

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

CAMBRIDGE UNIVERSITY PRESS,
et al.,

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

In accordance with this Court's May 3, 2011 Order, Defendants in the above-captioned matter hereby file this brief in opposition to "Plaintiffs Motion *In Limine* to Preclude the Admission of Recently Created Fair Use Checklists" (the "Motion," Dkt. 274).

During the course of discovery, Defendants' counsel learned that certain GSU professors had filled out the Fair Use Checklists in the 2009 timeframe for

works they intended to load to GSU's electronic reserve system, but in some cases they were unable to find the 2009 checklists (despite having kept a copy of them), or in other cases, they did not keep a copy of their 2009 checklists. These professors were asked to "recreate" the checklists as they originally completed them in the 2009 timeframe to reflect the fair use analysis they performed in 2009.

Plaintiffs now seek to preclude the admission of these recreated checklists, claiming that the recreated checklists cannot be authenticated under Federal Rule of Evidence 901 or admitted under Federal Rule of Evidence 1002 to prove the contents of the original 2009 checklists.

Plaintiffs' request, however, is based on a misapplication of these Federal Rules of Evidence. The GSU professors who recreated the checklists can seemingly authenticate them for what they are -- recreations of the fair use analyses performed by the GSU professors in 2009 using the Fair Use Checklist. In addition, these recreated checklists are admissible at least under Federal Rule of Evidence 1004, which provides that other evidence of the contents of a writing is admissible if the originals are lost or have been destroyed and there is no evidence of bad faith, as is the case here. Accordingly, Plaintiffs' Motion should be denied.

BACKGROUND

On November 5, 2010, this Court ordered that Defendants produce available Fair Use Checklists relevant to Plaintiffs' copyright infringement allegations. (*See* Dkt. 240). As directed, GSU personnel sought to collect from its professors all relevant checklists.

GSU collected numerous original checklists as part of this collection effort. GSU also determined that a number of professors had used the Fair Use Checklist in 2009 to determine if their proposed use of a given excerpt was a fair use before posting the materials electronically, but either had not retained a copy of the analysis or indicated they had retained a copy, but could not locate it when requested to produce it for this litigation.

Professors who used the checklist in 2009 but did not have the checklist(s) available for production in November 2010 could not provide them to counsel for a variety of reasons. Dr. Jennifer Esposito, for example, could not locate her 2009 fair use checklists for one of three courses at issue in this case: EPRS8520 Qualitative Research in Education III, taught in Fall 2009. (*See* Dep. Tr. of Jennifer Esposito at 28:6-11, 36:15-18, 93:1-96:4 (Exhibit A)). Dr. Esposito did provide original checklists for eight other alleged uses related to two other courses. Dr. Esposito testified that she believes she may not have retained the EPRS8520

checklists because she did not, in the end, use the excerpts in her course. (*See id.*). In fact, when the library was unable to locate the works in its collection, she did not deliver her copy of the works to the library to be used after she submitted the initial request for the library to post the excerpts on EReserves.

By way of further example, Dr. Kruger indicated that she filled out the checklist electronically in pdf form and printed a copy of the checklist because she was unable to save the completed form, but then was unable to find her printed copies. (*See Kruger Dep. Tr. at 23:11-24:4 (Exhibit B)*). And, Dr. Gainty testified that he discarded the checklist after the course was cancelled. (*See Gainty Dep. Tr. at 22:23-23:8 (Exhibit C)*).

Dr. Lee Orr, by contrast, stated that he did not physically mark the checklist, but rather, used the checklist to analyze whether his proposed uses were fair uses without physically marking a copy. (*See Orr Dep. Tr. at 8:22-9:25 (Exhibit D)*). Thus, he did not have a physical copy to retain. (Dr. Orr noted during his deposition that he now understands he is to mark a physical copy of the checklist and retain it.

Upon discovering that some professors had not complied with the retention requirements of the policy (such as the retention of a copy of the completed checklist), GSU asked that each professor who indicated he or she had completed a

checklist prior to posting the subject excerpt, recreate the checklist as closely as possible to the way it was completed at the time the work was posted,¹ and retain the recreated checklist in accordance with the current Copyright Policy.²

Because the recreated checklists met the definition of available checklists under the Court's November 5, 2010 Order, those checklists were produced to Plaintiffs.

