

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

CAMBRIDGE UNIVERSITY PRESS;)
OXFORD UNIVERSITY PRESS, INC.;)
SAGE PUBLICATIONS, INC.,)

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' OPPOSITION TO PLAINTIFFS' REQUEST
FOR INJUNCTIVE RELIEF**

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I. INTRODUCTION

Plaintiffs are not entitled to any relief because they have failed to “put forth evidence of a sufficient number of instances of infringement” to show that the 2009 Copyright Policy resulted in “ongoing and continuous misuse of the fair use defense.” Dkt. No. 235 at 30; Dkt. No. 423 at 4. Instead, of the 126 original infringement allegations (and of the 99 asserted at trial), Defendants prevailed on all but five (5).

Simply put, five (5) violations are not enough. Three infringements of the same book (albeit multiple editions) by one assistant professor in the College of Education, a single infringement by one associate professor in the School of Social Work, and a single infringement by one assistant professor in the Sociology Department are not sufficient to establish ongoing and continuous misuse of the fair use defense by Georgia State University (“GSU”). *See* Dkt. No. 235 at 30 (footnote omitted); Dkt. No. 423 at 4. Such *de minimus* acts do not justify any relief – much less the broad and overreaching injunctive relief sought by Plaintiffs.

To the contrary, the Defendants have demonstrated an ongoing and good-faith effort to prevent copyright infringement. Indeed, as found by the Court: “Defendants, in adopting the 2009 policy, tried to comply with the Copyright Act.” Dkt. No. 423 at 338. There is no evidence that GSU misused the fair use defense.

There is no evidence that GSU will ignore the Court's comprehensive discussion and analysis of the fair use defense. In fact, Defendants have already taken steps to comply with the findings of this Court in its May 11, 2012 Order. *See* Exhibits A and B. There is no basis for relief here.

Defendants submit that the Court should deny Plaintiffs' request for an injunction. If any relief is to be granted, Defendants submit a proposed Declaratory Judgment (*see* Exhibit C) that delineates the parties' respective rights in the unique environment of academic use of scholarly works, and request that the Court adopt their proposed Declaratory Judgment in accordance with the Court's May 11, 2012 Order.

II. PLAINTIFFS ARE NOT ENTITLED TO AN INJUNCTION

A. Plaintiffs Failed To Prove A Sufficient Number of Infringements

GSU is a substantial public enterprise, serving approximately 30,000 undergraduate and graduate students with over 1,000 full-time faculty members. Dkt. No. 235 at 7. GSU students routinely purchase and use thousands of books per term.

Plaintiffs originally alleged that GSU was engaged in massive unlawful copying of excerpts. More particularly, Plaintiffs' complaint alleged "systematic, widespread" infringement of "a vast amount of copyrighted works." Dkt. No. 39

at ¶ 1. At trial, Plaintiffs failed to prove those allegations. Far from finding “widespread” or “systematic” infringement, the Court found five infringing uses:

<u>PROFESSOR</u>	<u>WORK (PUBLISHER)</u>	<u>% USED</u>	<u>TERM</u>
Kaufmann	The Sage Handbook of Qualitative Research (Third Edition) (Sage)	8.38%	Maymester, 2009
Kaufmann	The Sage Handbook of Qualitative Research (Second Edition) (Sage)	3.01%	Summer, 2009
Kaufmann	The Sage Handbook of Qualitative Research (Third Edition) (Sage)	12.29%	Fall, 2009
Harvey	The Power Elite (Oxford)	12.5%	Fall, 2009
Ohmer	Utilization – Focused Evaluation: The New Century Text (Sage)	8.28%	Fall, 2009

When focused by the Court on three academic terms in 2009,¹ Plaintiffs asserted 126 alleged infringements involving 48 professors. By the beginning of trial, Plaintiffs’ claims were reduced to 99 alleged infringements involving 33 professors. At trial, Plaintiffs offered evidence of only 75 alleged infringements involving 23 professors. Dkt. No. 410 at 9; Dkt. No. 423 at 8. Plaintiffs attempted to introduce into evidence a reduced list of 75 alleged infringements, but that list was not admitted. Dkt. No. 423 at 8 n.8. The total number of infringements tried

