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

CAMBRIDGE UNIVERSITY PRESS,)	CV. NO. 1:08-1425
ET AL.,)	ATLANTA, GA
)	MAY 31, 2011
PLAINTIFF,)	
)	
)	
VERSUS)	
)	
J. L. ALBERT, IN HIS OFFICIAL))	
CAPACITY AS GEORGIA STATE)	
UNIVERSITY ASSOCIATE PROVOST))	
FOR INFORMATION SYSTEMS AND))	
TECHNOLOGY, ET AL.,)	
)	
DEFENDANTS.)	

BEFORE THE HONORABLE ORINDA D. EVANS
UNITED STATES SENIOR DISTRICT COURT JUDGE
BENCH TRIAL
VOLUME X

APPEARANCES:

FOR THE PLAINTIFF:	EDWARD B. KRUGMAN, ESQ.
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12 COURT REPORTER:

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13 UNITED STATES COURT REPORTER
1959 RICHARD RUSSELL BUILDING
14 75 SPRING STREET, SW
ATLANTA, GA 30303

15 STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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1 THE COURT: GOOD MORNING. HOPE YOU HAD A NICE
2 WEEKEND. WELL, WHERE ARE WE NOW?

3 MR. SCHAETZEL: ABOUT TO CALL THE NEXT WITNESS. LIKE
4 TO INTRODUCE MARY KATHRYN BATES. SHE WILL CONDUCT THE NEXT
5 EXAMINATION OF PROFESSOR KRUGER.

6 THE COURT: ALL RIGHT. LET'S PROCEED.

7 THE CLERK: RAISE YOUR RIGHT HAND TO BE SWORN.

8 ANN CALE KRUGER, HAVING BEEN FIRST DULY SWORN,
9 TESTIFIED AS FOLLOWS:

10 THE CLERK: PLEASE BE SEATED. STATE YOUR FULL NAME
11 FOR THE RECORD AND SPELL YOUR LAST NAME, PLEASE.

12 THE WITNESS: ANN CALE KRUGER, K-R-U-G-E-R.

13 DIRECT EXAM

14 BY MS. BATES:

15 Q. GOOD MORNING, DR. KRUGER. I AM KATIE BATES
16 REPRESENTING THE DEFENDANTS IN THIS CASE. GOOD MORNING.

17 A. GOOD MORNING.

18 Q. COULD YOU PLEASE INTRODUCE YOURSELF?

19 A. ANN CALE KRUGER.

20 Q. FOR WHOM DO YOU WORK?

21 A. GEORGIA STATE UNIVERSITY.

22 Q. IN WHAT CAPACITY?

23 A. I'M AN ASSOCIATE PROFESSOR IN EDUCATIONAL PSYCHOLOGY
24 AND SPECIAL EDUCATION.

25 Q. AND WHEN DID YOU START TEACHING AT GEORGIA STATE

1 UNIVERSITY?

2 A. FALL SEMESTER 1992.

3 Q. HAVE YOU AUTHORED ANY PUBLICATIONS, DR. KRUGER?

4 A. YES.

5 Q. CAN YOU TELL US ABOUT THOSE WORKS THAT YOU HAVE
6 PUBLISHED?

7 A. SEVERAL JOURNAL ARTICLES IN SCHOLARLY MEDIA AND SOME
8 BOOK CHAPTERS.

9 Q. THOSE BOOK CHAPTERS, ARE THEY IN EDITED VOLUMES?

10 A. YES.

11 Q. AND WHO ARE THE PUBLISHERS OF THOSE BOOKS?

12 A. BLACKWELL, SCIENTIFIC AMERICAN BOOKS, RUTLEDGE.

13 Q. WHAT IS THE GENERAL SUBJECT MATTERS OF THESE JOURNAL
14 ARTICLES AND CHAPTERS?

15 A. SUBAREA DEVELOPMENTAL PSYCHOLOGY.

16 Q. ARE YOU AWARE OF ANY OTHER INSTRUCTOR HAVING USED A
17 CHAPTER IN A BOOK THAT YOU HAVE AUTHORED OR A JOURNAL ARTICLE
18 THAT YOU HAVE AUTHORED IN HIS OR HER CLASS?

19 A. YES.

20 Q. DO YOU KNOW HOW OFTEN THAT HAS OCCURRED?

21 A. HAPPENS FAIRLY ROUTINELY WITH ONE PROFESSOR I CAN THINK
22 OF.

23 Q. WHO IS THAT?

24 A. DR. AMY LEDBETTER.

25 Q. IS SHE AT GEORGIA STATE UNIVERSITY?

1 A. YES.

2 Q. IS IT A BENEFIT TO YOU IF OTHER PROFESSORS USE YOUR
3 WORK IN THEIR COURSES?

4 A. YES.

5 Q. AND CAN YOU PLEASE EXPLAIN HOW THAT IS THE CASE?

6 A. CERTAINLY. PROFESSORS AND AUTHORS WANT THEIR IDEAS
7 COMMUNICATED, SO IT IS WONDERFUL IF OTHER PEOPLE GET TO FIND
8 OUT WHAT RESEARCH I DO, HELPS ME TO RECRUIT STUDENTS. HELPS
9 ME GET MORE FEEDBACK AND MORE IDEAS.

10 Q. AND AT GEORGIA STATE, DO YOU KNOW IF OTHERS USING
11 YOUR WORKS OR PUBLISHING WORKS PLAYS INTO A TENURE DECISION?

12 A. IT DOES IN THE SENSE THAT ONE'S REPUTATION IS IN
13 SCIENTIFIC REPUTATION IS IMPORTANT.

14 Q. AS AN AUTHOR YOURSELF OF NUMEROUS PUBLICATIONS, DO YOU
15 HAVE EXPERIENCE DEALING WITH COPYRIGHT RELATED ISSUES?

16 A. YES.

17 Q. HOW DO YOU TREAT THE COPYRIGHTS OF OTHERS?

18 A. WITH RESPECT.

19 Q. WE ARE GOING TO TURN NOW TO THE COURSES YOU TEACH. IF
20 YOU CAN FIRST TELL US GENERALLY WHAT TYPES OF COURSES YOU
21 TEACH AT GEORGIA STATE?

22 A. I TEACH MOSTLY GRADUATE LEVEL COURSES AND EXCLUSIVELY
23 GRADUATE LEVEL COURSES IN THE PAST SEVERAL YEARS; ONE MASTERS
24 LEVEL COURSE AND TWO DOCTORAL LEVEL COURSES.

25 Q. CAN YOU TELL US THE TITLE AND COURSE NUMBER FOR THE

1 MASTERS LEVEL COURSE YOU TEACH?

2 A. IT IS EPY 7090, PSYCHOLOGY OF LEARNING AND THE
3 LEARNER.

4 Q. IS THIS A SINGLE SEMESTER COURSE?

5 A. THIS IS A COURSE THAT IS TAUGHT IN AN UNCONVENTIONAL
6 MANNER. IT IS TAUGHT TO THE COLLABORATIVE MASTERS PROGRAM
7 COHORT IN EARLY CHILDHOOD. IT MEETS LESS FREQUENTLY OVER A
8 LONGER PERIOD OF TIME THAN A TYPICAL COURSE WOULD.

9 Q. DID YOU TEACH EPY 7090 IN THE SUMMER AND FALL OF 2009?

10 A. YES.

11 Q. AM I CORRECT IN UNDERSTANDING THAT THE SAME STUDENTS
12 WOULD HAVE BEEN ENROLLED IN THIS COURSE IN BOTH SEMESTERS?

13 A. IT WAS THE SAME STUDENTS. IT WAS A SINGLE COURSE THAT
14 MET OVER THOSE TWO SEMESTERS.

15 Q. AND WHEN WOULD STUDENTS ACTUALLY REGISTER FOR THAT
16 COURSE?

17 A. THEY WOULDN'T REGISTER UNTIL THE FOLLOWING MAY OF 2010.

18 Q. IS THAT IN ORDER TO HAVE A GRADE POSTED FOR THE COURSE
19 AT THAT TIME?

20 A. THAT'S RIGHT.

21 Q. WE WILL DISCUSS THAT COURSE A BIT FURTHER IN A MOMENT.

22 CAN YOU FIRST TELL US IF EPY 8220 IS ONE OF THE PH.D.
23 COURSES YOU TEACH?

24 A. YES.

25 Q. WHAT IS IT?

1 A. ADVANCED DEVELOPMENTAL PSYCHOLOGY AND SOCIALIZATION
2 ENVIRONMENTAL DEVELOPMENT.

3 Q. DID YOU TEACH IT IN THE FALL OF 2009?

4 A. YES.

5 Q. IS IT DIFFERENT THAN 7090 BEING A SINGLE COURSE?

6 A. YES.

7 Q. FOCUSING NOW ON THAT COURSE AND YOUR TEACHING OF IT IN
8 THE FALL OF 2009, CAN YOU TELL US, GENERALLY, WHAT THE COURSE
9 WAS ABOUT?

10 A. THE EPY 8220 COURSE IS ABOUT RESEARCH AND SCHOLARSHIP
11 IN A SUBFIELD OF DEVELOPMENTAL PSYCHOLOGY THAT -- CONCERNING
12 THE DEVELOPMENT OF PERSONALITY AND SOCIALIZATION OF THE CHILD.

13 Q. WHAT TEACHING METHOD DO YOU USE FOR THE COURSE?

14 A. SEMINAR STYLE COURSE, SO THERE IS AN OVERVIEW KIND OF
15 LECTURE EACH WEEK, BUT IT IS BRIEF. IT IS FOLLOWED BY STUDENT
16 PRESENTATIONS AND BY CLASS DISCUSSION.

17 Q. DO YOU RECALL HOW MANY STUDENTS WERE IN THAT CLASS IN
18 THE FALL OF 2009?

19 A. I DON'T RECALL SPECIFIC NUMBER, BUT APPROXIMATELY 20.

20 Q. DID YOU PREPARE A SYLLABUS FOR THAT COURSE?

21 A. I DID.

22 MS. BATES: YOUR HONOR, MAY I APPROACH THE WITNESS?

23 THE COURT: YOU MAY.

24 BY MS. BATES:

25 Q. DR. KRUGER, I HAVE HANDED YOU A WITNESS NOTEBOOK WITH

1 SEVERAL DOCUMENTS THAT WE WILL COVER DURING YOUR EXAMINATION.
2 IF YOU CAN TURN IN THAT NOTEBOOK, WHICH HAS BEEN PREVIOUSLY
3 ADMITTED PLAINTIFF'S EXHIBIT 554. DO YOU RECOGNIZE THAT
4 DOCUMENT?

5 A. I DO.

6 Q. WHAT IS IT?

7 A. THIS IS THE SYLLABUS I PREPARED FOR 8220 IN THE FALL OF
8 2009.

9 Q. LOOKING AT THE FIRST PAGE OF YOUR SYLLABUS FOR THE FALL
10 2009 8220 COURSE, IT IS MARKED GEORGIA STATE 66288, THERE IS
11 A SECTION ENTITLED "COURSE OBJECTIVES."

12 A. YES.

13 Q. CAN YOU READ THIS PARAGRAPH TO US, PLEASE?

14 A.

15 "THE PURPOSE OF THIS COURSE IS FOR
16 THE STUDENT TO ACTIVELY EXPLORE THE
17 RESEARCH LITERATURE IN SOCIAL AND
18 PERSONALITY DEVELOPMENT. AS WITH
19 ANY COURSE IN HUMAN DEVELOPMENT
20 ISSUES SUCH AS CULTURE, RACE AND
21 GENDER AND THEIR ROLES IN CHILDREN'S
22 LIVES ARE CONSIDERED. STUDENTS
23 WILL BECOME PROFICIENT IN READING
24 AND CRITICIZING THEORETICAL WORK AND
25 EMPIRICAL REPORTS AND THEY WILL GAIN

1 EXPERIENCE IN USING LIBRARY RESEARCH
2 TECHNOLOGIES IN THE PREPARATION OF
3 THEIR PAPERS. THE GOAL IS TO
4 GENERATE INDEPENDENT THINKING AND
5 CLEAR COMMUNICATION REGARDING
6 RESEARCH IN THIS SUBFIELD OF
7 DEVELOPMENTAL PSYCHOLOGY."

8 Q. DOES THIS SECTION REFLECT YOUR OBJECTIVE FOR YOUR
9 STUDENTS IN THIS CASE?

10 A. YES.

11 Q. CAN YOU TURN TO THE NEXT, 66829?

12 A. (WITNESS COMPLIES.) YES.

13 Q. DO YOU SEE THERE THE SECTION THERE "COURSE OUTLINE" IN
14 BOLD?

15 A. YES.

16 Q. WHAT DOES THE "COURSE OUTLINE" CONVEY?

17 A. THIS IS A CALENDAR OF THE COURSE WITH THE TOPICS FOR
18 EACH WEEK ORGANIZED.

19 Q. AND ARE THESE SUBSECTIONS OF THE COURSE ALL RELATED TO
20 THE OVERARCHING TOPICS OF SOCIAL AND PERSONALITY DEVELOPMENT?

21 A. YES, THEY ARE.

22 Q. CAN YOU NOW LOOK AT THE BOTTOM OF THAT PAGE, PAGE TWO,
23 TO WHERE IT SAYS "REQUIRED READING?" DO YOU SEE THAT
24 HEADING?

25 A. I DO.

1 Q. WHAT INFORMATION FALLS UNDER THIS HEADING?

2 A. THE LISTING OF RESEARCH ARTICLES AND CHAPTERS THAT ARE
3 APPROPRIATE AND REQUIRED AND/OR SUPPLEMENTAL FOR EACH WEEK.

4 Q. DO THE BOLD HEADINGS OF THESE PAGES RESPOND TO THE
5 DATED COURSE LINE ON PAGE TWO OF THE SYLLABUS?

6 A. THEY DO.

7 Q. AND, ACCORDINGLY, SHOULD THE READINGS THAT FALL UNDER A
8 PARTICULAR COURSE OUTLINE SUBHEADING AND THE REQUIRED READINGS
9 SECTION RELATE TO THAT COURSE SUBTOPIC?

10 A. THAT'S RIGHT.

11 Q. THE BACKGROUND READINGS INDICATED IN ALL CAPS AND BOLD
12 ON PAGES THREE AND FOUR OF PLAINTIFF'S EXHIBIT 554, THE
13 SYLLABUS FOR THIS COURSE, WERE THEY REQUIRED READINGS?

14 A. THE BACKGROUND READINGS ARE OPTIONAL.

15 Q. ARE THE OTHER READINGS LISTED IN THIS SECTION REQUIRED
16 READINGS?

17 A. THEY ARE.

18 Q. PLEASE TURN BACK TO PAGE TWO OF THE SYLLABUS. DO YOU
19 SEE THE NOTE TOWARD THE BOTTOM OF THE PAGE?

20 A. YES.

21 Q. CAN YOU READ THAT NOTE FOR US, PLEASE?

22 A.

23 "THE COURSE SYLLABUS PROVIDES A
24 GENERAL PLAN FOR THE COURSE,
25 DEVIATIONS MAY BE NECESSARY."

1 Q. DO YOU RECALL ANY PARTICULAR DEVIATIONS FROM THE
2 REQUIRED READINGS FOR THIS COURSE INVOLVED IN 2009?

3 A. NO, I DON'T.

4 Q. CAN YOU DESCRIBE FOR US JUST GENERALLY THE TYPES OF
5 READINGS YOU ASSIGNED FOR THE COURSE?

6 A. MOSTLY THEY ARE ARTICLES FROM RESEARCH REPORTS,
7 JOURNALS, WITH A FEW CHAPTERS.

8 Q. DO YOU MEAN BOOK CHAPTERS?

9 A. BOOK CHAPTERS.

10 Q. HOW WERE YOUR STUDENTS TO ACCESS COPIES OF THE JOURNAL
11 ARTICLES AND BOOK EXCERPTS THAT YOU ASSIGNED?

12 A. THROUGH THE LIBRARY ELECTRONIC RESERVES.

13 Q. ON PAGE THREE OF YOUR SYLLABUS, IF YOU CAN TURN TO
14 THAT, PLEASE, THERE IS A READING ASSIGNMENT LISTED FROM
15 "UNDERSTANDING TRAUMA: INTEGRATING BIOLOGICAL, CLINICAL AND
16 CULTURAL PERSPECTIVES," DO YOU SEE THAT?

17 A. YES.

18 Q. CAN YOU DESCRIBE GENERALLY WHAT IS "UNDERSTANDING
19 TRAUMA: INTEGRATING BIOLOGICAL, CLINICAL AND CULTURAL
20 PERSPECTIVES"?

21 A. THAT IS AN EDITED VOLUME WHICH MEANS IT IS A COLLECTION
22 OF CHAPTERS BY DIFFERENT AUTHORS.

23 Q. WHAT IS THE SUBJECT MATTER?

24 A. THE SUBJECT MATTER IS TRAUMA AND ITS CONSEQUENCES IN
25 DIFFERENT DOMAINS.

1 Q. IS IT A NONFICTION WORK?

2 A. IT IS NONFICTION.

3 Q. WHAT EXCERPTS DID YOU ASSIGN FROM "UNDERSTANDING
4 TRAUMA"?

5 A. I ASSIGNED THE CHAPTER BY VAN DER KOLK, WHICH IS TITLED
6 "THE DEVELOPMENTAL IMPACT OF CHILDHOOD TRAUMA."

7 Q. WHAT PAGES DOES THAT EXCERPT APPEAR?

8 A. 224 TO 241.

9 Q. DO YOU UNDERSTAND PLAINTIFFS IN THIS CASE HAVE ALLEGED
10 THAT THE USE OF THIS EXCERPT INFRINGES ONE OR MORE OF THEIR
11 COPYRIGHT RIGHTS?

12 A. YES.

13 Q. DR. KRUGER, YOU HAVE IN FRONT OF YOU WHAT HAS BEEN
14 ADMITTED AS PLAINTIFF'S EXHIBIT 142. DO YOU RECOGNIZE THIS
15 BOOK?

16 A. YES.

17 Q. IS THIS A COPY OF THE EDITION OF "UNDERSTANDING TRAUMA"
18 FROM WHICH YOU ASSIGNED THE READING ON PAGE THREE OF YOUR
19 SYLLABUS?

20 A. IT IS.

21 Q. PLEASE TURN IN THE BOOK TO PAGE ROMAN NUMBER EIGHT OF
22 THE TABLE OF CONTENTS. CAN YOU CONFIRM THAT THE
23 DEVELOPMENTAL IMPACT OF CHILDHOOD TRAUMA, CHAPTER 11, IS ONE
24 OF SEVERAL CHAPTERS IN SECTION TWO OF THE BOOK?

25 A. THAT'S CORRECT.

1 Q. AND HOW MANY CHAPTERS APPEAR IN THE BOOK?

2 A. TWENTY-ONE.

3 Q. HOW MANY CHAPTERS APPEAR IN SECTION TWO OF THE BOOK?

4 A. SEVEN.

5 Q. AND LASTLY, CAN YOU TELL US HOW MANY DISCRETE
6 IDENTIFIED SUBSECTIONS THE BOOK HAS?

7 A. THREE.

8 MS. BATES: YOUR HONOR, PLAINTIFFS HAVE IDENTIFIED
9 "UNDERSTANDING TRAUMA" AS CONTAINING 490 PAGES; DEFENDANTS
10 IDENTIFY AS CONTAINING 547 PAGES INCLUDING THE PAGES WITH
11 ROMAN NUMERALS IN THE FRONT OF THE WORKS, SUCH AS LIST OF
12 FIGURES, LIST OF TABLES, THE FORWARD AND THE PREFACE.

13 BY MS. BATES:

14 Q. DR. KRUGER, YOU ASSIGNED AS A READING ROUGHLY 18 PAGES
15 OUT OF SOMEWHERE BETWEEN 490 AND 547 PAGES IN THE BOOK; IS
16 THAT CORRECT?

17 A. THAT'S CORRECT.

18 MS. BATES: BY PLAINTIFF'S COUNT, THAT IS 3.7
19 PERCENT; BY DEFENDANT'S COUNT THAT IS 3.34 PERCENT OF THE
20 WORK.

21 BY MS. BATES:

22 Q. I WOULD LIKE TO DISCUSS THE SUBSTANCE OF THIS READING
23 ASSIGNMENT. CAN YOU PLEASE DESCRIBE THE VAN DER KOLK
24 EXCERPTS OF "UNDERSTANDING TRAUMA" LISTED HERE ON THIS
25 SYLLABUS PAGE THERE?

1 A. THIS CHAPTER ADVANCES A UNIQUE ARGUMENT ABOUT THE
2 IMPORTANCE OF THE TIMING OF TRAUMA IN INFLUENCING THE TYPE OF
3 OUTCOME.

4 Q. WE PREVIOUSLY IDENTIFIED THIS READING ASSIGNMENT AS
5 FALLING UNDERNEATH THE COURSE OUTLINE SUBHEADING APPROACHES TO
6 DEVELOPMENT TWO RISK AND RESILIENCE, DO YOU SEE THAT ON THE
7 SYLLABUS?

8 A. YES.

9 Q. WAS THIS EXCERPT ASSIGNED FOR A PARTICULAR CLASS?

10 A. YES.

11 Q. ON WHAT DATE DID THAT CLASS OCCUR, ACCORDING TO THE
12 SYLLABUS?

13 A. SEPTEMBER 3RD.

14 Q. AND WHAT WAS THE SUBJECT MATTER OF THE CLASS TAUGHT ON
15 THAT DAY?

16 A. RISK AND RESILIENCE.

17 Q. CAN YOU EXPLAIN FURTHER WHAT RISK AND RESILIENCE MEANS?

18 A. I CAN. ONE OF THE IMPORTANT FOUNDATIONAL IDEAS ABOUT
19 DEVELOPMENT IS THE ADAPTATION OF ORGANIZATIONS TO
20 ENVIRONMENTS. THE EXTENT TO WHICH AN ORGANISM CAN ADAPT TO
21 AN ENVIRONMENT IS AFFECTED BY THE AMOUNT OF STRESS OR TRAUMA
22 IN THE ENVIRONMENT, SO RISK AND RESILIENCE EXAMINES THAT
23 COMPLICATED INTERACTION BETWEEN THE ABILITY TO ADAPT AND
24 STRESS OF THE ENVIRONMENT.

25 Q. CAN YOU THEN EXPLAIN WHY YOU ASSIGNED THE DEVELOPMENTAL

1 IMPACT OF CHILDHOOD TRAUMA EXCERPT ON THAT DAY?

2 A. THE CHAPTER IS SPECIAL, FOCUSED ON THE TIMING OF THE
3 STRESS OR TRAUMA IN THE ENVIRONMENT. SO THE STAGE OF BRAIN
4 DEVELOPMENT THAT HAS BEEN OBTAINED AT THE TIME OF THE TRAUMA
5 IS IMPORTANT IN -- ACCORDING TO THE ARGUMENT IN THE CHAPTER.

6 Q. HOW DID USE OF THAT EXCERPT IN THE COURSE THAT DAY
7 RELATE TO THE OVERALL OBJECTIVE FOR THE COURSE?

8 A. TO UNDERSTAND RISK AND RESILIENCE COMPLETELY, IT IS
9 IMPORTANT TO UNDERSTAND IT IN DEVELOPMENTAL CONTEXT, THIS IS
10 A DEVELOPMENTAL COURSE. SO THIS CHAPTER ADDED THAT
11 PARTICULAR FOCUS AND ARGUMENT.

12 Q. HOW DID YOU INTEND FOR YOUR STUDENTS TO ACCESS A COPY
13 OF THE DEVELOPMENTAL IMPACT OF CHILDHOOD TRAUMA EXCERPT?

14 A. THROUGH THE UNIVERSITY ELECTRONIC RESERVE SYSTEM.

15 Q. HAVE YOU EVER POSTED AN EXCERPT ON THE ULEARN SYSTEM?

16 A. NO.

17 Q. DID YOU REQUEST THAT THIS EXCERPT BE LOADED ON TO
18 ERESERVES?

19 A. I DID.

20 Q. WHAT STEPS DID YOU REQUEST IT BE LOADED ON TO
21 ERESERVES?

22 A. ERESERVE SYSTEM HAS A WEB PAGE. WHEN ONE GOES TO THE
23 WEB PAGE, THERE IS A FAIR USE CHECKLIST FOR EACH ARTICLE OR
24 CHAPTER THAT ONE WANTS TO ASSIGN. COMPLETE THE -- COMPLETE
25 THE FAIR USE CHECKLIST AND THEN COMPLETE FURTHER OF THE

1 GRAPHIC INFORMATION ABOUT THE READING AND SUBMIT IT TO THE
2 LIBRARY FOR REVIEW.

3 Q. AND IS THIS AN ELECTRONIC SUBMISSION?

4 A. YES, IT IS.

5 Q. IN DOING THE CHECKLIST, DID YOU CONDUCT A FAIR USE
6 ANALYSIS?

7 A. I DID.

8 Q. FOCUSING ON YOUR FAIR USE ANALYSIS RELATED TO USE OF
9 UNDERSTANDING TRAUMA IN YOUR COURSE 8220 IN THE FALL OF 2009,
10 WHEN YOU CONDUCTED THAT ANALYSIS, DID YOU CONSIDER ALL FOUR
11 FAIR USE FACTORS?

12 A. YES.

13 Q. AND WHAT WAS YOUR OVERALL CONCLUSION ON WHETHER OR NOT
14 YOUR PROPOSED USE OF THIS EXCERPT WAS FAIR USE?

15 A. IT WAS FAIR USE.

16 Q. IF YOU CAN TURN IN YOUR NOTEBOOK TO PLAINTIFF'S EXHIBIT
17 598, WHICH I BELIEVE IS ALREADY IN EVIDENCE, DO YOU RECOGNIZE
18 THIS DOCUMENT?

19 A. I DO.

20 Q. WHAT IS IT?

21 A. IT IS A COPY OF THE FAIR USE CHECKLIST FROM FALL 2009
22 FOR THE UNDERSTANDING TRAUMA CHAPTER THAT I ASSIGNED.

23 Q. WHY DID YOU RECREATE THIS CHECKLIST?

24 A. I RECREATED THE CHECKLIST BECAUSE I COULD NOT LOCATE
25 THE PHYSICAL COPY OF THE ORIGINAL THAT I PRINTED OUT IN

1 PREPARATION FOR FALL 2009.

2 Q. SO YOU INDICATED THAT YOU DID PRINT A COPY OF THE FAIR
3 USE CHECKLIST THAT YOU COMPLETED IN 2009 PRIOR TO THIS TIME?

4 A. I DID. I PRINTED IT OUT BECAUSE I COULDN'T SAVE IT
5 ELECTRONICALLY.

6 Q. AND YOU WERE UNABLE TO LOCATE THAT COPY?

7 A. I WAS UNABLE TO LOCATE THE ORIGINAL, THAT'S RIGHT.

8 Q. HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

9 A. TO THE BEST OF MY ABILITY, RECONSTRUCTED MY PROCEDURE
10 THAT I USED ORIGINALLY IN PREPARATION OF FALL OF '09.

11 Q. DO YOU BELIEVE THE RECREATED CHECKLIST DEPICTED HERE IS
12 A FAIR AND ACCURATE RECREATION OF THE CHECKLIST AS YOU
13 COMPLETED IT BEFORE REQUESTING THAT THE VAN DER KOLK EXCERPTS
14 BE POSTED ON THE ERESERVE SYSTEM IN THE FALL OF '09?

15 A. YES.

16 Q. CAN YOU STATE WHETHER THIS IS A FAIR AND ACCURATE
17 RECREATION?

18 A. IT IS.

19 Q. AND AM I CORRECT, PLAINTIFF'S EXHIBIT 598, IS A COPY OF
20 THE CHECKLIST YOU HAD CREATED?

21 A. THAT'S RIGHT.

22 Q. CAN YOU TELL US WHY YOU INITIALLY COMPLETED THE
23 CHECKLIST THAT IS RECREATED OF PLAINTIFF'S EXHIBIT 598?

24 A. IT IS UNIVERSITY POLICY AND A REQUIREMENT THAT EACH
25 READING ASSIGNED BE REVIEWED WITH RESPECT TO A FAIR USE.

1 Q. WHEN YOU COMPLETED THE CHECKLIST IN 2009, DID YOU
2 ATTEMPT TO CONDUCT A THOROUGH FAIR USE ANALYSIS IN GOOD FAITH?

3 A. I DID.

4 Q. DID YOU USE THE CHECKLIST TO ASSIST YOU IN DETERMINING
5 WHETHER YOUR PROPOSED USE OF UNDERSTANDING TRAUMA WAS A FAIR
6 USE?

7 MR. RAINS: OBJECTION, YOUR HONOR, LEADING.

8 THE COURT: SUSTAINED.

9 BY MS. BATES:

10 Q. DID YOU CONDUCT A FAIR USE ANALYSIS WITH REGARD TO
11 UNDERSTANDING TRAUMA?

12 A. I DID.

13 Q. DID YOU USE ANY TOOLS TO ASSIST YOU IN CONDUCTING THAT
14 ANALYSIS?

15 A. I USED THE FAIR LIST CHECKLIST.

16 Q. LET'S WALK THROUGH YOUR FAIR USE ANALYSIS FOR
17 UNDERSTANDING TRAUMA USE OF IT IN YOUR COURSE 8220 FALL OF
18 2009. YOU SAID PREVIOUSLY YOU CONSIDERED ALL FOUR FAIR USE
19 FACTORS?

20 A. THAT'S RIGHT.

21 Q. WITH REGARD TO FACTOR ONE, THE PURPOSE AND CHARACTER
22 OF THE USE, WHAT WAS YOUR CONCLUSION REGARDING WHETHER THIS
23 FACTOR WEIGHED IN USE OF FAIR USE?

24 A. IT DID.

25 Q. WITH REGARD TO FACTOR TWO, NATURE OF COPYRIGHTED WORK,

1 WHAT WAS YOUR CONCLUSION?

2 A. IT WEIGHED IN FAVOR.

3 Q. WITH REGARD TO THREE, AMOUNT AND SUBSTANTIALITY --

4 THE COURT REPORTER: COULD YOU PLEASE START OVER?

5 BY MS. BATES:

6 Q. WITH REGARD TO FACTOR THREE, AMOUNT AND SUBSTANTIALITY

7 OF THE PORTION USED, WHAT WAS YOUR RECOLLECTION REGARDING

8 WHETHER THIS FACTOR WEIGHED IN USE OF FAIR USE?

9 A. IT WEIGHED IN FAVOR OF FAIR USE.

10 Q. WITH REGARD TO FACTOR FOUR, EFFECT ON THE MARKET FOR

11 THE ORIGINAL, WHAT WAS YOUR CONCLUSION REGARDING WHETHER THIS

12 FACTOR WEIGHED IN FAVOR OF FAIR USE?

13 A. IT WEIGHED IN FAVOR OF FAIR USE.

14 Q. LOOKING NOW TO THE SUBFACTORS UNDER FACTOR ONE ON YOUR

15 RECREATED CHECKLIST, WHY DID YOU CONCLUDE THAT THIS FACTOR

16 ONE WEIGHS IN FAVOR OF FAIR USE?

17 A. THE OVERWHELMING NUMBER OF SUBFACTORS PRESENT IN FAVOR

18 OF FAIR USE.

19 Q. DID YOU CONSIDER EACH OF THESE SUBTESTS?

20 A. YES, I DID.

21 Q. WHICH OF THE SUBTESTS REFLECTED ON THE CHECKLIST DID

22 YOU FIND WEIGHED IN FAVOR OF FAIR USE?

23 A. NONPROFIT EDUCATIONAL, TEACHING, RESEARCH OR

24 SCHOLARSHIP, USE NECESSARY TO ACHIEVE INTENDED PURPOSE.

25 Q. FOCUSING NOW ON CERTAIN OF YOUR SELECTIONS, WHY DID YOU

1 CHOOSE PERSONAL STUDY?

2 A. MY UNDERSTANDING OF PERSONAL STUDY IS THAT THE STUDENTS
3 WILL READ PRIVATELY, AS WELL AS THE ASSIGNED READINGS, THINK
4 ABOUT THEM, AND THEN BE PREPARED TO DISCUSS THEM IN CLASS.

5 Q. TURNING BACK, PLEASE, TO PLAINTIFF'S EXHIBIT 554,
6 THE SYLLABUS FOR 8220.

7 A. YES.

8 Q. PLEASE READ ALOUD THE FIRST AND THIRD SENTENCES UNDER
9 COURSE OBJECTIVES ON THE FIRST PAGE.

10 A.

11 "THE PURPOSE OF THIS COURSE IS FOR
12 THE STUDENT TO ACTIVELY EXPLORE THE
13 RESEARCH LITERATURE IN SOCIAL AND
14 PERSONALITY DEVELOPMENTS. STUDENTS
15 WILL BECOME PROFICIENT IN READING
16 AND CRITICIZING THEORETICAL WORK AND
17 EMPIRICAL REPORTS AND THEY WILL GAIN
18 EXPERIENCE IN USING LIBRARY RESEARCH
19 TECHNOLOGIES IN PREPARATION OF THEIR
20 PAPERS."

21 Q. READ THE FULL THREE SENTENCES UNDER "COURSE
22 REQUIREMENTS."

23 A.

24 "STUDENTS ARE EXPECTED TO READ AND
25 DIGEST ALL THE ASSIGNED ARTICLES."

1 Q. ARE THESE SENTENCES REFERENCES TO WHAT YOU TOOK TO
2 UNDERSTAND AS PERSONAL STUDY?

3 A. YES.

4 Q. TURNING BACK TO THE CHECKLIST AT PLAINTIFF'S EXHIBIT
5 598, WHY DID YOU SELECT "USES NECESSARY" FOR THIS PARTICULAR
6 EXCERPT?

7 A. THIS PARTICULAR EXCERPT ADVANCED A UNIQUE ARGUMENT THAT
8 I WANTED AND FOUND NECESSARY FOR STUDENTS TO UNDERSTAND, WHICH
9 IS THE DEVELOPMENTAL TIMING OF TRAUMA AND ITS RELEVANCE TO
10 OUTCOME.

11 Q. DO YOU SEE UNDER FACTOR ONE IN THE WEIGHS IN FAVOR OF
12 FAIR USE COLUMN THE SUBFACTOR "TRANSFORMATIVE"?

13 A. YES.

14 Q. AND ON THE RIGHT-HAND SIDE UNDER WEIGHS AGAINST FAIR
15 USE, NONTRANSFORMATIVE?

16 A. I SEE THAT.

17 Q. WHY DID YOU NOT SELECT EITHER OF THOSE TWO SUBFACTORS?

18 A. I MISSED THE FIRST CHOICE THERE.

19 Q. WERE YOU COMPLETING THIS CHECKLIST TODAY, WOULD YOU
20 CHECK ONE OF THESE, TRANSFORMATIVE OR NONTRANSFORMATIVE?

21 A. NONTRANSFORMATIVE.

22 Q. WOULD IT CHANGE YOUR OVERALL CONCLUSION IF IT WEIGHS IN
23 FAVOR OF OR AGAINST USE IN IF YOU CHECKED TRANSFORMATIVE IN
24 2009?

25 A. IN THE END IT WOULDN'T MAKE A DIFFERENCE.

1 Q. WHY NOT?

2 A. THERE WOULD STILL BE A SIGNIFICANT NUMBER IN FAVOR OF
3 FAIR USE.

4 Q. LOOKING NOW, DR. KRUGER, TO FACTOR TWO, TO PAGE TWO ON
5 THE FAIR USE CHECKLIST, THAT IS GEORGIA STATE 26259,
6 PLAINTIFF'S EXHIBIT 598, WHY DID YOU CONCLUDE THAT FACTOR TWO
7 WEIGHS IN FAVOR OF FAIR USE?

