

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 N. LEE ORR, Ph.D.,
taken on behalf of the plaintiffs, pursuant to the
stipulations contained herein, before Teresa Bishop,
RPR, RMR, CCR No. B-307, at 104 Marietta Street, SB-2
Conference Room, Atlanta, Georgia, on Friday, February
4, 2011, commencing at the hour of 12:66 p.m.

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KENNITH DRAKE, VIDEOGRAPHER

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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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THE VIDEOGRAPHER: This will be the
videotaped deposition of Lee Orr taken by
the plaintiffs in the matter of Cambridge
University Press, Oxford University Press
Incorporated and Sage Publications
Incorporated versus Mark P. Becker in his
official capacity as Georgia State
University president et al.

The date is February the 4th, 2011.
We're on the record at 12:56.

N. LEE ORR, Ph.D.,
having been first duly sworn, was examined and testified as
follows:

EXAMINATION

BY MR. LARSON:

Q. Professor Orr, thank you for coming today. My
name is Todd Larson. I'm here representing the
plaintiffs in this matter.

A. All right.

Q. Could you just provide your address for the
record?

1 A. 506 Lantern Wood Drive, Scottdale, Georgia,
2 30079.

3 Q. Have you been deposed before?

4 A. No.

5 Q. I assume your counsel probably gave you an
6 idea of how things would go today, but let me provide a
7 few additional cautions, if I could.

8 I just ask that you answer the questions
9 verbally as opposed to nodding so that it makes its way
10 on to the transcript. Let me finish my questions before
11 you answer and I will do my best not to interrupt you,
12 your answers. If I ask a question that's unclear, you
13 don't understand in some way, please feel free to tell
14 me and I can clarify.

15 If you need a break, just let me know and we
16 can take a break. I'll say we'll probably be stopping
17 after about an hour to change the videotape, and so you
18 can plan on a break there.

19 Your counsel may put objections on the record
20 during the course of the deposition, that's sort of
21 standard practice. Unless he instructs you not to
22 answer, you can then go ahead and answer the questions.

23 The testimony you give today could be used at
24 trial, just so you know.

25 And I think that's it. Does all that seem

1 clear?

2 A. Yeah.

3 Q. What did you do to prepare for today's
4 deposition?

5 A. I reread the university system guidelines, and
6 I had just marked up four sheets for some reserve
7 readings right now, and I took a little more time after
8 marking to study them through.

9 Q. Did you look at any checklists from prior
10 semesters or just those that you --

11 A. Just the ones now, yes.

12 Q. Did you look at any filings from the case, the
13 complaint or any legal briefs or anything like that?

14 A. No.

15 Q. Did you look at any transcripts of prior
16 depositions from the case?

17 A. No.

18 Q. Have you spoken to any of the other professors
19 who have been deposed?

20 A. No.

21 Q. Did you meet with counsel?

22 A. What?

23 Q. Did you meet with counsel in preparation for
24 today's deposition?

25 A. Yes.

1 Q. When was that?

2 A. Wednesday.

3 Q. Okay. At any point in the course of this
4 litigation, were you asked to preserve documents related
5 to the litigation?

6 A. No. Just send copies of what I had done.

7 Q. And copies of what you had done meaning what?

8 A. For the semesters in question. Because I keep
9 everything.

10 Q. And by done, you mean the checklist that you
11 filled out?

12 A. I didn't start filling them out until
13 recently. I didn't know I needed to actually do that.
14 Okay.

15 Q. I see. I was going to ask. You're aware that
16 the suit as it's currently constituted is focusing on
17 semesters from 2009, is that your understanding?

18 A. Yes.

19 Q. And for the -- and I believe you taught in the
20 summer and fall of 2009, is that right?

21 A. Yes.

22 Q. And did you complete checklists for the works
23 that you provided to students on the EReserve system
24 during those two semesters?

25 A. I didn't write on the actual paper. I used

1 the checklist as my guideline for each reading because
2 I'm not -- they don't require us to turn them in. And
3 that point about the literal writing I didn't, but I
4 adhered to it and kept it there in mind when I selected
5 the reading.

6 Q. So you -- this was at the beginning of those
7 semesters that you did this?

8 A. Sir?

9 Q. This, the process you just described took
10 place at the beginning of each of those two semesters,
11 summer and fall of 2009?

12 A. No. I look at it with each books I'm
13 considering specifically.

14 Q. Right. And is that something that takes place
15 as the semester goes along or --

16 A. Yes.

17 Q. Just let me finish the question.

18 A. Right, sorry.

19 Q. And so in those semesters for the readings
20 that you put -- for each of the readings that you put on
21 the EReserve system, you walked through, you had a
22 checklist in front of you and you walked through it to
23 see whether or not the work was a fair use according to
24 the checklist?

25 A. Yes.

1 Q. But you didn't write down, didn't check any
2 boxes or save a form of any kind?

3 A. Yes. I mean, you're correct.

4 Wait, I do keep the electronic form I submit
5 or my notes.

6 Q. And what's the electronic form that you
7 submit?

8 A. After we select the readings and go through
9 the checklist, then we fill out an electronic form for
10 the library.

11 Q. That's a form requesting the library to
12 actually put the work up on the EReserve system?

13 A. Yes.

14 Q. And you save those?

15 A. I have been in the last year or so. At times
16 it was just my notes that I made to get the book, and
17 then I remember -- I thought a while back I need to
18 start saving these electronic submissions, my own copy.

19 Q. And did you save them for the summer and fall
20 2009 semesters or is this something that you started
21 doing in 2010?

22 A. No, I did not save them earlier. But
23 recently, yes. Actually let me -- last -- last fall is
24 when I realized, or maybe summer.

25 Q. 2010?

1 A. Yeah. And I've always kept some, it just
2 depends on if I had the notes or not.

3 Q. And what do you mean by notes?

4 A. Here's a book that -- notes on it that I'm
5 looking at and the page numbers and the title.

6 Q. And do you mean by notes, like handwritten
7 notes?

8 A. Mine that I take, this book, this title, these
9 pages, yes.

10 Q. And just so I'm clear, those are notes you
11 keep so that you then know what you want to ask the
12 library to put on the EReserve system?

13 A. Yes.

14 Q. I see. And do those notes exist for either
15 the summer or fall of 2009 semesters?

16 A. I think I've kept all of them or nearly all of
17 them since we converted to EReserves.

18 Q. And did you turn those over to counsel for
19 this case, do you know?

20 A. I turned everything I had for the courses and
21 times they requested, yes.

22 MR. LARSON: Tony, we would request to
23 the extent any of these forms or notes that
24 Dr. Orr has been discussing that haven't
25 been produced, we would ask for production

1 of those, if they exist.

2 MR. ASKEW: You can send me a letter
3 about that if you would like and I'll
4 consider that.

5 BY MR. LARSON:

6 Q. Professor Orr, what's your understanding of
7 what this case is about?

8 A. I understand that the publishers feel that we
9 have infringed on the copyrights for the books by
10 putting them on EReserve, and that they contend I've not
11 been following the fair use ideas.

12 Q. And you understand that you were identified in
13 the original complaint filed by the publishers?

14 A. I wasn't sure exactly who identified me, but
15 yes.

16 Q. Okay. Show you what's been marked as Orr
17 Exhibit 1. This is a copy of a page from the Georgia
18 State web site that we made and a copy of your CV that's
19 also available on the web site.

20 Can you just confirm for me is this in fact
21 your CV?

22 A. Yes.

23 Q. And is it accurate to the best of your
24 knowledge?

25 A. Is it what?

1 Q. Is it accurate?

2 A. Let me go through it.

3 Q. Yeah, anything I provide you today, if you
4 need to take some time to read through it to be sure.

5 A. I don't think this is the most recent one I
6 turned in. I turned in one just about a week ago, a CV
7 that has stuff I've published since then.

8 Q. And any additional books that you've published
9 since what's listed here?

10 A. Yes. Yes.

11 Q. How many are there?

12 A. Okay. This is going to be to my knowledge. I
13 could forget something here. There's one book I
14 finished from my friend that died, "Music Of The Gilded
15 Age".

16 And a chapter in a book -- I didn't do the
17 book, I did a chapter in a book "Festschrift For Barbara
18 Owen".

19 Q. What was the first, please?

20 A. F-e-s-t-s-c-h-r-i-f-t. Festschrift.

21 Q. That was a book chapter?

22 A. And I did a chapter in there.

23 Q. Who's the publisher of "Music In The Gilded
24 Age?"

25 A. Scarecrow.

1 Q. And when was that published?

2 A. Three or four years ago.

3 Q. How long have you been at Georgia State?

4 A. Since 1978.

5 Q. Did you teach anywhere else prior to that?

6 A. Yes. I taught at Tift College near Macon for

7 two years before that.

8 Q. You're in the music department?

9 A. Yes.

10 Q. Just tell me the -- generally the reporting

11 structure within the music department?

12 A. I report to the chairman.

13 Q. And who's the chair?

14 A. Dwight Coleman.

15 Q. And who does Mr. Coleman report to?

16 A. To the dean of arts and sciences.

17 Q. And does that dean report up to the provost

18 then?

19 A. Yes.

20 Q. Let me show you what's been marked as Dixon

21 Exhibit 2 from a prior deposition.

22 Do you recognize this as the current copyright

23 policy at Georgia State?

24 A. Yes.

25 Q. And is this what you mentioned at the

1 beginning of the deposition you reviewed in the past
2 couple days in --

3 A. Yes.

4 Q. -- preparation for the deposition?

5 A. Yes.

6 MR. ASKEW: Wait for him to finish his
7 question.

8 THE WITNESS: Huh?

9 MR. ASKEW: Wait for him to finish his
10 question.

11 THE WITNESS: Oh, excuse me.

12 BY MR. LARSON:

13 Q. That's okay.

14 When do you recall first seeing this policy?

15 A. When they started the EReserves and they sent
16 it online and I read it, through it online.

17 Q. And when was that?

18 A. Okay, let me back up. This was a revised one
19 two or three years ago. When they first started it
20 years ago it was much more general. It might have been
21 10 or 12 years ago.

22 Q. You're saying the policy was more general?

23 A. Right.

24 Q. The policy that preceded the one we're looking
25 at here in Dixon Exhibit 2?

1 A. Yes.

2 Q. What do you mean it was more general?

3 A. It didn't -- it was more vaguer and did not go
4 into all these details.

5 Q. And when did you -- at a certain point -- I'll
6 just represent to you that this was -- this policy was
7 implemented or promulgated in early 2009.

8 Do you recall around that time seeing this for
9 the first time?

10 A. Yes. This as well as I remember is the policy
11 I saw online. Subsequently I got a copy.

12 Q. And how did you first find out about it? Or
13 when you say you saw it online, how did you know to look
14 at it online?

15 A. I think it was online. They sent an e-mail
16 and a link I thought.

17 Q. Who's they?

18 A. The library, the circulation desk. I'm not
19 sure who. People from the library.

20 Q. Sent that out to school wide or --

21 A. I don't know that.

22 Q. But you received it?

23 A. Right.

24 Q. And when you got the e-mail you clicked on the
25 link and looked at the policy?

1 A. Yes. I think it was on the Internet or did
2 they give me a copy. I've forgotten which.

3 Q. That's fine.

4 A. We get all of -- get so much of each one.
5 I remember the discussions about it and I
6 remember reading through this. And whether they gave me
7 a copy or it was online, I can't recall right here.

8 Q. What discussions are you referencing that you
9 recall?

10 A. The circulation desk when the library people
11 told me that they were -- a new policy and the new
12 checklist and the electronic submission form.

13 Q. And did -- do you recall did this
14 communication say anything other than here's the new
15 policy for you to read? Was there any sort of
16 instruction or additional information provided to you?