¹ Plaintiffs suggest that the Court unfairly limited their case to just the three terms immediately following the implementation of GSU’s new copyright policy. Dkt. No. 426 at 5. But as the Court previously stated: “Plaintiffs made the strategic choice to build their case based on evidence obtained before the instructors had ample time to become adjusted to the current policy.” Dkt. No. 234 at 9.

to the Court was 99. Of those 99, only five (5) were found to be infringements (5% of all tried allegations);² three by the same professor (Kaufmann), and all quite close to fair, with the Court resolving those close questions in favor of infringement (factors one and two in favor of Defendants and factors three and four in favor of Plaintiffs). Dkt. No. 428 at 338-339. Only two plaintiffs (Sage and Oxford) prevailed on any claims. No Cambridge copyright was found to be infringed.

That is simply not enough to establish an ongoing and continuous violation of federal law as *Ex Parte Young* requires to enjoin a State actor. *See Ex Parte Young*, 209 U.S. 123 (1908); *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635 (2002); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336-38 (11th Cir. 1999).

Plaintiffs’ Brief implicitly recognizes the paucity of “instances of infringement” because instead of focusing on the Court’s findings as to its 99 tried allegations of copyright infringement, Plaintiffs call attention to facts not relied on by the Court. For example, Plaintiffs argue that “each of the [3] GSU faculty who infringed Plaintiffs’ copyrights . . . believed their use of Plaintiffs’ works was

² Those five (5) infringements, out of the original 126 allegations, represent approximately 3% of all allegations of infringement.

authorized by the fair use doctrine.” Dkt. No. 426 at 6. Plaintiffs ignore the other twenty (20) professors who were found not to have infringed Plaintiffs’ copyrights. Indeed, the evidence shows that in the vast majority of instances, the 2009 Copyright Fair Use Checklist assisted in addressing the fair use analysis. Dkt. No. 423 at 38.

Moreover, Plaintiffs’ request for a forward-looking injunction does not, standing alone, demonstrate a continuing violation of federal law. *Ex Parte Young* relief does not apply in “cases in which federal law has been violated at one time or over a period of time in the past.” *See Summit Med.*, 180 F.3d at 1338. Courts must carefully scrutinize whether actions are in fact continuing violations. *See Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 269 (1997). The Supreme Court, in addressing the continuing violation requirement, noted that the most important consideration when invoking the *Ex Parte Young* exception is understanding the exception’s “proper role in our federal system” – such suits will only be allowed to end continuing violations of federal law. *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

Permanent injunctions are not automatic after a finding of infringement. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006) (patent);

Christopher Phelps & Assoc., LLC v. Galloway, 492 F.3d 532, 543 (4th Cir. 2007) (copyright); *Love v. Kwitny*, 772 F. Supp. 1367 (S.D.N.Y. 1991), aff'd, 963 F. 2d 1521 (2d Cir. 1992), cert. denied, 506 U.S. 862 (1992). They are even less so against State officers and agencies, as injunctive relief is proper only where the case is reasonably free from doubt and an injunction is necessary to prevent great and irreparable injury. *See Pub. Utils. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 468-69 (1943); *U.S. ex rel. McNeill v. Tarumianz*, 242 F.2d 191, 195 (3d Cir. 1957).

The evidence of appropriate use of the fair use defense, and the decidedly small number of infringements, demonstrate that Plaintiffs have not met their burden of showing continuous and ongoing misuse of the fair use defense as required by the Court and *Ex Parte Young*. It is irrelevant that Plaintiffs did not present any evidence at trial for 23 of the 99 alleged claims. Plaintiffs asserted those claims and Defendants were prepared to defend those allegations as they defended the others. Plaintiffs prevailed on a mere 5% of the total 99 alleged infringements at trial. *See* Dkt. No. 423 at 338-339.

The cases cited by Plaintiffs in favor of the broad injunctive relief they seek do not address what may be “sufficient” in a situation where Plaintiff failed to

prove 95% of its allegations. In fact, Plaintiffs rely on two default judgment cases³ where there was no defense and no evidence of non-infringement. Moreover, in direct contrast to those two cases where the failure to defend was cited as evidence of intent to continue willful copyright infringement, here the Court found that the Defendants “tried to comply with the Copyright Act” and failed only five (5) times because “fair use principles are notoriously difficult to apply.” Dkt. No. 423 at 338. There is no basis for any injunction here because Plaintiffs could not and did not prove a “sufficient number of infringements” to establish a misuse of the fair use defense.

