

**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 Georgia State University
President, et al.,

Defendants.

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

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR POST-TRIAL PROPOSED DECLARATORY JUDGMENT
AND PERMANENT INJUNCTION**

On May 11, 2012, this Court issued an opinion finding that Defendants had infringed certain of Plaintiffs' copyrights by distributing (and causing to be distributed) excerpts of copyrighted works without permission through the Electronic Reserves ("ERes") and uLearn systems at Georgia State University ("GSU"), notwithstanding Defendants' adoption of a new copyright policy following the commencement of this lawsuit.

As the Court acknowledged in its opinion, before Plaintiffs filed this lawsuit GSU's faculty was led to believe that unlicensed takings of up to twenty percent of

copyrighted works for use as course readings were permitted under the fair use doctrine. Order, May 11, 2012, Dkt. No. 423 (“May 2012 Order”) at 38. In the words of GSU’s expert, Dr. Crews, this pre-2009 policy “just said ‘yes’ to everything.” Trial Transcript Volume 13, June 3, 2011, Dkt. No. 396 (“Trial Tr. Vol. 13”) at 82. During discovery, GSU unveiled a new copyright policy, the centerpiece of which was a so-called “fair use checklist” that delegated all responsibility for the fair use analysis to faculty. *See* May 2012 Order at 38. The parties submitted extensive briefing on the new policy in the form of cross-motions for summary judgment.

After ruling on those motions, the Court ordered the parties to prepare for a bench trial focused on the effect of the new policy on practice at GSU during the three 2009 academic terms immediately following the policy’s adoption. Two of those terms, the three-week “Maymester” and the Summer session, were not full semesters. Nevertheless, through rulings on motions *in limine* and on evidentiary objections made at trial, the Court confined Plaintiffs’ presentation of evidence at trial (held during 2011) to the three designated 2009 terms. Even that limited record, however, confirmed that GSU’s new policy caused faculty to infringe Plaintiffs’ copyrights. As the Court found, the checklist did nothing to limit GSU’s “mirror-image, nontransformative” copying (May 2012 Order at 65) to “decidedly

small” excerpts of Plaintiffs’ works, and it failed to provide guidance to GSU’s faculty as to the proper application of the fourth fair use factor. *Id.* at 337-38.

Consequently, even after dismissing many claimed infringements for various asserted failures of proof, the Court nonetheless found a number of instances of copyright infringement that established ongoing and continuous infringement by GSU. Plaintiffs therefore respectfully submit that the trial record and the legal arguments already before the Court support a finding that they are entitled to the relief set forth in the injunction Plaintiffs proposed before trial. Dkt. No. 300-1. *See, e.g.*, Plaintiffs’ Pre-Trial Proposed Conclusions of Law, Dkt. No. 338 at 53-60; Plaintiffs’ Post-Trial Proposed Conclusions of Law, Dkt. No. 409-6 at 85-90; Trial Transcript Volume 1, May 17, 2011, Dkt. No. 399 (“Trial Tr. Vol. 1”) at 42-46 (discussing Plaintiffs’ proposed injunction); Trial Transcript Volume 15, June 7, 2011, Dkt. No. 398 (“Trial Tr. Vol. 15”) at 32-35 (same).

To the extent the Court’s invitation to Plaintiffs to propose injunctive and declaratory relief “[i]n light of the findings of fact and conclusions of law contained in” its May 2012 opinion contemplates a more narrowly tailored injunction tracking the Court’s application of the fair use doctrine to the specific works reviewed (May 2012 Order at 339), Plaintiffs have prepared a second proposal, attached hereto as Exhibit A (the “Proposed Order”), which attempts to

do so.¹ We note at the outset that this form of injunction is intended to apply solely to the defined categories of “Works” of the Plaintiffs and does not purport to address, let alone define, the intersection of copyright law and the fair use doctrine as applied to any other types of works, including those identified in the Proposed Order as being specifically excluded from its coverage.

ARGUMENT AND CITATION OF AUTHORITY

I. PLAINTIFFS ARE ENTITLED TO A DECLARATORY JUDGMENT AND A PERMANENT INJUNCTION

The Court has found that Defendants’ policies caused GSU faculty to infringe Plaintiffs’ copyrights. May 2012 Order at 337-38. That finding justifies the issuance of a declaratory judgment and a permanent injunction to prevent future infringement of Plaintiffs’ works.

