No. 17-14110-HH

In the United States Court of Appeals for the Eleventh Circuit

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Fastcase, Inc.,
Plaintiff-Appellant,

v.

Lawriter, LLC,
Defendant-Appellee.

On Appeal
from the United States District Court for the Northern District of Georgia
(Hon. Timothy C. Batten, Sr., United States District Judge)
NO. 1:17-cv-414-TCB

REPLY BRIEF OF APPELLANT FASTCASE, INC.

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Certificate of Interested Persons
and Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 28-1(b), Appellant submits this Certificate of Interested Persons and Corporate Disclosure Statement:

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Batten, Hon. Timothy C., U.S. District Judge for the Northern District of Georgia, Atlanta Division

Brazier, Robert G., counsel for appellant

Fastcase, Inc., appellant

Hall, Steven G., counsel for appellant

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No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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I. INTRODUCTION TO REPLY

Appellee Lawriter has threatened to enforce, by litigation, rights exclusive to federal copyright. Lawriter has tried to wiggle free from federal adjudication by embodying its claims in a clickwrap contract, postponing its threat of copyright litigation, offering not to sue for past actions while reserving the right to sue in the future, questioning the amount in controversy, and claiming that the State of Georgia is an indispensable party. These litigation gymnastics cannot change the facts. Lawriter cannot exercise exclusive copyright-like rights in Georgia Regulations, by copyright or by contract. Lawriter threatens to litigate this issue, and the District Court has jurisdiction to adjudicate it.

In its initial Brief, Appellant Fastcase showed that the District Court had erred in finding that it lacked subject matter jurisdiction in a declaratory judgment action asking whether a private for-profit entity can obtain copyright-like exclusive rights in public law. Lawriter's efforts to defeat diversity jurisdiction by speculating that the amount in controversy might, possibly, be less than $75,000, fail because the law requires only good faith allegation of the amount in controversy unless the other party shows "to a legal certainty" that the controversy necessarily involves less. Fastcase's allegations that the value of the requested judgment exceeds $75,000 are indisputably in good faith, and Lawriter's speculation cannot show a legal certainty that the threshold could not be met.

Similarly, allowing Lawriter's tactical efforts to defeat federal question jurisdiction fail because (i) jurisdiction would exist to resolve a copyright infringement claim by Lawriter against Fastcase, even if the result would be dismissal for failure to fulfill the procedural prerequisite of registration; and (ii) the primary purpose of the Declaratory Judgment Act would be defeated if a copyright claimant could delay registration, threaten suit, and register later if its threats were not enough to achieve its wrongful objectives.

Simply put, full, free and unfettered access to our laws is vital to our democracy and cannot be defeated by carefully orchestrated efforts to restrict access and evade judicial review. This case presents, at its core, a single simple, but very important question, fundamentally a matter of federal law: can a private party - with or without the complicity of a governmental office - obtain and exercise exclusive copyright-like rights to the publication of public law? Putting aside strategic artifice, it cannot.

The basic principle that no one can copyright the law was confirmed almost 200 years ago by the United States Supreme Court, in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834) ("the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right"). The applicability of the same principle to state law was recognized not long after, in

Davidson v. Wheelock, 27 F. 61, 62 (C.C.D.Minn. 1866) (the laws are "public records, subject to inspection by every one," and a "compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him").

Lawriter has threatened suit to defeat this proposition of federal law, and seeks to evade jurisdiction by dressing up its copyright claims to look like ordinary contract claims. Such contract claims would still be subject to exclusive federal jurisdiction because they would be pre-empted by the federal copyright law, whether a copyright is registered or not. Fastcase respectfully ask this Court to reverse the jurisdictional holding and remand for review on the merits.

II. DIVERSITY JURISDICTION

A. Fastcase Has Met Its Burden of Alleging in Good Faith that the Amount in Controversy Exceeds $75,000

Lawriter contends that Fastcase failed to establish the $75,000 amount in controversy by a preponderance of the evidence. Following the law, the District Court should have accepted Fastcase's good-faith allegation of the amount in controversy because Lawriter failed to show, to a legal certainty, that the amount was less than $75,000.

