

**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' MEMORANDUM IN SUPPORT OF DEFENDANTS'  
DETAILED REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND  
OTHER COSTS**

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## I. INTRODUCTION

Following its decision that Plaintiffs failed to prove 89 of Plaintiffs' initial 99 allegations of copyright infringement, the Court directed the parties to confer regarding attorneys' fees and costs, and if no agreement could be reached, to file briefs addressing "which party (or parties) is (or are) the prevailing party (or parties)" and whether costs should be awarded. (Dkt. 563 at 236.) The parties have conferred, but have not reached agreement on these issues. Accordingly, Defendants submit this Detailed Request for Award of Attorneys' Fees and Other Costs that includes briefing as to why Defendants are a prevailing party.

The underlying purpose of awarding a party fees and costs under Section 505 of the Copyright Act, 17 U.S.C. § 505, is to encourage defendants "to litigate meritorious copyright defenses to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016). Plaintiffs do not request an award of fees or costs. (See Dkt. 567.) The only issue before the Court is whether an award of fees to Defendants fulfills the purpose and meets the requirements of Section 505.

In analyzing that issue, the Court first determines whether Defendants are a "prevailing party" as that term has been interpreted by the Supreme Court and the Eleventh Circuit. As shown below, Defendants are a prevailing party because the

industry-funded Plaintiffs failed to prove a sufficient number of infringements to demonstrate that Georgia State University was misusing the fair use defense.

The Court should next exercise its broad discretion in finding it reasonable to award fees and costs to Defendants as prevailing party. This determination includes considering whether making the fee award will deter “overaggressive assertions of copyright claims,” *Kirtsaeng*, 136 S. Ct. at 1989, and/or “further the goals of the Copyright Act, i.e., by encouraging the raising of objectively reasonable claims and defenses, which may . . . ensure ‘that the boundaries of copyright law [are] demarcated as clearly as possible’ in order to maximize the public exposure to valuable works” *Mitek Holdings, Inc. v. Arce Eng’g Co.*, 198 F.3d 840, 842-43 (11th Cir. 1999). An award of fees to Defendants achieves these and other objectives.

Finally, the Court should determine that Defendants’ fee award is reasonable considering the number of hours expended and the hourly rate. While a greater amount is appropriate, Defendants only request the fees and costs this Court already awarded Defendants after its first decision (*see* Dkt. 462)<sup>1</sup>, and the additional fees Defendants accrued between the first remand by the Eleventh Circuit and this Court’s second decision (*see* Dkt. 518 and associated exhibits for Defendants’ prior request for these fees). All of this work was essential to Defendants’ ultimate success in

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<sup>1</sup> Defendants’ current request excludes expert witness fees already granted by the Court. *See* III.C.1., *infra*.

establishing that there was no ongoing and continuous misuse of the fair use defense and in prevailing on 89 of the 99 allegations of copyright infringement considered at trial. Further, these fees and costs are reasonable, particularly considering the ever-changing and massive number of infringement allegations made by Plaintiffs in this case.

In sum, as the prevailing party, Defendants seek an award totaling \$3,094,196.48 in attorneys' fees and \$85,746.39 in costs. Defendants' total fees and cost request is in accord with the applicable law and fully supported by detailed declarations filed previously.

## **I. FACTUAL BACKGROUND<sup>2</sup>**

### **A. Plaintiffs Shifting Allegations of Massive Infringement**

Plaintiffs filed their original Complaint on April 15, 2008, alleging that the Defendants had engaged in "a vast amount" of infringement of Plaintiffs' copyrighted works. (Dkt. 1 ¶ 1.) After Defendants filed their Answer (Dkt. 14), denying all allegations of infringement and claiming sovereign immunity and fair use, Plaintiffs filed an Amended Complaint, naming additional Defendants (Dkt. 39).

While repeatedly reciting that there was "a vast amount" of infringement (*see*

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<sup>2</sup> The background of this case is well-known to the court. The Defendants highlight certain facts relevant to the instant petition and rely on previous factual statements as appropriate.



