

A-1401
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Cash Payments and future revenues earned for unreverted out-of-print Books will be split between the author and publisher of the Book as follows: (a) for Books first published prior to 1987, the Registry will pay 65% to the author and 35% to the publisher; and (b) for Books first published during or after 1987, the Registry will pay each of the author and the publisher 50%. A-P § 6.2(c).<sup>12</sup> In addition, for Books that are not reverted and are not works-for-hire, in general, both the author and the publisher have the right to manage the Books. (*See* A-P for further details concerning the A-P.)

**E. Other Provisions.**

**1. Public Access Service.**

The Parties have agreed to provide, upon request, free access to the entire subscription database at a computer terminal in every public library building in the United States that requests one and at least one computer terminal at each not-for-profit higher educational institution. SA §§ 1.66, 1.119, 4.8. Anyone in any urban or small town library building in the U.S. could have free, full access to the entire database of Books.

**2. Non-Display Uses.**

In addition to the Display Uses, Google will be permitted to make “Non-Display Uses” of Books, including full-text indexing (without displaying the text), geographic indexing, algorithmic listings of key terms for chapters of Books, and other internal research. SA §§ 1.91, 3.4.

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<sup>12</sup> Based on discovery taken by the author plaintiffs, most form book publishing contracts in the late 1980s began to include express electronic rights grants to the publisher. Counsel for the authors and publishers thus agreed that authors would receive a greater revenue split for out of print Books published prior to 1987 than those published thereafter.

### **3. Security Provisions.**

Google and plaintiffs developed security standards to prevent security breaches and unauthorized use of Google's books database. SA §§ 8.1-8.2 and Attachment D. The SA provides remedies to Rightsholders for security breaches and unauthorized access. SA §§ 8.3-8.7.

### **4. Dispute Resolution Mechanism.**

If disputes concerning the Settlement arise among Rightsholders and Google or the libraries, they will be subject to arbitration. Examples are disputes (1) between authors and publishers of the same Books; (2) over claimed security breaches; (3) over whether a Book is in-print, out-of-print, or in the public domain; and (4) over whether Google or a participating library has made a use of a Book that is not authorized under the Settlement. *See generally* SA Article IX. The Settlement Agreement also provides that the court will have continuing jurisdiction over other disputes concerning the parties' obligations under the Settlement Agreement. SA § 17.23. Disputes between publishers are not subject to arbitration.

### **5. Non-Exclusive Rights.**

The authorizations granted to Google under the Settlement Agreement are non-exclusive only. Rightsholders retain all their rights to use and license their Books in any way, including ways identical to those authorized to Google. No authorization under the Settlement constitutes a transfer of any copyright ownership interest in any Book or Insert. SA §§ 2.4, 3.1(a).

## **IV. COPYRIGHT ISSUES**

The Settlement has been the subject of substantial discussion. I would like to

elaborate on my remarks in the Executive Summary regarding the Settlement's treatment of so-called "orphan works," and I will then address the potential effect of including foreign rightsholders in the Settlement Class on U.S. foreign relations.

**A. The Question of "Orphan Works"**

A number of critics of the Google Book Search Settlement have complained that the Settlement will confer on Google a monopoly over "orphan works." These critics have stated – without any evidence – that "orphan works" will include millions of books, comprising anywhere from 50% to 70% of the books covered by the Settlement. These percentages are over-inflated, principally because at least some of the critics appear to have equated the term "out-of-print books" with "orphan works," which is erroneous, and, further, because they incorrectly assume that the rightsholders of out-of-print books are either unknown or cannot be found.

The term "orphan works," however, has no meaning under the Copyright Act; the Act only recognizes works only as in-copyright or not in-copyright. That term, however, has been typically understood and used – both in the context of legislative proposals considered by the Congress, including this Committee, over the last several years, as well as by the Copyright Office – to refer to a work for which the copyright owner cannot be identified or found (such as a photograph with no attributed photographer).

Contrary to the use of that term by the Settlement's critics, we start with the principle that published books found in U.S. libraries – unlike many other types of copyrighted works – are generally quite unlikely to be orphan works. They are published works. They have identifiable authors and publishers. Published books include readily accessible information as to their author, publisher and date of publication.

Moreover, as to all United States works, the Settlement only covers those that are “registered” with the United States Copyright Office. So, at least with respect to United States works, the Copyright Office registration is available as an important starting point in attempting to identify and locate the current copyright owner. There is no reason to believe that a significant number of the copyright owners of books covered by the Settlement cannot be identified and found – by anyone, including would-be competitors of Google – if due diligence efforts are made to do so.

Prior to the Settlement, at least for purposes of large scale commercial exploitation, few such efforts have been made. That is because there has been no commercial market for a collection of out-of-print books, and thus no incentives to identify rightsholders of out-of-print books or for them to come forward to associate themselves with their works for purposes of licensing others to use them. Now, for the first time, the settlement provides just such a product, and brand new incentives for rightsholders of out-of-print books to participate. Not only have meaningful, ambitious efforts been made to locate these rightsholders, those efforts will be continued into the future by the Registry. In addition and importantly, the prospect of earning money under the Settlement – and the very availability of revenues generated by the Settlement – will provide powerful incentives for rightsholders to come forward to claim their works. Once they do so, of course, such works would have identifiable copyright owners and could not be considered to be “orphans.”

First, approval of the Settlement required the parties to undertake an unprecedented, worldwide Notice Program that was designed to reach as many members of the Settlement Class as possible. As a result of the Notice Program, many

rightsholders of out-of-print books have already claimed their books. Because there is no deadline to claim one's books through the Settlement, it is reasonable to expect that the numbers of claimed out-of-print books will grow exponentially.

Second, one of the Registry's core missions will be to locate rightsholders of out-of-print books that have not yet been claimed. This is for the purpose of having the Registry assist them in claiming their works and, ultimately, to pay to them the revenues they are owed under the Settlement's revenue models.

Also, as noted above, the Registry will want to enter into licensing arrangements with others, not just Google. For this purpose, the Registry and claiming rightsholders will want as many rightsholders as possible to come forward and authorize the Registry to include their books in those arrangements. In this way, there will be a more robust set of books available for license, which will redound to the benefit of all rightsholders..

The goals of the Notice Program and the Registry are achievable precisely because the settlement creates meaningful incentives for copyright owners of out-of-print works to claim their books. The new services authorized by the Registry (which include the subscriptions and consumer purchase options offered by Google, as well as alternative, even competing products that others may establish) will begin earning rightsholders new revenue.

Most authors write for two reasons, for their books to be read, and to be compensated. Because the Settlement has given new exposure and commercial life to out-of-print books, authors are more likely to claim their books and the Registry will have a greater chance of finding them.

What does that mean for the so-called "orphan books?" We've already learned

through the Settlement's claiming process that many out-of-print books' "parents" are alive and claiming their books. And, as "parent" rightsholders claim their books, the number of books that might arguably be considered "orphans" will be dramatically reduced.

Significantly, the Registry will maintain a publicly accessible database of which books are claimed. The database will also make public who has claimed those books (except where the claimant has asked that his or her name not be disclosed). This database will make it far, far easier than at present for anyone to identify rightsholders of books and obtain permission to use them. The experiences of the Authors Registry and the ALCS, reported in the Executive Summary, bear this out. Thus, where it might once have been difficult to find the copyright owners of books it will now become much more feasible to license out-of-print books, either through the Registry or directly from their copyright owners.

Of course, there may still be books whose rightsholders prove difficult to find. The Settlement is not a panacea. But the facts suggest, contrary to the gloomy scenarios painted by the critics, that the number of such books ultimately will be quite low.

**B. The Settlement is Wholly Consistent with the International Obligations of the United States**

Questions also have been asked as to whether the Settlement complies with the international treaty obligations of the United States. These issues have been raised under two provisions of the 1971 Berne Convention for the Protection of Literary & Artistic Works (the "Berne Convention"), to which the United States adhered effective March 1,

1989.<sup>13</sup> The first provision is that of national treatment, found in Article 5(1) of the Berne Convention. The second provision is Article 5(2) of the Berne Convention, which bans the imposition of certain “formalities.” Examining both provisions, we believe that the Settlement is fully consistent with our country’s treaty obligations.

To begin, the Berne Convention is not itself self-executing in the United States. In the Berne Convention Implementation Act of 1988 (BCIA), which implemented the Berne Convention,<sup>14</sup> Congress was crystal clear that the Berne Convention itself does not create any rights or obligations under U.S. law.<sup>15</sup> Thus, if any provision of the enacted laws of the United States is inconsistent with our country’s Berne Convention obligations, the only remedy is for another *country* to take the United States to the International Court of Justice, or to invoke the dispute resolution provisions set forth in

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<sup>13</sup> The United States has entered into other international agreements that incorporate the United States’ Berne Convention obligations by reference, such as the 1994 GATT TRIPS agreement. However, because these other agreements are derivative of the Berne obligations, we do not discuss them separately.

<sup>14</sup> 102 Stat. 2853-2861.

<sup>15</sup> Section 2 of the BCIA provides:

- (1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and laws of the United States.
- (2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.
- (3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Section 3(a) declares:

- (a) Relationship with Domestic Law.--The provisions of the Berne Convention--
  - (1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and
  - (2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

the GATT, leading possibly to a WTO panel. With respect to the pending approval of the Settlement, the District Court must follow the Copyright Act, and it has no authority to deviate from it in an effort to comply with its understanding of the United States' treaty obligations.

### **1. National Treatment**

The Settlement is fully consistent with the national treatment principle of Article 5(1) of the Berne Convention,<sup>16</sup> which Congress implemented in the BCIA, and is now enshrined in Section 104 of the Copyright Act, as amended. In the United States, that principle “simply assures that if the law of the country of infringement applies to the scope of substantive copyright protection, that law will be applied uniformly to foreign and domestic authors.” *See Itar-Tass Russian Newspaper Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 89 (2d Cir. 1998). Thus, Article 5(1) applies only to national *laws* granting *substantive* rights. A private settlement agreement is, by definition, not a law nor can it grant substantive statutory rights. As Congress made clear, only Congress can grant such rights. The Settlement does not provide or grant any substantive copyright rights; only Congress can do so. Instead, it is the settlement of copyright litigation between private parties that provides extensive remedies to members of the class.

Most importantly, the Settlement is careful to treat all covered books identically, without regard to whether their rightsholders are United States or foreign publishers or authors. Consistent with Section 104 of the Copyright Act, all copyright owners of books

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<sup>16</sup> Article 5(1) of the Berne Convention provides:

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.



covered by the Settlement, regardless of their nationality, are entitled to exactly the same rights and receive exactly the same remedies under the Settlement.

## 2. Formalities and the Means of Redress

The Settlement and the class action opt-out procedure do not constitute a prohibited formality within the meaning of Article 5(2) of the Berne Convention.<sup>17</sup> The term “formality” is not defined in the Article. The World Intellectual Property Organization’s guide to the Berne Convention provides some guidance. It states: “The word ‘formality’ must be understood in the sense of a condition which is necessary for the right to exist -- administrative obligations laid down by national law, which is not fulfilled, lead to loss of copyright.” *See WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act 1971) at 33 (1978). As the WIPO drafted the Berne Convention and is charged by the United Nations with administering it, its views should be entitled to great deference.

The process for reviewing and approving class action settlements under Rule 23(b)(3) of the Federal Rules of Civil Procedure necessarily includes a mechanism to allow class members to opt out. That requirement of federal law is not a formality. It cannot lead to a loss of statutory copyright protection under the Copyright Act. Nor is the Settlement itself or the opt-out procedure of Rule 23(b)(3) an administrative obligation laid down by national law that is necessary for the copyright right to exist.

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<sup>17</sup> Article 5(1) of the Berne Convention provides:  
The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

The Rule constitutes, instead, a *procedural* device.

The language of Article 5(2) makes clear that such procedural mechanisms – which are the means by which copyright infringement suits may be brought and resolved – fall exclusively within the province of national law and, as such, can be adopted by Congress and applied by federal courts consistently with the United States’ obligations. *See* Article 5(2) (providing that “the extent of protection, as well as the *means of redress* afforded to the author to protect his rights, shall be governed *exclusively* by the laws of the country where protection is claimed [emphasis supplied]).

**C. The Settlement is not “Legislating”**

Some have expressed concern that the Settlement constitutes “judicial legislating” or that approval of this particular class action settlement is not otherwise properly within the province of the federal courts. That is not the case. Whatever one’s view of judicial activism, a class action settlement negotiated by parties to a lawsuit and approved by a federal court only binds members of the class who have chosen not to opt out. It does not bind – or supplant the role of – Congress.

Moreover, settlements of litigation do not establish rights or obligations of general applicability, which is, by contrast, in the very nature of statutes. In this case, the Settlement only pertains to the rights of class members vis-à-vis Google, which is obtaining a non-exclusive license from rightsholders who have chosen to remain in the Settlement.

Furthermore, the class action device is widely used in all manner of state and federal common law and statutory claims. It has also been used in the context of federal copyright claims. Such actions have been settled, and those settlements are subject to the

requirements of the Federal Rules and to judicial decisions interpreting such Rules. Congress has not chosen to exempt copyright infringement actions from the Federal Rules that authorize the use of the class action device in appropriate circumstances. Parties utilizing a congressionally created procedural device, and courts approving class action settlements, are, therefore, fully adhering to federal law.

Finally, nothing in the Settlement prevents Congress from legislating in the future as broadly as it wishes. Congress could, for example, pass orphan works legislation, to enable users to make use of a work after a due diligence effort to identify and locate the copyright owner.

## **EXHIBIT 9**

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3  
4 THE AUTHORS GUILD, INC., et )  
al., )Civil Action No.  
5 Plaintiffs, )05-CV-8136 (DC)  
6 vs. )  
7 GOOGLE, INC., )  
8 Defendant. )  
-----)  
9 Thursday, April 19, 2012  
10 9:08 a.m.  
11  
12

13 Confidential Videotaped Deposition  
14 of PAUL AIKEN, held at the offices of  
15 Milberg, LLP, One Penn Plaza, New York,  
16 New York, pursuant to Rule 30 (b) (6)  
17 Notice, before Otis Davis, a Notary  
18 Public of the State of New York.  
19  
20  
21  
22  
23  
24

25 (#442577)

1 Q. So if I was doing genealogical research  
2 on my great-grandmother, she might be mentioned in a  
3 book, but not identified as a topic in the card  
4 catalog entry pertaining to that book; is that right?

5 A. That's correct.

6 Q. So if I were conducting such genealogical  
7 research on my great-grandmother and wanted to find  
8 every book in which her name had been mentioned, in  
9 the absence of Google Books, would there be a way for  
10 me to do that other than by reading every book in the  
11 library that might possibly include a reference to  
12 her?

13 MR. BONI: Object to form.

14 You can answer.

15 A. Yes. Except for Google's bold act of  
16 infringing millions of copyrights, you would not be  
17 able to find your great-grandmother's name in an  
18 out-of-print in-copyright book.

19 Q. Do you think Google's Library Project has  
20 helped the sale of books?

21 A. No.

22 Q. Would you expect Google's Library Project  
23 to have had any positive or negative effect on book  
24 sales?

25 A. I would expect it to have a negative

1 in your testimony.

2 Are you aware of any instance in which  
3 Google's security has been compromised with respect  
4 to the digital copies of books made in connection  
5 with the Library Project?

6 A. Yes.

7 Q. What such instances are you aware of?

8 A. Early on after the announcement of  
9 Google's Library Project, I recall that some hackers  
10 had developed a program to basically repeatedly  
11 search the particular book and pull the --  
12 essentially pull the string of text out of Google's  
13 database for a title through a brief period of  
14 search.

15 Q. Do you know whether it's possible to  
16 obtain a complete copy of a book that is included  
17 within Google Books' search results in snippet  
18 display by virtue of running such repetitive  
19 searches?

20 A. That's what I was just talking about.

21 Q. Do you know whether Google blacklists any  
22 portions of books that are included in snippet  
23 display?

24 A. No.

25 Q. Do you know whether Google has any

1 security measures in place to prevent the repetitive  
2 running of searches in order to try to aggregate  
3 snippets from a single book?

4 A. My understanding from engineers at Google  
5 is that they do have such programs in place.

6 Q. Do you know whether those programs are  
7 effective?

8 A. No.

9 Q. Are you aware of any instance in which  
10 any security regime that protects a digital copy of a  
11 book made as part of the Google Library Project has  
12 been compromised?

13 MR. BONI: Other than what he just  
14 testified to?

15 Q. Other than the instance of running  
16 multiple word searches on Google Books itself.

17 A. Could you repeat that one more time.

18 Q. Sure.

19 Are you aware of any instance in which  
20 any security measures protecting the digital copies  
21 of books made as part of the Google Library Project  
22 have been compromised other than the instance you  
23 described of running searches for multiple words that  
24 appear within a single book on Google Books itself?

25 A. No. I should say, I believe there were



1 multiple such attempts done and successfully done to  
2 pull out e-books from Google's program early in the  
3 project. I don't know what happened later in the  
4 project.

5 Q. Do you know whether any of those attempts  
6 resulted in the unauthorized publication of a book on  
7 the Internet?

8 A. No, I don't.

9 MS. DURIE: Why don't we take a break.

10 THE VIDEOGRAPHER: Here now marks the end  
11 of tape 3 of the deposition of Mr. Paul Aiken. The  
12 time is 2:25 p.m., we're now off the record.

13 (Recess taken.)

14 THE VIDEOGRAPHER: Here now marks the  
15 beginning of tape 4 of the deposition of Mr. Paul  
16 Aiken. The time is 2:35 p.m., we're back on the  
17 record.

18 MS. DURIE: Let me have marked as the  
19 next exhibit a copy of the tax return relating to The  
20 Authors Guild.

21 (Aiken Exhibit 7, 2009 Authors Guild tax  
22 return, marked for identification, as of this date.)

23 Q. Mr. Aiken, do you recognize what has been  
24 marked as Exhibit 7?

25 A. Yes.

1 used, over books not in the program. Those figures  
2 from Amazon should be taken with a grain of salt  
3 because Amazon plays its cards very close to the  
4 past. They would never provide information on the  
5 types of books and how sales might be affected.

6 Publishers have also told me that it  
7 increases sales, but they've often been skeptical  
8 about how much and whether or not those figures are  
9 in any way artificially affected by Amazon in  
10 changing its search results within Amazon based on  
11 whether or not it's in the Search Inside the Book  
12 program. I don't know one way or another what may be  
13 done behind the scenes.

14 Q. Do you think it's more likely than not  
15 that Search Inside the Book on average has a net  
16 positive effect on sales?

17 A. Yes.

18 Q. Would you agree that Search Inside the  
19 Book has created a browsable bookstore?

20 MR. BONI: Object to form.

21 A. No.

22 MR. BONI: You can answer.

23 A. No.

24 MS. DURIE: Let me have marked as the  
25 next exhibit a multipage document, the first page of

**EXHIBIT 10**

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

10 DATE: January 4, 2012

11 TIME: 1:05 P.M.

12

13

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

20

21

22

23

24

25

B. MILES

1 owns the rights to, that's my right and that's the right  
2 of every author, so.

3 Q. Do you consider that an economic right?

4 A. Among others.

5 Q. Have you lost any sales of books as a  
6 result of Google Books?

7 A. I have no way of knowing that.

8 Q. Do you think that Google scanning and a  
9 snippet display of your out of print books has resulted  
10 in lost sales?

11 MR. BONI: Objection to form. You can  
12 answer.

13 A. I don't know.

14 Q. Do you think that Google scanning and a  
15 snippet display of your out of print books has resulted  
16 in economic harm to you in the form of lost sales?

17 A. No.

18 Q. Have you done anything to try to find out  
19 whether there have been any lost sales?

20 A. No.

21 Q. Are any of your books currently in print?

22 A. It is a little unclear. Most of them are  
23 out of print. Some of them are in print in certain  
24 versions and not in ours, and publishers hold on to the  
25 category in print as long as they possibly can.

## B. MILES

1 marked as Miles Exhibit 2 for identification as of this  
2 date by the Reporter.)

3 Q. I have put in front of you what has been  
4 marked as Miles Exhibit 2. Do you recognize what is  
5 depicted here?

6 A. Yes.

7 Q. What is it?

8 A. A page from the book called The Real Me.  
9 I don't know if it is a full page or not, actually not.

10 Q. In the upper right corner do you see the  
11 Amazon logo. It is a little dim.

12 A. It is too dim.

13 Q. Do you see in the upper right corner you  
14 see Look Inside? The upper left corner. Sorry.

15 A. Yes.

16 Q. Have you used the Look Inside feature?

17 A. No.

18 Q. Do you know that this much of a page of  
19 The Real Me was available to be viewed on Amazon.com?

20 A. No.

21 Q. Do you object to Amazon.com of making  
22 this much of a page available on Amazon.com?

23 A. As I just said, the usual small bit is  
24 what I expect and would prefer to see.

25 Q. Do you think that the availability of as

B. MILES

1 much text as you see here on Exhibit 2 could harm sales  
2 of The Real Me?

3 A. Oh, probably not.

4 Q. Why not?

5 A. Well, it gives a flavor of the style.

6 Q. Any other reason?

7 A. No.

8 Q. Did you authorize Amazon to display this  
9 much of a page of The Real Me on Amazon.com?

10 A. No.

11 Q. Do you know if anyone did?

12 A. No, I don't.

13 Q. Do you know if the The Authors Guild?

14 A. I doubt it.

15 MR. BONI: Don't guess, Betty. Say what you  
16 want. Don't doubt or not doubt.

17 A. I don't know.

18 MR. BONI: He doesn't want your guesses. He  
19 wants to know what you know.

20 Q. Looking again at Exhibit 2, you said that  
21 this particular excerpt wasn't something that you  
22 objected to because it gave a flavor of the book. Is  
23 there any --

24 A. I didn't say -- first I said I thought I  
25 didn't object to it, then second you said why would

B. MILES

1 Q. How?

2 MR. BONI: The search for Annie is the  
3 question.

4 A. Yes.

5 MR. BONI: Make sure you understand the  
6 question.

7 A. I don't understand. That's the key word  
8 for the search.

9 Q. Yes.

10 A. No, I don't know.

11 Q. Focusing your attention on the three  
12 snippets that are shown on the first page of Exhibit 8,  
13 could a person read these snippets and then not need to  
14 buy The Trouble With Thirteen?

15 MR. BONI: Asked and answered.

16 A. That's true. Yes, we did go through  
17 that.

18 Q. Sorry. What was the answer?

19 A. We did go through that earlier.

20 Q. Is it right that reading these three  
21 snippets is not a substitute of needing to buy a copy of  
22 The Trouble With Thirteen?

23 A. Yes.

24 Q. Turning to the fourth page of Exhibit 8,  
25 this is a similar web page, but you will see that the



## **EXHIBIT 11**

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

The Authors Guild, et al.	:	
	:	
Plaintiffs,	:	Master File No. NO. 05 CV 8136-DC
	:	
v.	:	
	:	
Google Inc.,	:	
	:	
Defendant.	:	

**PLAINTIFFS' RESPONSES AND OBJECTIONS TO  
DEFENDANT GOOGLE INC.'S FIRST SET OF INTERROGATORIES TO  
PLAINTIFFS THE AUTHORS GUILD, INC., JIM BOUTON, JOSEPH GOULDEN AND  
BETTY MILES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiffs hereby respond and object to Defendant Google Inc.'s First Set of Interrogatories to Plaintiffs The Authors Guild, Inc., Jim Bouton, Joseph Goulden and Betty Miles.

**General Objections**

1. Plaintiffs generally object to the Interrogatories and their instructions to the extent that they seek information not discoverable under, or impose procedures not required by, the Federal Rules of Civil Procedure or the Local Rules of the Southern District of New York.

2. Plaintiffs generally object to the Interrogatories to the extent that they seek the disclosure of information protected by the attorney-client privilege, the attorney work product doctrine and/or any other applicable privilege or protection. Responses hereunder shall not include information protected by such privileges or doctrines.

3. Plaintiffs generally object to the Interrogatories to the extent they seek information that may be ascertained by Google Inc. with substantially the same burden as plaintiffs.

4. Plaintiffs object to the Interrogatories on the ground that the term “YOUR BOOKS,” used throughout the Interrogatories, is not defined.

5. Plaintiffs reserve the right to supplement and/or amend the specific responses set forth below, and to rely on additional facts and law.

**RESPONSES**

**INTERROGATORY 1:**

Identify all factual and legal bases supporting Your contention that Google’s Library Project is not fair use.

**Response:**

In addition to the General Objections, plaintiffs object to this Interrogatory on the grounds that the word “all” is overbroad and unduly burdensome in this context. Without waiving these objections, plaintiffs respond as follows:

- A. Google’s Library Project involves the following infringements of copyright:
  - (1) Google digitally copies, and converts into separate, machine readable digital text copies, in-copyright books in their entirety for its own uses without the permission of the copyright owners in violation of 17 U.S.C. § 106(1);
  - (2) Google distributes digital copies of in-copyright books in their entirety to libraries without the permission of the copyright owners in violation of 17 U.S.C. § 106(3);
  - (3) Google publicly displays verbatim expression from in-copyright books on the Internet in response to requests by users of its website without the permission of the copyright owners in violation of 17 U.S.C. § 106(5).
- B. The above infringements are not protected by the fair use doctrine of 17 U.S.C.

§ 107:

**INTERROGATORY 6:**

Describe the value of each of YOUR BOOKS.

**Response:**

Without waving the General Objections, plaintiffs respond that books have value as works of creative authorship that are protected by copyright. Authors can derive a financial benefit from this value by selling or licensing their books, including to publishers, consumers, businesses, libraries, collective licensees, search engines, databases and other persons and entities seeking to purchase, copy, display or otherwise use books databases, books or excerpts of books.

**INTERROGATORY 7:**

Identify each effect that Google's conduct has had on the value of each of YOUR BOOKS or the Books of any member of the putative class, including a description of each such effect and a statement of all facts supporting Your contention that Google's conduct has had each such effect.

**Response:**

In addition to the General Objections, plaintiffs object to this Interrogatory on the grounds that the words "each" and "all" are overbroad and unduly burdensome in this context. Without waving these objections, plaintiffs respond as follows: See the response to Interrogatory 1.

**INTERROGATORY 8:**

Describe the purpose of each of YOUR BOOKS.

**Response:**

In addition to the General Objections, plaintiffs object to this Interrogatory on the grounds that it seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Plaintiffs further object that the word "purpose" is unclear in

this context. Without waiving these objections, plaintiffs respond that the purpose of books in general is to entertain, educate, teach and/or express thoughts, feelings and ideas.

**INTERROGATORY 9:**

Describe the nature of each of YOUR BOOKS.

**Response:**

Without waiving the General Objections, plaintiffs respond that, in the context of 17 U.S.C. § 107(2), the nature of the books copied, distributed and displayed by Google is fiction and nonfiction books, and in-print and out-of-print books.

**INTERROGATORY 10:**

For each of YOUR BOOKS, state whether such book is published or unpublished.

**Response:**

The books at issue are published.

**INTERROGATORY 11:**

Describe the purpose and character of Google's Library Project, including a statement of all factual and legal bases supporting your response.

**Response:**

In addition to the General Objections, plaintiffs object to this Interrogatory on the grounds that the word "all" is overbroad and unduly burdensome in this context. Without waiving these objections, plaintiffs respond as follows:

The purpose and character of Google's Library Project is commercial. Google seeks to copy all offline print books (as well as other offline content such as journals and government works), whether in-copyright or in the public domain, and make them available for search on the Internet in order to benefit its commercial search engine and gain a competitive advantage over its rivals in the search engine market by having more content to search, thereby increasing its

usership, with the ultimate goal of increasing its advertising revenues from its increased usership.

See also the response to Interrogatory 1 above.

**INTERROGATORY 12:**

Describe the amount and substantiality of YOUR BOOKS used in Google's Library Project, including a statement of all factual and legal bases supporting your response.

**Response:**

In addition to the General Objections, plaintiffs object to this Interrogatory on the grounds that the word "all" is overbroad and unduly burdensome in this context. Without waiving these objections, plaintiffs respond as follows: See the response to Interrogatory 1 above.

**INTERROGATORY 13:**

If you contend that Google's Library Project is commercial in nature, identify all factual and legal bases for that contention.

**Response:**


In addition to the General Objections, plaintiffs object to this Interrogatory on the grounds that the word "all" is overbroad and unduly burdensome in this context. Without waiving these objections, plaintiffs respond as follows:

Google's Library Project, and the copying, distribution and display of books by Google in connection with its Library Project, are commercial in nature. See also the responses to Interrogatories 1 and 11 above.

**VERIFICATION**

I am the Executive Director of plaintiff The Authors Guild, Inc. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the responses of plaintiff The Authors Guild, Inc. in Plaintiffs' Responses and Objections to Defendant Google Inc.'s First Set of Interrogatories to Plaintiffs The Authors Guild Inc., Jim Bouton, Joseph Goulden and Betty Miles are true and correct to the best of my knowledge, information and belief.

Dated: April 27, 2012

  
Paul Aiken

## **EXHIBIT 12**



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

4 -----X  
5 THE AUTHORS GUILD, INC., et al.,

6 PLAINTIFFS,

7 -against-

8 Case No:  
9 05CV8136 (DC)

10 GOOGLE INC.,

11 DEFENDANT.

12 -----X

13 DATE: December 15, 2011

14 TIME: 1:00 P.M.

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

1           Do you think that you have suffered any  
2   economic harm from the display of any quotes from your  
3   books in Google Books?

4           A.   I don't know.

5           Q.   Do you know whether any other members of  
6   the class have suffered any economic harm as a result of  
7   the display of quotes from their books in Goggle Books?

8           A.   I don't know if they have or not.

9           Q.   Let me just caution you. We are speaking  
10   over each other a little bit, which is a normal thing to  
11   do in every day conversation. It makes it hard for the  
12   Court Reporter because she is trying to take it down.  
13   Even though you may know what I am going to say and what  
14   my question is, it will help her out a lot if you wait  
15   for me to finish speaking before you give your answer.

16          A.   Got it.

17          Q.   Very good.

18          Do you have an understanding that some  
19   members of the class are academics who are also authors?

20          A.   I assume some of them are.

21          Q.   Do you have a view as to whether the  
22   ability to use Google Books to conduct searches is a  
23   benefit to those academic authors?

24          MR. BONI: Object to the form. Can we get a  
25   working definition of academics and then can we get some

## **EXHIBIT 13**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et al.

Plaintiffs

Civil Action No.

vs.

1:2005cv08136

GOOGLE, INC.

Defendant

\_\_\_\_\_/

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

REPORTED BY: Christine A. Gonzalez, CSR, RPR

1 BY MR. GRATZ:

2 Q. Have you been harmed by Google's program of  
3 scanning books?

4 A. I have no way of knowing.

5 Q. So you don't know one way or the other?

6 A. No. Let me make an addition to that. I am  
7 harmed by the fact that Google sold my material, put it  
8 in digital form, and gave this to other libraries. That  
9 is something that took away something I owned, without  
10 my permission, and gave it away for their profit.

11 Q. How has that harmed you?

12 MR. BONI: Object to form.

13 A. One must protect copyrights. That is a rule of  
14 publishing. A couple times I had occasion to go to the  
15 Court and defend my own copyrights.

16 BY MR. GRATZ:

17 Q. So it's a matter of principle?

18 MR. BONI: Object to form.

19 A. It's a matter primarily of principle and,  
20 secondarily, a matter of financial protection.

21 BY MR. GRATZ:

22 Q. Have you been financially harmed by Google's  
23 actions?

24 A. As I said, I do not know, as of yet. But with  
25 the existence of this digital library, I'm nervous about

1 it.

2 Q. Have you been financially benefited by  
3 Google's action?

4 A. I don't know. Have no way of knowing.

5 Q. Have you sold additional books as a result of  
6 the existence of Google books?

7 MR. BONI: Object to form.

8 A. Not that I know of.

9 BY MR. GRATZ:

10 Q. You said that you have gone to court to defend  
11 your copyrights in the past?

12 A. Yes.

13 Q. What were those situations?

14 A. First was a book, my book, "The Money Lawyers."  
15 Soon thereafter, an acquaintance who had reviewed that  
16 book for the Washington Post told me he just read a book  
17 called "The Harvard Mystique" by a man named Enrico Hank  
18 Lopez, which argued, essentially, people who graduated  
19 from Harvard were superior to the rest of us, and he  
20 picked up -- you're a Harvard graduate?

21 Q. I am not.

22 A. He picked up large chunks of "The Superlawyers"  
23 without our permission. On the advice of my agent, I  
24 retained a lawyer in New York who specialized in  
25 literary affairs, and we collected settlement from the

1 Korea, have you been engaged in any other copyright  
2 disputes?

3 A. No.

4 MR. BONI: Want to take a -- unless you're in  
5 the middle of something, take about five minutes or so.

6 THE WITNESS: Yeah.

7 (Whereupon, a recess was held.)

8 BY MR. GRATZ:

9 Q. Back on the record. We're back from a break.

10 Has anyone decided not to buy one of your books  
11 because they were able to see it in snippet view on  
12 Google books?

13 A. I have not the slightest idea.

14 MR. BONI: Object to form. You've answered.

15 Fine.

16 BY MR. GRATZ:

17 Q. Is reading three snippets from pages of your  
18 book a substitute for buying the book?

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

20 A. No.

21 BY MR. GRATZ:

22 Q. Do you object to either Google or libraries,  
23 without displaying any text from your book, allowing  
24 people to search for words in the full text and telling  
25 them what page those words appear on?

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

3           BY MR. GRATZ:

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

8           A. Over the years, yes.

9           Q. About how many?

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

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

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

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

19          MR. BONI: Object to the form.

20          A. Have no way of knowing.

21          BY MR. GRATZ:

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

24          A. Yes.

25          Q. What books are those?



1           A. Two. One was "The Dictionary of Espionage,"  
2       which I published under the name of Henry S.A. Becket,  
3       B-e-c-k-e-t, in 1982. It's later than that. That is  
4       being reproduced in a expanded edition this very month  
5       by Dover Publications.

6           The second book was "Korea: The Untold Story  
7       of the War." In December, I signed a contract with a  
8       publisher in Shanghai for a Chinese language edition of  
9       that book, and that's gonna be published at a date not  
10      yet established.

11          Q. Any others?

12          A. None that come to mind immediately.

13          Q. Other than -- am I right you testified earlier  
14      that you understood "The Superlawyers" and "Korea" to  
15      have been scanned by Google?

16          A. My understanding is they have.

17          Q. Do you know whether any of your other books  
18      have been scanned by Google?

19          A. I've not checked to find out, so I don't know.

20          Q. What were the circumstances -- what caused "The  
21      Dictionary of Espionage" to come back into print?