8 A. BECAUSE THE SUBTESTS WERE PRESENT THAT WEIGHED IN FAVOR
9 OF FAIR USE.

10 Q. WHICH SUBTEST DID YOU FIND WEIGHED IN FAVOR OF FAIR
11 USE?

12 A. PUBLISHED WORK, FACTUAL OR NONFICTION WORK, IMPORTANT
13 TO EDUCATIONAL OBJECTIVES.

14 Q. IN PARTICULAR, WHY DID YOU SELECT FACTUAL OR
15 NONFICTION?

16 A. THIS IS A WORK OF RESEARCH, IT IS BASED ON RESEARCH
17 DATA, WHICH IS AN ACCURATE REFLECTION OF WORK.

18 Q. DOES IT CONTAIN THE AUTHOR'S ORIGINAL DATA?

19 A. IT INCLUDES THAT, BUT IT INCLUDES DATA, SUMMARIZING
20 DATA FOR MANY OTHER PEOPLE.

21 Q. CAN YOU PLEASE POINT TO SOME EXAMPLES IN THIS WORK OF
22 SUMMARIZING OTHERS DATA IN THE RELEVANT PIECE, PLEASE?

23 A. NEARLY EVERY SENTENCE HAS MULTIPLE CITATIONS OF OTHER
24 PUBLISHED RESEARCH. THERE IS NOT A PARAGRAPH WITHOUT A
25 CITATION, THAT I CAN SEE, AND THERE ARE ALMOST 50 REFERENCES

1 CITED AT THE END OF THE CHAPTER.

2 Q. SO HOW WOULD YOU DESCRIBE HOW MUCH OF THIS WORK IS
3 SUMMARIZING OTHERS' WORKS?

4 A. THE OVERWHELMING MAJORITY; NINETY PERCENT I WOULD
5 ESTIMATE OR MORE.

6 Q. LOOKING BACK AT THE CHECKLIST, WHY DID YOU NOT SELECT
7 "HIGHLY CREATIVE WORK" IN THE RIGHT-HAND COLUMN?

8 A. IT IS NOT A WORK OF IMAGINATION. IT IS A WORK OF
9 SUMMARY AND ARGUMENTS.

10 Q. AND WHY DID YOU SELECT "IMPORTANT TO EDUCATIONAL
11 OBJECTIVES"?

12 A. BECAUSE THE ARGUMENT THAT IS MADE IS IMPORTANT FOR THE
13 UNDERSTANDING OF RISK AND RESILIENCE, IT IS HIGHLY RELEVANT.

14 Q. DO YOU VIEW "IMPORTANT EDUCATIONAL OBJECTIVES" HERE
15 UNDER FACTOR TWO AS HAVING ANY RELATIONSHIP TO "NECESSARY TO
16 ACHIEVE YOUR INTENDED EDUCATIONAL PURPOSE" UNDER FACTOR ONE?

17 A. SOMETHING CAN BE IMPORTANT, BUT NOT NECESSARY. IT IS
18 BOTH IMPORTANT AND NECESSARY IN THIS CASE.

19 Q. MOVING THEN, DR. KRUGER, TO FACTOR THREE, "AMOUNT AND
20 SUBSTANTIALITY TO THE PORTION USED. CAN YOU TELL US WHY YOU
21 CONCLUDED FACTOR THREE WEIGHS IN FAVOR OF FAIR USE?

22 A. YES. THE ELEMENTS, ALL THE ELEMENTS LISTED THERE ARE
23 IN FAVOR OF FAIR USE, ARE RELEVANT AND APPROPRIATE.

24 Q. WHY IN PARTICULAR DID YOU SELECT SMALL PORTION?

25 A. IT IS ONLY A SINGLE CHAPTER FROM A BOOK WITH 21

1 CHAPTERS AND AN EPILOGUE.

2 Q. DO YOU HAVE ANY NUMERICAL CUTOFF FOR WHAT YOU CONSIDER
3 A SMALL PORTION?

4 A. I DON'T USE NUMBERS, I PREFER TO USE MY JUDGMENT.

5 Q. DO YOU CONSIDER LESS THAN FOUR PERCENT TO BE A LARGE OR
6 SMALL AMOUNT?

7 A. I WOULD SAY THAT IS SMALL.

8 Q. WHY DID YOU ALSO SELECT HERE "NARROWLY TAILORED"?

9 A. THIS CHAPTER IS VERY SPECIFIC ABOUT TIMING AND SO IT IS
10 IN TIMING OF INSULT OR TRAUMA, SO IT IS NARROWLY TAILORED TO
11 A PARTICULAR ASPECT OF RISK AND RESILIENCE.

12 Q. AND IS THAT AN ASPECT OF RISK AND RESILIENCE THAT YOU
13 WERE TRYING TO TEACH IN YOUR COURSE THAT DAY?

14 A. THAT'S RIGHT.

15 Q. PLEASE EXPLAIN HOW YOU DETERMINED AT THE "PORTION USED
16 IS NOT CENTRAL TO THE ENTIRE WORK AS A WHOLE"?

17 A. EACH CHAPTER STANDS ALONE IN THIS EDITED VOLUME, THEY
18 ARE BY DIFFERENT AUTHORS, SO IT IS NOT CENTRAL.

19 Q. SO WHEN EVALUATING WHAT MAY BE THE HEART OF THE WORK,
20 YOU CONSIDERED THE BOOK AS A WHOLE, NOT THE INDIVIDUAL
21 CHAPTER?

22 A. THAT'S RIGHT.

23 Q. FINALLY, DR. KRUGER, ON PAGE TWO OF THE FAIR USE
24 CHECKLIST, THERE IS A REFERENCE HERE TO FACTOR FOUR, EFFECT
25 ON THE MARKET FOR THE ORIGINAL. WHY DID YOU CONCLUDE THAT

1 THIS FACTOR FOUR WEIGHS IN FAVOR OF FAIR USE?

2 A. THE MAJORITY OF THE ELEMENTS THAT ARE RELEVANT HERE ARE
3 IN THE FAIR USE COLUMN.

4 Q. WHICH SUBTEST, IN PARTICULAR, DID YOU FIND WEIGHS IN
5 FAVOR OF FAIR USE?

6 A. NO SIGNIFICANT EFFECT ON MARKET, USE STIMULATES
7 MARKETS, SUPPLEMENTAL CLASSROOM READING, WHICH IS AN ERROR,
8 USER OWNS LAWFULLY ACQUIRED COPY, AND RESTRICTED ACCESS.

9 Q. WHY DID YOU SELECT "USE STIMULATES MARKET" FOR THE
10 ORIGINAL WORK?

11 A. WHEN THE STUDENT GETS INTRODUCED TO NEW MATERIAL, THEY
12 WANT TO LEARN MORE AND ARE LIKELY TO BUY BOOKS ON THE SUBJECT.

13 Q. WHEN COMPLETING THIS CHECKLIST IN 2009, WHAT DID YOU
14 CONSIDER TO BE THE MARKET FOR THE WORK?

15 A. PURCHASE OF THE BOOK.

16 Q. AND SITTING HERE TODAY, DO YOU BELIEVE YOUR ASSIGNMENT
17 OF THIS EXCERPT COULD STIMULATE THE MARKET FOR THE ORIGINAL
18 WORK?

19 A. YES.

20 Q. DO YOU HAVE KNOWLEDGE OF STUDENTS PURCHASING A WORK
21 AFTER HAVING BEEN EXPOSED TO IT IN YOUR COURSE?

22 MR. RAINS: OBJECTION, LEADING.

23 THE COURT: OVERRULED.

24 BY MS. BATES:

25 Q. DID YOU PURCHASE BOOKS TO WHICH YOU WERE EXPOSED IN

1 YOUR COURSES AS A STUDENT?

2 A. MANY.

3 Q. WHY DID YOU ALSO SELECT HERE "ALSO USER OWNS"?

4 A. I OWN A COPY OF THIS BOOK.

5 Q. WHY DID YOU SELECT "RESTRICTED ACCESS"?

6 A. STUDENTS PAY TUITION AND ARE ENROLLED IN A COURSE AND
7 ARE THEN GIVEN A PASSWORD TO HAVE ACCESS TO THE READINGS AND
8 ONLY STUDENTS WHO HAVE PAID TUITION AND ARE ENROLLED IN THAT
9 CLASS HAVE ACCESS TO THE PASSWORD AND THOSE READINGS.

10 Q. DID YOU PROVIDE YOUR STUDENTS WITH THIS PASSWORD?

11 A. THE UNIVERSITY CREATED THE PASSWORD AND THEN I CONVEYED
12 IT TO THE STUDENTS.

13 Q. ON THE LEFT-HAND SIDE UNDER "FAIR USE," YOU SELECTED
14 "SUPPLEMENTAL CLASSROOM READING," WHICH YOU JUST INDICATED WAS
15 PERHAPS A MISTAKE AND ON THE RIGHT-HAND SIDE YOU DID NOT
16 SELECT "REQUIRED CLASSROOM READING," CAN YOU EXPLAIN THOSE
17 COURSES?

18 A. I OVERLOOKED THE FIRST CHOICE ELEMENT. HERE IT IS
19 CLEARLY REQUIRED, IT SAYS SO IN THE SYLLABUS.

20 Q. SO SITTING HERE TODAY WERE YOU TO BE COMPLETING THIS
21 CHECKLIST FOR UNDERSTANDING TRAUMA IN THE COURSE 8220, WHICH
22 OF THESE SUBFACTORS WOULD YOU SELECT?

23 A. THE REQUIRED.

24 Q. AND WOULD HAVING SELECTED "REQUIRED CLASSROOM READING"
25 AND NOT "SUPPLEMENTAL CLASSROOM READING" IN 2009 CHANGED YOUR

1 CONCLUSION CONCERNING WHETHER FACTOR FOUR WEIGHS AGAINST FOR
2 OR AGAINST USING IT?

3 A. IN THE END, NO.

4 Q. WHY NOT?

5 A. BECAUSE THE WEIGHT OF THE FACTORS IN FAVOR ARE GREATER.

6 Q. YOU ALSO DID NOT SELECT "LICENSING OR PERMISSION
7 REASONABLY AVAILABLE" IN THE WEIGHS AGAINST FAIR USE COLUMN,
8 CAN YOU EXPLAIN WHY?

9 A. IT IS NOT REASONABLE. THEY ARE NOT REASONABLY
10 AVAILABLE TO MY STUDENTS.

11 Q. WHAT DO YOU UNDERSTAND IS MEANING REASONABLY AVAILABLE?

12 A. STUDENTS WOULD HAVE TO PAY SOME KIND OF FEE TO ACCESS A
13 SINGLE CHAPTER AND MY STUDENTS ARE UNABLE TO DO THAT.

14 Q. SO AM I UNDERSTANDING, YOU CORRECT ME, REASONABLENESS
15 INCLUDES A CONSIDERATION OF COST?

16 A. YES. YES, IT DOES.

17 Q. ONCE YOU COMPLETED THE FAIR USE CHECKLIST FOR ALL FOUR
18 FACTORS, DID YOU ARRIVE AT AN OVERALL CONCLUSION ABOUT WHETHER
19 USE OF THIS EXCERPT IN YOUR COURSE CONSTITUTED FAIR USE?

20 A. I DID.

21 Q. WHAT WAS YOUR CONCLUSION?

22 A. IT WEIGHED IN FAVOR OF FAIR USE.

23 Q. IN REACHING THIS CONCLUSION, DID YOU SIMPLY TALLY THE
24 CHECK BLOCKS UNDER THE WEIGHS IN FAVOR AND WEIGHS AGAINST
25 COLUMNS?

1 A. NO, I DIDN'T JUST TALLY.

2 Q. WHAT ELSE DID YOU DO?

3 A. I USED MY PROFESSIONAL JUDGMENT.

4 Q. AFTER COMPLETING THE CHECKLIST, WHAT DID YOU DO TO GET
5 YOUR EXCERPTS LOADED TO ERESERVES?

6 A. I COMPLETED THE ONLINE REQUEST.

7 Q. DID YOU INFORM THE LIBRARY THAT YOU BELIEVED YOUR USE
8 TO BE A FAIR USE?

9 A. I DID.

10 Q. AND DID YOU INDICATE TO THE LIBRARY YOU HAD COMPLETED A
11 FAIR USE CHECKLIST?

12 A. I DID.

13 Q. HOW DID YOU COMMUNICATE THIS TO THE LIBRARY?

14 A. THROUGH THE ONLINE SUBMISSION FORM AT THE LIBRARY'S
15 WEBSITE.

16 Q. CAN YOU PLEASE TURN IN YOUR NOTEBOOK TO DEFENDANT'S
17 EXHIBIT 514. DO YOU RECOGNIZE THESE DOCUMENTS?

18 A. THERE ARE SEVERAL PAGES HERE OF E-MAILS BETWEEN THE
19 LIBRARY RESERVES LIBRARIAN AND MYSELF.

20 Q. CAN YOU LOOK AT GEORGIA STATE PAGE 65596?

21 A. YES.

22 Q. DO YOU SEE THE SECOND LISTING THERE FOR "UNDERSTANDING
23 TRAUMA"?

24 A. I DO.

25 Q. IS THE EMAIL GENERATED BY YOUR ELECTRONIC RESERVE

1 POSTING A REQUEST FOR YOUR COURSE 8220 IN FALL OF 2009?

2 A. YES.

3 Q. DR. KRUGER, LET'S TURN OUR ATTENTION TO EPY 7090 TAUGHT
4 IN SUMMER AND FALL OF 2009. I BELIEVE YOU SAID IT WAS A
5 MASTER'S LEVEL COURSE?

6 A. THAT'S RIGHT.

7 Q. CAN YOU TELL US GENERALLY WHAT THE 7090 COURSE WAS
8 ABOUT?

9 A. THAT IS A FOUNDATIONS COURSE MEANING PSYCHOLOGICAL
10 FOUNDATIONS FOR EARLY CHILDHOOD EDUCATORS, LOOKS AT DIFFERENT
11 THEORIES OF LEARNING AS THEY APPLY TO CLASSROOM PRACTICE.

12 Q. AND WHAT WERE THE OBJECTIVES FOR THIS COURSE?

13 A. TO ACQUAINT STUDENTS WITH THESE THEORIES AND TO GIVE
14 THEM AN OPPORTUNITY TO TRY TO PUT THE THEORIES INTO PRACTICE
15 IN THEIR CLASSROOM AND THEN TO BE MORE REFLECTIVE
16 PRACTITIONERS AS A CONSEQUENCE.

17 Q. WHAT TEACHING METHOD DID YOU USE?

18 A. THAT IS A COMBINATION OF DISCUSSION, LECTURE, SMALL
19 GROUP WORK.

20 Q. AND AM I CORRECT IN UNDERSTANDING THAT THESE STUDENTS
21 ARE ACTIVELY TEACHING?

22 A. THAT'S RIGHT.

23 Q. DO YOU RECALL ABOUT HOW MANY STUDENTS WERE IN THAT
24 CLASS?

25 A. I DON'T REMEMBER THE EXACT NUMBER. IT WOULD BE

1 BETWEEN 15 AND 20.

2 Q. DID YOU PREPARE A SYLLABUS FOR THE COURSE?

3 A. I DID.

4 Q. PLEASE TURN IN YOUR NOTEBOOK TO WHAT HAS BEEN
5 PREVIOUSLY ADMITTED AS PLAINTIFF'S EXHIBIT 553. IS THIS A
6 COPY OF YOUR SYLLABUS FOR THIS COURSE?

7 A. IT IS.

8 Q. CAN YOU EXPLAIN WHY IT BEARS THE DATE 2009 TO 2010?

9 A. THE STUDENTS BEGIN TO MEET WITH ME IN JUNE OF 2009, BUT
10 THEY DON'T ACTUALLY REGISTER FOR THE COURSE UNTIL MAY OF 2010,
11 SO I WANTED THEM TO BE ABLE TO IDENTIFY WHICH COHORT THIS
12 SYLLABUS WAS PREPARED FOR.

13 Q. TURNING TO 66214, PAGE FOUR, IT IS A SECTION ENTITLED
14 "COURSE OUTLINE." DO YOU SEE THAT?

15 A. YES.

16 Q. WHAT DOES THE SECTION GENERALLY REFLECT?

17 A. THIS REFLECTS THE TOPICS THAT WILL BE ADDRESSED IN THE
18 COURSE ACCORDING TO THE CLASS MEETINGS.

19 Q. AND CAN YOU DESCRIBE FOR US, GENERALLY, THE TYPES OF
20 READINGS YOU ASSIGNED FOR THIS COURSE?

21 A. CHAPTERS, SOME RESEARCH PRESENTATIONS, SOME JOURNALS.

22 Q. AND HOW WERE YOUR STUDENTS TO ACCESS COPIES OF THE
23 JOURNALS AND BOOK EXCERPTS YOU ASSIGNED?

24 A. THROUGH ELECTRONIC RESERVES.

25 Q. AND YOU DID NOT USE -- I'M SORRY, DID YOU USE ULEARN

1 FOR THIS COURSE?

2 A. NO.

3 Q. ON PAGE SIX OF YOUR SYLLABUS MARKED 66286 OF
4 PLAINTIFF'S EXHIBIT 553, THERE IS A READING ASSIGNMENT LISTED
5 FROM "AWAKENING CHILDREN'S MINDS" BY LAURA BURKE, DO YOU SEE
6 THAT ASSIGNMENT?

7 A. YES.

8 Q. IF YOU TURN BACK ONE PAGE IN THE SYLLABUS YOU CAN SEE
9 THIS READING APPEARS UNDER READINGS OF VYGOTSKY CLASS NUMBER
10 FIVE, DO YOU SEE THAT?

11 A. YES.

12 Q. CAN YOU DESCRIBE GENERALLY WHAT IS "AWAKENING
13 CHILDREN'S MINDS"?

14 A. IT IS A BOOK BY LAURA BERK, WHO IS AN EXPERT ON
15 APPLICATIONS OF VYGOTSKY THEORY, AND VYGOTSKY THEORY IN
16 GENERAL AND CLASSROOM PRACTICE.

17 Q. WHAT EXCERPTS DID YOU ASSIGN FROM "AWAKENING CHILDREN'S
18 MINDS"?

19 A. CHAPTER NUMBERED SIX, WHICH IS SPECIFIC TO GENERAL
20 EDUCATION CLASSROOM, EARLY PRIMARY GRADES.

21 Q. DO YOU UNDERSTAND THE PLAINTIFFS IN THIS CASE HAVE
22 ALLEGED THAT THE USE OF THIS EXCERPT INFRINGES ONE OF THEIR
23 COPYRIGHTS?

24 A. YES.

25 Q. AND WHERE PLAINTIFFS HAVE ALLEGED USE OF THIS WORK IN

1 BOTH SUMMER 2009 AND FALL 2009 FOR THE COURSE EPY 7090, WOULD
2 THAT BE CORRECT THAT IS A SINGLE COURSE?

3 A. SINGLE COURSE.

4 Q. WAS THE WORK ASSIGNED TWICE IN THAT COURSE?

5 A. NO, JUST FOR THIS ONE MEETING.

6 Q. IF YOU CAN LOOK AT WHAT IS IN FRONT OF YOU THERE MARKED
7 PLAINTIFF'S EXHIBIT 354, I BELIEVE IT HAS BEEN PREVIOUSLY
8 ADMITTED, THE BOOK IN FRONT OF YOU, DO YOU RECOGNIZE THIS
9 BOOK?

10 A. YES.

11 Q. IS THIS A COPY OF THE EDITION OF "AWAKENING CHILDREN'S
12 MINDS" FROM WHICH YOU ASSIGN CHAPTER SIX ENTITLED "LEARNING IN
13 CLASSROOMS" FOR CLASS FIVE?

14 A. YES.

15 Q. AND YOU SAID YOU ASSIGNED CHAPTER SIX. CAN YOU LOOK AT
16 THE TABLE OF CONTENTS AND CONFIRM THE PAGE NUMBERS FOR THAT
17 CHAPTER?

18 A. TABLE OF CONTENTS SAYS THAT CHAPTER SIX BEGINS ON PAGE
19 181.

20 Q. IT GOES THROUGH?

21 A. APPEARS TO GO THROUGH 219.

22 Q. IS THAT ROUGHLY 39 PAGES?

23 A. YES.

24 MS. BATES: YOUR HONOR, PLAINTIFF HAS IDENTIFIED
25 "AWAKENING CHILDREN'S MINDS" AS HAVING 250 PAGES; THE

1 DEFENDANTS CONTEND 320 PAGES WHEN YOU INCLUDE THE PREFACE AND
2 LATTER PAGES. ACCORDINGLY, PLAINTIFFS CONTEND 15.6 PERCENT
3 OF THIS WORK WAS COPIED AND DEFENDANTS WOULD CALCULATE THE
4 AMOUNT AT 12.2 PERCENT.

5 BY MS. BATES:

6 Q. DR. KRUGER, WAS THE "AWAKENING CHILDREN'S MINDS"
7 EXCERPT ASSIGNED FROM YOU AS NUMBER FIVE IN THIS COURSE?

8 A. YES.

9 Q. WHAT WAS THE SUBJECT MATTER YOU INTENDED TO TEACH OF
10 CHAPTER SIX?

11 A. VYGOTSKY THEORY, WHICH IS SOCIAL CONSTRUCTIONISM.

12 Q. WHY DID YOU ASSIGN THIS CHAPTER SPECIFICALLY AS READING
13 FOR THAT DAY?

14 A. THIS CHAPTER TAKES THE THEORY AND DEMONSTRATES HOW IT
15 CAN BE APPLIED IN THE PRIMARY GRADE CLASSROOM.

16 Q. HOW IS CHAPTER SIX DIFFERENT, IN YOUR VIEW, THAN THE
17 OTHER CHAPTERS IN BERK'S BOOK ON THIS GENERAL CHAPTER?

18 A. THE EARLY CHAPTERS IN BERK'S BOOK ARE ABOUT THE THEORY,
19 GENERALLY SPEAKING, AND THEN THERE ARE, IN THE LATTER HALF OF
20 THE BOOK, SOME APPLICATIONS AND VERY SPECIFIC AND DIFFERENT
21 CIRCUMSTANCES. ONE OF THOSE APPLICATIONS IS CHAPTER SIX AND
22 IT IS SPECIFIC TO THE GENERAL ED PRIMARY CLASSROOM.

23 Q. DID YOU REQUEST THAT THIS EXCERPT FROM "AWAKENING
24 CHILDREN'S MINDS" BE LOADED ON ERESERVES?

25 A. YES.

1 Q. WHAT STEPS DID YOU TAKE TO MAKE SURE THIS EXCERPT BE
2 LOADED?

3 A. I WENT TO THE WEB PAGE THAT THE ERESERVES LIBRARIAN
4 HAS. I COMPLETED THE VARIOUS CHECKLISTS AND THEN COMPLETED
5 THE BIBLIOGRAPHIC INFORMATION AND REQUEST FOR THE LIBRARY TO
6 DO.

7 Q. UNDERSTANDING TRAUMA?

8 A. EXACTLY.

9 Q. IF YOU COULD TURN IN YOUR NOTEBOOK WHAT HAS BEEN
10 PREVIOUSLY ADMITTED AS PLAINTIFF'S EXHIBIT 597. DO YOU
11 RECOGNIZE THIS DOCUMENT?

12 A. YES.

13 Q. AND CAN YOU TELL US WHAT IT IS, PLEASE?

14 A. THIS IS THE FAIR USE CHECKLIST COMPLETED FOR SUMMER
15 2009 FOR THE COURSE 7090 AND FOR THIS PARTICULAR CHAPTER SIX
16 FROM BERK'S BOOK.

17 Q. DID YOU COMPLETE THIS CHECKLIST?

18 A. YES.

19 Q. THE DATE ON THIS CHECKLIST IS SUMMER 2009, DO YOU SEE
20 THAT?

21 A. YES.

22 Q. DID YOU COMPLETE A VERSION OF THIS CHECKLIST IN THE
23 SUMMER 2009 TIME FRAME FOR YOUR EPY 7090 COURSE?

24 A. YES.

25 Q. DID YOU COMPLETE IT BEFORE YOU REQUESTED THE EXCERPT BE

1 LOADED ON ERESERVES?

2 A. I DID.

3 Q. IS THIS A COPY OF THAT CHECKLIST?

4 A. THIS IS A RECONSTRUCTION OF THAT CHECKLIST.

5 Q. WHY DID YOU RECONSTRUCT THAT ORIGINAL CHECKLIST?

6 A. THE VERSION OF ADOBE I HAVE ON MY LAPTOP DOESN'T ALLOW
7 ME TO SAVE ELECTRONIC COPIES OF FORMS THAT ARE FILLED OUT, I
8 CAN ONLY PRINT THEM OUT. SO WHEN I COMPLETED THE CHECKLIST, I
9 PRINTED IT OUT AND THEN WHEN IT WAS TIME TO FIND IT I COULDN'T
10 FIND THE ORIGINAL PRINTOUT.

11 Q. YOU BELIEVE THAT YOU ORIGINALLY KEPT A PAPER COPY OF
12 YOUR ORIGINAL CHECKLIST?

13 A. I DID. I DID.

14 Q. WHEN YOU RECREATED THIS CHECKLIST THAT YOU HAD
15 ORIGINALLY FILLED OUT IN THE SUMMER OF 2009, DID YOU MAKE AN
16 EFFORT TO FILL IT OUT IN THE SAME WAY YOU FILLED OUT YOUR
17 ORIGINAL CHECKLIST?

18 A. I DID.

19 Q. AND WHEN YOU ORIGINALLY FILLED OUT THAT CHECKLIST IN
20 THE SUMMER OF 2009, DID YOU ATTEMPT TO CONDUCT A THOROUGH FAIR
21 USE ANALYSIS IN GOOD FAITH?

22 A. I DID.

23 Q. HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

24 A. TO THE BEST OF MY ABILITY, TRIED TO RECONSTRUCT MY
25 THINKING THAT I USED ORIGINALLY WHEN I COMPLETED THE LIST.

1 Q. DO YOU BELIEVE THAT PLAINTIFF'S EXHIBIT 597 THERE IN
2 FRONT OF YOU IS A FAIR AND ACCURATE RECREATION OF THE
3 CHECKLIST AS YOU COMPLETED IT BEFORE REQUESTING THE EXCERPT BE
4 ON ERESERVE?

5 MR. RAINS: OBJECTION, LEADING.

6 THE COURT: SUSTAINED.

7 BY MS. BATES:

8 Q. IF YOU CAN LOOK AT THE CHECKLIST IN FRONT OF YOU, THE
9 RECREATED CHECKLIST YOU HAVE IDENTIFIED AS PLAINTIFF'S EXHIBIT
10 597, IS THIS A FAIR AND ACCURATE RECREATION OF THE CHECKLIST?

11 A. IT IS.

12 Q. AND THE ORIGINAL CHECKLIST WAS COMPLETED WHEN?

13 A. IN ANTICIPATION OF SUMMER OF '09.

14 Q. WHY DID YOU COMPLETE THE ORIGINAL CHECKLIST THAT IS
15 RECREATED IN PLAINTIFF'S EXHIBIT 597?

16 A. IT IS A REQUIREMENT AND APPROPRIATE TO CONSIDER
17 CAREFULLY THE AMOUNT ASSIGNED OR ASSIGNMENT IS FAIR.

18 Q. ASK YOU PLEASE TURN NOW IN YOUR NOTEBOOK WHAT HAS BEEN
19 PREVIOUSLY ADMITTED AS PLAINTIFF'S EXHIBIT 599.

20 A. (WITNESS COMPLIES.)

21 Q. DO YOU RECOGNIZE THIS DOCUMENT?

22 A. I DO.

23 Q. WHAT IS IT?

24 A. IT IS FOR THE FALL OF 2009 FOR THE SAME COURSE, 7090,
25 FOR THE SAME READING, CHAPTER SIX FROM BERK'S BOOK.

1 Q. DO YOU SEE WHERE THIS CHECKLIST INDICATES CHAPTER SIX
2 IN PARENTHESIS INDICATES 181 THROUGH 199?

3 A. YES.

4 Q. ARE THESE THE PAGES FULLY ENCOMPASSING CHAPTER SIX?

5 A. NO. I BELIEVE THAT IS AN ERROR.

6 Q. WHEN YOU CONDUCTED THE FAIR USE ANALYSIS WITH REGARD TO
7 THE EXCERPT TO BE POSTED ON ERESERVES, WAS IT WITH REGARD TO
8 PAGES 181 TO 189 OR WITH REGARD TO THE ENTIRETY OF CHAPTER 6?

9 A. IT WAS CHAPTER SIX IN ITS ENTIRETY.

10 Q. SO THIS IS A MISTAKE, TYPOGRAPHICAL?

11 A. TYPO, YES.

12 Q. DID YOU COMPLETE THIS CHECKLIST THAT WE ARE VIEWING
13 NOW, PLAINTIFF'S EXHIBIT 599?

14 A. I DID.

15 Q. DID YOU COMPLETE THIS IN THE FALL 2009 TIME LINE FOR
16 YOUR EPY 7090 CLASS?

17 A. YES.

18 Q. DOES YOUR FAIR USE ANALYSIS AS REFLECTED ON THIS
19 CHECKLIST CONSIDER USE OF ALL OF THE PAGES FOR BOTH SEMESTERS,
20 SUMMER AND FALL 2009?

21 A. YES.

22 Q. WHY DID YOU RECONSTRUCT OR RECREATE THE ORIGINAL
23 CHECKLIST?

24 A. FOR THE SAME REASON AS BEFORE, I COULDN'T FIND THE
25 ORIGINAL PRINTOUT.

1 Q. BUT AS WITH THE SUMMER OF 2009, YOU BELIEVE YOU KEPT A
2 PAPER COPY OF YOUR ORIGINAL CHECKLIST?

3 A. YES.

4 Q. IS THAT BECAUSE IT IS YOUR PRACTICE TO COMPLETE THE
5 CHECKLIST AND PRINT THEM?

6 A. THAT'S RIGHT.

7 Q. WHEN YOU RECREATED YOUR CHECKLIST YOU HAD FILLED OUT
8 ORIGINALLY IN THE FALL 2009, DID YOU MAKE AN EFFORT TO FILL IT
9 OUT IN THE SAME WAY THAT YOU FILLED OUT YOUR ORIGINAL
10 CHECKLIST?

11 A. I DID.

12 Q. AND WHEN YOU ORIGINALLY FILLED OUT THE CHECKLIST IN
13 FALL 2009, DID YOU ATTEMPT TO CONDUCT A FAIR AND THOROUGH
14 ANALYSIS IN GOOD FAITH?

15 A. YES.

16 Q. HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

17 A. TO THE BEST OF MY ABILITY, I TRIED TO RECONSTRUCT THE
18 SAME THOUGHT PROCESS I ENGAGED IN AT THE TIME.

19 Q. IS PLAINTIFF'S EXHIBIT 599 A FAIR AND ACCURATE
20 RECREATION OF THE CHECKLIST YOU CREATED IN THE FALL OF 2009?

21 MR. RAINS: OBJECTION LEADING.

22 THE COURT: OVERRULED.

23 THE WITNESS: IT IS.

24 BY MS. BATES:

25 Q. AND WHY DID YOU COMPLETE THE CHECKLIST RECREATED AS

1 PLAINTIFF'S EXHIBIT 599 IN THE FIRST INSTANCE IN FALL 2009?

2 A. SORRY, REPEAT THE QUESTION.

3 Q. WHY DID YOU COMPLETE THE CHECKLIST RECREATED AS
4 PLAINTIFF'S EXHIBIT 599 WHEN YOU ORIGINALLY DID SO IN THE FALL
5 OF 2009?

6 A. I ORIGINALLY COMPLETED IT SO THAT THE WORK COULD REMAIN
7 AVAILABLE ON ERESERVES AND SO THAT IT COULD BE CONFIRMED THAT
8 IT WAS FAIR USE.

9 Q. WERE YOU REQUIRED TO COMPLETE ANOTHER CHECKLIST?

10 A. THAT'S RIGHT, I WAS.

11 Q. IF YOU CAN TURN IN YOUR NOTEBOOK PLEASE TO DEFENDANT'S
12 EXHIBIT 514, WHICH WE PREVIOUSLY VIEWED, YOU IDENTIFIED AS
13 COMMUNICATIONS BETWEEN YOU AND THE LIBRARY?

14 A. YES.

15 Q. IF YOU CAN TURN TO GEORGIA STATE 65597. CAN YOU
16 EXPLAIN TO US WHAT THIS EMAIL COMMUNICATION IS?

17 A. THIS IS CORRESPONDENCE WITH THE LIBRARY RESERVE STAFF
18 ABOUT MY DESIRE TO RENEW THE ERESERVES, BUT I CAME TO
19 UNDERSTAND THAT ONE CAN'T RENEW ERESERVES, WE HAVE TO RECREATE
20 EACH SEMESTER, EVEN THOUGH IT IS STILL THE SAME COURSE ONGOING
21 OVER THE SEMESTER BREAK. DOES THAT MAKE SENSE?

22 Q. YES. THANK YOU.

23 IF YOU CAN, LOOK AT PLAINTIFF'S EXHIBIT 597 AND
24 PLAINTIFF'S EXHIBIT 599, THE TWO CHECKLISTS WE HAVE JUST BEEN
25 VIEWING. CAN YOU TELL US WHETHER ANY DIFFERENCE IN THE

1 SUBFACTOR SELECTED FOR EACH OF THE FOUR FAIR USE FACTORS --

2 A. BETWEEN -- SORRY, REPEAT THE QUESTION.

3 Q. BETWEEN THE SUMMER 2009 AND FALL 2009 RECREATED
4 CHECKLIST, IS THERE ANY DIFFERENCE IN THE SUBFACTORS SELECTED?

5 A. NO.

6 Q. WHY IS THAT?

7 A. IT WAS FOR THE SAME WORK FOR THE SAME COURSE FOR THE
8 SAME PURPOSE.

9 Q. FOCUSING NOW ON YOUR FAIR USE ANALYSIS RELATED TO USE
10 OF "AWAKENING CHILDREN'S MINDS" EXCERPT FOR 7090 AND LOOKING
11 AT THE FALL 2009 RECREATED CHECKLIST FOR PURPOSES OF OUR
12 DISCUSSION, WHEN YOU CONDUCTED YOUR FAIR USE ANALYSIS, DID
13 YOU CONSIDER ALL FOUR FAIR USE FACTORS?

14 A. I DID.

15 Q. AND WHAT WAS YOUR OVERALL CONCLUSION REGARDING WHETHER
16 OR NOT YOUR PROPOSED USE OF THE EXCERPT WAS FAIR USE?

17 A. THAT IT WAS INDEED FAIR USE.

18 Q. LET'S WALK THROUGH YOUR FAIR USE ANALYSIS A BIT. IF
19 YOU CAN FOCUS ON PLAINTIFF'S EXHIBIT 599. YOU SAID THAT YOU
20 CONSIDERED ALL FOUR FAIR USE FACTORS WITH REGARD TO FACTOR
21 ONE, "PURPOSE AND CHARACTER OF THE USE." WHAT WAS YOUR
22 CONCLUSION REGARDING WHETHER THIS FACTOR WEIGHS IN FAVOR OF
23 FAIR USE?

24 A. THAT IT DID.

25 Q. WITH REGARD TO FACTOR TWO, "NATURE OF THE COPYRIGHTED

1 WORK," WHAT WAS YOUR CONCLUSION REGARDING WHETHER THIS FACTOR
2 WEIGHED IN FAVOR OF FAIR USE?

3 A. IT DID.

4 Q. WITH REGARD TO FACTOR THREE, "AMOUNT AND
5 SUBSTANTIALITY OF THE PORTION USED," WHAT WAS YOUR CONCLUSION?

6 A. IT WEIGHED IN FAIR USE.

7 Q. EFFECT FOUR, "EFFECT ON THE MARKET FOR THE ORIGINAL,"
8 WHAT WAS YOUR CONCLUSION?

9 A. IT WEIGHED IN FAVOR OF FAIR USE.

10 Q. LOOKING NOW AT THE SUBFACTORS UNDER FACTOR ONE ON YOUR
11 RECREATED CHECKLIST, WHY DID YOU CONCLUDE THAT THIS FACTOR
12 ONE WEIGHS IN FAVOR OF FAIR USE?

13 A. BECAUSE A NUMBER OF THE SUBTESTS WERE RELEVANT AND
14 APPROPRIATE FOR THE READING.

15 Q. WHICH OF THE SUBTEST DID YOU FIND WEIGHED IN FAVOR OF
16 FAIR USE?

17 A. NONPROFIT EDUCATIONAL, TEACHING, RESEARCH OR
18 SCHOLARSHIP, PERSONAL STUDY, USE IS NECESSARY TO ACHIEVE
19 YOUR INTENDED EDUCATIONAL PURPOSE.

20 Q. AGAIN, FOCUSING ON CERTAIN OF YOUR SELECTIONS, WHY DID
21 YOU SELECT PERSONAL STUDY?

22 A. STUDENTS ARE EXPECTED TO READ AND DIGEST THE
23 ASSIGNMENTS ON THEIR OWN BEFORE THEY COME TO CLASS. THEY
24 SHOULD HAVE MASTERED IT AS SHOULD I BEFORE WE DISCUSS IT IN
25 CLASS.

1 Q. IF YOU CAN TURN BACK TO THE SYLLABUS FOR 7090 MARKED
2 PLAINTIFF'S EXHIBIT 553 AND TURN TO PAGE TWO, AND THEN READ
3 ALOUD FOR US THE FIRST THREE SENTENCES UNDER "HOMEWORK."