*e.g.*, Dkt. 1) and “massive infringement” (Dkt. 142-1 at 5), Plaintiffs remained elusive regarding the actual allegedly infringing content. For example, Plaintiffs concede that their Amended Complaint identified only 15 works (and 31 allegations of infringement related to those works). (*See* Dkt. 39 ¶¶ 22-27 & Ex. 1.) After the close of discovery and during summary judgment briefing, Plaintiffs sought to rescue their overly broad allegations by adding 270 allegations of infringement. (Dkt. 142-3 ¶¶ 267-69.) Such belated allegations precluded Defendants from being able to conduct meaningful discovery of such claims. (Dkts. 187; 210; 213.)

In order to address such sharp litigation tactics, the Court entered its orders of August 11, 2010 and August 12, 2010 directing that the parties were to focus on three academic terms in 2009. (*See* Dkts. 226; 227.) While Plaintiffs now contend that they only had ten days to identify all alleged infringements during that time period, they fail to recount that they had already done the work to expand their allegations to add 270 new allegations before the Court issued that deadline. (*See* Dkt. 142-3 ¶¶ 267-69.) And even after Plaintiffs had finally submitted a list of 126 claimed infringements (Dkt. 228) pursuant to the Court’s August 11 and August 12, 2010 Orders (Dkts. 226; 227), Plaintiffs’ claims were still not finalized. Instead, Plaintiffs added another claim of infringement and dropped others, resulting in a final total of 99 that were the subject of trial. (Dkt. 226 (Joint Exhibit 5); *see* Dkt. 423

(“Cambridge I”) at 337; *see also* Dkt. 567 at 16 (Plaintiffs noting that there were 99 allegations presented for trial).)

Plaintiffs misrepresent that they attempted narrowed the list to 75 “before the trial began.” (*See* Dkt. 567 at 15.) Rather, it was *after* trial had begun and at the *close* of Plaintiffs’ case-in-chief that Plaintiffs tried to drop 25 claims. (*See* Dkt. 441 at 14.) The Court refused to enter the new list of 75 infringements into evidence, stating that it “is not an appropriate evidentiary source.” (Cambridge I at 8 n.8.) And, importantly, Defendants were required to prepare to defend against all 99 allegations. During the course of proceedings, Defendants had to conduct extensive discovery including taking and defending several depositions, file and defend numerous motions, including multiple summary judgment motions, and conduct a bench trial for over a three-and-one half week period involving over 30 witnesses. (Cambridge I at 6-8.) Addressing only the evidence presented at trial, the Court ultimately considered 74 different allegations of infringement after two claims relating to Professor Kruger’s use of *Awakening Children’s Minds* were considered to be a single claim. (*See* Cambridge I at 183 n.89.)<sup>3</sup>

### **B. Defendants Were Twice Named Prevailing Party and Awarded Fees**

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<sup>3</sup> Defendants have prevailed on this claim in each of this Court’s three decisions (Cambridge I at 186; Dkt. 510 (“Cambridge III”) at 91; Dkt. 563 (“Cambridge V”) at 91). Accordingly, for the purposes of Defendants’ arguments below, Defendants rebuffed two of Plaintiffs’ claims of infringement with this single holding.

### **and Costs**

In this Court's first decision, Defendants were named the prevailing party and awarded their costs and fees. (Dkt. 441 at 14.) In its Order, the Court noted that no *prima facie* case was proven in 26 of the 75 instances, no permissions at all were available in 18 cases, and digital permissions were unavailable in an additional 15 cases. (*Id.*) The Court reasoned that "Plaintiffs' failure to narrow their individual infringement claims significantly increased the cost of defending the suit." (*Id.*)

In accordance with that Order, Defendants moved for fees and other costs, initially requesting \$3,022,788.46 in attorneys' fees and \$85,975.69 in costs. (Dkt. 444.) Defendants later filed several supplemental statements excluding fees and costs related to sovereign immunity, which reduced Defendants' request to \$2,953,493.71 in attorneys' fees and \$85,746.39 in costs. (Dkts. 446; 448; 453.) Plaintiffs filed objections to Defendants' reduced request (Dkt. 451), and this Court held a hearing on the matter on September 14, 2012.

