

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|--------------------------|---|----------------------|
| CAMBRIDGE UNIVERSITY |) | |
| PRESS, et al., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | Civil Action File |
| |) | No. 1:08-CV-1425-ODE |
| MARK P. BECKER, in his |) | |
| official capacity as |) | |
| Georgia State University |) | |
| President, et al., |) | |
| |) | |
| Defendants. |) | |

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Videotaped deposition of MARNI DAVIS, taken on behalf of the plaintiffs, pursuant to the stipulations contained herein, before Teresa Bishop, RPR, RMR, CCR No. B-307, at 75 Piedmont Avenue Street, Room 1130, Atlanta, Georgia, on Wednesday, April 13, 2011, commencing at the hour of 1:54 p.m.

Shugart & Bishop
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I N D E X

Examinations

Page

EXAMINATION BY MR. KRUGMAN

5

E X H I B I T S

No.

Description

Page

1 CV

11

Dixon 2 copy of the current policy

24

on copyright at Georgia State

3 confirmation from the library for reserve

requests

4 class schedule listing for history

47

7010 course for fall of 2009

5 draft syllabus for history 7010

48

course for fall of 2009

6 final syllabus for history 7010

49

course for fall of 2009

7 report generated from the university's

64

ERes system

1 8 fair use checklist completed on 80
2 or about November 29th of 2010
3 for history 7010 course
4 9 copy of cover and table of 83
5 contents of "The Unpredictable Past"
6 10 checklist for Ideology and 95
7 Race in American History

8
9
10
11
12 - - -

13 (Disclosure was made pursuant to O.C.G.A. Annotated 9-11-28
14 (c) and (d) and 15-14-37 (a), (b) and (c).)

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APPEARANCES OF COUNSEL:

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ALSO PRESENT:

KENNITH DRAKE, VIDEOGRAPHER

- - -

1 THE VIDEOGRAPHER: This will be the
2 videotaped deposition of Marni Davis taken
3 by the plaintiffs in the matter of
4 Cambridge University Press, Oxford
5 University Press Inc. and Sage Publications
6 Inc., versus Mark P. Becker in his official
7 capacity as Georgia State University
8 president, et. al.

9 The date is April 13th, 2011. We're on
10 the record at 1:54.

11 MR. KRUGMAN: If you could please state
12 your full name. First swear in the
13 witness.

14 MARNI DAVIS,
15 having been first duly sworn, was examined and testified as
16 follows:

17 EXAMINATION

18 BY MR. KRUGMAN:

19 Q. Now if you could please state your full name.

20 A. Full name is Marni Ellen Davis.

21 Q. And where do you reside?

22 A. I live at -- you want my full address?

23 Q. Yes, please.

24 A. 559 Cherokee Avenue, southeast, Atlanta,
25 30312.

1 Q. My name is Edward Krugman and I'm representing
2 Cambridge University Press, Oxford University Press and
3 Sage Publications in the lawsuit that brings you here
4 today.

5 First of all, have you ever been deposed
6 before?

7 A. No, I haven't.

8 Q. So what this will be -- I'm sure your counsel
9 has advised you, but I'll be asking a series of
10 questions today. If at any time you do not understand
11 what I'm asking you, please let me know and I will do my
12 best to restate it.

13 It's important that you respond verbally
14 rather than simply nodding either yes or no so our court
15 reporter can take it down. If at any time you need a
16 break, just let me know. It's not an endurance contest,
17 and if you want to take a break, just ask.

18 A. Okay.

19 Q. And there may be times where your counsel
20 objects to questions, and typically you'll be required
21 to go ahead and answer it unless I restate it or unless
22 it involves a matter of privilege, which your counsel
23 can advise you about.

24 If you could, just tell me briefly what you
25 did to prepare for your deposition today?

1 A. I'm not sure I understand the question.

2 Q. First of all, when did you find out your
3 deposition was going to be taken?

4 A. About two weeks ago. A week ago I guess.
5 About a week ago.

6 Q. And how did you learn?

7 A. Via e-mail.

8 Q. Was it from counsel or from someone else?

9 A. Counsel.

10 Q. Did you review any documents prior to your
11 deposition in order to prepare?

12 A. Other than in conversation with Katrina, no.
13 I had seen some of the documents she had, but other than
14 that I reviewed nothing.

15 Q. You reviewed nothing other than what Ms.
16 Quicker provided you?

17 A. Yes.

18 Q. Did you meet with her?

19 A. Yes.

20 Q. On how many occasions?

21 A. Once.

22 Q. And when was that?

23 A. Monday.

24 Q. And approximately how long did you meet?

25 A. Two hours. Two hours.

1 Q. Did you review the checklist that you had
2 prepared in connection with a couple of the works that
3 are at issue in this case?

4 A. I had seen the checklist that I had filled out
5 in connection to the documents. That's it.

6 Q. Did you review the copyright policy for
7 Georgia State, the Board Of Regents?

8 A. Not in the last several weeks.

9 Q. Did you see any depositions or transcripts of
10 depositions that had been taken in the case?

11 A. No.

12 Q. Reviewed any briefs?

13 A. No.

14 Q. Other than counsel, did you speak with anyone
15 at Georgia State about your deposition?

16 A. That it was coming up, you mean? That it was
17 happening? My husband is on faculty at Georgia State,
18 so I told him where I would be today.

19 Q. Have you had occasion to speak with anyone
20 else who may have been deposed in this case about the
21 deposition that he or she may have given?

22 A. No.

23 Q. When did you become aware of this litigation?

24 A. Several years ago. I guess it would have been
25 the spring of 2009.

1 Q. And how did you learn about the litigation?

2 A. I was contacted by legal affairs, Georgia
3 State legal affairs, and told that the information --
4 information about the courses that I had taught and the
5 documents that I had put up on EReserves would
6 potentially be requested. Okay. That's it.

7 Q. Were you asked to preserve documents relating
8 to this case?

9 A. I don't remember.

10 Q. Apart from whether you were asked to preserve
11 documents, did you retain documents that relate to this
12 case in any way, as you understand it?

13 A. No. Other than my syllabus, which I save all
14 of my syllabi, anyway, because I might use them again.

15 Q. What about the checklists that you filled out
16 in conjunction with requesting the library to post works
17 on the Georgia State ERes system?

18 A. I didn't fill out. I had looked through --
19 when I had first put things up online, I don't remember
20 what sort of checklist was requested of us. Once the
21 new rules were put into effect there was sort of a -- it
22 was formal, but a checklist of questions that was asked
23 of us when we were putting our documents up on EReserves
24 and if we fulfilled all the obligations of fair use,
25 then we went ahead and put things up on EReserves. So

1 that's what I had done.

2 Q. Okay. When you say that's what you had done,
3 when did you do that?

4 A. As I was putting the documents up on
5 EReserves, which since -- this would have been during
6 the summer, the late summer of 2009.

7 Q. Okay. So any of the documents, any of the
8 checklists that you would have filled out in the summer
9 of 2009 in conjunction with requesting works to be
10 posted on ERes, you had retained copies of those
11 documents?

12 A. No. When you put -- when you follow the
13 checklist that was up on the library's web site it
14 didn't produce anything permanent, so I didn't retain
15 any permanent document.

16 Q. Okay. And we'll get to the checklist in a
17 bit. But basically during the summer of 2009, at that
18 point you had not retained hard copies of any of the
19 checklists that you may have filled out?

20 A. No.

21 Q. And did you later seek to recreate the
22 checklists?

23 A. Yeah.

24 Q. I'm going to hand you what's been marked as
25 Davis Exhibit Number 1. And are you able to identify

1 this as your CV?

2 A. Yes.

3 Q. Have you taken, over the many years of your
4 education, have you taken any law cases, law related
5 cases?

6 A. You mean courses or --

7 Q. Courses, I'm sorry, yes.

8 A. No, I have not.

9 Q. I said cases, yeah, I meant courses.

10 A. I have studied and I have taught about some
11 cases, but I've never taken a law class.

12 Q. You've never taken a law course?

13 A. No.

14 Q. Other than what may have occurred in
15 conjunction with any policy on copyright at Georgia
16 State, have you had any training in copyright?

17 A. No.

18 Q. Have you had any training in any other type of
19 intellectual property?

20 A. No.

21 Q. So you've been an assistant professor in the
22 department of history at Georgia State from 2008 to the
23 present?

24 A. Yes.

25 Q. And prior to that you were a visiting lecturer

1 for about a year?

2 A. Yes.

3 Q. And then you were a visiting assistant
4 professor prior to that at Emory University?

5 A. Correct, yes.

6 Q. In 2006 and 2007?

7 A. (Nods head affirmatively.)

8 Q. Did you have any employment prior to the
9 visiting assistant professor position at Emory
10 University in 2006, 2007, academic related?

11 A. I was a teaching assistant, but that was part
12 of my graduate fellowship so I don't know if that counts
13 as employment.

14 My master's degree from the New School Of
15 Social Research, I was the departmental administrator
16 while I was getting my degree. Beyond that, no.

17 Q. Beyond that you've not taught at any other
18 universities?

19 A. No.

20 Q. Are you a tenured professor at Georgia State?

21 A. No.

22 Q. To whom do you report?

23 A. My chair is Hugh Hudson.

24 Q. So he is the department chair, is that the
25 department chair of history?

1 A. Of the history department.

2 Q. Okay. And do you know who Mr. Hudson reports
3 to?

4 A. He reports to Lauren Adamson, who is the dean
5 of the college of arts and sciences.

6 Q. What is your understanding, if any, as to the
7 role of the provost at the university?

8 A. To be quite honest, I'm not quite sure what
9 the role of the provost is.

10 Q. Do you know who the provost is?

11 A. Risa Palm.

12 Q. Is it your understanding she has any
13 responsibility whatsoever vis-a-vis the professors at
14 the university?

15 A. I don't know.

16 Q. If Ms. Palm were to direct you to do
17 something, would you follow her direction?

18 MS. QUICKER: Objection. Form.

19 BY MR. KRUGMAN:

20 Q. You may answer.

21 A. I can. Okay. I don't know.

22 Q. And what do you understand the role of the
23 president of the university to be?

24 A. To oversee the long term -- how to say. The
25 long term direction of the intellectual life, but also

1 the business life of the university.

2 Q. Your CV shows that you have a publication or a
3 book that is scheduled for publication in late 2011.

4 Have you had any books published other than the ones --

5 A. This will be my first.

6 Q. Congratulations.

7 A. Thank you.

8 Q. And the topic appears to be "Jews And Booze:
9 Ethnicity And Commerce in the Prohibition Era".

10 A. The title has actually changed a little bit.
11 It's now called "Becoming American In The Age Of
12 Prohibition."

13 Q. And what is the subject matter of the book?

14 A. It is on both the history of Jewish
15 involvement in the American alcohol trade and also about
16 the history of the interactions between American Jews
17 and temperance and prohibition movements and how anti
18 alcohol ideology affected American Jewish cultururation
19 over the period of the American revolution.

20 Q. Do you consider this or is this book published
21 considered to be a work of nonfiction?

22 A. Yes.

23 Q. Although it's nonfiction, am I correct this
24 book will contain or does contain your original analysis
25 on the subject matter?

1 A. Yes.

2 Q. It's not simply a recitation of facts, is that
3 correct?

4 A. That is correct.

5 Q. Is there a final manuscript of the book?

6 A. Yes.

7 Q. And when do you expect publication?

8 A. At the end of this year.

9 Q. But work is largely complete?

10 A. Yes. A copy editor has it now.

11 Q. Would you describe the expression and analysis
12 that is contained in this forthcoming book as being
13 creative?

14 A. Yes.

15 Q. Certainly the fact that it's nonfiction does
16 not mean that it could not be creative, correct?

17 A. Sure.

18 Q. Did you sign a contract for this book with the
19 publisher?

20 A. Yes.

21 Q. And the publisher is New York University
22 Press?

23 A. Uh-huh. Yes.

24 Q. Who owns the copyright in this work?

25 A. NYU Press does.

1 Q. So it's your understanding that the New York
2 University Press will be the entity that owns the
3 copyright to this book?

