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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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4 THE AUTHORS GUILD, et al.,

5 Plaintiffs,

6 Master File No.

7 vs-

05 CV 8136-DC

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9 GOOGLE, INC.,

10 Defendant.
11 _____/

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15 DEPOSITION OF GLORIANA ST. CLAIR,
16 taken at Carnegie Mellon University, 4909 Frew
17 Street, Pittsburgh, PA 15213, commencing at
18 10:00 a.m., Thursday, May 31, 2012,
19 before Gloria Donavich, RPR, CRR.
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<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 Joanne Zack, Esq.</p> <p>4 Boni & Zack, LLC</p> <p>5 15 St. Asaphs Road</p> <p>6 Bala Cynwyd, Pennsylvania 19004</p> <p>7 (610) 822-0200</p> <p>8 JZack@bonizack.com</p> <p>9 Appearing on behalf of Plaintiffs, via</p> <p>10 Speakerphone</p> <p>11</p> <p>12</p> <p>13 David McGowan, Esq.</p> <p>14 Genevieve Rosloff, Esq.</p> <p>15 Durie Tangri</p> <p>16 217 Leidesdorff Street</p> <p>17 San Francisco, California 94111</p> <p>18 (415) 362-6666</p> <p>19 dMcGowan@durietangri.com</p> <p>20 Appearing on behalf of Defendant Google</p> <p>21</p> <p>22 Also present:</p> <p>23 DF Ryan, CMU</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 GLORIANA ST. CLAIR,</p> <p>2 having been duly sworn,</p> <p>3 was examined and testified as follows:</p> <p>4 - - - -</p> <p>5 EXAMINATION</p> <p>6 - - - -</p> <p>7 BY MS. ZACK:</p> <p>8 Q. Good morning, Ms. St. Clair. What do you</p> <p>9 prefer to be called? "Doctor"?</p> <p>10 A. "Dean."</p> <p>11 Q. "Dean"? Did you say "dean"?</p> <p>12 A. I did.</p> <p>13 Q. Just one instruction. If you can't hear me,</p> <p>14 please let me know since we're not in the same</p> <p>15 room, and I'll do the same for you. Also, if</p> <p>16 you don't understand my question, I'll</p> <p>17 rephrase it.</p> <p>18 Could you state your full name for</p> <p>19 the record, please.</p> <p>20 A. My name is Gloriana St. Clair.</p> <p>21 Q. Uh-huh. And where are you currently employed?</p> <p>22 A. At Carnegie Mellon University.</p> <p>23 Q. You're the dean of the university libraries.</p> <p>24 Is that correct?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 3</p> <p>1 EXAMINATION INDEX</p> <p>2</p> <p>3 GLORIANA ST. CLAIR</p> <p>4 BY MS. ZACK 4</p> <p>5</p> <p>6</p> <p>7</p> <p>8 EXHIBIT INDEX</p> <p>9 PLAINTIFF'S EXHIBIT</p> <p>10 Exhibit 87 Report 7</p> <p>11 Exhibit 88 Denise Troll Covey Article 60</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 Q. And you've held that position since April,</p> <p>2 1998?</p> <p>3 A. Correct.</p> <p>4 Q. You've been retained by Google as an expert in</p> <p>5 this matter?</p> <p>6 A. Yes.</p> <p>7 Q. Approximately when were you retained?</p> <p>8 A. A couple of months ago.</p> <p>9 Q. And what do you consider to be your area of</p> <p>10 expertise?</p> <p>11 A. The running of libraries and the research</p> <p>12 around copyright clearance.</p> <p>13 Q. Are you trained in any way as a lawyer?</p> <p>14 A. No.</p> <p>15 Q. Do you have a legal staff that's assigned to</p> <p>16 you as dean of the university libraries?</p> <p>17 A. Yes.</p> <p>18 Q. And who is that?</p> <p>19 A. Various; Mary Jo Dively is the university</p> <p>20 counsel. I often work with Jim Mercolini who</p> <p>21 is our human resources specialist lawyer.</p> <p>22 I've worked in the past with Mary Beth Shaw</p> <p>23 and one other attorney employed by the</p> <p>24 University.</p> <p>25 Q. And is any of those persons particularly</p>

<p style="text-align: right;">Page 6</p> <p>1 assigned to work with you on copyright 2 clearance matters? 3 A. I don't remember which of those people helped 4 us with copyright clearance. 5 Q. In connection with preparing your report in 6 this matter, did you speak to anyone from 7 Google? 8 A. No. 9 Q. Did you speak to any of the other experts 10 retained by Google in this matter? 11 A. No. 12 Q. Did you receive assistance from anyone else in 13 preparing the report? 14 A. From some members of my staff and from the 15 attorneys at Durie Tangri. 16 Q. Which members of your staff? 17 A. My assistant Dan Ryan, my scholarly 18 communications librarian Denise Troll Covey, 19 and my associate dean Erika Linke. 20 Q. What type of assistance did you receive from 21 those people? 22 A. From all of them just a variety of assistance 23 in discussing the issues in doing the research 24 for the report. 25 Q. Who wrote the report?</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. Did you use any of these materials in your 2 report? 3 A. Yes. 4 Q. And in a case where you used the materials, 5 did you cite them? 6 A. Yes. 7 MR. INGBER: Objection. Vague with 8 respect to use, but you may answer. 9 THE WITNESS: Yes. 10 BY MS. ZACK: 11 Q. So just to be clear, the list of materials 12 considered includes the Fourth Amended Class 13 Action Complaint. Did you use that document 14 in your report? 15 A. Yes. 16 Q. And in what way? 17 A. Well, I read it and I thought about it and 18 talked about it with my team here at Carnegie 19 Mellon. 20 Q. Is that true of each item that's listed here? 21 MR. MCGOWAN: Objection. Compound. 22 You may answer. 23 BY MS. ZACK: 24 Q. You can answer separately. There are fifteen 25 items listed. Would your answer be the same</p>
<p style="text-align: right;">Page 7</p> <p>1 A. I did with the help of my attorneys at Durie 2 Tangri. 3 Q. Have you served as an expert before in any 4 cases? 5 A. No. 6 Q. Never? 7 A. No. 8 Q. Have you ever testified before? 9 A. No. 10 Q. Your report at Exhibit B listed some material 11 that you considered. Do you have that in 12 front of you? Perhaps we should mark your 13 report as -- 14 I'm going to mark it as Plaintiffs' 15 Exhibit 87, please. 16 MR. MCGOWAN: 87, Joanne? 17 MS. ZACK: Yes. 18 ---- 19 (Plaintiffs' Exhibit No. 87 marked for 20 identification.) 21 ---- 22 BY MS. ZACK: 23 Q. At least in my version the last page is a list 24 of materials considered 25 A. Yes.</p>	<p style="text-align: right;">Page 9</p> <p>1 for each of those items or would it be 2 different? 3 A. It would be different. 4 Q. Okay. Are there any items that you did not 5 read? 6 A. No. 7 Q. Are there any that you did not consider in 8 connection with your report? 9 MR. MCGOWAN: Objection. Vague. 10 You may answer. 11 THE WITNESS: No. 12 BY MS. ZACK: 13 Q. Are there any that you did not discuss with 14 others? 15 A. Yes. 16 Q. Which ones would those be? 17 A. Perle. 18 Q. Mr. Perle; he pronounces it "Perle," 19 P-E-R-L-E? 20 A. Yes. 21 Q. Anything else? 22 A. Jaskiewicz I didn't discuss with Carnegie 23 Mellon people. Aiken I only discussed with 24 Dan and Denise Troll Covey and Dave and Jenny, 25 and the same for Courant.</p>

<p style="text-align: right;">Page 10</p> <p>1 Q. Have you ever met Mr. Courant?</p> <p>2 A. Yes.</p> <p>3 Q. In what connection?</p> <p>4 A. The University of Michigan and the Carnegie</p> <p>5 Mellon University libraries were both members</p> <p>6 of the Digital Library Federation.</p> <p>7 Q. How long have you known him?</p> <p>8 A. I'm not certain.</p> <p>9 Q. Have you ever discussed with Mr. Courant the</p> <p>10 matters discussed in this lawsuit?</p> <p>11 A. No.</p> <p>12 Q. Have you discussed with him the Google Books?</p> <p>13 A. No.</p> <p>14 Q. Or the Google Library project?</p> <p>15 A. No.</p> <p>16 Q. Anything about Google --</p> <p>17 A. No.</p> <p>18 Q. -- with Mr. Courant?</p> <p>19 MR. McGOWAN: I'll just caution Dean</p> <p>20 St. Clair to make sure that Mrs. Zack is</p> <p>21 finished with her question because especially</p> <p>22 in this setup we don't want you to speak over</p> <p>23 each other.</p> <p>24 I think the record is clear on that.</p> <p>25 MS. ZACK: Yes. Thank you.</p>	<p style="text-align: right;">Page 12</p> <p>1 Q. And did they ask you for those?</p> <p>2 MR. McGOWAN: I'm going to insert a</p> <p>3 caution because I think that the agreement as</p> <p>4 I understand it in this case under Rule 26 is</p> <p>5 that communications are treated as work</p> <p>6 product. I don't mind at a high level of</p> <p>7 generality; I just ask that we be mindful of</p> <p>8 that.</p> <p>9 MS. ZACK: Yeah. I'm just trying to</p> <p>10 establish a foundation, because Dean St. Clair</p> <p>11 doesn't appear to know what I'm asking about</p> <p>12 at this point.</p> <p>13 MR. McGOWAN: I disagree with that,</p> <p>14 but, as I say --</p> <p>15 BY MS. ZACK:</p> <p>16 Q. Are you familiar with the documents that I'm</p> <p>17 talking to you about, Dean St. Clair?</p> <p>18 A. No.</p> <p>19 Q. All right. You provided some documents to</p> <p>20 Google. Correct?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. What type of documents did you provide</p> <p>23 to Google?</p> <p>24 A. A wide variety of documents.</p> <p>25 Q. And can you describe what they were as the</p>
<p style="text-align: right;">Page 11</p> <p>1 BY MS. ZACK:</p> <p>2 Q. You also produced some documents that are</p> <p>3 E-mails and some other materials. Do you know</p> <p>4 what I'm referring to?</p> <p>5 A. No.</p> <p>6 MS. ZACK: Dave, do you know what</p> <p>7 I'm referring to?</p> <p>8 MR. McGOWAN: Yeah. It might help</p> <p>9 if you identified specifically what you're</p> <p>10 referring to.</p> <p>11 BY MS. ZACK:</p> <p>12 Q. Well, there were a number of documents</p> <p>13 produced by Google to us as plaintiffs that</p> <p>14 were represented to be your materials, and</p> <p>15 they consist of some E-mails and other matters</p> <p>16 relating or appearing to relate to the Million</p> <p>17 Book Project.</p> <p>18 Did you produce documents to Google?</p> <p>19 A. Yes.</p> <p>20 Q. What type of documents did you produce to</p> <p>21 Google?</p> <p>22 A. I don't understand "to Google."</p> <p>23 Q. Did you provide some of your E-mails or other</p> <p>24 internal documents to Google attorneys?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 13</p> <p>1 variety?</p> <p>2 A. Articles, E-mails, National Science Foundation</p> <p>3 reports.</p> <p>4 Q. Did you produce to Google all of the E-mails</p> <p>5 that you generated or received in connection</p> <p>6 with the Million Book Project?</p> <p>7 A. No.</p> <p>8 Q. Did you produce some subset of those E-mails?</p> <p>9 A. Yes.</p> <p>10 Q. What particular subset did you produce?</p> <p>11 A. We made several points in the report about our</p> <p>12 work in the Million Book Project, and I</p> <p>13 produced documents that I thought would make</p> <p>14 appropriate footnotes.</p> <p>15 Q. So it would be fair to say that you have many</p> <p>16 more documents concerning the Million Book</p> <p>17 Project that were not produced to Google. Is</p> <p>18 that correct?</p> <p>19 A. Yes.</p> <p>20 Q. Do you know approximately how many documents</p> <p>21 you have that relate to the Million Book</p> <p>22 Project in total?</p> <p>23 A. A couple of filing cabinet drawers' worth.</p> <p>24 Q. And do others in your organization have</p> <p>25 additional documents?</p>

<p style="text-align: right;">Page 14</p> <p>1 A. Yes.</p> <p>2 Q. Did you produce documents from anyone else's</p> <p>3 files other than your own?</p> <p>4 A. Yes.</p> <p>5 Q. Who else's files?</p> <p>6 A. Denise Troll Covey's files.</p> <p>7 Q. Anyone else?</p> <p>8 A. I don't think so.</p> <p>9 Q. Did you produce all of her documents or again</p> <p>10 a subset?</p> <p>11 A. No, a subset.</p> <p>12 Q. And that was to illustrate points in your</p> <p>13 report?</p> <p>14 A. Yes.</p> <p>15 Q. Referring you now to your report --</p> <p>16 Before I do that, let me ask you a</p> <p>17 different question. Have you other than</p> <p>18 speaking to Google's attorneys about this</p> <p>19 particular report, have you communicated in</p> <p>20 the past with Google or personnel from Google</p> <p>21 on any other matters?</p> <p>22 A. Yes.</p> <p>23 Q. And what matters?</p> <p>24 A. The --</p> <p>25 Well, of course, you know there are</p>	<p style="text-align: right;">Page 16</p> <p>1 A. Yes.</p> <p>2 Q. What year was that?</p> <p>3 A. I don't know.</p> <p>4 Q. Any other connections or communications with</p> <p>5 Google?</p> <p>6 A. Nothing memorable.</p> <p>7 Q. Did you ever have any discussions with or</p> <p>8 communications of any kind with anyone from</p> <p>9 Google concerning the Google Books?</p> <p>10 A. I need to amend.</p> <p>11 Q. Uh-huh.</p> <p>12 A. I just recalled that Dan Clancy was on campus,</p> <p>13 and Raj Reddy, Mike Shamos, Jaime Carbonell</p> <p>14 and I had lunch with him and discussed with</p> <p>15 him over several months the possibility of</p> <p>16 putting the Million Book Project's books into</p> <p>17 Google Books because the U.S. partners of the</p> <p>18 Million Book Project believe that Google Books</p> <p>19 is the best destiny for our corpus.</p> <p>20 Q. And at what time period did those discussions</p> <p>21 take place, what year?</p> <p>22 A. I think about four years ago.</p> <p>23 Q. That would be 2007, 2008?</p> <p>24 A. I can call somebody at the break if you need</p> <p>25 something more definite.</p>
<p style="text-align: right;">Page 15</p> <p>1 many Carnegie Mellon faculty members who do</p> <p>2 research for Google. Google has a research</p> <p>3 facility here at Carnegie Mellon, and most</p> <p>4 particularly one of our alums is the head of</p> <p>5 Google Scholar, and he visited here perhaps a</p> <p>6 year, year and a half ago, and we had a very</p> <p>7 robust and enlightening conversation about</p> <p>8 Google Scholar.</p> <p>9 Q. And what is that person's name?</p> <p>10 A. Ahurag Acharya.</p> <p>11 Q. Can you spell that?</p> <p>12 A. No.</p> <p>13 Q. Ahurag --</p> <p>14 A. -- Acharya.</p> <p>15 Q. Can you do some phonetics on that? I'm on the</p> <p>16 phone. It's very hard for me to pick it up.</p> <p>17 A. I think the last name is A-C-H-Y-A, but on the</p> <p>18 break we could look it up.</p> <p>19 Q. A-C-H-Y-A? Okay. Thank you.</p> <p>20 Any other communications with</p> <p>21 personnel from Google other than Mr. Acharya?</p> <p>22 A. I was on the commencement platform when Eric</p> <p>23 Schmidt got his honorary doctorate, but I</p> <p>24 don't believe that I spoke with him.</p> <p>25 Q. That was at Carnegie Mellon?</p>	<p style="text-align: right;">Page 17</p> <p>1 Q. Okay. Thank you.</p> <p>2 MR. McGOWAN: You should provide</p> <p>3 your best recollection. It's not a research</p> <p>4 project.</p> <p>5 BY MS. ZACK:</p> <p>6 Q. You're saying it was approximately four years</p> <p>7 ago. Right?</p> <p>8 A. Yes.</p> <p>9 Q. Do you recall if it was before or after the</p> <p>10 Google Book settlement was announced?</p> <p>11 A. Before.</p> <p>12 Q. You said those discussions occurred over</p> <p>13 several months?</p> <p>14 A. Yes.</p> <p>15 Q. And how many is "several"?</p> <p>16 A. I think we carried on that conversation for</p> <p>17 maybe seven or eight months.</p> <p>18 Q. All right. And that was with -- among -- the</p> <p>19 conversation you said was among yourself, Dan</p> <p>20 Clancy, Raj Reddy, and who were the others?</p> <p>21 I'm sorry.</p> <p>22 A. Michael Shamos and Jaime Carbonell.</p> <p>23 Q. Okay.</p> <p>24 A. Raj Reddy and Dan Clancy were the primaries.</p> <p>25 Q. What was the ultimate decision the Million</p>

<p style="text-align: right;">Page 18</p> <p>1 Book Project reached as to that, whether or</p> <p>2 not to join -- or provide your corpus to</p> <p>3 Google?</p> <p>4 A. The American directors of the Universal</p> <p>5 Library Project wanted to do that. The</p> <p>6 Chinese partners said they would think about</p> <p>7 it, and the Indian partners were skeptical.</p> <p>8 Q. Yes. And that was the end of the discussion?</p> <p>9 A. Yes.</p> <p>10 Q. Did Carnegie Mellon ever consider --</p> <p>11 Let me withdraw that. Did Carnegie</p> <p>12 Mellon University ever become a library</p> <p>13 partner with Google?</p> <p>14 A. No.</p> <p>15 Q. Did you ever discuss that with Google?</p> <p>16 A. No.</p> <p>17 Q. Google never approached you to become a</p> <p>18 library partner?</p> <p>19 A. Correct.</p> <p>20 Q. And you didn't approach them to become a</p> <p>21 library partner?</p> <p>22 A. No.</p> <p>23 Q. Did you discuss it internally at Carnegie</p> <p>24 Mellon?</p> <p>25 MR. McGOWAN: Objection. Vague.</p>	<p style="text-align: right;">Page 20</p> <p>1 A. Any other copyrights?</p> <p>2 Q. Uh-huh.</p> <p>3 A. That I own?</p> <p>4 Q. Yes.</p> <p>5 A. Yes. I've written over a hundred articles.</p> <p>6 Q. And are they all available on the Web?</p> <p>7 A. No.</p> <p>8 Q. Are some available on the Web?</p> <p>9 A. Yes.</p> <p>10 Q. Approximately how many?</p> <p>11 A. Thirty.</p> <p>12 Q. Is there some reason the rest are not?</p> <p>13 A. I haven't done the work necessary to clear</p> <p>14 with the publishers.</p> <p>15 Q. Okay, now turning to your report, please --</p> <p>16 MR. McGOWAN: Is there a page,</p> <p>17 Joanne?</p> <p>18 MS. ZACK: Sure; Page 1, please.</p> <p>19 MR. McGOWAN: We have it.</p> <p>20 MS. ZACK: Thank you.</p> <p>21 BY MS. ZACK:</p> <p>22 Q. Under Summary of Opinions which is near the</p> <p>23 bottom of Page 1 --</p> <p>24 A. Yes.</p> <p>25 Q. -- Paragraph 5, there's a lead-in that says in</p>
<p style="text-align: right;">Page 19</p> <p>1 You may answer.</p> <p>2 BY MS. ZACK:</p> <p>3 Q. Did you discuss internally at Carnegie Mellon</p> <p>4 the possibility of becoming a library partner</p> <p>5 with Google?</p> <p>6 A. No.</p> <p>7 Q. Did you ever personally consider that option?</p> <p>8 A. I don't know.</p> <p>9 Q. When you say you don't recall, do you mean you</p> <p>10 don't recall or --</p> <p>11 A. I mean, we had our own project. We wanted to</p> <p>12 join our project with the Google project, and</p> <p>13 we were working on that with Dan Clancy.</p> <p>14 Q. And after that failed to come to fruition, you</p> <p>15 don't recall whether you considered having</p> <p>16 Carnegie Mellon become a library partner with</p> <p>17 Google separately?</p> <p>18 A. It was my impression that partners were</p> <p>19 invited, that they didn't volunteer.</p> <p>20 Q. Do you personally own any copyrights?</p> <p>21 A. Yes.</p> <p>22 Q. Are they in books?</p> <p>23 A. I have one book which I have on the Web under</p> <p>24 a creative comments license.</p> <p>25 Q. Okay. Anything else?</p>	<p style="text-align: right;">Page 21</p> <p>1 brief my opinions are, and then there are A,</p> <p>2 B, C, D, four subparagraphs.</p> <p>3 Do you see that?</p> <p>4 A. I do.</p> <p>5 Q. All right. The first subparagraph, A, says in</p> <p>6 thinking about digitization of books, it is</p> <p>7 critical to distinguish between digitization</p> <p>8 to facilitate search to find a book and</p> <p>9 digitization for the purpose of displaying the</p> <p>10 whole text of a book.</p> <p>11 Has Carnegie Mellon at Carnegie</p> <p>12 Mellon libraries digitized books to facilitate</p> <p>13 search?</p> <p>14 A. No.</p> <p>15 Q. Was that ever done in the Million Book</p> <p>16 Project?</p> <p>17 A. Yes.</p> <p>18 Q. Okay.</p> <p>19 A. Let me amend. We have digitized books to</p> <p>20 facilitate search.</p> <p>21 Q. "We" being --</p> <p>22 A. Carnegie Mellon University libraries.</p> <p>23 Q. And what books have you digitized to</p> <p>24 facilitate search?</p> <p>25 A. Most obviously the Posner collection.</p>

<p style="text-align: right;">Page 22</p> <p>1 Q. Anything else?</p> <p>2 A. Well, we've digitized two million pages of</p> <p>3 archival content, some of which is books, and</p> <p>4 we did that to provide access to them and, of</p> <p>5 course, search, for instance, the books and</p> <p>6 papers of Herbert Simon, our Nobel laureate --</p> <p>7 one of our Nobel laureates.</p> <p>8 Q. Was that in connection with --</p> <p>9 In connection with what endeavor was</p> <p>10 that done?</p> <p>11 A. When Senator Heinz died in the airplane crash,</p> <p>12 the Heinz family asked Carnegie Mellon</p> <p>13 University to digitize his papers and bring</p> <p>14 them to the Web so that they could be used by</p> <p>15 as many people as possible.</p> <p>16 Q. And the Heinz family asked Carnegie Mellon to</p> <p>17 digitize Senator Heinz' papers?</p> <p>18 A. Correct.</p> <p>19 Q. And did Carnegie Mellon do that?</p> <p>20 A. Yes.</p> <p>21 Q. And that was at the request of the family?</p> <p>22 A. Yes.</p> <p>23 Q. And with respect to Herbert Simon, is that the</p> <p>24 same or a different initiative?</p> <p>25 A. It was at Herbert Simon's request.</p>	<p style="text-align: right;">Page 24</p> <p>1 open.</p> <p>2 Q. When you say "open," what do you mean?</p> <p>3 A. Open to the Web, make accessible on the Web.</p> <p>4 Q. Let's take it a step at a time. At a certain</p> <p>5 point Carnegie Mellon made a decision to</p> <p>6 attempt to digitize the Posner collection.</p> <p>7 Correct?</p> <p>8 A. Yes.</p> <p>9 Q. And this was before the Million Book Project.</p> <p>10 Right?</p> <p>11 A. No.</p> <p>12 Q. What were the time frames? When was the</p> <p>13 decision made by Carnegie Mellon to attempt to</p> <p>14 just digitize the Posner collection?</p> <p>15 A. About ten years ago.</p> <p>16 Q. And what when was the Million Book Project</p> <p>17 begun?</p> <p>18 A. About fourteen years ago.</p> <p>19 Q. And in connection with the Posner collection,</p> <p>20 is it correct the collection included</p> <p>21 materials that were out of copyright as well</p> <p>22 as materials that were in copyright?</p> <p>23 A. Yes.</p> <p>24 Q. My question is did Carnegie Mellon digitize</p> <p>25 the in-copyright books before it received any</p>
<p style="text-align: right;">Page 23</p> <p>1 Q. So again that was with permission of</p> <p>2 Mr. Simon?</p> <p>3 A. Dr. Simon.</p> <p>4 Q. Dr. Simon. Excuse me.</p> <p>5 A. Yes.</p> <p>6 Q. And when the Posner collection was digitized</p> <p>7 by Carnegie Mellon, isn't it correct that</p> <p>8 Carnegie Mellon did not digitize any</p> <p>9 in-copyright books unless it had permission?</p> <p>10 A. Precisely we did not open for access any books</p> <p>11 for which we did not have permission, any</p> <p>12 books that were in copyright for which we did</p> <p>13 not have permission.</p> <p>14 Q. My question is did you digitize any books in</p> <p>15 copyright without permission?</p> <p>16 A. No.</p> <p>17 Q. Not even for search?</p> <p>18 A. Well, okay, to be precise, we digitized all</p> <p>19 the books that we could digitize without doing</p> <p>20 them physical harm.</p> <p>21 We opened to the Web only those</p> <p>22 books which were either out of copyright or</p> <p>23 for which we had permission.</p> <p>24 I'm not certain whether you can</p> <p>25 search books that we digitized but didn't</p>	<p style="text-align: right;">Page 25</p> <p>1 permissions.</p> <p>2 A. Both of those projects, the digitization of</p> <p>3 the books and the searching for -- seeking</p> <p>4 copyright permission were lengthy and</p> <p>5 ongoing.</p> <p>6 Q. Yes, but as a matter of actual practice, did</p> <p>7 Carnegie Mellon digitize any books in the</p> <p>8 Posner collection that were in copyright</p> <p>9 before it had received a permission?</p> <p>10 A. I'm not sure.</p> <p>11 Q. Part of the work that Carnegie Mellon did in</p> <p>12 connection with the Posner collection</p> <p>13 digitization effort was work to attain</p> <p>14 permissions for in-copyright books. Right?</p> <p>15 A. Yes.</p> <p>16 Q. So you're not sure of the sequence as to</p> <p>17 whether or not Carnegie Mellon ever digitized</p> <p>18 an in-copyright work before it had a</p> <p>19 permission to do so?</p> <p>20 A. Correct.</p> <p>21 Q. Who would know that at Carnegie Mellon?</p> <p>22 A. I'm not certain we kept records at that</p> <p>23 detail, and I'm not certain whether the</p> <p>24 machines recorded --</p> <p>25 We are using a home-grown system.</p>

<p style="text-align: right;">Page 26</p> <p>1 Q. A home-grown system of --</p> <p>2 A. To store the copies of all of our digital</p> <p>3 content and to allow search engines to search.</p> <p>4 Q. When you say a "home-grown system," you're</p> <p>5 talking about the actual system that houses</p> <p>6 the copies?</p> <p>7 A. Yes.</p> <p>8 Q. And that's on servers?</p> <p>9 A. Yes.</p> <p>10 Q. Do you also keep backup copies?</p> <p>11 A. Yes.</p> <p>12 Q. Who actually creates the copies?</p> <p>13 A. Our library information technology staff.</p> <p>14 Q. Who's in charge of the home-grown system at</p> <p>15 Carnegie Mellon that stores the digital</p> <p>16 copies?</p> <p>17 A. Melanie Myers.</p> <p>18 Q. What's her position?</p> <p>19 A. She's the head of library information</p> <p>20 technology.</p> <p>21 Q. Are the books from the Posner collection that</p> <p>22 have been digitized stored on that home-grown</p> <p>23 system?</p> <p>24 A. Yes.</p> <p>25 Q. And are the books from the Million Book</p>	<p style="text-align: right;">Page 28</p> <p>1 you said, about ten years ago?</p> <p>2 A. Yes.</p> <p>3 Q. And again the Million Book Project was about</p> <p>4 fourteen years ago, and that was about the</p> <p>5 time you joined Carnegie Mellon?</p> <p>6 A. Yes.</p> <p>7 Q. And those were fairly significant digitization</p> <p>8 efforts, wouldn't you agree?</p> <p>9 MR. MCGOWAN: Objection. Vague.</p> <p>10 You may answer.</p> <p>11 THE WITNESS: Yes.</p> <p>12 BY MS. ZACK:</p> <p>13 Q. Were you aware of any other libraries that</p> <p>14 were engaged in any digitization efforts at</p> <p>15 that time in the early part of this</p> <p>16 millennium?</p> <p>17 A. Yes.</p> <p>18 Q. What other libraries?</p> <p>19 A. Other members of the Digital Library</p> <p>20 Federation.</p> <p>21 Q. Which ones in particular?</p> <p>22 A. Michigan, Penn State, Cornell, Harvard,</p> <p>23 Berkeley, New York Public, Tennessee --</p> <p>24 Q. That's all you can recall?</p> <p>25 A. Perhaps Texas, Virginia, Princeton, Yale,</p>
<p style="text-align: right;">Page 27</p> <p>1 Project that have been digitized stored</p> <p>2 there?</p> <p>3 A. No.</p> <p>4 Q. Aside from the Posner collection, what other</p> <p>5 books are stored on the home-grown system</p> <p>6 you're referring to?</p> <p>7 MR. MCGOWAN: Objection. Lacks</p> <p>8 foundation.</p> <p>9 You may answer.</p> <p>10 THE WITNESS: Are you just</p> <p>11 interested in books, or are you interested in</p> <p>12 a broader range of materials?</p> <p>13 BY MS. ZACK:</p> <p>14 Q. Well, let's just stay with books.</p> <p>15 A. I'm thinking.</p> <p>16 Well, the archival collections of</p> <p>17 Dr. Simon and Dr. Newell, Dr. Traub, have</p> <p>18 books in them, so those are there.</p> <p>19 I think we have scanned some costume</p> <p>20 books with permission or out of copyright and</p> <p>21 they're there, but our main book collection</p> <p>22 that we're hosting ourselves is the Posner</p> <p>23 collection.</p> <p>24 Q. Okay. So Carnegie Mellon began its efforts to</p> <p>25 digitize the Posner collection in about 2002,</p>	<p style="text-align: right;">Page 29</p> <p>1 Oxford, National Archives, Library of</p> <p>2 Congress, University of Pennsylvania.</p> <p>3 Q. So each of those institutions was involved in</p> <p>4 some digitization efforts in 2000 or</p> <p>5 thereabouts or shortly after that?</p> <p>6 A. Yes.</p> <p>7 Q. And the last sentence of Paragraph 5 A which</p> <p>8 is on the top of Page 2 --</p> <p>9 A. Yes.</p> <p>10 Q. -- it says no large-scale digitization</p> <p>11 projects were under way in the U.S.</p> <p>12 A. Yes.</p> <p>13 Q. And you're talking about 2004?</p> <p>14 A. Yes.</p> <p>15 Q. But in 2004 the Million Book Project was under</p> <p>16 way. Correct?</p> <p>17 A. Correct.</p> <p>18 Q. And that was a large-scale digitization</p> <p>19 project, was it not?</p> <p>20 A. Yes, but not in the U.S.</p> <p>21 Q. Weren't you digitizing books present in the</p> <p>22 U.S.?</p> <p>23 A. No.</p> <p>24 Q. So you're talking about the physical location</p> <p>25 of the books?</p>

<p style="text-align: right;">Page 30</p> <p>1 A. And of the digitization.</p> <p>2 Q. Well, when the books were digitized in the</p> <p>3 Million Book Project, were they available for</p> <p>4 display in the U.S.?</p> <p>5 A. Sometimes.</p> <p>6 Q. How many books in the Million Book Project are</p> <p>7 available for display at Carnegie Mellon?</p> <p>8 MR. MCGOWAN: Objection. Vague as to</p> <p>9 timing.</p> <p>10 You may answer.</p> <p>11 THE WITNESS: Certainly when their</p> <p>12 servers are up, students at Carnegie Mellon</p> <p>13 can look at about 300,000 books that were</p> <p>14 digitized by our project in China, they can</p> <p>15 look at some books from the library at</p> <p>16 Alexandria that were digitized as part of our</p> <p>17 project, they can look at some books on the</p> <p>18 Internet archive that were digitized in China</p> <p>19 and in India as part of our project.</p> <p>20 There are, I believe, almost two</p> <p>21 million books that were digitized in China,</p> <p>22 and if a university has a license to the</p> <p>23 database, then that university's students can</p> <p>24 look at those books.</p> <p>25 BY MS. ZACK:</p>	<p style="text-align: right;">Page 32</p> <p>1 Q. Are these two million books in Chinese?</p> <p>2 A. Primarily.</p> <p>3 Q. As part of the Million Book Project, how many</p> <p>4 books in English were digitized?</p> <p>5 A. I don't know.</p> <p>6 Q. Do you know approximately?</p> <p>7 A. I've heard the figure, but I can't recall it.</p> <p>8 Q. Is it more than a million, less than a</p> <p>9 million?</p> <p>10 A. Of the total books in the Million Book</p> <p>11 Project?</p> <p>12 Q. Uh-huh.</p> <p>13 A. Less than a million.</p> <p>14 Q. You mentioned that there were 300,000 books</p> <p>15 digitized in China that are available to</p> <p>16 Carnegie Mellon students for display. Is that</p> <p>17 correct?</p> <p>18 A. No.</p> <p>19 Q. When their servers are up, you said?</p> <p>20 A. In India when their servers are up.</p> <p>21 Q. Well, you I believe said there were 300,000</p> <p>22 books digitized in China.</p> <p>23 A. No.</p> <p>24 Q. Did your mean to say India?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 31</p> <p>1 Q. Okay. So you said there are two million books</p> <p>2 digitized in China approximately, and that was</p> <p>3 through the Million Book Project?</p> <p>4 A. Yes.</p> <p>5 Q. And that's to date?</p> <p>6 A. Yes.</p> <p>7 Q. And you say if the university has a license to</p> <p>8 the database. Who provides the license?</p> <p>9 A. CADAL, C-A-D-A-L.</p> <p>10 Q. Is that an acronym?</p> <p>11 A. Yes.</p> <p>12 Q. What does it stand for?</p> <p>13 A. I'm not sure. Chinese something, and the L is</p> <p>14 for library.</p> <p>15 Q. Okay. So if the university obtains a license</p> <p>16 from CADAL to the database, the university</p> <p>17 student can look at these two million books.</p> <p>18 Correct?</p> <p>19 A. Correct.</p> <p>20 Q. Does Carnegie Mellon have such a license?</p> <p>21 A. No.</p> <p>22 Q. And why not?</p> <p>23 A. We don't have Chinese --</p> <p>24 We don't offer very many --</p> <p>25 Well, we can't afford it.</p>	<p style="text-align: right;">Page 33</p> <p>1 Q. All right. Were those books in English?</p> <p>2 A. Some.</p> <p>3 Q. And does Carnegie Mellon have a license to</p> <p>4 display those books?</p> <p>5 A. Those books are free to read.</p> <p>6 Q. And is that because they're out of copyright</p> <p>7 or why are they free to read?</p> <p>8 A. They're either out of copyright, they're</p> <p>9 government publications and, therefore, either</p> <p>10 not in -- never in copyright or there has been</p> <p>11 copyright permission granted.</p> <p>12 Q. How many books were digitized in the Posner</p> <p>13 collection?</p> <p>14 A. Around a thousand.</p> <p>15 Q. You mentioned that Carnegie Mellon, I think,</p> <p>16 and correct me if I'm wrong, digitized --</p> <p>17 We previously discussed the archival</p> <p>18 collections of Dr. Simon, and then you</p> <p>19 mentioned Drs. Newell and someone else. Who</p> <p>20 was the other person?</p> <p>21 A. Dr. Joseph Traub.</p> <p>22 Q. Traub?</p> <p>23 A. T-R-A-U-B.</p> <p>24 Q. And in each case was that done by permission?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 34</p> <p>1 Q. Were these books or personal papers?</p> <p>2 A. Both.</p> <p>3 Q. Now, Paragraph 5 B of your report, which is on</p> <p>4 Page 2, you talk about how digitization helps</p> <p>5 libraries achieve their mission.</p> <p>6 A. Yes.</p> <p>7 Q. Does Carnegie Mellon engage in any -- to the</p> <p>8 extent you're aware -- engage in any</p> <p>9 digitizations pursuant to Section 108 of the</p> <p>10 Copyright Act?</p> <p>11 MR. McGOWAN: Objection to the</p> <p>12 extent it calls for a legal conclusion.</p> <p>13 You may answer.</p> <p>14 THE WITNESS: What is Section 108?</p> <p>15 BY MS. ZACK:</p> <p>16 Q. Are you familiar with that section?</p> <p>17 A. Is that orphan works?</p> <p>18 Q. Section 108 is the --</p> <p>19 I don't want you to testify about it</p> <p>20 if you're not familiar with it, but it is a</p> <p>21 provision that deals specifically with</p> <p>22 libraries making replacement copies,</p> <p>23 et cetera, under certain circumstances?</p> <p>24 A. Yes.</p> <p>25 Q. You are familiar with it?</p>	<p style="text-align: right;">Page 36</p> <p>1 MR. McGOWAN: You may answer.</p> <p>2 THE WITNESS: We have procedures and</p> <p>3 documents and practices. Mary Jo Dively, who</p> <p>4 is our university counsel, pays Jonathan Band</p> <p>5 to regularly give us advice on how to run our</p> <p>6 E-reserves operations.</p> <p>7 BY MS. ZACK:</p> <p>8 Q. To give advice as to how Carnegie Mellon</p> <p>9 should run its E-reserves operations to comply</p> <p>10 with copyright law?</p> <p>11 A. Yes.</p> <p>12 Q. Now, it would serve the mission of Carnegie</p> <p>13 Mellon, would it not, if Carnegie Mellon were</p> <p>14 to digitize all of its works for full text</p> <p>15 viewing?</p> <p>16 A. I don't understand the question.</p> <p>17 Q. Well, if you take away the restrictions of the</p> <p>18 Copyright Act and talk about only what would</p> <p>19 serve Carnegie Mellon's mission as a library,</p> <p>20 wouldn't its mission be served if you just</p> <p>21 digitized all the books you have and put them</p> <p>22 up on the Web for full text viewing?</p> <p>23 A. Probably.</p> <p>24 Q. But you haven't done that. Right?</p> <p>25 A. No.</p>
<p style="text-align: right;">Page 35</p> <p>1 A. Somewhat.</p> <p>2 Q. Is that something you discussed with your --</p> <p>3 just yes or no -- that you've discussed with</p> <p>4 university counsel?</p> <p>5 A. I don't recall.</p> <p>6 Q. Do you know whether Carnegie Mellon makes</p> <p>7 digital copies pursuant to Section 108 of the</p> <p>8 Copyright Act?</p> <p>9 MR. McGOWAN: Same objection on a</p> <p>10 legal conclusion.</p> <p>11 You may answer.</p> <p>12 MS. ZACK: Only if you know.</p> <p>13 THE WITNESS: Are we talking about</p> <p>14 putting work on E-reserves?</p> <p>15 BY MS. ZACK:</p> <p>16 Q. Well, let me ask a different question. Does</p> <p>17 Carnegie Mellon put works on E-reserves?</p> <p>18 A. Yes.</p> <p>19 Q. And what circumstances or what are the steps</p> <p>20 that Carnegie Mellon goes through before it</p> <p>21 allows its professors to put works on</p> <p>22 E-reserves?</p> <p>23 MR. McGOWAN: Objection. Lacks</p> <p>24 foundation, compound.</p> <p>25 MS. ZACK: If you know.</p>	<p style="text-align: right;">Page 37</p> <p>1 Q. And why not?</p> <p>2 A. Several reasons; copyright law, money are the</p> <p>3 top two.</p> <p>4 Q. Referring you to Paragraph 5 C of your</p> <p>5 report --</p> <p>6 A. Yes.</p> <p>7 Q. -- you talk about the payment of money for</p> <p>8 books and for digitization, et cetera.</p> <p>9 A. Uh-huh.</p> <p>10 Q. Now, Carnegie Mellon does pay for print</p> <p>11 books. Right?</p> <p>12 A. Yes.</p> <p>13 Q. And does Carnegie Mellon now sometimes pay for</p> <p>14 digital works in lieu of print books?</p> <p>15 MR. McGOWAN: Objection. Vague.</p> <p>16 You may answer.</p> <p>17 MS. ZACK: Do you understand what</p> <p>18 I'm asking?</p> <p>19 THE WITNESS: So you're asking if</p> <p>20 sometimes we pay to buy the E-book version of</p> <p>21 a book rather than buying the print version of</p> <p>22 a book?</p> <p>23 MS. ZACK: Yes.</p> <p>24 THE WITNESS: Yes.</p> <p>25 MS. ZACK: And how do you determine</p>

<p style="text-align: right;">Page 38</p> <p>1 whether to buy a print version or an E-book 2 version? 3 MR. McGOWAN: Objection. 4 Foundation. 5 You may answer. 6 THE WITNESS: We prefer buying 7 E-books. 8 BY MS. ZACK: 9 Q. So if you're buying a book for the first time 10 and you have a choice, you would buy an E-book 11 rather than a print book? 12 A. Yes. 13 Q. And does Carnegie Mellon buy subscriptions to 14 E-journals or that type of product? 15 A. Yes. 16 Q. What particular subscriptions does Carnegie 17 Mellon purchase that you can recall? 18 A. Association For Computing Machinery, tons of 19 things from Elsevier, tons of things from 20 Springer Verlag, tons of things from all of 21 the sci-tech publishers for which we pay a 22 lot. 23 All of our clients prefer us to buy 24 things in digital format. We buy as many 25 databases and electronic journals and</p>	<p style="text-align: right;">Page 40</p> <p>1 MR. McGOWAN: Can we do ten? 2 MS. ZACK: That's fine. 3 - - - 4 (There was a recess in the proceedings.) 5 - - - 6 BY MS. ZACK: 7 Q. Dean St. Clair, do the patrons of Carnegie 8 Mellon libraries have access to Google? 9 A. Yes. 10 Q. So persons -- or your clients as you call 11 them -- persons using your library can go on 12 computers within Carnegie Mellon's libraries 13 and have access to Google Search. Is that 14 correct? 15 A. Correct. 16 Q. Do you know what benefits Google obtains from 17 its digitization of books? 18 MR. McGOWAN: Objection. Lacks 19 foundation. 20 You may answer. 21 THE WITNESS: Not precisely. 22 BY MS. ZACK: 23 Q. Have you ever been involved in testifying 24 before Congress on orphan works legislation? 25 A. No.</p>
<p style="text-align: right;">Page 39</p> <p>1 electronic books as we can afford in the areas 2 that our university, which is a very focused 3 university, teaches and does research. 4 Q. You said "all of our clients." Who do you 5 consider the library's clients to be? 6 A. Our students, faculty, staff, our OSHER life- 7 long learning group, and everyone who walks 8 into one of our library buildings. 9 Q. Can the general public walk into your library 10 buildings and use -- get digital access? 11 A. Yes, but they have to get a day pass to do 12 that. 13 Q. Are there any requirements to get a day pass? 14 A. You have to have an ID. 15 Q. It doesn't have to be a Carnegie Mellon ID? 16 A. No. 17 Q. In other words, a driver's license or 18 something like that would work? 19 A. Yes. 20 MR. McGOWAN: Joanne? 21 MS. ZACK: Do you need a break? 22 MR. McGOWAN: Yeah. If we could 23 take a quick break, that would be good. 24 MS. ZACK: Okay. Is five minutes 25 enough or do you need more?</p>	<p style="text-align: right;">Page 41</p> <p>1 Q. Have you submitted any materials to Congress 2 in connection with orphan works legislation? 3 A. Yes. 4 Q. Did you say yes? I'm sorry. 5 A. Yes. 6 Q. Okay. And on how many occasions have you 7 submitted material? 8 A. Several. 9 Q. And what position have you taken? 10 A. We are pro open access and -- 11 Q. When you say "pro open access," what do you 12 mean? 13 A. Well, when calls come out about things like 14 the NIH, we take a positive position on the 15 creation of that database and the continuing 16 of that database and the financial 17 arrangements around that database. 18 Q. Have you ever taken any position on particular 19 bills that contain suggested provisions about 20 how much procedurally needs to be done to try to 21 locate copyright owners before a book is 22 declared to be an orphan work? 23 A. Yes. 24 Q. And specifically do you recall any specific 25 decisions that you've taken or that Carnegie</p>

<p style="text-align: right;">Page 42</p> <p>1 Mellon has taken?</p> <p>2 A. Well, we believe that there should be a</p> <p>3 reasonable effort to locate copyright owners,</p> <p>4 but that then there should be some provision</p> <p>5 for orphan works.</p> <p>6 Q. Would it be fair to say you believe the</p> <p>7 current copyright laws are inadequate in that</p> <p>8 regard?</p> <p>9 MR. McGOWAN: Objection. Vague.</p> <p>10 You may answer.</p> <p>11 THE WITNESS: Yes.</p> <p>12 BY MS. ZACK:</p> <p>13 Q. You would like them to be changed?</p> <p>14 A. Yes.</p> <p>15 Q. You said Carnegie Mellon believes there should</p> <p>16 be a reasonable effort to locate copyright</p> <p>17 owners?</p> <p>18 A. Yes.</p> <p>19 Q. What does Carnegie Mellon consider to be a</p> <p>20 reasonable effort?</p> <p>21 A. Mary Jo Dively has worked with us to put</p> <p>22 together a work flow that we can use to</p> <p>23 determine -- to work on copyright issues,</p> <p>24 gaining permission.</p> <p>25 Q. You mean the steps you should take?</p>	<p style="text-align: right;">Page 44</p> <p>1 Q. -- book or person?</p> <p>2 A. No.</p> <p>3 Q. Who keeps records of these matters at Carnegie</p> <p>4 Mellon?</p> <p>5 A. Denise Troll Covey, Gabrielle Michalek, Ann</p> <p>6 Marie Mesco.</p> <p>7 Q. Now, turning to Paragraph 6 of your report,</p> <p>8 you talk about the Google Books project. All</p> <p>9 of that is secondhand knowledge, I take it.</p> <p>10 A. Yes, or based on what I read in Clancy.</p> <p>11 -----</p> <p>12 (There was a discussion off the record.)</p> <p>13 -----</p> <p>14 BY MS. ZACK:</p> <p>15 Q. Referring you to Paragraph 6 of your report,</p> <p>16 looking at all the sentences in that paragraph</p> <p>17 other than the last sentence, does that all</p> <p>18 come from your review of materials rather than</p> <p>19 your firsthand knowledge?</p> <p>20 A. A review.</p> <p>21 Q. You're saying yes, it comes from a review?</p> <p>22 A. Primarily.</p> <p>23 Q. Does it come in any way from firsthand</p> <p>24 knowledge?</p> <p>25 A. Well, I was a member of the Digital Library</p>
<p style="text-align: right;">Page 43</p> <p>1 A. Yes.</p> <p>2 Q. And what steps does that entail?</p> <p>3 A. We try to locate the rights-holder, and then</p> <p>4 if we are unable to locate the rights-holder,</p> <p>5 we think about putting the work -- making the</p> <p>6 work available on the Web with the idea that</p> <p>7 if a rights-holder objected, we would</p> <p>8 instantly take the work down.</p> <p>9 Q. Have you ever done that?</p> <p>10 A. Yes.</p> <p>11 Q. You've put work on the Web without permission</p> <p>12 even though it was in copyright?</p> <p>13 A. Yes.</p> <p>14 Q. And when did you begin doing that?</p> <p>15 A. Seven, eight years ago.</p> <p>16 Q. How many such works have you placed on the Web</p> <p>17 that were in copyright without permission?</p> <p>18 A. I don't know.</p> <p>19 Q. Has anyone come forward and asked you to take</p> <p>20 them down?</p> <p>21 A. One.</p> <p>22 Q. I'm sorry?</p> <p>23 A. One.</p> <p>24 Q. Do you recall the name of that --</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 45</p> <p>1 Federation and all of these people were</p> <p>2 members of the Digital Library Federation, and</p> <p>3 we met together twice a year.</p> <p>4 Q. And did they discuss with you at that time</p> <p>5 their participation in Google Books or Google</p> <p>6 Library project?</p> <p>7 A. No.</p> <p>8 Q. So did you --</p> <p>9 You became aware, I assume, from</p> <p>10 public information that this was happening.</p> <p>11 Right?</p> <p>12 A. Yes.</p> <p>13 Q. And you never discussed it with anyone from</p> <p>14 Michigan or Harvard or Stanford or Oxford or</p> <p>15 any other public library?</p> <p>16 A. No.</p> <p>17 Q. All right. The last sentence of Paragraph 6</p> <p>18 says as discussed below, Google's interest in</p> <p>19 digitizing books stemmed in part from the</p> <p>20 Million Book Project, of which I am a</p> <p>21 director.</p> <p>22 Did you ever have a discussion with</p> <p>23 anyone from Google about this?</p> <p>24 A. No.</p> <p>25 Q. All right. So you gleaned that from their</p>

<p style="text-align: right;">Page 46</p> <p>1 website?</p> <p>2 A. Yes.</p> <p>3 Q. Referring you to Paragraph 9 of your report,</p> <p>4 you talk about the history of indexing from</p> <p>5 card catalogs to computerized MARC records.</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. The MARC system, what does MARC stand for?</p> <p>9 A. Machine something readable something.</p> <p>10 Q. All right. Is that --</p> <p>11 What exactly are MARC records?</p> <p>12 A. MARC records are essentially the electronic</p> <p>13 version of a catalog card record.</p> <p>14 Q. Who creates that version?</p> <p>15 A. Catalogers.</p> <p>16 Q. And does Carnegie Mellon pay for access to</p> <p>17 MARC records?</p> <p>18 A. Yes.</p> <p>19 Q. And MARC is a separate entity from any given</p> <p>20 library?</p> <p>21 A. MARC is a format. It's a template that you</p> <p>22 use to describe a book, a journal article, a</p> <p>23 piece of realia.</p> <p>24 Q. And what company creates MARC records?</p> <p>25 A. The Library of Congress creates many MARC</p>	<p style="text-align: right;">Page 48</p> <p>1 Yes. You can search them on a</p> <p>2 computer.</p> <p>3 BY MS. ZACK:</p> <p>4 Q. And the search would be limited there to what,</p> <p>5 title, title information?</p> <p>6 A. Author, title, publishing information,</p> <p>7 typically two or three subject headings and</p> <p>8 some kinds of notes about additions and so</p> <p>9 forth.</p> <p>10 Q. Okay. So there's no searching within the</p> <p>11 books in connection with those records.</p> <p>12 Right?</p> <p>13 A. Right.</p> <p>14 Q. It's like searching a card catalog on a</p> <p>15 computer?</p> <p>16 A. Yes.</p> <p>17 Q. Do you know how much Carnegie Mellon pays MARC</p> <p>18 on a yearly basis for access to the use of</p> <p>19 those MARC records? Or pays OCLC; excuse me.</p> <p>20 A. Probably a dollar something.</p> <p>21 Q. When you say a dollar something, what do you</p> <p>22 mean?</p> <p>23 A. I can recall at one time we were paying</p> <p>24 78 cents, and at one time we were paying</p> <p>25 \$1.04. I'm not sure what we're paying today.</p>
<p style="text-align: right;">Page 47</p> <p>1 records, and libraries around the country</p> <p>2 create their own subset of MARC records and</p> <p>3 contribute those to a nonprofit entity called</p> <p>4 OCLC.</p> <p>5 Q. And then Carnegie Mellon pays OCLC to use MARC</p> <p>6 records?</p> <p>7 A. Yes.</p> <p>8 Q. Is what is that subscription fee?</p> <p>9 A. It varies back and forth. I believe right now</p> <p>10 we may have a subscription that allows us to</p> <p>11 do X amount of use of MARC records for our</p> <p>12 own -- to move those records from OCLC into</p> <p>13 our local library system.</p> <p>14 Q. And MARC records are, as you said, basically a</p> <p>15 digital version of the old card catalog?</p> <p>16 A. Yes.</p> <p>17 Q. So they contain --</p> <p>18 And they're searchable on the</p> <p>19 computer?</p> <p>20 MR. MCGOWAN: Objection. Vague.</p> <p>21 You may answer.</p> <p>22 MS. ZACK: Can you search MARC</p> <p>23 records on a computer?</p> <p>24 THE WITNESS: You can both search</p> <p>25 them on the Web and you can --</p>	<p style="text-align: right;">Page 49</p> <p>1 Q. For the entire year for the entire use of the</p> <p>2 record?</p> <p>3 A. Per record, a one-time fee for long-term use.</p> <p>4 Q. Per record or for all records?</p> <p>5 A. Per record. So for --</p> <p>6 Q. Does that mean per book or --</p> <p>7 A. Well --</p> <p>8 Q. If it was a book, it would be a one-time</p> <p>9 fee --</p> <p>10 For the record, for that particular</p> <p>11 book if we're talking about a book, would it</p> <p>12 be forever? Is that what you're saying?</p> <p>13 A. Yes.</p> <p>14 Q. So if you had a million books you would</p> <p>15 multiply it by a dollar to get the the amount</p> <p>16 you would be paying?</p> <p>17 A. Yes.</p> <p>18 Q. Do you purchase any --</p> <p>19 Do the Carnegie Mellon libraries</p> <p>20 purchase any services from Bowker?</p> <p>21 A. Probably.</p> <p>22 Q. What type of services?</p> <p>23 A. I believe that Bowker produces some things</p> <p>24 that I would call databases, and we license</p> <p>25 those databases.</p>

<p style="text-align: right;">Page 50</p> <p>1 Bowker also produces --</p> <p>2 Q. I'm sorry. Go ahead.</p> <p>3 A. Bowker --</p> <p>4 Bowker also produces print books.</p> <p>5 Q. What databases does Carnegie Mellon libraries</p> <p>6 purchase from Bowker?</p> <p>7 A. I don't know.</p> <p>8 Q. Are there any other computerized records other</p> <p>9 than the MARC records that Carnegie Mellon</p> <p>10 libraries uses?</p> <p>11 MR. McGOWAN: Objection. Vague.</p> <p>12 You may answer.</p> <p>13 THE WITNESS: We also use EAD which</p> <p>14 is an archival format, and we use Dublin Core</p> <p>15 which I would call MARC light, and we're</p> <p>16 beginning to use a new format that I will call</p> <p>17 for lay purposes MARC heavy.</p> <p>18 BY MS. ZACK:</p> <p>19 Q. I'm sorry. I got Dublin Core and MARC heavy.</p> <p>20 What was the third, the first one you</p> <p>21 mentioned, A --</p> <p>22 A. E, as in Edgar, AD.</p> <p>23 Q. Does that stand for something?</p> <p>24 A. Probably encoding archival description or</p> <p>25 something like that.</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. Such as?</p> <p>2 A. Such as the nature of the electronic files,</p> <p>3 who produced them, when they were produced,</p> <p>4 where they were produced, what kind of files</p> <p>5 they are, file protocols.</p> <p>6 Q. So it has additional metadata about the book?</p> <p>7 A. MARC, MARC heavy and MARC light are all</p> <p>8 metadata.</p> <p>9 Q. Right, so I'm saying it has additional</p> <p>10 metadata.</p> <p>11 A. Yes.</p> <p>12 Q. And MARC heavy?</p> <p>13 A. Right.</p> <p>14 Q. But there's no searching within the book with</p> <p>15 MARC heavy either. Right?</p> <p>16 A. Yes.</p> <p>17 Q. And do the MARC heavy records cost more per</p> <p>18 book?</p> <p>19 A. I don't know.</p> <p>20 Q. But like the regular MARC records they're</p> <p>21 purchased on a licensed basis?</p> <p>22 A. Well, yes. We would acquire them in the same</p> <p>23 way that we acquire regular MARC records.</p> <p>24 Q. Is that considered a license or --</p> <p>25 MR. McGOWAN: Objection to the</p>
<p style="text-align: right;">Page 51</p> <p>1 Q. Is that something that Carnegie Mellon</p> <p>2 acquires from a third party?</p> <p>3 A. No.</p> <p>4 Q. Is that produced in-house?</p> <p>5 A. Yes.</p> <p>6 Q. What about Dublin Core?</p> <p>7 A. Produced in-house.</p> <p>8 Q. What about MARC heavy?</p> <p>9 A. We will both produce it in-house and acquire</p> <p>10 it.</p> <p>11 Q. Where do you acquire it from?</p> <p>12 A. OCLC.</p> <p>13 Q. And is that something that's also paid for --</p> <p>14 A. Yes.</p> <p>15 Q. -- when acquired from OCLC?</p> <p>16 A. Yes.</p> <p>17 Q. And what's the difference between this product</p> <p>18 that you're calling MARC heavy and the product</p> <p>19 you previously described, the MARC product?</p> <p>20 A. MARC itself is -- grew up maybe thirty years</p> <p>21 ago, and MARC heavy is an effort to make it</p> <p>22 work better with digital resources.</p> <p>23 Q. Does it have any additional information or is</p> <p>24 it just a functionality improvement?</p> <p>25 A. It has additional information.</p>	<p style="text-align: right;">Page 53</p> <p>1 extent it calls for a legal conclusion.</p> <p>2 MS. ZACK: If you know.</p> <p>3 MR. McGOWAN: You may answer.</p> <p>4 THE WITNESS: I don't know.</p> <p>5 BY MS. ZACK:</p> <p>6 Q. Okay. There's a sentence within Paragraph 9</p> <p>7 on Page 3 that carries over to Page 4 at the</p> <p>8 very bottom of Page 3. It says but over the</p> <p>9 history of indexing --</p> <p>10 Do you see where I am?</p> <p>11 A. Yes.</p> <p>12 Q. -- from card catalogs to computerized MARC</p> <p>13 records, libraries have not paid authors nor</p> <p>14 sought their permission merely to index or to</p> <p>15 search through their books?</p> <p>16 A. Yes.</p> <p>17 Q. I wasn't sure what you meant by "or to search</p> <p>18 through their books."</p> <p>19 A. We've never paid authors for our people to</p> <p>20 come in and flip through a book.</p> <p>21 Q. Are you talking about browsing?</p> <p>22 A. Yes.</p> <p>23 Q. Referring you to Paragraph 12 of your report</p> <p>24 which is at the bottom of Page 4, you're</p> <p>25 setting examples of digitization projects not</p>

