

**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' REPLY BRIEF IN SUPPORT OF THEIR  
MOTION *IN LIMINE* TO EXCLUDE IRRELEVANT EVIDENCE IN  
ACCORDANCE WITH ORDER OF SEPTEMBER 30, 2010**

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion *In Limine* to Exclude Irrelevant Evidence in Accordance with Order of September 30, 2010 (Dkt. 287) ("Plaintiffs' response") attempts to take this case back to its position prior to summary judgment over six months ago. (*See, e.g.*, Dkt. 287 at 6-7 (focusing on language from this Court's June 22, 2009 protective order, which was consistent with, but not as definitive as this Court's summary judgment ruling over a year later); *see also, e.g.*, Defs.' Mot. for Summ. J., Dkt. 160 (dated Feb. 26, 2010).)

Prior to summary judgment briefing, and this Court’s subsequent orders, Plaintiffs made broad and often unspecified claims of infringement of countless works owned by them and other publishers. (*See* Sept. 30, 2010 Or., Dkt. 235 at 2-5 (describing Plaintiffs’ sweeping and ever-growing allegations of “‘unauthorized copying and distribution of a vast amount of copyrighted works’” “the great majority of which occurred before the 2009 Copyright Policy was enacted” and most of which “[did] not contain full information”).)

Recognizing the impossibility of defending against such claims and the limitations imposed on injunctive relief by principles of sovereign immunity, this Court’s summary judgment order of September 30, 2010 (Dkt. 235) focused the case. There, this Court held “that only the 2009 Copyright Policy is relevant to Plaintiffs’ claims, which are for injunctive and declaratory relief only” and that “only claimed infringements occurring after February 17, 2009 will be considered.” (Dkt. 235 at 5.) Reiterating this point, this Court then placed the following limitation on “Further Proceedings”: “Going forward, in order to show that Defendants are responsible for the copyright infringements alleged in this case, Plaintiffs must show that *the 2009 Copyright Policy* resulted in ongoing and continuous misuse of the fair use defense.” (Dkt. 235 at 30 (emphasis added).) Furthermore, the Court determined that “[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.*), which included only allegations of infringements that occurred after implementation of the 2009 Copyright Policy. Plainly, uses of works prior to implementation of the 2009 Copyright Policy and uses of works that exceed the limits imposed by the Court cannot show the result of the 2009 Copyright Policy. Plaintiffs' response defies this logic, stating: "Plaintiffs do not understand the Court to have intended to preclude them from adducing evidence demonstrating that the ongoing practice [from the relevant semesters in 2009] represents a continuation of conduct pre-dating GSU's new copyright policy." (Dkt. 287 at 6 .)

Further, on August 11, 2010 and August 12, 2010, and again on November 5, 2010, and March 3, 2011, this Court ordered the parties to prepare 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; Dkt. 227; Dkt. 226.) On March 15, 2011, the parties jointly filed a list of approximately 99 alleged infringements of works purportedly owned by a Plaintiff. (Dkt. 266.) In Plaintiffs' Opposition to Defendants' Motion *In Limine* to Exclude Evidence of Alleged Infringement of Improperly-Asserted Copyrights (Dkt. 288), filed only two days ago, Plaintiffs voluntarily dropped ten percent of the 99 alleged infringements.

(Dkt. 288 at 13 & n.11 (“Plaintiffs will not present evidence related to [4 identified] works or their [alleged] infringement at GSU.”), Dkt. 266-4 at 28, 37, 69, 70-72, 92-93, 95 (identifying 9 alleged uses of these 4 works in the parties’ joint filing).) Plaintiffs’ voluntary exclusion of these works from this case demonstrates why Plaintiffs also, in accordance with this Court’s prior rulings, should be prohibited from presenting evidence of Defendants’ alleged uses of other works during periods other than the three identified semesters of 2009: They are not relevant to Plaintiffs’ claims of infringement and Defendants should not be forced to defend against such alleged uses.

Under the guise of providing purportedly necessary “context,” Plaintiffs propose to cloud the record and confuse the issues in this case with evidence of uses of other works, in other classes, with other students, in other semesters, for potentially other purposes, in some cases owned by other publishers, and under the previous copyright policy. Plaintiffs say they are not contemplating “mini-fair use trials” (Dkt. 287 at 3; *see also id.* at 7) for these “other” uses, yet every one of these other alleged uses (if they occurred)<sup>1</sup> may have been licensed<sup>2</sup> or have been a

---

<sup>1</sup> Some contemplated uses of copyrighted works may be reflected on EReserves even though the work was never used. For example, an instructor may initially plan to use a particular reading excerpt and proceed with requesting it be posted (prompting the library to start a “document page” for the work in EReserves), but then (a) not provide the excerpt to the library for copying and

fair use under the law. Such legal use cannot support Plaintiffs' case for injunction. So while Plaintiffs say they are not contemplating "mini-fair use trials," in order to avoid prejudice to Defendants, that is precisely what such a showing would require.

