

**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 FOR PARTIAL RECONSIDERATION**

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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 to Plaintiffs’ Motion for Partial Reconsideration and Supporting Memorandum of Law (Def. Mem.) and in further support of their motion for partial reconsideration.

PRELIMINARY STATEMENT

Part I of Plaintiffs’ motion for partial reconsideration demonstrated that the Court clearly erred in holding in its September 30, 2010 Order (“Order”) that Defendants could not be held directly liable for copyright infringement committed by employees of Georgia State University (GSU) under the doctrine of respondeat superior.¹ September 30, 2010 Order, Dkt. # 235 (“Order”) at 18. Contrary to Defendants’ mischaracterization of the motion, Plaintiffs are not asking the Court to “consider new legal theories.” Rather, the Court’s rejection of the direct infringement claims presented in their summary judgment motion, and its failure even to address Plaintiffs’ *Ex parte Young* argument, was clearly erroneous, which is one of the recognized grounds for reconsideration. Far from there being “no reason” to correct this error, as Defendants maintain, it should be

¹ Part II of the motion is no longer at issue.

corrected so that Plaintiffs are not at trial unnecessarily required to prove liability under a secondary liability theory, contrary to settled law.

Defendants' effort to read the doctrine of respondeat superior out of copyright law has no merit. Defendants rely largely on inapposite civil rights cases arising under Title VII and Section 1983 that are governed by a different statutory scheme and have no bearing on the question of Defendants' direct liability under respondeat superior and *Ex parte Young* for acts of unauthorized copying and distribution by GSU employees – acts the Court found in its summary judgment ruling were done within the scope of their employment and subject to Defendants' supervisory authority.

Part I of Plaintiffs' motion for partial reconsideration should be granted.

ARGUMENT

I. PLAINTIFFS HAVE DEMONSTRATED CLEAR ERROR SUFFICIENT TO WARRANT RECONSIDERATION

Plaintiffs' opening memorandum established what Defendants acknowledge to be one of the recognized grounds for granting reconsideration, namely the need to correct a clear error of fact or law. *See* Plaintiffs' Motion for Partial Reconsideration and Supporting Memorandum of Law, Dkt. # 237 ("Pl. Mem.") at 4-18; Defendants' Response to Plaintiffs' Motion for Partial Reconsideration and Supporting Memorandum of Law, Dkt. # 241 ("Def. Mem.")

at 4. Specifically, Plaintiffs discussed the argument advanced in their summary judgment motion that Defendants can be held directly liable for copyright infringement committed by GSU employees within the scope of their employment under the doctrines of respondeat superior and *Ex parte Young* without having to establish the elements of vicarious or contributory infringement, and they explained why the Court clearly erred in holding otherwise. *See* Pl. Mem. at 4-18.

Defendants, in their opposition, suggest that “ask[ing] the court to rethink” a legal holding is per se an insufficient basis for reconsideration. *See* Def. Mem. at 5 (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). Defendants’ position cannot be correct; identifying a clear error of law and asking the Court to correct, i.e., reconsider, it necessarily involves “asking the court to rethink” its prior ruling. The determinative factor is the nature of the claimed error; when it is “clear” – as it is here with respect to the Court’s direct infringement analysis – and where the movant has “articulate[d] a persuasive reason for the court to depart from its prior ruling,” *Preserve Endangered Areas of Cobb’s History, Inc. v. U.S. Army Corps of Engineers*, 916 F. Supp. 1557, 1560-61 (N.D. Ga. 1995), reconsideration is appropriate.

Defendants mischaracterize Plaintiffs’ motion as offering a new legal theory that could have been raised earlier. *See* Def. Mem. at 5-6. To the contrary, the motion identifies two related legal doctrines that were squarely presented in Plaintiffs’ summary judgment motion – respondeat superior and *Ex parte Young* – the first of which the Court analyzed incorrectly, and the second of which the Court did not address at all.² The only new aspect of Plaintiffs’ motion is added explanation of the previously asserted theories of Plaintiffs’ direct infringement claims, aimed at persuading the Court that its rejection of those claims in its September 30 ruling was clearly erroneous.

In short, the response to Defendants’ statement that “Plaintiffs could have raised all such arguments regarding direct infringement during summary judgment briefing,” (Def. Mem. at 7), is “They did.”