The Court awarded Defendants \$2,861,348.71 in attorneys' fees and \$85,746.39 in costs. (Dkt. 462 at 10.) The Court held that Defendants' award would include fees associated with their expert witness Dr. Kenneth Crews and "order compliance" fees, but would not include \$92,145.00 for costs and fees attributable to the Defendants' formulation of the 2009 Copyright Policy. (*Id.* at 5-10.) Plaintiffs did

not challenge either the grant or the amount of that award in their first appeal to the Eleventh Circuit. Following an appeal by Plaintiffs on other grounds, the Eleventh Circuit later reversed portions of this Court's initial decision, vacated the fee award, and remanded the case for further consideration. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1284 (11th Cir. 2014) ("*Cambridge II*").

In this Court's second decision, its first post-remand decision, Defendants prevailed on all but four claims of infringement and were again named prevailing party. (Cambridge III at 212). Pursuant to this Court's order, Defendants moved for attorneys' fees and costs. (Dkts. 518; 521 (and associated exhibits).) The motion requested that the Court's prior award of fees and costs be carried forward and supplemented by an amount of \$374,886.31 for attorneys' fees incurred by Defendants after the Eleventh Circuit's first remand. (Dkt. 518 at 2.) Plaintiffs opposed Defendants' fee request, specifically contesting the number of hours Defendants worked on the remand. (Dkt. 523.) In response, Defendants filed a Motion for Production of Plaintiffs' Billing Records so that the Court would have the necessary context for analyzing Defendants' fee request. (Dkt. 525.) Plaintiffs also filed a Motion to Reopen the Record for additional fact finding regarding digital licenses (Dkt. 517) and a Motion for Reconsideration of the Court's fee award to Defendants on the basis of the Supreme Court's decision in *Kirtsaeng* (Dkt. 527).

Both of Plaintiffs' motions were denied. (Dkt. 531.) Although Plaintiffs produced redacted billing records at the end of a hearing regarding Defendants' Motion for Production of Plaintiffs' Billing Records, a decision on Defendants' motion, and the amount of fees and costs due to Defendants, was deferred. (*Id.*)

The Court issued a judgment declaring that (1) Plaintiffs prevailed on four specific claims of infringement and take nothing with regard to fees and costs, and (2) Defendants prevailed on the other infringement claims and were entitled to costs and attorneys' fees. (Dkt. 532.) Defendants were also ordered to "maintain copyright policies for Georgia State University that are not inconsistent with" the Court's Orders of March 31, 2016 and July 27, 2016, and to disseminate the essential points of the Court's rulings to faculty and relevant staff at Georgia State. (Dkt. 531 at 6.)

### **C. Plaintiffs' Second Appeal To the Eleventh Circuit and the Second Remand Decision**

Following this Court's first remand decision, Plaintiffs again appealed certain of this Court's holdings. The Eleventh Circuit remanded, instructing that this Court must (1) give each individual excerpt "the holistic, qualitative, and individual analysis that the Act demands"; (2) "eschew" any quantitative approach to balancing the fair use considerations; (3) omit any consideration of price in its third statutory factor analysis; and (4) reinstate its original analysis finding that the fourth statutory factor "strongly disfavors fair use" for 31 of the 48 excerpts. *Cambridge Univ. Press*

*v. Albert*, 906 F.3d 1290, 1302 (11th Cir. 2018) (“*Cambridge IV*”). The Court’s decision in this matter meets all of these requirements. (*See Cambridge V.*)

Applying the Eleventh Circuit’s instructions, of the original 99 claims of infringement posited by Plaintiffs at trial, only ten (10) were deemed an infringement in this Court’s third decision. (*Cambridge V* at 235; Dkt. 568 at 2.) Those ten (10) uses related to only seven works. (*Id.*) The Court directed both sides to confer in an effort to resolve any disputes regarding attorneys’ fees and costs, and if no agreement could be reached, to file briefs addressing “which party (or parties) is (or are) the prevailing party (or parties)” and whether costs should be awarded. (Dkt. 563 at 236.) Defendants reached out to Plaintiffs pursuant to this Court’s direction, however, the parties did not agree as to prevailing party or parties or an award of fees and costs.

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

This Court should name Defendants as a prevailing party and award Defendants their reasonable attorneys’ fees and costs. Fee shifting to the Defendants is permitted under Section 505 of the Copyright Act, which allows the court to “award a reasonable attorney’s fee to the prevailing party as a part of the costs” and to allow the recovery of full costs. 17 U.S.C. § 505. The Eleventh Circuit defined “prevailing party” within the context of Section 505 “as the party succeeding on a significant litigated issue that achieves some of the benefits sought by that party.”

