

**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 IN FURTHER SUPPORT
OF THEIR MOTION TO EXCLUDE TESTIMONY AND
EVIDENTIARY PROFFERS IN DECLARATIONS OF
GEORGIA STATE UNIVERSITY PROFESSORS**

Plaintiffs Cambridge University Press (“Cambridge”), Oxford University Press, Inc. (“Oxford”), and SAGE Publications, Inc. (“SAGE”) (collectively, “Plaintiffs”) submit this memorandum in reply to Defendants’ Response in Opposition to Plaintiffs’ Motion To Exclude Testimony and Evidentiary Proffers in Declarations of Georgia State University Professors (“Def. Mem.”) and in further support of their motion to exclude.

PRELIMINARY STATEMENT

Disregarding both the spirit and the letter of the Federal Rules of Civil Procedure, Defendants submitted new evidence – declarations from GSU professors discussing and appending completed “fair use checklists” – for the first time in conjunction with their summary judgment opposition papers, and only following an outright refusal to provide such checklists when previously requested. Defendants now marshal a series of meritless arguments in an attempt to excuse this untimely and improper disclosure, which clearly violated Rule 26(e) and warrants preclusion under Rule 37(c). No amount of obfuscation can hide the plain fact that this belated production consists of the very same checklists that Defendants refused to produce last Fall in response to Plaintiffs’ request to supplement their document production. Having taken the position in September 2009 that they had no “continuing obligation” to supplement their incomplete production under Rule 26(e), it is the height of discovery abuse for Defendants now selectively to produce that very material in support of their summary judgment filings. What is more, the rationale for Defendants’ earlier refusal to produce the requested checklists – that there had been no “material change” in ERes activity that would give rise to a duty to produce additional documents, *see* Plaintiffs’ Memorandum of Law in Support of Their Motion to Exclude Testimony

and Evidentiary Proffers in Declarations of Georgia State University Professors, Docket No. 207 (“Pl. Mem.”) at 5-7 – is the complete opposite of what now underlies the prejudicially late proffer of these very same checklists: the contention that they demonstrate a change of approach by GSU professors to distributing electronic course reading materials.

Defendants lamely attempt to excuse their failure timely to produce these documents on the *form* of Plaintiffs’ request for supplementation (and the lack of a motion to compel such supplementation); on the alleged lack of any surprise that Defendants would reverse course and introduce the checklists months after refusing to produce them; on Plaintiffs’ asserted ability to have conducted additional professor depositions during the discovery period; and on the astonishing argument that, had Plaintiffs only agreed to allow the massive infringement of their works to continue for a few more semesters, they could have had all the discovery they wished. None of these efforts at justification is meritorious, and none affects the propriety of the remedy of exclusion of these documents and the accompanying testimonial proffers pursuant to Rule 37(c)(1).

ARGUMENT

In a previous motion, Defendants themselves argued to the Court that the purpose of the Rule 37(c)(1) sanction is to provide “an incentive to timely disclose

all material evidence in support of their positions that they intend to use at any point during the course of the litigation, thus attacking the temptation some parties might feel to try to gain a tactical advantage at trial by exposing for the first time at that stage evidence that is favorable to their position.” Memorandum in Support of Defendants’ Motion for Summary Judgment, Docket No. 160 (“Def. S.J. Mem.”) at 19 (quoting 7 MOORE’S FEDERAL PRACTICE ¶ 37.60). Defendants further explained that parties who do not supplement incomplete productions are precluded from using that additional evidence. *Id.* at 17-19. Having chosen not to produce potentially probative evidence until the very last minute – their opposition brief on summary judgment – Defendants must themselves abide these well-settled principles.

I. DEFENDANTS WERE REQUIRED TO SUPPLEMENT THEIR INCOMPLETE PRODUCTION AND THEIR FAILURE TO DO SO CANNOT BE BLAMED ON THE FORM OF THE REQUEST

In a transparently inadequate effort to exalt form over substance, Defendants try to pin blame on the Plaintiffs for Defendants’ failure to supplement their production with the requested checklists. They argue that Plaintiffs’ email request for supplementation was somehow deficient and that Plaintiffs did not file a motion to compel production of the material when it was not produced. Def. Mem. at 6-7. These criticisms are unfounded and, in any event, cannot justify

Defendants' failure to fulfill their duty under Rule 26(e) to supplement their production in response to prior requests to which they did not originally object – a duty which exists regardless of the form or even existence of Plaintiffs' request for supplementation.

