

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

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

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Videotaped deposition of JOHN M. MURPHY, taken on behalf of the plaintiffs, pursuant to the stipulations contained herein, before Teresa Bishop, RPR, RMR, CCR No. B-307, at 1180 Peachtree Street, 16th Floor, Atlanta, Georgia, on Friday, April 22, 2011, commencing at the hour of 10:03 a.m.

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

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21 ALSO PRESENT:

22 KENNITH DRAKE, VIDEOGRAPHER

23 - - -
24
25

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

9 The date is April 22nd, 2011. We're on
10 the record at 10:03.

11 JOHN M. MURPHY,
12 having been first duly sworn, was examined and testified as
13 follows:

14 EXAMINATION

15 BY MR. BLOOM:

16 Q. Good morning, Professor Murphy. My name is
17 Jonathan Bloom. I'm with the law firm of Weil Gotshal &
18 Manges. I represent the plaintiffs in this action who
19 are, as you know, Cambridge University, Oxford
20 University Press and Sage Publications. I'll be asking
21 you some questions here this morning. We're committed
22 to not keeping you too long.

23 Have you been deposed before?

24 A. Never.

25 Q. Okay. Just give you some quick ground rules

1 which your counsel may have already gone over with you.

2 I just need you to wait until I've finished
3 with my question before you answer so Ms. Bishop can
4 transcribe our respective words accurately. I need you
5 to answer orally rather than nodding your head or saying
6 uh-huh or anything like that so again the record is
7 clear. You can take a break if you need to at any time,
8 just let me know.

9 Your counsel may object from to time to my
10 questions, but unless she instructs you not to answer,
11 you can answer the question if you understand it. If my
12 question isn't clear for any reason, just say I don't
13 understand, can you rephrase, something like that and
14 I'll be happy to rephrase the question.

15 Just some quick preliminaries. What if
16 anything did you do to prepare for the deposition?

17 A. What if anything did I do to prepare. I
18 didn't do anything. I mean, I had a preparation with
19 Katrina two days ago.

20 Q. How long did you meet for approximately?

21 A. I guess it was about two hours.

22 Q. Okay. And did you look at any documents with
23 her?

24 A. Did I look at any documents. I'm trying to
25 remember. Yes.

1 Q. Okay. Were those documents that were provided
2 to you by counsel?

3 A. That's correct.

4 Q. Okay. And were you asked to save any
5 documents in connection with this litigation at any
6 time?

7 A. I'm not sure I understand. Do you mean since
8 two days ago when I met with Katrina?

9 Q. No, just going back sort of to the beginning
10 of this litigation, were you at any time asked by
11 counsel to preserve or save documents in your possession
12 for purposes of this action?

13 A. To preserve or save, no, no one asked me to do
14 that.

15 Q. All right. Did you at some point provide
16 counsel with documents in your possession in connection
17 with this litigation?

18 A. I'm not sure because what does the word
19 counsel refer to? Does it refer to Katrina?

20 Q. Well, it could refer to -- I meant it to refer
21 to any lawyers at King & Spalding or the legal affairs
22 office at Georgia State University.

23 A. Yeah, yes. Yes.

24 Q. So you did provide some documents --

25 A. Yes.

1 Q. -- to counsel. Was it King & Spalding
2 counsel?

3 A. I believe it was the university office.

4 Q. Okay. And those included fair use checklists,
5 is that correct?

6 A. Yes.

7 Q. And some other documents?

8 A. Fair use checklist. They didn't specifically
9 request it, but I provided them with my course syllabus,
10 also.

11 Q. Okay. We'll get to that.

12 Let me show you what I've marked as Murphy
13 Plaintiff's Exhibit 1, which is a document that says on
14 the first page John M. Murphy, curriculum vitae.

15 I ask you just to flip through it and tell me
16 if in fact this is your curriculum vitae?

17 A. Yes, uh-huh.

18 Q. Does it appear to be accurate? And I don't
19 need you --

20 A. Yeah, I'm looking at the first page and it
21 does appear to be accurate, yes.

22 Q. There's nothing missing that you would care to
23 add for the record as far as you can tell, is that
24 correct?

25 A. It looks right.

1 Q. Okay. So you are a full professor, is that
2 correct?

3 A. Yes.

4 Q. Meaning you have tenure?

5 A. That's correct.

6 Q. And you are in the department of applied
7 linguistics and English as a second language, is that
8 correct?

9 A. Yes.

10 Q. Can you just tell me briefly what that field
11 entails?

12 A. So applied linguistics and English as a second
13 language, we do language teacher preparation so to
14 teach -- primarily to teach English to speakers of other
15 languages, but it could be to teach other languages to
16 folks that who don't speak those languages either.

17 It's the application -- we prepare language
18 teachers, so it's the application of knowledge about
19 language teaching in general.

20 Q. Does it cover specific languages?

21 A. The primary focus of the department is to
22 teach English to speakers of other languages. But we
23 often get folks in our courses who are going to be
24 French teachers or Chinese teachers or Korean teachers.

25 Q. Okay. I guess that was a bad question.

1 Does it focus on teaching students whose
2 native language is a particular group of languages?

3 A. No. It's anyone whose native language is not
4 English. Although I do the teacher preparation part, so
5 it's not so much -- I'm not working with language
6 learners primarily, I'm working with people who are
7 going to be language teachers.

8 Q. And when did you begin teaching at Georgia
9 State University?

10 A. The fall of 1988.

11 Q. Okay. And do I take it from the first page
12 here that you became an assistant professor at Georgia
13 State University in 1998?

14 A. No. Well, I'm not looking at the page right
15 now, but my appointment in 1988 was as an assistant
16 professor.

17 Q. I see. The reason I ask it says under
18 professional credentials, it says assistant professor
19 1998 to 1994, Georgia State University.

20 A. That is incorrect.

21 Q. So that 1998 should be 1988?

22 A. That should be 1988, yes.

23 Q. Got you. Okay.

24 And you've taught in the same department from
25 1988 until the present, is that correct?

1 A. Yes. Yes.

2 Q. Okay. Just looking at some of the credentials
3 that you have included on your CV here, I notice on page
4 2 under Roman IV you served on some search committees
5 for positions within the department, is that correct?

6 A. Yes.

7 Q. Okay. And can you just sort of describe what
8 the search committee process entails?

9 A. Yes. Search committee, so the department is
10 able to negotiate with the dean that there's a job
11 opening aligned, and we advertise nationally,
12 internationally. Typically it's for a tenured track
13 position. In fact I just chaired one recently.

14 And advertisements go out. Applications come
15 in. Advertisements have to be -- appear in particular
16 forms, like the Chronicles of Higher Education,
17 different list serves for applied linguistics. And
18 there's affirmative action type requirements we have to
19 meet.

20 Applications come in. There's typically a
21 committee that's composed of three or four people with
22 one person designated as chair. The committee and the
23 chair is formed at the discretion of the department
24 chair. So then as a committee we review the files after
25 the deadline has come in for when they're supposed to

1 arrive. And we look through all the files, try to
2 figure out who are the top candidates. We make a report
3 to the whole faculty, the tenured track faculty, which
4 right now I believe it's nine people. And the search
5 committee hones it down to about six people.

6 We start to do telephone interviews. So we
7 telephone the candidates, we telephone the people that
8 they're using as a references or other people who might
9 know about the qualifications of the candidates. We get
10 that pooled down to about four people typically. Then
11 there's on-campus interviews.