*Cable Home Commc'n Corp. v. Network Prods.*, 902 F.2d 829, 853 (11th Cir. 1990) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 429, 433 (1983)). The only requirement is that a prevailing party obtain a “material alteration of the legal relationship of the parties.” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 604, (2001).

The Court should next determine that a fee award to Defendants is appropriate in view of several non-exclusive factors that “include frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Mitek Holdings*, 198 F.3d at 842 (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994)). Finally, the Court should find Defendants’ fee award request reasonable through an application of the lodestar approach set forth in *Hensley*, 461 U.S. at 433-37, and *Blum v. Stenson*, 465 U.S. 886, 896-97 (1984).

#### **A. Defendants Are a Prevailing Party**

Prevailing party status is equally available to both plaintiffs and defendants under Section 505: “[A] court may not treat prevailing plaintiffs and prevailing defendants any differently; defendants should be encouraged to litigate meritorious copyright defenses to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Kirtsaeng*, 136 S. Ct. at 1985 (internal

quotations omitted). In accordance therewith, the Eleventh Circuit has upheld Section 505 fee awards to parties that have successfully defended copyright infringement claims on multiple occasions. *Original Appalachian Artworks, Inc. v. McCall Pattern Co.*, 825 F.2d 355, 356–57 (11th Cir. 1987); *Dawes-Ordonez v. Forman*, 418 Fed. Appx. 819, 821 (11th Cir. 2011) (unpublished); *Hermosilla v. Coca-Cola Co.*, 492 Fed. Appx. 73, 75 (11th Cir. 2012) (unpublished); *InDyne, Inc. v. Abacus Tech. Corp.*, 587 Fed. Appx. 552, 555 (11th Cir. 2014) (unpublished).

Here, Defendants meet the prevailing party requirements of “succeeding on a significant litigated issue” (*Cable Home*, 902 F.2d at 853) and achieving a “material alteration of the legal relationship of the parties” (*Buckhannon*, 532 U.S. at 604). Defendants successfully defended 89 of Plaintiffs’ 99 infringement claims, which amounts to succeeding on multiple, and in fact, 89, “significant litigated issues.” *Cable Home*, 902 F.2d at 853. Defendants achieved the benefit of an entirely successful defense of an individual copyright infringement claim many times over, and with respect to Plaintiff Cambridge, have succeeded on all asserted claims. Based on that success, in accordance with the Court’s construct of the case, Defendants are also a prevailing party because they succeeded in defeating so many of Plaintiffs’ infringement allegations that Plaintiffs have failed to prove that there is ongoing and continuous misuse of the fair use defense. A finding that a few isolated instances of



infringement (*i.e.*, ten (10) alleged uses held to not be a fair use) is *not* the equivalent of a finding of ongoing and continuous misuse of the fair use defense. Defendants succeeded in showing that there was no such misuse.

Defendants also prevailed on several significant overarching issues in the case. Importantly, both this Court and Eleventh Circuit agreed with Defendants that “fair use must be determined on a work-by-work basis.” *See, e.g., Cambridge II*, 769 F.3d at 1259. This holding in Defendants’ favor is foundational because, as noted by the Eleventh Circuit, if it were “to accept Plaintiffs’ argument [that no work-by-work analysis should be performed], the District Court would have no principled method of determining whether a nebulous cloud of infringements . . . should be excused by the fair use defense.” *Id.* Defendants have also been successful in arguing that: (1) the coursepack cases are not controlling (*id.* at 1261); (2) Defendants’ uses were non-profit under factor one (*id.* at 1267); (3) factor one favors fair use and is not dominated by the transformative analysis (*id.*); (4) the amount used must be determined based on the length of the entire work (*id.* at 1273); (5) the Classroom Guidelines do not control the fair use analysis (*id.* at 1273-74); (6) “the small excerpts Defendants used do not substitute for the full books from which they were drawn” under factor four (*id.* at 1276); (7) Plaintiffs have the burden of establishing evidence of digital licenses (*id.* at 1279); and (8) factor four favors fair use when

there is a lack of digital licensing availability (*id.* at 1280-81). Defendants successes on these significant litigated issues contributed significantly to this Court's holdings that Defendants prevail on 89 of Plaintiffs' 99 allegations of copyright infringement.