A declaratory judgment is “an appropriate means of determining intellectual property rights” where an actual controversy exists as to whether a party is infringing a copyright. *See generally Baisden v. I’m Ready Prods., Inc.*, 804 F. Supp. 2d 549, 551-52 (S.D. Tex. 2011); 28 U.S.C. § 2201(a). Accordingly, as set forth in the May 11 Order, Plaintiffs’ Proposed Order seeks a declaration that

¹ In offering this alternative proposal, Plaintiffs expressly reserve their right to challenge the Court’s findings of fact and conclusions of law on appeal.

Defendants infringed the works identified in that Order. *See* Ex. A (Proposed Order) ¶¶ II(A)-(E).

The Court's finding that Defendants' policies caused GSU faculty to infringe Plaintiffs' copyrights also merits permanent injunctive relief. The Copyright Act authorizes the Court to grant an injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). "[A]n injunction is appropriate when there is a past infringement and a substantial likelihood of future infringement." *New World Music Co. v. Tampa Bay Downs, Inc.*, No. 8:07-CV-398-T-33TBM, 2009 WL 35184, at *9 (M.D. Fla. Jan. 6, 2009) (internal quotation marks and citation omitted). Courts routinely enter broad injunctions in copyright cases based on a small sample of infringing uses. *See, e.g., Atlantic Recording Corp. v. Carter*, 508 F. Supp. 2d 1019, 1026-28 (S.D. Ala. 2007) (enjoining defendant from infringing any of plaintiff record label's works based on a sample of twelve infringements); *Virgin Records Am., Inc. v. Johnson*, 441 F. Supp. 2d 963, 965-67 (N.D. Ind. 2006) (enjoining defendant from infringing any of plaintiff record label's works based on a sample of ten infringements).

Here, the Court limited the evidentiary record to three terms chosen by the Court (two of which were not full academic semesters). In limiting the scope of

the evidentiary record in this manner and expressly refusing to allow Plaintiffs to introduce any evidence of infringement in semesters in 2010 and 2011,² the Court intended that the infringements be deemed representative of GSU's current practice for the purposes of injunctive relief. *See* Transcript of Chambers Conference, Nov. 5, 2010, Dkt. No. 261, at 12-14. Indeed, in a November 2010 conference, the Court noted that if Defendants refused to agree to discovery for periods later than 2009, they would not be heard to argue that their copyright practices had changed. *Id.*

The trial record contains testimony from each of the GSU faculty who infringed Plaintiffs' copyrights that they believed their use of Plaintiffs' works was authorized by the fair use doctrine even after applying the so-called fair use checklist Defendants promulgated. Indeed, the record contains no evidence that a single professor found that any of the four fair-use factors weighed against a fair use determination with respect to any of Plaintiffs' works. Plaintiffs' Trial Exhibits ("PX") 558, 563-67, 570-603, 606, 608, 613, 629, 639, 643, 647-52, 654-62, 938; Defendants' Trial Exhibits ("DX") 346-48, 428-29, 473-74, 480-81.

Thirty-one of the fair use checklists admitted into evidence did not contain a single

² Plaintiffs' summary judgment filing, for example, detailed the continued, extensive use of Plaintiffs' works during the Spring 2010 semester. *See* Plaintiffs' Supplemental Local Rule 56.1 Statement of Facts in Support of Their Motion for Summary Judgment, Dkt. No. 185-1.

check in the “weighs against fair use” column. PX 564-67, 570, 595-99, 602-03, 608, 639, 643, 647-655; DX 473-74, 428-29, 346-48.

The Court consequently determined that Defendants’ 2009 Copyright Policy caused the infringements the Court found were committed during 2009:

The question now is whether Georgia State’s 2009 Copyright Policy caused those infringements. The Court finds that it did, in that the policy did not limit copying in those instances to decidedly small excerpts as required by this Order. Nor did it proscribe the use of multiple chapters from the same book. Also, the fair use policy did not provide sufficient guidance in determining the “actual or potential effect on the market or the value of the copyrighted work,” a task which would likely be futile for prospective determinations (in advance of litigation). The only practical way to deal with factor four in advance likely is to assume that it strongly favors the plaintiff-publisher (if licensed digital excerpts are available).

May 2012 Order at 337-38. Because it is clear that GSU faculty will continue to distribute course readings electronically, there is a substantial likelihood of future infringement unless GSU changes its copyright policy. Accordingly, the Court should issue an injunction that prohibits the copying, display, or distribution of Plaintiffs’ Works unless either permission to use the Work is obtained or the use meets the fair-use criteria embodied in this Court’s findings of fact and conclusions of law and incorporated into Plaintiffs’ Proposed Order.

