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

CAMBRIDGE UNIVERSITY PRESS, et al.,

Plaintiffs,

CIVIL ACTION FILE

vs.

NO. 1:08-CV-1425-ODE

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

Defendants.

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Videotaped deposition of WILLIAM GRAY POTTER,  
taken on behalf of the Plaintiffs pursuant to  
Rules 26 and 30 of the Federal Rules of Civil  
Procedure, before Michelle M. Boudreaux, Georgia  
Certified Court Reporter, at King & Spalding,  
1180 Peachtree Street, Atlanta, Georgia, on the  
9th day of March 2009, commencing at the hour of  
10:04 a.m.

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

1 counsel. But you chaired a committee which created a  
2 product which for more than 11 years, I take it, was  
3 the principal source of a University System of  
4 Georgia guidance with respect to copyright and  
5 educational fair use, correct?

6 A Yes.

7 Q Did you have a view, you yourself,  
8 uninformed by legal judgment, whether this document  
9 still retains vitality and usefulness as a guide such  
10 that it should or should have stayed up on the Web  
11 site in conjunction with the new committee product?

12 A Well, I -- no, my opinion is no, it should  
13 not have stayed up. However, I do believe, as a  
14 librarian, it should be archived, it should be  
15 available as a historical document, yes.

16 Q And the reason you had for it -- for  
17 believing it shouldn't stay up was what?

18 A That we have a new policy that supersedes  
19 these guides, this guide, and that people should rely  
20 on the new policy --

21 Q And --

22 A -- as opposed to this.

23 Q And in what particulars, in your  
24 estimation, does the new policy differ from these  
25 guides such that, to use your word, it is -- the

1 writes, "This will be used in legal proceedings and  
2 is extremely sensitive." Do you see that?

3 A Yes.

4 Q What do you understand she meant by that?

5 A You would have to ask her what she meant by  
6 it. I can speculate.

7 Q No, I don't want you -- I want to know if  
8 you have any understanding, based on your work with  
9 her, the committee's work, any discussions that  
10 occurred over 60 or 90 days, if you have any  
11 understanding of what she meant there. Does that  
12 statement come as a surprise to you?

13 A No. I think within the committee's  
14 discussion, there certainly was an awareness that  
15 this lawsuit was pending or in process or whatever  
16 you want to call it, and that what we did as a  
17 committee would likely be brought up in the  
18 proceedings or -- again, I don't know what the exact  
19 terms for things are, would be brought up at some  
20 point, so that we -- we knew it was a sensitive  
21 matter.

22 MR. RICH: Now, let's mark as  
23 Plaintiff's 6 an e-mail dated November 7,  
24 2008. It bears production numbers 020869  
25 through 70. It's from William Potter to

1 material that's available?

2 A Yes. I think it also references other  
3 functions like GALILEO, which is our shared  
4 electronic library, that we do offer licensed  
5 copyrighted material there that all -- anybody within  
6 the University System can use and that we do --  
7 through GALILEO, to facilitate access and use of that  
8 material.

9 Q Does University of Georgia have a budget  
10 for faculty who may make a determination that they  
11 want to use materials but require copyright  
12 permission to do so?

13 A No.

14 Q What is an individual faculty member to do  
15 in that situation?

16 A They would either use their -- I should  
17 respond that my understanding would be --

18 Q Yes.

19 A -- that they would either use their own or  
20 use departmental funds to do that.

21 Q Or departmental funds?

22 A Yes.

23 Q And to your knowledge, just within the  
24 University of Georgia itself, have departmental funds  
25 been made available over time for that purpose?

1 A Not to my knowledge, no.

2 Q Last bullet, "Identifies individuals at the  
3 University System and member institutions who can  
4 counsel faculty and staff regarding application of  
5 copyright law."

6 How does the University System do that and  
7 who are these individuals?

8 A I believe within the policy itself, we  
9 reference -- we urge people to contact legal counsel  
10 of their own institutions or to contact Mr. Newsome.

