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

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

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE THE PUTATIVE EXPERT TESTIMONY OF KENNETH D. CREWS

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Plaintiffs Cambridge University Press, Oxford University Press, Inc., and SAGE Publications, Inc. (collectively, "Plaintiffs") hereby move to exclude in its entirety the putative expert testimony of Kenneth D. Crews, J.D., Ph.D., as inadmissible under Federal Rule of Evidence 702.

PRELIMINARY STATEMENT

In an effort to place an authoritative imprimatur on their revised copyright policy, Defendants rely on two putative "expert" reports from the same individual, Dr. Kenneth Crews, that purport to "bless" the new GSU policy both as a matter of copyright law and by reference to a claimed survey of practice at other higher educational institutions. *See* Expert Report of Kenneth D. Crews, J.D., Ph.D. (June 1, 2009), Docket No. 104 ("Crews Report"); Rebuttal Expert Report of Kenneth D. Crews, J.D., Ph.D. (November 2, 2009), Docket No. 127 ("Crews Rebuttal Report") (collectively, the "Crews Reports"). The Court has already ruled that the portion of Dr. Crews's reports that addresses legal issues – most specifically his attempted application of fair use law to the facts presented by this case – constitutes inappropriate expert testimony that will be disregarded. Order Denying Plaintiffs' Motion to Exclude the Expert Report of Kenneth D. Crews, *Cambridge University Press, et al. v. Becker, et al.,* No. 08 Civ. 1425 (N.D. Ga. Sept. 3, 2009), Docket No. 121 ("Crews Order") at 4. This motion addresses the balance of Dr.

Crews's reports, which consist of a mix of: a distinctly non-expert recitation of the facial provisions of the new policy; an admittedly non-scientific survey of copyright policies (though not practices) at other institutions; citations to library journals anecdotally reporting on random experiences that were neither investigated nor verified by Dr. Crews for their accuracy or more general import; and non-expert opinion on the economics of various licensing markets.

Underscoring the many infirmities of Defendants' offer of Dr. Crews as an expert on these topics are: Dr. Crews's lack of impartiality, having been a paid consultant to GSU in connection with the development of the very policy his expert reports endorse; his authorship of a fair use checklist after which the one at issue here is closely patterned (leading him unsurprisingly to validate his own work product); and his lack of any investigation into actual copyright *practices* at GSU or at any other school, which leads him to effectively concede the irrelevance of his reports, which focus exclusively on the facial language of copyright *policies* untethered from actual implementation and practice.

With respect to Dr. Crews's ostensible "survey" of practices at other schools, he has conceded not only the non-scientific basis for the survey, but also that he did not even prepare it. His wife did. This being so, this portion of his

report plainly lacks the most basic indicia of "reliable principles and methods" as called for by Rule 702 of the Federal Rules of Evidence.

What is more, Dr. Crews has conceded that he has virtually no knowledge as to actual *practice* at any of the schools identified in the "survey," and even more centrally, he also has admitted that he has performed no analysis as to the manner in which GSU's own new copyright policy has been implemented. When asked at his deposition whether his unscientific survey "answer the question as to the actual legality of practice at Georgia State University," he candidly responded that it "does not answer that question." Deposition of Kenneth D. Crews (December 10, 2009), Docket No. 176 ("Crews Dep.") at 97:22–98:6. That response encapsulates the failure of the Crews Reports to assist the trier of fact to understand the evidence to determine a fact in issue, as Rule 702 requires.

PROCEDURAL HISTORY

The 69-page, single-spaced Crews Report was untimely served on Plaintiffs on June 1, 2009, after the window for fact discovery (other than depositions) had closed. *See* Crews Order at 5, 2. Plaintiffs moved to strike the Report under Rule 702 on the grounds that it was untimely and that it improperly advocated an ultimate legal conclusion. In its September 3, 2009 order denying the motion, the Court agreed with Plaintiffs that Dr. Crews's report "contain[ed] . . . legal

conclusions regarding Georgia State's new copyright policy" but noted that the Court was "capable of disregarding the portions of Dr. Crews's report that impinge on its responsibility to determine and apply the law." *Id.* at 3-4. The Court suggested that it might consider other aspects of the report, which consists primarily of Dr. Crews's admittedly unscientific "survey" of copyright policies at some thirty-nine colleges and universities. *Id.*

Following the Court's ruling, a period of expert discovery ensued. Plaintiffs served rebuttal expert reports on October 15, 2009, and Defendants served the Crews Rebuttal Report on November 3, 2009. All experts were deposed. Discovery – including Dr. Crews's deposition – has significantly strengthened the argument that even consideration of limited non-legal portions of the Crews Reports would be improper under Rule 702 for the reasons that follow.

