

13-4829-CV

United States Court of Appeals for the Second Circuit

THE AUTHORS GUILD, BETTY MILES, JIM BOUTON, JOSEPH
GOULDEN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

HERBERT MITGANG, DANIEL HOFFMAN, individually and on behalf of all
others similarly situated, PAUL DICKSON, THE MCGRAW-HILL
COMPANIES, INC., PEARSON EDUCATION, INC., SIMON & SCHUSTER,
INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., CANADIAN
STANDARD ASSOCIATION, JOHN WILEY & SONS, INC., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

GOOGLE, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX (UN-SEALED REDACTED VERSION) Volume 6 of 6 (Pages A-1501 to A-1640)

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<p style="text-align: right;">Page 209</p> <p>1 interest of all the parties I've already mentioned.</p> <p>2 Q How many similar licenses have you personally</p> <p>3 negotiated, similar to the ones that you're</p> <p>4 hypothesizing?</p> <p>5 A Personally negotiated?</p> <p>6 Q Yeah.</p> <p>7 A None.</p> <p>8 Q How many did you review in connection with</p> <p>9 your report?</p> <p>10 A I'm not sure what you mean, licenses of the</p> <p>11 typo that I -- there is no exact license that covers</p> <p>12 exactly what I have described. I'm just saying that the</p> <p>13 rights that would be covered by a such a license are</p> <p>14 already aggregated, to the most part, so it would be</p> <p>15 fairly easy to come up with a licensing arrangement to</p> <p>16 be negotiated.</p> <p>17 Q You said the probability was high, didn't you?</p> <p>18 A Yes.</p> <p>19 Q The probability is high, even though no such</p> <p>20 license exists now?</p> <p>21 A Yes.</p> <p>22 Q And you know that because it makes sense to</p> <p>23 you?</p> <p>24 A Because I believe -- my understanding is it</p> <p>25 makes sense for all the parties involved, and it is</p>	<p style="text-align: right;">Page 211</p> <p>1 that there's a high probability that that functionality</p> <p>2 would be included in a license that would include</p> <p>3 additional terms; is that your point?</p> <p>4 A Yes.</p> <p>5 Q What are those additional terms?</p> <p>6 A Other uses that would be licensed in the same</p> <p>7 contract would include, for example, making copies of</p> <p>8 entire books, allowing Google to profit from its</p> <p>9 scanning efforts in other ways. And I assume that this</p> <p>10 would not be restricted by the license. I don't know.</p> <p>11 Q Copies of entire books?</p> <p>12 A That's what Google is doing, according to the</p> <p>13 documents filed by Google in the case.</p> <p>14 Q Is it displaying targets?</p> <p>15 A Not in the snippet program, and what I</p> <p>16 described -- what you described in the partner program,</p> <p>17 I think they do that. But to my mind, that's not the --</p> <p>18 when I am talking Google Books, I'm talking snippets,</p> <p>19 right. So in the snippet program, I'm not aware that</p> <p>20 they display entire books.</p> <p>21 Q Is it your understanding that the partner</p> <p>22 program displays entire books?</p> <p>23 A I remember reading that it displays more than</p> <p>24 snippets. Whether it's entire books, I don't know.</p> <p>25 Q So when we go back to the royalty-free</p>
<p style="text-align: right;">Page 210</p> <p>1 consistent with behavior I have observed, including, for</p> <p>2 example, the proposed settlement, the fact that a lot of</p> <p>3 major users of digital content are licensing that</p> <p>4 content.</p> <p>5 Q How many are licensing search?</p> <p>6 A Alone? Search alone? Separate from other</p> <p>7 functions, I have not seen a license that applies</p> <p>8 strictly to search.</p> <p>9 Q How many are licensing the return of snippets</p> <p>10 in connection with search?</p> <p>11 MR. SNYDER: Objection to form.</p> <p>12 THE WITNESS: I don't -- I don't know beyond</p> <p>13 the example that you've mentioned that you called the</p> <p>14 Amazon search in the book. You described that as a</p> <p>15 snippet, so . . .</p> <p>16 Q So we've got one data point for display of</p> <p>17 snippets in connection with search?</p> <p>18 A Well, it's not an insignificant data point if</p> <p>19 it is Amazon, but okay.</p> <p>20 Q It's not one you looked at; correct?</p> <p>21 A Not to prepare this report.</p> <p>22 Q So we've got one data point of -- for a</p> <p>23 license in connection with a license -- strike that.</p> <p>24 One data point in which people opt-into a</p> <p>25 search program. Your testimony, as I understand it, is</p>	<p style="text-align: right;">Page 212</p> <p>1 question, which is where we began, your point was that</p> <p>2 even if search is royalty free, under the license</p> <p>3 authors who agreed might derive revenue from additional</p> <p>4 uses. Is that your point?</p> <p>5 A My point is that search might be free for now.</p> <p>6 I don't know it would be forever. And, yes, I think</p> <p>7 authors might sign that agreement if they saw value in</p> <p>8 allowing search, without compensation, because they were</p> <p>9 compensated in some other ways. That would be for them</p> <p>10 to make that determination.</p> <p>11 Q Does that compensation come from things that</p> <p>12 Google is not presently doing?</p> <p>13 A It may come from things that Google's not</p> <p>14 presently doing, but would have an interest in doing to</p> <p>15 exploit this database of millions of books that it has</p> <p>16 scanned.</p> <p>17 Q Have you asked anyone at Google whether they</p> <p>18 have such an interest?</p> <p>19 A No. My -- my understanding is based on what</p> <p>20 would have been allowed under the proposed settlement</p> <p>21 that I understand that Google had agreed to.</p> <p>22 Q Do you understand that the settlement was not</p> <p>23 accepted?</p> <p>24 A I do, but not by Google. As I understand it,</p> <p>25 it had been accepted by Google and other parties in the</p>

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<p>1 case.</p> <p>2 Q And do you think that that is an important</p> <p>3 foundation for the inference you draw that there is a</p> <p>4 high probability?</p> <p>5 A No. It's one factor I -- I took into</p> <p>6 consideration. I'm much more basing my opinion on the</p> <p>7 fact that I believe it's in the interest of all parties</p> <p>8 involved to make this work.</p> <p>9 Q Okay. It can work as it is right now; right?</p> <p>10 MR. SNYDER: Objection to form.</p> <p>11 THE WITNESS: Technically or legally?</p> <p>12 BY MR. MCGOWAN:</p> <p>13 Q Well, legally, you told me you -- you don't --</p> <p>14 A Exactly.</p> <p>15 Q -- take a position?</p> <p>16 A That's correct.</p> <p>17 Q Technically, obviously, it can?</p> <p>18 A Technically is a matter -- technology seem</p> <p>19 that it's working. But whether it's legal or not, I</p> <p>20 don't know.</p> <p>21 Q Let me take you to Paragraph 42. I want to</p> <p>22 make sure that we have this clear on the record.</p> <p>23 We began this line of inquiry when I asked you</p> <p>24 what practices were included in the first line of 42,</p> <p>25 and you said, as I recall, scanning and snippets. And I</p>	<p>1 Q Why?</p> <p>2 A For the reason I just stated.</p> <p>3 Q So why would it affect the display of full</p> <p>4 text of books, which Google does not do?</p> <p>5 A I said it could.</p> <p>6 Q Okay. What is the probability?</p> <p>7 A That it would affect -- I just told you. It's</p> <p>8 very hard to call exactly what a fair use determination</p> <p>9 would have. If for example, a snippet is fair use and</p> <p>10 people will say, well, how about double snippet or</p> <p>11 triple snippet, and then we're going to get into</p> <p>12 arguments about how far the exception goes. And I don't</p> <p>13 know how that far it would be taken. It really depends</p> <p>14 on if and how a court would make that determination.</p> <p>15 Q So are those arguments that people do not have</p> <p>16 now?</p> <p>17 A They are not based on an actual determination</p> <p>18 by a court about whether snippets and reproduction of</p> <p>19 entire books by Google is, indeed, a fair use or not.</p> <p>20 If we have that case determination, I believe</p> <p>21 that the landscape changes very dramatically for</p> <p>22 authors.</p> <p>23 Q Because you now have an opinion pertaining to</p> <p>24 an eighth of a page snippet?</p> <p>25 A Because you have an opinion that would either</p>
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<p>1 asked if search were included. And you say practices</p> <p>2 like Google's -- "Allowing practices like Google's as</p> <p>3 fair use may be expected to thwart the development of</p> <p>4 collective management systems."</p> <p>5 What do you mean by collective management</p> <p>6 systems? Is that CCC?</p> <p>7 A That is one example of such a system. A</p> <p>8 collective management system is rights aggregated by the</p> <p>9 plurality of rightsholders typically for one type of</p> <p>10 content that is licensed to one or more users. And so I</p> <p>11 do believe that if a court finds that what Google is</p> <p>12 doing here is fair use, it will be harder, hence the</p> <p>13 word "thwart" here, to develop collective management</p> <p>14 systems for digital uses of books and specifically book</p> <p>15 excerpts.</p> <p>16 Q So would it be harder to develop systems for</p> <p>17 the display of full text if what Google is doing here is</p> <p>18 found to it be fair use?</p> <p>19 A It could. It might affect existing markets</p> <p>20 for digital uses of book experts as well. It's very</p> <p>21 hard to predict what would happen if there was a fair</p> <p>22 use determination. It would depend on how the court</p> <p>23 arrives at that determination, what conditions it</p> <p>24 imposes. It is very difficult to call the exact impact</p> <p>25 of that determination.</p>	<p>1 say that -- that would -- if it's said it's not a fair</p> <p>2 use, then it would need to be licensed. And I -- as I</p> <p>3 said in my report, I fully expect that there would be</p> <p>4 some collective management system that would emerge as a</p> <p>5 result of a determination that this is not fair use.</p> <p>6 Q Are you familiar with the Georgia State</p> <p>7 opinion?</p> <p>8 A I've heard about it; I have not read it.</p> <p>9 Q Has it had an effect on CCC?</p> <p>10 A I don't know.</p> <p>11 Q Has it had an effect on collective licensing?</p> <p>12 A I don't -- I'd have to check whether it's on</p> <p>13 appeal. I'd have to ask CCC.</p> <p>14 Q Well, you don't have appeal in here in</p> <p>15 Paragraph 42, do you?</p> <p>16 A Yes, of course, I do. I mean, determination</p> <p>17 is something that is fair use is a final determination</p> <p>18 in the case, that it is a fair use, which would</p> <p>19 presumably be made by the 2nd Circuit of the Supreme</p> <p>20 Court of the United States.</p> <p>21 Q I see. You are --</p> <p>22 A Assuming the final determination.</p> <p>23 Q So you don't know whether a decision that just</p> <p>24 came down in a case underwritten by the copyright</p> <p>25 clearance center suing one of its users that had an</p>

<p style="text-align: right;">Page 217</p> <p>1 influence similar to the one you hypothesize here; is 2 that correct?</p> <p>3 A I have not read that opinion. I understand 4 that a number of very important uses were determined not 5 to be fair. But I don't -- that's -- I read that on 6 blogs. I have not read the opinion. So I don't know 7 more.</p> <p>8 Q Okay. Can you point me to an effect it's had?</p> <p>9 A I have not researched that, so I don't know.</p> <p>10 Q Do you have any reason to expect that the 11 decision in that case would have a different effect than 12 a decision in this case?</p> <p>13 A If in Georgia State -- well, Georgia State, I 14 would have to check what exact uses were found not to be 15 fair uses and whether a license was already available, 16 whether there's been a change in the take-up rate for 17 that license. Again, I don't even know if that case is 18 a final determination. I seem to recall it's a district 19 court opinion, not a circuit opinion, but I may be 20 wrong. I have not read it, so . . .</p> <p>21 Q Well, let me ask you this. Google Books 22 project started in 2004. Are you aware of that?</p> <p>23 THE REPORTER: I'm sorry?</p> <p>24 MR. McGOWAN: Started in 2004.</p> <p>25 BY MR. McGOWAN:</p>	<p style="text-align: right;">Page 219</p> <p>1 Paragraph 42, don't you?</p> <p>2 A Yes. I'm saying that if there is a fair use 3 determination, it will have a significant impact. I 4 cannot quantify that impact.</p> <p>5 Q You also actually can't describe that impact 6 in terms of contract terms; correct?</p> <p>7 A Well, I guess I could. You know, you have a 8 license to perform certain uses of parts of books. And 9 if, for example, they had been the fair use 10 determination, I'm pretty sure that those uses would not 11 be covered in the license.</p> <p>12 In addition, uses that are close to those, the 13 so-called marginal uses I referred to earlier, would 14 likely be fought over in terms of both licensing rate 15 and possible additional litigation. So this would 16 definitely impact the contract in that way.</p> <p>17 I can't point to specific words, but I can 18 really see how it would affect the contract negotiation.</p> <p>19 Q I'm asking about terms. I'm trying to get an 20 understanding of what terms would differ?</p> <p>21 A The uses that would be licensed would likely 22 differ.</p> <p>23 Q Okay. So you said a moment ago that you don't 24 know whether by virtue of Google undertaking the Google 25 Books project, you don't know how that affected the</p>
<p style="text-align: right;">Page 218</p> <p>1 Q Are you aware of that?</p> <p>2 A I wasn't aware of the exact start date, but I 3 have no reason to doubt that.</p> <p>4 Q Approximately, were you aware?</p> <p>5 A Approximately.</p> <p>6 Q Since its inception, has it had -- do you 7 opine in this case that it has thwarted the development 8 of markets?</p> <p>9 A Well, there's -- there is no licensing market 10 for those type of uses. But I don't know that -- how 11 many other players are in the -- in the process or are 12 not getting in the process of offering similar services. 13 There is -- you're asking a negative determination about 14 nonfacts, which is very, very difficult.</p> <p>15 Are there other companies that would do this 16 if there was clarity, if this was licensed. Amazon is 17 doing it, but it apparently is doing it, from what 18 you're saying, under license. It is very difficult to 19 know alternative universes or futures based on the fact 20 that Google has been doing this. I think everybody, or 21 a lot of people, know there's pending litigation, and it 22 may very well be that the outcome of this litigation 23 will, in fact, lead to developments that are hard to 24 predict.</p> <p>25 Q Well, you opine on a hypothetical universe in</p>	<p style="text-align: right;">Page 220</p> <p>1 market?</p> <p>2 A It may have prevented certain developments. 3 It may have interrupted chains of events. It is very 4 difficult to make those calls. I also believe that the 5 fact that there's pending litigation as to whether this 6 is or isn't fair use may have impacted the development 7 of licensing systems because people are not sure to the 8 extent that this case is concerned. But even more 9 broadly, what uses of book excerpts online are or aren't 10 fair use.</p> <p>11 And so it's very hard to negotiate a 12 license -- I'm talking about other players here -- with 13 this uncertainty. You would have to basically be 14 playing licensing poker by trying to figure out if this 15 is fair use or not.</p> <p>16 Q Let's break this down. When you say "may," 17 what steps have you taken in connection with your report 18 to determine whether the project has, in fact, had an 19 effect of altering licensing practices?</p> <p>20 A I have not made a determination in this 21 specific case that something did not happen because of 22 the case, if that's your question.</p> <p>23 Q You don't know?</p> <p>24 A I don't know.</p> <p>25 Q Whether something did not happen because of</p>

<p style="text-align: right;">Page 221</p> <p>1 the project?</p> <p>2 A No. It's very hard to know something that did</p> <p>3 not happen.</p> <p>4 Q That's not opinion that you're expressing?</p> <p>5 A What is not an opinion that I'm not</p> <p>6 expressing?</p> <p>7 Q That there are licensing events that would</p> <p>8 have occurred had it not been for the Google Books</p> <p>9 project, but did not occur because of the project.</p> <p>10 A I said I'm not aware of specific examples of</p> <p>11 cases where this did not happen. It is entirely logical</p> <p>12 to think that when the scope of what needs to be</p> <p>13 licensed is unclear, people will hesitate to enter into</p> <p>14 licensing transactions.</p> <p>15 Q Well, the scope was unclear before the Google</p> <p>16 Books project, wasn't it?</p> <p>17 MR. SNYDER: Objection to form.</p> <p>18 THE WITNESS: I'm not sure what -- you know,</p> <p>19 you said 2004. So we're looking at 2004 and making</p> <p>20 available book excerpts online. Situation may have</p> <p>21 changed now. There may be companies that do not exist</p> <p>22 because they don't -- because there's no venture capital</p> <p>23 in this area.</p> <p>24 What I'm saying, is there may very well be</p> <p>25 interrupted chains of events. What I'm saying, though,</p>	<p style="text-align: right;">Page 223</p> <p>1 Google was interested in performing. It may have</p> <p>2 changed it's mind, that's entirely possible, I don't</p> <p>3 know. But at the time, those uses were possible. It</p> <p>4 would have been possible under the settlement. So there</p> <p>5 would have been an interest, apparently, in making those</p> <p>6 additional uses.</p> <p>7 That's one example of something that did not</p> <p>8 happen. It's also the case that if other players were</p> <p>9 looking at the situation, saying, Hey, we would like to</p> <p>10 do this same type of thing, they're probably thinking</p> <p>11 we're not going to do it because of the pending</p> <p>12 indeterminacy on the scope of fair use.</p> <p>13 Q Who are those other players?</p> <p>14 A I don't know.</p> <p>15 Q How do you distinguish what you just said from</p> <p>16 pure speculation?</p> <p>17 A Well, there's a limit between speculation and</p> <p>18 educated guessing. What I am saying is, there is -- I</p> <p>19 expect that there is a broader market for digital books</p> <p>20 out there, broader than just snippets. And that market</p> <p>21 seems to be thwarted in -- in the same way that there's</p> <p>22 this indeterminacy on the production of snippets, there</p> <p>23 is an indeterminacy on these other markets that would</p> <p>24 develop if we had a license.</p> <p>25 Q Okay. You say authors and publishers would</p>
<p style="text-align: right;">Page 222</p> <p>1 as a matter of my report is that the uncertainty, and</p> <p>2 specifically in my report, paragraph 42, I say, a fair</p> <p>3 use determination that scanning entire books, making</p> <p>4 snippets available as a fair use is likely to thwart --</p> <p>5 may be expected to thwart the development of collective</p> <p>6 management system for digital uses of book excerpts and</p> <p>7 books because there will be that determination and then</p> <p>8 there will be other determinations that people will try</p> <p>9 to make, based on whatever the determination is made in</p> <p>10 this case -- there will be a period of uncertainty.</p> <p>11 Uncertainty is unlikely to be conducive to these new</p> <p>12 systems emerging rapidly.</p> <p>13 If you're an investor, that, to me, is just --</p> <p>14 I'm using a simple determination here that to have a</p> <p>15 collective management system, you have to have rights to</p> <p>16 license.</p> <p>17 Q When you say "thwart," do you mean to imply</p> <p>18 that there are waiting in the wings services that would</p> <p>19 develop if Google does not succeed in its fair use</p> <p>20 defense?</p> <p>21 A Well --</p> <p>22 Q That are only not visible now because there is</p> <p>23 no decision yet?</p> <p>24 A If I return to the settlement for a second,</p> <p>25 there were uses there that were well beyond snippet that</p>	<p style="text-align: right;">Page 224</p> <p>1 likely development. "Likely develop" does not refer to</p> <p>2 the search only license?</p> <p>3 A "Likely" refers to the three verbs that</p> <p>4 follow, so develop, join, or license. I think it's</p> <p>5 likely that authors and publishers would do one of these</p> <p>6 three things.</p> <p>7 Q They likely would --</p> <p>8 A Either develop their own system, join an</p> <p>9 existing system, or license a third party to develop a</p> <p>10 system. I think that the online availability of books</p> <p>11 beyond snippets, so not just snippets, is a desirable</p> <p>12 outcome, but I believe it should be licensed and, in</p> <p>13 appropriate cases, paid for.</p> <p>14 Q Okay. So develop, join, or license, no one's</p> <p>15 going to join a search only license because we don't</p> <p>16 know of any; correct?</p> <p>17 A I don't know that no one would ever join one.</p> <p>18 I just said I can't identify one.</p> <p>19 Q Is it your opinion that there likely will be a</p> <p>20 search only license if the court does not accept</p> <p>21 Google's fair use defense?</p> <p>22 A I believe it's in everybody's interest to have</p> <p>23 a system that makes available books and book excerpts in</p> <p>24 a way that allows authors to be paid, Google to monetize</p> <p>25 its investment in digitizing these books, and allowing</p>

<p style="text-align: right;">Page 225</p> <p>1 users access to those book excerpts.</p> <p>2 And so based on that, my appreciation, which</p> <p>3 hasn't changed since 1998 of how the market has evolved</p> <p>4 online, I believe that these users are desirable, and</p> <p>5 that the market is likely to make them happen. Hence,</p> <p>6 the word likely in Paragraph 42.</p> <p>7 Q When you say "likely," are you talking about</p> <p>8 full text display and full text availability?</p> <p>9 A Not necessarily. Book and book excerpts.</p> <p>10 Q How long are these excerpts?</p> <p>11 A This is not something that can be uniformly</p> <p>12 answered. So it may very well be that it will depend on</p> <p>13 each book and each book or author or publisher. It may</p> <p>14 very well be a case-by-case determination by the</p> <p>15 rightsholder in that case.</p> <p>16 Or it may not be. It may be a standard</p> <p>17 licensing term you were referring to the CCC which had</p> <p>18 the 20 percent upper limit on electronic course backs I</p> <p>19 think the market should be allowed to develop.</p> <p>20 Q So the excerpts, you don't know how long it</p> <p>21 would be. It might be book to book, author to author?</p> <p>22 A It might be. Or it might be a standard</p> <p>23 solution. It depends on the companies offering the</p> <p>24 service, how many competitors Google ends up having if</p> <p>25 this sees the light of day, et cetera, et cetera. There</p>	<p style="text-align: right;">Page 227</p> <p>1 available chapter 3 of that book and I know I want that</p> <p>2 chapter. And I download or otherwise access that one</p> <p>3 chapter, and the author gets compensated for that</p> <p>4 access.</p> <p>5 Q All right. Suppose I find that I want</p> <p>6 Chapter 3 by picking the book up in a library and</p> <p>7 browsing through it. Does the author get royalty when I</p> <p>8 do that?</p> <p>9 A When you browse a book in the library? Well,</p> <p>10 the library had to buy the book, in the first place, so</p> <p>11 to that extent, the author got paid for that.</p> <p>12 Q For my browsing?</p> <p>13 A For your browsing, under U.S. law, no, they</p> <p>14 don't. In certain countries they do, but not in the</p> <p>15 United States.</p> <p>16 Q So in your excerpts example, where I know that</p> <p>17 I'm going to use a full chapter of a book --</p> <p>18 A Yes.</p> <p>19 Q -- my process of browsing in the library to</p> <p>20 find the book is not a royalty bearing process; correct?</p> <p>21 A The royalty -- no. In the United States,</p> <p>22 browsing in a library is not something that entails</p> <p>23 payment of a royalty. But if you download the book</p> <p>24 excerpt, then you can work with it. You can annotate</p> <p>25 it, you can print it, you can do a number of things with</p>
<p style="text-align: right;">Page 226</p> <p>1 are, admittedly, a number of unknowns but what is a</p> <p>2 known quantity is, at least in my opinion, the</p> <p>3 desirability of making books available online legally</p> <p>4 and in a way that allows authors to get paid.</p> <p>5 Q Desirability is going to be a function of cost</p> <p>6 at some level, isn't it?</p> <p>7 A Yes.</p> <p>8 Q So the excerpts you're talking about here, are</p> <p>9 these larger than snippets, or do you mean to include</p> <p>10 snippets?</p> <p>11 A I -- I did not consider snippet when I said</p> <p>12 book excerpt, but to me a snippet is, technically, an</p> <p>13 excerpt from a book.</p> <p>14 Q The excerpts that you're talking about here,</p> <p>15 are these tied to search or not?</p> <p>16 A Not necessarily.</p> <p>17 Q So in Paragraph 42, your conclusion, the</p> <p>18 collective management systems, include excerpts that are</p> <p>19 not connected to a search function, but are just posted?</p> <p>20 A It would include that, but it would also</p> <p>21 include search. You could find a book excerpt -- if you</p> <p>22 know for a fact that you need Chapter 3 of a certain</p> <p>23 book, is that a search, if you know exactly what you</p> <p>24 want? I would -- I'm not sure I would qualify that as a</p> <p>25 search, but there might very well be a market for making</p>	<p style="text-align: right;">Page 228</p> <p>1 it that have value to the user that you cannot do with</p> <p>2 the library copy.</p> <p>3 Q Sure. I just want to take this one step at a</p> <p>4 time.</p> <p>5 So the browsing in the library doesn't</p> <p>6 generate royalty to the author in the United States.</p> <p>7 Does browsing in a bookstore enter into the royalty in</p> <p>8 the United States?</p> <p>9 A Browsing in the bookstore, no.</p> <p>10 Q And the excerpts, which may not may not</p> <p>11 connected to search, you don't know how large they would</p> <p>12 be in that --</p> <p>13 A I'm saying that excerpts can it be licensed</p> <p>14 independently of how long the excerpt is. There's a</p> <p>15 possible licensing transaction. I'm also saying I</p> <p>16 believe there's a market for excerpts of various</p> <p>17 lengths. If snippets are not fair use, there is a</p> <p>18 market for that, I believe. And I believe there's a</p> <p>19 market for more than snippets --</p> <p>20 Q Okay.</p> <p>21 A -- as in the electronic course back example.</p> <p>22 Q Let's focus on snippet. You said earlier, and</p> <p>23 we read in one of your articles, that are you not in</p> <p>24 favor of fair use?</p> <p>25 A As I defined it earlier in my testimony.</p>

<p style="text-align: right;">Page 229</p> <p>1 Q Are you in favor of word-by-word licensing of 2 quotations by books? 3 A As a general principle, I can't answer that 4 question. I actually think there are cases where that 5 may be appropriate. Word-by-word licensing is not a 6 very common practice. I have not seen a lot of 7 licenses. I don't think I've ever seen a license that 8 counted the exact number of words, although I've seen 9 licenses that identified excerpts. 10 Q Like the Chapter 3 example? 11 A Or smaller excerpts. 12 Q The -- have you considered in your report the 13 likelihood that if Google does not prevail in its fair 14 use defense, a license would be created limited to the 15 actual uses in this case? 16 A That is a possibility. 17 Q Unaffiliated with any additional making 18 available of chapters or whole texts? 19 A My educated guess is that this is a suboptimal 20 result of the parties involved, so it is not most likely 21 outcome, but it is a possible outcome. 22 Q What methodology did you employ in reaching 23 that conclusion? 24 A I have answered that question at least twice. 25 Q It's an educated guess?</p>	<p style="text-align: right;">Page 231</p> <p>1 MR. SNYDER: Objection to form. 2 THE WITNESS: I do not know a license limited 3 to scanning, indexing, and search. But the rights 4 involved are already aggregated, the rights that are 5 necessary to make those snippets, and more, available. 6 Q I was setting snippets aside. 7 A Well, the search function, you've been doing 8 that for the entire afternoon, separating the search 9 from the snippet. But the search has to return 10 something, and if it returns a snippet, it's very hard, 11 in my mind at least, to separate the two entirely. 12 Q Okay. We went through that the things that 13 could be separated. I will add snippet in a moment. 14 The probability of a snippet licensing market, 15 meaning one-eighth of a page, roughly three lines, what 16 existing practices limited in length, two, three lines, 17 1/8th of a page, are you using as a foundation for your 18 probabilistic assertion? 19 A Well, this is, first of all, very common among 20 publishers to license short excerpts among one another. 21 I don't know if it's limited to three lines. I also 22 know that, as I said earlier, CCC licenses fairly short 23 excerpts for reuse in the commercial context. And 24 again, I don't have an exact number of words that they 25 would have licensed in this way. But I -- I know for a</p>
<p style="text-align: right;">Page 230</p> <p>1 A An educated guess based on the interest of the 2 parties, existing practices, the existence of an agreed 3 settlement, though rejected by the court, and the other 4 factors that I mentioned earlier in my testimony. 5 Q Okay. The settlement -- and the reason I'm 6 framing the question to focus on the actual uses -- you 7 said that the settlement went beyond what we're actually 8 now discussing; correct? 9 A A future settlement? What you do you mean? 10 Q I thought in your testimony you were referring 11 to the settlement that the court had not accepted? 12 A Yes, I was. That's what he said, a 13 settlement. 14 Q That pertained to things in addition to what 15 the case is currently about? 16 A The proposed settlement that was not accepted 17 by the court would have covered uses beyond snippets as 18 I read it. 19 Q Okay. And so -- I just want to make sure I 20 understand where your probabilities are coming from and 21 how they've been derived. 22 Your probability with respect to scanning and 23 indexing and search doesn't rest on an existing license 24 because you don't know of an existing license limited to 25 scanning, indexing, and search; correct?</p>	<p style="text-align: right;">Page 232</p> <p>1 fact that they've licensed short excerpts for things 2 like corporate newsletters, websites, and other uses of 3 that nature. 4 I don't think they called them snippets, but 5 they resemble what you define as a snippet. So these 6 are fairly short excerpts, so these markets exist. 7 The rights involved mostly the right of 8 reproduction. This right is already aggregated in a 9 CMO, which is, in my mind, evidence that this could 10 apply to snippets or beyond. 11 Q The right of reproduction is the same right, 12 whether it's a paragraph or a whole book, isn't it? 13 A That is my exact point. 14 Q So you cannot, using the right of 15 reproduction, distinguish between reproduction of one 16 sentence in one book. It's the same right? 17 A It's the same right -- 18 MR. SNYDER: Objection to form. 19 THE WITNESS: -- as per the statute, it is not 20 the same, necessarily, for a CMO perspective. The CMO 21 may have limits in its authority to license on the 22 amount of the book. I don't -- I don't know that CCC 23 does, but I know of cases where, you know, a publisher 24 will specifically limit the amount of a book that can be 25 licensed in a single transaction.</p>

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1 You know, those are -- those -- those things
2 are -- are possible. They were negotiated based on
3 these existing services that I have described earlier.
4 But the right involved is the same. The owner of the
5 right is known. The rights are aggregated so that it's
6 fairly easy to go from the existing situation to a
7 situation where Google's current uses are licensed and
8 other uses that the parties might, I believe, find
9 desirable, would also be licensed.

10 Q All right. You mentioned two sources of your
11 probability. One was that you said it's common for
12 people to license excerpts for use in business
13 environments?

14 A I didn't say -- I said I am aware that CCC
15 does that on a regular basis. I did not use the work
16 "common," I believe.

17 Q Okay. It's regularly done. Is that done in
18 conjunction with search?

19 A I don't know how the people who want to
20 license a short excerpt from -- whether it's a newspaper
21 article, someone found that article. Were they reading
22 it on the plane. Did they find it online. I don't know
23 how they find it. But they find it, and they want to
24 license it for their newsletter or their website, and
25 they get the right to do that.

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1 Q But their licensing is reproduction for
2 purposes of display or distribution?

3 A I assume depending on what's in the website or
4 a newsletter that the license might read differently.

5 Q Okay. The question I'm asking is the examples
6 you're referring to, is CCC licensing the paragraph that
7 you put in your newsletter, or is it licensing you to
8 create a search engine and render text searchable?

9 A I have not looked at the license recently. My
10 understanding is what they allow you to do is make a
11 reproduction of the excerpt and then display it or
12 distribute it, depending on the medium.

13 Q And you say fairly short excerpts?

14 A I have seen one paragraph. Now, whether that
15 would correspond to three lines in a book, four lines in
16 a book. One newspaper paragraph. How is that? I
17 remember seeing at least one example of that. So, is
18 that three lines in the book?

19 Q Who is the licensor?

20 A I don't recall, plus I believe that would be
21 confidential. If I did recall, which I don't, which the
22 company was at the time. But it was for their
23 newsletter and a website. I remember that transaction.
24 But I don't recall who the licensor is.

25 Q Why do you remember it?

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1 A Why do I remember it? I think it may have
2 been something that came up in a meeting where they
3 wanted -- somebody wanted to show us an example of this
4 new licensing system that they had made available at CCC
5 that I described earlier that the user point licensing,
6 where it's actually not on the website of CCC, on the
7 website of user. I think it was an example in a
8 management meeting, but I do not recall which company it
9 was.

10 Q Do you remember what kind of text -- it was a
11 newspaper article?

12 A Newspaper article.

13 Q Do you remember what fraction of the article?

14 A Paragraph.

15 Q What fraction of the whole article?

16 A I do not recall.

17 Q And that was not in conjunction with search?

18 A I do not know how they found the paragraph.

19 Q Sorry. CCC did not license the paragraph to
20 enable a search function; they licensed it for inclusion
21 of a bulletin or something like that?

22 A For reproduction display or distribution, yes.

23 Q The probabilities that a market would likely
24 develop, to the extent they incorporate search and do
25 not extend beyond snippet display, are there any other

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1 examples that you can think of in the current practices
2 that inform your thinking, that inform your --

3 A The company --

4 Q -- probability?

5 THE REPORTER: I'm sorry. What was the last
6 word?

7 MR. McGOWAN: Your thinking.

8 THE WITNESS: The company I mentioned earlier,
9 icopyright.com, at the time I checked which was a while
10 back -- by this, I mean, it would have been over a year
11 or two ago -- but was precisely in the business of
12 licensing short excerpts of digital content for online
13 uses. But I did not review their website for the
14 preparation of this report.

15 BY MR. McGOWAN:

16 Q I understand that. What I'm trying to do is
17 find out in connection with ascertaining the method by
18 which you derived your probability, your educated guess.
19 I'm trying to find out what the closest case to Google
20 Books is, and I want to include the search component in
21 the base case because search is a component of Google
22 books. And I want to know what the closest case you
23 have examined to Google Books, including search, is?

24 MR. SNYDER: Objection to form.

25 THE WITNESS: I did not opine about search. I

<p style="text-align: right;">Page 237</p> <p>1 opined about reproduction of whole books and making 2 snippets available mostly. I did not opine specifically 3 about search. And what I am saying is, if the 4 reproduction and the display of snippets are not fair 5 uses, they can be licensed because this very much 6 resembles the reproduction of books and book excerpts 7 that is currently licensed by CCC, probably by 8 icopyright.com and by RROs in 30 countries, at least 9 now, worldwide.</p> <p>10 MR. MCGOWAN: Let's take a short break. 11 VIDEOGRAPHER: Off the record at 4:14. 12 (Recess taken.). 13 VIDEOGRAPHER: On the record at 4:31. 14 BY MR. MCGOWAN: 15 Q Professor Gervais, with respect to the 16 licenses that the Copyright Clearance Center has entered 17 into with universities, do you know whether, as part of 18 those licenses, the Copyright Clearance Center sometimes 19 allows universities to scan content and make it 20 available digitally for students to use? 21 A I believe they do in their electronic course 22 back service. 23 Q Do you know whether, in connection with those 24 licenses the Copyright Clearance Center requires 25 universities to adopt specified security protocols</p>	<p style="text-align: right;">Page 239</p> <p>1 STATE OF CALIFORNIA) ss: 2 COUNTY OF SAN FRANCISCO) 3 4 I, STACEY M. DIODATI, C.S.R. #11925, a Certified 5 Shorthand Reporter in and for the State of California, 6 do hereby certify: 7 That prior to being examined, the witness named in 8 the foregoing deposition was by me duly sworn to testify 9 the truth, the whole truth, and nothing but the truth. 10 That said deposition was taken before me at the 11 time and place set forth and was taken down by me in 12 shorthand and thereafter reduced to computerized 13 transcription under my direction and supervision, and I 14 hereby certify the foregoing deposition is a full, true 15 and correct transcript of my shorthand notes so taken. 16 I further certify that I am neither counsel for nor 17 related to any party to said action nor in anywise 18 interested in the outcome thereof. 19 IN WITNESS WHEREOF, I have hereunto subscribed 20 my name this 18th day of June, 2012. 21 22 _____ 23 Stacey M. Diodati 24 Certified Shorthand Reporter 25</p>
<p style="text-align: right;">Page 238</p> <p>1 pertaining to that content? 2 A At the time I was there, I believe they did. 3 I do not know if they do that now. 4 Q Do you recall what they were? 5 A I recall that they had conditions imposed, but 6 as I said, I was on the rightsholders side and 7 international side. I did not deal with individual 8 users. So I had with limited contact with users and 9 with the contracts with users. 10 Q You don't remember any specific terms? 11 A No. 12 MR. MCGOWAN: That is all I have. Thank you 13 for your time. 14 MR. SNYDER: I have no questions. Thank you. 15 VIDEOGRAPHER: This the end of Disk 3 of 16 Daniel Gervais. Off the record at 4:33. 17 THE REPORTER: Would you like a copy? 18 MR. SNYDER: Yes. 19 (WHEREUPON, the deposition of DANIEL GERVAIS 20 was concluded at 4:33 p.m.) 21 22 23 24 25</p>	

EXHIBIT 16

<p style="text-align: center;">Page 1</p> <p style="text-align: center;">UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK</p> <p>-----</p> <p>THE AUTHORS GUILD, INC.,) ASSOCIATIONAL PLAINTIFF,) BETTY MILES, JOSEPH) GOULDEN, AND JIM BOUTON,) INDIVIDUALLY AND ON) BEHALF OF ALL OTHERS) SIMILARLY SITUATED,) C.A. 05 CV 8136-DC Plaintiffs) Volume: I vs.) GOOGLE, INC.) Defendant)</p> <p>-----</p> <p>DEPOSITION OF EXPERT WITNESS, BENJAMIN G. EDELMAN, before Avis P. Barber, a Notary Public and Registered Professional Reporter, in and for the Commonwealth of Massachusetts, at the Harvard Business School, Baker Library, 25 Harvard Way, Boston, Massachusetts, on Thursday, June 14, 2012, commencing at 10:03 a.m.</p> <p>Job No. 148413 PAGES 1 - 312</p>	<p style="text-align: right;">Page 3</p> <p style="text-align: center;">I N D E X</p> <p>1 2 WITNESS DIRECT CROSS REDIRECT RECROSS 3 4 BENJAMIN G. EDELMAN 5 6 BY MR. GRATZ 6 7 8 E X H I B I T S 9 10 NUMBER PAGE 11 Exhibit 1 Expert Report of Benjamin Edelman 17 12 Exhibit 2 Whenu.com Emergency Motion 98 13 Exhibit 3 Initial Expert Report of Doctor 14 Benjamin Edelman Concerning Industry 15 Practices and Activities of 16 Valueclick 101 17 Exhibit 4 Expert Report of Benjamin Edelman 112 18 Exhibit 5 Document entitled "Google Toolbar 19 Tracks Browsing even after User 20 Choose Disable" 129 21 Exhibit 6 Search Engine Land, Blog Post, 131 22 1/26/10 23 Exhibit 7 Document entitled "Privacy Lapse at 24 Google JotSpot" 137 25 Exhibit 8 Document entitled "Google's JotSpot Exposes User Data" 139 Exhibit 9 Declaration of Benjamin Edelman 143 Exhibit 10 Supplemental Declaration of Benjamin Edelman 143</p>
<p style="text-align: center;">Page 2</p> <p>1 APPEARANCES: 2 3 On behalf of the Plaintiffs: 4 BONI & ZACK, LLC 5 15 St. Asaphs Road 6 Bala Cynwyd, Pennsylvania 19004 7 By: Michael J. Boni, Esquire 8 Tel: 610-822-0201 9 Fax: 610-822-0206 10 mboni@bonizack.com 11 12 On behalf of the Defendant 13 DURIE TANGRI 14 217 Leidesdorff Street 15 San Francisco, California 94111 16 By: Joseph C. Gratz, Esquire 17 Tel: 415-362-6666 18 Fax: 415-236-6300 19 jgratz@durietangri.com 20 21 ALSO PRESENT: Jody Urbati, Videographer 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p style="text-align: center;">E X H I B I T S (Continued)</p> <p>1 2 NO. PAGE 3 4 Exhibit 11 Document entitled "The Online 5 Economy: Strategy and 6 Entrepreneurship" 156 7 Exhibit 12 Declaration of Benjamin G. Edelman 161 8 Exhibit 13 Document entitled "Advertisers Using 9 WhenU" 164 10 Exhibit 14 Exhibit 1 171 11 Exhibit 15 Document entitled "Google Books 12 Partner Program Standard Terms and 13 Conditions" 213 14 Exhibit 16 Search Inside, Publisher Sign-Up 221 15 Exhibit 17 Participating Authors' Reprint 16 Agreement v2.0 228 17 Exhibit 18 Cooperative Agreement 267 18 Exhibit 19 Document entitled "NDA Never Existed" 270 19 Exhibit 20 Benjamin Edelman's Thesis 306 20 21 EXHIBITS RETAINED BY THE COURT REPORTER 22 23 24 25</p>

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<p>1 PROCEEDINGS</p> <p>2 THE VIDEOGRAPHER: Good morning. We</p> <p>3 are on the record at 10:03 A.M. on June 14th,</p> <p>4 2012. This is the videotaped deposition of</p> <p>5 Benjamin Edelman. My name is Jody Urbati, here</p> <p>6 with our court reporter Barbara Avis. We are</p> <p>7 here from Veritext National Deposition and</p> <p>8 Litigation Services at the request of counsel.</p> <p>9 This deposition is being held at</p> <p>10 Harvard Business School in the city of Boston,</p> <p>11 Massachusetts. The caption of this case is the</p> <p>12 Authors Guild versus Google, Inc. Please note</p> <p>13 that the audio and video recording will take</p> <p>14 place unless all parties agree to go off the</p> <p>15 record. Microphones are sensitive and may pick</p> <p>16 up whispers, private conversations and cellular</p> <p>17 interference.</p> <p>18 At this time will counsel and all</p> <p>19 present identify themselves for the record.</p> <p>20 MR. GRATZ: Joseph Gratz from Durie</p> <p>21 Tangri, LLP in San Francisco for defendant</p> <p>22 Google.</p> <p>23 MR. BONI: Michael Boni from Boni &</p> <p>24 Zach, Bala Cynwyd, Pennsylvania for plaintiffs.</p> <p>25 THE WITNESS: Benjamin --</p>	<p>1 Q. You have an undergraduate degree and</p> <p>2 a Ph.D. in economics; is that right?</p> <p>3 A. Yes.</p> <p>4 Q. Do any of the opinions stated in your</p> <p>5 report apply economic analysis?</p> <p>6 A. I think they do broadly understood,</p> <p>7 yes.</p> <p>8 Q. How so?</p> <p>9 A. The report considers the incentives</p> <p>10 of various parties, the factors motivating them</p> <p>11 to act or not to act and the likely consequences</p> <p>12 of those incentives.</p> <p>13 Q. Are there any specific economic</p> <p>14 methods that are applied in your report?</p> <p>15 MR. BONI: Object to form.</p> <p>16 A. I'm not sure I understand what you</p> <p>17 mean.</p> <p>18 Q. What economic methods are applied in</p> <p>19 your report?</p> <p>20 MR. BONI: Same objection.</p> <p>21 A. My training and economics teaches me</p> <p>22 to understand and analyze incentives in</p> <p>23 considering the actions of any rational actor.</p> <p>24 That method of analysis of considering and</p> <p>25 applying incentives is applied throughout the</p>
Page 6	Page 8
<p>1 MR. BONI: I'm sorry, and here</p> <p>2 representing the witness.</p> <p>3 THE VIDEOGRAPHER: Thank you. The</p> <p>4 witness will be sworn in and we can proceed.</p> <p>5 BENJAMIN G. EDELMAN,</p> <p>6 A witness called for examination, having been</p> <p>7 duly sworn, testified as follows:</p> <p>8 DIRECT EXAMINATION</p> <p>9 BY MR. GRATZ:</p> <p>10 Q. Good morning.</p> <p>11 A. Good morning.</p> <p>12 Q. Could you state your name for the</p> <p>13 record, please.</p> <p>14 A. Benjamin Edelman.</p> <p>15 Q. And you're an assistant professor at</p> <p>16 Harvard Business School; is that right?</p> <p>17 A. Yes.</p> <p>18 Q. Do you have tenure?</p> <p>19 A. No.</p> <p>20 Q. You have a number of degrees from</p> <p>21 Harvard; is that right?</p> <p>22 A. Yes.</p> <p>23 Q. Are any of those degrees in computer</p> <p>24 science?</p> <p>25 A. No.</p>	<p>1 report.</p> <p>2 Q. Can you tell me more about that</p> <p>3 method?</p> <p>4 MR. BONI: Objection to form.</p> <p>5 A. Well, you know I think it's pretty</p> <p>6 intuitive. It can be structured in a formal</p> <p>7 algebraic model when a particular situation</p> <p>8 calls for that approach. It can be studied</p> <p>9 empirically through large sample or small sample</p> <p>10 data when the context calls for that approach.</p> <p>11 It can also inform understanding and analysis</p> <p>12 without specific application of modeling or of</p> <p>13 large sample data analysis.</p> <p>14 Q. Did you apply any algebraic modeling</p> <p>15 in preparing your report?</p> <p>16 A. No.</p> <p>17 Q. Did you apply any empirical large</p> <p>18 sample data analysis in preparing your report?</p> <p>19 A. I wouldn't call it large sample data</p> <p>20 analysis. There are sections that draw on</p> <p>21 specific examples considered individually which</p> <p>22 probably is a better example of small sample</p> <p>23 data analysis.</p> <p>24 Q. And those are the particular</p> <p>25 anecdotes that you set forth in your report?</p>

<p style="text-align: right;">Page 9</p> <p>1 MR. BONI: Object to form.</p> <p>2 A. The particular examples that are</p> <p>3 detailed in my report, yes.</p> <p>4 Q. And do you extrapolate from those</p> <p>5 examples to reach conclusions that are more</p> <p>6 general?</p> <p>7 A. I interpret those examples in order</p> <p>8 to reach conclusions that are more general, yes.</p> <p>9 Q. By what means do you interpret those</p> <p>10 examples to reach more general conclusions?</p> <p>11 A. I'm thinking in particular of a</p> <p>12 section of my report about defects in other</p> <p>13 Google offerings and the security and design</p> <p>14 thereof. And I examine a series of such defects</p> <p>15 and conclude that defects are possible, indeed</p> <p>16 even likely, even for products coming from a</p> <p>17 company as esteemed and trusted as Google. So</p> <p>18 an argument from analogy, I suppose it's an</p> <p>19 existence proof. If one exists, then others</p> <p>20 could also exist. Straightforward, logical</p> <p>21 reasoning to my eye.</p> <p>22 Q. And the proposition that if one</p> <p>23 exists than others could also exist is an</p> <p>24 application of your training in economics?</p> <p>25 MR. BONI: Object to form.</p>	<p style="text-align: right;">Page 11</p> <p>1 not whether there are necessarily other needles</p> <p>2 in the haystack; is that right?</p> <p>3 A. I'm not sure. Looking at the</p> <p>4 specific examples can be quite informative and</p> <p>5 understanding the kinds of problems that occur,</p> <p>6 the frequency with which they occur, the</p> <p>7 probability with which they occur.</p> <p>8 Q. How can you determine a probability</p> <p>9 by looking at a single example?</p> <p>10 MR. BONI: Object to form.</p> <p>11 Mischaracterizes the testimony.</p> <p>12 A. At first you can draw inferences</p> <p>13 about a probability from a single example. If</p> <p>14 we saw that it rained on one out of five days,</p> <p>15 we could draw inferences about the probability</p> <p>16 of rain, even if those were the only five days</p> <p>17 in which we had ever experienced a particular</p> <p>18 city. We could say the probability of rain</p> <p>19 probably isn't 90 percent and probably isn't one</p> <p>20 one-thousandth of a percent. It's probably</p> <p>21 something closer to 20 percent, and of course</p> <p>22 with more data points you could draw a better</p> <p>23 inference.</p> <p>24 Q. And those are the types of inferences</p> <p>25 that you draw in your report?</p>
<p style="text-align: right;">Page 10</p> <p>1 A. You know, I think it's a principle</p> <p>2 that comes from multiple disciplines, training</p> <p>3 and mathematics, statistics, economics, logic,</p> <p>4 all the areas in which I have some training.</p> <p>5 And all of which speak to the same underlying</p> <p>6 logical principle which I don't think really</p> <p>7 requires all that much specialized training.</p> <p>8 Q. And that principle is that the</p> <p>9 existence of one example suggests that such an</p> <p>10 example is, at least, not impossible and there</p> <p>11 might be others.</p> <p>12 A. Precisely. If one thought there were</p> <p>13 no needles in a haystack, finding the first</p> <p>14 needle suggests there might be more.</p> <p>15 Q. It doesn't make it certain that there</p> <p>16 are any others; is that right?</p> <p>17 A. That's right.</p> <p>18 Q. And the only thing it tells you about</p> <p>19 the probability of there being others is that --</p> <p>20 strike that.</p> <p>21 The only thing it tells you about the</p> <p>22 probability of there being any needles in the</p> <p>23 haystack -- strike that.</p> <p>24 The only thing it tells you is about</p> <p>25 the existence of any needles in the haystack,</p>	<p style="text-align: right;">Page 12</p> <p>1 A. That method of analysis consistent</p> <p>2 with my training and my research and my</p> <p>3 background informs the conclusions drawn in my</p> <p>4 report.</p> <p>5 Q. That if something happens with a</p> <p>6 certain frequency, it's likely to happen with</p> <p>7 that frequency in the future?</p> <p>8 A. I wouldn't have put it quite as</p> <p>9 simply as that, but that looking at the past can</p> <p>10 inform inferences about the future. That much,</p> <p>11 absolutely.</p> <p>12 Q. Does that require economic analysis?</p> <p>13 A. I think economic analysis is quite</p> <p>14 useful, particularly in understanding the</p> <p>15 incentives that make it more or less likely that</p> <p>16 a given problem will or won't occur.</p> <p>17 Q. Does the existence of the issue in</p> <p>18 the first place inform you about what the</p> <p>19 incentive structure is?</p> <p>20 MR. BONI: Object to form.</p> <p>21 A. Sometimes it does. Sometimes seeing</p> <p>22 a specific example helps crystalize</p> <p>23 understanding of the problem. Ah, I see because</p> <p>24 of this problem, well, that resulted because of</p> <p>25 this incentive, and so the specific example</p>