Each of these 89 victories individually warrant naming Defendants a prevailing party because each resulted in a separate and distinct "material alteration of the legal relationship of the parties." *See Buckhannon*, 532 U.S. at 604. This holds true even if some of the claims are deemed dismissed without prejudice during trial. The U.S. Supreme Court has made clear that "a defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party.'" *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1651 (2016). As long as the defendant successfully rebuffs a claim made by the plaintiff, that may be the basis for the defendant to be named a prevailing party. *Id.* The Court reasoned:

Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant's favor, whether on the merits or not. Imposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available.

*Id.* at 1652. Although *CRST* dealt with the fee shifting provision of Title VII of the Civil Rights Act, the Court further noted that this interpretation of prevailing party should be consistently applied across all of the various fee-shifting statutes. *Id.* at

1646. Accordingly, Defendants should be considered prevailing party on 89 of Plaintiffs' initial 99 claims of copyright infringement—each of the 89 holdings being a material alteration of the legal relationship of the parties on a significant litigated issue. Those 89 holdings also collectively demonstrate Plaintiffs' failure to establish Defendants' ongoing and continuous misuse of the fair use defense, which is again a significant material alteration of the parties' legal relationship.

To be clear, however, Defendants are not arguing that their overall degree of success is necessarily what determines whether they are named a prevailing party. Defendants' success on “*a significant litigated issue*” renders them *a* prevailing party. *Cable Home*, 902 F.2d at 853 (emphasis added); *see also Balsley v. LFP, Inc.*, 691 F.3d 747, 771 (6th Cir. 2012) (determining whether “Plaintiffs, Defendant, both, or neither were a ‘prevailing party’”); *Tempest Pub., Inc. v. Hacienda Records and Recording Studio, Inc.*, CIV.A. H-12-736, 2015 WL 1246644, at \*12–14 (S.D. Tex. Mar. 18, 2015) (approving finding *each* prevailing party's entitlement to fees). Further, any degree of success that this Court may attribute to Plaintiffs' efforts does not erase Defendants' 89 successes or render Defendants a non-prevailing party.

Plaintiffs take their arguments regarding prevailing party too far by essentially arguing that any success by a plaintiff renders the plaintiff “the” prevailing party “as a matter of law.” (See Dkt. 567 at 8-10 citing *Gamma Audio & Video, Inc. v. Ean-*

*Chea*, 11 F.3d 1106 (1<sup>st</sup> Cir. 1993).) In effect, Plaintiffs argue that Defendants who do not succeed in defending 100% of the claims asserted against them should be stripped of prevailing party status, whereas Plaintiffs that succeed in asserting a minimal number of claims should be deemed the sole prevailing party. Accepting such an argument would be in direct contradiction to both *Fogerty* and *Kirtsaeng*, which require that prevailing defendants be treated the same as prevailing plaintiffs.

*Kirtsaeng*, 136 S. Ct. at 1985; *Fogerty*, 510 U.S. at 527; *but cf. Kennedy v. Avondale Estates*, No. 1:00-CV-1847, 2006 WL 826194, at \*2 (N.D. Ga. Mar. 29, 2006)

(indicating that plaintiffs have a “handicap” when determining prevailing party). The Supreme Court has made clear that Section 505 should be interpreted in a manner that encourages defendants “to litigate meritorious copyright defenses to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.”

*Kirtsaeng*, 136 S. Ct. at 1985. Yet, Plaintiffs’ proposed prevailing party test would discourage defendants from litigating meritorious copyright defenses in all cases where Plaintiffs might manage to succeed on a few isolated claims or issues. In cases such as the one here, where Defendants have succeeded in defending 89 claims against them and have rebuffed Plaintiffs’ allegation regarding a continuous misuse of the fair use defense, and where Plaintiffs have succeeded on only 10 claims, an application of Plaintiffs’ proposed prevailing party test would be manifestly unjust.

