

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

4 CAMBRIDGE UNIVERSITY PRESS,
5 OXFORD UNIVERSITY PRESS, INC.,
6 and SAGE PUBLICATIONS, INC.,

7 Plaintiffs, Civil Action No.
8 1:08-CV-1425-ODE

9 -v.-

10 MARK P. BECKER, in his official
11 capacity as Georgia State
12 University President, et al.,

13 Defendants.
14 _____/

15 Videotaped deposition of
16 DENIS CHARLES GAINTY, Ph.D., taken on behalf of the
17 defendants, pursuant to the stipulations contained
18 herein, before Carole E. Poss, RDR, CRR, Certified
19 Court Reporter, at 1180 Peachtree Street, NE, Atlanta,
20 Georgia, on the 20th day of April, 2011, commencing at
21 the hour of 10:13 a.m.

22 _____
23 SHUGART & BISHOP
24 Certified Court Reporters
25 13 Corporate Square
Suite 140
Atlanta, Georgia 30329
(770) 955-5252

1 INDEX TO EXAMINATIONS

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Examination	Page
Direct Examination by Ms. Moffitt	5
Cross-Examination by Mr. Bloom	41
Redirect Examination by Ms. Moffitt	60

INDEX TO EXHIBITS

Defendants' Exhibit

Gainty TX

1 Syllabus, Cross-Cultural Encounters in World History	11
2 Fair use checklist	21

Plaintiffs' Exhibit

Gainty PX

1 Policy on the Use of Copyrighted Works in Education and Research	44
2 Excerpt from The Cambridge History of China, volume 8, part 2	56
3 Portion of e-reserve report relating to Dr. Gainty's HIST 4820 course	58

1 APPEARANCES OF COUNSEL:

2 On behalf of the Plaintiffs:

3 JONATHAN BLOOM, ESQ.
4 Weil, Gotshal & Manges LLP
5 767 Fifth Avenue
6 New York, New York 10153-0119

7 On behalf of the Defendants:

8 NATASHA H. MOFFITT, ESQ.
9 King & Spalding LLP
10 1180 Peachtree Street, NE
11 Atlanta, Georgia 30309-3521

12 Also Present:

13 Elizabeth Kemp, Videographer

14 - - -

15 THE VIDEOGRAPHER: We're now on the video
16 record. This is the beginning of tape number 1.
17 This is the videotaped deposition of Denis Gainty
18 taken by the defendants in the matter of Cambridge
19 University Press, Oxford University Press,
20 Incorporated, and Sage Publications, Incorporated,
21 versus Mark P. Becker, in his official capacity as
22 Georgia State University president, et al.

23 Madam Court Reporter, would you please swear
24 in the witness.

25 (Witness sworn.)

MR. BLOOM: I'd like to make an objection on

1 the record before we begin the questioning.
2 Plaintiffs object to this deposition to the extent
3 it's intended to be offered as trial testimony.
4 The witness resides within the United States
5 District Court for the Northern District of
6 Georgia and is represented by counsel for the
7 defendants, and presumably the defendants could
8 subpoena the witness to appear at trial and
9 provide live testimony.

10 Accordingly, plaintiffs expressly reserve and
11 do not waive the right to object to any attempt by
12 the defendants to introduce this deposition
13 testimony of Professor Gainty at trial because he
14 or she is certainly not unavailable within the
15 Federal Rules of Evidence and the Federal Rules of
16 Civil Procedure and the applicable rules of this
17 federal district. So the parties have agreed that
18 the deposition will go forward subject to those
19 objections.

20 I'd also like to put on the record an
21 objection to defendants' withdrawal of Professor
22 Gainty's -- Professor Gainty for purposes of a
23 discovery deposition. And we will be pursuing
24 that issue with the Court, but I wanted to be
25 clear on the record that we don't waive any rights

1 in that regard by proceeding with the deposition
2 here this morning.

3 MS. MOFFITT: Thank you, and I'll just note
4 simply for the record that we acknowledge your
5 reservation, your right to object at a later time
6 with respect to our use of this deposition at
7 trial, and also with respect to our withdrawal of
8 our offer to make Professor Gainty available for a
9 discovery deposition. And we will, of course,
10 respond to your arguments and objections when
11 they're made, at a later time.

12 This will be the deposition of Dr. Denis
13 Gainty, taken by agreement of the parties. This
14 deposition is being taken for use at trial and for
15 any other purpose permitted under the Federal
16 Rules.

17 DENIS CHARLES GAINTY, Ph.D.,
18 being first duly sworn, was deposed and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MS. MOFFITT:

22 Q Professor Gainty, could you please state your
23 name for the record?

24 A Denis Charles Gainty.

25 Q And do you understand, Professor Gainty, that

1 you are here to provide testimony today under oath in
2 connection with a copyright infringement case brought
3 by Cambridge University Press, Oxford University Press,
4 and Sage Publications against the president of Georgia
5 State University, certain members of the Board of
6 Regents of the University System of Georgia, and
7 others?

8 A Yes.

9 Q And do you understand that this case is
10 scheduled for trial starting on May 13, 2011?

11 A Yes.

12 Q Do you plan to be in the Atlanta area in the
13 May-June time frame?

14 A No.

15 Q Why not?

16 A My wife, our children, and I are going on a
17 family vacation that we've planned for some time.
18 We're going to be in upstate New York, in the Finger
19 Lakes area, visiting my elderly mother and in the
20 Baltimore area visiting my in-laws. There will also be
21 some time at Bethany Beach. And I honestly don't know
22 if that's Delaware or Maryland. But that's also been
23 planned for some time, for several months, including
24 having made payments on a rental house.

25 Q And do you know approximately when you will

1 be leaving on your trip to New York and Baltimore?

2 A It's sometime early May. I don't know
3 exactly. That's -- my wife knows.

4 Q And how long do you plan to be away?

5 A Until early July, July 1 or 2 or something
6 like that. Again, my wife knows.

7 Q And how long did you say that you believe
8 this trip has been planned?

9 A Oh, for several months. I know that my
10 mother-in-law needed particularly to lock in the rental
11 of the property some time ago.

12 Q Who do you work for?

13 A Georgia State University.

14 Q And what do you do for Georgia State
15 University?

16 A I'm an assistant professor of history.

17 Q Are you associated with any particular
18 department at Georgia State University?

19 A I am. The history department.

20 Q When did you start teaching at Georgia State
21 University?

22 A In the fall of 2007. I was hired as a
23 visiting lecturer. I had two years as a visiting
24 lecturer, and then I was hired in a tenure track
25 capacity in the fall of 2009.

1 Q Can you describe for us generally what types
2 of courses you've been teaching at Georgia State
3 University since the fall of 2007?

4 A As a visiting lecturer, I taught almost
5 exclusively lower-level survey courses in world
6 history, either from 1500 to the present or from, I
7 guess, the beginning of time to 1500. I was hired in
8 2009 specifically as a world historian. So my
9 undergraduate courses tend to focus on world history,
10 which emphasizes transnational and transregional
11 contact processes, modes of communication, that sort of
12 thing. I also teach graduate courses in world history
13 and in pedagogy.

14 Q Have you ever taught a course called
15 Cross-Cultural Encounters in World History?

16 A Yes.

17 Q Is the course number associated with that
18 course H-I-S-T or HIST 4820?

19 A Yes.

20 Q Can you tell us generally what that course is
21 about?

22 A Generally, the -- and I have a description on
23 the course syllabus but -- which says it probably in a
24 more eloquent way than I can now, but generally the
25 course is concerned with looking at contact between and

1 among different cultures as a way to think about
2 different narratives in world history. It focuses on
3 contact among and between cultures before Columbus,
4 before the age of European exploration, to emphasize
5 the connectivity of different cultures before that
6 time, and it also looks at contact after the sort of
7 Columbian moment, especially focusing on non-European
8 kind of centers of power or cultural exchange.

