

12-3200

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES,
JOSEPH GOULDEN, and JIM BOUTON, individually and
on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

GOOGLE INC.,
Defendant-Appellant.

On Appeal from an Order Granting Certification of a Class Action, Entered on
May 31, 2012, by the United States District Court for the Southern District of New
York, No. 1:05-cv-08136-DC Before the Honorable Denny Chin

JOINT APPENDIX—Volume III of IV (A508-781)

MICHAEL J. BONI
JOSHUA D. SNYDER
BONI & ZACK LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
(610) 822-0200
Counsel for Plaintiffs-Appellees
The Authors Guild, Inc. et al.

SETH P. WAXMAN
LOUIS R. COHEN
RANDOLPH D. MOSS
DANIEL P. KEARNEY, JR.
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
Counsel for Defendant-Appellant
Google Inc.

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

November 9, 2012

ROBERT J. LAROCCA
KOHNSWIFT & GRAF, P.C.
One South Broad Street
Suite 2100
Philadelphia, PA 19107
(215) 238-1700

SANFORD P. DUMAIN
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

*Counsel for Plaintiffs-Appellees
The Authors Guild, Inc. et al.*

DARALYN J. DURIE
JOSEPH C. GRATZ
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
(415) 362-6666
*Counsel for Defendant-Appellant
Google Inc.*

TABLE OF CONTENTS

	Page
<u>Volume I</u>	
Docket entries, No. 1:05-cv-08136-DC (SDNY)	A1
Letter From Pamela Samuelson to Honorable Denny Chin re Academic Author Objections to the Google Book Search Settlement, Jan. 27. 2010, Dkt. No. 893	A95
Fourth Amended Class Complaint, Oct. 14, 2011, Dkt. No. 985	A119
Declaration of Joanne Zack in Support of Plaintiffs’ Motion for Class Certification, Dec. 12, 2011, Dkt. No. 991	A135
Exhibit 10, Google Books Snippet View Page for <i>Ball Four</i> by Jim Bouton	A139
Exhibit 11, Google Books Snippet View Page for <i>Ball Four</i> by Jim Bouton	A205
Exhibit 12, Google Books Snippet View Page for <i>Ball Four</i> by Jim Bouton	A211
Exhibit 15, Application for Registration of a Claim to Copyright, <i>Ball Four</i> by Jim Bouton.....	A217
Exhibit 16, U.S. Copyright Office Certificate of Registration No. A173097, <i>Ball Four</i> by Jim Bouton	A220
Exhibit 17, Application for Registration of a Claim to Copyright, <i>The Superlawyers</i> by Joseph C. Goulden.....	A224
<u>Volume II</u>	
Declaration of Hal Poret in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, Feb. 8, 2012, Dkt. No. 1001	A226
Exhibit 1, Expert Report of Hal Poret, Survey of Published Authors Regarding Google Books, Jan. 2012.....	A228
Appendix A, Curriculum Vitae	A262

Appendix B, Instructions/Questionnaires	A269
Appendix C, Materials Reviewed/Fees Charged	A277
Appendix D, Data File	A279
Appendix E, Cross-Tab Analysis of Data	A305
Appendix F, Verbatim Responses	A316
Declaration of E. Gabriel Perle in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, Feb. 8, 2012, Dkt. No. 1002	A345
Declaration of Joseph C. Gratz in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, Feb. 8, 2012, Dkt. No. 1003	A355
Exhibit 1, Google Books Snippet View Page for <i>Ball Four</i> by Jim Bouton	A360
Exhibit 2, Excerpts of Deposition of Jim Bouton, Dec. 15, 2011	A362
Exhibit 3, Excerpts of Deposition of Joseph Goulden, Jan. 6, 2011	A378
Exhibit 5, Excerpts of Deposition of Betty Miles, Jan. 4, 2012.....	A392
Exhibit 7, Publishing Agreements Produced by Plaintiff Jim Bouton	A408
Exhibit 10A, Various Publication Agreements Produced by Plaintiff The Authors Guild (excerpts)	A434
Exhibit 10B, Various Publication Agreements Produced by Plaintiff The Authors Guild (excerpts)	A455
Exhibit 11, Google Books Snippet View Pages for Various Books	A489
Exhibit 12, Google Books Snippet View Page for <i>Standard Mathematical Tables</i> by Samuel M. Selby	A493
Exhibit 14, Books and Pamphlets, Current and Renewal Registrations, January-June 1996, Catalog of Copyright Entries, <i>Third Series</i> , Vol. 20, Part I, No. I, Section I, Library of Congress, 1968 (excerpt)	A495

Exhibit 15, Copyright Registrations Produced by Plaintiff Betty Miles	A500
Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification, Feb. 8, 2012, Dkt. No. 1004	A504

Volume III

Zack Reply Declaration in Support of Plaintiffs’ Motion for Class Certification, Apr. 3, 2012, Dkt. No. 1009 (public version)	A508
Exhibit 1, Defendants’ Responses and Objections to Plaintiffs’ First Set of Requests for Admission, Dec. 22, 2011	A511
Exhibit 2, Expert Report of Ben Edelman, Apr. 2, 2012	A536
Exhibit 3, Report of Professor Daniel Gervais, Apr. 2, 2012.....	A560
Exhibit 4, Deposition of Jim Bouton, Dec. 15, 2011 (excerpts)	A594
Exhibit 5, Deposition of Joseph Goulden, Jan. 6, 2012 (excerpts)	A609
Exhibit 6, Deposition of Betty Miles, Jan. 4, 2012 (excerpts)	A633
Exhibit 7, Deposition of Daniel Clancy, Feb. 10, 2012 (redacted version) (excerpts)	A647
Exhibit 8, Deposition of Kurt Groetsch (excerpts), Feb. 13, 2012	A680
Exhibit 9, Deposition of Stephane Jaskiewicz (excerpts), Feb. 14, 2012	A690
Exhibit 10, Deposition of Thomas Turvey (excerpts), Feb. 17, 2012 (redacted version)	A695
Exhibit 11, Deposition of E. Gabriel Perle (excerpts), Mar. 19, 2012	A703
Exhibit 12, Deposition of Hal Poret (excerpts), Mar. 22, 2012	A720

Volume IV

Exhibit 13, “Reference Guide on Survey Research,” from <i>Reference Manual on Scientific Evidence</i> , Federal Judicial Center (2d ed. 2000).....	A782
Exhibit 14, Information Produced by Defendant Google Related to Poret Deposition, Mar. 26, 2012	A832
Exhibit 15, Defendant’s Supplemental Narrative Responses and Objections to Plaintiffs’ Second Request for Production of Documents and Things, Dec. 9, 2011 (public redacted version)	A836
Exhibit 18, U.S. Copyright Office Public Catalog Entry, <i>E- commerce strategies</i> , Charles H. Trepper	A854
Deposition of Paul Aiken, Apr. 19, 2012 (excerpts)	A856
Defendant Google Inc.’s Responses and Objections to Plaintiffs’ First Set of Interrogatories, Apr. 27, 2012	A865
Class Certification Hearing Transcript, May 3, 2012.....	A885
Order Granting Motion for Leave to Appeal, Aug. 14, 2012, Dkt. No. 1 (2d Cir.)	A929

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X

<p>The Authors Guild, Inc., Associational Plaintiff, Betty Miles, Joseph Goulden, and Jim Bouton, individually and on behalf of all others similarly situated,</p> <p style="padding-left: 40px;">Plaintiffs,</p> <p style="padding-left: 40px;">v.</p> <p>Google Inc.,</p> <p style="padding-left: 40px;">Defendant.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>Case No. 05 CV 8136-DC</p> <p>FILED ELECTRONICALLY</p>
---	---	--

----- X

**REPLY DECLARATION OF JOANNE ZACK IN SUPPORT OF PLAINTIFFS’
MOTION FOR CLASS CERTIFICATION**

I, Joanne Zack, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a partner in Boni & Zack LLC, counsel for plaintiffs in this litigation, and a member of the bar of this Court. I submit this reply declaration in support of Plaintiffs’ Motion for Class Certification.
2. Attached hereto as Exhibit 1 is a true and correct copy of Defendant Google Inc.’s Responses and Objection to Plaintiffs’ First Set of Requests for Admission.
3. Attached hereto as Exhibit 2 is a true and correct copy of the Expert Report of Benjamin Edelman.
4. Attached hereto as Exhibit 3 is a true and correct copy of the Expert Report of Daniel Gervais.

5. Attached hereto as Exhibit 4 are true and correct copies of pages from the transcript of the deposition of Jim Bouton in this case.

6. Attached hereto as Exhibit 5 are true and correct copies of pages from the transcript of the deposition of Joseph Goulden in this case.

7. Attached hereto as Exhibit 6 are true and correct copies of pages from the transcript of the deposition of Betty Miles in this case.

8. Attached hereto as Exhibit 7 are true and correct copies of pages 6-7, 30-45, 90-92, 108-09, 114-18, 162-63 from the transcript of the deposition of Daniel Clancy in this case. Google has consented to the public filing of these pages (as redacted). Pages 96-99, 140-41, and 182-87 from this deposition will be filed under seal.

9. Attached hereto as Exhibit 8 are true and correct copies of pages 4, 27-31 and 104-05 from the transcript of the deposition of Kurt Groetsch in this case. Google has consented to the public filing of these pages (as redacted).

10. Attached hereto as Exhibit 9 are true and correct copies of pages 5, 16-17 from the transcript of the deposition of Stephane Jaskiewicz in this case. Google has consented to the public filing of these pages (as redacted).

11. Attached hereto as Exhibit 10 are true and correct copies of pages 3, 62-64, and 96 from the transcript of the deposition of Thomas Turvey in this case. Google has consented to the public filing of these pages (as redacted). Pages 57-61, 81-85, 88-92 and 102-05 from this deposition will be filed under seal.

12. Attached hereto as Exhibit 11 are true and correct copies of pages from the transcript of the deposition of E. Gabriel Perle in this case.

13. Attached hereto as Exhibit 12 are true and correct copies of pages from the

transcript of the deposition of Hal Poret in this case.

14. Attached hereto as Exhibit 13 is a true and correct copy of the Reference Manual on Scientific Evidence, *Second Edition*, Federal Judicial Center 2000, marked as Plaintiffs' Exhibit 76 at Mr. Poret's deposition.

15. Attached hereto as Exhibit 14 is a true and correct copy of information produced by defendant to plaintiffs after Mr. Poret's deposition.

16. Attached hereto as Exhibit 15 is a true and correct copy of the Public Redacted Version of Defendant Google Inc.'s Supplemental Responses and Objections to Plaintiffs' Second Request for Production of Documents and Things.

17. Attached hereto as Exhibits 16 and 17 are, respectively, the Complaint and Answer filed in the case *Authors Guild, et al. v. Hathitrust, et al.*, 11 Civ. 6351 (HB), S.D.N.Y.

18. Attached hereto as Exhibit 18 is a true and correct copy of copyright registration information obtained online from the U.S. Copyright Office's Public Copyright Catalog (1978 to present) at <http://www.copyright.gov/records/>.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct, and that this declaration was executed on April 3, 2012 in Bala Cynwyd, Pennsylvania.

/s/Joanne Zack
Joanne Zack

EXHIBIT 1

DURIE TANGRI LLP
DARALYN J. DURIE (*Pro Hac Vice*)
ddurie@durietangri.com
JOSEPH C. GRATZ (*Pro Hac Vice*)
jgratz@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendant
Google Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc. et al.,

Plaintiffs,

v.

Google Inc.,

Defendant.

Civil Action No. 05 CV 8136 (DC)

**DEFENDANT GOOGLE INC.'S RESPONSES AND OBJECTIONS TO
PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION**

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, Defendant Google Inc. (“Google”) hereby responds to Plaintiffs’ First Set of Requests for Admission (Nos. 1-34) with the following objections and responses.

GENERAL OBJECTIONS

1. Google objects to the preface, instructions, and definitions to the Requests to the extent that they purport to impose obligations that exceed those imposed by the Federal Rules of Civil Procedure, relevant local rules, and applicable case law. In responding to these requests, Google has followed the applicable law and has ignored the improper preface, instructions, and definitions.

2. Google objects to the Requests in their entirety and to each request to the extent that the documents and information sought are protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege.

3. Google objects to each and every request to the extent that it seeks information that is confidential and/or proprietary information. To the extent not otherwise subject to objection, Google will produce such confidential documents in accordance with the terms of the protective order entered in this case.

4. Google objects to the Requests in their entirety and to each discovery request as unduly burdensome to the extent they seek information or documents already known to Plaintiffs, or which are equally available to Plaintiffs.

5. Google objects to the Requests in their entirety and to each discovery request to the extent they seek documents not relevant to any claim or defense in this action or reasonably calculated to lead to the discovery of admissible evidence.

6. Google objects to The Authors Guild's definition of "Google" as vague, ambiguous, unintelligible, and overly-broad. For purposes of responding to these discovery requests, Google will interpret "Google" to mean Google Inc. and/or its agents.

7. Google objects to the time period of these requests as overly broad and unduly burdensome.

8. Google objects to the Requests to the extent they request information pertaining to persons or activities outside the United States.

9. Google objects to the Requests to the extent they request information pertaining to Google products other than Google Books, and Google's responses are limited to Google Books.

10. Google objects to each and every discovery request to the extent that it purports to impose a burden of providing information not in Google's possession, custody, or control or which cannot be found in the course of a reasonable search. Google has undertaken a reasonable and good-faith effort to locate all relevant, non-privileged documents known to it at this time that are responsive to these requests, but they reserve the right to conduct further investigation and discovery as to any issue raised or suggested by any discovery request and to rely on any subsequently discovered information or documents at trial or any other proceeding.

11. Google has not yet completed its investigation of the facts relating to this case. Any and all responses to the following discovery requests are therefore based solely on information presently known to Google, and Google reserves its right to conduct further discovery and investigation and to use at trial or any other proceeding evidence of any subsequently discovered facts, documents, or information.

12. In responding to these discovery requests, Google does not concede the relevancy or materiality of any request or of the subject to which any request refers. Google's responses to

these discovery requests are made expressly subject to and without waiving any objections in any proceeding, including trial of this action, as to competency, relevancy, materiality, or privilege of any of the documents referred to or the responses given.

RESPONSES AND OBJECTIONS TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

As part of its Library Project, Google began in 2004 to digitally copy printed in-copyright works in their entirety, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it began in 2004 to scan, among other works, printed in-copyright and out-of-copyright works from libraries in their entirety, and that Google scans some works without the permission of the copyright owners in those works, as Google's acts with respect to those works constitute fair use. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 2:

One of Google's goals in its Library Project has been to digitally copy all of the printed books in the United States, including in-copyright books, regardless of their content.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of

the term “copy” as vague and ambiguous, and construes that term to mean “to create one or more copies, as that term is defined in 17 U.S.C. § 101.” Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 3:

Google undertook the Library Project for commercial reasons.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 4:

Google undertook the Library Project to gain a competitive advantage over other participants in the search engine market.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 5:

Google has entered into agreements with libraries, including the University of Michigan, Stanford University, and the University of California, to obtain access to works for the purpose of digitally copying such works, including in-copyright works.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has entered into agreements with certain libraries, including the University of Michigan, Stanford University, and the University of California, pursuant to which those libraries request that Google scan books, including in-copyright works, provided to Google by the library. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 6:

In order to gain access to printed works for the purpose of digitally copying them, Google agreed to provide libraries with digital copies of works copied from the libraries' collections.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has entered into agreements with certain libraries, including the University of Michigan, Stanford University, and the University of California, pursuant to which those libraries request that Google scan books, including in-copyright works, provided to Google by

the library, and Google provides digital copies of those books to the libraries which, pursuant to the contracts, may be used only in ways which do not violate copyright law. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 7:

To date, as part of its Library Project, Google has copied millions of in-copyright works, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has scanned millions of in-copyright works from library collections and that, because Google's acts constituted fair use, permission was generally not sought or granted with respect to some of those works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 8:

To date, as part of its Library Project, Google has provided to libraries digital copies of millions of in-copyright works, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of

the term “copy” as vague and ambiguous, and construes that term as that term is defined in 17 U.S.C. § 101. Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has entered into agreements with certain libraries, pursuant to which those libraries have requested that Google scan books, including in-copyright works, provided to Google by the library, and Google has provided digital copies of millions of those books to the libraries which, pursuant to the contracts, may be used only in ways which do not violate copyright law. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 9:

To date, as part of its Library Project, Google has copied in their entirety millions of in-copyright works, including in-print and out-of-print works, fiction and non-fiction works, reference works, anthologies, educational works, textbooks, dissertations, monographs, journals, government publications and other type of works.

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request’s use of the term “copy” as vague and ambiguous, and construes that term to mean “to create one or more copies, as that term is defined in 17 U.S.C. § 101.” Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has scanned in their entirety millions of books from libraries, including in-print and out-of-print works, fiction and non-fiction works, reference works, anthologies, educational works, textbooks, dissertations, monographs, journals, government publications and other types of works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 10:

Each in-copyright work copied by Google as part of its Library Project was copied by Google in its entirety at least twice, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 10:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it creates and maintains, as necessary for its fair uses, more than one copy of the books it scans from library collections. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 11:

Google maintains on its servers digital copies of millions of in-copyright works, without permission from the copyright owners of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 11:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term as that term is defined in 17 U.S.C. § 101. Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to the term "works" as vague and ambiguous. Google objects to this Request to

the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that it creates and maintains, as necessary for its fair uses, more than one copy of the books it scans from library collections, and that it has scanned millions of books from library collections. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 12:

Google uses the works copied in its Library Project to display search results to users of its search engine.

RESPONSE TO REQUEST FOR ADMISSION NO. 12:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that one of the fair uses to which it puts books is rendering them searchable using the Google Books website. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 13:

In response to search queries by users of its search engine, Google has displayed content on the Internet from millions of in-copyright works, without permission from the copyright owner of such works.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits in response to search queries by users of Google Books, in order to help users find the book they're looking for, Google has displayed short "snippets" of text from millions of books to those users, though it only displays a maximum of three "snippets" in response to a search query. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 14:

In response to search inquiries by users of its search engine, Google searches the complete text of works copied in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 14:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits in response to search queries by users of its Google Books website, in order to help users find the book they're looking for, Google searches the complete text of at least some of the works scanned from library collections. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 15:

None of the representative plaintiffs gave permission to Google to copy, distribute or display any of their works.

RESPONSE TO REQUEST FOR ADMISSION NO. 15:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that the representative plaintiffs themselves did not give Google any permissions with respect to any of their books, as Google's acts constituted fair use, although their publishers gave Google certain permissions with respect to some of their works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 16:

Google did not seek permission from any of the representative plaintiffs to copy, distribute or display any of their works.

RESPONSE TO REQUEST FOR ADMISSION NO. 16:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Google admits that, because its acts constituted fair use, Google did not seek any permission from the representative plaintiffs themselves, although their publishers gave Google certain permissions with respect to some of their works. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 17:

Google did not seek permission from copyright owners before copying in-copyright works in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 17:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that before beginning to scan works from libraries, because its acts constituted fair use, it generally did not seek or receive permissions from copyright holders with respect to its project of

scanning books from libraries. Except as specifically admitted, Google responds as follows:

Denied.

REQUEST FOR ADMISSION NO. 18:

Google has not compensated copyright owners for its copying in its Library Project of in-copyright works.

RESPONSE TO REQUEST FOR ADMISSION NO. 18:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has not provided direct monetary compensation to copyright holders with respect to its scanning of books from libraries and the display of short "snippets" of text in response to search queries. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 19:

Google has not compensated copyright owners for its display on the Internet of content from in-copyright works copied in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 19:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it has not provided direct monetary compensation to copyright holders with respect to its scanning of books from libraries and the display of short “snippets” of text in response to search queries. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 20:

Google’s security measures may be breached due to the actions of outside parties, employee error, malfeasance, or otherwise, and, as a result, an unauthorized party may obtain access to data held by Google, including works copied in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 20:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the term “security.” Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google’s response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 21:

Outside parties may attempt to fraudulently induce Google employees, users, or customers to disclose sensitive information in order to gain access to data held by Google.

RESPONSE TO REQUEST FOR ADMISSION NO. 21:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous. Google objects to this Request on the ground that it seeks

information pertaining to the state of mind of third parties, of which Google has no direct knowledge. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 22:

Because the techniques used by outside parties to obtain unauthorized access to data change frequently and often are not recognized until launched against a target, Google may be unable to anticipate these techniques or to implement adequate preventative measures.

RESPONSE TO REQUEST FOR ADMISSION NO. 22:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous. Google objects to this Request to the extent it requests information pertaining to Google products other than Google Books, and Google's response is limited to Google Books.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 23:

Google does not consider itself responsible for the security of the digital copies of works provided by it to libraries in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 23:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the term "security."

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 24:

Google does not monitor or control the security of the digital copies of works provided by it to libraries in its Library Project.

RESPONSE TO REQUEST FOR ADMISSION NO. 24:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the terms “monitor,” “control,” and “security.” Google objects to this Request’s use of the term “copies” as vague and ambiguous, and construes that term as it is defined in 17 U.S.C. § 101.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 25:

The security measures of libraries who receive digital copies of works from Google may be breached due to the actions of outside parties, employee error, malfeasance, or otherwise, and, as a result, an unauthorized party may obtain access to data held by such libraries.

RESPONSE TO REQUEST FOR ADMISSION NO. 25:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous, including without limitation in its use of the term “security.” Google objects to this Request’s use of the term “copies” as vague and ambiguous, and construes that term as it is defined in 17 U.S.C. § 101.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 26:

Outside parties may attempt to fraudulently induce library employees or patrons to disclose sensitive information in order to gain access to data held by the library.

RESPONSE TO REQUEST FOR ADMISSION NO. 26:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous. Google objects to this Request on the ground that it seeks information pertaining to the state of mind of third parties, of which Google has no direct knowledge.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 27:

Because the techniques used by outside parties to obtain unauthorized access to data change frequently and often are not recognized until launched against a target, libraries may be unable to anticipate these techniques or to implement adequate preventative measures.

RESPONSE TO REQUEST FOR ADMISSION NO. 27:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it presents a hypothetical question. Google objects to this Request on the ground that it is vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 28:

Google pays license fees and royalties to certain content providers to display content on its website.

RESPONSE TO REQUEST FOR ADMISSION NO. 28:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it is vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Google admits that it pays license fees to certain content providers to display certain content on certain websites that Google operates. Except as specifically admitted, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 29:

Google does not use the works copied in its Library Project for the purpose of criticism.

RESPONSE TO REQUEST FOR ADMISSION NO. 29:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 30:

Google does not use the works copied in its Library Project for the purpose of commenting on the works.

RESPONSE TO REQUEST FOR ADMISSION NO. 30:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the

ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 31:

Google does not use the works copied in its Library Project for the purpose of news reporting.

RESPONSE TO REQUEST FOR ADMISSION NO. 31:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies, as that term is defined in 17 U.S.C. § 101." Google objects to the definition of "Library Project" as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 32:

Google does not use the works copied in its Library Project for the purpose of teaching.

RESPONSE TO REQUEST FOR ADMISSION NO. 32:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request's use of the term "copy" as vague and ambiguous, and construes that term to mean "to create one or more copies,

as that term is defined in 17 U.S.C. § 101.” Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 33:

Google does not use the works copied in its Library Project for the purpose of scholarship.

RESPONSE TO REQUEST FOR ADMISSION NO. 33:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request’s use of the term “copy” as vague and ambiguous, and construes that term to mean “to create one or more copies, as that term is defined in 17 U.S.C. § 101.” Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

REQUEST FOR ADMISSION NO. 34:

Google does not use the works copied in its Library Project for the purpose of research.

RESPONSE TO REQUEST FOR ADMISSION NO. 34:

Google objects to this request to the extent it calls for the disclosure of material protected by the attorney-client privilege or any other privilege. Google objects to this Request on the ground that it calls for a legal conclusion. Google objects to this Request’s use of the term “copy” as vague and ambiguous, and construes that term to mean “to create one or more copies, as that term is defined in 17 U.S.C. § 101.” Google objects to the definition of “Library Project” as vague and ambiguous.

Subject to and without waiving its objections, Google responds as follows: Denied.

Dated: December 22, 2011

By: */s/ Joseph C. Gratz*

Daralyn J. Durie (*pro hac vice*)

ddurie@durietangri.com

Joseph C. Gratz (*pro hac vice*)

jgratz@durietangri.com

DURIE TANGRI LLP

217 Leidesdorff Street

San Francisco, CA 94111

Telephone: 415-362-6666

Facsimile: 415-236-6300

Attorneys for Defendant Google Inc.

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the State Bar of California, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On December 22, 2011, I served the following document(s) in the manner described below:

DEFENDANT GOOGLE INC.'S RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
- (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.
- (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.
- BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jgratz@durietangri.com to the email addresses set forth below.
- (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

Michael J. Boni
Joanne E. Zack
BONI & ZACK LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
Telephone: 610-822-0200
Fax: 610-822-0206
Email: mboni@bonizack.com
jzack@bonizack.com

Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 22, 2011, in San Francisco, California.

/s/ Joseph C. Gratz

Joseph C. Gratz

EXHIBIT 2

Expert Report of Ben Edelman

Introduction and qualifications

1. I am an assistant professor at Harvard Business School. My research focuses on the design of electronic marketplaces including Internet advertising, search engines, privacy, and information security. I hold a Ph.D. in Economics from Harvard University, a J.D. from Harvard Law School, an A.M. in statistics from Harvard University, and an A.B. in economics from Harvard College. Further information concerning my background and qualifications is provided in my curriculum vitae, which is attached hereto as Exhibit A.

2. My experience includes more than 15 years as a computer programmer, in which time I developed software for my own use, end-user computers, local networks, and web servers; and administered servers for myself and others. My technical experience includes efforts to verify the security of other programmers' code including uncovering shortfalls in others' security systems. I have studied and written about questions of information security, accidental information revelation, and information distributed more broadly than online services anticipated. For example, I have personally uncovered multiple Google privacy flaws, including improper data collection by Google Toolbar as well as improper data distribution by Google JotSpot. I also found and demonstrated to a court's satisfaction that an early online video service, iCraveTV, had failed to secure video contents in the way that it had previously represented to that court.

3. My academic publications explore a variety of aspects of online business, including multiple articles considering the difficulty of limiting access to and use of information systems. A full list of my publications is provided in my curriculum vitae, which is attached hereto as Exhibit A. Among the publications relevant to questions at issue in this matter are the following articles: In "Shortcomings and Challenges in the Restriction of Internet Retransmissions of Over-the-air Television Content to Canadian Internet Users," a submission to Industry Canada, I evaluated the difficulty of imposing certain access restrictions when distributing video material over the Internet. In "Securing Online Advertising: Rustlers and Sheriffs in the New Wild West," I presented the challenges of designing online advertising markets to satisfy the requirements of advertisers, online publishers, and advertising platforms while unauthorized activities such as advertising fraud are taking place. In numerous articles, I have presented all manner of online miscreants using information systems in ways their providers did not intend, did not anticipate, sought to prevent, and/or claimed to seek to prevent.

4. My teaching assignment currently consists of a HBS elective course called *The Online Economy*, which analyzes strategies for all manner of online businesses. The course includes concerns arising out information security.

5. I have testified as an expert witness in federal courts, and I have testified to committees of the United States House of Representative and United States Senate. I have offered expert testimony in the U.S. District Courts for Michigan and Pennsylvania and in Utah State Court. A listing of the cases in which I have testified as an expert at trial or by deposition during the past four years is attached as Exhibit B.

6. I am being compensated for my work in this matter at the rate of \$450 per hour.

Scope of retention

7. I understand Google is asserting a fair use defense to the allegations that, without permission from rights-holders, it digitized millions of in-copyright books from a number of university libraries, maintains digital copies of those books on its servers, distributed digital copies of those books to the libraries, and displays on the Internet verbatim content from the books. In this report, I address and opine on risks of a security breach exposing widely online the contents of in-copyright books from (a) the scanning, storage and display of books (or book excerpts) by smaller, less sophisticated entities that, under an adverse fair use ruling, would be permitted to engage in conduct similar to Google's Library Project, (b) Google's distribution of digital copies of scanned books to libraries, and (c) Google's retention and storage of multiple copies of the millions of books it digitizes in its Library Project.

8. I conclude that unrestricted and widespread conduct of the sort engaged in by Google would result in a substantially adverse impact on the potential market for books.

9. If the Google Library Project is found not to be a fair use, then the books could be digitally copied, distributed and displayed through licenses that include security protocols and a damages structure for breaches of those protocols. Conversely, if such uses are deemed permissible without requiring permission from rights-holders -- i.e., if fair use were to be found here -- then rights-holders will have little or no means to reduce the security risks identified in this report.

10. Exhibit C lists the documents I reviewed and sources I considered.

Piracy of books is already a real, not hypothetical problem

11. The electronic distribution of electronic copies of books, without authorization from publishers or rights-holders, is already occurring. For example, consider a user seeking a copy of "American Sniper," the number one bestseller hardcover nonfiction book according to the New York Times bestseller list dated April 1, 2012. Such a user might run a Google search for "american sniper mobi" (without quotes), using the word "mobi" to indicate interest in a ".mobi" book (a popular electronic book file format). The first, second, third, fourth, fifth, sixth, eighth, ninth, and tenth-listed links all offer or purport to offer copies of the specified book. I checked these nine links; I found that all but one confirmed that the book was available and offered a download link or download instructions. Of the ten links, only one (the seventh) pointed to a site (Amazon) that charged for access to the book. Of course the book is a top-selling in-copyright commercial publication; anyone offering no-charge copies is almost certainly doing so without permission from the copyright holder.

12. Sites with pirated books fall into several categories. Some sites charge for pirated book copies, though they do not share the resulting revenues with those who created the books. Other sites distribute pirated book copies for free. Among sites offering free book copies, some offer direct web-based downloads, providing pirated book copies when a user simply clicks to request a copy. Other sites offer links to Bit torrent ".torrent" files that direct a user's computer to other computers from which a desired file may be copied.

Similar Scanning Operations Could Allow Book Copies to Be Copied and Redistributed

13. If Google's conduct is found to be a fair use and others engage in similar conduct, a risk is created of book redistribution through piracy.

14. If other providers ("providers") scan books, the resulting digital book copies could enter widespread public circulation via any of several channels. First, pirates could extract book copies through defects in the security of a provider's systems. Once books are scanned, the resulting digital files are stored on a server or, more often, multiple servers. Defects in the access controls of any such server could allow pirates to gain access to digital book copies. Defects could arise through flaws in the operating system, database server, web server, or other software run on a provider's servers; such flaws have been widespread in even the most popular server software. Defects could also arise through the provider's custom software, which is likely to be less secure because custom software usually receives a lesser level of scrutiny, testing, and verification than software that is distributed and used more broadly.

15. Second, pirates could extract books via errors in the security configuration of a provider's systems. If even one of a provider's servers lacks a required update or other security feature, pirates could use that server to obtain the book copies.

16. Third, pirates could extract books by impersonating provider staff to access provider systems. Suppose an attacker can obtain the username and password of a person with full access to a provider's book copies. The attacker can log in with that password to access and copy the provider's book copies. Similar attacks are frequent: For example Amazon Zappos,¹ Gawker,² and Microsoft Hotmail³ suffered similar attacks in 2009-2011. Even the United Nations suffered a breach of the same type.⁴ If a single staff person at a single book provider used the same password for a hacked site and for access to book copies, then a hacker could use that password to access book copies, copy book copies to the hacker's own systems, and redistribute book copies further from there.

17. Fourth, a rogue employee could intentionally redistribute book copies. Rogue employees gain and exploit privileged access to data despite organizations' efforts to screen and supervise key staff. Consider the classified US State Department material distributed by Wikileaks in 2010 – information obtained via a rogue employee. A rogue employee with access to book copies could intentionally make those copies available to the public.

18. Fifth, when books are scanned by a smaller and less sophisticated provider, there is a particularly acute risk of book contents being accessed and redistributed. For one, less sophisticated organizations have a reduced capability to design, install, and maintain suitable web site, database, and related security systems as well as anti-reconstruction

¹ Dominic Rushe. "Zappos Database Hit by Cyberattack." The Guardian. January 16, 2012.

² Zachary Seward and Albert Sun. "The Top 50 Gawker Media Passwords." Wall Street Journal - Digits. December 13, 2010.

³ Bogdan Calin. "Statistics from 10,000 Leaked Hotmail Passwords." Acunetix. October 6, 2009. <http://www.acunetix.com/blog/news/statistics-from-10000-leaked-hotmail-passwords/>.

⁴ Chloe Albanesius. "Team Poison Hacks UN, Leaks Usernames, Passwords." PC Magazine. November 30, 2011.

systems to secure books. Furthermore, less sophisticated organizations have a lesser ability to screen key staff to prevent data loss through rogue employees, and a lesser ability to configure security systems to exclude hackers. Thus, if other companies and organizations follow Google's lead in scanning books, a risk exists that book contents will be accessed and redistributed.

19. As set out in the section captioned "A Single Breach Could Cause Devastating Harm to the Class," one instance of book copying can have large effects. For example, if numerous companies and organizations scan books, attackers can focus their efforts on whichever installs the weakest security. Similarly, attackers can take advantage of even a brief period when a single book provider is insecure (for example, through failure to properly update a server). Once attackers obtain book copies, they can then redistribute the copies as desired. If many providers begin scanning and storing digital book copies, the affected books are only as secure as the least secure provider – so the diligent efforts of some providers would be undermined by lax security of others.

Breaches in Libraries' Systems Could Facilitate Book Piracy

20. I understand that the Google Library Project includes providing to its library partners a full digital copy of the books the libraries allowed Google to scan. Breaches in the security systems at these libraries could facilitate book piracy.

21. I have not been informed of all the ways that libraries intend to use the book contents data they receive from Google, nor have I been informed how libraries intend to secure that data. But the information currently available indicates that libraries' actions present a risk of book piracy.

22. If libraries provide book contents in a way where authorized library users can access the data, it is likely that some users will attempt to exceed the intended scope of authorization to access and copy book contents en masse. For example, in July 2011, a student used MIT library access to download 4.8 million articles and other documents.⁵

23. Structural factors also increase the difficulty of libraries properly securing book contents. University libraries typically serve myriad users including students, visitors, and others with limited long-term connection to the library – limiting a library's ability to establish accountability. Moreover, libraries typically specialize in making information available rather than in restricting how information may be used. While some libraries offer electronic resources that are subject to restrictions on use, these restrictions are typically implemented by keeping the information on the information provider's servers so that the information provider, not the library, can monitor usage and attempt to assure compliance. For example, when a library licenses journals and articles and other documents from the JSTOR digital archive, libraries do not receive full copies of the articles to store on library servers. Instead, libraries receive secure access to JSTOR servers, allowing library patrons to access individual documents on JSTOR without ever receiving the full corpus of all articles JSTOR holds. Access to documents held by Lexis-Nexis and Westlaw is similar. In contrast, the book contents here at issue would be stored on libraries' servers without an outside third party to assure and enforce compliance with access restrictions.

⁵ United States of America v. Aaron Swartz. Indictment. July 14, 2011.

24. The likely uses of digital book copies further exacerbate the risk of copying. A natural use of digital book copies is to analyze patterns in book text. From the perspective of a researcher seeking to perform such analysis, it is natural to begin by copying digital book copies onto a system the researcher controls, allowing the researcher to run flexible and high-speed searches of those book copies using the researcher's preferred tools. (In contrast, if the researcher had to run analyses on a server controlled by the library, the researcher would ordinarily be able to use only those tools the library provides, and the speed of the researcher's analysis might be constrained by server capacity and availability.) Crucially, once a researcher copies the data onto his own system, the library's prior security efforts (whatever they might be) are largely irrelevant. A researcher might even store digital book copies on a laptop or USB drive, where loss and theft are particularly frequent. When book copies are processed into text using optical character recognition, the resulting files can be quite small – making it feasible to store tens of thousands of book copies on an ordinary laptop or USB drive.

25. A further risk of book piracy from or via university libraries comes from the culture of “pranks” enjoyed by many software and engineering students. For example, the MIT Hack Gallery presents hundreds of hacks including public displays of the Apple logo, the logo of the Boston Red Sox, and the logos of various movies.⁶

26. In its agreement with the University of Michigan, Google has specifically avoided responsibility for monitoring how libraries store or use book contents. The University of Michigan agreement specifically speaks to Google's duty of care over physical books in Google's custody (including the risk of loss, damage, pests, fire, theft, and the like).⁷ However, the agreement offers limited commitments as to the University of Michigan's duty to keep secure its Digital Copy of the book contents.⁸ For example, Google's agreement with University of Michigan provides the use of robots.txt as a supposed “technological measure ... to restrict automated access” to the Digital Copy, but robots.txt offers no genuine security protection and instead relies on a requester's compliance with stated restrictions on access. The other provisions of Google's agreement with University of Michigan are vague (“reasonable efforts,” “cooperate in good faith to mutually develop methods,” etc.). These vague provisions offer significantly lower protection than Google provides for even its routine business confidences.⁹

Google Itself Is Not Immune to Design Flaws and Security Breaches

27. Despite Google's considerable resources, Google products and services nonetheless suffer from design flaws and security breaches which result in information flowing in ways Google and/or users did not intend.