4 A. Yes.

5 Q. Do you anticipate receiving royalties for
6 sales of the book?

7 A. It's in my contract, but I don't know.

8 Q. And when you say you don't know --

9 A. I don't know how many copies I'm going to
10 sell.

11 Q. Okay. You're hopeful that you'll receive
12 royalties for sales of the book, is that correct?

13 A. Yes.

14 Q. But at this time you just are not certain what
15 the market is and what the demand will be for the book,
16 correct?

17 A. Yes.

18 Q. Did you grant rights to the publisher, to New
19 York University Press, to publish the book
20 electronically?

21 A. I don't know. I have to go back over my
22 contract.

23 Q. Were you represented by counsel in connection
24 with the contract?

25 A. No.

1 Q. Do you know whether you will receive any fees
2 in the event that New York University Press licenses,
3 gives permission for --

4 A. I don't know.

5 Q. For the book? You don't know one way or the
6 other?

7 A. I don't know one way or the other.

8 Q. So is it your hope -- I take it it's your hope
9 that professors will assign your book in classes?

10 A. Yes.

11 Q. And if the professors assign the book in
12 class, is it fair to say that it's your -- it would be
13 your expectation that students would purchase the book
14 for use in those classes?

15 A. I guess it depends on how much of the book
16 they assign. But if they assign -- if the entire book
17 is on the syllabus, then yes.

18 Q. So if the entire book is on the syllabus you
19 would expect or your expectation would be that students
20 would purchase the book for use in the class, is that
21 correct?

22 A. Yes.

23 Q. But if 50 percent of the book was assigned,
24 what would be your expectation?

25 A. I don't know.

1 Q. If 75 percent of the book was assigned, would
2 you have any expectation as to whether students should
3 or should not buy the book?

4 A. I don't know. I mean -- I don't know.

5 Q. Is there any percentage below 100 percent that
6 you have any expectation?

7 A. I'm not sure. I know that that is part of
8 what's at issue here, and honestly I don't have a hard
9 and fast answer.

10 Q. I take it that's not something that you've
11 received any direction on from the university?

12 MS. QUICKER: I just wanted to caution
13 you --

14 BY MR. KRUGMAN:

15 Q. Other than counsel, other than communications
16 you may have had with counsel, is that an issue that
17 you've received direction from Georgia State on?

18 A. I have.

19 Q. Okay. And what is the direction that you've
20 received from Georgia State on that issue?

21 A. When I first began teaching at Georgia State I
22 was told that the number was 12 percent.

23 Q. Okay. And when you say 12 percent, that if
24 you use -- utilize less than 12 percent --

25 A. Of the text.

1 Q. -- of the text, then what?

2 A. Then it falls under the category of -- if it
3 also fell under the category of fair use under -- if I
4 wasn't selling it, for instance, or otherwise utilizing
5 it in ways that wouldn't -- in which it wouldn't fall
6 under the category of fair use, 12 percent was the
7 number at which over that was not fair use any more.

8 Q. And that was something you were advised --

9 A. When I first arrived. And that was in 2008.

10 Q. And who advised you?

11 A. Hugh Hudson.

12 Q. Your department chair?

13 A. Precisely.

14 Q. And in 2009 a new policy was adopted, is that
15 correct?

16 A. Yes.

17 Q. And is it your understanding that that new
18 policy eliminated this 12 percent threshold?

19 A. It wasn't my understanding. I didn't know one
20 way or the other. But at that point I was careful to
21 limit the puttings I put on EReserve to as much -- to
22 far less than that just to be free and clear.

23 Q. When you say at that time, what do you mean?
24 You mean when you started at the university?

25 A. Well, when I got that -- when I got that --

1 when I was advised that 12 -- when I was given the 12
2 percent number by Hugh I was careful to go well under
3 that number just to be safe.

4 Q. But you have no understanding one way or
5 another whether there's any specific percentage that
6 governs under the new policy?

7 A. I don't know.

8 Q. Has the publisher for your book provided any
9 sales projections?

10 A. There is an initial print, which I believe
11 it's 1500. But I would have to go back to my contract
12 to make sure.

13 Q. Beyond the initial print of whatever the
14 number is you believe may be 1500, has the publisher
15 provided any projections?

16 A. No.

17 Q. Do you have any idea of what the profit margin
18 is on -- for this book?

19 A. No.

20 Q. Do you have any idea how many books the
21 publisher needs to sell in order to turn a profit?

22 A. I don't.

23 Q. Now, one benefit to being published is that
24 there's potentially the opportunity to earn some money,
25 is that correct?

1 A. Yes.

2 Q. And you're hopeful that that will happen here,
3 that you will receive some -- either some royalties from
4 sales or fees for licensing of the book?

5 A. My expectations are minimal at best.

6 Q. And why is that?

7 A. Because it is my understanding and it's been
8 part of my training that, especially first books, but
9 academic books, the reason to publish them is not to
10 make money, it is to get tenure and establish yourself
11 in your field in a reputable way.

12 Q. Yeah. One goal is to really establish your
13 reputation, correct?

14 A. Sure.

15 Q. And with tenure that would equate in part to
16 career advancement?

17 A. Indeed.

18 Q. You need to verbalize.

19 A. Okay.

20 Q. Is that correct?

21 A. I'm agreeing with you.

22 Q. What has been the role of New York University
23 Press in developing what was initially a manuscript into
24 a finished book?

25 A. Editorial suggestion, sending the book out or

1 the manuscript out to external readers. I am just now
2 beginning to have conversations about artwork and
3 marketing so that's at the very beginning stages. I
4 don't know what that's going to look like at the end.
5 But up until now it's been primarily editorial.

6 Q. You agree that certainly in connection with
7 your book that New York University Press is providing a
8 valuable service that hopefully will allow your
9 scholarly work to be available to others in academia --

10 A. Yes.

11 Q. -- both professors and students?

12 A. Yes.

13 Q. And is it correct, that certainly a large
14 percentage of academic works that are used by professors
15 such as yourself are published by a university press --

16 A. Yes.

17 Q. -- such as NYU or Oxford and Cambridge, is
18 that correct?

19 A. That's correct.

20 Q. If these -- if the publication of scholarly
21 books such as the book that -- your book that will be
22 forthcoming later this year was not viable, what would
23 you as a professor be able to do to present to academia
24 works such as this book?

25 A. I would rely on journals, on academic

1 journals. I would --

2 If the situation came up where my book --
3 where NYU press went under, weren't going to publish my
4 book, I would turn my book into -- one of them --
5 actually two of the chapters already are freestanding
6 articles. I would turn the rest of it into freestanding
7 articles.

8 Q. But that would be a far more difficult way of
9 presenting this complete work to professors and
10 students --

11 A. I'm not --

12 Q. -- by having to publish on an article by
13 article basis rather than being able to have the entire
14 book published?

15 A. I'm not sure I understand the question.

16 Q. It would be -- you've developed this book and
17 it's a creative work of nonfiction that you are hopeful
18 will enhance your reputation and also help you attain
19 tenure as a professor of history, is that correct?

20 A. That's correct.

21 Q. And one method of achieving that is to the
22 publication of books such as the one that will be coming
23 out later this year, is that correct?

24 A. Yes.

25 Q. It is certainly a benefit to you to be able to

1 have an academic publisher such as New York University
2 Press available to publish and release this compilation
3 of chapters that make up the body of your work, correct?

4 A. Yes.

5 Q. And it would certainly be a disadvantage to
6 you that if these academic publishers were not available
7 and instead you had to attempt to publish on an article
8 by article basis the subject matter of this book,
9 correct?

10 A. It would make it a very different project.

11 Q. And you would agree that academic publishers
12 such as New York University Press and Oxford and
13 Cambridge and others provide a tremendous benefit to the
14 academic world?

15 A. Yes.

16 Q. I'm going to hand you what was previously
17 marked as Dixon Exhibit 2. It was marked in a previous
18 deposition.

19 And is this Exhibit, Dixon Exhibit 2, a copy
20 of the current policy on copyright at Georgia State?

21 A. I don't know.

22 Q. Were you ever provided a copy of the current
23 policy?

24 A. I have in the past received information about
25 the copyright policy. I don't know when the last time

1 was that I received that, so I couldn't say for sure if
2 I have seen the most recent.

3 Q. In 2009 you learned of the new policy,
4 correct?

5 A. Yes.

6 Q. At that time were you provided a copy of the
7 new policy?

8 A. Yes. Yes.

9 Q. Okay. Have you been provided copies of any
10 policy subsequent to 2009 when the new policy was
11 adopted?

12 A. I don't know.

13 Q. And sitting here today, you're not sure
14 whether this is the current policy?

15 A. Right.

16 Q. Do you have any reason to believe that it
17 isn't?

18 A. That I'm sorry, what?

19 Q. That it isn't the current policy?

20 A. No.

21 Q. And you can take a moment to look at it, if
22 you like.

23 A. I can say that as far as I can tell from
24 memory this fair use checklist is the fair use checklist
25 that is currently in use and that I have used most

1 recently.

2 Q. Okay. And when you speak about the fair use
3 checklist, you're referring to --

4 A. Page 7 and 8.

5 Q. -- pages 7 and 8?

6 A. Yes.

7 Q. Of Dixon Exhibit Number 2?

8 A. Yes.

9 Q. Is that correct?

10 A. That is correct.

11 Q. Looking at page 7 under the instructions, it
12 states that complete and retain a copy of this checklist
13 for each fair use of a copyrighted work in order to
14 establish a reasonable and good faith attempt at
15 applying fair use should any dispute regarding such use
16 arise.

17 The question I have is, did you do that in
18 connection with the checklists that you filled out in
19 connection with requesting works to be posted on Georgia
20 State's ERes system?

21 A. No, I didn't, not when I put the stuff up on
22 EReserve.

23 Q. Okay. And why did you not?

24 A. Because the checklist that was provided on the
25 library web site struck me as equivalent and sufficient

1 to make sure that I was following the rules.

2 Q. I don't quite -- I don't quite understand the
3 response. The instructions were to complete and retain
4 a copy of the checklist, is that correct?

5 A. That is correct.

6 Q. And you didn't and what you said is you said
7 because the checklist that was provided on the library
8 web site struck me as equivalent and sufficient to make
9 sure I was following the rules.

10 A. Right.

11 Q. What do you mean?

12 A. Well, as I had said before, before you put --
13 when you go up -- when you go to the library's EReserve
14 web site, before you can put anything up, actually
15 before each document it asks you a series of questions
16 about are they -- about fair use. And my responses
17 indicated -- my responses and in addition to the fact
18 that I had seen this before and was familiar with the
19 parameters made me feel confident I was following the
20 rules of fair use as laid out by this checklist and by
21 the rules of -- you know, as currently structured.

22 Q. What are the questions?

23 A. I don't recall offhand.

24 Q. Are these questions that are currently -- if
25 you were to go and request that a work be posted on

1 Georgia State's ERes system, that these are questions
2 that you're asked in order to be able to do that
3 currently?

4 A. Yes.

5 Q. And are those questions different than what is
6 contained on the fair use checklist?

7 A. I don't recall the exact wording.

8 Q. Okay. Are you required to answer the
9 questions electronically?

10 A. Yes.

11 Q. Do you remember any of the questions that
12 you're asked?

13 A. No.

14 Q. Do you know what happens to the data that --

15 A. No.

16 Q. Do you remember any of the questions?

17 A. No.

18 Q. Are any of the questions -- do any of the
19 questions overlap with any of the statements or the
20 subjects on the fair use checklist?

