

**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' REPLY TO DEFENDANTS' OPPOSITION TO
PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF¹**

For the second time in this litigation – and just one day before their response to Plaintiffs' post-trial injunction brief was due – Defendants have adopted a new copyright policy in an attempt to stave off judicial relief. Defendants initially sought to moot the case in February 2009 after unilaterally adopting a revised copyright policy that purported to rectify the more egregious infringements

¹ This reply is not intended to be a comprehensive response to the many erroneous contentions contained in Defendants' Opposition to Plaintiffs' Request For Injunctive Relief. Rather, it briefly addresses the impropriety of the scanty relief proposed by Defendants, most particularly Defendants' latest amended copyright policy, announced on June 14, 2012, and disclosed for the first time in Defendants' Opposition.

enabled by the prior policy. The Court instead recognized in its May 11, 2012 decision numerous legal shortcomings in that revised policy, including that it “did not limit copying” of Plaintiffs’ works to “decidedly small excerpts,” did not “proscribe the use multiple chapters from the same book,” and did not instruct Georgia State University faculty to “assume” that factor four of the fair use analysis “strongly favors the plaintiff-publisher (if licensed digital excerpts are available).” Order, Dkt. No. 423, May 11, 2012 (“May 2012 Order”), at 337-38. In addition, the trial record made clear that the 2009 policy was responsible for multiple copyright infringements insofar as it delegated copyright compliance to faculty through a so-called “fair use checklist” and failed to establish any procedures for detecting and correcting excessive copying that did not comport with fair use parameters. Defendants’ attempted derogation of responsibility for copyright compliance – even in the midst of litigation over that very issue – demonstrates the need for a court-ordered injunction with appropriate oversight procedures, notwithstanding yet another attempt by Defendants to evade Court supervision of their infringing activities.

Defendants’ contention that injunctive relief is inappropriate rests on a misreading of the Court’s ruling. The Court used the work-by-work analysis as a vehicle to articulate the fair use rules that must govern Defendants’ conduct going

forward. This is not a case brought solely to address a discrete number of infringing works from three 2009 academic terms (only one of which was a full term). Rather, the Court selected those three terms as a basis for determining whether there are ongoing infringements under the 2009 policy. It found that in fact there are. *See* May 2012 Order at 337-38. This conclusion in and of itself mandates injunctive relief to prevent future such infringements. It is no answer that not all of the works from those three 2009 academic terms were found by the Court to be infringing. Simply because some of a defendant's conduct may be found to be lawful does not insulate its remaining ongoing unlawful conduct from appropriate judicial remedies.

Defendants acknowledge that the current policy must be changed to conform to the Court's order, but jump the judicial gun by unilaterally instituting changes that do not comply with the Court's May 2012 Order. *See* Defendants' Opposition to Plaintiffs' Request For Injunctive Relief, Dkt. No. 432, ("Defs.' Opp'n"), at Exhibit A. In this latest effort, Defendants pay lip service to the substantive fair use criteria the Court announced in its findings of fact and conclusions of law, but they only superficially tweak the 2009 policy that the Court found to be legally deficient. This effort to co-opt the Court's own fashioning of appropriate relief would subvert, rather than adequately implement, the Court's order, in no small

measure because it continues to rely on the same “fair use checklist” that proved at trial to be an engine of infringement. *See* Defs.’ Opp’n at Exhibit B.

Simply inserting certain of the Court’s articulated fair-use standards into a manifestly flawed checklist does not effectuate the Court’s ruling. The design of the checklist, which preordained faculty fair use determinations, remains intact;² in continuing to reduce the fair use calculus to an arithmetic tally of “weighs in favor” and “weighs against” fair use criteria, the proposed revised checklist continues to “stack the deck” such that, *even taking account of the Court’s enunciated guidelines*, the result will inevitably lead to a finding of fair use.

By way of illustration, in applying factor three to the copying of academic books for distribution on ERes or uLearn, the revised checklist subordinates the importance of the quantitative guideline that the Court established by reducing it to the status of but one criterion – one box potentially to be checked – to be weighed equally with every other listed criterion under factor three. Likewise, in contravention of the Court’s finding that “[t]he only practical way to deal with factor four in advance likely is to assume that it strongly favors the plaintiff-

² The Court will recall that every checklist determination examined at trial resulted in a conclusion by the faculty member that the proposed use was a fair use. 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.

publisher (if licensed digital excerpts are available),” May 2012 Order at 338, the checklist makes this factor just one of several equally-weighted criteria, thereby inviting the conclusion that this critical component of the fair use analysis is outweighed if, for example, the instructor owns a copy of the book in question and subjectively believes the unlicensed taking would “stimulate” the market for the book.

If professors were faithfully to follow the revised checklist, they could easily – though erroneously – “justify” reliance on the fair use doctrine for each of the takings this Court specifically found to be infringing at trial. For example, evaluating her use of chapters from the *Sage Handbook of Qualitative Research (Third Edition)* during the 2009 Maymester, Professor Kaufmann would again conclude that factors one and two on the revised checklist, which have not changed, favor fair use. On her original checklists under factor three, Professor Kaufmann checked “Portion used is not central or significant to entire work as a whole” and “Amount taken is narrowly tailored to educational purpose. . . .” *See, e.g.,* Plaintiff’s Exhibit 572 (for ease of reference a copy is attached hereto as Exhibit 1). If she once again were to check those boxes, she would conclude that factor three also favored fair use because two of the three subfactors weighed in favor of fair use, even though the taking exceeded one chapter. Under factor four,

if Professor Kaufmann were to check “Use stimulates market for original work” (as she did originally) and “User owns lawfully acquired or purchased copy of original work” (which she does, *see* Trial Transcript Volume 6, May 24, 2011, Dkt. No. 404 (“Trial Tr. Vol. 6”) at 7, factor four would be a “tie” even though the work is available for licensing from Copyright Clearance Center and, as the Court found, a large portion of the worked was used. With three factors favoring fair use, Defendants’ revised checklist directs that “reliance on fair use is justified.” Defs.’ Opp’n at Exhibit B. This would be so even though this Court specifically determined that Professor Kaufmann’s use of this multi-chapter excerpt from the *Sage Handbook* was infringing. *See* May 2012 Order at 119-24, 338. In short, just like the original checklist, the revised checklist would continue to be an engine of infringement under the Court’s interpretation of fair use.