⁶ <http://hacks.mit.edu/>

⁷ Cooperative Agreement between Google Inc. and Regents of the University of Michigan, sections 2.3.1 and 2.7.

⁸ Cooperative Agreement between Google Inc. and Regents of the University of Michigan, sections 4.4.1-2.

⁹ For example, the Google NDA presented at <http://valleywag.com/230407/this-nda-never-existed> offers greater protection including greater restrictions on the circumstances in which information can be shared, greater restrictions on the permissible recipients of such information, and more precise requirements as to how information must be secured.

28. In general, Google faces each of the vulnerabilities detailed in “Similar Scanning Operations Could Allow Book Copies to Be Copied and Redistributed” above. The following sections flag specific problems that could occur, as well as noting similar problems Google has already faced.

Google’s Security Systems are not Failproof

29. In other information and distribution services, Google has failed to comply with its commitments to users and the public. For example, in January 2010, I found and reported the popular Google Toolbar program – installed on “hundreds of millions” of computers¹⁰ – continuing to track users’ browsing (including every web page visited) even after users had specifically requested that the Toolbar be “disable[d]” and even after the Toolbar had confirmed users’ request and disappeared from screen.¹¹ The user browsing at issue was users’ most sensitive online activities: reasonable users would activate the Toolbar’s “disable tracking” feature exactly when they sought to engage in private activities they did not wish Google to track. Google subsequently characterized its nonconsensual information collection as “an issue”¹² but offered no explanation for why it collected information users had specifically indicated, and Google had agreed, should not be collected. Google has paid no compensation to affected users. Neither did Google promise to undo the error: Google never offered to let affected users identify themselves so Google could delete their data from its records.

30. In spring 2010, Google introduced Buzz, a social network for connecting to online colleagues and sharing information about who is doing what. For users of Google’s email service, Gmail, Buzz shared with the general public the names of the persons Gmail users corresponded with – information Google had previously indicated it would keep confidential. Google subsequently faced class litigation for this information breach, alleging that affected users suffered direct economic loss as a result of Google’s information revelation. For example, Buzz revealed the persons sending email to and receiving email from Andrew McLaughlin, who had previously served as a Google lobbyist, and was working in the White House as deputy Chief Technology Officer of the United States. Buzz’s information revelation indicated that Mr. McLaughlin had engaged in impermissible activities with his prior employers, in violation of White House ethics rules. After Buzz-posted information prompted a complaint and an investigation, Mr. McLaughlin was formally reprimanded for the improper communications.¹³ To the best of my knowledge, Google never offered any compensation to Mr. McLaughlin or other affected Gmail users.

¹⁰ Ian Paul. “Google Toolbar Tracks Some Browsing Even When It’s Not Supposed To.” PC World. January 25, 2010. http://www.pcworld.com/article/187670/google_toolbar_tracks_some_browsing_even_when_its_not_supposed_to.html .

¹¹ Benjamin Edelman. “Google Toolbar Tracks Browsing Even After Users Choose ‘Disable’.” January 26, 2010. <http://www.benedelman.org/news/012610-1.html> .

¹² Barry Schwarz. “Disabling The Google Toolbar Doesn’t Stop Google From Tracking You.” January 26, 2010. <http://searchengineland.com/disabling-the-google-toolbar-doesnt-stop-google-from-tracking-you-34438>

¹³ J. Nicholas Hoover. “White House Reprimands Deputy CTO.” Information Week. May 17, 2010. <http://www.informationweek.com/news/government/leadership/224900083> .

31. In addition, during February 2012, researchers discovered that Google was bypassing Safari and Internet Explorer privacy settings to collect data that those browsers would ordinarily decline to provide.¹⁴ While Google ceased further collection via these methods, Google has not offered to delete information improperly collected, nor has Google offered to compensate affected users.

32. In each of these examples, Google's services worked in exactly the way Google's engineers designed, in a way any Google engineer could have noticed through straightforward testing and, in many instances, in a way Google staff specifically intended. Yet Google lacked authorization for these information collection and distribution practices.

Rogue Google Employees Could Access or Redistribute Book Contents

33. In September 2010, news reports revealed that David Barksdale, a senior Google engineer, had used his privileged position at Google to spy on four teenagers for months. Because Barksdale was a Site Reliability Engineer at Google, he was able to tap into call logs for Google Voice (records of phone calls to and from the youths), read the youths' instant message chat logs, and unblock himself from buddy lists in order to send instant messages to and from the youths. Barksdale used each of these methods to access the communications of the affected youths. While Google terminated Barksdale's employment after these practices became known, Barksdale was able to continue his practices for months without Google's internal controls noticing what he was doing.¹⁵ Google subsequently admitted that it had previously caught at least one other Google staff person accessing user data without authorization.¹⁶

Hackers Could Access or Redistribute Book Contents

34. Outside hackers could access or redistribute book contents. Many hackers disagree with the public policy embodied in applicable copyright law. For example, during January 2012, hackers disabled web sites of the U.S. Department of Justice and FBI, trade associations Recording Industry Association of America and Motion Picture Association of America, and record labels Universal, BMI, and Warner Music Group, when hackers disapproved of possible revisions to copyright law then under discussion in Congress.¹⁷ Google's digitized book contents thus could attract hackers seeking to redistribute notable information.

35. In January 2010, Google reported a "highly sophisticated and targeted attack on our corporate infrastructure originating from China that resulted in the theft of intellectual

¹⁴ Jonathan Mayer. "Safari Trackers." February 17, 2012. <http://cyberlaw.stanford.edu/blog/2012/02/safari-trackers>.

¹⁵ Adrian Chen. "GCreep: Google Engineer Stalked Teens, Spied on Chats." Gawker. September 14, 2010. <http://gawker.com/5637234/gcreep-google-engineer-stalked-teens-spied-on-chats>.

¹⁶ Jacon Kincaid. "This Is the Second Time a Google Engineer Has Been Fired for Accessing User Data." TechCrunch. September 14, 2010.

¹⁷ Ingrid Lunden. "SOPA Blackout, Anonymous-Style: FBI, DOJ Sites Downed In Megaupload Protest." paidContent.org. January 19, 2012. <http://paidcontent.org/article/419-sopa-blackout-anonymous-style-doj-riaa-hacked-in-megaupload-protest/>.

property from Google.”¹⁸ A subsequent analysis by McAfee indicated that hackers had specifically sought access to the source code for Google systems, and that hackers had even obtained the ability to alter the source code for Google systems.¹⁹ If Google cannot keep its own intellectual property secure from attackers, it is plausible to conclude that Google cannot keep book contents invulnerable to security breaches.

A Single Breach Could Cause Devastating Harm to the Class

36. A single breach of the systems that store book contents could allow book contents to become ubiquitous online. In particular, after that single breach occurs, users are likely to copy and/or share the material en masse, preventing any subsequent efforts to resecure book contents. For example, on August 4, 2006, AOL posted twenty million searches performed by more than 650,000 users over a three-month period. Once AOL realized that posting this information was inadvisable (because it included myriad sensitive subjects and could be easily linked to individual AOL users), AOL removed the file from its servers the same week, but the file remains easily available, including on the web and via BitTorrent.²⁰ Similarly, Wikileaks in February 2010 began publishing hundreds of thousands of pages of classified material. The information remains easily available, including via straightforward Google searches. The information simply cannot be “unpublished” once it has become publicly available on the Internet.

37. Thus, if book contents become available once – via a breach of book copies scanned by others, via a breach in libraries’ copies of books scanned by Google, or via a breach of Google’s own systems – the book contents are likely to be available easily and indefinitely.

38. However remote one may consider the risk of book contents becoming available, that risk must be considered in light of the devastating impact to the Class if book contents become available.

Conclusion

39. If Google’s practices of digitally copying, distributing and displaying books without rightsholder permission are found to be fair uses and become widespread, the market for books will be adversely impacted by the potential for security breaches. Conversely, requiring Google and others to obtain the permission of rights-holders before engaging in such practices could prompt negotiations between rights-holders and those who seek to digitally use their works, thereby fostering standards for the allocation of the costs and risks of any harm flowing from such security breaches.

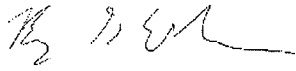
¹⁸ David Drummond. Official Google Blog. January 12, 2010.

<http://googleblog.blogspot.com/2010/01/new-approach-to-china.html> .

¹⁹ McAfee Labs. “Protecting Your Critical Assets: Lessons Learned from ‘Operation Aurora.’” March 2010. http://www.wired.com/images_blogs/threatlevel/2010/03/operationaurora_wp_0310_fnl.pdf .

²⁰ For example, I searched Google for “AOL search torrent” (without quotes) on March 27, 2012. Among the first ten results, I found six locations where I could download the files. <http://gregsadsdetsky.com/aol-data/> presents nine different locations where the data remains available.

Signed April 2 2012,

A handwritten signature in black ink, appearing to read 'B. Edelman', written in a cursive style.

Benjamin Edelman

EXHIBIT A

27a Linnaean St.
Cambridge, MA 02138

Benjamin G. Edelman

ben@benedelman.org
(617) 359-3360

Experience

Assistant professor, Harvard Business School. Negotiations, Organizations & Markets unit. (April 2007 – present)

Fields: Industrial organization, market design, information economics.

Research interests: Electronic markets. Internet advertising, reputation, and fraud. Automated data collection.

Teaching: Networked businesses, market design, information systems, online marketing, negotiation.

Independent consultant and expert witness (November 1999 – present)

Conducted quantitative analyses and empirical testing for a variety of clients including the American Civil Liberties Union, AOL, Microsoft, National Association of Broadcasters, National Football League, New York Times, Universal Music Group, and Washington Post on topics including online advertising, advertising fraud, spyware, spam, pay-per-click advertising and click fraud, Internet filtering, geolocation and targeting, privacy, security, automated data collection, and user interface design.

Qualified as an expert in Federal court on multiple occasions, and provided oral testimony under direct and cross examination.

Student Fellow / Technology Analyst, Berkman Center for Internet & Society (May 1998 – January 2004)

Conducted empirical studies of the Internet's domain name system, spyware/adware, content filtering by network intermediaries.

Developed software systems for interactive real-time communication among class/meeting participants. Designed and operated system for webcast of and remote participation in numerous Berkman Center, Harvard Law School, and Cambridge community events as well as twelve ICANN public meetings.

Education

Harvard Graduate School of Arts & Sciences - Ph.D., Economics, 2007. Dissertation: "Topics in Internet Advertising."

Harvard Law School - J.D., 2005.

Harvard Graduate School of Arts & Sciences - A.M., Statistics, 2002.

Harvard College - A.B., Economics, *summa cum laude*, 2002; Phi Beta Kappa.

Woodrow Wilson Senior High School - Washington, DC: 1998; valedictorian.

Representative Research

Internet Advertising and the Generalized Second Price Auction (*American Economic Review*, 2007)
with Michael Ostrovsky and Michael Schwarz

Optimal Auction Design and Equilibrium Selection in Sponsored Search Auctions (*American Economic Review*, 2010)
with Michael Schwarz

Strategic Bidder Behavior in Sponsored Search Auctions (*Decision Support Systems*, 2007) with Michael Ostrovsky

Measuring the Perpetrators and Funders of Typosquatting (*FC'10, SVLNCS*) with Tyler Moore; web introduction and appendix also available

Greedy Bidding Strategies for Keyword Auctions (*Proceedings of the 9th ACM Conference on Electronic Commerce*, 2007)
with Matthew Cary, Aparna Das, Ioannis Giotis, Kurtis Heimerl, Anna Karlin, Claire Mathieu, and Michael Schwarz

On Best-Response Bidding in GSP Auctions (2008)
with Matthew Cary, Aparna Das, Ioannis Giotis, Kurtis Heimerl, Anna Karlin, Claire Mathieu, and Michael Schwarz

Running Out of Numbers: Scarcity of IPv4 Addresses and What To Do About It (*Proceedings of AMMA*, 2009)

Adverse Selection in Online "Trust" Certifications (*Proceedings of ICEC 2009*)

Adverse Selection in Online "Trust" Certifications and Search Results (*Electronic Commerce Research and Applications*, 2011)

Deterring Online Advertising Fraud Through Optimal Payment in Arrears (*FC'09, SVLNCS*)

- Securing Online Advertising: Rustlers and Sheriffs in the New Wild West (published in *Beautiful Security*, 2009)
- Assessing and Improving the Safety of Internet Search Engines (published in *The Rising Power of Search Engines on the Internet*, 2006)
- Web Sites Sharing IP Addresses: Prevalence and Significance (2003) cyber.law.harvard.edu/people/edelman/ip-sharing
- Empirical Analysis of Internet Filtering in China (2002) with Jonathan Zittrain cyber.law.harvard.edu/filtering/china
Published in *IEEE Internet Computing* as “Internet Filtering in China” (March-April 2003)

Long-Term Research Projects

- Strategies and Outcomes in Search Engine Advertising (2004-)
- “Spyware”: Research, Testing, Legislation, and Suits (2002-) benedelman.org/spyware
- Resources for Affiliates and Affiliate Merchants (2004-) benedelman.org/affiliates
- Documentation of Internet Filtering Worldwide (2002-2003) with Jonathan Zittrain cyber.law.harvard.edu/filtering
- The Top-Level Domain Evaluation Project (2002-2003) with Jonathan Zittrain cyber.law.harvard.edu/tlds
- Classroom and Meeting Technology Tools (1998-2002) cyber.law.harvard.edu/meetingtools
- ICANN Public Meeting Archives, Notes, and Briefing Books (1998-2001) cyber.law.harvard.edu/icann
cyber.law.harvard.edu/ifwp

Additional Writings

- Advertising Disclosures: Measuring Labeling Alternatives in Internet Search Engines (2012)
with Duncan Gilchrist *Information Economics and Policy*
- Internet Protocol Numbers and the American Registry for Internet Numbers: Suggested Guidance for Bankruptcy Trustees, Debtors-in-Possession, and Receivers. *BNA’s Bankruptcy Law Reporter* (2012) with Steven Ryan and Matthew Martel
- Pricing and Efficiency in the Market for IP Addresses (2011) with Michael Schwarz
- The Design of Online Advertising Markets (forthcoming) *Handbook of Market Design*
- Earnings and Ratings at Google Answers (forthcoming) *Economic Inquiry*
- Bias in Search Results?: Diagnosis and Response (2011) *The Indian Journal of Law and Technology*
- Measuring Bias in “Organic” Web Search (2011) with Ben Lockwood benedelman.org/searchbias
- To Groupon or Not to Groupon: The Profitability of Deep Discounts (2010) *HBS Working Paper* – with Scott Kominers and Sonia Jaffe
and To Groupon or Not To Groupon: New Research on Voucher Profitability (2011) *HBR Blogs*
- Least-Cost Avoiders in Online Fraud and Abuse (2010) *IEEE Security and Privacy*
- The Pathologies of Online Display Advertising Marketplaces (2010) *ACM Sigecom Exchanges*
- Competing Ad Auctions: Multi-homing and Participation Costs (2010) with Itai Ashlagi and Hoan Soo Lee
- Priced and Unpriced Online Markets (2009) (*Journal of Economic Perspectives*, summer 2009)
- Red Light States: Who Buys Online Adult Entertainment? (2009) (*Journal of Economic Perspectives*, winter 2009)
- Who Owns Metrics?: Building a Bill of Rights for Online Advertisers (2009) (*Journal of Advertising Research*, Dec. 2009)
- How to Combat Online Ad Fraud (2009) *Harvard Business Review*
- The Dark Underbelly of Online Advertising (2009) *Harvard Business Review Online – HBR Now*

Fraud in Online Advertising (2009) *The Business Standard (India)*

Typosquatting: Unintended Adventures in Browsing (2008) *McAfee Security Journal*

CPC/CPA Hybrid Bidding in a Second Price Auction (2008) with Hoan Soo Lee

When the Net Goes Dark and Silent (2002) *South China Morning Post (op-ed)*

The Effect of Editorial Discretion Book Promotion on Sales at Amazon.com (2001-2002)

Seymour and Ruth Harris Prize for Best Thesis in Economics, Thomas Temple Hoopes Prize for Undergraduate Research

Web Site Writings

Search My Logs of Affiliate Fraud and Affiliate Fraud Information Lookup (2012) with Wesley Brandi

Hack-Based Cookie-Stuffing by Bannertracker-script (2012) benedelman.org/news/022712-1.html
with Wesley Brandi

Large-Scale Cookie-Stuffing at Eshop600.co.uk (2012) benedelman.org/news/013012-1.html with Wesley Brandi

Advertising Disclosures in Online Apartment Search (2012) benedelman.org/adlabeling/apartmentsearch
with Paul Kominers

Google Tying Google Plus and Many More (2012) benedelman.org/news/011212-1.html

Revisiting Search Bias at Google (2011) benedelman.org/news/111111-1.html

Understanding the Purposes – and Weaknesses – of Online-to-Offline Discounting *Pymnts.com* (2011)

Towards Improvement in Singapore's Transportation Efficiency and Environmental Impact (2011)
submission to the National Climate Change Secretariat of Singapore

Google's Dominance – And What To Do About It and Finding and Preventing Biased Results (2011)
American Constitution Society for Law and Policy – Blog Debate

Advertisers' Missing Perspective in the Google Antitrust Hearing (2011) benedelman.org/news/092011-1.html

Implications of Google's Pharmacy Debacle (2011) benedelman.org/news/082611-1.html and republished at *Betanews*

Online Discount Vouchers – Letter-Writing Tool (2011) vouchercomplaints.org with Paul Kominers & Xiaoxiao Wu

Consumer Protection in Online Discount Voucher Sales (2011) benedelman.org/voucher-consumer-protection
with Paul Kominers

Revisiting Unlawful Advertisements at Google (2011) benedelman.org/news/051811-1.html and excerpted at
Huffington Post

Personal Rapid Transport - Environmental Issues for Earth Day (2011) hbs.edu/news/releases/earthday042011.html

Remedies for Search Bias (2011) benedelman.org/news/022211-1.html

In Accusing Microsoft, Google Doth Protest Too Much (2011) *HBR Blogs*

Knowing Certain Trademark Ads Were Confusing, Google Sold Them Anyway -- for \$100+ Million (2010)
benedelman.org/news/113010-1.html

Advertisers Should Raise Their Voices Against Arrogant Google (2010) *mUmBRELLA*

Hard-Coding Bias in Google 'Algorithmic' Search Results (2010) benedelman.org/hardcoding

A Closer Look at Google's Advertisement Labels (2010) benedelman.org/adlabeling/google-nov2010.html

On Facebook and Privacy (2010) www.hbs.edu/news/releases/facultyonfacebookprivacy.html

Tying Google Affiliate Network (2010) benedelman.org/news/092810-1.html

Facebook Leaks Usernames, User IDs, and Personal Details to Advertisers (2010)
benedelman.org/news/052010-1.html

Sony's Crackle: Invisible Traffic Galore (2010) benedelman.org/news/042710-1.html

Protecting Privacy by Design (2010) *McAfee AVERT Blog*

Google's Privacy Breach: Lessons for Companies (2010) *Harvard Business Review Online – HBR Now*

Google Toolbar Tracks Browsing Even After Users Choose “Disable” (2010) benedelman.org/news/012610-1.html

Upromise Savings -- At What Cost? (2010) benedelman.org/news/012110-1.html

Google Still Charging Advertisers for Conversion-Inflation Traffic (2010) benedelman.org/news/010510-1.html

Towards a Bill of Rights for Online Advertisers (2009) benedelman.org/advertisersrights
(excerpted in Advertising Week Welcome Guide, excerpted in Huffington Post)

Payment Card Network Rules Prohibit Aggressive Post-Transaction Tactics (2009)
benedelman.org/posttransaction/cardnetworks

Deception in Post-Transaction Marketing Offers (2009) benedelman.org/posttransaction (including Senate testimony)

How Google and Its Partners Inflate Measured Conversion Rates and Increase Advertisers' Costs (2009)
benedelman.org/news/051309-1.html

In Support of Utah's HB450 (2009) benedelman.org/news/030909-1.html

False and Deceptive Display Ads at Yahoo's Right Media (2009) benedelman.org/rightmedia-deception

Privacy Lapse at Google JotSpot (2008) benedelman.org/google-jot-privacy

Hydra Media's Pop-Up Problem -- Ten Examples (2008) benedelman.org/news/101408-1.html

CPA Advertising Fraud: Forced Clicks and Invisible Windows (2008) benedelman.org/news/100708-1.html

Auditing Spyware Advertising Fraud: Wasted Spending at VistaPrint (2008) benedelman.org/news/093008-1.html

PPC Platform Competition and Google's “May Not Copy” Restriction (2008) benedelman.org/news/062708-1.html

Debunking Zango's “Content Economy” (2008) benedelman.org/news/052808-1.html

Coupons.com and TRUSTe: Lots of Talk, Too Little Action (2008) benedelman.org/news/031808-1.html

Delaying Payment to Deter Online Advertising Fraud (2008) benedelman.org/paymentdelay

Critiquing C-NetMedia's Anti-Spyware Offerings and Advertising Practices (2008)
benedelman.org/news/021408-1.html

Sears Exposes Customer Purchase History in Violation of Its Privacy Policy (2008)
benedelman.org/news/010408-1.html

The Sears “Community” Installation of ComScore (2008) benedelman.org/news/010108-1.html

A Closer Look at Coupons.com (2007) benedelman.org/news/082807-1.html

Spyware Still Cheating Merchants and Legitimate Affiliates (2007) benedelman.org/news/052107-1.html

How Spyware-Driven Forced Visits Inflate Web Site Traffic Counts (2007) benedelman.org/news/050707-1.html

Advertising Through Spyware -- After Promising To Stop (2007) benedelman.org/news/031407-1.html

Why I Can Never Agree with Adware and Spyware (2007)
technology.guardian.co.uk/online/insideit/story/0,,1997629,00.html

Bad Practices Continue at Zango (2006) with Eric Howes benedelman.org/news/112006-1.html

Intermix Revisited (2006) benedelman.org/news/110806-1.html

Current Ask Toolbar Practices (2006) benedelman.org/spyware/ask-toolbars

False and Deceptive Pay-Per-Click Ads (2006) benedelman.org/ppc-scams

Cookies Detected by Anti-Spyware Programs: The Current Status (2006)

www.vinnylingham.com/specialreports/cookiedetections

How Vonage Funds Spyware (2006) benedelman.org/news/071806-1.html

Spyware Showing Unrequested Sexually-Explicit Images (2006) benedelman.org/news/062206-1.html

Banner Farms in the Crosshairs (2006) benedelman.org/news/061206-1.html

The Safety of Internet Search Engines (2006) siteadvisor.com/studies/search_safety_may2006 with Hannah Rosenbaum

New York v. Direct Revenue, LLC - Documents and Analysis (2006) benedelman.org/spyware/nyag-dr

The Spyware - Click-Fraud Connection - and Yahoo's Role Revisited (2006) benedelman.org/news/040406-1.html

Advertisers Funding Direct Revenue (2006) benedelman.org/spyware/images/dr-mar06

Critiquing ITSA's Pro-Adware Policy (2006) benedelman.org/news/033106-2.html

Advertisers Funding 180solutions (2006) benedelman.org/spyware/images/180-jan06

Nonconsensual 180 Installations Continue (2006) benedelman.org/news/022006-1.html

Pushing Spyware through Search (2006) benedelman.org/news/012606-1.html

Affiliate Hall of Shame (2006) benedelman.org/news/011606-1.html

180solutions's Misleading Installation Methods - Dollidol.com (2006)

benedelman.org/spyware/installations/dollidol-180

Scanning for Solutions (2005) publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=37284

What Claria Doesn't Disclose (Any More) (2005) benedelman.org/news/111505-1.html

Claria Shows Ads Through Exploit-Delivered Popups (2005) benedelman.org/news/101805-1.html

Video: New.net Installed through Security Holes (2005) benedelman.org/news/100505-1.html

How Affiliate Programs Fund Spyware (2005) benedelman.org/news/091405-1.html

How Expedia Funds Spyware (2005) benedelman.org/news/090705-1.html

How Yahoo Funds Spyware (2005) benedelman.org/news/083105-1.html

What Passes for "Consent" at 180solutions (2005) benedelman.org/news/062805-1.html

Google's Role: Syndicated Ads Shown Through Ill-Gotten Third-Party Toolbars (2005)

benedelman.org/news/060605-1.html

Ask Jeeves Toolbar Installs via Banner Ads at Kids Sites (2005)

benedelman.org/spyware/installations/askjeeves-banner

Hotbar Installs via Banner Ads at Kids Sites (2005) benedelman.org/spyware/installations/kidzpage-hotbar

The 180 Turnaround That Wasn't (2005) adbumb.com/adbumb159.html

The PacerD Installation Bundle (2005) benedelman.org/spyware/installations/pacerd

Claria's Misleading Installation Methods - Ezone.com (2005) benedelman.org/spyware/installations/ezone-claria

Claria's Misleading Installation Methods - Dope Wars (2005) benedelman.org/spyware/installations/dopewars-claria

180solutions's Misleading Installation Methods - Ezone.com (2005) benedelman.org/spyware/installations/ezone-180

3D Desktop's Misleading Installation Methods (2005) benedelman.org/spyware/installations/3d-screensaver

Comparison of Unwanted Software Installed by P2P Programs (2005) benedelman.org/spyware/p2p

Advertisers Supporting eXact Advertising (2005) benedelman.org/spyware/exact-advertisers

How Google's Blogspot Helps Spread Unwanted Software (2005) benedelman.org/news/022205-1.html

How VeriSign Could Stop Drive-By Downloads (2005) benedelman.org/news/020305-1.html

Intermediaries' Role in the Spyware Mess (2005) benedelman.org/news/052305-1.html

Media Files that Spread Spyware (2005) benedelman.org/news/010205-1.html

Video: Ebates Installed through Security Holes (2004) benedelman.org/news/121504-1.html

Direct Revenue Deletes Competitors from Users' Disks (2004) benedelman.org/news/120704-1.html

Who Profits from Security Holes? (2004) benedelman.org/news/111804-1.html

Gator's EULA Gone Bad (2004) benedelman.org/news/112904-1.html

Grokster and Claria Take Licenses to New Lows, and Congress Lets Them Do It (2004)
benedelman.org/news/100904-1.html

California's Toothless Spyware Law (2004) benedelman.org/news/092904-1.html

The Effect of 180solutions on Affiliate Commissions and Merchants (2004) benedelman.org/spyware/180-affiliates

WhenU Spams Google, Breaks Google "No Cloaking" Rules (2004) benedelman.org/spyware/whenu-spam

WhenU Copies 26+ Articles from 20+ News Sites (2004) benedelman.org/spyware/whenu-copy

Advertisers Using WhenU (2004) benedelman.org/spyware/whenu-advertisers

WhenU Security Hole Allows Execution of Arbitrary Software (2004) benedelman.org/spyware/whenu-security

WhenU Violates Own Privacy Policy (2004) benedelman.org/spyware/whenu-privacy

Methods and Effects of Spyware (FTC Comments) (2004) benedelman.org/spyware/ftc-031904.pdf

A Close Reading of Utah's Spyware Control Act (2004) benedelman.org/spyware/utah-mar04

Blocked Sites will Return, but with Limited Access (2003) South China Morning Post (op-ed)

Web Sites Sharing IP Addresses: Prevalence and Significance (2003)
cyber.law.harvard.edu/people/edelman/ip-sharing

Documentation of Gator Advertisements and Targeting (2003) cyber.law.harvard.edu/people/edelman/ads/gator

Empirical Analysis of Google SafeSearch (2003) cyber.law.harvard.edu/people/edelman/google-safesearch

Large-Scale Registration of Domains with Typographical Errors (2003) cyber.law.harvard.edu/people/edelman/typo-domains

Technical Responses to Unilateral Internet Authority: The Deployment of VeriSign "Site Finder" and ISP Response (2003) with Jonathan Zittrain cyber.law.harvard.edu/tlds/sitefinder

Compliance with UDRP Decisions: A Case Study of Joker.com (2003) cyber.law.harvard.edu/people/edelman/udrp-compliance

Domain Name Typosquatter Still Generating Millions (2003) circleid.com/article/101_0_1_0_C

Localized Google Search Result Exclusions (2002-2003) with Jonathan Zittrain cyber.law.harvard.edu/filtering/google

Defensive Registrations: Why They're Still Needed, and How to Make Them Earn Their Keep (2002)
Verisign Digital Brand Management Digital Branding Bulletin, www.verisign.com/services/cdns/news/columnist_200212.html

Documentation of Internet Filtering in Saudi Arabia (2002) with Jonathan Zittrain
cyber.law.harvard.edu/filtering/saudi-arabia

Localized Google Search Result Exclusions (2002) with Jonathan Zittrain cyber.law.harvard.edu/filtering/filtering/google

Analysis of Domain Reregistrations Used for Distribution of Sexually-Explicit Content (2002)
cyber.law.harvard.edu/people/edelman/renewals

- Large-Scale Intentional Invalid WHOIS Data (2002) cyber.law.harvard.edu/people/edelman/invalid-whois
- .NAME Registrations Not Conforming to .NAME Registration Restrictions (2002)
cyber.law.harvard.edu/people/edelman/name-restrictions
- Alternative Perspectives on Registrar Market Share (2002) cyber.law.harvard.edu/people/edelman/registrar-choice
- DNS as a Search Engine: A Quantitative Evaluation (2002) cyber.law.harvard.edu/people/edelman/dns-as-search
- Disputed Registrations in .BIZ (2002) cyber.law.harvard.edu/people/edelman/biz-sunrise
- TLD Registration Enforcement: A Call for Automation (2002) circleid.com/article/66_0_1_0_C
circleid.com/article/72_0_1_0_C
- Invalid WHOIS Data: Who Is Responsible? (2002) circleid.com/article/79_0_1_0_C
- iCraveTV.biz/Entervision Retransmits CNN, Cartoon Network, PAX TV, California NBC Affiliate (2002)
cyber.law.harvard.edu/people/edelman/icrave
- Analysis of Registrations in Alternative Root TLDs (2001)
cyber.law.harvard.edu/people/edelman/dotbiz and [/people/edelman/dotweb](http://people/edelman/dotweb)
- Documentation of Privacy and Security Shortcomings at Buy.com (2000)
cyber.law.harvard.edu/people/edelman/buy-privacy.html
- Understanding and Critiquing ICANN's Policy Agenda (2000)
cyber.law.harvard.edu/icann/pressingissues2000/briefingbook
- Software Environments for Online Deliberative Discourse (1999-2000) cyber.law.harvard.edu/projects/deliberation
- Executive Summaries of Formative ICANN Documents (1999)
cyber.law.harvard.edu/pressbriefings/icann/briefingbook/executivesummaries.html
- ICANN and the Public Interest: Pressing Issues (1999) cyber.law.harvard.edu/icann/workshops/la/briefingbook
- Using Trumpet Winsock on Netcom Netcruiser Accounts (1995) cyber.law.harvard.edu/people/edelman/trumpet.html

Teaching Cases and Notes

- Airbnb (A) and (B) (HBS Case 912-019, -020) (and TN) (2011) with Michael Luca
- Attack of the Clones: Birchbox Defends Against Copycat Competitors (HBS Case 912-010) (2011) with Peter Coles
- The Online Economy: Strategy and Entrepreneurship - Course Architecture Note (HBS Note 911-069) (2011)
with Peter Coles
- Mobilizing Online Businesses (HBS Module Note 911-048) (2011) with Peter Coles
- Online Marketing at Big Skinny (HBS Case 911-033) (and TN) (2011) with Scott Kominers
- The iPhone at IVK (TN) (HBS Teaching Note 911-414) (2010)
- Akamai, Inc. (HBS Case 804-158) (2010) with Thomas Eisenmann and Eric Van den Steen
- Google Inc. and Google Inc. (Abridged) (HBS Case 910-036 and 910-032) (2010) (and TN) with Thomas Eisenmann
- Personal Rapid Transport at Vectus, Inc. (HBS Case 910-010) (2010) (and TN)
- eBay Partner Network (A), (B), and (C) (HBS Case 910-008, -009, and -012) (2009) (and TN) with Ian Larkin
- Symbian, Google & Apple in the Mobile Space (A) and (B) (HBS Case 909-055, -056) (2009)
with F. Suarez & A. Srinivasan
- Distribution at American Airlines (A) and (B) (HBS Case 909-035 and -036) (and TN) (2009)
- Windows Vista (HBS Case 909-038) (2009)

Online Restaurant Promotions (HBS Case 909-034) (and TN) (2009)
Ad Classification at Right Media (HBS Case 909-032) (and TN) (2009)
Consumer Payment Systems – United States (HBS Case 909-006) (2009) (and TN) with Andrei Hagiu
Consumer Payment Systems – Japan (HBS Case 909-007) (2009) (and TN) with Andrei Hagiu
TheLadders (HBS Case 908-061) (2008) (and TN) with Peter Coles, Brian Hall, and Nicole Bennett
Opening Dot EU (A) and (B) (HBS Case 908-052 and -053) (2008)
Microsoft adCenter (HBS Case 908-049) (and TN) (2008) with Peter Coles

Programming Experience

Microsoft Visual Basic (15+ years experience), VB.NET	Mathworks MatLab	Stata
SPlus / R	Python	PHP

Awards

Emerald Citations of Excellence Award (2011)
ECCH Award for Outstanding Contribution to the Case Method – Strategy and General Management (2011)
Best Paper Award, Honorable Mention – The 11th International Conference on Electronic Commerce (2009)
Harvard University Graduate Economics Fellowship (2003-2006)
John M. Olin Fellowship in Law and Economics (2003-2004, 2004-2005)
Hoopes Prize for Undergraduate Research (2002)
Seymour and Ruth Harris Prize for Best Honors Thesis in Economics (2002)
John Harvard Scholarship, Harvard College (1998-1999, 1999-2000, 2000-2001)
Rank I Honors, Harvard College (1998-1999, 1999-2000, 2000-2001)
Phi Beta Kappa, Harvard College (2001)
Undergraduate Honors Research Scholarship, Department of Economics, Harvard College (2001)
Detur Prize, Harvard College (1999)

Congressional and Expert Testimony

US Senate, Commerce Committee (2009) (statement for the record)
US House of Representatives, Committee on the Judiciary (2008) (invited / hearing cancelled)
US Senate, Committee on Commerce, Science, and Transportation (2008)
Federal Trade Commission Public Hearing on Effectiveness of CAN-SPAM (2005)
District Court, Third Judicial District of Utah (2004)
US Federal Court, Eastern District of Michigan (2003)
US House of Representatives, Committee on the Judiciary (2003)
US Federal Court, Eastern District of Pennsylvania (2002)
US Federal Court, Western District of Pennsylvania (2000)

Academic Service

Associate Editor: Journal of Economic Perspectives (2008-2012)

Referee: American Economic Review, Quarterly Journal of Economics, Journal of Applied Economics, RAND Journal of Economics, Management Science, Journal of Economics & Management Strategy, Sponsored Search Workshop, Workshop on the Economics of Information Security, Workshop on the Economics of Securing the Information Infrastructure, Manufacturing & Services Operations Management, The International Conference on Electronic Commerce (2009), International Review of Law and Economics, Journal of Industrial Economics, Operations Research, Berkeley Electronic Press – Policy & Internet, Review of Economic Studies, Economics Letters, Management Science, Review of Industrial Organization, Telecommunications Policy, Emerald Program

Program committee: Workshop on the Economics of Securing the Information Infrastructure (2006), Sponsored Search Workshop (2007), WWW2008, Fourth Workshop on Ad Auctions (2008), The First Conference on Auctions, Market Mechanisms and Their Applications (2009), ACM Conference on Electronic Commerce (2010), Workshop on the Economics of Information Security (2010), Workshop on the Economics of Information Security (2011), Seventh Workshop on Ad Auctions (2011), The Second Conference on Auctions, Market Mechanisms and Their Applications (2011), WWW2012

Co-organizer: Sixth Workshop on Ad Auctions (2010)

Non-resident tutor / senior common room member: Cabot House (2004-2012)

EXHIBIT B

Benjamin Edelman – Prior Testimony at Trial or Deposition

Proceeding	Court	Reference	Context	Year	On behalf of
State of South Carolina v. Casale Media, Inc., et al.	South Carolina Court of Common Pleas, Richland County	08-CP-40-0729	Deposition	2008	Plaintiff
UMG Recordings, Inc., et al. v. Veoh Networks, Inc., et al.	U.S. District Court, Central District of California	No. CV 07-5744 AHM (AJWx)	Deposition	2009	Plaintiff
Netscape Communications Corp. v. Valueclick, Inc., et al.,	U.S. District Court, Eastern District of Virginia	No. 1:09-cv-225-TSE-IDD	Deposition	2009	Plaintiff
Arista Records, et al., v. Myxer, Inc., et al.	U.S. District Court, Central District of California	No. CV 08-03935 GAF (JCx)	Deposition	2009	Plaintiff
Stephanie Lens v. Universal Music Corp., et al.	United States District Court, Northern District of California	No. C 07-03783 JF (PVT)	Deposition	2010	Defendant

EXHIBIT C

Exhibit C to Edelman Report

1. The Fourth Amended Class Action Complaint
2. Google Objections and Responses to Plaintiffs' First Requests for Admissions
3. Plaintiffs' Brief in Support of Their Motion for Class Certification
4. Zack Decl. and Exhibits in support of motion for class certification
5. Google's Brief in Opposition to Class Certification
6. Declarations of Daniel Clancy, dated February 11, 2010, and February 7, 2012
7. Plaintiffs' brief in opposition to Google's motion to dismiss the Authors Guild
8. Cooperative Agreement between Google and the University of Michigan (from the University of Michigan website)
9. The Complaint and Plaintiffs' brief in support of motion for partial judgment on the pleadings in *Authors Guild, et al. v. Hathitrust, et al.*, 11 Civ. 6351 (HB)(S.D.N.Y.)
10. Defendant Google Inc.'s Supplemental Narrative Responses and Objections to Plaintiffs Second Request for Production of Documents and Things – Public Redacted Version
11. The books.google.com website
12. The materials cited in my report

EXHIBIT 3

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- x
The Authors Guild, Inc., Associational Plaintiff,
Betty Miles, Joseph Goulden, and Jim Bouton,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

Google Inc.,

Defendant.
----- x

Case No. 05 CV 8136-DC

ECF Case

REPORT OF PROFESSOR DANIEL GERVAIS

A. INTRODUCTION AND BACKGROUND

1. I have been retained by Plaintiffs as an expert on issues of intellectual property, and collective licensing of intellectual property.

