

FILED IN CHAMBERS

U.S.D.C. - Atlanta

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

SEP 21 2010

By: *A.M. Cawley*  
Deputy Clerk

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

Plaintiffs

v.

CIVIL ACTION NO.  
1:08-CV-1425-ODE

MARK P. BECKER, in his official capacity as President of Georgia State University; RISA PALM, in her official capacity as Senior Vice President for Academic Affairs and Provost of Georgia State University; J.L. ALBERT, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology; NANCY SEAMANS, in her official capacity as Dean of Libraries at Georgia State University; ROBERT F. HATCHER, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia; KENNETH R. BERNARD, JR., JAMES A BISHOP, FREDERICK E. COOPER, LARRY R. ELLIS, FELTON JENKINS, W. MANSFIELD JENNINGS, JR., JAMES R. JOLLY, DONALD M. LEEBERN, JR., WILLIAM NESMITH, JR., DOREEN STILES POITEVINT, WILLIS J. POTTS, JR., WANDA YANCEY RODWELL, KESSEL STELLING, JR., BENJAMIN J. TARBUTTON, III, RICHARD L. TUCKER, ALLAN VIGIL, and LARRY WALKER, in their official capacities as members of the Board of Regents of the University System of Georgia,

Defendants

ORDER

This copyright infringement action, brought under 17 U.S.C. §§ 101 et seq., is before the Court on several motions to exclude testimony. Specifically, Plaintiffs have filed a motion to exclude the expert testimony of Dr. Kenneth D. Crews [Doc. 202], Plaintiffs have also filed a motion to exclude the declarations of certain Georgia State University professors [Doc. 207], and Defendants have filed a motion to exclude the expert testimony of Debra J. Mariniello [Doc. 131]. Opposition and reply briefs have been filed as to all of these motions.

For the following reasons, Plaintiffs' motion to exclude Dr. Crews' testimony [Doc. 202] is DENIED; Plaintiffs' motion to exclude the declarations of the Georgia State University professors [Doc. 207] is DENIED; and Defendants' motion to exclude Mariniello's testimony [Doc. 131] is DENIED.

I. Background

Plaintiffs, publishers of academic works, brought this suit against Defendants, officials associated with Georgia State University ("GSU") and/or the University System of Georgia ("USG"), alleging copyright infringement pursuant to the Copyright Act, 17 U.S.C. §§ 101 et seq. Plaintiffs allege that Defendants infringed their copyrights by providing students access to copyrighted materials through electronic systems and the internet without obtaining permission from the copyright owner. Specifically, Plaintiffs contend that their copyrights were infringed when non-defendant GSU employees placed electronic copies of excerpts from books and other academic works, the rights

to which are owned by Plaintiffs, on GSU's electronic reserves system ("ERes") and electronic course management system ("uLearn"). Plaintiffs seek relief in the form of a declaration of copyright infringement, permanent prospective injunctive relief, and attorney's fees and costs. Plaintiffs do not seek monetary damages.

Defendants argue, however, that they cannot be held directly liable for this alleged infringement because none of them actually performed the alleged infringing activities, namely the scanning, copying, displaying and/or distributing of Plaintiffs' copyrighted works without permission. Further, they contend that they cannot be held indirectly liable as contributory or vicarious infringers.

In the evaluation of evidence gathered during discovery, Plaintiffs assert that the Court should exclude the expert testimony of Dr. Kenneth Crews, the director of the Copyright Advisory Office at Columbia University, because Dr. Crews is not qualified and is too biased. Plaintiffs also argue that the Court should exclude the testimony of several GSU professors because the testimony relies on purportedly material information that Defendants failed to disclose on a timely basis. Defendants contend that the Court should exclude the testimony of Debra Mariniello, along with certain portions of her report, because Plaintiffs' counsel allegedly drafted her expert report and because Mariniello failed to prove "market harm" with scientific rigor and misrepresents the contents of the Crews Report. Specific details as to each item of evidence contested is included within the individual analysis below.

## II. Analysis

### A. Dr. Kenneth Crews

In their motion to exclude the expert testimony of Dr. Kenneth Crews, Plaintiffs argue that 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" [Doc. 202-2 at 10]. Further, Plaintiffs contend that Dr. Crews' survey of copyright policies is not reliable or probative [Id. at 14].