<p style="text-align: right;">Page 13</p> <p>1 really can help inform understanding. 2 Q. Can you give me an understanding of 3 such an instance? 4 A. Sure. 5 Q. Please go ahead and do so. 6 A. In January 2010 I uncovered the 7 Google Toolbar continuing to track user 8 behavior, what web pages users viewed even after 9 users had specifically disabled the toolbar, 10 even after the toolbar had confirmed that it was 11 disabled and even after the toolbar had 12 disappeared from view, seemingly further 13 confirming that it had ceased operation, but, in 14 fact, it continued operation. It continued to 15 track users' most sensitive online activities. 16 That example helped me understand 17 Google's incentive to collect the data at issue, 18 users browsing. Namely, it was always in 19 Google's interests to collect more data, the 20 more data the better for reasons that Google 21 well knows. 22 Users, meanwhile, were most concerned 23 about the appearance of their data being 24 collected. What bugged users wasn't the actual 25 collection but the knowledge that the data was</p>	<p style="text-align: right;">Page 15</p> <p>1 Had it failed to collect any data 2 someone at Google would have noticed that in a 3 hurry; whereas, when it collected too much, that 4 was something that the Google engineers were 5 much less likely to notice. 6 Q. Your master's degree is in 7 statistics; is that right? 8 A. Yes. 9 Q. Do any of the opinions stated in your 10 report apply statistical methods? 11 A. As in our prior discussion, I think 12 the report is grounded in the approach of 13 statistics, in the analytical structure of 14 statistics, but doesn't apply the formal methods 15 of statistics; for example, the algebraic method 16 of statistics. 17 Q. What methods of statistics does your 18 report apply? 19 A. Hereto drawing on information from a 20 sample, history, in order to make inferences 21 about a larger population, that is, the future. 22 That's the essence of statistical inference, and 23 that's something that my report does repeatedly. 24 Q. Does your report draw on any 25 statistical methods that are different from the</p>
<p style="text-align: right;">Page 14</p> <p>1 being collected. Users really had no way to 2 tell one way or the other whether or not the 3 data was being collected. All they could tell 4 was whether they thought the data was being 5 collected. 6 So the understanding of the 7 incentives on both ends helped me understand the 8 cause of this problem, how it came to be that 9 Google allowed this defect to occur in quite a 10 widely used product and how it came to be that 11 users had failed to notice this defect, even 12 when it had been extant for several months at 13 that point. 14 Q. This led you to the conclusion that 15 Google had an incentive to cause its software to 16 operate in that manner? 17 A. At the very least, Google had little 18 incentive to check for this defect or to prevent 19 this defect. One could consider the opposite 20 defect. Suppose the toolbar had failed to 21 collect any of the data that Google wanted to 22 collect. Would anyone have noticed that? 23 Absolutely. Because the whole purpose of this 24 data collection system was, in fact, to collect 25 data.</p>	<p style="text-align: right;">Page 16</p> <p>1 economic methods we've already discussed? 2 A. I don't always draw a crisp 3 distinction between statistical methods and 4 economic methods, but I think we've discussed 5 the relevant methods of both of those 6 disciplines. 7 Q. You have a law degree as well; is 8 that right? 9 A. Yes. 10 Q. Do you express any legal opinions in 11 your report? 12 A. No. 13 Q. In your course work, did you take any 14 courses dedicated to how to secure networked 15 computers from intrusion? 16 A. I did not take any such courses as a 17 student. 18 Q. Are you familiar with the 19 certification known as Certified Information 20 Systems Security Professional or CISSP? 21 A. Yes. 22 Q. What is it? 23 A. It's a certification consistent with 24 the name, purporting to certify the skills and 25 background of a certified person in the area of</p>

<p style="text-align: right;">Page 17</p> <p>1 information security. 2 Q. Are you certified as a CISSP? 3 A. No. 4 Q. Do you hold any other certifications 5 related to information security? 6 A. Nothing comes to mind. 7 MR. GRATZ: I'd like to mark as 8 Edelman Exhibit 1, this document. 9 (Report marked as Exhibit No. 1 for 10 identification.) 11 Q. Do you recognize this document, 12 Mr. Edelman? 13 A. Yes. 14 Q. What is it? 15 A. It's my expert report on this matter. 16 Q. Turning your attention to 17 Paragraph 1, you say, "My research focuses on 18 the design of electronic marketplaces, including 19 Internet advertising, search engines, privacy 20 and information security. Do you see that?" 21 A. Yes. 22 Q. Turning first to advertising, what 23 Internet advertising systems have you done 24 research on? 25 A. I've written about a variety of</p>	<p style="text-align: right;">Page 19</p> <p>1 them to be labeled in a way different from the 2 way they are labeled. Whether consumers can 3 distinguish between advertising content and 4 non-advertising content. 5 Q. Did your research into advertising 6 relate to information security as it relates to 7 those marketplaces? 8 A. In some instances, yes. 9 Q. What instances are those? 10 A. My understanding of information 11 security in the context of advertising would 12 certainly need to include whether an advertiser 13 charged the right amount, whether their ads are 14 placed in the correct places, whether they are 15 given truthful information about where and how 16 their ads performed. And I've written about all 17 of those questions, including defects and 18 shortfalls in those areas. 19 Q. Have you ever written about 20 intrusions into advertising systems by hackers? 21 A. I have. 22 Q. In what instances? 23 A. I've written about a series of 24 hackers, fraudsters of multiple sorts who have 25 taken money from advertisers, money that they</p>
<p style="text-align: right;">Page 18</p> <p>1 Internet advertising systems, including search 2 engines and their paper click advertising 3 platforms, display advertising systems, and 4 display advertising exchanges, affiliate 5 marketing, listing services, for example, real 6 estate listings, apartment rentals. There 7 probably are some more online advertising that 8 permeates my writing of the last decade. 9 Q. What aspects of Internet advertising 10 systems did you research? 11 MR. BONI: Object to form. You can 12 answer. 13 A. My best known academic article 14 explores the game theory of online advertising 15 and search engines, how much to bid, assuming 16 that the rules are structured in a particular 17 way. I've written about fraud in advertising 18 marketplaces, whereby advertisers are 19 overcharged. I've written about fraud, whereby 20 consumers are deceived, where an advertisement 21 offers something other than what it purports to 22 offer. 23 I've written about advertisement 24 labeling, whether advertisements are labeled as 25 such, whether applicable legal doctrines require</p>	<p style="text-align: right;">Page 20</p> <p>1 were not entitled to according to any applicable 2 contract. I've written about the methods 3 whereby they did so, the computer code that 4 allowed them to take the money, and the methods 5 that I used in order to catch them, the proposed 6 remediation of this problem, both in the short 7 run, how to get the money back, and in the long 8 run, how to make sure that it doesn't reoccur in 9 the future. 10 Q. The code that you spoke of in your 11 previous answer, did it result in intrusion into 12 any computer systems? 13 A. Yes. 14 Q. What computer systems are those? 15 A. The advertising tracking systems of 16 the victims of the respective frauds. 17 Q. And how were those systems intruded 18 upon? 19 A. Well, it varies from example to 20 example. In one example that I'm -- that I'm 21 thinking of the intruder caused other people's 22 computers to connect to the victim's computer in 23 a way that caused false records to be created as 24 to the supposed efficacy of an advertising 25 system that, in fact, wasn't working at all, but</p>

5 (Pages 17 to 20)

<p style="text-align: right;">Page 21</p> <p>1 the intrusion caused records to indicate that</p> <p>2 the system was working quite well and caused the</p> <p>3 advertiser to pay actually in the millions of</p> <p>4 dollars of unearned commission payments.</p> <p>5 Q. Have they hacked into the tracking</p> <p>6 system itself or merely caused other computers</p> <p>7 to make false reports of ad impressions?</p> <p>8 MR. BONI: Object to form.</p> <p>9 A. I'm not sure I know what you mean by</p> <p>10 the word "hacked" in that context.</p> <p>11 Q. Had they gained access to the --</p> <p>12 strike that.</p> <p>13 In the instance you're discussing,</p> <p>14 had the fraudsters gained access to confidential</p> <p>15 information on the systems of the ad network,</p> <p>16 and by that I mean stored on the servers</p> <p>17 operated by the ad network?</p> <p>18 A. In the example that I described, no</p> <p>19 confidential information was involved one way or</p> <p>20 the other.</p> <p>21 Q. It was a situation in which the</p> <p>22 fraudsters were causing third-party computers to</p> <p>23 make false reports to that ad tracking system;</p> <p>24 is that right?</p> <p>25 A. That was one aspect of the problem.</p>	<p style="text-align: right;">Page 23</p> <p>1 A. No.</p> <p>2 Q. Were the fraudsters operating a</p> <p>3 server?</p> <p>4 A. Yes.</p> <p>5 Q. And that server communicated with</p> <p>6 third-party computers?</p> <p>7 A. Yes.</p> <p>8 Q. And the communication between the</p> <p>9 third-party computers and the server caused</p> <p>10 those third-party computers to make reports to</p> <p>11 the ad network; is that right?</p> <p>12 A. Yes.</p> <p>13 Q. And that was the method by which the</p> <p>14 fraud was achieved; is that right?</p> <p>15 A. That's the essence of it.</p> <p>16 Q. And it was because those false</p> <p>17 reports were made that the fraudsters were able</p> <p>18 to make millions of dollars; is that right?</p> <p>19 A. That was one of the necessary steps,</p> <p>20 multiple lines of causation, of course,</p> <p>21 necessary to get such a large check.</p> <p>22 Q. Sure. They had to actually write the</p> <p>23 check. They had to not have it caught by the</p> <p>24 fraud systems and so on?</p> <p>25 A. Among others, yes.</p>
<p style="text-align: right;">Page 22</p> <p>1 Q. What were the other aspects?</p> <p>2 A. The fraudster was causing the ad</p> <p>3 tracking system to believe that the</p> <p>4 advertisements had been delivered and had caused</p> <p>5 purchases to occur, when, in fact, neither of</p> <p>6 those was the case.</p> <p>7 Q. How did they achieve that?</p> <p>8 MR. BONI: Object to form.</p> <p>9 A. That was achieved by a set of</p> <p>10 computer codes using multiple programming</p> <p>11 languages, at least one server, multiple client</p> <p>12 computers and the victim's server all operating</p> <p>13 in concert in a way directed by the perpetrator</p> <p>14 in order to cause the false records to be</p> <p>15 created.</p> <p>16 Q. Did the fraudsters have control of</p> <p>17 the ad networks server?</p> <p>18 A. I don't know what you mean by</p> <p>19 "control" in this circumstance.</p> <p>20 Q. Did the fraudsters gain information</p> <p>21 from the ad networks server?</p> <p>22 A. I don't think the fraudsters wanted</p> <p>23 information so much as millions of dollars which</p> <p>24 they did gain successfully.</p> <p>25 Q. Was this a Botnet?</p>	<p style="text-align: right;">Page 24</p> <p>1 Q. Any other instances in which your</p> <p>2 research on advertising has related to</p> <p>3 information security?</p> <p>4 A. So of course, there are other</p> <p>5 examples in the realm of advertising fraud of</p> <p>6 which I've just given you one. A big one with a</p> <p>7 large amount of money at issue and a criminal</p> <p>8 indictment and so forth, but there are others</p> <p>9 very much in the same vein.</p> <p>10 Q. In which the fraudsters are causing</p> <p>11 false reports to be made to advertisers or</p> <p>12 advertising networks; is that right?</p> <p>13 A. Broadly understood, yes.</p> <p>14 Q. What peer review publications</p> <p>15 resulted from your research on Internet</p> <p>16 advertising systems?</p> <p>17 A. The best known is my American</p> <p>18 Economic Review article as to the gain theory of</p> <p>19 sponsored search auctions. There are various</p> <p>20 others, I believe each of them listed on my CV.</p> <p>21 Q. Is your research on Internet</p> <p>22 advertising a basis for any of the opinions in</p> <p>23 your report?</p> <p>24 A. Not specifically. In some areas</p> <p>25 probably what I've learned about Internet</p>

<p style="text-align: right;">Page 25</p> <p>1 advertising informs my understanding of other 2 information security matters and other matters 3 detailed in my report. 4 Q. In what way? 5 A. For example, information in 6 electronic form can be copied, often quite 7 easily and at minimal cost. A gives it to B, B 8 gives it to C, and the chain can continue more 9 quickly and more easily and more accurately in 10 electronic form than, for example, on paper. 11 I've seen that in spades in online advertising 12 where the supply chain between an advertiser and 13 a publisher can have literally a dozen 14 intermediaries all made possible by the low cost 15 of electronic copying. That's broadly at issue 16 in this case also and comes up in my report in 17 several areas. 18 Q. Are there any other ways in which 19 your research on Internet advertising systems 20 forms a basis for any of the opinions in your 21 report? 22 A. I'm just not sure. I could reread 23 the report with an eye to that question. I 24 considered the totality of my experience and 25 research, professional activities and so forth</p>	<p style="text-align: right;">Page 27</p> <p>1 engines was about certain results that were 2 systematically missing in certain countries. So 3 you'd go to the French version of Google, and 4 there would be some sites that would never come 5 up. Sometimes sites with terrible content that 6 might even be unlawful in France and sometimes 7 sites that seemed pretty unremarkable but 8 strangely would be missing nonetheless. 9 Other articles about quote unquote 10 bias, that is, the systematic favorable 11 treatment of some sources or some viewpoints 12 relative to others, methods of evaluating 13 whether such bias exists, preserving proof, 14 drawing comparisons and drawing inferences 15 between search engines on that question. 16 Q. Anything else? 17 A. I believe I've written about privacy 18 on search engines, about privacy of records of 19 users' activities. 20 Q. Anything else? 21 A. The size and prevalence of 22 advertising on search engines, other changes to 23 the layout, structure of visual presentation of 24 search engine results, the interaction between 25 Spyware and Adware on users' computers and</p>
<p style="text-align: right;">Page 26</p> <p>1 in drawing the conclusions that are in the 2 report. 3 Q. Nothing else, specifically, comes to 4 mind right now? 5 A. Not right now. 6 Q. The second item you mentioned is 7 search engines. What search engines have you 8 done research on? 9 A. I've looked at a variety of search 10 engines. I spent most of my time looking at 11 Google's practices, and Google is, of course, 12 the largest and most popular search engine in 13 most countries. I've also looked at Yahoo. 14 I've looked at Bing and its predecessors. I've 15 looked at Ask.com. I've looked at AOL. Various 16 others whose names aren't familiar to the 17 typical American consumer, but whose practices 18 I've also examined. 19 Q. What research did you do relating to 20 search engines? 21 A. I've written a variety of articles 22 about search engines. I've written about the 23 labeling of advertising on search engines. I've 24 written about the patterns of which results 25 appear where. My first article about search</p>	<p style="text-align: right;">Page 28</p> <p>1 search engines, search engine results. 2 Q. Anything else? 3 A. There probably are some more aspects 4 of search engines that I've written about. 5 Q. Do they come to mind? 6 A. Not right now. 7 Q. Did any of your research relate to 8 the security of search engines against attacks 9 from hackers? 10 A. Some of it, yes. 11 Q. What research is that? 12 A. For example, the research on Spyware 13 and Adware speaks to security issues on multiple 14 levels, security of the users' computers as 15 against the Spyware and Adware that have some 16 effects, potentially harmful effects, and 17 security and integrity of the search engine 18 result page to present results in the order and 19 format that the search engine intended, rather 20 than in some modified presentation, modified in 21 large part by the Spyware or Adware. 22 Q. The security issues you described in 23 your previous answer are security issues that 24 relate to the security of an Internet user's 25 computer rather than to a server; is that right?</p>

7 (Pages 25 to 28)

<p style="text-align: right;">Page 29</p> <p>1 MR. BONI: Object to form.</p> <p>2 A. I guess I don't think of it quite</p> <p>3 that way.</p> <p>4 Q. Are you aware of any instance in</p> <p>5 which Spyware or Adware has been installed on a</p> <p>6 search engine's server?</p> <p>7 A. I guess I wouldn't use those terms to</p> <p>8 describe the kinds of problems that I've been</p> <p>9 looking at.</p> <p>10 Q. Are you aware of any situation in</p> <p>11 which the data being served by a search engine's</p> <p>12 servers has been affected by Spyware or Adware?</p> <p>13 A. I'm aware of many instances where the</p> <p>14 data served by a web server has been affected by</p> <p>15 software installed onto the web server. Whether</p> <p>16 that has occurred with search engines</p> <p>17 specifically, I'm not sure one way or the other.</p> <p>18 Q. You don't know of any such instance?</p> <p>19 A. I guess it wouldn't usually be via</p> <p>20 the mechanism of spyware or adware. If one</p> <p>21 wanted to influence the results shown by a</p> <p>22 search engine, there would be other ways to make</p> <p>23 that influence, but typically one wouldn't use</p> <p>24 the words Spyware or adware to describe those</p> <p>25 practices.</p>	<p style="text-align: right;">Page 31</p> <p>1 search for a map, if you typed in Boston map</p> <p>2 into Bing, I would expect that a map would</p> <p>3 appear, and that it would be a Bing map, and</p> <p>4 that there's a software program installed into</p> <p>5 the Bing server that causes that Bing map to</p> <p>6 appear.</p> <p>7 Q. And that software was installed with</p> <p>8 the authorization of the operator of that</p> <p>9 server; is that right?</p> <p>10 A. That's right.</p> <p>11 Q. Are you aware of any instance in</p> <p>12 which search rankings have been modified by</p> <p>13 software which was installed without the</p> <p>14 authorization of the operator of the search</p> <p>15 engine?</p> <p>16 A. I've perceived some ambiguity in your</p> <p>17 question which makes it hard for me to answer.</p> <p>18 Q. What's ambiguous about it?</p> <p>19 MR. BONI: Object to form.</p> <p>20 A. Why don't you just restate the</p> <p>21 question.</p> <p>22 Q. Sure. Are you aware of any instance</p> <p>23 in which someone other than the search engine</p> <p>24 has been successful in installing software on a</p> <p>25 search engine's server for some purpose that was</p>
<p style="text-align: right;">Page 30</p> <p>1 Q. Are you aware of any instance in</p> <p>2 which a party seeking a higher search engine</p> <p>3 ranking has been successful in installing</p> <p>4 software on a search engine's servers to achieve</p> <p>5 that goal?</p> <p>6 A. Yes.</p> <p>7 Q. What instance is that?</p> <p>8 A. Google, itself, in order to grant its</p> <p>9 own services preferred ranking installs software</p> <p>10 onto its own search engine in order to achieve</p> <p>11 that goal.</p> <p>12 Q. Are you aware of any other such</p> <p>13 instances?</p> <p>14 A. Yes.</p> <p>15 Q. What instances are you aware of?</p> <p>16 A. I think other search engines also</p> <p>17 typically do that to favor their own services</p> <p>18 and their partner services and their prospective</p> <p>19 partner services and others consistent with</p> <p>20 their business objectives.</p> <p>21 Q. Does Bing do that?</p> <p>22 A. In some areas they do.</p> <p>23 Q. What areas are those?</p> <p>24 A. Well, I need to look at specific</p> <p>25 searches, but, for example, if you were to</p>	<p style="text-align: right;">Page 32</p> <p>1 not authorized by the search engine?</p> <p>2 MR. BONI: Object to form.</p> <p>3 A. Well, the notion of installing</p> <p>4 software onto the server has multiple levels.</p> <p>5 Certainly, providing data to a server that the</p> <p>6 server then processes, it's quite routine for</p> <p>7 publishers to provide data to a search engine in</p> <p>8 hopes that the search engine process it in a way</p> <p>9 that provides the publisher with preferred</p> <p>10 listings. And it's quite routine to do that</p> <p>11 with predictable consequences; namely, obtaining</p> <p>12 the preferred placement that is sought. That</p> <p>13 happens, sadly, every day.</p> <p>14 Q. What is the nature of the data that</p> <p>15 you referred to that's sent to the server in</p> <p>16 your previous answer?</p> <p>17 A. Well, it's computer code. It's</p> <p>18 interpreted by the server. Is it executed by</p> <p>19 the server? I guess it depends. Some of the</p> <p>20 code actually does have to be executed in order</p> <p>21 to have meaning because it doesn't have any</p> <p>22 meaning until it is executed. It can't stand</p> <p>23 alone.</p> <p>24 Q. What programming language is that</p> <p>25 data written in?</p>

<p style="text-align: right;">Page 33</p> <p>1 A. It can be written in multiple 2 languages. Classically, it would be written 3 simply in HTML. More recently it would often be 4 written in JavaScript, in Flash. It could be 5 written in a variety of other languages also. 6 Typically, a modern search engine would 7 nonetheless be able to receive that computer 8 code, execute it, interpret it and draw 9 conclusions about its implications. 10 Q. And the code that you're talking 11 about is code that someone would post on their 12 website in order for the search engine to 13 download and index or otherwise -- or otherwise 14 use; is that right? 15 A. That's one way it could happen. 16 Q. What are the other ways? 17 A. One could provide that code solely to 18 the search engine and not to anyone other than 19 the search engine, and indeed I've found 20 examples of that and have written about that. 21 In fact, was invited to the Google campus for 22 the first time after I had found a particularly 23 notable example of that. 24 Q. And that is a situation in which a 25 web server operator would give a different</p>	<p style="text-align: right;">Page 35</p> <p>1 the search engine ranking for some other website 2 or increase the search engine ranking for some 3 other website; is that right? 4 A. Those are other common objectives. 5 Q. And the way that they're trying to do 6 that is by providing input to the search engine 7 that the search engine will interpret in a way 8 that causes it to give that page a higher 9 ranking, for example; is that right? 10 A. That's one common strategy. 11 Q. They're not changing the algorithm 12 that's used to rank web pages; is that right? 13 A. The examples we've been discussing so 14 far don't change the algorithm. 15 Q. Are you aware of any instance in 16 which a hacker has been able to change the 17 search engine's algorithm. 18 A. Yes. 19 Q. What instances are those? 20 A. Google engineers last year fed 21 systemically deceptive, maybe false data, to 22 Microsoft's search engine in an attempt to 23 sabotage Microsoft search engine and cause it to 24 display results that were nonsensical and 25 purportedly incriminating.</p>
<p style="text-align: right;">Page 34</p> <p>1 response to a request coming from a search 2 engine than coming from some other user? 3 A. That's right. 4 Q. And that response would be in the 5 form of sort of the elements that would 6 otherwise make up a web page like HTML, 7 JavaScript, CSS and so on? 8 A. Yes. 9 Q. Are you aware of any instance in 10 which the way in which the search engine 11 operates has been able -- has been able to be 12 modified by code that was downloaded from a 13 website that search engine was attempting to 14 index? 15 MR. BONI: Object to form. 16 A. I perceive some ambiguity in the 17 phrased way in which the search engine operates. 18 Q. The point of these web pages that are 19 served just to the search engine is to try and 20 get a higher search engine ranking for that 21 website, generally; is that right? 22 A. That is a common objective. It's not 23 the only objective, but it probably is the most 24 common. 25 Q. It might also be to try and reduce</p>	<p style="text-align: right;">Page 36</p> <p>1 Q. Could you tell me more about that? 2 A. Google engineers believed correctly 3 that Microsoft Internet Explorer and certain 4 Microsoft toolbars when configured with certain 5 optional advanced features would track users' 6 clicking on results both at Microsoft's search 7 engines and other search engines such as Google 8 in order to draw inferences about developments 9 of particular results to particular queries. 10 Google engineers on multiple 11 computers, all off of the Google campus, rather 12 in the engineers' residences, intentionally 13 provided false data to Microsoft in order to 14 contaminate the data collected by Microsoft in 15 order to demonstrate that this feature was 16 working exactly as Microsoft had stated that it 17 would work and exactly as Microsoft had intended 18 it to work. But by providing false data, they 19 were able to push the algorithm towards results 20 that were, in fact, nonsensical, thereby in 21 Google's view and the view of these staff 22 persons in some way demonstrating the 23 impropriety of Microsoft's activities in this 24 regard. 25 Q. Do you think that was wrong?</p>

<p style="text-align: right;">Page 37</p> <p>1 A. I'm not sure.</p> <p>2 Q. What factors go into that answer?</p> <p>3 MR. BONI: Object to form.</p> <p>4 A. Well, on one hand, it's fair game to</p> <p>5 do what you want on your own computer in</p> <p>6 general; to install software, run searches and</p> <p>7 click results. One wouldn't think that by</p> <p>8 taking those steps with nothing more one had</p> <p>9 done anything improper. All of these searches</p> <p>10 were actual searches run by people, not by</p> <p>11 robots or automation. The results were clicked</p> <p>12 again by people not by robots or automation.</p> <p>13 Where I thought Google went the most</p> <p>14 astray was in their interpretation of what</p> <p>15 occurred. Had Microsoft done anything wrong?</p> <p>16 Google says they had. Google says that</p> <p>17 Microsoft shouldn't have collected this data.</p> <p>18 That even when users granted permission for</p> <p>19 Microsoft to collect the data, the permission</p> <p>20 wasn't the users' permission to give. Only</p> <p>21 Google can grant the permission for this data to</p> <p>22 be collected or so Google would have us believe,</p> <p>23 according to Google's statements on the subject.</p> <p>24 And there I'm not so sure that's a notion of</p> <p>25 two-party consent that, I think, just isn't</p>	<p style="text-align: right;">Page 39</p> <p>1 A. I'm not sure.</p> <p>2 Q. Are you aware of any instance in</p> <p>3 which the operation of a search engine has been</p> <p>4 modified by hackers other than the instance in</p> <p>5 which you just described?</p> <p>6 A. Yes.</p> <p>7 Q. What instance is that?</p> <p>8 A. I'm aware of a series of instances</p> <p>9 whereby hackers have intentionally sent clicks,</p> <p>10 either genuine clicks or fake clicks in order to</p> <p>11 inflate the apparent click-through rate of</p> <p>12 particular algorithmic results and particular</p> <p>13 advertisements in order to influence search</p> <p>14 engines' decisions about which algorithmic</p> <p>15 results and which advertisements to display and</p> <p>16 in what order to display them.</p> <p>17 Q. So by appearing to interact with the</p> <p>18 search engine as if they were search engine</p> <p>19 users, but, in fact, intending to manipulate the</p> <p>20 search engine itself, these hackers were able to</p> <p>21 change the internals of the search engine in</p> <p>22 that way?</p> <p>23 MR. BONI: Object to form.</p> <p>24 A. They were certainly able to change</p> <p>25 the order in which results appeared and which</p>
<p style="text-align: right;">Page 38</p> <p>1 grounded in any principle, regulation, law or</p> <p>2 other such authority in this area.</p> <p>3 Q. So the thing that Microsoft had done</p> <p>4 that Google said was inappropriate in your view,</p> <p>5 Google was not correct in their -- in their</p> <p>6 assessment?</p> <p>7 A. I'm sorry. I got a little bit</p> <p>8 muddled about who thought what.</p> <p>9 Q. Sorry. Do you think that Google was</p> <p>10 correct in their assessment of what Microsoft</p> <p>11 had done?</p> <p>12 A. I think they were correct on the</p> <p>13 facts of what data Microsoft had collected and</p> <p>14 how Microsoft had analyzed it.</p> <p>15 Q. Are you aware of any -- actually let</p> <p>16 me ask another question.</p> <p>17 Did the Bing search ranking algorithm</p> <p>18 change the result of Google's actions?</p> <p>19 A. I'm not sure.</p> <p>20 Q. Are you aware of any instance in</p> <p>21 which -- actually, strike that.</p> <p>22 Did any internal portion of the Bing</p> <p>23 search engine other than, of course, its index</p> <p>24 of all of the websites that it had indexed</p> <p>25 change as a result of Google's actions?</p>	<p style="text-align: right;">Page 40</p> <p>1 results appeared. You asked about the internals</p> <p>2 of the search engine. I'm not so sure about</p> <p>3 that, but it seems to me that the essence of the</p> <p>4 search engine is the output, and so if they were</p> <p>5 able to change the output, I think they were</p> <p>6 probably content with that.</p> <p>7 Q. But you don't know of any changes</p> <p>8 that have ever been made other than to the</p> <p>9 output as a result of hackers attempting to</p> <p>10 intrude upon search engines; is that right?</p> <p>11 A. As to hackers attempting to intrude</p> <p>12 on search engines, I know about some changes</p> <p>13 other than -- well, I know about some actions</p> <p>14 taken other than changes to the output.</p> <p>15 Q. Actions taken by whom?</p> <p>16 A. By the hackers.</p> <p>17 Q. What actions are those?</p> <p>18 A. It was reported in public news</p> <p>19 sources, I believe cited in my expert report</p> <p>20 that the Chinese hackers or suspected Chinese</p> <p>21 hackers who intruded into Google systems one to</p> <p>22 two years ago obtained access to source code,</p> <p>23 including obtaining the ability to change source</p> <p>24 code. Whether or not they used that ability,</p> <p>25 news coverage indicated that they obtained that</p>

10 (Pages 37 to 40)

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<p>1 ability. And that would be an action taken 2 other than the action of changing result 3 ordering. 4 Q. Do you know whether those news 5 reports were accurate? 6 A. I think there were multiple indicia 7 of accuracy. 8 Q. Do you know what source code was 9 accessed? 10 A. I don't recall specifically. 11 Q. Do you know whether that source code 12 had anything to do with books? 13 A. I'm not sure. 14 Q. Do you know one way or the other? 15 A. I think the source cited in my expert 16 report probably could tell us in short order, 17 but I don't recall sitting here today. 18 Q. What is the source cited in your 19 expert report? 20 A. Shall I flip to it? 21 Q. Sure. I'll direct your attention to 22 the top of page 8, the bottom of page 7. 23 A. Great. So you've directed my 24 attention correctly first as to the indicia of 25 the liability. Footnote 18 cites the official</p>	<p>1 Q. Do you recall one way or the other 2 whether that cited article discusses whether 3 those responsible for the intrusion discussed in 4 the blog post or the intrusion discussed in 5 Paragraph 35 gained access to Google's source 6 code? 7 A. I don't recall. 8 Q. Do you know whether the McAfee report 9 mentions Google at all? 10 A. I think it does, but I'd want to go 11 and look at it again. It seems like the easier 12 way to answer your questions would be to review 13 the document itself. 14 Q. So you don't have a recollection as 15 to whether the document cited states that 16 hackers had specifically sought access to the 17 source code for Google systems and that hackers 18 had obtained the ability to alter the source 19 code for Google systems? 20 A. That quoting verbatim from my expert 21 report when I wrote that sentence of my report, 22 I reviewed the McAfee document at issue and 23 summarized it in that sentence, and I believe 24 the summary is accurate as written. 25 Q. But you don't remember whether that</p>
Page 42	Page 44
<p>1 Google blog and a statement from none other than 2 David Drummond. So if David says it is so, I 3 think that's a good prima facie reason to think 4 that it is. 5 Secondly, the analysis by McAfee, one 6 notch removed from Google to be sure, but with 7 the defensible methodology grounded in data that 8 they obtained from multiple sources, and 9 McAfee's trustworthiness I think requires no 10 further elaboration. Look, if McAfee says that 11 this is what happened and no one rebuts it, I 12 think that's a pretty good reason to believe 13 that it is so. 14 Q. Does the statement from David 15 Drummond that you cite in this report discuss 16 whether the hackers had access to source code? 17 A. It does not. 18 Q. Does the McAfee Labs blog post that 19 you cite in your report discuss whether hackers 20 had access to Google's source code? 21 A. I think the report does discuss it. 22 Footnote 19 gives you the URL to the full 23 original report. I'd want to review it further 24 before attempting to opine on exactly what it 25 says.</p>	<p>1 document mentioned Google at all? 2 MR. BONI: Object to form. 3 A. I think it did. It's just that the 4 fact that you ask about it in that way suggests 5 maybe you think it didn't, and rather than 6 speculate sitting here, I'd just take a moment 7 to go back and read the document to find out one 8 way or the other. 9 Q. Maybe we'll do that later today. 10 What peer review publications -- actually strike 11 that. 12 Other than the instances we've 13 discussed, that is, attempting by interaction 14 with the search engine by its ordinary 15 interfaces to modify search engine rankings or 16 by the intrusions described in Paragraph 35 of 17 your report, are you aware of any other 18 intrusions into search engines? 19 A. Yes. 20 Q. What intrusions are those? 21 A. First, I'm not sure that I'd describe 22 the actions of Google engineers using the 23 toolbar manipulation as the ordinary interfaces. 24 There's some of that that's ordinary, and 25 there's some of that that's quite extraordinary.</p>

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<p>1 Putting that aside, I'm aware of other instances 2 in which website publishers have managed to 3 modify the operation of search engines in ways 4 not yet discussed. 5 Q. And did they do that by manipulating 6 the data that their own web pages sent to the 7 search engine's crawler? 8 A. In the example I'm thinking of right 9 now, yes. 10 Q. Do you know of any instances in which 11 that -- a different method was used? 12 A. Yes. 13 Q. What instance is that? 14 A. Some search engines including Google 15 search engine obtain a portion of their data, 16 not by a crawl but by a data feed, a particular 17 document using a particular pre-agreed structure 18 that provides particular information in a 19 particular format. And through certain methods 20 pertaining to the data feed, putting data in a 21 particular format, it's possible to manipulate 22 the results obtained by that data feed collector 23 in order to alter both the substance of the 24 results that are displayed and the format of the 25 display.</p>	<p>1 intrusion that you're discussing right now; is 2 that right? 3 A. No. I had in mind a different kind 4 of intrusion. 5 Q. What did you have in mind? 6 A. It's possible, at least historically 7 has sometimes been possible, to produce an 8 invalid syntax in your data feed such that the 9 very attempts to process your invalid data feed 10 can corrupt either the data stored in the search 11 engine servers or the method whereby the search 12 engine presents results to users causing 13 something else altogether to appear when a user 14 runs a search. 15 Q. What search engines have been the 16 victims of that type of attack? 17 A. I think multiple search engines have 18 been the victims of that kind of attack. 19 Q. Can you list the ones that you know 20 of? 21 A. I can't recall specifically. They're 22 not the big five U.S. search engines. 23 Q. And by providing data in a corrupted 24 form to these search engines, the fraudsters 25 were able to manipulate the results or change</p>
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<p>1 Q. Is that data feed known as a site 2 map? 3 A. A site map is an example of a data 4 feed, but that's not what I was thinking of, 5 specifically. 6 Q. What were you thinking of? 7 A. I was thinking of a product data 8 feed. 9 Q. What's a product data feed? 10 A. Typically, it's a list of products 11 usually accompanied by descriptions, pricing 12 availability, perhaps images, other such 13 details. 14 Q. That's information that a search 15 engine takes in in order to know what products 16 are offered by a particular website; is that 17 right? 18 A. That's right. 19 Q. And by manipulating the data that's 20 given to the search engine you might be able to 21 appear to have products you don't or appear to 22 have products with different qualities than your 23 actual products; is that right? 24 A. Among other benefits. 25 Q. And that's the -- that's the type of</p>	<p>1 them in some way? 2 A. Yes. 3 Q. Were they able to gain root access to 4 the search engine's servers? 5 A. I don't think they sought root access 6 to the search engine's servers. I don't know 7 whether they were able to obtain it. 8 Q. Are you familiar with the term "root 9 access"? 10 A. Yes. 11 Q. What does root access mean? 12 A. Typically, the term "root access" is 13 used to refer to an operation mode of a computer 14 system where it's possible to change any aspect 15 of the computer system without any limitation 16 whatsoever. 17 Q. Are you aware of any situation in 18 which an outside intruder has been able to gain 19 root access to a search engine's servers? 20 A. I'm not aware one way or the other. 21 Q. What peer review publications have 22 resulted from your research on search engines? 23 A. Can I flip through the CV? 24 Q. Sure. 25 A. Be quickest that way. So that papers</p>

<p style="text-align: right;">Page 49</p> <p>1 previously discussed as to advertising, many of 2 them are as to search engine advertising and 3 thus fit dually. For example, the first three 4 under the heading "Representative Research" all 5 are as to search engine advertising. Others in 6 this list also as to search engine advertising, 7 the article about typo-squatting is about a 8 particular place where advertisements can be 9 placed via a search engine onto other sites. If 10 there's an element of advertising, there's an 11 element of search engines. 12 The article titled "Adverse 13 Selection" and "Online Trust Certifications" in 14 search results contains quite an extended 15 discussion of the trustworthiness of certain 16 search results. 17 The "Rustlers and Sheriff's" piece 18 considers certain practices at search engines. 19 Internet filtering in China discusses the 20 filtering of certain search results, advertising 21 disclosures, label search engines. It 22 continues. There are quite a few. 23 Q. Is your research on search engines a 24 basis for any of the opinions in your report? 25 A. I think it is generally, yes.</p>	<p style="text-align: right;">Page 51</p> <p>1 my writing in this area began with an instance 2 in which Buy.com, a popular online retailer, was 3 mistakenly publishing the names, street address 4 and phone number of every customer who had ever 5 made a product return to Buy.com. That was an 6 error, a breach of their privacy policy, which 7 to they credit, they corrected after I brought 8 to their attention. 9 I've uncovered other privacy errors, 10 instances in which the Google JotSpot service 11 was sharing documents specifically contrary to 12 users' instructions to JotSpot. You tell it not 13 to share your document with anyone, and they 14 share it anyway. And a problem that was 15 corrected by Google somewhat after I brought it 16 to their attention. 17 Q. Did any of your research on privacy 18 relate to security against computer intrusion? 19 A. I think of privacy and security as 20 two sides of the same coin. Privacy is security 21 of your private information, and so I would say 22 that all of the privacy matters relate to 23 security. Security from what? Security from 24 viewing, security from intrusion, broadly 25 understood.</p>
<p style="text-align: right;">Page 50</p> <p>1 Q. How so? 2 A. My work on search engines explores 3 the operation and incentives of interconnected 4 systems the way that the systems can be used and 5 have been used and the consequences of that use. 6 Q. What does that have to do with the 7 opinions you set forth in your report? 8 A. My report discusses the way that 9 certain books search services can be used and 10 what's likely to happen if they are used in that 11 way, which is informed by the way other online 12 systems that are already more broadly in use, 13 the way that they have been used and what has 14 happened there. 15 Q. So they influence your opinions in 16 that that which has happened already to search 17 engines may happen to book search engines in the 18 future? 19 A. That's right. 20 Q. The next area of interest or research 21 that you mention is privacy. What research have 22 you done on electronic privacy? 23 A. I mentioned one article as to the 24 Google Toolbar privacy problems. I've written a 25 series of other pieces about privacy. I think</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. Do you draw a distinction between 2 unauthorized access to computer systems and 3 malfunctioning computer systems that disclose 4 private information? 5 MR. BONI: Object to form. 6 A. I certainly draw a distinction 7 between systems that are malfunctioning versus 8 systems that are functioning in the way that 9 their designers intended. Though, of course, 10 figuring out what their designers intended and 11 whether a malfunction has actually occurred can 12 sometimes be difficult. I'm not so sure about 13 the specific distinction that you raise. Maybe 14 you could rephrase it, and I could give you a 15 better answer. 16 MR. GRATZ: Let's change the tape. 17 THE VIDEOGRAPHER: The end of Tape 1. 18 Off the record 11:03 a.m. 19 (Brief recess.) 20 THE VIDEOGRAPHER: Here begins Tape 21 No. 2 in today's deposition of Benjamin Edelman. 22 Back on the record 11:09 a.m. 23 Q. Mr. Edelman, when you refer to 24 security, you're speaking broadly of everything 25 from avoiding intrusions into computer systems</p>

<p style="text-align: right;">Page 53</p> <p>1 to steal confidential data to ensuring that the 2 data collected by websites is fully disclosed to 3 users; is that right? 4 MR. BONI: Object to form. 5 A. I wouldn't ordinarily say that 6 disclosing information collection practices 7 falls within security. I think it does on a 8 broad understanding of security, but I probably 9 wouldn't have used the term that way in the 10 ordinary course. 11 Q. In your report when you discuss 12 security, are you applying the broad -- the 13 broad view of security you mention in your last 14 answer or some narrower view? 15 A. In general, I think I'm applying a 16 slightly narrower view than the -- than my last 17 answer and then the question that preceded my 18 last answer. 19 Q. What scope of the term "security" do 20 you apply in your report? 21 A. When I use the term "security" in the 22 report, I begin with notions that attach to 23 changing the underlying code of the computer 24 system; for example, obtaining root access and 25 the benefits associated with that, but I</p>	<p style="text-align: right;">Page 55</p> <p>1 engineer intended, that the telephone rings when 2 it is called, and yet in a way quite contrary to 3 what the user intended, probably even contrary 4 to what the phone company intended, at least in 5 a marketing sense when they touted the benefits 6 of obtaining a telephone to your residence. 7 Q. And that is encompassed in the use of 8 the term "security" as you use it in your 9 report? 10 A. The analog in an information system 11 is encompassed. 12 Q. What is the -- sorry, I don't mean to 13 interrupt. What is the analog in an information 14 system? 15 MR. BONI: Why don't you ask the 16 question and let him answer the question. You 17 were in the middle of an answer, but let's make 18 sure we're clear on what the question was. So 19 that you can answer it. You want to read back 20 the last question, please. 21 (Last question read back.) 22 Q. Are prank calls in the middle of the 23 night encompassed within the term "security" as 24 you use it in your report? 25 A. I think prank calls may not be the</p>
<p style="text-align: right;">Page 54</p> <p>1 definitely also include taking advantage of the 2 computer system working in exactly the way that 3 it's installed or operator intended. 4 So for example, Frank calls in the 5 middle of the night calling your telephone over 6 and over when you're trying to sleep. That's 7 not a malfunction of the telephone. The 8 telephone is working exactly as intended when 9 someone calls you, the ringer activates and 10 makes a sound. And yet from your perspective, 11 your telephone is quite insecure because it 12 keeps waking you up when you're trying to sleep. 13 So too in the context of obtaining 14 information online. If a large amount of 15 information can be obtained perhaps piece by 16 piece, that could be an example of a lack of 17 security. 18 Q. What security issue is presented by 19 prank calls in the middle of the night? I'm 20 asking in what sense is that a security issue? 21 A. One wouldn't ordinarily use the word 22 security to describe the freedom from being 23 awoken by the telephone. The sense in which 24 that example is helpful is that it gives an 25 example of a system working exactly as the</p>	<p style="text-align: right;">Page 56</p> <p>1 most helpful example in understanding what I 2 mean by the word "security." But a very similar 3 example actually may be more helpful; Spam 4 e-mail, unsolicited commercial e-mail, is an 5 example of the e-mail system on one view working 6 completely reliably. The Spamer sends you 4,000 7 e-mails, and your e-mail program displays to you 8 4,000 e-mails. It's working perfectly, a 9 hundred percent, and yet from your perspective 10 as a user, your e-mail is quite insecure. It 11 has been clogged up by the Spamer, and then the 12 important message from your friend or associate 13 is buried under the mountain of Spam. So I 14 would use the word "security" to describe that 15 problem and that concern. 16 Q. And that category of concern and that 17 scope of security is -- strike that. 18 That's the scope of the term 19 "security" that you use in your report? 20 A. That kind of problem, a system that 21 works maybe too well, that works in a way 22 different from what the marketing folks 23 intended, yet consistent with what the 24 engineering folks intended, that's an example of 25 something that I believe does fall within the</p>

<p style="text-align: right;">Page 57</p> <p>1 meaning of the word "security." 2 Q. Is your research on electronic 3 privacy a basis for any of the opinions in your 4 report? 5 A. It is. 6 Q. What opinions are those? 7 A. I have opinions on the difficulty of 8 securing access to information, of limiting 9 access so that particular users can obtain 10 particular information in particular 11 circumstances, but not other information in 12 other circumstances. Those are questions and 13 concerns that arise often in the context of 14 privacy and also arise in the context of the 15 book services here at issue. 16 Q. What has your research into privacy 17 shown you that you relied on in forming your 18 opinions in your report? 19 A. First, my research into privacy has 20 shown me just how difficult these challenges 21 are, that even excellent companies with capable 22 engineers and diligent managers sometimes fail 23 to achieve what they set out to achieve. They 24 make mistakes, frankly. These are difficult 25 areas where perfection is unlikely and not often</p>	<p style="text-align: right;">Page 59</p> <p>1 systems other than the example you gave of 2 setting the information on fire and never 3 looking at it again, what infor -- electronic 4 information storage systems do not present that 5 difficulty? 6 A. For example, information that is 7 freely available to the public in unlimited 8 quantity and without restriction, the U.S. 9 government printing office allows you to obtain 10 the U.S. code in whatever quantity you want as 11 often as you want, free of charge. They face 12 minimal need to restrict access to the 13 information that they provide. 14 Even ordinary Google search, you can 15 run as many searches as you want and no great 16 harm results if you run too many searches. The 17 operators of the search service might try to 18 figure out if you're a robot, and if you are, 19 they might try to stop you from running 20 searches, but if they fail to stop some robots 21 some of the time, no great harm results. So 22 those are much lower stakes games. 23 Q. Is there an index underlying the 24 Google search service? 25 MR. BONI: Object to form.</p>
<p style="text-align: right;">Page 58</p> <p>1 seen. 2 Second, my work on privacy has 3 distinctively shown the difficulty of securing 4 information so that some people can get some of 5 it some of the time, but not everyone can get 6 everything all of the time. I suspect it 7 wouldn't be hard to design an information system 8 for which no one can get information ever. Step 9 one, set the information on fire. Step two, 10 wait for the fire to consume it completely. The 11 end. That would be straightforward actually. I 12 think we could run that system so reliably that 13 it would operate with a very, very high level of 14 performance. 15 On the other hand, securing the 16 information so that only some people can get it 17 or people can only get part of it, requires 18 engineering decisions that are actually quite a 19 bit more difficult. 20 Q. Is that a task that is undertaken by 21 every electronic information storage system? 22 MR. BONI: Object to form. 23 A. I wouldn't say every electronic 24 information storage system undertakes that task. 25 Q. What electronic information storage</p>	<p style="text-align: right;">Page 60</p> <p>1 A. My understanding is that there is an 2 index underlying the Google search service. 3 Q. And one can by running searches query 4 that index at least in part; is that right? 5 A. Yes. 6 Q. Are you aware of any instance in 7 which the entire Google search index has been 8 acquired by an outside party? 9 A. I'm not aware of any instance in 10 which an outside party has obtained the entire 11 Google search index. 12 Q. So in that sense, Google has been 13 successful in permitting access to certain 14 information under certain circumstances and not 15 to a bulk download of the whole; is that right? 16 A. I don't think that the facts just 17 discussed supported the conclusion in your last 18 question. 19 Q. Why not? 20 A. There have been instances in which 21 users have used the Google search service to 22 obtain more information than Google intended to 23 provide and use that information even for 24 harmful purposes. So the fact that Google 25 managed to prevent any single person from</p>

<p style="text-align: right;">Page 61</p> <p>1 obtaining all of the information doesn't mean 2 that the system is working as well as your last 3 question suggested. 4 Q. Google has successfully permitted 5 access to certain information and not other 6 information with respect to its search service; 7 is that right? 8 A. You know the word "successful" is 9 tricky. When an editor at CNET obtained the 10 home address and charitable contributions of the 11 then CEO of Google, Google, using the Google 12 search tools, Google responded in quite a 13 negative way, including banning that publication 14 from interviewing any Google staff for a full 15 year. 16 So that seems to be an instance 17 wherein Google thought that its own search 18 service had either malfunctioned or had been 19 abused by someone who had taken advantage of the 20 search engine providing more information than it 21 should have provided. 22 Q. Did the search engine malfunction in 23 that instance? 24 A. In my view it did not. In my view it 25 functioned exactly as the engineers intended.</p>	<p style="text-align: right;">Page 63</p> <p>1 A. I probably wouldn't have used the 2 phrase "security breach" to characterize that 3 occurrence. 4 Q. Are you aware of any instance in 5 which Google's search ranking algorithm has been 6 made public? 7 A. I'm aware of some instances where a 8 portion of -- portions of the algorithm, 9 specific decisions and specific circumstances 10 have been made public. 11 Q. That's because they had been deduced 12 by looking at the results of searches; is that 13 right? 14 A. That's one way, but it's not the only 15 way. 16 Q. Had they been acquired by intruding 17 into Google's servers? 18 A. I'm not sure. It's possible that 19 some have, but I don't have any examples of that 20 in mind. 21 Q. You don't know that that's ever 22 happened? 23 A. I don't know that anyone has ever 24 obtained information about algorithms by, for 25 example, obtaining root level access as</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. Did the search engine provide any 2 information in that instance that its technical 3 design indicated that it should not provide? 4 A. I don't think so. 5 Q. That was an instance in which the 6 search engine provided information that had been 7 indexed from a third-party website; is that 8 right? 9 A. At least in part. 10 Q. And the information, the presence of 11 the information on a third-party website was 12 that which was objected to rather than the fact 13 that Google search engine had made that 14 information able to be found; is that right? 15 A. I'm not quite sure what -- 16 MR. BONI: Object. 17 A. -- Google objected to in that 18 circumstance. 19 Q. Do you think that that was a security 20 breach -- strike that. 21 Do you think that the instance in 22 which a Google employee's home address was able 23 to be found from a third-party website using the 24 Google search engine was a security breach? 25 MR. BONI: Object to form.</p>	<p style="text-align: right;">Page 64</p> <p>1 discussed. 2 Q. Would you agree with me that the 3 Google search engine is not -- strike that. 4 Would you agree with me that the 5 Google search engine is a way of allowing people 6 to get access to some but not all of the 7 information that Google stores? 8 MR. BONI: Object to form. 9 A. Certainly there's some information 10 that Google stores that you can't access using 11 the Google search engine. You can't access 12 Google's internal payroll data using Google 13 search engine, and yet that is data that Google 14 stores. So does the Google search engine 15 provide access to some but not all? Yes, it 16 provides access to some but not all. 17 Q. And there are some search results 18 that would otherwise be displayed in Google's 19 search results that have been removed for one 20 reason or another; are you familiar with that? 21 A. Yes. 22 Q. And those search results are not 23 displayed to users; is that right? 24 A. In certain circumstances some of the 25 results are not displayed to users.</p>

16 (Pages 61 to 64)

<p style="text-align: right;">Page 65</p> <p>1 Q. Are you aware of any instance in 2 which an intruder has been able to gain access 3 to those search results which Google has 4 removed? 5 A. Yes, I think I've done that 6 personally. 7 Q. Could you tell me about that? 8 A. So the project I described previously 9 where certain sites were missing from Google.FR, 10 the French version of Google, I ran a set of 11 comparisons, and I recall tens of thousands of 12 comparisons between Google.com and Google.FR. 13 As an intruder I was able to nonetheless make 14 that comparison between the two Google search 15 services and determine which results were 16 omitted. 17 Q. In what sense were you an intruder? 18 A. I was certainly an outsider to 19 Google. I had no privileged access to their 20 computer systems, no special account, no root 21 access, and yet I was able to obtain this 22 information which Google didn't otherwise make 23 available to the public and use that information 24 to demonstrate that Mr. Drummond himself had 25 made false statements on an official written</p>	<p style="text-align: right;">Page 67</p> <p>1 A. One that I've been thinking about in 2 some detail is the claim that results come from 3 an algorithm, which I think is at the very least 4 deceptive because it fails to give full credit 5 to the significant control and judgment that 6 staff exercised in configuring the algorithm and 7 in otherwise overriding the algorithm, adjusting 8 search results. I think that that false 9 statement probably is material. It's quite a 10 few users who care quite a bit about whether 11 they're getting a computer's opinion or a 12 person's opinion, and that's a subject on which 13 Google has made very firm commitments over a 14 period of years. 15 Q. Do you think that Google was doing 16 something bad by making those commitments? 17 MR. BONI: Object to form. 18 A. I think there were multiple forces 19 within Google. Some staff wanted the service to 20 work in one way. Some wanted it to work in a 21 different way. And we see that internal tension 22 borne out in inconsistent statements by various 23 Google staff, as well as inconsistent practices, 24 both inconsistent at a given moment in time and 25 inconsistent over time.</p>
<p style="text-align: right;">Page 66</p> <p>1 statement of Google policy statements that 2 turned out to be contrary to the facts as I 3 demonstrated them. 4 Q. Do you think that Mr. Drummond was 5 lying? 6 A. He wasn't telling the truth. 7 Q. Do you think that that was wrong? 8 A. I'm not sure if he knew subjectively, 9 internally at the time when he made the false 10 statement, I don't know whether he knew that it 11 was false. 12 Q. Do you think that Google should be 13 punished for that? 14 A. You know, the damage to the consumer 15 public was that people thought Google was a 16 little bit better as a search engine than it 17 really was. Of all of the misrepresentations of 18 product attributes or qualities, I don't think 19 this is the most significant or the most 20 material. 21 Q. Of all of Google's 22 misrepresentations? 23 A. Yes. 24 Q. Tell me about Google's other 25 misrepresentations?</p>	<p style="text-align: right;">Page 68</p> <p>1 Q. Do you think that Google lied to the 2 public? 3 MR. BONI: Object to form. 4 A. I think there are some subjects on 5 which Google has been less than forthright. 6 There probably are some areas where Google's 7 staff simply didn't tell the truth. But 8 sometimes, perhaps mistakenly, based on 9 incomplete information available to the given 10 person making the statement, there might be 11 instances in which Google affirmatively made 12 false statements. 13 Just yesterday, I suppose the UK 14 privacy commissioner announced their 15 investigation alleging exactly that, and so I 16 wouldn't be alone in thinking that some false 17 statements may have been made. 18 Q. Do you think that Google should be 19 punished for making those statements? 20 MR. BONI: Object to form. 21 A. I guess you'd have to look at the 22 specific statement, the specific statutory basis 23 for any enforcement action, but I think all the 24 laws should be enforced strictly as to all 25 potential violators, and so I'd have to look one</p>