9 Q How do you go about teaching your students in
10 that particular course, HIST 4820, the subject matter
11 of the course?

12 A Well, we -- I assign readings, including
13 several monographs, or typically single-authored
14 scholarly works, books, basically, and also excerpts or
15 articles that are shorter in length that address one
16 facet or another of intercultural contact and even the
17 definition of what cultures are. And I lecture and
18 then discuss those readings with students. I ask them
19 to write papers based on those readings and other --
20 other work that they may do and their own kind of
21 thoughts on the matter.

22 Q Did you teach the History 4820 course in the
23 fall of 2009?

24 A I did not.

25 Q Why not?

1 A The course was canceled due to
2 underenrollment.

3 Q Do you know approximately when it was
4 canceled due to underenrollment?

5 A The -- I don't remember specifically. The --
6 we met for one day. There was only one class meeting,
7 at which I think eight or nine students showed up. I
8 believe nine or ten students were registered at that
9 point for the course. That was under the number that
10 was required for the course to make, we say, to
11 continue. And I know we waited for a day or two. I
12 hoped that more students might register, but they did
13 not. And at the same time I wanted, if we were going
14 to cancel, to cancel quickly so that those students who
15 were enrolled would have a chance to enroll in another
16 course before those courses filled up.

17 Q So is it the case then that you met only
18 once?

19 A We met only one time, for the introductory
20 class meeting. There were no other class meetings.

21 Q In one of your previous answers you
22 referenced a syllabus for the course?

23 A I did.

24 Q Did you prepare a syllabus for that course?

25 A I did.

1 MS. MOFFITT: Mark this exhibit for me.

2 (Defendants' Exhibit Gainty TX 1 marked for
3 identification.)

4 BY MS. MOFFITT:

5 Q Professor Gainty, the court reporter has
6 handed you a document that has been marked Gainty TX 1,
7 and it bears production numbers in the bottom
8 right-hand corner Georgia State 0066084 through
9 0066090. Do you recognize this document?

10 A I do.

11 Q What is it?

12 A This is my syllabus for the HIST 4820
13 Cross-Cultural Encounters in World History course.

14 Q Did you prepare this document?

15 A I did.

16 Q And does this syllabus relate to a particular
17 semester the course was taught?

18 A This relates to fall 2010.

19 Q How does the fall two thousand -- well, let
20 me start by asking, when did you prepare this
21 particular syllabus dated fall 2010?

22 A This particular syllabus -- I don't -- maybe
23 the best way to answer is to say I prepared much of the
24 text of this syllabus for the fall 2009 course. When
25 the fall 2009 course was canceled, subsequently -- I

1 can't remember exactly when -- I changed the dates, as
2 appropriate, and the classroom and the meeting time.
3 In the upper left-hand corner of the first page you'll
4 see the CRN. That's some kind of computer number. I
5 believe that's different. My office, I believe, moved.
6 So there are details like that that were changed. But
7 for the most part, the content of the syllabus, with
8 the exception of those details, is the same as it was
9 for the fall 2009 course.

10 Q When did you prepare the fall 2009 syllabus
11 with respect to the 4820 course you were going to teach
12 in the fall 2009?

13 A I can't recall exactly. I would imagine at
14 some point after finding out that I was hired as a
15 tenure track professor and finding out that I would be
16 teaching this course and before the course actually
17 began.

18 Q Okay.

19 A So it's -- perhaps over the summer of 2009.

20 Q Do you still have a copy of the actual
21 syllabus that was used or intended to be used for the
22 fall 2009 4820 course?

23 A I do not.

24 Q Why not?

25 A When the course was canceled, I didn't see

1 any reason to keep paper copies of the syllabus, and I
2 changed in the electronic version the dates and the
3 details that I mentioned earlier and then saved over
4 that file.

5 Q So other than perhaps the CRN number and your
6 classroom information and the time that the course was
7 being offered, do you believe that in substance the
8 syllabus is identical to the syllabus you used for the
9 fall 2009 course?

10 A The dates are also different.

11 Q Which dates are you referring to?

12 A I'm sorry. The schedule -- under schedule of
13 class meetings and assignments, the dates reflect 2010
14 dates, but otherwise I believe -- I believe the content
15 is the same.

16 Q And the dates you're referring to are those
17 depicted on Georgia State 66087 through 90?

18 A Correct.

19 Q On the first page of Gainty TX 1, Georgia
20 State 66084, you have a section entitled "Course
21 Description"?

22 A Yes.

23 Q Earlier when I asked you to provide a general
24 overview of what the course was about, you referenced a
25 description in your syllabus; is that correct?

1 A Yes.

2 Q Is this the course description that you were
3 referring to in the substance of your answer to my
4 previous question?

5 A Yes.

6 Q Turning to page 2 of your -- the second page
7 of your syllabus, marked 66085, you have a section
8 entitled "Course Readings." Do you see that?

9 A Yes.

10 Q There are five numbered paragraphs within
11 that section. Do you see that?

12 A Yes.

13 Q What are those five items that are listed in
14 that paragraph under "Course Readings"?

15 A They are collectively the monographs that I
16 assigned as required reading for the course. Students
17 were directed to purchase and read them in their
18 entirety or at least overwhelming portions of them.

19 Q Why did you require students to purchase
20 these monographs?

21 A Because I wanted them to read all or almost
22 all of each monograph.

23 Q And can you explain again what a monograph
24 is?

25 A I'm sorry. A monograph, as I understand it,

1 is a book-length scholarly work that constructs and
2 supports a single core argument or a sort of cluster of
3 arguments that all revolve around a central issue.
4 It's different from a textbook in that it's designed to
5 put an argument forward rather than, I guess,
6 communicate data with less of an overt argument.

7 Q Turning to the fourth page of your syllabus,
8 which is marked Georgia State 66087, you have a section
9 there entitled, "Schedule of Class Meetings and
10 Assignments." Do you see that?

11 A I do.

12 Q What does this particular section in your
13 syllabus reflect?

14 A This section of the syllabus, pages 66087
15 through 66090, gives a list of dates on which the class
16 will meet and then tells the student on which date they
17 are asked to do readings and/or submit written work.
18 Essentially it tells them what the assignments are and
19 when they must complete the assignments.

20 Q And with respect to the readings that you
21 have assigned in this section, were those required
22 readings?

23 A Yes.

24 Q On the page marked Georgia State 66088 of
25 Gainty TX 1 there's an entry for Tuesday, October 5.

1 Do you see that?

2 A I do.

3 Q What are the two items that you have -- or
4 what are the items that you have essentially listed for
5 that date?

6 A The first item is a short paper that is due,
7 which is a student paper that was assigned to them on
8 readings in the previous unit. Throughout the syllabus
9 you'll see different short paper assignments in bold.
10 The other two parts are two readings that I assigned to
11 the students. The first is a reading entitled, "Japan
12 in the Chinese Dynastic Histories," which is excerpted
13 from a book called Sources of Japanese Tradition,
14 volume 1. And the second is a reading entitled,
15 "Sino-Korean Tributary Relations Under the Ming," which
16 is excerpted from The Cambridge History of China,
17 volume 8, part 2.

18 Q With respect to The Cambridge History of
19 China entry listed there, can you describe for me
20 generally, what is The Cambridge History of China?

21 A The Cambridge History of China is a
22 multivolume, multipart scholarly work that contains, as
23 I understand it, many different writings by different
24 authors, all of which relate in some way to the history
25 of China.