4 A.

5 "FOR MOST CLASS SECTIONS, A HOMEWORK
6 TASK WILL BE ASSIGNED. THE PURPOSE
7 IS FOR YOU TO BE ACTIVE IN YOUR
8 LEARNING. IT WILL REQUIRE YOU TO
9 READ THE ASSIGNED MATERIAL,
10 ACTIVELY PROCESS IT, AND REFLECT ON
11 THE IDEAS, ESPECIALLY WITH REGARD
12 TO YOUR TEACHING EXPERIENCES."

13 Q. ARE THESE SENTENCES REFERENCES TO WHAT YOU UNDERSTOOD
14 TO BE PERSONAL STUDIES?

15 A. YES.

16 Q. TURNING BACK TO THE CHECKLIST OF 599, WHY DID YOU
17 SELECT USE AS NECESSARY FOR THIS PARTICULAR EXCERPT?

18 A. IT WAS NECESSARY IN ORDER TO ACQUAINT THE STUDENTS WITH
19 THE APPLICATION OF VYGOTSKY'S THEORY TO THE CLASSROOM.

20 Q. HOW DID IT RELATE TO YOUR EDUCATIONAL INTENDED PURPOSE
21 FOR THE CLASS?

22 A. MY PURPOSE FOR THE CLASS WAS TO HELP STUDENTS
23 UNDERSTAND FOUNDATIONAL THEORIES OF PSYCHOLOGY AND HOW THEY
24 APPLIED TO CLASSROOM TEACHING.

25 Q. AND THE VYGOTSKY THEORY IS ONE OF THOSE?

1 A. VYGOTSKY THEORY IS ONE.

2 Q. DO YOU SEE UNDER NUMBER ONE, THE SUBFACTOR
3 TRANSFORMATIVE?

4 A. YES.

5 Q. ON THE RIGHT-HAND SIDE UNDER WEIGHS AGAINST FAIR USE,
6 NONTRANSFORMATIVE?

7 A. YES.

8 Q. WHY DID YOU NOT SELECT EITHER OF THOSE TWO SUBFACTORS?

9 A. IT WAS AN OVERSIGHT.

10 Q. WERE YOU COMPLETING THIS CHECKLIST TODAY, WOULD YOU
11 CHECK ONE OF THESE TRANSFORMATIVE OR NONTRANSFORMATIVE?

12 A. I WOULD SELECT NONTRANSFORMATIVE.

13 Q. WOULD IT HAVE CHANGED YOUR OVERALL CONCLUSION REGARDING
14 WHETHER FACTOR ONE WEIGHS IN FAVOR OF OR AGAINST DEFINING FAIR
15 USE IF YOU SELECTED NONTRANSFORMATIVE WHEN YOU COMPLETED THE
16 ORIGINAL CHECKLIST IN 2009?

17 A. IT WOULDN'T CHECK THE OVERALL DECISION, NO.

18 Q. AND WHY IS THAT?

19 A. BECAUSE THERE IS STILL A SIGNIFICANT NUMBER OF SUBTESTS
20 THAT WEIGH IN FAVOR OF FAIR USE.

21 Q. LOOKING NOW TO FACTOR TWO ON PAGE TWO OF THE FAIR USE
22 CHECKLIST, PLAINTIFF'S EXHIBIT 599, WHAT IS MARKED GEORGIA
23 STATE 65621. WHY DID YOU CONCLUDE FACTOR TWO WEIGHS IN FAVOR
24 OF FAIR USE?

25 A. THE SUBTESTS THAT WEIGH IN FAVOR OF FAIR USE ARE

1 APPROPRIATE TO THE WORK.

2 Q. WHICH SUBTEST DID YOU FIND WEIGHED IN FAVOR OF FAIR
3 USE?

4 A. "PUBLISHED WORK, FACTUAL WORK, IMPORTANT TO
5 EDUCATIONAL OBJECTIVE."

6 Q. WHY DID YOU SELECT "PUBLISHED WORK"?

7 A. THE BOOK IS PUBLISHED.

8 Q. WHY DID YOU SELECT "FACTUAL" OR "NONFICTION"?

9 A. IT IS A FACTUAL ACCOUNT OF APPLICATIONS OF VYGOTSKY'S
10 THEORY TO THE CLASSROOM.

11 Q. AND WHY DID YOU CHECK "IMPORTANT TO EDUCATIONAL
12 OBJECTIVES"?

13 A. ONE OF THE THINGS I VERY MUCH WANTED THE STUDENTS TO
14 UNDERSTAND, HOW TO TAKE A THEORY SUCH AS VYGOTSKY AND MAKE IT
15 WORK FOR THEM IN THE CLASSROOM.

16 Q. AND YOU DID NOT SELECT "HIGHLY CREATIVE WORK" IN THE
17 RIGHT-HAND COLUMN, CAN YOU EXPLAIN TO US WHY?

18 A. IT IS NOT A WORK OF IMAGINATION, IT IS BASED ON
19 PUBLISHED WORK BY VYGOTSKY.

20 Q. IF YOU CAN LOOK NOW, DR. KRUGER, TO FACTOR THREE ON
21 PAGE TWO OF THE FAIR USE CHECKLIST, "AMOUNT AND
22 SUBSTANTIALITY OF THE PORTION USED," WHY DID YOU CONCLUDE THIS
23 FACTOR WEIGHS IN FAVOR OF FAIR USE?

24 A. ALL OF THE ELEMENTS THAT ARE CONSIDERED ARE IN FAVOR.

25 Q. WHY IN PARTICULAR DID YOU CHECK "SMALL PORTION"?

1 A. ONE CHAPTER OUT OF A MULTI-CHAPTER BOOK WITH ONE
2 PARTICULAR PURPOSE WAS ASSIGNED.

3 Q. WHY DID YOU SELECT "NARROWLY TAILORED TO THE
4 EDUCATIONAL PURPOSE"?

5 A. THE FOCUS WAS JUST ON THE GENERAL ED PRIMARY CLASSROOM
6 AND APPLICATION OF THEORY TO THAT CONTEXT.

7 Q. AND WHY DID YOU SELECT "THE PORTION USED IS NOT CENTRAL
8 OR SIGNIFICANT TO THE ENTIRE WORK AS A WHOLE"?

9 A. THE ENTIRE WORK AS A WHOLE REVIEWS ALL OF THE THEORY
10 AND HOW IT IS APPLIED IN A VARIETY OF CONTEXTS.

11 Q. AND THIS CHAPTER DEALT WITH APPLYING IT IN WHAT
12 CONTEXT?

13 A. IN THE GENERAL ED PRIMARY CLASSROOM.

14 Q. WERE THERE OTHER CHAPTERS THAT DEALT WITH OTHER
15 SPECIFIC APPLICATIONS?

16 A. YES.

17 Q. FINALLY, DR. KRUGER, FACTOR FOUR ON THE LAST PAGE OF
18 THE SYLLABUS -- EXCUSE ME, OF THE CHECKLIST, LABELED "EFFECT
19 ON THE MARKET FOR THE ORIGINAL," YOU INDICATED PREVIOUSLY
20 THAT YOU CONSIDERED THE FOUR FACTORS, CONSIDERED IT, WEIGHED
21 IN FAVOR OF FAIR USE. WAS IT NECESSARY FOR YOU TO CONSIDER
22 THE FOUR FACTORS, EVEN THOUGH YOU CONSIDERED THE OTHER THREE
23 AND YOU FOUND THEM TO FAVOR FAIR USE?

24 A. YES.

25 Q. WHY IS THAT?

1 A. TOTALITY OF ALL OF THE SUBTEST THAT IS IMPORTANT.

2 Q. AND WHY DID YOU CONCLUDE THAT THIS FACTOR FOUR IN
3 PARTICULAR WEIGHS IN FAVOR OF FAIR USE?

4 A. BECAUSE THE MAJORITY OF THE SUBTESTS WERE APPROPRIATE
5 TO THE READING THAT ARE IN FAVOR OF FAIR USE.

6 Q. IN PARTICULAR, WHICH SUBTEST UNDER FACTOR FOUR DID YOU
7 FIND WEIGHED IN FAVOR OF FAIR USE?

8 A. NO SIGNIFICANT EFFECT ON MARKET, USE STIMULATES
9 MARKET, SUPPLEMENTAL CLASSROOM READING, AGAIN, THAT IS AN
10 ERROR, USER OWNED COPY AND RESTRICTED ACCESS.

11 Q. CAN YOU EXPLAIN FOR US WHY IN THIS CONTEXT YOU SELECTED
12 "USE STIMULATES MARKET FOR ORIGINAL WORK"?

13 A. TEACHERS ARE HUNGRY FOR IDEAS THAT CAN HELP THEM WITH
14 THEIR PRACTICE. AND WHEN THEY ARE EXPOSED TO THOSE IDEAS IN
15 THE CLASS -- IN OUR CLASS, THEY BECOME VERY INTERESTED IN
16 LEARNING MORE. AND SO IT IS HIGHLY LIKELY THAT THEY WILL
17 PURCHASE OTHER BOOKS.

18 Q. AND SITTING HERE TODAY, DO YOU BELIEVE YOUR ASSIGNMENT
19 OF THIS EXCERPT COULD STIMULATE THE MARKET FOR THE ORIGINAL
20 WORK?

21 A. ABSOLUTELY.

22 Q. AND AS PART OF THE REASONING FOR THAT, THE SAME REASONS
23 YOU STATED EARLIER REGARDING STUDENTS REFERENCES TO PURCHASING
24 WORKS?

25 A. YES.

1 Q. AND TO YOUR OWN PURCHASING OF WORKS TO WHICH YOU WERE
2 EXPOSED AS A STUDENT?

3 A. YES.

4 Q. WHY DID YOU SELECT HERE "USER OWNS THE WORK"?

5 A. I OWN A COPY OF THE BOOK.

6 Q. AND WHY DID YOU SELECT "RESTRICTED ACCESS"?

7 A. ONCE STUDENTS HAVE PAID THEIR TUITION AND ENROLLED IN A
8 PARTICULAR COURSE, ONLY THEN CAN THEY HAVE ACCESS TO THE
9 ERESERVES THAT ARE LINKED TO THAT COURSE.

10 Q. AND, AGAIN, ON THIS CHECKLIST, YOU HAVE CHECKED ON THE
11 LEFT-HAND SIDE "SUPPLEMENTAL CLASSROOM READING." AND ON THE
12 RIGHT YOU DID NOT SELECT "REQUIRED CLASSROOM READING," CAN
13 YOU EXPLAIN THOSE CHOICES?

14 A. THAT WAS AN ERROR, OVERSIGHT ON MY PART. IT IS
15 CLEARLY REQUIRED.

16 Q. SITTING HERE TODAY, WERE YOU TO BE COMPLETING THIS
17 CHECKLIST, WHICH OF THESE SUBFACTORS WOULD YOU SELECT FOR
18 THIS READING?

19 A. "REQUIRED CLASSROOM."

20 Q. WOULD HAVING SELECTED "REQUIRED CLASSROOM READING" AND
21 NOT "SUPPLEMENTAL CLASSROOM READING" IN 2009 CHANGE YOUR
22 CONCLUSION REGARDING WHETHER FACTOR FOUR WEIGHS IN FAVOR OF OR
23 AGAINST FAIR USE?

24 A. IN THE END IT WOULDN'T HAVE CHANGED IT, NO.

25 Q. AND WHY?

1 A. BECAUSE THERE WOULD STILL BE A SIGNIFICANT NUMBER,
2 GREATER NUMBER OF SUBTEST WEIGHING IN FAVOR OF FAIR USE.

3 Q. YOU ALSO DID NOT SELECT ON THIS CHECKLIST "LICENSING OR
4 PERMISSION REASONABLY AVAILABLE" IN THE WEIGHS AGAINST FAIR
5 USE COLUMN.

6 A. THAT'S RIGHT.

7 Q. WHAT WAS YOUR REASONING FOR THAT?

8 A. IT IS NOT REASONABLE FOR MY STUDENTS TO PAY A LICENSING
9 FEE.

10 Q. WOULD YOU REACH THE SAME CONCLUSION IF YOU WERE TOLD
11 THAT IT WOULD COST NO MORE THAN FIVE DOLLARS PER STUDENT TO
12 USE THIS WORK?

13 A. THAT IS FIVE DOLLARS MORE THAN THEY HAVE TO SPEND.

14 Q. IF YOU WERE TOLD YOU COULD NOT USE THIS WORK, WHAT
15 WOULD YOU DO?

16 A. IF I WERE TOLD I COULDN'T USE IT, I WOULD STOP USING
17 IT.

18 Q. COULD YOU FIND OTHER WORKS TO SERVE THE PURPOSE THAT
19 THIS ONE DID IN THIS COURSE?

20 A. WELL, I WOULD INVESTIGATE THE LITERATURE AND SEE WHAT
21 ELSE IS AVAILABLE. MASTER'S LEVEL CHAPTERS ARE OFTEN UPDATED,
22 THEY ARE FREQUENTLY UPDATED, AND THERE MAY BE SOMETHING ELSE
23 THAT IS MORE APPROPRIATE NOW.

24 Q. FINISHING WITH OUR REVIEW OF THIS CHECKLIST, ONCE YOU
25 COMPLETED THIS CHECKLIST FOR ALL FOUR FACTORS, BOTH IN THE

1 SUMMER AND FALL TERMS, DID YOU ARRIVE AT AN OVERALL
2 CONCLUSION ABOUT WHETHER YOUR USE OF THIS EXCERPT CONSTITUTED
3 A FAIR USE?

4 A. I DID.

5 Q. WHAT WAS YOUR CONCLUSION?

6 A. THAT IT WAS FAIR USE.

7 Q. AGAIN, WITH THESE CHECKLISTS, DID YOU SIMPLY TALLY THE
8 CHECK BOXES UNDER THE WEIGHS IN FAVOR AND WEIGHS AGAINST
9 COLUMNS?

10 A. NO, IT WASN'T JUST TALLYING.

11 Q. WHAT ELSE DID YOU CONSIDER?

12 A. I CONSIDERED THE TOTALITY AND I USED PROFESSIONAL
13 JUDGMENT.

14 Q. AFTER COMPLETING THESE CHECKLISTS, WHAT DID YOU DO TO
15 GET THE EXCERPT POSTED TO ERESERVES?

16 A. COMPLETED THE BIBLIOGRAPHIC MATERIALS AND QUESTIONS ON
17 THE WEBSITE, LIBRARY WEBSITE.

18 Q. HOW DID YOU COMMUNICATE THIS TO THE LIBRARY?

19 A. SUBMISSION OF AN ONLINE FORM.

20 Q. CAN YOU TURN ONE MORE TIME TO DEFENDANT'S EXHIBIT 514?
21 THESE ARE EMAIL COMMUNICATIONS THAT YOU PREVIOUSLY IDENTIFIED.
22 DO YOU SEE AT THE BOTTOM OF THE FIRST PAGE OF THAT EXHIBIT,
23 IS THIS -- CAN YOU EXPLAIN WHAT THIS EMAIL IS?

24 A. FIRST PAGE IS CORRESPONDENCE REGARDING THE SUMMER OF
25 '09, EPY 7090.

1 Q. AND CAN YOU TURN TO GEORGIA STATE, THE PAGES THAT ARE
2 MARKED GEORGIA STATE 65601 TO 602, AND DESCRIBE THE CONTENTS
3 OF THAT EMAIL FROM YOU TO THE LIBRARY?

4 A. THIS IS A MESSAGE FROM THE ERES STAFF SAYING THAT THE
5 READINGS ARE UPLOADED.

6 Q. AND ON THE PAGE ENDING 602, CAN YOU TELL US WHAT THE
7 SECOND LISTING THERE IS?

8 A. IT REFERS TO CHAPTER 6 OF LAURA BERK'S "AWAKENING A
9 CHILD'S MIND."

10 MS. BATES: YOUR HONOR, WE OFFER EXHIBIT 514 INTO
11 EVIDENCE.

12 THE COURT: IT IS ADMITTED.

13 MR. RAINS: NO OBJECTION.

14 BY MS. BATES:

15 Q. I WANT TO TALK TO YOU ABOUT COPYRIGHT AND GEORGIA
16 UNIVERSITY PRACTICE OF COPYRIGHT. HAVE YOU RECEIVED ANY
17 INSTRUCTION ON COPYRIGHT OR COPYRIGHT LAW?

18 A. YES.

19 Q. WHERE DID YOU RECEIVE THE TRAINING?

20 A. SEVERAL SOURCES, UNIVERSITY SYSTEM OF GEORGIA HAS
21 ARTICLES AVAILABLE ONLINE AND EXPLICATION OF FAIR USE. ALSO
22 THERE WERE E-MAILS CIRCULATED TO FACULTY TO MAKE SURE THEY
23 UNDERSTOOD FAIR USE AND HOW TO COMPLETE THE CHECKLIST.
24 APPROPRIATELY AND IN ADDITION TO THAT IN THE COURSE I TEACH,
25 EPY 9000, FACILITATING COLLEGE TEACHING, I ASK GENERAL COUNSEL

1 OF THE UNIVERSITY TO COME DISCUSS WITH MY CLASS MANY MATTERS
2 OF COLLEGE TEACHING, BUT THAT INCLUDES COPYRIGHT AND FAIR USE.

3 MR. RAINS: YOUR HONOR, WE MOVE TO STRIKE THE LAST
4 PORTION OF THAT ANSWER. THAT COURSE IS NOT AT ISSUE IN THIS
5 LAWSUIT. NO FOUNDATIONAL TESTIMONY AS TO WHEN THAT TRAINING
6 SESSION HAPPENED.

7 MS. BATES: THE DISCUSSION IS NOT WITH REGARD TO WORK
8 AT ISSUE OR ALLEGATION OF ISSUE, BUT RATHER TRAINING THE
9 WITNESS HAS RECEIVED, YOUR HONOR.

10 THE COURT: AT WHAT POINT IN TIME? I THINK IT IS
11 CORRECT THAT WASN'T ESTABLISHED.

12 MS. BATES: OKAY. I WILL FOLLOW UP WITH THAT
13 QUESTION, IF I MAY.

14 BY MS. BATES:

15 Q. CAN YOU TELL US AT WHAT POINT YOU RECEIVED THE E-MAILS
16 IN QUESTION CONVEYING INFORMATION ABOUT HOW TO USE THE FAIR
17 USE CHECKLIST?

18 A. TO THE BEST OF MY RECOLLECTION, THOSE E-MAILS WERE
19 SENT OUT AT THE TIME THAT THE FAIR USE CHECKLIST SYSTEM WAS
20 PUT INTO PLACE.

21 Q. AND WHEN DID YOU CONDUCT YOUR REVIEW OF THE ONLINE
22 MATERIALS THAT YOU REFERENCED REGARDING THE COPYRIGHT POLICY?

23 A. AT THAT SAME TIME.

24 Q. AND YOU MENTIONED THAT KERRY HEYWARD HAD CONDUCTED SOME
25 LECTURES, I THINK, OR LACK OF A BETTER WORD IN ONE OF YOUR

1 COURSES, DO YOU KNOW WHEN THAT OCCURRED?

2 A. IN THE SPRING OF '09 -- SORRY, SPRING OF 2010 AND
3 SPRING OF 2011.

4 MR. RAINS: I RENEW THE MOTION.

5 THE COURT: I THINK THE QUESTION HAS SOME RELEVANCE
6 TO THE WITNESS'S CURRENT UNDERSTANDING OF WHAT THE POLICIES
7 ARE, BUT IT IS CORRECT THAT IT DOESN'T HAVE ANY RELEVANCE TO
8 WHAT HER UNDERSTANDING WOULD HAVE BEEN IN THE SPRING AND
9 SUMMER OF 2009. I WILL SUSTAIN THE OBJECTION. AS TO THE
10 LAST PART ABOUT KERRY DAVIS.

11 MS. BATES: HEYWARD.

12 THE COURT: WHAT HE HAD TO SAY TO THE CLASS.

13 MS. BATES: I HAVE NO MORE QUESTIONS, THANK YOU.

14 CROSS EXAM

15 BY MR. RAINS:

16 Q. GOOD MORNING, PROFESSOR KRUGER. I AM JOHN RAINS. I
17 WILL HAVE A FEW MINUTES OF QUESTIONS FOR YOU.

18 I BELIEVE YOU TESTIFIED ON DIRECT EXAMINATION YOU HAVE
19 SEVERAL BOOK CHAPTERS AND JOURNAL ARTICLES OF YOUR OWN THAT
20 HAVE BEEN PUBLISHED; IS THAT CORRECT?

21 A. THAT'S CORRECT.

22 Q. DO YOU OWN THE COPYRIGHTS FOR THOSE WORKS?

23 A. NO.

24 Q. SO A PUBLISHER OWNS THE COPYRIGHTS TO THOSE WORKS?

25 A. THAT'S RIGHT.

1 Q. DO YOU KNOW WITH RESPECT TO THE JOURNAL ARTICLE YOU
2 TESTIFIED ABOUT THAT ONE OF YOUR COLLEAGUE USES IN HIS OR HER
3 COURSE, WHETHER THE UNIVERSITY LICENSES THAT JOURNAL?

4 A. OH, YES.

5 Q. SO WITH RESPECT TO THE WORK YOU TESTIFIED ABOUT ON
6 DIRECT, THE UNIVERSITY PAYS THE PUBLISHER TO BE ABLE TO USE
7 THAT JOURNAL IN COURSES; IS THAT CORRECT?

8 A. THAT'S RIGHT.

9 Q. WHEN YOU CITE OTHER PEOPLE'S WORKS IN YOUR JOURNAL
10 ARTICLES, I ASSUME YOU DO THAT?

11 A. YES.

12 Q. WOULD YOU DESCRIBE YOUR WORK NEVERTHELESS AS ORIGINAL
13 WORK, SCHOLARSHIP, DESPITE THE FACT YOU ARE SUMMARIZING OTHER
14 PEOPLE'S WORK?

15 A. IT IS ORIGINAL BUT NOT INVENTIVE.

16 Q. IN THE JOURNAL ARTICLES AND BOOK CHAPTERS THAT YOU
17 PUBLISHED, IS IT SOMETIMES NECESSARY TO SUMMARIZE OTHER
18 PEOPLE'S WORK IN ORDER TO LAY A FOUNDATION FOR YOUR OWN
19 CONTRIBUTION TO SCHOLARSHIP?

20 A. YES.

21 Q. SO IT WOULD BE FAIR TO SAY THAT WITH RESPECT TO THOSE
22 JOURNAL ARTICLES, THEY ARE STILL YOUR ORIGINAL WORK?

23 A. YES.

24 Q. WOULD YOU AGREE WITH ME THAT A BOOK CHAPTER IN A BOOK
25 THAT IS EDITED AND THAT CONTAINS THE CONTRIBUTIONS OF MANY

1 DIFFERENT AUTHORS IS MORE LIKE A SCHOLARLY JOURNAL THAN IT IS
2 LIKE A BOOK BY A SINGLE AUTHOR?

3 A. MORE LIKE IN WHAT FASHION, DO YOU MEAN?

4 Q. THE NATURE OF THE CONTRIBUTION. A CHAPTER BY A SINGLE
5 AUTHOR THAT IS THAT AUTHOR'S ENTIRE CONTRIBUTION TO A BOOK IS
6 MORE LIKE A JOURNAL ARTICLE THAN A BOOK THAT IS WRITTEN AS
7 MANY CHAPTERS THAT IS ALL THE CHAPTERS ARE WRITTEN BY ONE
8 AUTHOR?

9 A. A BOOK OF SCHOLARSHIP BY A SINGLE AUTHOR OFTEN ALSO
10 CITES MANY OTHER PREVIOUSLY --

11 Q. I SORT OF MOVED ON TO ANOTHER ISSUE NOW. MAYBE THAT
12 WASN'T CLEAR.

13 A. OKAY.

14 Q. JUST GENERALLY WOULD YOU AGREE WITH ME THAT A BOOK
15 CHAPTER AND A MULTI-AUTHOR BOOK WHERE EACH CHAPTER IS AUTHORED
16 BY DIFFERENT AUTHORS IS MORE LIKE A JOURNAL ARTICLE THAN IT IS
17 LIKE AN ENTIRE BOOK THAT IS WRITTEN BY A SINGLE AUTHOR?

18 A. MORE LIKE IN TERMS OF THE AMOUNT OF CONTENT?

19 Q. THEY WOULD BE ABOUT THE SAME LENGTH TYPICALLY.

20 THE COURT: I DON'T UNDERSTAND YOUR QUESTIONS HERE.

21 THE WITNESS: NOT NECESSARILY.

22 THE COURT: I DON'T KNOW IF THE WITNESS DOES OR NOT.

23 BUT I AM NOT --

24 MR. RAINS: THE POINT I AM TRYING TO MAKE HERE, YOUR
25 HONOR, IS WITH RESPECT TO, FOR EXAMPLE, "THE UNDERSTANDING

1 TRAUMA" WORK AT ISSUE HERE, EACH CHAPTER IN THAT BOOK IS
2 WRITTEN BY A SEPARATE AUTHOR. I AM SIMPLY TRYING TO ESTABLISH
3 THAT THOSE CHAPTERS ARE THAT AUTHOR'S COMPLETE CONTRIBUTION TO
4 THAT MULTI-AUTHOR WORK, AND I AM JUST TRYING TO ASK --

5 THE COURT: I THINK THAT IS IMPLICIT IN YOUR
6 QUESTION IF EACH AUTHOR WRITES A SECTION.

7 MR. RAINS: TRYING TO ESTABLISH THAT IS MORE LIKE A
8 JOURNAL THAN A BOOK BY A SINGLE AUTHOR. IF THE COURT IS
9 INTERESTED --

10 THE COURT: NO, I AM NOT SAYING I AM NOT
11 INTERESTED, I JUST DON'T QUITE FOLLOW THE QUESTION.

12 MR. RAINS: DO YOU UNDERSTAND WHAT I AM SAYING?

13 THE COURT: YOU CAN ANSWER IF YOU UNDERSTAND THE
14 QUESTION.

15 THE WITNESS: I DON'T THINK I UNDERSTAND IT
16 COMPLETELY.

17 BY MR. RAINS:

18 Q. I WILL MOVE ON.

19 IN YOUR EPY 7090 COURSE, DO YOU REQUIRE THE STUDENTS TO
20 PURCHASE ANY TEXTBOOKS?

21 A. WHICH SEMESTER?

22 Q. THE SEMESTERS WE HAVE BEEN TALKING ABOUT TODAY, THE
23 SUMMER AND FALL OF 2009?

24 A. NO.

25 Q. AND WITH RESPECT TO YOUR EPY 8220 COURSE, DO YOU

1 REQUIRE THE STUDENTS TO PURCHASE ANY TEXTBOOKS?

2 A. TEXTBOOKS ARE NOT APPROPRIATE FOR DOCTORAL LEVEL
3 COURSE.

4 Q. THAT WAS NOT MY QUESTION.

5 A. NO.

6 Q. DO YOU REQUIRE THEM TO PURCHASE ANY TEXTS?

7 A. NO.

8 Q. I WILL USE A BETTER WORD THAN TEXT, DO YOU REQUIRE
9 THEM TO PURCHASE ANY BOOKS?

10 A. NO.

11 Q. WITH RESPECT TO THE TWO COURSES YOU TESTIFIED TO TODAY,
12 NO STUDENTS WERE REQUIRED TO PURCHASE ANY BOOKS, WHETHER
13 TEXTBOOKS OR BOOKS?

14 A. NO.

15 Q. WITH RESPECT TO ALL OF THE READINGS YOU USE, THEY ARE
16 AVAILABLE ON ELECTRONIC RESERVE?

17 A. THAT'S CORRECT.

18 Q. FOR THE EPY 7090 COURSE, THAT WOULD HAVE BEEN 19 WORKS,
19 DOES THAT SOUND RIGHT?

20 A. I WOULD HAVE TO CHECK THE SYLLABUS.

21 Q. DO YOU WANT TO LOOK AT THE SYLLABUS FOR THAT ONE? I
22 BELIEVE THAT IS PLAINTIFF'S EXHIBIT 553 THAT YOU SHOULD HAVE
23 UP THERE.

24 A. FIFTEEN BY MY COUNT.

25 Q. AND FOR THE EPY 8220 COURSE, I BELIEVE YOU HAVE THAT

1 SYLLABUS IN FRONT OF YOU AS PLAINTIFF'S 554, ARE THERE
2 APPROXIMATELY 39 READINGS IN THAT COURSE?

3 A. YES.

4 Q. WITH RESPECT TO BOTH COURSES, MOST OF THOSE COURSE
5 READINGS ARE ARTICLES FROM JOURNALS; IS THAT CORRECT?

6 A. WITH RESPECT TO 8220 MOST ARE.

7 Q. IN THE 8220 COURSE, IT IS YOUR UNDERSTANDING THE
8 UNIVERSITY OF GEORGIA STATE PAYS A LICENSING FEE FOR THE USE
9 OF THOSE WORKS?

10 A. YES.

11 Q. I BELIEVE YOU TESTIFIED TO THAT ON DIRECT, BOTH OF THE
12 WORKS YOU DISCUSSED, EXCERPTS FROM "UNDERSTANDING TRAUMA" AND
13 "AWAKENING A CHILD'S MIND" WERE REQUIRED COURSES?

14 A. YES.

15 Q. LET'S TURN TO DEFENDANT'S EXHIBIT 465, THAT IS
16 PLAINTIFF'S 598. THIS IS YOUR RECREATED CHECKLIST FROM THE
17 "UNDERSTANDING TRAUMA" EXCERPT FROM THE FALL 2009, CORRECT?

18 A. CORRECT.

19 Q. NOW, WITH RESPECT TO THE TWO CHECKLISTS THAT YOU
20 TESTIFIED ON DIRECT EXAMINATION, IS IT FAIR TO SAY THAT YOU
21 FILLED OUT THE SAME BOXES ON -- EXCUSE ME -- THREE CHECKLISTS,
22 THE SAME BOXES ON EACH OF THOSE CHECKLISTS?

23 A. I THINK THAT IS CORRECT.

24 Q. AS THE EXHIBITS APPEAR, 16 SUBTESTS WEIGH IN FAVOR OF
25 FAIR USE AND ZERO WEIGH AGAINST; IS THAT CORRECT?

1 A. I WOULD HAVE TO COUNT, DO YOU WANT ME TO DO THAT?

2 Q. IF YOU COULD.

3 A. (WITNESS COMPLIES.) THAT'S RIGHT.

4 Q. I BELIEVE ON DIRECT YOU TESTIFIED THAT IF YOU WERE
5 DOING THESE CHECKLISTS OVER AGAIN YOU WOULD AMEND THE CHECK
6 BOXES THAT YOU HAD CHECKED, CORRECT?

7 A. THAT'S CORRECT.

8 Q. YOU WOULD DELETE UNDER THE CHECK FACTOR FOUR
9 "SUPPLEMENTAL READING," ADD THE CHECK FOR "REQUIRED READING"
10 AND "NONTRANSFORMATIVE"; IS THAT CORRECT?

11 A. YES.

12 Q. THAT WOULD MAKE THE TOTAL FIFTEEN TO TWO INSTEAD OF
13 SIXTEEN TO ZERO?

14 A. YES.

15 Q. YOUR TESTIMONY ON DIRECT YOU DON'T BELIEVE THAT
16 CHANGING THOSE BOXES WOULD CHANGE YOUR FAIR USE ANALYSIS AT
17 ALL?

18 A. THAT'S CORRECT.

19 Q. ARE YOU CERTAIN THAT THE RECREATED CHECKLIST YOU
20 TESTIFIED ABOUT ON DIRECT EXAMINATION, AND THOSE ARE
21 PLAINTIFF'S EXHIBITS 597, 598 AND 599, ARE IDENTICAL TO THE
22 CHECKLISTS YOU ORIGINALLY COMPLETED AND COULD NOT LOCATE?

23 A. THEY ARE AS CLOSE AS I CAN IMAGINE. I CANNOT CERTIFY
24 BECAUSE I DON'T HAVE THE ORIGINAL IN FRONT OF ME, BUT I THINK
25 THEY ARE TO THE BEST OF MY ABILITY THE SAME.

1 Q. BUT YOU DON'T KNOW THAT THEY ARE IDENTICAL?

2 A. I COULDN'T KNOW THAT, IT IS NOT POSSIBLE TO KNOW THAT.

3 Q. YOU BELIEVE, DON'T YOU, THAT NONE OF THE INDIVIDUAL
4 SUBTESTS, I BELIEVE WAS THE WORD YOU USED ON DIRECT
5 EXAMINATION, ARE MORE IMPORTANT THAN ANY OF THE OTHERS; IS
6 THAT CORRECT?

7 A. MY UNDERSTANDING IS THEY EACH STAND ALONE.

8 Q. SO, FOR EXAMPLE, NONTRANSFORMATIVE IS NO MORE OR LESS
9 IMPORTANT THAN NONPROFIT EDUCATIONAL IN YOUR UNDERSTANDING?

10 A. THAT IS MY UNDERSTANDING.

11 Q. IS THAT UNDERSTANDING BASED ON ANY OF THE TRAINING YOU
12 HAVE RECEIVED FROM GEORGIA STATE UNIVERSITY?

13 A. I CAN'T RECALL A SPECIFIC ELEMENT OF THE TRAINING THAT
14 LED ME TO THAT, BUT IT WOULD SEEM LIKELY THAT IT WAS THERE,
15 BUT I CAN'T, I DON'T HAVE A SPECIFIC MEMORY OF IT.

16 Q. LET'S STAY ON PLAINTIFF'S EXHIBIT, I BELIEVE IT IS,
17 598, WHICH IS THE CHECKLIST YOU HAVE RECREATED FOR THE
18 "UNDERSTANDING TRAUMA" WORK. IF WE COULD LOOK AT FACTOR ONE.
19 YOU TESTIFIED ON DIRECT EXAMINATION THAT YOU HAD HAD SOME
20 CONVERSATIONS OR INTERACTION WITH MS. KERRY HEYWARD AND OFFICE
21 OF LEGAL AFFAIRS; IS THAT RIGHT? ABOUT THE COPYRIGHT POLICY
22 OF GEORGIA STATE UNIVERSITY?

23 A. I DON'T BELIEVE I TESTIFIED TO THAT EFFECT, NO.

24 Q. HAVE YOU?

25 A. HAVE I HAD CONVERSATIONS WITH KERRY?

1 Q. YES.

2 A. YES.

3 Q. ABOUT THE COPYRIGHT LAW?

4 A. YES.

5 Q. DURING ANY OF THOSE CONVERSATIONS, HAVE YOU EVER
6 DISCUSSED WHAT TRANSFORMATIVENESS MEANS WITH RESPECT TO FACTOR
7 ONE OF FAIR USE ANALYSIS?

8 A. I DON'T HAVE A SPECIFIC MEMORY OF THAT.

9 Q. SO YOU DON'T RECALL HER TELLING YOU ANYTHING ABOUT THE
10 TRANSFORMATIVENESS FACTOR?

11 A. I DON'T RECALL ONE WAY OR THE OTHER.

12 Q. UNDER FACTOR ONE YOU CHECKED "USE AS NECESSARY TO
13 ACHIEVE YOUR INTENDED EDUCATIONAL PURPOSE"; IS THAT CORRECT?

14 A. I DID CHECK THAT.

15 Q. I BELIEVE YOU TESTIFIED ON DIRECT EXAMINATION THAT YOU
16 BELIEVE THAT THE EXCERPT FROM "UNDERSTANDING TRAUMA" IS
17 UNIQUE; IS THAT CORRECT?

18 A. THAT IS MY UNDERSTANDING.

19 Q. AND BY THAT YOU MEAN THAT THERE IS NOT ANOTHER
20 SCHOLARLY WORK THAT CONVEYS THE SAME ARGUMENT?

21 A. NOT AT THE TIME I ASSIGNED IT, NO.

22 Q. SO, IN THE FALL OF 2009, THE ONLY SCHOLARLY WORK YOU
23 WERE AWARE OF THAT ADDRESSED THIS EDUCATIONAL PURPOSE IS THE
24 EXCERPT YOU ASSIGNED FROM "UNDERSTANDING TRAUMA"?

25 A. THAT'S RIGHT.

1 Q. I THINK YOU MIGHT HAVE TESTIFIED IN YOUR DEPOSITION
2 THAT THAT WAS A SPECIAL ARGUMENT OR A UNIQUE ARGUMENT?

3 A. UNIQUE ARGUMENT.

4 Q. LOOKING AT FACTOR TWO, I BELIEVE DURING DIRECT
5 EXAMINATION YOU TESTIFIED THAT IT WAS YOUR OPINION THAT THE
6 MAJORITY OF THE EXCERPT YOU ASSIGNED FROM "UNDERSTANDING
7 TRAUMA" WAS A SUMMARY OF OTHER INDIVIDUAL SCHOLARSHIP; IS THAT
8 CORRECT?

