THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FASTCASE, INC.,	
Plaintiff,	Case 1:16-cv-00327-TCB
v.	**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
LAWRITER LLC, dba CASEMAKER,	
Defendant.	

Plaintiff Fastcase has established "that there is no genuine dispute as to any material fact" regarding the status of the Georgia Administrative Rules and Regulations (the "Georgia Regulations") as public law that must be freely available. Defendant Lawriter has no copyright in them, and cannot create a private copyright to them in contract. Fastcase's motion for summary judgment should, therefore, be granted because it "is entitled to judgment as a matter of law." Fed. R.Civ. Proc. Rule 56(a); *Celotex v. Catrett,* 477 U.S. 317, 322 (1986).

Fastcase makes the Georgia Regulations available for free to members of state bar associations such as the State Bar of Georgia as a benefit of membership in the bar. Dkt. 17-3 at 2, ¶ 5. It must update the Georgia Regulations from their official source, the Secretary of State's website, in order to serve members of the State Bar. After Fastcase filed this suit to protect itself from Lawriter's demand

letter threatening litigation, on April 7, 2016, Lawriter added a registration requirement to the Secretary of State's website, providing that:

> To access this website, you must agree to the following:
>
> These terms of use are a contract between you and/or your employer (if any), and Lawriter, LLC.
>
> You agree that you will not copy, print, or download anything from this website other than for your personal use.
>
> You agree not to use any web crawler, scraper, or other robot or automated program or device to obtain data from the website.
>
> You agree that you will not sell, will not license, and will not otherwise make available in exchange for anything of value, anything that you download, print, or copy from this site.
>
> You agree that you will not copy, print, or download any portion of the regulations posted on this site exceeding a single chapter of regulations for sale, license, or other transfer to a third party, except that you may quote a reasonable portion of the regulations in the course of rendering professional advice.
>
> If you violate this agreement, or if you access or use this website in violation of this agreement, you agree that Lawriter will suffer damages of at least $20,000.

Dkt 21 at 4-5.

Lawriter's brief opposing summary judgment suggests that this change in its cause of action against Fastcase and other legal users of the Georgia Regulations deprives the Court of the power to adjudicate this case. In its pleadings and brief,

however, Lawriter still threatens to sue Fastcase for violation of this clickwrap contract in addition to any claims it has reserved after April 7, 2016.

Lawriter's modification of the Secretary of State's website prevents Fastcase from updating the Georgia Regulations without appearing to breach the new clickwrap "contract" unilaterally imposed by Lawriter. The law does not require Fastcase to breach this "contract" to show a real and immediate controversy.

Replacing one set of claims to exclusive rights with another set of claims to exclusive rights does not change this Court's ability to declare that Lawriter cannot exercise ownership rights over the Georgia Regulations. Whether Lawriter's claims sound in copyright, quasi-contract, or clickwrap contract, nearly two centuries of consistent law and public policy prevent any person from having any exclusive rights, under copyright, contract or any other theory, that can prevent another from copying and publishing the public law of Georgia or of other states.

I. THE COURT HAS FEDERAL QUESTION JURISDICTION

This Court has federal question jurisdiction pursuant to 28 U.S.C., § 1331 and 1138(a) because Lawriter explicitly threatens to sue Fastcase for copyright infringement if Fastcase updates the Georgia Regulations from the website of the Georgia Secretary of State and distributes and publishes the Georgia Regulations on a subscription basis to its users. Dkt. 20 at 2. Now that Lawriter has made that

threat, federal question jurisdiction is clear whether or not the other claims Lawriter threatens would be pre-empted by copyright.

Lawriter argues that jurisdiction cannot be based on copyright because "Lawriter does not have a copyright registration." Dkt. 20 at 6. However, Lawriter insists that its website includes not only "the text and numbering of regulations adopted by the State of Georgia" but also "additional copyrighted material necessary to incorporate the statutory text and numbering into HyperText Markup Language ('HTML')." *Id.* at 10. By explicitly threatening a copyright infringement suit, in a pleading subject to Rule 11, Lawriter implies that registration of its copyright is either already in progress or imminent. Therefore, the scope of copyright pre-emption of non-copyright claims is no longer critical, and *Stuart Weitzman, LLC v. Microcomputer Resources, Inc.,* 542 F.3d 859 (11th Cir. 2008), is not an obstacle to the exercise of jurisdiction in this dispute.

