

**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' CORRECTED 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 corrected 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 who had used the Fair Use Checklists in the 2009 timeframe for

works they intended to load to GSU's electronic reserve system, 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. Accordingly, professors were asked to "recreate" the checklists 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 professors who had used the fair use checklists in 2009 prior

to posting electronic copies of the materials, but who did not keep or could not locate them, to recreate such checklists¹ and retain the recreations (the Policy specifying the checklist should be retained).² Defendants timely notified Plaintiffs that some of the checklists were recreations (some are dated 2010 or 2011), and segregated those known to be recreations.

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

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.

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 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 known) 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). However, GSU only asked professors who had used the fair use checklists in 2009 prior to posting electronic copies of the materials, but who did not keep or could not locate them, to recreate such checklists. 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 11th day of May, 2011.

SAMUEL S. OLENS
Georgia Bar No. 551540
Attorney General

R. O. LERER
Georgia Bar No. 446962
Deputy Attorney General

DENISE E. WHITING-PACK
Georgia Bar No. 558559
Senior Assistant Attorney General

MARY JO VOLKERT
Georgia Bar No. 728755
Assistant Attorney General

s/ Mary Katherine Bates
Stephen M. Schaezel
Georgia Bar No. 628653
Mary Katherine Bates
Georgia Bar No. 384250
KING & SPALDING LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100

Anthony B. Askew
Special Assistant Attorney General
Georgia Bar No. 025300
211 Townsend Place
Atlanta, GA 30327
Telephone: (404) 262-7981

Katrina M. Quicker
Georgia Bar No. 590859
BALLARD SPAHR LLP
999 Peachtree Street, Suite 1000
Atlanta, GA 30309-3915
Telephone: (678) 420-9300
Facsimile: (678) 420-9301
Email: quickerk@ballardspahr.com

Attorneys for Defendants

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' CORRECTED 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
Mary Katherine Bates

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

CAMBRIDGE UNIVERSITY PRESS,
et al,

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of May, 2011, I have electronically filed the foregoing **DEFENDANTS' CORRECTED 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:

Edward B. Krugman
krugman@bmelaw.com
Georgia Bar No. 429927
Corey F. Hirokawa
hirokawa@bmelaw.com
Georgia Bar No. 357087
John H. Rains IV
rains@bmelaw.com
Georgia Bar No. 556052

BONDURANT, MIXSON &
ELMORE, LLP
1201 West Peachtree Street N.W.
Suite 3900
Atlanta, GA 30309
Telephone: (404) 881-4100
Facsimile: (404) 881-4111

R. Bruce Rich
Jonathan Bloom
Randi Singer
Todd D. Larson

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

s/ Mary Katherine Bates
Mary Katherine Bates

EXHIBIT A

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

CAMBRIDGE UNIVERSITY)	
PRESS, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Civil Action File
)	No. 1:08-CV-1425-ODE
MARK P. BECKER, in his)	
official capacity as)	
Georgia State University)	
President, et al.,)	
)	
Defendants.)	

- - -

Videotaped deposition of JENNIFER ESPOSITO,
PH.D., taken on behalf of the plaintiffs, pursuant to
the stipulations contained herein, before Teresa Bishop,
RPR, RMR, CCR No. B-307, at 104 Marietta Street, SB-2
Conference Room, Atlanta, Georgia, on Thursday, February
3, 2011, commencing at the hour of 9:09 a.m.

Shugart & Bishop
Certified Court Reporters
Suite 140
13 Corporate Square
Atlanta, Georgia 30329
(770) 955-5252

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1 A. Yes.

2 Q. And this indicates that there were it looks
3 like 22 students in the class. Is that accurate, to
4 your recollection?

5 A. Yes.

6 Q. Can you turn to the second page which is a
7 similar printout for the fall semester of 2009. This
8 appears to indicate that you taught a class called EPRS
9 8520 in the fall semester. Does that square with your
10 recollection?

11 A. Yes.

12 Q. And is it correct that you had 14 students in
13 the class?

14 A. Yes.

15 Q. Let me give you a document identified as
16 Esposito 3. Do you recognize this as your syllabus from
17 the EPSF 8280 class that we were just --

18 A. Yes.

19 Q. -- discussing from the summer of 2009?

20 A. Yes.

21 Q. Is it a graduate course or an undergrad
22 course?

23 A. Graduate.

24 Q. And if you turn to page 2 there's -- you'll
25 see about four lines down a star, additional readings

1 Q. Would you have reason to believe that the work
2 was not made available and hit 62 times during that
3 semester?

4 A. I don't believe I said that with Gordon. I
5 think I said that I thought the one that wasn't made
6 available was Tedlock.