<p style="text-align: right;">Page 54</p> <p>1 affiliated with academic or local libraries. 2 Correct? 3 A. In Paragraph 12? 4 Q. Yes, which carries over -- 5 A. Carries over onto Page 5. 6 Q. Right. 7 A. Yes. 8 Q. You mentioned project Gutenberg? 9 A. Yes. 10 Q. Do you know if that involved any in-copyright 11 books? 12 A. It did not. 13 Q. What about the Library of Congress' American 14 Memory project? 15 Did that involve any in-copyright 16 books? 17 A. No. 18 Q. What about the Making of America project? 19 A. No. 20 Q. No in-copyright books? 21 A. None. 22 Q. And then you mention lastly the Million Book 23 Project which we'll discuss, you know, more 24 fulsomely in a moment. 25 Turning to the Million Book Project,</p>	<p style="text-align: right;">Page 56</p> <p>1 project. Correct? 2 A. Correct. 3 Q. There's a -- 4 On the top of Page 7 there's a 5 sentence that says in spring and summer of 6 1999, many librarians dismissed this idea even 7 though it would have brought work to their 8 states and even though the NSF program 9 officer, Michael Lesk, made clear that NSF 10 believed it could provide \$25 million in 11 supplemental funding for such efforts if 12 libraries showed initiative in pursuing them. 13 So NSF here is the National Science 14 Foundation. Is that correct? 15 A. Correct. 16 Q. Are you saying that the National Science 17 Foundation was willing to provide \$25 million 18 in funding for a major library digitization 19 project? 20 A. The National Science Foundation was willing to 21 ask Congress to provide \$25 million if these 22 libraries which were in these states would 23 undertake this project. 24 Q. Was that a project similar to the Million Book 25 Project you were considering?</p>
<p style="text-align: right;">Page 55</p> <p>1 you mentioned before the break or earlier in 2 the deposition that you had a series of 3 conversations with Dan Clancy about it. 4 Did Google ever offer to provide any 5 funding for the Million Book Project? 6 A. That's the conversation we were having. 7 Q. Did they ever offer to provide any funding? 8 A. We were asking them to give us funding in 9 return for our scanned content. 10 Q. And those conversations culminated in nothing 11 coming of that, I guess. Right? 12 A. Right. 13 Q. Because of the objections of your foreign 14 partners? 15 A. I'm not certain what all the factors were, but 16 certainly our foreign partners were not as 17 eager to do that as the directors of the 18 universal library were. 19 Q. Referring you to Page 7 of your report, the 20 top of the page which is part of 21 Paragraph 19 -- 22 A. Yes. 23 Q. -- there occurs in your report in a discussion 24 of your attempts to interest various libraries 25 to engage in some sort of major digitization</p>	<p style="text-align: right;">Page 57</p> <p>1 A. Yes. 2 Q. But in the U.S.? 3 A. Yes. 4 Q. So it would have involved digitization of 5 books in the U.S.? 6 A. Yes. 7 Q. And would that have been with permission for 8 in-copyright books? 9 A. I don't know. 10 Q. Well, at the time wasn't that your practice, 11 to get permission for in-copyright books? 12 A. Well -- 13 MR. McGOWAN: Objection. Vague. 14 You may answer. 15 THE WITNESS: Our thinking at that 16 time was that we would work on books that were 17 pre-'23. 18 In that same time period we 19 created -- we scanned all of the copyright 20 renewal records, and Dr. Lesk himself 21 personally programmed them so that they became 22 searchable so that we could look at the 23 copyright status of books that were published 24 between 1923 and 1963, and that database is 25 still available. Stanford hosts it.</p>

15 (Pages 54 - 57)

<p style="text-align: right;">Page 58</p> <p>1 BY MS. ZACK:</p> <p>2 Q. Right. That was to facilitate a potential</p> <p>3 digitization project?</p> <p>4 A. Yes.</p> <p>5 Q. So the National Science Foundation was willing</p> <p>6 to put up \$25 million for libraries to</p> <p>7 digitize. Correct?</p> <p>8 MR. McGOWAN: Objection. Asked and</p> <p>9 answered.</p> <p>10 BY MS. ZACK:</p> <p>11 Q. Correct?</p> <p>12 A. They were willing to ask Congress for</p> <p>13 \$25 million.</p> <p>14 Q. But the libraries didn't want to do the</p> <p>15 digitization?</p> <p>16 A. Correct.</p> <p>17 Q. And why was that?</p> <p>18 A. They didn't have the vision.</p> <p>19 Q. Now, with respect to the Million Book Project,</p> <p>20 do you know the total amount of funding that</p> <p>21 has been received for that project from its</p> <p>22 inception to date?</p> <p>23 A. The National Science Foundation project from</p> <p>24 the National Science Foundation?</p> <p>25 Q. No, I'm sort of changing subjects a little</p>	<p style="text-align: right;">Page 60</p> <p>1 the feasibility study, one is the Posner</p> <p>2 collection study, and one is the Million Book</p> <p>3 Project study. Is that right?</p> <p>4 A. They're not digitization efforts.</p> <p>5 Q. Well, you generally discuss in your report the</p> <p>6 feasibility study, the Posner collection</p> <p>7 study, and the Million Book project study.</p> <p>8 Correct?</p> <p>9 A. Correct.</p> <p>10 MS. ZACK: Can we mark as Exhibit</p> <p>11 PX --</p> <p>12 I guess it's 88. Correct?</p> <p>13 MR. McGOWAN: It is 88. Yes.</p> <p>14 MS. ZACK: -- an article entitled --</p> <p>15 dated January, 2005, and it's entitled</p> <p>16 Acquiring Copyright Permission to Digitize and</p> <p>17 Provide Open Access to Books, and it says from</p> <p>18 the selected works of Denise Troll Covey, 63</p> <p>19 pages</p> <p>20 MR. McGOWAN: We have that, Joanne.</p> <p>21 MS. ZACK: You have that?</p> <p>22 MR. McGOWAN: Yes.</p> <p>23 ----</p> <p>24 (Plaintiffs' Exhibit No. 88 marked for</p> <p>25 identification.)</p>
<p style="text-align: right;">Page 59</p> <p>1 bit.</p> <p>2 A. Okay.</p> <p>3 Q. Back just generally to the Million Book</p> <p>4 Project, and I'm saying from all sources, what</p> <p>5 is the total funding that has been received</p> <p>6 for that project from its inception to date?</p> <p>7 A. U.S. funding has only been from the National</p> <p>8 Science Foundation to the tune of about</p> <p>9 \$3.6 million.</p> <p>10 Q. And what about other sources of funding?</p> <p>11 A. The government of China, the government of</p> <p>12 Egypt, and the government of India each</p> <p>13 provided funding for all of the labor and all</p> <p>14 of the research that went on in their</p> <p>15 countries and the value of that was many</p> <p>16 times -- many, many, many times more than the</p> <p>17 funding provided by the National Science</p> <p>18 Foundation.</p> <p>19 Q. Has that ever been quantified?</p> <p>20 A. Yes. It's in my published works.</p> <p>21 Q. And you don't recall those numbers right now?</p> <p>22 A. No.</p> <p>23 Q. So you discuss in your report --</p> <p>24 I believe you discuss three</p> <p>25 different digitization efforts. One you call</p>	<p style="text-align: right;">Page 61</p> <p>1 ----</p> <p>2 MS. ZACK: And it's been marked?</p> <p>3 MR. McGOWAN: Correct.</p> <p>4 BY MS. ZACK:</p> <p>5 Q. Now, you cite this article in your report.</p> <p>6 Correct?</p> <p>7 A. Correct.</p> <p>8 Q. And Denise Troll Covey works for you.</p> <p>9 Correct?</p> <p>10 A. She works for Carnegie Mellon University</p> <p>11 libraries.</p> <p>12 Q. Does she report to you?</p> <p>13 A. She does.</p> <p>14 Q. And she also did so in 2005. Correct?</p> <p>15 A. Correct.</p> <p>16 Q. And then in 2005 and prior to that she was the</p> <p>17 is principal librarian for special projects at</p> <p>18 Carnegie Mellon University library?</p> <p>19 A. Yes.</p> <p>20 Q. Was she --</p> <p>21 What was her role with respect to</p> <p>22 these three studies, the feasibility study,</p> <p>23 the Posner collection study and the Million</p> <p>24 Book Project study?</p> <p>25 MR. McGOWAN: Objection. Compound.</p>

<p style="text-align: right;">Page 62</p> <p>1 You may answer.</p> <p>2 THE WITNESS: She was in charge of</p> <p>3 them.</p> <p>4 BY MS. ZACK:</p> <p>5 Q. She was in charge of all three studies?</p> <p>6 A. Yes.</p> <p>7 Q. This article which we've marked as PX 87 is a</p> <p>8 fairly comprehensive discussion and</p> <p>9 description by her of those three studies.</p> <p>10 Correct?</p> <p>11 MR. McGOWAN: I just want to note</p> <p>12 for the record, Joanne, it's 88.</p> <p>13 MS. ZACK: Oh, it's 88?</p> <p>14 MR. McGOWAN: Yes.</p> <p>15 MS. ZACK: Sorry.</p> <p>16 MR. McGOWAN: And then I'm going to</p> <p>17 object that it's vague.</p> <p>18 You may answer.</p> <p>19 THE WITNESS: It's a description of</p> <p>20 these projects.</p> <p>21 BY MS. ZACK:</p> <p>22 Q. Did you read this before it was published?</p> <p>23 A. Not that I recall.</p> <p>24 Q. Did you read it after it was published?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 64</p> <p>1 copyright law also allows digitization for</p> <p>2 preservation purposes in certain</p> <p>3 circumstances, but access to the online copy</p> <p>4 must be restricted to users physically in the</p> <p>5 library that created the digital copy.</p> <p>6 A. Yes.</p> <p>7 Q. Do you agree with that?</p> <p>8 MR. McGOWAN: Objection. Vague.</p> <p>9 You may answer.</p> <p>10 MS. ZACK: I mean do you agree with</p> <p>11 that statement.</p> <p>12 THE WITNESS: I'm reading.</p> <p>13 MR. McGOWAN: And I'll object to the</p> <p>14 extent it calls for a legal conclusion.</p> <p>15 You may answer.</p> <p>16 THE WITNESS: Yes. I agree.</p> <p>17 BY MS. ZACK:</p> <p>18 Q. The next sentence, it says to provide open</p> <p>19 access or even authenticated remote access to</p> <p>20 those digitized works requires permission from</p> <p>21 the copyright owner of each title.</p> <p>22 Do you agree with that?</p> <p>23 A. I think so.</p> <p>24 Q. The second full paragraph on this page which</p> <p>25 begins, however, on January 26, 2005 --</p>
<p style="text-align: right;">Page 63</p> <p>1 Q. Do you consider it to be accurate?</p> <p>2 A. Yes.</p> <p>3 Q. And you relied on it in your report. Correct?</p> <p>4 A. Yes.</p> <p>5 Q. And this article has, you know, quite a bit</p> <p>6 more detail than you have included in your</p> <p>7 report. Correct?</p> <p>8 A. Yes.</p> <p>9 Q. Now, if you could open, I guess -- I believe</p> <p>10 they're numbered at the top so we'll refer to</p> <p>11 the numbers at the top of the pages -- with</p> <p>12 NPXAD 8, Page 1, and it also says</p> <p>13 Introduction.</p> <p>14 A. Yes.</p> <p>15 Q. And the first paragraph of the introduction,</p> <p>16 the last sentence, it says realizing this</p> <p>17 dream -- creating a digital library that is</p> <p>18 comparable to an excellent traditional library</p> <p>19 and providing open access to it -- requires</p> <p>20 negotiating copyright permission.</p> <p>21 Do you agree with that statement?</p> <p>22 A. Yes.</p> <p>23 Q. Referring you to numbered Page 8 --</p> <p>24 A. Yes,</p> <p>25 Q. -- the first full sentence on Page 8 says</p>	<p style="text-align: right;">Page 65</p> <p>1 Do you see that?</p> <p>2 A. I do.</p> <p>3 Q. It says the U.S. Copyright Office issued a</p> <p>4 notice of inquiry regarding orphan works, and</p> <p>5 then it says further down the Copyright Office</p> <p>6 received 721 additional comments and 146</p> <p>7 replied comments.</p> <p>8 Do you know if you at Carnegie</p> <p>9 Mellon made any comments in connection with</p> <p>10 this particular legislation or call for</p> <p>11 legislation on January 6, 2005?</p> <p>12 A. Probably.</p> <p>13 Q. And you expressed the opinion that you</p> <p>14 previously testified about?</p> <p>15 A. Yes.</p> <p>16 Q. Referring you to Page 10 at the very bottom,</p> <p>17 the carry-over sentence that goes to Page 11,</p> <p>18 it says creating a digital library that is</p> <p>19 comparable to an excellent traditional library</p> <p>20 requires negotiating copyright permission to</p> <p>21 digitize and to provide open access to an</p> <p>22 array of materials.</p> <p>23 Would you agree with that?</p> <p>24 A. I'm reading.</p> <p>25 I see some kind of sequence problems</p>

17 (Pages 62 - 65)

<p style="text-align: right;">Page 66</p> <p>1 possibly in that sentence.</p> <p>2 Q. What do you mean?</p> <p>3 A. I mean that I wouldn't see that you</p> <p>4 necessarily had to seek permission before you</p> <p>5 digitized. I would see that you should --</p> <p>6 that it would be desirable for you to seek</p> <p>7 permission before you opened the text to the</p> <p>8 Web to be read in full text form.</p> <p>9 Q. But you previously testified, did you not,</p> <p>10 that you are not aware that Carnegie Mellon</p> <p>11 has ever digitized before it received</p> <p>12 permission. Correct?</p> <p>13 MR. McGOWAN: Objection. Misstates</p> <p>14 prior testimony.</p> <p>15 You may answer.</p> <p>16 THE WITNESS: Could you ask the</p> <p>17 question again, please?</p> <p>18 BY MS. ZACK:</p> <p>19 Q. I think you previously testified that you</p> <p>20 could not state that Carnegie Mellon had ever</p> <p>21 digitized a book before it received -- an</p> <p>22 in-copyright book -- before it received</p> <p>23 permission to do so.</p> <p>24 A. I don't make those kind of sequential</p> <p>25 distinctions.</p>	<p style="text-align: right;">Page 68</p> <p>1 Well, let's stop there.</p> <p>2 Q. Okay.</p> <p>3 MR. McGOWAN: I'll note for the</p> <p>4 record, and I don't know that this matters to</p> <p>5 you, Joanne, "open access" is a defined term</p> <p>6 in this paper, and I don't know if that's part</p> <p>7 of what your questions are concerning, but</p> <p>8 I'll just note it so it's clear.</p> <p>9 BY MS. ZACK:</p> <p>10 Q. Referring you to the next -- further down, the</p> <p>11 random sample feasibility study then is</p> <p>12 discussed, is that correct, on Page 11?</p> <p>13 A. Yes.</p> <p>14 Q. And it says between 1999 and 2001 the Carnegie</p> <p>15 Mellon University libraries conducted a</p> <p>16 feasibility study to determine the likelihood</p> <p>17 of publishers granting nonexclusive permission</p> <p>18 to digitize and provide surface Web access to</p> <p>19 their copyrighted books.</p> <p>20 The primary goal of the project was</p> <p>21 to develop an understanding of the process,</p> <p>22 the time it takes, and the problem</p> <p>23 encountered.</p> <p>24 We also wanted to ascertain whether</p> <p>25 different types of publishers responded</p>
<p style="text-align: right;">Page 67</p> <p>1 Q. Well, whether you do or don't, as a matter of</p> <p>2 fact, books have been digitized at Carnegie</p> <p>3 Mellon, and either permission was granted or</p> <p>4 was not granted prior to the digitization, so</p> <p>5 do you know whether it was or was not?</p> <p>6 A. I don't know.</p> <p>7 Q. The first full sentence on the top of Page 11</p> <p>8 says given the cost of acquiring and storing</p> <p>9 redundant library collections, it behooves</p> <p>10 libraries to explore the possibility of</p> <p>11 acquiring permission to digitize and provide</p> <p>12 open access to different kinds of materials.</p> <p>13 Did you agree with that in 2005?</p> <p>14 A. Well, I didn't read this before she published</p> <p>15 it.</p> <p>16 Q. But you said you read it after she published</p> <p>17 it.</p> <p>18 A. Yeah, recently I read it.</p> <p>19 Q. Did you read it shortly after she published</p> <p>20 it?</p> <p>21 A. No.</p> <p>22 Q. Do you agree with that sentence today?</p> <p>23 A. I believe that libraries must try to seek</p> <p>24 permission in some form. There's more than</p> <p>25 one way to do that, and I'm --</p>	<p style="text-align: right;">Page 69</p> <p>1 differently and whether they responded</p> <p>2 differently on the basis of the type or print</p> <p>3 status of their publications.</p> <p>4 So is that an accurate description</p> <p>5 of the random sample feasibility study's</p> <p>6 purposes?</p> <p>7 A. Yes.</p> <p>8 Q. Was this a study that you participated in</p> <p>9 designing?</p> <p>10 A. Yes.</p> <p>11 Q. And this study took place between 1999 and</p> <p>12 2001. Correct?</p> <p>13 A. Yes.</p> <p>14 Q. And on Page 12, the first paragraph, last</p> <p>15 sentence, it says in PX 88 the final sample</p> <p>16 for which we were seeking copyright permission</p> <p>17 included 277 titles published by 209</p> <p>18 publishers.</p> <p>19 Is that right?</p> <p>20 A. Yes.</p> <p>21 Q. Your overall results on Page 13 talks about</p> <p>22 the various results of this feasibility study</p> <p>23 conducted between 1999 and 2001. Correct?</p> <p>24 A. Yes.</p> <p>25 Q. And you said you've recently read this</p>

<p style="text-align: right;">Page 70</p> <p>1 publication?</p> <p>2 A. Yes.</p> <p>3 Q. And you've cited it in your report fairly</p> <p>4 extensively. Correct?</p> <p>5 A. Correct.</p> <p>6 Q. Is there anything in these overall results</p> <p>7 that you think is inaccurate?</p> <p>8 A. I don't recall that I had -- that there was</p> <p>9 anything that I thought was particularly</p> <p>10 inaccurate. I thought some of the figures</p> <p>11 were designed in a way that was confusing.</p> <p>12 Q. Well, whether it was confusing, did you still</p> <p>13 consider it accurate?</p> <p>14 A. Yes.</p> <p>15 Q. Now, on Page 21 there begins a discussion in</p> <p>16 PX 88, the fine and rare book study. Is that</p> <p>17 the same as the Posner study?</p> <p>18 A. "Posner."</p> <p>19 Q. "Posner." Excuse me.</p> <p>20 A. Yes.</p> <p>21 Q. And that was commenced in 2001?</p> <p>22 A. Yes.</p> <p>23 Q. Do you know when that ceased? It says 2004 on</p> <p>24 Page 21, so does that sound right?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 72</p> <p>1 Q. Did you personally participate in attempting</p> <p>2 to get copyright permissions in connection</p> <p>3 with either the feasibility study or the</p> <p>4 Posner study?</p> <p>5 A. Yes.</p> <p>6 Q. How much time did you spend on that?</p> <p>7 A. Whatever is recorded on the cost sheets.</p> <p>8 Q. On the what? I'm sorry.</p> <p>9 A. On the cost sheets.</p> <p>10 Q. Did you personally speak to publishers?</p> <p>11 A. I personally spoke to the employees of</p> <p>12 publishers.</p> <p>13 Q. One of the statements in this article, PX 88,</p> <p>14 is that university presses were less likely to</p> <p>15 give permission than some other types of</p> <p>16 publishers. Do you recall that?</p> <p>17 MR. McGOWAN: Can you direct us to</p> <p>18 where you are referring to, Joanne?</p> <p>19 MS. ZACK: Sure.</p> <p>20 MR. McGOWAN: Thank you.</p> <p>21 MS. ZACK: Okay. If you look at</p> <p>22 Page 31, which is at the end of the section</p> <p>23 called Analysis by Publisher Type, it says</p> <p>24 more than half of the commercial publishers</p> <p>25 granted permission.</p>
<p style="text-align: right;">Page 71</p> <p>1 Q. And the bottom paragraph on Page 21, it says</p> <p>2 we knew that the selection, referring to the</p> <p>3 Posner collection, or "Posner" collection --</p> <p>4 Right?</p> <p>5 A. No, "Posner."</p> <p>6 Q. Now I'm confused.</p> <p>7 We knew that the collection</p> <p>8 contained some copyrighted titles and</p> <p>9 therefore that the project entailed acquiring</p> <p>10 copyright permission.</p> <p>11 The Posner project, which took place</p> <p>12 between 2001 and 2004, became our second</p> <p>13 copyright-permission study.</p> <p>14 Is that an accurate description of</p> <p>15 the study?</p> <p>16 A. It is.</p> <p>17 Q. It was a copyright permission study?</p> <p>18 A. Yes.</p> <p>19 Q. And again did you find in reading this in</p> <p>20 connection with your report anything that you</p> <p>21 considered inaccurate?</p> <p>22 A. I think there are some phrases that are not</p> <p>23 the phases I would have used.</p> <p>24 Q. Yes, but is there anything that's inaccurate?</p> <p>25 A. Not that I observed.</p>	<p style="text-align: right;">Page 73</p> <p>1 University presses were the least</p> <p>2 likely to grant permission.</p> <p>3 Do you see that?</p> <p>4 THE WITNESS: In the Posner study?</p> <p>5 BY MS. ZACK:</p> <p>6 Q. Uh-huh.</p> <p>7 A. I haven't found this yet.</p> <p>8 Q. It's on Page 31.</p> <p>9 A. Oh, here it is. Yes. So that's about the</p> <p>10 Posner study.</p> <p>11 Q. Correct.</p> <p>12 A. Yes. That was what Denise concluded.</p> <p>13 Q. Do you disagree with that?</p> <p>14 A. No.</p> <p>15 Q. Did you have any view about why that was the</p> <p>16 case?</p> <p>17 A. Well, the Posner collection is a fine and rare</p> <p>18 book collection, so there weren't very many</p> <p>19 university presses' titles in it, and it was</p> <p>20 such a relatively small --</p> <p>21 It wasn't a random sample. It was a</p> <p>22 collection. It was a quirk.</p> <p>23 Q. You think it was just a quirk?</p> <p>24 A. Yes.</p> <p>25 MR. McGOWAN: Joanne, when it's</p>

<p style="text-align: right;">Page 74</p> <p>1 convenient, I think we could use a break on 2 this end. 3 MS. ZACK: All right. Just give me 4 one second to follow up and finish off this 5 one. 6 MR. McGOWAN: Sure. 7 MS. ZACK: All right. Well, let's 8 take a break now. How long do you want to 9 take? 10 MR. McGOWAN: Can we do lunch right 11 now? 12 MS. ZACK: You want to do lunch? 13 MR. McGOWAN: Yes. Well, it's 14 twelve. Let's go off the record and we can 15 talk about it. 16 ---- 17 (There was a discussion off the record for lunch.) 18 ---- 19 BY MS. ZACK: 20 Q. Before the break I had asked you about the 21 university presses and specifically about the 22 Posner study, and I just wanted you to take a 23 look at Page 46 of PX 88, which is the article 24 requiring copyright permission. 25 A. Okay.</p>	<p style="text-align: right;">Page 76</p> <p>1 university press books involved and that it 2 was just a quirk that university presses were 3 the least likely to get permission. Correct? 4 A. I did say that. 5 Q. Okay, but it appears that that was true also 6 with the Million Book Project. Do you have 7 any explanation for that? 8 A. No. 9 Q. Referring you back to Page 24, PX 88, it would 10 be the acquiring copyright permission article 11 we have been discussing. 12 A. 24? 13 Q. 24. 14 A. Okay. Yes. 15 Q. This is again relating back to the Posner 16 study. 17 A. Okay. 18 Q. The last sentence of the next-to-the-last 19 paragraph says by the conclusion of the study 20 we determined that these 284 copyrighted works 21 were owned by 104 different copyright-owners. 22 Do you see that? 23 A. Yes. 24 Q. So the Posner study then examines Carnegie 25 Mellon's ability to get permission for these</p>
<p style="text-align: right;">Page 75</p> <p>1 Q. At the top of the page the sentence begins as 2 in the Posner study -- 3 Do you see that? 4 A. Yes. 5 Q. -- special publishers, authors -- 6 ---- 7 (There was a discussion off the record.) 8 ---- 9 BY MS. ZACK: 10 Q. I'm referring to Page 46 -- 11 A. Yes. 12 Q. -- of PX 88. 13 At the top is a sentence that says 14 as in the Posner study, special publishers, 15 authors, and estates and scholarly 16 associations were the most likely to grant 17 permission. University presses were the least 18 likely. 19 Do you see that? 20 A. I do. 21 Q. And that's in connection with the Million Book 22 Project. Correct? 23 A. Correct. 24 Q. You had previously said that you thought on 25 the Posner study there weren't enough</p>	<p style="text-align: right;">Page 77</p> <p>1 284 copyrighted works. Is that correct? 2 A. Yes. 3 Q. On Page 27 and 28, the -- 4 There's a heading Overall Result on 5 Page 26, and on Page 27 and then carrying over 6 to Page 28 there's a couple paragraphs talking 7 about the result of the study. It says -- 8 Do you see the paragraph that says 9 to better understand the outcome? 10 A. I do. 11 Q. To better understand the outcome of our 12 efforts, we must look strictly at the 13 publishers we located. 14 Of those we contacted, almost all 15 responded and most granted permission. As 16 shown in Figure 11, the permissions granted 17 enabled us to digitize and provide Web access 18 to 71 percent of the copyrighted titles 19 published by those we contacted. 20 Do you have any disagreement with 21 that as a matter of fact? 22 A. No. 23 Q. Page 28 at the top it says looking only at the 24 publishers with which we have completed 25 negotiations and the titles in the Posner</p>

<p style="text-align: right;">Page 78</p> <p>1 collection to which they hold copyright, the</p> <p>2 overall success rate was 70 percent, granting</p> <p>3 permission for 75 percent of the titles</p> <p>4 published by those that responded</p> <p>5 So that's correct?</p> <p>6 A. Yes.</p> <p>7 Q. So for those titles I take it they were then</p> <p>8 digitized and made available on the Web.</p> <p>9 Right?</p> <p>10 A. They were digitized and you can get to them</p> <p>11 from the Web.</p> <p>12 Q. And that was as a result of permission</p> <p>13 received from the publishers. Correct?</p> <p>14 A. Correct.</p> <p>15 Q. On Page 33 of PX 88 --</p> <p>16 A. My pages are kind of shuffled, ma'am, so it</p> <p>17 may take me a minute to try to find it --</p> <p>18 I have it now.</p> <p>19 Q. -- there's a couple bullet points in the</p> <p>20 middle of the page.</p> <p>21 Do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. Referring you to the first one, it says</p> <p>24 publishers of older material in the Posner</p> <p>25 collection were not conspicuously more</p>	<p style="text-align: right;">Page 80</p> <p>1 letter to prompt follow-up by E-mail or</p> <p>2 telephone and to the publishers' ability to</p> <p>3 see the quality of the digitized books in the</p> <p>4 Posner collection on the Web.</p> <p>5 A. Yes.</p> <p>6 Q. Do you agree with that?</p> <p>7 A. I do.</p> <p>8 Q. Further down is a paragraph that begins the</p> <p>9 Posner project confirmed our belief that it is</p> <p>10 possible to secure copyright permission to</p> <p>11 digitize books and to provide open access to</p> <p>12 them on the Web.</p> <p>13 Do you agree with that?</p> <p>14 A. Yes.</p> <p>15 MR. McGOWAN: I'll object just for</p> <p>16 rule of completeness' sake to the cherry-</p> <p>17 picking element, but I'll note that for the</p> <p>18 record.</p> <p>19 BY MS. ZACK:</p> <p>20 Q. It says it also confirmed what we had learned</p> <p>21 in the feasibility study about how difficult</p> <p>22 and time-consuming it is to determine</p> <p>23 copyright status and to identify and locate</p> <p>24 copyright-holders, particularly authors and</p> <p>25 estates.</p>
<p style="text-align: right;">Page 79</p> <p>1 difficult to locate than were publishers of</p> <p>2 more recent material.</p> <p>3 More diligence and persistence were</p> <p>4 expended on locating and following up with</p> <p>5 publishers in the Posner study than in the</p> <p>6 feasibility study; consequently, more</p> <p>7 publishers were found and more of them</p> <p>8 responded than in the feasibility study.</p> <p>9 Do you agree with that?</p> <p>10 A. Yes.</p> <p>11 Q. And that is more diligence and persistence</p> <p>12 were expended by personnel at Carnegie</p> <p>13 Mellon. Correct?</p> <p>14 A. Yes.</p> <p>15 Q. On Page 5, there's a heading Conclusions and</p> <p>16 Lessons Learned. It says although we located</p> <p>17 fewer of the publishers of copyrighted content</p> <p>18 in the Posner project than in the feasibility</p> <p>19 study, we greatly increased the response and</p> <p>20 success rates during the Posner study.</p> <p>21 Is that true?</p> <p>22 A. Yes.</p> <p>23 Q. And further down the page it says we</p> <p>24 attributed the increased success in the Posner</p> <p>25 project to a more informative initial request</p>	<p style="text-align: right;">Page 81</p> <p>1 However, by dedicating personnel and</p> <p>2 adjusting our processes, we significantly</p> <p>3 reduced the cost per title for which</p> <p>4 permission was granted.</p> <p>5 Further adjustments to our work flow</p> <p>6 or refinements to our negotiation strategies</p> <p>7 would yield even greater cost savings.</p> <p>8 Do you agree with that?</p> <p>9 A. It says "could," not "would," and yes, I</p> <p>10 agree.</p> <p>11 Q. Then on Page 38 of PX 88 it begins a</p> <p>12 discussion of the Million Book Project study.</p> <p>13 Correct?</p> <p>14 A. Correct.</p> <p>15 Q. You had partners in China and India. Did you</p> <p>16 have any U.S. partners in this Million Book</p> <p>17 Project?</p> <p>18 A. Kind of.</p> <p>19 Q. Yes? Who were they?</p> <p>20 A. Well, certainly Brewster Kahle was our partner</p> <p>21 for quite a long time. I went and gave a talk</p> <p>22 at Hopkins, and they talked to us about it.</p> <p>23 At various points --</p> <p>24 We had communications with Cornell</p> <p>25 at various points. We had dealings with the</p>

<p style="text-align: right;">Page 82</p> <p>1 University of Merced as they were building 2 their collection -- the University of 3 California at Merced. 4 Q. Any others? 5 A. I think the University of Washington helped us 6 out and traveled with us at one point. 7 Oregon State University did part of 8 a project that was under the umbrella of the 9 Million Book Project. 10 Q. Anyone else? 11 A. Not that I recall. 12 Q. What was Brewster Kahle's involvement in the 13 Million Book Project? 14 A. Brewster Kahle actually believed that he had 15 thought up the idea of the Million Book 16 Project, and he was very actively involved 17 with the library at Alexandria. 18 He traveled with us in our trip to 19 India and -- in our first trip to India and in 20 our first trip to China. 21 Q. Yes, and did he participate in negotiations 22 with your partners there? 23 A. At Alexandria, certainly. Yes, he did. When 24 we had partner meetings, he attended. 25 Q. Was he considered a partner?</p>	<p style="text-align: right;">Page 84</p> <p>1 partner and you said yes. 2 A. I misspoke. 3 Q. So you're saying now you're not sure whether 4 he is or isn't a partner currently? 5 A. From the perspective of the universal digital 6 library directors he is still a partner. 7 Q. And has he ever expressed anything to the 8 opposite? 9 A. I don't know. 10 Q. Does he attend partner meetings? 11 A. One of his staff attended a partner meeting 12 that was held in Pittsburgh. 13 Q. Recently? 14 A. Perhaps five years ago. 15 Q. Okay. So since that meeting five years ago 16 has he or any of his representatives attended 17 any meetings of the Million Book Project 18 partners? 19 A. Him, I don't know. 20 Q. Do you keep minutes of that group -- 21 A. No. 22 Q. -- of the meetings? 23 A. No. 24 Q. Have you discussed with him the Million Book 25 Project in the last five years?</p>
<p style="text-align: right;">Page 83</p> <p>1 A. Yes, at the beginning of the project. 2 Q. And did he cease to be a partner at some 3 point? 4 A. Yes. 5 Q. When was that? 6 A. At some point he didn't think we were doing 7 things quickly enough, and so he founded a 8 group called the Open Content Alliance and 9 pulled together a partnership with Microsoft 10 in order to have control of his own project. 11 Q. So when he founded the Open Contents Alliance 12 , did he cease to be a partner with the 13 Million Book Project? 14 A. No, not from our perspective. 15 Q. When did he cease to be a partner? 16 MR. MCGOWAN: I think that misstates 17 the answer. 18 BY MS. ZACK: 19 Q. Oh. Did he ever cease to be a partner from 20 your perspective? 21 A. No. 22 Q. From his perspective did he cease to be a 23 partner? 24 A. I don't know. 25 Q. I previously asked you did he cease to be a</p>	<p style="text-align: right;">Page 85</p> <p>1 A. No. Well, five years. When would that be? 2 2007? 3 Q. Well, at the time that he -- 4 From the time he began Open Contents 5 Alliance, have you discussed the Million Book 6 Project with him? 7 A. Yes. 8 Q. And in more recent years, say from 2007 on, 9 have you discussed it with him? 10 A. When we met here in Pittsburgh and he sent a 11 representative, who to my recollection did not 12 attend the partner meeting, that was our last 13 kind of quasiformal contact with him. 14 Dr. Reddy is often in San Francisco, 15 and I don't know what other discussions they 16 may have had. 17 Q. Now, you said that Brewster Kahle believed he 18 had thought up the idea for the Million Book 19 Project? 20 A. Yes. 21 Q. Had he thought up the idea? 22 A. Probably. 23 Q. And when he expressed that he didn't think you 24 were moving quickly enough, what did he want 25 you to do to move quicker?</p>

<p style="text-align: right;">Page 86</p> <p>1 A. He wanted to have all of our books to load 2 into the Internet archive more quickly. 3 Q. When you say "our books," you're talking about 4 the Million Book Project books? 5 A. Yes, the project in India and the project in 6 China. 7 Q. And from your perspective why was it taking so 8 long to load books into the Internet archive? 9 A. We had originally anticipated that we would 10 use file transfer protocol to move books 11 around, but in the end the network in India 12 was not robust enough to accomplish that. 13 Q. Any other reasons? 14 A. Well, I think there were also political 15 reasons. Our memoranda of understanding 16 required the partners to share books with each 17 other, to share digital copies of books with 18 each other, but in practice we were very 19 surprised to find out that the librarians and 20 to an extent the computer scientists in those 21 countries didn't want to share. 22 Q. You're talking about in India and in China? 23 A. Yes. 24 Q. Now, with respect to these other U.S. partners 25 in the Million Book Project you named,</p>	<p style="text-align: right;">Page 88</p> <p>1 the early 2000s from embarking on a 2 digitization project even though the National 3 Science Foundation had offered significant 4 funding. Is that right? 5 A. In 1999. 6 Q. Right. 1999 that happened. Right? 7 A. Yes. 8 Q. And I assume since 1999 there has been a 9 change in librarians' views about 10 digitization. 11 A. Yes. 12 Q. A fairly significant change? 13 A. Yes. 14 Q. Not just at Carnegie Mellon but all over the 15 country. Right? 16 A. Yes. 17 Q. And has any consortium of libraries, to your 18 knowledge, attempted to go back to the 19 National Science Foundation and get funding 20 for a digitization project? 21 A. No. 22 Q. And why not? 23 MR. McGOWAN: Well, I'm going to 24 object. 25 MS. ZACK: To your knowledge. I'm</p>
<p style="text-align: right;">Page 87</p> <p>1 Hopkins, Cornell, University of California at 2 Merced, University of Washington, Oregon 3 State, did they digitize any books for you? 4 A. No. 5 Q. What types of things did they do? 6 A. Well, sometimes they traveled and attended 7 strategy meetings with us, and sometimes they 8 loaned books to the project, loaned physical 9 books to the project. 10 Q. And were those books then sent out of the U.S. 11 to be copied? 12 A. Yes. 13 Q. Why didn't you copy them here? 14 A. It was too expensive. 15 Q. I -- 16 MR. McGOWAN: I think you guys may 17 have talked over each other. 18 BY MS. ZACK: 19 Q. I'm sorry. My question, I didn't know if it 20 was clear. Why were they not copied in the 21 U.S.? 22 A. My answer was it was too expensive. 23 Q. I see. 24 Now, you mentioned earlier that lack 25 of vision had prevented various libraries in</p>	<p style="text-align: right;">Page 89</p> <p>1 only asking for what you know. 2 MR. McGOWAN: I'm going to object to 3 this intrinsically. Very compound and calls 4 for speculation, but you may answer. 5 THE WITNESS: I only know of two 6 librarians who have gotten funding from the 7 National Science Foundation. I'm one of them, 8 and Michael -- what's his name -- who's the 9 director of the libraries at Stanford is the 10 other. 11 BY MS. ZACK: 12 Q. Do you know of others who have tried to get 13 funding? 14 A. Yes. 15 Q. And have been turned down? 16 A. Yes. 17 Q. Do you know of any consortium of university 18 libraries that has attempted to get National 19 Science Foundation funding for book 20 digitization and has been turned down? 21 A. No. 22 Q. Have you attempted to put together a 23 consortium -- 24 A. No. 25 Q. -- in more recent years?</p>

<p style="text-align: right;">Page 90</p> <p>1 A. No.</p> <p>2 Q. And surely that's crossed your mind. Right?</p> <p>3 A. No.</p> <p>4 Q. Why not?</p> <p>5 A. Well, I had my own consortium. I had the</p> <p>6 Million Book Project.</p> <p>7 Q. Right. You didn't think you could start</p> <p>8 another project?</p> <p>9 A. Not while I was doing the Million Book</p> <p>10 Project.</p> <p>11 Q. Referring you back to PX 88 beginning at</p> <p>12 Page 38, the Million Book Project study is</p> <p>13 discussed. I assume you've read this</p> <p>14 recently. Correct?</p> <p>15 A. Yes.</p> <p>16 Q. Did you find anything you considered to be</p> <p>17 inaccurate as a matter of fact?</p> <p>18 A. No.</p> <p>19 Q. From my understanding from reading this, a</p> <p>20 decision was made to approach publishers to</p> <p>21 get permission for large amounts of their</p> <p>22 books. Correct?</p> <p>23 A. Yes.</p> <p>24 Q. Because that would be more efficient. Is that</p> <p>25 right?</p>	<p style="text-align: right;">Page 92</p> <p>1 A. Yes.</p> <p>2 Q. And on Page 54, first full paragraph, it says</p> <p>3 while the experiment demonstrated that the</p> <p>4 Authors Registry is a cost-effective way to</p> <p>5 locate authors, the benefit of contacting</p> <p>6 authors or their estates for the Million Book</p> <p>7 Project was quite small.</p> <p>8 Do you agree with that?</p> <p>9 A. Yes.</p> <p>10 Q. Outside the Million Book Project have you ever</p> <p>11 at Carnegie Mellon used the Authors Registry</p> <p>12 to locate authors?</p> <p>13 A. Outside of the work that's reported in</p> <p>14 acquiring copyright?</p> <p>15 Q. For the Million Book Project.</p> <p>16 A. For the Million Book Project?</p> <p>17 Q. Outside of what you did with the Million Book</p> <p>18 Project, have you ever used the Authors</p> <p>19 Registry as a way to contact authors for other</p> <p>20 permissions?</p> <p>21 A. I think we might have used it in the Posner</p> <p>22 project permissions.</p> <p>23 Q. Have you used other agencies to get author</p> <p>24 permissions?</p> <p>25 A. No.</p>
<p style="text-align: right;">Page 91</p> <p>1 A. Yes.</p> <p>2 Q. On Page 42 there's a heading that says</p> <p>3 Tracking the Data.</p> <p>4 A. Yes.</p> <p>5 Q. Above there is a sentence that says the data</p> <p>6 analyses in this report are based on the 364</p> <p>7 publishers with which we sought to close</p> <p>8 negotiations.</p> <p>9 A. Yes.</p> <p>10 Q. Does that mean that in the Million Book</p> <p>11 Project with respect to in-copyright books the</p> <p>12 various partners sought to negotiate</p> <p>13 permission from 364 publishers for as many</p> <p>14 books as you could get them to agree to?</p> <p>15 MR. McGOWAN: Objection. Vague.</p> <p>16 You may answer.</p> <p>17 THE WITNESS: Yes.</p> <p>18 BY MS. ZACK:</p> <p>19 Q. Referring you on Page 46 --</p> <p>20 Forget that. Sorry. We already</p> <p>21 went over that.</p> <p>22 On Page 53 at the bottom of the page</p> <p>23 it talks about contacting the Authors Registry</p> <p>24 in an attempt to get permission directly from</p> <p>25 authors for some books.</p>	<p style="text-align: right;">Page 93</p> <p>1 Q. Are you aware that there are many freelance</p> <p>2 independent contractor people who deal in</p> <p>3 getting permissions for copyrights?</p> <p>4 MR. McGOWAN: Objection. Lacks</p> <p>5 foundation.</p> <p>6 You may answer.</p> <p>7 THE WITNESS: No.</p> <p>8 BY MS. ZACK:</p> <p>9 Q. At the bottom of Page 54 is a heading</p> <p>10 Conclusions and Lessons Learned.</p> <p>11 A. Yes.</p> <p>12 Q. And near the bottom of the page there's a</p> <p>13 sentence not counting the publishers we</p> <p>14 abandoned early in the project --</p> <p>15 Do you see that?</p> <p>16 A. I do.</p> <p>17 Q. -- almost all of the publishers we contacted</p> <p>18 in the MBP responded to our request.</p> <p>19 Is that correct?</p> <p>20 A. Yes.</p> <p>21 Q. In the middle of Page 55 there's a paragraph</p> <p>22 that starts Figure 24 --</p> <p>23 Do you see that?</p> <p>24 A. I do.</p> <p>25 Q. -- suggests that the Posner study is our most</p>

<p style="text-align: right;">Page 94</p> <p>1 successful project to date in terms of</p> <p>2 response and success rates. However, the</p> <p>3 transaction costs per title for permissions</p> <p>4 granted in the Posner study, though</p> <p>5 significantly better than the feasibility</p> <p>6 study, is far too high to pursue on a large</p> <p>7 scale.</p> <p>8 Despite the lower overall success</p> <p>9 rate, the per-publisher approach taken in the</p> <p>10 MBP garnered permission for significantly more</p> <p>11 titles at less cost than the per-title</p> <p>12 approach of the previous projects.</p> <p>13 Do you agree with that?</p> <p>14 A. I do.</p> <p>15 Q. And that per-title -- or that per-publisher</p> <p>16 approach ended up with you, Carnegie Mellon or</p> <p>17 the Million Book Project, obtaining permission</p> <p>18 for 52,900 titles. Right?</p> <p>19 A. Right.</p> <p>20 Q. And there is a chart in the middle of Page 55</p> <p>21 that compares the various studies, the</p> <p>22 feasibility, the Posner, the Million Book</p> <p>23 studies, and various costs and success rates.</p> <p>24 Correct?</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 96</p> <p>1 transaction costs from the feasibility study</p> <p>2 to the Million Book study. Right?</p> <p>3 A. Yes.</p> <p>4 Q. Referring you to Page 57 --</p> <p>5 A. Yes.</p> <p>6 Q. -- at the very bottom of the page it says the</p> <p>7 MBP, meaning the Million Book Project,</p> <p>8 confirmed that dedicated personnel,</p> <p>9 experimentation, and flexibility are critical</p> <p>10 to success in acquiring copyright permission</p> <p>11 to digitize and provide open access to books.</p> <p>12 Do you agree with that?</p> <p>13 A. Yes.</p> <p>14 Q. Then it says adapting strategies and adjusting</p> <p>15 processes to accommodate what we learn day-to-</p> <p>16 day could further improve the results of our</p> <p>17 efforts.</p> <p>18 Do you agree with that?</p> <p>19 A. Yes.</p> <p>20 Q. Again we need to develop a better way to</p> <p>21 manage the data and routinely calculate</p> <p>22 statistics. More sophisticated ongoing</p> <p>23 analyses might expose trends that could be</p> <p>24 leveraged during the project to reduce the</p> <p>25 cost and increase the success of seeking</p>
<p style="text-align: right;">Page 95</p> <p>1 Q. And the feasibility study, 209 publishers were</p> <p>2 attempted to be contacted. Correct?</p> <p>3 A. Yes.</p> <p>4 Q. And as a result of that, permission for only</p> <p>5 66 titles was granted?</p> <p>6 A. Yes.</p> <p>7 Q. At a transaction cost of \$200 per title?</p> <p>8 A. That was a partial cost.</p> <p>9 Q. That's an estimated partial cost. Correct?</p> <p>10 A. Yes.</p> <p>11 Q. For the Posner study there were 104 publishers</p> <p>12 sought to be contacted, and as a result</p> <p>13 permission was granted for 178 books at a</p> <p>14 transaction cost per title granted of \$78 per</p> <p>15 book. Is that right?</p> <p>16 A. Yes.</p> <p>17 Q. And then for the million books project there</p> <p>18 were 364 publishers attempted to be contacted</p> <p>19 ending up in permissions granted for 52,900</p> <p>20 books at a transaction cost per title granted</p> <p>21 at 69 cents per title. Correct?</p> <p>22 A. That was a partial cost.</p> <p>23 Q. They were all partial costs. Correct?</p> <p>24 A. Yes.</p> <p>25 Q. So there was a tremendous difference in the</p>	<p style="text-align: right;">Page 97</p> <p>1 copyright permission for open access.</p> <p>2 A. Yes.</p> <p>3 Q. This article was written in 2005. Has a</p> <p>4 similar article with updated statistics been</p> <p>5 published since then?</p> <p>6 A. Not to my knowledge.</p> <p>7 Q. Are you intending to do that or is someone at</p> <p>8 Carnegie Mellon intending to do that?</p> <p>9 A. As far as I know, we don't have it on our</p> <p>10 list.</p> <p>11 Q. Again on Page 58 under looking ahead, there's</p> <p>12 a discussion about meetings between I take it</p> <p>13 the Million Book Project personnel and</p> <p>14 Carnegie Mellon legal counsel.</p> <p>15 Do you see that?</p> <p>16 A. No.</p> <p>17 Q. It says initial meetings with Carnegie Mellon</p> <p>18 legal counsel in October of 2002 led to the</p> <p>19 preparation --</p> <p>20 See that?</p> <p>21 A. Yes.</p> <p>22 Q. There's a sentence that says the understanding</p> <p>23 was that if we designed and followed a</p> <p>24 rigorous work flow approved by legal counsel</p> <p>25 and documented our efforts, then we could</p>

<p style="text-align: right;">Page 98</p> <p>1 digitize and provide Web access to books</p> <p>2 without permission under certain conditions</p> <p>3 (for example, if the publisher had gone out of</p> <p>4 business or we could not ascertain who owned</p> <p>5 the copyright to a work).</p> <p>6 We agreed that if we digitized a</p> <p>7 book and made it Web-accessible without</p> <p>8 permission and the copyright owner then</p> <p>9 contacted us, we would remove that book from</p> <p>10 the Web at the owner's request.</p> <p>11 However, in May, 2003, university</p> <p>12 legal counsel changed their minds and took a</p> <p>13 more conservative approach; no permission, no</p> <p>14 digitization and access. They are now</p> <p>15 reconsidering this decision.</p> <p>16 To your knowledge, has that decision</p> <p>17 made in May, 2003, been changed?</p> <p>18 A. No.</p> <p>19 Q. So the current status is no permission, no</p> <p>20 digitization and access?</p> <p>21 A. Yes.</p> <p>22 Q. The last paragraph on Page 58 says invited by</p> <p>23 the OITP, which apparently stands for the</p> <p>24 American Library Association Office of</p> <p>25 Information Technology Policy --</p>	<p style="text-align: right;">Page 100</p> <p>1 We all agreed that though the</p> <p>2 per-publisher approach of the MBP is</p> <p>3 consistent with the vision of the Universal</p> <p>4 Library Project, the approach is artificial in</p> <p>5 terms of what libraries typically do in</p> <p>6 regards to digitizing collections.</p> <p>7 Were you part of that agreement?</p> <p>8 A. No.</p> <p>9 Q. So were you aware that the ALA OITP lobbyists</p> <p>10 did not want you to argue to Congress based on</p> <p>11 the transaction cost of 69 cents per title</p> <p>12 that had been achieved in the Million Book</p> <p>13 Project?</p> <p>14 MR. McGOWAN: Objection. Misstates</p> <p>15 the document.</p> <p>16 You may answer.</p> <p>17 MS. ZACK: I asked whether she was</p> <p>18 aware of it.</p> <p>19 MR. McGOWAN: That's not what the</p> <p>20 statement was. It's still been misstated.</p> <p>21 You may answer.</p> <p>22 THE WITNESS: I don't know what the</p> <p>23 question is, so I don't know how to answer.</p> <p>24 BY MS. ZACK:</p> <p>25 Q. Denise Troll --</p>
<p style="text-align: right;">Page 99</p> <p>1 Correct?</p> <p>2 A. Yes.</p> <p>3 Q. And the American Library Association is a</p> <p>4 trade association for libraries. Is that</p> <p>5 right?</p> <p>6 A. Yes.</p> <p>7 Q. And the OITP is an arm of the ALA. Is that</p> <p>8 correct?</p> <p>9 A. Yes.</p> <p>10 Q. It says invited by the OITP, I presented the</p> <p>11 results of Carnegie Mellon's copyright</p> <p>12 permission research to ALA congressional</p> <p>13 lobbyists in November, 2004.</p> <p>14 Did you participate in that?</p> <p>15 A. No.</p> <p>16 Q. The lobbyists responded that the per-publisher</p> <p>17 approach used in the MBP which reduced the</p> <p>18 transaction cost to 69 cents per title would</p> <p>19 not persuade Congress that acquiring copyright</p> <p>20 permission is prohibitively expensive under</p> <p>21 the current copyright regime.</p> <p>22 The transaction cost of the</p> <p>23 per-title approach taken in the Posner</p> <p>24 project, \$78 per book, is more likely to be</p> <p>25 persuasive and yield changes in public policy.</p>	<p style="text-align: right;">Page 101</p> <p>1 This paragraph says that I, meaning</p> <p>2 Denise Troll Covey, presented the results to</p> <p>3 this ALA group.</p> <p>4 Did she ever report back to you</p> <p>5 about this discussion that she had?</p> <p>6 A. Probably.</p> <p>7 Q. I'm sorry?</p> <p>8 A. Probably.</p> <p>9 Q. You don't have any recollection of it?</p> <p>10 A. No.</p> <p>11 Q. Did you participate in strategy discussions</p> <p>12 about the best way to persuade Congress to</p> <p>13 change copyright laws?</p> <p>14 A. Yes.</p> <p>15 Q. And as part of those strategy discussions did</p> <p>16 you discuss whether or not the transaction</p> <p>17 costs of the Million Book Project should be</p> <p>18 highlighted or not?</p> <p>19 A. I don't recall.</p> <p>20 Q. Well, is there some reason why in your report</p> <p>21 filed in this case you never mentioned the 69</p> <p>22 percent per-title transaction cost?</p> <p>23 MR. McGOWAN: Objection.</p> <p>24 Argumentative. Percent is incorrect.</p> <p>25 You may answer,</p>

<p style="text-align: right;">Page 102</p> <p>1 THE WITNESS: But the cost sheets --</p> <p>2 We did provide cost sheets as part</p> <p>3 of our report. Right?</p> <p>4 BY MS. ZACK:</p> <p>5 Q. Well, your report, Pages 1 through 15, does</p> <p>6 not mention a 69 cent transaction cost.</p> <p>7 A. Correct.</p> <p>8 Q. Is there some reason why you left that out?</p> <p>9 A. Advice of counsel.</p> <p>10 Q. Are you talking about Durie Tangri?</p> <p>11 A. I'm not certain why we left it out.</p> <p>12 Q. There's some discussion in here about why it's</p> <p>13 inefficient to seek permission for publishers</p> <p>14 across all books, and can you explain to me</p> <p>15 why based on the Million Book Project it's</p> <p>16 more efficient to seek permission from a</p> <p>17 publisher for all his books why you wouldn't</p> <p>18 continue to do that?</p> <p>19 MR. McGOWAN: Objection. Vague.</p> <p>20 You may answer if you followed that.</p> <p>21 THE WITNESS: We are not engaged in</p> <p>22 any digitization project in the U.S.</p> <p>23 BY MS. ZACK:</p> <p>24 Q. So since the publishing of this article in</p> <p>25 2005 you have not since then sought to obtain</p>	<p style="text-align: right;">Page 104</p> <p>1 study, and the feasibility study? Why is the</p> <p>2 feasibility study the most statistically</p> <p>3 reliable?</p> <p>4 A. It was a random sampling of the books in the</p> <p>5 Carnegie Mellon University library's</p> <p>6 collection.</p> <p>7 Q. A random sample of --</p> <p>8 A. The titles.</p> <p>9 Q. It was a random sample of 277 works.</p> <p>10 A. Correct.</p> <p>11 Q. And you consider that statistically reliable?</p> <p>12 A. The statisticians at Carnegie Mellon</p> <p>13 University advised us that it was</p> <p>14 statistically reliable.</p> <p>15 Q. Based on that study which was conducted in the</p> <p>16 period of time of what, 2001 to 2002?</p> <p>17 A. Yes.</p> <p>18 Q. It says copyright clearance research indicates</p> <p>19 that for approximately one-third of the books,</p> <p>20 rights clearance either cannot occur at all or</p> <p>21 will not be attempted, et cetera.</p> <p>22 Haven't your methods for locating</p> <p>23 copyright owners improved through your</p> <p>24 experiences in 2001?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 103</p> <p>1 permission from U.S. publishers?</p> <p>2 A. No, we have not.</p> <p>3 Q. Is there a reason why you haven't chosen to</p> <p>4 seek additional permission?</p> <p>5 A. We're doing other things.</p> <p>6 Q. So you did not expand the Million Book Project</p> <p>7 based on these results and try to get</p> <p>8 additional permissions from U.S. publishers on</p> <p>9 a per-publisher basis?</p> <p>10 A. No.</p> <p>11 Q. Referring you back to your report --</p> <p>12 A. Yes.</p> <p>13 Q. -- on Page 12, Paragraph 38 says on balance,</p> <p>14 therefore, rights clearance poses significant</p> <p>15 obstacles to furthering the public good</p> <p>16 through digitization. Relying on the random</p> <p>17 sample study --</p> <p>18 By that do you mean the feasibility</p> <p>19 study?</p> <p>20 A. Yes.</p> <p>21 Q. -- relying on the random sample or feasibility</p> <p>22 study as the most statistically reliable --</p> <p>23 Why are you saying that that study</p> <p>24 is the most statistically reliable as between</p> <p>25 the Posner study, the Million Book Project</p>	<p style="text-align: right;">Page 105</p> <p>1 MR. McGOWAN: Objection. Vague.</p> <p>2 BY MS. ZACK:</p> <p>3 Q. Have they?</p> <p>4 A. I believe so.</p> <p>5 Q. And hasn't, frankly, the public information</p> <p>6 available improved with respect to locating</p> <p>7 persons in general?</p> <p>8 MR. McGOWAN: Objection. Vague.</p> <p>9 I'm also --</p> <p>10 MS. ZACK: Wouldn't you agree that</p> <p>11 between 2001 and currently, 2012, it's a lot</p> <p>12 easier to find people?</p> <p>13 MR. McGOWAN: Same objection.</p> <p>14 You may answer.</p> <p>15 THE WITNESS: Yes.</p> <p>16 BY MS. ZACK:</p> <p>17 Q. So would you agree that the results of your</p> <p>18 searches in 2001 would not be particularly</p> <p>19 pertinent to searches done in the period after</p> <p>20 2010?</p> <p>21 A. No.</p> <p>22 Q. You wouldn't agree?</p> <p>23 A. No.</p> <p>24 Q. You think the numbers would still be the same?</p> <p>25 A. More or less.</p>

<p style="text-align: right;">Page 106</p> <p>1 Q. But you haven't done any searches in the</p> <p>2 period after 2005 you're saying. Right?</p> <p>3 MR. McGOWAN: Asked and answered.</p> <p>4 You may answer.</p> <p>5 BY MS. ZACK:</p> <p>6 Q. Just to clarify, since 2005 Carnegie Mellon</p> <p>7 has not engaged in any efforts to locate</p> <p>8 copyright owners pursuant to any studies in</p> <p>9 the U.S. Correct?</p> <p>10 A. We haven't done any large projects.</p> <p>11 Q. And you've been a librarian for many years.</p> <p>12 Correct?</p> <p>13 A. Yes.</p> <p>14 Q. And the switchover to digital media, when</p> <p>15 would you say that that primarily occurred?</p> <p>16 MR. McGOWAN: Objection. Vague.</p> <p>17 Lacks foundation.</p> <p>18 You may answer.</p> <p>19 THE WITNESS: I left the profession</p> <p>20 and worked as a professor of English for a</p> <p>21 number of years.</p> <p>22 When I came back from that jaunt</p> <p>23 through the agency of having gotten a master's</p> <p>24 of business administration, I found the field</p> <p>25 to be in the beginning of what has been a</p>	<p style="text-align: right;">Page 108</p> <p>1 that the job of making most libraries see that</p> <p>2 the future of libraries is digital had been</p> <p>3 accomplished.</p> <p>4 Q. So you're talking about 2009?</p> <p>5 A. Approximately.</p> <p>6 MS. ZACK: All right. I don't have</p> <p>7 anymore questions. Thank you very much for</p> <p>8 your time.</p> <p>9 MR. McGOWAN: Very good.</p> <p>10 Joanne, the court reporter is asking</p> <p>11 what you would like by way of transcript. I</p> <p>12 don't know if you heard that.</p> <p>13 MS. ZACK: Yeah. I'm sorry. I</p> <p>14 would like a rough and then I will --</p> <p>15 I've got to go back and look at the</p> <p>16 various options in terms of how quickly the</p> <p>17 delivery is, but I'll E-mail somebody about</p> <p>18 that. Is that all right?</p> <p>19 THE COURT REPORTER: Yes.</p> <p>20 MS. ZACK: All right. Thank you</p> <p>21 very much.</p> <p>22 MR. McGOWAN: Very good. I'll see</p> <p>23 you in New York on Friday.</p> <p>24 MS. ZACK: Okay. Have a good</p> <p>25 flight.</p>
<p style="text-align: right;">Page 107</p> <p>1 profound change, a change so profound that my</p> <p>2 boss, the provost, has called the library the</p> <p>3 most changed place on the campus.</p> <p>4 BY MS. ZACK:</p> <p>5 Q. Uh-huh. And in 1999 when you attempted to get</p> <p>6 other libraries to engage in a digitization</p> <p>7 project, they didn't yet have the vision to do</p> <p>8 so. Right?</p> <p>9 A. Right.</p> <p>10 Q. And so would you agree that it was sometime</p> <p>11 after 1999 that other librarians came to your</p> <p>12 view that digitization was the wave of the</p> <p>13 future?</p> <p>14 A. It was excruciatingly slow.</p> <p>15 Q. Right. And when do you think that there was</p> <p>16 significant momentum among other libraries</p> <p>17 other than just Carnegie Mellon which is a</p> <p>18 university with a mission in line with</p> <p>19 digitization?</p> <p>20 A. The Digital Library Federation was active for</p> <p>21 a number of years from around the time I came</p> <p>22 to Carnegie Mellon -- well, before I came to</p> <p>23 Carnegie Mellon, up until about three years</p> <p>24 ago, and it was about three years ago that the</p> <p>25 Digital Library Federation members concluded</p>	<p style="text-align: right;">Page 109</p> <p>1 MR. McGOWAN: Take care.</p> <p>2 ----</p> <p>3 (The proceedings were concluded at 1:38 p.m.)</p> <p>4 ----</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

Page 110	Page 112
<p>1 COMMONWEALTH OF PENNSYLVANIA</p> <p>2 COUNTY OF ALLEGHENY</p> <p>3 I, G. Donavich, CRR, RPR, a Court Reporter and</p> <p>4 Notary Public in and for the Commonwealth of</p> <p>5 Pennsylvania, do hereby certify that the witness,</p> <p>6 GLORIANA ST. CLAIR, was by me first duly sworn to</p> <p>7 testify to the truth; that the foregoing deposition</p> <p>8 was taken at the time and place stated herein; and</p> <p>9 that the said deposition was recorded</p> <p>10 stenographically by me and then reduced to printing</p> <p>11 under my direction, and constitutes a true record of</p> <p>12 the testimony given by said witness.</p> <p>13 I further certify that the inspection, reading</p> <p>14 and signing of said deposition were not waived by</p> <p>15 counsel for the respective parties and by the</p> <p>16 witness.</p> <p>17 I further certify that I am not a relative or</p> <p>18 employee of any of the parties, or a relative or</p> <p>19 employee of either counsel, and that I am in no way</p> <p>20 interested directly or indirectly in this action.</p> <p>21 IN WITNESS WHEREOF, I have hereunto set my hand</p> <p>22 and affixed my seal of office this 5th day of June,</p> <p>23 2012.</p> <p>24 _____</p> <p>25 Notary Public</p>	<p>1 ERRATA SHEET</p> <p>2 IN RE: AUTHORS GUILD, ET AL. V. GOOGLE, INC.</p> <p>3 DATE: MAY 31, 2012</p> <p>4 PAGE LINE CORRECTION AND REASON</p> <p>5 _____</p> <p>6 _____</p> <p>7 _____</p> <p>8 _____</p> <p>9 _____</p> <p>10 _____</p> <p>11 _____</p> <p>12 _____</p> <p>13 _____</p> <p>14 _____</p> <p>15 _____</p> <p>16 _____</p> <p>17 _____</p> <p>18 _____</p> <p>19 _____</p> <p>20 _____</p> <p>21 _____</p> <p>22 _____</p> <p>23 _____</p> <p>24 _____</p> <p>25 (DATE) GLORIANA ST. CLAIR</p>
<p style="text-align: right;">Page 111</p> <p>1 ACKNOWLEDGMENT OF DEPONENT</p> <p>2</p> <p>3 I have read the foregoing transcript of</p> <p>4 my deposition and except for any corrections or</p> <p>5 changes noted on the errata sheet, I hereby</p> <p>6 subscribe to the transcript as an accurate record</p> <p>7 of the statements made by me.</p> <p>8</p> <p>9 _____</p> <p>10 GLORIANA ST. CLAIR</p> <p>11</p> <p>12 SUBSCRIBED AND SWORN before and to me</p> <p>13 this ____ day of _____, 20____.</p> <p>14</p> <p>15</p> <p>16 _____</p> <p>17 NOTARY PUBLIC</p> <p>18</p> <p>19</p> <p>20 My Commission expires:</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	

ACKNOWLEDGMENT OF DEPONENT

I have read the foregoing transcript of my deposition and except for any corrections or changes noted on the errata sheet, I hereby subscribe to the transcript as an accurate record of the statements made by me.



