

**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 ~~filled-out~~used 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~~ Accordingly, 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~~professors 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,~~<sup>1</sup> 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<sup>1</sup> and retain the ~~recreated checklist in accordance with the current Copyright Policy.~~<sup>2</sup> recreations (the Policy specifying the checklist should be retained).<sup>2</sup> 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

---

<sup>1</sup> 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.

<sup>2</sup> 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.

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 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). ~~Only~~ However, GSU only asked professors who ~~said they~~ had ~~completed~~ used the fair use ~~checklist~~ checklists 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, 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 9<sup>11</sup>th 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' 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 9<sup>11</sup>th 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:

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# **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.

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Shugart & Bishop  
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## I N D E X

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## E X H I B I T S

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1	bio and CV from the Georgia State web site	9
2	printout from the GoSolar system showing summer 2009 and fall 2009 courses	27
3	syllabus for EPSF 8280 from summer of 2009 semester	28
4	syllabus for EPRS 8520 from fall of 2009 semester	36
5	photocopy of cover and table of contents from the "Handbook Of Qualitative Research" Second Edition	45

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.

~~~~~

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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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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## 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.  
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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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2  
3 FOR THE PLAINTIFFS:

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22 GWEN SPRATT  
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25 OFFICE OF LEGAL AFFAIRS  
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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

---

**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