12 They come, individually they visit for two
13 days typically. They meet individually with the chair
14 person, with the search committee, with the whole
15 graduate faculty. They'll meet with lecturers who are
16 nontenured track in the department. They meet with grad
17 students. They do a job talk, which is typically a
18 research presentation of whatever their current research
19 is. And there's -- we take them out to dinner twice, so
20 there's a couple informal settings.

21 So we repeat that process with four different
22 people. There's exit interviews with the assistant dean
23 and the dean of the college. And eventually after all
24 people have visited, we've had written feedback by the
25 different constituencies as who they would prefer as a

1 candidate. And then the search committee deliberates.
2 We consult with the whole faculty and eventually we make
3 a nonbinding recommendation to the chair.

4 It's ultimately the chair's decision as far as
5 who gets the hire.

6 Q. Just take as an example, you list search
7 committee for three tenure track assistant professor
8 positions in 2002. Do you see that?

9 A. Uh-huh.

10 Q. Okay. And that resulted in the hire of one
11 position, according to this, correct?

12 A. Search committee, three tenure track assistant
13 professor positions, resulted in the hiring of one
14 position.

15 Now, I don't remember the specifics of 2002.

16 Q. Well, let me ask a more specific question.
17 Well, strike that. It's actually a more general
18 question.

19 Can you sort of list for me what the criteria
20 are that you apply in evaluating candidates for
21 assistant professor positions including in this
22 instance?

23 A. Could you repeat that question?

24 Q. Yeah. Can you just indicate for me what are
25 the criteria by which a search committee evaluates

1 candidates for an assistant professor position?

2 A. I can. The criteria would be different for
3 different searches because in the advertisement that
4 goes out we're looking for candidates who are qualified
5 in different ways at different points in time.

6 So for example, we might advertise for someone
7 who's a specialist in a particular area like corpus
8 linguistics or second language acquisition, so then when
9 people apply, out of say there's 50 people that apply,
10 many of them will not have the specified area of
11 specialization, so that would be an example of not
12 meeting the criteria.

13 Another example of criteria would be they
14 would have to have a doctorate in hand or they're about
15 to finish the doctorate because they'd have to have that
16 degree in place before they began the position.

17 So sometimes we'll interview folks who are
18 almost completed with their dissertation, almost have
19 the doctorate but not quite yet. And then the
20 invitation to accept the position would be contingent
21 upon completing the dissertation.

22 So criteria, we look at teaching
23 effectiveness -- it's going to be tied to the
24 advertisement that goes out for the position. Teaching
25 effectiveness, compatibility as far as their research

1 and areas of specialization with the advertised
2 position.

3 Q. How about publications?

4 A. Okay. So in a job search having publications
5 is an attractive quality for a candidate. The
6 advertisement for the position might say something like
7 has a strong record, but it won't specify X, Y or Z
8 number of publications. So I don't think we would say
9 the number of publications is a requirement to get the
10 appointment. The degree would be a requirement.

11 Q. Okay. I take it in this particular case only
12 one candidate met the criteria, is that a fair
13 assumption?

14 A. Again, I don't remember what happened in 2002.

15 Q. Okay. On page 4 under committee memberships,
16 it indicates that you were on the promotion and tenure
17 committee for the college of arts and sciences
18 commercial and behavioral sciences area 2005, 2006. Do
19 you see that?

20 A. Could you just help me, where is it?

21 Q. Toward the bottom under committee memberships,
22 the first entry under committee memberships.

23 A. Yes, yes.

24 Q. So is this a committee that evaluated
25 candidates for tenure?

1 A. Yes.

2 Q. Okay. And did publications play a role in the
3 evaluation of candidates for tenure?

4 A. Definitely.

5 Q. And can you just tell me what role
6 publications play in that evaluation process?

7 A. Okay. So for -- that's a committee that
8 reviews candidates for tenure, promotion to associate
9 professor, if they're already associate professor and
10 are already tenured for promotion for full professor.
11 So the individual case of the candidate differs
12 depending on what their current rank is.

13 In the committee we're looking at the whole
14 profile of the candidate. So the categories are
15 research, teaching and service. We're looking at all
16 three.

17 Part of the process is there are letters that
18 come in from external reviewers, so that committee is
19 looking at letters that have come in from external
20 reviewers which are assessing the quality of the
21 candidate's profile. There's a letter from a
22 departmental committee. There's a letter from the
23 department chair. So by the time this college wide
24 committee is looking at a candidate's profile, they have
25 these various sources of information.

1 So along with that, included in that is their
2 publications record, their record in teaching and their
3 record in service.

4 And I guess I need to ask you to specify if
5 you need more information.

6 Q. Okay. That's fine. But is it fair to say
7 that the calibre of publications is an important part of
8 the evaluation process?

9 A. It is an important part, yes.

10 Q. Okay. And does it make a difference in your
11 evaluation of publications in connection with the tenure
12 evaluation process whether they are peer reviewed or
13 not?

14 MS. QUICKER: Objection to form.

15 THE WITNESS: I guess I need you to
16 repeat that or clarify that.

17 BY MR. BLOOM:

18 Q. Okay. In evaluating publications in
19 connection with the tenure review process, does it make
20 a difference to the tenure review committee whether the
21 publication -- a publication is peer reviewed or not?

22 A. Does it make a difference. We look at the
23 nature and the quality of publications. We pay
24 attention to if it's peer reviewed or if it's not peer
25 reviewed. So we are -- that's a characteristic of a

1 publication that we do take into consideration, yes.

2 Q. Okay. And what is the -- strike that.

3 Why does it matter if a publication is peer
4 reviewed in connection with a tenure review process?

5 A. Could you say that again?

6 Q. Yeah. You testified that you note whether a
7 publication is peer reviewed or not, correct?

8 A. Yes.

9 Q. And the question is really why you would take
10 note of that fact, that a publication is or is not peer
11 reviewed?

12 A. So peer review would indicate that specialists
13 not connected with the university -- I'm trying to think
14 of a good way to say this.

15 It's an indicator of the quality of the
16 publications in conjunction with the journal,
17 characteristics of the journal. So it's an indicator of
18 the quality of the publications, the quality of the
19 candidate's published work.

20 Q. Okay. Have you yourself served as a peer
21 reviewer?

22 A. So the phrase peer reviewer can refer to a
23 number of different entities.

24 Q. Well, let me ask you a more specific
25 question --

1 A. Okay.

2 Q. -- with reference to page 6 of the document.

3 A. Okay.

4 Q. I see about a third of the way down the page
5 there's a section where the title, referee for book
6 publishers?

7 A. Uh-huh.

8 Q. And the second item there says two book
9 prospectuses for Cambridge University Press. You see
10 that?

11 A. Yes.

12 Q. And it says 1999?

13 A. Uh-huh.

14 Q. Do you recall this?

15 A. Yes. Let me amend that, I recall one clearly.
16 I believe that there was two, but I only recall one.

17 Q. Okay. And what does it mean to be a referee
18 for a book publisher?

19 A. So a publisher might telephone me or e-mail me
20 or contact me somehow and say, look, we have a
21 prospectus for a book -- actually this is different from
22 what you were asking me about earlier, the tenure review
23 type things, because it's before publication, so the
24 piece is coming.

25 And they contact me and say we have a

1 prospectus for a book. It's maybe 25 pages long, the
2 book is not completed yet. What we'd like you to do is
3 take a look at the prospectus and provide your
4 assessment as to whether we should continue with the
5 project.

6 And I said I remember one because I do
7 remember one that was through -- in that year. And then
8 I'll provide a written assessment of, you know, what the
9 quality of the prospectus is.