21 MS. QUICKER: Objection. She just
22 answered she doesn't remember.

23 BY MR. KRUGMAN:

24 Q. Does that help to refresh your recollection
25 then?

1 A. No.

2 Q. You just don't know one way or the other?

3 A. No.

4 Q. Okay. So you felt that it was sufficient for
5 you simply to answer whatever the questions were when
6 you requested --

7 A. Yes.

8 Q. -- posting of a work --

9 A. Yes.

10 Q. -- rather than having to complete and retain a
11 copy of the checklist?

12 A. Correct.

13 Q. Did you at the time in fact complete a
14 checklist for each of the works?

15 A. No.

16 Q. And why not?

17 A. Because I felt confident that the information
18 that I had already given and my understanding of the
19 fair use rules were sufficient, that I was following the
20 guidelines even though I hadn't filled out a checklist
21 and retained it.

22 Q. Was that understanding based on your
23 understanding of the new policy?

24 A. It was based on my understanding of the
25 checklist specifically, which I had seen previously.

1 Q. So you had seen the checklist, but had you
2 reviewed the entire policy?

3 A. I had read through the policy. When I got the
4 e-mail that had the policy in it, I looked through it
5 and I paid particular attention to the checklist.

6 Q. Did you attend a training session?

7 A. No.

8 Q. Okay. So you had no training -- you did not
9 attend a training session following the adoption of this
10 new policy?

11 A. That's correct.

12 Q. Were you requested to attend a training
13 session?

14 A. Invitations were extended.

15 Q. Did you understand that attendance at the
16 training sessions was discretionary on your part?

17 A. Yes.

18 Q. So it was your understanding that there was no
19 requirement that you as a professor at Georgia State
20 attend one of the training sessions?

21 A. Correct.

22 Q. If you have questions about the current policy
23 including the checklist, is there any specific
24 individual that you would expect to consult?

25 A. My chair, Hugh.

1 Q. So if you have questions about filling out a
2 checklist or other questions about the policy, you would
3 go to your chair?

4 A. Yes.

5 Q. Anyone else that you would go to that you can
6 think of? And I'm not suggesting there is.

7 A. Nobody that I -- nobody, no. He would be my
8 first resource and I imagine that he would be a
9 sufficient resource.

10 Q. And what is his -- he's obviously a professor
11 of history. Does he have a certain specific field?

12 A. Russian history.

13 Q. Do you know whether your chair has any
14 training in copyright?

15 A. I don't know.

16 Q. Has he ever told you that he does?

17 A. We've never spoken about it.

18 Q. Have you gone to your chair with any questions
19 about either the checklist or the policy in general?

20 A. Other than my initial query to him when I
21 first started teaching and he gave me the 12 percent,
22 that was the last time he and I discussed it.

23 Q. So you've had no communications with him
24 about --

25 A. No.

1 Q. -- the checklist or the new policy since its
2 adoption?

3 A. No.

4 Q. So I take it you've not had any questions at
5 all when you've had occasion to fill out or complete the
6 checklist or alternatively to respond to whatever
7 questions that are prompted when you request a work to
8 be posted?

9 A. Correct. That's correct.

10 Q. If you had a question about either the
11 checklist or the policy, would you agree with me that
12 someone who had a specific expertise in copyright would
13 probably be better positioned to answer questions that
14 you have rather than your department head?

15 A. I would suspect that if my department head
16 couldn't answer my question, he would direct me towards
17 someone who could.

18 Q. So back to my question. Would you agree with
19 me that someone who has a specific expertise in
20 copyright would in all likelihood be better positioned
21 to answer questions about either the checklist or the
22 policy in general than your department head?

23 A. No.

24 MS. QUICKER: Objection, form.

25 BY MR. KRUGMAN:

1 Q. Who enforces the copyright policy of Georgia
2 State?

3 A. I don't know.

4 Q. Do you have any understanding whatsoever as to
5 who enforces it?

6 A. I assume it is the legal affairs department,
7 but I don't know.

8 Q. Do you know what the consequences are in the
9 event of a violation of the policy?

10 A. No.

11 Q. If the university provost contacted you and
12 advised you that she considered a work that you had
13 caused to be published on the ERes system to violate
14 copyright law, would you take it down?

15 A. Yes.

16 Q. If the president of the university were to do
17 that, would you take it down?

18 A. Yeah.

19 Q. What about the head librarian, if the
20 librarian, head librarian contacted you and said --

21 A. Yes, I would. I would.

22 Q. -- I believe this violates copyright policy,
23 you would request that it be removed?

24 A. I would. And I should say -- actually, let me
25 back up.

1 In all cases, I would then go back to the fair
2 use checklist, and if I felt that I had followed all the
3 rules as laid out on the checklist, I would query
4 further as to what's the discrepancy.

5 Q. But ultimately if you were directed to remove
6 the work by the president of the university, you would
7 do that?

8 A. The first thing I would do is agree.

9 Q. If a representative of the Board Of Regents
10 for the university system of Georgia were to contact you
11 and advise you that the board believed a work that you
12 had caused to be posted on the ERes system violated
13 copyright law, would you follow the direction of the
14 board?

15 A. Again, I would take the work down and then I
16 would consult my checklist, and if I felt there was a
17 discrepancy, I would probably start by going to my chair
18 and asking what is -- what is missing here.

19 Q. So you first get compliant and then raise some
20 questions?

21 A. Yes.

22 Q. If you could turn to page 13 of Dixon Exhibit
23 2. Do you recall whether you reviewed this portion of
24 the policy on copyright?

25 A. I don't recall.

1 Q. Are you familiar with the concept of
2 permissions?

3 A. Yes.

4 Q. And what is your understanding of that
5 concept?

6 A. That if you're seeking to use a copyrighted
7 work you have to obtain permission from the copyright
8 owner.

9 Q. And are you familiar with collective licensing
10 agencies?

11 A. What page are you on?

12 Q. Page 15. Essentially agencies that grant
13 permission for works that may be owned by many different
14 publishers or writers.

15 A. Yes, I'm familiar with organizations like
16 ASCAP and BMI, generally speaking, yes.

17 Q. Are you familiar with an organization known as
18 the Copyright Clearance Center?

19 A. No.

20 Q. Is today the first you've heard of that
21 organization?

22 A. I don't know.

23 Q. So you're not aware of the Copyright Clearance
24 Center granting permission for thousands of works?

25 A. I'm unfamiliar. I'm not familiar.

1 Q. I take it sitting here today, you don't recall
2 in conjunction with the adoption of the policy in 2009
3 reviewing this portion of the policy that references the
4 Copyright Clearance Center?

5 A. I don't recall.

6 Q. What is the ULearn system at Georgia State?

7 A. ULearn is a site where professors can put
8 information about the class, can also aggregate, grade
9 data, allow students to have conversations with each
10 other in sort of a place that's limited to the students
11 only via messaging and online communications.

12 Q. Are you able to post on the ULearn system
13 copies of articles?

14 A. Yes. Yes.

15 Q. And have you done that --

16 A. Yes.

17 Q. -- in the past?

18 A. I have.

19 Q. And have some of these articles -- have any of
20 them been copyrighted materials?

21 A. Yes.

22 Q. Do you know whether the policy on the use of
23 copyrighted works that's Plaintiff's Exhibit or Dixon
24 Exhibit Number 2, whether that applies on the posting of
25 copyrighted materials on the ULearn system?

1 A. It's my understanding that it does, if it
2 falls under fair use.

3 Q. Do you fill out -- are you required to fill
4 out a checklist --

5 A. No.

6 Q. -- such as the one that's contained in Dixon
7 Exhibit 2 --

8 A. No.

9 Q. -- prior to posting copyrighted works on the
10 ULearn system?

11 A. No.

12 Q. So it's your understanding that this checklist
13 does not apply if you seek to post materials on ULearn
14 rather than ERes system?

15 A. The opposite. It's my understanding it does
16 apply to all copyrighted materials that are being posted
17 and made available to students.

18 Q. But you're not required to fill out a
19 checklist?

20 A. No.

21 Q. Do you complete a checklist prior to posting
22 copyrighted materials on the ULearn system?

23 A. No.

24 Q. Do you currently do so for materials that are
25 to be posted on the ERes system?

1 A. Yes.

2 Q. Although initially you did not?

3 A. Precisely.

4 Q. When you seek to post materials on the ULearn
5 system, are you required to respond to questions of the
6 type you've indicated you are prompted to respond to
7 when you seek to post works on the ERes system?

8 A. No.

9 Q. Okay. You could, please, just briefly
10 describe the process that you go through in order to
11 cause a work to be posted on the ERes system?

12 A. It depends on if it's an article in a journal
13 that's available electronically or a portion of a book.

14 Q. Okay. Let's start with the former.

15 A. Okay.

16 Q. If it's an article in a journal that's
17 available electronically, what is the process that you
18 go through in order to cause that to be posted on ERes?

19 A. I'm not going to be able to be absolutely
20 precise because off the top of my head I don't recall
21 the exact, you know, the step one, step two sort of
22 process.

23 However, generally speaking, you specify what
24 class it is that you want to post the reading for. I'm
25 not sure what the order is in terms of when they ask you

1 the information about fair use. And at some point that
2 you are prompted to give the, I think it's the UR -- to
3 be quite honest, I don't recall. To be quite honest I
4 don't recall.

5 Q. But you have an interaction with the library?

6 A. Yes. Via the EReserve system.

7 Q. And do you provide the information to the
8 library regarding the specific article that you want
9 published?

10 A. Yes. Yes.

11 Q. You're prompted to respond to some questions?

12 A. Yes.

13 Q. And then the library handles --

14 A. Actually making it available.

15 Q. Yes.

16 A. Yes.

17 Q. What about if you're seeking to have a portion
18 of the book posted on ERes that is not available
19 electronically, what is the process that you go through?

20 A. Actually the process is the same. It's just
21 that it then requires -- as far as I understand, I don't
22 know exactly what happens when the information is
23 transmitted. My understanding is that the library then
24 has assistants and student workers who go and get that
25 portion of the book, the hard copy, off the shelves and

1 I imagine scan it and then put it up online.

2 Q. So it's not something you personally do as a
3 professor?

4 A. No. This is all done at the library and I'm
5 just typing.

6 Q. Professor Davis, one of the -- one of the
7 courses that you taught was -- and if you look on the
8 second page of your CV.

9 A. Yes.

10 Q. History course 7010?

11 A. Yes.

12 Q. Graduate seminar: Issues and interpretations
13 in American history. You see that?

14 A. Yes.

15 Q. And that's a course that you taught in the
16 fall of 2009?

17 A. That's correct.

18 Q. Have you taught that course at other times?

19 A. I taught it again in the fall of 2010 maybe.

20 Q. Had you taught that course prior to the fall
21 of 2009?

22 A. No, I had not.

23 Q. Were all of the works -- a number of the works
24 that were used for the class were posted on Georgia
25 State's ERes system, is that correct?

1 A. That's correct.

2 MS. QUICKER: I'm sorry, which semester?

3 BY MR. KRUGMAN:

4 Q. For the fall of 2009. That's what we're
5 focusing on.

6 A. Yes.

7 Q. And were those works all posted following the
8 adoption of the new copyright policy at Georgia State,
9 as best as you can recall?

10 A. As best as I can recall.

11 Q. I'm going to skip a number just to avoid
12 confusion. This will be Davis Exhibit 3.

13 I've handed you what's been marked as Davis
14 Exhibit Number 3, and can you identify this document,
15 Professor Davis?