Defendants also claim incorrectly that there is no valid reason for reconsideration. *See* Def. Mem. at 6. The reason is both obvious and important: although the Court held that Plaintiffs can proceed under a contributory infringement theory (and Plaintiffs believe they will prevail under that theory), the contributory infringement doctrine contains elements that are not required for

² Thus, Plaintiffs are not asking the Court to “rethink” its analysis and “change its mind” (Def. Mem. at 6) as to that argument.

a direct infringement claim. Rather, under *Ex parte Young*, the stipulated facts as to Defendants' responsibility for the ERes system and the facts as to the unauthorized copying and distribution of Plaintiffs' works by GSU employees – which, the Court has found, fell within the scope of their employment, (Order at 18) – should suffice to establish Defendants' liability.

II. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING OF CLEAR ERROR

On the merits, Defendants' effort to redefine respondeat superior as a doctrine of secondary infringement liability is wrong. Defendants begin by arguing that a government official can only be held liable for acts of “constitutional deprivation” in which he is personally involved, (Def. Mem. at 9) – a discussion that draws upon an inapposite line of Section 1983 cases. *See* Def. Mem. at 8-11.³ As Defendants have explained elsewhere, Section 1983 actions involve “constitutional torts committed by a governmental employee exercising

³ Citing *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983); *Kline v. North Tex. State Univ.*, 782 F.2d 1229, 1234 (5th Cir. 1986); *Reeves v. Thigpen*, 879 F. Supp. 1153, 1178 (M.D. Ala. 1995); *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987); *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987); *Bowen v. Watkins*, 669 F.2d 979, 988 (5th Cir. 1982); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989); *Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989); *Howard v. Adkison*, 887 F.2d 134, 137-38 (8th Cir. 1989); *Watson v. Interstate Fire & Cas. Co.*, 611 F.2d 120, 123 (5th Cir. 1980); *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

discretionary powers so that constitutional rights personal to the plaintiff are violated as a result.” *See* Defendants’ Memorandum in Support of Their Motion to Dismiss Under Rules 12(b)(1) and 12(c), Dkt. # 239 at 17. Plaintiffs’ theory of direct copyright infringement liability in this action is different: it is directed at the officials responsible for the electronic course reading systems at GSU, and it relies on Eleventh Circuit authority for the proposition that official-capacity defendants are liable for infringement committed by employees for which they are responsible – without direct involvement by the defendants – under the doctrine of *Ex parte Young*. This theory is consistent with respondeat superior and is applicable specifically to officials of state institutions. *See* Pl. Mem. at 12-16; Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment, Dkt. # 185 at 33-39. Section 1983 cases are irrelevant.

Defendants go on to misconstrue the cases that Plaintiffs cite for the proposition that employers in copyright cases are routinely held directly liable under respondeat superior for the infringing acts of their employees. *See* Def. Mem. at 11-13. Defendants note correctly that the court in *Shapiro Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963), “created a two-part test for determining vicarious liability” which, the court observed, was “an outgrowth of the agency principles of respondeat superior.” Def. Mem. at 11. But the

implication Defendants draw from this – that *Shapiro* defined respondeat superior as vicarious liability – is incorrect. As Plaintiffs have explained, *Shapiro* extended respondeat superior liability to non-employment relationships *without affecting the traditional agency theory of respondeat superior in the employment context*. See Pl. Mem. at 11.

Defendants also note that the court in *Sygma Photo News, Inc. v. High Society Magazine, Inc.*, 596 F. Supp. 28 (S.D.N.Y. 1984), *aff'd*, 778 F.2d 89 (2d Cir. 1985), cited “‘principles of contributory infringement and respondeat superior’ *rather than* direct liability,” Def. Mem. at 12 (quoting *Sygma*, 596 F. Supp. at 33), but Defendants’ suggestions that (i) contributory infringement is a form of respondeat superior and (ii) there is a distinction between respondeat superior and direct liability are both wrong.

Putting aside the illogic of contending that respondeat superior is a form of both vicarious (*Shapiro*) and contributory (*Sygma*) liability, the reason the district court in *Sygma* referred to both contributory infringement and respondeat superior was because it was considering the responsibility of the defendant publisher Drake for the infringing actions of its employees under respondeat superior as well as Drake’s liability as a contributory infringer in relation to a separate entity, Dorjam, that actually published the magazine in which the infringing photo

appeared. That the court did not intend to draw a distinction between respondeat superior and direct infringement is clear from its quotation from *Shapiro* of the principle that “the normal agency rule of respondeat superior applies to copyright infringement by a servant within the scope of his employment,” *Sygma*, 596 F. Supp. at 33 (quoting *Shapiro*, 316 F.2d at 307), and its factual finding that employees of Drake undertook the acts that led to infringement “within the scope of their employment and under the supervision of Drake.” *Id.* The court did not indicate that any further showing was required to establish Drake’s legal responsibility for its employees’ conduct.