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<p>1 by one.</p> <p>2 Q. Have you ever created a data</p> <p>3 base-backed website?</p> <p>4 A. Yes.</p> <p>5 Q. Could you give me an example of such</p> <p>6 a site?</p> <p>7 A. Sure. I have a website that gives</p> <p>8 examples of false and deceptive advertisements</p> <p>9 that I saw at Google, and I stored those</p> <p>10 advertisements in a database and then displayed</p> <p>11 that database to interested viewers of that</p> <p>12 portion of my website.</p> <p>13 Q. What's the URL of that website?</p> <p>14 A. Ben Edelman.org/PPC-scams maybe slash</p> <p>15 list. I'm not sure about the slash list, but I</p> <p>16 think that's correct.</p> <p>17 Q. This is a website that you've created</p> <p>18 that includes a number of advertisements shown</p> <p>19 via Google's ad network; is that right?</p> <p>20 A. These are all advertisements that I</p> <p>21 personally saw on the Google search engine which</p> <p>22 is -- you could call it the Google ad network.</p> <p>23 I'd probably call it just the Google search</p> <p>24 engine, to be very clear about it. There might</p> <p>25 be a very few that were submitted by outsiders</p>	<p>1 portion of the Google results page where I saw</p> <p>2 that advertisement.</p> <p>3 Q. What sort of database is behind this</p> <p>4 page?</p> <p>5 A. I believe this one actually is a text</p> <p>6 file that is processed by text to database</p> <p>7 engine and then sorted and output into the HTML</p> <p>8 in the way that you may be viewing now.</p> <p>9 Q. Do any database queries occur at the</p> <p>10 time a user visits the web page?</p> <p>11 A. Yes.</p> <p>12 Q. Is there any information in the</p> <p>13 database that's not displayed?</p> <p>14 A. Yes.</p> <p>15 Q. What information is that?</p> <p>16 A. I think the exact date and time of</p> <p>17 submission, the IP address of submission, the</p> <p>18 e-mail address of the user who made the</p> <p>19 submission. There probably are some other</p> <p>20 fields.</p> <p>21 Q. And have you been successful in</p> <p>22 preventing that other information from being</p> <p>23 displayed?</p> <p>24 A. I've been successful in preventing</p> <p>25 that information from being displayed at the</p>
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<p>1 that I personally verified before adding them to</p> <p>2 this list.</p> <p>3 Q. Does this include ads from any other</p> <p>4 search engines?</p> <p>5 MR. BONI: I'm sorry, Joe, does what</p> <p>6 include? The list?</p> <p>7 Q. Does your PPC -- so this web page is</p> <p>8 about false or deceptive paper click ads; is</p> <p>9 that right?</p> <p>10 A. Yes.</p> <p>11 Q. Does it include false or deceptive</p> <p>12 paper click ads from anywhere but Google?</p> <p>13 A. I don't recall.</p> <p>14 Q. Can you think of any ads that it</p> <p>15 includes from places other than Google?</p> <p>16 A. I suspect that many of these</p> <p>17 advertisers were using other search engine</p> <p>18 advertising platforms, also.</p> <p>19 Q. But your website is just about the</p> <p>20 Google ads; is that right?</p> <p>21 A. I believe my website lists the search</p> <p>22 term that I entered into Google and the position</p> <p>23 and location on which I saw that ad at Google,</p> <p>24 and, in fact, in general provides an image</p> <p>25 screen shot, a partial image screen shot of the</p>	<p>1 specific URL that I dictated to you. Whether</p> <p>2 I've been successful in preventing that</p> <p>3 information from being obtained by others at</p> <p>4 other URLs, I'm not sure.</p> <p>5 Q. Could you explain your last answer.</p> <p>6 A. Maybe someone knows how to get that</p> <p>7 material from my web server even though I didn't</p> <p>8 intend to provide it.</p> <p>9 Q. Do you know whether anyone has?</p> <p>10 A. I don't know one way or the other.</p> <p>11 Q. Have you taken measures to prevent</p> <p>12 that?</p> <p>13 A. I've attempted to.</p> <p>14 Q. And as far as you know, you've been</p> <p>15 successful?</p> <p>16 MR. BONI: He just said he doesn't</p> <p>17 know one way or the other.</p> <p>18 A. I'm really not sure in that if I had</p> <p>19 been unsuccessful, I doubt anyone would tell me</p> <p>20 that I had been unsuccessful.</p> <p>21 Q. How many submissions on this page are</p> <p>22 from people other than you?</p> <p>23 A. I think not very many. It never</p> <p>24 really took off. I wouldn't be surprised if it</p> <p>25 was less than ten.</p>

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<p>1 MR. BONI: Joe, by "this page," could</p> <p>2 you just put into the record what you're</p> <p>3 referring to that you have up on your laptop,</p> <p>4 the website URL in question.</p> <p>5 MR. GRATA: Sure.</p> <p>6 MR. BONI: So the record's complete.</p> <p>7 MR. GRATZ: It was the URL -- I'm</p> <p>8 referring by "this page" to the URL that</p> <p>9 Mr. Edelman dictated to me; namely,</p> <p>10 www.BenEdelman.org/PPC-scams/list.</p> <p>11 MR. BONI: Thank you.</p> <p>12 Q. If you were unsuccessful in</p> <p>13 preventing that information in the database from</p> <p>14 being taken by an intruder, the private e-mail</p> <p>15 addresses of those who submitted advertisements</p> <p>16 to you for display on this page would be</p> <p>17 disclosed; is that right?</p> <p>18 A. Yes.</p> <p>19 Q. And their IP addresses would be</p> <p>20 disclosed; is that right?</p> <p>21 A. I believe it would be the IP address</p> <p>22 of the user at the time of submission, which</p> <p>23 might or might not be quote unquote their IP</p> <p>24 address in any lasting sense.</p> <p>25 Q. Do you consider that to be private</p>	<p>1 Google offers vouchers and similar prepurchase</p> <p>2 discounts. And then in light of the user's</p> <p>3 concern, this tool will actually write a</p> <p>4 complaint letter grounded in applicable law at</p> <p>5 the user's direction customized in light of the</p> <p>6 user's concerns, the user's state of residence,</p> <p>7 the merchant's states of the residence, the</p> <p>8 voucher services state of residence, citing</p> <p>9 appropriate authority for the user then to</p> <p>10 submit if they so choose.</p> <p>11 Q. Does it store the submission in a</p> <p>12 database?</p> <p>13 A. It does.</p> <p>14 Q. And those submissions include the</p> <p>15 e-mail addresses of those who submit?</p> <p>16 A. Yes.</p> <p>17 Q. Are you aware of any intrusion into</p> <p>18 that database resulting in the -- resulting in</p> <p>19 the taking of those e-mail addresses?</p> <p>20 A. I am not.</p> <p>21 Q. What security measures do you have in</p> <p>22 place to prevent that sort of intrusion?</p> <p>23 A. One important security measure that</p> <p>24 my technician student installed at my direction</p> <p>25 was that the system never stores the voucher</p>
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<p>1 information nonetheless?</p> <p>2 A. It depends, but sometimes it is.</p> <p>3 Q. And you consider this security of</p> <p>4 this website from intrusion good enough to</p> <p>5 include that private information in the database</p> <p>6 which lies behind it; is that right?</p> <p>7 MR. BONI: I'm sorry. Object to</p> <p>8 form. That characterizes the witness's</p> <p>9 testimony.</p> <p>10 A. I consider this approach suitable</p> <p>11 under the circumstances, primarily due to the</p> <p>12 nature and quantity of the information being</p> <p>13 secured.</p> <p>14 Q. And if there were higher value</p> <p>15 information, you would regard greater security</p> <p>16 measures as being necessary?</p> <p>17 A. Certainly appropriate and possibly</p> <p>18 necessary.</p> <p>19 Q. Have you -- do you operate any other</p> <p>20 database-backed website?</p> <p>21 A. Yes.</p> <p>22 Q. What websites are those?</p> <p>23 A. I have a website called Voucher</p> <p>24 Complaints.org whereby users can register their</p> <p>25 consumer law grievance as to Groupon vouchers,</p>	<p>1 number of a user's pre-purchased voucher. That</p> <p>2 means that the most important piece of</p> <p>3 information, the information that actually has</p> <p>4 cash redeemable value is not in our server ever,</p> <p>5 not even for instant. So if we got hacked,</p> <p>6 there wouldn't be any money to be taken, nor</p> <p>7 anything that's redeemable for goods or</p> <p>8 services.</p> <p>9 Q. Do you operate any other data</p> <p>10 based-back websites?</p> <p>11 A. Yes.</p> <p>12 Q. What websites are those?</p> <p>13 A. The website query.ipensatori.com.</p> <p>14 That's i-p-e-n-s-a-t-o-r-i.com.</p> <p>15 Q. What is ipensatori.com?</p> <p>16 A. That's a domain name registered by my</p> <p>17 friend, and for some purposes, business partner,</p> <p>18 Wesley Brandi.</p> <p>19 Q. For what purposes is Mr. Brandi your</p> <p>20 business partner?</p> <p>21 A. We have a collaboration in detecting</p> <p>22 certain online advertising fraud and certain</p> <p>23 other improprieties.</p> <p>24 Q. What other improprieties are those?</p> <p>25 A. We're still figuring it out. But we</p>

<p style="text-align: right;">Page 77</p> <p>1 have a general purpose detection tool that can 2 detect all manner of things happening on the 3 Internet that shouldn't happen, and depending on 4 client needs, I suppose we configure it 5 appropriately. 6 Q. The database that lies behind 7 query.ipensatori.com, does it include any 8 confidential information? 9 A. It does. 10 Q. What information is that? 11 A. There are two separate data bases. 12 There's a database of the users who have made 13 requests to the query tool, and the query tool 14 retains information about who used it, name, 15 e-mail address, employer, what the search was. 16 Some of those fields, of course, being optional. 17 And secondly, there's a database of 18 our research findings. The purpose of the tool 19 is to allow users to view a portion of our 20 research findings, and so our research findings 21 are embodied in the database that the tool 22 accesses as needed. 23 Q. Do you make the entirety of your 24 research findings available for bulk download? 25 MR. BONI: Object to form.</p>	<p style="text-align: right;">Page 79</p> <p>1 because even a well-secured electronic system is 2 not entirely foolproof in all circumstances? 3 A. That's one of the reasons. 4 Q. Why else? 5 A. There are quite a few attack modes 6 that would be unlikely to leave any records or 7 fingerprints or other evidence that could be 8 detected, or if it could be detected, then I 9 would actually successfully detect personally, 10 given my skills and capabilities, and given that 11 I have other activities and don't spend that 12 much time each day checking whether anyone has 13 attacked this tool. 14 Q. With additional skills and additional 15 time to do so, would that it make it more likely 16 that you would detect an attack? 17 A. Sure. Putting more time into it 18 would make it more likely that I would detect 19 it. Conversely, if I put better data into the 20 tool, that would make it more likely that 21 someone would want to attack it and would 22 redouble his efforts to attack it without being 23 detected. So there are multiple factors that 24 can make it both more and less likely that an 25 attack would occur or would be detected if it</p>
<p style="text-align: right;">Page 78</p> <p>1 A. We do not make the entirety available 2 for bulk download. 3 Q. Why not? 4 A. We prefer to obtain some records. 5 I'll be it, limited and minimal, but still some 6 of who accesses which portions of the database. 7 Q. Would fraudsters be interested in the 8 results of your research? 9 A. I'm not sure. 10 MR. BONI: Object to form. Go ahead, 11 Ben. 12 A. We thought about that at some length 13 and concluded that we could publish this data 14 such that even if a fraudster took the entirety 15 of the data, it wouldn't really give them any 16 significant advantage in perpetrating their 17 fraud or in avoiding detection by us or anyone 18 else. 19 Q. Do you know whether the entirety of 20 the data lying behind the query.ipensatori.com 21 website that you operate has been taken by an 22 intruder? 23 A. I believe that it has not been, but 24 it's hard to say for sure. 25 Q. And you say it's hard to say for sure</p>	<p style="text-align: right;">Page 80</p> <p>1 did occur. 2 Q. So you're not aware of any such 3 attacks sitting here today? 4 A. That's right. 5 Q. Do you operate any other data 6 based-backed websites? 7 A. I do. 8 Q. Could you list them for me? 9 A. I think there are many of them. And 10 even the tense of your question operate versus 11 used to operate. 12 Q. Just sticking with right now which of 13 the data based-backed sites -- which of the data 14 based-backed websites that you operate contains, 15 in your estimation, the most high value data? 16 MR. BONI: Object to form. 17 Q. And by "high value," let me -- let me 18 clarify that. The data most attractive to an 19 intruder? 20 MR. BONI: Same objection. Joe, do 21 you mean relative to his universe of data based 22 backed websites or more in the absolute. 23 Q. Rank them in order in your head and 24 give me the first one. 25 A. Yes. The first one is the internal</p>

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<p>1 database that Wesley and I access internally 2 that keeps records of all of the advertising 3 fraud incidents that our tools have identified. 4 Q. Is that database connected directly 5 to any web server? 6 A. No. 7 Q. And it's a portion of that database 8 that's extracted and then used to provide the 9 query.ipensatori.com website; is that right? 10 A. That's one use of a portion of the 11 database. 12 Q. That database, where is it stored? 13 A. It's stored in Wesley's basement. 14 Q. Is it stored in the same computer 15 that runs the query.ipensatori.com website? 16 A. No. 17 Q. Why not? 18 A. We believe that it is more likely to 19 be secure if we store it on a separate computer. 20 Well, really there are a variety of reasons of 21 which that's just one. 22 Q. Is the computer on which its stored 23 connected to the Internet. 24 A. It is. 25 Q. Is it behind a firewall.</p>	<p>1 engine and advertising dominates my vitae. On 2 the other hand, I'm proud of my work on 3 information security. Some of it was original 4 and important and set the stage for other's work 5 that followed. And often information security 6 work lays an important groundwork for some other 7 activity such as understanding advertising fraud 8 or understanding privacy problems. So they are 9 definitely all interrelated. 10 Q. When you say the "information 11 security work," you're referring to the 12 activities that we've discussed relating to 13 security previously today? 14 A. I think there also are quite a few 15 that we haven't discussed. 16 Q. Do any of them relate to gaining root 17 access on a server connected to the Internet? 18 A. I've largely been looking at aspects 19 of information security other than gaining 20 access at a root server level. 21 Q. Has any of your research looked at 22 gaining access to Internet connected servers on 23 a root level? 24 A. I certainly have written about 25 gaining access to Internet connected devices on</p>
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<p>1 A. I think broadly understood, it's 2 behind a fire wall. It's behind some security 3 apparatus that would colloquially be called a 4 firewall. 5 Q. Are you aware of any intrusion that 6 has allowed access to that database of all of 7 your research results with respect to 8 advertising fraud? 9 A. No. 10 Q. What's the next most valuable 11 database among those that you operate? 12 MR. BONI: Object to form. 13 A. Next most is probably the query tool 14 which we've already discussed. 15 Q. Turning back to Paragraph 1 of your 16 report, you list information security as one of 17 the areas of your research focus. Is research 18 on information security a more or a less 19 significant focus of your research than research 20 on Internet advertising, search engines or 21 privacy? 22 MR. BONI: Object to form. 23 A. There are multiple ways of thinking 24 about that. In terms of my academic vitae, I 25 think most people would say my work on search</p>	<p>1 a root level. Much of the Spyware and adware 2 work entails exactly that, and I had some 3 important work in that vein that I could tell 4 you about. But those are end users devices 5 rather than servers. 6 Q. And gaining root access to an end 7 user device is a different enterprise than 8 gaining root access to an Internet connected 9 server; is that right? 10 A. Sometimes it is, and sometimes it 11 isn't. 12 Q. But as we've discussed, you're not 13 aware of any instances in which executable 14 Spyware has been executed on Internet-connected 15 servers; is that right? 16 A. I think I'm aware of such instances. 17 Q. Were those -- who operated those 18 servers in those instances? 19 A. There have been a set of instances in 20 which the servers operated by both banks and 21 retailers as to credit card processing have been 22 infiltrated by a set of devices that obtained 23 either root level access or other access 24 sufficient to obtain user's credit card numbers, 25 expiration dates, billing addresses and zip</p>

<p style="text-align: right;">Page 85</p> <p>1 codes and so forth, the information that the 2 attackers sought in any event. And those had 3 been attacks perpetrated by obtaining access to 4 servers with the required security levels. 5 Q. So what you're saying is banks' 6 servers had been hacked into, and root level 7 access or similar access gained somehow passed? 8 A. Both banks and merchants. 9 Q. Can you recall an instance in which 10 you described the areas on which your research 11 focuses without including information security? 12 A. Yes. 13 Q. What instance is that? 14 A. I suspect the bio on HBS website 15 doesn't use the phrase "information security," 16 although I'm confident that it discusses some of 17 my work in the area of information security. 18 Q. Why didn't it use the phrase 19 "information security"? 20 A. I'm not sure. I wrote it. So I 21 could have used that phrase had I wanted to. I 22 think I was attempting to fit more within the 23 area of research of my colleagues of this 24 hallway who are largely economists. And so I 25 was there structuring my focus to emphasize the</p>	<p style="text-align: right;">Page 87</p> <p>1 research focuses without including information 2 security? 3 A. I was recently evaluated for a 4 promotion by the Harvard Business School and had 5 to prepare a personal statement. I know that 6 the personal statement discussed my work in the 7 area of information security, but I doubt that 8 it used the phrase "information security." 9 Q. And the work in information security 10 that was discussed is the -- is the work on 11 spyware, advertising, privacy and so on that 12 we've discussed? 13 A. I think it includes those. There's 14 others also. 15 Q. Is there any work that you've done 16 that is more germane to Internet security -- 17 strike that. 18 Is there any work that you've done 19 that is more germane to information security 20 than the work that we have discussed thus far 21 today? 22 A. I think there is actually. 23 Q. What work is that? 24 A. The first matter which I was retained 25 as an expert was the matter captioned National</p>
<p style="text-align: right;">Page 86</p> <p>1 economics aspects of my research and to somewhat 2 downplay the computer science aspects of the 3 research. 4 Q. Are you -- can you recall any other 5 instance in which you describe the areas on 6 which your research focuses without including 7 information security? 8 A. Sure. 9 Q. What instance is that? 10 A. I'm sure bios and converse 11 description and description of the speaker and 12 so forth, typically. Usually, any reference to 13 any information security. 14 Q. Why is that? 15 A. Usually, I find myself speaking to 16 advertisers or publishers or online business 17 people more generally, and they usually would 18 not be drawn to information security and such. 19 Even though it's important to what they do, they 20 wouldn't regard it as important or strategic, 21 and so presenting other aspects of my work would 22 be more likely to capture their interest and 23 attention. 24 Q. What other instances can you recall 25 in which you describe these areas on which your</p>	<p style="text-align: right;">Page 88</p> <p>1 Football League versus I Crave TV, and that was 2 1999 or 2000. In that matter a Canadian company 3 was copying American network television to a 4 video format, not unlike YouTube except live 5 rather than recorded. My work in that case and 6 subsequent publications, comments to regulators 7 and so forth, were grounded in the remarkable 8 difficulty of securing that video content 9 against those who might further copy and wish to 10 access it in violation of applicable law. 11 Q. Anything else that is more germane to 12 information security than that which we have 13 discussed so far today? 14 A. Yes. 15 Q. What's that? 16 A. I had a set of projects as to 17 Internet filtering, attempting to determine what 18 websites were blocked by what commercial 19 filters, by what library filters, by what school 20 filters, by what national filters. In some 21 instances affecting entire countries. Well, in 22 a portion of that project, I wished to take 23 apart a series of commercial Internet filters in 24 order to determine what websites those filters 25 blocked. The list was installed on a server in</p>

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<p>1 m office, in my custody, and I needed to access 2 this data secured within the server, although 3 there were, in fact, some impediments to 4 accessing the data. 5 Q. And did you circumvent those 6 impediments? 7 A. I developed some methods to 8 circumvent a portion of the impediments. Other 9 impediments were more difficult, both for 10 technical and for legal reasons. 11 Q. Did this project result in 12 litigation? 13 A. One aspect of it did. 14 Q. Were you the plaintiff in that 15 litigation? 16 A. Yes. 17 Q. What was the claim that you made in 18 that litigation, and actually -- sorry, let me 19 ask. Was that the Edelman versus N2H2 20 litigation? 21 A. Yes. 22 Q. What was your claim as a plaintiff in 23 that litigation? 24 A. That was a declaratory judgment 25 action seeking guidance from the court as to</p>	<p>1 particularly as to the significant security 2 vulnerabilities that had given rise to the 3 installation of spyware and adware and about 4 which I have written in great detail. 5 Q. Anything else? 6 A. And my first publication on any 7 subject was a manual on how to use software 8 called Trumpet Winsock to connect to Net.com. 9 Net.com, being an early unlimited Internet 10 service provider, which I believe uniquely at 11 that time would provide unlimited Internet 12 access for \$20 a month. This was in an era of 13 monthly charges. I think I was about 14 15-years-old at the time and figured out how to 15 use Trumpet to connect to Netcom, which was 16 important at that point because Trumpet would 17 allow you to use Netscape and Udora and other 18 software that you might very much want to use. 19 Well, this was an information 20 security project because the Netcom service was 21 bundled with software called Net Cruiser which 22 was viewed as strategically significant from 23 Netcom corporation. I think mistakenly viewed. 24 They thought that it would be good for them to 25 provide your e-mail program and your web browser</p>
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<p>1 whether it would be lawful for me to circumvent 2 an information system that constrained access to 3 a list of websites being filtered. 4 Q. What was the result of that 5 litigation? 6 A. The court refused to give any 7 guidance one way or the other. 8 Q. On what grounds did the court so 9 refuse? 10 A. I believe it was standing mootness. 11 Something procedural and early in that vein. 12 Q. Following the court's decision, did 13 you proceed with the project? 14 A. I abandoned the project, at least in 15 that respect. 16 Q. Who was your counsel in that 17 litigation? 18 A. The American Civil Liberties Union, 19 national office. 20 Q. Do you have any other areas of 21 research that are more germane to information 22 security than those we've already discussed? 23 A. Well, we've discussed spyware and 24 adware only to a limited extent, but that's 25 clearly important to information security,</p>	<p>1 and your Internet access service. They were 2 mistaken. They would have been better off 3 providing only Internet access, but they didn't 4 know that. 5 So they wanted users to accept the 6 entire bundle. I wanted to use only a portion 7 of the bundle and to bring my own software at my 8 own expense for other services, and I determined 9 how to do that and wrote an article explaining 10 how to do it which raised significant questions 11 of security, frankly; namely, was their system 12 secure against people like me, and it turned out 13 that it was not. 14 Q. Was that a peer-reviewed article? 15 A. Well, it wasn't published in a 16 traditional journal. On the other hand, I 17 discussed it with genuine peers, people who 18 really knew this material, including the 19 software developers who wrote development 20 software and later the engineers at the Netcom 21 Corporation. So the relevant experts were 22 absolutely consulted and offered feedback and 23 opinions in great detail. 24 Q. Of your research, can you recall any 25 other research, other than that which we've</p>

<p style="text-align: right;">Page 93</p> <p>1 discussed today, which is more germane to 2 information security than that which we've 3 discussed already? 4 A. Yes. Here's another one that's more 5 germane than much of what we've discussed. 6 Yahoo operates an advertising service called 7 Right Media which has a very, very large 8 proportion of deceptive advertisements. Perhaps 9 30 percent or more of the Right Media 10 advertisements are deceptive by Yahoo's own 11 classification system, and here's how I know 12 that: As a Right Media publisher, a person 13 authorized to put Right Media advertisements 14 onto my website, I logged into the Right Media 15 interface and carefully excluded each of the 16 various categories of deceptive ads, 17 individually and in various combinations and 18 noted the proportion of advertisements that were 19 respectively excluded when I activated the 20 various category exclusions. 21 In that way, I was able to obtain 22 from Yahoo's server the proportion of Yahoo's 23 advertisement that according to Yahoo's own 24 staff were deceptive and indeed unlawful. And 25 to demonstrate that a very sizable fraction of</p>	<p style="text-align: right;">Page 95</p> <p>1 Q. You nonetheless published it; is that 2 right? 3 A. Yes. 4 Q. Had you entered into any agreements 5 with Yahoo at the time that you published that 6 information? 7 A. There was a standard click-through 8 agreement for which, frankly, I don't recall the 9 terms one way or another. 10 Q. Do you recall whether there were 11 confidentiality terms? 12 A. I don't recall one way or the other. 13 Q. Did you check whether there were 14 confidentiality terms before publishing this 15 information? 16 A. I think I thought about the legal 17 questions posed, and I expect that I would have 18 checked the confidentiality terms and resolved 19 the question to my satisfaction before 20 proceeding. 21 Q. If there had been confidentiality 22 terms, would you have proceeded? 23 A. I might have. 24 Q. Why? 25 A. I might have concluded that the terms</p>
<p style="text-align: right;">Page 94</p> <p>1 Yahoo's advertisements had this problem and then 2 to post those screen shots to my website along 3 with a discussion of the business, marketing and 4 legal questions posed, which prompted an 5 investigation by a state attorney general, 6 compelling Yahoo to change some of those 7 practices. 8 Q. Do you consider your work on Right 9 Media an intrusion into a computer system? 10 A. I believe Yahoo considered it an 11 intrusion into their computer system. 12 Q. Do you consider it an intrusion into 13 a computer system? 14 A. I'm not sure. I see both sides of 15 it. 16 Q. Were you able through your intrusion 17 to gain access to any confidential Yahoo or 18 Right Media information? 19 MR. BONI: Object to form. 20 Mischaracterizes the testimony. 21 A. Yahoo took the position that the 22 information they provided to me in my capacity 23 as publisher was confidential and should not 24 have been presented on my website or disclosed 25 to anyone else.</p>	<p style="text-align: right;">Page 96</p> <p>1 didn't apply to the information that I was 2 publishing, didn't apply to this purpose, to 3 demonstrate unlawful conduct and Yahoo's 4 knowledge thereof, were contrary to public 5 policy, and therefore, unenforceable or for some 6 other reason were deficient or defective. 7 Q. Do you remember what conclusion you 8 came to on those questions? 9 A. The bottom line was that I should 10 publish the article, and I don't recall the 11 specific intermediary steps that took me to that 12 conclusion. 13 Q. How is Right Media research germane 14 to information security? 15 A. There was a set of information that 16 Yahoo wanted to keep away from public view and 17 away from, for example, the attorneys general 18 who ultimately investigated. They wanted their 19 own employees to be able to classify 20 advertisements, and they wanted publishers to 21 make informed decisions about which categories 22 of advertisements to accept. After all, 23 accepting the deceptive advertisements was 24 actually quite important to Yahoo's business 25 because they could make significant money from</p>

<p style="text-align: right;">Page 97</p> <p>1 their revenue share, their commission for 2 putting the deceptive advertisements onto 3 publishers' sites. 4 So they wanted publishers to be able 5 to accept the deceptive advertisements, but they 6 didn't want it to be required. Good publishers 7 would insist on excluding them. Well, Yahoo had 8 this set of complicated business objectives. 9 They wanted the ads classified in this way. 10 They wanted these people to see this 11 information, and these people not to see it. 12 And unfortunately for them, it was difficult to 13 thread the needle, that is, difficult to provide 14 exactly that information only to the people that 15 Yahoo wanted to provide it to because as I 16 demonstrated, one of the people who received the 17 information might elect to republish it to 18 Yahoo's detriment. 19 Q. Even in the face of a confidentiality 20 agreement requiring to the contrary? 21 A. Perhaps. 22 MR. GRATZ: Let's change the tape. 23 THE VIDEOGRAPHER: Here ends Tape 2. 24 Off the record 12:09 p.m. 25 (Brief recess.)</p>	<p style="text-align: right;">Page 99</p> <p>1 Q. And it wasn't ruled upon because the 2 case settled very shortly after it was filed; is 3 that right? 4 A. I don't think that's correct. 5 Q. Why wasn't it ruled on? 6 A. I think it wasn't ruled on because 7 WhenU withdrew the motion. 8 Q. Did WhenU withdraw the motion 9 contemporaneously or roughly contemporaneously 10 with a settlement of litigation? 11 A. No. I think the litigation continued 12 for more than a year thereafter, as I recall. 13 Well, I'm not sure. But in any event, if there 14 was a settlement, it was unrelated to the 15 withdrawal of the motion, to the best of my 16 knowledge. 17 Q. What was the allegation in that 18 contempt motion? 19 A. The allegation was that I disclosed 20 or otherwise used testimony that was given under 21 seal in writing an article on my website. 22 Q. In describing your expertise in 23 previous expert reports, have you ever omitted 24 to include any mention of information security? 25 A. Usually, in an expert report, I</p>
<p style="text-align: right;">Page 98</p> <p>1 THE VIDEOGRAPHER: Here begins Tape 2 No. 3 in today's deposition of Benjamin Edelman. 3 Back on the record, 12:13 p.m. 4 Q. Mr. Edelman, have you ever been the 5 subject of a contempt motion? 6 A. I have. 7 Q. Could you tell me about that? 8 A. This was a contempt motion brought by 9 WhenU, a spyware or adware company, depending on 10 who you ask, that alleged that I had violated a 11 portion of a protective order. 12 MR. GRATZ: We'll mark this as 13 Edelman 2. 14 (Document marked as Exhibit No. 2 for 15 identification.) 16 Q. You have before you what's been 17 marked as Edelman 2. Do you recognize this 18 document? 19 A. Yes. 20 Q. What is it? 21 A. It's WhenU's motion. 22 Q. Did WhenU settle -- excuse me. 23 Do you know whether this motion was 24 ruled upon? 25 A. It was not.</p>	<p style="text-align: right;">Page 100</p> <p>1 discuss the experience that is relevant to that 2 matter. Thinking about the most recent 3 instances in which I've served as an expert, I 4 don't think information security would have been 5 particularly relevant, and therefore, I probably 6 wouldn't have mentioned it. 7 Q. Do you consider Internet advertising 8 search engines and privacy particularly relevant 9 to the issues in this case? 10 A. Some more than others, but because 11 those are so central to the overwhelming 12 majority of my research, I mentioned them almost 13 as a matter of course, whether or not they're 14 relevant. 15 Q. And information security falls into a 16 different category? 17 MR. BONI: Object to form. 18 A. I think information security is 19 somewhat less prominent in my research. It 20 still permeates the research, but particularly 21 given widespread view that information security 22 is somehow less important or is best left to 23 technicians and is not of general significance, 24 it's something I'd be less likely to mention 25 unless it was specifically at the core of the</p>

<p style="text-align: right;">Page 101</p> <p>1 matter.</p> <p>2 MR. GRATZ: Let's mark this as</p> <p>3 Exhibit 3.</p> <p>4 (Document marked as Exhibit No. 3 for</p> <p>5 identification.)</p> <p>6 Q. Do you recognize this document?</p> <p>7 A. Yes.</p> <p>8 Q. Turning to -- actually what is this</p> <p>9 document?</p> <p>10 A. It begins with my expert report in a</p> <p>11 dispute between AOL, owner of Netscape, and</p> <p>12 Valueclick. It looks like it continues with a</p> <p>13 set of attachments. I'd need to flip through it</p> <p>14 all to be sure.</p> <p>15 Q. In your expert report in the</p> <p>16 Valueclick case, did you opine on issues of</p> <p>17 information security?</p> <p>18 A. I need to think back for a moment to</p> <p>19 remember what was at issue in that case.</p> <p>20 MR. BONI: Take your time and look at</p> <p>21 the report.</p> <p>22 A. I think Paragraph 11 purports to</p> <p>23 summarize my opinions, and as I recall, it does</p> <p>24 summarize my opinions. This is largely about</p> <p>25 the structure of online advertising markets and</p>	<p style="text-align: right;">Page 103</p> <p>1 information security in Paragraph 1.</p> <p>2 Q. Do you identify expertise and</p> <p>3 information security in any other portion of the</p> <p>4 description of your background and</p> <p>5 qualifications?</p> <p>6 A. I'm sure I attach my CV to the expert</p> <p>7 report as required by the applicable rules, and</p> <p>8 that does discuss information security via the</p> <p>9 various articles on that subject. The word</p> <p>10 secure, securing does appear in the title of an</p> <p>11 article in Paragraph 3. I think there's --</p> <p>12 there's discussion of information and security.</p> <p>13 Q. But it's not an important enough</p> <p>14 reason or interest to appear in the second</p> <p>15 sentence of Paragraph 1?</p> <p>16 A. I don't think that's the reason why</p> <p>17 it doesn't appear. It doesn't appear in the</p> <p>18 second sentence of Paragraph 1 because it's not</p> <p>19 as germane to the expert opinions presented in</p> <p>20 this expert report.</p> <p>21 Q. Whereas affiliate marketing is</p> <p>22 described there, but does not appear in</p> <p>23 Paragraph 1 of your report of this case; is that</p> <p>24 right?</p> <p>25 A. That's true. If we were to flip</p>
<p style="text-align: right;">Page 102</p> <p>1 the import of cookies in online advertising</p> <p>2 markets. There's significant technical analysis</p> <p>3 of whether or not the cookies work as</p> <p>4 instructed, whether or not the cookies are</p> <p>5 defective in some way, whether browsers</p> <p>6 correctly process the cookies. All questions</p> <p>7 very much grounded in whether information</p> <p>8 systems work in the way that they might have</p> <p>9 been expected to or whether they malfunction in</p> <p>10 some way. Whether that's information security</p> <p>11 or not, that's diagnosis and analysis of the</p> <p>12 functioning of information systems.</p> <p>13 Q. Would you say that your opinions in</p> <p>14 the Valueclick case have more or less to do with</p> <p>15 information security than your opinions in this</p> <p>16 case?</p> <p>17 A. Less.</p> <p>18 Q. And in describing your background and</p> <p>19 qualifications in the Valueclick case, you don't</p> <p>20 identify any expertise in information security;</p> <p>21 is that right?</p> <p>22 A. Let me check. Well, in Paragraph 1,</p> <p>23 for example, I discuss various aspects of</p> <p>24 advertising which is what was at issue in the</p> <p>25 case here, the Valueclick case. I don't discuss</p>	<p style="text-align: right;">Page 104</p> <p>1 through a variety of my expert reports, I think</p> <p>2 we'd find that, first, they copied this</p> <p>3 paragraph, and second, the end of that sentence</p> <p>4 especially tends to be customized a bit</p> <p>5 according to the context in which that report is</p> <p>6 being prepared.</p> <p>7 Q. Turning to your CV in this case,</p> <p>8 attached to your report, under experience you</p> <p>9 identify certain research interests. Do you see</p> <p>10 that?</p> <p>11 A. Yes.</p> <p>12 Q. Is information security listed among</p> <p>13 those research interests?</p> <p>14 A. Automated data collection actually is</p> <p>15 quite closely related to information security,</p> <p>16 but -- and information security permeates the</p> <p>17 other listed research interests, but it's not</p> <p>18 listed specifically by that name.</p> <p>19 Q. Have you ever provided consulting</p> <p>20 services or expert witness services with respect</p> <p>21 to subject matter as to which you did not</p> <p>22 consider yourself an expert?</p> <p>23 A. No.</p> <p>24 Q. Do you consider yourself an expert on</p> <p>25 the subject matter of computer security?</p>

<p style="text-align: right;">Page 105</p> <p>1 MR. BONI: Object to form.</p> <p>2 A. There are aspects of computer</p> <p>3 security on which I do consider myself an</p> <p>4 expert, and there are other aspects of computer</p> <p>5 security on which I don't consider myself an</p> <p>6 expert.</p> <p>7 Q. On which aspects of computer security</p> <p>8 do you consider yourself an expert?</p> <p>9 A. I consider myself an expert in areas</p> <p>10 of information security in a multiuser online</p> <p>11 information system, partial access to</p> <p>12 information, context in which some information</p> <p>13 is made available to some people but not others,</p> <p>14 information systems where some information is</p> <p>15 available to the general public without</p> <p>16 restriction or login.</p> <p>17 Conversely, at the other end of the</p> <p>18 spectrum, for example, as to the most technical</p> <p>19 aspects of hacking, finding the specific</p> <p>20 security defects that allowed an attacker to</p> <p>21 circumvent a security control, in general,</p> <p>22 that's something that I would have less to say</p> <p>23 about.</p> <p>24 Q. But you nonetheless consider yourself</p> <p>25 qualified to opine on the subject of computer</p>	<p style="text-align: right;">Page 107</p> <p>1 beyond what an ordinary computer professional</p> <p>2 would be likely to know.</p> <p>3 Q. Anything else?</p> <p>4 A. Sure. You know, there are many</p> <p>5 facets of information security. And we could go</p> <p>6 through the numerous specialized fields.</p> <p>7 Hardware security modules, specialized computer</p> <p>8 chips that provide security benefits, I'm</p> <p>9 familiar about them only incidentally from a</p> <p>10 particular single matter, but wouldn't consider</p> <p>11 myself an expert in hardware security modules in</p> <p>12 general.</p> <p>13 Q. How to conduct a penetration test of</p> <p>14 a system?</p> <p>15 A. Well, I wouldn't be so quick on that</p> <p>16 one. There are some systems for which I could</p> <p>17 appropriately design a penetration test. Some</p> <p>18 systems for which I have personally performed a</p> <p>19 penetration test and have achieved the</p> <p>20 penetration. So it all depends on the kind of</p> <p>21 system and the kind of testing that is under</p> <p>22 consideration.</p> <p>23 Q. Have you ever designed or performed a</p> <p>24 penetration test with respect to a system which</p> <p>25 stored digital books?</p>
<p style="text-align: right;">Page 106</p> <p>1 security generally?</p> <p>2 MR. BONI: Object to form. You can</p> <p>3 answer.</p> <p>4 A. I'm sure there are some questions of</p> <p>5 computer security that I wouldn't consider</p> <p>6 myself qualified to opine on, but as to the</p> <p>7 questions presented in this report, the</p> <p>8 questions on which I was asked to opine, I</p> <p>9 consider myself an expert for the purpose of</p> <p>10 those questions.</p> <p>11 Q. So you said you don't consider</p> <p>12 yourself an expert in sort of determining the</p> <p>13 means by which a particular intrusion occurred</p> <p>14 at the code level; is that right?</p> <p>15 MR. BONI: Object to form.</p> <p>16 A. I think that slightly</p> <p>17 mischaracterizes it, but it's probably</p> <p>18 satisfactory in many purposes.</p> <p>19 Q. In what other areas of computer</p> <p>20 security do you not consider yourself an expert?</p> <p>21 A. There are people with specialized</p> <p>22 expertise on physical security, vaults, tamper</p> <p>23 proof screws, tamper evidence seals. Some very</p> <p>24 important work, frankly. And I haven't written</p> <p>25 on that subject, haven't learned much about it</p>	<p style="text-align: right;">Page 108</p> <p>1 A. No.</p> <p>2 Q. Do you consider yourself an expert on</p> <p>3 the subject of online advertising?</p> <p>4 A. Yes.</p> <p>5 Q. Do you consider yourself an expert on</p> <p>6 the subject of advertising fraud?</p> <p>7 A. Yes.</p> <p>8 Q. Do you consider yourself an expert on</p> <p>9 the subject of spyware?</p> <p>10 A. Yes.</p> <p>11 Q. Do you consider yourself an expert on</p> <p>12 the subject of Spam?</p> <p>13 A. Some aspects of Spam more than</p> <p>14 others. I wouldn't be as unqualified with that</p> <p>15 one.</p> <p>16 Q. Do you consider yourself an expert on</p> <p>17 the subject of Internet filtering?</p> <p>18 A. Certainly there was a time when I was</p> <p>19 as close to that subject as anyone. Now I'm</p> <p>20 less sure, but there certainly are aspects of it</p> <p>21 where I put myself out as an expert.</p> <p>22 Q. Do you consider yourself an expert on</p> <p>23 the subject of geolocation?</p> <p>24 MR. BONI: Just to be fair, what it</p> <p>25 says in his CV is geolocation and targeting.</p>

<p style="text-align: right;">Page 109</p> <p>1 Q. Mr. Edelman, do you consider yourself 2 an expert on the subject of geolocation? 3 MR. BONI: Object to form. 4 A. There are aspects of geolocation on 5 which I have offered expert opinions. And 6 geolocation has changed somewhat since that time 7 and has become more complicated in multiple 8 respects, so there are portions of geolocation 9 on which I would not put myself out as an 10 expert. 11 Q. Do you have greater or lesser degree 12 of expertise in the area of geolocation than in 13 information security? 14 A. It's hard to make that comparison 15 because the term "information security" is just 16 such a broad term that encompasses so much. 17 There are portions of information security where 18 I have a much deeper understanding and a much 19 more current understanding than I have today of 20 geolocation. 21 Q. Do you consider yourself an expert on 22 the subject of privacy? 23 A. On some aspects of privacy. Privacy 24 also is quite broad. Probably even broader than 25 information security.</p>	<p style="text-align: right;">Page 111</p> <p>1 design do you consider yourself an expert? 2 A. I think my greatest expertise is at 3 the intersection of user interface design and 4 consumer law, disclosures. I would make myself 5 less than expert on the ordinary questions of 6 ease of use and user friendliness, intuitiveness 7 and so forth. 8 Q. Of the areas of expertise that we've 9 just discussed, are there any in which you have 10 a greater degree of expertise than in the area 11 of information security? 12 A. The thing about these areas is that 13 they vary just dramatically in their breadth. 14 So you see on the list that we just discussed, 15 you see something like advertising fraud, where 16 I might have coined the term "online advertising 17 fraud." In any event, I think I have the single 18 best website on that subject on the whole 19 Internet. I'm the guy if you want to talk about 20 online advertising fraud. In part because it's 21 kind of a small subject, and at least in the 22 sense that not that many people are interested. 23 Maybe more people should be interested. 24 Conversely, for a huge subject like 25 privacy or information security, there are just</p>
<p style="text-align: right;">Page 110</p> <p>1 Q. Do you consider yourself an expert on 2 the subject of online privacy? 3 A. Even there the term is quite broad 4 and comparable in breadth to information 5 security. 6 Q. What areas of online privacy do you 7 consider yourself an expert in? 8 A. I have expertise in data collection 9 from personal computers, especially Windows 10 computers, data collected by websites, data 11 collected through mechanisms in websites such as 12 HTML, JavaScript and Flash, methods of 13 determining forensically what data is collected 14 or has been collected, interpreting log files, 15 forensically interpreting historic records. 16 Those are the areas of privacy where I have done 17 the most work. 18 Q. Do you consider yourself an expert in 19 the subject of automated data collection? 20 A. Yes. 21 Q. Do you consider yourself an expert on 22 the subject of user interface design? 23 A. Some aspects of user interface 24 design. 25 Q. On what aspects of user interface</p>	<p style="text-align: right;">Page 112</p> <p>1 many more subfields, and so it's like apples and 2 oranges to try to compare those two. 3 MR. GRATZ: Let's mark this as I 4 guess, we're on Exhibit 4. 5 (Document marked as Exhibit No. 4 for 6 identification.) 7 Q. We have before you what's been marked 8 as Exhibit 4. Do you recognize this document? 9 A. Yes. 10 Q. Is this a true and correct copy of an 11 expert report you submitted in Multnomah County 12 Public Library versus United States on October 13 15, 2001? 14 A. It seems to be. 15 Q. Turning to page 2, you say, "My 16 experience includes six years as an Internet web 17 server administrator, including operation of a 18 server ordinarily receiving more than 20,000 19 hits per day." Do you see that? 20 A. Yes. 21 Q. What server was that? 22 A. I think I must have been referring to 23 the main Berkman Center server as it stood at 24 that time. 25 Q. Were you the primary administrator of</p>

<p style="text-align: right;">Page 113</p> <p>1 that server as of October 15, 2001?</p> <p>2 MR. BONI: Object to form.</p> <p>3 A. I'm not sure if October 15th, 2001 is</p> <p>4 the date of this report. Just take a moment to</p> <p>5 check that. I certainly was during a period on</p> <p>6 or about that time. I think my time as the</p> <p>7 primary administrator might have ended shortly</p> <p>8 before then.</p> <p>9 Q. Are you aware of any intrusions --</p> <p>10 actually strike that.</p> <p>11 The primary Berkman web server, are</p> <p>12 you referring to the web server at</p> <p>13 Ciber.law.Harvard.edu?</p> <p>14 A. That was the domain name that</p> <p>15 associated with the server that I administered.</p> <p>16 Q. Was that a data based-backed website?</p> <p>17 A. It was in part.</p> <p>18 Q. Are you aware of any intrusions that</p> <p>19 resulted in the disclosure of confidential</p> <p>20 information from that server when you were its</p> <p>21 administrator?</p> <p>22 A. There were intrusions into that</p> <p>23 server. I don't know what information, if any,</p> <p>24 was obtained during those intrusions.</p> <p>25 Q. What intrusions were those?</p>	<p style="text-align: right;">Page 115</p> <p>1 servers improved since 1995?</p> <p>2 A. I think the security of the servers</p> <p>3 has improved, although some confounding factors</p> <p>4 have caused reductions in security at the same</p> <p>5 time, such that I'm not sure on the whole</p> <p>6 information is a whole lot more secure than it</p> <p>7 was in that time period. Perhaps, it's less</p> <p>8 security.</p> <p>9 Q. And what confounding factors are</p> <p>10 those?</p> <p>11 A. Attackers have become significantly</p> <p>12 more skillful. Automatic attacking tools have</p> <p>13 become more widely used. Information sharing</p> <p>14 among attackers has become more common through</p> <p>15 specialized information sharing websites such</p> <p>16 that one defect can readily be known to others.</p> <p>17 Economic incentives to monetize stolen</p> <p>18 information have become significantly more</p> <p>19 widespread such that there's a much improved</p> <p>20 business model to attacking servers. Servers</p> <p>21 have become much more complicated with more</p> <p>22 software installed, more interconnections and</p> <p>23 more exposure to possible attacks.</p> <p>24 Q. Turning back to Exhibit 1 of your</p> <p>25 report, in the second sentence of Paragraph 2,</p>
<p style="text-align: right;">Page 114</p> <p>1 A. That was a Windows server, and it was</p> <p>2 subject to the -- I believe it was called SQL</p> <p>3 slammer, was an early worm. There were some</p> <p>4 other worms. It's hard to recall a decade later</p> <p>5 which one specifically managed to infect that</p> <p>6 server and which ones I successfully blocked.</p> <p>7 Q. But you don't recall any that</p> <p>8 resulted in the disclosure of confidential</p> <p>9 information?</p> <p>10 A. Well, if they did result in that</p> <p>11 disclosure, I don't think I learned about it. I</p> <p>12 don't know one way or the other. One of our</p> <p>13 main protection strategies, of course, was to</p> <p>14 try not to keep sensitive, high-risk,</p> <p>15 confidential information on that server for a</p> <p>16 variety of reasons, including the perceived</p> <p>17 vulnerabilities of the server and the fact that</p> <p>18 it was connected to the Internet in quite an</p> <p>19 exposed way.</p> <p>20 Q. Did your work as an Internet web</p> <p>21 server administrator begin in about 1995?</p> <p>22 A. Yes.</p> <p>23 Q. How old were you in 1995?</p> <p>24 A. I was 15.</p> <p>25 Q. Has the security of Internet web</p>	<p style="text-align: right;">Page 116</p> <p>1 you say "My technical experience includes</p> <p>2 efforts to verify the security of other</p> <p>3 programmers' code, including uncovering</p> <p>4 shortfalls in others' security systems." Is</p> <p>5 there anything referred to in that sentence that</p> <p>6 we haven't yet discussed today?</p> <p>7 A. Yes.</p> <p>8 Q. What's that?</p> <p>9 A. There are several instances in which</p> <p>10 I found significant security defect in others'</p> <p>11 codes. I can tell you about all of them that I</p> <p>12 remember, and you can check my CV for more. One</p> <p>13 that's particularly vivid was the WhenU software</p> <p>14 that we discussed on a couple of occasions. The</p> <p>15 WhenU software had a remote execution</p> <p>16 vulnerability; namely, it was possible for</p> <p>17 anyone to send a purported update to the WhenU</p> <p>18 spyware, adware application, which the WhenU</p> <p>19 application would then install on the user's</p> <p>20 computer with full administrative privileges,</p> <p>21 allowing the attacker to obtain complete control</p> <p>22 over the user's computer.</p> <p>23 I uncovered that, brought it to the</p> <p>24 attention of both WhenU and the general public,</p> <p>25 and subsequent to my report, it was corrected.</p>

<p style="text-align: right;">Page 117</p> <p>1 That's one. There are several other examples. 2 Q. Do any of those examples relate to 3 the security of code which is run on servers? 4 A. Well, much of this code is right at 5 the intersection of desktop computers and 6 servers. This was a vulnerability relating to 7 the way that the client connected to the server. 8 For example, they failed to use any 9 cryptographic verification, and so the 10 correction to the problem that I just described 11 required changes both to the client and to the 12 server. 13 Q. It wasn't a security defect in the 14 server that you found though; isn't that right? 15 A. It was a security defect in the 16 overall architecture that encompassed both the 17 server and the client. 18 Q. Did the defect that you identified 19 allow intrusion into the server? 20 A. I'm not sure. 21 Q. It did allow intrusion into the 22 client, in that one could install any software 23 one wanted and take complete control of the 24 client; is that right? 25 A. That much definitely could be done.</p>	<p style="text-align: right;">Page 119</p> <p>1 should -- would govern. 2 It was complicated and confusing. I 3 prefer to reread the underlying article which I 4 think offers a precise description of what went 5 wrong. Sitting here today, recalling an article 6 of half a decade ago, it's difficult for me to 7 summon the details with precision. 8 Q. Was that a situation in which there 9 was an intrusion that went past a designed 10 security system or a situation in which the 11 security settings through the security interface 12 didn't end up doing sort of what the user 13 intended? 14 MR. BONI: Object to form. You can 15 answer. 16 A. I think there are other possibilities 17 beyond the two in your question. I believe the 18 system didn't operate in the way that the 19 technical documentation said that it would 20 operate. I believe it didn't operate in the way 21 that a reasonable user would have expected it to 22 operate in light of the technical documentation 23 and the configuration screen. It's possible 24 that there's an engineer who knew that it would 25 operate this way because he designed it that</p>
<p style="text-align: right;">Page 118</p> <p>1 Q. Do you know of any other instances in 2 which you have verified or uncovered shortfalls 3 in the security of other security systems where 4 the security was protecting a server from 5 intrusion? 6 A. Google acquired a service called 7 JotSpot which suffered a defect that could be 8 styled as either a privacy defect or a security 9 defect. The result of the defect was that any 10 user could view the documents, even when the 11 author of those documents had instructed the 12 documents were to be kept private and secure 13 from other users. 14 Q. And that's in a situation where the 15 administrator of the particular wiki that was 16 involved had set all pages to be public; is that 17 right? 18 MR. BONI: Object to form. 19 A. As I recall, there were multiple 20 inconsistent settings areas, so you might set it 21 to be public in one place and private in another 22 place, and it looked from the user interface 23 like the private settings, the stricter of the 24 two settings should govern, when the fact of the 25 matter was that the looser of the two settings</p>	<p style="text-align: right;">Page 120</p> <p>1 way, and he knew that he designed it that way. 2 Nonetheless, I would say there was a 3 defect in the design, if that's how he designed 4 it, particularly in light of the technical 5 documentation. 6 Q. Was there any security measure that 7 needed to be circumvented in order to access the 8 information in the JotSpot situation? 9 A. I think the main tactic that an 10 attacker would need to utilize was to ask. It's 11 like the joke about God and the lottery ticket, 12 meet me halfway. Buy a ticket. You have to ask 13 for the private information in order to get it. 14 The main thing, protecting the private 15 information here was that no one would bother to 16 ask, and, therefore, no one would get it. 17 Q. And that was the security scheme that 18 was circumvented in that circumstance? 19 A. As I recall, the main request -- the 20 main circumvention technique was to ask for it. 21 To know of something obscure, to know of the 22 possible existence of something obscure and to 23 ask for it and receive the response. 24 Q. Are there any other instances of 25 uncovering shortfalls in server-based security</p>