16 A. This is the confirmation from the EReserve
17 staff that they received my request and are putting the
18 material up online.

19 Q. And this is in conjunction with the fall 2009
20 course that we just referenced in your CV, is that
21 correct?

22 A. Yes. Yes.

23 Q. So under the subject it is history, H-I-S-T
24 7010, is that correct?

25 A. Yes. Yes, and that number is listed here.

1 Yes.

2 Q. And the top part of this, is that the
3 confirmation that you received from the library staff?

4 A. It takes the form of the confirmations that I
5 generally receive from the EReserve staff. So --

6 Q. Okay.

7 A. I don't know if -- I don't recall the exact
8 e-mail, but this would be the kind of e-mail they would
9 send me.

10 Q. This would be the type that you would receive
11 from the library staff?

12 A. Correct.

13 Q. And it has personal information, and that
14 would be your information, is that correct?

15 A. Name, department, phone number, my e-mail
16 address.

17 Q. And then the course information that's for the
18 fall of 2009?

19 A. Yes.

20 Q. And then below that material not owned by the
21 library, you see that?

22 A. Yes.

23 Q. And the first one is electronic book, and it
24 speaks of the copyright status, it falls under fair use
25 according to the fair use checklist I completed?

1 A. Yes.

2 Q. Is that information you would have provided
3 to --

4 A. Yes.

5 Q. To the university?

6 A. Yes.

7 Q. With the author Marc Bloch?

8 A. I should say here that this ended up not being
9 on the syllabus. My students didn't read this.

10 Q. Right. This particular book the students did
11 not read?

12 A. Yes, that's correct.

13 Q. We'll get to that.

14 You had a draft syllabus that you later
15 finalized and this came off the final syllabus, is that
16 correct?

17 A. That's correct. That's what happened.

18 Q. Okay. And where it says copyright status, it
19 states it falls under fair use according to the fair use
20 checklist I completed.

21 Is that information that you provided to the
22 library staff?

23 A. Yes.

24 Q. And when it says drop off date 4/28/2009, you
25 see that?

1 A. Yes.

2 Q. Is that the date that you submitted the
3 information?

4 A. That would be the date that I brought a
5 physical copy of the book to the library.

6 Q. Okay.

7 A. My personal copy that I had that I bought.

8 Q. At the time this was submitted to the library,
9 in fact you had not completed a fair use checklist for
10 this work, is that correct?

11 A. At that point I don't have a checklist in my
12 possession, so I assume that that is the case.

13 Q. Were there any questions that you were
14 required to respond to when you were seeking to post
15 something to the ERes system other than stating that it
16 falls under the fair use?

17 A. I don't recall what the questions are that
18 they ask on EReserves, as I've said.

19 MR. KRUGMAN: Why don't we take a break.
20 We're out of tape.

21 THE VIDEOGRAPHER: Off the record at
22 2:53.

23 (Brief recess.)

24 THE VIDEOGRAPHER: This is tape 2.
25 We're back on the record at 3:00.

1 BY MR. KRUGMAN:

2 Q. Professor Davis, Davis Exhibit 3, was this a
3 document that came from your files?

4 A. No. I did not provide it, so --

5 Q. Is this a -- but it's directed to you from
6 library reserves?

7 A. Yes.

8 Q. To Marni Davis, is that correct?

9 A. That is correct.

10 Q. And is this the type of document you would
11 typically receive from the library confirming materials
12 that you had requested be posted?

13 A. Yes.

14 Q. Was it your practice to retain copies of those
15 communications from the library?

16 A. For the semester. And through the course of
17 that semester and usually the semester that follows.
18 And then just in the interest of keeping my files small,
19 I usually delete them at that point.

20 Q. So you do not currently have from the fall of
21 2009 semester any of the e-mail communications?

22 A. No.

23 Q. This was not the final list of publications or
24 works that you requested be posted on ERes for the
25 course, the history course that you taught in the fall

1 of 2009, is that correct?

2 A. That's correct.

3 Q. And I take it you don't know where a later
4 version would be for this course, is that correct?

5 A. That's correct, I don't know.

6 Q. There's a reference here on the bottom of page
7 1 of Davis Exhibit 3 to electronic articles where it
8 says copyright status, the library licenses the database
9 that provides, says and electronic --

10 A. An. That's a typo. An electronic version.

11 Q. So as you testified earlier, you are aware of
12 the ability of the licensing for electronic versions of
13 articles, is that correct?

14 A. That's correct.

15 Q. Would the same be true for books, if you know?

16 A. I don't know.

17 Q. Why did you remove Marc Bloch's work from the
18 final syllabus?

19 A. Because at a certain point I realized that I
20 had assigned too much reading and that I wanted the
21 students to read more deeply into fewer texts. And of
22 the historians crafted, it's a beautiful chapter, but
23 alas, it had to go.

24 Q. It had nothing to do with the fair use
25 determination?

1 A. No.

2 Q. But obviously reading was a critical part of
3 the course that you were taking, correct?

4 A. Yes.

5 Q. And you did not want to overwhelm the students
6 with lots of reading?

7 A. They already had lots to read, yes.

8 Q. Are you familiar with the Georgia State
9 GoSolar system?

10 A. Yes.

11 Q. And what is it?

12 A. It is the administrative system that keeps
13 track of students and -- not attendance, but enrollment
14 in classes. It tracks grades. It is the system through
15 which I post my grades and I keep track of who is in my
16 class and if anyone has dropped and so on.

17 Q. I hand you what's been marked as Davis Exhibit
18 4. And can you identify this as a class schedule
19 listing for the history 7010 course that you taught in
20 the fall of 2009?

21 A. Yes. What this is is a list of the semester
22 when I was supposed to teach two sections of the same
23 class. One of those sections did not make, as we say,
24 it didn't have sufficient enrollment, so it was
25 cancelled. So I only taught one section of this class

1 that semester.

2 Q. You anticipated my question --

3 A. Okay.

4 Q. -- there. So you originally were going to
5 teach two courses during the fall of 2009?

6 A. Two sections of this one course.

7 Q. Right. And was the one you ended up teaching,
8 was that on Wednesdays from 5:30 to 8:50?

9 A. That's correct.

10 Q. And on this document it says cap. Is that the
11 capacity for the class?

12 A. Yes. That is the no more than 20 can enroll
13 without special permission.

14 Q. And then it says -- the next column it said it
15 looks like 15. Is that actual --

16 A. Yes.

17 Q. Who actually enrolled?

18 A. This is -- I suppose, yes, that is what the
19 act means.

20 Q. Did you have more than 15 in the class?

21 A. I don't recall. 15 seems about right, but I
22 couldn't say without looking at my grade book.

23 Q. Let me hand you what's been marked as Davis
24 Exhibit Number 5. And is this the draft syllabus for
25 the history 7010 course that you taught in the fall of

1 2009?

2 A. Yes. This is the draft.

3 Q. And from what you said, I take it you
4 concluded that you were in the process of assigning too
5 many works to the students to read?

6 A. Yep.

7 Q. And then that led you to revise the syllabus?

8 A. Yes.

9 Q. I hand you what's been marked as Davis Exhibit
10 6. And is this the final syllabus that you used for the
11 history 7010 course in the fall of 2009?

12 A. Yes. I was just looking to see that other
13 things like the EReserves password matches up.

14 Q. So you had the draft syllabus, which is
15 Exhibit 5, and then the final syllabus which is Exhibit
16 6?

17 A. Yes.

18 Q. And how was the syllabus provided to the
19 students? Is it provided electronically?

20 A. On the first day of class I make a hard copy
21 available. I pass it out so we can discuss it. It's
22 also put up on ULearn, and that is made available so
23 that they -- by enrolling in the class they
24 automatically have access to ULearn.

25 Q. And were you responsible for posting the

1 syllabus on the ULearn system?

2 A. Yes.

3 Q. Is that something that you do personally?

4 A. Yes.

5 Q. Is there any involvement by the library with
6 the posting?

7 A. No, that is just me.

8 Q. Just you?

9 A. Yes.

10 Q. How do you do it just mechanically?

11 A. Mechanically. You go to the site itself. It
12 has -- there's actually a button. I'm sorry, I'm not
13 much of a computer proficient. But there's a button
14 that says syllabus, so you click the button that says
15 syllabus and it jumps to a window that asks for -- that
16 allows you to link to a document on your hard drive in
17 your computer. So I link it to the document that is my
18 syllabus and it automatically is posted.

19 Q. If you wanted to post an article that you had
20 in a hard copy, how do you do that? How do you post
21 that on ULearn?

22 A. The same way, really, except that I wouldn't
23 hit it with the syllabus button. It's a general file
24 button.

25 Q. You would first scan a copy of the article on

1 to your hard drive of your computer?

2 A. Or write it yourself.

3 Q. Right, it could be one you wrote. But if it
4 was an article that had been published, written and
5 published by someone else, you've had occasion to you
6 would scan the article and then --

7 A. And then download the PDF.

8 Q. And the same would be true if you elected to
9 do so for a chapter of a book, you could do the same?

10 A. Yes.

11 Q. Have you done that?

12 A. Yes.

13 Q. On how many occasions?

14 A. I don't know.

15 Q. More than one?

16 A. Yes.

17 Q. Why in those instances, why did you use ULearn
18 as opposed to the ERes system?

19 A. I don't know. I don't know. I mean, the
20 articles that are available electronically, it's very
21 easy, and for -- over time I have learned how easy it
22 has been to use EReserves for books that the library
23 owns as well, so I have tended to use EReserves more
24 than ULearn.

25 Generally, currently the times when I'm using

1 ULearn -- I'm trying to think of what I've set up on
2 ULearn right now -- are, for instance, a couple of --
3 actually a collection of newspaper articles from, you
4 know, a hundred years ago that I could get the students,
5 you know, the URL and make it available to them, you
6 know, so that they would then have to go to ProQuest
7 Historical Newspapers. And they would basically have to
8 go through several steps, that I find, you know, any
9 number of steps to be a barrier to getting the students
10 to actually download it and doing the reading. So if
11 that makes it easier, I make that information available.

12 Q. Trying to make things easier for the students
13 to access the materials?

14 A. Yes.

15 Q. That you would hope that students would --

16 A. That I require students to read. Slash hope
17 that they read.

18 Q. But you consider them required readings?

19 A. Yes.

20 Q. And is that true for the -- we'll go through
21 in a moment, but for the works that are listed on the
22 syllabi, you considered those to be required readings,
23 is that correct?

24 A. Yes. Yes.

25 Q. Do you recall which books or -- that you've

1 utilized in the past -- strike that.

2 Do you recall which books that you've posted
3 portions of on the ULearn system in the past?

4 A. Yes.

5 Q. What are they?

6 A. For example, I very recently posted one of
7 Phillip Roth's short stories from "Good-Bye Columbus",
8 "Defender Of The Faith".

9 Q. Do you know whether that is, that short story
10 is copyrighted?

11 A. Yes, I assume that it is, yes.

12 Q. And did you complete a fair use checklist?

13 A. No.

14 Q. Why not?

15 A. Because I had in the past looked at the fair
16 use checklist and gone through it and I felt confident
17 based on my knowledge of the fair use checklist that it
18 was compliant. That I was compliant.

19 Q. And when was that posted?

20 A. It would have been posted at the beginning of
21 this semester.

22 Q. Of the --

23 A. Of -- so I would have posted it in January of
24 this year.

25 Q. What other books have you posted portions of

1 on ULearn?