2. I am FedEx Research Professor of Law at Vanderbilt University Law School and Director of the Vanderbilt Intellectual Property Program.

3. I am an expert in the field of intellectual property law. I have taught intellectual property law at various institutions in the U.S., Europe, and Canada. I have edited or contributed to 33 books related to intellectual property; and have written publications on intellectual property law for journals around the world, including the *Journal of the Copyright Society of the USA* (my article won the Charles B Seton Award in 2002-03), *Columbia Journal of Law & the Arts*, *Fordham Law Review*, *Cardozo Arts & Entertainment Law Journal*, *European Intellectual Property Review*, *American Journal of International Law*, *Chicago-Kent Law Review*, *Vanderbilt Journal of Technology and Entertainment Law* and the *Journal of Intellectual Property Law*. I have been cited in a decision by the Supreme Court of the United States (*Golan v. Holder*, 2011),

and in decisions by many other courts. A recent article was republished in *Intellectual Property Law Review (2011)* as one of the best intellectual property articles of 2010.

4. One of my special interests is in “collective management” of copyright, meaning how aggregations of individual copyrights are legally protected, licensed, and marketed. I authored the first chapter of a 2010 book I edited on this subject, entitled “Collective Management of Copyright: Theory and Practice in the Digital Age.”

5. In January 2011, I gave the keynote talk at an event on collective management of copyright organized by the Kernochan Center for Law, Media and the Arts at Columbia Law School. An updated version of my presentation was published under the title “The Landscape of Collective Management.”¹

6. Prior to my teaching career, I served as Head of the Copyright Projects Section at the World Intellectual Property Organization (WIPO). In that capacity, I was asked to help establish new, or improve the functioning of existing, Collective Management Organizations (CMOs) in various countries around the world.

7. I also served as Deputy Secretary General of the International Confederation of Societies of Authors and Composers, the largest association of copyright collectives in the world; and as Vice-President of Copyright Clearance Center, Inc., based in Danvers, MA, during which time I was also Deputy Chair of the International Federation of Reprographic Rights Organizations (IFRRO), a worldwide association of CMOs, specializing in reprography (photocopying and digital reproduction of printed content). I have spoken at over 130 academic, professional and other conferences and events, discussing various issues related to intellectual property, including copyright law of the United States, international copyright law and the TRIPS Agreement.

¹ 24:4 COLUM-VLA J. L & ARTS 423-449 (2011).

8. I also serve as Editor-in-Chief of the *Journal of World Intellectual Property*, published jointly by John Wiley & Sons (New York) and Blackwell Publishing (Oxford, UK).

9. My complete curriculum vitae is attached here to as Exhibit A. The facts and data I considered in forming my opinion are listed on Exhibit B. I have not testified as an expert at trial or by deposition in the last four years. I am being compensated for my time at the rate of \$400 per hour.

B. MY OPINION

10. It is my understanding that Google has engaged in the digital copying of millions of books in libraries, the distribution of digital copies of these books to libraries, and display of “snippets” from these books in search results. I have been asked my opinion (a) whether collective licensing markets will continue to develop for the digital uses of books and (b) whether unrestricted and widespread conduct of the type engaged in by Google will harm the development of such markets. As I discuss in greater detail below, in my opinion, the answer to each of these questions is the affirmative.

11. I believe that, if Google’s uses are determined not to be fair uses, the market would intervene and one or more CMOs (with proper authorizations from right holders) would license Google (and potentially others) to scan, distribute and display copyrighted works. In fact, as discussed further below, the type of copyrighted content that Copyright Clearance Center, Inc. presently licenses is essentially printed content, much of the same nature as the material scanned by Google. The rights involved are also essentially the same. In other words, this type of licensing is already a reality.

12. Collective management is already indispensable for many categories of content creators and for many types of copyright uses, including online uses. The value of copyright

rights to authors and other copyright owners is often monetized not in individual transactions (authorizing the use of one or more specific works) but in licensing their rights in aggregated form, as part of a “repertory” of works or rights. This allows markets for those repertoires of works and rights to form and to operate, allowing access to and uses of copyrighted material while compensating creators for their work. Collective licensing markets have often developed in response to new technologies and uses and will continue to develop for digital uses of books unless widespread copying of entire books is permitted as a fair use, thus discouraging the development of such collective licenses.

13. Making books and other copyrighted works available online is desirable both for authors and readers. Technologically, it may be inevitable. It is likely to become a major form of access to content. It may also facilitate access by people with disabilities.

14. Allowing the market, or Congress, to develop a collective licensing system for the types of uses that Google has been making would not prevent these uses. Instead, it would compensate those who created and published the content and whose ability to earn a living often depends on being able to monetize online uses. The actual scope of the uses could be taken into account in determining appropriate rates. Collective management solutions can be applied to manage this type of licensing transaction, as the existence of successful similar collective systems demonstrates.

15. An argument that collective management is not possible or desirable in this case because there are many different types of books is negated by the existence of successful licensing systems for more than two centuries that have combined works of a similar form but with different content into repertoires. Collective Management Organizations license old and new works. Today, existing collective rights music organizations license everything from Philip

Glass to the latest hip-hop hit. CMOs typically pay authors and other right holders based on actual usage.

16. Collective licensing was the thrust of the proposed settlement in this case. The proposed Book Rights Registry was a form of collective management with a repertory license allowing Google to use millions of titles. The Registry would have maintained a database of rights information, received on behalf of the rightsholders the agreed payments from Google, and distributed those payments to rightsholders who had registered their works with the Registry.

17. It is my opinion that a similar type of collective management system, most likely one requiring that rightsholders opt their books in to participate in collective management, would develop here if some or all of Google's uses are found not to be fair. Further, it is my opinion that, if conduct such as Google's is permitted and becomes widespread, this will harm or impede the development of such a collective management model.

C. BASES FOR THE OPINION

(1) The Emergence and Basic Operations of Copyright Management Organizations

18. Collective management reportedly emerged around 1777 in France, when authors of theatrical plays formed an association to license their plays.² In the United States, collective

² In 1838, Honoré de Balzac and Victor Hugo established the Society of French Writers, (known in French as Société des gens de lettres. *See* online : <<http://www.sgdj.org/>> (last visited : March 28, 2012), which was mandated with the collection of royalties from print publishers. A net of authors' societies, shaped by the cultural environment of each country, slowly spread throughout the world. *Id.* at 10. Around the same time, the Universal Theatrical Society was established. *See* www.answers.com/topic/firmin-g-mier (last visited: March 28, 2012).

Both of these initiatives led to the founding congress in 1926 of the International Confederation of Societies of Authors (CISAC). *See* www.cisac.org (last visited: March 28, 2012).

The founding members identified the need to establish both uniform principles and methods in each country for the collection of royalties and the protection of works, and to ensure that copyright was protected throughout the world. (By "world", I am referring only to the Western World. This is inclusive of the Anglo-Saxon and *droit d'auteur* traditions of copyright.)

Today, CISAC has 232 members in 121 countries. *See* <http://www.cisac.org/CisacPortal/initConsultDoc.do?idDoc=22994> (last visited: March 28, 2012).

management developed as technology and markets made possible the widespread and dispersed infringement of copyrights. Broadcasters were considered “pirates,” until their use of music was licensed by performing rights organizations (PROs). ASCAP, BMI and SESAC are the three PROs identified as such in 17 U.S.C. §101. The first PRO, the American Society of Composers and Publishers (ASCAP), was formed in 1914.

19. Collective management provides a number of advantages in licensing uses of copyrights. CMOs are a single-source for the licensing of specific uses, thereby eliminating the need for individually negotiated licenses from each copyright owner. By reducing the transaction costs associated with enforcing, on the one hand, and licensing, on the other, they help convert widespread infringement into markets. This benefits authors and users.

(2) Collective Management in the Copyright Act

20. The Copyright Act regulates CMOs in the United States in a variety of ways. For example, PROs are named in section 101. Section 115 establishes a compulsory license for making and distributing phonorecords. When certain uses are determined by Congress to be desirable but subject to a payment to authors, Congress may establish a compulsory license. Such a system is now in place to set rates for non-interactive transmissions of sound recordings.³

21. A brief review of the legislative history might be helpful to illuminate the issue at hand.

22. The initial focus of legislative action was the collective management of music. In the 1897 Act, Congress prohibited unauthorized public performances generally.⁴ However, in the Copyright Act of 1909, Congress limited the prohibition to those done “for profit.”⁵

For 2010, CISAC members reported collections of \$9.9 billion. *See id.*

³ Section 114 and chapter 8 of Title 17 of the United States Code.

⁴ *Id.*

⁵ *Id.*

23. Not surprisingly, within a few years of the 1909 Act's enactment, the need to define "for profit" emerged.⁶ In *Herbert*, the Supreme Court, in the words of Justice Holmes, explained that the notion should be defined fairly broadly:

The defendants' performances are ... part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.⁷

24. The Court thus established the need for the public performance licenses that ASCAP and now the other PROs provide.⁸ This is a good example of infringement preceding the establishment of a working collective licensing system.

25. When Congress enacted the Copyright Act of 1976,⁹ it did away with the "for profit" language of the 1909 Act. However, Congress also expressly exempted from copyright liability "the public reception of [a transmission embodying a performance of a work] on a single receiving apparatus" where no separate charge was made to see or hear the transmission.¹⁰

26. In an effort to adapt the statute to technological change, in the Digital Performance Right in Sound Recordings Act of 1995, Congress enacted a limited digital public

⁶ See *Herbert v. Shanley Co.*, 242 U.S. 591 (1917) [*Herbert*]; *John Church Co. v. Hilliard Hotel Co.*, 221 F. 229 (2nd Cir. 1915). The named plaintiff in *Herbert v. Shanley Co.*, Victor Herbert, was a founding member of ASCAP, and brought the case as a test case to establish a broader scope for the right of public performance.

⁷ See *Herbert*, *id.*

⁸ Exempted from license fees in the 1909 Act were certain charitable performances and for jukeboxes.

⁹ Act of October 19, 1976, Pub. L. No. 553, 94th Cong., 1st Sess., 90 Stat. 2586, codified as amended at 15 U.S.C. §§ 1-1332 (2005).

¹⁰ *Id.* at § 110(1), (2), (3), (4), (6), (8), (9), codified as amended 17 U.S.C. § 110(1), (2), (3), (4), (6), (8), (9) (2005).

performance right for sound recordings, contained in 17 U.S.C. § 114.¹¹ Congress then provided a compulsory license for non-interactive transmissions - that do not enable a member of the public to receive, on request, a transmission of a particular sound recording or a program specially created for the recipient.¹² The Act also tasked the U.S. Copyright Office to designate a CMO to administer the license, which it did, naming SoundExchange, Inc.¹³

27. The 1995 amendments did not follow the antitrust regulation model that applies to ASCAP and BMI. Instead, Congress opted for a more specialized and modern form of regulation of collective management. Under this new regulatory model, the Act gave the Library of Congress (of which the Copyright Office forms part) the authority to set rates and licensing conditions. The Act also set a distribution key according to which SoundExchange distributes 50% of the revenues to the sound recording copyright owners, 45% to the featured artists, and 5% to an independent administrator to distribute to non-featured artists and vocalists. Licensing rates are set by Copyright Royalty Judges (CRJs)¹⁴ appointed by the Librarian of Congress for six-year terms.

(3) The Copyright Clearance Center

28. A different, voluntary model emerged when Copyright Clearance Center, Inc. (“CCC”) was formed in 1978 as a New York not-for-profit corporation. Publishers and authors register their works with the CCC and set the fee for use of their works in CCC’s several per-use license services. CCC also offers annual repertory licenses in both the business and academic

¹¹ 104 Pub. L. No. 39, 109 Stat. 336 (1995).

¹² 17 U.S.C. § 114(d)(2), (f)(2) (2009); *see also* *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, (3d Cir. 2003) (affirming Copyright Office’s decision to require a compulsory license for simultaneous transmission of a radio station’s broadcast through the Internet).

¹³ *See* 17 U.S.C. § 114(g)(2); and Notice of Designation As Collective Under Statutory License filed with the Licensing Division of the Copyright Office in accordance with Copyright Office regulation 270.5(c), 37 C.F.R. § 270.5(c).

¹⁴ 17 U.S.C. §§ 801-805 (2009).

markets. For the year ended June 30, 2011, CCC reported revenues in excess of \$238 million and payments to right holders in excess of \$171 million.¹⁵ According to its website, CCC licenses business users, under one or more of its repertory or per-use licenses, the right to photocopy an article from a newspaper, magazine, book, journal, research report or other published document; e-mail an online article or PDF; post digital content on their corporate Web sites, intranets and extranets; print out Web-based and other digital content onto paper and overhead slides; republish content in a newsletter, book or journal; and scan printed content into digital form when an electronic version is not readily available.¹⁶ For academic institutions, again under one or more of its repertory or per-use services, it licenses the right to photocopy material from books, newspapers, journals and other publications for use in coursepacks and classroom handouts; use and share information in library reserves, interlibrary loan and document delivery services; post and share content electronically in e-reserves, course management systems, e-coursepacks and other e-learning environments; distribute content via e-mail or post it to their intranets, Internet and extranet sites; and republish an article, book excerpt or other content in their own books, journals, newsletters and other materials.¹⁷

(4) Other Collective Management Organizations

29. Today, CMOs in the United States license: (a) musical works (primarily the three PROs and Harry Fox Agency (HFA) which licenses mostly the reproduction of musical works); (b) sound recordings and the artists' performances they contain (Sound Exchange); and (c) photocopying and digital reprography (Copyright Clearance Center, Inc. or CCC), to name the

¹⁵ The difference between the two numbers includes but is not all a service charge. Due to the time period required to process usage data, the 2011 distributions were mostly of 2010 collections which were significantly lower than 2011 collections. See <http://annualreport.copyright.com/management-summary-financial-data>.

¹⁶ See www.copyright.com.

¹⁷ See *id.*

most well-known organizations. In addition, a form of collective management is used to collect and distribute residuals to certain actors, directors and screenwriters by the audiovisual guilds.

30. CMOs typically operate as follows: Once established (sometimes an authorization is required to operate as a CMO, as was the case for SoundExchange¹⁸), a CMO needs the authority to license a repertory of works, performances or recordings and/or to collect a license fee. The authority may be granted by law, as when a compulsory or statutory license is in place¹⁹, or by contracts with individual right holders or other CMOs. With that authority, a CMO can license and/or collect fees on the basis of rates (also known as “tariffs”). Those rates may be set by a governmental authority such as the Legislative Branch as in section 115 of the Copyright Act or in section 114 by the Copyright Royalty Judges for SoundExchange, or by the Judiciary Branch, such as the federal judges operating as rate courts under the ASCAP and BMI consent decrees.²⁰ At other times, the rates are set by rightholders, as is the case with CCC.²¹

¹⁸ See *infra* note 13.

¹⁹ According to the US Copyright Office, there are eight compulsory and statutory licenses in the Copyright Act (the Copyright Office also notes that the “terms ‘compulsory’ and ‘statutory’ are interchangeable”):

Section 111 - Statutory License for Secondary Transmissions by Cable Systems

Section 112 - Statutory License for Making Ephemeral Recordings

Section 114 - Statutory License for the public performance of Sound Recordings by Means of a Digital Audio Transmission

Section 115 - Compulsory License for Making and Distributing Phonorecords

Section 118 - Compulsory License for the use of Certain Works in Connection with Non-Commercial Broadcasting

Section 119 - Statutory License for Secondary Transmissions for Satellite Carriers

Section 122 - Statutory License for Secondary Transmissions by Satellite Carriers for Local Retransmissions

Section 1003 - Statutory Obligation for Distribution of Digital Audio Recording Devices and Media (Chapter 10).

See www.copyright.gov/licensing/

²⁰ See, e.g., *United States v. Am. Soc'y of Composers, Authors and Publishers*, No. 41-1395, 2001 WL 1589999, (S.D.N.Y. June 11, 2001); and Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 361 (2001).

²¹ Sometimes the price is set by a governmental authority without the need to seek a voluntary agreement first.

31. Having thus obtained the authority to license and/or collect fees, the CMO will normally proceed to sign agreements with users that provide for the collection of license fees and usage data. For example, radio stations (broadcasters) provide logs (often in digital form) of the recordings they used to the PROs in an agreed format. While a radio station may use computer logs to report the recordings used, for other types of users (hotels, bars, restaurants), it is difficult to require 100% reporting. Sometimes statistical surveys are used instead. For example, a number of (representative) users may be surveyed for a specific period of time, and the data thus gathered will then be extrapolated to the class of users concerned using statistical regressions and other similar models.

32. The CMO will process such data and apply them to distribute the funds to copyright holders.²² Identification data (metadata) is generally used to match usage data reported by users or generated by the CMO to specific works, recordings or performances and the right holders therein.

(5) Collective management is a major part of copyright in practice

33. As I see it, in practice there are six ways in which copyrights are currently treated in the United States:

- (A) Full individual exercise of rights by the copyright owner
- (B) Voluntary collective management of rights by the copyright owner
- (C) Presumption/designation of uses by statute
- (D) Statutory limitations on damages to the applicable CMO rate
- (E) Statutory or judicial compulsory licensing

²² Payment to foreign copyright holders is often done through local CMOs in each territory on the basis of a contract usually referred to as a Reciprocal Representation Agreement. Worldwide databases of identification data have been created by CISAC and IFRRO. This allows their members to identify foreign works, performances and recordings licensed to them under those reciprocal representation agreements.

(F) Exceptions allowing uncompensated uses (such as fair use)

34. In a full individual exercise scenario (level A), a user must contact the copyright owner to obtain permission to make uses. Examples would be a book author's contract with a publisher or an author allowing the making of a derivative work, such as a film made based upon a novel. This often entails significant transaction costs (negotiation, etc.).

35. Then there are four levels of right at which the author loses the ability to say no to certain uses by others but retains a right to be paid for such uses. Such is the case when an author voluntarily joins a CMO (level B) because CMOs in most cases will not prohibit the use of a work in their repertory.²³

36. At level C, a CMO may be designated by governmental authorities to manage a right. This system is applied in the United States under section 114 (SoundExchange is the designated CMO).

37. Another option (level D) is to statutorily limit the damages available for certain uses. A number of options under consideration for orphan works resemble this option.²⁴

38. The next level is a compulsory license (level E). This may be managed by a private CMO (for example Harry Fox Agency under the section 115 compulsory license). A governmental authority can also be designated for this purpose. The U.S. Copyright Office directly administers royalty fee collections from cable operators for retransmitting television and radio broadcasts (under 17 U.S.C. § 111), from satellite carriers for retransmitting non-network

²³ Often they simply cannot or should not, as would arguably be the case with ASCAP and BMI under their respective consent decrees.

²⁴ See <http://www.copyright.gov/orphan/> (last accessed March 28, 2012). One of the proposals most discussed would limit damages (conditions apply) to a "reasonable compensation" mutually agreed by the owner and the user or, failing that, be decided by a court and the suppression of statutory damages. My point is that if a collective rate was in place, it would likely inform the reasonable compensation determination by a court.

and network signals (17 U.S.C. § 119), and from importers or manufacturers for distributing digital audio recording products ((17 U.S.C. § 1003).²⁵

39. At level F, a statute takes away from the copyright owner the right to receive remuneration for certain uses. Fair use is such a situation.

40. I believe that if Google's uses are not determined to be fair uses, the market, or Congress, will develop a collective licensing system for the types of uses that Google has been making so that Google would not have to negotiate a transactional license for each book or other work it wishes to use. Such an approach would compensate those who created and published the content and whose ability to earn a living often depends on being able to monetize online uses.

(6) Collective management and the digitization of, and mass access to, books

41. Often after a new form of use has emerged, collective management systems are established to license uses that have been found to be desirable but unauthorized. The purpose of collective management is not to put roadblocks in the utilization of works but rather to reconcile the needs of users and authors, to ensure that copyright rights are duly reflected in new forms of use that do not constitute fair uses or are otherwise exempt. Using collective management, users can obtain licenses with limited transaction costs (such as the annual licenses granted by the PROs and by CCC) or at least a single interlocutor. CMOs can also aggregate usage data to protect the privacy of individuals and the confidentiality of institutional and business users.

²⁵ See *Circular 75: The Licensing Division of the Copyright Office*, available at <http://www.copyright.gov/circs/circ75.pdf> (last accessed March 28, 2012).

CONCLUSION

42. Allowing practices like Google's as fair use may be expected to thwart the development of collective management systems for the digital uses of books and book excerpts that authors and publishers would otherwise likely develop, join or license others to develop.

Dated: April 2, 2012



Daniel Gervais, Ph.D.

EXHIBIT A

CURRICULUM VITAE

Daniel J. Gervais

PART I – EMPLOYMENT & HONORS

a) CURRENT POSITION

Professor of Law
Co-Director, Vanderbilt Intellectual Property Program
Vanderbilt University Law School

b) EDUCATION

- Doctorate, University of Nantes (France), 1998
 - *magna cum laude* (“très honorable”)
- Diploma of Advanced International Studies, Geneva (Switzerland), 1989
 - *summa cum laude* (“très bien”)
- LL.M., University of Montreal, 1987
- Computer science studies University of Montreal, 1984-1985
- LL.B. (McGill University/University of Montreal), 1984
- D.E.C. (Science, Jean-de-Brébeuf College, Montreal), 1981

c) PREVIOUS EMPLOYMENT & OTHER ACADEMIC EXPERIENCE

- Acting Dean, Common Law Section, University of Ottawa (Feb-Jul 2006 and Sep-2007-July 2008)
- University Research Chair, Common Law Section, University of Ottawa (2006-2008)
- Vice-Dean, Research, Common Law Section, University of Ottawa (2003-2006)
- Full Professor, Common Law Section, University of Ottawa (2005-2008)
- Associate Professor, Common Law Section, University of Ottawa (2001-2005)
- Vice-President, International, Copyright Clearance Centre, Inc., Massachusetts, USA, 1997-2000
- Consultant, Organization for Economic Cooperation and Development (OECD), Paris, 1997
- Assistant Secretary General, International Confederation of Societies of Authors and Composers (CISAC), Paris, 1995-1996
- Head of Section, World Intellectual Property Organization (WIPO), Geneva, 1992-1995
- Consultant & Legal Officer, General Agreement on Tariffs and Trade (GATT/WTO), Geneva, 1990-1991
- Lawyer, Clark, Woods, (Montreal), 1985-1990.

Visits:

- Visiting Lecturer, Washington College of Law, American University, June 2011;
- Visiting Professor, University of Liège (Belgium), March 2010 and 2011;

- Visiting Professor, University of Strasbourg (Centre for International Intellectual Property Studies (CEIPI), France), Nov.-Dec. 2009;
- Visiting Professor, Université de Montpellier, France (Feb. 2007 and Apr. 2008)
- Visiting Professor, University of Haifa (2005)
- 2004 Trilateral Distinguished Scholar-in-Residence, Michigan State University, Detroit College of Law (April-May 2004)
- Visiting Scholar, Stanford Law School, Feb-Apr. 2004
- Visiting Professor, DEA (graduate) program, Faculty of Law, University of Nantes, France (May 2003)
- Visiting Professor, Faculty of Law, Graduate program in intellectual property (DESS), Centre universitaire d'enseignement et de recherché en propriété intellectuelle (CUERPI), Université Pierre Mendès-France (Grenoble II), France
- Visiting Professor, Faculty of Law, University of Puerto Rico (June-July 2002--instruction in Spanish and English)
- Lecturer, Institute for Information Law, Faculty of Law, University of Amsterdam, Postdoctoral Summer Program in International Copyright Law (every year since 2000; last in July 2011)

d) HONORS

- Ontario Research Excellence Award (ex PREA), 2005*
- Charles B. Seton Award, 2003 (see under "Scholarly Articles" below)
- Quebec Bar 1985. Finished first ex aequo out of 600+ candidates—received all available awards, including:
 - Quebec Bar Award
 - Quebec Young Bar Award
 - Paris Bar Prize
- Two Excellence Awards, Faculty of Law, University of Montreal, 1984

e) OTHER RELEVANT

1. Editor-in-Chief, *Journal of World Intellectual Property*, Wiley-Blackwell (2006-)
2. Panelist, UDRP, WIPO Arbitration and Mediation Center
3. International editor, *Journal of Intellectual Property Law & Practice* (Oxford Univ. Press) (2005-2008)
4. Member, International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)
5. Member of the Law Society of Upper Canada (Ontario Bar) and of the Bar of Quebec
6. Languages: English, French, Spanish. German (functional). One year of Mandarin.

* Of the 64 awards in 2005, only one given to a law professor.

f) ACADEMIC CONFERENCES:

- Invited speaker, Copyright in a borderless online environment Symposium, Thoresta, Sweden, October 27-28, 2011
- Invited moderator, Max-Planck Institute Workshop on Economic Partnership Agreements of the EU: A Step Ahead an International IP Law?“, Frauenchiemsee, Germany, June 26-28, 2011
- Invited keynote speaker, 39e Colloque Annuel International de l’AFEC, Stretching borders: How far can Canada Go?, Montpellier, France, June 15-17, 2011
- Moderator, Vanderbilt University Law School Program, Beijing, May 21, 2011
- Invited moderator and panelist, 19th Annual Conference on Intellectual Property Law & Policy, Fordham University Law School, New York, April 28-29, 2011
- Invited Chair, Invitation-only Intellectual Property Workshop, Canadian International Council, Ottawa, March 31-April 1, 2011
- Moderator, Patent Unrest, Vanderbilt Law School. February 24, 2011
- Keynote Speaker, Annual Symposium of the Kernochan Center for Law, Media & the Arts, Columbia Law School, New York, January 28, 2011
- Invited speaker, Intellectual Property Institute of Australia (IPRIA), University of Melbourne, Australia, December 13, 2010
- Invited speaker, Trade, Intellectual Property and the Knowledge Assets of Indigenous Peoples: The Developmental Frontier, Victoria University, Wellington, New Zealand, December 8-10, 2010
- Invited speaker, Computer Programs and TRIPS, TRIPS@10 Conference, Columbia University, November 16-18, 2010
- Speaker, International Law Weekend, American Branch of the International Law Association, Fordham Law School, New York, October 22-23, 2010
- Invited speaker, Bits Without Borders conference, Michigan State University, East Lansing, MI, September 25-26, 2010;
- Invited speaker, World Trade Forum, Bern, Switzerland, September 3-4, 2010
- Invited speaker, Copyright @ 300, UC Berkeley School of Law, Berkeley, CA, April 9-10, 2010
- Invited speaker, The Statute of Anne 300 Birthday, Cardozo Law School, New York, March 24-25, 2010
- Invited panelist, Access to Knowledge (A2K) conference, Yale Law School, February 12-13, 2010
- Invited speaker, IUS COMMUNE, Reinventing the Lisbon Agreement, Maastricht University, The Netherlands, November 26, 2009
- Invited speaker, The Lisbon Agreement, CEIPI (Université de Strasbourg, France), November 17, 2009
- Invited keynote speaker, Signifiers in Cyberspace: Domain Names and Online Trademarks

- Conference, Case Western Reserve University, Cleveland, Ohio, November 12, 2009
- Invited speaker, Beyond TRIPS: The Current Push for Greater International Enforcement of Intellectual Property, American University (Washington College of Law), November 5, 2009
- Invited speaker, Intellectual Property Developments in China: Global Challenge, Local Voices conference, Drake University, Des Moines, Iowa, October 15-16, 2009
- Invited speaker, University of Hong Kong, June 12-13, 2009
- Invited speaker, Conference on 100th Anniversary of the 1909 Copyright Act, Santa Clara University, April 27, 2009
- Invited panelist, Fordham International Intellectual Property law & Policy Conference, Cambridge, England, April 15-16, 2009
- Invited participant, University of Cambridge-University of Queensland Copyright History Roundtable, Cambridge, England, April 15, 2009
- Commentator, Vanderbilt Roundtable on User-Generated Content, Social Networking & Virtual Worlds, Nashville, November 14, 2008
- Distinguished Finnegan Lecturer, Washington College of Law, Washington, D.C., October 18, 2008
- Invited panelist, International Law Weekend, New York, October 16, 2008
- Invited speaker, IP Speaker Series, Cardozo Law School, September 22, 2008
- Invited lecturer, Intellectual Property Research Institute of Australia (IPRIA), Melbourne, June 3, 2008
- Invited speaker, International Conference on Patent Law, University of New Zealand, Wellington, May 29-30, 2008
- Invited speaker, Law School of National Taiwan University, March 21, 2008
- Invited commentator, EDGE Project Conference on Intellectual Property and Development, Hong Kong, March 17-18, 2008
- Invited speaker, Cardozo Law School Conference on Harmonizing Exceptions and Limitations to Copyright Law, New York, March 30-31, 2008
- Invited panelist, Fordham Conference on International Intellectual Property Law & Policy, New York, March 27-28, 2008
- *Rapporteur*, International Literary and Artistic Association Biennial Congress (ALAI), Punta del Este, Uruguay, Oct. 31 – Nov. 3 2007
- Invited speaker, Vanderbilt University, Nashville, Tennessee, Oct. 16-17, 2007. “Collective Management of Copyright in North America”, (conference organized in cooperation with WIPO)
- Invited speaker, University of South Carolina, Columbia, SC, October 12, 2007 “The Future of Copyright Law”
- Invited panellist, Fordham University Conference on International Intellectual Property Law & Policy, New York, April 12-13, 2007
- Invited speaker, Dean’s lectures on intellectual property, George Washington University School of Law, Washington D.C., March 13, 2007
- Invited Speaker, UCLA Conference on the WIPO Development Agenda, Los Angeles, March 9-11, 2007
- Invited speaker, International Conference on Impact of TRIPS: Indo-US Experience. NALSAR University of Law, Hyderabad (India), Dec. 15-16, 2006
- Invited speaker, International intellectual property conference, University of Chicago-Kent, October 12-13, 2006
- Speaker, Study days of the International Literary and Artistic Association, Barcelona, June 18-21, 2006

- Invited moderator, Fourteenth Annual Conference on International Intellectual Property Law & Policy, New York, April 20-21 2006
- Invited speaker, University of Michigan, Ann Arbor. Intellectual Property & Development, April 14 2006;
- Invited speaker, Michigan State University College of Law (MSU), East Lansing, The International Intellectual Property Regime Complex, April 7-8 2006
- Invited Roundtable participant, Vanderbilt University Law School, Nashville, Tennessee. Private International Law and Intellectual Property Law: Theory and Practice, March 24-25, 2006
- Invited panelist, Federalist Society, Annual Lawyers Convention. Washington, D.C., November 2005
- Panel Chair, Annual meeting of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), Montréal, July 11-13, 2005
- Invited lecturer, Institute of European Studies, Macau (IEEM), Advanced IP course (25 June-1 July 2005)
- Invited lecturer, Advanced IP conference, Macau, June 27-30, 2005
- Invited speaker, Conference on the Relationship between international and domestic law McGill University, June 15-16, 2005
- Invited speaker, Conference on the Collective Management of Copyright, Oslo, May 19-21, 2005
- Invited keynote speaker, Conference of the Department of Justice on intellectual property and Internet Law, Ottawa, April 21, 2005
- Invited keynote speaker, LSUC Annual Communications Law Conference, Toronto, April 8-9, 2005
- Invited speaker, Law & the Information Society Conference, Fordham University, New York, April 6-7, 2005
- Invited panelist, Fordham International Intellectual Property Law & Policy Conference, New York, March 31-April 1, 2005
- Invited Speaker, Shanghai 2004: Intellectual Property Rights and WTO Compliance. University of East China, Shanghai, China, Nov. 24, 2004
- Invited speaker, "The Internet: A Global Conversation" Conference, University of Ottawa, Oct. 1-2, 2004
- Invited lecturer, Office for Harmonization in the Internal Market (Trade Marks and Designs). Alicante (Spain), July 2004
- Organizer and speaker, Rethinking Copyright Conference, University of Ottawa, May 20-21, 2004
- Invited panelist, American Intellectual Property Lawyers Association (AIPLA), Dallas TX, May 13-14, 2004
- Invited speaker, 2004 Computers Freedom & Privacy Conference, Berkeley, California Apr. 20-23, 2004
- Invited speaker, Intellectual Property, Sustainable Development & Endangered Species Conference. Detroit College of Law, Michigan State University, March 26-27, 2004
- Invited Speaker, Securing Privacy in the Internet Age Symposium, Stanford Law School, March 13-14, 2004
- Invited keynote speaker, "US Copyright Office Comes to California" Conference, Hastings College of Law, San Francisco, CA, March 3, 2004
- Invited speaker, Global Arbitration Forum, Geneva, Switzerland, Dec. 4-5, 2003;

- Invited Panel Chair and speaker, "Copyright and the Music Industry: Digital Dilemmas", Institute for Information Law, Amsterdam, July 4-5, 2003. Topic: "Collective Rights Management & the Future of Copyright";
- Conference Fellow, "International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime" Conference, Duke Law School, Raleigh, NC, USA, Apr. 4-6, 2003
- Invited speaker, Roundtable on questions arising out of the intersections of technology and questions of social justice, University of Ottawa, March 28, 2003. Topic: "Democracy, Technology and Social Justice" (available at commonlaw.uottawa.ca);
- Invited speaker, Conference of Copyright Law Association of Japan (CLAJ), Tokyo, Dec. 7, 2002. Topic: "Transactional Copyright: Licensing Tailored Uses"
- Invited speaker, Facultés universitaires de Saint-Louis, Belgique, May 25-26 2002. Topic: «De l'œuvre à l'auteur »
- Invited speaker. Institutions administratives du droit d'auteur, colloquium organized by the Université de Montréal, Montreal, Oct. 2001. Topic: « La gestion collective au Canada: fragmentation des droits ou gestion fragmentaire »
- Invited speaker, Annual Meeting of the International Literary and Artistic Association (ALAI International), Columbia University, New York, 2001. Topic: "Rights Management Systems"
- Invited lecturer, Swedish School of Economics and the Finnish IPR Institute, Helsinki, Finland, 2000. Topic: "Copyright and Electronic Commerce", lecture presented to graduate students
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 2001. Topic "Electronic Commerce and Copyright"
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 2000. Topic: "The TRIPS Agreement After Seattle"
- Invited speaker, Ohio State University, Columbus, Ohio, 2000. Topic: "Digital Licensing of Copyright"
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 1999. Topic: "Digital Distance Education: Exemption or Licensing?"
- Invited speaker, Fordham University Conference on International Intellectual Property, New York, April 1999. Topic: "An Overview of TRIPS: Historical and Current Issues"

g) PUBLIC LECTURES:

- Invited speaker and session leader, High-level (Ministerial) Forum on Intellectual Property for the Least-Developed Countries, WIPO, Geneva, July 24-25, 2009
- Invited moderator, Copyright Counseling, Management, and Litigation Law Seminar, Seattle, WA, April 26-27, 2009
- Invited speaker, Annual Meeting. Commission on Intellectual Property, International Chamber of Commerce, Cambridge, England, April 17, 2009
- Invited keynote speaker, Asian Copyright Seminar, Tokyo, Japan, February 25-27, 2009
- Invited speaker, International Copyright Institute, Washington DC, Nov. 28, 2006
- Invited speaker, International Trademark Association, Trademarks Administrators Conference, Crystal City, Virginia, September 19-20, 2006
- Invited speaker, General Assembly of the National Association of Publishers (ANEL), Montréal, September 14, 2006

- Invited speaker, Federalist Society Annual Lawyers Convention, Washington D.C. November 2005.
- Invited keynote speaker. InSIGHT, Old Mill Inn, Toronto, September 2005. Topic: "Copyright Reform in Canada"
- Invited speaker. Canadian Institute, , Montréal, 5-6 June, 2005;
- Invited speaker, Canadian Bar Association, Montreal, Nov. 9, 2004. Topic: "Recent developments in Canadian copyright law"
- Invited speaker, Peer-to-Peer Luncheon speech, The 45th Circuit, Ottawa Centre for Research and Innovation (OCRI), Oct. 5, 2004. Topic: "Peer-to-Peer File-Sharing"
- Invited speaker, Luncheon conference, ALAI Canada, Toronto, Sept. 13, 2004. Topic: "The Supreme Court decision in *SOCAN v. Can. Ass'n of Internet Providers*"
- Invited Lecturer, International Copyright Institute, Washington, D.C., May 5, 2004. Topic: "Collective management of copyright"
- Invited speaker, Biannual Canadian Bar Association/Law Society of Upper Canada Communications Law Conference, Ottawa, April 23-24, 2004. Topic: "The Supreme Court decision in *CCH v. Law Society of Upper Canada*"
- Invited Speaker, Association pour l'avancement des sciences et des techniques de la documentation (ASTED), Annual Meeting, Gatineau, Quebec, Nov. 7, 2003. Topic : "Copyright Exceptions and Librarians"
- Invited Keynote Speaker, International Conference on National Copyright Administrative Institutions, Ottawa, Oct. 8-10, 2003. Topic: "Status Report on Internet Tariffs";
- Invited Panelist, Intellectual Property Institute of Canada (IPIC), Annual Meeting, Halifax, Sept. 19, 2003. Topic: "Technical Protection Measures and Copyright";
- Invited Speaker, North American Workshop on Intellectual Property and Traditional Knowledge, Ottawa, Sept. 7-9, 2003. Topic: Traditional Knowledge and Intellectual Property: The Issues (overview)";
- Invited speaker, Association des juristes d'expression française de l'Ontario (AJEFO), Ottawa, June 21, 2003. Topic: Law & Technology
- Invited speaker, Editors Association of Canada, Ottawa, June 15, 2003. Topic : "A Walk Through the Copyright Labyrinth";
- Keynote speaker, Computer Assisted Language Instruction Consortium (CALICO), Ottawa, May 22, 2003. Topic : "Copyright, Copyleft, Copywrong?";
- Invited speaker, Expert Roundtable on Transactions in Intellectual Property, Amsterdam, May 17-18, 2003. Topic: "Fragmentation of Copyright and Rights Management";
- Invited speaker, "The 45th Circuit" (OCRI), Ottawa, Apr. 1, 2003. Topic : "Emerging Issues in Digital Rights Management";
- Invited speaker, Information Highways Conference, Toronto, March 24, 2003. Topic : Digital Rights Management : Balancing Creators Rights and User Interests";
- Invited speaker, Literary and Artistic Association (ALAI Canada), Montreal, Oct. 22, 2002. Topic : « La gestion collective es-elle en crise? »;
- Invited instructor, World Trade Organization (WTO), Nairobi, Sept. 2002. Topic: The TRIPS Agreement after Doha";
- Invited instructor, World Trade Organization (WTO), Casablanca, Sept. 2002. Topic: "The TRIPS Agreement After Doha";
- Invited speaker, Literary and Artistic Association (ALAI Canada), Montreal, May 7, 2002. Topic: « La décision de la Cour suprême dans l'affaire *Galerias d'art du Petit Champlain Inc. c. Théberge* »;

- Invited instructor. International Copyright Institute (Washington, D.C.), Nov. 2000 and Nov. 2001. Topic: “Collective Management of Copyright in the Digital Age”;
- Invited speaker. Annual Meeting of the International Trademark Association (INTA), Denver, CO, USA, May 2000. Topic: “The TRIPS Agreement: Implementation and Dispute Settlement Issues”;
- Invited speaker, New York Bar (NYCLA), 2000. Topic : “Current Rights Clearance Issues”;
- Invited speaker, Society of Scholarly and Professional Publishers (SSP), Boston, Mass., 1999. Topic: “Copyright Licensing Issues” ;
- Invited speaker, Canadian Writers Union Conference, Toronto, 2000. Topic: “Copyright Management in the Digital Age”;
- Invited Speaker, Heritage Canada Roundtable on Copyright Management, Ottawa, 1999. Topic: “Copyright Management: US Practices”;
- Invited speaker, International Publishers Association (IPA) Congress, Tokyo, Japan, 1998. Topic: “Copyright, Publishing in the Face of Technological Change”;
- Invited speaker, Marché international du multimédia (MILIA), Cannes, France, 1995. Topic : “Droit d’auteur et multimédia”;
- Invited speaker, Chilean Book Fair, Santiago, Chile, 1999. Topic: “El papel de las sociedades de derechos reprográficos y de la IFRRO”;
- Invited speaker, Sydney Bar, NSW, Australia, 1996. Topic: “Intellectual Property and Technology”
- Invited speaker, Congress of the International Publishers Association, Barcelona, Spain, 1996. Topic: “Online Copyright Licensing”;
- Invited speaker, Pan African Film Festival (FESPACO), Ouagadougou, Burkina Faso, 1994. Topic: “Protection of Intellectual Property in Film” ;
- Invited speaker, Chambre française du commerce et de l’exportation (CFCE), Paris, 1990. Topic : “TRIPS: Le point à dix semaines de Bruxelles”;

h) Publications [†]

i) Summary

Books authored	8
Books edited	3
Book chapters	23+7
Articles	50+2
Conference proceedings (refereed).....	1
Major reports	15
Other publications.....	26
Commissioned Reports.....	6

ii) Detailed description

Books (authored)

1. INTELLECTUAL PROPERTY: THE LAW IN CANADA, 2^d ed. (Carswell, 2011) --with Prof. Elizabeth Judge, 1223 p.

[†] **Only ACCEPTED publications are indicated as forthcoming.**

2. L'ACCORD SUR LES ADPIC: PROPRIÉTÉ INTELLECTUELLE À L'OMC (Larcier, 2010), 733 p.
3. THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS, 3rd ed. (Sweet & Maxwell, December 2008), 785 p.
4. LE DROIT DE LA PROPRIÉTÉ INTELLECTUELLE, (Yvon Blais, 2006). 702 pages--with Professors Elizabeth Judge and Mistrale Goudreau
5. INTELLECTUAL PROPERTY: THE LAW IN CANADA (Carswell, 2005), with Prof. Elizabeth Judge
6. THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS, 2ND ed. (Sweet & Maxwell, June 2003). 590 p.
7. THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS. (Sweet & Maxwell, 1998). 444 p.
8. LA NOTION D'ŒUVRE DANS LA CONVENTION DE BERNE ET EN DROIT COMPARÉ. (Librairie Droz, 1998). 276 p.

Books (edited)

1. COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, 2nd ed. (Kluwer Law International, 2010) 495 p.
2. INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT (Oxford Univ. Press, 2007). 564 p.
3. COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Kluwer Law International, 2006), 464 p.

Book Chapters[‡]

1. *Traditional Innovation and the Ongoing Debate on the Protection of Geographical Indications*, INTELLECTUAL PROPERTY AND INDIGENOUS INNOVATION (P Drahos and S Frankel, eds) (forthcoming)
2. *The International Legal Framework of Border Measures in the Fight against Counterfeiting and Piracy*, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS THROUGH BORDER MEASURES, 2D ED. (O. Vriens and M. Schneider eds.). Oxford Univ. Press, 2011 (forthcoming)
3. *Adjusting Patentability Criteria to Optimize Innovation: A Look at China and India*, GLOBAL PERSPECTIVES ON PATENT LAW (M Bagley and R Okediji, eds). Oxford Univ. Press, x (forthcoming)
4. *The TRIPS Agreement and Climate Change*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CLIMATE CHANGE (Joshua Sarnoff, ed.) (forthcoming)
5. *Copyright, Culture and the Cloud*, in BITS WITHOUT BORDERS (Sean Pager & Adam Candeub, eds.) (forthcoming)
6. *Country Clubs, Empiricism, Blogs and Innovation: The Future of International Intellectual Property Norm-Making in the Wake of ACTA*, TRADE GOVERNANCE IN THE DIGITAL AGE, Mira Burri and Thomas Cottier (eds). Cambridge University Press, 2011 (forthcoming)

[‡] R= refereed publication.

7. **R** *The TRIPS Agreement*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW; (forthcoming, 2011)
8. *TRIPS Articles 10; 63-71*, in CONCISE INTERNATIONAL AND EUROPEAN IP LAW, 2D ED. (Th. Cottier and P. Véron, eds). Kluwer Law International, 2011, pp. 38-42 and 168-186
9. *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA (M. Geist, ed.)
10. *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law, in INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS* (Robert F. Brauneis, ed) (Edward Elgar, 2010) 74-106--with Professor Elizabeth Judge;
 - Also published as an article (see below)
11. *Policy Calibration and Innovation Displacement*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM (J. Trachtman, and Ch. Thomas, eds.) (Oxford Univ. Pr., 2009) 363-394;
12. *TRIPS 3.0*, in THE DEVELOPMENT AGENDA : GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES (N. Netanel, ed) 51-75. (Oxford Univ. Pr., 2009)
13. **R** *A Uniquely Canadian Institution: The Copyright Board of Canada*, in A NEW INTELLECTUAL PROPERTY PARADIGM: THE CANADIAN EXPERIENCE (Y. Gendreau ed). (Edward Elgar, 2009)
14. *TRIPS Article 10; Articles 63-71*, in CONCISE INTERNATIONAL AND EUROPEAN IP LAW (Th. Cottier and P. Véron, eds). (Kluwer Law International, 2008), 39-42 et 153-170
15. *Intellectual Property and Human Rights: Learning to Live Together*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS (P. Torremans, ed). (Wolters Kluwer, 2008) 3-24
16. **R** *A Canadian Copyright Narrative*, in COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH. (P. Torremans, ed.) (Edward Elgar, 2007) 49-82;
17. *The Changing Landscape of International Intellectual Property*, in, INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS. (Christopher Heath and Ansel Kamperman Sanders, eds) (Oxford: Hart Publishing, 2007), 49-86;
18. *TRIPS and Development*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT (D. Gervais, ed--see under Books (edited) above), 3-60
19. *A TRIPS Implementation Toolbox*, in *idem*, 527-545
20. *Traditional Knowledge and Intellectual Property; A TRIPS Compatible Approach*, in, IPR PROTECTION AND TRIPS COMPLIANCE. (Veena, ed.) (Amicus/ICFAI University Press, 2007), 146-178;
 - Republication of article listed under No. 24 below
21. *Em busca de uma Norma Internacional para os Direito de Autor: O 'Teste dos Três Passos Reversos'*, in PROPIEDADE INTELECTUAL (Edson Beas Rodrigues Jr et Fabrício Polido, eds), (Rio de Janeiro, Elsevier, 2007), 201-232 (republication of article listed under No 22 in list below)
22. *The TRIPS Agreement and the Changing Landscape of International intellectual Property*, in INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA. (Paul Torremans et al., eds). (Edward Elgar, 2007), 65-84
23. *The TRIPS Agreement and the Doha Round: History and Impact on Development*, in

- INTELLECTUAL PROPERTY AND INFORMATION WEALTH. (Peter Yu, ed), (Praeger, 2006), vol. 3, 23-72.
24. *The Changing Role of Copyright Collectives*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS. (Daniel Gervais, ed.) (Kluwer Law International, 2006), 3-36
 25. **R** *The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes*, in THE GLOBALIZED RULE OF LAW: RELATIONSHIPS BETWEEN INTERNATIONAL AND DOMESTIC LAW. (O. FITZGERALD, ED), (Toronto: Irwin Law, 2006), 549-572
 26. **R** *Le rôle des traits internationaux dans l'interprétation des lois canadiennes sur la propriété intellectuelle*, in O. Fitzgerald (ed), RÈGLE DE DROIT ET MONDIALISATION : RAPPORTS ENTRE LE DROIT INTERNATIONAL ET LE DROIT INTERNE (Yvon Blais, 2006), 679-712;
 - French version of previous item in list
 27. **R** *The TRIPS Enforcement Provisions*, in, CONCISE COMMENTARY OF EUROPEAN INTELLECTUAL PROPERTY LAW (Thomas Dreier, Charles Gielen, Richard Hacon, eds.) (Kluwer Law International, 2006)
 28. *The TRIPS Agreement*, in BORDER MEASURES IN THE EUROPEAN UNION. (OLIVIER VRINS AND MARIUS SCHNEIDER, EDS.), (Oxford University Press, 2006), 37-62;
 29. **R** *Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing*, in IN THE PUBLIC INTEREST: THE FUTURE OF COPYRIGHT LAW IN CANADA (Michael Geist, ed). (Toronto: Irwin Law, Oct. 2005);
 30. *Copyright and eCommerce: License or Lock-up?*, in INTELLECTUAL PROPERTY IN THE GLOBAL MARKETPLACE : 2001 UPDATE. (Neil Wilkof et al. eds.), (New York: John Wiley & Sons, 2002). 18 p.

Articles in English[§]

1. *The Landscape of Collective Management*, COLUM-VLA J. L & ARTS (2011) (forthcoming)
2. *Cloud Control: Copyright, Global Memes and Privacy*, J. TELECOM. & HIGH TECH L. (2011) (coauthored with Dan Hyndman) (forthcoming)
3. *Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations*, 5:1/2 UNIV. OTTAWA L. & TECH. J. 1-41 (2008)*
 - Published in March 2011
4. *The Google Book Settlement and the TRIPS Agreement*, 2011 STAN. TECH. L.R. 1-11;
5. *Fair Use, Fair Dealing, Fair Principles: Efforts to Conceptualize Exceptions and Limitations to Copyright*, 57:3 J. COPYRIGHT. SOC.Y OF THE USA 499-520 (2010);
 - **Reprinted in INTELLECTUAL PROPERTY LAW REVIEW (2011) as one of best intellectual property articles of 2010**
6. *Reinventing Lisbon: The Case for a Protocol to the Lisbon Agreement* , 11:1 CHICAGO J. INT'L L.67-126 (2010);

[§] Only accepted publications indicated as forthcoming. Book reviews are listed separately.

7. *The Regulation of Inchoate Technologies*, 47 HOUSTON L. REV. 665 (2010);
8. *The 1909 Copyright Act in Historical Context*, 26:2 SANTA CLARA HIGH TECH L.J.185-214 (2010);
9. *L'Arrangement de Lisbonne, un véhicule pour l'internationalisation du droit des indications géographiques ?* 35 PROPRIÉTÉS INTELLECTUELLES 691 (2010) (coauthored with Prof. Christophe Geiger, Norbert Olszak and Vincent Ruzek)
10. *Towards a Flexible International Framework for the Protection of Geographical Indications*, 1:2 WIPO JOURNAL 147-158 (2010) (coauthored with Prof. Christophe Geiger, Norbert Olszak and Vincent Ruzek)
 - English version of previous title
11. *The Misunderstood Potential of the Lisbon Agreement*, 1:1 WIPO JOURNAL 87-102 (inaugural issue - on invitation) (2010)
12. *Of Silos and Constellations: Comparing Notions of Originality in Copyright Law*, 27:2 CARDOZO ARTS & ENTERTAINMENT L. J. 375-408 (2009)--with Professor Elizabeth Judge;
13. *Traditional Knowledge: Are We Closer to the Answers?*, 15:2 ILSA J. OF INT'L. AND COMP. LAW 551-567 (2009);
14. *The Tangled Web of User-Generated Content*, 11:4 VAND. J. OF TECHNOLOGY AND ENTERTAINMENT LAW 841-870 (2009);
15. *World Trade Organization panel report on China's enforcement of intellectual property rights*, 103:3 AM. J. INT'L L.549-554 (2009) (International Decision--on invitation);
16. *Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation*, 77:5 FORDHAM L. R. 2353-2377 (2009)
17. *R A Canadian Copyright Narrative*, 21 INT. PROP. J. (Can.) 269 (2009)
 - Republication of book chapter with same title
18. *The Protection of Databases*, 82:3 CHI-KENT L. REV. 1101-1169 (2007);
19. *R The Purpose of Copyright Law in Canada*, 2:2 UNIV. OTTAWA. J. L. & TECH. 315-356 (2006);
20. *R The Changing Landscape of International Intellectual Property*, 2 J. OF INTELL. PROP. LAW & PRACTICE 1-8 (2006);
21. *Intellectual Property and Development: The State of Play*, 74 FORDHAM LAW REVIEW 505-535 (2005);
22. *Towards A New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1-37 (2005);
23. *Copyright in Canada: An Update After CCH*, REVUE INT. DROIT D'AUTEUR RIDA 2-61(2005);
 - Also published in French (see below)
24. *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, [2005] MICH. ST. L. REV. 137-166;
25. *R International Intellectual Property and Development: A Roadmap to Balance?*, 2:4 J. OF GENERIC MEDICINES 327-334 (2005);

26. *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39-74 (2004);
27. **R** *The Compatibility of 'Skill & Labour' with the Berne Convention and the TRIPS Agreement*, [2004] 2 EUR. INT. PROP. REV. 75-80;
28. *Canadian Copyright Law Post CCH*, 18:2 INTELL. PROP. J. (Can.) 131-168 (2004);
29. *Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. OF INT'L & COMP. LAW 467-495(2003);
30. **R** *TRIPS, Doha & Traditional Knowledge: A Proposal*, 6 J. WORLD INT. PROP. 403-419 (2003);
31. **R** *Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management*, 2 CAN. J. OF L. & TECH 15-34 (2003) (with Prof. Alana Maurushat)
32. **R** *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49:4 J. COPYRIGHT. SOC.Y OF THE USA 949-981(2002);*
 - Winner, **Charles Best Seton Award**, Best Article of 2002-3, Copyright Society of the USA
 - Article cited by the Chief Justice of Canada in *CCH Canadian Inc. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (Can.), at para. 18.
33. *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12:4: FORDHAM INTELL. PROP., MEDIA & ENTERTAINMENT L. J. 929-990 (2002);
34. **R** *Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective*, 1 CAN. J. OF LAW & TECH. 21-50 (2002);
35. *Transmission of Music on the Internet: A Comparative Study of the Laws of Canada, France, Japan, the U.K. and the United States*, 34:3 VANDERBILT J. OF TRANSNAT'L L. 1363-1416 (2001);
 - Article cited in the majority opinion of the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45 (Can.), at para. 75.
36. **R** *The TRIPS Agreement After Seattle: Implementation and Dispute Settlement Issues* 3 J. OF WORLD INT. PROP. 509-523(2000);
37. **R** *Electronic Rights Management Systems*, 3 J. OF WORLD INT. PROP. 77-95 (2000);
38. **R** *The TRIPS Agreement: Interpretation and Implementation*, 3 EUR. INT. PROP. REV., 156-162 (1999);
39. **R** *Intellectual Property in the MAI: Lessons to Be Learned*, 2 J. WORLD INT. PROP. 257-274 (1999) (with Vera Nicholas)
40. **R** *Electronic Rights Management and Digital Identifier Systems*, J. ELEC. PUBLISHING, online only, March 1999. Available at <http://www.press.umich.edu/jep/04-03>. (18 pages)
41. **R** *The Protection Under International Copyright Law of Works Created with or by Computers*, 5 IIC INTERN'L REV. INDL PROP. AND COPYRIGHT L. 629-660 (1991).

Articles in French and other languages

1. *Trente ans de droit d'auteur à la Cour suprême du Canada*, 21 :2 CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 419-448 (2009)
2. *Propiedad intelectual y derechos humanos: aprendiendo a vivir juntos*, 3:5 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR (2009)
 - o Edited translation of book chapter with same title
3. Roberston c. Thomson Corp. : *Un commentaire sur le droit des pigistes à la lumière de l'intervention de la Cour suprême du Canada*, 3 :2 REVUE DE DROIT & TECHNOLOGIE DE L'UNIVERSITÉ D'OTTAWA/UNIVERSITY OF OTTAWA LAW & TECHNOLOGY JOURNAL, 601-614 (2006);
 - o French version of article mentioned at no 25 in list above.
4. **R** *Le droit d'auteur au Canada après CCH*, 203 REVUE INT. DROIT D'AUTEUR RIDA 2-61(2005);
5. **R** *Essai sur la fragmentation du droit d'auteur : Deuxième partie* 16 CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 501-536 (2004);
6. **R** *Etre au parfum: La protection des marques olfactives en droit canadien*, 15 CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 865-904(2003);
7. **R** *Essai sur la fragmentation du droit d'auteur : Première partie*, 15 CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 501-536 (2003);
8. **R** *L'affaire Théberge*, 15 CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 217-240 (2002);
9. **R** *Los sistemas básicos de derecho de autor y copyright: La noción de obra y la gestión de los derechos de autor*, 26 REVISTA DE DERECHO PRIVADO, 15-27(2001);
10. **R** *La Responsabilité des États à l'égard des actes des organes judiciaires*, 6 R.Q.D.I. 71-82 (1989-1990);
11. **R** *Le Droit de refuser un traitement psychiatrique au Québec*; 26 CAHIERS DE DROIT 807 (1985)

Conference Proceedings (Refereed)

- **R** *Le droit d'auteur au Canada: fragmentation ou gestion fragmentaire*, in INSTITUTIONS ADMINISTRATIVES DU DROIT D'AUTEUR.(Y. Gendreau, ed.). (Cowansville : Éditions Yvon Blais, 2002), 459-477

Other Publications—All languages

1. *The Google Book Settlement and International Intellectual Property Law*, 15:9 ASIL INSIGHT (Apr, 11, 2011)
2. *Foreword*, in IMPLEMENTING THE WIPO DEVELOPMENT AGENDA (Jeremy DeBeer, Ed.). Ottawa: Wilfrid Laurier University Press. 2009. ix-xii;
3. *Collective Management of Copyright and Related Rights in North America*, in ASIAN COPYRIGHT SEMINAR, (Tokyo, Feb. 25, 2009) 17-72;
4. *La Parodie et le moyen de défense fondé sur l'« intérêt du public »*, in DROIT D'AUTEUR ET LIBERTÉ D'EXPRESSION/COPYRIGHT AND FREEDOM OF EXPRESSION, 2006 BARCELONE, (ALAI, 2008);
5. *Litigation, not politics, drives change in IP*, 25:28, THE LAWYERS WEEKLY (November 25, 2005) 2 pages;

6. *TRIPS: A Question of Balance*. IPR INFO (Helsinki: Imateriaalioikeuinstituutti), 2/2005, 26-27;
7. *The Realignment of Copyright in Canada*. Twelfth National Conference on Communications Law, Toronto, April 7, 2005 (51 pages);
8. *The Changing Face of Copyright*, 7:4 COPYRIGHT & NEW MEDIA LAW NEWSLETTER, 3 pages (2003);
9. *Arbitration Concerning Intellectual property Rights: A Key to the Success of the Doha Round*, 7:2 J. OF WORLD INT. PROP. 245-248 (2004);
10. *The Evolving Role(s) of Copyright Collectives, in DIGITAL RIGHT MANAGEMENT - THE END OF COLLECTING SOCIETIES?* (Christoph Beat Graber, ed.) (Lucerne, 2005);
11. *A Viable Rights Clearance Scheme*, 6:2 COPYRIGHT & NEW MEDIA LAW NEWSLETTER 3 (2002);
12. "Copyright and the Use Paradigm," in *COPYMART: THE PRODUCT AND ITS PROSPECTS: PROCEEDINGS OF THE BERLIN SYMPOSIUM*. (Z. Kitagawa, ed.), (Kyoto: IIAS, 2003), 109-116;
13. "Traditional Knowledge: A Challenge to the International Intellectual Property System," in, 7 *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY*. (New York: Juris, 2002). ch 76-1;
14. "The TRIPS Agreement: Life After Seattle?," in 6 *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY*. (New York: Juris, 2001). ch. 40-1;
15. *E-Commerce and Intellectual Property: Lock-it Up or License?*, in 6 *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY*. (New York: Juris, 2001). ch. 87-1;
16. *Electronic Rights Management Systems*, in *Y2C: COPYRIGHT LAW 2000* (Jon A. Baumgarten and Marybeth Peters, eds),. (New Jersey: Glasser Legal Works: 2000) (15 pages);
17. *An Overview of TRIPS: Historical and Current Issues*, in 5 *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY*. (New York: Juris, 2000), ch. 40;
18. *Digital Distance Education: Exemption or Licensing?*, in, 4 *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY*. (New York: Juris, 1999), ch. 87;
19. *Copyright Aspects of Electronic Publishing*, in *PROCEEDINGS OF EP'94*, (Beijing: The Science Press, 1994) 4-12;
20. *ECMS: From Rights Trading to Electronic Publishing*, in *THE PUBLISHER IN THE CHANGING MARKETS. PROCEEDINGS OF IPA FOURTH INTERNATIONAL COPYRIGHT SYMPOSIUM*. (Tokyo: Ohmsha, 1998). 194-212 (18 pages);
21. *The TRIPS Agreement: Enforcement and Dispute-Settlement Provisions*, in *THE PUBLISHER IN THE CHANGING MARKETS. PROCEEDINGS OF IPA FOURTH INTERNATIONAL COPYRIGHT SYMPOSIUM* (Tokyo : Ohmsha, 1998). 230-236 (7 pages);
22. « L'état des lieux: la gestion collective dans le monde, en Europe et en France ». (Paris: SACEM, 1996). (11 pages);
23. « Gestion des droits », in *ACTES DU COLLOQUE LES AUTOROUTES DE L'INFORMATION : ENJEUX ET DÉFIS* », HUITIÈMES ENTRETIENS DU CENTRE JACQUES CARTIER RHÔNE-ALPES. (Lyon: Université de Lyon-2, 1996);
24. « Les 'œuvres multimédia' : le point de vue de l'OMPI », in *LE MULTIMÉDIA : MARCHÉ, DROIT ET PRATIQUES JURIDIQUES. ACTES DU JURISCOPE 94*. (Paris : P.U.F., 1995). (8 pages);

25. « Identificación de las obras utilizadas en sistemas digitales », in NUM NOVO MUNDO DO DIREITO DE AUTOR. (Lisbon: COSMOS/Arco-Iris, 1994). (17 pages);
26. “El principio del trato nacional en los acuerdos internacionales de propiedad intelectual”, same book— (15 pages);

Book Reviews

- *T. Scassa and M. Deturbide. Electronic Commerce Law In Canada* (Toronto: CCH, 2004). Reviewed at 42 CAN. BUS. L. J. 292-310 (2005);
- *Le Droit du Commerce Électronique. (V. Gautrais, ed.)*. (Montréal, Thémis, 2002. 709 pp.), reviewed at 33 REVUE GÉNÉRALE DE DROIT 489-505 (2003)

Technical Reports, Law Reform, and Commissioned Research Work

1. *Fair Dealing, the Three Step test and Exceptions in the Canadian Copyright Act*, Report commissioned by Industry Canada, November 2007
2. *Application of an Extended Licensing Regime in Canada: Principles and Issues Related to Implementation*. Department of Canadian Heritage, July 2003*
3. *Collective Management of Copyright and Neighboring Rights in Canada: An International Perspective*. Department of Canadian Heritage, August 2001*
4. *Intellectual Property Practices in the Field of Biotechnology*. Report published by the Trade Directorate, Organization for Economic Co-operation and Development (OECD), Paris 1999. Document No. TD/TC/WP(98)15/FINAL.(23 pages);
5. THE LAW AND PRACTICE OF DIGITAL ENCRYPTION. (Amsterdam: University of Amsterdam, 1998). (64 pages)
6. *ECMS: The Policy Issues*, in IMPRIMATUR CONSENSUS FORUM. 21/22 NOVEMBER 1996. (London: Imprimatur, 1996).

EXHIBIT B

Exhibit B to Gervais Report

1. The Fourth Amended Class Action Complaint
2. Google Objections and Responses to Plaintiffs' First Requests for Admissions
3. Plaintiffs' Brief in Support of Their Motion for Class Certification
4. Zack Decl. and Exhibits in support of motion for class certification
5. Google's Brief in Opposition to Class Certification
6. Clancy Decl., Gratz Decl., Perle Decl., Poret Decl. and Report, filed with Google class certification opposition
7. Google's brief and reply brief in support of its motion to dismiss the Authors Guild
8. Plaintiffs' brief in opposition to Google's motion to dismiss the Authors Guild
9. The materials cited in my report
10. The article available at <http://papers.ssrn.com/so13/papers.cfm> and materials cited therein
11. The books.google.com website
12. The Complaint, Answer and Plaintiffs' brief in support of motion for partial judgment on the pleadings in *Authors Guild, et al. v. Hathitrust, et al.*, 11 Civ. 6351 (HB)(S.D.N.Y.)

EXHIBIT 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

THE AUTHORS GUILD, INC., et al.,

PLAINTIFFS,

-against-

Case No:
05CV8136 (DC)

GOOGLE INC.,

DEFENDANT.

-----X

DATE: December 15, 2011

TIME: 1:00 P.M.

DEPOSITION of a Witness, JIM BOUTON, on
behalf of the Plaintiffs, taken by the Defendants,
pursuant to a Notice and to the Federal Rules of Civil
Procedure, held at the offices of MILBERG, LLP, One
Pennsylvania Plaza, New York, New York 10119, before
Deborah Garzaniti, a Notary Public of the State of New
York.

J. BOUTON

1 J I M B O U T O N, called as a witness, having been
2 first duly sworn by a Notary Public of the State of New
3 York, was examined and testified as follows:

4 EXAMINATION BY

5 MS. DURIE:

6 Q. Please state your name for the record.

7 A. Jim Bouton.

8 Q. What is your address?

9 A. Care of Boni & Zack, LLC, 15 St. Asaphs
10 Road, Bala Cynwyd, Pennsylvania 19004.

11 Q. Good afternoon.

12 A. Good afternoon.

13 Q. You understand that you are here giving a
14 deposition in a case that has been brought against
15 Google?

16 A. Yes.

17 Q. What is that case about?

18 A. It is about whether Google has the right
19 to copy and disseminate copyrighted books.

20 Q. When you say "whether Google has the
21 right to disseminate copyrighted books," what do you
22 mean by disseminate?

23 A. Well, I am not sure. Let's leave it that
24 they are violating copyrights.

25 Q. Do you have an understanding as to how it

J. BOUTON

1 is that Google is violating copyrights, in your opinion?

2 A. Well, they are simply copying them. They
3 don't have the right to copy copyrighted materials.

4 Q. So is your primary contention in this
5 case that Google is violating copyright laws by making
6 electronic copyright works?

7 MR. BONI: Objection to the form. If you can
8 answer, answer the question.

9 A. Repeat it again.

10 Q. Sure.

11 Is your primary contention in this case that
12 Google is violating the copyright laws by making an
13 electronic copy of copyright works?

14 A. That is certainly one of them.

15 Q. What else is it about Google's conduct
16 that you believe is violating the copyright laws, in
17 addition to making electronic copy?

18 A. That they are using this material, making
19 it available for other people, making digital copies for
20 libraries, putting pieces of it on the Internet, using
21 excerpts from the book in order to make advertising
22 money. They never called me and asked if they could do
23 that, never offered me any money to use my books in a
24 way that allowed them to make money.

25 Q. I want to ask you about each of those

J. BOUTON

1 Q. Where have you read that?

2 A. Newspapers.

3 Q. Have you read anything else, to your
4 recollection, that says that Google sells advertising in
5 conjunction with the display of excerpts of books?

6 A. I don't know what other sources. I am
7 just aware of the fact that they do that.

8 Q. You said that you've seen this as well.
9 Can you describe to me the circumstance under which
10 you've seen that?

11 A. I seen the advertising. I don't recall.

12 Q. Is one of the facts that gives you
13 concern in this case your belief that Google is
14 profiting from advertising revenue in conjunction with
15 displaying excerpts of books?

16 A. Either because they already done it or
17 they would have the potential to do it. My point is, my
18 feeling is that they should not have the right to
19 reproduce the book or any portion of the book without
20 getting my permission.

21 Q. Let's go back to the various reasons that
22 you gave for being concerned about Google's conduct. We
23 talked about in connection with Ball Four, the display
24 of the cover and excerpts of your book. You also made
25 reference to giving copies of works to libraries; is

J. BOUTON

1 that right?

2 A. Yes.

3 Q. Is that a claim that you understand as
4 being made in this lawsuit?

5 A. Yes.

6 Q. How is it that you come to have that
7 understanding?

8 A. How did I come to have that
9 understanding?

10 Q. Yes.

11 A. I have read that in the newspapers, I am
12 aware of the lawsuits against Google. I can't tell you
13 the exact source of it.

14 Q. Have you read the Complaint in this case?

15 A. Yes.

16 Q. Does the Complaint in this case make
17 reference to the return of digital copies to libraries?

18 A. Yes, so I am aware of it there also.

19 Q. Do you have an understanding as to what,
20 if anything, libraries are doing with digital copies
21 that have been returned to them?

22 A. No, I don't know what they are doing with
23 them. I don't want them to have the right to do
24 whatever they want also.

25 Q. Why is that?

J. BOUTON

1 A. Because it is protected by copyright and
2 they would need to ask my permission to use that digital
3 copy in any way that they choose.

4 Q. Do you think that libraries would need to
5 ask your permission in order to use the digital copies
6 particularly to index your work in their collection?

7 MR. BONI: Objection to the form.

8 A. In other words, if you are saying that a
9 library uses a digital list to list all of the books
10 that they have in their library, that would certainly be
11 an acceptable use of it, but to have a digitized copy of
12 my book, no, they don't have the right to do that.

13 Q. My question assumes that libraries are
14 using digital copies of books for the purpose of
15 generating electronic indexes.

16 A. Why would they need to make a copy of the
17 book if they are just indexing the books in their
18 library? Why would they need to make a copy of the
19 book?

20 Q. First let me ask the question. Is it
21 your view that using an electronic copy of a book to
22 generate an index of works in a library collection is
23 something that you would not consent to?

24 A. I would not consent to that. I don't
25 think they need a digitized copy of the book in order to

J. BOUTON

1 things, is there anything else that you challenge?

2 A. Well, I am challenging on behalf of the
3 class that I am a member of.

4 Q. Understood.

5 A. Okay.

6 Q. But as a representative of the class that
7 you are here on behalf of, is there any other conduct
8 that you are challenging?

9 A. I don't think so.

10 Q. Now, what is it that you want the Court
11 to do in response to this lawsuit?

12 A. I want the Court to realize that these
13 are copyrighted materials and that Google has violated
14 that copyright by making copies of these books, that is
15 one.

16 Q. Are you asking the Court for money on
17 behalf of the class?

18 A. Yes.

19 Q. Do you have an understanding as to how
20 much money you are asking?

21 A. Yes, \$750 per book.

22 Q. Are you also asking the Court to order
23 Google to shut down the portion of Google Books that
24 shows quotes from those books in response to a search?

25 A. I don't know if that is the proper remedy

J. BOUTON

1 for that, so.

2 Q. Would you want the Court to shut down
3 that feature in Google Books?

4 A. If it is part of what Google needs to do
5 in order to avoid copyright violations, yes.

6 Q. Do you have a view that Google would need
7 to shut down the part of Google Books that allows for
8 quotes from books to be displayed in order not to be
9 violating copyright?

