

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

3 CAMBRIDGE UNIVERSITY PRESS,)
ET AL.,)
4)
)
)
)
)
6 VERSUS)
)
)
7 J. L. ALBERT, IN HIS OFFICIAL)
CAPACITY AS GEORGIA STATE)
8 UNIVERSITY ASSOCIATE PROVOST)
FOR INFORMATION SYSTEMS AND)
9 TECHNOLOGY, ET AL.,)
)
)
10 DEFENDANTS.)
)
11 _____)

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

14 APPEARANCES:

15 FOR THE PLAINTIFF: EDWARD B. KRUGMAN, ESQ.
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1 APPEARANCES CONTINUED

2 FOR THE DEFENDANT:

STEPHEN M. SCHAEZEL, ESQ.
JOHN W. HARBIN, ESQ.
NATASHA MOFFITT, ESQ.
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UNITED STATES COURT REPORTER
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18 STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

19 *** **

INDEX

KENNETH CREWS

DIRECT EXAM BY MR. SCHAE TZEL

14

CROSS EXAM BY MR. RICH

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1 THE COURT: GOOD MORNING.

2 MR. RICH: WE WERE HOPING TO RENEW OUR MOTION TO
3 EXCLUDE DR. CREWS'S TESTIMONY MAY BE HEARD. IF I COULD BE
4 HEARD BRIEFLY ON THAT.

5 THE COURT: YES.

6 MR. RICH: IT IS EVIDENT THAT DR. CREWS'S TESTIMONY
7 WILL NOT PARTICULARLY BENEFIT THE TRIAL RECORD THAT HAS NOW
8 BEEN DEVELOPED AND ASSIST THE COURT IN ITS UNDERSTANDING OF
9 ITS EVIDENCE OR DETERMINATION OF ANY FACTS IN ISSUE.

10 DR. CREWS IS A COPYRIGHT LAWYER -- AND INCIDENTALLY, I
11 THINK FOR THIS PURPOSE, MAY WE EXCUSE THE WITNESS?

12 THE COURT: PLEASE STEP OUT IN THE HALL, PLEASE.
13 (WHEREUPON, THE WITNESS LEFT THE COURTROOM.)

14 MR. RICH: THANK YOU.

15 DR. CREWS IS A COPYRIGHT LAWYER WHOSE CAREER HAS BEEN
16 DEVOTED TO ASSISTING USERS IN MAXIMIZING THEIR USE OF THE FAIR
17 USE DOCTRINE. EVEN AT THAT, EVEN TAKING THAT INTO ACCOUNT,
18 HE IS NOT AN IMPARTIAL EXPERT HAVING, IN EFFECT, APPEARED HERE
19 TO DEFEND THE VERY CHECKLIST WHICH HE CONSULTED WITH GEORGIA
20 STATE UNIVERSITY AND THE UNIVERSITY SYSTEM OF GEORGIA TO
21 ADOPT.

22 MOST OF HIS TWO EXPERT REPORTS, WHICH FORM THE PREDICATE
23 OF HIS TESTIMONY, ARE DEVOTED TO FRANKLY ESCHEWED LEGAL
24 ANALYSIS OF COPYRIGHT LAW BASED ON THAT BIAS. NOW, THE COURT
25 HAS ALREADY RULED, I APPRECIATE, IN SEPTEMBER OF '09 THAT YOU

1 WILL DO AS YOU WILL AND DISREGARD SUCH LEGAL DISCUSSION AS YOU
2 BELIEVE INTRUDES ON YOUR PROVINCE, WE UNDERSTAND THAT. BUT
3 THE MAJORITY OF THE REST OF DR. CREW'S EXPERT REPORT CONSISTS
4 OF A RECOUNTING OF A HIGHLY SELECTIVE SURVEY, AS IT WERE, OF
5 COPYRIGHT POLICIES AT AN ADMITTEDLY UNREPRESENTED SAMPLE OF
6 OTHER SCHOOLS. THIS SURVEY WAS NOT DRAWN OR CONDUCTED BY
7 DR. CREWS, IT WAS DONE BY HIS WIFE AND SUPERVISED BY HIM.
8 IT WAS NOT BASED ON ANY RELIABLE METHODS OR PRINCIPLES. IT
9 REFLECTS NO SPECIAL KNOWLEDGE OR EXPERTISE ON HIS PART, JUST
10 HIS SELECTIVE CULLING FROM A STACK OF INTERNET PRINTOUTS
11 PROVIDED BY HIS WIFE OF THOSE PORTIONS OF THOSE POLICIES THAT
12 HE DECIDED FOSTER THE PERSPECTIVE THAT HE PROPOSES TO OFFER IN
13 THOSE.

14 IF YOU LISTENED CAREFULLY TO THE CREDENTIALING OF THE
15 WITNESS YESTERDAY AFTERNOON BY MR. SCHAEZEL, DR. CREWS DID
16 NOT, AS WAS INTIMATED BY THE QUESTIONING, WRITE OR CONSULT ON
17 ANY OTHER POLICIES AT ANY OTHER SCHOOLS EXCEPT THE SCHOOLS BY
18 WHICH HE WAS EMPLOYED, COLUMBIA AND INDIANA. HE ATTENDED
19 MEETINGS, HE HAD INVITATIONS TO SPEAK AT LUNCH, HE DID NOT
20 CRAFT ANY OTHER POLICIES AT ANY OTHER SCHOOL.

