

Ann C. Kruger, Ph.D.

April 22, 2011

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

CAMBRIDGE UNIVERSITY
PRESS, OXFORD UNIVERSITY
PRESS, INC., and SAGE
PUBLICATIONS, INC.,

CIVIL ACTION FILE

Plaintiffs,

NO. 1:08-CV-1425-ODE

vs.

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

Defendants.

~~~~~

VIDEOTAPE DEPOSITION OF  
ANN CALE KRUGER, Ph.D.

April 22, 2011

2:56 p.m.

Conference Room 16-K  
1180 Peachtree Street, N.E.  
Atlanta, Georgia

S. Julie Friedman, CCR-B-1476

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APPEARANCES OF COUNSEL

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Also Present:

Henry Stewart, Videographer

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WITNESS:

Ann Cale Kruger, Ph.D.

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1 Videotape Deposition of Ann Cale Kruger, Ph.D.  
2 April 22, 2011  
3

4 (Reporter disclosure made pursuant to  
5 Article 10.B. of the Rules and Regulations of  
6 the Board of Court Reporting of the Judicial  
7 Council of Georgia.)

8 THE VIDEOGRAPHER: This is Tape No. 1 to  
9 the videotape deposition of Dr. Ann Kruger, in  
10 the matter of Cambridge University Press versus  
11 Mark Becker. This deposition is being held at  
12 King & Spalding, 1180 Peachtree Street, in  
13 Atlanta, Georgia, on April 22nd, 2011.

14 The time is now 2:56 p.m. We're on the  
15 record.

16 My name is Henry Stewart. I'm the  
17 videographer. The court reporter is Julie  
18 Friedman.

19 Counsel, will you please introduce  
20 yourselves and affiliations; and the witness  
21 will be sworn.

22 MR. BLOOM: Jonathan Bloom, Weil,  
23 Gotshal & Manges, for the plaintiffs.

24 MS. MOFFITT: Natasha Moffitt, King &  
25 Spalding, for the defendants.

1           ANN CALE KRUGER, Ph.D., having been first  
2           duly sworn, was examined and testified as  
3           follows:

4           MR. BLOOM:   Okay.   Natasha, before we  
5           start --

6           MS. MOFFITT:   Okay.

7           MR. BLOOM:   -- I just wanted to put the  
8           objection on the record to the -- to the  
9           defendants' use of this deposition for  
10          testimonial purposes at trial given that the  
11          witness presumably resides within the Northern  
12          District of Georgia and is represented by  
13          counsel for defendants, who could subpoena  
14          Dr. Kruger to testify live at trial.

15          And on that basis, the plaintiffs object  
16          to the deposition testimony being introduced as  
17          testimony at trial on the grounds that  
18          Dr. Kruger is unavailable within the meaning of  
19          the Federal Rules of Evidence, the Federal Rules  
20          of Civil Procedure, and any applicable local  
21          rules of this district.

22          And on that basis, plaintiffs agree to go  
23          forward with the deposition without -- with the  
24          understanding that in doing so, they're not  
25          waiving any of their rights with respect to the

1 use of this testimony as -- as trial testimony  
2 in this action.

3 That's it.

4 MS. MOFFITT: The --

5 MR. BLOOM: Now you can --

6 MS. MOFFITT: Yeah, yeah. I can go.

7 On behalf of the defendants, I just  
8 acknowledge the objection and your preservation  
9 of rights; and we'll take the issue up when the  
10 issue is raised with the Court, if at all.

11 MR. BLOOM: Thank you.

12 MS. MOFFITT: This will the deposition of  
13 Dr. Ann Cale Kruger, taken by agreement of the  
14 parties. The deposition will be taken for use  
15 at trial and for any other purpose permitted  
16 under the Federal Rules.

17 DIRECT EXAMINATION

18 BY MS. MOFFITT:

19 Q. Dr. Kruger, could you please state your  
20 full name for the record.

21 A. Ann Cale Kruger.

22 Q. And do you understand that you are here  
23 today to provide testimony under oath in connection  
24 with a copyright infringement case brought by  
25 Cambridge University Press, Oxford University Press,

1 and Sage Publications against the president of  
2 Georgia State University, certain members of the  
3 Board of Regents of the University System of Georgia,  
4 and others?

5 A. I do.

6 Q. And do you understand that this case has  
7 been scheduled for trial starting on May 16th?

8 A. Yes.

9 Q. And do you plan to be in the Atlanta area  
10 in the May-June timeframe of this year?

11 A. No.

12 Q. Where do you plan to be in the May-June  
13 timeframe of this year?

14 A. From May the 3rd -- oh, sorry -- 4th until  
15 May the 29th, I will be in Israel mainly, with a  
16 brief trip to Cambridge, England.

17 And I have three trips scheduled in June  
18 which I can outline for you, if you want.

19 Q. Sure. What trips do you have planned in  
20 June?

21 A. June. I apologize. May 31st to June 2nd,  
22 I will be in Charleston, South Carolina; June 9th to  
23 June 13th, I will be in New York City; and June 17th  
24 to June 25th, I will in Chautauqua, New York.

25 Q. And with respect to your trip from May

1 4th, through May 29th to Israel and Cambridge,  
2 England, what's the purpose of that trip?

3 A. That is for vacation and personal study.

4 Q. And how long has that trip been planned?

5 A. Two years.

6 Q. With respect to your trip from May 31st to  
7 June 2nd to Charleston, South Carolina, what's the  
8 purpose of that trip?

9 A. That's for a family event.

10 Q. How long has that trip been planned?

11 A. A year.

12 Q. And what type of family event is it?

13 A. My niece's graduation from high school.

14 Q. With respect to your trip from June 9th  
15 through June 13th to New York City, what's the --

16 A. Uh-huh.

17 Q. -- purpose of that trip?

18 A. That is a visit to my daughter.

19 Q. How long has that trip been planned?

20 A. One year.

21 Q. And with respect to your trip from June  
22 17th through June 25th to New York, what's the  
23 purpose of that trip?

24 A. That's a professional conference.

25 Q. Okay. And how long has that trip been

1 planned?

2 A. Oh, about a year and a half.

3 Q. Okay. Who do you work for, Dr. Kruger?

4 A. Georgia State University.

5 Q. And what do you do for Georgia State  
6 University?

7 A. I'm on the faculty in educational  
8 psychology.

9 Q. Do you have a particular title?

10 A. Associate professor.

11 Q. Are you associated with any particular  
12 department within Georgia State University?

13 A. Yes. Educational psychology and special  
14 education.

15 Q. When did you start teaching at Georgia  
16 State University?

17 A. The fall semester of 1992.

18 Q. Can you tell us generally what types of  
19 courses you teach at Georgia State University?

20 A. For the past several years, I've taught  
21 only graduate-level courses.

22 Mainly I teach a course in learning and  
23 the learner, which is a foundations, -- psychological  
24 foundations course for master's level students; I  
25 teach a doctoral level course in advanced

1 developmental psychology; and I teach a doctoral  
2 level course in facilitating college teaching.

3 Q. Have you ever taught a course called  
4 advanced developmental psychology, social and  
5 personality development, EPY 8220?

6 A. Yes.

7 Q. Can you tell us generally what that course  
8 is about.

9 A. That's a doctoral level seminar course  
10 that is for advanced students who already have some  
11 knowledge of developmental psychology and of  
12 personality and socialization in particular; and so  
13 it's a seminar-styled study of recent research  
14 reports primarily on subtopics in that field.

15 Q. And when you say seminar-styled course,  
16 what do you mean by that?

17 A. It means it's taught not didactically, but  
18 through a combination of lecture and discussion.

19 Q. How do you go about teaching your students  
20 the subject matter of the EPY 8220 class?

21 MR. BLOOM: Object to the form. Vague.

22 You can answer.

23 THE WITNESS: I can answer.

24 I -- I teach that class by studying  
25 the -- the current literature in the subarea,

1           the topic of the course, and selecting readings  
2           organized around controversies in the field.

3           Q.       (By Ms. Moffitt) So one of the methods  
4           you use to teach the subject matter of the class is  
5           readings in the field?

6           A.       Yes.

7           Q.       Did you teach the EPY 8220 course in the  
8           fall of 2009?

9           A.       Yes.

10          Q.       And just for the record, what does EPY  
11          stand for?

12          A.       Educational psychology.

13          Q.       Did you prepare a syllabus for the EPY  
14          8220 course in the fall of 2009?

15          A.       I did.

16                   (Defendant's Exhibit TX-1 was marked for  
17                   identification.)

18          Q.       (By Ms. Moffitt) I've handed you what's  
19          been marked Kruger TX-1 --

20          A.       Uh-huh.

21          Q.       -- with production numbers Georgia State  
22          66051 through 057.

23          A.       Uh-huh.

24          Q.       Do you recognize this document?

25          A.       I do.

1 Q. And what is this document?

2 A. This is the syllabus for my course EPY  
3 8220.

4 Q. Is it for a particular semester?

5 A. It is.

6 Q. Did you prepare this document?

7 A. I did.

8 Q. When did you -- When approximately did  
9 you prepare it?

10 A. In advance of the beginning of fall  
11 semester 2009.

12 Q. Is it your practice to create syllabi and  
13 maintain then for purposes of your courses at Georgia  
14 State University?

15 A. Yes. It is.

16 Q. Turning to Page 2 of your syllabus, Kruger  
17 TX-1, there's a section entitled "Course Outline."

18 A. Uh-huh.

19 Q. What does this particular section reflect?

20 A. This shows the organization of the topics  
21 of the course across the weeks of the semester.

22 Q. And there also appears to be the beginning  
23 of a section perhaps at the bottom of this page,  
24 66052, entitled "Required Reading."

25 A. Uh-huh.

1 Q. Does that section span multiple pages of  
2 your syllabus?

3 A. It does.

4 Q. Okay. What's the purpose of -- I guess  
5 which -- which pages in particular does this required  
6 reading section relate to?

7 A. The required readings, the heading for  
8 required readings, as you said, is the bottom of Page  
9 2.

10 Q. Uh-huh.

11 A. And the list continues through Pages 3, 4,  
12 5, and the first half of 6.

13 Q. Okay. And what is the purpose of this  
14 required reading section?

15 A. To identify for the students the articles  
16 that they will be expected to read for the course.

17 Q. Are all of the readings listed from Pages  
18 3 through half of Page 6 required readings --

19 A. No.

20 Q. -- per se?

21 A. No. Not all.

22 Q. Which ones specifically are not required  
23 readings?

24 A. There is a -- a bolding -- a bold --  
25 bolded heading that says, "Background Reading" on

1 some of the sections, and that background reading is  
2 optional for students who feel they need a better  
3 foundational knowledge.

4 Q. All right. Turning to Page 3 of the  
5 syllabus, 66053, there's a section entitled,  
6 "Approaches to Development II --

7 A. Uh-huh.

8 Q. -- "Risk and Resilience."

9 Do you see that?

10 A. Yes.

11 Q. And what are the items listed within that  
12 subsection there?

13 A. The first item listed is the optional  
14 background reading, and then the next three items  
15 listed are the required readings.

16 Q. And then there appears to be one reading  
17 that's entitled "The developmental impact of  
18 childhood trauma" from "Understanding trauma:  
19 Integrating biological, clinical and cultural  
20 perspectives."

21 Do you see that?

22 A. Yes.

23 Q. Can you describe for me generally what  
24 this "Understanding trauma: Integrated biological,  
25 clinical and cultural perspectives" reference is.

1           A.       It's an edited volume, which means that  
2 there are multiple chapters written by different  
3 authors that are collected because they have the  
4 title subject in common; that is, they are related to  
5 trauma in one of -- from one of these perspectives  
6 listed.

7           Q.       And what -- Did you assign an excerpt  
8 from this particular reference?

9           A.       Yes. I did.

10          Q.       And -- And which one was that?

11          A.       The chapter by van der Kolk titled "The  
12 Developmental Impact of Childhood Trauma.'

13          Q.       And what were the page numbers associated  
14 with that particular excerpt that you assigned?

15          A.       It -- On the syllabus, it reads Pages 224  
16 to 241.

17          Q.       And are those the pages that you believe  
18 you assigned for this particular work?

19          A.       Yes.

20          Q.       Do you understand that the plaintiffs in  
21 this case have alleged that the use of this  
22 particular excerpt, "The Developmental Impact of  
23 Childhood Trauma," Pages 224 through 224 -- 224  
24 through 241 infringes one of their copyrights?

25          A.       Yes.

1 MR. BLOOM: I just object to the form just  
2 to the extent that we actually allege that it  
3 infringes multiple copyrights, but that's a  
4 quibble.

5 THE WITNESS: One per.

6 MS. MOFFITT: Well, I think I said  
7 infringes one -- one of their copyrights, one or  
8 more.

9 MR. BLOOM: Yeah. My -- My only purpose  
10 of clarifying was that there are multiple  
11 copyright rights implicated. That's all.

12 Q. (By Ms. Moffitt) Okay. Were the readings  
13 that are listed in -- in this subsection, "Approaches  
14 to Development II: Risk and Resilience" --

15 A. Uh-huh.

16 Q. -- associated with or otherwise assigned  
17 for a particular class within this course, EPY 8220?

