

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION**

CAMBRIDGE UNIVERSITY PRESS, et
al.,

Plaintiffs,

– vs. –

MARK P. BECKER, in his official
capacity as Georgia State University
President, et al

Defendants.

Civil Action No. 1:08-CV-1425-ODE

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF THEIR
POSITION AS PREVAILING PARTY AND IN OPPOSITION TO AN
AWARD OF ATTORNEYS’ FEES AND COSTS**

INTRODUCTION

In its March 2, 2020 remand ruling, the Court ordered the parties to “confer with a view toward resolving disputed issues pertaining to taxation of costs and an award of attorneys’ fees.” Dkt. No. 563 at 236. In the absence of agreement, the Court directed the parties to file briefs addressing “which party (or parties) is (or are) the prevailing party (or parties) and whether the Court should exercise its discretion to award costs.” *Id.*

The parties conferred and did not reach agreement. Defendants have stated that they believe they are the prevailing party and intend to seek attorneys' fees and costs dating back to 2008 despite having lost twice at the Eleventh Circuit and having twice been enjoined by this Court for excessive and otherwise inappropriate unlicensed copying of Plaintiffs' works. Accordingly, Plaintiffs explain below why they, not Defendants, are now even more clearly than before the prevailing party in this litigation as a matter of law and why, even if the Court finds otherwise, Defendants are not entitled to a discretionary award of attorneys' fees and costs.

We note that even if the Court finds (correctly) that Plaintiffs are the prevailing party, consistent with recent Supreme Court guidance discussed in Section II of this brief, Plaintiffs do not intend to seek an award of attorneys' fees and costs given the vigorously disputed nature of the copyright issues that were raised in this case for the first time in the context of digital course readings.

ARGUMENT

I. PLAINTIFFS ARE THE PREVAILING PARTY

Section 505 of the Copyright Act provides that the court may, in its discretion, allow the recovery of "full costs" and "a reasonable attorney's fee" to the prevailing party. 17 U.S.C. § 505. A "prevailing party" is one in whose favor

a judgment is rendered that creates a “material alteration” in the legal relationship of the parties. *Buckhannon Bd. & Care Home v. West Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603-04 (2001); *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 907 (11th Cir. 2003). A “material alteration” exists where a party “has been awarded by the court *at least some relief* on the merits of [its] claim or . . . a judicial imprimatur on the change in the legal relationship between the parties.” *Smalbein*, 353 F.3d at 905 (emphasis added; internal quotations and citation omitted); *see also Kennedy v. Avondale Estates*, No. 1:00-CV-1847, 2006 WL 826194, at *2 (N.D. Ga. Mar. 29, 2006).

In its initial, post-trial ruling the court found that the five infringements it then identified were “caused” by the failure of GSU’s copyright policy to (i) limit copying to “decidedly small excerpts” (as defined by the court); (ii) prohibit the use of multiple chapters from the same book; or (iii) “provide sufficient guidance in determining the ‘actual or potential effect on the market or the value of the copyrighted work.’” Dkt. No. 423 at 337-39 (quoting 17 U.S.C. § 107(4)). On August 10, 2012, the court entered an injunction that required Defendants to maintain copyright policies for GSU not inconsistent with the court’s May 11 and August 10, 2012 orders. Dkt. No. 441 at 11. However, the Court held that Defendants were the “prevailing party” because they “prevailed on all but five of

the 99 copyright claims which were at issue” when the trial began, *id.* at 12-13, and that they were entitled to reasonable attorneys’ fees and costs because Plaintiffs’ “failure to narrow their individual infringement claims significantly increased the cost of defending the suit.” *Id.* at 14. The Eleventh Circuit vacated these rulings on the ground that they were based on “erroneous fair use analysis.” *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1283-84 (11th Cir. 2014) (“*Cambridge I*”).