9 A. YES.

10 Q. BUT SOME PORTION OF IT IS THIS UNIQUE ARGUMENT THAT YOU
11 CAN'T FIND SOMEPLACE ELSE; IS THAT CORRECT?

12 A. THAT'S CORRECT.

13 Q. YOU ASSIGNED ALL OF THE PORTIONS OF THAT EXCERPT?

14 A. THAT'S RIGHT.

15 Q. INCLUDING THE UNIQUE PART OF IT THAT ISN'T FOUND
16 ANYWHERE ELSE?

17 A. THAT'S RIGHT.

18 Q. SO AS FAR AS YOU WERE AWARE, IN THE FALL OF 2009, THE
19 ONLY PLACE YOU COULD GET THAT UNIQUE PART OF THAT ARGUMENT
20 WOULD HAVE BEEN FROM A PORTION OF THIS EXCERPT OF
21 "UNDERSTANDING TRAUMA"; IS THAT CORRECT?

22 A. NO. THE UNIQUE ARGUMENT ISN'T IN A PORTION.

23 Q. OKAY. IT IS IN THE ENTIRETY OF IT?

24 A. IT IS IN THE ORGANIZATION OF THE OTHER MATERIALS CITED.

25 Q. SO, THE SUMMARIZED MATERIAL?

1 A. IT IS IN THE ORGANIZATION OF THE SUMMARIZED MATERIAL.

2 Q. ALL RIGHT. SO THE WAY THE AUTHOR OF THAT EXCERPT, VAN
3 DER KOLK, ORGANIZED THAT MATERIAL IS UNIQUE?

4 A. THAT'S RIGHT.

5 Q. SO IT IS MORE THAN JUST A SUMMARY, THERE IS SOME UNIQUE
6 ORGANIZATION GOING ON THERE?

7 A. CORRECT.

8 Q. SITTING HERE TODAY, DO YOU SEE ANYTHING IN FACTOR TWO
9 THAT WOULD ALLOW YOU TO -- AND THIS CHECKLIST UNDER FACTOR TWO
10 THAT WOULD ALLOW YOU TO ACCOUNT FOR THE SORT OF UNIQUE
11 ORGANIZATION THAT THAT SCHOLAR CONTRIBUTED TO PREPARING THAT
12 EXCERPT?

13 A. I DON'T SEE THAT AS HIGHLY CREATIVE. MY UNDERSTANDING
14 OF HIGHLY CREATIVE IS THAT IT IS A WORK OF IMAGINATION.

15 Q. SO MORE DIRECTLY TO MY QUESTION, THERE IS NO PLACE ON
16 THIS CHECKLIST UNDER FACTOR TWO FOR YOU TO REGISTER THE
17 UNIQUENESS OF THE ORGANIZATION IN THAT EXCERPT THAT YOU FOUND?

18 A. THAT'S RIGHT.

19 Q. YOU HAVE A FOURTH CHOICE BETWEEN FACTUAL AND HIGHLY
20 CREATIVE BETWEEN ART, MUSIC, NOVELS, ET CETERA?

21 A. THAT'S CORRECT.

22 Q. THE EXCERPT YOU USED FROM VAN DER KOLK WAS THE ENTIRE
23 SUBMISSION OF VAN DER KOLK OF "UNDERSTANDING TRAUMA"?

24 A. I WOULD HAVE TO CHECK IF HE HAD ANOTHER CHAPTER, BUT IT
25 WAS THE ENTIRE CHAPTER.

1 Q. TURNING TO FACTOR THREE, YOU TESTIFIED THAT YOU
2 CHECKED A SMALL PORTION OF THE WORK USED HERE, BUT THAT YOU
3 DID NOT BELIEVE THERE WAS A SORT OF NUMERICAL WAY TO QUANTIFY
4 WHAT ALL WENT?

5 A. I DON'T HAVE A HARD AND FAST NUMBER RULE.

6 Q. DO YOU HAVE A FLEXIBLE RULE?

7 A. I HAVE JUDGMENT.

8 Q. IN YOUR JUDGMENT, HAVE YOU EVER ASSIGNED A PERCENTAGE
9 THAT YOU WOULD USE TO CALCULATE WHETHER SOMETHING WAS A SMALL
10 PORTION OF THE WORK USED?

11 A. CAN YOU SAY THAT AGAIN?

12 Q. IT WAS A POORLY WORDED QUESTION.

13 YOU SAID IT WAS FLEXIBLE AND IT WAS IN YOUR JUDGMENT AND I
14 UNDERSTAND THAT. HAVE YOU EVER ASSIGNED A PERCENTAGE IN YOUR
15 MIND FOR DOING FAIR USE ANALYSIS TO WHAT WOULD BE SMALL VERSUS
16 NOT SMALL?

17 A. I DON'T THINK I HAVE EVER PUT A NUMBER ON IT, NO.

18 Q. DO YOU RECALL SIGNING A DECLARATION IN APRIL OF 2010 IN
19 CONNECTION WITH THIS LAWSUIT?

20 A. I DO REMEMBER THAT.

21 MR. RAINS: MAY I APPROACH, YOUR HONOR?

22 THE COURT: YES.

23 BY MR. RAINS:

24 Q. IF YOU COULD BRING UP DEFENSE EXHIBIT 535, PLEASE. I
25 HAVE JUST HANDED YOU DEFENSE EXHIBIT 535. IS THIS THE

1 DECLARATION YOU SIGNED IN APRIL OF 2010 IN CONNECTION WITH
2 THIS LITIGATION?

3 A. IT APPEARS TO BE A COPY.

4 Q. YOU SIGNED THE ORIGINAL?

5 A. I BELIEVE I DID.

6 Q. TURN TO THE SECOND PAGE, PARAGRAPH FOUR. LOOK AT THE
7 SECOND SENTENCE, YOU WRITE:

8 "EACH COURSE READING ASSIGNMENT I
9 HAVE MADE AVAILABLE ON ERESERVES
10 SINCE ADOPTION OF THE POLICY IS
11 NARROWLY TAILORED TO SUPPORT A
12 SPECIFIC TEACHING POINT AND
13 CONSTITUTES NO MORE THAN FIFTEEN
14 PERCENT OF THE ENTIRE WORK."

15 DO YOU SEE THAT?

16 A. YEAH, I DO.

17 Q. WHERE DID YOU GET THAT 15 PERCENT FIGURE FROM?

18 A. IT IS FACTUAL. I BELIEVE THE LARGEST PERCENTAGE
19 ASSIGNED IN THAT PERIOD OF TIME WAS SOMETHING LIKE 12 PERCENT.

20 Q. SO YOU DON'T HAVE A VIEW ONE WAY OR THE OTHER WHETHER
21 15 PERCENT IS A SMALL PORTION OF THE WORK?

22 A. IT IS JUST THE FACT ABOUT WHAT I ASSIGNED.

23 Q. NOT A GUIDELINE YOU WERE USING?

24 A. NO.

25 Q. NOT A GUIDELINE YOU RECEIVED FROM ANYBODY IN THE OFFICE

1 OF LEGAL AFFAIRS AT GEORGIA STATE UNIVERSITY?

2 A. NO.

3 Q. IF WE COULD RETURN TO FAIR USE CHECKLIST, PLAINTIFF'S
4 EXHIBIT 554.

5 THE COURT: YOU KNOW MAYBE WE OUGHT TO BREAK HERE
6 FOR LUNCH. I HAVE A COMMITTEE MEETING TODAY AT LUNCHTIME AND
7 TO ACCOMMODATE MY MEETING WE ARE GOING TO BREAK UNTIL 1:45.
8 SO Y'ALL HAVE A NICE, LEISURELY LUNCH.

9 MR. RAINS: THANK YOU, YOUR HONOR.

10 MR. RICH: MIGHT WE ADDRESS BEFORE WE ADJOURN
11 EVERYBODY'S ESSENCE OF TIMING?

12 THE COURT: THANK YOU. YES.

13 (WHEREUPON, A LUNCH RECESS WAS HELD.)

14 THE COURT: ALL RIGHT.

15 MR. RAINS: YES, YOUR HONOR, I HAVE A FEW MORE
16 MINUTES OF QUESTIONS.

17 THE COURT: YOU ARE REMINDED YOU ARE STILL UNDER
18 OATH, PROFESSOR.

19 THE WITNESS: YES, YOUR HONOR.

20 BY MR. RAINS:

21 Q. PROFESSOR KRUGER, BEFORE WE TOOK THE LUNCH BREAK, I
22 BELIEVE WE WERE LOOKING AT PLAINTIFF'S EXHIBIT 598, THE FAIR
23 USE CHECKLIST YOU FILLED OUT OR REFILLED OUT, FOR YOUR CLASS
24 WORK, "UNDERSTANDING TRAUMA." LOOK AT FACTOR FOUR. IN
25 CONDUCTING THE FAIR USE ANALYSIS UNDER FACTOR FOUR, YOU DID

1 NOT CHECK "REPEATED LONG-TERM USE DEMONSTRABLY EFFECTS THE
2 MARKET FOR THE WORK;" IS THAT CORRECT?

3 A. YES.

4 Q. YOU LEFT IT UNCHECKED EVEN THOUGH YOU USED THE
5 "UNDERSTANDING TRAUMA" IN PREVIOUS SEMESTERS?

6 A. I BELIEVE --

7 MS. BATES: I OBJECT TO RELEVANCE. IT IS NOT WITHIN
8 THE STATE OF TIME FRAME OF THIS LITIGATION.

9 THE COURT: SUSTAINED.

10 BY MR. RAINS:

11 Q. YOU TESTIFIED ON DIRECT EXAMINATION THAT ONE OF THE
12 REASONS YOU BELIEVE THAT MAKING THIS EXCERPT FROM THE
13 "UNDERSTANDING TRAUMA" WORK AVAILABLE TO STUDENTS STIMULATING
14 THE MARKET FOR THE ORIGINAL WORK IS THAT PROVIDING IT TO THE
15 STUDENTS ON ELECTRONIC RESERVES MAKES THE STUDENTS AWARE OF
16 THE WORK; IS THAT RIGHT?

17 A. THAT'S RIGHT.

18 Q. CAN YOU EXPLAIN WHAT DIFFERENCE, IF ANY, THERE WOULD BE
19 IN THE LEVEL OF AWARENESS STUDENTS WOULD HAVE FOR THE WORK IF
20 THEY PAID PERMISSION FEES VERSUS NOT PAYING PERMISSION FEES?
21 IN OTHER WORDS, THE STUDENTS WOULDN'T BE ANY LESS AWARE OF
22 THIS WORK IF THEY HAD TO PAY SAY 2.40 TO ACCESS IT RATHER THAN
23 IF THEY GOT IT FOR FREE?

24 A. THAT IS ASSUMING THEY WOULD PAY 2.40, THEN THEY WOULD
25 BE EQUALLY AWARE.

1 Q. OR IF THE UNIVERSITY PAID IT FOR THEM, THEN THEY WOULD
2 BE EQUALLY AWARE?

3 A. THAT'S RIGHT.

4 Q. IN YOUR DISCUSSIONS WITH MS. HEYWARD AND THE OFFICE OF
5 LEGAL AFFAIRS AT GEORGIA STATE UNIVERSITY ABOUT THE NEW
6 COPYRIGHT POLICY, DID YOU EVER DISCUSS WHAT THE MARKET WAS
7 FOR A PARTICULAR WORK IN THE CONTEXT OF FACTOR FOUR IN THIS
8 CHECKLIST?

9 A. I DON'T HAVE ANY SPECIFIC RECOLLECTION ABOUT THE
10 DETAILS OF OUR CONVERSATION.

11 Q. WHEN YOU WERE FILLING OUT THE CHECKLIST, THE ORIGINAL
12 CHECKLIST IN 2009, IT WAS YOUR UNDERSTANDING THAT THE MARKET
13 YOU WERE TALKING ABOUT WAS THE MARKET FOR THE SALE OF BOOKS,
14 CORRECT?

15 A. THAT'S RIGHT.

16 Q. IN 2009, WHEN YOU FILLED OUT THE CHECKLIST, THIS
17 "UNDERSTANDING TRAUMA" WORK AND ALSO FOR THE "AWAKENING
18 CHILDREN'S MINDS" EXCERPT, YOU DID NOT INVESTIGATE WHETHER
19 LICENSING WAS AVAILABLE TO USE THE EXCERPTS YOU WERE WANTING
20 TO USE, CORRECT?

21 A. THAT'S CORRECT.

22 Q. YOU DIDN'T KNOW IN 2009 WHAT IT WOULD HAVE COST TO USE
23 PERMISSION EXCERPTS FROM THESE WORKS; IS THAT CORRECT?

24 A. I DID NOT KNOW.

25 Q. ALL RIGHT.

1 PROFESSOR KRUGER, THE PLAINTIFFS HAVE CALCULATED YOU COULD
2 HAVE OBTAINED PERMISSION TO USE THE EXCERPT IN THE
3 "UNDERSTANDING TRAUMA" WORK THAT YOU MADE AVAILABLE TO YOUR
4 STUDENTS ON ERES DURING THE FALL OF 2009 FOR 2.70 PER STUDENT.
5 IF YOU KNEW THAT YOUR STUDENTS HAD HAD TO PAY THAT AMOUNT TO
6 USE THE WORK, WOULD YOU STILL HAVE ASSIGNED IT IN YOUR FALL OF
7 2009 CLASS?

8 A. I WOULD HAVE TO THINK ABOUT IT PRETTY CAREFULLY BECAUSE
9 2.70 ISN'T A LOT TO YOU OR ME, BUT WHEN IT ACCUMULATES ACROSS
10 MULTIPLE READINGS AND ACROSS MULTIPLE COURSES, IT STARTS TO BE
11 BURDENSOME, ESPECIALLY FOR OUR STUDENTS.

12 Q. IN YOUR, I BELIEVE IT IS THE EPY 8220 COURSE, WHICH IS
13 THE COURSE IN WHICH YOU USED THE "UNDERSTANDING TRAUMA" WORK,
14 OF THE I BELIEVE YOU TESTIFIED 39 WORKS YOU MADE AVAILABLE ON
15 THE ELECTRONIC RESERVE SYSTEM, HOW MANY OF THOSE WERE NOT
16 LICENSED JOURNAL EXCERPTS? HOW MANY OF THEM WOULD HAVE BEEN
17 BOOK CHAPTERS?

18 A. I CAN COUNT. MY MEMORY IS THREE, BUT I CAN COUNT TO
19 BE SURE.

20 Q. PLEASE DO.

21 A. IF YOU ALLOW ME TO DO THAT. (WITNESS COMPLIES.)
22 INCLUDING THE VAN DER KOLK, THERE ARE THERE.

23 Q. WHEN YOU ARE TALKING ABOUT HAVING TO CONSIDER NOT JUST
24 THE LICENSING PERMISSION COSTS FOR THIS ONE AT 2.70 PER
25 STUDENT, YOU WOULD HAVE TO FIGURE OUT WHAT IT WAS FOR THOSE

1 OTHER TWO WORKS?

2 A. THOSE OTHER TWO WORKS AND HALF OF THE STUDENTS HOW MANY
3 OTHER COURSES WITH HOW MANY OTHER WORKS.

4 Q. DO YOU KNOW WHAT STUDENTS PAY IN FEES PER SEMESTER AT
5 GEORGIA STATE UNIVERSITY?

6 A. A LOT. I DON'T KNOW HOW MUCH EXACTLY.

7 Q. AND THE STUDENTS DON'T PAY ANYTHING FOR ANY TEXT OR
8 BOOK IN YOUR COURSE; IS THAT RIGHT, YOUR EPY 8220 COURSE?

9 A. AS WRITTEN IN 2009, THAT'S RIGHT.

10 Q. ALL RIGHT. EARLIER ON DIRECT EXAMINATION I THINK YOU
11 UNEQUIVOCALLY SAID YOU WOULD NOT MAKE THE "AWAKENING
12 CHILDREN'S MINDS" EXCERPTS AVAILABLE TO YOUR CHILDREN ON ERES
13 IF PERMISSIONS HAD TO BE PAID FOR THAT, YOU WOULD HAVE SOUGHT
14 SOME OTHER WORK INSTEAD OF THAT, DO YOU REMEMBER THAT?

15 A. I DON'T REMEMBER SAYING IT EXACTLY THAT WAY.

16 Q. ALL RIGHT. HOW WOULD YOU SAY?

17 A. IF PERMISSIONS WERE -- IF PAYING FOR USE OF THE CHAPTER
18 WERE NECESSARY TODAY, I WOULD SEEK -- I WOULD INVESTIGATE
19 WHETHER SOMETHING ELSE WAS AVAILABLE BECAUSE AT THE MASTER'S
20 LEVEL, NEW WORKS ARE COMING OUT ALL THE TIME.

21 Q. THAT IS NOT THE CASE, THOUGH, WITH RESPECT TO THE
22 "UNDERSTANDING TRAUMA" EXCERPT, AT LEAST IN 2009; IS THAT
23 RIGHT?

24 A. THAT'S RIGHT.

25 Q. SO, WITH RESPECT TO THE "UNDERSTANDING TRAUMA"

1 EXCERPT, YOUR CHOICE WOULD HAVE BEEN LICENSING FOR 2.70 OR NOT
2 USING IT AT ALL, BECAUSE THERE ISN'T A REPLACEMENT FOR THAT
3 WORK?

4 A. AT THE TIME, THAT'S CORRECT.

5 Q. I BELIEVE YOU ALSO TESTIFIED ON DIRECT EXAMINATION THAT
6 IT WAS AT LEAST YOUR HOPE THAT BY EXPOSING STUDENTS TO THESE
7 EXCERPTS OF WORK IN YOUR COURSE THEY MIGHT PURCHASE EITHER THE
8 "UNDERSTANDING TRAUMA" OR THE "AWAKENING CHILDREN'S MINDS"
9 WORKS OR PERHAPS EVEN OTHER BOOKS THEMSELVES; IS THAT RIGHT?

10 A. NOT ONLY MY HOPE, BUT MY EXPERIENCE.

11 Q. AND CAN YOU EXPLAIN TO ME HOW THAT IS YOUR EXPERIENCE
12 IF YOUR STUDENTS CANNOT AFFORD EVEN 2.70 FOR AN EXCERPT FROM
13 ONE OF THOSE WORKS?

14 A. IT IS BECAUSE THEY ARE SOMETIMES MOTIVATED ONCE THEY
15 READ IT. BUT THEY ARE AND THEY DIG DEEPLY TO BUY A BOOK IF
16 IT IS HIGHLY RELEVANT TO THEIR COURSE OF STUDY.

17 Q. SO YOU EXPECTED THE STUDENTS IN YOUR COURSE OR HOPED OR
18 EVEN EXPERIENCED THAT THEY WOULD SPEND 35.99 FOR THE ENTIRE
19 BOOK, BUT YOU BELIEVE THEY COULDN'T PAY 2.70 FOR AN EXCERPT
20 FROM IT?

21 A. THEY WOULDN'T SPEND THAT MUCH ON EACH AND EVERY BOOK
22 THAT WAS A SOURCE, BUT IF IT WAS SOMETHING THAT THEY WERE
23 VERY INTERESTED IN, THEN, YES. IT DEPENDS ON THEIR OWN
24 MOTIVATION AND THEIR OWN AREA OF INTEREST.

25 Q. ARE YOU FAMILIAR WITH GEORGIA STATE UNIVERSITY'S

1 FACULTY HANDBOOK?

2 A. YES.

3 Q. IN MAKING THE FAIR USE DETERMINATION YOU MADE IN THE
4 FALL OF 2009 AND SUMMER OF 2009, DID YOU CONSULT ANY PORTION
5 OF THE GEORGIA STATE UNIVERSITY HANDBOOK FACULTY HANDBOOK?
6 EXCUSE ME?

7 A. REPEAT THE QUESTION FOR ME.

8 Q. IN MAKING THE FAIR USE DETERMINATIONS YOU TESTIFIED
9 ABOUT TODAY IN 2009, DID YOU CONSULT ANY PORTIONS OF THE
10 GEORGIA STATE UNIVERSITY FACULTY HANDBOOK?

11 A. I DON'T RECALL.

12 MR. RAINS: MAY I HAVE A FEW MOMENTS?

13 THE COURT: YES.

14 MR. RAINS: NO FURTHER QUESTIONS.

15 MS. BATES: JUST A FEW.

16 REDIRECT EXAM

17 Q. MR. RAINS ASKED YOU TO IDENTIFY FOR YOUR SYLLABUS IN
18 FALL OF 2009 IN OFFERING OF EPY 8220 THE NUMBER OF ASSIGNED
19 WORKS.

20 A. YES.

21 Q. YOU IDENTIFIED THREE BOOK EXCERPTS FROM WHICH YOU HAD
22 PULLED FOR THAT COURSE. CAN YOU ALSO CONSULT THAT SYLLABUS
23 WHICH IS PLAINTIFF'S EXHIBIT 554 AND IDENTIFY THE NUMBER OF
24 JOURNAL ARTICLES OR EXCERPTS OF JOURNAL ARTICLES YOU ASSIGNED?

25 A. OF REQUIRED, 36 JOURNALS.

1 Q. AND ARE THESE JOURNALS AVAILABLE ON THE ELECTRONIC
2 JOURNAL DATABASE TO WHICH THE LIBRARY SUBSCRIBES?

3 A. YES.

4 Q. MR. RAINS ALSO ASKED YOU TO IDENTIFY IN YOUR SYLLABUS
5 FOR THE SUMMER TO FALL 2009 OFFERING OF EPY 7090 THE NUMBER OF
6 DIFFERENT WORKS FOR WHICH YOU ASSIGNED READINGS. DO YOU
7 RECALL SAYING 19 WORKS?

8 A. I BELIEVE I RECALL SAYING 15.

9 Q. IF YOU DON'T MIND TAKING A LOOK AT THAT SYLLABUS AND I
10 AM OPEN TO BEING CORRECTED CERTAINLY. SYLLABUS IS
11 PLAINTIFF'S EXHIBIT 553.

12 MR. RAINS: I THINK I SAID 19 AND THE WITNESS SAID
13 15. I STAND CORRECTED, IT WAS 15.

14 THE COURT: THANK YOU.

15 BY MS. BATES:

16 Q. IF YOU COULD JUST LET ME KNOW HOW MANY OF THOSE WERE
17 JOURNAL ARTICLES.

18 A. THREE.

19 Q. WERE THOSE AVAILABLE ON THE ELECTRONICALLY -- THROUGH
20 THE DATABASES SUBSCRIBED TO YOU BY THE LIBRARY?

21 A. NO.

22 Q. WERE THEY AVAILABLE THROUGH ERESERVES?

23 A. THEY WERE ARTICLES THAT I HAD A COPY OF AND MADE
24 AVAILABLE TO ERESERVE.

25 Q. IF WE COULD RETURN QUICKLY TO EPY 8220. IS THERE A

1 REASON THAT YOU ASSIGNED SO MANY DIFFERENT JOURNAL ARTICLES
2 FOR THAT COURSE?

3 A. YES, THERE IS.

4 Q. CAN YOU EXPLAIN TO US WHAT THAT REASON IS?

5 A. THIS IS AN ADVANCED COURSE FOR DOCTORAL STUDENTS AND IT
6 IS IMPORTANT FOR DOCTORAL LEVEL STUDENTS TO READ ORIGINAL WORK
7 OF SCHOLARSHIP TO LEAD RESEARCH REPORTS RATHER THAN READING
8 ACCOUNTS OF RESEARCH REPORTS. SO ONE OF THE STATED RATIONALE
9 FOR SELECTING THE MATERIAL IS THAT THEY READ THE MOST CURRENT
10 RESEARCH PUBLISHED IN FLAGSHIP JOURNALS IN THE SUBAREAS LISTED
11 THAT THE COURSE COVERS.

12 Q. IF YOU COULD FLIP BACK VERY QUICKLY TO PLAINTIFF'S
13 TRIAL EXHIBIT 554, IT IS THE SYLLABUS FOR THAT COURSE, AND
14 LOOK AT SUBTITLE COURSE OBJECTIVES YOU PREVIOUSLY READ THIS TO
15 THE COURT. REREAD THE FIRST LINE THERE.

16 A.
17 "THE PURPOSE OF THIS COURSE IS FOR
18 THE STUDENT TO ACTIVELY EXPLORE THE
19 RESEARCH LITERATURE IN SOCIAL AND
20 PERSONALITY DEVELOPMENT."

21 Q. SO IS IT FAIR TO SAY YOUR ASSIGNMENT OF SO MANY JOURNAL
22 ARTICLES IS CONSISTENT WITH YOUR COURSE OBJECTIVE HERE?

23 A. YES, IT IS.

24 Q. ONE LAST QUESTION: MR. RAINS ASKED ABOUT WHETHER YOU
25 WOULD CONSIDER ASSIGNING THE WORK FOR COURSE 7090 IF YOUR

1 STUDENTS HAD TO PAY FOR THE WORK AND YOU INDICATED THAT IT
2 COULD BECOME BURDENSOME FOR THEM TO DO SO. CAN YOU DESCRIBE
3 TO THE COURT THE TYPES OF STUDENTS IN YOUR CLASS AND WHY YOU
4 WOULD FIND IT A BURDEN FOR SOME TO PAY FOR IT?

5 A. THESE ARE STUDENTS WHO ARE PRACTICING TEACHERS. THEY
6 ARE NOT PAID VERY WELL. THEY TRAVEL SOMETIMES UP TO
7 TWO-AND-A-HALF HOURS TO GET TO CLASS. THEY ARE HIGHLY
8 STRESSED AND ARE REALLY STRETCHING TO GO TO GRADUATE SCHOOL.
9 I TRY TO MAKE GRADUATE EXPERIENCE AS COMFORTABLE AND DOABLE
10 FOR THEM AS POSSIBLE, BUT I THINK IT IS IN THEIR BEST INTEREST
11 AND THE BEST INTEREST OF THE CHILDREN THAT THEY SERVE.

12 MS. BATES: THANK YOU, DR. KRUGER. NO FURTHER
13 QUESTIONS.

14 THE COURT: SHALL THE WITNESS BE EXCUSED?

15 MR. RAINS: YES.

16 THE COURT: YOU ARE EXCUSED, THANK YOU.

17 MR. SCHAETZEL: OUR NEXT WITNESS WILL BE DR. JOHN
18 MURPHY.

19 THE CLERK: STEP FORWARD PLEASE. COME RIGHT ON UP.
20 RAISE YOUR RIGHT HAND TO BE SWORN.

21 JOHN MURPHY, HAVING BEEN FIRST DULY SWORN, TESTIFIED
22 AS FOLLOWS:

23 THE CLERK: BE SEATED. STATE YOUR FULL NAME FOR THE
24 RECORD.

25 THE WITNESS: JOHN M. MURPHY.

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THE COURT: YOU MAY PROCEED.

1 DIRECT EXAM

2 BY MS. QUICKER:

3 Q. PROFESSOR MURPHY, WILL YOU PLEASE DESCRIBE YOUR
4 UNDERGRADUATE EDUCATION?

5 A. I WENT TO UNDERGRADUATE SCHOOL AT ST. JOSEPH UNIVERSITY
6 IN PHILADELPHIA.

7 Q. AND YOUR GRADUATE EDUCATION?

8 A. AND I WENT TO COLUMBIA UNIVERSITY IN NEW YORK. I DID
9 AN M.A., M.ED, AND ALSO DOCTOR OF EDUCATION.

10 Q. AND WHAT IS YOUR CURRENT POSITION AT GEORGIA STATE?

11 A. LET'S SEE. I AM A TENURED FULL PROFESSOR AT GEORGIA
12 STATE IN THE DEPARTMENT OF APPLIED LINGUISTICS AND ENGLISH AS
13 A SECOND LANGUAGE.

14 Q. HOW LONG HAVE YOU BEEN TEACHING AT GEORGIA STATE
15 UNIVERSITY?

16 A. SINCE THE FALL OF 1988.

17 Q. AND CAN YOU GENERALLY DESCRIBE THE COURSES YOU TEACH AT
18 GEORGIA STATE?

19 A. YES. I TEACH IN THE M. A. PROGRAM AND A PH.D. PROGRAM
20 AND OCCASIONALLY IN AN UNDERGRADUATE PROGRAM. IN PH.D. I
21 TEACH THEORY RESEARCH IN TEACHER COGNITIONS, SORT OF THE WAY
22 THE TEACHERS THINK, LANGUAGE TEACHERS THINK. AND IN THE
23 M. A. PROGRAM I TEACH A BASIC METHODOLOGY COURSE, CALLED
24 APPROACHES TO TEACHING LANGUAGES. THE CLASSROOM PRACTICES
25 COURSE, WHICH IS MORE HANDS ON. A COURSE IN PHONOLOGY AND

1 PHONETICS, HOW TO TEACH PRONUNCIATION AND SOUND SYSTEM OF
2 ENGLISH, PRACTICUM COURSE. AND I TEACH A COURSE IN
3 SUPERVISION, HOW TO BE A SUPERVISOR OF LANGUAGE TEACHERS OR
4 HOW TO BE A TEACHER WORKING WITH SUPERVISORS.

5 Q. AND AS A FACULTY MEMBER AT GEORGIA STATE, HAVE YOU
6 AUTHORED ANY PUBLICATIONS?

7 A. YES. LET'S SEE, I HAVE TWO BOOKS, ONE IS COEDITED
8 WITH MY COLLEAGUE PAT BYRD, DID SIX CHAPTERS IN THAT BOOK
9 MYSELF, THEN EDITED THE COLLECTION WITH OTHER CONTRIBUTIONS.
10 I DID A SOLO-AUTHORED BOOK ON SPOKEN COMMUNICATION. I HAVE A
11 NUMBER OF, I'M THINKING, BETWEEN 16 MAYBE 18 PEER-REVIEWED
12 JOURNAL ARTICLES, SEPARATE FROM THAT MAYBE TEN OR 12 BOOK
13 CHAPTERS IN COLLECTIONS EDITED BY OTHER PEOPLE. THINGS LIKE
14 THAT.

15 Q. WERE YOU COMPENSATED FOR THOSE WORKS?

16 A. YEAH. IN THE FIELD, NO, NOT VERY MUCH. SO I THINK A
17 COUPLE OF THE PIECES YOU MIGHT BE COMPENSATED SAY \$200 FOR A
18 BOOK CHAPTER. THE BOOK I COEDITED WITH PAT BYRD, WE GET
19 ANNUAL ROYALTIES, IT IS NOT VERY MUCH, 100 TO 200 DOLLARS
20 PER YEAR. THE REASON FOR PUBLISHING IN THE FIELD IS MORE
21 RECOGNITION ON YOUR CV AND MATTERS LIKE THAT.

22 Q. IN MAYMESTER 2009, DID YOU TEACH A CLASSROOM PRACTICES
23 IN SECOND AND FOREIGN LANGUAGE TEACHING IDENTIFIED AS AL 8480?

24 A. YES.

25 Q. AND WAS THAT AN UNDERGRADUATE OR GRADUATE LEVEL COURSE?

1 A. THAT IS A MASTER'S DEGREE COURSE.

2 Q. APPROXIMATELY HOW MANY STUDENTS WERE IN THAT CLASS?

3 A. I BELIEVE THERE WERE ABOUT TEN STUDENTS. I DON'T HAVE
4 A CLEAR MEMORY OF EXACTLY, BUT IT WOULD HAVE BEEN BETWEEN 10
5 AND 12 STUDENTS.

6 Q. WOULD YOU GENERALLY DESCRIBE THE SUBJECT MATTER OF THE
7 AL 8480 COURSE IN MAY OF 2009?

8 A. THE CLASSROOM PRACTICES COURSE REALLY GREW OUT OF
9 HISTORICALLY OUR BASIC METHODS COURSE, SO THAT 20 YEARS AGO
10 WITH COLLEAGUES WE DECIDED TO DO A SEPARATE COURSE WHICH WOULD
11 BE MORE HANDS ON, A LITTLE MORE PRACTICAL FOCUS, THAT IS
12 CLASSROOM PRACTICES COURSE WHICH IS MORE IMPLEMENTATION, HOW
13 TO DO THINGS IN THE CLASSROOM, HOW TO IMPLEMENT LANGUAGE
14 LESSONS. SO IT IS AN OPPORTUNITY FOR THE PRESERVICE TEACHERS
15 TO HONE THEIR TEACHING SKILLS AND ACQUIRE CLASS MANAGEMENT
16 SKILLS AND GET EXPERIENCE OF ACTUALLY TEACHING, MICROTEACHING
17 MANY LESSONS IN THE SEMINAR SETTING.

18 Q. APPROXIMATELY HOW MANY DAYS A WEEK DID THE STUDENTS
19 MEET IN THE MAYMESTER 2009 COURSE?

20 A. IT HAS 15 CLASS MEETINGS, IT MEETS FIVE DAYS A WEEK FOR
21 THREE WEEKS.

22 Q. HOW LONG A DAY?

23 A. IT IS ABOUT TWO-AND-A-HALF HOURS PER CLASS MEETING.

24 Q. WAS SYLLABUS PREPARED FOR THIS COURSE?

25 A. YES.

1 MS. QUICKER: YOUR HONOR, MAY I APPROACH?

2 BY MS. QUICKER:

3 Q. WOULD YOU TURN TO PTX 540 IN YOUR NOTEBOOK?

4 A. PTX?

5 Q. 540. DO YOU RECOGNIZE THIS DOCUMENT?

6 A. YES.

7 Q. WHAT IS IT?

8 A. THIS IS THE COPY OF THE COURSE SYLLABUS THAT I PREPARED
9 FOR THE CLASSROOM PRACTICES COURSE IN MAYMESTER 2009.

10 Q. WERE THERE ANY TEXTBOOKS THAT THE STUDENTS WERE
11 REQUIRED TO PURCHASE?

12 A. YEAH AT THE BOTTOM OF PAGE ONE AND THE TOP OF PAGE TWO,
13 THERE ARE FOUR REQUIRED TEXTBOOKS LISTED. SO STUDENTS WERE
14 REQUIRED TO PURCHASE AND BRING TO CLASS THESE FOUR BOOKS.
15 ONE IS RICHARD DAYS "NEW WAYS IN TEACHING READING"; THE SECOND
16 IS KLIPPEL, "KEEP TALKING," FOCUSED ON ORAL COMMUNICATION
17 ACTIVITIES; THIRD IS UR, "GRAMMAR PRACTICE ACTIVITIES"; AND
18 FOURTH IS TRICIA HEDGE, "WRITING TECHNIQUES."

19 Q. DO YOU KNOW IF ANY OF YOUR STUDENTS PURCHASED THESE?

20 A. I KNOW I INSIST THEY BRING ALL FOUR BOOKS TO THE CLASS.
21 IN ADDITION TO USING FOR MICROTEACHING, THEY ALSO WORK IN
22 SMALL GROUPS LOOKING AT SELF-ACTIVITIES CRITIQUING THEM AND
23 DISCUSSING THEM.

24 Q. ON THE SYLLABUS DID YOU ASSIGN AS REQUIRED READING ANY
25 EXCERPTS FROM BOOKS THAT WERE POSTED ON ERES?

1 A. COULD YOU ASK THAT AGAIN, PLEASE?

2 Q. ON THE SYLLABUS, DID YOU ASSIGN AS REQUIRED READING ANY
3 EXCERPTS FROM BOOKS THAT WERE POSTED ON ERES?

4 A. ON THAT, THE FOUR REQUIRED TEXTS WHICH STUDENTS ALSO
5 COPIED, PURCHASED COPIES OF, I DIDN'T REQUIRE THAT STUDENTS
6 READ ANY MATERIALS THAT WAS ON ERES.

7 Q. DID YOU CONTEMPLATE USING ANY ERES POSTINGS AS ANY
8 ADDITIONAL READING IN YOUR COURSE?

9 A. I DID CONTEMPLATE, YES, SUPPLEMENTARY READING
10 MATERIAL.

11 Q. WHAT DO YOU MEAN BY SUPPLEMENTAL READING MATERIALS?

12 A. YES. SO IN THE COURSE I WANT STUDENTS TO HAVE EXPOSURE
13 TO A WIDE RANGE OF DESCRIPTIONS OF ACTIVITIES TO BUILD FROM.
14 I REFER TO THESE BOOKS NOT IN A PEJORATIVE WAY AS CLASSROOM
15 ACTIVITY RECIPE COLLECTIONS, THE BOOKS ARE COLLECTIONS OF
16 ILLUSTRATIONS OF CLASSROOM ACTIVITIES. SO, I GUESS I NEED
17 TO HEAR THE QUESTION AGAIN.