<p style="text-align: right;">Page 121</p> <p>1 systems -- strike that.</p> <p>2 Are there any other instances in</p> <p>3 which you have uncovered shortfalls in the</p> <p>4 security systems that allowed intrusions into</p> <p>5 servers other than those which we've discussed</p> <p>6 so far?</p> <p>7 A. Yes. Here's one actually not</p> <p>8 reflected in my CV because it didn't result in a</p> <p>9 published article. It did result in a New York</p> <p>10 Times article. American Airlines had an</p> <p>11 internal website whereby documents were provided</p> <p>12 to flight attendants and ground staff, maybe one</p> <p>13 or the other, maybe both. Training documents,</p> <p>14 policy documents and so forth. It turned out</p> <p>15 thereto that the method of securing documents</p> <p>16 was importantly defective. Documents provided</p> <p>17 as plain text were appropriately secured with a</p> <p>18 user name and password, and I guess you could</p> <p>19 guess someone's user name and password to access</p> <p>20 them, but I didn't do that.</p> <p>21 In contrast, documents provided as</p> <p>22 attachments were available to anyone who</p> <p>23 happened to guess the attachment number, and the</p> <p>24 numbers were sequential beginning with one and</p> <p>25 continuing to some maximum, such that it was</p>	<p style="text-align: right;">Page 123</p> <p>1 Q. Do you know of any techniques that</p> <p>2 can be used to avoid such an attack?</p> <p>3 A. Yes.</p> <p>4 Q. What techniques are those?</p> <p>5 A. One could avoid publishing these</p> <p>6 files with predictable file names. Instead of</p> <p>7 using numbers like 1.PDF, you could have a</p> <p>8 lengthy number too long to guess. You could</p> <p>9 restrict access to -- even to these raw binary</p> <p>10 files, restrict access to those users who have,</p> <p>11 in fact, entered a user name and password.</p> <p>12 That's a little bit more complicated but</p> <p>13 certainly doable for an engineer who needs to.</p> <p>14 Q. And those are two separate methods.</p> <p>15 One would be choosing file names that are</p> <p>16 predictable. Another would be sort of requiring</p> <p>17 a user name and password before providing access</p> <p>18 to the files?</p> <p>19 A. There are some other methods also.</p> <p>20 Certainly it could be done for someone who</p> <p>21 recognized the vulnerability and elected to take</p> <p>22 steps to defend against it.</p> <p>23 Q. Are there any other instances in</p> <p>24 which you have uncovered shortfalls in the</p> <p>25 security of servers against intrusion other than</p>
<p style="text-align: right;">Page 122</p> <p>1 quite straightforward to download all of them,</p> <p>2 which I did.</p> <p>3 And then I read the documents in</p> <p>4 sequence from one to the last and found some</p> <p>5 that were quite embarrassing to the company, in</p> <p>6 fact, which I provided to the New York Times</p> <p>7 which wrote an article about them.</p> <p>8 Q. Do you think that what you did was an</p> <p>9 intrusion into American Airlines systems?</p> <p>10 A. I'm not sure. Actually, I found the</p> <p>11 articles using Google. I found the first one</p> <p>12 using Google because Google had previously found</p> <p>13 the very same PDF attachments and directed me to</p> <p>14 one of them as I was attempting to find records</p> <p>15 of a relevant American Airlines policy. So if</p> <p>16 it was an intrusion, Google did it first, and</p> <p>17 then I identified the pattern and continued it</p> <p>18 from there.</p> <p>19 Q. That was because the files at issue</p> <p>20 were publicly available on the Internet. All</p> <p>21 one had to do was type in the URL, and they</p> <p>22 would come up; is that right? If one knew the</p> <p>23 URL?</p> <p>24 A. If one knew the URL, they were</p> <p>25 available upon request.</p>	<p style="text-align: right;">Page 124</p> <p>1 those we've discussed?</p> <p>2 A. We discussed Buy.com previously.</p> <p>3 Q. Yes.</p> <p>4 A. That was very much in the same vein</p> <p>5 as the American Airlines example just discussed.</p> <p>6 Namely, the name, address and phone number were</p> <p>7 provided on UPS prepaid shipping labels, which</p> <p>8 were posted in some binary format like a gift or</p> <p>9 a PDF or a PNG with sequential numbers, so that</p> <p>10 by guessing numbers, Buy.com/returns/17 dot,</p> <p>11 yes, you'd be able to see the seventeenth return</p> <p>12 and thereby obtain that information directly</p> <p>13 from the Buy.com server, again, without any</p> <p>14 defect in any client software.</p> <p>15 Q. That would be avoided by choosing</p> <p>16 unpredictable file names or the other methods</p> <p>17 which we've discussed?</p> <p>18 A. Yes.</p> <p>19 Q. Anything else?</p> <p>20 A. The I Crave TV case which we've</p> <p>21 discussed already.</p> <p>22 Q. And in what sense was that a -- why</p> <p>23 don't we discuss that in more detail. Anything</p> <p>24 else?</p> <p>25 A. I think there probably are more. I</p>

<p style="text-align: right;">Page 125</p> <p>1 have never thought of myself as limited to 2 client-side security. I've certainly always 3 been interested in server security. It's just 4 that there were other people doing server-side 5 security, and so I was better able to 6 distinguish myself in the realm client-side 7 security which others weren't focused on. But I 8 think there are other publications. I could 9 flip through my whole CV line by line to try to 10 identify some more for you. 11 Q. Do any others come to mind? 12 MR. BONI: Do you want him to look 13 through his CV? 14 Q. You're welcome to look through your 15 CV? 16 A. Sure, I'll take a minute and look. 17 Okay, here we go, the second item 18 under the heading "website writings" on page 3 19 of the CV is entitled "Hack-based 20 Cookie-Stuffing by Bannertracker-script." 21 Q. And what's that? 22 A. So this is an article very much at 23 the intersection of security and advertising, 24 advertising fraud. Bannertracker-script is the 25 controlling domain name used by a set of hackers</p>	<p style="text-align: right;">Page 127</p> <p>1 to their own code and use their own code to 2 create the invisible eye frame window that loads 3 Amazon that makes the putative referral. 4 Q. And this is through an exploit in 5 software called vBulletin? 6 A. That's my understanding. 7 Q. Anything else? Actually let me ask 8 this: Did you analyze that exploit in 9 vBulletin? 10 A. I didn't analyze the exploit. I was 11 able to determine forensically from the location 12 of the insertion and from others discussing this 13 method of insertion that it had been perpetrated 14 by exploit. It was clear from the circumstance, 15 the same insertion on hundreds, even thousands 16 of unrelated websites, that it had to be an 17 exploit, and I quickly confirmed to my 18 satisfaction that it was. 19 Q. Do you know whether any confidential 20 information from these bulletin board sites was 21 compromised as a result of this exploit? 22 A. There were some losses to the 23 bulletin board sites. The bulletin board sites 24 began to load more slowly for users. Users had 25 to waste bandwidth, and Amazon, of course, pays</p>
<p style="text-align: right;">Page 126</p> <p>1 who attack discussion board sites, online 2 bulletin boards, to insert their code into the 3 bottom of the bulletin board site, and having 4 inserted their code, they then perpetrate 5 advertising fraud, primarily against Amazon, 6 claiming to have referred users to Amazon, such 7 that if users make a purchase from Amazon within 8 the 24 hours after the putative referral, Amazon 9 will pay a commission of as much as 8 percent to 10 the putative referrer. 11 Q. And this is a way in which sites 12 which display advertisements from certain ad 13 networks may result in the unintended data going 14 to users? 15 A. Not at all of. This is a genuine 16 hack. The perpetrators of this hack identify a 17 defect in the code that allows them to put their 18 code onto the fixed-in websites without any 19 permission whatsoever. It's not via an ad 20 network. It's via a security exploit. I 21 reserve the word "hack" typically for that kind 22 of circumstance. So they exploit a defect in 23 the victims's web server or application level 24 server sitting on top of the web server and use 25 that defect to install the JavaScript reference</p>	<p style="text-align: right;">Page 128</p> <p>1 significant funds. But the main losses here are 2 not in user privacy. The losses here are 3 measured in dollars actually, dollars taken out 4 of the pockets of Amazon shareholders. 5 Q. So the answer to that question is, 6 no, you don't know of any confidential 7 information having been taken as a result of 8 this exploit? 9 A. I think what was taken was money and 10 bandwidth but not information. 11 Q. In the next sentence of paragraph -- 12 little bit lower down in Paragraph 2, you say, 13 "For example, I have personally uncovered 14 multiple Google privacy flaws, including 15 improper data collection by Google Toolbar as 16 well as improper data distribution by Google 17 JotSpot." Do you see that? 18 A. Yes. 19 Q. Do you claim to have uncovered any 20 Google privacy flaws other than the two you 21 claim to have uncovered in this sentence? 22 A. It's possible that there are some 23 more Google privacy flaws that I know about and 24 could be taking credit for, but I can't remember 25 any sitting here today. I don't think I've</p>

<p style="text-align: right;">Page 129</p> <p>1 written about any others. I think there 2 probably are some more. There probably are some 3 that I know about that I haven't written about 4 or have disclosed only peripherally in 5 presentations or otherwise. 6 Q. Do any come to mind? 7 A. No. 8 MR. GRATZ: We'll mark as Exhibit 5. 9 (Document marked as Exhibit No. 5 for 10 identification.) 11 Q. Do you recognize Exhibit 5? 12 A. Yes. 13 Q. What is it? 14 A. This is a article published on my 15 website in January 2010. 16 Q. Is this the research referred to by 17 the phrase "improper data collection" by Google 18 Toolbar in Paragraph 2 of your report? 19 A. Yes. 20 Q. What methodology did you use to reach 21 these results? 22 A. I tested Google Toolbar forensically 23 using a virtual computer, using a set of virtual 24 computers in my home office. 25 Q. And your research found that Google</p>	<p style="text-align: right;">Page 131</p> <p>1 thing than disabling the Google Toolbar only for 2 this window that you've been tracking? 3 A. You're right, that's a different 4 thing, and, in fact, there's yet another example 5 on page 3 that's another different thing. 6 Q. These -- and all of these settings 7 properly take effect after the user restarts 8 their browser; is that right? 9 A. That's right. 10 Q. But what you found was that these 11 settings didn't properly take effect until the 12 user restarted their browser; is that right? 13 A. That's true, with the additional 14 concern that as to the first example, the whole 15 purpose was for it to take effect immediately 16 for the current browsing session. By the terms 17 of the user's instruction, it was to take effect 18 only for that session and for no other, and so 19 restarting your browser was supposed to 20 terminate it, meaning the feature was completely 21 defective in the mechanism presented in the 22 first section. 23 MR. GRATZ: We'll mark this document 24 as Exhibit 6. 25 (Document marked Exhibit No. 6 for</p>
<p style="text-align: right;">Page 130</p> <p>1 Toolbar -- certain features of Google Toolbar 2 continued to operate after the feature had been 3 turned off and the toolbar had been hidden, at 4 least until the user restarted the browser; is 5 that right? 6 A. That's right. 7 Q. And if the user restarted their 8 browser, than the settings would take effect; is 9 that right? 10 A. When the user restarted his or her 11 web browser, the disabling which had always been 12 described as only for this window would by its 13 term expire, and, therefore, the feature would 14 be re-enabled, the toolbar would reappear, and 15 the user would rightly expect that the tracking 16 would continue. 17 Q. Does your research discuss only the 18 disable only for this window feature? 19 A. That's right. 20 Q. Turning to the second page of Exhibit 21 5, it says, "Google Toolbar continues tracking 22 browsing even when users disable the toolbar via 23 manage add-ons." Do you see that? 24 A. Yes. 25 Q. Is that the same thing or a different</p>	<p style="text-align: right;">Page 132</p> <p>1 identification.) 2 Q. Turning back to Exhibit 5 for a 3 moment, this is a blog post from January 26, 4 2010; is that right? 5 A. Yes. 6 Q. Turning to Exhibit 6, this is also a 7 blog post from January 26 of 2010 on a blog 8 called Search Engine Land; is that right? 9 A. Yes. 10 Q. This includes a statement from Google 11 responding to your blog post; is that right? 12 A. Yes. 13 Q. The last sentence of that statement 14 is "A fix that doesn't require a browser restart 15 is now available on www.Google.com/toolbar and 16 in an automatic update to Google Toolbar that we 17 are starting tomorrow." Is that right? 18 A. That's what it says. 19 Q. Do you know whether that was a true 20 statement as of January 26, 2010? 21 A. I agree that effective roughly 24 22 hours thereafter the Google Toolbar began to 23 update itself to a version that no longer had 24 the defects described in my article. 25 Q. The next sentence, and this is not</p>

<p style="text-align: right;">Page 133</p> <p>1 from Google's statement, but from the author of 2 the blog post on Search Engine Land, says, "I 3 wonder if Ben Edelman knew about restarting I.E. 4 would fix the issue and left it out." When you 5 wrote Exhibit 5, did you know that restarting 6 Internet Explorer would cause the settings to 7 take effect? 8 A. I think this misunderstands -- the 9 Barry Schwartz article misunderstands the scope 10 of the problem, particularly as to the first 11 section of my article. 12 Q. Turning your attention to the 13 sections of your article other than the first 14 section, were you aware at the time you 15 published Exhibit 5 that restarting the browser 16 would cause the settings to take effect? 17 A. Well, when I published the article, 18 it included the first and second sections, and 19 the third section, captioned, "Google Toolbar 20 Continues Tracking Browsing When Users Disable 21 the Toolbar Via Right Click," was added late on 22 the night of January 26th, and it even includes 23 a parenthetical and italics to that effect. So 24 we should be limiting ourselves to the first two 25 sections for purposes of discussing what I knew</p>	<p style="text-align: right;">Page 135</p> <p>1 data collection by Google Toolbar? 2 A. Well, an interesting twist about 3 Exhibit 5 is that I know Google knew about the 4 problem for more than a month before I wrote it 5 up on my website. 6 Q. How do you know that? 7 A. A state attorney general told me, 8 staff of a state attorney general. 9 Q. What's that person's name? 10 A. I can't recall. 11 Q. What state was it? 12 A. I don't recall. 13 Q. About when did they make that 14 statement to you? 15 A. I was at a meeting of staff of state 16 attorneys general in Florida, somewhere in Miami 17 vicinity, and someone told me that. 18 Q. When was that roughly? 19 A. It was in the same winter when I 20 published this article, so it must have been 21 February or March 2010. 22 Q. Was it before or did -- so it was 23 after the publication of this article? 24 A. That's right. 25 Q. And what basis did the person who</p>
<p style="text-align: right;">Page 134</p> <p>1 when I published the article. 2 Q. Let me be -- let me be very precise 3 as to the time. When you published the section 4 of Exhibit 5 marked "Google Toolbar Continues 5 Tracking Browsing Even When Users Disable the 6 Toolbar Via Manage Add-Ons." Do you see that 7 portion? 8 A. Yes. 9 Q. Did you know that that disabling 10 setting took effect when the user restarted 11 their browser? 12 A. Well, the article right now as I'm 13 looking at it, page 3, says -- not only says 14 that I knew, but alerts readers to that very 15 fact in the paragraph that begins "In my tests," 16 towards the top of page 3. It says exactly 17 that. Maybe Barry Schwartz didn't notice that 18 paragraph of the article. 19 Q. Are you aware of any intrusion to 20 Google's servers related to the issue set forth 21 in Exhibit 5? 22 A. This problem isn't about intrusion 23 into Google's servers. 24 Q. Other than what's described in 25 Exhibit 5, have you found any other improper</p>	<p style="text-align: right;">Page 136</p> <p>1 told you this have for making that statement? 2 MR. BONI: Object to form. 3 A. It purported to be personal 4 knowledge. 5 Q. Personal knowledge of that? 6 MR. BONI: Object to form. 7 A. Personal knowledge as conveyed to me 8 of some sort of a dispute between Google and 9 Microsoft pursuant to a Microsoft antitrust 10 consent decree and the ongoing oversight 11 therefrom; wherein, Google complained that 12 Microsoft was doing this, and Microsoft 13 complained that Google was doing that. And the 14 state attorney general staff person was on a 15 phone call where all of that was discussed and 16 perhaps an e-mail exchange. In some other way 17 it was all made known to this person. 18 Q. Do you think that person was telling 19 the truth? 20 A. I do. I wish I knew the person's 21 name. Unfortunately, it was all in, you know, a 22 reception or other social function at that 23 event. 24 Q. Turning back to Paragraph 2 of your 25 report, you mention improper data distribution</p>

<p style="text-align: right;">Page 137</p> <p>1 by Google JotSpot. Do you see that?</p> <p>2 A. Yes.</p> <p>3 MR. GRATZ: I'd like to mark this as</p> <p>4 Exhibit 7.</p> <p>5 (Document marked as Exhibit No. 7 for</p> <p>6 identification.)</p> <p>7 Q. You have before you what's been</p> <p>8 marked as Exhibit 7. Do you recognize this as</p> <p>9 an October 30th, 2008 blog post by you?</p> <p>10 A. I don't recall the date, but maybe</p> <p>11 if --</p> <p>12 MR. BONI: There's a different --</p> <p>13 there's a different date on that.</p> <p>14 A. That's the date on the last page. I</p> <p>15 think that's probably correct.</p> <p>16 Q. Is this the research referred to by</p> <p>17 the phrase "improper data collection" by Google?</p> <p>18 Excuse me.</p> <p>19 Is this the research referred to by</p> <p>20 the phrase "improper data distribution" by</p> <p>21 Google JotSpot in your report?</p> <p>22 A. This is what I had in mind, yes.</p> <p>23 Q. What methodology did you use to reach</p> <p>24 the results set forth in Exhibit 7?</p> <p>25 A. Direct hands-on testing and screen</p>	<p style="text-align: right;">Page 139</p> <p>1 third grader could do it also.</p> <p>2 MR. GRATZ: Mark this as Exhibit 8.</p> <p>3 (Document marked as Exhibit No. 8 for</p> <p>4 identification.)</p> <p>5 Q. Do you recognize what's been placed</p> <p>6 before you as Exhibit 8?</p> <p>7 A. I don't really recall it one way or</p> <p>8 the other, but I can see what it must be.</p> <p>9 Q. What is it?</p> <p>10 A. It seems to be news coverage of the</p> <p>11 Google JotSpot article that I wrote.</p> <p>12 Q. Turning to the second page of Exhibit</p> <p>13 8, under the screen shot, there's a statement</p> <p>14 from a Google spokesman; do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. Could you read that statement,</p> <p>17 please.</p> <p>18 A. This is a statement from a Google</p> <p>19 spokesperson, giving his view of the issue. He</p> <p>20 says, "This is not a security issue. The</p> <p>21 information in these wikis is accessible because</p> <p>22 they have been set to public on the site</p> <p>23 permissions page. Users are always in control</p> <p>24 of the information they share. If wikis are set</p> <p>25 to private, no information will be publically</p>
<p style="text-align: right;">Page 138</p> <p>1 shot evidence.</p> <p>2 Q. You used a web browser; is that</p> <p>3 right?</p> <p>4 A. A web browser, a screen shot tool,</p> <p>5 potentially a packet sniffer. I don't recall.</p> <p>6 Q. What is a packet sniffer?</p> <p>7 A. A packet sniffer is a specialized</p> <p>8 tool for reviewing and confirming all data sent</p> <p>9 over a network connection.</p> <p>10 Q. Did you use a packet sniffer in</p> <p>11 conducting the research set forth in Exhibit 7?</p> <p>12 A. I often run one in the background</p> <p>13 while doing this kind of test. Let me skim</p> <p>14 through the article and see whether there's any</p> <p>15 discussion of the fruits of that methodology.</p> <p>16 Okay, there's no discussion of use a</p> <p>17 packet sniffer. I believe I probably ran one</p> <p>18 anyway, checked its output, found that there was</p> <p>19 nothing notable in the packet sniffer output,</p> <p>20 above and beyond what the screen shot showed,</p> <p>21 and, therefore, had no need to mention it.</p> <p>22 Q. Were there any other elements of your</p> <p>23 methodology?</p> <p>24 A. No. I think what's beautiful about</p> <p>25 this article is it's just so simple, a typical</p>	<p style="text-align: right;">Page 140</p> <p>1 accessible."</p> <p>2 Q. Was it true that the information in</p> <p>3 the wikis which were the subject of your article</p> <p>4 had been set to public in the site permissions</p> <p>5 page?</p> <p>6 A. I think it may not be as simple as</p> <p>7 that. I think there was an import from one</p> <p>8 JotSpot system to another as part of the</p> <p>9 acquisition, and something might have been</p> <p>10 changed during the import. I definitely think</p> <p>11 this engineer is only telling part of the story.</p> <p>12 Q. Do you know what the other parts of</p> <p>13 the story are?</p> <p>14 A. I think it's along the lines just</p> <p>15 described, that some options had been added,</p> <p>16 something had been converted, perhaps subsequent</p> <p>17 to the acquisition or in some other upgrade.</p> <p>18 And so things that had started out more private</p> <p>19 had become less private over time.</p> <p>20 Q. Were you aware that the wikis that</p> <p>21 were the subject of your blog post had been set</p> <p>22 to public on their site permissions page?</p> <p>23 MR. BONI: Object to form.</p> <p>24 A. First had been set is nicely in the</p> <p>25 passive voice. Who did the setting is exactly</p>

<p style="text-align: right;">Page 141</p> <p>1 the question. Whether it was the site 2 administrator or Google who set it that way. 3 But I think, yes, the article discusses that and 4 discusses the contrary and inconsistent 5 statements, inconsistencies between this screen 6 and that screen and the help file all discussed 7 in the body of Exhibit 7 as it is before us. 8 Q. Google fixed this issue within 48 9 hours; is that right? 10 A. That wasn't my recollection actually. 11 Q. How long did it take for Google to 12 fix this issue, in your recollection? 13 A. I thought Google's initial position 14 was that everything was working perfectly. 15 Nothing at all was wrong, and that's consistent 16 with the quote from the Google spokesman in the 17 CNET article. I don't really recall 18 specifically. 19 Q. Turning to the last paragraph of 20 Exhibit 7, does this refresh your recollection 21 as to the time that it took to remedy this 22 issue? 23 A. That suggests it took about a week 24 after I first notified Google. I had thought it 25 took longer than that. But this paragraph seems</p>	<p style="text-align: right;">Page 143</p> <p>1 Back on the record 2:13 p.m. 2 Q. Turning your attention to the final 3 paragraph of Paragraph -- strike that. 4 Turning your attention to the final 5 sentence in Paragraph 2 of Exhibit 1, it says, 6 "I also found and demonstrated to a court's 7 satisfaction that an early online video service, 8 iCraveTV, had failed to secure video contents in 9 the way that it had previously represented to 10 that court." Do you see that? 11 A. Yes. 12 MR. GRATZ: I'd like to mark this as 13 Exhibit 9. 14 (Documents marked as Exhibit Nos. 9 15 and 10 for identification.) 16 Q. You have before you what has been 17 marked as Exhibit 9 and 10. Do you recognize 18 these documents? 19 A. Yes. 20 Q. Is Exhibit 9 your initial declaration 21 in a case titled "National Football League 22 versus TVRadioNow Corporation"? 23 A. Yes. 24 Q. And is Exhibit 10 a supplemental 25 declaration that you submitted in that case?</p>
<p style="text-align: right;">Page 142</p> <p>1 to indicate that a week is about as long as it 2 took. 3 Q. This was a week after you sent 4 notification to Google, but as of the same day 5 you posted this publicly; is that right? 6 MR. BONI: Object to form. 7 A. That's what this says. It's possible 8 that my last paragraph here is inaccurate, that 9 in some sense the problem lingered. I just -- 10 I just don't know. But if the paragraph of my 11 article is correct, then it was fixed the same 12 day that I posted the article. Although it 13 wasn't fixed during the intervening week when I 14 hadn't posted the article. When Google was just 15 on notice of the problem, but there was no 16 public concern and no article neatly laying it 17 out, Google dragged its feet a little bit. Then 18 when I twisted their arm, they finally fixed it 19 that same day. 20 MR. GRATZ: We can change the tape. 21 THE VIDEOGRAPHER: Here ends Tape 22 No. 3. Off the record 1:15 p.m. 23 (Recessed for lunch.) 24 THE VIDEOGRAPHER: Here begins Tape 25 No. 4 in today's deposition of Benjamin Edelman.</p>	<p style="text-align: right;">Page 144</p> <p>1 A. Yes. 2 Q. Are these expert declarations? 3 A. Yes. 4 Q. You are an expert retained by the 5 plaintiffs in that case; is that right? 6 A. Yes. 7 Q. And these declarations were submitted 8 in January and February of the year 2000 9 respectively; is that right? 10 A. Yes. 11 Q. What opinions did you render? 12 A. I could take a moment to refresh my 13 recollection of these documents of 12 years ago, 14 but generally I offered the opinion that 15 iCraveTV security systems were not properly 16 designed to limit access to Canadian users only, 17 and, that, in fact, significant American and 18 other users could access and were accessing the 19 video contents that was supposed to be limited 20 to Canadians only. 21 Q. So the system was designed based on 22 the IP address of the user to either grant or 23 deny access based on whether that user was 24 coming from an IP address associated with the 25 United States; is that right?</p>

<p style="text-align: right;">Page 145</p> <p>1 A. Well, there were a series of security 2 systems. You described a portion of one of the 3 security systems. 4 Q. What were the other security systems 5 about which you rendered opinions in Exhibits 9 6 and 10? 7 A. Some of the security systems predated 8 my opinions, and I believe are not discussed 9 here. There was one that was grounded in typing 10 in an area code. If you knew a Canadian area 11 code, that would prove that you were Canadian. 12 I don't know that I had to offer an opinion as 13 to the defects of that security, but that was 14 one that was also an issue. 15 You describe restrictions based on 16 the IP address which is true but only in part. 17 That was a restriction on access to a portion of 18 the web server; whereas, what was actually 19 desired was the video which was provided by a 20 different server; namely, a streaming video 21 server from a company called Real Networks, 22 which didn't have any such access restriction. 23 And so it was possible completely to circumvent 24 the IP address filter that you just described. 25 Q. Did your opinions in the National</p>	<p style="text-align: right;">Page 147</p> <p>1 users who, in fact, have done so. There might 2 have been students at Harvard College, and we 3 could even identify them by name from 4 information present within the defendant's log 5 files. I don't recall whether we identified any 6 of them by names in the context of the 7 declaration. We might have thought that was a 8 much notch too personal, but we could, and I 9 think that might have come out in the oral 10 testimony, if not in the deposition. 11 Q. This was a system that had both a web 12 server and a media server or a set of web 13 servers instead of media servers; is that right? 14 A. That's right. 15 Q. And on the web servers, there was an 16 attempt to restrict access to users outside the 17 United States; is that right? 18 A. That's right. 19 Q. And on the media servers, there was 20 no such attempt; is that right? 21 A. That's true. 22 Q. Were the log files you were looking 23 at log files from the media servers? 24 A. I believe I looked at both sets of 25 log files.</p>
<p style="text-align: right;">Page 146</p> <p>1 Football League case relate to the area 2 code-based security system? 3 MR. BONI: Object to form. 4 A. I know that I formed opinions. 5 Whether those opinions are expressed in this 6 declaration, I'd need to read through both of 7 the declarations to say for sure. My opinion 8 was and is that the area code system didn't work 9 very well for reasons that are probably 10 apparent, and I might have mentioned that in a 11 paragraph, or that might have gotten deleted 12 when the defendants abandoned that system. 13 Q. So the opinion that you were 14 rendering in this case is that users from the 15 United States were, in fact, able to access 16 television programming where the system had been 17 attempted to be designed to prevent users in the 18 United States from accessing that program; is 19 that right? 20 A. I demonstrated both the users were 21 able to and that they, in fact, and did so in 22 significant quantities. 23 Q. Did you demonstrate anything else in 24 these reports? 25 A. I gave specific examples of specific</p>	<p style="text-align: right;">Page 148</p> <p>1 Q. Did you find that the IP -- what is 2 IP geolocation? 3 A. IP geolocation is a set of systems 4 that convert an IP address to a geographic 5 location or a likely geographic location, an 6 inference as to geographic location. 7 Q. In your report did you find errors in 8 the IP geolocation database used by the 9 defendant in this case, in Exhibits 9 and 10? 10 A. I believe I did find and discuss some 11 errors. 12 Q. Did you also find that users from the 13 United States had, in fact, accessed the media 14 server? 15 A. I found that users from the United 16 States could access the media server. I believe 17 there was evidence that they actually had done 18 so, including discussions on web pages directing 19 users as to how to do so. 20 Q. Were those people hackers? 21 MR. BONI: Object to form. 22 A. It depends on the definition of the 23 word "hackers," but on some definitions 24 including reasonable definitions, they were. 25 Q. In that they were gaining access to a</p>

<p style="text-align: right;">Page 149</p> <p>1 system when they knew that they weren't supposed 2 to have access to it? 3 A. Right. 4 Q. They weren't -- they didn't have the 5 root access to the system; is that right? 6 A. They didn't even want root access. 7 All they wanted was to watch the video content 8 that was available via this much easier 9 mechanism. 10 Q. And this much easier mechanism more 11 or less amounted to directing their software to 12 a particular address which held the video 13 content in an unprotected form; is that right? 14 A. Yes. 15 Q. Other than that, are you aware of any 16 intrusion into iCraveTV's servers relating to 17 the issues discussed in Exhibits 9 and 10? 18 A. Immediately after that, they faced an 19 injunction requiring them to shut down the 20 servers, and at that point, I don't think it 21 would have been possible to intrude because they 22 were no longer operating. So that was the end 23 of the line for them. 24 Q. But you're not aware of any intrusion 25 prior to the time the servers were shut down; is</p>	<p style="text-align: right;">Page 151</p> <p>1 knew their name and their home address. 2 Q. And that was a designed feature of 3 that website; is that right? 4 A. I think it was, although some -- 5 subject to some caveats. Maybe it wasn't 6 supposed to be quite so easy to put in someone 7 else's name and address. I'd need to refresh my 8 recollection by rereading that article. 9 Q. Anything else? 10 MR. BONI: Anything else what? 11 Q. Any other relevant technical 12 experience other than that which we've discussed 13 on which you've relied in preparing your report? 14 MR. BONI: Object to the form. Vague 15 and ambiguous to the extent of what you mean by 16 technical as opposed to any other kind of 17 experience. 18 A. There have been other defects in the 19 privacy and security -- privacy and information 20 security of software systems that I've examined. 21 There was, I think, a compete toolbar that would 22 send your credit card number in plain text, so 23 that anyone in a nearby Internet cafe could see 24 your credit card number. That sort of 25 difficulty of properly securing information in a</p>
<p style="text-align: right;">Page 150</p> <p>1 that right? 2 A. I didn't really look at it one way or 3 the other, but I'm not aware of any intrusion 4 like that. 5 Q. Other than that which we have 6 discussed so far, do you have any other 7 technical experience on which you rely in 8 forming your opinions in this case? 9 A. As I walked back in from lunch, I saw 10 the related project as to the Sears' privacy 11 violation linked at the top of Exhibit 7. It's 12 not that I specifically relied on it, but it is 13 yet another of these examples of a server side 14 security defect that allows the access of 15 information the users weren't intended to be 16 able to access. 17 Q. And was that through predictable 18 URLs? 19 A. No, it wasn't. 20 Q. By what means were they able to 21 access that information? 22 A. I think last name, plus street 23 address, plus zip code. You could see what 24 anyone had bought from Sears, maybe what major 25 appliances anyone had bought from Sears if you</p>	<p style="text-align: right;">Page 152</p> <p>1 multiuser information service is again on my 2 mind when I evaluate the book service here at 3 issue, but it's not that I specifically relied 4 on it. It just informs the totality of my 5 professional experience in this area. 6 Q. Anything else? 7 A. Nothing else comes to mind. 8 Q. Turning to Paragraph 3, you highlight 9 two publications as being particularly relevant 10 to the opinions you render in your report, and 11 the first of those is titled "Shortcomings and 12 Challenges in the restriction of Internet 13 Retransmissions of Over-the-Air Television 14 Content to Canadian Internet Users." Do you see 15 that? 16 A. Yes. 17 Q. Was that about largely the same 18 subject matter as your expert reports in the NFL 19 case? 20 A. Well, it was related, but a little 21 bit broader. 22 Q. Broader in what way? 23 A. The NFL case was limited to the 24 specific facts at hand. One specific defendant 25 with one specific set of security systems. In</p>

<p style="text-align: right;">Page 153</p> <p>1 contrast, the submission to Industry Canada was 2 about all the matters that could potentially 3 arise if such retransmissions were to be 4 permitted, all of the possible systems that 5 future defendant infringers might design and the 6 likely defects and consequences of those 7 systems. 8 Q. Is the thesis of that article that IP 9 geolocation as a security mechanism is 10 imperfect? 11 A. That was one of the points raised and 12 one of the bases for concern. 13 Q. Were there any other bases for 14 concern that were of the same level of 15 importance? 16 A. Well, it's not just that it's 17 imperfect in the sense of one in a thousand 18 times it makes an error or two in 10,000 times 19 it makes an error. It's imperfect in the sense 20 that once an error is identified, it can be 21 systematically exploited such that 1,000 users 22 drive through that one-in-a-thousand hole, and 23 then it becomes a thousand in a thousand because 24 everyone knows that's where the hole is. Just 25 like a hole in a damn, you might say there's</p>	<p style="text-align: right;">Page 155</p> <p>1 mention "Securing Online Advertisers, Rustlers 2 and Sheriffs in the New Wild West." What was 3 that article about? 4 A. That's a cross-cutting article really 5 surveying a series of other articles, including 6 problems affecting consumers; for example, 7 deceptive advertising, as well as problems 8 affecting advertisers, including overcharging in 9 advertising fraud and presenting the 10 relationship between those problems and the 11 underlying computer security systems that are 12 closer to the core of what the readers of this 13 multiple author bound volume would be likely to 14 be familiar with. 15 Q. That relates primarily to the 16 security of end user computers; is that right? 17 A. A portion of it does, but not all. 18 For example, the deceptive advertisements are 19 equally deceptive no matter how well secured 20 your end user device might be. 21 Q. Does this article mention in 22 Paragraph 3, securing online advertising, 23 discuss intrusion to servers connected to the 24 Internet? 25 A. I don't recall one way or the other.</p>
<p style="text-align: right;">Page 154</p> <p>1 only one square inch of the damn that has a 2 hole, but never mind, a lot of water can pour 3 through that one hole. 4 I also pointed out in that article 5 the importance of user incentives, that users 6 will jump through quite a few hoops to get the 7 content that they want, particularly if they 8 don't have another good way to get it. And so 9 the users' willingness to find the hole and to 10 exploit the hole is likely to be commensurate 11 with the value of the content that they would 12 receive. So one shouldn't assume that users 13 won't do it because they haven't done it to get 14 something they didn't want very much. The more 15 they want it, the more they'll be willing to do 16 to get it. 17 Q. So the amount of effort that one 18 needs to put into securing a system is 19 commensurate with the level of demand for the 20 material being protected? 21 MR. BONI: Object to form. 22 A. I think that's right, with the right 23 understanding of demand, the level of user 24 interest vis-a-vis possible alternatives. 25 Q. In Paragraph 3 you also say --</p>	<p style="text-align: right;">Page 156</p> <p>1 I can't think of a specific section in which it 2 would be likely to do so. But it might. 3 Q. Are there any other academic 4 publications of yours which you consider more 5 relevant to the questions at issue in this case 6 than those identified at the end of Paragraph 3? 7 A. I don't usually draw a distinction 8 between academic publications and other 9 publications. They're all important to me. 10 Some are peer reviewed and some aren't. I think 11 we've discussed all of the publications, be they 12 peer reviewed or otherwise, that are most 13 relevant to my opinions. 14 Q. In Paragraph 4, it says that your 15 teaching assignment currently consists of a 16 Harvard Business School elective course called 17 "The Online Economy" which analyzes strategies 18 for all manner of online businesses, and that 19 the course includes concerns arising out of 20 information security. Do you see that? 21 A. Yes. 22 MR. GRATZ: Mark this as Exhibit 23 13 -- 11. 24 (Document marked as Exhibit No. 11 25 for identification.)</p>

<p style="text-align: right;">Page 157</p> <p>1 Q. Do you recognize this document?</p> <p>2 A. Yes.</p> <p>3 Q. What is it?</p> <p>4 A. This is the syllabus of the course as</p> <p>5 presented on the course website.</p> <p>6 Q. Could you identify for me the section</p> <p>7 of the course that deals with information</p> <p>8 security?</p> <p>9 A. Information security is a theme that</p> <p>10 arises in a variety of the cases taught in this</p> <p>11 course. I can go through the cases, the days of</p> <p>12 the course one by one and flag contents in which</p> <p>13 information security arises. In online</p> <p>14 apartment rentals as to Rent Jungle and its</p> <p>15 scrapers, there's quite a bit of discussion</p> <p>16 there, of whether scrapers are an appropriate</p> <p>17 technique, whether it's appropriate to scrape</p> <p>18 your competitors' sites in order to make your</p> <p>19 own site, how would your competitors feel about</p> <p>20 that, is there anything they can do to stop you,</p> <p>21 is there anything you can do to stop them from</p> <p>22 stopping you.</p> <p>23 Q. What do you mean by scraping?</p> <p>24 A. In this context the term "scraper"</p> <p>25 refers to a software system that collects</p>	<p style="text-align: right;">Page 159</p> <p>1 Airlines PDF example I just discussed where to</p> <p>2 get the underlying text would require a user</p> <p>3 name and password, but to get the attachments</p> <p>4 mistakenly, no password was required.</p> <p>5 Q. Does any of the material in your</p> <p>6 online economy course relate to the intrusion</p> <p>7 into servers for the purpose of gaining root</p> <p>8 access?</p> <p>9 A. I don't think we discussed security</p> <p>10 in that context in this class. It comes up more</p> <p>11 in some of the executive education teaching that</p> <p>12 I've done, and other notions of security other</p> <p>13 than obtaining root access arise often in this</p> <p>14 class.</p> <p>15 Q. Do they include gaining access to</p> <p>16 information hosted on web servers which one is</p> <p>17 not permitted to access?</p> <p>18 A. Yes.</p> <p>19 Q. In any situations other than those</p> <p>20 which we've already discussed to today?</p> <p>21 A. No. I think we've discussed the</p> <p>22 examples that arise.</p> <p>23 Q. Turning to Paragraph 5, Paragraph 5</p> <p>24 of your report, you discuss previous expert</p> <p>25 work. Was your first expert engagement the NFL</p>
<p style="text-align: right;">Page 158</p> <p>1 information from another website.</p> <p>2 Q. That's information that that other</p> <p>3 website makes available publicly; is that right?</p> <p>4 MR. BONI: Object to form.</p> <p>5 A. It makes it available on its website,</p> <p>6 perhaps to the general public, perhaps only to</p> <p>7 users who log in with a password, perhaps</p> <p>8 without restriction of any of kind, perhaps</p> <p>9 subject to a terms of use restriction imposed in</p> <p>10 some way.</p> <p>11 Q. And the same restrictions that would</p> <p>12 be imposed on an ordinary web browser are</p> <p>13 imposed on a scraper; is that right? For</p> <p>14 example, if an ordinary user would need to enter</p> <p>15 a user name and password, then the scraper would</p> <p>16 need to provide the same credentials; is that</p> <p>17 right?</p> <p>18 A. Often that's true, although I</p> <p>19 wouldn't want to be too sweeping about it.</p> <p>20 There might be ways to circumvent that sort of</p> <p>21 thing, and I've seen some of those ways from</p> <p>22 time to time.</p> <p>23 Q. Do you discuss any of those ways in</p> <p>24 your class?</p> <p>25 A. Sometimes we discuss that American</p>	<p style="text-align: right;">Page 160</p> <p>1 versus TVRadioNow case?</p> <p>2 A. Yes.</p> <p>3 Q. Was your second expert engagement the</p> <p>4 Multnomah County Libraries versus the United</p> <p>5 States case?</p> <p>6 A. I'm not sure that was second or if</p> <p>7 there was something else in between. That was</p> <p>8 surely the next significant engagement.</p> <p>9 Q. Was the next significant engagement</p> <p>10 Washington Post versus Gator Corporation?</p> <p>11 A. That was certainly shortly</p> <p>12 thereafter, and was one of the larger cases.</p> <p>13 There might have been something else in between.</p> <p>14 Whether that was significant or not...</p> <p>15 Q. In what area of expertise did you</p> <p>16 testify in the Washington Post case?</p> <p>17 A. My testimony there consisted solely</p> <p>18 of expert reports and deposition. The case</p> <p>19 settled before trial.</p> <p>20 Q. And what were your opinions in that</p> <p>21 case?</p> <p>22 A. That was a case about spyware and</p> <p>23 adware installed on users' computers. Initially</p> <p>24 replacing the ads on websites with other ads,</p> <p>25 later showing pop-up ads and pop-under ads. My</p>

<p style="text-align: right;">Page 161</p> <p>1 opinions went to the methods of installation, 2 the disclosures that were shown, the pop-ups 3 themselves, the circumstances in which the 4 pop-ups would appear, user perception of the 5 pop-ups, perhaps other aspects of the pop-ups. 6 Q. Did you render any opinions in that 7 case? 8 A. I think I did. 9 Q. What opinions were those? 10 A. It's a little bit difficult to recall 11 based on the duration, since the case as well as 12 the significant subsequent work in that area. 13 MR. GRATZ: We'll mark this as 14 Exhibit 12. 15 (Document marked as Exhibit No. 12 16 for identification.) 17 Q. Do you recognize this document? 18 A. This is a declaration I wrote in the 19 Gator matter. 20 Q. Is it an expert declaration? 21 A. I believe I was anticipating being 22 designated as an expert, or maybe I had been 23 designated as an expert, so yes, it is an expert 24 declaration. 25 Q. What opinions are contained in</p>	<p style="text-align: right;">Page 163</p> <p>1 right? 2 MR. BONI: Object to form. 3 A. Gator did not intrude onto the 4 plaintiff's servers in that case. 5 Q. In 2003 did you submit an expert 6 report in connection with the case, Wells Fargo 7 & Company and Quicken Loans Inc. versus 8 WhenU.com? 9 A. Yes. 10 Q. What was the subject matter of your 11 declaration in that case? 12 A. It was generally similar to the Gator 13 declaration just discussed. Namely, methods of 14 installation, methods of operation and the 15 advertisements that were displayed. 16 Q. Did it involve any intrusions into 17 servers? 18 A. WhenU software also didn't intrude 19 onto plaintiffs' servers. 20 Q. Did it intrude onto anyone's servers? 21 A. WhenU never needed to place code into 22 the server in order to accomplish its business 23 objectives. 24 MR. GRATZ: I'd like to mark this as 25 Exhibit 13.</p>
<p style="text-align: right;">Page 162</p> <p>1 Exhibit 12? 2 A. I discussed the Gator software 3 generally, including its methods of installation 4 and the advertisements that it displayed. 5 Q. Are those facts or expert opinions? 6 MR. BONI: Object to the form. 7 A. Some of the contents of this 8 declaration reflects my firsthand personal 9 observation and would be appropriate for a fact 10 witness. Other portions of the declaration 11 reflect the judgment and experience of an expert 12 and probably would require that. 13 Q. Did any of your work in the 14 Washington Post case relate to intrusions into 15 servers? 16 A. Significantly at issue was how 17 exactly Gator managed to replace the ads on 18 websites with Gator's own ads and later to show 19 pop-ups and pop-under. That was all done 20 wholly on the client side, without making an 21 intrusion onto web servers. Although users 22 probably wouldn't understand that and would 23 perceive it otherwise. 24 Q. So no intrusion into servers was 25 involved in the Washington Post case; is that</p>	<p style="text-align: right;">Page 164</p> <p>1 (Document marked as Exhibit No. 13 2 for identification.) 3 Q. Do you recognize this document? 4 A. Yes. 5 Q. Is this the blog post that gave rise 6 to the motion for contempt in the WhenU case? 7 A. It is. 8 Q. At the time you wrote this blog post, 9 were you in possession of confidential WhenU 10 information? 11 A. I believe I had been present in the 12 courtroom at a time when confidential 13 information was presented orally. I don't know 14 whether I was in possession of any written 15 confidential information. 16 Q. Did you in -- strike that. 17 Did you testify in a case called 18 WhenU versus State of Utah? 19 A. Yes. 20 Q. Was the subject matter of your 21 testimony in that case similar to that in the 22 other WhenU case and in the Gator case? 23 A. Similar, although with some different 24 twists based on the procedural context in the 25 specific substantive issues in dispute there.</p>

<p style="text-align: right;">Page 165</p> <p>1 Q. How was it different?</p> <p>2 A. WhenU argued that it would be</p> <p>3 difficult for WhenU to keep out of the state of</p> <p>4 Utah because their software operated the same on</p> <p>5 a nationwide or worldwide basis. I demonstrated</p> <p>6 that quite the contrary, WhenU's system utilized</p> <p>7 geolocation to identify the users' geographic</p> <p>8 location or apparent geographic location, that</p> <p>9 WhenU told advertisers that the system worked</p> <p>10 reliably, and that WhenU's system had an</p> <p>11 adequate geolocation system to substantially</p> <p>12 avoid showing certain ads or even all ads in</p> <p>13 Utah.</p> <p>14 Q. Was it your opinion that WhenU could</p> <p>15 effectively limit usage to users outside of</p> <p>16 Utah?</p> <p>17 A. It could certainly avoid showing ads</p> <p>18 to users in Utah and could otherwise allow usage</p> <p>19 of its software if they so chose.</p> <p>20 Q. That would be through -- by means of</p> <p>21 geolocation; is that right?</p> <p>22 A. The existing geolocation system that</p> <p>23 they had already installed for their own</p> <p>24 business purposes.</p> <p>25 Q. It was your opinion that that</p>	<p style="text-align: right;">Page 167</p> <p>1 A. Casale Media produced a software</p> <p>2 program purporting to clean spyware off of a</p> <p>3 user's computer, and it was advertised as having</p> <p>4 that benefit, even when it didn't really do all</p> <p>5 that much, and furthermore, at least as</p> <p>6 important, the advertisements overstated the</p> <p>7 user's need for the software, in particular, the</p> <p>8 advertisements would make statements like, your</p> <p>9 computer is infected when the fact of the matter</p> <p>10 was Casale had no information one way or the</p> <p>11 other as to whether or not your computer was</p> <p>12 infected.</p> <p>13 Q. And what were the opinions to which</p> <p>14 you testified in that case?</p> <p>15 A. First, I needed to reconstruct</p> <p>16 historic records of what advertisements were</p> <p>17 shown and how they looked. The advertisements</p> <p>18 were no longer running as of the commencement of</p> <p>19 litigation, and I needed to reconstruct how the</p> <p>20 software worked, what the software said. The</p> <p>21 software also had been withdrawn from the market</p> <p>22 by the date of commencement of the litigation.</p> <p>23 So there was significant forensic work necessary</p> <p>24 to lay the groundwork.</p> <p>25 Then, for basically just fact witness</p>
<p style="text-align: right;">Page 166</p> <p>1 geolocation system was effective?</p> <p>2 A. That it was sufficiently effective</p> <p>3 for WhenU's own business purposes and</p> <p>4 sufficiently effective to comply with the</p> <p>5 statute in the state of Utah.</p> <p>6 Q. Is that consistent with your opinion</p> <p>7 in the National Football League case regarding</p> <p>8 the reliability of geolocation?</p> <p>9 A. It is.</p> <p>10 Q. How so?</p> <p>11 A. Users attempting to get copyrighted</p> <p>12 media content would be highly likely to find</p> <p>13 ways to circumvent any geolocation that was</p> <p>14 denying them access. You want to watch the</p> <p>15 video, you pretend you're in Chicago so you can</p> <p>16 watch the video. In contrast, it would be quite</p> <p>17 unusual for a user to pretend they were in a</p> <p>18 different state in order to receive extra pop-up</p> <p>19 ads which are widely regarded as unwanted rather</p> <p>20 than as desirable.</p> <p>21 Q. Did you testify in a case called</p> <p>22 South Carolina v. Casale Media?</p> <p>23 A. Yes.</p> <p>24 Q. What was the subject matter of your</p> <p>25 testimony in that case?</p>	<p style="text-align: right;">Page 168</p> <p>1 work to say what was on the screen after I got</p> <p>2 it to work again. I believe there was also</p> <p>3 discussion of user perceptions of these offers,</p> <p>4 how a user would respond upon receiving a</p> <p>5 particular message.</p> <p>6 Q. Did you do any forensic work as a</p> <p>7 basis for the opinions you expressed in your</p> <p>8 report in this case?</p> <p>9 MR. BONI: Object to form.</p> <p>10 A. I didn't examine any historic sources</p> <p>11 or any archives or anything of that sort.</p> <p>12 Q. Did you examine any computer systems?</p> <p>13 A. Yes.</p> <p>14 Q. What computer systems did you</p> <p>15 examine?</p> <p>16 A. Well, I reviewed the documents that</p> <p>17 are cited in the attachment to the report. I</p> <p>18 also wanted to check the availability of</p> <p>19 copyright infringing books right now online as</p> <p>20 it stands. If you wanted to find a copy of</p> <p>21 Malcolm Gladwell's new book, how easily could</p> <p>22 you do that. And if you wanted to find some</p> <p>23 other book, again in copyright, how easily could</p> <p>24 you do that, how easily could you get it for</p> <p>25 free via some unlawful copyright infringement</p>

