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

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

Plaintiffs,

– vs. –

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

Defendants.

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

Conference is requested

PROPOSED CONSOLIDATED PRETRIAL ORDER

COME NOW Plaintiffs Cambridge University Press, Oxford University Press, Inc., and SAGE Publications, Inc. (collectively "Plaintiffs") and Defendants Mark P. Becker, Risa Palm, Nancy Seamans, J.L. Albert, Kenneth R. Bernard, Jr., Larry R. Ellis, Rutledge A. Griffin Jr., Robert F. Hatcher, C. Thomas Hopkins, Jr., W. Mansfield Jennings, Jr., James R. Jolly, Donald M. Leebern, Jr., William NeSmith, Jr., Doreen Stiles Poitevint, Willis J. Potts, Jr., Neil L. Pruitt, Jr., Wanda Yancey Rodwell, Kessel Stelling, Jr., Benjamin J. Tarbutton, III, Richard L. Tucker, Larry Walker, and Philip A. Wilheit, Sr. (collectively "Defendants"), by

and through their undersigned counsel, submit this Proposed Consolidated Pretrial Order.

1.

There are no motions or other matters pending for consideration by the Court except as noted:

Plaintiffs have filed two motions *in limine*: one to preclude the admission into evidence of certain recently created fair use checklists produced by Defendants, and one to overrule certain objections made by Defendants with respect to Plaintiff works identified on the parties' jointly submitted list of alleged infringements (filed with the Court on March 15, 2011).

Defendants have filed two motions *in limine*: Defendants' Motion in Limine To Exclude Evidence Of Improperly Asserted Copyrights, and Defendants' Motion in Limine to Exclude Irrelevant Evidence in Accordance With Order of September 30, 2010. Also pending is Defendants' Motion to Dismiss, which Defendants presently intend to renew in accordance with the Court's Order of March 17, 2011.

2.

All discovery has been completed, unless otherwise noted, and the Court will not consider any further motions to compel discovery. (Refer to LR 37.1.B). Provided there is no resulting delay in readiness for trial, the parties shall, however, be permitted to take the depositions of any persons for the preservation of evidence and for use at trial.

Plaintiffs state that pursuant to the Court's November 5, 2010 Order, the Defendants were directed to produce, by December 10, 2010, all available syllabi for each course identified in Plaintiffs' August 20, 2010 submission to the Court and all available fair use checklists for Plaintiffs' works used in those courses. The parties were further instructed to provide an updated list of alleged infringements to the Court, which they did on March 15, 2011 ("Alleged Infringement List"). The Defendants have failed to provide checklists for at least 24 instances of alleged infringement identified on the Alleged Infringement List. Plaintiffs have repeatedly sought from Defendants these documents or an admission that they do not exist. On March 4, 2011, Defendants responded to Plaintiffs' requests stating that they could not confirm that the documents "do not exist," but that they can confirm that they "have searched for relevant syllabi and responsive checklists, syllabi and related materials, and produced all that they have found."

Plaintiffs also note that in light of Defendants' plan to call nearly every GSU instructor identified on the Alleged Infringement List and Plaintiffs' Amended Complaint, not all of whom Plaintiffs have had the opportunity to depose, Plaintiffs expect to take, prior to trial, the deposition of those instructors from Defendants' witness list that Plaintiffs have not previously deposed. Plaintiffs also note that they have filed the two motions *in limine* described in Paragraph 1 above.

* * *

In accordance with their March 29, 2011 offer to make as many as possible previously undeposed professors available for a brief (1.5 hours) discovery deposition, Defendants state that certain yet-to-be deposed professors identified on Defendants' witness list may be deposed prior to trial. The parties reserve the right to submit deposition designations and counter-designations from the transcripts of any such depositions. The parties request permission to amend or make designations, cross-designations and objections of depositions taken since Defendants' March 29, 2011 offer.

3.

Unless otherwise noted, the names of the parties as shown in the caption to this Order and the capacity in which they appear are correct and complete, and there is no question by any party to the misjoinder or non-joinder of any parties.

The parties agree that this statement is correct.

Plaintiffs note that the individual members of the Board of Regents are named because Defendants identified them as necessary parties and consented to their being named. *See* Defendants' Response to Plaintiffs' Motion for Leave to Amend the Complaint to Add Additional Defendants, Docket No. 33, at 2 n.1 ("The University Administrators do not oppose adding as defendants the individual

members of the Board in their official capacities."); Order, Docket No. 38 (Dec. 11, 2008).