2 A. I don't recall.

3 Q. Have there been nonfiction works that you've
4 posted portions of in the past?

5 A. I don't know. I don't know.

6 Q. Have you posted portions of works that were
7 published by university publishers?

8 A. I don't know.

9 Q. You just don't remember one way or the other?

10 A. I don't remember one way or the other.

11 Q. Let's look at Exhibit 6, Davis Exhibit 6.

12 A. Okay.

13 Q. And the title of the course was issues and
14 interpretations in American history?

15 A. Yes.

16 Q. And you described the objectives as this
17 seminar is a readings course that examines a selection
18 of scholarly works about the social, cultural, political
19 and economic history of the United States from
20 colonization to the present.

21 You talk about a range of topics. And our
22 mission in the seminar is twofold. One is to read each
23 one of these monographs and articles closely and
24 carefully and to evaluate the arguments. I've chosen
25 these readings not only because they represent a topical

1 range, but also because they will help us to think about
2 different ways of doing history.

3 Now, the readings that you were assigning to
4 the students was a very critical part of this class,
5 correct?

6 A. Yes.

7 Q. In fact perhaps the most important part of the
8 class, would that be fair?

9 A. Yes.

10 Q. And would you have been able to offer this
11 course in the way that you offered it if these readings
12 had not been available?

13 A. I guess I would have to say if these specific
14 readings hadn't been available I would have been able to
15 replace all of them with equally important readings and
16 it still would have been a course that would have
17 sufficiently introduced my students to historiography in
18 American scholarship.

19 Q. Okay. I understand. But you certainly had to
20 have some readings for the students?

21 A. Got to read something. Yes.

22 Q. Go to read something. And the course as you
23 had envisioned it couldn't have worked without the
24 readings?

25 A. Without readings.

1 Q. And under learning outcomes you wrote students
2 will learn to recognize and evaluate historical
3 scholarship and to communicate about scholarly texts in
4 both written and verbal form at the graduate level?

5 A. Yes.

6 Q. And this was a graduate level course?

7 A. Yes. Graduate seminar.

8 Q. Under course requirements and grade
9 assessment, and I promise I won't go through all the
10 grade assessments, for weeks 2, 3 and 4 you must come to
11 class prepared to hand in the following. A timeline of
12 U.S. history based upon that week's book and a short
13 essay (250 words) where you express some brief thoughts
14 about your timeline choices.

15 And are the books that you referenced, are
16 they -- if you go to page 4 -- that would be the books
17 that are referenced for August 26, September 2nd, and
18 September 9?

19 A. That's correct.

20 Q. And it was your expectation that the students
21 would read each of those works on a weekly basis?

22 A. Yes.

23 Q. And then come prepared to discuss the book and
24 to provide an essay?

25 A. A timeline and an essay.

1 Q. And then you go on to say that you will write
2 three papers (1250 words each) evaluating the required
3 readings during weeks 5 to 15, and you will choose which
4 three weeks you will write about. Your paper must
5 include analysis of all of that week's reading.

6 So that's under essentially parts 2, 3 and --

7 A. 4 and 5.

8 Q. -- 4 and 5 of this. So the students were --
9 the requirement was that they would pick three weeks of
10 those different portions to write a paper about?

11 A. Correct.

12 Q. Okay. And they would have to write about each
13 and every one of the readings for that particular week,
14 is that correct?

15 A. Yes.

16 Q. Was it your expectation that even if the
17 student was not to write a paper about a particular week
18 that the student nonetheless was expected to read all of
19 the works for that week?

20 A. Yes.

21 Q. And be prepared to discuss those works in
22 class?

23 A. Yes.

24 Q. If you turn to page 2 of this exhibit, you
25 wrote that everyone is required to bring a discussion

1 question based upon that day's reading to every class.

2 And so your expectation was that after reading
3 the works for a particular week the student would have a
4 question about one or more of those works to bring to
5 the class to discuss?

6 A. Yes.

7 Q. In fact you go on to say this will be part of
8 your overall participation grade?

9 A. Yes.

10 Q. Moving down on this page under additional
11 issues regarding grades, all cell phones, Blackberries,
12 computers, iPods and other electronic devices must be
13 turned off for the entirety of the class meeting. You
14 see that?

15 A. Yes, I do.

16 Q. I take it it was your expectation that
17 students would not have laptops --

18 A. Yes.

19 Q. -- up and running during the class?

20 A. Yes, that's correct.

21 Q. And is that something that you enforced?

22 A. Yes.

23 Q. Student had a laptop on, what would you do?

24 A. I would say please turn off your laptop, we
25 have a technology free classroom.

1 Q. On page 3, the second bullet point from the
2 bottom you wrote, you must always bring that day's
3 assigned text to class. This is crucial since the bulk
4 of our time together will be spent discussing the
5 language of these texts and you will need to be able to
6 refer directly to them in order to participate
7 intelligently.

8 That was something you expected of the
9 students?

10 A. Absolutely, yes.

11 Q. And I take it since it was an electronic -- a
12 technology free classroom that it was your expectation
13 the students would bring hard copies, printed copies or
14 bound book if they happened to purchase the book to the
15 class, is that correct?

16 A. Yes, that is correct.

17 Q. And to the extent that the students accessed
18 any of the materials from the ERes system at Georgia
19 State, it was your expectation the students would print
20 that out and bring the printout to the class, is that
21 correct?

22 A. Yes, that's correct.

23 Q. You say all of the -- in the last bullet
24 point, all of the assigned books are available for
25 purchase at the Georgia State bookstore. They are also

1 on reserve at the university library. Any additional
2 readings are available at EReserve or will be
3 distributed as handouts.

4 So some of the materials that you -- that the
5 students were required to read were available for
6 purchase at the bookstore, is that correct?

7 A. Most.

8 Q. Most were?

9 A. All of the monographs were available at the
10 bookstore.

11 Q. Were some of the monographs also available on
12 the ERes?

13 A. No. Well, they were available -- no, they
14 weren't available on ERes. They were hard copy, you
15 know, the bound copy. The library's copy was on reserve
16 and they could take the book out for two hours at a
17 stretch.

18 Q. Were some of the monographs on ERes?

19 A. No.

20 Q. None?

21 A. Okay.

22 Q. We'll go through those in a moment to try to
23 determine what was on ERes and what wasn't.

24 In the middle of this page 3 before we move
25 on, under prerequisite knowledge, it's expected that you

1 come to this class with some basic knowledge of American
2 history and if you feel that you would benefit from some
3 background reading on our time period, I recommend the
4 following. And you recommended "The Great Republic, A
5 History Of the American People", volumes one and two.

6 And I take it that was not a required reading
7 for the course?

8 A. No, it was not.

9 Q. Simply something that you were recommending
10 students read if they --

11 A. Felt they need it they could go seek it out.

12 Q. So page 4 of the syllabus for this course, at
13 the top there's a link to the reserves for GSU and then
14 a password. This would provide the students access to
15 what was posted on ERes for this particular course?

16 A. Yes.

17 Q. Then you wrote, make sure that you have access
18 to the class ULearn web site. I will post handouts,
19 reading materials, announcement and links to the site
20 when necessary.

21 What were the handouts and reading materials
22 that you posted to Georgia State's ULearn web site for
23 this course?

24 A. For this course?

25 Q. Yes, ma'am.

1 A. I'm just looking to make sure I'm not missing
2 anything.

3 On September 30th the third reading, Karl Marx
4 "The German Ideology". I have a one page handout of
5 selections from this text that I wanted to use as part
6 of the discussion, so that was --

7 Q. That one page text was something that was
8 available to the students on ULearn?

9 A. I believe so. That's certainly something I
10 would post on ULearn, generally speaking, that one page
11 handout.

12 Q. Do you know whether that was available for
13 purchase in the bookstore, in the Georgia State
14 Bookstore?

15 A. I don't know.

16 Q. How would the students know to go to ULearn to
17 access Karl Marx, "The German Ideology"?

18 A. I would have told them the week before.

19 Q. And was it your practice to advise students
20 the week before if a particular work was available on
21 the ERes system as well?

22 A. Yes.

23 Q. Let's start with the part I of the course.
24 And I think as you confirmed earlier that for August 26
25 and September 2nd and September 9, each student was

1 required to read those materials, prepare a timeline and
2 also a short essay about the work and their timeline
3 choices, is that correct?

4 A. Yes.

5 Q. The first work for August 21st is The Master
6 Narrative, Paul Johnson, "The History Of The American
7 People". Where was that available for the students?

8 A. At the Georgia State bookstore.

9 Q. Do you know whether that work was available on
10 the ERes system at Georgia State?

11 A. I didn't make it available on the ERes.

12 The hard copy -- if I did this semester what I
13 do every semester, and I have no reason to think I
14 wouldn't, the hard copy, the library's hard copy of this
15 book was on reserve. But it was the hard copy, not
16 electronically available.

17 Q. Do you know how long a book this was? Was
18 this a book or what you refer to as a manuscript?

19 A. A manuscript, book, same thing. This one is
20 like 600. It's a door stopper. Big book.

21 Q. Okay. I'm going to hand you what's been
22 marked as Davis Exhibit 7.

23 A. Okay.

24 Q. And I will tell you this is -- it's not a
25 document that you've seen before today unless your

1 counsel showed it to you, but it's a report that was
2 generated from the university's ERes system that we
3 understood, at least our understanding is that these are
4 materials that are works that were posted on the ERes
5 system, the date range that they were posted, and then
6 the number of times that these works were accessed.

7 At the top of Exhibit 7 the first document is
8 "A History Of The American People". It's for -- the
9 course reserves page is for the course you were
10 teaching, correct, the history 7010?

11 A. Yes.

12 Q. Issues and interpretations in American
13 history.

14 Date range, that was the date range that you
15 taught the course, is that correct?

16 A. Yes.

17 Q. That represents the fall 2009 semester. And
18 then number of hits is number 3, which we understand is
19 the number of times that work was accessed.

20 Sitting here today, do you have any
21 explanation for why this particular work appeared on the
22 report that was produced by the defendants in this case?

23 A. No.

24 Q. Is it your understanding that that particular
25 work was not posted on ERes, at least not by you?

1 A. That is my understanding.

2 Q. And that was an assigned, required reading in
3 the course?

4 A. Yes.

5 Q. On September 2nd for the week of -- for that
6 week the work was Eric Foner, "The Story Of American
7 Freedom".

8 A. Which doesn't seem to be on this list.

9 Q. Right. Was that a work that was available for
10 purchase in the bookstore?

11 A. Yes.

12 Q. Was that also a door stopper?

13 A. No.

14 Q. Was it also available on reserve at the
15 library?

16 A. Yes.

17 Q. And I take it that's something you would have
18 advised the students of the week before?

19 A. No, it was available for purchase. The Foner
20 was available for purchase. And all books that are
21 available for purchase are -- I expect them to either
22 purchase them or get hard copies from if not our
23 library, from other libraries in the area.

24 Q. Earlier you indicated it was your expectation
25 and it's in the syllabus that the students would need to

1 bring that day's assigned texts to class, correct?

2 A. Yes.

3 Q. So it was your expectation that the students
4 would either have to purchase the book or find it in
5 some library on loan where they could have it at the
6 actual class, is that correct?

7 A. That's correct.

8 Q. The next entry is September 9. I guess the
9 topic was Against American Exceptionalism for that week,
10 and a work by Thomas Bender, "A Nation Among Nations:
11 America's Place In World History". The publisher was
12 Hill and Wang 2006.

13 And was that a work that you understood was
14 available for purchase in the bookstore?

15 A. Yes.

16 Q. Was it your understanding that that was
17 available on the university ERes system?

18 A. No.

19 Q. If you look at Exhibit 7, you'll see on the
20 second entry on the first page reference to "A Nation
21 Among Nations".

22 And I take it if in fact this work was
23 available on ERes it was not something that you were
24 responsible for, is that correct?