17 A. There wasn't a great deal of it, details, just
18 to follow the guidelines in the checklist.

19 Q. Have you read this entire policy?

20 A. Yes, I've been back through it this week.

21 Q. And did you read the entire policy at the time
22 when it was first provided to you?

23 A. I probably skimmed over it and didn't read
24 every word.

25 Q. Okay. Do you recall which pieces you read and

1 which ones you didn't?

2 A. Which pieces what?

3 Q. Which sections you read and which ones you
4 didn't?

5 A. It was more I read a good chunk of each
6 section.

7 Q. Can you look at page -- you'll see they're
8 numbered at the top, 1 out of 19, 2 out of 19, et
9 cetera. Can you look at page 7 of 19?

10 A. Yes.

11 Q. And is this the fair use checklist that you've
12 mentioned earlier?

13 A. Okay. At that time this looks like it. It's
14 been three years. This is one I've been using these
15 last years.

16 Q. Now, you'll see that -- look at the third
17 paragraph, it starts with the word complete. You see
18 that?

19 A. Uh-huh.

20 Q. It says complete and retain a copy of this
21 checklist for each fair use of the copyrighted work in
22 order to establish a reasonable and good faith attempt,
23 and it goes on.

24 For the summer 2009 semester and fall 2009
25 semester, did you do that?

1 A. Did I look at this?

2 Q. No, did you complete and retain a copy of the
3 checklist for each --

4 A. No, did I mark each one, no.

5 Q. And what was your reason for not filling out a
6 checklist as it instructs here?

7 A. I went through it to remind myself of the
8 points so that I was satisfied it was fair use.

9 Q. I understand that's what you did. My question
10 is, why didn't you complete and retain a copy of the
11 checklist for each work that you used?

12 A. Because I didn't fill it out for that book, I
13 kept a copy of the electronic submission, and I use this
14 as a guideline. Since it's not required to be turned in
15 and I had gone through it and followed it, I felt I had
16 complied with the fair use structures.

17 Q. Okay. What you filled out online, the form
18 that you indicated that you filled out for the library,
19 that didn't include the checklist itself, correct?

20 A. No.

21 Q. Can you look at page 13 for me. Is that a
22 page that you've read before and seen?

23 A. I have seen this page before, yes.

24 Q. And can you look at page 15?

25 A. Yes.

1 Q. Is that a page you've seen before?

2 A. I saw it this week again.

3 Q. Do you recall reviewing this page when you
4 first looked at the policy in 2009?

5 A. I can't remember if there were all these
6 details. It looks familiar, but that's all I can claim
7 to.

8 Q. Sure. Did -- do you see where it mentions
9 Copyright Clearance Center there under works in print?

10 A. Yes.

11 Q. Are you aware of what Copyright Clearance
12 Center is?

13 A. I believe it's where they check to -- about
14 permission for works, if they're using them when it's
15 not fair use.

16 Q. Who's they?

17 A. The library.

18 Q. Have you ever had any interaction with
19 Copyright Clearance Center?

20 A. No.

21 Q. Ever been to their web site?

22 A. No.

23 Q. Any idea of the rates that they charge for
24 permissions?

25 A. No.

1 Q. Did you attend any training sessions in the --
2 related to this policy?

3 A. No. Things seemed clear to me.

4 Q. Were you aware that training sessions were
5 offered by the university?

6 A. It seems they were. I don't remember specific
7 things. I know they're good to do sessions.

8 Q. I'm sorry, they're what sessions?

9 A. I know they're good to do training sessions.
10 Exactly if they had one on this I can't recall now.

11 Q. Are you aware of whether there are resources
12 at the university for you to consult if you have a
13 question about whether a particular reading constitutes
14 a fair use?

15 MR. ASKEW: I'll object that the
16 question is vague and indefinite as to what
17 you mean by resources.

18 BY MR. LARSON:

19 Q. You can answer.

20 A. Not specifically, no.

21 Q. Have you had any situations where you've had
22 questions about whether a particular work was or was not
23 a fair use?

24 A. Not really, because after I had been through
25 the checklist and I had looked at this and read this

1 that it seemed that the pieces I was selecting fell
2 within fair use.

3 Q. And when you did this, when you looked through
4 the checklist with respect to the works you were using
5 or wanted to use in your courses, tell me what you did
6 when you were actually sitting there with the checklist
7 in front of you and working through it.

8 A. Here's this book I'm considering and here's
9 this checklist. I have a copy and I've consulted it.

10 Q. And did you go -- read through the list factor
11 by factor and ask yourself whether or not you would
12 check that particular factor?

13 A. I scanned them, I mean, with my eye, yeah.

14 Q. Right. But my question is a little different
15 than whether you scanned it. My question is did you
16 literally go through each and every factor on the page
17 and ask yourself whether or not you checked that factor?

18 A. Specifically each factor every time, probably
19 not.

20 Q. And did you make any attempt at factor --
21 looking through the list to add up how many factors
22 weighed in favor of fair use versus how many factors
23 weighed against fair use?

24 A. Oh, yes. In fact I put books and scores on
25 reserve every term that I feel wouldn't follow fair use.

1 The book is on the reserve in the library.

2 Q. You put books on hard copy reserve?

3 A. Yeah, and music scores that would not fall
4 under fair use. So those I just take to the desk and
5 put them on reserve.

6 Q. So I'm not sure how that relates. Let me try
7 my last question again.

8 A. Okay.

9 Q. Which was, when you were sitting with the work
10 as you were just describing --

11 A. Right.

12 Q. -- and scanning the checklist as you stated,
13 did you make any attempt in doing that to actually tally
14 or add up the number of factors weighing in favor of
15 fair use versus the number of factors weighing against
16 fair use?

17 A. Had there been a number of ones on the right
18 hand side, I would have added it up. The readings I
19 finally put on reserve fit with some few exceptions on
20 the whole left hand side.

21 Q. So the factors that you found that would --
22 that you would check off were all on the left hand side?

23 A. Yes.

24 Q. And on the weighs in favor of fair use side?

25 A. Yes.

1 Q. Do you recall there being any factors that
2 weighed against fair use on the right hand side?

3 A. There was two or three or four I wasn't sure
4 of. It wasn't clear.

5 Q. All right. Why don't you turn to the page 7
6 of Exhibit 2, Dixon 2.

7 A. Transformative on page 7 is not. Okay. But I
8 didn't see a box on the right hand side which was
9 against fair use.

10 Oh, nontransformative, excuse me. Yes, in
11 that sense of the word that it's in a whole other
12 context.

13 Q. What does transformative mean to you?

14 A. What does what?

15 Q. What do you understand transformative to mean?

16 A. To mean put in a whole new context, like a
17 picture on another picture or a quote in a paragraph, to
18 alter it considerably, which mine don't.

19 Q. And so do you view your uses of the readings
20 for your students as being nontransformative?

21 A. In that sense, yes.

22 Q. And so I guess what I'm not -- I think you
23 said, and correct me if I'm wrong, that when you were
24 scanning the list that you didn't see any checks on the
25 right hand side of the chart that you would check?

1 MR. ASKEW: I will object to that
2 question as mischaracterizes his testimony.

3 BY MR. LARSON:

4 Q. Is that wrong?

5 A. I didn't see enough numbers, more than a
6 couple, two or three, to warrant adding them up if it's
7 nearly probably 95 percent were on the left hand side.

8 Q. So there were some -- as you did this exercise
9 there were some factors on the right hand column that
10 you felt would be checked or would be applicable?

11 A. Yes.

12 Q. Okay. And was nontransformative one of them?

13 A. Yes.

14 Q. And you recall specifically considering that
15 factor when you went through this exercise that you're
16 describing?

17 A. Yes. Puzzled about it.

18 Q. And what were you puzzled about?

19 A. It -- it wasn't nontransformative, but I'm not
20 really, still really extremely sure that it wasn't
21 perhaps altered when you put it online out of context.
22 But I didn't -- I didn't use that as a dodge.

23 Q. I'm sorry, what do you mean use it as a dodge?

24 A. I mean, I checked -- I considered the
25 nontransformative and it's not.

1 Q. Were there any others in this factor 1 that
2 you considered to be applicable to any of your readings?

3 A. Not there. Page 8, it's required classroom
4 reading. Bottom of 8.

5 Q. Uh-huh.

6 A. And -- yes.

7 Q. So nontransformative and required reading
8 would be the two?

9 A. Yes.

10 Q. Make this a little more specific. I'm going
11 to provide you with what's been identified and marked as
12 Orr 3.

13 Do you recognize this as the syllabus for your
14 summer 2009 class, music 8860?

15 A. Yes.

16 Q. Take a look for me, if you would, at the third
17 page. And do you see there there's a -- under the June
18 24th entry there's a listing under readings for
19 "Understanding The Sonata in B Minor"?

20 A. Uh-huh.

21 Q. Am I correct that's an excerpt from the book
22 "Liszt Sonata In B Minor"?

23 A. I believe so.

24 Q. And do you know what pages you provided or
25 what section that "Understanding The Sonata In B Minor"

1 comprises?

2 A. Not sitting right here. I would have to check
3 the book and the reading.

4 Q. I'm going to provide you with a copy of what's
5 been marked as Orr Exhibit 6.

6 A. Yes.

7 Q. And this is -- what I've given you is just a
8 photocopy of the cover and table of contents from "Liszt
9 Sonata In B Minor".

10 MR. ASKEW: Do you have another copy?

11 MR. LARSON: I think I do. Well, I'm
12 not sure I do.

13 BY MR. LARSON:

14 Q. Is this the book that's referenced in the
15 syllabus in the June 24th reading slip?

16 A. I believe so.

17 Q. And just turning to the table of contents, do
18 you see it says "Understanding The Sonata In B Minor" is
19 chapter 3?

20 A. Yes.

21 Q. Is that the excerpt that you provided
22 students -- that you provided to students for reading on
23 June 24th?

24 A. That sounds familiar, yes.

25 Q. Next page is 28 to -- looks like 28 to 48?

1 A. That was -- yeah.

2 Q. So to be more specific, let's go back to the
3 checklist in Dixon Exhibit 2.

4 A. Okay.

5 Q. And what I'd like you to do is let's walk
6 through so we're a little more specific in our -- we
7 have a reference point.

8 I'd like you to tell me how you filled out the
9 checklist for this particular excerpt?

10 A. Okay.

11 Q. Let me ask first --

12 MR. ASKEW: I'll object to that
13 question. Are you asking him how he did
14 fill it out or how he would fill it out
15 now?

16 MR. LARSON: Let me step back for a
17 second.

18 BY MR. LARSON:

19 Q. Do you recall in the summer of 2009
20 considering whether this excerpt that we're talking
21 about here was fair use?

22 A. Yes.

23 Q. And did you walk through or go through the
24 factors on the checklist and determine whether or not
25 you would check those or whether they applied for this

1 particular excerpt?

2 A. Yes. I did not mark them, but I went through
3 the checklist.

4 Q. And did you go through every single factor one
5 by one when you did that exercise or did you do
6 something less than that?

7 A. I'd go through them specifically to check and
8 see if that violates fair use.

9 Q. You say I go through them. My question is for
10 this particular excerpt, did you in fact --

11 A. Yes.

12 Q. -- go through every single check on the list
13 to see whether or not it would apply?

14 A. Yes.

15 Q. And I take it given that the work appears on
16 your syllabus that you determined that it was a fair
17 use?

18 A. Yes.

19 Q. All right. So let's look at factor 1 on Dixon
20 7.

21 Do you recall whether or not you checked --
22 you have the checklist in front of you? Okay.

23 Do you recall whether or not you determined
24 that the use of this work was nonprofit educational?

25 A. Yes.

1 MR. ASKEW: I object to the form of the
2 question. You said checked and then you
3 said determined. Which one are you asking
4 about?