The United States Supreme Court has held that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-

289 (1938). Lawriter makes no effort to meet the "legal certainty" test established by the Supreme Court. Instead, Lawriter twice mis-states the standard a plaintiff seeking declaratory relief must satisfy to show a sufficient amount in controversy, stating:

> Where a plaintiff brings a claim for declaratory judgment, "the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets the jurisdictional minimum." *McKinnon Motors*, 329 F.3d at 807.

Brief of Appellee at 13-14 and at 21.

The case Lawriter cites for this proposition, *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir. 2013), uses the words quoted by Lawriter, but Lawriter mentions only a truncated part of the sentence. What this Court actually held was that the preponderance standard applies only in very limited circumstances, which do not apply in this case:

> Generally, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Red Cab Co.*, 303 U.S. at 289, 58 S.Ct. at 590. However, **where jurisdiction is based on a claim for indeterminate damages**, the *Red Cab Co*. "legal certainty" test gives way, and the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets the jurisdictional minimum.

329 F.3d at 807 (emphasis added).

Thus, only where the amount in controversy is "indeterminate" does the burden shift to the plaintiff to prove that the amount in controversy exceeds the

jurisdictional minimum. Lawriter has not argued that the amount in controversy here is indeterminate. It is not. Either Fastcase stands to lose much more than $75,000 if it remains unable to perform on its contract with the State Bar, or Fastcase would stand exposed to potential liability far in excess of that amount in liquidated damages if it acts in a way that Lawriter would consider a breach of contract. Without judicial relief, Fastcase must suffer one of those harms, and the amount of harm could be determined precisely in either event.

Therefore, as Lawriter failed to show to a "legal certainty" that the value of this claim to Fastcase is necessarily less than $75,000, diversity jurisdiction was present, and dismissal was reversible error.

B. Costs and Liability Avoided Are Benefits That Would Flow to Fastcase if the Judgment Requested Here Is Granted

Lawriter also contends that the avoidance of loss, or the avoidance of liability, simply do not count as benefits that would flow to Fastcase from a favorable judgment in this action. Again, Lawriter's argument is based on the wrong standard. "For amount in controversy purposes, the value of … declaratory relief is the value of the object of the litigation measured from the plaintiff's perspective." *Morrison v. Allstate Indem. Co*., 228 F.3d 1255, 1268 (11th Cir. 2000) (internal quotation marks omitted). "Stated another way, the value of declaratory relief is the monetary value of the benefit that would flow to the plaintiff if the relief he is seeking were granted." *S. Fla. Wellness, Inc. v. Allstate*

Ins. Co., 745 F.3d 1312, 1316 (11th Cir. 2014) (internal quotation marks omitted and alteration adopted).

Lawriter relies entirely on an unpublished District Court decision that mis-quotes this Court as supporting its position. Brief of Appellee at 22, quoting *Ala. Power Co. v. Calhoun Power Co*., 2012 WL 6755061 (N.D. Ala. 2012). A more recent decision from the same district disagreed, in an opinion more clearly in line with precedent, logic and basic fairness:

> Further, to the extent *Alabama Power Co*. requires an actual monetary benefit to be realized (instead of merely conferred), the court finds it unpersuasive. **The amount in controversy for declaratory and injunctive relief is assessed by the value of the monetary benefit of the relief, not merely the cash consequences to the plaintiff**.

Community Foundation of North Alabama v. Anniston HMA LLC, 2017 WL 1927850, *3 (N.D.Ala. May 10, 2017) (emphasis added).

In fact, the U.S. Supreme Court has held that the value of avoiding a potential claim by the other party should be considered in these circumstances. *See Horton v. Liberty Mutual Insurance Co*., 367 U.S. 348, 353-354 (1961) ("No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules."). The logic is simple; avoidance of a cost or liability is just as much a "pecuniary consequence to those involved in the litigation" as a monetary judgment.

This Court has also recognized that the avoidance of cost and expense is a legitimate component in the amount in controversy:

> [T]he plaintiff's claim for monetary damages need not, by itself, exceed the requisite statutory amount because the immediate financial consequences of the litigation to the plaintiff--in that case, **the financial benefit of not having to pay** the interest contracted to be charged--**may also be considered in calculating the amount in controversy**.

Ericsson GE Mobile Comm'ns, Inc. v. Motorola Comm'ns & Electronics, Inc., 120 F.3d 216, 220 (11th Cir. 1997) (emphasis added).

