

Defendants Mark P. Becker, in his official capacity as President of Georgia State University, et al, respectfully submit the following Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

PARTIES

A. Plaintiffs

1. Plaintiff Cambridge University Press (“Cambridge”) is a corporation with an office in New York, New York that publishes various academic works.

2. Plaintiff Oxford University Press, Inc. (“Oxford”) is a corporation with an office in New York, New York that publishes various academic works.

3. Plaintiff SAGE Publications (“SAGE”) is a corporation with an office in Thousand Oaks, California that publishes various academic works.

B. Defendants

4. Georgia State University (“GSU”) is a public university in Atlanta, Georgia and an institution unit of the University System of Georgia.

5. Defendant Mark P. Becker is the President of GSU, and has been sued in his official capacity.

6. Defendant Donald M. Leebern, Jr. is a member of the Board of Regents of the University System of Georgia (“Board of Regents”), and has been sued in his individual capacity.

7. Defendant Larry Walker is a member of the Board of Regents, and has been sued in his individual capacity.

8. Defendant Robert F. Hatcher is a member of the Board of Regents, and has been sued in his individual capacity.

9. Defendant W. Mansfield Jennings, Jr. is a member of the Board of Regents, and has been sued in his individual capacity.

10. Defendant James R. Jolly is a member of the Board of Regents, and has been sued in his individual capacity.

11. Defendant Doreen Stiles Poitevint is a member of the Board of Regents, and has been sued in her individual capacity.

12. Defendant Wanda Yancey Rodwell is a member of the Board of Regents, and has been sued in her individual capacity.

13. Defendant Richard L. Tucker is a member of the Board of Regents, and has been sued in his individual capacity.

14. Defendant Kenneth R. Bernard, Jr. is a member of the Board of Regents, and has been sued in his individual capacity.

15. Defendant William Nesmith, Jr. is a member of the Board of Regents, and has been sued in his individual capacity.

16. Defendant Willis J. Potts, Jr. is a member of the Board of Regents, and has been sued in his individual capacity.

17. Defendant Kessel Stelling, Jr. is a member of the Board of Regents, and has been sued in his individual capacity.

18. Defendant Benjamin J. Tarbutton, III is a member of the Board of Regents, and has been sued in his individual capacity.

19. Defendant Larry R. Ellis is a member of the Board of Regents, and has been sued in his individual capacity.

20. Defendant Rutledge A. Griffin, Jr. is a member of the Board of Regents, and has been sued in his individual capacity.

21. Defendant Thomas Hopkins is a member of the Board of Regents, and has been sued in his individual capacity.

22. Defendant Neal L. Pruit, Jr. is a member of the Board of Regents, and has been sued in his individual capacity.

23. Defendant Phillip A. Wilheit, Sr. is a member of the Board of Regents, and has been sued in his individual capacity.

24. Defendant Nancy Seamans is the Dean of Libraries at GSU, and has been sued in her official capacity.

25. Defendant J.L. Albert is the Associate Provost for Information Systems and Technology at GSU, and has been sued in his official capacity.

26. Defendant Risa Palm is the Senior Vice President for Academic Affairs and Provost of GSU, and has been sued in her official capacity.

STATUS OF THE CASE

27. Plaintiffs' Complaint for copyright infringement in this action was filed on April 15, 2008, naming only GSU Administrators.¹ The Complaint alleged, *inter alia*, that GSU professors were uploading or posting to online systems "many, if not all, of the assigned readings for a particular course without limitation, without oversight and without the requisite authorization and appropriate compensation to the copyright owners...." (Complaint, ¶ 1.)

28. Plaintiffs contend that their goal was to end the "systematic, widespread distribution and copying of a vast amount" of Plaintiffs' copyrighted

¹ The Complaint originally named only Carl V. Patton, then the President of GSU; Ron Henry, then the Provost of GSU; Charlene Hart, then the GSU Dean of Libraries, and J.L. Albert.

works without authorization. (Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, p.1 [Dkt. No. 185].)