II. THE COURT’S FINDINGS AND CONCLUSIONS SUPPORT EACH TERM OF PLAINTIFFS’ PROPOSED ORDER

To assist the Court in crafting appropriate injunctive relief, the remainder of this memorandum sets forth in italics specific terms from Plaintiffs’ Proposed Order and explains the legal and factual bases for including those provisions in an injunction. Each italicized provision below appears in Exhibit A to this submission.

A. Definitions

*The term “GSU” includes each and every Defendant, and all of their agents, servants, employees, representatives, and successors, all other persons acting under their direction, control, or supervision, including all part-time or full-time faculty employed by, and students enrolled at, Georgia State University, and all those in active concert or participation with them.*³

Plaintiffs’ alternative proposed injunction applies to “GSU,” defined to include not only Defendants but also GSU’s employees, faculty, and students because, as the Court recognized in its findings of fact, the users of GSU’s ERes and uLearn systems include both faculty and students. May 2012 Order at 42. For any injunction to be meaningfully enforceable, it must reach all of those users. In addition, the members of the Board of Regents must be included in the definition of GSU because they exercise control over the university’s copyright policies and

³ Ex. A (Proposed Order) ¶ I(A).

also host GSU's uLearn system on a Board of Regents server. Stipulated Facts, Dkt. No., 278-3 ¶ 73.

*The terms “Work” or “Works” shall mean any non-fiction book other than a textbook in hardcopy, e-book or any other format now in existence or yet to be published in which Cambridge University Press, Oxford University Press, Inc., or SAGE Publications, Inc. (hereafter “Plaintiffs”) own or control the exclusive right under copyright that GSU seeks to exercise.*⁴

As the Court recognized, “The analysis of the fair use defense must be done on a case-by-case basis, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985), and ‘All four factors are to be explored, and the results weighed together, in light of the purposes of copyright.’ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).” May 2012 Order at 48. The Court’s findings of fact and conclusions of law are limited to the works that were at issue in the case – scholarly books that inform and educate. *Id.* at 20-23. Although there was no dispute that many of the works at issue in this lawsuit were creative works of scholarship, each of the takings the Court found to be non-infringing was a nonfiction academic work. The Court concluded that the informational character of Plaintiffs’ works “favor[ed]” GSU in the Court’s fair use analysis. *Id.* at 54. In contrast, the artistic or fictional nature of a work indisputably would weigh against a finding of fair use. *See Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F.

⁴ Ex. A (Proposed Order) ¶ I(B).

Supp. 1522, 1532-33 (S.D.N.Y. 1991) (“Fictional works . . . are often based closely on the author’s subjective impressions and, therefore, require more protection.”). Thus, to comport with the Court’s interpretation of the second fair use factor, Plaintiffs’ Proposed Order limits the definition of “Works” to the types of scholarly books at issue in the case; the proposed injunction does not purport to cover works of fiction or poetry for which the second fair use factor would likely favor Plaintiffs and dictate a different fair use determination. *See* May 2012 Order at 51-52; 17 U.S.C. § 107.⁵

As the Court recognized in its factor two analysis, the academic books at issue in this lawsuit are not typical textbooks. May 2012 Order at 36-37. Accordingly, Plaintiffs exclude textbooks from their Proposed Order. Doing so is important, as such works call for a different analysis under the third and fourth fair use factors because an unlicensed taking of even two or three percent of a textbook is of a different character than the takings at issue in this action and would indisputably cause direct harm to the market for such a work.

⁵ Although Plaintiffs’ Proposed Order is limited to non-fiction books, it should not be read as authorizing unlimited takings of fictional works; some limitation is necessary because GSU faculty have distributed entire works of fiction without permission in electronic form. Professor Davis admitted, for example, that in one of her courses she posted a complete short story on uLearn. Trial Transcript Volume 7, May 25, 2011, Dkt. No. 405 (“Trial Tr. Vol. 7”) at 118.

Next, consistent with the media-neutral nature of copyright law, *see generally Greenberg v. Nat'l Geographic Soc'y*, 533 F.3d 1244, 1257 (11th Cir. 2008), the definition of “Work” applies to all formats of scholarly books – hardcopy, electronic, and otherwise. The Proposed Order covers copies made with a scanner as well as copies downloaded from an e-book.

