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

MOTION FOR EARLY PRETRIAL CONFERENCE AND MEMORANDUM IN SUPPORT

Plaintiffs Cambridge University Press, Oxford University Press, Inc., and SAGE Publications, Inc. (collectively, "Plaintiffs") respectfully request an early pretrial conference to ascertain the Court's preferred approach to the presentation of GSU professor witnesses at trial.

BACKGROUND AND PROCEDURAL HISTORY

In its March 3, 2011 Order, the Court directed the parties to jointly submit, by March 15, 2011, a list of all alleged infringements for the 2009 Maymester, Summer 2009 term, and Fall 2009 terms at GSU (the "Alleged

Infringement List") and further directed the parties to file a Pre-Trial Order by April 29, 2011. Following the filing of the March 15 submission, which listed ninety-nine allegations of infringement of works owned or controlled by Plaintiffs across the academic terms chosen by the Court, Plaintiffs have attempted unsuccessfully to persuade Defendants to agree to a streamlined trial presentation that would involve calling as witnesses a modest number of GSU professors identified on the Alleged Infringement List, with the understanding that the conduct of these professors would be deemed representative of that of the GSU faculty as a whole for purposes of the Court's resolution of Plaintiffs' claims. *See generally* Declaration of R. Bruce Rich, dated April 4, 2011 ("Rich Decl."), attached hereto as Exhibit 1.

This approach is consistent with the position repeatedly taken by our adversaries in seeking to limit the number of professor depositions during discovery: that the testimony of a small number of professors would be representative of the practices of the faculty as a whole, such that more than a couple of depositions was unnecessary. Defendants thus argued that Plaintiffs had not explained why they needed the depositions of "***multiple*** professors . . . There is clear overlap among these witnesses, making their testimony unreasonably cumulative and duplicative." Docket No. 88. at 11 (emphasis in

original). Defendants argued that seeking to depose even seven professors from GSU was

> a number well beyond what is necessary for this case. The professors noticed by Plaintiffs use GSU's ERes and uLearn systems in similar fashions and thus are likely to provide similar testimony regarding their use of GSU's online systems. While it may be true that Plaintiffs need to depose at least *one 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.

Id. at 12 (internal citations omitted and emphasis added).

At the November 5, 2010 scheduling conference, the Court stated that it planned to leave it to the parties to work out the structure of the trial, but commented "I don't know how helpful individual professor testimony is going to be," (November 5, 2010 Hearing Tr. at 19) and observed that it "wouldn't be too happy to hear from 48 or 49 professors, particularly if they're all going to be saying the same thing." *Id.* at 23.

Plaintiffs' counsel raised its streamlined approach in a call with Defendants' counsel on March 23, 2011, (*see* Rich Decl. ¶ 3), and suggested that the parties stipulate that the testimony of a limited number of GSU professors would be deemed representative so that the trial would properly focus on the gravamen of Plaintiffs' claims – the pattern and practice of

unauthorized copying at GSU – rather than on each of the alleged infringements on a work-by-work basis (as might be appropriate in a damages case).

On March 29, 2011, Defendants' counsel informed Plaintiffs' counsel that they did not agree to Plaintiffs' suggested streamlining plan and that they intended instead to call every professor on the Alleged Infringement List (twenty-nine professors by Defendants' count; thirty-three by our count) to testify at trial. Rich Decl. ¶ 6.

On the morning of April 1, 2011, Plaintiffs' counsel told Defendants' counsel that in light of the implications of the parties' divergent positions for the length and conduct of the trial as well as for each side's trial preparation (in particular, the possibility that Plaintiffs would need to depose as many as twenty or more professors in the short time remaining before trial – which counsel for Defendants has only belatedly offered), Plaintiffs wished to seek an immediate conference with the Court to enlist the Court's assistance in determining how to structure the trial. Plaintiffs invited Defendants to join a motion seeking such a conference. *Id.* ¶ 7.

On the afternoon of April 1, 2011, Defendants' counsel responded that Defendants would not join such a motion. *Id.* ¶ 8.

ARGUMENT

The trial of this matter should be structured in the most appropriate and efficient manner possible. There is no need for the Court to hear from thirty-three professors whose testimony is highly likely to be cumulative and thus wasteful of the Court's and the parties' time. Defendants themselves consistently argued at various intervals during this case for some reasonable limitation; indeed, in opposing Plaintiff's request for more than four professor depositions during the discovery period, Defendants acknowledged that: "There is clear overlap among these witnesses, making their testimony unreasonably cumulative and duplicative." Docket No. 88 at 11. As the Court recognized after discovery was completed, it "wouldn't be too happy to hear from 48 or 49 professors, particularly if they're all going to be saying the same thing." November 5, 2010 Hearing Tr. at 23.