21 IN ANY EVENT, THOUGH, EVEN BEYOND THAT AND PROBABLY MORE
22 IMPORTANTLY, HE HAS NO KNOWLEDGE, EVEN AS TO THOSE POLICIES,
23 HOW ANY OF THEM WAS INTIMATED. HE IS COMMENTING ON THE FACE
24 OF THE POLICIES. AND IF WE KNOW ANYTHING OF THE SEVERAL WEEKS
25 WE HAVE BEEN BEFORE YOUR HONOR AT TRIAL HERE, WHAT IS ON THE

1 FACE OF A POLICY CAN SAY VERY LITTLE ABOUT HOW IN FACT THAT
2 POLICY IS IMPLEMENTED IN NATURAL PRACTICE.

3 SO WHEREAS HERE THE ISSUE THAT YOUR HONOR HAS ASKED THE
4 PARTIES TO FOCUS ON, WHICH IS WHETHER GSU'S OWN COPYRIGHT
5 POLICY IN ITS DAY-TO-DAY APPLICATION HAS FOSTERED
6 INFRINGEMENTS OF COPYRIGHT REQUIRING REMEDIATION, IS
7 COMPLETELY IRRELEVANT TO THE ANSWER OF THAT QUESTION OF WHAT
8 THE FACIAL POLICY OF ASHLAND UNIVERSITY MAY BE OR ANY OTHER
9 SCHOOL, ESPECIALLY SINCE AGAIN IT IS NOT BEING OFFERED TO
10 INDICATE WHAT THE IMPLEMENTATION OR THE PRACTICE EVEN UNDER
11 THOSE POLICIES HAS BEEN.

12 AS FAR AS DR. CREWS'S EXPERTISE AS TO THE GSU POLICIES,
13 HE ADMITTED IN HIS DEPOSITION THAT ALL HE PURPORTED TO DO WAS
14 TO TALK ABOUT WHAT AN EXCELLENT POLICY IT IS ON ITS FACE.
15 DIDN'T PURPORT TO SPEAK TO, AND HAD NO KNOWLEDGE ABOUT ITS
16 IMPLEMENTATION, IN FACT. AND WHATEVER HE MAY KNOW ABOUT THAT,
17 YOUR HONOR, COMES FROM THE VERY SAME FACT RECORD THAT YOUR
18 HONOR IS CONSIDERING. IT IS EXPLICITLY YOUR ROLE, NOT AN
19 EXPERT'S ROLE, TO TIE THOSE TRIAL FACTS TO WHATEVER THE POLICY
20 DICTATES HERE MAY BE. IN OTHER WORDS, HE ABSOLUTELY ADDS
21 NOTHING IN THE WAY OF EXPERTISE OR RELEVANCE TO THAT PROCESS.

22 FINALLY, TO THE EXTENT THAT HIS TESTIMONY WOULD PURPORT TO
23 OFFER OPINIONS AS TO THE ECONOMIES AND ECONOMICS OF COPY
24 SHOPS, OF THE COPYRIGHT CLEARANCE CENTER OF WHAT REALLY SERVES
25 PUBLISHERS MARKETS WELL, WELL, DR. CREWS SIMPLY ISN'T

1 QUALIFIED BY ANY SPECIAL BACKGROUND OR TRAINING TO DO SO. HE
2 IS NOT AN ECONOMIST, HE HAS NO BACKGROUND OR EXPERIENCE OR
3 EMPLOYMENT IN ANY OF THOSE INDUSTRIES OR BUSINESSES. HE HAS
4 MADE NO STUDIES, HE HAS PRESENTED NO DATA. WHAT HE DOES IS
5 BASICALLY PRESENT IN HIS EXPERT REPORT A SERIES OF ANECDOTAL
6 EVIDENCE DRAWN FROM THIRD-PARTY'S EXPERIENCES DATING BACK IN
7 SOME CASES TO THE EARLY 2000'S, AND REPORTS IT, AND IT IS IN
8 HIS DEPOSITION, FREELY ADMITTED THAT HE HAD NO BASIS TO DRAW
9 ANY INFERENCES OF ANY GENERALIZED NATURE FROM ANY OF THAT.

10 SO FOR ALL OF THOSE REASONS, WHILE IT UNDOUBTEDLY WILL BE
11 INTERESTING TO HEAR DR. CREWS'S PERSPECTIVE ON ALL OF THESE
12 ISSUES, I RESPECTFULLY SUBMIT THAT IT IS NOT THE PROPER
13 SUBJECT OF EXPERT OPINION.

14 MR. HARBIN: YOUR HONOR, IF I MAY BRIEFLY RESPOND.
15 I WILL BE BRIEF BECAUSE WHILE THIS IS AN IMPORTANT ISSUE TO
16 THE DEFENDANTS, YOUR HONOR HAS SQUARELY ADDRESSED THE MAJORITY
17 OF IT NOT ONCE BUT TWICE, THE FIRST TIME ALMOST TWO YEARS AGO.
18 AND I UNDERSTAND ON THE ISSUE OF THE QUESTION OF THE -- OF
19 PROFESSOR CREWS OFFERING LEGAL TESTIMONY, ALL THE PLAINTIFFS
20 ARE REALLY DOING IS PRESERVING THEIR OBJECTION, WHICH IS ALL
21 THEY SAID IN THE PRETRIAL ORDER IS THAT THEY OBJECTED TO HIS
22 TESTIMONY FOR THE REASONS THEY SET FORTH IN THE PRIOR MOTIONS.

