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1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF GEORGIA
4 ATLANTA DIVISION



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6 CAMBRIDGE UNIVERSITY PRESS,)
7 OXFORD UNIVERSITY PRESS, INC.,)
8 and SAGE PUBLICATIONS, INC.,)

9 Plaintiffs,)

10 -against-)

11) Index No.
12) 1:08-CV-1425-ODE

13 MARK P. BECKER, in his)
14 official capacity as Georgia)
15 State University President, et)
16 al.,)

17 Defendant.)

18 ----- X

19 DEPOSITION OF KENNETH D. CREWS
20 New York, New York
21 December 10, 2009

22
23 Reported by:
24 Judi Johnson, RPR, CRR, CLR
25 Job No.: 26678

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767 Fifth Avenue
New York, New York

December 10, 2009
9:30 A.M.

Deposition of KENNETH D. CREWS, held
at the offices of WEIL, GOTSHAL & MANGES,
LLP, 767 Fifth Avenue, New York, New York,
pursuant to Notice, before Judi Johnson, a
Registered Professional Reporter, a
Certified Realtime Reporter, a Certified
LiveNote Reporter and Notary Public of the
State of New York.

1 KENNETH D. CREWS

2 APPEARANCES:

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7

8 BY: R. BRUCE RICH, ESQ.
9 HARRIS COHEN, ESQ.

10 KING & SPALDING, LLP
11 Attorney for the Defendant
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14

15 BY: STEPHEN M. SCHAEZEL, ESQ.
16 KRISTEN A. SWIFT, ESQ.
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1 KENNETH D. CREWS

2 IT IS HEREBY STIPULATED AND AGREED by
3 and between the attorneys for the respective
4 parties herein, that filing and sealing and
5 the same are hereby waived.

6 IT IS FURTHER STIPULATED AND AGREED
7 that all objections, except as to the form
8 of the question, shall be reserved to the
9 time of the trial.

10 IT IS FURTHER STIPULATED AND AGREED
11 that the within deposition may be sworn to
12 and signed before any officer authorized to
13 administer an oath, with the same force and
14 effect as if signed and sworn to before the
15 Court.

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1 KENNETH D. CREWS

2 KENNETH D. CREWS,

3 Called as a witness herein, having
4 first been duly sworn, was examined and
5 testified as follows:

6 BY THE REPORTER:

7 Q Please state your name and address for
8 the record.

9 A Kenneth D. Crews, J.D., Ph.D., 535
10 West 114th Street, New York, New York 10027.

11 EXAMINATION

12 BY MR. RICH:

13 Q Good morning. Is it Mr., Doctor,
14 Professor? What do you like to be called?

15 A Everybody calls me different things.
16 But, I mean, formally, you could call me
17 Professor Crews. But you can call me Kenneth or
18 Kenny. I just don't go by Ken.

19 Q All right. We'll go with Professor
20 Crews.

21 A All right.

22 Q Good morning, Professor Crews.

23 My name is Bruce Rich. As you know,
24 I'm representing the plaintiffs in this lawsuit.
25 And you are appearing today, I take it,

1 KENNETH D. CREWS

2 represented by the gentlemen to your right and
3 by the law firm King & Spalding?

4 A Am I represented by them?

5 Q Yes.

6 A Well, they've invited me to be an
7 expert in the case, yes, if that's what that
8 means.

9 Q And you are appearing today as an
10 expert witness in the proceeding; is that
11 correct?

12 A That's correct.

13 Q All right. And what was the nature of
14 the assignment you were given in relation to
15 your expert testimony in this case?

16 A In relation to my expert testimony, if
17 I understand correctly -- I mean, I'm a novice
18 to this, so I may not appreciate all the fine
19 details.

20 Q And if any of my questions are ever
21 less than clear, please ask me to sharpen them.

22 A Well, thank you very much.

23 In April of 2009, I was asked to begin
24 preparing a report, the report that you have in
25 front of you that was filed in June, and then

1 KENNETH D. CREWS

2 later was asked to prepare a rebuttal report in
3 response to the plaintiff's expert witnesses.

4 Q And what was the scope of your expert
5 engagement starting with the preparation of the
6 first expert report to which you refer?

7 A To respond to the issues related to
8 electronic reserves and put them in context as I
9 was familiar with them.

10 Q Was that the extent of your assignment
11 as an expert?

12 A I was asked to prepare a report
13 related to the case, knowing that the case was
14 about copyright fair use electronic reserves,
15 and that was the extent of the issues.

16 MR. RICH: Why don't we mark as
17 Plaintiff's Exhibit 290 the June 1, 2009
18 expert report of Kenneth D. Crews.

19 (Whereupon, June 1, 2009 expert report
20 of Kenneth D. Crews was marked as
21 Plaintiff's Exhibit 290 for identification,
22 as of this date.)

23 BY MR. RICH:

24 Q Can you identify the document that
25 we've placed in front of you as Plaintiff's

KENNETH D. CREWS

1
2 Exhibit 290?

3 A Yes, I can.

4 Q What is it?

5 A It's labeled "Expert Report of Kenneth
6 D. Crews, JD, Ph.D," and then the name of the
7 case, title of the case and the court, dated
8 June 1, 2009.

9 Q Have you ever seen that document
10 before?

11 A Yes, I have.

12 Q What is it?

13 A It -- all indications are it appears
14 to be the report that I wrote.

15 Q Why don't you take a minute and
16 confirm that it is.

17 A (Witness complies.)

18 Q Barring typographic -- pardon me,
19 Xerographic error, I assume that looks to be the
20 report?

21 A It sure does look to be the report.

22 Q Now, if you turn to Page 2 of that
23 document, please.

24 A Uh-huh.

25 Q In the last paragraph, you state in

1 KENNETH D. CREWS

2 the first sentence, "This report will examine
3 the circumstances of E-Reserves at GSU and the
4 current state of the law of copyright as applied
5 to E-Reserves."

6 Do you see that?

7 A I do.

8 Q Is that an accurate summation, at at
9 least a high level, of the purpose of this
10 report?

11 A Yes. I think I would like to have
12 inserted a word. The report will examine the
13 circumstances of the E-Reserves policy at a GSU
14 and the circumstances of the law of copyright.

15 Q When you say the circumstances of the
16 E-Reserves policy, what do you have in mind by
17 that statement?

18 A Sure. Later in the report, I do
19 examine the policy itself, line by line
20 essentially, and there is some indication from
21 the depositions, in particular, that I was able
22 to review that tells me something about how the
23 policy may have been developed, why it was
24 developed and tells me something about its
25 implementation and the effect that it may have

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1
2 had.

3 Q And what expert addition do you give
4 to the testimony that you advert to? In other
5 words, beyond the actual facts and circumstances
6 as known by and will be attested to by those who
7 participated, what is the expert gloss that you,
8 through this report, are putting on the, quote,
9 circumstances of E-Reserves at GSU?

10 A Did you say expert gloss, with a G?

11 Q Yeah.

12 MR. SCHAEZEL: Objection as to form.

13 BY MR. RICH:

14 Q You can answer.

15 A Okay. What is the expert gloss that
16 I'm putting on this? I wouldn't use the word
17 "gloss." But what expertise might I be bringing
18 to this evaluation, to this report? I have a
19 background of many years of working with
20 questions of fair use in the higher education
21 context, specifically considerable experience
22 working with the questions associated with
23 electronic reserves and having followed the
24 history and development of the relevant law and
25 having paid attention to a great extent to

1 KENNETH D. CREWS

2 different policies that have been adopted at
3 different universities.

4 Q And so my question stands, which is:
5 What additional insights do you believe you are
6 bringing to the court by summarizing or doing an
7 overview of what you understood to be the
8 circumstances of E-Reserves at GSU?

9 A Okay, good. I think I understand.
10 What I was able to bring to this report, among
11 other things, I'm sure, but what I was able to
12 bring to this report is an understanding of the
13 lineage of policy making, the lineage of
14 thinking about electronic reserves in
15 relationship to fair use over a period of years,
16 a period of learning, a period of
17 experimentation at different universities and
18 then from that, the emergence of the policy at
19 Georgia State University or the University
20 System of Georgia. If I mix up the label there,
21 I mean one, I mean the other. And the emergence
22 of the policy at the Georgia University and how
23 it fits relative to other policies and how it
24 fits relative to broader national thinking about
25 fair use and about fair use policies.

1 KENNETH D. CREWS

2 Q So let me take that in pieces.

3 A Sure.

4 Q So do I understand you to be saying
5 that a portion of what you were presenting here
6 was to place the actual process that the
7 University of Georgia state system went through,
8 that you are -- strike that.

9 Do I understand you to be stating in
10 part that the backdrop and the history, as
11 you've cited, are known by you factually to have
12 been a component of the deliberations undertaken
13 by the University of Georgia system in
14 developing the new policy? Do you know that
15 factually?

16 A No, I do not.

17 Q So you are surmising to that degree to
18 what extent that context or history or
19 background may have informed the judgments and
20 decision making which culminated in the current
21 policy; is that correct?

22 A To a great extent, yes. But there
23 were times when I was -- I am aware of the fact
24 that some of the discussion included some
25 reflection on what may have been in existence in

1 KENNETH D. CREWS

2 other documents and other policies. So
3 partially, I'm going to say I am aware, and for
4 the most part I am going to say I am not aware.

5 Q And to the extent you are aware, what
6 is the basis of the awareness of the various
7 sums that you had in that last sentence?

8 A Okay. I participated very slightly in
9 witnessing something of the decision making that
10 was going on in the development of the policy.
11 And that slight bit of witnessing would've been
12 one telephone conversation that I had with the
13 attorneys representing the University, where the
14 policy was effectively finished or nearly
15 finished, and we just bounced a couple of ideas
16 around about possibilities. That gave an
17 opportunity for -- I don't remember whether they
18 put it in context of other policies, but it
19 certainly gave me a chance to reflect upon and
20 add to the conversation that, well, I've seen it
21 done like this and I've seen it done like that
22 and introduce some of that into the
23 conversation, but that's a small amount.

24 Q Now, you said that occurred when the
25 policy was largely done. Can you put that in a

1 KENNETH D. CREWS

2 date time frame for me?

3 A To the best of my recollection, it
4 would've been February of 2009.

5 Q Let's cycle back, if we can, then.

6 A Sure.

7 Q To my understanding, the first contact
8 you had with any representatives of GSU, whether
9 related specifically to what we have in front of
10 you as Plaintiff's Exhibit 290 or otherwise --

11 A Right.

12 Q -- when was that?

13 A Yeah, the very first -- I'm going to
14 have trouble putting a good date on it. But the
15 very first contact would have been a telephone
16 call from Mary Jo Volkert, who is, as I
17 understand, an attorney. In fact, I have her
18 listed in my report as Assistant Attorney
19 General for the State of Georgia. A phone call.
20 If I recall, she initiated a phone call to me.
21 It sounded a little bit like she was calling to
22 different people who worked on these issues.

23 Q To, T-W-O? Or calling to, T-O,
24 different people?

25 A Good point. Good point. If I

1 KENNETH D. CREWS

2 remember my statement correctly, it sounded like
3 she was calling me and some other people.

4 Q Okay.

5 A The number, I can't put a number on
6 it.

7 Q Fine.

8 A And that she was simply contacting
9 people who were familiar with the issues of fair
10 use, electronic reserves. She found me and
11 wanted to talk generally about the issues. At
12 that point, I knew of the fact that the case had
13 been filed. I maybe had seen a complaint, but
14 that was the extent of my knowledge and my
15 contact.

16 Q And was it your understanding that the
17 reason that Ms. Volkert reached out and
18 contacted you was in relation in some fashion to
19 the filing of the complaint in this case?

20 A Oh, yes.

21 Q And what did she say you to in terms
22 of what she was curious to learn from you or how
23 otherwise to engage you?

24 A Well, I hear two different questions.

25 Q That's fair enough. Let me break it

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1
2 up.

3 What was the substance of your, I take
4 it, one conversation with Ms. Volkert at that
5 time?

6 A And that first conversation. There
7 may have been on one or two other brief
8 conversations afterwards. But in that first
9 conversation, it was extremely general, very
10 high level, and she simply wanted to talk about
11 the general nature of fair use. I believe it
12 was a new subject for her to explore. The
13 general nature of electronic reserves and what
14 universities and libraries may be doing. As I
15 recall, it was in that regard a very, very
16 general conversation. These were new subjects
17 to her.

18 Q How long did that phone call take?

19 A Oh, if I had to guess, it was probably
20 not more than 30 minutes.

21 Q And did you do most of the talking on
22 that phone call?

23 A Yes.

24 Q And what sorts of information do you
25 recall providing Ms. Volkert with during that

1 KENNETH D. CREWS

2 conversation?

3 A And at that point, I probably would've
4 talked with her about the fact that E-Reserves
5 exist. They exist in hundreds, if not thousands
6 of colleges and universities all over the
7 country. That there's been open questions about
8 what fair use means. There have been different
9 ways that different colleges and universities
10 have addressed those questions through their
11 policy statements. It probably would've gone
12 something like that.

13 Q Did she ask you if you had had a
14 chance to review the complaint?

15 A I don't recall her asking that.

16 Q Whether or not she asked you, do you
17 recall in that conversation conveying any
18 reactions, preliminary or otherwise, to the
19 allegations of the complaint?

20 A No.

21 Q Have you had occasion at any time
22 thereafter to convey your reactions to the
23 allegations of the complaint to any GSU
24 representative?

25 A To any GSU representative? And, you

1 KENNETH D. CREWS

2 know, no. At no point.

3 Q Let me phrase the question a little
4 more generally. Have you ever expressed an
5 opinion as a copyright expert as to the merits
6 or lack of merits of the allegations that are as
7 you understand them in this case?

8 A No.

9 I'll tell you something that probably
10 is as close as it gets to that. I remember a
11 professional colleague, who also works on these
12 issues, saying that she -- she informed me early
13 on that Georgia State had, in fact, filed a
14 defense; and I remember saying something like,
15 that's great, and that's it.

16 Q Whether or not you communicated it,
17 did you ever have a chance to review the
18 complaint in this case?

19 A Have I ever reviewed the complaint?

20 Q Yes.

21 A Oh, yes, I have.

22 Q And have you formed an opinion as to
23 the merits of the position set forth in that
24 complaint?

25 A I have not specifically systematically

1 KENNETH D. CREWS

2 made that determination.

3 Q Have you generally made that
4 determination?

5 A No. I think it's dangerous to do that
6 just from a complaint. The complaint is only a
7 view of the whole picture.

8 Q I take it, though, you have had some
9 familiarity with the preexisting 1997 University
10 of Georgia copyright policy; is that correct?

11 A That's correct.

12 Q And am I correct that one of its
13 principal authors was a professor in the field
14 known to you personally?

15 A That's correct.

16 Q And who is that?

17 A Professor Ray Patterson.

18 Q And you had a lot of admiration for
19 him; is that correct?

20 A Oh, yes.

21 Q And you're aware that at the time this
22 suit was brought, that was the prevailing policy
23 both at GSU and throughout the University system
24 in Georgia, correct?

25 A I'm aware of that now, yes.

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2 Q And you had been asked at or around
3 the time of its promulgation by Professor
4 Patterson to comment on the draft of that
5 policy; is that correct?