II. THE COURT HAS DIVERSITY JURISDICTION

The Court has diversity jurisdiction pursuant to 28 U.S.C., § 1332(a)(1), because it is undisputed that, for purposes of diversity, Fastcase is a citizen of Delaware and the District of Columbia while Lawriter is a citizen of Virginia. Dkt. 14 at 3, ¶¶ 8-9. The amount in controversy is indisputably greater than $75,000, because Fastcase ordinarily updates its materials daily, and the new terms and

conditions Lawriter seeks to impose on users of the Secretary of State's website requires users to agree in advance that each single violation of those terms would cause Lawriter to "suffer damages of at least $20,000." Dkt. 21 at 5.

The Supreme Court established long ago that:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

S*t. Paul Mercury Indemnity Co v. Red Cab Co*., 303 U.S. 283, 288-289 (1938) (footnotes omitted).

Fastcase alleges that it "has sold, or offered to sell, access to electronic databases including the Georgia Regulations with a cumulative value in excess of $75,000." Dkt. 4 at 4, ¶ 10. Lawriter does not contend that Fastcase has made this allegation in bad faith. Nor does Lawriter deny the factual truth of this allegation, although Lawriter originally disputed its legal significance.[1]

The cost to Lawriter of creating and maintaining the Rules and Regulations page of the Secretary of State's website is entirely irrelevant. What matters is the *value* of the rights involved. "In a diversity litigation the value of the 'matter in

[1] Lawriter's Answer to ¶ 10 does not deny the *fact* alleged by Fastcase, but denies its relevance.

controversy' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation." *Thomson v. Gaskill*, 315 U.S. 442, 447 (1942). Lawriter seeks to prevent Fastcase from publishing the Georgia Regulations to its subscribers, and the amount in controversy is the value of the business for which Lawriter hopes to evade competition. That value is, indisputably, far more than the minimum amount of harm Lawriter would suffer from a single unauthorized access to the website.

III. LAWRITER'S THREATS CREATE A JUSTICIABLE CONTROVERSY

Between its demand letter, pleadings, and its new terms of use on the Secretary of State's website, Lawriter has articulated a variety of theories for excluding others from lawfully using the Georgia Regulations. Declaratory relief is designed to protect against exactly this sort of shifting ground. "[V]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction." *Nat'l Advertising Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005).

Lawriter argues that the controversy is moot because it has promised not to sue for anything that happened before April 7, 2016. Yet Lawriter insists that it could still sue Fastcase at any time for updating its collection of the Georgia

Regulations after April 7; the only change would be Lawriter's legal theory.

A. Lawriter Has Not Ceased Its Threats Against Fastcase

Lawriter implicitly acknowledges that the law is against it on this point:

> The voluntary-cessation doctrine recognizes that a controversy becomes moot when the defendant voluntarily ceases the actions that gave rise to the controversy. *See Already, LLC v. Nike, Inc*., 133 S.Ct. 721, 727, 184 L.Ed 2d 553 (2013). In order to employ this doctrine, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167, 190 (2000).

Dkt. 20 at 8.

Far from "showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," Lawriter confirms and even extends its threats against Fastcase:

> [I]f Plaintiff were allowed to amend or supplement its Complaint to state a claim based on the period after April 7, 2016, Lawriter would present a claim for breach of contract that would not be preempted by the Copyright Act, along with a claim for copyright infringement, depending on whether Plaintiff copied any materials authored by Lawriter.

Dkt. 20 at 2.

The Supreme Court has identified two criteria that must be met for an asserted "voluntary cessation" to moot a controversy:

> (1) it can be said with assurance that "there is no reasonable expectation . . ." that the alleged violation will recur [citations], and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation [citations].

Los Angeles County v. Davis, 440 U.S. 625, 631 (1979).

Lawriter has not satisfied either condition. The "timing and content" of a "voluntary cessation" are instructive in determining whether a party has "completely and irrevocably" rendered itself incapable of continuing or repeating the challenged conduct:

> As for timing, a defendant's cessation before receiving notice of a legal challenge weighs in favor of mootness, . . . while cessation that occurs "late in the game" will make a court "more skeptical of voluntary changes that have been made." . . . With respect to content, we look for a well-reasoned justification for the cessation as evidence that the ceasing party intends to hold steady in its revised (and presumably unobjectionable) course.

Harrell v. The Fla. Bar, 608 F.3d 1241, 1266 (11th Cir. 2010) (dispute not moot where the circumstances "raise a substantial possibility that 'the defendant has ... changed course simply to deprive the court of jurisdiction,' which itself prevents us from finding the controversy moot") (quoting *Nat'l Advertising*, 402 F.3d at 1333).

1. <u>Lawriter's timing indicates an effort to avoid jurisdiction</u>

Here, Lawriter's change of position occurred not only after Fastcase filed this action, but even after Lawriter filed its original Answer and Counterclaims.

