

# EXHIBIT D

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.

---

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.

---

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

1 guidelines would be slightly more prescriptive. But  
2 then a policy would be an actual policy saying this  
3 is the policy of the University System of Georgia and  
4 this is what you should do.

5 Q You were involved in the formulation of the  
6 1997 guide, correct?

7 A Yes.

8 Q In fact, you chaired that effort, yes?

9 A Yes.

10 Q Is it accurate that a considerable amount  
11 of effort went into the creation of that guide?

12 A Yes.

13 Q And was that process also informed by  
14 access to legal counsel?

15 A Yes, in that the vice chancellor for legal  
16 affairs was a member of the committee.

17 Q Who was that?

18 A Her name was Corlis Cummings. She's no  
19 longer at the University System office. I think  
20 she's at Kennesaw.

21 Q Did an individual named L. Ray Patterson  
22 have anything to do with the formulation of the 1997  
23 guidelines?

24 A He was a member of the committee.

25 Q And a lawyer?

1           A     Yes.

2           Q     Professor of law?

3           A     Professor of law, yes.

4           Q     Is it accurate that he was influential in  
5 the creation of those guidelines?

6           A     It's accurate that he was a member of the  
7 committee and has as much say as any member of the  
8 committee, yes.

9           Q     And was it your understanding, as chair of  
10 that effort culminating in 1997, that individual  
11 institutions within the State system were free to  
12 establish policy that, if they chose, disregarded, in  
13 part or in whole, the guide?

14          A     Insofar as they were free to do that  
15 before, yes. The guide was not intended to set  
16 policy. The guide was intended to educate.

17          Q     Did you become aware over time of the  
18 degree to which -- let me ask this question first.  
19 Strike that.

20                 To your knowledge, how many of the  
21 individual institutions within the State of Georgia  
22 system adopted after 1997 what you would term  
23 "copyright policies"?

24          A     I have no knowledge that any of them did.

25          Q     Do you know whether there was any other

1 basis in Georgia law or in a supervisory role of the  
2 Board of Regents that required individual  
3 institutions to establish copyright policies?

4 A No.

5 Q Why, to your knowledge, did the University  
6 of Georgia itself establish copyright policies?

7 A What University of Georgia copyright policy  
8 are you referring to?

9 MR. RICH: Let me mark as -- we did  
10 not mark the complaint, so let's mark this  
11 document as -- Tony, we'll go with  
12 plaintiff's numbering sequentially instead  
13 of witness name, if you don't mind.

14 MR. ASKEW: That will be fine. So you  
15 want to use one system throughout?

16 MR. RICH: I think we'll try.

17 MR. ASKEW: Okay, that's fine.

18 MR. RICH: It requires a little more  
19 record-keeping, but let's try that, if you  
20 don't mind.

21 MR. ASKEW: Fine with me.

22 MR. RICH: So let's mark as  
23 Plaintiff's 1 a document titled "The  
24 University of Georgia Libraries Copyright  
25 Policy." I will note that while I've

1 operations we could eliminate and decided that of all  
2 of the things we do, that was one thing we could do  
3 without.

4 Q Did concerns over intellectual property or  
5 copyright compliance have any relationship to that  
6 decision?

7 A No.

8 Q Looking at item numbered 3 on this page,  
9 which reads, among the criteria to be met, "The  
10 request is for a single copy of one original, as  
11 opposed to multiple copies of the same original." Do  
12 you see that?

13 A Yes.

14 Q Do you have any understanding as to whether  
15 that request permitted the copying of the -- an  
16 entire copyrighted work, a single copy of an entire  
17 copyrighted work?

18 A I don't know how it was applied in  
19 practice.

20 Q Do you know how it was intended to be  
21 applied?

22 A No.

23 Q If you look at the bottom of the page,  
24 carrying over to page 4, it states, "Photocopy  
25 requests from commercial, for-profit entities or

1           Q     How were the remaining committee members  
2 selected? Did you have a role in their selection?

3           A     No.

4           Q     And over what period of time,  
5 approximately, say in months, did the committee work  
6 before this product was created?

7           A     Understand this is 12 years ago.

8           Q     If you recall.

9           A     I believe it was around seven or eight  
10 months.

11          Q     Now, if you look at the first page of this  
12 document, it indicates that, "The purpose of this  
13 guide is to provide faculty, employees, and students  
14 of the University System of Georgia with a basic  
15 understanding of copyright and fair use." Do you see  
16 that?