6 A That's correct.

7 Q And you declined to do so; is that
8 correct?

9 A That is not correct.

10 Q What is the correct answer to that?

11 A The correct answer is it was in 1997,
12 he had sent me a copy of the policy asking
13 generally what do you think of this, and I
14 remember writing a fairly detailed letter back
15 to him, a one-and-a-half, two-page letter back
16 to him.

17 Q And the essence of that letter was to
18 endorse the policy or something different?

19 A Oh, something different.

20 Q And what was the something different,
21 substantively?

22 A Substantively? Well, I don't have it
23 in front of me, so I'm working from memory. And
24 so if I had it in front of me, you know, I might
25 have the ability to give you a different answer.

1 KENNETH D. CREWS

2 But I remember raising some serious concerns
3 about the 1997 policy.

4 Q And what is your recollection about
5 what the most salient of those concerns were?

6 A They generally fit into, I guess, a
7 couple of groupings. One is as a matter of
8 policy making by a University, it's structurally
9 not right. In other words, it's a highly
10 detailed policy that purports to walk the reader
11 through a series of detailed scenarios.
12 Professor wants to do X, Y, Z, A, B, C, detailed
13 scenarios with an answer. And as a matter of
14 policy making, I find that just simply
15 ineffective and in many ways, over time, can be
16 counterproductive. A policy should be very
17 general, leaving room for experience and growth
18 and circumstances that change for that
19 maturation of experience to occur and keep the
20 policy relatively general, aiming the users of
21 the policy in a general direction, giving them
22 some parameters, but not necessarily hammering
23 nails on the head. Because if you do that, the
24 policy is going to immediately not be meaningful
25 to anybody who has a question that's not in the

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2 policy. It's over time going to not be useful
3 for new needs and new circumstances, new
4 technologies that arise that in 1997 they
5 weren't thinking of. So structurally, I found
6 it -- I found it flawed.

7 Q What about in terms of substance of
8 it?

9 A Well, it's been a lot of years since
10 I've combed through the substance of that
11 policy, and I did find that -- what I remember,
12 and I won't -- you might want to show me
13 something, but I'm not going to pretend that I
14 remember exact individual questions and exactly
15 how he responded. But what I think I
16 remember -- well, what I -- yeah, what think I
17 remember, I suppose it's the best way to put it,
18 is that litany of question/answer,
19 question/answer, question/answer,
20 question/answer. And then a whole lot of the
21 questions were yes, explanation. Can I do this,
22 this, this; answer, yes, explanation. Now, that
23 may be distorted in my memory. There may be
24 more no answers than I'm remembering. But, you
25 know, a policy that just says yes to everything

1 KENNETH D. CREWS

2 is not very helpful. A policy also has to give
3 you a heads-up about what you can't do.

4 Q And do I interpret correctly the use
5 of yes in this context as a shorthand for yes,
6 it is within the bounds of fair use and
7 therefore you can do it without further
8 permission or consent?

9 A If I'm recalling the policy correctly,
10 that's what he meant.

11 Q That's the context of your answer?

12 A Yes.

13 MR. RICH: Why don't we mark the
14 correspondence to which you refer so we have
15 it in the record, please. And we'll mark
16 that as Plaintiff's 291.

17 (Whereupon, Bates GASTATE 63527-28 was
18 marked as Plaintiff's Exhibit 291 for
19 identification, as of this date.)

20 BY MR. RICH:

21 Q Please take your time looking at what
22 we've marked. I will ask you to identify it
23 after you have done that.

24 A Sure.

25 Q Is this the correspondence to which

1 KENNETH D. CREWS

2 you referred a few minutes ago?

3 A Yes, it is.

4 Q Do you recall any other written
5 exchanges with Professor Patterson on this
6 subject?

7 A No, I do not.

8 Q Now, coming back to the complaint in
9 this action for a moment. Assuming for the sake
10 of my question that the policy that was
11 thereafter promulgated was essentially the one
12 you had reviewed and commented on to Professor
13 Patterson and that that was the policy in place
14 at the time this complaint was filed, is it
15 still your view that you formed no impression or
16 view or perspective on the merits of that
17 complaint?

18 A It is. It is still my position.

19 Q And that's because you just didn't do
20 it or because you would have needed more facts?

21 A Probably both of those. I just didn't
22 do it; and I would need more information, I'm
23 sure, if I were to do it.

24 MR. RICH: Let's mark as

25 Plaintiff's 292 a May 13 E-mail from Kenneth

1 KENNETH D. CREWS

2 Crews to Mary Jo Volkert.

3 (Whereupon, Bates GSUX 2170 was marked
4 as Plaintiff's Exhibit 292 for
5 identification, as of this date.)

6 BY MR. RICH:

7 Q Do you recognize this as an E-mail
8 which you transmitted to Ms. Volkert on or about
9 May 13th, 2008?

10 A It sure purports to be.

11 Q And do you have any reason to doubt
12 that it is what it purports to be?

13 A Just give me one second to finish
14 reading.

15 No. It purports to be from me, and I
16 believe it is.

17 Q Now, the first sentence says, "I
18 greatly appreciated the chance to talk with you
19 today." Is your recollection that the
20 conversation you described a few minutes ago is
21 the conversation that you're referencing in this
22 E-mail?

23 A I'm confident it is.

24 Q And what was the culmination of that
25 call in the sense that did Ms. Volkert and you

1 KENNETH D. CREWS

2 agree to talk again or did she inquire as to
3 whether you might be retained in some consulting
4 capacity or anything of that nature?

5 A No. No. I think she was looking just
6 for helpful background information about the
7 issues.

8 Q And you provided that for a fee or
9 gratis?

10 A Gratis.

11 Q And why was it that you attached a
12 copy of your resume, as promised? Did she ask
13 you for that?

14 A She must have.

15 Q And in the second paragraph, you
16 indicate that you had located two documents, the
17 document we've just marked as Plaintiff's
18 Exhibit 291, as well as the 1997 AAP legal
19 analysis of the region's policy.

20 Do you see that?

21 A I do.

22 Q Was that a topic of discussion during
23 your 30-minute or so phone call?

24 A I suspect I mentioned to her that I
25 knew that that document existed and I had seen

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1
2 it, yes.

3 Q And why did you believe it was
4 pertinent to what she would be interested in?

5 A Oh, because it's about their policy.
6 If I were in her position, I'd want to know all
7 about my policy too.

8 Q "Their policy" meaning?

9 A The Georgia University policy.

10 Q And had you --

11 MR. RICH: Let's mark now as
12 Plaintiff's 293 a December 23, 1997 document
13 on AAP letterhead to members of the
14 University System of Georgia, Regents
15 Copyright Committee.

16 (Whereupon, Bates GASTATE 63529-534
17 was marked as Plaintiff's Exhibit 293 for
18 identification, as of this date.)

19 BY MR. RICH:

20 Q And once you've had a chance to look
21 at this document, is this the document to which
22 the May 13th E-mail refers; that is, the AAP
23 legal analysis?

24 A Yes, it is.

25 Q And I take it you forwarded both of

1 KENNETH D. CREWS

2 these items on to Ms. Volkert?

3 A Are there two items here?

4 Q By both, I meant your July 1997
5 correspondence with Professor Patterson as well
6 as this document.

7 A I believe that's right. I sent both
8 of them to her.

9 Q Do you recall at that time providing
10 Ms. Volkert with any other material of any kind?

11 A No.

12 Q And what is your recollection of what
13 happened next in terms of any interaction with
14 any representatives of either Georgia State
15 University or the University System of Georgia?

16 A I had one, maybe two more phone
17 calls -- I'd be surprised if it were more than
18 that -- with Ms. Volkert, and we talked about
19 later, sometime later, maybe it was June, maybe
20 it was July, about what I might be able to do to
21 help the University, and we talked about some
22 possibilities. And then that's as far as it
23 went.

24 Q And had you made certain suggestions
25 as to what value you might bring to the process

1 KENNETH D. CREWS

2 the University was then engaging in, whatever
3 that process might have been?

4 A Oh, I'm sure I did, yes.

5 Q And what, to your recollection, were
6 the suggestions you made as to how you might
7 assist the process?

8 A Sure. If they were wanting to make --
9 either make a new policy, I have at some
10 universities helped or given advice or given
11 guidance about policy making. Or probably what
12 I would've said much more enthusiastically is if
13 you are interested in having seminars or
14 workshops at the University to help the
15 community better understand these issues and how
16 to work with those issues, I like doing that. I
17 do that as often as I can fit it into my
18 schedule, and I have been an invited guest at
19 dozens and dozens of colleges and universities
20 around the country to do exactly that. And I
21 find that it is received very nicely. So I
22 suspect I would have emphasized my ability to
23 provide educational services for the community.

24 Q Now, in these several discussions that
25 you had in this period of time with Ms. Volkert,

1 KENNETH D. CREWS

2 did you provide her with your thoughts as to the
3 directions of change in policy that you thought
4 might be appropriate in response to the pending
5 litigation?

6 A Well, let me add just one word of
7 caution. You use the word "several," several
8 conversations. I mean, really, to my
9 recollection, we're talking two or three.

10 Q All right. I didn't mean anything
11 different by several.

12 A It's an issue I have with my wife all
13 the time. To me, several means seven, and to
14 her means three.

15 Q That's okay. We want to be precise.
16 In the two or three conversations.

17 A Whatever it was, right. So I think I
18 lost your question.

19 Q My question was: In those two or
20 three conversations, did you provide Ms. Volkert
21 with thinking directionally as to the
22 modifications and policy that might be
23 appropriate in light of the pendency of the
24 litigation?

25 A No.

1 KENNETH D. CREWS

2 Q She didn't ask, and you didn't
3 volunteer?

4 A No. And I don't want to be cagey. I
5 mean, back to this other E-mail of May 13th, I
6 do raise to her the California State University
7 example, and I led the drafting of much of the
8 discussion of fair use is a statement that I put
9 in my E-mail. We may very well have talked
10 about have I worked on other policies at other
11 universities. That could easily have been a
12 topic of discussion.

13 If there's any hesitation in my
14 answer, it's only because in light of the
15 complaint that you filed -- if the question is
16 something about creating new policy that exactly
17 responds to what's in the complaint, no, we did
18 not have that conversation. If the question is
19 maybe work on issues, workshops, suggestions
20 about policy making because the complaint has
21 put this issue in front of us and we maybe have
22 to or should do something, well, then the answer
23 is probably yes.

24 Q Did you identify for Ms. Volkert or
25 for anyone else in the process of your various

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2 interactions with Georgia State University and
3 with the Board of Regents, areas of what you
4 thought were legal vulnerability in relation to
5 the then existing copyright policies of the
6 University system?

7 A No.

8 Q In this --

9 MR. RICH: Let's mark next a June 20,
10 2008 E-mail -- this will be 294, I
11 believe -- from Mary Jo Volkert to Kenneth
12 Crews.

13 (Whereupon, Bates GSUX 2135 was marked
14 as Plaintiff's Exhibit 294 for
15 identification, as of this date.)

16 BY MR. RICH:

17 Q I ask you to take a look at that
18 document, please. (Handing.)

19 A Okay.

20 Q Starting, I guess, at the bottom,
21 which is an earlier E-mail.

22 A Right.

23 Q Do you recall sending Ms. Hurt the
24 E-mail which appears -- the June 3rd E-mail
25 which appears at the bottom of this document?

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2 A Yes, I do.

3 Q And when you wrote "Ms. Volkert
4 thought that you and I could explore ideas about
5 policy alternatives and would be happy to share
6 some perspectives from my years in the copyright
7 trenches," what did you have in mind and what
8 were you trying to convey?

9 A Sure. I have conversations like that
10 with University officials frequently, and so
11 because of my years of experience, if she were
12 -- "she" meaning Ms. Hurt, were in the position
13 or desiring to have a fresh look at their
14 policy, I may be able to lend a hand and give
15 some pointers.

16 Q And do you recall why it was that
17 Ms. Volkert suggested you reach out to Ms. Hurt?

18 A Because I think -- well, she didn't
19 say, if that's what your question is.

20 Q Ms. Hurt was then the chief librarian
21 at GSU; is that correct?

22 A To my understanding, yes.

23 Q Were you aware that she was nearing
24 retirement at the same point?

25 A No, I was not.

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2 Q Now, as of June 20th, Ms. Volkert
3 writes to you, "I hope you're well," and so
4 forth. "I'm wondering if you ever heard back
5 from Charlene Hurt." And did you ever hear back
6 from Charlene Hurt?

7 A No, I don't recall ever hearing back
8 from her.

9 Q So as of the period, say, through
10 June 2008, did any of the conversations with
11 Ms. Volkert culminate in any more formal
12 consulting or other arrangement with GSU?

13 A No.

14 Q Okay. What was the next point of
15 contact as you recall it?

16 A I think the next point of contact
17 would have come from somebody at the offices of
18 King & Spalding.

19 Q And what is your recollection about
20 the nature of that contact?

21 A And we talked about very much what I
22 do for other universities. Could you come in,
23 have a meeting with officials, as I do with
24 visits to other universities, to just talk about
25 copyright, talk about role of policy, talk about

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2 options, talk about the issues of fair use, talk
3 about the options for policy making for
4 E-Reserves.

5 Q And what was the context in which you
6 recall that request was made or that exploratory
7 outreach was made?

8 A Well, at this point -- I believe by
9 that point, not only complaint, but there was
10 answer filed, I believe. I'd have to go back
11 and map the dates. And so I think at that
12 point, probably all conversation about this
13 issue was done through counsel. So in that
14 regard, even the simplest questions probably
15 would have come through counsel. So as I
16 understood it, I was simply being invited to
17 come and meet with University officials to talk
18 about the issues in broad general terms, the way
19 I do at other institutions.

20 Q And that contact came from inside
21 counsel at the University or outside counsel?

22 A I believe it was outside counsel, King
23 & Spalding.

24 Q Who specifically, do you recall?

25 A No. Maybe it was the gentleman

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2 sitting next to me, Steve Schaetzel.

3 Q Okay. And roughly when in time was
4 that contact made?

5 A Well, we had those conversations with
6 Ms. Volkert, the non-conversations with Ms. Hurt
7 in June. And so maybe all of that would be in
8 August.

9 Q So did that culminate in one or more
10 meetings?

11 A One meeting.

12 Q And when did that meeting take place?

13 A I don't remember the exact date, but
14 it was in September, I hope I'm remembering the
15 month, of 2008.

16 Q And where did that meeting take place?

17 A It took place initially at the law
18 firm of King & Spalding in Atlanta, Georgia, and
19 then we had part of the day with the -- at the
20 offices of counsel at Georgia State University.

21 Q And what was the agenda for that
22 meeting, as you recall, or those meetings,
23 plural?

24 A Sure. And by "agenda," what was the
25 topic?

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2 Q Yeah, what were the topics?

3 A The topic was really, again, very,
4 very general. It was what are our alternatives
5 for policy making. What are other universities
6 doing? How do I see the issues? What's been my
7 experience working with the issues? Generally,
8 what do I suggest to libraries and to
9 universities about how to handle fair use and
10 fair use decision making. What exactly to put
11 in a policy. What's the structure of a policy.
12 It was questions like that.