10 Q. And do you recall specifically that that one
11 was in connection with Cambridge University Press?

12 A. I do.

13 Q. Okay. Do you remember who you dealt with at
14 Cambridge University Press?

15 A. I do not.

16 Q. Okay. But you provided them a written
17 evaluation, is that correct?

18 A. I did.

19 Q. Okay. Do you recall whether you were
20 compensated or not for providing that service?

21 A. I do not remember.

22 Q. Okay. Do you have any recollection of whether
23 in that case the prospectus ultimately became a
24 published book?

25 A. I don't know. I didn't follow that case. I

1 mean, I didn't follow it through.

2 Q. Then on page 7 there's a section titled
3 refereed journal articles. You see that? And are those
4 articles that you've authored that have been evaluated
5 by peers in the field?

6 A. I'm sorry, I looked at the page for a second
7 and then I blanked on what your question was.

8 Q. The question is whether refereed journal
9 articles, whether the articles listed under that heading
10 are articles that you have authored or co-authored that
11 have been evaluated by other experts in the field?

12 A. I don't like the word expert in that context.
13 I prefer the word specialist. But yes.

14 Q. Do you have any -- have you ever had any
15 academic training in intellectual property law?

16 A. No.

17 Q. Okay. That includes copyright law I assume?

18 A. Well, okay. The word training --

19 Q. Let's say, did you ever take a university
20 class on copyright law?

21 A. No, never.

22 Q. Let's -- are you familiar with the copyright
23 policy at GSU?

24 A. I guess I need help with the word familiar.

25 Q. Okay. Did there come a time when you became

1 aware that there is a copyright policy at Georgia State
2 University?

3 MS. QUICKER: Objection. Form.

4 THE WITNESS: Like I guess I need you to
5 repeat that question.

6 BY MR. BLOOM:

7 Q. Let me show you a document I've marked as
8 Plaintiff's Exhibit 2. This is a document that is
9 titled policy on the use of copyrighted works in
10 education and research.

11 My question is whether you've ever seen this
12 document before?

13 A. I have seen what before me looks like pages 7
14 and 8. The rest of it I don't remember.

15 Q. Okay. So I take it you do not currently
16 possess a physical copy of this entire document, is that
17 right?

18 MS. QUICKER: Objection to form.

19 THE WITNESS: In my files in my office I
20 haven't printed out and I don't have in any
21 of those files a hard copy of this
22 document.

23 BY MR. BLOOM:

24 Q. And do you have any recollection of ever
25 reading this document other than -- strike that.

1 Do you have a recollection of ever reading
2 this document in its entirety?

3 A. In its entirety, I don't remember.

4 Q. Okay. You said you recall pages 7 and 8, is
5 that correct?

6 A. Yes.

7 Q. Do you recall when you first saw those pages?

8 A. So I received an e-mail communication from the
9 library, from EReserves, when I requested material put
10 on EReserves, so this would have been sent to me
11 electronically as an attachment, and that's when I saw
12 it.

13 Q. Do you remember when that was?

14 A. I don't remember when that was.

15 Q. Do you remember what year it was?

16 A. Could you ask that again?

17 Q. Do you remember in what year you first saw
18 this document?

19 A. Okay, so I heard the word --

20 MS. QUICKER: Objection to form.

21 THE WITNESS: I heard the word first.

22 I don't remember what year was the first
23 time.

24 BY MR. BLOOM:

25 Q. Okay. But do you have an understanding that

1 these pages are part of a policy at the University of
2 Georgia?

3 A. Yes.

4 Q. And is that a policy that you understand
5 you're expected to follow within the scope of your
6 employment at GSU?

7 A. Yes.

8 Q. Do you have an understanding as to whether
9 this checklist -- whether there was a different policy
10 prior to the policy that's reflected on this checklist?

11 MS. QUICKER: Objection to form.

12 THE WITNESS: You asked do you have an
13 understanding. Could you just say that
14 again?

15 BY MR. BLOOM:

16 Q. Was there a different policy that you followed
17 before this one?

18 A. There was a time when the procedures that
19 EReserves follows changed. That's what I remember.

20 Q. Okay. Do you remember, can you identify any
21 specific respects in which it changed?

22 A. From my perspective it changed from I had to
23 do reserves in hard copy at the reserve desk in the
24 library, and then the change was there was now a
25 possibility to do things electronically on reserve.

1 Q. And did you change your practices in any way
2 in response to that change in policy?

3 A. Yeah. I took advantage of the availability of
4 EReserves.

5 Q. And why did you do so?

6 A. That might be a long response. But I think
7 the primary reason I did so was that over the years I've
8 noticed that graduate students who are in a program have
9 a higher expectation for accessibility to materials and
10 they're also very used to using their laptops and
11 working at home and not physically going over to the
12 library. And that expectation on the part of grad
13 students is manifested in a lot of different ways.

14 So as a faculty member there's more and more
15 expectation that we provide materials through them
16 that's more easily acceptable. And EReserves would be
17 an example of that. So that would be my primary
18 motivation.

19 Q. Were you ever encouraged by anyone in the
20 administration at GSU to use EReserves?

21 A. Encouraged, no.

22 Q. Was it ever recommended to you that using
23 EReserves would be a good idea?

24 A. No.

25 Q. And in your experience do some of your

1 students who access readings on EReserves print out
2 copies to bring to class?

3 MS. QUICKER: Objection, form. Calls
4 for speculation.

5 MR. BLOOM: No, it doesn't.

6 THE WITNESS: Could you repeat the
7 question?

8 BY MR. BLOOM:

9 Q. Yes. In your experience, have any of your
10 students who's accessed any of your readings for any of
11 your classes on EReserves printed them out and brought
12 them to class?

13 MS. QUICKER: Objection, form.

14 THE WITNESS: Yes, that happens.

15 BY MR. BLOOM:

16 Q. Okay. Is that something that you encourage?

17 A. Okay. Ask the question again because I can
18 answer but I need to hear the question again.

19 Q. Have you ever recommended to students that
20 they print out readings from EReserves and bring them --
21 and bring physical copies to class?

22 MS. QUICKER: Objection. Compound.

23 THE WITNESS: I need to say something to
24 help me clarify.

25 BY MR. BLOOM:

1 Q. Sure.

2 A. Because I'll put on EReserves things that
3 include like just course handouts that I've created
4 myself, and course handouts that I've created myself I
5 will ask them to bring them to class.

6 As far as the content readings that they're
7 doing that are created by others, those are presented
8 as -- let me think of that -- as resources for students.
9 Some may be required readings and some may be
10 supplemental readings for a course, so just there's
11 different categories.

12 The only things I would require students bring
13 to class would be things that are more along the nature
14 of course handouts.

15 Q. Okay. And what do you mean specifically by
16 course handout?

17 A. A course handout might be I want to set up an
18 activity. In order to set up the activity in the old
19 days we run something off and it will give like
20 discussion questions or words to be defined or grouping
21 patterns, directions for the activity, and I'd hand that
22 out in class and everybody look at it and we'd get into
23 groups and do what they're going to do. But nowadays, I
24 try to get that stuff available so they bring that to
25 class and I don't have to run off the copies myself.

1 Q. So it's not a journal article or --

2 A. No.

3 Q. And it's not a book chapter?

4 A. No.

5 Q. Let me direct your attention to page 15 of the
6 policy. You see toward the bottom there's two bullets
7 and the top one says Copyright Clearance Center. Do you
8 see that?