The Proposed Order also defines “Works” to include not only Plaintiffs’ existing copyrighted books but also books that Plaintiffs may publish in the future. Courts regularly issue copyright injunctions prohibiting infringement of any of a plaintiff’s current and future works, not just of the specific works sued upon. For example, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007), a group of record-company and movie-studio plaintiffs appended to their complaint exhibits identifying certain of their works found on the defendants’ internet file-sharing systems. The district court (after a remand from the United States Supreme Court) entered an injunction covering “all of Plaintiffs’ copyrighted works whether now in existence or later created,” not just the works in the exhibits attached to the plaintiffs’ complaint. *Grokster*, 518 F. Supp. 2d at 1229. In doing so, the court explained that such a broad injunction was “entirely proper” and cited supporting case law to that effect from the Eleventh Circuit and other circuits. *Id.* The *Grokster* injunction extended to unregistered works

because the Copyright Act is clear that registration “is not a condition of copyright protection.” *Id.* (quoting 17 U.S.C. § 408).

An Eleventh Circuit case cited by the *Grokster* court, *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), exemplifies the broad scope of injunctive relief that is appropriate where infringement of a plaintiff’s work has been found. In that case, a television station owner sued over the infringement of a single newscast but sought to enjoin the defendant from infringing any of its other newscasts. The Eleventh Circuit rejected the defendant’s argument that the injunction could not sweep more broadly than the single work identified in the complaint and upheld this Court’s authority to issue an injunction addressing all of the plaintiff’s works, including “unregistered works” and “works that have not been created.” *Id.* at 1499 n.17; *Pac. & S. Co. v. Duncan*, 618 F. Supp. 469, 471 (N.D. Ga. 1985) (Evans, J.), *aff’d*, 792 F.2d 1013 (11th Cir. 1986) (enjoining the copying of any of the plaintiff’s broadcast news programs).

Courts enter such broad injunctions for the pragmatic purpose of reducing the need for further litigation. As one district court in this Circuit explained, “because Plaintiffs continually create new works – works that would be vulnerable to infringement if the injunction were limited to existing works, and that would require new litigation to redress each future infringement – the requested

injunction follows standard practice in copyright cases by covering works to be created in the future.” *Arista Records, Inc. v. Beker Enters., Inc.*, 298 F. Supp. 2d 1310, 1315 (S.D. Fla. 2003); *see also Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 686 (S.D.N.Y. 1979) (“[I]t would be inequitable to grant the copyright owner . . . judgment on the issue of liability without enjoining the infringement of future registered works. Otherwise, HBO would be required to bring a separate infringement action every time it register[ed] a new copyrighted work . . .”).

The need to include future works is particularly appropriate here, where the Court limited the evidence of infringement to 2009 on the understanding that it would be treated as representative of ongoing conduct at GSU. Indeed, in its summary judgment opinion, the Court explicitly stated that Plaintiffs could prove GSU’s ongoing infringement by “put[ting] forth evidence of a sufficient number of instances of infringement of Plaintiffs’ copyrights.” Order, September 30, 2010, Dkt. 235 at 30. It would therefore be unfair to limit the injunction to the works infringed in 2009 when Plaintiffs were not permitted to introduce evidence of infringement of their works in 2010 and 2011 on the premise that conduct during 2009 would be considered representative of current practice at GSU.

The term “GSU Electronic Course Systems” shall include EReserves, uLearn, faculty websites, course websites, or any other system now in

*existence or hereinafter developed that is owned, licensed, used, or controlled by GSU or the Board of Regents of the University System of Georgia through which course reading materials (whether required, additional, supplemental, optional or otherwise) are made available to Georgia State University students electronically. Any copying, posting, uploading, downloading, or other distribution done on any GSU Electronic Course System shall, for purposes of this Order, be attributed to and be considered done by GSU.*⁶

Plaintiffs' Proposed Order defines "GSU Electronic Course System" to include ERes, uLearn, and faculty and course websites as well as any similar systems that GSU implements in the future. Any injunction must encompass these systems to prevent infringing activity from being shifted away from ERes or uLearn to evade the injunction.

B. Restrictions on Unlicensed Takings

Plaintiffs' Proposed Order tracks copyright law by prohibiting copying of Plaintiffs' Works unless GSU obtains permission or the use comports with the fair use doctrine.⁷ *See* 17 U.S.C. § 106 (granting copyright owners exclusive rights with respect to their works); *id.* §§ 107-112 (outlining limited exceptions, including fair use, to the copyright owner's exclusive rights). The Proposed Order prohibits the copying and distribution of Plaintiffs' Works and excerpts thereof via ERes, uLearn, faculty websites, course websites, or any electronic course content

⁶ Ex. A (Proposed Order) ¶ I(C).