GLORIANA ST. CLAIR

SUBSCRIBED AND SWORN before and to me
this 20 day of June, 2012.

NOTARY PUBLIC

My Commission expires:

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1	E R R A T A S H E E T		
2	IN RE: AUTHORS GUILD, ET AL. V. GOOGLE, INC.		
3	DATE: MAY 31, 2012		
4	PAGE	LINE	CORRECTION AND REASON
5	<u>7</u>	<u>7</u>	<u>McGowan is written as INGBAR</u>
6	<u>18</u>	<u>24</u>	<u>Creative commons license</u>
7	<u>31</u>		<u>Did you mean to say</u>
8	<u>47</u>	<u>8</u>	<u>Notes about editions</u>
9	<u>62</u>	<u>11-12</u>	<u>Within PX 88</u>
10	<u>73</u>	<u>24</u>	<u>The article, <i>Acquiring Copyright Permission</i></u>
11	<u>83-84</u>	<u>4</u>	<u>content</u>
12	<u>85</u>	<u>8</u>	<u>Archive</u>
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24	<u>June 20, 2012</u>	<u>Gloriana St. Clair</u>	
25	(DATE)	GLORIANA ST. CLAIR	

EXHIBIT 37

**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,

Case No. 05 CV 8136-DC

Plaintiffs,

v.

ECF Case

Google Inc.,

Defendant.
----- x

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 17 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

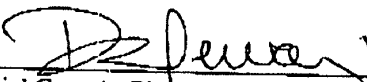

Daniel Gervais, Ph.D.

EXHIBIT 38

FILED UNDER SEAL

EXHIBIT 39

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

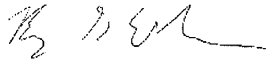
39. If Google’s practices of digitally copying, distributing and displaying books without rightsholder permission are found to be fair uses and become widespread, the market for books will be adversely impacted by the potential for security breaches. Conversely, requiring Google and others to obtain 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://gregsadetsky.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', with a horizontal line extending to the right.

Benjamin Edelman

EXHIBIT 40

Page 1

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 Master File No. 05 CV 8136-DC

5 - - - - -x
6 THE AUTHORS GUILD, et al.,

7 Plaintiffs,

8 -against-

9 GOOGLE, INC.,

10 Defendant.

11 - - - - -x
12 June 1, 2012

13 9:55 a.m.

14 Deposition of BRUCE S. HARRIS,
15 taken by attorneys for Plaintiffs, pursuant to
16 notice, held at the offices of Milberg LLP, One
17 Pennsylvania Plaza, New York, New York, before
18 Helen Mitchell, a Shorthand Reporter and Notary
19 Public.
20
21
22
23
24
25

<p style="text-align: right;">Page 2</p> <p>1 2 APPEARANCES: 3 4 BONI & ZACK LLC Attorneys for Plaintiffs 5 15 St. Asaphs Road Bala Cynwyd, Pennsylvania 19004 6 BY: JOANNE ZACK, ESQ. 7 jzack@bonzack.com 8 9 DURIE TANGRI LLP Attorneys for Defendant 10 217 Leidesdorff Street San Francisco, California 94111 11 BY: DAVID McGOWAN, ESQ. 12 dmcgowan@durietangri.com 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 2 BRUCE S. HARRIS, 3 having been first duly sworn by the Notary 4 Public (Helen Mitchell), was examined and 5 testified as follows: 6 EXAMINATION 7 BY MS. ZACK 8 Q Good morning, Mr. Harris. 9 A Good morning. 10 Q Would you state your full name for 11 the record, please. 12 A Bruce Harris. 13 Q And where are you employed 14 currently? 15 A I'm a consultant, and I'm 16 self-employed. 17 MS. ZACK: I'm going to mark as PX 18 89 your expert report in this matter. 19 (Expert report by Mr. Harris 20 marked Exhibit PX 89 for 21 identification.) 22 Q Mr. Harris, is PX 89 your report 23 in this matter? 24 A Yes, it is. 25 Q And you've been retained as an</p>
<p style="text-align: right;">Page 3</p> <p>1 2 STIPULATIONS 3 4 IT IS HEREBY STIPULATED AND AGREED 5 by and between counsel for the 6 respective parties hereto, that the 7 filing, sealing and certification of the 8 within deposition shall be and the same 9 are hereby waived; 10 IT IS FURTHER STIPULATED AND 11 AGREED that all objections, except as to 12 the form of the question, shall be 13 reserved to the time of the trial. 14 IT IS FURTHER STIPULATED AND 15 AGREED that the within deposition may be 16 signed and sworn to before any officer 17 authorized to administer an oath with 18 the same force and effect as if signed 19 and sworn to before the Court. 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 Harris 2 expert; is that correct? 3 A That's correct. 4 Q By Google? 5 A Yes. 6 Q And what is your expertise in? 7 A Custom and practice in the 8 publishing industry. 9 Q Approximately when were you 10 retained? 11 A I guess two months ago, two and a 12 half months ago. 13 Q And did you write this report 14 yourself? 15 A Yes, I did. 16 Q Did you have any assistance? 17 A Yes. I wrote the first draft, and 18 Dave helped me. 19 Q Dave McGowan? 20 A Um-hum. 21 Q Anyone else? 22 A No. 23 Q So you didn't use any research 24 assistants -- 25 A No.</p>

<p style="text-align: right;">Page 6</p> <p>1 Harris</p> <p>2 Q -- or anything like that?</p> <p>3 MR. McGOWAN: I'll caution you,</p> <p>4 Mr. Harris, wait until Miss Zack is</p> <p>5 finished with the questions so you don't</p> <p>6 speak over each other for the court</p> <p>7 reporter.</p> <p>8 MS. ZACK: For the sake of the</p> <p>9 court reporter.</p> <p>10 Q Referring you to Exhibit A to your</p> <p>11 declaration, which is your CV or biography, it</p> <p>12 says you began your publishing career at the</p> <p>13 Crown Publishing Group; is that right?</p> <p>14 A Correct.</p> <p>15 Q And what approximate years did you</p> <p>16 work at Crown publishing?</p> <p>17 A From 1960 through 1988.</p> <p>18 Q What positions did you hold there?</p> <p>19 A I was a promotion assistant,</p> <p>20 salesman, marketing manager, sales manager,</p> <p>21 director of publishing and publisher.</p> <p>22 Q And then your next employment was</p> <p>23 where?</p> <p>24 A Random House.</p> <p>25 Q And that was what approximate</p>	<p style="text-align: right;">Page 8</p> <p>1 Harris</p> <p>2 Q Can you give some examples of</p> <p>3 clients?</p> <p>4 A Yes. Presently I'm working with</p> <p>5 The Cooking Lab, which is a laboratory that was</p> <p>6 founded by Nathan Myhrvold, M-y-h-r-v-o-l-d.</p> <p>7 We're publishing a book called Modernist</p> <p>8 Cuisine. And I'm working for The Anomaly Group,</p> <p>9 A-n-o-m-a-l-y, and we're publishing a graphic</p> <p>10 novel called Anomaly.</p> <p>11 I'm also working for Skyhorse</p> <p>12 Publishing here in New York.</p> <p>13 Q When you say -- you said when you</p> <p>14 were at Crown Publishing you ultimately became</p> <p>15 publisher?</p> <p>16 A Yes.</p> <p>17 Q What does it mean to be publisher?</p> <p>18 A The editorial and marketing</p> <p>19 functions generally report to the publisher.</p> <p>20 Q What are the marketing functions,</p> <p>21 generally, in a publishing company?</p> <p>22 A Promotion, publicity, subsidiary</p> <p>23 rights, sales.</p> <p>24 Q Now, have you ever consulted for</p> <p>25 authors directly?</p>
<p style="text-align: right;">Page 7</p> <p>1 Harris</p> <p>2 years?</p> <p>3 A From '88 to '99.</p> <p>4 Q And what positions did you hold</p> <p>5 there?</p> <p>6 A I was director of publishing, and</p> <p>7 then I was president of trade, sales and</p> <p>8 marketing.</p> <p>9 Q And then your next employment was?</p> <p>10 A At Workman Publishers.</p> <p>11 Q From which dates, approximately?</p> <p>12 A Ninety-nine to 2004.</p> <p>13 Q And your positions there?</p> <p>14 A I was publisher and chief</p> <p>15 operating officer.</p> <p>16 Q And your next position?</p> <p>17 A I became a consultant.</p> <p>18 Q So that was in 2004?</p> <p>19 A Yes.</p> <p>20 Q Who did you consult for,</p> <p>21 generally?</p> <p>22 A Publishing companies and authors.</p> <p>23 Q In what areas?</p> <p>24 A Basically sales and marketing, and</p> <p>25 now self-publishing.</p>	<p style="text-align: right;">Page 9</p> <p>1 Harris</p> <p>2 A Yes.</p> <p>3 Q What types of things have you</p> <p>4 consulted on?</p> <p>5 A Mostly non-fiction books.</p> <p>6 Q And consulted about what sort of</p> <p>7 things?</p> <p>8 A By "things" do you mean topics?</p> <p>9 Q What did you give them advice</p> <p>10 about?</p> <p>11 A I gave them advice about whether</p> <p>12 they should be published by existing firms or</p> <p>13 publish on their own, marketing strategies,</p> <p>14 distribution, sales and fulfillment.</p> <p>15 Q Are you involved at all in any --</p> <p>16 you mentioned self-publishing.</p> <p>17 A Um-hum.</p> <p>18 Q What do you do as a consultant for</p> <p>19 self-publishers?</p> <p>20 A Set up a framework where an author</p> <p>21 can find distribution, sales and fulfillment</p> <p>22 from independent sources.</p> <p>23 Q Have you ever advised authors to</p> <p>24 publish in e-book form?</p> <p>25 A It's part of the publishing</p>

<p style="text-align: right;">Page 10</p> <p>1 Harris</p> <p>2 process today.</p> <p>3 Q E-books?</p> <p>4 A Yeah.</p> <p>5 Q Have you ever previously --</p> <p>6 switching topics slightly -- done any work for</p> <p>7 Google?</p> <p>8 A No.</p> <p>9 Q Amazon?</p> <p>10 A No.</p> <p>11 Q Any e-book publishers?</p> <p>12 A No.</p> <p>13 Q Have you been an expert -- I see</p> <p>14 in your -- I think it's Exhibit B -- that you</p> <p>15 were an expert in one other case -- or C --</p> <p>16 another case that's listed; is that correct?</p> <p>17 A Yes.</p> <p>18 Q And which case was that?</p> <p>19 A That was JK Rowling versus RTR</p> <p>20 Publishing.</p> <p>21 Q And who did you testify for?</p> <p>22 A RTR Publishing.</p> <p>23 Q And what was that case about?</p> <p>24 A RTR was putting out a Harry Potter</p> <p>25 encyclopedia, and Miss Rowling objected.</p>	<p style="text-align: right;">Page 12</p> <p>1 Harris</p> <p>2 Q And what was it you talked to her</p> <p>3 about?</p> <p>4 A Custom and practice in the book</p> <p>5 business.</p> <p>6 Q And what did you tell her?</p> <p>7 A We were talking about how</p> <p>8 conditions actually apply in publishing.</p> <p>9 Q Can you be more specific?</p> <p>10 A I'm not sure I remember exactly</p> <p>11 what we discussed.</p> <p>12 Q How long was the discussion?</p> <p>13 A About 45 minutes.</p> <p>14 Q Was it over the telephone?</p> <p>15 A Yes.</p> <p>16 Q Did anyone else participate?</p> <p>17 A I don't think so.</p> <p>18 Q And you can't remember what you</p> <p>19 discussed with her other than that it was custom</p> <p>20 and practice in the book business?</p> <p>21 A Yeah.</p> <p>22 Q You've attached to your report</p> <p>23 various exhibits.</p> <p>24 A Yes.</p> <p>25 Q Are these all exhibits from books</p>
<p style="text-align: right;">Page 11</p> <p>1 Harris</p> <p>2 Q And what was the subject matter of</p> <p>3 your expert report in that case?</p> <p>4 A Whether the publication of a Harry</p> <p>5 Potter encyclopedia would hurt her commercial</p> <p>6 sales of the Harry Potter books.</p> <p>7 Q And what was your opinion there?</p> <p>8 A I said it would not hurt the sales</p> <p>9 of Harry Potter books.</p> <p>10 Q And do you know what the court</p> <p>11 ruled in that case?</p> <p>12 A They ruled for Miss Rowling, and</p> <p>13 she settled the case.</p> <p>14 Q You mean while it was on appeal?</p> <p>15 A I guess so, yeah.</p> <p>16 Q Have you been an expert in any</p> <p>17 other matters?</p> <p>18 A No.</p> <p>19 Q Have you talked to any of the</p> <p>20 other experts retained by Google in this case?</p> <p>21 A No.</p> <p>22 Q Did you speak to Miss Chevalier?</p> <p>23 A Yes.</p> <p>24 Q When was that?</p> <p>25 A That was several weeks ago.</p>	<p style="text-align: right;">Page 13</p> <p>1 Harris</p> <p>2 that you had some connection to?</p> <p>3 A No, but they're things that came</p> <p>4 to hand in the last few months.</p> <p>5 Q Well, let's look at Exhibit D.</p> <p>6 A Okay.</p> <p>7 Q And what is this?</p> <p>8 A These are the back covers of two</p> <p>9 books published by Penguin.</p> <p>10 Q And did you have anything -- were</p> <p>11 you in any way involved in the publication of</p> <p>12 these books?</p> <p>13 A No, they were just in my library.</p> <p>14 Q So do you have any knowledge about</p> <p>15 whether anything on these back covers was there</p> <p>16 by permission or not of the publisher or author?</p> <p>17 A I don't have any direct knowledge</p> <p>18 of that.</p> <p>19 Q Looking at Exhibit E, which is</p> <p>20 "Weird things customers say in bookstores," did</p> <p>21 you represent in any way the publisher or author</p> <p>22 of this book?</p> <p>23 A No. I had worked for this</p> <p>24 publisher previously.</p> <p>25 Q Which publisher is that?</p>

<p style="text-align: right;">Page 14</p> <p>1 Harris</p> <p>2 A The Overlook Press.</p> <p>3 Q You worked for them as a</p> <p>4 consultant?</p> <p>5 A Yes, I did.</p> <p>6 Q But with this particular book you</p> <p>7 had no involvement?</p> <p>8 A No.</p> <p>9 Q Do you know whether these</p> <p>10 selections were made by permission of the</p> <p>11 publisher or author?</p> <p>12 A I don't know.</p> <p>13 Q Where did you find these?</p> <p>14 A This is a little booklet,</p> <p>15 promotional booklet, that has been made by</p> <p>16 Overlook, which they're going to distribute next</p> <p>17 week at the book expo, give out to people -- to</p> <p>18 bookstores.</p> <p>19 Q So this Exhibit E, if we had the</p> <p>20 original rather than a copy, would be in the</p> <p>21 form of a booklet?</p> <p>22 A Yeah.</p> <p>23 Q And it's a promotional booklet</p> <p>24 that Overlook, the publisher, prepared itself?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 16</p> <p>1 Harris</p> <p>2 MS. ZACK: Well...</p> <p>3 MR. McGOWAN: Objection, lacks</p> <p>4 foundation, calls for speculation.</p> <p>5 If you want to argue about the</p> <p>6 sequencing of questions and objections,</p> <p>7 we can do that, but I don't --</p> <p>8 MS. ZACK: I don't want to argue</p> <p>9 that, I just want to say that --</p> <p>10 MR. McGOWAN: I don't see the</p> <p>11 point.</p> <p>12 MS. ZACK: I'm just going to say</p> <p>13 that all objections -- all you need to</p> <p>14 do is say "object to the form." All</p> <p>15 objections are preserved other than to</p> <p>16 the form, and stating grounds for</p> <p>17 objections is a form of coaching.</p> <p>18 MR. McGOWAN: And that's</p> <p>19 incorrect.</p> <p>20 Q Exhibit F, could we turn to that,</p> <p>21 please.</p> <p>22 A Yes.</p> <p>23 Q And this is "Death Will Extend</p> <p>24 Your Vacation" by Elizabeth Zelvin; is that</p> <p>25 correct?</p>
<p style="text-align: right;">Page 15</p> <p>1 Harris</p> <p>2 Q And distributes at -- where?</p> <p>3 A At conventions, places where</p> <p>4 booksellers gather, and I assume they'll also</p> <p>5 probably let bookstores have them to give out to</p> <p>6 their customers.</p> <p>7 Q So it's an attempt by the</p> <p>8 publisher of the book to promote the book?</p> <p>9 A Exactly.</p> <p>10 Q And sales of the book; correct?</p> <p>11 A Yes.</p> <p>12 Q So we would assume that was by</p> <p>13 permission of a rights holder; correct?</p> <p>14 MR. McGOWAN: Objection, lacks</p> <p>15 foun --</p> <p>16 Q Do you have any reason to believe</p> <p>17 it lacks permission?</p> <p>18 MR. McGOWAN: Let me finish my</p> <p>19 objection.</p> <p>20 MS. ZACK: All you need to say is</p> <p>21 "objection."</p> <p>22 MR. McGOWAN: I can answer your</p> <p>23 question if you want me to. You can let</p> <p>24 me state my objection and not speak over</p> <p>25 it.</p>	<p style="text-align: right;">Page 17</p> <p>1 Harris</p> <p>2 A Yes.</p> <p>3 Q Do you know who the publisher is?</p> <p>4 A I don't know who the publisher is.</p> <p>5 Q Did you at any time represent</p> <p>6 Elizabeth Zelvin?</p> <p>7 A No.</p> <p>8 Q Where did you find this?</p> <p>9 A My wife is a mystery writer, and</p> <p>10 we go to mystery gatherings, and this was being</p> <p>11 given out.</p> <p>12 Q By whom?</p> <p>13 A By the author.</p> <p>14 Q So this, Exhibit F -- was this</p> <p>15 also in booklet form?</p> <p>16 A Yes.</p> <p>17 Q So if we had the original, what is</p> <p>18 Exhibit F would have been a booklet of what</p> <p>19 looks to be a chapter of the book Death Will</p> <p>20 Extend Your Vacation by Elizabeth Zelvin; is</p> <p>21 that correct?</p> <p>22 A Yes.</p> <p>23 Q And you received this at a</p> <p>24 gathering from the author herself?</p> <p>25 A Yes.</p>

<p style="text-align: right;">Page 18</p> <p>1 Harris</p> <p>2 Q Did you discuss this with the</p> <p>3 author?</p> <p>4 A No.</p> <p>5 Q Did you buy the book?</p> <p>6 A No.</p> <p>7 Q Exhibit G is a series of pages.</p> <p>8 Is this all one handout?</p> <p>9 A Yes.</p> <p>10 Q Where did you get this, Exhibit G?</p> <p>11 A I got this from the publisher.</p> <p>12 Q And who is that?</p> <p>13 A Clarkson Potter, which is a part</p> <p>14 of Crown, which is a part of Random House.</p> <p>15 Q And was this also in booklet form</p> <p>16 when you received it?</p> <p>17 A Yes. It's called a blad.</p> <p>18 Q What is blad?</p> <p>19 A A blad is when you have</p> <p>20 illustrated books, it's a selling tool for</p> <p>21 publishers to show booksellers and reviewers</p> <p>22 what they're going to be coming out with in a</p> <p>23 highly illustrated format.</p> <p>24 Q So Exhibit G is what you're</p> <p>25 calling a blad, which was in booklet form and</p>	<p style="text-align: right;">Page 20</p> <p>1 Harris</p> <p>2 A This is from the Huffington Post,</p> <p>3 and it was a page on Katie Workman's cookbook,</p> <p>4 The Mom 100 Cookbook.</p> <p>5 Q Did you have any connection to</p> <p>6 this cookbook?</p> <p>7 A No. I know Katie, but I have no</p> <p>8 connection to the book.</p> <p>9 Q And do you know who published it?</p> <p>10 A Yes. This is published by</p> <p>11 Workman.</p> <p>12 Q Do you know if this -- what would</p> <p>13 you call this page? Would you call this a promo</p> <p>14 or --</p> <p>15 A Yes.</p> <p>16 Q Do you know if this promo was in</p> <p>17 the Huffington Post by permission of the author</p> <p>18 or publisher?</p> <p>19 MR. McGOWAN: Objection, compound</p> <p>20 and vague.</p> <p>21 You may answer.</p> <p>22 A I don't know.</p> <p>23 Q You don't know?</p> <p>24 A I don't know particularly.</p> <p>25 Q You're familiar with Google Books?</p>
<p style="text-align: right;">Page 19</p> <p>1 Harris</p> <p>2 distributed by the publisher; is that correct?</p> <p>3 A That's correct.</p> <p>4 Q What was it a blad for, which</p> <p>5 book?</p> <p>6 A Well, it's for all the books that</p> <p>7 they were publishing this season. I think the</p> <p>8 next-to-last page is a listing of the books. At</p> <p>9 least some of the books, so they're both</p> <p>10 cookbooks and style books.</p> <p>11 Q This page (indicating) --</p> <p>12 A That lists some of them, yes.</p> <p>13 Q I can't read the text at the top.</p> <p>14 Can you? Do you know what it says? It's very</p> <p>15 light.</p> <p>16 A I think it's an Amphoto -- Watson</p> <p>17 Guptil -- it's the name of a different division</p> <p>18 of Clarkson Potter, so it's Watson Guptil,</p> <p>19 Potter Style and Amphoto.</p> <p>20 Q And it says "Spring" -- two</p> <p>21 thousand and --</p> <p>22 A 2012. I think it's 2012. Yeah,</p> <p>23 these are recent books.</p> <p>24 Q Referring you to Exhibit H, what</p> <p>25 is this?</p>	<p style="text-align: right;">Page 21</p> <p>1 Harris</p> <p>2 A Yes.</p> <p>3 Q And you're familiar with the fact</p> <p>4 that Google Books includes both books from the</p> <p>5 Google Partner Program and books throughout the</p> <p>6 Google Library Project?</p> <p>7 A Yes.</p> <p>8 Q The Google Partner Program</p> <p>9 includes books by permission of the rights</p> <p>10 holder; is that correct?</p> <p>11 A Yes.</p> <p>12 Q Did you -- I guess you became a</p> <p>13 consultant in 2004, is that what you said?</p> <p>14 A Yes.</p> <p>15 Q At any time -- and your last</p> <p>16 employment was at Workman?</p> <p>17 A Yes.</p> <p>18 Q Any time at Workman did you put</p> <p>19 any books into the Google Partner Program?</p> <p>20 A I don't recall.</p> <p>21 Q Since then have you advised any of</p> <p>22 your consulting clients to put books into the</p> <p>23 Google Partner Program?</p> <p>24 A No.</p> <p>25 Q Have you advised any not to put</p>

<p style="text-align: right;">Page 22</p> <p>1 Harris</p> <p>2 books in the Google Partner Program?</p> <p>3 A No.</p> <p>4 Q Just haven't given them advice</p> <p>5 about the Google Partner Program?</p> <p>6 A Right.</p> <p>7 Q Have you ever talked to anyone at</p> <p>8 Google, prior to your retention as their expert,</p> <p>9 about the Google Partner Program?</p> <p>10 A No.</p> <p>11 Q When did you first learn about the</p> <p>12 Google Library Project?</p> <p>13 A Oh, I think I read about it in the</p> <p>14 paper when it was first occurring.</p> <p>15 Q Did you ever discuss that with</p> <p>16 anyone from Google?</p> <p>17 A No.</p> <p>18 Q With anyone in the publishing</p> <p>19 industry?</p> <p>20 A Not that I recall.</p> <p>21 Q Are you aware that Google copies</p> <p>22 books for its Library Project without</p> <p>23 permission?</p> <p>24 A Yes.</p> <p>25 Q Referring you to the text of your</p>	<p style="text-align: right;">Page 24</p> <p>1 Harris</p> <p>2 Q You don't have any independent</p> <p>3 knowledge of that?</p> <p>4 A No.</p> <p>5 Q What about paragraph six?</p> <p>6 A Same.</p> <p>7 Q When you're a publisher and you</p> <p>8 want to sell books, you're interested in getting</p> <p>9 the books visibility; is that correct?</p> <p>10 A Yes.</p> <p>11 Q Did you ever have any</p> <p>12 responsibility for permissions for the use of</p> <p>13 quotes from books that you had published by</p> <p>14 other persons or books?</p> <p>15 MR. McGOWAN: Objection, lacks</p> <p>16 foundation.</p> <p>17 You may answer.</p> <p>18 Q Permission fees.</p> <p>19 A I'm not sure I understand the</p> <p>20 question.</p> <p>21 Q Are you conversant with the</p> <p>22 concept of permission fees --</p> <p>23 A Yes.</p> <p>24 Q -- for the use of books --</p> <p>25 A Yes.</p>
<p style="text-align: right;">Page 23</p> <p>1 Harris</p> <p>2 report -- well, before I do that, have you ever</p> <p>3 used Google Books?</p> <p>4 A For myself?</p> <p>5 Q Yes.</p> <p>6 A Yes.</p> <p>7 Q Have you looked at entire chapters</p> <p>8 of books in the Google -- in Google book search?</p> <p>9 A Occasionally I've seen, you know,</p> <p>10 longer...</p> <p>11 Q Seen longer?</p> <p>12 A Excerpts.</p> <p>13 Q Have you also seen shorter</p> <p>14 excerpts?</p> <p>15 A Yes.</p> <p>16 Q Referring you back to your report,</p> <p>17 on page 2 of your report, paragraph five, you</p> <p>18 talk about "Google has scanned more than 20</p> <p>19 books," et cetera.</p> <p>20 Do you see that?</p> <p>21 A Yes.</p> <p>22 Q Was the information in this</p> <p>23 paragraph based on your review of documents</p> <p>24 provided to you by Google?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 25</p> <p>1 Harris</p> <p>2 Q -- or some content of books?</p> <p>3 A Yes.</p> <p>4 Q Was that part of the business of</p> <p>5 Crown Publishing under your jurisdiction at any</p> <p>6 time while you were there?</p> <p>7 A Yes.</p> <p>8 Q And did you have a permissions</p> <p>9 department?</p> <p>10 A Not a whole department, but there</p> <p>11 was somebody who was responsible.</p> <p>12 Q What did they do?</p> <p>13 A When people asked for permissions</p> <p>14 they would set a rate and ask for money if</p> <p>15 somebody was going to use it, or they would let</p> <p>16 them use it for free.</p> <p>17 Q How was it determined whether to</p> <p>18 pay for the use of the text or to do it for</p> <p>19 free?</p> <p>20 A They were individual cases.</p> <p>21 Q So you mean it was decided based</p> <p>22 on how much was asked for, and --</p> <p>23 A What the book was, who was asking,</p> <p>24 what the use was going to be.</p> <p>25 Q And was a permissions department</p>

<p style="text-align: right;">Page 26</p> <p>1 Harris</p> <p>2 ever under your jurisdiction at Random House?</p> <p>3 A No, because they worked for the</p> <p>4 editors and publishers rather than the sales</p> <p>5 department.</p> <p>6 Q What about at Workman?</p> <p>7 A Yes.</p> <p>8 Q It was under your jurisdiction?</p> <p>9 A Yes.</p> <p>10 Q And was the procedure at Workman</p> <p>11 the same as it had been at Crown Publishing?</p> <p>12 A Yes.</p> <p>13 Q So you had one or more persons who</p> <p>14 worked in that area?</p> <p>15 A Yes.</p> <p>16 Q It was the case that fees were</p> <p>17 sometimes charged for permission to use excerpts</p> <p>18 of books?</p> <p>19 MR. McGOWAN: Objection, vague.</p> <p>20 You may answer.</p> <p>21 Q Is that correct, as a matter of</p> <p>22 custom and practice in the publishing industry?</p> <p>23 A Sometimes.</p> <p>24 Q Are you aware of any promotional</p> <p>25 uses of the books for which you were responsible</p>	<p style="text-align: right;">Page 28</p> <p>1 Harris</p> <p>2 A Yes, each contract can be a little</p> <p>3 bit different.</p> <p>4 Q Was it your understanding that</p> <p>5 Crown had the right vis-a-vis the author to</p> <p>6 promote the books --</p> <p>7 A Yes.</p> <p>8 Q -- that Crown was publishing?</p> <p>9 A Yes.</p> <p>10 Q And then Crown would take</p> <p>11 responsibility for the best way to promote the</p> <p>12 book; correct?</p> <p>13 A Yes.</p> <p>14 Q And if Crown decided it didn't</p> <p>15 want to release a chapter of the book for -- it</p> <p>16 would not do so; right?</p> <p>17 A Correct.</p> <p>18 Q You didn't create pamphlets with</p> <p>19 chapters for all your books, did you?</p> <p>20 A No.</p> <p>21 Q And how were those decisions made?</p> <p>22 A They were made by the marketing</p> <p>23 people and the editorial people.</p> <p>24 Q And what criteria did they take</p> <p>25 into account?</p>
<p style="text-align: right;">Page 27</p> <p>1 Harris</p> <p>2 at Crown that were not done by permission of</p> <p>3 Crown?</p> <p>4 A I'm not sure I understand what</p> <p>5 you're asking.</p> <p>6 Q While you were at Crown, Crown</p> <p>7 promoted its books.</p> <p>8 A Yeah.</p> <p>9 Q So Crown was deciding how to</p> <p>10 promote the books; correct?</p> <p>11 A Yes.</p> <p>12 Q And one of the ways they would</p> <p>13 promote them is to create little pamphlets;</p> <p>14 correct?</p> <p>15 A Yes.</p> <p>16 Q And when those pamphlets were</p> <p>17 created, Crown would decide what portion of the</p> <p>18 book to put into the pamphlets; correct?</p> <p>19 A That's correct, yes.</p> <p>20 Q And Crown had a contract with the</p> <p>21 author that gave it the right to promote the</p> <p>22 books; correct?</p> <p>23 MR. McGOWAN: Objection, vague,</p> <p>24 calls for a legal conclusion.</p> <p>25 You may answer.</p>	<p style="text-align: right;">Page 29</p> <p>1 Harris</p> <p>2 A Effectiveness; what would be</p> <p>3 effective, what they thought would be effective</p> <p>4 in the sale of the book.</p> <p>5 Q And did they do that based on</p> <p>6 their knowledge of the book itself?</p> <p>7 A Yes.</p> <p>8 Q And what they thought would best</p> <p>9 promote the sales of the book?</p> <p>10 A Yes.</p> <p>11 Q And did you ever sue anyone for</p> <p>12 copyright infringement while you were at Crown?</p> <p>13 A No.</p> <p>14 Q Never?</p> <p>15 A I didn't.</p> <p>16 Q Did someone on your behalf?</p> <p>17 A I don't think so.</p> <p>18 Q What about at Random House?</p> <p>19 A I'm sure there were suits, but I</p> <p>20 had nothing to do with them.</p> <p>21 Q What about at Workman?</p> <p>22 A No, I don't think so.</p> <p>23 Q You're not litigious?</p> <p>24 A No. Thank God.</p> <p>25 Q While you worked at Crown, did</p>

<p style="text-align: right;">Page 30</p> <p>1 Harris</p> <p>2 anyone other than the author or publisher, in</p> <p>3 your experience, ever come out with a booklet</p> <p>4 that had a whole chapter of one of your books?</p> <p>5 A Not that I know of.</p> <p>6 Q How about a booklet that had</p> <p>7 excerpts from 30 pages of one of your books?</p> <p>8 A Not that I know of.</p> <p>9 Q How about a booklet that had</p> <p>10 excerpts from 75 percent of your books?</p> <p>11 A No.</p> <p>12 Q What about at Random House?</p> <p>13 A No.</p> <p>14 Q What about at Workman?</p> <p>15 A I don't think so.</p> <p>16 Q Now, in this modern world of</p> <p>17 digital computers which we've all come into,</p> <p>18 there are many ways to promote books that there</p> <p>19 didn't used to be; isn't that correct?</p> <p>20 A Yes.</p> <p>21 Q Including authors have websites;</p> <p>22 is that right?</p> <p>23 A That's correct.</p> <p>24 Q And you advise authors with</p> <p>25 respect to how they can promote books on their</p>	<p style="text-align: right;">Page 32</p> <p>1 Harris</p> <p>2 when you search on -- I'm talking about the main</p> <p>3 Google -- if you put a search term in, they will</p> <p>4 search the web to find a match?</p> <p>5 A Yes.</p> <p>6 MR. McGOWAN: I'll object, vague</p> <p>7 with respect to the phrase "index."</p> <p>8 Q Well, let me ask you this --</p> <p>9 MR. McGOWAN: Miss Zack may</p> <p>10 actually want to specify what she's</p> <p>11 talking about. I suspect what's going</p> <p>12 on is that we're dealing in adjectives</p> <p>13 that have not been specified.</p> <p>14 Q Looking at Exhibit A, which is</p> <p>15 your bio that we previously looked at, is that</p> <p>16 on the internet?</p> <p>17 A Yes.</p> <p>18 Q And if I go to Google and I type</p> <p>19 in "Bruce Harris" do you know if I'll get a link</p> <p>20 to your bio?</p> <p>21 A Eventually.</p> <p>22 Q Have you ever done that?</p> <p>23 A I haven't. I think there's a</p> <p>24 judge in New Jersey, though.</p> <p>25 Q I'm sorry.</p>
<p style="text-align: right;">Page 31</p> <p>1 Harris</p> <p>2 own websites?</p> <p>3 A Yes.</p> <p>4 Q And is it your understanding that</p> <p>5 if an author puts up a website promoting his or</p> <p>6 her book, that the result -- that that website</p> <p>7 will be searched and results will show up on</p> <p>8 Google?</p> <p>9 MR. McGOWAN: Objection,</p> <p>10 incomplete hypothetical and radically</p> <p>11 compound.</p> <p>12 MS. ZACK: It's a hypothetical.</p> <p>13 A I don't know about the results</p> <p>14 appearing on Google.</p> <p>15 Q You've never checked that to see</p> <p>16 whether it did or didn't?</p> <p>17 A No.</p> <p>18 Q Do you understand how Google</p> <p>19 search engine works?</p> <p>20 A I think so, roughly.</p> <p>21 Q How does it work?</p> <p>22 A They're looking for key phrases.</p> <p>23 Q Well, is it your understanding</p> <p>24 that Google's search engine indexes the World</p> <p>25 Wide Web, what we call the internet, so that</p>	<p style="text-align: right;">Page 33</p> <p>1 Harris</p> <p>2 A Same name, a judge in New Jersey.</p> <p>3 Q So you're not really familiar with</p> <p>4 the way Google's main search engine works?</p> <p>5 A No.</p> <p>6 Q What kind of advice do you give</p> <p>7 your author clients about whether or not they</p> <p>8 should put excerpts from their books on their</p> <p>9 own websites?</p> <p>10 A I think they should have the most</p> <p>11 promotional website that they can have with the</p> <p>12 best material, whether it's from the book or</p> <p>13 featuring features in the book.</p> <p>14 Q Have you ever advised an author to</p> <p>15 not include portions of the book, but to promote</p> <p>16 the book in other ways?</p> <p>17 A I don't -- that's too broad, I</p> <p>18 can't -- I can't say yes or no.</p> <p>19 Q Have you ever given an author</p> <p>20 advice about how much of the book they should</p> <p>21 make available in order to promote it?</p> <p>22 A No.</p> <p>23 Q Have you about a publisher?</p> <p>24 A We've talked about different ways</p> <p>25 to promote chapters or topics.</p>

<p style="text-align: right;">Page 34</p> <p>1 Harris</p> <p>2 Q And what different ways have you</p> <p>3 suggested to publishers?</p> <p>4 A Using single topics, which can be</p> <p>5 then used in a variety of ways. So not just the</p> <p>6 entire book, but parts of it.</p> <p>7 Q Do you think it's easier for</p> <p>8 authors to promote books nowadays with the World</p> <p>9 Wide Web, or harder?</p> <p>10 A Both.</p> <p>11 Q How is it easier?</p> <p>12 A Easier because the web obviously</p> <p>13 gives you the facility to reach a wide audience</p> <p>14 at meaningful cost, but harder because there's</p> <p>15 so much more activity, which I call static.</p> <p>16 Q Do you ever advise authors or</p> <p>17 publishers of out-of-print books as to how to</p> <p>18 promote their books?</p> <p>19 A No.</p> <p>20 Q Why not?</p> <p>21 A I've never had a client with</p> <p>22 out-of-print books.</p> <p>23 Q Is there any point in promoting an</p> <p>24 out-of-print book?</p> <p>25 MR. MCGOWAN: Objection, lacks</p>	<p style="text-align: right;">Page 36</p> <p>1 Harris</p> <p>2 Inside the Book program?</p> <p>3 A No, I've never seen this before.</p> <p>4 Q Have you ever advised any of your</p> <p>5 clients regarding Amazon's Search Inside the</p> <p>6 Book program or feature?</p> <p>7 A No.</p> <p>8 Q If you look at page 2 of this</p> <p>9 exhibit, there's print book FAQs.</p> <p>10 Do you see that?</p> <p>11 A Yes.</p> <p>12 Q It says:</p> <p>13 "What rights do I need to have to</p> <p>14 participate in Look Inside the Book program?</p> <p>15 "In order to submit books for Look</p> <p>16 Inside you must hold the merchandising rights</p> <p>17 for the book you wish to submit and the region</p> <p>18 you're submitting for."</p> <p>19 Do you see that?</p> <p>20 A I see it.</p> <p>21 Q Did you ever have an understanding</p> <p>22 that Amazon could -- that Amazon's program was</p> <p>23 not by permission?</p> <p>24 A No.</p> <p>25 Q Could you look at page 4, numbered</p>
<p style="text-align: right;">Page 35</p> <p>1 Harris</p> <p>2 foundation, it's a hypothetical.</p> <p>3 You may answer.</p> <p>4 A I like to say a book is new to</p> <p>5 somebody who hasn't read it, so I don't know.</p> <p>6 Q In your report you mention Amazon</p> <p>7 Search Inside the Book.</p> <p>8 A Yes.</p> <p>9 Q And that's a feature of Amazon</p> <p>10 that is -- required permission of the author or</p> <p>11 the publisher or the rights holder of the book;</p> <p>12 is that right?</p> <p>13 A I think so.</p> <p>14 Q You don't know for sure?</p> <p>15 A I don't know for sure.</p> <p>16 MS. ZACK: Let's mark as PX 90</p> <p>17 materials from the internet concerning</p> <p>18 Amazon.com Search Inside the Book</p> <p>19 program, five pages.</p> <p>20 (Amazon Search Inside the Book</p> <p>21 FAQs marked Exhibit PX 90 for</p> <p>22 identification.)</p> <p>23 Q Have you ever seen these --</p> <p>24 A No.</p> <p>25 Q -- FAQs concerning Amazon's Search</p>	<p style="text-align: right;">Page 37</p> <p>1 Harris</p> <p>2 page 4, it says "4 of 5" at the top. About</p> <p>3 two-thirds down there's a question, "What is the</p> <p>4 flexible percent viewing limit feature?</p> <p>5 And it says, "The flexible percent</p> <p>6 viewing limit feature gives print book</p> <p>7 publishers control over how much of the book is</p> <p>8 available for customers to view."</p> <p>9 Do you see that?</p> <p>10 A I see the flexible percent viewing</p> <p>11 limit feature; is that what you're --</p> <p>12 Q Yes.</p> <p>13 It states that it gives publishers</p> <p>14 control over how much of a book is available for</p> <p>15 customers to view.</p> <p>16 A Um-hum.</p> <p>17 Q Is that similar to the control</p> <p>18 that you had as a publisher when you decided how</p> <p>19 much of a book to promote?</p> <p>20 MR. MCGOWAN: Objection, lacks</p> <p>21 foundation.</p> <p>22 You may answer.</p> <p>23 A As a publisher and promotion</p> <p>24 person, I thought I could use almost any</p> <p>25 material that would help promote the book.</p>

<p style="text-align: right;">Page 38</p> <p>1 Harris</p> <p>2 Q And is it your opinion that</p> <p>3 Google, with no permission from either the</p> <p>4 author or publisher, can do the same thing?</p> <p>5 MR. McGOWAN: Objection to the</p> <p>6 extent it calls for a legal conclusion.</p> <p>7 You may answer.</p> <p>8 And vague with respect to "same</p> <p>9 thing."</p> <p>10 You may answer.</p> <p>11 Q Well, I'll make it clear.</p> <p>12 You said you thought as a</p> <p>13 publisher you could promote the book in any way</p> <p>14 you thought fit, basically; correct?</p> <p>15 A Yes.</p> <p>16 Q Are you offering an opinion here</p> <p>17 that Google, without any permission from a</p> <p>18 rights holder of the book, can do that?</p> <p>19 A Yes.</p> <p>20 Q So if I, Joanne Zack, decide that</p> <p>21 I love a book, let's say one of the books you</p> <p>22 published previously for Crown -- what books did</p> <p>23 you love --</p> <p>24 A Let's say Hitchhiker's Guide to</p> <p>25 the Galaxy.</p>	<p style="text-align: right;">Page 40</p> <p>1 Harris</p> <p>2 MR. McGOWAN: Objection, vague</p> <p>3 with respect to "looks the other way,"</p> <p>4 incomplete hypothetical.</p> <p>5 You may answer.</p> <p>6 A I think most authors would be</p> <p>7 delighted to have third parties say "I love this</p> <p>8 book" and give examples.</p> <p>9 Q Your opinion is that most authors</p> <p>10 would be delighted.</p> <p>11 A Yes.</p> <p>12 Q My question was have you seen it</p> <p>13 happen?</p> <p>14 A You said five chapters? No.</p> <p>15 Q Have you seen third parties with</p> <p>16 no permissions publish one chapter?</p> <p>17 A Not a chapter, but certainly</p> <p>18 paragraphs from books that appear on websites,</p> <p>19 "I love this book," and then quotes.</p> <p>20 Q Paragraphs?</p> <p>21 A Yeah.</p> <p>22 Q Anything more than paragraphs.</p> <p>23 A Not that I know of.</p> <p>24 Q And you're not offering any</p> <p>25 opinions as a matter of law here?</p>
<p style="text-align: right;">Page 39</p> <p>1 Harris</p> <p>2 Q Hitchhiker's Guide to the Galaxy,</p> <p>3 I love that book. It's still in copyright,</p> <p>4 isn't it?</p> <p>5 A Yes.</p> <p>6 Q I decide I want to promote it. So</p> <p>7 I decide to put up five chapters on Boni & Zack</p> <p>8 and I say, "I love this book, you will too"; is</p> <p>9 that okay?</p> <p>10 A I think that would be okay.</p> <p>11 Q It's okay with you?</p> <p>12 A Yes.</p> <p>13 Q You're not litigious?</p> <p>14 A No.</p> <p>15 Q Are you expressing an opinion</p> <p>16 whether that violates the copyright laws?</p> <p>17 A No, I don't know about the</p> <p>18 copyright law, I'm not an expert on it.</p> <p>19 Q Have you ever seen that happen,</p> <p>20 where a publisher looks the other way when</p> <p>21 someone --</p> <p>22 MR. McGOWAN: On the Boni & Zack</p> <p>23 website.</p> <p>24 Q -- publishes on a website five</p> <p>25 chapters of a book in copyright?</p>	<p style="text-align: right;">Page 41</p> <p>1 Harris</p> <p>2 A No.</p> <p>3 Q Have you written any books?</p> <p>4 A Way back when.</p> <p>5 Q Are they still in copyright?</p> <p>6 A Probably not.</p> <p>7 Q Probably not?</p> <p>8 A Probably not. Well, maybe. I</p> <p>9 don't know.</p> <p>10 Q Were they registered?</p> <p>11 A Yes.</p> <p>12 Q Do you promote them?</p> <p>13 A No.</p> <p>14 It was more editing than writing;</p> <p>15 they were art books.</p> <p>16 Q Are you familiar with any revenues</p> <p>17 that are derived from either Search Inside the</p> <p>18 Book or the Partner Program, Amazon's Search</p> <p>19 Inside the Book or the Google Partner Program,</p> <p>20 by the persons who participate?</p> <p>21 A No.</p> <p>22 Q You don't know anything about</p> <p>23 that?</p> <p>24 A No.</p> <p>25 Q Do you know of any revenues that</p>

<p style="text-align: right;">Page 42</p> <p>1 Harris</p> <p>2 are derived from any promotional uses of books?</p> <p>3 MR. McGOWAN: Objection, vague</p> <p>4 with respect to "derived."</p> <p>5 You may answer.</p> <p>6 Q Earned.</p> <p>7 MR. McGOWAN: By whom is the</p> <p>8 objection?</p> <p>9 MS. ZACK: Anyone.</p> <p>10 A I don't know.</p> <p>11 MS. ZACK: Let's take a short</p> <p>12 break.</p> <p>13 (Recess taken)</p> <p>14 MS. ZACK: Let's mark as PX 91</p> <p>15 four pages entitled "Google Books</p> <p>16 Partner Program Standard Terms and</p> <p>17 Conditions," from the internet.</p> <p>18 (Document entitled "Google Books</p> <p>19 Partner Program Standard Terms and</p> <p>20 Conditions" marked Exhibit PX 91 for</p> <p>21 identification.)</p> <p>22 Q Have you seen this before,</p> <p>23 Mr. Harris?</p> <p>24 A No.</p> <p>25 Q This is a Partner Program,</p>	<p style="text-align: right;">Page 44</p> <p>1 Harris</p> <p>2 Q You didn't know that before today?</p> <p>3 A No.</p> <p>4 Q Now, if a book is out of print,</p> <p>5 how does Google's displaying it help the author</p> <p>6 sell the book?</p> <p>7 A I assume that people can search</p> <p>8 and find it.</p> <p>9 Q But if it's out of print, how</p> <p>10 can -- what is the author or the publisher</p> <p>11 getting out of it?</p> <p>12 A It may be available in e-book</p> <p>13 form.</p> <p>14 Q What if it's not?</p> <p>15 A I don't know.</p> <p>16 Q You don't know whether --</p> <p>17 A I don't know how it would help.</p> <p>18 It's possible that if a lot of people click on</p> <p>19 that title, a publisher or an author will bring</p> <p>20 it back into print if there was demand.</p> <p>21 Q Do you have any evidence that</p> <p>22 that's happening?</p> <p>23 A No.</p> <p>24 Q Do you know if Google reports to</p> <p>25 authors and publishers of books that it puts</p>
<p style="text-align: right;">Page 43</p> <p>1 Harris</p> <p>2 basically contract, or terms and conditions,</p> <p>3 that a rights holder can enter into with Google</p> <p>4 to participate in the Partner Program.</p> <p>5 A (Nodding)</p> <p>6 Q If you look on page 2, you'll see</p> <p>7 paragraph eight, "Ads Payment."</p> <p>8 A Yes.</p> <p>9 Q It talks about payment for ads on</p> <p>10 pages with authorized content.</p> <p>11 You have no knowledge about this</p> <p>12 feature of the Partner Program?</p> <p>13 A No.</p> <p>14 Q Do you understand the Partner</p> <p>15 Program to be promotional?</p> <p>16 A Yes.</p> <p>17 Q And do you understand that Google</p> <p>18 places ads on some portions of the content that</p> <p>19 is authorized by participants in the Partner</p> <p>20 Program?</p> <p>21 A Yes.</p> <p>22 Q And do you understand that Google</p> <p>23 shares a portion of the ad revenues based on</p> <p>24 clicks with its Partner Program participants?</p> <p>25 A I see that.</p>	<p style="text-align: right;">Page 45</p> <p>1 Harris</p> <p>2 into Google Books through the Library Project</p> <p>3 how much people have clicked on ads?</p> <p>4 A No.</p> <p>5 Q You don't know one way or the</p> <p>6 other?</p> <p>7 A No.</p> <p>8 Q Do you know how Google earns money</p> <p>9 from its business?</p> <p>10 MR. McGOWAN: Objection, vague.</p> <p>11 You may answer.</p> <p>12 A Only what I've read in the papers</p> <p>13 about advertising revenue.</p> <p>14 Q So what's your understanding?</p> <p>15 A People pay money to advertise</p> <p>16 their services or products, and when the ad is</p> <p>17 read, Google gets money from the advertiser.</p> <p>18 Q Do you know what percentage of</p> <p>19 books copied by Google in the Library Project</p> <p>20 were out of print as opposed to in print?</p> <p>21 A No, I don't.</p> <p>22 Q Have you ever advised any</p> <p>23 publishers or authors of out-of-print books how</p> <p>24 best to put those books back into print?</p> <p>25 A No.</p>

<p style="text-align: right;">Page 46</p> <p>1 Harris</p> <p>2 Q Are you familiar with services</p> <p>3 such as iUniverse, which will create e-books of</p> <p>4 out-of-print works?</p> <p>5 A Yes.</p> <p>6 Q Are you familiar with any other</p> <p>7 services like that?</p> <p>8 A I know there are quite a few, but</p> <p>9 I don't know the names of them.</p> <p>10 Q Have you ever advised any author</p> <p>11 or publisher to use any of those services?</p> <p>12 A No.</p> <p>13 Q Do you consider yourself an expert</p> <p>14 in e-book publishing?</p> <p>15 A No.</p> <p>16 Q Do you consider yourself an expert</p> <p>17 in using the internet for promotional purposes?</p> <p>18 MR. McGOWAN: Objection, lacks</p> <p>19 foundation.</p> <p>20 You may answer.</p> <p>21 A I'm familiar with using the</p> <p>22 internet as a promotional vehicle.</p> <p>23 Q Do you consider yourself an expert</p> <p>24 in it?</p> <p>25 A It's changing so fast, I wouldn't</p>	<p style="text-align: right;">Page 48</p> <p>1 Harris</p> <p>2 You may answer.</p> <p>3 A It's part of what I do. I don't</p> <p>4 know how much.</p> <p>5 Q Would it be fair to say that you</p> <p>6 focus more of your consulting practice on print</p> <p>7 publishing?</p> <p>8 A No, I think at this point it's</p> <p>9 50/50.</p> <p>10 Q When did it become 50/50?</p> <p>11 A Oh, I guess about five years ago.</p> <p>12 Q Have you personally made any</p> <p>13 promotional decisions for any books since you</p> <p>14 left Workman Publishers?</p> <p>15 A Yes.</p> <p>16 Q So you've done that in your</p> <p>17 capacity as a consultant?</p> <p>18 A Yes.</p> <p>19 Q Has that been for publishers?</p> <p>20 A For authors and publishers.</p> <p>21 Q Have any of them delegated to you</p> <p>22 the right to make their promotional decisions?</p> <p>23 MR. McGOWAN: Objection, vague.</p> <p>24 You may answer.</p> <p>25 A In consultation.</p>
<p style="text-align: right;">Page 47</p> <p>1 Harris</p> <p>2 say I'm an expert.</p> <p>3 Q You left Workman in 2004.</p> <p>4 A Yes.</p> <p>5 Q And a lot has happened since then.</p> <p>6 A That's right.</p> <p>7 Q With respect to the internet,</p> <p>8 anyway.</p> <p>9 A Yeah.</p> <p>10 Q Do you think you've kept up with</p> <p>11 all that?</p> <p>12 A I've --</p> <p>13 MR. McGOWAN: Objection, vague.</p> <p>14 A I've kept up with as much as I</p> <p>15 can.</p> <p>16 Q Do you work full-time as a</p> <p>17 consultant?</p> <p>18 A No.</p> <p>19 Q Approximately how much time do you</p> <p>20 work now?</p> <p>21 A About four days a week.</p> <p>22 Q How much of your time is devoted</p> <p>23 to working on matters involving digital rights,</p> <p>24 digital promotion or digital publication?</p> <p>25 MR. McGOWAN: Objection, compound.</p>	<p style="text-align: right;">Page 49</p> <p>1 Harris</p> <p>2 Q So you've given them advice,</p> <p>3 basically?</p> <p>4 A Yes.</p> <p>5 Q With respect to approximately how</p> <p>6 many books?</p> <p>7 A Say about 25 or 30.</p> <p>8 Q So 25 or 30 books since 2004?</p> <p>9 A Yeah.</p> <p>10 Q With respect to none of these</p> <p>11 books have you advised your client to utilize</p> <p>12 Google Library Project?</p> <p>13 A No.</p> <p>14 Q You have not?</p> <p>15 A It has not been part of what I've</p> <p>16 advised, no.</p> <p>17 Q And with respect to those 25 or 30</p> <p>18 books, you have not advised any of them to use</p> <p>19 Amazon's Search Inside the Book function?</p> <p>20 A I recommended that they use it.</p> <p>21 Q Oh, you did recommend that?</p> <p>22 A Yes.</p> <p>23 Q With respect to how many books?</p> <p>24 A I would say all of them.</p> <p>25 Q Did you recommend any other</p>

13 (Pages 46 - 49)

<p style="text-align: right;">Page 50</p> <p>1 Harris</p> <p>2 digital promotions other than Amazon for any of</p> <p>3 the 25 to 30 books?</p> <p>4 MR. McGOWAN: Objection, vague.</p> <p>5 You may answer.</p> <p>6 A Yes.</p> <p>7 Q What other types of digital</p> <p>8 promotion?</p> <p>9 A Book trailers, contests, games.</p> <p>10 Q Anything else?</p> <p>11 A Nothing specific I can remember.</p> <p>12 Q What's a book trailer?</p> <p>13 A A book trailer is a -- like a</p> <p>14 movie trailer, like a small feature, video</p> <p>15 feature, about the book.</p> <p>16 Q Like an interview with the author?</p> <p>17 A Could be an interview with the</p> <p>18 author, it could be pages from the book, it</p> <p>19 could be sound and light; it could be anything.</p> <p>20 Q So you didn't give the same advice</p> <p>21 for each of these 25 to 30 books?</p> <p>22 A No, no.</p> <p>23 Q And when you gave advice about how</p> <p>24 to promote the book, what were your</p> <p>25 considerations?</p>	<p style="text-align: right;">Page 52</p> <p>1 Harris</p> <p>2 see?</p> <p>3 A I would get -- book titles would</p> <p>4 come up.</p> <p>5 Q And with respect to those titles,</p> <p>6 did you ever look -- do any searches within the</p> <p>7 books?</p> <p>8 A Yes.</p> <p>9 Q Did you ever see a search result</p> <p>10 that was snippets only and it said that this was</p> <p>11 from the Library Project?</p> <p>12 A Yes.</p> <p>13 Q And how many searches did you do</p> <p>14 within a single book?</p> <p>15 A Two or three.</p> <p>16 Q And you stopped?</p> <p>17 A Yeah.</p> <p>18 Q What was the purpose of doing the</p> <p>19 searches?</p> <p>20 A Just to see how it worked, find</p> <p>21 out a particular piece of information.</p> <p>22 Q Was that in connection with your</p> <p>23 retention?</p> <p>24 A Lately, yes.</p> <p>25 Q Through Google?</p>
<p style="text-align: right;">Page 51</p> <p>1 Harris</p> <p>2 A The target market and the amount</p> <p>3 of money of you could spend, our budget.</p> <p>4 Q Anything else?</p> <p>5 A No.</p> <p>6 Q Now, with respect -- going back to</p> <p>7 Google Books itself, you said you had done a</p> <p>8 search for a book title or some sort of search?</p> <p>9 A Yeah.</p> <p>10 Q Did you do any search within the</p> <p>11 books, where you put -- after you found a book,</p> <p>12 you then searched within the book?</p> <p>13 A No.</p> <p>14 Q When you've done your searches,</p> <p>15 have you used the Google main search engine or</p> <p>16 have you gone to the Google Books --</p> <p>17 A I went to the Google Books. Both,</p> <p>18 I guess.</p> <p>19 Q Let's talk about Google Books.</p> <p>20 When you went to Google Books, how</p> <p>21 did you search? Did you put in the name of a</p> <p>22 book, or did you put in just a general search</p> <p>23 term?</p> <p>24 A Both.</p> <p>25 Q And what type of results did you</p>	<p style="text-align: right;">Page 53</p> <p>1 Harris</p> <p>2 A Yes.</p> <p>3 Q Had you done that before you were</p> <p>4 retained by Google?</p> <p>5 A No.</p> <p>6 MS. ZACK: I don't have any other</p> <p>7 questions.</p> <p>8 MR. McGOWAN: I don't have any</p> <p>9 questions.</p> <p>10 (Time noted: 11:03 a.m.)</p> <p>11</p> <p>12</p> <p>13 BRUCE S. HARRIS</p> <p>14</p> <p>15 Signed and subscribed to before me</p> <p>16 this ____ day of _____, 2012.</p> <p>17</p> <p>18</p> <p>19 Notary Public</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

Page 54		Page 56	
1		1	ERRATA SHEET
2	CERTIFICATE	2	VERITEXT REPORTING COMPANY
3		3	1250 BROADWAY
4	I, HELEN MITCHELL, a Shorthand	4	NEW YORK, NEW YORK 10001
5	Reporter and Notary Public, do hereby	5	800-362-2520
6	certify:	6	CASE: AUTHORS GUILD, ET AL. VS. GOOGLE, INC.
7	I reported the proceedings in the	7	DEPOSITION DATE: JUNE 1, 2012
8	within-entitled matter, and that the	8	DEPONENT: BRUCE S. HARRIS
9	within transcript is a true record of	9	PAGE LINE(S) CHANGE REASON
10	such proceedings.	10	
11	I further certify that I am not	11	
12	related, by blood or marriage, to any of	12	
13	the parties in this matter and that I am	13	
14	in no way interested in the outcome of	14	
15	this matter.	15	
16	IN WITNESS WHEREOF, I have	16	
17	hereunto set my hand this 6th day	17	
18	of June, 2012.	18	
19		19	
20		20	
21	HELEN MITCHELL	21	BRUCE S. HARRIS
22		22	SUBSCRIBED AND SWORN TO BEFORE ME
23		23	THIS ____ DAY OF _____, 20__.
24		24	
25		25	(NOTARY PUBLIC) MY COMMISSION EXPIRES:

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1 Harris

2 A Yes.

3 Q Had you done that before you were
4 retained by Google?

5 A No.

6 MS. ZACK: I don't have any other
7 questions.

8 MR. MCGOWAN: I don't have any
9 questions.

10 (Time noted: 11:03 a.m.)