The decision mistakenly cited in *Alabama Power* for the proposition that avoided liability should not be considered, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000), did not involve any claim for avoidance of loss, or for avoidance of potential liability. Thus, its statement that "the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted" (*id.* at 1077) did not even consider whether costs or liabilities avoided should be counted in determining the value of the benefit to the plaintiff.

By failing to follow controlling authority from the Supreme Court and from this Court, and relying instead on a loose statement from a case that was not evaluating the circumstances at hand, the District Court made a reversible error.

C. Lawriter Cannot Defeat Jurisdiction With Speculation

Lawriter tries to bolster its position by speculating that the damages Fastcase

alleges it is exposed to may not actually be incurred: "Appellant's only allegations regarding damages are hypothetical losses that Appellant might incur if some future event occurred." Brief of Appellee at 15. While Lawriter speculates that Fastcase's contract with the State Bar might not be canceled, that speculation does not rise to anywhere near the level of a legal certainty. Nor does Lawriter's speculation that it might not pursue the full amount of its liquidated damages.

However, as explained in Fastcase's opening brief, the value to Fastcase of the judgment sought here is readily seen to exceed $75,000. Either Fastcase stands to lose much more than $75,000 if it remains unable to perform on its contract with the State Bar, or Fastcase would stand exposed to potential liability far in excess of that amount in liquidated damages if it acts in a way that Lawriter would consider a "breach of contract." Lawriter does not dispute any of this.

Lawriter derides Fastcase's undisputed allegation that "[p]rolonged delay in updating the Georgia Regulations in Fastcase's database presents a risk of being held in breach of Fastcase's contract with the State Bar of Georgia, with a potential loss to Fastcase of hundreds of thousands of dollars" (Complaint, Doc. 1 at 10, ¶ 31) as "hypothetical damages that would be allegedly suffered by Appellant" (Brief of Appellee at 22). However, Lawriter does not offer any reason, let alone any evidence, suggesting that Fastcase's contract with the State Bar is not at risk or that the loss to Fastcase in the event of termination would be less than $75,000.

Granting the requested declaration would directly and completely eliminate the risk.

Similarly, Lawriter hints, in a footnote, that Fastcase's liability exposure to suit by Lawriter for breach of contract might be less than $20,000 per violation because "the plain language of the 'Terms of Use' as cited in the Complaint do not support Appellant's 'per occurrence' exposure." Brief of Appellee at 22, n. 2. Lawriter explains:

> The provision **merely** provides that "[i]f you violate [the Terms of Use], or if you access or use this website in violation of [the Terms of Use], you agree that Lawriter will suffer damages of at least $20,000." (Doc. 8-3).

Id. (emphasis added).

> In fact, the Terms and Conditions also require that any user agree:
>
> You agree that you will not copy, print, or download anything from this website for any commercial use.
>
> You agree not to use any web crawler, scraper, or other robot or automated program or device to obtain data from the website.
>
> You agree that you will not sell, will not license, and will not otherwise make available in exchange for anything of value, anything that you download, print, or copy from this site.
>
> You agree that you will not copy, print, or download any portion of the regulations posted on this site exceeding a single chapter of regulations for sale, license, or other transfer to a third party, except that you may quote a reasonable portion of the regulations in the course of rendering professional advice.

Terms and Conditions, Doc. 8-3 at 1.

In other words, the plain language of Lawriter's Terms and Conditions says that:

- Lawriter would be entitled to liquidated damages of at least $20,000 for the use of any automated program or device to obtain data from the website;
- Lawriter would be entitled to liquidated damages of at least $20,000 for the **copying** of more than a single chapter of the Regulations from the Secretary of State's website, or of **anything** from the Secretary of State's website for commercial use;
- Lawriter would be entitled to liquidated damages of at least $20,000 for the **downloading** of more than a single chapter of the Regulations from the Secretary of State's website, or of **anything** from the Secretary of State's website for commercial use;
- Lawriter would be entitled to liquidated damages of at least $20,000 for the **sale or license** of anything downloaded from the Secretary of State's website;

Fastcase alleged that "[t]o provide a current Georgia law library to members of the State Bar of Georgia in compliance with its contract, Fastcase would be required to engage in conduct that Lawriter would consider a violation, at least daily, and possibly thousands of times every day, depending on how many members access Fastcase's Georgia Database." Complaint, Doc. 1 at 4, ¶ 7.

