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11 UNITED STATES DISTRICT COURT  
 12 SOUTHERN DISTRICT OF CALIFORNIA

13 KEVIN VANGINDEREN,  
 14 Plaintiff,  
 15 v.  
 16 CORNELL UNIVERSITY,  
 17 Defendant.

) Case No. 07-CV-2045 BTM(JMA)  
 )  
 ) Hon. Barry T. Moskowitz  
 )  
 ) **DECLARATION OF BERT H.**  
 ) **DEIXLER IN SUPPORT OF**  
 ) **CORNELL'S MOTION FOR**  
 ) **ATTORNEYS' FEES**  
 )  
 ) [Per chambers, no oral argument unless  
 ) requested by the Court]  
 )  
 ) [Notice of Motion and Motion and  
 ) Davidson Declaration filed concurrently  
 ) herewith]  
 )  
 ) Hearing Date: August 22, 2008  
 ) Time: 11:00 a.m.  
 ) Place: Courtroom 15  
 )  
 ) Action Filed: October 1, 2007

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**DECLARATION OF BERT H. DEIXLER**

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I, Bert H. Deixler, declare as follows:

1. I am a senior partner at Proskauer Rose LLP (“Proskauer”), counsel of record for defendant Cornell University (“Cornell”). I am admitted to practice before this Court. The facts stated herein are personally known to me and I could and would testify competently thereto if called upon as a witness.

2. In my role as Managing Partner of Proskauer’s Los Angeles office, I am heavily involved in the establishment and revision of the hourly rates of Proskauer attorneys. I am familiar with, and keep abreast of, developments regarding the fees charged by attorneys and law firms in Southern California.

3. I have practiced law as a federal prosecutor and business trial lawyer in Los Angeles for over 30 years. I have litigated on behalf of individuals and entities in all aspects of the entertainment industry, including motion pictures, television, music and new technologies; copyright and trademark law; employment law; and a wide variety of commercial disputes. In November 2004, I successfully argued before the United States Supreme Court a civil rights case, *Johnson v. California*, 543 U.S. 499 (2005), which forced the racial integration of the California prisons.

4. The following is a list of reported decisions in which I was either lead trial or appellate counsel (or both):

*Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141 (2005).

*Young v. City of Simi Valley*, 216 F.3d 807 (2000).

*Classic Auto Refinishing Inc. v. Marino*, 181 F.3d 1142 (1999).

*Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. 1994).

*Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989).

*Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984).

*Young v. City of Simi Valley*, 977 F. Supp. 1017 (C.D. Cal. 1997).

*Morrill v. Smashing Pumpkins*, 157 F. Supp. 120 (C.D. Cal. 2000).

*United States v. Halbert*, 640 F.2d 100 (9th Cir. 1981).

1 *United States v. Gardner*, 611 F.2d 770 (9th Cir. 1980).  
2 *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979).  
3 *United States v. General Dynamics Corp.*, 644 F. Supp. 1497 (1986).  
4 *Litton Intl. Dev. Corp. v. City of Simi Valley*, 616 F. Supp. 275 (1985).  
5 *Watermark, Inc. v. United Stations, Inc.*, 219 U.S.P.Q. (1982).  
6 *United States v. Seide*, 492 F. Supp. 164 (1980).  
7 *In re Williams*, 7 Cal. 4th 572, 870 P.2d 1072 (1994).  
8 *People v. Williams*, 44 Cal. 3d 1127, 751 P.2d 901 (1988).  
9 *Third Story Music, Inc. v. Waits*, 1995 Cal. App. (1995).  
10 *Pulskamp v. Martinez*, 2 Cal. App. 4th 954 (1992).  
11 *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613 (1991).  
12 *Lincoln Natl. Bank v. Dworsky*, 218 Cal. App. 3d 852 (1990).  
13 *All Points Traders, Inc. v. Barrington Assocs.*, 211 Cal. App. 3d 723 (1989).  
14 *Rodie v. Max Factor & Co.*, 207 Cal. App. 3d 1509 (1989).  
15 *Beverly Glen Music, Inc. v. Warner Communs., Inc.*, 178 Cal. App. 3d 1142 (1986).  
16 *O'Connor v. Superior Court of Kern County*, 177 Cal. App. 3d 1013 (1986).

17 In addition, I have served as:

- 18 • Consultant, Los Angeles Ethics Commission ("Cowan Commission");
- 19 • Counsel, Independent Commission on the Los Angeles Police Department ("Christopher  
20 Commission");
- 21 • Counsel, Special Advisor to the Board of Police Commissions ("Judge Webster Study");
- 22 • Member, Los Angeles County District Attorney's Task Force on Workers' Compensation  
23 Fraud;
- 24 • Deputy General Counsel, Rampart Independent Review Panel ("LAPD Rampart  
Investigation");
- 25 • Member, Federal Civil Rights Panel, Central District of California;
- 26 • Member, Board of Directors, Western Justice Center Foundation; and
- 27 • Instructor, National Institute of Trial Advocacy.
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1           5.       Although my regular billing rate is \$775 per hour, I billed my time to Cornell at  
2 \$350 per hour in this matter. Further, all attorney work performed in this matter was billed to  
3 Cornell at a rate of \$350 per hour, notwithstanding the fact that several of the attorneys who  
4 worked on this case regularly bill at considerably higher rates. Proskauer reduced its rates as an  
5 accommodation to Cornell in light of the national significance of this case, which Cornell is  
6 prepared to litigate to the highest court necessary in order to establish the core legal principle  
7 regarding digitization and which academic institutions and libraries are now interested in and  
8 focused upon.

