

**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**

I. INTRODUCTION

Pursuant to Section 505 of the Copyright Act, 17 U.S.C. § 505, this Court previously awarded Defendants \$2,861,348.71 in attorneys’ fees and \$85,746.39 in costs as the prevailing party. Dkt. No. 462. Plaintiffs did not challenge the grant of that award or the amount in their appeal to the Eleventh Circuit. While the case was reversed and remanded for consideration of certain fair use issues, the award of fees and costs was substantively undisturbed on appeal. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1284 (11th Cir. 2014). In fact, the Eleventh Circuit

validated much of this Court's initial opinion, including the Plaintiffs' voluntary withdrawal of many claimed infringements, the Plaintiffs' failure to prove a *prima facie* case for many other claimed infringements, and much of the Court's initial fair use determination. *Id.* Nothing in the Eleventh Circuit's opinion suggests that this Court should use a different standard for determining the reasonableness of attorneys' fees and costs once the prevailing party is determined on remand. *Id.*

The Court has now reconsidered the fair use issues as directed by the Eleventh Circuit. Defendants—the Board of Regents, the President of Georgia State University, and other state employees—have successfully defended themselves, and the Court has concluded that there were only 4 of 99 claims of infringement (one less than in this Court's previous decision). Dkt. Nos. 510, 514. The Defendants are again the prevailing party. Dkt. No. 510. Accordingly, this Court's prior determination of an award for Defendants' fees and costs should be carried forward with a supplementation for fees incurred after the Eleventh Circuit's remand. In view thereof, and in accordance with Section 505 of the Copyright Act, Defendants now request an additional award of attorneys' fees in the amount of \$374,886.31 for fees incurred after the Eleventh Circuit's remand. Defendants do not seek any additional costs. The requests for these additional amounts are supported by detailed declarations (with exhibits) attached hereto as Exhibits 1-5.

As the prevailing party, Defendants seek an award totaling \$3,236,235.02 in attorneys' fees and \$85,746.39 in costs.¹ Defendants' total fees and cost request is in accord with the applicable law and fully supported by detailed declarations filed previously and herewith.

II. FACTUAL BACKGROUND²

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. No. 1 at ¶ 1. After Defendants filed their Answer (Dkt. No. 14), denying all allegations of infringement and claiming sovereign immunity and fair use, Plaintiffs filed an Amended Complaint on December 15, 2008 naming additional defendants. Dkt. No. 39.

While repeatedly reciting that there was "a vast amount" of infringement (*see e.g.*, Dkt. No. 1) or "massive infringement" (Dkt. No. 142-1 at 5), Plaintiffs remained elusive regarding the actual allegedly infringing content. For example, in the Amended Complaint, Plaintiffs identified 15 works and 31 allegations of

¹ Defendants request for a total of \$3,236,235.02 as reasonable attorneys' fees and costs in the amount of \$85,746.39 does not include attorneys' fees and expenses incurred in continued defense of this action from April 1, 2016 to the present. Defendants will supplement the present submission as appropriate, specifically to include fees and costs incurred in the preparation of this detailed request and any other fees and costs as may be appropriate.

² 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.