11 
12 _____

13 BRUCE S. HARRIS

14

15 Signed and subscribed to before me

16 this _____ day of _____, 2012.

17

18 _____

19 Notary Public

20

21

22

23

24

25

EXHIBIT 41

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.
- against -) 05 CV 8136 (DC)
)
GOOGLE INC.,)
)
)
Defendant.)
_____)

One Penn Plaza
New York, New York

June 6, 2012
10:31 a.m.

Deposition of ALBERT N. GRECO, held at the
offices of MILBERG LLP, before LINDA DEVECKA, a
Notary Public of the State of New York.

<p style="text-align: right;">Page 2</p> <p>1 2 A P P E A R A N C E S: 3 4 BONI & ZACK, LLC 5 Attorneys for Plaintiffs 6 15 St. Asaphs Road 7 Bala Cynwyd, Pennsylvania 19004 8 BY: JOANNE ZACK, ESQ. 9 10 11 DURIE TANGRI LLP 12 Attorneys for Defendant 13 217 Leidesdorff Street 14 San Francisco, California 94111 15 BY: DAVID McGOWAN, ESQ. 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 2 MS. ZACK: Mark this, please. 3 (Plaintiff's Exhibit 92, document titled 4 "Expert Report of Professor Albert N. Greco May 5 3, 2012", marked for identification, as of this 6 date.) 7 A L B E R T N . G R E C O , called as a 8 witness, having been duly sworn by a Notary 9 Public, was examined and testified as follows: 10 EXAMINATION BY 11 MS. ZACK: 12 Q. Good morning, Professor Greco. 13 Could you just state your full name for 14 the record, please. 15 A. Sure. Albert N. Greco, G-r-e-c-o. 16 Q. What is your current position? 17 A. I am a professor of marketing, Fordham 18 University, New York City, in the Schools of Business 19 Administration. 20 Q. You have been retained in this matter by 21 Google as an expert? 22 A. Yes. 23 Q. When were you retained? 24 A. Sometime in March of 2012. Perhaps the 25 middle of the month. Somewhere in that time period.</p>
<p style="text-align: right;">Page 3</p> <p>1 2 IT IS HEREBY STIPULATED AND AGREED, by 3 and among counsel for the respective 4 parties hereto, that the filing, sealing and 5 certification of the within deposition shall be 6 and the same are hereby waived; 7 IT IS FURTHER STIPULATED AND AGREED 8 that all objections, except as to the form of 9 the question, shall be reserved to the time 10 of the trial; 11 IT IS FURTHER STIPULATED AND AGREED 12 that the within deposition may be signed 13 before any Notary Public with the same 14 force and effect as if signed and sworn to 15 before the Court. 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 Greco 2 Q. What is your area of expertise? 3 A. I have done research on customs and 4 practices in the book industry, also the scholarly 5 journal business which is obviously not of any 6 interest today. 7 Q. When you say you have done research on the 8 customs and practices in the book industry, what 9 research are you speaking of? 10 A. I am the author or editor of 12 scholarly 11 books, most of which dealt with some aspect of the 12 book publishing industry, including a book called 13 "The Book Publishing Industry," another one called 14 "The Culture and Commerce of Publishing in the 21st 15 Century." A series of journal articles in a variety 16 of journals here and in Europe on various aspects of 17 the book publishing industry. Presentations at 18 conferences. 19 Q. Are there particular aspects of the book 20 publishing industry that you focus on in your 21 research? 22 A. A great deal of the research is spent on 23 sales, marketing, distribution. I look at the other 24 areas of the industry, too. 25 Q. Do you have any expertise in legal matters</p>

<p style="text-align: right;">Page 6</p> <p>1 Greco</p> <p>2 concerning the book publishing industry?</p> <p>3 A. I am not an attorney. I have written</p> <p>4 about contracts in various publications.</p> <p>5 Q. Do you consider yourself an expert on fair</p> <p>6 use?</p> <p>7 A. I am familiar with fair use.</p> <p>8 Q. But not an expert?</p> <p>9 A. I have never written extensively on fair</p> <p>10 use.</p> <p>11 Q. You have been an expert before, I take it?</p> <p>12 A. Yes.</p> <p>13 MR. MCGOWAN: Let me just caution you to</p> <p>14 wait until Ms. Zack is finished speaking because</p> <p>15 it's important that you not speak over each</p> <p>16 other.</p> <p>17 THE WITNESS: Okay.</p> <p>18 Q. We have marked as PX 92 your expert</p> <p>19 report. You have that, right?</p> <p>20 A. Yes, I do.</p> <p>21 Q. If you look at what was marked as Exhibit</p> <p>22 B to your expert report which comes very near the</p> <p>23 end.</p> <p>24 A. Exhibit B, yes.</p> <p>25 Q. There is a list of, I think, four cases</p>	<p style="text-align: right;">Page 8</p> <p>1 Greco</p> <p>2 retained to discuss book marketing, book selling and</p> <p>3 book distribution in the United States.</p> <p>4 Q. You served as an expert for Feld, you</p> <p>5 said?</p> <p>6 A. Yes, Feld.</p> <p>7 Q. Is that a person or a publisher?</p> <p>8 A. Mr. Feld is a business executive.</p> <p>9 Q. Do you recall the claims against him?</p> <p>10 A. In terms of the book publishing industry,</p> <p>11 there were allegations that Pottker, who was and I</p> <p>12 still believe is an author, there were allegations</p> <p>13 that Mr. Feld tried to hurt her career as an author.</p> <p>14 Q. What was the nature of your expert</p> <p>15 opinion?</p> <p>16 A. Well, there was a confidentiality</p> <p>17 agreement. I was asked to look into book sales,</p> <p>18 marketing and book distribution during the period of</p> <p>19 time in which the allegations centered on.</p> <p>20 Q. Did this case have anything to do with</p> <p>21 eBooks?</p> <p>22 A. No.</p> <p>23 Q. Or digital marketing of books?</p> <p>24 A. I don't believe so.</p> <p>25 Q. Is there anything else you can tell me</p>
<p style="text-align: right;">Page 7</p> <p>1 Greco</p> <p>2 that you served as an expert in, is that correct?</p> <p>3 A. Yes.</p> <p>4 Q. In the last five years or four years or is</p> <p>5 this all the ones you have --</p> <p>6 A. This is a complete list covering the</p> <p>7 period from 2008 to the present.</p> <p>8 Q. It's a complete list from 2008 to the</p> <p>9 present?</p> <p>10 A. Yes.</p> <p>11 Q. Prior to 2008, did you serve as an expert</p> <p>12 in any litigation matters?</p> <p>13 A. The first matter actually started, I</p> <p>14 believe, in 2007. It was settled in 2008.</p> <p>15 Q. Is that on this list?</p> <p>16 A. Yes, it is.</p> <p>17 Q. Which one is that?</p> <p>18 A. Number 1.</p> <p>19 Q. Which side did you serve as an expert for</p> <p>20 in that case number 1, Pottker versus Feld?</p> <p>21 A. Feld.</p> <p>22 Q. What type of case was that?</p> <p>23 MR. MCGOWAN: Objection, vague. You may</p> <p>24 answer.</p> <p>25 A. It involved a variety of issues. I was</p>	<p style="text-align: right;">Page 9</p> <p>1 Greco</p> <p>2 about that case?</p> <p>3 A. It was settled, and I have no idea about</p> <p>4 the terms of the settlement.</p> <p>5 Q. Other than the settlement. I mean, under</p> <p>6 your confidentiality agreement as you understand it,</p> <p>7 is there any other matters that you can tell me about</p> <p>8 concerning your report?</p> <p>9 A. I analyzed sales data for a period of</p> <p>10 time, looked at marketing customs and trends during</p> <p>11 that period of time, talked about distribution of</p> <p>12 books into the channels of distribution during that</p> <p>13 time. It dealt really with those three areas.</p> <p>14 Q. But your report didn't deal with the eBook</p> <p>15 channel of distribution?</p> <p>16 A. No.</p> <p>17 Q. And it didn't deal with marketing online?</p> <p>18 A. No.</p> <p>19 Q. Did it deal with digital copying?</p> <p>20 A. I don't believe so.</p> <p>21 Q. The second case listed is Health</p> <p>22 Communications, Inc. versus Chicken Soup For the Soul</p> <p>23 Publishing.</p> <p>24 Who were you retained as expert for?</p> <p>25 A. Health Communications, Inc.</p>

<p style="text-align: right;">Page 10</p> <p>1 Greco</p> <p>2 Q. What line of business were they in?</p> <p>3 A. They are a book publisher publishing a</p> <p>4 variety of different kinds of books, often in</p> <p>5 inspirational, self-help psychology areas and other</p> <p>6 areas.</p> <p>7 Q. What was the nature of the claim in that</p> <p>8 litigation?</p> <p>9 A. Two authors had a long-term contract with</p> <p>10 Health Communications. The contract reached a</p> <p>11 termination point and the two authors left. As I was</p> <p>12 told, Health Communications had the legal authority</p> <p>13 to print and distribute backlist titles that were</p> <p>14 originally printed under the then terms and</p> <p>15 conditions of a contract.</p> <p>16 When the two authors left -- and they were</p> <p>17 the two primary editors of this book series called</p> <p>18 "Chicken Soup For the Soul." When they left and went</p> <p>19 to a new publisher, and they had every right to do</p> <p>20 that, the allegation was that material that had</p> <p>21 originally appeared in books published by Health</p> <p>22 Communications, Inc. was being used in new books</p> <p>23 published by a new publisher, and there was a request</p> <p>24 for an injunction to stop the sale of these new books</p> <p>25 that allegedly used material from</p>	<p style="text-align: right;">Page 12</p> <p>1 Greco</p> <p>2 THE WITNESS: I really don't know for</p> <p>3 sure.</p> <p>4 Q. In any event, you are not aware of a</p> <p>5 trial? You are not aware of any trial?</p> <p>6 A. No, I'm not.</p> <p>7 Q. And you didn't testify at a trial?</p> <p>8 A. There was a hearing before a judge.</p> <p>9 Q. You did testify at the injunction hearing?</p> <p>10 A. Yes.</p> <p>11 Q. That was in Connecticut?</p> <p>12 A. Yes.</p> <p>13 Q. Was an injunction granted?</p> <p>14 A. No.</p> <p>15 Q. Was there a confidentiality agreement in</p> <p>16 that case?</p> <p>17 A. Yes.</p> <p>18 Q. Do you recall more specifically what you</p> <p>19 testified about sales and marketing in that case?</p> <p>20 MR. McGOWAN: Objection, asked and</p> <p>21 answered. You may answer.</p> <p>22 MS. ZACK: I said "more specifically."</p> <p>23 Q. You don't have to repeat what you already</p> <p>24 said.</p> <p>25 A. I was asked a series of questions</p>
<p style="text-align: right;">Page 11</p> <p>1 Greco</p> <p>2 previously-published books.</p> <p>3 Q. What was the nature of your opinion as an</p> <p>4 expert?</p> <p>5 A. I was asked to deal with the sales and</p> <p>6 marketing and distribution issues, customs,</p> <p>7 traditions, during the period in which the matter</p> <p>8 centered on.</p> <p>9 Q. Did that case have anything to do with</p> <p>10 eBooks?</p> <p>11 A. I don't believe it had anything to do with</p> <p>12 eBooks.</p> <p>13 Q. Did it have anything to do with digital</p> <p>14 marketing of books?</p> <p>15 A. Only in the sense that books by that point</p> <p>16 were available online, but that was not a major</p> <p>17 issue. It was very much a secondary issue in the</p> <p>18 matter.</p> <p>19 Q. And it says "Matter will go to trial."</p> <p>20 Did it ever go to trial?</p> <p>21 A. I don't know. I have a feeling the</p> <p>22 parties may have settled or perhaps the one party</p> <p>23 just dropped the suit.</p> <p>24 MR. McGOWAN: I caution you not to guess.</p> <p>25 If you know or --</p>	<p style="text-align: right;">Page 13</p> <p>1 Greco</p> <p>2 regarding customs, practices, traditions in the</p> <p>3 selling of books, the marketing of books, the</p> <p>4 distribution of books, and a whole series of</p> <p>5 questions on those three topics.</p> <p>6 Q. You don't remember what questions there</p> <p>7 were, what you answered?</p> <p>8 A. Not really, in all candor.</p> <p>9 Q. Referring you to case number 3 on your</p> <p>10 list, the National Federation of the Blind versus the</p> <p>11 Arizona Board of Regents, who retained you as an</p> <p>12 expert?</p> <p>13 A. National Federation of the Blind.</p> <p>14 Q. What was the nature of the claims at issue</p> <p>15 in that case?</p> <p>16 A. The National Federation of the Blind had</p> <p>17 represented individuals that had vision impairment</p> <p>18 problems. Arizona State University had an honors</p> <p>19 program, which is very typical, and they were using</p> <p>20 an electronic handheld device, an eReader called the</p> <p>21 Kindle, and the National Federation of the Blind felt</p> <p>22 that individuals that had a vision problem could not</p> <p>23 use that device. It really centered on higher</p> <p>24 education college textbooks.</p> <p>25 Q. When you say "centered on," what do you</p>

<p style="text-align: right;">Page 14</p> <p>1 Greco</p> <p>2 mean?</p> <p>3 A. They asked me to discuss trends in higher</p> <p>4 education textbook publishing, sales, marketing,</p> <p>5 distribution.</p> <p>6 Q. What did you say about those areas?</p> <p>7 A. They asked specifically about the use of</p> <p>8 textbooks in colleges in the United States and in</p> <p>9 terms of the use of eReaders and the potential growth</p> <p>10 of eReaders in that market.</p> <p>11 Q. Anything else that you talked about?</p> <p>12 A. That was really the extent of it.</p> <p>13 Q. Did that case go to trial?</p> <p>14 A. No. The parties settled.</p> <p>15 Q. You said you testified in an injunction in</p> <p>16 case number 2, Health Communications, Inc.</p> <p>17 Did you ever testify at a deposition in</p> <p>18 the Pottker case?</p> <p>19 A. I gave depositions in the Pottker case.</p> <p>20 Q. And in the National Federation of the</p> <p>21 Blind case?</p> <p>22 A. Yes.</p> <p>23 Q. The fourth case is Illinois Computer</p> <p>24 Research versus Harpo Productions.</p> <p>25 Who retained you there?</p>	<p style="text-align: right;">Page 16</p> <p>1 Greco</p> <p>2 Q. You talked about historical or custom and</p> <p>3 practices as to book distributions of printed books?</p> <p>4 A. Of printed books and excerpts.</p> <p>5 Q. So what was your opinion?</p> <p>6 A. That there was a long tradition in the</p> <p>7 United States and a long tradition in the U.K. but</p> <p>8 specifically a long tradition in the United States</p> <p>9 about sales, marketing and distribution of printed</p> <p>10 books and the use of excerpts in the United States.</p> <p>11 Q. Excerpts for what purpose?</p> <p>12 A. Book excerpts.</p> <p>13 Q. Used for what purpose of book excerpts?</p> <p>14 A. Several different uses. One was</p> <p>15 marketing, and one centered on the fact that certain</p> <p>16 authors released books as excerpts over a period of</p> <p>17 time. In a sense in serials, magazines.</p> <p>18 Q. You are saying it was a custom and</p> <p>19 practice for authors to release portions of their</p> <p>20 books as excerpts in magazines over time as serials?</p> <p>21 A. Some authors did that going back to the</p> <p>22 mid 19th century in the United States.</p> <p>23 Q. What did you say about marketing?</p> <p>24 A. Specifically, you know, why excerpts were</p> <p>25 released. In some cases it was to market the entire</p>
<p style="text-align: right;">Page 15</p> <p>1 Greco</p> <p>2 A. Harpo Productions, Inc.</p> <p>3 Q. What is their line of business?</p> <p>4 A. It is a primarily but not -- it's</p> <p>5 primarily a television -- it's a company with</p> <p>6 television operations and a magazine. They may have</p> <p>7 other -- they have been involved in the motion</p> <p>8 picture industry also. They may have other</p> <p>9 businesses that I am not aware of.</p> <p>10 Q. What was the claim in that case or claims?</p> <p>11 A. It was a patent -- the allegations were</p> <p>12 that it was a patent infringement case involving</p> <p>13 books and book excerpts.</p> <p>14 Q. Patent infringement of book excerpts?</p> <p>15 A. Yes.</p> <p>16 Q. Was there a copyright claim, too?</p> <p>17 A. I don't believe there was any copyright</p> <p>18 claim in this matter.</p> <p>19 Q. What type of matters did you offer an</p> <p>20 expert opinion on for Harpo Productions?</p> <p>21 A. Book sales, book marketing, book</p> <p>22 distribution of printed books and excerpts in the</p> <p>23 United States back to approximately the middle of the</p> <p>24 19th century and some work on those issues in the</p> <p>25 United Kingdom back to the 19th century.</p>	<p style="text-align: right;">Page 17</p> <p>1 Greco</p> <p>2 book.</p> <p>3 Q. Why excerpts were released by whom?</p> <p>4 A. It included author Conan Doyle, James</p> <p>5 Michener and more than a dozen other authors. I</p> <p>6 can't remember all of them.</p> <p>7 Q. So you analyzed the circumstances under</p> <p>8 which those authors released excerpts for marketing</p> <p>9 purposes?</p> <p>10 A. Yes.</p> <p>11 Q. What did you conclude about that?</p> <p>12 A. That it was as very longstanding tradition</p> <p>13 in the United States and in the U.K. for some authors</p> <p>14 to release excerpts in order to generate interest in</p> <p>15 their writings and the ultimate publication of a book</p> <p>16 or the use of excerpts after a book had been</p> <p>17 published in order to generate interest in the sales</p> <p>18 of their book or books.</p> <p>19 Q. How is that relevant to the case, this</p> <p>20 Illinois Computer Research versus Harpo Productions</p> <p>21 case?</p> <p>22 MR. McGOWAN: Objection to the extent it</p> <p>23 calls for a legal conclusion. You may answer.</p> <p>24 Q. How is it pertinent to the case?</p> <p>25 A. The allegation from Illinois Computer</p>

5 (Pages 14 - 17)

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<p style="text-align: right;">Page 18</p> <p>1 Greco</p> <p>2 Research LLC was that they had a patent on the use of</p> <p>3 excerpts online.</p> <p>4 Q. They had a patent on the use of excerpts</p> <p>5 from certain books?</p> <p>6 A. I believe the allegation was for all</p> <p>7 content, not just books, but this matter that I was</p> <p>8 involved in centered only on books.</p> <p>9 Q. Illinois Computer Research was alleging it</p> <p>10 had a patent on the use of excerpts online from all</p> <p>11 books?</p> <p>12 A. I don't believe they said all books. They</p> <p>13 were dealing specifically with Harpo Productions,</p> <p>14 Inc.</p> <p>15 Q. So they said they had a patent on the use</p> <p>16 of excerpts from books that Harpo Productions, Inc.</p> <p>17 had an interest in?</p> <p>18 MR. McGOWAN: I am going to object.</p> <p>19 Q. Is that your understanding?</p> <p>20 MR. McGOWAN: I am going to object to the</p> <p>21 extent it calls for claim construction. It is a</p> <p>22 pending case. I think his testimony establishes</p> <p>23 the relevance. You may answer.</p> <p>24 Q. You can say you don't know if you don't</p> <p>25 know.</p>	<p style="text-align: right;">Page 20</p> <p>1 Greco</p> <p>2 Q. And now this one?</p> <p>3 A. Yes.</p> <p>4 MR. McGOWAN: Exhibit C.</p> <p>5 Q. If you look at the last page of PX 92</p> <p>6 which is Exhibit C, it's a list of materials</p> <p>7 considered.</p> <p>8 A. Yes.</p> <p>9 Q. Did you read all these materials that are</p> <p>10 listed cover-to-cover?</p> <p>11 A. Yes.</p> <p>12 Q. Most of them are not cited in your report,</p> <p>13 you would agree, correct?</p> <p>14 A. Correct.</p> <p>15 Q. What use did you make of these materials</p> <p>16 on this list?</p> <p>17 A. It provided background information about</p> <p>18 the matter between the Authors Guild and Google.</p> <p>19 Q. Before you were retained, did you have any</p> <p>20 awareness of this case?</p> <p>21 A. Yes.</p> <p>22 Q. You mention in your report, the body of</p> <p>23 your report, that you have a copyright interest in a</p> <p>24 book, is that right?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 19</p> <p>1 Greco</p> <p>2 A. I don't know the full extent of their</p> <p>3 claim. I only was asked to discuss the Harpo</p> <p>4 Productions matter.</p> <p>5 Q. Did you give a deposition in that case?</p> <p>6 A. Yes.</p> <p>7 Q. Are you under a confidentiality agreement</p> <p>8 there?</p> <p>9 A. Yes.</p> <p>10 Q. Do you know the disposition of that case?</p> <p>11 A. It was settled.</p> <p>12 Q. Have you ever served as an expert for</p> <p>13 Google in any matter?</p> <p>14 A. No.</p> <p>15 Q. Have you ever been retained previously by</p> <p>16 Google in any capacity?</p> <p>17 A. No.</p> <p>18 Q. Have you ever served as an expert for</p> <p>19 Durie Tangri in any matter?</p> <p>20 A. No.</p> <p>21 Q. For Keker Van Nest?</p> <p>22 A. No.</p> <p>23 Q. Is it the case that you served as an</p> <p>24 expert in only these four cases and that's it?</p> <p>25 A. Only those four cases.</p>	<p style="text-align: right;">Page 21</p> <p>1 Greco</p> <p>2 Q. Were you aware of this settlement that</p> <p>3 never was approved finally in this case?</p> <p>4 A. Yes.</p> <p>5 Q. Did you file a claim?</p> <p>6 A. No.</p> <p>7 Q. Did you object?</p> <p>8 A. No.</p> <p>9 Q. Have you talked to anyone at Google</p> <p>10 personally other than counsel about the matters that</p> <p>11 you were retained to be expert about?</p> <p>12 A. No.</p> <p>13 Q. Have you talked to anyone else about those</p> <p>14 matters?</p> <p>15 A. My wife is aware of this.</p> <p>16 Q. So you talked to your wife.</p> <p>17 I presume you talked to counsel at Durie</p> <p>18 Tangri?</p> <p>19 A. Yes.</p> <p>20 Q. Anyone else?</p> <p>21 A. No.</p> <p>22 Q. Did anyone assist you in writing your</p> <p>23 report?</p> <p>24 A. No.</p> <p>25 Q. Not even Durie Tangri?</p>

<p style="text-align: right;">Page 22</p> <p>1 Greco</p> <p>2 MR. McGOWAN: Objection, vague.</p> <p>3 Q. You can answer yes or no.</p> <p>4 A. No.</p> <p>5 Q. Have you ever written any articles about</p> <p>6 Google Books?</p> <p>7 A. No. I may have mentioned it, but I don't</p> <p>8 believe so.</p> <p>9 Q. Have you written any articles about Amazon</p> <p>10 Search Inside the Book?</p> <p>11 A. No, but I may have mentioned it.</p> <p>12 Q. Have you written articles about digital</p> <p>13 marketing?</p> <p>14 A. Articles, probably if it was -- not an</p> <p>15 article on digital marketing as such. It's possible</p> <p>16 it's been mentioned in a book or articles that I have</p> <p>17 done but I have never done an exclusive study on this</p> <p>18 matter.</p> <p>19 Q. And you never studied Google Books from a</p> <p>20 research point of view?</p> <p>21 MR. McGOWAN: Objection, vague. You may</p> <p>22 answer.</p> <p>23 A. I don't believe I have written anything</p> <p>24 specifically about Google Books except in passing.</p> <p>25 Q. What about anything about Google in</p>	<p style="text-align: right;">Page 24</p> <p>1 Greco</p> <p>2 foundation, vague. You may answer.</p> <p>3 A. I have never done anything specifically on</p> <p>4 Google.</p> <p>5 Q. You talk in your report about mergers and</p> <p>6 acquisitions, et cetera, in the publishing industry,</p> <p>7 is that correct?</p> <p>8 A. Yes.</p> <p>9 Q. Is that something you studied?</p> <p>10 A. Yes.</p> <p>11 Q. What is the purpose of those studies?</p> <p>12 MR. McGOWAN: Objection. Compound, vague.</p> <p>13 You may answer.</p> <p>14 A. Scholars are interested in what has</p> <p>15 happened in various industries and sectors. I</p> <p>16 happened to study this sector in this industry.</p> <p>17 There have been a series of mergers and acquisitions</p> <p>18 in this industry in the United States going back into</p> <p>19 the 19th century. I thought it was an interesting</p> <p>20 topic. Not a lot of scholars have addressed the</p> <p>21 issue. I did a series of studies on it.</p> <p>22 Q. Did you compare the rate of mergers and</p> <p>23 acquisitions in the publishing industry to the rate</p> <p>24 of mergers and acquisitions in other industries?</p> <p>25 A. If I did, only in passing.</p>
<p style="text-align: right;">Page 23</p> <p>1 Greco</p> <p>2 general, have you written any articles about Google</p> <p>3 general business?</p> <p>4 A. No article specifically on Google.</p> <p>5 Q. Articles about search engines?</p> <p>6 A. No article specifically about search</p> <p>7 engines.</p> <p>8 Q. Have you studied or written articles about</p> <p>9 digital copying?</p> <p>10 A. No article specifically on that topic.</p> <p>11 Q. Generally?</p> <p>12 A. In general terms I have mentioned it in</p> <p>13 various publications because it's significant.</p> <p>14 Q. Have you written any articles about</p> <p>15 libraries engaging in digital copying of any type?</p> <p>16 A. Nothing specifically on that topic.</p> <p>17 Q. How about libraries setting up or engaging</p> <p>18 in their own search engines?</p> <p>19 MR. McGOWAN: Objection, vague. You may</p> <p>20 answer.</p> <p>21 A. I have looked at libraries in very general</p> <p>22 terms. So, not really.</p> <p>23 Q. Have you ever studied Google's market</p> <p>24 power?</p> <p>25 MR. McGOWAN: Objection. Lacks</p>	<p style="text-align: right;">Page 25</p> <p>1 Greco</p> <p>2 Q. Referring you back to the first page of</p> <p>3 the body of your report which is PX 92.</p> <p>4 A. Yes.</p> <p>5 Q. Paragraph 2 says "I have been asked to</p> <p>6 describe the following:", and then subparagraph A</p> <p>7 says "Characteristics and practices in the book</p> <p>8 industry, such as mergers, acquisitions, and</p> <p>9 reversions, that affect one's ability to locate</p> <p>10 rights holders for books."</p> <p>11 You were asked by Google to talk about</p> <p>12 that in your report?</p> <p>13 A. Yes.</p> <p>14 Q. Had you previously written about that</p> <p>15 subject in particular, the effect of mergers,</p> <p>16 acquisitions and reversions on the ability to locate</p> <p>17 rights holders for books?</p> <p>18 A. Not in terms of the last part of the</p> <p>19 sentence "to locate rights holders for books."</p> <p>20 Q. You have published no articles about how</p> <p>21 the mergers, acquisitions and reversions have</p> <p>22 historically affected one's ability to locate rights</p> <p>23 holders for books?</p> <p>24 A. If I did, it was in passing.</p> <p>25 Q. Do you recall doing that?</p>

7 (Pages 22 - 25)

<p style="text-align: right;">Page 26</p> <p>1 Greco</p> <p>2 A. I have worked on 12 books, 20 articles, 10</p> <p>3 professional books. It's certainly possible</p> <p>4 somewhere I referred to that, off the top of my head.</p> <p>5 I would have to go back and look, in all candor. I</p> <p>6 may have.</p> <p>7 Q. You don't cite any articles of that</p> <p>8 nature?</p> <p>9 A. No.</p> <p>10 Q. Have you ever engaged in a study whose</p> <p>11 object was an attempt to locate rights holders for</p> <p>12 books?</p> <p>13 A. I have never done such a study on that</p> <p>14 topic.</p> <p>15 Q. Have you asked others to do it for you?</p> <p>16 A. No.</p> <p>17 Q. Have you researched studies, if any, by</p> <p>18 others on that topic?</p> <p>19 A. I believe there have been some articles on</p> <p>20 those issues in a variety of publications that I</p> <p>21 almost certainly read and may have even cited</p> <p>22 somewhere along the line.</p> <p>23 Q. But you didn't cite them in your report?</p> <p>24 A. No.</p> <p>25 Q. Have you ever attempted to locate a rights</p>	<p style="text-align: right;">Page 28</p> <p>1 Greco</p> <p>2 books back in print, and I gave him some suggestions</p> <p>3 for titles, and the matter seemed to die.</p> <p>4 Q. Other than passing on the suggestion, did</p> <p>5 you do anything there to attempt to locate anyone?</p> <p>6 A. Not really.</p> <p>7 Q. Anything else; any other times that you</p> <p>8 attempted to locate a rights holder for a book?</p> <p>9 A. Not that I can remember.</p> <p>10 Q. 2 B says "The benefits to authors of</p> <p>11 making it easy for potential readers to find their</p> <p>12 books."</p> <p>13 That was something that Google asked you</p> <p>14 to opine about?</p> <p>15 A. Yes.</p> <p>16 Q. Have you previously written on that</p> <p>17 subject?</p> <p>18 A. I have written about new title output, the</p> <p>19 number of backless books, books in print, and about</p> <p>20 what is often called in the marketing literature</p> <p>21 "clutter in the marketplace."</p> <p>22 Q. In connection with any of those writings,</p> <p>23 did you write about the benefits to authors of making</p> <p>24 it easy for potential readers to find their books?</p> <p>25 A. I wrote about the problem authors face in</p>
<p style="text-align: right;">Page 27</p> <p>1 Greco</p> <p>2 holder for a book?</p> <p>3 A. Yes.</p> <p>4 Q. In what context?</p> <p>5 A. A colleague named John Tebbel wrote what I</p> <p>6 believe was the definitive four-volume history of the</p> <p>7 book publishing industry in the United States. The</p> <p>8 book was published by a company that, if I remember</p> <p>9 correctly, put the books out of print, out of stock,</p> <p>10 and the company no longer did books.</p> <p>11 I was in discussions with a university</p> <p>12 press director about possibly bringing those four</p> <p>13 books back into print. The author died, and I could</p> <p>14 not find out who held the rights, whether his estate</p> <p>15 or the initial publisher, and we dropped the matter.</p> <p>16 Q. When you say you couldn't find out, what</p> <p>17 did you do to attempt to find out?</p> <p>18 A. I believe I tried to reach out to people</p> <p>19 in Bowker, the original publisher, but they no longer</p> <p>20 were doing books. They had sold certain operations</p> <p>21 to another company and, unfortunately, John Tebbel</p> <p>22 passed on, and we just dropped the matter.</p> <p>23 Q. Any other times other than that time?</p> <p>24 A. Yes. I was talking to a series editor --</p> <p>25 a book series editor who was trying to bring older</p>	<p style="text-align: right;">Page 29</p> <p>1 Greco</p> <p>2 getting publicity for books in a business environment</p> <p>3 where there is a very large number of new titles</p> <p>4 published every hour of the day.</p> <p>5 Q. Anything else on that subject?</p> <p>6 A. I would have to go back and reread the</p> <p>7 various things that I wrote about.</p> <p>8 Q. Have you ever written about the question</p> <p>9 of whether the Internet allows authors to get more</p> <p>10 noticed through their own websites?</p> <p>11 A. I probably have certainly mentioned that</p> <p>12 in some of the publications that I worked on, yes.</p> <p>13 Q. What about publisher websites?</p> <p>14 A. I believe I have written about publisher</p> <p>15 websites as a marketing tool.</p> <p>16 Q. And you have written about author websites</p> <p>17 as a marketing tool?</p> <p>18 A. I am sure I have. If you write about</p> <p>19 marketing books, these are very typical topics that</p> <p>20 you would at least mention.</p> <p>21 Q. Are there any other digital tools aside</p> <p>22 from search engines that you have written about with</p> <p>23 respect to marketing books?</p> <p>24 MR. McGOWAN: Objection, vague. You may</p> <p>25 answer.</p>

<p style="text-align: right;">Page 30</p> <p>1 Greco</p> <p>2 A. I have probably written about blogs and</p> <p>3 other digital sites that discuss books, analyze</p> <p>4 books, talk about books or authors. Those have grown</p> <p>5 in popularity in the last few years.</p> <p>6 Q. 2 C says "Industry custom and practice</p> <p>7 pertaining to the sales and marketing of books, and</p> <p>8 in particular to the practice of allowing potential</p> <p>9 buyers to search within books."</p> <p>10 A. Yes.</p> <p>11 Q. Google asked you to opine about that?</p> <p>12 A. I have written a lot about the sales and</p> <p>13 marketing of books. This is the first time I have</p> <p>14 put ink on paper dealing with "allowing potential</p> <p>15 buyers to search within books."</p> <p>16 Q. The second portion of 2 C which says "and</p> <p>17 in particular to the practice of allowing potential</p> <p>18 buyers to search within books," you haven't written</p> <p>19 about that before?</p> <p>20 A. If so, only in passing.</p> <p>21 Q. Have you discussed that particular</p> <p>22 practice with publishers?</p> <p>23 A. I have discussed it with individuals in</p> <p>24 the book publishing industry in the United States.</p> <p>25 Q. Have you discussed it with authors?</p>	<p style="text-align: right;">Page 32</p> <p>1 Greco</p> <p>2 I couldn't say for sure whether they were the very</p> <p>3 first one.</p> <p>4 Q. Who else do you understand to be engaged</p> <p>5 in this practice other than Amazon.com?</p> <p>6 MR. McGOWAN: Objection, vague. You may</p> <p>7 answer.</p> <p>8 A. Barnes&Noble.com, companies that are</p> <p>9 involved in selling new or backless books online, and</p> <p>10 that list would be, I would assume, dozens of various</p> <p>11 companies.</p> <p>12 Q. Can you give me an example of one such</p> <p>13 company?</p> <p>14 A. In addition to Amazon.com or</p> <p>15 Barnes&Noble.com?</p> <p>16 Q. Yes.</p> <p>17 A. Google. I assume Apple. I am sure there</p> <p>18 are many, many others.</p> <p>19 Q. Have you, yourself, searched inside a book</p> <p>20 at Amazon?</p> <p>21 A. Yes.</p> <p>22 Q. What have you done with respect to Barnes</p> <p>23 & Noble?</p> <p>24 MR. McGOWAN: Objection, vague. You may</p> <p>25 answer.</p>
<p style="text-align: right;">Page 31</p> <p>1 Greco</p> <p>2 A. I have had discussions with authors.</p> <p>3 Q. Who have you discussed it with? Which</p> <p>4 individuals in the book publishing industry have you</p> <p>5 discussed that topic with?</p> <p>6 A. From 1985 to the present, I have talked to</p> <p>7 a sizeable number of people in this industry.</p> <p>8 Q. Let me stop you there.</p> <p>9 I mean, this particular practice didn't</p> <p>10 start in 1987, right?</p> <p>11 A. Right.</p> <p>12 Q. We are talking more recent conversations</p> <p>13 you would have had, correct?</p> <p>14 A. Yes.</p> <p>15 Q. What I am asking you is, since this</p> <p>16 practice developed, allowing potential buyers to</p> <p>17 search within books, do you know when the practice</p> <p>18 first developed online?</p> <p>19 A. I couldn't give you a month or a year</p> <p>20 without going back and looking at some documents. I</p> <p>21 would assume it was sometime after August 1995.</p> <p>22 Q. Do you know who first developed a tool</p> <p>23 online that allowed potential buyers to search within</p> <p>24 books?</p> <p>25 A. I believe Amazon.com was involved in this.</p>	<p style="text-align: right;">Page 33</p> <p>1 Greco</p> <p>2 Q. With respect to this practice of allowing</p> <p>3 potential buyers to search within books.</p> <p>4 A. I have used the Barnes&Noble.com website</p> <p>5 and other websites doing various research projects.</p> <p>6 Q. Do you know whether or not the books that</p> <p>7 you can search through at Amazon.com are there by</p> <p>8 permission of the author or publisher?</p> <p>9 MR. McGOWAN: Objection, vague. You may</p> <p>10 answer.</p> <p>11 A. I would have to assume yes.</p> <p>12 Q. Why do you say that?</p> <p>13 A. Amazon.com is a well-known company, and I</p> <p>14 couldn't list all the various books or book</p> <p>15 publishers, but let's assume it's HarperCollins, any</p> <p>16 of those major publishers, any of the major</p> <p>17 university presses, I would assume that they will</p> <p>18 have a contract stipulating what can and cannot be</p> <p>19 posted on Amazon.com, Barnes&Noble.com, et cetera.</p> <p>20 Q. What about Google?</p> <p>21 MR. McGOWAN: Objection, vague.</p> <p>22 Q. Do you assume that --</p> <p>23 A. I would have to assume. I have not read</p> <p>24 any contracts between a publisher and/or an online</p> <p>25 site. I would assume there has to be a contract</p>

<p style="text-align: right;">Page 34</p> <p>1 Greco</p> <p>2 stipulating terms and conditions.</p> <p>3 MR. McGOWAN: I will caution the witness</p> <p>4 not to assume as opposed to testifying as to</p> <p>5 knowledge.</p> <p>6 THE WITNESS: Okay.</p> <p>7 Q. Did you have that assumption when you</p> <p>8 wrote your report?</p> <p>9 A. Yes.</p> <p>10 Q. Just to be clear, when you wrote your</p> <p>11 report which is PX 92, you assumed that all of the</p> <p>12 excerpts that show up in Google Books are shown by</p> <p>13 permission of the publisher or author?</p> <p>14 A. I assume that's correct.</p> <p>15 Q. Referring you to paragraph 3 which says</p> <p>16 "In brief, my opinion on these topics is as follows:</p> <p>17 Given the many factors that make it difficult to</p> <p>18 trace rights holders, it would be infeasible to clear</p> <p>19 rights for any comprehensive attempt to digitize</p> <p>20 books, such as the 20 million plus books in Google</p> <p>21 Books."</p> <p>22 A. That's what I wrote, yes.</p> <p>23 Q. When you say "infeasible," what do you</p> <p>24 mean?</p> <p>25 A. When you look at new title output and when</p>	<p style="text-align: right;">Page 36</p> <p>1 Greco</p> <p>2 MR. McGOWAN: Objection. Vague, lacks</p> <p>3 foundation. You may answer.</p> <p>4 A. I do not remember what the percentage was</p> <p>5 of the 20 million that were or were not in public</p> <p>6 domain.</p> <p>7 Q. 3 B says "Custom and practice in the book</p> <p>8 industry recognize that it is both difficult for</p> <p>9 authors to have their works discovered by potential</p> <p>10 readers and important for authors to make it easy for</p> <p>11 readers to find their works." Then it says "Search</p> <p>12 tools such as Google Books, which make it easier for</p> <p>13 authors to be found, benefit rather than harm</p> <p>14 authors."</p> <p>15 A. Correct.</p> <p>16 Q. Is it your opinion that any marketing tool</p> <p>17 that makes it easier for authors to be found benefits</p> <p>18 rather than harms authors?</p> <p>19 MR. McGOWAN: Objection, vague. You may</p> <p>20 answer.</p> <p>21 A. In light of the new title output in the</p> <p>22 last eight to ten years, it is amazingly difficult</p> <p>23 for any author aside from what you would call a star</p> <p>24 author to have his or her books marketed effectively.</p> <p>25 Q. Is it your opinion that any tool that</p>
<p style="text-align: right;">Page 35</p> <p>1 Greco</p> <p>2 you look at backless books in print, you are dealing</p> <p>3 with a very, very large number of titles. Some of</p> <p>4 those titles would be relatively easy to find who is</p> <p>5 the rights holder.</p> <p>6 Looking at this industry, it would be</p> <p>7 difficult to find certain rights holders.</p> <p>8 Q. Do you draw any further conclusions from</p> <p>9 that?</p> <p>10 A. 20 million plus books probably had well</p> <p>11 more than 20 million authors because many books have</p> <p>12 coauthors.</p> <p>13 Q. You said you read Dan Clancy's deposition,</p> <p>14 right?</p> <p>15 A. Yes.</p> <p>16 Q. In his deposition he explained that these</p> <p>17 20 million books include public domain books?</p> <p>18 A. That's my understanding.</p> <p>19 Q. Is it your understanding that it's not</p> <p>20 necessary to clear rights for public domain books?</p> <p>21 A. As I understand it, if a book is in public</p> <p>22 domain, anyone can publish it.</p> <p>23 Q. A substantial portion of the 20 million</p> <p>24 books are in the public domain and don't require</p> <p>25 rights clearance, right?</p>	<p style="text-align: right;">Page 37</p> <p>1 Greco</p> <p>2 helps authors market their books is a good thing?</p> <p>3 MR. McGOWAN: Objection, vague. Asked and</p> <p>4 answered. You may answer.</p> <p>5 A. I believe anything that helps market a</p> <p>6 book helps theoretically sell the book, and that</p> <p>7 ultimately helps the author.</p> <p>8 Q. Do you believe that marketing without</p> <p>9 permission of a publisher and author is a good thing?</p> <p>10 MR. McGOWAN: Objection, vague. You may</p> <p>11 answer.</p> <p>12 A. That requires a legal conclusion. I am</p> <p>13 not an attorney.</p> <p>14 MR. McGOWAN: We have been going about an</p> <p>15 hour. When you get a chance to change</p> <p>16 direction, I would like to take a break.</p> <p>17 MS. ZACK: I just want to get through this</p> <p>18 one paragraph.</p> <p>19 Q. 3 C, it says "Authors are paid for sales,</p> <p>20 not searches. Both as matter of industry custom and</p> <p>21 practice, and in my own personal experience, authors</p> <p>22 do not receive royalties in return for allowing their</p> <p>23 works to be searched."</p> <p>24 What do you mean by that?</p> <p>25 A. The first sentence in 3 C, an author is</p>

<p style="text-align: right;">Page 38</p> <p>1 Greco</p> <p>2 paid when -- an author would receive some sort of a</p> <p>3 royalty payment when a book is sold. I have seen</p> <p>4 nothing in the literature or I have heard nothing</p> <p>5 from individuals that I have talked to that authors</p> <p>6 are paid anything for a search.</p> <p>7 As for the second sentence, including my</p> <p>8 own personal experiences, authors do not receive a</p> <p>9 royalty in return for allowing their works to be</p> <p>10 searched. They receive a royalty based on the terms</p> <p>11 and conditions of whatever the contract stipulates</p> <p>12 for sales, not searches.</p> <p>13 The third part of the third sentence,</p> <p>14 search benefits authors in the sense that if you are</p> <p>15 looking for a book on the French Revolution, you</p> <p>16 would have to do a search in order to perhaps find</p> <p>17 that book. So if the search leads to someone finding</p> <p>18 the book and possibly buying the book, then that can</p> <p>19 lead to, depending on the terms and conditions of the</p> <p>20 contract, a royalty payment.</p> <p>21 I have no reason to believe that authors</p> <p>22 are paid for "the development of things that help</p> <p>23 them sell books."</p> <p>24 Q. When you say you have no reason to</p> <p>25 believe, that means because you have never seen it</p>	<p style="text-align: right;">Page 40</p> <p>1 Greco</p> <p>2 MR. McGOWAN: Yes.</p> <p>3 (Recess.)</p> <p>4 Q. Turning to page 2, Professor Greco, of</p> <p>5 your report.</p> <p>6 A. Yes.</p> <p>7 Q. Paragraph 4, did you write that yourself?</p> <p>8 A. Yes, based on --</p> <p>9 Q. That is based on the materials --</p> <p>10 A. From Clancy.</p> <p>11 Q. -- provided by Google; primarily</p> <p>12 Mr. Clancy's declaration?</p> <p>13 A. Yes, I read through the declaration.</p> <p>14 That's where the stats came from.</p> <p>15 Q. In paragraph 5 you mention that your book</p> <p>16 called "The Book Publishing Industry" is in the</p> <p>17 Google partner program, is that right?</p> <p>18 A. Yes.</p> <p>19 Q. Who is the publisher of that book?</p> <p>20 A. The publisher is Erl Baum, but Erl Baum</p> <p>21 was sold to Informer Plc, a British company, which in</p> <p>22 the United States is known as Taylor, Francis &</p> <p>23 Routledge. At this minute, the official publisher is</p> <p>24 Taylor, Francis & Routledge, even though an older</p> <p>25 name appears on the spine.</p>
<p style="text-align: right;">Page 39</p> <p>1 Greco</p> <p>2 happen?</p> <p>3 A. As far as I know, the industry custom and</p> <p>4 practice is that if an author gets involved in</p> <p>5 marketing his or her book, a publisher -- it depends</p> <p>6 on the nature of the publisher and the author and the</p> <p>7 book. If you are talking about a big trade book, a</p> <p>8 big trade publisher, the general practice is that an</p> <p>9 author who might do a five or ten-city hype tour, go</p> <p>10 out and perhaps read from your book, perhaps sign</p> <p>11 books, the custom and practice in the industry is</p> <p>12 that the publisher pays for all costs related to</p> <p>13 taking that individual from New York to Chicago, et</p> <p>14 cetera, et cetera, but the author is not paid for his</p> <p>15 or her time. They would cover airfare, room and</p> <p>16 board, cab fare, et cetera, et cetera.</p> <p>17 So that is my understanding of the</p> <p>18 industry practice in terms of big trade books and big</p> <p>19 trade publishers. If you are talking about small</p> <p>20 publishers and especially university presses, I think</p> <p>21 it's fair to say that university presses are happy if</p> <p>22 an author goes out on a tour, but they rarely pay for</p> <p>23 those costs.</p> <p>24 MS. ZACK: Okay. Do you want to take a</p> <p>25 break?</p>	<p style="text-align: right;">Page 41</p> <p>1 Greco</p> <p>2 Q. How is your book, the book publishing</p> <p>3 industry, in the partner program? Is that by</p> <p>4 permission of your publisher?</p> <p>5 A. It's my understanding that the 45,000</p> <p>6 publishers, including the publisher that I deal with,</p> <p>7 has an agreement with Google, unlike the library</p> <p>8 program.</p> <p>9 Q. I'm not asking about all those other</p> <p>10 books, I am asking about your book.</p> <p>11 A. How did it end up in the program?</p> <p>12 Q. Yes.</p> <p>13 A. I was never even informed. It was just</p> <p>14 done between in this case Taylor & Francis, as one of</p> <p>15 the 45,000 publishers involved in the partner</p> <p>16 program.</p> <p>17 Q. Do you know how much of your book is being</p> <p>18 displayed in the partner program?</p> <p>19 A. Perhaps a chapter or large portions of a</p> <p>20 chapter. I have never really measured it.</p> <p>21 Q. Do you get royalties from that book?</p> <p>22 A. Yes.</p> <p>23 Q. Was that a work for hire or is the</p> <p>24 copyright in your name?</p> <p>25 A. I wrote the original book --</p>

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<p style="text-align: right;">Page 42</p> <p>1 Greco</p> <p>2 MR. McGOWAN: Objection to the extent that</p> <p>3 that's not the legal universe. It calls for a</p> <p>4 legal conclusion. You may answer.</p> <p>5 MS. ZACK: Let me withdraw it.</p> <p>6 Q. Is the copyright to that book in your</p> <p>7 name?</p> <p>8 A. No.</p> <p>9 Q. Whose name is it in?</p> <p>10 A. Either Informer Plc, Taylor & Francis or</p> <p>11 Routledge. However they are structured in the United</p> <p>12 States.</p> <p>13 Q. So it's in the publisher's name?</p> <p>14 A. It's in the publisher's name.</p> <p>15 Q. You said you are not quite sure how much</p> <p>16 of your book is displayed in the partner program; you</p> <p>17 think it's perhaps a chapter?</p> <p>18 A. It's perhaps a chapter or very close to a</p> <p>19 chapter.</p> <p>20 Q. Are you aware that in the partner program</p> <p>21 Google shares ad revenues with its partners?</p> <p>22 MR. McGOWAN: Objection. Lacks</p> <p>23 foundation, compound. You may answer.</p> <p>24 A. I have a very vague understanding of that.</p> <p>25 Q. When you say a "vague understanding," do</p>	<p style="text-align: right;">Page 44</p> <p>1 Greco</p> <p>2 Q. Are any of those other books included in</p> <p>3 Google Books?</p> <p>4 A. I believe "The Culture and Commerce of</p> <p>5 Book Publishing in the 21st Century" is included. I</p> <p>6 don't know about the others.</p> <p>7 Q. Who is the publisher of that book?</p> <p>8 A. Stanford University Press.</p> <p>9 Q. Do you know how "The Culture and Commerce</p> <p>10 of Book Publishing in the 21st Century," how that</p> <p>11 book came to be in Google Books?</p> <p>12 A. I believe it's part of the publisher</p> <p>13 program but I have never discussed it with anyone at</p> <p>14 Stanford.</p> <p>15 Q. For that particular book, in whose name is</p> <p>16 the copyright?</p> <p>17 A. Stanford University Press.</p> <p>18 Q. Let me show you what was previously marked</p> <p>19 as PX 91. "Google Books Partner Program Standard</p> <p>20 Terms and Conditions."</p> <p>21 Have you ever seen this before?</p> <p>22 A. No.</p> <p>23 Q. Referring you to the second page where it</p> <p>24 says "Ad Payment."</p> <p>25 A. Item 8?</p>
<p style="text-align: right;">Page 43</p> <p>1 Greco</p> <p>2 you understand at all what the relationship is there?</p> <p>3 A. No. I understand there is some sort of a</p> <p>4 sharing, but I have no idea about it and have never</p> <p>5 received any royalty from it, at least to the best of</p> <p>6 my knowledge.</p> <p>7 Q. Over the last few years, have you received</p> <p>8 royalty payments for your book?</p> <p>9 A. For that book, yes.</p> <p>10 Q. When you say "for that book," you have</p> <p>11 other books that you receive royalty payments for?</p> <p>12 A. Yes.</p> <p>13 Q. How many others?</p> <p>14 A. Could I look at the list?</p> <p>15 MS. ZACK: Sure.</p> <p>16 (Witness reviewed document.)</p> <p>17 A. I receive a royalty payment from the book</p> <p>18 publishing industry for a book called "The Culture</p> <p>19 and Commerce of Book Publishing in the 21st Century";</p> <p>20 for a book called "Access For All: Closing the Book</p> <p>21 Gap For Children in Early Education"; for a book</p> <p>22 called "The Media and Entertainment Industries"; and</p> <p>23 three books were translated into Chinese where I</p> <p>24 received a payment, and that took place, and I</p> <p>25 believe that's all.</p>	<p style="text-align: right;">Page 45</p> <p>1 Greco</p> <p>2 Q. Yes.</p> <p>3 A. I see item 8.</p> <p>4 Q. This talks about the payment and sharing</p> <p>5 of ad revenues between Google and the partner.</p> <p>6 You are not familiar with that?</p> <p>7 MR. McGOWAN: Objection, vague. You may</p> <p>8 answer.</p> <p>9 A. I'm not familiar with this document or any</p> <p>10 of the items in the document.</p> <p>11 Q. Are you aware that Google scans books that</p> <p>12 it receives from libraries; digitally scans books</p> <p>13 that it gets from libraries?</p> <p>14 A. Yes.</p> <p>15 Q. Have you talked to any libraries that</p> <p>16 participate in that scanning project?</p> <p>17 MR. McGOWAN: Objection. Vague as it's</p> <p>18 phrased. It might be useful to narrow that one.</p> <p>19 Q. Do you understand the question?</p> <p>20 A. I don't believe I have ever talked to a</p> <p>21 librarian about that program. I have talked to</p> <p>22 librarians but I don't believe about that program.</p> <p>23 Q. Other than what you read in the materials</p> <p>24 that you listed on Exhibit C to your report, is it</p> <p>25 fair to say you don't have any information about the</p>

<p style="text-align: right;">Page 46</p> <p>1 Greco</p> <p>2 library scanning project that Google was engaged in?</p> <p>3 A. I have read articles over the years in</p> <p>4 Publishers Weekly about the program.</p> <p>5 Q. Anything else?</p> <p>6 A. It's possible it's been covered in the New</p> <p>7 York Times or the Wall Street Journal. I couldn't</p> <p>8 say definitively at this point. I think it's fair to</p> <p>9 say I remember reading in Publishers Weekly, possibly</p> <p>10 in any of the book industry daily blogs.</p> <p>11 Q. Any other source of information about</p> <p>12 that?</p> <p>13 A. I can't remember any other source.</p> <p>14 Q. There was a deposition in this case taken</p> <p>15 of Paul Courant of the University of Michigan.</p> <p>16 Did you read that?</p> <p>17 A. Which number is that, please?</p> <p>18 Q. It's not on your list.</p> <p>19 A. These are the only documents.</p> <p>20 Q. So you didn't read that, Mr. Courant's</p> <p>21 deposition?</p> <p>22 A. No, these are the only documents that I</p> <p>23 read through.</p> <p>24 Q. Referring to page 3 of your report,</p> <p>25 paragraph 7.</p>	<p style="text-align: right;">Page 48</p> <p>1 Greco</p> <p>2 report says "That 45,000 publishers participate in</p> <p>3 Google's Partner program indicates that the Commerce</p> <p>4 Department data reveal just the tip of the iceberg."</p> <p>5 Are you aware that those 45,000 publishers</p> <p>6 include publishers not in the U.S.?</p> <p>7 A. I have never seen a master list of the</p> <p>8 45,000 publishers. To be tracked by the Department</p> <p>9 of Commerce, as I understand it, a company has to</p> <p>10 have a federal ID number, at least one paid employee,</p> <p>11 and its primary business has to be in publishing.</p> <p>12 Q. Right. Now I am asking you whether you</p> <p>13 are aware that the 45,000 publishers that participate</p> <p>14 in the Google's partner program include foreign</p> <p>15 publishers?</p> <p>16 A. I have no knowledge about who is in that</p> <p>17 45,000 database.</p> <p>18 Q. Are you aware that the 20 million books in</p> <p>19 Dan Clancy's declaration includes books published</p> <p>20 outside the United States?</p> <p>21 A. That's my recollection. I would have to</p> <p>22 reread Clancy to verify that.</p> <p>23 Q. I am handing you PX 1. PX 1 that I have</p> <p>24 handed to you, Professor Greco, is the Declaration of</p> <p>25 Daniel Clancy in Support of Google Inc.'s Opposition</p>
<p style="text-align: right;">Page 47</p> <p>1 Greco</p> <p>2 A. I see it.</p> <p>3 Q. The second line, there's a sentence that</p> <p>4 starts "The Commerce Department, for example, tracks</p> <p>5 slightly more than 3,000 publishing firms."</p> <p>6 Are you referring to the United States</p> <p>7 Department of Commerce?</p> <p>8 A. Yes. It's cited in footnote 10.</p> <p>9 Q. When you say "3,000 publishing firms," are</p> <p>10 those U.S. publishing firms?</p> <p>11 A. As far as I know, these are publishing</p> <p>12 firms in the United States. They could possibly be</p> <p>13 owned by foreign entities. These are publishing</p> <p>14 firms operating in the United States.</p> <p>15 Q. In that sentence where you say "tracks,"</p> <p>16 what do you mean by "tracks"?</p> <p>17 A. There's a federal law that in years ending</p> <p>18 in '2 and '7, publishers have to submit confidential</p> <p>19 information to the U.S. Department of Commerce. The</p> <p>20 Department of Commerce collects, aggregates and</p> <p>21 releases aggregated data about the book industry in</p> <p>22 the United States. They have indicated that</p> <p>23 approximately 3,000 firms participate in those</p> <p>24 surveys that are done every five years.</p> <p>25 Q. The next sentence of paragraph 7 of your</p>	<p style="text-align: right;">Page 49</p> <p>1 Greco</p> <p>2 to Plaintiffs' Motion For Class Certification.</p> <p>3 A. Yes, I see it.</p> <p>4 Q. Referring to paragraph 4 which says</p> <p>5 "Google has scanned more than 20 million books as</p> <p>6 part of Google Books"; do you see that?</p> <p>7 A. Yes, I do.</p> <p>8 Q. Then it says "Users of Google Books can</p> <p>9 see search results that include snippets of text in</p> <p>10 English for more than 4 million of these books."</p> <p>11 Do you see that?</p> <p>12 A. I see that.</p> <p>13 Q. Are you offering any opinions in this case</p> <p>14 about whether or not it's infeasible to locate the</p> <p>15 rights holders of 4 million books that are subject to</p> <p>16 U.S. copyright?</p> <p>17 A. I believe a search of that size would be</p> <p>18 in many ways difficult.</p> <p>19 Q. For the same reasons you previously</p> <p>20 testified?</p> <p>21 A. Yes, because you may or may not be dealing</p> <p>22 with 4 million authors, you may be dealing with more</p> <p>23 than 4 million authors; coauthors.</p> <p>24 Q. Referring you to the next page of your</p> <p>25 report, page 4.</p>

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<p style="text-align: right;">Page 50</p> <p>1 Greco</p> <p>2 A. I see it.</p> <p>3 Q. This says in paragraph 9 "I have signed 12</p> <p>4 book contracts and have obtained reversions of the</p> <p>5 rights in my own books."</p> <p>6 So you have reverted rights to 12 books,</p> <p>7 is that right?</p> <p>8 A. No. I have signed 12 contracts, and in a</p> <p>9 few instances I asked for the copyright back when the</p> <p>10 book was declared out of print.</p> <p>11 Q. How many books have reverted back to you?</p> <p>12 A. Can I look?</p> <p>13 MS. ZACK: Oh, sure.</p> <p>14 (Witness reviewed document.)</p> <p>15 A. The first edition of "The Book Publishing</p> <p>16 Industry" was originally signed with Simon &</p> <p>17 Schuster. They sold it to Penguin Plc. They</p> <p>18 declared it out of print. I asked for the copyright.</p> <p>19 They gave it to me. I then took that material and</p> <p>20 revised it to then Lawrence Erl Baum Associates. The</p> <p>21 second one was "Advertising Management in the Book</p> <p>22 Publishing Industry," originally published by NYU</p> <p>23 Press. The third one was "Business Journalism," also</p> <p>24 published by New York University Press.</p> <p>25 Q. For the two that were published by NYU</p>	<p style="text-align: right;">Page 52</p> <p>1 Greco</p> <p>2 Q. Let's start with the last sentence.</p> <p>3 What sales and marketing efforts were made</p> <p>4 for your books?</p> <p>5 A. It depended on the publisher. I have done</p> <p>6 a number of books with university presses. So if I</p> <p>7 go out and give a lecture at an institution, another</p> <p>8 institution aside from Fordham, I might mention that</p> <p>9 material was taken from book X or article Y,</p> <p>10 depending on what was relevant.</p> <p>11 If I do an interview with a reporter, I</p> <p>12 might mention that I am the author of article X or</p> <p>13 book Y, depending on what the article and the</p> <p>14 reporter is interested in.</p> <p>15 When you deal with university presses they</p> <p>16 have for the most part limited resources. And in</p> <p>17 some cases exceptionally limited resources. So an</p> <p>18 author in that case would be expected to try to</p> <p>19 publicize the book as best as he or she can. Often</p> <p>20 at academic conferences or whatever the event would</p> <p>21 be.</p> <p>22 If you deal with what is called a</p> <p>23 commercial scholarly publisher, for example Taylor &</p> <p>24 Francis, Erl Baum, they have never paid for any of</p> <p>25 those marketing efforts on my part. Even though they</p>
<p style="text-align: right;">Page 51</p> <p>1 Greco</p> <p>2 Press that were reverted to you, have you placed</p> <p>3 those books into Google Books?</p> <p>4 A. No.</p> <p>5 Q. Or into the partner program?</p> <p>6 A. No.</p> <p>7 Q. Has anyone from Google ever asked you to</p> <p>8 do that?</p> <p>9 A. I'm not aware of any correspondence.</p> <p>10 Q. Would you like for those books to be in</p> <p>11 Google Books?</p> <p>12 A. It wouldn't hurt. But they were done a</p> <p>13 few years ago. I would probably want to update them.</p> <p>14 Q. Paragraph 11 of your report that starts at</p> <p>15 the bottom of page 4.</p> <p>16 A. I see it.</p> <p>17 Q. You say "As part of my scholarly study of</p> <p>18 the book publishing industry, I have discussed sales</p> <p>19 and marketing practices with over 50 academic</p> <p>20 publishers and with large commercial publishers such</p> <p>21 as Random House, Penguin, HarperCollins, Simon &</p> <p>22 Schuster, Hachette, and Macmillan. I am of course</p> <p>23 familiar with the sales and marketing efforts for my</p> <p>24 books."</p> <p>25 A. That's what is stated in item 11.</p>	<p style="text-align: right;">Page 53</p> <p>1 Greco</p> <p>2 may have more resources, it's just the nature of the</p> <p>3 business. So that's what I have tried to do.</p> <p>4 One other thing you can do is if you write</p> <p>5 a book, let's say, in 2007, and you then write an</p> <p>6 article in 2009 or 2010, you may cite it. That</p> <p>7 citation could pop up somewhere in another book,</p> <p>8 another article, et cetera.</p> <p>9 There are various things you might do, and</p> <p>10 these are the various things that I have done. I</p> <p>11 have not published with -- I don't do trade books, so</p> <p>12 I have not published with any of those what are</p> <p>13 called the big six, the trade publishers in the</p> <p>14 United States.</p> <p>15 Q. You say you have discussed with them,</p> <p>16 though, marketing?</p> <p>17 A. Yes.</p> <p>18 Q. Who specifically at Random House have you</p> <p>19 talked about this issue with?</p> <p>20 A. Over the years I have talked to Alberto</p> <p>21 Vitale, Jack Hoeft. I have talked to the director of</p> <p>22 research there. The name is Dave. I have to get</p> <p>23 back to you about his last name. I have talked to --</p> <p>24 I have had two sons that worked at Random House.</p> <p>25 Three, I am sorry. Three that have worked at Random</p>