5 BY MR. LARSON:

6 Q. My understanding is you didn't check any of
7 them because you didn't fill out the list, but you
8 looked at the factor and considered whether it applied,
9 correct?

10 A. Yes.

11 Q. And so I'll use the word determined to mean
12 that process or refer to that process.

13 Did you determine that nonprofit educational
14 applied?

15 A. Yes.

16 Q. Did you determine that teaching applied?

17 A. Yes.

18 Q. Did you determine that research and
19 scholarship applied?

20 A. Yes.

21 Q. Did you determine that criticism, comment,
22 news reporting or parody applied?

23 A. Yes.

24 Q. Did you determine that nontransformative
25 applied?

1 A. No.

2 Q. Did you determine that personal study applied?

3 A. Yes.

4 Q. Did you determine that use is necessary to

5 achieve your intended educational purpose applied?

6 A. Yes.

7 Q. Tell me why nonprofit educational?

8 A. Georgia State University does not make profit.

9 Q. And tell me why you selected teaching?

10 A. Because that's what I do. You said for, only.

11 Q. And tell me why you selected research or

12 scholarship?

13 A. Because that's the highest form of study of

14 these pieces in my opinion, and that's what it is.

15 Q. So you selected that because this chapter is

16 an example of research or scholarship?

17 A. Yes.

18 Q. Tell me why you determined that criticism,

19 comment, news reporting or parody applied?

20 A. Because that chapter is criticism.

21 Q. And so for both research and scholarship and

22 for criticism, comment, news reporting or parody, your

23 analysis was an analysis of those readings as opposed to

24 your use of those readings in the classroom?

25 A. As I answered earlier, yes.

1 Q. You checked personal study or determined that
2 personal study applied.

3 Tell me what your thinking was there?

4 A. Yes, that each one of them has to study it on
5 their own outside of class.

6 Q. And you checked use or determined that use is
7 necessary to achieve your intended educational purpose
8 applied.

9 Tell me why you determined or thought that
10 that applied?

11 A. Because in class we don't have enough time to
12 go into that detail of understanding the sonata, so we
13 talk about the important things and then they can read
14 that further in their reading.

15 Q. And so you viewed the reading as necessary to
16 achieve your --

17 A. Yes.

18 Q. Your purpose?

19 A. Yes.

20 Q. Would you have assigned a reading that was not
21 necessary to achieve your educational purpose?

22 A. At times as the semester goes on and we run
23 out of time, I take things off required reading. Most
24 of them are necessary. Any ones I pick are necessary.
25 They just may not have to read them all.

1 Q. Because of time concerns?

2 A. Uh-huh.

3 Q. The six factors here, six sub factors that you
4 just identified as applying to this particular excerpt,
5 is it the case that when you've gone through this
6 exercise of looking at the checklist with respect to
7 your other works that you've used, that you've
8 determined that those same six apply in all those other
9 instances as well?

10 A. Yes, the ones I pick.

11 Q. And in the weighs against fair use column with
12 respect to this list, excerpt we're looking at, when you
13 filled out the checklist or when you looked at the
14 checklist at the time you wanted to use that work, did
15 you determine that any of the factors on that side, the
16 right hand side applied?

17 A. Yes, the nontransformative.

18 Q. Any others?

19 A. No.

20 Q. And in looking at the checklist in relation to
21 any of the other works that you've used on EReserves, do
22 you recall for any of those other works ever determining
23 that any of these other factors in the weighs against
24 fair use column applied to the other works?

25 A. No.

1 Q. So just so it's clear, every time, for every
2 work you've used on ERes system, it's been your
3 determination that there were six factors that applied
4 under factor 1 on the left hand side and one that
5 applied to right hand side?

6 A. Yes.

7 Q. Under factor 2, just tell me for the "Liszt
8 Sonata In B Minor" excerpt, when you did this exercise
9 before did you determine that published work applied?

10 A. Yes.

11 Q. And a factual or nonfiction work?

12 A. Yes.

13 Q. Important to educational objectives?

14 A. Yes.

15 Q. And tell me your reason for determining
16 important to educational objectives applied?

17 A. In learning more about the Liszt B minor
18 sonata than we had time to cover in class.

19 Q. I'm sorry, I don't --

20 A. So they learned more about the B minor sonata
21 in addition to what we covered in class.

22 Q. And is that essentially the same reason that
23 you checked back on page 1 use -- or page 7 of the
24 exhibit, use is necessary to achieve your intended
25 educational purpose?

1 A. Yes.

2 Q. Did you determine that any of the factors on
3 the right hand column of factor 2 apply?

4 A. No.

5 Q. And has that been the case for all of the
6 works for which you've considered this checklist?
7 Strike that question.

8 A. Yes.

9 Q. Let me ask it --

10 A. Excuse me.

11 Q. -- in a more clear fashion.

12 For each of the works that you've put on
13 EReserves, was it the case that for factor 2 you
14 determined that all three of the factors under weighs in
15 favor of fair use applied and that none of the factors
16 under weighs against fair use applied under factor 2?

17 A. Say that again?

18 Q. For each of the works that you've put on
19 EReserves where you've gone through the exercise of
20 looking at the checklist and deciding whether or not the
21 use was a fair use, did you determine that all three of
22 the sub factors under factor 2 applied?

23 MR. ASKEW: You said all three of the
24 sub factors, you're talking about on the
25 left hand side or weighs in favor?

1 BY MR. LARSON:

2 Q. Yes, yeah, all three of the sub factors on the
3 left hand side.

4 A. Yes.

5 Q. Those have applied in all cases?

6 A. Right.

7 Q. And similarly the three sub factors on the
8 right hand side, weighs against fair use, has it been
9 the case that you've never determined that any of those
10 applied to any of your ERes readings?

11 A. Yes.

12 Q. Let's look at factor 3. For the "Sonata In B
13 Minor" excerpts, when you looked at the checklist, did
14 you determine that small portion of work used applied?

15 A. And I have forgotten the exact number of
16 pages, but with the -- I'm not sure is the answer.
17 Because of the short length of the book it's not as
18 clear to me, okay, on the first one there. It's small
19 when compared to the whole book, but it's a short book.

20 Q. All right. Well, let's look specifically. Do
21 you recall, do you have a recollection whether or not
22 you determined small portion of work did or did not
23 apply?

24 A. That's my guideline as I do it and I would
25 have for then. But sitting right here now I don't

1 remember exactly how many pages.

2 Q. Let's look back at Orr Exhibit 6.

3 A. Okay. I mean, how many pages I put on
4 reserve.

5 Q. Okay. Correct me if I'm wrong, but I think
6 what you indicated before was that you provided chapter
7 3 that runs from page 28 to 48, is that correct?

8 A. Not necessarily. I probably -- I'm not
9 looking at it.

10 Given the short list of -- short length of the
11 book, I would -- I generally wouldn't do that many
12 pages. Right here I can't remember how many. It seems
13 to me I did a portion of the musical analysis, but I'd
14 have to check.

15 Q. You don't recall whether you provided the
16 entire chapter or some subsection?

17 A. I -- I don't recall. I don't -- I rarely do
18 an entire chapter. Mine are generally just selected
19 pages.

20 Q. I'll represent to you that the EReserve report
21 that we received from your counsel for the summer of
22 2009 identifies pages 28 to 48 as being the excerpt that
23 was provided.

24 A. Okay. Then I'm corrected.

25 Q. And you don't need to agree or disagree with

1 that, but for purposes of looking at the chart here --

2 A. Okay.

3 Q. -- if it were the 20 pages, would you consider
4 that to be a small portion of the work?

5 A. Now that I think about it, no.

6 Q. You would consider it to be a large portion of
7 the work?

8 A. Sir?

9 Q. Would you consider it to be a large portion of
10 the work?

11 A. I think it could be, yes.

12 Q. And what's the dividing line for you of where
13 it goes from small to large?

14 A. I almost always limit myself to about 10
15 percent of the pages, around there, which strikes me as
16 small.

17 Q. So over 10 percent for you you would consider
18 large?

19 A. In general. It's not never, but in general,
20 yes.

21 Q. And what would be the -- when you say it's not
22 ever, what would be a situation where you would consider
23 more than 10 percent to be still small?

24 A. 15 percent. It's hard to make these
25 generalizations sitting here.

1 Q. I understand.

2 15 percent you would consider to be small?

3 A. Yes. I don't generally go that far. I'm not
4 saying it's never happened, okay. My goal is I do about
5 10 -- around 10 percent, and if it exceeds that I choose
6 another book or change what I'm doing.

7 Q. So in this case if it's -- if the chapter were
8 20 pages out of 87 or so it looks like we have here --

9 MR. ASKEW: Well, I object to that
10 question. It's a mischaracterization.
11 You're not including the preface and the
12 acknowledgement.

13 BY MR. LARSON:

14 Q. Let's call it a hundred and if that's
15 incorrect then -- about 20 percent?

16 A. That would be high, and I generally almost
17 always avoid that.

18 Q. You would consider that large for purposes of
19 the chart?

20 A. It's 20 percent -- I would put it under a
21 small portion this time because if the book is 100
22 pages, that's 20 percent.

23 Q. And when you -- do you actually calculate a
24 percentage in your mind?

25 A. Yeah. Yes.

1 Q. And when you do that, do you include, looking
2 at the table of contents here, would you include the
3 notes and bibliography and index in the page count for
4 determining a percentage?

5 A. Absolutely, I go to the end of the book and
6 look at the last page.

7 Q. And you include the preface and the
8 acknowledgements from the front, too, in determining the
9 percentage?

10 A. Yes.

11 Q. Looking back to factor 3 on the checklist.
12 Did you determine for this -- for your "Sonata In B
13 Minor" excerpt that the portion used is not central or
14 significant to entire work as a whole?

15 A. No, it's not.

16 Q. So that's a box you --

17 A. Yes, I would have checked or I would check it
18 today if I were doing this.

19 Q. And what's your reason for that?

20 A. Sir?

21 Q. What's your reason for not checking that?
22 What's your thinking that it's not central?

23 A. I did check it.

24 Q. Right. Just tell me why you would check that
25 one.

1 A. Because, first of all, a book like that will
2 have multiple central points. There's no central
3 central point. And if there is it's in a broader
4 discussion, which I rarely ever use. So no.

5 Q. Is there any, looking at the table of
6 contents, any section of the book that you would
7 consider to be central or significant to the entire work
8 as a whole?

9 A. Without looking at it, I'm not sure. I would
10 think the fifth chapter, page 79, could be.

11 Q. The entire fifth chapter?

12 A. No, just page 79.

13 Q. And what is it about that particular page that
14 you would think would make it central or significant to
15 the entire work as a whole?

16 A. That that's where she would summarize and make
17 her central points.

18 Q. Looking back at the checklist, factor 3. Did
19 you determine for this work that the amount taken was
20 narrowly tailored to educational purpose such as
21 criticism, comment, research or subject being taught?

22 A. Yes.

23 Q. And why so?

24 A. Because, again, for that sonata, the time we
25 had in class I didn't get down to a deeper level. That

1 fills in that level, gives them a complete insight into
2 the whole sonata.

3 Q. And that's the same basic reason that you
4 checked important to educational objective or determined
5 that it was important to educational objectives under
6 factor 2?

7 A. Yes.

8 Q. And the same reason that you determined under
9 factor 1 that the use was necessary to achieve your
10 intended educational purpose?

11 A. Yes.

12 Q. In the weighs against fair use column under
13 factor 3, I think you indicated that at least if we were
14 considering the full 20 page chapter you would -- that
15 would be for you a large portion of the entire work
16 used, is that right?

17 MR. ASKEW: I'll object to that. It
18 mischaracterizes his testimony.

19 BY MR. LARSON:

20 Q. If I mischaracterize I apologize. Let me just
21 ask. If it were the 20 page chapter, would you
22 determine or feel that that would be a large portion of
23 the entire work?

