

# ATTACHMENT D

## **ATTACHMENT D: DEFENDANTS' OUTLINE OF THE CASE**

### Succinct Factual Summary

Plaintiffs Cambridge University Press (“Cambridge”), Oxford University Press, Inc. (“Oxford”) and Sage Publications, Inc. (“Sage”) are publishing houses that publish academic works. The Plaintiffs have granted “reproduction rights” to the Copyright Clearance Center (“CCC”), a centralized clearinghouse for such rights. The CCC is able to grant and grants “permissions” to third parties for use of Plaintiffs’ works. The CCC is funding one-half of this litigation.

The Defendants are officials of Georgia State University (“GSU”) or Members of the Board of Regents of the University System of Georgia. The Board of Regents has general supervisory authority over GSU’s operations and elects the President of GSU, which is a unit of The University System of Georgia. The President has general supervisory authority over GSU administrators. In the fall of 2009, GSU had approximately 30,000 undergraduate and graduate students, approximately 1000 full time faculty and several hundred part time faculty. The Defendants are being sued in their official capacities. No Defendant has personally copied or provided electronic access to any excerpt at issue. No Defendant has threatened to violate any federal law. Also, the Defendants assert that they are entitled to immunity under the Eleventh Amendment of the United States Constitution.

In their teaching role, GSU professors and instructors are able to use one of two systems for providing students with electronic access to course materials: an electronic reserve system known as “ERes,” and an electronic course management system known as “uLearn.” The primary function of these systems is to assure that students and instructors have timely access to course related information and resources. Thus, for example, a professor may post the course

syllabus on uLearn or cause a book excerpt to be posted on ERes. Students thereby have online access to the syllabus or an excerpt for class purposes.

With reference to use of the ERes system at GSU, a professor identifies an excerpt that could possibly be made available to students via ERes. Under the 2009 University System of Georgia Copyright Policy (“Copyright Policy”), the professor would first consider whether posting of that particular excerpt is a “fair use” of the copyrighted work by completing a “Fair Use Checklist” form. That Checklist provides for the professor to work through a series of issues guided by the four fair use factors of 17 U.S.C. § 107 and determine whether such use constitutes a “fair use” under the Copyright Act. If the professor determines that reliance on fair use is justified, the professor completes an ERes Request form indicating that he or she has completed the fair use checklist. The ERes Request form is submitted to the GSU Library staff. In the usual case, the library staff retrieves the copyrighted work from the GSU Library and examines the request for “red flags” (e.g., too much material being used or the proposed use is in some other respect not in compliance with the Copyright Policy). If no “red flags” are seen, a library staff member will scan the excerpt and upload it onto the ERes system so as to be available for use as part of the professor’s class materials. If the professor then teaches the course and assigns the subject excerpt, it is made available for online access by students in that class. In order to gain such access, the student must be enrolled in and possess a password that is specific for the course being taught by that professor. The ERes system is able to track how many times a given excerpt is accessed, including by the professor and library staff during the uploading process and by students in the subject class. At the conclusion of the academic term, the excerpt is no longer accessible on the ERes system.

The University System's present Copyright Policy, which was adopted in February of 2009, discourages acts of copyright infringement. That Policy requires the professor to evaluate, on a case-by-case basis using the Fair Use Checklist, whether the use of an excerpt from a copyrighted work on ERes requires permission from the copyright owner or qualifies as a "fair use." The Court has limited the parties to a consideration of all alleged infringements and uses in the three academic terms immediately following adoption of the 2009 Copyright Policy: Maymester 2009, Summer 2009 and Fall 2009. In those three academic terms, GSU faculty taught a total of eight thousand fifty-two (8052) courses. According to a federal study, the average college student spends approximately \$550.00 per full semester on books. On March 15, 2011, the parties submitted a "Joint Filing Concerning Allegations of Infringement at GSU in response to the Court's November 5, 2010 and March 4, 2011 Orders." That document lists ninety-nine (99) allegations of infringement (involving a corresponding number of works) resulting from the posting of excerpts on ERes by thirty-two (32) GSU professors.

The Plaintiffs contend that by use of the ERes system, the Defendants have directly and contributorily infringed Plaintiffs' alleged copyrights in the subject works by digitally distributing excerpts from Plaintiffs' copyrighted works. Plaintiffs seek a permanent injunction enjoining Defendants from digitally distributing such excerpts in the future. To obtain such relief, the Court held in its September 30, 2010 Summary Judgment Order that the issue is whether, in practice, the Current 2009 Copyright Policy is encouraging improper application of the fair use defense. In order to show that Defendants are responsible for the alleged copyright infringement, Plaintiffs must show that the 2009 Copyright Policy has resulted in ongoing and continuous misuse of the fair use defense by putting forth evidence of a sufficient number of instances of infringement.

Defendants contend that there are not a sufficient number of such instances of infringement to prove that implementation of the 2009 Copyright Policy has resulted in ongoing and continuous misuse of the fair use defense. Defendants raise several defenses to the claims of infringement.

