

**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' PROPOSAL FOR RELIEF AND  
OPPOSITION TO PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT  
OF PROPOSED DECLARATORY JUDGMENT AND PERMANENT  
INJUNCTION**

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## I. INTRODUCTION

Plaintiffs have failed to establish that the Georgia State University 2009 Copyright Policy (“Policy”) resulted in *ongoing and continuous misuse* of the fair use defense or that any misuse that may have occurred is likely to occur again in the future. Of the Plaintiffs’ initial 99 allegations of copyright infringement brought to trial, this Court found only ten of those, or 10%, were not fair uses. (*See* Dkts. 563 at 235; 568 at 2.) Those ten uses related to only seven copyrighted works. (*Id.*) This Court also found that Defendants always intended to follow the law. (*E.g.*, Dkts. 423 at 345 (“*Cambridge I*”); 235 at 29.) There is no reason to doubt Defendants will continue to follow the law as elucidated by this Court and the Eleventh Circuit. Defendants’ revision of the Policy soon after this Court’s *Cambridge I* decision evidences this dedication to following the law. (*See* Dkt. 432 at 27 & Ex. A.) Moreover, because Defendants are all state actors, only prospective relief can be imposed, and then, only if there is a threat of ongoing and continuous violations of Plaintiffs’ rights. Because there is no such threat, no injunctive or other forward-looking relief is warranted. A judgment to that effect is appropriate. (*See* Defendants’ Proposed Judgment, Exhibit A.)

Plaintiffs nevertheless again propose that the Court enter an order, judgment, and permanent injunction against Defendants, and GSU students, that is impermissibly broad, violates Federal Rule of Civil Procedure 65, and seeks

extensive, sweeping prohibitions against Defendants that are logistically impossible to abide and not supported by applicable law. (*See* Dkt. 566-1.) Among other things, Plaintiffs' proposed injunction improperly encompasses yet to be created works over which this Court has no jurisdiction, covers works (as well as workbooks) owned by Cambridge when Cambridge failed to prove Defendants' liability with respect to any of its works, applies to students who attend GSU (not just state officials), and ignores this Court's prior observation that "[t]here is insufficient reason to impose a burdensome and expensive regimen of record-keeping and report-making based on the totality of the circumstances." (*See* Dkt. 441 at 11.) This Court should reject Plaintiffs' proposal.

Defendants respectfully request that this Court adopt the proposed judgment provided in Exhibit A hereto and reject any proposal for injunctive relief. Should this Court determine that an injunction should be granted, Defendants respectfully submit herewith as Exhibit B a proposed injunction that avoids the sweeping and unworkable nature of that proposed by Plaintiffs. In contrast, the injunction contained in Exhibit B is clear and specific, and tailored to address the past conduct that the Court found to be improper.

## II. FACTUAL BACKGROUND<sup>1</sup>

### A. The Court's Construct to Evaluate Plaintiffs' Allegations

Plaintiffs initially alleged a “vast amount” of infringement of Plaintiffs’ copyrighted works. (Dkt. 1 ¶ 1; *see also* Dkt. 142-1 at 5 (“massive amount”).) Then throughout discovery—and even after the close of discovery—Plaintiffs added and took away new assertions of infringement. (*See* Dkt. 210-1; Dkt. 235 at 4; Dkt. 142-3 ¶¶ 267-69 (Pls.’ attempt to add 270 allegations).).

In view of Plaintiffs’ ever-shifting allegations, the Court devised a construct that tied Plaintiffs’ claims to alleged infringements during a specific time period. This allowed the Court to evaluate whether, as implemented, the Policy was “encouraging improper application of the fair use defense” despite the Policy’s text not demonstrating an intent by Defendants to encourage copyright infringement.<sup>2</sup> (Dkt. 235 at 29-30.) The Court stated that “in order to show that Defendants are responsible for the copyright infringements alleged in this case, Plaintiffs must show that the Policy resulted in ongoing and continuous misuse of the fair use defense.” (Dkt. 235 at 30.) And “[t]o do so, Plaintiffs must put forth evidence of a *sufficient* number of instances of infringement of Plaintiffs’ copyrights to show

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<sup>1</sup> The background of this case is well-known to the Court. Defendants highlight certain facts relevant to the instant question, and rely on previous factual statements as appropriate.