24 A. No.

25 Q. And tell me why not?

1 A. Because it's 20 percent -- if I did the whole
2 thing, and it says I did, 20 percent which I think is
3 high, but it's not a large portion. I think a large
4 portion would be -- I don't know. It's hard to talk
5 about it in the abstract. But no, for this book, no.

6 Q. Okay. But -- is 30 percent in your mind a
7 large portion?

8 A. Well, I prefer not to speculate on abstract
9 books because no, I would never do 30 percent.

10 Q. All right. But let's talk about this book
11 specifically. You said you don't feel that 20 percent
12 is a large portion, correct?

13 A. No. I think it's maximum for me, but it's not
14 a large portion.

15 Q. And if you took 30 pages from this -- 30
16 percent from this book --

17 A. Right.

18 Q. -- would you consider that to be a large
19 portion?

20 A. Probably. And I wouldn't do it.

21 Q. So somewhere between 20 and 30 you get into
22 that it crosses over into being large?

23 A. It could. But all this is so speculative and
24 abstract, I'm real hesitant about giving specific
25 answers.

1 Q. I understand.

2 A. You know, my nearly constant practice is
3 around 10 percent. This strayed because that book is so
4 excellent. Okay. But many of them fall under 10
5 percent indeed. 6, 7, 8 percent.

6 Q. Looking back to factor 3 on the chart, the
7 checklist, would you -- did you determine when you
8 looked at the checklist with respect to these excerpts
9 that either portion used is central to work or heart of
10 the work or amount taken is more than necessary for
11 criticism, comment, research or subject being taught;
12 did you determine that either of those applied?

13 A. No.

14 Q. Under -- looking back to the left hand side,
15 has there ever been a -- strike that.

16 For any of your works that you've provided or
17 excerpts that you provide on the ERes system, has there
18 ever been an instance where you determined that the
19 portion used was central to work or the heart of the
20 work?

21 A. No.

22 Q. So in all cases you've determined that the
23 middle box on the left hand side under factor 3 applied?

24 A. Yes.

25 Q. And in all cases have you also determined that

1 the third box under factor 3 on the left hand side
2 applied?

3 A. Yes, narrowly tailored.

4 Q. Do you recall ever determining for any of your
5 EReserves excerpts that large portion or entire work
6 used applied?

7 A. Not that I remember. I start out with I'm not
8 going to do that. Okay. So -- and that's why I count
9 the pages.

10 Q. Looking at factor 4. You know, I think our
11 tape is about done, so why don't we break here for a
12 couple minutes.

13 THE VIDEOGRAPHER: Off the record at

14 1:54.

15 (Brief recess.)

16 THE VIDEOGRAPHER: This is tape 2.

17 We're back on the record at 2:02.

18 BY MR. LARSON:

19 Q. Professor Orr, can you look at factor 4 for me
20 on the checklist?

21 A. Yes. May I clarify something?

22 Q. Sure.

23 A. Okay. As we've been going through this, I
24 want to make it clear that I have determined that the
25 various factors against fair use would not apply and as

1 I've gone through considering the list as well as the
2 ones on the left hand side.

3 Q. Okay. Let's look at factor 4. For the
4 "Sonata In B Minor" excerpt we've been considering, when
5 you looked at the checklist in relation to that work,
6 which of the sub factors in the weighs in favor of fair
7 use column did you determine applied?

8 A. Which list -- that they did apply.

9 Q. The left hand side.

10 A. Okay. No significant effect on the market or
11 potential market for copyrighted work. The use does
12 stimulate market for original work.

13 More than -- about once a term I'll have a
14 student say --

15 Q. Well, let's -- if you can tell me which ones
16 apply and we'll discuss each one.

17 MR. ASKEW: I'm going to object to you
18 interrupting him. Let him answer the
19 question. You've asked it, so let him
20 answer the question.

21 THE WITNESS: Number one, no significant
22 effect on the market. The second one, the
23 use stimulates market for original work.
24 Three, no similar product marketed by the
25 copyright holder, yes. No longer in print.

1 I don't always know. I don't check
2 each one to see if it's in print.

3 BY MR. LARSON:

4 Q. So for this work you did or didn't check that
5 one?

6 A. I did not.

7 Q. Any others in that column?

8 A. Sir?

9 Q. Any others in that column that you determined
10 applied to this "Sonata In B Minor" excerpt?

11 A. Licensing or permission unavailable, I don't
12 know. Supplemental classroom reading, yes. One or few
13 copies made or distributed, yes. User owns lawfully
14 acquired or purchased copy of original work, yes.
15 Restricted access, yes.

16 Q. All right. Now, tell me why you determined
17 that -- the first line, no significant effect on market
18 or potential market for copyrighted work?

19 A. Because it would not, to my understanding it
20 would not cause somebody -- it would not cause the
21 market to sell fewer books at that. My experience is
22 students would go out and buy the book.

23 Q. And the market that you -- market for purposes
24 of that analysis that you made was the market for sales
25 of the book?

1 A. Yes.

2 Q. Did you consider the market for licensing or
3 permissions of excerpts of the book in that analysis?

4 A. No, because I didn't know.

5 Q. Are there particular instances that you can
6 recall where the stimulative effect you described
7 occurred?

8 A. Specific people I've forgotten, but it's been
9 one or two graduate students ever since we've done
10 electronic reserves, a year.

11 Q. When you say one or two graduate students a
12 year, what does that mean?

13 A. Would go out and buy the book after reading
14 the short excerpt.

15 Q. One or two every year since you started
16 putting --

17 A. Yes.

18 Q. And do you recall instances with respect to
19 the "Sonata In B Minor" excerpt any student that you had
20 purchasing the entire book because you assigned a
21 chapter of it?

22 A. Now, I don't know if it was that book.

23 Q. What book do you recall specifically?

24 A. I don't. I don't.

25 Q. So there's no book that you have a specific

1 recollection of that someone bought because you used it
2 in your course, correct?

3 A. No, because as they come by I look at it and I
4 say great, and that's all I think about.

5 Q. So is your answer to my last question yes,
6 there's no specific book that you can recall someone
7 purchasing because you used it in your class?

8 A. Now I'm confused.

9 Q. Let me just ask the question again.

10 A. Okay.

11 Q. Can you name any specific book that a student
12 in your class has bought as a result of your providing
13 an excerpt from the book in your class?

14 A. No.

15 Q. Tell me why in the list under factor 4 you
16 determined that no similar product marketed by the
17 copyright holder applied?

18 A. First because I looked and that was the only
19 book that examined the B minor sonata in the detail I
20 needed that I found on the databases.

21 Q. And why did you determine that supplemental
22 classroom reading applied?

23 A. Because it's in addition to the textbooks they
24 buy.

25 Q. Was this excerpt a required reading?

1 A. Yes.

2 Q. Let's look at the weighs against fair use
3 side. And just tell me for this "Sonata In B Minor"
4 excerpt which of the factors under weighs against fair
5 use, sub factors under weighs against fair use you
6 determined to apply? You determined to apply here.

7 A. Determined to apply here.

8 Significantly impairs market or potential
9 market for copyright works, no, it does not apply here.
10 Licensing and permission reasonably available, not to my
11 knowledge, no. Numerous copies made or distributed, no.
12 Repeated or long term use that demonstrably affects the
13 market for the work, no. Required classroom reading,
14 yes. User does not own lawfully acquired or purchased
15 copy of original work, no. Unrestricted access on the
16 web or other public forum, no.

17 Q. So just required classroom reading, did I get
18 that right?

19 A. Yes.

20 Q. And tell me your thinking on the licensing or
21 permission reasonably available, why you didn't see that
22 as applying?

23 A. Reasonably available meant that we could look
24 into it without a great deal of delay. And I knew from
25 my past experience with friends who have gotten

1 permission to do stuff or when I've gotten permission to
2 publish manuscripts how long it took.

3 Q. And when you talk about publishing
4 manuscripts, do you mean permission to include some
5 third party work in your manuscript?

6 A. No. I'm specifically thinking about Dudley
7 Buck's oratorio or cantata, excuse me, "The Meditation
8 Of Columbia". And he's been dead a hundred years, but I
9 did find his grandson and I got permission and I have a
10 letter somewhere in my file.

11 Q. Permission to do what?

12 A. Publish it.

13 Q. All right. Have you -- what do you mean by
14 publish it?

15 A. Okay. Here's a manuscript that Dudley Buck
16 wrote in 1876. I did an addition and I published it
17 with H. R. Additions in Wisconsin. And before we did
18 that, I found his grandson after diligent searching and
19 wrote him a letter and he wrote me a letter back.

20 Q. And that experience informed your
21 determination that licensing or permission was not
22 reasonably available for this "Sonata In B Minor"?

23 A. For that and the other things I've heard from
24 a lot of colleagues as well.

25 Q. And what have you heard from colleagues?

1 A. That it takes a long time.

2 Q. Have you ever investigated yourself how long
3 it takes?

4 A. I've had my experience. Have I looked into
5 it, no. I understand that we have permission to use
6 these excerpts under a fair use guideline, so that
7 permission is available from what I have understood of
8 the policy to this point.

9 Q. And by permission, so that -- but you didn't
10 check, you didn't determine that this factor applied,
11 correct?

12 A. See, both these two are -- this one is so
13 abstruse that I -- I guess I could check it because
14 permission is available through the fair use act. But
15 is that what you're asking?

16 I'm not sure. I'm not sure. Okay.

17 Q. Have you yourself ever inquired -- other than
18 the Buck experience you described for publishing the
19 manuscript, for using a work on EReserves in one of your
20 courses, have you ever made any inquiry as to whether
21 licensing or permission is available for the work?

22 A. No.

23 Q. In all the works that -- for which you've put
24 them on EReserves and considered the fair use checklist,
25 has it been the case that in every instance you

1 determined that there was no significant effect on the
2 market or potential market for the copyrighted work?

3 A. Correct, I've determined there was no
4 significant effect.

5 Q. And same question for use stimulates market
6 for original work?

7 A. Yes. In my experience.

8 Q. In all your EReserves readings for which
9 you've considered the fair use checklist, have you ever
10 determined any factor in the weighs against fair use
11 column under factor 4 to apply other than required
12 classroom reading?

13 A. No.

14 Q. If you turn back to your syllabus, please.
15 Let me ask -- if I have asked this before I apologize,
16 we've done five of these so I can't recall in some cases
17 who I asked and who I didn't.

18 Have you ever consulted with anyone at the
19 university, from the library or legal counsel's office
20 as to whether a particular work you're offering is or
21 isn't a fair use?

22 A. Yes. Denise Dimsdale I have a number of
23 times, four, five, asked her what she thought. She is
24 the person at the EReserves that I talk to. And I
25 showed her something and we will discuss it.

1 Q. When's the last time you recall doing that?

2 A. It's been months. Let's see. It was last
3 year. Maybe in the spring. But I'm not sure.

4 Q. And just tell me what you recall about that.
5 What was your question?

6 A. I said, here's this book, look at this, do you
7 think this is a narrowly focused section. And what do
8 you think. And she'll -- at one time she said it's
9 fine. Another time we didn't know so we didn't do it.

10 Q. What was the work at issue with her?

11 A. I have no idea.

12 Q. And had you prior to talking with Ms.
13 Dimsdale, had you considered the factors on the
14 checklist with respect to that work?

15 A. Yes, I had gone through them. But that's why
16 I asked about it, I was concerned about the extent
17 and -- mainly the extent and the focus.

18 Q. And by extent, you mean the size of the
19 excerpt?

20 A. Yes.

21 Q. And what did she tell you about the size of
22 the excerpt?

23 A. With one book we thought it was too much and
24 didn't do it.

25 Q. And you recall how much -- what percentage of

1 the overall work that particular excerpt was?