4.

Unless otherwise noted, there is no question as to the jurisdiction of the Court; jurisdiction is based on the following code sections:

It is Plaintiffs' position that jurisdiction is based on the Court's original jurisdiction over copyright infringement claims, 28 U.S.C. § 1338. Plaintiffs seek prospective relief from state officials in their official capacities pursuant to the *Ex parte Young* exception to sovereign immunity because the Defendants have control over and responsibility for the challenged conduct and authority to ensure compliance with federal copyright law at GSU. Plaintiffs further submit that all necessary copyright registrations were obtained in a timely manner, including as to infringed works for which issue was joined for the first time in the parties' Joint Filing on March 15, 2011, and that the Court has full jurisdiction over this matter.

Defendants submit that there is a jurisdictional issue regarding immunity from suit under the Eleventh Amendment and that Plaintiffs have failed to establish jurisdiction or to meet the mandatory precondition in those instances where Plaintiffs have not timely obtained a copyright registration, which is a

precondition for bringing a claim of infringement. 17 U.S.C.§ 411(c); M.G.B. Homes v. Ameron Homes, Inc., 903 F.2d 1486, 1488 (11th Cir. 1990).

5.

The following individually-named attorneys are hereby designated as lead counsel for the parties:

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6.

Normally, the Plaintiff is entitled to open and close arguments to the jury. (Refer to LR 39.3(B)(2)(b). State below the reasons, if any, why the Plaintiff should not be permitted to open arguments to the jury.

Not applicable (jury trial not requested).

7.

The captioned case shall be tried ( ) to a jury or (X) to the court without a jury, or ( ) the right to trial by jury is disputed.

8.

State whether the parties request that the trial to a jury be bifurcated, i.e., that the same jury consider separately issues such as liability and damages. State briefly the reasons why trial should or should not be bifurcated.

Not applicable (jury trial not requested).

9.

Attached hereto as Attachment "A" and made part of this order by reference are the questions which the parties request that the Court propound to the jurors concerning their legal qualifications to serve.

Not applicable (jury trial not requested).

10.

Attached hereto as Attachment "B-1" are the general questions which Plaintiffs wishes to be propounded to the jurors on voir dire examination.

Attached hereto as Attachment "B-2" are the general questions which Defendants wishes to be propounded to the jurors on voir dire examination.

The court, shall question the prospective jurors as to their address and occupation and as to the occupation of a spouse, if any. Counsel may be permitted to ask follow up questions on these matters. It shall not, therefore, be necessary for counsel to submit questions regarding these matters. The determination of whether the judge or counsel will propound general voir dire questions is a matter of courtroom policy which shall be established by each judge.

Not applicable (jury trial not requested).

11.

State any objections to Plaintiff's voir dire questions.
State any objections to Defendant's voir dire questions.
State any objections to the voir dire questions of the other parties, if any.

Not applicable (jury trial not requested).

12.

All civil cases to be tried wholly or in party by jury shall be tried before a jury consisting of not less than six (6) members, unless the parties stipulate otherwise. The parties must state in the space provided below the basis for any requests for additional strikes. Unless otherwise directed herein, each side as a group will be allowed the number of peremptory challenges as provided by 28 U.S.C. §1870. See Fed. R. Civ. P. 47(b).

Not applicable (jury trial not requested).

13.

State whether there is any pending related litigation. Describe briefly, including style and civil action number.

None.

14.

Attached hereto as Attachment "C" is Plaintiffs' outline of the case which includes a succinct factual summary of Plaintiffs' cause of action and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law creating a specific legal duty relied upon by Plaintiff shall be listed under separate heading. In negligence cases, each and every act of negligence relied upon shall be separately listed. For each item of damage claimed, Plaintiff shall separately provide the following information: (a) a brief description of the item claimed, for example, pain and suffering; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

15.

Attached hereto as Attachment "D" is Defendant's outline of the case which includes a succinct factual summary of all general, special, and affirmative defenses relied upon and which shall be neither argumentative nor recite evidence. All relevant rules, regulations, statutes, ordinances, and illustrative case law relied upon as creating a defense shall be listed under separate heading. For any counterclaim, the Defendant shall separately provide the following information for each item of damage claimed: (a) a brief description of the item claimed, for example, pain and suffering; (b) the dollar amount claimed; and (c) a citation to the law, rule, regulation or any decision authorizing a recovery for that particular item of damage. Items of damage not identified in this manner shall not be recoverable.