If Fastcase used automated software to scan the Regulations even once, in response to a single search request, copied the results into its database for use by the requesting user, then downloaded the results pursuant to its subscriber's license, there would already be four violations, resulting in potential liability for $80,000 in liquidated damages claims by Lawriter. Depending on how many searches are run by how many Fastcase subscribers, the number of violations could amount to thousands within a single day, potentially exposing Fastcase to millions of dollars in liquidated damages claims. The amount of potential exposure is not indeterminate just because it is not yet known; it could be determined quite precisely if Fastcase were obliged to wait and get sued. Fastcase's effort to avoid that liability by a judicial declaration of rights manifestly involves more than $75,000.

That Lawriter added language purporting to impose liability for a liquidated amount after this dispute arose, and has not released Fastcase from any potential future violations (unlike Lawriter's covenant not to sue for past issues) shows that Lawriter would likely pursue damages to the fullest extent it can. In any event, the question is not the amount Lawriter would actually sue for, but the amount of Fastcase's potential exposure.

Only speculation, unsupported by any evidence, would permit contemplation that Lawriter might sue Fastcase for less than $20,000 per violation. The total

amount of Fastcase's potential liability is not yet known, but is certainly in excess of $75,000. Precise figures would be readily determinable if Fastcase were obliged to engage in conduct that Lawriter would perceive as a breach of contract, without the benefit of a prior judicial declaration. In this suit for a declaration of Fastcase's right to be free of that potential liability, the amount in controversy includes the full extent of the liability Fastcase seeks to avoid. Simply put, the threshold for diversity jurisdiction was satisfied and the District Court made a reversible error by granting Lawriter's motion to dismiss.

III. FEDERAL QUESTION JURISDICTION

Lawriter's sole response to the authority showing the existence of federal question jurisdiction is a contention that its tactical decision not to register its claim of copyright before this action was filed prevents any finding of federal question jurisdiction. Lawriter's argument fails.

A. Copyright Jurisdiction Is Now Clear

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks," and "[n]o State court shall have jurisdiction over any claim for relief arising under" such statutes. 28 U.S.C., § 1338(a). Fastcase's plea for declaratory relief raises issues arising under the Copyright Act, either directly or under the pre-emptive effect of 17 U.S.C., § 301(a) ("no person is entitled to any

such right or equivalent right in any such work under the common law or statutes of any State"). No court of any state could grant the relief Fastcase seeks here.

1. Copyright registration is no longer a requirement for jurisdiction

Lawriter argues, and the District Court mistakenly ruled, that it lacked federal question jurisdiction, on the ground that Lawriter's lack of a copyright registration certificate would deprive it of jurisdiction over a copyright claim asserted against Fastcase by Lawriter. The District Court reached this conclusion on the basis of this Court's 2008 decision in *Stuart Weitzman, LLC v. Microcomputer Resources*, 542 F.3d 859, 863 (11th Cir. 2008).

However, since *Stuart Weitzman* was decided, the Supreme Court has held that the registration requirement is **not jurisdictional**. *Reed Elsevier, Inc. v. Muchnick*, 559 U. S. 154, 157 (2010). Therefore, while a claim against Fastcase by Lawriter **might be dismissible** for failure to satisfy the procedural requirement of registration (depending on the circumstances), a federal court would have jurisdiction to hear - and dismiss - it.

This Court recently held exactly that:

> As a preliminary matter, **the issue presented does not involve jurisdiction**. Until 2010, our precedent held that registration was a jurisdictional prerequisite to filing an action for infringement. [citation omitted] But in *Reed Elsevier, Inc. v. Muchnick*, the Supreme Court held that the "registration requirement is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction."

Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC, 856 F.3d 1338, 1339-1340 (11th Cir. May 18, 2017) (U.S. cert. pending, No. 17-571) (emphasis added) (affirming dismissal for failure to state a claim, pursuant to F.R.C.P. 12(b)(6), not for lack of subject matter jurisdiction).