29. Plaintiffs filed a First Amended Complaint for copyright infringement on December 15, 2008, naming members of the Board of Regents of the University System of Georgia in their official capacities. The Amended Complaint, coupled with discovery responses, listed only thirty-one (31) alleged infringements in the form of excerpts, but pled that the improper distribution of copyrighted materials at GSU was "pervasive, flagrant and on-going." Plaintiffs sought only injunctive relief; Plaintiffs do not seek damages.

30. On January 2, 2009, Defendants answered the First Amended Complaint. Defendants denied any act of copyright infringement. Defendants also pled that they were protected by the doctrine of sovereign immunity and that their conduct was permitted by the doctrine of fair use, 17 U.S.C. § 107.

31. In February of 2009, the Board of Regents adopted a new copyright policy for member institutions of the University System of Georgia, including GSU (The "2009 Copyright Policy" or the "current copyright Policy"). The 2009 Copyright Policy was created by the Board of Regents' Select Committee of Copyright, which was chaired by Dr. William G. Potter, Director of Libraries at the University of Georgia in Athens, Georgia. Dr. Potter was joined by

educators from various University System of Georgia member units, including Georgia Health Services University, Georgia Institute of Technology, Kennesaw State University, and the University System of Georgia, and counsel from the University of Georgia Research Foundation and GSU. Counsel for GSU was Ms. Cynthia V. Hall.

32. Discovery was conducted by the parties. At the conclusion of the discovery period in January of 2010, all parties filed summary judgment motions. Plaintiffs' motion addressed the 2009 Copyright Policy, but relied on the alleged infringements cited in the First Amended Complaint that predated that policy. Plaintiffs motion also listed additional alleged copyright infringements, most of which occurred before the 2009 Copyright Policy was adopted. Many of Plaintiffs' listed allegations of infringement did not provide complete and necessary information, such as the author of the book, the course, the professor, the total number of pages in the subject work, and the name of the copyright owner. For the most part, Plaintiffs provided only the name of the work and an identification of the semester in which a particular excerpt was used.

33. Defendants' summary judgment motion contended that only alleged acts of infringement subsequent to adoption of the 2009 Copyright Policy were relevant. Plaintiffs disagreed, arguing that Defendants' acts of infringement

were “massive.” In apparent support of such argument, Plaintiffs identified some 270 newly claimed infringements.

34. On September 30, 2010, the Court ruled on the pending cross-motions for summary judgment. The Court agreed with the Defendants that only the 2009 Copyright Policy was relevant to Plaintiffs claims. The Court held that in order to show that Defendants are responsible for the copyright infringements alleged in this case, Plaintiffs . . . must put forth evidence of a sufficient number of instances of infringement of Plaintiffs’ copyrights to show . . . ongoing and continuous misuse of the fair use defense.” (Sept. 30, 2010 Or., Dkt. 235 at 30.) The Court further held that in making this showing (and in Defendant’s making their showings that the alleged uses amount to fair uses, “[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 order.” (*Id.*) The Court denied Plaintiffs’ motion for summary judgment.

35. The August 11 and 12 orders required Plaintiffs to file with the Court as claimed infringements only alleged uses of works (i) the copyright for which is owned by one of the Plaintiffs and (ii) that occurred during one or more of the three semesters immediately following adoption of the 2009 Copyright Policy: Maymester 2009, Summer 2009, and Fall 2009. (Dkt. 226; Dkt. 227.) In response,

Plaintiffs enumerated 126 uses of works purportedly owned or controlled by them across the three semesters. (Dkt. 228.)

36. On November 5, 2010, and March 3, 2011, this Court again indicated that Plaintiffs' infringement evidence would be limited to claimed infringements from the 2009 Maymester, Summer 2009, and Fall 2009 terms. (Dkt. 265 at 1-2; Dkt. 240 at 3.) Therein, the Court ordered that the parties jointly develop "an accurate and complete list of all alleged infringements from the 2009 Maymester, Summer 2009 terms, and Fall 2009 term." (Dkt. 265 at 1; Dkt. 240 at 3.) In response, the parties jointly filed on March 15, 2011, a list of 99 alleged infringements during the three relevant semesters. (Dkt. 266.)²

37. The September 30, 2010 Order narrowed the issues for trial, granting Defendants' motion for summary judgment on the issues of direct and vicarious liability for copyright infringement. However, the Court denied Defendants' motion as to summary judgment on the issue of contributory infringement, and that issue remains for trial.