23 AS TO THE ARGUMENT, YOUR HONOR, THAT HIS USE OF OTHER
24 STUDIES, OF OTHER POLICIES, HIS REFERENCES TO OTHER POLICY
25 SOMEHOW DOES NOT MEET THE STANDARDS FOR EXPERT TESTIMONY, TWO

1 PRINCIPLE ARGUMENTS TO THAT, YOUR HONOR. FIRST, I THINK
2 WHEN YOU HEAR THE TESTIMONY IT WILL, AND YOUR HONOR CAN, YOU
3 KNOW, IF IT IS NOT -- A LOT OF HIS ARGUMENTS GO TO
4 CROSS-EXAMINING AND WEIGHT OF HIS TESTIMONY, ET CETERA. BUT,
5 YOUR HONOR, THESE STUDIES, THESE POLICIES, THESE SAME 37
6 POLICIES WERE IN HIS REPORT FROM TWO YEARS AGO. WHEN THEY
7 MOVED TWO YEARS AGO, THEY DID NOT MOVE ON THAT BASIS. AND IN
8 PARAGRAPH ONE OF THE PRETRIAL ORDER, YOUR HONOR PROVIDES
9 THAT THE MOTION IS PENDING, YOU NEED TO STAY -- LOCAL RULE
10 26.2 --

11 THE COURT: I BELIEVE THERE WAS AN OBJECTION IN THE
12 PRETRIAL ORDER TO THE USE OF DR. CREWS'S DEPOSITION. AS I
13 RECALL, I DIDN'T RULE ON IT, I LEFT IT OPEN, YOU KNOW, FOR
14 TRIAL. SO THAT IS WHERE WE ARE.

15 MR. RICH: FOR THE RECORD IT MAY BE THAT MR. HARBIN,
16 I AM SURE HE IS SINCERE IN MAKING THIS STATEMENT, HE MAY BE
17 UNAWARE WE FILED A MOTION EXPRESSLY DIRECTED TO A SECOND
18 MOTION EXPRESSLY DIRECTED TO IN APRIL OF 2010 TO THESE ISSUES
19 AND THAT WAS EXPRESSLY INCORPORATED BY REFERENCE IN OUR
20 PRETRIAL ORDER, AS WELL.

21 MR. HARBIN: MY UNDERSTANDING, THE SECOND MOTION WAS
22 DIRECTED TO THE BIAS ISSUE, WHICH ALSO --

23 THE COURT: YEAH, BUT I AM SURE THAT IN THE
24 PRETRIAL ORDER THERE WAS SOMETHING SAYING THAT THE PLAINTIFFS
25 OBJECT TO THE USE OF DR. CREWS'S TESTIMONY, DIDN'T I?

1 MR. RICH: YES, YOUR HONOR. SIMPLY A MISSTATEMENT
2 OF THE APRIL 13 MOTION, WHICH WAS PREDICATED NOT ONLY ON BIAS,
3 BUT ON PRECISELY THE IMPERMISSIBLE NATURE OF THESE THIRD-PARTY
4 STUDIES.

5 THE COURT: SO, HERE WE ARE TODAY, WE ARE ON FRESH
6 GROUND. YOU CAN MAKE WHATEVER ARGUMENTS YOU WOULD LIKE AND I
7 WILL RULE ON IT.

8 MR. HARBIN: ALL RIGHT. YOUR HONOR, I BELIEVE
9 PROFESSOR CREWS IS, I WOULD SUBMIT ON THAT SECOND ISSUE, YOUR
10 HONOR AGAIN LEGALLY STRONGLY ADDRESSED IT, PRESERVED THEIR
11 OBJECTIONS BY THEIR COMMENT IN THE PRETRIAL ORDER. THIS HAS
12 BEEN SQUARELY REVIEWED AND PROPERLY REVIEWED, WE SUBMIT.
13 YOUR HONOR IS ENTITLED TO CONSIDER THIS TESTIMONY, GIVE IT
14 WHAT WEIGHT YOUR HONOR DEEMS APPROPRIATE. PROFESSOR CREWS IS
15 NOT SIMPLY A COPYRIGHT LAWYER, HE IS AN EXPERT BY EDUCATION
16 AND TRAINING.

17 BY THE WAY, THE RECOLLECTION OF PLAINTIFFS' COUNSEL THAT
18 HE TESTIFIED THAT HE ONLY CONSULTED WITH THE UNIVERSITIES HE
19 HAS BEEN EMPLOYED AT AS A PROFESSOR IS INCORRECT. HE
20 TESTIFIED THAT HE HAS CONSULTED WITH SEVERAL, NOT ALL THESE
21 DRAFTING POLICIES, BUT ASSISTING WITH THE POLICIES, AND IT WAS
22 UP TO TEN. HE DID HIS PH.D. THESIS, NOT AS A LAWYER, IN
23 LIBRARY SCIENCE, PRECISELY ON COPYRIGHT AND LIBRARY SCIENCE,
24 YOUR HONOR. HE HAS CONSULTED WITH THE U.S. GOVERNMENT, HE
25 HAS CONSULTED WITH INTERNATIONAL GOVERNMENT. HE HAS WRITTEN

1 BOOKS ON COPYRIGHT ISSUES IN LIBRARIES.

2 AND, YOUR HONOR, HIS EXPERT REPORT IS NOT PURELY LEGAL, IT
3 IS FACTUAL. WHEN YOU LOOK AT HIS CONCLUSIONS, HE DOES RELY
4 IN PART ON THE POLICY, IN HIS VIEW, COMPORTING WITH HIS
5 UNDERSTANDING OF THE APPLICATION OF THE FOUR FACTORS. THAT
6 IS CERTAINLY A RELEVANT ISSUE IN THIS CASE. WE CITED IN THE
7 INITIAL OPPOSITION TO THEIR MOTION, YOUR HONOR, CASES WHERE
8 THE COURTS HAVE ALLOWED LEGAL TESTIMONY, EVEN ON ULTIMATE
9 ISSUES, BUT CLEARLY WHEN A LEGAL ISSUE IS INVOLVED IN THE
10 APPROPRIATENESS OF THIS POLICY. I CAN IMAGINE THE PLAINTIFFS
11 SCREAMING, YOUR HONOR, IF GEORGIA STATE ADOPTED A POLICY THAT
12 REWROTE TOTALLY OR TOTALLY DISREGARDED THE FOUR FACTORS. SO
13 IT IS CLEARLY A RELEVANT ISSUE IN THE CASE. AND IT IS AN
14 APPLICATION OF LAW AT THESE POLICIES. IS IT, AS THEY CONTEND,
15 RESULT IN A POLICY THAT HAS FURTHER INFRINGEMENT OR DOES IT
16 RESULT IN A POLICY THAT HELPS PROFESSORS COMPLY AND THE SCHOOL
17 COMPLY WITH COPYRIGHT LAW?