<sup>2</sup> The Eleventh Circuit approved of this Court’s construct based on a 2009 time period. *See Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1280 (11th Cir. 2014) (“*Cambridge II*”).

such ongoing and continuous misuse [of the fair use defense].” (*Id.* (emphasis added).)

Pursuant to the Court’s August 11, 2010 and August 12, 2010 Orders (Dkts. 226; 227.), Plaintiffs submitted a list of 126 claimed infringements (Dkt. 228.). Plaintiffs thereafter added and dropped infringement claims, thus presenting a total of 99 claims for trial. (*See* Dkt. 423 (“Cambridge I”) at 337.) After Plaintiffs’ case-in-chief closed, they filed a revised list of 75 claimed infringements. (Dkt. 361.) The Court refused to enter the new list into evidence (Cambridge I at 8 n.8.), but construed two claims as consolidated (Cambridge I at 183 n.89), and analyzed the 74 remaining claims. (Cambridge I.)

### **B. This Court’s and the Eleventh Circuit’s Decisions**

After a three-and-a-half-week trial, no *prima facie* case was proven for 26 of the allegations. (Cambridge I at 338-39.) The Court’s findings on these 26 allegations remain unchallenged and undisturbed. *See Cambridge II*, 769 F.3d at 1259-60 & 1283-84. Due to Plaintiffs’ two appeals to the Eleventh Circuit, this Court has now performed a detailed fair use analysis of the remaining 48 allegations three times over. In all three decisions, this Court has found that only a very small number of uses were not a fair use (Cambridge I at 338 (five uses not fair uses); Dkts. 510 at 211; 514 at 2 (four uses not fair uses) (“Cambridge III”); Dkts. 563 at 235; 568 at 2 (ten uses not fair uses) (“Cambridge V”). Defendants



were named prevailing party after each of this Court's first and second decisions. (Dkts. 441 at 14 & Cambridge III at 212). The Court entered a declaratory judgment and a tailored injunction in each of its prior decisions as well. (Dkts. 463 at 2-3 & 531 at 3-4 & 6.)

In each appeal, the Eleventh Circuit affirmed large portions of this Court's fair use analysis and reversed other portions of that analysis. *See generally, Cambridge II*, 769 F.3d 1232; *Cambridge Univ. Press v. Albert*, 906 F.3d 1290 (11th Cir. 2018) ("*Cambridge IV*"). Importantly, the Eleventh Circuit affirmed this Court's construct: to justify the need for injunctive relief, Plaintiffs had to show ongoing and continuous misuse of the fair use privilege; to do so, individual allegations of infringement each had to be evaluated to determine whether a sufficient number of infringements occurred. *See Cambridge II*, 769 F.3d at 1259. However, because this Court's grants of injunctive and declaratory relief and award of fees and costs were predicated at least in part on its fair use analysis, those decisions were vacated when the entire case was remanded for further proceedings. *See Cambridge II*, 769 F.3d at 1283-84; *Cambridge IV*, 906 F.3d at 1302.

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The Court directed Plaintiffs to file "the proposed text of any injunctive or declaratory relief they seek, together with the rationale supporting their request."

(Cambridge V at 236.) Plaintiffs filed a Memorandum of Law in Support of Proposed Declaratory Judgment and Permanent Injunction on March 23, 2020. (Dkt. 566.) Defendants now submit their response in opposition.

### **III. ARGUMENT AND CITATION TO AUTHORITIES**

#### **A. Plaintiff Cambridge Is Not Entitled to Any Relief**

Because this Court has ruled that Cambridge has not suffered any infringement of its copyright rights (Cambridge V), that plaintiff is not entitled to any relief. *See Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1499 (11th Cir. 1984) (indicating a past infringement is necessary to form the basis of an injunction). Rather, Defendants are entitled to a judgment that they have not infringed any of Cambridge's copyright rights asserted in this action.