infringement related to those works. *See* Dkt. No. 39 at ¶¶ 22-27 and Exhibit 1 thereto. After the close of discovery, in response to Defendants' Summary Judgement Motion, Plaintiffs sought to add 270 alleged infringements. Dkt. No. 142-3, ¶¶ 267-69. Even after Plaintiffs' had finally submitted a list of 126 claimed infringements (Dkt. No. 228) pursuant to the Court's August 11, 2010 and August 12, 2010 orders (Dkt. Nos. 226 and 227), Plaintiffs claims were not finalized. Instead, Plaintiffs added another claim of infringement and dropped others, resulting in a final total of 99 presented at trial. (Dkt. No. 226; Joint Exhibit 5). *See* Dkt. No. 423 at 337. After the trial began, Plaintiffs abandoned 25 claims and added one to arrive at 75 claims of copyright infringement. *See* Dkt. No. 441 at 14. During the course of proceedings, Defendants were required to conduct extensive discovery including taking and defending several depositions, file and defend a number of motions, including summary judgment motions, and conduct a bench trial over a three-and-one half week period involving over 30 witnesses. Dkt. No. 423 at 6-8. Defendants were named as the prevailing party and entitled to an award of costs and fees in this Court's August 10, 2012 Order. Dkt. No. 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 response to that Order, Defendants filed a Memorandum in Support of Defendants’ Detailed Request for Attorneys’ Fees and Other Costs with initial requests in the amounts of \$3,022,788.46 in attorneys’ fees and \$85,975.69 in costs. Dkt. No. 444. Defendants later filed several supplemental statements that ultimately excluded the fees and costs related to the sovereign immunity issue and reduced Defendants’ request to \$2,953,493.71 in attorneys’ fees and \$85,746.39 in costs. Dkt. Nos. 446, 448, 453. Plaintiffs filed objections to Defendants’ request (Dkt. No. 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. No. 462 at 10. The Court held that Defendants’ fee and cost award would include costs and fees associated with 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.

The Eleventh Circuit later reversed this Court’s grant of an injunction to Plaintiffs and remanded the case for further consideration. *Cambridge*, 769 F.3d at 1284. Plaintiffs then filed a Motion to Re-Open the Record. Dkt. No. 489. Although that motion was denied by the Court, Plaintiffs proceeded to attempt to supplement the record to include a declaration by Debra J. Mariniello and

referenced the new declaration in their remand brief. Dkt. Nos. 494, 500. Plaintiffs also filed a Motion for Extension of Time (Dkt. No. 496) to file their remand brief despite the Court setting a schedule for briefing indicating that “[n]o extensions will be granted” (Dkt. No. 495). That motion was later denied. Dkt. No. 497. Defendants filed a Motion to Strike both the new declaration and Plaintiffs’ reference to the declaration in their brief. Dkt. No. 502. The Court granted Defendants’ Motion to Strike in its entirety indicating that Plaintiffs’ reliance on the declaration was “obviously improper.” Dkt. No. 510 at 18. On March 31, 2016, the Court issued its decision on remand and held that only 4 out of 99 of Plaintiffs’ claims of copyright infringement had succeeded, naming Defendants the prevailing party for a second time. *Id.* at 212; *see also* Dkt. No. 514. Based on the Court’s Order, Defendants are now submitting a new request for an award of reasonable costs and attorneys’ fees.

At the outset of this lawsuit eight years ago, Defendants retained Mr. Anthony B. Askew (then a senior partner at King & Spalding) as a Special Assistant Attorney General to represent them. Mr. Askew is an experienced intellectual property trial attorney with over 40 years of litigating complex cases, including numerous copyright cases. Mr. Askew has been ranked by *Chambers USA* in tier one for over ten years and has been listed as one of the *Best Lawyers in America* for the past fifteen years. In addition, Mr. Askew has been named as a

Georgia *Super Lawyer* for more than ten years and as one of the top 100 lawyers in the State of Georgia. He has served as a member of the University of Georgia Law School's Advisory Board for the *Journal of Intellectual Property Law* and was the co-editor of the *Wiley Intellectual Property Law Update* for more than 5 years.

Mr. Askew worked with and supervised other attorneys during the eight years of this litigation, roughly six of which have been before this Court, including other partners and associates of various years of experience. *See* Dkt. No. 444, Exhibit 6, Declaration of Robert W. Clarida at ¶¶ 14-19 (detailing the partners and associates involved in the matter as of August of 2012); Exhibit 5, Declaration of Lawrence K. Nodine, ¶ 11. All of Mr. Askew, Mr. Stephen M. Schaezel and Ms. Katrina M. Quicker served as Special Assistant Attorneys General both before and after the Eleventh Circuit's remand decision. *Id.*