13 Q And what answers did you provide, as
14 you recall, to those issues?

15 A Oh, I probably talked all day.

16 Q We have all a day as well.

17 A We do. Do you want me to recreate it?

18 Q In summary form would be good.

19 A In summary form, sure. I've had many
20 such meetings. I have many conversations like
21 this, that are very general, at different
22 universities with different University
23 officials. I usually begin by talking about
24 what is copyright. The conversation usually
25 begins there. On the other hand, I'm dealing

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2 with lawyers at that meeting who are experienced
3 with copyright, so I could move through that
4 fairly quickly. But I could get straight to the
5 question of the different exceptions,
6 limitations in the copyright act. How, for
7 purposes of fair use, Section 107 on -- I'm
8 sorry, for purposes of electronic reserves,
9 Section 107 of fair use is really the provision
10 of principal importance, and then what it means
11 in general. Probably had some conversation
12 about other fair use court decisions of all
13 different types and all different subject
14 matter. And then some discussion -- probably
15 would have had some discussion about the
16 background and development of electronic reserve
17 policy making on a national level, on a local
18 level. Probably had some discussion about the
19 classroom guidelines from 1976, developments
20 since then, implementation in policy or policies
21 that have taken a different approach to
22 understanding and applying fair use. And
23 probably, it was really a very, very general
24 conversation. In many respects, I felt like I
25 was being, again, the teacher, helping them

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2 understand what was going on.

3 Q Did any of the participants in the
4 meetings you described that day indicate to you
5 what aspects of the then existing University of
6 Georgia system policy they believed it would be
7 appropriate to modify in whatever fashion?

8 A No.

9 Q And did you indicate your views in
10 connection with your overview of points, where
11 the approach you would adopt or the approaches
12 you would adopt would diverge from existing
13 practices?

14 A I do recall mentioning the 1997 letter
15 that you've introduced and that I had concerns
16 in 1997, and my experience since then has
17 reaffirmed that a more general approach in
18 policy making is more appropriate.

19 Q And you had mentioned two types of
20 critiques you had offered Professor Patterson.

21 A Uh-huh.

22 Q One was general versus specific, and
23 the other was too many yes's. I'm slightly
24 paraphrasing. But on the too many yes's side,
25 did you discuss that at the meetings in

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2 September of 2008?

3 A I don't recall bringing up that point.

4 Q Now, if you'd look at your report for
5 a moment, please --

6 A Sure.

7 Q -- which is in your pile there and
8 turn to Page 7.

9 A Okay.

10 Q There's a reference to October 3
11 meetings. Was that, in fact -- does that
12 refresh you that that was the date of the
13 meetings we've just been discussing?

14 A You are exactly right.

15 Q And the listed participants were the
16 participants in one or the combination of those
17 meetings, correct?

18 A That's correct.

19 Q And were you paid to participate in
20 that meeting?

21 A Yes, I was.

22 Q And what was the arrangement you
23 worked out?

24 A I gave them my standard arrangement
25 for a one-day visit to a University, and that

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2 standard arrangement is \$4,000 plus
3 out-of-pocket expenses.

4 Q And I take it you were paid?

5 A I have been.

6 Q Glad to hear that.

7 A Thank you.

8 Q And did that form the beginning -- how
9 would you characterize that relationship as of
10 then, a consultancy?

11 A A one-day consultancy, yes.

12 Q Which was going to lead to my
13 question, which was: Did that lead to an
14 ongoing consultancy with respect to the process
15 that then evolved, as we're all familiar with
16 now, where the University of Georgia System
17 convened a copyright committee, engaged counsel,
18 promulgated a policy, which was, I think,
19 announced in February, if I recall, of 2009? My
20 broad question for the moment is, what level of
21 involvement, if any, following October 3rd,
22 did you have in that process?

23 A I can tell you one thing I was not was
24 I was not a consultant to the policy making task
25 force or committee. I was not. In fact,

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2 whatever communication that happened after
3 October 3rd, it wasn't very much that I'm
4 recalling until we get to the one communication
5 that I've already mentioned that I believe was
6 in February of 2009 in which we had a telephone
7 conversation about a policy document that was
8 either finished or nearly finished, that the
9 task force was wrapping up its work.

10 Q And so were you aware, even, from
11 October until the time of that phone call that
12 there was a process ongoing?

13 A I was.

14 Q How did you know that?

15 A Somebody at King & Spalding would have
16 told me.

17 Q But not with any more substantive
18 participation on your part?

19 A Absolutely not.

20 MR. RICH: Let's now mark as
21 Plaintiff's 295 a January 13, 2009 E-mail
22 from Kenneth Crews to Steve Schaetzel.

23 (Whereupon, Bates GSUX 2092-93 was
24 marked as Plaintiff's Exhibit 295 for
25 identification, as of this date.)

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2 BY MR. RICH:

3 Q I ask you if you recall this E-mail.
4 (Handing.)

5 A Boy, really vaguely, but I think I
6 remember this E-mail.

7 Q What was the predicate for your
8 writing "Steve, this is great. I actually wrote
9 this material?" Was there a phone call with
10 Mr. Schaetzel?

11 A You know what it was? I can feel the
12 "this is great" response. There was some
13 confusion in a phone call about exactly what he
14 was referring to. He asked me something about
15 may we have permission to use some documents
16 that he found on the Columbia website. And my
17 mind went to something and he was talking about
18 something else, and then we had this exchange
19 that clarified what we were talking about. And
20 I remember the feeling, oh, yes, that material.
21 Oh, yes, no problem. Go a right ahead. And so
22 I think that's what the emotion here is about.

23 Q And during the call leading to this
24 E-mail with Mr. Schaetzel, did he update you on
25 the state of activity with respect development

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2 of a new copyright policy?

3 A Not in substance, but in process I
4 remember his saying there is a committee. The
5 committee has representation of different
6 participants at the University. The committee
7 is meeting. The committee has a desired
8 deadline for finishing their work. And that's
9 all you remember, that it was a lot of process
10 and not substance.

11 Q And in that phone conversation, did
12 you and Mr. Schaetzel discuss any further role
13 for you in that process?

14 A No.

15 MR. RICH: Let's mark next a
16 January 19, 2009 note from Steve Schaetzel
17 to Kenneth Crews. That's now
18 Plaintiff's 296.

19 (Whereupon, Bates GSUX 2030 was marked
20 as Plaintiff's Exhibit 296 for
21 identification, as of this date.)

22 BY MR. RICH:

23 Q Do you recall receiving what we've
24 marked as Plaintiff's Exhibit 296? (Hanging.)

25 A Only in general terms, yes. I don't

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2 remember exactly this E-mail.

3 Q Did this come out of the blue? Or,
4 again, what predicate was there for
5 Mr. Schaetzel writing you "Kenny, per our
6 conversation, I'm pleased to confirm that you
7 are being retained by the Board of Regents of
8 the University System of Georgia. Pursuant
9 thereto, we ask that you review this proposed
10 document."

11 A Okay. And as I say, I didn't recall
12 this exact E-mail, but I suspect it was just the
13 lead-in to that phone conversation that I'm
14 remembering being in February, where we had some
15 then reflection about the policy that was coming
16 out of the policy making task force.

17 Q But in other words, between the
18 earlier conversation, perhaps a week or so
19 earlier, where Mr. Schaetzel asked for
20 permission to use some materials from, I guess,
21 the Columbia University website and this, this
22 just developed in the interim week, that they
23 were asking you to perform this role?

24 A I'm not recalling anything different.

25 Q Okay. And what did you understand

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2 your retention by the Board of Regents of the
3 University System of Georgia to be?

4 A It was -- there's an attached
5 document, review the proposed document. I
6 assume it was attached or was delivered some
7 other way. And what I remember is that it was
8 being retained to review the document and give
9 some feedback.

10 Q And what was your understanding --
11 what is your recollection of what the attached
12 document was?

13 A Well, I do see a reference on this
14 E-mail itself down at the bottom. It says "USG
15 copyright policy website clean.doc." If this
16 printout is structured the way I'm used to
17 seeing them, that probably means that there was
18 a document attached to it. So that's probably
19 the proposed document. And it would have
20 been -- clean refers to maybe edited, fixed.
21 You know, the typing errors and so on were
22 cleaned out of it. And that it would have been
23 then a version of what the policy task force was
24 proposing as the content of the website.

25 Q Do you recall it to -- the attached

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2 material to constitute a single document, namely
3 a draft fair use checklist or a series of
4 documents?

5 A Well, I don't recall exactly. The
6 checklist was certainly there, if I'm
7 remembering correctly. But it was probably more
8 than just a checklist.

9 Q Sitting here today, do you remember
10 performing edits to anything more than a
11 proposed checklist?

12 MR. SCHAEZEL: Objection as to form.

13 A Honestly, I didn't see myself as an
14 editor. So I don't think of anything I did as
15 being an edit.

16 Q Well, you don't have to over react to
17 your counsel's instruction or coaching.

18 A I'm not.

19 Q All I was trying to get at, do you
20 recall making comments on any document other
21 than a proposed fair use checklist?

22 A Yes, I do.

23 Q What other documents do you recall,
24 just by nature?

25 A Sure. There probably was -- in fact,

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2 what I'm recalling is having -- during this time
3 period, whether it was late January or into
4 February, giving comments, for example, about
5 some additional statement about electronic
6 reserves, and one thing that stood out in my
7 mind -- it was important then; it stands out in
8 my recollection -- was, for example, a statement
9 in the document that the library would, where
10 possible, link to the item in a database as
11 opposed to scanning. And I remember making a
12 comment that that's really extremely important.
13 It may not actually be an aspect of fair use
14 law, but it's a very important part of the
15 overall component of such a policy statement,
16 guiding the users, guiding the librarians with
17 respect to fair use and the implementation of
18 fair use.

19 Q Why was that your view? What was the
20 basis for that view that it was a very important
21 component?

22 A Sure. As important as fair use is,
23 it's also important to realize that we should
24 save fair use for different types of
25 circumstances where fair use really has that

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2 importance at the University. And this means
3 that if we have a ready availability of the
4 content through these databases, that it's wise,
5 it's effective, both as a management matter, I
6 think as well as a pedagogical matter for the
7 readers, for the faculty member, for the
8 students to link to that content in those
9 databases. We're paying a tremendous amount of
10 money for those databases, and it's good to use
11 them. It's good to direct students and others
12 to use them so that they know that those
13 resources are there and available. And it a
14 also means that because we know that fair use
15 involves an important element of decision making
16 about what is, what is not fair use, that we're
17 then able to just save that decision for when we
18 need it in other circumstances.

19 MR. RICH: Let's mark as
20 Plaintiff's 297 a January 30, 2009 E-mail
21 from Kenneth Crews to Laura Gary, to which
22 is an attachment bearing Bates Numbers 63160
23 through 63162.

24 (Whereupon, Bates GASTATE 63159-63162
25 was marked as Plaintiff's Exhibit 297 for

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2 identification, as of this date.)

3 BY MR. RICH:

4 Q Can you identify what we've marked as
5 Plaintiff's Exhibit 297, please? (Handing.)

6 A Yes. It appears to be an E-mail from
7 me addressed to Laura Gary, copies to others at
8 King & Spalding; and I assume this document,
9 fair use checklist, was the document that
10 accompanied it. Where I say "please see
11 attached," that was probably what was attached.

12 Q Do you recognize those as comments
13 that you made on the draft which had been press
14 engined to you?

15 A I do.

16 Q Focusing on -- first, if you turn to
17 the draft, please, and focusing on the first
18 paragraph labeled "Instructions."

19 A Yes.

20 Q You will see that there's an
21 underline -- there is underlined language
22 following a semicolon, which do I understand the
23 editing protocol to mean that this was an
24 insertion which you were proposing, the
25 underlined words beginning with "reach a

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2 conclusion"?

3 A It sure does appear to be what Word or
4 another document would underline as an
5 insertion. Now, there's nothing here that
6 indicates that I made that insertion or whether
7 it came to me with that insertion already, but
8 there it is.

9 Q Focusing on that underlined language
10 which reads "reach a conclusion only after
11 considering all relevant facts and all four
12 factors."

13 A Right.

14 Q Do you recall that being a suggestion
15 on your part?

16 A Do I recall that as a suggestion?

17 Q Yes.

18 A No.

19 Q Is it consistent -- whether or not you
20 recall it, is it consistent with your
21 perspective that that would have been or would
22 be a useful modification and amplification?

23 A Yes.

24 Q And why is that?

25 A Because it's an accurate statement of

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2 the law. One of the problems is reaching a
3 conclusion too hastily, and I'm trying to push
4 people back to all four factors.

5 Q And have you, from experience, seen
6 instances where application of the fair use
7 doctrine has been in some fashion distorted by a
8 failure to evaluate all four factors?

9 A Yes.

10 Q Now, in connection with -- so tell me
11 next what happened then. So on the 30th of
12 January, according to Plaintiff's Exhibit 297,
13 you forwarded to King & Spalding a checklist
14 with suggestions, correct?

15 A It appears that way, that's correct.

16 Q Now, I don't see attached to this
17 document any suggestions on any other document
18 or documents that might have been compromising
19 the draft policy.

20 A I do not see those either.

21 Q Do you recall, independently of this
22 document, having made such suggestions and
23 forwarding them on in writing to King &
24 Spalding?

25 A I do not recall.

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2 Q Now, what happened next in terms of
3 your involvement with the process in which you
4 now were commenting?

5 A Well, I hope you'll just show me the
6 E-mail, if there's something that I said, and
7 I'll happily acknowledge whatever.

8 Q This isn't a memory test.

9 A And that's okay. Because what I do
10 remember is -- and now we really are at the end
11 of January. So sometime in February having that
12 telephone conversation that I mentioned.

13 Q And who -- I do not have a document
14 that would refresh you or me as to that. To the
15 best of your recollection, who was that
16 conversation with?

17 A To the best of my recollection,
18 lawyers at King & Spalding and nobody other than
19 lawyers at King & Spalding. And those specific
20 lawyers would have been Steve Schaezel, as I
21 recall, Kristen Swift. Maybe Laura Gary was on
22 the phone. And I believe an attorney that I
23 never met, Tony Askew, was on the phone.

24 Q What was the subject matter of that
25 discussion?

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2 A Discussing the draft of the website
3 policy, whatever was coming out of that task
4 force.

5 Q Now, was the subject matter of that
6 discussion broader than the document and your
7 comments on the document that were attached to
8 Plaintiff's Exhibit 297?

9 A I do remember talking about that one
10 issue, and let's see if it might be in here.
11 The issue about linking to the databases, where
12 possible.

13 Q Why don't you take your time. Is it
14 in here, in fact?

15 A I don't recall its being in here.

16 Well, in a way it is here, because it
17 certainly raises not in quite so explicit form,
18 in some of the factors relevant to the fourth
19 factor, an issue about licensing available. And
20 licensing comes in all different forms. And in
21 the library community, frequently when somebody
22 raises the word "license," what they usually are
23 thinking of is the license to purchase the big
24 database of thousands or millions of journal
25 articles on which we spend 10, \$12 million a

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2 year to acquire. In the library community,
3 whenever we raise the word "license," that's
4 usually where most people's mind will go. And
5 certainly, we talked about that concept and is
6 it relevant here, is it an appropriate part of
7 the policy.