ARGUMENT

The Crews Reports do not meet the Rule 702 standard of admissibility for expert testimony. Under Federal Rule of Evidence 702, expert testimony is admissible "provided that the expert is qualified by virtue of his or her knowledge, skill, experience, training or education" and if the expert's scientific, technical, or otherwise specialized knowledge "will assist the trier of fact to understand the

evidence or to determine a fact in issue." Fed. R. Evid. 702. In determining whether expert testimony meets this test, courts consider whether:

> 1) the expert is qualified to testify competently regarding the matters he intends to address; 2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert* [*v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)]; and 3) the testimony will assist the trier of fact through the application of scientific, technical, or specialized expertise, to understand the evidence or determine a fact in issue.

Cook v. Sheriff of Monroe County, 402 F.3d 1092, 1107 (11th Cir. 2005). The Supreme Court has held that the "gatekeeping" role played by district court judges in assessing the reliability of an expert's methodology under *Daubert* applies equally to witnesses proffered as experts on non-scientific subjects. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). A district court has "broad latitude when it decides how to determine reliability." *Id.* at 142. Courts may utilize the specific factors set forth in *Daubert* where appropriate,[1] as well as other

[1] Those factors include: "Whether a 'theory or technique . . . can be (and has been) tested'; whether it 'has been subjected to peer review and publication'; whether, in respect to a particular technique, there is a high 'known or potential rate of error' and whether there are 'standards controlling the technique's operation'; and whether the theory or technique enjoys 'general acceptance' within a 'relevant scientific community.'" *Kumho Tire*, 526 U.S. at 149-150 (quoting *Daubert*, 509 U.S. at 592-94).

considerations specific to "the particular case at issue." *Id.* at 150. *See also Clarke v. Schofield*, 632 F. Supp. 2d 1350, 1354-55 (M.D. Ga. 2009).

The proponent of expert testimony bears the burden of establishing its admissibility. *Cook*, 402 F.3d at 1107. Defendants here have not met this burden and, in fact, the Court has already recognized that a significant portion of Dr. Crews's testimony should be excluded as legal argumentation. *See* Crews Order at 3-4.

Furthermore, there is nothing in the strictly non-legal portions of Dr. Crews's testimony that could not readily be accessed and understood by an average lay person. *See United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004) ("[E]xpert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person."). The balance of the Crews Report is devoted to (a) a "survey" of copyright and fair use policies at various universities and a discussion of anecdotal evidence concerning them; and (b) a discussion of the GSU copyright policy. The Crews Rebuttal Report consists of (a) another improper discussion of copyright case law; (b) a list of universities that use a version of a "Fair Use Checklist"; and (c) an irrelevant discussion of open access publishing that is not probative of anything. Dr. Crews's survey of copyright policies is merely a collection of publicly available documents that anyone can

access via the Internet. Such testimony – requiring no "specialized knowledge" – does not satisfy the requirements of Federal Rule of Evidence 702.

Moreover, Dr. Crews's reports are fatally tainted by the bias he brings to them as well as by the failure of his "survey" to meet the requisite indicia of reliability. Thus, Dr. Crews's testimony should be excluded because it will not assist the Court to understand the evidence or to determine a fact in issue.

I. DR. CREWS IS NOT QUALIFIED TO PERFORM SURVEY ANALYSIS OR TO OPINE ON THE ECONOMICS OF THE COURSEPACK MARKET, AND HE IS TOO BIASED FOR THE COURT TO CREDIT HIS TESTIMONY

A. Lack of Expertise

Dr. Crews is not qualified to opine on the several of the matters he addresses in his reports. Specifically:

- He has no training in statistics or statistical analysis. Crews Dep. at 143:13-17.
- He has no background or training in economics. *Id.* at 143:10-12.
- He has not done any research on sales or licensing markets for textual works. *Id.* at 144:16-24.
- He does not have any training in computer science. *Id.* at 143:18-19.
- He is not an expert on the publishing industry. *Id.* at 143:23-144:15.