⁷ Ex. A (Proposed Order) ¶¶ III and IV.

system unless the use is (A) licensed or (B) constitutes fair use in keeping with the Court's analysis in the May 2012 Order. Consistent with the Court's view that some concrete guidance is necessary as a practical matter, Paragraph IV.B. sets forth specific criteria to be used to evaluate whether non-transformative, mirror-image copying of decidedly small excerpts of Plaintiffs' Works posted to a GSU Electronic Course System constitutes fair use.

Specific Criteria

1. *are made and/or distributed by GSU without charge strictly for nonprofit educational purposes; AND*
2. *fulfill a legitimate purpose in the course curriculum and are narrowly-tailored to serve a nonprofit educational purpose;*⁸

The Court's analysis of the first fair use factor turned on the nonprofit educational use of concededly non-transformative excerpts of Plaintiffs' works in a classroom setting. Pretermittting whether this Court's findings and conclusions overstate the significance of the nonprofit educational purpose to the fair use analysis, the injunction should prohibit GSU from profiting from the unlicensed use of Plaintiffs' works by charging students a library or computer fee for accessing unlicensed excerpts from Plaintiffs' works on ERes or uLearn. GSU also should not be permitted to distribute Plaintiffs' works for purposes other than

⁸ Ex. A (Proposed Order) ¶¶ IV(B)(1)-(2).

classroom teaching or to make available to students excerpts that are not narrowly-tailored to accomplish the instructor’s educational objectives.

3. *do not constitute the “heart of the work”;*⁹

As the Court correctly noted, under the third fair use factor the copying of even very small excerpts may be outside the permissible bounds of fair use if the excerpt is the “heart” of the copyrighted work. *See* May 2012 Order at 67 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (holding that copying the “heart” of a work is not fair use)); *id.* at 328 (finding that the chapters Professor Harvey assigned from *The Power Elite* were “the heart of the work in that they essentially sum up the ideas in the book”). Accordingly, this provision is included as an additional, non-quantitative check against infringing uses of Plaintiffs’ Works.

4. *constitute a decidedly small excerpt in accordance with the following criteria:*

a. *if from a book that is not divided into chapters or contains fewer than ten chapters and for which a license for digital academic use is available, do not exceed ten (10) percent of the pages in the Work; or*

b. *if from a book that contains ten or more chapters and for which a license for digital academic use is available, do not exceed one (1) chapter; or*

⁹ Ex. A (Proposed Order) ¶ IV(B)(3).

*c. if, after a reasonable investigation that shall at a minimum include consulting both the copyright owner and its authorized agent (such as Copyright Clearance Center, Inc.), GSU determines that the digital excerpt cannot be licensed or purchased for use on GSU Electronic Course Systems, and that the excerpt is sufficiently small so as not to cause actual or potential market harm to the Work;*¹⁰

This section of the Proposed Order addresses the Court’s interpretation of the third and fourth fair use factors. The Court’s determination of whether any particular unlicensed taking by GSU ran afoul of the fair use doctrine largely turned on two factors: first, whether the excerpt was “decidedly small” and, second, whether permission was available to distribute the excerpt in digital form. May 2012 Order at 55, 64-66, 88-89. Subclauses (a) and (b) address the former and incorporate the size limitations imposed by the Order. Subclause (c) addresses the availability of digital permissions. Given the weight that the Court placed upon this factor, it is clear that, as a practical matter, GSU must be required to investigate the availability of digital permissions before it may determine that a proposed use of an excerpt of a Work is protected by the fair use doctrine – something GSU did not do with respect to any of the works at issue in this case.

Requiring GSU to inquire into the availability of digital permissions is not burdensome. As the trial record demonstrated, Copyright Clearance Center (CCC) provides an easy-to-use Web site for this purpose, and contacting the publisher

¹⁰ Ex. A (Proposed Order) ¶¶ IV(B)(4)(a)-(c).

directly if CCC cannot provide digital permission would not be difficult. *See* Trial Transcript Volume 4, May 20, 2011, Dkt. No. 402 (“Trial Tr. Vol. 4”) at 24-30 (describing CCC’s web site and the process for obtaining digital permissions).