<p style="text-align: right;">Page 54</p> <p>1 Greco</p> <p>2 House. One son is currently at Penguin. We had</p> <p>3 discussions about this business. I have had lunch</p> <p>4 with Peter Mayer when he ran Penguin. I have had</p> <p>5 lunch with Michael Pietsch who runs Little Brown. If</p> <p>6 you go to the Book Expo America, you run into these</p> <p>7 people. I had another son that worked at Simon &</p> <p>8 Schuster. I have had students who were working at</p> <p>9 those houses or may have been placed as interns or</p> <p>10 employees at those big six houses. Over a period of</p> <p>11 time you meet a lot of people at these places.</p> <p>12 Q. Have you discussed Google's library</p> <p>13 project with any of those people?</p> <p>14 A. Only when it came up with my sons because</p> <p>15 it was public information in Publishers Weekly. I</p> <p>16 don't believe I discussed Google with what you would</p> <p>17 call a major executive at any of the big six. I may</p> <p>18 have discussed it with some of the academic</p> <p>19 university press publishers but just in passing.</p> <p>20 People in this business meet and talk.</p> <p>21 Q. Are you aware that Simon & Schuster was a</p> <p>22 plaintiff or is a plaintiff in the case against</p> <p>23 Google for their scanning of books without permission</p> <p>24 for use in Google Books?</p> <p>25 MR. McGOWAN: Objection, lacks foundation.</p>	<p style="text-align: right;">Page 56</p> <p>1 Greco</p> <p>2 Q. Where did you get that understanding?</p> <p>3 MR. McGOWAN: Objection, asked and</p> <p>4 answered. You may answer.</p> <p>5 A. It was covered in Publishers Weekly. I</p> <p>6 would have to assume it was covered in the New York</p> <p>7 Times and the Wall Street Journal. It was common</p> <p>8 knowledge I think in the book publishing industry in</p> <p>9 New York City.</p> <p>10 Q. Let's go back in time.</p> <p>11 At the time that you believed that the</p> <p>12 publishers were suing, which publishers did you</p> <p>13 understand to be suing Google?</p> <p>14 A. I never read any legal documents. I</p> <p>15 relied entirely on newspaper and magazine articles,</p> <p>16 so I couldn't say definitively which one or which</p> <p>17 ones of the big six were involved in any litigation.</p> <p>18 Q. Were you aware that the AAP sued Google?</p> <p>19 A. Off the top of my head, I don't remember</p> <p>20 that, but I am sure it was covered in Publishers</p> <p>21 Weekly.</p> <p>22 MR. McGOWAN: Again, you should offer your</p> <p>23 best recollection if you have it. You should</p> <p>24 not speculate.</p> <p>25 THE WITNESS: I don't remember.</p>
<p style="text-align: right;">Page 55</p> <p>1 Greco</p> <p>2 You may answer.</p> <p>3 A. I am not aware of any publishing company</p> <p>4 that is currently suing Google over the matter</p> <p>5 related in Civil Action 05 CV 8136 (DC).</p> <p>6 Q. Are you aware of any publisher that was</p> <p>7 ever suing Google over that?</p> <p>8 A. I am aware that certain publishers were at</p> <p>9 one point, but not at the current time.</p> <p>10 Q. Why do you say that they are not currently</p> <p>11 suing?</p> <p>12 A. The matter before me is the Authors Guild,</p> <p>13 Incorporated versus Google. I have never seen any</p> <p>14 document indicating that in this civil action that a</p> <p>15 publisher is suing Google.</p> <p>16 Q. Well, I didn't ask you about this</p> <p>17 particular civil action. The question was whether</p> <p>18 you were aware that publishers were suing Google for</p> <p>19 the same practices that are at issue in this</p> <p>20 particular matter.</p> <p>21 MR. McGOWAN: That question has been asked</p> <p>22 and answered.</p> <p>23 A. It's my understanding that at some point</p> <p>24 in the past they were involved but not at the current</p> <p>25 time.</p>	<p style="text-align: right;">Page 57</p> <p>1 Greco</p> <p>2 Q. Do you have any information about the</p> <p>3 nature of the claims made by the publishers against</p> <p>4 Google?</p> <p>5 A. No.</p> <p>6 Q. Or any understanding of what claims were</p> <p>7 made?</p> <p>8 A. No. I haven't read anything lately. So</p> <p>9 it was at some point in the past.</p> <p>10 Q. Would it surprise you if I told you that</p> <p>11 the publishers claimed that Google was violating the</p> <p>12 Copyright Act by scanning books in libraries without</p> <p>13 permission?</p> <p>14 MR. McGOWAN: Objection. Lacks</p> <p>15 foundation, relevance with respect to surprise.</p> <p>16 He may answer.</p> <p>17 A. If you are telling me that information, I</p> <p>18 would have to assume you are telling me the truth. I</p> <p>19 can't verify any of the issues that you are raising.</p> <p>20 I just don't have that information. I never really</p> <p>21 followed the case close enough to be able to respond</p> <p>22 yes or no to your statement.</p> <p>23 Q. Based on your understanding of the</p> <p>24 publishing industry, you wouldn't be at all surprised</p> <p>25 for publishers to sue Google for copying their books</p>

<p style="text-align: right;">Page 58</p> <p>1 Greco</p> <p>2 without permission, would you?</p> <p>3 MR. McGOWAN: Same objection. It calls</p> <p>4 for speculation. You may answer.</p> <p>5 A. If I went back and read the earlier</p> <p>6 articles, I would be in a position to answer that</p> <p>7 question definitively. At this point I just don't</p> <p>8 have the information.</p> <p>9 Q. Directing you to paragraph 14 of your</p> <p>10 report.</p> <p>11 A. Yes, I see it.</p> <p>12 Q. The first sentence says "To get the</p> <p>13 attention of consumers in this environment,</p> <p>14 publishers often use some of a book's content to</p> <p>15 promote the book and they do not pay royalties for</p> <p>16 such uses."</p> <p>17 A. I see that.</p> <p>18 Q. That's been a fact for many years, hasn't</p> <p>19 it?</p> <p>20 A. It's a fact that goes back decades.</p> <p>21 Q. That publishers don't pay royalties to</p> <p>22 authors for promotion?</p> <p>23 A. That's my understanding.</p> <p>24 Q. Can you tell me any promotional uses of</p> <p>25 books in the publishing industry that you are</p>	<p style="text-align: right;">Page 60</p> <p>1 Greco</p> <p>2 Publishing Industry" in which you have a copyright</p> <p>3 interest, correct?</p> <p>4 A. Yes.</p> <p>5 Q. And in which your publisher has a</p> <p>6 copyright interest, correct?</p> <p>7 A. Yes.</p> <p>8 Q. And in which I have no copyright interest?</p> <p>9 A. You mean you personally?</p> <p>10 Q. I have no copyright interest, right?</p> <p>11 A. I'm not aware that you have any copyright</p> <p>12 interest.</p> <p>13 Q. Can I promote that book?</p> <p>14 MR. McGOWAN: Objection, vague.</p> <p>15 A. Sure.</p> <p>16 Q. Without your permission?</p> <p>17 A. Sure.</p> <p>18 Q. I could put the entire book on my website?</p> <p>19 MR. McGOWAN: Objection. Vague,</p> <p>20 argumentative. You may answer.</p> <p>21 MS. ZACK: I am asking a question.</p> <p>22 MR. McGOWAN: Now you are distorting</p> <p>23 language.</p> <p>24 A. If you wrote a letter to a friend, if you</p> <p>25 had a website and you indicated that you read my book</p>
<p style="text-align: right;">Page 59</p> <p>1 Greco</p> <p>2 familiar with that are done without the permission of</p> <p>3 the rights holders?</p> <p>4 MR. McGOWAN: Objection, vague. You may</p> <p>5 answer.</p> <p>6 A. Without the permission of the rights</p> <p>7 holder?</p> <p>8 Q. Yes.</p> <p>9 A. Most of the research I have done has</p> <p>10 centered on sales and marketing by publishers.</p> <p>11 Q. Who were rights holders?</p> <p>12 A. Not every author conveys the copyright to</p> <p>13 the publisher. Some authors hold the copyright.</p> <p>14 Q. Did you have an understanding that the</p> <p>15 publishers had an agreement with the authors in the</p> <p>16 cases where they were promoting the book?</p> <p>17 A. It's my understanding if you convey the</p> <p>18 copyright to the publisher, the publisher handles all</p> <p>19 sales and marketing operations. So if the publisher</p> <p>20 then decided to send out a galley print and/or</p> <p>21 digital galley or post things in a company magazine</p> <p>22 or website, they just do it. Except for the star</p> <p>23 authors, the publisher really controls that</p> <p>24 exclusively.</p> <p>25 Q. Let's talk about your book. "The</p>	<p style="text-align: right;">Page 61</p> <p>1 Greco</p> <p>2 and liked the book and encouraged your friends to</p> <p>3 read it, I wouldn't necessarily know you did that.</p> <p>4 Q. Well, let's say I posted the text, the</p> <p>5 actual text of your book on my website and said "I</p> <p>6 love this book," is that okay with you?</p> <p>7 MR. McGOWAN: Objection, vague. You may</p> <p>8 answer.</p> <p>9 A. I would refer that to my editor.</p> <p>10 Q. Has anyone ever done that to any of your</p> <p>11 books?</p> <p>12 MR. McGOWAN: Objection, vague. You may</p> <p>13 answer.</p> <p>14 A. I don't know.</p> <p>15 Q. Do you know how Google makes money?</p> <p>16 MR. McGOWAN: Objection, foundation. You</p> <p>17 can answer.</p> <p>18 A. It's my understanding that they make money</p> <p>19 from a variety of business operations including</p> <p>20 advertising.</p> <p>21 Q. What are the other operations that you are</p> <p>22 aware of that are moneymaking for Google?</p> <p>23 MR. McGOWAN: Same objection.</p> <p>24 A. I have never gone through their quarterly</p> <p>25 reports, their annual reports, conference call</p>

<p style="text-align: right;">Page 62</p> <p>1 Greco</p> <p>2 transcripts, so I really couldn't say.</p> <p>3 Q. Do you consider Google a commercial</p> <p>4 operation?</p> <p>5 MR. McGOWAN: Objection, vague. It calls</p> <p>6 for a legal conclusion. You may answer.</p> <p>7 A. I believe it's a business incorporated in</p> <p>8 the United States.</p> <p>9 Q. Are you familiar with the Copyright</p> <p>10 Clearance Center?</p> <p>11 A. I have read about the Copyright Clearance</p> <p>12 Center.</p> <p>13 Q. What do you know about it?</p> <p>14 A. I believe it's an organization. I believe</p> <p>15 it's based in New England, and that they clear</p> <p>16 copyrights for various publications.</p> <p>17 Q. Are you aware of any licensing offered by</p> <p>18 them on behalf of authors and publishers?</p> <p>19 A. I have never looked into that matter.</p> <p>20 Q. So you don't know whether or not the CCC</p> <p>21 offers collective licenses?</p> <p>22 MR. McGOWAN: Objection, vague, to the</p> <p>23 extent it calls for a legal conclusion, but you</p> <p>24 may answer.</p> <p>25 A. I never looked into it, so I really</p>	<p style="text-align: right;">Page 64</p> <p>1 Greco</p> <p>2 issue of possible licenses for digital copying of</p> <p>3 books?</p> <p>4 MR. McGOWAN: Objection, vague. You may</p> <p>5 answer.</p> <p>6 A. I don't believe so.</p> <p>7 Q. Have you ever done any research on the</p> <p>8 book purchasing practices of libraries?</p> <p>9 A. I am familiar with those practices.</p> <p>10 Q. Are you aware that libraries are currently</p> <p>11 buying both print books and eBooks?</p> <p>12 MR. McGOWAN: Objection. Lacks</p> <p>13 foundation, vague and compound. You may answer.</p> <p>14 A. Yes.</p> <p>15 Q. Are you aware that libraries, including</p> <p>16 university libraries, purchase licenses for scholarly</p> <p>17 works?</p> <p>18 MR. McGOWAN: Objection, vague. You may</p> <p>19 answer.</p> <p>20 A. Yes.</p> <p>21 Q. Do you know if any of your works are</p> <p>22 included in any such license?</p> <p>23 A. Yes.</p> <p>24 Q. Which works?</p> <p>25 A. Bear with me for a second.</p>
<p style="text-align: right;">Page 63</p> <p>1 Greco</p> <p>2 couldn't say yes or no.</p> <p>3 Q. Are you familiar with ASCAP or BMI?</p> <p>4 A. Yes, I am familiar with those two</p> <p>5 entities.</p> <p>6 Q. Has any of your research been in the music</p> <p>7 industry?</p> <p>8 A. I once coauthored a chapter on the radio</p> <p>9 industry a number of years ago, so it's likely I may</p> <p>10 have referred to them.</p> <p>11 Q. Are you aware of any licenses offered by</p> <p>12 the ASCAP or BMI?</p> <p>13 MR. McGOWAN: Objection, vague. You may</p> <p>14 answer.</p> <p>15 A. Only in very general terms.</p> <p>16 Q. What general terms are you aware of?</p> <p>17 A. Well, ASCAP and BMI represent, as I</p> <p>18 understand it, individuals that write music and</p> <p>19 lyrics and music publishers, and that they work with</p> <p>20 an organization called Harry Fox to collect fees</p> <p>21 whenever a song is played or in the case of</p> <p>22 synchronization fees when a song is used in a motion</p> <p>23 picture, television, commercial, et cetera. That's</p> <p>24 my understanding of those organizations.</p> <p>25 Q. Have you ever done any research on the</p>	<p style="text-align: right;">Page 65</p> <p>1 Greco</p> <p>2 (Witness reviewed document.)</p> <p>3 A. I believe that the journal articles</p> <p>4 published by the Journal of Scholarly Publishing; the</p> <p>5 journal articles published by -- the journal article</p> <p>6 published by Learned Publishing; I believe the</p> <p>7 article published in the Journal of Cultural</p> <p>8 Economics; I believe the article published in the</p> <p>9 Journal of Media Management; I believe the articles</p> <p>10 published in Publishing Research Quarterly or Book</p> <p>11 Publishing Quarterly are available on various online</p> <p>12 sites.</p> <p>13 Q. Available as part of a subscription?</p> <p>14 MR. McGOWAN: Objection, compound. You</p> <p>15 may answer.</p> <p>16 A. I don't know what the terms and conditions</p> <p>17 are.</p> <p>18 Q. Do you not get any royalties for that?</p> <p>19 A. I have never received a royalty for an</p> <p>20 article.</p> <p>21 Q. Do you have a right to receive royalties</p> <p>22 for articles?</p> <p>23 MR. McGOWAN: Objection to the extent it</p> <p>24 calls for a legal conclusion. You may answer.</p> <p>25 A. Perhaps if it's reprinted in an anthology,</p>

17 (Pages 62 - 65)

<p style="text-align: right;">Page 66</p> <p>1 Greco</p> <p>2 but that would be the only case, and I have never</p> <p>3 received a payment based on an article in an</p> <p>4 anthology.</p> <p>5 Q. So you have seen these general articles</p> <p>6 that you have mentioned in an online subscription, is</p> <p>7 that what you are telling me?</p> <p>8 A. I have seen them in online services.</p> <p>9 Q. But you are not aware of how they got</p> <p>10 there?</p> <p>11 A. I listed many different publishing --</p> <p>12 journal publishing operations, so I'm not aware of</p> <p>13 those terms and conditions. But I have seen them on</p> <p>14 Project Muse and elsewhere.</p> <p>15 Q. Project Muse, and where else can you tell</p> <p>16 me?</p> <p>17 A. It's possible that it's been on Proquest.</p> <p>18 It's possible it's on the Springer website. They</p> <p>19 bought Publishing Research Quarterly and Book</p> <p>20 Research Quarterly from Irving Horowitz. There could</p> <p>21 be others.</p> <p>22 Q. Referring you to your c.v. on page 25 of</p> <p>23 PX 92.</p> <p>24 A. Yes, I see page 25.</p> <p>25 Q. There is a heading "Papers Delivered</p>	<p style="text-align: right;">Page 68</p> <p>1 Greco</p> <p>2 Department of Labor, industry statistical data from</p> <p>3 other reliable sources regarding the sale of books in</p> <p>4 various retail channels. The sale of eReaders,</p> <p>5 various types, et cetera.</p> <p>6 Q. Is it your understanding that Google Books</p> <p>7 includes both partner program books and library</p> <p>8 project books?</p> <p>9 A. I have looked at it as two separate</p> <p>10 operations. The partnership program of 45,000 or so</p> <p>11 publishers, and the library. I have never commingled</p> <p>12 the two, although at times I may commingle them in a</p> <p>13 presentation but they are really two very separate --</p> <p>14 as far as I know, two separate operations.</p> <p>15 Q. They are both Google Books, though, right?</p> <p>16 A. Right, but they have different parameters.</p> <p>17 Q. But in your report when you refer to</p> <p>18 "Google Books," you are referring to both, right?</p> <p>19 MR. McGOWAN: Objection, vague. You may</p> <p>20 answer.</p> <p>21 Q. You say "I understand that Google has</p> <p>22 scanned more than 20 million books in connection with</p> <p>23 the Google Books project."</p> <p>24 A. That's correct.</p> <p>25 Q. When you refer to "Google Books," you are</p>
<p style="text-align: right;">Page 67</p> <p>1 Greco</p> <p>2 Before Scholarly and Professional Associations."</p> <p>3 Then there's a entry for September 16, 2011, at The</p> <p>4 Library of Congress. It says "Books in Our Digital</p> <p>5 Future."</p> <p>6 Is that your presentation, "Books in Our</p> <p>7 Digital Future"?</p> <p>8 A. Yes.</p> <p>9 Q. Is that available online?</p> <p>10 A. I don't know. It's possible the Library</p> <p>11 of Congress has posted it. I don't know.</p> <p>12 Q. What did you say generally; what was your</p> <p>13 thesis?</p> <p>14 A. I dealt with the growth in print books and</p> <p>15 digital books over a period of time, and gave some</p> <p>16 historical overview and some outlook on what was</p> <p>17 happening in the digital book sectors in all of the</p> <p>18 book categories; adult, juvenile, mass market, et</p> <p>19 cetera.</p> <p>20 Q. And that was based on what type of</p> <p>21 statistic?</p> <p>22 A. Some of the statistical data came from the</p> <p>23 U.S. Department of Commerce, Bureau of the Census.</p> <p>24 Some of the statistical data came from other federal</p> <p>25 agencies. U.S. Department of Education, the U.S.</p>	<p style="text-align: right;">Page 69</p> <p>1 Greco</p> <p>2 referring to both partner program and the library</p> <p>3 project, correct?</p> <p>4 A. In that sentence, yes.</p> <p>5 Q. Is there any sentence in which that's not</p> <p>6 the case?</p> <p>7 A. Well, on page 2, item number 5, I refer</p> <p>8 specifically to the partner program.</p> <p>9 Q. Right, I understand. But I am saying when</p> <p>10 you use the term "Google Books," you are referring</p> <p>11 both to the partner program and the library project,</p> <p>12 correct?</p> <p>13 A. Yes. And I probably should have separated</p> <p>14 the two in a more precise manner.</p> <p>15 MS. ZACK: I don't have any more</p> <p>16 questions.</p> <p>17 MR. McGOWAN: I have two because I want to</p> <p>18 make sure the record is clear on what Ms. Zack</p> <p>19 was just alluding to.</p> <p>20 EXAMINATION BY</p> <p>21 MR. McGOWAN:</p> <p>22 Q. Dr. Greco, you just said that you</p> <p>23 understand the partner program and the library</p> <p>24 project have different parameters, is that correct?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 70</p> <p>1 Greco</p> <p>2 MS. ZACK: I object to the form.</p> <p>3 Q. In the library program, do you understand</p> <p>4 that Google copies books that are provided by</p> <p>5 libraries?</p> <p>6 A. Yes.</p> <p>7 Q. With respect to that program, do you</p> <p>8 understand that Google does not contact all, at</p> <p>9 least, of the rights holders in connection with that</p> <p>10 program?</p> <p>11 A. That's my understanding.</p> <p>12 Q. Did you understand that when you wrote</p> <p>13 your report?</p> <p>14 A. Yes.</p> <p>15 Q. You testified as to steps that you</p> <p>16 personally have taken to publicize your books.</p> <p>17 In addition to steps that you have taken,</p> <p>18 did your publishers do things such as distribute</p> <p>19 copies to get reviews, that sort of thing?</p> <p>20 A. That's my understanding.</p> <p>21 Q. In paragraph 14 on page 5, you refer to</p> <p>22 publishers using some of a book's content to promote</p> <p>23 the book, do you see that?</p> <p>24 A. Paragraph 14, yes, "to promote the book,"</p> <p>25 yes, the first sentence.</p>	<p style="text-align: right;">Page 72</p> <p>1 Greco</p> <p>2 with Mr. McGowan during the break?</p> <p>3 MR. McGOWAN: Objection, asked and</p> <p>4 answered. You may answer.</p> <p>5 A. We did discuss the library portion and the</p> <p>6 publisher portion. The publisher program portion.</p> <p>7 MS. ZACK: I have no other questions.</p> <p>8 (Time noted 12:40 p.m.)</p> <p>9</p> <p>10</p> <p>11</p> <p>12 ALBERT N. GRECO</p> <p>13</p> <p>14 Subscribed and sworn to before me</p> <p>15 this ____ day of _____, 2012.</p> <p>16</p> <p>17</p> <p>18 NOTARY PUBLIC</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 71</p> <p>1 Greco</p> <p>2 Q. Is it your understanding that it is the</p> <p>3 use of the book's content that is what gets the</p> <p>4 attention of the consumers in this environment, which</p> <p>5 is the beginning of the sentence?</p> <p>6 MS. ZACK: Objection to form.</p> <p>7 A. I believe it's almost always the book</p> <p>8 content.</p> <p>9 MR. McGOWAN: I have nothing further.</p> <p>10 (CONTINUED) EXAMINATION</p> <p>11 BY MS. ZACK:</p> <p>12 Q. Are you aware of any books shown in Google</p> <p>13 Books without permission of authors or publishers?</p> <p>14 MR. McGOWAN: Objection, vague. You may</p> <p>15 answer.</p> <p>16 A. I believe the library portion.</p> <p>17 Q. You believe what?</p> <p>18 A. I believe the books that were scanned in</p> <p>19 the library portion of Google Books may or may not</p> <p>20 have been done with prior permission.</p> <p>21 Q. Did you discuss that topic with</p> <p>22 Mr. McGowan during the break?</p> <p>23 A. It may have come up just in passing.</p> <p>24 Q. We have only been here a short time.</p> <p>25 Did you or did you not discuss that topic</p>	<p style="text-align: right;">Page 73</p> <p>1</p> <p>2 CERTIFICATE</p> <p>3</p> <p>4 STATE OF NEW YORK)</p> <p>5) s.s.:</p> <p>6 COUNTY OF NEW YORK)</p> <p>7</p> <p>8 I, LINDA DEVECKA, a Notary Public</p> <p>9 within and for the State of New York, do</p> <p>10 hereby certify:</p> <p>11 That ALBERT N. GRECO, the witness whose</p> <p>12 deposition is hereinbefore set forth, was duly</p> <p>13 sworn by me and that such deposition is a true</p> <p>14 record of the testimony given by such witness.</p> <p>15 I further certify that I am not related to</p> <p>16 any of the parties to this action by blood or</p> <p>17 marriage; and that I am in no way interested in</p> <p>18 the outcome of this matter.</p> <p>19 IN WITNESS WHEREOF, I have hereunto set my</p> <p>20 hand this 12th day of June, 2012.</p> <p>21</p> <p>22</p> <p>23 LINDA DEVECKA</p> <p>24</p> <p>25</p>

19 (Pages 70 - 73)

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Page 74

1	
2	----- I N D E X -----
3	WITNESS EXAMINATION BY PAGE
4	ALBERT N. GRECO MS. ZACK 4
5	MR. McGOWAN 69
6	MS. ZACK 71
7	
8	----- EXHIBITS -----
9	PLAINTIFF'S DESCRIPTION FOR ID
10	Exhibit 92, document titled "Expert 4
11	Report of Professor Albert N. Greco May
12	3, 2012"
13	
14	The reporter retained the exhibit to annex to the
15	transcript.
16	
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Page 75

1 ERRATA SHEET

2 VERITEXT REPORTING COMPANY

3 1250 BROADWAY

4 NEW YORK, NEW YORK 10001

5 800-362-2520

6 CASE: THE AUTHORS GUILD, INC. v GOOGLE INC.

7 DEPOSITION DATE: JUNE 6, 2012

8 DEPONENT: ALBERT N. GRECO

9 PAGE LINE(S)	10 CHANGE	11 REASON
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25		

21 _____

22 ALBERT N. GRECO

23 SUBSCRIBED AND SWORN TO BEFORE ME

24 THIS ____ DAY OF _____, 20__.

25 _____ MY COMMISSION EXPIRES:

20 (Pages 74 - 75)

Page 72

1 Greco
2 with Mr. McGowan during the break?

3 MR. MCGOWAN: Objection, asked and
4 answered. You may answer.

5 A. We did discuss the library portion and the
6 publisher portion. The publisher program portion.

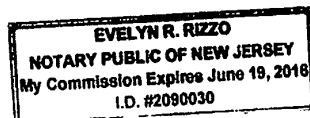
7 MS. ZACK: I have no other questions.

8 (Time noted 12:40 p.m.)
9

10
11 
12 ALBERT N. GRECO

13
14 Subscribed and sworn to before me
15 this 10th day of July, 2012.

16
17 
18 NOTARY PUBLIC



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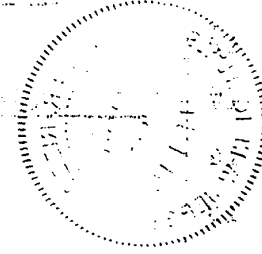
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PAGE 75 #1

Page 75

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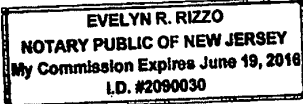
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CASE: THE AUTHORS GUILD, INC. v GOOGLE INC.

DEPOSITION DATE: JUNE 6, 2012

DEPONENT: ALBERT N. GRECO

PAGE	LINE(S)	CHANGE	REASON
17	4	ARTHUR	SPELLING ERROR
40	20	ERLBAUM	ONE WORD
40	21	INFORMA	SPELLING ERROR
40	22	TAYLOR & FRANCIS	DELETE COMMA; ADD &
40	24	TAYLOR & FRANCIS	DELETE COMMA; ADD &
46	4	ITALICS: PUB. WEEKLY	ADD ITALICS
46	6+7	ITALICS: NEW YORK TIMES	"
46	7+8	ITALICS: WALL ST. JOURNAL	"
46	9	ITALICS: PUB. WEEKLY	"
50	20	ERLBAUM	ONE WORD
52	24	ERLBAUM	ONE WORD
53	22+23	DAVE THOMPSON	ADDED LAST NAME
54	15	ITALICS: PUB. WEEKLY	ADD ITALICS



ALBERT N. GRECO

SUBSCRIBED AND SWORN TO BEFORE ME

THIS 10th DAY OF JULY, 2012.

(NOTARY PUBLIC)

6/19/2016

MY COMMISSION EXPIRES:

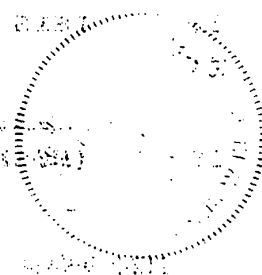
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115.27 115.37



PAGE 75 # 2

Page 75

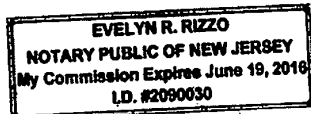
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CASE: THE AUTHORS GUILD, INC. v GOOGLE INC.

DEPOSITION DATE: JUNE 6, 2012

DEPONENT: ALBERT N. GRECO

PAGE	LINE(S)	CHANGE	REASON
56	5	ITALICS: PJA. WGEKLY	ADD ITALICS
56	6	ITALICS: NEW YORK	"
56	7	ITALICS: TIMES	"
56	7	ITALICS: WALL ST. JOURNAL	"
65	4	ITALICS: J. OF SCH. PUB.	"
65	6	ITALICS: LEARNER PJA.	"
65	7	ITALICS: J. OF CULINARY	"
65	9	ITALICS: J. OF MEDIA MGT.	"
66	19	ITALICS: PJA. R. QUAA	"
66	19 & 20	ITALICS: BOOK	"
66	20 & 21	ITALICS: RES. QUAA	"



Albert N. Greco
ALBERT N. GRECO

SUBSCRIBED AND SWORN TO BEFORE ME

THIS 10th DAY OF JULY, 2012.

Evelyn R. Rizzo
 (NOTARY PUBLIC)

6/19/2016
 MY COMMISSION EXPIRES:

[illegible]

EXHIBIT 42

PART 1

Page 1

1 **C O N F I D E N T I A L**

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 THE AUTHORS GUILD, et al.,

CONFIDENTIAL

6
7 Plaintiffs,

8 - against-

Master File No.

9 05 CV 8136-DC

10
11 GOOGLE, INC.,

12 Defendant.

13 -----X

14
15 June 8, 2012

16 9:30 a.m.

17
18 Deposition of JUDITH A. CHEVALIER,
19 held at the offices of Milberg, LLP, One
20 Penn Plaza, New York, New York, pursuant to
21 Agreement, before NANCY SORENSEN, a Notary
22 Public of the State of New York.

<p style="text-align: right;">Page 2</p> <p>1</p> <p>2 APPEARANCES:</p> <p>3 BONI & ZACK, LLC</p> <p>4 Attorneys for Plaintiffs</p> <p>5 15 St. Asaphs Road</p> <p>6 Bala Cynwyd, Pennsylvania 19004</p> <p>7 BY: JOANNE ZACK, ESQ.</p> <p>8</p> <p>9 DURIE TANGRI</p> <p>10 Attorneys for Defendant</p> <p>11 217 Leidesdorff Street</p> <p>12 San Francisco, California 94111</p> <p>13 BY: DAVID McGOWAN, ESQ.</p> <p>14</p> <p>15</p> <p>16</p> <p>17 ALSO PRESENT:</p> <p>18 ANY KEATING, ESQ. - GOOGLE</p> <p>19 SAMUEL WEGLEIN, Ph.D. - Analysis Group</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1</p> <p>2 JUDITH A. CHEVALIER,</p> <p>3 called as a witness, having been duly sworn by a</p> <p>4 Notary Public, was examined and testified as</p> <p>5 follows:</p> <p>6 EXAMINATION BY</p> <p>7 MS. ZACK:</p> <p>8 (Plaintiff's Exhibits 95 and 96,</p> <p>9 Expert Report of Judith A. Chevalier and a</p> <p>10 number of pages collected from Google's</p> <p>11 website concerning the Partner Program,</p> <p>12 marked for identification, as of this</p> <p>13 date.)</p> <p>14 Q. Good morning.</p> <p>15 A. Morning.</p> <p>16 Q. Could you state your full name for</p> <p>17 the record, please?</p> <p>18 A. Sure, Judith Ann Chevalier.</p> <p>19 Q. What is your current position?</p> <p>20 A. I'm a professor at the Yale School of</p> <p>21 Management.</p> <p>22 Q. We have your CV which outlines your</p> <p>23 various positions. I take it that's up to date;</p> <p>24 is that right?</p> <p>25 A. I think so, yes.</p>
<p style="text-align: right;">Page 3</p> <p>1</p> <p>2 IT IS HEREBY STIPULATED AND AGREED,</p> <p>3 by and between the attorneys for the respective</p> <p>4 parties herein, that filing and sealing be and</p> <p>5 the same are hereby waived.</p> <p>6 IT IS FURTHER STIPULATED AND AGREED</p> <p>7 that all objections, except as to the form</p> <p>8 of the question, shall be reserved to the</p> <p>9 time of the trial.</p> <p>10 IT IS FURTHER STIPULATED AND AGREED</p> <p>11 that the within deposition may be sworn to</p> <p>12 and signed before any officer authorized to</p> <p>13 administer an oath, with the same force and</p> <p>14 effect as if signed and sworn to before the</p> <p>15 Court.</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. You've brought with you someone else.</p> <p>3 Could you just tell us who that is?</p> <p>4 A. Sure, that's Samuel Weglein. He's</p> <p>5 from the Analysis Group.</p> <p>6 Q. How do you spell his last name?</p> <p>7 A. W-E-G-L-E-I-N.</p> <p>8 Q. Did Mr. Weglein assist you with your</p> <p>9 report?</p> <p>10 A. Yes.</p> <p>11 Q. Anyone else?</p> <p>12 A. The staff of the analysis group, in</p> <p>13 general, assisted with my report.</p> <p>14 Q. What kind of assistance did they</p> <p>15 provide?</p> <p>16 A. So I drafted the report. But the</p> <p>17 staff at Analysis Group helped with tracking</p> <p>18 down references, wordsmithing, finding things.</p> <p>19 Things like that.</p> <p>20 Q. You've been retained by Google; is</p> <p>21 that right?</p> <p>22 A. Correct.</p> <p>23 Q. Approximately when were you retained?</p> <p>24 A. I think mid to late March.</p> <p>25 Q. You've been retained as an expert;</p>

<p style="text-align: right;">Page 6</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 correct?</p> <p>3 A. Correct.</p> <p>4 Q. What do you consider to be your area</p> <p>5 or areas of expertise?</p> <p>6 A. So economics, industrial</p> <p>7 organization, and the economics of technology,</p> <p>8 and competitive strategy, actually.</p> <p>9 Q. Have you ever done any work for</p> <p>10 Google before?</p> <p>11 A. No.</p> <p>12 Q. Have you ever done any work for any</p> <p>13 search engine before?</p> <p>14 A. No.</p> <p>15 Q. Do you consider yourself an expert on</p> <p>16 publishing?</p> <p>17 A. No.</p> <p>18 Q. Have you ever been retained by Durie</p> <p>19 Tangri before as an expert?</p> <p>20 A. No, I have not.</p> <p>21 Q. By Keker Van Nest?</p> <p>22 A. I worked on a case in which lawyers</p> <p>23 from Keker were involved. But I wasn't retained</p> <p>24 by Keker, I believe.</p> <p>25 Q. Which case was that?</p>	<p style="text-align: right;">Page 8</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. With respect to these five, did you,</p> <p>3 you did provide a report in all five, you said?</p> <p>4 A. Yes.</p> <p>5 Q. Did you attend a deposition in all</p> <p>6 these cases?</p> <p>7 A. No, I attended a deposition in number</p> <p>8 3, Presstek versus Creo, and in number five,</p> <p>9 State Attorney General of New York.</p> <p>10 Q. With respect to the first case, which</p> <p>11 is the Procter & Gamble Company versus the</p> <p>12 Coca-Cola Company?</p> <p>13 A. Yes.</p> <p>14 Q. Who engaged you there, which side of</p> <p>15 the litigation?</p> <p>16 A. Coca-Cola.</p> <p>17 Q. What type of expert opinion did you</p> <p>18 provide in that case, generally?</p> <p>19 A. Yes, that was a patent infringement</p> <p>20 case, and I calculated lost profits.</p> <p>21 Q. Anything else other than calculating</p> <p>22 lost profits?</p> <p>23 A. I don't think so.</p> <p>24 Q. What about the second case, which</p> <p>25 apparently was an arbitration; correct?</p>
<p style="text-align: right;">Page 7</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. That was the State Attorney General</p> <p>3 of New York versus Intel.</p> <p>4 Q. We have pre-marked as PX 95 your</p> <p>5 report, and here is a copy. I'm sorry, I don't</p> <p>6 have copies for the others.</p> <p>7 I think that we'll start by looking</p> <p>8 at the list of your previous engagements, which</p> <p>9 is Exhibit B, I believe, to your report?</p> <p>10 A. Yes.</p> <p>11 Q. This is a list within the past four</p> <p>12 years; correct?</p> <p>13 A. Actually, as I was reviewing this</p> <p>14 yesterday, I noticed that I believe the prior,</p> <p>15 the first three engagements are a little bit</p> <p>16 older. I should have fixed that.</p> <p>17 Q. Other than these five engagements,</p> <p>18 have you been an expert in any other cases?</p> <p>19 A. So these are the only cases where</p> <p>20 I've filed reports.</p> <p>21 Q. Have you consulted as an expert in</p> <p>22 other cases?</p> <p>23 A. I've consulted as an expert in cases</p> <p>24 that have, you know, settled or, you know,</p> <p>25 somehow ended before I filed a report.</p>	<p style="text-align: right;">Page 9</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Correct.</p> <p>3 Q. It says, I guess that's SESAC, Inc.</p> <p>4 versus Television Music License Committee?</p> <p>5 A. Yes.</p> <p>6 Q. Which side were you retained by?</p> <p>7 A. SESAC.</p> <p>8 Q. What does SESAC stand for?</p> <p>9 A. I think technically it doesn't stand</p> <p>10 for anything anymore.</p> <p>11 Q. Okay.</p> <p>12 A. They once did.</p> <p>13 Q. What do they do?</p> <p>14 A. They license performance rights for</p> <p>15 music.</p> <p>16 Q. What expert opinion were you, did you</p> <p>17 provide there, generally?</p> <p>18 A. There, I was asked to provide an</p> <p>19 opinion about the structure of the contract that</p> <p>20 the television stations would receive from</p> <p>21 SESAC.</p> <p>22 Q. What was the nature of your opinion?</p> <p>23 A. Well, I think that's under -- I mean</p> <p>24 I believe it's under protective order. So, but</p> <p>25 generally speaking, my opinion had to do with</p>

<p style="text-align: right;">Page 10</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 different -- yeah, I'm not sure exactly a good</p> <p>3 way to say it, different type of contractual</p> <p>4 forms and the effect they would have.</p> <p>5 Q. These were SESAC contracts?</p> <p>6 A. Yes.</p> <p>7 Q. In order to prepare that expert</p> <p>8 report, did you study the market for the</p> <p>9 licensing of music?</p> <p>10 MR. McGOWAN: Object, foundation.</p> <p>11 You may answer.</p> <p>12 A. I studied, I studied -- the market</p> <p>13 for licensing music is very complicated, and</p> <p>14 there's a number of different pieces. I studied</p> <p>15 a narrow piece.</p> <p>16 Q. Just generally, what was the narrow</p> <p>17 piece that you studied?</p> <p>18 A. So performance licenses for</p> <p>19 television.</p> <p>20 Q. So performance licenses for music on</p> <p>21 television?</p> <p>22 A. Correct.</p> <p>23 Q. Number 3 on your list is Presstek,</p> <p>24 Inc. versus Creo, Inc. Who engaged you there?</p> <p>25 A. Creo.</p>	<p style="text-align: right;">Page 12</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 environment.</p> <p>3 Q. Was it a patent case or --</p> <p>4 A. No, it's an antitrust case.</p> <p>5 Q. Did you, in that case, opine on a</p> <p>6 relevant market or --</p> <p>7 A. No.</p> <p>8 Q. You didn't do damages in that case?</p> <p>9 A. I did not.</p> <p>10 Q. Case number five, is that another</p> <p>11 antitrust case?</p> <p>12 A. Yes.</p> <p>13 Q. I take it you were retained by Intel?</p> <p>14 A. Yes.</p> <p>15 Q. Was your opinion the same there or</p> <p>16 different than in the other Intel case?</p> <p>17 A. It was a different report. And the</p> <p>18 assignment was slightly different. But it was,</p> <p>19 it was, you know, at a high level, it was the</p> <p>20 same. It was to analyze the success or failure</p> <p>21 of competitive strategies in the but for</p> <p>22 environment.</p> <p>23 Q. So that was to assist the damage</p> <p>24 analysis?</p> <p>25 A. I think it might have assisted both</p>
<p style="text-align: right;">Page 11</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. What is the nature of their business?</p> <p>3 A. They make printing products. Well,</p> <p>4 they may do other things, but the case involved</p> <p>5 printing products.</p> <p>6 Q. Generally, what was the nature of</p> <p>7 your report in that case?</p> <p>8 A. That was also a patent infringement</p> <p>9 case, and I also calculated lost profits.</p> <p>10 Q. Did you do regression analyses in</p> <p>11 these cases where you calculated lost profits?</p> <p>12 A. I think so.</p> <p>13 Q. What was the -- I'm guessing that the</p> <p>14 first case was a 2002 case, is that right, case</p> <p>15 number one?</p> <p>16 A. That's my -- I don't remember. But</p> <p>17 that sounds approximately the right time frame.</p> <p>18 Q. Referring you to number 4, Advanced</p> <p>19 Micro Devices, Inc. versus Intel Corporation.</p> <p>20 Who retained you there?</p> <p>21 A. Intel.</p> <p>22 Q. What was the nature of your opinion?</p> <p>23 A. So that in that case, I provided an</p> <p>24 analysis of how competitive strategies in the</p> <p>25 market would succeed or fail in a but for</p>	<p style="text-align: right;">Page 13</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 liability and damages.</p> <p>3 Q. Have you testified before Congress?</p> <p>4 A. No.</p> <p>5 Q. Have you written any articles on</p> <p>6 copyright matters?</p> <p>7 A. No.</p> <p>8 Q. On patent matters?</p> <p>9 A. No.</p> <p>10 Q. Have you written any articles on</p> <p>11 search engines?</p> <p>12 A. No.</p> <p>13 Q. On Google?</p> <p>14 A. No.</p> <p>15 Q. Amazon?</p> <p>16 A. Amazon, I've written an article on</p> <p>17 Amazon, yes.</p> <p>18 Q. What about Microsoft?</p> <p>19 A. No.</p> <p>20 Q. What was your article on Amazon</p> <p>21 about?</p> <p>22 A. I have three.</p> <p>23 Q. Um-hmm?</p> <p>24 A. Two of them were about loosely</p> <p>25 estimating cross price elasticities between</p>

<p style="text-align: right;">Page 14</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Amazon and Barnes & Noble in the book selling</p> <p>3 market.</p> <p>4 A second was about user reviews and</p> <p>5 the effect of user reviews at Amazon and Barnes</p> <p>6 & Noble.</p> <p>7 Q. Right.</p> <p>8 A. Actually, I have another paper that</p> <p>9 used data from Amazon, so I don't know if you</p> <p>10 want to count that. That used data from the</p> <p>11 used book marketplace at Amazon.</p> <p>12 Q. What type of data about used books?</p> <p>13 A. Prices and sales. Well, I guess</p> <p>14 prices, prices and attributes.</p> <p>15 Q. Not sales?</p> <p>16 A. No. They were, in all of these</p> <p>17 cases, these weren't data that we received from</p> <p>18 Amazon, it was data we collected from the</p> <p>19 website.</p> <p>20 Q. Any other articles that -- three or</p> <p>21 four, I'm sorry, I thought you said there were</p> <p>22 three.</p> <p>23 Were you including this one that</p> <p>24 you --</p> <p>25 A. So there were three about Amazon.</p>	<p style="text-align: right;">Page 16</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 A. Since I've written the report, I</p> <p>3 reviewed deposition testimony from Bruce Harris</p> <p>4 and Gloriana St. Clair.</p> <p>5 Q. Anything else?</p> <p>6 A. No.</p> <p>7 Q. Did anything you read in those</p> <p>8 depositions cause you to have any changes or</p> <p>9 additions to your report?</p> <p>10 A. No.</p> <p>11 Q. You didn't read the reports of</p> <p>12 plaintiff's experts?</p> <p>13 A. Oh, I did, yes, sorry.</p> <p>14 Q. Which reports did you read?</p> <p>15 A. I read the report of Ben Edelman.</p> <p>16 Q. Um-hmm?</p> <p>17 A. And I read the report of Mr. Gervais.</p> <p>18 Q. Did anything in those reports cause</p> <p>19 you to have any changes or additions to your</p> <p>20 report?</p> <p>21 A. No.</p> <p>22 Q. In paragraph 8 of page 2 of your</p> <p>23 report, you say, "My work in this case is</p> <p>24 ongoing, and I may amend or supplement this</p> <p>25 report in light of new information, additional</p>
<p style="text-align: right;">Page 15</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 There were three that I would say were, you</p> <p>3 know, explicitly more about Amazon, so --</p> <p>4 Q. The first one was the cross price</p> <p>5 elasticity --</p> <p>6 A. There were two related to the cross</p> <p>7 price elasticity.</p> <p>8 MR. McGOWAN: I just caution that you</p> <p>9 need to take turns speaking.</p> <p>10 A. Sorry.</p> <p>11 Q. Just for the sake of the record.</p> <p>12 A. Sorry.</p> <p>13 Q. That's all right.</p> <p>14 Referring you to, do you have Exhibit</p> <p>15 C of your report, which is PX 95?</p> <p>16 A. Yes.</p> <p>17 Q. Is this a comprehensive list of</p> <p>18 everything that you reviewed in connection with</p> <p>19 your report?</p> <p>20 A. I believe so, yes.</p> <p>21 Q. The first category here is legal</p> <p>22 filings, and you list various legal documents</p> <p>23 from this lawsuit.</p> <p>24 Since you've written the report, have</p> <p>25 you reviewed any other documents?</p>	<p style="text-align: right;">Page 17</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 discovery, or expert testimony and opinion in</p> <p>3 this case."</p> <p>4 So as of now, having reviewed these</p> <p>5 additional materials, you have nothing to amend</p> <p>6 or supplement?</p> <p>7 A. Correct.</p> <p>8 Q. So you were retained mid to late</p> <p>9 March?</p> <p>10 A. Correct.</p> <p>11 Q. Did you talk to anybody from Google</p> <p>12 in connection with writing this report?</p> <p>13 A. No.</p> <p>14 Q. I take it you talked to Google's</p> <p>15 counsel; right?</p> <p>16 A. Correct.</p> <p>17 Q. Did you talk to in-house counsel?</p> <p>18 A. No, I only talked to Mr. McGowan.</p> <p>19 Q. You didn't talk to any of the</p> <p>20 business personnel at Google?</p> <p>21 A. No.</p> <p>22 Q. Did you seek to talk to them?</p> <p>23 A. No.</p> <p>24 Q. Did you do any empirical research for</p> <p>25 this report?</p>

<p style="text-align: right;">Page 18</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. MCGOWAN: Objection, vague.</p> <p>3 You may answer.</p> <p>4 Q. Do you understand my question?</p> <p>5 A. Yes. So, well, actually, let me</p> <p>6 clarify your question. So do you mean did I use</p> <p>7 any numbers for the report?</p> <p>8 Q. Did you do any research involving any</p> <p>9 review of data or numbers?</p> <p>10 A. Yes.</p> <p>11 Q. What research was that?</p> <p>12 A. So we obtained a listing of members</p> <p>13 of publishers that were members of the Partner</p> <p>14 Program, and we compared that to -- I compared</p> <p>15 that to -- I instructed my staff to find a list</p> <p>16 of top publishers in the U.S., and there's a</p> <p>17 discussion in the report of a comparison between</p> <p>18 those lists. So it's data that we used.</p> <p>19 Q. Any other data?</p> <p>20 A. There was data from the Partner</p> <p>21 Program that I looked at.</p> <p>22 Q. What type of data?</p> <p>23 A. Data about the -- data about the</p> <p>24 members of the Partner Program and the records</p> <p>25 from the Partner Program.</p>	<p style="text-align: right;">Page 20</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 that's the piece that I don't see here, as I sit</p> <p>3 here. Though, it I may be forgetting where it's</p> <p>4 put.</p> <p>5 RQ MS. ZACK: If that data has not been</p> <p>6 produced to plaintiffs, I would request</p> <p>7 that it be produced.</p> <p>8 MR. MCGOWAN: It has been produced.</p> <p>9 MS. ZACK: Are you talking about</p> <p>10 particular PX's or documents with Bates</p> <p>11 numbers?</p> <p>12 MR. MCGOWAN: It's a Bates labeled</p> <p>13 document.</p> <p>14 MS. ZACK: Can you amend, tell me</p> <p>15 what the numbers are, so we can amend this,</p> <p>16 and I can know what we're referring to.</p> <p>17 MR. MCGOWAN: Perhaps at the break if</p> <p>18 you give me a moment.</p> <p>19 MS. ZACK: Yes, sure. I'm not asking</p> <p>20 you to do it this second.</p> <p>21 MR. MCGOWAN: I understand.</p> <p>22 Q. You say in your report that you had a</p> <p>23 conversation with Bruce Harris; is that correct?</p> <p>24 A. I did.</p> <p>25 Q. That was over the telephone?</p>
<p style="text-align: right;">Page 19</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. What do you mean by records?</p> <p>3 A. So there's a listing of the partners</p> <p>4 and their relationships over time, and the</p> <p>5 payments.</p> <p>6 Q. What type of payments?</p> <p>7 A. Payments relating to the Partner</p> <p>8 Program. So payments to the partners.</p> <p>9 Q. Anything else? Any other data?</p> <p>10 A. No, I don't think so.</p> <p>11 Q. You didn't personally do any analysis</p> <p>12 of Google's costs in connection with either the</p> <p>13 Partner Program or the Library Project?</p> <p>14 A. No, I did not.</p> <p>15 Q. Is the data that you looked at</p> <p>16 included in the list that is Exhibit C to your</p> <p>17 report, the data you just referred to?</p> <p>18 A. I think so. Let me check exactly how</p> <p>19 that -- well, the, the Nielson BookScan Report</p> <p>20 is included. I don't, as I see here, see the</p> <p>21 list of participants in the Publishers Program</p> <p>22 included, though it may be included by reference</p> <p>23 in another piece.</p> <p>24 Q. What about the data about payments?</p> <p>25 A. So that's the same data source. Yes,</p>	<p style="text-align: right;">Page 21</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Yes.</p> <p>3 Q. Was that at your request?</p> <p>4 A. Yes.</p> <p>5 Q. How long was that conversation?</p> <p>6 A. I don't recall precisely. I would</p> <p>7 say on the order of a half an hour.</p> <p>8 Q. Did you take notes?</p> <p>9 A. I don't think so.</p> <p>10 Q. So you didn't take any notes?</p> <p>11 A. No.</p> <p>12 Q. What did he tell you?</p> <p>13 A. I asked about common practice in the</p> <p>14 industry, and I asked about advice he would give</p> <p>15 his clients.</p> <p>16 Q. Anything else?</p> <p>17 A. Not that I recall.</p> <p>18 Q. You asked him about common practice</p> <p>19 in the industry about what?</p> <p>20 A. So I asked him about common practice</p> <p>21 about the use of excerpts to promote books.</p> <p>22 Q. Anything else? Any other common</p> <p>23 practices?</p> <p>24 A. We discussed, in general, the</p> <p>25 difficulty in the industry of being found, of a</p>

<p style="text-align: right;">Page 22</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 book being found by readers.</p> <p>3 So, and the common practices in the</p> <p>4 industry for publishers to help their books</p> <p>5 reach readers.</p> <p>6 Q. Anything else about common practices?</p> <p>7 A. That's what I recall.</p> <p>8 Q. You asked him about advice he would</p> <p>9 give his clients, and that was on what subjects,</p> <p>10 advice he would give them on what subjects?</p> <p>11 A. So I asked whether he would encourage</p> <p>12 clients to make their books available to</p> <p>13 programs like Amazon Search Inside the Book or</p> <p>14 other programs that would display parts of the</p> <p>15 book to consumers.</p> <p>16 Q. You asked him about whether he would</p> <p>17 encourage his clients to make their books</p> <p>18 available in Amazon Search Inside the Book.</p> <p>19 Did you ask him about whether he</p> <p>20 would encourage his clients to make their books</p> <p>21 available in Google Books?</p> <p>22 A. Yes. I did similar, yes.</p> <p>23 Q. Anything else?</p> <p>24 A. That's what I recall.</p> <p>25 Q. What did he tell you about whether he</p>	<p style="text-align: right;">Page 24</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 correct.</p> <p>3 Q. You didn't care about whether he</p> <p>4 really did it?</p> <p>5 MR. MCGOWAN: Objection,</p> <p>6 argumentative.</p> <p>7 You may answer.</p> <p>8 A. I believe I asked what type of advice</p> <p>9 he would give his clients, and I don't believe I</p> <p>10 clarified whether that was advice he had given</p> <p>11 his clients or whether that was advice that if a</p> <p>12 client asked, he would give.</p> <p>13 Q. So did your conversation with him</p> <p>14 form the basis of any of your conclusions?</p> <p>15 A. My conversation with him contributed</p> <p>16 to my conclusions. Though, I also relied, you</p> <p>17 know, on his reports and the other reports.</p> <p>18 My conversation with him was not the</p> <p>19 sole basis of any conclusion.</p> <p>20 Q. I'm just talking about the subject</p> <p>21 matter of industry custom and practice.</p> <p>22 What were the bases of your</p> <p>23 conclusions about that subject matter?</p> <p>24 A. Oh, so more generally, is your</p> <p>25 question more generally in the report, what are</p>
<p style="text-align: right;">Page 23</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 would or wouldn't encourage his clients to make</p> <p>3 their books available in Amazon Search Inside</p> <p>4 the Book?</p> <p>5 A. So my recollection is that he</p> <p>6 answered that he would encourage his clients, in</p> <p>7 general, to make their books available in a wide</p> <p>8 variety of platform that would allow customers</p> <p>9 to see the book. So including Search Inside the</p> <p>10 Book.</p> <p>11 Q. Did he specifically say he encouraged</p> <p>12 the use of Search Inside the Book by his</p> <p>13 clients?</p> <p>14 A. I don't recall whether I asked him if</p> <p>15 he did encourage his clients or whether he would</p> <p>16 encourage his clients.</p> <p>17 I asked, I believe I asked if his</p> <p>18 clients were seeking advice, would he encourage</p> <p>19 them to make the book available to programs,</p> <p>20 such as Google Books or Amazon Search Inside the</p> <p>21 Book, and he answered that he would.</p> <p>22 Q. So you didn't ask him whether he</p> <p>23 actually did it, you just asked him whether you</p> <p>24 would do it?</p> <p>25 A. I can't recall, but I believe that's</p>	<p style="text-align: right;">Page 25</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 the bases of my conclusions about industry</p> <p>3 practice?</p> <p>4 Q. Right. You cite Mr. Harris quite</p> <p>5 extensively.</p> <p>6 A. I do. So my conversation with</p> <p>7 Mr. Harris, Mr. Harris's report, Mr. Greco's</p> <p>8 report, Mr. Aiken's deposition, Mr. Zohn's</p> <p>9 deposition, and Mr. Perle's deposition and</p> <p>10 report, all contributed to my understanding of</p> <p>11 practice in the industry.</p> <p>12 Q. Anything else?</p> <p>13 A. So there are other materials I cite</p> <p>14 that are related to practice in the industry,</p> <p>15 but I would say the ones I described were the</p> <p>16 main ones.</p> <p>17 Q. What other materials that you cite</p> <p>18 were relevant to that issue?</p> <p>19 A. So, for example, I cite here --</p> <p>20 Q. Can you just tell me the page?</p> <p>21 A. Sure. I'm sorry, the page is not</p> <p>22 numbered, but towards the end of Appendix C,</p> <p>23 Publicly Available Sources.</p> <p>24 For example, I quote an industry</p> <p>25 practitioner from the Investors Business Daily</p>

<p style="text-align: right;">Page 26</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 article, and that's in the report.</p> <p>3 These iUniverse citations, for</p> <p>4 example, have to do with -- they're mostly in a</p> <p>5 footnote, but have to do with promotional</p> <p>6 practices in the industry.</p> <p>7 These are the ones that I notice,</p> <p>8 offhand. For example, well, this is "Amazon</p> <p>9 announces the first publicly available source.</p> <p>10 Amazon announces sales impact from new Search</p> <p>11 Inside the Book features." There's some</p> <p>12 information that, that I used to describe</p> <p>13 practice in the industry.</p> <p>14 Q. Okay, now you've read Mr. Harris's</p> <p>15 deposition?</p> <p>16 A. I have.</p> <p>17 Q. You saw that he said that he had</p> <p>18 never actually advised any clients to put their</p> <p>19 books in the Google Partner Program?</p> <p>20 A. Yes.</p> <p>21 Q. Does that affect your analysis in any</p> <p>22 way?</p> <p>23 A. It doesn't affect my analysis,</p> <p>24 because my understanding from my conversation</p> <p>25 with him and my understanding from my -- from</p>	<p style="text-align: right;">Page 28</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Correct.</p> <p>3 Q. Partner Program is by permission?</p> <p>4 A. Correct.</p> <p>5 Q. Are you aware of any programs, other</p> <p>6 than the portion of Google Books that we call</p> <p>7 the Library Project, that involve the placement</p> <p>8 of books that are in copyright into search</p> <p>9 engines, without permission?</p> <p>10 A. I think -- could you clarify what you</p> <p>11 mean by placement into search engines?</p> <p>12 I mean, so, for example, reviews</p> <p>13 contain excerpts of books, and excerpts of books</p> <p>14 are therefore, you know, found in search</p> <p>15 engines. But I don't think, I don't know if</p> <p>16 that's your question.</p> <p>17 Q. Are we talking, is your report about</p> <p>18 Google's search engine or about Google Books?</p> <p>19 A. My report is about Google Books, but</p> <p>20 you asked about search engines.</p> <p>21 Q. Are you aware of any book search</p> <p>22 engine in which books have been placed without</p> <p>23 permission, in copyright books, other than in</p> <p>24 Google Books?</p> <p>25 A. So I guess what I'm trying to get at</p>
<p style="text-align: right;">Page 27</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 his report, and my understanding from his</p> <p>3 deposition, and my understanding from the other</p> <p>4 materials that I relied on, was that, in</p> <p>5 general, he and many of the other industry</p> <p>6 practitioners that I'm referring to, as a</p> <p>7 general practice, encouraged authors or</p> <p>8 publishers to participate in any programs that</p> <p>9 had the feature of allowing consumers to find</p> <p>10 their books through excerpts.</p> <p>11 Q. So you understand that it's the</p> <p>12 general practice in the publishing industry for</p> <p>13 publishers to allow their books to be placed in</p> <p>14 search engines without permission?</p> <p>15 MR. McGOWAN: Objection, misstates.</p> <p>16 Q. Is that your understanding?</p> <p>17 A. That's not what I said.</p> <p>18 Q. Well, do you understand that to be</p> <p>19 the practice?</p> <p>20 A. What I understand to be the practice</p> <p>21 is that it is common, it is common practice in</p> <p>22 the industry for publishers to make excerpts</p> <p>23 available through a variety of programs.</p> <p>24 Q. Amazon within Search, Amazon's Search</p> <p>25 Within the Book is by permission; correct?</p>	<p style="text-align: right;">Page 29</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 is I think you mean by that, where the full text</p> <p>3 of the book has been placed in the search</p> <p>4 engine.</p> <p>5 Q. No, I don't mean that. I mean text</p> <p>6 of the books.</p> <p>7 MR. McGOWAN: : Asked and answered.</p> <p>8 MS. ZACK: No, it isn't.</p> <p>9 Q. Let me ask it a different way.</p> <p>10 A. Okay.</p> <p>11 Q. You tell me every search engine where</p> <p>12 you understand that books are available by</p> <p>13 search, for search?</p> <p>14 A. So again, my question, my -- why I</p> <p>15 don't completely understand your question is</p> <p>16 when you say books are available for search, do</p> <p>17 you mean the entirety of the book is available</p> <p>18 for search?</p> <p>19 Q. Yes.</p> <p>20 A. Okay, then I can answer your</p> <p>21 question.</p> <p>22 Q. Okay.</p> <p>23 A. So I believe that Google Books is the</p> <p>24 only program, that I'm aware of, that has that</p> <p>25 feature.</p>