Federal Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." FED. R. EVID. 702. Ultimately, the Court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999).

The Crews Report describes the role of electronic reserves in colleges and universities, including their development in recent years and the benefits they offer for higher education. It reviews copyright law and the fair use doctrine generally, and discusses how this law might apply to electronic reserves. The report contains an overview of model copyright policies and brief descriptions of example copyright policies regarding electronic

reserves from diverse colleges and universities across the country. Finally, the report contains a general description of common elements of an electronic reserves copyright policy and an "overview and evaluation" of USG's 2009 Copyright Policy.

This is Plaintiffs' second motion to exclude Dr. Crews' expert report under Rule 702. In denying their first motion, this Court held that Dr. Crews' "review of the history and development of university electronic reserves systems and . . . discussion of copyright policies at other universities[] . . . will be helpful to the Court in understanding the evidence presented, determining the facts, and crafting relief, if appropriate" [Order Denying Plaintiff's Motion to Exclude Dr. Crews' Expert Report, Doc. 121 at 4]. The Court also noted that since this case is not subject to a jury trial, there is no danger that a jury might give too much weight to expert testimony that includes legal conclusions [Id.].

Here, Plaintiffs have failed to show that Dr. Crews is unqualified to render the opinions in his report, that he is improperly biased, or that the information in his report is not reliable or probative. Dr. Crews is the director of the Copyright Advisory Office at Columbia University [Crews Expert Report, Doc. 104-2 at 3]. He has a Ph.D. from UCLA's Graduate School of Library and Informational Sciences and a J.D. from Washington University in St. Louis [Id.]. He wrote an award-winning dissertation on fair use policies at major research universities and has given numerous speeches, educated other members of the academic community, and testified before the U.S. Copyright Office about copyright issues in the educational work of colleges and

universities [Id. at 3-5]. These qualifications are more than sufficient to establish that Dr. Crews has useful knowledge and experience that will assist the Court in evaluating the issues in this case. In light of the level of Dr. Crews' experience in his field, the fact that he does not have a degree in statistics, economics, or computer science does not render his expert report unreliable. See Loeffel Steel Prods. Inc. v. Delta Brands, Inc., 387 F. Supp. 2d 794, 801-02 (N.D. Ill. 2005) (noting that an expert witness did not need to be a CPA in order to testify about economic damages). Dr. Crews' report is based on generalized survey data, which his extensive research experience in the area of copyright at educational institutions qualifies him to discuss. This Court is fully capable of evaluating Dr. Crews' conclusions in light of his specific areas of expertise and to accordingly give appropriate weight to his expert opinions.

Further, Plaintiffs have failed to show that Dr. Crews' report is unreliable due to bias. The fact that Dr. Crews first developed the original fair use checklist in the late 1990s and allows and encourages its use in educational copyright policies does not indicate that he is incapable of objectively evaluating GSU's current policy. The fact that the USG committee that adopted the current policy considered the Columbia University policy developed by Dr. Crews and modeled the USG Fair Use Checklist in part on Dr. Crews' checklist does not create a self-interest that would render Dr. Crews' report unreliable. On the contrary, these facts indicate that Dr. Crews has substantial experience in this area and is particularly qualified to give his opinion on the relative merits of the USG policy compared to that

of other educational institutions. To the extent that Dr. Crews' relationship with USG's current policy reflects on his credibility as a witness, Plaintiffs have failed to show how Dr. Crews' familiarity with the USG policy renders him improperly biased and this Court is capable of evaluating Dr. Crews' credibility in its consideration of the evidence he presents.

Accordingly, Plaintiffs' motion to exclude Dr. Crews' expert report is denied.

B. GSU Professors

In their motion to exclude the testimony and evidentiary proffers in declarations of GSU professors, Plaintiffs argue that "those portions of the Professor Declarations and accompanying exhibits that reference the checklists and any changes in thinking or practices resulting therefrom" should be excluded because their production violated Federal Rule of Civil Procedure 26(e)(1) [Doc. 207-2 at 10-11]. Plaintiffs argue that this evidence must be excluded because it relies on purportedly material information, namely completed fair use checklists, that Defendants failed to disclose on a timely basis.