25 A. That's correct.

1 Q. And then we move to September 16th, "The
2 American Paradox". And there were three works that
3 students were required to read for that week, is that
4 correct?

5 A. Two.

6 Q. Oh, I'm sorry. Yeah, two. One by Edmund
7 Morgan and one by Barbara Jeanne Fields?

8 A. Yes.

9 Q. Okay. The first one, Edmund Morgan, "American
10 Slavery, American Freedom, The Ordeal Of Colonial
11 Virginia", was that available on the ERes system at
12 Georgia State?

13 A. I did not put it on EReserve. It's a
14 monograph, it was available for purchase in the
15 bookstore, and it was the hard copy of the library --
16 library's hard copy was on reserve.

17 Q. Okay. The next entry is for that week Barbara
18 Jeanne Fields "Ideology And Race In American History",
19 "Region, Race And Reconstruction Essays In Honor Of C.
20 Vann Woodward".

21 Was that a work that was available on the ERes
22 system?

23 A. Yes.

24 Q. And that was an assigned work that you caused
25 the library to post on that system, is that correct?

1 A. Correct.

2 Q. And as I understand your testimony before, you
3 did not formally fill out a checklist for that
4 particular work at the time you requested it to be
5 posted?

6 A. That's correct.

7 Q. And next is -- for the following week there
8 are two works.

9 Before I go on, that particular one that we
10 just talked about, Barbara Jeanne Fields, "Ideology And
11 Race In American History", that was published by Oxford
12 University Press, is that correct?

13 A. That is correct.

14 Q. Okay. September 23 there were two works
15 assigned as required reading for the students, correct?

16 A. Yes.

17 Q. The first Gordon Wood, "The Radicalism Of The
18 American Revolution". And how was that made available
19 to students?

20 A. There were copies available in the bookstore.
21 The library's hard copy was available on reserve.

22 Q. And then the next one, Gary B. Nash, "Social
23 Change And The Growth Of Prerevolutionary Urban
24 Radicalism". Looks like pages 3 through 36 of this.

25 How was this made available to students?

1 A. EReserve.

2 Q. And as you testified to earlier, it was your
3 expectation for this work as well as for the one
4 published by Oxford University Press that the students
5 would actually print out the work and bring it with them
6 to class, is that correct?

7 A. Yes, that is correct.

8 Q. For September 30th there were three works as
9 required reading, one we've talked about already, Karl
10 Marx, which was available on ULearn?

11 A. And via handout.

12 Q. Okay. So you actually have that at the class.
13 Did you hand it out the week before?

14 A. I don't recall.

15 Q. One of the works, required reading which was
16 David Roediger, "The Wages Of Whiteness: Race And The
17 Making Of The American Working Class".

18 How was that made available to students?

19 A. Bookstore and hard copy on reserve.

20 Q. If you look to the second page of Davis
21 Exhibit 7 on the report, there's reference on I guess in
22 the second row again to "The Wages Of Whiteness: Race
23 And The Making Of The American Working Class". And I
24 take it you have no understanding why that would be on
25 this report?

1 A. I do not.

2 Q. Back to the syllabus, there's -- on September
3 30th there's Herman Gutman, "Work, Culture, And Society
4 In Industrializing America", which was from "Work,
5 Culture, And Society In Industrializing America: Essays
6 In American Working-Class And Social History".

7 And how was that work made available to
8 students?

9 A. On EReserves.

10 Q. And if you look on Davis 7, you will actually
11 see reference to that work, is that correct --

12 A. Yes.

13 Q. -- on page 1. And it shows there were 18 --
14 at least on this report, 18 hits for that particular
15 work? It's on page 1.

16 A. Okay.

17 Q. Right in the middle.

18 A. Yep.

19 Q. And just to back up just very quickly. For
20 the previous one, that Gary B. Nash, "Social Change And
21 Growth Of Prerevolutionary Urban Radicalism", that's on
22 the -- that's actually the last entry on Davis Number 7.
23 And there it shows there were 12 hits on that.

24 And then for the Barbara Jeanne Fields,
25 "Ideology And Race In America", on page one it shows

1 that there were 12 hits for that.

2 Does that suggest that not all of the students
3 were in fact --

4 A. Doing their reading.

5 Q. -- fulfilling their obligations to read the
6 required readings?

7 A. You're breaking my heart here.

8 I don't -- I can't account for the lower
9 number.

10 Q. And all this is just a report that was
11 produced, and --

12 October 7th there were two works as assigned
13 required reading. The first one, Eugene Genovese, "Roll
14 Jordan Roll: The World The Slaves Made".

15 And how was that made available?

16 A. Hard copy for purchase and hard copy in the --
17 on reserve at the library.

18 Q. Okay. And then the next one was Lawrence
19 Levine "Slave Songs And Slave Consciousness: An
20 Exploration In Neglected Sources" published by Oxford
21 University Press.

22 And was that made available on ERes?

23 A. EReserves, yes.

24 Q. EReserves. And Davis Exhibit 7 on the first
25 page reflects 15 hits for that work, is that correct?

1 A. Yes.

2 Q. The October 14 required readings, Edward Jones
3 "The Known World", published by Amistad, how was that
4 made available to students?

5 A. For purchase and hard copy on reserve.

6 Q. And if you look at the bottom of the first
7 page of Davis Exhibit 7 you see reference to that work.
8 And I take it if it was in fact posted, you had no role
9 in that?

10 A. That's correct.

11 Q. And then there's -- next one is James Goodman
12 "For The Love Of Stories: Reviews In American History".
13 That was available on ERes, is that correct?

14 A. Yes.

15 Q. And the report, at least Davis Exhibit 7
16 references 17 hits, correct?

17 A. Yes.

18 Q. And these numbers, I mean, certainly the
19 majority of the students in your class, if that
20 represented an access by each individual student,
21 correct?

22 A. Yes.

23 Q. I asked you before, you don't today remember
24 the exact number of students enrolled?

25 A. I don't.

1 Q. Near capacity if not at?

2 A. Somewhere between 15 and 20.

3 Q. Okay. Part IV: The Nation At The Turn Of The
4 Century, October 21, first entry is for Robert Wiebe,
5 "The Search For Order". Was that a book?

6 A. That is a book.

7 Q. Available in the bookstore and on reserve?

8 A. Hard copy.

9 Q. Hard copy. What about the next one, Frederick
10 Jackson Turner, "The Significance Of The Frontier"?

11 A. I don't recall if I made a document available
12 to my students on ULearn. I'm pretty sure I directed
13 them to an URL that contained this document. But I
14 would have to look back in my records, into my file.

15 Q. Okay. It's possible you put it on ULearn, but
16 you just don't recall?

17 A. I don't recall.

18 Q. But it was something that the students had to
19 go and purchase?

20 A. No.

21 Q. October 28: Gender History and Culture, two
22 required readings. The first Gail Bederman, "Manliness
23 And Civilization", University of Chicago Press. And
24 that was -- was that available for purchase in the
25 library and then a hard copy on reserve?

1 A. Purchase in the bookstore.

2 Q. The bookstore, I'm sorry.

3 A. And hard copy on reserve in the library.

4 Q. And it was Davis 7, but you had no role in
5 putting that on ERes if in fact it was, correct?

6 A. That's correct.

7 Q. John Scott, "Gender: A Useful Category Of
8 Historical Analysis", an excerpt or portion of that, was
9 that available on ERes?

10 A. Well, it's a journal article, so it's not a
11 portion of anything. It is --

12 Q. It's a portion of a journal?

13 A. It's a portion of a journal. And yes, it was
14 available on EReserves.

15 Q. Okay. And Davis 7 references 15 hits on that
16 one. Most of the students.

17 A. You're trying to hurt me here.

18 Q. November 4th: American Identity And Popular
19 Culture. John F. Kasson, "Amusing The Million: Coney
20 Island At The Turn Of The Century". Is that a book?

21 A. Yes.

22 Q. And available for purchase in the bookstore
23 and hard copy on reserve?

24 A. Precisely.

25 Q. And then the next one, Nan Enstad, "Fashioning

1 Political Identities: Cultural Studies And The
2 Historical Construction Of Political Subjects".
3 American Quarterly. And what was that?

4 A. That is a journal article that I made
5 available on EReserves.

6 Q. And that too is referenced in the fourth
7 column or fourth row on the Davis 7, correct?

8 A. Yes.

9 Q. And you had a third required reading for
10 November 4th, and that was Thomas Frank, "New Consensus
11 For Old: Cultural Studies From Left To Right".
12 Doubleday. And how was that available?

13 A. If I remember correctly, I ended up taking
14 this off of the syllabus. I had a hard time tracking
15 down a copy of the book and at a certain point I decided
16 that I was giving them enough reading.

17 Q. So they were excused from --

18 A. They were excused from that.

19 Q. From that one?

20 A. And it was not made available -- if I recall
21 it was not made available to them in any form.

22 Q. Thank you. November 11th: History As
23 Advocacy. The first one is an Oxford University Press
24 publication, C. Vann Woodward, "The Strange Career Of
25 Jim Crow". And what was that work?

1 A. Monograph, hard copy bookstore, library and on
2 reserve.

3 Q. And I take it no explanation for its presence
4 on this report?

5 A. No.

6 Q. And then there's Howard N. Rabinowitz, "More
7 Than The Woodward Thesis: Assessing The Strange Career
8 Of Jim Crow", from the Journal of American History. And
9 what was that?

10 A. It's a journal article that was made available
11 to the students via EReserves.

12 Q. And that is referenced on the third row from
13 the bottom on the first page of Davis Exhibit Number 7,
14 correct?

15 A. Yes.

16 Q. And then November 18th: Local History and the
17 Big Picture. Kevin Kruse, "White Flight: Atlanta And
18 The Making Of Modern Conservatism", Princeton Press
19 2007.

20 And how was that -- or first of all, what was
21 that?

22 A. It's a book.

23 Q. It's a book. And was that again --

24 A. Bookstore, reserves.

25 Q. And the final, December 2: History and the

1 Memoir, Timothy Tyson, "Blood Done Sign My Name", Three
2 Rivers Press.

3 And what was that?

4 A. A book available at the bookstore.

5 Q. And on hard copy on --

6 A. Yeah.

7 Q. On reserves.

8 But again, as we discussed before, it was your
9 expectation with regards to the hard copies that
10 students would bring a hard copy with them to class?

11 A. Yes.

12 Q. Whether it be of a book or of an article or
13 portions of the book that were posted on ERes, is that
14 correct?

15 A. That's correct.

16 Q. Do you know whether for any of the works that
17 were posted on the ERes system, whether there was any
18 payment made for permission to use any of those works?

19 A. I don't know.

20 Q. You certainly didn't make any payment?

21 A. No, I did not.

22 Q. And I take it based on what you believed to be
23 your fair use determination that payment wasn't
24 required?

25 A. I don't know.

1 Q. You don't know. You don't know one way or the
2 other the import of that determination?

3 A. All I know is that I didn't pay.

4 Q. It's your understanding it's possible that
5 someone else did pay, notwithstanding your
6 determination?

7 A. It's possible. But I don't know.

8 Q. Did the university encourage use of the ERes
9 system, or does it?

10 A. No, no. It seems to be that they make it
11 available. I have never heard any encouragement or
12 discouragement I guess one way or the other. It's just
13 a resource. Value neutral.

14 Q. You know it's available. You certainly were
15 advised of its availability when you became a
16 professor --

17 A. Yes.

18 Q. -- at Georgia State?

19 A. Yes.

20 Q. But it's use neutral, if you will, correct?

21 A. Yes.

22 Q. Do you know what a coursepack is?

23 A. Yes.

24 Q. And what is it?

25 A. It is a selection of readings, shorter pieces

1 that are chosen by the professor, collected and printed,
2 bound together and made available to the students at the
3 bookstore.