B. Even If Five Infringement Findings Are Sufficient, No Injunction Should Issue

Even if this Court were to find that GSU had “misused the fair use defense,” which Defendants strenuously deny, injunctive relief would still not be justified. As the Supreme Court has recognized, the “goals of the copyright law. . . are not always best served by automatically granting injunctive relief” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (citing with approval *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir. 1988), *aff’d sub nom. Stewart v. Abend*, 495 U.S. 207 (1990)).

³ See Dkt. No. 426 at 5 (citing *Atl. Recording Corp v. Carter*, 508 F. Supp. 2d 1019 (S.D. Ala. 2007) and *Virgin Records Am., Inc. v. Johnson*, 441 F. Supp. 2d 963 (N.D. Ind. 2006)).

For example, in *Dun v. Lumbermen's Credit Ass'n*, 209 U.S. 20 (1908), the Supreme Court upheld the refusal to grant an injunction even though defendant had been found to infringe the plaintiff's copyright. The defendant in *Dun* published a book that contained commercial business information, such as credit ratings of merchants and manufacturers in North America. Defendant admitted using portions of the plaintiff's work but also included other information.⁴ The Court found that the use of plaintiff's work was "so insignificant compared with the injury from stopping [defendant's] use of their enormous volume of independently acquired information, that an injunction would be unconscionable." *Id.* at 23. Defendants here submit that, likewise, it would be unconscionable to enjoin them given the significant volume of non-infringing uses as compared to the relatively insignificant number of infringements actually established by two of the Plaintiffs.

During the instant litigation, Defendants did not stubbornly resist but instead took steps to change their previous copyright guide and institute the 2009 Copyright Policy. As Plaintiffs point out, prior to the adoption of the 2009 Copyright Policy, some GSU faculty believed that using as much as twenty percent of a copyrighted work was acceptable as fair use. Dkt. No. 426 at 1-2. The 2009

⁴ For example, the defendant's book provided information on 113 subjects while the plaintiff's book only discussed 19. And, the defendant's book contained over 16,000 names (and over 400 towns) that were not in plaintiff's book. *Dun*, 209 U.S. at 22-23.

Copyright Policy appreciably altered those perceptions. As the Court found, the average use in the 99 instances of alleged infringement was just “9.6% of the pages in the copyrighted books” and “[t]he majority of the excerpts were one chapter of a multichapter book” (with an average of 18 chapters).⁵ Dkt. No. 423 at 6.

Moreover, the 2009 Copyright Policy ensured that any use was only in “carefully monitored circumstances” and that use was restricted to students and only during the relevant course for the term. Dkt. No. 423 at 79. Given these protections, this Court concluded that the “2009 Copyright Policy significantly reduced the unlicensed copying of Plaintiffs’ works” *Id.* at 38. Thus, even if five (5) infringements are sufficient to show “ongoing and continuous” infringement, injunctive relief is not warranted.

C. Declaratory Judgment Is A Proper Remedy

Although Defendants submit that an injunction is not appropriate relief, Defendants alternatively submit that a Declaratory Judgment would be appropriate to delineate the scope of both parties’ rights in an effort to avoid future litigation regarding these same issues.

⁵ The numbers only change slightly for the works for which Plaintiffs actually presented proof at trial: “On average these excerpts were 10.1% of the pages in the copyrighted books. Fifty-six of the excerpts were comprised of one chapter or less from 54 of the books.” Dkt. No. 423 at 37.

Plaintiffs rely on *Baisden v. I'm Ready Prods., Inc.*, 804 F. Supp. 2d 549, 551-552 (S.D. Tex. 2011), for the proposition that a declaratory judgment in a copyright case is “an appropriate means of determining intellectual property rights.” Dkt. No. 426 at 4. This is also so when the prevailing party is the alleged infringer. *See id.* (entering Declaratory Judgment for defendants).