<p style="text-align: right;">Page 169</p> <p>1 website.</p> <p>2 Q. Did you examine the security of any</p> <p>3 computers in connection with this report?</p> <p>4 A. I wasn't checking for security. I</p> <p>5 was checking for the availability of the</p> <p>6 copyright infringement materials.</p> <p>7 Q. And it wasn't copyright infringement</p> <p>8 materials that were available by breaking</p> <p>9 through security but because the infringing</p> <p>10 materials were intended to be accessible by the</p> <p>11 operator of that website; is that right?</p> <p>12 A. That's right.</p> <p>13 Q. Did you testify in a case called</p> <p>14 Arista against Myxer?</p> <p>15 A. Yes.</p> <p>16 Q. In what area of expertise did you</p> <p>17 testify in that case?</p> <p>18 A. As I recall that, my expert work in</p> <p>19 that case was as to the financial benefit that</p> <p>20 the defendant there reaped by showing</p> <p>21 advertising on a website with copyright</p> <p>22 infringing material.</p> <p>23 Q. Did you render any opinions about</p> <p>24 copyright law?</p> <p>25 A. No, I didn't render any opinions</p>	<p style="text-align: right;">Page 171</p> <p>1 isn't publicly known.</p> <p>2 Q. What was the name of that case?</p> <p>3 A. I would have great difficulty</p> <p>4 summoning it for you from memory and I</p> <p>5 apologize.</p> <p>6 Q. In the UMG against Veoh case, in what</p> <p>7 area of expertise did you testify?</p> <p>8 A. I think it was the same as the Myxer</p> <p>9 case just described.</p> <p>10 Q. In the Lens against UMG case, in what</p> <p>11 area of expertise did you testify?</p> <p>12 A. I think it was the same as what was</p> <p>13 just discussed, but I prefer to check the expert</p> <p>14 report to confirm.</p> <p>15 Q. So it is before you as I believe -- I</p> <p>16 believe it's before you. It's not before you.</p> <p>17 MR. GRATZ: We'll mark this as</p> <p>18 Exhibit 14.</p> <p>19 (Document mark as Exhibit No. 14 for</p> <p>20 identification.)</p> <p>21 Q. So you have before you what's been</p> <p>22 marked as Exhibit 14. You recognize this as</p> <p>23 your expert report in the Lens against UMG case?</p> <p>24 A. Yes.</p> <p>25 Q. In what areas of expertise did you</p>
<p style="text-align: right;">Page 170</p> <p>1 about any law.</p> <p>2 Q. Did you render any opinions about</p> <p>3 security in the Myxer case?</p> <p>4 A. I don't recall.</p> <p>5 Q. You don't recall any such opinions?</p> <p>6 A. I don't recall one way or the other.</p> <p>7 There were a series of these cases. I get them</p> <p>8 confused to this day. I think there might have</p> <p>9 been three. There were the number that are</p> <p>10 listed in the attachment to my expert report.</p> <p>11 All of them are properly listed, and what was at</p> <p>12 issue in one versus what was at issue in</p> <p>13 another, I would be on very thin ice if I tried</p> <p>14 to recite that from memory.</p> <p>15 Q. The three cases you're talking about</p> <p>16 are Arista against Myxer in which Arista is a</p> <p>17 record Company on the one side; UMG against</p> <p>18 Veoh, which UMG is a record company on one side;</p> <p>19 and Lens versus UMG, which UMG is a record</p> <p>20 company. You're talking about the three record</p> <p>21 company cases?</p> <p>22 A. There are those three. There might</p> <p>23 have been another one that didn't make it to the</p> <p>24 point where I had my deposition taken, and,</p> <p>25 therefore, it isn't disclosed. It probably</p>	<p style="text-align: right;">Page 172</p> <p>1 testify in that case?</p> <p>2 A. I believe Paragraph 7 details the</p> <p>3 expert opinions as to the scope of copyright</p> <p>4 infringing material or in any event copyrighted</p> <p>5 material present without permission from the</p> <p>6 rights holders, the difficulty of applying fair</p> <p>7 use analysis, the information that the defendant</p> <p>8 in that case considered before sending his</p> <p>9 take-down request and the damage that results</p> <p>10 from a mistaken take-down request in light of</p> <p>11 the counter-notification provided by law.</p> <p>12 Q. Did you render any legal opinions in</p> <p>13 your report in the Lens case?</p> <p>14 A. My intension was not to render any</p> <p>15 legal opinions, and I believe I succeeded in not</p> <p>16 rendering any legal opinions.</p> <p>17 Q. When you say at the top of -- I want</p> <p>18 to direct your attention at the top of what's</p> <p>19 marked at the bottom as page 3 in Exhibit 14.</p> <p>20 Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. It says, "The type of fair use</p> <p>23 analysis that would be conducted in infringement</p> <p>24 litigation cannot readily be conducted using the</p> <p>25 information available to a rights-holder upon</p>

<p style="text-align: right;">Page 173</p> <p>1 sending a takedown request." Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. Was that one of the opinions you</p> <p>4 expressed in the report in the Lens case?</p> <p>5 A. Yes.</p> <p>6 Q. Is that still your opinion today?</p> <p>7 A. It's my opinion as to the facts of</p> <p>8 this matter. There might be other contacts in</p> <p>9 which it would be possible to conduct that fair</p> <p>10 use analysis with the information available, but</p> <p>11 thinking about the context in which I offered</p> <p>12 this report, I think this opinion is correct,</p> <p>13 and it's still my view.</p> <p>14 Q. When you say the type of fair use</p> <p>15 analysis that would be conducted in infringement</p> <p>16 litigation, what do you mean by that?</p> <p>17 A. I believe the expert report details</p> <p>18 that further, for example, 13, and follows from</p> <p>19 there, listing the factors that need to be</p> <p>20 considered in order to apply a fair use</p> <p>21 analysis.</p> <p>22 Q. And that's set forth in Paragraph 14?</p> <p>23 A. Fourteen discusses the factors, and</p> <p>24 then 15 and 16 discussed the limited information</p> <p>25 available to rights-holder confronting an</p>	<p style="text-align: right;">Page 175</p> <p>1 offer an opinion.</p> <p>2 MR. BONI: Joe, we're not proffering</p> <p>3 him as a fair use expert at all. This has</p> <p>4 nothing to do with the report he's doing in this</p> <p>5 case.</p> <p>6 Q. Turning your attention to Paragraph</p> <p>7 17, in the middle of the paragraph it says,</p> <p>8 "Even when all the facts are known, it is</p> <p>9 difficult to apply the required legal standards</p> <p>10 to those facts, which makes fair use</p> <p>11 particularly difficult to apply in any sort of</p> <p>12 perfunctory or quick look review." Do you see</p> <p>13 that?</p> <p>14 A. Yes.</p> <p>15 Q. Is that a statement that you can</p> <p>16 continue to consider true?</p> <p>17 MR. BONI: Object to form.</p> <p>18 A. I think it's true in context. Of</p> <p>19 course, there would be some sets of facts that</p> <p>20 are sufficiently clear-cut that one could make a</p> <p>21 fair use determination one way or the other.</p> <p>22 It's not that every case is a difficult case,</p> <p>23 but that there are some difficult cases.</p> <p>24 Q. Did you identify any of those</p> <p>25 difficult cases in your report in the Lens case?</p>
<p style="text-align: right;">Page 174</p> <p>1 unauthorized video at YouTube.</p> <p>2 Q. In Paragraph 14 you say, "Nor do the</p> <p>3 examples of Section 107 limit what may be fair</p> <p>4 use." What do you mean by that?</p> <p>5 A. I think the portion of the sentence</p> <p>6 after the colon is informative, quoting some</p> <p>7 authority from a case interpreting the Section</p> <p>8 107, fair use defense.</p> <p>9 Q. It says that the examples in the</p> <p>10 preamble to Section 107 are illustrative and not</p> <p>11 limitative. You see that?</p> <p>12 A. Yes.</p> <p>13 Q. Do you agree with that today?</p> <p>14 A. I think I correctly characterized the</p> <p>15 holding of Campbell. Whether or not I would</p> <p>16 have decided it the same way had I been</p> <p>17 presiding in that matter, I guess I haven't</p> <p>18 really thought it through, but I don't hold that</p> <p>19 position.</p> <p>20 Q. You agree that that's currently the</p> <p>21 law?</p> <p>22 A. I don't know. I'm not enough of a</p> <p>23 scholar --</p> <p>24 MR. BONI: Objection.</p> <p>25 A. -- of fair use law to attempt to</p>	<p style="text-align: right;">Page 176</p> <p>1 A. I guess I cited some cases that were</p> <p>2 reversed, including the three cases cited within</p> <p>3 Paragraph 17. So those must have been difficult</p> <p>4 facts if in each of those three instances the</p> <p>5 cases were twice reversed.</p> <p>6 Q. Do you know what the use at issue in</p> <p>7 the Lens case was?</p> <p>8 A. It was background music to a home</p> <p>9 video.</p> <p>10 Q. Do you think that the use in the Lens</p> <p>11 case was fair use?</p> <p>12 MR. BONI: Object to form.</p> <p>13 A. I'm not sure.</p> <p>14 MR. BONI: Joe, we're not proffering</p> <p>15 him as a fair use expert. This is improper</p> <p>16 questioning.</p> <p>17 Q. You weren't asked to opine on that</p> <p>18 matter in the Lens case?</p> <p>19 A. That's correct, I was not asked.</p> <p>20 Q. And you never, in fact, formed an</p> <p>21 opinion on the question?</p> <p>22 A. I didn't. It's a difficult question</p> <p>23 to me, and no one wanted to pay me to figure it</p> <p>24 out, so I spent my time on other matters</p> <p>25 instead.</p>

<p style="text-align: right;">Page 177</p> <p>1 Q. What makes it a difficult question?</p> <p>2 MR. BONI: Object to form.</p> <p>3 A. Well, some of the factors cut in one</p> <p>4 direction. Some of the factors cut in the other</p> <p>5 direction. And it leaves me uncertain about the</p> <p>6 correct way to apply the Section 107 factors.</p> <p>7 Q. Which factors cut against fair use in</p> <p>8 the Lens case?</p> <p>9 MR. BONI: Object to form. Joe, I'm</p> <p>10 going to stop the questioning. You keep going</p> <p>11 down this path that has nothing whatsoever to do</p> <p>12 with qualifying him for the report for which he</p> <p>13 proffered in this case. It has nothing to do</p> <p>14 with security or his report.</p> <p>15 Q. You can answer the question.</p> <p>16 A. For example, the Lens video used the</p> <p>17 most distinctive part of a song. I can't recall</p> <p>18 what song it was. But, you know, it has a</p> <p>19 chorus or something, the part that everyone</p> <p>20 hums, and wouldn't you know it, in her 30-second</p> <p>21 clip, she manages to get that part. The video</p> <p>22 was set to be viewable by the entire world. It</p> <p>23 wasn't limited just to her family and friends.</p> <p>24 It was accessible by everyone. Those are</p> <p>25 factors that would seem to cut against fair use.</p>	<p style="text-align: right;">Page 179</p> <p>1 Q. In what cases have you practiced as</p> <p>2 an attorney?</p> <p>3 MR. BONI: Object to form.</p> <p>4 A. I brought a class action against</p> <p>5 Yahoo as to overcharging of certain advertisers.</p> <p>6 Q. Anything else?</p> <p>7 A. I was co-counsel in a class action</p> <p>8 against Google as to certain type of squatting</p> <p>9 practices.</p> <p>10 Q. Anything else?</p> <p>11 A. I am currently counsel in a case</p> <p>12 against Apple as to charges incurred by minors</p> <p>13 and charges without a user entering a password</p> <p>14 to authorize the charges.</p> <p>15 Q. Anything else?</p> <p>16 A. I'm currently counsel in a case</p> <p>17 against Facebook as to charges incurred by</p> <p>18 minors.</p> <p>19 Q. Who's your co-counsel in the Facebook</p> <p>20 case?</p> <p>21 A. I need to discuss with my attorney.</p> <p>22 Q. Do you need to discuss --</p> <p>23 A. Yeah.</p> <p>24 Q. Okay.</p> <p>25 THE VIDEOGRAPHER: You want to go</p>
<p style="text-align: right;">Page 178</p> <p>1 Q. What factors weighed in favor of fair</p> <p>2 use in your view in the Lens case?</p> <p>3 A. It would be seem to be a</p> <p>4 noncommercial use, although to be sure, these</p> <p>5 days Google pays significant royalties to those</p> <p>6 who upload videos. So maybe not so</p> <p>7 noncommercial after all. The quality of the</p> <p>8 audio and video were consistent with a home</p> <p>9 recording which is to say not all that good,</p> <p>10 which maybe could cut either direction, in fact,</p> <p>11 depending on how you think about it. It's not</p> <p>12 much of a substitute, but then again, the artist</p> <p>13 would never have allowed his recorded music to</p> <p>14 be presented in this way.</p> <p>15 Q. And on balance, you don't have a view</p> <p>16 one way or the other as to how the fair use</p> <p>17 analysis comes out?</p> <p>18 MR. BONI: Asked and answered.</p> <p>19 A. I don't have a view one way or the</p> <p>20 other.</p> <p>21 Q. In addition to your expert work, have</p> <p>22 you practiced as an attorney?</p> <p>23 A. Yes.</p> <p>24 Q. In what cases?</p> <p>25 MR. BONI: In what cases?</p>	<p style="text-align: right;">Page 180</p> <p>1 off.</p> <p>2 MR. BONI: Go off.</p> <p>3 THE VIDEOGRAPHER: Off the record</p> <p>4 3:02 p.m.</p> <p>5 (Brief recess.)</p> <p>6 THE VIDEOGRAPHER: Back on the record</p> <p>7 3:07 p.m. Could we have the last question read</p> <p>8 back please.</p> <p>9 (Last question read back.)</p> <p>10 A. The firm is Kershaw, K-e-r-s-h-a-w.</p> <p>11 There are some more names after that.</p> <p>12 Q. Are there any other cases in which</p> <p>13 you are or have been counsel?</p> <p>14 A. There are.</p> <p>15 Q. How many?</p> <p>16 A. Some individual disputes, you know,</p> <p>17 airline overcharged money. There are some for</p> <p>18 which I have a confidential role, not on the</p> <p>19 paper as an advisor, co-counsel. I think I've</p> <p>20 listed all of the significant matters, all of</p> <p>21 the matters in which I appear on the papers, for</p> <p>22 example.</p> <p>23 Q. Turning to Paragraph 6 of your report</p> <p>24 it says, "I am being compensated for my work in</p> <p>25 this matter at the rate of \$450 per hour"; is</p>

<p style="text-align: right;">Page 181</p> <p>1 that right?</p> <p>2 A. Yes.</p> <p>3 Q. Is payment contingent on the outcome</p> <p>4 of the litigation?</p> <p>5 A. No.</p> <p>6 Q. Is payment contingent on any opinions</p> <p>7 you render?</p> <p>8 A. No.</p> <p>9 Q. When were you first contacted by</p> <p>10 counsel for plaintiffs in this case?</p> <p>11 A. Several years ago counsel for</p> <p>12 plaintiffs asked me about a different aspect of</p> <p>13 this case.</p> <p>14 Q. What aspect was that?</p> <p>15 MR. BONI: I'm going to instruct the</p> <p>16 witness not to answer on the grounds of the</p> <p>17 attorney work product.</p> <p>18 Q. When did counsel for plaintiffs first</p> <p>19 contact you about putting forward subject matter</p> <p>20 set forth in Exhibit 1?</p> <p>21 A. That's sometime this winter to spring</p> <p>22 after the new year.</p> <p>23 Q. Who contacted you?</p> <p>24 A. Mr. Boni.</p> <p>25 Q. Have you spoken with any of</p>	<p style="text-align: right;">Page 183</p> <p>1 A. Not really.</p> <p>2 Q. Before today, how many hours had you</p> <p>3 spent on this engagement?</p> <p>4 A. I'd estimate about 20.</p> <p>5 Q. Did anyone assist you?</p> <p>6 A. No.</p> <p>7 Q. Have you received payment for your</p> <p>8 work on this case?</p> <p>9 A. No.</p> <p>10 Q. Do you anticipate receiving payment</p> <p>11 for your work on this case?</p> <p>12 A. Yes.</p> <p>13 Q. Who is going to be paying you?</p> <p>14 A. I think the Boni & Zach firm will be</p> <p>15 paying me.</p> <p>16 Q. Turn to Paragraph 7 of your report.</p> <p>17 In the middle of that paragraph it says, in this</p> <p>18 report I address and opine on risks of a</p> <p>19 security breach exposing widely online the</p> <p>20 contents of in-copyright books from a number of</p> <p>21 sources. Do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. Do you provide opinions in your</p> <p>24 report regarding any matters other than risks of</p> <p>25 a security breach exposing widely online the</p>
<p style="text-align: right;">Page 182</p> <p>1 plaintiffs' counsel other than Mr. Boni?</p> <p>2 A. Ms. Zack.</p> <p>3 Q. Anyone else?</p> <p>4 A. A fellow named Josh.</p> <p>5 Q. Anyone else?</p> <p>6 A. I think that's all.</p> <p>7 Q. Have you spoken with anyone regarding</p> <p>8 this engagement other than Mr. Boni, Ms. Zack</p> <p>9 and Josh?</p> <p>10 A. I discussed it with my father,</p> <p>11 spiritual guidance on all important questions.</p> <p>12 Q. What did you discuss with your</p> <p>13 father?</p> <p>14 A. The case generally, my role in it,</p> <p>15 the extent of my opinions, the substance of my</p> <p>16 opinions.</p> <p>17 Q. What did your father tell you?</p> <p>18 A. He supports my work and supportive of</p> <p>19 my work in this area.</p> <p>20 Q. Anything else?</p> <p>21 MR. BONI: Anything else that his</p> <p>22 father told him?</p> <p>23 MR. GRATZ: Correct.</p> <p>24 A. Nothing of any great significance.</p> <p>25 Q. Nothing that comes to mind?</p>	<p style="text-align: right;">Page 184</p> <p>1 contents of in-copyright books?</p> <p>2 A. I'm sure I do.</p> <p>3 Q. What opinions can you identify in</p> <p>4 your report where you express those opinions?</p> <p>5 A. Well, for example --</p> <p>6 MR. BONI: Go ahead. That's okay.</p> <p>7 A. The boldface heading midway through</p> <p>8 this page 2 that piracy of books is already</p> <p>9 real. I don't think that speaks to the risks of</p> <p>10 a security breach exposing in-copyright books.</p> <p>11 This is something that's already happening</p> <p>12 without any security breach above and beyond</p> <p>13 what has already happened.</p> <p>14 Q. Any other opinions that are not</p> <p>15 related to the risks of a security breach</p> <p>16 exposing widely online the contents of</p> <p>17 in-copyright books?</p> <p>18 MR. BONI: Let me object to the form,</p> <p>19 and say that the report speaks for itself. It</p> <p>20 is what it is. If you want a thorough, complete</p> <p>21 answer, then the witness should go through line</p> <p>22 by line and see what exactly there is other than</p> <p>23 what he saw on this page.</p> <p>24 Q. Mr. Edelman, you're welcome to take a</p> <p>25 look at any portions of the report you need to</p>

<p style="text-align: right;">Page 185</p> <p>1 to fully answer my question. The question is</p> <p>2 could you identify for me other than the portion</p> <p>3 you identified in your previous answer about</p> <p>4 present book piracy any opinions you expressed</p> <p>5 in your report other than opinions on the risks</p> <p>6 of a security breach exposing widely online the</p> <p>7 contents of in-copyright books?</p> <p>8 A. I think the rest of the declaration</p> <p>9 fits within that sentence, broadly understood.</p> <p>10 Q. Is it your opinion that the level of</p> <p>11 security afforded to the scanned books is</p> <p>12 relevant to the fair use analysis in this case?</p> <p>13 MR. BONI: Object to form.</p> <p>14 A. I think it could be.</p> <p>15 Q. How?</p> <p>16 A. In a couple of ways. One, the level</p> <p>17 of security that Google is providing, can</p> <p>18 provide, will provide speaks to the effect on</p> <p>19 the market for the books, a factor under Section</p> <p>20 107. Second, the practices of other sites that</p> <p>21 might engage in book scanning of their own with</p> <p>22 quite different security practices potentially,</p> <p>23 could certainly affect those same Section 107</p> <p>24 factors.</p> <p>25 Q. By those same Section 107 factors, do</p>	<p style="text-align: right;">Page 187</p> <p>1 factors. Subject to the proviso that, of</p> <p>2 course, we must consider all of the other sites,</p> <p>3 book scanning services that might seek to engage</p> <p>4 in similar conduct if this were ruled to be a</p> <p>5 fair use.</p> <p>6 Q. Is there any other way in which it's</p> <p>7 your opinion that the level of security afforded</p> <p>8 to the scanned books is relevant to the fair use</p> <p>9 analysis?</p> <p>10 MR. BONI: Object to form.</p> <p>11 A. I think it's mostly through the</p> <p>12 fourth factor, as I've already discussed.</p> <p>13 Q. In Paragraph 8 you say, "I conclude</p> <p>14 that unrestricted and widespread conduct of the</p> <p>15 sort engaged in by Google would result in a</p> <p>16 substantially adverse impact on the potential</p> <p>17 market for books."</p> <p>18 A. Yeah.</p> <p>19 Q. Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Is that the conclusion of your</p> <p>22 report?</p> <p>23 MR. BONI: Object to form.</p> <p>24 A. That is a conclusion of my report.</p> <p>25 Q. Is that the most important conclusion</p>
<p style="text-align: right;">Page 186</p> <p>1 you mean the fourth factor, the effect on the</p> <p>2 market?</p> <p>3 A. That one in particular, yes.</p> <p>4 Q. Is there any other way in which the</p> <p>5 level of security afforded to the scanned books</p> <p>6 is relative to the fair use analysis?</p> <p>7 A. The level of security is certainly</p> <p>8 related to the character of the use. If the</p> <p>9 level of security was to store them on a hard</p> <p>10 drive, put the hard drive in a vault, put the</p> <p>11 vault at the bottom of the ocean, that would be</p> <p>12 one character of use. And a different character</p> <p>13 of use is to connect the hard drive to a set of</p> <p>14 servers and display the contents in some form</p> <p>15 for all the world to see, but I think it could</p> <p>16 go to the first factor also.</p> <p>17 Q. So a site with better security would</p> <p>18 have a purpose or character of use that is more</p> <p>19 likely to favor fair use?</p> <p>20 MR. BONI: Object to form. He's not</p> <p>21 here as a fair use expert, Joe. And he's not</p> <p>22 offering an opinion for that reason.</p> <p>23 Q. You can answer.</p> <p>24 A. I think all else equal, that's the</p> <p>25 way I've been taught to apply the fair use</p>	<p style="text-align: right;">Page 188</p> <p>1 of your report?</p> <p>2 MR. BONI: Object to form.</p> <p>3 A. I guess I hadn't ranked the</p> <p>4 conclusions in order of importance.</p> <p>5 MR. BONI: Important to whom?</p> <p>6 Important in what way? It's too vague and</p> <p>7 ambiguous a question.</p> <p>8 MR. GRATZ: Please let the witness</p> <p>9 finish.</p> <p>10 MR. BONI: I'm sorry.</p> <p>11 MR. GRATZ: I'll ask it again. Could</p> <p>12 we have the question read back.</p> <p>13 Q. Is the statement in Paragraph 8 the</p> <p>14 most important conclusion in your report?</p> <p>15 MR. BONI: Object to form. Vague and</p> <p>16 ambiguous as to the term "important."</p> <p>17 A. I hadn't ranked the conclusions by</p> <p>18 importance, so I'm not sure.</p> <p>19 Q. Referring to Paragraph 8, what do you</p> <p>20 mean by unrestricted?</p> <p>21 A. There are several kinds of</p> <p>22 restrictions that could in principle attach to</p> <p>23 anyone engaged in the kind of conduct Google has</p> <p>24 been engaged in. By unrestricted I meant to</p> <p>25 convey that perhaps few to none of those</p>

<p style="text-align: right;">Page 189</p> <p>1 restrictions would, in fact, be in place. 2 Q. What are those restrictions? 3 A. For example, there could be 4 restrictions as to the length of each snippet, 5 the number of snippets per page, the number of 6 times a user can view snippets from a single 7 work, the systems to keep out automated crawling 8 software, the systems to prevent users from 9 pooling their snippets in order to slowly piece 10 back together the entire work, a variety of 11 restrictions in that vein. 12 Q. And your conclusion is that without 13 those restrictions, the use would result in a 14 substantially adverse impact on the potential 15 market for books? 16 A. That's certainly true. 17 MR. BONI: Object to form. Doesn't 18 limit it to unrestricted. You're not reading it 19 accurately, Joe. You left out unrestricted and 20 widespread conduct of the sort engaged in by 21 Google. 22 Q. So I just want to make sure I 23 understand what you mean by unrestricted, and by 24 unrestricted in your previous answer I 25 understand you to mean that it's not -- it</p>	<p style="text-align: right;">Page 191</p> <p>1 sort engaged in by Google? 2 A. I mean the large-scale scanning of a 3 large number of in-copyright books, the digital 4 archival of those scans, and the presentation 5 of, at least, portions of those works through an 6 interactive website. 7 THE VIDEOGRAPHER: Here ends Tape 4. 8 Off the report, 3:21 p.m. 9 (Brief recess.) 10 THE VIDEOGRAPHER: We're back on the 11 record. It's 3:24 p.m. 12 Q. Mr. Edelman, I understand that 13 following our break and your discussion with 14 Mr. Boni, you have a clarification for one of 15 your previous responses. 16 A. Yes. 17 Q. Go ahead. 18 A. The word "unrestricted" in Paragraph 19 8, what I meant to convey when I wrote this 20 paragraph was that the word "unrestricted" 21 refers to the sort of conduct that might be 22 permitted if the court were to rule that 23 Google's conduct was a fair use, and, therefore, 24 that other sites and services could engage in 25 the same conduct, consistent with that ruling.</p>
<p style="text-align: right;">Page 190</p> <p>1 wouldn't be subject to restrictions such as 2 restricting the length of the snippet, 3 restricting the number of snippets per page and 4 so on; is that right? 5 A. That's what I have in mind sitting 6 here today rereading the sentence. There may be 7 other restrictions that could reasonably be read 8 into that word. 9 Q. The next word is -- it says 10 unrestricted and widespread. What do you mean 11 by widespread? 12 A. Affecting a large number of works, a 13 large number of books, accessible to a large 14 number of users, unreasonable price. If you 15 told me that, you know, the subscription would 16 be \$1 million a year to be able to search the 17 books, that wouldn't be widespread. Few people 18 would be willing to pay it. It would be less 19 likely to have an adverse impact on the 20 potential market for books. 21 Q. In Paragraph 8 you referred to 22 unrestricted and widespread conduct of the sort 23 engaged in by Google. Do you see that? 24 A. Yes. 25 Q. What do you mean by conduct of the</p>	<p style="text-align: right;">Page 192</p> <p>1 Q. What restrictions would not be in 2 place in such a circumstance making it 3 unrestricted? 4 A. The restrictions of the copyright 5 act, I suppose, would not be in place if this 6 were deemed to be a fair use, and, therefore, 7 permissible notwithstanding restrictions of the 8 copyright act. 9 Q. So do I understand you to be 10 testifying that what unrestricted means is 11 permissible under the Fair Use Doctrine? 12 A. What I intended to convey in 13 Paragraph 8 was that if the fair use ruling were 14 in Google's favor and if other sites arose on a 15 widespread basis with conduct similar to 16 Google's, then there would be a substantially 17 adverse impact on the potential market for 18 books. 19 Q. Does the word "unrestricted" in 20 Paragraph 8 refer to restrictions on the length 21 of a snippet? 22 A. The length of a snippet is surely a 23 factor that would be considered for purposes of 24 a finding of fair use, but the word 25 "unrestricted" there was intended, perhaps</p>

<p style="text-align: right;">Page 193</p> <p>1 somewhat unclearly, but intended to capture all 2 that would follow if a fair use ruling were to 3 find that the Google conduct in this area is a 4 fair use. 5 Q. When you refer in this sentence to 6 conduct of the sort engaged in by Google, are 7 you including or excluding from what you mean by 8 that phrase the security measures put in place 9 by Google? 10 MR. BONI: Object to form. You can 11 answer. 12 A. Well, the security measures 13 encompasses certainly multiple aspects; for 14 example, one could think of the duration, the 15 length in words of a snippet as a security 16 measure, the number of snippets per page as a 17 security measure, the way Google secures its 18 network and secures its server is surely a 19 security measure. 20 What I envision here is the state of 21 affairs in which a court offers a fair use 22 finding in Google's favor, and then others begin 23 to install similar services in their own way. 24 They probably do it somewhat differently than 25 Google. They might have 20 percent more words</p>	<p style="text-align: right;">Page 195</p> <p>1 doing, I bet you could add 20 percent to it, and 2 if Google's use is a fair use, that plus 20 3 percent version might also be a fair use, and 4 how about plus 40 percent. One gets into some 5 interesting questions of the gray area. 6 Q. Is it your view that if what Google 7 is doing is found to be a fair use, then showing 8 20 percent larger snippets is necessarily also a 9 fair use? 10 A. Not necessarily. There has to be a 11 line somewhere. But, surely, there will be some 12 difficult line-drawing exercises in that event. 13 Q. Who would be the arbitrator in those 14 line-drawing exercises? 15 MR. BONI: Object to form. 16 A. I think it's beyond the scope of my 17 report, but I'm happy to try to answer. I think 18 it would have to be a judge when the case was 19 brought, if such a case was brought. 20 Q. And that judge could decide whether 21 these different circumstances were, likewise, 22 fair use or whether the differences meant that 23 the later user was not engaged in fair use; is 24 that right? 25 A. I think that would be the question</p>
<p style="text-align: right;">Page 194</p> <p>1 in their snippet. Their servers might be a 2 little bit less secure because they're not quite 3 as clever as Google in securing them. Exactly 4 which things they do differently and how they do 5 them differently is hard to predict sitting here 6 today, but in Paragraph 8, I intended to 7 contemplate the state of affairs where they 8 begin to head down that road. 9 Q. Could those differences between those 10 later users and Google affect whether the use by 11 the later user you're hypothesizing is, in fact, 12 a fair use? 13 A. Yes, they could. 14 Q. So a ruling that what Google is doing 15 is fair use doesn't necessarily mean that what 16 someone else would be doing, to the extent it 17 was different from what Google was doing, would, 18 likewise, be a fair use; is that right? 19 A. I think that's true. At least when 20 taken to the extreme. If there was a site whose 21 idea of a snippet was up to 500 words, one would 22 scoff at the idea that a snippet could have 500 23 words, and it's possible that Google's use is a 24 fair use, and that site's use is not a fair use. 25 On the other hand, whatever Google is</p>	<p style="text-align: right;">Page 196</p> <p>1 posed, yes. 2 Q. What does "substantially adverse 3 impact" mean in Paragraph 8? 4 A. I was thinking about the word 5 substantial with its meaning in multiple 6 contexts, material, substantial, that is, 7 something that an author or publisher would need 8 to consider when deciding whether or not to 9 engage in the economic enterprise of writing or 10 publishing a book. 11 Q. And you use the word "would" in 12 Paragraph 8. Do you see that? 13 A. Yes. 14 Q. Does that indicate that it is your 15 view that the probability of such a 16 substantially adverse impact is 100 percent? 17 A. In this state of affairs discussed 18 here, I think the probability is very, very 19 high. I wouldn't call it 100 percent. Nothing 20 is certain. But it's sufficiently likely that 21 the word "would" is an appropriate word to use. 22 Q. You've referred in your previous 23 answer "the state of affairs discussed here." 24 What did you mean by that? 25 A. The hypothesis of Paragraph 8.</p>

<p style="text-align: right;">Page 197</p> <p>1 Q. The hypothesis is that if 2 unrestricted and widespread conduct of the sort 3 engaged in by Google, that is, widespread 4 scanning, archiving and presentation of portions 5 through web services without necessarily the 6 limitations and security measures put in place 7 by Google were to occur, then that would result 8 in a substantially adverse impact on the 9 potential market for books; is that right? 10 A. I was with you except for the clause 11 that began "without." 12 Q. Did you not understand it or not 13 agree with it? 14 A. I thought that when you said it it 15 differed from what I intended to convey. The 16 meaning of the word "unrestricted," as I 17 intended to use it here, is not restricted by 18 the Copyright Act because the fair use defense 19 offers that exception of the Copyright Act. 20 Q. So if that conduct, that is, 21 scanning, archiving, and presentation of 22 portions of works was found to be fair use, 23 regardless of security measures, it's your view 24 that that would result in a substantially 25 adverse impact on the potential market for</p>	<p style="text-align: right;">Page 199</p> <p>1 that would result in a substantially adverse 2 impact on the potential market for books? 3 A. If they were doing it exactly the 4 same as Google, that is not my view. But I 5 didn't intend to address that situation either. 6 I intended to address the situation where 7 they're doing it like Google except, except that 8 they're doing it themselves, and they're not 9 quite as diligent, or they're cutting some 10 corners, but nonetheless, they manage to fall 11 within the Google fair use ruling. 12 Q. You say it would result in a 13 substantially adverse impact on the potential 14 market for books. Do you mean that on balance 15 the effect would be negative? 16 A. We haven't discussed any positive 17 effects. 18 MR. BONI: Object to form. 19 Q. Does Google's current conduct with 20 respect to in-copyright books have any positive 21 effects on copyright-holders? 22 A. It could in some situations. 23 Q. Would the conduct you hypothesize in 24 Paragraph 8 have any positive impact on 25 copyright-holders?</p>
<p style="text-align: right;">Page 198</p> <p>1 books? 2 MR. BONI: Object to form. Joe, 3 that's mischaracterizing the nature of our 4 claims by leaving out the fact that we also 5 allege that the conduct engaged in by Google 6 includes distribution of the scans back to the 7 libraries. 8 Q. You can answer the question, Mr. 9 Edelman. 10 A. Again, you've inserted into the 11 question the hypothesis that the other sites 12 have no restriction as to snippet length or 13 quantity or what have you, and that certainly 14 makes the conclusions of Paragraph 8 even more 15 certain. If the other sites are offering 16 snippets of exceptional length, then I 17 definitely stand by the conclusion of 18 Paragraph 8. But even if we don't add that 19 additional hypothesis, I still stand by 20 Paragraph 8 as written. 21 Q. So is it your view, as expressed in 22 Paragraph 8, that if there were a dozen or 100 23 other enterprises doing in every respect exactly 24 what Google does with all of Google's security 25 measures and all of Google's resources, that</p>	<p style="text-align: right;">Page 200</p> <p>1 A. It might. We'd need to look at the 2 sites and their specific practices to see. 3 Q. By the "sites," you mean the future 4 sites that could come into being? 5 A. Precisely. 6 Q. Is the effect you hypothesize on 7 books in general or on particular books? 8 A. I meant to cover the full universe of 9 books that are subject to the scanning. 10 Q. The scanning by the future users? 11 A. Right. Although to be sure, in 12 principle, there might be some effect even on 13 books that were never scanned. The book that I 14 declined to write because I anticipated that it 15 would be scanned, not knowing that every single 16 one of the scanners would hate my book so much 17 that they wouldn't bother to scan it. It's the 18 threat of scanning and the threat of 19 distribution that has the preclusive effect, 20 discouraging the production of the book, for 21 example. 22 Q. Would the effect be the same for all 23 authors? 24 MR. BONI: Object to form. 25 A. I think there are some important</p>

<p style="text-align: right;">Page 201</p> <p>1 effects that would be the same, substantially</p> <p>2 the same for all authors. There might be some</p> <p>3 others that would differ in idiosyncratic ways.</p> <p>4 Q. How would those differ?</p> <p>5 A. There might be some authors for whom</p> <p>6 the snippet better captures the essence of the</p> <p>7 work than others, where the work must be read as</p> <p>8 a whole. There might be some authors who are so</p> <p>9 well known that they've already sold every</p> <p>10 possible copy they could sell, others who could</p> <p>11 benefit from visibility links to Google, others</p> <p>12 who would suffer because the online copy of</p> <p>13 their book would be a realistic substitute for</p> <p>14 purchasing the book.</p> <p>15 Q. Any other way?</p> <p>16 MR. BONI: Again, this is not what</p> <p>17 the witness is here to testify about. He's here</p> <p>18 to testify about security.</p> <p>19 MR. GRATZ: Well, I'm asking about</p> <p>20 his opinion that something would result in a</p> <p>21 substantially adverse impact on the potential</p> <p>22 market for books, and I want to figure out what</p> <p>23 he means by that.</p> <p>24 Q. So is there any other way that</p> <p>25 books -- that the conduct you hypothesize would</p>	<p style="text-align: right;">Page 203</p> <p>1 an expert about. He's not here to tell you</p> <p>2 whether in print or out of print differs.</p> <p>3 That's a legal question, and he is not here to</p> <p>4 opine about that area of this case. You really</p> <p>5 ought to stick to what he's proffered for.</p> <p>6 Q. Referring to Paragraph 8 of your</p> <p>7 report, Mr. Edelman, the last word in that</p> <p>8 paragraph is "books." Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. And I want to ask you a question</p> <p>11 about what books you are referring to by that</p> <p>12 reference in Paragraph 8 of your report. The</p> <p>13 substantially adverse impact you referred to in</p> <p>14 Paragraph 8 of your report on the potential</p> <p>15 market for books, does that substantially</p> <p>16 adverse impact, will it vary, depending whether</p> <p>17 the book is in print or out of print?</p> <p>18 MR. BONI: Object to form.</p> <p>19 A. It's not a question I thought about</p> <p>20 when drafting the report.</p> <p>21 Q. The substantially adverse --</p> <p>22 actually.</p> <p>23 Let me ask this: Do you have a view</p> <p>24 about it?</p> <p>25 A. Every book is in print when it's</p>
<p style="text-align: right;">Page 202</p> <p>1 differ in its effect from book to book?</p> <p>2 MR. BONI: Object to form.</p> <p>3 A. There probably are some books that</p> <p>4 are more amenable to being used in snippets.</p> <p>5 Others for which having the entire work is</p> <p>6 particularly important. Probably some you need</p> <p>7 in your bag, and some where you can accept an</p> <p>8 online substitute. There could be differences</p> <p>9 of this sort. I think these differences in</p> <p>10 general are smaller than the overall effect.</p> <p>11 Q. Would it matter to the amount of the</p> <p>12 adverse impact on the potential market for a</p> <p>13 book in the situation you hypothesized if that</p> <p>14 book was in print or out of print?</p> <p>15 MR. BONI: Object to form. He's not</p> <p>16 here as a fair use expert, Joe.</p> <p>17 MR. GRATZ: I'm not asking about fair</p> <p>18 use.</p> <p>19 MR. BONI: You are. That's a ---</p> <p>20 that's a legal -- you're calling for a legal</p> <p>21 conclusion there, and you know you are.</p> <p>22 Q. You can answer the question.</p> <p>23 MR. BONI: No, at this point, I'm</p> <p>24 going to cut it off. That's not what he's here</p> <p>25 to -- that's not what he's proffered himself as</p>	<p style="text-align: right;">Page 204</p> <p>1 published. The day I publish it, it's in print.</p> <p>2 The day I consider writing it, I'm planning for</p> <p>3 it to be in print for a while, so that I can</p> <p>4 sell some copies and be paid for my efforts in</p> <p>5 writing it. No one expects their book to be in</p> <p>6 print forever. You do expect it to be in print</p> <p>7 for a while. If digital copies reduced your</p> <p>8 ability to sell it when it's in print for a</p> <p>9 while, then you'll enjoy lesser revenue and</p> <p>10 lesser profit from selling it.</p> <p>11 So I would think it would affect all</p> <p>12 books. As to the guys who are dead, we can't</p> <p>13 motivate Ben Franklin to write any more books.</p> <p>14 No matter what we do with the Copyright Act,</p> <p>15 he's still dead, and he's not going to write any</p> <p>16 more books for us, be that as it may.</p> <p>17 Q. That means that with respect to books</p> <p>18 that are already out of print, there wouldn't be</p> <p>19 an impact one way or the other, as long as they</p> <p>20 were out of print at the time the scanning took</p> <p>21 place; is that right?</p> <p>22 MR. BONI: Object to form.</p> <p>23 A. That's beyond what I've thought about</p> <p>24 previously. There might be some factors I'm not</p> <p>25 considering.</p>

<p style="text-align: right;">Page 205</p> <p>1 MR. BONI: You should stick to what 2 you were -- 3 MR. GRATZ: Please don't interrupt 4 the witness. 5 MR. BONI: He was finished -- he was 6 finished, and I'm cautioning the witness to 7 testify about the subject matter of the expert 8 report and your qualifications. 9 Q. So, Mr. Edelman, that means that with 10 respect to books that are already out of print 11 at the time the hypothesized scanning took 12 place, the substantially adverse impact on the 13 potential market for those books couldn't occur 14 because they're already exited from the market; 15 is that right? 16 MR. BONI: Object to form. You can 17 answer. 18 A. I'm not sure. There could be -- 19 there could be effects that I haven't 20 considered. It's just so far outside of what 21 the expert report is about that I shouldn't 22 speculate. 23 Q. So you didn't consider the effect on 24 in-print versus out-of-print books in forming 25 the opinions set forth in your expert report?</p>	<p style="text-align: right;">Page 207</p> <p>1 A. Yes. 2 Q. If -- if the Google Library Project 3 is found to be a fair use, then books could, 4 likewise, in your view, be digitally copied, 5 distributed and displayed in their entirety 6 through licenses that include secured protocols 7 and a damages structure for breaches of those 8 protocols; is that also true? 9 A. Thanks to the breadth of the word 10 "could," it's true, but the reality is that the 11 Google Library Project would have no reason to 12 enter into a license that includes security 13 protocols, nor would any other site have reason 14 to enter into a license that includes security 15 protocols because they can instead take the 16 material without license and without security 17 protocols. 18 Q. What security terms do you 19 hypothesize? 20 A. My thinking here is guided by 21 approaches used in other sectors. For example, 22 the credit card network has quite well-developed 23 security rules as to what a merchant or bank 24 must do to secure this valuable material in 25 order to avoid causing harm to others in that</p>
<p style="text-align: right;">Page 206</p> <p>1 A. I considered all books taken as a 2 whole, taken collectively. 3 Q. Did you take any steps to quantify 4 the effect referred to in Paragraph 8? 5 A. I did not. 6 Q. The effect referred to in Paragraph 7 8, is it an effect that would result -- it's an 8 effect that would result from follow-on behavior 9 by third parties in the event of a ruling of a 10 certain sort in your view, not as a result of 11 Google's current actions; is that right? In 12 other words, you aren't opining here about the 13 effects of what Google has done to date? 14 A. I'm not opining on the effects of 15 what Google has done to date. It's about 16 something else, either what Google might do in 17 the future or what others might do in the 18 future. 19 Q. Turning to Paragraph 9 of your 20 report, you say "If the Google Library Project 21 is found not to be a fair use, then books could 22 be digitally copied, distributed and displayed 23 through licenses that include security protocols 24 and a damages structure for breaches of those 25 protocols." Do you see that?</p>	<p style="text-align: right;">Page 208</p> <p>1 ecosystem. So there are specific actions that 2 must be taken, specific audits, specific 3 technologies that must be used, and then there 4 are a set of damages, both actual damages and 5 liquidated damages in the event of breach, 6 compensation to be paid to those who suffer harm 7 as a result of a breach. 8 Q. And those damages are -- in your 9 previous answer are you referring to something 10 called PCI? 11 A. PCI is one of the requirements of 12 that web of contract, although there are others 13 beyond PCI. PCI largely refers to the technical 14 standards, but then there's a set of contracts. 15 If you fail your PCI, if you had a breach during 16 a period where you hadn't complied with your 17 PCI, then you must pay this much money to these 18 victims. 19 Q. Are you aware of any such agreements 20 in The Book Space? 21 A. My understanding is that the 22 proposed, now defunct settlement agreement in 23 this case had provisions in that vein. 24 Q. Are you aware of any others? 25 A. In the related context of digital</p>

<p style="text-align: right;">Page 209</p> <p>1 music and digital movies, my understanding is 2 that there are confidential contracts typically 3 between the right-holders and the technology 4 providers offering certain compensation in the 5 event of certain breaches. 6 Q. Do you know the terms of those 7 contracts? 8 A. Some of them may be publicly 9 available. My understanding was that most of 10 them are confidential and not readily available. 11 Q. I'm not asking whether they are 12 available. I'm asking whether you know the 13 terms of any of those contracts governing the 14 storage of digital music or movies? 15 A. I haven't had the opportunity to read 16 the contract. I know about them only 17 secondhand. 18 Q. And what you know secondhand is that 19 they include liquidated damages for security 20 breaches? 21 A. They include the kinds of methods 22 just discussed, some combination of liquidated 23 damages, perhaps actual damages, perhaps 24 specific actions to be taken, specific 25 technologies to be implemented.</p>	<p style="text-align: right;">Page 211</p> <p>1 opinions set forth in the first sentence of 2 Paragraph 9 of your report? 3 A. The first sentence there discusses 4 what could be done, and to see what could be 5 done, I need look no further than the proposed 6 settlement agreement in this case and consider 7 what I as an attorney or a business person might 8 do if I were trying to solve this problem. 9 Q. Did you do a survey of contracts 10 governing the digital storage of books in 11 connection with forming the opinions you 12 expressed in your report? 13 A. I did not do such a survey. 14 Q. Have you ever seen such a contract, 15 setting aside the settlement agreement in this 16 case that was rejected by the court? 17 A. I'm not sure. 18 Q. Do any come to mind? 19 A. Nothing comes to mind. 20 Q. Were there any on which you relied in 21 forming the opinions set forth in your report? 22 A. No. 23 Q. Do you know whether any such 24 contracts include the security term which you 25 hypothesize in the first sentence of</p>
<p style="text-align: right;">Page 210</p> <p>1 Q. And how do you know that? 2 A. I'm not sure. I've a few 3 possibilities in mind. People who might have 4 told me this previously. 5 Q. What are those people? 6 A. My contact at Universal Music Group 7 pursuant to the cases previously discussed is 8 the general counsel at Universal Music Group, 9 and I think his name is a Mr. Geller. 10 Q. Is that Harvey Geller? 11 A. That's right. It might be from him. 12 It might be from someone else. It might be from 13 discussions at an executive education program 14 here on the HBS campus where I spent some time 15 with music industry participants. 16 Q. Did you rely on your conversations 17 with Harvey Geller in forming your opinions set 18 forth in Paragraph 9 of your report? 19 A. No. 20 Q. Did you rely on any discussions with 21 any content industry participant in forming the 22 opinions set forth in Paragraph 9 of your 23 report? 24 A. No. 25 Q. On what did you rely in forming the</p>	<p style="text-align: right;">Page 212</p> <p>1 Paragraph 9? 2 A. I guess I don't know for sure. 3 Q. Do you know whether any include the 4 damages term which you hypothesize in the first 5 sentence of Paragraph 9? 6 A. I don't know for sure. 7 Q. Are you aware of something called the 8 Google Books Partner Program? 9 A. Yes. 10 Q. What is it? 11 A. That's a program whereby publishers 12 can provide copies of their books to Google for 13 display in any of several versions to users who 14 enter relevant searches. 15 Q. Is it your understanding that there 16 are more than 45,000 publishers participating in 17 that program? 18 A. I'm not sure. 19 Q. Do you know the terms of any of the 20 Google Books Partner Program agreement? 21 A. I'm not sure. If the contract is 22 posted. I might have read it, but I don't 23 recall one way or the other. 24 MR. GRATZ: I'd like that marked as 25 Exhibit 19, this document.</p>

<p style="text-align: right;">Page 213</p> <p>1 (Document marked as Exhibit No. 15 2 for identification.) 3 Q. Have you seen this document before, 4 Mr. Edelman? 5 A. I think I've seen this at least once, 6 yes. 7 Q. What is it? 8 A. It says it's the "Google Books 9 Partner Program standard terms and conditions." 10 Q. Does Exhibit 15 include the security 11 and damages terms that you hypothesize in 12 Paragraph 9 of your report? 13 A. It includes at least some, for 14 example, Paragraph 4. 15 Q. In Paragraph 4 says that, "Google 16 will use commercially reasonable efforts to 17 limit the number of pages viewed and to disable 18 right-click cut, copy and paste functions, 19 provided that Google does not guarantee that its 20 efforts to prevent or limit the actions stated 21 above will in every instance be effective." Is 22 that right? 23 A. Yes. 24 Q. Does that differ from the terms you 25 have hypothesized would be negotiated in</p>	<p style="text-align: right;">Page 215</p> <p>1 contract. 2 Q. So when you say in Paragraph 9 that 3 books could be copied through licenses that 4 include a damages structure for breaches of 5 those protocols, do you mean anything other than 6 include promises not to breach those protocols 7 which could then result in contract expectation 8 damages in a breach of contract suit? 9 MR. BONI: Object to form. 10 Mischaracterizes his testimony. 11 A. I did envision something other than 12 expectation damages. I envisioned something 13 that would look more like liquidated damages due 14 to the significant difficulty of proving out 15 one's expectation damages, but in principle, the 16 parties could agree to do it either way. It 17 would be a negotiation between them, and I'm not 18 going to tell them where they have to end up in 19 that negotiation. 20 Q. Do you have a view as to what the 21 probability would be that the parties to a 22 license of the -- the license -- strike that. 23 Do you have a view as to what the 24 probability would be that the parties to the 25 license you identify in Paragraph 9 of your</p>
<p style="text-align: right;">Page 214</p> <p>1 Paragraph 9 of your report? 2 A. Well, this is an agreement negotiated 3 between Google and a publisher. The publisher 4 gives up some rights. On the other hand, they 5 stand to gain advertisement revenue from Google 6 pursuant to Section 8 and perhaps visibility, 7 perhaps some other benefits. So it's a contract 8 negotiated between two parties. This is a fine 9 example of the kind of outcome that might 10 result. 11 Q. So in your view -- actually let me 12 ask this. 13 Does Exhibit 15 include the damages 14 terms that you hypothesize in Paragraph 9 of 15 your report? 16 A. It doesn't include explicit terms to 17 that effect. On the other hand, it includes a 18 specific commitment, commercially reasonable 19 efforts, words that have meaning. If it should 20 turn out that Google used less than commercially 21 reasonable efforts, and if damages ensued, you'd 22 expect the relying party to be able to bring 23 suit for the damages that resulted from that 24 breach, subject to any exclusions or waivers 25 that might be provided elsewhere in the</p>	<p style="text-align: right;">Page 216</p> <p>1 report would, in fact, negotiate inclusion of 2 liquidated damages as a term of the contract? 3 A. Well, I think they just might because 4 Google is so confident in its excellent security 5 that they would view that kind of promise as 6 cost free. If we are invaded by martians or 7 someone hacks our server, we'll give you a 8 million dollars, and neither of those things is 9 going to happen. We're so confident in our 10 engineers, that we're willing to put a million 11 dollars behind it. 12 Q. Is Exhibit 15 a counter example to 13 that hypothesis, in that it does not include 14 provision for liquidated damages? 15 A. You know, this is the standard terms 16 and conditions. Whether every publisher gets 17 this, I'm not sure. I wouldn't be surprised if 18 a big publisher, a publisher with works that 19 Google particularly wanted, a publisher that 20 possessed some market power, frankly, was able 21 to insist on terms superior to these standard 22 terms. 23 Q. But it's not your view that every 24 copyright-holder would have the power to insist 25 on such terms in the negotiation you hypothesize</p>