He thus lacks the requisite knowledge, skill, experience, training, or education to qualify as an expert on any these subjects. *Frazier*, 387 F.3d at 1261; *see, e.g.*,

Oliveira v. Bridgestone Americas Holding, No. 1:06-CV-1280-RLV, 2007 WL 1655842 (N.D. Ga. 2007) (qualifications must relate to the particular field in which the expert testimony is offered).

Without the proper qualifications, the non-legal portions of the Crews Reports are not admissible. For instance, without any economics background, Dr. Crews's assertions regarding the economics of the coursepack market, the impact of those economics on the incentives of copy shops and educational institutions to seek licensing or to assert fair use, and the economic impact of open access publishing, *see* Crews Rebuttal Report at 10-12, amount to mere conjecture. Without any statistical training, any conclusions based on his "survey" (even putting to one side how the survey was conducted, as discussed below) are baseless. *See* Crews Report at 28-49, 68-69. And without any expertise as to the publishing industry, his contentions regarding the future of scholarly publishing barely rise to the level of supposition. *See* Crews Rebuttal Report at 31-38.

B. Bias

In addition to his lack of expertise, Dr. Crews's testimony is too biased to be reliable. Dr. Crews had a professional relationship with Defendants and their counsel relating to this litigation prior to his engagement as a testifying witness. Proffered expert testimony is vulnerable where the expert maintains an "ongoing

professional relationship" with a party's counsel. *Clarke*, 632 F. Supp. 2d at 1362. As early as May 13, 2008 – more than a year before he was retained as a testifying expert in this case – Georgia Assistant Attorney General Mary Jo Volkert contacted Dr. Crews to discuss the case. Crews Dep. at 14:13-17:20, 25:3-28:8; Plaintiffs' Deposition Exhibit ("PX") 292, Docket No. 176. Dr. Crews spoke with Ms. Volkert in the ensuing two months about what he could do "to help the University" with regard to the litigation, and, at the behest of Defendants' outside counsel, Dr. Crews had a consulting session with officials of the University System of Georgia. Crews Dep. at 28:16-23; 36:9–39:1.

Dr. Crews was also consulted regarding the drafting of the copyright policy on which he now purportedly opines as an expert. Defendants' counsel requested his feedback on draft policy documents in January 2009, PX 295, Docket No. 176, and officially "retained" him as a paid consultant later that month. PX 296, Docket No. 176. In that role, Dr. Crews provided his comments on various policy documents, including the Fair Use Checklist. Crews Dep. at 45:3—47:8; PX 296, Docket No. 176. He also participated in phone conferences with Defendants' counsel to discuss his proposed edits. Crews Dep. at 53:9–54:4. In all, Dr. Crews was paid more than $4,000 to engage in this process—months before he was

designated an "expert witness" in April 2009. *Id.* at 40:24–41:3, 73:18–75:16, 58:3-17; PXs 300-301, Docket No. 176.

Further, Dr. Crews's delight that the core element of the Georgia copyright policy he endorses is a "Fair Use Checklist" that is based on *his own work product* underscores the anything-but-disinterested nature of his appraisal of the policy: "This is great. I actually wrote this material." PX 295, Docket No. 176; *see also* Crews Dep. at 71:10-18, 72:12–73:10. He acknowledged that GSU's reliance on his advice is a "source of pride" for him. *Id.* at 73:5-10. It is no wonder, then, that he would characterize the checklist as "wide[ly] accept[ed] . . . as an appropriate element of responsible decision making about fair use" and would devote ten pages of his rebuttal report to cataloging its uses at various institutions. *See* Crews Rebuttal at 20-30. Indeed, to state otherwise would have amounted to impugning his own professional reputation as the creator and principal sponsor of that document.

Dr. Crews's lack of appropriate experience, coupled with his obvious self-interest in defending his own work, compels the conclusion that his testimony is not admissible.

II. DR. CREWS'S CONCEDEDLY UNSCIENTIFIC "SURVEY" OF COPYRIGHT POLICIES AND RELATED ANECDOTAL EVIDENCE IS NOT RELIABLE OR PROBATIVE

Even apart from Dr. Crews's lack of qualifications and his inherent bias, the non-legal portions of the Crews Reports should be excluded because they are not reliable and cannot assist the Court in determining any of the facts at issue. At best, the point of Dr. Crews's reports appear to be an irrelevant attempt to compare GSU's new copyright policy to the copyright policies at other institutions. Even if done correctly (which it was not), such an effort would have virtually no probative value. At issue in this case is GSU's (infringing) copyright *practices*. Dr. Crews freely admits that he did no investigation and has no knowledge about the copyright practices at GSU. Moreover, even if GSU's policy were relevant (which it is not), policies at other schools are not relevant because fair use is not determined by industry custom. Finally, even if the Court were inclined to consider the policies at other schools, Dr. Crews's "survey" is so methodologically flawed that it cannot form a basis for comparison.