Rule 26(e) requires that a party “must supplement . . . its disclosure or response” in a “timely manner” if the party learns the disclosure is incomplete. Fed. R. Civ. P. 26(e). *See also* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2048 (2010). Courts strictly enforce the supplementation requirement, precluding the use of evidence that was not provided by supplementation. *See* WRIGHT, MILLER & MARCUS, *supra*, § 2049.1 (citing *ChemFree Corp. v. J. Walter, Inc.*, 250 F.R.D. 570 (N.D. Ga. 2007)). It has been observed that “the broader approach to supplementation embodied in Rule 26(e), coupled with the possibility of sanctions including the exclusion of evidence, should make follow-up efforts unnecessary.” *See id.* § 2049.1 (citing *AVX Corp. v. Cabot Corp.*, 251 F.R.D. 70 (D. Mass. 2008) (explaining that a party may not free itself of burden to fully comply with its duty to supplement by placing a heretofore recognized duty of repeated requests for information on its adversary)).

The recent case *Discrete Wireless, Inc. v. Coleman Technologies, Inc.*, No.

1:06-CV-0554-GET, 2009 WL 3334873 (N.D. Ga. Mar. 4, 2009), is illustrative.

There, the defendant filed a motion to exclude evidence produced after the close of discovery. Discrete Wireless argued in response that the evidence should not be excluded because defendant had not requested any supplementation. *Id.* at *5.

The court rejected that argument and excluded the evidence, finding that defendant's failure to specifically request supplementation did not provide "substantial justification" for Discrete Wireless' failure to comply with Rule 26(e). *Id.*

As *Discrete Wireless* makes clear, Plaintiffs were under no duty to request supplementation, so surely they cannot be faulted for not moving to compel production of the requested information or for any alleged imperfections in the form of their request. Rather, it was Defendants who had a duty to supplement their incomplete production with or without a reminder from the Plaintiffs.¹ If Defendants had an objection to the lack of clarity or to the burden involved in complying with Plaintiffs' document requests, that objection should have been

¹ Although it was not technically required, Plaintiffs of course did request that Defendants supplement their production in September 2009, asking for checklists and other documentation "reflecting ongoing implementation of the February 2009 policy" and requesting that Defendants supplement their prior production with "updated discovery" including, among other things, completed fair use checklists. Declaration of John H. Rains IV, Docket No. 208 ("Rains Decl.") at Ex. D (September 23, 2009 Rains email).

raised in response to the initial request, not used later to avoid complying with the mandates of Rule 26.

Furthermore, it is undisputed that the checklists were responsive to Plaintiffs' initial document production requests and that Defendants had in fact previously produced a handful of checklists without objection. *See* Pl. Mem. at 7 & n.1. Indeed, in objecting to the September 2009 request, Defendants contended that no supplementation was required. *See id.* at 6-7; Rains Decl., Ex. D at 1-2. In other words, although Defendants now focus on vagueness and burden grounds, it is clear both that Defendants recognized that Plaintiffs were merely seeking supplementation of a prior request, and that even if Plaintiffs had formulated the request in a way that Defendants found less vague or burdensome, Defendants still would not have produced the requested documents because they (wrongly) viewed supplementation as unnecessary.

Defendants try to suggest that they did supplement their production by producing "all requested ERes reports," Def. Mem. at 5 (emphasis omitted), but this suggestion is both misleading and irrelevant. Although Defendants did agree to produce one last ERes report some three weeks into the Fall 2009 semester, they explicitly denied that they had "a continuing obligation to supplement their production with this report or with any additional reports under Rule 26(e) of the

Federal Rules of Civil Procedure” going forward and noted that they “do not agree to the ongoing production of ERes reports.” Rains Decl., Ex. D at 2 (Swift email). In other words, Defendants refused to provide reports for the remainder of the Fall 2009 semester or for the Spring 2010 semester – *i.e.*, for the period of over six months until they decided to rely on and produce a Spring 2010 report to support their summary judgment briefing. If, as Defendants now claim, ERes reports subsequent to September 2009 show a material change in practice with respect to copyright compliance, then Defendants violated Rule 26(e) by failing to produce them in a timely manner.

II. DEFENDANTS’ FAILURE TO SUPPLEMENT THEIR PRODUCTION WAS NEITHER HARMLESS NOR JUSTIFIED

Defendants argue that their failure to comply with Rule 26 is somehow excused because Plaintiffs “knew that fair use checklists were part of the Policy, were being completed by professors in compliance with the Policy, and had evidence in the ERes reports that behaviors were, in aggregate, changing.” Def. Mem. at 14. This argument is contradicted by the position that Defendants took when they initially refused to produce the requested supplementation – that there had “not been a material change” in ERes activity since the production of ERes reports from earlier semesters. Rains Decl., Ex. D at 2. On the other hand, if what Defendants now contend is true – that practice at GSU is changing on an ongoing

basis – then Defendants should have supplemented their production as requested, as it concededly was incomplete and inaccurate.

Defendants also point out that the Spring 2010 checklists discussed in and appended to the Professor Declarations did not exist at the time of Plaintiffs' September request, so they could not have been produced. Def. Mem. at 7. As an initial matter, this fails to explain why checklists created in January were not produced until some three months later in April. Had they been produced promptly, Plaintiffs would have had the opportunity to address them in their affirmative summary judgment briefing. More important, Defendants' argument overlooks the larger issue: it is not just the particular checklists Defendants used in the Professor Declarations that Plaintiffs are concerned about, but also Defendants' categorical refusal to produce any additional checklists after the discovery period closed, including those from the Fall 2009 and Spring 2010 semesters, while at the same time arguing that copyright compliance at GSU improved during that time period.