8 Q You may have answered this, and if so,
9 I just want to be clear.

10 A Sure.

11 Q Is it your best recollection that in
12 that conversation with King & Spalding
13 following -- sometime following January 30th,
14 that you were -- you either physically had
15 access to or were, in any event, commenting on a
16 broader scope of documents that were proposed to
17 be part of the copyright policy, the new one,
18 than simply the checklist?

19 A I wouldn't say broader scope of
20 documents, but certainly a few issues came up
21 that were maybe within the parameters, depending
22 upon how you interpret the parameters of the
23 checklist, and maybe not.

24 Q Between the time you provided these
25 comments and the promulgation of the policy,

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2 were you shown any other drafts of any aspect of
3 the policy?

4 A I don't recall seeing anything else
5 after that.

6 Q And were you compensated for, you
7 know, this activity? And by "this activity" I
8 mean for your time commenting on the checklist
9 and/or having that conversation with counsel.

10 A I was probably keeping track of hours
11 at that point and added them up, yes.

12 Q And do you recall whether you
13 submitted an invoice for that?

14 A I believe I did. I've submitted
15 invoices for my time, and I believe that that
16 included some few hours from January, February,
17 when we were reviewing these documents or this
18 document.

19 Q What is your practice when you submit
20 such an invoice? Is it on a personal
21 letterhead? What does your letterhead say?

22 A It's just personal. I actually just
23 type my name and address at the top.

24 Q And do you have a heading, like
25 consulting services or anything of that nature?

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2 A No.

3 Q Services rendered? What do you say?

4 A Well, at the top just name, address,
5 maybe E-mail, maybe phone number. Invoice for
6 services, words like that.

7 Q And do you typically describe the
8 dates the services were performed and the time
9 involved --

10 A No.

11 Q -- in any detail at all?

12 A No, no.

13 Q Just a sum, a number?

14 A Sometimes a summary of types of
15 services rendered and then span of dates or as
16 of a certain date. Total hours, fee for hours,
17 any out-of-pocket expenses added up.

18 Q Now, you testified at the very outset
19 of this deposition that you were retained with
20 respect to preparation of your report and now
21 reports, plural --

22 A Uh-huh.

23 Q -- in or around April of this year; is
24 that correct?

25 A Yes. I believe I state in the report

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1
2 an exact date.

3 Q April 22nd, I believe it is. Is
4 that your recollection?

5 A That sounds correct.

6 Q What is your recollection of how that
7 retention came about?

8 A I received another phone call from
9 attorneys at King & Spalding, and I reflect that
10 in the exact date, saying that they would now
11 like me to become -- and again, my apologies if
12 I'm stumbling over the terminology. I'm a
13 newcomer to being an expert witness, so I may
14 not get the terms and labels exactly right. But
15 to be an expert witness involved in the case,
16 and you might phrase that differently. And
17 therefore, they would like me to write a report.

18 Q And that was a phone conversation?

19 A That was a phone conversation.

20 Q And in that conversation, what more
21 specifically were you asked to cover in that
22 report?

23 A I was given remarkably little
24 guidance. In fact, again, being a newcomer to
25 doing this, that was a little bit frustrating

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2 and perplexing for me. I was actually looking
3 for more advice than I was receiving. But they
4 were allowing me a free hand to do what I
5 thought was appropriate. And so therefore, when
6 I think about these issues, and I resolved that
7 my goal was not to be the judge, I'm not going
8 to render verdict on the issues that are raised
9 in this case. My goal, as I saw myself, was to
10 be as helpful as possible with helping anybody
11 who reads this report to understand the context
12 of the issues, the context of electronic
13 reserves, the evolution or history of
14 policymaking surrounding electronic reserves
15 and, therefore, to see whatever these issues may
16 be that lawyers or judges are struggling with
17 today in this case, to be able to see those
18 issues in the context of what's been happening
19 nationally.

20 Q Whose decision was it to do a survey
21 of fair use law?

22 A Mine.

23 Q And your report indicates for this
24 phase of your work, you are being compensated at
25 the rate of \$250 an hour plus expenses; is that

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correct?

A That's correct.

Q Have you kept a record of approximately how many hours you have invested in this process?

A I have.

Q And what is it, approximately?

A Well, I have submitted invoices that come through the end of the first report, and if I remember correctly, it's approximately 140, 150 hours, something like that. That brings us through the end of the first report. And then I have not submitted an invoice since then, but my little cryptic notes show a total of somewhere around 120 hours on activities since the first report, including preparation of the second report.

Q The hours you cite, are those your own time or are those inclusive of any assistant's time?

A Strictly my own time.

Q And how many assistants did you employ?

A The only assistants that I have

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2 retained in preparing either of these reports
3 was Neil Wehenman, W-E-H-E-N-M-A-N. He is --
4 was a student at Indiana University who had done
5 work with me on other projects. I needed some
6 quick help; he was available. And I paid him an
7 hourly rate to do some background research for
8 me.

9 In preparing the gathering of policies
10 themselves that are reflected in the -- in
11 report number one, my wife helped me out. And
12 she wanted to be helpful. She saw me busy
13 working nights and weekends to prepare this
14 report and said, what can I do? And I said,
15 well, I need an assortment of policies, not
16 scientific, that just shows a range of different
17 approaches that different universities and
18 different libraries have taken on electronic
19 reserves. And I turned her loose with that
20 task, and she came back with a long list of
21 policies and printouts, and that became the
22 overview. I transformed that raw data into the
23 overview that you see in report number one.

24 Q And your wife's name is?

25 A Elizabeth Crews.

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2 Q And what is her professional
3 background and training?

4 A Elizabeth has a degree in English and
5 French from the University of Southern
6 California. She has a master's degree in
7 special education from the University of
8 Southern California. She worked for 10 years as
9 a special education teacher in the Torrance
10 Unified School District in California. When our
11 second child was born, she became what she calls
12 mom at home. In the last couple of years that
13 we were in Indiana, so that would've been
14 roughly 2006 and 2007, she went back to school
15 and earned a master's in library science,
16 graduating in December of 2007. And then we
17 moved here, and she is sending resumes, looking
18 for a new career.

19 Q And was she compensated for her work
20 on this project?

21 A Only with love and attention.

22 Q And so her hours were not logged in
23 any way and billed for?

24 A Not in any way.

25 Q However, your assistant, I take it,

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2 received some compensation, your research
3 assistant?

4 A Neil Wehenman?

5 Q Yes.

6 A Yes.

7 Q And approximately how much time did he
8 put into this project?

9 A Approximately 20 to 25 hours total.

10 Q And did he work on the rebuttal report
11 as well?

12 A No.

13 Q Only on the first report?

14 A Only on the first one.

15 Q And did you advise King & Spalding
16 during the process that your wife Elizabeth was
17 assisting you on part of this project?

18 A I think I may have told them.

19 Q How many drafts of your first report
20 do you recall preparing?

21 A Well, now that's a tough question to
22 answer. I mean, does every time I stop turn
23 into a draft, every time I need to take a break
24 and go back to my other work?

25 Q Fair enough. Let me rephrase that.

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2 A Yeah.

3 Q How many drafts did you communicate to
4 counsel for GSU?

5 A I think two.

6 Q And what is your recollection of the
7 nature of feedback you received on those drafts
8 from counsel for GSU?

9 A Sure. Let's deal with the easy one
10 first. One of those two drafts I think I
11 submitted the day before the June 1. And it was
12 knowing that we were all in a hurry, knowing
13 that it had to be filed the next day, I said to
14 Kristin Swift, I believe, take a look at this,
15 see if you catch anything. We have about 10
16 minutes to fix anything if there's an obvious
17 error. I typed my name wrong on the cover or
18 something like that. And I think she may have
19 come back with something the equivalent of a
20 typographical error, and that was it. So that
21 was the easy one. That was the one of the
22 drafts.

23 And then there was one a week or 10
24 days before that, where I submitted it to them
25 and I was -- as I said earlier, I was kind of

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2 feeling adrift. I wasn't quite sure what an
3 expert report is supposed to look like and
4 especially in an extraordinary case like this.
5 And so I was eager for some feedback, so they
6 agreed to give me some feedback. And so I
7 submitted that to them.

8 And the feedback -- you did ask what
9 sort of comments did I get back. They really
10 fall into two categories. One was a category of
11 what did you mean by this? Just clarify what it
12 was that I was trying to say. And that was
13 perfectly understandable, writing on a tight
14 deadline, something doesn't communicate well.
15 And the other one, that I had to agree 100
16 percent, was the draft I submitted was painfully
17 missing something that I wish was in there. And
18 so, yeah, I heard it from them, so I hurried up
19 and did it. And that was the survey of the fair
20 use checklist and just some comments about the
21 legal -- I'm not quite sure how to word it, but
22 point of law that may be relevant to each
23 element on that fair use checklist. I had, by
24 that time, already done the breakout of the rest
25 of the Georgia State or the Georgia University

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2 policy, but I didn't have a similar break out of
3 the checklist. So I had to quickly go to work.
4 We were down to a matter of days. I was on a
5 tight schedule. I had will other deadlines too,
6 but just quickly go to work. And that's where I
7 think I also contacted Neil Wehenman and said
8 you gotta help me, you gotta help me.

9 Q Did the entirety of this work on the
10 initial report take place between April 22nd
11 and the date it was submitted?

12 A 100 percent.

13 Q And what reason were you provided with
14 why it was on such a tight deadline?

15 A Well, I guess, I mean, really -- why
16 not start earlier, in other words? I wasn't
17 asked to. I mean, what I understood -- all I
18 know is what I was told. And at the outside, we
19 had whatever deadline it ended up being,
20 June 1st, as the deadline to file this, and
21 April 22nd when I got the call to prepare this
22 document.

23 Again, I'm sitting way up here; the
24 lawyers are way down there. I'm not privy to
25 their conversations. Why didn't they call me on

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2 the 21st? Why didn't they call me some other
3 date? I don't know. I don't know. There it
4 is.

5 MR. RICH: Let's mark as Plaintiff's
6 298 a May 14th E-mail from Kenneth Crews to
7 Kristen Swift, together with an attachment
8 dated May 14th, 2009, bearing Bates Number
9 63228 through 63291.

10 (Whereupon, Bates GASTATE 63212 and
11 63228-63291 was marked as Plaintiff's
12 Exhibit 298 for identification, as of this
13 date.)

14 BY MR. RICH:

15 Q While you're free to look it all over,
16 I'm going to have very, very few questions on
17 the draft itself. And my first question is
18 whether you can identify this exhibit as a
19 transmittal of your first -- transmittal of the
20 first draft which you sent to counsel.

21 A It has every appearance that it is.

22 Q On or about May 14th sounds right to
23 you?

24 A That does sound right.

25 MR. RICH: Now let's mark as

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2 Plaintiff's 299 a May 31 transmittal from
3 you to Ms. Swift to which is attached a
4 document bearing the date May 31, 2009,
5 bearing Bates Number 63009 through 63080.

6 (Whereupon, Bates GASTATE 63008
7 through 63080 was marked as Plaintiff's
8 Exhibit 299 for identification, as of this
9 date.)

10 BY MR. RICH:

11 Q And for the moment, my question, sir,
12 to you is whether you recognize this to be the
13 second and, if not ultimate, close to final
14 draft that was transmitted on or about May 31?

15 A Everything suggests that it is.

16 Q Now, if you would turn back to the
17 May 14 draft and flip to Page 52.

18 A All right.

19 Q You will see under the section labeled
20 "Fair Use Exception," there is a quote from what
21 I take it to be the policy that you are
22 commenting on, followed by the following
23 statement: "A critically important statement
24 that immediately reminds all readers that they
25 need to consider all four factors and resist

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1 reaching a conclusion based on a single factor."

2 Do you see that?

3 A I do.

4 Q I take it that's consistent with the
5 discussion we had a little while ago reflecting
6 your strong viewpoint, correct?

7 A It is.

8 Q Now, if you turn to Page 52 of the
9 May 31 draft.

10 A Uh-huh.

11 Q You will see that the prior quoted
12 language has been replaced by, "This statement
13 reminds readers that they need to consider all
14 four factors and resist reaching a conclusion
15 based on a single factor."

16 Do you see that?

17 A I do.

18 Q What is your recollection as to why
19 that language was modified in the fashion it was
20 between the May 14th and the May 31st draft?

21 A I don't recall any particular reason,
22 because I don't think it changes it in
23 substance, other than I will tell you this. I
24 remember in my final editing, I over use a few
25

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2 words, and one of those words is "important."
3 And one of those words is "critical." And I
4 think I went through the document in my own
5 editing and took out certain words like that
6 that just became tiresome as you read it. But
7 otherwise, I don't see any particular reason to
8 have changed it, because substantively it's the
9 same.

10 Q And I take it this didn't reflect any
11 editing suggestion from counsel for Georgia
12 State University?

13 A Not that I can recall. And frankly,
14 not that I can imagine.

15 Q Is it your view, however it's worded,
16 that the notion that all four factors should be
17 evaluated in a given case is a critically
18 important component of the fair use analysis?

19 A It does sound like something I would
20 say.

21 MR. RICH: Let's take a five-minute
22 break.

23 (Whereupon, a break was taken.)

24 MR. RICH: Back on the record.

25

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2 BY MR. RICH:

3 Q When you had occasion, Professor
4 Crews, to look at the new -- the University
5 System of Georgia policy in its final form, did
6 you see some Ken Crews imprints on it?

7 A Oh, yeah.

8 Q Can you describe those, at least at a
9 general level?

10 A Sure. I mean, it really goes back to
11 the lawyers asked may I have permission to use
12 some of these documents from the Columbia
13 website that I host, and I said absolutely. I
14 give permission to lots of people, or they just
15 use it or whatever. So I'm on happy to see them
16 out and being used. And so certainly I
17 recognized elements of things that came from me
18 or were like me or whatever.

19 Q And that were facilitated by the prior
20 discussions, presumably, that you had over time
21 with the folks at GSU?

22 A I don't know what facilitated means,
23 but did it maybe -- I'm not sure what it means.

24 Q Let me ask the question more narrowly.
25 You mentioned a meeting back in

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2 October of 2008, for example. When you later
3 saw the culmination of the process and the new
4 policy, did you say, ah, I recognize some of my
5 thoughts? Again, not by express, oh, here it
6 is, but by inference, did you recognize,
7 perhaps, some of the influence of your thinking
8 in the final product, in your own opinion?

9 A Yeah. In my own opinion, I'm going to
10 say yes to something just slightly different.

11 Q Please.

12 A And that is not so much that there
13 were things said and done in October that
14 therefore were reflected in it, but explicitly
15 the final website-based document from Georgia
16 even mentions kind courtesy or whatever of
17 Columbia University, et cetera. And so it
18 didn't take me long to look at that, know they
19 were acknowledging my work as a source, and I
20 could look at it and say there it is. In
21 substance and even some words, there are some
22 pieces of my work. And I was happy to see that.
23 I'm always happy to see my work being used. But
24 can I relate it specifically back to an October
25 meeting, no, I can't. They could have just as

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2 easily found somebody else's work and preferred
3 that over mine, and that could easily have been
4 the case.

5 Q You're proud of the contributions
6 you've made that when people borrow, as it were,
7 from checklists and the like that you've helped
8 to shape over time. That's a source of pride to
9 you, I take it?