Both of the post-*Muchnick* cases cited by Lawriter, for the erroneous proposition that there is no federal question subject matter jurisdiction where a copyright registration has not been issued, recognize this distinction. *See Dowbenko v. Google Inc*., 582 Fed. App'x 801, 805 (11th Cir. 2014) (affirming dismissal for failure to state a claim while acknowledging that "411(a)'s registration requirement is not jurisdictional"); *Foundation for Lost Boys v. Alcon Entertainment, LLC*, 2016 WL 4394486, **5-8 (N.D.Ga. 2016) ("the Court concludes it has jurisdiction over Plaintiffs' copyright claims").

In short, since the Supreme Court's *Muchnick* decision, a claim **for copyright infringement** may still not succeed without registration at some point before entry of final judgment, but the lack of registration is not a jurisdictional barrier to suit for a declaration of rights under the Copyright Act, or of rights concerning state-law claims that are pre-empted by copyright.

2. <u>Lawriter's threat created a substantial copyright "case or controversy"</u>

In any event, this case is readily distinguishable from *Stuart Weitzman* because there was no explicit threat of a copyright infringement suit in that case.

Here, in contrast, Lawriter was quite clear that it would sue Fastcase for copyright infringement. To make good on its explicit threat to sue Fastcase, Lawriter must register its claim of copyright, and Lawriter could apply for registration at any time. The law does not, and should not, allow a copyright claimant to intimidate others from exercising their own lawful rights by such threats, only to avoid adjudication of the strength of the threats by deferring registration.

The Declaratory Relief Act permits judicial resolution of disputes "well before a fully formed legal case is presented—**indeed, before a coercive suit might even be possible**." *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc*., 697 F.3d 59 (2nd Cir. 2012) (emphasis added). This relieves a party from being obliged to violate rights claimed by another, and either cause or suffer substantial damages, before being able to obtain judicial relief. Thus, although Lawriter could not yet sue Fastcase for copyright infringement, the temporary procedural impediment to carrying out its threats is not a jurisdictional bar to declaratory relief. A party "is not compelled to wait until he has committed an act which the other party asserts will constitute a breach, but may seek relief by declaratory judgment and have the controversy adjudicated in order that he may avoid the risk of damages or other untoward consequence." *Keener Oil & Gas Co. v. Consolidated Gas Utilities Corp*., 190 F.2d 985, 989 (10th Cir. 1951).

Fastcase's plea for a declaration that Lawriter cannot use copyright law to

block Fastcase from publishing the Georgia Regulations arises under federal law because federal law prohibits Lawriter from enforcing any copyright or copyright-like claims for publication of public laws. 28 U.S.C., § 1338(a); 17 U.S.C., § 301(a). To whatever extent *Stuart Weitzman* appears to preclude relief (which Fastcase does not believe it does), the decision should be revisited and clarified.

B. Lawriter's Various Other Contentions Are Unfounded

Lawriter asserts that "it is undisputed among the parties that Lawriter has neither registered nor applied to register a copyright in the materials at issue," and denies that its threat to sue for copyright infringement "necessarily implies at least an attempt to obtain copyright registration." Brief of Appellee at 18. Actually, all that is undisputed is that Lawriter had not yet registered any claim of copyright. Fastcase has no way of knowing whether Lawriter has applied for registration, and Lawriter could apply at any time. Lawriter undeniably understood that registration was a prerequisite to the suit it threatened. How else could Lawriter hope to carry out its threat? Lawriter's threat to sue for copyright infringement was among the facts known when the Complaint was filed; whether it would take Lawriter a day or a year to carry out its threat is of no jurisdictional significance.

Lawriter suggests that it could not sue Fastcase for copyright infringement because "Lawriter has provided Appellant a Covenant Not To Sue for any copyright infringement concerning the Regulations." Brief of Appellee at 18. Yet

Lawriter threatened to sue for copyright infringement even after providing the covenant, so Lawriter must have understood and intended its covenant to be narrower than it now suggests. In fact, the covenant does not in any way say Lawriter would not sue Fastcase for copyright infringement. The covenant says only that Lawriter would not sue for "copying, distribution or use" of the "text or numbering" of the Georgia Regulations. *See* Covenant, Doc. 4-2 at 16-17. Lawriter clearly has not covenanted never to assert any copyright claims relating to the Georgia Regulations. Fastcase's plea for declaratory relief seeks a judgment that Lawriter may not assert any such claims, but Lawriter's covenant is not so broad.