The recreated checklists, as Plaintiffs note, are not uniform. Some bear the date of recreation, and others bear the date the professor initially conducted the fair use analysis for the work, prior to placing the material on electronic reserve (*i.e.*, some bear a 2009 date and others bear a 2010 or 2011 date). Plaintiffs suggests that this is a misrepresentation. (*See* Dkt. 274 at 4-5). That is untrue. As the deposition testimony shows, some professors appropriately denominated a recreated checklist with the date they first conducted the fair use analysis for the excerpt at issue. (*See, e.g.*, Pls.' Mot. at Ex. G (Dkt. 274-7) at 45:24-46:16). That

¹ Plaintiffs imply that the recreated checklists indicate that the professors did not conduct a fair use analysis in 2009. (*See* Dkt. 274 at 4). To the contrary, GSU only instructed professors to recreate checklists in instances where, to its knowledge, a fair use analysis was actually conducted using the checklist in 2009.

² The recreated checklists were solicited to impress upon professors the requirements of the 2009 Copyright Policy and ensure that, as best as possible, the documentation dictated by the 2009 Copyright Policy is maintained.

date was accurate because the analysis was first conducted at that time and that was the term in which the excerpt was to be used. In other cases, professors thought it appropriate to mark the recreated checklist with the date of re-creation. This, too, was accurate in that it designated the date on which the professor's recollection of the 2009 analysis was recorded. Plaintiffs' counsel was informed that a checklist had been recreated, whether it bore a 2009 or 2010 or 2011 date, because it was designated as recreated when produced to Plaintiffs. (*See, e.g.*, 12/10/2010 email from K. Quicker to Plaintiffs' counsel attaching recreated checklists (Exhibit E)).

Whichever date they bear, the recreated checklists are what they purport to be: *recreations of the analyses conducted at the time the professors decided to post the subject materials to ERes*. Defendants have not represented the recreated checklists to Plaintiffs, nor would they represent them to the Court, as the original checklists from 2009.

ARGUMENT AND CITATION OF AUTHORITIES

I. PLAINTIFFS' ATTEMPT TO CAST PROFESSORS' RECREATED CHECKLISTS AS INADMISSIBLE UNDER THE BEST EVIDENCE RULE MISCONSTRUES THE NATURE OF THE RECREATED CHECKLISTS AND THEIR POTENTIAL USE AT TRIAL.

Plaintiffs have incorrectly characterized the recreated checklists as duplicates (within the meaning of Rule 1002) of the original checklists completed

in 2009. (*See* Dkt. 274 at 2, 5-6). They are not. Although the recreated checklists document, as best as possible, the fair use analyses conducted by professors in 2009, Defendants have not, as Plaintiffs claim, represented that the recreated checklists are “exact duplicates” of the original checklists that “reflect the original . . . in every respect,” or are themselves “originals.” (*See* Dkt. 273 at 2, 5-6).

Rather, the recreated checklists are the professors’ good faith attempts to document the analyses they completed in 2009 prior to posting excerpts of the works at issue on GSU’s electronic reserves systems. The checklists were recreated under instruction from GSU when the university discovered that professors had used the Fair Use Checklist to complete their fair use analyses for excerpts relevant to this litigation, but did not retain or could not in November 2010 locate copies of those checklists. Once re-created, those checklists met the parameters of this Court’s November 5, 2010 Order (Dkt. 240) and were properly produced. As mentioned, where Defendants’ counsel was aware that a checklist had been recreated, it was identified to Plaintiffs as a recreation, separate and apart from photocopies of original checklists completed in 2009. (*See* Exhibit E).

A. Defendants have not represented the recreated checklists as originals and do not intend to do so.

Plaintiffs’ argument that the recreated checklists are duplicate originals that fall within Federal Rule of Evidence 1002 misconstrues the nature of the recreated

checklists. Defendants have not represented to Plaintiffs that the recreated checklists are the original checklists completed in 2009. Accordingly, Plaintiffs' arguments for exclusion on this ground are unfounded.

B. Even where Federal Rule of Evidence 1002 applies, another writing can evidence an original's content if the original is lost or destroyed.