While Plaintiffs have not prescribed hard and fast limits on the amount of a Work that may be used when digital permission is not available, subclause (c) is not without limit. To the contrary, its final sentence makes clear that even if permission to make use of a digital excerpt is not available, the fair use analysis still may favor Plaintiffs and prohibit use of an excerpt that is large enough to harm the actual or potential print market for the work. Thus, for example, a GSU professor could not distribute hundreds of pages from a copyrighted work in PDF form simply because digital permissions for that work were not available.

Plaintiffs respectfully urge the Court to clarify that takings of Works for which digital licenses are not available shall not substantially exceed one chapter or ten percent of a Work. Inclusion of limiting language is crucial because copyright law does not require Plaintiffs to make all of their works available in any form, nor should fair use turn on their refusal or inability to do so. *See, e.g., Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 119 (D. Mass. 2010) (rejecting defendant’s fair use defense and finding that “[e]ven if a copyrighted work’s commercial availability factors into the fair-use analysis, a consumer does not have

a right to demand that a copyright owner make his work available in the exact format that the consumer desires.”), *aff’d in part and rev’d in part*, 660 F.3d 487, 509 (1st Cir. 2011) (reversing district court’s reduction of jury’s statutory damages award). In fact, as a contractual matter, Plaintiffs are limited in the extent to which they can make certain works available digitally.

Allowing unlicensed takings of large excerpts simply because (i) a digital license is unavailable and (ii) the user does not want to pay for a print license has no basis in the law.

*5. are not from works intended to be “consumable” in the course of study or of teaching, including but not limited to workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material;*¹¹

Copying portions of a workbook and distributing those to students directly substitutes for a purchase of the work and thereby impacts the market for the original. Students would not purchase workbooks if professors distributed the portions of those works that they used in class electronically.

C. Monitoring and Compliance

For all excerpts of Works for which permission has not been obtained that is distributed through GSU Electronic Course Systems pursuant to Paragraph IV(B) above, designated GSU personnel shall confirm that the excerpt meets these criteria and shall retain for at least three (3) years a record identifying at least the title, author, and publisher

¹¹ Ex. A (Proposed Order) ¶ IV(B)(5).

*of the Work, the pages or chapter copied, as relevant, the total pages or chapters of the Work, the sources consulted to determine whether licensing was available (including without limitation, Copyright Clearance Center and the publisher), and the date of such investigation.*¹²

This provision requires GSU to maintain records concerning its faculty's unlicensed takings. It also requires GSU to document the efforts it undertakes to determine whether licensing is available for such excerpts. This provision is important to the enforcement of any injunction for several reasons. First, despite GSU's current policy requiring faculty to keep a copy of the fair use checklists, many faculty who testified at trial admitted that they either did not fill out the checklist (some claiming to have done so "mentally") or did not keep a copy of the checklist after completing it. *See, e.g.*, Trial Transcript Volume 6, May 24, 2011, Dkt. No. 404 ("Trial Tr. Vol. 6") at 112 (Kim); Trial Tr. Vol. 7 at 103, 114, 118 (Davis); *id.* at 62-63 (Orr); Trial Transcript Volume 8, May 26, 2011, Dkt. No. 406 ("Trial Tr. Vol. 8") at 150-51 (Hankla); Trial Transcript Volume 10, May 31, 2011, Dkt. No. 393 ("Trial Tr. Vol. 10") at 131-34 (Murphy).

Second, ensuring that GSU actually inquires into the availability of licensing and documents that inquiry is critical; not a single GSU professor who testified at trial investigated whether digital permissions were available for the excerpts they

¹² Ex. A (Proposed Order) ¶ IV(C).

used. *See, e.g.*, Trial Tr. Vol. 6 at 120 (Kim); Trial Tr. Vol. 7 at 73 (Orr); *id.* at 167 (Davis); Trial Tr. Vol. 8 at 162 (Hankla); Trial Transcript Volume 9, May 27, 2011, Dkt. No. 407 (“Trial Tr. Vol. 9”) at 9-10, 24 (Gabler-Hover); *id.* at 164-165 (Moloney); Deposition of Patricia Dixon, February 2, 2011 at 101-103 (by video, *see* Trial Tr. Vol. 7 at 168-69); Deposition of Jennifer McCoy, February 3, 2011 at 69-70 (by video, *see* Trial Transcript Volume 12, June 2, 2011, Dkt. No. 395 (“Trial Tr. Vol. 12”) at 37); Trial Tr. Vol. 10 at 68 (Kruger).

Third, documentation of GSU’s investigations as to the availability of licensing is the only way to monitor GSU’s compliance without having to conduct full-scale evidentiary hearings with testimony from professors. Placing the burden on GSU to document and maintain records concerning its unlicensed takings is consistent with the fact that the defendant bears the burden of proof as to the fair use affirmative defense. May 2012 Order at 72-73.