As the Federal Circuit said about such covenants in a recent patent dispute:

> Although a patentee's grant of a covenant not to sue a potential infringer can sometimes deprive a court of subject matter jurisdiction[citation omitted], the **patentee "bears the formidable burden of showing" "that it 'could not reasonably be expected' to resume its enforcement efforts** against" the covenanted, accused infringer.

Arcelormittal v. AK Steel Corp., 856 F.3d 1365, 1370 (Fed. Cir., May 16, 2017) (emphasis added).

Lawriter cannot satisfy that "formidable burden." The Terms and Conditions Lawriter has grafted onto the Secretary of State's website purport to prohibit a variety of conduct other than "copying, distribution or use" of the "text or numbering" of the Georgia Regulations. *See* Terms and Conditions, Doc. 8-3.

To the extent that any of Lawriter's potential claims based on its Terms and Conditions would be pre-empted by copyright law, Fastcase's request for declaratory relief from those claims still arises under federal law. The controversy remains real and present, despite Lawriter's offer to carve away some pieces of it.

IV. THE SECRETARY OF STATE IS NOT INDISPENSABLE

In the District Court, as here, Lawriter also argued that the action should be dismissed because the State of Georgia was not named as a party. Lawriter offers no reason why this Court should reach the issue. If the judgment below is reversed because subject matter jurisdiction is established, then the action should be remanded to the District Court for appropriate further proceedings, including consideration by the District Court of any other defenses Lawriter might assert.

Out of abundance of caution, Fastcase will respond to Lawriter's arguments, and explain why the State is not a proper party to this litigation, and why the action should proceed in any event.

A. Legal Standard

Determining whether a party is indispensable is a two-step process. The first step is to decide "whether complete relief can be afforded in the present procedural posture, or whether the nonparty's absence will impede either the nonparty's protection of an interest at stake or subject parties to a risk of inconsistent obligations." *City of Marietta v. CSX Transportation,* 196 F.3d 1300, 1305 (11th

Cir. 1999) (citing Fed. R. Civ. P. 19(a)(1)-(2)). Only if the answer to this threshold question is affirmative, and the nonparty cannot be joined for some reason, may a court proceed to step two. *See Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 8 (1990).

Step two requires a court to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

1. The full relief requested can be granted without joining the State

The full relief requested in this action could be granted without in any way interfering with the interests of the State. Fastcase's Complaint asks for a declaration of rights on four matters:

First, that "Lawriter does not and cannot have any copyright or other exclusive right in or to the Georgia Regulations, or in or to the laws, rules, and regulations of any other State." Complaint, Doc. 1 at 13, ¶ (A)(1). Nothing in the State's contract with Lawriter purports to grant Lawriter "any copyright or other exclusive right in or to the Georgia Regulations, or in or to the laws, rules, and regulations of any other State." *See* Secretary of State Contract, Doc. 4-2 at 8-12. Lawriter's rights to the Georgia Regulations, whatever they may ultimately be determined to be, are, obviously, not the same as the State's rights, even if Lawriter claims rights based on its contract with the State. Therefore, the Court can adjudicate Fastcase's rights relative to Lawriter without joining the State as a

party in this litigation.

Second, Fastcase seeks a declaration that "[a]ny state-law claims Lawriter might assert on the basis of copying and publication of the Georgia Regulations would be pre-empted by federal copyright law." Complaint, Doc. 1 at 13-14, ¶ (A)(2). This is a pure question of federal jurisprudence, and is also entirely independent of the State's rights. Therefore, the question of copyright pre-emption can be adjudicated as well, without joining the State as a party.

Third, Fastcase seeks a declaration that "Plaintiff Fastcase does not and cannot infringe any exclusive contract rights held by Defendant in the Georgia Regulations, or in the laws, rules, and regulations of any other State." Complaint, Doc. 1 at 14, ¶ (A)(3). This, in essence, seeks confirmation that public law is in the public domain as a matter of public policy, so that Fastcase has the same right to access the law and to pass it along to others that anyone else has, regardless of Lawriter's contract with the State.

Significantly, there is no indication that the State purports to claim either a right to limit any person's access to the Georgia regulations or a right to convey any such power to Lawriter. In fact, Lawriter's contract with the State reveals that the opposite is true. That contract provides that:

> Lawriter shall make the Rules continuously and freely available twenty-four (24) hours a day, seven (7) days a week for viewing and searching by the general public via Internet connection; this shall be done at no charge and without the requirement of any passwords,

codes, or registration requirements of any kind.