First, with reference to certain infringement allegations, Defendants contend that Plaintiffs cannot prove requisite originality or ownership of a proper copyright registration for certain of the works. With reference to other allegations, Defendants contend that Plaintiffs copyright registrations so differ in scope from the excerpt that is the subject of the asserted infringement that Plaintiffs allegations are without merit.

Second, with reference to all infringement allegations, Defendants contend that, when using an excerpt for a reading assignment or for use as part of a class, the professors made a “fair use” of the subject work and that there is no ongoing or continuous misuse of the “fair use” defense under the 2009 Copyright Policy. Defendants’ fair use contentions are specific to the alleged infringements, but generally address the four “fair use” factors. For example, Defendants contend that the purpose and character of the use is for non-commercial criticism, comment, teaching, scholarship or research. Defendants further contend that many of the subject works are primarily fact-based academic works (as opposed to creative, fiction works) and that such fact-based works deserve less protection under the second “fair use” factor. Defendants contend that the amount used is small and relatively insubstantial, averaging between 8.4% and 9.6% for all 99 alleged infringements.<sup>1</sup> In many instances, the amount used is less than five percent (5%), and even as little as one percent (1%). Defendants also contend that the taking has had little to no effect upon the potential market for the subject works. In many instances, the assigning of

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<sup>1</sup> The average is expressed as a range because the Plaintiffs count only text when counting pages, whereas the Defendants count all the pages of the work as deposited with the Copyright Office with the copyright registration application.

excerpts from one of the Plaintiffs works has inspired students to purchase the entire work, thus providing a positive market effect. Moreover, if professors were required to pay licensing fees for the excerpts at issue, they would simply not use the works or would place the copyrighted work on traditional library reserve. The 2009 Copyright Policy was well thought out and the professors considered and applied the four fair use factors in good faith. The 2009 Copyright Policy has not resulted in ongoing and continuous misuse of the fair use defense.

Finally, Defendants assert that even if Plaintiffs could prove such misuse of the fair use defense, Plaintiffs have failed adequately to specify actions that must be taken by the State and its officials with regard to the exercise of fair use under 17 U.S.C. § 107. Defendants contend that Plaintiffs are not entitled to the broad injunctive relief they seek.

#### Relevant Rules, Regulations, Statutes and Illustrative Case Law

17 U.S.C. § 101 et seq

17 U.S.C. § 106

17 U.S.C. § 107

17 U.S.C. § 411

17 U.S.C. § 412

17 U.S.C. § 501

17 U.S.C. § 504

U.S. Constitution, 11th Amendment

*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)

*Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994)

*Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227 (11th Cir. 2005)

*Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009)

*Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991)

*Blackwell Publ. Inc. v. Excel Research Group, LLC*, 661 F. Supp. 2d 786 (E.D. Mich. 2009)

*Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615 (6th Cir. 2004)

*Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999)

*Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829 (11th Cir. 1990)

*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)

*Cannon v. City of W. Palm Beach*, 250 F.3d 1299 (11th Cir. 2001)

*Costar Group, Inc. v. Loopnet, Inc.*, 372 F.3d 544 (4th Cir. 2004)

*Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004)

*Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004)

*Ex Parte Young*, 209 U.S. 123 (1908)

*Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991)

*Greenberg v. Nat'l Geographic Soc.*, 488 F.3d 1331 (11th Cir. 2007)

*Greenberg v. Nat'l Geographic Soc.*, 244 F.3d 1267 (11th Cir. 2001)

*Harper and Row, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)

*Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979)

*King Records, Inc. v. Bennett*, 438 F. Supp. 2d 812 (M.D. Tenn. 2006)

*Lowery v. Ala. Power Co.*, 483 F.3rd 1184 (11th Cir. 2007)

*Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988)

*Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)

*Microsoft Corp. v. Silver Star Micro, Inc.*, No. 06-1350, 2008 U.S. Dist. LEXIS 1526 (N.D. Ga. Jan. 9, 2008)

*N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483, 121 S. Ct. 2381 (2001)

*Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (2000)

*Parker v. Google, Inc.*, 242 Fed. Appx. 833 (3d Cir. 2007)

*Payne v. Travenol Labs., Inc.*, 565 F.2d 895 (5th Cir. 1978)

*Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334 (Fed. Cir. 2006)

*Princeton Univ. Press v. Mich. Document Servs. Inc.*, 99 F.3d 1381 (6th Cir. 1996)

*Resnick v. Copyright Clearance Center*, 422 F.Supp. 2d 252 (D.Mass. 2006)

*Rizzo v. Goode*, 423 U.S. 362 (1976)

*Skrnich v. Thornton*, 280 F.3d 1295 (11th Cir. 2002)

*Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)

*Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

*Students for a Conservative Am. v. Greenwood*, 378 F.3d 1129 (9th Cir. 2004)

*Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999).

*Venegas-Hernandez v. Asociacion de Compositores y Editores de Musica Latinoamericana*, 424 F.3d 50 (1st Cir. 2005)

*Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962)

Defendants further incorporate by reference and rely on those cases cited in their summary judgment briefs and their Proposed Findings of Fact and Conclusions of Law which will be submitted in accordance with the Pretrial Order. Please see Proposed Consolidated Pretrial Order, Para. 25.