7 Q. Yeah, I'm not trying to suggest otherwise. I
8 think, correct me if I'm wrong, you just couldn't recall
9 with the Gordon one way or the other, that is right?

10 A. That's correct.

11 Q. And do you have any reason to believe that the
12 work wasn't made available and hit 62 times during that
13 time range?

14 A. No.

15 Q. All right. Let's turn to Esposito 4. Do you
16 recognize this as the syllabus for EPRS 8520 from the
17 fall of 2009 semester?

18 A. Yes.

19 Q. Can you take a look at page 4 for me. Is it
20 correct that the entries where you provide the full
21 title of the excerpt and book are EReserves entries, for
22 example, the Corrine Glesne and Denzin and Lincoln?

23 A. Yes. Some are full text articles that the
24 library owns a license to. The majority of them are
25 full text articles that the library owns a license to.

1 Q. Can you look back at Esposito 4 for me.
2 That's the syllabus for the fall 2009 course.

3 A. Yes.

4 Q. Do you know whether you completed -- I'm
5 sorry. If you could turn to page 5.

6 Do you know whether you completed the
7 checklist for the Charmaz excerpts that are identified
8 here?

9 A. I did.

10 Q. You did. And do you still -- is that still in
11 your possession?

12 A. I don't believe it is. I removed that from
13 the course reserves, so because I didn't require it I
14 may have discarded it.

15 Q. You say you may have. Do you know whether you
16 did or didn't discard it?

17 A. I'm not sure.

18 Q. So you did do a checklist, but you don't know
19 sitting here whether you have it or not?

20 A. Yes.

21 MR. LARSON: All right. We'd request a
22 copy of that, Tony, if it does exist.

23 MR. ASKEW: You can include that in your
24 letter to me about what you'd like to have.

25 BY MR. LARSON:

1 Q. If you can flip to page 8. There are entries
2 there we discussed for the 11/19 column or row for the
3 "Handbook Of Mixed Methods" and the Creswell and Clark
4 entries, do you see those?

5 A. Yes.

6 Q. Did you complete checklists for those works?

7 A. Yes.

8 Q. And do you know whether you have those in your
9 possession or not?

10 A. Again, these were, as I said, removed from my
11 requirement, my required reading, so they were not put
12 on reserve so I don't think I have the checklists.

13 Most likely if I did not send my checklist to
14 legal affairs, then I don't have those checklists. If I
15 removed it from the syllabus, you know, there was no
16 point to continue holding on to it because they weren't
17 made available to students.

18 Q. Do you recall actually affirmatively deleting
19 your copy of those checklists?

20 A. I don't recall.

21 Q. Okay. So you may have and you may not?

22 A. Well, when you say delete, I don't do it
23 online. I print them out and do hard copies.

24 Q. So do you recall affirmatively throwing away
25 your hard copies of the checklists for those two works?

1 A. I don't recall.

2 Q. So you may have them or you may not, you just
3 don't know?

4 A. Most likely I don't because when I was asked
5 to send my checklists to legal affairs, I looked through
6 my files.

7 Q. And they -- these checklists had you retained
8 them would be in those files?

9 A. Most likely. I mean, my office is a mess,
10 they could be other places.

11 Q. And if you could turn to page 9, Anfara,
12 Vincent and Mertz entry there. Did you complete a
13 checklist for those works?

14 A. Yes.

15 Q. And same question, do you have that in your
16 possession?

17 A. Not with me, no.

18 Q. I mean your possession at your office or home
19 or wherever.

20 A. Again, I'm not sure.

21 Q. Same, for the same reason you've described for
22 the others?

23 A. Yes. Those were not -- this was not required
24 by the students, so I removed it from course reserves.

25 Q. And possibly then discarded the checklist you

1 had filled out?

