

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

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

Plaintiffs,

- v. -

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

Defendants.

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

**PLAINTIFFS' REPLY 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”) submit this reply memorandum in response to Defendants’ Opposition to Plaintiffs’ Second Motion To Exclude the Expert Report of Kenneth D. Crews, Dkt. No 219 (“Def. Mem.”).

PRELIMINARY STATEMENT

Defendants spend over twenty pages in their opposition brief attacking arguments Plaintiffs have not made, while failing squarely to address the fundamental shortcomings Plaintiffs’ *Daubert* motion identifies in the expert testimony of Dr. Kenneth Crews. Most notably, Defendants tout Dr. Crews’s expertise in fair use and “the field of copyright” – precisely the sort of legal expertise the Court previously indicated it will disregard – without providing any basis for finding him to be expert in the various non-legal matters he addresses in his reports or for finding his survey methodology to be reliable.

Dr. Crews’s credentials or experience in the broad subjects of “copyright and fair use compliance in the college and university setting,” Def. Mem. at 6, are not the issue here. Rather, Plaintiffs assert (i) that he lacks the requisite knowledge, skill, experience, training, or education to testify as an expert on subjects such as the economics of the coursepack market and the relative incentives of copy shops and academic institutions to license academic works; (ii)

that the methodology he employs (if any) in his survey of copyright policies is not sufficiently reliable; and (iii) that the substance of his testimony will not assist the Court to “understand the evidence or to determine a fact in issue,” as Federal Rule of Evidence 702 requires. Plaintiffs also assert that Dr. Crews’s inherent conflict of interest in opining on a copyright policy that was based on his own work further compromises his ability to provide the Court with unbiased expertise.

Rather than respond to the merits of these assertions, Defendants improperly characterize it as a motion for reconsideration of the Court’s September 3, 2009 ruling denying Plaintiffs’ motion to exclude Dr. Crews’s first report. This is not the case. This is a *Daubert* motion that seeks to exclude Dr. Crews as an expert and to exclude the remaining, non-legal portions of his reports based on the unreliability of his methodology. What is more, the present motion relies on significant admissions made by Dr. Crews in his deposition, which was conducted some three months after the Court’s September 3 ruling, and it is also directed to Dr. Crews’s rebuttal report, which was filed two months after that ruling.

For these and other reasons discussed below, Defendants have failed to meet their burden of establishing the admissibility of Dr. Crews’s testimony under Rule 702. *See McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002).

ARGUMENT

I. PLAINTIFFS' MOTION IS NOT INAPPROPRIATELY DUPLICATIVE OF THEIR PRIOR MOTION TO EXCLUDE

As a threshold matter, Plaintiffs' motion is not an improperly duplicative motion for reconsideration of the Court's September 3, 2009 order, as Defendants contend. *See* Def. Mem. at 3-5. Plaintiffs' prior motion to exclude Dr. Crews's first report was based principally on the fact that the report consists largely of improper legal advocacy. *See* Plaintiffs' Reply Memorandum of Law in Further Support of Motion to Exclude the Expert Report of Kenneth D. Crews, Dkt. No. 112, at 1-5. In response to that motion, the Court has already determined that it will not consider the legal argument in Dr. Crews's report. The present motion, by contrast, is a *Daubert* motion focused on the admissibility of the balance of Dr. Crews's "expert" testimony under Rule 702. Indeed, the prior motion expressly reserved the right to present a *Daubert* challenge to Dr. Crews's expert qualifications and to the reliability of his methodology. *See id.* at 4 n.1.

Moreover, the current motion is made in the wake of two developments subsequent to the Court's prior ruling: first, Dr. Crews's deposition, which was taken on December 10, 2009 (after the Court's September 3 order made the deposition necessary), and second, the filing of Dr. Crews's rebuttal report on November 2, 2009. Obviously, neither the deposition testimony nor the arguments

as to the rebuttal report “could have been presented in the previously-filed motion,” as Defendants suggest. Def. Mem. at 5. Thus, even if the Court were to regard the present motion as a motion for reconsideration, it would be appropriate because it is based on new evidence, which, as Defendants note, is a proper basis for seeking reconsideration. *See id.* at 4. To the extent arguments in the present motion overlap those made in Plaintiffs’ prior motion to exclude, they are informed by Dr. Crews’s deposition testimony and/or by other new evidence that strengthens Plaintiffs’ Rule 702 challenge.

