

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

CAMBRIDGE UNIVERSITY PRESS,
et al.,

Plaintiffs,

- vs. -

CARL V. PATTON, in his official
capacity as Georgia State University
President, *et al.*,

Defendants.

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

DEFENDANTS' INITIAL DISCLOSURES

Defendants KENNETH R. BERNARD, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, JAMES A. BISHOP, in his official capacity as member of the Board of Regents of the University System of Georgia, HUGH A. CARTER, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, WILLIAM H. CLEVELAND, in his official capacity as member of the Board of Regents of the University System of Georgia, ROBERT F. HATCHER, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia, FELTON

JENKINS, in his official capacity as member of the Board of Regents of the University System of Georgia, W. MANSFIELD JENNINGS, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, JAMES R. JOLLY, in his official capacity as member of the Board of Regents of the University System of Georgia, DONALD M. LEEBERN, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, ELRIDGE MCMILLAN, in his official capacity as member of the Board of Regents of the University System of Georgia, WILLIAM NESMITH, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, DOREEN STILES POITEVINT, in her official capacity as member of the Board of Regents of the University System of Georgia, WILLIS J. POTTS, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, WANDA YANCEY RODWELL, in her official capacity as member of the Board of Regents of the University System of Georgia, KESSEL STELLING, JR., in his official capacity as member of the Board of Regents of the University System of Georgia, BENJAMIN J. TARBUTTON, III, in his official capacity as member of the Board of Regents of the University System of Georgia, RICHARD L. TUCKER, in his official capacity as Chair of the Board of Regents of the University System of Georgia, and ALLAN VIGIL, in his official capacity as member of the Board of Regents of the University System of Georgia (collectively,

“Board Members” or “Defendants”), pursuant to Local Rule 26.1 and Rule 26 of the Federal Rules of Civil Procedure, and without waiving any claim of attorney-client privilege, work product protection, or trade secret protection, respectfully submit their Initial Disclosures to Plaintiffs Cambridge University Press, Oxford University Press, Inc., and Sage Publications, Inc. (“Plaintiffs”). The Board Members expressly reserve the right to supplement these disclosures and to introduce additional information in connection with any motion, hearing, or trial as discovery proceeds.

1) If the defendant is improperly identified, state defendant’s correct identification and state whether defendant will accept service of an amended summons and complaint reflecting the information furnished in this disclosure response.

Without conceding the merits of Plaintiffs’ claims, and specifically denying them, the Board Members state that they have been properly identified.

2) Provide the names of any parties whom defendant contends are necessary parties to this action, but who have not been named by plaintiff. If defendant contends that there is a question of misjoinder of parties, provide the reasons for defendant’s contention.

Without conceding the merits of Plaintiffs’ claims, and specifically denying them, the Board Members do not contend there is a question of misjoinder of parties, but reserve the right to supplement their response in accordance with the Federal Rules, the Local Rules, and the Rules and Orders of this Court.

3) Provide a detailed factual basis for the defense or defenses and any counterclaims or crossclaims asserted by defendant in the responsive pleading.

The Board Members refer to their Answer for a factual basis for the defenses of the Board Members in this matter. Because discovery is not yet complete, the Board Members reserve the right to supplement this disclosure in accordance with Fed. R. Civ. P. 26. Without limiting the factual and legal defenses available to them stated in their Answer, or limiting their ability to supplement this response as additional facts are developed during discovery or otherwise, the Board Members offer the following details as a factual basis for their defenses:

The Board Members deny that they have infringed any valid copyright owned by Plaintiffs. The library at Georgia State University (“GSU”) facilitates GSU professors in making excerpts of reading materials for particular courses available via GSU’s electronic reserve system (“ERes”) and facilitates student access to such excerpts. Only students who are given a specific password can access the excerpts on ERes. The course reading material excerpts made available by the GSU library through ERes are intended to allow students online access to such excerpts held in reserves by the GSU library, and are not digital replacements or substitutes for textbooks or paper “coursepacks.”