22          MR. BONI: Object to form.

23          A. Dover was looking for books in the Washington  
24      area, and one of their acquisition editors visited the  
25      International Spy Museum. He asked the director Peter

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

3 A. Yes, it was.

4 Q. Are all of your books nonfiction?

5 A. Yes.

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

8 MR. BONI: Object to form.

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

11 BY MR. GRATZ:

12 Q. Are your books works of journalism?

13 MR. BONI: Object to form.

14 A. No.

15 BY MR. GRATZ:

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

18 A. I was a newspaperman for ten years.

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

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

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

1 yet reverted to you?

2 A. Again, this is another publisher out of  
3 business who sent me a crate of books, and there may  
4 have been a letter saying "It's Yours."

5 Q. Did you retain that letter?

6 A. No.

7 Q. Did you keep it?

8 Do you have a recollection of there being such  
9 a letter or was your previous answer based on sort of  
10 thinking there might have been such a letter?

11 A. There might have been.

12 Q. But you don't recall one way or another whether  
13 there was?

14 A. No.

15 Q. All of your books are out of print; is that  
16 right?

17 A. With two exceptions we noted earlier.

18 Q. And those two exceptions are "The Dictionary of  
19 Espionage" being reprinted by Dover and the Chinese  
20 version of "Korea"?

21 A. Correct.

22 Q. Have you had any e-mail correspondence  
23 regarding this litigation with anyone other than your  
24 lawyers?

25 A. I notified Paul Dickson last week that this

1 deposition had been scheduled, as a matter of  
2 information for him.

3 Q. Other than your e-mail last week with Paul  
4 Dickson regarding this deposition, have you had any  
5 other e-mail correspondence regarding this litigation  
6 with anyone other than your lawyers?

7 A. I had correspondence with Brandt & Hochman,  
8 e-mail. E-mail correspondence.

9 Q. What was the subject of that correspondence?

10 A. Passing on your request for documents and  
11 asking what they had.

12 Q. Anything else?

13 A. That's all I recall.

14 Q. Do you use the Google search engine?

15 A. Beg your pardon?

16 Q. Do you use the Google search engine at  
17 Google.com?

18 A. Yes, I use that.

19 Q. What do you use it for?

20 A. Oh, mainly to look up references to people I'm  
21 maybe writing about or dates on something.

22 Q. Do you find it useful?

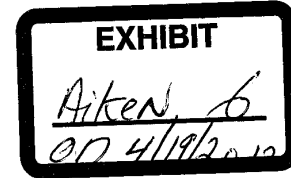
23 A. Yeah, very useful.

24 Q. When you type in a search in the Google search  
25 engine, a set of search results come up; is that right?

**EXHIBIT 14**

## The Authors Guild

# Google Makes Thousands of Books Available in Full Text



### Text of October 7, 2004, e-mail to members:

Like Amazon's program, but there's some money in it; publishers still lack authority to participate.

Yesterday, the search engine company Google announced the launch of the "beta" (test) phase of a new program it calls Google Print, which makes the texts of participating publishers' titles available for browsing. Links to book excerpts in the form of low-resolution images of printed pages show up as results in standard Google searches. The program is quite similar to one launched by Amazon 12 months ago, but Google, unlike Amazon, will share search statistics with publishers and provide links to multiple book retailers from each excerpt. Google also is offering to place ads below book page images and share the revenue from those ads with publishers. (We expect those revenues to be quite modest.) The Guild believes, as it does with Amazon's "Search Inside the Book" program, that most publishers don't have the necessary rights to license this use of their titles to Google without their authors' permission.

#### SIMILARITIES TO AMAZON'S SEARCH INSIDE THE BOOK

As with Amazon's program, users can view a limited number of pages (20% of the text will soon be the default setting, but publishers may opt for higher limits), but no more than five consecutive pages. Google Print has also mimicked Amazon in disabling the browser's print, copy, save, and paste functions, in an attempt to limit piracy. (Savvy computer users can work around some of these limitations, but the efforts are probably too cumbersome to be worthwhile for most users.)

Our review of publishers' contracts shows, as it did last year, that most publishers do not have the right to participate in Google Print without their authors' permission. Although many publishers argued with our interpretation of their contracts last year, they removed works from Amazon's program at their authors' request. We believe that publishers will generally remove a work from Google's program on request.

We think Google Print will likely prove to be useful in promoting certain titles. Midlist and backlist books that are receiving little attention, for example, may benefit from additional exposure in searches. For other titles, the program could erode sales. Reference, travel books and cookbooks might be at greater risk, and we urge authors of these titles in particular to press for access to Google Print usage statistics. Fiction titles are not likely to be threatened.

#### IMPORTANT DIFFERENCES

Unlike Amazon, Google promises to provide publishers "detailed book-level reporting on the page impressions [that is, viewings], ad clicks, Buy this Book clicks, and ad revenue generated." It will update this information throughout the day, allowing publishers to track the performance of all titles in the program. This transparency in reporting should illuminate the effect on sales of Google's program, and, if shared with authors, help them decide whether their books should be part of the program. It would be a relatively simple matter to allow authors to view this information through a secure web page. We'll be urging Google and publishers to do so.

Google is giving publishers the option of allowing "relevant" advertising links to appear on the page with text from a work and will share the revenue from those ads with the publisher. Book

AG : The Authors Guild : News : Google Launches Book-Browse ...

[http://www.authorsguild.org/news/google\\_launches\\_browse.htm](http://www.authorsguild.org/news/google_launches_browse.htm)

publishing contracts provide that the author is entitled to a share – typically 50% or more – of all income earned from licensing the title to third parties. Clearly, this kind of advertising revenue falls into that category. (Some book contracts prohibit advertising in authors' books.)

Google Print will reach a far broader audience than Amazon's program, but that audience won't necessarily be book buyers. Google is the most popular Internet search engine in the U.S. and, according to one survey, has about seven times the average daily page views as Amazon.

#### **SAMPLE PAGES**

Our research suggests that there is a quite limited number of titles available in Google Print at the moment – at least compared to Amazon's program – but Google appears to be aggressively moving to add titles. Here are some sample book pages from Google Print; the first is from Penguin Classics. Each of these include the optional (to the publisher) ads at the bottom of the page. Note how the ads attempt to coordinate with the text:

#### **Thomas Paine:**

<http://print.google.com/print?id=GDRt70vGw9YC&prev=http://print.google.com/print%3Fq%3Dth>

#### **Charlie Parker:**

<http://print.google.com/print?id=3anaSNjKS-4C&prev=http://print.google.com/print%3Fq%3Dchar>

#### **New Deal:**

<http://print.google.com/print?id=S8RAzsZK8YMC&prev=http://print.google.com/print%3Fq%3Dne>

#### **Mickey Mantle:**

<http://print.google.com/print?id=RVJo6nKx8UoC&prev=http://print.google.com/print%3Fq%3Dmic>

We'll be sending you more information about the program shortly, and we're going to be in touch with the major publishers about their participation in Google Print and their obligation to share ad revenue with authors. If you'd like a book removed from the program and your publisher isn't cooperating, please let us know.

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This may be forwarded and posted at other sites in its entirety, including this notice.

The Authors Guild is the nation's largest and oldest society of published authors and the leading writers' advocate for fair compensation, effective copyright protection, and free expression.

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31 E. 32nd Street, 7th Floor — New York, NY 10016 — Phone: (212) 563-5904 — Fax: (212) 564-5363

## **EXHIBIT 15**



Page 1		Page 3	
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK		1 APPEARANCES:	
THE AUTHORS GUILD, INC., ET AL., Plaintiffs,		2	
vs. No. 05 CV 8136 (DC)		3 For Plaintiff:	
GOOGLE, INC.,		4 BONI & ZACK, LLC	
Defendants.		5 BY: JOSHUA D. SNYDER, ESQ.	
		6 15 St. Asaphs Road	
		7 Bala Cynwyd, PA 19004	
		8 610.822.0200	
		9 jsnyder@bonizack.com	
		10	
VIDEOTAPED DEPOSITION OF DANIEL GERVAIS		11 For Defendant:	
San Francisco, California,		12 DURIE TANGRI	
Tuesday, June 12, 2012		13 BY: DAVID McGOWAN, ESQ.	
Volume I		14 217 Leidesdorff Street	
		15 San Francisco, CA 94111	
		16 415.362.6666	
		17 dmcgowan@durietangri.com	
		18	
Reported by:		19 Also Present:	
STACEY M. DIODATI		20 Peter Hibdon, Videographer	
CSR No. 11925		21	
Job No. #147938		22	
		23	
		24	
PAGES 1 - 239		25	

Page 2		Page 4	
1 UNITED STATES DISTRICT COURT		1 INDEX OF EXHIBITS	
2 SOUTHERN DISTRICT OF NEW YORK		2	
3		3 Exhibits Description Page	
4 THE AUTHORS GUILD, INC., ET AL.,		4	
5 Plaintiffs,		5 Exhibit 1 Photocopy of Webpage 18	
6 vs. No. 05 CV 8136 (DC)		6 SSRN.com	
7 GOOGLE, INC.,		7	
8 Defendants.		8 Exhibit 2 Report of Professor 23	
		9 Daniel Gervais	
		10	
		11 Exhibit 3 The Protection of 39	
		12 Databases by Daniel J.	
		13 Gervais	
		14	
Videotaped Deposition of DANIEL GERVAIS, taken		15 Exhibit 4 Article Titled "Internet 48	
on behalf of Defendants, at Durie Tangri, 217		16 anti-piracy legislation	
Leidesdorff Street, San Francisco, California, beginning		17 is flawed, says	
at 9:59 a.m. and ending at 4:33 p.m. on Tuesday, June		18 Vanderbilt professor"	
12, 2012, before Stacey M. Diodati, Certified Shorthand		19	
Reporter No. 11925.		20 Exhibit 5 The Internationalization 54	
		21 of Intellectual	
		22 Property: New Challenges	
		23 from the Very Old and	
		24 the Very New	
		25	

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1	INDEX OF EXHIBITS (cont.)			1	INDEX OF EXAMINATION		
2				2			
3	Exhibits	Description	Page	3		Page	
4	Exhibit 6	Advisory Committee on	64	4	By Mr. McGowan .....	8	
5		Management of Copyright		5			
6		and Related Rights in		6			
7		Global Information		7			
8		Networks, First Session,		8			
9		Geneva, December 14 &		9			
10		15, 1998		10			
11				11			
12	Exhibit 7	Written Comments f	97	12			
13		Copyright Clearance		13			
14		Center, Inc., dated		14			
15		2/5/99		15			
16				16			
17	Exhibit 8	Keynote: The Landscape	124	17			
18		of Collective Management		18			
19		Schemes		19			
20				20			
21	Exhibit 9	The Tangled Web of UGC:	144	21			
22		Making Copyright Sense		22			
23		of User-Generated		23			
24		Content		24			
25				25			

Page 6				Page 8			
1	INDEX OF EXHIBITS (cont.)			1	San Francisco, California		
2				2	Tuesday, June 12, 2012; 9:59 a.m.		
3	Exhibits	Description	Page	3			
4	Exhibit 10	Email from Daniel	177	4	VIDEOGRAPHER:	Good morning. We are on the	
5		Gervais to Frederic		5	record at 9:59 a.m., on June 12, 2012. This is the		
6		Haber, dated 3/25/12		6	video recorded deposition of Daniel Gervais. My name is		
7				7	Peter Hibdon, here with our court reporter, Stacey		
8	Exhibit 11	Document Titled	180	8	Diodati. We are here from Veritext National Deposition		
9		"Insights"		9	& Litigation Services.		
10				10	The caption of this case is the Authors Guild		
11	Exhibit 12	Condensed Deposition	188	11	versus Google, Inc.		
12		Transcript of Betty		12	At this time, will Counsel and all present		
13		Miles, dated 1/4/12		13	please identify themselves for the record.		
14				14	MR. McGOWAN: David McGowan, Durie Tangri for		
15				15	Google.		
16				16	MR. SNYDER: Joshua Snyder, Boni & Zack, for		
17				17	class representatives in the class and the witness, the		
18				18	expert witness.		
19				19	DANIEL GERVAIS,		
20				20	being administered the oath by the Certified Shorthand		
21				21	Reporter to tell the truth, the whole truth, and nothing		
22				22	but the truth, testified as follows:		
23				23	EXAMINATION BY MR. McGOWAN:		
24				24	BY MR. McGOWAN:		
25				25	Q Good morning, Professor Gervais.		

<p style="text-align: right;">Page 9</p> <p>1 A Good morning.</p> <p>2 Q Thank you for coming here.</p> <p>3 A Happy to be here.</p> <p>4 Q If called as a witness at trial, do you</p> <p>5 propose to offer expert testimony in this case?</p> <p>6 A I suppose so.</p> <p>7 Q In what fields of expertise?</p> <p>8 A My field of expertise in my report is</p> <p>9 collective management of copyright.</p> <p>10 Q Any other fields?</p> <p>11 A I consider myself an expert in international</p> <p>12 intellectual property as well.</p> <p>13 Q What do you mean by "international</p> <p>14 intellectual property"?</p> <p>15 A The application of international treaties and</p> <p>16 norms concerning intellectual property rights such as</p> <p>17 copyrights, trademarks, patents, geographical</p> <p>18 indications --</p> <p>19 THE REPORTER: What's that one?</p> <p>20 "Geographical"?</p> <p>21 THE WITNESS: Indications.</p> <p>22 -- industrial designs, and so on.</p> <p>23 BY MR. McGOWAN:</p> <p>24 Q Is that intellectual property law?</p> <p>25 A Law and policy.</p>	<p style="text-align: right;">Page 11</p> <p>1 A Counsel.</p> <p>2 Q Anyone else?</p> <p>3 A I ran one paragraph, which I believe -- I</p> <p>4 don't have the report in front of me, but Paragraph 18,</p> <p>5 which deals with deals Copyright Clearance Center. And</p> <p>6 I sent a draft of that paragraph to a lawyer there to</p> <p>7 review for accuracy.</p> <p>8 Q What was the name of the lawyer?</p> <p>9 A Frederick Haber, H-a-b-e-r.</p> <p>10 Q When did you send him a paragraph of your</p> <p>11 report?</p> <p>12 A As I was preparing it, which would have been</p> <p>13 late February, early March, I'm thinking.</p> <p>14 Q Did you receive any comments from Mr. Haber?</p> <p>15 A Yes. He pointed a few things that he thought</p> <p>16 could be said differently. And I considered those</p> <p>17 suggested changes and incorporated some of of them in</p> <p>18 the report.</p> <p>19 Q Was -- when you say "he pointed," how did he</p> <p>20 point? Was this in an email?</p> <p>21 A I think we had an email exchange and a</p> <p>22 conference -- or not a conference, but had a telephone</p> <p>23 call.</p> <p>24 Q Did you rely on his connections in drafting</p> <p>25 Paragraph 18?</p>
<p style="text-align: right;">Page 10</p> <p>1 Q What opinions do you propose to offer?</p> <p>2 A In the report I state in Paragraph 10 what I</p> <p>3 am opining for the purposes of this case, which is</p> <p>4 whether there is a role for collective management and</p> <p>5 whether a fair use determination with Google is doing</p> <p>6 might affect that likelihood.</p> <p>7 Q A role for collective management in what?</p> <p>8 A In licensing rights to use books or parts of</p> <p>9 books online, including the types of uses that Google is</p> <p>10 doing in the -- that is described in the case, in the</p> <p>11 materials that I reviewed to prepare my report.</p> <p>12 Q What do you understand those types of uses to</p> <p>13 be?</p> <p>14 A Well, my understanding is that Google has</p> <p>15 scanned the entire text of millions of books and is</p> <p>16 making those books available in a number of a ways; in</p> <p>17 some cases, only bibliographic data, but many cases it</p> <p>18 makes available snippets, which I believe were defined</p> <p>19 in the materials I reviewed as being very often 1/8th of</p> <p>20 a page.</p> <p>21 And then there's a certain number of snippets</p> <p>22 per book. I don't recall the exact way in which Google</p> <p>23 does that.</p> <p>24 Q In preparing your report, did you speak to</p> <p>25 anyone?</p>	<p style="text-align: right;">Page 12</p> <p>1 A Rely on -- he pointed me to a page on their</p> <p>2 website which described one of their programs more fully</p> <p>3 than I had in my draft. And I incorporated additional</p> <p>4 details from the website into Paragraph 18. So to that</p> <p>5 extent, I guess, yes.</p> <p>6 Q Did you list your conversation with him as one</p> <p>7 of the materials you considered?</p> <p>8 THE REPORTER: "As one of the materials . . ."</p> <p>9 MR. McGOWAN: You considered.</p> <p>10 THE WITNESS: I'm not sure. I don't have the</p> <p>11 exhibit in front of me. To be honest, I don't recall if</p> <p>12 I listed it or not.</p> <p>13 Q Did you speak to anyone else at CCC?</p> <p>14 A No.</p> <p>15 Q Do you know Tracy Andrews?</p> <p>16 A No. If you mean Armstrong --</p> <p>17 Q Armstrong. My apologies.</p> <p>18 A Yes, I do know Tracy Armstrong.</p> <p>19 Q You did not speak to her about --</p> <p>20 A Not about my report, no.</p> <p>21 Q Have you ever spoken to her about Google?</p> <p>22 A Yes.</p> <p>23 Q When was the first time you spoke to</p> <p>24 Ms. Armstrong about Google?</p> <p>25 A I believe when she was on the panel in</p>

<p style="text-align: right;">Page 13</p> <p>1 New York. That would have been well before I was  2 retained in the case. And this was during the  3 settlement negotiations. And I think she and Mr. Haber  4 might have been there too, were talking about the case  5 on the panel which, I -- as I recall, was at Columbia.  6 And I wasn't on the panel, but I spoke to them  7 on that occasion. And I think the conversation went  8 something like, "It's interesting, this proposed  9 settlement, this is something that CCC could do."  10 And my recollection was that they seemed to  11 agree with that suggestion. But that was the extent of  12 that discussion.  13 Q Other than the conversations with Mr. Haber  14 you just mentioned, did you speak to anyone else in  15 connection with preparing your report?  16 A No.  17 Q Did you review any contracts in connection  18 with preparing your report?  19 A Contracts, no.  20 Q Did you review the deposition of Paul Aikan?  21 A I think I saw -- I scanned part of that, yes.  22 But I can't remember if it was after or before my  23 report.  24 Q Let me -- let me divide. From the time you  25 submitted your report, have you continued to review</p>	<p style="text-align: right;">Page 15</p> <p>1 A No, that doesn't ring a bell.  2 Q Have you been deposed before?  3 A Have I been deposed before? Certainly not  4 recently. I'm trying to think, if I go back in time.  5 I've written expert reports before, but I have not  6 deposed, no.  7 Q How many expert reports have you written?  8 A I have written at least two others in U.S.  9 cases. And then I've written expert reports for  10 international cases as well.  11 Q Let's start with the U.S. cases. What's the  12 the name of the first case in which you can recall  13 writing an expert report?  14 A I remember writing a report in the case  15 involving a publisher called Elsevier in the Southern  16 District of New York. That would have been  17 approximately two years ago. I understand the case was  18 dismissed on summary judgment, and I wasn't deposed in  19 the case.  20 Q What's the next case subsequent in time to the  21 Elsevier case that you recall?  22 A Actually, I misspoke. I didn't file an expert  23 report. I was thinking of my Amicus Brief at the 10th  24 Circuit and then in the Supreme Court, and then in the  25 Golan v. Holder case. So it was not an expert report.</p>
<p style="text-align: right;">Page 14</p> <p>1 materials pertaining to the case?  2 A Yes.  3 Q Have any of those materials caused you to  4 alter any of the opinions that you express in your  5 report?  6 A No.  7 Q What materials do you recall having reviewed?  8 A I recall reviewing the expert report by Harris  9 Greco Chevalier. And I scanned, in the last few days,  10 the rough transcripts of parts of their depositions. I  11 also read part of the judge's opinion on class  12 certification.  13 I think that's it.  14 Q And you think you may also have read the  15 deposition of Paul Aikan?  16 A I remembering reading part of it, scanning  17 part of it. But I remember it was a very long document,  18 and I didn't have time to go through all of it. And I  19 don't remember if it was after or before my report, but  20 most likely would have been after my report was filed.  21 Q Eric Zohn, Z-o-h-n?  22 A No, that does not ring a bell.  23 Q The plaintiffs, Betty Miles?  24 A No.  25 Q Jim Boutin? Boutin?</p>	<p style="text-align: right;">Page 16</p> <p>1 Q Golan and Holder is a brief?  2 A It was a brief on my own behalf, yes, filed  3 both in the 10th Circuit and the Supreme Court.  4 Q In addition to the Elsevier report that you  5 mentioned, have you submitted other expert reports in  6 other U.S. cases?  7 A Not yet. I am retained as an expert in the  8 settlement in a state case in California involving the  9 so-called audio visual guild on the Screen Actors Guild,  10 Directors Guild of America, and the Writers Guild of  11 America West.  12 Q Who retained you?  13 A The plaintiffs' counsel. The settlement, as I  14 understand it, specifically directs that two experts  15 should be appointed to overview the distribution of  16 foreign levies that are received by the guilds, and I am  17 one of two experts.  18 Q Who is the other?  19 A His name is Donald Jasko, J-a-s-k-o.  20 Q Have you submitted expert reports in any other  21 U.S. cases?  22 A No.  23 Q International cases in which you have  24 submitted expert reports, what is the first in time that  25 you can recall?</p>

<p style="text-align: right;">Page 17</p> <p>1 A I am advising counsel on that case involving</p> <p>2 the packaging of tobacco. That is a case that is</p> <p>3 pending before -- actually several cases pending before</p> <p>4 different international jurisdictions.</p> <p>5 Q Who are the counsel?</p> <p>6 A They are in London. A firm called Fresh</p> <p>7 Fields.</p> <p>8 Q Who is their client?</p> <p>9 A To what extent am I -- I'm not sure to what</p> <p>10 extent I can disclose that.</p> <p>11 THE REPORTER: I'm sorry. I can't hear you.</p> <p>12 What was that?</p> <p>13 THE WITNESS: I'm not sure to what extent I</p> <p>14 can disclose that. It's really not a copyright</p> <p>15 management related case.</p> <p>16 BY MR. McGOWAN:</p> <p>17 Q I understand. And if you wish to consult with</p> <p>18 your counsel, I understand that as well. Let's take one</p> <p>19 step at a time.</p> <p>20 Did you sign a confidentiality undertaking</p> <p>21 with respect to that case?</p> <p>22 A I believe I did.</p> <p>23 Q And that's a current case?</p> <p>24 A Yes.</p> <p>25 Q Any other international cases in which you</p>	<p style="text-align: right;">Page 19</p> <p>1 Q To the extent that you are allowed to put them</p> <p>2 there, have you done so?</p> <p>3 A I think that's an incomplete list, but let's</p> <p>4 say I've put -- most recent papers are there, yes.</p> <p>5 Q And if I were to, for example, want to</p> <p>6 download traditional knowledge and intellectual</p> <p>7 property, the first paper listed, can I get the entire</p> <p>8 paper?</p> <p>9 A Yes.</p> <p>10 Q At the top left-hand corner underneath your</p> <p>11 name there's an entry that says, "SSRN, Author, Rank."</p> <p>12 Do you see that.</p> <p>13 A Yes.</p> <p>14 Q What does that refer to?</p> <p>15 A I don't know.</p> <p>16 Q On the -- above the listing, there's a box</p> <p>17 that says aggregate statistics. Do you see that?</p> <p>18 THE REPORTER: "Aggregate"?</p> <p>19 MR. McGOWAN: Aggregate statistics.</p> <p>20 THE WITNESS: Where, exactly? I don't see it.</p> <p>21 BY MR. McGOWAN:</p> <p>22 Q In the rectangular box titled, "Daniel J.</p> <p>23 Gervais Scholarly Papers," on the right-hand side?</p> <p>24 A Oh, yes. Yes, I do.</p> <p>25 Q Total downloads, 7619?</p>
<p style="text-align: right;">Page 18</p> <p>1 have prepared a report?</p> <p>2 A Prepared the report, no.</p> <p>3 Q Any other international cases in which you</p> <p>4 have given testimony by deposition?</p> <p>5 A No.</p> <p>6 MR. McGOWAN: Let me have marked as Exhibit</p> <p>7 Gervais 1 --</p> <p>8 (Exhibit 1 was marked for identification.)</p> <p>9 MR. McGOWAN: -- a copy of a web page.</p> <p>10 BY MR. McGOWAN:</p> <p>11 Q I will ask you, Professor Gervais, do you</p> <p>12 recognize this web page?</p> <p>13 A Yes. This looks like a list of the papers</p> <p>14 that I made available on the site called SSRN.com.</p> <p>15 Q SSRN stands for the Social Science Research</p> <p>16 Network?</p> <p>17 A Correct.</p> <p>18 Q The papers that are listed here, can these be</p> <p>19 downloaded from this site?</p> <p>20 A I believe so.</p> <p>21 Q All of them?</p> <p>22 A I believe so. In some cases, you can only put</p> <p>23 in abstract, and in some cases you can put full text</p> <p>24 depending on -- some of my papers are not there because</p> <p>25 I'm not allowed to put them there.</p>	<p style="text-align: right;">Page 20</p> <p>1 A Correct.</p> <p>2 Q Total citations 19?</p> <p>3 A Yes.</p> <p>4 Q Do you know what those refer to?</p> <p>5 A I can only assume that the first number refers</p> <p>6 to the number of times my papers were downloaded, not</p> <p>7 knowing which one, unless I look at the rest of the</p> <p>8 list. And citations, I don't have a clue what that</p> <p>9 number means because, frankly, even in context I don't</p> <p>10 understand the number.</p> <p>11 Q Why don't you put your articles, or at least</p> <p>12 your more recent ones, up on SSRN?</p> <p>13 A It's a practice of Vanderbilt Law School that</p> <p>14 is strongly encouraged. Actually, our administrative</p> <p>15 assistants are encouraged to help us do so.</p> <p>16 Q Why did you do it personally?</p> <p>17 A I did not give it much thought. As I said,</p> <p>18 it's a practice that is encouraged, and I have no</p> <p>19 objection to having people download my papers. I'm</p> <p>20 actually happy if they do so.</p> <p>21 Q Why are you happy?</p> <p>22 A Because it's part of legal scholarship, I</p> <p>23 suppose, as of any scholarship that you would want</p> <p>24 people to access your material and review and critique</p> <p>25 it and use it and build on it.</p>

<p style="text-align: right;">Page 21</p> <p>1 Q Do you benefit when people are able to access 2 your papers and read your ideas? 3 MR. SNYDER: Objection to form. 4 THE WITNESS: Do I benefit? I'm not sure what 5 you mean. Financially, or otherwise? 6 BY MR. MCGOWAN: 7 Q In terms of your scholarly goals. 8 MR. SNYDER: Objection. 9 THE WITNESS: I really don't know. I'm just 10 really having trouble with "benefit." The fact that 11 people refer to my scholarship, is that a benefit? Very 12 hard to answer that question. 13 I know financially SSRN offers the option of 14 sending paper -- bound paper copies for a fee. But I 15 have not looked into that program. I know some of my 16 colleagues have, and I haven't. 17 Q Have you done that with any of these papers 18 listed on Exhibit 1? 19 A No. I have not -- I've not given it much 20 thought, to be honest, whether I should join that system 21 or not. I just put my papers up there when I am allowed 22 to do so by my publishing agreement. 23 Q Is one of your aspirations in writing 24 scholarship to expose others to your ideas? 25 A Well, I think it's the aspiration of a writer</p>	<p style="text-align: right;">Page 23</p> <p>1 A I'm aware that some people do that. And one 2 of my colleagues actually knows a system he told me to 3 look into. But Geiger -- Eiger, something. But to be 4 very honest, I haven't paid any attention to that. 5 Q Do you know if the rankings are based on the 6 number of times that a person's work is cited so that a 7 greater number implies greater influence? 8 A I don't know how the system works. 9 Q We'll go through some of these in particular. 10 But as you sit here now, looking at your list of recent 11 papers, has your work in this case led you to modify any 12 of the opinions you expressed in any of them? 13 MR. SNYDER: Objection. 14 THE WITNESS: In any of the papers I have ever 15 written? I can't think of any opinion that would have 16 changed, but obviously I would have to reread every 17 single paper, going back to the first one. 18 THE REPORTER: Going back to what? 19 THE WITNESS: To the first one. 20 MR. MCGOWAN: Let me have marked as Exhibit 2 21 your report. 22 (Exhibit 2 was marked for identification.) 23 BY MR. MCGOWAN: 24 Q Let me ask you to turn to the last page, which 25 is Exhibit B.</p>
<p style="text-align: right;">Page 22</p> <p>1 to be read, so yes, to that extent. 2 Q Does posting papers and allowing readers to 3 download them help you achieve that aspiration? 4 MR. SNYDER: Objection to form. 5 THE WITNESS: Empirically, I cannot verify 6 that. But it looks, intuitively, like that could be the 7 case. 8 Q Do you ever receive offprints of your 9 articles? 10 A Yes, regularly. 11 Q Do you circulate offprints to your colleagues? 12 A Yes. 13 Q And by offprint, so the record is clear, that 14 would be a soft bound version of the specific article 15 you wrote; correct? 16 A Correct. 17 Q Do you charge the people you send your 18 offprints to for them? 19 A No, I have not charged to send offprints to. 20 The law school pays the offprints when they come in, and 21 then I send them out, through my assistant, to 22 colleagues I think might be interested. 23 Q Are you familiar with a practice in legal 24 academe of measuring scholarly influence by citation 25 count?</p>	<p style="text-align: right;">Page 24</p> <p>1 A (Witness complies.) 2 Um-hum. 3 Q This is -- what is Exhibit B? 4 A It's a list of materials I considered prior to 5 writing the report. 6 Q I do not see your email to the lawyer at the 7 CCC on here. Did you omit that? 8 MR. SNYDER: Objection to form. 9 THE WITNESS: To the extent that that would 10 qualify as material considered for -- you know, I didn't 11 put discussions with counsel either. To that extent it 12 is not there, yes. 13 BY MR. MCGOWAN: 14 Q Why not? 15 A I don't -- I don't recall thinking of it as 16 material considered. I really was thinking of material 17 that I directly used. I just sent that paragraph for 18 verification, and so I just didn't -- didn't indicate it 19 here. 20 Q Do you have a copy of the email he sent you? 21 A Not with me. 22 MR. SNYDER: Objection. 23 BY MR. MCGOWAN: 24 Q Do you have a copy of the email he sent you 25 anywhere?</p>



<p style="text-align: right;">Page 25</p> <p>1 A Oh, it's likely somewhere in my -- in my email 2 system, yes. 3 MR. MCGOWAN: We can discuss it at break. 4 We'll ask for production of that. It should have been 5 listed. 6 MR. SNYDER: We can discuss it at the break. 7 THE WITNESS: I defer to counsel on that one. 8 BY MR. MCGOWAN: 9 Q Let's go to Exhibit A, please. 10 A The C.V.? 11 Q Yes? 12 A Okay. 13 Q Under "Education" you list a doctorate from 14 the University of Nates. 15 A Correct. 16 Q What is the doctorate in? 17 A Intellectual property. Copyright, 18 specifically. 19 Q Copyright law? 20 A It was -- the dissertation part of the 21 doctorate was on the notion of work on the Berne 22 Convention, copyrighted work. The Berne Convention 23 being an important international copyright treaty. 24 Berne is B-e-r-n-e. 25 Q Is it a doctorate of law?</p>	<p style="text-align: right;">Page 27</p> <p>1 Q In your C.V., the third entry from the bottom, 2 it says, "Head of Section" -- 3 A On which page, please. 4 Q Under -- on the first page. 5 A You're on previous employment? 6 Q Yes. Previous employment. 7 A Um-hum. 8 Q Third entry from the bottom. "Head of 9 Section, World Intellectual Property Organization." 10 A Um-hum. 11 Q What were your responsibilities in that 12 position? 13 A The section was called Copyright Project 14 Section, which ask not very descriptive. The main 15 responsibility was to overview the conferences, meetings 16 having to do with the future of copyright. So 17 basically, organizing international events, including 18 one at Harvard Law School, where we invited people to 19 come and talk about where they thought copyright policy, 20 copyright law might go in the future. 21 These were typically very international in 22 nature, bringing people from both developed and 23 developing countries and the proceedings of these 24 meetings were systematically published by WIPO, which is 25 the World Intellectual Property Organization.</p>
<p style="text-align: right;">Page 26</p> <p>1 A Yes. Well, it's called Ph.D. in law in 2 political science, I think, technically. I'd have to 3 look at the degree. It goes back awhile. 4 Q Are you an economist at all? 5 A No. 6 Q Your previous employment -- I want to make 7 sure we've got that. The answer is? 8 THE REPORTER: No. 9 BY MR. MCGOWAN: 10 Q Okay. Previous employment, let's go down to 11 lawyer Clark Woods in Montreal? 12 A Um-hum. 13 Q Are you admitted to practice in any 14 United States jurisdiction? 15 A No. 16 Q Have you ever sought admission in any United 17 States jurisdiction? 18 A No. I'd rather not -- not be admitted. To be 19 honest, I'm very happy not -- to be able to tell people, 20 naturally when they call several times a week to get IP 21 advice, that I'm not a lawyer in Tennessee. 22 Q Do you seek -- did you seek admission to the 23 Bar when you submitted your Amicus Brief? 24 A No, I submitted the brief through a lawyer 25 in -- I think he's based in Denver.</p>	<p style="text-align: right;">Page 28</p> <p>1 In addition to that, I attended meetings 2 dealing with copyright at WIPO, and occasionally would 3 prepare the report of the meeting. It could be a 4 committee of experts; it could be a diplomatic 5 conference; it could be an informal discussion. 6 And again, those reports were made available 7 publicly by the organization. 8 Q Did you negotiate any licenses while you were 9 at WIPO on behalf of third parties? 10 A I can't -- I don't recall negotiating a 11 license with anyone. 12 Q Were you involved in the publishing of books 13 while you were at WIPO? 14 A No. 15 Q So there are three things I have. You held 16 conferences, and assisted in preparation of publication 17 papers relating to those conferences; correct? 18 A I assisted in making sure we had the papers, 19 that they were proper in terms of both substance and 20 form. But the publication of the book itself was 21 handled by the publications division. I think there are 22 1200 employees. It's a big shop, and they have a 23 specialized publications division. 24 Q And you attended meetings and would sometimes 25 write reports concerning those meeting?</p>