4 Q. For purchase?

5 A. For purchase.

6 Q. Have you used coursepacks as a professor?

7 A. No.

8 Q. Why not?

9 A. Because I -- I don't know. I don't know.

10 E-Reserves was available, I liked doing it
11 electronically.

12 Q. Other than the fact that one is made available
13 electronically, the other is in hard copy, is there any
14 difference in your mind between providing readings using
15 ERes as distinguished from providing the readings
16 through a coursepack?

17 A. No.

18 Q. And certainly the end result for at least in
19 your course where you expected students to print and
20 bring with them hard copies of the materials that were
21 posted on ERes, at the end of the day you end up with a
22 hard copy?

23 A. Yes.

24 Q. The same as you would with a coursepack,
25 correct?

1 A. Correct.

2 Q. Except one is free to the student, is that
3 correct, meaning the ERes?

4 A. I don't think of it as free to the student
5 because they still have to pay for their resources that
6 allow them to print it.

7 Q. But the student doesn't have to actually go to
8 the bookstore and pay for a copy of the --

9 A. That's correct.

10 Q. -- materials that he or she prints from the
11 ERes system, is that correct?

12 A. Yes.

13 Q. I hand you what's been marked as Davis Exhibit
14 8. And is this a fair use checklist that you completed
15 on or about November 29th of 2010 for the history 7010
16 course that we've been discussing that you taught in the
17 fall of 2009?

18 A. Yes.

19 Q. And as you testified before, you did not
20 complete a checklist back in 2009 prior to requesting
21 that this -- that the work referenced here be posted on
22 the ERes system, is that correct?

23 A. That's correct.

24 Q. Okay. And Davis Exhibit 8, when you say the
25 title of copyrighted work is "Slave Songs And Slave

1 Consciousness", is that correct?

2 A. That's the title of the essay.

3 Q. The author and publisher was Lawrence Levine
4 and the actual book that that came from was "The
5 Unpredictable Past", is that correct?

6 A. Yes.

7 Q. And published by Oxford University Press, is
8 that correct?

9 A. Yes.

10 Q. Why did you have occasion to complete this
11 fair use checklist for this work on or about November
12 29th, 2010?

13 A. I was instructed to do so by legal affairs.

14 Q. And what did you then do?

15 A. I have a copy, I do have a hard copy of this
16 in my files, so I went and got a copy.

17 Q. When you say you have a hard copy of this,
18 meaning a hard copy --

19 A. Of the blank.

20 Q. Of the blank checklist?

21 A. Of the blank checklist. And so I went and
22 made some copies of it and filled it out.

23 Q. What were you doing when you filled it out?
24 Were you attempting to put yourself in the shoes -- your
25 shoes back in 2009 or was this basically your own new

1 creation of a checklist?

2 A. Not sure how to answer that.

3 Q. It's possible you've already answered it given
4 the fact you didn't complete the checklist back in 2009.

5 A. Well, I guess it's the former, I was trying to
6 put myself in the shoes of myself when I was putting the
7 information up on EReserves. But you know, my shoes are
8 my shoes, they're the same shoes. So I was just --

9 Answers that I gave in 2010 would have been
10 the same answers that I gave in 2009, anyway.

11 Q. And the answers that you gave in 2010 are
12 presumably the same answers that you would give today in
13 completing the checklist?

14 A. That is correct.

15 Q. Okay. Did you -- you taught this course in
16 the fall of 2010, is that correct?

17 A. Yes.

18 Q. Did you complete any checklist for the
19 course --

20 A. No.

21 MR. KRUGMAN: Why don't we take a break
22 to change the tape.

23 THE VIDEOGRAPHER: Off the record at
24 3:59.

25 (Brief recess.)

1 THE VIDEOGRAPHER: This is tape 3.

2 We're back on the record at 4:06.

3 BY MR. KRUGMAN:

4 Q. Professor Davis, are you now completing
5 checklists in advance of requesting materials to be
6 posted on ERes?

7 A. I have not as of yet.

8 Q. How much time did you spend in completing
9 Exhibit 8?

10 A. I don't know.

11 Q. More than five minutes?

12 A. I don't know.

13 Q. You just don't remember?

14 A. (Shakes head negatively.) I don't remember.

15 Q. Under factor one there was purpose and
16 character of the use.

17 And actually before we go on, let me mark as
18 Exhibit 9, Davis Exhibit 9, and this is a copy of the
19 cover and table of contents for the book referenced in
20 Exhibit 8, is that correct?

21 A. Uh-huh.

22 Q. And this was -- and the actual copyrighted
23 work that is referenced is the actual book, "The
24 Unpredictable Past: Explorations In American Cultural
25 History", is that correct?

1 A. Yes.

2 Q. And it was -- on the second page it was
3 chapter 3, "Slave Songs And Slave Consciousness:
4 Explorations In Neglected Sources" that you caused to be
5 posted on the EReserve system at Georgia State, correct?

6 A. Yes.

7 Q. First of all, factor one, purpose and
8 character of the use, there are on the right under
9 weighs against fair use, there's a box for
10 nontransformative. Do you see that?

11 A. I do.

12 Q. And then to the left there's a box for
13 transformative (use changes work for new utility or
14 purpose).

15 What is your understanding of the terms
16 transformative and nontransformative?

17 A. My understanding of that term is that if I
18 were to use this work in such a way that also
19 reorganized it such that it suggested that I had, you
20 know, I had turned it into a collage or something, so
21 that it included my own sort of imaginative and
22 premature, I guess, that would be a way of using
23 published work but in a way that would be my own.

24 Q. And that would be as you understand the term
25 transformative, is that correct?

1 A. Yes.

2 Q. Now, is it your understanding that providing a
3 copy of a chapter of a book, is that transformative such
4 as occurred here where a copy of this book by Lawrence
5 Levine was or a chapter of that book was copied and
6 posted on the ERes system?

7 A. I'm not sure I understand the question.

8 Q. Is it your understanding that simply copying
9 and posting a chapter of a book is something that is
10 transformative with that particular work?

11 A. It is -- well, I mean, that's a hard question.
12 I'm not transforming the work itself I guess it's fair
13 to say.

14 Q. Is there any reason that you did not in
15 completing Davis Exhibit 8 check the nontransformative
16 box?

17 A. None that I can recall.

18 Q. Okay. Under the weighs in favor of fair use
19 you checked both nonprofit, educational and then
20 teaching including multiple copies for classroom use.

21 Do you see a difference between those two?
22 And if so, what is the difference as you understand it?

23 A. I don't see a difference.

24 Q. Can you think of any instance where you would
25 not check both boxes for work that you elect to use for

1 one of your courses?

2 A. I suppose if it was educational for teaching
3 but I was also making my students purchase it and
4 collecting the proceeds for myself or my department,
5 which I didn't do.

6 Q. Other than that, you cannot foresee an
7 instance where you would not check both boxes, correct?

8 A. No.

9 Q. Under factor 2, nature of the copyrighted
10 work, you checked published work, you did not check
11 important to educational objectives. Why was that?

12 A. Because it seemed to me that -- I mean, when I
13 read important I was thinking more along the lines of I
14 guess necessary.

15 And you know, like I've said, I feel like all
16 of these texts though wonderful are replaceable by other
17 excellent texts.

18 Q. And did you consider this work to be creative,
19 the book itself, "The Unpredictable Past: Explorations
20 In American Cultural History"?

21 A. Not in the way that this checklist categorizes
22 creative work.

23 Q. Okay. But you agree that nonfiction work can
24 be very creative, correct?

25 A. Yes.

1 Q. And do you consider this work by Lawrence
2 Levine to be creative?

3 A. Not in the way that is listed or categorized
4 on this checklist.

5 Q. And when you say not in the way, what do you
6 mean, if you can explain?

7 A. I mean, it is not art, music, a novel, a film,
8 a play, poetry or fiction.

9 Q. So by definition on the checklist it excludes
10 as a factor weighing against fair use a work of
11 nonfiction?

12 A. Yes.

13 Q. Under factor 3, amount and substantiality of
14 portion used, you checked all three boxes.

15 First one small portion of work used. And how
16 did you determine that?

17 A. I did the math with 12 percent as my barrier
18 and I came in -- I couldn't tell you, give you exact
19 numbers right now, but it came in under 12 percent.

20 Q. Okay.

21 A. So it fulfilled that.

22 Q. So when you were completing the checklist you
23 were still utilizing the 12 percent guideline that your
24 department chair had advised you when you first began
25 teaching at the university?

1 A. Yes.

2 Q. And so based on how you would complete this,
3 if you were completing a checklist today, if it was more
4 than 12 percent that would not be a small portion?

5 A. If it were more than 12 percent I wouldn't use
6 it.

7 Q. Okay. You also checked under factor three the
8 portion used is not central or significant to the entire
9 work as a whole. You see that?

10 A. Yes.

11 Q. And first of all, what do you understand that
12 subfactor to mean?

13 A. There are -- and there are actually books that
14 are on this syllabus where there is an introductory
15 chapter, for instance, and the introduction is
16 significant in length that lays out the theoretical
17 framework of the entire text, and it's impossible to
18 understand the rest of the book without having read that
19 introductory chapter. The one that I'm thinking of is
20 Gail Bederman.

21 So that's what I was thinking, that's one of
22 the sorts of texts that I was thinking of, that that
23 introduction is significant to the entire book as a
24 whole.

25 A collection of essays, certainly the essay

1 that I had included, and I would say certainly most if
2 not all of these essays, it's an aggregation of works
3 that he's published elsewhere more or less, by in large.

4 So any of these chapters, any of these essays
5 could be removed from the book and it would still be a
6 book of spectacular essays that could be read and, you
7 know, fully utilized by historians. That's what I was
8 looking for.

9 Q. And for these two factors, the work that
10 you're referring to is the book itself, the entire
11 collection, correct? The small portion of the work
12 used.

13 The title of the copyrighted work on the fair
14 use checklist was "Slave Songs And Slave Consciousness",
15 is that correct?

16 A. That's correct.

17 Q. And you used 100 percent of that work for
18 publication on ERes, correct?

19 A. Yes.

20 Q. And similarly when you -- in the second factor
21 where the portion used is not central or significant to
22 the entire work as a whole, there the work is referring
23 to the entire book rather than the --

24 A. In both cases the word work I thought -- I saw
25 the word work to mean the same thing, small portion of

1 work, being the book. Significant to the entire work as
2 a whole, being the book.

3 Q. Yeah. And why in completing the checklist
4 where you talked about the title of the copyrighted
5 work, why did you refer to the individual portion of the
6 work rather than the entire work?

7 A. That could well have been my misunderstanding
8 about what it was that the checklist called for,
9 that it --

10 And I see here that, you know, in other author
11 and publisher I've got the title of the book which isn't
12 called for. So in truth I should have written "Slave
13 Songs And Slave Consciousness" from "The Unpredictable
14 Past" on that first line, and that was just my error.

15 Q. Just trying to understand.

16 Could any chapter of that book be central or
17 significant to the entire work as a whole?

18 A. No, I don't think so.

19 Q. Any two chapters?

20 A. I don't think so.

21 Q. What about any three chapters?

22 A. It starts to become a different book I guess.
23 But in his analysis of and his presentation of his own
24 methods of cultural history, and as he's offering, you
25 know, a selection of essays that show how he does

1 cultural history, any three of these chapters it seems
2 to me as a scholar could be removed and the rest of the
3 essays could still be, you know, a useful piece of
4 scholarship for any historian who's interested.

5 Q. You also checked that the amount taken is
6 narrowly tailored to educational purpose such as
7 criticism, comment, research or subject being taught.

