

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

## PRELIMINARY STATEMENT

As the Court has ordered, the trial in this action will center on the alleged infringements of Plaintiffs' copyrighted works identified in the parties' March 15, 2011 joint filing (the "Joint Filing"). With their Motion in Limine to Exclude Irrelevant Evidence in Accordance with Order of September 30, 2010, Defendants seek to prevent Plaintiffs from countering Defendants' fair use defense as to the Joint Filing works in the manner the law – including this Court's prior orders – allows by precluding all evidence of the context in which the conduct reflected on the Joint Filing occurred.

The blindered conception of a "work-by-work" approach into which Defendants seek to channel the Court is not required by Rules 401 or 402 of the Federal Rules of Evidence or by any of the Court's orders as Plaintiffs understand them. From the outset, this case has been about ongoing practice at GSU involving widespread, unauthorized copying, display, and distribution of significant portions of Plaintiffs' copyrighted works by means of online course reading systems. The evidence Defendants are seeking to preclude includes evidence that works identified in the Amended Complaint continued to be copied without authorization during the 2009 academic terms covered by the Joint Filing. The limited, contextual evidence of this sort will show that the infringements of the Joint Filing

works in 2009 – which the Court has determined to be representative of ongoing infringement under the current GSU policy – also represented a continuation of conduct under GSU’s prior copyright policy. Such a showing of a pattern of repeated use is one that Congress and the courts have recognized to be inconsistent with fair use. It also will serve to underscore the ineffectiveness of the new policy in rectifying GSU’s copyright compliance.

Defendants also want to keep the Court from considering the import of GSU’s practice of assembling excerpts from the Joint Filing works with excerpts from many other copyrighted works to form, in combination, digital course anthologies that are no different in their intended educational function, and no different in their impact on the market for Plaintiffs’ works, than paper coursepacks. Plaintiffs do not need, nor do they intend, to demonstrate that Defendants have also infringed the numerous other copyrighted works that have been combined with those of the Plaintiffs to create these digital course anthologies. Defendants’ purported fear that Plaintiffs are contemplating mini-fair use trials as to a multitude of additional works is misplaced. Rather, the relevance of establishing this broader practice is to bolster Plaintiffs’ demonstration of the full extent of the market harm that has occurred and that would be greatly

magnified if GSU's practices were to continue unabated and become widespread – a showing directly relevant to the fourth fair use factor.

### **RELEVANT PROCEDURAL BACKGROUND**

Plaintiffs commenced this action in 2008 seeking to enjoin the continued widespread unauthorized copying, display, and distribution of significant portions of their copyrighted academic books via one or more online course readings systems at GSU. In their Amended Complaint, Plaintiffs identified representative examples of their works that had been distributed electronically without their authorization to GSU students via ERes and uLearn. *See* Amended Complaint, Docket No. 39 at Ex. 1.

On February 17, 2009, in the midst of ongoing discovery, GSU announced a new copyright policy. *See* April 27, 2009 Order, Docket No. 83 at 2. On the premise that adoption of the new policy rendered all prior conduct irrelevant, Defendants moved for a protective order to cut off further discovery into conduct under the old policy. *See* Defendants' Motion for Protective Order, Docket No. 58; Defendants' Renewed Motion for Protective Order, Docket No. 87. On June 22, 2009, the Court found that Plaintiffs already had "obtained sufficient . . . evidence of past infringement in support of a request for an injunction," and granted the renewed motion. Order, Docket No. 111 at 5. Among the evidence the

Court cited as “sufficient” was a list of works posted to ERes from 2005 to Spring 2009 – precisely the type of evidence Defendants now seek to exclude by attempting to contort this prior discovery ruling into a sweeping evidentiary preclusion order.

In orders issued on August 11 and 12, 2010, the Court directed Plaintiffs to produce a list of claimed infringements of their works during the Maymester 2009, Summer 2009, and Fall 2009 terms along with specified information relating to each claimed infringement. *See* Docket Nos. 226, 227; *see also* Sept. 30, 2010 Order, Docket No. 235 at 30. During the November 5, 2010 scheduling conference, the Court stated its understanding that ERes activity during the three designated 2009 terms would be deemed representative of current ERes activity. *See* Tr. of Proceedings held on Nov. 5, 2010, Docket No. 261 at 14 (hereinafter “11/5/10 Tr.”) (Court declining to extend temporal scope of proceeding to 2010, stating, “I can’t see any reason why things would be different when you’ve got the same policy and a lot of the same professors.”).

### **ARGUMENT**

1. Consistent with the Court’s directive at the November 5 scheduling conference, 11/5/10 Tr. at 13-14, examination into the copying, display, and distribution of the works set forth on the Joint Filing will be treated by the parties

as representative of current, *i.e.*, ongoing practice at GSU. At the same time, Plaintiffs do not understand the Court to have intended to preclude them from adducing evidence demonstrating that the ongoing practice reflected in the Joint Filing represents a continuation of conduct pre-dating GSU's new copyright policy. *See e.g., Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984) (holding that evidence of "past wrongs" bears on "whether there is a real and immediate threat of repeated injury which could be averted by the issuing of an injunction").