9 A. Yes.

10 Q. Have you ever heard of the Copyright Clearance
11 Center?

12 A. No.

13 Q. Did you ever attend at GSU any kind of a
14 training session in connection with this copyright
15 policy?

16 A. No.

17 Q. Okay. Do you recall ever being informed that
18 any kind of training session was available to you?

19 A. I don't recall that.

20 Q. Okay. Do you recall ever being instructed,
21 you know, that you were required to follow this policy?

22 A. No.

23 Q. And do you recall ever being made aware of any
24 resources at GSU that you might utilize to assist you in
25 complying with this policy?

1 A. I'm not clear on made aware. If you could
2 repeat the question.

3 Q. Are you aware of any resources at GSU that you
4 can utilize to help you comply with this policy?

5 A. I'm aware that such resources probably exist.

6 Q. Can you identify any such resources
7 specifically?

8 A. No.

9 Q. And if, hypothetical question, if the head
10 librarian were to inform you that a reading that you had
11 indicated you wanted to post on EReserves would not
12 comply with this policy, would you -- and asked you not
13 to place it on EReserves, would you comply with that
14 directive?

15 MS. QUICKER: Objection. Foundation,
16 form. Compound.

17 MR. BLOOM: It's a hypothetical
18 question.

19 MS. QUICKER: Objection. Same
20 objection.

21 THE WITNESS: This is a question I have
22 to answer?

23 BY MR. BLOOM:

24 Q. Yes.

25 A. Okay. Could you ask the question again?

1 Q. Yeah. Hypothetically, if the head librarian
2 at GSU told you that a reading that you proposed to
3 place on EReserves was not fair use and told you that it
4 could not be placed on EReserves, would you comply with
5 that directive?

6 A. Yes, I would.

7 MS. QUICKER: Objection. Objection,
8 foundation and form.

9 MR. BLOOM: Noted. Okay.

10 I'm sorry, can you read back the
11 answer?

12 MS. QUICKER: And I want to reassert
13 the same objection to the question being
14 asked again.

15 (The record was read by
16 the court reporter.)

17 BY MR. BLOOM:

18 Q. And if the president of the university told
19 you the same thing, would you comply with his directive?

20 MS. QUICKER: Objection. Foundation,
21 form.

22 THE WITNESS: I'm having a hard time
23 imagining that the president of the
24 university would contact me over that,
25 but --

1 BY MR. BLOOM:

2 Q. So am I, but it's a hypothetical question.

3 MS. QUICKER: Same objection.

4 THE WITNESS: If the president of the
5 university contacted me about such a
6 matter, yes, I would comply.

7 BY MR. BLOOM:

8 Q. Okay. Same question with respect to the board
9 of regents?

10 MS. QUICKER: Objection. Speculation,
11 foundation, form.

12 THE WITNESS: If the board of regents
13 requested --

14 Play back again what the board of
15 regents in your hypothetical is asking me
16 to do?

17 BY MR. BLOOM:

18 Q. If the board of regents told you that you had
19 violated -- strike that.

20 If the board of regents told you that a
21 particular reading would constitute copyright
22 infringement and would not be fair use if it were placed
23 on EReserves and that you couldn't place it on EReserves
24 for that reason, would you comply with that directive?

25 MS. QUICKER: Objection. Foundation,

1 form.

2 THE WITNESS: Yes, I would.

3 BY MR. BLOOM:

4 Q. Same question with respect to the provost?

5 MS. QUICKER: Objection. Foundation,
6 form.

7 THE WITNESS: Yes, I would.

8 BY MR. BLOOM:

9 Q. Okay. Let me show you what I'm marking as
10 Murphy Plaintiff's Exhibit 3. And this is a document
11 entitled declaration of John M. Murphy. It's executed
12 on March 16, 2011.

13 Is this a declaration signed by you, Professor
14 Murphy?

15 A. Yes.

16 Q. And did you write this document?

17 A. That is a question that's complicated.

18 Q. Okay. Let me withdraw that question.

19 Reviewing this document as you sit here today,
20 is it -- is everything on this document accurate?

21 A. Okay. 1 is accurate. 2, yes. 3 as I sit
22 here right now, I believe that that is accurate.

23 Q. Okay.

24 A. 4, I would -- as I read it now I would only
25 qualify after the word assigned I would insert the words

1 as required readings.

2 Q. So I ultimately did not use or assign as
3 required readings, this is how you would modify it?

4 A. Yes.

5 Q. Let me just ask you a few questions, if I
6 could, about that paragraph.

7 You said I ultimately did not use or assign as
8 required readings to my students any of the materials
9 loaded on to ERes. And the materials refers to the
10 materials you've identified in paragraph 3, is that
11 correct?

12 A. Yes.

13 Q. Okay. My question is, why did you not use or
14 assign those materials?

15 A. Yeah, so in the EReserve system -- let me
16 think for a second.

17 As a faculty member you have to make decisions
18 about what's going to be placed on electronic reserve
19 further in advance of the start date for the course than
20 making final decisions on your course syllabus and how
21 the course is actually planned out and the syllabus
22 handed to students on the first day of class. So things
23 have to be placed on reserve, I don't know if it's a
24 month in advance or several weeks in advance. But I'm
25 tinkering with my course syllabus all the way up until

1 the start day for the course, even the day of the
2 course.

3 And in this particular case as I got closer to
4 the start date of the course, I decided that there were
5 four books that I wanted them to own copies of, so they
6 would be purchasing their own copies. And this is a
7 three week Maymester course that meets for 15 days in a
8 three week period. And I decided that the hard copy
9 material that they would own would suffice for the kinds
10 of micro teaching activities that we were going to do in
11 the course.

12 So the electronic material for me was
13 supplementary material to support the hard copy material
14 they were actually going to own and use in the course as
15 a basis for their micro teaching activities.

16 I think that answered the question.

17 Q. So if I understand correctly, the materials
18 identified in paragraph 3 were placed on EReserve at
19 your direction, is that correct, as far as you know?

20 A. Yes.

21 Q. And you informed your students that they were
22 not required to read them, is that correct?

23 A. That's correct.

24 Q. Okay. Do you have any knowledge one way or
25 the other whether any of your students in fact read

1 those materials?

2 A. I can answer with a yes or no or I can explain
3 my impression of how they were used?

4 Q. Well, why don't you give me a yes or no first.

5 A. Just repeat the question again, please.

6 Q. Do you know one way or the other whether any
7 of your students did read any of those materials?

8 A. I don't know.

9 Q. But it's possible?

10 A. It is possible.

11 Q. Did you -- and this was in connection with a
12 course designated AL 8480, correct?

13 A. 8480 is the classroom practices course. I
14 might have to look at it.

15 Q. That's correct.

16 A. Yes. Yes.

17 Q. And did you -- had you taught that course
18 previously?

19 A. Yes.

20 Q. Okay. Had you put these same materials on
21 EReserves previously?

22 A. I'm not sure if I should answer I don't know
23 or I don't remember. I believe I did not.

24 Q. Just show you a document I'm marking as Murphy
25 Plaintiff's Exhibit 4. This is a GoSolar report --

1 A. Uh-huh.

2 Q. -- for summer semester 2009.

3 You see the top row there identifies AL 8480,
4 you see that?

5 A. Yeah.

6 Q. And that is your course. What's the title of
7 that course?

8 A. Classroom practices in teaching English as a
9 second language or as a foreign language.

10 Q. And you see it indicates May session?

11 A. Yes.

12 Q. So this -- dates are May 11th to June 3rd.
13 You see that?

14 A. Yes.

15 Q. So you taught this course during the May
16 session, correct?

17 A. Yes.

18 Q. And it indicates that there were 20 students
19 who actually attended the class, is that correct?

20 A. That's not correct.

21 Q. I'm sorry. 10 students?

22 A. This sheet indicates that there were 10
23 students, yes.

24 Q. Does that sound correct?

25 A. Approximately 10, yes, but I cannot say

1 definitively it was 10.