18 A. They were assigned for a particular class  
19 meeting for a week, a particular week.

20 MR. BLOOM: Can I just have that question  
21 and answer back.

22 (Whereupon, the record was read by the  
23 reporter as requested.)

24 MR. BLOOM: Thanks.

25 Q. (By Ms. Moffitt) And what was the subject

1 matter?

2 Well, do you recall which -- which class  
3 in particular you assigned these works for?

4 A. If I refer to the syllabus, it appears it  
5 was for the class meeting on September the 3rd --

6 Q. Okay.

7 A. -- of 2009.

8 Q. And that appears on Page 2 of your  
9 syllabus?

10 A. That's correct.

11 Q. And it -- That particular class is  
12 described as "Approaches to Development II: Risk and  
13 Resilience"?

14 A. Correct.

15 Q. What was the subject matter that you  
16 intended to teach that day in class?

17 A. Uh-huh. It -- Risk and resilience refers  
18 to how environment and biology work together to lead  
19 to particular outcomes for particular individuals  
20 over development. Risk and resilience refers to how  
21 certain numbers or levels of risk can result in  
22 maladaptation or good adaptation. That would be the  
23 resilience part.

24 Q. And why did you assign "The Developmental  
25 Impact of Childhood Trauma" as a reading that day?

1           A.     This chapter is a -- a unique argument,  
2 evidence-based argument, the best I could find about  
3 the importance of the timing of trauma in its  
4 consequence.

5                     Would you like to hear more about that?

6           Q.     Well, and -- and specifically why --  
7                     I guess what was unique from your  
8 perspective about this particular work --

9           A.     Uh-huh.

10          Q.     -- and how did that relate to -- to what  
11 you were teaching in class that day?

12          A.     Okay. There are very few studies and no  
13 chapter that I know of that -- other than this one  
14 that pull together the argument that -- support for  
15 the argument that post-traumatic stress disorder is  
16 different depending on the age at which the trauma  
17 occurs.

18                     Therefore, it is a particular approach to  
19 risk that is developmentally sensitive with respect  
20 to the timing of the -- in brain development and  
21 psychological development of the trauma, and that  
22 timing predicting different outcomes.

23          Q.     Now how did you intend for your students  
24 to access a copy of "The Developmental Impact of  
25 Childhood Trauma"?

1           A.     Through university library Ereserves.

2           Q.     And what is the university library  
3 Ereserves?

4           A.     That is a method of reserve reading that  
5 the university makes available to students. The  
6 university takes a digital version of the work, makes  
7 it password-protected, supplies the password to the  
8 students in the class for the time that the class is  
9 in session over the semester.

10                   And students enter the password, have  
11 access to the document, and read it.

12           Q.     Did you request that this excerpt, "The  
13 Developmental Impact of Childhood Trauma" be loaded  
14 to ERes for your fall 2009 course?

15           A.     I did.

16           Q.     And what steps did you take to request  
17 that this excerpt be loaded to ERes or the Ereserve  
18 system?

19           A.     I completed a fair use checklist. I went  
20 through the procedures that the library requires  
21 professors to do in order to do that and -- and also  
22 to submit it to the library for consideration for  
23 inclusion.

24           Q.     And you mentioned some procedures that you  
25 needed -- that you were required to do in order to

1 make those requests.

2 A. Uh-huh.

3 Q. Can you describe generally for me the  
4 types of procedures you need to follow.

5 A. You complete a -- a fair use checklist,  
6 which is resident on your computer or available on  
7 the website.

8 And then, once that is completed, you  
9 answer questions the library poses about ownership of  
10 the work, whether your completion of the checklist  
11 has resulted in determination that it's fair use or  
12 some other situation, information like that.

13 Q. And when you said that you're required to  
14 submit information about the ownership of the work --

15 A. Uh-huh.

16 Q. -- what did you mean by that?

17 A. Does the library own the work? Does the  
18 professor own the work?

19 If the professor owns the work, at what  
20 time will the professor bring the book, or whatever  
21 it might be, to the library.

22 Q. And when you say own the work, are you  
23 referring to owning a physical copy --

24 A. Yes.

25 Q. -- of the work?

1           A.     Yes.

2                     (Defendant's Exhibit TX-2 was marked for  
3                     identification.)

4           Q.     (By Ms. Moffitt) I'm handing you what has  
5           been marked Kruger TX-2. Do you recognize this  
6           document?

7           A.     I do.

8           Q.     And what is this?

9           A.     This is the fair use checklist.

10          Q.     For?

11          A.     For EPY 8220 fall 2009.

12          Q.     Is it for a particular work?

13          A.     It is.

14          Q.     Which work?

15          A.     The chapter by van der Kolk from the  
16          volume edited by Kirkmeyer, et al., the article we  
17          were just discussing.

18          Q.     And that is the article entitled  
19          "Understanding Trauma?"

20                     No?

21          A.     No. "The Developmental Impact of  
22          Childhood Trauma."

23          Q.     Okay. And for which pages did you fill  
24          out the checklist?

25          A.     Pages 224 to 241.

1 Q. The date on this particular checklist,  
2 Kruger TX-2, is fall 2009. Do you see that?

3 A. I do.

4 Q. Did you complete a version of this  
5 checklist in the fall of 2009?

6 A. I did.

7 Q. With respect to the specific copy, Kruger  
8 TX-2, dated fall 2009, is this a copy of your  
9 original checklist?

10 A. No.

11 Q. Can you explain. Is this a -- Is it a  
12 re-creation of your original checklist?

13 A. It is.

14 Q. And why did you re-create your original  
15 checklist?

16 A. Excuse me. I could not locate my printed  
17 copy.

18 Q. Did you believe you kept a printed copy of  
19 the checklist?

20 A. I did.

21 Q. What -- What is the basis for your  
22 belief?

23 A. It's my practice to complete the checklist  
24 on my computer. However, the version of Adobe that I  
25 have doesn't allow me to save it as a completed form.

1 It, therefore, has to be printed out in order to  
2 save. There's no other way to save it.

3 So I printed it out and saved it, but I  
4 could not put my hands on it.

5 Q. Why did you fill out this checklist back  
6 in the fall of 2009 when you completed the original  
7 version?

8 A. It's part of the procedure that we  
9 undertake when we are creating Ereserves to complete  
10 a checklist for each item that we want to put on  
11 Ereserves.

12 Q. And is that pursuant to any kind of  
13 directive or policy?

14 A. It's a policy. It's a requirement.

15 Q. And when you re-created this checklist,  
16 TX-2, Kruger TX-2, did you make an effort to fill it  
17 out in the same way that you filled it out prior to  
18 your fall 2009 --

19 A. I did.

20 Q. -- course?

21 A. I did.

22 Q. And when you originally filled out the  
23 checklist in the fall of 2009 timeframe, did you make  
24 a good-faith effort to conduct a fair use analysis in  
25 accordance with the checklist?

1           A.     I did.

2           Q.     Directing your attention to the first page  
3 of the checklist, Georgia State 65258, and for  
4 purposes of the record, the Kruger TX-2 Exhibit is  
5 labeled with the production numbers Georgia State  
6 65258 through 259.

7                     Directing your attention to the first  
8 page, 65258, there is a factor referred to as Factor  
9 1, purpose and character of the use. Do you see  
10 that?

11          A.     I do.

12          Q.     Upon completing -- Did you complete this  
13 particular section --

14          A.     Yes.

15          Q.     -- under Factor 1?

16          A.     Uh-huh. I did.

17          Q.     And upon completing that section, did you  
18 reach a conclusion about whether Factor 1 weighed in  
19 favor of fair use?

20          A.     I did.

21          Q.     And what did you conclude?

22          A.     I concluded that factor -- the factors  
23 weighed in favor of fair use.

24          Q.     And why did you conclude that this Factor  
25 1 weighed in favor of fair use?

1           A.       There were five elements that were  
2 relevant; and there were in the column weighs in  
3 favor of fair use on the left-hand side of the page;  
4 and there were no factors checked in the right-hand  
5 column, which is labeled weighs against fair use.

6           Q.       And specifically which factors did you  
7 find that weighed in favor of fair use for Factor 1?

8           A.       I checked nonprofit educational, teaching,  
9 research or scholarship, personal study, and use is  
10 necessary to achieve your intended educational  
11 purpose.

12          Q.       Why did you select nonprofit educational  
13 for this particular work?

14          A.       It's for a course taught at Georgia State  
15 University, which is a nonprofit educational  
16 institution.

17          Q.       And why did you select teaching, including  
18 multiple copies for classroom use, for this  
19 particular work?

20          A.       It was for a class I was teaching.

21          Q.       And with respect to research or  
22 scholarship, why did you select that subfactor for  
23 this work?

24          A.       The purpose of the course is to acquaint  
25 students with scholarship and research in this field

1 of developmental psychology.

2 Q. You also selected personal study. Why did  
3 you select that particular subfactor --

4 A. It's a --

5 Q. -- for this work?

6 A. It's a seminar-styled course, which means  
7 that each student is to expected to commit themselves  
8 to both personal study of the works, as well as to  
9 collective study of the works as a class.

10 Q. And --

11 MR. BLOOM: I'm sorry. Could I hear the  
12 question and answer back, please.

13 (Whereupon, the record was read by the  
14 reporter as requested.)

15 MR. BLOOM: Okay. Thank you.

16 Q. (By Ms. Moffitt) You also selected use as  
17 necessary to achieve your intended educational  
18 purpose. Why did you select this factor for this  
19 work?

20 A. The work was unique and important to the  
21 point of developmental timing in outcomes of  
22 psychological trauma.

23 Q. And how did that relate to the educational  
24 purpose of your class?

25 A. It related to the particular subtopic of

1 risk and resilience. It is a especially good  
2 explication of the relationship between timing, brain  
3 development, psychological processes, and  
4 consequences of trauma.

5 Q. Looking at Page 2 of your checklist, 65259  
6 of Kruger TX-2, there's a factor there entitled,  
7 "Factor 2: Nature of Copyrighted Work."

8 Do you see that?

9 A. I do.

10 Q. Did you complete this section for Factor 2  
11 in the fall of 2009?

12 A. Yes.

13 Q. And upon completing that section did you  
14 reach a conclusion about whether Factor 2 weighed in  
15 favor of fair use?

16 A. I did.

17 Q. And what did you conclude?

18 A. I concluded that it did weigh in favor of  
19 fair use.

20 Q. And why did you conclude that Factor 2  
21 weighed in favor of fair use?

22 A. All three of the items in the column  
23 titled "Weighs in Favor of Fair Use" were selected,  
24 and none of the items in the column titled "Weighs  
25 Against Fair Use" were selected.

1 Q. You selected published work under Factor 2  
2 for this work. Why did you --

3 A. Yes.

4 Q. -- select that factor?

5 A. The article in question was published.

6 Q. You also selected factual or nonfiction  
7 work. Why did you select that particular factor?

8 A. The article was a research review.

9 Q. Was it a -- of a factual or nonfiction  
10 nature --

11 A. Yes. It was.

12 Q. -- the review?

13 A. Uh-huh.

14 Q. You also selected important to educational  
15 objectives. Why did you select that?

16 A. For reasons similar to my previous  
17 statement that it was a unique and special,  
18 especially effective review of the importance of  
19 timing in predicting outcomes of trauma.

20 Q. Page 2 of the fair use checklist also  
21 refers to a Factor 3 amount and substantiality of the  
22 portion used. Do you see that?

23 A. I do.

24 Q. Did you complete this section under Factor  
25 3?

1           A.     I did.

2           Q.     Upon completing that section, did you  
3 reach a conclusion about whether Factor 3 weighed in  
4 favor of fair use?

5           A.     I did.

6           Q.     And what was your conclusion?

7           A.     I concluded that it weighed in favor of  
8 fair use.

9           Q.     And why did you conclude that these  
10 factors weighed in favor of fair use?

11          A.     All three items in the column of choices  
12 titled "Weighs in Favor of Fair Use" were selected,  
13 and none in the column titled "Weighs Against Fair  
14 Use" were selected.

15          Q.     You selected small portion of work used  
16 under Factor 3. Why did you select that factor for  
17 this work?

18          A.     It was one chapter out of a multichapter,  
19 edited volume.

20          Q.     Do you recall how many chapters were in  
21 this particular book?

22          A.     Not off the top of my head. No.

23          Q.     You also -- did you -- When you assigned  
24 Pages 224 to 241, did that correspond with one  
25 particular chapter in the book?

1           A.     It did.

2           Q.     You also selected portion used is not  
3 central or significant to the entire work as a whole.  
4 Why did you select that factor?

5           A.     Each of the chapters stand alone. They're  
6 by different authors, and they cover different  
7 subject matters. Related to each other, but  
8 independent. They're independent works.

9           Q.     And you selected the amount taken as  
10 narrowly tailored to educational purpose such as  
11 criticism, comment, research, or subject being  
12 taught. Why did you select that particular  
13 subfactor?

14          A.     That chapter was research on a very  
15 particular subtopical area that I thought was  
16 important to study of risk and resilience.

17          Q.     And -- And with respect to the amount  
18 taken, why did you conclude that the amount taken was  
19 narrowly tailored to the educational purpose?

20          A.     I took no more than was relevant to the  
21 particular topic of the week, and it was a single  
22 argument that arced over the course of those pages.  
