

**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' BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION TO AMEND THEIR TRIAL EXHIBIT LIST**

Pursuant to Local Rule 7.1(B) and the Court's May 10, 2011 Order (Dkt. 294) directing Defendants to file their response, if any, by May 12, 2011, Defendants Mark P. Becker, et al., hereby file this response in opposition to Plaintiffs' Motion to Amend Their Trial Exhibit List (Dkt. 291) ("Motion"). Defendants do not object to the amendment of Plaintiffs' exhibit list to include the document Bates numbered OUP900003-OUP900005, which Plaintiffs inadvertently left off their exhibit list (*See* Dkt. 291 at 2), reserving all other

objections regarding this document and the associated allegation of infringing use. Defendants oppose the balance of Plaintiffs' motion.

The issue before this Court is whether Plaintiffs will suffer a manifest injustice if the pretrial order is not amended to add to Plaintiffs' exhibit list seven irrelevant and prejudicial documents that were in Plaintiffs' or their affiliates' possession at the time the proposed pretrial order was filed.

In the Motion, Plaintiffs move this Court to amend the pretrial order signed by this Court May 2, 2011. (Mot., Dkt. 291; Pretrial Or., Dkt. 280 at 20.) The pretrial order, in accordance with Local Rule 16.4(B)(29) and Federal Rule of Civil Procedure 16(e), states that the Pretrial Order "shall not be amended except by Order of the court to prevent manifest injustice." (Dkt. 280 at 20 (emphasis added)); *see* Fed. R. Civ. P. 16(e) ("The order following a final pretrial conference shall be modified only to prevent manifest injustice."); LR 16.4(B)(29), NDGa (providing limiting language for pretrial order).

Plaintiffs have not even attempted to establish any manifest injustice. At most, Plaintiffs claim that these seven additions would not prejudice Defendants, and about this they are wrong. The Defendants would suffer prejudice.

First, not only were the documents not listed in the pretrial order, but over half of them were not provided to Defendants until the day the instant motion was

filed. (See Email from T. Larson to S. Schaetzel, attached hereto as Exhibit A.) Plaintiffs excuse for not having previously even looked for these documents is that they were motivated to find them in response to Defendants' Motion *In Limine* to Exclude Evidence of Alleged Infringement of Improperly-Asserted Copyrights (Dkt. 277), filed the same day as the proposed pretrial order. (Dkt. 291 at 2-3.) But Plaintiffs were under an obligation to look for *and produce* two of these four documents pursuant to this Court's scheduling order of November 5, 2010, which provided that "Plaintiffs shall produce . . . [s]upplemental responses to Defendants' document requests and interrogatories relating to Plaintiffs' ownership and/or licensing of the subject works." (Dkt. 240 at 2.)¹ It cannot be a manifest injustice to disallow amendment of the pretrial order to add documents Plaintiffs failed to even look for, despite this Court's order to do so six months earlier.

Second, Defendants would be prejudiced by allowing the addition of these two previously-undisclosed documents. Defendants have prepared their defenses to the allegations of infringement of these two works—*Vocabulary* and *Writing: Resource Books for Teachers*—based, in part, on Plaintiffs' failure to produce certain documents they now seek to add. Defendants, for example, included

¹ Plaintiffs alleged infringements of the works *Vocabulary* and *Writing: Resource Books for Teachers* in the parties' joint filing on March 5, 2011. (Dkt. 266.)

specific objections relating to Plaintiffs' rights in these works in the parties' joint filing on March 15, 2010. (*See* Dkt. 266-4 at 9-10.) They then defended those objections in their response to Plaintiffs' Motion *In Limine* to Overrule Objections to Evidence of Alleged Infringements (Dkt. 273). (Dkt. 289.)² Defendants also filed a motion *in limine* to exclude evidence of alleged infringement of improperly-asserted copyrights where just such documentation had not been provided (Dkt. 277), leading Plaintiffs to seek out this information in response (Dkt. 291 at 2-3)). And Defendants have prepared their witnesses in accord with their understanding that these documents did not exist. It is far too late for Plaintiffs to be searching for such documents, presenting them for the first time to Defendants, and adding them to the pretrial order.

The other two previously-undisclosed documents Plaintiffs propose to add relate to a work not at issue in this case, *Evolutionary Medicine and Women's Health*. (*See* Joint Filing, Dkt. 266 at Exs. A-D.) Accordingly, those documents are irrelevant, inadmissible, and prejudicial. These documents are the subject of

² Defendants note that Plaintiffs' "discovery" that they had not produced evidence of their rights to the copyrights of certain subject works after the pretrial order was filed validates the point in Defendants' Brief in Opposition to Plaintiffs' Motion *In Limine* to Overrule Objections to Evidence of Alleged Infringements that until the parties have made their showings on the issue of ownership at trial, it is premature for the Court to rule on Defendants' objections with regard to Plaintiffs' ownership, and Plaintiffs' motion (Dkt. 273) accordingly should be denied. (*See* Dkt. 289 at 2-5.)

Defendants' previously-filed Motion *In Limine* to Exclude Irrelevant Evidence in Accordance with Order of September 30, 2010. (See Dkt. 272.) For all of the reasons stated in that motion and the associated reply (Dkt. 301), allowing presentation of evidence regarding works that are not the subject Plaintiffs' allegations of infringement identified in the parties' March 15, 2011 [joint filing](#) would greatly prejudice Defendants. Defendants would be forced to defend against extraneous allegations of infringement for which discovery was not conducted and witnesses have not been prepared, and which may infringe upon principles of sovereign immunity.

The same is true of two more documents Plaintiffs propose to add: EReserves reports for Fall 2005 and Spring 2006. As Defendants' motion *in limine* explains, uses of works prior to implementation of the 2009 Copyright Policy fall outside the scope of this litigation, as defined by this Court, and are irrelevant to establishing ongoing and continuous misuse after the adoption of that Policy, thus placing the Court's consideration of them in violation of principles of sovereign immunity. (See Dkt. 301; Dkt. 272.) Furthermore, as explained in Defendant's reply to that motion, EReserves does not always reflect actual uses of works thereon listed and does not indicate if a work has been licensed. (Dkt. 301 at 4-5 n.1 & n.2.) Were Plaintiffs to introduce such EReserves reports, Defendants

would unreasonably and prejudicially be forced to defend against allegations of use for which Plaintiffs cannot, under principles of sovereign immunity, be granted relief.

Because Plaintiffs have not established any manifest injustice for denying their Motion, Defendants assert that the Motion should be denied. Plaintiffs seek to add irrelevant evidence and evidence that is extremely prejudicial to Defendants. Such evidence would require Defendants to defend additional, previously-unspecified claims of infringement, and reexamine their defenses and objections regarding existing allegations of use. This, despite the fact that Plaintiffs or Plaintiffs' affiliates at all times had the relevant documents and, in four cases, failed to produce them. In light of the hardship to Defendants and the absence of any demonstration of injustice to Plaintiffs, Plaintiffs' motion to amend the pretrial order to add six of the seven specified documents (as identified above) should be denied.

Respectfully submitted, this 12th day of May, 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' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THEIR TRIAL EXHIBIT LIST** 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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of May, 2011, I have electronically filed the foregoing **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFS' MOTION TO AMEND THEIR TRIAL EXHIBIT LIST** 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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