2 A. No.

3 Q. And you said you also asked her about the
4 question of whether it was narrowly tailored or narrowly
5 focused, is that right?

6 A. I didn't use those words. Yes.

7 Q. Please, I don't want to put words in your
8 mouth.

9 A. I didn't use those words. I think I said
10 something like do you think this is appropriate under
11 the guidelines.

12 Q. And what was her response?

13 A. It depends on the book. Most of the time it's
14 been fine. There was one book we decided not to do.

15 Q. And how did she make the determination of
16 whether or not it was appropriate?

17 A. Through those discussions I just told you.
18 Okay. Same thing I just said.

19 Q. Did she work through the checklist with
20 respect to the work?

21 A. Not at the desk. She knows it.

22 Q. It's a work she's familiar with?

23 A. I gather so. She's the one I talked to, and
24 the one I talked to about it.

25 Q. I guess what I was trying to understand is

1 whether she -- whether Ms. Dimsdale in discussing this
2 with you considered anything other than the size of the
3 excerpt relative to the book.

4 A. No, not at that time.

5 Q. Have there been any instances where she in
6 these conversations considered any aspect of the use
7 other than the size of the excerpts relative to the
8 book?

9 A. I don't know because I didn't ask her about
10 those. I don't know what she knows. I know what I've
11 had my conversations with her on, which I've recounted
12 to you.

13 Q. And did those conversations with her involve
14 any discussion of the substance of the chapter or the
15 excerpt that you wanted to use or were they solely about
16 the size of the chapter?

17 A. The conversation was on the amount of the
18 excerpt.

19 Q. And those occurred under the current policy or
20 was this under the prior policy that you described to me
21 before?

22 A. I believe it was in the last couple years.

23 Q. In the instance where you felt with her that
24 it was too much, I think you said, or that the excerpt
25 was too large, what did you do with respect to that

1 reading?

2 A. We didn't include it.

3 Q. Did you put it on hard copy reserve or --

4 A. I think I went and found another reading that
5 fit the checklist as I have been through it.

6 Q. In that instance for the one that was -- that
7 you determined to be too large, what was the -- when you
8 did, looked through the checklist, how did the checklist
9 come out? Did the checklist tell you that it was fair
10 or not fair?

11 A. Most of the other factors were yes, that it
12 was fair.

13 Q. Uh-huh.

14 A. But that one I couldn't say that it was fair,
15 and that's why I asked her.

16 Q. So the checklist indicated that it was fair,
17 but then in conversation with her, the two of you
18 determined that it was probably too large?

19 A. Well, the checklist indicated the other
20 questions were yes, it's a published work, et cetera.
21 That question I couldn't answer comfortably so I asked
22 her about it.

23 Q. That question, you mean small portion or large
24 portion?

25 A. Small portion used, yes. I couldn't answer

1 comfortably, so we didn't come to a decision except not
2 to use that book.

3 Q. And by determining that it wasn't a small
4 portion and was -- strike that.

5 Is what you're saying that through this
6 conversation you determined that it was a large portion
7 for purposes of the checklist?

8 A. I determined it could be. I wasn't sure, so I
9 asked her. And in discussing we weren't sure, so we did
10 not use it. That's how -- that's what happened. Beyond
11 that I don't remember the book or the day except that
12 when I brought it to her and we looked at it we weren't
13 sure, so we did not use it.

14 Q. I understand. And did -- in terms of the
15 overall checklist for this work, had you checked or
16 determined that large portion applied, would that have
17 led there to being more checks on the right hand side of
18 the chart than on the left hand side of the chart or was
19 it not that specific?

20 A. No, not except for the ones I've mentioned,
21 required classroom and others. But that seemed clear to
22 me, so I -- we ultimately decided not to use it.

23 Q. So even if you had determined that it was a
24 large portion, you'd still have had more checks on the
25 left hand side of the chart than the right hand side,

1 correct?

2 A. Yes.

3 Q. If you were instructed by the provost office
4 to remove a reading from EReserves because it violated
5 copyright law, would you do so?

6 A. Absolutely. That minute.

7 Q. And same question for the president's office,
8 would you remove it if they told you to?

9 A. Absolutely.

10 Q. And if a representative of the state Board Of
11 Regents instructed you to remove a reading, would you do
12 so?

13 A. Absolutely.

14 Q. Let's look at Orr Exhibit 3, your syllabus.

15 A. Which one?

16 Q. The summer syllabus.

17 A. Yeah, I mean which page?

18 Q. Let's look at the June 17 entry.

19 A. Uh-huh.

20 Q. Let's do it this way. I'm going to provide
21 you several additional exhibits that are labeled Orr 4,
22 Orr 5, Orr 7, Orr 8, Orr 9 and Orr 10.

23 MR. ASKEW: Can you give me those
24 numbers again?

25 MR. LARSON: Sure. Why don't I provide

1 you with a copy.

2 MR. ASKEW: And you tell me which ones
3 are which.

4 MR. LARSON: Provide you with a copy.
5 And these are all copies of cover pages and
6 table of contents from the works from the
7 syllabus.

8 Orr 4 is "Cambridge Companion To
9 Beethoven".

10 MR. ASKEW: Can we read that --

11 MR. LARSON: The Beethoven is a little
12 hard to read on that one. By Glenn
13 Stanley.

14 MR. ASKEW: Okay.

15 MR. LARSON: Orr 5 is "Cambridge
16 Companion To Schubert".

17 Orr 7 is the "Cambridge Companion To
18 Berlioz".

19 Orr 8 is "The Music Of Berlioz".

20 MR. ASKEW: That's Orr --

21 MR. LARSON: 8. Orr 9 is "Cambridge
22 Companion To Mendelssohn".

23 And Orr 10 is the "Cambridge Companion
24 To Schumann".

25 MR. ASKEW: Orr 10?

1 MR. LARSON: Yeah.

2 BY MR. LARSON:

3 Q. So let's start with Orr 4, which is the
4 "Cambridge Companion To Beethoven". Okay. And I direct
5 your attention to the syllabus to the June 8 - 10 class
6 session section.

7 And actually for this one, just a question.
8 The ERes report I mentioned before at least suggests
9 that chapter 10 from the Beethoven Companion, "Sound And
10 Structure in Beethoven's Orchestral Music" by Leon
11 Botstein was found on the EReserve for the course in the
12 summer of 2009 but I don't see it here on the syllabus.
13 And I was just wondering whether you could tell me if
14 you actually do recall using it or if it's listed here
15 and it's just under a different name or something like
16 that?

17 A. I think that fell out because of time
18 constraints.

19 Q. So it was on -- one you planned to use
20 originally and then pulled?

21 A. Yes.

22 MR. ASKEW: That's Orr 4?

23 MR. LARSON: That was Orr 4.

24 MR. ASKEW: It wasn't used.

25 BY MR. LARSON:

1 Q. Looking at the June 17th - 22nd part of the
2 syllabus, there's an entry there for Schubert, Muller
3 and Die Schone Mullerin. You see that?

4 A. Uh-huh.

5 Q. Is that a reading that was assigned for the
6 course? This is -- I don't have a printout of that
7 particular work for you. But can you just confirm for
8 me that that reading was in fact assigned for the
9 students?

10 MR. ASKEW: Which one are we talking
11 about now?

12 MR. LARSON: Under readings for June 17
13 and 22, the entry that starts on the first
14 line, Schubert, Muller and Die Schone
15 Mullerin.

16 MR. ASKEW: Uh-huh. Uh-huh.

17 THE WITNESS: Okay. I'm not sure. That
18 I think is another book. I don't think --

19 BY MR. LARSON:

20 Q. Yes, there's no exhibit for that one.

21 A. Okay, okay, yes.

22 Q. And I'm just asking about -- not asking about
23 an exhibit. I'm just asking whether an excerpt from
24 that book was in fact assigned?

25 A. Yes.

1 Q. And placed on EReserves?

2 A. Yes.

3 Q. And do you recall which pages or which chapter

4 of that work you used?

5 A. No.

6 Q. Is that one you use regularly in your courses?

7 A. Not regularly. Once in a while.

8 Q. Let's look at Orr Exhibit 5. You see the

9 syllabus indicates in that same week that there was

10 reading Gibbs "Cambridge Companion To Schubert".

11 Is that the work displayed here on Orr Exhibit

12 5?

13 A. Yes.

14 Q. And is it correct that you assigned to your

15 students chapter 6, "Schubert's Songs, The

16 Transformation Of A Genre"?

17 A. That sounds right. Yes.

18 Q. And that was placed on EReserves?

19 A. Yes.

20 Q. Let's look down to the July 1 and 8 Berlioz

21 section. You see that?

22 A. Yes.

23 Q. And then there's an entry there for "Cambridge

24 Companion To Berlioz". Is that the book that's

25 displayed on Orr Exhibit 7?

1 A. Yes.

2 Q. Do you recall which chapter or portion of that
3 work you assigned?

4 A. Sitting here I'm not positive. I would -- I
5 think it's a section of the chapter on the symphonies.
6 And if I recall that's -- I picked the section on the
7 Symphonie Fantastique, which is a few pages in chapter
8 4.

9 Q. Is there a record that you have that exists
10 that would clarify which pages you used?

11 A. I'm pretty sure, yes.

12 Q. What would that record be?

13 A. The file I keep, the guidelines and the blank
14 checklists and the readings for the various courses that
15 I've used.

16 Q. And looking back up to the June 22nd entry,
17 that Schubert, Muller and Die Shone Mullerin that we
18 discussed before --

19 A. Yes.

20 Q. -- would those same records indicate the pages
21 that you used of that work?

22 A. Yes.

23 MR. LARSON: Tony, we request
24 production of those documents that reveals
25 what pages were used.

1 MR. ASKEW: Did you identify the
2 Schubert Muller work on your list that was
3 provided to the court in response to its
4 order in August?

5 MR. LARSON: I believe we did, although
6 I can't --

7 MR. ASKEW: Well, you send me your --

8 MR. LARSON: I can't say for sure.

9 MR. ASKEW: You can send me a letter and
10 I'll look at it and consider it.

11 BY MR. LARSON:

12 Q. Let's go back to the July 1st and 8th. You
13 see there's an entry for Berlioz Symphonie Fantastique,
14 starts on the first line of the readings section?

15 A. Wait. Berlioz Past, Present And Future?

16 Q. No, before that, Berlioz Symphonie
17 Fantastique, you see that?

18 A. Uh-huh.

19 Q. And take a look at Orr 8 for me, which is a
20 copy of the cover page from "The Music Of Berlioz" and
21 the table of contents.

22 If you can turn over in the table of contents
23 to chapter 9 you'll see under chapter 9 there's an entry
24 for Symphonie Fantastique starting at page 251.

25 Is that the section that's referenced in the

1 syllabus that we were just looking at?

2 A. It would be out of that section.

3 Q. Do you know sitting here whether you provided
4 the entire section Symphonie Fantastique or some subset?

5 A. I can't remember that one.

6 Q. Would that be in the records, that information
7 be in the records you were just describing to me?

8 A. Yes.

9 MR. LARSON: Tony, I'll add that to my
10 previous request for the production of
11 those records.

12 MR. ASKEW: Again, if you'll include
13 that in a letter, I'll be glad to consider
14 it.

15 BY MR. LARSON:

16 Q. See down under the readings at the bottom of
17 this page -- excuse me. See down at the bottom of the
18 page there's an entry under the readings for Seaton,
19 "Mendelssohn Companion"?

20 A. Yes.

21 Q. If you look at Orr Exhibit 9, please. This is
22 a printout of the cover page and table of contents for
23 the "Cambridge Companion Of Mendelssohn". On page 2
24 under part 3 there's an entry or a chapter 6, "Symphony
25 And Overture" by Douglas Seaton starting on page 91.