9           6.       Proskauer has represented Cornell in this matter since October of 2007. In addition  
10 to myself, the Proskauer attorneys who worked on this matter include Charles S. Sims, Lary Alan  
11 Rappaport, Clifford S. Davidson and Joseph K. Wright

12           7.       Mr. Sims is a partner in Proskauer's New York office with over 30 years' litigation  
13 experience. He specialized in First Amendment cases and served for nine years as national staff  
14 counsel to the American Civil Liberties Union. In the course of practicing his specialty, Mr. Sims  
15 has represented *The New York Times* and The Discovery Channel in class action litigation testing  
16 the right to engage in newsgathering, and recently defeated on interlocutory appeal a lower court's  
17 class certification order. He has litigated challenges to content-based federal restrictions of cable  
18 television programming, which the Supreme Court largely invalidated in *Denver Area*  
19 *Educational Television Consortium v. FCC*; and handled a facial First Amendment challenge to  
20 New York's Son of Sam law for Simon & Schuster, which the Supreme Court unanimously  
21 invalidated. In addition to counseling leading cultural institutions in New York City on First  
22 Amendment issues, he has handled major libel actions (for clients including the Philadelphia  
23 Eagles, Multimedia Entertainment, Phil Donahue, NBC, and UPS), with none decided adversely.  
24 Mr. Sims' regular billing rate is \$750 per hour, but Proskauer billed Cornell at \$350 per hour for  
25 his work in this matter.

26           8.       Mr. Rappaport is a partner in Proskauer's Los Angeles office with over 25 years'  
27 litigation experience. He has litigated a wide variety of commercial, entertainment, intellectual  
28 property and sports disputes, and represents lawyers and law firms in litigation, employment

1 disputes and ethical matters. He has represented clients in a wide variety of intellectual property  
2 matters, including trademark and copyright. Mr. Rappaport also has experience defending against  
3 SLAPP suits. Mr. Rappaport's regular billing rate is \$635 per hour, but Proskauer billed Cornell  
4 at \$350 per hour for his work in this matter.

5 9. Mr. Davidson is a second-year associate. He has litigated a variety of matters  
6 involving intellectual property, real estate, breaches of contract, class action defense, privacy law  
7 and white collar matters. When Mr. Davidson became involved in this litigation, his rate was  
8 \$350 per hour. On May 1, 2008, Mr. Davidson's rate increased to \$390 per hour, but his time  
9 preparing and arguing Cornell's Bill of Costs and Motion for Attorneys' Fees will be billed to  
10 Cornell at \$350 per hour. Mr. Davidson was primarily responsible for the drafting and research in  
11 this matter.

12 10. Mr. Wright is a first-year litigation associate. His billing rate was \$295 per hour  
13 when he worked on this matter. Such work was performed prior to his admission to the California  
14 State Bar.

15 11. Proskauer's attorneys were assisted in this matter by Legal Assistant Ivania  
16 Munguia, whose time was billed to Cornell at a rate of \$95 per hour.

17 12. On July 2, 2008, I spoke with Robert S. Brewer, Jr., Managing Partner of the San  
18 Diego office of McKenna Long & Aldridge LLP and my former colleague at the Office of the  
19 United States Attorney for the Central District of California. Mr. Brewer and I discussed the  
20 typical billing rate in the Southern District of California for attorneys of my age, experience and  
21 expertise. We discussed the hourly rates of partners in Mr. Brewer's office, as well as law firms  
22 such as DLA Piper, Latham & Watkins LLP and Morrison & Foerster LLP. Mr. Brewer informed  
23 me that partners at the San Diego offices of those firms generally charge from \$600 to \$750 per  
24 hour. On this basis, I conclude that the \$350 per hour charged for all attorney time in this matter  
25 is unreasonably low and below a market rate.

26 13. In the summer of 2004, in connection with another matter in which I was involved,  
27 I investigated the rates charged by partners at law firms comparable to Proskauer by contacting  
28 partners at Gibson, Dunn & Crutcher; Sullivan & Cromwell; Latham & Watkins; Munger, Tolles

1 & Olson; O'Melveny & Myers; Manatt, Phelps & Phillips; Jeffer Mangels Butler & Marmaro;  
2 Greenberg Glusker Fields Claman Machtinger & Kinsella; Irell & Manella; and McDermott Will  
3 & Emery. Rates charged by the partners with experience and backgrounds comparable to mine at  
4 these firms in the summer of 2004 ranged from \$585 to \$800. These rates were for work  
5 nationwide, including work in San Diego. The \$350 rate charged by Proskauer attorneys in this  
6 matter therefore is significantly below that charged in the relevant market.

7 14. For a detailed description of the work performed in this matter, please see the  
8 concurrently filed Declaration of Clifford S. Davidson.

9 I declare under penalty of perjury under the laws of the United States of America that the  
10 foregoing is true and correct.

11 Executed this 2nd day of July, 2008, in Los Angeles, California.

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14 Bert H. Deixler  
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