10 A Yes, it is.

11 MR. RICH: We found a couple of
12 invoices, and I want to mark them for the
13 record here. So let's go to Plaintiff's
14 Exhibit 300, which is an October 6th,
15 2008 -- appears to be an October 6th, 2008
16 invoice from Mr. Crews directed to
17 Mr. Schaetzel.

18 (Whereupon, Bates GSUX 0000001 was
19 marked as Plaintiff's Exhibit 300 for
20 identification, as of this date.)

21 BY MR. RICH:

22 Q I'll ask you if you can identify this
23 document for the record.

24 A Yes, I can.

25 Q Please.

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2 A It's an invoice dated October 6th,
3 2008, signed by me, to Mr. Schaetzel at King &
4 Spalding.

5 Q And this is consistent with your
6 earlier testimony that you charged a daily
7 consulting fee, as I recall, your standard daily
8 consulting fee in association with that October
9 visit; is that correct?

10 A That's correct.

11 Q And that's when you gave that
12 consulting advice about how they might be
13 thinking about developing a new policy?

14 A That's correct.

15 MR. RICH: Let's mark next as
16 Plaintiff's Exhibit 301 an invoice dated
17 March 2, 2009, also from Mr. Crews directed
18 to Mr. Schaetzel.

19 (Whereupon, Bates GSUX 000007 was
20 marked as Plaintiff's Exhibit 301 for
21 identification, as of this date.)

22 BY MR. RICH:

23 Q I'll also ask you, sir, to tell us
24 what this document is.

25 A Uh-huh. It's an invoice dated

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2 March 2, 2009 from me. This particular copy
3 doesn't have the signature on it, but it's got
4 my name at the bottom, and it's addressed to
5 Mr. Schaetzel at King & Spalding.

6 Q And I take it from the entries and
7 from our prior colloquy that this reflects
8 activity involved, as indicated, in reviewing
9 policy drafts and conversations concerning same,
10 correct?

11 A It sure appears to be that way.

12 Q And this was preceding your retention
13 as an expert for purposes of preparing the
14 report we're going to spend the balance of the
15 day discussing, yes?

16 A That's correct.

17 Q If you would turn to Page 6 of your
18 report, please.

19 A (Witness complies.) Are we now
20 looking at the June 1st dated report?

21 Q We are looking at the June 1st
22 report.

23 A Okay.

24 Q You list the documents that as of the
25 time this report was prepared, you had reviewed.

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2 How was it determined which documents you would
3 review?

4 A Some documents were supplied by King &
5 Spalding. That would have been my only manner
6 of receiving the transcripts of any of the
7 depositions. So those came directly from King &
8 Spalding. The other documents would have been
9 either in my possession. We've talked about the
10 consultations or whatever appropriate word that
11 occurred in January and February 2009. And then
12 I was able to find the University System of
13 Georgia policy on the website, publicly
14 accessible. So I don't remember whether
15 somebody said go look here, but I was interested
16 enough. I knew to go look there. And then I
17 had earlier, even before talking with anybody
18 connected with the case, had seen the complaint,
19 as I already mentioned, and then at some point
20 saw the answer. These are also publicly
21 available.

22 Q Now, you indicate at a general level
23 the legal research that you conducted.

24 Do you see that?

25 A I do.

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2 Q Was that personally done by you or you
3 in combination with your research assistant?

4 A Almost of all of it would have been
5 personally done by me. When I asked the
6 research assistant, Neil Wehenman, to help with
7 that, especially the last stage of points about
8 the elements of the fair use checklist, he did
9 some original research and cited some of those
10 cases that are there.

11 Q Was all the writing in the report
12 yours?

13 A All of it's mine.

14 Q And the library science research, was
15 that -- who conducted that?

16 A I did.

17 Q And the review of sample copyright
18 policies, I believe you indicated that that was
19 a task which your wife graciously agreed to take
20 on at least in part?

21 A She took on the task of handing me a
22 stack of policies, and then I did the task of
23 the review, organizing, pulling out information
24 and so on.

25 Q So all she did was cull, as it were,

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2 sources for you to then review?

3 A Located policies on websites, that's
4 correct.

5 Q And did you ultimately use a subset of
6 the totality of website information she provided
7 you?

8 A I did not use 100 percent of what she
9 gave me, that's correct.

10 Q What was the basis for filtering out
11 some of it?

12 A Mostly I was seeing repetition. I
13 think by the time, of course, I was working on a
14 tight deadline, couldn't do everything. Plus it
15 got to the point where you begin to see patterns
16 in the policies. My principal goal in putting
17 the policies in here at all or at least, I
18 should say, my principal goal in the selection
19 of which policies ended up in the report was to
20 demonstrate something about the variety of
21 positions that colleges and universities were
22 taking. And when I was getting through the
23 stack of policies, when I was pretty much seeing
24 the same language again and again and again, I
25 just realized maybe I've had enough. It's time

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2 to move to the next task.

3 Q Why did you believe it was relevant to
4 your assignment to provide an overview of what
5 you term the diversity or variety, pardon me, of
6 positions taken by universities?

7 A I can think of a few reasons. Among
8 them would be the fact that, at least as
9 professionals have worked with fair use, have
10 worked in the context of electronic reserves,
11 they've seen the issue or, if you will, the
12 answer about what is fair use and how to work
13 with fair use. They've seen that issue in
14 different ways. So just simply the fact that
15 there is a diversity of views and understanding
16 and ways of implementing fair use. I'm simply
17 underscoring that fact, underscoring the fact
18 that there is a -- that there is variation in
19 how a University might, in fact, implement its
20 fair use or implement its electronic reserve
21 system and, therefore, how that might impinge on
22 what's important in the fair use equation. And
23 so on. I really wanted to show the variety of
24 approaches that were out there.

25 Q Turn to page 69 of this report.

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1
2 A I'm there.

3 Q In your conclusion section, the last
4 bullet states, "The policy is consistent with
5 and similar to many policies that have been in
6 place at colleges and universities throughout
7 the country."

8 Do you see that?

9 A I do.

10 Q And you cite that as a factor, among
11 others, that leads you to the conclusion at the
12 start of your conclusion that the Georgia
13 University policy as examined in this report is
14 consistent with the copyright law of the United
15 States.

16 Do you see that?

17 A I do.

18 Q If, in fact, your main purpose was to
19 show diversity and that somewhere in that
20 diversity, almost by definition, a policy falls,
21 why is that supportive of a conclusion that it's
22 consistent with fair use?

23 A Well, because fair use itself is
24 flexible. Fair use itself is open to diverse
25 interpretation. Fair use itself applies

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1
2 differently under different circumstances. And
3 so fair use itself doesn't lock in and give one
4 answer, especially to something as multifaceted
5 as a system of electronic reserves. And so it
6 doesn't give one answer. As we see from these
7 policies, that to the -- if we accept that the
8 policies are consistent with the law, that there
9 is a diversity of ways that an institution can
10 look at the law, determine what it is that
11 really is more important at that institution in
12 the way it structures electronic reserves and
13 also then choose, make some important policy
14 choices about how in turn to structure its
15 policy. So diversity doesn't mean that some are
16 lawful and some aren't. It means that there is
17 a range of choices where a policy maker may land
18 in its effort to comply with the law of fair
19 use.

20 Q So in sponsoring part 7, I guess it
21 is, of this report, which is your non-scientific
22 survey of posted information about fair use
23 policies at different colleges and
24 universities --

25 A Uh-huh.

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2 Q -- was a premise that each of the
3 cited institutions, based solely on what you
4 know from what's publicly posted, is operating
5 in conformance with copyright law?

6 A Am I making the statement that each of
7 these policies --

8 Q Are you making that assumption?

9 A Am I making that assumption that they
10 are in fact in compliance with copyright law?
11 No, I am not making that assumption, no.

12 Q Are you making the assumptions that
13 the policies, at least so much of them as you
14 became familiar with through this search
15 process, on their face are in conformance with
16 copyright law?

17 A No, I'm not making that assumption
18 either.

19 Q But then you nonetheless conclude that
20 since Georgia State's policy falls within this
21 diverse range, it is support for the lawfulness
22 of the Georgia State policy. How do you do
23 that? How do you make that leap?

24 A I will tell you what I am assuming. I
25 am assuming that the makers of these policies

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2 have addressed, have considered issues of fair
3 use, have considered the fair use law as it
4 applies to their institution, that they have --
5 somebody, in developing these policies, has
6 learned about fair use and has -- has written a
7 policy that they believe is in conformity with
8 the law of fair use. I'm assuming that,
9 therefore, there is a very, very good chance
10 that they are in conformity with fair use, as
11 opposed to my having made a specific evaluation
12 of each of these policies. I haven't done that.

13 And I also know that the one thing
14 that we can see, and we have some documented
15 evidence of that, is that a lot of the policy
16 making process of different universities is a
17 process of learning from one another. We also
18 have documented evidence that I've cited in here
19 that a lot of the policies have gone to
20 University counsel for formal legal review,
21 which I think heightens the likelihood that they
22 are, in fact, in conformity with the law. I
23 know that a lot of the elements of the policies
24 are, in fact, directly relatable to things that
25 I could, given more time, cite in the law as

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2 being part of the law.

3 And therefore, while I'm not here to
4 endorse any particular one or to pass legal
5 judgment that X university is in compliance with
6 the law, I am making what I think is a
7 supportable assumption, that as a general trend,
8 we are seeing universities that have legal
9 support, have legal advice, have years of
10 experience, have experimented with different
11 policies. And in fact, I think we can make an
12 assumption that they are likely, highly likely
13 operating within the law.

14 Q How many of the 39 institutions that
15 you culled from your wife's surveying of the
16 Internet have you personally spent time with and
17 discussed and learned the details as to their
18 fair use policies and practices?

19 A Me personally?

20 Q Yes. I assume Indiana is one of them.

21 A Actually, not. One of them I list in
22 here is Indiana Northwest, I think it is. And
23 it's my experience from having been at Indiana
24 University that the different campuses actually
25 make different -- have the flexibility to make

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2 different policies on these issues. And so I
3 have not worked on that particular policy. So
4 how many have I actually spent time discussing
5 to any extent with any of these universities,
6 not very many.

7 Q How many?

8 A You know, in fact, I've had some
9 conversation with -- I met -- chatted with
10 somebody many years ago at Brown University.
11 Many years ago with somebody at Bucknell. I've
12 had conversations with people at Pennsylvania
13 State University.

14 Q How recently?

15 A About E-Reserves in particular?

16 Q Yes. How recently?

17 A On E-Reserves, it's probably been five
18 years, maybe more.

19 Q When you say you chatted with them, in
20 what capacity? Were you hired as a consultant?

21 A Not hired as a consultant, other than
22 you might -- one of the visits that I've made to
23 different campuses and made a visit to
24 Pennsylvania State University, not as a
25 policy-making consultant, but somebody to come

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2 and visit and be available to discuss these
3 issues. Then they take whatever we talk about
4 and make their own decisions.

5 Q How much time did you spend with them?

6 A I was there for a full day's visit.

7 Q One day?

8 A One day.

9 Q You wouldn't say you're an expert in
10 their current practices as they relate to
11 E-Reserves, would you?

12 A No.

13 Q Keep going.

14 A I've had occasion over the years to
15 talk with people at Yale University, maybe most
16 recently within the last year or two.

17 Q What were the nature of those
18 conversations?

19 A I visited Yale as a guest but to talk
20 about other issues, and I know that we had just
21 some just side conversations about some of the
22 issues that they're dealing with and still
23 making decisions. But if Penn State was a
24 one-day visit, this would've been a 15-minute
25 visit.

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2 Q Okay.

3 A University of Wisconsin. Their policy
4 at the University of Wisconsin, if I recall
5 correctly, it's been in place there for eight or
6 10 years, and I don't believe it's been changed
7 in the meantime. And I remember back at that
8 time having some extensive conversations with
9 people at the University of Wisconsin, some give
10 and take about their position.

11 Q In any formal capacity or just
12 conversation?

13 A Just conversation, just one
14 professional to another, sharing ideas.

15 Cornell University, I chatted with
16 somebody at just a lunch meeting as recently as
17 within the month to talk about what they've
18 done, how their policy may be working and how
19 they use it.

20 Q Was that a meeting set up for that
21 purpose?

22 A No. No. Somebody from Cornell
23 happened to be in town, somebody I work with,
24 and we share ideas on different copyright
25 issues.

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2 Q Who was that?

3 A Peter Hirtle, H-I-R-T-L-E.

4 Q And did you have occasion to discuss
5 with Mr. Hirtle the impact of the understanding
6 that Cornell reached with the Association of
7 American Publishers on ongoing E-Reserves
8 practices at Cornell?

9 A We did talk a little bit about that,
10 because that does form the crux of their policy.

11 Q What did he have to say about that?

12 A He said that actually it's given --
13 because they rely, it's integrated into their
14 standard. They use the fair use checklist,
15 their own version of it. I believe he said they
16 made some minor changes to it. That it
17 actually -- the result has given them a good
18 amount of flexibility for how they proceed with
19 what materials they can put on electronic
20 reserves.

21 Q So he reports that the resolution of
22 the dialogue with the publishers had a positive
23 impact on the application of fair use at
24 Cornell?

25 A I believe he was saying in some

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2 respects, it does.

3 Q Anyone else?

4 A Keep turning the page here.

5 I did make a visit to the University
6 of North Carolina at Greensboro, but it was one
7 of the general visits, big crowd, answering
8 questions. I don't believe we talked anything
9 about electronic reserves. And I can say the
10 same thing about the University of Washington.
11 And that brings us to the end of the year.

12 Q Turn to Page 41. Let's just take
13 Princeton University.

14 A Sure.

15 Q Tell me all the details you know about
16 Princeton University's E-Reserves practice?

17 A I did put an appendix.

18 Q Yes, we have that. We'll mark that
19 now.

20 MR. RICH: We'll mark as
21 Plaintiff's 302 -- well, it's really
22 Appendix E to the June 1 report of the
23 witness.

24 (Whereupon, Appendix E to the June 1
25 report of the witness was marked as

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2 Plaintiff's Exhibit 302 for identification,
3 as of this date.)

4 BY MR. RICH:

5 Q I think you're going to find it
6 towards the back of this compilation. Page 92
7 out of 120, if you look at the pagination at the
8 top right.

9 A 92?

10 Q Out of 120.

11 A I am there.

12 MR. RICH: You can read back my
13 question.

14 (Whereupon, the requested portion was
15 read back by the court reporter: Tell me
16 all the details you know about Princeton
17 University's E-Reserves practice?)

18 A The details I know is limited to
19 what's publicly available. It's limited to what
20 I'm reading here and what I have included in the
21 appendix. I believe that I did click these
22 links that are inside this report to copyright
23 basics and the University's copyright policy;
24 but I did not include them here, and I don't
25 recall exactly what they said.

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2 Q What do you know about the actual
3 day-to-day implementation of E-Reserves
4 practices at Princeton University?

5 A Nothing.

6 Q If I were to ask you that question
7 about the additional 38 colleges and
8 universities, how would your answer differ; that
9 is, what you know beyond what appears in
10 Appendix E?

11 A Other than an occasional insight, such
12 as the one I mentioned about Cornell or -- you
13 know, I better rephrase it a different way.