Federal Rule of Evidence 1002 provides that “[t]o prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by Act of Congress.” Federal Rule of Evidence 1004 then provides that “[t]he original is not required, and other evidence of the contents of a writing . . . is admissible if . . . [a]ll originals are lost or have been destroyed,” so long as the proponent did not lose or destroy the originals in bad faith. Fed. R. Evid. 1004(1). Plaintiffs have not asserted that original checklists were lost or destroyed in bad faith, and they were not. Accordingly, in the absence of the original 2009 checklists, professors' recreated checklists can evidence the content of the original checklists under Federal Rule of Evidence 1004(1).

C. Federal Rule of Evidence 1002 also does not dictate exclusion of the recreated checklists as evidence of other matters.

Plaintiffs ignore other purposes for which the recreated checklists may be introduced. For example, a recreated checklist could evidence a professor's familiarity with the Fair Use Checklist. Even if the Court were to determine that

the recreated checklists should be excluded for some limited uses, it should not exclude them from all uses.

II. FEDERAL RULE OF EVIDENCE 901 IS, AT THIS JUNCTURE, IRRELEVANT.

Federal Rule of Evidence 901(a) provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” By way of example, Federal Rule of Evidence 901(b)(1) states that authentication or identification can be provided by testimony of a witness with knowledge “that a matter is what it is claimed to be.” Fed. R. Evid. 901(b)(1).

Plaintiffs proclaim that the recreated checklists “are self-evidently *not* what Defendants claim” (Dkt. 274 at 7), and argue that professors therefore cannot authenticate them as such. But Plaintiffs wrongly characterize what Defendants supposedly claim the recreated checklists to be, creating an oddly circular and incorrect argument. In fact, each authoring professor could seemingly authenticate at trial her own recreated checklist as her documentation of her own 2009 fair use analysis, as recalled in 2010 or 2011, and created at the direction of GSU.

Plaintiffs also argue about the weight that this Court should give to professors’ recreated checklists. This argument as to the weight of the evidence,

presented under the guise of a Rule 901 authentication argument, is best considered at trial, upon a showing of all the evidence.

For the reasons set forth above, Plaintiffs' Federal Rule of Evidence 901 argument, like their Federal Rule of Evidence 1002 argument, fails.

III. PLAINTIFFS INCORRECTLY CLAIM THAT PROFESSORS “RECREATED” CHECKLISTS FOR FAIR USE ANALYSES THAT THEY NEVER PERFORMED IN 2009.

Plaintiffs contend that professors who provided recreated checklists did not complete a fair use analysis in accordance with the 2009 Copyright Policy prior to selecting the posted excerpts or distributing them to students. (*See* Dkt. 274 at 3 n.1, 4, 8). Only professors who said they had completed the fair use checklist in 2009 prior to posting electronic copies of the materials were instructed by the university to recreate such checklists and retain the recreations in accordance with the Policy. In fact, even professors who indicated that they used the Fair Use Checklist to conduct their fair use analysis were *not* asked to recreate their analysis on paper, if they did not physically mark a checklist in 2009. Dr. Orr is one such example. Accordingly, Plaintiffs' claim that Defendants are manufacturing evidence after-the-fact is misplaced. (*See* Dkt. 274 at 8).

CONCLUSION

Plaintiffs' Motion misconstrues the nature and purpose of the recreated checklists, and then applies an incorrect evidentiary analysis. Neither Federal Rule of Evidence 1002, nor Federal Rule of Evidence 901, is negatively implicated by the admission of the recreated fair use checklists. Nor does it seem plausible that this Court would be confused by the admission of these checklists, or that the trial record would be "unavoidably compromise[d] and mudd[ied]" such that exclusion is required "to promote accurate fact-finding and avoid prejudicing Plaintiffs." (*See* Dkt. 274 at 8). For the reasons stated herein, Defendants respectfully submit that Plaintiffs' Motion should be denied.

Respectfully submitted, this 9th day of May, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1D of the Local Rules of the Northern District of Georgia, counsel for Defendants certifies that the foregoing **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE THE ADMISSION OF RECENTLY CREATED FAIR USE CHECKLISTS** was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1C.

s/ Mary Katherine Bates

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of May, 2011, I have electronically filed the foregoing **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE THE ADMISSION OF RECENTLY CREATED FAIR USE CHECKLISTS** with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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