#### **B. Any Final Judgment Should Acknowledge That Defendants Prevailed On 89 Allegations of Infringement**

Defendants believe that it is appropriate for this Court to issue a final judgment stating that it has found Sage to prevail in eight infringement allegations and Oxford to prevail in two infringement allegations, and Defendants to prevail on the remaining 89 infringement allegations brought to trial (including all of those brought by Cambridge). On the other hand, as Defendants previously argued, and incorporate now by reference, a declaratory judgment strictly about past violations is not permissible under the law. (*See* Dkts. 432 at 14-19; 524 at 9-10.)

Accordingly, in Exhibit A, Defendants propose a judgment consistent with this Court's orders.

**C. Because There Is No Threat of Ongoing or Continuous Misuse of the Fair Use Defense Caused By the Policy, No Prospective Relief Is Warranted**

Injunctive relief is not warranted here because ten instances of infringement do not indicate that Defendants are encouraging an ongoing improper application of the fair use defense. This Court's authority to award injunctive relief under *Ex parte Young* is limited to those circumstances under which there is a reasonable expectation that the injured party will be subject to the same injury again or will be unable to seek review in the unlikely event that the injury recurs. *See Duncan*, 744 F.2d at 1499 (To obtain an injunction, plaintiffs must prove "a past infringement and a substantial likelihood of future infringements."); *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991) ("[T]he relief which a district court may grant can be no broader than that necessary to correct the violation."). This Court determined that only a "sufficient number of instances of infringement" would demonstrate that the Policy is encouraging an ongoing improper application of the fair use defense. (Dkt. 235 at 29-30.) Ten instances of infringement are not a sufficient number to indicate that Defendants are encouraging an ongoing misuse of the fair use defense. Thus, Plaintiffs' request for an injunction should be denied.

### **D. If An Injunction Is Granted, Deference Should Be Given to Defendants' Proposed Injunction**

If the Court deems that an injunction is appropriate, the Court should give deference to Defendants as state actors and adopt Defendants' proposed injunction as provided in Exhibit B. The Supreme Court has explained the importance of giving a state defendant "adequate deference" when fashioning an injunction against a state. *Lewis v. Casey*, 518 U.S. 343, 361-363 (1996) (striking down an injunction that was opposed by a state defendant for failure to give the state adequate deference); *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) ("one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions"); *see also Inmates of Occoquan v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988).

The Court noted in *Lewis* that a federal court should "respect[] the limits on its role . . . [by] permitting [a state official] to exercise wide discretion within the bounds of constitutional requirements." *Lewis*, 518 U.S. at 363. In the process of disapproving a court order that was overly intrusive, Justice Scalia, speaking for the Court, explained that district courts must exercise care in fashioning relief to avoid intruding on the need and responsibility for state officials to manage their own affairs. *Id.* at 362. In his concurring opinion, Justice Thomas relied upon the principles of federalism and separation of powers as the foundation for this deference. *Id.* Those foundational principles apply equally here.

Applying *Lewis*, several circuit courts have struck down overly detailed and far-reaching injunctions of a state like the one proposed by Plaintiffs when those injunctions were opposed by the state. *See, e.g., Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982 ); *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986) (“We have repeatedly been cautioned to give the state a reasonable opportunity to remedy a . . . deficiency, imposing upon it a court-devised solution only if the state plan proves to be unfeasible or inadequate for the purpose.”). The case of *Walker v. City of Calhoun*, 682 F. App’x 721 (11th Cir. 2017), cited by Plaintiffs is not contradictory. There, the court agreed with the city defendant that a district court’s preliminary injunction language was insufficient because its directive for the city “to comply with the Constitution” impinged upon the city’s due process rights because the injunction failed to notify the city which of its future actions would not comply with the Constitution. *See Walker*, 682 F. App’x at 724-25. The Eleventh Circuit respected the city’s concern about the injunction as applied to its own actions in *Walker*. However, here, Plaintiffs have no grounds on which to claim that this Court’s injunction of Defendants violates Plaintiffs’ due process rights.