A. Dr. Crews Did Not Undertake the Concededly Necessary Factual Investigation

This lawsuit addresses copyright infringement at GSU. Accordingly, an analysis of the electronic course reading system practices at GSU arguably might have been of some utility to the Court. As Dr. Crews noted:

> If the question before the court is, is this University . . . in fact in compliance with copyright law with respect to . . . whatever content is in electronic reserves . . . then we need to know more than just the facial policy that's in the policy manual or on a website.

Crews Dep. at 95:16–96:8. That is the question, but Dr. Crews is unable to answer it because he did not do anything to learn "more than just the facial policy." He did not consult with anyone at GSU – no one from the library staff, no one from the faculty, no students, no administrators, no one from the Board of Regents, no one from the committee responsible for developing the new policy, no IT people, and no one responsible for the uLearn system – to learn how the policy is actually being carried out in practice. *Id.* at 120:8-121:2; 122:4-19. He also conceded that he did not "have any specific awareness of the technological conditions at Georgia State University." *Id.* at 164:9-11.

As Dr. Crews admittedly did not even attempt in his analysis to go beyond the written policy, his testimony has no bearing on the central question before the Court: whether there are ongoing copyright violations at GSU. To the extent Dr. Crews attempts to excuse the myriad failings of the GSU copyright policy because it at least represents a good-faith effort, that testimony is not probative. Without any factual investigation into copyright compliance *practice* at GSU and without

the least notion of how it relates to actual practice, Dr. Crews cannot reliably opine on the policy.

B. The Survey of Copyright Policies Relies on an Arbitrary Sampling of University Policies With No Statistical Significance and Ignores Material Provisions of the Cited Policies

Even a properly conducted survey of other institutions would not have any probative value as to the legality of the practice at GSU, but the "survey" that is the centerpiece of the Crews Report, *see* Crews Report at 28-45 – a discussion of copyright policies from thirty-nine colleges and universities assembled arbitrarily by Dr. Crews's wife – is so defective that it must be excluded. Even Dr. Crews admits that this "survey" was not conducted pursuant to any reliable principle or method. The same is true of the anecdotal information he offers concerning efforts by various university libraries to license course materials and the list of universities that use a checklist. *See* Crews Report at 23-27; Crews Dep. at 84:14-93:8; Crews Rebuttal Report at 20-29.

At his deposition, Dr. Crews explained that he had little or no involvement in the selection of the copyright policies cited in his report. The task was instead delegated to his wife, who has no background in copyright law or in survey design or analysis and was never engaged by the Defendants as an expert in her own right. Crews Dep. at 61:9-62:18. She apparently chose the policies haphazardly, and

without guidance, supervision, or any discernible organizing principle. Dr. Crews did not devise any method of selection that would produce a statistically significant sample or account scientifically for variables such as the size of the chosen schools or their geographic locations. *Id.* When asked whether his unscientific survey "answer the question as to the actual legality of practice at Georgia State University," Dr. Crews acknowledged that it "does not answer that question." *Id.* at 97:22–98:6.

Dr. Crews compounded the problematic selection of policies by omitting from his summaries of the individual policies many provisions that bear directly upon issues in this case. Given the prominence in this case of (a) the relationship of electronic course materials to hard-copy coursepacks; (b) the portion of a work that may be used consistent with fair use; (c) the effect of the availability of licensing mechanisms on the fair use analysis; and (d) the feasibility of paying license fees for electronic course material uses, any reliable method of inquiry would not have failed to note the following provisions:

- Ashland University: "Electronic reserves are not intended to replace a course pack or traditional textbook." Crews Dep. at 102:25-104:4.
- University of Vermont: "The total amount of material on reserve for a class should be a small proportion of the total assigned reading for that class when invoking fair use." *Id.* at 109:13-24.

- University of Chicago: "Instructor should consider whether materials are reasonably available and affordable for students to purchase, whether as a book, course pack or other format." *Id.* at 112:12-22. And: "When materials are included as a matter of fair use, electronic reserve systems should constitute an ad hoc or supplemental source of information for students beyond a textbook or other materials." *Id.* at 113:7-114:3.