2 Q. I show you a document I'm marking as Murphy
3 Plaintiff's Exhibit 5. And I'll represent to you that
4 this is a document that was derived from an EReserves
5 report for Maymester 2009 that was provided to us by the
6 defendants, and it was sorted so that it reflects the
7 readings associated with the course AL 8480, which was
8 your course.

9 A. Okay.

10 Q. And the fourth column over I'll represent to
11 you represents the number of hits on the materials
12 listed.

13 A. Okay.

14 Q. Can you just review this and tell me if this
15 appears to reflect the readings that you selected for
16 EReserves for that course?

17 A. Okay. Just a second. They include three
18 works that were required for students to purchase.

19 Q. Okay. Which three are those?

20 A. Okay. Students were required to purchase
21 Hedge, Tricia, "Writing Resources". Okay. To the best
22 of my recollection.

23 Q. Actually, before you finish your answer, let
24 me show you Murphy Plaintiff's Exhibit 6 and just in the
25 event that may help you?

1 A. Yes, so Klippel "Keep Talking", Hedge, the one
2 I just started, and the Penny, Ur "Grammar Practice
3 Activities". So yes.

4 Q. And Murphy Plaintiff's Exhibit 6 is the
5 syllabus you prepared for that course, is that correct?

6 A. Yes, I believe so.

7 Q. Okay. And so do you have this -- this appears
8 to reflect -- strike that.

9 So you testified earlier that you did not
10 require your students to read the nonrequired -- strike
11 that.

12 Other than those four texts, you testified
13 that you did not require students to read the materials
14 that were posted on EReserves?

15 A. Yes.

16 Q. And you see on this document there are some
17 hits reflected for those materials that you told
18 students they didn't have to read, correct?

19 A. That's the fourth column.

20 Q. Yes.

21 A. Yeah, I've never seen this report before,
22 but --

23 Q. I understand that.

24 A. Yes, I believe you.

25 Q. My question is, do you have any understanding

1 as to why there are hits reflected on this document?

2 MS. QUICKER: Objection. Foundation.

3 THE WITNESS: I really have no idea
4 about the definition of a hit in this case.
5 For example, I might have accessed -- I
6 could have -- one of the hits could be
7 mine. I don't know.

8 BY MR. BLOOM:

9 Q. Do you have a recollection of personally
10 accessing those materials on ERes during this semester?

11 A. I remember thinking, oh, this is a pretty cool
12 accessibility, and I very likely accessed a couple just
13 to see what it was like and see what they would look
14 like.

15 Q. And prior to placing these materials on ERes,
16 did you fill out the fair use checklist for each
17 reading?

18 A. When you said fill out, I'm not sure. I don't
19 remember.

20 Q. I'll get to that in a moment. Let me just
21 direct your attention briefly to the second page of the
22 syllabus.

23 A. Uh-huh.

24 Q. Specifically to items 3 and 4 under the
25 required text.

1 A. Okay.

2 Q. The first is a book entitled "Grammar Practice
3 Activities"?

4 A. Yes.

5 Q. Correct? And that was published by Cambridge
6 University Press, according to this, correct?

7 A. Yes.

8 Q. And then the second is a book called "Writing
9 Resource Books For Teachers", correct?

10 A. Yes.

11 Q. And it's published by Oxford University Press,
12 correct?

13 A. Yes.

14 Q. And were these texts that you required your
15 students to read in their entirety?

16 A. Yes.

17 Q. Okay.

18 A. Multiple times, multiple years.

19 Q. Do you recall how many years?

20 A. I've been using both of those books since, oh,
21 the date they first came out. I've been offering that
22 course since 1988. When the Ur text came out it was a
23 tremendous resource, and the Hedge text as well. So
24 since the first year of their publication.

25 Q. And would your ability to teach this course be

1 impaired if either of those texts were not in existence?

2 A. Impaired is difficult to say because there's a
3 wide range of such resources available in the field. It
4 would be possible to select alternative texts and teach
5 the course in very much the same way. So I'm unsure of
6 the word impaired.

7 Q. Would it be harder to teach the class the way
8 you would like to teach the class ideally if the
9 "Grammar Practice Activities" text did not exist?

10 MS. QUICKER: Objection, form.

11 THE WITNESS: I'm trying to figure out
12 if that was a yes no question. Could you
13 ask that again?

14 BY MR. BLOOM:

15 Q. Sure. Would it be harder to teach that course
16 the way you would like to teach the class if that book
17 did not exist?

18 MS. QUICKER: Objection. Form.

19 THE WITNESS: I'm not sure. I don't
20 think so because there are alternative
21 texts which I could select.

22 The nature of the course that I teach
23 is more in the nature of the interaction of
24 the classroom and what happens in the
25 classroom, and the platform from which

1 they're reading activities and implementing
2 activities could change.

3 Higher priority for me is the
4 interactive dynamic in the room, not very
5 much the platform of materials that they're
6 building from. So there are alternative
7 materials that could give me as
8 satisfactory of a platform.

9 BY MR. BLOOM:

10 Q. But is it a fair statement that that text
11 helps you teach this class?

12 A. Yes, I like that text.

13 Q. And is it fair to say that the Tricia Hedge
14 text helps you teach the class?

15 MS. QUICKER: Objection. Asked and
16 answered.

17 THE WITNESS: Helps, I don't think the
18 book helps me teach the class, no. I do
19 think it's a strong text and I like working
20 with it.

21 BY MR. BLOOM:

22 Q. And why do you assign it?

23 A. Oh, why do I assign it. Okay.

24 So these are -- this is a class in honing
25 teaching skills. So these are pre-service teachers for

1 the most part, some are in-service teachers. And the
2 idea is to offer a course where they actually begin
3 doing some simulation of language teaching in the
4 classroom with their peers.

5 So I structure the course with a format called
6 micro teaching, which means that they take turns
7 implementing classroom activities and sometimes it will
8 be one person working with a whole group, sometimes it
9 will be two or three people working simultaneously with
10 smaller groups.

11 So what I like to make available to them are
12 activities -- I'm not using this word in a pejorative
13 way -- but activity recipe collections. So second
14 language class with activity recipe collections where a
15 specialist has made available through a published book a
16 wide range of examples of the kinds of things that you
17 can do in the classroom as a language theory. They're
18 very hands on and practical.

19 And I look at it like if you're a carpenter
20 you need to have hammers and a level and the tools of
21 carpentry. If you're a plumber, you have to have the
22 tools of plumbing. If you're a language teacher, I see
23 these as kind of the tools of the trade so that they
24 have ideas to build from.

25 Then what they actually do in the classroom

1 varies from the original source, but it is something
2 that they use as an inspiration and for ideas for what
3 to do in the classroom.

4 So the reason I use these books is it provides
5 students with a starting point and then they implement
6 language activities based upon ideas presented in those
7 texts.

8 Q. Okay. So you regard that text as a tool for
9 purposes of this course?

10 A. Yeah.

11 MR. BLOOM: Okay. Why don't we go off
12 the record. We'll change the tape and then
13 we'll have our last little portion of the
14 examination thereafter.

15 THE VIDEOGRAPHER: Off the video record
16 at 11:01.

17 (Brief recess.)