23 It couldn't be interrupted, but it was all that was  
24 necessary. It was all that was present.

25          Q.     Page 2 also has a section entitled

1 Factor 4: Effect On Market for Original. Do you see  
2 that?

3 A. Yes.

4 Q. Did you complete that -- that section in  
5 the fall of 2009?

6 A. I did.

7 Q. And did you reach a conclusion about  
8 whether Factor 4 weighed in favor of fair use upon  
9 completing that section?

10 A. I did.

11 Q. And what did you conclude with -- with  
12 respect to Factor 4?

13 A. It weighed in favor of fair use.

14 Q. And what was the basis for your conclusion  
15 that this Factor 4 weighed in favor of fair use?

16 A. I found five of the items listed as  
17 relevant in the column labeled "Weighs in Favor of  
18 Fair Use," and I found no items relevant in the  
19 column "Weighs Against Fair Use."

20 Q. Okay. You selected no significant effect  
21 on market or potential market for copyrighted work.  
22 Why did you select that particular factor?

23 A. I was introducing this author and these  
24 ideas to students for the first time. I don't  
25 believe they would otherwise be aware of the work.

1 Q. And how does that relate to whether or not  
2 there's a significant effect on the market or the  
3 potential market for the copyrighted work?

4 A. It -- I -- I do not believe that students  
5 who are unaware of a book will buy it or are  
6 unacquainted with the subject matter of a book will  
7 buy it.

8 Q. You also selected that the use stimulates  
9 the market for the original work. Do you see that?

10 A. Yes. I do.

11 Q. And why did you select that particular  
12 subfactor?

13 A. Once the students have been introduced to  
14 the ideas the author expresses in the chapter, they  
15 become interested in the ideas. They see the  
16 importance of the work and other works similar to it,  
17 and for their own research and personal study may  
18 well buy more books or buy that book.

19 Q. Now you also selected supplemental  
20 reading -- classroom reading.

21 A. Uh-huh.

22 Q. Why did you select that particular factor?

23 A. I see now that that is an error, because I  
24 see that there is a -- inherent forced choice between  
25 supplemental and required classroom reading in the

1 other column, and it's clearly required. It's so  
2 stated in the syllabus. That's an error.

3 Q. So is it your belief you should have  
4 selected required classroom reading and not  
5 supplemental classroom reading?

6 A. Yes.

7 Q. Okay. Sitting here today, if you were to  
8 fill out this checklist for this particular work,  
9 would you select required classroom reading?

10 A. I would.

11 Q. You also selected user owns lawfully  
12 acquired or purchased copy of the original work. Why  
13 did you select that factor?

14 A. I owned the book.

15 Q. And you selected restricted access to  
16 students or other appropriate group. Why did you  
17 select that factor?

18 A. I believe I selected that factor because  
19 the book was not -- The reading was not going to be  
20 available except by password-protected access to  
21 certain people who enrolled, paid tuition, and were  
22 in the class; and it was restricted for a period of  
23 time and to a particular group.

24 Q. Now had you selected in the fall of 2009  
25 the required classroom reading --

1           A.     Uh-huh.

2           Q.     -- and not selected supplemental classroom  
3 reading --

4           A.     Yes.

5           Q.     -- would that have changed your analysis  
6 and conclusion with respect to whether Factor 4  
7 weighed in favor of fair use?

8           A.     It wouldn't have changed that.  No.

9           Q.     And why not?

10          A.     It would have gone from a tally of five to  
11 zero to a tally of four to one, still strongly  
12 weighing in favor of fair use.

13          Q.     Now once you completed the checklist for  
14 all four factors for the -- this particular work, did  
15 you arrive at an overall conclusion about whether  
16 your use of "The developmental impact of childhood  
17 trauma" excerpt constituted a fair use?

18          A.     I did.  I -- I believed that it did  
19 constitute fair use.

20          Q.     And, again, had you selected required  
21 reading as one of the subfactors under Factor 4 and  
22 not selected supplemental classroom reading, how  
23 would this have changed your overall conclusion with  
24 respect to whether your use of this particular work  
25 constituted a fair use?

1 MR. BLOOM: Object to the form.

2 THE WITNESS: It would not have changed  
3 it.

4 Q. (By Ms. Moffitt) After completing the  
5 checklist for this particular work, "The  
6 developmental impact of childhood trauma," for your  
7 EPY 8220 course in the fall of 2009, what did you do  
8 to get your excerpt loaded to the Ereserve system?

9 A. After I completed the checklist, I went to  
10 the ERes web page, answered the questions the library  
11 has for you about each item that you would like to  
12 place in reserves. And this includes questions such  
13 as have you completed the fair use checklist. What  
14 have you concluded about that. Do you want the  
15 library -- Does the library own a copy? Do you own  
16 a copy, and so forth and bibliographic information  
17 that they need.

18 Q. And as part of your completion of that  
19 form for this EPY 8220 class in the fall of 2009, did  
20 you inform the library that you believed that your  
21 use of this particular excerpt "The developmental  
22 impact of childhood trauma" was a fair use?

23 A. I did.

24 Q. Once your course is completed --

25 A. Uh-huh.

1 Q. -- for a given semester, do you have an  
2 understanding of what happens to the materials that  
3 are loaded to Ereserve for that particular course?

4 A. In laymen's terms, they're taken down.  
5 They're no longer available.

6 Q. If you were to teach that same course in a  
7 subsequent semester, would you be able to access the  
8 previous materials you had loaded to Ereserve for  
9 your new course in the new semester?

10 A. No. I would not.

11 Q. If it were determined that your use of  
12 "The developmental impact of childhood trauma"  
13 excerpt were not a fair use, what would you do with  
14 respect to your EPY 8220 class?

15 A. If it were not fair use, I wouldn't use  
16 it.

17 Q. Is there something that you would do  
18 instead in its place?

19 A. I would have to examine the readings that  
20 I had prepared and -- for that week and try to find a  
21 replacement.

22 Q. Okay. Have you ever taught a course  
23 called "Psychology of Learning and the Learner," EPY  
24 7090?

25 A. I have.

1 Q. Can you tell us generally what that course  
2 is about.

3 A. That course is especially taught to a  
4 cohort, a unique cohort of -- called the  
5 Collaborative Masters Program in Early Childhood  
6 Education at Georgia State University. That course  
7 provides their foundational psychological study to  
8 support their practice as classroom teachers.

9 Q. And how do you -- what -- What methods do  
10 you employ to teach your students the subject matter  
11 of your EPY 7090 course?

12 A. The students are currently in the  
13 classroom. They currently are teaching in either  
14 pre-K through -- through grades five. Meet in a  
15 unique organization around the year.

16 I introduce them to different theories of  
17 learning that are relevant to early childhood  
18 education. They take what we have learned in the  
19 class with some assignments, and they implement  
20 practices in the classroom based on that theory.

21 And then they come back to class at a  
22 later date, and we revisit the theory and the  
23 practice again in light of their application.

24 Q. Do you -- you assign any readings to your  
25 students in connection with this class?

1           A.     I do.

2           Q.     What are the types of readings, generally  
3 speaking, that you would assign to students in your  
4 EPY 7090 course?

5           A.     Could be journal articles. It could be  
6 chapters.

7           Q.     From books?

8           A.     From textbooks or books.

9           Q.     Did you teach the EPY 7090 course in the  
10 2009 to 2010 school year?

11          A.     Yes.

12          Q.     Okay. And can you describe for us during  
13 which semesters you taught this particular course?

14          A.     Yes. This -- This cohort of students  
15 enrolls in a program that is a lockstep prepared  
16 sequence of -- of events for them for 18 months.

17                 They begin in June, and they meet with all  
18 the professors of their cohort in June for a few  
19 days. I met with them in June of 2009, I believe,  
20 for three, possibly four full days. Then we meet  
21 again one long evening a week -- no -- a month, one  
22 long evening a month in the fall.

23                 That is the end of their meetings with me,  
24 but they continue to meet with other professors in  
25 this program through the spring. They do not

1 actually register for EPY 7090 until the following  
2 Maymester. In this case Maymester of 2010, but they  
3 will have already completed the course by the time  
4 they register for it.

5 Q. So if -- So were there separate EPY 7090  
6 courses taught in the -- in the summer 2009 and the  
7 fall 2009 timeframes or --

8 A. Not by me. There are many sections of EPY  
9 7090. My section is the only one that's taught in  
10 this way, and it is the same section. It is not a  
11 different course.

12 Q. So between June 2009 when you meet  
13 initially, for the next 18 months, that is one course  
14 with the same students enrolled the entire time?

15 A. Same students, same syllabus.

16 Q. And the course actually spans 18 months?

17 A. The program spans 18 months.

18 Q. Okay.

19 A. I meet with them from June to December.

20 Q. June 2009 through December of 2009?

21 A. Correct.

22 Q. Did you prepare a syllabus for the EPY  
23 7090 course?

24 A. I did.

25 ///

1                   (Defendant's Exhibit TX-3 was marked for  
2                   identification.)

3           Q.       (By Ms. Moffitt) I'm handing you what has  
4           been marked Kruger TX-3. Do you recognize this  
5           document?

6           A.       I do.

7           Q.       And can you tell us what it is.

8           A.       This is the syllabus I prepared for EPY  
9           7090 for 2009 to 2010.

10          Q.       Now I believe you said that you met with  
11          the students from June 2009 through December of 2010;  
12          is that correct?

13          A.       It was -- It may have been November or  
14          December depending on how it was scheduled that year.  
15          I can check and see exactly.

16                   Oh, it doesn't say. It was scheduled  
17          after the fact. It appears that we did have a final  
18          meeting in December of 2009.

19          Q.       Okay. And -- and your syllabus,  
20          however --

21          A.       Pardon me.

22          Q.       -- have a date at the top, 2009 to 2010?

23          A.       Uh-huh. That was to identify for the  
24          students which cohort this syllabus refers to,  
25          because they don't register for the course until

1 2010.

2 Q. Okay. And did you prepare this syllabus?

3 A. I did.

4 Q. And when would you have prepared this  
5 syllabus?

6 A. I would have prepared it in the time  
7 leading up to the first meeting in June of 2009.

8 Q. Is it your practice to -- to create and  
9 maintain your syllabi for your classes that you teach  
10 at Georgia State University?

11 A. It is.

12 Q. Turning to the fourth page of your  
13 syllabus, which is marked Georgia State 66047; and  
14 for the record again I'll just note that Kruger TX-3  
15 is marked with production numbers Georgia State 66044  
16 through 050.

17 So turning to Page 4 of your syllabus,  
18 there's a section entitled "Course Outline"?

19 A. Yes.

20 Q. Can you tell us what this section  
21 reflects.

22 A. This section outlines for the students the  
23 topics that will be taught and the meetings during  
24 which they will be taught.

25 Q. On Page 5 of your syllabus, Kruger TX-3

1 marked Georgia State 66048, there's a section  
2 entitled "Readings on Vygotsky"; is that correct?

3 A. Uh-huh.

4 Q. Did I say that right?

5 A. Vygotsky.

6 Q. Due at Class No. 5. Do you see that?

7 A. Yes.

8 Q. What are the items that are listed under  
9 that subsection on Pages 5 and 6 of your syllabus?

10 A. Those are readings that I selected and put  
11 on Ereserves.

12 Q. And one of the readings is for -- Or  
13 yeah. One of the readings is entitled, "Awakening  
14 Children's Minds", Chapter 6, "Learning in  
15 Classrooms" on Page 6. Do you see that?

16 A. I do.

17 Q. Can you -- is "Awakening Children's  
18 Minds" -- What is that?

19 A. That's a title of a -- a book by Laura  
20 Berk.

21 Q. And did you assign to your students a  
22 particular excerpt from the Awakenings -- "Awakening  
23 Children's Minds" book?

24 A. I did. I assigned Chapter 6.

25 Q. Is there a page range associated with that

1 particular chapter?

2 A. The syllabus indicates it's Pages 181 to  
3 219.

4 Q. And you understand that the plaintiffs in  
5 this case have alleged that the use of this excerpt  
6 from the "Awakening Children's Minds" book  
7 infringes on one or more of their copyrights?

8 A. I do.

9 Q. Is this a reading that you assigned for  
10 your -- the Class No. 5 for this particular course?

11 A. In preparation for the meeting on Class  
12 No. 5, yes.

13 Q. What was -- What was the subject matter  
14 that you intended to teach during Class No. 5?

15 A. The theory of love Vygotsky, and it's  
16 relevance for classroom practices in early childhood  
17 education.

18 Q. And why did you assign specifically this  
19 Chapter 6, "Learning in Classrooms" from the  
20 "Awakening Children's Minds" book?

21 A. Laura Berk is a -- a premiere scholar in  
22 the application of Vygotsky in the classroom, and  
23 this one chapter out of her book refers -- or it  
24 describes her ideas about that application.

25 Q. And how was Chapter 6 in your view

1 different from the other chapters that might have  
2 been in her book on this general subject matter?

3 A. The other chapters in the book are  
4 explications of different aspects of the theory  
5 generally, which is a general theory of cognitive  
6 development and -- And it's a theory of  
7 sociocultural development in particular.

8 There is one applied chapter on  
9 disabilities, as I recall. There's a -- a concluding  
10 chapter that's on possibilities of application, but  
11 there's only one chapter that's on classroom,  
12 generally classroom use.