The State of Georgia Attorney General's office was also active in the case. Entries of appearance were filed by the State Attorney General, Samuel Olens, the presiding Deputy Attorneys General, R.O. Lerer and W. Wright Banks, and two Senior Assistant Attorneys General, Ms. Denise E. Whiting-Pact and Mary Jo Volkert. The Senior Assistant Attorneys General and Assistant Attorneys General who were assigned to the case were not mere liaisons between GSU and the other attorneys. Instead, they took an active role in the litigation providing substantive value during discovery, motion practice and at trial. *See* Dkt. No. 443-1; Exhibit 4,

Declaration of Mary Jo Volkert and attached exhibits.

Mr. Askew and the State of Georgia negotiated a special hourly rate for work on the case. Although King & Spalding partners customarily billed clients in excess of \$500/hour for their work (and more senior partners such as Messrs. Askew, Schaetzel, and Harbin in excess of \$600/hour), Mr. Askew agreed to represent the State of Georgia for a heavily discounted hourly rate of \$225/hour for every attorney assigned to the case – senior partners as well as associates. Paralegals billed the State of Georgia at a heavily discounted rate of \$50/hour. During the course of the action, some team members left King & Spalding for other law firms (for example, Mr. Askew, Mr. Schaetzel and Mr. Harbin are currently at Meunier Carlin & Curfman and Ms. Quicker is at Baker Hostetler). However, in keeping with Mr. Askew's agreement with the State, all attorneys have maintained their original \$225/hour billing rate throughout the course of the litigation.³

Defendants retained Dr. Kenneth Crews as a testifying expert in the case. Dr. Crews was the Director of the Copyright Advisory Office at Columbia University during the time of his work on this case. Trial Transcript 12-157 at 6-10. He has extensive experience in formulating copyright compliance policies in

³ The first month of billing at King & Spalding was billed at a fixed lump sum, "flat rate," which was set in advance to cover the work performed for the first month. The discounted rate of \$225/hour was billed thereafter.

educational environments. *See e.g.*, Dkt. 234 at 6-7 (finding that Dr. Crews has substantial experience in the area of copyright at educational institutions). In fact, Dr. Crews is widely regarded as the creator of the well-known fair use checklist, which is used as an aid in conducting a fair use analysis. He also has specialized knowledge regarding the importance of e-reserves in educational settings. As part of his expert work, Dr. Crews conducted a review of university copyright policies. Dkt. No. 234 at 4-5. This review surveyed numerous University policies and classified those policies generally into three broad categories based on “how much” use of a work a policy permitted as a fair use in e-reserves. Trial Transcript at 13-26 at 5-20. At trial, Dr. Crews testified extensively regarding this review and the Court admitted the reviewed policies into evidence. Trial Transcript 14-81 at 7 thru 14-82 at 17.

III. ARGUMENT AND CITATION TO AUTHORITIES

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 v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (internal quotation marks omitted)). The district court should consider several non-exclusive factors cited with approval in *Fogerty v. Fantasy* 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, Inc. v. Arce Eng’g Co.*, 198 F.3d 840, 842 (11th Cir. 1999) (citing *Fogerty*, 510 U.S. at 534 n.19). The application of these factors should be considered in the context of “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.” *Id.* at 842-43.

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 by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983), and *Blum v. Stenson*, 465 U.S. 886, 896-97 (1984). Under the lodestar approach, the starting point in fashioning an award of attorneys’ fees 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 Authority of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988).

A. The Fogerty Factors Support An Award Of Attorneys’ Fees And Costs To Defendants

Applying the *Fogerty* factors to this case indicates that it is both reasonable and appropriate to award Defendants’ attorneys’ fees and costs. An award of

attorneys' fees to Defendants as the prevailing party would encourage the raising of objectively reasonable defenses to claims of copyright infringement and further the interests of the Copyright Act, and in particular, delineate the boundaries of fair use in the non-profit educational context.