<p style="text-align: right;">Page 29</p> <p>1 A Well, I would prepare the report in advance of  2 the meeting so people would have, obviously, discussion  3 papers to consider, and then we would prepare a report.  4 And occasionally, I would write the whole report;  5 occasionally, parts of the report, depending on how long  6 the meeting was and how quickly we needed the minutes  7 adopted.  8 It might be useful to add that reports that  9 are adopted at WIPO meetings will typically suspend at  10 the end of two or three days, the conferencing will  11 suspend for a day, so we have to draft overnight so that  12 the report can actually be voted on the next day.  13 Q Following your work at WIPO, you moved to  14 SESAC in Paris?  15 A Correct.  16 Q What were your responsibilities at SESAC?  17 A I was an assistant secretary general. So this  18 was a very broad mandate, basically, management of the  19 office, their policy and legal papers. There was a  20 director of legal affairs that was -- it's a fairly  21 small organization of about 10 or 12 employees at the  22 time at the headquarters. And then there were offices  23 in Singapore and Buenos Aires as well.  24 But for the Paris office, I was doing both  25 substance on collective management and administrative of</p>	<p style="text-align: right;">Page 31</p> <p>1 Q And what did you do to set up the collective?  2 A Basically everything. In the case of Burkina  3 Faso, I flew in with the computers. And the software,  4 we had trained people in Geneva. We basically then  5 installed the machines, made sure they were -- the data  6 base was working, and then trained additional people  7 locally. And I stayed until basically the operations  8 were up and running.  9 Q Where did you obtain the data for the  10 databases?  11 A This was provided by -- there was an agreement  12 at the time between by WIPO and SESAC to have access to  13 a database that was not totally complete at the time, so  14 that part of the processing, the data processing, was  15 done locally. And part of the data processing, in the  16 case of specifically Burkina Faso, because it's a French  17 speaking country, was done in Paris by the French Music  18 Rights Organization as a service to help this new  19 collective.  20 Q What data were collected in the database?  21 A It would be what we call meta data. So  22 basically titles of songs, names of performers, names of  23 songwriters, names of music publishers, record  24 companies, and I think the part of the database that was  25 still in Paris was addresses to send payments to and the</p>
<p style="text-align: right;">Page 30</p> <p>1 the office. I also helped set up collectives in a few  2 countries, both at WIPO. I actually did one of those I  3 forgot to mention, and then at SESAC, I did a number of  4 those where I would go to a country, very often from  5 scratch, we would train people, install software, get  6 them going. And then I would go back, typically, a year  7 or two later to see how they're doing and help them in  8 the process.  9 Q Let's go back to WIPO then. In which  10 countries did you assist?  11 A For WIPO it was Burkina Faso.  12 THE REPORTER: I'm sorry.  13 THE WITNESS: Burkina Faso, formerly known as  14 Upper Volta. B-u-r-k-i-n-a, second word, F-a-s-o; it is  15 somewhere between Ivory Coast and Senegal.  16 BY MR. McGOWAN:  17 Q And when you say set up collectives, can you  18 tell me what was being collectivized?  19 THE REPORTER: I can't hear you.  20 MR. McGOWAN: What was being collectivized.  21 THE WITNESS: These were typically what we  22 would call either performing rights organizations or  23 music rights organizations by which, I mean, both  24 performing rights and mechanical rights.  25 BY MR. McGOWAN:</p>	<p style="text-align: right;">Page 32</p> <p>1 splits.  2 Q The splits between the collective and --  3 A No, between the publisher and the songwriter,  4 typically.  5 Q Was your work at SESAC in setting up  6 collectives similar in nature to your work --  7 A Very much so.  8 Q I'll just mention, we need to be careful to  9 take turns speaking so that the court reporter can get  10 each of our statements.  11 A Good point.  12 Q You joined Copyright Clearance Center in 1997?  13 A That sounds right.  14 Q When you began work there, what was your  15 title?  16 A Briefly, director of international -- I'm not  17 sure of the exact title, but something director of  18 international affairs or operations and very -- fairly  19 quickly, though I don't remember the exact date, became  20 vice president, international.  21 Q And what did you do as vice president  22 international?  23 A Basically, my job was to negotiate reciprocal  24 representation agreements between CCC, which is the U.S.  25 Reprographic Rights Organization, which we usually</p>



<p style="text-align: right;">Page 33</p> <p>1 abbreviate to RRO, and foreign RROs in Europe, Asia,  2 Latin America. So that was a very significant part of  3 the job.  4 Then obviously, once these agreements are  5 signed, they need to be administered. So you basically  6 then deal with issues that come up occasionally between  7 RROs, anything from technical information on data to  8 payments to basically anything else that can happen  9 between two collectives.  10 Q Anything else?  11 A I participated as a senior executive at senior  12 management team meetings. I advised the CEO on whenever  13 he asked for advice.  14 Q Who was the CEO while you were --  15 A Joseph Alen, A-I-e-n.  16 Q The agreements that you negotiated, were they  17 all between or among collective rights organizations?  18 A They were not all between RROs. Almost all of  19 them were -- we negotiated some tripartite agreements  20 concerning some revenue that is from, I believe, Norway  21 where the bylaws of the Norwegian RRO required that the  22 payment be sent to not the RRO itself, but to  23 organizations representing right holders, namely authors  24 and publishers, separately.  25 And so that was a more complicated</p>	<p style="text-align: right;">Page 35</p> <p>1 something the general counsel would usually take over  2 from me. But I would negotiate on a more business  3 level, I suppose.  4 Q Business as opposed to the terms? I'm not  5 sure I follow that.  6 A No, basically explaining to -- these were  7 agreements by which, for example, a publisher or an  8 author would want to join CCC, so very often, they have  9 a long list of questions. Many of them are very  10 concrete questions about how often do I get paid, what  11 data do I receive with my payment, how do you base your  12 payments to authors and publishers. So you would  13 explain all of that. And then when it came time to  14 actually negotiating the exact terms of the contract  15 with CCC, that would be taken over by the legal  16 department.  17 Q So you did not negotiate the terms; you  18 provided information?  19 A I did not negotiate terms of the actual  20 contract, yes, that's right.  21 Q Did you negotiate the terms of an actual  22 contract with authors?  23 A The role would be the same. So I would talk  24 to the author, explain the services, and then very often  25 I would attend these negotiations but I would not</p>
<p style="text-align: right;">Page 34</p> <p>1 negotiation. But all of the others, as I recall, were  2 fairly typical contracts between two collectives.  3 Q Where were the authors and publishers located  4 who received these proceeds that you mentioned?  5 A I believe they were all in the United States.  6 Q And these were payments from Norwegian?  7 A Well, Norwegian is the one contract that was  8 more complicated because of their disbursement policies.  9 Everything else was very typical. In other words, you  10 get payment from a foreign RRO with data. Then you  11 process the data and pay the U.S. rights holders  12 accordingly.  13 Q During your time at CCC did you negotiate any  14 agreements with a U.S. publisher?  15 A Yes.  16 Q How many?  17 A Several. I don't recall. So at some point  18 during my tenure as vice president international, the  19 vice president of rights holders relations, which is  20 authors and publisher relations, left the company. And  21 I took over on an interim basis, which must have lasted  22 six months or so.  23 And during that time, I did negotiate  24 agreements with publishers. Now, I typically would not  25 negotiate the exact legal terms of the contract. That's</p>	<p style="text-align: right;">Page 36</p> <p>1 typically be very active. I would let the general  2 counsel take over.  3 Q Did you have any other responsibilities at the  4 CCC during your tenure there?  5 A That's a hard question. As I said, as member  6 of a senior executive team, all kinds of things can  7 happen. And sometimes you just, you know, due to an  8 emergency, something that shows up -- comes up, and then  9 you basically help the team. I can't recall anything  10 specific. But anything from fire evacuation to -- you  11 know, so it's very hard to answer your question  12 categorically.  13 Q Any other responsibilities pertaining to the  14 negotiation of agreements with either publishers or  15 authors?  16 A Not beyond what I have already indicated.  17 Q Did you have responsibilities for dealing with  18 users of CCC?  19 A As a rule, no. Did it happen on occasion,  20 probably. But that was a separate part of the company  21 that would negotiate user agreements. So I don't recall  22 any specific instance where I would have certainly not  23 negotiated the terms of the contract with the user.  24 Attended the negotiation or discussion, yes.  25 Q Do you recall any particular user whose</p>

<p style="text-align: right;">Page 37</p> <p>1 negotiations you attended?</p> <p>2 A No, I don't recall any specific names.</p> <p>3 Q Do you recall, for example, whether they were</p> <p>4 business users or academic users?</p> <p>5 A I think both. I certainly attended with</p> <p>6 business users. I think I attended a discussion with, I</p> <p>7 think it might have been, Penn State, but I'm not</p> <p>8 100 percent sure. I think was Penn State, though, at</p> <p>9 the time.</p> <p>10 I remember visiting the campus, so there must</p> <p>11 have been discussions involved there. But I don't</p> <p>12 recall the specifics of -- this was probably when the</p> <p>13 electronic course back service was being launched.</p> <p>14 Q Did you have any role in the development of</p> <p>15 the terms for the electronic course back service?</p> <p>16 A Depends on the how you define terms. I did</p> <p>17 not negotiate for the contract, but I did provide input</p> <p>18 on how the service should function.</p> <p>19 Q What input do you recall providing?</p> <p>20 A These were half-day or sometimes even longer</p> <p>21 meetings with the entire team, on into, you know, how</p> <p>22 user friendly the interface should be to what to do if</p> <p>23 the title doesn't show up when the user searches it</p> <p>24 online, to, in other words, customer service to those</p> <p>25 kinds of issues.</p>	<p style="text-align: right;">Page 39</p> <p>1 Q Did that service have a title?</p> <p>2 A Yes. But I don't remember -- it was Write,</p> <p>3 something. To be honest, I don't remember.</p> <p>4 Q Did it have standard terms associated with it?</p> <p>5 A I assume so. I did not review those terms.</p> <p>6 Q Come back to the report in a bit. Set that</p> <p>7 aside for a moment.</p> <p>8 A Set the report aside?</p> <p>9 MR. McGOWAN: Yes. I'm going to mark as</p> <p>10 Exhibit 3 an article entitled, "The Protection of</p> <p>11 Databases."</p> <p>12 (Exhibit 3 was marked for identification.)</p> <p>13 BY MR. McGOWAN:</p> <p>14 Q Did you write this article?</p> <p>15 A Yes.</p> <p>16 Q The -- I want to direct your attention to</p> <p>17 Page 1157.</p> <p>18 A Yes.</p> <p>19 Q In Section 3, the first sentence says, "My</p> <p>20 quote, The Internet was built with information.</p> <p>21 Information on the Internet has value not because it is</p> <p>22 scarce. The model in which applied in traditional</p> <p>23 microeconomics to goods, including informational goods</p> <p>24 such as books, but because those who value it most are</p> <p>25 able to find it."</p>
<p style="text-align: right;">Page 38</p> <p>1 So I really honestly don't remember specific</p> <p>2 advice. I just remember being part of that, those</p> <p>3 meetings, and contributing what I could.</p> <p>4 Q During the time that you were at CCC, was</p> <p>5 there any offering by CCC targeted at general consumers</p> <p>6 as opposed to business or academic users?</p> <p>7 A Yes. They started a program. The name has</p> <p>8 since changed. I don't remember what it was called at</p> <p>9 the time. But basically, this was a service that</p> <p>10 allowed any user, including individual users -- you have</p> <p>11 to recall these were the days where people were setting</p> <p>12 up -- starting to set up so-called personal websites and</p> <p>13 wanting to put content on them.</p> <p>14 And there was a service at CCC that we had</p> <p>15 launched to allow people take contact from, for example,</p> <p>16 newspapers and so on to put on a personal website.</p> <p>17 There were rates specific to that use.</p> <p>18 And then the service was exported so that --</p> <p>19 what I mean by that is the -- there was an icon at the</p> <p>20 bottom of the -- of an article, say, in the New York</p> <p>21 Times page. You could click on that and then the window</p> <p>22 would open to process a transaction, a licensing</p> <p>23 transaction. Even though you never left the New York</p> <p>24 Times site, the actual processing of the data was done</p> <p>25 at CCC.</p>	<p style="text-align: right;">Page 40</p> <p>1 Do you see that that?</p> <p>2 A Yes.</p> <p>3 Q What did you mean by that?</p> <p>4 A Well, it's something that was repeated at the</p> <p>5 conference yesterday and which I mentioned in several</p> <p>6 other publications almost in the same terms. So this is</p> <p>7 something I obviously believe. It's that the best way</p> <p>8 to generate value for creators on the Internet for their</p> <p>9 content to be found, the challenge being for them to get</p> <p>10 paid.</p> <p>11 For example, I have written extensively that</p> <p>12 the solution to music file sharing is not to sue</p> <p>13 teenagers or take content down, but to license it, as I</p> <p>14 actually believe Google does with its AdSense program on</p> <p>15 YouTube.</p> <p>16 But I think that's the right way to go. It's</p> <p>17 to make content available, simply to find ways to have</p> <p>18 financial flows that adequately reward the people who</p> <p>19 created the content.</p> <p>20 Q So if I understand you correctly, you've</p> <p>21 described a two-step process. Step 1 is search, in</p> <p>22 which the consumer finds an object of content on the</p> <p>23 Internet?</p> <p>24 A I did not discover a two-step process. I</p> <p>25 discovered a process with two objectives. One is making</p>

<p style="text-align: right;">Page 41</p> <p>1 the content available, and second objective being to  2 make that happen in a way that rewards creators.  3 Q Okay. Do you have to search -- strike that.  4 Do you have to find the content before you  5 have any dealings with it on the Internet?  6 MR. SNYDER: Objection to form.  7 THE WITNESS: The true answer to that is,  8 frankly, it depends. So if you're -- if you're talking  9 about certain types of content, where searching it means  10 you've -- you've acquired enough of the content that you  11 don't need more, then both operations happen at the same  12 time. For other types of content, you would need to  13 search it and then make a decision.  14 So it really depends on which exact element of  15 content one is looking at.  16 BY MR. MCGOWAN:  17 Q When you say it depends, is it your testimony  18 that there are elements of content on the Internet that  19 do not need to be found before they can be consumed?  20 A Again, it depends on what "found" means.  21 Let's say you want the latest book by a certain author,  22 the latest song by a certain artist, and you have the  23 title. Have you not already found it? It is really  24 unnecessary at that point to download the song to say, I  25 found it, or to download the book?</p>	<p style="text-align: right;">Page 43</p> <p>1 it?  2 A Um-hum.  3 Q When you say, "able to find it," why do you  4 say "able"?  5 MR. SNYDER: I'd like to object and point out  6 this is a long article written several years ago. You  7 are focusing on a specific part. I assume Professor  8 Gervais can review it for context, if it -- if he would  9 like.  10 THE WITNESS: Well, actually, I was going to  11 say the paper is not about what is in the database, but  12 is about incentives to create databases in the first  13 place, and make the case that the European union  14 approach, which was to create a specific right in  15 databases, does not seem to have generated more  16 databases. There are various explanations as to why  17 that did or did not happen, which I explore in the  18 paper.  19 So I -- I stand by the sentence that you've  20 pointed out, that content -- online content business  21 models presuppose accessibility, but they only will work  22 if there is proper compensation of creators.  23 BY MR. MCGOWAN:  24 Q I see you followed your counsel's lead. My  25 question was, what do you mean by the word "able"?</p>
<p style="text-align: right;">Page 42</p> <p>1 I think the answer is probably no.  2 Q How do you get the title in the first place?  3 A It could be on -- it could be anywhere from  4 Facebook to a conversation at the local coffee shop to  5 you've heard it on the radio, to you've read the review  6 in the New York Times book section. Who knows.  7 Q To searching on the Internet?  8 A Possibly.  9 Q Have you undertaken any study to find out how  10 common it is to find, say, books on the Internet through  11 coffee shop conversations?  12 A No.  13 MR. SNYDER: Objection; form.  14 BY MR. MCGOWAN:  15 Q Have you taken any study to find out how  16 common it is to find books on the Internet through any  17 means?  18 A I have not seen those studies. I have not  19 performed them myself, no.  20 Q Are you an expert in search?  21 A No, I don't consider myself an expert in  22 search.  23 Q When you say that -- in this sentence on  24 Page 1157, that information has value not because it is  25 scarce, but because who value it most are able to find</p>	<p style="text-align: right;">Page 44</p> <p>1 MR. SNYDER: Objection to form.  2 THE WITNESS: How do I define the word able?  3 That they have the ability to.  4 BY MR. MCGOWAN:  5 Q And they need the ability because there's a  6 lot of content on the Internet?  7 A There is, indeed.  8 Q That could be difficult to find what you want?  9 A It can be.  10 Q At the end of this paragraph, you say, "Some  11 forms of restrictions sought by database owners almost  12 as knee jerk attachment to, quote/unquote, property, may  13 not, in the end, be their own interest."  14 Do you see that?  15 A Yes.  16 Q What forms of restriction are you referring  17 to?  18 A I think some types of databases. The paper  19 is -- makes some of these distinctions. Some types of  20 databases are, more naturally, going to work subject to  21 access restrictions, such as passwords and payments.  22 One example might be Westlaw Nex-Lexis, which seem to  23 work at that business models.  24 Other databases might work better if they work  25 on a different model. And what the sentence says is</p>

<p style="text-align: right;">Page 45</p> <p>1 that to consider any use of the database as, say</p> <p>2 trespass in the property context is incorrect, that this</p> <p>3 needs to be contextual. You look at the database, you</p> <p>4 look at the business models, and you should make the</p> <p>5 call based on that, not based on a knee jerk attachment</p> <p>6 to the fact that it is, quote/unquote, property.</p> <p>7 Q I would like you to take a look at Page 1165</p> <p>8 at the end in the conclusion.</p> <p>9 A Um-hum.</p> <p>10 Q At the end of the first paragraph there is a</p> <p>11 quotation from Professor Cornish.</p> <p>12 Do you see that?</p> <p>13 A Yes, I do.</p> <p>14 Q It says, "Industrial and commercial</p> <p>15 developments in competitive economies have always</p> <p>16 turned, in large measure, upon the borrowing of ideas.</p> <p>17 Intellectual property, including rights of unfair</p> <p>18 competition should be restricted to cases where the</p> <p>19 borrowing is unacceptably parasitic. It should not be</p> <p>20 allowed to become a blocking mechanism lurking in every</p> <p>21 crevice of endeavor."</p> <p>22 Do you see that?</p> <p>23 A Yes, I do.</p> <p>24 Q Did you seek Professor Cornish's permission to</p> <p>25 quote that?</p>	<p style="text-align: right;">Page 47</p> <p>1 Q De minimis use is one of those documents?</p> <p>2 A I haven't looked recently at the de minimis</p> <p>3 cases. I know there are cases about de minimis in</p> <p>4 copyright law, yes.</p> <p>5 Q Is it one of the doctrines that you're</p> <p>6 referring to in that context?</p> <p>7 A Well, the idea of a quotation of right is a</p> <p>8 very complicated one, which was your question about</p> <p>9 whether I sought permission.</p> <p>10 As I indicated at the beginning of my</p> <p>11 testimony, I consider myself reasonably versant in --</p> <p>12 conversant in international copyright. It just so</p> <p>13 happens that the quotation right, in other words, using</p> <p>14 a short quote in the context of creating a new work is a</p> <p>15 mandatory exception under international treaty. It's</p> <p>16 actually the only mandatory exception in the Berne</p> <p>17 Convention.</p> <p>18 And so it is my belief that taking a short</p> <p>19 quote in the context of preparing another work is</p> <p>20 acceptable. And because there's no specific quotation</p> <p>21 exception in the U.S. statute, we have to rely on</p> <p>22 doctrines such as de minimis, for example.</p> <p>23 Q And fair use?</p> <p>24 A And fair use.</p> <p>25 Q This is published in the Chicago law library;</p>
<p style="text-align: right;">Page 46</p> <p>1 A No, I did not.</p> <p>2 Q Did you pay him a royalty?</p> <p>3 A No, I did not.</p> <p>4 Q Do you agree with his comment?</p> <p>5 A I would not have said it exactly that way, but</p> <p>6 I thought he made an interesting point there, in the</p> <p>7 words, like "unacceptably parasitic" are the kind of</p> <p>8 words that we could write books about. But I like the</p> <p>9 way that he makes the point that this goes back to not</p> <p>10 just Isaac Newton, but before, that we all stand on the</p> <p>11 shoulders of the giants.</p> <p>12 That's not -- the point of my report in this</p> <p>13 case, is about whether there should be payment for some</p> <p>14 online uses and how that payment can be effective.</p> <p>15 Q You agree with the proposition that we all</p> <p>16 stand on the shoulders of giants?</p> <p>17 A Well, I think what I was saying is that</p> <p>18 Professor Cornish's point follows in the same line of</p> <p>19 thought, when he talks about the borrowing of ideas.</p> <p>20 Q Which is a creation invariably draws on</p> <p>21 previous ideas, previous creation?</p> <p>22 A Yes, and Copyright has numerous doctrines from</p> <p>23 derivative rights to idea expression dichotomy and so on</p> <p>24 that handles the proper limits of that borrowing,</p> <p>25 especially when it's done without compensation.</p>	<p style="text-align: right;">Page 48</p> <p>1 correct?</p> <p>2 A Yes.</p> <p>3 Q Published in the United States?</p> <p>4 A Yes.</p> <p>5 Q Not published internationally, as far as you</p> <p>6 know?</p> <p>7 A It is distributed internationally.</p> <p>8 Q Original publication in the United States?</p> <p>9 A Correct.</p> <p>10 Q Is your report in this case based on your</p> <p>11 understanding of international laws?</p> <p>12 A My report is really on collective management</p> <p>13 and based on, to the extent I talk about the U.S.</p> <p>14 statute, yes, obviously, it is based on my understanding</p> <p>15 of U.S. law. I did not specifically write the report</p> <p>16 with international considerations in mind.</p> <p>17 Q Did you bring to bear in your analysis your</p> <p>18 knowledge of international law?</p> <p>19 A Possibly indirectly. I did not intend that,</p> <p>20 but it is possible. It's part of what I know.</p> <p>21 MR. MCGOWAN: Let me ask to have it marked as</p> <p>22 Exhibit 3?</p> <p>23 THE REPORTER: 4.</p> <p>24 MR. MCGOWAN: 4, sorry.</p> <p>25 (Exhibit 4 was marked for identification.)</p>

<p style="text-align: right;">Page 49</p> <p>1 BY MR. McGOWAN:</p> <p>2 Q Exhibit 4 is a -- I'll represent to you is a</p> <p>3 printout of a web page from what appears to be the</p> <p>4 Vanderbilt News, and it has your photograph on it.</p> <p>5 A It does. An old one, too.</p> <p>6 Q And it says -- you must get them to update.</p> <p>7 A Yes, I do, indeed.</p> <p>8 Q "Internet anti-piracy legislation is flawed,</p> <p>9 says Vanderbilt professor."</p> <p>10 Do you see that?</p> <p>11 A Yes, I do.</p> <p>12 Q The last two paragraphs of this article depict</p> <p>13 quotations attributed to you.</p> <p>14 Do you see that?</p> <p>15 A Yes.</p> <p>16 Q Did you make these comments that are here in</p> <p>17 the last two paragraphs?</p> <p>18 A No. The piece was drafted based on the</p> <p>19 conversation I had on the phone with a media person at</p> <p>20 Vanderbilt, and they sent me this draft. And then I</p> <p>21 looked at it, and then they put it up on the website.</p> <p>22 Q Did you approve it?</p> <p>23 A It's, to a certain extent, media speak in the</p> <p>24 sense that I would probably not say things exactly this</p> <p>25 way. But I agree with the gist of what is there.</p>	<p style="text-align: right;">Page 51</p> <p>1 individual users. I would much rather see an</p> <p>2 environment in which use is licensed and not limited in</p> <p>3 ways that don't -- you know, that are unnecessary.</p> <p>4 Q Now, you refer to search engines here</p> <p>5 separately from end users.</p> <p>6 Do you see that?</p> <p>7 A Yes, I do.</p> <p>8 Q What unjustifiable targeting of search engines</p> <p>9 were you referring to when you made this comment?</p> <p>10 A Well, there were -- I don't recall exact</p> <p>11 language of the bill. I looked at it at the time. This</p> <p>12 was six months ago or so.</p> <p>13 There were burdens imposed on intermediaries</p> <p>14 such as search engines to take down content, but also</p> <p>15 possibly liability for simply linking to content that</p> <p>16 was then found to be illegal, or it could be read that</p> <p>17 way. And I thought that was actually a very difficult</p> <p>18 burden to meet for anyone to know whether what they're</p> <p>19 linking to is infringing or not.</p> <p>20 Q Why?</p> <p>21 A Because it is a very hard determination, in</p> <p>22 some cases, to decide what is infringing and what is</p> <p>23 not.</p> <p>24 Q What is would be wrong with imposing liability</p> <p>25 notwithstanding that difficulty?</p>
<p style="text-align: right;">Page 50</p> <p>1 Q Okay. This article pertains to SOPA?</p> <p>2 A Correct.</p> <p>3 Q What is SOPA?</p> <p>4 A It's a bill that was pending in Congress</p> <p>5 called Stop Online Piracy Act. And there was a Senate</p> <p>6 version in PIPA which is also mentioned in the exhibit.</p> <p>7 Q You say in the second sentence of the next to</p> <p>8 the last paragraph, "Unless substantially amended, it</p> <p>9 might reach a level of over enforcement by unjustifiably</p> <p>10 targeting search engines that reference other sites and</p> <p>11 also end users of those sites."</p> <p>12 Do you see that?</p> <p>13 A Yes.</p> <p>14 Q What did you mean by "unjustifiably targeting</p> <p>15 search engines"?</p> <p>16 A I had several issues with SOPA, still do. One</p> <p>17 reason is the one I already mentioned, which I don't</p> <p>18 think the way to get online business models to go is to</p> <p>19 take content down, but rather to monetize it.</p> <p>20 Second, is I think there were provisions in</p> <p>21 SOPA that were imposing burdensome requirements on</p> <p>22 whether search engines or other intermediaries that</p> <p>23 really seemed both unnecessary and normatively dubious</p> <p>24 in the sense that this is another step in what I call</p> <p>25 the over-enforcement of copyright against particular</p>	<p style="text-align: right;">Page 52</p> <p>1 MR. SNYDER: Objection to form.</p> <p>2 THE WITNESS: "Wrong" is a moral question.</p> <p>3 Can you -- do you mean it as a moral question or legal</p> <p>4 wrong or . . .</p> <p>5 BY MR. McGOWAN:</p> <p>6 Q Well, let me ask you in terms of the second</p> <p>7 sentence. "This could have a chilling effect and could</p> <p>8 damage the development of the very technology that is</p> <p>9 revolutionizing how consumers receive information in the</p> <p>10 arts."</p> <p>11 Do you see that?</p> <p>12 A Yes.</p> <p>13 Q "Wrong" in the sense of bad effects.</p> <p>14 A I -- I certainly think SOPA could have had</p> <p>15 chilling effects in the way that it was written. Again,</p> <p>16 I don't recall the exact language of the statutes, but</p> <p>17 it seemed overbroad, in particular, in dealing with -- I</p> <p>18 believe there were felony provisions dealing with even</p> <p>19 individual users. I really think that's excessive.</p> <p>20 So I basically did not like the legislation.</p> <p>21 I was -- I am not against efforts to enforce copyright.</p> <p>22 I just think this effort was excessive, and I think it</p> <p>23 was defeated for that reason.</p> <p>24 Q You refer to the very technology that is</p> <p>25 revolutionizing how consumers receive information in the</p>



<p style="text-align: right;">Page 53</p> <p>1 arts.</p> <p>2 Do you see that?</p> <p>3 A Yes.</p> <p>4 Q What is that technology?</p> <p>5 A Again, I didn't -- I'm not the author of the</p> <p>6 quote, although I agree with the gist of it. I think</p> <p>7 the technology is, in one word, online and that would</p> <p>8 include anything from computers to mobile devices to</p> <p>9 access to digital content, generally.</p> <p>10 Q Search?</p> <p>11 A Search would be part of it, yes.</p> <p>12 Q And although, as you have said, you didn't</p> <p>13 really draft this, you reviewed it and authorized its</p> <p>14 publications?</p> <p>15 A I agree with the gist of it. As I said --</p> <p>16 THE REPORTER: "Authorized its . . .?"</p> <p>17 MR. MCGOWAN: Authorized its publications.</p> <p>18 THE WITNESS: I answered that question, I</p> <p>19 believe, already.</p> <p>20 BY MR. MCGOWAN:</p> <p>21 Q And your answer is "yes"?</p> <p>22 A The answer is I agree with the gist of it. I</p> <p>23 made a point that the language seemed a little media</p> <p>24 speak to me, which is not the way I typically write,</p> <p>25 but . . .</p>	<p style="text-align: right;">Page 55</p> <p>1 Q And direct your attention to Page 982.</p> <p>2 A Yes.</p> <p>3 Q At the end of the first carry-over</p> <p>4 paragraph --</p> <p>5 A Um-hum.</p> <p>6 Q -- adjacent to Footnote 271, you state, "One</p> <p>7 major advantage of e-content is that it can be</p> <p>8 word-searched and previously unavailable archives are</p> <p>9 often searchable as well."</p> <p>10 A Yes.</p> <p>11 Q What did you mean by that?</p> <p>12 A Well, first of all, the paper was written 11</p> <p>13 years ago, one thing to bear in mind. But what I was</p> <p>14 trying to say at the time was that I thought -- I was</p> <p>15 trying to figure out what would change the title of the</p> <p>16 piece, is where the challenges are coming, to</p> <p>17 intellectual property and, in this case, copyright.</p> <p>18 And I was trying to explain that there is an</p> <p>19 advantage to having content available digitally because</p> <p>20 it can be word searched, whereas if you have the paper</p> <p>21 version, that is, obviously, harder to do.</p> <p>22 Q Why is it an advantage that it can be word</p> <p>23 searched?</p> <p>24 A There's types of content of which that is</p> <p>25 advantageous. I would think for many types of</p>
<p style="text-align: right;">Page 54</p> <p>1 Q I'm referring to the process of its</p> <p>2 publication. You received a draft; correct?</p> <p>3 A Yes.</p> <p>4 Q You reviewed it?</p> <p>5 A Yes.</p> <p>6 Q And you said it was okay for Vanderbilt to</p> <p>7 post?</p> <p>8 A Yes.</p> <p>9 MR. SNYDER: I think we've been going about an</p> <p>10 hour.</p> <p>11 MR. MCGOWAN: Yeah.</p> <p>12 MR. SNYDER: Let's take a couple of minutes.</p> <p>13 MR. MCGOWAN: Fine.</p> <p>14 VIDEOGRAPHER: Off the record at 11 a.m.</p> <p>15 (Recess taken.)</p> <p>16 VIDEOGRAPHER: On the record at 11:12.</p> <p>17 MR. MCGOWAN: Professor Gervais, I'm going to</p> <p>18 mark as Exhibit 5 one of your articles.</p> <p>19 (Exhibit 5 was marked for identification.)</p> <p>20 BY MR. MCGOWAN:</p> <p>21 Q An article published in the Fordham</p> <p>22 Intellectual Property Media and Entertainment Law</p> <p>23 Journal.</p> <p>24 Did you write this?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 56</p> <p>1 nonfiction content, in particular, that would be</p> <p>2 advantageous.</p> <p>3 Q What advantage would it provide?</p> <p>4 A It would allow a user to locate the parts of</p> <p>5 the work that are relevant for that user's purposes.</p> <p>6 Q On Page 983 --</p> <p>7 A Um-hum.</p> <p>8 Q -- the first full sentence after the call for</p> <p>9 Footnote 275, you say, "Sometimes only an abstract or a</p> <p>10 few seconds of the song or film trailer are available to</p> <p>11 illustrate the content, but fees are charge to download,</p> <p>12 view, and listen to the complete work.</p> <p>13 Do you see that?</p> <p>14 A Yes, I do.</p> <p>15 Q What are you referring to there?</p> <p>16 A Well, this was -- I hope makes clear about</p> <p>17 music and film that consumption model for music and film</p> <p>18 is sometimes that the user will access, in the case of a</p> <p>19 film, an actually authorized trailer which is</p> <p>20 essentially an ad for the film made available by the</p> <p>21 producer or the film studio. And for a song, there are</p> <p>22 services.</p> <p>23 At the time these were only very beginning.</p> <p>24 But now they're fairly common where the user will be</p> <p>25 able to listen to parts of the song. There are debates</p>

<p style="text-align: right;">Page 57</p> <p>1 as to whether that is a use that needs to be licensed or  2 not. And then the user obviously will access, who  3 wishes to access the full work, will then get a licensed  4 copy of the entire song or movie, either by download or  5 stream.  6 Q So the abstract for a few seconds is free and  7 then the full content is paid?  8 A In those cases, yes.  9 Q Is it your testimony that your discussion in  10 this article is limited to sound reportings and film?  11 A No. In that sentence, I think that is the  12 context.  13 Q Is there any reason that sentence does not  14 apply to text?  15 A Well, it -- it could be, yes, that there would  16 be differences between, for example, certain types of  17 nonfiction content, where once you have figured out a  18 few snippets of the book are sufficient, and you no  19 longer need to access the whole work. This would hardly  20 make sense for a song or film, unless the user is  21 obviously not interested in the content at all.  22 Q Unless they just wanted to hook to the song;  23 right?  24 A The hook is a technical word in music, so I'm  25 not sure what you mean.</p>	<p style="text-align: right;">Page 59</p> <p>1 longer needed to access the whole book.  2 Q Okay. So other than your personal practice,  3 which we will discuss, do you know any person who has  4 foregone the purchase of a book because they saw a  5 snippet?  6 A I can't recall anyone specifically.  7 Q You didn't talk to anyone who did so in  8 connection with this report; correct?  9 A In connection with this report, no.  10 Q Have you performed any studies to determine  11 whether this possibility you hypothesize is a reality?  12 MR. SNYDER: Objection.  13 THE WITNESS: Which possibility?  14 BY MR. McGOWAN:  15 Q The possibility that somebody would forego a  16 purchase because they saw a snippet?  17 A No, I did not study that empirically.  18 Q And you didn't actually say that anyone would  19 forego a purchase, did you? You just said they might  20 see what they wanted to see in a snippet; correct?  21 A I think I said they no longer need the whole  22 book. Whether they acquire the book, go to a library,  23 or other form of access, would be -- you know, depend on  24 many factors, availability, for example.  25 Q So the testimony that you just gave, you're</p>
<p style="text-align: right;">Page 58</p> <p>1 Q The hook meaning the characteristic portion of  2 the song.  3 A And that may or may not be the excerpt that is  4 made available. And again, that is a decision that is  5 typically made by whoever's making the song available  6 online, whether they make the first 30 seconds  7 available, the first five seconds, the hook. I do not  8 know if there is data as to what parts of songs are made  9 available in this form.  10 Q Now, we are going to talk about this in detail  11 later. But you just said it's possible that somebody  12 could look at a snippet of text and be satisfied with  13 it?  14 A Yes.  15 MR. SNYDER: Objection.  16 THE WITNESS: It is possible.  17 BY MR. McGOWAN:  18 Q How do you know that? Have you studied it?  19 A I have done it myself.  20 Q What text?  21 A I don't recall. In using both before and  22 after preparing this report, I have used a Google book  23 site, and very often was -- I got a snippet; sometimes  24 might be for a quote, but I would use for other purposes  25 to get information that was in the book. And I no</p>	<p style="text-align: right;">Page 60</p> <p>1 not actually saying that the snippet is a substitute for  2 a purchase; correct?  3 A I actually said it could be, yes.  4 Q Okay. You said it could be, and you haven't  5 studied it; correct?  6 A I'm referring to personal experience only.  7 Q Which book were you willing to purchase until  8 you saw a snippet?  9 A I purchase a lot of books for my research  10 because I like to write in the margins. And, therefore,  11 I have limited use of library books. Occasionally, I  12 have used snippets on Google. And because of technology  13 restrictions I will make a screen capture and then put  14 that in a PowerPoint slide. And then I have that page  15 print and write in the margin, so I have a copy of the  16 page. I've done that on a couple of occasions. I don't  17 recall the exact titles of of the book. But I did do  18 that on a few occasions.  19 Q Were you otherwise planning to purchase the  20 whole book for the one quote?  21 A It's actually not as easy to annotate,  22 obviously, a printed PowerPoint. But it was sufficient  23 that I did not need to spend to buy. These books are  24 very often nonfiction books that can be scholarly books  25 too. They are expensive sometimes. Some cases I</p>