13 Q. How did you intend for your students to  
14 access the copy of this excerpt from her book,  
15 Chapter 6?

16 A. Through the university Ereserves.

17 Q. And did you request that this excerpt from  
18 ""Awakening Children's Minds"" be loaded to Ereserve?

19 A. I did.

20 Q. What steps did you take to request that  
21 this excerpt be loaded to Ereserve?

22 A. I completed the fair use checklist and  
23 then completed the required procedures on-line at the  
24 Ereserve web page.

25 Q. And the procedures that you followed you

1 characterize as required. Why do you characterize  
2 them as being required?

3 A. It's not possible to put anything on  
4 Ereserves unless you've completed these procedures.

5 Q. And do you know --

6 A. The university makes it necessary.

7 Q. So these are procedures that are required  
8 by the university --

9 A. That's right.

10 Q. -- for you to follow before you load  
11 materials to Ereserve?

12 A. Yes.

13 Q. Okay.

14 (Defendant's Exhibit TX-4 was marked for  
15 identification.)

16 Q. (By Ms. Moffitt) I'm handing you what has  
17 been marked Kruger TX-4. Do you recognize this  
18 document?

19 A. I do.

20 Q. What is it?

21 A. It's a fair use checklist for EPY 7090,  
22 summer of 2009.

23 Q. Is it for a particular work?

24 A. It is.

25 Q. Which work?

1           A.     Chapter 6 from ""Awakening Children's  
2 Minds"" by Laura Berk.

3           Q.     And is Chapter 6 the chapter you assigned  
4 your students to read from ""Awakening Children's  
5 Minds"" entitled "Learning in Classrooms"?

6           A.     Yes.

7           Q.     Did you complete this checklist?

8           A.     Yes.

9           Q.     The date of this particular checklist is  
10 summer 2009. Do you see that?

11          A.     I do.

12          Q.     Did you create a or complete a version of  
13 this checklist in the summer 2009 timeframe for your  
14 EPY 7090 course?

15          A.     Yes.

16          Q.     Is this a copy of that particular  
17 checklist?

18          A.     It's a reconstruction.

19          Q.     And why is it a reconstructed version of  
20 that original checklist?

21          A.     I was unable to find my paper copy.

22          Q.     Do you believe you kept a paper copy of  
23 your original checklist?

24          A.     I do.

25          Q.     And is that because it's your practice to

1 complete the checklists and print them out?

2 A. It is.

3 Q. When you re-created the checklists that  
4 you had filled out originally in the summer of 2009  
5 timeframe, did you make an effort to fill it out in  
6 the same way that you filled out your original  
7 checklist in the summer of 2009?

8 A. I did.

9 Q. And when you originally filled out the  
10 checklist in the summer of 2009 timeframe for this  
11 excerpt from "Awakening Children's Minds," did you  
12 make a good faith effort to conduct a fair use  
13 analysis with regards to the checklist?

14 A. I did.

15 (Defendant's Exhibit TX-5 was marked for  
16 identification.)

17 Q. (By Ms. Moffitt) I've handed you what's  
18 been marked Kruger TX-5. Do you recognize this  
19 document?

20 A. Yes.

21 Q. And what is this?

22 A. This is the fair use checklist for EPY  
23 7090 for fall 2009.

24 Q. And does this particular checklist relate  
25 to a particular work?

1           A.     It relates to Chapter 6 from "Awakening  
2 Children's Minds" by Laura Berk.

3           Q.     And did you complete this checklist?

4           A.     I did.

5           Q.     The date on this particular checklist is  
6 fall 2009. Do you see that?

7           A.     Yes.

8           Q.     Is this a copy of the checklist that you  
9 completed in the fall of 2009 for the "Awakening  
10 Children's Minds" excerpts for the EPY 7090 course?

11          A.     It's a re-creation of it.

12          Q.     And why is this a re-creation of your  
13 original checklist?

14          A.     I could not locate my printed-out copy.

15          Q.     Do you believe you kept a printed-out  
16 version of the original checklist you created in the  
17 fall 2009 timeframe?

18          A.     Yes.

19          Q.     But it's just that you weren't able to  
20 find it; is that correct?

21          A.     That's right.

22          Q.     Can you explain to us why you have --

23                 Well, let me ask. Do these two checklists  
24 relate to the same course, EPY 7090, that was offered  
25 in the June 2009 timeframe?

1           A.       That's right.  It's the same course, the  
2 same section, the same students, the same syllabus.

3           Q.       Why did you complete two different  
4 versions of the checklist for this particular excerpt  
5 from "'Awakening Children's Minds'"?

6           A.       Ereserves operates on a -- a semester  
7 basis; but this course does not operate on a semester  
8 basis, so when I placed the readings on reserve in  
9 the summer semester, at the end of the summer  
10 semester, they were taken down, even though the  
11 course was ongoing.

12                    So I had to ask them to re-create  
13 Ereserves for this course, even though it was the  
14 same course.

15           Q.       And how did you -- What did you have to  
16 do in order for them to re-create the Ereserves for  
17 this particular course?

18           A.       Had to go through all the same procedures  
19 as if it were a new course, but it was not a new  
20 course.

21                    So the ones I explained before --  
22 completing the fair use checklist, then going to the  
23 Ereserve web page, completing the procedures there,  
24 and submitting that information for review by the  
25 library.

1 Q. So even though there are two different  
2 fair use checklists for the Chapter 6 excerpt  
3 ""Awakening Children's Minds"" for the EPY 7090  
4 course which are Kruger TX-4 and Kruger TX-5, these  
5 checklists relate to the same excerpt for the same  
6 course for the same class of students that started in  
7 the June 2009 timeframe?

8 A. That's right.

9 Q. Okay. With respect to both Kruger TX-4  
10 and TX-5, under portions to be used, e.g., pages,  
11 timer counts, you've listed Chap or CH 6, Chapter  
12 6 --

13 A. Uh-huh.

14 Q. -- presumably, pages 181 through 199. Do  
15 you see that?

16 A. I do.

17 Q. Did you assign to your students only Pages  
18 181 through 199 of this particular excerpt?

19 A. No. That's an error.

20 Q. Okay. What should it have been?

21 A. 181 to 219.

22 Q. When you completed this checklist back in  
23 the summer of 2009 or when you completed the original  
24 version of this checklist in the summer of 2009, in  
25 the fall of 2009, did you intend for the checklist to

1 relate to your assigned reading from Chapter 6 of  
2 Pages 181 through 219?

3 A. I did intend for it to. Yes.

4 Q. And did your analysis apply to the  
5 entirety of the Chapter 6 when you completed the  
6 checklist in September 2009, in fall of 2009?

7 A. Yes. It did.

8 Q. All right. Looking at Kruger TX-4 first,  
9 Page 1 of the fair use checklist marked 65256 refers  
10 to Factor 1: Purpose and Character of the Use.

11 Did you complete the section under Factor  
12 1 relating to the purpose and character of the use?

13 A. I did.

14 Q. And did you reach a conclusion upon  
15 completing that section about whether Factor 1  
16 weighed in favor of the fair use?

17 A. I did.

18 Q. And what did you conclude with respect to  
19 Factor 1?

20 A. I concluded that it weighed in favor of  
21 fair use.

22 Q. And why did you conclude that that Factor  
23 1 weighed in favor of fair use?

24 A. There were five elements in that factor  
25 that I saw as relevant, and none that weighed against

1 fair use.

2 Q. And therefore, because there were five  
3 that weighed in favor of fair use and none that  
4 weighed against fair use, you concluded what?

5 A. That it was fair use.

6 Q. Okay. Under weighs in favor of fair use,  
7 you selected nonprofit educational. Can you explain  
8 why you selected that.

9 A. The course is taught for Georgia State  
10 University, which is a nonprofit educational  
11 institution.

12 Q. And you selected teaching for this  
13 particular work?

14 A. Yes.

15 Q. And why is that?

16 A. I was using it for the purpose of teaching  
17 this course.

18 Q. And you also selected research or  
19 scholarship. Why did you select that factor?

20 A. The -- The material assigned represents  
21 review of researchers and scholarship on the topic of  
22 the course.

23 Q. Okay. And you selected personal study for  
24 this particular work. Why did you select that?

25 A. It's my expectation that students and I

1 will study independently, as well as collectively.

2 Q. And what would you study independently or  
3 collectively?

4 A. The -- The assigned readings.

5 Q. Why did you select use is necessary to  
6 achieve your intended educational purpose?

7 A. The chapter is, I think, outstanding in  
8 its application of Vygotskian theory to the early  
9 childhood classroom, and I know of no other chapter  
10 that is like it.

11 Q. And how did that relate to your  
12 intended -- toward achieving your intended  
13 educational purpose?

14 A. My intended educational purpose for this  
15 course is to acquaint these classroom teachers with  
16 different theories of psychology and to have them  
17 learn how they can use the theories in their  
18 classrooms in an applied way, and so this was  
19 supporting that purpose with respect to Vygotsky's  
20 theory.

21 Q. Turning to Page 2, under Factor 2: Nature  
22 of Copyrighted Work, did you complete that section in  
23 the fall of 2009 when you originally completed this  
24 checklist?

25 A. Yes.

1 Q. And upon completing that section, did you  
2 reach a conclusion about whether the factors --  
3 whether Factor 2 weighed in favor of fair use?

4 A. I did.

5 Q. And what was the basis for that  
6 conclusion?

7 A. I concluded that it -- it weighed in favor  
8 of fair use because all of the elements in that  
9 column were selected and none in the column that  
10 weighed against fair use were selected.

11 Q. You selected published work. Why did you  
12 select that factor?

13 A. The work's published.

14 Q. And you selected factual or nonfiction  
15 work. Why did you select that factor?

16 A. It's a factual work.

17 Q. And finally, you selected important to  
18 educational objectives. Why did you select that  
19 factor?

20 A. It was highly relevant and important to  
21 the goal of the course.

22 Q. Was it also important and relevant to what  
23 you were teaching in class that particular day?

24 A. Yes.

25 Q. In Factor 3: Amount and Substantiality of

1 the Portion Used, did you complete that section when  
2 you completed the original version of this checklist  
3 in the summer of 2009?

4 A. I did.

5 Q. And did -- Upon completing that section,  
6 did you reach a conclusion as to whether Factor 3  
7 weighed in favor of fair use?

8 A. I concluded that it did.

9 Q. And what was the basis of your conclusion?

10 A. All three items under weighs in favor of  
11 fair use were selected and none under weighs against  
12 fair use were selected.

13 Q. Why did you select small portion of work  
14 used?

15 A. It's one chapter out of a multichapter  
16 book.

17 Q. Do you recall how many chapters were in  
18 that book?

19 A. I don't.

20 Q. But at the time when you completed the  
21 checklist, it was your judgment that the Chapter 6  
22 that you were using from the book was a small portion  
23 of the entirety of the work used?

24 A. That's correct.

25 Q. You also selected portion used is not

1 central or significant to the entire work as a whole.

2 Do you see that?

3 A. I do.

4 Q. And why did you select that particular  
5 factor?

6 A. The work as a whole is an explication of  
7 the theory in general, and this chapter is a  
8 particular application, so the -- The chapter isn't  
9 the heart of the work.

10 Q. You also selected that the amount taken is  
11 narrowly tailored to the educational purpose such as  
12 criticism, comment, research, or subject being  
13 taught. Why did you select that factor?

14 A. It is narrowly tailored to the subject  
15 being taught. It is narrowly tailored to taking a  
16 abstract theory and figuring out how to apply it very  
17 specifically in an early childhood classroom.

18 Q. And how does that relate to the amount  
19 that you took?

20 Was the amount that you took narrowly  
21 tailored to your educational purpose for that  
22 particular class?

23 A. That chapter was the only chapter on  
24 applications in the general ed classroom.

25 Q. And did the portion relate to anything

1 more than what you were --

2 In terms of subject matter --

3 A. No.

4 Q. -- did the -- did the chapter that you  
5 took, Chapter 6, did it cover other topics that you  
6 were not covering during that particular day in  
7 class?

8 A. No. It was coherent and relevant.  
9 Each -- Each page was relevant.

10 Q. On Page 2 of your checklist, Factor 4:  
11 Effect On Market for the Original, did you complete  
12 that section back in the summer of 2009 for this  
13 particular work?

14 A. I did.

15 Q. And upon completing that section, did you  
16 reach a conclusion about whether Factor 4 weighed in  
17 favor of fair use?

18 A. I did.

19 Q. What was your conclusion?

20 A. I concluded it weighed in favor of fair  
21 use.

22 Q. And what was the basis of your conclusion?

23 A. There were five elements in favor and zero  
24 elements against fair use.

25 Q. You selected no significant effect on

1 market or potential market for copyrighted work. Why  
2 did you select that particular factor?

3 A. If I did not assign the chapter to the  
4 students who were being acquainted with these  
5 theories for the first time, I do not believe that  
6 they would seek out the book or buy the book.

7 Q. You also selected stimulates market for  
8 original work. Why did you select that particular  
9 factor?

10 A. Once students are exposed to these new  
11 ideas and become interested in them, they often  
12 become excited and are moved to further their own  
13 study by purchasing books on the topic.