1 Q Do you know how many volumes make up The
2 Cambridge History of China?

3 A Honestly, I know that there are at least
4 eight, but I don't know how many in total.

5 Q How do you know there are at least eight?

6 A The excerpt that I chose to assign to my
7 students comes from volume 8. It also comes from --
8 I'm sorry. It comes from volume 8, part 2, which I
9 assume also means that there is a volume 8, part 1.

10 Q What pages did you assign for the particular
11 excerpt you assigned for this reading?

12 A 272 through 300.

13 Q What was the title of that work again that
14 you assigned as a reading for this particular class?

15 A "Sino-Korean Tributary Relations Under the
16 Ming."

17 Q Do you understand that plaintiffs in this
18 case have alleged that the use of this particular
19 excerpt infringes on one or more of their copyrights?

20 A I do.

21 Q What was the subject matter of the class that
22 you intended to teach where you were using this reading
23 or where you planned to use this reading?

24 A The subject matter of the class was an
25 introduction to a historical examination of the

1 phenomenon, I guess, of Chinese history and its
2 connections to other East Asian and Asian cultures or
3 states or polities. This particular class, in addition
4 to introducing that idea, presented two examples of
5 contact between China and another -- another such Asian
6 culture or state.

7 Q And what were the other -- the one or more
8 other Asian cultures or states that you were presenting
9 in this particular class?

10 A In this particular class one of them is
11 Japan, and the other is Korea. To be clear
12 historically, Korea and Japan both at different points
13 in history have meant different things. They may not
14 have gone by the name of "Japan" or "Korea." So for
15 convenience what I'm referring to is the group of
16 people that lived at that point in the place that we
17 now refer to as Japan or, similarly, the group of
18 people that live in the place that we now refer to as
19 Korea.

20 Q With respect to your reading "Sino-Korean
21 Tributary Relations under the Ming," why did you select
22 that particular reading for this class?

23 A This class dealt with Chinese interactions
24 with other Asian states or peoples or cultures, and the
25 reading "Sino-Korean Tributary Relations Under the

1 Ming" deals directly with the question of how China
2 interacted with one other such state or people or
3 polity or what have you.

4 Q How does that particular reading compare to
5 the other reading you assigned that day, "Japan in the
6 Chinese Dynastic Histories"?

7 A Well, "Japan in the Chinese Dynastic
8 Histories" deals particularly with how China was
9 interacting with Japan, and "Sino-Korean Tributary
10 Relations Under the Ming" deals specifically with how
11 China dealt with Korea or the peoples or cultures or
12 states in Korea, especially through tributary
13 relations.

14 Q Understanding that the class in the fall of
15 2009 or the course in the fall of 2009 was canceled,
16 how did you intend for your students of that course,
17 had it not been canceled, to obtain a copy or access a
18 copy of the "Sino-Korean Tributary Relations Under the
19 Ming" reading?

20 A Had the class not been canceled, I would have
21 tried to make it available. I would have -- I would
22 have expected them to find it through the university's
23 e-reserve system.

24 Q And what is the e-reserve system?

25 A It's based in the library. And as I

1 understand it, it's a mechanism by which some readings
2 are made available in electronic form to students.
3 Those students in a particular class must have a
4 password provided to them so that only the students in
5 that class can access the material. And they go
6 through the library website and are able to see those
7 readings and then read them.

8 Q Do you recall whether you requested in
9 advance of the course in fall 2009 that this excerpt be
10 loaded to the e-reserve system?

11 A I believe I did.

12 Q What steps did you take to request that this
13 excerpt, "Sino-Korean Tributary Relations Under the
14 Ming," be loaded to e-reserve prior to your fall 2009
15 course being offered?

16 A At some point before 2009 the university
17 changed the manner in which they asked faculty to make
18 e-reserve requests. Previously we would simply send an
19 e-mail with a list of all of the readings, with
20 identifying information, such as title, author, page
21 numbers, to the library, as one document. However, we
22 then switched over, before this point, to a system of
23 submitting on the library website an individual request
24 through a library form for each individual reading in
25 order to -- or we are prompted by the library website

1 to complete a fair use checklist to determine whether
2 the reading that we're requesting may fairly be used.

3 Q And in connection with this particular work,
4 "Sino-Korean Tributary Relations Under the Ming," did
5 you complete a fair use checklist prior to requesting
6 that this work be loaded into e-res?

7 A I believe I did.

8 MS. MOFFITT: Can I have you mark this
9 document Gainty TX 2?

10 (Defendants' Exhibit Gainty TX 2 marked for
11 identification.)

12 BY MS. MOFFITT:

13 Q Professor Gainty, the court reporter has
14 handed you what's been marked as Gainty TX 2. Do you
15 recognize this document?

16 A I do.

17 Q And what is it?

18 A This is a fair use checklist that I completed
19 for -- although it's very hard to read, unfortunately,
20 on this copy, but it -- as I make it out, for the work
21 "Sino-Korean Tributary Relations Under the Ming."

22 Q And given that this particular checklist
23 appears to be somewhat illegible, are you able to
24 ascertain from other information contained in this
25 checklist that it is, in fact, the checklist related to

1 that particular work?

2 A Yes.

3 Q What informs you on this checklist that this
4 checklist, in particular, relates to that particular
5 work?

6 A I can read my name, the name of the course,
7 the author and publisher and portions to be used, the
8 page numbers. All of those match the work in question.

9 Q When -- did you fill out this checklist?

10 A I did.

11 Q When did you fill out this fair use
12 checklist?

13 A I filled out this fair use checklist in the
14 last few months.

15 Q Now, in the upper right-hand corner it's
16 dated August 1, 2009. Do you see that?

17 A Yes.

18 Q What does that date reflect?

19 A I tried, as best I could, to the best of my
20 ability, to recreate the fair use checklist that I
21 would have filled out and I believe I did fill out for
22 the fall 2009 semester.

23 Q You stated that you recreated the checklist.
24 Can you explain why you recreated the checklist?

25 A I did not have any longer a copy of the fair

1 use checklist that I completed for 2009.

2 Q And why not? Why did you no longer have a
3 copy of that checklist?

4 A I discarded it.

5 Q Why?

6 A I believed that because the course was
7 canceled after one class meeting, it was not necessary
8 to retain the fair use checklist.

9 Q And can you explain why you went about
10 recreating this checklist?

11 A I was informed that there was a lawsuit and
12 asked by the Office of Legal Affairs at Georgia State
13 to recreate this checklist.

14 Q And when you recreated the checklist, did you
15 make an effort to fill it out in the same way that you
16 filled it out in the office -- or in the 2009 time
17 frame before the course started?

18 A Yes.

19 Q When you originally filled this particular
20 checklist out in the 2009 time frame, did you make a
21 good faith effort to conduct a fair use analysis in
22 accordance with the checklist?

23 A Yes.

24 Q And this particular checklist, Gainty TX 2,
25 relates to which pages of the "Sino-Korean Tributary

1 Relations Under the Ming"?

2 A Pages 272 through 300.

3 Q And were those the pages that you intended to
4 assign your students to read in the History 4820 course
5 had it not been canceled?

6 A Yes.

7 Q I'm going to direct your attention to page 1,
8 the first page, marked Georgia State 66119, of the fair
9 use checklist, Gainty TX 2. Are you there?

10 A Yes.

11 Q Page 1 -- or this first page of Gainty TX 2
12 refers to a "Factor 1: Purpose and Character of the
13 Use." Do you see that?

14 A Yes.

15 Q Did you complete this section of the fair use
16 checklist?

17 A Yes.

18 Q And I should -- so upon completing that
19 section of factor 1, did you reach a conclusion about
20 whether factor 1 weighed in favor of fair use?