10 A. As far as I am concerned, they violated
11 the copyright if they have done nothing with it.

12 Q. I understand that.

13 A. So then it would follow that. I am also
14 against them using that digital copy in any way that
15 they want. So I am against them using it in the way
16 they used it. I am against them using, having a copy in
17 the first place.

18 Q. Do you think first it would benefit you
19 personally for the portion of Google Books that displays
20 quotes from the books in response to search results to
21 be shut down?

22 MR. BONI: Object to the form.

23 A. I don't know if that is the best
24 solution. I don't know.

25 Q. Do you have any other solution?

J. BOUTON

1 MR. BONI: I object to the form. I also
2 object to the extent that any part of that question
3 calls for the substance of any discussions we had in the
4 attorney-client relationship, Jim. So Daralyn's
5 question clearly asks for discussions prior to the time
6 that we formed an attorney-client relationship, but do
7 not recite any substance of discussions that we had once
8 we formed the attorney-client relationship. Okay?

9 THE WITNESS: Yes.

10 A. So now repeat the question.

11 Q. What did Mr. Boni tell you about the
12 lawsuit when you agreed to become a Plaintiff?

13 A. I don't recall.

14 Q. Do you remember anything that you had
15 learned about the case prior to the time that you agreed
16 to become a Plaintiff?

17 A. Nothing more than -- nothing more than
18 the fact that there was such a lawsuit being formed or
19 organized.

20 Q. Why was it that you agreed to be one of
21 the named class representatives in this case?

22 A. Because I believe in collective action
23 sometimes to get things done. I was a baseball player
24 and required collective action on the part of the
25 players to get rights in that industry.

J. BOUTON

1 A. I have no idea.

2 Q. Do you have a view as to how time
3 consuming it would be to make that request?

4 A. Do I have an idea how time consuming it
5 would be to have me make the request or get a response?

6 Q. No, make the request.

7 A. I don't know how time consuming it would
8 be. I am not even sure what the procedure would be to
9 do that.

10 Q. Have you ever investigated how to make a
11 request to Google to remove the display of quotes from
12 any of your books from Google Books?

13 A. I haven't investigated how to do that.

14 Q. What do you understand your role in this
15 case to be as a class representative?

16 A. Simply to represent the class.

17 Q. Do you have an understanding as to what
18 your job is in representing the class?

19 A. Yes, to be an example of the group.

20 Q. What have you done so far in your
21 capacity as a class representative in this case?

22 A. I have read all of the materials and if a
23 class member were to question me, I think I can give
24 pretty good answers about the lawsuit, what it is about,
25 so I see my role here as, at this stage, an educator.

J. BOUTON

1 Q. An educator of the class members?

2 A. No, an educator as to what is being
3 sought here for the benefit of other class members when
4 they want to know what the lawsuit is about.

5 Q. When you say your role here as an
6 educator, who are you educating?

7 A. Other class members.

8 Q. So you see part of your role as educating
9 other class members about what the lawsuit is about?

10 A. Yes, if they were to call me up,
11 contacted me.

12 Q. You said that you have reviewed all of
13 the materials. What are the materials that you
14 reviewed?

15 A. Well, of course all of the documents that
16 come from my own files for one thing and I reviewed the
17 Complaint.

18 Q. Are there any other materials that you
19 reviewed?

20 A. There may be, but I might not know
21 offhand the legal term for the document. I have seen a
22 number of documents.

23 Q. Are they documents that were filed with
24 the Court?

25 A. I think so, yes.

J. BOUTON

1 A. No.

2 Q. Was the copyright in Foul Ball registered
3 within three months of its publication?

4 A. I believe so.

5 Q. Do you have any basis for that belief,
6 other than your understanding, as to standard practice?

7 A. No.

8 Q. You understand that in this case you are
9 representing a class of authors; is that right?

10 A. Yes.

11 Q. Included within that class are the
12 authors of various different kinds of works; correct?

13 A. Yes.

14 Q. Included within the class are academics
15 who write books as part of their academic
16 responsibilities; is that correct?

17 A. Yes, I am assuming so.

18 Q. For example, included within the class
19 might be a professor who writes books in an effort to
20 get tenure; correct?

21 A. Yes.

22 Q. Do you feel that you are qualified to
23 represent the perspectives of those academic authors?

24 A. Generally speaking, with respect to the
25 Complaint, yes.

J. BOUTON

1 Q. Why is that?

2 A. Because their books are copyrighted, my
3 books are copyrighted, that is the commonality here.
4 Whether it is a gardening book or a history book or
5 academic textbook or a baseball book, we are all
6 protected by copyrights.

7 Q. Do you know whether academic authors
8 might have different interests in the dissemination of
9 their books?

10 MR. BONI: Object to the form.

11 A. I don't know whether they have different
12 interests or not. They might have.

13 MS. DURIE: Let me have marked as the next
14 exhibit a one-page document bearing a fax line of
15 July 16, 2003.

16 (Whereupon, the aforementioned document was
17 marked as Bouton Exhibit 9 for identification as of this
18 date by the Reporter.)

19 Q. Do you recognize what has been marked as
20 Exhibit 9?

21 A. Yes.

22 Q. Can you tell me what it is?

23 A. Yes. Somebody is asking permission to
24 use -- I am trying to figure out what book is involved
25 here. Yes, they want to use -- they have asked

J. BOUTON

1 but it is something that I probably did.

2 Q. Have you checked to see whether there is
3 a copyright registration?

4 A. No. I will check when I get home.

5 MS. DURIE: No further questions.

6 MR. BONI: I have a couple.

7 EXAMINATION BY

8 MR. BONI:

9 Q. You testified earlier about your role as
10 a class representative. Do you recall that testimony?

11 A. Yes.

12 Q. Do you have anything that you want to
13 amplify with respect to your response to that question?

14 A. As to my duties you mean?

15 Q. Yes.

16 A. Yes, I see myself as educating other
17 class members who I expect will be, you know, calling me
18 once in a while to see how things are going or explain
19 this or that to them. Also I expect to have some say in
20 the direction of the Complaint of the lawsuit, major
21 developments I expect to be apprised of and as to my
22 thoughts, anything to do with the settlement I would
23 think would be part of my duties to evaluate and give my
24 opinion.

25 MR. BONI: No further questions.

EXHIBIT 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et al.

Plaintiffs

Civil Action No.

vs.

1:2005cv08136

GOOGLE, INC.

Defendant

_____ /

The Deposition of JOSEPH GOULDEN was held on Friday, January 6, 2012, commencing at 12:57 p.m., at the Offices of Gore Brothers Reporting & Videoconferencing, 1025 Connecticut Avenue, N.W., Suite 1000, Farragut Square, Washington, D.C. 20036, before Christine A. Gonzalez, CSR, RPR, a Notary Public.

REPORTED BY: Christine A. Gonzalez, CSR, RPR

1 A. Correct. Correct.

2 Q. What is this lawsuit go?

3 A. About Google's unlawful infringement of the
4 copyright in books written by me and many, many other
5 writers.

6 Q. Anything else?

7 A. I think that fairly well covers it.

8 Q. What are you asking the Court to do?

9 A. To require Google to obey the law, receive a
10 permanent injunction against further digitalization of
11 books and whatever relief the Court might decide upon.

12 Q. Are you asking for money?

13 A. \$750.

14 Q. Why are you asking for that amount of money?

15 A. That is the amount that was recommended by
16 Mr. Boni.

17 Q. Do you think that's an appropriate amount?

18 A. Because I'm trying to establish a principle,
19 yes. Pardon me. Make that, defend a principle, yes.
20 I'm not in this for the money.

21 Q. Are you asking the Court to order Google to
22 shut down the snippet view portion of the Google books
23 Website?

24 A. Yes, because they're violating copyright and
25 putting them up there using material that is mine and

1 other authors without permission.

2 Q. If the Court were to order Google to shut down
3 the snippet view portion of the Google books Website,
4 would that benefit you personally?

5 A. I have no way of knowing.

6 Q. Why is that?

7 A. Because the way Google distributes it to
8 libraries is wide use elsewhere. Google has given our
9 property to other libraries without permission.

10 Q. Other than giving copies of books to libraries,
11 what other conduct do you understand to be at issue in
12 this case?

13 A. I think that's it. Well, the snippets and the
14 -- giving the books to libraries. Thirdly, the physical
15 act of making these books in digital form.

16 Q. And you understand if I refer to the process of
17 taking a physical book and turning it into digital form
18 as "scanning." Is that a term you're familiar with?

19 A. Yes, I am.

20 Q. Other than scanning books, providing copies to
21 libraries and displaying snippets, do you understand any
22 other conduct to be at issue in this litigation?

23 A. I think there's a severe security issue
24 involved here.

25 Q. What security issue is that?

1 A. Google professes to have safeguards against
2 invasion of these libraries. I view that with a great
3 deal of suspicion.

4 Q. Why do you view that with suspicion?

5 A. 'Cause I read almost daily in the interest of
6 hacking in supposedly secure databases, including those
7 run by the United States Government, the military and
8 intelligence organizations.

9 Q. So your concern is that through hacking copies
10 of your books could be disclosed?

11 A. Yes.

12 MR. BONI: Object to form.

13 BY MR. GRATZ:

14 Q. Other than your concern about hacking, are
15 there other security concerns that you understand to be
16 the subject of this lawsuit?

17 MR. BONI: Object to form. Your original
18 question, Joe, was directed to him and what he thought.
19 Now you're talking about the lawsuit. You can answer
20 the question. Joe, I just want it to be clear that you
21 shifted gears.

22 A. Well, what particularly strikes me about Google
23 pilfering of our property and putting into digital form
24 is that these digital books are gonna be put in
25 university libraries; I think eight or ten of them by

1 now. From what I read in the press, there are students
2 who consider a closed archive a challenge to which they
3 can hack. And putting digital books on a college
4 library is -- makes about as much sense as having an
5 open bar in an AA meeting.

6 BY MR. GRATZ:

7 Q. And why is that?

8 A. It's there. They're gonna try to get in there,
9 and they'll do it.

10 Q. And what would their goal be?

11 MR. BONI: Object to form. Who's "they"?

12 A. I don't know. I can probably sit around and
13 make up something. The fact that they're doing it is
14 violation enough.

15 BY MR. GRATZ:

16 Q. And in your -- when you say "the fact that
17 they're doing it," do you mean the libraries or Google?

18 MR. BONI: Object to form.

19 A. Google has created the libraries to pass on to
20 the -- the digital library to pass on to the
21 universities. The universities would not have this --
22 these digital books for it not for Google.

23 BY MR. GRATZ:

24 Q. And do you personally object to the possession
25 of digital books by university libraries?

1 times had you spoken to Mr. Boni?

2 A. I wouldn't estimate.

3 Q. What documents have you reviewed in relation to
4 this case?

5 MR. BONI: Let me object to the form of the
6 question. You can answer if you can.

7 A. This might be slow. The final amended pleading
8 by the plaintiffs. The plaintiffs' motion for
9 certification of class action, Google's response, your
10 request for documents, the deposition of the Jim Booten.
11 A paper called the declaration of Joanne Zack. The
12 judge's refusal of the first class action settlement.
13 And I've also, online, reviewed various things that
14 Google had to say about its library project.

15 BY MR. GRATZ:

16 Q. Anything else?

17 A. Not that I recall.

18 Q. And the documents that you referred to in your
19 previous answer, when did you -- when did you review
20 those documents?

21 A. In the last month or the last six weeks.

22 Q. Other than the documents you have reviewed in
23 the last six weeks, are there any other documents that
24 you've reviewed in connection with this case?

25 A. I reviewed the original copyright for "The

1 Superlawyers," also reviewed various letters that
2 publishers sent to my agent, Carl Brandt, reverting
3 rights to me.

4 Q. And those were documents that you provided to
5 Mr. Boni to be produced in discovery; is that right?

6 A. Yes. The chain went from Brandt to me to
7 Mr. Boni.

8 Q. Out of the documents that Mr. Brandt sent to
9 you in relation to this matter, were there any that you
10 withheld and did not send to Mr. Boni?

11 A. No.

12 Q. Other than the documents that you've reviewed
13 in the last six weeks and the documents that you
14 provided to Mr. Boni for production, are there any other
15 documents that you've reviewed in connection with this
16 lawsuit?

17 A. Yes. Thinking back, before the settlement was
18 proposed, I was sent by Authors Guild a draft of the
19 proposed settlement, and I reviewed that, and I was
20 asked to comment on that.

21 Q. Did you comment on that?

22 A. I don't recall. I remember reading it and may
23 have made a suggestion, but what it was, I don't
24 remember at this date.

25 Q. Did you have any meetings regarding the

1 settlement agreement?

2 A. No, all done telephone.

3 Q. Did you have any telephone conversations
4 regarding the settlement agreement?

5 A. With the Authors Guild, yes.

6 Q. How many?

7 A. Three, four, five.

8 Q. About how long did each one last?

9 MR. BONI: Object to form. You can answer.

10 A. I'd say anywhere from five minutes to 15, 20
11 minutes.

12 BY MR. GRATZ:

13 Q. Who was on those phone calls?

14 A. A woman lawyer from Authors Guild.

15 Q. Do you recall the name of that lawyer?

16 A. No, I do not.

17 Q. Anyone else?

18 A. Memory tells me I discussed it with Mr. Dickson
19 at the time.

20 Q. And was that on the same phone call as with the
21 Authors Guild?

22 A. No. This is independent.

23 Q. And the phone call with the Authors Guild, was
24 it just you and a lawyer with the -- from the Authors
25 Guild?

1 A. It was someone from the Authors Guild. I'm not
2 gonna assume it was a lawyer, but it was someone from
3 Authors Guild. It was familiar with the -- pardon me.
4 Let me get a drink of this. It was someone familiar
5 with the terms.

6 Q. Do you remember if it was a man or a woman?

7 A. My recollection it was a man. Pardon me. A
8 woman.

9 Q. Was it the same person during each
10 conversation?

11 A. No.

12 Q. You said there were between three and five of
13 these conversations?

14 A. I would estimate. That's a long time ago.

15 Q. Other than those conversations and reviewing
16 the documents that you have reviewed in the last six
17 weeks and reviewing the documents that were provided to
18 Mr. Boni to be produced during discovery, have you had
19 any other involvement in the progress of the litigation?

20 A. Yes, I have.

21 MR. BONI: Object to the form of the question.
22 You can answer.

23 A. Yes.

24 BY MR. GRATZ:

25 Q. What's that?

1 A. Mr. Dickson has been intimately involved in
2 this, talking to the Authors Guild and being sort of
3 central point to gather information. I talked to him on
4 an ongoing basis about it.

5 Q. Was anyone else on these calls?

6 A. No. These were person-to-person calls. We're
7 good friends, have been since 1967. We talk a lot.

8 Q. About how many times would you estimate you've
9 discussed the litigation with Mr. Dickson?

10 A. I cannot even give you a ballpark figure. We
11 see one another frequently, and it came up sometimes and
12 sometimes it didn't. No way I can answer that.

13 Q. Do you understand Mr. Dickson is no longer a
14 plaintiff in this case?

15 A. I'm aware of that.

16 Q. Do you know why?

17 MR. BONI: I'll caution you. You can give a
18 general response without getting into detail, and the
19 reason I say that, Joe, is because it does involve an
20 element of attorney work product, and so it's for that
21 reason I'm cautioning the witness to be guided by that.
22 I will let the witness give a --

23 THE WITNESS: Go off the record?

24 MR. BONI: -- general response.

25 MR. GRATZ: Sure.

1 (Whereupon, discussion was held off the
2 record.)

3 THE WITNESS: Give me your question again.

4 MR. GRATZ: Sure. I just want to note a
5 discussion was had between counsel off the record
6 regarding the level of detail necessary for the
7 witness's answer.

8 BY MR. GRATZ:

9 Q. So my question, again, was: Do you know why
10 Mr. Dickson is no longer a plaintiff in this case?

11 A. Yes, I do know.

12 Q. Why is that?

13 A. Because serious medical condition of two very
14 close members of his family.

15 Q. Do you know if there's any other reason?

16 A. I don't know. I think that's damn well
17 sufficient.

18 Q. Not saying that it isn't.

19 Would you say you got most of your information
20 about the progress of the litigation from Mr. Dickson?

21 A. Most -- yeah, probably say I kept current on
22 it, like a current bulletin.

23 Q. Do you know whether Mr. Dickson had similar
24 conversations with others?

25 MR. BONI: Object to form. You mean other

1 named plaintiffs?

2 BY MR. GRATZ:

3 Q. Anyone else?

4 A. I have been in situations where he discussed
5 that with other writers.

6 Q. Do you know whether Mr. Dickson had similar
7 discussions with other named plaintiffs?

8 A. I'm sorry?

9 Q. Do you know whether Mr. Dickson had similar
10 discussions with other named plaintiffs?

11 A. I don't know.

12 Q. What's your role in this litigation?

13 A. Representative of the class plaintiffs.

14 Q. Are you also in this litigation to represent
15 your own interests?

16 A. Yes.

17 Q. Did you review the Complaint in this case
18 before it was originally filed?

19 A. Yes, I did.

20 Q. Did you make any comments on it?

21 A. Not that I recall.

22 Q. Are you a lawyer, Mr. Goulden?

23 A. No, I'm not.

24 Q. Who makes decisions about the direction of the
25 litigation?

1 MR. BONI: Object to form. You can answer.

2 A. I think the lawyers do with input considered --
3 by the lawyers with input -- pardon me. I'm tongue tied
4 today. From the lawyers with input requested by the
5 lawyers who are handling the case.

6 BY MR. GRATZ:

7 Q. Who decides what positions to take in
8 litigation?

9 MR. BONI: Object to form.

10 A. I think ultimately the lawyers do, guided by
11 the wishes of the lead plaintiffs.

12 BY MR. GRATZ:

13 Q. What do you base your understanding of that on?

14 MR. BONI: Object to form of his previous
15 response.

16 BY MR. GRATZ:

17 Q. What do you base your -- on what do you base
18 your previous response?

19 A. Watching the way the litigation has progressed.

20 Q. Have you provided -- strike that.

21 Are you being paid for your participation in
22 this case?

23 A. I'm sorry. I can't...

24 Q. Are you being paid for your participation in
25 this case?

1 A. No.

2 Q. What do you understand Mr. Boni's role to be in
3 the litigation?

4 A. From what I've observed, he's lead counsel in
5 this case along with Ms. Zack.

6 Q. And Mr. Boni and Ms. Zack make the decisions
7 about when -- what to say in their papers, for example?

8 MR. BONI: Object to form.

9 A. To get into that, would have to get into the
10 conversation between me and Mr. Boni. I'm not gonna go
11 into lawyer discussions.

12 BY MR. GRATZ:

13 Q. Do you know whether any of the other named
14 plaintiffs have provided input to Mr. Boni regarding how
15 the litigation should be conducted?

16 MR. BONI: Object to form.

17 A. The only litigant I know personally is
18 Mr. Dickson, and I understand he was talking to Mr. Boni
19 before his problems arose.

20 BY MR. GRATZ:

21 Q. Anyone else?

22 A. Not that I know of.

23 Q. Have you provided input to Mr. Boni regarding
24 how he should litigate this case?

25 A. I think you're getting into conversations of my

1 attorney there.

2 Q. Are you withholding information based on the
3 attorney-client privilege?

4 A. Yes.

5 MR. BONI: I think you can answer that
6 question. Joe, repeat the question. I think it can be
7 answered with a "yes" or "no."

8 MR. GRATZ: Sure.

9 BY MR. GRATZ:

10 Q. Have you provided input to Mr. Boni regarding
11 how he should litigate this case?

12 MR. BONI: Object to the form of that question.
13 I will let you answer the question with a "yes" or --

14 A. Yes.

15 BY MR. GRATZ:

16 Q. About how many times?

17 MR. BONI: Joe, we've really gone over this.
18 From 2006 until today, you want to know how many times
19 what? I mean --

20 A. I cannot begin to answer that.

21 BY MR. GRATZ:

22 Q. Why not?

23 A. I simply don't jot down on my calendar
24 everybody I talked to every day. My memory at age 77 is
25 not all that keen, as you might discover in another 50

1 years.

2 Q. What was your involvement with respect to the
3 proposed settlement? Strike that.

4 Do you recall there was a settlement proposed
5 in this litigation?

6 A. You mean the earlier settlement?

7 Q. Yes.

8 A. Yes, I was aware of it.

9 Q. What were, in rough terms, the terms of this
10 settlement?

11 A. It was so complex that I'm still having trouble
12 figuring it out. I read it again the other night, and
13 essentially it was striking the business deal between
14 the authors and Google for the authors' share
15 financially in any proceeds that Google earned, and also
16 I think it had a proposal that Google would get
17 copyright permission before they would digitize books.

18 Now, again, though, this all happened a long
19 time ago, and I'd say it was very confusing to me, the
20 settlement.

21 Q. Would you say that you fully understand the --
22 all the terms of the settlement agreement?

23 MR. BONI: Object to form. You can answer.

24 A. The current one, no.

25 BY MR. GRATZ:

1 BY MR. GRATZ:

2 Q. Anything else?

3 A. I perhaps discussed that with Mr. Dickson.

4 Q. Anything else?

5 A. That's all I recall.

6 Q. Did you read the text of the settlement
7 agreement itself?

8 A. Yes, I did.

9 Q. Did you think that it was a fair settlement?

10 A. No, I did not. Settlement, yes. I thought the
11 settlement was very fair.

12 Q. In your previous answer, you said that you
13 thought something wasn't fair. What were you referring
14 to?

15 MR. BONI: Object to form. You can answer.

16 A. I'm trying to think what it was I thought was
17 unfair. I think I thought some of the opinion was
18 unfair, not the settlement itself.

19 BY MR. GRATZ:

20 Q. The Judge Chin opinion?

21 A. Yes, I do.

22 Q. And what parts were those?

23 A. I think he was overly concerned with authors
24 not being represented, whereas I felt then and I still
25 feel that any author who seeks protection of the

1 copyright laws is covered. If he wants to get out of
2 the case at a later point, he can always opt out.

3 Q. Anything else?

4 A. I think that's it.

5 Q. Why do you think that Judge Chin was overly
6 concerned with authors not being represented?

7 MR. BONI: Object to form.

8 A. I don't know. I don't try to read the minds of
9 federal judges.

10 BY MR. GRATZ:

11 Q. Did you agree with all of the terms of the
12 settlement that was rejected by Judge Chin?

13 A. As far as I remember them, I do.

14 Q. Do you know there were objections to the
15 settlement from some authors?

16 A. I read that.

17 Q. Have you reviewed any of those objections?

18 A. No, I have not. I read about it in general
19 terms. I've not looked at any specific filings with the
20 Court.

21 Q. Read about it in the newspaper, for example?

22 A. Yeah.

23 Q. What were the grounds of those objections?

24 MR. BONI: Object to form.

25 A. From what I read in the press, seems to be that

1 academics who wanted to make wide use of the Google
2 holdings.

3 BY MR. GRATZ:

4 Q. Anything else?

5 A. That's all that -- that's the main point I
6 recall.

7 Q. Do you think that you agreeing to the
8 settlement adequately represented those authors who
9 objected?

10 A. Yes.

11 Q. Why is that?

12 A. Because anyone who enjoys the protection of the
13 copyright laws sought that out, that was a voluntary
14 submission of their rights, for approval of their
15 rights, so, therefore, they should be included with
16 everybody else as a class.

17 Now, if they do not like the settlement, they
18 can always opt out of it.

19 Q. Do you think their objections were sincerely
20 held?

21 MR. BONI: Object to form.

22 A. I can't read the mind of an academic either.

23 BY MR. GRATZ:

24 Q. Have you spoken with any of the authors who
25 objected to the settlement?

1 A. I'm trying to put this when and where this
2 happened. I was at a conference down at Virginia
3 Military Institute. I talked to a professor there of
4 another college who was attending and somehow the
5 conversation got around to the Google suit, and he said
6 simply that he felt that anything in print should be
7 available for general public without resort to things
8 like copyright.

9 In other words, if it existed, he should be
10 able to download it and use it. Needless to say, I
11 disagreed with him.

12 Q. Do you remember who that was?

13 A. A man from Western Kentucky University. His
14 name, I do not recall. He was a political science
15 teacher.

16 Q. Other than the political science professor from
17 Western Kentucky University, have you spoken with any of
18 the other authors who objected to the settlement?

19 A. Not that I recall.

20 Q. Do you know why the objectors who objected to
21 the settlement took the view that they did?

22 MR. BONI: Object to form.

23 A. As I said before, they want the unlimited use
24 of the Internet or material on the Internet regardless
25 of who owns it.

1 knowing.

2 BY MR. GRATZ:

3 Q. Do you think it's likely or unlikely?

4 MR. BONI: Object to form.

5 A. As I said, I have no way of knowing.

6 BY MR. GRATZ:

7 Q. Do all class members share your view that
8 Google's scanning and display of snippets is something
9 that's objectionable?

10 MR. BONI: Object to form.

11 A. The writers I know without exception are
12 covered -- enjoy the protection of the copyright
13 statute. The fact that they or their publisher gets the
14 copyright protection suggests to me that they wish to be
15 protected.

16 BY MR. GRATZ:

17 Q. So you don't think there are any class members
18 who don't object to Google's scanning and display of
19 snippets?

20 MR. BONI: Object to form. That
21 mischaracterizes the testimony.

22 A. I have no way of knowing.

23 BY MR. GRATZ:

24 Q. Have you spoken with any?

25 MR. BONI: Asked and answered.

1 A. I've not raised the index question with any
2 other writers.

3 BY MR. GRATZ:

4 Q. Other than Mr. Dickson and others who were at
5 some time a named plaintiff in this case, have you
6 spoken with other writers who do object to Google's
7 scanning and snippet display?

8 A. Over the years, yes.

9 Q. About how many?

10 A. This is a guesstimate. 20, 30.

11 Q. Did they say why they objected to Google's
12 scanning program?

13 A. For the same reason I do. They -- Google is
14 stealing things that don't belong to Google for
15 commercial purposes.

16 Q. Do you think there are any authors who would be
17 harmed if the Court ordered Google to shut down the
18 snippet display feature of Google books?

19 MR. BONI: Object to the form.

20 A. Have no way of knowing.

21 BY MR. GRATZ:

22 Q. Have any of your out-of-print books come back
23 into print?

24 A. Yes.

25 Q. What books are those?

1 co-author "The News Manipulators" contributed within the
2 scope of your employment at Accuracy in Media?

3 A. Yes, it was.

4 Q. Are all of your books nonfiction?

5 A. Yes.

6 Q. What is the purpose for which you wrote your
7 books?

8 MR. BONI: Object to form.

9 A. To make a living and to satisfy my long-time
10 desire to be a writer.

11 BY MR. GRATZ:

12 Q. Are your books works of journalism?

13 MR. BONI: Object to form.

14 A. No.

15 BY MR. GRATZ:

16 Q. You have written works of journalism; is that
17 right?

18 A. I was a newspaperman for ten years.

19 Q. What is the difference between your books and
20 what you consider journalism?

21 A. Journalism seems to be sort of -- it's not
22 the in-depth research that you would do for a book.
23 There's a difference between what I write and what is
24 called journalism.

25 Q. Because the depth of research, for example,

EXHIBIT 6

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF NEW YORK
 2 -----X
 3 THE AUTHORS GUILD, INC., et al.,
 4
 5 PLAINTIFFS,
 6
 7 -against- Case No:
 8 05CV8136 (DC)
 9
 10 GOOGLE INC.,
 11
 12 DEFENDANT.
 13 -----X
 14

10 DATE: January 4, 2012
 11 TIME: 1:05 P.M.
 12
 13

14 DEPOSITION of a Plaintiff, BETTY MILES, taken
 15 by the Defendants, pursuant to a Notice and to the
 16 Federal Rules of Civil Procedure, held at the offices of
 17 MILBERG, LLP, One Pennsylvania Plaza, New York, New York
 18 10119, before Deborah Garzaniti, a Notary Public of the
 19 State of New York.
 20
 21
 22
 23
 24
 25

B. MILES

1 A. Yes.

2 Q. So I will ask while we are here today, I
3 want to have a conversation with you, but she also has
4 to write down everything that we are saying. We should
5 not talk over each other. We should say yes and no
6 rather than nodding.

7 A. Okay, yes.

8 Q. And it is a little warm in here and it is
9 a cold day. I know you have come a long way. If you
10 need to take a break at any point, let me know.

11 A. Thank you.

12 Q. You are here because you are a Plaintiff
13 in a lawsuit against Google; is that right?

14 A. That's right.

15 Q. What is the lawsuit about?

16 A. The lawsuit is about whether or not
17 Google has the right to have control of my copyrighted
18 books and those of all of the other authors that I
19 represent.

20 Q. What do you mean by control?

21 A. I mean being able to do what I want with
22 my own copyrighted books, that is to earn money from
23 them, to sell rights to them.

24 Q. What is Google doing that is interfering
25 with those rights?

B. MILES

1 A. It is taking control of those rights
2 without asking me whether it has permission to do so.

3 Q. What are you asking the Court to do about
4 that?

5 A. To ask permission of me and all of the
6 other authors that I represent before doing something
7 with the books, which have their own copyright, and also
8 to pay damages for the books that they have already
9 taken over, \$750.

10 Q. What is Google doing that you object to?

11 A. It is not asking my permission as a
12 copyright holder for anything that it is doing,
13 specifically putting quote snippets from the books on
14 the website and sending a copy of a digitized book back
15 to the libraries from which they are cooperating with it
16 in this time.

17 Q. You mentioned the objection to Google not
18 having asked permission?

19 A. Yes.

20 Q. If Google had asked your permission
21 before scanning your book and displaying snippets, what
22 would your response have been?

23 MR. BONI: Objection to the form. You can
24 answer. I am placing an objection into the record.

25 THE WITNESS: Okay.

B. MILES

1 A. It is not the problem of my books. It is
2 the problem of the principle of doing this for all
3 books.

4 Q. So apart from your desire that Google
5 Books be changed with respect to all books, you don't
6 have a particular desire to have your own books removed?

7 MR. BONI: It mischaracterizes the testimony.
8 I object to the form.

9 A. I mean I care about -- this is something
10 that I care about. I care about it for my own books, of
11 course they are my own books, I care about it for all
12 authors' books.

13 Q. But you haven't asked Google to remove?

14 A. No, well, except as this claim is asking.

15 Q. Do you want Google to remove your books
16 from Google Books?

17 A. Yes.

18 Q. What is your role in this litigation?

19 A. My role is to stand for all other authors
20 and to be aware of the gist of the claim and to approve
21 of that, yes.

22 Q. When did your involvement in this
23 litigation begin?

24 A. Back when the original -- I guess that
25 was 2005.

B. MILES

1 Q. Do you have a written engagement
2 agreement with the law firm of Boni & Zack?

3 A. No.

4 Q. Do you have a written engagement
5 agreement with the law firm of Milberg LLP?

6 A. No.

7 Q. Do you have a written engagement
8 agreement with the Authors Guild as your lawyers?

9 A. No.

10 Q. And the Authors Guild and the staff of
11 the Authors Guild is not acting as your lawyer; is that
12 right?

13 A. No, not at all.

14 Q. Do you understand that there was
15 previously a proposed settlement in this case?

16 A. Yes, I do.

17 Q. What do you think of that settlement?

18 A. I can't really talk about the
19 technicalities of that. I know that Judge Chin asked
20 the parties to -- no, I don't, I don't.

21 MR. BONI: Do you mean as she is sitting here
22 today or when she was discussing it at the time of the
23 settlement?

24 Q. As you sit here today?

25 A. Well, I understand what today's claim is

B. MILES

1 about, yes.

2 Q. Did you read the settlement agreement?

3 A. Yes.

4 Q. Did you think it was a fair settlement?

5 A. Yes.

6 Q. Were there any elements of the settlement
7 agreement that, and this a yes or no question, were
8 there any elements of the settlement agreement that you
9 thought were unfair?

10 A. No.

11 Q. Do you think that you adequately
12 represented all of the class members in agreeing to the
13 settlement?

14 MR. BONI: Object to the form. You can
15 answer the question.

16 A. I think so.

17 Q. Did you know that there were objections
18 to the settlement from authors?

19 A. I do.

20 Q. What were the grounds of those
21 objections?

22 A. There were some from another author
23 group, I forget what else.

24 Q. Do you remember anything else about the
25 objections?

B. MILES

1 A. No.

2 Q. Do you think you adequately represented
3 those authors who objected?

4 A. I think I adequately represented the
5 majority of authors.

6 Q. But there are some who take a different
7 view?

8 A. I know that from reading, yes.

9 Q. With respect to them, do you think you
10 are an adequate representative?

11 MR. BONI: Object to the form. It would be
12 helpful to establish what adequate representative means.
13 It is very vague, the question.

14 A. I do think I can speak for all authors.
15 I think when this claim is settled, all authors are
16 likely to be happy with the kind of outcome we are
17 hoping for.

18 Q. What outcome are you hoping for?

19 A. We are hoping that each author will have
20 control of the rights to his or her book and some
21 negatives, that these books will not be in the program
22 that send the digitized copies of a book to libraries.

23 Q. Anything else?

24 A. And financial settlement.

25 Q. Do you think that the financial terms of

B. MILES

1 the proposed settlement were fair?

2 A. Yes.

3 Q. But the authors are now asking for a
4 different amount of money than was in the settlement, is
5 that your understanding?

6 A. I don't know.

7 Q. Thinking back to the proposed settlement,
8 were you in charge of deciding what its terms should be?

9 A. No.

10 Q. Who was?

11 A. That's a group of people, not whom I am
12 one.

13 Q. Did you have the independent ability to
14 reject the settlement?

15 A. No. I am not a lawyer.

16 Q. Turning to a different topic in 2011,
17 just by category, what were your sources of income?

18 A. Royalties. Well, Social Security, right,
19 pension, TIAA. Do you know that?

20 Q. Yes.

21 A. And royalties from my own books and
22 royalties from my late husband's books.

23 Q. What is your late husband's name?

24 A. Matthew B. Miles.

25 Q. Is your pension related to your work at

B. MILES

1 Q. This is an article by Katie Hafner,
2 headlined At Harvard, a Man, a Plan and a Scanner; is
3 that right?

4 A. Yes.

5 Q. This is an article that you clipped from
6 the newspaper; is that right?

7 MR. BONI: We produced this in the first
8 production six years ago, five or six years ago.

9 A. I intend to clip things, yes.

10 Q. Do you maintain clipping files of
11 interesting articles?

12 A. Yes, I do.

13 Q. What led you to clip this article?

14 A. I have been clipping articles about the
15 Google case from the beginning because I am very
16 invested in this. My opinion on this has been sought
17 and given and I feel that my role in this case is to
18 weigh in on issues around it, so it is important to me
19 to keep up with. I mean this is an early one, but I
20 read it, not just in the Times, in the New York review
21 of books. This is important to me because I feel I am
22 really representing authors who want to control their
23 rights and I am concerned that I will weigh in sensibly
24 and be aware and my opinion bears some weight.

25 Q. Turning to the second page of Exhibit 13.

B. MILES

1 A. This is going to be an article from quite
2 far back. I am not going to remember.

3 MR. BONI: He didn't ask you a question.
4 Just answer.

5 A. I am turning to page two.

6 Q. In the first column in the last full
7 paragraph.

8 A. Yes.

9 Q. That paragraph ends, "The thing that
10 consoles me," Mr. Verba said, "is Google's notion of
11 showing only the snippets, which have everything to do
12 with what's in the book, but nothing to do with reading
13 the book."

14 Do you understand what Mr. Verba means by
15 that?

16 A. I do.

17 Q. Do you agree?

18 A. No.

19 Q. What is your disagreement?

20 A. Well, can you say it again? Where is it?

21 MR. BONI: Down here (indicating).

22 A. Okay.

23 Q. It has been indicated to you. Do you see
24 it now?

25 A. I know. You told me.

B. MILES

1 MR. BONI: I just marked it. I am sorry.

2 MR. GRATZ: Let the record reflect that the
3 exhibit has been marked at the place where I was talking
4 about.

5 A. I see it, but he is not.

6 Q. Go ahead.

7 A. No, you ask me.

8 Q. What were you about to say I am tempted
9 to ask.

10 You said that you disagreed with what Verba
11 is saying here?

12 A. I didn't say that.

13 Q. Do you agree that Google's notion of
14 showing only the snippets, which has everything to do
15 with what's in the book, but nothing to do with reading
16 the book?