<p style="text-align: right;">Page 61</p> <p>1 probably would have bought the book.</p> <p>2 Q Which cases?</p> <p>3 A I would have to go back in my research over</p> <p>4 the last couple of years. I may or may not have some of</p> <p>5 these PowerPoint files. Usually when I finish the</p> <p>6 paper, I don't necessary keep all of that, but I may</p> <p>7 have kept some of them. I don't know.</p> <p>8 Q You don't recall the books; correct?</p> <p>9 A That's right.</p> <p>10 Q You don't recall the snippet; correct?</p> <p>11 A No, but I do recall using the technique that I</p> <p>12 just described.</p> <p>13 Q When I say "snippet," the segment of text that</p> <p>14 you used, what did it say?</p> <p>15 A I don't remember.</p> <p>16 Q Did you review these files in connection with</p> <p>17 your report?</p> <p>18 A No.</p> <p>19 Q How many books would you say you would have</p> <p>20 purchased had it not been for these snippets?</p> <p>21 A I can't say. I would have to go back and</p> <p>22 check. I don't know.</p> <p>23 Q On Page 985 of your article carrying over to</p> <p>24 Page 986, you say, "To put it simply, for all content</p> <p>25 providers, digitization is inevitable and it is a</p>	<p style="text-align: right;">Page 63</p> <p>1 This is one year after the Napster injunction</p> <p>2 was issued. We are in the very early days of business</p> <p>3 models. So I was trying to make the point that -- and</p> <p>4 the metaphor in the following sentence you see that the</p> <p>5 Internet train is coming, it will not stop.</p> <p>6 I don't think it can be any clearer than that.</p> <p>7 Q Why won't it stop?</p> <p>8 A Because the Internet is a technology that is</p> <p>9 very difficult to stop, as record companies have --</p> <p>10 would probably be able to tell you more -- better than</p> <p>11 me. But my point is more of a normative nature. I</p> <p>12 don't believe it is desirable to make -- to take content</p> <p>13 off the Internet in most cases. I believe, however,</p> <p>14 that creators should be compensated for many online</p> <p>15 uses.</p> <p>16 Q It is not going to stop, in part, because it's</p> <p>17 useful to consumers?</p> <p>18 A It's not going to stop, first, as a matter of</p> <p>19 of technology. The Internet, as I understand the story,</p> <p>20 was designed with a grant from the Department of Defense</p> <p>21 of United States as a network that is inherently hard to</p> <p>22 control. And as I said, my point is more of a normative</p> <p>23 nature. I think it is a good, desirable thing to make</p> <p>24 content desirable -- to make content available online.</p> <p>25 I believe I say so in my report.</p>
<p style="text-align: right;">Page 62</p> <p>1 resource to be harnessed, not feared."</p> <p>2 Do you see that?</p> <p>3 A Yes.</p> <p>4 Q Why is it not to be feared?</p> <p>5 A Well, again, this paper was written 11 years</p> <p>6 ago. And the discussion at the time was very much about</p> <p>7 whether content should be available online. I've</p> <p>8 since -- actually, before this paper, I believe my first</p> <p>9 paper on the topic goes back to 1998. I've been saying</p> <p>10 that the proper way to use the Internet is to make the</p> <p>11 content available, not to restrict access to the</p> <p>12 content, although there would be various business models</p> <p>13 that accommodate different types of content.</p> <p>14 My point simply is that because I believe this</p> <p>15 is a major mode of access, that there should be a way to</p> <p>16 monetize this type of use for the content creators. And</p> <p>17 actually, I believe I used the word "inevitable" in my</p> <p>18 report itself.</p> <p>19 Q You do. Why did you use the word "fear" here?</p> <p>20 A Because it was very much a fear in the those</p> <p>21 days. The large publishers, the record companies, and</p> <p>22 others -- the film companies were all discussing how</p> <p>23 much content should be made available online and how.</p> <p>24 And the business models hadn't really started to emerge</p> <p>25 again 11 years ago.</p>	<p style="text-align: right;">Page 64</p> <p>1 MR. McGOWAN: Mark as Exhibit 6.</p> <p>2 (Exhibit 6 was marked for identification.)</p> <p>3 THE WITNESS: Well, there we go, 1998.</p> <p>4 BY MR. McGOWAN:</p> <p>5 Q A document entitled Advisory Committee on</p> <p>6 Management Copyright and Related Works -- and Related</p> <p>7 Rights in Global Information Networks.</p> <p>8 Your name is listed on the first page.</p> <p>9 A Um-hum.</p> <p>10 Q Do you recognize this document?</p> <p>11 A I do. It's actually the document that I was</p> <p>12 referring to earlier. It's my first paper on the topic.</p> <p>13 Q On Page 8 --</p> <p>14 A Um-hum.</p> <p>15 Q -- of this document, in the next to the last</p> <p>16 paragraph, you say, "For individual creators, this new</p> <p>17 technology means access to existing material creating,</p> <p>18 as it were, a realtime universal library of ideas and</p> <p>19 content."</p> <p>20 Do you see that?</p> <p>21 A Yes, I do.</p> <p>22 Q Why is that important for individual creators?</p> <p>23 A Well, I believe we touched on this earlier,</p> <p>24 the idea being that creators rarely create in a vacuum.</p> <p>25 They very often look at what's already available,</p>



<p style="text-align: right;">Page 65</p> <p>1 especially in the nonfiction world. People will want to  2 know what's already published or what information is  3 already available.  4 And this paper, which I consider reasonably  5 perceptive for something that was written in early 1998,  6 over 14 years ago, made the point that digital networks  7 should make it easier to get access to information.  8 Q Because it's useful to creators?  9 A It is useful to creators and others, yes.  10 Q You then say, "Digital networks allow access  11 not only to various manifestations of protected works,  12 but to information generally. And many users are, in  13 fact, submerged by this worldwide flow of information.  14 Without management, information is practically  15 inaccessible and cannot reach a proper audience."  16 Do you see that?  17 A Yes.  18 Q What do you mean by that?  19 A Well, this is an inqorate version of the  20 point I was making, that I have made subsequently about  21 the -- the need for information to be available out  22 there so that connections can be established between the  23 users and the content, users who value the content then  24 the content.  25 I was -- you see the germ of this idea here,</p>	<p style="text-align: right;">Page 67</p> <p>1 was pre-XML and other types of tools of that nature, so  2 that we were very much using word searches in the type  3 of search engines that are mentioned later in that  4 paragraph.  5 Q And what will, in this context, ECMS use  6 search engines to do?  7 A ECMS basically managed copyright by providing  8 metadata as to who is the author and owner of the work  9 and can also provide information on at least where to  10 get a license or, in some cases, even what the licensing  11 terms might be. It's a point made later in the paper  12 that what should happen on the Internet, which is the  13 same point I've been making for those 14 years, the  14 content should be available online; however, creators  15 should be compensated for uses when this is appropriate.  16 Q On Page 31, if I can ask you to turn there.  17 A Yes.  18 Q The second full paragraph beginning "ECMS."  19 A Um-hum.  20 Q Says, "ECMS should also be flexible enough to  21 allow users to access material in such a way that they  22 know what they are buying."  23 A Yes.  24 Q Why is it important for users to know what  25 they are buying?</p>
<p style="text-align: right;">Page 66</p> <p>1 if I can call it that, that obviously information being  2 made available online, there's then a challenge to  3 locate it. It's a challenge that is, in part, a matter  4 of search; in part, a matter of nowadays social networks  5 and other tools that people use to find information  6 online.  7 There are several ways that people can locate  8 information, but they need information tools of one form  9 or another.  10 Q At the top of Page 9, you say, "Finding the  11 material that one wants or needs is a challenge."  12 And then the last sentence in this paragraph  13 says, "To answer these" -- "The answer to those  14 questions really depends on the quality and intelligence  15 of search engines, hopefully ECMS providers will be able  16 to rely on advance search engines to help users locate  17 what they need.  18 Do you see that?  19 A Yes.  20 Q ECMS in this paper refers to what?  21 A It's a term that was used early in the days of  22 the Internet. It stands for Electronic Copyright  23 Management System. In those -- in more recent parlance,  24 I suppose, one might call it rights management system.  25 And in those days, essentially there -- this</p>	<p style="text-align: right;">Page 68</p> <p>1 A I'm not sure how to answer that question. I  2 assume that buyers want to know what they're buying.  3 Beyond that, the sentence, I think, speaks for itself.  4 Q It makes them more willing to engage in the  5 transaction?  6 A Well, you cannot want to turn to a transaction  7 to buy something you don't -- you don't know what it is,  8 but you don't necessarily need access to -- as I said  9 earlier, if you know the song you want by title, you  10 don't need the excerpt. It depends on the context and  11 the type of content we're talking about.  12 Q So you think for some types of content, people  13 will buy what they don't know about?  14 A No. They will know enough from, say, the  15 title. I will buy every novel by certain authors, for  16 example. I don't need to read an excerpt. I will just  17 download or buy the book, because it is a new book by a  18 certain author. So I don't need more.  19 Q And that's because you're familiar with the  20 author's work from previous exposure?  21 A Usually, yes.  22 Q And you'll extrapolate from your previous  23 exposure to your probable consumption experience on the  24 new book?  25 A Correct.</p>

<p style="text-align: right;">Page 69</p> <p>1 Q Is that what you mean when you say sometimes 2 people just need the title of a song?</p> <p>3 A That's part of what I mean. What I also mean 4 is I know my -- one of my teenage daughters will 5 download a song on iTunes if a particular friend 6 recommends it, she will not hesitate. She will just do 7 it because a friend recommended it and then she goes by 8 the song title.</p> <p>9 Q So word of mouth would be one way?</p> <p>10 A Word of mouth is another way.</p> <p>11 Q Which would be a way of gaining familiarity 12 through the recommendation of a trusted third party?</p> <p>13 A Yes. You could stretch that, I suppose, to 14 include that.</p> <p>15 Q You say, "For example, a viable commercial 16 model might allow users to browse part of the content 17 for free, a few pages of an article, 30 seconds of 18 music, a film trailer, et cetera, or the work at reduced 19 graphic resolution; e.g., for photographs, while full 20 viewing, reading, listening would require payment. 21 Do you see that?</p> <p>22 A Yes.</p> <p>23 Q Are you aware of such models being used on the 24 Internet?</p> <p>25 A Well, this paper was written, as I said, 14</p>	<p style="text-align: right;">Page 71</p> <p>1 Q Are you aware of any models in which some text 2 is made available, but there is no expectation by the 3 person displaying the test -- text that it will make a 4 future sale?</p> <p>5 A I -- yes. I can think of situations where a 6 work would be made available -- part of a work would be 7 made available to test the waters, see if there might or 8 might not be a reaction to that excerpt, and then maybe 9 the decision will be made not to make available the 10 whole work.</p> <p>11 Q Are you hypothesizing or speaking from factual 12 knowledge?</p> <p>13 A I can't recall a specific example, but I 14 think, with time, I could.</p> <p>15 I can, yes, recall one example of a play that 16 was controversial, and then the parts of the play were 17 made available. There was a public uproar. This was in 18 Canada, years ago. And then the play was never 19 released.</p> <p>20 Q When you say "made available," what do you 21 mean?</p> <p>22 A I think they were -- I can't recall if they 23 were selling or distributing the excerpt from the play 24 at the time.</p> <p>25 Q Are you -- so you don't know whether there was</p>
<p style="text-align: right;">Page 70</p> <p>1 years ago. I was trying to feel my way in the dark, 2 this being one of the first papers on the topic as to 3 what might emerge as possible business models. I 4 certainly did not, at the time, have in mind any of the 5 current practices online.</p> <p>6 Q You are aware now, however, that this model 7 is, in fact, employed?</p> <p>8 A Yes.</p> <p>9 Q It's employed in publishing?</p> <p>10 A It's employed in publishing and -- music 11 publishing and in film trailers, yes, at least.</p> <p>12 Q Have you ever seen anyone do the reverse, 13 which is offer only a few pages of text, but not offer 14 to sell or display an entire work?</p> <p>15 A Yes.</p> <p>16 Q What sources are those?</p> <p>17 A Well, I think it's very common for a publisher 18 to put an excerpt from a forthcoming novel, for example, 19 available without making the work available -- as a 20 temporal matter it is not available at the time when the 21 excerpt is made available.</p> <p>22 Q The author does that or the publisher does 23 that because they want to drive sales when the book is 24 released?</p> <p>25 A I don't know. It is possible.</p>	<p style="text-align: right;">Page 72</p> <p>1 any payment?</p> <p>2 A I don't know.</p> <p>3 Q Are you aware of any publisher that charges 4 for a chapter of a book, but does not sell the full 5 book?</p> <p>6 A Well, other than the temporal issue that I 7 mentioned earlier, I am not aware of a specific case, 8 no.</p> <p>9 Q You agree today that the model that you 10 describe here is a viable commercial model?</p> <p>11 A It certainly seems to have worked for music 12 and film to make parts available. Obviously, at the 13 time I had no idea that social networks would emerge the 14 way they have, which have changed the equation to a 15 certain degree. And I think for a book or an article, 16 it might make sense for a publisher, depending on 17 context, to make a few pages available, yes.</p> <p>18 Q You have read the expert report of Bruce 19 Harris; right?</p> <p>20 A Yes.</p> <p>21 Q And you've seen the examples he provides; 22 correct?</p> <p>23 A I recall scanning them, but I can't say I have 24 them fresh in mind right now.</p> <p>25 Q Do you have any factual basis for disagreeing</p>

<p style="text-align: right;">Page 73</p> <p>1 with the conclusions he reaches about these use of text 2 in his report? 3 MR. SNYDER: Objection to form. 4 THE WITNESS: No specific examples. 5 BY MR. MCGOWAN: 6 Q In this paragraph, you say at the end, "The 7 highest level of right, i.e., the right to commercially 8 reuse material, would require a higher level of 9 clearance." 10 Do you see that? 11 A Yes. 12 Q Is the concept that you are conveying in this 13 paragraph that for greater uses, greater payment may be 14 expected? 15 A No, the -- not necessarily. The idea is that 16 some type of transactions, when I say higher, means it 17 may be the payment, but it's certainly the transaction 18 itself will be typically more complicated when 19 commercial reuse is involved. The contract may very 20 well be negotiated, as opposed to being a form that is 21 used for mass uses. 22 So my view at the time, again, 14 years ago, 23 was that for these type of content reuses, it may not be 24 possible to automate the process. 25 Q Do ECMS providers usually use form agreements?</p>	<p style="text-align: right;">Page 75</p> <p>1 together by the Copyright offices as a part of the 2 Library of Congress of the United States and other 3 metadata providers. And so again metadata -- oh, it's 4 described on Page 25. I haven't looked at Marc in 15 5 years, so I need to refresh my memory here. 6 But I -- I believe the description on Page 25 7 is accurate. I have no reason to doubt that I got it 8 wrong at the time. 9 Q You have no reason to question what you wrote 10 at the time? I think you said you have no reason to 11 doubt that you got it wrong. 12 A I misspoke. 13 Q That's what I thought you meant. 14 What do you mean -- what do you mean by 15 "metadata"? 16 A Metadata in copyrite -- well, it depends on 17 the type of work, but it would typically be, at the very 18 least, name of the author, year of publication, the 19 title, the publisher, producer -- producer in the case 20 of music or film, for example. It might include the 21 country of first publication. It might include the 22 birth year of the author and the birth -- the year of 23 death, which is important to calculate copyright term. 24 Obviously, this is if the author is deceased. 25 So it's basically information about the work.</p>
<p style="text-align: right;">Page 74</p> <p>1 A I have not done an empirical study of how ECMS 2 provides use forms. I know some of them do use forms. 3 Q You mentioned earlier that you have sometimes 4 found text that you're interested in in a snippet and 5 made a screen shot of it. 6 Do you recall that? 7 A Um-hum. 8 Q In those cases, would you be able to make the 9 same use by photocopying a page? 10 A Probably. 11 Q Did you consider that as an option for putting 12 together your PowerPoint? 13 A I have done that. And I don't know if they 14 were in the same cases, but I have photocopied pages so 15 I could annotate when I don't have my own copy of the 16 book. Obviously, I don't write in library copies. 17 Q On Page 24 of your WIPO report. 18 A The same document you were referring to? 19 Q Yes. 20 A Yes. 21 Q You refer to U.S. Marc, M-a-r-c. 22 A Yes. 23 Q What is U.S. Marc? 24 A Oh, you're taking me back 15 years or so. 25 Marc was a database that, I believe, was put</p>	<p style="text-align: right;">Page 76</p> <p>1 Metadata is data about data. 2 Q Who creates them? 3 A Many people do. Publishers have metadata that 4 they generate. Author associations, collectives, 5 governmental organizations. A lot of people create 6 metadata. 7 Q You wrote this document while you were at the 8 Copyright Clearance Center; is that correct? 9 A I believe I -- yes. I -- I switched -- this 10 was written early in '98. It was for a meeting in late 11 '98, but I believe I wrote it fairly early in '98 for an 12 international meeting in Geneva on -- on, as the title 13 indicates, how rights would be managed and copyrighted 14 works identified in, what at the time we called, global 15 information networks. We could maybe simplify to online 16 environment. 17 Q Does this document state the position of the 18 CCC at the time? 19 A It does, right on the cover. 20 Q Let me ask you to return to your report, which 21 is Exhibit 2. 22 Do you know whether you listed your report in 23 the Elsevier case in this report here? 24 A I don't think I did. I -- I believe -- I 25 believe I had to list cases in which I had been examined</p>

<p style="text-align: right;">Page 77</p> <p>1 or deposited, and I haven't been in that case. So I did  2 not list it, no. Nor did I consider it in preparing the  3 report.  4 Q Sure. Did you read Rule 26?  5 A Not recently.  6 Q Did you read it in connection with this?  7 A No, I don't think I reread it in connection  8 with this.  9 Q Okay. What year was the Elsevier report?  10 A Three years ago. Three or four years ago.  11 Q Within four?  12 A I believe so. I would have to check.  13 Q In Paragraph 13 of your report, you say,  14 "Making books and other copyrighted works available  15 online" --  16 A Which paragraph.  17 Q 13?  18 A Paragraph or page?  19 Q Paragraph 13?  20 A Okay.  21 Q Page 4.  22 A Um-hum.  23 Q You say, "Making books and other copyrighted  24 works available online is desirable for both -- "both  25 for authors and readers."</p>	<p style="text-align: right;">Page 79</p> <p>1 Q Have you talked to any authors about the  2 distinction you just drew between fiction and nonfiction  3 books?  4 A Not for the purposes of preparing this report.  5 But that is a discussion I remember having a number of  6 times at conferences on panels with people who work for  7 trade associations and others representing authors and  8 publishers. And I've heard the distinction made between  9 fiction and nonfiction, made a number of times.  10 Q And have you talked -- so in these  11 discussions, those include publishers as well?  12 A Occasionally.  13 Q Do you remember any specific names of  14 publishers?  15 A Again, I did not speak to any publisher for  16 purposes of preparing the report, so nothing recent.  17 Q I'm just asking about the conversations you  18 just mentioned.  19 A I can recall one conversation only  20 specifically with a lawyer from Wiley. But I can't  21 recall his name.  22 Q Do you remember what he said, or she said?  23 A He was a he. Not specifically, no. But --  24 but it was about what you -- you know, making -- Wiley  25 is a publisher of the journal in which I am editor in</p>
<p style="text-align: right;">Page 78</p> <p>1 Why is it desirable for authors?  2 A Because it's a very interesting way to make  3 some forms of content and increasing all forms of  4 content available to users.  5 Q And in some forms here, you specifically  6 mention books?  7 A That's right.  8 Q When you say "interesting," what do you mean?  9 A Well, I would think that for authors, it is a  10 quick access to a potentially worldwide dissemination  11 network of their works. And so that would be an  12 interesting way to be published. And I understand that  13 there are, in fact, increasingly authors who  14 self-publish, using this technology, which I think is  15 another use that is desirable for authors.  16 Q Where did you gain that understanding?  17 A Press reports. But I can't recall one  18 specifically.  19 Q When you say "available," making books and  20 other material available online, what do you mean by  21 "available"?  22 A Well, in the case of a book, it depends,  23 again, on the type of book. If it's fiction, I would  24 presume that it's the entire book. If it's a nonfiction  25 book, it may or may not be the entire book.</p>	<p style="text-align: right;">Page 80</p> <p>1 chief. And we were discussing online, and we moved from  2 from the distinctions between articles and books. And I  3 don't recall the specifics of the discussion, but that's  4 the way the discussion generally went.  5 Q What distinctions between articles and books  6 did you discuss?  7 A That it is -- that the markets may be a little  8 different for both. He indicated that, but I don't,  9 again, recall -- this was at least two years ago -- that  10 books respond differently, I think is the word he used,  11 to online availability. But I -- I honestly cannot  12 recall specifically more than that.  13 Q Do you recall in these discussions any  14 particular conversation with an author? And what I'm  15 looking for is the name of any author.  16 A I was in the panel in Washington at the  17 American Bar Association, I believe, last February. And  18 there was a lawyer representing authors on the panel.  19 And I believe she made that distinction. But I do not  20 recall her name. But it should be easy to locate.  21 Q In Paragraph 10, you begin to summarize your  22 opinion.  23 A Yes.  24 Q You mentioned that you used Google books  25 yourself?</p>

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<p>1 A Yes.</p> <p>2 Q When did you first use it?</p> <p>3 A Don't recall. Well before I prepared this</p> <p>4 report, though.</p> <p>5 Q Have you used it regularly since you began</p> <p>6 using it?</p> <p>7 A I would say occasionally more than regularly.</p> <p>8 Q Once every two months, once every three</p> <p>9 months?</p> <p>10 A Something like that.</p> <p>11 Q Did you have -- have you used Google books in</p> <p>12 connection with your scholarly work?</p> <p>13 A Occasionally.</p> <p>14 Q As a way finding materials that you use in</p> <p>15 connection with your work?</p> <p>16 A Occasionally.</p> <p>17 Q In Paragraph 10 you say, "It is my</p> <p>18 understanding that Google has engaged in the digital</p> <p>19 copying of millions of books in libraries."</p> <p>20 A Um-hum.</p> <p>21 Q And you gain that understanding from?</p> <p>22 A From -- you're asking me from where?</p> <p>23 Q Um-hum.</p> <p>24 A This was from the material that I reviewed</p> <p>25 that was filed in the case. It was, I believe, a</p>	<p>1 Do you know how many publishers have joined</p> <p>2 the Partner Program?</p> <p>3 A No, I don't.</p> <p>4 Q Do you know that it is over 45,000?</p> <p>5 A I have no reason to doubt your number, but I</p> <p>6 don't know.</p> <p>7 Q Did you consider it important, in drafting</p> <p>8 your report, to know the extent to which publishers deal</p> <p>9 with Google already?</p> <p>10 A Well, the -- the gist of the report is that</p> <p>11 there is, in copyright, of an exclusive right in books,</p> <p>12 but my point is that it is not -- it shouldn't be used</p> <p>13 mostly to take content off the Internet; rather, to make</p> <p>14 it available in a way that is monetized.</p> <p>15 It is obviously up to a right holder, for</p> <p>16 example, to make a decision that they want the content</p> <p>17 available without payment. That is a possible use of</p> <p>18 copyright to make it available without payment.</p> <p>19 But I believe that for authors in particular,</p> <p>20 if this becomes a major form of distribution, they</p> <p>21 should have the option of monetizing these online uses.</p> <p>22 Q We'll talk about that in a moment. My</p> <p>23 question is did you consider, in drafting this report,</p> <p>24 it important to know how publishers deal with Google</p> <p>25 books?</p>
Page 82	Page 84
<p>1 declaration made by somebody from Google. His name</p> <p>2 escapes me now, though.</p> <p>3 Q Um-hum. Are are you also familiar that Google</p> <p>4 has, in Google books, some books that originate with</p> <p>5 publishers?</p> <p>6 A I have heard of something called the Partner</p> <p>7 Programs, if that's what you're referring to. I haven't</p> <p>8 looked into that specifically more than what is</p> <p>9 described in the material that is in Exhibit B.</p> <p>10 Q Do you have any understanding of the Partner</p> <p>11 Program?</p> <p>12 A I believe some books are made available</p> <p>13 voluntarily by publishers for access via Google books,</p> <p>14 but beyond that, no, I don't.</p> <p>15 Q Did you know you have a book in the Partner</p> <p>16 Program?</p> <p>17 A No, I didn't know I had a book in the Partner</p> <p>18 Program.</p> <p>19 Q You were the editor.</p> <p>20 A Okay.</p> <p>21 Q Do you know how much text is available to</p> <p>22 people who search books -- is made available to people</p> <p>23 who search books in the Partner Program?</p> <p>24 A No, I don't.</p> <p>25 Q You say -- strike that.</p>	<p>1 A I don't understand exactly what you mean, how</p> <p>2 publishers deal with Google books.</p> <p>3 Q For example, the amount of text that they make</p> <p>4 available to be browsed freely?</p> <p>5 A I would assume that's a decision they make</p> <p>6 case by case on the book, but I don't know specifically</p> <p>7 how each publisher arrives at that decision.</p> <p>8 Q Was it important to you, in talking about the</p> <p>9 contract behavior to understand the contracting behavior</p> <p>10 of publishers?</p> <p>11 A I'm not sure I understand the question.</p> <p>12 Q Do you understand what a contract is?</p> <p>13 A Yes, I do.</p> <p>14 Q Do you understand what contracting behavior</p> <p>15 is?</p> <p>16 A That's where I -- I'm trying to understand</p> <p>17 when you say -- whether publishers decide to use a</p> <p>18 certain service as a tool or not, doesn't mean that</p> <p>19 there cannot be a licensing market, especially on the</p> <p>20 author's side, for use of that content.</p> <p>21 So I'm trying to see, when you say contracting</p> <p>22 behavior, what exactly you're referring to.</p> <p>23 Q The terms on which publishers voluntarily join</p> <p>24 Google books, was that important to you in opining about</p> <p>25 contracting behavior in your report?</p>



<p style="text-align: right;">Page 85</p> <p>1 A Yes, to the extent that I reviewed the 2 proposed settlement and looked at what uses authors and 3 publishers were willing to license in that draft 4 settlement. 5 Q Did you review the draft settlement in 6 connection with your preparing your report? 7 A I had reviewed the draft settlements well 8 before a year ago or two when I wrote a paper on the 9 Google book settlement in international law. I did not 10 review the settlement after being engaged in this 11 report. 12 Q Does your report rely on the settlement? 13 A It doesn't rely on the settlement, but I have 14 knowledge of the settlement. 15 Q Does it rely, in part, on your understanding 16 of the settlement? 17 A It's something that's in my mind, so to that 18 extent, it's possible that I -- it's something that I -- 19 that, you know, I have relied on indirectly, but I have 20 not relied on it directly. 21 Q Okay. setting aside the settlement, was it 22 important in your opinion about contracting to 23 understand what, right now, publishers are doing in 24 their agreements with Google as they pertain to Google 25 books?</p>	<p style="text-align: right;">Page 87</p> <p>1 art? 2 A No. The opinion is not about infringement, 3 and so I did not specifically refer to distribution in 4 that specific context. It's really a word that could be 5 making available or other similar terminology. 6 Q Yet, the clause says, "distribution of digital 7 copies of these books to libraries." 8 Do you know how that process actually happens? 9 A Only what I've read in the materials that were 10 filed in the case that -- 11 Q And what -- 12 A -- I reviewed. 13 Q Sorry. What is your understanding? 14 A Of the copying or the distribution? 15 Q Of the manner in which libraries may obtain 16 copies? 17 A I understand that there is a -- that -- that 18 these digital copies are made available to libraries. I 19 believe there is a password or other form of 20 technological restriction in the way that the books are 21 made available. That is the essence of my understanding 22 of how that works. 23 Q Prior to Google books, were you aware of any 24 digitization projects in which full texts of books could 25 be searched?</p>
<p style="text-align: right;">Page 86</p> <p>1 A Well, I don't know what each publisher is 2 doing specifically with Google books at this time. It's 3 something that might be relevant if there was a 4 licensing system to be put in place. The report, the 5 opinion is as to whether there is a potential collective 6 licensing market here, to which I answer in the 7 affirmative. 8 I don't need to know the specifics of the 9 existing contracts with publishers to know what the 10 exist -- what the market exactly would be in such a 11 negotiation. Presumably, there would be a discussion of 12 what uses need -- need to be compensated and which, if 13 any, need not be compensated, or in which publishers 14 need not be paid. 15 That is a negotiation that is not -- that does 16 not change a conclusion that there is a collective 17 licensing market that could develop here. 18 Q You're not opining in this case on the terms 19 that would actually be reached through a collective 20 licensing market? 21 A The exact terms, no. 22 Q You use the word "distribution" in the second 23 line of Paragraph 10. 24 A Um-hum. 25 Q Do you intend to use that as a legal term of</p>	<p style="text-align: right;">Page 88</p> <p>1 A Well, there are, or have been, small scale 2 efforts to digitize books. I know some publishers have 3 digitized some older titles. And I believe some foreign 4 libraries have engaged in that conduct. But I can't -- 5 I don't know the specifics, in particular, whether those 6 uses were licensed or not. 7 Q They -- when you say smaller, they were less 8 comprehensive? 9 A That's correct. 10 Q In the second sentence of Paragraph 10, you 11 say, "I have been asked my opinion, A, whether 12 collective licensing markets will continue to develop 13 for the digital uses of books." 14 A Um-hum. 15 Q Do you see that? 16 A I do. 17 Q Markets. How many markets -- well, strike 18 that. 19 You say, "continue to develop." Is it your 20 testimony that there are presently collective licensing 21 markets for digital uses of books? 22 A Yes. 23 Q How many? 24 A Several. 25 Q Three, four?</p>

<p style="text-align: right;">Page 89</p> <p>1 A Depends how one counts. It's a matter of how 2 you categorize them. So it's very hard to answer the 3 question numerically. 4 Q How do you categorize them? 5 A In the report I don't categorize them. 6 Q Do you categorize them as a matter of your own 7 understanding? 8 A Not in -- in a way that could be numerically 9 identified as such. I think there are markets for 10 anything from electronic course backs to reuses of text 11 on -- on websites, to excerpts in -- online and other 12 publications, to use of text in online advertising. 13 There are some -- these could be identified as 14 separate markets or not. It's a matter of market 15 definition. My report does not opine on market 16 definition here, but there are clearly existing and, I 17 would think, future markets for digital uses of books. 18 Q And you are not an expert on market 19 definition; correct? 20 A That's correct. 21 Q So we're going to look at markets and say 22 there's more than one; we don't know the precise number. 23 Fair? 24 A Fair. 25 Q "Continue to develop for the digital uses of</p>	<p style="text-align: right;">Page 91</p> <p>1 A I don't know if they license every type of 2 text. I -- I haven't looked at their exact list of 3 titles. I think they license almost essentially -- 4 essentially nonfiction material. But it's not a company 5 that I know extremely well. I just know they exist and 6 generally what they do. 7 Q What is the source of your knowledge? 8 A I have certainly been on their website a few 9 times. I have, years ago, met somebody who worked 10 there, but this was at least seven or eight years ago. 11 So I don't recall the name the person. It was at a 12 conference somewhere. 13 Q Do you know to whom they license? 14 A No, I don't. 15 Q Do you know whether they license trade books? 16 A I don't. 17 Q What uses, as you use the term here, do you 18 understand Google to make of books as relevant to your 19 report? 20 A Well, they make a full copy of books. Then 21 they make available those books to libraries in a way 22 that includes, as I said earlier, some technological 23 restrictions. And then they make snippets available to 24 the general public. 25 Q Anything else?</p>
<p style="text-align: right;">Page 90</p> <p>1 books." 2 What uses are currently licensed in these one 3 to more markets? 4 A I would think there are major existing markets 5 in the reuse of excerpts of books in paper and 6 electronic course backs. I don't know the exact number, 7 for example, of CCC issued licenses in that area, but it 8 is very substantial. There is a licensing market for 9 corporate and other entities of this type -- corporate 10 users and entities of this type to put content on their 11 intranets or other similar networks. There are 12 licensing markets for reuses of parts of books in the 13 creation of other books. It can be anthologies or 14 things of that nature. 15 These markets exist. I do not have numbers to 16 the extent to which they generate revenue. But in the 17 case of CCC specifically, it is a significant part of 18 their income. There are other entities that do this. 19 icopyright.com would be an example. 20 Q icopyright.com? 21 A Yes. That would be another example of a 22 company that does specifically only digital licensing of 23 digital reuses of text, not just books, but text. 24 Q And what do they license -- they license any 25 kind of text?</p>	<p style="text-align: right;">Page 92</p> <p>1 A Those are the three that come to mind. 2 Q With respect to the licensing market you opine 3 on in your report, are these the only uses that will be 4 traded in that market? 5 A I -- I can't say they're the only uses. And I 6 can't say that all three would be. But these are 7 certainly three candidates that could be licensed, yes. 8 Q Does Google make available through the Google 9 books program the full text of any book, as you 10 understand it? 11 A I believe I read somewhere that it may do this 12 for public domain books, but I haven't seen that myself. 13 Q Fair clarification. In copyright books? 14 A Not to my knowledge. 15 Q Is full text display in copyright books 16 something that will be traded in the licensing market 17 you opine about in this report? 18 A That would be something to be negotiated 19 between the parties. 20 Q In Paragraph B you say, "Whether unrestricted 21 and widespread conduct of the type engaged in by Google 22 will harm the development of such markets." 23 Do you see that? 24 A I do. 25 Q What do you mean by "unrestricted"?</p>