Here, the 2009 Copyright Policy was demonstrably effective. Dkt. No. 423 at 38. The use of a checklist to guide professors’ decisions regarding fair use reduced the use of excerpts. In keeping with the Court’s findings, the current Fair Use Exception Section of the 2009 Copyright Policy and the Fair Use Checklist have been carefully revised as to the specific factors per the findings in the May 11, 2012 Order. *See* Exhibits A and B.⁶ While the professors remain the appropriate person to conduct the fair use analysis, the revised Fair Use Checklist and the revised Fair Use Exceptions section of the 2009 Copyright Policy ensure that the Court’s findings regarding the four fair use factors are carefully considered. Plaintiffs’ efforts to eliminate the checklist should therefore be rejected.

Requiring the professors to undertake the fair use analysis remains necessary

⁶ The revised Fair Use Exception Section of the 2009 Copyright Policy is found on the GSU website at www.usg.edu/copyright/the-fair-use-exception. The revised Fair Use Checklist is found at www.usg.edu/copyright/fair-use-checklist.

for several reasons. First, the professors are the only ones who can make the Factor 1 determination regarding the “purpose and character of the use.” Only the individual professor teaching the course will know how the use of the excerpt will fulfill the educational purpose. Accordingly, professors must necessarily be involved in the analysis.

Moreover, Defendants submit that the unique circumstances of the educational environment place professors in the best position to analyze the fair use factors because professors are both content creators and content users. As the Court found, the works involved in this case are all non-fiction that include “research-based monographs, instructional books, trade books (general readership books) and other works on academic topics.” Dkt. No. 423 at 23. These books are marketed to professors who teach courses at colleges and universities. *Id.* at 21. But perhaps more importantly, “all of the authors, contributing authors and external editors of the books at issue are professors at colleges and universities.” *Id.* at 82; *see also id.* at 23.

Thus, GSU professors are in a unique position – they are both the creators of content and the users of content; the authors of works and the “fair users” of works. Based on this unique position, the Court appropriately recognized that there “is no reason to believe that allowing unpaid, nonprofit academic use of

small excerpts in controlled circumstances would diminish creation of academic works.” *Id.* at 82. While certainly true, there is another important consideration here, what Immanuel Kant called the “Categorical Imperative.”

In basic terms, the Categorical Imperative guides the determination of what is “right” (helping someone) as opposed to what is “good” (enriching oneself). That is, professors will act as users and creators of content as they wish other professors would act as users and creators of content – because they serve both functions in the university environment. In this context, when a professor, who is at least potentially an author of a similar work, uses a “decidedly small amount” (*i.e.*, 10% or less or 1 chapter of a multi-chapter book), the professor is also recognizing that as a content creator, she is acknowledging the propriety of such use when it is her work that is being used by another Professor at another institution. Thus, the community standard of what is a “fair use” is set by both authors and users who are guided by the Categorical Imperative.

Here, in the academic context, which enjoys a special place in the fair use analysis (*see* 17 U.S.C. §107), the applicability of the Categorical Imperative has resulted in the “unlicensed copying of excerpts of copyrighted books at colleges and universities [and] is a widespread practice.” Dkt. No. 423 at 42.

Plaintiffs express concern that if GSU's practices "become the norm across the country," they would suffer harm. Dkt. No. 142-2 at 35. However, the practice of using excerpts is already widespread and Plaintiffs continue to flourish. In fact, the evidence showed that the 2009 Copyright Policy is more conservative than many. Dkt. No. 423 at 42. The Categorical Imperative here, as appropriately practiced at GSU, ensures that in the unique academic environment, the professors, as both creators and users of content, determine what can fairly be used to accomplish the educational purpose within the bounds of the law.