*GSU shall promptly, and in no event any later than 45 days following entry of this Order, take all appropriate steps to modify its existing copyright policies governing the activities of GSU so as to comport with all aspects of this Order, including without limitation by notifying faculty and other instructors that the criteria for fair use determinations set forth in this Order supersede use of GSU’s existing “fair use” checklist.*¹³

¹³ Ex. A (Proposed Order) ¶ V.

Because the Court has found that GSU's 2009 copyright policy caused the infringements, GSU must conform its policy to this Court's Order, including by promptly informing faculty that the injunction supersedes the so-called fair use checklist. This provision of Plaintiffs' Proposed Order requires GSU to do so within forty-five days of the entry of the injunction.

GSU shall promptly and in no event later than 30 days following entry of this Order provide a copy of this Order to all faculty and other instructors and users as well as to all other administrative and technical personnel who have to date been, or are reasonably likely in the future to be, involved in the development, operation, or maintenance of GSU Electronic Course Systems. In addition:

A. Whether in conjunction with such communication or otherwise, GSU shall make clear the importance of compliance with the terms of the Order and that violations will be subject to disciplinary sanctions and, potentially, to legal actions for copyright infringement; and

B. GSU shall post the full Order on the GSU website in an appropriately prominent manner and shall cause the provisions of Paragraphs III and IV of the Order to appear on the screen before a faculty member, library employee, or other GSU personnel is able to upload, post, or otherwise make available any copyrighted material via GSU Electronic Course Systems; and

C. GSU shall incorporate reference to this Order, including either by reproducing its text or otherwise providing advice on how the reader can easily locate it, in all university-wide handbooks or the like that set forth codes of faculty, student, or employee conduct. Users must be reminded of the limitations imposed on their conduct by copyright law and must be prohibited from distributing copies otherwise permitted by this Order to others.¹⁴

¹⁴ Ex. A (Proposed Order) ¶ VI.

This provision of the Proposed Order requires GSU to promptly distribute the injunction within the university; to ensure that it is available and visible on-screen in its electronic course systems; and to incorporate its terms into GSU's handbooks and codes of conduct. The rationale for this provision is obvious: GSU is a large institution, and if it does not take prompt steps to communicate the terms of the injunction effectively, members of its community may not learn about it and may violate its terms unknowingly.

Although Plaintiffs' proposal leaves the exact nature of the sanctions for non-compliance to GSU's discretion, it is important that GSU formulate and impose sanctions on members of the university community who violate the injunction. Otherwise, it is unlikely that the injunction will be taken seriously. The university's experience with the current policy provides ample basis for concern on this score. Of the professors who testified at trial (either in person or by deposition), only three both (i) physically filled out fair use checklists and (ii) retained copies of them. *See* Appendix C to Plaintiffs' Post-Trial Proposed Findings of Fact, Dkt. No. 412-3. This was so even though the current GSU policy requires faculty to do both of these things. Joint Trial Exhibit 4 at 7-8.

Within forty-five (45) days of the entry of the Order, GSU shall certify to the Court, and shall serve on plaintiffs, a report detailing the measures it has taken to comply with the Order. The report shall

include a certification signed by the Provost of GSU that all Works that reside or have resided on any GSU Electronic Course System have been brought into compliance with this Order. In addition, for each academic term (Spring, Maymester, Summer, Fall, and Winter) for three (3) years following the effective date of this Order, the GSU Provost shall certify to the Court, with a copy to Plaintiffs' counsel, that based on diligent monitoring efforts GSU is in compliance with the terms of the Order for all GSU Electronic Course Systems, including but not limited to with respect to the ERes and uLearn systems or their equivalents.

A. Such certification shall be accompanied by a standard ERes report in the same format as was produced during the litigation (or an equivalent report from any similar system) listing the title, author, and publisher for all reading materials present on the ERes system during that semester, the course-reserves page for which the materials are listed, and the pages or chapter made available to students during that semester.¹⁵

In addition to adjusting its policy to comport with the injunction the Court enters and educating its faculty and students about the injunction, this Court and Plaintiffs must have the opportunity to monitor GSU's compliance with the injunction. To that end, Plaintiffs' Proposed Order includes modest oversight provisions that require GSU administrators to certify to this Court within forty-five days of the entry of the injunction that the university is in compliance. In addition, Plaintiffs propose that for three years following the entry of an injunction, GSU certify its compliance with the Court's the injunction once per semester. To allow the Court and Plaintiffs to assess the efficacy of GSU's compliance, the injunction

¹⁵ Ex. A (Proposed Order) ¶¶ VII-VII(A).

also should require GSU to attach appropriate reports to its certifications. Such reports, which GSU produced during discovery, can be created in a matter of minutes, and they provide information from which GSU's compliance with an injunction may be ascertained.