GSU also facilitates professors in making digitized course information available via uLearn (Blackboard/WebCT Vista), course web pages and faculty web

pages. Such electronic course management tools may provide syllabi, reading materials, and other course-related information. Only students who are given a specific password and are registered for an affected course can access the excerpts information for such course on uLearn. Course web pages and faculty web pages may or may not be password-protected. Course reading material available via uLearn, course web pages, or faculty web pages, if any, is intended to allow students online access to such material and is not a digital replacement or substitute for textbooks or paper “coursepacks.”

GSU also facilitates the provision of individual GSU college or school departmental web pages. Such web pages provide information related to the particular department, including information pertaining to faculty and courses. The Board Members do not believe that course reading material is intended to be made available or is made available via departmental web pages.

In all of the foregoing, the Board Members believe and understand that the University System of Georgia copyright policy is followed. The policy is in part grounded upon the statutory doctrine of fair use as set forth in the Copyright Act, 17 U.S.C. §§ 101 et seq. or permission granted by the copyright holder. The Board Members assert additional defenses, including that they are protected by library immunity under 17 U.S.C. § 108, that they are immune from suit in federal court pursuant to the doctrines of Eleventh Amendment immunity, qualified immunity,

and sovereign immunity, and that Plaintiffs' claims are barred in whole or in part by Plaintiffs' laches and acquiescence, by the applicable statute of limitations, by lack of causation, by the independent-duty doctrine, and by the doctrines of waiver, estoppel and unclean hands. The Board Members reserve the right to raise any other defenses allowed by law at such time as the allegations are more specifically pled or developed.

4) Describe in detail all statutes, codes, regulations, legal principles, standards and customs or usages, and illustrative case law which defendant contends are applicable to this action.

The Board Members incorporate into their response to this question all of those statutes, codes, legal principles, standards and customs or usages, and illustrative case law that are contained in their answer.

Nevertheless, in addition to the statutes, codes, legal principles, standards and customs or usages that are contained in their answer, the Board Members contend that the statutory doctrine of fair use as set forth in the Copyright Act, 17 U.S.C. §§ 101 et seq., library immunity under 17 U.S.C. § 108, the doctrines of Eleventh Amendment immunity, sovereign immunity, and qualified immunity, and case law and regulatory interpretations thereto, are applicable to this action, including by way of illustration only and without limitation: Williams & Wilkins Co. v. U.S., 487 F.2d 1345 (Ct. Cl. 1973), Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y.

1991), Encyclopedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982), Greenberg v. Nat'l Geographic Society, No. 05-16964, 2008 U.S. App. LEXIS 13832 (11th Cir. Jun. 30, 2008), A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008), Peter Letterese and Associates Inc. v. World Institute of Scientology Enterprises Int'l, No. 05-05129, 2008 U.S. App. LEXIS 14496 (11th Cir. Jul. 8, 2008), American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994), Assoc. of American Med. Colleges v. Cuomo, 928 F.2d 519 (2d Cir. 1991), Princeton Univ. Press v. Michigan Doc. Services, Inc., 99 F.3d 1381 (6th Cir. 1996), Nat'l Assoc. of Boards of Pharmacy v. Board of Regents of the Univ. System of Georgia, No. 3:07-cv-084, 2008 U.S. Dist. LEXIS 32116 (M.D. Ga. Apr. 18, 2008) and Ex Parte Young, 209 U.S. 123 (1908).

5) Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your claims or defenses, unless solely for impeachment, identifying the subjects of the information. (Attach witness list to Initial Disclosures as Attachment A.)

The Board Members have identified the people of whom they are currently aware who are likely to have discoverable information relating to this lawsuit in Attachment A. The Board Members reserve the right to supplement their response to this question as they gain additional information.

6) Provide the name of any person who may be used at trial to present evidence under Rules 702, 702, or 705 of the Federal Rules of Evidence. For all experts described in Fed. R. Civ. P. 26(a)(2)(B), provide a

separate written report satisfying the provisions of that rule. (Attach expert witness list and written reports to Initial Disclosures as Attachment B.)

The Board Members have not yet identified the persons that they may use at trial to present evidence under Rules 702, 703, and/or 705 of the Federal Rules of Civil Procedure.