16.

Attached hereto as Attachment "E" are the facts stipulated by the parties. No further evidence will be required as to the facts contained in the stipulation and the stipulation may be read into evidence at the beginning of the trial or at such other time as is appropriate in the trial of the case. It is the duty of counsel to cooperate fully with each other to identify all undisputed

facts. A refusal to do so may result in the imposition of sanctions upon the non-cooperating counsel.

17.

The legal issues to be tried are as follows:

For Plaintiffs:

- Whether Defendants are infringing Plaintiffs' copyrights, whether through their own actions or, via *respondeat superior,* through the actions of individuals in their employ or control or in the employ or control of Georgia State University (GSU).
- Whether Defendants are contributorily infringing Plaintiffs' copyrights.
- Whether the ongoing and unauthorized use of the excerpts from Plaintiffs' copyrighted materials by Defendants or individuals in their employ or control in conjunction with ERes and uLearn offerings is protected by the doctrine of fair use.
- Whether Plaintiffs are entitled to recover their attorneys' fees and costs pursuant to 17 U.S.C. § 505.

For Defendants:

- Whether the case must be dismissed for lack of subject matter jurisdiction in accordance with the Eleventh Amendment's prohibition against suits in

federal court against Georgia state officials that have been sued in their official capacities?

- Whether, in practice, GSU implementation of the 2009 University System of Georgia Copyright Policy is encouraging improper application of the "fair use" defense of 17 U.S.C. § 107 such that there is ongoing and continuous misuse of that defense by GSU sufficient to find the Defendants liable for direct or contributory copyright infringement?
- Whether Plaintiffs can demonstrate a sufficient number of instances of copyright infringement to establish ongoing and continuous misuse of the fair use defense such as to obtain the injunctive relief sought? (Defendants note, in this regard, their motions in limine).
- Whether plaintiffs have been irreparably harmed so as to warrant injunctive relief and whether the other tests for injunctive relief have been satisfied?
- Whether broad injunctive relief of the type apparently sought by Plaintiffs is legally appropriate in this case?
- Whether Defendants are entitled to recover their fees and costs?

18.

Attached hereto as Attachment "F-1" for the Plaintiffs and Attachment "F-2" for the Defendants is a list of all the witnesses and their address for each party. The list must designate the witnesses whom the party will have present and trial and those witnesses whom the party may have present at trial. Expert (and witnesses who might express an opinion under Rule 702), impeachment and rebuttal witnesses whose use as a witness can be reasonably anticipated must be included. Each party shall also attach to the list a reasonable specific summary of the expected testimony of each expert witness.

All of the other parties may rely upon a representation by a designated party that a witness will be present unless notice to the contrary is given ten (10) days prior to trial to allow the other party(s) to subpoena the witness or to obtain the witness' testimony by other means. Witnesses who are not included on the witness list (including expert, impeachment and rebuttal witnesses whose use should have been reasonably anticipated) will not be permitted to testify, unless expressly authorized by court order based upon a showing that the failure to comply was justified.

Plaintiffs object to Defendants' witness list – which identifies 80 witnesses Defendants "may call" but none that Defendants "will call" – on the ground that it does not adequately structure the issues to be considered at trial, as contemplated by Rule 16 of the Federal Rules of Civil Procedure. *See, e.g.*, F.R.C.P. 16(c)(2)(A) (court to consider "formulating and simplifying the issues, and eliminating frivolous claims and defenses"); *id.* 16(c)(2)(D) (court to consider "avoiding unnecessary proof and cumulative evidence"); *see also* 6A Wright, Miller & Kane, Federal Practice & Procedure §1522 (2010). Defendants' excessively long witness list violates the spirit of Rule 16, which is intended to "help[] remove extraneous disputes from the case and serve[] to expedite the determination of the merits,

thereby saving time and expense for the litigants and easing the burden on the courts by facilitating the handling of congested dockets." *Id.*

Specifically, Plaintiffs object to Defendants' claimed intention to present the testimony of 33 professors. Much of this testimony will be cumulative, and thus a waste of judicial resources, and it is also objectionable for the other reasons stated in Plaintiffs' Motion for Early Pretrial Conference and Memorandum in Support filed with the Court on April 4, 2011 (Docket No. 268). Plaintiffs further object to the proposed testimony of 17 members of the Board of Regents as cumulative and a waste of judicial resources.