14 Q. Have you ever had the experience as a  
15 professor that you've assigned a particular reading  
16 to your students and later learned that they either  
17 purchased a book relating to the reading or that  
18 included the reading or that they otherwise indicated  
19 to you that they might do so?

20 MR. BLOOM: Objection. Calls for hearsay.

21 THE WITNESS: I have the experience of --  
22 of students saying that they were very excited  
23 about different things we had read in class, and  
24 they were moved to go and buy -- buy materials.  
25 I cannot recall whether it was exactly the

1 edited volume that I assigned, or it was  
2 something else.

3 Q. (By Ms. Moffitt) Did --

4 MR. BLOOM: Objection. Hearsay.

5 Q. (By Ms. Moffitt) Does that form -- when  
6 you say -- When you selected use simulates market  
7 for original work, on what do you base your  
8 conclusion that your use of this particular excerpt  
9 stimulates the market?

10 A. For this work itself?

11 Q. (Attorney nods head.)

12 A. The goal of college education is to excite  
13 people about ideas, and that's what we're about, and  
14 my -- my purpose is to -- is to inspire students to  
15 learn more; and if they want to learn more about what  
16 Laura Berk has to say about these subjects, they need  
17 to buy her book.

18 Q. You've also selected supplemental  
19 classroom reading. Why did you select that factor?

20 A. It was an error.

21 Q. What should you have selected instead, if  
22 anything?

23 A. A required. It's clearly required. It  
24 stated so on the syllabus.

25 Q. Sitting here today, if you were completing

1 this checklist for this particular work or excerpt,  
2 Chapter 6 from "Awakening Children's Minds," would  
3 you select required classroom reading and not select  
4 supplemental classroom reading?

5 A. Yes.

6 Q. You selected user owns lawfully acquired  
7 or purchased copy of the original work. Why did you  
8 select that?

9 A. I own the book.

10 Q. Okay. And you selected restricted access  
11 to students or other appropriate group. Why did you  
12 select that for this work?

13 A. When the chapter is placed on Ereserves,  
14 it's password-protected; and it expires in  
15 availability after a semester.

16 Q. Had you selected required classroom  
17 reading and not selected supplemental classroom  
18 reading, how would that have affected or -- or how  
19 would that have affected your conclusion with respect  
20 to whether Factor 4 weighs in favor of fair use?

21 A. It would not have changed my assessment.

22 Q. And why is that?

23 A. It would have been a tally of four to one  
24 instead of five to zero, which still is -- leads to  
25 the conclusion that it is fair use.

1           Q.     And once you completed the checklist for  
2 all four factors, did you arrive at an overall  
3 conclusion about whether your use of the Chapter 6  
4 from "Awakening Children's Minds" constituted a  
5 fair use?

6           A.     I did.

7           Q.     What was your conclusion?

8           A.     I concluded it was fair use.

9           Q.     And, again, had you selected required  
10 classroom reading under Factor 4 and not selected  
11 supplemental classroom reading --

12          A.     Uh-huh.

13          Q.     -- under Factor 4, would that have changed  
14 your overall conclusion that the four factors weighed  
15 in favor of fair use?

16          A.     It would not have changed it.

17          Q.     And why is that?

18          A.     Because the -- the overwhelming element --  
19 number of elements is in favor of fair use.

20          Q.     If it were determined that your use of  
21 Chapter 6 from "Awakening Children's Minds" were  
22 not a fair use, what would you do with respect to  
23 your EPY 7090 course?

24          A.     I would no longer assign it.

25          Q.     What would you do instead?

1           A.     I would have to search for an appropriate  
2 fair alternative.

3           Q.     Turning to Kruger TX-5, which is your fair  
4 use checklist for Chapter 6 of "Awakening Children's  
5 Minds" --

6           A.     Uh-huh.

7           Q.     -- that you completed, of course, that you  
8 originally completed in the fall of 2009 --

9           A.     Uh-huh.

10          Q.     -- the re-created version of that, can you  
11 compare the two checklists, Kruger TX-4 and Kruger  
12 TX-5, and tell me whether your selections for any of  
13 the factors are different.

14          A.     They are exactly the same.

15          Q.     Okay. And do you believe that your  
16 analysis with respect to Kruger TX-5, which was a  
17 version of the checklist you created in the fall of  
18 2009 -- do you believe your analysis was the same as  
19 the analysis you just described with respect to  
20 Kruger TX-4, which you filled out in the summer of  
21 2009?

22          A.     It was the same.

23          Q.     And why do you believe it was the same?

24          A.     Because I believe I consistently selected  
25 the same items and because I understand the use of

1 the work in the same way.

2 MR. BLOOM: Can we take a two-minute  
3 break --

4 MS. MOFFITT: Sure.

5 MR. BLOOM: -- Natasha.

6 THE VIDEOGRAPHER: This concludes Tape No.  
7 1. 4:10 p.m. We're off the record.

8 (Recess from 4:10 p.m. to 4:21 p.m.)

9 THE VIDEOGRAPHER: This is Tape No. 2.  
10 4:21 p.m. We're on the record.

11 Q. (By Ms. Moffitt) Are you aware that the  
12 Georgia State University adopted a new policy on  
13 copyright in the 2009 timeframe?

14 A. Yes.

15 Q. Okay. Are you familiar with that policy?

16 A. Yes.

17 Q. How have you become familiar with that  
18 policy?

19 A. We were alerted by e-mail notifications.  
20 I think also by paper notification perhaps. We were  
21 directed to a new website hosted by the university  
22 of -- University System of Georgia Board of Regents  
23 where there was some explanatory material and  
24 instruction on how to complete a fair use checklist,  
25 and there was also a fair use checklist there

1 available for download.

2 Q. Have you attended any training about the  
3 copyright policy that was implemented in 2009?

4 A. There was training available. I -- In  
5 lieu of attending a group workshop, I invited the  
6 university attorney, Kerry Heyward, to come to my  
7 class that I teach, Facilitating College Teaching --  
8 that's EPY 9000 -- to talk about copyright issues, as  
9 well as other legal and ethical issues in the  
10 profession of college teaching.

11 MR. BLOOM: Can I have an answer -- that  
12 answer read back, please.

13 (Whereupon, the record was read by the  
14 reporter as requested.)

15 MR. BLOOM: Thank you.

16 THE COURT REPORTER: You're welcome.

17 Q. (By Ms. Moffitt) And do you recall when  
18 you invited the university attorney, Kerry Heyward,  
19 to come speak to your EPY 9000 class?

20 A. I taught that class -- I have taught that  
21 class several times. I am teaching it currently, and  
22 she visited this semester. I taught it a year ago,  
23 spring of '10; and she visited then.

24 Beyond that I'd have to go check my -- my  
25 records as to the other visits.

1           Q.     Do you recall whether she taught --  
2 whether you taught the class EPY 9000 in the spring  
3 or -- Try again.

4                     Do you recall whether you taught the EPY  
5 9000 class in 2009?

6           A.     I don't recall.

7           Q.     And when the university attorney, Kerry  
8 Heyward, came to speak to your EPY 9000 class about  
9 copyright issues, as you mentioned --

10          A.     Uh-huh.

11          Q.     -- did she talk at all about the copyright  
12 policy implemented at Georgia State University?

13          A.     Yes. She did.

14          Q.     And was it the new policy that was  
15 implemented in the 2009 timeframe that she discussed?

16          A.     Yes.

17          Q.     Have you had other occasions to learn  
18 about the new Georgia State -- your Georgia State  
19 University copyright policy that was implemented in  
20 the 2009 timeframe outside of Kerry Heyward  
21 discussing it in the EPY 9000 class that you taught?

22          A.     And the Board of Regents website with its  
23 training materials, and it's also been discussed in  
24 faculty meetings.

25          Q.     And you also mentioned e-mails.

1           A.       There were -- Yes. At the time there  
2 were e-mails.

3                   And, of course, contacting Ereserves at  
4 the time of the new policy redirected you to the  
5 Board of Regents' website to learn more about the  
6 policy in detail.

7           Q.       Have you ever reviewed the newly  
8 implemented copyright policy that was implemented in  
9 the 2009 timeframe?

10          A.       Yes.

11          Q.       Have you ever had any conversations with  
12 anyone at the Office of Legal Affairs about the  
13 Georgia State University copyright policy?

14          A.       I have a personal relationship with Kerry  
15 Heyward, and I talk to her about lots of things. I  
16 am sure I discussed copyright with her several times.

17          Q.       If you had a question about the GSU  
18 copyright policy, is there anyone that you would go  
19 to, to ask those questions?

20          A.       I would go to Kerry.

21          Q.       And Kerry is the university attorney?

22          A.       She is.

23          Q.       Prior to posting -- Or prior to  
24 requesting that the -- that Chapter 6 of the  
25 ""Awakening Children's Minds"" book be posted to

1 Ereserve for your EPY 7090 course, did you consider  
2 whether or not to have your students purchase that  
3 book for purposes of your class?

4 A. I didn't -- Well, I would consider lots  
5 of options for readings for any given week in any  
6 given course; but I didn't. It did not seem to me to  
7 be a practical option to ask them to buy that book  
8 since they were only going to read a very tiny  
9 portion of it.

10 Q. Okay. And I have a similar question with  
11 respect to the other work we discussed today, namely,  
12 the chapter entitled about -- or the article entitled  
13 "The Developmental Impact of Childhood Trauma," from  
14 "Understanding trauma: Integrating biological,  
15 clinical and cultural perspectives."

16 Prior to teaching the EPY 8220 course in  
17 the fall of 2009, as part of your preparing your --  
18 your outline for that course, did you consider  
19 whether or not to have your students purchase the  
20 "Understanding trauma" book instead of simply posting  
21 one of the articles from the book to Ereserves?

22 A. That would be impractical. I did -- So  
23 if I considered it, it was immediately ruled out as  
24 impractical.

25 Q. And it's impractical because why?

1           A.     A tiny portion of the book is being read.

2           Q.     Since the policy that's been put in  
3 place -- since -- Since the newer copyright  
4 policy --

5           A.     Uh-huh.

6           Q.     -- was put in place in the 2009 timeframe,  
7 did you change your practices in any way as a  
8 result --

9           A.     I did.

10          Q.     -- with respect to the works that you're  
11 posting to Ereserves?

12          A.     I did.

13          Q.     And how did you change those practices?

14          A.     I no longer post Ereserves for EPY 7090.

15          Q.     And that is the course we discussed  
16 earlier today?

17          A.     That's the course we discussed earlier  
18 today, Psychology of Learner and Learning.

19          Q.     And why do you no longer post materials  
20 for that particular class?

21          A.     It became too burdensome. I elected to  
22 assign a textbook instead.

23                 MR. BLOOM: I move to strike the response  
24 to the extent that it addresses conduct after  
25 the fall of 2009. That's not a --

1 Q. (By Ms. Moffitt) Okay. He's just  
2 objecting.

3 Have you changed your practices in any  
4 other way with -- since the implementation of the new  
5 copyright policy in the 2009 timeframe?

6 A. In any other way other than the previous  
7 answer?

8 Q. Yes.

9 A. Yes. I am hesitant to assign -- for EPY  
10 8220 to assign chapters from edited volumes. I rely  
11 more on articles from journals that are licensed by  
12 the university.

13 MR. BLOOM: I'm just going to renew my  
14 objection again to the extent that the response  
15 refers to current practice as opposed to  
16 practice during the -- during 2009.

17 Q. (By Ms. Moffitt) Okay. And how soon  
18 after the new policy was implemented in the 2009  
19 timeframe do you believe that you altered your  
20 practices with respect to the posting of materials on  
21 ERes?

22 A. After the 7090 course that we've been  
23 talking about today, which was the one from June of  
24 '09 through the fall of '09, that was, to my  
25 recollection, the last year I assigned readings for

1 that -- Ereserve readings for that course.

2 Q. Okay.

3 MR. BLOOM: Same objection.

4 Q. (By Ms. Moffitt) After the new policy was  
5 put into place in the 2009 timeframe, is it your  
6 understanding that that policy required you to  
7 complete fair use checklists for works that you  
8 wanted to post to Ereserves?

9 A. Can you repeat the question, please.

10 Q. Sure. Is it your understanding that the  
11 policy that was put into place in the 2009  
12 timeframe --

13 A. Uh-huh.

14 Q. -- required you to complete checklists for  
15 the works you wanted to have posted to Ereserves?

16 A. That's right.

17 Q. And once that policy was put into place in  
18 the 2009 timeframe, did you begin completing  
19 checklists for the works that you wanted to have  
20 posted for your courses in 2009?

21 A. I did.

22 MS. MOFFITT: I don't have any other  
23 questions. It's your witness.

24 MR. BLOOM: Okay. Thank you.

25 ///

1 CROSS-EXAMINATION

2 BY MR. BLOOM:

3 Q. Professor Kruger, directing your attention  
4 to the two syllabi that we were looking at earlier --  
5 and that's TX-1 and TX-3 --

6 A. Uh-huh.

7 Q. -- both of them indicate, do they not,  
8 that you have made all of the readings for those  
9 courses available on Ereserves; is that correct?

10 A. I believe that's correct.

11 MS. MOFFITT: Feel free to take your time  
12 to review the exhibit.

