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	)	

DEFENDANTS' SUR-REPLY IN OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

I. INTRODUCTION

The Board of Regents has embraced judicial relief, rather than attempting to avoid it, by amending the University System of Georgia Copyright Policy ("Policy") in accordance with the Court's May 11, 2012 Order. The Policy's Fair Use Checklist, a proven and effective tool, and the Fair Use Exception explanatory materials were revised to expressly address the Court's findings that, in the five identified infringements, the Policy did not limit copying to decidedly small excerpts, did not proscribe the use of multiple chapters from the same book, and did not provide sufficient guidance in determining the actual or potential effect on the market or value of the copyrighted work. *See* Dkt. No. 423 at 337-38.

Plaintiffs nonetheless attack the amended Policy by rehashing their failed summary judgment arguments objecting to the use of any checklist (compare, *e.g.*, Dkt. No. 142-2 at 23-32 to Dkt. No. 434-1 at 4-8), and arguing that Professor Kaufmann could hypothetically come to a "wrong" conclusion in her fair use analysis using an amended checklist. Plaintiffs failed summary judgment arguments are no more persuasive now than before. The amended Fair Use Checklist, as part of the larger Policy, helps professors to consider the many and difficult fair use issues; it does <u>not</u> predetermine a decision by Professor Kaufmann or any other professor. What the Plaintiffs fear is that by using the Checklist and

guidance from the remainder of the Policy, professors will make the correct decision regarding fair use and will, therefore, owe no permissions fees to the publishers.

II. ARGUMENT AND CITATION TO AUTHORITIES

A. The Policy, Including the Checklist, Is Effective

1. The Evidence Showed That Checklists are Widely Used Tools to Address Fair Use Determinations in Academia

Plaintiffs' focus on the Fair Use Checklist is a thinly veiled attempt to secure precedent that may generally bar the use of fair use checklists at any number of universities. The undisputed evidence, however, is that fair use checklists are an oft-used and well-established vehicle for evaluating the fair use factors. Dr. Kenneth Crews identified 66 colleges and universities that utilize a fair use checklist, including the University of Chicago, Virginia Tech, Cornell, Stanford, Harvard University Office of General Counsel, and Johns Hopkins. Tr. 13-49, line 12 - Tr. 13-51, line 14. Dr. Crews further identified more than 50 institutions that had contacted him to request permission to use (or link) to the checklist he created. Tr. 13-51, line 23 - Tr. 13-53, line 1. One of those institutions was the Copyright Clearance Center (CCC), the party funding 50% of the Plaintiffs' case. *See* Dkt. No. 423 at 25. The CCC checklist, like the others, makes no mention of enforcement or correction mechanisms. *See* Exhibit 1 (Defs' Trial Ex. 14). In

fact, a recent CCC White Paper directed to fair use and electronic reserves makes no mention of any enforcement or correction mechanism. *See* Exhibit 2 (Defs' Trial Ex. 906).

Plaintiffs' unsupported assertion that "the trial record made clear that the [] 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" is belied by the trial record. The Policy properly incorporates a checklist, and the Court found that the Policy "significantly reduced the unlicensed copying of Plaintiffs' works (and, by inference, the works of other publishers) at Georgia State." Dkt. No. 423 at 38. Plaintiffs' attacks on fair use checklists are generally unsupported and not in keeping with the evidence.

2. The Evidence Showed That The Policy and Checklist are Effective

The Court has evaluated the Policy at length. *See* Dkt. No. 235 at 8-11, 28-30. For example, at summary judgment, the Court stated that the Policy "seems comparable to, and in many cases far more comprehensive than, the copyright

policies instituted by other colleges and universities." *Id.* at 29 n.7.[1] The instructions provided with the Fair Use Checklist, which are in effect with the revised Checklist, ensure that it is not a rigid tool that predetermines a fair use result. Rather, as the Policy states: "The fair use checklist is a tool to assist you in making a reasoned and balanced application of the four fair use factors in determining whether a given use of a work is a fair use." Exhibit 3, Introduction to the Fair Use Checklist, found at http://www.usg.edu/copyright/introduction_to_the_fair_use_checklist (emphasis added). It is not an "arithmetic tally" sheet. Rather, the Policy anticipates that it is likely that professors will use the checklist to think through the issues and may well "check more than one box in each column and even check boxes across columns." *Id.* Thus, the Checklist is designed to assist a professor in considering facts that weigh against and in favor of fair use, and provides a discussion of those issues to assist the professor in making what can be "notoriously difficult" determinations. Dkt. No. 423 at 338.

