyright and Fair Use has helped professors understand what is permitted under the fair use exception and keep in mind all of the factors relevant to fair use while conducting a fair use analysis. Ex. C, Kaufmann Decl. ¶ 5; Ex. D, Kruger Decl. ¶¶ 5-6; Ex. E, Meyers Decl. ¶ 5.
6. In completing fair use checklists as part of the USG Policy on Copyright and Fair Use, professors consider each of the four fair use factors before reaching a decision regarding whether the proposed use is a fair use. *See* Ex. B., Esposito Decl., Ex. A (indicating Professor Esposito considered each of the four fair use factors for each of the 23 fair use checklists she completed for Spring 2010); Ex. C, Kaufmann Decl., Ex. A (indicating Professor Kaufmann considered each of the four fair use factors for each of the 51 fair use checklists she completed for Spring 2010).

7. The Course Reserves Request Form that the new USG Policy on Copyright and Fair Use requires professors to complete in order to place materials on eReserves requires the professor to identify the “copyright status” of the work. *See, e.g.*, Ex. B., Esposito Decl., Ex. A at 1-2. For example, the professor can indicate that the work “falls under fair use according to the Fair Use Checklist I completed,” or that “[t]he library licenses a database that provides an electronic version.” *Id.* at 1-2, 10, 12-17.
8. If a professor determines that the proposed use of a work she wants to post on eReserves is a fair use, then after the professor enters all of the works she wants to post on eReserves into the Course Reserves Request Form, she must review a summary page and affirm that she completed a fair use checklist and the work falls under the fair use exception. *See, e.g.*, Ex. B., Esposito Decl., Ex. A at 1-2, 10, 12-17.
9. Professors and staff have attended training sessions led by members of the Georgia State University Office of Legal Affairs regarding the new USG Policy on Copyright and Fair Use and how to complete the fair use checklist that forms part of that policy. Ex. A, Dixon Decl. ¶ 3.

10. Professors, who study the USG Policy on Copyright and Fair Use, use the fair use checklist, and consult with the Georgia State University Office of Legal Affairs regarding the Policy and the checklist, can come away with a more conservative understanding of how fair use is defined, particularly with respect to the amount of a work that can be used. Ex. D, Kruger Decl. ¶ 5.
11. Review of the USG Policy on Copyright and Fair Use, use of the fair use checklist, and consultation with the Office of Legal Affairs regarding the Policy and the checklist can provide university community members with a better understanding of the factors relevant to a fair use analysis, including how the market effect of a proposed use impacts the fair use analysis. Ex. D, Kruger Decl. ¶ 5; Ex. E, Meyers Decl. ¶ 5.
12. Training sessions led by members of the Georgia State University Office of Legal Affairs regarding the new USG Policy on Copyright and Fair Use and how to complete the fair use checklist that forms part of that Policy have been well attended by professors and staff. Ex. A, Dixon Decl. ¶ 3.
13. Many professors that post course reading assignments on eReserves also require their students to read books or other works they must purchase and/or access through library subscriptions. Ex. A, Dixon Decl. ¶ 5; Ex. B.,

Esposito Decl. ¶ 3; Ex. C, Kaufmann Decl. ¶ 4; Ex. D, Kruger Decl. ¶ 6; Ex. E, Meyers Decl. ¶ 3.

14. Professors are required to complete a fair use checklist each time they use a given work for a course, even if they have used that work for the same course in a different semester. *See, e.g.*, Ex. D, Kruger Decl. ¶ 3.
15. Professors would drop reading assignments that otherwise would be posted on eReserves rather than require students to purchase those additional books or other materials or license excerpts. Ex. A, Dixon Decl. ¶ 6; Ex. B., Esposito Decl. ¶ 5; Ex. D, Kruger Decl. ¶ 7; Ex. E, Meyers Decl. ¶ 4.
16. One reason a professor would drop a reading assignment that otherwise would be posted on eReserves rather than have students purchase the work or purchase a license is because he or she has determined that licensing is too expensive. Ex. B., Esposito Decl. ¶ 5.
17. One reason a professor would drop a reading assignment that otherwise would be posted on eReserves rather than have students purchase the work or purchase a license is because he or she has determined that purchasing the book would not be worth the expense. Ex. D, Kruger Decl. ¶ 7; Ex. E, Meyers Decl. ¶ 4.