D. Any Perceived Need For An Injunction Is Moot

Injunctive relief is also not available because the University System of Georgia has revised the 2009 Copyright Policy in accordance with the Court's May 11, 2012 Order. *See* Exhibits A and B. Denial of injunctive relief is proper when a plaintiff fails to establish a continuing threat of infringement. *See, e.g., Dolori Fabrics, Inc. v. Limited, Inc.*, 662 F. Supp. 1347, 1358 (S.D.N.Y. 1987) ("The Court recognizes that an injunction is an 'extraordinary remedy' which ordinarily should not be granted where a plaintiff has not proven a probability or threat of continuing or additional infringements") (citing 3 Nimmer on Copyright §14.06[B] at 14-54-55 (1986)). Because the Court found that the 2009 Copyright Policy "caused" the infringement, the revisions to the Policy based on this Court's Order

(as shown in Exhibits A and B) have eliminated the threat of continuing infringement. *See, e.g., Dolori Fabrics*, 662 F. Supp. at 1358 (denying injunction because defendants had no history of infringement and ceased infringement after notice); *Northwest Airlines, Inc. v. Am. Airlines, Inc.*, 870 F. Supp. 1504 (D. Minn. 1994) (denying injunction when infringer returned copyrighted materials). Here, the 2009 Copyright Policy has been revised in accordance with the Court's findings.

Relief under the *Ex Parte Young* exception must be prospective in nature. *See Green v. Mansour*, 474 U.S. 64, 73 (1985). The Supreme Court in *Green* denied the petitioners a declaratory judgment that the respondent violated federal law because such relief would serve no useful purpose. *See id.* at 72-73. A declaration that past acts violated federal law is prohibited by the Eleventh Amendment, much like a claim for past damages. *See id.* at 73; *see also Deuel v. Dalton*, No. 3:11-cv-466, 2012 U.S. Dist. LEXIS 48166 , at *14 (M.D. Tenn. Apr. 4, 2012). Accordingly, *Ex Parte Young* should not be used to obtain relief for a past violation of federal law. *See Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 484 (D.N.J. 2001); *Robertson v. Huffman*, 144 F. Supp. 2d 447, 452-453 (W.D.N.C. 2001). Here, Plaintiffs' proposed relief is aimed at only eliminating a condition that no longer exists (or does not yet exist). Injunctive

relief is therefore neither necessary nor proper.

The question at this stage is what judicial remedies are necessary and appropriate to satisfy the purposes of *Ex Parte Young* without sacrificing the “real interests served by the Eleventh Amendment.” *Coeur d’Alene*, 521 U.S. at 270.

The Court must “ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law.” *Id.* at 269. That can be accomplished in this case by a declaratory judgment so that this Court can be satisfied the Defendants will avoid any future infringement of Oxford and Sage’s works under the Copyright Policy.

Defendants have already taken steps to avoid future infringement by revising the 2009 Copyright Policy in accordance with the Court’s May 11, 2012 Order. The revised Fair Use sections of the 2009 Copyright Policy and the Fair Use Checklist, attached hereto as Exhibits A and B, incorporate the provisions of the Court’s Order that were not already present in the 2009 Copyright Policy. The remedy here is complete. Accordingly, there is no continuing violation of federal law to warrant the invocation of the *Ex Parte Young* exception. For the same reasons, any ambiguity in the 2009 Copyright Policy as to the quantity and market effect has been remedied.

In *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50

(2d Cir. 1992), the court concluded that an emergency regulation suspending a State minority business program (for the purpose of allowing the State to develop an adequate record to support it) mooted a demand for injunctive and declaratory relief, on the ground that there was no reason to think the government would seek to enforce the program in the future without a sufficient record. *Id.* at 58-59.

Plaintiffs' suite of demands is neither necessary to, nor will it, cause the Defendants to achieve compliance with the Court's May 11, 2012 Order and, therefore, falls outside the narrow *Ex Parte Young* exception. The proposed relief effectively requires GSU to pre-clear any future use of Plaintiffs' works, in violation of the well-established principle that federal courts may not interfere with, or restrain in advance, State agency discretion. A court of equity, through injunctive relief, should not assume to control the State agency's discretion. *See Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 418 (6th Cir. 1999).

III. IF NECESSARY, DEFENDANTS PROPOSE AN APPROPRIATE INJUNCTION

Section 502(a) of the Copyright Act authorizes injunctions "to prevent or restrain infringement of copyright." 17 U.S.C. §502(a). "Injunctive relief should be narrowly tailored to fit specific legal violations." *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994). The scope of an injunction should

be no broader than the infringement because broad injunctions are in contravention of copyright's goal to promote the progress of science and the useful arts. 4 Nimmer on Copyright § 14.06 [C], at 14-123 to 14-124 (Matthew Bender, Rev. Ed.); *see also Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527 (5th Cir. 1994).