11 Q Now, if Mr. Newsome gets a call, is he  
12 going to personally give advice, or what's the plan?

13 A That's my understanding, that he will  
14 personally give advice to a faculty member, yes.

15 Q Have you added extra phone lines in his  
16 office?

17 A It's not my department.

18 MR. RICH: We're going to mark next a  
19 document titled "Additional Guidelines for  
20 Electronic Reserves."

21 (Exhibit 12 marked for identification.)

22 Q (By Mr. Rich) And is this another document  
23 that's part of the policy that's been rolled out?

24 A Yes.

25 Q First sentence reads, "The University

1 basic determination by use of the checklist, correct,  
2 whether the intended uses are fair uses?

3 A That's right.

4 Q What sorts of checks and balances are  
5 intended to be built into that process beyond  
6 delegating that decision to individual faculty?

7 A Well, first off, I think we have to have  
8 faith in our faculty that they'll do the right thing  
9 given the right tools and the right information. So  
10 that, I think, is the most important check or balance  
11 on it.

12 Beyond that, we will -- we're still -- this  
13 was just introduced, what, two weeks ago now, and, in  
14 fact, has not been, at this point, formally released  
15 to the full University System community. But  
16 libraries will need to develop procedures to make  
17 sure that a checklist has been completed.

18 And then we will also need to talk about  
19 what we're going to do with that checklist. And  
20 that's still -- like I say, it's still in the works  
21 as to how we're going to do that.

22 Q What's involved in the more formal rollout  
23 of this that you said has not occurred yet?

24 A Formal announcement --

25 Q Formal announcement?

1 Q Does that give you concern?

2 A Does it give me concern? I would -- no,  
3 because I -- no, it does not.

4 Q Was that a topic of discussion within your  
5 committee, namely the incentives of faculty to apply  
6 the guidelines in a way that wouldn't be economically  
7 detrimental to themselves?

8 A We -- no, we did not discuss the economic  
9 impact on faculty or other departments.

10 Q Did you do any trial balloons with faculty  
11 members, whether those on the committee or off the  
12 committee, saying, "Let's take the following  
13 hypothetical situation and apply this new checklist,  
14 how would you come out?"

15 A No.

16 Q Was it done, to your knowledge, against any  
17 of the so-called Exhibit 1 works that were appended  
18 to our complaint?

19 A Not to my knowledge.

20 Q Was it done with any group of E-Reserves  
21 offerings at any of the 35 institutions within the  
22 Georgia State system, to your knowledge?

23 A Not to my knowledge.

24 Q So sitting here today, you really have no  
25 idea how individual faculty will apply these in any

1 individual situation?

2 A No.

3 Q Now, the second sentence of the first  
4 bullet says, "If relying upon the fair use exception,  
5 instructors must complete a copy of the fair use  
6 checklist before submitting material for electronic  
7 reserves."

8 And I take it, if not here, elsewhere,  
9 another important component of this policy is that  
10 those checklists be retained in some fashion; is that  
11 correct?

12 A Yes.

13 Q Whether by the faculty or some central  
14 repository or some combination?

15 A Yes.

16 Q Okay. And why is that important?

17 A In case it were ever to be questioned  
18 whether the faculty member had conducted a fair use  
19 analysis, they'd have the checklist to demonstrate  
20 it.

21 Q Is it your personal view that conducting  
22 the process in good faith is at least as important as  
23 getting the answer, quote, right?

24 A I don't know. I have to think about that.  
25 I would say at least as important, yes, in good

1 are a series of statements made about the concept of  
2 transformative uses.

3           What is your understanding of the concept  
4 of transformative use as it's applied in copyright?

5           A     My understanding is transformative use is  
6 where you take a copyrighted piece, an article, song,  
7 whatever, and creatively turn it into something else.  
8 You spend a significant amount of creative effort  
9 into coming up with a new work that, while it might  
10 be based on the original work, actually is very  
11 different because of the energy and the creative  
12 efforts you've put into it. And I think the best  
13 example I know of is the 2 Live Crew transformation  
14 of Pretty Woman into whatever their song was, but it  
15 was a significant change.

16           Q     So that if all that's done is make a  
17 photocopy or a digital copy, exact digital copy of an  
18 excerpt of a copyrighted work without more, I take it  
19 you would agree with me that doesn't qualify as  
20 transformative?