² In the Consolidated Pretrial Order, the Plaintiffs allege "infringements of more than 80 of Plaintiffs' works during those terms." Despite the dwindling list of alleged infringements, Plaintiffs continue to maintain that there is "widespread copyright infringement at GSU." (Brief, p. 6.)

38. The Plaintiff sought partial reconsideration on the issue of direct infringement as set forth in Claim One of the Complaint. In the September 30, 2010 Order, the Court determined that the doctrine of respondeat superior in the copyright context is a basis for finding indirect liability, not direct liability. The Court found that Plaintiffs' First Amended Complaint arguably pled a direct infringement claim based on respondeat superior (e.g., ... "hundreds of professors employed by Georgia State have compiled thousands of copyrighted works, made them available for electronic distribution, and invited students to download, view and print such materials without permission from the copyright owner." (Compl., ¶ 3.) In view thereof, on December 28, 2010, the Court granted Plaintiffs' motion for reconsideration and denied Defendants' motion for summary judgment as to Plaintiffs' Claim One when construed as an indirect infringement claim.

39. On November 5, 2010, the Court held a scheduling conference and issued an order that counsel should confer and jointly prepare an accurate and complete list of all alleged infringements from the 2009 Maymester, Summer 2009 and Fall 2009 terms.

40. Just prior to that hearing, on November 4, 2010, Defendants filed a motion to dismiss under Rule 12(b)(1) and 12(c) of the Federal Rules of Civil Procedure, asserting Eleventh Amendment immunity. Plaintiffs argued that

the motion was not timely and that the court had jurisdiction regardless of whether the issues turn on the strict averments of the First Amended Complaint or on the fact that Defendants have oversight responsibility for the professors and GSU personnel.

41. On March 17, 2011, the Court denied Defendants' motion to dismiss, without prejudice, stating that "the parties will need to present evidence and argument that will allow the Court to rule on the question of whether Plaintiffs may proceed under Ex Parte Young or whether the case must be dismissed for lack of subject matter jurisdiction." On March 15, 2011, the parties submitted a "Joint Filing Concerning Allegations Of Infringement at GSU." As shown, it includes, inter alia, the course, the instructor, the title of the work, the asserted copyright owner, a brief description of the work, the number of pages allegedly used, the percent allegedly copied, cost information and objections made by the Defendant. These allegations of infringement form the basis of the trial.

GSU and Its E-Reserves System

42. The Defendants are officials of GSU or Members of the Board of Regents. The Board of Regents has general supervisory authority over GSU's operations and elects the President of GSU, which is an institution 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.

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

44. 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.

45. 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.

46. 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 2009 Copyright Policy

47. The current Copyright Policy is comprised of several sections, including a discussion of copyrights and copyright law, and of fair use. A key aspect of the current Copyright Policy is the so-called “fair use checklist,” which is provided with an introduction. More particularly, the introduction states:

Before using the checklist to conduct a fair use analysis, the following threshold questions should be considered:

1. You should first determine whether the work to be used is protected by copyright. If not, a fair use analysis is not necessary. For example, works created by U.S. government employees as part of their official duties are not protected by copyright. Works first published prior to 1923 are no longer protected by copyright. All materials first published after 1978 should be presumed to be protected by copyright, even if no copyright notice is present.
2. You do not need to conduct a fair use analysis if you or your institution has a license (or permission) to use the work and your use falls within that license. For example, some materials are distributed with a license that specifically allows for nonprofit educational use. The work may also be available through an electronic database at your institution’s library or legally available on the web. If so, you may be able to direct students to that work or link directly to that work without conducting a fair use analysis.
3. A separate exception in federal copyright law specifically allows for performance or display (but not copying and distribution) of a work by instructors or students in the course of “face-to-face” teaching activities. [17 U.S.C. §

110(1)]. If your proposed use falls into this statutory exception, you need not conduct a fair use analysis.