17 A. It is that this doesn't summarize what
18 this claim is about to me.

19 Q. What does it leave out?

20 A. It leaves out, and this was in 19 --
21 anyway, this was early on and it leaves out the whole
22 point of the Google Books being scanned and copies being
23 given to libraries and nothing is being said about that.
24 It is inadequate. It is one man's opinion of a
25 particular part of this issue.

B. MILES

1 A. In the Author Guild's bulletin?

2 Q. Yes.

3 A. Yes, there were.

4 Q. Were those articles provided to your
5 Counsel as part of discovery in this case?

6 A. I have no idea.

7 MR. BONI: We are not maintaining privilege
8 as to those, Joe.

9 MR. GRATZ: But they haven't been produced?

10 MR. BONI: No.

11 MR. GRATZ: Nothing further.

12 MR. BONI: I just have a question or two.

13 EXAMINATION BY

14 MR. BONI:

15 Q. You were just asked among the documents
16 you were shown was the notice with respect to the
17 settlement agreement in the case; is that correct?

18 A. Yes.

19 Q. Did you weigh in with respect to the
20 settlement agreement?

21 A. Yes, I did.

22 Q. You testified earlier about royalty
23 income with respect to your late husband. What type of
24 author was your husband?

25 A. He was an academic author. He wrote

B. MILES

1 textbooks.

2 Q. You were asked earlier about academic
3 authors and whether you can fairly represent or I think
4 the word was adequately represent academic authors. Do
5 you believe that you can?

6 A. Very much so.

7 Q. Why is that?

8 A. Well, not only in my husband's case, but
9 many of his colleagues. I know a great many academics,
10 as I know a great many plain authors and I know that no
11 matter what kind of book they are writing, they are all
12 concerned about their copyright and the rights of
13 holders of copyright to control their books.

14 MR. BONI: I have no further questions.

15 Thank you.

16 CONTINUED EXAMINATION BY

17 MR. GRATZ:

18 Q. One or two questions.

19 With respect to your husband's books, were
20 they all textbooks?

21 A. Yes, they were published by Sage
22 Publications, which is essentially a text house in the
23 social sciences essentially, yes.

24 Q. The publishing contracts with respect to
25 those textbooks, did they provide for that your late

EXHIBIT 7

MILLER & COMPANY REPORTERS

CONFIDENTIAL
CERTIFIED COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC.,)
Associational Plaintiff, BETTY)
MILES, JOSEPH GOULDEN, and JIM)
BOUTON, on behalf of themselves)
and all other similarly situated,)
)
Plaintiffs,)
)
Vs.)
)
GOOGLE INC.,)
)
Defendant.)
-----)

Civil Action No.
05 CV 8136 (DC)

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

DEPOSITION OF: DANIEL CLANCY

TAKEN ON: February 10, 2012

NO. 13042 **REPORTED BY:**
A648

BRENDA L. MARSHALL
CSR No. 6939

Los Angeles

San Francisco

800.487.6278

Pages 96-99, 140-41 and 182-87
of the deposition of Daniel Clancy will be filed under seal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DANIEL CLANCY,
a Witness having been duly
sworn, testified as follows:

EXAMINATION

BY MS. ZACK:

Q. Okay. Could you state your name and
address for the record.

A. Yes. Daniel J. Clancy,

09:18:57

REDACTED

Q. And you work for Google; right?

A. Yes.

Q. And what's your current position?

09:19:07

A. Current position is director of
engineering for YouTube.

Q. When did you join Google?

A. I joined Google in January 2005.

Q. Okay. And what was your first position?

09:19:19

A. My first position was engineering
director for Google Books.

Q. And how long did you have that position?

A. I kept that role till June of last year.
2011.

09:19:40

Q. Okay. So six and a half years, you were
an engineering director for Google Books?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

09:19:53

REDACTED

09:20:10

Q. Okay. As engineering director for Google Books, how would you describe that position?

09:20:26

A. I was responsible for directing the engineering team that developed the technology for Google Books back-end servers, and I also was heavily involved in strategy and other -- other issues involving Google Books.

09:20:49

Q. When you say "strategy," what do you mean?

09:21:05

A. I mean decisions about the product and the -- and the directions we would be going with the product, and I was involved heavily in our -- in our library partnerships.

1 A. Yes.

2 Q. And did someone take over Jim Gerber's
3 role?

4 A. Yes. Tom Turvey.

09:52:04

5 Q. And who is the current product counsel
6 for Google Books?

7 A. I'm not sure. There have been a few
8 changes lately.

09:52:47

9 Q. So on February 7, 2012, three days ago,
10 right, you signed this declaration; is that
11 correct?

12 A. Yes.

09:53:02

13 Q. Okay. And paragraph 4, you say, "Google
14 has scanned more than twenty million books as
15 part of Google Books"; correct?

16 A. Correct.

17 Q. Did you review any documents to make
18 that assertion?

09:53:21

19 A. I -- I reviewed our dashboard that
20 keeps -- verifies the number of books.

21 Q. So you know this case is not about
22 public domain books; right?

23 A. Yes.

09:53:37

24 Q. And you understand this case is about
25 in-copyright books; right?

1 A. Yes.

2 Q. So this 20 million books includes --
3 that you put in the affidavit or declaration
4 refers to both public domain and copyright?

09:53:48

5 A. Yes.

6 Q. And the number of in-copyright books
7 scanned, as you previously testified, is
8 approximately what? Sixteen or 17 million?

09:54:14

9 A. So with our Partner Program, we scanned
10 approximately 3 million. And here, I say 2.5.
11 And these are estimates. And then the estimate
12 of the number of public domain books is very
13 approximate.

09:54:36

14 So I think in terms of in copyright,
15 including Partner Program books and non Partner
16 Program books, the estimate of about 16 million
17 would be a rough estimate.

18 Q. Sixteen million?

19 A. That includes our Partner Program books.

09:54:48

20 Q. Right. So would it be correct to --
21 and -- to say that in the public -- there are no
22 Partner Program books that are public domain
23 books?

09:55:06

24 A. To be precise, there are Partner Program
25 books that are -- the work is in the public

1 domain, but the book they provide to us may also
2 include copyrighted material, such as Topsetter.

3 Q. We'll consider that an in-copyright book
4 for purposes of this discussion. Okay?

09:55:21

5 A. Yes.

6 Q. But -- and you're not considering those
7 types of books within the approximately four or
8 so million public domain books; correct?

9 A. Correct.

09:55:32

10 Q. So of the 16 million in-copyright books
11 that Google has scanned, if we subtract the
12 approximately 3 million from the Partner
13 Program, we're left with 13 million. Simple
14 math. Is that correct?

09:55:51

15 A. That is correct.

16 Q. Okay.

17 A. And remember that my estimate for the
18 public domain was very broad. It was 4 to 6
19 million. So --

09:55:58

20 Q. I understand.

21 A. Yes.

22 Q. So it could be 11 to 13 million?

23 A. And these are books that may be in
24 copyright.

09:56:06

25 Q. Eleven to 13 million books that Google

1 is treating as in copyright?

2 A. That we are not displaying the full text
3 for.

09:56:23

4 Q. Because you don't want to be sued for
5 copyright infringement?

6 MS. DURIE: Objection. Argumentative.

7 BY MS. ZACK:

8 Q. Is that right?

09:56:29

9 MS. DURIE: Wait. Wait. Objection.
10 Argumentative. Calls for, potentially, a legal
11 conclusion and attorney-client privileged
12 information.

09:56:41

13 So don't answer to the extent that the
14 answer would necessarily implicate
15 communications with counsel. If you have a
16 nonprivileged basis on which to answer the
17 question, you can.

09:56:50

18 THE WITNESS: Yeah. I don't think we
19 have a nonprivileged basis on which to answer
20 the question.

21 BY MS. ZACK:

22 Q. All right. So 11 to 13 million books
23 that are -- that were scanned in libraries;
24 right? Correct?

09:57:05

25 A. Yes.

1 Q. And Google is treating -- showing only
2 snippets?

3 MS. DURIE: Objection. Mischaracterizes
4 the witness's testimony.

09:57:15

5 But you can answer.

6 THE WITNESS: These are books that we
7 are showing snippets, and for some of them, we
8 do not show snippets.

9 BY MS. ZACK:

09:57:23

10 Q. Okay. But you're not -- for each of
11 these books, you're showing snippets or less?

12 A. Snippets or less. Correct.

13 Q. And these 11 to 13 million books were
14 copied as part of the Library Project; correct?

09:57:40

15 A. These were copied as part of the Library
16 Project.

17 Q. And that is a term that people at Google
18 use; right? The Library Project?

19 A. Yes.

09:57:48

20 Q. And what is your understanding of what
21 the Library Project is?

22 A. The Library Project is our initiative
23 for scanning books that we predominantly obtain
24 from libraries, that, again, some are public

09:58:08

25 domain, some may be in copyright, and that we

1 use for -- to search and index the books to help
2 users discover the books, and then we provide
3 links to -- of mechanisms to access the books
4 either through purchasing them or through a
5 library.

09:58:27

6 Q. Right. And is there any other part of
7 the Library Project?

8 A. I'm not sure what you mean.

9 Q. Well, don't you give digital copies of
10 the books back to the libraries?

09:58:37

11 A. Oh. As part of our initiative, we --
12 we -- the Library Project, we receive a book
13 from the library, overall, it's a process that
14 includes the digitization, the indexing, the
15 inclusion in Google search index, the providing
16 snippets.

09:58:57

17 In addition, libraries receive a copy,
18 and with that copy, they may use it for similar
19 search and indexing or other nondisplay uses,
20 various different research initiatives and,
21 also, archiving it for posterity.

09:59:16

22 Q. So 11 to 13 million books have been
23 copied by Google in libraries, and as to these
24 books, Google treats them as if they were in
25 copyright; is that correct?

09:59:48

1 MS. DURIE: Objection. Mischaracterizes
2 the witness's testimony.

3 THE WITNESS: We -- as I stated, we
4 display snippets or less for these books.

10:00:07

5 MS. ZACK: Okay. Let's mark as
6 Plaintiffs' Exhibit 2 a page from Google Books
7 Web site.

8 (Whereupon, the document referred to
9 was marked Plaintiffs' Exhibit 2 for
10 identification by the Reporter, a
11 copy of which is attached hereto.)

12 BY MS. ZACK:

13 Q. Have you had a chance to look at this?

14 A. Not prior to you handing it to me.

10:01:14

15 Q. Well, okay. Have you had a chance now?

16 A. Since you handed it to me, yes.

17 Q. Have you seen it before?

18 A. Not to my recollection.

10:01:27

19 Q. Okay. Did you ever participate in
20 drafting materials for the Google Books Web
21 site?

22 A. In general, I was not involved in
23 proofreading or drafting these materials. I
24 may, at times, have seen something.

10:01:42

25 Q. Okay. Well, this is currently still

1 available on Google Books. I'll make that
2 representation. At least as of yesterday.

3 A. Okay.

4 Q. For books that are in snippet form --

10:01:57

5 A. Uh-huh.

6 Q. -- there's a link, "Why can't I read the
7 entire book?" If you click on it, come over to
8 this --

9 A. Yeah.

10:02:03

10 Q. -- it says, "Many of the books in Google
11 Books come from authors and publishers who
12 participate in our Partner Program."

13 Is that true?

14 A. Yes.

10:02:11

15 Q. Okay. So -- and that we're talking
16 about approximately 3 million books?

17 A. Approximately.

18 Q. "For these books, our partners decide
19 how much of the book is browsable - anywhere
20 from a few sample pages to the whole book."

10:02:21

21 Is that true?

22 A. Yes.

23 Q. "Some partners offer the entire book in
24 a digital edition through Google eBooks, in
25 which case you can purchase the book."

10:02:37

1 Is that true?

2 A. Yes.

3 Q. Okay. Then it says, "For books that
4 enter Google Books through the Library Project,
10:02:46 5 what you see depends on the book's copyright
6 status."

7 Is that true?

8 A. So what you see depends if we -- since
9 we -- we cannot conclusively determine the
10:02:57 10 copyright status of a book, I think this is --
11 this is a simplification, and it's to see that
12 if we believe a book is in the public domain.

13 Then, as it says later on, "We then
14 allow you to access the rest of the book. If we
10:03:15 15 are unsure of the copyright status, then we
16 display snippets."

17 Q. So is that sentence true or not true?

18 MS. DURIE: Objection.

19 BY MS. ZACK:

10:03:26 20 Q. The first sentence.

21 MS. DURIE: Objection. Argumentative
22 and asked and answered.

23 THE WITNESS: I believe I've answered
24 the question.

25 BY MS. ZACK:

1 Q. The second sentence says, "We respect
2 copyright law and the tremendous creative effort
3 authors put into their work." Is that true?

4 A. Yes.

10:03:41

5 Q. The next sentence says, "If the book is
6 in the public domain and therefore out of
7 copyright, you can page through the entire book
8 and even download it and read it offline."

9 Is that true?

10:03:50

10 A. So if -- it is a simplification. If we
11 believe -- if we are confident that a book is in
12 the public domain, then this is true. There are
13 lots of books in our index that are in the
14 public domain where we do not provide this
15 access, and so you cannot do this.

10:04:09

16 So the statement "If the book is in the
17 public domain," this would be, again, a
18 simplification because there are books in the
19 public domain for which we do not allow users to
20 use this.

10:04:24

21 Q. Okay. The next sentence says, "If the
22 book is under copyright and the publisher or
23 author is not part of the Partner Program, we
24 only show basic information about the book,
25 similar to a card catalog, and, in some

10:04:33

1 instances, a few snippets - sentences of your
2 search terms in context."

3 Is that true?

4 A. Similar -- we can't determine copyright
10:04:46 5 status, but if we believe the book may be under
6 copyright, then this is true.

7 Q. So it's your testimony that Google is
8 unable to determine the copyright status of the
9 books it scans?

10:05:02 10 A. Google makes a determination of how to
11 present these books to -- to our users, based
12 upon the -- the information we have. We cannot
13 conclusively confirm that something is under
14 copyright because for the number of books, to do
10:05:25 15 this for each book and to identify who the
16 copyright holders are, whether or not it has
17 gone into the public domain, is -- is very
18 difficult.

19 Q. So Google -- it's your testimony that
10:05:43 20 Google is unable to determine whether books are
21 or are not in copyright?

22 MS. DURIE: Objection. Asked and
23 answered.

24 THE WITNESS: I believe I've answered
10:05:52 25 the question.

1 BY MS. ZACK:

2 Q. Is the answer yes or no?

3 MS. DURIE: Objection. Argumentative
4 and asked and answered.

10:05:58

5 MS. ZACK: It's not argumentative.

6 THE WITNESS: I believe I've answered
7 the question.

8 BY MS. ZACK:

10:06:03

9 Q. It's a simple question. You believe
10 you've answered it. Are there any books for
11 which Google is confident that it has determined
12 whether the book is not in copyright or is in
13 copyright?

10:06:16

14 A. There are books that Google has
15 determined that we are confident that they are
16 not in copyright.

17 Q. And are there any books which Google has
18 determined that it is confident that they are in
19 copyright?

10:06:28

20 A. Google makes a determination of books
21 that we are confident are under -- are in the
22 public domain. We have books in our Partner
23 Program that we are getting permission, we do
24 not confirm the copyright status in terms of the
25 records, but we believe those books are under

10:06:47

1 copyright.

2 Q. Do you believe that Google has copied
3 books that were in copyright?

4 MS. DURIE: Objection. Vague.

10:07:08

5 THE WITNESS: In our effort, we have
6 scanned books that are in copyright.

7 BY MS. ZACK:

8 Q. In other words, you're not denying that
9 Google scans and copyrights books, are you?

10:07:14

10 A. I'm not denying it.

11 Q. Now, getting back to the process that
12 involves your categorizing, for your own
13 purposes, that a book will be -- can we say
14 deemed in copyright by Google?

10:07:34

15 A. I think it's fair to say deemed in the
16 public domain. We don't deem it to be in
17 copyright.

18 Q. All right. So you only make
19 determinations that you're confident that books
20 are in the public domain?

10:07:49

21 A. Correct.

22 Q. So Google does not try to determine
23 whether the books it's copied are actually in
24 copyright?

10:07:55

25 MS. DURIE: Objection. Argumentative.

1 Asked and answered. Mischaracterizes the
2 witness's testimony.

3 BY MS. ZACK:

4 Q. Is that true?

10:08:01

5 A. Huh?

6 Q. Is that true?

7 A. I think I've -- I think I've answered
8 that.

10:08:22

9 Q. Now, when you display snippets, how many
10 snippets from a book can a user see? How would
11 you describe that?

12 A. The way I would describe it is when you
13 enter search query, it will display up to three
14 snippets of that book in response to that query.

10:08:43

15 For a given book and for a given query, those
16 snippets remain consistent, meaning it's the
17 same snippets. You issue the query again, you
18 see the same snippets.

10:08:58

19 Q. And for that book, if another query is
20 entered, would other snippets from the book
21 appear?

22 A. Yes.

10:09:13

23 Q. So would it be accurate to describe
24 snippets as being limited to three per book? Is
25 that an accurate description of Google's display

1 of snippets in a book?

2 A. As I said, I don't think that's an
3 accurate description. It is -- for a given
4 query, we might display up to three snippets,
10:09:25 5 but then if you entered a different query, you
6 might see different snippets.

7 Q. Okay. And would it be an accurate
8 description, in your view, of the Library
9 Project to discuss it without mentioning that
10:09:39 10 Google returns copies of the books scanned to
11 the libraries?

12 MS. DURIE: Objection. That's vague and
13 ambiguous.

14 THE WITNESS: Yeah.

15 BY MS. ZACK:

16 Q. Is -- if you gave a description of the
17 Library Project, do you think it would be
18 complete if you omitted to include the fact that
19 Google provides copies of the books it scans to
10:10:01 20 the libraries?

21 MS. DURIE: Still vague.

22 THE WITNESS: So if you're asking me to
23 describe the Library Project right now, I would
24 describe the Library Project as I stated before
10:10:16 25 as including the scanning, indexing, search,

1 discovery, snippets, along with the return of
2 the book to the library and the -- and then the
3 uses of those for other forms of nondisplay,
4 nonconsumptive research.

10:10:33

5 BY MS. ZACK:

6 Q. You would agree with me that a material
7 part of the Library Project is Google's
8 distribution back to the library of a digital
9 copy of the entire book scanned; correct?

10:10:46

10 MS. DURIE: Objection. It's vague,
11 ambiguous, calls for a legal conclusion.

12 THE WITNESS: Yeah. I'm not a lawyer.
13 So I won't -- I won't conclude, you know,
14 legally.

10:10:57

15 BY MS. ZACK:

16 Q. Well, you would agree that it's an
17 important part of the Library Project that
18 Google returns back to the library a digital
19 copy of the entire book scanned; correct?

10:11:10

20 A. As it -- it is part of the Library
21 Project that -- as I stated -- that we provide a
22 copy, the ability to get a copy, for our library
23 partners of the books we scan, in addition to
24 any other uses.

10:11:29

25 Q. And how many books have been provided to

1 A. I think that also would be potentially
2 overbroad. I think we would want a database
3 that would include metadata.

11:13:38

4 But, then, in terms of our scanning
5 initiative, we had an initiative that would
6 allow rate holders to opt out. So we wanted
7 to -- the ambition would be to create a database
8 that includes digitized books, as many books as
9 we -- we could obtain and scan, and you would
10 not include those books where rights holder
11 requested us not to scan.

11:14:01

12 Q. When did Google start allowing people to
13 opt out of scanning?

11:14:23

14 A. I believe the time frame was somewhere
15 in the time frame of summer 2005. I don't
16 remember the exact dates, but I think that was
17 approximately when we initiated our opt-out
18 program.

11:14:42

19 Q. Was that because Google -- let me
20 withdraw that.

21 Did Google, after it announced --
22 publicly announced the Library Program, to your
23 knowledge, receive complaints from publishers
24 concerning the scanning of books from libraries?

11:14:58

25 A. I am not aware of a specific complaint,

1 but I believe we -- in general, I believe we did
2 receive complaints from some of our publisher
3 partners and others about the Library Project,
4 yes.

11:15:09

5 Q. So did you talk to anybody who was
6 complaining?

11:15:28

7 A. I can't remember any specific meeting,
8 but I -- I believe I would have been
9 participating in meetings with some of our
10 publisher partners that would have been
11 concerned about the Library Project, although I
12 can't tell you about any one particular one.

11:15:43

13 Q. And you did participate -- how
14 frequently did you meet with Jim Gerber and Tom
15 Turvey?

16 A. I would meet fairly regularly with Jim
17 and Tom.

18 Q. Every week or --

19 A. Yes.

11:15:49

20 Q. Okay. And they were the ones that were
21 talking to publishers on a regular basis;
22 correct?

23 A. Yes.

11:15:55

24 Q. And did they report to you the
25 publishers were concerned about the Library

1 Project?

2 A. Yes.

3 Q. And when did they first start telling
4 you that?

11:16:02

5 A. I can't tell you exactly when, but
6 fairly -- fairly early on.

7 Q. Now, the Library Project was publicly
8 announced by Google, prior to your joining
9 Google; correct?

11:16:18

10 A. I am pretty sure. Yes. I believe it
11 was a few months before I joined was when it was
12 announced.

13 MS. ZACK: Let's mark as, I guess, PX 8
14 a document with the Bates Nos. Google 101101
15 through 101116.

11:16:57

16 (Whereupon, the document referred to
17 was marked Plaintiffs' Exhibit 8 for
18 identification by the Reporter, a
19 copy of which is attached hereto.)

11:17:21

20 BY MS. ZACK:

21 Q. You can look at the entire document --

22 A. Yeah.

23 Q. -- but I'm going to refer you to the
24 page that's 010103.

11:17:32

25 A. Okay.

1 A. No, I don't.

2 Q. Would it be fair to say that the
3 publishers were briefed extensively by Google
4 concerning the Library Project, after it was
11:38:45 5 publicly announced?

6 A. I believe there were numerous meetings
7 with publishers after the Library Project was
8 announced.

9 Q. And those publishers, therefore, were in
11:39:00 10 a position to ask questions and get Google's
11 responses concerning the project?

12 A. I believe that there were publishers
13 that requested meetings for discussions on it,
14 and if -- if someone requested a meeting, then,
11:39:17 15 yes, we would -- they were able to ask
16 questions. We were fairly open about our
17 program.

18 Q. Okay. And it's fair to say that those
19 publishers who were extensively briefed
11:39:31 20 expressed serious concerns about the Library
21 Project; is that correct?

22 MS. DURIE: Objection. Asked and
23 answered.

24 Go ahead.

11:39:39 25 THE WITNESS: I was not in many of those

1 meetings, but I think it is fair to say, as
2 stated earlier, that a number of publishers had
3 concerns about the Library Project and
4 communicated that to Google.

5 BY MS. ZACK:

6 Q. And is it fair to say that authors
7 groups also did so?

8 A. I believe it's also fair to say that,
9 certainly, the Authors Guild expressed concerns
10 about the Library Project.

11:40:10

11 Q. Do you know of any other authors groups
12 that Google talked to?

13 A. I do not know of any other one prior to
14 settlement -- settlement agreement and
15 discussions during the settlement. I do not
16 know if there were other authors groups we
17 talked to.

11:40:25

18 MS. ZACK: Okay. Let me mark as the
19 next exhibit document Google 5000439 through
20 446.

11:40:46

21 (Whereupon, the document referred to
22 was marked Plaintiffs' Exhibit 9 for
23 identification by the Reporter, a
24 copy of which is attached hereto.)

11:41:14

25 BY MS. ZACK:

1 A. I -- I -- not that I -- I expect it was
2 because of changes in the interface that would
3 have reduced the ad's revenue.

11:47:19

4 Q. What benefits does Google, as a company,
5 get from the Google Books?

11:47:47

6 A. So when we initiated the project, the
7 motivation was about enhancing the Google search
8 experience by expanding our index to include
9 books that previously were not searchable or
10 indexable, and that users would then be able to
11 find these books and then access the books
12 either by purchasing them or finding them in a
13 library. By improving Google search, that
14 benefits Google because more people would use
15 search and might do more searches.

11:48:10

16 And then the other benefit was Google
17 had always envisioned this as an ambitious
18 project whose benefits were going to be realized
19 over time in terms of from a societal
20 perspective and that that also benefits Google
21 in ways that by contributing to society, in
22 general, in a positive fashion, that also can be
23 good for the company in terms of establishing a
24 brand and establishing a relationship with
25 users.

11:48:33

11:48:55

1 Q. And you got that understanding from
2 discussions with senior management of Google?

3 A. Yes.

11:49:29

4 Q. And that would be Larry Page, Serge
5 Brent, Eric Schmidt? Others?

11:49:45

6 A. I think it's fair to say that I got this
7 understanding from the other leads, when I came
8 in, as to the why are we embarking on this
9 initiative. And then it was also as much my job
10 to articulate to our executive committee the
11 benefits of this project.

12 Q. And did -- were there other internal
13 benefits to Google from having the digitized
14 information?

11:50:06

15 A. So there had been -- I'm aware of one
16 initiative where we used scans of works to help
17 in automated translation, and that is where you
18 would be using the underlying text to
19 automatically learn a system that can translate
20 from one language to another.

11:50:39

21 We predominantly use information
22 obtained from the Web. So the use of books was
23 actually quite limited in that. But there had
24 been some use of the -- of the text for that.

11:50:53

25 It was -- it was minor, though.

1 The predominant use, far and away, is to
2 enhance the search experience and have users
3 search either on Google.com or with a restrict,
4 just looking over the books corpus.

11:51:13

5 Q. Some of the documents I've seen is that
6 Google's mission is to organize and make
7 available the world's content. Have you seen
8 that?

11:51:27

9 A. Yes. I don't remember the organize and
10 make available -- I don't -- yeah. No. I know.
11 The precise words, I -- you'll see it in lots of
12 documents.

11:51:46

13 Q. So Google's mission, as you recall or
14 understand, is to organize and make useful the
15 world's content?

16 A. Information.

17 Q. Information. And that's partly to
18 enhance the search experience?

11:52:02

19 A. It's -- by enhancing the -- by enhancing
20 the search experience, we accomplish the
21 mission.

22 Q. And the better the search experience,
23 the more users for Google; is that right?

11:52:16

24 A. So we believe that as our product
25 improves and users have a better search

1 experience, then more or the same number of
2 people will continue to use Google search.

3 Q. And then how is that monetized by
4 Google?

11:52:30

5 A. Google runs advertisements on Google
6 search in response to some but not all queries,
7 and that is traditionally on the right-hand side
8 or above the search results, and then we make
9 money when people click on the advertisements.

11:52:49

10 Q. And is there any other way that Google
11 makes money besides ads?

12 A. There are other initiatives within
13 Google, yes.

11:53:00

14 Q. Do you know about how much or what
15 percent of Google's revenues come from ad
16 revenues?

17 A. I do not know specifically, but a
18 large -- large percentage comes from
19 advertisements in one form or another.

11:53:13

20 Q. And as director of engineering for
21 Google Books, did you consider that your
22 initiative was benefitting Google commercially?

11:53:35

23 A. I believe that this initiative was a
24 good investment for Google in terms of both the
25 ability to enhance search, but also for the

1 public benefits realized from the project.

2 The project was an expensive project,
3 and I never did any analysis to determine if the
4 investment level, if there was a return on that
5 investment.

11:53:58

6 I executed on the project because it was
7 very much of a project that was driven from a
8 vision, and I executed on delivering that vision
9 but never assessed whether or not we actually
10 were financially benefitting when you looked at
11 the overall cost of the project.

11:54:12

12 Q. Well, Google does not break out its
13 benefits on a product-by-product basis, does it,
14 in it's financials?

11:54:24

15 A. Correct. To my knowledge, it does not.

16 Q. And have you heard the executives state
17 that they believe they cannot do so because all
18 the products are important and create a synergy
19 that benefits Google?

11:54:43

20 A. I have heard the --

21 MS. DURIE: Wait. Wait. You need to
22 let her finish her question.

23 MS. ZACK: Sorry. Going slow.

24 THE WITNESS: I have not heard the

11:54:51

25 executives state that. I believe it would be

13:50:

REDACTED

13:50:

13:50:

13:51:04 20 Q. Does Google keep any statistics on how
21 many clicks there are on the Buy the Book's
22 links?

23 A. We did keep statistics on the
24 click-through rate for the Buy the Book link.

13:51:21 25 Q. While you were director of engineering?

1 A. Uh-huh. Yes.

13:51:41

REDACTED

13:51:58 10 Q. And did you have any information about
11 whether people ever bought the book after they
12 clicked?

13 A. In general, we weren't -- we did not
14 have any information. We made various efforts
13:52:08 15 to get estimates from some of our partners, but
16 I don't remember ever really having a good
17 estimate of what the -- what happened once it
18 went off to partners.

13:52:24

22

REDACTED

23

24

13:52:39 25

EXHIBIT 8

MILLER & COMPANY REPORTERS

CONFIDENTIAL

COPIED COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC.,)
Associational Plaintiff, BETTY)
MILES, JOSEPH GOULDEN, and JIM)
BOUTON, on behalf of themselves)
and all other similarly situated,)
)
Plaintiffs,)
)
vs.)
)
GOOGLE INC.,)
)
Defendant.)
-----)

Civil Action No.
05 CV 8136 (DC)

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

DEPOSITION OF: KURT GROETSCH

TAKEN ON: February 13, 2012

NO. REPORTED BY:

13043

A681

BRENDA L. MARSHALL
CSR No. 6939

Los Angeles

San Francisco

800.487.6278

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

KURT GROETSCH,
a Witness having been duly
sworn, testified as follows:

EXAMINATION

BY MS. ZACK:

Q. Could you state your full name for the record, please.

A. Yes. Kurt McCollester Groetsch.

09:30:46 Q. And your address, please.

A.

Q. You currently work for Google; is that right?

09:30:58 A. Yes, I do.

Q. What is your position?

A. Technical collections specialist.

Q. When did you join Google?

A. August of 2007.

09:31:09 Q. Can you run through your employment history since college.

A. Since college.

Q. Very briefly.

09:31:19 A. Very briefly. Sure. I worked as a freelance graphic designer between 1994 and

1 BY MS. ZACK:

2 Q. Well, what do you understand it to be?

3 MR. GRATZ: Objection. Vague.

4 THE WITNESS: We are -- so as I stated

10:00:45

5 earlier, we are ingesting library catalogs in

6 order to understand the -- what a library holds

7 and what may be eligible for digitization as

8 part of the Library Project.

9 BY MS. ZACK:

10:00:59

10 Q. And how do you determine what's eligible

11 for digitization as part of the Library Project?

12 A. Well, I'm -- how do we -- are you asking

13 a question about the process, or are you asking

14 a question about the criteria that we use for

10:01:18

15 eligibility determination?

16 Q. Let's start with the criteria.

17 A. Okay. There are criteria, three primary

18 criteria, that we use. The first one is we

19 determine -- we want to determine whether a book

10:01:32

20 has been digitized already. If a book has been

21 digitized already, it is ineligible.

22 We also want to make sure that a

23 particular volume has been opted out from

24 digitization. If a book has been opted out, we

10:01:53

25 will not scan it. If we determine that a book

1 has been opted out, we will not scan it.

2 And then we also eliminate material that
3 has been committed for digitizing by another
4 library.

10:02:08

5 If a book passes all three criteria,
6 then we will place it on a candidate list, which
7 is just a list of all material from a particular
8 library that passes all three criteria.

10:02:26

9 Q. And when -- after you place a book on
10 the candidate list, what happens to the
11 candidate list?

10:02:40

12 A. The candidate list is provided to the
13 library, the library partner, for them to
14 analyze, and they will use that to determine
15 what they choose to send to Google.

16 Q. And do you discuss in any way, either by
17 e-mails or in writing or orally, with libraries
18 what -- how they make that selection process?

19 MR. GRATZ: Objection. Vague.

10:03:01

20 THE WITNESS: Yeah. I'm not quite sure
21 that I understand the question. Are we asking
22 about --

23 BY MS. ZACK:

10:03:12

24 Q. I'll rephrase it if you don't understand
25 it.

1 A. Sure.

2 Q. You said that Google, using the criteria
3 you've described, creates a candidate list which
4 it provides to the library; correct?

10:03:19

5 A. Yes.

6 Q. To your knowledge -- and then the
7 library chooses books from that list that it's
8 going to allow Google to copy; is that correct?

10:03:32

9 A. They -- they choose books from that list
10 to provide to Google for digitization.

11 Q. Okay. So my question is, do you
12 communicate with the library about their process
13 of making that selection?

10:03:47

14 A. I generally don't discuss that directly
15 with the libraries. That would be a
16 conversation between the libraries and the
17 library partner managers. Yeah. I generally
18 don't have direct conversations about the
19 specific books that they're going to send from
20 their collections, once they receive the
21 candidate list.

10:04:03

22 Q. Are you privy to those communications
23 either through e-mail or discussions with your
24 manager?

10:04:13

25 A. Yes. I've been included in some e-mails

1 on that.

2 Q. And do you have any understanding from
3 that as to what criteria, for instance, Michigan
4 uses?

10:04:23

5 A. Michigan is -- yes. I do understand the
6 criteria that they use to select books for
7 sending. Generally, yes, I've been -- I'm
8 familiar with some of the criteria that
9 libraries use.

10:04:42

10 Q. Can you just tell me what that is?

11 A. In general, libraries have used
12 logistical considerations to determine what to
13 send to -- to Google for digitization.

10:05:01

14 Libraries are interested in the ease of
15 access to the books, and they've mentioned that
16 they're also concerned about, like, there -- a
17 lot of physical logistical considerations that
18 have to be taken into account.

10:05:20

19 So whether there are facilities for
20 staging books in a particular building, whether
21 there's access to a loading dock to get the
22 books out, and whether -- you know, what the
23 sensibilities of a particular librarian in a
24 particular library are.

10:05:35

25 So, generally, it's logistical

1 considerations that we work with when libraries
2 are determining what to send.

3 Q. Any other considerations that you've
4 learned of that libraries have brought to
10:05:50 5 Google's attention?

6 A. Let's see. There may be some internal
7 discussions about collections that they would
8 care to digitize over others, but, in general,
9 those discussions about particular collections
10:06:12 10 are internal, and they're not decisions that we
11 participate in.

12 Q. "We" meaning Google?

13 A. Google, yes.

14 Q. Now, to -- you mentioned to prepare the
10:06:32 15 candidate list, Google has three mentioned
16 criteria.

17 A. Uh-huh.

18 Q. Whether the book has already been
19 digitized, and I assume you mean digitized by
10:06:42 20 Google; correct?

21 A. Yes.

22 Q. And that Google has its own records to
23 determine that; correct?

24 A. Yes. We know which books have -- are
10:06:51 25 part of the corpus of digitized material.

1 BY MS. ZACK:

2 Q. -- in your job at Google?

3 A. In my job? I do not use this set -- no.

4 I do not use this set of records in my job at

12:00:31

5 Google.

6 Q. Do you ever have occasion to review

7 copyright renewal records as part of your job at

8 Google?

9 A. I -- copyright renewal records?

12:00:46

10 Q. Yes.

11 A. I have viewed them in the past, yes.

12 Q. While at Google?

13 A. While at Google. Yes.

14 Q. And for what purpose?

12:00:57

15 A. To determine whether a particular title

16 that was originally registered has a renewal

17 record.

18 Q. And why were you doing that?

19 A. In some cases, it is curiosity. In

12:01:18

20 other cases, it is -- it would be part of --

21 part of my role, sort of a secondary role in --

22 let's see. I'm trying to characterize it.

23 Looking -- it is to determine whether there is a

24 renewal record present for a particular volume.

12:01:51

25 Q. And when you want to determine if a

1 renewal record is present for a particular
2 volume, how do you do that?

3 A. There are a variety of tools one can
4 use. One is the Stanford copyright renewal
12:02:08 5 database, which is fairly comprehensive.

6 There's also a -- for 1978 onward, as mentioned
7 in the post, U.S. government -- U.S. copyright
8 office records are available online through
9 their site.

10 Q. Any other tools that you've used?

11 A. I believe that is -- those are the
12 primary tools.

13 Q. And have you -- using those tools, have
14 you been able to determine whether a book --
12:02:35 15 copyright for a given book has or has not been
16 renewed?

17 A. Using those tools, you can determine
18 whether or not a renewal record is present.

19 MS. ZACK: Let's mark as the next, PX
12:02:59 20 35, two pages, Google 5000787 through 788.

21 (Whereupon, the document referred to
22 was marked Plaintiffs' Exhibit 35 for
23 identification by the Reporter, a
24 copy of which is attached hereto.)