14 We know -- I know -- because your
15 question is what do I know. I know pieces of
16 information about some of these institutions,
17 and typical examples of that would be the one
18 spot of information that I mentioned about
19 Cornell or the pieces of information that I was
20 able to find in some of the published articles
21 that individuals at those universities have
22 written, to say here is our experience at, for
23 example, the University of Colorado and here is
24 experience we've incurred. Here is how we
25 developed our policy and so on. So actually, I

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2 am able to say I know some pieces of information
3 about practices at some of these universities.

4 Q How many the 39 do you know some
5 information about beyond the public?

6 A Oh, beyond what's public?

7 Q Beyond what you have described and
8 otherwise put into Appendix E.

9 A Oh, then we kind of go back to reading
10 through the list. Do you really want me to do
11 that?

12 Q I do.

13 A Okay. And so, for example, University
14 of Colorado, but I think this is not exactly
15 what you've asked for. I have cited some
16 experiences that were published that were public
17 from the University of Colorado.

18 Q That had to do, if I recall, with
19 permissioning issues, correct?

20 A That's correct. That's correct. But
21 that's part of the process.

22 Q All right. So that's the extent of
23 what you know in addition about the University
24 of Colorado?

25 A That's right.

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2 Q What else?

3 A No, I'm not going to claim to be a
4 witness to the internal operations of these
5 institutions and how they do their E-Reserves on
6 a day-to-day basis. If that's what you're
7 wondering, the answer is going to be very
8 simply, no, I'm not that.

9 Q And without that knowledge, you're
10 still comfortable that it's very, very likely,
11 in your earlier words, that every one of these
12 institutions is in compliance with copyright in
13 their E-Reserves practices?

14 A I believe I said highly likely.

15 Q Highly likely.

16 A Highly likely. And I didn't say
17 practices. I was referring specifically to the
18 policy documents themselves and that the policy
19 document that they've offered up has a high
20 likelihood of being consistent with fair use
21 law.

22 Q And irrespective of the degree to
23 which that policy document has been implemented
24 in practice at a given institution?

25 A Well, if we don't know that

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2 information, what we don't know could actually
3 go both directions. What we don't -- we don't
4 know, for example, if they ignore their policy
5 or we don't know if they're actually tougher
6 behind the scenes, that the policy allows
7 something but in practical reality, they don't
8 do it.

9 Q But you allow for the possibility that
10 they could ignore their policy, correct? You
11 don't know one way or the other?

12 A That's possible.

13 Q And if they did ignore their policy,
14 is that a matter of indifference to you in terms
15 of a conclusion as to copyright compliance?

16 A You've changed the question.

17 Q I'm allowed to do that.

18 A You are allowed to do that. I just
19 want to make sure I respond -- make sure that
20 I'm not mixing up questions.

21 It's not -- if the question is
22 copyright compliance, then I would say, in
23 general, I'm going to look for more than just a
24 document that's in a file. On the other hand,
25 if you're asking is the document itself and the

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2 substantive statements in the document, is it
3 consistent with what fair use law is or provides
4 for, I may say yes to that. While at the same
5 time, at the same institution, we would look for
6 additional facts, additional information to
7 answer a separate question about compliance.

8 Q You claim to be an expert in copyright
9 law. And accepting that for the sake of my
10 question, is it your view that all the court
11 needs to do in this case is to look at a facial
12 policy enacted by Georgia State University to
13 determine whether Georgia State is in compliance
14 with copyright law as it comes to E-Reserves
15 practices?

16 A I'm going to answer your question.
17 I'm just going to want to make sure I'm
18 answering the right question. If the question
19 before the court is as you've set it up -- and
20 make sure I get this right, because I really
21 want to answer your question. If the question
22 before the court is, is this University,
23 whatever University, in fact in compliance with
24 copyright law with respect to whatever
25 content -- I know you didn't say that, but tell

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2 me if this is okay -- with whatever content is
3 in electronic reserves --

4 Q That is my question.

5 A That is your question.

6 -- then we need to know more than just
7 the facial policy that's in the policy manual or
8 on a website.

9 Q What else do we need to know?

10 A Sure. Then we would want to look at
11 the process of implementation, absolutely. But,
12 you know, I'm wondering if your question isn't
13 even something simpler than that. Could you --
14 if you're suggesting that the best policy in the
15 world -- or the United States, because we're
16 only talking about U.S. law. The best policy --

17 Q You actually cite Canadian law at one
18 point.

19 A That's different.

20 If the best policy imaginable,
21 whatever that may mean, and the best
22 implementation possible, whatever that might be,
23 I mean, is it conceivable that still something
24 goes awry under those circumstances and
25 therefore one could point to it and say, ah-ha,

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2 you know, I found something that's outside the
3 limits? Could that happen? Sure.

4 Q You're asking your own questions and
5 answering them. I'd rather you answer mine. My
6 question, which you did answer was: Can you
7 make a judgment about the lawfulness of
8 copyright practice at Georgia State University
9 strictly by looking at the facial policy
10 promulgated by the University?

11 MR. SCHAETZEL: Objection as to form.

12 BY MR. RICH:

13 Q You can answer. I believe you
14 answered it no.

15 A I believe I've answered it no.

16 MR. SCHAETZEL: Same objection.

17 BY MR. RICH:

18 Q Okay. That was my question.

19 And therefore, if that is the
20 question -- I'm asking you to assume that's the
21 question that the court in this case will be
22 required to answer -- would you agree with me
23 that looking at the facial policies, without
24 more, of 39 other unscientifically selected
25 institutions really doesn't answer the question

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2 as to the actual legality of practice at Georgia
3 State University?

4 MR. SCHAETZEL: Same objection.

5 You can answer.

6 A It does not answer that question.

7 Q Thank you.

8 Let's stay with Appendix E for a few
9 minutes. You said that your wife handed you a
10 stack, right, whatever they were. How many
11 different institutions were in that stack, to
12 your recollection?

13 A You gave me a number earlier.

14 Q There are 39 in here.

15 A 39 here. I mean, if I had to just
16 guess, roughly, what the number was, I think it
17 was like 10, maybe fewer, that I did not
18 include.

19 Q Because you found them to be
20 repetitive of what you saw elsewhere, right?

21 A It wasn't giving me anything new.

22 Q And then what was the process by which
23 you extracted the information that appears in
24 the various bullets under each listing here?

25 A Yeah, I did that, and I went through

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2 each policy, one at a time, and extracted the
3 elements of the policy that I thought evidenced
4 something helpful and insightful about how they
5 are defining their position on fair use.

6 Q Let's just take a few example so I can
7 understand this a little better. We'll go in
8 order much the tabs on the exhibit. I think we
9 will, anyway. Let's try.

10 The first one is if you turn to
11 Page 30 of your report, please.

12 A (Witness complies.)

13 Q And at the top we have University of
14 Colorado, right?

15 A That's correct.

16 Q And then if you flip to, hopefully,
17 the first yellow sticky. If it looks like this,
18 we're on the same place.

19 A We're there.

20 Q And if you look down to the bottom of
21 that page, there's a bullet that says, under
22 Copyright Guidelines, "Up to 25 percent of most
23 other works may be placed on E-Reserves based
24 upon our interpretation of fair use."

25 Do you see that?

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2 A Actually not right now.

3 Q Page 9 of 120.

4 A Yes.

5 Q Do you see at the very bottom, where
6 it says "Up to 25 percent" and so forth?

7 A Yes.

8 Q Then look back at your synopsis, eight
9 bullets down it says, "Copying limited to 25
10 percent of most works."

11 A Uh-huh.

12 Q Do you think that's a fair and
13 accurate synopsis of what appears at the bottom
14 line there?

15 A Based on what I'm saying right now, I
16 think that's right.

17 Q That a straight 25 percent copying
18 rule is consistent with saying up to 25 percent
19 based on interpretation of fair use, meaning
20 conceivably less than that?

21 A I think I'm hearing two different
22 things.

23 Q I'm sorry. You find that copying
24 limited to 25 percent of most works accurately
25 captures the last bullet on that page?

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2 A Yes, because what I meant and what I
3 think that I still read when I see "limited to,"
4 that means up to. It could be less than. And
5 the document itself says up to 25 percent. I
6 certainly meant the same thing as that.

7 Q Okay. Let's turn next -- oh, by the
8 way, as I read your type one groupings, which
9 you describe at Page 28, policies with
10 quantified limits based on percentage of work.

11 A Okay.

12 Q The high end of that, to me, was at
13 Page 31, Indiana University Northwest, books
14 limited to 50 percent, articles limited to 50
15 percent, is that accurate from your research?

16 A Is it accurate that that is the high
17 end of what I saw?

18 Q Of what you saw.

19 A Yes. I don't recall seeing anything
20 higher than that.

21 Q And is it a coincidence that it is
22 Indiana University, meaning coincidence in the
23 sense that you had no input on that
24 determination?

25 A I think there's no connection there

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2 whatsoever. I had no input whatsoever on the
3 determination at Northwest, and they made no
4 contact with me about it.

5 Q Had they contacted you and said would
6 you be comfortable with a bright-lined 50
7 percent of a book or journal entry as a fair use
8 litmus test, what would you have counseled them?

9 A I would have said 50 percent of a
10 journal is unusually low. 50 percent of a book
11 is very unusually high. I would begin the
12 conversation there.

13 Q Stated differently, you would be
14 uncomfortable with a policy that blanketly
15 allowed up to 50 percent of a book to be copied
16 under a fair use rubric?

17 A I would be.

18 Q Next I believe is Ashland University,
19 so that's over at Page 35 of your report, sir.

20 A Okay.

21 Q I just want you to follow along. And
22 then hopefully it's the next tab as well. So it
23 would be Page 52 of 120.

24 A I am there.

25 Q If you would look down, please, in the

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2 section called "Restrictions," the second
3 paragraph from the bottom there's a statement
4 that says, "Electronic reserves are not intended
5 to replace a course pack or traditional
6 textbook."

7 Do you see that?

8 A Do you mean right here?

9 MR. SCHAEZEL: Objection to form. I
10 think you mean under the heading "Length of
11 Works" --

12 MR. RICH: I beg your pardon. I past
13 that. You're right.

14 BY MR. RICH:

15 Q So under Lengths of Works. Are we on
16 the same page? Yes. It's the second paragraph
17 from the bottom of that paragraph. "Electronic
18 reserves are not intended to."

19 Do you see that?

20 A I see that.

21 Q I don't see that. Although you have a
22 very lengthy recitation of propositions, I don't
23 see that on your list. And my question is: Why
24 did you decide not to enumerate as that as a
25 potentially significant feature of Ashland's.

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2 fair use E-Reserves practices?

3 A I'm not so sure I have an answer for
4 you, other than just trying to get the job done.

5 Q You would agree that that's a relevant
6 and indeed significant limitation on access to
7 E-Reserves, correct?

8 A On access to E-Reserves?

9 Q Access without permission -- let me
10 rephrase. That was poorly worded.

11 You would agree this is an important
12 element of the criteria used by Ashland to
13 determine whether works require permission or
14 not?

15 MR. SCHAEZEL: Objection as to form.

16 A No, actually, I wouldn't.

17 Q So whether or not somebody is
18 proffering what is a substitute for a textbook
19 as an E-Reserves offering is of no moment to the
20 fair use analysis?

21 A That's a very different question.
22 That's a very different question. Your question
23 is use of material -- well, you know, I'm going
24 to butcher your question, but I really want to
25 answer. I really want to answer both questions.

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2 Q Let me re-pose a couple of narrower
3 questions.

4 Did you deliberately read this
5 sentence and determine that it was not a
6 significant aspect -- significant cannot enough
7 aspect of Ashland University of Ohio's policy to
8 put into your otherwise 20 bullets here?

9 MR. SCHAEZEL: Objection as to form.

10 A I don't honestly remember exactly what
11 I was or was not thinking when I read that and
12 created my list of bullet points. So if I'm
13 reconstructing my thinking at the time, I don't
14 have a good answer for you.

15 Q Looking at it now, would you agree
16 that it's at least as salient a consideration
17 as, for example, audio, video and graphic images
18 will not be placed on E-Reserves without
19 permission?

20 MR. SCHAEZEL: Objection as to form.

21 A No, I think it's just altogether
22 different.

23 Q Different and unimportant?

24 MR. SCHAEZEL: Objection as to form.

25 A No, just different.

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2 Q You earlier suggested you didn't think
3 it was particularly important, if I understood
4 you.

5 MR. SCHAEZEL: Objection as to form.

6 A I'd really like to clarify what I'm
7 thinking.

8 Q Please.

9 MR. SCHAEZEL: Same objection.

10 Go ahead.

11 A You've asked many, many questions now,
12 and if it's a question about -- one question you
13 asked is about materials being available as a
14 textbook, is that relevant in the equation on
15 fair use.

16 Q Let me pose a clean question to you so
17 you know what question you're answering.

18 A Thank you.

19 Q I take it that your objective in going
20 through this exercise with respect to any given
21 university was to fairly capture elements of
22 their E-Res policy that you think have some
23 implication or bearing on the issues involved in
24 this case, true?

25 MR. SCHAEZEL: Objection as to form.

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2 A True.

3 Q My question is: Looking at this
4 statement that I have read into the record that
5 I don't see appearing in the bullets, do you
6 agree with me that that statement, now that you
7 have a chance to study it, properly warranted
8 being included in your list here? If not, why
9 not?

10 MR. SCHAEZEL: Objection as to form.

11 A It does not necessarily need to be or
12 properly be warranted to be listed over in my
13 report. And your follow-up was why not. And
14 the answer to why not is because it's not
15 necessarily something that has to do with the
16 fair use equation. So now that I'm looking at
17 it, it's very often a reserve service at a
18 library will not put textbook material on
19 reserve or will not put existing course pack
20 material on reserve. And why? Because either
21 sometimes it's, A, it's outside the scope of the
22 content materials that the library is going to
23 be responsible for owning, handling, managing
24 and making available. It may have absolutely
25 nothing to do with the question of fair use.

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2 Sometimes the answer is B, that a library will
3 not put traditional textbook course pack
4 materials on reserve, again, simply for the
5 management reason that they have a cooperative
6 working relationship with the nearby bookstore,
7 and the bookstore says we need to handle this
8 type of material and the library says, okay,
9 we'll let you handle that, we'll do other
10 things. And so the reason why this kind of
11 limit often occurs in reserve practices around
12 the country has nothing whatsoever to do with
13 copyright. It's a management decision.

14 Q And what is your knowledge as to the
15 rationale that Ashland University put that
16 limitation in its policy?

17 MR. SCHAETZEL: Objection as to form.

18 A I have no specific knowledge of the
19 decision at Ashland.

20 Q And you would agree with me, would you
21 not, that it would be just as reasonable to
22 infer that one or more universities would place
23 such a limitation on unpermissioned use of
24 E-Reserves materials because of a concern that
25 it could entail copyright infringement, correct?

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2 MR. SCHAEZEL: Objection as to form.

3 A I'm not sure I'd make that same
4 inference.

5 Q Okay. Let's go on. We're going on to
6 Page 36 of the report dealing with University of
7 Vermont, and I ask you to look at Page 55 in
8 Exhibit E to your report and specifically the
9 third paragraph down, beginning with "Instructor
10 should not."