21 A I did.

22 Q And what was your conclusion with respect to
23 factor 1?

24 A My conclusion was that the subfactors in
25 factor 1 weighed in favor of fair use.

1 Q Why?

2 A I checked one, two, three boxes under "Weighs
3 in Favor of Fair Use." I checked no boxes in the
4 column "Weighs Against Fair Use." So it seemed to me
5 that a preponderance of factors in favor of fair use
6 existed, and therefore the entire section weighed in
7 favor of fair use.

8 Q Which factors did you select that weighed in
9 favor of fair use?

10 A The first subfactor, I guess, "nonprofit
11 educational," the second subfactor, "teaching,
12 including multiple copies for classroom use," and the
13 final subfactor, "use is necessary to achieve your
14 intended educational purpose."

15 Q Why did you select "nonprofit educational"
16 for this particular work?

17 A Because Georgia State University is a
18 nonprofit -- or a not-for-profit institution and
19 because a university is engaged in education, and I was
20 teaching in a classroom and engaged in education.

21 Q And you also selected "teaching, including
22 multiple copies for classroom use." Why did you select
23 that subfactor for this particular work?

24 A Because I planned to use the work for
25 teaching. I planned to discuss the work with students

1 in the classroom.

2 Q And you also selected "use is necessary to
3 achieve your intended educational purpose." Why did
4 you select that particular subfactor for this
5 particular work?

6 A I believed that the use of this reading was
7 necessary in order to illuminate the educational
8 purpose of that class, which was presenting Chinese
9 relations with other cultures or states or peoples in
10 Asia.

11 Q And why did you believe that the use of this
12 reading was necessary to illuminate that educational
13 purpose of the class?

14 A Well, this reading touches directly on the
15 question of Chinese relationships with another East
16 Asian or, more broadly, Asian state or peoples or
17 culture. And, as such, it speaks directly to the
18 larger question of how China interacted in its history
19 with other peoples or cultures.

20 Q I want to direct your attention now to factor
21 2, which appears on Georgia State 66120 of Gainty TX 2.
22 Did you complete the section under factor 2 entitled,
23 "Nature of Copyrighted Work" in the fall of 2009 time
24 frame?

25 A I -- yes.

1 Q Upon completing that section for factor 2,
2 did you reach a conclusion about whether factor 2
3 weighed in favor of fair use?

4 A I did.

5 Q What was that conclusion?

6 A My conclusion was that the factor, the nature
7 of copyrighted work, weighed completely in favor of
8 fair use.

9 Q And how did you reach that conclusion?

10 A I read the subfactors on both sides, both in
11 favor of fair use and against fair use, and in each
12 case I selected the subfactor in favor of fair use.

13 Q And specifically which subfactors did you
14 select in favor of fair use?

15 A I selected the first subfactor, "published
16 work." I selected the second subfactor, "factual or
17 nonfiction work," and I selected the third subfactor,
18 "important to educational objectives."

19 Q With respect to the first subfactor,
20 "published work," why did you select that subfactor for
21 this particular work?

22 A Because this particular work is -- is
23 published.

24 Q With respect to the second subfactor,
25 "factual or nonfiction work," why did you select that

1 particular subfactor for this particular work?

2 A Because -- I selected that because this is
3 not a work of fiction and -- because it's a nonfiction
4 work.

5 Q And with respect to the third subfactor in
6 favor of fair use, "important to educational
7 objectives," why did you select that subfactor?

8 A Similar to my previous answer regarding
9 factor 1 subfactor, "use is necessary to achieve your
10 intended educational purpose," I believe that this work
11 was important to my educational objectives, those
12 objectives being to introduce students to different --
13 different examples of Chinese interaction with other
14 Asian states or peoples or cultures.

15 Q And can you explain why this particular
16 reading was important to that objective?

17 A This particular reading deals with China and
18 its interactions with Korea, which is a neighboring
19 state or a neighboring cultural region, or whatever you
20 would like to call it, through the tributary system,
21 which was an important component of Chinese
22 relationships with other Asian states or peoples or
23 cultures. So I felt that presenting this was important
24 in introducing those ideas to students.

25 Q On page 66120 of Gainty TX 2 there's a factor

1 3 entitled, "Amount and Substantiality of Portion
2 Used." Did you complete that portion of the checklist?

3 A I did.

4 Q And upon completing that section of the
5 checklist relating to factor 3, did you reach a
6 conclusion about whether factor 3 weighed in favor of
7 fair use?

8 A I did.

9 Q And what was that conclusion?

10 A I concluded that the factor weighed in favor
11 of fair use.

12 Q And why did you conclude that factor 3
13 weighed in favor of fair use?

14 A I read all of the subfactors, both in favor
15 of fair use and against fair use, and I checked two of
16 the three subfactors in favor of fair use and none of
17 the subfactors against fair use.

18 Q What were the factors that you selected in
19 favor of fair use?

20 A The first is "small portion of work used,"
21 and the second is "amount taken is narrowly tailored to
22 educational purpose, such as criticism, comment,
23 research, or subject being taught."

24 Q Why did you select, for this particular work,
25 "small portion of work used"?

1 A Because I -- in -- I deemed this to be a
2 small portion of the entire work, certainly a very
3 small portion of the entire Cambridge History of China,
4 which is, although a multivolume set, one title, as I
5 understand it, but it's also a small portion of even
6 that volume 8, part 2, of The Cambridge History of
7 China.

8 Q Do you know roughly how many pages you
9 assigned, with respect to this excerpt, from The
10 Cambridge History of China?

11 A I assigned 29 pages, if I am counting
12 correctly.

13 Q Do you recall how many pages are contained
14 within that volume 8, part 2, from which you assigned?

15 A I do not, but I believe it has at least 300
16 pages, given that my selection is from page 272 through
17 page 300.

18 Q You also selected that the amount taken is
19 narrowly tailored to educational purpose, such as
20 criticism, comment, research, or subject being taught.
21 Why did you select that subfactor for this particular
22 work?

23 A I thought carefully about how much of both
24 The Cambridge History of China and of this particular
25 volume and, in fact, of this article was necessary for

1 educational purpose. And I determined, in my best
2 judgment, that pages 272 through 300 were necessary for
3 my educational purpose regarding the subject being
4 taught and the general construction of a historical
5 argument.

6 Q Was any portion of the excerpt that you
7 selected, 272 through 300, unrelated to the subject
8 matter that you were teaching that day in class or that
9 you intended to teach that day in this particular
10 class?

11 A No, not -- not -- not to my knowledge.

12 Q Turning to the fourth factor entitled,
13 "Effect on Market for Original" on that same page,
14 66120 of Gainty TX 2, did you complete that section on
15 the checklist?

16 A I did.

17 Q Upon completing the section, did you reach a
18 conclusion about whether factor 4 weighed in favor of
19 fair use?

20 A I did.

21 Q What was that conclusion?

22 A I concluded that factor 4 weighed in favor of
23 fair use.

24 Q How did you reach that conclusion?

25 A I, as in the other factors, read all of the

1 subfactors and used my best judgment to determine which
2 accurately described my use of the material in this
3 class. I selected three subfactors in favor of fair
4 use and one subfactor against fair use. Because -- not
5 to be silly, but because three is greater than one, I
6 felt that there were more factors in favor of fair use,
7 and therefore the aggregate outcome of factor 4 weighed
8 in favor of fair use.

9 Q Which three factors did you select that
10 weighed in favor of fair use?

11 A I selected "no significant effect on market
12 or potential market for copyrighted work" and "use
13 stimulates market for original work" and "restricted
14 access to students or other appropriate group."