<p style="text-align: right;">Page 30</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. What portion? It's not in the</p> <p>3 Partner Program that has that feature; correct?</p> <p>4 MR. McGOWAN: Objection, vague.</p> <p>5 Q. Does Google Partner Program allow the</p> <p>6 search of the full book?</p> <p>7 A. My understanding is that the Google</p> <p>8 Partner Program, that -- I believe that books in</p> <p>9 the Google Partner Program can be searched, so</p> <p>10 that when a search term that the consumer uses</p> <p>11 is found in the book, the book will appear.</p> <p>12 Q. That's by permission; correct?</p> <p>13 A. That is by permission; correct.</p> <p>14 Q. The same for Amazon Search Within the</p> <p>15 Book?</p> <p>16 A. Correct, that's by permission.</p> <p>17 Q. Are you aware of any other search</p> <p>18 engine that searches the entire book by</p> <p>19 permission?</p> <p>20 A. No.</p> <p>21 Q. The only search engine that you are</p> <p>22 aware of that searches the entire book, without</p> <p>23 permission, is Google Books?</p> <p>24 A. Correct.</p> <p>25 Q. As to Google Books, it's only books</p>	<p style="text-align: right;">Page 32</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 to allow entire books to be searched on search</p> <p>3 engines, without permission of copyright owners;</p> <p>4 are you?</p> <p>5 A. I guess since you've used the term</p> <p>6 "allow" and "without permission" in the same</p> <p>7 sentence, I'm finding it very difficult to</p> <p>8 answer this question.</p> <p>9 Q. You can't answer the question? All</p> <p>10 right, let me hear it restated, and I'll restate</p> <p>11 it.</p> <p>12 (The record was read.)</p> <p>13 Q. You can't answer that question?</p> <p>14 A. I can't answer that question.</p> <p>15 Q. You're not opining here that there is</p> <p>16 a custom and practice in the publishing industry</p> <p>17 whereby publishers permit, without permission,</p> <p>18 their books to be searched in search engines,</p> <p>19 their entire books to be searched in search</p> <p>20 engines?</p> <p>21 MR. McGOWAN: Objection, vague.</p> <p>22 Q. Can you answer that?</p> <p>23 A. I'm sorry, so you're asking me</p> <p>24 whether publishers permit, without permission, I</p> <p>25 just, I can't, I don't understand what you mean</p>
<p style="text-align: right;">Page 31</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 that were copied in the Library Project that had</p> <p>3 that feature, correct, of being without</p> <p>4 permission?</p> <p>5 A. Correct.</p> <p>6 Q. Do you think a sample of one</p> <p>7 establishes a custom and practice?</p> <p>8 MR. McGOWAN: Objection, vague.</p> <p>9 You may answer.</p> <p>10 A. So your question was not about</p> <p>11 permission. Your question originally -- I guess</p> <p>12 I don't understand your question.</p> <p>13 Q. I will rephrase it because I did, you</p> <p>14 know, segue a little bit further back.</p> <p>15 Do you think that having one search</p> <p>16 engine that displays without permission -- or</p> <p>17 searches, excuse me, without permission the</p> <p>18 entire book, establishes a custom and practice</p> <p>19 in an industry?</p> <p>20 A. I haven't -- I described to you the</p> <p>21 custom and practice in the industry with regard</p> <p>22 to making promotional materials available. So I</p> <p>23 guess I don't understand your question.</p> <p>24 Q. So you're not opining that there's a</p> <p>25 custom and practice in the publishing industry</p>	<p style="text-align: right;">Page 33</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 by that.</p> <p>3 Q. You don't understand the concept of</p> <p>4 permission in publishing?</p> <p>5 A. I do understand the concept of</p> <p>6 permission in publishing.</p> <p>7 Q. Well, why don't you tell me what that</p> <p>8 is then? What do you understand about</p> <p>9 publishing permission?</p> <p>10 A. So I understand that, for example, in</p> <p>11 this case, publishers permit Amazon Search</p> <p>12 Inside the Book to search inside the book.</p> <p>13 And I also understand that publishers</p> <p>14 permit the Google Partner Program to Search</p> <p>15 Inside the Book and to display excerpts of the</p> <p>16 book, so I understand that.</p> <p>17 And I understand that the publisher,</p> <p>18 yes, I understand that the publisher gives</p> <p>19 permission for those programs.</p> <p>20 And I understand that the books in</p> <p>21 the Library Project have not received that</p> <p>22 permission.</p> <p>23 Q. You can't tell me any other search</p> <p>24 engine that searches the entire book, that does</p> <p>25 so without permission; correct?</p>


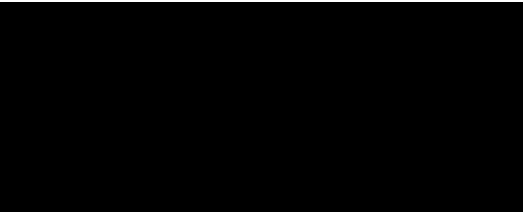
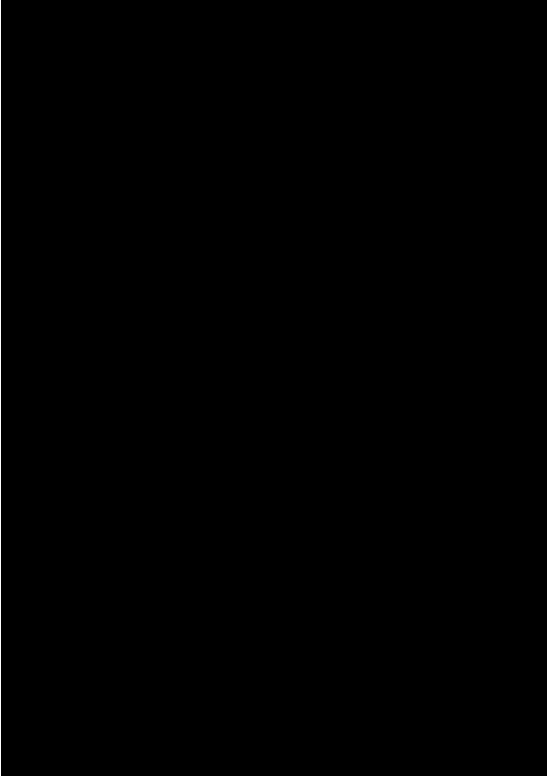
<p style="text-align: right;">Page 34</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 MR. McGOWAN: Asked and answered.</p> <p>3 You may answer.</p> <p>4 Q. Correct?</p> <p>5 A. Correct.</p> <p>6 Q. So what I'm asking you is from all</p> <p>7 that information, do you discern a custom and</p> <p>8 practice with respect to the placement and</p> <p>9 search of in copyright books in Google Books?</p> <p>10 A. By custom and practice, it is my</p> <p>11 understanding that publishers in a wide variety</p> <p>12 of formats and authors, encourage sampling from</p> <p>13 their books.</p> <p>14 I also understand that the Google</p> <p>15 Books provides sampling from the books.</p> <p>16 Q. So do you understand from any source</p> <p>17 that publishers and authors encourage sampling</p> <p>18 of their books in search engines that display or</p> <p>19 search entire books without a copyright</p> <p>20 permission?</p> <p>21 MR. McGOWAN: Objection. Vague and</p> <p>22 compound.</p> <p>23 You may answer.</p> <p>24 A. Sorry, can you repeat that?</p> <p>25 MS. ZACK: Please re-read it.</p>	<p style="text-align: right;">Page 36</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. Have you asked anyone whether that's</p> <p>3 true or not?</p> <p>4 A. I have not.</p> <p>5 Q. You didn't ask Google?</p> <p>6 A. I imagine there may be books that</p> <p>7 they don't place in the Partner Program, but I</p> <p>8 didn't ask.</p> <p>9 Q. So you imagined that a publisher</p> <p>10 might make a choice not to put certain books</p> <p>11 into the Partner Program; correct?</p> <p>12 A. They might.</p> <p>13 Q. Why might they not do that?</p> <p>14 MR. McGOWAN: Objection. Calls for</p> <p>15 speculation.</p> <p>16 You may answer.</p> <p>17 MS. ZACK: She said she imagined.</p> <p>18 A. Yes, so I concede that it is possible</p> <p>19 that publishers may not put all of the books in</p> <p>20 the partner Program.</p> <p>21 But I have not investigated whether,</p> <p>22 to what extent that is true or why that might</p> <p>23 be.</p> <p>24 Q. You don't think that's relevant to</p> <p>25 your report?</p>
<p style="text-align: right;">Page 35</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 (The record was read.)</p> <p>3 A. So I think perhaps the difficulty</p> <p>4 here is that the permission is, the -- as I</p> <p>5 explained in my report, the getting noticed of</p> <p>6 the book, the advertising, the creation of</p> <p>7 awareness, is the economic construct in which,</p> <p>8 you know, publishers and authors have an</p> <p>9 interest.</p> <p>10 They give permission for that in many</p> <p>11 circumstances. But it's not, it's not the</p> <p>12 giving of permission that creates value for</p> <p>13 them. It's the advertising of the book.</p> <p>14 So I understand that -- what I</p> <p>15 understand, my inference from the Google Partner</p> <p>16 Program, is that when given an opportunity to</p> <p>17 provide more materials, have a greater display</p> <p>18 of the book, many publishers, all of the large</p> <p>19 publishers in the U.S., have found that to be a</p> <p>20 valuable opportunity.</p> <p>21 Q. Do you understand that all the</p> <p>22 publishers who are members of the Partner</p> <p>23 Program, allow all their books to be placed in</p> <p>24 the Partner Program?</p> <p>25 A. I don't know that they do.</p>	<p style="text-align: right;">Page 37</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 A. I investigated the participation of</p> <p>3 publishers in the Partner Program. I do not</p> <p>4 know of -- I do not know of books that are</p> <p>5 exceptions to that program, you know.</p> <p>6 Q. If I told you that there were, would</p> <p>7 that change your analysis?</p> <p>8 A. If you told me that there were some</p> <p>9 exceptions, that would not change my analysis.</p> <p>10 If you told me that, if you told me</p> <p>11 that -- yes, if you told me there were some</p> <p>12 exceptions, that would not change my analysis.</p> <p>13 Q. Suppose I told you that 30 percent of</p> <p>14 the books aren't put in the Partner Program,</p> <p>15 would that change your analysis?</p> <p>16 A. No.</p> <p>17 Q. How about 50 percent?</p> <p>18 A. No.</p> <p>19 Q. Seventy percent of the books?</p> <p>20 A. If you told me that the publishers</p> <p>21 who are participating in the Partner Program --</p> <p>22 I mean I recognize not all publisher participate</p> <p>23 in the Partner Program.</p> <p>24 If you told me that of the publishers</p> <p>25 that participate in the Partner Program, they</p>

<p style="text-align: right;">Page 38</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 chose to keep 30 percent of -- sorry, chose to</p> <p>3 keep 70 percent of new books out of the Partner</p> <p>4 Program, that might change my -- that would</p> <p>5 change my analysis.</p> <p>6 Q. It might or it would?</p> <p>7 A. I would have to think about it. I</p> <p>8 think it would. Now I note that I think that's</p> <p>9 true, there are some cost to publishers of</p> <p>10 participating in a Partner Program.</p> <p>11 So I would have to think about</p> <p>12 exactly -- I would have to think about it, you</p> <p>13 know. I think what I say is true for, you know,</p> <p>14 new books being created by the publisher.</p> <p>15 Q. Well, you haven't talked to</p> <p>16 publishers about why they put their books into</p> <p>17 the Partner Program; have you?</p> <p>18 A. I haven't talked to publishers about</p> <p>19 why they put their books into the Partner</p> <p>20 Program.</p> <p>21 Though some of the material in my</p> <p>22 report discusses, you know, why my understanding</p> <p>23 from industry practice, about why publishers put</p> <p>24 their books in the Partner Program.</p> <p>25 Q. Is it your understanding that</p>	<p style="text-align: right;">Page 40</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 with the bookstore. They, you know, as</p> <p>3 described in Mr. Harris's report, you know, they</p> <p>4 create blads, they create, you know, sample</p> <p>5 chapters. Things like that.</p> <p>6 Q. Anything else?</p> <p>7 A. I think there's a myriad of things</p> <p>8 that they do that are described in the reports.</p> <p>9 But I'm, you know, I'm not an expert in</p> <p>10 publishing marketing.</p> <p>11 Q. Is there any value to a copyright</p> <p>12 owner in the copyright?</p> <p>13 MR. McGOWAN: Objection.</p> <p>14 Q. From an economic point of view?</p> <p>15 A. Is there a value to the owner in the</p> <p>16 copyright?</p> <p>17 Q. Yes.</p> <p>18 A. So by that you mean is there monetary</p> <p>19 value to the copyright?</p> <p>20 Q. Economic value of any type.</p> <p>21 A. Well, okay, so by economic value, I</p> <p>22 think I would take that to mean monetary value.</p> <p>23 And I would say there certainly are for some</p> <p>24 copyrights.</p> <p>25 Q. You don't think there's any other</p>
<p style="text-align: right;">Page 39</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 publishers want to control the publicity for the</p> <p>3 books that they have published?</p> <p>4 MR. McGOWAN: Objection, vague.</p> <p>5 You may answer.</p> <p>6 A. My understanding is that publishers</p> <p>7 allow a wide variety of sampling with different</p> <p>8 degrees of control over what that sampling</p> <p>9 involves.</p> <p>10 For example, books are reviewed</p> <p>11 without the publisher's permission. And they</p> <p>12 don't control whether the book is reviewed or</p> <p>13 the nature of reviews.</p> <p>14 Consumers browse books in bookstores</p> <p>15 and sample. The publisher doesn't control which</p> <p>16 parts of the book the consumer reads or how</p> <p>17 much.</p> <p>18 So there are pieces of the marketing</p> <p>19 of the book that the publisher controls, and</p> <p>20 there are pieces of the marketing of the book</p> <p>21 that the publisher does not control.</p> <p>22 Q. Which pieces does the publisher</p> <p>23 control, to your knowledge?</p> <p>24 A. So, to my knowledge, the publisher</p> <p>25 controls, you know, co-marketing arrangements</p>	<p style="text-align: right;">Page 41</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 value, other than monetary value, in owning a</p> <p>3 copyright?</p> <p>4 MR. McGOWAN: Objection, misstates.</p> <p>5 You may answer.</p> <p>6 A. So there's, you know, economic value</p> <p>7 would be the monetary value of the copyright or</p> <p>8 the possible future monetary value created by</p> <p>9 the copyright.</p> <p>10 Q. Does the copyright basically give the</p> <p>11 owner of the copyright a monopoly?</p> <p>12 A. Well, the copyright gives the</p> <p>13 copyright owner a -- not a monopoly in the</p> <p>14 antitrust sense, but exclusive rights to the</p> <p>15 copyrighted work, subject to the limitations in</p> <p>16 the copyright law.</p> <p>17 Q. From an economic sense, is it a</p> <p>18 monopoly?</p> <p>19 MR. McGOWAN: I object. It's very</p> <p>20 compound, but you may answer.</p> <p>21 A. So is the copyright a monopoly?</p> <p>22 Q. Um-hmm.</p> <p>23 A. So I think in order to answer that</p> <p>24 question, you would first have to ask the</p> <p>25 question of whether the copyrighted goods</p>

<p style="text-align: right;">Page 42</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 constitutes a market over which we can normally</p> <p>3 use the term monopoly.</p> <p>4 So copyrighted works compete with one</p> <p>5 another. So in that sense, I don't think I</p> <p>6 would -- I would not use the term monopoly as an</p> <p>7 economist.</p> <p>8 Q. So you would agree that the copyright</p> <p>9 provides some value, in an economic sense, to</p> <p>10 the copyright owner, but you limit it to</p> <p>11 monetary value; is that what your testimony is?</p> <p>12 MR. McGOWAN: Objection.</p> <p>13 A. I have -- you asked me actually about</p> <p>14 economic value?</p> <p>15 Q. Right.</p> <p>16 A. The economic value is the monetary</p> <p>17 value created by the copyright, and the</p> <p>18 potential future monetary value created by the</p> <p>19 copyright.</p> <p>20 Q. Referring you back to your report,</p> <p>21 which is PX 95, referring to you page 2.</p> <p>22 Page 2, paragraph 6, you state, "I</p> <p>23 understand that plaintiffs, three individual</p> <p>24 authors and the Authors Guild, allege that</p> <p>25 Google, Inc., ("Google") has infringed the</p>	<p style="text-align: right;">Page 44</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. So I consider myself an expert in the</p> <p>3 areas that I've told you, competitive strategy,</p> <p>4 industrial organization and economics. You</p> <p>5 know, copyrights play a role in that, but I'm</p> <p>6 not a -- for example, I'm not a legal expert in</p> <p>7 copyrights.</p> <p>8 Q. Well, with respect to copyright</p> <p>9 specifically, is there some area of copyright,</p> <p>10 that concept, that you do consider yourself an</p> <p>11 expert in?</p> <p>12 A. So within the area of copyright, a</p> <p>13 copyright, a copyright is a, is an input to an</p> <p>14 economic process.</p> <p>15 And I'm an expert in industrial</p> <p>16 organization, and so to the extent that, you</p> <p>17 know, copyrights and perhaps they play a</p> <p>18 particular role in the economics of technology.</p> <p>19 So I'm an expert in -- I'm an expert</p> <p>20 in the economic processes that use copyrights,</p> <p>21 but I'm not a specific expert in copyright law.</p> <p>22 Q. Both of these types of industrial</p> <p>23 organizations and technology involve a lot of</p> <p>24 different subject matter; right?</p> <p>25 A. Correct.</p>
<p style="text-align: right;">Page 43</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 plaintiffs' copyrights by scanning and indexing</p> <p>3 several million books as part of its Google</p> <p>4 Books project, ("Google Books"), as well as by</p> <p>5 making certain related uses of those works, such</p> <p>6 as displaying snippets."</p> <p>7 Where did you get that understanding?</p> <p>8 A. So that's my understanding from the,</p> <p>9 for example, the complaint.</p> <p>10 Q. Anything else?</p> <p>11 A. Sorry, what is your question?</p> <p>12 Q. Did you get that understanding from</p> <p>13 anything other than the complaint?</p> <p>14 A. You know, I think that, you know,</p> <p>15 that this is the controversy is, you know,</p> <p>16 probably, it's most notably in the complaint.</p> <p>17 But any of the legal filings, you know, have</p> <p>18 some discussion of that.</p> <p>19 Q. So you understand this is a copyright</p> <p>20 case; right?</p> <p>21 A. I do.</p> <p>22 Q. You don't consider yourself an expert</p> <p>23 in copyright; do you?</p> <p>24 MR. McGOWAN: Vague.</p> <p>25 You may answer.</p>	<p style="text-align: right;">Page 45</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. You could apply them to various</p> <p>3 different subject matters, including copyright;</p> <p>4 correct.</p> <p>5 A. Correct.</p> <p>6 Q. But you don't consider yourself an</p> <p>7 expert on all these subjects that you might</p> <p>8 apply your area of expertise to; do you?</p> <p>9 MR. McGOWAN: Objection, vague.</p> <p>10 A. So I've already answered that I'm not</p> <p>11 an expert in the legal theory of copyright. I</p> <p>12 am an expert in industrial organization, which</p> <p>13 is the study of competition in markets, to which</p> <p>14 copyrights and other forms of intellectual</p> <p>15 property are an important input.</p> <p>16 Q. Is your report at all about</p> <p>17 industrial organization here?</p> <p>18 A. Yes, my report is about, yes. The,</p> <p>19 yes, my report is about industrial organization.</p> <p>20 Q. In what sense is your report about</p> <p>21 industrial organization?</p> <p>22 A. So, for example, my report discusses,</p> <p>23 my report discusses the topic of whether Google</p> <p>24 Books is a new good. And that is a topic -- the</p> <p>25 study of new books is a -- sorry.</p>

<p style="text-align: right;">Page 46</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. New goods?</p> <p>3 A. Strike that. New goods is a study,</p> <p>4 an important area of study in industrial</p> <p>5 organization.</p> <p>6 I discuss whether Google Books, the</p> <p>7 services provided by Google Books are a</p> <p>8 substitute or a compliment for the purchase of</p> <p>9 the book. That is also an area of industrial</p> <p>10 organization.</p> <p>11 Q. When you discuss those topics in this</p> <p>12 report, did you include or make any special</p> <p>13 allowances for the fact that this product that</p> <p>14 you're studying is a, has a copyright, which</p> <p>15 distinguishes it from a lot of goods in the</p> <p>16 marketplace that don't have that legal</p> <p>17 protection?</p> <p>18 MR. McGOWAN: Objection, foundation.</p> <p>19 You may answer.</p> <p>20 MS. ZACK: I should restate it.</p> <p>21 Q. When you wrote your report, you were</p> <p>22 writing about books. In this case, we're</p> <p>23 talking about copyrighted books which have a</p> <p>24 certain legal protection.</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 48</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 you know, recognize that the products are --</p> <p>3 that the books are copyrighted, but my analysis,</p> <p>4 and my analysis, you know, understands that</p> <p>5 those products are copyrighted, but the</p> <p>6 opinions, the opinions are opinions about their</p> <p>7 relationship of the product to other products in</p> <p>8 the marketplace.</p> <p>9 Q. Have you ever done any reports where</p> <p>10 you've analyzed barriers to entry in markets?</p> <p>11 A. Expert reports for academic --</p> <p>12 Q. No, any kind of academic writing on</p> <p>13 barriers to entry?</p> <p>14 A. Sure, I have.</p> <p>15 Q. If you wrote about barriers to entry</p> <p>16 in a market, would you consider the effect of</p> <p>17 regulation?</p> <p>18 A. Sure, of course.</p> <p>19 Q. Would you consider the effect of</p> <p>20 patents and copyrights?</p> <p>21 A. Yes.</p> <p>22 Q. So you would consider that in that</p> <p>23 analysis to barriers to entry; correct?</p> <p>24 A. Yes.</p> <p>25 Q. Going back to paragraph 6, you make</p>
<p style="text-align: right;">Page 47</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Which distinguish these goods, these</p> <p>3 books, from many other goods that you could</p> <p>4 study in industrial organization.</p> <p>5 Does your report take account of</p> <p>6 that?</p> <p>7 MR. McGOWAN: Objection.</p> <p>8 Q. And if it does, how so?</p> <p>9 MR. McGOWAN: Objection, compound.</p> <p>10 Go ahead, you may answer.</p> <p>11 A. So my report, my report -- I might</p> <p>12 have to go vague. My report discusses the --</p> <p>13 let's see, my report discusses the question, for</p> <p>14 example, whether or not Google Books is a new</p> <p>15 good.</p> <p>16 And I understand that, and I think I</p> <p>17 discuss, that an input to the production of that</p> <p>18 new good is the copyrighted works that are</p> <p>19 searched.</p> <p>20 Q. Right, but you don't discuss any</p> <p>21 ramifications of the fact that there is a</p> <p>22 copyright for the works; right?</p> <p>23 A. That's, that's not, it's -- let me</p> <p>24 see. I think, you know, the questions that I</p> <p>25 answer in the report, the issues that I discuss,</p>	<p style="text-align: right;">Page 49</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 no specific mention in paragraph 6 about the</p> <p>3 distribution by Google to libraries of entire</p> <p>4 digital copies of books?</p> <p>5 A. I do not mention the library copy</p> <p>6 here.</p> <p>7 Q. Is there a reason why you don't</p> <p>8 mention that?</p> <p>9 A. So I, I mention the scanning. And my</p> <p>10 understanding is the scanning -- my</p> <p>11 understanding is that Google has made the scan,</p> <p>12 and they have allowed libraries to download that</p> <p>13 scan, if they choose to do so.</p> <p>14 So I understand, I understand that</p> <p>15 the issue of the library copy, but I would, I</p> <p>16 would, in paragraph 6, the issue of the library</p> <p>17 copy, to me, is encompassed in the term scanning</p> <p>18 that I've used.</p> <p>19 Q. So Google's giving the library a</p> <p>20 copy, you understand; is that right?</p> <p>21 MR. McGOWAN: Objection.</p> <p>22 Q. You understand that that occurs?</p> <p>23 A. I understand that Google provides</p> <p>24 facilities from which the library can, if they</p> <p>25 choose, to make a copy.</p>

<p style="text-align: right;">Page 50</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Have you read the agreements between</p> <p>3 Google and the libraries?</p> <p>4 A. I think I have not. I have read the</p> <p>5 deposition of -- I'm not sure I can pronounce</p> <p>6 it.</p> <p>7 Q. Paul Courant?</p> <p>8 A. Well, I have read the deposition of</p> <p>9 Paul Courant, which discusses that issue, but</p> <p>10 I've also read the deposition Stephane</p> <p>11 Jaskiewicz, which discusses that issue.</p> <p>12 Q. You haven't read the actual contracts</p> <p>13 between Google and its library partners?</p> <p>14 A. No.</p> <p>15 Q. Google has contractually agreed to</p> <p>16 provide digital copies to the libraries; are you</p> <p>17 aware of that?</p> <p>18 A. As I said before, my understanding</p> <p>19 from these materials that I've just described to</p> <p>20 you, is that Google has provided the facilities</p> <p>21 from which the libraries can make a copy.</p> <p>22 Q. What do you mean by providing the</p> <p>23 facilities?</p> <p>24 A. So my understanding is that the</p> <p>25 libraries can download a copy, if they choose to</p>	<p style="text-align: right;">Page 52</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 (Brief recess taken.)</p> <p>3 FURTHER EXAMINATION</p> <p>4 BY MS. ZACK:</p> <p>5 Q. Paragraph 7 of your report -- I'm</p> <p>6 sorry, before I get to paragraph 7, I wanted to</p> <p>7 ask you something about flipping further back in</p> <p>8 your report to page 15?</p> <p>9 A. Um-hmm.</p> <p>10 Q. If you look at your footnote 64, do</p> <p>11 you see that?</p> <p>12 A. Yes.</p> <p>13 Q. You talk about "The preceding</p> <p>14 analysis," do you see where I am?</p> <p>15 A. Um-hmm.</p> <p>16 Q. "The preceding analysis suggests that</p> <p>17 such a market could only be created by law</p> <p>18 because the relevant economic principles would</p> <p>19 not sustain it otherwise"; do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Those relevant economic principles,</p> <p>22 are those the same principles you discuss</p> <p>23 elsewhere in your report or are they different</p> <p>24 principles?</p> <p>25 A. So those are the economic principles</p>
<p style="text-align: right;">Page 51</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 do so.</p> <p>3 Q. But you don't understand that</p> <p>4 Google's contractually obligated to allow them</p> <p>5 to download the books?</p> <p>6 A. Yes, I understand that Google does</p> <p>7 allow them to download the books, and that's --</p> <p>8 and I understand that that's part of the</p> <p>9 agreement with the libraries.</p> <p>10 Q. Because there's a difference between</p> <p>11 allowing someone to do something and having a</p> <p>12 contractual obligation to do it; isn't there?</p> <p>13 MR. McGOWAN: Objection.</p> <p>14 Q. As a matter of economics?</p> <p>15 MR. McGOWAN: Objection to the extent</p> <p>16 it calls for a legal conclusion.</p> <p>17 A. So I'm not a legal expert. My</p> <p>18 understanding is that Google has agreed to make</p> <p>19 the facilities available to the libraries so</p> <p>20 that they can download a copy, if they choose to</p> <p>21 do so.</p> <p>22 MR. McGOWAN: We have been going a</p> <p>23 little over an hour.</p> <p>24 MS. ZACK: If you want to take a</p> <p>25 break.</p>	<p style="text-align: right;">Page 53</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 that I discussed from point -- all of section,</p> <p>3 the section labeled B starting on page 14.</p> <p>4 Q. So you're not referring there to any</p> <p>5 additional economic principles, other than the</p> <p>6 ones you've otherwise described in your report;</p> <p>7 that's just what I want to know; right?</p> <p>8 A. Right.</p> <p>9 Q. So the answer is you're not referring</p> <p>10 to anything outside the report?</p> <p>11 A. I am -- right. I'm referring to the</p> <p>12 preceding analysis, which actually perhaps</p> <p>13 preceding is a poor choice of words, because I'm</p> <p>14 referring to the analysis in points 48 to 54.</p> <p>15 Q. Going back to paragraph 7 on page 2,</p> <p>16 it's a summary of your conclusions.</p> <p>17 It says, "I conclude based on the</p> <p>18 evidence I have seen, that: (1) Google Books is</p> <p>19 new good - it provides benefits to consumers</p> <p>20 that previous goods did not."</p> <p>21 When you use the term "Google Books"</p> <p>22 there, are you saying that Google Books itself</p> <p>23 is a new good?</p> <p>24 A. I am saying Google Books itself is a</p> <p>25 new good.</p>

<p style="text-align: right;">Page 54</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. So that includes both the Partner</p> <p>3 Program and the Library Project?</p> <p>4 A. It includes all of the elements of</p> <p>5 Google Books.</p> <p>6 Q. If we took Google Books and put it</p> <p>7 into the two categories, the Partner Program</p> <p>8 first, is the Partner Program a new good?</p> <p>9 A. Do you mean the product Google Books</p> <p>10 implementing only books, only the Partner</p> <p>11 Program, but not the other books?</p> <p>12 Q. Yes, let's just say hypothetically,</p> <p>13 Google Books only included Partner Program</p> <p>14 books, would that be a new good, in your</p> <p>15 opinion?</p> <p>16 A. That would be a new good, but it</p> <p>17 would be a good of lower value to consumers than</p> <p>18 the totality of Google Books.</p> <p>19 Q. Is Amazon Search Within the Book, a</p> <p>20 new good?</p> <p>21 A. I haven't analyzed that.</p> 	<p style="text-align: right;">Page 56</p>  <p>8 A. So, in other words, if you took the</p> <p>9 45,000 partners in the most recent year, and you</p> <p>10 asked what's the total amount of revenue they</p> <p>11 received, the mode, the most frequent number.</p> <p>12 Q. Oh, the modal partner?</p> <p>13 A. Modal, yes. The mode would be zero.</p> <p>14 Q. So you're saying the fact that ad</p> <p>15 revenues are shared, doesn't play a large role</p> <p>16 in your analysis.</p> <p>17 Does it play any role in your</p> <p>18 analysis?</p> <p>19 A. As I just said, I considered it. But</p> <p>20 I decided since the ad revenues are small, they</p> <p>21 don't play a substantial role in my analysis.</p> <p>22 Q. That's what I'm trying to say. What</p> <p>23 role do they play? You didn't say it plays no</p> <p>24 role, so what role does it play?</p> <p>25 A. I -- I evaluated the Partner Program</p>
<p style="text-align: right;">Page 55</p> 	<p style="text-align: right;">Page 57</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 and determined that the ad revenue, for most</p> <p>3 partners, the partner would have to gain</p> <p>4 substantial benefits from being in the program,</p> <p>5 apart from the ad revenue, in order to</p> <p>6 participate. Because for the typical partner,</p> <p>7 the ad revenues are zero.</p> <p>8 Q. Is that because nobody is clicking on</p> <p>9 the books?</p> <p>10 A. No, I don't think that's right.</p> <p>11 Q. How do the partners get revenue in</p> <p>12 the Partner Program, the publishing partners get</p> <p>13 revenue?</p> <p>14 A. My understanding is they get revenue</p> <p>15 if they click on -- if, if consumers click on</p> <p>16 ads.</p> <p>17 The publishing partners, of course,</p> <p>18 also get revenue if the consumer goes and buys</p> <p>19 the book.</p> <p>20 Q. Is it your understanding that the</p> <p>21 publishing partner gets any revenue from the</p> <p>22 Partner Program, if someone clicks on the Amazon</p> <p>23 link?</p> <p>24 A. So my understanding is that the</p> <p>25 partner gets revenue -- I would actually like to</p>

<p style="text-align: right;">Page 58</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 double-check this because I would like to get</p> <p>3 this right.</p> <p>4 But my understanding is that the</p> <p>5 partner gets revenue only as it might flow</p> <p>6 through the Amazon transaction, if the consumer</p> <p>7 buys the book.</p> <p>8 Q. So they get revenue from Google?</p> <p>9 A. My understanding is they do not.</p> <p>10 Q. Well, all right, now I'm confused.</p> <p>11 It's not your understanding that Google is</p> <p>12 paying ad revenues to partners when books are</p> <p>13 purchased at Amazon; are you?</p> <p>14 A. It's my understanding that Google is</p> <p>15 paying ad revenues to partners when consumers</p> <p>16 click on ads.</p> <p>17 Q. Is the Amazon link considered an ad?</p> <p>18 A. My understanding is that it is not.</p> <p>19 Q. Where did you get that understanding?</p> <p>20 A. So that's my understanding from the</p> <p>21 materials I cite here regarding the -- this is</p> <p>22 my reading of the description of the Google</p> <p>23 Partners Program that are cited in my report.</p> <p>24 So I cite the Google Partner Program</p> <p>25 description pages on the Google website, and</p>	<p style="text-align: right;">Page 60</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 are from the Partner Program website. But</p> <p>3 roughly speaking, these are what I've seen.</p> <p>4 Q. Did you look at the Partner Program</p> <p>5 contract that was on-line?</p> <p>6 A. Yes, previously.</p> <p>7 Q. Let me hand you what's been</p> <p>8 previously marked as PX 91.</p> <p>9 Have you seen this before?</p> <p>10 A. I think so, yes. I believe this is</p> <p>11 the standard downloadable one, correct.</p> <p>12 Q. Yes. So can you just show me, in</p> <p>13 these documents, where you gained your</p> <p>14 understanding as to how and on what basis</p> <p>15 partners receive funds from Google?</p> <p>16 A. So in item 96 --</p> <p>17 Q. PX 96?</p> <p>18 A. -- PX 96, that includes a summary.</p> <p>19 On the preview page for your book, we display a</p> <p>20 set of links to buy the books at the major</p> <p>21 retailers, as well as to a site of your choice.</p> <p>22 These links are not paid for by the</p> <p>23 site features. Clicking on a link to purchase</p> <p>24 your book at an on-line retailer, won't generate</p> <p>25 any revenue directly.</p>
<p style="text-align: right;">Page 59</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 that's my understanding from that.</p> <p>3 Q. So you didn't ask anybody from Google</p> <p>4 how it works?</p> <p>5 MR. MCGOWAN: Objection. Asked and</p> <p>6 answered.</p> <p>7 You may answer.</p> <p>8 A. I did not. I did not. As I</p> <p>9 mentioned before, I did not speak to Google</p> <p>10 employees in preparing this report.</p> <p>11 Q. Do you think the materials that you</p> <p>12 looked at are crystal clear?</p> <p>13 A. I think the materials -- to me, the</p> <p>14 materials I looked at were clear.</p> <p>15 Q. I pre-marked PX 96, which is from</p> <p>16 Google's website. It's a number of pages</p> <p>17 collected from Google's website concerning the</p> <p>18 Partner Program.</p> <p>19 Take your time and flip through it,</p> <p>20 but have you seen any of these pages before?</p> <p>21 A. Yes.</p> <p>22 Q. Are these the same things that you</p> <p>23 looked at?</p> <p>24 A. Roughly, I think I have looked at</p> <p>25 these pages. I also cite some other pages that</p>	<p style="text-align: right;">Page 61</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 So that, that's, so that's one piece</p> <p>3 of it. And then my understanding is Section 8,</p> <p>4 ads payment.</p> <p>5 "You agree that Google may serve</p> <p>6 third-party and/or Google provided</p> <p>7 advertisements, collectively ads, in connection</p> <p>8 with the authorized content using Google's</p> <p>9 advertising serving technology. Such ads will</p> <p>10 appear in the style and format that may be</p> <p>11 offered generally by Google when such</p> <p>12 advertising inventory is available.</p> <p>13 "You shall receive a payment related</p> <p>14 to the number of valid clicks on ads displayed</p> <p>15 on content excerpt pages as determined by Google</p> <p>16 for its participants in the program."</p> <p>17 So Section 8, combined with what do I</p> <p>18 earn from the program, I can't say that this is</p> <p>19 the exact page I looked at, at the time, but my</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 partners are payments for ads clicked through</p> <p>24 for standard Google style ads; and that the</p> <p>25 partner additionally would earn revenues, but</p>

<p style="text-align: right;">Page 62</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 not through the partner -- not through Google</p> <p>3 for, you know, any incremental sales of the book</p> <p>4 that might occur.</p> <p>5 Q. Are these revenues from these</p> <p>6 incremental sales that copyright owners might</p> <p>7 earn, important to your report?</p> <p>8 A. So because, because those sales occur</p> <p>9 in other places, you know, they occur at Amazon</p> <p>10 or at Barnes & Noble, I don't have, I don't have</p> <p>11 a mechanism to measure them.</p> <p>12 But the fact -- and it is not</p> <p>13 necessarily the case that incremental sales that</p> <p>14 take place, would only take place, you know,</p> <p>15 from the search page from a click.</p> <p>16 But the fact that displaying the book</p> <p>17 in Google, Google Books, in the Partner Program,</p> <p>18 would provide incremental sales, is important to</p> <p>19 my report.</p> <p>20 Because, because as I've said, I</p> <p>21 think that the revenues from the ad program are</p> <p>22 de minimis.</p> <p>23 And so the opportunity for readers to</p> <p>24 learn about the book and, hopefully, buy the</p> <p>25 book, is -- I have concluded the main benefit</p>	<p style="text-align: right;">Page 64</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 books, it would stimulate demand and how is the</p> <p>3 author monetizing that or the publisher?</p> <p>4 A. So it will clearly be more difficult</p> <p>5 for the author to monetize that interest, that</p> <p>6 increased demand for an out-of-print book.</p> <p>7 So there may be circumstances when</p> <p>8 monetarily the -- there are probably many</p> <p>9 circumstances where, you know, the consumer may</p> <p>10 be interested in purchasing the book, but, you</p> <p>11 know, there's no mechanism for that to occur.</p> <p>12 The consumer may purchase, you know,</p> <p>13 in some circumstances, a used book. That</p> <p>14 doesn't directly benefit the author.</p> <p>15 To the extent, I think it's, I think</p> <p>16 it's reasonable that, you know, the search, you</p> <p>17 know -- in circumstances where there's an</p> <p>18 opportunity for the consumer to buy the book or</p> <p>19 to buy another book by the author, you know,</p> <p>20 then the author will benefit; or if enough</p> <p>21 consumers have interest, you know, there are</p> <p>22 programs to bring books back into print, which</p> <p>23 are possible ways in which the author would</p> <p>24 ultimately benefit.</p> <p>25 Q. Does Google provide any information</p>
<p style="text-align: right;">Page 63</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 from participating in the Partner Program.</p> <p>3 Q. The main benefit to publishers and</p> <p>4 authors?</p> <p>5 A. The main benefit to publishers and</p> <p>6 authors.</p> <p>7 Q. Is that also the main benefit to</p> <p>8 publishers and authors, in your opinion, of</p> <p>9 having their books available for search through</p> <p>10 the Library Project?</p> <p>11 MR. McGOWAN: Objection, vague.</p> <p>12 You may answer.</p> <p>13 A. So I think the -- yes, I should note</p> <p>14 that because many of the books in the Library</p> <p>15 Program are out of print, the consumer may have</p> <p>16 limited opportunities to purchase those books.</p> <p>17 But to the extent that there is an</p> <p>18 opportunity to purchase the book or the consumer</p> <p>19 becomes interested in the author and purchases</p> <p>20 the author's other books, you know, on net, I</p> <p>21 think the publisher and author would receive a</p> <p>22 benefit from being in the Google Library</p> <p>23 Project, because it would stimulate interest in</p> <p>24 demand for the books.</p> <p>25 Q. So with respect to out-of-print</p>	<p style="text-align: right;">Page 65</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 to copyright owners about how many, who are not</p> <p>3 in the Partner Program, so copyright owners</p> <p>4 whose books are in Google Books through the</p> <p>5 Library Project, to your knowledge, does Google</p> <p>6 provide copyright owners with any information</p> <p>7 about how many searches have been made on their</p> <p>8 book?</p> <p>9 A. I believe they do not.</p> <p>10 Q. So how would they know, how does that</p> <p>11 benefit the author or publisher if they don't</p> <p>12 know how many, how much demand is being</p> <p>13 expressed?</p> <p>14 A. Well, if, for example, a number of</p> <p>15 consumers, if consumers -- so they won't know</p> <p>16 that the consumer searched for the book.</p> <p>17 But if consumers seek the book</p> <p>18 through Amazon, if the consumer, if the consumer</p> <p>19 seeks out the author's other books, the author</p> <p>20 may not be able to track the extent to which</p> <p>21 Google Books has driven demand for their books,</p> <p>22 but it nonetheless exists.</p> <p>23 Q. How do you think Google tracks that?</p> <p>24 A. Well, there are things that are</p> <p>25 outside of Google's ability to track. So they</p>

<p style="text-align: right;">Page 66</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 presumably know what terms people searched on.</p> <p>3 They probably do not know what things that came</p> <p>4 up on a page, unless the person clicks the</p> <p>5 individual was interested in, they may know --</p> <p>6 they do know whether the person clicked on a</p> <p>7 link, but they don't know of the -- they</p> <p>8 ultimately, do not know whether -- Google, my</p> <p>9 understanding is, does not ultimately know</p> <p>10 whether the consumer made a purchase, unless</p> <p>11 they did so through Google Play, made a purchase</p> <p>12 in response to having searched for the book.</p> <p>13 Q. My question is do you know whether</p> <p>14 Google tracks searches in books?</p> <p>15 MR. McGOWAN: Objection, vague.</p> <p>16 You may answer.</p> <p>17 A. So what do you mean by searches in</p> <p>18 books?</p> <p>19 So do you mean does Google keep track</p> <p>20 of the search terms?</p> <p>21 Q. Yes, that people use.</p> <p>22 A. I'm sure that Google has a record of</p> <p>23 the search terms that people use.</p> <p>24 Q. Do you think they have a record of</p> <p>25 what books are displayed as a result of those</p>	<p style="text-align: right;">Page 68</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 sometimes search that way.</p> <p>3 But, you know, I don't know even how</p> <p>4 frequent it is for consumers to undertake a</p> <p>5 secondary search within the book, and I don't</p> <p>6 even recall that. I don't, haven't used that</p> <p>7 feature of the website.</p> <p>8 But they, you know, the entries that</p> <p>9 the consumer has made in Google websites, I'm</p> <p>10 sure Google at some moment knows.</p> <p>11 Though it's, you know, obviously, a</p> <p>12 mass of data that's probably, you know, in a</p> <p>13 very raw form. But at some point, they know it.</p> <p>14 Q. You don't think Google uses that data</p> <p>15 for its own purposes?</p> <p>16 MR. McGOWAN: Objection.</p> <p>17 You may answer.</p> <p>18 A. I, for example, know that the search</p> <p>19 terms used at the Google search page are used to</p> <p>20 sell ads, so they use the, you know, that's the</p> <p>21 whole business model.</p> <p>22 Q. What do you know about Google's</p> <p>23 business model?</p> <p>24 A. Well, Google's, obviously, a pretty</p> <p>25 complicated company with a number of different</p>
<p style="text-align: right;">Page 67</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 search terms?</p> <p>3 A. I imagine they do.</p> <p>4 Q. Do you think that when people search</p> <p>5 inside a given book with additional search</p> <p>6 terms, that Google keeps records of that?</p> <p>7 A. I am sure in some raw data form, any</p> <p>8 click that the consumer made within a Google</p> <p>9 site is, you know, whether it's kept, how it's</p> <p>10 aggregated, I don't know, but at some moment,</p> <p>11 Google has a record of the clicks that the</p> <p>12 consumers make in Google sites.</p> <p>13 Q. Well, I don't know what you mean by</p> <p>14 click, but I'm saying do they keep a record of a</p> <p>15 search term entered by a user, that in their</p> <p>16 function that's called Search Within the Book?</p> <p>17 MR. McGOWAN: Objection. I think you</p> <p>18 crossed companies in that question.</p> <p>19 MS. ZACK: I may have. I'm sorry.</p> <p>20 Well, there is a Search Inside the Book</p> <p>21 feature of Google.</p> <p>22 A. So, yes, so my understanding is the</p> <p>23 main way consumers interact with Google Books is</p> <p>24 they enter a search term at the main Google</p> <p>25 website or possibly at Google Books. I</p>	<p style="text-align: right;">Page 69</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 products and services. Are you talking about</p> <p>3 search?</p> <p>4 Q. Yes, let's talk about search.</p> <p>5 A. So is your question what is the</p> <p>6 business model of Google?</p> <p>7 Q. Um-hmm.</p> <p>8 A. So my understanding is that Google</p> <p>9 provides search functionality, and they sell ads</p> <p>10 that are key to search terms.</p> <p>11 Q. Do they have any way of targeting ads</p> <p>12 to users?</p> <p>13 MR. McGOWAN: Objection as to form.</p> <p>14 You may answer.</p> <p>15 A. So I'm not an expert on Google search</p> <p>16 engine. My understanding is that, for example,</p> <p>17 I am more likely to receive ads for businesses</p> <p>18 in New Haven, Connecticut than someone who</p> <p>19 doesn't live in New Haven, Connecticut.</p> <p>20 So there is some targeting, but I</p> <p>21 don't know the intricacies of it, and I'm not an</p> <p>22 expert on that.</p> <p>23 Q. Do you know whether or not Google</p> <p>24 uses information it obtains from searches made</p> <p>25 within Google Books for purposes of its general</p>

<p style="text-align: right;">Page 70</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 ad targeting?</p> <p>3 MR. MCGOWAN: Objection, foundation.</p> <p>4 A. So I don't know about that</p> <p>5 specifically.</p> <p>6 Q. Isn't it relevant to your report,</p> <p>7 what benefits Google is getting from Google</p> <p>8 search and Google Books?</p> <p>9 MR. MCGOWAN: Objection, foundation.</p> <p>10 You may answer.</p> <p>11 A. Actually, I don't think it's that</p> <p>12 relevant to the specific questions that I</p> <p>13 addressed in my report, no.</p> <p>14 Q. So you're saying to me that you don't</p> <p>15 think understanding Google's financial</p> <p>16 interests, with respect to its search engine, is</p> <p>17 relevant to the conclusions you have reached in</p> <p>18 your report?</p> <p>19 MR. MCGOWAN: Objection, foundation.</p> <p>20 You may answer.</p> <p>21 A. So, for example, I don't think it's</p> <p>22 relevant to the question of whether Google Books</p> <p>23 is a new good.</p> <p>24 Q. Okay, anything else it's not relevant</p> <p>25 to?</p>	<p style="text-align: right;">Page 72</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 if you count up all the costs and benefits that</p> <p>3 Google's received, I am not convinced that the</p> <p>4 Google Books project was a positive, what we in</p> <p>5 economics call a net present value project for</p> <p>6 Google. But that's, you know, not germane to my</p> <p>7 conclusions.</p> <p>8 Q. You're not convinced? Have you</p> <p>9 analyzed that?</p> <p>10 A. It's not germane to my conclusions.</p> <p>11 Q. Whether it's germane or not, you have</p> <p>12 not done any analysis of the benefits to Google,</p> <p>13 so how could you possibly express an opinion</p> <p>14 about it?</p> <p>15 You haven't even asked Google; have</p> <p>16 you?</p> <p>17 MR. MCGOWAN: Objection,</p> <p>18 argumentative, compound.</p> <p>19 MS. ZACK: I'll withdraw it.</p> <p>20 Q. You've been retained by Google.</p> <p>21 You haven't asked anyone at Google</p> <p>22 how much money they make or from Google Books?</p> <p>23 MR. MCGOWAN: Objection, foundation,</p> <p>24 asked and answered.</p> <p>25 You may answer.</p>
<p style="text-align: right;">Page 71</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 A. I don't think it's particularly</p> <p>3 relevant to the question of whether the search</p> <p>4 output is a compliment or substitute to the</p> <p>5 purchase of the good -- of the book.</p> <p>6 I, I can -- in the final section of</p> <p>7 the report, I considered, you know, whether a</p> <p>8 market for search terms would occur. I think</p> <p>9 it's not that relevant to that either.</p> <p>10 Q. Referring you to, back to page 2,</p> <p>11 paragraph 7, you conclude, your conclusion</p> <p>12 number 2 is Google Books provides value to</p> <p>13 authors; correct?</p> <p>14 A. Correct.</p> <p>15 Q. Does Google Books provide value to</p> <p>16 Google?</p> <p>17 A. I believe Google Books probably</p> <p>18 provides value to Google, that it's -- I</p> <p>19 obviously didn't express an opinion about it.</p> <p>20 Q. Do you have any doubt that Google</p> <p>21 Books provides value to Google?</p> <p>22 MR. MCGOWAN: Objection, vague.</p> <p>23 You may answer.</p> <p>24 A. I, I am not -- I have, I am not</p> <p>25 convinced that the Google Books project was a,</p>	<p style="text-align: right;">Page 73</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 A. There is not -- I was retained to</p> <p>3 answer specific questions. The answer to that</p> <p>4 question is not germane to these three</p> <p>5 conclusions summarized in point 7.</p> <p>6 Q. Seven (3), you say "Economic analysis</p> <p>7 provides no reason to believe that Google Books</p> <p>8 has superceded any potential market for books or</p> <p>9 licenses to scan and index books," and your</p> <p>10 reference there to economic analysis, is that</p> <p>11 the economic analysis in your report?</p> <p>12 A. Correct.</p> <p>13 Q. You are not referring to any other</p> <p>14 economic analysis?</p> <p>15 A. Correct.</p> <p>16 Q. Referring you to paragraph 9, "Google</p> <p>17 Books is a search tool developed by Google."</p> <p>18 A. Yes.</p> <p>19 Q. What do you mean by a search tool?</p> <p>20 A. I mean that Google Books is a</p> <p>21 mechanism for consumers to, or users, to search.</p> <p>22 Q. Do you consider Google, Google's</p> <p>23 general search engine, to be a search tool?</p> <p>24 A. I do.</p> <p>25 Q. Are there any differences that you're</p>

<p style="text-align: right;">Page 74</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 aware of that you consider material between the</p> <p>3 Google search engine, generally, and Google</p> <p>4 Books?</p> <p>5 A. Well, so Google Books is the marriage</p> <p>6 of the Google digitization project, Google</p> <p>7 search functionality and, you know, a display</p> <p>8 mechanism that's particular to books.</p> <p>9 So it's, you know, Google Books is</p> <p>10 distinct from the rest of the search engine.</p> <p>11 Though, it, obviously, uses expertise related to</p> <p>12 the general search expertise.</p> <p>13 Q. So Google's -- can we -- I don't know</p> <p>14 what to call it, but the general search engine.</p> <p>15 You know what I'm talking about when</p> <p>16 we talk about Google's general search engine, to</p> <p>17 distinguish it from the Google Books search</p> <p>18 engine, can we use those terms generally here?</p> <p>19 MR. McGOWAN: Object, vague,</p> <p>20 foundation.</p> <p>21 MS. ZACK: I don't want to be vague.</p> <p>22 I want to make sure the witness understands</p> <p>23 what we're talking about.</p> <p>24 Q. Do you understand those distinctions?</p> <p>25 A. So you're going to use the term the</p>	<p style="text-align: right;">Page 76</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 program, the snippet, the whole text, the, the</p> <p>3 partner.</p> <p>4 Q. Do you understand that Google Books</p> <p>5 involves Google obtaining off-line content and</p> <p>6 making it available on the Internet?</p> <p>7 MR. McGOWAN: Objection, vague.</p> <p>8 You may answer.</p> <p>9 A. I understand that the Google Books</p> <p>10 project involved Google digitizing physical</p> <p>11 books.</p> <p>12 Q. That's different than the general</p> <p>13 Google Web engine?</p> <p>14 MR. McGOWAN: Objection, vague.</p> <p>15 Calls for speculation.</p> <p>16 A. So I'm not aware of every program</p> <p>17 that Google has undertaken. For example, I</p> <p>18 don't know whether there's a digitization</p> <p>19 component in, say, Google Scholar.</p> <p>20 But when we think about the Google</p> <p>21 search engine, certainly, the most common thing</p> <p>22 that we could -- that my understanding is it</p> <p>23 searches materials, you know, in large part, on</p> <p>24 the Web.</p> <p>25 Q. In order to search the off-line</p>
<p style="text-align: right;">Page 75</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 general Google search engine and Google Books</p> <p>3 separately?</p> <p>4 Q. Right.</p> <p>5 A. Okay.</p> <p>6 Q. Is it your understanding that</p> <p>7 Google's general search engine crawls the Web?</p> <p>8 A. It is my understanding that Google</p> <p>9 search engine searches Web pages, yes.</p> <p>10 Q. Those Web pages are not placed on the</p> <p>11 Web by Google; right?</p> <p>12 A. In general, those Web pages are not</p> <p>13 placed on the Web by Google.</p> <p>14 Q. With respect to Google Books, do you</p> <p>15 understand that Google actually digitizes</p> <p>16 material for purposes of searching and placing</p> <p>17 it on the Web?</p> <p>18 MR. McGOWAN: Objection, foundation.</p> <p>19 Calls for speculation.</p> <p>20 You may answer.</p> <p>21 A. So my understanding is that Google</p> <p>22 digitizes material. That that material is</p> <p>23 searched in Google's servers, and then the</p> <p>24 material -- and then, you know, the material</p> <p>25 displayed is, you know, depending on the</p>	<p style="text-align: right;">Page 77</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 material, the books, Google digitizes it;</p> <p>3 correct?</p> <p>4 A. Yes, correct.</p> <p>5 Q. So Google Books then involves not</p> <p>6 just a search tool, but the creation of an</p> <p>7 entire database of digital books; correct?</p> <p>8 A. The Google search, the Google Books,</p> <p>9 you know, in order to create the search tool,</p> <p>10 the search tool is the product facing consumers.</p> <p>11 As an input to that, Google created this digital</p> <p>12 database.</p> <p>13 Q. So wouldn't it be more correct to say</p> <p>14 Google Books is a digital database of books,</p> <p>15 coupled with the search tool?</p> <p>16 A. I think you could say that. I</p> <p>17 wouldn't say it's more correct. I think that</p> <p>18 Google Books -- I mean, you know, those are both</p> <p>19 pieces of the project.</p> <p>20 You know, when I describe the Google</p> <p>21 Books, I'm thinking of the product that's</p> <p>22 relevant to consumers in the marketplace, and</p> <p>23 that's a search tool.</p> <p>24 That is a search tool that relies on</p> <p>25 the comprehensiveness of the database that's</p>

<p style="text-align: right;">Page 78</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 created. So, you know, obviously, the</p> <p>3 digitization is an important input to the final</p> <p>4 product.</p> <p>5 Q. Is the provision of the books to the</p> <p>6 library, the digital copies of the books to the</p> <p>7 library, an important component of the project?</p> <p>8 MR. MCGOWAN: Objection, foundation.</p> <p>9 You may answer.</p> <p>10 A. So, again, I understand that as part</p> <p>11 of its agreement with the libraries, Google</p> <p>12 provides the facilities that allow the libraries</p> <p>13 to make a digital copy.</p> <p>14 I don't -- I, I imagine, I think that</p> <p>15 -- I won't say imagine -- I think that's an</p> <p>16 important piece of, I understand, from, say,</p> <p>17 Mr. Courant's deposition, that that's an</p> <p>18 important component of the library's</p> <p>19 participation.</p> <p>20 But, again, I would think that for</p> <p>21 the purposes of the consumer product, which is</p> <p>22 what I'm focused on in Section 1 of the report,</p> <p>23 the digital copy to the library is not the</p> <p>24 consumer product that I'm really describing.</p> <p>25 Q. But from Google's point of view, it's</p>	<p style="text-align: right;">Page 80</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Isn't it important to Google to have</p> <p>3 books to digitize?</p> <p>4 A. It is important to Google to have</p> <p>5 books to digitize.</p> <p>6 Q. Is it your understanding that they</p> <p>7 get the books from the libraries?</p> <p>8 A. It is my understanding that the</p> <p>9 books, that the core of the books that are</p> <p>10 included, were from the libraries.</p> <p>11 Q. Is it your understanding that the</p> <p>12 libraries provide those books to Google for</p> <p>13 digitization in exchange for a digital copy to</p> <p>14 the libraries?</p> <p>15 MR. MCGOWAN: Objection to the extent</p> <p>16 it calls for a limited conclusion.</p> <p>17 You may answer.</p> <p>18 A. So is my understanding that the</p> <p>19 libraries provide the books to Google for</p> <p>20 digitization.</p> <p>21 It's also my understanding that the</p> <p>22 opportunity to make a digital copy is of value</p> <p>23 to the libraries.</p> <p>24 So, you know, I cannot, I cannot say</p> <p>25 exactly what was essential to the participation</p>
<p style="text-align: right;">Page 79</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 an important component because that's how Google</p> <p>3 gets the physical books to copyright?</p> <p>4 MR. MCGOWAN: Objection, vague.</p> <p>5 You may answer.</p> <p>6 A. So my understanding is from, say,</p> <p>7 Mr. Courant's deposition, is that the ability to</p> <p>8 make a digital copy on the part of the</p> <p>9 libraries, is a value to the libraries.</p> <p>10 Q. I wasn't asking what was the value to</p> <p>11 the libraries.</p> <p>12 I was asking what was the value to</p> <p>13 Google.</p> <p>14 And I said isn't it important to</p> <p>15 Google, the library digital copy, since that is</p> <p>16 necessary for Google to get the print books and</p> <p>17 digitizes, puts into its search tool, and then</p> <p>18 provides digital copies back to the libraries?</p> <p>19 MR. MCGOWAN: Can I have that read</p> <p>20 back, please.</p> <p>21 (The record was read.)</p> <p>22 MS. ZACK: I will restate it.</p> <p>23 Q. I was saying my question is not about</p> <p>24 the library's perspective, but about Google's</p> <p>25 perspective.</p>	<p style="text-align: right;">Page 81</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 of every partner. But I think the facility to</p> <p>3 make a digital copy, would be an important</p> <p>4 component of the library's participation.</p> <p>5 That's my understanding from Mr. Courant.</p> <p>6 Q. That's what got the libraries to</p> <p>7 participate; correct?</p> <p>8 MR. MCGOWAN: Objection. Calls for</p> <p>9 speculation.</p> <p>10 You may answer.</p> <p>11 A. So as I just said, I understand the</p> <p>12 opportunity to make a digital copy is of value</p> <p>13 to the libraries, but I really can't say whether</p> <p>14 that was the crucial element for every library.</p> <p>15 Q. What kind of value is it to the</p> <p>16 libraries to get the digital copy?</p> <p>17 A. So my understanding from, for</p> <p>18 example, Mr. Courant's deposition, is that, you</p> <p>19 know, the library's fundamental mission</p> <p>20 includes, for example, preservation.</p> <p>21 And so the mere existence of the</p> <p>22 opportunity to make a digital copy, could be of</p> <p>23 value to the library.</p> <p>24 So I think Mr. Courant, you know,</p> <p>25 mentions the floods in New Orleans, so that, you</p>