1 A. Yes.

2 Q. Is that the excerpt that's referred to on the
3 syllabus as Seaton, "Mendelssohn Companion" --

4 A. Probably, yes.

5 Q. -- that was placed on EReserves?

6 A. Sir?

7 Q. That was placed on EReserves?

8 A. Yes.

9 Q. If you look over at the next page, exam 2 due
10 27 July, just under that, the readings listed there.

11 A. July 27.

12 Q. Down below the -- down at the bottom of the
13 page.

14 A. Yeah.

15 Q. There's an entry for "The Operas Of Charles
16 Gounod"?

17 A. Yes.

18 Q. Do you know which -- what pages of that work
19 or what chapter that refers to?

20 A. No.

21 Q. Would that also be, that information be in the
22 records that you described to me before?

23 A. Should be, yes.

24 MR. LARSON: Tony, we'll add that to our
25 request as well.

1 MR. ASKEW: You may include that in
2 your letter and I'll be glad to consider
3 it.

4 BY MR. LARSON:

5 Q. Would you take a look at Orr Exhibit 10, which
6 is a cover page to the "Cambridge Companion To Schumann"
7 and table of contents. And this one I don't see on the
8 syllabus, but it was a title listed on an EReserve
9 report we were provided for this semester.

10 Do you recall whether you provided students
11 with any excerpts from this book?

12 A. If I did it would have been chap -- out of
13 chapter 6.

14 Q. Why Sing? Lieder And Song Cycles?

15 A. Yes.

16 Q. And do you know which pages?

17 A. No, I don't.

18 Q. Would you have a record or information on
19 which pages in your records?

20 A. I should, yes.

21 MR. LARSON: We'll make a request for
22 those records as well.

23 MR. ASKEW: You may put that in your
24 letter and I'll be glad to consider it.

25 BY MR. LARSON:

1 Q. I take it your course, when you assign these
2 readings you expect the students to read them?

3 A. Yes.

4 Q. Do you have experience with them printing out
5 copies of the EReserves readings?

6 A. I have seen them, but not many.

7 Q. But you have, some have done it?

8 A. I've known of some that did it.

9 Q. Do they bring them to class?

10 A. Rarely.

11 Q. Where is it that you've seen them do it or --

12 A. I've run into them in the library or someone
13 has showed me after class.

14 Q. I'll provide you what's been marked as Orr 11.
15 Do you recognize this as a syllabus from music 8840 in
16 the fall of 2009 semester?

17 A. Yes.

18 Q. If you can turn to the second page, look at
19 the August 24 to 31 readings. There's an entry there
20 for "North Italian Church Music", do you see that?

21 A. Yes.

22 Q. First question, is that -- is the full title
23 of that work "North Italian Church Music In The Age Of
24 Monteverdi"?

25 A. Yes.

1 Q. And do you recall that the chapter you or the
2 portion that you assigned the students was a chapter by
3 Jerome Roche?

4 A. Could be. I've forgotten. I don't know
5 specifically what it is.

6 Q. Have you -- do you recall assigning it in the
7 past, the Jerome Roche chapter from this book?

8 A. In the past, I believe so.

9 Q. Do you recall ever assigning any other
10 chapters from this book?

11 A. No. And I doubt that it was the whole
12 chapter. I need clarify that. It was just excerpts.

13 Q. Do you recall which pages?

14 A. No.

15 Q. Would that be in your records?

16 A. I think so.

17 MR. LARSON: Tony, we'll add that to our
18 request.

19 MR. ASKEW: You may include that in your
20 letter and I'll be glad to consider it.

21 BY MR. LARSON:

22 Q. Down under the September 28th entry there's an
23 entry there for "North German Church Music In The Age Of
24 Buxtehuder". Is that how you say it?

25 A. Yes.

1 Q. That was a reading that was placed on
2 EReserves?

3 A. Yes, I believe so.

4 Q. Let me provide you Exhibits 12, 13 and 14.
5 Orr Exhibit 12 is a printout of the cover page
6 of "North German Church Music In The Age Of Buxtehude"
7 and the table of contents.

8 A. Uh-huh.

9 Q. If you look at the table of contents --

10 MR. ASKEW: Before we get this, what are
11 the exhibit numbers for the other two?

12 MR. LARSON: Orr 13 is "The Organ As A
13 Mirror Of Its Time". And "The Cambridge
14 Companion To Bach" is Orr 14.

15 MR. ASKEW: Thank you.

16 BY MR. LARSON:

17 Q. Now, I'll represent to you that the EReserves
18 report that we got suggested that the portion from
19 "North German Church Music In The Age Of Buxtehude" was
20 chapter 1, Music In Religious Thought And Education.
21 Does that square with your recollection?

22 A. That's probably right.

23 Q. And looking at Orr 13, which is the cover page
24 for "The Organ Is A Mirror Of Its Time" and the table of
25 contents, there again I'll represent to you that the

1 EReserves report identifies The Organ -- in chapter 6
2 The Organ In 17th Century Cosmology as being the excerpt
3 that was used. Is that accurate?

4 A. That sounds right.

5 Q. And if we can look over to the entry that
6 says -- a couple pages later, November 2. You see that?
7 And there's a section for Handel on the 9th and 16th?

8 A. Right.

9 Q. There's --

10 A. You know, I have to point out they have
11 inflated these. This one now is a fall time because of
12 the dates.

13 Q. Right.

14 A. I'm not sure where they got these. This --
15 and did they just put them all together?

16 Q. This is the fall term course, isn't it? We've
17 switched from the summer course to the fall course.

18 A. Okay. Yes. Handel.

19 Q. So with that clarification does this appear to
20 be the proper syllabus from the fall term course?

21 A. Yes.

22 Q. Yeah. Under Handel there's a reading listed,
23 "Handel's Dramatic Oratorios And Masques" and a page
24 range from that book.

25 A. Yes.

1 Q. Is that a reading that was placed on EReserves
2 for students?

3 A. I think so.

4 Q. And was that required reading?

5 A. Yes.

6 Q. There's no cover page for that one.

7 For the next section down, "Bach And The
8 Culmination of Baroque Music", there's an entry for
9 "Cambridge Companion To Bach", you see that?

10 A. Yes.

11 Q. And if you'd look at Orr 14, which is a copy
12 of the cover and table of contents in "The Cambridge
13 Companion to Bach", ask you to turn to the second page.
14 And there's -- again, the EReserves report suggests that
15 the chapter that was placed on EReserves was chapter 6
16 by Stephen Crist?

17 A. Yes.

18 Q. Is that accurate to your recollection?

19 A. That seems to be right. Yes.

20 Q. And then finally there's a -- towards the
21 bottom of the readings just above where it says exam 2 9
22 December on the syllabus --

23 A. Yes.

24 Q. -- there's an entry on the last line for
25 Geiringer, Bach, you see that? Is that -- can you tell

1 me --

2 A. Wait, which date?

3 Q. I'm sorry, for -- looks like it's under
4 November 23rd to 30th.

5 A. Okay.

6 Q. The very last line before the --

7 A. Geiringer, Bach.

8 Q. Geiringer, Bach, yes. What is that?

9 A. It's a biography of Bach.

10 Q. And do you know which pages you used from that
11 biography?

12 A. Not sitting here.

13 Q. Do you remember a particular chapter or title
14 or section?

15 A. It would be something pertaining to the vocal
16 music.

17 Q. Would your records that you described to me
18 before include information on which pages were provided
19 from that work?

20 A. It should.

21 MR. LARSON: Tony, we would add that to
22 our request as well.

23 MR. ASKEW: You may include that in your
24 letter and I'll be glad to consider it.

25 BY MR. LARSON:

1 Q. That was -- whatever section it was from that
2 book, that would have been provided on EReserves?

3 A. Yes.

4 Q. And that was required reading?

5 A. Yes.

6 Q. If you would, turn two pages over and under
7 exam 2.

8 A. Yes.

9 Q. You'll see there's an entry for Geiringer,
10 Bach?

11 A. Yes.

12 Q. Same pages, 153 to 301?

13 A. Uh-huh.

14 Q. Does that indicate that that was the assigned
15 portion of that book?

16 A. No.

17 Q. Okay. What is this list?

18 A. This is a supplemental reading list. If they
19 want to consult these for those two exams, books in the
20 library that they go look at.

21 Q. We just looked at, discussed several readings
22 from this fall course. Did you --

23 MR. ASKEW: What page are you on now?

24 MR. LARSON: I'm not on any particular
25 page. I'm just asking about the four or

1 five readings in general that we just
2 talked about.

3 BY MR. LARSON:

4 Q. Did you for each of those prior to putting
5 them on EReserves consider them with the fair use
6 checklist?

7 A. Yes, I went through the checklist and
8 determined that they fit under the fair use.

9 Q. And you did that mentally but not -- you
10 didn't actually write any checks on the checklist,
11 correct?

12 A. Yes.

13 Q. Are you familiar with the GoSolar system on
14 the school web site?

15 A. Yes.

16 Q. I'll provide you what's been marked Orr
17 Exhibit 2 and ask you to look at the --

18 MR. LARSON: Actually, Tony, can I see
19 yours back? I think I gave you more pages
20 than --

21 That matches now.

22 MR. ASKEW: Hold on just a second. Let
23 me see what he's got. Okay. Hold on.

24 Okay.

25 BY MR. LARSON:

1 Q. These are printouts we made from the GoSolar
2 system on the web site for your courses from the summer
3 and fall semesters of 2009.

4 For the summer semester on the first page it
5 indicates that for music 8860 there were 10 students in
6 the class?

7 A. Yes.

8 Q. Does that comport with your recollection of
9 the course?

10 A. Yes.

11 Q. And it indicates, turning to the next page,
12 that in the fall semester for music 8840 there were 18
13 students in the class, is that right?

14 A. Yes.

15 MR. ASKEW: Do you intend to include the
16 page for the spring of 2010?

17 MR. LARSON: I may have included it. I
18 don't care either way.

19 MR. ASKEW: I don't want that to be a
20 part of this exhibit. We're not
21 considering classes from the spring of
22 2010.

23 MR. LARSON: Does it matter?

24 MR. ASKEW: Just seems like it's an
25 unnecessary part of the exhibit if you're

1 just talking about things in the summer and
2 fall of 2009.

3 MR. LARSON: I don't care either way.
4 Lots of exhibits have pages we don't talk
5 about necessarily.

6 MR. ASKEW: Why don't we remove that
7 page since we were specifically ordered by
8 the court to limit our examination to the
9 things that are involved in the spring and
10 fall of 2009.

11 BY MR. LARSON:

12 Q. I'm going to show you what's been marked as
13 Orr Exhibit 15.

14 MR. ASKEW: What's this number?

15 MR. LARSON: 15. Is that 8840?

16 MR. ASKEW: Yes, summer of '08, though.
17 We're not going to look at this syllabus,
18 are we?

19 MR. LARSON: We are going to look at
20 it, yes.

21 Sorry I don't have another copy of it.
22 I might be able to find one at a break. I
23 just have a couple questions about this.

24 BY MR. LARSON:

25 Q. Professor Orr, do you recognize this as a

1 syllabus for music 8840 from the summer of 2008?

2 A. Yes.

3 Q. And this is the same course that you taught in
4 the fall of 2009, is that right?

5 A. Yes.

6 Q. I just want you to look in Orr 15. Actually
7 let's take a look at the two together, if we could, so
8 look at page 2 of each syllabus.

9 A. Okay.

10 Q. Under the entry for "Later 17th Century
11 Italy", and the readings for both, in both syllabi,
12 there's an entry for "North Italian Church Music",
13 correct?