As Plaintiffs have shown, Dr. Crews’s deposition testimony provides ample basis for the Court to revisit its prior conclusion as to the admissibility of his first report. The Court’s conclusion that Dr. Crews’s survey of copyright policies would potentially be “helpful” to the Court in determining facts and, if necessary, crafting an injunction, *see* Def. Mem. at 4 (quoting September 3 Order, Dkt. No. 121, at 4) was reached before Dr. Crews testified that:

- the copyright policies in the survey were assembled arbitrarily by his wife, who has no background in copyright law or in survey design and analysis and was not proffered as an expert, *see* Plaintiffs’ Memorandum of Law in Support of Motion To Exclude the Putative Expert Testimony of Kenneth D. Crews (“Pl. Mem.”) at 13-14;
- to determine whether a university is in compliance with copyright law, one needs to know more than just the facial policy, *see* Pl. Mem. at 12;

- he had no information as to copyright practices (as opposed to facial policies) at any of the schools in question, *see* Pl. Mem. at 16;
- the survey “does not answer [the] question” of whether GSU’s practices are lawful, *see* Pl. Mem. at 14; and
- the survey was only intended to show “the variety of approaches that were out there,” *see* Pl. Mem. at 16.

In addition, any conceivable utility of Dr. Crews’s summaries of the policies is diminished by the fact – elicited during his deposition – that his summaries omit provisions of the policies which reveal that the GSU policy takes a far broader view of fair use than do those of other schools. *See* Pl. Mem. at 14-15. In short, Defendants’ effort to avoid consideration of the merits of this motion should be rejected.

II. DEFENDANTS FAIL TO ESTABLISH DR. CREWS’S EXPERT QUALIFICATIONS TO OPINE ON FACTUAL MATTERS IN HIS REPORTS

Plaintiffs’ motion challenges Dr. Crews’s competence to offer expert testimony on several subjects addressed in his reports as to which he has neither training nor experience. *See* Pl. Mem. at 7-8. In response, Defendants assert that “Dr. Crews is a preeminent expert in the field of copyright and fair use compliance in the college and university setting.” Def. Mem. at 6; *see also id.* at 16 (asserting that Dr. Crews is qualified “for the central issues of copyright compliance and fair use”). Even assuming that to be true (which Plaintiffs do not concede), it does not

establish his expertise *as to the specific testimony Plaintiffs challenge*. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) (stating that issue for trial court was whether expert had sufficient specialized knowledge to assist fact finder “in deciding the particular issues in the case”); *Graff v. Baja Marine Corp.*, No. 2:06-CV-68-WCO, 2007 WL 6900363, at *7 (N.D. Ga. Dec. 21, 2007) (“Rampolla has an impressive educational and professional record, but plaintiffs have failed to demonstrate that he is qualified to opine about . . . the alleged ‘root cause’ of the gimbal housing’s failure.”); *Clarke v. Schofield*, 632 F. Supp. 2d 1350, 1357 (M.D. Ga. 2009) (“Because of his lack of experience on key issues, the Court has serious problems with Dr. Thompson testifying in this case . . .”).

Dr. Crews’s purported “expertise in the field of copyright,” Def. Mem. at 7, is irrelevant. As the Court correctly suggested in its September 3 order, the interpretation of copyright law is not a proper subject of expert testimony, and, to the extent it is addressed in Dr. Crews’s testimony, the Court will disregard it. See September 3, 2009 Order, Dkt. No. 121, at 4 (“The Court is capable of disregarding the portions of Dr. Crews’s report that impinge on its responsibility to determine and apply the law.”).

Plaintiffs instead challenge Dr. Crews’s “survey” of copyright policies at thirty-nine schools without him (or his wife) having employed any reliable method

of statistical analysis – shortcomings addressed in Section III below – as well as Dr. Crews’s lack of expertise and/or experience with respect to the following specific aspects of his reports: (i) his discussion of the economics of the coursepack market without any training or practical experience in economics; (ii) his observations concerning the relative incentives of copy shops and non-profit universities to license academic works without having done any research on the subject; (iii) his observations concerning the impact on Plaintiffs’ incentives of “open access” publishing without any expertise in the academic publishing business; and (iv) his conjectural comments as to the feasibility of GSU charging students for copies made via ERes and uLearn without having conducted any independent research on the subject. *See* Pl. Mem. at 7-8.