At trial, the evidence demonstrated that the Policy, including the Fair Use Checklist, was already a significant help to professors trying to make fair use

[1] For example, the Court stated that the Emory University policy does not require a checklist, but instead allows material to be placed on electronic reserves after the instructor conducts a "reasonable analysis." *Id.* at 29 n.7.

determinations. More particularly, the Court found 43 alleged infringements were instead instances of proper academic fair use. *See* Exhibit 4, Table of alleged infringements where fair use found. Of those 43 instances, a Fair Use Checklist was expressly used in 37 instances. *Id.* Thus, rather than being "fatally flawed," the Fair Use Checklist assisted professors in making correct fair use determinations. At trial, Dr. Crews further testified that other schools' policies allowed more liberal unlicensed copying than the USG Policy. *See* Dkt. No. 423 at 42. Accordingly, the Court found that the Policy "significantly reduced the unlicensed copying of Plaintiffs' works . . . ." Dkt. No. 423 at 38. The Policy, including the Fair Use Checklist, is already an effective tool that does not need to be extensively rewritten or reworked.

B. The Policy, with an Amended Checklist, Complies with the Court's May 11 Order

Plaintiffs assert that the revised Policy "does not effectuate the Court's ruling." To the contrary, the Policy has been amended to comply with the Court's Order.

The Court's May 11, 2012 Order determined that in five identified infringements, the Policy did not limit copying to decidedly small excerpts, did not proscribe the use of multiple chapters from the same book, and did not provide sufficient guidance in determining the actual or potential effect on the market or

value of the copyrighted work. Dkt. No. 423 at 337-8. The revised Fair Use Checklist and explanatory materials addresses each of the Court's points.

First, with reference to "decidedly small excerpts" and "multiple chapters from the same work," the amended Checklist's entries under Factor 3 expressly state:

Weighs in Favor of Fair Use	*Weighs Against Fair Use*
Decidedly small portion of work used (no more than 10% of work not divided into chapters or having less than 10 chapters or no more than 1 chapter of a 10 or more chapter work)	Large portion or entire work used (more than 10% of work not divided into chapters or having less than 10 chapters or more than 1 chapter of a 10 or more chapter work)

Dkt. No. 432-2.

In like fashion, the Policy's amended "Fair Use Exception" explanatory materials state that the

> excerpt constitutes a <u>decidedly small portion</u> of the work in accordance with the following criteria:
>
> a. If the excerpt is from a work that is not divided into chapters or contains fewer than ten chapters, the excerpt does not exceed ten (10) percent of the pages in the work as a whole; or
> b. If the excerpt is from a work that contains ten or more chapters, the excerpt does not exceed one (1) chapter; or
> c. If, after consulting the copyright owner (often the publisher) or its authorized agent (such as the Copyright Clearance Center), it is determined that the

> excerpt is not readily available for digital academic use at a reasonable price. . .

Dkt. No. 432-1 (emphasis added).

Second, with reference to potential effect on the market, the Policy's amended Fair Use Checklist's entries under Factor 4 expressly state it weighs against fair use "where permission for [a] digital excerpt is readily available from [the] publisher or Copyright Clearance Center at a reasonable price." Dkt. No. 432-2.

Plaintiffs seek hard and fast rules. For example, with reference to Professor Kaufmann, Plaintiffs argue that the fair use determination is a *fait accompli,* even if she, hypothetically, seeks to use more than one chapter from a work. This rationale runs contrary to the Court's May 11, 2012 Order. The Court expressly stated that resolving fair use issues is done within a "fluid framework." Dkt. No. 423 at 19. Consistent therewith, in applying factor 3, in four instances, the Court found that a fair use was made even though more than 10% of a work was used. *See* Dkt. No. 423 at 190-94; 214-217; 300-3; 311-14 (Professor Orr (18.52% of "Liszt Sonata in B Minor"); Professor Dixon (12.50% of African American Single Mothers: "Understanding Their Lives and Families"); Professor Lasner (10.78% of "The Politics of Public Housing, Black Women's Struggles Against Urban Inequality"); and Professor McCoy (16.72% of "Regimes and Democracy in Latin

American; Theories and Methods")). Rather than "trivialize" the Court's line drawing, Defendants embrace it. The revised Policy provides for those rare instances when the use of an excerpt that is greater than 10% of the whole is contemplated but where there are no digital licenses available. This Court found fair use in four instances when more than 10% or one chapter was used. Plaintiffs' proposed injunction would prohibit any such fair use. Defendants submit that, consistent with Supreme Court precedent, the Court's line drawing is flexible and guided by fair use principles rather than by hard and fast rules.