14 A. Yes.

15 Q. Does that reflect that you used the same
16 reading each instance of the course?

17 A. Say that again?

18 Q. Does that reflect that you used the same
19 reading in each instance of the course?

20 A. Yes.

21 Q. And then down under the section for "The Later
22 17th Century In The Empire"?

23 A. Yes.

24 Q. There are in both syllabi, there are entries
25 for "North German Church Music In The Age Of Buxtehude",

1 correct?

2 A. Yes.

3 Q. And also entries for "The Organ A Mirror Of
4 Its Time", is that right?

5 A. Yes.

6 Q. And does that reflect the fact that you used
7 those same readings in each instance of the course?

8 A. Yes.

9 Q. And then turning --

10 A. Wait, I've got to clarify that. Sometimes as
11 we go on I change the pages. Same book, change the
12 pages. Sitting -- and it's not real often.

13 Sitting right here I couldn't be more
14 specific. But I wanted to be on the record. Okay.
15 It's the same book but at times I'll change my mind.

16 Q. And you don't know for the readings -- for the
17 three we've looked at so far, whether or not when you
18 taught it in 2009 you changed your mind as to the pages
19 that you used from those?

20 A. I have no idea.

21 Q. Let's look over at the Handel section of the
22 syllabus. And in the summer 2008 syllabus it's
23 identified as July 14th and in the fall 2009 syllabus
24 it's November 9 and 16. You see that?

25 A. Yes.

1 Q. And under both of those there's an entry for
2 Handel's "Dramatic Oratorios And Masques" pages 33 to 80
3 and 274 to 310?

4 A. Uh-huh.

5 Q. Does that indicate that you indicate that you
6 used those same readings, this same portions in each
7 instance of the course?

8 A. Yes.

9 Q. And at least with respect to that one, the
10 pages were in fact the same, right?

11 A. Sir?

12 Q. With respect to this particular excerpt, given
13 that there were pages listed here in the syllabus --

14 A. I'm not sure about that.

15 Q. And why not?

16 A. Because as we went on to EReserves from the
17 books I generally cut the page numbers down.

18 Q. So in --

19 A. It was -- and I missed it is what happened.
20 The ERes is just those pages I selected. So they would
21 have to find the pages. You know that, okay. So
22 these -- this might have been leftover from when we put
23 the books on reserve.

24 Q. Let's unpack that a little bit.

25 Look at the summer term syllabus --

1 A. Right.

2 Q. The summer of 2008 you were using EReserves,
3 correct?

4 A. Uh-huh.

5 MR. ASKEW: Wait a minute. Okay.

6 BY MR. LARSON:

7 Q. So in the entry on the summer 2008 syllabus
8 for Handel's "Dramatic Oratorios And Masques", that
9 would have been on EReserves, correct?

10 A. Yes.

11 Q. Okay. And going over to November --

12 A. I'm pretty sure.

13 Q. Going to the 2009 syllabus, the entry for
14 Handel's "Dramatic Oratorios And Masques", that likewise
15 would have been on EReserves, correct?

16 A. I think so.

17 Q. And is it your testimony that the pages that
18 are listed here on the second syllabus for fall 2009 are
19 an inaccurate reflection of what was actually placed on
20 EReserves?

21 A. Sitting here I don't know. I do a great deal,
22 as you can see.

23 Q. Do you have any reason to believe it would be
24 inaccurate?

25 A. No. It just looks like a leftover to me. And

1 I -- from before we did the EReserves, okay, and also
2 because I change my mind on terms. Okay.

3 Q. So a leftover from --

4 A. From when I put the book on reserve and I had
5 to list the page numbers. So at times -- I just had
6 missed that on this particular one. I don't know why.

7 Q. What you're saying is that this could be a
8 hold over from some semester prior to even summer term
9 2008 where you taught the course but put the books on
10 hard copy reserve rather than on EReserves?

11 A. Yes.

12 Q. It's just continued to carry through --

13 A. Right.

14 Q. -- through to the current semester?

15 A. Right.

16 MR. ASKEW: I object to your question.
17 When you say it continued to carry through,
18 are you referring to this --

19 MR. LARSON: This listing for Handel's
20 Dramatic Oratorios.

21 THE WITNESS: Yes. But I change my mind
22 at times. And then I also say right now I
23 can't be positive -- this tends to be
24 EReserves, but there are also books here
25 that I put the hard copy on reserve. Okay.

1 So --

2 BY MR. LARSON:

3 Q. So then my question is, is there any
4 particular reason with respect to this excerpt that you
5 can point to or to indicate or that would suggest to you
6 that this page range is incorrect as to what's actually
7 on EReserves?

8 A. It might be, yes.

9 Q. It might be but you don't know?

10 A. I don't know sitting here, right.

11 Q. And would the pages that you actually used be
12 in your records?

13 A. I believe so.

14 MR. LARSON: Okay. We'd add that to
15 our request, Tony.

16 MR. ASKEW: Well, you may include that
17 in your letter to me and I'll be glad to
18 consider it.

19 THE WITNESS: Unless I put the book on
20 reserve, then I wouldn't have to keep a
21 separate checklist or sheet for it, right?
22 Hard reserve, okay. I would just tell the
23 students which pages.

24 BY MR. LARSON:

25 Q. But this work, is it your testimony that this

1 Handel's "Dramatic Oratorios And Masques", whatever the
2 page range is currently on EReserve?

3 A. Right now?

4 Q. No, no the fall 2009 semester of this course,
5 that excerpt was placed on EReserves?

6 A. I'm not sure right here. It may have been,
7 yes. But I'm not sure.

8 Q. And is there some reason -- what reason would
9 there be that if it's listed here in your syllabus as a
10 reading material it wouldn't have been on EReserves when
11 you taught this course?

12 A. I just thought that it would be better if they
13 read it off the hard copy and could do more detail. I'm
14 not sure. Okay.

15 Q. You're saying you did think that or that's
16 possible that that's what happened?

17 A. That's possible. As I've said, I put hard
18 copies and I suggest pages for them to consult. Okay.
19 So --

20 Q. Now, this is a required reading, correct?

21 A. Yes. Whether it's EReserve or the hard copy.

22 Q. You see looking at the two syllabi under the
23 "Bach And The Culmination Of Baroque Music Section" --

24 A. Yes.

25 Q. -- there's an entry under both to "Cambridge

1 Companion to Bach", you see that?

2 A. Yes.

3 Q. And does that suggest that you in both
4 instances of the class provided the same reading excerpt
5 to the students?

6 A. I'm not sure. I change my mind at times. It
7 probably was.

8 Q. And same question for -- down under the vocal
9 music, there's an entry for Geiringer, Bach?

10 A. Yes.

11 Q. And does that indicate that you used the same
12 reading excerpt in both instances of the course?

13 A. Perhaps. With Bach there's a great deal of
14 music and when new stuff comes out I'll change my mind
15 if I use some older stuff.

16 MR. LARSON: All right. Why don't we
17 take a break. I think the video is about
18 to end. We don't have much more to go.

19 THE VIDEOGRAPHER: Off the record at
20 3:04.

21 (Brief recess.)

22 THE VIDEOGRAPHER: This is tape 3.
23 We're back on the record at 3:16.

24 BY MR. LARSON:

25 Q. Professor, I'm going to hand you what's been

1 marked as Orr Exhibit 16. This is an article that was
2 printed from online from www.dailyreportonline.com.
3 It's an article from April 18, 2008 by Janet L. Conley.
4 And it begins with a discussion of you.

5 Do you recall providing an interview to Ms.
6 Conley?

7 A. Which section?

8 Q. Well, my question is do you recall providing
9 an interview to Janet Conley?

10 A. I believe so, yes.

11 Q. And just if you look at the first three
12 paragraphs.

13 A. Okay.

14 Q. I mean the three -- starting with "Ask Georgia
15 State", starting with "So when Orr" and then starting
16 with "I would be surprised". If you just quickly read
17 through those?

18 MR. ASKEW: I see, you want the sentence
19 that starts "I would be surprised".

20 MR. LARSON: Yeah. I'm asking read up
21 to the point where it says "Orr says he
22 carefully follows".

23 THE WITNESS: Right.

24 BY MR. LARSON:

25 Q. I just want to ask, did Ms. Conley accurately

1 quote you in the article where she's providing comments
2 from you?

3 A. It sounds like as I remember it.

4 Q. In the third sentence there "I would be
5 surprised", do you see that?

6 A. Right.

7 Q. Says I would be surprised if any of the many
8 scholars in the country would order that book for all
9 students, says Orr.

10 Is it your understanding that if you determine
11 that a work isn't fair use that the only option other
12 than not using the work is to make the students buy it?

13 A. No, I can put the hard copy on reserve.

14 Q. And what about seeking permission to use the
15 excerpt you want to use from the publisher?

16 A. I didn't know -- I didn't think we had to
17 because of the fair use.

18 Q. And my question is, if it's not a fair use --

19 A. Right.

20 Q. -- do you understand that seeking permission
21 from the publisher to use the particular excerpt you
22 want to use is a possibility?

23 A. Yes.

24 Q. And is that one -- I take from what you said
25 before it's not one that you've ever personally

1 investigated, correct?

2 A. Not for electronic reserves. I have
3 investigated for my own work.

4 Q. Take a look at the second page, if you would.
5 Down at the bottom four or five lines up there's a
6 paragraph starting with "GSU music professor Orr". You
7 see that?

8 A. Say it again?

9 Q. At the bottom of the second page.

10 A. Yes.

11 Q. There's a paragraph about six lines up, seven
12 lines up that starts "GSU music professor". You see
13 that?

14 A. Right.

15 Q. Just read from there through the end for me.

16 A. GSU music Professor Orr --

17 Q. You can just read it to yourself.

18 A. Oh.

19 Q. Did Ms. Conley accurately quote you there?

20 A. It seems like it at this point.

21 Q. Okay. Tell me, when was it that you started
22 using EReserves?

23 A. Whenever they implemented them.

24 Q. And why did you decide to use EReserves to
25 provide course reading?

1 A. Well, first they're a lot more convenient as
2 our students are from all over the metro area. And two,
3 it saves a great deal of paper. And three, I think
4 there's been an increase in their reading the materials
5 since they're more readily available.

6 Q. And you're talking about an increase as
7 opposed to when they were placed on hard copy reserves?

8 A. Yes. Some of them just wouldn't go over there
9 and do it.

10 Q. And I take it that's because it was more
11 burdensome to go to the library and do it there as
12 opposed to getting it through EReserves, is that right?

13 A. Yes.

14 Q. You still use hard copy reserves, though, in
15 some instances, is that right?

16 A. Yes.

17 Q. And when is it that you will use the hard copy
18 reserve now?

19 A. When I don't think it complies with fair use.

20 Q. And when -- is that as a result of using the
21 checklist?

22 A. Yes.

23 Q. And so are there instances then where you've
24 used the checklist and determined that there are more
25 factors in the weighs against fair use side than the

1 weighs in favor of fair use side?

2 A. Yes.

3 Q. And when was -- when did that happen?

4 A. It happens most every term. And I don't
5 remember the specific books. I will put books like "The
6 Guide For Research on J. S. Bach" or a musical score
7 especially, I'll put musical scores.

8 Q. For "The Guide To Research For J.S. Bach" did
9 you actually consult a checklist for that or is that one
10 where you just decided to put --

11 A. No, I just put that on reserve.

12 Q. And my question, do you recall any that you've
13 put on hard copy reserve specifically as a result of
14 doing the checklist and determining that it wasn't a
15 fair use?

16 A. Right now I can't remember the exact process.
17 In general, because I've done it for a while, if a book
18 strikes me it's not going to make it or stretching it, I
19 just don't have to go through the checklist, I just take
20 it down and put it on hard copy reserve.

21 Q. At a certain point, I think you indicated
22 earlier that you started actually writing on the
23 checklist and saving those. Is that right?