2 A. I might have.

3 Q. Or you might still have it?

4 A. (Nods head affirmatively.)

5 Q. Okay. Let me give you what's been marked as
6 Exhibit 18. Do you recognize this as the -- sorry.
7 Strike that.

8 Do you recognize this as the declaration you
9 completed in this case last April?

10 A. Yes.

11 Q. Tell me how did it come about that you
12 submitted this declaration?

13 A. I was asked to by someone from legal affairs.

14 Q. Who was that?

15 A. I don't remember.

16 Q. And then what happened, did you sit down and
17 draft it or have a conversation or how did the process
18 work?

19 A. I honestly don't remember.

20 Q. Did you write this declaration or was it
21 drafted and then you signed off on it?

22 A. I think it was -- I don't think I -- yeah, I
23 think I signed off on it after I was asked questions and
24 asked to make statements about my answers to the
25 questions. So I think someone was, you know, like

EXHIBIT B

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

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

CIVIL ACTION FILE

Plaintiffs,

NO. 1:08-CV-1425-ODE

vs.

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

Defendants.

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VIDEOTAPE DEPOSITION OF  
ANN CALE KRUGER, Ph.D.

April 22, 2011

2:56 p.m.

Conference Room 16-K  
1180 Peachtree Street, N.E.  
Atlanta, Georgia

S. Julie Friedman, CCR-B-1476

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APPEARANCES OF COUNSEL

On behalf of the Plaintiffs:

WEIL, GOTSHAL & MANGES  
JONATHAN BLOOM, ESQ.  
767 Fifth Avenue  
New York, New York 10153  
212.310.8775  
212.310.8007 Fax  
jonathanbloom@weil.com

On behalf of the Defendants:

KING & SPALDING LLP  
NATASHA HORNE MOFFITT, ESQ.  
1180 Peachtree Street, N.E.  
Atlanta, Georgia 30309-3521  
404.572.2783  
404.572.5134 Fax  
nmoffitt@kslaw.com

Also Present:

Henry Stewart, Videographer

1 Q. The date on this particular checklist,  
2 Kruger TX-2, is fall 2009. Do you see that?

3 A. I do.

4 Q. Did you complete a version of this  
5 checklist in the fall of 2009?

6 A. I did.

7 Q. With respect to the specific copy, Kruger  
8 TX-2, dated fall 2009, is this a copy of your  
9 original checklist?

10 A. No.

11 Q. Can you explain. Is this a -- Is it a  
12 re-creation of your original checklist?

13 A. It is.

14 Q. And why did you re-create your original  
15 checklist?

16 A. Excuse me. I could not locate my printed  
17 copy.

18 Q. Did you believe you kept a printed copy of  
19 the checklist?

20 A. I did.

21 Q. What -- What is the basis for your  
22 belief?

23 A. It's my practice to complete the checklist  
24 on my computer. However, the version of Adobe that I  
25 have doesn't allow me to save it as a completed form.

1 It, therefore, has to be printed out in order to  
2 save. There's no other way to save it.

3 So I printed it out and saved it, but I  
4 could not put my hands on it.

5 Q. Why did you fill out this checklist back  
6 in the fall of 2009 when you completed the original  
7 version?

8 A. It's part of the procedure that we  
9 undertake when we are creating Ereserves to complete  
10 a checklist for each item that we want to put on  
11 Ereserves.

12 Q. And is that pursuant to any kind of  
13 directive or policy?

14 A. It's a policy. It's a requirement.

15 Q. And when you re-created this checklist,  
16 TX-2, Kruger TX-2, did you make an effort to fill it  
17 out in the same way that you filled it out prior to  
18 your fall 2009 --

19 A. I did.

20 Q. -- course?

21 A. I did.

22 Q. And when you originally filled out the  
23 checklist in the fall of 2009 timeframe, did you make  
24 a good-faith effort to conduct a fair use analysis in  
25 accordance with the checklist?

# **EXHIBIT C**

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

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

Plaintiffs,

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

-v.-

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

Defendants.

---

Videotaped deposition of  
DENIS CHARLES GAINTY, Ph.D., taken on behalf of the  
defendants, pursuant to the stipulations contained  
herein, before Carole E. Poss, RDR, CRR, Certified  
Court Reporter, at 1180 Peachtree Street, NE, Atlanta,  
Georgia, on the 20th day of April, 2011, commencing at  
the hour of 10:13 a.m.