As demonstrated above, a Declaratory Judgment addressing the Court's findings is a sufficient and proper remedy in view of the May 11, 2012 Order. Such a declaration addresses the 2009 Copyright Policy's adjudged deficiencies of (1) not limiting copying in the five (5) instances to decidedly small excerpts; (2) not proscribing the use of multiple chapters from the same book; and (3) not providing sufficient guidance in determining the "actual or potential effect on the market or the value of the copyrighted work." Dkt. No. 423 at 86-89, 337-38. Thus, if the Court deems injunctive relief to be necessary, Defendants' proposed Declaratory Judgment provides a template by which to craft any such injunction. The Defendants respectfully submit that any broader relief would exceed the bounds of the Court's May 11, 2012 Order and unlawfully enjoin a State actor under the applicable law.

IV. PLAINTIFFS' PROPOSED INJUNCTION IS INAPPROPRIATE

It is a longstanding maxim that the power of a federal court to enjoin a State

agency or official is limited to remedying the constitutional violation that the court found. *See Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004). In fact, it is an abuse of discretion to impose on State officials an injunction broader than necessary to remedy a violation. *See Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (quoting *Lewis v. Casey*, 518 U.S. 343, 359 (1996)); *Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982).

In *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986), the Second Circuit stated:

We have repeatedly been cautioned (1) not to use a sledgehammer where a more delicate instrument will suffice, (2) not to move too quickly where it appears that the state, in the exercise of its administrative authority, will in its own way adopt reforms bringing its system into compliance with the Constitution, and (3) to give the state a reasonable opportunity to remedy a constitutional deficiency, imposing upon it a court-devised solution only if the state plan proves to be unfeasible or inadequate for the purpose.

In a similar fashion, the Seventh Circuit vacated a district court's injunction which went beyond simply enjoining State officials from failing to comply with a federal motor voter law. *See ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995) (Posner, C.J.). The Court found that a limited injunction enjoining State officials from failing to comply with the law was proper, but struck down additional elements requiring the State to designate an official to be responsible for coordinating the State's

compliance with the law, ordering that the official be delegated all necessary powers to achieve compliance and setting forth detailed instructions concerning compliance. *See id.* at 797-98. In vacating that portion of the injunction, the Seventh Circuit stated:

We are forced to the conclusion that the Department of Justice, in proposing such a decree, and the district judge, in entering it, failed to exhibit an adequate sensitivity to the principle of federalism. The value of decentralized government is recognized more clearly today than it has been for decades. This recognition, born of experience, enables us (and not only us) to see that federal judicial decrees that bristle with interpretive difficulties and invite protracted federal judicial supervision of functions that the Constitution assigns to state and local government are to be reserved for extreme cases of demonstrated noncompliance with milder measures. They are last resorts, not first. Since the State of Illinois, rather than seeking a declaratory judgment that the “motor voter” law is invalid, decided not to comply with the law, an injunction commanding compliance with it was a proper remedy, and of course a lawful one. But until it appears that the state will not comply with such an injunction, there is no occasion for the entry of a complicated decree that treats the state as an outlaw and requires it to do even more than the “motor voter” law requires.

Id. at 798 (emphasis added) (citations omitted). Just as the detailed injunction against the State of Illinois was over intrusive into State government operations, so too is the Plaintiffs’ proposed injunction too broad and thus improper.

In copyright cases, as in other cases, any injunctive relief should be narrowly tailored to fit a specific legal violation, and the scope of the injunction should be no broader than the infringement. *See Chicago Bd. of Educ. v. Substance, Inc.*, 354

F.3d 624 (7th Cir. 2003) (Posner, C.J.); *Kepner-Tregoe*, 12 F.3d at 538; *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790-91 (5th Cir. 1999).