Plaintiffs further object to the proposed testimony of Kenneth Crews for the reasons stated in their Motion to Exclude the Expert Report of Kenneth D. Crews (June 5, 2009), their Motion to Exclude the Putative Expert Testimony of Kenneth D. Crews (Apr. 13, 2010), and the reply briefs on those motions (Docket Nos. 106, 112 202, 222).

19.

Attached hereto as Attachment "G-1" for the Plaintiffs and "G-2" for the Defendants are the typed lists of all documentary and physical evidence that will be tendered at trial. Learned treatises which are expected to be used at trial shall not be admitted as exhibits. Counsel are required, however, to identify all such treatises under a separate heading on the party's exhibit list.

Each party's exhibits shall be numbered serially, beginning with 1, and without the inclusion of any alphabetical or numerical subparts. Adequate space must be left on the left margin of each party's exhibit list for court stamping purposes. A courtesy copy of each party's list must be submitted for use by the judge.

Prior to trial, counsel shall mark the exhibits as numbered on the attached lists by affixing numbered yellow stickers to Plaintiffs' exhibits, numbered blue stickers to Defendants' exhibits, and numbered white stickers to joint exhibits. When there are multiple Plaintiffs or Defendants, the surname of the particular Plaintiff or Defendant shall be shown above the number on the stickers for that party's exhibits.

Specific objections to another party's exhibits must be typed on a separate page and must be attached to the exhibit list of the party against whom the objections are raised. Objections as to authenticity, privilege, competency, and, to the extent possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by the parties and shall be admitted at trial without further proof of authenticity.

Unless otherwise noted, copies rather than originals of documentary evidence may be used a trial. Documentary or physical exhibits may not be submitted by counsel after filing of the pretrial order, except upon consent of all the parties or permission of the court. Exhibits so admitted must be numbered, inspected by counsel, and marked with stickers prior to trial.

Counsel shall familiarize themselves with all exhibits (and the numbering thereof) prior to trial. Counsel will not be afforded time during trial to examine exhibits that are or should have been listed.

The parties' joint exhibit list is attached as Attachment G-3.

20.

The following designated portions of the testimony of the persons listed below may be introduced by deposition:

PLAINTIFFS

See Attachment I.

DEFENDANTS

See Attachment I.

In addition to the designations and counter-designations set forth in Attachment I, Defendants state that the testimony of the following persons may be introduced by deposition:

Professor Lloyd

Professor Gainty

Professor Dixon

Professor Greenberg

Professor Kruger

GSU President Becker

In addition, given Defendants accommodation of Plaintiffs' request to depose all professors that may be called as trial witnesses, and Plaintiffs designation of portions of recent discovery depositions, Defendants counter-designate the deposition of the following witness in their entireties in response to Plaintiffs designations:

Professor Murphy

Professor Freeman

Professor Ruprecht

Professor Hankla

Professor Moloney

Defendants will continue to work with Plaintiffs to delete and narrow such testimony in advance of trial. Further, in accordance with the Local Rules, Defendants reserve the right to conduct testimonial depositions that do not delay trial.

Any objections to the depositions of the foregoing persons or to any questions or answers in the depositions shall be filed in writing no later than the day the case is first scheduled for trial. Objections not perfected in this manner will be deemed waived or abandoned. All depositions shall be reviewed by counsel and all extraneous and unnecessary matter, including non-essential colloquy of counsel, shall be deleted. Depositions, whether preserved by stenographic means or videotape, shall not go out with the jury.

Plaintiffs object to Defendants' intention to introduce at trial testimony from depositions taken by Defendants prior to the entry of this Order but not designated as part of this order. This includes the deposition testimony of Vincent Lloyd, Denis Gainty, and Patricia Dixon (deposed April 20, 2011), Daphne Greenberg (Deposed April 21, 2011), and Mark Becker and Ann Kruger (deposed April 22, 2011). In the event such testimony is admitted at trial, Plaintiffs reserve the right

to use any part of each such deposition not introduced by Defendants. Plaintiffs also object to Defendants' blanket designation of entire deposition transcripts while reserving the right to make specific designations prior to trial; this approach fails to delete "extraneous and unnecessary matter" as required by rule and will require Plaintiffs to review every question and answer in every such deposition for potential objections rather than only those defendants will ultimately designate.