18 SO, YES, THESE LEGAL ISSUES ARE CLEARLY IN THE CASE AND
19 YOUR HONOR HAS APPROPRIATELY RULED WITHIN YOUR DISCRETION
20 CLEARLY TO ALLOW CERTAIN TESTIMONY AND DECIDE: A, IS THE
21 SPECIFIC ISSUE GOING TOO FAR OR, B, AM I JUST GOING TO
22 DISREGARD IT BECAUSE I CAN MAKE THIS DECISION ON MY OWN? BUT
23 WE CITED TO THE SUNTRUST CASE, YOUR HONOR, ABOUT "THE WIND
24 DONE GONE" PARODY, WHERE SEVERAL EXPERTS IN THE NORTHERN
25 DISTRICT OF GEORGIA WERE ALLOWED TO FIND, IN MY RECOLLECTION

1 IS MUCH CLOSER TO THE ULTIMATE ISSUE THAN WE ARE DOING HERE.
2 PROFESSOR CREWS IS NOT GOING TO COME IN AND SAY THIS
3 INDIVIDUAL PROFESSOR DIXON MADE A PROPER FAIR USE ANALYSIS AND
4 THE USE OF THAT EXCERPT WAS FAIR USE. THAT IS NOT HIS
5 OPINION. SO WE THINK HIS TESTIMONY IS CLEARLY RELEVANT. IT
6 IS HARD TO IMAGINE SOMEONE WITH DEEPER OR MORE APROPOS
7 EXPERTISE THAN PROFESSOR CREWS, WHICH IS PROBABLY WHY THE
8 PLAINTIFFS PROTEST SO MUCH.

9 I WOULD NOTE, YOUR HONOR, THE PLAINTIFFS' COUNSEL
10 QUESTIONED, QUESTIONED MS. SEAMANS YESTERDAY ABOUT PURELY
11 LEGAL ISSUES, ISN'T IT TRUE, MS. SEAMANS THAT ON THE
12 TRANSFORMATIVE USE IS THE MOST IMPORTANT FACTOR? I FORGOT,
13 FRANKLY FACTOR TWO OR THREE, PURELY LEGAL QUESTION? IT IS
14 PERFECTLY APPROPRIATE FOR THIS EXPERT TO COME IN AND ADDRESS
15 THESE LEGAL ISSUES. THE PLAINTIFF CLEARLY BELIEVES IT IS
16 APPROPRIATE TO SOLICIT TESTIMONY FROM WITNESSES ON THESE LEGAL
17 ISSUES. IT IS CLEARLY, SQUARELY INVOLVED IN THE APPLICATION
18 OF THIS POLICY, THE DRAFTING OF THIS POLICY AND ITS
19 APPLICATION.

20 THE FACT THAT HE MAY OR MAY NOT HAVE KNOWLEDGE ABOUT THE
21 ACTUAL IMPLEMENTATION AGAIN GOES TO THE WEIGHT, YOUR HONOR, I
22 THINK. AND I THINK IT BEARS MENTIONING, I DON'T WANT TO GET
23 TOO MUCH IN THE ULTIMATE MERITS, I DO SUBMIT -- WE SUBMIT THE
24 PLAINTIFFS ARE MIXING UP THE ISSUE OF, IS THIS A VIOLATION FOR
25 WHICH YOU CAN HOLD GEORGIA STATE AND ITS ADMINISTRATORS AND

1 BOARD OF REGENTS LIABLE VERSUS POORLY IMPLEMENTED POLICY WHICH
2 IS A GOOD POLICY THAT IS NOT, I SUBMIT, THAT DOESN'T MEET
3 THEIR BURDEN OF PROOF, BUT IT ALSO ISN'T A STANDARD FOR
4 JUDGING WHETHER THIS EXPERT SHOULD TESTIFY. ALSO DISAGREE
5 WITH HIS CHARACTERIZATION YOU CAN'T ADDRESS IMPLEMENTATION
6 DEALING WITH -- BY THE FACE OF THE POLICY. SURE THERE HAVE
7 BEEN SOME PROFESSORS, YOUR HONOR, WHO DIDN'T FOLLOW POLICY,
8 DIDN'T PHYSICALLY FILL OUT A CHECKLIST, DIDN'T KEEP A COPY,
9 BUT THAT DOESN'T MEAN THE POLICY ISN'T A GOOD POLICY. THE
10 FACT IS THAT IS GOING TO HAPPEN ON ANY POLICY. ANY RULE, ANY
11 REGULATION THERE ARE GOING TO BE SOME PEOPLE WHO WILL BE
12 DILIGENT, SOME LESS DILIGENT. IT PROVIDES AGAIN FOR PASSWORD
13 PROTECTION, WHICH BEEN NO EVIDENCE THAT WAS DISREGARDED.
14 PROVIDES FOR THE REMOVAL OF MATERIAL. BEEN NO EVIDENCE THAT
15 WAS DISREGARDED. SO, YES, THE FACE OF THE POLICY CLEARLY
16 DOES ADDRESS THE IMPLEMENTATION OF THE POLICY.