18 THE VIDEOGRAPHER: This is tape 2.

19 We're back on the video record at 11:12.

20 BY MR. BLOOM:

21 Q. Professor Murphy, I'm going to show you a
22 series of documents. First one is Murphy Plaintiff's
23 Exhibit 7. And Murphy -- sorry. Murphy Plaintiff's
24 Exhibit 8, Murphy Plaintiff's Exhibit 9, Murphy
25 Plaintiff's Exhibit 10, Murphy Plaintiff's Exhibit 11,

1 Murphy Plaintiff's Exhibit 12, Murphy Plaintiff's
2 Exhibit 13, Murphy Plaintiff's Exhibit 14 and Murphy
3 Plaintiff's Exhibit 15.

4 Professor Murphy, I just ask you to look at
5 these documents and tell me if these appear to be --
6 well, why don't you tell me what these are.

7 A. So it's titled fair use checklist and there
8 seems to be one for however many texts are here, I think
9 you said nine earlier. Right. So there's nine separate
10 ones.

11 Q. And do these correspond to the readings that
12 you placed on EReserve for the course AL 8480 from
13 Maymester 2009?

14 A. You said do they correspond to the what?

15 Q. Do they correspond to the readings that you
16 placed on EReserves for the course AL 8480 in the
17 Maymester 2009?

18 A. The readings, I would use the word
19 supplemental readings.

20 Q. With that modification --

21 A. Yes.

22 Q. -- is that what they are? Okay.

23 When did you complete these checklists?

24 A. Yeah, what we're looking at is the checklists
25 as I completed them when I was at the TCEA conference in

1 New Orleans about -- I don't know if it was six weeks
2 ago or a month ago.

3 Q. Okay. You see there's a date on -- I'm
4 looking at the first one.

5 A. Right.

6 Q. There's a date that says drop off date?

7 A. Uh-huh.

8 Q. 4/27/209. Do you see that?

9 A. Yes.

10 Q. What does that refer to?

11 A. That refers to my best estimate of when I
12 dropped them off with EReserves in 2009.

13 Q. And when you say them, what do you mean,
14 dropped them off?

15 A. Oh, dropped the excerpts from these various
16 books to EReserves.

17 Q. Okay. And prior -- strike that.

18 In 2009 did you fill out a fair use checklist
19 for -- let's talk about this reading, "Pronunciation
20 Games" pages 8 to 27.

21 A. Your question was did I --

22 Q. Back in 2009 before this reading was placed on
23 EReserves, did you fill out a fair use checklist?

24 A. I'm only paying attention right there to the
25 word fill out. I remember --

1 Q. Let me withdraw the question and pose a
2 different question.

3 A. Okay.

4 Q. Did you complete a fair use checklist for this
5 reading in 2009?

6 A. Yes, as requested by EReserves.

7 Q. Okay. And did you retain that document?

8 A. I did not.

9 Q. What did you do with it?

10 A. I don't know.

11 Q. Okay. Were you asked at some point in
12 connection with this litigation to locate that document?

13 A. To locate, no, I don't think so.

14 Q. Were you asked if you had a checklist for this
15 reading?

16 A. I don't know. I don't remember.

17 Q. Okay. You said you completed this document
18 six weeks to a month ago, is that correct?

19 A. Yes, yes.

20 Q. And why did you do that at that time?

21 A. The -- I believe the legal office at Georgia
22 State contacted me when I was in New Orleans and asked
23 me to complete the document for these proceedings.

24 Q. And did they ask you whether you had completed
25 a document, a checklist, in 2009?

1 A. I don't remember if they asked me that.

2 Q. Okay. Did you prior to your placing this
3 reading on EReserves in 2009, did you refer to the fair
4 use checklist?

5 A. Yes.

6 Q. Did you fill in the boxes in the fair use
7 checklist at that time? In other words, let me --

8 A. I don't remember specifically what the
9 procedure was in 2009.

10 Q. So you don't remember physically completing a
11 checklist in 2009, is that right?

12 A. I don't remember that.

13 Q. Okay. Is it possible that you did?

14 A. Is it possible, yes.

15 Q. Do you recall analyzing this reading in
16 accordance with the criteria that are listed on the
17 checklist back in 2009?

18 A. I recall examining the checklist.

19 Q. Okay. And when you completed this document
20 six weeks or a month ago, what were you attempting to
21 do?

22 A. I was attempting to complete it as I would
23 have completed it in 2009.

24 Q. Okay. And in doing so, did you have any
25 specific recollection of what you did back in 2009?

1 A. Specific recollection, no.

2 Q. Okay. So were you interpreting the factors --
3 strike that.

4 Did you have a recollection -- did you have
5 any recollection in completing this document of any
6 aspect of what you did in 2009 in evaluating whether
7 this reading was fair use?

8 MS. QUICKER: Objection, form.

9 THE WITNESS: You'll have to say that
10 again.

11 BY MR. BLOOM:

12 Q. Does any aspect of this document here reflect
13 your recollection of what you did back in 2009?

14 MS. QUICKER: Objection, form.

15 THE WITNESS: Any aspect? I don't know.

16 BY MR. BLOOM:

17 Q. Looking at factor 1 on this document. Okay.
18 Am I correct that where you have two bold Xs, does that
19 mean that you found that that -- that subfactor
20 applicable to the reading, is that what that means?

21 A. Yes.

22 Q. Okay. So you found five factors on the left
23 hand side applicable to this reading, correct?

24 A. Yeah, as I look at the last one I'm not happy
25 with it. But that's what the Xs indicate, yes.

1 Q. And there are no double Xs on the right hand
2 side, which is weighs against fair use, correct?

3 A. That's correct.

4 Q. Okay. So you did not find the reading to be
5 transformative, correct, you did not mark that on the
6 left hand side?

7 A. I'm not sure what the word transformative
8 means in that context.

9 Q. And similarly I take it you do not -- strike
10 that.

11 You also didn't check nontransformative on the
12 right hand side, correct?

13 A. There's no check there.

14 Q. So do you have understanding of what
15 nontransformative means in this context?

16 A. No.

17 Q. Looking at factor 2 --

18 And so you concluded that the first -- you
19 make a conclusion as to whether factor 1 weighed in
20 favor or against fair use?

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

23 Q. Okay. And was that because there were more
24 checks on the left hand side than on the right hand
25 side?

1 A. Yes.

2 Q. Okay. Did you have any understanding as to
3 whether each of the subfactors were to be given equal
4 weight? In other words, did you have an understanding
5 one way or the other as to whether the factors were to
6 be given equal weight?

7 MS. QUICKER: Objection. Form.

8 THE WITNESS: I'm --

9 BY MR. BLOOM:

10 Q. Let me withdraw the question and ask another
11 question.

12 A. Okay.

13 Q. Did you give each of the subfactors equal
14 weight in your analysis?

15 A. Equal weight, I don't remember.

16 Q. Looking at factor 2. Well, let's just go back
17 for a moment. This is, why did you assign this reading?
18 Strike that.

19 So this is the book, a portion of the book
20 "Pronunciation Games", correct?

21 A. Yes.

22 Q. And the pages that you were assigning were 8
23 to 27, correct?

24 MS. QUICKER: Objection. Form.

25 THE WITNESS: It's the word assigning

1 I'm having difficulty with.

2 BY MR. BLOOM:

3 Q. Okay. The excerpt in question here is pages 8
4 to 27, correct?

5 A. Yes.

6 Q. Okay. So approximately 20 pages, correct?

7 A. I would have to count them on my fingers.

8 Q. Do you recall, was this a full chapter of the
9 book?

10 A. I'm not sure that the word chapter applies.
11 These are activity recipe collections, so it's not
12 subdivided into chapters that way.