The excessive number of claims of copyright infringement alleged by Plaintiffs demonstrates the objectively unreasonable nature of those claims. Plaintiffs repeatedly alleged that there was "a vast amount" of infringement (*see e.g.*, Dkt. No. 1) or "massive infringement" (Dkt. No. 142-1 at 5) by Defendants, and at one point after the close of discovery, Plaintiffs sought to add 270 alleged infringements for a total of approximately 300 alleged infringements. Dkt. No. 142-3, ¶¶ 267-69. Plaintiffs ultimately settled on pursuing roughly a third of its claims (99 claims) at trial. Dkt. No. 228. Plaintiffs then abandoned 25 of the 99 claims during the trial and failed to make a *prima facie* case in 26 more. *See* Dkt. No. 441 at 14. Defendants were therefore required to prepare for trial on 51 claims of copyright infringement that Plaintiffs should not have pursued.⁴ Further, only 4, or 4%, of the original 99 claims were deemed an infringement. Dkt. Nos. 510, 514.

Plaintiffs' assertion of 51 claims of copyright infringement that it could not

⁴ In its Order regarding Defendants' entitlement to costs and attorneys' fees, the Court further noted that digital permissions were not available in 33 instances, and "neither digital nor hard copy permissions were available in 18 cases." Dkt. No. 441 at 14.

or would not support with evidence, and their “failure to narrow their individual infringement claims significantly increased the cost in defending suit.” Dkt. 441 at 14. This mass assertion of unsupported claims of copyright infringement amounts to objective legal unreasonableness. Accordingly, the *Fogerty* factor regarding objective unreasonableness favors awarding Defendants attorneys’ fees and costs.

Further, Plaintiffs’ motivation in pursuing claims of copyright infringement against Defendants was to eliminate all fair use of copyrighted works by academic institutions in the teaching of their students. Defendants, along with many other academic institutions, have developed fair use policies and procedures specifically so that they may demarcate the “‘boundaries of copyright law . . . as clearly as possible’ in order to maximize the public exposure to valuable works.” *Mitek*, 198 F.3d at 842-43. Plaintiffs pursued claims of copyright infringement driven by a motivation to eliminate fair use copying in teaching and to require payment of licensing or other royalty fees for any use of their academic works. Accordingly, this *Fogerty* factor regarding motivation favors awarding Defendants attorneys’ fees and costs because it serves to deter other publishers from filing copyright infringement lawsuits for the purpose of eliminating academic fair use during teaching, and thwarting 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).

An award of fees and costs to defendants is also in compliance with “the need in particular circumstances to advance considerations of compensation and deterrence.” 510 U.S. at 534 n.19. This factor must again be considered in the context of “whether the imposition of fees will further the goals of the Copyright Act.” *Mitek*, 198 F.3d at 842. With respect to advancing considerations of compensation, Plaintiffs are not seeking monetary compensation, but only seeking an injunction and declaratory relief. Further, any relief granted to Plaintiffs must consider only the 4 instances of infringement found by this Court, as well as the remaining 95 claims of infringement on which Plaintiffs lost. Accordingly, these particular circumstances do not warrant a focus on compensation considerations.

This Court’s award of fees and costs to Defendants would appropriately deter Plaintiffs and other similar publishers from asserting an unwarranted number of unsupported infringement claims, and failing to narrow those claims appropriately, merely in an effort to clothe an academic institution employing fair use practices in the garb of “extreme infringer.” *See Lil’ Joe Wein Music, Inc. v. Curtis James Jackson*, No. 06-20079-CIV, 2008 WL 2688117 at *8 (S.D. Fl. July 1, 2008) (holding that a failure to make an adequate pre-suit investigation will advance considerations of deterrence); *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). Fair use is a statutorily recognized right that furthers the constitutional purpose of promoting the progress of science and learning. Non-profit academic institutions exercising this right in the process of teaching their students should not be subjected to lawsuits that are enormously expensive to defend because publisher plaintiffs assert hundreds of unsuccessful claims of copyright infringement. The academic fair use considerations at the core of this case raise unique issues in the context of the *Fogerty* factors, rendering many other cases not dispositive. *See, e.g., Malibu Media, LLC v. Pelizzo*, 604 Fed.Appx. 879, 881 (11th Cir. 2015) (holding that the district court appropriately withheld attorneys' fees from a prevailing defendant in a case that did not involve fair use). For example, deterrence of excessive litigation tactics in response to academic fair use policies was not at issue in *Malibu Media*.