21.

Attached hereto as Attachments "H-1" for the Plaintiffs and "H-2" for the Defendant are any trial briefs which counsel may wish to file containing citations to legal authority concerning evidentiary questions and any other legal issues which counsel anticipate will arise during the trial of the case. Limitations, if any, regarding the format and length of trial briefs is a matter of individual practice which shall be established by each judge.

In addition to the briefs attached hereto, the parties refer this Court to their respective briefs submitted in connection with the motions for summary judgment. *See* Docket Nos. 142, 160, 185, 201, 206, 210, 237, 241, 244. In lieu of additional briefing, the Defendants will provide proposed findings of fact and conclusions of law in accordance with Paragraph 25 below.

Plaintiffs state that the Stipulations of Fact Regarding ERes and uLearn Usage at Georgia State University, filed July 10, 2009 (Docket No. 118), should become part of the trial record.

22.

In the event this is a case designated for trial to the court with a jury, requests for charge must be submitted no later than 9:30 a.m. on the date on which the case is calendared (or specially set) for trial. Requests which are not timely filed and which are not otherwise in compliance with LR 51.1, will not be considered. In addition, each party should attach to the requests to charge a short (not more than one (1) page) statement of that party's contentions, covering both claims and defenses, which the court may use in its charge to the jury.

Counsel are directed to refer to the latest edition of the Eleventh Circuit District Judges Association's Pattern Jury Instructions and Devitt and Blackmar's Federal Jury Practice and Instructions in preparing the requests to charge. For those issues not covered by the Pattern Instructions or Devitt and Blackmar, counsel are directed to extract the applicable legal principle (with minimum verbiage) from each cited authority.

Jury trial not requested.

23.

If counsel desire for the case to be submitted to the jury in a manner other than upon a general verdict, the form of submission agreed to by all counsel shall be shown in Attachment "I" to this Pretrial Order. If counsel cannot agree on a special form of submission, parties will propose their separate forms for the consideration of the court.

Jury trial not requested.

24.

Unless otherwise authorized by the court, arguments in all jury cases shall be limited to one-half hour for each side. Should any party desire any additional time for argument, the request should be noted (and explained) herein.

Jury trial not requested.

25.

If the case is designated for trial to the court without a jury, counsel are directed to submit proposed findings of fact and conclusions of law not later than the opening of trial.

The parties anticipate filing proposed findings of fact and conclusions of law not later than the opening of trial.

Pursuant to LR 16.3, lead counsel and persons possessing settlement authority to bind the parties met (by telephone) on February 24, 2010, to discuss in good faith the possibility of settlement of this case. The court (_____) has or (X) has not discussed settlement of this case with counsel. It appears at this time that there is:

(_____) A good possibility of settlement.
(_____) Some possibility of settlement.
(X) Little possibility of settlement.
(_____) No possibility of settlement.

26.

Unless otherwise noted, the Court will not consider this case for a special setting, and it will be scheduled by the clerk in accordance with the normal practice of the court.

27.

The Plaintiffs estimate that it will require 4-6 days to present their evidence. The Defendants estimate that it will require 7-9 days to present their evidence. It is estimated that the total trial time is 11-15 days.

28.

IT IS HEREBY ORDERED that the above constitutes the pretrial order for the above captioned case (__x__) submitted by stipulation of the parties or (_____) approved by the court after conference with the parties.

IT IS FURTHER ORDERED that the foregoing, including the attachments thereto, constitutes the pretrial order in the above case and that it supersedes the pleadings which are hereby amended to conform hereto and that this pretrial order shall not be amended except by Order of the court to prevent manifest injustice. Any attempt to reserve a right to amend or add to any part of the pretrial order after the pretrial order has been filed shall be invalid and of not effect and shall not be binding upon any party or the court, unless specifically authorized in writing by the Court.

IT IS SO ORDERED this 2 day of May, 2011.

UNITED STATES DISTRICT JUDGE

Each of the undersigned counsel for the parties hereby consents to the entry of the foregoing pretrial order, which has been prepared in accordance with the form pretrial order adopted by this Court.

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Attorneys for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **PROPOSED CONSOLIDATED PRETRIAL ORDER** with the Clerk of Court using the CM/ECF filing system which will send e-mail notification of such filing to opposing counsel as follows:

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This 29th day of April, 2011.

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