

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

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

Plaintiffs,

- v -

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

Defendants.

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

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

Plaintiffs have moved, under Rule 901 and 1002 of the Federal Rules of Evidence, to preclude the admission of what Defendants have styled as “recreated” Fair Use Checklists on the grounds that they cannot be authenticated as “lost” checklists completed in 2009 or used to prove the contents of such original 2009 checklists, let alone used to prove the contents of checklist that assertedly *would have been*, but were not, completed in 2009. The so-called “recreated” checklists are apparently offered as evidence that professors completed a Fair Use Checklist –

as GSU's copyright policy requires – before the corresponding copyrighted work listed on the parties March 15, 2011 Joint Filing, Docket No. 266, was posted to ERes.

I. A Number of Professors Never Filled Out Checklists Before Having Plaintiffs' Works Posted to ERes, Such That There Was No Lost Original to "Recreate"

While Defendants concede that "some professors had not complied with the retention requirements of the [GSU copyright] policy." Defendants' Brief in Opposition to Plaintiffs' Motion *in Limine* to Preclude the Admission of Recently Created Fair Use Checklists ("Defs.' Opp'n") Docket No. 290 at 4, they do not forthrightly address the fact that at least six instructors – Freeman, Orr, Ruprecht, Davis, Murphy, and Hankla – have admitted they never actually filled out checklists in 2009. *See* Plaintiffs' Motion *in Limine* to Preclude the Admission of Recently Created Fair Use Checklists ("Pls.' Mot.") Docket No. 274 at 4.¹ As to

¹ Defendants' corrected opposition brief on this motion, continuing to evade directly addressing this issue, modifies the prior assertion that certain GSU professors had "filled out" the Fair Use Checklists in 2009 to state that they "used" them. *Compare* Defs.' Opp'n at 1-2 *with* Defendants' Corrected Brief in Opposition to Plaintiffs' Motion *in Limine* to Preclude the Admission of Recently Created Fair Use Checklists ("Defs.' Corrected Opp'n") Docket No. 295-1 at 5. But even this amended statement is not wholly accurate. In fact, some professors admitted that they did not even use the checklists in making their course reading selections or may have but could not specifically remember doing so. *See, e.g.*, Deposition of Marni Davis at 26:17-29:21; Deposition of Carrie Freeman at 28:11-

these professors and the associated “recreated” checklists, Defendants’ assertion that the “recreated checklists can evidence the content of the original checklists under Federal Rule of Evidence 1004(1),” (Defs.’ Opp’n at 8), is baseless, as no originals ever existed. *See* 6 WEINSTEIN’S FEDERAL EVIDENCE § 1004.10[1] (2011) (secondary evidence of the contents of a lost original only comes into play under Rule 1004 once a court is “satisfied that . . . the original existed and had been executed”).

II. The Recreated Checklists Are Not Admissible Under F.R.E. 1004 or 901

Defendants’ effort to salvage the admissibility of recreated checklists prepared by professors who claim to have actually completed checklists in 2009 fares no better. In relation to these documents, Defendants admit that they cannot attest that the recreated checklists are identical to the supposedly lost originals. *See* Defs.’ Opp’n at 8 (“Defendants have not represented to Plaintiffs that the recreated checklists are the original checklists completed in 2009.”); *id.* at 7 (acknowledging that the recreated checklists are not “duplicate originals”). Indeed, in their corrected filing on this motion, Defendants have abandoned their initial contention that professors were instructed to “create the checklist as closely as

32:21; Deposition of John M. Murphy at 39:15-19, 48:10-12, excerpts attached hereto as Exhibits A, B and C, respectively.

possible to the way it was completed at the time the work was posted,” (*id.* at 5), and now admit that professors simply were asked to recreate them, presumably without any instructions. *See* Defs.’ Corrected Opp’n at 4-5. Insofar as much of the trial will focus on the actual fair use determinations made by these professors at the time the course materials were considered for use in 2009, the admission that the recreated checklists do not purport to faithfully reflect those decisions renders this group of documents equally lacking in probative value. Defendants’ resort to Rule 1004 does not salvage their position.

Rule 1004 of the Federal Rules of Evidence permits “other evidence of the contents of a writing” in lieu of an original in limited circumstances. But where, as here, it is acknowledged that the recreated checklists are *not* evidence of the contents of the original but, rather, mere “attempts,” (Defs.’ Opp’n at 7), in late 2010 or early 2011 to recall how they *may have filled the checklists out*, Rule 1004 does not apply. To adopt Defendants’ position would be to entitle a litigant to proffer any asserted recreation of evidence, however inexact or unprovable its relationship to the original, on the premise that the original was “lost.” We note in this regard Defendants’ own advocacy to the effect that “the exception of Fed. R. Evid. 1004(1) would not apply” in a circumstance where “lost” documents are the proponent’s “own fault” – plainly the circumstance presented here. Reply in

Support of Defendants’ Motion in Limine to Exclude Evidence of Alleged Infringement of Improperly-Asserted Copyrights, Docket No. 302 at 5 n.3.

Defendants further contend that the “recreated” checklists can be authenticated as just that – recreated checklists – and admitted as such under Rule 901. *See* Defs.’ Opp’n at 9 (contending that the checklists can be authenticated by the relevant instructor under Rule 901 as “her documentation of her own 2009 fair use analysis, as recalled in 2010 or 2011”). Given, however, Defendants’ concession that the checklists cannot reliably be authenticated as “recreations of the fair use analyses performed by the GSU professors in 2009 using the Fair Use Checklist,” (*id.* at 2), admitting these instructors’ attempts to recreate what they were thinking in 2009 is irrelevant and will serve only to confuse the trial record.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs’ opening brief, the Court should preclude the admission of all recreated checklists.

Respectfully submitted this 12th day of May, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that this document complies with the font and point selections set forth in Local Rule 5.1. This document was prepared in Times New Roman 14 point font.

/s/ John H. Rains IV
John H. Rains IV

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **PLAINTIFFS’
REPLY MEMORANDUM IN SUPPORT OF 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 send e-mail notification of such filing to opposing counsel as follows:

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This 12th day of May, 2011.

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