<p style="text-align: right;">Page 217</p> <p>1 in Paragraph 9 of your report?</p> <p>2 MR. BONI: You mean with Google or</p> <p>3 with anybody? It's a very vague question,</p> <p>4 unless you limit it.</p> <p>5 Q. With anybody?</p> <p>6 A. Yeah, if there were a marketplace of</p> <p>7 many companies all needing permission to scan</p> <p>8 books or digitally post books, some of whom had</p> <p>9 great difficulty getting traction, I wouldn't be</p> <p>10 surprised if the ones having the most difficulty</p> <p>11 were willing to put their money behind it, some</p> <p>12 kind of a performance bond or what have you.</p> <p>13 There have been sectors in which this sort of</p> <p>14 thing has occurred where performance bonds</p> <p>15 actually are quite routine for folks to</p> <p>16 demonstrate their capability and the adequacy of</p> <p>17 their systems.</p> <p>18 Q. Has it occurred with respect to books</p> <p>19 to date?</p> <p>20 A. There haven't been that many</p> <p>21 different companies wanting to license book</p> <p>22 content to date, so that sort of competition</p> <p>23 hasn't occurred with books to date. I was</p> <p>24 thinking of construction project performance</p> <p>25 bonds and real estate agent performance bonds</p>	<p style="text-align: right;">Page 219</p> <p>1 each one wanted and was willing to give up; is</p> <p>2 that right?</p> <p>3 MR. BONI: Object to form.</p> <p>4 A. It might. It might be that if Google</p> <p>5 needs to enter into these contracts with</p> <p>6 thousands of publishers, Google's standard</p> <p>7 offer, their stock offer, their opening offer</p> <p>8 and the standard terms and conditions would</p> <p>9 actually become more generous because they</p> <p>10 warned a large number of publishers to accept.</p> <p>11 Q. Do you know what proportion of the</p> <p>12 publishers in the Google Books Partner Program</p> <p>13 are participating pursuant to the terms in</p> <p>14 Exhibit 15 as opposed to other terms?</p> <p>15 A. I don't know.</p> <p>16 Q. Would that fact affect your last</p> <p>17 answer or rather the answer before the answer --</p> <p>18 let me ask a slightly better question.</p> <p>19 Would that fact affect your view of</p> <p>20 the extent to which publishers would in the</p> <p>21 situation you hypothesize in Paragraph 9 of your</p> <p>22 report negotiate for and receive security terms?</p> <p>23 A. It might. But one shouldn't read too</p> <p>24 much into the past because publishers' decision</p> <p>25 to accept the standard terms document in the</p>
<p style="text-align: right;">Page 218</p> <p>1 and the myriad of other contexts in which</p> <p>2 service providers actually do put liquidated</p> <p>3 damages in their contract in order to prove</p> <p>4 their seriousness about providing the required</p> <p>5 performance.</p> <p>6 Q. So it's your view that in the event</p> <p>7 of competition between multiple service</p> <p>8 providers, a market might result in which</p> <p>9 liquidated damages clauses were included in the</p> <p>10 licenses you discussed in Paragraph 9, but they</p> <p>11 might or might not, depending on the market</p> <p>12 dynamics?</p> <p>13 A. I think that's largely consistent</p> <p>14 with my views. To what extent it requires</p> <p>15 competition and many services scanning or</p> <p>16 digitally producing books, I'm not so sure, but</p> <p>17 I do think that if a license were required, if</p> <p>18 agreement from the publisher and/or author was</p> <p>19 required, it would be more likely that the terms</p> <p>20 would end up including provisions favorable to</p> <p>21 the publisher and/or author, and the provisions</p> <p>22 could well include these sorts of security</p> <p>23 benefits.</p> <p>24 Q. But that outcome would depend on the</p> <p>25 particular parties to that negotiation and what</p>	<p style="text-align: right;">Page 220</p> <p>1 past could reflect a variety of factors, causing</p> <p>2 them to accept it even when in reality they</p> <p>3 would have preferred a document rather</p> <p>4 different.</p> <p>5 Q. Does the acceptance of Exhibit 15 by</p> <p>6 many publishers suggest to you that the</p> <p>7 publishers regard the bargain set forth in</p> <p>8 Exhibit 15 as one that is satisfactory?</p> <p>9 MR. BONI: Objection to form.</p> <p>10 There's no foundation for that question, Joe.</p> <p>11 A. That's not the conclusion that I</p> <p>12 would draw from that fact.</p> <p>13 Q. Would you draw any conclusion from</p> <p>14 that fact?</p> <p>15 A. No, I wouldn't -- I would draw a</p> <p>16 different conclusion from that fact.</p> <p>17 Q. What conclusion would you draw?</p> <p>18 A. I would find it evidence of Google's</p> <p>19 market power.</p> <p>20 MR. GRATZ: I'd like to mark as</p> <p>21 Exhibit 16 this document. Actually before I</p> <p>22 mark this as Exhibit 16.</p> <p>23 Q. Are you familiar with something</p> <p>24 called Amazon Search Inside the Book?</p> <p>25 A. Yes.</p>

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<p>1 Q. What is it?</p> <p>2 A. It's a program whereby publishers can</p> <p>3 provide copies of their book contents to be</p> <p>4 presented on the Amazon website for users to</p> <p>5 browse or search.</p> <p>6 Q. Have you ever seen the agreement</p> <p>7 governing the terms under which Amazon may use</p> <p>8 the books which are submitted through Search</p> <p>9 Inside the Book?</p> <p>10 A. I think I looked at it once.</p> <p>11 MR. GRATZ: Mark this as Exhibit 16.</p> <p>12 (Document marked as Exhibit No. 16 for</p> <p>13 identification.)</p> <p>14 Q. Is this the agreement governing</p> <p>15 Amazon's use of books submitted through Search</p> <p>16 Inside the Book?</p> <p>17 A. It seems to be. It seems to be at</p> <p>18 least the standard version, and what variance</p> <p>19 might exist, I don't know.</p> <p>20 Q. Does it include the security terms</p> <p>21 that you hypothesize in Paragraph 9 of your</p> <p>22 report?</p> <p>23 A. It includes a portion of them.</p> <p>24 Q. How do the terms of Exhibit 16 differ</p> <p>25 from the agreement that you hypothesize in</p>	<p>1 Do you know how many books are in</p> <p>2 Search Inside the Book by Amazon?</p> <p>3 A. Quite a lot. But I don't know</p> <p>4 specifically.</p> <p>5 Q. Does the existence of Exhibit 16 as</p> <p>6 the terms by which those books are digitized,</p> <p>7 stored and shown to the public change any of the</p> <p>8 views expressed in your report?</p> <p>9 A. No.</p> <p>10 Q. Is Exhibit 16 the sort of agreement</p> <p>11 that you are referring to in the first sentence</p> <p>12 of Paragraph 9 of your report?</p> <p>13 A. It's the sort of agreement; albeit,</p> <p>14 not with the substantive terms that I was</p> <p>15 anticipating. It's a contract between the right</p> <p>16 parties. It has the right kind of title on it.</p> <p>17 Q. What reason do you have to think that</p> <p>18 in the future parties would bargain for</p> <p>19 different terms than they have in Exhibits 15</p> <p>20 and 16?</p> <p>21 A. In the context of Exhibits 15 and 16,</p> <p>22 these are books in print for which the publisher</p> <p>23 might reasonably expect to sell more if they go</p> <p>24 along with the contracts provided in 15 and 16.</p> <p>25 The publisher at least gets something; namely,</p>
Page 222	Page 224
<p>1 Paragraph 9 of your report?</p> <p>2 A. Certainly the substantive commitment</p> <p>3 is rather narrow here in Exhibit 16. Amazon</p> <p>4 will employ available technologies to hinder</p> <p>5 downloading. But it's something. It says</p> <p>6 they'll do something, and if they don't, you</p> <p>7 could try to sue them for your actual damages</p> <p>8 that resulted from that breach.</p> <p>9 Q. Does it include liquidated damages</p> <p>10 for breach?</p> <p>11 A. I don't see any liquidated damages.</p> <p>12 I do see the remedy that at least an author or</p> <p>13 publisher can take their books out which is a</p> <p>14 benefit. Better than nothing, from their</p> <p>15 perspective.</p> <p>16 Q. Do you consider that an important</p> <p>17 remedy for an author or publisher?</p> <p>18 A. It's a limited remedy. You know, one</p> <p>19 shouldn't be too effusive in the praise, but the</p> <p>20 alternative is even worse.</p> <p>21 Q. The alternative being the provider</p> <p>22 being deaf to requests for removal?</p> <p>23 A. Correct.</p> <p>24 Q. Does the existence of Exhibit 16 as</p> <p>25 an -- actually strike that.</p>	<p>1 they get the possibility of more sales, thanks</p> <p>2 to these examples being available.</p> <p>3 In contrast, as to older books for</p> <p>4 which there is less likelihood of additional</p> <p>5 sales, maybe books out of print, it's harder to</p> <p>6 see what the publisher's upside is. Furthermore</p> <p>7 here, the publisher gets to choose which</p> <p>8 specific books they want to do it for one by</p> <p>9 one, opting in; whereas, in other contexts, the</p> <p>10 books are chosen by someone else, not by the</p> <p>11 publisher.</p> <p>12 Q. In your previous answer, are you</p> <p>13 distinguishing between a program like Amazon</p> <p>14 Search Inside the Book and unrestricted fair use</p> <p>15 of books or between a program like Amazon Search</p> <p>16 Inside the Book and a future in which the Google</p> <p>17 Library Project is found not to be a fair use?</p> <p>18 MR. BONI: Object to form.</p> <p>19 A. I'm getting a little bit muddled</p> <p>20 here. I think maybe both of those, but there</p> <p>21 might be some part of it that only makes sense</p> <p>22 in one or the other.</p> <p>23 Q. Let me ask this: In the first</p> <p>24 sentence of Paragraph 9 of your report, you're</p> <p>25 discussing the situation in which the Google</p>

<p style="text-align: right;">Page 225</p> <p>1 Library Project is found not to be a fair use; 2 is that right? 3 A. Yes. 4 Q. And you're hypothesizing certain 5 terms that would be bargained for as between 6 parties who wanted to make use of the books and 7 copyright-holders of those books in that 8 circumstance; is that right? 9 A. Yes. 10 Q. The terms that you hypothesize in 11 that hypothetical negotiation, in the event the 12 Google Library Project is found not to be a fair 13 use, do they differ from the terms set forth in 14 Exhibit 16? 15 MR. BONI: Object to form. 16 A. Who's to say what the parties might 17 come up with, but the most pro-publisher, 18 pro-author of those terms would certainly differ 19 significantly. 20 Q. And the most pro -- the most pro-user 21 or most pro-Amazon version of those terms would 22 differ from these terms as well? 23 A. I suppose there's a spectrum, and you 24 could go either way on the spectrum. 25 Q. Do you know what the probability --</p>	<p style="text-align: right;">Page 227</p> <p>1 the first sentence of Paragraph 9 of your report 2 would result in precisely the terms set forth in 3 Exhibit 15 or precisely the terms set forth in 4 Exhibit 16? 5 A. That could happen. 6 Q. Indeed, the terms could be worse for 7 the copyright-holders than these or they could 8 be better? 9 A. They could be worse or they could be 10 better. 11 Q. In your view, is one of the factors 12 that would make them better for 13 copyright-holders having an organization making 14 the use that was more sensitive to 15 copyright-holder concerns? Would that make it 16 more likely that the damages and security terms 17 would be in the agreement? 18 A. If the service provider needed this 19 agreement, because absent the agreement they 20 couldn't provide the service they aspire to 21 provide, then they would be more likely to come 22 with hat in hand, willing to bend over backwards 23 in order to make sure that they got the contract 24 that they needed. 25 Conversely, if they thought we don't</p>
<p style="text-align: right;">Page 226</p> <p>1 so it could be -- it could be -- the negotiation 2 could end up anywhere on the spectrum, is that 3 right, between the most anti-copyright-holder 4 terms and the most pro-copyright-holder terms; 5 is that right? 6 A. It could end up along the spectrum, I 7 suppose, anywhere, although there are factors 8 that might make it more likely to end up on one 9 end or the other end. 10 Q. What is the probability of it ending 11 up on the most anti-copyright-holder end? 12 A. The spectrum doesn't even necessarily 13 have an end. You can always go further, but I 14 think the likelihood is that it would end up 15 somewhere in the middle; whereas, when I look at 16 15 and 16, they look like unilateral contracts 17 drafted by the service providers. They seem to 18 have an awful lot of disclaimers of liability 19 and disclaimers of warranty. They look like 20 they were drafted by Google's lawyers and 21 Amazon's lawyers. I think they look like that 22 because they were, and those lawyers did a good 23 job of representing their clients' interest. 24 Q. So you can't rule out the possibility 25 that the hypothetical negotiation set forth in</p>	<p style="text-align: right;">Page 228</p> <p>1 really need this because it's just fair use 2 anyway, we can do what we want; if we get a 3 contract, that's great, if not, that's okay too, 4 well, then they'd be less likely to agree to 5 contract terms that were on the side of the 6 publishers. 7 Q. Do you think the identity of the 8 service provider matters in that a service 9 provider that was affiliated with 10 copyright-holders, for example, would be more 11 likely to include a security term in liquidated 12 damages? 13 MR. BONI: Object to form. 14 A. I think it's probably true that a 15 company that comes from the world of copyright, 16 and has as its constituents its management team, 17 its attorneys, folks who come from that world 18 and that view, would be more likely to be 19 sensitive of the concerns of those constituents. 20 MR. GRATZ: Mark this as Exhibit 17. 21 (Document marked as Exhibit No. 17 for 22 identification.) 23 MR. BONI: Seventeen? 24 MR. GRATZ: Yes, 17. 25 Q. Do you recognize what's been marked</p>

<p style="text-align: right;">Page 229</p> <p>1 as Exhibit 17?</p> <p>2 A. I don't.</p> <p>3 Q. Do you know -- are you aware of</p> <p>4 something called Back In Print?</p> <p>5 A. I think so. But I'm not sure</p> <p>6 specifically. It's well beyond anything I</p> <p>7 opined on in this report.</p> <p>8 Q. Are you aware that the Authors Guild</p> <p>9 is a party to this lawsuit?</p> <p>10 A. Yes.</p> <p>11 Q. And that's the party for which you --</p> <p>12 in favor of whom you submitted your expert</p> <p>13 report; is that right?</p> <p>14 MR. BONI: Object to form.</p> <p>15 A. Yes.</p> <p>16 MR. BONI: On its face for all</p> <p>17 plaintiffs, not one as opposed to any other, but</p> <p>18 if that's the import of your question, Joe.</p> <p>19 MR. GRATZ: No.</p> <p>20 MR. BONI: You said "the party," on</p> <p>21 whose behalf.</p> <p>22 MR. GRATZ: Sorry. One of the</p> <p>23 parties on whose behalf.</p> <p>24 MR. BONI: Right, I understand. I</p> <p>25 just want it to be clear.</p>	<p style="text-align: right;">Page 231</p> <p>1 contemplating in Paragraph 9 or what we've been</p> <p>2 discussing in Exhibits 15 and 16.</p> <p>3 Q. In that this is a service to sell</p> <p>4 eBooks rather than a service to help people find</p> <p>5 books?</p> <p>6 MR. BONI: Object to form. That</p> <p>7 wholly mischaracterizes the contract which says</p> <p>8 both print copies and eBook copies. This is not</p> <p>9 an exclusively eBook program. I mean, let's be</p> <p>10 accurate here.</p> <p>11 Q. Let me ask some foundational</p> <p>12 questions. eBooks are electronic books; is that</p> <p>13 right?</p> <p>14 A. Yes.</p> <p>15 Q. And eBooks are sold through</p> <p>16 electronic means, at least today; is that right?</p> <p>17 A. Yes.</p> <p>18 Q. Through -- through computer networks</p> <p>19 of one kind or another?</p> <p>20 A. Yes.</p> <p>21 Q. And eBook purchases take place</p> <p>22 frequently through eCommerce websites; is that</p> <p>23 right?</p> <p>24 A. Yes.</p> <p>25 Q. And eBooks are stored on those</p>
<p style="text-align: right;">Page 230</p> <p>1 Q. The author -- that same Authors Guild</p> <p>2 is one of the parties to the Exhibit 17; is that</p> <p>3 right?</p> <p>4 A. Yes.</p> <p>5 Q. Exhibit 17 is an agreement by which</p> <p>6 an entity called iUniverse, along with the</p> <p>7 Authors Guild, can, among other things, make</p> <p>8 certain books of signatories to this agreement</p> <p>9 available as eBooks; is that right?</p> <p>10 A. So it seems.</p> <p>11 Q. Does Exhibit 17 include any security</p> <p>12 terms?</p> <p>13 MR. BONI: When you say --</p> <p>14 MR. GRATZ: There's a new question</p> <p>15 pending.</p> <p>16 A. I don't see any security terms.</p> <p>17 Q. Are there any liquidated damages</p> <p>18 terms in exhibit -- are there any liquidated</p> <p>19 damages terms in Exhibit 17?</p> <p>20 A. I don't see any.</p> <p>21 Q. Do the terms of Exhibit 17 differ</p> <p>22 from the terms you hypothesize in Paragraph 9 of</p> <p>23 your report?</p> <p>24 A. As I understand it, so far this is</p> <p>25 quite a different service than what I was</p>	<p style="text-align: right;">Page 232</p> <p>1 websites, and access is given to those eBooks</p> <p>2 only after payment is made; is that right?</p> <p>3 A. Yes.</p> <p>4 Q. Thus eBooks present a similar</p> <p>5 security concern as any other service that makes</p> <p>6 available portions of books under certain</p> <p>7 circumstances to certain people; is that right?</p> <p>8 A. Now I'm no longer with you.</p> <p>9 Q. So do eBooks -- does the offering of</p> <p>10 eBooks bring with it security concerns?</p> <p>11 A. It does, but they're different</p> <p>12 security concerns than the security concerns</p> <p>13 associated with snippets.</p> <p>14 Q. They relate to making sure that only</p> <p>15 the people who should have access to a given</p> <p>16 work or portion thereof have access to a given</p> <p>17 work or portion thereof; is that right?</p> <p>18 A. In the eBooks that I'm familiar with,</p> <p>19 there's much less of a notion of portion. A</p> <p>20 user who buys an eBook has access to the</p> <p>21 entirety of the eBook. Typically, the eBook is</p> <p>22 a single encrypted file which is provided in its</p> <p>23 totality to the user for deployment to an eBook</p> <p>24 reader, and that's the end of that. That</p> <p>25 security is pretty well understood at this point</p>

<p style="text-align: right;">Page 233</p> <p>1 thanks to experience with similar technologies 2 in music and movies. 3 Q. The provider of eBooks needs to store 4 the entire book on its servers; is that right? 5 A. Yes. 6 Q. It's at least possible that the book 7 could be stolen from the servers by one who 8 intrudes upon those servers; is that right? 9 A. It could happen. 10 Q. Do you consider that more or less 11 likely than the taking of books from one who 12 stores those books who is not an eBook provider? 13 A. I think the snippet provider is more 14 vulnerable than the seller of eBooks. 15 Q. Why? 16 A. The snippet provider is offering in 17 all likelihood orders of magnitude more 18 transactions, giving away a very, very large 19 number of free snippets, versus selling a more 20 modest number of eBooks. Furthermore, giving 21 things away at a cost of zero, the structure of 22 the web services that provide that tool uses 23 ordinary HTML images, JavaScript, maybe Flash, 24 probably not, uses the most standard and 25 insecure of web-based systems; whereas, the</p>	<p style="text-align: right;">Page 235</p> <p>1 installed. 2 MR. GRATZ: We can change the tape. 3 THE VIDEOGRAPHER: Here ends Tape 5. 4 Off the record at 4:24 p.m. 5 (Brief recess.) 6 THE VIDEOGRAPHER: Here begins Tape 7 No. 6 in today's deposition of Benjamin Edelman. 8 Back on the record. It's 4:31 p.m. 9 Q. Turning to Paragraph 11 of your 10 report, Paragraphs 11 and 12 discuss the current 11 state of book -- eBook piracy; is that right? 12 A. Yes. 13 Q. This eBook piracy discussed in 14 Paragraphs 11 and 12 isn't piracy that's 15 occurring via Google Books; is that right? 16 A. That's true. 17 Q. And it isn't a risk that Google Books 18 created; is that right? 19 A. That's true. 20 Q. And the contents of Paragraph 11 and 21 12 would be true whether or not Google Books 22 existed; is that right? 23 A. That's true, although it's possible 24 that Google Books will make the problem worse. 25 Q. The files you're referring to, the</p>
<p style="text-align: right;">Page 234</p> <p>1 provision of an encrypted eBook uses highly 2 specialized secure file formats designed 3 specifically for that purpose. 4 Q. Do any popular eBook formats not use 5 encryption? 6 A. There are some that don't use 7 encryption. 8 Q. Can one buy unencrypted eBooks from 9 Barnes & Noble? 10 A. I don't recall one way or the other. 11 Q. Can one buy unencrypted eBooks from 12 the Google eBooks store? 13 A. I'm sure there are some. 14 Q. And with respect to those, do the 15 risks associated with running that sort of 16 service similarly -- are they comparable to 17 running a snippet-based or indexing service? 18 A. Even then, notwithstanding that the 19 file itself is unencrypted, the tasks are just 20 rather different to provide a single, large file 21 for deployment to the user's reader versus 22 providing a snippet in the browser, providing, 23 to be sure, orders of magnitude more snippets on 24 a per-second basis, just a voluminous task, 25 limiting the kinds of security that can be</p>	<p style="text-align: right;">Page 236</p> <p>1 .mobi files, those are files that did not come 2 from Google Books; is that right? 3 A. That's true. 4 Q. Do the pirate sites referred to in 5 Paragraphs 11 and 12 offer snippets or whole 6 books? 7 A. Whole books. 8 Q. Why whole books instead of just 9 snippets? 10 A. Once you're a pirate, there's no need 11 to use snippets. 12 Q. Is it because the snippets aren't a 13 substitute for the whole books? 14 MR. BONI: Object to form. 15 A. In some circumstances I'm sure the 16 snippets are. In others, they might not be. 17 Q. In what circumstances would they be? 18 A. When one just needs a quote, needs to 19 find the book that has a certain distinctive 20 phrase, in certain reference contexts, of 21 course, whether or not those reference contexts 22 would be included in the Google program as 23 currently envisioned. There are other contexts 24 in which snippets could be sufficient. 25 Q. Do you know whether any pirated books</p>

<p style="text-align: right;">Page 237</p> <p>1 have ever come from Google's scans? 2 A. I don't know. 3 Q. Turning to Paragraph 13 of your 4 report, it says, "If Google's conduct is found 5 to be a fair use and others engage in similar 6 conduct, the risk is created of book 7 redistribution through piracy." By "similar 8 conduct" do you mean scanning, archiving and the 9 presentation of the portions of books through a 10 web service? 11 A. Yes. 12 Q. Turning to Paragraph 14, you discuss 13 the risk that pirates could extract book copies 14 through defects in the security of a provider's 15 systems; is that right? 16 A. Yes. 17 Q. Is that a risk that, likewise, 18 applies to Amazon's Search Inside the Book 19 service? 20 A. It does. 21 Q. Is it inherent in any sort of digital 22 storage of a digitized book that makes portions 23 of that book available, either sort of -- or 24 makes the whole book available to those who have 25 purchased it?</p>	<p style="text-align: right;">Page 239</p> <p>1 that would be negotiated is a subject that we 2 discussed previously, right? 3 A. Right. 4 Q. Turning to Paragraph 16, you 5 discussed the risk that someone could use a 6 staff member's user name and password to access 7 books; is that right? 8 A. Yes. 9 Q. And that would happen by stealing the 10 service provider's staff member's user name and 11 password and then using it, right? 12 A. That's right. 13 Q. Is the risk you discussed in 14 Paragraph 16 a risk which could be mitigated by 15 two-factor authentication? 16 A. That would mitigate the risk. It 17 wouldn't eliminate it, but it would make some 18 progress. 19 Q. What is two-factor authentication? 20 A. Two-factor authentication is a 21 security practice whereby a user is verified 22 using two distinct, distinctive characteristics, 23 a password perhaps being one, but another also 24 being required. 25 Q. An example of one of those would be a</p>
<p style="text-align: right;">Page 238</p> <p>1 A. With the others that we're 2 discussing, for example, Amazon Search Inside 3 the Book or those that sell books reflect a 4 contract, an agreement between the rights-holder 5 that owns rights in the books and the service 6 providers that's distributing it. 7 In contrast, this section 8 contemplates a finding of fair use and others 9 beginning to engage in similar conduct without 10 needing to get that permission, and so the 11 quality and caliber and capability of the folks 12 engaged in this task could be quite different. 13 Q. Does the risk of extraction through 14 defects in the security of a provider's system 15 necessarily depend on whether or not there is an 16 agreement in place regarding security? 17 MR. BONI: Object to form. 18 A. It's not that the agreement itself 19 changes the risks, but that agreements might be 20 entered into only with those whose risks are 21 appropriate, for example, because of their 22 higher level of capability or their higher level 23 of care that they promised to exercise. 24 Q. And the circumstances in which those 25 agreements would be entered into and the terms</p>	<p style="text-align: right;">Page 240</p> <p>1 one-time code number that appears on a key chain 2 sized screen and changes every once in a while; 3 is that right? 4 A. That's an example. 5 Q. And so the risk hypothesized in 6 Paragraph 16 would be one that service providers 7 who did not use two-factor authentication 8 properly could be subject to; is that right? 9 A. Even two-factor authentication, 10 depending on how it's implemented, could still 11 be subject to this risk, but the risk is more 12 severe when a vendor uses only one-factor 13 authentication. 14 Q. And two-factor authentication would 15 still be subject to this risk because somebody 16 could steal an employee's physical key chain as 17 well as stealing their user name and password; 18 is that right? 19 A. If the second factor was, in fact, a 20 physical key chain, if it was something easier 21 to steal or easier to impersonate, tell me the 22 name of your first pet, something like that, or 23 you're logging in from a computer I recognize, 24 but maybe the attacker can impersonate that 25 computer, it might still be possible.</p>

<p style="text-align: right;">Page 241</p> <p>1 Q. Turning to Paragraph 17, it says, 2 "Fourth, a rogue employee could intentionally 3 redistribute book copies." Is that true of any 4 electronic system to which employees of an 5 organization have access? 6 MR. BONI: Object to form. 7 A. It's true that any employee with 8 access to digital works could potentially 9 distribute them. However, in general, employees 10 only have access to the works licensed by their 11 employer for their distribution or resale; 12 whereas, this section as detailed in 13 Paragraph 13 is about companies that might begin 14 to redistribute books pursuant to a finding of 15 fair use and without permission from the 16 rights-holders, an important difference that 17 would greatly expand the number of employees who 18 might potentially have access. 19 Q. Are you aware of any circumstance in 20 which a rogue employee has distributed copies of 21 books from a book-service provider? 22 A. I'm not aware of anything responsive 23 to that specific request. 24 Q. How can that risk be mitigated? 25 A. One way to mitigate is to allow</p>	<p style="text-align: right;">Page 243</p> <p>1 were to exist, but you're right that it's not 2 there. 3 Q. Where would we look for it? 4 A. We're talking about a class of 5 hundreds of thousands of works of market value, 6 God knows how much. I'd want to know how Steven 7 Spielberg secures the pre-release copies of his 8 next big movie, and there, I bet the contract 9 between Spielberg and his movie company and the 10 guy who drives the truck with the master print 11 actually does say something about the way that 12 truck has to be locked and the GPS to be 13 installed on the roof of the truck and the 14 background check required for the driver. I 15 would expect that all of those sorts of things 16 would be discussed in that contract. 17 Q. What's the basis for your previous 18 answer? 19 A. I've read a little bit about that 20 actually during the transition to digital movie 21 distribution, rather than movies being loaded 22 onto trucks. A lot of these questions were 23 reopened and were the subject even of the 24 Wall Street Journal style news coverage. 25 Q. What did you read?</p>
<p style="text-align: right;">Page 242</p> <p>1 rights-holders in books to approve the specific 2 vendors who are holding and distributing their 3 works. 4 Q. How is that -- sorry. 5 A. For example, pursuant to a contract, 6 and the contract could, if the parties so chose, 7 specify background checks or three-factor 8 authentication or authentication by two 9 different people, you need the guy and his 10 manager in order to get the digital file out of 11 repository, or you can only do it during 12 business hours. There are lots of internal 13 controls that could be required through contract 14 if this were pursuant to the contract. 15 Q. Do you know of any book-related 16 contracts that includes those terms? 17 A. I don't know of that in the context 18 of books. 19 Q. And in fact, the three book-related 20 contracts that we've looked at today all do not 21 include those terms; is that right? 22 A. I'm not sure that those contracts 23 each to be exercised by -- to be entered into by 24 an individual publisher, those aren't 25 necessarily where we would look for it if it</p>	<p style="text-align: right;">Page 244</p> <p>1 A. I don't recall specifically. 2 Q. Did you rely on the articles that you 3 referred to in your previous answer in forming 4 the opinions set forth in your report? 5 A. No. 6 Q. Turning to Paragraph 18, in the first 7 sentence you say, "Fifth, when books are scanned 8 by a smaller and less sophisticated provider, 9 there is a particular acute risk of book 10 contents being accessed and redistributed." 11 What do you mean by smaller and less 12 sophisticated? 13 A. Google is fortunate to have ample 14 resources and top-notch technical talents. Not 15 everyone will enjoy those benefits. The 16 discussion in Paragraph 13 at the top of the 17 page contemplates others entering into the book 18 provider sector and potentially doing that 19 without the significant resources that Google is 20 able to bring to bear. 21 Q. What's your basis for saying that 22 smaller companies do not have the capabilities 23 necessary to secure books adequately? 24 A. I'm not sure that those are my exact 25 words, for example, "adequately." But I think</p>

<p style="text-align: right;">Page 245</p> <p>1 it's pretty straightforward that if you have 2 more limited resources, your ability to expand 3 those resources on any given project is going to 4 be correspondently limited. 5 Q. In your view is it necessarily the 6 case that smaller and less sophisticated 7 entities have worse security than larger and 8 more sophisticated entities? 9 MR. BONI: Object to form. 10 A. Not always. Sometimes with simpler 11 systems or with less valuable contents to 12 safeguard, the security of a smaller entity can 13 be more than satisfactory. On the other hand, 14 when one flips around those conditions, a small 15 entity guarding a very large gem, one could 16 quickly get into trouble. 17 Q. Are your statements in Paragraph 18 18 of your report based on a survey of companies of 19 various sizes considering their security 20 measures? 21 A. No. 22 Q. Can you provide an example of one of 23 the smaller and less sophisticated companies to 24 which you refer? 25 A. For example, in the context of domain</p>	<p style="text-align: right;">Page 247</p> <p>1 report, you say that attackers can take 2 advantage of even a brief period when a single 3 book provider is insecure. You see that? 4 A. Yes. 5 Q. Is that true today? 6 A. Today there aren't so many book 7 providers. We've discussed only two today. 8 Both of them large, sophisticated companies with 9 impressive information security defenses; 10 whereas, the premise of this section, 11 Paragraph 13, is that there might be 12 significantly more in the future, and they might 13 look quite different. 14 Q. In the event of a fair use ruling? 15 A. Correct, which has been the premise 16 of the entire section where we've been here. 17 Q. Have you -- so it's your view that 18 today's book providers like Google and Amazon 19 have a different and higher level of security 20 than tomorrow's book providers might in event of 21 a fair use ruling, such that smaller entities 22 would enter the market and present the risks 23 discussed in this section; is that right? 24 A. That's right. 25 Q. Turning to Paragraph 20, you say, "I</p>
<p style="text-align: right;">Page 246</p> <p>1 names, there used to be one company, VeriSign 2 Network Solutions that was the sole vendor of 3 .com domain names. When that market was opened 4 up to competition, there were a variety of 5 benefits, but there have also been some 6 downsides, including that some of the smaller 7 guys have been hacked in various ways, have 8 allowed their servers to be taken down by 9 something as routine as a power outage and have 10 otherwise failed to lived up to their 11 contractual commitments. In contrast, the 12 larger vendors in that space have largely 13 succeeded in living up to their contractual 14 commitments. 15 Q. Are you aware of any in The Book 16 Space? 17 MR. BONI: Do you understand the 18 question? 19 A. I do, but I think it's a little bit 20 speculative at this point that there aren't that 21 many smaller sites holding digital copies of 22 books and presenting them in snippet form. If 23 there are any small such companies, I guess I 24 don't know about them. 25 Q. Turning to Paragraph 19 of your</p>	<p style="text-align: right;">Page 248</p> <p>1 understand that the Google Library Project 2 includes providing to the library partners a 3 full digital copy of the books the libraries 4 allowed Google to scan. Breaches at the 5 security systems at these libraries" -- excuse 6 me -- "breaches in the security systems at these 7 libraries, could facilitate book piracy." Do 8 you know what security systems the libraries who 9 store books such as the University of Michigan 10 have in place? 11 A. I don't know about all of the 12 security systems that they have. 13 Q. How do they compare to the security 14 systems that, for example, iUniverse which is 15 the party to the agreement in Exhibit 17 has in 16 place? 17 MR. BONI: Object to form. He just 18 said he's not sure what the security systems are 19 in the libraries. 20 A. I'm also not sure what the security 21 systems are at iUniverse, so I really don't 22 think I can make a comparison. 23 Q. You, likewise, couldn't make a 24 comparison to the security systems that Google 25 or Amazon has in place?</p>

<p style="text-align: right;">Page 249</p> <p>1 A. I don't know everything that I'd want 2 to know in order to make that comparison. In 3 general, I think there's good reason to suspect 4 that the libraries will have significantly lower 5 levels of security. 6 Q. But you don't know one way or the 7 other? 8 A. I don't know one way or the other, 9 and furthermore, I'm not sure the answer is 10 knowable just yet. We need to think about what 11 level of security libraries will have several 12 years from now. It's hard to say, sitting here 13 today what they'll do in several years. 14 Q. Are you aware of any books being 15 pirated or stolen from a research library 16 archived with scans made by Google? 17 A. No. 18 Q. Turning to Paragraph 21, you say, 19 "I've not been informed of all the ways that 20 libraries intend to use the book contents data 21 they receive from Google, nor have I been 22 informed how libraries intend to secure that 23 data. But the information currently available 24 indicates that libraries' actions present a risk 25 of book piracy." You see that?</p>	<p style="text-align: right;">Page 251</p> <p>1 Q. Did any of your work on the Multnomah 2 County case or the interviews with librarians 3 and other librarian staff members in that case 4 form a basis for any of the opinions you render 5 in your report in this case? 6 A. It's not a basis. It's part of my 7 overall professional background consistent with 8 expert service. 9 Q. Do you know whether the University of 10 Michigan is storing book scans in its normal 11 library information systems or in a separate 12 system? 13 MR. BONI: Object to form. 14 A. I don't know one way or the other. 15 Q. What information, additional to the 16 information you have about the library's 17 security measures, would permit you to better 18 assess the risks? 19 MR. BONI: What risks? 20 Q. The risks you discussed in Paragraphs 21 20 and 21. 22 A. Understanding both what they do now 23 and what they will do in the future, what they 24 commit in some sort of a binding contractual 25 sense to do or not to do. I need to understand</p>
<p style="text-align: right;">Page 250</p> <p>1 A. Yes. 2 Q. You don't know what security measures 3 the libraries have in place today; is that 4 right? 5 A. I don't know all of what they have in 6 place. 7 Q. What do you mean by "information 8 currently available" as you use it in Paragraph 9 21? 10 A. Yes, in Exhibit C, I cite the 11 Hathitrust materials which I did review. That 12 gives some information about some of the 13 libraries' security systems. I actually have 14 quite a bit of experience with library 15 information systems from the Multnomah County 16 Public Library case that we discussed 17 previously. 18 I've spent time interviewing 19 librarians. I've spent time with the CIOs of 20 libraries. I've spent time in the library 21 computer systems, understanding how they work 22 and how they interoperate and have come to have 23 a general understanding of the overall culture 24 and approach to information sharing that's 25 common in libraries.</p>	<p style="text-align: right;">Page 252</p> <p>1 the servers on which the data is to be stored, 2 the physical security, the network security, the 3 logical security, software level, user accounts, 4 credentialing. 5 This sounds like a full security 6 audit. I'm not sure I'm the best person to do 7 it, but in any event, it requires understanding 8 quite a bit about their practices, both in the 9 present and their future practices, which is a 10 little bit harder to investigate in 11 anticipation. 12 Q. Turning to Paragraph 22, you refer to 13 a student who used MIT library access to 14 download 4.8 million articles and other 15 documents. You see that? 16 A. Yes. 17 Q. Is that man named Aaron Swartz? 18 A. Yes. 19 Q. Aaron Swartz is being charged 20 criminally for that activity; is that right? 21 A. Yes. 22 Q. And those charges are currently 23 pending; is that right? 24 A. That's my understanding. 25 Q. What was the effect on the value of</p>

<p style="text-align: right;">Page 253</p> <p>1 the articles from Mr. Swartz' actions?</p> <p>2 A. As I understand it, Mr. Swartz copied</p> <p>3 the articles but didn't redistribute them at</p> <p>4 all. I'm not sure he even got around to</p> <p>5 analyzing them. The effect from those actions</p> <p>6 is probably minimal. It's probably zero.</p> <p>7 On the other hand, had Mr. Swartz</p> <p>8 sent them all to WikiLeaks or put them all on</p> <p>9 BitTorrent, the consequences could have been</p> <p>10 absolutely devastating, and I don't think it</p> <p>11 would have been very hard for him to do that,</p> <p>12 once he got the 4.8 million files sitting on his</p> <p>13 hard drive. I think it would have been less</p> <p>14 than an hour of additional work for him.</p> <p>15 Q. Do you know Aaron Swartz?</p> <p>16 A. I've met him.</p> <p>17 Q. Do you charge for access to your</p> <p>18 blog?</p> <p>19 A. No.</p> <p>20 Q. Why not?</p> <p>21 A. I'm happy to give it away. Anyone</p> <p>22 who wants to read my blog is welcome to do so.</p> <p>23 Q. Would the distribution of articles</p> <p>24 from your blog on BitTorrent harm the market for</p> <p>25 those posts?</p> <p style="text-align: right;">Page 254</p> <p>1 MR. BONI: Object to form.</p> <p>2 A. I would be disappointed and unhappy</p> <p>3 if someone put my articles on BitTorrent. As to</p> <p>4 the market for it, I'm not sure, because I don't</p> <p>5 sell these materials. It's hard to think about</p> <p>6 what the concept of the market even means here.</p> <p>7 Q. Would the answer be the same with</p> <p>8 respect to your published journal articles?</p> <p>9 A. Well, there, I don't sell them,</p> <p>10 although the journal publisher does, which is</p> <p>11 sometimes a source of some contention. I might</p> <p>12 prefer that they gave it away, in fact, and they</p> <p>13 might prefer to charge for it. So it's kind of</p> <p>14 a messy one.</p> <p>15 If I found those on BitTorrent -- I'm</p> <p>16 fortunate in that all of my articles actually</p> <p>17 can be obtained for free from my</p> <p>18 website because I've arranged that -- so it</p> <p>19 wouldn't make a whole lot of difference to me,</p> <p>20 but again, I'm in a very special situation,</p> <p>21 thanks to other sources of revenue.</p> <p>22 Q. Turning to Paragraph 23, you refer to</p> <p>23 JSTOR; do you see that?</p> <p>24 A. Yes.</p> <p>25 Q. Do you have articles posted on JSTOR?</p>	<p style="text-align: right;">Page 255</p> <p>1 A. I think some of my articles are in</p> <p>2 JSTOR.</p> <p>3 Q. Have you done anything to insure the</p> <p>4 security of JSTOR's systems?</p> <p>5 A. I have not. I leave that to JSTOR.</p> <p>6 Q. Do you know whether JSTOR's systems</p> <p>7 are more or less secure than Google's?</p> <p>8 A. I think there are some respects in</p> <p>9 which they are more secure and some respects in</p> <p>10 which they are less secure.</p> <p>11 Q. What are the respects in which they</p> <p>12 are less secure? Let me ask a slightly better</p> <p>13 question.</p> <p>14 What are the respects in which, in</p> <p>15 your view, JSTOR systems are less secure than</p> <p>16 Google's?</p> <p>17 A. I would expect that Google has more</p> <p>18 staff dedicated to security, to making sure that</p> <p>19 all of their servers are patched with the latest</p> <p>20 security updates, generally to treating security</p> <p>21 as the high priority that it should be. JSTOR,</p> <p>22 in contrast, I would think, has fewer resources</p> <p>23 to have a dedicated security team to have</p> <p>24 round-the-clock monitoring and so forth.</p> <p>25 Q. Do you know of any instances in which</p> <p style="text-align: right;">Page 256</p> <p>1 content providers allow their licensed content</p> <p>2 to be placed on university servers?</p> <p>3 A. Yes.</p> <p>4 Q. What instances are you aware of?</p> <p>5 A. Typically, in exchange for payment of</p> <p>6 a fee.</p> <p>7 Q. What types of content are involved in</p> <p>8 those transactions that you're aware of?</p> <p>9 A. Journal articles, groups of journal</p> <p>10 articles, books, groups of books, periodicals,</p> <p>11 almost any sort of printed media or electronic</p> <p>12 media could be subject to such a license.</p> <p>13 Q. Do all content providers who allow</p> <p>14 such content to be placed on university servers</p> <p>15 require oversight of the university's</p> <p>16 information security implementation?</p> <p>17 A. Do you all of them require it? I'm</p> <p>18 sure there are some who don't require it,</p> <p>19 particularly for the right price. If you pay</p> <p>20 enough, they won't necessarily ask any more</p> <p>21 questions.</p> <p>22 Q. Do you know whether any content</p> <p>23 providers who allow content to be placed on</p> <p>24 university servers require oversight of the</p> <p>25 university's information security</p>
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<p style="text-align: right;">Page 257</p> <p>1 implementation?</p> <p>2 A. I know that some of them do. For</p> <p>3 example, the one where we're sitting right now</p> <p>4 does have exactly that requirement.</p> <p>5 Q. By "the one where we're sitting right</p> <p>6 now," what do you mean?</p> <p>7 A. I mean Harvard Business School</p> <p>8 Publishing provides information products on a</p> <p>9 licensed basis, but oversees some aspect of the</p> <p>10 security of the licensees' servers.</p> <p>11 Q. What aspect of security of the</p> <p>12 licensees' servers does it oversee?</p> <p>13 A. It oversees the requirement that a</p> <p>14 user name and password are provided before</p> <p>15 access is available and specifically searches</p> <p>16 for and affirmatively pursued anyone who posts</p> <p>17 files in a way that's available to the general</p> <p>18 public.</p> <p>19 Q. Anything else?</p> <p>20 A. I think there are some additional</p> <p>21 requirements. There's a team of multiple,</p> <p>22 full-time employees who do nothing but this all</p> <p>23 day. Actually I do know of some additional</p> <p>24 requirements that they impose.</p> <p>25 Q. What are those?</p>	<p style="text-align: right;">Page 259</p> <p>1 A. It's a good case.</p> <p>2 Q. Is it posted on your website?</p> <p>3 A. It is not.</p> <p>4 Q. Have you done anything to insure the</p> <p>5 information security of Harvard Business School</p> <p>6 Press?</p> <p>7 A. I've offered them some advice on</p> <p>8 various aspects of their information, security</p> <p>9 and their user interface and multiple other</p> <p>10 facets of their business. Acting more as a</p> <p>11 friend and colleague than as an author wanting</p> <p>12 to protect my interests. It doesn't really</p> <p>13 matter to me how many copies they sell. My</p> <p>14 royalties are pretty small either way. So I'm</p> <p>15 not thinking about it from that purpose.</p> <p>16 Q. Turning to Paragraph 24 of your</p> <p>17 report, you discuss libraries permitting</p> <p>18 researchers to copy books in their entirety</p> <p>19 under the researcher's systems; is that right?</p> <p>20 A. Yes.</p> <p>21 Q. Do you know whether any of the</p> <p>22 libraries to whom Google has -- with whom Google</p> <p>23 has cooperated in the Library Project have</p> <p>24 permitted researchers to store digital copies of</p> <p>25 books on their own computers rather than on</p>
<p style="text-align: right;">Page 258</p> <p>1 A. They disallow libraries from</p> <p>2 collecting our case materials. A library can't</p> <p>3 buy these. If a library did buy them, they</p> <p>4 would be subject to for-sale rights, but a</p> <p>5 library is ineligible to purchase. And in order</p> <p>6 to make a purchase, you must certify that you're</p> <p>7 not a library, which offers additional</p> <p>8 protection to prevent this valuable,</p> <p>9 intellectual property from being distributed in</p> <p>10 a way that they prefer to prevent.</p> <p>11 Q. You wrote a case study on Google; is</p> <p>12 that right?</p> <p>13 A. The -- I would present it in the</p> <p>14 following way: I updated someone else's case</p> <p>15 study to a sufficient extent, changing enough of</p> <p>16 the sentences and enough of the paragraphs that</p> <p>17 it was deemed a new document and given a new</p> <p>18 document number. I would still characterize it</p> <p>19 as an update and a revision.</p> <p>20 Q. Do you know how much it cost to</p> <p>21 purchase a PDF of that case study from Harvard</p> <p>22 Business School Press website?</p> <p>23 A. I think it's 4 and \$6. There are</p> <p>24 some discounts available.</p> <p>25 Q. I think it's six ninety-five.</p>	<p style="text-align: right;">Page 260</p> <p>1 secured servers?</p> <p>2 A. I don't know.</p> <p>3 Q. The type of research that you</p> <p>4 describe in Paragraph 24, analyzing patterns in</p> <p>5 book text, can you name any researchers who are</p> <p>6 engaged in that type of research?</p> <p>7 A. I know that there are some. I've</p> <p>8 read some of the papers, but I don't have their</p> <p>9 names on the tip of my tongue.</p> <p>10 Q. Have you ever engaged in such</p> <p>11 research yourself?</p> <p>12 A. I haven't analyzed patterns in book</p> <p>13 texts. I certainly have used large data sets</p> <p>14 obtained from library-based data set archives.</p> <p>15 I've had to learn the processes for obtaining</p> <p>16 that and analyzing that.</p> <p>17 Q. Have you ever spoken with a</p> <p>18 researcher doing analysis of book text?</p> <p>19 A. I think so. We've had at least one</p> <p>20 come to campus for a seminar, and I spoke to him</p> <p>21 pursuant to that.</p> <p>22 Q. When was that?</p> <p>23 A. Within the last two years.</p> <p>24 Q. Did you talk to any in connection</p> <p>25 with this report?</p>

<p style="text-align: right;">Page 261</p> <p>1 A. No.</p> <p>2 Q. Did you do a survey of book text</p> <p>3 analysis researchers to find out how they would</p> <p>4 want to use book text in their research?</p> <p>5 A. No.</p> <p>6 Q. What is your view as to the</p> <p>7 probability that the library would permit a book</p> <p>8 text analysis researcher to copy the entire text</p> <p>9 of a large corpus of books onto their own</p> <p>10 computers in terms of a percentage?</p> <p>11 A. I think it would be unlikely that any</p> <p>12 library would allow that right now during the</p> <p>13 pendency of this litigation, given the</p> <p>14 significant concerns that are extant right now.</p> <p>15 On the other hand, my experience with</p> <p>16 other aspects of information security and</p> <p>17 library information security is that there tends</p> <p>18 to be a decrease over time where folks become</p> <p>19 more liberal as they become more confident, and</p> <p>20 sometimes that confidence turns out to be</p> <p>21 misplaced confidence. I have some specific</p> <p>22 examples in mind.</p> <p>23 Q. What examples are those?</p> <p>24 A. For example, sticking with the</p> <p>25 Harvard Business School, it used to be that when</p>	<p style="text-align: right;">Page 263</p> <p>1 research on the text of books?</p> <p>2 A. Amazon has limited automated analysis</p> <p>3 of specific fixed factors that are embodied in</p> <p>4 known proven code designed by professional</p> <p>5 full-time Amazon engineers who did this once and</p> <p>6 then leave it running. I'm thinking about, for</p> <p>7 example, the statistically improbable phrases</p> <p>8 analysis that Amazon at least previously ran on</p> <p>9 most books.</p> <p>10 In contrast, what we were discussing</p> <p>11 in Paragraph 24 is ad hoc analysis by professors</p> <p>12 who come and go, students who come and go,</p> <p>13 visiting researchers who really come and go all</p> <p>14 in the context of a library relationship where</p> <p>15 there's much less of a culture of supervision,</p> <p>16 management and oversight when compared to</p> <p>17 professional engineers designing software.</p> <p>18 Q. That's not a necessary but instead</p> <p>19 only a potential result of a fair use finding in</p> <p>20 this case; is that right?</p> <p>21 A. I didn't mean Paragraph 24 to be</p> <p>22 limited to a fair use finding. Right now the</p> <p>23 data sitting in libraries could already be</p> <p>24 analyzed in this way and could give rise to the</p> <p>25 sorts of problems discussed in Paragraph 24,</p>
<p style="text-align: right;">Page 262</p> <p>1 we sold an electronic copy of a case, we sold it</p> <p>2 in a special encrypted format that required that</p> <p>3 you install a reader, not the PDF reader. You</p> <p>4 had to get from us a special reader, and that</p> <p>5 reader had a variety of special purpose</p> <p>6 functions that would prevent you from printing</p> <p>7 it, prevent you from showing it on a computer</p> <p>8 connected to a projector, prevent you from</p> <p>9 taking a screen capture image. It had a number</p> <p>10 of security features.</p> <p>11 Later, we decided to abandon that</p> <p>12 software because it was unpleasant for users to</p> <p>13 install a special purpose program and have</p> <p>14 subsequently found that while our new</p> <p>15 replacement is much more convenient to users, it</p> <p>16 has created a certain amount of piracy, which is</p> <p>17 a source of some concern.</p> <p>18 Q. Does the risk set forth in Paragraph</p> <p>19 24 of your report exist at Amazon today?</p> <p>20 MR. BONI: At Amazon?</p> <p>21 MR. GRATZ: Yes.</p> <p>22 A. Gee, I really don't think so. I</p> <p>23 hadn't been thinking of that as a risk that</p> <p>24 would occur with Amazon today.</p> <p>25 Q. Does Amazon engage in analysis or</p>	<p style="text-align: right;">Page 264</p> <p>1 even prior to a court's fair use finding one way</p> <p>2 or the other.</p> <p>3 Q. Do you know whether problems of this</p> <p>4 type have occurred?</p> <p>5 A. I don't.</p> <p>6 Q. Have you done anything to try and</p> <p>7 find out?</p> <p>8 A. I asked Mr. Boni.</p> <p>9 Q. What did he tell you?</p> <p>10 A. I think he told me he didn't know of</p> <p>11 any specifically.</p> <p>12 Q. Turning to Paragraph 25, have you</p> <p>13 ever heard of a prank involving book piracy?</p> <p>14 A. I've heard of a prank involving other</p> <p>15 kinds of piracy.</p> <p>16 Q. What other kinds of piracy?</p> <p>17 A. For example, when I went to the MIT</p> <p>18 Hack Gallery, I found quite a few that involved</p> <p>19 use of other company's trademarks which might or</p> <p>20 might not be trademark infringement, depending</p> <p>21 on whether or not a fair use defense would</p> <p>22 apply.</p> <p>23 Q. Can you tell me about the Apple -- so</p> <p>24 in Paragraph 25 you refer to an Apple -- the</p> <p>25 Apple -- a prank involving the Apple logo?</p>