### **1. Defendants’ Proposed Injunction Appropriately Excludes Works Outside the Scope of the Decision**

While no injunction is necessary or appropriate in this case under *Ex parte Young*, Defendants propose herewith as Exhibit B an appropriate injunction should the Court deem one necessary. The injunction proposed by Defendants is narrowly

tailored to the specific claims of infringement on which two Plaintiffs prevailed. *See Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994) (an injunction for copyright infringement “should be narrowly tailored to fit [the] specific legal violations”). Importantly, Defendants proposed injunction does not encompass works of Plaintiffs that have yet to be created. The Eleventh Circuit has found that injunctions covering “putative copyrights in works which are not yet in existence” are “manifestly contrary to the basic concepts of copyright law and represents serious legal mischief.” *Cable News Network, Inc. v. Video Monitoring Services of Am., Inc.*, 940 F.2d 1471, 1480–81 (11th Cir. 1991), *reh'g granted and opinion vacated*, 949 F.2d 378 (11th Cir. 1991), *and on reh'g*, 959 F.2d 188 (11th Cir. 1992). The Eleventh Circuit reasoned:

The power of the district court to grant injunctive relief springs from 17 U.S.C. § 502(a) which provides: “Any court having jurisdiction of a civil action arising under this title may ... grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” The operative words here are “having jurisdiction” and “copyright.” Before a court can have jurisdiction to entertain an infringement action, the *prior* registration requirements of 17 U.S.C. § 411(a) must be met; that is, “no action for infringement of the copyright in *any* work shall be instituted until registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. § 411(a); *see Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 850 (11th Cir.1990). Accordingly, the scope of the *remedy* for copyright infringement is constrained and dictated by the scope of the copyright claim actually registered.

*Id.* (emphasis in original). The Eleventh Circuit further indicated that any equitable concept that would grant protection to works not yet in existence would be “antithetical to the teachings of *Fiest*.” *Id.*

Although the Eleventh Circuit’s decision in *Cable News* was vacated when the appeal became moot, the reasoning underlying the *Cable News* holding regarding the inability of injunctions to cover works not yet in existence still stands: This Court lacks subject matter jurisdiction over uncreated works under 17 U.S.C. § 411(a), which requires that a work be registered before a court has subject matter jurisdiction over a claim of infringement of the work. The Supreme Court reinforced that reasoning when it held that registration of a copyright is a requirement for filing suit for infringement, and noted that only “[o]nce the Register grants or refuses registration, [may] the copyright owner. . . seek an injunction barring the infringer from continued violation.” *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 891 (2019). Accordingly, any injunction issued by the Court cannot encompass works that have not yet been created and should be limited to the specific works and uses found not to be a fair use as Defendants propose in Exhibit B.

## **2. Plaintiffs’ Proposed Injunctive Relief Is Overbroad, Unnecessary, and Unenforceable**

Initially, Plaintiffs’ proposed injunction is unacceptable because it impermissibly covers works that have yet to be created as it specifically defines

“Work” as one that is “now in existence or yet to published.” (Dkt. 566-01 at 2 (I.B. and III).) Their proposed injunction is also not limited to works for which Plaintiffs have obtained a copyright registration, which as discussed above, is in contravention of the Supreme Court’s decision in *Fourth Estate*. *See Fourth Estate*, 139 S. Ct. at 891. For these reasons alone, Plaintiffs’ proposed injunction should be rejected.

And, the impermissible overbreadth of Plaintiffs’ proposed injunction extends further. Federal Rule of Civil Procedure 65(d)(2) provides that an injunction *only* binds certain persons who are personally served with the injunction. *See* Fed. R. Civ. Pro. 65(d)(2) (emphasis added). Plaintiffs’ proposed injunction violates that rule by seeking to enjoin students that were neither a party to this litigation nor shown to be infringing.<sup>3</sup> (*See* Dkt. 566-01 at 1 (I.A. and III).)

Plaintiffs further improperly seek injunctive relief (including monitoring) for Cambridge works even though Cambridge failed to prove a single alleged infringement. (*See* Dkt. 566-01 at 2 (I.B and III).) Without an infringement, there is no basis for such an injunction. *Duncan*, 744 F.2d at 1499. Moreover, when multiple plaintiffs seek relief against a state agency, awarded relief should be limited to the injured plaintiff. *See Gomez v. Vernon*, 255 F.3d 1118, 1130 (9th Cir.