Accordingly, an analysis of the *Fogerty* factors in light of the purpose of the Copyright Act indicates that an award of attorneys' fees and costs to Defendants is appropriate. Three of the four factors favor an award of Defendants' attorneys' fees and costs. Even if the Court does not find Plaintiffs' actions to amount to frivolousness, "it is not a precondition to an award [of attorneys' fees] to show that the losing party acted in bad faith or brought a frivolous claim." *Sherry Mfg. Co. v. Towel King of Florida, Inc.* 822 F.2d 1031, 1035 (11th Cir. 1987); *see also Garcia-Goyco v. Law Envtl. Consultants, Inc.*, 428 F.3d 14, 20 (1st Cir. 2005)

(holding that “an explicit finding of frivolity or bad faith is not required for the award of attorney's fees under 17 U.S.C. § 505” and noting that in *Fogerty*, the Supreme Court expressly disapproved the practice of requiring a showing of frivolousness or bad faith in awarding fees to prevailing defendants). Since three *Fogerty* factors favor an award of Defendants’ fees and costs, such an award is appropriate.

B. Defendants’ Fee Rates Are Reasonable

In order to determine the appropriate amount of fees that should be awarded, the Court should multiply the number of hours reasonably expended by a reasonable hourly rate. *Norman*, 836 F.2d at 1299. Defendants provided ample evidence that its rates, including an across-the-board outside counsel attorney rate of \$225/hour, are reasonable. Dkt. No. 444 at 8-13 and associated exhibits. Although the Eleventh Circuit reversed this Court’s award of costs and fees to Defendants, the Eleventh Circuit only did so on the basis of its remand on the substantive issue of the fair use analysis. *Cambridge*, 769 F.3d at 1283-84. The Eleventh Circuit did not criticize this Court for its decision to award fees and costs and did not direct this Court to use a different standard for determining the reasonableness of attorneys’ fees and costs once the prevailing party was determined on remand. *Id.*

This Court’s prior award of Defendants attorneys’ fees reflects the Court’s

acceptance of the reasonableness of the fee rates applied by Defendants in this case. Dkt. No. 462. Defendants' rates are unchanged since the Court's last award of fees, and remain well below the prevailing market rates for similar services by lawyers of comparable skill, experience and reputation. Exhibit 5, Declaration of Lawrence K. Nodine, ¶ 12. For these reasons, Defendants' attorneys' fee rates are reasonable.

C. This Court's Previous Award of Attorneys' Fees and Costs Should Carry Forward

This Court determined that a reasonable award of attorneys' fees and costs for Defendants' efforts prior to Plaintiffs' appeal to the Eleventh Circuit would be \$2,861,348.71 in attorneys' fees and \$85,746.39 in costs. Dkt. No. 462. These amounts remain reasonable and continue to be supported by declarations and billing documents already filed by Defendants, as well as arguments previously submitted. Dkt. Nos. 442, 443, 443-1, 444 (and associated exhibits). Defendants do not reiterate those arguments here, but note that the Court previously analyzed in depth whether attorneys' fees and costs associated with Dr. Crews' assistance and testimony should be included in Defendants' award of fees and costs. Dkt. No. 462 at 6-9. This Court found that those fees and costs should be included and they are a part of the amounts provided above. *Id.*