Review of the professor deposition testimony to date and of the fair use checklists produced by Defendants does in fact reveal a clear and consistent pattern of deficient copyright compliance practices under GSU's new policy. Defendants' prediction that because professors "use GSU's ERes and uLearn systems in similar fashions" they were "likely to provide similar testimony

regarding their use of GSU's online systems" (Docket No. 88. at 12) proved to be correct.

Such repetitive testimony at trial from more than two dozen professors would far exceed what is necessary to demonstrate (i) the nature and extent of the unauthorized copying of Plaintiffs' works at GSU and (ii) the details of the policy that have allowed such copying to occur. Plaintiffs cannot conceive that, in order to ascertain whether such unlawful pattern and practice warranting injunctive relief has been proven, the Court will want to hear from as many as thirty-three professors.

Having resisted Plaintiffs' attempts to take more than four professor depositions, and having only reluctantly agreed to allow eight professor depositions, Defendants have now expressed an intention to adduce testimony from every professor whose ERes postings appear on the Alleged Infringement List. The introduction of needlessly cumulative testimony from each of these professors would come at a considerable cost in terms of judicial efficiency. It also would necessitate Plaintiffs' taking of as many as twenty or more depositions prior to trial (something the Defendants have agreed only now to allow), in addition to all the other trial preparation, and it could easily add

weeks to the length of a trial that Plaintiffs estimate would otherwise take two weeks.

There would be no prejudice to Defendants if the Court were to hear from an appropriately-sized sample of representative professors. Plaintiffs are not seeking damages for the infringement of particular works but, rather, solely prospective injunctive relief that will bring copyright practices at GSU into line with fair-use principles – a remedy that is routinely granted based upon a limited sample of representative examples of infringement. *See, e.g., Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994) (granting relief based on the copying from one representative journal by one representative employee); *Pac. & S. Co v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984) (rejecting defendant's argument that injunction could not sweep more broadly than the single work named in the suit and upholding court's authority to issue an injunction addressing all plaintiff works, including "unregistered works" and "works that have not been created"); *Pac. & S. Co. v. Duncan*, 618 F. Supp. 469, 471 (N.D. Ga. 1985) (Evans, J.) (subsequently enjoining the copying of any of the plaintiff's broadcast news programs); *CNN v. Video Monitoring Servs. of Am.*, 949 F.2d 378 (11th Cir. 1991) (vacating panel decision limiting injunction to single infringing example); *CNN v. Video Monitoring Servs. of*

Am., 959 F.2d 188 (11th Cir. 1992) (allowing reinstated injunction covering all plaintiff newscasts); *Sony BMG Music Entm't v. Villarreal*, No. 5:06-CV-323(CAR), 2007 U.S. Dist. LEXIS 883, *10 (M.D. Ga. Jan. 5, 2007) (granting injunction "barring Defendant from infringing upon all of Plaintiffs' copyrighted recordings, and not just those eight recordings listed herein"); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) (granting relief based on twelve alleged instances of infringement).[1]

As the gravamen of Plaintiffs' claims involves the systematic violation of their copyright rights arising from a pattern and practice of widespread unauthorized copying at GSU in a manner inconsistent with fair use – conduct rooted in a flawed copyright compliance policy – there is no need for Defendants to undertake a painstaking work-by-work, professor-by-professor examination at trial. Allowing this trial to become essentially ninety-nine mini-trials would not only unnecessarily prolong the proceedings, it would risk losing the forest (the cumulative pattern and practice of unauthorized copying, display, and distribution of academic books at GSU) for the trees (whether each specific ERes posting on the Alleged Infringement List is or is not fair use).

[1] Plaintiffs discussed these precedents in more detail at pp. 17-22 of their Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Docket No. 185.

Plaintiffs believe instead that the testimony of six to ten professors (with each side identifying three to five as witnesses) would allow the Court to accurately and efficiently ascertain the legality of GSU's practices.

Plaintiffs' desire to avoid a prolonged work-by-work examination at trial or, at a minimum, to be able to prepare adequately for it should the Court favor Defendants' proposal, motivates Plaintiffs to seek a pretrial conference at the Court's early convenience to address the issues raised in this motion.

CONCLUSION

For the foregoing reasons, Plaintiffs request a conference with the Court at an early date to discuss the most efficient means of structuring the trial.

Respectfully submitted this 4th day of April, 2011.

/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 **MOTION FOR EARLY PRETRIAL CONFERENCE WITH MEMORANDUM IN SUPPORT** 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. Schaetzel, 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 4th day of April, 2011.

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