Armed with a complete production, Plaintiffs could have analyzed whether the reformation in practice alleged in the Professor Declarations was widespread

(or existed at all).² Defendants’ decision to provide Plaintiffs with a few cherry-picked examples taken out of context, coupled with their refusal to provide Plaintiffs with an opportunity to examine “practice” across a broader spectrum of professors and time periods, cannot be written off as harmless or excused on the ground that Plaintiffs “should have known” the Defendants might spring the checklists on Plaintiffs during summary judgment briefing.

Finally, Defendants devote a significant portion of their memorandum to arguing that they never claimed that one to two professor depositions would be sufficient to provide a representative picture of professor use of electronic course reading material under the new copyright policy, or that if they did, Plaintiffs could not have relied on it to their detriment because Defendants meant to suggest that those depositions would be sufficient to describe professor activity under the previous GSU policy, not the new one. *See* Def. Mem. at 3-4. But these *post hoc* assertions simply cannot be squared with Defendants’ own unequivocal statement to the Court that, “[w]hile it may be true that Plaintiffs need to depose at least one

² Plaintiffs do not concede that the checklists at issue reflect acceptable copyright compliance. To the contrary, as explained in Plaintiffs’ summary judgment reply brief, they instead demonstrate the continued failure of the new GSU policy to ensure compliance with a reasonable conception of fair use even by the professors GSU holds out as exemplary of its supposedly reformed practices. *See* Plaintiffs’ Reply Memorandum of Law in Further Support of Their Motion for Summary Judgment at 23-24.

or two professors because of their roles in applying the new copyright policy at GSU, Defendants submit that a sample of far less than seven professors would be sufficient to obtain the desired discovery.” *See* Pl. Mem. at 4 (first emphasis in original). Defendants should be held accountable for their prior representations to this Court and opposing counsel.

III. DEFENDANTS’ FAILURE TO SUPPLEMENT THEIR PRODUCTION CANNOT BE BLAMED ON PLAINTIFFS’ REFUSAL TO STAY THE LITIGATION

Defendants’ final salvo is the remarkable contention that their discovery shortcomings are Plaintiffs’ fault because of Plaintiffs’ refusal to stay the litigation and monitor changes in compliance over the course of the following semesters. *See* Def. Mem. at 7-8. Stated differently, Defendants contend that Plaintiffs’ price for getting the discovery to which they were entitled and avoiding being ambushed with untimely discovery was to put a halt to this more than two-year-old litigation and allow the massive numbers of infringements of their copyrights to continue, semester after semester, in the hope that Defendants would gradually lessen the rate of those infringements. But copyright law does not provide a “grace period”

of the type Defendants would have preferred³ – and the ongoing evidence of semester-after-semester infringements of Plaintiffs’ works under the new policy makes manifest that such an undertaking by Plaintiffs would have been completely ill-advised.

CONCLUSION

For reasons discussed above and in Plaintiffs’ opening brief in support of this motion, Plaintiffs respectfully request that the Court strike Paragraphs 2-6 of the Declaration of Anne Kruger, Ph.D.; paragraphs 2, 4, and 5 of the Declaration of Marian Meyers, Ph.D.; paragraphs 2-4 of the Declaration of Patricia Dixon, Ph.D.; paragraphs 2, 4, and 5 and Exhibit A of the Declaration of Jennifer Esposito, Ph.D.; paragraphs 2, 5, and 6 and Exhibit A of the Declaration of Jodi Kaufmann, Ph.D.; and paragraphs 1-12, 14, and 23 of Defendants’ Statement of Additional Facts in Support of Defendants’ Motion for Summary following Defendants’ violation of Rule 26(e)(1).

³ By their effective plea for more time, Defendants actually reinforce the case for injunctive relief. The thrust of Defendants’ argument – that Plaintiffs should “allow professors time to use the Policy over several semesters,” Def. Mem. at 8 is an implicit acknowledgement that infringement at GSU has continued and will continue under the new policy for an indeterminate period of time. Basic precepts of copyright law do not require that Plaintiffs “allow” GSU professors a “chance” to change their behavior (while continuing to infringe); instead, the law demands, and provides remedies for, the prompt and immediate cessation of infringing behavior.

Respectfully submitted this 1st day of June, 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 IN FURTHER SUPPORT OF THEIR MOTION
TO EXCLUDE TESTIMONY AND EVIDENTIARY PROFFERS IN
DECLARATIONS OF GEORGIA STATE UNIVERSITY PROFESSORS
with the Clerk of Court using the CM/ECF filing system which will automatically
send e-mail notification of such filing to the following attorneys of record:

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This 1st day of June, 2010.

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