Unlike Defendants’ proposed enforcement paradigm, which trivializes the import of the Court’s fair use line-drawing, Plaintiffs’ proposed injunction (*see* Dkt. No. 426-1) unambiguously directs faculty to follow the guidelines the Court articulated.³

³ Plaintiffs maintain their disagreement with certain aspects of the Court’s fair-use analysis and determinations. That, however, is a matter separate from the proper embodiment of those rulings in the relief and Order under discussion.

Defendants’ “new” policy is not only plainly flawed in substance, it also lacks any enforcement or oversight mechanism so it does not eliminate the need for a court-ordered injunction. The un rebutted evidence at trial demonstrated the hapless – if generally good-faith – nature of the GSU faculty members’ fair use determinations. What is more, many GSU faculty did not complete and retain checklists despite being required to do so.⁴ And not a single professor investigated the availability of digital permissions.⁵ In the face of that record, Defendants persist in their view that faculty members are in the best position to make fair use determinations. The eve-of-enforcement “new” policy would continue Defendants’ complete delegation of copyright compliance responsibility by doing nothing to ensure that GSU faculty (who labored for years under a policy so flawed that GSU unilaterally rewrote it prior to the trial) comply with the newest iteration

⁴ Trial Tr. Vol. 6 at 112 (Kim); Trial Transcript Volume 7, May 25, 2011, Dkt. No. 405 (“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).

⁵ 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 164-65 (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).

of GSU's policy – for instance, it contains no requirement that faculty investigate the availability of licensing before concluding that a proposed use would be fair,⁶ and it proposes no review mechanisms to monitor faculty determinations.

For these reasons, Defendants' attempt to moot Plaintiffs' request for injunctive relief should be rejected. As the Supreme Court recognized in *City of Mesquite v. Alladin's Castle, Inc.*, "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." 455 U.S. 283, 289 (1982). Before the Court declines to enter an injunction on mootness grounds, Defendants would have to present evidence that makes "it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968). Given the history of this litigation, including a trial record demonstrating Defendants' disregard for Plaintiffs' copyright rights, Defendants cannot carry this burden.

⁶ In contrast, Plaintiffs propose modest monitoring provisions – amply justified by the record evidence – for a limited period of time to ensure compliance. These monitoring provisions are not "overbroad," Defs.' Opp'n at 20, given the university-wide reach of the 2009 Copyright Policy and the steps required to bring GSU into compliance with the copyright law. Nor is it "overbroad" to address the injunction to "both the professors who caused the excerpts to be uploaded to ERES and the students who accessed them" because the Court specifically found both to be "users' of the excerpts." May 2012 Order at 42.

The mere publication of a new copyright policy—without any evidence as to its likely effect on actual practice among faculty—does not constitute the requisite proof that these wrongs will not be repeated, particularly since there is no basis for believing that the practices complained of in this lawsuit will end. *See Bourgeois v. Peters*, 387 F.3d 1303, 1310 n.7 (11th Cir. 2004). Given that the minimally-altered, and still fundamentally flawed, checklist remains the centerpiece of GSU’s “new” copyright policy, it can hardly be said that there is “no reasonable expectation” of repeated injury to Plaintiffs from the infringing conduct that took place under the 2009 policy and that, as we have shown, will likely continue under the “new” policy.⁷ Indeed, even where a defendant has ceased its infringement, courts still look to the pattern of prior infringement to determine whether an injunction is necessary, as it is “entirely too easy for an adjudicated infringer to claim a reformation once the specter of a permanent injunction looms near.” *New*

⁷ It is only when plaintiffs mount facial challenges to state policies themselves (as opposed to practice under those policies), and those policies are thereafter altered to address the concerns at issue, without any suggestion they would be re-instituted, that claims premised on those policies may be deemed moot. *See Students for a Conservative Am. v. Greenwood*, 378 F.3d 1129, 1130 (9th Cir. 2004) (provisions of university election code); *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1519 (10th Cir. 1992) (suspension of showing of controversial film and prior restraint policies); *Marcavage v. West Chester Univ.*, No. 06-CV-910, 2007 WL 789430, at *1 (E.D. Pa. Mar. 15, 2007) (policy on dissemination of literature on campus).

World Music Co. v. Tampa Bay Downs, Inc., No. 8:07-CV-398, 2009 WL 35184, at *10 (M.D. Fla. Jan. 6, 2009) (quotations omitted).⁸

Plaintiffs therefore respectfully request that this Court enter their proposed injunction to ensure that infringements of their works at GSU be brought to a halt.

Respectfully submitted this 21st day of June, 2012.

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⁸ See also *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990) (upholding view of cessation of infringement “in a . . . Machiavellian light”); *Mattel, Inc. v. Robarb’s, Inc.*, No. 00 Civ. 4866, 2001 WL 913894, at *3, 6 (S.D.N.Y. Aug. 14, 2001) (in light of a pattern of infringement, courts are “entitled to consider [cessation] skeptically”).

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
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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **PLAINTIFFS’
REPLY TO DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ REQUEST
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This 21st day of June, 2012.

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