On the first remand, despite having again ordered that that an injunction be entered in Plaintiffs’ favor, the Court again found Defendants to be the prevailing party. *See* Dkt. No. 510 at 212; Dkt. No. 531 at 6 (entering injunction). However, the Eleventh Circuit vacated that remand ruling, finding multiple errors in the Court’s fair use analysis. *Cambridge Univ. Press v. Albert*, 906 F.3d 1290, 1302 (11th Cir. 2018) (“*Cambridge II*”), and also vacated the award of attorneys’ fees and costs, on the ground that it “was based on . . . erroneous fair-use analysis,” as well as “the underlying determination that the University is the prevailing party.” *Id.*

On the second remand, even while *misapplying*, in Plaintiffs’ view, the Court of Appeals’ instructions, this Court increased to ten the number of acts of infringement it found. *See* Dkt. No. 563 at 235. That result clearly constitutes a “material alteration” in the parties’ relationship: Plaintiffs indisputably have been

(or soon will be) awarded “at least some relief” on the merits of their claims as well as a “judicial imprimatur” on the change in the parties’ legal relationship: a declaration of infringement and a permanent injunction (which Plaintiffs address in a separate filing). *See Smalbein*, 353 F.3d at 905. Indeed, the blatant nature of these ten infringements, which had no claim to transformative value, *see Cambridge I*, 769 F.3d at 1262-63, only underscores the propriety of this conclusion. *See, e.g.*, Dkt. No. 563 at 25-32 (copying four chapters of the *SAGE Handbook of Qualitative Research* (3d ed.) not fair use); *id.* at 218-224 (copying two chapters of *The Power Elite*, constituting the heart of the work, not fair use).

It should be noted, moreover, in evaluating which party prevailed, that the Court of Appeals squarely rejected Defendants’ core contention: that unlicensed verbatim copying for nonprofit educational purposes is an especially favored fair use. Defendants argued, specifically, that there is “no higher valued purpose in a fair use analysis than teaching, and teaching uses should accordingly be given great weight in the fair use analysis.” Brief of Defendants, *Cambridge University Press, et al. v. Albert, et al.*, No. 16-15726 (11th Cir. filed Feb. 6, 2017), at 40. Rejecting this reasoning, the Court of Appeals held that although the nonprofit educational purpose of GSU’s copying favored fair use, it did *not* do so strongly because “the threat of market substitution [was] significant.” *Cambridge I*, 769 F.3d at 1267. As

a result, the court cautioned, “care must be taken not to allow too much educational use, lest we undermine the goals of copyright by enervating the incentive for authors to create the works upon which students and teachers depend.” *Id.* at 1264. On remand, accordingly, this Court revised its prior conclusion that factor one strongly favored fair use and held instead that it does *not* strongly favor fair use. Dkt. No. 510 at 11. The Court of Appeals further made clear that factor four—market harm—“strongly disfavor[] fair use” where licenses for digital excerpts were available, *Cambridge II*, 906 F.3d at 1300, because of the “severe” threat of market harm from GSU’s nontransformative copying. *Id.* at 1299 (citing *Cambridge I*, 769 F.3d at 1267, 1275, 1281). In short, the Court of Appeals agreed with Plaintiffs and squarely rejected Defendants’ claim that the nonprofit educational nature and purpose of GSU’s unlicensed verbatim copying of Plaintiffs’ works was entitled to greater weight than the harm caused by direct market substitution.

Plaintiffs submit that it would be wholly inappropriate to again deem Defendants to be the prevailing party after this Court—having rejected Defendants’ sovereign immunity defense, *see* Dkt. No. 423 at 10-18—repeatedly found their copyright policy to be unlawful; after the Court of Appeals twice decisively rejected their principal legal argument and instructed this Court to give

greater weight to factor four; and after this Court increased the number of infringements committed by Defendants, finding on the second remand that nearly one-third of the infringement claims Plaintiffs contested were not fair use.

