

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

CAMBRIDGE UNIVERSITY PRESS,
et al.,

Plaintiffs,

-v-

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

Defendants.

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

**DEFENDANTS' MOTION IN LIMINE TO EXCLUDE IRRELEVANT
EVIDENCE IN ACCORDANCE WITH ORDER OF SEPTEMBER 30, 2010,
WITH INCORPORATED MEMORANDUM OF LAW**

Defendants, pursuant to this Court's rulings on the scope of activities relevant to Plaintiffs' claims and Federal Rules of Evidence 401 and 402, move this Court to exclude all evidence regarding the acts of Defendants, Defendants' employees, independent contractors working for Defendants, and Defendants' predecessors that do not fall within the scope of relevant uses of published works identified by this Court in its September 30, 2010 summary judgment order (the "2010 Summary Judgment Order") or subsequent rulings dated November 5, 2010, and March 3, 2011. In particular, Defendants move to have excluded evidence

related to allegations of infringing use of published works in conjunction with teaching or research activities (a) in semesters outside of the May 2009 through December 2009 time frame, (b) in courses or regarding works not identified in Plaintiffs' August 20, 2010 filing (Dkt. 228) or the parties' joint March 15, 2011 filing (Dkt. 266), and (c) regarding works to which no Plaintiff has any relevant copyright.

BACKGROUND

This is a copyright infringement case brought under 17 U.S.C. §§ 101 et seq. by three publishing houses against officials of the University System of Georgia and Georgia State University. Plaintiffs allege Defendants are responsible for infringement of their copyrighted works. In particular, Plaintiffs complain about instructors' practice of using electronic systems to reproduce and distribute excerpts from copyrighted works for academic use by Georgia State University students.

In the 2010 Summary Judgment Order, this Court held that "in order to show that Defendants are responsible for the copyright infringements alleged in this case, Plaintiffs . . . must put forth evidence of a sufficient number of instances of infringement of Plaintiffs' copyrights to show . . . ongoing and continuous misuse." (Sept. 30, 2010 Or., Dkt. 235 at 30.) This Court held that in making this

showing (and in Defendants' making their showings that the alleged uses amount to fair uses), "[b]oth sides will be limited to the list of claimed infringements produced in response to the Court's August 11, 2010 and August 12, 2010 orders."

(Id.) The August orders required Plaintiffs to file with the Court as claimed infringements only alleged uses of works (i) the copyright for which is owned by one of the Plaintiffs and (ii) that occurred during one or more of the three semesters immediately following adoption of the 2009 Copyright Policy: Maymester 2009, Summer 2009, and Fall 2009. (Dkt. 226; Dkt. 227.) In response, Plaintiffs enumerated approximately 126 uses of works purportedly owned or controlled by them across the three semesters. (Dkt. 228.)

On November 5, 2010, and March 3, 2011, this Court again indicated that Plaintiffs' infringement evidence would be limited to claimed infringements from the 2009 Maymester, Summer 2009, and Fall 2009 terms. (Dkt. 265 at 1-2; Dkt. 240 at 3.) Therein, the Court ordered that the parties jointly develop "an accurate and complete list of all alleged infringements from the 2009 Maymester, Summer 2009 term, and Fall 2009 term." (Dkt. 265 at 1; Dkt. 240 at 3.) In response, the parties jointly filed on March 15, 2011, a list of approximately 99 alleged infringements during the three relevant semesters. (Dkt. 266.)

Contrary to this Court's September 30, 2010 ruling, and in contrast to the parties' joint filing on March 15, 2011, however, Plaintiffs have indicated that they intend to introduce at trial evidence of uses by Georgia State University employees or contractors not included in the August filings or March list of alleged infringements. For example, Plaintiffs' proposed exhibit list includes purported evidence of use of published works as far back as 2006. (Pls.' Ex. List, attached hereto as Exhibit A, at 154-181, 184, 190-197, 329-336, 488-491, 507, 776-781, 803-810, 813-818, 836-851, 869-876, 889, 917 (referencing works used prior to adoption of the 2009 Copyright Policy; for example, *White Supremacy* used in 2006).) Plaintiffs' proposed stipulated facts similarly include statements regarding use of works owned or licensed by other publishers, uses outside the relevant time frame, and uses of works not named in the August 2010 filings or the joint March 2011 filing, including uses in courses not referenced in those documents. (*See, e.g.*, Pls.' Proposed Stipulated Facts ¶¶ 134-141 (identifying uses of works prior to adoption of the 2009 Copyright Policy, including uses in Fall 2006, Fall 2007, Spring 2007, Spring 2008, and Spring 2009); 149 (asserting that "thousands of copyrighted works were placed on ERes" "[u]nder the pre-2009 guidelines"); 160 (identifying uses of works not owned by Plaintiffs, uses of works not listed in the August or March filings, and uses in courses not identified in the August or March

filings, for example, *Handbook of Theories of Aging*; *Suburban Alchemy: 1960's New Towns and the Transformation of the American Dream* for course HIST 8655; *Fearon's American Government* published by Fearon/Janus/Quercus; *The Varieties of History: From Voltaire to the Present* published by Vintage.)