Secretary of State Contract, Doc. 4-2 at 9, § D(1).

Nothing in the relief sought by Fastcase would prevent the State from enforcing its contract with Lawriter.

Finally, Fastcase's fourth request seeks a determination that, "[t]he 'Terms of Use' imposed by Defendant Lawriter on the website of the Georgia Secretary of State are unenforceable as violating public policy and cannot establish a binding contract between Lawriter and any other person." Complaint, Doc. 1 at 14, ¶ (A)(4). Lawriter's Terms and Conditions of Use, which purport to restrict access to, copying, dissemination, and publication of Georgia law, not only violate Lawriter's contract with the Secretary of State, they are an improper attempt to create a private copyright in public law.

As was held long ago, public law cannot be subject to private control because "each citizen is a ruler, a law-maker." *Banks v. West*, 27 F. 50 (C.C.D.Minn. 1886). "The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process." *Bldg. Officials & Code Adm. v. Code Tech., Inc*., 628 F.2d 730, 734 (1st Cir. 1980). Furthermore, due process of law dictates that those subject to the rule of law must have access to the law if they are to be held responsible for complying

with it. *Id*. Through its Terms and Conditions of Use, Lawriter, a company owned by California residents, claims the exclusive right to control access and distribution of law created by, and for the benefit of, the citizens of Georgia. Lawriter's Terms and Conditions of Use can, and should, be held unenforceable as a matter of law, without any need for the State's participation in the litigation.

2. Fastcase does not challenge any interest of the State

Lawriter mischaracterizes the relief requested by Fastcase in multiple ways.

First, Lawriter asserts (without reference to Fastcase's Complaint) that Fastcase "asks the District Court to declare unenforceable the State's chosen contractual mechanism for publishing the Regulations and paying the costs of publication." Brief of Appellee at 25. Not at all. Fastcase does not challenge any act of the State, and does not dispute the power of the State to enter into the contract it made with Lawriter. To the contrary, the conduct of Lawriter that is challenged in this action is in many ways contrary to and in violation of its contract with the State, which requires the web-based electronic version to be free to all without registration of any kind, and authorizes Lawriter to charge only for print sales - not for access:

> Lawriter shall make the Rules continuously and freely available twenty-four (24) hours a day, seven (7) days a week for viewing and searching by the general public via Internet connection; this shall be done at no charge and without the requirement of any passwords, codes, or registration requirements of any kind.
> . . . .

> **SALES BY LAWRITER.** Lawriter shall have the right to sell complete copies of the entire set of rules and regulations or individual chapters of the rules and regulations at such reasonable prices and terms that Lawriter may determine in its sole discretion.

Secretary of State Contract, Doc. 4-2 at 9, §§ D(1) and E.

Fastcase does not seek to limit in any way Lawriter's contractual right to sell copies of the Georgia Rules and Regulations, so this suit does not in any way implicate the State's interests.

Next, Lawriter asserts that Fastcase "sought to enjoin Lawriter and the SOS from impeding Appellant's ability to resell and profit from publication of the Regulations." Brief of Appellee at 26. Fastcase does not seek any relief from the State, and does not seek to impose any restraint on the State. The State is not doing anything to impede Fastcase from accessing and republishing the Georgia Regulations; only Lawriter is trying to do that. Accordingly, Fastcase seeks to enjoin Lawriter, not the State.

Third, Lawriter asserts (again without reference to Fastcase's Complaint) that Fastcase "has challenged the State's decision to delegate its statutory obligation and contractually engage Lawriter to 'compile, index, and publish in print or electronically' the Georgia Regulations." Brief of Appellee at 27. Again, not true. Nothing in the State's contract with Lawriter purports to grant to Lawriter any exclusive rights to the Georgia Regulations, or to any subset of them. This case challenges Lawriter's unilateral act of claiming exclusive publication rights

that the State did not grant it, not the State's authority to grant **non**exclusive publication rights.