Dkt. 13. Only after Lawriter realized that it had neither legal nor factual basis for its demand letter did it change the Secretary of State's website to attempt to impose new "Terms of Use." Lawriter's change manifests an attempt to strengthen its position in the controversy with Fastcase, not to make the controversy go away. The addition of these "Terms of Use" demonstrates that Lawriter intends to maintain its claims to exclude fastcase from legal use of the Georgia Regulations.

2. <u>The scope of the covenant is limited, and excludes the current controversy</u>

Lawriter's covenant not to sue does not resolve the controversy, but merely waives only the original counterclaims. *See* Dkt. 20-1 at 4, ¶ 11, and 15-16. It is an attempt to bypass this lawsuit so Lawriter may sue under a different posture at a time and venue of its own choosing. Lawriter still threatens suit for anything done since April 7, 2016, two months before Lawriter executed the covenant.

The reason Lawriter cannot claim copyright protection is not peculiar to the copyright statute, but is inherent in the due process rights of a free society. Imposing a new "Terms of Use" requirement on the Secretary of State's website, in an attempt to create by contract rights that Lawriter concedes it cannot have by copyright, does not change the fact that Lawriter claims exclusive rights in legal materials which must by law and public policy remain free to all, as set forth at length in Fastcase's original brief, and not disputed or denied by Lawriter.

Lawriter cannot acquire by contract with the Secretary of State any greater power to exclude others than Michie did by its contract with the Code Revision Commission, which was conclusively held to be insufficient to give an exclusive franchise as to the publication of laws in Georgia. *Harrison Co. v. Code Revision Commission*, 244 Ga. 325, 329 (1979).

The U.S.Supreme Court's decision in *Already v. Nike*, relied on by Lawriter, involved a broader covenant, which promised not to sue even for future conduct implicating the same basic issue. 133 S.Ct. at 725. That case was "moot because the challenged conduct cannot reasonably be expected to recur." *Id.* at 729. This case is very different. Here, Fastcase has manifest an intention to continue accessing the text of the Georgia Regulations from the website of the Secretary of State, and Lawriter has manifest an intention to sue if this Court does not declare that it may not. In short, the "voluntary cessation" of Lawriter's original threat does not end the story because that threat has simply been replaced by a new one.

3. <u>Lawriter cannot offer a "well-reasoned justification for the cessation"</u>

Lawriter has offered no reason at all for its partial "cessation," let alone a well-reasoned one. In light of the Eleventh Circuit's directive in *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010) that a case should not be found moot in the absence of a "well-reasoned justification for the cessation," it might be

worth noting that Lawriter's newest efforts to prevent Fastcase from copying and publishing the Georgia Regulations, by modifying the Secretary of State's website, is so badly reasoned that it appears to violate Lawriter's contract with the State. *See* Dkt. 20-1 at 8, ¶ (D)(1) (prohibiting registration requirements of any kind).

B. <u>Declaratory Relief is Appropriate on the Current Pleadings</u>

Lawriter contends that Fastcase must amend its pleadings to allege a new threat based on the new "Terms of Use" Lawriter has written into the Secretary of State's website. Dkt. 20 at 2. Lawriter's new threat is well within the scope of the current complaint, which alleges:

> 1. This is a civil action in which Fastcase seeks declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, preliminary and permanent injunctive relief, and other necessary and proper relief, enjoining Defendant Lawriter, LLC ("Defendant" or "Lawriter") from acting in such a manner as to impede Fastcase's publication of (a) the Georgia Administrative Rules and Regulations (the "Georgia Regulations") or (b) any other state or federal laws, rules or regulations.

Dkt. 4 at 1, ¶ 1.

Actually entering into, and breaching, the clickwrap "contract" Lawriter now threatens to enforce, is not essential to declaratory jurisdiction:

> In such a situation, a party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute a breach, but may seek relief by declaratory judgment and have the controversy adjudicated in order that he may avoid the risk of damages

or other untoward consequence.

Keener Oil & Gas Co. v. Consolidated Gas Utilities Corp., 190 F.2d 985, 989 (10th Cir. 1951).

The controversy does not have to remain exactly the same in every detail from the moment it begins to the final judgment. It is enough that a party might be subjected to repeated claims, yet any request for declaratory relief might be otherwise mooted by updating the basis for the claims.

> The "capable of repetition, yet evading review" exception to the mootness doctrine applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1343 (11th Cir. 2014) citing *Davis v. FEC*, 554 U.S. 724, 735 (2008).

Fastcase should not be obliged to change its pleadings, let alone file a new lawsuit, every time Lawriter adjusts its tactics, as long as Lawriter continues to threaten to sue Fastcase for legal collection and publication of the Georgia Regulations. "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already v. Nike,* 133 S.Ct. 721, 727 (2013).