The only respect in which Defendants can claim to have prevailed—the tally of “wins” and “losses” on the individual infringement claims (which no longer tips heavily in Defendants’ favor)—is immaterial. As a matter of law, the scorecard of individual claims is not an appropriate measure of which party prevailed for purposes of section 505. The “prevailing party” determination does not turn on the parties’ *relative* success but, rather, on whether the plaintiff was awarded “some of the benefit the [plaintiff] sought in bringing suit.” *Smalbein*, 353 F.3d at 907 (citation omitted). Here, the work-specific claims were understood by the parties and the Court to be merely a vehicle to test the legality of GSU’s copyright policy, and that test has resulted in multiple rulings by this Court that an injunction constraining GSU’s copyright policy and practices should be entered on the premise that the copyright violations are attributable to GSU’s copyright policy. Dkt. No. 423 at 337-38; Dkt. No. 441 at 10-11; Dkt. No. 531 at 5-6. The Supreme Court has held that “an injunction or declaratory judgment, like a damages award, will usually satisfy [the prevailing party test].” *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (quoted in *Williams v. City of Atlanta*, No. 1:17-CV-1943-AT, 2018 WL

2284374, at *3 (N.D. Ga. Mar. 30, 2018)); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009) (“The NAACP and voters are prevailing parties because the preliminary injunction they obtained materially altered their legal relationship with the election officials.”).

Moreover, the Court’s determination that GSU’s copyright policy, as it existed in 2009, was unlawful and caused infringements to occur is a fundamental one and plainly represents a “material alteration of the legal relationship of the parties,” *Smalbein*, 353 F.3d at 907, not merely a “technical” win. *Id.* at 907 n.7; *Kennedy*, 2006 WL 826194, at *3.

The case law illustrates the fallacy of the “scorecard” approach to the prevailing party issue. In *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993), for example, the defendant, a video rental store operator, argued that the plaintiff, the exclusive licensee of television program videotapes, was not the prevailing party because, in addition to voluntarily dismissing five non-copyright claims, it conceded it was not entitled to statutory damages for twelve episodes of the “Jade Fox” program because the copyrights had not been timely registered, and it failed to prove infringement of the tapes of the “Hunters Prey” program. However, the plaintiff succeeded on its claims as to four episodes of “Jade Fox” and won \$2,500 in statutory damages, and the defendant was

permanently enjoined from further acts of infringement. The court held that although the plaintiff “downscaled its case as the litigation proceeded,” its victory as to the four “Jade Fox” episodes constituted success on “a significant issue in the litigation.” *Id.* at 1114. Moreover, the injunction represented “a clear change in the legal relationship between the parties enuring to Gamma’s benefit.” *Id.*

Of particular relevance to this case, the *Gamma Audio* court rejected the defendant’s argument that the plaintiff was not the prevailing party because of its “poor winning percentage,” *id.*, noting that it had “firmly rejected a ‘mathematical approach’ to the ‘prevailing party’ determination.” *Id.* (citation omitted). The court explained that a party’s degree of success goes to the reasonableness of awarding fees, not to whether an award is *allowable*, i.e., not to the “prevailing party” determination. *Id.*

Similarly, in *Kennedy*, 2006 WL 826194 , the court observed that prevailing party status “is not gauged the way one would judge a sporting event,” and explained that the plaintiff “doesn’t have to win on all or most issues, but merely has to succeed on any significant issue.” *Id.* at *3. The court held that the plaintiffs in that case were a prevailing party based on having won four out of their fourteen constitutional challenges to a local sign ordinance. *Id.* The court stated

that the plaintiffs' degree of success was relevant to the *amount* of the award of fees and costs, not to whether they were a prevailing party. *See id.* at *4.

Plaintiffs here have prevailed on a significant number of their infringement claims (even under what they believe to be this Court's erroneous implementation of the Eleventh Circuit's remand instructions). More important, Plaintiffs prevailed on a key legal issue presented in this case: the centrality of factor four (market substitution) to the fair use analysis in the academic setting.