17          A     Yes.

18          Q     Is that a fair statement in terms of  
19 characterizing the purpose of these -- of this  
20 Regents Guide?

21          A     Yes.

22          Q     And if you turn to page 5, at the bottom,  
23 after essentially repeating the same statement, the  
24 paragraph goes on to say, "Individuals and  
25 institutions acquire copyrighted materials -- books

1 or not.

2 Q If it might assist you in refreshing your  
3 recollection, I would invite your attention to -- I'm  
4 using different pages here, so there's a little bit  
5 of a pause here, to page 22.

6 A Yeah.

7 Q There's a reference toward the bottom to  
8 electronic course reserves. Do you see that?

9 A Yes. Then we were -- yes, we did consider  
10 that, yes.

11 Q Yes. Now, if you turn to page 6 of this  
12 document, the third full paragraph, it states in its  
13 last sentence, "The basic rule of thumb, elaborated  
14 in the document, is that a copyrighted work can be  
15 used or copied for educational purposes so long as  
16 the use is not solely a substitute for purchasing a  
17 copy of the work." Do you see that?

18 A Yes.

19 Q What is your understanding of what was  
20 being conveyed by that statement?

21 A My understanding is that we were attempting  
22 to come up with sort of a -- as stated here, a basic  
23 rule of thumb that would help people understand this,  
24 that the main thing they needed to be considering was  
25 whether their -- the use they were making was a use



1 made in place of purchasing a copy, that if -- that  
2 if the only reason they were -- as it says here, to  
3 be clear, if the only reason they're making the copy  
4 is so they don't have to buy it, then that's -- is  
5 not a good enough reason in and of itself. But I  
6 think in -- that was an attempt to kind of boil it  
7 down to alert them to that one fact before going into  
8 some other factors they need to consider.

9 Q So as you understood this and what it was  
10 attempting to convey, if a member of the faculty in  
11 good faith said, "Well, I have a completely  
12 legitimate pedagogical purpose to take certain  
13 excerpts from copyrighted works. I would rather  
14 create my own array of customized course materials.  
15 I don't find any single textbook adequate for that  
16 purpose, so I'm going to mix and match a bit from a  
17 variety of sources," as this statement in this guide  
18 was conceived, was that consistent with the view  
19 that, therefore, that faculty member didn't have the  
20 purpose solely of substituting for purchases of  
21 works?

22 MR. ASKEW: Mr. Rich, I'm going to  
23 permit the witness to answer, but we've  
24 been spending now a pretty good bit of time  
25 on this Regents Guide, and I do want to

1 state for the record, at least now, that we  
2 question the relevance of this sort of  
3 inquiry in view of the adoption of the new  
4 policy and guidelines as of the middle of  
5 February. But I do want you to understand  
6 we do object to the relevance of this line  
7 of inquiry in view of the adoption of the  
8 new guidelines as of the middle of  
9 February.

10 MR. RICH: Thank you. You're  
11 certainly welcome to state that for the  
12 record.

13 THE WITNESS: I'm trying to  
14 reconstruct your question.

15 MR. RICH: Yes.

16 THE WITNESS: In the hypothetical  
17 situation you're talking about, what we  
18 would -- I think what the committee at that  
19 point, again, going back more than 12  
20 years, would have wanted the faculty member  
21 to do is stop and think, "Well, is it  
22 really the educational purposes that  
23 overrides this, or am I just trying to  
24 avoid purchasing something?"

25 But again, there have to be other

1 factors that come into play, and we would  
2 hope that they would do that. But again,  
3 we were not trying to establish a policy.  
4 We were trying to get people to think about  
5 these things, and the rule of thumb was one  
6 attempt to get them thinking about it.

7 Q (By Mr. Rich) If you would flip to page 7  
8 of this document, please. I take it notwithstanding  
9 your statements about this is only a guide, that it  
10 was -- this was not simply designed as a -- pardon  
11 the pun, as a matter strictly of academic interest by  
12 the committee, you did have purposes in mind in  
13 promulgating this document, correct?

14 A Yes.

15 Q And one of those purposes was, in fact, to  
16 allow people to shape their copyright use -- their  
17 use of -- their judgments as to uses of copyrighted  
18 materials based on information provided by the guide,  
19 correct?