B. Upon request made no more frequently than once each semester, GSU shall provide such access to the GSU Electronic Course Systems and any relevant records concerning activities subject to this Order, including the uLearn system (or its equivalent), and to the certifications referred to in Paragraph IV(C) above, to a designated representative of Plaintiffs as will enable Plaintiffs to confirm GSU's compliance with the terms of the Order. Access shall be afforded at reasonable times during GSU's business hours upon fifteen (15) days' advance notice. In the event that any use or posting on any GSU Electronic Course System is not in compliance with this Order, GSU will make best efforts to timely bring such use or posting into compliance.¹⁶

To further ensure compliance with the proposed injunction and with copyright law, GSU also must afford Plaintiffs reasonable, periodic access to the uLearn system. As the Court noted in its findings of fact, unlike ERes, uLearn does not have a "hit count" reporting mechanism. May 2012 Order at 42 n.29. Moreover, unlike ERes, which GSU library staff administer, instructors can post course readings on uLearn directly, with no oversight of any kind. *Id.*; Trial Transcript Volume 5, May 23, 2011, Dkt. No. 403 ("Trial Tr. Vol. 5") at 16-19, 29. Left unmonitored, uLearn presents an opportunity for GSU's instructors to evade

¹⁶ Ex. A (Proposed Order) ¶ VII(B).

compliance with the proposed injunction. The limited uLearn monitoring Plaintiffs seek should not impose any material burden on GSU, which provided similar access to the uLearn system during fact discovery.

*Nothing herein is intended to prescribe the extent to which GSU may be permitted to use copyrighted material other than the Works as defined herein without securing the permission of the owners of copyright in such materials.*¹⁷

Plaintiffs' Proposed Order is limited to the Works at issue in this case and to the Court's findings of fact and conclusions of law. Accordingly, the Proposed Order does not attempt to define or address the limits of fair use for works of fiction, textbooks, journal articles, paper coursepacks, or any of the other myriad uses of other types of copyrighted works that may occur at GSU.

CONCLUSION

Although Plaintiffs believe the injunctive relief they proposed before trial is warranted in light of the record and controlling copyright law, they have prepared and submitted an alternative proposed injunction based on the findings and conclusions this Court has reached. Plaintiffs expressly reserve the right to challenge the Proposed Order on appeal.

¹⁷ Ex. A (Proposed Order) ¶ VIII.

Respectfully submitted this 31st day of May, 2012.

/s/ John H. Rains IV
Edward B. Krugman
Georgia Bar No. 429927
John H. Rains IV
Georgia Bar No. 556052

BONDURANT, MIXSON & ELMORE, LLP
1201 West Peachtree Street NW
Suite 3900
Atlanta, Georgia 30309
(404) 881-4100

R. Bruce Rich (*pro hac vice*)
Randi W. Singer (*pro hac vice*)
Jonathan Bloom (*pro hac vice*)
Todd D. Larson (*pro hac vice*)

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that this document complies with the font and point selections set forth in Local Rule 5.1. This document was prepared in Times New Roman 14 point font.

/s/ John H. Rains IV
John H. Rains IV

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **PLAINTIFFS'**
MEMORANDUM OF LAW IN SUPPORT OF THEIR POST-TRIAL
PROPOSED DECLARATORY JUDGMENT AND PERMANENT
INJUNCTION 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:

John W. Harbin, Esq.
Natasha H. Moffitt, Esq.
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309

Katrina M. Quicker, Esq.
BALLARD SPAHR, LLP
999 Peachtree Street, Suite 1000
Atlanta, Georgia 30309

Anthony B. Askew, Esq.
Stephen M. Schaetzel, Esq.
MCKEON, MEUNIER, CARLIN & CURFMAN, LLC
817 W. Peachtree Street, Suite 900
Atlanta, Georgia 30308

Mary Jo Volkert, Esq.
Assistant State Attorney General
40 Capitol Square
Atlanta, Georgia 30334

This 31st day of May, 2012.

/s/ John H. Rains IV
John H. Rains IV