18 Q. IT WAS -- WHAT DO YOU MEAN BY "SUPPLEMENTAL READING"?

19 A. BY SUPPLEMENTARY. SO THE MATERIALS ON ERESERVES,
20 OTHER THAN THE EXCERPTS FROM THESE FOUR TEXTS I INTENDED AS
21 ADDITIONAL EXPOSURE TO SUPPLEMENTARY MATERIAL, WHICH THEY
22 COULD USE TO BUILD FROM AS FAR AS MICROTEACHING IN THE COURSE
23 AND TO HAVE ACTIVITIES ABOUT ACTIVITIES THEY MIGHT TRY
24 IMPLEMENTING.

25 Q. IN 2009 DID YOU CONTEMPLATE ADDING THESE SUPPLEMENTARY

1 READING MATERIALS TO THE COURSE?

2 A. THAT WOULD HAVE BEEN ABOUT A MONTH BEFORE THE COURSE
3 STARTED, SO BETWEEN FOUR WEEKS, TWO WEEKS BEFORE THE COURSE
4 STARTED BECAUSE THE WAY THE SYSTEM WORKS FOR ERESERVES, YOU
5 HAVE TO MAKE THOSE DECISIONS OF WHAT YOU ARE GOING TO POST ON
6 ERESERVES IN ADVANCE OF THE START DATE FOR THE COURSE, WHICH
7 IS DIFFERENT FROM THE WAY I WORK WITH COURSE SYLLABUS BECAUSE
8 I AM TINKERING WITH THE COURSE SYLLABUS ALL THE WAY UP UNTIL
9 THE COURSE BEGINS. SO IT WOULD HAVE BEEN AT LEAST TWO WEEKS
10 BEFORE THE COURSE BEGAN.

11 Q. DID YOU IN FACT REQUEST THE EXCERPTS OF BOOKS BE LOADED
12 ON ERES?

13 A. I DID.

14 Q. AND WHAT STEPS DID YOU TAKE TO REQUEST THAT THESE
15 EXCERPTS BE LOADED ON ERES?

16 A. SO ONCE I HAVE LOOKED THROUGH MATERIALS THAT I HAVE IN
17 MY OFFICE AND DECIDE THE KIND OF THINGS I WOULD LIKE TO SERVE
18 AS SUPPLEMENTAL READINGS, I CONTACT THE LIBRARY THROUGH OUR
19 EMAIL COMMUNICATIONS THROUGH GROUPWISE AND ASK, WHAT DO I
20 NEED TO DO? THEN THEY REPLY WITH INFORMATION ON WHAT THE
21 PROCEDURES ARE. SO I FOLLOWED THE PROCEDURES I WAS GUIDED TO
22 USE THROUGH ERESERVES.

23 Q. WAS A PASSWORD CREATED FOR YOUR ERES MATERIALS THAT
24 WERE POSTED ON OR FOR YOUR SUPPLEMENTARY READINGS THAT WERE
25 POSTED ON ERES? DID YOU PROVIDE THAT PASSWORD IN YOUR

1 SYLLABUS?

2 A. NO.

3 Q. DID YOU PROVIDE THE PASSWORD AT ALL TO YOUR STUDENTS?

4 A. YES.

5 Q. HOW DID YOU PROVIDE IT TO YOUR STUDENTS?

6 A. FIRST DAY IN CLASS WHEN I AM GOING THROUGH THE COURSE
7 PROCEDURES I AM TALKING TO THEM ABOUT WHAT THE MID-TERM EXAM
8 WILL INVOLVE, FINAL PROJECT, WHAT WE WILL BE DOING, MEETINGS
9 IN CLASS. GENERALLY DESCRIBING WHAT THE COURSE IS ALL ABOUT.
10 I TOLD THEM ABOUT THE AVAILABILITY OF SUPPLEMENTAL MATERIALS
11 ON ERESERVES, I GAVE THEM THE PASSWORD. I DON'T RECALL RIGHT
12 NOW IF I JUST SAID IT OUT LOUD, I PROBABLY WROTE IT UP ON THE
13 WHITE BOARD AT THE FRONT OF THE ROOM, TOO.

14 Q. AND TO YOUR KNOWLEDGE, DID ANY OF YOUR STUDENTS IN
15 FACT USE THE SUPPLEMENTAL READING MATERIALS IN THE COURSE WORK
16 IN MAYMESTER 2009?

17 A. USED IN THE COURSEWORK, NO. BECAUSE THAT WOULD MEAN
18 IN THE CLASSROOM THEY WOULD HAVE USED SOME OF THE MATERIALS
19 THROUGH THE MICROTEACHING, AND TO THE BEST OF MY RECOLLECTION,
20 NO ONE USED THE SUPPLEMENTAL READING MATERIALS OTHER THAN THE
21 ONES WHICH ARE LISTED AS REQUIRED ON THE COURSE SYLLABUS.
22 AND AGAIN, IN MID-TERM ESSAY AND IN THE FINAL PROJECT, I
23 DON'T BELIEVE THAT ANYONE ACTUALLY USED THOSE MATERIALS IN
24 EITHER ONE OF THOSE FORMATS EITHER.

25 Q. I PUT A COLLECTION OF BOOKS IN FRONT OF YOU AND I WOULD

1 LIKE FOR YOU TO GRAB THE BOOK THAT IS MARKED DX786, WHICH HAS
2 BEEN PREVIOUSLY ADMITTED AS PTX 138.

3 A. 786, OKAY.

4 Q. YES. DO YOU RECOGNIZE THIS BOOK?

5 A. YES.

6 Q. WHAT IS IT?

7 A. IT IS MARK HANCOCKS "PRONUNCIATION GAMES."

8 Q. CAN YOU GENERALLY DESCRIBE THE SUBJECT MATTER OF
9 "PRONUNCIATION GAMES"?

10 A. OKAY. SO THE GENRE IS AT THIS TIME A RECIPE COLLECTION
11 THAT I PREVIOUSLY DESCRIBED AND THIS ONE IS FOCUSED ON THE
12 TEACHING OF PRONUNCIATION. SO IT IS A COLLECTION OF SEPARATE
13 DESCRIPTIONS OF LANGUAGE LEARNING ACTIVITIES THAT YOU MIGHT
14 IMPLEMENT IN A LANGUAGE CLASSROOM.

15 Q. WAS AN EXCERPT FROM "PRONUNCIATION GAMES" ONE THAT YOU
16 CONTEMPLATED USING IN YOUR MAYMESTER 2009 COURSE?

17 A. THAT I CONTEMPLATED USING AS SUPPLEMENTARY MATERIALS,
18 YES.

19 Q. AND IN YOUR NOTEBOOK, WILL YOU PLEASE TURN TO PTX 656?

20 A. OKAY.

21 Q. AND WHAT IS THAT?

22 A. THIS IS THE FAIR USE CHECKLIST FOR "PRONUNCIATION
23 GAMES" BY HANCOCK.

24 Q. WHAT PAGES OF "PRONUNCIATION GAMES" DID YOU CONTEMPLATE
25 USING IN MAYMESTER 2009?

1 A. OKAY. IN THIS DOCUMENT IT IS LISTED PAGES 8 THROUGH
2 27.

3 Q. SO APPROXIMATELY 20 PAGES?

4 A. YEAH, IT LOOKS ABOUT RIGHT.

5 Q. HOW MANY PAGES ARE IN THE BOOK?

6 A. THE PAGE NUMBER AT THE END IS 108.

7 Q. IS THERE ANYTHING ELSE IN THE BOOK?

8 A. LOOKS LIKE FIVE PAGES IN FRONT OF THE BOOK BEFORE PAGE
9 ONE.

10 Q. WHY DID YOU SELECT THOSE 20 PAGES TO BE USED AS
11 SUPPLEMENTAL READING MATERIAL IN YOUR MAYMESTER COURSE?

12 A. I SELECTED THE QUESTION WAS -- WHY DID I?

13 Q. YES.

14 A. BECAUSE THESE ACTIVITIES ARE FOCUSED ON THE TEACHING OF
15 PRONUNCIATION, WHICH IS A FACET OF SPOKEN COMMUNICATION. SO I
16 WANTED TO HAVE SOME RESOURCES AVAILABLE WHERE THE STUDENTS IN
17 THE COURSE WHO TYPICALLY HAVE NOT HAD MUCH BACKGROUND IN
18 TEACHING PRONUNCIATION YET HAVE SOME EXPOSURE TO ILLUSTRATIONS
19 OF LANGUAGE LESSONS OF THAT KIND.

20 Q. IS THERE ANY INDICATION IN THE BOOK THAT CERTAIN PAGES
21 WOULD BE PHOTOCOPYABLE?

22 A. IN FRONT OF THE BOOK THERE IS EIGHT OR TEN LINE NOTE
23 ABOUT PAGES BEING PHOTOCOPIED.

24 Q. YOU SAID THE FRONT OF THE BOOK?

25 A. YEAH, COPYRIGHT PAGE. THE PAGE RIGHT BEFORE THE TABLE

1 OF CONTENTS.

2 Q. WHAT DOES THAT SAY IN THE FRONT OF THE BOOK?

3 A. SHOULD I READ IT OUT LOUD.

4 Q. SURE, PLEASE.

5 A.

6 "IT IS NORMALLY NECESSARY FOR
7 WRITTEN PERMISSION FOR COPYING TO BE
8 OBTAINED IN ADVANCE FROM A
9 PUBLISHER. THE WORKSHEETS, ROLE
10 PLAY CARDS, TESTS, AND TRANSCRIPTS
11 AT THE BACK OF THIS BOOK ARE
12 DESIGNED TO BE COPIED AND
13 DISTRIBUTED IN CLASS. THE NORMAL
14 REQUIREMENTS ARE WAIVED HERE AND IT
15 IS NOT NECESSARY TO WRITE TO
16 CAMBRIDGE UNIVERSITY PRESS FOR
17 PERMISSION FOR AN INDIVIDUAL TEACHER
18 TO MAKE COPIES FOR USE WITHIN HIS OR
19 HER OWN CLASSROOM. ONLY THOSE
20 PAGES WHICH CARRY THE WORDING
21 COPYRIGHT SIGN CAMBRIDGE UNIVERSITY
22 PRESS MAY BE COPIED."

23 Q. THANK YOU.

24 ARE ANY OF THE PAGES FROM THE EXCERPT PAGES 8 TO 27
25 IDENTIFIED AS PHOTOCOPYABLE?

1 A. OKAY. CAN I GO THROUGH? THAT SIGN APPEARS AT THE
2 BOTTOM RIGHT-HAND CORNER OF PAGES 9, 11, 13, 14, 17, 18,
3 21, EXCUSE ME 20 AND 21, 23, 25, 26.

4 Q. SO 11 OF THE 20 PAGES YOU USED FOR SUPPLEMENTAL READING
5 MATERIALS WERE IDENTIFIED AS PHOTOCOPYABLE?

6 A. I DIDN'T COUNT JUST THEN, BUT THE ONES I SAID OUT LOUD.

7 Q. TURNING TO PTX 656, WHEN DID YOU CREATE THIS
8 CHECKLIST?

9 A. THE CHECKLIST, FAIR USE CHECKLIST, I CREATED IT IN
10 MARCH OF THIS YEAR, 2011.

11 Q. SO IT IS A RECREATED CHECKLIST?

12 A. YES.

13 Q. WHY DID YOU RECREATE THE CHECKLIST?

14 A. I WAS AT MY INTERNATIONAL CONFERENCE IN NEW ORLEANS IN
15 MARCH. I RECEIVED EMAIL COMMUNICATION FROM THE LEGAL AFFAIRS
16 OFFICE AT GEORGIA STATE AND THEY ASKED ME TO DO SO.

17 Q. HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

18 A. TO THE BEST OF MY ABILITY, I TRIED TO RECREATE IT THE
19 WAY I WOULD HAVE COMPLETED IT IN 2009.

20 Q. AND PRIOR TO REQUESTING THAT THE "PRONUNCIATION GAME"
21 EXCERPT BE POSTED TO ERES, DID YOU PERFORM A FAIR USE
22 ANALYSIS?

23 A. YES.

24 Q. AND HOW DID YOU PERFORM THAT ANALYSIS BACK IN 2009?

25 A. AFTER CONTACTING ERESERVES, THEY SENT ME GUIDELINES ON

1 HOW TO GET MATERIALS ADDED TO ERESERVES THROUGH ELECTRONIC
2 ACCESS THROUGH THE LIBRARY. I FOLLOWED THE PROCEDURES WHICH
3 THEY SENT ME WHICH WOULD HAVE BEEN A LINK TO THE FAIR USE
4 CHECKLIST AND I FOLLOWED THE DIRECTIONS THAT WAS PRESENTED TO
5 ME THROUGH THE ELECTRONIC COMMUNICATION.

6 Q. SO YOU CONSIDER THE FAIR USE CHECKLIST IN YOUR
7 ANALYSIS?

8 A. YES.

9 Q. AND DO YOU BELIEVE THAT THE RECREATED CHECKLIST IS A
10 FAIR AND ACCURATE RECREATION OF THE FAIR USE ANALYSIS YOU
11 INITIALLY PERFORMED IN 2009?

12 A. YES. I TRIED TO HAVE IT BE THE WAY I WOULD HAVE DONE
13 IT IN 2009.

14 Q. SO IN 2009, TURNING TO FACTOR ONE OF THE FAIR USE
15 ANALYSIS, DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO
16 FACTOR ONE?

17 A. YEAH. I DECIDED THAT FOR FACTOR ONE, PURPOSES AND
18 USE, THAT THE VARIOUS SUBCATEGORIES WEIGHED IN FAVOR OF FAIR
19 USE.

20 Q. WHY DID YOU CONCLUDE THAT FACTOR ONE WEIGHED IN FAVOR
21 OF FAIR USE?

22 A. OKAY. SO THE FIRST THING THAT JUMPED OUT AT ME WAS
23 THAT THE MATERIALS IS GOING TO BE USED FOR NONPROFIT
24 EDUCATIONAL TEACHING, WHICH WAS RELEVANT TO THE COURSE.

25 THAT IT WAS GOING TO BE USED FOR PERSONAL STUDY, THAT IS THE

1 STUDENTS WOULD BE WORKING WITH THE MATERIAL AT HOME IN
2 PREPARATION OF CLASS. THAT IT DID TIE IN TO CRITIQUING
3 MATERIAL BECAUSE OF ONE OF THE RECURRING ACTIVITIES IN THE
4 COURSE IS THEY TALK TO ONE ANOTHER AND DECIDE ABOUT STRENGTHS
5 AND WEAKNESSES OF PARTICULAR ACTIVITY DESCRIPTION. SO TYING
6 INTO CRITICISM CONTENT, IT IS A SAMPLE OF SCHOLARSHIP IN THE
7 FIELD. LOOKING AT VARIOUS SUBCATEGORIES, I BELIEVE THEY
8 WEIGHED IN FAVOR OF FAIR USE.

9 Q. DID YOU CONSIDER FACTOR TWO IN YOUR FAIR USE ANALYSIS
10 IN 2009?

11 A. YES.

12 Q. DID YOU REACH A CONCLUSION?

13 A. YEAH. I BELIEVE THAT AGAIN FACTOR TWO WEIGHED IN
14 FAVOR OF FAIR USE.

15 Q. WHY DID YOU CONCLUDE THAT IT WEIGHED IN FAVOR OF FAIR
16 USE?

17 A. THE SUBFACTOR THAT WAS CLEAREST TO ME AS I LOOK AT THE
18 DOCUMENT IS THAT THE MATERIAL WAS RELEVANT AND IMPORTANT TO
19 EDUCATIONAL OBJECTIVES. THAT IS I WANTED STUDENTS TO HAVE
20 AVAILABLE TO THEM KIND OF LOOK AT A CORNUCOPIA OF
21 ILLUSTRATIONS OF ACTIVITY DESCRIPTIONS OF THIS NATURE SO IT
22 PROVIDED THAT. AND ALSO THAT THE MATERIAL, ALTHOUGH NO
23 CHECKS LISTED THERE, THE MATERIAL WAS FACTUAL MATERIAL AND IT
24 COMES FROM A PUBLISHED WORK.

25 Q. AND DID YOU CONSIDER FACTOR THREE IN YOUR FAIR USE

1 ANALYSIS?

2 A. YES.

3 Q. AND DID YOU REACH ANY CONCLUSION ABOUT FACTOR THREE?

4 A. YEAH, I BELIEVED THAT IT WEIGHED IN FAVOR OF FAIR USE.

5 Q. WHY DID YOU BELIEVE IT WEIGHED IN FAVOR OF FAIR USE?

6 A. THE FIRST FACTOR THAT WEIGHED WAS THAT A RELATIVELY
7 SMALL PORTION OF THE WORK WAS BEING USED, SO I TRIED TO KEEP
8 THE AMOUNT THAT I WAS USING APPROPRIATE SO THAT IT WASN'T
9 EXCESSIVE. AND THAT THE SEGMENT I WAS USING FROM THE TEXT
10 WASN'T IN ANY PARTICULAR WAY UNIQUE AND SPECIAL IN TERMS OF
11 THE REST OF THE TEXT, THAT IT WAS KIND OF REPRESENTATIVE OF
12 THE TEXT AS A WHOLE. AND THAT THE SECTION TAKEN WAS TAILORED
13 TO THE EDUCATIONAL PURPOSES OF THE COURSE. IN THIS CASE THAT
14 IT WAS FOCUSED ON THE TEACHING OF PRONUNCIATION.

15 Q. DID YOU CONSIDER FACTOR FOUR IN YOUR FAIR USE ANALYSIS?

16 A. YES, I DID.

17 Q. DID YOU REACH ANY CONCLUSIONS?

18 A. YES. I CONCLUDED THAT IT WEIGHED IN FAVOR OF FAIR
19 USE.

20 Q. WHY DID YOU REACH THAT CONCLUSION?

21 A. YEAH. I THINK THE MOST IMPORTANT ONE FOR ME AT THE
22 TIME IS THAT USING THAT SEGMENT WOULD STIMULATE MARKET FOR THE
23 ORIGINAL WORK. THAT IS IN MY THINKING ABOUT THE COURSE.
24 THESE ARE FUTURE LANGUAGE TEACHERS, AND THE WAY I PRESENT
25 ACTIVITY RECIPE COLLECTIONS, I TRY TO PRESENT THEM AS KIND OF

1 THE TOOLS OF THE TRADE: THAT IS, IF YOU ARE A CARPENTER, YOU
2 NEED A HAMMER, SAW, AND NAILS; IF YOU ARE A PLUMBER, YOU NEED
3 THE TOOLS OF PLUMBING; IF YOU ARE A LANGUAGE TEACHER, YOU NEED
4 TO HAVE ACCESS OF WHAT PEOPLE HAVE DONE BEFORE, ILLUSTRATION
5 OF CLASSROOM ACTIVITY TYPE. AND BY INTRODUCING THEM TO
6 PORTIONS OF ADDITIONAL TEXT, OTHER THAN THE REQUIRED READINGS
7 IN THE COURSE, MY THINKING IS THAT THEY WOULD THEN BECOME
8 EXCITED AND STIMULATED, THAT IS A GOOD TEXT, TOO, MAYBE IN
9 THE FUTURE I WILL BUY IT FOR MYSELF. I SAW IT AS STIMULATING
10 THEIR INTEREST IN THE WORK AND POTENTIALLY THEY MIGHT PURCHASE
11 THEIR OWN COPY IN THE FUTURE.

12 Q. DID YOU CONSIDER ANYTHING ELSE IN REACHING YOUR
13 CONCLUSION WITH RESPECT TO FACTOR FOUR?

14 A. YEAH. I DID ENVISION THESE AS BEING SUPPLEMENTAL
15 CLASSROOM READINGS. THAT IS, THESE WERE NOT THE REQUIRED
16 READING MATERIALS OTHER THAN THE FOUR THAT WERE REQUIRED IN
17 THE COURSE. BUT THIS PARTICULAR BOOK, "PRONUNCIATION GAMES,"
18 WAS NOT LISTED AS REQUIRED READING. I ALSO OWN A COPY OF THE
19 TEXT MYSELF, IT IS ONE OF THE ITEMS HERE, SO I HAVE IT IN MY
20 OFFICE SHELVES. THAT THE MATERIALS HAVE RESTRICTED ACCESS,
21 THAT THERE IS GOING TO BE A PASSWORD THROUGH ERESERVES, SO NOT
22 JUST ANYONE COULD ACCESS THE MATERIAL, BUT THE PEOPLE DOING
23 THE COURSE. AND I DIDN'T KNOW OF THE SAME KIND OF PRODUCT
24 WHICH WAS BEING PRESENTED BY THE SAME COPYRIGHT OWNER.

25 SO, TAKING THOSE INTO CONSIDERATION, I THOUGHT IT WEIGHED

1 IN FAVOR OF FAIRNESS.

2 Q. ONCE YOU CONSIDERED ALL FOUR OF THE FACTORS, DID YOU
3 ARRIVE AT AN OVERALL CONCLUSION AS TO WHETHER OR NOT THE
4 EXCERPT "PRONUNCIATION GAMES" WAS FAIR?

5 A. YEAH. TAKING ALL FOUR FACTORS INTO CONSIDERATION, I
6 BELIEVE THAT IT WEIGHED IN FAVOR OF FAIRNESS.

7 Q. I WILL ASK YOU TO LOOK AT WHAT IS MARKED AS DX787. IN
8 FRONT OF YOU IS A BOOK. IT HAS BEEN PREVIOUSLY IDENTIFIED IN
9 THE RECORD AS PTX 114. DO YOU RECOGNIZE THIS BOOK?

10 A. YES, KLIPPEL, "KEEP TALKING," ABOUT 787?

11 Q. CAN YOU DESCRIBE THE SUBJECT MATTER "KEEP TALKING"?

12 A. "KEEP TALKING," IT IS ACTUALLY A TRANSLATION FROM
13 GERMAN. IT IS THE TEACHING OF GERMAN SPEAKING OF OTHER
14 LANGUAGE. IT IS SPOKEN ON SPOKEN LANGUAGE ACTIVITIES. IN
15 CONTRAST TO THE OTHER BOOK, THIS ISN'T PRONUNCIATION, THIS IS
16 MORE GENERALLY SPOKEN FLUENCY ACTIVITIES. IT IS THE SAME
17 GENRE. IT IS ALSO AN ILLUSTRATION OF A CLASSROOM ACTIVITY
18 RECIPE COLLECTION.

19 Q. DOES THIS "KEEP TALKING" -- "KEEP TALKING" REFERENCED
20 RIGHT HERE ON YOUR SYLLABUS AS REQUIRED TEXTBOOK READING?

21 A. YEAH, THIS WAS ONE OF THE FOUR TEXTS WHICH STUDENTS
22 WERE REQUIRED TO PURCHASE AND OWN AND BRING TO CLASS, YEAH.

23 Q. TWO TO FOUR WEEKS BEFORE YOU COMPLETED YOUR SYLLABUS
24 YOU CONTEMPLATED USING AN EXCERPT?

25 MR. KRUGMAN: LEADING.

1 THE COURT: SUSTAINED. WHAT IS YOUR QUESTION?

2 MS. QUICKER: THERE IS AN EXCERPT FROM "KEEP
3 TALKING," THEN ASSIGNED READING. I AM TRYING TO UNDERSTAND
4 WHY THERE IS AN EXCERPT AND A REQUIRED.

5 THE COURT: STATE YOUR QUESTION.

6 BY MS. QUICKER:

7 Q. IS THIS "KEEP TALKING" THAT YOU ASSIGNED SOMETHING YOU
8 ORIGINALLY CONTEMPLATED IN JUST USING AN EXCERPT FROM?

9 A. I AM NOT SURE I CAN USE A YES OR NO ANSWER FOR THAT,
10 BUT I COULD EXPLAIN MY THINKING AT THE TIME.

11 Q. PLEASE EXPLAIN YOUR THINKING.

12 A. OKAY. SO, I BELIEVE I PREVIOUSLY TESTIFIED THAT IN
13 PULLING THE RESERVES MATERIALS TOGETHER, THAT OCCURS AT AN
14 EARLIER POINT IN TIME, THEN ANOTHER TWO, THREE, FOUR WEEKS
15 BEFORE THE COURSE ACTUALLY BEGAN. BEFORE THE CLASS BEGAN,
16 WHAT I DECIDED WAS THAT THIS TEXT I WOULD LIKE TO INCLUDE IN
17 THE COURSE AS REQUIRED READING MATERIAL. SO BEFORE THE FIRST
18 DAY OF CLASS, I HAD MADE THAT DECISION AND THIS TEXT IS
19 INCLUDED ON MY SYLLABUS AS MATERIAL THAT STUDENTS WERE
20 REQUIRED TO PURCHASE AND OWN AND BRING A COPY TO CLASS.

21 Q. WAS AN EXCERPT FROM "KEEP TALKING" ONE OF THE
22 SUPPLEMENTAL READING MATERIALS YOU CONTEMPLATED USING IN APRIL
23 2009?

24 A. YES.

25 Q. AND WILL YOU PLEASE TURN TO PTX 657 IN YOUR NOTEBOOK?

1 A. 657?

2 Q. YES.

3 A. (WITNESS COMPLIES.)

4 Q. DO YOU RECOGNIZE THIS DOCUMENT?

5 A. YEAH, THIS IS THE FAIR USE CHECKLIST FOR THE KLIPPEL
6 TEXT "KEEP TALKING."

7 Q. WHAT PAGES OF "KEEP TALKING" DID YOU CONTEMPLATE USING?

8 A. ON THIS DOCUMENT IT LISTS PAGES 58 TO 98.

9 Q. AND SO THAT IS APPROXIMATELY 41 PAGES?

10 A. I THINK THAT IS RIGHT.

11 Q. AND HOW MANY PAGES ARE IN THE BOOK ITSELF?

12 A. SO THE LAST NUMBERED PAGE SAYS 202.

13 Q. WHY DID YOU CONTEMPLATE USING THE EXCERPTED PAGES 58 TO
14 98 IN YOUR MAYMESTER 2009 COURSE?

15 A. SO I GO BACK TO THE METAPHOR OF HAVING A CORNUCOPIA OF
16 MATERIAL DESCRIPTIONS AVAILABLE TO STUDENTS FOR THEM TO LOOK
17 AT. AND IN THIS TEXT, THERE IS A BRIEF SECTION IN THE FRONT
18 THAT IS A MORE DISCURSIVE DISCUSSION OF TEACHING SECOND
19 LANGUAGES WHICH I AM NOT INTERESTED IN. I GO TO 58 AND THAT
20 IS WHERE THE DESCRIPTIONS BEGIN. SO I WANTED TO INCLUDE THIS
21 BECAUSE IT FOCUSES ON SPEAKING, AND IN THE COURSE I WANT TO
22 MAKE SURE I INCLUDE SPEAKING, WRITING, READING, AND GRAMMAR
23 AS KIND OF FOUR CORE AREAS. I WANTED A TEXT WHICH DID COVER
24 SPEAKING AS WELL AS THE OTHER THREE CORE AREAS AND THIS BOOK
25 FITS THAT CRITERIA.

1 Q. WHEN DID YOU RECREATE THE CHECKLIST IDENTIFIED AS PTX
2 657?

3 A. WHEN I WAS AT THE CONFERENCE IN NEW ORLEANS, I BELIEVE
4 IT WAS IN MARCH OF 2011.

5 Q. HOW DID YOU GO ABOUT RECREATING THE CHECKLIST PTX 657?

6 A. YEAH, TO THE BEST OF MY ABILITY I WAS TRYING TO
7 RECREATE IT AS I WOULD HAVE DONE IT IN 2009.

8 Q. PRIOR TO REQUESTING THE "KEEP TALKING" EXCERPT TO BE
9 POSTED TO THE ERES IN 2009, DID YOU PERFORM A FAIR USE
10 ANALYSIS?

11 A. YES.

12 Q. HOW DID YOU PERFORM THAT ANALYSIS?

13 A. SO I CONTACTED ERESERVES THROUGH GROUPWISE EMAIL
14 COMMUNICATION AND THEY GOT BACK TO ME WITH THE GUIDELINES ON
15 HOW TO GET MATERIALS PLACED ON ERESERVES, AND I FOLLOWED THE
16 GUIDELINES THEY REPRESENTED TO ME THROUGH THE EMAIL
17 COMMUNICATION.

18 Q. AND DID YOU CONSIDER THE VARIOUS CHECKLISTS AND
19 GUIDELINES?

20 A. YES.

21 Q. DO YOU BELIEVE THE RECREATED CHECKLIST IS A FAIR AND
22 ACCURATE RECREATION OF YOUR FAIR USE ANALYSIS YOU PERFORMED IN
23 2009?

24 A. TO THE BEST OF MY ABILITY, YES, THAT IS WHAT I TRIED
25 TO DO.

1 Q. IN YOUR FAIR USE ANALYSIS FOR THE "KEEP TALKING"
2 EXCERPT IN 2009, DID YOU CONSIDER FACTOR ONE?

3 A. YES.

4 Q. DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO FACTOR
5 ONE?

6 A. YEAH. MY CONCLUSION WAS THAT IT WEIGHED IN FAVOR OF
7 FAIR USE.

8 Q. WHY DID YOU CONCLUDE IT WEIGHED IN FAVOR OF FAIR USE?

9 A. SO I BEGIN WITH IT WAS BEING USED FOR NONPROFIT
10 EDUCATIONAL TEACHING. LIMIT AREA WOULD BE FOR PERSONAL
11 STUDY, STUDENTS READING IT AT HOME FOR PREPARATION OF CLASS.
12 IT DID TIE IN TO CRITICISM AND COMMENT BECAUSE THEY ARE
13 CRITIQUING MATERIAL, ALSO TEACHING EACH OTHER MICROTEACHING
14 AS THEY IMPLEMENT ACTIVITIES FROM WHICH THESE ARE THE SOURCE
15 IDEAS FOR THOSE ACTIVITIES. IT IS A SAMPLE OF SCHOLARSHIP IN
16 THE FIELD, SO A SPECIALIST HAS PULLED THE BOOK TOGETHER. I
17 DID SEE IT AS BEING RELEVANT FOR THE INTENDED EDUCATIONAL
18 PURPOSES OF THE COURSE.

19 Q. DID YOU CONSIDER FACTOR TWO IN YOUR FAIR USE ANALYSIS
20 FOR "KEEP TALKING" IN 2009?

21 A. YES.

22 Q. DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO FACTOR
23 TWO?

24 A. YEAH. MY CONCLUSION WAS THAT IT WEIGHED IN FAVOR OF
25 FAIR USE.

1 Q. AND WHY DID YOU CONCLUDE THAT?

2 A. THE FIRST REASON WOULD BE THAT IT WAS IMPORTANT FOR
3 EDUCATIONAL OBJECTIVES. THAT IS THE ONE I HAVE CHECKED ON
4 THE FAIR USE GUIDELINE. I SEE DIFFERENT CATEGORIES ALSO,
5 PUBLISHED WORK, ALSO A WORK OF FACTUAL MATERIAL.

6 Q. DID YOU CONSIDER FACTOR THREE IN THE FAIR USE ANALYSIS
7 FOR "KEEP TALKING"?

8 A. YES.

9 Q. AND DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR
10 THREE?

11 A. YES. LOOKING BACK ON IT NOW, THIS WAS ONE OF THE
12 REQUIRED TEXTS THAT STUDENTS OWN. BUT AS FAR AS FILLING OUT
13 THE FAIR USE, THE PORTION THAT WAS BEING USED WAS I CHECKED
14 SMALL, I BELIEVE IT WAS, RELEVANT TO THE SIZE OF THE ENTIRE
15 TEXT. THAT THIS SECTION WASN'T GOING TO BE WEIGHED UNUSUAL,
16 IT WAS REPRESENTATIVE OF THE TEXT AS A WHOLE. ALSO THE FOCUS
17 IN THIS COLLECTION BEING ON SPEAKING IS RELEVANT TO THE
18 EDUCATIONAL PURPOSES OF THE COURSE.

19 Q. DID YOU CONSIDER FACTOR FOUR IN YOUR FAIR USE ANALYSIS?

20 A. YES.

21 Q. DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO FACTOR
22 FOUR?

23 A. YEAH, THAT IT DID WEIGH IN FAVOR OF FAIR USE.

24 Q. HOW DID YOU REACH THAT CONCLUSION?

25 A. THE USER, WHICH I INTERPRETED TO BE ME, IT OWNS THE

1 MATERIAL, SO I OWN THE MATERIAL, THAT WAS ONE ITEM. AGAIN I
2 WAS LOOKING AT SIMULATES MARKET FOR THE ORIGINAL WORK, THAT IS
3 BEFORE I REACHED THE DECISION TO INCLUDE THE WHOLE TEXT AS
4 REQUIRED READING. AND THAT IDEA IS THAT STUDENTS SEE THE
5 MATERIAL, THEY BECOME INTERESTED IN THIS AS AN EXERCISE
6 RECIPE COLLECTION, LIKE TO HAVE IT ON THE SHELVES THEMSELVES.
7 I DIDN'T KNOW OF ANOTHER PRODUCT HELD BY THE SAME COPYRIGHT
8 HOLDER THAT THERE WOULD BE RESTRICTED ACCESS. THERE WAS GOING
9 TO BE A PASSWORD INCLUDED FOR ACCESS TO ERESERVES.

10 Q. ONCE YOU CONSIDERED ALL FOUR OF THESE FACTORS UNDER
11 FAIR USE, DID YOU ARRIVE AT AN OVERALL CONCLUSION WITH RESPECT
12 TO THE EXCERPT OF "KEEP TALKING" IN MAYMESTER 2009?

13 A. YES. TAKING THE FACTORS INTO CONSIDERATION, I WEIGHED
14 -- I BELIEVE THEY WEIGHED IN FAVOR OF FAIR USE.

15 Q. I WOULD LIKE YOU TO GRAB THE BOOK THAT IS MARKED PTX
16 729, WHICH HAS BEEN PREVIOUSLY ADMITTED INTO EVIDENCE AS PTX
17 134?

18 A. 729, "MORE GRAMMAR GAMES."

19 Q. YES. DO YOU RECOGNIZE THIS BOOK?

20 A. YES. THE LAST NAME RINVOLUCRI AND DAVIS, "MORE
21 GRAMMAR GAMES."

22 Q. CAN YOU GENERALLY DESCRIBE THE SUBJECT MATTER IN "MORE
23 GRAMMAR GAMES"?

24 A. THIS IS AN ACTIVITY RECIPE COLLECTION AND THE FOCUS IN
25 THIS ONE IS THE TEACHING OF GRAMMAR.

1 Q. DID YOU CONTEMPLATE USING AN EXCERPT FROM "MORE GRAMMAR
2 GAMES" IN YOUR SUPPLEMENTAL READING IN YOUR MAY 2009 COURSE?

3 A. SUPPLEMENTAL READINGS, YES.

4 Q. WOULD YOU PLEASE TURN IN YOUR NOTEBOOK TO 658?

5 A. (WITNESS COMPLIES.)

6 Q. KEEP THE BOOK NEAR YOU.

7 A. OKAY.

8 Q. DO YOU RECOGNIZE PTX 658?

9 A. YES. FAIR USE CHECKLIST FOR "MORE GRAMMAR GAMES" TEXT.

10 Q. WHAT PAGES OF "MORE GRAMMAR GAMES" DID YOU CONTEMPLATE
11 USING AS AN EXCERPT IN 2009?

12 A. ON THIS DOCUMENT IT SAYS PAGE 58 TO 93.

13 Q. SO, ABOUT 36 PAGES?

14 A. THAT SOUNDS ABOUT RIGHT.

15 Q. HOW MANY PAGES ARE IN THE BOOK, "MORE GRAMMAR GAMES"?

16 A. SO THE LAST PAGE WITH A NUMBER IS 176.

17 Q. DID YOU CONTEMPLATE USING THOSE 36 PAGES IN MAYMESTER
18 2009 GRAMMAR CLASS?

19 A. SUPPLEMENTAL READING MATERIAL, YES.

20 Q. AND WHY?

21 A. IMAGE OF HAVING A WIDE-RANGE ILLUSTRATION OF THIS TYPE
22 OF MATERIAL FOR THE STUDENTS. THIS ONE FOCUSES ON UNORDINARY
23 TEACHING OF LANGUAGE, IT IS COGNITIVE, AFFECTIVE AND MOVEMENT
24 ACTIVITIES FOR EFL STUDENTS. SO I THOUGHT THIS WOULD BE A
25 USEFUL TEXT.