18. An inability to post excerpts from works on eReserves would have significant pedagogical consequences. Ex. E, Meyers Decl. ¶ 6.
19. Excerpts from The SAGE Handbook of Qualitative Research (one of the works at issue in this case) that have been placed on eReserves since adoption of the USG Policy on Copyright and Fair Use have been narrowly tailored to support a specific teaching point and have constituted less than ten percent of the total work. Ex. B., Esposito Decl. ¶ 3, Ex. A; Ex. C, Kaufmann Decl. ¶¶ 3-4, Ex. A.
20. Excerpts from The SAGE Handbook of Qualitative Research (one of the works at issue in this case) that have been placed on eReserves since adoption of the USG Policy on Copyright and Fair Use have constituted only a portion of the total reading assignments for the course, sometimes as little as ten percent. Ex. B., Esposito Decl. ¶ 3, Ex. A; Ex. C, Kaufmann Decl. ¶¶ 3-4, Ex. A.
21. Excerpts from Awakening Children's Minds by L.E. Berk (one of the works at issue in this case) that have been placed on eReserves since adoption of the USG Policy on Copyright and Fair Use have been narrowly tailored to

support a specific teaching point and have constituted less than fifteen percent of the total work. Ex. D, Kruger Decl. ¶¶ 3-4, 7.

22. With regard to the book Awakening Children's Minds by L.E. Berk, if Professor Ann Kruger was no longer permitted to place any excerpt from the book on eReserves, she would not require her students to purchase the book or license the excerpt, but would replace the reading assignment with something else. Ex. D, Kruger Decl. ¶ 7.
23. Multiple entries appear on the 2009 eReserves Report for chapter six of the book Awakening Children's Minds by L.E. Berk, on reserve for Professor Ann Kruger's course "Learning and the Learner," because the course meets year round and Professor Kruger was required to complete a fair use checklist each semester so that the assignment remained available to those students. Ex. D, Kruger Decl. ¶ 3.
24. With regard to the book The Slave Community by John W. Blassingame, if Professor Patricia Dixon was no longer permitted to place any excerpt from the book on eReserves, she would not require her students to purchase the book or license the excerpt, but would place it on physical reserve instead. Ex. A, Dixon Decl. ¶ 6.

25. Excerpts from Feminist Media Studies by Liesbet van Zoonen (one of the works at issue in this case) that have been placed on eReserves since adoption of the USG Policy on Copyright and Fair Use have been narrowly tailored to support a specific teaching point and have constituted less than twenty percent of the total work. Ex. E, Meyers Decl. ¶¶ 3, 6.
26. With regard to the book Feminist Media Studies by Liesbet van Zoonen, if Professor Marian Meyers was no longer permitted to place any excerpt from the book on eReserves, she would not require her students to purchase the book or license the excerpt because she does not think she needs enough of the book to warrant the purchase and it would not be practical from an administrative standpoint to pass along the costs to the students. Ex. E, Meyers Decl. ¶ 6.
27. If Professor Marian Meyers could not place any excerpt from Feminist Media Studies by Liesbet van Zoonen on eReserves, there would, in her opinion, be a significant pedagogical consequence. Meyers Dec. ¶ 6.
28. Despite not being a party to this case, Copyright Clearance Center is funding half of the Plaintiffs' lawsuit. Mariniello Dep. Tr. 202:17-203:3, attached hereto as Ex. F.

29. Georgia State University spends millions of dollars in permissions to license electronic copies of copyrighted works. *See, e.g.*, Burtle Dep. 27-28, attached hereto as Ex. G (describing the millions of dollars of the Georgia State University library budget that pay for licenses to electronic databases of copyrighted material); Seamans Dep. 51, 54-55, attached hereto as Ex. H (same).

Respectfully submitted this 5th day of April, 2010.

THURBERT E. BAKER
Georgia Bar No. 033887
Attorney General

R. O. LERER
Georgia Bar No. 446962
Deputy Attorney General

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

MARY JO VOLKERT
Georgia Bar No. 728755
Assistant Attorney General
KING & SPALDING LLP

/s/ Katrina M. Quicker
Anthony B. Askew
Georgia Bar No. 025300
Special Assistant Attorney General
Stephen M. Schaetzel
Georgia Bar No. 628653
Katrina M. Quicker
Georgia Bar No. 590859
Kristen A. Swift
Georgia Bar No. 702536

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to L.R. 5.1B and 7.1D of the Northern District of Georgia, that the foregoing Defendants' Statement of Additional Facts in Support of Defendants' Response to Plaintiffs' Motion for Summary Judgment complies with the font and point selections approved by the Court in L.R. 5.1B. The foregoing pleading was prepared on a computer using 14-point Times New Roman font.

/s/ Katrina M. Quicker
Katrina M. Quicker
(Ga. Bar No. 590859)

Edward B. Krugman
krugman@bmelaw.com
Georgia Bar No. 429927
Corey F. Hirokawa
hirokawa@bmelaw.com
Georgia Bar No. 357087
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
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/ Katrina M. Quicker
Katrina M. Quicker
(Ga. Bar No. 590859)