**B. The *Fogerty* Factors and *Kirtsaeng* Support An Award Of Attorneys' Fees And Costs To Defendants**

In the Eleventh Circuit, “[t]here is no precise rule or formula for making [the determination to award attorneys’ fees,] but instead equitable discretion should be exercised . . . .” *Broadcast Music, Inc. v. Evie’s Tavern Ellenton, Inc.*, 772 F.3d 1254, 1261 (11th Cir. 2014) (citing *Fogerty*, 510 U.S. at 534 (internal quotation marks omitted)). The district court should also consider several non-exclusive factors cited with approval in *Fogerty* that “include frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Mitek Holdings*, 198 F.3d at 842 (citing *Fogerty*, 510 U.S. at 534 n.19). However, “objective reasonableness can be only an important factor in assessing fee applications—not the controlling one.” *Kirtsaeng*, 136 S. Ct. at 1988–89. “[Section] 505 confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions.” *Id.* A court may order fee shifting for the specific purpose of deterring “overaggressive assertions of copyright claims” or “litigation misconduct” regardless of the reasonableness of the plaintiff’s claims. *Id.* A court should also consider “whether the imposition of fees will further the goals of the Copyright Act, i.e., by encouraging the raising of objectively reasonable claims and defenses, which

may serve not only to deter infringement but also to ensure ‘that the boundaries of copyright law [are] demarcated as clearly as possible’ in order to maximize the public exposure to valuable works.” *Mitek Holdings*, 198 F.3d at 842-43.

Applying *Kirtsaeng* and the *Fogerty* factors here, it is both reasonable and appropriate to award Defendants’ attorneys’ fees and costs.

### **1. Plaintiffs Engaged In An Overaggressive Assertion of Copyright Claims, Including Frivolous Claims**

*Kirtsaeng* specifically authorizes a fee award to deter the overaggressive assertion of infringement claims even when the plaintiffs’ litigating position was reasonable. *Kirtsaeng*, 136 S. Ct. at 1989. This Court has already determined that Plaintiffs engaged in an overaggressive assertion of copyright claims and their “failure to narrow their individual infringement claims significantly increased the cost in defending suit.” (Dkt. 441 at 14.) No relevant facts have changed since the Court last made that determination.

In a desperate attempt to change this Court’s previous ruling, Plaintiffs now claim that they only sought to try a small number of claims, but both Defendants and this Court “stymied” their efforts to do so. (*See* Dkt. 567 at 14.) Specifically, Plaintiffs indicate that this Court’s orders for the parties to focus on three academic terms in 2009 required Plaintiffs to assert as many claims as possible within a short span of ten (10) days. (*See id.* at 14-15.)

Plaintiffs' new arguments fail. First, Plaintiffs ignore their continuous mischaracterizations of this case as one that relates to a "a vast amount" of infringement (*see e.g.*, Dkt. 1) or "massive infringement" (Dkt. 142-1 at 5). It is those unsupported assertions that set the stage for the enormity of this case. Plaintiffs also disregard that several of their efforts to increase their infringement claims occurred *before* the Court issued its orders regarding the 2009 time frame. Plaintiffs attempted to increase the number of asserted claims by adding an additional 270 claims at the summary judgement stage some six months before the Court issued those orders. (*See* Dkt. 142-3, ¶¶ 267-69; *see also* Dkts. 226; 227.) Within the ten days after the orders, Plaintiffs presumably merely needed to remove those already identified allegations that fell outside of the three semesters in 2009. Accordingly, any assertion that this Court's August 11 and August 12, 2010 orders caused Plaintiffs to assert a massive amount of infringement claims that they had no time to investigate is baseless.

Finally, apparently recognizing the weakness of their position, Plaintiffs also now misrepresent when they attempted to further limit the number of infringement allegations to 75. It was *not* before trial, but rather *during* trial (*see* Cambridge I at 8 n.8.), and thus, Defendants were required to defend all 99 allegations at trial. Plaintiffs, of their own volition, alleged "massive" amounts of infringement, failed to narrow those claims, and significantly increased the cost in defending suit. Plaintiffs'

responsibility for these actions cannot be passed off to Defendants or this Court.

