

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

CAMBRIDGE UNIVERSITY PRESS,  
OXFORD UNIVERSITY PRESS, INC.,  
and SAGE PUBLICATIONS, INC.,

Plaintiffs,

- vs. -

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

Defendants.

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

**PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE THE  
ADMISSION OF RECENTLY CREATED FAIR USE CHECKLISTS**

Plaintiffs Cambridge University Press, Oxford University Press, Inc., and SAGE Publications, Inc. (collectively, "Plaintiffs") hereby move under Rules 901 and 1002 of the Federal Rules of Evidence to preclude the admission of checklists which, although they apparently relate to reading materials distributed at Georgia State University (GSU) via ERes and uLearn during 2009, were not filled out by GSU instructors until late 2010 or early 2011 at the request of counsel for purposes of this litigation. Admission of what Defendants have characterized as "recreated"

checklists is foreclosed by Rule 1002, which requires the original writing to prove the content of the original (2009) checklists that the instructors claim to have lost or for some reason not retained. Admission of these later-created checklists is also foreclosed by Rule 901 because these checklists cannot reliably be authenticated as exact duplicates of the original checklists the instructors claim to have completed in 2009 (i.e., well over a year earlier).

Additionally, in those cases where the instructor admittedly did not complete any checklists in 2009 (in violation of GSU's copyright policy), the recently "recreated" checklists are not recreations at all, as there was no original checklist to be recreated. These later-created checklists are merely irrelevant records of how the instructor filled them out – at the request of counsel – in late 2010 or early 2011. These checklists are neither reliable nor authentic copies of the checklists the instructors *should have completed* at or about the time the material was posted on ERes in 2009 and thus are inadmissible under Rules 1002 and 901.

### **FACTUAL BACKGROUND**

This case focuses on copyright compliance at Georgia State University (GSU) after the implementation of its current copyright policy in February 2009. The Court has ordered that Defendants' activities during the May, Summer, and Fall 2009 academic terms be treated as representative of current activity under that

policy. The GSU copyright policy centers on a “Fair Use Checklist” that GSU faculty members are required to “[c]omplete and retain” for each “fair use” of a copyrighted work they propose to make available to students via the ERes or uLearn systems. Defendants’ Proposed Trial Exhibit 13 at 7, attached hereto as Exhibit A.<sup>1</sup> Under the policy, therefore, there should be a contemporaneously completed checklist for every reading posted to those systems.

In its November 5, 2010 Order, the Court directed Defendants to produce, *inter alia*, available checklists for each work identified in Plaintiffs’ August 20, 2010 filing. Order, Docket No. 240. Defendants’ initial production, on December 10, 2010, included sixteen so-called “recreated checklists,” a term Defendants failed to define for months but eventually explained (in response to numerous requests from Plaintiffs’ counsel) were checklists that instructors assertedly had completed in 2009 but now were unable to locate. According to Defendants’ counsel, the instructors “recreated” the checklists to “comport with the previously completed but unlocated checklist[s].” Letter from S. Schaetzel to R. Singer, dated March 4, 2011, Exhibit 1 to the Declaration of Todd D. Larson in Support of Plaintiffs’ Motion *In Limine*, dated April 29, 2011, attached hereto as Exhibit B.

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<sup>1</sup> The Policy further instructs that “instructors must complete a copy of the fair use checklist *before* submitting material for electronic reserves.” Defendants’ Proposed Trial Exhibit 13 at 9 (emphasis added).

Defendants' subsequent production of additional documents in the early months of 2011 included yet more fair use checklists, many of which were dated November 2010 – more than fifteen months after the corresponding reading material was posted on ERes – even though GSU's copyright policy expressly requires that a checklist be completed *before* a reading is posted. *See supra* note 1.

Deposition testimony from the instructors revealed the following:

- In many cases, the instructors who supposedly “recreated” one or more checklists in 2010 or 2011 never completed checklists at the time the reading was placed on ERes in 2009, such that the proffered checklists are not, in fact, recreations of any original document. *See, e.g.*, Deposition of Carrie Freeman at 28:11-32:21 (Exhibit C);<sup>2</sup> Deposition of N. Lee Orr at 8:10-10:3; 76:4-76:12 (Exhibit D); Deposition of Louis Ruprecht at 13:7-14:22; 44:9-25 (Exhibit E); Deposition of Marni Davis at 26:17-22; 53:6-13; 67:17-68:6; 80:13-23 (Exhibit F); Deposition of John M. Murphy at 39:15-19, 48:10-12 (Exhibit G); Deposition of Charles Hankla at 36:5-37:17 (Exhibit H).
- Even instructors who did create checklists in 2009 acknowledged at their depositions that they could not be sure the later-created checklists accurately duplicated the misplaced or discarded originals. *See, e.g.*, Deposition of Patricia Dixon at 84:5-25 (Exhibit I); Deposition of Karen Petruska at 30:23-31:24 (Exhibit J); Deposition of Ann C. Kruger at 79:12-25 (Exhibit K).
- A number of checklists bearing a 2009 date were in fact created in 2010 or 2011. *See, e.g.*, Deposition of N. Lee Orr at 91:21-92:6 (Exhibit D); Deposition of John M. Murphy at 44:21-46:16, 48:10-12 (Exhibit G); Deposition of Ann C. Kruger at 23:1-17 (Exhibit K); Deposition of Dennis Gainty at 21:13-22:22 (Exhibit L).