12:03:21 25 BY MS. ZACK:

EXHIBIT 9

MILLER & COMPANY REPORTERS

CONFIDENTIAL
CERTIFIED COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC.,)	
Associational Plaintiff, BETTY)	
MILES, JOSEPH GOULDEN, and JIM)	
BOUTON, on behalf of themselves)	
and all other similarly situated,)	
)	
Plaintiffs,)	
)	Civil Action No.
vs.)	05 CV 8136 (DC)
)	
GOOGLE INC.,)	
)	
Defendant.)	
-----)	

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

DEPOSITION OF: STEPHANE JASKIEWICZ
TAKEN ON: February 14, 2012

NO.	REPORTED BY:	
13044	A691	BRENDA L. MARSHALL
		CSR No. 6939

Los Angeles	San Francisco
800.487.6278	

1 Q. Director of engineering? Is that what
2 you said?

3 A. Yeah. The exact title was Director of
4 Product Development.

11:04:01 5 Q. When you joined Google, what position
6 did you take in April 2007?

7 A. Program manager.

8 Q. And what were your -- how long did you
9 hold that position?

11:04:14 10 A. It's not very clear. Things are often
11 in a continuum. So I actually didn't act that
12 much as a program manager, mostly as an
13 engineering manager, which is what I'm doing
14 today.

11:04:27 15 Q. Mostly as an engineering manager?

16 A. Yeah.

17 Q. So since about April 2007 till today,
18 you've been an engineering manager, essentially,
19 for Google, or acted in that capacity?

11:04:37 20 A. Yeah. It's a continuum. I started
21 doing project management in the beginning and
22 very quickly moved to more technical issues.

23 Q. Okay. And have you been assigned to
24 Google Books for that entire period?

11:04:50 25 A. Yes.

1 scan center?

2 A. It is in the scan center, yes.

3 Q. And does your team write any software
4 for the check-in station?

11:19:18 5 A. Yes.

6 Q. And what is the purpose of the check-in
7 station?

8 A. There -- there are a few of them. The
9 two main ones are I -- or I guess the main
11:19:33 10 one -- because they all end up determining
11 whether or not the book is fit to scan. I guess
12 the other one is to register -- register the
13 fact the book is in the scanning center so that
14 we can track it later and inquire about its
11:19:48 15 location in the scanning center.

16 Q. And when you say determine whether the
17 book is fit to scan, how is that determined?

18 A. So one of the things is what you asked
19 about, opt-outs, in determining whether or not
11:20:03 20 the book is opted out. The others have to do
21 with physical conditions of the book. We have
22 different type of scanning stations for
23 different type of material so they tell us which
24 one is, like, the appropriate one.

11:20:17 25 They also check for the size of the

1 book, make sure that we can actually scan it.
2 They check for the condition of the book. If
3 it's too damaged, we won't scan it. And they
4 check for specific conditions, like the text
11:20:29 5 being too close to the gutter. If it is, then
6 we won't scan it because we wouldn't be able to
7 capture all the text.

8 Q. Too close to the what?

9 A. The gutter.

11:20:40 10 Q. The binding of the book?

11 A. Yeah. The binding of the book. Sorry.

12 Q. So the scan wouldn't end up being useful
13 to view?

14 A. Correct.

11:20:49 15 Q. Do you have any responsibility for
16 creating the opt-out list at Google?

17 A. No.

18 Q. Do you know who does?

19 A. So I don't know how to answer that
11:21:05 20 question because Google doesn't decide what the
21 opt-out list is. It's just publishers coming
22 forward and telling us what the list should be
23 of things we shouldn't scan.

24 Q. Right. But does someone have the
11:21:18 25 responsibility for making sure that list is

EXHIBIT 10

CONFIDENTIAL

* * * C O N F I D E N T I A L * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE AUTHORS GUILD, et)
al.,)
)
Plaintiffs,)
)
vs.)
)
GOOGLE INC.,)
)
Defendant.)
-----)

No. 05 Civ.
8136 (DC)

February 17, 2012
9:52 a.m.

Deposition of THOMAS TURVEY, held at
the offices of Milberg, One Penn Plaza, New
York, New York, before Laurie A. Collins, a
Registered Professional Reporter and Notary
Public of the State of New York.

A696

Pages 57-61, 81-85, 88-92 and 102-05
of the Deposition of Thomas Turvey will be filed under seal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

T H O M A S T U R V E Y ,
called as a witness, having been duly sworn
by the notary public, was examined and
testified as follows:

EXAMINATION BY

MS. ZACK:

Q. Good morning.

A. Good morning.

Q. Can you state your full name and
address, please?

A. Sure. Thomas Turvey,

REDACTED

Q. And you work for Google?

A. I do.

Q. What is your position?

A. I am the director of strategic
partnerships.

Q. How long have you had that particular
position at Google, approximately?

A. Approximately three years.

Q. And when did you join Google?

A. February 2004.

Q. And when you first joined, what was
your position?

A698

1 Turvey - Confidential

2 happened.

3 Q. I'm expanding it out and saying aside
4 from this particular meeting do you recall ever
5 hearing from any publishers that they took the
6 position that Google should get permission before
7 scanning copyrighted materials?

8 A. I have heard that from publishers.

9 Q. Do you recall which publishers?

10 A. Not specifically.

11 Q. Have you heard that from my authors?

12 A. I have heard that from authors involved
13 in this case that are named in this case.

14 Q. Which authors are you speaking of?

15 A. I'm speaking of Jim -- I'm sorry, I
16 forgot the last name. You're not going to help me
17 with that? Okay. Fine.

18 MS. DURIE: Sorry.

19 Q. Jim Boughton?

20 A. No, not Jim Boughton. Besides --

21 Q. Jim Glick?

22 A. Jim Glick, yes.

23 Q. All right. So you heard from Jim Glick
24 that -- who is an author?

25 A. Yes.

A699

1 Turvey - Confidential

2 Q. What did he say?

3 A. I don't remember specifically.

4 Q. Did he say to you that he thought
5 Google should get permission before scanning in
6 copyright materials?

7 A. It's possible he said that.

8 Q. There are persons -- rights holders who
9 have said that to you; right?

10 A. It's possible, yeah.

11 Q. Well, what I'm saying is you may not
12 recall specifically who said it, but you recall
13 that rights holders have said that to you --
14 correct? -- that they believe that Google should
15 get permission before scanning in copyright
16 materials; correct?

17 MS. DURIE: Objection, asked and
18 answered.

19 You can answer.

20 A. As I stated, I have no specific
21 recollection other than Jim Glick, but it's
22 possible that was said to me.

23 Q. Do you have a general recollection that
24 that was said to you?

25 MS. DURIE: Objection, asked and

A700

1 Turvey - Confidential

2 answered.

3 A. I have nothing more to add.

4 Q. Well, there's a difference between
5 saying it was possible and saying I have a general
6 recollection that it was said to me but I can't
7 identify precisely who said it.

8 What I'm trying to ascertain is if you
9 agree that it was said to you; you just can't
10 recall who said it.

11 MS. DURIE: Asked and answered.

12 You can answer.

13 A. I have nothing more to add.

14 Q. What was the reason that Google met
15 with the AAP?

16 MS. DURIE: Objection, calls for
17 speculation.

18 You can answer.

19 Q. To the extent you know.

20 A. Upon request.

21 Q. And prior to attending the meeting, did
22 you get some sense of what the meeting was going
23 to be about?

24 A. I was told it would be about the
25 library project.

A701

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Turvey - Confidential

REDACTED

Q. Did you at any time get any data about whether after the "buy the book" link was clicked that books were actually purchased?

A. Not that I remember.

Q. Did you ever attempt to get that data?

A. I think we had a discussion or two.

Q. Was there some reason why you didn't get that done?

A. As I remember, no retailer was willing to provide that to us.

Q. Excuse me?

A. As I remember, no retailer was willing to provide that to us.

REDACTED

A702

EXHIBIT 11

ORIGINAL

Perle

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Master File No.: 05 CV 8136-DC

THE AUTHORS GUILD, et. al.,
Plaintiffs,
vs.
GOOGLE, INC.,
Defendants.

_____ /

2500 South Ocean Boulevard
Apartment 3A5
Palm Beach, Florida
Monday, 2:00-3:37 p.m.
March 19, 2012

DEPOSITION OF E. GABRIEL PERLE

Taken on behalf of the Plaintiffs before Janet M.
Willnitz, RPR, RMR, Notary Public in and for the State of
Florida at Large, pursuant to Plaintiffs' Notice of
Taking Deposition in the above cause.

1 book publishing industry, is that correct?

2 A. Yes.

3 Q. Do you consider Google to be a part of the
4 book publishing industry?

5 A. What a strange question. I mean, it's all a
6 matter of definition. Certainly, Google is
7 participating in the book publishing industry now, but
8 it's not what I would consider to be a book publisher as
9 such.

10 Q. And then the next sentence says: I have not
11 been asked to and do not herein render any opinions
12 regarding issues of substantive copyright law.

13 What do you mean by that?

14 A. Just what it says.

15 Q. What type of substantive issues are you not
16 rendering opinions about?

17 A. Oh, what constitutes fair use would be the
18 obvious one, but whether or not something is subject to
19 libel or things of that nature.

20 Q. So you're not offering any opinions about fair
21 use, right?

22 A. Correct.

23 Q. Are you offering any opinions about whether
24 any particular authors are legal or beneficial owners?

25 A. No.

1 A. Yes.

2 Q. I'd like for you to look at paragraph 20 on
3 page 5 of your declaration.

4 A. I've got it.

5 Q. And you write: Some publishing contracts
6 provide for royalty-free promotional uses. Then you
7 say: Under such contracts, the author has given up
8 legal ownership of the copyright, but does not have the
9 right to receive royalties for promotional uses.

10 A. Yes.

11 Q. What do you mean by legal ownership there?

12 A. Legal ownership.

13 Q. As opposed to what?

14 A. As opposed to just an interest.

15 Q. Well, are you making any judgments about that
16 official ownership?

17 A. Not at this point, no.

18 Q. So you're not suggesting that an author who
19 has given a publisher a royalty-free promotional right
20 has given up its beneficial interest in the copyright,
21 are you?

22 A. No.

23 Q. Now in paragraph 21, the first sentence says:
24 Some contracts expressly prohibit royalty-free
25 promotional use, comma, reserving all electronic

1 Q. No royalties shall be payable on copies
2 furnished gratis to the author or for review,
3 advertising sample, sales promotion or like purposes or
4 on copies destroyed by fire or other accident, but
5 nothing in this clause shall be construed as exempting
6 from royalty copies supplied by the publisher for resale
7 in payment for trade advertising.

8 Do you see that?

9 A. Yes.

10 Q. And you would agree that that is a promotional
11 use clause, correct?

12 MR. GRATZ: Objection, vague.

13 You can answer it.

14 THE WITNESS: Well, you can call it anything
15 you want to. You can call it macaroni, but, I
16 mean, you're trying to characterize, by a label, a
17 sentence which has clear meaning in the English
18 language, and in the custom of the trade, people
19 don't refer to clauses in contracts with labels
20 that way.

21 BY MS. ZACK:

22 Q. So is it correct that in your practice you
23 have never heard the phrase promotional use?

24 A. Of course, I've heard it.

25 Q. So it's not a phrase that you're unfamiliar

1 with?

2 A. Wait a minute. Did you say promotional use
3 clause?

4 Q. Yes.

5 A. No, I've heard the phrase promotional use, the
6 term promotional use clause.

7 Q. So you've heard the term promotional use.

8 MR. GRATZ: I'm not sure that the witness was
9 finished with his answer.

10 MS. ZACK: Oh, I'm sorry, I thought he was.

11 THE WITNESS: Now I am because I don't
12 remember where I was.

13 MS. ZACK: The reporter can read it back to
14 you.

15 (Thereupon, the portion referred to was read
16 by the reporter as above recorded.)

17 THE WITNESS: Okay.

18 BY MS. ZACK:

19 Q. And so in your trade usage, you've heard the
20 phrase promotional use?

21 A. Yes.

22 Q. And you've seen promotional use provisions in
23 contracts?

24 A. Of course.

25 Q. But you don't like clause? You don't like

1 that word, that phrase?

2 A. You're asking me if that is the customary
3 language.

4 Q. No, sir, I'm not asking you whether it's
5 customary or not; I'm just asking you whether, in this
6 particular contract, you would consider it a promotional
7 use provision.

8 A. Of course.

9 Q. And in trade custom and usage, what is the
10 promotional use?

11 A. How long is a piece of string? I can't answer
12 that question.

13 Q. Well, I mean, what are the reasons why
14 promotional use provisions are included in these
15 contracts?

16 A. So that the publisher can authorize
17 promotional use of excerpts to benefit the sale of a
18 book.

19 Q. Right. And also so the publisher can
20 distribute the book for reviews?

21 A. Oh, sure.

22 Q. What other types of uses or what other types
23 of promotional purposes are there?

24 A. That's almost impossible to answer. As many

25 ---

1 Q. You gave an example of excerpts, and that
2 would be excerpts for what? What type of excerpts would
3 you -- You started practicing in the '50s and '60s,
4 right?

5 MR. GRATZ: Objection. So the question is:
6 You started practicing in the '50s or '60s?

7 MS. ZACK: Yes.

8 THE WITNESS: Yes.

9 BY MS. ZACK:

10 Q. And at that time, there were no electronic
11 rights, right?

12 A. Wrong.

13 Q. Well, what electronic rights were there at
14 that time?

15 A. All kinds of mechanical recording rights and
16 transmission rights.

17 Q. So with respect to the mechanical recording
18 and transmission rights, were there promotional uses
19 with respect to those rights?

20 MR. GRATZ: Objection, vague as to time.

21 MS. ZACK: That's fine, I'm talking about back
22 in the '50s and '60s.

23 MR. GRATZ: That's still vague.

24 BY MS. ZACK:

25 Q. Did you, as a matter of custom and trade

1 practice, when you were a publisher, use microfiche or
2 microfilm for promotional uses?

3 A. No.

4 Q. What types of outlets did you typically use in
5 the '50s and '60s for promotional uses?

6 A. Trade advertising, newspaper advertising, The
7 Sunday Times Book Review, Publishers Weekly. Things of
8 that nature.

9 Q. And that would include excerpts, right?

10 A. Sure, it could.

11 Q. And sometimes you would give away the whole
12 book so it could be reviewed, right?

13 A. Right.

14 Q. And you used excerpts for advertising,
15 correct?

16 A. Correct.

17 Q. And so, I mean, this has been a longstanding
18 practice in the publishing industry, correct?

19 A. What has?

20 Q. To have provisions in contracts for
21 promotional uses.

22 A. Yes, historically, publishing contracts
23 provide for promotional uses of all or part.

24 Q. Right, and typically they're royalty-free
25 because neither the publisher nor the author is getting

1 any compensation, correct?

2 A. Correct.

3 Q. And that's what my point is. That's not
4 something new that just developed in the last ten years;
5 that's been going on for fifty years, right?

6 A. In a different context, yes.

7 Q. Now referring back to the contract that we
8 were looking at, which was, I believe, 60-G, correct?

9 A. Correct.

10 Q. Referring you back to the paragraph note that
11 we looked at a little bit before which says: No royalty
12 shall be payable on copies furnished gratis to the
13 author or for review, advertising sample, sales
14 promotion or like purposes.

15 A. What paragraph is that?

16 Q. It's on AG100060, and it's a paragraph that
17 looks like to me that it has got a (k) in it.

18 A. I've got it.

19 Q. But it says: No royalty, et cetera. Do you
20 see that?

21 A. Yes.

22 Q. That's a promotion clause, correct, or a
23 provision of this contract?

24 MR. GRATZ: Objection, vague. Asked and
25 answered.

1 MS. ZACK: Well, I really can't remember
2 whether it has been asked and answered. I thought
3 he said: I could call it macaroni. I'm just
4 trying to get a straight answer here.

5 BY MS. ZACK:

6 Q. You would agree with me, Mr. Perle, that this
7 is a promotion clause, correct?

8 MR. GRATZ: Objection, vague. Asked and
9 answered.

10 You can answer it if you understand the
11 question.

12 THE WITNESS: Well, you can call it whatever
13 you want to call it. It covers -- Repeat your
14 question.

15 BY MS. ZACK:

16 Q. What does it cover?

17 A. Repeat your question.

18 Q. My question was: Would you call it a
19 promotion? Do you think it covers promotional uses?

20 A. It covers promotional uses, yes.

21 Q. All right.

22 A. It covers promotional royalties on promotional
23 uses.

24 Q. And it says: There will be no royalties,
25 right?

1 A. Correct.

2 Q. As was standard --

3 MR. GRATZ: Objection.

4 BY MS. ZACK:

5 Q. -- in the publishing procedure, correct?

6 MR. GRATZ: Objection. Vague as to the time.

7 BY MS. ZACK:

8 Q. Well, did that ever change in your experience?

9 A. Did what ever change?

10 Q. Was there a time when it was typical to give
11 royalties for promotional uses, and then it changed?

12 A. No.

13 Q. So it has pretty much been the same for all
14 your fifty years of practice, right?

15 MR. GRATZ: Objection, vague in its use of
16 promotional uses.

17 You can answer it if you understand the
18 question.

19 THE WITNESS: Repeat the question.

20 BY MS. ZACK:

21 Q. My question was whether -- Well, never mind.
22 I'm going to withdraw it. It's not necessary at this
23 point.

24 Let's now look at 60-J.

25 A. I have it.

1 Q. Now with respect to all of these contracts, PX
2 60-A through the last one, which I guess is 60-Y, in
3 each of these contracts, there were royalty clauses,
4 correct?

5 A. Correct.

6 Q. Is that typical in your experience in the book
7 publishing industry?

8 A. For a book publishing contract to provide for
9 royalties? Yes.

10 Q. Have you personally ever registered a
11 copyright?

12 A. What do you mean by registered a copyright? I
13 have ---

14 Q. Not for yourself, but for Time, Inc.?

15 A. No, I had associates, lawyers and clerks to
16 take care of the clerical functions, and registration
17 was one of those.

18 Q. Did you have a practice as to whether or not
19 you attempted to register within ninety days of
20 publication when you were at Time, Inc.?

21 A. I gave orders that all books that were
22 published should have a registration filed within that
23 period of time.

24 Q. Which is ninety days of the first publication?

25 A. Yes.

1 Q. So you gave those orders to the persons
2 working for you?

3 A. Yes.

4 Q. And was that because you wanted to have the
5 right to recover statutory damages in the event of an
6 infringement?

7 MR. GRATZ: Objection, vague as to time.

8 BY MS. ZACK:

9 Q. When you gave those orders, was that the
10 reason for the orders because you wanted to have the
11 right to recover statutory damages for infringement?

12 MR. GRATZ: Same objection.

13 THE WITNESS: That was part of the reason, and
14 it's also the time provided in this statute.

15 BY MS. ZACK:

16 Q. Have you ever in your practice attempted to
17 determine whether a book was registered, whether the
18 copyright for a book was registered?

19 A. Yes.

20 Q. Have you been able to do that?

21 A. Yes.

22 Q. How do you do that?

23 A. I have somebody in my office that works for me
24 do it.

25 Q. Do you know what steps they take?

1 A. No.

2 Q. Were people in your office typically able to
3 determine that information for you?

4 A. They would, yes.

5 Q. And did you sometimes ask people working for
6 you to determine whether a copyright in a particular
7 book had been registered within ninety days?

8 A. Repeat that.

9 Q. Did you sometimes, in your work, ask those who
10 reported to you, to check to see, with respect to
11 certain books, whether their copyright had, in fact,
12 been registered within ninety days?

13 A. Probably, but I don't remember any specific
14 instances.

15 Q. You don't recall having any problems in making
16 determinations as to the registration status of books?

17 A. No.

18 Q. And you would agree that if an author has the
19 royalty right under a contract, even if the contract is
20 not reverted, the author is the beneficial owner,
21 correct?

22 MR. GRATZ: Objection. Calls for a legal
23 conclusion.

24 You can answer it.

25 THE WITNESS: No, I have no answer to that.

1 the copyright office or something like that?

2 A. No, no. It's just that there is no office
3 that I know of where such requests are collected and
4 archived. I don't know what the copyright office is
5 doing.

6 Q. And then 19 says: Some offices do not
7 maintain records of where the rights have reverted.

8 A. Correct.

9 Q. What is your basis for that?

10 A. Instances that I know of.

11 Q. Is it also true that some publishers do not
12 maintain records of where the rights have reverted?

13 A. I don't know the answer to that.

14 Q. All right. How many hours have you worked in
15 this matter, Mr. Perle?

16 A. I honestly don't know.

17 Q. Just approximately?

18 A. Twenty. That's a rough guess.

19 Q. I understand. Do you have any knowledge about
20 what purposes Google is using your declaration for?

21 A. Repeat that.

22 Q. Do you know why you have been asked to give
23 these opinions?

24 A. No.

25 Q. Have you read Google's brief?

1 A. Yes. Oh, no, no, not the brief.

2 Q. And you haven't read Google's brief in which
3 your declaration is cited?

4 A. No.

5 Q. So obviously, you can't say whether you agree
6 or disagree with the use that Google is making of your
7 opinion?

8 A. You are correct.

9 Q. We're almost done.

10 A. All right.

11 Q. Can we look at a couple more contracts? If
12 you would, please look at PX 60-V.

13 MR. GRATZ: Is that G as in golf?

14 MS. ZACK: No, I'm sorry, it's V as in Victor.

15 MR. GRATZ: V as in Victor? New American
16 Library?

17 MS. ZACK: No.

18 THE WITNESS: I've got it.

19 MS. ZACK: I think it's Chronicle Books.

20 MR. GRATZ: Oh, I'm sorry, the U and the V
21 look very similar.

22 MS. ZACK: Yes, they do look alike.

23 BY MS. ZACK:

24 Q. It's Chronicle Books, and it's AG100192 is the
25 first Bates number.

EXHIBIT 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et)
al.,)

Plaintiffs,)

vs.)

No. 05 Civ.
8136 (DC)

GOOGLE INC.,)

Defendant.)

-----)

March 22, 2012
12:50 p.m.

Deposition of HAL PORET, held at the
offices of Milberg, One Penn Plaza, New York,
New York, before Laurie A. Collins, a
Registered Professional Reporter and Notary
Public of the State of New York.

1 Poret

2 Q. Why? What was the purpose of looking
3 at it?

4 A. Just to generally learn about the case.

5 Q. And did you make use of any information
6 from that complaint in designing your survey?

7 A. Yes.

8 Q. What information?

9 A. Basically how the plaintiffs described
10 the issues and what the case was about.

11 Q. Then number 2 you say you reviewed the
12 following materials: Gale Contemporary Authors
13 data. Which particular Gale Contemporary Authors
14 data did you review?

15 A. The database that was the list of
16 authors that the survey was done from.

17 Q. That's in that?

18 MS. DURIE: I was going to say, Joanne,
19 you had asked to receive a copy of it, and I
20 have a copy of it (handing).

21 MS. ZACK: Okay. Thanks.

22 Q. Now, in your report you say that Gale
23 has, I don't know, 600 databases or something; is
24 that right?

25 A. Yes.

1 Poret

2 Q. How did you pick the one you used?

3 A. Gale maintains a number of different
4 databases that are different subject matter or
5 purposes, and this was their database which is a
6 reference work that consists of authors. So this
7 was -- since the purpose was to interview authors,
8 that was the relevant database.

9 Q. And did Gale have any other databases
10 with authors included?

11 A. I don't know if they have any others.
12 My understanding was this was the most
13 comprehensive attempt to keep track of published
14 authors that they have.

15 Q. Did you talk to somebody from Gale?

16 A. No.

17 Q. How did you choose this particular
18 database, or did someone else choose it?

19 A. The attorneys from Durie Tangri gave me
20 this database.

21 Q. So you did not choose the database;
22 that was done by Durie Tangri?

23 A. Well, I wouldn't say I didn't choose
24 it. When I was called about the case, we -- I
25 discussed with them the need to have a way to get

1 Poret

2 through to the right types of respondents and that
3 I would need some way -- some way to get through
4 to authors. And they told me that they had access
5 to this database. And so we discussed whether
6 that would be suitable for the survey, and I
7 decided that I felt that it would be. So I --

8 Q. Did you investigate whether there are
9 other databases with authors information
10 available?

11 A. Yes.

12 Q. And you found no other databases?

13 A. I didn't -- I didn't find -- I wouldn't
14 say that, but when I searched around I didn't find
15 any leads on anything that I thought would be more
16 suitable than this or any reason to think this
17 wouldn't be suitable.

18 Q. Well, what was the target population
19 for your survey?

20 A. In a broad sense it was authors -- it
21 was published authors, and in a more narrow sense
22 I understood the class to be limited to authors
23 who I believe have had a copyright registration
24 filed within three months of the book being
25 published, maybe.

1 Poret

2 So -- so that would have been the
3 narrower definition of the universe that I was
4 going for.

5 Q. So the universe you were attempting to
6 locate was published authors that had a copyright
7 registration filed within three months?

8 A. Well, I was attempting to get published
9 authors in general but find out whether they had
10 had a copyright registration filed within that
11 period so as to determine whether they met that
12 definition of the class, if that's what the
13 definition was going to be.

14 Q. And what did you do to attempt to find
15 those people who had copyrights registered within
16 three months?

17 A. Just ask questions as part of the
18 survey to determine, once we've reached somebody,
19 did they fall into that description of the class.

20 Q. Did Google provide you with any data
21 concerning books that were actually copied by them
22 in their library project?

23 A. No.

24 Q. Did you ask for that data?

25 A. No.

1 Poret

2 have them? You don't have it on a respondent-by-
3 respondent basis?

4 A. This is a respondent-by-respondent
5 basis.

6 Q. I'm just asking you if this is the only
7 format in which this information exists.

8 A. It exists in an Excel spreadsheet, and
9 this is the Excel spreadsheet printed out.

10 Q. And there's nothing else that you have
11 concerning the -- no other format in which the
12 data exists other than the Excel spreadsheet?

13 A. I can't think of what it would be.
14 This is literally every response of every
15 respondent.

16 Q. Okay. I'm just trying to ascertain if
17 there's anything else. You're telling me there
18 isn't.

19 A. No.

20 MS. ZACK: Let's mark as the next
21 exhibit, 76, Reference Manual on Scientific
22 Evidence, second edition, Federal Judicial
23 Center 2000.

24 (Plaintiffs' Exhibit 76, Reference
25 Manual on Scientific Evidence, marked for

1 Poret

2 identification.)

3 Q. Have you seen this before?

4 A. Yes.

5 Q. Do you use this in connection with your
6 surveys?

7 A. I'm familiar with it. I don't use it
8 in the sense that I consult it as I'm doing a
9 survey. But I'm familiar with the general
10 principles that are discussed within it.

11 Q. And do you try to follow the principles
12 discussed in it?

13 A. Yes.

14 Q. Are there any principles discussed in
15 it that you disagree with?

16 MS. DURIE: It's overbroad.

17 But you can answer.

18 Q. That you can tell me.

19 A. There are some things discussed in this
20 which are out of date. There are some things that
21 are discussed in this which I wouldn't put it
22 quite the same way as Dr. Diamond, so perhaps a
23 moderate disagreement.

24 She is also in the process of redoing
25 it right now, but for the most part these are

1 Poret

2 pretty accepted principles on a general basis.

3 Q. Well, are there any generally accepted
4 survey principles that you do consider to be
5 authoritative?

6 MS. DURIE: It's vague.

7 You can answer.

8 A. A lot of what's in here I consider to
9 be generally authoritative. It's just extremely
10 generally. And in designing a survey, general
11 statements of survey principles aren't all that
12 helpful. It's a matter of implementing them
13 specifically for the circumstances of any given
14 survey.

15 Q. Other than this particular document
16 that we've marked as PX 76, are there other
17 treatises or articles or books that you consider
18 authoritative with respect to designing surveys?

19 A. There are others that have some
20 guidance that I would look to at various times.

21 Q. What are they?

22 A. Well, for trademark matters, the
23 McCarthy on Trademark Treatise is certainly
24 considered authoritative or useful on certain
25 topics. On occasion I've read law review articles

1 Poret

2 or articles in other publications.

3 But there's nothing that I would single
4 out as an authoritative treatise.

5 Q. Can you name any others that you use
6 other than McCarthy on Trademark and PX 76?

7 A. I wouldn't say that I use. I've seen
8 other works at various times. There's some book
9 by Phyllis Welter that I've seen before.

10 Q. In connection with doing your surveys,
11 do you consult PX 76?

12 A. Only if there's some specific topic
13 that I have reason to think this is going to have
14 some specific guidance on. But in general I would
15 not go to consult it. It's something that is in
16 the background of my knowledge and understanding.
17 But it's not a handbook that I can go to to help
18 me in any specific survey, really.

19 Q. What about McCarthy on Trademark? When
20 you are doing trademark-related surveys, do you
21 consult McCarthy on Trademark?

22 A. Again, not unless I happen to think
23 there's something very specific in there that
24 would be useful.

25 Q. You just follow your own guidelines?

1 Poret

2 MS. DURIE: Objection, argumentative,
3 and it mischaracterizes the witness's
4 testimony.

5 Q. For surveys.

6 A. No. It's just that a lot of these
7 things that you would call authorities or general
8 guidelines are -- come from many different sources
9 over many years; and they become part of your
10 basic knowledge and experience, and you don't need
11 to consult them on a project-by-project basis as
12 if they are handbooks for how to do something
13 specific.

14 Q. What are the guidelines that you follow
15 in designing surveys?

16 A. I don't know that I can answer such a
17 general question. There are many different --

18 Q. There must be some big-picture
19 guidelines that you use when you design surveys;
20 right?

21 A. Yes.

22 Q. Can you tell me what they are?

23 A. I can tell you some of them.

24 Attempting to get through to a relevant universe
25 is certainly one. Attempting to write questions

1 Poret

2 that are clear and understandable and don't bias
3 the results, interpreting data properly and
4 reporting it properly.

5 Those are some of the big ones that
6 come to mind.

7 Q. Anything else?

8 A. There are countless other things that
9 would come to mind as principles if I was working
10 through the issues of a specific survey, but it's
11 hard to just name them all in the abstract.

12 Q. Do you know how many Google has copied
13 in its library project?

14 A. No.

15 Q. Do you have any idea at all?

16 A. No.

17 Q. Do you know whether it's 100,000 or 100
18 million or 10 million?

19 A. I don't know.

20 Q. Is that relevant?

21 A. To the -- not to --

22 Q. To the survey.

23 A. No.

24 Q. Do you know how many authors' books
25 have been copied by Google in the library project?

1 Poret

2 A. No.

3 Q. Do you have any ballpark as to whether
4 it's 100,000 authors, 2 million authors, 880
5 authors?

6 A. No. I assume it's far less than 2
7 million, because I don't think there are that many
8 published authors, but I don't -- I couldn't give
9 you a specific estimate.

10 Q. Did you ask Google if they knew?

11 A. No.

12 Q. You don't think that's relevant?

13 A. I don't see how that's relevant to what
14 the survey was trying to measure.

15 Q. And the survey was trying to measure
16 what?

17 A. It was trying to determine whether a
18 published author -- what their attitude was toward
19 the specific issue of having their books scanned
20 so that for the specific purpose of the snippets,
21 these short excerpts being findable and displayed
22 in search results, and that pertains both to
23 somebody whose books have been scanned and are
24 available on Google Books and authors who that has
25 not happened with.

1 Poret

2 but I just don't know if that is part of this
3 program you're describing as opposed to some other
4 program.

5 Q. And do you know whether those sales are
6 by permission of the author or publisher?

7 A. I don't know.

8 Q. Now, on the bottom of the page -- the
9 last paragraph on page 1, second sentence, you
10 say, The purpose of the survey was to determine
11 the extent to which members of the proposed class
12 object to Google's scanning of books and display
13 of short excerpts in Google Books search results
14 and the extent to which they believe they have
15 been negatively impacted by these actions.

16 Right?

17 A. Yes.

18 Q. So that was the purpose of the survey?

19 A. Yes.

20 Q. So the survey's purpose was not to
21 determine whether authors objected to Google's
22 scanning of books without permission?

23 A. It was. That was the purpose.

24 Q. It was the purpose to determine if
25 authors objected to Google scanning without

1 Poret

2 permission?

3 A. Yes.

4 Q. So why doesn't the survey disclose
5 anywhere within its terms that the scanning was
6 without permission?

7 A. It is intended to do that.

8 Q. Well, where does it do that?

9 A. It lays out two different things that
10 can happen in Google Books. It says that short --
11 that short excerpts -- that Google scans books and
12 provides short excerpts or, with permission,
13 fuller or longer portions are available. And that
14 is -- that is conveying that one form is with
15 permission and one is without.

16 Q. Let's look at what we've marked as
17 PX 64, which is Appendix B, which is the survey
18 itself; correct?

19 A. Yes.

20 Q. If you go to -- for some reason these
21 pages are not numbered at the bottom, but at the
22 top it says page 5 of 8. Do you see that?

23 A. Yes.

24 Q. Then there's a question or I guess this
25 is 220, which is when you explained to the

1 Poret

2 respondents about Google Books; right?

3 A. Yes.

4 Q. It says, As you may or may not know,
5 Google scans books so that their content can be
6 searched online and results displayed in Google
7 Books. We'd like to ask your opinion about one
8 particular aspect of Google Books.

9 For some books short excerpts of a
10 book, about one-eighth of a page each, are
11 viewable in Google Books search results. A user
12 who performs a search can see up to three short
13 excerpts of the book containing the relevant
14 search terms.

15 A user can also click on a link to find
16 the book in a bookstore or library. The scanning
17 of books and displaying of short excerpts and
18 search results is what we would like to ask you
19 about.

20 Where does it say that this scanning is
21 without permission?

22 A. Because the next thing it says is for
23 some other books the full book or longer portions
24 are available with special permission from the
25 publisher or author.

1 Poret

2 Q. Well, Mr. --

3 MS. DURIE: Wait, wait. Let him finish
4 his answer.

5 Q. Go ahead. Finish.

6 A. The flow of this is here's one thing
7 that happens and here's the others thing that
8 happens, and the second thing is saying this is
9 what happens when there is permission.

10 Q. Yeah, let's talk about that. So in the
11 first flow, which is 220, you say for some books
12 short excerpts of the book, about one-eighth of
13 the page, are viewable in Google Books search
14 results.

15 Nowhere do you use the term -- the
16 phrase "without permission"; correct?

17 A. Not in those words that you just read.

18 Q. Well, those are two pretty simple
19 words, "without permission"; right?

20 MS. DURIE: Objection, argumentative.

21 Q. What would have been so hard to say, As
22 you may or may not know, Google scans books
23 without permission so that their content can be
24 searched online and displayed in Google Books?

25 MS. DURIE: Objection, argumentative.

1 Poret

2 A. I never said anything would be hard
3 about saying that. I'm just saying I wrote it in
4 a way that conveys clearly that one version is
5 without permission and one is. And I think it's
6 perfectly clear.

7 Q. So you don't think it would have been a
8 little bit more clear if you had added the words
9 "without permission" after "Google scans books"?
10 You don't think that would have been slightly more
11 clear?

12 A. No, I don't think it would have been
13 more clear. I think it's as clear as it can be.

14 Q. Oh, you think it's as clear as it can
15 be?

16 A. Yes, and partly --

17 MS. DURIE: Wait, wait. If you asked a
18 question, please let the witness answer it.

19 MS. ZACK: The question calls for a
20 "yes" or "no" answer.

21 MS. DURIE: He does not have to answer
22 the question "yes" or "no," and you shouldn't
23 interrupt his answers.

24 A. The only thing I'm adding that goes
25 into this, you have to realize the question do you

1 Poret

2 approve of or object to Google doing something in
3 and of itself makes no sense as a question if it's
4 suggesting that it's done with your permission.

5 It makes no sense to somebody to say do you object
6 to something that you have given permission for.

7 It's an illogical question.

8 So even -- it makes no sense to
9 interpret it that way even if there was no
10 explanation at all. So the explanation that is
11 given here I think is clear without being leading
12 in one direction or the other.

13 Q. Did you have any discussions with
14 anyone about whether you should include the words
15 "without permission" after "Google scans books"?

16 A. Not that I recall.

17 Q. So you just unilaterally decided that
18 those words were unnecessary?

19 MS. DURIE: Objection, argumentative.

20 A. I decided that they were -- I have the
21 words "with permission" here --

22 Q. What --

23 MS. DURIE: Wait, wait. Let him finish
24 answering.

25 Go ahead.

1 Poret

2 A. The answer is I put -- I put "with
3 permission" in as I thought would be the best way
4 to be clear and yet not overly leading.