13 Q. Is it a full activity recipe collection?

14 A. Okay. So this isn't --

15 Q. Let me show you what -- a document which I can
16 mark, but I don't necessarily intend to mark, just for
17 your -- to refresh your recollection.

18 Does that appear to be a copy of the cover and
19 title page of the -- of the cover and table of contents?

20 A. Yes.

21 MS. QUICKER: You're not marking this
22 but you're going to show him that and have
23 him testify about it?

24 MR. BLOOM: I can mark it. It doesn't
25 matter.

1 MS. QUICKER: I just want the record to
2 be clear what you're showing him and have a
3 full record. And it should be an exhibit.

4 BY MR. BLOOM:

5 Q. All right. So we'll say Murphy, what's the
6 next number, 16, so this is Murphy Plaintiff's Exhibit
7 16.

8 How would you describe the portion of the text
9 that's covered by these pages?

10 A. It's a segment of the text "Pronunciation
11 Games".

12 Q. Under factor 2 you checked it was important to
13 educational objectives?

14 A. Wait a minute. Factor 2. Yes, there's two
15 checks.

16 Q. Okay. And why did you conclude that it was
17 important to your educational objectives?

18 A. We need to go back to my earlier testimony.
19 When I was putting these materials on reserve, it was
20 before the course was finalized. My vision was that the
21 course -- these materials would be used as supplementary
22 materials for whatever else we were doing in the course.
23 And as supplementary materials I considered them to be
24 of potential value to students and therefore I thought
25 the word important was applicable.

1 Q. You didn't indicate published work. You see
2 that?

3 A. Yeah, I wasn't really sure what it referred to
4 in this context. I mean, it is a published work, but I
5 wasn't sure what they were asking here.

6 Q. And did you conclude that factor 2 weighed in
7 favor of fair use?

8 A. I'm sorry?

9 Q. Did you conclude that factor 2 weighed in
10 favor of fair use?

11 A. Yes.

12 Q. Okay. And looking at factor 3, you checked
13 small portion of work used, correct?

14 A. Yes.

15 Q. Okay. And can you just describe for me what
16 your thinking was on that subfactor?

17 A. Small portion, so a -- I was going for less
18 than 20 percent of the whole work.

19 Q. Okay. And why did you use 20 percent as a
20 reference point in your thinking?

21 A. I'm not sure. I've been at Georgia State
22 since 1988 and that's the number that I've heard bandied
23 about over the years as falling within fair use for
24 copyright purposes.

25 Q. And you indicated that the portion used is not

1 central or significant to the entire work as a whole.
2 Can you just tell me what your thinking was on that
3 factor?

4 A. Yeah, I mean, these are the kind of materials
5 that I recommend that students purchase and have on
6 their office shelves. So by using this size of a
7 portion, my thinking is that it's the whole work which
8 is central and significant and that I'd be encouraging
9 students to have a wide range of these kinds of
10 materials and to own them and take them with them when
11 they teach English in other countries and things like
12 that.

13 So I don't see this segment as being central,
14 I see the whole piece as being an important piece, the
15 whole book as being important.

16 Q. And back on factor 2 for a moment, you didn't
17 check any of the items on the right hand side, weighs
18 against fair use, correct?

19 A. That's correct.

20 Q. Okay. And similarly factor 3, you didn't
21 check any of the factors on the weighs against fair use
22 side, correct?

23 A. That's right.

24 Q. Okay. And you concluded that factor three
25 weighed in favor of fair use, is that correct?

1 A. I did.

2 Q. Okay. Because there were three checks on the
3 weighs in favor and no checks on the weighs against fair
4 use side, is that why you made that conclusion?

5 A. Well, the ones on the right are weighs against
6 fair use. I heard you say that differently just then.

7 Q. I might have misspoke.

8 There were three factors weighing in favor and
9 no factors weighing against under your analysis, is that
10 correct?

11 A. That's correct.

12 Q. Looking at factor 4, you checked use
13 stimulates market for original work, correct?

14 A. Yes.

15 Q. Okay. And can you explain to me your thinking
16 on that subfactor?

17 A. Oh, yeah. So in this course -- I'll go back
18 to my analogy with carpentry and plumbing. So I do see
19 these as the kinds of materials that language teachers
20 should have in their possession and have on their office
21 shelves. And that's how I present myself as a
22 specialist in the area with students, I tell them in my
23 office I have like 35 or 40 of these kinds of books to
24 draw ideas from.

25 So by presenting these as supplemental

1 material my thinking is they will be excited and
2 interested in those materials as resources and would be
3 more likely to purchase the whole material for
4 themselves.

5 Q. Okay. And you checked no similar product
6 marketed by the copyright holder. Do you see that?

7 A. Uh-huh.

8 Q. Okay. And can you tell me your thinking on
9 that subfactor?

10 A. I guess -- okay, wait a minute. Okay. Let me
11 think for a second.

12 That each of these individual activity recipe
13 collections has a particular niche, so this one for
14 example specifically is pronunciation and in the context
15 of playful games in the classroom. So that's a very
16 nice twist for resource material. And I know of other
17 materials of that nature, but when it said by same -- by
18 the copyright holder, I just assumed that to be an
19 author, I didn't assume that to be the publisher. So I
20 don't know the similar project marketed by that same
21 author.

22 Q. In other words, you didn't know of a similar
23 book by the same author, was that your thinking?

24 A. That's correct.

25 Q. Okay. Weighs against fair use under factor 4,

1 you checked licensing or permission reasonably
2 available. Do you see that?

3 Can you explain to me your thinking on that
4 subfactor?

5 A. Yeah. Over the years I am aware that there
6 are procedures for, you know, writing a formal letter
7 soliciting permission from the publisher, so I checked
8 that.

9 Q. Was that something you had ever done yourself?

10 A. No.

11 Q. And did you conclude that factor 4 weighed in
12 favor of fair use?

13 A. Yes.

14 Q. Okay. And if you would just look for me at
15 each of these fair use checklists, each of these nine
16 documents. Can you tell me whether any of them is
17 different than any of the others in terms of how you
18 evaluated the fair use factors?

19 A. I'm not looking at them at this second, but my
20 recollection is that the ones which were in fact
21 included as required reading materials in the course I
22 completed differently.

23 Q. And how did -- what was the difference?

24 A. For that I'd have to go and look at them.

25 So the first one I'm seeing is the Exhibit 8,

1 so it's the "Keep Talking" text.

2 Q. And what are you referring to specifically on
3 Exhibit 8?

4 A. Yeah, that's -- my testimony is that I believe
5 that I handled those -- I think it was three actually,
6 there were four in the course but I think three are
7 included here of the ones that were required for
8 students to purchase that they owned a copy of, and I
9 believe I handled them differently when I filled out
10 this checklist in retrospect in 2011 knowing that when
11 the course was offered these were materials that
12 students actually owned. So it was kind of a moot point
13 that they were on EReserves.

14 Now that I'm looking at them I'm not noticing
15 that they were handled differently. I seem to have
16 checked all the same items for those as well.

17 Q. Okay. Looking at these nine documents, is
18 there any difference in your thinking about fair use in
19 connection with any of these readings that you would
20 identify from one to the other, other than what you just
21 mentioned?

22 A. I don't think so.

23 Q. Okay. So you concluded that each of these
24 nine readings was fair use, is that correct?

25 A. Yes.

1 Q. Okay. A few more questions.

2 Going back to 2009, do you recall filling
3 out -- do you specifically recall filling out any fair
4 use checklists at that time?