15 Q And which factors did you select under factor
16 4 that did not weigh in favor of fair use?

17 A "Required classroom reading."

18 Q I want to step through each of these
19 subfactors, as we have before. With respect to the
20 first subfactor under "Weighs in Favor of Fair Use,"
21 "no significant effect on market or potential market
22 for copyrighted work," can you explain why you selected
23 that particular subfactor?

24 A I believe that whether a student reads this
25 excerpt or not will not have a significant negative

1 effect on the potential market for the copyrighted
2 work.

3 Q Why not?

4 A The copyrighted work contains much more and,
5 as I understand it, very diverse writing on the history
6 of China. This particular excerpt from the work deals
7 specifically with one small component of the
8 multimillennia history of China. Because of this, I
9 felt the work I selected in no way exhausted the entire
10 range of ideas or scholarship contained in the larger
11 work.

12 Q You also selected that the use stimulates the
13 market for the original work. Can you explain why you
14 selected that subfactor?

15 A Yes. The -- selecting "use stimulates market
16 for original work" reflects my belief and -- at least
17 my hope but my belief that exposing students to a small
18 portion of this sort of scholarship will encourage
19 students to continue to be excited by and seek out
20 readings and other scholarship on Chinese history and
21 on history in general. It was my hope, therefore, and
22 I think a reasonable belief that students who are
23 excited by this particular excerpt would then, on their
24 own, potentially try to find more from this particular
25 work.

1 Q You also selected the subfactor "restricted
2 access to students or other appropriate group." Why
3 did you select that subfactor?

4 A It's my understanding that the e-reserve
5 system, which is password protected, only allows
6 students who have the password from the course to have
7 access to that particular course's page and to read
8 those materials. This restricts access.

9 Q Do you have any understanding of what happens
10 to the materials posted to e-res once a course has
11 concluded?

12 A I do.

13 Q And what is that understanding?

14 A My understanding is that the materials are no
15 longer available through e-reserve, even to students
16 with the password. This understanding is based on my
17 personal experience when I have gone on the library's
18 e-reserve website. The e-reserve system can be
19 searched in a number of ways. One of them is by
20 instructor name. When I search by instructor name,
21 only my current courses for that semester are visible,
22 and courses from previous semesters are not visible.

23 Q On the right-hand side of the section under
24 factor 4, you selected "required classroom reading."
25 Can you explain why you selected "required classroom

1 reading"?

2 A I required my students to read this work.

3 Q So once you completed the checklist for all
4 four of these factors that we just discussed, did you
5 arrive at an overall conclusion about whether your use
6 of this excerpt constituted a fair use?

7 A I did.

8 Q And what was your overall conclusion with
9 respect to fair use for this particular excerpt that
10 you assigned?

11 A My overall conclusion was that all of the
12 factors weighed in favor of fair use and that my use of
13 this reading, this excerpt, in this class was a fair
14 use of this copyrighted work.

15 Q After you completed this checklist, Gainty TX
16 2, for the excerpt that you intended to assign in this
17 course, History 4820, what steps did you take to
18 request that the excerpt be loaded to the e-reserve
19 system?

20 MR. BLOOM: Object to the form of the
21 question. The objection just is you said
22 "intended to assign." I think he actually did
23 assign.

24 You can go ahead and answer.

25 A I'm sorry. I'm a little bit confused by that

1 exchange, but I -- could you please repeat the
2 question?

3 Q I'll repeat the question, sure.

4 A I'm sorry.

5 Q After you completed this fair use checklist,
6 Gainty TX 2, what steps did you take to request that
7 this excerpt be loaded to the e-reserve system?

8 A There is a form on the library website that
9 is to be completed by the faculty member for each
10 course in order to submit a request for a document or a
11 reading to be placed on e-reserve. I believe I
12 completed this form and requested that this be loaded
13 onto the e-reserve site.

14 Q And what type of information are you
15 requested to submit in connection with this form that
16 you completed?

17 A I -- I don't remember exactly, but it would
18 be some kind of identifying data about that work so
19 that librarians know what it is that I'm requesting,
20 such as author or edition or page numbers or that sort
21 of thing.

22 Q Are you -- does the form prompt you to say
23 anything about your completion of the fair use
24 checklist?

25 A It does.

1 Q And specifically what does it prompt you to
2 submit with respect to the form?

3 A This is only my paraphrasing. I don't
4 remember exactly, but I believe there are boxes to be
5 checked, one of which says something like, to the
6 effect of, this -- the use of this reading constitutes
7 fair use according to a fair use checklist that I
8 completed. I believe it's something like that.

9 Q And do you recall whether you submitted any
10 information with respect to that prompt in the form,
11 for this particular work?

12 A I believe, again, that I checked that box.

13 Q And had you, in fact, completed a fair use
14 checklist for that particular work that you were
15 requesting to be posted for the fall 2009 course, the
16 work that we've been discussing from The Cambridge
17 History of China?

18 A As I recall, yes.

19 MR. BLOOM: I'm sorry. Could I have that
20 question and answer read back, please?

21 (Last question and answer read.)

22 BY MS. MOFFITT:

23 Q If it is determined that your use of the
24 "Sino-Korean Tributary Relations Under the Ming" work
25 excerpt that you intended to assign from The Cambridge

1 History of China was not a fair use, what would you do
2 with respect to your use of this excerpt?

3 MR. BLOOM: Object to the form.

4 MS. MOFFITT: Basis? Just so I understand
5 your objection.

6 MR. BLOOM: Again, you just said "intended to
7 assign."

8 MS. MOFFITT: Okay.

9 MR. BLOOM: And I believe the testimony is
10 that he did assign the reading.

11 BY MS. MOFFITT:

12 Q Let me ask the question then. With respect
13 to the fall 2009 course, History 4820, that you
14 testified earlier was canceled due to underenrollment,
15 is it your belief that you assigned the "Sino-Korean
16 Tributary Relations Under the Ming" excerpt from The
17 Cambridge History of China to your students that were
18 enrolled in that course for that particular semester?

19 A I'm sorry. Now, do I correctly understand
20 your question to be did I assign it?

21 Q I think that's what I'm asking, but if my
22 question isn't clear, I can try again.

23 A Could you please try again?

24 Q Sure.

25 A I'm sorry. Thank you.

1 Q With respect to this History 4820 course
2 that -- in the fall of 2009 that was canceled due to
3 underenrollment, did you assign to your students the
4 "Sino-Korean Tributary Relations Under the Ming"
5 excerpt from The Cambridge History of China?

6 A I placed it on the syllabus that -- I'm now
7 feeling slightly unsure about the definition of
8 "assignment." I mean --

9 MR. BLOOM: Maybe -- I don't want to
10 interrupt you.

11 A I apologize for that. I -- one might say
12 that one only assigns a work on that given day. I
13 certainly placed it on the syllabus with the intention
14 that students would read it.

15 MR. BLOOM: Maybe we can just stipulate that
16 he selected this reading for that course --

17 MS. MOFFITT: Yeah.

18 MR. BLOOM: -- which was subsequently
19 canceled.

20 MS. MOFFITT: Okay.

21 MR. BLOOM: I just wanted the record to be
22 precise.

23 Is that a fair characterization? You
24 selected this reading for that course?

25 THE WITNESS: Yes.

1 BY MS. MOFFITT:

2 Q I can ask the question for you so you feel
3 comfortable about our exchange. Would you say,
4 Professor Gainty, that with respect to the History 4820
5 course that was scheduled to be taught in the fall of
6 2009, that you selected the "Sino-Korean Tributary
7 Relations Under the Ming" excerpt from The Cambridge
8 History of China as a reading for that particular
9 course?