48. The current Policy specifically provides a “fair use checklist” that lists the four so-called “fair use factors” and includes boxes that a professor using the checklist can “check” as they work through it. The document is footnoted with the following:

Revised for use by the University System of Georgia, based upon the Copyright Advisory Office at Columbia University’s “Fair Use Checklist,” <http://www.copy-right.columbia.edu/fair-use-checklist>.

49. Once these threshold questions are considered, the users opens a link to the “fair use checklist.” As stated, the checklist sets out the four fair use factors:

1. Purpose and Character of the Use;
2. Nature of the Copyrighted Work;
3. Amount and Substantiality of the Portion Used; and
4. Effect on Market for Original.

Beneath each factor are two columns entitled “Weighs in Favor of Fair Use” and “Weighs Against Fair Use;” with various different aspect of the subject factor set forth in each column. Each aspect is based or derived from the Copyright Act (15 U.S.C. § 107) or case law. Thus, the fair use checklist seeks a balance such that

the user is presented with a choice of whether the particular aspect favors or does not favor fair use.

50. The 2009 GSU Copyright Policy fair use checklist is to thus be contrasted with the Columbia University checklist from which it was derived. In the many instances, the Columbia checklist is not so balanced. For example, under the first factor, the “Favoring Fair Use” column list ten (10) aspects³ whereas the “Opposing Fair Use” column lists only five (5) aspects.⁴ In contrast, the 2009 Copyright Policy’s first factor lists seven (7) aspects under each column, both in favor and against fair use.

51. At the bottom of each factor, the current Copyright Policy provides a place for the user to indicate whether, upon a comparison of the checks in each column, the factor weighs in favor or against fair use.

³ Teaching (including multiple copies for classroom use), Research, Scholarship, Nonprofit educational institution, Criticism, Comment, News reporting, Transformative or productive use (changes the work for new utility), Restricted access (to students or other appropriate group).

⁴ Commercial activity, Profiting from the use, Entertainment, Bad-faith behavior, Denying credit to original author.

52. Importantly, the current Copyright Policy also includes “Additional Guidelines for electronic Reserves.” This portion of the policy explains that the University System of Georgia supports instruction with electronic reserves and similar electronic services. The primary function of these services, according to the current policy, is “to assure that students and teachers will have timely access to course-related library resources.” These “Additional Guidelines” set forth standards that apply “to use of copyrighted works for electronic reserves:”

- Instructors are responsible for evaluating, on a case-by-case basis, whether the use of a copyrighted work on electronic reserves requires permission or qualifies as a fair use. If relying upon the fair use exception, instructors must complete a copy of the fair use checklist before submitting material for electronic reserves.
- Inclusion of materials on electronic reserves will be at the request of the instructor for his or her educational needs.
- Materials made available on electronic reserves should include a citation to the original source of publication and a form of copyright notice.
- The instructor, library or other unit of the institution must possess a lawfully obtained copy of any material submitted for electronic reserves.
- Access to course material on electronic reserves should be restricted by password to students and instructors enrolled in and responsible for the course. Access should be terminated as soon as the student has completed the course.

- Library reserves staff should check to see whether materials submitted for electronic reserves are available through an electronic database or are otherwise legally available. If so, staff should provide a link rather than scanning and posting the material.
- Library reserves staff should delete materials available on electronic reserves at the conclusion of each semester.
- Institutions at the University System of Georgia will impose no charge to students for access to materials on electronic reserves.

53. Thus, the 2009 Copyright Policy gives the instructor responsibility for evaluating whether a particular excerpt is, in fact, a fair use and therefore can be posted on the GSU E-Res system.