5 Q. Oh, so you think if you added the term
6 "without permission" that would be leading?

7 A. I didn't say --

8 Q. I'm trying to understand what you're
9 saying. Are you saying that if the words "without
10 permission" were added it would become leading?

11 A. Not necessarily, but it could be.

12 Q. All right. Let's get to the next
13 sentence, which you say makes it all fine. You
14 say, For some other books the full book or longer
15 portions of the book are viewable in response to
16 search Google Books with special permission from
17 the publisher or author. Our questions are not
18 about the display of full books or longer
19 portions.

20 Why did you use the word "special"?

21 A. Well, just to highlight that we're
22 talking about an instance where Google has
23 affirmatively gone to the author or the publisher
24 and gotten permission.

25 Q. What was special about it?

1 Poret

2 A. Well, in other words, that it's a
3 specific effort to have gotten permission for that
4 specific book.

5 Q. Why didn't you just say "with
6 permission"?

7 A. I think that would have been fine too.

8 Q. Yeah, well, don't you think the
9 juxtaposition of these two paragraphs actually,
10 contrary to your view, conveys the impression that
11 the original scanning is with permission and that
12 the secondary, for other books, is with special
13 permission?

14 A. No.

15 Q. You don't think so?

16 A. No. I think that's completely
17 illogical.

18 Q. You don't think that that is a
19 reading -- a possible reading for somebody who's
20 over 80-years-old?

21 A. I don't. I don't think that hearing
22 that and then hearing a question as it was worded,
23 I don't think it's possible that somebody
24 interpreted a question to be asking do you approve
25 of something or do you object to something that

1 Poret

2 receiving statutory damages for Google's scanning
3 of books without permission of the author or
4 publisher?

5 A. No.

6 Q. Is there a particular reason you didn't
7 ask that question?

8 A. It never would have occurred to me to
9 ask something like that.

10 Q. Because you didn't want to know the
11 answer; right?

12 MS. DURIE: Objection, argumentative.

13 A. No.

14 Q. Well, if you want to know about whether
15 people want to participate in a lawsuit, don't you
16 have to talk to them about the remedies that they
17 might get if they won?

18 A. I don't know. That's not quite how I
19 conceive of the survey.

20 Q. Okay. So this survey is not intended
21 to determine whether or not authors want to
22 participate in this lawsuit, is it?

23 A. I don't know that I'd put it exactly
24 that way. I'd say it's more whether -- one of the
25 purposes would be whether the lawsuit is

1 Poret

2 consistent with the interests or desires of a
3 significant portion of authors who might be in the
4 class. I don't know whether you'd call that
5 whether they want to participate or not.

6 Q. But you would agree that the way the
7 questions are worded here does not really -- is
8 not a fair determination of whether any of these
9 authors want to participate in this lawsuit;
10 right?

11 A. I do -- I do think it's fair. I think
12 the fair way to find out is asking their opinion
13 on the substantive topic, not saying to them, hey,
14 If we pay you enough money, would you, you know,
15 change your mind about this. That's what a survey
16 is not supposed to do.

17 Q. Oh, so you think it's fair to leave out
18 the fact that Google's scanning books without
19 permission and that they have a right to damages
20 for that --

21 MS. DURIE: Object.

22 Q. -- and that that somehow would give you
23 some insight into whether they would want to
24 participate in a lawsuit?

25 MS. DURIE: Objection, argumentative,

1 Poret

2 lacks foundation, mischaracterizes the
3 witness's testimony.

4 A. That's not what the survey did.

5 Q. In the survey from point 220 and the
6 next couple of pages, the phrase "short excerpts"
7 is repeated about eight times. Was that
8 intentional on your part?

9 A. I don't know that eight was
10 intentional, but it was intentional to try to make
11 sure that they understand the distinction between
12 the two categories that we're talking about and
13 that they're answering about the right one.

14 Q. Do you think that someone who has never
15 been on Google would understand from this prose
16 what this all means?

17 A. I don't know how to answer that across
18 the board, but I know that I looked at the results
19 of the survey and they were consistent among
20 people who said they were very familiar with
21 Google Books versus those who aren't. So I don't
22 think that was a factor in the results.

23 Q. How many people did you attempt to
24 reach in the survey? How many phone calls were
25 made?

1 Poret

2 A. I don't know, but the whole intent of
3 that previous description that we gave people was
4 that we're not talking about an extended section
5 of a book, that we're talking about the several-
6 sentence, eighth-of-a-page snippets surrounding a
7 search term.

8 So the intent is by this point, having
9 heard our description a couple of times, we have
10 defined for them what the short excerpt means and
11 that they should now understand that.

12 Q. Do you know if anybody asked them -- is
13 there some reason why you didn't say something
14 specific like Google has a program called the
15 partner program. Books are available by
16 permission for preview of up to 10 percent or 20
17 percent of the book. These are not the type of
18 short excerpts that we're talking about in this
19 survey.

20 A. That is what I feel we did in the
21 previous section, just not the way you stated it.

22 Q. Not as clear?

23 A. No, not -- no, I don't agree with that.

24 Q. It says, followed by we'd like to know
25 the extent to which you approve of or object to

1 Poret

2 Google scanning your copyrighted books so that
3 they can be searched online and short excerpts
4 delayed in search results.

5 What's the use -- why are you asking
6 them about the "so that"?

7 A. Because that is what the -- that's what
8 the survey is about. It's Google making short
9 excerpts of their books available in search
10 results.

11 Q. You don't think this conveys an
12 impression that that's the reason why Google scans
13 the books?

14 A. Well, that -- yes, I do think it partly
15 conveys that that's the reason. That's what we're
16 asking about. Assuming somebody is not giving
17 permission, the question is do they approve of
18 Google doing this so that they're -- so that these
19 results can be displayed like this, that that
20 is -- that is a purpose of what Google's doing,
21 and it's the purpose that's relevant to the
22 survey.

23 Q. So am I to glean from your last answer
24 that you were trying to determine whether or not
25 people, respondents, objected or not to Google

1 Poret

2 scanning without permission?

3 A. Yes, for the specific purpose of
4 showing these excerpts, short excerpts.

5 Q. Right. So you want to know whether or
6 not the respondents object, but you don't include
7 the words "without permission" --

8 A. Yes.

9 Q. -- here, just like you didn't include
10 it in the description?

11 A. We've already talked about how I feel
12 it was included in the description. But yes, I
13 agree it's not repeated in this question.

14 Q. Now, there's no choice here of no
15 opinion or not enough information. Is there some
16 reason why those are not choices?

17 A. Well, neither approve nor object is --

18 Q. That could mean they're neutral. That
19 doesn't necessarily mean they have no opinion,
20 does it?

21 A. Well, if someone has no opinion, then
22 they neither approve nor object.

23 Q. So you believe that the phrase "neither
24 approve nor object" is exactly the same as an
25 option of no opinion?

1 Poret

2 A. I believe it encompasses it.

3 Q. You do?

4 A. Yes.

5 Q. And what about the option of I don't
6 have enough information to answer, or need more
7 information?

8 A. If some -- well, that -- I never -- I
9 never heard that anybody gave an answer like that.
10 And if that was -- that's the type of thing that
11 if people were giving a response like that, I
12 would have been told and asked about that. So I
13 don't think that was an issue.

14 Q. That wasn't an option given to them;
15 correct?

16 A. That wasn't an option on the scale, but
17 people can obviously say what they want on the
18 phone, at least. And when people say things like
19 that in the initial phase of a survey, that comes
20 back to me when we talk about it. And we
21 sometimes make little tweaks.

22 But I never heard anything about
23 anybody giving a response like that.

24 Q. And you didn't think that it was
25 appropriate to have that as one of the options?

1 Poret

2 A. I'm not saying it's inappropriate; I'm
3 saying the way I did it I think is appropriate.

4 Q. Now, you've mentioned this survey was
5 limited to the snippets. You're aware that Google
6 scanned entire books and gave copies of the entire
7 scans to libraries; right?

8 A. Yes.

9 Q. Were you specifically instructed not to
10 ask any questions about that?

11 A. No.

12 Q. You just didn't?

13 A. Nobody said to me don't ask questions
14 about that, but that was not a subject that was
15 brought up as a purpose of the research.

16 Q. On the top of page 9 it says, The order
17 in which "object" came before "approved" was
18 randomized in both the question text and in the
19 order of the response option, so that half of
20 respondents were always presented with "approved"
21 first and half presented with "object" first.

22 That's done by the computer. Even
23 though you have a lot of nonrespondents, you can
24 make sure that half and half of the actual
25 respondents had this different order?

1 Poret

2 A. Yes.

3 Q. How do you do that?

4 A. Well, there's two ways it can be done
5 technologically. It can either be that every time
6 you get to this question it literally picks a
7 random number that determines this, or it can be
8 that every other respondent gets a different -- a
9 different order. I'm pretty sure it was the
10 former option, technologically that it simply
11 randomized.

12 Q. It randomized only for those actually
13 responding?

14 A. Yes, because it's literally happening
15 as you're getting to that point of the
16 questionnaire.

17 Q. I see.

18 Now, going back to -- on page 9 there's
19 this question: Which of the following best
20 represents your opinion how, if at all, you have
21 been financially impacted by Google scanning your
22 copyrighted books so that they can be searched
23 online and short excerpts displayed in search
24 results?

25 And there's three choices: I feel I

1 Poret

2 have financially benefited, I feel I have been
3 financially harmed, I feel I have not been
4 financially impacted one way or the other.

5 Again, why is there no choice of I
6 don't have current information to answer this
7 question?

8 A. It's the same answer before.

9 Q. Well, meaning what?

10 A. The person either has a perception that
11 they've been harmed or that they've benefited or
12 they don't. They don't -- they don't need
13 information to answer that question.

14 Q. So this is only designed to elicit
15 perceptions, not actual facts; right?

16 A. Well, I don't think the line between
17 perception and fact is that is all that clear.
18 It's certainly intended to get at facts, but of
19 course you necessarily are dealing with somebody's
20 perception of what the facts are.

21 Q. You could have designed a survey to
22 say, I have been financially benefited; and then
23 the next question would be why; and then they
24 would give a verbal response; right?

25 A. Well, that is -- that is how it -- that

1 Poret

2 is what happens in this survey.

3 Q. The question was I feel I have been.
4 You didn't ask whether they had been; you asked
5 whether I feel I have financially benefited. It's
6 a different question than I have financially
7 benefited; correct?

8 A. It's different wording. But what I was
9 saying is that the other piece of what you said
10 does happen, which is if they give one of these
11 answers they are asked about that.

12 Q. Right. But is there a particular
13 reason why you included the "feel" part of the
14 question?

15 A. Yes, because I don't expect that
16 somebody on the phone is going to -- is going to
17 know for sure how this has affected them. In
18 other words, I don't know that an author always
19 would have the ability to quantify somehow whether
20 this has financially benefited them or not.

21 So it is phrasing it in a way that is
22 intended to convey we want to know your opinion
23 about this. You don't have to necessarily have
24 plotted this out with an accountant and figured it
25 out.

1 Poret

2 But that doesn't mean we're not
3 interested in fact. We're interested in their
4 perception of what the facts are.

5 Q. Let's go back to page 7, going back to
6 this description that you read to all the
7 respondents or that they read themselves online if
8 they responded to the e-mail version. There's a
9 sentence that says, A user can also click on a
10 link to find a book in a bookstore or library.

11 Is there a particular reason you put
12 that in there, that text?

13 A. Yes.

14 Q. What was the reason?

15 A. That that is an accurate description of
16 what happens that I think would be relevant to
17 some people's opinions.

18 Q. Have you ever clicked on any of those
19 links?

20 A. I did, in some of my searches, see that
21 there were in fact links to buy books. I can't
22 remember if I clicked on any of those links.

23 Q. Well, if you click on a link for some
24 of the books and -- you didn't click on any of
25 them, so you don't know what happens when you

1 Poret

2 click?

3 A. I don't remember if I clicked on links
4 for buying books.

5 Q. Did you get any information from Google
6 about whether or not they know whether or not
7 those clicks result in any sales of books?

8 A. I do not have any information about
9 that.

10 Q. One way or the other?

11 A. Right.

12 Q. Did you ask them that question?

13 A. No.

14 Q. So in all of these questions you're
15 always asking about feelings, which for the reason
16 you've already testified? Is that the reason?

17 A. Again, that's -- I wouldn't quite put
18 it that we're asking about feelings. I'd put it
19 that we're asking about attitudes in one instance
20 and perceptions of impact on them in the other.

21 Q. Every question has the word "feel";
22 right?

23 A. Not every question. The questions that
24 we are talking about.

25 Q. These questions about financial impact

1 Poret

2 and demand, et cetera, they all ask about "feel,"
3 feelings; correct?

4 A. No. They have the word "feel" in it.

5 Q. You don't think that means it's a
6 question about how you feel?

7 A. I think the word "feel" is intended to
8 convey we're not asking for quantitative backup of
9 this; we're asking for your opinion.

10 Q. For a seat-of-the-pants answer when
11 they get called up by somebody randomly at, you
12 know, 8 o'clock at night?

13 MS. DURIE: Objection.

14 Q. Is that what it's intended to get?

15 A. No, it's just like saying I think -- I
16 think I've benefited or I feel I've benefited or
17 it's conveying that we're asking for an opinion,
18 not something quantitative.

19 Q. Okay. So now go to page 12. We have
20 these questions about do they feel they were
21 financially impacted, do they feel they were
22 financially benefited, et cetera, do they feel
23 demand has improved or not; right? That's the way
24 they're all phrased; right?

25 A. You just said a bunch of things. I

1 Poret

2 typical response rates for a population like this.

3 Q. "Like this" meaning what?

4 A. Meaning not just an ordinary consumer
5 but -- I don't know if you would say more
6 sophisticated or professional, but a typically
7 higher educated, more sophisticated -- the other
8 thing is that 3 percent number that you came up
9 with is just an arbitrary number because, until we
10 find out, it might be that a thousand of the
11 e-mail addresses were just invalid addresses.

12 It's not as if that means that
13 everybody who didn't respond looked at this and
14 chose not to responsible. It could be that most
15 of them never even saw it.

16 Q. Right. But let's just back up and talk
17 about your sample to begin with was just this Gale
18 database; right?

19 A. Yes.

20 Q. And that's not -- that was just
21 given -- you were told to use that by Google;
22 right?

23 MS. DURIE: Objection, asked and
24 answered, mischaracterizes.

25 Q. By Google's counsel?

1 Poret

2 MS. DURIE: Mischaracterizes the
3 witness's testimony.

4 Q. That's what happened; right?

5 A. No, I wouldn't put it that way.

6 Q. They provided it to you?

7 A. Yes.

8 Q. Did you make any determination about
9 whether that was an over-inclusive or under-
10 inclusive list with respect to your target
11 population?

12 A. Yes, I thought about that. My sense is
13 it might have been over inclusive in that it might
14 contain authors who don't end up meeting a class
15 definition. But that is not a problem because we
16 can just find out from them if they meet the class
17 definition. And then if they don't, those people
18 could always be put aside in the analysis.

19 And could it be under inclusive? By
20 some degree it could be. You can never have a
21 list that actually has managed to get everybody in
22 an industry. So I'm sure that there are some
23 authors that Gale didn't manage to get on the list
24 for one reason or another.

25 But my understanding is it's a fairly

1 Poret

2 comprehensive list. If it was missing some
3 authors, it wouldn't be enough to undermine its
4 validity for use in a study like this.

5 Q. So you said it might be over inclusive
6 because it includes authors that aren't in the
7 class; right?

8 A. Yes.

9 Q. And then you said but you could adjust
10 for that by determining who was in the class and
11 figuring out, as to those, what their responses
12 were; right?

13 A. What I meant was if you wanted to you
14 could just take anybody who, based on their
15 answers, does not appear to be in the class and
16 put them aside and just look at the data of the
17 people who are in the class.

18 Q. And how could you determine by your
19 survey who was and who wasn't in the class?

20 A. One thing you could do is determine
21 which people said yes to -- yes, that there was a
22 copyright registration filed within three months
23 versus the people who said no. So those are some
24 people -- that would identify some people who were
25 not members of the class.

1 Poret

2 information about these 550 that you just
3 mentioned who said their copyright was filed;
4 right?

5 A. The reason is that I looked at it and
6 the results are so similar to the overall group
7 that it didn't seem -- it didn't strike me as
8 putting in a section about that.

9 Q. You've put in other tables where you
10 said the results were consistent?

11 A. Right.

12 Q. Referring you to page 19 of your
13 report. I'm sorry, I lost my train of thought.
14 Before you do that, you said the report -- I mean
15 your sample could have been under inclusive;
16 right? We talked about over inclusive. You said
17 it also could have been under inclusive.

18 I mean, it was by definition under
19 inclusive, wasn't it? This Gale list could not
20 possibly be a list of all the authors whose books
21 have been copied in Google Books, could it?

22 A. I don't know. Every single list that
23 any survey has ever been done from could be called
24 under inclusive, depending on how you look at it.
25 The question is Gale maintains a reference work

1 Poret

2 that is designed to have as many authors on it as
3 they -- as they can manage to keep track of.

4 I'm saying I'm sure it couldn't
5 possibly be a hundred percent of authors at all
6 times, but as a reputable company that maintains
7 databases like that I think if it's under
8 inclusive it's not by a concerning amount.

9 Q. Nobody is faulting Gale for their
10 database. What I'm asking you about is as the
11 creator of a survey you -- one of the issues that
12 you have to consider is whether the sample was
13 under inclusive or not; right?

14 A. Yes.

15 Q. Because a sample is not necessarily a
16 fair sample if it's grossly under inclusive;
17 right?

18 A. That may or may not be true.

19 Q. It may or may not be true.

20 So you could have a sample that was --
21 did you do any kind of testing of this sample to
22 determine that it is representative of all authors
23 in the United States, of the Gale data?

24 A. The only people who were called were
25 from this database, so I have no way to compare

1 Poret

2 that to anybody who isn't in the database. But my
3 understanding is that this database is a reliable
4 source, that if it's under inclusive it's not --
5 it's not by much. It's not going to be missing
6 enough of a universe to undermine the results.

7 Q. Where did you get that information,
8 that it was -- that it's not grossly under
9 inclusive?

10 A. Well, in look -- in digging around,
11 that seemed to be the best -- the best available
12 source, and the number of authors it has on it is
13 really large.

14 And based on everything that we
15 discussed at the time, I don't have any reason to
16 believe that there's 2 million authors in the U.S.
17 with published books, and yet this only has
18 142,000. I don't know what the numbers are
19 exactly. But I think this is -- it's a sizeable
20 list.

21 Q. Well, it may be that there is no list
22 that has every author on it. But to say that it's
23 the best list you could find does not mean that it
24 isn't grossly under inclusive, does it?

25 A. No, that in and of itself doesn't mean

1 Poret

2 that. But that it has something approaching
3 150,000 authors seems pretty robust.

4 Q. 142,000 authors, you said, but you only
5 had contact information for about a third; right?

6 A. That may be about right, but we looked
7 for contact information for others.

8 Q. And you can't tell me, then, what the
9 total number you found contact information was;
10 right?

11 A. No, I can. The report discusses that
12 we had a sub sample to deal with this very issue
13 of people who were on the list but had no contact
14 information. And we found contact information for
15 a lot of other people on the list so that we could
16 get through to a sample of people who had no
17 contact information and confirm that the results
18 among them were basically consistent with the
19 results among everybody else.

20 Q. Yeah, you have 119 people that you said
21 you had no contact information for from Gale that
22 you somehow got contact information for, and they
23 responded to the survey; correct?

24 A. Yes.

25 Q. But you don't tell me how -- you don't

1 Poret

2 say how many others without contact information
3 you got contact information for and they didn't
4 respond?

5 A. Well, this is the issue we've already
6 talked about. It has nothing to do with whether
7 they had contact information or not.

8 Q. Right. So one of the issues is of the
9 142,000, which is already grossly under inclusive,
10 how many did you ultimately get contact
11 information for. And we don't know the answer to
12 that question as we sit here; right?

13 A. Right.

14 Q. So it could have been -- do you have
15 any idea of what possible number it was?

16 MS. DURIE: Calls for speculation.

17 A. I said I'd find out for you.

18 Q. So then from an already grossly under-
19 inclusive starting point of 142,000, we're down to
20 a yet more grossly under inclusive of probably
21 less than 50,000 people that were contacted;
22 right?

23 MS. DURIE: Objection. It's
24 argumentative, it lacks foundation, and it
25 mischaracterizes the witness's testimony.

1 Poret

2 A. First of all, I never agreed that
3 142,000 is grossly under inclusive. And what
4 you're talking about now I also don't think is so
5 much an issue of under inclusiveness.

6 Q. When you did your analysis of the data,
7 did you notice that there weren't too many young
8 authors?

9 A. Yes.

10 Q. You don't think that affects the
11 results?

12 A. Well, I did -- I did look at the
13 results by age, and my assessment of that is that
14 the results were very similar across all the age
15 groups, at least through the forties, fifties,
16 sixties, seventies. Below that I don't feel like
17 I had enough respondents to really look at those
18 individually.

19 But my sense is that from looking at
20 the data across ages that the results were fairly
21 consistent and that even if you wanted to
22 re-weight the numbers to reflect a different age
23 distribution that the numbers weren't going to
24 change by more than a percentage point or two here
25 and there.

1 Poret

2 Q. I'm trying to find the results by
3 age -- oh, here it is, page 19. You say -- you
4 have your chart at the top, and then you say,
5 While the set of authors surveyed more heavily
6 represents older authors, the survey results were
7 reasonably consistent among authors of various
8 ages.

9 What do you mean by "reasonably
10 consistent"?

11 A. Within a couple of percentage points,
12 nothing that would result in a different
13 conclusion.

14 Q. So then you have your chart which has
15 authors divided up by under 60, 112; 60 to 69,
16 166; 70 and older, 537.

17 So that doesn't seem to be -- what
18 happened to the 50 to 59, 40 to 49, 30 to 39
19 categories? You didn't think you should set those
20 out?

21 A. Obviously we're getting to a smaller
22 sample size at that point, so I figured grouping
23 those together into under 60 made sense. But you
24 could break it out into 50 to 59, and you could
25 look at 40 to 49; and I did. And the results

1 Poret

2 among those groups are similar.

3 Q. So do you know how many respondents
4 were age 20 to 29?

5 A. None.

6 Q. How many 30 to 39?

7 A. Yeah, I think there were four.

8 Q. Right. And how many 40 to 49?

9 A. I think it was something between 25 and
10 30.

11 Q. Yeah, 25, does that sound right?

12 A. I said 25 to 30 so...

13 Q. And 50 to 59, do you know how many?

14 A. I'd say, you know, 80 to 90.

15 Q. I counted 80, but that could be off.

16 You didn't really have a heck of a lot
17 of younger respondents?

18 A. I agree with that.

19 Q. And yet people in their twenties,
20 thirties, forties, do write books; right?

21 A. Yes.

22 Q. In fact, they're the ones that are
23 probably writing books that are in print; right?

24 A. Well, that -- that did occur to me, and
25 that does seem to make sense. And that's part of

1 Poret

2 the reason that I looked at the results between
3 people who have books in print and people whose
4 books are not in print and saw that whether books
5 are in print or not really wasn't making much of a
6 difference in the results. So I don't think that
7 that would be a basis for young people to have
8 different responses.

9 The other thing that was at work in my
10 consideration as this was going on was that my
11 understanding is the class representatives were in
12 their seventies or older, and they're purporting
13 to represent the interests of a class.

14 So it doesn't seem inappropriate that
15 the survey respondents tended to be toward the age
16 range of the class representatives. And if
17 somebody thinks that 20-year-olds -- people in
18 their twenties and thirties are just categorically
19 different interests than people in their sixties
20 and seventies, then that's --

21 Q. I'm not asking what people think; I'm
22 asking whether you think the survey was under
23 inclusive or not.

24 A. That's what I'm telling you, though.
25 The only reason somebody would worry about a

1 Poret

2 survey being under inclusive is if you were
3 thinking, all right, we're missing a group of
4 people that might be categorically different.
5 They might have different issues. They might have
6 different interests.

7 And if you believe that, you know, by
8 definition this class -- those people couldn't be
9 part of this class anyway. So that's why it does
10 not seem to me to be an issue of under
11 inclusiveness.

12 Q. So your role here is as the designer of
13 a survey; right?

14 A. Yes.

15 Q. You seem to be sort of crossing over
16 into opining about what's appropriate in a class
17 action setting.

18 A. No, I'm just -- I'm just saying that by
19 definition when you raise an issue of should we,
20 in a survey, be overly concerned that we're
21 missing a group of people, the only reason you
22 would be concerned is if you're thinking that
23 group of people might be essentially a different
24 class of people than the ones we reached, who have
25 different answers and different interests.

1 Poret

2 And that does not strike me as
3 problematic in and of itself when the whole basis
4 of -- or a big part of the basis of what we're
5 testing is do the people -- do authors have
6 interests that are consistent across this class
7 with the class leaders.

8 Q. You had 32 respondents who were over
9 90; right? You're aware of that?

10 A. I'm actually not sure at the top, but
11 I'll take your word for it.

12 Q. Well, approximately 32. You don't
13 think they might be a little less familiar with
14 the Internet than people in their twenties,
15 thirties, and forties?

16 A. No, they very well might be.

17 Q. Is that of any relevance?

18 A. First of all, 32 people are not going
19 to affect the results one way or the other, but
20 across the survey and across the different ages
21 the survey should be accounting for different
22 levels of familiarity that different people have.

23 Q. That assumes that it was properly
24 constructed in the first place; right?

25 A. I don't know.

1 Poret

2 Q. The survey can only be extrapolated if
3 it was properly designed; right? It's not ipso
4 facto that just because you do a survey you can
5 say that the results can be extrapolated from one
6 population to another; right?

7 A. It's hard to tell what you're asking.
8 I basically agree with the idea that a survey
9 should be properly designed for -- to make use of
10 the results.

11 Q. An do you know what use of the results
12 Google is making of your survey?

13 A. Not -- I know that this report has been
14 submitted. I don't know how to characterize what
15 attorneys or Google are doing with it.

16 Q. Well, all the percentages in your
17 report are based on all the authors sampled,
18 whether or not they're books were actually scanned
19 and Googled in Google's library project; right?

20 A. I think there are tables in the report
21 that break down people who -- that talk about
22 people who said that their books are available on
23 Google Books in short excerpts and those who
24 didn't or weren't sure. That issue is to some
25 extent addressed.

1 Poret

2 Q. But you never got a list from Google of
3 the books that they actually scanned so that you
4 could be sure that those particular books were the
5 ones that were the subject of your survey?

6 A. I didn't get any kind of list from
7 Google.

8 Q. On page 16 of your report, Footnote
9 5 --

10 A. Okay.

11 Q. -- it says, Out of the total 880
12 respondents, 1 indicated that they or someone in
13 their household works for Google, 16 indicated
14 they or someone in their household works for the
15 U.S. government, and 5 indicated that they or
16 someone in their household works for either a
17 local, state, or federal court. Removing these
18 respondents would not change the survey findings.

19 Right, you say that?

20 A. Yes.

21 Q. I can do simple math, and I added these
22 up. You're talking about 22 respondents; right?

23 A. Yes.

24 Q. 22 out of 880 you're saying is not
25 statistically significant? Is that what you're

1 Poret

2 which is the point of a pilot or pretest.

3 But I did not see anything that seemed
4 problematic that was going to require any changes,
5 so I sort of just rolled on. But I would consider
6 the first phase of it essentially a pilot.

7 Q. So when you say "the first phase," the
8 first how many surveys?

9 A. I don't -- I don't remember. I think
10 that we could tell that from -- I know that they
11 e-mailed me a data file, so -- which I'm sure from
12 that I could tell what sample size I first was
13 looking at.

14 Q. So you looked at the first whatever
15 number of it was surveys, and you didn't make any
16 changes; right?

17 A. Right.

18 Q. Are there any such things as generally
19 accepted survey principles?

20 A. Yes.

21 Q. Where can one find them?

22 A. I don't think one can find them in any
23 one place written down. I think, like a lot of
24 fields, there's -- general principles come from a
25 lot of different sources and from a lot of

1 Poret

2 experience.

3 Q. So there's nowhere written down
4 anywhere a list of generally accepted survey
5 principles?

6 A. There are plenty of places that have
7 things, like the reference guide, that have some
8 general principles. But there's no single place
9 that I would point to. And I wouldn't even say
10 that these general -- I wouldn't say that any
11 particular source is the authoritative guide on
12 anything.

13 Q. But yet there are generally accepted
14 survey principles?

15 A. Yes, I think that's fair to say.

16 Q. And have you ever criticized someone
17 else's survey?

18 A. Yes.

19 Q. And when you criticize someone else's
20 survey, it's because you believe they haven't
21 followed certain survey principles, sometimes?

22 A. I don't know that I think about it in
23 the abstract like that. I look at their survey
24 and review it. And if I think there are serious
25 flaws in it, I would point them out.

1 Poret

2 Q. What type of flaws have you found in
3 other people's surveys?

4 A. That there were flaws in the universe,
5 that the questions were poorly done for one reason
6 or the other, that data was analyzed incorrectly.
7 Those are the examples that come to mind.

8 Q. So "flaws in the universe," you mean
9 flaws in the universe that was sampled? What do
10 you mean by "flaws in the universe"?

11 A. That the people who were interviewed
12 were not really the right people.

13 Q. You ever criticized a survey for being
14 over or under inclusive?

15 A. I've certainly criticized a survey for
16 being over inclusive. I'm not sure I have for
17 being under inclusive.

18 Q. Is that because you think over
19 inclusiveness is more problematic?

20 A. Not necessarily, but in those -- in the
21 instances where I've done that, there's been the
22 possibility that the majority of the people in the
23 survey didn't actually belong in the survey; and
24 those people who didn't belong, that there's
25 reason to think that they were not even

1 Poret

2 appropriate test subjects and their answers could
3 be -- could make no sense for that survey.

4 Q. When you've criticized a survey for
5 having questions that were poorly done, in what
6 ways from a survey's -- surveyor's perspective
7 would a question be poorly done?

8 A. It's almost impossible to answer
9 questions like this in the abstract. Questions
10 could be worded in a way that they're misleading
11 or that they're not understood. They could be
12 leading and suggestive. They could be irrelevant.

13 Q. Anything else?

14 A. I think that covers it.

15 Q. In cases where you found other
16 surveyors to have data -- analyzed data
17 incorrectly, what type of mistakes do people make?

18 A. Typically that answers are being
19 classified to mean one thing when they don't
20 really mean that.

21 Q. Anything else?

22 A. That's all I can think of.

23 Q. Are there any such thing as generally
24 accepted statistical methods for surveyors?

25 A. Yes.

1 Poret

2 Q. Can you find them somewhere in writing?

3 A. You could find textbooks and you could
4 find articles, but there's no source that I would
5 point you to.

6 Q. Well, when you criticize -- have you
7 ever criticized another surveyor because of their
8 statistical methods?

9 A. I don't think so.

10 Q. Do you still have PX 76?

11 A. Yes.

12 Q. On the numbered page 262?

13 A. Okay.

14 Q. About the middle of the page there. It
15 says, The report submitted by a survey expert who
16 conducts a telephone survey shall specify, one,
17 the procedures that were used to identify
18 potential respondents; two, the number of
19 telephone numbers for which no contact was made;
20 and three, the number of contacted potential
21 respondents who refused to participate in the
22 survey.

23 Do you agree or disagree with that?

24 A. I don't agree that that is an automatic
25 rule.

1 Poret

2 Q. So that's not part of generally
3 accepted survey principles, in your view?

4 A. No.

5 Q. Do you sometimes include that
6 information in your report?

7 A. I don't think I ever have.

8 Q. You never have?

9 A. I don't believe so.

10 Q. Have you seen other people who do
11 include it?

12 A. I've seen it included. I've seen far
13 more that do not include it, though.

14 Q. Referring you to page 245?

15 A. Okay.

16 Q. The second paragraph says, One
17 suggested formula for quantifying a tolerable
18 level of nonresponse in a probability sample is
19 based on the guidelines for statistical surveys
20 issued by the former U.S. Office of Statistical
21 Standards.

22 Have you seen those guidelines?

23 A. No.

24 Q. You've never seen them?

25 A. No.

1 Poret

2 Q. You've read PX 76 before; right?

3 A. Yes.

4 Q. And you've seen that this exists;
5 right?

6 A. Well, first of all, nobody thinks that
7 any of this makes any sense, including
8 Dr. Diamond, and she's rewriting all of this.

9 Q. My question is have you seen the U.S.
10 Office of Statistical Standards, and my question
11 is you've seen that it existed -- right? -- these
12 guidelines.

13 A. I've read this document. I have not --

14 Q. You never looked at them to see what
15 they said?

16 A. I have not, for the reason that I just
17 said to you, which is this is way out of touch
18 with the reality of the market research industry.
19 And Dr. Diamond does not stand behind any of this.

20 Q. You're talking about the rest of the
21 paragraph. I'm talking about the fact that
22 there's some guidelines for statistical surveys
23 issued by the former U.S. Office of Statistical
24 Standards. It's a document that exists; right?

25 A. It may exist, but this whole section is

1 Poret

2 reporting numbers from that document, which is why
3 I haven't looked at the document, because she's
4 explicitly discussing the numbers that are in that
5 document.

6 Q. Do you know if that document has other
7 information in it?

8 A. I'd imagine it does.

9 Q. But you never thought to look at it?

10 A. No.

11 Q. The next portion of this paragraph
12 says, According to these guidelines, response
13 rates of 90 percent or more reliable, et cetera,
14 and then it goes down. It says, If the response
15 rate drops below 50 percent, the survey should be
16 regarded with significant caution as a basis for
17 precise quantitative statements about the
18 population from which the sample was drawn.

19 You don't agree with that, I take it?

20 A. Well, I don't -- I don't agree with the
21 number 50 percent. And I know she's rewriting
22 this section, because no survey would ever come
23 close to that anymore.

24 I do agree with the issue of caution
25 about precise quantitative statements. But

1 Poret

2 when -- in a survey like this, it's -- to me
3 whether 14 percent is the exact number or it's
4 really 16 percent or 12 percent is not -- is not
5 as important.

6 In other words, to me whether
7 something's 14 percent as a precise quantitative
8 statement is not so much the point. The point is
9 more -- it is obviously relevant, but the grander
10 conclusion is that there's a dramatic pattern of
11 people favoring -- saying they approve of
12 something as opposed to objecting to it. A
13 response -- a low response rate does not call that
14 into question at all.

15 Q. You don't like her numbers here, but
16 there's no number that you would substitute and
17 agree with, like if the response rate drops below
18 X percent the survey should be regarded with
19 significant caution?

20 A. I don't know what number I would put on
21 that, but I would tell you that no survey getting
22 a 20 percent rate is miraculous with a survey
23 these days. The standards for response rates have
24 changed dramatically with the way the world has
25 changed.

1 Poret

2 And I know that -- well, at least from
3 what I've been told, the next version of this
4 reference guide is dramatically changing this
5 section to reflect what the standards are in the
6 industry.

7 Q. Is that because nobody responds to
8 surveys?

9 A. It's not because nobody responds; it's
10 because there are heightened security and privacy
11 concerns, and it's not like it used to be where
12 people could walk up -- go door to door doing
13 surveys. It's harder and harder to reach people.

14 Q. So because it's harder and harder to
15 reach people, somehow the standards for
16 reliability drop?

17 A. Yes. The only -- the standards -- the
18 only standards one can have are what is standard
19 in your field. And standard response rates are in
20 the 10 to 20 percent range now. And something
21 that's going to be used as evidence can't be
22 expected to do anything but comply with accepted
23 standards within its field.

24 Q. Assuming the courts accept standards
25 that are lowered; correct?

1 Poret

2 MS. DURIE: That calls for speculation
3 and legal conclusion.

4 A. I don't think that's right. I think
5 it's fairly clear that the rules for courts are
6 that some -- that scientific evidence has to
7 satisfy the standards that are accepted within the
8 relevant field. And these surveys are accepted
9 within the field of market research.

10 And companies are spending billions and
11 billions of dollars on surveys with response rates
12 below 20 percent and 10 percent to make decisions
13 of tremendous consequence for them. And that
14 would not be happening if it wasn't well accepted
15 that surveys with lower response rates are
16 reliable.

17 Q. People wouldn't be spending money on
18 advertising irrationally? Is that your testimony?

19 A. No, I didn't say advertising; I said on
20 market research. Companies wouldn't be spending
21 billions of dollars to get information that they
22 consider obtained through an unreliable method.

23 MS. DURIE: Joanne, I should either
24 move my flight --

25 MS. ZACK: I told Joe that I was going