---

SHUGART & BISHOP  
Certified Court Reporters  
13 Corporate Square  
Suite 140  
Atlanta, Georgia 30329  
(770) 955-5252

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## INDEX TO EXHIBITS

## Defendants' Exhibit

## Gainty TX

1 Syllabus, Cross-Cultural Encounters in  
World History

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2 Fair use checklist

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## Plaintiffs' Exhibit

## Gainty PX

1 Policy on the Use of Copyrighted Works in  
Education and Research

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2 Excerpt from The Cambridge History of China,  
volume 8, part 2

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3 Portion of e-reserve report relating to  
Dr. Gainty's HIST 4820 course

58



1 APPEARANCES OF COUNSEL:

2 On behalf of the Plaintiffs:

3 JONATHAN BLOOM, ESQ.  
4 Weil, Gotshal & Manges LLP  
5 767 Fifth Avenue  
6 New York, New York 10153-0119

7 On behalf of the Defendants:

8 NATASHA H. MOFFITT, ESQ.  
9 King & Spalding LLP  
10 1180 Peachtree Street, NE  
11 Atlanta, Georgia 30309-3521

12 Also Present:

13 Elizabeth Kemp, Videographer

14 - - -

15 THE VIDEOGRAPHER: We're now on the video  
16 record. This is the beginning of tape number 1.  
17 This is the videotaped deposition of Denis Gainty  
18 taken by the defendants in the matter of Cambridge  
19 University Press, Oxford University Press,  
20 Incorporated, and Sage Publications, Incorporated,  
21 versus Mark P. Becker, in his official capacity as  
22 Georgia State University president, et al.

23 Madam Court Reporter, would you please swear  
24 in the witness.

25 (Witness sworn.)

MR. BLOOM: I'd like to make an objection on

1 that particular work?

2 A Yes.

3 Q What informs you on this checklist that this  
4 checklist, in particular, relates to that particular  
5 work?

6 A I can read my name, the name of the course,  
7 the author and publisher and portions to be used, the  
8 page numbers. All of those match the work in question.

9 Q When -- did you fill out this checklist?

10 A I did.

11 Q When did you fill out this fair use  
12 checklist?

13 A I filled out this fair use checklist in the  
14 last few months.

15 Q Now, in the upper right-hand corner it's  
16 dated August 1, 2009. Do you see that?

17 A Yes.

18 Q What does that date reflect?

19 A I tried, as best I could, to the best of my  
20 ability, to recreate the fair use checklist that I  
21 would have filled out and I believe I did fill out for  
22 the fall 2009 semester.

23 Q You stated that you recreated the checklist.  
24 Can you explain why you recreated the checklist?

25 A I did not have any longer a copy of the fair

1 use checklist that I completed for 2009.

2 Q And why not? Why did you no longer have a  
3 copy of that checklist?

4 A I discarded it.

5 Q Why?

6 A I believed that because the course was  
7 canceled after one class meeting, it was not necessary  
8 to retain the fair use checklist.

9 Q And can you explain why you went about  
10 recreating this checklist?

11 A I was informed that there was a lawsuit and  
12 asked by the Office of Legal Affairs at Georgia State  
13 to recreate this checklist.

14 Q And when you recreated the checklist, did you  
15 make an effort to fill it out in the same way that you  
16 filled it out in the office -- or in the 2009 time  
17 frame before the course started?

18 A Yes.

19 Q When you originally filled this particular  
20 checklist out in the 2009 time frame, did you make a  
21 good faith effort to conduct a fair use analysis in  
22 accordance with the checklist?

23 A Yes.

24 Q And this particular checklist, Gainty TX 2,  
25 relates to which pages of the "Sino-Korean Tributary

# **EXHIBIT D**

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

|                          |   |                      |
|--------------------------|---|----------------------|
| CAMBRIDGE UNIVERSITY     | ) |                      |
| PRESS, et al.,           | ) |                      |
|                          | ) |                      |
| Plaintiffs,              | ) |                      |
|                          | ) |                      |
| vs.                      | ) | Civil Action File    |
|                          | ) | No. 1:08-CV-1425-ODE |
| MARK P. BECKER, in his   | ) |                      |
| official capacity as     | ) |                      |
| Georgia State University | ) |                      |
| President, et al.,       | ) |                      |
|                          | ) |                      |
| Defendants.              | ) |                      |

- - -

Videotaped deposition of N. LEE ORR, Ph.D.,  
taken on behalf of the plaintiffs, pursuant to the  
stipulations contained herein, before Teresa Bishop,  
RPR, RMR, CCR No. B-307, at 104 Marietta Street, SB-2  
Conference Room, Atlanta, Georgia, on Friday, February  
4, 2011, commencing at the hour of 12:66 p.m.