13 Q. (By Mr. Bloom) And Exhibit 1, let me  
14 direct your attention to the second to last page --

15 A. Uh-huh.

16 Q. -- where it says "Accessing the Readings."

17 A. Uh-huh.

18 Q. And it says, "All required readings are  
19 available online through GSU eReserves."

20 Do you see that?

21 A. Yes. I do.

22 Q. Okay. And was that an accurate statement?

23 A. It was.

24 Q. Okay. And looking a TX-3, which is the  
25 syllabus for EPY 7090 --

1           A.     Uh-huh.

2           Q.     -- on Page 2, I'm under Course  
3 Requirements. It says, "The readings for the course  
4 are on the electronic library reserves, ERes, and are  
5 accessed through the website."

6                     Do you see that?

7           A.     I do.

8           Q.     Okay. Does that refer to all readings in  
9 the class?

10          A.     Yes.

11                     MS. MOFFITT: Object to the form.

12          Q.     (By Mr. Bloom) Okay. So just looking  
13 back for a moment at TX-1, that's the syllabus for  
14 EPY 8220. Can you tell me how many readings you  
15 placed on Ereserves for that class?

16          A.     I can count them.

17                     Oops. Lost count.

18                     There are 39 required readings placed on  
19 Ereserve. There are an additional four optional.

20          Q.     Okay. And did you fill out a fair use  
21 checklist for each of those readings?

22          A.     I did.

23          Q.     Okay. And that was some time prior to the  
24 commencement of this semester?

25          A.     That's correct.

1 Q. Okay. Would it be fair to say that you  
2 created a kind of digital anthology of the readings  
3 for this course on Ereserves?

4 MS. MOFFITT: I'm going to object to the  
5 form of the question. It's vague.

6 THE WITNESS: I don't understand what you  
7 mean by digital anthology.

8 Q. (By Mr. Bloom) I'm just asking if it  
9 would be fair to characterize the readings that you  
10 placed on Ereserves for this course as a digital  
11 anthology of the readings.

12 MS. MOFFITT: Same objection. The  
13 question's vague.

14 Q. (By Mr. Bloom) If you understand the  
15 question, you can answer.

16 A. I don't understand what you mean by  
17 digital anthology.

18 Q. Okay. Did you create a digital collection  
19 of the readings for the course for the benefit of the  
20 students in the course?

21 MS. MOFFITT: Object to form. The  
22 question's vague.

23 THE WITNESS: I created a list and  
24 submitted it to the library. The library did  
25 the rest.

1 Q. (By Mr. Bloom) Okay. And what did the  
2 library do?

3 MS. MOFFITT: Form. Foundation.

4 MR. BLOOM: Don't understand that  
5 objection at all, but it doesn't matter.

6 THE WITNESS: I wasn't present when the  
7 library did their work.

8 I can tell what you the outcome of their  
9 work was.

10 Q. (By Mr. Bloom) What was the outcome of  
11 their work?

12 A. The readings were available to the  
13 students on electronic reserves.

14 Q. Okay. And directing your attention to the  
15 syllabus for EPY 7090, can you tell me how many  
16 readings you placed on Ereserves for that course.

17 A. 15.

18 Q. Okay. And we were talking with respect to  
19 EPY 8220, the -- the chapter -- a chapter in  
20 "Understanding trauma," correct?

21 A. Uh-huh. It was.

22 Q. Page 224 to 241?

23 A. 224 to 220 -- 41. Yes.

24 Q. Okay. And had you taught this course  
25 before?

1 A. Yes.

2 Q. Okay. Do you recall how many times?

3 A. Oh, I've taught this course since I was  
4 first hired at Georgia State.

5 Q. Okay. When was that?

6 A. 1992.

7 Q. Okay. And have you assigned this  
8 particular reading previously for students in this  
9 course?

10 MS. MOFFITT: Object to the form of the  
11 question. It's irrelevant.

12 MR. BLOOM: No. It's not.

13 THE WITNESS: I don't recall which -- I --  
14 I -- It is my practice to redesign the syllabus  
15 to some degree each time I teach the course, so  
16 I don't recall.

17 I -- Some articles are taught for several  
18 years in a row. Some are not.

19 Q. (By Mr. Bloom) Okay. If I showed you  
20 prior syllabi, might it refresh your --

21 A. It --

22 Q. -- recollection?

23 A. -- might indeed.

24 MR. BLOOM: Okay. Okay. We'll mark this  
25 as Kruger Plaintiff's Exhibit 1.

1                   (Plaintiff's Exhibit 1 was marked for  
2                   identification.)

3           Q.       (By Mr. Bloom) And can -- Can you tell  
4 me what this document is, Dr. Kruger.

5           A.       This appears to be the syllabus that I  
6 prepared for EPY 8220, fall 2008.

7           Q.       Okay. And can you tell me if you included  
8 the same chapter from "Understanding trauma" in the  
9 syllabus for the fall 2008?

10          A.       I see it there.

11          Q.       Okay. And that's the same chapter,  
12 correct?

13          A.       Yes.

14                   MR. BLOOM: Okay. And we'll mark as  
15 Kruger Plaintiff's Exhibit 2 a copy of --  
16                   (Plaintiff's Exhibit 2 was marked for  
17 identification.)

18          Q.       (By Mr. Bloom) -- a syllabus for EPY 8220  
19 from the fall of 2007.

20                   MS. MOFFITT: I'm going to object.

21          Q.       (By Mr. Bloom) Let --

22                   MS. MOFFITT: I'm sorry. Go ahead.

23                   MR. BLOOM: I'm sorry.

24          Q.       (By Mr. Bloom) Let me just ask you if you  
25 would identify this document, Dr. Kruger.

1           A.     Identify this document.  It looks like the  
2 syllabus I prepared for EPY 8220 in the fall of 2007.

3           Q.     Okay.  And do you see anywhere on this  
4 syllabus the -- the same chapter from "Understanding  
5 trauma" that we were just discussing, that is, Pages  
6 224 to 241?

7                   MS. MOFFITT:  Again, for purposes of the  
8 record, I'll object to the line of questioning  
9 with respect to works used outside the relevant  
10 semesters that are at issue in the case.

11                  MR. BLOOM:  Objection noted.

12                  THE WITNESS:  I see the -- the listing.

13           Q.     (By Mr. Bloom)  Okay.  You do?

14           A.     (Witness nods head affirmatively.)

15           Q.     Okay.  When did you begin using Ereserves,  
16 Dr. Kruger?

17           A.     I'm sorry.  I don't remember.

18           Q.     Okay.  Looking at the syllabus for the  
19 fall of 2007 --

20           A.     Uh-huh.

21           Q.     -- can you tell from that whether these  
22 readings were -- Well, let's strike that.

23                   Can you tell from looking at the syllabus  
24 for fall of 2007 whether that particular chapter was  
25 available on Ereserves?

1 MS. MOFFITT: Same objection.

2 THE WITNESS: On Page 6 of the syllabus,  
3 it indicates, "All required readings are  
4 available online through GSU eReserves."

5 Q. (By Mr. Bloom) Okay. Let me just go back  
6 and ask you the same question with respect to Kruger  
7 TX-1, which is the fall of 2008 syllabus.

8 MS. MOFFITT: Same objection.

9 THE WITNESS: Page 6 of that syllabus  
10 indicates that all the readings were available  
11 through Ereserves.

12 Q. (By Mr. Bloom) Okay. Now, Dr. Kruger,  
13 you testified that the fair use checklists that we --  
14 that Miss Moffitt asked you about were re-created --

15 A. Uh-huh.

16 Q. -- is that correct?

17 A. That's right.

18 Q. Because you couldn't locate the checklists  
19 that you completed in 2009, correct?

20 A. Right.

21 Q. Okay. Are you certain sitting here today  
22 that the re-created checklists are identical to the  
23 original checklists that you completed and could not  
24 locate?

25 A. I can't confirm that they are identical.

1 Q. Okay. And the -- the three of -- These  
2 three checklists are identical to one another in  
3 terms of how you completed the -- completed the  
4 checklists. Is that fair to say?

5 A. These three --

6 MS. MOFFITT: The question's vague.  
7 Objection.

8 THE WITNESS: These three meaning --

9 Q. (By Mr. Bloom) In other words --

10 A. -- which three?

11 Q. -- you checked the same boxes on all three  
12 of these; is that correct?

13 A. All three of which, please.

14 Q. The three checklists that we've looked at.  
15 This is Kruger Exhibits 2, 4, and 5.

16 MS. MOFFITT: Same objection.

17 THE WITNESS: I appear to have checked the  
18 same items.

19 Q. (By Mr. Bloom) Okay. And you testified  
20 that you completed fair use checklists for the other  
21 readings that were placed on Ereserves for these  
22 classes; is that correct?

23 A. Yes.

24 Q. Okay. Do you know if you -- if you -- if  
25 any of those other checklists were -- differed in any

1 respect from these three?

2 A. I don't have --

3 MS. MOFFITT: Object to form.

4 THE WITNESS: I don't have a memory for  
5 that.

6 Q. (By Mr. Bloom) Okay. So it's possible?

7 A. It's possible.

8 Q. Okay. Directing your attention to Kruger  
9 TX-2, this is EP -- for EPY 8220, the fall for -- the  
10 fall of 2009 --

11 A. Uh-huh. Excuse me.

12 Q. -- on the -- under Factor 1, you did not  
13 check transformative; is that correct?

14 A. That's right.

15 Q. Can you explain to me why you did not  
16 check that box.

17 A. Our use did not change the chapter.

18 Q. Okay. And what do you mean by -- by  
19 change?

20 A. My understanding of change would mean that  
21 we were parroting the chapter or reconstructing the  
22 chapter in some ways that significantly altered its  
23 meaning or purpose.

24 Q. Okay. Looking on the same document in the  
25 right-hand column, the weighs against fair use

1 factors, you did not check nontransformative,  
2 correct?

3 A. That's right.

4 Q. Okay. What was your thinking as to that  
5 box?

6 A. Clearly that's an error, because this is a  
7 forced choice. It either is or is not --

8 Q. Okay.

9 A. -- transformative.

10 Q. Okay. And is it your testimony that if  
11 sitting here today you were to complete this again,  
12 you would check nontransformative?

13 A. That's correct.

14 Q. Okay. When Miss Moffitt was questioning  
15 you about the conclusions that you reached as to each  
16 of the Factors 1 through 4 --

17 A. Uh-huh.

18 Q. -- in completing these checklists --

19 A. Uh-huh.

20 Q. -- you referred a couple of times to a --  
21 a tally of factors. You'd said five to none or four  
22 to one or four to zero. Do you recall that?

23 A. I do.

24 Q. Okay. Is it your understanding that each  
25 of these subfactors is to be treated equally in the

1 fair use analysis?

2 A. It is not my understanding that they're to  
3 be treated equally. No. Not necessarily.

4 I don't have -- I don't think one  
5 quantifies this. I don't think it's reducible to  
6 numbers. I think that there are -- There's an  
7 element of judgment involved.

8 Q. Okay. Well, you -- You used numbers in  
9 terms of adding up the checks, correct?

10 A. I did.

11 Q. Okay. And was there any element of  
12 judgment involved in that process?

13 A. There is an element of judgment. Yes.  
14 Indeed.

15 Q. Okay. And can you explain what you mean  
16 by that.

17 A. There's a -- a -- There is a quantifying,  
18 but there is an independent judgment about whether  
19 the overwhelming -- if there is an overwhelming  
20 tendency towards one decision or the other, real  
21 weight.

22 Q. When you say that, are you referring to  
23 tallying up the subfactors within a given factor; or  
24 you were talking about the overall fair use  
25 conclusion based on all four factors?

1 MS. MOFFITT: Object to form.

2 THE WITNESS: I would say both.

3 Q. (By Mr. Bloom) Okay. Do you have an  
4 understanding --

5 I'm looking at the criteria or facts --  
6 factors that are listed on this document. Do you  
7 have an understanding as to whether any of them are  
8 more important than any others?

9 MS. MOFFITT: Object to form.

10 THE WITNESS: No. I don't.

11 Q. (By Mr. Bloom) Okay. So if I asked you  
12 to identify any particular factors that have  
13 particular importance, are there any that you would  
14 point to?

15 MS. MOFFITT: The question's vague.

16 Objection.

17 THE WITNESS: No. I don't think so.

18 Q. (By Mr. Bloom) Okay. Looking at Factor  
19 1, the first -- the first box on the left-hand side  
20 is nonprofit educational, correct?

21 A. That's correct.

22 Q. Okay. And would you agree that that is  
23 something that you would check for any reading that  
24 you were thinking of posting on Ereserves for one of  
25 your courses at GSU?

1           A.     If it was for GSU, yes.

2           Q.     Okay.  And would that --  Would that be  
3 the same for the second box for teaching?  Would you  
4 check that box for any reading that you were  
5 contemplating using for a course at GSU?

6           A.     Yes.

7           Q.     Okay.  And the same question for the last  
8 factor under Factor 1, use is necessary to achieve  
9 your intended educational purpose.  Would that be  
10 true of any reading that you had selected to make  
11 available to your students at GSU?

12          A.     Yes.

13          Q.     Okay.  Skipping around a little bit, going  
14 down to Factor 4 --

15          A.     Uh-huh.

16          Q.     -- second page, you didn't check licensing  
17 or permission reasonably available, correct?