Thus, Fastcase's plea for declaratory judgment, that Lawriter simply cannot exclude others from using public law, remains as vital on the basis of the new threats Lawriter has pleaded as it was on the basis of the original threat. A grant of summary judgment by this Court would resolve all Lawriter's claims to exclusivity in the Georgia Rules and Regulations, regardless of legal theory.

IV. THERE ARE NO DISPUTES OF MATERIAL FACT IN THIS CASE

Fastcase is entitled to summary judgment because there are no issues of material fact in controversy. Fastcase's own pleadings show that the Georgia Secretary of State's website is the source of its updates. The Court may declare that Lawriter may not sue Fastcase, as a matter of law, under copyright or contract, on the face of the pleadings in this case.

Lawriter claims that "There Remain Disputes of Material Fact and Additional Discovery is Needed…***Related to pre-April 7, 2016 Copying***." Dkt. 20 at 9 (emphasis added). However, Lawriter has made very clear that it will not pursue anyclaims relating to pre-April 7, 2016, copying. Dkt. 20 at 3 and 7-9.

This motion seeks a declaration that, as a matter of law, *even after April 7, 2016*, Lawriter still has no right to prevent Fastcase from copying the Georgia Regulations from the Secretary of State's website and republishing them to its own subscribers. There are no facts in dispute; the Court can rule as a matter of law

without factual discovery.

Lawriter suggests that factual issues *might* exist because Fastcase *might* have copied something other than the unprotectable Rules and Regulations, such as HTML that displays paragraph breaks or italics in web browsers. However, Lawriter has not shown any evidence that it has any copyright in such material. To defeat summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). There are no triable issues of fact with regard to the copying and republishing of the text and numbering of the Georgia Regulations themselves. Summary judgment in favor of Fastcase is appropriate and should be ordered.

V. CONCLUSION

Lawriter has attempted to assert rights it does not have in Georgia's public Rules and Regulations. It has sent a demand letter to Fastcase demanding that Fastcase cease lawful use of this body of public law, under threat of lawsuit. Fastcase has asked this Court to declare that Fastcase's collection and publication of the Georgia Regulations was and is lawful. Lawriter has attempted to evade this declaration by challenging the Court's jurisdiction, retracting some threats of suit, and creating new "Terms of Use" that claim in contract rights to which Lawriter is

not legally entitled, in an attempt to block a competitor from using public law.

No matter what conditions it purports to require for access to the official website of Georgia's Secretary of State, Lawriter simply has no right to control or limit access to the official text of the Georgia Regulations. This Court can and should adjudicate that Lawriter's attempts to do so are improper and unlawful. Nearly two centuries of uniform law and public policy, recognized by the Supreme Courts of Georgia and the United States, as well as by many other courts, precludes any limitation on copying or republication of public law. So long as Lawriter asserts claims of exclusivity, Fastcase will remain under threat of lawsuit for its legal use of the Georgia Regulations.

For these reasons, Fastcase respectfully submits that its motion for summary judgment should be granted, and that the Court should enter judgment declaring (1) that Lawriter does not and cannot have any copyright in the Georgia Regulations, or in the laws, rules, and regulations of any other State; and (2) that Fastcase does not and cannot infringe any exclusive contract rights held by Defendant in the Georgia Regulations, or in the laws, rules, and regulations of any other State.

Respectfully submitted this 5th day of July 2016.

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.

/s/ Robert G. Brazier
Robert G. Brazier (Georgia Bar No. 078918)
rbrazier@bakerdonelson.com
Steven G. Hall (Georgia Bar No. 319308)
shall@bakerdonelson.com
Joshua Tropper (Georgia Bar No. 716790)
jtropper@bakerdonelson.com
Monarch Plaza, Suite 1600
3414 Peachtree Road N.E.
Atlanta, GA 30326
Telephone (404) 577-6000
Facsimile (404) 221-6501

Attorneys for Plaintiff Fastcase, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief has been prepared with Times New Roman 14-point, which is one of the font and point selections approved by the court in LR 5.1B.

/s/ Robert G. Brazier
Robert G. Brazier
Georgia Bar No. 078918
rbrazier@bakerdonelson.com

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2016, I electronically filed the within and foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

Kurt M. Rozelsky (Bar No. 617932)
kurt.rozelsky@smithmoorelaw.com
Joseph W. Rohe (Bar No. 727154)
joseph.rohe@smithmoorelaw.com
Smith Moore Leatherwood LLP
2 West Washington Street, Suite 1100
P.O. Box 87
Greenville, SC 29602

This 5th day of July, 2016.

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.

/s/ Robert G. Brazier
Robert G. Brazier
Georgia Bar No. 078918