Plaintiffs' response in essence returns to Plaintiffs' pre-summary judgment rhetoric that any use of any owner's work is an infringement that warrants an injunction. (*Id.* at 7 ("Plaintiffs are not seeking to engage in a work-by-work adjudication of instances of prior unauthorized copying . . . , merely to make a

---

uploading, (b) drop the assignment from the class, or (c) not ever teach the course. Dr. Jennifer Esposito, for example, has explained that if she learns after submitting her request to have material posted on EReserves that the library does not have a copy of the necessary work, she may not take her own copy to the library for EReserve posting. (Esposito Dep., attached hereto as Exhibit A, at 30:18-31:2, 31:14-32:8, 32:16-33:3, 33:18-23.) The result is a "document page" for the excerpt in EReserves without any associated copy of a work. Dr. Lee Orr has explained that if he runs out of time during the semester, he may not require that students read a work previously required on his syllabus. (Orr Dep., attached hereto as Exhibit B, at 32:20-33:2.) Other instructors may intend to use material for a given course, and proceed with the EReserves posting process, but never end up teaching the course. For example, Defendants have raised objections to many of Plaintiffs' alleged infringements on the ground that the courses were not taught. (Dkt. 266-4; *see also* Decls. attached here to as Exhibits C-G (explaining that these courses were not taught).)

<sup>2</sup> Individual licenses may have been obtained in accordance with the 2009 Copyright Policy (*see* Dkt. 235-1 at 3 ("If the instructor determines that the reading is not fair use, he or she must obtain permission from the copyright holder in order to place the reading on ERes.")) or the work may be one of the hundreds of works in an electronic journal to which the university has a license (*see* Burtle Decl., Dkt. 212 (listing electronic journals licensed by GSU)).

showing of the widespread distribution of unauthorized course readings prior to 2009 and its continuation . . . .”), Or. Sept. 30, 2010, Dkt. 235 at 4-5 (describing Plaintiffs’ sweeping allegations).) The letter of the law defies such an assertion. *See* 17 U.S.C. § 107 (stating “the fair use of a copyrighted work . . . is not an infringement of copyright.”). As postured, this case is in accord. As this Court has indicated, where Defendants demonstrate that a use properly established by Plaintiffs to be infringing was in fact a fair use, that use does not weigh in favor of an injunction. (Dkt. 235 at 30.)

Finally, Plaintiffs claim that this supposed “proper context” of other uses will demonstrate “digital anthologizing” that itself has an adverse market impact.<sup>3</sup> (Dkt. 287 at 6-7.) Contrary to Plaintiffs’ creative description, EReserves is nothing more than an electronic bookshelf, mimicking the Reserved Books section of a brick-and-mortar library. Like “the traditional library reserve system where instructors place a hard copy of a course reading on reserve at the library so that students can check it out for a period of time to complete the reading assignment, make photocopies, and take notes for classroom use,” “Georgia State’s ERes

---

<sup>3</sup> Defendants note that even were the Court to entertain the suggestion that EReserves or uLearn have been used to “anthologize,” and that such use would bear on the market harm to any individual work at issue in this case, the evidence related to such “anthologizing” must be limited to works used by the same instructor for the same course in the same semester, as these parameters are indicated in the parties joint March 15, 2011 filing (Dkt. 266).

system allows instructors to place an electronic copy of the reading on a centralized website that students in the course can access in order to complete the reading.” (App. A to Statement of Undisputed Facts, Summ. J. Or., Sept. 30, 2010 at 1.) The general function of uLearn is the same. (Or. Sept. 30, 2010, Statement of Undisputed Facts, Dkt. 235 at 7.) Students can go to these electronic bookshelves, give the proper credentials (*i.e.*, password(s) or identification information), and pull the particular reading off the “shelf.” (*See* App. A to Statement of Undisputed Facts, Summ. J. Or., Sept. 30, 2010 at 1-2.)

The various readings assigned for a course are not—and Plaintiffs do not allege that they are—collated into a single file. They are not bound together into a new “book” like a coursepack<sup>4</sup> and are not sold like a coursepack.<sup>5</sup> (*See* Summ. J. Or., Sept. 30, 2010 at 21-24 (describing coursepacks and finding no financial benefit to GSU for use of ERes or uLearn).) The electronic “course pages” on ERes and uLearn merely organize the material onto separate shelves to which

---

<sup>4</sup> This Court defined coursepacks in its Summary Judgment Order as “printed anthologies composed of all the required readings for a particular course, which are typically designed by the instructor and brought to a commercial copyshop for printing. Students then purchase the coursepacks . . . .” (Dkt. 235 at 21 n.5.)