10 A Yes.

11 Q All right. So if it is determined that your
12 use of this excerpt, "Sino-Korean Tributary Relations
13 Under the Ming," was not a fair use, what would you do
14 with respect to your use of this checklist in this
15 course?

16 A If it were determined, according to the fair
17 use checklist, that it was not, in fact, fair use, I --
18 I suppose -- I can only speculate, but I suppose I
19 would either find a different reading -- I don't know
20 what that reading would be; I would look for one, I
21 suppose -- or I would speak with the Office of Legal
22 Affairs. I don't know.

23 Q Would you continue to assign the excerpt to
24 your students if it were determined that your use of
25 that excerpt was not a fair use?

1 A If -- if in its current form it were not fair
2 use, then I would not assign it. What I'm trying to
3 say, I guess, is that I would not assign a reading in a
4 form that was specifically determined not to be fair
5 use.

6 MS. MOFFITT: Those are all the questions I
7 have for now.

8 MR. BLOOM: Okay.

9 MS. MOFFITT: Your witness.

10 MR. BLOOM: Can we just take two minutes?

11 MS. MOFFITT: Sure.

12 MR. BLOOM: Go off the record?

13 THE VIDEOGRAPHER: Off the video record at
14 11:18.

15 (Discussion off the record.)

16 THE VIDEOGRAPHER: We're back on the video
17 record. The time is 11:23 a.m.

18 CROSS-EXAMINATION

19 BY MR. BLOOM:

20 Q Professor Gainty, my name is Jonathan Bloom.
21 I'm with the law firm Weil, Gotshal & Manges in
22 New York, and I'll be asking you some questions on
23 behalf of the plaintiffs in this action. Hopefully I
24 won't keep you all that long.

25 You testified that sometime prior to the

1 start of the fall semester in 2009 you completed a fair
2 use checklist for the Clark reading; is that correct?

3 A I believe so.

4 Q Okay. Now, do you have a specific
5 recollection of completing a fair use checklist back in
6 2009 with respect to that reading?

7 A I believe that I completed one. I -- I can't
8 recall specifically, for example, sitting at my desk
9 and filling out a checklist.

10 Q And given that, why is it that you believe
11 you did complete a checklist?

12 A The university, as I understood it, asked us
13 to complete checklists for materials that we wanted to
14 place on e-reserve. And there, as I mentioned, is a
15 prompt on the e-reserve submission system which directs
16 us again to the fair use checklist.

17 Q So it's your belief that you would have
18 followed that instruction; is that correct?

19 A That's correct.

20 Q But you don't specifically recall doing so?

21 A That's correct.

22 Q And just to confirm, you testified that you
23 did not retain that checklist -- we'll assume that you
24 actually completed a checklist -- when you learned that
25 the course was canceled; is that correct?

1 A That is correct.

2 Q But you don't have any specific recollection
3 of discarding it? Is that also correct?

4 A That's also correct.

5 Q And Ms. Moffitt walked you through the fair
6 use checklist that you testified that you completed in,
7 I think you said, the last few months with respect to
8 the Clark reading. Is that -- you recall that?

9 A Yes.

10 Q Okay. And you concluded that the reading was
11 fair use, correct?

12 A That's correct.

13 Q Okay. And do you have an understanding, one
14 way or the other, as to whether that reading that you
15 selected and completed -- or I believe you completed
16 the checklist for actually was placed on the e-reserve
17 system?

18 A I do not.

19 Q So you never checked that?

20 A I certainly don't recall checking it.

21 Q Okay. So you just don't know for sure one
22 way or the other? Is that accurate?

23 A That's correct.

24 Q Okay. And are you -- you testified about a
25 change in the university's copyright policy in 2009.

1 Do you recall that?

2 A I do.

3 Q Okay. And can you explain how you became
4 aware of that change in policy?

5 A Honestly, I don't recall specifically.

6 Q Do you recall when you became aware of it?

7 A No. Honestly, I do not.

8 Q And do you recall a sort of larger document
9 of which this checklist is a portion?

10 MS. MOFFITT: Object. Assumes facts.

11 A I -- no, I do not. I'm trying to recall if
12 there is -- if this is a portion of the document, and
13 that doesn't -- I don't recall.

14 Q Let me just -- I'm going to show you what I'm
15 going to mark as Gainty Plaintiffs' Exhibit 1 and just
16 ask you if you recall having seen that document before.

17 (Gainty Plaintiffs' Exhibit 1 marked for
18 identification.)

19 MS. MOFFITT: I'm going to object on the
20 grounds it goes beyond the scope of direct.

21 Can you read the question back, please?

22 (Last question read.)

23 A I don't recall specifically seeing this
24 document.

25 Q Okay. Well, that answers the question.

1 Okay. You can put that aside.

2 Professor Gainty, when you were answering
3 Ms. Moffitt's questions about the fair use checklist
4 and how you completed it, you, you know, referenced
5 using your judgment as to the factors listed on the
6 exhibit. Is that a fair characterization of your
7 testimony?

8 A Yes.

9 Q Okay. Did you receive any kind of
10 instruction from anyone at the university that sort of
11 informed the judgment that you exercised in completing
12 this checklist?

13 MS. MOFFITT: Object. The question is vague.
14 You can answer it if you understand it.

15 A I -- I don't remember a specific instance of
16 instruction.

17 Q Did you intend -- did you attend any kind of
18 class offered by the university with respect to how to
19 fill out the checklist?

20 A Not that I recall.

21 Q And did you seek any guidance from anyone at
22 the university with respect to how to complete the
23 checklist?

24 A Do you mind if I ask you to be specific?

25 MR. BLOOM: Can you read the question back,

1 please?

2 (Last question read.)

3 BY MR. BLOOM:

4 Q Did you have any discussions with anyone in
5 the legal affairs office with respect to how to
6 complete the checklist?

7 A The -- just to clarify, to be sure that I
8 understand, do you mean generally how to use this form?

9 Q Okay. Yeah, I understand your confusion.

10 Let me just ask, generally, at any time, did
11 you have any conversations with anyone in the legal
12 affairs department about how fair use checklists in
13 general, not with respect to this specific work
14 necessarily, should be completed?

15 A Not that I recall. Not that I recall.

16 Q Okay. And so then I assume you didn't have
17 any conversations with anyone in the legal affairs
18 department about this specific checklist; is that
19 correct?

20 A To be clear, I believe I made mention before
21 about having a conversation with the legal affairs
22 department about reproducing this checklist.

23 Q Okay. And let me ask you about that, that
24 testimony. When you were in the process of, as you
25 say, recreating the checklist, did you -- do you recall

1 rethinking any of the factors as you went through that
2 exercise?

3 A I read the factors carefully. I'm -- I'm
4 sorry. Can you --

5 Q Let me ask another question.

6 A Thank you.

7 Q Maybe it will be easier for you to answer.

8 When you were completing this checklist, did
9 you -- do you recall, with respect to any of the
10 factors, questioning whether you had thought about it
11 correctly back in 2009?

12 A I don't recall any such example.

13 Q But you testified earlier, I believe, and
14 correct me if I'm wrong, that you don't specifically
15 recall completing the checklist in 2009, correct?

16 MS. MOFFITT: The question has been asked and
17 answered.

18 BY MR. BLOOM:

19 Q You can answer again.

20 A Correct.

21 Q Okay. Let me direct your attention to page 1
22 of the checklist. You testified earlier as to the
23 reasons why you checked the three boxes on the
24 left-hand side, "Weighs in Favor of Fair Use." You
25 recall that?