18          A.     I did not check that.

19          Q.     Okay.  And you didn't check that on the  
20 other two checklists that we've looked at this  
21 afternoon, correct?

22          A.     I'll have to see.

23          Q.     Okay.  Take your time.

24          A.     I didn't.

25          Q.     Okay.  And can you explain why you didn't

1 complete that, why -- why you didn't check that box?

2 And for purposes of this question, we'll  
3 just talk about the specific checklist, which is  
4 Kruger TX-2.

5 A. My reconstruction of my understanding is  
6 that it would be possible to write to the publisher  
7 to request permission.

8 Q. Okay. And how does that relate to your  
9 decision not to check this box?

10 A. This box says permission is not available.

11 Q. I'm looking at the -- I'm looking at the  
12 box that said licensing or permission reasonably  
13 available.

14 A. Oh, I'm sorry. I was looking at the one  
15 that said --

16 Q. Yeah.

17 A. -- licensing or permission unavailable.

18 Q. Yeah. I'm sorry. I'm looking at the box  
19 on the right-hand column.

20 A. I see. Well, obviously, that's another  
21 case of a forced choice that I overlooked.

22 Q. Okay. So sitting here today, if you were  
23 to fill out this form, you would check that box,  
24 licensing or permission reasonably available?

25 A. I would have to, I think, investigate

1 whether it was true for this particular work.

2 Q. Okay. Have you ever heard of a copyright  
3 clearance center?

4 A. I have.

5 Q. Okay. And what -- What do you understand  
6 the Copyright Clearance Center to be?

7 A. It collects fees, royalties for the  
8 reproduction of copyrighted material.

9 Q. Okay. And did you give any consideration  
10 to the potential to contact CCC in connection with  
11 this reading at the time that you were filling out  
12 this checklist in 2009?

13 A. I did not consider it. It wasn't  
14 necessary.

15 Q. Okay. And it wasn't necessary for what  
16 reason?

17 A. The University System of Georgia has a --  
18 a careful procedure that all professors go through to  
19 assign readings on Ereserve.

20 Q. And what -- What is that procedure?

21 A. Completion of the fair use checklist and  
22 completion of the Ereserves procedures on-line.

23 Q. Okay. So are -- Are you saying that you  
24 didn't think it was necessary to consider obtaining  
25 permission from Copyright Clearance Center -- Center

1 because you concluded that this was fair use; is  
2 that --

3 A. Can you repeat that. Sorry.

4 Q. Yeah. I'm sorry.

5 So you said you didn't believe it was --  
6 You testified, I believe, it was not necessary to  
7 contact the Copyright Clearance Center; is that  
8 correct?

9 A. Right.

10 Q. Okay. And why? Just explain again, if  
11 you would, why you decided it was not necessary to do  
12 that.

13 MS. MOFFITT: Object to form. Asked and  
14 answered.

15 THE WITNESS: My understanding is that the  
16 University System of Georgia and our university  
17 library have procedures in place so that  
18 readings may be available digitally to students,  
19 and those procedures are within the law and are  
20 fair and appropriate.

21 Q. (By Mr. Bloom) And that is part of that  
22 procedure, the completion of this checklist?

23 A. Yes.

24 Q. Okay. So if you complete this checklist  
25 and you conclude that a reading is not fair use --

1 I'm sorry -- if you conclude that a reading is fair  
2 use, then you're saying that contacting the Copyright  
3 Clearance Center is not necessary. Is that your  
4 testimony?

5 MS. MOFFITT: Object to form.

6 THE WITNESS: It's my understanding.

7 Q. (By Mr. Bloom) Okay. When you -- You  
8 checked the first box on the left-hand side under  
9 Factor 4: No significant effect on the market or  
10 potential market for the copyrighted work. Do you  
11 see that?

12 A. I do.

13 Q. Okay. And what market did you have in  
14 mind when you complete -- when you checked that box?

15 A. The market for the purchase of the work  
16 that's named on the first page.

17 Q. Okay. And are you -- are you -- Did you  
18 take into account a market for licensing of excerpts  
19 of that book?

20 A. Yes.

21 Q. Okay. You did?

22 A. (Witness nods head affirmatively.)

23 Q. Okay. But you just testified that we --  
24 the market was market for sales of the book, correct?

25 A. That's right. You're right.

1 Q. Okay. So just so I'm clear, did you  
2 consider with respect to the first factor, the market  
3 for licensing excerpts, as the opposed to the  
4 license?

5 MS. MOFFITT: Object to form.

6 THE WITNESS: I cannot reconstruct a  
7 memory that includes that, fees. I cannot  
8 reconstruct that memory. It may be possible  
9 that I did do that, but I cannot say for sure --

10 Q. (By Mr. Bloom) Okay.

11 A. -- that I thought about that in 2009.

12 Q. So you recall in 2009 thinking about the  
13 market for sales, correct?

14 A. Yes.

15 Q. And you don't specifically recall  
16 considering a market for licensing of excerpts. Is  
17 that --

18 A. I don't recall --

19 Q. -- your testimony?

20 A. -- distinguishing between sales and  
21 licensing.

22 Q. Okay. Did you ever in connection with  
23 this excerpt -- Did you ever investigate how much it  
24 would cost to license just the use of this chapter?

25 A. No.

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MS. MOFFITT: Object to form.

You're referring to TX-2 still?

MR. BLOOM: Yes.

MS. MOFFITT: Okay.

THE WITNESS: No. I did not.

Q. (By Mr. Bloom) Okay. And did you investigate the cost of licensing excerpts for any of the other readings that you posted on Ereserves for EPY 8220 in the fall of 2009?

MS. MOFFITT: Object to form. To the extent it goes beyond the scope of the allegations.

THE WITNESS: Excuse me.

MR. BLOOM: I'm sorry. I didn't hear your --

THE WITNESS: I'm sorry.

MR. BLOOM: I didn't hear the end of your objection.

MS. MOFFITT: I object to the form and to the extent it goes beyond the scope of plaintiff's accusations or allegations in the case to the extent you're asking about works that aren't at issue in this case.

THE WITNESS: The overwhelming majority of the readings I assign in EPY 8220 are from

1 journals for which I have a subscription and the  
2 university has a subscription.

3 Q. (By Mr. Bloom) Okay. I'm not sure that  
4 answers my question which was whether -- Well,  
5 strike that.

6 Were there other excerpts from books that  
7 you posted on Ereserves for this semester?

8 A. Let me see.

9 MS. MOFFITT: Same objections.

10 THE WITNESS: There is -- There are two  
11 required readings on this syllabus that are from  
12 books.

13 Q. (By Mr. Bloom) Okay. Which are those  
14 two?

15 A. One is on Page 5 --

16 Q. Uh-huh.

17 A. -- under racial and ethnic identity, an  
18 article by Good, Dweck, and Aronson from an edited  
19 volume by Fuligni.

20 Q. Okay.

21 A. And the second one is on Page 4 --

22 Q. Uh-huh.

23 A. -- the chapter by Sroufe, et al. from "The  
24 development of the person."

25 Q. Okay. Did you investigate the cost of

1 licensing excerpts of either of those works?

2 A. No.

3 Q. Okay.

4 MS. MOFFITT: The same objection.

5 Q. (By Mr. Bloom) Directing your attention  
6 the same, the Kruger TX-2, to Factor 3, you checked  
7 small portion of work used.

8 Do you see that, Dr. Kruger?

9 A. Yes.

10 Q. Okay. Now do you recall -- Do you recall  
11 submitting the declaration in connection with this  
12 action?

13 A. Yes.

14 Q. Okay. And let me just show you.

15 MR. BLOOM: I guess I'd better mark this.  
16 This will be --

17 Q. (By Mr. Bloom) I show you what I'll mark  
18 as Kruger Plaintiff's Exhibit 3 --

19 (Plaintiff's Exhibit 3 was marked for  
20 identification.)

21 Q. (By Mr. Bloom) -- and -- and ask you,  
22 Dr. Kruger, if this is a declaration that you signed  
23 on April 2nd, 2010.

24 A. Looks like a copy of it.

25 Q. Okay. That's your signature on Page 3?

1           A.     Yes.

2           Q.     Okay.  And I'm directing your attention to  
3 Paragraph 4.  You state there that, "Each course  
4 reading I have made available on Ereserves since the  
5 adoption of the Policy is narrowly tailored to  
6 support a specific teaching point and constitutes no  
7 more than fifteen percent of the work."

8                     Do you see that?

9           A.     I do.

10          Q.     Okay.  Can you tell me why you used that  
11 15-percent figure in this document.

12          A.     I don't recall whether that was an  
13 estimate or a calculation.

14          Q.     Okay.  Did anyone ever instruct you that  
15 15 percent was an appropriate guideline?

16          A.     No.

17          Q.     Okay.  So do you have any recollection of  
18 where -- where the 15 percent figure came from?

19          A.     I don't.

20          Q.     Okay.  You say in Paragraph 5, in the last  
21 sentence, "For example, I now understand how the  
22 market effect of a proposed use impacts the fair use  
23 analysis."

24                     Do you see that?

25          A.     Uh-huh.

1 Q. Can you explain what you meant by that.

2 A. Uh-huh. Let me read the whole paragraph  
3 to make sure I understand the context.

4 I think what I understand with respect to  
5 the market effect of a proposed use is that when one  
6 assigns a reading, one should consider -- I should  
7 consider whether it would have an adverse impact on  
8 the sales of the book.

9 Q. Okay. But when you completed this  
10 checklist, Kruger TX-2, you concluded that your  
11 assignment of this chapter would stimulate the market  
12 for the work; is that correct?

13 A. That's my analysis.

14 Q. Okay. You mentioned that you believe that  
15 you spoke with -- is it Kerry Heywood --

16 A. Uh-huh.

17 Q. -- about copyright?

18 A. Uh-huh. Uh-huh.

19 MS. MOFFITT: Make sure you use verbal  
20 responses.

21 THE WITNESS: Oh. Yes.

22 Q. (By Mr. Bloom) Okay. And did she ever --  
23 Strike that.

24 In your discussion about copyright with  
25 Kerry, did you ever discuss the concept of

1       transformativeness, if you recall?

2           A.       Are you referring to the conversations  
3       that Kerry and I had in the context of EPY 9000?

4           Q.       Well, let's start with that.

5           A.       I don't recall transformative being  
6       singled out as a -- a point of focus in that  
7       discussion.

8           Q.       Okay. And did you have discussions about  
9       copyright with her outside of her presentation to  
10      that class?

11           MS. MOFFITT: Can you repeat the question.  
12      I'm sorry. Or read it back for me.

13           (Whereupon, the record was read by the  
14      reporter as requested.)

15           MS. MOFFITT: I'm going to object to form.  
16      But you can answer.

17           THE WITNESS: I don't have any direct  
18      recollection of conversations; but I am pretty  
19      sure I must have, because people talk about  
20      copyright quite a lot at Georgia State.

21           Q.       (By Mr. Bloom) Okay. And you -- Do you  
22      recall ever discussing the concept of transformative  
23      use with Kerry?

24           A.       No.

25           Q.       Okay. And do you ever recall discussing

1 the concept of market harm with Kerry in connection  
2 with fair use analysis?

3 MS. MOFFITT: Object to form.

4 THE WITNESS: My memory is not detailed  
5 about the specific elements --

6 Q. (By Mr. Bloom) Okay.

7 A. -- that we discussed.

8 Q. Okay. Would your ability to -- Strike  
9 that.

10 Would your ability to teach EPY 8220 in  
11 the fall of 2009 have been impaired if you had not  
12 been able to use this, this chapter from  
13 "Understanding trauma"?

14 MS. MOFFITT: Object to form. The  
15 question's vague.

16 THE WITNESS: What do you mean by  
17 impaired?

18 Q. (By Mr. Bloom) Okay. Would -- Would you  
19 have been prevented from teaching the class the way  
20 you wanted to teach it?

21 MS. MOFFITT: Same objection.

22 THE WITNESS: I chose the work because I  
23 wanted the class to discuss its unique  
24 contribution to the topic, so yes.

25 Q. (By Mr. Bloom) Okay. Just directing your

1 attention back to your declaration to Paragraph 7 --

2 A. Uh-huh.

3 Q. -- you say in the first sentence, "With  
4 regard to the book "Awakening Children's Minds", " if  
5 I were no longer permitted to place any excerpt from  
6 this book on eReserves, I would replace the reading  
7 assignment with something else rather than require  
8 the students to buy the book or license the excerpt."

9 Do you see that?

10 A. I do.

11 Q. Okay. Do you have an understanding of  
12 what it would have -- what it costs to purchase that  
13 book?

14 A. I have a understanding of what books of  
15 its kind cost generally.

16 Q. Okay. And how much is that?

17 A. I would estimate \$60.

18 Q. Okay. And I know I may have asked that  
19 before. But do you have an understanding of what it  
20 costs to license the excerpt?

21 A. Of a single chapter? I imagine it would  
22 be --

23 I -- I don't have --

24 MS. MOFFITT: Object to the form.

25 THE WITNESS: -- I don't have a --

1           I can speculate. If you would like me to  
2 speculate, I can speculate.

3           Q.     (By Mr. Bloom) No. I don't want you to  
4 speculate.