Rule 26(e)(1) requires that a party supplement its discovery responses "if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Under Rule 37(c)(1), if a party fails to supplement its discovery responses, courts will preclude that party from introducing the undisclosed evidence; the party is "not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

Courts have identified five factors to guide the determination of whether a failure to disclose evidence is substantially justified or harmless:

(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

United States ex rel. Bane v. Breathe Easy Pulmonary Servs., Inc., No. 8:06-cv-40-T-33MAP, 2009 WL 92826, at \*3 (M.D. Fla. Jan. 14, 2009) (citation omitted).

The contested evidence is contained in five declarations from GSU professors identified in the First Amended Complaint as having distributed Plaintiff's copyrighted works without permission: Jodi Kaufmann, Marian Meyers, Jennifer Esposito, Patricia Dixon, and Ann Kruger. These declarations are in the record at Doc. 188. Each declaration describes the professor's experience filling out fair use checklists as part of the current Copyright Policy. The declarations of Professors Kaufmann and Esposito append completed checklists that were filled out in January 2010, at the beginning of the Spring 2010 semester. These five declarations were filed in conjunction with Defendants' opposition to Plaintiffs' motion for summary judgment on April 5, 2010.

The Court concludes that Plaintiffs have failed to show that the professor declarations must be excluded, in whole or in part. The declarations represent the professors' experience using ERes following the implementation of the 2009 Copyright Policy and did not exist until they were collected by Defendants in response to Plaintiffs' motion for summary judgment. The fact that two of the



declarations include checklists which were completed in January 2010 does not render them inadmissible. Indeed, it would be unreasonable to expect Defendants to supplement discovery every semester with all of the newly completed checklists from each of the professors at GSU. Moreover, Plaintiffs chose to depose only three professors at an early stage when two of the professors had never even used the checklists under the new policy; Plaintiffs could have waited to depose these witnesses until sufficient time had passed for them to become familiar with the current policy and actually use it. Plaintiffs cannot now claim unfair surprise that professors' opinions and practices regarding the policy have evolved as they have become familiar with it when it was foreseeable that this would occur, and when Plaintiffs made the strategic choice to build their case based on evidence obtained before the instructors had ample time to become adjusted to the current policy. The Court therefore denies Plaintiffs' motion to exclude the professors' declarations.

C. Debra Mariniello

Defendants argue that Debra Mariniello must be excluded as an expert because Plaintiffs' counsel allegedly drafted her expert report (hereinafter the "Mariniello Report"), and that certain portions of the report must be stricken because Mariniello failed to prove "market harm" with scientific rigor and because Mariniello misrepresents the contents of the Crews Report.

As to Defendants' first argument, the fact that Plaintiffs' counsel prepared the first draft of the Mariniello Report does not render the report inadmissible. See United States v. Kalymon, 541 F.3d 624, 638 (6th Cir. 2008) (stating that "[a] party's attorney

can reduce an expert's oral opinion to writing so long as the report reflects the actual views of the expert").<sup>1</sup> The record contains evidence showing counsel consulted with Mariniello prior to drafting the report and that Mariniello edited and produced several versions of the report subsequent to the first draft. Moreover, Defendants have had the opportunity to depose Mariniello and thereby explore whether the opinions set forth in her report were her own. Defendants have not pointed to any specific portion of the Mariniello Report that they allege cannot be attributed to Mariniello's own thoughts and opinions.

As to Defendants' arguments that portions of the Mariniello Report relating to harm to the revenue stream and relating to the Crews Report must be excluded, the Court concludes that such exclusions are unnecessary because the Court is well-situated to evaluate Mariniello's conclusions in light of her specific area of expertise and to accordingly give appropriate weight to her expert opinions. The Court therefore denies the Defendants' motion to exclude Debra Mariniello's testimony.

### III. Conclusion

For the reasons stated above, Plaintiffs' motion to exclude Dr. Crews' testimony [Doc. 202] is DENIED; Plaintiffs' motion to exclude the declarations of the Georgia State University professors [Doc. 207] is DENIED; and Defendants' motion to exclude Mariniello's testimony [Doc. 131] is DENIED.

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<sup>1</sup>It is appropriate, however, to scrutinize the report more closely.

SO ORDERED, this 21 day of September, 2010.

  
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ORINDA D. EVANS  
UNITED STATES DISTRICT JUDGE