Frivolousness or bad faith “is not a precondition to an award [of attorneys’ fees].” *Sherry Mfg. Co. v. Towel King of Fla., Inc.* 822 F.2d 1031, 1035 (11th Cir. 1987); *see also Fogerty*, 510 U.S. at 533 (rejecting a “dual standard” that required prevailing defendants to show the original suit was frivolous or brought in bad faith for an award of attorneys’ fees). However, Plaintiffs’ actions here amount to frivolousness. For many of the claims, Plaintiffs’ overaggressive assertion of infringement claims was attributable to Plaintiffs’ own failure to make even the most basic of investigations, such as copyright ownership. Plaintiffs also asserted copyright infringement in many other instances where no copyright registration was obtained or no students had accessed the excerpt. Those claims should be deemed frivolous since a minimal investigation would have alerted Plaintiffs to the lack of a substantive claim. *See Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254 (11th Cir. 1996); *see also Business Guides, Inc. v. Chromatic Commc’ns. Enters., Inc.*, 498 U.S. 533, 542-44, 554 (1991) (equating a lack of reasonable inquiry into the facts underlying a copyright infringement action with frivolousness).

Each of Plaintiffs’ overaggressive and frivolous claims supports an award of fees and costs to Defendants. Plaintiffs “problems” were of their own making, and Defendants’ increased costs were directly attributable to Plaintiffs’ litigation tactics.



## **2. There Is a Need to Advance Considerations of Deterrence**

Another *Fogerty* factor is whether there is a need to advance considerations of deterrence. *See Mitek Holdings*, 198 F.3d at 842 (citing *Fogerty*, 510 U.S. at 534 n.19). Here, there is such a need.

Fair use is a statutorily recognized right that furthers the constitutional purpose of promoting the progress of science and learning. Non-profit educational institutions such as Defendants should be able to rely on this right and make a fair use of certain materials in teaching their students. If Plaintiffs and other similar publishers are not deterred from asserting an unwarranted number of unsupported infringement claims against these nonprofit educational institutions, it will make the cost of defending the fair use right exorbitant and educational fair use is likely to fade into non-existence. This Court's award of fees and costs to Defendants would appropriately deter Plaintiffs from a mass assertion of overaggressive and frivolous claims that by mere quantity become burdensome to defend. *See Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 595 (6th Cir. 2008) (holding that deterrence of Plaintiffs' overall excessive litigation strategy and failure to weed out stale claims favored an award of fees to the prevailing Defendant when applying the *Fogerty* factors).

## **3. Plaintiffs' Motivation In Bringing Suit Was Not In Furtherance of the Copyright Act**

The instant case was a “test case litigation that was organized by the Copyright Clearance Center (‘CCC’) and the American Association of Publishers (‘AAP’) who recruited the three Plaintiffs to serve as plaintiffs.” (Dkt. 531 at 7.) The Court noted that it “doubts that any of the Plaintiffs knew anything about Defendants or their copyright practices before being contacted by CCC and AAP.” (*Id.*) Accordingly, Plaintiffs’ motivation was not to enforce valid copyright interests, but rather, to act as a conduit to test whether publisher clearing houses could successfully argue that *any* educational use of a copyrighted work, no matter how small, is not a fair use and requires payment of a license fee. As shown by its proposed injunction, at least the CCC and AAP are motivated to shut down fair use despite it being a statutorily recognized right—especially for an educational institution.

This *Fogerty* factor favors awarding Defendants’ fees and costs to deter other publishers from filing suits alleging “mass infringement” where the majority of uses are fair uses made for teaching purposes in keeping with the overall purpose of the Copyright Act, which is “[t]o promote the Progress of Science and useful Arts . . . .” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. CONST., art. I, § 8, cl. 8).

### **C. Defendants’ Hours and Fee Rates Are Reasonable**

Once the decision to award attorneys’ fees is made, courts in the Eleventh

Circuit calculate an award of attorneys' fees using the lodestar approach set forth in *Hensley*, 461 U.S. at 433-37, and *Blum*, 465 U.S. at 896-97. Under the lodestar approach, the starting point is to multiply the number of hours reasonably expended by a reasonable hourly rate. *See, e.g., Hensley*, 461 U.S. at 433; *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988).

**1. This Court's Previous Award of Attorneys' Fees and Costs Should Carry Forward Excluding Expert Witness Fees**

This Court has already determined that Defendants' attorneys' fees and costs associated with Defendants' efforts prior to Plaintiffs' first appeal to the Eleventh Circuit are reasonable as to hours expended, fees charged, and amount. (Dkt. 462.) Defendants were awarded \$2,861,348.71 in attorneys' fees and \$85,746.39 in costs. (*Id.*) Defendants request that the Court carry forward this fee award with the below noted exception.