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<sup>3</sup> Plaintiffs’ proposed injunction raises serious and difficult if not unworkable implementation issues regarding the disclosure of student information under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99, a Federal law that protects the privacy of student education records.



2001) (because class relief was inappropriate, prospective relief was properly limited to just six inmates); *Rizzo v. Goode*, 423 U.S. 362, 367-69 (1976) (where only two of 28 alleged incidents, involving only two police officers, involved deprivation of a federal right, broad-based relief was not warranted); *City of L.A. v. Lyons*, 461 U.S. 95, 97-100 (1983) (single plaintiff's allegation that his constitutional rights were violated insufficient to justify city-wide injunctive relief). Similarly, Plaintiffs also seek to address “consumables” (*e.g.*, workbooks and the like) which were not addressed by the Cambridge V decision. (*See* Dkt. 566-01 at 4 (IV.B.1.v.).)

As to monitoring, Plaintiffs seek unfettered access to all of Defendants systems and to unnecessarily and improperly require the Court to intervene “over judgment-compliance issues” and to “entertain such requests for modification of the Order as may be warranted based upon technological or other future developments.” (*See* Dkt. 566-01 at 7 (VII); *see also O’Shea v. Littleton*, 414 U.S. 488, 493 (1974) (reversing injunction requiring district court to scrutinize county’s criminal justice system to ensure state court officials did not deprive the plaintiffs of their constitutional rights)). Plaintiffs’ proposed procedures are unduly burdensome, invite future litigation, and should be rejected.

### 3. Plaintiffs' Proposed Injunction Fails to Embody the Eleventh Circuit's Opinion

Plaintiffs' proposed injunction is further unacceptable because it does not follow the Eleventh Circuit's prescription for a fair use analysis. As recognized by this Court, the Court of Appeals made clear that "the four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Cambridge II*, 769 F.3d at 1275. The Court referred to this as conducting "a holistic analysis." *Cambridge III* at 5. Yet Plaintiffs' proposed injunction generally ignores Defendants' right to conduct a proper fair use analysis and make a fair use, and specifically prevents any weighing of the statutory factors in a holistic analysis. Instead, their proposed injunction requires that factor one and factor three favor fair use before an "approved" fair use can be made. (*See* Dkt. 566-01 at 4 (IV.B.1.i-iv).) The proposed injunction requires that "[c]opies to be made, distributed or otherwise made available as course readings . . . may be made available" only, *inter alia*, when 1) they are strictly for nonprofit educational purposes and narrowly tailored to fulfill a legitimate pedagogical purpose (making factor one favor use), and 2) they do not reproduce an excessive amount of the work and do not use the heart of the work (making factor three favor fair use). (*See id.*) There can be no fair use under Plaintiffs' proposed system when either factor one or factor three do not favor fair use, and factor two is disregarded entirely. (*See* Dkt. 566-01 at 4

(IV.B.1.).) Further, the only weighing of any factor is a weighing of factor four against a fair use. (*See* Dkt. 566-01 at 4 (IV.B.2.).)

There is no trace of a holistic analysis in Plaintiffs' proposed injunction. It blatantly contradicts the Eleventh Circuit's clear direction that a fair use analysis must include a holistic analysis of all four fair use factors in light of the purposes of copyright. For these reasons, and in combination with those reasons enumerated above regarding the impermissible breadth of Plaintiffs' proposed injunction, Plaintiffs' proposal should be refused.

#### **IV. CONCLUSION**

Defendants submit that Plaintiffs are not entitled to any injunctive relief and that a judgment to that effect, as shown in Exhibit A, is the proper disposition of this case. Alternatively, if injunctive relief is to be granted, Defendants submit that a narrowly tailored injunction such as that shown in Exhibit B is appropriate.

Respectfully submitted this 7th Day of April 2020.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to L.R. 5.1C and 7.1D of the Northern District of Georgia, that the foregoing complies with the font and point selections approved by the Court in L.R. 5.1C. The foregoing pleading was prepared on a computer using 14-point Times New Roman font.

/s/Anthony B. Askew

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 7th day of April 2020, I have electronically filed the foregoing using the CM/ECF system which will automatically send an e-mail notification of such filing to the following attorneys of record:

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