- Emory University: "If a reserve assignment seems to exceed the threshold of fair use, the libraries will seek and pay applicable permissions fees on those materials as a service for the faculty." *Id.* at 114:16-116:11.

- Cornell University: "The copyright principles that apply to instructional use of copyrighted works in electronic environments are the same as those that apply to such use in paper environments. Any use of copyrighted electronic course content that would require permission from the copyright owner if the materials were part of a printed course pack, likewise requires the copyright owner's permission when made available in electronic format." *Id.* at 118:3-19.

These omissions, concerning which Dr. Crews offered no cogent explanation, expose the severely limited utility of Dr. Crews's "survey." Moreover, the manner in which Dr. Crews chose to highlight specific portions of those policies while omitting others that tend to undermine key assertions on which he and the Defendants rely suggests more than just sloppiness but, rather, a deliberate effort to cherry-pick those aspects of other policies that appear supportive of Dr. Crews's attempt to sanitize GSU's policy.

At the very most, all that this "survey" shows is that different academic institutions have crafted different policies, the details as to the implementation of which are completely unknown. If, in the end, as Dr. Crews himself testified, all

he "really wanted to show" was "the variety of approaches that were out there," Crews Dep. at 79:23-24, this is scarcely probative of anything relevant to this case – let alone the proper subject of expert testimony.

Dr. Crews is not even in a position to show the variety of approaches that were out there since he did not gather any empirical data as to copyright practices in relation to electronic course reading systems at any other school. As he testified: "[I]'m not going to claim to be a witness to the internal operations of these institutions and how they do their E-Reserves on a day-to-day basis." Crews Dep. at 93:3-6. Indeed, he acknowledged having no more than "an occasional insight" into those practices, having never spent more than a day at any of the schools (and having visited only four of them), *id.* at 84:21-86:12; 91:11-92:3, and he admitted that any of the policies he cited could – in practice – be totally ignored by students and faculty. *Id.* at 94:9-12. He also admitted to not knowing or necessarily even believing that all of the referenced schools' practices are in compliance with copyright law. *Id.* at 82:9-11.

Without some basic knowledge as to how these policies work in practice, Dr. Crews's ruminations offer no help to the factfinder. As Defendants themselves have argued, where "the proposed expert testimony is not grounded in the actual facts of the case, by definition that testimony is neither relevant nor helpful to the

fact finder." Defendants Motion to Exclude Debra J. Mariniello as an Expert, Docket No. 131, at 14 (citing *Browder v. GMC*, 5 F. Supp. 2d 1267, 1283 (M.D. Ala. 1998), for proposition that "[b]asing an 'expert' opinion on facts not in evidence is not helpful to the trier of fact"); *see also id.* at 16 ("[T]here is simply too great an analytical gap between the data and the opinion proffered.") (quoting *GE v. Joiner*, 522 U.S. 136 (1997)).

Given these glaring methodological omissions, all conceded by Dr. Crews, any notion that Dr. Crews's informal "survey" of copyright policies is representative of an industry standard approach to copyright compliance in the academic community is completely unfounded.

C. Evidence of Industry Practice Is Not Relevant to a Fair Use Determination

Even if Dr. Crews had shown that there was an industry standard approach to copyright compliance, as a matter of law that showing would not be relevant to Defendants' fair use defense. Thus, to the extent the Crews Reports attempt to validate GSU's policy by reference to the policies of other schools, the attempt is unavailing, as courts have squarely rejected the notion that industry custom has any bearing on a fair use determination. *See, e.g.*, *Maxtone-Graham v. Burtchaell*, 631 F. Supp. 1432, 1436 (S.D.N.Y.), aff'd, 803 F.2d 1253 (2d Cir. 1986) ("Since the doctrine of fair use is a legal doctrine having Constitutional implications, it cannot

be subject to definition or restriction as a result of any [] trade custom or practice, no matter how long continued."); *Meeropol v. Nizer,* 417 F. Supp. 1201, 1210 (S.D.N.Y. 1976), *reversed on other grounds*, 560 F.2d 1061 (2d Cir. 1977) ("Fair use is a legal question to be determined by the court not by alleged industry practice."); *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 719 F. Supp. 1551, 1561 (S.D. Fla. 1988), aff'd, 933 F.2d 952 (11th Cir. 1991) (alleged "standard industry practice" is "not relevant to the fair use defense").