<p style="text-align: right;">Page 93</p> <p>1 A Unlicensed.</p> <p>2 Q Unrestricted means unlicensed. What do you</p> <p>3 mean by "widespread"?</p> <p>4 A Well, obviously if we were talking about five</p> <p>5 books, making them available would not have the same</p> <p>6 impact as several dozens of millions of books. So</p> <p>7 widespread basically means which part of the potential</p> <p>8 licensing market, if we were to look at it as a</p> <p>9 horizontal plane, which part of that plane is captured</p> <p>10 by the making available by Google.</p> <p>11 If it's essentially all books, say, in the</p> <p>12 English language or all books published in the</p> <p>13 United States or some extremely important subset of all</p> <p>14 books, then obviously that greatly reduces the</p> <p>15 possibility that a licensing market would emerge</p> <p>16 successfully for the rest.</p> <p>17 Q For the rest of the books?</p> <p>18 A Correct.</p> <p>19 Q You say "obviously." Is this something you</p> <p>20 studied?</p> <p>21 A I have to answer yes to that. That is</p> <p>22 something I've been working on for quite awhile.</p> <p>23 Q Tell me what that work entails?</p> <p>24 A Well, it's my work inside of Copyright</p> <p>25 Collective, and my work at WIPO, and my work as law</p>	<p style="text-align: right;">Page 95</p> <p>1 Q You're not an economist; we've established</p> <p>2 that.</p> <p>3 A That's correct.</p> <p>4 Q Okay. When you say you need rights to</p> <p>5 license, if you don't have rights, then you can't</p> <p>6 license. That's your point?</p> <p>7 A My point is, as I begin Paragraph 11, I say,</p> <p>8 "If the uses are not fair uses, then there will be a</p> <p>9 licensing market. Conversely, if the uses are fair</p> <p>10 uses, then there is no or very small licensing market</p> <p>11 that would be possible.</p> <p>12 Q Because if it's a fair use, you don't need</p> <p>13 permission?</p> <p>14 A That's correct.</p> <p>15 MR. MCGOWAN: We need to change the tape, and</p> <p>16 it's 10 after 12:00, so if you guys want to grab lunch,</p> <p>17 that might be a fine time.</p> <p>18 THE WITNESS: Fine by me.</p> <p>19 VIDEOGRAPHER: This is the end of Disk 1. Off</p> <p>20 the record at 12:07.</p> <p>21 (Lunch recess taken.)</p> <p>22 VIDEOGRAPHER: This is Disk 2 of Daniel</p> <p>23 Gervais. On the record at 12:54.</p> <p>24 BY MR. MCGOWAN:</p> <p>25 Q Professor Gervais, let me direct your</p>
<p style="text-align: right;">Page 94</p> <p>1 professor in part dealing with collective management of</p> <p>2 rights. Collective management of rights has three</p> <p>3 parts. I have compared it in a book chapter that we may</p> <p>4 come to later in that book entitled Collective</p> <p>5 Management of Copyright Related Rights to a plumbing</p> <p>6 system where you need water to come in, water to be</p> <p>7 processed, and water to be pumped out.</p> <p>8 And the incoming part is composed essentially</p> <p>9 of rights. So if there is no right to license, there is</p> <p>10 very little to pump or process. So that would be the</p> <p>11 shortest answer I can give you.</p> <p>12 Q People license different uses, don't they?</p> <p>13 A Yes.</p> <p>14 Q So it's not the fact of copying that would</p> <p>15 preclude a license market for other uses, is it?</p> <p>16 A The fact of copying books?</p> <p>17 Q Sure.</p> <p>18 A Well, there might be a market in the copying</p> <p>19 of the books themselves, that if there is no right to</p> <p>20 prevent the copying or to license the copying, that</p> <p>21 prevents that market from emerging.</p> <p>22 Q All right. Have you studied that?</p> <p>23 A I would give the same answer earlier. You</p> <p>24 need rights to license, you need water to come to the</p> <p>25 mill.</p>	<p style="text-align: right;">Page 96</p> <p>1 attention once more to Paragraph 10 of your report.</p> <p>2 I want to make sure that I understand your use</p> <p>3 of the word "widespread" in Subpart B of Paragraph 10.</p> <p>4 If I understood your testimony before lunch correctly,</p> <p>5 widespread refers to the fractions of books that would</p> <p>6 be encompassed in a particular endeavor; is that</p> <p>7 correct?</p> <p>8 A Well, I don't know what you mean by</p> <p>9 "particular endeavor." I mean in my report I believe</p> <p>10 there is an existing and future market for digital uses</p> <p>11 of books. If those uses are determined not to be</p> <p>12 covered by copyright right, then -- or if a lot of the</p> <p>13 books are in -- are already in a program such as Google,</p> <p>14 then that leaves the space for others.</p> <p>15 Q So widespread refers to books, not users; is</p> <p>16 that correct?</p> <p>17 A Those two are linked. So you -- there would</p> <p>18 be, obviously, more uses if there's more content. So I</p> <p>19 would not associate the two.</p> <p>20 Q Okay. Is widespread referring to other people</p> <p>21 or companies who might undertake book search projects?</p> <p>22 A Well, it says engaged in by Google -- of the</p> <p>23 type engaged in by Google, so it could be done by</p> <p>24 others, yes. But at this point, I'm referring to</p> <p>25 Google.</p>



<p style="text-align: right;">Page 97</p> <p>1 MR. MCGOWAN: I'm going to have marked as  2 Exhibit 7 a document captioned, "Written Comments  3 Copyright Clearance Center."  4 (Exhibit 7 was marked for identification.)  5 BY MR. MCGOWAN:  6 Q Do you recognize this document, Professor  7 Gervais?  8 A Vaguely.  9 Q Your name appears on the last page?  10 A Yes. I -- I remember having something to do  11 with this document. I don't -- I think it was a team  12 effort in terms of drafting. And I think the decision  13 was that I would be the point person for follow-up, yes.  14 Q You participated in the drafting?  15 A I did.  16 Q You were the point person?  17 A Point person for follow-up.  18 Q On Page 5, in the first full paragraph, in the  19 middle of the paragraph this document discusses the  20 electronic course content service.  21 Do you see that?  22 A I'm sorry. Where are you exactly on the page?  23 Q In the second sentence following the colon.  24 A You're in the second paragraph? Yes.  25 Q The first full paragraph.</p>	<p style="text-align: right;">Page 99</p> <p>1 and rightsholder relations. I did not do much work on  2 the user side. I would not have been involved in  3 preparing or negotiating otherwise those contracts for  4 ECCS users, which would typically be, I assume,  5 higher -- higher education users.  6 Q At the end of this paragraph there is a  7 reference for service fees.  8 Do you see that?  9 A Yes.  10 Q And you mention those also in your report?  11 A Yes.  12 Q What is the service fee you're referring to in  13 your report?  14 A Well, collectives typically charge service  15 fees. CCC is no different. It charges a service fee.  16 I think on this program -- but this would be subject to  17 verification -- I think they charge a service fee both  18 to the user and rightsholders authors and publishers,  19 but I'm not sure.  20 Q You didn't look that up in connection with  21 your report?  22 A My report is not about ECCS specifically so,  23 no.  24 Q Would it encompass the type of use you discuss  25 in your report?</p>
<p style="text-align: right;">Page 98</p> <p>1 A Yeah, the first full paragraph.  2 Q So following, colon, ECCS includes standard --  3 A Yes.  4 Q -- limitations --  5 A Correct. I see that.  6 Q -- on the amount of material that may be used?  7 A Um-hum.  8 Q What were those limitations at the time this  9 document was written?  10 A I don't recall.  11 Q Do you know currently whether the ECCS program  12 at the Copyright Clearance Center has standard  13 limitations?  14 A It certainly has its limitations. I don't  15 know how standard they are or if they differentiate by  16 each, you know, title or type of material.  17 Q Did they differentiate by title and type of  18 material at the time you prepared --  19 A I don't recall. This is just too long ago.  20 Q Were the terms -- strike that.  21 Were the forms employed in licensing in the  22 ECSS program standard forms?  23 A You mean ECCS?  24 Q Yes.  25 A Would the forms -- my job at CCC was foreign</p>	<p style="text-align: right;">Page 100</p> <p>1 A Electronic course backs are one of the types  2 of uses of online -- online uses of books that is  3 mentioned in Paragraph 10, yes. Whether or not there's  4 a fee charged on one end or both really doesn't change  5 the substance of my conclusions in any way.  6 Q Do you know in the hypothetical world in which  7 there would be a license emerge from the type of  8 bargaining you describe in your report whether it would  9 have a service charge?  10 MR. SNYDER: Objection to form.  11 THE WITNESS: Well, collective has expenses,  12 so somebody would have to pay for those services,  13 whether it's done through a service fee or otherwise.  14 It would be something to be negotiated.  15 BY MR. MCGOWAN:  16 Q On Page 6 of this document, at the end of the  17 full paragraph on the page, the document said -- says,  18 "It is also important to note that because CCC acts as  19 an intermediary as the trading floor of the market, as  20 it were, the ECCS program also does not take a position  21 on issues of fair use, as is true of ECCS's other  22 licensing programs as well. Instead, like ECCS's other  23 programs, ECCS serves to license that which is not fair  24 use.  25 Do you see that?</p>

<p style="text-align: right;">Page 101</p> <p>1 A I do.</p> <p>2 Q Is that CCC's policy at the time you were</p> <p>3 there?</p> <p>4 A That's my understanding, yes.</p> <p>5 Q Is that its current policy, as far as you</p> <p>6 know?</p> <p>7 A I believe so. But I can't speak for them,</p> <p>8 obviously.</p> <p>9 Q Why doesn't CCC try to license fair uses?</p> <p>10 A The view at the time -- and I don't know that</p> <p>11 it has changed -- is that users take a license for</p> <p>12 certain uses, and it may be that some of them, if a</p> <p>13 case-by-case determination was made, would be a fair</p> <p>14 use. I think it's fair to describe the CCC system as an</p> <p>15 honor system.</p> <p>16 And basically users take licenses in a way of</p> <p>17 agreeing to disagreeing on fair use or -- or not having</p> <p>18 a case-by-case determination made. But their licenses</p> <p>19 cover uses that would not be fair uses. You don't need</p> <p>20 a license for a fair use.</p> <p>21 Q Let me go back to Paragraph 10, where you</p> <p>22 describe --</p> <p>23 A 10.</p> <p>24 Q Of your report, sorry. Exhibit 2.</p> <p>25 In the first sentence you say that you</p>	<p style="text-align: right;">Page 103</p> <p>1 I want to focus on "one or more" in that</p> <p>2 phrase.</p> <p>3 A Okay.</p> <p>4 Q Which would it be?</p> <p>5 A I don't know. It could very well be Copyright</p> <p>6 Clearance Center, but it could be an organization that</p> <p>7 performs the same type of function. I understand that</p> <p>8 in the proposed settlement there was a registry that was</p> <p>9 to be set up to do this function. My report says that</p> <p>10 this is a function that can be performed by a CMO, which</p> <p>11 stands for Collective Management Organization, and it</p> <p>12 really is not necessary to identify which one.</p> <p>13 A -- a CMO needs a data database. It needs</p> <p>14 expertise. It needs resources. Currently, CCC has all</p> <p>15 three. But it doesn't mean that CCC would be the</p> <p>16 organization to perform this function necessarily.</p> <p>17 Q You have written in your works about barriers</p> <p>18 to entering collective management organizations?</p> <p>19 A I have.</p> <p>20 Q We still go over each other, but . . .</p> <p>21 A I'm sorry.</p> <p>22 Q Um-hum. You have written in your works about</p> <p>23 barriers entry in collective management; correct?</p> <p>24 A That's correct. They are essentially the ones</p> <p>25 that I just described.</p>
<p style="text-align: right;">Page 102</p> <p>1 understand Google has engaged in the copying of millions</p> <p>2 of books and display of snippets. Do you also</p> <p>3 understand that Google has facilitated search of those</p> <p>4 texts?</p> <p>5 A I -- I -- I understand it when books are in</p> <p>6 the Google Books -- by Google Books, I refer to the</p> <p>7 snippet part, right, of -- of what Google does. So I'm</p> <p>8 not talking about -- about the whole books. But when</p> <p>9 there's a snippet function, that's how you find a</p> <p>10 snippet by searching.</p> <p>11 Q Do you understand that Google indexes books to</p> <p>12 facilitate, sir?</p> <p>13 A I don't know how it does its indexing.</p> <p>14 Q Do you know that it does indexing?</p> <p>15 A I know it uses a certain technology to make</p> <p>16 the works searchable, but I do not know what that</p> <p>17 technology is.</p> <p>18 Q Is there any reason you didn't mention the</p> <p>19 fact that Google uses technology to make the works</p> <p>20 searchable in your report?</p> <p>21 A There was no -- no reason to mention it.</p> <p>22 Q In Paragraph 11 of your report you say, "I</p> <p>23 believe that if Google's uses are determined not to be</p> <p>24 fair uses, the market would intervene and one or more</p> <p>25 CMOs would license Google."</p>	<p style="text-align: right;">Page 104</p> <p>1 Q Can you name another collective management</p> <p>2 organization that has the three capabilities you just</p> <p>3 testified to, other than the CCC at the moment?</p> <p>4 A Do you mean for books or any other types of</p> <p>5 content?</p> <p>6 Q For books in the United States.</p> <p>7 A It is possible that icopyright.com does. I</p> <p>8 don't know them enough. But based on my superficial</p> <p>9 knowledge of their operations, it looks like they may</p> <p>10 have these resources. I just don't know that for a</p> <p>11 fact.</p> <p>12 Q Did you contact anyone --</p> <p>13 A No.</p> <p>14 Q -- at --</p> <p>15 A Sorry.</p> <p>16 Q Are you confident that if the court were to</p> <p>17 rule as you suggest in Paragraph 11, that the CCC itself</p> <p>18 could be the collective management organization you</p> <p>19 refer to in this paragraph?</p> <p>20 A If your question is could they do this, the</p> <p>21 answer is yes.</p> <p>22 Q Are you confident that anyone else in the</p> <p>23 United States could?</p> <p>24 A I don't know for a fact that icopyright.com</p> <p>25 could.</p>

<p style="text-align: right;">Page 105</p> <p>1 Q And you don't know of any others?</p> <p>2 A Well, it's -- it could. Obviously it's</p> <p>3 something that needs to be defined. So a CMO that's</p> <p>4 operating in a different field already has the expertise</p> <p>5 and structure in terms of a database and so on. What it</p> <p>6 doesn't have is probably the data, and it may need some</p> <p>7 additional expertise that is specific to books.</p> <p>8 But it is not inconceivable that an</p> <p>9 organization that is managing music rights, for example,</p> <p>10 would be able to do so this.</p> <p>11 Q I am interested in knowing -- so</p> <p>12 hypothetically -- if the court rules as you suggest in</p> <p>13 Paragraph 11 on Friday. On Monday --</p> <p>14 A Yeah.</p> <p>15 Q -- can you give me the names of the</p> <p>16 organizations that have the capability to serve the CMO</p> <p>17 function you describe in Paragraph 11 in the</p> <p>18 United States for books?</p> <p>19 A I think CCC could turn around very quickly and</p> <p>20 make this available. It is possible that an</p> <p>21 organization like icopyright.com can do so as well.</p> <p>22 Q But you don't know?</p> <p>23 A In the latter case, I'm not sure.</p> <p>24 Q Why do you need a collective management</p> <p>25 organization for authors to contract with Google?</p>	<p style="text-align: right;">Page 107</p> <p>1 Q Have you attempted to measure the relative</p> <p>2 difficulty of finding the Copyright Clearance Center in</p> <p>3 Danvers, Massachusetts and finding Google?</p> <p>4 A I can speak from experience here that we</p> <p>5 received payments at CCC when I was there for authors;</p> <p>6 in other words, authors that were not signed up. So in</p> <p>7 those cases CCC will contact these authors and in almost</p> <p>8 every case, an agreement will be signed. So it's CCC's</p> <p>9 job at that point to locate the rightholder in question.</p> <p>10 So that is very typical of not just books, but</p> <p>11 in music as well. If there's a song that is broadcast</p> <p>12 and ASCAP or BMI don't have that songwriter because it's</p> <p>13 a self-published song, for example, they will locate the</p> <p>14 person and try to get them to join.</p> <p>15 So it is fairly easy for authors at that</p> <p>16 point. All they have to do is respond to the request</p> <p>17 that they receive. And CCC has an extensive database of</p> <p>18 authors and publishers.</p> <p>19 Q So I'd ask you to listen to my question.</p> <p>20 Have you attempted to measure the relative</p> <p>21 difficulty of an author finding the CCC as compared to</p> <p>22 an author finding Google?</p> <p>23 A I have not measured the difficulty.</p> <p>24 Q Have you undertaken any analysis of that</p> <p>25 question whatsoever?</p>
<p style="text-align: right;">Page 106</p> <p>1 A Collective management organizations are useful</p> <p>2 when you have a plurality of a rightsholders on one side</p> <p>3 trying to negotiate a license for the use of their</p> <p>4 content with one or more users. It's not essential to</p> <p>5 have a collective management organization, but it is a</p> <p>6 way to make the process more efficient to reduce</p> <p>7 transaction costs.</p> <p>8 It is unrealistic, in my experience, to expect</p> <p>9 individual rightsholders to do this one by one. It is</p> <p>10 much easier in terms of processing usage data as well to</p> <p>11 have a collective management organization to process</p> <p>12 that organization and pay rightsholders accordingly.</p> <p>13 Q So let's break this down.</p> <p>14 An individual rightsholder would need to</p> <p>15 contact CCC in order to derive the contract you describe</p> <p>16 in Paragraph 11; correct?</p> <p>17 A It may or may not already be something that</p> <p>18 CCC can license under its current agreements with</p> <p>19 rightsholders. That I would have to look at their</p> <p>20 latest rightsholders' agreements. I don't know if they</p> <p>21 need additional rights.</p> <p>22 Q Let us assume an author who is not currently</p> <p>23 in a contract with the CCC, they need to find and</p> <p>24 contact the CCC to convey rights; correct?</p> <p>25 A In the optimum system, yes.</p>	<p style="text-align: right;">Page 108</p> <p>1 A Yes. I -- in determining that there was a</p> <p>2 reasonable market for a collective management system to</p> <p>3 operate in this area, I took into account that authors</p> <p>4 would have to be contacted or would have to opt-in in</p> <p>5 some way, shape, or form. I took into account that the</p> <p>6 fact that the Authors Guild already has a database, that</p> <p>7 CCC already has the database, and foreign RROs that have</p> <p>8 contracts -- contracts with CCC or, in some cases, with</p> <p>9 U.S. author organizations have a data, it would not be</p> <p>10 tremendously complicated to get a lot of authors into</p> <p>11 the system who are not in currently to participate.</p> <p>12 Q Now, my question was comparative. Do you</p> <p>13 recall that?</p> <p>14 A And I answered that I did not measure</p> <p>15 comparatively whether typing google.com or copyright.com</p> <p>16 is more or less complicated.</p> <p>17 Q Did you do any comparative analysis of that</p> <p>18 question whatsoever?</p> <p>19 A I think by "comparative" you're trying to ask</p> <p>20 me to quantify something. I'm giving you a sense that</p> <p>21 authors could join a system, whether it's</p> <p>22 icopyright.com, which is a CCC's website, or when they</p> <p>23 are contacted by some other organizations. And that</p> <p>24 system would be workable.</p> <p>25 Q By the phrase "whatsoever," I mean to indicate</p>

<p style="text-align: right;">Page 109</p> <p>1 either qualitative or quantitative, but let's break them  2 down. You performed no comparative quantitative  3 analysis; correct?  4 A No, I gave a -- my previous answer was a  5 qualitative answer.  6 Q And you prepared no quantitative analysis of  7 the relative difficulty of contacting the CCC as  8 compared to Google; correct?  9 A Quantitative, no.  10 Q Qualitatively, what steps did you take to  11 ascertain how difficult it would be for an author to  12 contact Google?  13 A I -- as ascertained whether it would be a  14 significant step for authors to contact a CMO that would  15 be asked to operate in this field, and I determined that  16 it would not be an insurmountable problem -- far from  17 it -- based on experience.  18 Q My question was drawn to Google. Did you  19 understand that?  20 MR. SNYDER: Objection to form.  21 THE WITNESS: I -- I have not -- as I said,  22 measured or tried to determine qualitatively how  23 difficult it is for an author to contact Google.  24 Q So you don't know?  25 A It is not irrelevant to the conclusion in my</p>	<p style="text-align: right;">Page 111</p> <p>1 system would need to contact authors, and the more they  2 have in their database or already signed up as  3 participating rightsholders would be material, yes.  4 Q Then why didn't you ask them?  5 A Because I know that the collective licensing  6 market in this area is viable and I know that authors  7 can be contacted, from experience there. When the  8 author relations people were trying to contact authors  9 they were almost always able to find them.  10 Q Did you personally attempt to contact authors  11 as part of your responsibilities at the CCC?  12 A Occasionally.  13 Q How many times?  14 A I don't recall exactly.  15 Q The people you are referring to, did you ever  16 ask them how many times they had failed to contact an  17 author?  18 A All I remember is we had meetings where we  19 were discussing the number of authors we could not find  20 and how we could find authors that were hard to locate.  21 And it was a very small number. But I do not remember  22 in percentage or other terms, what the number was.  23 Q So you don't know how many authors are in the  24 CCC's database; correct?  25 A Exactly, no.</p>
<p style="text-align: right;">Page 110</p> <p>1 report, which is that there is a collective licensing  2 market here, and authors can participate fairly easily.  3 Q Have you any opinion in this case about  4 whether a collective solution through the CCC is the  5 most efficient means for authors to contract?  6 A It is an efficient means, I cannot say. I  7 wonder who can, what is the most way in the abstract.  8 Q It could be second best; correct?  9 A It's conceivable.  10 Q Now, how many people, individual authors, are  11 in the CCC's author database?  12 A At this point, I do not know.  13 Q Did you ever know?  14 A The exact number, no. But we are certainly  15 talking about millions of books. So you can extrapolate  16 from that the number of authors.  17 Q What calculation would you use to perform the  18 extrapolation?  19 A They could provide the number of authors.  20 They would know. The database people there can give you  21 a number fairly quickly. That was not what I was in  22 charge of.  23 Q Is it relevant to your report that you agree  24 to which the CCC can contract with authors?  25 A Yes. A CMO who would operate this kind of</p>	<p style="text-align: right;">Page 112</p> <p>1 Q You don't know what fraction of total authors  2 that unknown number represents; correct?  3 A Total number of book authors?  4 Q Yes.  5 A I personally do not know that number, no.  6 Q And you didn't ask?  7 A Correct.  8 Q With respect to the Authors Guild, you  9 mentioned the Authors Guild has a list of authors?  10 A I did.  11 Q What was the significance of that fact to your  12 report?  13 A Well, it's one more tool that can be used  14 to -- if resources are pooled, to contact authors.  15 There are several others that could be used in addition  16 to existing databases. You can use the copyright office  17 as another example. You can -- obviously, if there is  18 great publicity around a case like this, this generates  19 interest. Publishers can contact their authors.  20 There are several ways that authors can be  21 contacted to participate in this kind of system.  22 Q Have you ever studied the success rate of any  23 of those mechanisms in contacting authors?  24 A Well, I don't know what you mean by "studied."  25 But as I've answered before, I -- it was my experience</p>

<p style="text-align: right;">Page 113</p> <p>1 at CCC that we were successful in a very large number of</p> <p>2 cases in contacting authors with relatively little work.</p> <p>3 There are databases of authors that exist. There are</p> <p>4 trade associations that exist. And I know collectives</p> <p>5 who have used other systems like posting names of</p> <p>6 authors on the website to whom payments are owed</p> <p>7 et cetera. And the success rate tends to be fairly</p> <p>8 high.</p> <p>9 Q Do you know the success rate of the Copyright</p> <p>10 Clearance Center as opposed to the number of times</p> <p>11 somebody told you they found someone?</p> <p>12 A There were numbers at the time when I worked</p> <p>13 there 13 years ago. I do not recall those numbers now.</p> <p>14 Q You don't know them at the present day, do</p> <p>15 you?</p> <p>16 A At the present day, I don't.</p> <p>17 Q You just referred to success rate on websites.</p> <p>18 What website are you referring to that posts a</p> <p>19 percentage of success in its efforts to contact authors?</p> <p>20 A Well, either I misspoke or you misunderstood.</p> <p>21 What I said is there are CMOs that post names of authors</p> <p>22 to which -- to whom, rather -- money is payable, not</p> <p>23 CCC, to my knowledge, but I know that some of the audio</p> <p>24 visual guilds have done this with a certain degree of</p> <p>25 success.</p>	<p style="text-align: right;">Page 115</p> <p>1 A Necessary --</p> <p>2 MR. SNYDER: Objection to form.</p> <p>3 THE WITNESS: -- is -- necessary is -- again,</p> <p>4 we can discuss that term. It would be an efficient way</p> <p>5 to do this. I can't think of a more efficient way of</p> <p>6 doing this at this point.</p> <p>7 Q But not necessary?</p> <p>8 A It's -- necessary in the strict sense, no.</p> <p>9 Q For example, can you think of anything</p> <p>10 prohibiting an author from contacting Google today if</p> <p>11 they want to?</p> <p>12 A Prohibiting? No.</p> <p>13 Q In Paragraph 11 -- strike that.</p> <p>14 So let's suppose an author contacts the CCC,</p> <p>15 in your hypothetical world. What benefit does that give</p> <p>16 the author relative to contacting Google directly?</p> <p>17 A I think I can think of number of -- first of</p> <p>18 all, it reduces that author's need to spend time on both</p> <p>19 getting paid and getting -- knowing for when -- what one</p> <p>20 is getting paid. It allows that author possibly to</p> <p>21 participate in other licensing programs that the CMO</p> <p>22 has. It might actually provide the author advice that</p> <p>23 may not be available from Google. I don't know what</p> <p>24 advice Google gives authors who contact Google.</p> <p>25 A very good example of this is, in the</p>
<p style="text-align: right;">Page 114</p> <p>1 I do not know the exact degree of success.</p> <p>2 What I'm trying to convey is that there are several</p> <p>3 tools to locate authors, and that by combining those</p> <p>4 tools, people who run CMOs and know what they're doing</p> <p>5 are able to locate authors in a very high percentage of</p> <p>6 cases.</p> <p>7 Q What fraction?</p> <p>8 A I do not know the exact number.</p> <p>9 Q Did you read the expert report of Glorianna</p> <p>10 St. Clair?</p> <p>11 A St. Clair. I'm not sure I -- I recall the</p> <p>12 report.</p> <p>13 Q Are you aware that there are studies that show</p> <p>14 the Authors Guild is successful .5 of the time it seeks</p> <p>15 out authors?</p> <p>16 A Well, the Authors Guild is, at this point, not</p> <p>17 something I would consider a CMO. It's part of the</p> <p>18 constellation of tools and databases that could be used.</p> <p>19 I am not familiar with the contents of their database or</p> <p>20 with their success rate. It is just one more tool that</p> <p>21 would be available.</p> <p>22 Q Do you have any reason -- strike that.</p> <p>23 So you're not actually saying, are you, that a</p> <p>24 CMO would be necessary for authors to strike agreements</p> <p>25 with Google; correct?</p>	<p style="text-align: right;">Page 116</p> <p>1 performing rights world, there are two major performing</p> <p>2 rights organizations, ASCAP and BMI. Both have</p> <p>3 nonexclusive agreements with their song writers, yet</p> <p>4 there are relatively few songwriters who decide to</p> <p>5 license outside of those channels.</p> <p>6 That I take as an indication that there must</p> <p>7 be some value to them in doing it by those</p> <p>8 organizations. And this has been the situation for</p> <p>9 decades, since the consent decrease. I would take that</p> <p>10 as an indication that authors may see an interest in</p> <p>11 dealing with a CMO.</p> <p>12 Q Now, in the ASCAP case, one of the things</p> <p>13 ASCAP does is go around to bars and skating rinks and</p> <p>14 restaurants and try to sign them up to pay royalties for</p> <p>15 public performances of sound performances; correct?</p> <p>16 A That's my understanding of some of what they</p> <p>17 do, yes.</p> <p>18 Q Is that your testimony about this hypothetical</p> <p>19 bargaining world you were discussing here, is that CCC</p> <p>20 is going to go out to each end user individually?</p> <p>21 A My testimony is it might be in the author's</p> <p>22 interest to be part of a collective system that will</p> <p>23 negotiate on behalf of authors with a user, whether it's</p> <p>24 Google or somebody else.</p> <p>25 Q Well, if it were only Google, it wouldn't be</p>



<p style="text-align: right;">Page 117</p> <p>1 like the ASCAP going out to bars and skating rinks and 2 restaurants, would it?</p> <p>3 A That's one of the differences between the two, 4 that ASCAP does some licensing that would be certainly 5 impracticable for an individual songwriter.</p> <p>6 Q At the end of Paragraph 11, you say, "The 7 rights involved are also essentially the same."</p> <p>8 Do you see that?</p> <p>9 A Yes.</p> <p>10 Q What do you mean by "essentially"?</p> <p>11 A Well, it's essentially the right of 12 reproduction that comes to mind first. CCC licenses the 13 reproduction of parts of books and articles, and that is 14 a large part where the Google Books system does as well. 15 So that's -- that's what I mean by the rights are 16 essentially the same.</p> <p>17 Q And the reproduction; right?</p> <p>18 A Well, that's certainly the first one that 19 comes to mind, yes.</p> <p>20 Q So you're are not talking about uses; you're 21 talking about the legal Section 106?</p> <p>22 A I'm talking about 106, that's correct.</p> <p>23 Q In Paragraph 12 on Page 4 you're saying, 24 "Collective licensing markets have often developed in 25 response to new technologies and will continue to</p>	<p style="text-align: right;">Page 119</p> <p>1 &amp; Chevalier. They were rough transcripts by the way.</p> <p>2 Q Aikan?</p> <p>3 A Aikan I saw -- yes, I did see parts of the 4 Aikan transcript. As I think -- I believe I said 5 earlier, it was very long, and I only had time to scan a 6 very small part of it.</p> <p>7 Q Fair enough. Insofar as you know, has CCC 8 ever obtained a licensee who paid an author the right to 9 index a book?</p> <p>10 A Specifically to make index, I don't think so.</p> <p>11 Q To make a mark record?</p> <p>12 A I don't know.</p> <p>13 Q So when you say, "continue to develop," you're 14 not referring to a market print of right to index a 15 book; correct?</p> <p>16 A When I -- I mentioned digital uses, I mean 17 access and possibly a reuse of books or parts of books.</p> <p>18 Q But not indexing?</p> <p>19 A I am not aware that there is a licensing 20 market specifically for indexing. There may be, as part 21 of other licensing arrangements. I haven't seen it 22 myself.</p> <p>23 Q In Paragraph 14, you say, "allowing the market 24 or congress to develop a collective licensing system." 25 Do you see that?</p>
<p style="text-align: right;">Page 118</p> <p>1 develop for digital uses of books unless widespread 2 copying of entire books is permitted as a fair use; 3 thus, discouraging the development of such collective 4 licenses."</p> <p>5 Do you see that?</p> <p>6 A I do.</p> <p>7 Q This is a causal claim, as I understand it. 8 My question is what does the "unless" mean? Is this a 9 statement that markets will continue to develop unless 10 no permission is required?</p> <p>11 A Yes. If -- if widespread copying is permitted 12 as a fair use, and there is no right to license, and 13 therefore, the market for licensing of those uses would 14 either fail to develop or develop in a much, much 15 smaller way.</p> <p>16 Q Why would it develop -- strike that. 17 Have you ever seen a license that pays 18 royalties to an author of a licensee indexing a book?</p> <p>19 A Indexing specifically, no.</p> <p>20 Q Are you aware that there's testimony from the 21 University of Michigan in this case that it would not 22 pay the author for the right to index a book?</p> <p>23 A I don't recall seeing that testimony.</p> <p>24 Q Did you see the deposition of Mr. Courant?</p> <p>25 A No. The depositions I saw were Harris, Greco</p>	<p style="text-align: right;">Page 120</p> <p>1 A Yes, I do.</p> <p>2 Q Is it part of your opinion in this matter -- 3 is part of your opinion in this matter about what 4 congress is likely to do?</p> <p>5 A Well, at least indirectly, so congress can do 6 obviously one thing, which is adopt legislation, like it 7 has done for the online availability of music by digital 8 audio transmissions, in which case there's a specific 9 section of the statute; namely, 114, which deals with 10 that process.</p> <p>11 Congress can also act in a nonlegislative way. 12 I think it's fair to say that CCC was created because 13 there were signals at the time. This was the late '70s 14 from congress that an organization of that type should 15 exist. And so it could be that kind of impetus from 16 congress, so in other words, nonlegislative in nature.</p> <p>17 Q Congress -- what does that opinion have to do 18 with this case, meaning congress can do what congress 19 chooses, can't it?</p> <p>20 A Yes. I'm basing my report here, the words "or 21 congress" were there -- were put there because it is 22 possible that if the market doesn't, for whatever 23 reason, react quickly enough or achieve the solution 24 that congress considers undesirable, that they would do 25 here what they've done in the sound exchange case, which</p>