In sum, Plaintiffs are the prevailing party as matter of law.

II. AWARDING FEES AND COSTS TO EITHER PARTY WOULD BE INAPPROPRIATE; REINSTATING SUCH AN AWARD TO DEFENDANTS WOULD BE AN ABUSE OF DISCRETION

Whichever party the Court finds to be the prevailing party, an award of attorneys' fees and costs to that party would be unwarranted. In particular, on the facts and legal posture of this case, a renewed award of such fees and costs to Defendants would be an abuse of the Court's discretion.

In *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016), the Supreme Court held that courts must give "substantial weight to the objective reasonableness of the losing party's position." *Id.* at 1989. Given the vigorously disputed nature of the copyright issues that were raised in this case for the first time in the context of digital course readings—issues that were the subject of two

appellate reviews and reversals—it would be inappropriate to characterize either of the parties’ litigating positions as other than “objectively reasonable.”¹

Defendants have nonetheless advised that they will again seek to recover their attorneys’ fees and costs if the Court were to hold that they are the prevailing party. Such an award would be unfounded. This Court has repeatedly acknowledged the reasonableness of Plaintiffs’ litigating position in this case, insofar as they have “a legitimate economic interest in curtailing unpaid use of their copyrighted materials and this area of the law is unsettled.” Dkt. No. 531 at 7. The Court also has acknowledged that it did not “doubt Plaintiffs’ good faith in bringing this suit.” Dkt. No. 441 at 14.

These findings—that Plaintiffs’ claims were reasonable, were brought in good faith, and implicated an unsettled application of copyright law—should foreclose a fee award. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (“it is peculiarly important that the boundaries of copyright law be demarcated as

¹ Plaintiffs believe that settled principles of copyright law, as articulated and applied in the prior coursepack cases and other rulings, should have dictated findings of infringement with respect to Defendants’ unauthorized creation of what amount to digital coursepacks as well as with respect to their unauthorized copying of each of Plaintiffs’ works. Plaintiffs nevertheless agree with the Court that their claims implicated an “unsettled” area of copyright law to the extent they tested the application of the fair use doctrine to digital course readings in a nonprofit educational setting for the first time.

clearly as possible”). An award of attorneys’ fees and costs would be especially unwarranted in view of the fact that Plaintiffs could not reasonably have anticipated, *inter alia*, that this Court and the Eleventh Circuit would impose an unprecedented “digital license availability” requirement to establish market harm or that this Court would engage in a novel analysis of historical permissions revenues in evaluating factor four.

The *Kirtsaeng* Court did allow that a court can order fee-shifting based on a party’s litigation misconduct, such as “overaggressive assertions of copyright claims,” even if the party’s claims were objectively reasonable. *See Kirtsaeng*, 136 S. Ct. at 1988-89. Nothing of the kind occurred here, however. The Court’s previous rationales for awarding fees to the Defendants do not involve litigation misconduct; indeed, “reasonable,” “good faith” litigation in an “unsettled” area of copyright law is the *opposite* of litigation misconduct.

One rationale previously offered by the Court for awarding fees and costs to Defendants was the implicit (albeit counterfactual) assumption that presumptive “deep pockets” on the part of funders AAP and CCC is such that they can afford to absorb substantial fee-shifting. *See* Dkt. No. 531 at 7. The Eleventh Circuit has rejected such reasoning. In *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 198 F.3d 840 (11th Cir. 1999), the court held that the district court “should consider not whether

the losing party can afford to pay the fees but whether imposition of fees will further the goals of the Copyright Act.” *Id.* at 843. If the Court undertakes such an assessment here, it should readily conclude that the goals of copyright law would not be served by imposing a substantial fee award on Plaintiffs for seeking to protect what the Court recognized was the “legitimate economic interest” implicated by the widespread unauthorized copying and distribution of substantial portions of their scholarly books in their core market.