Defendants assert that in *Peter Letterese & Associates Inc. v. World Institute of Scientology Enterprises, International*, 533 F.3d 1287 (11th Cir. 2008), the court did not specifically conclude that the defendant organizations were directly liable for the infringement by their employees, focusing instead on the issues of laches and fair use. Def. Mem. at 12. The reason for this is that the defendant organizations had already admitted that portions of plaintiff’s work were copied (presumably by employees). Moreover, the fact that the court did not engage in, or even allude to, a secondary infringement analysis is Plaintiffs’ point: *Letterese* is a typical case in which the liability of an entity for the infringing acts of its employees is so uncontroversial as to be a non-issue.

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985), is another example of employees’ conduct being attributed to the employer by operation of law. Defendants insist that “the publication was liable for its *own* publication of the copyrighted work,” rather than the “direct infringement by the employee editor,” (Def. Mem. at 12-13 (emphasis added)), but it is hard to fathom what that means. The Court described how the editor of the defendant magazine selected verbatim quotes of copyrighted expression and hastily put together the infringing news story from the unpublished manuscript – before going on to find the *Nation* magazine (directly) liable for the use of verbatim excerpts from the unpublished manuscript, which it found was not a fair use. *See Harper & Row Pub. Inc.*, 471 U.S. at 543, 565. Under Defendants’ theory, *Harper & Row* should have been a vicarious or contributory infringement case, but it was not. Finally, Defendants’ discussion of *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987) – a Title VII case – fails to justify the Court’s reliance on that decision. According to Defendants the case stands for the proposition that respondeat superior liability only arises when the employer can be shown to have known about harassment and done nothing. *See* Def. Mem. at 13-14. Defendants therefore acknowledge the inapposite setting in which *Sparks* arose. As Plaintiffs have explained, Title VII discrimination claims are governed by a statute that

defines an “employer” (a definition that includes “agents”), such that where an alleged harasser fits the statutory definition, employers are directly liable under the statute, including for actions of their agents, and respondeat superior is irrelevant. *See* Pl. Mem. at 9 n.3. As the cases Defendants cite make demonstrate, Title VII cases address respondeat superior only in circumstances where the alleged harasser does *not* fit the statutory definition of “employer” (e.g., a plaintiff’s co-worker or supervisor). *See* Def. Mem. at 13-14 (citing *Sparks; Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988); *Cabaniss v. Coosa Valley Med. Ctr.*, No. 93-PT-2710-E, 1995 WL 241937, at *22 (N.D. Ala. Mar. 20, 1995); *Sullivan v. Lake Region Yacht & Country Club, Inc.*, 996 F. Supp. 1463, 1465 (M.D. Fla. 1998)). *Sparks* thus is not on point.

CONCLUSION

For the reasons discussed above and in Plaintiffs’ opening brief, the Court should grant Part I of Plaintiffs’ motion for partial reconsideration and reinstate Count One of Plaintiffs’ Complaint, which alleges that Defendants are directly liable for copyright infringement committed by employees of GSU, and allow that claim to proceed to trial.

Respectfully submitted this 16th day of November, 2010.

/s/ John H. Rains IV
Edward B. Krugman
krugman@bmelaw.com
Georgia Bar No. 429927
John H. Rains IV
rains@bmelaw.com
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 (*pro hac vice*)
Randi Singer (*pro hac vice*)
Jonathan Bloom (*pro hac vice*)
Todd D. Larson (*pro hac vice*)

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Plaintiffs

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
FOR PARTIAL RECONSIDERATION** 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:

Anthony B. Askew, Esq.
Stephen M. Schaezel, Esq.
Kristen A. Swift, Esq.
C. Suzanne Johnson, Esq.
King & Spalding
1180 Peachtree Street
Atlanta, Georgia 30309

Kristina M. Quicker, Esq.
BALLARD SPAHR, LLP
999 Peachtree Street, Suite 1000
Atlanta, GA 30309

Mary Jo Volkert, Esq.
Assistant S. Attorney General
40 Capitol Square
Atlanta, Georgia 30334

This 16th day of November, 2010.

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