<p style="text-align: right;">Page 121</p> <p>1 is the CMO that licenses sound recorded audio 2 transmissions. 3 And that CMO is specifically designated to do 4 so under the statute via the copyright office. 5 Q But you're not opining what terms that CMO 6 would be authorized to offer; correct? 7 A Specifically what congress impose, no, I 8 don't -- I'm not opining on exactly what congress would 9 do. 10 Q It would be difficult? 11 A Possibly. 12 Q In the second sentence in Paragraph 14, you 13 say -- I'm sorry. The third sentence -- oh, I'm sorry. 14 Second sentence, "Instead we compensate those who 15 created and published the content and whose ability to 16 earn a living often depends on being able to monetize 17 online uses." 18 Do you see that? 19 A I do. 20 Q Have you undertaken a study of what fraction 21 of publishers' ability to earn a living, or what 22 fraction of authors' ability to earn a living depends on 23 their ability to monetize online use? 24 A While I have not quantified that, it is 25 certainly my understanding that their online uses are</p>	<p style="text-align: right;">Page 123</p> <p>1 Q What does that mean? 2 A Well, I'm referring here to the process of 3 rate determination. So rate determination in a 4 collective context can be done in a number of ways. It 5 can be negotiated as part of a contract between a user 6 and a collective representing rightsholders. 7 It can be imposed by a court, as in the ASCAP 8 and BMI case, where the consent to create provide for a 9 rate court to be established. 10 It can be established by the copyright royalty 11 judges, in -- as in the sound exchange case. But in all 12 of those cases, what is necessarily taken into account, 13 in my opinion, is the actual scope of uses of material. 14 Q Let's focus on negotiated agreements over the 15 use of book text. 16 A Okay. 17 Q In that context, what does the sentence mean? 18 A Well, for example, if there was a solution 19 such as the -- the one suggested in the proposed 20 settlement, I would assume that it would be negotiation 21 as to which uses are licensed and for what amount. 22 Therefore, the actual uses that are licensed would be 23 determined in that agreement. 24 Q Let me -- so some uses in that agreement might 25 be for compensation, and other uses might be without</p>
<p style="text-align: right;">Page 122</p> <p>1 increasingly important. And if you carve those out as 2 noncompensatable [sic] because they're fair use, then 3 the ability to monetize online content diminishes. 4 Q And monetize could include the business model 5 you described earlier, which is make some available for 6 free and then charge for the rest? 7 A Well, that would be a business model if it's 8 not a fair use that rightsholders could decide that they 9 want. If it's a fair use, then rightsholders lose their 10 ability to make those decisions. 11 Q When you say "it," what is "it"? 12 A If the use is that the online uses are fair, 13 what -- whatever percentages of those uses are 14 determined to be fair, that the ability of rightsholders 15 to make decision on licensing is obviously nonexistent. 16 Q All right. Monetization does not exclude the 17 concept of show the consumer a little bit content, 18 familiarize them, and then charge them for the full 19 content, if they choose? 20 A I -- that would not it be excluded. 21 Q In the next sentence you say, "The actual 22 scope of the uses could be taken in account in 23 determining appropriate rates." 24 Do you see that? 25 A Yes.</p>	<p style="text-align: right;">Page 124</p> <p>1 compensation to an author? 2 A It's a negotiation. So it is up to the 3 parties to decide at that point how the payment is to be 4 made and what is the proper basis for that payment. 5 Q But it could be that some uses would be 6 uncompensated to authors and other uses would be; 7 correct? 8 A It's possible. 9 MR. MCGOWAN: Let me mark as Exhibit 8 your 10 keynote. 11 (Exhibit 8 was marked for identification.) 12 BY MR. MCGOWAN: 13 Q This is -- no, strike that. 14 Do you recognize this document, Professor 15 Gervais? 16 A I do. 17 Q Is this an article you wrote? 18 A It's the text of a lecture I gave at Columbia 19 Law School, which I updated for publication. So I 20 wouldn't call it an article, but it's the text of a 21 lecture. 22 Q And this actually is one of the documents 23 referenced in your report as a document you reviewed in 24 connection with your report? 25 A I did reread this article before filing my</p>



<p style="text-align: right;">Page 125</p> <p>1 report; correct.</p> <p>2 Q The link you gave us was broken, but I tracked</p> <p>3 it down.</p> <p>4 A I do apologize. The link was incomplete. We</p> <p>5 sent you, I believe, a --</p> <p>6 Q Yes.</p> <p>7 A -- complete link.</p> <p>8 Q I appreciate that. Thank you.</p> <p>9 Can you go to Page 445, please, in Subpart G.</p> <p>10 A Yes.</p> <p>11 Q In the second sentence of Subpart G, you say,</p> <p>12 "The United States has a fair use rule that is flexible,</p> <p>13 adaptable, and dynamic."</p> <p>14 Do you see that?</p> <p>15 A I do.</p> <p>16 Q Is that a view you hold?</p> <p>17 A I do.</p> <p>18 Q What do you mean by "flexible"?</p> <p>19 A Flexible means that unlike certain national</p> <p>20 laws that impose very specific conditions on exceptions,</p> <p>21 fair use rule is really a rule that is applied by -- by</p> <p>22 courts. And so, to that extent, it is flexible because</p> <p>23 it -- its application does not require an amendment of</p> <p>24 the statute.</p> <p>25 Q Adaptable?</p>	<p style="text-align: right;">Page 127</p> <p>1 that's -- that the type of use might be relevant, yes,</p> <p>2 under Section 107. But I did not review Section 107 or</p> <p>3 various criteria when preparing my report.</p> <p>4 BY MR. McGOWAN:</p> <p>5 Q Sure. Your report describes you as an expert</p> <p>6 in intellectual property law.</p> <p>7 MR. SNYDER: Objection.</p> <p>8 THE WITNESS: Yes. There's areas of</p> <p>9 intellectual property law that I know very well, but I</p> <p>10 did not do a fair use analysis in this case.</p> <p>11 BY MR. McGOWAN:</p> <p>12 Q That's fine. I'm just asking about the</p> <p>13 statement in your keynote lecture?</p> <p>14 A Okay.</p> <p>15 Q The case-by-case facts that might vary might</p> <p>16 include the type of work; right?</p> <p>17 A Yeah. Radically different types of works</p> <p>18 might definitely get a court to view the outcome</p> <p>19 differently.</p> <p>20 Q You previously drew a distinction between</p> <p>21 fiction and nonfiction; correct?</p> <p>22 A Yes.</p> <p>23 Q That might matter?</p> <p>24 MR. SNYDER: Objection.</p> <p>25 THE WITNESS: To be honest, I'd have to reread</p>
<p style="text-align: right;">Page 126</p> <p>1 A More or less the same idea, that it adapts</p> <p>2 over time to changes and technology and uses, or at</p> <p>3 least it can.</p> <p>4 Q Dynamic?</p> <p>5 A Again, very similar ideas.</p> <p>6 Q In the next paragraph, the first sentence</p> <p>7 says, "Fair use does suffer from the fact that it is</p> <p>8 fundamentally designed to be applied case by case by</p> <p>9 courts."</p> <p>10 Do you see that?</p> <p>11 A I do.</p> <p>12 Q What do you mean by, "case by case by courts"?</p> <p>13 A Well, it doesn't mean literally each and every</p> <p>14 case because you can rely on precedent to determine that</p> <p>15 certain uses are fair, at least to a certain extent. To</p> <p>16 have 100 percent certainty that a use is fair requires a</p> <p>17 court determination.</p> <p>18 Q On Page -- and the determination might vary,</p> <p>19 depending on the facts of a particular case?</p> <p>20 A I think every case depends on particular</p> <p>21 facts.</p> <p>22 Q It might vary depending on the character of a</p> <p>23 particular work?</p> <p>24 MR. SNYDER: Objection to form.</p> <p>25 THE WITNESS: I mean, that's -- I believe</p>	<p style="text-align: right;">Page 128</p> <p>1 the case law. Whether courts -- how much importance</p> <p>2 courts have attached to -- to whether work is fiction or</p> <p>3 nonfiction is not something I recall exactly.</p> <p>4 BY MR. McGOWAN:</p> <p>5 Q It would be a fact that might be considered in</p> <p>6 a particular case?</p> <p>7 A Might be, yes.</p> <p>8 Q On Page 446, you say, "In a license with or</p> <p>9 through a CMO, rightsholders and users could agree to</p> <p>10 disagree on the exact scope of fair use, yet include</p> <p>11 some of the marginal uses in the scope of the license</p> <p>12 and reflect that fact in the price."</p> <p>13 Do you see that?</p> <p>14 A I do.</p> <p>15 Q What do you mean by "marginal"?</p> <p>16 A Well, uses on -- that are at the margin, so</p> <p>17 there's a core of uses that are -- that are infringing,</p> <p>18 that are uses that are fair at some point beyond that</p> <p>19 core. And then there would typically be some</p> <p>20 disagreement as to where to draw the line. Let's call</p> <p>21 that the margin. And the point I'm making here is in</p> <p>22 the CMO contract, you could decide that if uses fall</p> <p>23 within that margin, they may be fair use, they may not</p> <p>24 be fair use, but they will be covered by the license in</p> <p>25 case they're not. And that can be reflected in the</p>

<p style="text-align: right;">Page 129</p> <p>1 price, for example, those uses could be at a different 2 price. 3 Q It could be zero? 4 A Anything's possible. It's a negotiation. 5 Q What's the core of fair use that you just 6 referred to? 7 A I did not refer to the core -- 8 Q I said the -- 9 A -- uses that are not fair. 10 Q What are those. My apologies. What are 11 those? 12 A Well, there's an unlimited list of uses 13 almost, that I've -- you know, for example, you -- to 14 take the most obvious example, you go and buy a book and 15 you make full copies of the whole book and you start 16 selling those. To me, that is the right in the middle 17 of core uses that are definitely not fair. But beyond 18 that, as I said, I did not make an analysis -- 19 Q Um-hum. 20 A -- in this case exactly where the line is for 21 fair uses or not. 22 Q What are the core fair uses? 23 A That is a much harder question to answer. 24 Fair use is a concept that is a little harder to -- to 25 pin down. So I did not review what uses in the case of</p>	<p style="text-align: right;">Page 131</p> <p>1 fair use must remain. They are essential, they are part 2 of the system, 107 is important, which means that not 3 every use of content is something that needs to be 4 licensed. 5 But beyond that, I cannot be specific as to 6 which uses in this case would or would not be fair use. 7 That is not what my opinion is about. 8 Q Sure, I understand. Some licenses without 9 permission must exist because you've got Section 107, 10 and that necessarily follows; right? 11 A Well, 107 says what it is says, and it's for a 12 court to determine how it applies in this case. I am 13 not giving an opinion on that. 14 Q Sure. My question was actually what fared use 15 refers to? 16 A Well, it really refers to the use in the 17 context of Tom Bell's article where he wrote this 18 article, as you can see, fairly early on in the context 19 of discussions in the late 1990s where the idea was that 20 every piece of content would circulate online with a 21 meter that would then be basically crossing what people 22 were referring to toll booths, very much using those 23 kind of highway metaphors. And basically, that each 24 time you would use a work for any purpose, you would 25 have a small payment made.</p>
<p style="text-align: right;">Page 130</p> <p>1 online books might be fair or not. 2 Q Well, in your -- one of the previous exhibits 3 we saw that you used a quotation about three sentences 4 long. Is that core fair use? 5 A I think the quotation in the context of 6 creating another work might be fair use. It depends on 7 the size of the quote. It depends on, for example, if 8 you were to quote a poem in its entirety, you know, 9 somebody might say that's not a fair use. 10 Somebody -- if you quote 300 words from Gerald 11 Ford's memoirs, that may not be a fair use. It's really 12 contextual, so I cannot answer your question in the 13 abstract. 14 Q Did you think that the quotation you used was 15 fair? 16 A I did in that case. 17 Q On Page 447 of your keynote address, in the 18 first full paragraph you say, "I hasten to add that I am 19 not suggesting a faired-use world." 20 Do you see that? 21 A Yes. I took that term from Tom Bell's article 22 at Footnote 128. 23 Q What do you understand the phrase, "faired 24 use," to refer to? 25 A I -- I think that there's no question that</p>	<p style="text-align: right;">Page 132</p> <p>1 I don't think that's an optimal solution. I 2 think in some cases aggregate payment is better. So 3 that, I think, was Tom Bell's point, and to that extent, 4 I agree with him. 5 Q In the next sentence you say, "Free uses must 6 remain, both because that is what some authors want and 7 because fair uses are essential." 8 Do you see that? 9 A I do. 10 Q Why must some free uses -- well, strike that. 11 What authors are you referring to? 12 A Not one in particular. I say some authors. 13 I -- I know some authors might be very happy with free 14 uses of their work, and if that's a determine -- the 15 determination that an author makes, that his or her work 16 should be available for free, that is that author's 17 right. 18 Q Well, you don't need fair use to come into 19 play for an author to make that determination, do you? 20 A You don't need fair use for that. 21 Q Is free use, in this sentence, connected to 22 fair use? 23 A Fair use is one form of free use. 24 Q Why are fair uses essential? 25 A I believe they're really part of the system.</p>

<p style="text-align: right;">Page 133</p> <p>1 To take a simple example, if you are going to ask  2 somebody for a license to make fun of them in a parody,  3 it's possible the license will be refused. Yet, I think  4 that society gains something by letting parodies exist.  5 So that's a fair use that is essential as a societal  6 matter. And that I would favor, and that should be  7 free.  8 Q Any others?  9 A I really cannot possibly give you a list of  10 everything that could or should be a fair use.  11 Q And "essential" here means because there are  12 social benefits to the use?  13 A In the case of parody, yes.  14 Q In other cases?  15 A Possibly.  16 Q Uses would hardly be essential if they were  17 not beneficial; would you agree?  18 A Would you repeat the question.  19 Q Uses would hardly be essential if they were  20 not beneficial?  21 MR. SNYDER: Objection.  22 THE WITNESS: Beneficial to whom, in what  23 context? I mean, I assume if somebody's making a use is  24 because they're getting some benefit from it, but it  25 doesn't mean it's fair use because somebody's getting a</p>	<p style="text-align: right;">Page 135</p> <p>1 which they are fair uses is contextual.  2 BY MR. McGOWAN:  3 Q You say in the end of the sentence, "Fair use  4 should be partially factored into rates for mass access  5 to commercial content. This would not prevent an  6 acknowledgment that certain uses remain outside the  7 scope of those contractual umbrellas, and new test cases  8 will be needed. A license covering some fair uses need  9 not be painted, as some uses can be licensed, but zero  10 rated."  11 Do you see that?  12 A I do.  13 Q Zero rated means they don't bear royalty to a  14 rightsholder?  15 A So the footnote refers to a very specific  16 case, where there was significant disagreement between  17 parties in a case in Canada about what uses should be  18 covered by the license and the copyright board, which is  19 essentially the equivalent of copyright royalty judges  20 under Section 114 --  21 THE REPORTER: Slow down a little bit, please.  22 THE WITNESS: Sorry. The equivalent of  23 copyright royalty judges under the U.S. statute  24 determined that some limited uses of -- covered by the  25 license should indeed be covered by the license, but</p>
<p style="text-align: right;">Page 134</p> <p>1 benefit from it.  2 BY MR. McGOWAN:  3 Q And we'll talk about your writing on that in a  4 little bit. Essential to whom, since you raised the  5 question?  6 A Systemically, essential.  7 Q Essential to society?  8 A In the case of parody, for example, yes.  9 Q In other cases?  10 A Possibly.  11 Q Do you know?  12 A I have -- I have not given it any thought. I  13 have not analyzed that for the report. It's very  14 possible that other fair uses are essential, but I did  15 not compile or prepare a list, and I would have to give  16 it some thought.  17 Q Did you analyze parody for the report?  18 A No. That's really, the one example that comes  19 to mind very quickly. Others I would have to think  20 about.  21 Q Is quotations in law review articles?  22 THE REPORTER: "Quotations . . ."  23 MR. McGOWAN: In law review articles.  24 THE WITNESS: Again, I -- I think I answered  25 quotations just a few minutes ago. To the extent to</p>	<p style="text-align: right;">Page 136</p> <p>1 zero rate, in other words, not paid for.  2 And I believe the case is before the Supreme  3 Court in that country, but I would have to check that.  4 BY MR. McGOWAN:  5 Q So the answer zero rated means not royalty  6 bearing to the author?  7 A It means no royalty paid because it's a  8 marginal case that, based on the determination of the  9 board, should be included in the license, but not paid  10 for, yes.  11 Q And in the context you're discussing your  12 report, that might be a conclusion the parties would  13 bargain to?  14 A In a voluntary system, yes.  15 Q The next paragraph you say, "There are  16 legitimate questions concerning access and culture. And  17 this debate should not detract from a duty to consider  18 their substantive merit," and you cite Jessica Litman.  19 A Um-hum.  20 Q What are those questions?  21 A Well, there's a long list, some of which are  22 listed by Professor Litman in Footnote 130. In simple  23 terms, I think there are only two essential players in  24 the copyright, the author and the user. And everything  25 else is essentially contingent.</p>

<p style="text-align: right;">Page 137</p> <p>1 There are intermediaries between the two, but</p> <p>2 they come and go and they change. But the user or</p> <p>3 reader is essential because the authors need people to</p> <p>4 read or watch or listen to what they do. And what I say</p> <p>5 here is we need to be mindful of both sides.</p> <p>6 I'm also, in that sentence, thinking of some</p> <p>7 international issues. I've worked on access to books in</p> <p>8 developing countries by certain users. For example, I</p> <p>9 think all of these are relevant parts of the debate, and</p> <p>10 my paragraph here is really to say there are legitimate</p> <p>11 concerns that need to be addressed concerning access and</p> <p>12 culture.</p> <p>13 Q And access is by readers in this context?</p> <p>14 A It would be by users whether they are readers,</p> <p>15 reusers, or listeners, viewers.</p> <p>16 Q In Paragraph 15 --</p> <p>17 A We're back on the report?</p> <p>18 Q Back on the report. I don't think the lecture</p> <p>19 was paragraph numbered.</p> <p>20 A No, that's right. I'm just checking.</p> <p>21 Q Back to the report.</p> <p>22 You say that "Collective management</p> <p>23 organizations license old and new works," at the bottom</p> <p>24 of Page 4, "from Philip Glass to the latest hip hop hit,</p> <p>25 CMO's typically pay authors and other rightsholders</p>	<p style="text-align: right;">Page 139</p> <p>1 of Google's uses are found to be fair."</p> <p>2 A Not to.</p> <p>3 MR. SNYDER: Objection.</p> <p>4 BY MR. McGOWAN:</p> <p>5 Q Not to be fair. "Most likely." Do you mean</p> <p>6 to say that there is, in your view, a possibility for</p> <p>7 something other than an opt-in form of management?</p> <p>8 A Well, it's -- Paragraph 17 follows 16, where I</p> <p>9 refer to the proposed settlement and the registry. And</p> <p>10 I have actually been critical in another article that</p> <p>11 you may bring out later of the opt-out function,</p> <p>12 especially vis-a-vis foreign authors and publishers.</p> <p>13 I believe that an opt-in is a better way to</p> <p>14 operate a collective management organization in any --</p> <p>15 in any event, because it creates buy-in, it allows the</p> <p>16 collective to get the authors and publishers to</p> <p>17 understand from the get-go exactly what's going on.</p> <p>18 So I would favor an opt-in system. But</p> <p>19 obviously, there was a discussion of something that</p> <p>20 looked like an opt-out before.</p> <p>21 Q So when you say, "most likely," you're</p> <p>22 actually referring back up to 16?</p> <p>23 A Well, that's the context. Obviously, I was</p> <p>24 saying in 17 that if a system, given that there was some</p> <p>25 negative reaction, including as I read it, at least by</p>
<p style="text-align: right;">Page 138</p> <p>1 based on actual usage."</p> <p>2 Do you see that?</p> <p>3 A I do.</p> <p>4 Q What usage are you referring to?</p> <p>5 A If can I go back to the plumbing metaphor I</p> <p>6 used earlier, where the CMO has rights coming in that</p> <p>7 are processed and then paid. What happens inside the</p> <p>8 CMO is they match usage data, which will be usage data</p> <p>9 provided by users against their database of names and</p> <p>10 titles, and that's how they will determine who gets paid</p> <p>11 what.</p> <p>12 This depends on the type of work and type of</p> <p>13 CMO concern. But that's why I use the word "typically."</p> <p>14 Most CMOs -- and I would be tempted to say almost all</p> <p>15 CMOs -- proceed on that basis, matching usage data to --</p> <p>16 to their database of names and rights.</p> <p>17 Q So usage here would refer to viewing portions</p> <p>18 of text?</p> <p>19 A Whatever usage has been licensed would be the</p> <p>20 actual usage that would be based for distribution.</p> <p>21 Q Let me draw your attention to Paragraph 17.</p> <p>22 You say, "It is my opinion that a similar type of</p> <p>23 collective management system most likely run requiring</p> <p>24 that rightsholders opt their books in to participate in</p> <p>25 collective management would develop here if some or all</p>	<p style="text-align: right;">Page 140</p> <p>1 the judge, to the opt-out system, I would think that an</p> <p>2 opt-in is more likely.</p> <p>3 Q Is it the basis of your report that something</p> <p>4 like the registry system might result in this case, even</p> <p>5 if the court holds as you hypothesize?</p> <p>6 A Would you rephrase or repeat the question.</p> <p>7 Q Yeah. I'm just -- in your report you say if</p> <p>8 Google uses are found not to be fair, then certain</p> <p>9 things may be possible.</p> <p>10 A Correct.</p> <p>11 Q Is a system, such as you describe in</p> <p>12 Paragraph 16, of the things that you believe would still</p> <p>13 be possible?</p> <p>14 MR. SNYDER: Objection to form.</p> <p>15 THE WITNESS: Well, there's nothing that</p> <p>16 prevents the type of solution like what was in the -- in</p> <p>17 the proposed settlement to be renegotiated with</p> <p>18 different terms, taking account in particular of the</p> <p>19 court's decision on the matter.</p> <p>20 But can a specific system be set up to license</p> <p>21 Google's uses or some of them? The answer is, yes.</p> <p>22 BY MR. McGOWAN:</p> <p>23 Q Did you talk to anyone at Google about that?</p> <p>24 A No.</p> <p>25 Q Have you expressed an opinion anywhere on what</p>

<p style="text-align: right;">Page 141</p> <p>1 Google would be willing to do?</p> <p>2 A Not since I was engaged to prepare this</p> <p>3 report. It's a matter I -- I discussed when the</p> <p>4 settlement was being discussed. But not since I was</p> <p>5 engaged to -- retained to do this report.</p> <p>6 Q Which wasn't my question.</p> <p>7 When were you engaged -- when were you</p> <p>8 retained?</p> <p>9 A Very early in February, 3rd, maybe.</p> <p>10 Q The month before that?</p> <p>11 A Not as -- as I recall, it was when the</p> <p>12 settlement was being discussed and then adjudicated</p> <p>13 upon. So I'd have go back in the calendar, but it</p> <p>14 strikes me as significantly earlier than January of this</p> <p>15 year.</p> <p>16 Q You are aware that you expressed such an</p> <p>17 opinion?</p> <p>18 MR. SNYDER: Objection to form.</p> <p>19 THE WITNESS: Expressed what?</p> <p>20 BY MR. MCGOWAN:</p> <p>21 Q You are aware that you have expressed such an</p> <p>22 opinion?</p> <p>23 MR. SNYDER: Objection.</p> <p>24 THE WITNESS: That I have expressed such an</p> <p>25 opinion?</p>	<p style="text-align: right;">Page 143</p> <p>1 Q What organization are you referring to?</p> <p>2 A I believe it's called the Right Flow.</p> <p>3 Q When did you become aware of that</p> <p>4 organization?</p> <p>5 A I've been aware of the organization for quite</p> <p>6 awhile. I was not aware that it had been acquired by</p> <p>7 Google until fairly recently.</p> <p>8 Q In Paragraph 17 you say here that "A</p> <p>9 collective management system, most likely an opt-in</p> <p>10 system, would develop if some or all of Google's uses</p> <p>11 are found not to be fair."</p> <p>12 Is it possible, in your view, that some would</p> <p>13 be fair and others would not be?</p> <p>14 A I am not opining on which uses may or may not</p> <p>15 be fair. I have deliberately not expressed an opinion</p> <p>16 on that in this report.</p> <p>17 Q Then why did you say some or all?</p> <p>18 A Because I don't know.</p> <p>19 MR. SNYDER: I couldn't hear you.</p> <p>20 BY MR. MCGOWAN:</p> <p>21 Q Why did you say some or all?</p> <p>22 A It is conceivable that some are. I don't</p> <p>23 know.</p> <p>24 Q And which are the uses that you're referring</p> <p>25 to here?</p>
<p style="text-align: right;">Page 142</p> <p>1 BY MR. MCGOWAN:</p> <p>2 Q On what Google would be willing to do in an</p> <p>3 opt-in world?</p> <p>4 MR. SNYDER: Objection.</p> <p>5 THE WITNESS: I'm not sure I follow your</p> <p>6 question.</p> <p>7 BY MR. MCGOWAN:</p> <p>8 Q Well, let me ask, in Paragraph 17 is it your</p> <p>9 testimony that Google, in the event that its use is</p> <p>10 found not to be fair --</p> <p>11 A Yes.</p> <p>12 Q -- is going to be a licensor?</p> <p>13 A Licensee.</p> <p>14 Q Sorry, licensee? Is that your testimony?</p> <p>15 A My testimony is one of the things I considered</p> <p>16 was that, as Paragraph 10 says, there is a feasibility</p> <p>17 part of my report and then there's -- which I -- I think</p> <p>18 we've discussed. We can go back to it.</p> <p>19 I did consider the fact that there was a draft</p> <p>20 settlement in which Google seemed to agree to collective</p> <p>21 licensing of some of its uses. I'm also aware that</p> <p>22 Google owns a collective management organization, though</p> <p>23 in a different field. So I assume that Google would not</p> <p>24 be completely allergic to the idea of collective</p> <p>25 management.</p>	<p style="text-align: right;">Page 144</p> <p>1 A All of the uses that I see in the -- in the --</p> <p>2 in the reproduction and make available of snippets. And</p> <p>3 all that -- I don't know if some of that is or isn't a</p> <p>4 fair use. I have not done that analysis.</p> <p>5 MR. MCGOWAN: Request for a break. It has</p> <p>6 been an hour, so why don't we take a short break.</p> <p>7 VIDEOGRAPHER: Off the record at 1:57.</p> <p>8 (Recess taken.)</p> <p>9 VIDEOGRAPHER: On the record at 2:06.</p> <p>10 MR. MCGOWAN: Professor Gervais, I'm going to</p> <p>11 mark as Exhibit 9 --</p> <p>12 (Exhibit 9 was marked for identification.)</p> <p>13 MR. MCGOWAN: -- a paper entitled, "A [sic]</p> <p>14 tangled Web of UGC."</p> <p>15 BY MR. MCGOWAN:</p> <p>16 Q Do you recognize this paper.</p> <p>17 A I do.</p> <p>18 Q Did you write it?</p> <p>19 A I did.</p> <p>20 Q I want to direct your attention to Page 859.</p> <p>21 A 859, yes.</p> <p>22 Q Under Section 3, "Users Copied Content," in</p> <p>23 the second full paragraph, you say, "The ratio issue</p> <p>24 might become relevant if only a short excerpt is used.</p> <p>25 This issue is not limited to the online environment."</p>



<p style="text-align: right;">Page 145</p> <p>1 Do you see that?</p> <p>2 A I do.</p> <p>3 Q And then in Note 78, you state, "The ratio is</p> <p>4 the amount used measured against the totality of the</p> <p>5 work from which it is taken."</p> <p>6 Do you see that?</p> <p>7 A Yes.</p> <p>8 Q What is the significance of the ratio issue?</p> <p>9 A In what context?</p> <p>10 Q In the context you are discussing in this</p> <p>11 paper?</p> <p>12 A I am discussing this paper -- it proposes a</p> <p>13 taxonomy of the types of content that one finds online</p> <p>14 that is referred to user-generated content. In my</p> <p>15 proposed taxonomy there are three types of content:</p> <p>16 User authored, user derived, and user copied content.</p> <p>17 My point is that user copied content is</p> <p>18 typically infringing, but I make allowance here for the</p> <p>19 possibility that some forms of copying of content would</p> <p>20 not be. And in one of those cases it would be because</p> <p>21 of a very small portion, qualitatively and</p> <p>22 quantitatively presumably, of something has been made</p> <p>23 available.</p> <p>24 And as I say specifically here, the issue's</p> <p>25 not limited to the underlying environment, Footnote 78</p>	<p style="text-align: right;">Page 147</p> <p>1 described it?</p> <p>2 A Yes. I would have at the time, but as I said,</p> <p>3 I don't -- I haven't reread that case in quite awhile.</p> <p>4 Q On Page 861, Section A, 3A, the third --</p> <p>5 second -- third full paragraph, second under Section A,</p> <p>6 you say, "This doctrine may have been extended by the</p> <p>7 Google defense."</p> <p>8 A Um-hum.</p> <p>9 Q Do you see that?</p> <p>10 A Yes.</p> <p>11 Q What is the Google defense?</p> <p>12 A I am referring to -- it's Footnote 87, makes</p> <p>13 clear the Perfect 10, Inc., the Google case from 2006.</p> <p>14 Q And what is the Google defense?</p> <p>15 A It's explained in the following sentence. The</p> <p>16 court found that the 9th Circuit specifically felt that</p> <p>17 thumbnails were a fair use. And I called that the</p> <p>18 Google defense, in part because I believe this case is</p> <p>19 an outlier, and I'm not sure other circuits would hold</p> <p>20 the same thing.</p> <p>21 Obviously, I can't prove that, but I call it</p> <p>22 the Google defense because I think the court was, in</p> <p>23 part, taking into account the fact that Google was</p> <p>24 involved as a significant player in the online world.</p> <p>25 Q And what was done with the thumbnails? How</p>
<p style="text-align: right;">Page 146</p> <p>1 refers to articles in cases that have help along those</p> <p>2 lines.</p> <p>3 Q And one of those cases is Bill Graham Archives</p> <p>4 versus Dorling Kindersley.</p> <p>5 Do you see that?</p> <p>6 A Yes.</p> <p>7 Q And your description of that case in the</p> <p>8 parentheticals says, "Finding the copying the entirety</p> <p>9 of work is sometimes necessary to make the fair use."</p> <p>10 Do you see that?</p> <p>11 A Yes.</p> <p>12 Q Is that your understanding of the holding of</p> <p>13 Dorling Kindersley?</p> <p>14 A Well, I believe there's a quote from the case</p> <p>15 here in the brackets, but I -- I've not checked this</p> <p>16 article recently. I believe is a quote from the case.</p> <p>17 It's obviously a fairly extreme example of copying the</p> <p>18 entirety of work, but as I said earlier, fair use is</p> <p>19 flexible and adaptable, and that would be an example of</p> <p>20 that.</p> <p>21 Q Is that your understanding of that portion of</p> <p>22 the holding of Dorling Kindersley?</p> <p>23 A I do not recall the specifics of the case. I</p> <p>24 would have to reread it.</p> <p>25 Q Did you have an understanding at the time you</p>	<p style="text-align: right;">Page 148</p> <p>1 did they relate to the case?</p> <p>2 A I'd have to reread the case. I remember there</p> <p>3 were thumbnails of so-called adult images that were made</p> <p>4 available in, obviously, lower resolution than the</p> <p>5 higher resolution images that one could purchase in</p> <p>6 Perfect Ten site. But beyond that, I would have to</p> <p>7 reread the case.</p> <p>8 Q Do you recall if they were used for purposes</p> <p>9 of search?</p> <p>10 A I don't.</p> <p>11 Q On Page 863 you say in the second sentence in</p> <p>12 the first full Paragraph, "Dissemination may also be</p> <p>13 fair use on other grounds. One may argue that there are</p> <p>14 public policy imperatives that will allow thumbnail</p> <p>15 access and, more generally, favor broad access to</p> <p>16 material on search engines such as Google."</p> <p>17 Do you see that?</p> <p>18 A Yes.</p> <p>19 Q Do you agree that that is an argument that</p> <p>20 could be made?</p> <p>21 A I -- I point to Footnote 102, to the 9th</p> <p>22 Circuit's holding again, in the parallel case and -- I</p> <p>23 mean, the case it speaks for itself. I -- I say one may</p> <p>24 argue because the 9th Circuit accepted that argument. I</p> <p>25 again believe that that case is an outlier in fair use</p>

<p style="text-align: right;">Page 149</p> <p>1 juris prudence.</p> <p>2 Q We'll come to that in a moment.</p> <p>3 "Public policy imperatives." What are the</p> <p>4 public policy imperatives?</p> <p>5 A Well, if you read the sentence, it does not</p> <p>6 refer to thumbnail access. I say there that the public</p> <p>7 policy imperatives deal with broad access to material.</p> <p>8 I can think of examples. The first that comes</p> <p>9 to mind was -- for some reason, is the copyright holder</p> <p>10 tried to prevent the use of the images of Princess Diana</p> <p>11 leaving her hotel the day she died in a car accident in</p> <p>12 Paris. And a court -- that was a British court -- held</p> <p>13 there was a public policy imperative to make that image</p> <p>14 available, in spite of copyright law.</p> <p>15 I thought that was an interesting example of a</p> <p>16 rare public policy imperative that might trump</p> <p>17 copyright. These, again, are fairly rare cases, which</p> <p>18 is why my sentence begins with a very careful, "One may</p> <p>19 argue."</p> <p>20 Q The Princess Diana case that you mentioned,</p> <p>21 did that involve a search engine?</p> <p>22 A I don't recall. It's an old case.</p> <p>23 Q You specifically mentioned search engine, such</p> <p>24 as Google?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 151</p> <p>1 understanding of the Perfect Ten court's ruling?</p> <p>2 MR. SNYDER: Objection to form.</p> <p>3 THE WITNESS: I think the case speaks for</p> <p>4 itself. As I said, I think that case is an outlier. I</p> <p>5 don't think the use, as I recall it, was transformative</p> <p>6 in the way I would be tempted to describe it. But I</p> <p>7 take the 9th Circuit's word for what it's worth.</p> <p>8 BY MR. MCGOWAN:</p> <p>9 Q This is your description of the case, however.</p> <p>10 It is not a quotation; correct?</p> <p>11 A There are no quotation marks in 111. That's</p> <p>12 all I can say.</p> <p>13 Q Is it your description?</p> <p>14 A I don't know to what extent the language</p> <p>15 follows the words of the case, but it's not a quotation</p> <p>16 from the case.</p> <p>17 Q Did you have a research assistant write it?</p> <p>18 A I usually work with research assistants.</p> <p>19 Whether I did for that particular paper -- that was four</p> <p>20 years ago -- I'm not sure. It's likely, but I'm not</p> <p>21 sure.</p> <p>22 Q Did you have a research assistant write this</p> <p>23 sentence for you?</p> <p>24 A That is very unlikely.</p> <p>25 Q This is your prose?</p>
<p style="text-align: right;">Page 150</p> <p>1 Q What are the public policy imperatives that</p> <p>2 relate to search engines such as Google?</p> <p>3 A Well, you would want people to be able to find</p> <p>4 an image such as the one I just described, and they</p> <p>5 would typically use a search engine to find that image.</p> <p>6 Q Does this relate to the statements you made in</p> <p>7 the papers we examined previously that it is important</p> <p>8 for people to be able to find information on the</p> <p>9 Internet?</p> <p>10 A Yes. Indirectly, at least.</p> <p>11 Q On Page 865 in Footnote 111, you say,</p> <p>12 "So-called here because it is the making available of</p> <p>13 content in a different form through a search engine that</p> <p>14 the court considered transformative."</p> <p>15 Do you see that?</p> <p>16 A Yes.</p> <p>17 Q Is that your understanding of the Perfect Ten</p> <p>18 court's ruling?</p> <p>19 A What is the question? I'm sorry.</p> <p>20 Q Your first sentence states --</p> <p>21 A Yes.</p> <p>22 Q -- "It is so called here because it is making</p> <p>23 available content in a different form through a search</p> <p>24 engine that the court considered transformative."</p> <p>25 My question is, does that state your</p>	<p style="text-align: right;">Page 152</p> <p>1 A Yeah. I think the use of the words, "the</p> <p>2 court considered transformative" are what I would</p> <p>3 underline here.</p> <p>4 Q Your next sentence -- does that mean, yes, it</p> <p>5 is your prose?</p> <p>6 A It is likely to be. Certainly it's an article</p> <p>7 I've written, so I take responsibility for Footnote 111.</p> <p>8 Q Your next sentence says, "If this type of</p> <p>9 transformation is indeed a fair use, then presumably it</p> <p>10 would apply to many categories of content that Google</p> <p>11 users may locate on the Internet, using search engines</p> <p>12 such as Google."</p> <p>13 A Yes.</p> <p>14 Q Do you agree with that statement?</p> <p>15 A I use quotations around transformation to</p> <p>16 signal this agreement with the fact that it is, but if,</p> <p>17 indeed, the 9th Circuit's view was often frank, it might</p> <p>18 apply to other types of uses.</p> <p>19 Q In your article you said, "would apply";</p> <p>20 correct?</p> <p>21 A The word "presumably" you seem to have</p> <p>22 forgotten. Presumably it would apply. I am not saying</p> <p>23 just "it would apply."</p> <p>24 Q Since undertaking this assignment, have you</p> <p>25 come across any information that causes you to alter</p>