7) Provide a copy of, or description by category and location of, all documents, data compilations, and tangible things in your possession, custody, or control that you may use to support your claims or defenses unless solely for impeachment, identifying the subjects of the information. (Attach document list and descriptions to Initial Disclosures as Attachment C.)

Listed in Attachment C are those documents that the Board Members may use to support their claims or defenses. The Board Members reserve the right to supplement their response in accordance with the Federal Rules, the Local Rules, and the Rules and Orders of this Court.

8) In the space provided below, provide a computation of any category of damages claimed by you. In addition, include a copy of , or describe by category and location of, the documents or other evidentiary material, not privileged or protected from disclosure on which such computation is based, including material bearing on the nature and extent of injuries suffered, making such documents or evidentiary material available for inspection and copying under Fed. R. Civ. P. 34. (Attach any copies and descriptions to Initial Disclosures as Attachment D.)

The Board Members are not claiming any damages at this time, other than their costs and legal fees incurred in defending this action.

9) If defendant contends that some other person or legal entity is, in whole or in part, liable to the plaintiff or defendant in this matter, state the full name, address, and telephone number of such person or entity and describe in

detail the basis of such liability.

The Board Members are not aware at this time of any other persons or entities who may be liable to Plaintiffs.

10) Attach for inspection and copying as under Fed. R. Civ. P. 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or to indemnify or reimburse for payments to satisfy the judgment. (Attach copy of insurance agreement to Initial Disclosures as Attachment E.)

The Board Members do not at this time have any such insurance agreements.

Respectfully submitted this 4th day of February, 2009.

THURBERT E. BAKER 033887
Attorney General

R. O. LERER 446962
Deputy Attorney General

DENISE E. WHITING-PACK 558559
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Georgia Bar No. 702536

Attorneys for Defendants

CERTIFICATE OF SERVICE AND TYPE

Pursuant to Local Rule 7.1D, the undersigned counsel for Defendants hereby certifies that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.) which was approved by the Court, and that on this 4th day of February, 2009, the foregoing **Defendants' Initial Disclosures** as electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following counsel of record:

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Attachment “A”

This disclosure lists persons who may have information that the Board Members may use to support their defenses to all of the claims pled in Plaintiffs’ Amended Complaint, without regard to the legal merit of those claims. All of the persons listed below may be contacted through the undersigned counsel.

By serving this disclosure, the Board Members do not waive any of their legal challenges to those claims or acknowledge that any of these persons possess discoverable information. The Board Members will amend or supplement this disclosure as necessary as this matter proceeds.

Name	Title
Carl V. Patton	President
Ron Henry	Provost
J. L. Albert	Associate Provost & CIO
Charlene Hurt	Dean of Libraries (retired)
Jim Palmour	Info. Sys. Spec. Lead, Library Services Support

Laura Burtle	Assoc. Dean Acad., Library
Marjorie Denise Dimsdale	Lib. Assoc. I, Library
Denita Hampton	Mgr. Lib. Svcs., Library
Paula Christopher	Proj. Mgr., Univ. Educ. Tech. Svcs.
Zoe Salloom	Project Manager, University Education Technology Services
Nancy P. Johnson	Law Librarian, Professor
Diane D. Belcher	Associate Professor, Applied Linguistics & ESL
Jodi Kaufmann	Assistant Professor, Educational Policy Studies
James Gordon Emshoff	Associate Professor, Psychology
Kim D. Reimann	Assistant Professor, Political Science
Nathaniel Leon Orr	Professor, School of Music
John David Bunting	Lecturer, Senior, Applied Linguistics & ESL

Jeffrey Lewis Lazarus	Assistant Professor, Political Science
Isa Blumi	Assistant Professor, History
James F. Darsey	Professor, Communication
Patricia Dixon	Associate Professor, African-American Studies
Doug Hyché	IT Program Director, Board of Regents Office of Information and Instructional Technology
George Hernandez	Database Analyst Staff Specialist

Attachment “C”

This disclosure lists documents that the Board Members may use to support their claims or defenses. By serving this disclosure, the Board Members do not waive any of their legal challenges to those claims or objections they may have to the relevance and admissibility of these documents.

- 1) Copyright policies and procedures for the University System of Georgia; and
- 2) Procedures for maintenance, support, and use of uLearn.