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<sup>2</sup> Exhibits C to L, which provide excerpts of deposition testimony, are attached to this motion.

In all, of the checklists produced relating to alleged infringements on the parties' March 15, 2011 Joint Filing, at least forty-two appear to have been completed solely for use in this litigation long after the reading in question was placed on ERes.<sup>3</sup>

### **ARGUMENT**

Rule 1002 of the Federal Rules of Evidence provides that to “prove the content of a writing . . . the original writing . . . is required.” Fed. R. Evid. 1002. The purpose of the rule is “to promote accurate fact-finding.” 31 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 7182 at 366 (2000). Consequently, evidence other than the original may be excluded. *Id.* § 7183 at 379. Although there are some exceptions to this rule, such as photocopies, accurate fact-finding is jeopardized where the recreated evidence raises the possibility of deviation from the original. *See, e.g., Fountain v. United States*, 384 F.2d 624, 630 (5th Cir. 1967) (holding that trial court did not err in excluding re-recording of conversation that altered original to eliminate mechanical interference on the ground that it “could not be accurately determined

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<sup>3</sup> Because Plaintiffs have not been able to depose every instructor on the Joint Filing, it is possible that other checklists bearing a 2009 date were also recreated (or created for the first time) in 2010 or 2011.

whether the copy in fact accurately reproduced the conversations transcribed on the original”).<sup>4</sup>

Rule 1002 clearly precludes the admission of the later-created checklists in this case. By definition, these checklists are not the originals; in some cases, indeed, there never was an original. Even where an original checklist *was* completed, moreover, the later-created checklists – filled out more than a year after the works in question were posted on ERes – are inherently unreliable. There is no way for the Court to know whether the recreation of a checklist requiring the instructor to consider more than forty subfactors and to check or not check forty-plus boxes accurately reflects the choices made and boxes checked by the instructor well over a year earlier. Instructor after instructor has admitted under oath that he or she could not be sure the recreations accurately reflect the original (if one existed) in every respect. Indeed, one professor produced two differing recreations of the same checklist – meaning at least one of them differs from the original. *See* Dixon Dep. at 109:11-113:17 (Exhibit I).

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<sup>4</sup> Courts have recognized that adherence to Rule 1002 also protects against fraud, as, in the absence of the original, “a witness may lie with impunity about the original’s contents because the risk of detection is small.” 31 WRIGHT & GOLD, *supra*, § 7182 at 368. *See United States v. Howard*, 953 F.2d 610, 613 (11th Cir. 1992) (stating that the best evidence rule “is intended to prevent fraud in proving the contents of documents”).

For the same reasons, the later-created checklists are also inadmissible under Rule 901, which provides that authentication is “a condition precedent to admissibility.” Fed. R. Evid. 901. This condition requires evidence “sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* at 901(a). The later-created checklists, however, are self-evidently *not* what Defendants claim (the supposedly “unlocated” originals) but, rather, litigation-driven attempts at reconstructing missing checklists that instructors were required, but failed, to complete and retain.

Although Rule 901 can be satisfied by the testimony of a witness with first-hand knowledge, *see id.* 901(b)(1), GSU instructors cannot possibly authenticate the “recreated” checklists as accurate copies of the originals (particularly where no such original actually existed) even if they attempted in good faith to recreate the original accurately. Deposition or trial testimony more than 18 months after the original checklist should have been completed to the effect that a recently created checklist accurately reflects how that checklist, with its forty-plus subfactors, was completed back in 2009 is too unreliable to authenticate the checklists. *See Ona Corp. v. Nat’l Labor Relations. Bd.*, 729 F.2d 713, 722 (11th Cir. 1984). As noted above, the instructors admitted as much – including, in several cases, that the recreations were *not* faithful efforts at recreating what the instructor did in 2009

but, rather, a record of how, at the time of “recreation,” the instructor believed the checklist should be filled out. *See, e.g.*, Deposition of Patricia Dixon at 84:5-25 (Exhibit I); Deposition of John M. Murphy at 59:4-16 (Exhibit G); Deposition of Carrie Freeman at 32:8-16 (Exhibit C).

Rules 1002 and 901 exist to prevent precisely this sort of after-the-fact manufacturing of evidence. This evidentiary bar is important given that Defendants’ merits defense relies on a policy that places full responsibility for fair use determinations on GSU instructors and requires them to fill out fair use checklists *prior* to distributing materials to students. These checklists – which were created specifically for this litigation – simply have no probative value as to a fundamental aspect of Defendants’ case: how instructors made fair-use determinations before they distributed Plaintiffs’ works to students in 2009. Admitting them would unavoidably compromise and muddy the trial record as to what the instructors did during 2009, including how many contemporaneously completed checklists actually exist and how often and how well the GSU “complete and retain” policy actually was followed. The Federal Rules of Evidence require the exclusion of all later-created checklists to promote accurate fact-finding and avoid prejudicing Plaintiffs in these respects.

## CONCLUSION

For the foregoing reasons, the Court should preclude the admission of all recreated checklists.

Respectfully submitted, this 29th day of April, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day filed the foregoing **PLAINTIFFS'**  
**MOTION *IN LIMINE* TO PRECLUDE THE ADMISSION OF RECENTLY**  
**CREATED FAIR USE CHECKLISTS** with the Clerk of Court using the  
CM/ECF filing system which will automatically send e-mail notification of such  
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This 29th day of April, 2011.

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