<p style="text-align: right;">Page 153</p> <p>1 that presumption?</p> <p>2 A The presumption that if we have -- that</p> <p>3 reading of those 9th Circuit opinions, there would be</p> <p>4 other uses that would be potentially covered, that</p> <p>5 opinion has not changed.</p> <p>6 Q On Page 863 -- I apologize. Let me ask you to</p> <p>7 go back one page.</p> <p>8 In the Footnote 100, you have the quotation</p> <p>9 from Judge Leval's article, "Toward a Fair Use</p> <p>10 Standard."</p> <p>11 Do you see that?</p> <p>12 A Yes.</p> <p>13 Q Did you seek permission from the Harvard Law</p> <p>14 Review for that excerpt?</p> <p>15 A I don't believe I did.</p> <p>16 Q Pay royalty?</p> <p>17 A I don't believe I did.</p> <p>18 Q Are you familiar with Judge Leval's 1990</p> <p>19 article?</p> <p>20 A I would have reread it at the time.</p> <p>21 Q Are you aware that it has been cited by the</p> <p>22 Supreme Court and circuit courts in many cases?</p> <p>23 A I'm aware that it has been cited. I did not</p> <p>24 count the cases in which it has been cited, but it's</p> <p>25 considered a fairly well-known piece, I believe.</p>	<p style="text-align: right;">Page 155</p> <p>1 exact number. But parody, I already said I agreed. The</p> <p>2 other two, not necessarily. Symbolism and aesthetic</p> <p>3 declarations is something I would consider contextual.</p> <p>4 But you asked me earlier for a list of fair</p> <p>5 uses. I cannot provide one, so to that extent it may</p> <p>6 well be that these innumerable. And to that extent, the</p> <p>7 word is correct.</p> <p>8 Q When you say symbolism may be contextual, you</p> <p>9 mean --</p> <p>10 A I don't know what Judge Lovoll meant.</p> <p>11 Q Do you know why you quoted him?</p> <p>12 A At the time, those four paragraphs looked like</p> <p>13 they belonged there.</p> <p>14 Q What do you mean when you say symbolism is</p> <p>15 contextual? Do you mean whether it's transformed or</p> <p>16 depends on its context?</p> <p>17 MR. SNYDER: Objection to form.</p> <p>18 THE WITNESS: It depends what symbolism means</p> <p>19 in that context. It could be defined in a number of</p> <p>20 ways. I think it includes certain forms of art uses and</p> <p>21 artistic uses and others that really, I cannot say in</p> <p>22 any abstract, say they're always transformative or not.</p> <p>23 I certainly agree with the parody part.</p> <p>24 BY MR. MCGOWAN:</p> <p>25 Q Whether they are transformative will depend on</p>
<p style="text-align: right;">Page 154</p> <p>1 Q In this excerpt that you quote, Judge Lovoll</p> <p>2 says, "The use" -- in the third full paragraph, "The use</p> <p>3 must be productive and must employ the quoted matter in</p> <p>4 a different manner or for a different purpose from the</p> <p>5 original."</p> <p>6 Do you see that?</p> <p>7 A Um-hum.</p> <p>8 Q Why did you quote that language?</p> <p>9 A I would -- I'd have to go back four years and</p> <p>10 think of how the creative process was for this article.</p> <p>11 I think it's a relevant quote in context. Why I chose</p> <p>12 that exact part, I would have to go back to the original</p> <p>13 article and see why I picked those four paragraphs. I</p> <p>14 don't -- I cannot tell you beyond that.</p> <p>15 Q Okay. In the last paragraph, Judge Lovoll</p> <p>16 states, "Transformative uses may include criticizing the</p> <p>17 quoted work, exposing the character of the original</p> <p>18 author," and then he concludes his passage by saying,</p> <p>19 "They also may include parody, symbolism, aesthetic</p> <p>20 declarations, and innumerable other uses."</p> <p>21 Do you see that.</p> <p>22 A I do.</p> <p>23 Q Do you agree with that?</p> <p>24 A I -- I would probably have a quibble with</p> <p>25 "innumerable," unless it means that it's hard to put an</p>	<p style="text-align: right;">Page 156</p> <p>1 the facts?</p> <p>2 MR. SNYDER: Objection to form.</p> <p>3 THE WITNESS: Yes.</p> <p>4 BY MR. MCGOWAN:</p> <p>5 Q And that's consistent with what you said</p> <p>6 earlier about case by case?</p> <p>7 A Case by case. Subject to the fact that, in</p> <p>8 some cases, we have precedent that acts as a useful</p> <p>9 guide.</p> <p>10 Q On Page 867 at the top of the page -- and</p> <p>11 this, I believe, is in a section in which you refer to</p> <p>12 user derived content?</p> <p>13 A Right.</p> <p>14 Q You say at the beginning of this page, "The</p> <p>15 availability of a technological licensing solution</p> <p>16 should not, in itself, be sufficient evidence that a</p> <p>17 market exists. It is sign that a market is possible."</p> <p>18 Do you see that?</p> <p>19 A Yes.</p> <p>20 Q What did you mean by that?</p> <p>21 A Well, the -- this is an explanation of my</p> <p>22 reading of Texaco, which, in the simplest term, is that</p> <p>23 one of the relevant factors in the fair use analysis is</p> <p>24 whether a licensing transaction is reasonably possible.</p> <p>25 So that's what the words, "in itself," are meant to</p>

<p style="text-align: right;">Page 157</p> <p>1 convey. It's not because the rightsholder says, I'm</p> <p>2 licensing parody, that parody is not a fair use. It's</p> <p>3 the fact that there's a licensing market is a sign that</p> <p>4 it may not be a fair use.</p> <p>5 I believe that's consistent with Texaco, but I</p> <p>6 would have to reread the case. I did not do so to</p> <p>7 prepare this opinion --</p> <p>8 Q So let me --</p> <p>9 A -- or this report, rather.</p> <p>10 Q Let's talk about your parody example for a</p> <p>11 minute. Can you explain what you mean by your comment</p> <p>12 just about parody. If I understood you correctly, you</p> <p>13 said the fact that somebody stands up and says "I'm</p> <p>14 willing to license parody," has significance. I did not</p> <p>15 understand the significance.</p> <p>16 A What the sentence, the words, "in itself,"</p> <p>17 convey is that it's not because a rightsholder, for</p> <p>18 example, says, "I'm making my work available for parody</p> <p>19 purposes by others." That would necessarily negate fair</p> <p>20 use. I don't consider that a reasonable licensing</p> <p>21 market.</p> <p>22 A reasonable licensing market is for uses that</p> <p>23 are not fair uses, and so what I'm saying is if there is</p> <p>24 such a licensing market, or if one is clearly possible,</p> <p>25 that is relevant in a fair use analysis.</p>	<p style="text-align: right;">Page 159</p> <p>1 license a parody, those two factors, even put together,</p> <p>2 would not mean that the parodic use was unfair?</p> <p>3 A In the case of parody, that's correct.</p> <p>4 Q Now, when you talk about the factors that have</p> <p>5 to be considered for a licensing -- make sure I</p> <p>6 understand you correctly. What factors have to be</p> <p>7 considered before you would conclude that a reasonable</p> <p>8 licensing market does exist?</p> <p>9 A I would consider the existence of similar</p> <p>10 licensing markets or systems, and I would consider</p> <p>11 whether those current licensing systems can be adapted</p> <p>12 or can be paralleled to license the uses in question.</p> <p>13 And I believe in the case of the online parts of books,</p> <p>14 that is the case.</p> <p>15 Q All right. Let's break it down because</p> <p>16 "online use" is a broad term. Would</p> <p>17 you agree?</p> <p>18 A We discussed that earlier what I meant by</p> <p>19 that, but yes, it is a broad term.</p> <p>20 Q Similar markets.</p> <p>21 A Um-hum.</p> <p>22 Q Are you aware of any opt-in market in which</p> <p>23 authors allow their works to be searched?</p> <p>24 A No. I can't think of a system where authors</p> <p>25 specifically license that use currently.</p>
<p style="text-align: right;">Page 158</p> <p>1 Q So "clearly possible," by that you don't mean</p> <p>2 technically possible?</p> <p>3 A That would be part of it.</p> <p>4 Q Here you say, "The availability of a</p> <p>5 technological licensing solution should not, in itself,</p> <p>6 be sufficient evidence that a market exists."</p> <p>7 A Um-hum.</p> <p>8 Q So it's not the technical feasibility that</p> <p>9 matters; correct?</p> <p>10 A It's one of the things that matters.</p> <p>11 Q Standing alone, that's insufficient?</p> <p>12 A It's not because the license is</p> <p>13 technologically available that the use is necessarily</p> <p>14 not a fair use. That's one of the factors that would be</p> <p>15 taken into account, I believe, based on my reading of --</p> <p>16 or my recollection, rather, of Texaco.</p> <p>17 Q Is that your understanding generally?</p> <p>18 A That strikes me as a reasonable proposition.</p> <p>19 Q And it's not, standing alone, the fact that a</p> <p>20 rightsholder would be willing to license; correct?</p> <p>21 A In itself, is not sufficient evidence. You</p> <p>22 need to look at existing market practices and other</p> <p>23 factors that are discussed in my report.</p> <p>24 Q So let's add the two together. If it's</p> <p>25 technically possible that a rightsholder is willing to</p>	<p style="text-align: right;">Page 160</p> <p>1 Q You didn't investigate that as part of your</p> <p>2 report?</p> <p>3 A I did not investigate the search functions</p> <p>4 specifically as part of my report.</p> <p>5 Q You've read the Chevalier report?</p> <p>6 A Correct.</p> <p>7 Q You skimmed the Aikan deposition?</p> <p>8 A Parts of it.</p> <p>9 Q In each of those it is established that</p> <p>10 Amazon's Search Inside the Book program is an opt-in</p> <p>11 which does not pay royalties to authors.</p> <p>12 Did you know that when you wrote your report?</p> <p>13 MR. SNYDER: Objection.</p> <p>14 THE WITNESS: I knew of Amazon's system. I</p> <p>15 did know the amount of payment or absence thereof.</p> <p>16 That's a matter that's obviously been negotiated between</p> <p>17 the parties.</p> <p>18 BY MR. MCGOWAN:</p> <p>19 Q Is it a premise of your opinion in this case</p> <p>20 that Amazon negotiates price with each individual</p> <p>21 author?</p> <p>22 A It's not a premise. It's the authors agree to</p> <p>23 free uses, as I mentioned before. That's their</p> <p>24 prerogative as copyright holder.</p> <p>25 Q Is Search Inside the Book on Amazon a fair</p>

<p style="text-align: right;">Page 161</p> <p>1 use?</p> <p>2 A I have no idea.</p> <p>3 Q Then why did you just say "fair uses"? You</p> <p>4 said if authors agree to --</p> <p>5 A I said "free."</p> <p>6 (Court reporter interrupted the proceedings</p> <p>7 to preserve the record.)</p> <p>8 MR. MCGOWAN: Sorry. Speak up just a touch.</p> <p>9 MR. SNYDER: I heard him.</p> <p>10 THE WITNESS: I did say "free." It should be</p> <p>11 on the record.</p> <p>12 BY MR. MCGOWAN:</p> <p>13 Q Similar markets. Is Amazon Search Inside the</p> <p>14 Book a similar market to Google Books?</p> <p>15 A The rights involved are in both cases, the</p> <p>16 right -- you certainly have the right to reproduction,</p> <p>17 possibly other rights under Section 106.</p> <p>18 Once an organization holds the right to -- or</p> <p>19 the authority to license those rights, it could license</p> <p>20 those uses if they are found to be not fair uses. It's</p> <p>21 a very simple thing to do at that point.</p> <p>22 Q Are they similar?</p> <p>23 A I would say yes. I mean, when you say "they,"</p> <p>24 maybe you should be specific, make sure --</p> <p>25 Q Amazon --</p>	<p style="text-align: right;">Page 163</p> <p>1 A Um-hum.</p> <p>2 Q Do you understand?</p> <p>3 A You want me to assume that a user can word</p> <p>4 search the entire book in both cases?</p> <p>5 Q Um-hum.</p> <p>6 A Okay.</p> <p>7 Q And get a display that is similar in length to</p> <p>8 the snippet display that you did testify earlier you</p> <p>9 were familiar with?</p> <p>10 A The snippet I have used, yes.</p> <p>11 Q So with respect to the searchability and the</p> <p>12 display, would you consider Amazon Search Inside the</p> <p>13 Book to be a similar market, as you were just describing</p> <p>14 in the market availability analysis in your paper?</p> <p>15 A Well, again -- I -- I -- I have not used the</p> <p>16 Amazon system to an extent that I remember how it works</p> <p>17 I assume that they will then try to sell the book or</p> <p>18 some other function. Maybe that's why authors agree. I</p> <p>19 have not spoken to authors why they use Amazon. I</p> <p>20 really can't -- it's -- it's beyond just searching and</p> <p>21 what you return. It's what happens after that would</p> <p>22 also be relevant.</p> <p>23 And so the answer to your question is I'm not</p> <p>24 sure that I would call them similar. They certainly</p> <p>25 have some parallels, but you've asked me to assume that</p>
<p style="text-align: right;">Page 162</p> <p>1 A -- we're saying the exact same thing.</p> <p>2 Q Amazon Search Inside the Book programs and</p> <p>3 Google Books?</p> <p>4 A Well, there are certainly many parallels. I</p> <p>5 have not used Amazon's system more than, maybe, once.</p> <p>6 So I'm -- would not qualify similarity there very -- in</p> <p>7 a very steadfast, but I'm not sure.</p> <p>8 Q Can you do a full text search of a book and</p> <p>9 return a display of a portion of text on Amazon and</p> <p>10 Search Inside the Book?</p> <p>11 A I don't recall.</p> <p>12 Q Have you ever done that?</p> <p>13 A I've used Amazon search engine -- or Search</p> <p>14 Inside, I think, maybe once. I don't recall what the</p> <p>15 return was in terms of how much was returned in the</p> <p>16 search result.</p> <p>17 Q Do you recall that some text was returned?</p> <p>18 A Yes.</p> <p>19 Q Do you know whether the entire text of the</p> <p>20 book can be searched?</p> <p>21 A No, I don't.</p> <p>22 Q Assume with me that in both Google Books and</p> <p>23 Amazon Search Inside the Books, a user can search the</p> <p>24 full text of a book and see a display of a portion of</p> <p>25 the text of the book.</p>	<p style="text-align: right;">Page 164</p> <p>1 similarity. I -- you know, beyond that, I can't really</p> <p>2 say Amazon is the same as Google.</p> <p>3 Q It's not something you researched for purposes</p> <p>4 of your opinion?</p> <p>5 A I have not researched the Amazon system for</p> <p>6 purposes of my report.</p> <p>7 Q Do you have any basis whatsoever to think that</p> <p>8 in the event there was a collective license for Google</p> <p>9 Books, the price for search would be anything other than</p> <p>10 the zero, as it is in Amazon?</p> <p>11 A Again, I don't know why authors, and again how</p> <p>12 many authors have participated in the system. It is a</p> <p>13 decision that authors have made in the case, unlike in</p> <p>14 the Google case. And whether the price would be zero</p> <p>15 and how many authors would be willing to do it for zero</p> <p>16 is not something I can speculate on in terms of</p> <p>17 percentage or books or authors.</p> <p>18 Q What facts do you possess now that would</p> <p>19 support the notion of there being anything different?</p> <p>20 A As I said, there may be differences between</p> <p>21 the Amazon system and the Google system I'm not aware</p> <p>22 of. What I -- my report states is that it is fairly</p> <p>23 easily -- it would be fairly easy for a CMO to license</p> <p>24 those uses, should it be determined that they need to be</p> <p>25 licensed, as I, from what you're saying, understand is</p>

<p style="text-align: right;">Page 165</p> <p>1 the case with Amazon. The price of the license is a</p> <p>2 matter to be negotiated.</p> <p>3 Q Do authors use a collective management</p> <p>4 organization to opt-inside the book?</p> <p>5 A I don't know.</p> <p>6 Q Did you look at that?</p> <p>7 A No, I did not look at Search Inside the Book</p> <p>8 in Amazon for my report.</p> <p>9 Q Did you ask anyone from CCC whether they ever</p> <p>10 approached Amazon and offered anyone to license search</p> <p>11 inside the book?</p> <p>12 A No.</p> <p>13 Q Do you know whether, in Google Books, if you</p> <p>14 see a return on a book on a search, you are then</p> <p>15 presented with a link to a place where you can buy the</p> <p>16 book?</p> <p>17 A I read that in one of the documents in -- that</p> <p>18 I used to my prepare report. I believe it's a</p> <p>19 declaration by somebody that Google -- that works at</p> <p>20 Google. The name escapes me.</p> <p>21 Q Have you seen that in your own use of it?</p> <p>22 A No.</p> <p>23 Q You've never seen a page where there's been a</p> <p>24 link to Amazon or Barnes or Nobel?</p> <p>25 A I have not looked for one, but I have not seen</p>	<p style="text-align: right;">Page 167</p> <p>1 A They could.</p> <p>2 Q I want to focus on search.</p> <p>3 A Okay.</p> <p>4 Q Are you aware of any seller in a market that</p> <p>5 sells a license for search only?</p> <p>6 A For search only, I'm not aware of a license</p> <p>7 that is limited to that, although what you've described</p> <p>8 from the Amazon system looks like it's a license to do</p> <p>9 that but with a zero rate.</p> <p>10 Q You didn't look at that?</p> <p>11 A Not for this report.</p> <p>12 Q You didn't look for any others?</p> <p>13 A I do not have access to the contract that</p> <p>14 Amazon provides for search inside. I did not have that</p> <p>15 access, so I did not look for it.</p> <p>16 Q So just so you know, it's an exhibit</p> <p>17 downloaded from the Internet in other depositions in</p> <p>18 this case. Did you -- did you not go to the web page</p> <p>19 and try and download it?</p> <p>20 A I did not see that exhibit. The Amazon</p> <p>21 contract, I did not see it for some reason.</p> <p>22 Q Did you look on Amazon?</p> <p>23 A I did not look at the Search Inside the Book</p> <p>24 for purposes of this report.</p> <p>25 Q And you don't know of any other market in</p>
<p style="text-align: right;">Page 166</p> <p>1 one.</p> <p>2 Q So on the topic of what markets are similar</p> <p>3 markets, as you phrase. So in forming your opinion with</p> <p>4 respect to search of the full text of a book, what</p> <p>5 similar markets did you look at?</p> <p>6 A Online uses of parts of books.</p> <p>7 Q Okay. Who is the seller in the Search Inside</p> <p>8 the Book that you looked at?</p> <p>9 A I did not look at Search Inside the Book.</p> <p>10 Q I'm trying to distinguish uses, okay?</p> <p>11 A Okay.</p> <p>12 Q One use is search, agreed? That's one thing</p> <p>13 Google Books allows users to do?</p> <p>14 A Yes. It allows people to search inside books</p> <p>15 and read snippets, yes.</p> <p>16 Q And you agree with me, as a copyright expert,</p> <p>17 that you could license search separately from display of</p> <p>18 snippets; correct?</p> <p>19 MR. SNYDER: Objection to form.</p> <p>20 THE WITNESS: If you're talking about</p> <p>21 contracts, parties can negotiate a contract the way they</p> <p>22 want. They can license different uses in different</p> <p>23 contracts.</p> <p>24 BY MR. McGOWAN:</p> <p>25 Q They could do that; right?</p>	<p style="text-align: right;">Page 168</p> <p>1 which the right that is traded is the right to search</p> <p>2 inside a book?</p> <p>3 A Well, other than the Amazon situation that</p> <p>4 you've described, I cannot come up with an example of a</p> <p>5 search only license, no.</p> <p>6 Q Can you come up with an example of a right to</p> <p>7 reproduce a work where the only use allowed is search?</p> <p>8 A I can think of licenses for reproduction. The</p> <p>9 search obviously returns a snippet so that you're</p> <p>10 separating things that are very hard to separate. The</p> <p>11 reproduction happens, then the search happens, and then</p> <p>12 the snippet happens.</p> <p>13 Q You'll agree with me, I take it -- tell me if</p> <p>14 you disagree. Is it a premise of your opinion that it</p> <p>15 is technically impossible to perform search without</p> <p>16 snippet display?</p> <p>17 A I don't know. If you search, you must return</p> <p>18 something. Presumably, you could return something other</p> <p>19 than the snippet, yes.</p> <p>20 Q Page number?</p> <p>21 A Pardon?</p> <p>22 Q Page number?</p> <p>23 A I suppose so.</p> <p>24 Q It would be less useful?</p> <p>25 A You know, the bibliographic data could be</p>

<p style="text-align: right;">Page 169</p> <p>1 returned. I don't -- I'm not sure what could be  2 returned other than the snippet. I'm sure there are  3 options.  4 Q So focusing now on an agreement in which the  5 use licensed is, you may reproduce the work and search  6 within the work and return, let's say, bibliographic  7 information only, or a page number only.  8 Are you aware of a market in which such a  9 license is sold?  10 A Bibliographic data, I don't think there's a  11 license that I can think of now that does only that.  12 Q Okay. Snippet --  13 A Um-hum.  14 Q -- three Lines. Has CCC even licensed, to  15 your knowledge, 3 lines of display only?  16 A I don't know about three lines, but they've  17 certainly licensed very short excerpts for use on  18 websites or in newsletters, those kinds of uses.  19 Whether it's three lines or a little bit more or less, I  20 cannot say exactly.  21 Q What is the shortest excerpt you can think of?  22 A I can't think of a -- I can think of fairly  23 short excerpts, but I can't quantify them.  24 Q You don't know as a percentage?  25 A No.</p>	<p style="text-align: right;">Page 171</p> <p>1 must be made?  2 A This part of the paper refers to, very  3 specifically, derived content which is defined earlier  4 in the paper as reuse of content to create other  5 content.  6 And so I was -- I'm referring here to  7 terminology suggested by others, which goes back to fair  8 use and juris prudence and other cases where the impact  9 on commercial exploitation is a relevant factor.  10 Q These phrases that I just read are not in  11 quotation marks; correct?  12 A They are not in quotation marks. Whether they  13 track what is said in, for example, David Gauthier's  14 paper, I don't recall.  15 Q Morals By Agreement is a book on ethics?  16 A Yes, that's what I recall.  17 Q What do you mean by the term you use, which is  18 parasitic or simply free writing, is the derivation of  19 parasitic or simply free writing?  20 A I was trying to draw a distinction in the  21 paper because this area of copyright law is very complex  22 in the forms of derivation which, again, means reuse to  23 create something else. And earlier in the paper, I  24 believe it's 18 -- I say the issue of derivative rights  25 is not fully addressed in the paper. It is a very</p>
<p style="text-align: right;">Page 170</p> <p>1 Q Do you know the -- the default limitation in  2 CCC's course pack, services is two chapters or  3 20 percent?  4 A That's the upper limit.  5 Q Upper limit, yes.  6 A Um-hum.  7 Q Two chapters --  8 A Sounds right. I haven't checked it recently,  9 but that sounds right.  10 Q On Page 867 --  11 A Of what? Sorry.  12 Q Of your tangled web paper.  13 A Yes.  14 Q You say near the bottom of Page 867, "A  15 distinction must be made between use value gained by the  16 user and lost exchange value by the rightsholders."  17 Do you see that?  18 A Yes, I do.  19 Q The proper test is when a commercial  20 exploitation and seems to focus on the latter -- sorry.  21 The proper test is commercial exploitation and seems to  22 focus on the latter. Put in blunt returns, is the  23 derivation parasitic or simply free writing?  24 A I do.  25 Q Do you agree that that is a distinction that</p>	<p style="text-align: right;">Page 172</p> <p>1 complex issue.  2 What I describe here is that there are various  3 types of derivation. If it's simple free writing, it's  4 not the same as a parasite on an existing work that may  5 have a type of value that would be sufficient, allow it  6 to survive a fair use analysis.  7 But if it's free writing, it's very unlikely  8 that this would happen. If you read the following  9 sentence, "Parasitic behavior imposes negative --  10 (Court reporter interrupted the proceedings  11 to preserve the record.  12 THE WITNESS: Sorry. "Parasitic behavior  13 imposes," for whatever reason there's some British  14 spelling -- "imposes negative externalities on the  15 rightholder, a free rider merely benefits from positive  16 externalities."  17 So I'm really focusing on the impact of the  18 reuse. So I think the paragraph makes the -- answers  19 your question in a way.  20 Q So free writing, in the context you're using  21 it here, is not objectionable from the point of view of  22 the analysis that you are discussing?  23 A No. They both might be objectionable.  24 Q Well, when you say a free writer merely  25 benefits from positive externality, in what way is that</p>



<p style="text-align: right;">Page 173</p> <p>1 different from parasitism?</p> <p>2 A Parasitisms will -- a parasite attacks the</p> <p>3 host. So it basically impacts the original work. The</p> <p>4 free writer only rides the wave of the original work.</p> <p>5 But that doesn't necessarily impose negative</p> <p>6 externalities on the -- on the original work.</p> <p>7 Q So if I can modify the biologic metaphor</p> <p>8 slightly.</p> <p>9 A Um-hum.</p> <p>10 Q A parasite is undercutting a market in which</p> <p>11 the work has been derived from is being exploited?</p> <p>12 A Parasitic behavior might include free use of</p> <p>13 an existing work in a way that affects that work, but we</p> <p>14 might still decide that that is allowable. Criticism</p> <p>15 parity, free writer doesn't do that. Free writer</p> <p>16 basically takes something out there and rides the wave.</p> <p>17 It's -- it does not affect negatively the original work.</p> <p>18 Q And the -- the free writer is less likely to</p> <p>19 be objectionable than the parasite, though neither is --</p> <p>20 A I would not say that. I think they might both</p> <p>21 be objectionable. It's contextual.</p> <p>22 Q It depends on the facts?</p> <p>23 A It depends, as I say, on -- it depends on the</p> <p>24 facts, yes, to the extent that you come to fair use</p> <p>25 analysis. And I say then you would look at the fair use</p>	<p style="text-align: right;">Page 175</p> <p>1 Q Is it your understanding that Plaintiff Miles</p> <p>2 has lost any sales as a result of Google's conduct in</p> <p>3 this case?</p> <p>4 A I did not check who lost or who didn't lose</p> <p>5 sales.</p> <p>6 Q Do you know, one way or the other whether any</p> <p>7 of the plaintiffs lost any sales?</p> <p>8 A No. I believe that is for the plaintiffs to</p> <p>9 establish, and I did not look or ask them.</p> <p>10 Q Assume with me that -- if you had read their</p> <p>11 depositions, you would have seen that each of them said</p> <p>12 that they were not aware of having lost any sales --</p> <p>13 would that put them on the nonparasitic side of the</p> <p>14 distinction you just drew?</p> <p>15 A It is a relevant distinction for the purposes</p> <p>16 of derivation. In here we're talking not about creating</p> <p>17 other works, at least not the -- the definition of</p> <p>18 derivation in the context of user generative content</p> <p>19 does not apply to these plaintiffs.</p> <p>20 Q Yes. The economic consequences that you're</p> <p>21 discussing, the difference between parasitism and free</p> <p>22 writing as economic matter is not limited to any</p> <p>23 particular form of use, is it?</p> <p>24 A You say that. But in my paper, I say -- I'm</p> <p>25 talking about derived content as a subset of</p>
<p style="text-align: right;">Page 174</p> <p>1 analysis and apply the criteria.</p> <p>2 Q And the facts might vary one work to another?</p> <p>3 MR. SNYDER: Objection to form.</p> <p>4 THE WITNESS: Might, yes.</p> <p>5 BY MR. MCGOWAN:</p> <p>6 Q So what work is this distinction doing for you</p> <p>7 here? Why are you drawing it in this paper?</p> <p>8 A Well, I think the distinction is made to</p> <p>9 inform a fair use analysis in the way that is explained</p> <p>10 in the following sentence, which says if there are no</p> <p>11 demonstrable lost sales, user derives content might fit</p> <p>12 in the free writing category.</p> <p>13 But if there are demonstrable lost sales, then</p> <p>14 it's parasitic because of the negative externalities.</p> <p>15 And I say that that's relevant to fair use analysis.</p> <p>16 But I didn't push it. And again, I refer you to earlier</p> <p>17 in the paper where I say issue of derivation in</p> <p>18 copyright is something that I planned when I wrote this</p> <p>19 article to get back to because I consider it, perhaps,</p> <p>20 the harder -- hardest question in copyright law at this</p> <p>21 point --</p> <p>22 Q Is it your understanding --</p> <p>23 A -- with Note 76.</p> <p>24 Q Sorry. Are you done?</p> <p>25 A I'm done.</p>	<p style="text-align: right;">Page 176</p> <p>1 user-generated content. I would not take that paragraph</p> <p>2 beyond that.</p> <p>3 Q I am asking for your opinion as a professor of</p> <p>4 law at Vanderbilt University. I'm asking whether, in</p> <p>5 your opinion, the distinction that you draw in the paper</p> <p>6 is limited to only derived uses and, therefore,</p> <p>7 inapplicable to any others?</p> <p>8 A I don't know. I would have to give it more</p> <p>9 thought. I mean, you take one paragraph from a</p> <p>10 four-year-old paper and ask me to broaden it. I can't</p> <p>11 do that in two minutes. I'd need to think it.</p> <p>12 Q You've cited the Landes and Posner copy of</p> <p>13 Intellectual Property Foundations book in your work from</p> <p>14 time to time, have you not?</p> <p>15 A I've consulted that book and sure, I've cited</p> <p>16 it, yes.</p> <p>17 Q Do you know whether it contains any limitation</p> <p>18 of the distinction between parasitic and free writing to</p> <p>19 derive works only?</p> <p>20 A I don't recall.</p> <p>21 Q Are you aware of any text in copyright law</p> <p>22 that says that distinction is limited only to derived</p> <p>23 works?</p> <p>24 A I'm limiting it to my paper, but other authors</p> <p>25 are obviously free to take it elsewhere. And all I'm</p>

<p style="text-align: right;">Page 177</p> <p>1 saying is I don't have, now, the ability to do so. I</p> <p>2 would have to think it through.</p> <p>3 Q I understand that you're talking about how you</p> <p>4 have used it in the paper. What I'm asking is whether</p> <p>5 you are actually affirmatively stating that it does not</p> <p>6 apply outside of the context?</p> <p>7 A I am not making any statement one way or the</p> <p>8 other. It may or may not. I don't know. I would have</p> <p>9 to think it through.</p> <p>10 MR. McGOWAN: Let me ask that we mark as</p> <p>11 Exhibit 10 the email that you reference earlier to</p> <p>12 Mr. Haber.</p> <p>13 THE WITNESS: Yes.</p> <p>14 MR. McGOWAN: And my thanks for forwarding it</p> <p>15 to us during the deposition. I appreciate that.</p> <p>16 (Exhibit 10 was marked for identification.)</p> <p>17 BY MR. McGOWAN:</p> <p>18 Q This was written on March 25th. Is this the</p> <p>19 email that you referenced?</p> <p>20 A It is.</p> <p>21 Q Had you spoken to Mr. Haber about your work on</p> <p>22 this report before sending this email?</p> <p>23 A I don't believe so, no.</p> <p>24 Q Okay. At the top of your Page 1 it says, "I</p> <p>25 will be able to give you the context fairly quickly.</p>	<p style="text-align: right;">Page 179</p> <p>1 me from this email that he has taken some of your text</p> <p>2 and edited it and sent it back to you?</p> <p>3 Is that what happened?</p> <p>4 A I sent him a draft of one paragraph, and he</p> <p>5 sent it back, yes --</p> <p>6 Q Okay.</p> <p>7 A -- with some line edits, as you can see.</p> <p>8 Q Do you have the email in which you -- is the</p> <p>9 email in which you sent the draft the one at the top?</p> <p>10 A No. The email I sent him is at the middle of</p> <p>11 Page 1. And I say, "On a strictly confidential</p> <p>12 basis" -- there is a typo -- "I'm writing a report."</p> <p>13 But at that time, I had not disclosed that I</p> <p>14 was writing this report to anybody, so I hadn't</p> <p>15 mentioned that here. I said, "It includes a paragraph</p> <p>16 on CCC. If you have a second" --</p> <p>17 THE REPORTER: Could you please slow down.</p> <p>18 THE WITNESS: -- "could you check to make sure</p> <p>19 all is accurate, please."</p> <p>20 And so what he did is he returned the email to</p> <p>21 me with his edits on my paragraph.</p> <p>22 Q In the red line?</p> <p>23 A In the -- yes, correct. So you have my email.</p> <p>24 And then he added -- the language at the end</p> <p>25 is actually part of his response to me that is part of</p>
<p style="text-align: right;">Page 178</p> <p>1 You will see why I had to get this right."</p> <p>2 A Correct.</p> <p>3 Q Did you give him the context?</p> <p>4 A I believe I spoke to him since and told him</p> <p>5 that I had filed a report and -- in the Google case. He</p> <p>6 was already aware of it, for some reason.</p> <p>7 Q What did you tell him about your work?</p> <p>8 A Just what I said, that I said -- I filed the</p> <p>9 report. The report that I was talking to you in March</p> <p>10 was for the Google case. And I think his answer was, I</p> <p>11 know, or something -- I don't think he indicated he had</p> <p>12 seen it, but he was aware of it.</p> <p>13 Q Did you tell him anything about the case?</p> <p>14 A No.</p> <p>15 Q Did you tell him who had retained you?</p> <p>16 A No.</p> <p>17 Q Did you tell him which side your report was</p> <p>18 going to be filed on?</p> <p>19 A My sense was he was aware already. So the</p> <p>20 discussion did not move further.</p> <p>21 Q You sensed that he was aware that you had been</p> <p>22 retained by the plaintiffs?</p> <p>23 A He was aware what was going on in terms of my</p> <p>24 report having been filed on behalf of the authors, yes.</p> <p>25 Q Well, let me -- let me back up. It appears to</p>	<p style="text-align: right;">Page 180</p> <p>1 Footnote 1.</p> <p>2 Q And that footnote in which he says, "I hope</p> <p>3 there is some mention that most of the 171 million is</p> <p>4 not from the amount collected."</p> <p>5 A Um-hum.</p> <p>6 Q Did you copy that, or portions of that, I</p> <p>7 should say, into your report?</p> <p>8 A As I recall, it's the footnotes that uses more</p> <p>9 or less the substance, but not the exact language.</p> <p>10 Yeah, Footnote 15. I did not reproduce the numbers, but</p> <p>11 the substance.</p> <p>12 Q Have you had any discussions with him since</p> <p>13 the exchange reflected in Exhibit 10?</p> <p>14 A About the case, no.</p> <p>15 Q And I take it, just to be sure, you haven't</p> <p>16 had discussions with anyone else at CCC about the case.</p> <p>17 A About the case, no. Absolutely not.</p> <p>18 Q Do you have any financial interest in CCC?</p> <p>19 A No. It is a not-for-profit, in any event.</p> <p>20 MR. McGOWAN: I need to ask that we mark as</p> <p>21 Exhibit 11 --</p> <p>22 (Exhibit 11 was marked for identification.)</p> <p>23 MR. McGOWAN: -- a document called "Insights."</p> <p>24 THE WITNESS: Um-hum.</p> <p>25 BY MR. McGOWAN:</p>