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Shugart & Bishop  
Certified Court Reporters  
Suite 140  
13 Corporate Square  
Atlanta, Georgia 30329  
(770) 955-5252

## I N D E X

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25Examinations Page

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1 APPEARANCES OF COUNSEL:

2  
3 FOR THE PLAINTIFFS:

4  
5 TODD D. LARSON  
6 ATTORNEY AT LAW  
7 WEIL GOTSHAL & MANGES  
8 767 FIFTH AVENUE  
9 NEW YORK, NY 10153-0119  
10 212.310.8238  
11 TODD.LARSON@WEIL.COM

12 FOR THE DEFENDANTS:

13 ANTHONY B. ASKEW  
14 KATIE BATES  
15 ATTORNEYS AT LAW  
16 KING & SPALDING  
17 1180 PEACHTREE STREET, N.E.  
18 ATLANTA, GA 30309-3521  
19 404.572.2530  
20 taskew@kslaw.com

21 MARY JO VOLKERT  
22 GWEN SPRATT  
23 ATTORNEYS AT LAW  
24 GEORGIA STATE UNIVERSITY  
25 OFFICE OF LEGAL AFFAIRS  
P.O. BOX 3987  
ATLANTA, GA. 30302-3987

26 ALSO PRESENT:

27 KENNITH DRAKE, VIDEOGRAPHER



1 Q. When was that?

2 A. Wednesday.

3 Q. Okay. At any point in the course of this  
4 litigation, were you asked to preserve documents related  
5 to the litigation?

6 A. No. Just send copies of what I had done.

7 Q. And copies of what you had done meaning what?

8 A. For the semesters in question. Because I keep  
9 everything.

10 Q. And by done, you mean the checklist that you  
11 filled out?

12 A. I didn't start filling them out until  
13 recently. I didn't know I needed to actually do that.  
14 Okay.

15 Q. I see. I was going to ask. You're aware that  
16 the suit as it's currently constituted is focusing on  
17 semesters from 2009, is that your understanding?

18 A. Yes.

19 Q. And for the -- and I believe you taught in the  
20 summer and fall of 2009, is that right?

21 A. Yes.

22 Q. And did you complete checklists for the works  
23 that you provided to students on the EReserve system  
24 during those two semesters?

25 A. I didn't write on the actual paper. I used

1 the checklist as my guideline for each reading because  
2 I'm not -- they don't require us to turn them in. And  
3 that point about the literal writing I didn't, but I  
4 adhered to it and kept it there in mind when I selected  
5 the reading.

6 Q. So you -- this was at the beginning of those  
7 semesters that you did this?

8 A. Sir?

9 Q. This, the process you just described took  
10 place at the beginning of each of those two semesters,  
11 summer and fall of 2009?

12 A. No. I look at it with each books I'm  
13 considering specifically.

14 Q. Right. And is that something that takes place  
15 as the semester goes along or --

16 A. Yes.

17 Q. Just let me finish the question.

18 A. Right, sorry.

19 Q. And so in those semesters for the readings  
20 that you put -- for each of the readings that you put on  
21 the EReserve system, you walked through, you had a  
22 checklist in front of you and you walked through it to  
23 see whether or not the work was a fair use according to  
24 the checklist?

25 A. Yes.

# **EXHIBIT E**

## Moffitt, Natasha

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**From:** Quicker, Katrina M. (Atlanta) [quickerk@ballardspahr.com]  
**Sent:** Friday, December 10, 2010 8:15 PM  
**To:** 'John H. Rains IV'; 'Singer, Randi'; 'Larson, Todd'; 'Mayer, Stacey'; 'Edward B. Krugman'  
**Cc:** Askew, Tony; Schaetzel, Steve; Bates, Katie; Swift, Kristen; 'mjvolkert@law.ga.gov'  
**Subject:** Cambridge v. GSU: GSU Document Production (3 of 5)  
**Follow Up Flag:** Follow up  
**Flag Status:** Orange  
**Attachments:** Recreated Checklists.PDF