

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BLACKWELL PUBLISHING, INC., ELSEVIER,
INC., OXFORD UNIVERSITY PRESS INC.,
SAGE PUBLICATION, INC., and
JOHN WILY & SONS, INC.,

Plaintiffs,

v.

Case No. 07-12731

EXCEL RESEARCH GROUP, LLC
d/b/a EXCEL TEST PREPARATION,
COURSEPACKS & COPIES, and NORMAN
MILLER, individually,

HONORABLE AVERN COHN

Defendants.

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
WITHOUT PREJUDICE**

This is a copyright infringement case. Plaintiffs Blackwell Publishing Inc., Elsevier, Inc., Oxford University Press, Inc., Sage Publication, Inc. and John Wiley & Sons, Inc. (collectively, "publishers") are suing defendants Excel Research Group, LLC d/b/a Excel Test Preparation Coursepacks & Copies, and Norman Miller (collectively "Excel") claiming that Excel has violated reproduction rights under 17 U.S.C. § 106(1) and distribution rights under 17 U.S.C. § 106(3) in the manner in which Excel provides copying services to professors and students at the University of Michigan.

Before the Court is Excel's motion for summary judgment. The Court heard argument on February 15, 2008.

The parties' competing positions are accurately reflected in the papers and in the transcript of the oral argument. Importantly, the publishers have not had the opportunity to depose Norman Miller, a named plaintiff, and Paul N. Courant, University Librarian and Dean of Libraries for the University of Michigan, both of whom filed declarations in support of Excel's motion. As discussed at the hearing, it is axiomatic that when a party files an affidavit or declaration in support of a motion for summary judgment under Fed. R. Civ. P. 56, the opposing party has the right to depose the affiant or declarant on the assertions made. See Vance, by and Through Hammons v. U.S., 90 F.3d 1145, 1148 (6th Cir. 1996) (stating that "[t]he general rule is that summary judgement is improper if the non-movant is not afforded a sufficient opportunity for discovery."); Wilfong v. Hord, No. CS-05-746, 2007 WL 1057396, *2 (S.D. Ohio Apr. 4, 2007) (allowing plaintiff to depose defendant who filed an affidavit in support of summary judgment, noting that "[p]rohibiting Plaintiff to depose [defendant] would only present one version of the facts at issue in this case.") Accordingly, Excel's motion for summary judgment is DENIED WITHOUT PREJUDICE to its right to renew the motion upon completion of further discovery.

SO ORDERED.

Dated: February 22, 2008

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, February 22, 2008, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5160