Neither of the Eleventh Circuit's decisions indicate the amounts awarded by this Court previously were unreasonable or that Defendants' work leading up to this Court's first decision was unwarranted. *Cambridge*, 769 F.3d at 1284. Many of this Court's findings have been affirmed by the Eleventh Circuit including the findings that Plaintiffs abandoned at trial or failed to make a *prima facie* case of 51 allegations of copyright infringement. *See generally*, *Cambridge I*. Those findings were in favor of Defendants prior to the fee award and remain in favor of Defendants now after this

Court's third decision in the matter. Further, the work done leading up to this Court's first decision was a prerequisite to Defendants' position as a current prevailing party.

Nevertheless, Defendants concede that the Supreme Court recently held that expert witness fees are not recoverable under Section 505, and accordingly, Defendants withdraw their request for Dr. Crew's fees and expenses in the amount of \$142,038.54. *See Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). The remaining amount of \$2,719,310.17 in fees and the original amount of awarded costs remain reasonable and continues to be supported by declarations and billing documents already filed by Defendants, as well as arguments previously submitted. (*See* Dkts. 442; 443; 443-1; 444 (and associated exhibits).) For these reasons, Defendants request that the Court carry forward this portion of the previously awarded fees (\$2,719,310.17) and the previously awarded costs (\$85,746.39).

## **2. Defendants' Request For An Additional \$374,886.31 In Fees Is Reasonable and Should Be Granted**

In addition to the fees and costs already granted by this Court, Defendants request \$374,886.31 in attorneys' fees, which includes litigation costs, accrued between the time of the Eleventh Circuit's first remand (*Cambridge II*) and this Court's first remand decision (*Cambridge III*). Defendants do not request any additional taxable costs. Defendants previously submitted supporting documentation establishing the reasonableness of the hours expended and fees charged for this

period of time, and rely on those filings here. (*See* Dkt. 518 (and exhibits).)

Defendants' efforts leading up to this Court's second decision (Cambridge III) were necessary to Defendants' current position as a prevailing party. In particular, Defendants expended a significant amount of time reviewing the works in accordance with the Eleventh Circuit's direction to re-evaluate the factor two analysis.

Defendants comprehensively reviewed each of the 48 works to accurately determine the factual and/or fictional content of each work, including the amount of author analysis and opinion within the excerpt, as directed by the Eleventh Circuit. *See Cambridge II*, 769 F.3d at 1270. Plaintiffs made no such similar comprehensive review of the factor two considerations. (*See* Dkt. 500 (Plaintiffs' remand brief providing no specific factor two analysis of each work).)

The Court had previously deferred its decision regarding the reasonableness of these additional fees, and also deferred its decision on Defendants' Motion to Produce Plaintiffs' Billing Records. (Dkt. 531 at 8.) Following a hearing on Defendants' motion, Plaintiffs produced highly redacted billing records that only showed the hours billed. Those records are insufficient. Defendants request that the Court grant Defendants' motion, require Plaintiffs to produce unredacted billing records, and allow the parties additional briefing on the issue. *See Naismith v. Professional Golfer's Ass'n*, 85 F.R.D. 552, 562-63 (N.D. Ga. 1979) (granting

prevailing party's motion to compel production of opponent's billing records when those records were relevant to the reasonableness of the number of hours prevailing party's counsel spent working on the case).

Once added to the Court's prior award of fees, Defendants request a total award of attorneys' fees in the amount of \$3,094,196.48 and taxable costs in the amount of \$85,746.39. Defendants do not seek any of their fees or costs incurred in association with either of the Eleventh Circuit appeal proceedings, with settlement negotiations taking place after this Court's original Order, or with the district court proceedings since the Eleventh Circuit's second remand (*Cambridge IV*) and leading up to this Court's second remand decision (*Cambridge V*). Although Defendants' efforts leading up to this Court's *Cambridge V* decision are also essential to Defendants' prevailing party status, Defendants do not seek their associated fees and costs for this time period as a compromise and based on any reduction of an award to Defendants that this Court may deem proper based on Plaintiffs minimal degree of success on 10% of its copyright infringement claims.

### **III. CONCLUSION**

For the foregoing reasons, Defendants respectfully submit that they should recover their reasonable attorneys' fees in the amount of \$3,094,196.48 and taxable costs in the amount of \$85,746.39.

Respectfully submitted this 13th 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 13th 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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