1 A Yes.

2 Q Okay. And those are the "nonprofit
3 educational," "teaching," and "use is necessary to
4 achieve your intended educational purpose," correct?

5 A Yes.

6 Q Is it fair to say that -- or do you agree
7 with the proposition that you would complete or fill
8 out each of those boxes for any reading that you had
9 decided you wanted to assign to your class?

10 MS. MOFFITT: Object. Calls for speculation.

11 MR. BLOOM: Let me ask the question
12 differently, if I could. So I'll withdraw that
13 one.

14 BY MR. BLOOM:

15 Q Can you imagine a situation in which you
16 would select a reading as appropriate for one of your
17 classes where you would not check all three of those
18 boxes?

19 A May I -- may I ask a clarification or -- can
20 you tell me what you mean by "appropriate"?

21 MR. BLOOM: Can you read the question back?

22 (Last question read.)

23 BY MR. BLOOM:

24 Q So let me just try one more time. Can you
25 imagine identifying a reading as one that you wish to

1 use with one of your classes, such as the Clark
2 reading, for which you would not check each of those
3 three boxes?

4 A I -- honestly, I don't know. I'm trying to
5 imagine -- I'm trying to imagine what sort of reading I
6 would want for a class that would not be necessary to
7 achieve my intended purpose or that I would -- I don't
8 have any occasion to -- that I can think of right now,
9 to engage in for-profit activities in the course of my
10 teaching. I -- I don't know. I'm sorry.

11 Q So is it fair to say that you cannot imagine
12 specifically a scenario in which you would not fill all
13 three of those out?

14 MS. MOFFITT: The question has been asked and
15 answered.

16 A I'm sorry. I really -- I -- the whole realm
17 of conjecture is getting a little bit sort of tricky
18 for me. I apologize.

19 Q Any reading that you are contemplating
20 assigning to your students would be nonprofit
21 educational, right --

22 A Uh-huh.

23 Q -- if you're doing this at GSU, correct?

24 A Correct.

25 Q And every one would be for the teaching

1 purpose, correct?

2 A Correct.

3 Q And you would have decided, if you were
4 contemplating using it for your class, that the use was
5 necessary to achieve your educational purpose, correct?

6 A I'm trying to imagine, in respect to the
7 third subfactor, whether I would think it was funny or
8 silly to assign something that didn't have an intended
9 educational purpose. Then I'm driven to imagine, well,
10 perhaps silliness is its own educational purpose. This
11 is why I'm sort of confused about -- and I do
12 apologize. I'm trying to answer as completely and
13 honestly as possible.

14 Q I understand. That's fine. Let me ask you
15 about the -- one of the factors on the other side of
16 the ledger, "non-transformative." Do you have an
17 understanding one way or the other as to whether this
18 particular reading -- the placement of this particular
19 reading on e-res would be transformative or
20 non-transformative?

21 A I honestly was not sure what "transformative"
22 might mean. On the one hand, the work -- maybe I
23 should have checked "transformative," thinking now
24 about it. The work was not intended for my class. So
25 I suppose that's a new utility or purpose. I don't

1 know.

2 Q Turning to the next page, Professor Gainty,
3 Ms. Moffitt asked you a number of questions about the
4 factor 3 subfactors, and you testified as to whether a
5 small portion was used, that you deemed this particular
6 reading to be a small portion of the entire work. Is
7 that an accurate characterization of your testimony?

8 A Yes.

9 Q And you testified that you deemed it a small
10 portion of the work conceived of as all of the volumes,
11 as well as the work conceived of as this particular
12 volume, correct?

13 A Yes.

14 Q Okay. Did you consider whether it was a
15 small portion of the work used in relation to this
16 particular chapter by Donald Clark?

17 A My understanding was that "work" referred to
18 a single published work, and I understood that Clark's
19 work was not published individually.

20 Q So you didn't conceive of a chapter within a
21 book as being a separate work. Is that an accurate
22 characterization of your thinking?

23 A Yes.

24 Q Looking down at factor 4, you testified, as
25 to your overall evaluation of this factor, that you

1 checked three boxes in the left-hand column and one box
2 in the right-hand column and that three was greater
3 than one, as you stated, and that led you to conclude
4 that the factor, as a whole, weighed in favor of fair
5 use. Do you recall that testimony?

6 A I do.

7 Q Okay. When you say three is greater than
8 one, does that reflect an understanding that each of
9 the subfactors is to be treated equally in terms of its
10 weight in the analysis?

11 A It does.

12 Q Okay. And do you have an understanding, with
13 respect to the factors, 1 through 4, not the subfactors
14 but factors 1 through 4, do you have an understanding
15 as to whether they are also to be treated equally in
16 the analysis?

17 A Honestly, I do not.

18 Q You don't have an understanding one way or
19 the other? Is that your testimony?

20 A That's correct.

21 Q Looking at the right-hand column under factor
22 4, the second box is "licensing or permission
23 reasonably available." Do you see that?

24 A I do.

25 Q Is that -- did you give any thought to that

1 subfactor when you were completing this form?

2 A I did.

3 Q And can you tell me what your thinking was?

4 A I was not sure what licensing or permission
5 would constitute.

6 Q What does that mean? Does it mean that you
7 don't understand what those terms refer to?

8 A Essentially, yes.

9 I -- I'm sorry. I also was not sure what
10 "reasonably" meant.

11 Q So is it -- do you have an understanding one
12 way or the other as to whether it is possible to get
13 permission to use a portion of a book in connection
14 with the e-res system?

15 A My understanding is that fair use is exactly
16 fair use and that either permission or the
17 determination of fair use would justify the use of a
18 work.

19 Q Have you ever heard of the Copyright
20 Clearance Center?

21 A I have not.

22 Q And I believe you testified when Ms. Moffitt
23 asked you whether -- if you undertook -- if a work that
24 you -- well, if this work were -- strike the question.

25 If your use of this chapter were determined

1 not to be fair use, that you would find a different
2 reading was one possibility, or you weren't sure what
3 else you might do. Is that a fair characterization of
4 your testimony?

5 MS. MOFFITT: Object to the extent that I
6 think it mischaracterizes the testimony.

7 A I think it is -- in some respects that's
8 accurate. I believe I said something else, although
9 now I can't recall exactly, I'm sorry.

10 Q Well, you said you might speak to the legal
11 affairs department. Do you recall that?

12 A I do.

13 Q Okay. But you -- if you were -- if -- strike
14 that.

15 If -- hypothetically, if you were told that
16 it were possible to obtain permission from the
17 publisher, for a fee, to use the chapter in the manner
18 that you contemplated, is that something that you would
19 consider in that scenario?

20 A Honestly, I don't know.

21 Q And that was not something that you
22 considered at the time because you concluded that this
23 was fair use, correct?

24 A That's correct.

25 Q Professor Gainty, you also testified that you

1 believed that the assignment of this chapter to your
2 students might stimulate the market for the work. Do
3 you recall that?

4 A I do.

5 Q Okay. And you checked that factor on the
6 left-hand column under factor 4 of that subfactor,
7 correct?

8 A That's correct.

9 Q Okay. And I believe you testified that you
10 hoped it would encourage students to seek out such
11 readings. Do you recall that?

12 A I do.

13 Q You have no basis other than your sort of
14 aspiration for making that conclusion; is that -- is
15 that fair to say?

16 MS. MOFFITT: I'm going to object on the
17 grounds that it mischaracterizes and misstates his
18 prior testimony.

19 MR. BLOOM: I'm asking -- strike that.

20 BY MR. BLOOM:

21 Q Is it fair to say that that is a hope on your
22 part but that you have no other basis for concluding
23 that the assignment would stimulate students to seek
24 out and purchase the work?