The Eleventh Circuit in its decision did not indicate that the amounts awarded by this Court previously were unreasonable or that Defendants' work

leading up to the appeal was not necessary to this Court's decision on remand. *Cambridge*, 769 F.3d at 1284. One could argue that neither Defendants nor Plaintiffs "won" or "lost" at the appellate level: The Eleventh Circuit reversed the injunction granted to Plaintiffs, reversed the declaratory judgment granted to Plaintiffs, and reversed the fees and costs awarded to Defendants. *Id.* The court did so because it provided this Court with instructions for balancing the four fair use factors and refining its application of factors two, three and four. *Id.* However, the Eleventh Circuit did not reverse this Court's prior findings regarding those 51 works which Plaintiffs abandoned at trial or failed to make a *prima facie* case of copyright infringement. *See generally, Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012). Those findings were in favor of Defendants prior to the appeal and remain in favor of Defendants now. Defendants' work on those issues, as well as its pre-appeal work on the educational nature of the use under factor 1, the nature of the works under factor 2 including whether the excerpts contained the "heart" of the work, the amount copied under factor 3, the multitude of analyses performed with respect to Plaintiffs' book sales and licensing fees under factor 4, and its balancing of these factors were all necessary for this Court to arrive at its remand decision.

Accordingly, the Court should carry forward its previous award of attorneys' fees and costs to Defendants and only consider whether the hours expended by

Defendants' after remand by the Eleventh Circuit were similarly reasonable.

Defendants do not seek any of their fees or costs incurred in association with the Eleventh Circuit appeal proceedings, nor do Defendants seek any of their fees or costs associated with settlement negotiations taking place after this Court's original Order (Dkt. No. 462).

The number of hours devoted to this case after the Eleventh Circuit's remand and now requested were reasonably necessary to perform the work required to apply the Eleventh Circuit's fair use analysis to 48 of the original 99 claims of infringement asserted by Plaintiffs. Defendants seek to recover only the fees and costs for which they were billed plus appropriate fees for the time devoted to the case by lawyers in the Office of the Attorney General of the State of Georgia. Defendants request reasonable fees and costs billed by Meunier Carlin & Curfman, King & Spalding, and Baker Hostetler, as well as fees for the time expended by the Attorney General for the State of Georgia. *See* Exhibits 1-5.

Defendants request an additional \$374,886.31 in attorneys' fees, which fees include litigation costs, accrued by Defendants after the Eleventh Circuit's remand. Defendants do not request any additional taxable costs. Once added to the Court's prior award of fees, Defendants request a total award of attorneys' fees in the amount of \$3,236,235.02 and taxable costs in the amount of \$85,746.39.

D. The Additional Hours Expended By Defendants Were Reasonable

The instant case was not a typical copyright case involving one or two works and one or two copyright registrations. This copyright infringement case involved an assertion of 99 claims of copyright infringement at trial, and has consumed an extensive amount of time and resources even after the Eleventh Circuit's remand of the case back to this Court. More particularly, the Eleventh Circuit remanded on the issue of fair use and that remand affected 48 of the 99 claims of infringement. *Cambridge*, 769 F.3d at 1283-84. The Eleventh Circuit directed this Court and the parties to re-evaluate the factor two analysis, the factor three analysis, the factor four analysis, and the weighing of all four factors together. *Id.* The factor two analysis alone occupied a significant amount of Defendants' time and efforts on remand. 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*, 769 F.3d at 1270.

Further, even after the remand decision by the Eleventh Circuit, this case continued to present various issues relating to copyright infringement that required specialized knowledge of copyright law. As the Court has recognized, "there was no controlling authority governing fair use in a nonprofit educational setting." Dkt. 441 at 14. Accordingly, Defendants were required to expend additional time

and labor to prepare their case as it was not a typical copyright infringement case. Instead, novel issues of law were involved.

In order to efficiently organize the case, a number of attorneys were assigned to one or more aspects of the case. It is well recognized that

[t]here is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer.