17 REGARDING THE ISSUE OF ECONOMIC ISSUES, THAT IS NOT GOING
18 TO BE THE THRUST OF HIS TESTIMONY, YOUR HONOR, THE ISSUE HE
19 WAS WORRIED ABOUT. BUT I WILL AGAIN SUBMIT THAT TO THE EXTENT
20 HE DOES GET UP ON DIRECT OR CROSS-EXAMINATION, THAT ANY ISSUES
21 ABOUT LACK OF STUDY WOULD GO TO THE WEIGHT. AGAIN, HE HAS
22 DEALT IN THIS ISSUE BASICALLY ON A DAILY BASIS. ALL OF THESE
23 FACTOR ISSUES WHICH INCLUDES MARKET EFFECT WITH UNIVERSITIES
24 AND THEY CAN ARGUE, YOUR HONOR, HE IS DOING IT TO HELP USERS
25 MAXIMIZE THEIR USE. I THINK DR. CREWS WOULD CONTEST THAT

1 BECAUSE THE ACADEMIC INVOLVES, AS YOU HEARD, IT INVOLVES
2 AUTHORS WHO ARE CREATING CONTENT AND HAVE COPYRIGHTS. SO,
3 IT IS A COMMUNITY, IT IS NOT SIMPLY USERS. SO I THINK HE
4 WOULD CONTEST THAT.

5 HE HAS BEEN HIRED AGAIN BY GOVERNMENTS TO LOOK AT IT, NOT
6 JUST FROM THE USER PERSPECTIVE, BUT WHAT IS A GOOD OVERALL
7 POLICY. I WOULD DISAGREE WITH THAT CHARACTERIZATION, YOUR
8 HONOR, BUT AGAIN IT WOULD GO TO THE WEIGHT. THEY CAN ARGUE
9 BIAS ALL THEY WANT.

10 AND I WOULD FINALLY POINT OUT, YOUR HONOR, IN REGARD TO
11 THIS ECONOMIC ISSUE, AS THE COURT MAY REMEMBER, THE
12 PLAINTIFFS PUT ON A LOT OF ECONOMIC EVIDENCE. I WOULDN'T
13 SUBMIT IT QUALIFIED AS ECONOMIC EVIDENCE, BUT TESTIMONY ABOUT
14 HARM TO THE PUBLISHERS WITHOUT MARKET STUDIES, WITHOUT DATA,
15 WITHOUT AN EXPERT, BY PEOPLE WHO HAD NO SUCH KNOWLEDGE WHEN
16 THEY WERE PRODUCING 30 (B) 6 REPRESENTATIVES.

17 THE COURT: WE NEED TO MOVE ON. I WILL OVERRULE
18 THE MOTION. BASED ON WHAT DR. CREWS SAID YESTERDAY, I THINK
19 HE PROBABLY DOES HAVE THE CREDENTIALS AND THE EXPERIENCE TO
20 ASSIST ME IN RESOLVING ISSUES OF FACT IN THIS CASE AND
21 POTENTIALLY TO BE OF ASSISTANCE IN RESOLVING ISSUES OF LAW.

22 HAVING SAID THAT, I DO WANT TO EMPHASIZE I AM QUITE AWARE
23 OF THE FACT THAT THE COURT ALONE HAS THE RESPONSIBILITY FOR
24 DETERMINING ISSUES OF LAW AND THAT AN EXPERT'S TESTIMONY DOES
25 NOT IN ANY WAY SUPPLANT THE COURT'S OBLIGATION TO THOROUGHLY

1 INVESTIGATE THE LAW AND MAKE AN INDEPENDENT DECISION. BUT I
2 DO HAVE SOME RECOLLECTION OF DR. CREWS'S TESTIMONY, I GUESS IT
3 IS FROM THE SUMMARY JUDGMENT MOTION, I DON'T RECALL NOW, AND
4 I THINK HE DOES HAVE SOME KNOWLEDGE AND INFORMATION THAT MAY
5 BE HELPFUL TO ME. SO, I AM GOING TO GO AHEAD AND LET HIM
6 TESTIFY WITH THE CAVEAT THAT IT IS POSSIBLE THERE WILL BE SOME
7 QUESTIONS THAT HE WOULD NOT BE ALLOWED TO ANSWER. I NEED TO
8 HEAR THE QUESTIONS, SO LET'S PROCEED.

9 MR. RICH: THANK YOU, YOUR HONOR.

10 DIRECT EXAM CONTINUED

11 BY MR. SCHAEZEL:

12 Q. GOOD MORNING, DR. CREWS.

13 A. GOOD MORNING.

14 Q. AT OUR REQUEST, HAVE YOU REVIEWED THE COPYRIGHT
15 POLICIES ADOPTED BY THE UNIVERSITY SYSTEM OF GEORGIA,
16 INCLUDING THE FAIR USE CHECKLIST?

17 A. YES, I HAVE. CAN I TAKE A MOMENT AND EXPLAIN WHAT I
18 THINK YOU MEAN BY "THE POLICY"?

19 Q. NO.

20 THE COURT: PULL THAT MIKE OVER TO YOUR RIGHT A
21 LITTLE BIT, DR. CREWS.

22 BY MR. SCHAEZEL:

23 Q. HAVE YOU REACHED ANY OPINIONS REGARDING THAT COPYRIGHT
24 POLICY?

25 A. YES, I HAVE.

1 Q. CAN YOU SUMMARIZE FOR ME WHAT WORK YOU DID IN REVIEWING
2 THE CURRENT GEORGIA POLICY?

3 A. YES. SPECIFICALLY, I REVIEWED THE DOCUMENTS
4 THEMSELVES THAT COMPRISED THE POLICY, PLUS SOME LITERATURE
5 STUDY, STUDY OF THE RESOURCES WHERE OTHER PEOPLE HAVE
6 ANALYZED THE RELEVANT ISSUES, LEGAL RESEARCH ON THE RELEVANT
7 CASE LAW AND STATUTES, AND A COMPARISON TO OTHER POLICIES IN
8 PLACE AT COLLEGES AND UNIVERSITIES AROUND THE COUNTRY.