25 MS. MOFFITT: Again, I'm going to object

1 because it mischaracterizes his prior testimony.

2 A Could you repeat the question?

3 Q Other than your hope as to the effect that
4 assigning the work would have on your students, do you
5 have any other basis for believing that your using this
6 excerpt on e-reserves would stimulate the market for
7 the work?

8 A Yes.

9 Q And what is that?

10 A It occurs to me that a student who has never
11 been made aware of The Cambridge History of China would
12 be less likely to pursue The Cambridge History of China
13 than a student who has had a limited exposure to The
14 Cambridge History of China.

15 MR. BLOOM: Can we go off the record for a
16 moment?

17 MS. MOFFITT: Sure.

18 THE VIDEOGRAPHER: Going off the video record
19 at 11:54.

20 (Discussion off the record.)

21 THE VIDEOGRAPHER: We're back on the record
22 at 11:55.

23 (Gainty Plaintiffs' Exhibit 2 marked for
24 identification.)

25 BY MR. BLOOM:

1 Q Professor Gainty, we've been discussing at
2 length the Donald Clark chapter from The Cambridge
3 History of China. I just, for the record, wanted to
4 show you Garity (sic) Plaintiff's Exhibit 2, which --
5 and ask you to look at that and tell me if that is the
6 table of contents for that volume?

7 MS. MOFFITT: Do you have a copy?

8 MR. BLOOM: Yeah (handing).

9 MS. MOFFITT: Thank you.

10 I just object on the grounds that this is an
11 incomplete copy, obviously, of The Cambridge
12 History of China but also that it doesn't include,
13 for example, copyright-related information
14 relating to this particular version of this
15 particular book.

16 But other than that, you can answer the
17 question, Professor Gainty, to the extent you can.

18 A I can't say for sure.

19 Q Can you locate on here the chapter that we
20 were discussing that you selected for your students in
21 History 4820?

22 A I -- assuming this is the same edition, of
23 which I have no way of knowing, certainly the same
24 title and author are here as chapter 5, and the page
25 numbers are the same.

1 Q Okay. You can put that aside.

2 Let me just show you what I'm going to mark
3 as Gainty Plaintiffs' Exhibit 3.

4 (Gainty Plaintiffs' Exhibit 3 marked for
5 identification.)

6 MS. MOFFITT: I have a question. What was
7 the prior exhibit number?

8 MR. BLOOM: That was Plaintiffs' Exhibit --
9 Gainty Plaintiffs' Exhibit 2.

10 MS. MOFFITT: Okay. Thanks. Sorry.

11 BY MR. BLOOM:

12 Q Professor Gainty, is this a document
13 you've -- you recognize?

14 A No.

15 Q I will represent to you that this is a
16 portion of an e-res report that was provided to us by
17 the defendants in this action, and this is the portion
18 that relates to your course History 4820. Do you see
19 that course reference there under the second column?

20 A I do.

21 Q Okay. And that's your -- that's the class
22 that you intended to offer in the fall of 2009 that
23 we've been discussing?

24 MS. MOFFITT: I'm going to object to form on
25 grounds of foundation, and it's not clear to me

1 based on what's in this particular document that
2 that's what that reflects.

3 BY MR. BLOOM:

4 Q You see the third row down on the left-hand
5 side? It says, "Donald Clark." It identifies the text
6 "Sino-Korean Tributary Relations Under the Ming"?

7 A I do.

8 Q Okay. And is that the reading that we were
9 discussing for which you filled out an e-res -- a fair
10 use checklist?

11 A Yes.

12 Q Okay. And do these pages correspond to the
13 pages listed on the checklist?

14 A I'm sorry. Listed on the checklist?

15 Q Yeah.

16 A I'm so sorry.

17 Q On Gainty TX 2.

18 A In the -- oh, Gainty TX. I'm so sorry.

19 Q It's okay.

20 A Yes.

21 Q And do those correspond to the pages that are
22 identified in the table of contents that we just marked
23 a minute ago?

24 A They do.

25 MR. BLOOM: I have no further questions.

1 MS. MOFFITT: I just have a few questions on
2 redirect, Professor Gainty.

3 REDIRECT EXAMINATION

4 BY MS. MOFFITT:

5 Q I believe you indicated in response to one of
6 Mr. Bloom's questions that the university asked
7 professors to complete checklists for materials that
8 they wanted to place on e-reserves; is that correct?

9 A I believe so, yes.

10 Q And is it your practice, Professor Gainty, to
11 complete checklists for works that you intend to place
12 on e-reserve, further to the request of the university?

13 A Yes.

14 Q And do you have any reason to believe that
15 you did not complete a checklist for the Clark work
16 identified in your syllabus, TX 1, as "Sino-Korean
17 Tributary Relations Under the Ming" from The Cambridge
18 History of China in the fall 2009, sometime prior to
19 when the History 4820 course started?

20 A I have no reason to believe that I didn't
21 complete a checklist.

22 Q And when you recreated the checklist that we
23 marked Gainty TX 2 a few months ago, as you testified,
24 did you use your best efforts to recreate the checklist
25 as you believed you had filled it out in the 2009 time

1 frame?

2 A Yes.

3 MS. MOFFITT: I have no further questions.

4 Did you have any -- can we go off the record
5 for just a second?

6 THE VIDEOGRAPHER: Going off the video record
7 at 12:03.

8 (Discussion off the record.)

9 THE VIDEOGRAPHER: We're back on the record.

10 MS. MOFFITT: Mr. Bloom, did you have any
11 further questions?

12 MR. BLOOM: No further questions.

13 THE VIDEOGRAPHER: Going off the video record
14 at 12:03 p.m.

15 (Deposition concluded at 12:03 p.m.)

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E R R A T A P A G E

Pursuant to Rule 30 (e) of the Federal Rules of Civil Procedure and/or Georgia Code Annotated 9-11-30(e), any changes in form or substance which you desire to make to your deposition testimony shall be entered upon the deposition with a statement of the reasons given for making them. To assist you in making any such corrections, please use the form below. If supplemental or additional pages are necessary, please furnish same and attach them to this errata sheet.

I, the undersigned, DENIS CHARLES GAINTY, Ph.D., 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 below.

Page	Line	Change	Reason
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 DENIS CHARLES GAINTY, Ph.D.

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Sworn to and subscribed before me

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this _____ day of _____, 2011.

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 22

 Notary Public.
 My commission expires _____

23
 24
 25

C E R T I F I C A T E

STATE OF GEORGIA:

DEKALB COUNTY:

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the proceedings were reduced to typewriting under my direction; that the foregoing pages 1 through 61 represent a true and correct transcript of the evidence given upon said hearing. I further certify that I am not of kin or counsel to the parties in this 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.

Disclosure pursuant to OCGA 9-11-28: The party taking this deposition will receive the original and one copy based on our standard and customary per page charges. Copies to other parties will likewise be furnished at our standard and customary per page charges. Incidental direct expenses of production may be charged to any party where applicable.

This the 25th day of April, 2011.

CAROLE E. POSS

GA CCR B-1182

DISCLOSURE

STATE OF GEORGIA:
COUNTY OF DEKALB:

Deposition of DENIS CHARLES GAINTY, Ph.D.

Pursuant of 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:

I am a Georgia Certified Court Reporter. I am here as a representative of Shugart & Bishop.

I am not disqualified for a relationship of interest under the provisions of OCGA 9-11-28.

Shugart & Bishop was contacted by the offices of Bondurant, Mixson & Elmore to provide court reporting services for this deposition.

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CAROLE E. POSS, GA CCR B-1182 DATE: 4-25-11