Moreover, any criticism of, and attempt to discourage, industry funding of admittedly legitimate litigation is misplaced. If litigants were penalized for exercising their First Amendment rights to pursue and fund important matters of social policy, myriad landmark cases in the areas of civil rights, school desegregation, abortion rights, and freedom of the press, among others, would never have been litigated and won. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (landmark equal protection case spearheaded by NAACP Legal Defense Fund); *NAACP v. Alabama*, 357 U.S. 449 (1958) (landmark ruling recognizing First Amendment right of association); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (landmark ruling upholding abortion rights); *Reno v. ACLU*, 521 U.S. 844 (1997) (landmark ruling on the scope of First Amendment rights on the Internet).

The Court also previously has justified a fee award to Defendants by criticizing Plaintiffs' "failure to narrow their individual infringement claims," which, in the Court's view, "significantly increased the cost of defending the suit." Dkt. No. 441 at 14. The record shows otherwise. At every stage of the case, Plaintiffs sought to try a small number of representative claims so as to adjudicate the legality of GSU's copyright policy in the most efficient manner, only to be stymied by Defendants and by the Court.

By way of review: Plaintiffs First Amended Complaint alleged infringement of fifteen works, which, Plaintiffs made clear, were "representative samples" of a "pervasive, flagrant, and ongoing" pattern of infringement of their works. Dkt. No. 39 ¶¶ 1-3, 24, 26, 27. In February 2009, Defendants abandoned their defense of the copyright policy that precipitated this case and attempted to moot Plaintiffs' claims by adopting a new copyright policy. Thereafter, at Defendants' urging, the Court excluded evidence as to GSU's ERes and uLearn practices preceding adoption of the new policy, thereby removing from the case the representative infringements alleged in Plaintiffs' First Amended Complaint. The Court instead designated three 2009 academic terms as representative of ongoing practice under the revised policy and ordered Plaintiffs, within ten days, to identify "a *comprehensive list of all claimed infringements* of their copyrights that had

occurred at Georgia State during the three full semesters post-dating enactment of the new Copyright Policy.” Dkt. No. 423 at 3 (emphasis added); *see also* Dkt. Nos. 226, 227.

This factual “reset” of the case required Plaintiffs, within a matter of days, to comb through ERes reports containing thousands of entries in an effort to identify all the infringements of Plaintiffs’ works during the newly designated semesters. Plaintiffs completed that task in good faith based on the internal records available to them at the time, and, as discovery related to the newly at-issue works occurred over the next several months, they continued to investigate and produce information regarding the copyright registration and chain of title for each work in order to confirm their ability to pursue claims as to each of them. Based on that ongoing investigation and discovery process, Plaintiffs winnowed the works to be tried from an initial list of 126 to 99, then further narrowed the list to 75 before the trial began. *See* Dkt. 423 at 8.

As *Gamma Audio*, 11 F.3d 1106, indicates, it is not unusual for a party to drop or modify claims prior to trial. In the circumstances presented here—a court order to quickly replace the original fifteen alleged infringements with a “comprehensive list” of “all” unauthorized uses in three later semesters—it was particularly understandable, indeed responsible, for Plaintiffs to present as many

meritorious claims as possible under the circumstances while also dropping those claims that they determined lacked evidentiary support after the discovery process.