20 A I don't think I would characterize it as  
21 "shape."

22 Q How would you characterize it?

23 A I think what we were trying to do was to  
24 instruct them on the current situation and to some  
25 extent let them draw conclusions and think about

1    their own situation.  I would not say we had any  
2    intention of shaping someone's thought or shaping  
3    certain opinions on it.

4           Q     Did you not intend -- did the committee not  
5    intend -- the committee of which you were chair not  
6    intend that the members of the university community  
7    would rely on this document in making copyright  
8    judgments?

9           A     We were hoping they would use this guide to  
10   educate themselves about the situation regarding  
11   copyright and fair use.

12          Q     My question was slightly different,  
13   whether -- isn't it a fact that that committee  
14   intended members of the university committee (sic) to  
15   rely on the contents of this guide and the positions  
16   adopted in it in shaping their copyright compliance  
17   activity?

18          A     Well, no.

19          Q     Take a look at the first full paragraph on  
20   page 7 of this document, "Special care has been taken  
21   to ensure that the contents of this guide accurately  
22   reflect the law.  To this end, the committee has  
23   relied upon the copyright clause of the U.S.  
24   Constitution, the copyright statute, and decisions of  
25   the U.S. Supreme Court.  A complex body of law, of

1 one may use a copyright only with permission or as a  
2 matter of fair use." Do you see that?

3 A Yes.

4 Q So if I'm reading 7b and 8 together  
5 correctly, it seems to suggest that so long as one  
6 copies a work for the purpose of study or research,  
7 one doesn't need permission to do that. Is that how  
8 you interpret those?

9 A Yes.

10 Q If you turn to the next page, there's an  
11 item listed at No. 14. It states, "Attempts to limit  
12 the fair use right with quantitative guidelines are  
13 without statutory authority." Do you know what that  
14 was attempting to convey?

15 A Yes.

16 Q Please explain.

17 A My recollection from way back then is that  
18 there was a belief by a majority of the committee  
19 that the statute itself did not mention quantitative  
20 guidelines and that, therefore, we could not set  
21 absolute quantitative guidelines one way or the  
22 other. We couldn't limit you too little or too much.  
23 And there was some resistance from members of the  
24 committee to set quantitative guidelines, although it  
25 was tempting to have something that simple. The

1 antitrust act, so I'm just not quite sure of what age  
2 alone has to do with --

3 A There's a difference between --

4 Q -- relevance.

5 A Well, I'm sorry. I think it's common with  
6 policies and procedures and guides that they need to  
7 be updated and changed. And when something has been  
8 updated and changed or replaced, then, again, I think  
9 for archival purposes, it would be good to have this  
10 around, but I don't see a need to have it prominent.  
11 I don't think it -- we don't need it to serve the  
12 same function that we felt was -- it served in 1997.  
13 The new policy serves that function.

14 Q And just to complete the thought, that  
15 function being?

16 A Well, to educate the University System  
17 community about copyright and fair use. But as I  
18 said before, the new policy goes further than that,  
19 it is a policy.

20 Q As of 1997, if you recall, what was the  
21 nature of electronic course reserves practices within  
22 the University System of Georgia?

23 A My recollection at that point was it was  
24 sort of something that was on the -- in the planning  
25 stages, that we did not have electronic reserves at

1           A       Yes.

2           Q       And what is your recollection -- again,  
3 subject to attorney-client privileged communications,  
4 what is your recollection about why the answer  
5 provided in the draft materials, which were examined  
6 by the more recent committee, differs from the answer  
7 in the '97 guide?

8                   MR. ASKEW: I think that question will  
9 involve, necessarily, a reference to  
10 attorney-client communications in this  
11 regard. And in that respect, I'll instruct  
12 the witness not to answer the question.

13          Q       (By Mr. Rich) Is that consistent with your  
14 understanding, sir, that to answer that question  
15 would involve revealing attorney-client privileged  
16 communications?