Norman, 836 F.2d at 1302 (11th Cir. 1988); *see also*, *Jones v. Central Soya Co.*, 748 F.2d 586, 594 (11th Cir. 1984). This Court previously found Defendants' attorneys' fee request reasonable when multiple attorneys were involved in the case and even multiple firms were involved in the case due to the movement of certain key attorneys to other firms. *See* Dkt. No. 462; *see also* Dkt. No. 444, Exhibit 6, Declaration of Robert We. Clarida at ¶¶ 14-19. Although one Special Assistant Attorney General has changed firms again since the Eleventh Circuit's remand of this case, the same number of firms are still involved in the case. Attorneys from King & Spalding remained involved due to those attorneys' longstanding involvement in the case and deep understanding of the issues. Given the extraordinary factors involved in this case, discussed above, it would be unusual if there had not been multiple attorneys assigned to the case.

The use of attorneys with different skills working on the same project is often necessary. A number of junior attorneys and senior attorneys working

together is not unusual where senior attorneys supervise junior attorneys or bring specialized knowledge of a particular issue. Such is the case here. Since the Eleventh Circuit's remand of the case, 76% of the attorney time billed to Defendants is attributable to four attorneys at Meunier Carlin & Curfman – Mr. Askew and Mr. Schaezel as senior attorneys and two additional junior attorneys. Exhibit 5, Declaration of Lawrence K. Nodine, ¶ 11.

Thus, the actual time billed for Defendants' activities after the Eleventh Circuit's remand reflects a reasonable number of hours for the required work. Exhibit 5, Declaration of Lawrence K. Nodine, ¶ 13. Defendants do not request any fees or costs associated with Plaintiffs' appeal to the Eleventh Circuit or any settlement discussions that occurred subsequent to this Court's original award of fees and costs. The parties have conferred regarding Defendants' fee and cost request as directed by the Court and have agreed to these exclusions along with the exclusion of copy charges and any further fees or costs associated with the assistance of expert witness Dr. Kenneth Crews. The parties have also agreed that Defendants' attorneys' fees and cost request will include fees and costs of Meunier Carlin & Curfman, King & Spalding and Baker Hostetler. Defendants presented a summary of the total fees and costs it would be requesting. Defendants expect to continue these discussions after submitting their request to the Court.

E. The Additional Litigation Costs Included In Attorneys' Fees Were Reasonable

An award of attorneys' fees under Section 505 of the Copyright Act may include "litigation costs which include reasonable out-of-pocket expenses incurred by the attorney which are normally charged to fee-paying clients, so long as these costs are incidental and necessary to the litigation." *Lil' Joe Wein Music*, 2008 WL 2688117 at *14. These charges include photocopying, computerized legal research costs, long distance telephone charges, federal express charges, court charges and travel expenses, facsimile charges and messenger services. *See, e.g., id.* Defendants request for additional costs as a part of its attorneys' fees fall within these acceptable categories and amount to \$5,470.91, making Defendants' total request for additional attorneys' fees following the Eleventh Circuit's remand decision \$374,886.31. This amount is reasonable. Exhibit 5, Declaration of Lawrence K. Nodine, ¶ 15. Defendants do not request any additional taxable costs under 28 U.S.C. § 1920.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully submit that they should recover their reasonable attorneys' fees in the amount of \$3,236,235.02 and costs in the amount of \$85,975.69.

Respectfully submitted this 20th day of April, 2016.

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Counsel for Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to L.R. 5.1C and 7.1D of the Northern District of Georgia, that the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' DETAILED REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND OTHER COSTS** 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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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
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CAMBRIDGE UNIVERSITY PRESS;)
OXFORD UNIVERSITY PRESS, INC.;)
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Plaintiffs)

CIVIL ACTION NO.)
1:08-CV-1425-ODE)

v.)

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

Defendants)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 20th day of April 2016, I have electronically filed the foregoing **DEFENDANTS’ MEMORANDUM IN SUPPORT OF DEFENDANTS’ DETAILED REQUEST FOR AN AWARD OF ATTORNEYS’ FEES AND OTHER COSTS** 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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