8 And what did you understand that subfactor to
9 mean?

10 A. I was putting the book -- essay, "Slave Songs
11 And Slave Consciousness" into conversation with another
12 book of -- another book about slavery and the American
13 antebellum south. And these two historians have very
14 different methods, they're looking at very different
15 sources. And I wanted the students to see what those
16 different methods looked like.

17 Q. The factor 4 was -- first of all, you checked
18 no significant effect on market or potential market for
19 copyrighted work. And the factor itself is effect on
20 market for original.

21 What was the market that you considered?

22 A. Historians who are interested in cultural
23 historical methods and aspiring historians.

24 Q. How did you go about evaluating the impact on
25 the market of historians who are interested in

1 historical cultural methods?

2 A. Well, I mean, like I said, if this essay
3 wasn't in the book at all I still feel fairly confident
4 that an interested historian would still find a
5 tremendous amount in this book to be of value.

6 Q. Did you consider the impact on the publisher
7 of the book in responding to this factor or subfactor,
8 no significant effect on market or potential market for
9 copyrighted work?

10 A. I don't remember.

11 Q. Did you consider the impact on licensing or
12 permissions for this book?

13 A. No.

14 Q. And how did you conclude there was no
15 significant effect on the market or potential market for
16 this copyrighted work?

17 A. I kind of feel like my previous answer answers
18 this question, too.

19 Q. And I guess I didn't quite understand your
20 previous answer that -- how did you conclude that there
21 was no significant effect on the market or potential
22 market for this work?

23 A. That though it's an excellent essay, it is not
24 a necessary essay for the book to be of interest and of
25 value for scholars who are interested in cultural

1 history.

2 Q. So in other words, using this portion of the
3 book would not make the remainder of the book or would
4 not hurt -- would not make the remainder of the work of
5 less interest to other scholars?

6 A. That is correct.

7 Q. On the right where it says weighs against fair
8 use, there's a category for licensing or permission
9 reasonably available. Do you see that?

10 A. Uh-huh.

11 Q. Did you do anything to determine whether
12 licensing or permissions were available for this work?

13 A. No.

14 Q. Why not?

15 A. I don't know.

16 Q. The next box after that is numerous copies
17 made or distributed. I think, as we testified earlier,
18 it was your expectation that students would bring with
19 them to the class a hard copy of each of the works that
20 were posted on ERes, is that correct?

21 A. I'm not sure I understand the question.

22 Q. You testified earlier it was your expectation
23 that students would bring with them to the class a hard
24 copy of each of the works that was posted on ERes,
25 correct?

1 A. I did have that expectation.

2 Q. And I take it you did not consider that to
3 be -- or did you take that into account when you
4 completed the checklist?

5 A. I did not.

6 Q. Now, you completed this checklist in November
7 of 2010 after you had -- while you were in the midst of
8 teaching the course a second time, is that correct?

9 A. Yes.

10 Q. And did you consider that fact in completing
11 the checklist and deciding not to check the box repeated
12 or long term use that demonstrably effects the market
13 for the work?

14 A. No, I didn't.

15 Q. There's also a box that says required
16 classroom reading. And we've established that each of
17 the readings on the syllabus was required reading for
18 your course, is that correct?

19 A. Uh-huh.

20 Q. Is there any reason that you did not check
21 that box in completing the checklist?

22 A. No, there was no reason.

23 Q. And would you agree it should have been
24 checked?

25 A. Yes.

1 Q. Davis Exhibit 10 is a copy of the checklist
2 for the other work published by Oxford University Press
3 that was posted on the ERes system for the fall 2009
4 class, is that correct?

5 A. Yes.

6 Q. And the actual copyrighted work was "Region,
7 Race And Reconstruction", is that correct?

8 A. That was the book, yes.

9 Q. And --

10 A. So I made the same error here that I did.

11 Q. And the portions that you used were pages 143
12 to 77, is that correct?

13 A. Yes.

14 Q. Are you using this work in your current class?

15 A. I'm not teaching it now.

16 Q. Oh, you not.

17 A. In the fall.

18 Q. In the fall did you use this in the --

19 A. Yeah.

20 Q. And did you use the previous one we looked at
21 in the fall of 2010?

22 A. I don't remember. I would have to check my
23 most recent syllabus.

24 Q. And I won't go through each of these, but is
25 it correct that this checklist was filled out identical

1 to the checklist Exhibit 10 that we looked at?

2 A. I would have to look and see. Yes.

3 Q. Have you had any works -- there have been any
4 works that you've submitted for posting on the ERes
5 system that have ever been questioned by anyone at the
6 library?

7 A. I don't remember.

8 Q. You recall whether you've had any requested
9 work rejected?

10 A. I don't recall.

11 Q. If you -- you indicated you're not, at least
12 as of the present, you're not filling out checklists for
13 works that you request to be posted on the ERes system,
14 is that correct?

15 A. Yes.

16 Q. Other than the 12 percent rule that we've
17 discussed, is there any other guideline that you use in
18 determining whether you are permitted to request that a
19 particular work be posted on the ERes system?

20 A. Yes.

21 Q. And what are those guidelines?

22 A. One is that the library either has to have
23 license with JSTOR, EBSCO or one of those other journal
24 licensing aggregators, or the library has to own a hard
25 copy.

1 And that reminds me, and I should amend my
2 previous response to a previous question when you asked
3 me if there was any time that I was told no. The one
4 time that I can recall being told no was when the
5 library didn't own a copy of the book. And that was the
6 Tom Frank.

7 When I said I had a hard time tracking down a
8 copy, that was what I was referring to. So if the
9 library owns a copy or we have access to it through
10 usually JSTOR.

11 Q. I may be wrong, I think earlier you testified
12 to a situation where you actually had taken your own
13 personal copy?

14 A. That was the Marc Bloch.

15 Q. Did the library not --

16 A. They had a copy. They had a copy -- they had
17 a copy of that book but it was a different edition than
18 the one I owned and I wanted them to have my edition.

19 Q. So the library owned a copy of that or an
20 edition of that book but not the particular edition?

21 A. Not the one that I wanted to use.

22 Q. Were the editions different?

23 A. Pagination.

24 Q. Okay. So there was one instance where the
25 library didn't own the book and you were not allowed to

1 post?

2 A. Yes.

3 Q. Other than that --

4 A. Other than that, always nonprofit educational
5 because I'm not selling the texts. That it's published
6 work, because I've used unpublished work but with
7 permission of the authors. The 12 percent, so a small
8 portion. And I do take into account the portion used is
9 not central or significant to entire work as a whole.

10 Like I said, I wouldn't post the introductory
11 chapter to Gail Bederman's book.

12 Q. Any other factors?

13 A. No.

14 Q. Okay. If you concluded that you could not
15 post on ERes a particular work I take it either because
16 the library didn't own a copy or you wanted to make
17 available more than 12 percent and therefore it could
18 not post it on ERes as you understand you were permitted
19 to do, what do you understand your choices to be in
20 order to make that work available to students?

21 A. It would require revising the syllabus so that
22 either we were reading a lot more of the book so that
23 would justify their going to buy it, or I would take the
24 reading off the syllabus all together and they wouldn't
25 read it at all.

1 Q. Would one of your options be to use the book
2 or some portion of the book on ERes with permission from
3 the publisher of the book?

4 A. If that were an option, yes.

5 Q. Do you understand that to be an option?

6 A. No, I don't. That has never occurred -- no,
7 it hasn't occurred to me that that was an option.

8 Q. I think you indicated one option is simply not
9 to use the work?

10 A. Or to use a lot of the work.

11 Q. To justify the purchasing, justify purchases
12 of the book by the student.

13 Other than the Tom Frank work, are there works
14 that you decided not to use because the portions that
15 you wanted to use exceeded 12 percent or failed to
16 satisfy one of the other factors you identified?

17 A. When I first -- first semester that I was
18 teaching at Georgia State, the conversation that I had
19 had with Hugh Hudson was inspired by my wanting to put
20 what turned out to be more than 12 percent of a book
21 called "Becoming Mexican American" on one of my syllabi,
22 and when I was told about that rule and I realized that
23 the numbers didn't work, I assigned far less of the
24 book.

25 Q. You still use the work, but just a smaller

1 portion?

2 A. Yes.

3 Q. Would one option to have the work available on
4 reserve in hard copy if you concluded that it could not
5 be posted on ERes?

6 A. And how would the students read it then?

7 Q. I take it for -- in terms of how you teach
8 your course and your expectations of the students, I
9 guess that option wouldn't work?

10 A. No.

11 Q. Because you want the students to bring with
12 them to class the actual work?

13 A. My understanding of my students, considering
14 that so many of them are commuters, come from really far
15 away, have full time jobs, they're taking care of their
16 kids or elderly parents or several jobs, that if the
17 only copy that's available to them is one hard copy
18 that's in the library that they can only take out two
19 hours at a pop, they'll never read.

20 Q. Would a coursepack be an option?

21 A. I don't know. I would have to look more
22 deeply into what coursepacks entail and how these rules
23 would apply. So I don't know enough about coursepacks,
24 the genre of coursepacks to say.

25 Q. So it's not something that you at least as of

1 today have considered and investigated?

2 A. I haven't investigated -- I've considered and
3 not investigated.

4 MR. KRUGMAN: That's all I have.

5 MS. QUICKER: I have nothing, either.

6 THE WITNESS: I have one thing I want to
7 add. I want to amend something that I said
8 previously.

9 At the very lo those many hours ago you
10 asked me if I had discussed this with
11 anyone else and I mentioned my husband, and
12 I had forgotten a colleague of mine who is
13 also being deposed. We saw each other's
14 names on the e-mail list saying this is
15 coming up and so we e-mailed each other
16 briefly. Just like -- and we didn't say --
17 I mean, it never got specific other than,
18 you know, I wish we could do other things
19 with our day instead.

20 BY MR. KRUGMAN:

21 Q. Who is the colleague?

22 A. Denis Ganty.

23 Q. Denis --

24 A. Ganty. D-e-n-i-s, G-a-n-t-y.

25 Q. What does he teach?

1 A. He also teaching history. He teaches Japanese
2 history and world history. So he's in my department.

3 MR. KRUGMAN: Thank you.

4 THE WITNESS: Sure.

5 THE VIDEOGRAPHER: Off the record at
6 4:38.

7 (Deposition concluded at 4:38 p.m.)

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E R R A T A S H E E T

I, the undersigned, Marni Davis, do hereby certify that I have read the foregoing deposition and that, to the best of my knowledge, said deposition is true and accurate (with the exception of the following corrections listed below).

PAGE / LINE CORRECTION

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NOTARY PUBLIC SIGNATURE

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MY COMMISSION EXPIRES:

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C E R T I F I C A T E

G E O R G I A :

F U L T O N C O U N T Y :

I hereby certify that the foregoing deposition was taken down, as stated in the caption, and the questions and the answers thereto were reduced to printing under my direction; that the preceding pages represent a true and correct transcript, to the best of my ability, of the evidence given by said witness upon said hearing. And I further certify that I am not of kin or counsel to the parties to the case; am not in the regular employ of counsel for any of said parties; nor am I in anywise interested in the result of said case.

This, the 20th day of April, 2011.

Teresa Bishop, RPR, RMR
CCR No. B-307
My commission expires 11-21-11.

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DISCLOSURE

STATE OF GEORGIA

COUNTY OF DEKALB

Deposition of Marni Davis

Pursuant to Article 10.B of the Rules and Regulations of the Board of court Reporting of the Judicial Council of Georgia, I make the following disclosure:

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Teresa Bishop
RPR, RMR, CCR B-307

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|----------|--|--|--|---|
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