1 Q. IS THERE ANY INDICATION IN THE BOOK THAT CERTAIN PAGES
2 MAY BE PHOTOCOPIED?

3 A. I BELIEVE SO, YES.

4 Q. WHERE IS THAT INDICATION?

5 A. IT IS A COPYRIGHT PAGE RIGHT BEFORE THE TABLE OF
6 CONTENTS.

7 Q. CAN YOU PLEASE READ WHAT THE INDICATION SAYS?

8 A.

9 "IT IS NORMALLY NECESSARY FOR
10 WRITTEN PERMISSION FOR COPYING TO BE
11 OBTAINED IN ADVANCE FROM A
12 PUBLISHER. CERTAIN PARTS OF THIS
13 BOOK ARE DESIGNED TO BE COPIED AND
14 DISTRIBUTED IN CLASS. THE NORMAL
15 REQUIREMENTS ARE WAIVED HERE AND IT
16 IS NOT NECESSARY TO WRITE TO
17 CAMBRIDGE UNIVERSITY PRESS FOR
18 PERMISSION FOR AN INDIVIDUAL TEACHER
19 TO MAKE COPIES FOR USE WITHIN HIS OR
20 HER OWN CLASSROOM. ONLY THOSE
21 PAGES WHICH CARRY THE WORDING
22 COPYRIGHT SIGN CAMBRIDGE UNIVERSITY
23 PRESS MAY BE COPIED.

24 Q. ARE ANY OF THE PAGES FROM THE EXCERPT PAGES 58 TO 93
25 IDENTIFIED AS PHOTOCOPYABLE?

1 A. PAGE 67.

2 Q. DID YOU MISS ONE? I THINK 58 WOULD BE?

3 A. NO, 58 DOESN'T HAVE ANYTHING.

4 Q. I MEANT, START LOOKING AT PAGE 58.

5 A. OH, 63, 67, 68, 74, 77, 80, 81, 82, 87, 88 AND
6 THAT IS IT.

7 Q. TEN OF THE 36 PAGES YOU CONTEMPLATED USING WERE
8 IDENTIFIED AS PHOTOCOPYABLE?

9 A. THAT SOUNDS ABOUT RIGHT.

10 Q. WHEN DID YOU RECREATE YOUR CHECKLIST IDENTIFIED AS PTX
11 658?

12 A. IN MARCH OF 2011.

13 Q. HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

14 A. MY INTENT WAS TO COMPLETE IT AS I WOULD HAVE COMPLETED
15 IT IN 2009.

16 Q. AND PRIOR TO REQUESTING THE EXCERPT FOR "MORE GRAMMAR
17 GAMES" BE POSTED TO ERES, DID YOU PERFORM AN ANALYSIS IN
18 2009?

19 A. YES.

20 Q. HOW DID YOU PERFORM THAT ANALYSIS?

21 A. I FOLLOWED THE PROCEDURES THAT WERE RELAYED TO ME
22 THROUGH THE ERESERVE SYSTEM WHEN I REQUESTED HOW DO I GO ABOUT
23 THIS KIND OF THING. AND THEY SENT ME A LINK WHICH I ACCESSED
24 AND FOLLOWED THE DIRECTIONS.

25 Q. DID YOU CONSIDER THE VARIOUS CHECKLISTS?

1 A. I CONSIDERED THE VARIOUS CHECKLISTS.

2 Q. DO YOU BELIEVE THE RECREATED CHECKLIST IS A FAIR AND
3 ACCURATE RECREATION OF YOUR FAIR USE ANALYSIS YOU ORIGINALLY
4 PERFORMED IN 2009?

5 A. TO THE BEST OF MY ABILITY IN MARCH OF 2009, YES.

6 Q. WHEN YOU PERFORMED YOUR FAIR USE ANALYSIS FOR THE
7 EXCERPT OF "MORE GRAMMAR GAMES," DID YOU CONSIDER FACTOR ONE?

8 A. YES.

9 Q. DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO FACTOR
10 ONE?

11 A. YEAH. I DECIDED THAT IT WEIGHED IN FAVOR OF FAIR USE.

12 Q. AND WHY DID YOU DECIDE IT WEIGHED IN FAVOR OF FAIR USE?

13 A. OKAY. IT WAS BEING USED FOR NONPROFIT EDUCATIONAL
14 TEACHING. I OWN A COPY OF IT -- OH, NO, EXCUSE ME IT WAS
15 BEING USED FOR PERSONAL STUDY, SO STUDENTS WERE REVIEWING
16 MATERIAL AT HOME IN PREPARATION OF CLASS. IT DID INCLUDE
17 ELEMENTS OF USE FOR CRITICISM AND COMMENT AS THEY WERE
18 CRITIQUING MATERIAL IN PAIRS IN GROUPS IN THE COURSE. IT IS
19 AN EXAMPLE OF USE OF MATERIAL FOR SCHOLARSHIP AND RELATED TO
20 THE TEACHING OF SECOND LANGUAGES. AND I DID SEE IT AS
21 RELEVANT TO THE INTENDED EDUCATIONAL PURPOSES OF THE COURSE.

22 Q. DID YOU CONSIDER FACTOR TWO IN YOUR FAIR USE ANALYSIS
23 OF 2009?

24 A. YES.

25 Q. AND DID YOU REACH ANY CONCLUSION WITH RESPECT TO FACTOR

1 TWO?

2 A. YEAH. YES, MY CONCLUSION WAS THAT IT WEIGHED IN FAVOR
3 OF FAIR USE.

4 Q. AND WHY?

5 A. IT MET THE EDUCATIONAL OBJECTIVES OF THE COURSE THAT
6 RELATED TO THAT. IT IS A PUBLISHED WORK AND IT IS A WORK OF
7 FACTUAL INFORMATION.

8 Q. DID YOU CONSIDER FACTOR THREE IN YOUR FAIR USE ANALYSIS
9 IN 2009?

10 A. YES, I DID.

11 Q. DID YOU REACH ANY CONCLUSION?

12 A. MY CONCLUSION WAS THAT IT WEIGHED IN FAVOR OF FAIR USE.

13 Q. WHY DID YOU REACH THAT CONCLUSION?

14 A. THE SECTION -- THE SEGMENT OF THE TEXT WHICH I WAS
15 PLACING ON RESERVES, I BELIEVE, WAS A FAIR SMALL ENOUGH
16 PORTION IN RELATION TO THE SIZE OF THE TEXT AS A WHOLE. THE
17 SECTION I SELECTED WAS NOT IN ANY WAY UNIQUE WITHIN THE
18 CONTEXT OF THE TEXT AS A WHOLE, SO IT WAS REPRESENTATIVE OF
19 THE TEXT. AND IT WAS TAILORED TO THE EDUCATIONAL PURPOSES OF
20 THE COURSE THAT THE COMPONENT HERE WOULD HAVE BEEN TEACHING OF
21 GRAMMAR.

22 Q. AND DID YOU CONSIDER FACTOR FOUR IN YOUR FAIR USE
23 ANALYSIS --

24 A. YES.

25 Q. -- IN 2009?

1 DID YOU REACH ANY CONCLUSION WITH RESPECT TO FACTOR FOUR?

2 A. YES, IT WEIGHED IN FAVOR OF FAIR USE.

3 Q. WHY DID YOU DETERMINE IT WEIGHED IN FAVOR OF FAIR USE?

4 A. THE LARGEST CONSIDERATION FOR MORE IS THAT USE
5 STIMULATES MARKET FOR THE ORIGINAL WORK. AGAIN, ONCE
6 STUDENTS ARE EXPOSED TO MATERIAL OF THIS KIND, THEY BECOME
7 INTERESTED IN OWNING THE WHOLE TEXT FOR THEMSELVES. WHEN I
8 -- WHAT I TELL STUDENTS IS I HAVE 35 OR 40 OF THESE KINDS OF
9 BOOKS ON MY OFFICE SHELVES, I PULL IDEAS FROM THEM ALL THE
10 TIME. SO I AM TRYING TO PRESENT MYSELF AS ONE WHO IS
11 CONTINUALLY WORKING WITH ACTIVITY RECIPE COLLECTIONS, THIS IS
12 AN EXAMPLE OF THAT, BY SEEING A SEGMENT OF ONE WHICH WAS NOT
13 REQUIRED READING IN THE COURSE THAT THEY MIGHT BECOME
14 INTERESTED IN OWNING THEIR OWN COPY. SO THAT WAS ONE OF THE
15 FACTORS, SUBFACTORS.

16 AND ALSO I DON'T KNOW THAT IT WAS BEING USED AS
17 SUPPLEMENTAL CLASSROOM READING, NOT REQUIRED READING. I OWN
18 A COPY OF THIS. AND THE ACCESS WOULD BE RESTRICTED TO PEOPLE
19 WHO WERE ENROLLED IN THE COURSE IN THE PASSWORD.

20 Q. ONCE YOU CONSIDERED ALL FOUR OF THESE FACTORS IN FAIR
21 USE ANALYSIS, DID YOU ARRIVE AT AN OVERALL CONCLUSION OF THE
22 USE OF THE EXCERPT OF "MORE GRAMMAR GAMES"?

23 A. I DID. MY CONCLUSION WAS IT WEIGHED IN FAVOR OF ITS
24 USE.

25 Q. THERE IS A BOOK IN FRONT OF YOU IDENTIFIED AS DX 788

1 TITLED "GRAMMAR PRACTICE ACTIVITIES."

2 A. YES.

3 Q. DO YOU RECOGNIZE THIS BOOK?

4 A. YES.

5 Q. AND WHAT IS IT?

6 A. THIS IS ONE OF THE FOUR REQUIRED TEXTS WHICH ALL
7 STUDENTS HAVE TO PURCHASE AND OWN A COPY OF IT IN THE COURSE.

8 Q. CAN YOU GENERALLY DESCRIBE THE SUBJECT MATTER "GRAMMAR
9 PRACTICE ACTIVITIES"?

10 A. "GRAMMAR PRACTICE ACTIVITIES" IS AN ILLUSTRATION OF A
11 CLASSROOM ACTIVITY RECIPE COLLECTION. IT PRESENTS
12 ACTIVITY-TYPE DESCRIPTIONS FOR TEACHING GRAMMAR.

13 Q. YOU SAID THIS IS ONE OF THE REQUIRED TEXTS THAT THE
14 STUDENTS HAD TO OWN AND PURCHASE?

15 A. THEY WERE REQUIRED TO OWN AND BRING TO CLASS FOUR
16 TEXTS, THIS IS ONE.

17 Q. WAS IT ONE OF THE SUPPLEMENTAL READINGS YOU
18 CONTEMPLATED IN USING IN YOUR 2009 COURSE, "GRAMMAR PRACTICE
19 ACTIVITIES"?

20 A. YES.

21 MS. QUICKER: WE OFFER DX 788 INTO EVIDENCE.

22 THE COURT: NO OBJECTION.

23 MS. QUICKER: PTX 659.

24 THE COURT: 659.

25

1 BY MS. QUICKER:

2 Q. DO YOU RECOGNIZE PTX 659?

3 A. YES.

4 Q. WHAT IS IT?

5 A. FAIR USE CHECKLIST FOR THE "GRAMMAR PRACTICE
6 ACTIVITIES" TEXT.

7 Q. WHAT PAGES OF "GRAMMAR PRACTICE ACTIVITIES" DID YOU
8 CONTEMPLATE USING IN YOUR MAY 2009 COURSE?

9 A. IN THIS DOCUMENT IT LISTS 44 TO 72.

10 Q. I WILL REPRESENT IT SAYS 44 TO 102. HOW MANY PAGES
11 ARE IN THE BOOK ITSELF? IN YOUR ERES IT SAYS --

12 A. THE LAST PAGE NUMBERED IS 288.

13 Q. FOR THE PAGES, THE ERES REPORT INDICATES PAGES 44 TO
14 102, IS THAT APPROXIMATELY 59 PAGES?

15 A. THAT SOUNDS RIGHT.

16 Q. WHY DID YOU CONTEMPLATE USING THOSE 59 PAGES AS
17 SUPPLEMENTAL READING MATERIALS IN YOUR MAYMESTER COURSE?

18 A. RIGHT NOW I AM SURPRISED THAT IT WENT PAST 72 BECAUSE
19 THIS DOCUMENT LISTS 72. BUT THE REASON FOR INCLUDING THEM
20 WOULD BE THAT THIS IS AN ILLUSTRATION OF LANGUAGE LESSON
21 ACTIVITY DESCRIPTIONS AND I WOULD LIKE THEM TO HAVE ACCESS TO
22 AS MANY AS POSSIBLE WITHIN THE CONTEXT OF THE COURSE.

23 Q. IS THERE ANY INDICATION IN GRAMMAR PRACTICE ACTIVITIES
24 THAT CERTAIN PAGES MAY BE PHOTOCOPIED?

25 A. I BELIEVE THERE IS. I CAN CHECK. YES.

1 Q. WHERE IS THAT INDICATION?

2 A. IT IS THE PAGE BEFORE THE TABLE OF CONTEXT, IT IS
3 LISTED "CE" IN THE BOTTOM LEFT-HAND CORNER.

4 Q. CAN YOU READ WHAT THAT NOTICE PROVIDES?

5 A.

6 "IT IS NORMALLY NECESSARY FOR
7 WRITTEN PERMISSION TO BE OBTAINED IN
8 ADVANCE FROM THE PUBLISHER.
9 BECAUSE 'GRAMMAR PRACTICE
10 ACTIVITIES' CONTAINS RESOURCE
11 MATERIAL, THOSE AT THIS TIME WHICH
12 CARRY THE WORDING COPYRIGHT SIGN
13 CAMBRIDGE UNIVERSITY PRESS 1988,
14 MAY BE PHOTOCOPIED. THE NORMAL
15 REQUIREMENT IS WAIVED HERE AND IT IS
16 NOT NECESSARY TO WRITE TO CAMBRIDGE
17 UNIVERSITY PRESS FOR PERMISSION."

18 Q. ARE ANY OF THE PAGES FROM THE EXCERPT PAGES 44 THROUGH
19 102 IDENTIFIED AS PHOTOCOPYABLE?

20 A. YES.

21 Q. CAN YOU PLEASE IDENTIFY THOSE PAGES?

22 A. FORTY-FIVE (45), 46, 49, 50, 51, 56, 57, 58,
23 59, 61, 65, 66, 67, 69, 70, 71, 73, 74, 76, 77,
24 81, 83, 84, 85, 86, 87, 88, 91, 92, 93, 95, 96,
25 97, 100, 101, 102, 103.

1 Q. WE WILL HAVE YOU STOP THERE, 102.

2 A. 102.

3 Q. WHAT ABOUT PAGE 60?

4 A. SIXTY? YEAH, SIXTY ALSO, IT IS A CONTINUATION OF PAGE
5 61.

6 Q. SO, APPROXIMATELY 37 PAGES YOU CONTEMPLATED USING WERE
7 IDENTIFIED AS PHOTOCOPYABLE?

8 A. I DIDN'T COUNT THEM JUST THEN, BUT THAT SOUNDS RIGHT.

9 Q. WHEN DID YOU REDO YOUR CHECKLIST IDENTIFIED AS PTX 659?

10 A. IN MARCH OF 2011.

11 Q. AND HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

12 A. TO THE BEST OF MY ABILITY AT THE TIME I WAS TRYING TO
13 RECREATE IT AS I INITIALLY WOULD HAVE COMPLETED IT IN 2011 --
14 I RECREATED IT IN 2011. THE WAY I WOULD HAVE INITIALLY DONE
15 IT IN 209, I THINK I MISSPOKE AT THE FIRST QUESTION. YEAH.
16 I RECREATED IT IN 2011.

17 Q. AND PRIOR TO REQUESTING THE "GRAMMAR PRACTICE
18 ACTIVITIES" EXCERPTS YOU POSTED TO ERES, DID YOU PERFORM A
19 FAIR USE ANALYSIS IN 2009?

20 A. YES.

21 Q. HOW DID YOU GO ABOUT PERFORMING THAT FAIR USE ANALYSIS
22 IN 2009?

23 A. I FOLLOWED THE GUIDELINES FORWARDED TO ME THROUGH AN
24 ELECTRONIC COMMUNICATION THROUGH THE ERESERVES OFFICE.

25 Q. DID YOU CONSIDER THE CHECKLIST?

1 A. I DID CONSIDER THE FAIR USE CHECKLIST.

2 Q. DO YOU BELIEVE THAT THE RECREATED CHECKLIST IDENTIFIED
3 AS PTX 659 IS A FAIR AND ACCURATE RECREATION OF YOUR FAIR USE
4 ANALYSIS PERFORMED IN 2009?

5 A. YES.

6 Q. WITH RESPECT TO YOUR FAIR USE ANALYSIS THAT YOU
7 PERFORMED IN 2009, DID YOU CONSIDER FACTOR ONE IN YOUR
8 ANALYSIS?

9 A. YES.

10 Q. AND DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR
11 ONE?

12 A. YEAH. MY CONCLUSION WAS THAT IT WEIGHED IN FAVOR OF
13 FAIR USE.

14 Q. AND WHY DID YOU BELIEVE IT WEIGHED IN FAVOR OF FAIR
15 USE?

16 A. PERSONAL STUDY. STUDENTS WOULD BE USING IT FOR STUDY
17 PURPOSES AT HOME. IT WAS BEING USED FOR NONPROFIT
18 EDUCATIONAL TEACHING. STUDENTS WOULD BE USING THE MATERIAL
19 TO CRITIQUE AND COMMENT IN CLASS AMONG THEIR PEERS AND THROUGH
20 MID-TERM AND FINAL PROJECT EXAM. AND THAT IT WAS RELEVANT TO
21 BEING INTENDED FOR EDUCATIONAL PURPOSES OF THE COURSE.

22 Q. DID YOU CONSIDER FACTOR TWO IN YOUR FAIR USE ANALYSIS
23 INTO 2009?

24 A. YES.

25 Q. DID YOU REACH ANY CONCLUSION WITH RESPECT TO FACTOR

1 TWO?

2 A. YES. THAT IT WEIGHED IN FAVOR OF FAIR USE.

3 Q. AND WHY DID YOU FIND IT WEIGHED IN FAVOR OF FAIR USE?

4 A. YEAH, THE FIRST THAT IT IS TIED TO THE EDUCATIONAL
5 OBJECTIVES OF THE COURSE. THAT IT IS A PUBLISHED WORK AND IT
6 PRESENTS FACTUAL MATERIAL.

7 Q. DID YOU CONSIDER FACTOR THREE IN YOUR FAIR USE ANALYSIS
8 IN 2009?

9 A. YES.

10 Q. DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO FACTOR
11 THREE?

12 A. YES. MY CONCLUSION WAS THAT IT WAS WEIGHED IN FAVOR
13 OF FAIR USE.

14 Q. AND WHY?

15 A. THAT THE PORTION OF THE TEXT THAT WAS BEING USED,
16 AGAIN THIS IS ONE OF THE TEXTS THAT EVENTUALLY I INCLUDED AS
17 REQUIRED READING, BUT THE PORTION WAS NOT EXCESSIVE AND THAT
18 THE PORTION SELECTED WASN'T IN ANY WAY SPECIAL OR UNIQUE IN
19 TERMS OF THE TEXT ITSELF, THAT IT WAS REPRESENTATIVE OF THE
20 TEXT AS A WHOLE. AND THAT THE AMOUNT TAKEN WAS TAILORED TO
21 EDUCATIONAL PURPOSES FOR THE COURSE.

22 Q. AND DID YOU CONSIDER FACTOR FOUR IN YOUR FAIR USE
23 ANALYSIS?

24 A. YES.

25 Q. AND DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO

1 FACTOR FOUR?

2 A. YES. FOR THE EFFECT ON MARKET THAT IT WAS WEIGHED IN
3 FAVOR OF FAIR USE.

4 Q. AND WHY?

5 A. AND AGAIN THE FIRST ONE THAT WOULD HAVE JUMPED OUT AT
6 ME WAS THAT THE USE STIMULATES MARKET FOR THE ORIGINAL WORK.
7 MY THINKING THAT WHEN STUDENTS SEE THIS KIND OF MATERIAL AND
8 THEY REALIZE THEY DON'T HAVE TO KEEP REINVENTING THE WHEEL
9 WHEN THEY DESIGN ACTIVITIES, THIS WOULD BE A VERY PRACTICAL
10 AND USEFUL RESOURCE TO HAVE OF THEIR OWN AND THEY WOULD BE
11 INTERESTED IN PURCHASING THE TEXT ON THEIR OWN. I PRESENT
12 MYSELF IN THE COURSE AS SOMEONE WHO OWNS A LOT OF THESE KINDS
13 OF TEXT OF THIS GENRE AND FIND THEM VERY USEFUL. THAT WOULD
14 BE THE FIRST THING. I DIDN'T KNOW OF A SIMILAR PRODUCT
15 COPYRIGHTED BY THE SAME PRODUCT HOLDER. AT THE TIME, A MONTH
16 BEFORE THE START OF THE COURSE, TWO WEEKS BEFORE THE START OF
17 THE USE, I WAS ENVISIONING IT AS SUPPLEMENTAL READING
18 MATERIAL. I OWN A COPY OF IT AND ACCESS WOULD BE RESTRICTED
19 TO PEOPLE WITH THE PASSWORD.

20 Q. ONCE YOU CONSIDERED ALL FOUR OF THESE FACTORS, DID YOU
21 REACH AN OVERALL CONCLUSION WITH RESPECT TO WHETHER OR NOT
22 YOUR EXCERPT FROM "GRAMMAR PRACTICE ACTIVITIES" WAS FAIR USE?

23 A. YES. MY DECISION WAS THAT IT WEIGHED IN FAVOR OF FAIR
24 USE.

25 THE COURT: WHY DON'T WE MAKE A FIFTEEN-MINUTE BREAK

1 HERE?

2 (WHEREUPON, A SHORT RECESS WAS HELD.)

3 THE COURT: YOU MAY PROCEED.

4 BY MS. QUICKER:

5 Q. PROFESSOR MURPHY, WOULD YOU PLEASE, THERE IS A BOOK IN
6 FRONT OF YOU ENTITLED DTX 730, ENTITLED "FIVE MINUTE
7 ACTIVITIES." DO YOU RECOGNIZE THIS BOOK? AND FOR THE COURT'S
8 INFORMATION, IT WAS PREVIOUSLY IDENTIFIED PTX 590.

9 A. YES. IT IS PENNY UR AND ANDREW WRIGHT'S "FIVE MINUTE
10 ACTIVITY" TEXT.

11 Q. CAN YOU GENERALLY DESCRIBE THE SUBJECT MATTER OF "FIVE
12 MINUTE ACTIVITIES"?

13 A. YEAH. AGAIN, THIS IS THE GENRE, IS A RECIPE ACTIVITY
14 COLLECTION. IT HAS A VIEW OF ACTIVITIES, RELATIVELY SHORT
15 LANGUAGE LEARNING ACTIVITIES.

16 Q. DID YOU CONTEMPLATE USING AN EXCERPT OF "FIVE MINUTE
17 ACTIVITY" IN YOUR MAYMESTER COURSE AS SUPPLEMENTAL READING
18 MATERIALS?

19 A. YES.

20 Q. WOULD YOU PLEASE TURN IN YOUR NOTEBOOK TO PTX 660.

21 A. (WITNESS COMPLIES.) OKAY.

22 Q. DO YOU RECOGNIZE PTX 660?

23 A. YEAH. THAT IS THE FAIR USE CHECKLIST FOR THE "FIVE
24 MINUTE ACTIVITIES" TEXT.

25 Q. AND WHAT PAGES OF "FIVE MINUTE ACTIVITIES" DID YOU

1 CONTEMPLATE USING AS AN EXCERPT?

2 A. YEAH, THIS DOCUMENT INDICATES PAGES ONE THROUGH 23.

3 Q. AND HOW MANY PAGES ARE IN THE BOOK?

4 A. THE LAST NUMBERED PAGE IS 105, 105.

5 Q. AND WHY DID YOU SELECT THE PAGES 1 THROUGH 23 AS USE OF
6 SUPPLEMENTAL READING MATERIALS IN YOUR MAYMESTER COURSE?

7 A. YES, I TURNED DIRECTLY TO THE START OF THE ACTIVITY
8 RECIPE COLLECTIONS. AND I USED THEM BECAUSE THESE ARE
9 ILLUSTRATIONS OF THE KIND OF LANGUAGE LEARNING ACTIVITY I
10 WANTED STUDENTS TO HAVE ACCESS TO IN THE COURSE.

11 Q. WHEN DID YOU RECREATE THE ACTIVITY FOR "FIVE MINUTES
12 ACTIVITY"?

13 A. I RECREATED THE CHECKLIST IN MARCH OF 2011.

14 Q. AND HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

15 A. TO THE BEST OF MY ABILITY, I ATTEMPTED TO RECREATE IT
16 AS I INITIALLY WOULD HAVE COMPLETED IT IN 2009.

17 Q. AND PRIOR TO REQUESTING THAT AN EXCERPT FROM "FIVE
18 MINUTE ACTIVITIES" BE POSTED TO ERES IN 2009, DID YOU PERFORM
19 A FAIR USE ANALYSIS?

20 A. YES.

21 Q. AND HOW DID YOU PERFORM THAT ANALYSIS?

22 A. I FOLLOWED THE PROCEDURES THAT WERE FORWARDED TO ME
23 THROUGH AN EMAIL COMMUNICATION THROUGH THE UNIVERSITY LIBRARY
24 ERESERVES.

25 Q. DID YOU CONSIDER THE FAIR USE CHECKLIST AND THAT

1 ANALYSIS?

2 A. YES.

3 Q. AND DO YOU CONSIDER THE FAIR USE CHECKLIST OF PTX 660 A
4 FAIR AND ACCURATE RECREATION OF THE FAIR USE ANALYSIS THAT YOU
5 PERFORMED IN 2009?

6 A. YES.

7 Q. IN YOUR "FIVE MINUTE ACTIVITIES" FAIR USE ANALYSIS IN
8 2009, DID YOU CONSIDER FACTOR ONE, THE PURPOSE AND CHARACTER
9 OF THE USE?

10 A. YES.

11 Q. AND DID YOU REACH ANY CONCLUSION WITH RESPECT TO FACTOR
12 ONE?

13 A. YEAH, MY CONCLUSION WAS THAT IT WEIGHED IN FAVOR OF
14 FAIR USE.

15 Q. WHY DID YOU CONCLUDE IT WEIGHED IN FAVOR OF FAIR USE?

16 A. LOOKING AT SUBCATEGORY ONE IS PERSONAL STUDIES, THE
17 STUDENTS WOULD BE READING THROUGH THE MATERIAL AT HOME. THAT
18 IT WAS BEING USED FOR NONPROFIT EDUCATIONAL TEACHING. THAT
19 STUDENTS GAINING ACCESS TO THE KIND OF MATERIAL ARE ENGAGED IN
20 THE SCHOLARSHIP OF THE FIELD, SCHOLARSHIP TEACHING.
21 CRITICISM AND COMMENT IS IMPLIED BECAUSE THEY ARE CRITIQUING
22 MATERIAL IN SMALL GROUPS WITHIN THE CONTEXT OF THE COURSE.
23 AND IT IS RELEVANT TO THE INTENDED EDUCATIONAL PURPOSES OF THE
24 COURSE.

25 Q. DID YOU CONSIDER FACTOR TWO IN YOUR FAIR USE ANALYSIS

1 FOR "FIVE MINUTE ACTIVITIES" IN 2009?

2 A. YES.

3 Q. AND DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR
4 2?

5 A. THE CONCLUSION WAS THAT IT WEIGHED IN FAVOR OF FAIR
6 USE.

7 Q. WHY DID YOU CONSIDER THAT IT WEIGHED IN FAVOR OF FAIR
8 USE?

9 A. IT IS A PUBLISHED WORK, IT CONTAINS FACTUAL MATERIAL,
10 AND IT IS SUPPORTIVE OF EDUCATIONAL OBJECTIVES OF THE COURSE.

11 Q. DID YOU CONSIDER FACTOR THREE IN YOUR FAIR USE ANALYSIS
12 IN 2009?

13 A. I DID.

14 Q. DID YOU REACH A CONCLUSION?

15 A. THAT THEY WEIGHED IN FAVOR OF FAIR USE.

16 Q. AND WHY?

17 A. THAT THE PORTION OF THE WORK WAS RELATIVELY SMALL.
18 THAT THE PORTION WAS NOT IN ANY WAY UNIQUE TO THE TEXT AS A
19 WHOLE, IT WAS REPRESENTATIVE TO THE TYPE OF MATERIAL
20 PRESENTED IN THE TEXT. THE AMOUNT TAKEN WAS TAILORED TO THE
21 PURPOSES OF THE COURSE.

22 Q. AND DID YOU CONSIDER FACTOR FOUR IN YOUR FAIR USE
23 ANALYSIS?

24 A. YES.

25 Q. DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO FACTOR

1 FOUR?

2 A. I DID, THAT IT WEIGHED IN FAVOR OF FAIR USE.

3 Q. AND WHY?

4 A. THE FIRST ITEM WOULD BE THAT IT STIMULATES MARKET FOR
5 ORIGINAL WORK IN THE SENSE THAT ONCE STUDENTS SEE A SEGMENT OF
6 A TEXT LIKE THIS AND RECOGNIZE ITS HIGH QUALITY, THAT THEY
7 WOULD BE INTRIGUED IN OWNING A COPY FOR THEMSELVES. THAT I
8 DIDN'T KNOW OF SIMILAR PRODUCT MARKETED BY THE SAME COPYRIGHT
9 HOLDER. THAT IT WAS BEING USED AS SUPPLEMENTAL MATERIAL,
10 NOT AS REQUIRED READING IN THE COURSE. I OWN A COPY OF THE
11 ORIGINAL WORK AND THAT ACCESS WOULD BE RESTRICTED TO THOSE WHO
12 HAD THE PASSWORD FOR THE ERESERVES.

13 Q. ONCE YOU CONSIDERED ALL FOUR OF THE FACTORS UNDER FAIR
14 USE, DID YOU ARRIVE AT AN OVERALL CONCLUSION WITH RESPECT TO
15 WHETHER YOUR USE OF "FIVE MINUTE ACTIVITIES" WAS CONSTITUTED
16 AS FAIR USE?

17 A. YES. IN MY ASSESSMENT THEY WEIGHED IN FAVOR OF FAIR
18 USE.

19 Q. WOULD YOU PLEASE GRAB THE BOOK IN FRONT OF YOU, WHICH
20 IS LABELED DX 789, WHICH HAS BEEN PREVIOUSLY IDENTIFIED AS
21 PTX 433 AND IT IS TITLED "NEWSPAPERS"?

22 A. OKAY.

23 Q. DO YOU RECOGNIZE THIS BOOK?

24 A. YES. THERE IS PETER GRUNDY'S "NEWSPAPERS."

25 Q. CAN YOU GENERALLY DESCRIBE THE SUBJECT MATTER OF THE

1 BOOK?

2 A. IT IS AN ACTIVITY RECIPE COLLECTION. THIS ONE FOCUSED
3 ON HOW TO USE NEWSPAPER ARTICLES FOR THE PURPOSES OF LANGUAGE
4 TEACHING.

5 Q. DID YOU CONTEMPLATE USING AN EXCERPT FROM "NEWSPAPERS"
6 IN YOUR MAYMESTER COURSE AS SUPPLEMENTAL READING MATERIALS?

7 A. YES. YES, I DID.

8 Q. AND WILL YOU PLEASE TURN TO PX 661 IN YOUR NOTEBOOK?

9 A. (WITNESS COMPLIES.) OKAY.

10 Q. DO YOU RECOGNIZE THE DOCUMENT?

11 A. THIS IS THE FAIR USE CHECKLIST FOR THE "NEWSPAPERS"
12 CLASSROOM ACTIVITIES TEXT.

13 Q. WHAT PAGES FROM "NEWSPAPERS" DID YOU CONTEMPLATE USING?

14 A. THIS DOCUMENT INDICATES PAGES 30 THROUGH 58.

15 Q. SO, APPROXIMATELY 29 PAGES?

16 A. YES.

17 Q. HOW MANY PAGES ARE THERE IN THE BOOK?

18 A. THE LAST NUMBERED PAGE IS 134.

19 Q. WHY DID YOU SELECT THE PAGES 30 TO 58 TO BE USED AS
20 SUPPLEMENTAL READING MATERIALS IN YOUR COURSE?

21 A. SUPPLEMENTAL BECAUSE THE USE OF "NEWSPAPERS" ISN'T ONE
22 OF THE CORE TOPIC SIDE OF THE COURSE, IT IS NOT SPEAKING,
23 GRAMMAR, WRITING, IT IS TIED TO READING. BUT NOT -- BUT I
24 SAW THE USE OF "NEWSPAPERS" NOT AS CORE TOPIC, BUT RELATED TO
25 GENERALLY ILLUSTRATIONS, OF CLASSROOM ACTIVITY ILLUSTRATIONS.

1 AND THIS DOES MEET THAT CRITERIA.

2 Q. IS THERE ANY INDICATION IN THE BOOK THAT CERTAIN PAGES
3 MAY BE PHOTOCOPIED?

4 A. I BELIEVE THERE IS, YES.

5 Q. WHERE IS THAT?

6 A. IT IS ON THE COPYRIGHT PAGE AFTER THE TITLE PAGE AND
7 ENTITLEMENT PAGE.

8 Q. WOULD YOU PLEASE READ WHAT THAT EXCERPT SAYS?

9 A.

10 "THE PUBLISHER GRANTS PERMISSION FOR
11 THE PHOTOCOPYING OF THOSE PAGES
12 MARKED QUOTE PHOTOCOPYABLE UNQUOTE
13 ACCORDING TO THE FOLLOWING
14 CONDITIONS. INDIVIDUAL PURCHASERS
15 MAY MAKE COPIES FOR THEIR OWN USE OR
16 FOR USE BY CLASSES THAT THEY TEACH.
17 SCHOOL PURCHASERS MAY MAKE COPIES
18 FOR USE BY STAFF AND STUDENTS, BUT
19 THIS PERMISSION DOES NOT EXTEND TO
20 ADDITIONAL SCHOOLS OR BRANCHES.
21 UNDER NO CIRCUMSTANCES MAY ANY PART
22 OF THIS BOOK BE PHOTOCOPIED FOR
23 RESALE."

24 Q. ARE THERE ANY PAGES FROM THE EXCERPT PAGES 30 TO 58
25 IDENTIFIED AS PHOTOCOPYABLE?

1 A. I WILL HAVE TO LOOK THROUGH EACH PAGE. PAGE 57 AND
2 PAGE 58.

3 Q. SO, TWO PAGES?

4 A. YES.

5 Q. AND WHEN DID YOU RECREATE THE CHECKLIST, PTX 661?

6 A. I RECREATED THE CHECKLIST IN MARCH OF 2011.

7 Q. AND HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

8 A. I ATTEMPTED TO RECREATE IT THE WAY I WOULD HAVE
9 ORIGINALLY COMPLETED IT IN 2009.

10 Q. SO PRIOR TO SELECTING AN EXCERPT FROM "NEWSPAPERS" BE
11 POSTED ON ERES, DID YOU PERFORM A FAIR USE ANALYSIS IN 2009?

12 A. YES.

13 Q. HOW DID YOU PERFORM THAT ANALYSIS?

14 A. I FOLLOWED THE PROCEDURES THAT WERE FORWARDED TO ME
15 THROUGH GROUPWISE EMAIL COMMUNICATION FROM THE LIBRARY
16 ERESERVES OFFICE.

17 Q. DID YOU CONSIDER THE FAIR USE CHECKLIST?

18 A. YES.

19 Q. AND DO YOU BELIEVE THAT THE RECREATED CHECKLIST
20 IDENTIFIED AS PTX 661 IS A FAIR AND ACCURATE RECREATION OF THE
21 FAIR USE ANALYSIS YOU ORIGINALLY CONDUCTED IN 2009?

22 A. YES.

23 Q. WITH RESPECT TO YOUR FAIR USE ANALYSIS IN 2009, DID
24 YOU CONSIDER FACTOR ONE?

25 A. YES.

1 Q. AND DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR
2 ONE?

3 A. YES. MY CONCLUSION WAS IT WEIGHED IN FAVOR OF FAIR
4 USE.

5 Q. WHY DID YOU DETERMINE THE COLLECTION OF "NEWSPAPERS"
6 WEIGHED IN FAVOR OF FAIR USE?

7 A. THE FIRST SUBCATEGORY, USE FOR NONPROFIT EDUCATIONAL
8 TEACHING, THAT APPLIED. PERSONAL STUDIES, STUDENTS WOULD
9 HAVE ACCESS TO STUDY AT HOME. IT DOES RELATE TO CRITICISM
10 AND COMMENT BECAUSE THEY ARE CRITIQUING MATERIAL IN CLASS.
11 IT IS BEING USED FOR SCHOLARSHIP, IN THIS CASE THE SCHOLARSHIP
12 OF TEACHING. AND IT IS RELEVANT TO ACHIEVING THE INTENDED
13 EDUCATIONAL PURPOSES OF THE COURSE.