<p style="text-align: right;">Page 181</p> <p>1 Q And is this an article that you wrote, or how</p> <p>2 would you describe it?</p> <p>3 A This is a summary of a longer piece that is</p> <p>4 published in the Stanford Technology of Law Review that</p> <p>5 the editor of Insight -- I forget her name -- having</p> <p>6 seen my Stanford piece said, "Would you be willing to do</p> <p>7 a condensed version for Insights?"</p> <p>8 And I agreed to do that.</p> <p>9 Q This is available for download?</p> <p>10 A The Stanford piece, absolutely.</p> <p>11 Q This one, as well?</p> <p>12 A I -- I don't know if this piece is online or</p> <p>13 for members only.</p> <p>14 Q The very last paragraph which is --</p> <p>15 A On which page?</p> <p>16 Q The next to the last page. And the page --</p> <p>17 the paragraph just before your bio.</p> <p>18 A Yes.</p> <p>19 Q It says, "At this stage, Judge Chin has asked</p> <p>20 the parties to revise their agreement, possibly making</p> <p>21 it opt-in for all rightsholders. This would not solve</p> <p>22 the orphan works issue" --</p> <p>23 A Um-hum.</p> <p>24 Q -- but it might solve the MFN issue if all</p> <p>25 foreign rightsholders have an equal opportunity to</p>	<p style="text-align: right;">Page 183</p> <p>1 that can create some obstacles.</p> <p>2 Collective management organizations have</p> <p>3 actually been dealing with this issue -- sorry. Just</p> <p>4 saw the name of the editor.</p> <p>5 -- have been working on this for a quite some</p> <p>6 time. Some collective management organizations have</p> <p>7 actually, more or less, solved the problem by collecting</p> <p>8 money for the use of works, not knowing who the exact</p> <p>9 rightsholder is, and will then keep that money and pay</p> <p>10 it if the rightsholder materializes. So that's one way.</p> <p>11 But the U.S. Copyright Office has proposed</p> <p>12 other options in terms of limiting damages for the use</p> <p>13 of those works. Those are all worthy for their</p> <p>14 consideration. An opt-in system does not, by itself,</p> <p>15 solve that issue.</p> <p>16 Q Let me -- we have five minutes left. Let me</p> <p>17 ask one more question, and then we'll come back to this.</p> <p>18 If you can't find the rightsholder, then the</p> <p>19 difficulty is that you can't use the work?</p> <p>20 A You can't --</p> <p>21 Q To the extent you need permission; correct?</p> <p>22 A Unless permission is given by law or some</p> <p>23 other way, yes.</p> <p>24 Q And the rightsholder can't get paid?</p> <p>25 A The rightsholder can get paid, if there's a</p>
<p style="text-align: right;">Page 182</p> <p>1 join."</p> <p>2 Q What is the orphan works issue?</p> <p>3 A The orphan works issue is the use of works,</p> <p>4 the rightsholder in which is unknown or unlocatable.</p> <p>5 Q Is that a problem?</p> <p>6 A Orphan works --</p> <p>7 MR. SNYDER: Objection to form.</p> <p>8 THE WITNESS: -- are something that many</p> <p>9 people, including U.S. Copyright Office, have been</p> <p>10 working on. It is an issue as a certainly theoretical</p> <p>11 matter to figure out what to do with orphan works,</p> <p>12 specifically in terms of damages.</p> <p>13 And so, to that extent, there has been work</p> <p>14 going on on orphan works. The extent to which it is a</p> <p>15 problem is that's it's starting to be quantified, as far</p> <p>16 as I know, by studies done by other people. And I -- I</p> <p>17 don't recall what the numbers are. But I know there is</p> <p>18 work being done to quantify how big the issue actually</p> <p>19 is.</p> <p>20 BY MR. MCGOWAN:</p> <p>21 Q Let me take these in order. What is the</p> <p>22 issue?</p> <p>23 A Well, the issue is if you don't know who the</p> <p>24 rightsholder is, and the work, that there is no one to</p> <p>25 contact to obtain a license to use the work. And so</p>	<p style="text-align: right;">Page 184</p> <p>1 collective that collects and pays, and that is quite</p> <p>2 common, in fact.</p> <p>3 Q Are this collectives collectors that are</p> <p>4 granting permissions when they don't have the rights?</p> <p>5 A Very often, they operate under compulsory</p> <p>6 licensing or other similar systems and --</p> <p>7 (Court reporter interrupted the proceedings</p> <p>8 to preserve the record.)</p> <p>9 THE WITNESS: Compulsory licensing.</p> <p>10 BY MR. MCGOWAN:</p> <p>11 Q So we're not talking about books in the</p> <p>12 United States?</p> <p>13 A We are not talking about books in the</p> <p>14 United States here, no.</p> <p>15 MR. MCGOWAN: Let's change the tape.</p> <p>16 VIDEOGRAPHER: This is the end of Disk 2 of</p> <p>17 Daniel Gervais. Off the record at 2:57.</p> <p>18 (Recess taken.)</p> <p>19 VIDEOGRAPHER: This is Disk 3 of Daniel</p> <p>20 Gervais. On the record at 3:06.</p> <p>21 BY MR. MCGOWAN:</p> <p>22 Q Professor Gervais, before we broke, we were</p> <p>23 speaking about the orphan works issue that you described</p> <p>24 in your Insights paper.</p> <p>25 Did I understand you to say that you</p>

<p style="text-align: right;">Page 185</p> <p>1 understood that collective management organizations had</p> <p>2 solved the orphan works problem -- or strike that.</p> <p>3 Did you say that?</p> <p>4 A I said that in some context they've certainly</p> <p>5 done what they could to solve it by collecting. I</p> <p>6 mentioned specifically a compulsory which is a case</p> <p>7 where you don't need a license, but you do need to pay</p> <p>8 somebody. But if you can't find a person, then the CMO</p> <p>9 has the duty to find that person to make sure that the</p> <p>10 money actually gets paid.</p> <p>11 So in those cases, they do, to a large extent,</p> <p>12 solve the problem. In the case where a license is, in</p> <p>13 fact, required, it may be that a legislative solution</p> <p>14 would be a better option.</p> <p>15 Q With respect to in copyright books in the</p> <p>16 United States, do you believe that there persists an</p> <p>17 orphan works issue, as you put it here?</p> <p>18 A I have just recently started to look at</p> <p>19 material on how extensive the problem is. I don't have</p> <p>20 enough data to answer the question one way or the other.</p> <p>21 Q When you refer to the orphan works issue here,</p> <p>22 were you referring to the United States?</p> <p>23 A The piece is really an international piece.</p> <p>24 And so it refers, certainly, not just to the</p> <p>25 United States. There are authors from foreign countries</p>	<p style="text-align: right;">Page 187</p> <p>1 MR. SNYDER: Objection to form.</p> <p>2 THE WITNESS: There was -- there were three</p> <p>3 clauses there, so I will have to ask to you repeat the</p> <p>4 question.</p> <p>5 BY MR. McGOWAN:</p> <p>6 Q Okay. Let me break it down.</p> <p>7 In your report, you hypothesize a situation in</p> <p>8 which Google's fair use defense is not accepted. And as</p> <p>9 I understand your opinion, it's that in the event</p> <p>10 Google's fair use defense is not accepted, collective</p> <p>11 management organizations will facilitate bargaining.</p> <p>12 Is that fair?</p> <p>13 A Or possibly congress, as mentioned in the</p> <p>14 report, yes. But I do believe that the voluntary</p> <p>15 non-congress solution would, in fact, emerge.</p> <p>16 What the report says is, if it's not fair use</p> <p>17 or to the extent that it is not fair use, it is possible</p> <p>18 to license it using the technology and expertise that we</p> <p>19 have. And it is then possible to create a licensing</p> <p>20 environment for the uses that are not considered to be</p> <p>21 fair.</p> <p>22 Q Are you actually opining that Google would</p> <p>23 participate in such negotiations?</p> <p>24 A I -- as I opined earlier, Google agreed, as</p> <p>25 far as I understand, to the terms of a previous</p>
<p style="text-align: right;">Page 186</p> <p>1 that would certainly be concerned here as well.</p> <p>2 Q You don't know what fraction of orphan works</p> <p>3 rightsholders have been found?</p> <p>4 A All I can say is I read -- scanned a report</p> <p>5 that I believe Berkeley Law School made available. And</p> <p>6 it said that it was very hard to quantify. So to that</p> <p>7 extent, that's all I know about quantification of the</p> <p>8 problem.</p> <p>9 Q In the next sentence in this paragraph you</p> <p>10 say, "It is not at all clear that Google -- which has</p> <p>11 the money to withstand a protracted legal battle with</p> <p>12 publishers -- will find an opt-in settlement</p> <p>13 commercially worthwhile."</p> <p>14 Do you see that?</p> <p>15 A I do.</p> <p>16 Q Was that correct at the time you wrote it?</p> <p>17 A Well, my -- my sense is we had no indication,</p> <p>18 and I don't think there has been since from Google --</p> <p>19 that they favor an opt-in settlement. But I don't have</p> <p>20 specific information. I just have not seen information</p> <p>21 to that effect.</p> <p>22 Q Your testimony, then, is not that if the court</p> <p>23 rules against Google and the fair use defense, as you</p> <p>24 posit in the report, that there will, in fact, be</p> <p>25 bargaining?</p>	<p style="text-align: right;">Page 188</p> <p>1 settlement. It owns a collective management</p> <p>2 organization. I don't have a reason to think that</p> <p>3 Google would be incapable of considering a collective</p> <p>4 management solution here.</p> <p>5 Q I didn't ask whether it was capable of</p> <p>6 considering it. I asked if you are opining that Google</p> <p>7 will, in fact, participate in such negotiations?</p> <p>8 A That will, in fact, participate --</p> <p>9 Q Yes.</p> <p>10 A I don't know.</p> <p>11 Q In this paragraph that you wrote, you say that</p> <p>12 it's not clear; correct?</p> <p>13 A That's right. That's why I say I don't know.</p> <p>14 MR. McGOWAN: I'm going to hand you what's to</p> <p>15 be marked Exhibit 12 --</p> <p>16 (Exhibit 12 was marked for identification.)</p> <p>17 MR. McGOWAN: -- the transcript of the</p> <p>18 deposition of one of the named plaintiffs.</p> <p>19 THE WITNESS: Okay.</p> <p>20 BY MR. McGOWAN:</p> <p>21 Q Betty Miles. And just to be clear, you have</p> <p>22 not previously read this?</p> <p>23 A I do not recall reading this. You know, I</p> <p>24 reviewed a whole bunch of documents in early February.</p> <p>25 I'd have to -- I don't recall. It's possible that I</p>

<p style="text-align: right;">Page 189</p> <p>1 did.</p> <p>2 Q On the second page, so if you turn this over.</p> <p>3 A Yes.</p> <p>4 Q At the very bottom it says, Page 9 to 12 of</p> <p>5 111. And in the rectangular pages, it's Page 11?</p> <p>6 A I see it.</p> <p>7 Q In this portion of Ms. Miles' testimony, the</p> <p>8 question is put to Ms. Miles, "Is one of the things you</p> <p>9 are asking the court to do is to stop Google from</p> <p>10 displaying snippets of books on Google Books?"</p> <p>11 Do you see that?</p> <p>12 A Yes.</p> <p>13 Q And she says, "Yes."</p> <p>14 And she is then asked at Line 7 and 8 -- and</p> <p>15 feel free to read down to the full page. At Lines 14 to</p> <p>16 19 she's asked why does she want the court to stop the</p> <p>17 display of snippets.</p> <p>18 She says, "I don't want people to read books</p> <p>19 that they search via the snippet without my control or</p> <p>20 permission."</p> <p>21 Do you see that?</p> <p>22 A I do.</p> <p>23 Q Is that a position you endorse, that people</p> <p>24 should not be able to read snippets on the internet</p> <p>25 without permission of an author?</p>	<p style="text-align: right;">Page 191</p> <p>1 have made in this case that authors have a right to</p> <p>2 control individual snippets?</p> <p>3 A I don't know if they do.</p> <p>4 Q Do you want Google Books to be taken down?</p> <p>5 A No. I say it's desirable in my report.</p> <p>6 Q If Ms. Miles seeks to have it taken down, do</p> <p>7 you think that would be a bad thing?</p> <p>8 A I think if she wants her content off Google</p> <p>9 Books, she could get that; right.</p> <p>10 Q Do you know if Google Book allows authors to</p> <p>11 opt out?</p> <p>12 A I read somewhere they do in the materials that</p> <p>13 I reviewed. Again, I don't recall which declaration it</p> <p>14 was.</p> <p>15 Q Are you aware that none of the named</p> <p>16 plaintiffs have asked that their books be removed?</p> <p>17 A I'm not aware of that.</p> <p>18 Q So let me go back to my question that I</p> <p>19 originally asked, is would it be good thing if Google</p> <p>20 Books were taken out?</p> <p>21 A My report --</p> <p>22 MR. SNYDER: Objection to form.</p> <p>23 THE WITNESS: I answer that question already.</p> <p>24 It's in my report.</p> <p>25 BY MR. MCGOWAN:</p>
<p style="text-align: right;">Page 190</p> <p>1 A I don't know what she means here. As I said</p> <p>2 before, I believe the optimal solution is that material</p> <p>3 should be available and monetized. I can't, from this</p> <p>4 excerpt, know whether she's talking about the fact that</p> <p>5 she's afraid that, via snippet, they'll get too much of</p> <p>6 the book or is she opposed to a single snippet. And so</p> <p>7 it's very difficult to -- to understand.</p> <p>8 What I am also saying, however, I'm not sure,</p> <p>9 as a matter of law, we should take away her right to</p> <p>10 decide that.</p> <p>11 I'm saying, as an optimal solution, if I were</p> <p>12 an author, I would put my material out there and look</p> <p>13 for a way to monetize it.</p> <p>14 Q Now, I thought you said you had made no fair</p> <p>15 use determination in this case; correct.</p> <p>16 A It's is not a fair use determination. This is</p> <p>17 me saying, as an author, I would authorize, as I</p> <p>18 actually do, the use of my material. And if I were</p> <p>19 writing the type of content that, I suppose, that -- I</p> <p>20 don't even know what she writes. She might be looking</p> <p>21 for a way to monetize that, but she might have decided</p> <p>22 snippets are not for her.</p> <p>23 Q When you say the right to decide that?</p> <p>24 A The right to opt out entirely.</p> <p>25 Q You are not referring to a determination you</p>	<p style="text-align: right;">Page 192</p> <p>1 Q The answer is no?</p> <p>2 A The answer's on the record. I say in my</p> <p>3 report, I think it's a desirable and probably inevitable</p> <p>4 use that material will be made available online.</p> <p>5 Q Including in Google Books?</p> <p>6 A Including in Google books.</p> <p>7 Q Let me take you back to Exhibit 2, which is</p> <p>8 your report.</p> <p>9 A What is 2?</p> <p>10 Q Your report.</p> <p>11 A Oh, okay. Yes.</p> <p>12 Q Paragraph 42 on Page 14.</p> <p>13 A Last one, yes.</p> <p>14 Q Says, "Allowing practices like Google's as</p> <p>15 fair use."</p> <p>16 Practices. What practices do you refer to?</p> <p>17 A Of scanning entire books, making snippets</p> <p>18 available. The type of practices that I described</p> <p>19 earlier, which I understand to be the Google Books</p> <p>20 system.</p> <p>21 Q Scanning, snippets, search?</p> <p>22 A Search is not specifically discussed in my</p> <p>23 report.</p> <p>24 Q Why not?</p> <p>25 A I didn't -- you know, the types of uses that</p>

<p style="text-align: right;">Page 193</p> <p>1 are licensed that I'm familiar with are copying and  2 making these snippets available is something that could  3 also be licensed because it very much resembles reuses  4 of parts of books. And so that's something that can be  5 there. You asked me if I was aware of a search license.  6 I am not aware of a search license. There may very well  7 be one out there.  8 Q Let me -- do you understand that after Google  9 scans a book, it enables search of that book by  10 indexing?  11 MR. SNYDER: Objection to form.  12 THE WITNESS: You asked that question earlier.  13 I -- again, I don't know how technology is used by  14 Google. I don't know what even indexing means in that  15 context. But I know that Google makes the work  16 searchable online using words.  17 Q And the scan is, in a sense, an input to the  18 search function?  19 A I don't -- I assume the scan is -- is a  20 function part -- a function or a part of the process to  21 make the book searchable, but that is not my area of  22 expertise.  23 Q You understand, do you not, that one of the  24 things you can do with Google Books is search a large  25 number of books very quickly?</p>	<p style="text-align: right;">Page 195</p> <p>1 Q And full text as opposed to an arrangement  2 dictated by key words?  3 A Yes. That strikes me as accurate as well.  4 Q And as opposed to a bibliographic system  5 adopted by a library?  6 A Which has, as I just mentioned, potentially  7 other advantages. But that's not a comparison I have  8 studied specifically.  9 Q Okay. You understand, in general, that Google  10 Books is a search tool?  11 A Yeah. We'd have to define words again. But  12 it's certainly -- one of the things Google Books allows  13 people to do is to search the context of books.  14 Q Okay. Is that among the practices you refer  15 here to in Paragraph 42?  16 A The practices that I really focus on in this  17 report is copying entire books and making snippets  18 available. I do not know whether these are fair uses.  19 If they are not fair uses, they can be licensed.  20 Q And as you have said, "can be" in a physical  21 technical sense is, in and of itself, not evidence that  22 a use is unfair?  23 A In itself, I say, yes.  24 Q And you haven't made a fair use determination  25 here, you have mentioned that?</p>
<p style="text-align: right;">Page 194</p> <p>1 A That sounds -- strikes me correct, yes.  2 Q Quicker than you could do in a card catalog?  3 MR. SNYDER: Objection to form.  4 THE WITNESS: Most likely. I haven't used the  5 card catalog in so long, but that certainly sounds  6 right.  7 BY MR. MCGOWAN:  8 Q And using full text instead of catalog key  9 words?  10 A Using full text? Yes. Yes, although, you  11 know, is that necessarily a win in every case, isn't  12 something I would be prepared to say yes to. Going to a  13 library and seeing the book on the shelf and seeing  14 other books in the same indexed part of the library is  15 something I've done several times.  16 So what I'm saying is Google books allows  17 users to do things that you can't do with card catalogs,  18 but maybe there are things you can do with card catalogs  19 or other types of indexes that you can't do with Google  20 Books.  21 I have not made the comparison fully, so I  22 wouldn't say that Google Books is necessarily better in  23 every case. I don't know.  24 Q You would say faster?  25 A Faster strikes me as definitely accurate, yes.</p>	<p style="text-align: right;">Page 196</p> <p>1 A Correct.  2 Q So what I'm trying to understand, very simply,  3 is does this report exclude search from the scope of its  4 opinion?  5 A Well, if the reproduction is not a fair use,  6 then there can be no search based on the way that you've  7 explained reproduction earlier as a necessary part of  8 search on which I have to take your word for it because  9 I don't know. It sounds reasonable.  10 Searching inside the book is, again, not  11 something I have seen specifically licensed as a -- as a  12 single function. It may be that in some case it is.  13 What you've referred as indexing, I can't say because I  14 would need to define the word. But I've not -- I don't  15 recall the contract licensing agreement specifically  16 directed to just the indexing function.  17 Q Sure. I understand that.  18 I want to ask, with respect to your report --  19 A Um-hum.  20 Q -- how do you account for the fact that the  21 reason the texts are scanned is to facilitate the  22 search?  23 MR. SNYDER: Objection to form.  24 THE WITNESS: I understand that's one of the  25 purposes. If you reread Paragraph 13 in my reports --</p>

<p style="text-align: right;">Page 197</p> <p>1 in my report -- it says, "Making books and other 2 copyrighted works available online is desirable both for 3 authors and readers." 4 Now, Google Books make snippets available, and 5 in many cases that may, indeed, be desirable. But I 6 actually believe it would make sense, I think in some 7 cases, to allow authors to make more than snippets 8 available. That's also something that could be 9 licensed. I understand that's not part of the snippet 10 program, but the thrust of my report is that the current 11 uses can be licensed and a license would also allow a 12 license to do more. I believe that, in fact, is 13 specifically what the proposed settlement envisions. 14 BY MR. MCGOWAN: 15 Q Is your report basically saying that you could 16 do the proposed settlement again? 17 MR. SNYDER: Objection to form. 18 THE WITNESS: My report doesn't speak to 19 whether you can do the proposed settlement again. My 20 report says that if there's a settlement or other 21 outcome of this case that says that some uses need to be 22 licensed, that can happen fairly quickly and easily. 23 Q Through the CCC? 24 A As one example. 25 Q But you don't have any others?</p>	<p style="text-align: right;">Page 199</p> <p>1 system is, which is you search and you get results. 2 Q Okay. 3 A I believe that's why a user would typically 4 engage in a search process. 5 Q Is it relative to your analysis that the 6 purpose of scanning is to facilitate search? 7 A You're asking me as a matter fair use? 8 Q I'm asking you as a matter of your report. 9 A My report's very clear. It is not a fair use 10 to make copies of entire books. This can be licensed. 11 I do not make -- I am not opining. I am not making a 12 determination as to whether the copying of these books, 13 whether it's for research or some other reason is fair 14 use. That is not something I am making a claim about in 15 any way. 16 Q Would your report read differently, other than 17 the one referenced in Paragraph 10, if this copying were 18 not for the purpose and did not, in fact, facilitate 19 search? 20 MR. SNYDER: Objection to form. 21 THE WITNESS: Very difficult hypothetical 22 question. I did not -- I would have to rethink my 23 report with a different set of facts. 24 Q You only mention it once -- 25 A Um-hum.</p>
<p style="text-align: right;">Page 198</p> <p>1 A I mentioned the possibility of icopyright.com. 2 I would have to check what their exact ability is. But 3 that's what they do. But whether it is scalable, I 4 don't know. 5 THE REPORTER: Whether it's what? 6 THE WITNESS: Scalable. 7 BY MR. MCGOWAN: 8 Q So Paragraph 13, which you just referred to me 9 to answer my question about search, does not mention 10 search? 11 A No. I did not make a specific determination 12 with respect to licensing just search. 13 Q I'm asking where, in the report, you take into 14 the account the fact that the purpose of the scan is 15 facilitating search. I want to see the paragraph where 16 you take that into account and discuss it. 17 A Search is mentioned in Paragraph 10. It 18 displays snippets of these books and search results, so 19 clearly there's an understanding that this is what this 20 system is used for. And there is somewhere else in the 21 report -- I don't see a specific discussion of search 22 beyond the mention in Paragraph 10. 23 Q And the mention in Paragraph 10 pertains to 24 the results? 25 A But it shows an understanding of what the</p>	<p style="text-align: right;">Page 200</p> <p>1 Q -- in terms of display? 2 A Yes. The report at the end of Paragraph 12, 3 for example, refers to digital use of books, and then it 4 refers to widespread copying of entire books. That's 5 one of the issues -- one of the -- whether it's for 6 search or not, and whether that impacts a fair use 7 determination, is for someone else than me to decide. 8 Q Sure. Does it impact licensing? 9 A If it's not a fair use, it will, in order to 10 continue, need to be licensed. And so . . . 11 Q Does the fact that a scanned book may be 12 searched, in your view, affect any of the licensing you 13 hypothesize? 14 A I assume, only thing I can answer, is that the 15 search function would be something that would be 16 addressed in the license as I, again, assume from your 17 earlier comment, that it is in the Amazon case. But I 18 have not researched the Amazon book display or whatever 19 it's called directly, search inside function. 20 It might be something that would be covered in 21 the license, and -- and -- and how it would be covered 22 would be something to be negotiated by the parties. 23 My point is, it can be licensed. And one way, 24 and the efficient way to do this, is for collective 25 management.</p>



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<p>1 Q It might or might not; right?</p> <p>2 A Might or might not what?</p> <p>3 Q It might not be included in the license. You</p> <p>4 don't know; right?</p> <p>5 MR. SNYDER: Objection to form.</p> <p>6 THE WITNESS: I am not expressing an opinion</p> <p>7 as to whether a search should be separately licensed</p> <p>8 here.</p> <p>9 BY MR. MCGOWAN:</p> <p>10 Q And if the court rules against Google's</p> <p>11 defense, you don't know whether it would be, do you?</p> <p>12 MR. SNYDER: Objection to form.</p> <p>13 THE WITNESS: My report, actually, on this</p> <p>14 point says that I think the market would respond and</p> <p>15 make a such a license possible.</p> <p>16 Q Okay. So we're on paragraph -- such a license</p> <p>17 possible. My question is whether a license would be</p> <p>18 struck. I'm not asking whether it is physically</p> <p>19 possible.</p> <p>20 A Um-hum.</p> <p>21 Q Is that --</p> <p>22 A You're asking?</p> <p>23 Q -- distinction clear?</p> <p>24 A Yes. You're asking a question about the</p> <p>25 future. I cannot say for sure what the future holds.</p>	<p>1 opinion, which is this can be licensed.</p> <p>2 Q When you say "can be," what, in addition to</p> <p>3 it's physically possible to accomplish such a license</p> <p>4 does your report opine?</p> <p>5 A That --</p> <p>6 MR. SNYDER: Objection to form.</p> <p>7 THE WITNESS: My report states quite clearly</p> <p>8 that there are online uses of parts of books that are</p> <p>9 currently licensed, have been for several years,</p> <p>10 successfully. And I believe that the same type of would</p> <p>11 apply, as indeed envisioned in the proposed settlement,</p> <p>12 if this -- these uses, or some of them, are not fair</p> <p>13 uses.</p> <p>14 BY MR. MCGOWAN:</p> <p>15 Q Okay. When you say "would apply," is that a</p> <p>16 probabilistic statement?</p> <p>17 A I'm making a determination in this report</p> <p>18 about future behavior, so it is necessarily problem --</p> <p>19 you know, probabilistic.</p> <p>20 Q Probabilistic. Okay.</p> <p>21 Past is prologue, your phrase.</p> <p>22 A Correct.</p> <p>23 Q If past is prologue with respect to --</p> <p>24 A Actually not my phrase technically, but yes.</p> <p>25 Q The past is prologue with respect to searching</p>
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<p>1 What I can say, as an expert in this case, having looked</p> <p>2 at existing practices based on the old saying that the</p> <p>3 past is prologue, I'm saying that I am confident that a</p> <p>4 collective management system would emerge to license the</p> <p>5 type of uses that I consider desirable which includes</p> <p>6 making books available online.</p> <p>7 I believe that is a both feasible, logical,</p> <p>8 and commercially viable thing that would happen.</p> <p>9 Q By making available online do you mean like in</p> <p>10 the iTunes, Apple Bookstore, like E-Books?</p> <p>11 A I'm not using "making available" in the</p> <p>12 technical sense in which it is used in international</p> <p>13 treaties. I'm using it in a colloquial sense of making</p> <p>14 material available. But whether it's by download or</p> <p>15 streaming or some other way is not something I was</p> <p>16 trying to parse in that use of the word.</p> <p>17 Q Or whether it is all of the work or part of a</p> <p>18 work?</p> <p>19 A That doesn't affect the making available</p> <p>20 method, whether, it's a whole work or part of a work.</p> <p>21 Q Whether a whole work is made available or only</p> <p>22 a part is made available?</p> <p>23 A Again, if that's not a fair use and needs to</p> <p>24 be licensed, whether it is a whole work or part of a</p> <p>25 work is -- is not -- doesn't change the substance of the</p>	<p>1 inside a book, then Amazon's royalty free system would</p> <p>2 be prologued for what would emerge in your licensing</p> <p>3 world; correct?</p> <p>4 A Well, both in the sense that it is licensed,</p> <p>5 and what you're saying is that license fee is zero,</p> <p>6 there have been uses in the past that were licensed at</p> <p>7 zero, close to zero, and eventually the price changed as</p> <p>8 the market evolved and a better understanding of</p> <p>9 business models emerged.</p> <p>10 I don't know if this would happen here, but a</p> <p>11 licensing transaction at whatever the price to be</p> <p>12 negotiated is, is, I believe, entirely consistent with</p> <p>13 existing practice.</p> <p>14 Q Okay. If the price is zero, authors are not</p> <p>15 going to get money; correct?</p> <p>16 A They are going to get the right to decide,</p> <p>17 which I think has value to them. Whether that's a</p> <p>18 dollar value in the specific case or not --</p> <p>19 Q Okay. They're not going to get money; right?</p> <p>20 A If it's part of a broader deal in which</p> <p>21 they're getting paid for certain uses, and that's part</p> <p>22 of the negotiation, certain uses are unpaid for, that is</p> <p>23 something that, you know, people can negotiate.</p> <p>24 Q All right. I'm asking with respect to the</p> <p>25 search function, if it's royalty free, they don't get</p>

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1 money from the search function; correct?  
 2 A If it's royalty free, licensed as such, they  
 3 wouldn't get paid for the search function, per se.  
 4 Q If they were to get paid, it would have to  
 5 come from additional uses; right?  
 6 A Other uses, additional.  
 7 Q If they are not going to get paid from  
 8 licensing search, then the failure to license search is  
 9 not costing them money; correct?  
 10 MR. SNYDER: Objection to form.  
 11 THE WITNESS: In the -- in the very tentative  
 12 hypothesis that you're making, that this would be  
 13 licensed at zero, going forward, which I don't know, you  
 14 mentioned one example I am not familiar with in any  
 15 detail. And what the deal was, why those authors and  
 16 how many authors made the deal that you referred to with  
 17 Amazon is something that would need to be explored to  
 18 see if it can be extrapolated. I have not done that  
 19 work.  
 20 Q If they're not getting any royalty, then  
 21 they're not losing any from the failure to license;  
 22 correct?  
 23 A No, that's incorrect. They can -- in a  
 24 contract where they agree to certain uses at zero,  
 25 consider that those uses are worth granting at zero

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1 because they're getting paid in other ways.  
 2 What you're assuming as a separate search  
 3 license at zero with no other consideration, that is not  
 4 my assumption.  
 5 Q I assure you we will through each tranche. I  
 6 want to start with the visible tranche of search.  
 7 A Okay.  
 8 Q If, in the current market, the opt-in price  
 9 for search is zero and is past is prologue, as you have  
 10 stated, then the payment to be derived from that would  
 11 be zero; correct?  
 12 MR. SNYDER: Objection to form.  
 13 THE WITNESS: No. Incorrect. That is  
 14 incorrect.  
 15 As I've tried to say -- I'll repeat it a third  
 16 time. You are making the assumption that licensed --  
 17 that authors would be willing to license the search for  
 18 zero with no other consideration. I don't know that  
 19 that's what's happening.  
 20 BY MR. MCGOWAN:  
 21 Q What other consideration do you assume will be  
 22 licensed? I am going to come back to this.  
 23 A I am not assuming anything. Your question is  
 24 asking me whether something is correct. I am saying no,  
 25 it's not correct.

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1 Q Are you saying in the bargaining that you  
 2 hypothesized in the event Google's fair use defense is  
 3 not accepted, that there will be no licenses for search  
 4 only?  
 5 THE REPORTER: "No license . . ."  
 6 MR. MCGOWAN: For search only.  
 7 THE WITNESS: I don't know.  
 8 BY MR. MCGOWAN:  
 9 Q You don't know one way or the other?  
 10 A It's possible that there would be license for  
 11 search only, but it seems it would make more sense that  
 12 encompasses a broader array of uses.  
 13 Q Why would it make more sense?  
 14 A I think that both parties would win. I think  
 15 all three parties would win. Authors would win because  
 16 more uses would be made of their work for which they  
 17 would be getting paid; google would be able to monetize  
 18 more uses of the books that it has scanned; and users  
 19 would get more uses of those books that Google has  
 20 scanned.  
 21 Q Okay. Let me come back to search.  
 22 Are you saying that you know that in the world  
 23 in which Google's fair use defense is not accepted that  
 24 there would be licensed in which users are compensated  
 25 for royalty free search because additional uses would be

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1 included in the license?  
 2 A I am saying that my best educated guess, based  
 3 on what I know and what I've explained in the report is  
 4 that this kind of licensing would emerge for uses that  
 5 are not fair uses beyond just search. I think the  
 6 license -- it would be in everybody's commercial  
 7 interest and other interest to have a license that  
 8 covers more than search.  
 9 Q Okay. What's the probability that would  
 10 happen?  
 11 A I think fairly high.  
 12 Q Can you give me an estimate?  
 13 A A number estimate, no.  
 14 Q You're not an economist; we know that.  
 15 A Exactly. And I'm not venturing a number. It  
 16 is probabilistic, but I'm saying that I think the  
 17 probability is fairly significant that is what happened.  
 18 Q Describe to me the method you used to derive  
 19 the conclusion that the probability is high?  
 20 A Okay. Well, I am using a number of criteria  
 21 such as existing licenses, past practice of the parties  
 22 involved, including the proposed settlement, and the  
 23 simple fact that it is usually fair to assume people  
 24 will act according to their best interest. And I see it  
 25 as this kind of broader license being in the best