<p style="text-align: right;">Page 265</p> <p>1 A. Yes.</p> <p>2 Q. Do you consider that to be in</p> <p>3 violation of intellectual property rights?</p> <p>4 A. I think it's an infringement of the</p> <p>5 trademark, and the question is whether a fair</p> <p>6 use defense applies. There is a doctrine of</p> <p>7 fair use for trademarks and stylized images. I</p> <p>8 think it's a plausible fair use defense. There,</p> <p>9 I'd really have to apply the factors and read</p> <p>10 the cases. I'm much less familiar with the Fair</p> <p>11 Use Doctrine as it applies to stylized images</p> <p>12 and logos.</p> <p>13 Q. The Apple prank which you refer</p> <p>14 occurred in October of 2011; is that right?</p> <p>15 A. I don't recall.</p> <p>16 Q. Did it occur shortly after the death</p> <p>17 of Steve Jobs?</p> <p>18 A. If you say so.</p> <p>19 Q. Did students display the Apple logo</p> <p>20 in the clock tower of Maseeh Hall at MIT in</p> <p>21 honor of Steve Jobs in the prank you referred to</p> <p>22 in Paragraph 25?</p> <p>23 A. Now, that could be. I don't recall.</p> <p>24 Q. Do you think that that prank is</p> <p>25 relevant to the issues in this case?</p> <p style="text-align: right;">Page 266</p> <p>1 A. I can certainly see how it would seem</p> <p>2 peripheral. On the other hand, the fact that</p> <p>3 students are well known to disregard</p> <p>4 intellectual property is anything but</p> <p>5 peripheral. It's well known that Napster was</p> <p>6 most used on college campuses. There were</p> <p>7 distinctive trends. You could see the number of</p> <p>8 users signed into Napster decrease when major</p> <p>9 schools went onto spring break. So the</p> <p>10 relationship between students, university</p> <p>11 libraries and piracy is not peripheral.</p> <p>12 Q. Could you tell me about the Red Sox</p> <p>13 logo prank you referred to in Paragraph 25?</p> <p>14 A. I don't recall. I went through the</p> <p>15 site, looked at the distinctive images</p> <p>16 memorializing the pranks, but I didn't note them</p> <p>17 in great specificity.</p> <p>18 Q. Do you consider that an instance of</p> <p>19 piracy?</p> <p>20 A. I'm not sure. I do think it's</p> <p>21 probably an instance of trademark infringement,</p> <p>22 and it might be subject to a fair use defense.</p> <p>23 Q. The prank you referred to in</p> <p>24 Paragraph 25 with respect to the logo of the</p> <p>25 Boston Red Sox, did that prank occur in October</p>	<p style="text-align: right;">Page 267</p> <p>1 of 2004?</p> <p>2 A. I don't know.</p> <p>3 Q. Did it occur when the Red Sox made it</p> <p>4 to the World Series?</p> <p>5 A. I don't know.</p> <p>6 Q. Were the -- do you think that the</p> <p>7 students celebrating the Red Sox making it to</p> <p>8 the World Series by displaying the logo on the</p> <p>9 dome of the university building was intellectual</p> <p>10 property infringement?</p> <p>11 A. The law is what it is, and it's not</p> <p>12 for me to rewrite trademark law. I wouldn't be</p> <p>13 surprised if that is infringement as a matter of</p> <p>14 law, and fair use defense might or might not</p> <p>15 apply. It wouldn't shock me if you said that to</p> <p>16 do that a license must be paid to the Red Sox,</p> <p>17 and if you don't pay it, then you're in</p> <p>18 violation of the law.</p> <p>19 MR. GRATZ: Mark as Exhibit 19, this</p> <p>20 document. I want to note for the record before</p> <p>21 I hand it to the witness that despite the</p> <p>22 confidential legend at the bottom of this</p> <p>23 document, this is not a confidential document.</p> <p>24 (Document marked as Exhibit No. 18</p> <p>25 for identification.)</p> <p style="text-align: right;">Page 268</p> <p>1 Q. You have before you what's been</p> <p>2 marked as Exhibit 18. Do you recognize this</p> <p>3 document?</p> <p>4 A. Yes.</p> <p>5 Q. Is this the document to which you</p> <p>6 refer in Paragraph 26 of your report?</p> <p>7 A. I think so.</p> <p>8 Q. Do you know what security measures</p> <p>9 the University of Michigan has in place?</p> <p>10 A. That's discussed in part in this</p> <p>11 document.</p> <p>12 Q. Aside from this document, do you have</p> <p>13 any knowledge other than what is in this</p> <p>14 document of security measures that the</p> <p>15 University of Michigan has in place?</p> <p>16 A. Aside from what's discussed in this</p> <p>17 document, I don't think I have knowledge of</p> <p>18 their current security.</p> <p>19 Q. Is it your opinion that an author</p> <p>20 would not agree to have his work stored by the</p> <p>21 University of Michigan without greater security</p> <p>22 terms than those set forth in Exhibit 18?</p> <p>23 MR. BONI: Object to form.</p> <p>24 A. I'm not sure. It all depends on what</p> <p>25 the author gets in exchange. If they get zero,</p>
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<p style="text-align: right;">Page 269</p> <p>1 it might be a pretty tough sell. If you give 2 them some money, that could be quite different. 3 Q. Can you -- do you have an assessment 4 of the probability that an author without 5 further payment would agree to the terms in 6 Exhibit 18? 7 A. I don't know. I'm sure some would 8 and some wouldn't. 9 Q. Referring to the terms of Exhibit 18 10 at the end of Paragraph 26 of your report, you 11 say that, "These vague provisions offer 12 significantly lower protection than Google 13 provides for even its routine business 14 confidences." Do you see that? 15 A. Yes. 16 Q. Do you mean that in terms of the 17 security required for the protection of the 18 information? 19 A. I meant to reference the comparisons 20 cited in Footnote 9 for which I note differences 21 in the circumstances in which information can be 22 shared, restrictions on recipients and 23 requirements as to security. I believe that the 24 Google NDA cited in Footnote 9 actually offers 25 greater protections, at least greater</p>	<p style="text-align: right;">Page 271</p> <p>1 A. All right, I'll need just a moment. 2 I've done half of it. I need to find two 3 different provisions, and I'm working on the 4 second. 5 So we are comparing Provision 3 of 6 Exhibit 19 with Provision 4.4.1 of Exhibit 18. 7 Q. Okay. And how are those -- what's 8 the difference that you intended to identify? 9 A. Well, I said there are greater 10 restrictions on the circumstances in which 11 information can be shared; to wit, I think the 12 Exhibit 19 NDA doesn't allow information to be 13 shared, and the Exhibit 18 provision does allow 14 information to be shared. 15 Q. Within the confines of copyright law; 16 is that right? 17 A. Well, I'm not sure. Perhaps even 18 beyond the confines of copyright law. 19 Q. I direct your attention to Part 4.1 20 of Exhibit 18. 21 A. Fair enough. That section says at 22 least that this will be within the confines of 23 copyright law. 24 Q. So that takes care of sharing. 25 Certainly a nondisclosure agreement requires no</p>
<p style="text-align: right;">Page 270</p> <p>1 specificity than what we see in Exhibit 18. 2 MR. GRATZ: I'd like to mark as 3 Exhibit 19 this document. 4 (Document marked as Exhibit No. 19 for 5 identification.) 6 Q. Do you recognize what's been marked 7 as Exhibit 19? 8 A. Yes. 9 Q. What is it? 10 A. It's the document cited in the 11 Footnote 9. 12 Q. Do you know whether this is a 13 nondisclosure agreement which has been entered 14 into by Google and various parties? 15 A. It purports to be. 16 Q. Do you know whether it, in fact, is? 17 A. I know that when I visited the Google 18 campus twice at the invitation of Google staff, 19 I was presented with a similar NDA, which in at 20 least one instance I refused to sign, perhaps in 21 both instances. 22 Q. Could you identify for me the more 23 precise requirements as to how information must 24 be secured in Exhibit 19 as compared to Exhibit 25 18?</p>	<p style="text-align: right;">Page 272</p> <p>1 sharing, and Exhibit 18 permits sharing under 2 certain circumstances. The question I asked is 3 with respect to precise requirements as to how 4 information must be secured. 5 A. Yes. So in the NDA, Exhibit 19, the 6 second sentence of Provision 3 calls for the 7 same degree of care, no less than a reasonable 8 degree of care as used with respect to the 9 participants' own similar information, and it 10 continues, they must prevent, they must try to 11 prevent, they must actually do it. Sounds like 12 strict liability. 13 MR. BONI: Say where you are. 14 A. Within Clause 3, somewhere around 15 there. Must actually succeed in doing the tasks 16 detailed within A and B of that second sentence. 17 Q. I'm not seeing the words "must 18 prevent." I'm sorry. 19 A. The word "prevent" is on the fifth 20 line of -- 21 Q. And followed with a colon? 22 A. Yes. 23 Q. So "Participant will use the same 24 degree of care, but no less than a reasonable 25 degree of care, as participant uses with respect</p>

<p style="text-align: right;">Page 273</p> <p>1 to its own similar information to protect the 2 confidential information and to protect -- 3 prevent." 4 So you understand "prevent" in 5 Exhibit 19, the "prevent" immediately before 6 that colon to be an absolute requirement, not a 7 requirement subject to the degree of care 8 previous -- previously in that sentence? 9 A. You know, when I first read this, I 10 thought it was subject to the degree of care 11 previously in the sentence. When I just 12 characterized it orally a moment ago, I thought 13 it was strict liability. Now I'm back to the 14 first interpretation which I think may have been 15 right all along. So -- 16 Q. At any rate, you're saying that this 17 requires the same degree of care as the 18 participant used with respect to its own similar 19 information and that Exhibit 18 does not; is 20 that right? 21 A. That's my recollection, and now we 22 can go back to 4.4.1. The 4.4 -- 23 Q. So and 4.4.1 says U of M shall also 24 make reasonable efforts to prevent third parties 25 from downloading or otherwise obtaining any</p>	<p style="text-align: right;">Page 275</p> <p>1 withstanding the very, very limited commitments 2 in the second sentence. 3 Q. I want to turn to Paragraphs 27 4 through 32 of your report. 5 MR. BONI: Done with these for now, 6 Joe? 7 MR. GRATZ: Yes, you can set those 8 aside. 9 Q. In Paragraphs 27 through 32, you 10 describe a number of flaws in Google's systems 11 which were identified. Did any result in 12 piracy? 13 A. I didn't choose any of the flaws that 14 resulted in piracy. 15 Q. Are there other flaws of which you're 16 aware that did result in piracy? 17 A. Yes. 18 Q. Which flaws are those? 19 A. The Google YouTube service, by 20 Google's own evaluation prior to acquiring 21 YouTube, was a massive source of privacy. 22 MR. BONI: Piracy. 23 A. Of piracy, excuse me. 24 Q. Was that as the result of security 25 breaches or because people were uploading</p>
<p style="text-align: right;">Page 274</p> <p>1 portion of the U of M digital copy for 2 commercial purposes, redistributing, etcetera. 3 So you're drawing the distinction between taking 4 reasonable measures and using no less than a 5 reasonable degree of care as participant uses 6 with respect to its own similar information? 7 A. It's the -- it's that last part, what 8 they do for their own similar information that 9 first seems stricter. Secondly, a preceding 10 sentence in 4.4.1, implementing technological 11 measures, e.g. robots.txt -- technological 12 measures, e.g. robots.txt, to restrict automated 13 access seemed sort of laughable to me because 14 that's a known defective measure, and if one 15 were serious about blocking automated access, 16 Google is probably the world expert on having to 17 do that properly, and it's not via robots.txt. 18 Q. You're referring to the second 19 sentence of 4.4.1? 20 A. That's right. 21 Q. Does the second sentence of 4.4.1 22 limit the commitment made in the third sentence 23 of 4.4.1? 24 A. No. There are additional 25 commitments, so the third sentence stands, not</p>	<p style="text-align: right;">Page 276</p> <p>1 infringing videos to YouTube? 2 A. It was a result of a design flaw. 3 Q. What was the design flaw? 4 A. The design flaw had several 5 manifestations, but it included the absence of a 6 report piracy button, a button that was tested 7 temporarily until it was removed in haste by 8 YouTube managers who realized that too many 9 users were reporting piracy. 10 Q. How do you know that? 11 A. That was all in Google documents 12 provided in the Viacom litigation and then 13 unsealed and made available for public review. 14 Q. Are those documents -- do those 15 documents form the basis for any of the material 16 in your report? 17 A. No. I relied on other Google design 18 flaws and security breaches to form the 19 conclusion in my report. 20 Q. And the design flaws that you're 21 alleging with respect to YouTube are not design 22 flaws that resulted in the unauthorized breach 23 of security measures which permitted piracy, but 24 instead, in your view, were measures that were 25 designed to -- strike that.</p>

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<p>1 MR. BONI: Good idea.</p> <p>2 Q. Start that question over.</p> <p>3 The design flaws that you referred to</p> <p>4 with respect to YouTube, were they, in your</p> <p>5 view, design flaws that resulted in the breach</p> <p>6 of security measures?</p> <p>7 A. These were not design flaws that</p> <p>8 resulted in the breach of security measures.</p> <p>9 Instead these design flaws resulted in the</p> <p>10 massive and unprecedented copyright infringement</p> <p>11 of a large number of copyrighted video and audio</p> <p>12 recordings.</p> <p>13 Q. Do you know of any instance in which</p> <p>14 third-party copyrighted material has been stolen</p> <p>15 from Google servers?</p> <p>16 A. I'm not sure what you mean by "stolen</p> <p>17 from Google servers."</p> <p>18 Q. I mean taken from Google servers</p> <p>19 without Google's authorization?</p> <p>20 MR. BONI: Object to form. Same</p> <p>21 ambiguity.</p> <p>22 A. There are multiple tools for, quote</p> <p>23 unquote, YouTube stealing. Often they have</p> <p>24 names like "YouTube stealer." These are</p> <p>25 programs that allow a user to take the video and</p>	<p>1 report, you say that outside hackers could</p> <p>2 access or redistribute book contents. Do you</p> <p>3 know of any instances in which hackers have</p> <p>4 accessed or redistributed books from Amazon?</p> <p>5 A. I have heard of that happening.</p> <p>6 Q. Was that following the download of a</p> <p>7 Kindle eBook file?</p> <p>8 A. That's one mechanism by which it can</p> <p>9 happen, but not the only mechanism.</p> <p>10 Q. What other mechanisms are you</p> <p>11 familiar with?</p> <p>12 A. I understand that it is possible to</p> <p>13 use Search Inside the Book to browse selected</p> <p>14 pages later or another user or another computer</p> <p>15 to browse other pages and for the book to be</p> <p>16 stitched together, and I have found programs</p> <p>17 that purport to do that all, although I wasn't</p> <p>18 able to verify the efficacy of those programs.</p> <p>19 Q. Notwithstanding the existence of</p> <p>20 those programs, publishers keep their books in</p> <p>21 Search Inside the Book, to your knowledge; is</p> <p>22 that right?</p> <p>23 A. Yes.</p> <p>24 MR. GRATZ: Let's change the tape.</p> <p>25 THE VIDEOGRAPHER: Here ends Tape</p>
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<p>1 audio of a recording on YouTube and save it to a</p> <p>2 file on their hard drive, so that, for example,</p> <p>3 they can watch it on airline, or they can</p> <p>4 continue to watch it, even if the file is</p> <p>5 removed from YouTube, and they can watch it</p> <p>6 without advertisements. Those programs exist.</p> <p>7 Google seems to have a bit of a cat</p> <p>8 and mouse program with them, where Google is the</p> <p>9 cat, but it doesn't always catch the mouse.</p> <p>10 I've confirmed repeatedly that they work, and</p> <p>11 that Google has been less than effective in</p> <p>12 stomping them out.</p> <p>13 Q. How have you confirmed that they</p> <p>14 work?</p> <p>15 A. I've attempted to use them from time</p> <p>16 to time.</p> <p>17 Q. Do you know of any such tools with</p> <p>18 respect to books?</p> <p>19 A. I've looked for such tools and</p> <p>20 couldn't find them in the first few minutes of</p> <p>21 searching.</p> <p>22 Q. Did you continue past the first few</p> <p>23 minutes of searching?</p> <p>24 A. Not really.</p> <p>25 Q. Turning to Paragraph 34 of your</p>	<p>1 No. 6. Off the record 5:33 p.m.</p> <p>2 (Brief recess.)</p> <p>3 THE VIDEOGRAPHER: Here begins Tape</p> <p>4 No. 7 in today's deposition of Benjamin Edelman.</p> <p>5 Back on the record, 5:41 p.m.</p> <p>6 Q. Turning to Paragraph 36 of your</p> <p>7 report, you say, "A single breach of the systems</p> <p>8 that store book contents could allow book</p> <p>9 contents to become ubiquitous online." What is</p> <p>10 the basis for your statement?</p> <p>11 A. There's an expression about putting</p> <p>12 the genie back in the bottle. I think that</p> <p>13 applies in spades here. I give two examples in</p> <p>14 the paragraph: AOL search data that should</p> <p>15 never have been put on the Internet and U.S.</p> <p>16 State Department wires that again should never</p> <p>17 have seen the light of day. Once those</p> <p>18 materials make it onto the Internet, as we all</p> <p>19 well know, there's no taking them off the</p> <p>20 Internet and so too here.</p> <p>21 Q. What's your basis for thinking that</p> <p>22 the AOL search data is the still available on</p> <p>23 BitTorrent?</p> <p>24 A. I checked.</p> <p>25 Q. Do you possess a copy of that file?</p>

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<p>1 A. I've downloaded it maybe more than 2 once. I wouldn't be surprised if I still have a 3 copy floating around. 4 Q. With respect to WikiLeaks, what's 5 your basis for saying the information is 6 available? 7 A. I've read other sources indicating 8 that it's available, although I actually haven't 9 checked personally in any great detail. 10 Q. Have you downloaded any of the 11 WikiLeaks cables yourself? 12 A. I should be clear, I've read it at 13 the New York Times site, for example. So to the 14 extent that you can read the primary sources 15 there, as you can often, and in significant 16 quantities, I've read some of them there. 17 Q. Have you read them anywhere else? 18 A. Maybe other mainstream major media 19 publications. 20 Q. How large is the AOL search data in 21 megabytes approximately? 22 A. Approximately one gigabyte. 23 Q. How large do you estimate that 24 scanned images of 20 million books would be? 25 A. Scanned images would be much larger,</p>	<p>1 book contents being available, the likelihood 2 rather than the magnitude of the harm larger if 3 there were a proliferation of book scanners? 4 MR. BONI: Object to form. You can 5 answer. 6 A. It makes the probability larger. 7 Q. Does it affect the magnitude of the 8 harm? 9 A. The magnitude also, I would expect, 10 to be larger in this context. In the context of 11 Search Inside the Book, only a portion of books 12 are available. I understand that the number of 13 books there available is smaller than the number 14 of books here at issue, and those, of course, 15 are publishers and authors who made the 16 considered decision to go down that route; 17 whereas, here no one was asked. 18 Q. Does Amazon store the entirety of 19 books in Search Inside the Book? 20 MR. BONI: Object to form. 21 A. I don't know. I would think they'd 22 need to store either all of it or most of it. 23 Q. And if Amazon's entire corpus of 24 digitized books, including, for example, their 25 eBooks were taken and distributed in the manner</p>
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<p>1 although after OCR, they might become much 2 smaller. I would think a few gigabytes of text 3 after OCR would probably be about right. 4 MR. BONI: I just want to place an 5 objection on the record that it's a slightly 6 misleading question. We're not talking about 7 20 million in-copyright books or books that fall 8 under the class definition. That's a much lower 9 number. 10 Q. Is the risk associated with a single 11 breach of all books resulting in the genie 12 coming out of the bottle, as you say, a risk 13 that also exists with any other digitized corpus 14 of a large number of books? 15 MR. BONI: Object to form. 16 A. The risk differs in some important 17 respects from the other corpuses we've talked 18 about, such as Amazon Search Inside the Book. 19 Q. How does it differ? 20 A. First, it differs because here we 21 must consider the effect of a possible fair use 22 ruling and the other travelers coming along and 23 storing the data in ways that might be somewhat 24 less secure than Google. 25 Q. That makes, in your view, the risk of</p>	<p>1 discussed in Paragraph 36 of your report, would 2 the magnitude of that be similar to the 3 magnitude of a breach at a library? 4 MR. BONI: Object to form. 5 A. Paragraph 36 isn't about libraries. 6 I can consider the question nonetheless. Shall 7 I consider the question? 8 MR. BONI: Why don't you -- 9 Q. If Paragraph 36 isn't about 10 libraries, that clears it up for me. 11 In Paragraph 38 you say, "However 12 remote one may consider the risk of book 13 contents becoming available, that risk must be 14 considered in light of the devastating impact to 15 the class if book contents become available." 16 Here you're comparing the probability of an 17 event to the magnitude of harm in case -- in the 18 case where that event occurs; is that right? 19 A. The sentence discusses both the 20 probability and the magnitude and suggests that 21 in light of the large magnitude, even a small 22 probability should be significant cause for 23 concern. 24 Q. What is the probability of the events 25 discussed in Paragraphs -- Paragraph 37 coming</p>

<p style="text-align: right;">Page 285</p> <p>1 to pass in the event of a fair use ruling in 2 favor of Google? 3 MR. BONI: Object to form. You want 4 a mathematical response to that question? 5 MR. GRATZ: Whatever the response the 6 witness has for me. 7 MR. BONI: Object to form. 8 A. I don't know. It would be easier to 9 say once that fair ruling resulted, if it did 10 result, once we see who comes along and scans 11 which books and stores them in what ways, until 12 then, it's just a little bit too speculative for 13 me to want to put a number on it, but it 14 certainly is a serious concern. 15 Q. What's the magnitude of the harm in 16 dollars? The harm here, I mean the harm that 17 you were discussing in Paragraph 38. 18 MR. BONI: Object to form. 19 A. I'm not sure. It's difficult to put 20 a dollar value on it, but I do think it's 21 significant. If you asked a publisher what 22 would they be willing to pay to have a complete 23 protection against piracy, to be able to print 24 their books on uncopyable paper or with magical 25 ink, I think you'd find publishers would be</p>	<p style="text-align: right;">Page 287</p> <p>1 MR. BONI: Objection. You know he's 2 not a damages expert, Joe. 3 Q. You can answer. 4 A. I have not. I'm not a damages 5 expert. 6 Q. Has a company ever come to you and 7 asked you to evaluate the risk of intrusion into 8 their computer systems which protects books? 9 A. No. 10 Q. Has a company ever come to you and 11 asked you to evaluate the risk of intrusion into 12 their computer systems at all? 13 A. That seems like the kind of thing 14 someone would have asked me to do at some point. 15 I just need to take a moment to think about it. 16 Certainly I've thought about that 17 question for the organizations which -- with 18 which I've had long-term relationships. So, for 19 example, when I was running the Berkman Center 20 server, that was a question I thought about. I 21 thought about it with ICANN. I've thought about 22 it as to portions of Harvard Business School. 23 I've thought about it with Wesley as to the 24 servers that we operate together, as to paying 25 clients that come specifically for that.</p>
<p style="text-align: right;">Page 286</p> <p>1 willing to pay a significant portion of their 2 enterprise values in order to get that magical 3 technology. 4 Q. And you consider that to be the 5 measure of the magnitude of the harm set forth 6 in Exhibit -- in Paragraph 38? 7 MR. BONI: Object to form. 8 A. It's not that that's how you'd 9 measure it, but that's the sort of thought 10 experiment one would do. 11 Q. How would you measure it? 12 A. On thinking about the way that other 13 large harms are measured, how do we assess the 14 value of a life when a life is taken away from a 15 person? How do we assess the value of a plane 16 crash or a nuclear disaster? It's really not my 17 area of expertise. It's not something I've 18 opined on here. But here I consider the 19 totality of future lost profits. So I do my 20 best to figure out what profits would have been 21 and then what they will be as a result of the 22 loss, and I subtract those two numbers, and that 23 would be the starting point for the harm. 24 Q. Have you done that in preparing your 25 report?</p>	<p style="text-align: right;">Page 288</p> <p>1 I think it would be unusual for 2 anyone to seek my assistance for that solely and 3 specifically, but if they already knew me from 4 something else, I can think of a couple of 5 clients who have sought assistance with problems 6 generally in that vein based on prior 7 relationships. 8 Q. If a company came to you and asked 9 you to evaluate the risk of intrusion into its 10 computer systems which protect books, would you 11 accept the assignment? 12 MR. BONI: Object to form. That's 13 the entire hypothetical? 14 MR. GRATZ: That's the question. 15 A. I don't think I would be the best 16 person to evaluate their security systems, but I 17 think I would be able to assist them in 18 selecting an appropriate person. I would be 19 able to guide that person towards the areas of 20 greatest concern, perhaps review their initial 21 report, and suggest areas for extension and 22 further inquiry. 23 Q. What process would you recommend be 24 undertaken to evaluate the risk of intrusion 25 into those computer systems that protect books?</p>

<p style="text-align: right;">Page 289</p> <p>1 A. I suppose it would all depend on what 2 books I was trying to protect, what I was trying 3 to protect them from, what access I needed to 4 allow. The easiest thing to do to prevent 5 unauthorized access is to prevent all access by 6 destroying the digital records, but I imagine 7 that wouldn't be what someone hired me to tell 8 them. They'd want some way to use it for some 9 purposes while disallowing use for other 10 purposes. 11 Q. If a company came to you and asked 12 you to evaluate the risk of an intrusion into 13 their computer systems which protect books and 14 which host books for the purpose of making 15 snippets available in response to searches, what 16 process would you take to under -- to make that 17 evaluation? 18 A. Well, I think I would -- I would 19 consider the sorts of security systems that 20 we've discussed a couple times today in 21 different parts of our time together as to 22 physical security, network security, software 23 security, application level security, human 24 resources and internal controls. I'd consider 25 each of those. Each would be significant. Each</p>	<p style="text-align: right;">Page 291</p> <p>1 at Google. I'd look at my organizations's 2 experience or the client's organization's 3 experience with rogue employees. 4 When we have a thousand engineers, 5 how many of them turn out to be bad apples, how 6 many bad ones do you get out of a thousand? Is 7 there any way to prevent two of them from acting 8 together in concert? Could we have an audit 9 trail that prevents this kind of copying and 10 that kind of copying? Is it possible to make an 11 audit trail that's so robust that even a senior 12 engineer can't turn it off? Because we know 13 some of the problems occur from senior engineers 14 who can bypass the ordinary control. 15 So that's the kind of question I'd be 16 asking as to that facet, but to be sure, each of 17 the facets would require a different type of 18 analysis. 19 Q. Did you do any of that in preparing 20 your report in this case? 21 A. I considered those kinds of 22 approaches. The data and information required 23 aren't available to me and weren't necessary in 24 order to reach the conclusions set out in my 25 report.</p>
<p style="text-align: right;">Page 290</p> <p>1 would have multiple facets within it. 2 And then my analysis would be 3 informed, importantly, by the material that I 4 was holding. If it was unique and one of a kind 5 and highly sought after, then I would be 6 particularly concerned about the skills of my 7 intruders. And if I needed to allow massive, 8 high-volume access by a large number of 9 different users, potentially some of them fake 10 or automated or robotic, I would be even more 11 concerned, and I would need to be open to the 12 possibility, the very real possibility that I 13 couldn't do this with the required level of 14 quality and would need to revisit my plans. 15 Q. What information would you need to 16 evaluate the risk of intrusion into such a 17 system which stores books for the purpose of 18 making snippets available in response to 19 searches, for example? 20 A. One would need to think about each of 21 the aspects of security just discussed. So for 22 example, as to human resources security, making 23 sure that there isn't a rogue employee who takes 24 the data in the way that other rogue employees 25 have done other untoward things, including even</p>	<p style="text-align: right;">Page 292</p> <p>1 Q. Why weren't they necessary? Would 2 having them have aided you in reaching your 3 conclusions? 4 A. Perhaps I could have reached 5 additional conclusions. I imagine that with 6 enough study, I might get to the point where I 7 was prepared to put a number on some of the 8 probabilities. There's this probability per 9 year of this kind of bad thing happening if you 10 use these controls. I think that is an 11 estimatable number. One can estimate even these 12 very small probabilities with enough analysis 13 and enough review, but it's quite difficult, and 14 I didn't consider it necessary or appropriate, 15 given what I was asked to do in this report at 16 this time. 17 Q. Did you run any bargaining 18 experiments in connection with your report? 19 A. No. 20 Q. Did you perform any statistical 21 analysis in connection with your report? 22 A. No. 23 Q. In signing your own consulting 24 agreements, have you performed market checks 25 regarding terms?</p>

<p style="text-align: right;">Page 293</p> <p>1 MR. BONI: Object to form. I don't 2 know what that means. Can you explain that. 3 Q. Mr. Edelman, are you familiar with 4 the term "market checks"? 5 A. I've a general understanding. 6 Q. What is it? 7 A. A market check would be a comparison 8 of a price term or some other term with possible 9 alternatives, benchmarks, competitors, in order 10 to see whether that term is consistent with 11 others that are in other respects similar. 12 Q. Have you done that with respect to 13 your own consulting agreements and your 14 consulting rates? 15 A. In some instances I have. 16 Q. Did you do that in connection with 17 any of the facts or opinions you set forth in 18 your report? 19 A. I'm sorry, I don't understand. 20 MR. BONI: I don't understand it 21 either. 22 Q. Did you review the terms of any 23 agreements -- strike that. 24 In reaching the conclusions set forth 25 in your report, did you perform any market</p>	<p style="text-align: right;">Page 295</p> <p>1 A. I didn't approach it that way. 2 Q. Did you determine the probabilities 3 for either of those terms, that the parties 4 would reach those terms in a negotiation? 5 MR. BONI: What parties? Object to 6 form. 7 Q. The parties to the hypothetical 8 agreement that you hypothesize in Paragraph 9 of 9 your report. 10 A. One thing that I did put a 11 probability on was the chance of any liquidated 12 damages clause becoming available without a 13 contract, and that was zero. So it can only go 14 up from there, and that much was clear to me. 15 As to whether or not it would go up, 16 it seems to me that -- that publishers, if 17 acting together in some way, bargaining 18 collectively, bargaining with Google, with 19 Google in a position of weakness for whatever 20 legal or business reason, it's possible that the 21 publishers would be able to get quite a bit of 22 the ground, particularly if they could use 23 Google's confidence as to the efficacy of its 24 security systems, frankly, to use that against 25 Google.</p>
<p style="text-align: right;">Page 294</p> <p>1 checks? 2 MR. BONI: I object to form. I just 3 don't understand the line of questioning. 4 A. I didn't see a basis for comparison 5 to compare the contents of my expert report with 6 three similar expert reports written by others. 7 I didn't see the comparison group. 8 MR. BONI: Not what you're asking. 9 MR. GRATZ: Not what I -- 10 Q. Did you do a market check of -- so 11 some of the -- some of the opinions you state, 12 one of the opinions you state in your report is 13 it that certain hypothetical contracts would 14 have certain terms; is that right? 15 A. At least they could if they were 16 subject to negotiation. 17 Q. Or that -- right. Or that certain 18 hypothetical contracts could at least -- at 19 least potentially have certain terms? 20 A. Yes. 21 Q. In determining -- did you form an 22 opinion as to what the likelihood is that either 23 the security term or the liquidated damages term 24 would, in fact, end up being an element of a 25 bargained-for agreement?</p>	<p style="text-align: right;">Page 296</p> <p>1 If Google is so sure that its 2 security is robust, then it shouldn't have any 3 problem making a guarantee of a thousand dollars 4 per work in the event of a defect, since Google 5 says that will absolutely never happen. 6 Q. Did you assign a probability to the 7 likelihood that that would occur? 8 A. I didn't assign a probability to it. 9 Q. Did you talk to any authors in 10 preparing your report? 11 A. No. 12 Q. Did you talk to any publishers in 13 preparing your report? 14 A. No. 15 Q. Did you talk to any staff members of 16 the Authors Guild in preparing your report? 17 A. No. 18 Q. Did you review the contract governing 19 the Back In Print program in preparing your 20 report? 21 A. No. 22 Q. Did you review any other publishing 23 agreements in preparing your report? 24 MR. BONI: He listed what he 25 reviewed, Joe, Exhibit C.</p>

<p style="text-align: right;">Page 297</p> <p>1 Q. You can answer the question.</p> <p>2 A. No.</p> <p>3 Q. Have you ever talked to anyone at</p> <p>4 Microsoft about its book program?</p> <p>5 A. Not recently. It would have been a</p> <p>6 couple of years ago. If I did, I don't really</p> <p>7 recall it specifically.</p> <p>8 Q. In preparing your report, did you</p> <p>9 investigate Google's security for books?</p> <p>10 A. I don't know what you mean by</p> <p>11 "investigate" in this context.</p> <p>12 Q. Did you seek to determine the</p> <p>13 strength of Google's security for books?</p> <p>14 A. I checked for secondary sources</p> <p>15 indicating that others had already bypassed the</p> <p>16 security. I didn't find sources to that effect.</p> <p>17 Q. You didn't find any sources</p> <p>18 indicating that others had bypassed Google's</p> <p>19 security for books?</p> <p>20 A. That's right, and that's something I</p> <p>21 would have wanted to know about, if such sources</p> <p>22 existed already.</p> <p>23 Q. Do you possess any Google</p> <p>24 confidential information regarding its book</p> <p>25 project?</p>	<p style="text-align: right;">Page 299</p> <p>1 A. In short, my advice to him -- well,</p> <p>2 he came to me as an attorney.</p> <p>3 MR. BONI: I was going to ask you</p> <p>4 that. Were you rendering legal advice?</p> <p>5 THE WITNESS: I wasn't retained.</p> <p>6 Nonetheless --</p> <p>7 MR. BONI: Doesn't matter.</p> <p>8 THE WITNESS: -- I think we should</p> <p>9 stop right here.</p> <p>10 MR. BONI: Yeah, I agree.</p> <p>11 Q. So it's your testimony that in your</p> <p>12 discussion with Deepak Malhotra regarding</p> <p>13 piracy, you were having attorney/client</p> <p>14 communications with Mr. Malhotra?</p> <p>15 A. I think I was, yes.</p> <p>16 Q. Other than Mr. Malhotra, have you</p> <p>17 discussed piracy with any other authors?</p> <p>18 A. I know that I have. But I'm having</p> <p>19 trouble recalling specifically who.</p> <p>20 Q. Do you remember what you said to</p> <p>21 them?</p> <p>22 A. Generally, my advice to individual</p> <p>23 authors is that it's hard for any individual</p> <p>24 author to do much about it, so they're probably</p> <p>25 better off individually focusing their efforts</p>
<p style="text-align: right;">Page 298</p> <p>1 A. I have specifically indicated that I</p> <p>2 don't want any such information, and I believe I</p> <p>3 don't have any.</p> <p>4 Q. Have you ever tried to pirate a book</p> <p>5 from Google Book Search?</p> <p>6 A. I have not.</p> <p>7 Q. Have you ever advised a -- strike</p> <p>8 that.</p> <p>9 Have you ever advised an author</p> <p>10 regarding piracy?</p> <p>11 A. I've discussed it with some authors.</p> <p>12 Q. What was the -- what authors were</p> <p>13 those?</p> <p>14 A. Most recently I discussed it with my</p> <p>15 colleague, Deepak Malhotra.</p> <p>16 Q. Any others?</p> <p>17 A. I have discussed it with others. I'm</p> <p>18 having trouble recalling specifically.</p> <p>19 Q. What did you discuss with Deepak</p> <p>20 Malhotra?</p> <p>21 A. The likelihood of piracy, the extent</p> <p>22 to which a pirated copy might detract from a</p> <p>23 ordinary purchased copy, his remedies, if any,</p> <p>24 as against piracy and those who profit from it.</p> <p>25 Q. What did you say to him?</p>	<p style="text-align: right;">Page 300</p> <p>1 on writing a great book and selling as many</p> <p>2 copies as they can to whoever is willing to pay</p> <p>3 for it.</p> <p>4 Q. Have you ever advised an author not</p> <p>5 to post digital contents for fear of piracy?</p> <p>6 A. In fact, I reached that own -- that</p> <p>7 conclusion for myself as to the Google case. I</p> <p>8 declined to post it on my website, even though I</p> <p>9 have the right to do that. So I advised myself</p> <p>10 not to do it.</p> <p>11 Q. And by the "Google case," you mean</p> <p>12 the case study regarding Google that you wrote</p> <p>13 for Harvard Business School Press?</p> <p>14 A. That's what I meant, yes.</p> <p>15 Q. Why didn't you -- why did you decide</p> <p>16 not to post it?</p> <p>17 A. The school would prefer that those</p> <p>18 cases be purchased directly from the school at</p> <p>19 the per copy price that you saw. And so even</p> <p>20 though it is an author's right to post it if the</p> <p>21 author so chooses, I decided not to for that</p> <p>22 case.</p> <p>23 Q. Do you understand the Authors Guild</p> <p>24 to be advising authors not to post digital</p> <p>25 content for fear of piracy?</p>

<p style="text-align: right;">Page 301</p> <p>1 MR. BONI: Object to form. 2 A. I'm not sure. 3 Q. Are any of your articles available 4 for licensing by the Copyright Clearance Center? 5 A. I expect that they are. 6 Q. Have you ever negotiated with the 7 Copyright Clearance Center regarding those 8 issues? 9 MR. BONI: Regarding? 10 Q. Those issues? 11 MR. BONI: What issues? 12 Q. Regarding the availability of your 13 articles for licensing through the Copyright 14 Clearance Center? 15 A. I believe there's a standard form 16 that I filled out when I submitted by Ph.D. to 17 the Harvard Library system, my Ph.D. 18 dissertation. That is a Copyright Clearance 19 Center form, as I call it. 20 Q. Was it a UMI microfilms form? 21 A. This was seven years ago. Perhaps I 22 should refresh my recollection in some other 23 way. It seems perfunctory, and I signed it, 24 although if there were choices to be made, I 25 can't tell you what choice I made.</p>	<p style="text-align: right;">Page 303</p> <p>1 MR. BONI: If there's any 2 confidential relationship or privileged 3 relationship, then you shouldn't answer. 4 A. There are both confidential and 5 privileged issues raised by that question. 6 MR. BONI: If there's anything you 7 can say outside the confines of the privilege, 8 to be fair, you should say that. 9 A. What I've said publicly and what 10 Microsoft has authorized me to say publicly is 11 that I've offered them guidance on a variety of 12 questions. Most of the work focused on things 13 other than Google, actually. Integrity and 14 auditing and advertising fraud and so forth. 15 Routine business matters, from my perspective. 16 Q. But some of the work focused on 17 Google? 18 A. I think I can give you a yes to that 19 without implicating the confidentiality or the 20 privilege, but beyond that, I feel I'm obliged 21 to tread lightly. 22 Q. How much money has Microsoft paid you 23 for your work related to Google? 24 A. I think that's confidential. 25 Q. You were opposing counsel -- strike</p>
<p style="text-align: right;">Page 302</p> <p>1 MR. BONI: You want to show him 2 something or are you just fishing? 3 MR. GRATZ: Neither. 4 Q. Does the CCC, the Copyright Clearance 5 Center, negotiate security protocols with those 6 who license content from the CCC for posting on 7 the web, for example? 8 A. I don't know. 9 Q. Does the CCC negotiate liquidated 10 damages terms with its licensees? 11 A. I don't know. 12 Q. You've done consulting work apart 13 from your -- the expert engagements that we've 14 discussed; is that right? 15 A. Yes. 16 Q. And some of that consulting work has 17 been for Microsoft; is that right? 18 A. Yes. 19 Q. Overall how much money has Microsoft 20 paid you? 21 A. That's confidential information. 22 Q. Have you ever spoken with anyone at 23 Microsoft about Google? 24 A. Yes. 25 Q. What was said?</p>	<p style="text-align: right;">Page 304</p> <p>1 that. 2 You were counsel for the plaintiff's 3 in the Vulcan Gulf case in which the plaintiffs 4 were suing Google; is that right? 5 A. Yes. 6 Q. Did you receive a fee in connection 7 with that litigation? 8 A. I did not. 9 Q. Was that a contingent fee 10 arrangement? 11 A. The agreement with the class 12 representative, the putative class 13 representative, was that the fees would be paid 14 only upon the successful conclusion of the 15 litigation. 16 Q. Did the litigation conclude 17 successful or successfully enough to result in 18 the payment of any money to you? 19 A. Not successfully enough to result in 20 the payment of any money to me. 21 Q. How many blog posts have you written 22 which were critical of Google? 23 A. I'm not sure. I think more than 20. 24 Q. How many blog posts have you written 25 which were supportive of Google?</p>

<p style="text-align: right;">Page 305</p> <p>1 A. More than five.</p> <p>2 Q. Fewer than 20?</p> <p>3 A. I think it's fair to say fewer than</p> <p>4 20.</p> <p>5 Q. Are you familiar with an economist</p> <p>6 named Judith Chevalier?</p> <p>7 A. Yes.</p> <p>8 Q. Who is Judith Chevalier?</p> <p>9 A. She was at the Yale School of</p> <p>10 Management. She's an excellent economist.</p> <p>11 Q. Have you ever cited Judith</p> <p>12 Chevalier's work regarding the economics of the</p> <p>13 market for books?</p> <p>14 A. I have in at least two instances that</p> <p>15 I'm aware.</p> <p>16 Q. In what instances were those?</p> <p>17 A. My undergraduate thesis used a method</p> <p>18 that Ms. Chevalier and Austan Goolsbee developed</p> <p>19 to convert an Amazon sales rank into an</p> <p>20 estimated sales quantity. And so I cited their</p> <p>21 work in the context of that in the graduate</p> <p>22 thesis.</p> <p>23 Then I recently published an article</p> <p>24 about collecting data from the Internet and</p> <p>25 using that data for economic research, and I</p>	<p style="text-align: right;">Page 307</p> <p>1 Goolsbee, the first author on that paper.</p> <p>2 Q. Turning to page 3 of the thesis, you</p> <p>3 cite the Goolsbee and Chevalier paper in the</p> <p>4 center of that page; is that right?</p> <p>5 A. Yes.</p> <p>6 Q. Turning to page 8 of the thesis, you</p> <p>7 cite the Goolsbee and Chevalier paper in the</p> <p>8 last line of that page; is that right?</p> <p>9 A. Yes.</p> <p>10 Q. And it's also cited on the following</p> <p>11 page in the second to last line; is that right?</p> <p>12 A. Yes.</p> <p>13 Q. As well as in the middle of the page?</p> <p>14 A. So it is.</p> <p>15 Q. Turning to page 31, you cite the</p> <p>16 Goolsbee and Chevalier paper at the beginning of</p> <p>17 the page?</p> <p>18 A. I do.</p> <p>19 Q. And then turning to page 70, you cite</p> <p>20 the Goolsbee and Chevalier paper in the center</p> <p>21 of the page in the middle of the line; is that</p> <p>22 right?</p> <p>23 A. Yes.</p> <p>24 Q. What is your opinion of Judith</p> <p>25 Chevalier's expertise regarding economics?</p>
<p style="text-align: right;">Page 306</p> <p>1 cited that same article again for substantially</p> <p>2 the same purpose.</p> <p>3 Q. And you cited Ms. Chevalier's work</p> <p>4 multiple times in your thesis; is that right?</p> <p>5 A. I should think I cited it multiple</p> <p>6 times, yes.</p> <p>7 Q. How about six times; is that right?</p> <p>8 MR. BONI: But who's counting?</p> <p>9 A. I don't know. I haven't read that</p> <p>10 often, recently.</p> <p>11 MR. GRATZ: Let's mark as Exhibit 20</p> <p>12 this document.</p> <p>13 (Document marked as Exhibit No. 20 for</p> <p>14 identification.)</p> <p>15 Q. Mr. Edelman, is this your</p> <p>16 undergraduate senior thesis?</p> <p>17 A. Well, it seems to be. It's not so</p> <p>18 easy to get. Usually, people have to ask me for</p> <p>19 it, so I'm intrigued you managed to find it</p> <p>20 without asking me for it. But it seems to be</p> <p>21 what it purports to be.</p> <p>22 Q. This is the document in which you</p> <p>23 cited Ms. Chevalier's work?</p> <p>24 A. I think so. Let's check the</p> <p>25 references section. Cited under "G" for</p>	<p style="text-align: right;">Page 308</p> <p>1 A. Well, I just loved this paper and</p> <p>2 found it very clever. She's been quite</p> <p>3 prolific, and I really haven't read the majority</p> <p>4 of her work. I look forward to taking the time</p> <p>5 to do that sometime soon I hope. But beyond</p> <p>6 that, she's very well-published in top journals,</p> <p>7 which means that the prevailing view among her</p> <p>8 peer reviewers is that her work is quite good.</p> <p>9 Q. What is your opinion of Judith</p> <p>10 Chevalier's expertise regarding the economics of</p> <p>11 the market for books?</p> <p>12 MR. BONI: Object to form.</p> <p>13 Q. What is your opinion of Judith</p> <p>14 Chevalier's expertise regarding the economics of</p> <p>15 the market for books?</p> <p>16 MR. BONI: Object to form.</p> <p>17 A. I'm not sure. I haven't read her</p> <p>18 opinions on that in general. I know the</p> <p>19 findings that are in the Goolsbee and Chevalier</p> <p>20 2001 paper. As to her other conclusions, I'd</p> <p>21 need to review both the conclusions and the</p> <p>22 methodologies to see what I think.</p> <p>23 Q. Are you familiar with a man by the</p> <p>24 name of Albert Greco?</p> <p>25 A. I don't think so.</p>

<p style="text-align: right;">Page 309</p> <p>1 Q. Turning to the references cited page 2 of your senior thesis on page 77, under G, do 3 you see a citation to a book by A. Greco called 4 The Book Publishing Industry? 5 A. Yes. 6 Q. And turning to page 33 of your senior 7 thesis, you see the bottom of page 33 it says, 8 "I further add two promotion-specific variables 9 to investigate market trends noted by Greco 10 (1997) in discussing clumping of book sales over 11 time"? 12 A. Yes. 13 Q. Is that a citation to the Greco work 14 titled The Book Publishing Industry cited in 15 your references cited section? 16 A. Seems to be. 17 Q. Do you have an opinion as to Albert 18 Greco's expertise regarding The Book Publishing 19 Industry? 20 A. Not really. 21 MR. BONI: Are you done with this, 22 Joe? 23 MR. GRATZ: Yes. Nothing further. 24 MR. BONI: I have nothing. 25 THE VIDEOGRAPHER: Here ends this</p>	<p style="text-align: right;">Page 311</p> <p>1 CERTIFICATE 2 COMMONWEALTH OF MASSACHUSETTS. 3 MIDDLESEX, SS. 4 I, Avis Barber, Registered Professional 5 Reporter and Notary Public, in and for the 6 Commonwealth of Massachusetts, do hereby certify 7 that: 8 BENJAMIN G. EDELMAN, the witness whose 9 deposition is hereinbefore set forth, was duly 10 sworn by me, that I saw a picture identification 11 for him in the form of his Harvard College 12 Identification card, and that the foregoing 13 transcript is a true and accurate transcription 14 of my stenotype notes to the best of my 15 knowledge, skill and ability. 16 I further certify that I am not related to 17 any of the parties in this matter by blood or 18 marriage and that I am in no way interested in 19 the outcome of this matter. 20 IN WITNESS WHEREOF, I have hereunto set my 21 hand and notarial seal this 20th day of June 22 2012. 23 ----- 24 Avis Barber, RPR 25 Notary Public My commission expires: July 30, 2015</p>
<p style="text-align: right;">Page 310</p> <p>1 deposition. Off the record, 6:18 p.m. 2 (Whereupon, the deposition was 3 concluded at 6:18 p.m.) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 312</p> <p>1 I declare under penalty of perjury 2 under the laws that the foregoing is 3 true and correct. 4 5 Executed on _____, 20____, 6 at _____, _____. 7 8 9 10 11 12 13 BENJAMIN G. EDELMAN 14 15 16 17 18 19 20 21 22 23 24 25</p>

EXHIBIT 17

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In the middle of August I went to see Marvin Milkes, the general manager of the Seattle Angels. I told him that I wanted some kind of guarantee from him about next year. There were some businesses with long-range potential I could go into over the winter and I would if I was certain I wasn't going to be playing ball.

"What I would like," I told him, "is an understanding that no matter what kind of contract you give me, major league or minor league, that it will be for a certain minimum amount. Now, I realize you don't know how much value I will be for you since you haven't gone through the expansion draft and don't know the kind of players you'll have. So I'm not asking for a major-league contract, but just a certain minimum amount of money."

"How much money are you talking about?" Milkes said shrewdly.

"I talked it over with my wife and we arrived at a figure of \$15 or \$16,000. That's the minimum I could afford to play for, majors or minors. Otherwise I got to go to work."

To this Milkes said simply, "No."

I couldn't say I blamed him.

It was right about then, though, that the knuckleball I'd been experimenting with for a couple of months began to do things. I won two games in five days, going all the way, giving up only two or three hits. I was really doing a good job and everyone was kind of shocked. As the season drew to a close I did better and better. The last five days of the season I finished with a flurry, and my earned-run average throwing the knuckleball was 1.90, which is very good.

The last day of the season I was in the clubhouse and Milkes said he wanted to see me for a minute. I went up to his office and he said, "We're going to give you the same contract for next year. We'll guarantee you \$22,000." This means if I didn't get released I'd be getting it even if I was sent down to the minors. I felt like kissing him on both cheeks. I also felt like I had a new lease on life. A knuckleball had to be pretty impressive to impress a general manager \$7,000 worth. Don't ever think \$7,000 isn't a lot of money in baseball. I've had huge arguments over a lot less.

3

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circulation manager

ticle—this one a his and hers pants show, with poems for all the models. One of the poems said:

*Pat and Paul together make many scenes
In classes and parties in their striped jeans.*

How can people write things like that! Ma said she was afraid someone would see her by-line and think she wrote the poems.

All her articles were printed in the "Food and Family" section of the paper. But she said, "I'm heading for the front page. Wait and see. Before the year is over."

Meanwhile, I was delivering papers every day as though I really had the route. Ma had taken my recommendations to the circulation manager. She says she told him: "This is about Barbara Fisher, my daughter. But I'm not asking you to change your rules because she's my daughter. I'm asking you to change them because they are discriminatory and wrong."

I bet she really made an impression on him. I know I couldn't talk like that.

But all the circulation manager said was, "I'm sorry, Marian, but a rule's a rule. Tell your little girl not to take it personally."

When she told me I said "But I do take it now."

Hide These Books

Your Browsing History
Customers Also Bought
Books customers also bought could not be retrieved

Feedback | Help | Expanded View | Close

26 used & new from \$0.79

Miles

Exhib. #12

1-4-2012 20

EXHIBIT 19

6/11/12

Amazon.com



Link to this page

Add to Widget

Add to aStore

Share

Your Earnings Summary

What's New

Discussion Boards

amazon

Settings

JOSEPH's Amazon.com

Today's Deals

Gift Cards

Help

Shop by
Department

Search

Go

Hello, JOSEPH
Your Account

0 Cart

Wish
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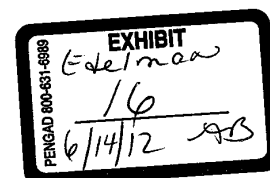
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6/11/12

Amazon.com

☐ Yes**Name*****Professional Title****Publishing Company Name*****Address Line 1*****Address line 2****City*****State/Province/Region*****Zip/Postal Code*****Country*****Email Address*****Professional Email Address (if different)****Telephone Number (including area code)*****Book Distributor (optional)**

* indicates required field

EXHIBIT 20

Page 1

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

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 THE AUTHORS GUILD, et al.,

6

7 Plaintiffs,

8 - against-

Master File No.

9

05 CV 8136-DC

10

11 GOOGLE, INC.,

12

Defendant.

13 -----X

14

15

June 8, 2012

16

9:30 a.m.

17

18

Deposition of JUDITH A. CHEVALIER,

19

held at the offices of Milberg, LLP, One

20

Penn Plaza, New York, New York, pursuant to

21

Agreement, before NANCY SORENSEN, a Notary

22

Public of the State of New York.