14 Q. DID YOU CONSIDER FACTOR TWO IN YOUR FAIR USE ANALYSIS?

15 A. YES.

16 Q. DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR TWO
17 IN YOUR FAIR USE ANALYSIS?

18 A. YES. MY CONCLUSION WAS IT WEIGHED IN FAVOR OF FAIR
19 USE.

20 Q. WHY?

21 A. IT IS A PUBLISHED WORK. IT CONTAINS FACTUAL MATERIAL.
22 AND I DID CONSIDER IT TO BE RELEVANT TO EDUCATIONAL OBJECTIVES
23 FOR THE COURSE.

24 Q. DID YOU CONSIDER FACTOR THREE IN YOUR FAIR USE ANALYSIS
25 IN "NEWSPAPERS" IN 2009?

1 A. YES.

2 Q. DID YOU REACH A CONCLUSION?

3 A. YES.

4 Q. WHAT WAS THAT?

5 A. THAT IT WEIGHED IN FAVOR OF FAIR USE.

6 Q. AND WHY?

7 A. THAT THE PORTION BEING USED IS RELATIVELY SMALL. THAT
8 THE PORTION BEING USED WASN'T IN ANY WAY UNIQUE OR SPECIAL IN
9 THE CONTEXT OF THE TEXT AS A WHOLE, BUT REPRESENTATIVE OF THE
10 TEXT AS A WHOLE. AND THAT THE AMOUNT TAKEN WAS TAILORED TO
11 WHAT WOULD BE USEFUL IN THE CONTEXT OF THE COURSE I WAS
12 TEACHING.

13 Q. DID YOU CONSIDER FACTOR FOUR IN YOUR FAIR USE ANALYSIS
14 IN 2009?

15 A. YES.

16 Q. AND DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR
17 FOUR?

18 A. YES. THAT IT WEIGHED IN FAVOR OF FAIR USE.

19 Q. AND WHY DID YOU FIND IT WEIGHED IN FAVOR OF FAIR USE?

20 A. THE MOST IMPORTANT ONE TO ME WAS THE USE AS
21 SUPPLEMENTAL MATERIAL WOULD STIMULATE MARKET FOR THE ORIGINAL
22 WORK THAT STUDENTS TAKING THE COURSE WOULD BECOME INTRIGUED
23 AND PERHAPS PURCHASE THE TEXT FOR THEMSELVES AFTER THE COURSE
24 WAS OVER. I DIDN'T KNOW OF A SIMILAR PRODUCT -- COPYRIGHTED
25 SIMILAR PRODUCT MARKETED BY THE COPYRIGHT MATERIAL. I OWN A

1 COPY OF THE ORIGINAL TEXT. ACCESS WOULD BE RESTRICTED TO
2 THOSE WHO HAVE A PASSWORD.

3 Q. ONCE YOU CONSIDERED ALL FOUR OF THESE FACTORS, DID YOU
4 ARRIVE AT AN OVERALL CONCLUSION WITH RESPECT TO WHETHER THE
5 EXCERPT FROM "NEWSPAPERS" WOULD CONSTITUTE FAIR USE?

6 A. YES. MY CONCLUSION WAS IT WEIGHED IN FAVOR OF FAIR
7 USE.

8 Q. WOULD YOU PLEASE LOOK AT WHAT IS MARKED AS DX 790,
9 TITLED "ROLE PLAY," WHICH HAS BEEN PREVIOUSLY IDENTIFIED PTX
10 458?

11 A. OKAY.

12 Q. DO YOU RECOGNIZE THE BOOK?

13 A. YES. THIS IS GILLIAN LADOUSSE "ROLE PLAY."

14 Q. CAN YOU GENERALLY DESCRIBE THE MATERIAL OF "ROLE PLAY"?

15 A. GENRE OF RECIPE ACTIVITY COLLECTIONS, AND THIS ONE
16 PRESENTS A LARGE SERIES OF ROLE PLAYS THAT CAN BE USED IN
17 LANGUAGE CLASSES.

18 Q. DID YOU CONTEMPLATE USING AN EXCERPT FROM "ROLE PLAY"
19 IN YOUR CLASS IN MAYMESTER 2009?

20 A. SUPPLEMENTARY READING MATERIAL, YES.

21 Q. AND WOULD YOU PLEASE TURN TO PTX 662 IN YOUR NOTEBOOK?
22 DO YOU RECOGNIZE THE DOCUMENT?

23 A. YES.

24 Q. WHAT IS IT?

25 A. FAIR USE CHECKLIST FOR LADOUSSE'S "ROLE PLAY," CLASSIC

1 RECIPE COLLECTION.

2 Q. WHAT PAGES OF "ROLE PLAY" DID YOU CONTEMPLATE USING AS
3 SUPPLEMENTAL READING MATERIAL?

4 A. THIS DOCUMENT INDICATES PAGES 24 TO 62.

5 Q. SO, APPROXIMATELY 39 PAGE EGGS?

6 A. THAT SOUNDS RIGHT, YES.

7 Q. HOW MANY PAGES ARE IN THE BOOK?

8 A. LAST PAGE NUMBER IS 182.

9 Q. WHY DID YOU CONTEMPLATE USING PAGES 24 TO 62 OF "ROLE
10 PLAY" AS SUPPLEMENTAL READING MATERIALS?

11 A. YES, SUPPLEMENTAL BECAUSE I WANTED STUDENTS TO HAVE
12 ACCESS TO A CORNUCOPIA OF ACTIVITY DESCRIPTIONS. THIS WOULD
13 FIT THAT CRITERIA. THIS WAS A LITTLE DIFFERENT FROM THE
14 OTHERS BECAUSE IT WAS ROLE PLAYING AS OPPOSED TO FOCUSING ON
15 SPECIFIC SKILL AREA, SO I THOUGHT IT WOULD BE A USEFUL
16 SUPPLEMENT.

17 Q. IS THERE ANY INDICATION IN "ROLE PLAY" THAT CERTAIN
18 PAGES MAY BE PHOTOCOPIED?

19 A. I BELIEVE SO, BUT I WILL HAVE TO LOOK. YES.

20 Q. WHERE IS THAT INDICATION?

21 A. ON COPYRIGHT PAGE JUST BEFORE THE ACKNOWLEDGMENTS PAGE.

22 Q. COULD YOU PLEASE READ WHAT THAT INDICATION SAYS?

23 A. IT IS UNDER THE TITLE "PHOTOCOPYING."

24 "THE PUBLISHER GRANTS PERMISSION FOR
25 THE PHOTOCOPYING OF THOSE PAGES

1 MARKED QUOTE PHOTOCOPYABLE UNQUOTE
2 ACCORDING TO THE FOLLOWING
3 CONDITIONS. INDIVIDUAL PURCHASERS
4 MAY MAKE COPIES FOR THEIR OWN USE OR
5 FOR USE BY CLASSES THAT THEY TEACH.
6 SCHOOL PURCHASERS MAY MAKE COPIES
7 FOR USE BY STAFF AND STUDENTS, BUT
8 THIS PERMISSION DOES NOT EXTEND TO
9 ADDITIONAL SCHOOLS OR BRANCHES."

10 Q. ARE ANY OF THE PAGES FROM THE EXCERPT PAGES 24 TO 62
11 IDENTIFIED AS PHOTOCOPYABLE?

12 A. I HAVE TO GO THROUGH AND LOOK.

13 Q. PLEASE DO.

14 A. PAGES 40, 42, 43, 44, 46, 47, 53, 54, 62.

15 Q. SO NINE PAGES THAT YOU CONTEMPLATED USING WERE
16 IDENTIFIED AS PHOTOCOPYABLE?

17 A. THAT SOUNDS CORRECT.

18 Q. AND WHEN DID YOU RECREATE YOUR CHECKLIST FOR "ROLE
19 PLAY"?

20 A. IN MARCH OF 2011.

21 Q. HOW DID YOU GO ABOUT RECREATING THE CHECKLIST FOR "ROLE
22 PLAY" IN MARCH 2011?

23 A. TO THE BEST OF MY ABILITY, I WAS ATTEMPTING TO COMPLETE
24 IT AS I WOULD HAVE COMPLETED IT IN 2009.

25 Q. AND PRIOR TO REQUESTING AN EXCERPT FROM "ROLE PLAY" BE

1 POSTED ON ERES 2009, DID YOU PERFORM A FAIR USE ANALYSIS?

2 A. YES.

3 Q. HOW DID YOU GO ABOUT PERFORMING THAT FAIR USE ANALYSIS?

4 A. I FOLLOWED THE PROCEDURES THAT WERE FORWARDED TO ME
5 ELECTRONICALLY THROUGH GROUPWISE EMAIL COMMUNICATION WITH
6 ERESERVES AT THE LIBRARY.

7 Q. DID YOU CONSIDER THE FAIR USE CHECKLIST IN YOUR FAIR
8 USE ANALYSIS?

9 A. YES.

10 Q. DO YOU BELIEVE THE RECREATED CHECKLIST IDENTIFIED AS
11 PTX 662 IS A FAIR AND ACCURATE RECREATION OF YOUR FAIR USE
12 ANALYSIS YOU PERFORMED IN 2009?

13 A. YES.

14 Q. IN YOUR FAIR USE ANALYSIS YOU PERFORMED IN 2009 FOR
15 "ROLE PLAY," DID YOU CONSIDER FACTOR ONE?

16 A. YES.

17 Q. DID YOU REACH ANY CONCLUSION WITH RESPECT TO FACTOR
18 ONE?

19 A. YES. MY CONCLUSION WAS THAT IT WEIGHED IN FAVOR OF
20 FAIR USE.

21 Q. WHY?

22 A. THE FIRST SUBCATEGORY WAS BEING USED FOR NONPROFIT
23 EDUCATIONAL TEACHING FOR THE PURPOSE OF SCHOLARSHIP, IN THIS
24 CASE THE SCHOLARSHIP OF TEACHING. FOR CRITICISM IN THE SENSE
25 THAT STUDENTS WERE CRITIQUING ACTIVITIES WITHIN THE CONTEXT OF

1 THE COURSE. IT WOULD BE USED FOR PERSONAL STUDIES, STUDENTS
2 WOULD BE WORKING WITH IT AT HOME. AND THAT IT WAS RELEVANT
3 TO THE INTENDED EDUCATIONAL PURPOSES OF THE COURSE.

4 Q. DID YOU CONSIDER FACTOR TWO IN YOUR VARIOUS ANALYSIS IN
5 2009?

6 A. YES.

7 Q. DID YOU REACH ANY CONCLUSION WITH RESPECT TO FACTOR
8 TWO?

9 A. YES. IT IS A PUBLISHED WORK. IT CONTAINS FACTUAL
10 MATERIAL. AND IT WAS SUPPORTIVE OF THE EDUCATIONAL OBJECTIVES
11 OF THE COURSE.

12 Q. DID YOU CONSIDER FACTOR THREE IN YOUR FAIR USE ANALYSIS
13 IN 2009?

14 A. YES.

15 Q. DID YOU REACH ANY CONCLUSIONS WITH RESPECT TO FACTOR
16 THREE?

17 A. YES. THAT IT WEIGHED IN FAVOR OF FAIR USE.

18 Q. AND WHY?

19 A. THE PORTION I WAS USING WAS RELATIVELY SMALL IN THE
20 CONTEXT OF THE WORK AS A WHOLE. THAT THE PORTION I SELECTED
21 WAS NOT IN ANY WAY SPECIAL OR UNIQUE, BUT REPRESENTATIVE OF
22 THE TEXT AS A WHOLE. AND THAT THE AMOUNT TAKEN WAS TAILORED
23 TO THE PURPOSES OF THE COURSE FOR CRITICISM, COMMENT, AND ET
24 CETERA.

25 Q. DID YOU CONSIDER FACTOR FOUR IN YOUR FAIR USE ANALYSIS?

1 A. YES.

2 Q. AND DID YOU REACH ANY CONCLUSION WITH RESPECT TO FACTOR
3 FOUR?

4 A. YES. IT WEIGHED IN FAVOR OF FAIR USE.

5 Q. WHY DID YOU CONCLUDE THAT THE EXCERPT FROM "ROLE PLAY"
6 WEIGHED IN FAVOR OF FAIR USE?

7 A. THE SUBCATEGORY THAT STRUCK ME MOST WAS THAT BY
8 INCLUDING IT AS SUPPLEMENTARY MATERIAL WOULD BE USED TO
9 STIMULATE MARKET FOR THE ORIGINAL WORK. THAT IS, ONCE
10 STUDENTS ENCOUNTER MATERIAL LIKE THIS AND SEE WHAT A USEFUL
11 RESOURCE IT IS, THEY WOULD BE INTERESTED IN OWNING THEIR OWN
12 COPY OF THE WHOLE COLLECTION. SO STIMULATED MARKET FOR THE
13 ORIGINAL WORK. I DIDN'T KNOW OF A SIMILAR PRODUCT BEING
14 MARKETED BY A COPYRIGHT HOLDER. IT WAS BEING INTENDED AS
15 SUPPLEMENTARY CLASSROOM READING FOR THE COURSE, NOT REQUIRED.
16 I OWN MY OWN COPY AND THAT ACCESS WOULD BE RESTRICTED TO THOSE
17 WHO HAVE A PASSWORD FOR THE ERESERVE SITE.

18 Q. ONCE YOU CONSIDERED ALL FOUR FACTORS UNDER FAIR USE,
19 DID YOU ARRIVE AT AN OVERALL CONCLUSION WITH RESPECT TO YOUR
20 USE OF THE EXCERPT FROM "ROLE PLAY" AS TO WHETHER OR NOT THAT
21 USE WOULD BE A FAIR USE?

22 A. YES. IT WEIGHED IN FAVOR OF FAIR USE.

23 Q. PROFESSOR MURPHY, I PUT ON THE OVERHEAD WHAT IS JOINT
24 EXHIBIT 5 IN THIS CASE. AND I WILL REPRESENT TO YOU THAT
25 THESE ARE THE ACCUSED INFRINGEMENTS WITH RESPECT TO YOUR

1 COURSE TAUGHT IN MAYMESTER 2009.

2 A. DO I HAVE A COPY OF THAT HERE?

3 Q. NO. SORRY. WITH RESPECT TO THE FIRST PAGE ENTITLED
4 EXHIBIT A-1, THERE ARE FOUR WORKS IDENTIFIED AND I WILL READ
5 THEM OUT SO THAT YOU CAN SEE THEM: "PRONUNCIATION GAMES,"
6 "KEEP TALKING," "MORE GRAMMAR GAMES" AND "GRAMMAR PRACTICE
7 ACTIVITIES." WITH RESPECT TO THESE FOUR WORKS IDENTIFIED ON
8 JOINT EXHIBIT 5 ON PAGE 1, WERE ANY OF THESE EXCERPTS EVER
9 ASSIGNED TO YOUR CLASS AS REQUIRED READINGS?

10 A. THE SECOND ITEM, "KEEP TALKING," AND THE "GRAMMAR
11 PRACTICE ACTIVITIES," WHEN I SETTLED THE SYLLABUS THE DAY
12 BEFORE THE COURSE WAS ACTUALLY OFFERED, THOSE TWO TEXTS WERE
13 INCLUDED AS REQUIRED TEXTS FOR STUDENTS TO PURCHASE. STUDENTS
14 HAD TO BUY THOSE TEXTS. THEY WERE REQUIRED TO BRING THEM TO
15 CLASS BECAUSE IN THE CONTEXT OF THE CLASS, I ASKED THEM TO
16 HAVE THE TEXT IN FRONT OF THEM FOR DISCUSSION PURPOSES WHEN
17 THEY ARE WORKING IN SMALL GROUPS. SO THE "KEEP TALKING" AND
18 THE "GRAMMAR PRACTICE ACTIVITIES" EVENTUALLY WERE INCLUDED AS
19 REQUIRED PURCHASES FOR THE COURSE.

20 Q. WITH RESPECT TO "PRONUNCIATION GAMES" AND "MORE GRAMMAR
21 GAMES," THOSE WERE NOT REQUIRED READINGS FOR YOUR STUDENTS IN
22 MAYMESTER?

23 A. NO, THEY WERE PRESENTED THROUGH ERESERVE SOLELY AS
24 SUPPLEMENTAL READINGS.

25 Q. WERE THOSE READINGS ASSIGNED ON THE SYLLABUS AS

1 SUPPLEMENTAL READING MATERIALS?

2 A. NO, THEY ARE NOT LISTED ON THE SYLLABUS. THE TWO
3 THAT WERE SUPPLEMENTAL WERE NOT LISTED ON THE SYLLABUS.

4 Q. AND ON THE SECOND PAGE OF JOINT EXHIBIT FIVE, WHICH IS
5 IDENTIFIED AS A-2, THERE ARE AN ADDITIONAL FIVE WORKS. AND I
6 WILL REPRESENT TO YOU THAT PLAINTIFFS HAVE WITHDRAWN THEIR
7 ALLEGATIONS OF INFRINGEMENT WITH RESPECT TO THE LAST TWO WHICH
8 IS WRITING AND VOCABULARY. SO WITH RESPECT TO THOSE FIVE,
9 ARE ANY OF THESE READINGS ASSIGNED TO -- WERE ANY OF THEM
10 ASSIGNED READINGS FOR YOUR STUDENTS IN YOUR MAYMESTER CLASS?

11 A. COULD YOU GIVE ME THE TITLES OF EACH OF THE FIVE? I
12 CAN'T READ THE FRONT SIZE?

13 Q. "FIVE MINUTE ACTIVITIES," "NEWSPAPERS," "ROLE PLAY,"
14 "WRITING" AND "VOCABULARY?"

15 A. YEAH, THE FOURTH ONE LISTED "WRITING," RESOURCE FOR
16 TEACHERS, THAT WAS INCLUDED AS A REQUIRED FOR STUDENTS TO
17 PURCHASE. THEY OWNED AND THEY BROUGHT COPIES OF THAT TEXT TO
18 CLASS EACH DAY.

19 Q. SO WITH RESPECT TO THE OTHERS, ANY OF THOSE ASSIGNED
20 READINGS FOR YOUR STUDENTS?

21 A. THEY WERE PRESENTED AS SUPPLEMENTARY READING MATERIAL.

22 Q. WERE THEY ASSIGNED IN THE SYLLABUS AS SUPPLEMENTAL
23 READING MATERIAL?

24 A. THEY ARE NOT LISTED ON THE SYLLABUS.

25 Q. SO WITH RESPECT TO THE NINE THAT I JUST SHOWED YOU,

1 THREE OF THEM YOU REQUIRED STUDENTS TO ACTUALLY PURCHASE THE
2 BOOK?

3 A. YEAH. ACTUALLY A FOURTH TEXT, WHICH IS NOT LISTED IN
4 THIS PROCEEDING, STUDENTS WERE REQUIRED TO BUY FOUR BOOKS,
5 THREE OF THEM WERE THE ONES I JUST MENTIONED.

6 MS. QUICKER: THANK YOU. I HAVE NO FURTHER
7 QUESTIONS.

8 THE COURT: MR. KRUGMAN, YOU MAY PROCEED.

9 CROSS EXAM

10 BY MR. KRUGMAN:

11 Q. GOOD AFTERNOON, PROFESSOR MURPHY. I AM EDWARD
12 KRUGMAN WITH BONDURANT, MIXSON AND ELMORE. I WILL BE ASKING
13 YOU SOME QUESTIONS THIS AFTERNOON.

14 YOU TESTIFIED ON DIRECT AT LENGTH ABOUT WHAT WERE
15 DESCRIBED AS RECREATED CHECKLISTS, DO YOU RECALL THAT?

16 A. YES.

17 Q. I BELIEVE THAT IN RESPONSE TO QUESTIONS FROM
18 MS. QUICKER YOU SAID THAT YOU COMPLETED THE RECREATED
19 CHECKLIST AS YOU WOULD HAVE COMPLETED THEM IN 2009, DO YOU
20 RECALL THAT?

21 A. I BELIEVE I SAID THAT IS WHAT MY INTENTION WAS TO THE
22 BEST OF MY ABILITY, YES.

23 Q. TO COMPLETE THEM AS YOU WOULD HAVE COMPLETED THE
24 CHECKLIST IN 2009, CORRECT?

25 A. YES.

1 Q. YOU WEREN'T TELLING THE COURT THAT YOU IN FACT
2 COMPLETED THE CHECKLIST IN 2009, WERE YOU?

3 A. THAT WAS MY INTENTION.

4 Q. IT WAS YOUR INTENTION TO TELL THE COURT THAT YOU
5 COMPLETED A PHYSICAL CHECKLIST IN 2009, AND WHAT YOU WERE
6 DOING WAS RECREATING THEM IN MARCH OF 2011, CORRECT?

7 A. I AM HAVING TROUBLE WITH THE WORD "PHYSICAL." CAN I
8 EXPLAIN?

9 Q. LET ME HAND YOU, IF I MAY APPROACH, YOUR HONOR.
10 THE COURT: YOU MAY.

11 BY MR. KRUGMAN:

12 Q. YOU RECALL YOUR DEPOSITION BEING TAKEN IN THIS CASE ON
13 APRIL 22 OF 2011?

14 A. YES.

15 Q. YOU WERE REPRESENTED BY MS. QUICKER AT THAT DEPOSITION,
16 CORRECT?

17 A. YES.

18 Q. IT WAS TAKEN, I BELIEVE, AT THE LAW OFFICES OF KING AND
19 SPALDING IN MIDTOWN; IS THAT CORRECT?

20 A. YES.

21 Q. YOU WERE UNDER OATH AT THAT TIME, CORRECT?

22 A. YES.

23 Q. I WOULD ASK YOU TO TURN TO PAGE 48. AND BEGINNING AT
24 LINES 6 TO 12, IF YOU COULD PLEASE PLAY THAT FOR THE COURT.

25 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS PLAYED.)

1 "Q. DID YOU FILL IN THE BOXES IN
2 THE FAIR USE CHECKLIST AT THAT TIME?

3 A. I DON'T REMEMBER SPECIFICALLY
4 WHAT THE PROCEDURE WAS IN 2009.

5 Q. SO YOU DON'T REMEMBER PHYSICALLY
6 COMPLETING A CHECKLIST IN 2009; IS
7 THAT RIGHT?

8 A. I DON'T REMEMBER."

9 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS STOPPED.)

10 BY MR. KRUGMAN:

11 Q. SITTING HERE TODAY, PROFESSOR MURPHY --

12 MS. QUICKER: YOUR HONOR --

13 MR. KRUGMAN: I WILL BE HAPPY TO READ THE NEXT LINE,
14 48, 6 TO 12. HE WAS ASKED:

15 "THEN, OKAY, IS IT POSSIBLE THAT YOU
16 DID?"

17 AND HE ANSWERED:

18 "IT IS POSSIBLE."

19 MR. KRUGMAN: YES.

20 BY MR. KRUGMAN:

21 Q. AT LEAST WHEN YOUR DEPOSITION WAS TAKEN IN THIS CASE.

22 MS. QUICKER: OBJECTION. I WANT THE REST OF DIRECT
23 READ, PLEASE.

24 THE COURT: WHAT LINES DO YOU WANT TO HAVE READ?

25 MS. QUICKER: FORTY-EIGHT TO LINE 23.

1 MR. KRUGMAN: I WILL BE HAPPY TO. YOU DON'T
2 REMEMBER --

3 QUESTION: "YOU DON'T REMEMBER
4 PHYSICALLY COMPLETING A CHECKLIST IN
5 2009 IS THAT RIGHT?

6 ANSWER: I DON'T REMEMBER THAT.

7 QUESTION: OKAY. IS IT POSSIBLE
8 THAT YOU DID?

9 ANSWER: IT IS POSSIBLE, YES.

10 QUESTION: DO YOU RECALL ANALYZING
11 THIS READING IN ACCORDANCE WITH THE
12 CRITERIA THAT ARE LISTED ON THE
13 CHECKLIST BACK IN 2009?

14 ANSWER: I RECALL EXAMINING THE
15 CHECKLIST."

16 THE WITNESS: COMPLETING THIS DOCUMENT. I INTERPRET
17 THAT AS A HARD COPY I HAD AT MY OFFICE. PHYSICALLY IS WHAT I
18 HAD ISSUE WITH. WHAT I DID WAS I FOLLOWED THE PROCEDURES AS
19 FORWARDED TO ME THROUGH ERESERVES. TO THE BEST OF MY
20 RECOLLECTION IT WAS AN ELECTRONIC PROCEDURE SO THAT THE
21 MATERIALS THAT I COMPLETED, I COMPLETED ELECTRONICALLY NOT
22 PHYSICALLY. SO IT IS THE WORD "PHYSICALLY" THAT I ASKED
23 ABOUT INITIALLY.

24 BY MR. KRUGMAN:

25 Q. JUST SO I UNDERSTAND, IT IS YOUR TESTIMONY THAT YOU

1 COMPLETED A CHECKLIST ELECTRONICALLY IN 2009, BEFORE
2 REQUESTING ELECTRONIC TO POST IT ON ELECTRONIC RESERVES?

3 A. TO THE BEST OF MY RECOLLECTION, I CONTACTED ERESERVES,
4 THEY FORWARDED TO ME THROUGH ELECTRONIC COMMUNICATION THE
5 PROCEDURES THAT I NEEDED TO COMPLETE THE FAIR USE CHECKLIST
6 AND WHAT THE ELECTRONIC PROCEDURE ASKED ME TO DO, I FOLLOWED
7 THE PROCEDURE. I RECALL AT THE END THERE WAS SOME
8 OVERARCHING BOX AT THE END THAT I HAD TO CHECK SAYING
9 ACKNOWLEDGING I READ THE PROCEDURES AND WAS FOLLOWING THE
10 PROCEDURES AND TO THE BEST OF MY KNOWLEDGE I COMPLETED ALL OF
11 THAT ELECTRONICALLY.

12 Q. DO YOU RECALL RECEIVING AN EMAIL OF ANY SORT BACK FROM
13 THE LIBRARY CONFIRMING THE WORKS THAT YOU HAD REQUESTED BE
14 POSTED ON ELECTRONIC RESERVE AND PROVIDING -- EMAILING THE
15 PASSWORD?

16 A. THE PASSWORD WAS PROVIDED. I DON'T RECALL IF IT
17 SPECIFIED ACKNOWLEDGMENT, BUT THERE WAS A PASSWORD PROVIDED,
18 YES.

19 Q. YOU DID GET A PASSWORD THAT I THINK YOU TESTIFIED THAT
20 YOU SHARED WITH STUDENTS IN YOUR CLASS?

21 A. YES.

22 Q. DO YOU RECALL WHETHER YOU RECEIVED BACK FROM THE
23 LIBRARY AN EMAIL THAT CONTAINED A COMPLETE LISTING OF WHAT I
24 THINK WE WILL LEARN WERE APPROXIMATELY 20 WORKS THAT YOU
25 REQUESTED BE POSTED ON ELECTRONIC RESERVES?

1 A. I DON'T RECALL THAT.

2 Q. WE HAVE SEEN SOME OF THOSE E-MAILS WITH OTHER
3 PROFESSORS AND YOU DON'T KNOW. YOU DON'T RECALL SEEING THAT?

4 A. I DON'T REMEMBER THEM.

5 Q. NOW, YOU HAVE NEVER HAD ANY ACADEMIC TRAINING IN
6 INTELLECTUAL PROPERTY LAW, CORRECT?

7 A. THAT IS CORRECT.

8 Q. YOU HAVE NEVER TAKEN A UNIVERSITY COURSE ON COPYRIGHT
9 LAW, CORRECT?

10 A. NO, I HAVE NOT.

11 Q. YOU HAVE NEVER ATTENDED ANY KIND OF TRAINING SESSION AT
12 GEORGIA STATE IN CONNECTION WITH THE POLICY THAT WENT INTO
13 EFFECT IN 2009; IS THAT CORRECT?

14 A. COULD YOU REPEAT THAT, PLEASE?

15 Q. YOU NEVER ATTENDED ANY KIND OF TRAINING SESSION AT
16 GEORGIA STATE IN CONNECTION WITH THE NEW POLICY THAT WENT INTO
17 EFFECT AT THE UNIVERSITY IN 2009?

18 A. NO.

19 MR. KRUGMAN: MAY I PROCEED?

20 THE COURT: YOU MAY.

21 BY MR. KRUGMAN:

22 Q. PROFESSOR MURPHY, YOU DO NOT RECALL EVER BEING
23 INFORMED THAT ANY KIND OF TRAINING SESSION WAS AVAILABLE TO
24 YOU AT GEORGIA STATE WITH RESPECT TO THE NEW POLICY; IS THAT
25 CORRECT?

1 A. YOUR WORDING, COULD YOU SAY THAT AGAIN, PLEASE?

2 Q. I WILL BE HAPPY TO. YOU DO NOT RECALL EVER BEING
3 INFORMED THAT ANY KIND OF TRAINING SESSION WAS AVAILABLE TO
4 YOU AT GEORGIA STATE WITH RESPECT TO THE NEW POLICY; IS THAT
5 CORRECT?

6 A. I DON'T RECALL. I WOULD GUESS THAT GENERAL EMAIL
7 COMMUNICATIONS GO OUT TO ALL THE UNIVERSITY FACULTY, BUT I
8 DON'T RECALL ONE, NO.

9 Q. IF YOU COULD PLEASE PLAY -- TAKE -- FIRST OF ALL, TAKE
10 A LOOK AT YOUR DEPOSITION AT PAGE 28, AND IF YOU COULD PLEASE
11 PLAY THE CLIPS FROM AT LINE 13 TO 19, PLEASE.

12 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS PLAYED.)

13 "Q. DID YOU EVER ATTEND AT GSU ANY
14 KIND OF TRAINING SESSION IN
15 CONNECTION WITH THIS COPYRIGHT
16 POLICY?

17 A. NO.

18 Q. OKAY. DO YOU EVER RECALL BEING
19 INFORMED THAT ANY KIND OF TRAINING
20 SESSION WAS AVAILABLE TO YOU?

21 A. I DON'T RECALL THAT."

22 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS STOPPED.)

23 BY MR. KRUGMAN:

24 Q. THAT WAS YOUR TESTIMONY, SIR, WAS IT NOT?

25 A. YES.

1 Q. IS IT ALSO TRUE THAT YOU DO NOT RECALL EVER BEING
2 INSTRUCTED THAT YOU WERE REQUIRED TO FOLLOW THE COPYRIGHT
3 POLICY, CORRECT?

4 A. COULD YOU REPEAT THAT AGAIN?

5 Q. YES, SIR. AM I CORRECT THAT YOU DO NOT RECALL EVER
6 BEING INSTRUCTED THAT YOU WERE REQUIRED TO FOLLOW THE NEW
7 COPYRIGHT POLICY?

8 A. I DON'T HAVE A SPECIFIC MEMORY OF ANYONE SPECIFICALLY
9 SAYING THAT TO ME.

10 Q. IF YOU COULD PLEASE LOOK AT YOUR DEPOSITION AGAIN AT
11 PAGE 28, LINE 20, AND I WILL JUST READ IT. THE QUESTION:

12 "OKAY. DO YOU RECALL EVER BEING
13 INSTRUCTED, YOU KNOW, THAT YOU WERE
14 REQUIRED TO FOLLOW THIS POLICY?"

15 AND THE ANSWER WAS, "NO."

16 AND THAT WAS YOUR TESTIMONY UNDER OATH OF THIS YEAR,
17 CORRECT?

18 A. YES.

19 Q. YOU ARE AWARE THERE ARE RESOURCES AT GEORGIA STATE THAT
20 YOU COULD UTILIZE TO HELP APPLY THE POLICY, ARE YOU NOT?

21 A. I WOULDN'T WORD IT THAT WAY. I ASSUME THAT THERE ARE.
22 IT IS NOT SOMETHING THAT I PRACTICALLY LOOKED INTO.

23 Q. TAKE A LOOK AT YOUR DEPOSITION, PLEASE, AT PAGE 29
24 LINES THREE TO FIVE.

25 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS PLAYED.)

1 "Q. ARE YOU AWARE OF ANY MONEY
2 SOURCE AT GSU THAT CAN HELP YOU
3 COMPLY WITH THIS POLICY?

4 A. I AM AWARE THAT SUCH SOURCES
5 PROBABLY EXIST."

6 (WHEREUPON, THE VIDEOTAPED DEPOSITION STOPPED.)

7 BY MR. KRUGMAN:

8 Q. BUT YOU CAN NOT SITTING HERE TODAY SAY WHAT THOSE
9 RESOURCES ARE, CORRECT?

10 A. I CANNOT.

11 Q. NOW, SINCE THE NEW POLICY WENT INTO EFFECT, WENT INTO
12 EFFECT IN FEBRUARY 2009, YOU HAVE NOT SOUGHT PERMISSION FROM
13 ANY PUBLISHER TO USE ANY EXCERPT ON ERESERVE FOR ANY OF YOUR
14 CLASSES ON ERESERVE, CORRECT?

15 A. ANY OF MY COURSES? COULD YOU -- YOU SAID "ERESERVE"
16 SPECIFICALLY, COULD YOU SAY THAT QUESTION AGAIN?

17 Q. I WILL BE HAPPY TO, PROFESSOR MURPHY.

18 SINCE THE NEW POLICY WENT INTO EFFECT IN FEBRUARY OF 2009,
19 YOU HAVE NOT SOUGHT PERMISSION FROM ANY PUBLISHER TO USE AN
20 EXCERPT ON ERESERVE FOR ANY OF THE CLASSES THAT YOU HAVE
21 TAUGHT AT GEORGIA STATE, CORRECT?

22 A. YES.

23 Q. THAT IS A TRUE STATEMENT, CORRECT?

24 A. YES.

25 Q. THANK YOU.

1 NOW, YOU TESTIFIED AT LENGTH THAT THE VARIOUS WORKS THAT
2 MR. -- MS. QUICKER TALKED TO YOU ABOUT THAT WERE POSTED ON
3 ERESERVE WERE TO BE SUPPLEMENTAL READINGS; IS THAT CORRECT?
4 THAT IS WHAT YOU WERE CONTEMPLATING AT THE TIME THAT YOU
5 REQUESTED THE LIBRARY TO POST THOSE MATERIALS ON ELECTRONIC
6 RESERVE?

7 A. YES.

8 Q. IF I COULD HAVE DEFENDANT'S TRIAL EXHIBIT 538, PLEASE.

9 MR. KRUGMAN: EXCUSE ME ONE MOMENT, YOUR HONOR. IF
10 I MAY APPROACH, YOUR HONOR.

11 THE COURT: YOU MAY.

12 MR. KRUGMAN: THANK YOU.

13 BY MR. KRUGMAN:

14 Q. PROFESSOR MURPHY, I HAVE HANDED YOU -- ONE SECOND. I
15 HAVE HANDED YOU A COPY OF A DECLARATION OF JOHN M. MURPHY,
16 ED.D, EXECUTED ON MARCH 16TH OF 2011, DO YOU SEE THIS?

17 A. YES.

18 Q. CAN YOU IDENTIFY THIS AS A DECLARATION THAT YOU
19 SUBMITTED IN CONNECTION WITH THIS LITIGATION ON OR ABOUT MARCH
20 16TH, 2011?

21 A. YES.

22 MR. KRUGMAN: YOUR HONOR, I MOVE INTO EVIDENCE
23 DEFENDANT'S TRIAL EXHIBIT 538.

24 MS. QUICKER: NO OBJECTION.

25 THE COURT: IT IS ADMITTED.

1 BY MR. KRUGMAN:

2 Q. NOW, WHEN YOUR DEPOSITION WAS TAKEN IN THIS CASE, YOU
3 WERE ASKED WHETHER YOU WROTE THIS DECLARATION, DO YOU RECALL
4 THAT?

5 A. YES.

6 Q. YOUR RESPONSE WAS -- WELL, LET'S HEAR YOUR RESPONSE AT
7 PAGE 32 OF YOUR DEPOSITION, LINES NINE TO 17.

8 MS. QUICKER: OBJECTION, YOUR HONOR. WHY ARE WE
9 PLAYING THIS DEPOSITION TESTIMONY? HE CAN JUST ASK THE
10 QUESTION.

11 THE COURT: I AM NOT SURE. WERE YOU GETTING READY
12 TO PLAY SOME EXCERPT?

13 MR. KRUGMAN: YEAH, PROBABLY FIFTEEN SECONDS.

14 THE COURT: I WILL ALLOW IT. OVERRULED.
15 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS PLAYED.)

16 "Q. OKAY. LET ME SHOW YOU WHAT I
17 AM MARKING AS MURPHY PLAINTIFF'S
18 EXHIBIT 3. AND THIS IS A DOCUMENT
19 ENTITLED "DECLARATION OF JOHN M.
20 MURPHY." IT IS EXECUTED ON MARCH
21 16TH, 2011. IS THIS A DECLARATION
22 SIGNED BY YOU, PROFESSOR MURPHY?