Consistent with this view, Plaintiffs read the Court's June 22, 2009 order on Defendants' motion for a protective order – in which Defendants argued that GSU's new copyright policy had rendered conduct under the old copyright policy irrelevant – as acknowledging the relevance of past infringements. That order stated, with reference to, *inter alia*, a list of 2005-2009 ERes postings cited by Plaintiffs, that "[e]ven if the new copyright policy fails to address the alleged problems in the old policy, Plaintiffs will have had sufficient discovery to argue that there is no significant difference between the two." Docket No. 111 at 5. The Court thus appeared to acknowledge that comparing conduct under the old policy to conduct under the new policy was relevant to the question of whether the new policy on which Defendants' case relies has in fact rectified the pervasive infringement identified in the Complaint.

It is precisely this sort of evidence that Defendants would preclude Plaintiffs from eliciting. Plaintiffs are not seeking to engage in a work-by-work adjudication of instances of prior unauthorized copying, as Defendants suggest, merely to make a showing of the widespread distribution of unauthorized course readings prior to 2009 and its continuation, including the repeated use of specific Joint Filing works, even after adoption of the new policy.<sup>1</sup>

2. The evidence that Defendants seek to exclude also would deprive Plaintiffs of the opportunity to place Defendants' takings of Plaintiffs' works identified on the Joint Filing in their proper context, including their incorporation without Plaintiffs' consent into digital anthologies comprising unlicensed takings from scores of other publishers. In responding to Defendants' fair use claims, Plaintiffs intend to provide testimony as to the adverse market impact on Plaintiffs

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<sup>1</sup> Examples of prior infringing practice continuing under the current policy include works identified in Exhibit 1 to the Complaint, such as Professor Kaufmann posting to ERes for EPRS8500 (Fall 2009) many of the same chapters from *The SAGE Handbook* that she assigned from the book during the Fall 2007 and Spring 2008 versions of the course, Joint Filing, Docket No. 266; Amended Complaint, Docket No. 39 ¶ 23 and Ex. 1 – and Professor Kruger posting for EPY7090 (Fall 2009) the same excerpt of Oxford's *Awakening Children's Minds* she used during the Fall 2007, Fall 2008, Spring 2009, and Summer 2009 semesters. Joint Filing, Docket No. 266; Amended Complaint, Docket No. 39 ¶ 27 and Ex. 1; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, Docket No. 185 at 9; Pl. Exs. 21, 49, and 51 to Plaintiffs' Motion for Summary Judgment, Docket No. 141.

of such anthologizing – a matter plainly relevant to the Court’s assessment of the fourth fair use factor.

Prior cases addressing analogous practices in the paper coursepack setting have recognized the probative value of the anthological nature of the uses made of the plaintiffs’ works to the fair use analysis. While *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996), was brought based on six enumerated copyright infringement claims from three publishers, and *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), was brought based on twelve such claims on the part of six publishers, both opinions contain analysis of the fair-use impact of compiling the complained-of works into coursepacks along with scores of other unlicensed works by other publishers. *See, e.g., Princeton Univ. Press*, 99 F.3d at 1390 (“In its systematic and premeditated character, its magnitude, its anthological content . . . the copying . . . goes well beyond anything envisioned by the Congress . . .”); *Basic Books*, 758 F. Supp. at 1535 (noting that the fact that the excerpts of the plaintiffs’ academic books “were compiled and sold in anthologies weighs against defendant”). Both courts compared the character of the defendants’ anthologies against the limitations prescribed by the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and



Periodicals,” H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 68-70, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5682-83 (“Classroom Guidelines”),<sup>2</sup> *see Princeton Univ. Press*, 99 F.3d at 1390; *Basic Books*, 758 F. Supp. at 1535-37, and central features of the injunctive relief afforded by both courts to the successful plaintiffs were prohibitions on anthologizing of precisely the sort challenged in this action.

The unauthorized uses of excerpts from Plaintiffs’ Joint Filing works, both before and after promulgation of the new policy, including in connection with customized digital anthologies of course readings, entail precisely the form of copying that the Classroom Guidelines – and all other pertinent precedent – condemn. Defendants’ effort to foreclose evidence into these practices should be rejected and their motion denied in its entirety.

### CONCLUSION

For the foregoing reasons, Defendants’ Motion to Exclude Irrelevant Evidence in Accordance with the Order of September 30, 2010 should be denied.

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<sup>2</sup> The Classroom Guidelines provide valuable insight into what Congress viewed as the parameters of fair use in the educational setting. Among other relevant guideposts, they provide that the unauthorized copying “shall not be used to create or to replace or substitute for anthologies, compilations or collective works,” § III(A), and that the copying shall not “substitute for the purchase of books, publishers’ reprints, or periodicals” and shall not be “repeated with respect to the same item by the same teacher from term to term.” *Id.* § III(C)(a)(c).

Respectfully submitted, this 9th day of May, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day filed the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE IRRELEVANT EVIDENCE IN ACCORDANCE WITH ORDER OF SEPTEMBER 30, 2010** 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 9th day of May, 2011.

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