<p style="text-align: right;">Page 82</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 know, the mere existence of the digital copy,</p> <p>3 even if it's not used, you know, the existence</p> <p>4 of the potential to make the digital copy is of</p> <p>5 value to the libraries.</p> <p>6 My understanding is the libraries,</p> <p>7 you know, exactly the totality of what the</p> <p>8 libraries plan to do and whether they will all</p> <p>9 take advantage of the opportunity to make a</p> <p>10 digital copy, has not yet been completely, you</p> <p>11 know, resolved.</p> <p>12 Q. How do you know that, how do you know</p> <p>13 it hasn't been resolved?</p> <p>14 A. Well, since technology's evolving,</p> <p>15 the set of things that the libraries can do</p> <p>16 with, if they were to make a digital copy today,</p> <p>17 is smaller than the set of things they could do</p> <p>18 if they were to make a digital copy at some</p> <p>19 point in the future.</p> <p>20 And I think, you know, in</p> <p>21 Mr. Courant's deposition, he discusses, you</p> <p>22 know, he mentions things like accessibility</p> <p>23 features for the disabled and suggests that the</p> <p>24 full set of things the library might do, given</p> <p>25 that the opportunity created digital copy</p>	<p style="text-align: right;">Page 84</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. I don't think it's necessarily clear</p> <p>3 that it does. So, for example, if the</p> <p>4 opportunity to make a digital copy is, you know,</p> <p>5 if the library's plan is to not make the digital</p> <p>6 copy until such time, you know, not -- if the</p> <p>7 library's, for example, primary purpose is</p> <p>8 preservation, it's not clear to me that the</p> <p>9 digital copy has any monetary value.</p> <p>10 I think it depends on what the</p> <p>11 library does with it.</p> <p>12 Q. Well, does it have monetary value if</p> <p>13 they would have to otherwise pay for the digital</p> <p>14 copy and they get it for free?</p> <p>15 MR. McGOWAN: Same objection.</p> <p>16 You may answer.</p> <p>17 A. I think that's a tricky question</p> <p>18 because my understanding is that while,</p> <p>19 obviously, libraries, many libraries have</p> <p>20 digitization projects, it's not at all clear</p> <p>21 that the books digitized as part of the Google</p> <p>22 Library Project, would have, in large part,</p> <p>23 certainly not all or in large part, been</p> <p>24 digitized by those libraries in the world where</p> <p>25 the Google Library Project didn't exist.</p>
<p style="text-align: right;">Page 83</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 exists, has not been fully explored.</p> <p>3 Q. Would you say that the digital copy</p> <p>4 to the library has a monetary value to the</p> <p>5 library?</p> <p>6 A. If the library makes a digital copy,</p> <p>7 depending on what it does with it, it could.</p> <p>8 But I don't know for a fact that in many or most</p> <p>9 cases, it would.</p> <p>10 Q. Well, I'm just talking about this</p> <p>11 particular project, Google Books, where Google</p> <p>12 makes available to libraries, digital copies.</p> <p>13 Does that have a monetary value to</p> <p>14 the libraries?</p> <p>15 MR. McGOWAN: Objection, asked and</p> <p>16 answered.</p> <p>17 You may answer.</p> <p>18 A. I think what I said was if the</p> <p>19 library makes a copy, it may, depending on what</p> <p>20 the library does with it.</p> <p>21 Q. Well, does the fact, does having a,</p> <p>22 is the fact that the library has in its</p> <p>23 possession a digital copy, is that worth</p> <p>24 something monetarily?</p> <p>25 MR. McGOWAN: Same objection.</p>	<p style="text-align: right;">Page 85</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 So I don't think I can assert, as you</p> <p>3 have, that the Google Library Project has saved</p> <p>4 them from another digitization effort.</p> <p>5 Certainly, in some circumstances, it</p> <p>6 may. But, you know, I think there may be</p> <p>7 circumstances in which the library, simply</p> <p>8 because of resource constraints, was not going</p> <p>9 to undertake a digitization project.</p> <p>10 Q. So just to make sure I understand.</p> <p>11 If in my house I have 10 couches, and</p> <p>12 someone gives me an 11th, and I don't really</p> <p>13 need it, that provides no monetary value to me,</p> <p>14 in your view?</p> <p>15 A. Well, monetary -- you may derive some</p> <p>16 utility, some happiness from having the couch.</p> <p>17 But you are not going to receive any monetary</p> <p>18 value for it, unless you do something to</p> <p>19 monetize it.</p> <p>20 Q. So the only value I get is the</p> <p>21 utility value?</p> <p>22 A. So it depends on what you do with the</p> <p>23 couch.</p> <p>24 Q. So you're saying, switching back to</p> <p>25 the libraries, there would be, is it your view</p>

<p style="text-align: right;">Page 86</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 that the libraries would have a utility value in</p> <p>3 the digital copies they get from Google?</p> <p>4 A. So my understanding, as I've said</p> <p>5 before, is that the libraries value the</p> <p>6 opportunity to create a digital copy.</p> <p>7 Whether that's a monetary value, I</p> <p>8 mean it's a little hard to think about utility</p> <p>9 when you think of an entity like the library.</p> <p>10 You know, so, for example, if the</p> <p>11 library chooses to make no digital copy, but,</p> <p>12 you know, thinks about, you know, except in the</p> <p>13 eventuality where the library burns down, you</p> <p>14 know, I think the librarian is probably happier</p> <p>15 in that circumstance, but I don't think there's</p> <p>16 a monetary value.</p> <p>17 Q. Do you know how many digital copies</p> <p>18 have been provided by Google to libraries in the</p> <p>19 Google Library Project?</p> <p>20 MR. McGOWAN: Objection, foundation.</p> <p>21 You may answer.</p> <p>22 A. So my understanding is that the</p> <p>23 libraries have the opportunity to make a digital</p> <p>24 copy, and I do not know how many digital copies</p> <p>25 the libraries have made.</p>	<p style="text-align: right;">Page 88</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 digital copies is not germane to your report?</p> <p>3 A. Whether or not the libraries have</p> <p>4 made a digital copy and what it is that the</p> <p>5 library will do with them, is not, is outside</p> <p>6 the scope of my assignment.</p> <p>7 It may be important to the case, but</p> <p>8 it is not important to my report.</p> <p>9 Q. Do you know with respect to the</p> <p>10 Google Library Project, not the Partner Program</p> <p>11 portion, how many of the books that Google scans</p> <p>12 and includes in the search tool, as you describe</p> <p>13 it, were commercially available books, as</p> <p>14 opposed to not commercially available books?</p> <p>15 A. I don't know that.</p> <p>16 Q. If I told you that 90 percent of the</p> <p>17 books were not commercially available, would</p> <p>18 that affect your opinions in any way?</p> <p>19 A. That would not affect my opinions.</p> <p>20 Q. If I told you that they were 10</p> <p>21 percent, would that affect your opinion?</p> <p>22 A. No.</p> <p>23 Q. Referring you to paragraph 10 on page</p> <p>24 3 of your report, about a little, you know, over</p> <p>25 halfway down, there is a sentence that begins,</p>
<p style="text-align: right;">Page 87</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. So you didn't get that information</p> <p>3 from Google?</p> <p>4 A. I did not get that information from</p> <p>5 Google, if Google has it.</p> <p>6 Q. They have it.</p> <p>7 A. Okay.</p> <p>8 Q. Would it matter to you how many</p> <p>9 libraries have chosen to afford themselves of</p> <p>10 that right to get a digital copy?</p> <p>11 MR. McGOWAN: Objection, calls for</p> <p>12 conclusion.</p> <p>13 You may answer.</p> <p>14 A. So I think that's beyond the scope of</p> <p>15 my report. In my report, I opine on whether</p> <p>16 Google Books is a new book, whether it provides</p> <p>17 value to authors, and whether Google Books has</p> <p>18 superseded any potential market for licenses to</p> <p>19 scan and index books.</p> <p>20 I don't think that the exact extent</p> <p>21 to which the libraries have or have not used</p> <p>22 their digital -- their opportunity to make a</p> <p>23 digital copy, is germane to any of those three</p> <p>24 questions.</p> <p>25 Q. So the libraries' uses of their</p>	<p style="text-align: right;">Page 89</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 "Google provides a snippet view for works that</p> <p>3 have not been confirmed to be in the public</p> <p>4 domain and for which the author or publisher has</p> <p>5 not requested that the book be removed from</p> <p>6 snippet view."</p> <p>7 A. Yes.</p> <p>8 Q. That's based -- you cite the</p> <p>9 supplemental narrative responses of Google?</p> <p>10 A. Um-hmm, yes.</p> <p>11 Q. Have you personally looked at</p> <p>12 snippets in Google Books?</p> <p>13 A. I have.</p> <p>14 Q. But you say you haven't used the</p> <p>15 search within Inside the Book tool?</p> <p>16 A. To search inside a specific book, as</p> <p>17 opposed to within the set of books that use the</p> <p>18 search terms, I do not recall doing that.</p> <p>19 Q. What snippets have you seen?</p> <p>20 From what book snippets have you</p> <p>21 seen?</p> <p>22 I mean give me an example of how you</p> <p>23 did a search in Google and then how snippets</p> <p>24 came up?</p> <p>25 A. Well, I mean let me point out that</p>

<p style="text-align: right;">Page 90</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 while, you know, I've described what I've done</p> <p>3 for the report in the report, Google Books has</p> <p>4 been around for a long time, and I'm a scholar,</p> <p>5 so I've used Google search tools extensively.</p> <p>6 So, you know, I cannot count how many</p> <p>7 times I have used Google Books.</p> <p>8 So an example that I describe in my</p> <p>9 report, you know, I was curious about the term</p> <p>10 choke price, which I use in my report.</p> <p>11 I searched the term choke price. A</p> <p>12 number of books, many books came up. Some in</p> <p>13 snippet view. Some with more Partner Program --</p> <p>14 some in the public domain, some in snippet view</p> <p>15 -- or I infer in the public domain, some in</p> <p>16 snippet view, and some Partner Program books</p> <p>17 where large sections of the book were available.</p> <p>18 Q. So did you search out the ones that</p> <p>19 were in snippet view?</p> <p>20 A. What do you mean did I search on the</p> <p>21 ones in snippet view?</p> <p>22 Q. You got a list of books -- you put in</p> <p>23 the term choke price?</p> <p>24 A. Um-hmm.</p> <p>25 Q. You got a list of books; right?</p>	<p style="text-align: right;">Page 92</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 And, you know, make a decision about whether or</p> <p>3 not the book is relevant to me and then, you</p> <p>4 know, maybe get the book.</p> <p>5 Q. So you haven't done any further</p> <p>6 searches, using that search box, for further</p> <p>7 snippets in the book?</p> <p>8 A. I don't believe -- I mean I may have</p> <p>9 at some point in a research, in research, but I</p> <p>10 don't think I did it for this report.</p> <p>11 Q. Do you recall that you can do</p> <p>12 many snippets -- I mean do you have any</p> <p>13 recollection or knowledge that you can, using</p> <p>14 that search box, you can do repetitive or</p> <p>15 multiple searches within a book and get</p> <p>16 different snippets?</p> <p>17 MR. McGOWAN: Objection, vague.</p> <p>18 You may answer.</p> <p>19 A. So I know that there are limits to</p> <p>20 the extent to which you can undertake searches</p> <p>21 and get snippets, different snippets from the</p> <p>22 same books.</p> <p>23 But I do not remember exactly what</p> <p>24 those limits are. I mean I know each snippet is</p> <p>25 about three lines, and I know there are limits</p>
<p style="text-align: right;">Page 91</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. I got, yeah, a display of books, I</p> <p>3 would say, yes.</p> <p>4 Q. I did it too. I saw 2,700 books,</p> <p>5 choke price.</p> <p>6 Did you click on any of the books</p> <p>7 that came up?</p> <p>8 A. Yes.</p> <p>9 Q. You're saying that some of the books</p> <p>10 that you clicked on were in snippet view?</p> <p>11 A. So it is a good -- I have seen many</p> <p>12 Books in snippet view on Google Books. Whether</p> <p>13 the choke price search led to books in snippet</p> <p>14 view, I can't specifically remember, but I</p> <p>15 believe so, yes.</p> <p>16 Q. So if you click on a book that's in</p> <p>17 snippet view, there is a window that comes up</p> <p>18 that says search within the book.</p> <p>19 You're not familiar with that?</p> <p>20 A. I don't remember -- so I don't, I</p> <p>21 don't think I've used that functionality</p> <p>22 specifically.</p> <p>23 I have looked -- I, generally, when I</p> <p>24 find a book in snippet view, I look at the</p> <p>25 snippets because that's what I'm interested in.</p>	<p style="text-align: right;">Page 93</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 as to how many snippets totally you can receive</p> <p>3 and how many for a given search term and how</p> <p>4 many for different search terms, but I don't</p> <p>5 recall those, offhand.</p> <p>6 I have received the message you have</p> <p>7 searched this book too many times, that's come</p> <p>8 up.</p> <p>9 But I think that's on repeated visits</p> <p>10 to the site that that happens to have happened</p> <p>11 to me.</p> <p>12 So I know such security terms exist,</p> <p>13 both from my reading and from my personal</p> <p>14 experience.</p> <p>15 Q. When you say three lines, are you</p> <p>16 talking about three lines like this or three</p> <p>17 sentences?</p> <p>18 A. My understanding is three long lines.</p> <p>19 Q. Three lines of snippets? You've</p> <p>20 never seen snippets longer than three lines?</p> <p>21 A. Well, certainly for Partner Program</p> <p>22 books and for books in the public domain, you</p> <p>23 see long things.</p> <p>24 Q. I'm talking about books in snippet</p> <p>25 view.</p>

<p style="text-align: right;">Page 94</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. I don't think I've seen snippets</p> <p>3 longer than three lines. I think it's about an</p> <p>4 8th of a page.</p> <p>5 Q. Have you determined how much of the</p> <p>6 books that Google makes available in snippet</p> <p>7 view, are available by Google's users, totally,</p> <p>8 to see snippets?</p> <p>9 MR. McGOWAN: Objection.</p> <p>10 Q. In other words, how much of the book</p> <p>11 is available?</p> <p>12 A. So my understanding is, as I said,</p> <p>13 each, each session, each user limits, you know,</p> <p>14 each, for each session and for each user, there</p> <p>15 is a limited number of snippets that can be</p> <p>16 returned to the -- in response to the user's</p> <p>17 search.</p> <p>18 Q. But that wasn't my question.</p> <p>19 A. So your question was across all</p> <p>20 users?</p> <p>21 Q. Yes, I'm saying how much of the book</p> <p>22 is available to be searched across all users?</p> <p>23 MR. McGOWAN: Objection, compound.</p> <p>24 You may answer.</p> <p>25 A. So my understanding is that the</p>	<p style="text-align: right;">Page 96</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 you know, determined to be harmful and, you</p> <p>3 know, has hurt consumers.</p> <p>4 But I'm describing the economic</p> <p>5 literature on new goods, and I think I describe</p> <p>6 it accurately.</p> <p>7 Q. So I mean let's just take an example</p> <p>8 of something like cigarettes.</p> <p>9 I mean at a certain point in time,</p> <p>10 that was a new good?</p> <p>11 A. Well, probably. I think cigarettes,</p> <p>12 yeah, cigarettes, you know, people have been</p> <p>13 drying and rolling tobacco for before there were</p> <p>14 markets for it.</p> <p>15 But commercial cigarettes, at some</p> <p>16 point, were probably a new good.</p> <p>17 Q. So the determination of it being a</p> <p>18 new good, does not depend on it improving</p> <p>19 consumer well-being; does it?</p> <p>20 A. Well, as I explained in the report,</p> <p>21 what makes a new good, a good new, is its</p> <p>22 ability to satisfy previously unmet or at least</p> <p>23 badly met needs.</p> <p>24 Q. Including addiction?</p> <p>25 A. So I believe that cigarettes satisfy</p>
<p style="text-align: right;">Page 95</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 entirety of the book is available to be</p> <p>3 searched, in general.</p> <p>4 (Brief recess taken.)</p> <p>5 FURTHER EXAMINATION</p> <p>6 BY MS. ZACK:</p> <p>7 Q. Paragraph 15 of your report, please,</p> <p>8 on page 4, it starts by saying, "There is basic</p> <p>9 agreement in the field of economics that the</p> <p>10 introduction of new goods is an important</p> <p>11 contributor to improved consumer well-being."</p> <p>12 I mean is that a blanket statement</p> <p>13 true to any new good, even something like slave</p> <p>14 labor?</p> <p>15 MR. McGOWAN: Objection, foundation.</p> <p>16 You may answer.</p> <p>17 A. So I'm not sure slave labor is a</p> <p>18 good. I think slave labor is a production</p> <p>19 input.</p> <p>20 I think what I say is right, that the</p> <p>21 introduction of new goods is an important</p> <p>22 contributor to improved consumer well-being.</p> <p>23 I imagine you could consider a</p> <p>24 situation in which a new good is introduced</p> <p>25 that, you know, subsequently, for example, is,</p>	<p style="text-align: right;">Page 97</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 some consumer desires. Whether, you know, that,</p> <p>3 you know, subsequent to the introduction of</p> <p>4 cigarettes, they turned out to, you know, have</p> <p>5 very harmful health effects, you know, doesn't,</p> <p>6 I think negate the basic principle that the</p> <p>7 advance of consumer well-being has been driven,</p> <p>8 in large part, by the introduction of new goods.</p> <p>9 Q. But I mean economics generally</p> <p>10 doesn't really look at the morality of the</p> <p>11 situation; right?</p> <p>12 MR. McGOWAN: Objection, vague.</p> <p>13 You may answer.</p> <p>14 A. I mean, you know, there is a</p> <p>15 literature on economics and morals. But, you</p> <p>16 know, there's a literature on economics and</p> <p>17 morals.</p> <p>18 Q. Right, but what I asked was</p> <p>19 generally, does economics consider morals in its</p> <p>20 determinations?</p> <p>21 MR. McGOWAN: Objection, vague.</p> <p>22 You may answer.</p> <p>23 A. So I, the field of economics that I</p> <p>24 am relying on here, do not contain explicit</p> <p>25 discussions of morality in any, to any great</p>

EXHIBIT 42

PART 2

<p style="text-align: right;">Page 98</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 extent.</p> <p>3 Q. Then in paragraph 16, you begin your</p> <p>4 analysis, I guess.</p> <p>5 You say, "Economics often model the</p> <p>6 introduction of a new good by describing a world</p> <p>7 in which the new good was always available in</p> <p>8 theory, but was only available at a</p> <p>9 prohibitively high price - a price at which no</p> <p>10 one would be willing to buy the good (often</p> <p>11 called the choke price).</p> <p>12 "Once a firm is able to offer the new</p> <p>13 good at a price that's is not prohibitively</p> <p>14 high, (i.e., at a price for which there will</p> <p>15 be positive demand and which makes sense, on</p> <p>16 the whole, for the firm), the firm will then</p> <p>17 introduce that good into the market"; right?</p> <p>18 A. That's what it says.</p> <p>19 Q. Correct. So it says "Once a firm is</p> <p>20 able to offer the new goods." So the firm here</p> <p>21 is Google; right?</p> <p>22 A. Well, here, I'm describing there's no</p> <p>23 -- I mean here I'm describing an economic</p> <p>24 principle.</p> <p>25 Q. When you're applying that economic</p>	<p style="text-align: right;">Page 100</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. So from the consumer perspective,</p> <p>3 they're not paying a price?</p> <p>4 A. The consumer is not paying to use a</p> <p>5 search tool, correct.</p> <p>6 Q. So the analysis of the choke price</p> <p>7 here really should look at Google's price</p> <p>8 or cost, the cost to Google; correct?</p> <p>9 A. Sorry, could you repeat that?</p> <p>10 Q. It says, "Once a firm," here Google,</p> <p>11 "is able to offer the new good at a price that</p> <p>12 is not prohibitively high," don't we have to</p> <p>13 consider the cost to Google of providing the</p> <p>14 good?</p> <p>15 MR. McGOWAN: I just object. That's</p> <p>16 actually not the sentence you were reading,</p> <p>17 and it sounds like you were quoting.</p> <p>18 You may answer.</p> <p>19 MS. ZACK: I quoted the whole</p> <p>20 paragraph.</p> <p>21 MR. McGOWAN: You inserted a couple</p> <p>22 of words.</p> <p>23 MS. ZACK: I'm sorry.</p> <p>24 Q. "Once a firm is able to offer the new</p> <p>25 good at a price that is not prohibitively high,</p>
<p style="text-align: right;">Page 99</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 principle to this scenario, the firm is Google;</p> <p>3 right?</p> <p>4 A. Correct.</p> <p>5 Q. When you talk about the choke price,</p> <p>6 you say, "It's a prohibitively high price - a</p> <p>7 price at which no one would be willing to buy</p> <p>8 the good."</p> <p>9 Now the price is set by the firm;</p> <p>10 correct?</p> <p>11 A. The price is set by the firm.</p> <p>12 Q. The firm here is Google?</p> <p>13 A. Well, again, here I'm describing a</p> <p>14 general context. When I apply it later, I'm</p> <p>15 talking about Google.</p> <p>16 Q. But I'm talking about theory, the</p> <p>17 firm is the seller or the provider of the good;</p> <p>18 correct?</p> <p>19 A. Here when I'm talking about the firm,</p> <p>20 I'm talking about the provider of the good,</p> <p>21 correct.</p> <p>22 Q. Google has never charged for its</p> <p>23 search tool; right?</p> <p>24 A. Google has not charged for its search</p> <p>25 tool.</p>	<p style="text-align: right;">Page 101</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 (i.e., at a price for which there will be</p> <p>3 positive demand and which makes sense, on the</p> <p>4 whole, for the firm), the firm will then</p> <p>5 introduce that good into the market."</p> <p>6 So in the context of this case, we're</p> <p>7 talking about Google; correct?</p> <p>8 A. We are talking about Google in this</p> <p>9 case.</p> <p>10 Q. So this sentence could read once</p> <p>11 Google is able to offer the new good, and the</p> <p>12 new good here is the Google Book search tool; is</p> <p>13 that right?</p> <p>14 A. The new good is the Google Book</p> <p>15 search tool.</p> <p>16 Q. So once Google is able to offer the</p> <p>17 Google Books search tool at a price that is not</p> <p>18 prohibitively high, i.e., at a price for which</p> <p>19 there will be positive demand and which makes</p> <p>20 sense on the whole for Google, Google will then</p> <p>21 introduce that good into the market, meaning the</p> <p>22 search tool; is that right?</p> <p>23 MR. McGOWAN: Can I have the</p> <p>24 question.</p> <p>25 A. Yeah, what is the question?</p>

<p style="text-align: right;">Page 102</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Is that the application of this</p> <p>3 sentence to this case?</p> <p>4 A. So in this, in this paragraph, I'm</p> <p>5 explaining how economists model the introduction</p> <p>6 of a new good.</p> <p>7 So a convenience that economists use</p> <p>8 to model or a framework that economists use to</p> <p>9 model the introduction of a new good is to</p> <p>10 behave as if the good always existed, but was</p> <p>11 available at a very high price.</p> <p>12 And then in our models, we think</p> <p>13 about, at some point, the product becomes viable</p> <p>14 in the marketplace. Usually, that may mean when</p> <p>15 it's invented.</p> <p>16 So here, for Google, what I'm saying</p> <p>17 is, you know, at some point, this product was</p> <p>18 impossible. It could not have produced this</p> <p>19 product.</p> <p>20 At some point, it made sense for</p> <p>21 Google to embark on producing this product, and</p> <p>22 they produced this product.</p> <p>23 Q. But there's a price or a cost to</p> <p>24 Google to producing the product; correct?</p> <p>25 A. There was definitely a cost to Google</p>	<p style="text-align: right;">Page 104</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. McGOWAN: Objection. Lacks</p> <p>3 foundation. Calls for legal conclusion.</p> <p>4 A. So I am sure, as any firm, when they</p> <p>5 launch a new project, Google had to consider all</p> <p>6 of the, you know, potential benefits of the</p> <p>7 project and the potential costs.</p> <p>8 And I would imagine that all</p> <p>9 potential -- all potential costs should, as an</p> <p>10 economic principle, be included in that</p> <p>11 analysis.</p> <p>12 Q. In this particular case, a cost is</p> <p>13 possible, that engaged in, that they are</p> <p>14 violating copyrights; correct?</p> <p>15 MR. McGOWAN: Objection to the extent</p> <p>16 it calls for legal conclusion, foundation.</p> <p>17 You may answer.</p> <p>18 A. So in undertaking this project, I</p> <p>19 would -- any firm that's undertaking the start</p> <p>20 of any project, should include all potential</p> <p>21 costs in, you know, and the probability of</p> <p>22 paying them, in assessing whether the project</p> <p>23 makes sense.</p> <p>24 And so for Google, potential</p> <p>25 litigation costs of this project should, should</p>
<p style="text-align: right;">Page 103</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 of producing the product.</p> <p>3 Q. That goes into what the price would</p> <p>4 be that they have to charge for?</p> <p>5 A. Well, you know, I guess here we</p> <p>6 might, you know, you know, in this paragraph</p> <p>7 since I'm, you know, speaking of the general</p> <p>8 economic modeling framework, I'm describing the</p> <p>9 price of the good quite straightforwardly.</p> <p>10 Of course, for Google, you know, like</p> <p>11 broadcast television, the consumer doesn't pay</p> <p>12 to consume it. But, you know, advertising and</p> <p>13 other things are sold.</p> <p>14 So what I'm saying is, you know,</p> <p>15 Google introduced this product when, you know,</p> <p>16 when it probably; A, had the idea; and B, made</p> <p>17 sense for Google to embark on this project.</p> <p>18 Q. Well, I mean what it says is that,</p> <p>19 "Once a firm," meaning here Google, "is able to</p> <p>20 offer the new good at a price that is not</p> <p>21 prohibitively high."</p> <p>22 Now in considering that in this case,</p> <p>23 don't you think Google would have had to</p> <p>24 consider the cost of copyright infringement</p> <p>25 suits?</p>	<p style="text-align: right;">Page 105</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 have been considered as a matter of economics,</p> <p>3 when thinking about whether or not to launch the</p> <p>4 project, as it should for any production</p> <p>5 process.</p> <p>6 Q. Would this analysis that you have in</p> <p>7 paragraph 16, would any firm seeking to offer a</p> <p>8 new good to the market, consider whether it was</p> <p>9 legal or not to do so?</p> <p>10 A. So any firm offering a new good to</p> <p>11 the market would, you know, have to consider</p> <p>12 whether it was legal to offer the new good to</p> <p>13 the market or not.</p> <p>14 Q. Referring you to paragraph 17. Well,</p> <p>15 before I get there, what other factors would</p> <p>16 Google consider in determining whether the</p> <p>17 product or the new good made sense for the firm?</p> <p>18 A. So they would consider, I think, the</p> <p>19 potential revenues from the product. They would</p> <p>20 consider the cost for the -- some estimate of</p> <p>21 the cost of the product.</p> <p>22 They may, there may be issues</p> <p>23 regarding thinking about the fit of the product</p> <p>24 with the rest of the company's offerings. And</p> <p>25 the fit of the product, the relationship of the</p>

27 (Pages 102 - 105)

<p style="text-align: right;">Page 106</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 product to the general mission of the company.</p> <p>3 Q. Would it be your view that the</p> <p>4 potential benefits to Google, as a firm, would</p> <p>5 have to substantially outweigh the costs before</p> <p>6 they would go to market with a new good?</p> <p>7 A. So, of course, many times when a firm</p> <p>8 makes a new product launch, you know, after the</p> <p>9 fact, it may or may not turn out to be, you</p> <p>10 know, it may not turn out to be valuable for the</p> <p>11 firm.</p> <p>12 But at the time of making the launch,</p> <p>13 the firm would consider whether the benefits on</p> <p>14 net to the firm, in this case Google, exceed the</p> <p>15 costs.</p> <p>16 But the benefits and the costs may</p> <p>17 be, you know, very widespread. So, you know, it</p> <p>18 may not just be -- the benefits may be, you</p> <p>19 know, this product will, you know, further</p> <p>20 Google's mission or this product will, you</p> <p>21 know -- the benefits have to be appropriately</p> <p>22 considered, but the benefits have to exceed the</p> <p>23 costs for any product to be launched.</p> <p>24 Q. So as a matter of economics, you</p> <p>25 would assume here that Google determined that</p>	<p style="text-align: right;">Page 108</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 provides value to authors, or whether Google</p> <p>3 Books has superceded a potential market for</p> <p>4 books or licenses.</p> <p>5 Well, I may find the question of how</p> <p>6 Google made the decision to launch the Library</p> <p>7 Project interesting, it's not germane to the</p> <p>8 answer to those three questions.</p> <p>9 Q. You assessed in answering the</p> <p>10 question whether or not it was a new good,</p> <p>11 meaning Google Books, you assessed the</p> <p>12 consumer's side of the equation; correct?</p> <p>13 A. I did.</p> <p>14 Q. But you didn't assess the Google side</p> <p>15 of the equation?</p> <p>16 A. So in the literature on new goods,</p> <p>17 and in the literature and in the practice of how</p> <p>18 to assess whether a good is a new good, the</p> <p>19 consumer side is the, the consumer -- the</p> <p>20 important test for whether tests for whether a</p> <p>21 good is a new good, are on the consumer side.</p> <p>22 We observe that the product has been</p> <p>23 introduced. Then we can assess whether that</p> <p>24 product meets needs that have previously been</p> <p>25 unmet or poorly met.</p>
<p style="text-align: right;">Page 107</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 the benefits to it of launching Google Books,</p> <p>3 exceeded the cost, including the cost of</p> <p>4 litigation?</p> <p>5 MR. McGOWAN: Objection, foundation,</p> <p>6 compound.</p> <p>7 You may answer.</p> <p>8 A. So, you know, as a matter of</p> <p>9 strategy, Google should undertake an analysis of</p> <p>10 the benefits and costs of the project upon</p> <p>11 launch.</p> <p>12 But I don't have any basis for which</p> <p>13 to know whether, you know they appropriately,</p> <p>14 whether they, you know -- I don't have any</p> <p>15 insight into the analysis that they undertook,</p> <p>16 other than what's contained in the record.</p> <p>17 Q. Because you didn't ask them?</p> <p>18 A. There's some discussion of it in the</p> <p>19 record, but I did not ask for a separate</p> <p>20 analysis of that.</p> <p>21 Q. Is that because you didn't care about</p> <p>22 the benefits to Google?</p> <p>23 A. As I've explained before, my report</p> <p>24 covers three questions. The question of whether</p> <p>25 Google Books is a new good, whether Google Books</p>	<p style="text-align: right;">Page 109</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. Do you think the Partner Program</p> <p>3 poorly meets the needs of consumers?</p> <p>4 MR. McGOWAN: Objection, vague.</p> <p>5 You may answer.</p> <p>6 A. I'm sorry, do you mean does the</p> <p>7 Partner Program, alone, poorly meet the needs of</p> <p>8 consumers?</p> <p>9 Q. Yes.</p> <p>10 A. The Partner Program, alone, does not</p> <p>11 meet the needs of the consumers, to the extent</p> <p>12 to which the entire project does.</p> <p>13 Surely, some consumers would find</p> <p>14 benefit in the Partner Program.</p> <p>15 Q. Would consumer needs be more fully</p> <p>16 met if Google displayed entire books?</p> <p>17 A. So you mean with the existing search</p> <p>18 functionality, but simply returned to the entire</p> <p>19 book?</p> <p>20 Q. Yes.</p> <p>21 A. Consumer needs, I think, consumers</p> <p>22 would, consumers would certainly benefit from</p> <p>23 being able to obtain more than the snippets.</p> <p>24 Q. Well, if Google displayed, in</p> <p>25 response to consumer requests, entire digital</p>

<p style="text-align: right;">Page 110</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 copies of all books, whether in copyright or out</p> <p>3 of copyright, wouldn't that be a benefit to</p> <p>4 consumers?</p> <p>5 A. Yes, that would be a benefit to</p> <p>6 consumers.</p> <p>7 Q. Would that be a new good?</p> <p>8 MR. McGOWAN: Objection, vague.</p> <p>9 You may answer.</p> <p>10 A. Yes, it would be a benefit to</p> <p>11 consumers and, yes, it would be a new good. It</p> <p>12 would be a, it would certainly be a benefit to</p> <p>13 the consumers, using the site at that moment.</p> <p>14 Q. I'm not quite sure I understand the</p> <p>15 caveat there?</p> <p>16 A. So the caveat is if Google, if Google</p> <p>17 or another entity were to do something that</p> <p>18 actually destroyed the market for books by --</p> <p>19 well, of course, it wouldn't single handedly</p> <p>20 destroy the market for books, but if Google were</p> <p>21 to do something that substantially diminished</p> <p>22 the market for books, then one might worry as</p> <p>23 is, you know, the basis for intellectual</p> <p>24 property law, that the market for books would</p> <p>25 ultimately shrink.</p>	<p style="text-align: right;">Page 112</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 not the case at hand.</p> <p>3 But in general, you know, given that</p> <p>4 consumers don't pay to use the search</p> <p>5 functionality, they can't, you know, they can't</p> <p>6 be -- they would, in general, not be worse off</p> <p>7 from the existence of the search functionality.</p> <p>8 But the extent to which they benefit</p> <p>9 is a function of the quality of the search</p> <p>10 functionality and the comprehensiveness of the</p> <p>11 works included.</p> <p>12 Q. Well, in order for something to be a</p> <p>13 new good, do consumers have to benefit?</p> <p>14 A. Yes. So in order for something to</p> <p>15 be -- well, as I explained in the thing, in</p> <p>16 order for something to be a new good, consumers</p> <p>17 have to have a willing -- consumers have to have</p> <p>18 -- it has to meet a need that was previously</p> <p>19 unmet. So the need implies consumers have to</p> <p>20 benefit.</p> <p>21 Q. So if we think of a new good that</p> <p>22 consumers don't have to pay for because it's</p> <p>23 given away free, but it was a neutral on</p> <p>24 benefit --</p> <p>25 MS. ZACK: Withdraw that.</p>
<p style="text-align: right;">Page 111</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 In this case, as I discuss in my</p> <p>3 later section, I believe that the functionality</p> <p>4 that Google provides is a compliment for the</p> <p>5 market for books, rather than a substitute. So</p> <p>6 no such concern arises.</p> <p>7 Q. Can't a new good benefit consumers</p> <p>8 and also destroy a different market?</p> <p>9 A. I think the concern is that if you --</p> <p>10 it depends, you know, I think the time horizon</p> <p>11 is an issue here.</p> <p>12 If Google were to display entire</p> <p>13 copies of books, the consumers who, without, you</p> <p>14 know, entire copies of books for which there was</p> <p>15 otherwise a market, and that led consumers to</p> <p>16 buy fewer books, then that would lead to fewer</p> <p>17 books being produced, which would ultimately</p> <p>18 harm consumers.</p> <p>19 Q. Since the price that consumers pay</p> <p>20 for Google Books search is zero, is there any</p> <p>21 reason why they wouldn't be benefited by Google</p> <p>22 Books?</p> <p>23 A. So since the price that consumers pay</p> <p>24 is zero -- well, I described one scenario where</p> <p>25 consumers could ultimately be harmed. That's</p>	<p style="text-align: right;">Page 113</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. -- a new product that, is given away</p> <p>3 free, sort of neutral to the consumers, that's</p> <p>4 not a new good?</p> <p>5 A. That's if's, if it's a product that</p> <p>6 is given away free and consumers, you know,</p> <p>7 don't derive substantially utility from it,</p> <p>8 different from previous goods, then they, then I</p> <p>9 wouldn't consider that a new good.</p> <p>10 Q. Referring you to page 6 of your</p> <p>11 report, footnote 28, please?</p> <p>12 A. Yes.</p> <p>13 Q. You write, "It is important to note</p> <p>14 that the search and index capabilities that</p> <p>15 define Google Books are feasible only through</p> <p>16 the scanning and digitization of the underlying</p> <p>17 book in its entirety. In order to present</p> <p>18 results that are relevant to each user's search,</p> <p>19 the entire book must be scanned and digitized.</p> <p>20 Therefore, while it is true that an input to</p> <p>21 Google Books is the scan, digitized book in its</p> <p>22 entirety, the output, which represents the</p> <p>23 actual use of the Google books, employs only</p> <p>24 small portions of the book, at most."</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 114</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Now the input or in the output,</p> <p>3 includes digital copies to the libraries; right?</p> <p>4 MR. McGOWAN: Objection, vague.</p> <p>5 You may answer.</p> <p>6 A. So as I've said before, it is my</p> <p>7 understanding that Google has provided the</p> <p>8 functionality of two libraries for libraries to</p> <p>9 make their own digital copy.</p> <p>10 I am not, you know, clearly here, I</p> <p>11 am describing the Google Books, I'm describing</p> <p>12 the Google Books website.</p> <p>13 Q. Well, when you talk about input to</p> <p>14 Google Books, and output -- all right, so an</p> <p>15 input to Google Books, do you consider the scan,</p> <p>16 library scan, to be an input to Google Books?</p> <p>17 MR. McGOWAN: Objection, vague.</p> <p>18 You may answer.</p> <p>19 A. So as I say here, "Therefore, while</p> <p>20 it is true that an input to Google books is the</p> <p>21 scanned, digitized book," yes.</p> <p>22 Q. Then you're talking about the output</p> <p>23 being the Google Books itself?</p> <p>24 A. Yes.</p> <p>25 Q. You say it "employs only small</p>	<p style="text-align: right;">Page 116</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 which represents the actual use of Google Books,</p> <p>3 employs only small portions of the book, at</p> <p>4 most."</p> <p>5 Now the Google Books allows search of</p> <p>6 entire books; correct?</p> <p>7 A. So it allows, it searches the book in</p> <p>8 its entirety.</p> <p>9 Q. And that it also allows consumers</p> <p>10 access to virtually the entirety of the book;</p> <p>11 right?</p> <p>12 MR. McGOWAN: Objection, vague.</p> <p>13 Q. Or employs, you used the word</p> <p>14 employs?</p> <p>15 A. I see. So is your objection to the</p> <p>16 use of the word employs?</p> <p>17 Q. It's not an objection. I mean Google</p> <p>18 employs more than small portions of the book;</p> <p>19 doesn't it?</p> <p>20 MR. McGOWAN: Objection, vague.</p> <p>21 You may answer.</p> <p>22 A. Okay, so I use the term input and</p> <p>23 output. And by employs, I mean that the output</p> <p>24 consists of only a small portion of the book.</p> <p>25 I believe that your question is, by</p>
<p style="text-align: right;">Page 115</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 portions of book, at most"?</p> <p>3 You previously testified that the,</p> <p>4 even for the Google Library Project, the entire</p> <p>5 book was available for search; right?</p> <p>6 A. So for the Google Library Project,</p> <p>7 yes, the entire book is searched, but the output</p> <p>8 is the search result that the consumer receives.</p> <p>9 And the output is only a small</p> <p>10 portion of the book.</p> <p>11 Q. That's for one consumer you're</p> <p>12 saying. What about all consumers?</p> <p>13 MR. McGOWAN: Objection, vague.</p> <p>14 You may answer.</p> <p>15 A. So I think it is what I said, that at</p> <p>16 the output for any given book, for any given</p> <p>17 search, for any given consumer, is a small</p> <p>18 portion of the book.</p> <p>19 Q. Well, that's not what you're saying</p> <p>20 says?</p> <p>21 MR. McGOWAN: Objection,</p> <p>22 argumentative.</p> <p>23 Q. Your sentence says, "While it is true</p> <p>24 that an input to Google Books is the scanned,</p> <p>25 digitized book in its entirety, the output,</p>	<p style="text-align: right;">Page 117</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 using the word employs some what differently,</p> <p>3 your question is doesn't the production of the</p> <p>4 snippet that the consumer views, rely on</p> <p>5 Google's having the entirety of the book,</p> <p>6 because the consumers search, searches the</p> <p>7 entirety of the book, and that is true.</p> <p>8 Q. What about the fact that Google</p> <p>9 employs the entire book to allow snippets to be</p> <p>10 displayed to many different consumers and in</p> <p>11 different snippets from virtually all of the</p> <p>12 book?</p> <p>13 MR. McGOWAN: Objection. Foundation.</p> <p>14 You may answer.</p> <p>15 A. So my understanding is that, yes,</p> <p>16 different snippets will be viewed by different</p> <p>17 consumers.</p> <p>18 Q. Those snippets, over different</p> <p>19 consumers, will consist of virtually the entire</p> <p>20 book, except for the parts that Google</p> <p>21 blacklists; correct?</p> <p>22 MR. McGOWAN: Same objection.</p> <p>23 You may answer.</p> <p>24 A. So are you asking me as an empirical</p> <p>25 matter, would it be the case that consumer</p>

<p style="text-align: right;">Page 118</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 search of a particular book would lead to across</p> <p>3 all consumers, the entirety of the content of</p> <p>4 that book being eventually displayed over some</p> <p>5 period of time?</p> <p>6 Q. Yes.</p> <p>7 A. Are you asking will that happen as an</p> <p>8 empirical matter or are you asking could that</p> <p>9 happen?</p> <p>10 Q. Well, could that happen?</p> <p>11 A. So I suppose it is the case that</p> <p>12 other than the piece of the book, the parts of</p> <p>13 the book that is blacked -- well, it would be</p> <p>14 tricky because no consumer is allowed -- gets</p> <p>15 the same search terms more than a limited number</p> <p>16 of times.</p> <p>17 I suppose we could write a program --</p> <p>18 no, no, we couldn't. I suppose if I had the</p> <p>19 book, I could -- and I had millions of</p> <p>20 helpers -- no, I think it -- no, I don't think</p> <p>21 it could happen because when you search -- I</p> <p>22 think, I think it is un -- I'm not a computer</p> <p>23 scientist, and I don't profess expertise in</p> <p>24 consumer science, but I think it, the entirety</p> <p>25 of -- across all consumers, across all time,</p>	<p style="text-align: right;">Page 120</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Do you know how many?</p> <p>3 A. I don't know how many have searches</p> <p>4 -- I don't know, off the top of my head.</p> <p>5 Q. I think they post on their website</p> <p>6 that they have billions of users?</p> <p>7 A. Okay.</p> <p>8 Q. I don't know if they're all using</p> <p>9 Google Books; do you?</p> <p>10 A. Well, Google Books, you know, is</p> <p>11 returned from the core search engine, they may</p> <p>12 or may not be.</p> <p>13 Q. Google also states that it blacklists</p> <p>14 about 10 percent of a book, one out of 10 pages,</p> <p>15 I'm saying 10 percent; do you understand that?</p> <p>16 A. I understand that.</p> <p>17 Q. So that's the blacklisted portion,</p> <p>18 and then they blacklist the snippet per page.</p> <p>19 Have you read that?</p> <p>20 A. I have read that.</p> <p>21 Q. So there's a portion of the book</p> <p>22 that's blacklisted?</p> <p>23 A. Correct.</p> <p>24 Q. Other than that portion, Google makes</p> <p>25 the rest available for display in snippets;</p>
<p style="text-align: right;">Page 119</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 it's very unlikely, it seems impossible,</p> <p>3 actually, that the entirety of the text of the</p> <p>4 book would be displayed.</p> <p>5 Q. You're saying you understand that</p> <p>6 Google divides, generally, the practice is to</p> <p>7 divide the book into eighths, and they call each</p> <p>8 eighth of the book a snippet; is that right?</p> <p>9 MR. McGOWAN: Objection, foundation,</p> <p>10 and that's actually an incorrect statement.</p> <p>11 A. Do you mean the page?</p> <p>12 Q. I meant page, yes. Sorry.</p> <p>13 A. So my understanding is that a snippet</p> <p>14 is about an eighth of a page.</p> <p>15 Q. You understand that those snippets</p> <p>16 are displayed in response to search requests?</p> <p>17 A. I understand that snippets are</p> <p>18 displayed in -- a limited number of snippets are</p> <p>19 displayed in response to search requests.</p> <p>20 Q. A limited number are -- three are</p> <p>21 displayed in response to each search request;</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. But how many users does Google have?</p> <p>25 A. It has a lot.</p>	<p style="text-align: right;">Page 121</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 right?</p> <p>3 MR. McGOWAN: Objection, vague.</p> <p>4 You may answer.</p> <p>5 A. Yes, my understanding is that the</p> <p>6 rest is searchable and viewable through</p> <p>7 snippets.</p> <p>8 Q. So Google employs all of the book,</p> <p>9 except the blacklisted parts; correct?</p> <p>10 MR. McGOWAN: Objection, vague.</p> <p>11 You may answer.</p> <p>12 A. Google uses as an input, all of the</p> <p>13 book, but they don't output all of the book.</p> <p>14 Q. They don't output all of the books on</p> <p>15 a single search, but they make, they certainly</p> <p>16 will output it all, if they can, if they get</p> <p>17 enough users, they'll output it all, right,</p> <p>18 except for the blacklisted pages?</p> <p>19 A. So I'm pretty sure I'm not the best</p> <p>20 person to answer this, but my understanding is</p> <p>21 that actually wouldn't happen because, for</p> <p>22 instance, when I search for a term, say the term</p> <p>23 heart, the first three instances of the use of</p> <p>24 the term heart appear.</p> <p>25 I don't, I don't even know across</p>

31 (Pages 118 - 121)

<p style="text-align: right;">Page 122</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 consumers how it is one would get to the</p> <p>3 subsequent uses of the term heart. So, so, so,</p> <p>4 I don't believe it is the case that anything</p> <p>5 resembling the book, the actual book, could be</p> <p>6 outputted via the Google search engine.</p> <p>7 Q. The snippet, when you search for</p> <p>8 heart and you get some snippets that includes</p> <p>9 the word heart, but there's a lot of other words</p> <p>10 on that page than that snippet; right?</p> <p>11 MR. McGOWAN: Objection, vague.</p> <p>12 You may answer.</p> <p>13 A. Correct, there are other words.</p> <p>14 Q. People could search for those other</p> <p>15 words, right, different people?</p> <p>16 A. Let us, let us stipulate, I do not</p> <p>17 know whether it is, and I'm not an expert in the</p> <p>18 exactity of exactly how -- I know, in general,</p> <p>19 how this search engine snippet function works.</p> <p>20 I believe it not to be the case that</p> <p>21 you could receive, you know, that a billion</p> <p>22 consumers put together, could somehow assemble</p> <p>23 the entire book from the results of the Google</p> <p>24 search engine.</p> <p>25 They certainly can't because of the</p>	<p style="text-align: right;">Page 124</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 So this -- for a consumer, what is the output of</p> <p>3 Google Go Books for the set of books that are in</p> <p>4 copyright, but not in the Partner Program, it is</p> <p>5 snippets, which represent a small fraction of</p> <p>6 the book.</p> <p>7 Q. So you're talking about the</p> <p>8 experience of a single consumer using Google</p> <p>9 Books?</p> <p>10 A. Well, in this footnote --</p> <p>11 Q. Right, in this sentence?</p> <p>12 A. -- in this footnote, I'm talking</p> <p>13 about the product as it is experienced by the</p> <p>14 consumer. And so it's, you know, it is the</p> <p>15 output as experienced by the consumer.</p> <p>16 Q. But not consumers as a whole?</p> <p>17 MR. McGOWAN: Objection, asked and</p> <p>18 answered.</p> <p>19 You may answer.</p> <p>20 A. So consumers, as a whole, all</p> <p>21 experience snippets. You know, the question of</p> <p>22 whether, you know, a number, you know -- yes,</p> <p>23 consumers, as a whole, experience snippets.</p> <p>24 Q. So paragraph 20 on page 7, this is</p> <p>25 the concluding paragraph of your analysis about</p>
<p style="text-align: right;">Page 123</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 blacklisted pieces, but I think, it is my</p> <p>3 understanding, they can't just in general. But,</p> <p>4 you know, I don't know that for a fact.</p> <p>5 Q. Oh, okay, I didn't ask you about who</p> <p>6 was assembling anything.</p> <p>7 I asked you whether Google employs</p> <p>8 it?</p> <p>9 A. So the output, which is the</p> <p>10 screenshot, employs only a small portion of the</p> <p>11 book.</p> <p>12 Q. So this sentence is only about a</p> <p>13 single search?</p> <p>14 A. This sentence certainly applies to a</p> <p>15 set of searches, but this sentence was intended</p> <p>16 to describe the output as relevant to a</p> <p>17 consumer.</p> <p>18 Q. So you're talking about basically one</p> <p>19 or two searches by a single consumer?</p> <p>20 MR. McGOWAN: Objection, misstates.</p> <p>21 You may answer.</p> <p>22 A. I'm talking about the set of searches</p> <p>23 that a consumer would experience. I'm not going</p> <p>24 to say one or two.</p> <p>25 I've done many more than one or two.</p>	<p style="text-align: right;">Page 125</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 new goods; is that right?</p> <p>3 A. Correct.</p> <p>4 Q. So this is, again, your analysis here</p> <p>5 is part of the economic theory involving the</p> <p>6 development of new goods?</p> <p>7 A. Correct.</p> <p>8 MS. ZACK: We can take a break for</p> <p>9 lunch.</p> <p>10 MR. McGOWAN: Before we do that, let</p> <p>11 me note for the record, the document number</p> <p>12 you asked for is Google 05004751.</p> <p>13 MS. ZACK: I know what that is, so</p> <p>14 that's the big long list.</p> <p>15 (Luncheon recess: 12:26 p.m.)</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<p style="text-align: right;">Page 126</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 AFTERNOON SESSION</p> <p>3 (Time noted: 1:15 p.m.)</p> <p>4 JUDITH A. CHEVALIER, resumed</p> <p>5 and testified as follows:</p> <p>6 CONTINUED EXAMINATION</p> <p>7 BY ZACK:</p> <p>8 Q. Referring you to page 9 of your</p> <p>9 report, please? You have discussion throughout</p> <p>10 this section about Google Books as a complement,</p> <p>11 not substitute?</p> <p>12 A. Correct.</p> <p>13 Q. And which you talk about the fact</p> <p>14 that books get noticed, etcetera --</p> <p>15 A. Correct.</p> <p>16 Q. -- through Google Books, and that</p> <p>17 that's a benefit. You conclude that's a benefit</p> <p>18 to authors; right?</p> <p>19 A. Correct.</p> <p>20 Q. That benefit is virtually exclusive</p> <p>21 to in-print authors; correct?</p> <p>22 A. I wouldn't say that. I think</p> <p>23 in-print authors will benefit more, but</p> <p>24 out-of-print authors may benefit under certain</p> <p>25 circumstances.</p>	<p style="text-align: right;">Page 128</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 by consumer demand.</p> <p>3 Q. That's true whether there is or isn't</p> <p>4 Google Books; isn't it?</p> <p>5 A. That's true whether there is or there</p> <p>6 isn't Google Books, but it's my testimony that</p> <p>7 Google Books helps drive consumer demand for</p> <p>8 books.</p> <p>9 Q. So if consumers are buying used books</p> <p>10 on Amazon, that helps drive consumer books for</p> <p>11 new books by those authors?</p> <p>12 A. I'm saying that -- I said, I think,</p> <p>13 two distinct things. The consumer may look for</p> <p>14 other books by the same author.</p> <p>15 And, you know, when consumers buy</p> <p>16 used books on Amazon, when used books, you know,</p> <p>17 when it becomes apparent that there's a lot of</p> <p>18 demand for a used book, that may assist in</p> <p>19 bringing the book back into print.</p> <p>20 Q. How does the author know if there's a</p> <p>21 lot of demand for a used book on Amazon?</p> <p>22 A. Well, for example, the price at which</p> <p>23 the book is selling in the Amazon Marketplace,</p> <p>24 reflects the, reflects the supply and demand of</p> <p>25 the book.</p>
<p style="text-align: right;">Page 127</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. Can you tell me those circumstances</p> <p>3 in which you think they'll benefit, given the</p> <p>4 way Google Books works?</p> <p>5 A. Yes. So I think they will benefit in</p> <p>6 a number of circumstances. One would be if,</p> <p>7 even though some of the authors' books are out</p> <p>8 of print and some of the books -- if in</p> <p>9 circumstances where some of the authors' books</p> <p>10 are out of print and other of the authors' books</p> <p>11 are in print, consumers may, you know, if they</p> <p>12 discover a book they're interested in via Google</p> <p>13 Books, that might lead them to other books by</p> <p>14 those authors.</p> <p>15 It may lead them to other books on</p> <p>16 the same topic, probably benefitting different</p> <p>17 authors. But I think also, there are some</p> <p>18 mechanisms and those mechanisms, I think, are</p> <p>19 becoming more relevant in the marketplace, where</p> <p>20 if consumers, say, buy used books on Amazon and,</p> <p>21 you know, there are used books on Amazon that</p> <p>22 are selling for very high prices because there's</p> <p>23 a demand for the book to come back into print.</p> <p>24 There may be circumstances in which,</p> <p>25 you know, a book could be driven back into print</p>	<p style="text-align: right;">Page 129</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. Right, so it could have a high price</p> <p>3 because it's in rare supply, but that doesn't</p> <p>4 mean there's a lot of demand; does it?</p> <p>5 A. If there's a high price for the book,</p> <p>6 and, you know, I suppose it's possible that a</p> <p>7 seller posted a high price for the book and</p> <p>8 never sells it, but if transactions are taking</p> <p>9 place at a high price, that means that there's</p> <p>10 high demand relative to supply.</p> <p>11 Q. Is that reported to authors or</p> <p>12 publishers?</p> <p>13 A. An author could easily look that up.</p> <p>14 Q. Could easily look it up where? Have</p> <p>15 you looked it up?</p> <p>16 A. Yes, so if you go to Amazon and you</p> <p>17 look at Amazon Marketplace, you would see -- and</p> <p>18 I would do this, I would advise, if I were an</p> <p>19 author doing this for other book sellers too, I</p> <p>20 would look at the copies of my used book, and</p> <p>21 the prices that they're selling for.</p> <p>22 Q. Does that functionality tell you the</p> <p>23 prices that -- the actual sales prices?</p> <p>24 A. So it tells you the prices that</p> <p>25 sellers have posted. If you, if you were to,</p>

<p style="text-align: right;">Page 130</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 you know, look over the course of some period of</p> <p>3 time, you would observe, you would observe -- I</p> <p>4 don't know that it directly provides data on</p> <p>5 sales.</p> <p>6 But, you know, if you were to look</p> <p>7 over time, you would see that, you know, sellers</p> <p>8 who have posted a book at a particular price</p> <p>9 have, you know, moved to those books off, which</p> <p>10 would lead an author to infer that they've been</p> <p>11 bought.</p> <p>12 Q. Or taken down by the seller?</p> <p>13 A. I suppose that's possible. But since</p> <p>14 the purpose of the seller is to sell books, and</p> <p>15 it doesn't really cost them anything to keep the</p> <p>16 books on Amazon Marketplace, unless the seller</p> <p>17 had some other desire to have the book or sell</p> <p>18 it off-line or some other place, which is</p> <p>19 selling the book, I think it's reasonable to</p> <p>20 infer that, you know, a book, if your book, you</p> <p>21 know, that books that are removed from Amazon</p> <p>22 Marketplace were being sold.</p> <p>23 Q. Have you ever looked at any data from</p> <p>24 Amazon about that?</p> <p>25 A. So I don't have data from Amazon</p>	<p style="text-align: right;">Page 132</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 advertising.</p> <p>3 Q. Right, and that choice of where to</p> <p>4 place an ad can be quite important; right?</p> <p>5 A. So, yes, I think firms' decisions</p> <p>6 about where to place ads are important.</p> <p>7 Q. There are sometimes places where</p> <p>8 firms don't want ads; right?</p> <p>9 MR. McGOWAN: Objection, foundation.</p> <p>10 You may answer.</p> <p>11 A. I understand there are circumstances</p> <p>12 where, you know, a firm would not want to</p> <p>13 advertise, say, in a venue that's a mismatch for</p> <p>14 the firm's message or product.</p> <p>15 Q. In paragraph 34 on page 10, you say</p> <p>16 "I understand that it is Mr. Harris's view that</p> <p>17 the excerpts were snippets provided by Google</p> <p>18 Books in response to a user's search bear a</p> <p>19 resemblance to these mechanisms that consumers</p> <p>20 may use to "find" a book."</p> <p>21 A. Yes.</p> <p>22 Q. Find is in quotes.</p> <p>23 So there you use the term Google</p> <p>24 Books, but again, there are two parts to it, the</p> <p>25 Partner Program and the Library Project; right?</p>
<p style="text-align: right;">Page 131</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 available to me about that. I've used data from</p> <p>3 Amazon Marketplace for books, but not for the</p> <p>4 purpose that you have just asked.</p> <p>5 Q. You have some data -- or I shouldn't</p> <p>6 say data -- discussion in here about</p> <p>7 advertising; is that right?</p> <p>8 A. Yes.</p> <p>9 Q. So you're analogizing Google Books to</p> <p>10 advertising?</p> <p>11 MR. McGOWAN: I just ask for a</p> <p>12 reference to where you're reading.</p> <p>13 MS. ZACK: I'm sorry, it's basically</p> <p>14 throughout in different places, but an</p> <p>15 example is on page 9, paragraph 28.</p> <p>16 MR. McGOWAN: Thank you.</p> <p>17 A. So I am saying that Google Books</p> <p>18 serves a function like advertising. And that it</p> <p>19 informs the consumer about the existence of</p> <p>20 books.</p> <p>21 Q. When companies decide to advertise</p> <p>22 products, they do choose where to advertise</p> <p>23 them; don't they?</p> <p>24 A. So when companies purchase</p> <p>25 advertising, they choose where to purchase the</p>	<p style="text-align: right;">Page 133</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Correct.</p> <p>3 Q. You think that both bear a</p> <p>4 resemblance to mechanisms that consumers may use</p> <p>5 to find a book?</p> <p>6 A. So as I say in the next sentence,</p> <p>7 "whether a more extensive sample of text is</p> <p>8 accessible (as in the case of the books that</p> <p>9 enter Google Books via the Partner Program) or</p> <p>10 whether snippets are available, Google Books</p> <p>11 makes it easier for a book to get noticed," so</p> <p>12 yes.</p> <p>13 Q. The previous paragraph 33 where you</p> <p>14 discuss Mr. Harris, you talked about in the</p> <p>15 second sentence, "A major role of the publisher</p> <p>16 is to attempt to achieve consumer awareness of</p> <p>17 the publisher's books. Consequently, publishers</p> <p>18 employ many tools to generate publicity about</p> <p>19 the book and to get the book noticed. These</p> <p>20 include: provision of excerpts," etcetera; you</p> <p>21 see that?</p> <p>22 A. I see that.</p> <p>23 Q. So I thought that paragraph 34</p> <p>24 related back to 33; is that true?</p> <p>25 MR. McGOWAN: Objection, vague, and</p>