24 A. Yes.

25 Q. When was that?

1 A. That was earlier this week when I understood
2 it was important to do that. And I did it Tuesday with
3 the books I took over there. Did it -- Tuesday or
4 Wednesday. Maybe it was Wednesday.

5 Q. Okay. And that was the first time?

6 A. Filled it out by hand, yes.

7 Q. Uh-huh. And that came as a result of your
8 meeting with counsel for this deposition?

9 A. Yes.

10 Q. Have you ever used coursepacks in your
11 courses?

12 A. The reserve reading copying?

13 Q. Well, do you have an understanding of what
14 coursepacks are?

15 A. Tell me.

16 Q. Are you familiar with the process of putting
17 articles or excerpts, binding them together at a copy
18 shop or bookstore?

19 A. Yes. No, I haven't done it for years. Years
20 and years.

21 Q. You did do it at some point?

22 A. At some point years ago, and then copyright
23 concerns so I stopped and put the books, hard copy in
24 the library on reserve. And then when EReserves began I
25 started doing that with the guidelines and the

1 checklist.

2 Q. What were the copyright concerns with the
3 coursepacks?

4 A. There wasn't guidelines, there wasn't
5 anything, it was just copying. And I thought that's
6 pretty wide open, so I stopped. And I never did it for
7 very long.

8 Q. Roughly timeline, when was this, in the 90s
9 or --

10 A. No, no, no, 20, 25 years ago. The print shop
11 is gone. And actually the copyright stuff hadn't gotten
12 heated up. As soon as it did, I ceased.

13 Q. And is that a reference to litigation that
14 took place back in the 90s about --

15 A. No. First of all it was 80s. And I don't
16 know specifically, it's been a long time. And it was
17 just general discussion among me and some colleagues and
18 my church music colleagues.

19 Q. And then there was some period of time where
20 you put readings on hard copy reserve and then when
21 EReserves came around you started using EReserves?

22 A. Yes.

23 MR. LARSON: Professor, those are all
24 the questions I have for you today.

25 EXAMINATION

1 BY MR. ASKEW:

2 Q. Professor Orr, we had a number of exhibits
3 that were identified I think as Orr 4, 5, 7, 8, 9, 10,
4 12, 13 and 14. They were all pages from books, cover
5 page and a content page. Mr. Larson would identify a
6 chapter and ask you if that chapter was the one that you
7 refer to in your syllabus.

8 Can you tell me what your practice was with
9 respect to the excerpts that were taken from these
10 various books with respect to -- in regard to how much
11 material you would take from each of those chapters?

12 A. Rarely I have ever done an entire chapter. It
13 was always the excerpts, of pages from that chapter.

14 Q. Did you have a particular percentage in mind
15 as to how much you would take from any chapter in your
16 placement of material on EReserves from these various
17 books that Mr. Larson has identified as Exhibits 4, 5,
18 7, 8, 9, 10, 12, 13 and 14 where he identified chapters?

19 MR. LARSON: I object. The percentage
20 is vague. Percentage of the chapter or
21 percentage of the book?

22 BY MR. ASKEW:

23 Q. Percentage of the book.

24 A. Percentage of the book. I generally planned
25 around 10 percent of the book. Often lower. But around

1 10 percent is my guideline that I use from the
2 materials.

3 Q. Just so the record is clear, so if the
4 chapter, full chapter would represent 20 percent of the
5 book, does that indicate you would take less than that
6 chapter so that you would be somewhere in the
7 neighborhood of 10 percent of the book?

8 A. Yes. Yes.

9 Q. Would you look at Orr Exhibit 14, which is
10 "The Cambridge Companion To Bach". I direct your
11 attention to part 2, Profiles Of The Music.

12 Mr. Larson has referred to the sixth chapter
13 there, The Early Works Of The Heritage Of The 17th
14 Century. You see that?

15 A. Yes.

16 Q. And he's indicated that that chapter runs from
17 page 73 -- excuse me. From page 75 to page 85. You see
18 that?

19 A. Yes.

20 Q. Do you know which edition of this book Mr.
21 Larson has shown to you?

22 A. No.

23 Q. If in the accusations of infringement in this
24 case Mr. Larson has indicated or others in his law firm
25 have indicated that the pages from this particular book

1 that were scanned as an excerpt and uploaded were pages
2 72 to 85, what would that indicate to you with respect
3 to this particular book?

4 MR. LARSON: I object. The question is
5 vague.

6 BY MR. ASKEW:

7 Q. You understand my question?

8 A. Yes, do those numbers correspond to this
9 chapter?

10 Q. What would that indicate to you with respect
11 to this particular book that he's taken photocopies
12 from?

13 A. That they seem to have the wrong edition.

14 Q. And have you -- in answering your questions
15 with respect to each of these exhibits, 4, 5, 7, 8, 9,
16 10, 12, 13 and 14, have you assumed that Mr. Taylor --
17 Mr. Larson, excuse me, that Mr. Larson has shown to you
18 photocopies of the correct edition that corresponds to
19 the material that you have shown in your syllabus?

20 A. Yes, I have assumed.

21 Q. And if the pages that are reported in Mr.
22 Larson's accusations of infringement do not correspond
23 to the pages that are shown on the tables of contents
24 for each of the works that Mr. Larson has shown to you
25 as Exhibits 4, 5, 7, 8, 9, 10, 12, 13 and 14, if the

1 pages in those exhibits do not correspond to the pages
2 in the accusations of infringement in Mr. Larson's
3 charts that have been provided, what does that indicate
4 to you with respect to what edition has been shown to
5 you as Exhibits 4, 5, 7, 8, 9, 10, 12, 13 and 14?

6 MR. LARSON: I object that the question
7 is based on a premise that's not on the
8 record, that there's -- they're all
9 incorrect in some way. Subject to that --

10 THE WITNESS: Well, they could be until
11 it's checked.

12 BY MR. ASKEW:

13 Q. Do you have an answer to my question?

14 A. Okay. Did I assume that they were correct?
15 Yes.

16 Q. But if the pages that are shown in the charts
17 that Mr. Larson has provided to us that includes the
18 accusations of infringement, if the pages in those
19 accusations do not correspond to the pages in the table
20 of contents for Exhibits 4, 5, 7, 8, 9, 10, 12, 13 and
21 14, what does that indicate to you as to the books that
22 have been shown to you?

23 A. It would indicate they have the wrong edition.

24 MR. LARSON: Wait, wait, wait. You
25 need to give me time to make an objection

1 to the question, please.

2 I object that the question assumes
3 facts not the evidence. And I object that
4 it's leading.

5 BY MR. ASKEW:

6 Q. You may answer the question.

7 A. I would assume -- it would indicate they had
8 the wrong edition.

9 MR. ASKEW: I have no further questions
10 of the witness.

11 FURTHER EXAMINATION

12 BY MR. LARSON:

13 Q. In your last answer when you said the wrong
14 edition, the wrong edition where? In the exhibit or --
15 from today's deposition or the charts that you've never
16 seen?

17 A. Say that again?

18 Q. You said it would indicate that we have the
19 wrong exhibit?

20 A. If the pages don't match up, these look like
21 they could be the wrong exhibit, the ones we have here,
22 this afternoon.

23 Q. Do you have any reason to believe other than
24 the Bach page that we just looked at that any of the
25 other exhibits that you looked at this afternoon weren't

1 the edition that you used for your course?

2 A. I couldn't say sitting here. But that is
3 noticeable with all the legal details, and it would make
4 me want to go check to see if they had their accurate
5 pages and edition.

6 Q. That is noticeable where?

7 A. To -- if it's wrong in here then that would
8 bring up the possibility the other edition cited here
9 could be mistaken, if the pages don't line up.

10 Q. So the possibility is that what you were shown
11 on this exhibit isn't the edition that you used for your
12 course?

13 A. There's a possibility, yes.

14 Q. There's also the possibility that the editions
15 that you were shown were the editions you used in your
16 course, correct?

17 A. Yes.

18 Q. And to the extent that there are -- is a
19 different page range indicated on some other legal
20 document referenced by Mr. Askew, it could be that the
21 page range there perhaps was incorrect, right?

22 A. It could be both.

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

24 A. I don't know without checking the details.

25 Q. Right. And you keep records you indicated in

1 the deposition of what pages you used, right?

2 A. Yes, on most of them I think so. It's been
3 my -- for the vast majority, yes. Okay. And kept the
4 files. I'm not going to sit here and say I never forgot
5 to write the pages down, I just filled out the form and
6 did the checklist.

7 Q. And do those, the records that you keep and
8 the records that you submit to the library indicate
9 which edition of the particular work you used?

10 A. They don't need to because I hand the book to
11 them.

12 Q. And so you have in your possession then the
13 actual edition that you used to provide readings to your
14 course, to your student?

15 A. Do you mean do I own it?

16 Q. Yes.

17 A. No, I get it off the shelf.

18 Q. Okay. So the library at GSU has the edition
19 that was used to provide readings to your students, is
20 that right?

21 A. Yes.

22 Q. Okay. So in your possession or the
23 university's possession is information about which pages
24 you used and which edition you used, is that correct?

25 A. I don't specify the edition because I hand

1 them the book and the page numbers and the date and the
2 year and the author and the publisher, the pages and the
3 book itself. So if it's noticeable perhaps, but in
4 general, no, because I don't see any ambiguity.

5 Q. The information you provide to the library
6 indicates the title of the book and the year of the
7 book, is that right?

8 A. No, it's a long detailed list, author, title,
9 publisher, year, place, catalogue number, pages, it's
10 detailed.

11 Q. Does -- from the year that you have to
12 identify you would be able to determine the edition
13 that's used, correct?

14 A. Yes.

15 Q. And are those forms forms that you keep a
16 record of or a copy of?

17 A. In the last months, and I guess year, I've
18 been keeping those records. Earlier on I kept my
19 records. Okay. But since then -- and some of those, it
20 depended on which computer I was at, but since then I've
21 been making sure I printed out each one of the ones that
22 I submitted.

23 Q. And for the earlier period, would the records
24 that you kept indicate that same body of information
25 that you just described?

1 A. Yes.

2 MR. LARSON: Tony, we request
3 production of those records.

4 MR. ASKEW: You may include that in your
5 letter.

6 THE WITNESS: I gave them to you.
7 You've got them.

8 BY MR. LARSON:

9 Q. Well, I will respectfully disagree that we do.
10 But we can deal with that with your counsel.

11 A. But I've given you everything that I have, the
12 sheets I've used.

13 Q. Okay. We'll handle that outside the
14 deposition with your counsel. I don't believe that we
15 do have the records that you're indicating. But we'll
16 take care of that.

17 And those records, just to confirm, would also
18 indicate in instances where you used some lessor amount
19 of chapter, some pages other than the full chapter, the
20 records would indicate which pages in particular you
21 used on EReserves?

22 A. Yes. And the form that's submitted has the
23 pages.

24 MR. LARSON: I have no more questions.

25 MR. ASKEW: All right. That will

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conclude the deposition.

THE VIDEOGRAPHER: Off the record at
3:39.
(Deposition concluded at 3:39 p.m.)

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E R R A T A S H E E T

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

PAGE / LINE CORRECTION

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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 9th day of February, 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 N. Lee Orr Ph.D.

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 Weil
13 Gotshal & Manges to provide court reporting services for
this deposition.

14 Shugart & Bishop will not be taking this deposition
15 under any contract that is prohibited by O.C.G.A. 15-14-37
(a) and (b).

16 Shugart & Bishop has no exclusive contract to provide
17 reporting services with any party to the case, any counsel
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
19 rates to all parties in the case, and a financial discount
will not be given to any party to this litigation.

20
21 Teresa Bishop
22 RPR, RMR, CCR B-307
23
24
25

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A				
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