9 Q. DID YOU SPEAK WITH ANY REPRESENTATIVES OF GEORGIA STATE
10 UNIVERSITY?

11 A. ABOUT THE POLICY OR IN CONNECTION WITH MY ANALYSIS OF
12 IT?

13 Q. ABOUT THE POLICY FIRST.

14 A. NO, I DID NOT.

15 Q. DID YOU SPEAK WITH ANY UNIVERSITY REPRESENTATIVES ABOUT
16 YOUR ANALYSIS?

17 A. NO, I DID NOT.

18 Q. WAS YOUR PRIOR EXPERIENCE RELEVANT TO YOUR WORK IN
19 REVIEWING THE CURRENT COPYRIGHT POLICY THAT IS IN PLACE AT
20 GEORGIA STATE UNIVERSITY?

21 A. YES, IT WAS.

22 Q. HOW WAS THAT PRIOR EXPERIENCE RELEVANT?

23 A. AS I EXPLAINED IN MY BACKGROUND YESTERDAY, I HAVE
24 WORKED ON RELEVANT ISSUES FOR MANY YEARS, MORE THAN 20 YEARS,
25 INCLUDING BEGINNING WITH THE RESEARCH I DID FOR MY DOCTORAL

1 DISSERTATION THAT I FINISHED IN 1990, AND THE WORK THAT I HAVE
2 DONE AND FURTHER RESEARCH THAT I HAVE DONE SINCE THEN. AND
3 ALL OF THAT CAME TO BEAR IN MY UNDERSTANDING OF THE ISSUES.

4 Q. ARE YOU BEING PAID A FEE FOR THE WORK THAT YOU HAVE
5 DONE?

6 A. YES, I AM.

7 Q. WHAT IS THAT FEE?

8 A. HOURLY FEE OF \$250 PLUS REIMBURSEMENT OF EXPENSES.

9 Q. COULD YOU PLEASE TELL THE COURT WHAT OPINIONS YOU HAVE
10 REACHED ABOUT THE CURRENT COPYRIGHT POLICY ADOPTED BY THE
11 UNIVERSITY SYSTEM OF GEORGIA? LET ME ASK FIRST, IS YOUR
12 WITNESS BOOK STILL THERE?

13 A. IT IS NOT.

14 MR. SCHAETZEL: IF I MAY APPROACH, YOUR HONOR.

15 THE COURT: YOU MAY.

16 BY MR. SCHAETZEL:

17 Q. NOW, LET ME GO BACK TO THE QUESTION AT HAND,
18 DR. CREWS. CAN YOU TELL THE COURT WHAT OPINIONS YOU HAVE
19 REACHED ABOUT THE CURRENT COPYRIGHT POLICY ADOPTED BY THE
20 UNIVERSITY SYSTEM OF GEORGIA?

21 A. WELL, IN THE MOST GENERAL TERMS, IT IS AN APPROPRIATE
22 POLICY FOR ADOPTION AT GEORGIA STATE UNIVERSITY AND
23 UNIVERSITIES LIKE GEORGIA STATE FOR PURPOSES OF ADDRESSING
24 FAIR USE QUESTIONS AS THEY ARISE. AND MORE SPECIFICALLY,
25 BECAUSE THERE IS A PART THAT ADDRESSES ELECTRONIC RESERVES,

1 ESPECIALLY WITH RESPECT TO ELECTRONIC RESERVES.

2 Q. ON WHAT DO YOU BASE YOUR OPINION THAT THE CURRENT
3 POLICY IS APPROPRIATE FOR GEORGIA STATE?

4 A. IN ADDITION TO WHAT I SAID TO ONE OF YOUR EARLIER
5 QUESTIONS, THE STUDY THAT I DID AND THE INFORMATION THAT CAME
6 TO BEAR IN MY BACKGROUND, MY EXAMINATION OF THE POLICY IN
7 THAT CONTEXT REALLY ALLOWED ME TO SEE A NUMBER OF ELEMENTS IN
8 THE POLICY THAT I THINK ARE GOOD, POSITIVE ELEMENTS TO BE IN
9 A POLICY. THAT THE POLICY REFLECTS ACCURATELY THE FACT THAT
10 FAIR USE IS REALLY BUILT UPON FOUR FACTORS, THAT IS WHAT
11 CONGRESS SAID THAT THE LAW IS. AND THAT IT AMPLIFIES ON
12 THOSE FOUR FACTORS IN A WAY THAT PARALLELS THE DEVELOPMENT OF
13 THE LAW IN CASES AND THE STATUTE ITSELF.

14 BUT IT ALSO PROVIDES FOR IMPLEMENTATION THROUGH THE USE OF
15 RESOURCES THAT ENABLE USERS OF THE POLICY TO THINK THROUGH THE
16 ISSUES SUCH AS THE CHECKLIST. THERE IS OVERSIGHT AND CHECKS
17 OF DIFFERENT DECISIONS THAT PEOPLE ARE MAKING IN DIFFERENT
18 CONTEXTS. AND THERE IS THE ROLE OF THE COUNSEL. THERE IS
19 THE AVAILABILITY OF OTHER RESOURCES, OTHER PEOPLE.
20 SPECIFICALLY, AS I UNDERSTAND, UNIVERSITY COUNSEL TO BE ABLE
21 TO BE HELPFUL FOR INDIVIDUALS AT THE UNIVERSITY WHO MAY HAVE
22 FURTHER QUESTIONS AND NEED ADDITIONAL INFORMATION.