It is undeniable that Plaintiffs' proposed relief "binds [school] administrators to do more than the constitutional minimum." *Gilmore v. California*, 220 F.3d 987, 999 (9th Cir. 2000).⁷ Plaintiffs' proposal would require designating "one or more university personnel with appropriate training in copyright" and require GSU's Provost to "certify to the Court" that GSU is in compliance with Plaintiffs' overbroad terms. Dkt. No. 300-1 at 4. This far exceeds the constitutional minimum.

Plaintiffs' proposed injunction is overbroad in both the conduct enjoined and the persons covered, and inappropriately constrains the discretion of local officials. For example, Plaintiffs seek to enjoin faculty and students that were neither a party to this litigation nor shown to be infringing. Plaintiffs seek to require GSU (and the Georgia University System member institutions) to obtain permission rather than exercise their statutory rights of fair use under 17 U.S.C. § 107. Plaintiffs also seek to address "consumables" (*e.g.*, workbooks and the like) which were not addressed by the May 11, 2012 Order. Although Plaintiffs purport to limit their

⁷ Remarkably, despite losing on 95% of the tried allegations of infringement, Plaintiffs again assert the injunction first proposed at trial, which is based on the Classroom Guidelines. The Court has already rejected Plaintiffs' arguments as to those Guidelines. Dkt. No. 423 at 56-59.

proposed injunction to only non-fiction works, they seek to monitor “all reading materials” regardless of publisher or title. Dkt. No. 426-1 at 6 (VII. A.). In fact, Plaintiffs seek injunctive relief (including monitoring) for Cambridge works although Cambridge failed to prove a single alleged infringement. Further, Plaintiffs seek to attribute to GSU any and all “copying, posting, uploading, downloading or other distribution done on EReserves, uLearn, faculty websites, course websites, or any other system” regardless of the type of work, the individual that posted the excerpt, the intended use of the excerpt, etc. Dkt. No. 426-1 at 2. Yet, further, as to monitoring, Plaintiffs seek unfettered access to all such systems – a transparent attempt to “snoop” on GSU faculty and students. Dkt. No. 426-1 at 6.

Moreover, compliance with the proposed injunction would be extremely difficult, if not impossible, for GSU to administer and the costs to GSU would be unreasonable. For example, the Plaintiffs’ proposed injunction provides for each faculty member to “certify” that all copies are in compliance with the Classroom Guidelines’ brevity and cumulative effect provisions, and for GSU to collect and store all such certificates. The logistics of such a procedure are problematic. Such burdensome and unnecessary provisions invite future litigation.

When a violation of federal law is established, only the State official whose

actions violate that law is the rightful party to the prospective injunctive relief and such relief can only be had against him. *See, e.g., Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 373 (2d Cir. 2005). Here, at best, the “State official” at issue is effectively the 2009 Copyright Policy. Plaintiffs’ Draconian proposals go well beyond the Policy to all faculty, students, administrators, Board members and users of GSU facilities. Such extensive restrictions are well beyond what could reasonably be termed “necessary” to address this Court’s findings of five (5) infringements by three professors in violation of the copyrights of only two Plaintiffs.

V. CONCLUSION

The Plaintiffs are not entitled to any relief because there was no “ongoing and continuous” misuse of the fair use defense. To the contrary, the Defendants prevailed on 94 of 99 alleged infringements. Dkt. No. 423 at 338-39. The Defendants have nonetheless revised the 2009 Copyright Policy in accordance with the Court’s May 11, 2012 Order. Defendants submit that no injunctive relief should be granted. If any relief is to be awarded, a Declaratory Judgment is all that is necessary to delineate the parties’ respective rights and duties.

Respectfully submitted this 15th day of June, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to L.R. 5.1B and 7.1D of the Northern District of Georgia, that the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF** complies with the font and point selections approved by the Court in L.R. 5.1B. The foregoing pleading was prepared on a computer using 14-point Times New Roman font.

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

CAMBRIDGE UNIVERSITY PRESS;)	
OXFORD UNIVERSITY PRESS, INC.;)	
SAGE PUBLICATIONS, INC.,)	
)	
Plaintiffs)	CIVIL ACTION NO.
)	1:08-CV-1425-ODE
v.)	
)	
MARK P. BECKER, in his official)	
capacity as President of Georgia State)	
University, et al.)	
)	
Defendants)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 15th day of June 2012, I have electronically filed the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF** 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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