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

6           Q.     Okay. Do you know approximately?

7           MS. MOFFITT: Object to form.

8           THE WITNESS: I don't know. I can guess.

9           Q.     (By Mr. Bloom) Okay. I don't want you to  
10 guess. I don't think Natasha wants you to guess  
11 either.

12           MR. BLOOM: Okay. Go off the record for a  
13 minute.

14           THE VIDEOGRAPHER: 5:14 p.m. Off the  
15 record.

16           (Discussion ensued off the record.)

17           THE VIDEOGRAPHER: 5:15 p.m. Back on the  
18 record.

19           Q.     (By Mr. Bloom) Dr. Kruger, do you --  
20 Have you ever used uLearn?

21           A.     ULearn is automatically assigned to any  
22 course that is offered at Georgia State University,  
23 so I -- it -- that page for a -- A uLearn page for a  
24 course exists whether I want it to or not.

25           I have not used it, did not use it until

1 January of 2011 with a few exceptions of putting  
2 sign-up sheets on-line, that kind of thing.

3 MR. BLOOM: Okay. I have one more  
4 question, but I forgot what it was.

5 Okay. Off the record.

6 THE VIDEOGRAPHER: 5:16 p.m. Off the  
7 record.

8 (Discussion ensued off the record.)

9 THE VIDEOGRAPHER: 5:17 p.m. Back on the  
10 record.

11 MR. BLOOM: No further questions.

12 MS. MOFFITT: I just had a few follow-up  
13 questions.

14 REDIRECT EXAMINATION

15 BY MS. MOFFITT:

16 Q. Dr. Kruger, when -- I believe Mr. Bloom  
17 was asking you some questions about your re-creation  
18 of the checklists that we've talked about today,  
19 Kruger TX-2, Kruger TX-4, and Kruger TX-5; and Mr.  
20 Bloom asked you, I believe, whether you were certain  
21 whether you completed the checklists in the same way  
22 as you did back in 2009.

23 Do you recall that question and your  
24 testimony?

25 A. I believe he asked me if they were -- if I

1 could confirm that they were identical.

2 Q. Okay. And do you recall what your  
3 response was to that question?

4 A. I cannot confirm that they are identical,  
5 because I do not have the original in front of me.

6 Q. Sitting here today, with respect to Kruger  
7 TX-2 --

8 A. Uh-huh.

9 Q. -- do you have any reason to believe  
10 sitting here today that you did not complete the  
11 re-created version of the checklist for  
12 "Understanding trauma" in the same way that you  
13 completed it in the fall of 2009 when you completed  
14 the original checklist?

15 A. I have no reason to believe that I did  
16 not. In other words, I fully believe I re-created it  
17 to the very best of my ability.

18 Q. And with respect to Kruger TX-4, do you  
19 have any reason to believe that you did not re-create  
20 it in the same way that it was created and completed  
21 when you created the original checklists in the  
22 summer of 2009 timeframe?

23 A. I have no reason to believe that I did  
24 not. I did it to the best of my ability.

25 Q. And, again, with respect to Kruger TX-5,

1 do you have any reason to believe with respect to  
2 this particular checklist that when you re-created  
3 it, that you -- Let me rephrase the question.

4 With respect to Kruger TX-5, do you have  
5 any reason to believe that the re-created version of  
6 the checklist is --

7 Let me try again. With respect to Kruger  
8 TX-5, which is the checklist for "Awakening  
9 Children's Minds" that you recreated for the fall of  
10 2009, do you have any reason to believe that you did  
11 not complete this checklist in the same way that you  
12 completed it in the fall 2009 timeframe?

13 A. I have no reason to believe that.

14 Q. Okay. We were -- Mr. Bloom was asking  
15 you some questions about your syllabus for EPY 8220,  
16 which is Kruger TX-1 -- P -- No. TX --

17 Is it TX-1? Did you --

18 A. Oh, wait.

19 MR. BLOOM: Which? Which year --

20 THE WITNESS: Yeah.

21 MR. BLOOM: -- are you referring to?

22 THE WITNESS: Which year?

23 MS. MOFFITT: Ah. Okay. Thank you. I'd  
24 like the 2009 version.

25 MR. BLOOM: Fall of 2009 was TX-1.

1 Q. (By Ms. Moffitt) Yeah. So Kruger TX-1.  
2 I believe Mr. Bloom was asking you some questions  
3 about Kruger TX-1, which is your syllabus for the EPY  
4 8220; and he asked you to indicate how many readings  
5 of -- that were listed in the syllabus were required  
6 readings.

7 Do you remember that?

8 A. Uh-huh.

9 Q. And you counted the number of readings you  
10 believe to be required readings in the --

11 A. Uh-huh.

12 Q. -- syllabus.

13 Do you recall that?

14 A. Yes, yes.

15 Q. I believe you testified that the vast  
16 majority of the readings that were assigned in  
17 collection -- in connection with this EPY 8220  
18 course, either you or Georgia State University owned  
19 a subscription for?

20 A. That's correct.

21 Q. And what do you mean by that?

22 What did you mean by that, by that  
23 testimony when you said you believe you and Georgia  
24 State owned a subscription for those works?

25 A. The journals that are listed in the list

1 of readings, "Child Development," "Developmental  
2 Psychology," for example, the majority of the  
3 articles come from "Child Development" or  
4 "Developmental Psychology."

5 I have a personal subscription to those  
6 journals, and the university has a subscription or a  
7 license for those journals. Those articles are  
8 available to all students enrolled at Georgia State  
9 University.

10 Q. And so those licenses -- Is it your  
11 understanding that that subscription would permit  
12 your students to access those readings in connection  
13 with your course, those particular journal articles  
14 for which you have -- the university has a  
15 subscription?

16 A. I still complete the fair checklist --  
17 fair use checklist for each item, including the ones  
18 licensed by the university and for which I have a  
19 subscription.

20 However, I would -- The students would  
21 have access to these articles even if they weren't on  
22 Ereserves. They have free access to those articles  
23 through the GALILEO database.

24 Q. Which provides access to the journal  
25 articles for which the university has a

1 subscription --

2 A. Yes, ma'am.

3 Q. -- correct?

4 Looking back at your checklists that we  
5 discussed earlier, starting with Kruger TX-2, looking  
6 at Factor 1, Mr. Bloom asked you some questions about  
7 the subfactor listed here as nontransformative.

8 A. Uh-huh.

9 Q. Had you selected nontransformative on this  
10 particular track -- checklist, Kruger TX-2, for the  
11 excerpt you used from "Understanding trauma," how  
12 would that have changed your analysis with respect to  
13 whether or not Factor 1 weighs in favor of fair use?

14 A. Had I selected nontransformative, I would  
15 still argue or deduce that the Factor 1 weighs in  
16 favor of fair use because there are so many elements  
17 that are in favor, selected in favor.

18 Q. And would your -- Even if you had  
19 selected nontransformative with respect to Factor 1  
20 for Kruger TX-2, that checklist --

21 A. Uh-huh.

22 Q. -- would it have changed your overall  
23 conclusion that your use of this particular excerpt  
24 was a fair use?

25 A. No. It would not.

1 Q. Turning to Kruger TX-4, which is the  
2 checklist for the excerpt used from "Awakening  
3 Children's Minds", Chapter 6 --

4 A. Uh-huh.

5 Q. -- had you selected nontransformative  
6 under Factor 1, how would that have changed your  
7 analysis with respect to whether Factor 1 weighed in  
8 favor of fair use?

9 MR. BLOOM: Object to the form.

10 THE WITNESS: I would still conclude that  
11 the checklist and the elements in Factor 1  
12 weigh -- weigh in favor of fair use.

13 Q. (By Ms. Moffitt) And had you selected  
14 nontransformative as a subfactor for Factor 1 for  
15 this particular excerpt, would that have changed at  
16 all your overall conclusion that your use of Chapter  
17 6 for this particular course was a fair use?

18 A. It would not.

19 Q. With respect to Kruger TX-5, Mr. Bloom  
20 asked you some questions again about -- Well, let me  
21 start over.

22 With respect to the Kruger TX-5, had you  
23 selected nontransformative under Factor 1 for your  
24 use of Chapter 6 from "Awakening Children's Minds",  
25 how would that have changed your analysis with

1 respect to Factor 1 and whether or not that factor  
2 weighs in favor of a fair use?

3 MR. BLOOM: I object to form.

4 THE WITNESS: I would reason that the --  
5 it is unchanged, and it still weighs in favor of  
6 fair use.

7 Q. (By Ms. Moffitt) And if you had selected  
8 nontransformative with respect to Factor 1 for this  
9 particular work, how would that have changed, if at  
10 all, your analysis or your conclusion with respect to  
11 your use of this work being a fair use?

12 A. It would not change my overall conclusion.

13 Q. And your conclusion being?

14 A. It is fair use.

15 Q. I believe Mr. Bloom asked you whether  
16 you -- With respect to use is necessary to achieve  
17 your intended educational purpose, which is a  
18 subfactor under Factor 1 on each of these  
19 checklists --

20 A. Uh-huh.

21 Q. -- whether you typically, commonly,  
22 always -- I'm not exactly sure what the exact  
23 question was -- select this particular factor for the  
24 works that you assign to your course.

25 Do you remember generally that -- those --

1 those -- that testimony?

2 A. Generally.

3 Q. Okay. Let me ask you. I mean, is it  
4 your --

5 Do you believe when you fill out these  
6 checklists, is it your recollection that use is  
7 necessary to achieve your intended educational  
8 purpose is a factor that you would typically select  
9 for the works that you assign in your class?

10 MR. BLOOM: Object to form.

11 THE WITNESS: I -- I only assign works  
12 that are intended toward my educational purpose.

13 Q. (By Ms. Moffitt) Okay. And therefore, is  
14 it the case that you believe with respect to each of  
15 the works that you assign your students in your  
16 courses that -- that those works are necessary to  
17 achieve your intended educational purpose?

18 A. Yes.

19 MS. MOFFITT: Those are all the questions  
20 I have.

21 MR. BLOOM: Okay. I just have one other  
22 question.

23 RE-CROSS-EXAMINATION

24 BY MR. BLOOM:

25 Q. Dr. Kruger, looking at TX-5 --

1           A.     Uh-huh.

2           Q.     -- you -- you testified that you would  
3 check nontransformative if you had to do this form  
4 again, correct?

5           A.     That's correct.

6           Q.     Okay.  And I asked you earlier about  
7 the -- the first two boxes on the left-hand side and  
8 the last one on the left-hand side.  Do you recall  
9 that?

10          A.     Yes.

11          Q.     Okay.  Let's assume that you had checked  
12 those three boxes, but not the other two, which are  
13 research or scholarship and personal study.

14          A.     Uh-huh.

15          Q.     Okay.  So you have those three checked,  
16 and you would -- and -- and nontransformative  
17 checked --

18          A.     Uh-huh.

19          Q.     -- on the right-hand side.

20          A.     Uh-huh.

21          Q.     In that circumstance, would you conclude  
22 that the reading was -- that this factor weighed in  
23 favor of fair use?

24          A.     You're saying if the first, second, and  
25 final item on the left were checked and

1 nontransformative on the right?

2 Q. Yeah. Correct.

3 A. I would look at it and conclude that it  
4 still weighed in favor of fair use.

5 Q. Okay. And would that be the same for  
6 the -- the other checklists that we -- that we looked  
7 at, TX-4 and TX-2?

8 A. Yes.

9 MR. BLOOM: Okay. I have no further  
10 questions.

11 MS. MOFFITT: I don't either.

12 We're going to -- going to read and sign.

13 MR. BLOOM: Thank you, Doctor.

14 THE VIDEOGRAPHER: This concludes today's  
15 deposition. April 22nd, 2011. 5:29 p.m. We're  
16 off the record.

17 (Whereupon, the deposition was concluded  
18 at 5:29 p.m.)

19 (Pursuant to Rule 30(e) of the Federal  
20 Rules of Civil Procedure and/or O.C.G.A.  
21 9-11-30(e), signature of the witness has been  
22 reserved.)

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C E R T I F I C A T E

STATE OF GEORGIA:  
COUNTY OF FULTON:

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the questions and answers thereto were reduced to typewriting under my direction; that the foregoing pages 1 through # represent a true, complete, and correct transcript of the evidence given upon said hearing, and I further certify that I am not of kin or counsel to the parties in 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 27th day of April, 2011.

S. JULIE FRIEDMAN, CCR B-1476

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3 Pursuant to Article 10.B. of the Rules and  
4 Regulations of the Board of Court Reporting of the  
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10 reporter, the court reporter's employer, or the  
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DEPOSITION ERRATA SHEET

Our Assignment No. 223629

Case Caption: CAMBRIDGE UNIVERSITY PRESS, OXFORD  
UNIVERSITY PRESS, INC., and SAGE  
PUBLICATIONS, INC. vs. MARK P. BECKER,  
in his official capacity as Georgia  
State University President, et al.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have  
read the entire transcript of my deposition taken in  
the above-captioned matter or the same has been read  
to me and the same is true and accurate, save and  
except for changes and/or corrections, if any, as  
indicated by me on the DEPOSITION ERRATA SHEET  
hereof, with the understanding that I offer these  
changes as if still under oath.

Signed on the \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_.

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ANN CALE KRUGER, Ph.D.

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ANN CALE KRUGER, Ph.D.

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