54. The 2009 Copyright Policy also directs that permission to make a use may be necessary. More specifically, the current copyright Policy states:

If you are seeking to use a copyrighted work, you may have to obtain permission from the copyright owner.... Sometimes, the copyright owner may require a fee or impose other conditions. You have to decide if the cost and conditions are acceptable....

55. The 2009 Copyright Policy also includes “additional Resources,” which includes a series of links that reference “collective Licensing Agencies.” Two such links are for “Works in Print” and “Online Works.” The first link for both of these works is the “Copyright Clearance Center” or “CCC.” The CCC is a company that provides “licensing mechanisms specifically designed

by the publishing community to foster innovative distribution formats (including electronic reserves).

56. The “CCC” link takes the user to the Copyright Clearance Center website. Interestingly, the CCC website provided its own checklist that was more in keeping with that provided by Columbia University. In fact, the CCC contacted Dr. Kenneth Crews, creator of the checklist, for permission. The CCC website checklist was removed during discovery in this action.

C. Sovereign Immunity

57. All of the defendants named in this lawsuit have been sued in their official capacity.

58. Plaintiffs’ Amended Complaint alleges three causes of action against the individual members of The Board of Regents in their official capacities.

59. Certain members of The Board of Regents— recently selected by Governor Nathan Deal—could not plausibly have been involved in the complained-of acts.

60. The Board of Regents of the University System of Georgia is an official arm of the state.

61. Plaintiffs’ Amended Complaint alleges three causes of action against GSU Administrators in their official capacities.

62. GSU Administrators sued in their official capacities are state officials.

63. The Regents and the GSU Administrators sued in their official capacities are protected by the Eleventh Amendment.

64. The individual members of the Board of Regents and the Board of Regents as a whole did not select which excerpts to use, were not involved in the process to have those excerpts posted on ERes, and were not involved in making those postings accessible to the GSU students.

65. The GSU Administrators did not select which excerpts to use, were not involved in the process to have those excerpts posted on ERes, and did not take any action to make those postings accessible to the GSU students.

66. Plaintiffs do not contend that any Defendant personally participated in the alleged copyright violations.

67. There is no evidence that any of the Defendants have themselves copied Plaintiffs' copyrighted works.

68. There is no evidence that any Defendant personally directed his or her subordinates to act unlawfully.

69. The Board of Regents does not mandate that professors infringe the plaintiffs' copyrights.

70. The GSU Administrators do not mandate that professors infringe the plaintiffs' copyrights.

71. There is no evidence that the Board of Regents or the GSU Administrators were aware of a widespread history of faculty and students infringing Plaintiffs' copyrights such that they would have been put on notice of the need to correct the alleged infringements.

72. There is no evidence that GSU faculty are or ever have been deliberately indifferent to Plaintiffs' copyright rights.

73. There is no evidence that the Board of Regents or the GSU Administrators directed GSU faculty to violate federal copyright law.

74. Plaintiffs have failed to prove the causal connection required to impose supervisor liability upon the Defendants.

75. The Board of Regents' Copyright Policy is based upon the four factor test for determining Fair Use as enunciated by the U.S. Supreme Court.

76. Each use is for a nonprofit educational purpose.

77. Each use is directly related to the pedagogical purpose of a specific course.

78. Either GSU or a professor lawfully acquired each of the works in question.

79. Each use is restricted to only those students enrolled in the specific course for which the use was assigned.

80. Each use of an excerpt from a work in question is reviewed by a student at the direction of the instructor of a specific course.

81. Each use is accessible only during the term of the specific course.

82. The individual Defendants did not know, at the time of the events alleged, that the GSU professor's use of each work could constitute copyright infringement.

83. The GSU professor's alleged use has little or no effect on "the potential market for or value of" the Plaintiffs' copyrighted works.

84. There is no evidence suggesting that GSU professors would have assigned Plaintiffs' works to GSU students, or that GSU students would have purchased the copyrighted works, if the works were not available on eRes.

85. A few incidents of infringing uses cannot, either together or separately, establish a widespread history of systematic violations of Plaintiffs' federal rights.