21           A     If all you've done is make a photocopy of  
22 it, yeah, I would not -- that's not transformative.

23           Q     Now, what if you've taken a series of  
24 photocopies of excerpts and made an entire course  
25 around it so that instead of taking preexisting

1 anthologies or textbooks, you in effect create your  
2 own course reader by taking a chapter here, a chapter  
3 there, an essay here, a journal article there, and  
4 you create 10 or 15 or 20 works in a course, is there  
5 a defensible argument there, as you've thought about  
6 it, to assert that that's a transformative use of  
7 those materials?

8 A If you're saying that you would take, say,  
9 20 photocopied works and organize them a certain way  
10 and that would --

11 Q Well, as course readings, you know, Week 1  
12 we'll read Chapters 1 and 4 from this, and Week 2  
13 we'll do the following, and that becomes your  
14 curricular material for the course.

15 A Well, I've -- given this is the first time  
16 I've ever thought about this, I would say no.

17 Q In the "Amount of the Work Used"  
18 subheading, carrying over to the second page of this  
19 document, you indicate -- it indicates, pardon me,  
20 "No exact measures of allowable quantity exist in the  
21 law." And we talked about that a bit earlier.

22 A Uh-huh.

23 Q It goes on to say, "Any copying of an  
24 entire work usually weighs heavily against fair use."  
25 And then down a few sentences it says, "One may also

1 project, you are probably best positioned to make  
2 that decision." Did I read that correctly?

3 A Yes.

4 Q Now, how does that work exactly in terms of  
5 how you do that balancing and how you determine if  
6 the cumulative weight of the factors weighs in favor  
7 of fair use or against it? Physically, how does one  
8 do that? What -- how do you do that exercise and how  
9 do you know where you come out?

10 A Well, physically you would either print out  
11 the checklist or bring the checklist up on your  
12 screen. Our version -- our checklist is fillable, I  
13 mean, you can actually check the boxes. You can fill  
14 in -- type in the information on the work and then  
15 click on the boxes. And I would say you either view  
16 it on the screen or then print it out and look at it  
17 and sort of gauge were most things checked on the  
18 fair use side or on the not fair use side.

19 Q Is your notion that you add up the entire  
20 left column of checks versus the entire right column  
21 of checks, or that you do the analysis within each  
22 factor and see how many factors --

23 A I think you would do it --

24 Q -- favor or disfavor?

25 A -- would do it within each factor and then

1 look at how the four factors weigh in comparison to  
2 each other.

3 MR. RICH: Let's mark the next one.

4 Yeah, the checklist. Let's mark next a  
5 document labeled "Fair Use Checklist," two  
6 pages.

7 (Exhibit 15 marked for identification.)

8 Q (By Mr. Rich) Now, is this the new fair  
9 use checklist to which we've been referring  
10 periodically?

11 A Yes.

12 Q Okay. Is the intent of your committee and  
13 of the newly promulgated policy that across all 35  
14 institutions within the University System of Georgia,  
15 faculty members seeking to use copyrighted materials,  
16 whether for reserve or E-reserve purposes, will be  
17 required to go through the exercise of filling out  
18 this fair use checklist?

19 A Yes.

20 Q No exceptions?

21 A No exceptions.

22 Q And where -- given what we read in the just  
23 prior marked document, which is the viewpoint that  
24 each faculty member is best positioned to make the  
25 judgment, what measures have been put in place or

1 the fair use. And there are other elements like that  
2 that might -- that tend to be more significant,  
3 depending on the situation, than others would be.

4 Q How have those been flagged from any of the  
5 materials we've marked this afternoon?

6 A I wouldn't say they've been flagged, but I  
7 think in some of the explanatory material that comes  
8 out and if -- we're also thinking that if a -- if an  
9 instructor consults with legal affairs once on  
10 something, they'll learn from that and be able to  
11 apply that in the future.

12 Q Is it purely volunteer that an instructor  
13 consults with legal affairs?

14 A Yes. We say that they should consult legal  
15 affairs, but --

16 Q If they have questions?

17 A If they have questions, but --

18 Q But if they're confident in their analysis,  
19 they don't need to?

20 A That's right.

21 Q In the last paragraph preceding the  
22 checklist, instructors are required to "complete and  
23 retain a copy of this checklist for each 'fair use'  
24 of a copyrighted work in order to establish a  
25 'reasonable and good faith' attempt at applying fair

1 use should any dispute regarding such use arise." Do  
2 you see that?