<sup>5</sup> Neither does Plaintiffs’ strained analogy address the “significantly greater capabilities” of ERes and uLearn previously recognized by this Court, “such as video, audio, and web links.” (Summ. J. Or., Sept. 30, 2010 at 23.) In contrast, audio and video material can be placed on hard copy reserve in the library on a reserved-works shelf next to course readings.

students go to pull a particular reserved item. (See App. A to Statement of Undisputed Facts, Summ. J. Or., Sept. 30, 2010, Dkt. 235-1 at 4-5 (describing course pages); Or., Sept. 30, 2010, Dkt. 235 at 23.) It is hard to imagine that anyone (other than Plaintiffs) would argue that books, videos, and music recordings on a library shelf next to one another, selected for reading by a professor who has listed them together on a syllabus, are “anthologies,” or certainly the “anthologies” contemplated in the coursepack cases cited by Plaintiffs. Thus, EReserves is nothing more than an electronic bookshelf, providing students with periodic access to supplemental reading materials, just as with hard copy library reserves.

Because Plaintiffs have demonstrated an intent to introduce extensive irrelevant and prejudicial evidence that would require Defendants to defend against allegations of use for which Plaintiffs cannot, under principles of sovereign immunity, be granted relief and alleged infringements previously ruled irrelevant by this Court, Plaintiffs respectfully request that the Court grant this motion *in limine* expressly prohibiting the admission of such evidence.

Respectfully submitted, this 11th day of May, 2011.

SAMUEL S. OLENS  
Georgia Bar No. 551540  
Attorney General

R. O. LERER  
Georgia Bar No. 446962  
Deputy Attorney General

DENISE E. WHITING-PACK  
Georgia Bar No. 558559  
Senior Assistant Attorney General

MARY JO VOLKERT  
Georgia Bar No. 728755  
Assistant Attorney General

*/s/ Mary Katherine Bates* \_\_\_\_\_

Stephen M. Schaetzel  
Georgia Bar No. 628653  
Mary Katherine Bates  
Georgia Bar No. 384250  
KING & SPALDING LLP  
1180 Peachtree Street, N.E.  
Atlanta, GA 30309  
Telephone: (404) 572-4600  
Facsimile: (404) 572-5100  
Email: kbates@kslaw.com

Anthony B. Askew  
Special Assistant Attorney General  
Georgia Bar No. 025300  
MCKEON, MEUNIER, CARLIN &  
CURFMAN, LLC  
817 W. Peachtree Street, NW  
Suite 900  
Atlanta, GA 30308  
Telephone: (404) 645-7709  
Facsimile: (404) 645-7707

Katrina M. Quicker  
Georgia Bar No. 590859  
BALLARD SPAHR LLP  
999 Peachtree Street, Suite 1000  
Atlanta, GA 30309-3915  
Telephone: (678) 420-9300  
Facsimile: (678) 420-9301  
Email: quickerk@ballardspahr.com

*Attorneys for Defendants*

**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' REPLY BRIEF IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE IRRELEVANT EVIDENCE IN ACCORDANCE WITH ORDER OF SEPTEMBER 30, 2010** was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1C.

*/s/ Mary Katherine Bates* \_\_\_\_\_

Mary Katherine Bates

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

CAMBRIDGE UNIVERSITY PRESS,  
et al,

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 11th day of May, 2011, I have electronically filed the foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION *IN LIMINE* TO EXCLUDE IRRELEVANT EVIDENCE IN ACCORDANCE WITH ORDER OF SEPTEMBER 30, 2010** 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:

Edward B. Krugman  
krugman@bmelaw.com  
Georgia Bar No. 429927  
Corey F. Hirokawa  
hirokawa@bmelaw.com  
Georgia Bar No. 357087  
John H. Rains IV  
rains@bmelaw.com  
Georgia Bar No. 556052

BONDURANT, MIXSON &  
ELMORE, LLP  
1201 West Peachtree Street N.W.  
Suite 3900  
Atlanta, GA 30309  
Telephone: (404) 881-4100  
Facsimile: (404) 881-4111

R. Bruce Rich  
Jonathan Bloom  
Randi Singer  
Todd D. Larson

WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153  
Telephone: (212) 310-8000  
Facsimile: (212) 310-8007

*/s/ Mary Katherine Bates* \_\_\_\_\_

Mary Katherine Bates  
Georgia Bar No. 384250  
KING & SPALDING LLP  
1180 Peachtree Street, N.E.  
Atlanta, GA 30309  
Telephone: (404) 572-4600  
Facsimile: (404) 572-5100  
Email: kbates@kslaw.com