23 MR. RICH: YOUR HONOR, I WOULD MOVE TO STRIKE THAT
24 PORTION OF HIS ANSWER THAT INCORPORATED AS A RATIONALE THAT IT
25 WAS CONSISTENT WITH HIS READING OF THE CASES INVOLVING THE

1 FAIR USE DOCTRINE.

2 THE COURT: OVERRULED.

3 BY MR. SCHAEZEL:

4 Q. DID YOU FORM AN OPINION REGARDING THE LANGUAGE THAT WAS
5 USED IN FORMING THE POLICY?

6 A. THE SPECIFIC LANGUAGE IN THE POLICY?

7 Q. YES, THE LANGUAGE IN THE POLICY, WHAT IS THAT?

8 A. YES, THE POLICY INCLUDES VARIOUS COMPONENTS WITH A LOT
9 OF LANGUAGE, A LOT OF GROUND TO COVER IN THAT QUESTION. BUT
10 FUNDAMENTALLY, AS I SEE THE POLICY, IT IS AN EXPLANATION OF
11 THE LAW. IT IS AN EXPLANATION OF COPYRIGHT IN GENERAL. IT IS
12 AN EXPLANATION OF FAIR USE IN GENERAL. IT IS A DESCRIPTION
13 OF THE APPLICATION OF SOME OF THESE PRINCIPLES AND THE WAY
14 THAT THEY WOULD BE IMPLEMENTED AT GEORGIA STATE IN CONNECTION
15 WITH ELECTRONIC RESERVES. AND IT IS SOME VERY GOOD GUIDANCE
16 TO HELP PEOPLE THROUGH THE ISSUES AND IMPLEMENT SUCH THINGS
17 MOST NOTABLY ELECTRONIC RESERVES, WITH SOME LANGUAGE THAT
18 STEERS THE DEVELOPMENT OF THE SYSTEM IN A CLEAR DIRECTION THAT
19 THERE WILL BE DIFFERENT ELEMENTS OF THE ELECTRONIC RESERVE
20 SYSTEM AT THE UNIVERSITY.

21 Q. IN REFERENCE TO OTHER POLICIES THAT YOU ARE AWARE OF
22 THROUGH YOUR EXPERIENCE AND YOUR EXPERTISE, HOW WOULD YOU,
23 GENERALLY SPEAKING, COMPARE GEORGIA POLICY TO OTHER POLICIES?

24 MR. RICH: OBJECTION, FOUNDATION.

25 THE COURT: SUSTAINED.

1 BY MR. SCHAEZEL:

2 Q. DR. CREWS, ARE YOU AWARE OF OTHER POLICIES THAT ARE IN
3 PLACE REGARDING FAIR USE AND ELECTRONIC RESERVES IN PARTICULAR
4 AT COLLEGES AND UNIVERSITIES?

5 A. YES, I AM.

6 Q. COULD YOU PLEASE DESCRIBE TO US HOW YOU ARE AWARE OF
7 SUCH OTHER POLICIES?

8 A. WELL, ELECTRONIC RESERVES REALLY CAME UNTO ITS OWN,
9 IT REALLY STARTED TO BECOME PREVALENT AT COLLEGES AND
10 UNIVERSITIES IN THE VERY EARLY 1990'S AND CERTAINLY BY THE MID
11 1990'S WAS A MAJOR ISSUE OF CONVERSATION AMONG COPYRIGHT
12 PEOPLE, AMONG LIBRARY PEOPLE, AMONG UNIVERSITY OFFICIALS.
13 AND BY THAT TIME, I MENTIONED YESTERDAY, THE CONFU,
14 CONFERENCE ON FAIR USE, STARTING IN 1994 INCLUDED ELECTRONIC
15 RESERVES AS ONE OF ITS TOPICS FOR EXPLORATION. SO I HAVE
16 BEEN FOLLOWING THE DEVELOPMENT OF POLICIES FROM THAT TIME,
17 FROM THE REALLY -- THE EARLIEST OF THOSE POLICIES AND HAVE
18 BEEN FAMILIAR WITH THEM IN MANY WAYS.

19 PLUS, IN CONNECTION WITH THIS REPORT, I WANTED TO DO A
20 CHECK TO BRING MYSELF CURRENT TO GET A BROADER OVERVIEW, A
21 BROADER SAMPLING OF WHAT WAS OUT THERE, AND SO COLLECTED A SET
22 OF POLICIES IN CONNECTION WITH DOING THIS REPORT AND HAVE THEM
23 PRESENTED AND SUMMARIZED IN THE REPORT.

24 Q. THEN, GENERALLY SPEAKING, IN TERMS OF OTHER POLICIES
25 WITH WHICH YOU ARE FAMILIAR, HOW WOULD YOU COMPARE THE POLICY

1 AT GEORGIA STATE WITH THOSE OTHER POLICIES?

2 A. IT COMPARES VERY NICELY IN THAT THERE ARE SOME POLICIES
3 THAT RELY THEY ARE CORE TO USE THE FOUR FACTORS FROM THE
4 STATUTE. AND THAT IS WHERE I SEE THE GEORGIA STATE POLICY,
5 SO IT IS CERTAINLY IN KEEPING WITH THAT TYPE OF POLICY.

6 Q. IN TERMS OF, YOU SAID, I BELIEVE COMPARING VERY NICELY,
7 WOULD YOU DEEM IT CONSISTENT OR INCONSISTENT WITH SOME OTHER
8 POLICIES?