23

24

25

Page 125

1 J.A. Chevalier - C O N F I D E N T I A L

2 new goods; is that right?

3 A. Correct.

4 Q. So this is, again, your analysis here
5 is part of the economic theory involving the
6 development of new goods?

7 A. Correct.

8 MS. ZACK: We can take a break for
9 lunch.

10 MR. McGOWAN: Before we do that, let
11 me note for the record, the document number
12 you asked for is Google 05004751.

13 MS. ZACK: I know what that is, so
14 that's the big long list.

15 (Luncheon recess: 12:26 p.m.)

16

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25

Page 126

1 J.A. Chevalier - C O N F I D E N T I A L
2 A F T E R N O O N S E S S I O N
3 (Time noted: 1:15 p.m.)
4 J U D I T H A. C H E V A L I E R, resumed
5 and testified as follows:
6 CONTINUED EXAMINATION
7 BY ZACK:
8 Q. Referring you to page 9 of your
9 report, please? You have discussion throughout
10 this section about Google Books as a complement,
11 not substitute?
12 A. Correct.
13 Q. And which you talk about the fact
14 that books get noticed, etcetera --
15 A. Correct.
16 Q. -- through Google Books, and that
17 that's a benefit. You conclude that's a benefit
18 to authors; right?
19 A. Correct.
20 Q. That benefit is virtually exclusive
21 to in-print authors; correct?
22 A. I wouldn't say that. I think
23 in-print authors will benefit more, but
24 out-of-print authors may benefit under certain
25 circumstances.

Page 127

1 J.A. Chevalier - C O N F I D E N T I A L

2 Q. Can you tell me those circumstances
3 in which you think they'll benefit, given the
4 way Google Books works?

5 A. Yes. So I think they will benefit in
6 a number of circumstances. One would be if,
7 even though some of the authors' books are out
8 of print and some of the books -- if in
9 circumstances where some of the authors' books
10 are out of print and other of the authors' books
11 are in print, consumers may, you know, if they
12 discover a book they're interested in via Google
13 Books, that might lead them to other books by
14 those authors.

15 It may lead them to other books on
16 the same topic, probably benefitting different
17 authors. But I think also, there are some
18 mechanisms and those mechanisms, I think, are
19 becoming more relevant in the marketplace, where
20 if consumers, say, buy used books on Amazon and,
21 you know, there are used books on Amazon that
22 are selling for very high prices because there's
23 a demand for the book to come back into print.

24 There may be circumstances in which,
25 you know, a book could be driven back into print

1 J.A. Chevalier - C O N F I D E N T I A L
2 by consumer demand.

3 Q. That's true whether there is or isn't
4 Google Books; isn't it?

5 A. That's true whether there is or there
6 isn't Google Books, but it's my testimony that
7 Google Books helps drive consumer demand for
8 books.

9 Q. So if consumers are buying used books
10 on Amazon, that helps drive consumer books for
11 new books by those authors?

12 A. I'm saying that -- I said, I think,
13 two distinct things. The consumer may look for
14 other books by the same author.

15 And, you know, when consumers buy
16 used books on Amazon, when used books, you know,
17 when it becomes apparent that there's a lot of
18 demand for a used book, that may assist in
19 bringing the book back into print.

20 Q. How does the author know if there's a
21 lot of demand for a used book on Amazon?

22 A. Well, for example, the price at which
23 the book is selling in the Amazon Marketplace,
24 reflects the, reflects the supply and demand of
25 the book.

1 J.A. Chevalier - C O N F I D E N T I A L

2 Q. Right, so it could have a high price
3 because it's in rare supply, but that doesn't
4 mean there's a lot of demand; does it?

5 A. If there's a high price for the book,
6 and, you know, I suppose it's possible that a
7 seller posted a high price for the book and
8 never sells it, but if transactions are taking
9 place at a high price, that means that there's
10 high demand relative to supply.

11 Q. Is that reported to authors or
12 publishers?

13 A. An author could easily look that up.

14 Q. Could easily look it up where? Have
15 you looked it up?

16 A. Yes, so if you go to Amazon and you
17 look at Amazon Marketplace, you would see -- and
18 I would do this, I would advise, if I were an
19 author doing this for other book sellers too, I
20 would look at the copies of my used book, and
21 the prices that they're selling for.

22 Q. Does that functionality tell you the
23 prices that -- the actual sales prices?

24 A. So it tells you the prices that
25 sellers have posted. If you, if you were to,

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Attorneys for Defendant
Google Inc.

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

THE AUTHORS GUILD, INC., Associational
Plaintiff, BETTY MILES, JOSEPH
GOULDEN, and JIM BOUTON, on behalf of
themselves and all other similarly situated,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 05 CV 8136 (DC)
ECF Case

**DECLARATION OF SCOTT DOUGALL IN OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

I, Scott Dougall, hereby declare under penalty of perjury:

1. I am Product Management Director of Digital Publishing at Google Inc. I submit this declaration in opposition to Plaintiffs' Motion for Summary Judgment. I make this declaration based on personal knowledge of the facts and circumstances set forth herein.
2. I have been involved in the Google Books project since September of 2010. Since that time, I have been responsible for defining and guiding the direction of the Google Book Search Partner Program, among other responsibilities.
3. The Partner Program is a program by which rightsholders, such as publishers, may provide books to Google for search, hosting, and display. Google does not charge fees for participation in the Partner Program.
4. Over 45,000 publishers have included works within the Partner Program, including HarperCollins, Penguin, Simon & Schuster, and Macmillan.
5. In the past, rightsholders had the option to display advertisements adjacent to pages of books displayed in the Partner Program. If they chose to do so, the rightsholder received a share of the revenue from those advertisements. The advertiser was charged, and the rightsholder paid, only when a user clicked on an advertisement.
6. Users viewing Partner Program books seldom clicked on advertisements adjacent to pages of books. This indicated to us that users did not find these advertisements very useful. It also meant that revenue from those advertisements was relatively low.
7. For these reasons, in 2011, we decided to stop running advertisements adjacent to pages of books in the Partner Program, and phased them out by early 2012.
8. I know of no rightsholder who has withdrawn books from the Partner Program because they were no longer able to run advertisements adjacent to pages of those books.

9. Google does not and would not pay for a license to do that which it has done with respect to books scanned from libraries, or for any use which helps promote the sale of books.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of August, 2013 at Mountain View, California.



Scott Dougall

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Google Inc.

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

THE AUTHORS GUILD, INC., Associational
Plaintiff, BETTY MILES, JOSEPH
GOULDEN, and JIM BOUTON, on behalf of
themselves and all other similarly situated,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 05 CV 8136 (DC)

**GOOGLE INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFFS'
STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Google Inc. (“Google”), by its attorneys, and pursuant to Local Rule 56.1, respectfully submits the following Response to Plaintiffs’ Statement of Material Facts. Facts designated “Undisputed” are facts Google has elected not to dispute for purposes of Plaintiffs’ Motion for Partial Summary Judgment in this matter, and do not constitute admissions.

1. Representative plaintiff Jim Bouton holds the United States copyright in BALL FOUR (registration number A173097). *See* Copy of U.S. Copyright Registration No. A173097 for JIM BOUTON, BALL FOUR (Declaration of Joanne Zack in Support of Plaintiffs’ Motion for Partial Summary Judgment (hereinafter “Zack SJ Decl.”) Ex. 1).

Response: Undisputed that Bouton is the legal or beneficial owner of the identified copyright.

2. Representative plaintiff Betty Miles holds the United States copyright in THE TROUBLE WITH THIRTEEN (registration number TX0000338841). *See* Copy of U.S. Copyright Registration No. TX0000338841 for BETTY MILES, THE TROUBLE WITH THIRTEEN (Zack SJ Decl. Ex. 2).

Response: Undisputed that Miles is the legal or beneficial owner of the identified copyright.

3. Representative plaintiff Joseph Goulden holds the United States copyright in THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS (registration number A346254). *See* Copy of U.S. Copyright Registration No. A346254 for JOSEPH GOULDEN, THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS (Zack SJ Decl. Ex. 3).

Response: Undisputed that Goulden is the legal or beneficial owner of the identified copyright.

4. Each of the books identified in Nos. 1-3 above has been copied and displayed by Google in its Library Project without plaintiffs' permission. *See* Print-outs from Google's website displaying search results in JIM BOUTON, BALL FOUR (Zack SJ Decl. Ex. 4); Print-outs from Google's website displaying search results for the term "pitch" in JIM BOUTON, BALL FOUR (Zack SJ Decl. Ex. 5); Print-outs from Google's website displaying search results for the term "pitches" in JIM BOUTON, BALL FOUR (Zack SJ Decl. Ex. 6); Print-outs from Google's website displaying search results in BETTY MILES, THE TROUBLE WITH THIRTEEN (Zack SJ Decl. Ex. 7); Print-outs from Google's website displaying search results in JOSEPH GOULDEN, THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS (Zack SJ Decl. Ex. 8); Defendant Google Inc.'s Responses and Objections to Plaintiffs First Set of Requests for Admission (hereinafter "Google Admissions") at 11 (Zack SJ Decl. Ex. 27).

Response: Undisputed that each of the books identified in Nos. 1-3 above has been scanned by Google in its Library Project without plaintiffs' permission, and that the cited print-outs reflect the display of snippets from the identified books.

5. Google had distributed approximately [REDACTED] scanned books to the partnering libraries, as of March 26, 2012. *See* Zack SJ Decl. Ex. 9 (excerpts from spreadsheet produced by Google to plaintiffs on March 26, 2012).

Response: Undisputed that libraries chose to download approximately [REDACTED] scanned books as of March, 26, 2012 using the GRIN system. Disputed that the creation and maintenance of the GRIN system by Google constitutes distribution on the part of Google, since Google does not create or distribute the electronic copies that libraries make. Decl. Stephane Jaskiewicz Supp. Def. Google Inc.'s Mot. Summ. J., ECF No. 1041 ("Jaskiewicz Decl.") ¶¶ 6-9.

6. Digital copies of BALL FOUR and SUPERLAWYERS have been distributed to the [REDACTED] library: BALL FOUR on July 20, 2010, and SUPERLAWYERS twice, on July 29, 2009, and November 16, 2010. *See id.*

Response: Undisputed that the [REDACTED] chose to download BALL FOUR and SUPERLAWYERS using the GRIN system. Disputed that the creation and maintenance of the GRIN system by Google constitutes distribution on the part of Google, since Google does not create or distribute the electronic copies that libraries make. Jaskiewicz Decl. ¶¶ 6-9.

7. The Authors Guild, Inc. is the nation's largest organization of published authors. Print-out from <http://www.authorsguild.org/about/history.html> (Zack SJ Decl. Ex. 10).

Response: Undisputed.

8. The Authors Guild advocates for and supports the copyright and contractual interests of published writers. *Id.*

Response: Undisputed.

9. Defendant Google Inc. ("Google") owns and operates the largest Internet search engine in the world. *See* Print-out from <http://investor.google.com/corporate/faq.html> ("Google is now widely recognized as the world's largest search engine.") (Zack SJ Decl. Ex. 11, p.1).

Response: Undisputed.

10. Each day, millions of people use Google's search engine free of charge, while commercial and other entities pay to display ads to visitors to Google's websites and other websites that contain Google ads. *See* Google Dec. 14, 2004 press release, "Google Checks Out Library Books," p.2 (Zack SJ Decl. Ex. 12).

Response: Undisputed.

11. For the year ended December 31, 2011, Google reported over \$36.5 billion in “advertising revenues.” 2011 Google Form 10-K, p.56 (Zack SJ Decl. Ex. 13).

Response: Undisputed.

12. For the year ended December 31, 2010, Google reported over \$29 billion in revenue generated “primarily by delivering relevant, cost-effective online advertising.” *See* 2010 Google Form 10-K, p.3 (Zack SJ Decl. Ex. 14).

Response: Undisputed.

13. In October 2004, Google first announced its digital books program, calling it Google Print. *See* GOOG000101103 (noting that Google Print was launched on October 6, 2004) (Zack SJ Decl. Ex. 15); *see also* Transcript of deposition of Daniel Clancy taken February 10, 2012 (hereinafter “Clancy Dep.”) at 93-94 (Zack SJ Decl. Ex. 16).

Response: Undisputed that Google announced a digital books program called “Google Print” involving the hosting and display of material provided by book publishers or other rightsholders in October 2004. As outlined in the cited document, however, “Google Print” involved only the hosting and display of material provided by book publishers or other rightsholders, not the scanning of books from the collections of libraries. *See* Zack SJ Decl. Ex. 15 at GOOG000101103 (discussing deals with publishers, not libraries).

14. Google Print later became Google Books. Clancy Dep. at 94 (Zack SJ Decl. Ex. 16).

Response: Undisputed that Google Print, which involved the hosting and display of material provided by book publishers or other rightsholders, became the “Partner Program” portion of Google Books. However, “Google Print” involved only the hosting and display of material provided by book publishers or other rightsholders, not the scanning of books from the

collections of libraries. *See* Zack SJ Decl. Ex. 15 at GOOG000101103 (discussing deals with publishers, not libraries).

15. Google's Partner Program together with Google's Library Project comprise the Google Books program. *Id.*

Response: Undisputed.

16. Works in the Partner Program are displayed with permission of the rightsholder. Clancy Dep. at 215 (Zack SJ Decl. Ex. 16); Google Books Partner Program Standard Terms and Conditions (hereinafter "Terms and Conditions") 2-3 (Zack SJ Decl. Ex. 17).

Response: Undisputed.

17. Since 2004, the Partner Program has allowed publishers and other rightsholders to permit Google to display their works in exchange for a split of ad revenue. GOOG000101103 (Zack SJ Decl. Ex. 15); Clancy Dep. at 93 (Zack SJ Decl. Ex. 16).

Response: Undisputed that Google shared revenue from ads shown next to full pages of books with the publishers or other rightsholders who asked that Google host the books for them. However, not all publishers chose to display ads in connection with their books, and Google has stopped displaying ads next to full pages of books in the Partner Program. Decl. Scott Dougall Opp'n Plas.' Mot. Partial Summ. J. ("Dougall Opp'n Decl.") ¶¶ 5-8.

18. The Partner Program is aimed at "help[ing] publishers sell books" and "help[ing] books become discovered," while "adding authoritative content" to Google's website. Transcript of the deposition of Thomas Turvey taken February 17, 2012 (hereinafter "Turvey Dep.") at 18-19 (Zack SJ Decl. Ex. 18).

Response: Undisputed, except that the cited passage indicates that the purpose was “[a]dding authoritative content” to “Google’s search results,” not to “Google’s website” in general. Zack SJ Decl. Ex. 18 (Turvey Dep.) at 19:7-17.

19. To participate in the program, rightsholders enter into a contract with Google and send a printed copy of their books to Google for scanning (or provide Google with an existing digital copy). Clancy Dep. at 215 (Zack SJ Decl. Ex. 16); Terms and Conditions 2-3 (Zack SJ Decl. Ex. 17).

Response: Undisputed.

20. Partners decide “how much of the book is browsable” on Google, “anywhere from a few sample pages to the whole book.” *See* Print-out from <http://support.google.com/books/bin/answer.py?hl=en&answer=43729/> (Zack SJ Decl. Ex. 19).

Response: Undisputed.

21. Google agrees to share with its partners a portion of the revenue it earns from ads shown next to pages of books searched in the Partner Program. Turvey Dep. at 31 (Zack SJ Decl. Ex. 18); Terms and Conditions 8 (Zack SJ Decl. Ex. 17).

Response: Undisputed that Google shared revenue from ads shown next to full pages of books with the publishers or other rightsholders who asked that Google host the books for them. However, not all publishers chose to display ads in connection with their books, and Google stopped displaying ads in connection with any books in 2011. Dougall Opp’n Decl. ¶¶ 5-8.

22. During 2004, Google entered into dozens of contracts with publishers covering tens of thousands of books. GOOG000101103 (Zack SJ Decl. Ex. 15).

Response: Undisputed.

23. By 2004 year end, Google had received nearly [REDACTED] books for the Partner Program, even though Google's extensive outreach efforts focused almost exclusively on publishers, with little or no attempt to sign up authors. *Id.*; Turvey Dep. at 76-80 (Zack SJ Decl. Ex. 18); Clancy Dep. at 93 (Zack SJ Decl. Ex. 16).

Response: Undisputed.

24. As of early 2012, the Partner Program included approximately 2.5 million books, by permission of approximately 45,000 rightsholders, with the number of partners continuing to grow. Turvey Dep. at 32 [sic] (Zack SJ Decl. Ex. 18).

Response: Undisputed.

25. Google publicly announced a new program in December 2004, stating that it had entered into agreements with four university libraries (Harvard, Stanford, the University of Michigan, and Oxford) and the New York Public Library to "digitally scan books from their collections so that users worldwide can search them in Google." Dec. 14, 2004 Google press release, "Google Checks Out Library Books" (Zack SJ Decl. Ex. 12, p.1).

Response: Undisputed.

26. Google refers to the endeavor identified above in No. 25 as its Library Project. Clancy Dep. at 33-34 (Zack SJ Decl. Ex. 16); June 6, 2007 Google press release, "Committee on Institutional Cooperation (CIC) Joins Google's Library Project" (Zack SJ Decl. Ex. 20).

Response: Undisputed.

27. Since its December 2004 announcement, Google has entered into agreements with additional libraries (such as the Library of Congress, University of Texas at Austin, University of Virginia, University of Wisconsin-Madison, Columbia University, Cornell University, Princeton University, University of California, and the Committee on Institutional Cooperation (a

consortium of twelve research universities)). June 6, 2007 Google press release, “Committee on Institutional Cooperation (CIC) Joins Google’s Library Project” (Zack SJ Decl. Ex. 20); Zack SJ Decl. Ex. 23 (compilation of agreements between Google and the various libraries, hereinafter “Library Agreements”).

Response: Undisputed.

28. Google has also developed and patented scanning technology that allows library books to be copied. Clancy Dep. at 14, 211 (Zack SJ Decl. Ex. 16).

Response: Undisputed.

29. Google has used this technology to copy the entirety of over twenty million books. *See id.* at 30; Declaration of Daniel Clancy in Support of Google Inc.’s Opposition to Plaintiffs’ Motion for Class Certification (hereinafter “Clancy Decl.”) 4 (Zack SJ Decl. Ex. 21).

Response: Undisputed.

30. In exchange for access to a library’s print books, Google distributes digital copies of the scanned books to the contributing library. *See* Print-out from <http://support.google.com/books/bin/answer.py?hl=en&answer=43751> (“Each library will receive a digital copy of every book we scan ... from their respective collections.”) (Zack SJ Decl. Ex. 22); Clancy Dep. at 44-45 (Zack SJ Decl. Ex. 16).

Response: Undisputed that a library can download a digital copy of each book Google scanned from its collection using the GRIN system. Disputed that the creation and maintenance of the GRIN system by Google constitutes distribution on the part of Google, since Google does not create or distribute the electronic copies that libraries make. Jaskiewicz Decl. ¶¶ 6-9.

31. To carry out its scanning *en masse*, Google set up scanning facilities [REDACTED]
[REDACTED], as well as in [REDACTED] and [REDACTED].
Clancy Dep. at 180-81 (Zack SJ Decl. Ex. 16).

Response: Undisputed.

32. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Response: Undisputed.

33. [REDACTED]
[REDACTED]

Response: Undisputed.

34. Google engaged in “bulk scanning,” with libraries providing “carts of books” for Google to scan. *Id.* at 15, 103.

Response: Undisputed, except that Google also refrains from scanning books as to which a rightsholder has requested that Google exclude the book from the program. Clancy Decl. ¶ 11.

35. Google’s scanning operations involved approximately [REDACTED] scanning machines, and reached an annual budget of [REDACTED] for the scanning alone. *Id.* at 84-85, 179.

Response: Undisputed.

36. Some libraries (*e.g.*, [REDACTED]
[REDACTED]) allowed Google to scan only public domain works, while others (*e.g.*, [REDACTED])

[REDACTED])
 allowed Google to scan in-copyright works as well. *See generally* Library Agreements (Zack SJ Decl. Ex. 23); Clancy Dep. at 19 (“[REDACTED]
 [REDACTED]”).

Response: Undisputed.

37. [REDACTED]
 [REDACTED]
 [REDACTED]

Response: Undisputed.

38. [REDACTED]
 [REDACTED]

Response: Undisputed that [REDACTED]
 [REDACTED]. However, human operators do examine the
 contents of books to determine whether the book should be placed in “snippet view.” Clancy
 Decl. ¶ 11.

39. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]. *See* Transcript of the deposition of Kurt Groetsch
 (hereinafter “Groetsch Dep.”) at 27-31 (Zack SJ Decl. Ex. 24); Transcript of the deposition of
 Stephane Jaskiewicz (hereinafter “Jaskiewicz Dep.”) at 16-17 (Zack SJ Decl. Ex. 25); Clancy
 Dep. at 182-87 (Zack SJ Decl. Ex. 16).

Response: Undisputed.

40. Each book copied by Google as part of its Library Project was copied by Google in its entirety multiple times. Jaskiewicz Dep. at 22-29 (Zack SJ Decl. Ex. 25); Defendant Google Inc.'s Supplemental Narrative Responses and Objections to Plaintiffs' Second Request for Production of Documents and Things (hereinafter "Supplemental Narrative") at 5-6 (Zack SJ Decl. Ex. 26); Google Admissions at 8 (Zack SJ Decl. Ex. 27).

Response: Undisputed that Google "creates and maintains, as necessary for its fair uses, more than one copy of the books it scans from library collections." Google Admissions, Response No. 10 (Zack SJ Decl. Ex. 27).

41. Google maintains digital copies of each book it copied as part of its Library Project on its servers and on back-up tapes. Jaskiewicz Dep. at 22-29, 69 (Zack SJ Decl. Ex. 25).

Response: Undisputed.

42. In response to search inquiries by users of its search engine, Google searches the complete text of books copied in its Library Project. *Id.* at 45-46; Supplemental Narrative at 8 (Zack SJ Decl. Ex. 26); Google Admissions at 11 (Zack SJ Decl. Ex. 27).

Response: Undisputed, except that Google does not search the text of books scanned but later excluded by request of a rightsholder. Clancy Decl. ¶ 11.

43. Since 2005, pursuant to uniform rules of its own devising, Google has displayed verbatim expression from these books on the Internet in response to search requests by users of its search engine. *See* Google Admissions at 10 (Zack SJ Decl. Ex. 27); Supplemental Narrative at 11-12 (Zack SJ Decl. Ex. 26).

Response: Undisputed that, as stated in the cited documents, Google has displayed "snippets" from millions of books in response to queries entered by users, but has not displayed snippets from books which are not in "snippet view" or "full view."

44. Google generally divides each page into eighths, each of which Google calls a snippet. Supplemental Narrative at 11-12 (Zack SJ Decl. Ex. 26); Print-out from <http://www.google.com/googlebooks/library.html> (Zack SJ Decl. Ex. 28); *see also* Print-out from <http://support.google.com/books/bin/answer.py?hl=en&answer=43729/> (Zack SJ Decl. Ex. 19).

Response: Undisputed as to books in “snippet view.”

45. By performing multiple searches using different search terms (including multiple search terms suggested by Google), a single user can view far more than three snippets from a Library Project book. *See* Print-outs from Google’s website displaying search results in JIM BOUTON, BALL FOUR (Zack SJ Decl. Ex. 4); Clancy Dep. at 43-45 (Zack SJ Decl. Ex. 16).

Response: Undisputed that different searches sometimes return different snippets, subject to the security limitations set forth in Zack Decl. Ex. 26 (Supplemental Narrative) at 9-13.

46. Zack SJ Decl. Ex. 4 demonstrates that Google displayed to one user- making a series of consecutive searches within BALL FOUR - about 37 different snippets, consisting of over 1900 words of verbatim expression.

Response: Undisputed.

47. Even minor variations in search terms will result in different displays of text. *Compare* snippet results for search term “pitch” in BALL FOUR (Zack SJ Decl. Ex. 5) *with* snippet results for search term “pitches” in BALL FOUR (Zack SJ Decl. Ex. 6); *see also* Clancy Dep. at 44 (Zack SJ Decl. Ex. 16) (“[F]or a given query, we might display up to three snippets, but then if you entered a different query, you might see different snippets.”).

Response: Undisputed that minor variations in search terms, as in the case of the cited search queries, will sometimes result in the display of different snippets, subject to the security limitations set forth in Zack Decl. Ex. 26 (Supplemental Narrative) at 9-13.

48. Google shows its users snippets from all portions of the books displayed in its Library Project, except for the small proportion of each book that it “blacklists.” Supplemental Narrative at 11 (Zack SJ Decl. Ex. 26); Clancy Decl. 10 (Zack SJ Decl. Ex. 21).

Response: Undisputed that, in response to a search query from a user, if a book is in “snippet view,” any portion of the book can be displayed if the user searches for text appearing in that portion, subject to the security limitations set forth in the cited documents, including “blacklisting” of portions of books so that they are never displayed in snippets. *See* Zack Decl. Ex. 26 (Supplemental Narrative) at 9-13

49. For those books in snippet view, Google blacklists 10% of the pages of books and one snippet per page. *See* Supplemental Narrative at 11 (Zack SJ Decl. Ex. 26); Clancy Decl. 10 (Zack SJ Decl. Ex. 21).

Response: Undisputed, except that Google sometimes blacklists more than 10% of the pages in a book, as noted in the above-cited Supplemental Narrative at 11. *See also* Decl. Brad Hasegawa Supp. Def. Google Inc.’s Mot. Summ. J., ECF No. 1040, ¶ 4.

50. For those books in snippet view, Google makes the vast majority of the text available for verbatim display to its users collectively. *See* Supplemental Narrative at 6-7 (Zack SJ Decl. Ex. 26); *see also* Zack SJ Decl. Ex. 4.

Response: Undisputed that the text in each non-blacklisted snippet of each book in “snippet view” could be displayed if a user entered a search query seeking text in that snippet, and that Google does not blacklist the “vast majority” of snippets. Disputed to the extent this

paragraph is intended to mean that Google makes the “vast majority” of any book available to any user, an assertion which would be contradicted by the cited documents. Supplemental Narrative at 6-13 (Zack SJ Decl. Ex. 26).

51. Some of the books copied in the Library Project are placed by Google into metadata only view, where no text is displayed. *See* Supplemental Narrative at 6-7 (Zack SJ Decl. Ex. 26).

Response: Undisputed.

52. In general, reference works [REDACTED]
[REDACTED]
[REDACTED], and works for which the
rightsholder has instructed Google not to display the work are placed in metadata only view. *Id.*; “QA Training Manual,” at GOOG05002440 (Zack SJ Decl. Ex. 29).

Response: Undisputed.

53. To date, in its Library Project, Google has digitally copied over [REDACTED] in-copyright English language books (Clancy Decl. ¶ 4) (Zack SJ Decl. Ex. 21); *see also* Zack SJ Decl. Exs. 30-31 (spreadsheet and accompanying email from Google identifying a list of over [REDACTED] English language books copied and that Google has determined not to be in the public domain); distributed complete digital copies of over [REDACTED] of in-copyright books to libraries (*see* Zack SJ Decl. Ex. 9) (spreadsheet from Google identifying the scanned books which have been distributed to the partnering libraries, including certain books distributed more than once); and displayed verbatim expression as snippets from millions of in-copyright books

over the Internet in response to search requests from its users. Google Admissions at 10 (Zack SJ Decl. Ex. 27).

Response: Undisputed that “To date, in its Library Project, Google has digitally copied over [REDACTED] in- copyright English language books” and “displayed verbatim expression as snippets from millions of in-copyright books over the Internet in response to search requests from its users[,]” as the paragraph states. Undisputed that libraries have chosen to download, using the GRIN system, digital copies of more than [REDACTED] books not known to be in the public domain, each library able to download only books scanned from the collection of that library. Disputed that the creation and maintenance of the GRIN system by Google constitutes distribution on the part of Google, since Google does not create or distribute the electronic copies that libraries make. Jaskiewicz Decl. ¶¶ 6-9. Disputed that Exhibits 30-31 of the Zack Declaration list books “that Google has determined not to be in the public domain.” Instead, as noted in Exhibit 31, list books “which are not known to be in the public domain[.]” and which Google conservatively treats as though they are not in the public domain, but which may be revealed to be in the public domain through further investigation.

54. Google did not seek or obtain permission from copyright owners before it made the uses described in No. 53 above. Google Admissions at 12-14 (Zack SJ Decl. Ex. 27).

Response: Undisputed, except as to the disputes identified in connection with No. 53 above.

55. Google has not compensated copyright owners for its copying, distribution to libraries, or display of verbatim expression from these books. *Id.* at 13.

Response: Undisputed, assuming that “these books” refers to those referred to in No. 53 above, except as to the disputes identified in connection with No. 53 above.

56. Google has admitted in its responses to Plaintiffs' Requests for Admissions that it digitally copies books in their entirety- including in-print and out-of-print books, fiction and nonfiction books, reference books, anthologies, educational books, textbooks, dissertations, monographs, journals, government publications, and other types of works; provides entire digital copies of books to libraries, and displays snippets from books in response to user requests, all without copyright owner permission. *Id.* at 5-12; *see also* Supplemental Narrative at 5-9 (Zack SJ Decl. Ex. 26).

Response: Undisputed.

57. Pursuant to their cooperative agreements with Google, each library provides books to Google, Google scans the books, makes a digital file of the books for Google's use, and distributes digital copies of scanned books to the providing library. Clancy Dep. at 44-45 (Zack SJ Decl. Ex. 16); Library Agreements (Zack SJ Decl. Ex. 23).

Response: Undisputed that "[p]ursuant to their cooperative agreements with Google, each library provides books to Google, Google scans the books, [and] makes a digital file of the books for Google's use[.]" Undisputed that the providing library can make its own copy from Google's digital files using the GRIN system. Disputed that the creation and maintenance of the GRIN system by Google constitutes distribution on the part of Google, since Google does not create or distribute the electronic copies that libraries make. Jaskiewicz Decl. ¶¶ 6-9.

58. One of Google's earliest library agreements, its digitization agreement with Stanford University, summarizes their agreement as follows: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Digitization Agreement with Leland Stanford Junior University, p.1 (Zack SJ Decl. Ex. 23 at GOOG05002264).

Response: Undisputed.

59. [REDACTED]

[REDACTED]
[REDACTED] See, e.g., Cooperative Agreement with the University of California, p.1 (Zack SJ Decl. Ex. 23 at GOOG05000306).

Response: Undisputed.

60. Google's agreements with each of the libraries have many of the same or similar terms. See Library Agreements (Zack SJ Decl. Ex. 23).

Response: Undisputed.

61. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Response: Undisputed.

62. Google executed the digitization by scanning the covers and every page of in-copyright books, performing optical character recognition on the scanned images to obtain machine-readable text, and then, through an "automated process compil[ing] a digital copy of the book." Supplemental Narrative at 5-6 (Zack SJ Decl. Ex. 26); see also Jaskiewicz Dep. 25-30 (Zack SJ Decl. Ex. 25).

Response: Undisputed.

63. To facilitate the mutual interest in making information available to the public (*see* No. 59 above), Google will “digitize” mass quantities of books, with “digitize” defined as “to convert content from a tangible, analog form into a digital representation of that content.” Cooperative Agreement with the University of Michigan, p.1 (Zack SJ Decl. Ex. 23 at 00000500355).

Response: Undisputed.

64. [REDACTED]

Response: [REDACTED]

Disputed to the extent this paragraph suggests that the creation and maintenance of the GRIN system by Google constitutes distribution on the part of Google, since Google does not create or distribute the electronic copies that libraries make. Jaskiewicz Decl. ¶¶ 6-9.

65. Google itself explained that after the library requests a copy of a particular book that Google has scanned, Google provides its digital copy by placing the file of the book on a server that the requesting library can access to download the file over the Internet. *See*

Supplemental Narrative at 8 (Zack SJ Decl. Ex. 26); *see also* Jaskiewicz Dep. at 65 (Zack SJ Decl. Ex. 25); Clancy Dep. at 217-19 (Zack SJ Decl. Ex. 16).

Response: Undisputed that the automated GRIN system creates encrypted copies of books that libraries can download in response to requests made by libraries. Disputed to the extent this paragraph suggests that the creation and maintenance of the GRIN system by Google constitutes distribution on the part of Google, since Google does not create or distribute the electronic copies that libraries make. Jaskiewicz Decl. ¶¶ 6-9.

66. The distribution of the digital copies to the libraries was an important component of the Library Project. *See* Clancy Dep. at 44 (Zack SJ Decl. Ex. 16); Zack SJ Decl. Ex. 23.

Response: Undisputed.

67. Dan Clancy stated at his deposition, “it is part of the Library Project that- as I stated- that we provide a copy, the ability to get a copy, for our library partners of the books we scan, in addition to any other uses.” Clancy Dep. at 45 (Zack SJ Decl. Ex. 16).

Response: Undisputed.

68. Google also transfers ownership of the distributed copies to the libraries, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Response: Disputed. Google does not create or distribute the electronic copies that libraries make using the GRIN system. Jaskiewicz Decl. ¶¶ 6-9. Thus, the libraries own their copies from the time they are created.

69.

Response: Undisputed.

70.

See, e.g., Cooperative Agreement with the University of Michigan, p.5 (Zack SJ Decl. Ex. 23 at GOOG05000359) (“As between Google and U of M ... U of M shall own all rights, title, and interest to the U of M Digital Copy.”);

Response: Disputed.

Google does not create or distribute the electronic copies that libraries make using the GRIN system. Jaskiewicz Decl. ¶¶ 6-9.

71.

Response: Undisputed.

72. For example, Google’s agreement with the University of Michigan specifically allows for the use of Michigan’s copies for “inclusion in Michigan’s search services.” Cooperative Agreement with the University of Michigan, p.1 (Zack SJ Decl. Ex. 23 at GOOG0500355); *see also* Clancy Dep. at 35 (Zack SJ Decl. Ex. 16) (“In addition, libraries receive a copy, and with that copy, they may use it for similar search and indexing or other nondisplay uses, various different research initiatives and, also, archiving it for posterity.”)

Response: Undisputed.

73. The University of Michigan has included the books that Google copied for it in its own digital library, HathiTrust. Transcript of the deposition of Paul Courant taken April 23, 2012 (hereinafter “Courant Dep.”) at 15, 20-21 (Zack SJ Decl. Ex. 33).

Response: Undisputed.

74. Michigan’s Dean of Libraries, Dr. Paul Courant, testified that “Google did scan works from the University of Michigan libraries, and Google- and we did indeed receive copies of those scans”; that the University of Michigan made backup copies of the files it received; and that it included those files, including of works that are in-copyright, in its HathiTrust database index, which is accessible to “essentially everyone in the United States with an Internet connection.” Courant Dep. at 15, 20-21, 43-45 (Zack SJ Decl. Ex. 33).

Response: Undisputed, except to the extent that the quoted language is interpreted to mean that the Univeristy of Michigan made any content from any books in the HathiTrust database available to the general public, which the cited passage does not support.

75. Google undertook the Library Project for commercial reasons. GOOG05004756 (Zack SJ Decl. Ex. 34); GOOG000645741 (Zack SJ Decl. Ex. 35); Supplemental Narrative at 9 (Zack SJ Decl. Ex. 26); Clancy Dep. at 84-85, 117, 120, 141, 198-203 (Zack SJ Decl. Ex. 16)

Response: Undisputed that Google undertook the Library Project in part for commercial reasons. The cited documents do not support the proposition that Google undertook the Library Project entirely for commercial reasons. Clancy Decl. ¶¶ 3-4.

76. A Google internal presentation in 2003 states that [REDACTED]

[REDACTED]

[REDACTED]

Response: Disputed. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

77. [REDACTED]

[REDACTED]

Response: [REDACTED]

[REDACTED]

[REDACTED]

78. Dan Clancy testified that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Response: Undisputed.

79. Google monetizes its search product by running advertisements in response to search queries. *Id.* at 117.

Response: Undisputed that advertisements appear on Google pages containing a list of search results.

80. [REDACTED]

[REDACTED]

Response: Undisputed.

81. Clancy testified that during the six years he was chief engineer for Google Books, Google invested [REDACTED]

[REDACTED]

[REDACTED]

Response: Undisputed.

82. [REDACTED]

[REDACTED]

[REDACTED]

Response: Undisputed in that facts 83 and 84 below are Undisputed.

83. As Clancy testified, [REDACTED]

[REDACTED]

[REDACTED]

Response: Undisputed.

84. Clancy testified that [REDACTED]

[REDACTED]

Response: Undisputed.

85. Google has stated: “Google admits that it has entered into agreements with certain libraries, pursuant to which those libraries have requested that Google scan books, including in-copyright works, provided to Google by the library, and Google has provided digital copies of millions of those books to the libraries....” Google Admissions at 7 (Zack SJ Decl. Ex. 27).

Response: Undisputed.

86. Google also makes a number of non-display uses of Books it copies in its Library Project. Supplemental Narrative at 9 (Zack SJ Decl. Ex. 26).

Response: Undisputed.

87. The non-display uses identified in No. 86 above have commercial benefits to Google. *Id.*

Response: Undisputed that some of the non-display uses Google makes of the books have some indirect commercial benefit to Google, in addition to their benefits to scholarship and the public interest. Clancy Decl. ¶¶ 3-4, 15.

88. Google makes available over [REDACTED] books on the Internet in snippet display. *See* Zack SJ Decl. Exs. 30-31.

Response: Undisputed that more than [REDACTED] books are in snippet view.

89. An “index” of books’ metadata already exists. Transcript of the deposition of Gloriana St. Clair taken May 31, 2012 (hereinafter “St. Clair Dep.”) at 46-48 (Zack SJ Decl. Ex. 36).

Response: Undisputed that electronic card catalogs, which allow searching only by metadata (rather than searching the text of the book), existed before Google Books was created.

90. Libraries use what is known as MARC records to catalog books. *Id.* at 48.

Response: Undisputed.

91. “MARC records are essentially the electronic version of a card catalog record,” and contain the book’s metadata, such as author, title, publishing information. *Id.* at 46, 48.

Response: Undisputed that MARC records contain the same information as a traditional paper card catalog.

92. To create MARC records, the book does not need to be scanned or copied. Clancy Dep. at 25-26 (Zack SJ Decl. Ex. 16); Groetsch Dep. at 21-25 (Zack SJ Decl. Ex. 24).

Response: Undisputed.

93. The cataloging of metadata through MARC records is done by hand with the cataloger reviewing the physical book and identifying enumerated fields of information. *See* Groetsch Dep. at 21-25 (Zack SJ Decl. Ex. 24).

Response: Undisputed.

94. The Copyright Clearance Center presently licenses “essentially printed content, much of the same nature as the material scanned by Google.” *See* Report of Daniel Gervais ¶ 11 (Zack SJ Decl. Ex. 37).

Response: Undisputed that the Copyright Clearance Center licenses uses of printed content, albeit for different uses than the conduct at issue in this litigation. *See* Decl. Joseph

Gratz Opp'n Plas.' Mot. Summ. J. ("Gratz Opp'n Decl.") Ex. 15 ("Gervais Dep. Tr.") 119:7-22; 169:14-176:2; 209:8-9, 11-12; 235:19-22.

95. If Google's uses are found to be fair, this will legitimize widespread digital copying without permission, thereby impeding the development of collective license for digital uses of books and excerpts from books by search engines, libraries, and others. *Id.* ¶¶ 17, 42.

Response: This paragraph recites conclusions based on an incomplete hypothetical involving parties other than Google. To the extent this paragraph recites any material facts, they are not supported by any competent evidence because Mr. Gervais has no basis for the conclusions he recites in the cited paragraphs. *See* Gervais Dep. Tr. 138:21-140:2; 192:14-196:16; 207:1-7; 210:5-15; 214:16-25; 199:16-23; 217:21-218:24. *See also id.* at 159:22-25; 164:7-17; 167:4-9; 167:25-168:5.

96. Collective management of copyright provides important advantages in licensing uses of copyrighted works, as it reduces transaction costs, benefitting authors and users. *Id.* ¶ 19.

Response: Undisputed.

97. Collective management of copyright has existed for more than two centuries and is indispensable for many types of copyright uses. *Id.* ¶¶ 12, 15.

Response: Undisputed.

98. For example, in the United States, ASCAP, BMI and SESAC are well-known organizations that license the use of music. *See id.* ¶ 18.

Response: Undisputed.

99. The Copyright Clearance Center ("CCC") is another well-known collective management organization ("CMO"). *Id.* ¶ 28.

Response: Undisputed.

100. If they wish to participate, authors or publishers register their works with the CCC, which offers per-use and annual repertory licenses. *Id.*

Response: Undisputed.

101. A business or academic institution can enter into an agreement with the CCC that permits it to, for instance, photocopy a periodical article or create an electronic coursepack. *Id.*

Response: Undisputed.

102. CMOs typically pay authors and other rightsholders based on actual usage of their works, *id.* ¶ 5, which can result in substantial revenue to rightsholders.

Response: Undisputed.

103. In its 2011 fiscal year, CCC reported revenues in excess of \$238 million, with payments to rightsholders exceeding \$171 million. *Id.* ¶ 28. The difference between the two numbers includes but is not all a service charge. Due to the time period required to process usage data, the 2011 distributions were mostly of 2010 collections which were significantly lower than 2011 collections. *Id.* at 9 n.15.

Response: Undisputed.

104. Collective licensing markets have often developed in response to new technologies: “Often, after a new form of use has emerged collective management systems are established to license uses that have been found to be desirable but unauthorized.” *Id.* ¶ 41.

Response: Undisputed.

105. A collective management system “would develop here if some or all of Google’s uses are found not to be fair.” *Id.* ¶ 17.

Response: This paragraph recites a conclusion based on an incomplete hypothetical, not a fact. To the extent this paragraph recites a fact, it is not supported by any competent

evidence because Mr. Gervais has no basis for the conclusion he recites in the cited paragraphs. *See* Gervais Dep. Tr. 138:21-140:2; 192:14-196:16; 207:1-7; 210:5-15; 214:16-25; 199:16-23; 217:21-218:24. *See also id.* at 159:22-25; 164:7-17; 167:4-9; 167:25-168:5.

106. If Google’s conduct is permitted as fair use and becomes widespread, such an outcome can be expected to thwart the development of collective management systems for the digital uses of books (and book excerpts) that would otherwise likely develop. *Id.* ¶ 42; *see also id.* ¶ 17.

Response: This paragraph recites a conclusion based on an incomplete hypothetical, not a fact. To the extent this paragraph recites a fact, it is not supported by any competent evidence because Mr. Gervais has no basis for the conclusion he recites in the cited paragraphs. *See* Gervais Dep. Tr. 138:21-140:2; 192:14-196:16; 207:1-7; 210:5-15; 214:16-25; 199:16-23; 217:21-218:24. *See also id.* at 159:22-25; 164:7-17; 167:4-9; 167:25-168:5.

107. Google admits in its Form 10-K that its “security measures may be breached due to the actions of outside parties, employee error, malfeasance, or otherwise, and, as a result, an unauthorized party may obtain access to our data or our users’ or customers’ data. Additionally outside parties may attempt to fraudulently induce employees, users, or customers to disclose sensitive information in order to gain access to our data or our users’ or customers’ data. Any such breach or unauthorized access could result in significant legal and financial exposure, damage to our reputation, and a loss of confidence in the security of our products and services that could potentially have an adverse effect on our business. Because the techniques used to obtain unauthorized access, disable or degrade service, or sabotage systems change frequently and often are not recognized until launched against a target, we may be unable to anticipate these

techniques or to implement adequate preventative measures.” Google 2011 Form 10-K, at 15 (Zack SJ Decl. Ex. 13).

Response: Undisputed.

108. Google [REDACTED] does not in practice, monitor or control the security of the digital copies of books provided by it to libraries in its Library Project, and the security measures of libraries who receive digital copies of books from Google are subject to similar breaches. Clancy Dep. at 195-202 (Zack SJ Decl. Ex. 16); Courant Dep. at 52-53 (Zack SJ Decl. Ex. 33); Transcript of the deposition of James Crawford taken April 10, 2012 (hereinafter “Crawford Dep.”) at 56 (Zack SJ Decl. Ex. 38); *see generally* Expert Report of Benjamin Edelman (hereinafter, “Edelman Report”) (Zack SJ Decl. Ex. 39).

Response: Undisputed that Google is not obligated to, and does not in practice, monitor or control libraries’ security measures. Disputed that libraries are subject to security breaches, for the reasons discussed with respect to paragraph 109 below.

109. Subsequent copying by the libraries of the digital files received by them from Google, *see* Courant Dep. at 22-27 (Zack SJ Decl. Ex. 33), risks further security breaches. Edelman Report ¶¶ 20-26 (Zack SJ Decl. Ex. 39).

Response: Disputed. Mr. Edelman admits he has no knowledge of the security measures put in place by the libraries, and thus has no basis to opine regarding whether their activities create security risks. *See* Edelman Report ¶ 21 (Zack SJ Decl. Ex. 39) (“I have not been informed of all the ways that libraries intend to use the book contents data they receive from Google, nor have I been informed how libraries intend to secure that data.”); Gratz Opp’n Decl. Ex. 16 (“Edelman Dep. Tr.”) 247:25-252:11. *See also* Decl. Joseph C. Gratz Supp. Def.

Google Inc.'s Mot. Summ. J., ECF No. 1036 ("Gratz SJ Decl.") Ex. 1 ("Courant Dep. Tr.") 106:23-107:9.

110. As the number of unlawful copies of an in copyright book increases, so does the risk of further infringement and/or piracy of the work. *Id.* ¶¶ 14-19.

Response: This paragraph recites a conclusion based on an incomplete hypothetical, not a fact. To the extent this paragraph purports to recite a fact, it is not supported by any competent evidence because Mr. Edelman has no basis for the conclusions he recites in the cited paragraphs. *See* Edelman Dep. Tr. 237:12-240:25. *See also id.* at 244:6-20; 245:17-246:24; 246:25-247:24; 296:9-298:6; 290:15-292:22.

111. The copyright holder's control over the distribution and publication of his or her work becomes increasingly threatened when multiple unauthorized digital copies are created, and even more so when they are placed on and/or distributed over the Internet. *Id.* ¶¶ 34, 36.

Response: This paragraph recites a conclusion based on an incomplete hypothetical, not a fact. To the extent this paragraph recites a fact, it is not supported by any competent evidence because Mr. Edelman has no basis for the conclusion he recites in the cited paragraphs. *See* Edelman Dep. Tr. 280:6-20. *See also id.* at 244:6-20; 245:17-246:24; 246:25-247:24; 296:9-298:6; 290:15-292:22.

112. If Google's bulk and indiscriminate copying is found to be "fair," other website operators, no matter how small, will also be given sanction to create online databases of books and other works. *Id.* ¶¶ 9, 13, 18.

Response: This paragraph recites a legal conclusion, not a fact. To the extent this paragraph recites a fact, disputed; Mr. Edelman testified to the contrary. Edelman Dep. Tr. 193:20-196:1.

113. These website operators may have insufficient security to prevent widespread piracy of such works. *Id.* ¶¶ 18-19.

Response: This paragraph recites conclusions based on an incomplete hypothetical involving parties other than Google. To the extent this paragraph recites any material facts, they are not supported by any competent evidence because Mr. Edelman has no basis for the conclusions he recites in the cited paragraphs. *See* Edelman Dep. Tr. 244:6-246:24; 246:25-247:24. *See also id.* at 210:16-212:23; 212:24-217:23.

114. In particular, less sophisticated operators have a reduced capability to design, install, and maintain systems to secure books, as well as a lesser ability to screen their internal staff to prevent data theft by rogue employees or to adapt their systems to prevent hacking by outsiders. *Id.* ¶ 18.

Response: This paragraph recites conclusions based on an incomplete hypothetical involving parties other than Google. To the extent this paragraph recites any material facts, they are not supported by any competent evidence because Mr. Edelman has no basis for the conclusions he recites in the cited paragraph. *See* Edelman Dep. Tr. 244:6-246:24.

115. These concerns will only be amplified if “numerous companies and organizations scan books,” because “attackers can focus their efforts on whichever installs the weakest security. Similarly, attackers can take advantage of even a brief period when a single book provider is insecure....” *Id.* ¶ 19.

Response: This paragraph recites conclusions based on an incomplete hypothetical involving parties other than Google. To the extent this paragraph recites any material facts, they are not supported by any competent evidence because Mr. Edelman has no basis for the conclusions he recites in the cited paragraph. *See* Edelman Dep. Tr. 246:25-247:24.

116. These are not merely hypothetical risks, but reveal a real danger to authors, as book piracy is already occurring. *Id.* ¶¶ 11-12; *see also id.* ¶¶ 13-17 (discussing multiple ways in which books may be redistributed through piracy).

Response: Undisputed that unauthorized copies of some books, taken from sources other than Google Books, are available on the Internet. To the extent this paragraph recites any other facts, they are not supported by any competent evidence because Mr. Edelman has no basis for the conclusion he recites in the cited and referenced paragraphs of his report, as described in connection with the above paragraphs. *See* Edelman Dep. Tr. 235:9-19; 236:4-7; 236:25-237:2; 241:19-242:18; 249:14-17.

117. A security breach could have a “devastating impact” on the Class. *Id.* ¶ 38; *see also id.* ¶ 36 (describing how information may remain widely available, even after measures are taken to correct the breach, as information cannot be “unpublished” once it becomes publicly available on the Internet).

Response: This paragraph recites conclusion based on an incomplete hypothetical, not a fact. To the extent this paragraph recites a fact, it is not supported by any competent evidence because Mr. Edelman has no basis for the conclusion he recites in the cited paragraphs. *See* Edelman Dep. Tr. 284:24-287:9. *See also id.* at 244:6-20; 245:17-246:24; 246:25-247:24; 296:9-298:6; 290:15-292:22.

118. If Google’s unauthorized reproduction, distribution and display is found not to be fair, licenses will be required for such uses, and copyright owners can require in such licenses that financial responsibility for the risks of unauthorized uses of the copies be fairly allocated between the parties to the license. *Id.* ¶¶ 9, 39.

Response: This paragraph recites a legal conclusion, not a fact. To the extent this paragraph recites a fact, it is not supported by any competent evidence because Mr. Edelman has no basis for the conclusion he recites in the cited paragraphs. *See* Edelman Dep. Tr. 206:6-208:7; 210:16-212:23; 212:24-217:23; 218:17-219:10; 221:6-23; 224:23-225:24; 226:24-227:10; 302:4-11. *See also id.* at 244:6-20; 245:17-246:24; 246:25-247:24; 296:9-298:6; 290:15-292:22.

Dated: August 26, 2013

Respectfully submitted,

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

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The Authors Guild, Inc., Associational Plaintiff,	:
Betty Miles, Joseph Goulden, and Jim Bouton,	:
individually and on behalf of all others similarly	:
situated,	:
	:
Plaintiffs,	:
	:
v.	:
	:
Google Inc.,	:
	:
Defendant.	:
----- X	

Case No. 05 CV 8136-DC

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiffs The Authors Guild, Inc., Associational Plaintiff, Betty Miles, Joseph Goulden and Jim Bouton, individually and on behalf of all others similarly situated ("Plaintiffs") in the above-captioned action hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment entered on November 27, 2013 and the Amended Judgment entered on December 11, 2013 granting Defendant's motion for summary judgment, denying Plaintiffs' motion for partial summary judgment, and dismissing Plaintiffs' claims with prejudice.

Respectfully submitted on this 23rd day of December, 2013.

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