That Dr. Crews holds himself out as an expert on copyright compliance at universities does not qualify him to opine on distinct matters such as the economics of the coursepack market simply because they arise in a copyright case. *See Oliveira v. Bridgestone Americas Holding*, No. 1:06-CV-128-RLV, 2007 WL 1655842, at **3-4 (N.D. Ga. June 5, 2007) (holding that qualifications must relate to particular field in which expert testimony is offered). The cases on which Defendants rely demonstrate that the admissibility of expert testimony requires professional competence as to the subject matter of the proposed testimony, which

is not the case here with respect to Dr. Crews and the subjects identified in Plaintiffs' motion. In *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000), the court rejected the proposition that the expert needed to have particular academic credentials because the expert's calculation of the discounted present value of lost future earnings where the calculation fell "well within the competence of a CPA." Likewise in *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 801-02 (N.D. Ill. 2005), the court accepted that the challenged expert need not be a CPA to testify about damages because, among other qualifications, he had testified in thirty-two cases involving economic loss. *See also Floyd v. Hefner*, 556 F. Supp. 2d 617, 639 (S.D. Tex. 2008) (rejecting challenge to the qualifications of plaintiff's expert to opine on the fair market value or financial condition of an oil and gas company where his professional experience included "over 40 years of experience" in the industry); *TVT Records v. Island Def Jam Music Group*, 250 F. Supp. 2d 341, 351 (S.D.N.Y. 2003) (finding expert's accounting degree together with his "extensive experience within the music and entertainment industry" qualified him to render an opinion about the market performance of a music album). Unlike the experts in these cases, Dr. Crews lacks experience specifically related to the topics in his reports (identified above) that might overcome his lack of relevant formal training or other

credentials.¹

III. DEFENDANTS FAIL TO ESTABLISH THE RELIABILITY OF DR. CREWS'S SURVEY METHODOLOGY

In their opening brief, Plaintiffs exposed the conceded arbitrariness of Dr. Crews's survey of copyright policies and the anecdotal nature of the "evidence" he offers on other matters, such as the feasibility of educational institutions licensing academic works and collecting permissions fees from students. *See* Pl. Mem. at 13-21. Defendants fail adequately to respond.

As an initial matter, Dr. Crews's alleged "extensive research on the Copyright Policy and its implementation at GSU," Def. Mem. at 16, did not – as the word "implementation" might suggest – entail any investigation into how GSU's copyright policy is being applied by the professors charged with making the fair use determinations. *See* Pl. Mem. at 11-13. Among other crucial omissions, Dr. Crews apparently did not review any of the ERes reports. Indeed, he conceded that to make a determination as to copyright compliance one would "need to know more than just the facial policy that's in the policy manual or on a website,"

¹ The case law identified by Defendants to support Dr. Crews – and the observation that "Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness," Def. Mem. at 8-9 – applies far more comfortably to *Plaintiffs'* expert, Ms. Mariniello, who by virtue of her tenure at the Copyright Clearance Center is well qualified to provide the Court with expertise concerning the licensing market for academic works.

Deposition of Kenneth D. Crews, Dkt. No. 176 (“Crews Dep.”) at 95:16-96-8, yet he admitted that he *never looked beyond the policy*. See Pl. Mem. at 12.²

There are further methodological problems with Dr. Crews’s testimony to which Defendants have no adequate answer. Regarding Dr. Crews’s delegation of the selection of copyright policies at other schools to his wife, *see* Pl. Mem. at 13-14, Plaintiffs’ argument is not so much directed to the fact that Dr. Crews delegated such an assertedly important aspect of his report to an assistant as it is that his wife did not employ any kind of reliable statistical methodology in selecting the schools, was not qualified to do so, and was not given direction in *how* to do so by Dr. Crews. *See, e.g., United States v. Frazier*, 387 F.3d 1244, 1265 (11th Cir. 2004) (finding that proponent of expert failed to establish reliability of opinion as to probability of finding trace evidence in rape case). Pointing this out is hardly a “quibble.” Def. Mem. at 18. The randomness of the selection process precludes any potentially probative comparative insight into the merits of GSU’s policy, even assuming the relevance of such a comparison, which Plaintiffs do not concede. *See* Pl. Mem. at 17-18. Indeed, as noted, Dr. Crews

² Defendants’ attempt to blame *Plaintiffs* for the deficiencies in Dr. Crews’s factual investigation because they refused to stay the litigation is absurd on its face.

admitted that the survey did “not answer the question” of the legality of the practice at GSU. Pl. Mem. at 14 (quoting Crews Dep. at 97:22-98:6).