17          A       Yes.

18          Q       And if I were to ask you the same -- to  
19 undertake the same comparison with respect to what  
20 appears as Scenario C on page 15 of Plaintiff's 4,  
21 Scenario B -- Scenario D on the same page --

22          A       Scenario?

23          Q       D.

24          A       I've lost track.

25          Q       Sorry.

1 MR. ASKEW: Which exhibit --

2 MR. RICH: What I'm trying to do in  
3 shorthand, Tony, not to belabor this, is  
4 we --

5 Q (By Mr. Rich) I've done a comparison, and  
6 what I'm about to read you are those areas where  
7 there is at least some degree of difference in the  
8 proposed response from the identical scenario in the  
9 guides. And I was going to ask you -- if I were to  
10 ask you what accounts for those, if your answer would  
11 be the same in each case, namely based on privileged  
12 communications with counsel. I just want to  
13 short-circuit it, or if there are any as to which you  
14 have independent knowledge or information.

15 MR. ASKEW: I believe his answer in  
16 each case is going to be based on advice  
17 he's received from counsel and would be  
18 privileged.

19 MR. RICH: Let's go through and make  
20 sure that he agrees as I identify them,  
21 okay? Again, we won't belabor --

22 MR. ASKEW: Which page are you  
23 referring to now?

24 MR. RICH: So the next scenario is  
25 Scenario B on page 14.



1 MR. ASKEW: In Exhibit --

2 MR. RICH: I'm sorry.

3 MR. ASKEW: Exhibit 4 or Exhibit 2?

4 MR. RICH: We're looking at Exhibit 4.

5 We covered A. Don't focus on B. Go to

6 Scenario C on page 15.

7 THE WITNESS: Of Exhibit 4?

8 MR. RICH: Of Exhibit 4.

9 THE WITNESS: Okay.

10 MR. RICH: The out-of-print book

11 scenario.

12 THE WITNESS: Okay.

13 Q (By Mr. Rich) And again, keep in mind that  
14 my question to you would be -- comparing the answers  
15 here to the prior guide, I'll represent to you that  
16 there are some references in the proposed response.  
17 And If I were to ask you what your understanding is  
18 as to the basis of those, what I'm trying to  
19 understand is whether you would give me the same  
20 answer as you gave me to Scenario A, namely to answer  
21 my question would involve disclosing privileged  
22 advice.

23 A I'm looking for the same scenario in the  
24 other --

25 Q Okay.

1           A       -- in Exhibit 2.

2           Q       Let me help you with that. It would be  
3 page 12 at the top. Do you see that? No, I'm sorry,  
4 I'm mistaken. Hold on. It's page 11, No. 4, in the  
5 1997 guide, out-of-print book.

6           A       Is your question are they different?

7           Q       No. My --

8           A       You just want me to read it?

9           Q       I will -- again, I'm happy to have you read  
10 it and give me your view whether there is a different  
11 answer, if you'd like.

12          A       No, I'm fine.

13          Q       It appears to me there is a different  
14 answer, and I can save you the trouble, if you want.

15          A       Okay, that's fine.

16          Q       My question to you is whether you're able  
17 to testify as to the reason that a different answer  
18 was proposed for the out-of-print book, Scenario C,  
19 without breaching attorney-client privileged  
20 communications?

21          A       No.

22          Q       And same exercise, now moving down page 15,  
23 "Printed Material, Journal Article for Classroom  
24 Use," the analog appears at page 12 of the 1997  
25 guide.

1           A       Same answer.

2           Q       And if you would move to, now, page 16 of  
3 Exhibit 4, labeled "Coursepacks," and compare that to  
4 No. 3 on page 12 of the Regent Guide, same question.

5           A       Same answer.

6           Q       If you look at page 12, with respect to  
7 coursepacks, the hypothetical presented was that,  
8 "A professor copies excerpts of documents, including  
9 copyrighted textbooks and journals, from various  
10 sources. The professor plans to distribute the  
11 materials to his class as a coursepack."

12                   The answer given there was, "One must do  
13 the fair use analysis. If the use of each excerpt  
14 complies with the fair use criteria, then use of the  
15 coursepack is a fair use. The inclusion of the  
16 excerpts in a coursepack will not change a fair use  
17 to an infringing use." Do you see that?

18          A       Yes.

19          Q       Is that a topic which the newly constituted  
20 copyright committee considered as part of its  
21 deliberations, namely the impact, if any, on a fair  
22 use analysis of whether a coursepack is being created  
23 as part of the use of copyrighted materials?

24                   MR. ASKEW: He's just asking you yes  
25 or no, was it considered. You can answer