Then, still without reference to Fastcase's Complaint, Lawriter asserts that Fastcase "has challenged the details of the contractual arrangement by which the SOS seeks to defray the costs of compiling, indexing, and publishing the Regulations, including Lawriter's ability to charge commercial users for access to the Georgia Regulations, thereby offsetting the amount of compensation paid to Lawriter by the SOS." Brief of Appellee at 27. Again, not true. The State did not, in fact, grant Lawriter the "ability to charge commercial users for access to the Georgia Regulations."

Nothing in the State's contract with Lawriter distinguishes between "commercial" and "non-commercial" users of either the online version or the printed version. Nor did the State authorize Lawriter to discriminate between "commercial" and other buyers of hard copies. What the State authorized Lawriter to sell, to offset the amount of compensation paid to Lawriter by the Secretary of State, was "complete copies of the entire set of rules and regulations or individual chapters of the rules and regulations." Secretary of State Contract, Doc. 4-2 at 9, § E. Fastcase does not dispute Lawriter's non-exclusive authorization to sell hard copies of the Georgia Regulations, in whole or in part.

Fifth, still without reference to Fastcase's Complaint, Lawriter asserts that

Fastcase "seeks to enjoin enforcement of the State's chosen contractual mechanism for publishing the Regulations and paying the costs of publication—including the Terms of Use, the State's chosen method of requiring those who commercially resell the Regulations to pay for copying them." As noted earlier, the State's "chosen contractual mechanism" (Secretary of State Contract, Doc. 4-2 at 8-12) requires Lawriter to publish the Georgia Regulations online without restriction, and contemplates recoupment of the cost of doing so only from the sale of hard copy compilations. *Id.* at 9, § E. The Secretary of State's contract with Lawriter does not provide any benefit to the State from Lawriter's efforts to extort payment from other publishers, so nothing in the claims Fastcase actually asserts in this action implicates or challenges any interest of the State of Georgia.

Fastcase does not contend that the State has done anything wrong here. Fastcase contends only that Lawriter has improperly and unlawfully tried to exploit its contract with the State to obtain rights that the State has not granted and cannot grant to it. A judgment in favor of Fastcase on every point would not interfere with the State in any way. Therefore, Rule 19(a)(1)(A) indicates that the action may proceed without joining the State. Rule 19(a)(1)(B) cannot apply, either, because the State does not claim any interest here, so judgment in this action could not "as a practical matter impair or impede the [State's] ability to protect" its interest in seeing the Georgia Regulations made available to the public. Lawriter

does not suggest that it faces any risk of "double, multiple, or otherwise inconsistent obligations."

B. The Action May Proceed Without the State

In the alternative, if the State of Georgia were indispensable, dismissal of Fastcase's complaint would still be inappropriate. Rule 19 does not absolutely require dismissal of actions when one or more of the circumstances listed in Rule 19(a)(1) is found to exist, but permits a court to proceed without the absent party if possible. Specifically, Rule 19(b) directs a court to determine whether a case should "in equity and good conscience" proceed, despite the fact that a required party cannot be joined, by weighing the following factors:

> (1) the extent to which a judgment entered in the nonparty's absence might prejudice the nonparty or existing parties;
>
> (2) the extent any prejudice might be avoided or lessened by protective provisions in the judgment, shaping the relief or other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate;
>
> and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R.Civ. Proc. 19(b).

Here, Lawriter has not made, and cannot make, any showing that a judgment rendered in the absence of the State would be inadequate or prejudice any party in any way, let alone in a way that could not be mitigated by other measures. Conversely, Fastcase would not "have an adequate remedy if the action were dismissed for nonjoinder." Accordingly, even if the District Court had reached this issue and determined that the State was a necessary party (which would have been yet another error if it had), balancing of the factors set forth in the Rule favors allowing this case to proceed on its merits among the current parties.

V. CONCLUSION

Despite Lawriter's tactical efforts to avoid adjudication by multiple changes of its presentation, Fastcase has alleged a controversy that not only is within the jurisdiction of the federal courts, but is within the exclusive jurisdiction of the federal courts. Dismissal for lack of federal subject matter jurisdiction was error, and should be reversed.

Respectfully submitted this 2nd day of January 2018.

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Certificate of Service

I hereby certify that on January 2, 2018, I electronically filed the foregoing **REPLY BRIEF OF APPELLANT FASTCASE, INC.** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record.

This 2nd day of January, 2018.

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