11 Are you with me there?

12 A I am.

13 Q The second sentence reads, "The total
14 amount of material on reserve for a class should
15 be a small proportion of the total assigned
16 reading for that class when invoking fair use."

17 Do you see that?

18 A I do.

19 Q Why did you exclude that?

20 A I don't know if I have a good answer
21 for you. Just, again, the process of covering a
22 lot of material and getting the job done on a
23 tight schedule. I'm not sure I have a good
24 answer for you.

25 Q And if you turn to the next page of

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2 this same policy statement, there is a heading
3 entitled "Course Packs."

4 A Uh-huh.

5 Q And two sentences from the bottom it
6 says, "Course packs will not be scanned for
7 electronic reserve."

8 Do you see that?

9 A I do see that.

10 Q What was your reason for excluding
11 that from your bullets?

12 A I don't recall any reason at all.

13 Q If you turn to the next page of your
14 report, 37, Yale.

15 A Uh-huh.

16 Q And if you would turn, please, to the
17 next tabbed sheet, which is Page 60 out of 120
18 from your compilation. In your report, you
19 indicate digitizing books allowed limited to one
20 chapter, digitizing articles allowed limited to
21 one article from a journal and so forth. If
22 you'd look under Section D on the Yale policy,
23 do you see that it says, at most, one article
24 from a single journal issue; at most, one
25 chapter from a single book?

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2 Do you see that?

3 A I do.

4 Q That's a little different from what
5 you wrote, isn't it?

6 A Well, it is.

7 Q Not important?

8 A No, I think I mean the same thing.

9 Q Down in the very next paragraph,
10 "Items for which we do not already own an
11 electronic copy, we will digitize, make
12 available And submit to the copyright clearance
13 center."

14 Do you see that?

15 A I do.

16 Q And did you deliberately leave out any
17 reference to the copyright clearance center in
18 your bullet?

19 A No. I've got mentions of the
20 copyright clearance center at various places
21 through here.

22 Q All criticisms, yes?

23 A No, no, no, no. I think I've got them
24 mentioned in some of these other summaries, if I
25 recall correctly. I have no reason to leave

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1
2 them out.

3 Q If you turn to the next page of your
4 report, University of Chicago.

5 A (Witness complies.)

6 Q Under effective use, the fourth
7 factor. This is page 66 of the exhibit.

8 A I'm there.

9 Q Do you see under effective use,
10 factor 4?

11 A Right.

12 Q The last item reads, "Instructor
13 should consider whether materials are reasonably
14 available and affordable for students to
15 purchase, whether as a book, course pack or
16 other format."

17 Do you see that?

18 A I do.

19 Q Why did you decide not to note that in
20 your bullets?

21 A No particular reason that I'm
22 recalling.

23 Q Next entry on Page 38 of your report
24 is University of Oklahoma, and it's the very
25 next, I think, page of this compendium, if I'm

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2 right, Page 68, actually of 120. In the middle
3 of that page under a paragraph beginning "Many
4 college University and school libraries."

5 A I see it.

6 Q In the middle of that it is stated,
7 "When materials are included as a matter of fair
8 use, electronic reserve systems should
9 constitute an ad hoc or supplemental source of
10 information for students beyond a textbook or
11 other materials."

12 Do you see that?

13 A I do.

14 Q Why did you not flag that element in
15 your otherwise lengthy recitation as to the
16 University of Oklahoma?

17 MR. SCHAEZEL: Objection as to form.

18 A And I had no reason that I recall,
19 other than, again, just the process of moving
20 through a stack policies in short order. I
21 could probably, you know, also really realize
22 that as we break out these type one, type two,
23 type three policies, giving a lot of attention
24 to a variety of different issues. The measure
25 of quantity and other elements that were across

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2 the policies. But otherwise, no particular
3 reason.

4 Q If we turn now to Page 39 of your
5 report, Emory University, and look at Page 75 of
6 the Appendix E. Your second bullet under Emory
7 says, "Library will assist with determination of
8 fair use."

9 Do you see that?

10 A I do.

11 Q If you look at the permissions
12 section, it states, "In support of classroom
13 instruction, Provost Lewis has generously
14 created a special fund for the libraries to pay
15 for permissions. This fund is separate from the
16 budget for new library materials. If a reserve
17 assignment seems to exceed the threshold of fair
18 use, the libraries will seek and pay applicable
19 permissions fees on those materials as a service
20 for the faculty." Please contact so and so.

21 Do you see that?

22 A I do.

23 Q Would it not be relevant for you to
24 indicate here that the library at Emory not only
25 would assist in determinations but would also

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2 substantially fund any permissions fees?

3 MR. SCHAEZEL: Objection as to form.

4 A Not -- not as to the question of
5 calculating whether something is or is not
6 within fair use, and that's really where most of
7 my attention was in pulling out these bullet
8 points.

9 Q You spend a fair amount of time
10 elsewhere in your reports, don't you, doing an
11 essay of sorts on why libraries are not well
12 equipped to handle and fund permissions
13 requests, correct?

14 A That's correct.

15 Q So would it not have been an aid to
16 the court in doing these extracts to identify
17 fairly for the court those instances from those
18 universities you surveyed where in fact the
19 University has funding and has indicated a
20 willingness to support that?

21 A I think --

22 MR. SCHAEZEL: Objection as to form.

23 A I think I've done that. Maybe I
24 didn't do it on this particular sentence. You
25 could probably look around and maybe find more

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1
2 sentences.

3 Q That's different from saying before
4 you didn't find it relevant to the fair use
5 analysis. That was your prior answer to me.

6 A It is. But then I thought you were
7 asking about whether or not it would have been
8 helpful to mention that universities have funds
9 available to pay permission fees, and I've
10 certainly done that in many instances through
11 this report.

12 Q Next, and I think last, is Cornell
13 University. Cornell appears at 41 of your
14 report. And I would ask you to turn, please, to
15 Page 96 of Exhibit E.

16 Now, looking at your own bullets here,
17 about midway down you say, "Under Cornell's
18 policy, course packs may not be available
19 digitally."

20 Do you see that?

21 A I do.

22 Q And so when you earlier suggested to
23 me when I pointed out with respect to another
24 institution the same policy and indicated you
25 didn't find it especially relevant to your

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2 undertaking, you nevertheless determined it to
3 be so with respect to Cornell?

4 A Evidently. If you could give me just
5 a few minutes just to make sure it isn't somehow
6 different, but -- you know, maybe my answer is
7 I'm not perfect.

8 Q With respect to Cornell -- actually,
9 let's look at Page 98.

10 A And may I also say that I think there
11 may actually be a real difference between the
12 Cornell statement and whichever university the
13 earlier statement came out of. Because here
14 we're talking about -- if I remember the other
15 statement correctly. In Cornell we're talking
16 about taking those course packet materials and
17 making the course pack itself digitally
18 available. Maybe that's a key difference, but I
19 don't know. Maybe it's just I'm not perfect.
20 Maybe that's all it is.

21 Q If you would turn to Page 98 of
22 Exhibit E, please, which is styled "Cornell
23 Electronic Course Content Copyright Guidelines."

24 A Yes.

25 Q If you look down at the second bullet,

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2 I'd just like to read that into the record. It
3 states "The copyright principles that apply to
4 instructional use of copyrighted works in
5 electronic environments are the same as those
6 that apply to such use in paper environments.
7 Any use of copyrighted electronic course content
8 that would require permission from the copyright
9 owner if the materials were part of a printed
10 course pack, likewise requires the copyright
11 owner's permission when made available in
12 electronic format."

13 Do you see that?

14 A I do.

15 Q Did you consciously decide that that
16 guideline, as it were, from Cornell didn't
17 warrant inclusion in your bulleted summaries?

18 A I don't recall making a decision about
19 including it or not including it.

20 Q Sitting here today, do you feel that's
21 a relatively important or unimportant facet of
22 how an institution might think about its
23 E-Reserves practices?

24 A Well, it's important that it may not
25 be -- I want to make clear, important doesn't

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2 mean good. It means it's important.

3 Q And by good, you mean what?

4 A Well, I think it's problematic in
5 terms of really coming to grips with fair use.

6 Q That's a legal conclusion you would
7 draw?

8 A Is it?

9 Q I'm asking you.

10 A I don't know. I mean, it's hard --
11 I'm not sure. We'd have to define what a legal
12 conclusion is. But it's certainly -- a
13 statement of the fair use permission standard in
14 one arena therefore needs to be the same as it
15 is in the other arena is, as a matter of fair
16 use, overlooking what may be real differences
17 between the two.

18 Q What do you mean by arenas?

19 A Well, by arena, in this case it would
20 be the arena of course packs and permissions --
21 course packs is really the arena. And
22 electronic reserves being the other arena where
23 this activity is taking place.

24 Q I understand that.

25 A That's what I mean.

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2 Q Coming back now to your work on this
3 report and the sources you consulted which we
4 were looking at when we moved in this section a
5 while ago. That was at Page 6 and 7 of your
6 report.

7 A Uh-huh.

8 Q Who else, other than the individuals
9 that you identify at Page 7 of your report, did
10 you interview or otherwise consult with in
11 connection with preparing your first or rebuttal
12 reports?

13 A I believe the answer is nobody.

14 Q Did you sit with any library staff at
15 GSU?

16 A No.

17 Q Did you -- and by "sit with" I mean
18 figuratively or by telephonic communication.
19 Did you sit with any members of the faculty?

20 A No.

21 Q Did you sit with any students?

22 A No.

23 Q Did you meet with any administrators,
24 again, apart from anybody who might here be
25 listed?

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A No.

Q Did you sit with any legal advisers for the University other than the group listed here?

A No.

Q Can you identify for me who the legal advisor or legal advisors are to whom faculty members are to turn for any advice in implementing the new policy?

A I believe that the answer -- that I learned from the depositions that the counsel's office was available and if there were named people, I believe that Cynthia Hall, assistant legal advisor at Georgia State, has been conducting workshops, making herself available. Probably Ms. Heyward, mentioned here, would be available.

Q But do you know that as a fact about Ms. Heyward?

A That I don't know as a fact.

Q Other than Ms. Hall, do you know anyone as a matter of fact?

A As a matter of fact, no.

Q Do you know Ms. Hall's current

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1
2 employment status with GSU?

3 A No, I don't.

4 Q Have you spoken with anyone who is or
5 was on the Board of Regents about your expert
6 report?

7 A No.

8 Q Did you speak with anyone who was on
9 the committee chaired by Mr. Potter that was
10 responsible for developing the new policy?

11 A No.

12 Q Did you speak with any IT people in
13 the University about the system which
14 facilitates the availability of E-Res materials?

15 A No.

16 Q Did you speak with anyone responsible
17 for the so-called uLearn course management
18 system?

19 A No.

20 Q Did you examine any course syllabi
21 created by any professors which have been
22 populated with works on the E-Res system?

23 A No.

24 Q Have you examined any summary data
25 with respect to the volume of works, say, for

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2 the fall 2009 semester that have been posted to
3 the E-Res system?

4 A I believe there was some mention of
5 those numbers in the depositions, but I don't
6 recall them and didn't make any use of them.

7 Q Have you investigated the number of
8 instances in which a member of the library staff
9 has reviewed in any fashion any proposed
10 scanning and a posting of E-Res materials in the
11 creation of E-Res course pages?

12 A The depositions suggested that that
13 might be happening in 100 percent of the cases.

14 Q Is that your understanding?

15 A That is my understanding.

16 Q If it was happening hypothetically in
17 less than 1 percent of the cases, would that be
18 of any concern to you?

19 A And if by review, you mean that a
20 member of the library staff sees what comes in,
21 and as I understand, that happens, because the
22 E-Reserves at Georgia State come through the
23 library, they're delivered by the faculty member
24 to the library. And if it's a claim of fair
25 use, the faculty member must have completed the

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2 checklist. And I think that if review means
3 seeing what's happening and seeing these simple
4 steps, then I would expect it to be a very, very
5 high percentage. And if that were under
6 1 percent, I would say we better revise our
7 procedures.

8 Q Just so I'm clear, you're saying that
9 the library review criterion which you speak
10 about with some degree of importance attached to
11 it, I think it's fair to say in your report, is
12 satisfied provided solely that there is a
13 physical handling of the material literally as
14 part of the mechanics of scanning, independently
15 of whether in the normal English conception of
16 the term "review," any review of that material
17 is actually made for fair use purposes? As long
18 as it's physically touched by a librarian, that
19 suffices?

20 A No.

21 MR. SCHAEZEL: Objection to form.

22 BY MR. RICH:

23 Q Then I misunderstood you?

24 A Yeah, yeah. What I understand is that
25 somebody in the library is receiving, and it may

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2 be -- I understand that most of it at this point
3 is paper, but it could be coming in
4 electronically. But nevertheless, somebody, a
5 person employed inside the library system is
6 seeing that content delivered to the E-Reserves
7 operation and that that person has the level of
8 knowledge sufficient to see the material and to
9 at least then recognize whether the faculty
10 member appears to have done his or her job and
11 recognize some particularly problematic
12 materials, either it's too much or there's
13 something else unusual about it, and raise those
14 questions then with somebody higher up in the
15 library to give it yet an additional review.
16 That's what I understand.

17 Q What level of training would you
18 regard as appropriate for those persons
19 performing that library function?

20 A At the very first level you mean?

21 Q The first level.

22 A It doesn't take much. I think that
23 especially with some time of practice and some
24 semesters of experience with the system and
25 seeing different types of works come in, they'll

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2 quickly gravitate toward being able to see
3 here's our general pattern of what is permitted
4 under our fair use standard. Here's a general
5 pattern of things that generally raise
6 questions. And I think that the person who's in
7 that first level doesn't need especially
8 high-level technical, certainly not technical
9 legal training. I would like to see that person
10 have some good awareness training. Here's what
11 copyright is. Here's what we mean by rights of
12 owners. Here are the kinds of materials that,
13 in fact, are copyrighted. Here are the kinds of
14 things that we allow and don't allow. Here's
15 what to watch for. And if you have any
16 questions, if you see something that raises
17 questions or concerns, follow your instinct, set
18 it aside and let us know. And somebody at a
19 higher level, who maybe has more expertise,
20 would then give it another look.

21 Q What minimal level of education would
22 you recommend such library staff to possess?

23 A Again, at that entry level, the very
24 first level?

25 Q Yes.

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2 A I would typically expect and probably
3 end up actually recommending, unless somebody
4 demonstrated that it's not working, these could
5 easily be good students at the University hired
6 on a part-time basis to help us manage that
7 intake. They could do it.

8 Q Now, if hypothetically the only review
9 that were to be undertaken of materials
10 proffered for the E-Res postings --

11 A Right.

12 Q -- was a quantitative litmus test,
13 X percent of a given work, below which end of
14 review. If that were -- hypothetically, if that
15 were the sole screen, is it your view that that
16 would be a meaningful check and balance of
17 potential misapplication of the fair use policy
18 that's been put in place?

19 A Well, really interesting question.
20 And I think this really is your question.
21 Because you didn't ask -- can I say what you
22 didn't ask?

23 Q Be careful, I may ask it.

24 A You might. You didn't ask policy
25 having a simple quantitative analysis.

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2 Q We'll get there later.