How GSU's new copyright policy stacks up against those adopted by other schools thus has no bearing on the fair use analysis. For this reason alone, the portions of the Crews Reports that purport to survey third-party practice should be disregarded.

D. Dr. Crews's Other Anecdotal and Speculative Testimony Cannot Support any Conclusion Regarding Institutions' Experiences with the Permissions Process or Regarding the Economics or Licensing Incentives of the Coursepack Market

The balance of the non-legal portions of the Crews Reports are devoted to a number of conclusory assertions drawn from anecdoctal sources and from Dr. Crews's non-expert opinion. Courts reject as inadmissible expert testimony devoid of factual or analytical support and testimony based on speculation. 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE § 6264 (1997) (citing *Barefoot v. Estelle*, 463 U.S. 880, 903 (1983));

see also McClain v. Metabolife Int'l., Inc., 401 F.3d 1233, 1244 (11th Cir. 2005) (holding that an expert's opinions were insufficiently reliable where he drew speculative conclusions from "broad principles of pharmacology"). Thus, the portion of Dr. Crews's reports devoted to speculation should be rejected.

For example, the Crews Report cites instances in which educators at Northwestern University, Washington State University Vancouver, and the University of Colorado reported on attempts to obtain permission to copy and distribute certain materials electronically through an "electronic reserves" system. Crews Report at 25-27. Dr. Crews acknowledged that he knew nothing about the facts or circumstances reported on beyond what was contained in the cited articles; that he had conducted no independent studies or research of his own on the topics involved; and that he lacked the faintest notion of the representativeness of the experiences reported. In his words: "I can't tell you if these [anecdotes] are outliers statistically." Crews Dep. at 256:15-16. In his reports Dr. Crews nevertheless is quick to draw sweeping conclusions from this limited base of information and knowledge, such as that educational institutions routinely "face the choice of either removing the materials and losing the educational opportunity, or seeking permission and possibly incurring permission fees." Crews Report at

25-27; 47-48.[2] In the crucible of cross-examination, however, Dr. Crews repeatedly recanted, indicating instead that he "would not ask the Court" to draw any broad conclusions from such anecdotal reports. *See, e.g.*, Crews Dep. at 257:17-22. This pattern of unsupported testimony is plainly unreliable.

Dr. Crews admitted under oath to further such speculation in his Rebuttal Report concerning the respective economic incentives of copy shops and educational institutions to charge and collect permissions fees for use of what often is the same material. For example, he asserts without any support that educational libraries are "not administratively structured to charge and collect service fees" for electronic reserves usage such that the cost of a license could be shared among the students who use copyrighted material. Crews Rebuttal Report at 11 n.13. But he cites no relevant literature, statistical analysis, interview, or other data to validate this claim. And, he acknowledged at his deposition that he had no information as to whether GSU's library would be able to efficiently operate a system in which license fees were charged back to students. *See* Crews Dep. at 270:16-272:15. Indeed, he *agreed* with Plaintiffs' counsel that "[Y]ou really don't have any

[2] We note that the Cubbage article cited by Dr. Crews, *see* Crews Report at 26 nn.39-40, is from 2007, not 2003; the Austin & Taylor article, *id.* at n.43, is from 2003, not 2007.

opinion you can offer the court that's informed as to the feasibility of shifting the cost to students at Georgia State University." *Id.* at 273:16-20.[3]

CONCLUSION

For all of these reasons, pursuant to Federal Rule of Civil Procedure 37(c)(1), Plaintiffs respectfully request that the Court exclude in its entirety the expert testimony of Kenneth D. Crews.

This 13th day of April, 2010.

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[3] In fact, the deposition testimony of GSU employees suggested that GSU likely *would* be able to charge permissions fees to students through their student accounts, no differently than it does for services such as printing course materials on university printers. *See* Deposition of James Daniel Palmour, Docket No. 167, at 156:24-157:18.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that this document complies with the font and point selections set forth in Local Rule 5.1. This document was prepared in Times New Roman 14 point font.

/s/ John H. Rains IV
John H. Rains IV

CERTIFICATE OF SERVICE

I hereby certify that I have this day served **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE THE PUTATIVE EXPERT TESTIMONY OF KENNETH D. CREWS** by hand delivery to the following attorneys of record:

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This 13th day of April, 2010.

/s/John H. Rains IV
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