In addition, prior to trial, Plaintiffs reached out—first to Defendants and then to the Court—to propose that the trial be further streamlined to address a representative sample of the newly identified takings sufficient to test the legality of GSU’s 2009 copyright policy rather than trying every infringement claim on the joint list. Defendants rejected the proposal, insisting instead that fair use determinations be made as to every one of the allegedly infringed works on the list—a posture that contemplated calling no fewer than thirty-three faculty members to testify. Believing this to be wasteful, Plaintiffs moved for a pretrial conference, arguing as follows:

There is no need for the Court to hear from thirty-three professors whose testimony is highly likely to be cumulative and thus wasteful of the Court’s and the parties’ time. . . . Allowing this trial to become essentially ninety-nine mini-trials would not only unnecessarily prolong the proceedings, it would risk losing the forest (the cumulative pattern and practice of unauthorized copying, display, and distribution of academic books at GSU) for the trees (whether each specific ERes posting on the Alleged Infringement List is or is not fair use). Plaintiffs believe instead that the testimony of six to ten professors . . . would allow the Court to accurately and efficiently ascertain the legality of GSU’s practices.

Dkt. No. 268 at 5, 6, 8-9. The Court denied the motion. *See* Dkt. No. 269.

The bottom line is that it was *Defendants'* litigation strategy that necessitated a protracted, three-week trial involving all of the alleged infringements, not an “overly aggressive” assertion of copyrights by Plaintiffs.

Given the foregoing, it would be decidedly inappropriate for the Court to conclude that it would be “just for CCC and AAP to pay Defendants’ litigation expenses because only [10] of 99 claims were successful.” Dkt. No. 531 at 7. The procedural history of the case demonstrates the unfairness and inaccuracy of the suggestion that *Plaintiffs* imposed an undue burden on Defendants or on the Court or were overly aggressive in asserting their copyrights. To the contrary, it shows that, from the start, Plaintiffs made diligent efforts to prosecute efficiently a case that—largely as a result of *Defendants'* litigation tactics—repeatedly shifted beneath Plaintiffs’ feet through no fault of their own. To punish Plaintiffs for their good-faith response to Defendants’ tactics and the evolving evidentiary requirements set by the Court would be unjust in the extreme.

CONCLUSION

For the foregoing reasons, the Court should hold that Plaintiffs are the prevailing party. If the Court finds that Defendants are the prevailing party, it should exercise its discretion to deny them an award of attorneys' fees and costs.

Respectfully submitted this 23rd day of March, 2020.

/s/ John H. Rains IV
Edward B. Krugman
Georgia Bar No. 429927
John H. Rains IV
Georgia Bar No. 556052

BONDURANT, MIXSON & ELMORE, LLP
1201 West Peachtree Street NW
Suite 3900
Atlanta, Georgia 30309
(404) 881-4100

Randi W. Singer (*pro hac vice*)
Todd D. Larson (*pro hac vice*)
Jonathan Bloom (*pro hac vice*)

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

R. Bruce Rich (*pro hac vice*)
900 Fifth Avenue
New York, New York 10021
(917) 685-7708

Attorneys for Plaintiffs

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
John H. Rains IV

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **PLAINTIFFS’
MEMORANDUM IN SUPPORT OF THEIR POSITION AS PREVAILING
PARTY AND IN OPPOSITION TO AN AWARD OF ATTORNEYS’ FEES
AND COSTS** with the Clerk of Court using the CM/ECF filing system which will send e-mail notification of such filing to opposing counsel as follows:

Anthony B. Askew, Esq.
Stephen M. Schaetzel, Esq.
John W. Harbin, Esq.
Lisa C. Pavento, Esq.
Mary Katherine Bates, Esq.
MCKEON, MEUNIER, CARLIN & CURFMAN, LLC
817 W. Peachtree Street, Suite 900
Atlanta, Georgia 30308
Email: sschaetzel@mcciplaw.com
taskew@mcciplaw.com
jharbin@mcciplaw.com
lpavento@mcciplaw.com
kbates@mcciplaw.com

Katrina M. Quicker
Special Assistant Attorney General
BAKER HOSTETLER LLP
1170 Peachtree Street NE, Suite 2400
Atlanta, GA 30309
Telephone: (404) 459-0050
Email: kquicker@bakerlaw.com

This 23rd day of March, 2020

/s/ John H. Rains IV
John H. Rains IV