3 A Yeah, I figured.

4 So, yeah, if the senior person in the
5 library were to say to the front guard people,
6 look, here is a short list of a couple of things
7 that might easily be outside of fair use or
8 merits a further review, and if maybe one of
9 those things is, you know, this quantitative
10 measure, send that over to me for further
11 review, that would be all right. That would be
12 all right.

13 Q What would your short list comprise?

14 A I haven't thought about this. So this
15 is a brand-new question, so I'm not sure -- I'm
16 going to give you a real meaningful answer. But
17 I suppose it could easily be things like, you
18 know, a certain percentage of a book. You know,
19 again, I'm not saying this is the policy. I'm
20 saying this is just our internal double check.
21 It could be that. It could be a type of work.
22 If anybody ever comes in and says put this clip
23 from a feature motion picture up on electronic
24 reserves, maybe that deserves a second look. So
25 it could be measured by -- the extra screening

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2 could be triggered by the type of work that's
3 involved. Something like that.

4 Q But as to text works, can you think of
5 nothing other than the very quantitative measure
6 which you have elsewhere said and others have
7 said is not a meaningful screen alone for fair
8 use?

9 A Oh, okay. You mean just sticking with
10 textural works.

11 Q That's what this case is about.

12 A Yeah, I'm with you. Yeah. You know
13 what I have seen some universities do, and I
14 think it's a real good thing, is at that
15 beginning level of screening, let's do a quick
16 check and see if we don't already have this work
17 in electronic form. Let's take a quick look.
18 Let's see if we don't have it, if it's a journal
19 article in one of those expensive databases that
20 we're buying. Or increasingly, universities are
21 buying electronic books. You know, "we" meaning
22 the sort of royal we. Universities, libraries
23 all over the country are buying electronic
24 books. So let's, for example, take a look and
25 see if it isn't already there. And if we

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2 already have it in our collection, fully
3 accessible for the students in that class, then
4 let's not scan it. So I would ask the initial
5 review to see if it's something we don't already
6 own. I would include that.

7 Q So putting that -- let's assume the
8 body of material presented otherwise is not
9 available through the library collection online,
10 accessible. So it's a group of either scanned
11 materials or hard physical copy materials sought
12 to be scanned. And let's assume again that the
13 only screen that the librarian is trained to do
14 is a straight quantitative screen. If the work
15 doesn't cry out for a red flag because it's not
16 more than X percent but otherwise saying I can't
17 be bothered with the rest of these fancy
18 standards, would that in your view pass muster
19 as a good check and balance?

20 A And you said check and balance. Not
21 to be confused with the policy, but just as an
22 initial screen so somebody else might take a
23 closer look?

24 Q Yes.

25 A And we had some sort percentage or

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2 quantitative measure, this deserves an extra
3 look? Yeah, that's all right. And again, we're
4 not talking the policy. We're not talking the
5 definition of fair use. We're talking just give
6 it an extra look.

7 Q And what if there were no librarian in
8 the process? What if it was up to the
9 unfettered discretion of the faculty member to
10 apply the standards and the checklists as they
11 would and have no library review or mechanism
12 for review in the process, would that concern
13 you?

14 A I would look for a few other things.
15 Again, what exactly is this policy? Does the
16 policy provide help for that individual to
17 really make some decisions. Does it provide
18 some guideposts about what are the things to
19 think about before you make that scan or make
20 that download and make that material available?
21 I would look for that. I would look for whether
22 or not the University has made clear to the
23 faculty member that, by the way, copyright
24 exists, fair use exists. Here are some
25 materials to help you make decisions about what

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2 fair use may mean and make them relevant to your
3 particular situation. I would look for the
4 University to hold some workshops and sessions
5 and educate the faculty. I would look for
6 elements like that to be able to support the
7 faculty as they make responsible decisions.

8 Q And would that make a review mechanism
9 such as you speak of in your report by the
10 library staff unnecessary?

11 A No. I think it could all be -- just
12 go hand in hand. You know, the neat thing about
13 all of this is there isn't just one method.
14 There isn't just one dynamic. There isn't just
15 one answer. We need to just keep experimenting
16 with all of these possibilities and keep them
17 all in mind simultaneously. Because part of the
18 simple fact, too, is that we can figure it all
19 out today, but tomorrow and next year we're
20 going to be facing some different challenges as
21 needs, technology, education change. So it's
22 important to keep an open mind and keep flexible
23 and keep reviewing what we're doing.

24 MR. RICH: Why don't we break for
25 lunch.

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2 MR. SCHAEZEL: Very well.

3 (Whereupon, a break was taken.)

4 BY MR. RICH:

5 Q Good afternoon.

6 You are -- you hold the position of
7 director of the copyright advisory office at
8 Columbia University; is that correct?

9 A That's correct.

10 Q And you've held that position since
11 December 2007?

12 A That's correct.

13 Q And I take it you also have an adjunct
14 appointment as a lecturer in law?

15 A That's correct.

16 Q And that appointment was as of August
17 of '08?

18 A That was when I began teaching a class
19 for the first time at Columbia, that's right.

20 Q And is yours a tenured position?

21 A It is not.

22 Q Am I correct that the course you teach
23 or have taught is an international copyright
24 course at Columbia?

25 A At Columbia, yes, that's correct.

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2 Q I take it that the reports you have
3 submitted reflect strictly your own views and
4 perspectives on the issues presented and not
5 that of any other faculty at Columbia Law
6 School, correct?

7 A That is correct.

8 Q Including any tenured copyright
9 faculty, such as Professor Ginsberg, right?

10 A That is correct. To my knowledge, he
11 doesn't even know I'm working on this case.

12 Q As a general proposition, you indicate
13 at Page 3 of your testimony in the first
14 paragraph that much of your work has been
15 centered on the copyright issues that are
16 important to the work of colleges and
17 universities; is that correct?

18 A That is correct.

19 Q And among those topics is fair use,
20 correct?

21 A Correct.

22 Q And in your vitae accompanying your
23 report you list, I believe, a number of -- I'm
24 looking at Page 12 of Exhibit A to your report.

25 MR. RICH: We can mark this as the

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2 next exhibit, which is Kenneth Crews'
3 curriculum vitae as attached to his report.

4 (Whereupon, Curriculum Vitae of
5 Kenneth D. Crews was marked as Plaintiff's
6 Exhibit 303 for identification, as of this
7 date.)

8 BY MR. RICH:

9 Q If you could just direct your
10 attention to Page 12 of your vitae. You list a
11 series of national associations who have hosted
12 programs you have conducted?

13 A Yes.

14 Q Is there a commonality of any kind
15 among those? How would you describe those in
16 terms of their orientation to issues that are
17 within your expertise?

18 A Sure. There are more. These are
19 actually just a set of examples of organizations
20 that have invited me. But the commonality among
21 most of the organizations that have invited me
22 to give a program or other presentation has been
23 some sort of a connection to higher education or
24 research or libraries.

25 Q And in that relation, when you were

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2 focusing -- I realize you focus on a series of
3 issues not limited to fair use, but staying with
4 the fair use aspect of your consulting work. Is
5 it accurate for the most part the groups of
6 people with whom you consult are, for the most
7 part, consumers of copyrighted material and
8 therefore their needs most dominantly are those
9 as users as opposed to copyright owners or
10 creators, viewing the fair use issue?

11 A Right. Right. The last point got me
12 mixed up.

13 Q I'm sorry. I didn't mean to be
14 complicated.

15 A That's okay. I don't mean for it to
16 be complicated.

17 Most of the groups that I talk to have
18 a strong interest in both questions of ownership
19 as well as questions of fair use. So please ask
20 me again. I'm not trying to dodge anything.

21 Q Let me ask the question a different
22 way.

23 You're obviously very familiar with
24 the broad literature on fair use, on academic
25 viewpoints, on core viewpoints. If there were a

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2 spectrum on which you would place yourself from
3 most restrictive views of the fair use doctrine
4 to the most liberal views, where would you place
5 yourself with a one being most restrictive and
6 10 being most liberal view?

7 A Based upon what I read of other people
8 and I say that person means --

9 Q Purely subjective.

10 A Yeah, that person looks really
11 restrictive, this person looks really liberal.
12 I'm pretty much in the middle, a five -- four,
13 five or six, something like that.

14 Q Were you surprised in any way to be
15 awarded the ALA's Patterson copyright award?

16 A And surprise means like surprise
17 party, happy birthday, I'm delighted, because
18 that's a good thing; and if that's what it
19 means, the answer is yes, absolutely.

20 Q What are the attributes of the
21 recipients of that award, as you understand it?
22 What do they look for?

23 A It is -- I was the first to receive
24 the award. And so, you know, in year one I
25 could say the attributes would be somebody just

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2 like me. But the pattern of people who have
3 received it really indicates that the award is
4 going to individuals who have really worked
5 closely with the different national
6 organizations to help them better understand
7 fair use and related doctrines and to work with
8 those organizations to implement, to understand
9 and to engage in fair use to one extent or
10 another.

11 Q Now, the award is styled as an award
12 in support of users' rights.

13 A Uh-huh.

14 Q What is the intended significance of
15 that?

16 A Honestly, I think the intended
17 significance is to borrow from Professor
18 Patterson, subtitle of Professor Patterson's
19 book, where it's really the award, no matter
20 what it says about the individuals who receive
21 it, it's a permanent recognition of Professor
22 Patterson and what the bestowers of the award
23 wanted to reflect about him and also capturing
24 one of his statements, the title, subtitle to
25 one of his books about a law of user rights,

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2 which I think really is the subtitle of his last
3 book. And I think it's really more reflecting
4 him than reflecting the recipients.

5 Q Do you believe as a rule, that
6 communities of users underutilized the available
7 scope and breadth of the fair use doctrine?

8 A I believe that many of them have, as
9 evidenced -- this is, you know, again, the
10 situation that we were talking about this
11 morning. That as evidenced by some of their
12 outward positions, such as their policy
13 statements. Do I know -- you may follow up by
14 saying do I know everything that they have
15 actually done. No. But I have anecdotes, and I
16 can certainly see some examples of
17 underutilizing. I can certainly see some policy
18 statements that I think don't adequately reflect
19 what the institution, the organization may be
20 able to do. So in those ways, I suppose the
21 answer is yes.

22 Q You used the phrase in your report
23 somewhere, one of your reports, the culture of
24 licensing. Does that ring a bell with you?

25 A It does. I don't remember actually

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2 putting it in the report, but if I did, that
3 doesn't surprise me.

4 Q What do you have in mind by that?

5 A It's a concept of coming to a task, I
6 need to do this, whatever the task may be. And
7 where is our mind going to go? Where is our
8 thinking going to go? How are we going to frame
9 or begin or pursue the objective of
10 accomplishing our goals? And very often in this
11 area of academic uses of copyrighted materials
12 there seems to be this kind of tension between
13 the turning to the law and understanding how
14 copyright applies, understanding how fair use
15 applies versus turning to getting permissions.
16 And you see different players in the system
17 turning first to one or first to the other. And
18 one of the hazards that I'm trying to point out
19 is by really building a system that relies
20 principally on licensing as a mechanism toward
21 accomplishing a goal is in effect building a
22 culture of licensing. It's building a set of
23 expectations, a set of norms that are -- that
24 surround and are premised upon the concept of
25 licensing. And in contrast to turning to fair

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2 use and determining if fair use applies, it may
3 be then turning to licensing as part of the
4 overall strategy rather than just picking one or
5 the other.

6 Q Do you view it as a binary proposition
7 that one can either look to licensing or look
8 to, as you term it, law?

9 A No, not at all. Not at all. I think
10 it's a bundle. We should keep it all on the
11 table, and we should be considering all of it.

12 Q So you would agree that oftentimes,
13 turning to licensing is turning to law?

14 A That's a different point, but I'll go
15 ahead and answer it. And if what you mean is
16 that licensing is consistent with the law,
17 licensing is allowed under the law, of course,
18 the answer is yes.

19 Q What if it's required under the law?

20 A Well, then if it's required, it's
21 required.

22 Q So that if a copy shop, meaning the
23 Kinko's and MDS decisions, were to put in place
24 protocols to assure that course packs brought to
25 it were the subject of appropriate permissions

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2 because its interpretation of those decisions
3 was that those materials required licensing,
4 they would be looking to the law as they saw it,
5 wouldn't they?

6 A And you've added something very
7 important to your question, that because you
8 added it, it's going to steer me to giving you a
9 straight answer.

10 Q We like that.

11 A That the critical piece was that the
12 photocopy shop made its evaluation of the law,
13 and its independent evaluation of the law said
14 that I, as a business practice, need permission
15 for this use, and therefore I won't make the
16 copy without getting permission. I'm going to
17 say yes, that's appropriate. And if you call
18 that law or consistent with the law or in
19 keeping with the law, that's okay. You know, I
20 think my answer is yes.

21 Q It's more than okay, it's appropriate,
22 isn't it?

23 A Well, yeah, it's appropriate, sure.
24 Sure.

25 Q Is this your first appearance as an

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1
2 expert witness?

3 A It is.

4 Q Your background reports an apparently
5 unrelated deposition. I don't want to know the
6 details, but what was the subject matter?

7 A It was a bar discipline matter
8 involving an individual, and I was just called
9 in as a witness.

10 Q Okay. Now, do you have formal
11 training as an economist?

12 A No, I do not.

13 Q Do you have formal training in
14 statistics?

15 A No, I do not.

16 Q In statistical analysis?

17 A No, I do not.

18 Q In computer science?

19 A No, I do not. I should hesitate to
20 say I have had courses in, I think, all of these
21 areas. But no, I'm not going to hold myself as
22 a statistician, for example.

23 Q Do you view yourself as expert in the
24 publishing industry and how its business
25 operates?

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2 A Some aspects of it, but not the entire
3 industry.

4 Q What aspects?

5 A Well, particularly some aspects of
6 copyright, and particularly I've had a lot of
7 experience working with publication agreements
8 and then some experience working with the other
9 end of the transaction, working with libraries
10 on the licensing. I used the word "licensing"
11 this morning. In the library perspective of the
12 acquisition of content from the publishers and
13 on what terms do we do that. I've had some
14 experience on that, but not as much as I've had
15 in some of these other areas.

16 Q In terms of what -- in terms of the
17 current economics of, say, scholarly publishing
18 today, the drivers of it, the markets for sales
19 of its work, how much study have you made of
20 that?

21 A Some. I mean, it's hard to quantify.

22 Q Sure.

23 A I haven't done research studies the
24 way I have done with fair use. But on the other
25 hand, I've spent a considerable amount of time

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2 working with the issue, exploring alternatives
3 from the perspective of working with authors,
4 dealing with publishers and with publishers
5 selling their works to us at the library, at the
6 University.

7 Q In your report you spend several pages
8 in talking about physical reserves. I think it
9 begins at Page 8. And then what you term the
10 evolution, I think, into eventually E-Reserves.
11 You're familiar with that section of your report
12 I take it?

13 A Yes, I am.

14 Q What do you regard to be the essential
15 attributes of a physical reserve system as
16 offered by a university?

17 A And you're not limiting your question
18 to fair use issues?

19 Q No.

20 A Just in general?

21 Q What are the components?

22 A How would I describe it?

23 Q Yeah.

24 A These kinds of physical reserve
25 services have been in universities for many