Plaintiffs are also incorrect in assuming that Professor Kaufmann's analysis would not change based on the revised Copyright Policy. As the Policy's Fair Use Exemption explanation directs, use of an excerpt is allowable if it is "decidedly small" or unavailable for licensing at reasonable cost. If Professor Kaufmann proposed to use more than one chapter in a multiple chapter work, the revised Fair Use Checklist would counsel against use. *See* Dkt. 432-1; 432-2. Moreover, as part of the Policy, the Fair Use Checklist would cause Professor Kaufmann to consider the relevant issues necessary for an informed fair use determination.

C. The Revised Copyright Policy Moots Plaintiffs' Proposed Injunctive Relief

The revised Policy moots the need for injunctive relief because it eliminates the threat of continuing infringement. Because relief under *Ex parte Young* must

be prospective in nature, injunctive relief in this case is moot. *See, e.g., Green v. Mansour*, 474 U.S. 64, 73 (1985). The mootness issue, however, provides no basis for Plaintiffs' unfounded criticism of the amended Policy.

Plaintiffs' argument that the revised Policy does not moot its request for injunctive relief hinges on their reliance on cases that do not apply the *Ex parte Young* doctrine. Plaintiffs' reliance on *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982) and *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) is misplaced because neither of those cases concerned a state actor protected by Eleventh Amendment Immunity.[2] Accordingly, the *Ex parte Young* doctrine's prohibition against retroactive relief did not apply in either case. Even so, the Supreme Court, in holding that neither case was moot, stated that the defendant's cessation of the illegal activity should be considered by the court in fashioning injunctive relief. As the Court stated in *City of Mesquite*, cessation of the challenged conduct "is an important factor bearing on the question whether a court should exercise its power to enjoin defendant from

[2] This distinction is important as when governmental entities are involved, "an assertion of mootness will be rejected only when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated." *See, e.g., Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, 586 F.3d 908, 917 (11th Cir. 2009) (citations and internal quotation marks omitted).

renewing the practice . . . ." 455 U.S. at 289. Similarly in *Concentrated Phosphate Export,* the Court stated that "it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary." 393 U.S. at 204.

When cases addressing the *Ex parte Young* exception are considered, it is apparent that Plaintiffs' request for injunctive relief is moot. In each of the *Ex parte Young* cases cited by Plaintiffs – *Students for a Conservative Am. v. Greenwood,* 378 F.3d 1129, 1130 (9th Cir. 2004); *Comm. For the First Amendment v. Campbell*, 962 F.2d 1517, 1519 (10th Cir. 1992); and *Marcavage v. West Chester Univ.,* No. 06-cv-910, 2007 WL 789430 (E.D. Pa. Mar. 15, 2007) – the courts found that the revised policies mooted the controversy. Plaintiffs attempt to distinguish such cases based on the contention that they involved "facial challenges to state policies themselves (as opposed to practice under those policies) . . . ." Dkt. No. 434-1 at 9 n.7. This attempt is flawed, however.

For example, in *Comm. For the First Amendment,* the plaintiffs sued for declaratory and injunctive relief against various university defendants based on the Board of Regents' suspension of the showing of a movie. After a preliminary injunction hearing in which the district court intimated that it favored plaintiff's position, the Board of Regents met and rescinded the suspension. A new policy

was also put into effect. The Tenth Circuit held that any equitable relief was moot based on the new policy and the Board of Regents' expressed intent to comply. Thus, *Comm. for the First Amendment* concerned the actions of the university – suspension of showing of a particular movie – rather than "facial challenge[s] to state policies themselves." Dkt. No. 434-1 at 9 n.7. Accordingly, these cases actually support Defendants' position that the revised Copyright Policy moots the need for injunctive relief.

III. CONCLUSION

The real issue here is not that the amended Fair Use Checklist will lead to incorrect determinations. Rather, Plaintiffs' concern is that the amended Policy will lead to correct fair use determinations, as has already occurred. Plaintiffs ardently want use of checklists, whether or not they lead to correct fair use determinations, stopped. Such overreaching is not warranted by the facts of this case. By complying with the Court's May 11, 2012 Order, Defendants have eliminated any ongoing threat of future infringements, if any, as represented by the five instances of infringement determined at trial.

Respectfully submitted this 5th day of July, 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' SUR-REPLY IN 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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 5th day of July 2012, I have electronically filed the foregoing **DEFENDANTS' SUR-REPLY IN 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

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