3 A Yes.

4 Q What are -- why -- what are the quoted  
5 reasonable and good faith words in that statement?  
6 Why are there quotes around those?

7 A My understanding is that is drawn from -- I  
8 believe it's drawn from the statute itself, isn't it,  
9 that it -- if you make a reasonable and good-faith  
10 attempt at determining fair use, that you're afforded  
11 some level of protection should a dispute arise. But  
12 again, I'm not -- I'm over my head on that. This is  
13 in there because -- based on the advice of counsel.

14 Q Okay. Now, am I right, therefore, that if,  
15 on any given fair use determination, the professor  
16 concludes that Factors 1, 2, and 3 all favor fair  
17 use, the outcome of the Factor 4 analysis effect on  
18 the market is not of consequence?

19 A The way we've written it, yes.

20 Q And you believe that's a correct  
21 application of fair use law?

22 A Yes, I do.

23 Q And likewise, if Factors 1, 2, and 4 are  
24 evaluated as favoring fair use, the amount and  
25 substantiality of the taking becomes irrelevant?

1 profiting from use --

2 Q Right.

3 A -- or entertainment.

4 Q Right.

5 A It's -- possibly, I think you could  
6 probably check nontransformative --

7 Q Yeah.

8 A -- because it's not a transformative use.  
9 It's not for publication. It's not for public  
10 distribution. And it would depend on the item as to  
11 whether use exceeds that which is necessary to  
12 achieve your intended purposes. It's conceivable she  
13 would have those other things marked, but taking --  
14 taking too much to accomplish her purpose.

15 Q But wouldn't you presume that a faculty  
16 member selecting items for his or her course would  
17 necessarily take what they believe is the appropriate  
18 amount for that course --

19 A I would think so.

20 Q -- only in proposition?

21 A But in going through the checklist, she  
22 might see that last one and say, "Well, gee, maybe  
23 that's not as much as I should -- maybe I'm taking  
24 more than I should."

25 Q Okay. But even if we, for discussion sake,

1 upon the individual item, so that could go either  
2 way.

3 Q How does the professor, who is not the  
4 author, make that determination?

5 A Well, especially if it's in their field, if  
6 this is a political science professor, I would think  
7 she would be able to make that determination if this  
8 is really the critical part of the work.

9 Q But what if there were 10 essays and the  
10 professor has only selected one out of the 10 and  
11 it's just this marvelous Pulitzer Prize winning book  
12 of essays on this?

13 A And she's taking one essay out of that  
14 work?

15 Q Yeah.

16 A Again, I think she needs to look at the  
17 individual -- it has to be weighed individually.

18 Q Okay.

19 A And the amount taken is narrowly tailored  
20 to educational purpose, such as criticism, comment,  
21 research, or subject being taught, or is more than  
22 necessary, again, that's going to be dependent upon,  
23 so I guess that could go either way.

24 Q Well, if the professor determines that it's  
25 a small portion, what would reasonably lead that

1 professor to conclude that the amount taken was not  
2 narrowly tailored to the subject being taught, in  
3 other words, this is the core curricular offering for  
4 the course?

5 A I mean, if she's -- if it's a book on 9/11  
6 and it's a civil liberties and her focus is on civil  
7 liberties and there's an essay on -- or, I'm sorry, a  
8 chapter that involves, I don't know, the actual  
9 events of 9/11, I would say that's not relevant. And  
10 I think she would have to make that determination  
11 that some things just aren't --

12 Q Highly subjective, yes?

13 A Subjective, yes, but I think something that  
14 can be discussed and reasoned.

15 Q With whom?

16 A With herself to a large extent.

17 Q She would have a conversation with herself  
18 about it?

19 A I think -- yeah, I think we at some point  
20 need to trust that the faculty are honest brokers in  
21 this, yes.

22 Q But it is -- even in good faith, it's  
23 highly subjective, a judgment such as is it narrowly  
24 tailored for the subject you're teaching?

25 A Yes --