23 A. YES.

24 Q. AND DID YOU WRITE THIS DOCUMENT?

25 A. THAT IS A QUESTION THAT'S

1 COMPLICATED."

2 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS STOPPED.)

3 BY MR. KRUGMAN:

4 Q. PROFESSOR MURPHY, WHAT I WANT TO ASK YOU TODAY IS WHY
5 WAS THAT A COMPLICATED QUESTION THAT YOU WROTE YOUR
6 DECLARATION?

7 A. YEAH, OKAY. I WAS CONTACTED BY LEGAL AFFAIRS OFFICE
8 FROM GEORGIA STATE, I BELIEVE THAT WAS THE OFFICE THAT
9 CONTACTED ME, WHILE I WAS ATTENDING A CONFERENCE IN NEW
10 ORLEANS. I HAD A LAPTOP COMPUTER, I OPENED UP MY EMAIL, THE
11 INTERNET CONNECTION WAS SLOW. I GOT THE REQUEST ABOUT
12 RECREATING THE FAIR USE AND THIS DOCUMENT. AND MY
13 RECOLLECTION OF THOSE EVENTS IS THAT THERE WAS SOME SORT OF A
14 TEMPLATE THAT THEY WERE ASKING ME TO COMPLETE AND FORWARD, SO
15 I DON'T HAVE A CLEAR MEMORY OF HOW MUCH OF IT WAS TEMPLATE,
16 HOW MUCH WAS MY ORIGINAL WORDING. SO WHEN SOMEONE ASKED ME,
17 DID YOU WRITE THE DOCUMENT, I SAID IT WAS COMPLICATED, BUT I
18 BELIEVE I WAS FOLLOWING A TEMPLATE THAT WAS FORWARDED TO ME AS
19 FROM WHAT MUST HAVE BEEN A WORD -- MICROSOFT WORD DOCUMENT.
20 SO, I MEAN, THE LANGUAGE AND THE FORMAT, IT IS NOT THE
21 LANGUAGE AND FORMAT OF A DOCUMENT I WOULD HAVE CREATED MYSELF,
22 BUT I WAS FOLLOWING A TEMPLATE THAT WAS FORWARDED TO ME. I
23 BELIEVE IT WAS LEGAL AFFAIRS OFFICE FROM GSU.

24 Q. WHEN YOU SAY "TEMPLATE," YOU MEAN KIND OF THE TEXT OF
25 YOUR DECLARATION, DEFENDANTS TRIAL EXHIBIT 538, IF YOU CAN

1 BRING IT UP?

2 A. I WOULD HAVE TO READ IT THROUGH CAREFULLY AND FIGURE
3 OUT WHAT IS MY WORDING AND IF THERE WAS WORDING, YOU KNOW.
4 LIKE EVEN THE BEGINNING, "I AM OVER THE AGE 58 AND COMPETENT
5 TO MAKE THIS DECLARATION," THAT IS NOT MY WORDING, THAT IS AN
6 EXAMPLE OF SOMETHING FROM A TEMPLATE.

7 Q. I UNDERSTAND. ATTACHED TO YOUR DECLARATION IS AN
8 EXHIBIT, WAS MOVED TO THE FOURTH, FIFTH PAGE OF THIS, THAT
9 IS A COPY OF THE SYLLABUS THAT WE HAVE LOOKED AT PREVIOUSLY
10 FOR THE MAYMESTER 2009 AL 8480 COURSE?

11 A. YES.

12 Q. ALL OF THAT WERE YOUR WORDS?

13 A. YES.

14 Q. I UNDERSTAND.

15 IN PARAGRAPH TWO, GOING BACK TO THE DECLARATION, YOU
16 WROTE:

17 "I AM A PROFESSOR IN THE DEPARTMENT
18 OF APPLIED LINGUISTICS AND ESL IN
19 THE COLLEGE OF ARTS AND SCIENCES AT
20 GEORGIA STATE."

21 THEN YOU TALK ABOUT THE COURSE THAT YOU TAUGHT DURING THE
22 MAYMESTER THAT WE HAVE BEEN TALKING ABOUT THIS AFTERNOON,
23 CORRECT?

24 A. YES.

25 Q. AND THEN IN PARAGRAPH THREE, YOU WRITE THAT, I

1 UNDERSTAND THAT PLAINTIFFS ALLEGE THAT YOU TAUGHT AL 8480 IN
2 MAYMESTER 2009 AND IN CONNECTION WITH THAT COURSE YOU PLACED
3 ON ERESERVES A NUMBER OF VARIOUS WORKS THAT ARE THEN
4 IDENTIFIED IN PARAGRAPH THREE AND THOSE ARE, AM I CORRECT,
5 THOSE ARE THE WORKS THAT WE HAVE BEEN TALKING ABOUT OR MOST OF
6 THE WORKS WE HAVE BEEN TALKING ABOUT THIS AFTERNOON?

7 A. YES.

8 Q. AM I CORRECT THAT THE GIST OF THE DECLARATION THAT,
9 ALTHOUGH YOU REQUESTED THE MATERIALS IDENTIFIED IN PARAGRAPH
10 THREE TO BE POSTED ON ELECTRONIC RESERVE, YOU ULTIMATELY DID
11 NOT ASSIGN THOSE READINGS TO THE STUDENTS IN YOUR CLASS DURING
12 THE 2009 MAYMESTER?

13 A. WITH THE EXCEPTION OF THE FOUR TEXTS WHICH I BELIEVE
14 ARE LISTED HERE, WHICH ULTIMATELY I DID INCLUDE IN THE COURSE
15 AS REQUIRED READING, WHICH STUDENTS WERE REQUIRED TO PURCHASE
16 AND BRING TO CLASS AND OWN A COPY OF. SO, THOSE FOUR WERE
17 INCLUDED AS REQUIRED READINGS, EVERYTHING ELSE WAS
18 SUPPLEMENTAL.

19 Q. I UNDERSTAND THAT. PUTTING THOSE ASIDE, SOME BECAME
20 REQUIRED PURCHASES BY STUDENTS?

21 A. YES, FOUR OF THOSE.

22 Q. NOW IN PARAGRAPH FOUR OF YOUR DECLARATION, YOU WROTE:

23 "ALTHOUGH I DID TEACH AL 8480 IN
24 MAYMESTER 2009, I ORIGINALLY
25 REQUESTED THE AFOREMENTIONED WORKS

1 BE LOADED TO ERES. I ULTIMATELY DID
2 NOT USE OR ASSIGN TO MY STUDENTS ANY
3 OF THE MATERIALS LOADED INTO ERES."

4 THAT IS WHAT YOUR DECLARATION SAYS, CORRECT?

5 A. I BELIEVE THIS CAME UP IN THE -- WHAT IS THIS CALLED?

6 Q. IT IS CALLED A DEPOSITION.

7 A. IN THE DEPOSITION.

8 Q. YES, SIR.

9 A. AND IN THE DEPOSITION I BELIEVE THAT I SAID I DID NOT
10 USE OR ASSIGN THE STUDENTS AS REQUIRED READING MATERIAL, DID
11 NOT USE OR ASSIGN THE STUDENTS -- DID NOT USE -- I DID NOT USE
12 OR ASSIGN ANY OF THE SUPPLEMENTAL READING MATERIALS FOR
13 STUDENTS TO USE IN THE COURSE, SOMETHING LIKE THAT. I WAS
14 TRYING TO DISTINGUISH THE ONES THAT REMAINED SUPPLEMENTAL WERE
15 ALWAYS SUPPLEMENTAL, THE ONES THAT BECAME REQUIRED IN THE
16 COURSE, THEY WERE IN A DIFFERENT CATEGORY BY THE TIME THE
17 COURSE WAS OVER.

18 Q. MAYBE I WILL HELP YOU. WHEN YOUR DEPOSITION WAS TAKEN
19 YOU SAID YOU WOULD MODIFY PARAGRAPH FOUR TO ADD THE WORDS "AS
20 REQUIRED" READING AFTER THE WORD "ASSIGNED"?

21 A. DID NOT USE AS REQUIRED READING.

22 Q. IS THAT A CORRECT STATEMENT OR WOULD YOU?

23 THE COURT: WHICH STATEMENT ARE YOU TALKING ABOUT,
24 YOURS OR THAT ONE?

25 MR. KRUGMAN: THE ONE I JUST READ.

1 BY MR. KRUGMAN:

2 Q. WHEN YOUR DEPOSITION WAS TAKEN YOU SAID THAT YOU WOULD
3 MODIFY PARAGRAPH 4 TO ADD THE WORDS "AS REQUIRED READING"
4 AFTER THE WORD "ASSIGNED," WHICH IS ON THE LAST LINE OF
5 PARAGRAPH 4.

6 A. YEAH, WITH THE EXCEPTION OF THE TEXT WHICH ULTIMATELY
7 WERE TEXT READING MATERIALS IN THE COURSE.

8 Q. SO, WITH THAT CHANGE, THAT PARAGRAPH OF YOUR
9 DECLARATION WOULD READ THAT, ALTHOUGH I DID TEACH AL 8480 IN
10 MAYMESTER 2009 AND ORIGINALLY REQUESTED THAT THE
11 AFOREMENTIONED WORK BE LOADED TO ERES, I ULTIMATELY DID NOT
12 USE OR ASSIGN AS REQUIRED READING TO MY STUDENTS ANY OF THE
13 MATERIALS LOADED ON TO ERESERVES; IS THAT CORRECT?

14 A. AGAIN, MY INTENTION WAS TO REFLECT THAT THE TEXTS
15 LISTED ON MY COURSE SYLLABUS AS REQUIRED WERE REQUIRED READING
16 MATERIALS. AND EVERYTHING OTHER THAN THOSE WERE
17 SUPPLEMENTAL. SO, IF THE REVISION DURING THE DEPOSITION
18 DIDN'T REFLECT THAT, I REGRET THAT, BUT THAT WAS MY INTENTION.
19 SO I AM TRYING TO DISTINGUISH BETWEEN THOSE TEXTS WHICH
20 ULTIMATELY WERE REQUIRED READING MATERIALS AS CLEARLY
21 INDICATED ON MY SYLLABUS AS OPPOSED TO THE ONES THAT REMAIN
22 SUPPLEMENTARY READING MATERIALS.

23 Q. YOU WOULD AGREE THAT THE WORD SUPPLEMENTAL IS NOWHERE
24 IN YOUR DECLARATION, SIR, WOULD YOU NOT?

25 A. I WOULD HAVE TO READ THE DECLARATION.

1 Q. YOU MAY LOOK AT IT.

2 A. I NOTICE ON POINT FIVE I LISTED THE TEXTS THAT WERE
3 REQUIRED READING IN THE COURSE. I DON'T FIND THE WORD
4 "SUPPLEMENTAL."

5 Q. IN FACT, SIR, ISN'T IT TRUE, THAT WHEN YOU INITIALLY
6 REQUESTED THOSE WORKS TO BE POSTED ON RESERVE, ELECTRONIC
7 RESERVE AT THE LIBRARY, IT WAS YOUR INTENTION THAT THOSE
8 WORKS WERE GOING TO BE THE REQUIRED READINGS FOR STUDENTS IN
9 THIS COURSE THAT YOU WERE TEACHING IN THE MAYMESTER OF 2009?

10 A. NO, ABSOLUTELY NOT.

11 Q. NOW, YOU UNDERSTOOD THE COPIES OF THOSE WORKS WERE
12 UPLOADED ONTO ELECTRONIC RESERVE FOR THE 2009 MAYMESTER COURSE
13 BY THE LIBRARY ERESERVE STAFF AT YOUR DIRECTION, CORRECT?

14 A. YES.

15 Q. AND IF YOU COULD TAKE A LOOK AT, I BELIEVE IT IS IN
16 YOUR NOTEBOOK, PROFESSOR MURPHY, PLAINTIFF'S EXHIBIT 656, AND
17 ACTUALLY IT IS NOT IN YOUR NOTEBOOK?

18 A. 656 IS LISTED HERE.

19 Q. OKAY.

20 A. THIS IS "PRONUNCIATION GAMES."

21 Q. YEAH, RIGHT. THIS IS THE CHECKLIST FOR THE WORK BY
22 HANCOCK FROM "PRONUNCIATION GAMES"?

23 A. YES.

24 Q. AND I BELIEVE THIS CHECKLIST IS SOMETHING I GUESS YOU
25 CREATED BEFORE YOUR DEPOSITION WAS TAKEN IN THIS CASE IN APRIL

1 OF 2011, CORRECT?

2 A. UPON REQUEST BY THE LEGAL AFFAIRS OFFICE OF GSU AND I
3 THINK IT WAS MARCH. IT IS WHENEVER MY INTERNATIONAL
4 CONFERENCE WAS IN NEW ORLEANS.

5 Q. WE WILL GET TO THAT MOMENTARILY TO TRY TO PINPOINT THE
6 EXACT DATE THAT IT OCCURRED. BUT WITHOUT REGARD TO THE
7 SPECIFIC DATE, PLAINTIFF'S TRIAL EXHIBIT 656 IS A CHECKLIST
8 THAT YOU CREATED FOR THE HANCOCK WORK "PRONUNCIATION GAMES";
9 IS THAT CORRECT?

10 A. YES.

11 Q. NOW, THERE IS AN ENTRY ON YOUR FORM FOR DROP-OFF DATE,
12 APRIL 27TH, 2009, DO YOU SEE THAT?

13 A. YES.

14 Q. AM I CORRECT THAT THE DROP-OFF DATE ON THIS CHECKLIST
15 REFERS TO YOUR BEST ESTIMATE OF WHEN YOU DROPPED THE WORK OFF
16 WITH THE ERESERVE DESK?

17 A. MY BEST ESTIMATE WHEN I WAS IN NEW ORLEANS IN 2011,
18 YES.

19 Q. THAT WAS YOUR BEST ESTIMATE AT THAT TIME OF WHEN YOU
20 ACTUALLY PHYSICALLY TOOK A COPY OF THAT WORK TO THE LIBRARY?

21 A. YEAH. ON THAT DROP-OFF DATE WHEN I WAS IN NEW ORLEANS
22 ATTENDING THE CONFERENCE I WAS NOT SURE OF THE EXACT DROP-OFF
23 DATE.

24 Q. SO WITH RESPECT TO PLAINTIFF'S TRIAL EXHIBIT 656, WHEN
25 YOU CREATED THE CHECKLIST AND WROTE "DROP-OFF DATE," YOU

1 REALLY WEREN'T SURE OF THAT DATE, IS THAT WHAT YOU ARE
2 TELLING US?

3 A. I DIDN'T HAVE A CALENDAR WITH ME THAT WENT BACK TO
4 2009, SO I WAS DOING MY BEST TO ESTIMATE WHEN IT WOULD HAVE
5 BEEN.

6 Q. THAT WAS YOUR BEST ESTIMATE IN MARCH OF 2011, CORRECT?

7 A. YES.

8 Q. NOW, YOU PHYSICALLY DROPPED OFF A COPY OF THAT WORK AT
9 THE LIBRARY, CORRECT?

10 A. MY PROCEDURE WOULD HAVE BEEN, KNOWING THE WAY THAT I
11 OPERATE WITH MATERIAL LIKE THIS, I WOULD HAVE MADE THE
12 PHOTOCOPIES OF THE PAGES MYSELF. I WOULD HAVE CARRIED THE
13 PHOTOCOPIES, THE PAGES, OVER TO THE ERESERVES MYSELF. I MAY
14 HAVE HAD THEM INSERTED INTO THE BOOK ITSELF, THAT PART I AM
15 NOT SURE OF. SO I EITHER WALKED OVER THE PHOTOCOPIED PAGES
16 IN HARD COPY MYSELF. I MIGHT HAVE INCLUDED BOTH THE
17 PHOTOCOPIES AND THE ORIGINAL TEXT, BUT I AM NOT SURE IF THE
18 ORIGINAL TEXT WAS THERE OR NOT.

19 Q. OKAY. THAT IS WHAT I AM TRYING TO UNDERSTAND. YOU
20 KNOW, YOU ARE CERTAIN YOU TOOK A PHOTOCOPY OF THE WORK,
21 CORRECT?

22 A. YES.

23 Q. BUT YOU ARE NOT CERTAIN IF YOU MAY HAVE TAKEN THE
24 ENTIRE BOOK THAT THAT PHOTOCOPY CAME FROM THE LIBRARY?

25 A. MY CONCERN IS I OWNED THE BOOK. I WOULD BE CONCERNED

1 IT WAS BEING MISTREATED OR LOST SOMEHOW SO I MAY HAVE, I AM
2 NOT SURE.

3 Q. YOU REQUESTED APPROXIMATELY 20 SEPARATE WORKS BE POSTED
4 ON ERESERVE FOR THIS MAYMESTER 2009 COURSE, CORRECT?

5 A. I DON'T HAVE A RECORD OF THAT HERE. THE ONLY THING I
6 HAVE BEEN REVIEWING RELATING TO THIS LITIGATION IS THE ONES
7 LISTED, THE NINE LISTED TO ME. IF YOU SAY THERE WERE 20,
8 OKAY. I DON'T HAVE --

9 Q. IT IS A LARGE NUMBER?

10 A. OKAY.

11 Q. YOU DON'T RECALL CARRYING 20 BOOKS WITH YOU TO THE
12 LIBRARY, DO YOU, SIR?

13 A. I REMEMBER WHEN I WENT OVER, WHATEVER IT IS THAT I
14 BROUGHT, I TOOK IN ONE TRIP.

15 Q. OKAY. SO YOU DELIVERED TO THE LIBRARY ON APRIL 27TH A
16 PHOTOCOPY OF EACH OF THE WORKS THAT YOU WANTED THE LIBRARY TO
17 POST ON ELECTRONIC RESERVE?

18 A. YES.

19 Q. THOSE WERE WORKS THAT YOU INITIALLY PLANNED TO ASSIGN
20 TO STUDENTS, WE WON'T QUIBBLE WHETHER THEY WERE SUPPOSED TO BE
21 REQUIRED OR SUPPLEMENTAL, BUT IT WAS YOUR PLAN TO PROVIDE
22 THOSE READINGS TO STUDENTS IN YOUR MAYMESTER COURSE ON
23 ELECTRONIC RESERVE; IS THAT CORRECT?

24 A. YOU USE THE WORD "ASSIGNED," I CANNOT SAY YES WITH THE
25 WORD "ASSIGNED" THERE. THEY WEREN'T INTENDED AS

1 SUPPLEMENTARY MATERIALS.

2 Q. AS THE START OF THE COURSE APPROACHED, YOU DECIDED
3 THAT CERTAIN HARD COPY MATERIAL YOU HAD ASSIGNED WOULD SUFFICE
4 FOR THIS COURSE; IS THAT CORRECT?

5 A. THAT IS AS THE START DATE OF THE COURSE GOT CLOSER, I
6 DECIDED THAT I DEFINITELY WANTED THE STUDENTS TO OWN FOUR
7 BOOKS THEY WOULD USE IN THE COURSE AS THE CORE REQUIRED
8 READING COURSE IN THE BOOK AS REFLECTED IN THE SYLLABUS.
9 YES, I DECIDED THERE WERE FOUR TEXTS THAT I WANTED THEM TO
10 OWN AND PURCHASE.

11 Q. IF YOU COULD TURN PLEASE TO PAGE 33 OF YOUR DEPOSITION
12 BEGINNING AT LINES 13 CARRYING OVER TO PAGE 34, LINE 16.

13 A. PAGE 33?

14 (WHEREUPON, THE VIDEOTAPE DEPOSITION WAS PLAYED.)

15 "Q. OKAY. MY QUESTION IS" --

16 MR. KRUGMAN: STOP FOR ONE SECOND, BRAD. I WILL LET
17 YOU LOOK.

18 THE WITNESS: IT IS AT THE MIDDLE OF THE PAGE?

19 BY MR. KRUGMAN:

20 Q. YES, SIR.

21 A. I HADN'T SEEN THE NUMBERS IN THE LEFT-HAND COLUMN.

22 Q. LINE NUMBERS ARE ON THE LEFT.

23 MR. KRUGMAN: START THAT OVER, PLEASE.

24 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS PLAYED.)

25 "Q. OKAY. MY QUESTION IS, WHY DID

1 YOU NOT USE OR ASSIGN THOSE
2 MATERIALS?

3 A. SO, SO IN THE ERESERVE SYSTEM,
4 LET ME THINK FOR A SECOND. AS A
5 FACULTY MEMBER, YOU HAVE TO MAKE
6 DECISIONS ABOUT WHAT IS GOING TO BE
7 PLACED ON ELECTRONIC RESERVE FURTHER
8 IN ADVANCE OF THE START DATE FOR THE
9 COURSE THAN MAKING FINAL DECISIONS
10 ON YOUR COURSE SYLLABUS AND HOW THE
11 COURSE IS ACTUALLY PLANNED OUT AND
12 THE SYLLABUS HANDED TO STUDENTS ON
13 THE FIRST DAY OF CLASS."

14 MS. QUICKER: OBJECTION, YOUR HONOR, IT IS IMPROPER
15 IMPEACHMENT.

16 THE WITNESS: "SO THINGS HAVE TO BE" --

17 THE COURT: STOP.

18 MR. KRUGMAN: STOP IT.

19 THE COURT: LET ME HEAR FROM BOTH SIDES.

20 MS. QUICKER: TESTIMONY IS ENTIRELY CONSISTENT WITH
21 WHAT HE JUST TESTIFIED TO.

22 MR. KRUGMAN: I THINK WHEN YOU GET IN TERMS OF HIS
23 PUSH BACK ON WHETHER THESE READINGS WOULD SUFFICE, I AM NOT
24 CERTAIN THAT WAS HIS TESTIMONY.

25 THE COURT: LET ME ASK THIS FIRST. DO WE HAVE A

1 RECORD OF WHAT YOU ARE PLAYING NOW?

2 MR. KRUGMAN: WE WILL PROVIDE THAT WITH YOUR HONOR AS
3 WE HAVE DONE WITH THE OTHER EXCERPTS THAT HAVE BEEN PLAYED,
4 BOTH AS PART OF DIRECT EXAMINATION AND ALSO WHEN WE HAVE
5 PERIODICALLY HAD PORTIONS PLAYED DURING CROSS-EXAMINATION.

6 THE COURT: HAVE WE GOTTEN TO THE PART THAT YOU
7 CONTEND CONTRADICTS HIS IN-COURT TESTIMONY?

8 MR. KRUGMAN: NO. THE PROBLEM WAS IT IS A LONG, THE
9 WITNESS IN DEPOSITION, WHICH I WAS NOT AT, WAS AT TIMES
10 SOMEWHAT --

11 THE COURT: WHY DON'T YOU --

12 MR. KRUGMAN: -- SOME LONG RESPONSES.

13 THE COURT: WHY DON'T WE DO THIS. I WILL SUSTAIN
14 THE OBJECTION. JUST GO TO THE PART THAT YOU CONTEND IS
15 CONTRADICTORY AND JUST READ IT OUT.

16 MR. KRUGMAN: OKAY. LET ME FIND.

17 "ASSIGN THOSE MATERIALS" AND ON PAGE

18 34, LINE 8: "THAT I DECIDED THAT
19 HARD COPY MATERIAL THAT THEY WOULD
20 OWN WOULD SUFFICE FOR THE KIND OF
21 MICROTEACHING ACTIVITIES THAT WE
22 WERE GOING TO DO IN THE COURSE."

23 AND SO HE --

24 MS. QUICKER: YOUR HONOR, IN THE VERY NEXT FOUR
25 LINES:

1 "STILL ELECTRONIC MATERIAL FOR ME
2 WAS SUPPLEMENTARY MATERIAL TO
3 SUPPORT THE HARD COPY MATERIAL THEY
4 WERE ACTUALLY GOING TO OWN AND USE
5 IN A COURSE AS A BASIS FOR THEIR
6 MICROTEACHING ACTIVITIES."

7 THE COURT: I WILL SUSTAIN THE OBJECTION.

8 MR. KRUGMAN: I WILL NOTE THAT WAS IN THE PORTION
9 THAT WAS TO BE PLAYED.

10 THE COURT: I GOT YOU.

11 BY MR. KRUGMAN:

12 Q. DID YOU HAVE, ON APRIL 27TH, DID YOU HAVE A DRAFT OF
13 THE SYLLABUS FOR THIS COURSE?

14 A. OKAY. I CAN TALK TO YOU ABOUT THE PROCEDURE I USE FOR
15 COURSE SYLLABUS. THE PROCEDURE IS I AM TINKERING WITH THE
16 COURSE SYLLABUS UP UNTIL THE VERY START OF THE COURSE,
17 USUALLY A FEW HOURS BEFORE THE COURSE.

18 THE COURT: ARE YOU SPEAKING OF THE SPECIFIC
19 INSTANCE THAT MR. KRUGMAN WAS ASKING YOU ABOUT OR JUST WHAT
20 YOUR GENERAL PRACTICES ARE?

21 THE WITNESS: BOTH, MY GENERAL PRACTICES AND WHAT I
22 DID THAT SUMMER.

23 THE COURT: I THINK HE IS INQUIRING ABOUT WHAT
24 HAPPENED THAT PARTICULAR TIME.

25 BY MR. KRUGMAN:

1 Q. THAT IS ALL I WANT TO KNOW. ON OR ABOUT APRIL 27TH OF
2 2009, YOUR BEST ESTIMATE IS THAT IS WHEN YOU WALKED OVER SOME
3 VOLUME OF MATERIALS TO THE LIBRARY TO REQUEST THAT THEY BE
4 POSTED ON ELECTRONIC RESERVE FOR THE MAYMESTER 2009 COURSE
5 THAT YOU WOULD BE TEACHING?

6 A. MY BEST ESTIMATE.

7 Q. LET ME --

8 A. SORRY.

9 Q. YOU SAID THAT IS YOUR BEST ESTIMATE WHEN YOU CREATED
10 THESE CHECKLISTS IN MARCH OF 2011, I UNDERSTAND THAT. WHEN
11 YOU DID THAT YOU OBVIOUSLY HAD SOME PURPOSE IN MIND FOR HAVING
12 THOSE READINGS POSTED ON ELECTRONIC RESERVES, CORRECT? YES OR
13 NO?

14 A. YOUR HONOR, I AM UNDER OATH. I FEEL I HAVE TO GIVE
15 MORE OF AN EXPLANATION THAN YES OR NO.

16 THE COURT: ANSWER YES OR NO FIRST. THERE MAY BE
17 SOME EXPLANATION THAT IS PERMISSIBLE, BUT NOW I HAVE FORGOTTEN
18 WHAT THE QUESTION IS.

19 MR. KRUGMAN: I HAVE ALMOST FORGOTTEN IT.

20 BY MR. KRUGMAN:

21 Q. WHEN YOU WENT OVER TO THE LIBRARY SOME TIME BEST
22 ESTIMATE APRIL, YOU HAD, I WILL REPRESENT TO YOU,
23 APPROXIMATELY 20 WORKS THAT YOU WERE ASKING THE LIBRARY TO
24 POST ON ELECTRONIC RESERVE. YOU HAD SOME PURPOSE IN MIND FOR
25 DOING THAT, CORRECT?

1 A. I HAD A PURPOSE IN MIND, YES.

2 Q. BECAUSE THOSE WERE GOING TO BE WORKS THAT IN SOME
3 FASHION THE STUDENTS IN THE COURSE THAT YOU WERE GOING TO BE
4 TEACHING IN MAYMESTER OF 2009 WOULD BE USING?

5 A. I KNEW THEY WOULD BE USED AS SUPPLEMENTARY MATERIALS,
6 YES.

7 Q. MY QUESTION IS, WHEN YOU WENT OVER TO THE LIBRARY,
8 WHATEVER THE SPECIFIC DATE IS, DID YOU HAVE A DRAFT SYLLABUS
9 PREPARED FOR THIS MAYMESTER COURSE THAT YOU WOULD BE TEACHING
10 IN JUST A FEW WORKS?

11 A. I HAD BEEN DRAFTING THE SYLLABUS, YES.

12 Q. YOU HAD A DRAFT SYLLABUS?

13 A. I HAD BEEN DRAFTING A SYLLABUS, YES.

14 Q. ON APRIL 27 -- ON OR ABOUT APRIL 27, 2009, YOU HAD A
15 DRAFT SYLLABUS, DID THAT DRAFT SYLLABUS HAVE ANY REQUIRED TEXT
16 FOR PURCHASE BY STUDENTS IN THIS COURSE?

17 A. I DON'T REMEMBER.

18 Q. AT SOME POINT YOU DECIDED YOU WERE GOING TO HAVE
19 REQUIRED TEXT, CORRECT?

20 A. YES.

21 Q. AND YOU CONCLUDED, AS YOU TESTIFIED IN DEPOSITION,
22 THAT THOSE TEXTBOOKS WOULD SUFFICE FOR THE READINGS THAT YOU
23 HAD REQUESTED THE LIBRARY TO POST ON ELECTRONIC RESERVE; IS
24 THAT CORRECT?

25 A. AS REQUIRED READINGS, YES.

1 Q. AND AT SOME POINT YOU REMOVED THOSE MATERIALS FROM YOUR
2 SYLLABUS?

3 A. WAIT, REMOVE WHAT?

4 Q. AT SOME POINT YOU HAD A DRAFT SYLLABUS WITH A BUNCH
5 WHAT YOU DESCRIBE AS SUPPLEMENTAL READINGS?

6 A. NO. I NEVER GOT TO THE POINT IN A DRAFT SYLLABUS OF
7 LISTING ALL OF THAT MATERIAL. I MEAN THAT WOULD HAVE
8 INVOLVED IN BEING CAREFUL ABOUT THE CITATION TO THE REFERENCE,
9 THE AUTHOR, THE YEAR, THE PUBLISHER, NO, IT NEVER GOT TO
10 THAT POINT IN THE DRAFT SYLLABUS.

11 Q. HOW DID YOU SELECT THE WORKS THAT YOU TOOK OVER TO THE
12 LIBRARY IN APRIL OF 2009 TO HAVE POSTED ON ELECTRONIC
13 RESERVES?

14 A. YEAH, AS I REPRESENTED I BELIEVE IN DEPOSITION AND
15 TODAY IN COURT, IN MY OFFICE I HAVE 35 OR 40 EXAMPLES OF THIS
16 GENRE OF MATERIAL, ACTIVITY RECIPE COLLECTIONS, THEY ARE ALL
17 ON MY OFFICE SHELF, I CAN SEE THEM AS I SIT HERE. RELATIVELY
18 SIMPLE MATTER FOR ME TO LOOK OVER TO THE SHELF. THESE ARE
19 ACTIVITY RECIPE COLLECTIONS. THESE ARE THE THINGS I WOULD
20 LIKE STUDENTS TO BE AWARE OF THAT THEY MAY IN FACT SOME DAY
21 PURCHASE THEMSELVES. THESE ARE THE TOOLS OF THE TRADE OF MY
22 FIELD SO THAT IS HOW I WOULD HAVE SELECTED THEM.

23 Q. DID YOU PICK THEM RANDOMLY?

24 A. I HAVE THINGS CATEGORIZED ACCORDING TO SKILL AREAS AND
25 FOCUS. SOME OF THEM CATEGORIZED ACCORDING TO THE PUBLISHER

1 AND MATERIALS I AM VERY FAMILIAR WITH. I USE THEM ALL THE
2 TIME. I WOULDN'T CHARACTERIZE IT AS RANDOM. I WAS TRYING
3 TO BE THOROUGH IN PROVIDING RESOURCES TO STUDENTS OF MY
4 COURSE, SUPPLEMENTARY MATERIALS THAT WOULD BE HELPFUL AND
5 HEALTHY FOR THEM AS LANGUAGE TEACHERS.

6 Q. WHEN YOU WENT OVER TO THE LIBRARY OR WHEN YOU DECIDED
7 WHICH OF THOSE WORKS YOU WERE GOING TO ASSIGN OR MAKE
8 AVAILABLE TO STUDENTS ON ELECTRONIC RESERVES, DID YOU ALREADY
9 HAVE PHOTOCOPIES OF THOSE WORKS?

10 A. NOW, THOSE WORKS WOULD IMPLY THE WHOLE BOOK, NO, NOT
11 -- FOR SOME OF THE INDIVIDUAL TEXTS, I HAVE PHOTOCOPIES
12 AVAILABLE OF SOME SECTIONS. FOR THE MAYMESTER 2009, I WOULD
13 HAVE GONE THROUGH THE TEXT I WAS SELECTING AND MADE ORIGINAL
14 PHOTOCOPIES OF THE ONES I WANTED TO PRESENT IN SUPPLEMENTAL
15 READING MATERIAL.

16 Q. SO IN APRIL OF 2009, YOU MADE PHOTOCOPIES OF
17 APPROXIMATELY 20 DIFFERENT EXCERPTS FROM BOOKS BEFORE TAKING
18 THOSE OVER TO THE LIBRARY?

19 A. I THINK WE HAVE AGREED, I DON'T KNOW THE EXACT DATE,
20 BUT, YES, AT SOME POINT BEFORE THE START OF THE MAYMESTER
21 COURSE, YES.

22 Q. DID YOU PERSONALLY MAKE THOSE PHOTOCOPIES?

23 A. YES.

24 THE COURT: HOW MUCH LONGER WILL YOU BE?

25 MR. KRUGMAN: THIS MAY BE AN APPROPRIATE TIME.

1 THE COURT: I WILL SEE YOU TOMORROW MORNING AT NINE
2 THIRTY. HAVE A NICE EVENING. PROFESSOR, PLEASE BE HERE NO
3 LATER THAN NINE THIRTY IN THE MORNING.

4 MR. KRUGMAN: YOUR HONOR, IF YOU COULD ALSO CAUTION
5 THE WITNESS. I KNOW THERE WON'T BE AN ISSUE, BUT HE IS ON
6 CROSS-EXAMINATION AND HE SHOULD NOT BE CONSULTING WITH
7 COUNSEL.

8 THE COURT: WELL, WHAT I NORMALLY TELL WITNESSES
9 WHEN THE RULE OF SEQUESTRATION HAS BEEN INVOKED IS THAT YOU
10 SHOULD NOT DISCUSS YOUR TESTIMONY WITH ANYONE EXCEPT FOR
11 COUNSEL FOR EITHER SIDE; HOWEVER, IN THIS PARTICULAR CASE THE
12 LAWYERS HAVE AGREED AMONG THEMSELVES THAT WHEN A WITNESS IS
13 PART WAY THROUGH HIS EXAMINATION HE SHOULD NOT AND CANNOT
14 SPEAK WITH LAWYERS FOR EITHER SIDE. SO I AM INFORMING YOU OF
15 THAT. SEE YOU AT NINE THIRTY.

16 MR. RICH: YOU DID ASK ME TO REMIND YOU.

17 THE COURT: DID YOU HAVE TIME TO TALK AMONG
18 YOURSELVES ABOUT THE LENGTH OF TRIAL?

19 MR. RICH: WE HAVE BEEN DISCUSSING LATELY. BUT IT
20 IS NICE TO SAY THE WITNESS LIST HAS BEEN A STATE SECRET EXCEPT
21 FOR 24 HOURS ADVANCE NOTICE AS POSSIBLE. AT THE SAME TIME
22 MR. SCHAEZEL AND I SPOKE THIS MORNING, IT WAS AN ASPIRATIONAL
23 GOAL TO FINISH THIS WEEK. I SEE THE WATER TORTURE, I WAS
24 HOPING MAYBE WE COULD GET SOME CLARITY ABOUT CLOSURE AND THEN
25 MAYBE CLOSING ARGUMENTS FROM YOUR HONOR, ET CETERA.

1 MR. SCHAEZEL: I WILL. OUR WITNESS LIST IS NOT A
 2 STATE SECRET, IT IS IN THE PRETRIAL ORDER. AS WE
 3 ANTICIPATED, THE ISSUE OF FAIR USE IS STILL VERY MUCH AT ISSUE
 4 IN THE CASE. WE FEEL THE QUESTIONS ARE APPROPRIATE. WITH
 5 THAT SAID, WE DO BELIEVE WE WILL BE ABLE TO FINISH OUR CASE
 6 THIS WEEK. TODAY HAS QUITE FRANKLY GONE QUITE SLOWER THAN I
 7 HAD ANTICIPATED. WE DO BELIEVE IT WILL PICK UP AS THE WEEK
 8 GOES ON.

9 THE COURT: YOU HAVE A NICE EVENING. SEE YOU
 10 TOMORROW.

11 *** END OF REQUESTED TRANSCRIPT ***

12 * * * * *

13 CERTIFICATE OF REPORTER

14 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
 15 MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED MATTER.

20 S/DEBRA R. BULL, RPR, CRR

JUNE 28, 2011
 DATE

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