<p style="text-align: right;">Page 134</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 you may answer.</p> <p>3 Q. When you say "These mechanisms" in</p> <p>4 paragraph 34, aren't you referring to the</p> <p>5 mechanisms that you've mentioned in paragraph</p> <p>6 33?</p> <p>7 A. Yes, in 34, I am saying that the</p> <p>8 excerpts or snippets resemble the mechanisms</p> <p>9 that consumers may use to find a book or that</p> <p>10 publishers may use to help consumers find a</p> <p>11 book.</p> <p>12 Q. Let's just stick with the first</p> <p>13 sentence in paragraph 34.</p> <p>14 So "these mechanisms" refers back to</p> <p>15 the tools employed by publishers; right?</p> <p>16 A. Yes.</p> <p>17 Q. These tools that you've mentioned</p> <p>18 here that are employed by publishers, are all</p> <p>19 done pursuant to contracts with third-parties;</p> <p>20 correct?</p> <p>21 MR. McGOWAN: Objection, foundation.</p> <p>22 You may answer.</p> <p>23 A. Sorry, so you mean that the publisher</p> <p>24 undertakes these promotional activities as part</p> <p>25 of its agreement with the author?</p>	<p style="text-align: right;">Page 136</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 are similar to the mechanisms that consumers, on</p> <p>3 the buy side or publishers on the sell side,</p> <p>4 use.</p> <p>5 Q. But there is -- they bear a</p> <p>6 resemblance, but there's a major difference in</p> <p>7 that the mechanisms listed in paragraph 33</p> <p>8 involve contractual permission; correct?</p> <p>9 MR. McGOWAN: Objection, vague.</p> <p>10 You may answer.</p> <p>11 A. So I think the point, that one of the</p> <p>12 points of this section is to explain that the,</p> <p>13 that the, that the mechanisms used that involve</p> <p>14 permission, are similar to the mechanism</p> <p>15 provided by Google. That they look the same to</p> <p>16 the consumer and should have the same effect.</p> <p>17 Q. But they look different to the</p> <p>18 author; right?</p> <p>19 MR. McGOWAN: Objection, foundation.</p> <p>20 You may answer.</p> <p>21 A. As I've said, as you have said, one</p> <p>22 involves, one involves the permission, at least</p> <p>23 of the publisher, and the other does not.</p> <p>24 Q. The permission of the publisher or</p> <p>25 the author; right?</p>
<p style="text-align: right;">Page 135</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Correct.</p> <p>3 A. Yes, I believe that the publisher,</p> <p>4 that the publishers -- the publisher, I think,</p> <p>5 has some discretion in their marketing</p> <p>6 activities.</p> <p>7 But it's my understanding that the</p> <p>8 reason authors use a publisher is so -- one of</p> <p>9 the reasons an author uses a publisher is to</p> <p>10 obtain some access to some of these marketing</p> <p>11 services.</p> <p>12 Q. A snippet view in Google Books</p> <p>13 through the Library Project, involves no</p> <p>14 contract between Google and any rights holder;</p> <p>15 right?</p> <p>16 A. Correct.</p> <p>17 Q. So in that sense, there's not a</p> <p>18 resemblance, there's a difference between the</p> <p>19 mechanisms in paragraph 33 and what Google does;</p> <p>20 right?</p> <p>21 MR. McGOWAN: Objection, vague.</p> <p>22 You may answer.</p> <p>23 A. I think my language states exactly</p> <p>24 what I mean, that the type of mechanisms</p> <p>25 provided by Google are -- bear a resemblance,</p>	<p style="text-align: right;">Page 137</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. The permission of the publisher --</p> <p>3 sorry, so in Section 33, generally, I'm talking</p> <p>4 about the publisher undertaking the marketing</p> <p>5 function.</p> <p>6 There may be circumstances, say, for</p> <p>7 self-published books where the author undertakes</p> <p>8 the marketing function, but, yes.</p> <p>9 Q. In paragraph 34, at the end of the</p> <p>10 second sentence, let's -- I will start with the</p> <p>11 whole second sentence.</p> <p>12 You say, "Whether a more extensive</p> <p>13 sample of text is accessible (as in the case of</p> <p>14 books that enter Google Books via the Partner</p> <p>15 Program) or whether snippets are available,</p> <p>16 Google makes it easier for a book to get</p> <p>17 noticed, which may increase demand for that book</p> <p>18 and benefit the author."</p> <p>19 Have you done any empirical research</p> <p>20 concerning that conclusion?</p> <p>21 A. So the research I've done or the</p> <p>22 foundation for that statement are the things</p> <p>23 that I cite.</p> <p>24 I don't, there's, there, you know, I</p> <p>25 don't, I do not believe there's a data set that</p>

<p style="text-align: right;">Page 138</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 would help me to measure empirically whether,</p> <p>3 whether more book sales take place as a result</p> <p>4 of the existence of the Google Partner Program.</p> <p>5 So there's a number of just --</p> <p>6 there's a number sites in the record and</p> <p>7 referenced in my report, but I didn't undertake</p> <p>8 an empirical analysis.</p> <p>9 Q. That's because you don't think that</p> <p>10 would be possible or --</p> <p>11 A. I don't have access -- I don't</p> <p>12 believe, I don't believe it would be possible to</p> <p>13 measure the effect of Google Books on the sales</p> <p>14 of books.</p> <p>15 Q. In paragraph -- I'm sorry, page 11,</p> <p>16 paragraph 36, you state in the second sentence,</p> <p>17 "That is, there is market-based evidence that</p> <p>18 market participants - authors and publishers -</p> <p>19 see value in Google Books, so much so that</p> <p>20 through the Partner Program, they have opted to</p> <p>21 have even larger excerpts than snippets</p> <p>22 available for consumers to read."</p> <p>23 A. Correct.</p> <p>24 Q. In the Partner Program, you are aware</p> <p>25 that the partners can have control over how</p>	<p style="text-align: right;">Page 140</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 I guess I don't know exactly what</p> <p>3 happens, if it is actually feasible that -- I</p> <p>4 know the whole book is searched.</p> <p>5 I'm exactly sure what happens if the</p> <p>6 partner can block specific pages or simply</p> <p>7 determines the percentage of the book that can</p> <p>8 be seen. I would have to double-check on that.</p> <p>9 Q. Isn't it your understanding that the</p> <p>10 amount of pages that can be seen in the Partner</p> <p>11 Program is fixed to certain pages?</p> <p>12 MR. McGOWAN: Objection. Asked and</p> <p>13 answered.</p> <p>14 A. Yes, so I said I understand that the</p> <p>15 fraction of the book that the user will be able</p> <p>16 to browse is, is controlled by the partner in</p> <p>17 the Partner Program.</p> <p>18 But I do not precisely know the</p> <p>19 implementation of it and, therefore, the exact</p> <p>20 answer to your question.</p> <p>21 Q. Does that have any bearing on your</p> <p>22 report, the answer to that question?</p> <p>23 A. No, the statement I make in the report</p> <p>24 report, the statements I make in the report are</p> <p>25 still, don't, don't bear on that distinction.</p>
<p style="text-align: right;">Page 139</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 large the excerpt is that is viewed; right?</p> <p>3 A. I understand that, yes.</p> <p>4 Q. There is no snippet view in the</p> <p>5 Partner Program?</p> <p>6 A. As though I understand that the</p> <p>7 entire book is searched, as it is in the Google,</p> <p>8 in the library program.</p> <p>9 Q. The entire book is searched, and then</p> <p>10 what happened?</p> <p>11 A. So my understanding is that the</p> <p>12 entire -- so if you type in the word guitar, the</p> <p>13 entire book is searched for the word guitar.</p> <p>14 But the partner controls the</p> <p>15 percentage of the book that the, that the user's</p> <p>16 able to see.</p> <p>17 Q. So if a book in the Partner Program</p> <p>18 includes the word guitar, but if that word</p> <p>19 itself is not in the excerpt that the partner</p> <p>20 has permitted to be viewed, what happens?</p> <p>21 A. So I would, my understanding is that,</p> <p>22 my understanding is that the -- my understanding</p> <p>23 is that the partner chooses the percentage of</p> <p>24 the book that can be seen, provides the book for</p> <p>25 scanning.</p>	<p style="text-align: right;">Page 141</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Are you aware that a number of</p> <p>3 publishers sued Google under the copyright laws</p> <p>4 with respect to Google's Library Project?</p> <p>5 A. I understand that a number of</p> <p>6 publishers -- that some publishers sued Google</p> <p>7 as part of the Library Project, but I don't</p> <p>8 believe they're currently parties to this</p> <p>9 complaint or a complaint.</p> <p>10 Q. What is your understanding about what</p> <p>11 the publisher's claim was?</p> <p>12 MR. McGOWAN: Objection to the extent</p> <p>13 it calls for conclusion.</p> <p>14 You may answer.</p> <p>15 A. So I did not review documents from</p> <p>16 that prior litigation, and so I don't know the</p> <p>17 answer to your question.</p> <p>18 Q. Were you aware that the publishers</p> <p>19 and the publishers trade association, the AAP,</p> <p>20 were parties to the same claims as the authors?</p> <p>21 A. So I understood, I understand that</p> <p>22 there was a previous litigation involving the</p> <p>23 publishers.</p> <p>24 My understanding is that that</p> <p>25 litigation is not in existence anymore. So I</p>

<p style="text-align: right;">Page 142</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 assumed that that litigation was ended to the</p> <p>3 publishers' satisfaction, but I don't know</p> <p>4 anything more about it.</p> <p>5 Q. You haven't asked Google about that?</p> <p>6 A. No.</p> <p>7 Q. Where did you gain the information or</p> <p>8 assumption that the publishers' case is closed?</p> <p>9 A. They are not -- I haven't read</p> <p>10 anything about the publishers' case and, you</p> <p>11 know, they are not a party to this, to this</p> <p>12 litigation.</p> <p>13 Q. So from that, you assume their case</p> <p>14 was closed?</p> <p>15 A. I assume their case was closed.</p> <p>16 Q. You don't know on what terms?</p> <p>17 A. I do not.</p> <p>18 Q. Is that relevant to you?</p> <p>19 A. No.</p> <p>20 Q. Well, you're talking here about the</p> <p>21 publishers seem to be pleased with Google;</p> <p>22 correct?</p> <p>23 A. I believe what I've said is that the</p> <p>24 publishers have found Google Books, the Partner</p> <p>25 Program, to be a program that they</p>	<p style="text-align: right;">Page 144</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 the publishers enter the Partner Program, that</p> <p>3 they have a larger portion of the book available</p> <p>4 for view?</p> <p>5 A. So the snippet -- instead of the</p> <p>6 three line snippets, what's returned in the</p> <p>7 Partner Program is, in general, a larger</p> <p>8 fraction of a, a larger readable chunk.</p> <p>9 Q. But it's a fixed chunk chosen by the</p> <p>10 publisher; correct?</p> <p>11 MR. McGOWAN: Objection.</p> <p>12 A. So as I said before, my understanding</p> <p>13 is that the publisher chooses the fraction of</p> <p>14 the book that's viewable to the consumer.</p> <p>15 Q. Have you talked to any publishers</p> <p>16 about this matter?</p> <p>17 A. I have not talked to any publishers</p> <p>18 about this matter, except Mr. Harris, who is a</p> <p>19 publishing strategist and former publisher.</p> <p>20 Q. Have you talked to anyone at Random</p> <p>21 House about this?</p> <p>22 A. I have not talked to anyone at Random</p> <p>23 House about this, though, of course, Mr. Harris</p> <p>24 is formerly of Random House.</p> <p>25 Q. Did you look at the settlement that</p>
<p style="text-align: right;">Page 143</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 overwhelmingly want to participate in.</p> <p>3 Q. Have you ever found evidence that the</p> <p>4 Google Library Project is a program that the</p> <p>5 publishers want to participate in?</p> <p>6 MR. McGOWAN: Objection, vague.</p> <p>7 You may answer.</p> <p>8 A. So since the Google library project</p> <p>9 is housed under the same search engine and</p> <p>10 integrates search with the Google Partner</p> <p>11 Program, I believe the way that a publisher</p> <p>12 expresses an interest in -- you know, the</p> <p>13 publisher doesn't have to do anything to have</p> <p>14 its book available in snippet view.</p> <p>15 If the publisher doesn't want its</p> <p>16 book available in snippet view, it can tell</p> <p>17 Google to remove the books.</p> <p>18 If the publisher wasn't more than</p> <p>19 snippets view, it joins the Partner Program.</p> <p>20 So the fact that publishers have</p> <p>21 joined the Partner Program, means that the</p> <p>22 publishers have chosen to have a larger fraction</p> <p>23 of the book viewable than would take place under</p> <p>24 the Library Program.</p> <p>25 Q. That's what you believe happens when</p>	<p style="text-align: right;">Page 145</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 was reached by publishers and authors with</p> <p>3 Google, and it was then not approved finally by</p> <p>4 the court?</p> <p>5 A. I have familiarity with that</p> <p>6 settlement. I mean I've seen it. I didn't</p> <p>7 review it for the purposes of writing this</p> <p>8 report, but I have read it previously.</p> <p>9 Q. Are you aware that the publishers</p> <p>10 consider -- that Random House, Penguin,</p> <p>11 HarperCollins, Simon & Schuster, Hachette,</p> <p>12 Macmillan, John Wiley, Houghton Mifflin and</p> <p>13 other publishers consider it extremely important</p> <p>14 that their books not be available to be</p> <p>15 digitized without a license?</p> <p>16 MR. McGOWAN: Objection, foundation.</p> <p>17 A. I know that they participate in the</p> <p>18 Partner Program. And I know that my</p> <p>19 understanding is that there is a, not a live</p> <p>20 case between these entities and Google.</p> <p>21 Q. That wasn't my question.</p> <p>22 My question was do you have any</p> <p>23 knowledge that Random House considers it</p> <p>24 important for there to be a license before its</p> <p>25 books are digitized?</p>

<p style="text-align: right;">Page 146</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. McGOWAN: Objection, foundation.</p> <p>3 A. So as I said, I have not spoken to</p> <p>4 anyone at Random House.</p> <p>5 Q. Do you know if there is a resolution</p> <p>6 between publishers and Google of this case that</p> <p>7 you're referring, to that requires a license?</p> <p>8 MR. McGOWAN: Objection, asked and</p> <p>9 answered.</p> <p>10 You may answer.</p> <p>11 A. I've told you pretty much everything</p> <p>12 I know about the case.</p> <p>13 Q. Well, you're making assumptions --</p> <p>14 you made some assumptions about the fact that</p> <p>15 publishers would want to participate in Google</p> <p>16 Library Project; correct?</p> <p>17 A. I have made, I have explained, as</p> <p>18 supported by the individuals I reference and as</p> <p>19 supported by the, you know, Web pages I</p> <p>20 reference, that publishers have decided to</p> <p>21 participate in the Partner Program.</p> <p>22 I have stated that the Partner</p> <p>23 Program involves larger pieces of the book being</p> <p>24 viewable to consumers.</p> <p>25 And I have, from that, from that</p>	<p style="text-align: right;">Page 148</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Project on net, economically benefits authors.</p> <p>3 I have not seen any evidence in the record that</p> <p>4 that's not true -- that from the named</p> <p>5 plaintiffs or from Mr. Aiken's deposition, that</p> <p>6 that's, you know, incorrect.</p> <p>7 But clearly, the named plaintiffs</p> <p>8 assert that they did not want their books to be</p> <p>9 digitized.</p> <p>10 So I concede that I have seen that</p> <p>11 those plaintiffs did not want their books to be</p> <p>12 digitized.</p> <p>13 Q. Have you seen evidence that other</p> <p>14 plaintiffs, other persons, excuse me, who are</p> <p>15 authors, did not want their books to be</p> <p>16 digitized without permission?</p> <p>17 A. I would say the -- well, it's not</p> <p>18 quite the same question. I have not.</p> <p>19 I could note the survey that asks,</p> <p>20 the Porett Survey that asks a question close to</p> <p>21 that question, but it's not quite the same</p> <p>22 question, so I'll say no, I haven't seen such</p> <p>23 evidence.</p> <p>24 Q. Google didn't provide to you copies</p> <p>25 of objections to the settlement from various</p>
<p style="text-align: right;">Page 147</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 analysis, noted that the Library Program</p> <p>3 provides snippets that are smaller than what the</p> <p>4 consumer sees under the Partner Program, and</p> <p>5 that the Library Program, therefore -- I have,</p> <p>6 I've concluded that the publishers -- no, have</p> <p>7 chosen to be part of the Partner Program, rather</p> <p>8 than merely the Library Program, which provide</p> <p>9 smaller snippets, nor, you know, in large part,</p> <p>10 removing the books from, you know, asking Google</p> <p>11 to remove the books entirely.</p> <p>12 Q. Have you concluded that publishers</p> <p>13 wanted their books to be digitized in the</p> <p>14 Library Project?</p> <p>15 A. I have not concluded that publishers</p> <p>16 wanted -- at the time the Library Project was</p> <p>17 undertaken, I have not concluded that publishers</p> <p>18 necessarily wanted their books to be digitized.</p> <p>19 Q. Have you concluded that authors</p> <p>20 wanted their books to be digitized in the</p> <p>21 Library Project?</p> <p>22 MR. McGOWAN: Objection, vague and</p> <p>23 compound.</p> <p>24 You may answer.</p> <p>25 A. So I have concluded that the Library</p>	<p style="text-align: right;">Page 149</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 authors who stated that they didn't want their</p> <p>3 books digitized by Google without their</p> <p>4 permission?</p> <p>5 A. I have not seen those. I'm sure I,</p> <p>6 you know, I -- yes, I have not seen those.</p> <p>7 Q. It wouldn't surprise you that those</p> <p>8 letters exist; right?</p> <p>9 MR. McGOWAN: Objection, foundation,</p> <p>10 vague.</p> <p>11 You may answer.</p> <p>12 A. So my report addresses the question</p> <p>13 of whether the authors are benefited or harmed,</p> <p>14 in an economic sense, from the project.</p> <p>15 I have, I have not seen the letters</p> <p>16 that you refer to, but, you know, I, I, I can</p> <p>17 imagine -- I would not be surprised that some</p> <p>18 letters of that sort exist.</p> <p>19 Q. Well, if I have a home, and let's say</p> <p>20 the fair market value is \$500,000, and it's on a</p> <p>21 nice piece of property, and a builder keeps</p> <p>22 telling me that he will give me a million</p> <p>23 dollars for my house because he's going to knock</p> <p>24 it down, build a bigger house, and I say no.</p> <p>25 And then one day I come home, and the</p>

<p style="text-align: right;">Page 150</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 house is knocked down, and there's a check for a</p> <p>3 million dollars, how does that fit into your</p> <p>4 economic theory?</p> <p>5 MR. McGOWAN: Objection, incomplete</p> <p>6 hypothetical.</p> <p>7 You may answer.</p> <p>8 Q. I've benefited?</p> <p>9 A. Well --</p> <p>10 MR. McGOWAN: Objection,</p> <p>11 argumentative. I'd like to proceed one</p> <p>12 question at a time, please.</p> <p>13 MS. ZACK: Certainly. I'll withdraw</p> <p>14 the last question.</p> <p>15 A. So I am not a lawyer, but my</p> <p>16 understanding is that while there are very few</p> <p>17 limitations to your rights, as an owner of the</p> <p>18 house, though, of course, you know, the</p> <p>19 government could declare your house, you know,</p> <p>20 knock it down.</p> <p>21 But, you know, there are very few</p> <p>22 limitations to what your ownership rights mean</p> <p>23 as an owner of a house.</p> <p>24 There are, indeed, limitations to the</p> <p>25 rights of a copyright holder. And my</p>	<p style="text-align: right;">Page 152</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 item being searched.</p> <p>3 Q. You've also said it's a benefit to</p> <p>4 the authors?</p> <p>5 A. I have said it's a benefit to the</p> <p>6 authors.</p> <p>7 Q. Have you done any analysis about how</p> <p>8 quickly, over time, new books were added to the</p> <p>9 Partner Program?</p> <p>10 A. I have not done an analysis of how</p> <p>11 quickly, over time, new books were added to the</p> <p>12 Partner Program.</p> <p>13 Q. You have some footnotes on the bottom</p> <p>14 of page 11, and these all refer -- well, not --</p> <p>15 I will take them one by one.</p> <p>16 The footnote 44, U.S. top 15</p> <p>17 publisher sales data, that's for in-print books;</p> <p>18 right?</p> <p>19 A. Yes.</p> <p>20 Q. Footnote 45 talks about the Partner</p> <p>21 Program. That's about in-print books; right?</p> <p>22 A. I would -- I would imagine that,</p> <p>23 largely, the Partner Program is about in-print</p> <p>24 books.</p> <p>25 Though, I believe you can be a member</p>
<p style="text-align: right;">Page 151</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 understanding, though I'm not a lawyer and</p> <p>3 cannot express an opinion about exactly how my</p> <p>4 economic analysis, you know, fits with, you</p> <p>5 know, the case law, my understanding is, as a</p> <p>6 copyright holder, there are limitations to the</p> <p>7 copyright holder's rights, in that whether a</p> <p>8 usage of the copyright holder's works</p> <p>9 economically harms or benefits the copyright</p> <p>10 holder, is a relevant factor in a way in which</p> <p>11 it may not be for your house.</p> <p>12 Q. So your analysis is assuming that</p> <p>13 what Google does is a fair use?</p> <p>14 MR. McGOWAN: Objection, misstates.</p> <p>15 You may answer.</p> <p>16 A. My analysis is neither assuming, nor</p> <p>17 expressing an opinion about what Google does.</p> <p>18 It's about what whether Google does is a fair</p> <p>19 use.</p> <p>20 My analysis is simply stating that</p> <p>21 the usage of the copyrighted works for the</p> <p>22 production of Google Books, is a complement,</p> <p>23 rather than a substitute for the sale of the</p> <p>24 book.</p> <p>25 So the search is a complement to the</p>	<p style="text-align: right;">Page 153</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 in the Partner Program. I think there could be</p> <p>3 examples of not-in-print Books that are</p> <p>4 publishers, who are members of the Partner</p> <p>5 Program.</p> <p>6 So, for example, if they do, if</p> <p>7 there's a link to a, there's a print-on-demand</p> <p>8 feature, such a thing.</p> <p>9 I believe it's not necessarily the</p> <p>10 case that a member of the Partner Program is</p> <p>11 providing in-print books.</p> <p>12 Q. You don't consider a print-on-demand</p> <p>13 book to be in print?</p> <p>14 A. I don't know if a book that can be</p> <p>15 printed on demand, would count as in print from</p> <p>16 the perspective of the contract between the</p> <p>17 publisher and the author, in all circumstances.</p> <p>18 I simply cannot say that all of the</p> <p>19 books, that all of the publishers in the Partner</p> <p>20 Program, that a hundred percent of what they've</p> <p>21 put in the Partner Program is an in-print book.</p> <p>22 Q. Let's use the term commercially</p> <p>23 available, instead of in print, to eliminate</p> <p>24 that ambiguity.</p> <p>25 Do you have any information that</p>

<p style="text-align: right;">Page 154</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Books that are not commercially available, are</p> <p>3 available in the Partner Program?</p> <p>4 A. Well, so I believe that, so my -- I</p> <p>5 think, in general, the books in the Partner</p> <p>6 Program will be commercially available.</p> <p>7 I believe it to be the case, though</p> <p>8 I'm not certain that there may be</p> <p>9 print-on-demand books or printable books in the</p> <p>10 Partner Program that are, that you don't, that</p> <p>11 are in copyright, but you don't -- but the</p> <p>12 publisher has decided to make them available</p> <p>13 without pay. I believe such things exist in the</p> <p>14 Partner Program.</p> <p>15 Q. That's based on?</p> <p>16 A. So the reason I am hesitant, I -- so</p> <p>17 for example, I have a number of works that</p> <p>18 appear when you search me in Google Books, and</p> <p>19 those are National Bureau of Economic Research</p> <p>20 working papers.</p> <p>21 And those works are in copyright, and</p> <p>22 I believe the National -- I believe, though I</p> <p>23 have not checked, that the National Bureau of</p> <p>24 Economic Research just let's you print them,</p> <p>25 since their primarily goal is dissemination. I</p>	<p style="text-align: right;">Page 156</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 function is assisting individuals find</p> <p>3 marketing. I do not know whether he represents</p> <p>4 any out-of-print books.</p> <p>5 Q. What about Mr. Zohn and his company</p> <p>6 William Morris, do you know if they represent</p> <p>7 out-of-print books?</p> <p>8 MR. McGOWAN: Objection, vague.</p> <p>9 Maybe you didn't mean authors.</p> <p>10 MS. ZACK: Books of authors.</p> <p>11 Q. They represent authors. Do they</p> <p>12 represent authors with respect to books that are</p> <p>13 out of print?</p> <p>14 A. They represent authors. I do not</p> <p>15 know for a fact whether or not those authors</p> <p>16 have out-of-print books.</p> <p>17 Q. Referring to page 13 of your report.</p> <p>18 I guess -- sorry, it carries over from page 12.</p> <p>19 Paragraph 43, talks about iUniverse</p> <p>20 back in print.</p> <p>21 Did you look at any other</p> <p>22 back-in-print programs other than iUniverse?</p> <p>23 A. No, I did not.</p> <p>24 Q. iUniverse makes books available for</p> <p>25 sale for authors; right?</p>
<p style="text-align: right;">Page 155</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 would have to double check that.</p> <p>3 Q. Do you know if they're in through the</p> <p>4 Partner Program?</p> <p>5 A. I think so. They're in copyright,</p> <p>6 and I believe the full text appears.</p> <p>7 Q. So you think so, but you're not sure?</p> <p>8 A. I think so, but I'm not sure. I</p> <p>9 would be hesitant to, therefore, say</p> <p>10 categorically that all books in the Partner</p> <p>11 Program are commercially available.</p> <p>12 Q. Would you say that the vast majority</p> <p>13 are?</p> <p>14 MR. McGOWAN: Objection, vague.</p> <p>15 You may answer.</p> <p>16 A. I would, I would I assume that the</p> <p>17 majority of the books in the Partner Program are</p> <p>18 commercially available.</p> <p>19 Q. In footnote 47, you talk about</p> <p>20 Richard Lowry's book, The Gulf War Chronicles,</p> <p>21 and that's an in-print book; right?</p> <p>22 A. Yes, I believe so.</p> <p>23 Q. Do you know whether Mr. Harris</p> <p>24 represents any out-of-print books?</p> <p>25 A. I do -- well, Mr. Harris's primary</p>	<p style="text-align: right;">Page 157</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Yes, my understanding is that</p> <p>3 back-in-print program makes, allows, yeah, makes</p> <p>4 books available for sale that were out of print,</p> <p>5 yeah.</p> <p>6 Q. Pursuant to contracts with copyright</p> <p>7 holders; correct?</p> <p>8 A. Yes, authors must choose to be part</p> <p>9 of the program.</p> <p>10 Q. Right, authors who have the right to,</p> <p>11 as a copyright owner; right?</p> <p>12 A. Correct.</p> <p>13 Q. The contract provides for royalties;</p> <p>14 correct?</p> <p>15 A. My understanding is that if consumers</p> <p>16 buy books from iUniverse, yes, the author gets</p> <p>17 royalties.</p> <p>18 Q. Part of that is authors can then</p> <p>19 permit portions of their book to be viewed in</p> <p>20 order to spur sales; correct?</p> <p>21 A. Authors can choose to have parts of</p> <p>22 their book browsable, so that, in order to</p> <p>23 encourage sales.</p> <p>24 Q. If there is a sale, iUniverse</p> <p>25 provides a royalty to the author; correct?</p>

<p style="text-align: right;">Page 158</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. McGOWAN: Objection, form.</p> <p>3 You may answer.</p> <p>4 A. My understanding is that if there's a</p> <p>5 sale, iUniverse provides a royalty to the</p> <p>6 author.</p> <p>7 Q. Referring you to paragraph 46, you</p> <p>8 say, "A related benefit of the search capability</p> <p>9 of Google Books is its ability to increase</p> <p>10 interest in and sales of books that may be</p> <p>11 relatively unknown, rare, or out-of-print.</p> <p>12 Research on the effect of the Internet supports</p> <p>13 the theory of a "long tail" or the creation of</p> <p>14 marketplaces where buyers and sellers, who</p> <p>15 otherwise would not find each other, can meet."</p> <p>16 And you say, "I expect that Google</p> <p>17 Books has the same effect."</p> <p>18 Do you have any empirical evidence to</p> <p>19 back that up?</p> <p>20 A. So empirical evidence to back up that</p> <p>21 consumers can find books through Google Books or</p> <p>22 empirical evidence that they, that they will buy</p> <p>23 used books, that they have bought used books as</p> <p>24 an outcome of that?</p> <p>25 I do not have any -- I have not done</p>	<p style="text-align: right;">Page 160</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 record. So, you know, first, for example, in</p> <p>3 the depositions of the named plaintiffs, they do</p> <p>4 not cite any evidence that Google Books is a</p> <p>5 substitute for the purchase of the book, that</p> <p>6 using Google Books as a substitute for the</p> <p>7 purchase of the books.</p> <p>8 Mr. Aiken, in his deposition, says</p> <p>9 that it is his belief, and he's an expert in the</p> <p>10 industry, that Google Books, the Google Book</p> <p>11 search function on net is a compliment to the</p> <p>12 sale of the books.</p> <p>13 And the, I might add, you know, the</p> <p>14 various, of course, these aren't a random</p> <p>15 sample, but I don't know where I would obtain</p> <p>16 one, the, you know, testimonials that I cite</p> <p>17 from the Google Books website, describe authors,</p> <p>18 you know, have discussions of authors who view</p> <p>19 the Google Books project as a complement to the</p> <p>20 sale of their books.</p> <p>21 So I'm, I haven't seen anything in</p> <p>22 the record, provided by the plaintiffs, to</p> <p>23 suggest that the snippets provided by Google</p> <p>24 Books are substitutes for the sale of the book.</p> <p>25 Q. Well, the -- you referred to author</p>
<p style="text-align: right;">Page 159</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 any empirical analysis of the sales of books</p> <p>3 that were on Google Books.</p> <p>4 Q. Can you provide me an example where</p> <p>5 there's been a marketplace created where a</p> <p>6 particular buyer and a particular seller found</p> <p>7 each other after using Google Books concerning</p> <p>8 an out-of-print book?</p> <p>9 MR. McGOWAN: Object to form.</p> <p>10 You may answer.</p> <p>11 A. No, I don't have any data about that.</p> <p>12 MR. McGOWAN: I will note for the</p> <p>13 record, I think a fire alarm went off.</p> <p>14 Off the record.</p> <p>15 (Discussion off the record.)</p> <p>16 Q. Paragraph 47 on page 14, you say,</p> <p>17 "While I do find substantial evidence that</p> <p>18 Google Books is a complement to the purchase of</p> <p>19 a book and thus, should stimulate book sales, I</p> <p>20 have not found evidence that Google Books</p> <p>21 searches are a substitute for the purchase of</p> <p>22 books."</p> <p>23 So where did you look for the</p> <p>24 evidence?</p> <p>25 A. So I think the resources are in the</p>	<p style="text-align: right;">Page 161</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 endorsements on Google Books.</p> <p>3 Were those endorsements of snippets</p> <p>4 or Partner Program books?</p> <p>5 A. So there, so for example, Mr., Mr. --</p> <p>6 sorry, Mr. Lowry, my understanding from his</p> <p>7 snippets, from his discussion, is that after his</p> <p>8 book appeared in Google Books as part of the</p> <p>9 Library Program, the sales increased.</p> <p>10 But I, the description there may not</p> <p>11 have been in, you know, entirely complete. So I</p> <p>12 believe what I said is exactly right, I have not</p> <p>13 seen any evidence that snippets have served as a</p> <p>14 substitute for the book.</p> <p>15 Q. Have you done any -- but you haven't</p> <p>16 done any empirical analysis where you've</p> <p>17 identified certain books that are available in</p> <p>18 snippet view, and then any research about their</p> <p>19 sales?</p> <p>20 A. So since I don't have any access to</p> <p>21 data about the sales of books, I can't do that.</p> <p>22 Q. Where would you, where would you get</p> <p>23 access to data about the sales of books?</p> <p>24 A. Well, I mean I, for -- I mean I</p> <p>25 could, I think it would be a difficult, if not</p>

<p style="text-align: right;">Page 162</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 impossible project, nonetheless.</p> <p>3 But, for example, if one had, you</p> <p>4 know, access to Amazon data, there may be things</p> <p>5 that one could do.</p> <p>6 Q. Any other data that you can think of?</p> <p>7 A. I think similarly, if you had access</p> <p>8 to, you know -- well, I think Amazon data would</p> <p>9 be probably the primary or best source, but</p> <p>10 there could be other, you know, other book</p> <p>11 sellers' data.</p> <p>12 Q. You don't have access to that because</p> <p>13 it hasn't been provided to you by Google or any</p> <p>[REDACTED]</p> <p>16 compound.</p> <p>17 You may answer.</p> <p>18 A. So, I don't have access to Amazon's</p> <p>19 proprietary data.</p> <p>20 Q. Referring you to paragraph 48, you</p> <p>21 say, "A related question to the one discussed</p> <p>22 above is whether, in the absence of Google</p> <p>23 Books, a market might have arisen in which</p> <p>24 authors stood to benefit in ways they do not</p> <p>25 currently."</p>	<p style="text-align: right;">Page 164</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 the Copyright Clearance Center, for instance?</p> <p>3 A. So, I have a, I have a familiarity</p> <p>4 with that Copyright Clearance Center. That</p> <p>5 Copyright Clearance Center is in the category of</p> <p>6 entities that I describe in my report that</p> <p>7 provides more than snippets, that provide users</p> <p>8 with not full text, like chapters, something</p> <p>9 like chapters of work.</p> <p>10 So that is in the category of works</p> <p>11 that I describe -- of licensing scenarios that I</p> <p>12 describe and report in my report as dissimilar</p> <p>13 to the services provided by Google Books.</p> <p>14 Q. What would you consider to be a</p> <p>15 similar licensing service, if any, to licensing</p> <p>16 of snippets?</p> <p>17 MR. McGOWAN: Objection, foundation.</p> <p>18 You may answer.</p> <p>19 A. So there are commercial entities that</p> <p>20 provide indexing functions and searchability --</p> <p>21 some index and search functions.</p> <p>22 They are different from Google Books,</p> <p>23 but such entities, you know, serve a somewhat</p> <p>24 similar function to users, and I have not found</p> <p>25 any examples of such entities that pay the</p>
<p style="text-align: right;">Page 163</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Did you consider any markets for</p> <p>3 collective licensing for digitization of books?</p> <p>4 MR. McGOWAN: Objection, foundation.</p> <p>5 You may answer.</p> <p>6 A. So as I discuss in the report, I</p> <p>7 considered, I considered markets for licensing</p> <p>8 of -- I observed that authors have been paid in</p> <p>9 situations in which books were digitized for the</p> <p>10 purpose of allowing, using, displaying to users</p> <p>11 the full text of the book, but I have not seen</p> <p>12 an example where firms pay authors for the right</p> <p>13 to scan and index their work.</p> <p>14 Q. There is, albeit, as you have said, a</p> <p>15 small amount of revenue, but there is a revenue</p> <p>16 component to the Partner Program; correct?</p> <p>17 A. There is a revenue component to the</p> <p>18 Partner Program.</p> <p>19 Q. Have you looked at other collective</p> <p>20 licenses for other copyrighted content --</p> <p>21 MR. McGOWAN: Objection, foundation.</p> <p>22 Q. -- to determine how those collective</p> <p>23 licenses operate?</p> <p>24 A. So can you be more specific?</p> <p>25 Q. Did you do any research concerning</p>	<p style="text-align: right;">Page 165</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 authors to index their work.</p> <p>3 Q. Have you found evidence where</p> <p>4 entities have paid for indexes?</p> <p>5 MR. McGOWAN: Objection, vague.</p> <p>6 You may answer.</p> <p>7 A. So is the indexing -- are there</p> <p>8 entities that, that want to purchase indexes?</p> <p>9 Q. Um-hmm.</p> <p>10 A. Yes.</p> <p>11 Q. Can you give me some examples of</p> <p>12 that?</p> <p>13 A. So for example, I was a member of the</p> <p>14 American Economic Association Executive</p> <p>15 Committee.</p> <p>16 The American Economic Association</p> <p>17 creates a product called Econlit. Econlit is a</p> <p>18 product where a human being reads -- I would</p> <p>19 have used the word scan, but that might be</p> <p>20 confusing in this context.</p> <p>21 A human being reads economics</p> <p>22 articles, writes down key words, and the product</p> <p>23 that is sold to libraries is a searchable index</p> <p>24 of those key words.</p> <p>25 Q. So the library pays for the index?</p>

<p style="text-align: right;">Page 166</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. The library pays for the index.</p> <p>3 Q. Have you heard of Marc Indexing for</p> <p>4 libraries?</p> <p>5 A. I have heard of that.</p> <p>6 Q. Do you know whether or not libraries</p> <p>7 pay for that?</p> <p>8 A. My understanding is that libraries</p> <p>9 pay for that.</p> <p>10 Q. In the area of music, would you</p> <p>11 consider a ring tone to be analogous to a</p> <p>12 snippet?</p> <p>13 MR. McGOWAN: Objection, vague.</p> <p>14 You may answer.</p> <p>15 A. No, I wouldn't consider a ring tone</p> <p>16 to be analogous to a snippet.</p> <p>17 Q. Why not? I meant a snippet from a</p> <p>18 book.</p> <p>19 A. Yes, I think a ring tone is a --</p> <p>20 well, I have not analyzed the market for ring</p> <p>21 tones, but I would say that snippet is a de</p> <p>22 minimis fraction of the total book, and that a</p> <p>23 ring tone is not.</p> <p>24 Q. On what basis do you say that one is</p> <p>25 de minimis and one isn't?</p>	<p style="text-align: right;">Page 168</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 BY MS. ZACK:</p> <p>3 Q. Back to page 14.</p> <p>4 A. Okay.</p> <p>5 Q. In paragraph 49 you state, "The</p> <p>6 underlying premise of any hypothetical market</p> <p>7 runs counter to the basic economics of this</p> <p>8 industry outlined above - there is no reason to</p> <p>9 expect that a market would arise between</p> <p>10 copyright holders (as sellers) and Google (as</p> <p>11 the buyer), when, as discussed above, it is the</p> <p>12 copyright holder who is benefitting from the use</p> <p>13 of the copyrighted material."</p> <p>14 Are you taking the position that</p> <p>15 Google does not benefit from the use of the</p> <p>16 copyrighted material?</p> <p>17 A. No, so Google clearly uses the</p> <p>18 copyrighted material as an input to its product.</p> <p>19 Just as, you know, other indexers who sell</p> <p>20 indexes, use the material as an input to their</p> <p>21 products.</p> <p>22 So, and then they sell that product</p> <p>23 or in Google's case, advertise around that</p> <p>24 product. So I'm not taking the position that</p> <p>25 Google does not benefit.</p>
<p style="text-align: right;">Page 167</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. The snippet is, given the number of</p> <p>3 snippets that are displayed for a user, the</p> <p>4 snippet is a small fraction of the total book.</p> <p>5 And I have not studied the market for</p> <p>6 ring tones, but, you know, I have heard ring</p> <p>7 tones, and ring tones are recognizable chunks of</p> <p>8 a song.</p> <p>9 Q. Do you know whether there's a market</p> <p>10 for licenses for ring tones?</p> <p>11 A. I believe there is a market for</p> <p>12 licenses for ring tones.</p> <p>13 Q. Where do you have that information --</p> <p>14 what is the basis for that belief?</p> <p>15 A. I believe that I have read in the,</p> <p>16 you know, press that there's a market for ring</p> <p>17 tones. But I don't know much about it.</p> <p>18 MR. McGOWAN: If you wouldn't mind</p> <p>19 taking a very short break when you're done</p> <p>20 with this line, that would be useful.</p> <p>21 MS. ZACK: Sure. Let me just see</p> <p>22 where I am. We can take a break now, if you</p> <p>23 want.</p> <p>24 (Brief recess taken.)</p> <p>25 FURTHER EXAMINATION</p>	<p style="text-align: right;">Page 169</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. So you agree that Google does benefit</p> <p>3 from the use of the copyrighted materials?</p> <p>4 MR. McGOWAN: Objection, vague.</p> <p>5 You may answer.</p> <p>6 A. So Google, you know, Google, Google</p> <p>7 benefits from the use of the copyrighted</p> <p>8 materials, in that they use the copyrighted</p> <p>9 materials as an input to the product.</p> <p>10 Q. You believe that Google benefits from</p> <p>11 the product; right?</p> <p>12 MR. McGOWAN: Objection, vague.</p> <p>13 You may answer.</p> <p>14 A. So I believe that Google, I believe</p> <p>15 that Google, on net, benefits from continuing to</p> <p>16 offer the product.</p> <p>17 Q. Have you discussed with anyone from</p> <p>18 Google whether or not Google would pay for the</p> <p>19 product if they -- for the copyrighted</p> <p>20 materials, if they were required to by the</p> <p>21 Doctrine of Fair Use?</p> <p>22 MR. McGOWAN: What?</p> <p>23 MS. ZACK: I'll restate it.</p> <p>24 Q. Have you discussed with anyone from</p> <p>25 Google whether they would pay for the</p>

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<p style="text-align: right;">Page 170</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 copyrighted material, if it was determined that</p> <p>3 they could not use it under the Copyright Act</p> <p>4 without a license?</p> <p>5 MR. McGOWAN: Vague.</p> <p>6 You may answer.</p> <p>7 A. Okay, so as I said before, I have not</p> <p>8 entered into conversations with executives at</p> <p>9 Google.</p> <p>10 Q. You don't really have a full</p> <p>11 understanding of how Google benefits from the</p> <p>12 use of the copyrighted materials; do you?</p> <p>13 MR. McGOWAN: Objection, vague.</p> <p>14 You may answer. Foundation.</p> <p>15 You may answer.</p> <p>16 A. I understand the types of ways in</p> <p>17 which Google benefits from the use of the</p> <p>18 copyrighted materials, but I don't -- I can't</p> <p>19 add up the benefit to Google of the use of the</p> <p>20 copyrighted materials.</p> <p>21 Q. Well, you haven't, you don't fully</p> <p>22 understand how they use all the materials that</p> <p>23 they accumulate in their search engine to</p> <p>24 benefit their business; right?</p> <p>25 MR. McGOWAN: Objection, vague.</p>	<p style="text-align: right;">Page 172</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 conclusion that no alternative market would</p> <p>3 arise for payment for the indexing functions,</p> <p>4 derives from my, from, from a few things.</p> <p>5 One piece is that the substantial</p> <p>6 benefit that the copyright holder gets from</p> <p>7 being indexed.</p> <p>8 And the second is that I am not aware</p> <p>9 of other markets in which index service --</p> <p>10 indexing services are provided where the author</p> <p>11 or publisher is paid for being included in that</p> <p>12 indexing service.</p> <p>13 Q. Well, Google Books is more about just</p> <p>14 indexing, it's also about digitizing entire</p> <p>15 books; right?</p> <p>16 MR. McGOWAN: Objection, vague.</p> <p>17 You may answer.</p> <p>18 A. I understand that books are</p> <p>19 digitized. The word digitized for it to create</p> <p>20 Google Books.</p> <p>21 Q. Do you know whether or not Google</p> <p>22 makes other use of the digitized books beyond</p> <p>23 merely indexing them?</p> <p>24 MR. McGOWAN: Same objection.</p> <p>25 You may answer.</p>
<p style="text-align: right;">Page 171</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 You may answer.</p> <p>3 A. So I do not know all of the -- I do</p> <p>4 not all -- I cannot catalog all of the benefits</p> <p>5 to Google of their, of providing the search</p> <p>6 functionality.</p> <p>7 Q. Have you looked at their public</p> <p>8 documents?</p> <p>9 A. I've looked at a number of Google</p> <p>10 public documents.</p> <p>11 Q. Have you looked at their 10-K?</p> <p>12 A. I have not looked at their 10-K's</p> <p>13 pursuant to this matter.</p> <p>14 Q. Have you looked at any of their</p> <p>15 earning statements?</p> <p>16 A. I have not looked at their earning</p> <p>17 statements pursuant to this matter.</p> <p>18 Q. So your statement that there is no</p> <p>19 reason to expect that a market would arise</p> <p>20 between the copyright holders and Google because</p> <p>21 the copyright holders benefit, discounts the</p> <p>22 fact that Google also benefits?</p> <p>23 MR. McGOWAN: Objection, vague.</p> <p>24 You may answer.</p> <p>25 A. So as I describe in the report, my</p>	<p style="text-align: right;">Page 173</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. So I don't know whether they have</p> <p>3 used the books for some other purpose, outside</p> <p>4 of the Google Books Project.</p> <p>5 Q. You don't know one way or the other?</p> <p>6 A. I don't know whether they have made</p> <p>7 use of the books for some purpose other than the</p> <p>8 Google Books project.</p> <p>9 Q. So you don't know whether they've</p> <p>10 used the digitized books for purposes of</p> <p>11 improving their general search engine?</p> <p>12 MR. McGOWAN: Objection, vague.</p> <p>13 You may answer.</p> <p>14 A. I don't know whether they have used</p> <p>15 the books for a purpose other than providing the</p> <p>16 Google Books project.</p> <p>17 Q. You don't consider that relevant to</p> <p>18 your analysis?</p> <p>19 A. I don't consider that relevant to my</p> <p>20 analysis.</p> <p>21 Q. You say at the end, "I have seen no</p> <p>22 evidence that any firm has paid, for example,</p> <p>23 for permission to display snippets"?</p> <p>24 A. Correct.</p> <p>25 Q. Are you talking about in search</p>

<p style="text-align: right;">Page 174</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 engines or anywhere?</p> <p>3 A. I'm talking about in general.</p> <p>4 Q. Are you familiar with the market for</p> <p>5 permissions for display of portions of books in</p> <p>6 other copyrighted books and other matter?</p> <p>7 MR. McGOWAN: Objection, foundation,</p> <p>8 vague.</p> <p>9 You may answer.</p> <p>10 A. Sorry, can you be more specific?</p> <p>11 Q. Sure. Are you familiar at all with</p> <p>12 the concept that if excerpts are used from one</p> <p>13 book, copyrighted book, and either another book</p> <p>14 or television or something like that, that</p> <p>15 permission fees are paid?</p> <p>16 MR. McGOWAN: Objection, foundation.</p> <p>17 You may answer.</p> <p>18 A. So, for example, so I haven't studied</p> <p>19 that.</p> <p>20 Q. Were you aware that that market</p> <p>21 existed?</p> <p>22 MR. McGOWAN: Objection, foundation.</p> <p>23 You can answer.</p> <p>24 A. I think it depends on the extent of</p> <p>25 the market. So, for example, I know that</p>	<p style="text-align: right;">Page 176</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. McGOWAN: Objection. Incomplete</p> <p>3 hypothetical.</p> <p>4 You may answer.</p> <p>5 A. Would my opinion about what change?</p> <p>6 Q. You said it was de minimis?</p> <p>7 A. So if -- I said it was de minimus for</p> <p>8 what purpose. So would my opinion about what</p> <p>9 section of my report change, if snippets were</p> <p>10 more than three lines?</p> <p>11 Q. Any section of your report.</p> <p>12 A. So if a snippet were 10 lines, I</p> <p>13 don't think there's any section of my report</p> <p>14 where my conclusions would change.</p> <p>15 Q. Is there some amount of lines where</p> <p>16 you can pick -- conclusions would change?</p> <p>17 A. As I've said in my report, I know</p> <p>18 that the amount of text that Google displays,</p> <p>19 under the Library Program, is smaller than the</p> <p>20 amount of text that appears to be chosen by</p> <p>21 publishers and authors to display in standard</p> <p>22 commercial use.</p> <p>23 So to the extent that that's true, my</p> <p>24 conclusions would remain the same.</p> <p>25 Q. Do you think there's a market for</p>
<p style="text-align: right;">Page 175</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 permission fees are paid for the inclusion of</p> <p>3 chapters of books in my course packet.</p> <p>4 Q. Do you know whether permission fees</p> <p>5 are sometimes paid for quotes that are included</p> <p>6 in books, you know, at the beginning of, above</p> <p>7 like chapter one, where there's a quote, do you</p> <p>8 know if permission fees are ever paid for that</p> <p>9 type of citation?</p> <p>10 MR. McGOWAN: Objection, foundation.</p> <p>11 You may answer.</p> <p>12 A. I don't know the answer to that.</p> <p>13 Q. Your definition of snippets is, as</p> <p>14 you previously stated, just three lines?</p> <p>15 MR. McGOWAN: Objection. Misstates,</p> <p>16 asked and answered.</p> <p>17 You can answer.</p> <p>18 MS. ZACK: I don't want to misstate.</p> <p>19 A. So my understanding is -- oh, I'm</p> <p>20 using the term snippets here to describe very</p> <p>21 short sections of text which, you know, in the</p> <p>22 case of the Google Books, is roughly three</p> <p>23 lines.</p> <p>24 Q. If snippets are 10 lines, would your</p> <p>25 opinion change?</p>	<p style="text-align: right;">Page 177</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 digital copies of books?</p> <p>3 MR. McGOWAN: Objection, vague.</p> <p>4 You may answer.</p> <p>5 A. So what do you mean do I think</p> <p>6 there's a market for digital copies of books?</p> <p>7 Q. A market in which someone would pay</p> <p>8 for digital copies of books.</p> <p>9 A. Do I think a market exists or could</p> <p>10 exist?</p> <p>11 Q. Either. Well, does it exist?</p> <p>12 A. So I think, you know, ebooks are</p> <p>13 bought and sold, so I think, you know, I would</p> <p>14 say that there's a market for digitized books.</p> <p>15 Q. So there's currently a market for</p> <p>16 digitized books?</p> <p>17 MR. McGOWAN: Objection, vague.</p> <p>18 You may answer.</p> <p>19 A. If I think ebooks are digitized</p> <p>20 books, I think there's a markets for ebooks.</p> <p>21 Q. I mean Google's currently selling</p> <p>22 ebooks; right?</p> <p>23 A. Yeah, you can -- you mean the books</p> <p>24 that you can purchase via Google Play? Is that</p> <p>25 what you mean?</p>

<p style="text-align: right;">Page 178</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. I'm asking you whether Google's</p> <p>3 currently selling ebooks?</p> <p>4 A. So okay --</p> <p>5 Q. It could be a yes-or-no answer.</p> <p>6 A. Okay, fine. All right, okay, I</p> <p>7 wasn't sure what you were referring to.</p> <p>8 Yes, my understanding is you can buy</p> <p>9 ebooks through Google Play.</p> <p>10 Q. You understand that libraries buy</p> <p>11 ebooks too; right?</p> <p>12 A. I understand that libraries sometimes</p> <p>13 buy ebooks, yes.</p> <p>14 Q. When Google digitized its books in</p> <p>15 the Library Program, it didn't pay the copyright</p> <p>16 owners for that right; did it?</p> <p>17 MR. McGOWAN: Objection to the extent</p> <p>18 it calls for a legal conclusion.</p> <p>19 You may answer.</p> <p>20 A. So my understanding is that when</p> <p>21 Google digitized books as part of the Library</p> <p>22 Program, it did not pay authors or publishers</p> <p>23 for the, for the scanning.</p> <p>24 Q. I previously asked you about</p> <p>25 collective licensing, and I asked you about the</p>	<p style="text-align: right;">Page 180</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. You say they "arose as a solution to</p> <p>3 the problems of widely, disbursed rights holders</p> <p>4 and widely disbursed music users."</p> <p>5 A. Correct.</p> <p>6 Q. With respect to Google Books, are</p> <p>7 there widely disbursed rights holders?</p> <p>8 A. There are widely disbursed rights</p> <p>9 holders.</p> <p>10 Q. Are there widely disbursed users of</p> <p>11 Google Books?</p> <p>12 A. So here I'm referring to the entity</p> <p>13 that -- not the end user, but the entity that</p> <p>14 would, that is making use of the license.</p> <p>15 And so in the music case, the music</p> <p>16 users were widely disbursed. But in the Google</p> <p>17 Books case, Google Books is a single entity.</p> <p>18 It's not widely disbursed.</p> <p>19 Q. So here you are saying the music</p> <p>20 users are like restaurants, etcetera?</p> <p>21 A. Correct.</p> <p>22 Q. This is all about performance rights?</p> <p>23 A. This discussion is about performance</p> <p>24 rights.</p> <p>25 MS. ZACK: Let's mark as the next</p>
<p style="text-align: right;">Page 179</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 CCC.</p> <p>3 Are you aware of any other collective</p> <p>4 licensing organizations? Are you familiar with</p> <p>5 any?</p> <p>6 A. Do you mean collective licenses</p> <p>7 organizations for books?</p> <p>8 Q. For copyrighted material.</p> <p>9 A. So I have some familiarity, as you</p> <p>10 know, as I said I've I disclosed some work for</p> <p>11 SESAC, and I have some familiarity with</p> <p>12 licensing of performance rights for music.</p> <p>13 But music licensing is very</p> <p>14 complicated, and I've only worked on narrow</p> <p>15 portions of it. So I have some familiarity with</p> <p>16 it, but --</p> <p>17 Q. What about licensing for music</p> <p>18 lyrics, as opposed to performance rights?</p> <p>19 A. I'm not familiar with that market, if</p> <p>20 it exists.</p> <p>21 Q. In paragraph -- I'm sorry, footnote</p> <p>22 63 on page 15?</p> <p>23 A. Um-hmm, yes.</p> <p>24 Q. You do talk about ASCAP and BMI?</p> <p>25 A. I do.</p>	<p style="text-align: right;">Page 181</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 exhibit, a series of pages from the Internet</p> <p>3 concerning the acquisition by Google of</p> <p>4 Rightsflow.</p> <p>5 (Defendant's Exhibit 97, a series of</p> <p>6 pages from the Internet concerning the</p> <p>7 acquisition by Google of Rightsflow,</p> <p>8 marked for identification, as of this</p> <p>9 date.)</p> <p>10 Q. Are you familiar with Rightsflow?</p> <p>11 A. No.</p> <p>12 Q. Or Google's acquisition of this</p> <p>13 collective licensing company?</p> <p>14 A. No.</p> <p>15 Q. If you look at the second page of</p> <p>16 this document, it says -- the second page,</p> <p>17 second paragraph, "The acquisition gives</p> <p>18 video-sharing service YouTube access to</p> <p>19 technology to help it manage its relationship</p> <p>20 with one of the most fragmented and unwieldy</p> <p>21 parts of the music industry: Music publishing.</p> <p>22 Music publishing concerns the copyrights on</p> <p>23 songs' lyrics and melodies, as distinct from a</p> <p>24 particular recording of a given song."</p> <p>25 Do you see that?</p>

<p style="text-align: right;">Page 182</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Yes.</p> <p>3 Q. So you were not aware, prior to now,</p> <p>4 that there was a -- there is a collective</p> <p>5 licensing organization for copyrighted lyrics?</p> <p>6 MR. McGOWAN: Objection. Misstates.</p> <p>7 A. So as I read this, it says, "Music</p> <p>8 publishing concerns the copyrights on songs'</p> <p>9 lyrics and melodies, as distinct from a</p> <p>10 particular recording of a given song."</p> <p>11 My understanding is that, my</p> <p>12 understanding of your previous question was</p> <p>13 performance rights are also rights for -- that</p> <p>14 flow to the composer and lyricist of the song.</p> <p>15 Those are composer's rights. So I</p> <p>16 don't, I -- from what I read here, I don't know</p> <p>17 this to be different than what I described.</p> <p>18 It may be, but I don't know this to</p> <p>19 be different than what I described ASCAP and BMI</p> <p>20 to be.</p> <p>21 Q. Would you agree that the collective</p> <p>22 licensing has developed in response to changes</p> <p>23 in technology?</p> <p>24 MR. McGOWAN: Objection, vague.</p> <p>25 You may answer.</p>	<p style="text-align: right;">Page 184</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 other?</p> <p>3 A. Correct.</p> <p>4 Q. Have you looked at any of the</p> <p>5 licenses available from Copyright Clearance</p> <p>6 Center?</p> <p>7 MR. McGOWAN: Objection, foundation.</p> <p>8 Q. In connection with this assignment?</p> <p>9 MR. McGOWAN: Objection, foundation.</p> <p>10 You may answer.</p> <p>11 A. I have not looked at licenses from</p> <p>12 Copyright Clearance Center.</p> <p>13 Q. Have you looked at licenses from any</p> <p>14 other organization in connection with this</p> <p>15 assignment?</p> <p>16 A. I think the list of materials I have</p> <p>17 is complete. I have not looked at other</p> <p>18 licenses that are not referenced here.</p> <p>19 Q. If a license for book digitization</p> <p>20 developed a collective license, would that be a</p> <p>21 new good?</p> <p>22 MR. McGOWAN: Objection, vague.</p> <p>23 You may answer.</p> <p>24 A. So what do you mean by a collective</p> <p>25 license for book digitization?</p>
<p style="text-align: right;">Page 183</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. As I described in my report,</p> <p>3 collective, the collective licensing that we</p> <p>4 observe in music -- well, this is, this is a new</p> <p>5 entity by which I don't know anything.</p> <p>6 But the description that I gave of</p> <p>7 the music rights organizations, that collective</p> <p>8 licensing process is a very old process.</p> <p>9 Q. When you say, "very old," how old are</p> <p>10 you talking about?</p> <p>11 A. Well, I don't remember precisely, but</p> <p>12 my recollection is, you know, dates from Tin Pan</p> <p>13 Alley in the 1920's.</p> <p>14 Q. Do you have any information about</p> <p>15 whether or not different types of licenses have</p> <p>16 been developed as new technologies have come</p> <p>17 into existence?</p> <p>18 MR. McGOWAN: Objection, vague.</p> <p>19 You may answer.</p> <p>20 A. The performance license that I</p> <p>21 describe, I believe, incorporates new</p> <p>22 technologies, but I do not know about the</p> <p>23 development of new types of licenses. That may</p> <p>24 exist, but I haven't studied it.</p> <p>25 Q. So you don't know one way or the</p>	<p style="text-align: right;">Page 185</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. A license where various rights</p> <p>3 holders give an intermediary the right to</p> <p>4 license all or portions of their work to third</p> <p>5 parties.</p> <p>6 A. So if you mean an organization where</p> <p>7 existing rights holders contribute their works</p> <p>8 in order for those works to be jointly licensed,</p> <p>9 I don't believe that that would be a new good</p> <p>10 under the definition I've proffered, because a</p> <p>11 new good serves a previously unmet or poorly met</p> <p>12 need.</p> <p>13 Q. So it could be a new product, but not</p> <p>14 a new good?</p> <p>15 A. I believe an amalgamation of -- an</p> <p>16 amalgamation of opt-in rights holders who have</p> <p>17 come together to form an organization, would not</p> <p>18 really constitute a new good because it doesn't,</p> <p>19 it doesn't particularly meet an unmet need.</p> <p>20 So it would be a product. It would</p> <p>21 be a product, but it wouldn't substantially meet</p> <p>22 an unmet need.</p> <p>23 Q. When you say, "It wouldn't meet an</p> <p>24 unmet need," from whose perspective would it not</p> <p>25 meet an unmet need?</p>