Defendants’ attempt to turn the survey’s haphazardness into a virtue, *see* Def. Mem. at 18, cannot overcome the objection that it remains an arbitrary sample of policies from schools of varying sizes that is completely unanalyzed in terms of its bearing (if any) on GSU’s policy (let alone its practices), and therefore is neither the product of specialized knowledge nor helpful to the fact finder (as we discuss below). Moreover, the omission from Dr. Crews’s summaries of provisions in the other policies that reflect a more restrictive approach to fair use than that taken by GSU, *see* Pl. Mem. at 14-15, further undercuts the reliability of the survey.³

IV. DEFENDANTS FAIL TO DEMONSTRATE THE NEED FOR EXPERT TESTIMONY AS TO READILY ACCESSIBLE COPYRIGHT POLICIES

Dr. Crews’s survey likewise fails to satisfy the third Rule 702 requirement: that the testimony will assist the fact finder. Defendants do not explain how an unscientific sampling of publicly available, readily comprehensible copyright

³ As for Plaintiffs’ challenge to the remainder of Dr. Crews’s reports as based on anecdote, speculation, and research conducted by others, *see* Pl. Mem. at 18-21, Defendants have no response and thus effectively concede the merit of Plaintiffs’ challenge.

policies will help the Court render a fair use determination regarding Defendants' conduct or why its presentation requires an expert witness. *See Frazier*, 387 F.3d at 1262 (“[E]xpert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person.”); Pl. Mem. at 6-7. Dr. Crews’s admittedly arbitrary “survey” – presented merely to show “the variety of approaches that [are] out there,” Crews Dep. at 79:23-24 (quoted in Pl. Mem. at 16) – in no way involves the “scientific, technical, or other specialized knowledge” that defines proper expert testimony under Rule 702.

The relevant inquiry under Rule 702 is not simply whether a proffered expert can offer information that is not otherwise in the record – “useful knowledge,” as Defendants put it, Def. Mem. at 8 – but whether he or she can offer expertise, or “specialized knowledge,” that will assist the fact finder. Here, Dr. Crews has merely padded the fact record with information – selective and incomplete at that – collected without any guiding principle to support the obvious, decidedly nonexpert, and unenlightening conclusion that colleges and universities have adopted a range of approaches to copyright compliance policies.

V. DEFENDANTS CANNOT REFUTE DR. CREWS’S INHERENT BIAS

Although, as shown above, Defendants fail to establish any of the three Rule 702 requirements with respect to Dr. Crews’s testimony, an additional factor

weighing against its admissibility is the inherent bias emanating from fact that the “fair use checklist” that is the centerpiece of the policy was based on Dr. Crews’s own prior work. *See* Pl. Mem. at 8-10.⁴ The conflict of interest, and hence the bias, is self-evident. It may well be that the widespread use of Dr. Crews’s checklist is a “source[] of pride” for him, Def. Mem. at 13, but that hardly rebuts the contention that he is not well situated to opine neutrally as an expert as to its substance. *See Virginia Vermiculite v. W.R. Grace & Co.*, 98 F. Supp. 2d 729, 740 (W.D. Va. 2000) (noting that “the court must be extra cautious when there is a potential for bias”).

As for the bias tending to arise from the prior consulting relationship between Dr. Crews and GSU during this lawsuit concerning the very copyright compliance on which Dr. Crews opines, *see* Pl. Mem. at 8-10, neither of the cases Defendants cite in response, *see* Def. Mem. at 13-14, involved Rule 702. Both *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-PJC, 2009 WL 1578937 (N.D. Okla. June 2, 2009), and *Western Resources, Inc. v. Union Pacific Railroad Co.*, No. 00-2043-CM, 2002 WL 181494 (D. Kan. Jan. 31, 2002), instead involved

⁴ Contrary to Defendants’ suggestion (*see* Def. Mem. at 12) Plaintiffs stated accurately that the checklist was *based on* Dr. Crews’s own work product (*see* Pl. Mem. at 10).

the obligation to produce documents that a testifying expert reviewed in a prior capacity as a consultant pursuant to Fed. R. Civ. P. 26.

Also inapt are the cases Defendants cite for the proposition that such bias goes only to credibility, not to admissibility. *See* Def. Mem. at 15-16. *United States v. Preciado-Gomez*, 529 F.2d 935 (9th Cir. 1976), and *United States v. Greschner*, 802 F.2d 373 (10th Cir. 1986), both involved claimed witness bias in criminal cases, not Rule 702 challenges. And unlike *Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980), where the court held it was proper for defendant to cross-examine the plaintiff's expert about fees earned for testifying in prior cases, the asserted bias here is of a more fundamental kind, as it shows him to be opining on the quality of his own advice.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court exclude the expert testimony of Kenneth D. Crews.

Respectfully submitted this 28th day of May, 2010.

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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 filed the foregoing **PLAINTIFFS'**
REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO
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