5 MS. QUICKER: Objection. Asked and
6 answered.

7 THE WITNESS: I don't recall that.

8 BY MR. BLOOM:

9 Q. When you completed these checklists, did you
10 seek assistance from anyone at GSU in terms of how to
11 complete the checklist?

12 A. In March of this year?

13 Q. If that's when you completed these documents.

14 A. Yeah, just if you could ask the question
15 again.

16 Q. So did you complete these all at or about the
17 same time?

18 A. Yes.

19 Q. Okay. And in doing so did you seek assistance
20 from anyone at GSU?

21 A. No, I was out of town.

22 Q. So you were out of town when the request was
23 made, correct?

24 A. Yes.

25 Q. And you completed these while you were out of

1 town, correct?

2 A. Yes.

3 Q. And how did you transmit them?

4 A. Okay. So I had a wireless Internet connection
5 with my laptop in the hotel room in New Orleans, the
6 Doubletree Hotel. So I would have gotten an e-mail
7 message. I believe it was from the legal affairs office
8 at Georgia State, there was a document e-mail
9 attachment.

10 The Internet connection was slow and I know
11 that at the end of the process I had the hotel front
12 desk fax the copies to Georgia State. I don't remember
13 how I got them printed out, so either I had the main --
14 I had the front desk at the hotel print them out in hard
15 copy and then had them faxed -- but right now I don't
16 remember when I actually got physical hard copies. I
17 believe it was a fax communication. It is possible that
18 I completed them electronically and sent them back as an
19 attachment. But I don't remember that part of the
20 process.

21 Q. Okay. A few more questions, Professor Murphy,
22 and then I'll be done.

23 Have you ever used ULearn?

24 A. I have never used ULearn.

25 Q. And have you ever used coursepacks in any of

1 your classes, physical coursepacks? I should say paper
2 coursepacks.

3 A. Yeah, the word ever goes back to 1988 for me
4 in Georgia State. Yes, I have used coursepacks.

5 Q. Okay. And during 2009 did you use coursepacks
6 in any of your classes?

7 A. 2009, well, we have to define coursepacks.
8 Previously I talked about the three different categories
9 of materials that I might include in a photocopy packet
10 from a print shop, and for me that would include a
11 packet of course handouts.

12 So for example I offer a course AL 8320, Sound
13 System of English, and I have a packet which is only
14 handouts, not tied to commercially available materials.
15 So I use that kind of a packet, I'm sure.

16 I have a separate packet for courses, for that
17 particular course, AL 8320, which includes printed
18 material to work with audio recordings and a work book
19 material for which I have copyright permission from the
20 authors at Columbia University where I did my graduate
21 training. And they've explicitly given me permission to
22 use those materials. I've been using those since 1988.

23 And I would refer to that as a coursepack, so
24 yes, I do use those materials.

25 Q. Okay. Have you ever completed a fair use --

1 strike that.

2 Have you ever using the fair use checklist
3 criteria concluded that a proposed reading for one of
4 your classes was not fair use?

5 A. I don't remember, but I can clarify.

6 Q. Please.

7 A. I don't remember. Okay. So I work with a
8 print shop facility that used to be called AlphaGraphics
9 that's now called The Print Shop, and there have been
10 times in the past, I'm thinking in the 1990s in
11 particular, when as part of their normal process I would
12 leave materials with them, they were soliciting the
13 copyright clearance. I wasn't involved in the process.
14 But I know that they were involved in that process.

15 Q. My question is specifically with respect to
16 this fair use checklist.

17 A. Oh, okay. So what was the question?

18 Q. The question is whether you've ever, using the
19 criteria on this fair use checklist concluded that a
20 reading that you were contemplating using with the class
21 was not fair use?

22 A. Did you say a reading that I was using in a
23 course?

24 Q. No, let's say have you ever following these
25 criteria concluded that an excerpt from a book that you

1 were planning to use with a class was not fair use?

2 A. I would never -- I wouldn't have gotten to
3 that stage. No.

4 Q. Okay. Final hypothetical question. If you
5 were to conclude that an excerpt from a book that you
6 wanted to use for a class was not fair use under those
7 criteria, what would you do?

8 MS. QUICKER: Objection. Calls for
9 speculation.

10 THE WITNESS: I need to hear the
11 question again.

12 BY MR. BLOOM:

13 Q. Yeah. If you concluded that a proposed
14 reading was not fair use, what would you do?

15 MS. QUICKER: Same objection.

16 THE WITNESS: I can think of two
17 options. And I don't know which one I
18 would follow.

19 BY MR. BLOOM:

20 Q. What are those two options?

21 A. Not use the material or go through a procedure
22 of soliciting permission to use the material.

23 Q. And I take it from -- strike that.

24 And what would influence which of those
25 options you would pursue?

1 MS. QUICKER: Objection. Calls for
2 speculation.

3 THE WITNESS: What would influence? I
4 don't know. It would depend upon the case.

5 BY MR. BLOOM:

6 Q. And that's not -- that's not in fact a
7 situation that you have ever confronted, correct?

8 A. I can't say that. In thinking about courses
9 and looking through materials, you know, I mean, I'm
10 making a lot of intuitive decisions about what I would
11 consider and what I wouldn't consider. But I guess I'd
12 have to hear the question again.

13 Q. But since this policy has been in place, have
14 you ever sought permission to use an excerpt in
15 connection with ERes?

16 A. I can't answer because I'm not sure when the
17 policy went in place.

18 Q. Well, let's say -- let's -- let's say if I
19 represent to you that the policy was put in place in
20 February of 2009, can you answer the question?

21 A. Okay. So the policy in February 2009. So
22 what was the question again?

23 Q. The question was whether since that time have
24 you ever sought permission from a publisher to use an
25 excerpt for one of your classes on EReserves?

1 A. No.

2 MR. BLOOM: I have no further
3 questions.

4 MS. QUICKER: Nothing further.

5 MR. BLOOM: Thank you very much,
6 Professor.

7 THE VIDEOGRAPHER: That concludes the
8 deposition. We're off the video record at
9 11:47.

10 (Deposition concluded at 11:47 a.m.)

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E R R A T A S H E E T

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

PAGE / LINE CORRECTION

[illegible]

NOTARY PUBLIC SIGNATURE

DATE-----

MY COMMISSION EXPIRES:

C E R T I F I C A T E

G E O R G I A:

FULTON COUNTY:

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

This, the 24th day of April, 2011.

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

1 DISCLOSURE

2
3 STATE OF GEORGIA

4 COUNTY OF DEKALB

5 Deposition of John M. Murphy

6 Pursuant to Article 10.B of the Rules and Regulations of
7 the Board of court Reporting of the Judicial Council of
8 Georgia, I make the following disclosure:9 I am a Georgia Certified Court Reporter. I am here as a
representative of Shugart & Bishop.10 I am not disqualified for a relationship of interest
11 under the provisions of O.C.G.A. 9-11-28.12 Shugart & Bishop was contacted by the offices of
Bondurant Mixson & Elmore to provide court reporting
13 services for this deposition.14 Shugart & Bishop will not be taking this deposition
under any contract that is prohibited by O.C.G.A. 15-14-37
15 (a) and (b).16 Shugart & Bishop has no exclusive contract to provide
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17 in the case, or any reporter or reporting agency from whom
a referral might have been made to cover this deposition.18 Shugart & Bishop will charge its usual and customary
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19 will not be given to any party to this litigation.20
21 Teresa Bishop
22 RPR, RMR, CCR B-307
23
24
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CAMBRIDGE vs. BECKER

JOHN MURPHY

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