ARGUMENT AND CITATION OF AUTHORITY

Only relevant evidence is admissible, and evidence is only relevant if it has the tendency to make the existence of a fact more or less probable than it would be without the evidence. Fed. R. Evid. 401, 402. The relief Plaintiffs seek is subject to principles of sovereign immunity, limiting relevant evidence to that of “ongoing and continuous” activity. This Court acknowledged that limitation in its June 19, 2009 Protective Order, which prohibited Plaintiffs’ further inquiry into practices prior to adoption of the 2009 Copyright Policy except to show: (1) the circumstances surrounding the adoption of the Policy, (2) the membership of the committee that adopted the Policy, (3) the resources consulted by the committee in adopting the Policy, and (4) the differences between the Policy and the previous guidelines. (Dkt. 111 at 5-6.)

After evaluating both sides’ motions for summary judgment, this Court held that in making their showings relevant to the remaining claims in this case “[b]oth sides will be limited to the list of claimed infringements produced in response to

the Court’s August 11, 2010 and August 12, 2010 orders.” (Dkt. 235 at 10.) In other words, consistent with principles of sovereign immunity, “[b]oth sides will be limited to” the list of alleged infringements of named works purportedly owned by Plaintiffs and used by the identified instructors in particular courses during the 2009 Maymester, Summer 2009, and Fall 2009 terms. This Court re-emphasized in its November 5, 2010 and March 3, 2011 orders that the only relevant uses of published works by any of Defendants or Defendants’ employees, contractors, or predecessors are those specifically identified in the parties’ filings responsive to the Court’s August 11 and 12, 2010 orders, as narrowed in the parties’ joint March 15, 2011 filing (Dkt. 266).

The Court’s September 2010 ruling also acknowledged the impossibility of defending against nebulous and sweeping allegations of infringement in a case that requires that Defendants be able to assert the fair use defense for each separate alleged infringement. (Dkt. 235 at 4.) A similar point was made in the protective order granted on June 19, 2009 (Dkt. 111), which stopped Plaintiffs’ burdensome and seemingly endless inquiries into practices pre-dating the 2009 Copyright Policy. Accordingly, this Court required in its September 30, 2010, November 5, 2010, and March 3, 2011 orders that Plaintiffs identify with specificity—for

Defendants and for the Court—those allegations of use properly at issue in this case.

The discovery that has taken place since the September 2010 ruling has been limited to the three-semester, Maymester 2009, Summer 2009, and Fall 2009, time period, and the list of alleged infringements filed by Plaintiffs in August, supplemented slightly during the extended discovery period. Plaintiffs now profess the intent to present at trial evidence of additional uses of published works, both within and outside of the Court's identified time frame, without having provided Defendants with the opportunity for further discovery on those allegations and in direct conflict with this Court's 2010 Summary Judgment Order. Furthermore, if Plaintiffs were permitted to introduce such evidence, Defendants would be required to defend against allegations of use for which Plaintiffs cannot be granted relief and alleged infringements previously ruled irrelevant by this Court. To require such a defense would run counter to this Court's rulings, Federal Rules of Evidence 401 and 402, and principles of sovereign immunity.

Because Plaintiffs have demonstrated an intent to introduce extensive evidence of (i) use of works not owned by Plaintiffs, (ii) use of works not identified in the August or March filings, (iii) use of works in courses not identified in the August or March filings, and (iv) use of works outside of the

relevant time frame as defined by the Court, all counter to this Court's 2010 Summary Judgment Order and the intent of the parties' joint March 15, 2011 filing, Defendants respectfully request that the Court grant this motion *in limine* expressly prohibiting the admission of such evidence. A proposed order is attached for the Court's convenience.

Respectfully submitted, this 28th day of April, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1D of the Local Rules of the Northern District of Georgia, counsel for Defendants certifies that the foregoing **DEFENDANTS' MOTION IN LIMINE TO EXCLUDE IRRELEVANT EVIDENCE IN ACCORDANCE WITH ORDER OF SEPTEMBER 30, 2010, WITH INCORPORATED MEMORANDUM OF LAW** was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1C.

/s/ Katrina M. Quicker
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of April, 2011, I have electronically filed the foregoing **DEFENDANTS' MOTION IN LIMINE TO EXCLUDE IRRELEVANT EVIDENCE IN ACCORDANCE WITH ORDER OF SEPTEMBER 30, 2010, WITH INCORPORATED MEMORANDUM OF LAW** with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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