9 A. I WOULD DEEM IT CONSISTENT WITH A COUPLE OF MENTIONED
10 THINGS THAT ARE WORTH MENTIONING. CONSISTENT BUT A LITTLE
11 BIT MORE. IN SOME CASES, IT IS PARTICULARLY CAUTIOUS IN
12 SOME OF ITS ELEMENTS AND PERHAPS MORE CAUTIOUS ONE COULD ARGUE
13 THAN IT NEEDS TO BE. SO, THERE ARE SOME ELEMENTS IN THE
14 GEORGIA POLICY THAT SHOW THAT IT IS IN FACT A CAUTIOUS POLICY.
15 IT IS ALSO A LITTLE BIT DIFFERENT AND I THINK DIFFERENT IN AN
16 IMPORTANT WAY IN THAT IT REALLY IS A COMMITMENT BY THE
17 UNIVERSITY TO HAVE NOT ONLY FACULTY INVOLVED IN THE
18 DECISION-MAKING ON THE GROUND, BUT TO HAVE THE COMMITMENT OF
19 THE OVERSIGHT CHECK BY MANY OF THEIR DECISIONS IN THE LIBRARY,
20 ALSO BY A COMMITMENT OF UNIVERSITY COUNSEL TO BE AVAILABLE TO
21 ANSWER QUESTIONS. AND THAT IS DIFFERENT FROM MOST POLICIES.

22 MR. RICH: I MOVE TO STRIKE THAT PORTION OF THE
23 WITNESS'S ANSWER THAT SAID THAT IT IS MORE CAUTIOUS THAN IT
24 NEEDS TO BE, WHICH IS A THINLY VEILED SUGGESTION THAT IT GOES
25 BEYOND WHAT THE LAW WOULD REQUIRE.

1 THE COURT: OVERRULED.

2 BY MR. SCHAEZEL:

3 Q. YOU MENTIONED THAT YOU DID SOME THINGS TO UPDATE YOUR
4 KNOWLEDGE AS TO POLICIES?

5 A. CORRECT.

6 Q. WHAT DID YOU DO?

7 A. CORRECT. I WANTED TO PUT, AS PART OF MY REPORT, I
8 WANTED TO PUT THE GEORGIA STATE POLICY IN THE CONTEXT OF WHAT
9 OTHER UNIVERSITIES WERE DOING. AND SO I WANTED TO HAVE
10 AVAILABLE A COLLECTION OF EXAMPLE POLICIES FROM A WIDE VARIETY
11 OF DIFFERENT COLLEGES AND UNIVERSITIES, VARIETY IN TERMS OF
12 SIZE AND LOCATION AND SO ON. AND TO COMPARE THIS POLICY TO
13 WHAT THE POLICY MAKING TRENDS MAY BE AROUND THE COUNTRY.

14 Q. AND TO ACCOMPLISH THAT, WHAT DID YOU DO TO LEARN ABOUT
15 OTHER POLICIES THAT YOU MENTIONED?

16 A. THROUGH MY OTHER WORK, I ALREADY HAD CONSIDERABLE
17 FAMILIARITY IN GENERAL WITH WHAT WAS GOING ON OUT THERE. I
18 WANTED TO BE MORE THOROUGH AND MORE SPECIFIC IN CONNECTION
19 WITH THIS REPORT. I ALSO WANTED TO COLLECT POLICIES IN A WAY
20 THAT REMOVED BIAS, ANY BIAS THAT I MIGHT BE SEEN AS BRINGING
21 TO THE TASK. AND SO I ENLISTED THE HELP OF A VERY ABLE
22 ASSISTANT WHOM I EDUCATED ABOUT THE FUNDAMENTALS OF FAIR USE
23 AND THE POLICY MAKING AND THE LANGUAGE OF POLICIES AND TURNED
24 HER LOOSE TO IDENTIFY POLICIES AND BRING A SET OF POLICIES, A
25 SAMPLE SET OF POLICIES BACK FOR ME TO TAKE A LOOK AT.

1 Q. WHO DID THE INITIAL SEARCHING FOR YOU, SIR?

2 A. THAT INITIAL SEARCH WAS MY VERY ABLE ASSISTANT
3 ELIZABETH CREWS, TO WHOM I HAPPEN TO BE MARRIED.

4 Q. AND WHAT IS MS. CREWS'S EDUCATIONAL BACKGROUND?

5 A. SHE STUDIED FRENCH AND ENGLISH AS AN UNDERGRADUATE AT
6 UNIVERSITY OF SOUTHERN CALIFORNIA. SHE HAS A MASTER'S DEGREE
7 IN EDUCATION FROM THE UNIVERSITY OF SOUTHERN CALIFORNIA. SHE
8 TAUGHT SCHOOL FOR MANY YEARS. THEN STEPPED OUT OF THAT
9 CAREER TO BE AT HOME AND RAISE OUR KIDS. AND THEN IN MORE
10 RECENT YEARS, SHE WENT BACK TO SCHOOL AND EARNED A SECOND
11 DEGREE IN LIBRARY SCIENCE. THAT WAS IN VERY RECENT YEARS,
12 THAT IS HER BACKGROUND.

13 Q. YOU MENTIONED THAT YOU EDUCATED HER, WHAT DID YOU ASK
14 MS. CREWS TO DO?

15 A. YES. AND WHAT I ASKED HER TO DO IS, I EXPLAINED JUST
16 SIMPLE FACTS THAT COLLEGES AND UNIVERSITIES INCREASINGLY ARE
17 USING ELECTRONIC RESERVES. THAT INCREASINGLY THEY HAVE
18 POLICIES THAT RELATE TO FAIR USE AND THEIR APPLICATION OF FAIR
19 USE IN THE CONTEXT OF ELECTRONIC RESERVES. AND SO GIVING HER
20 A CONTEXT IN THAT REGARD, BUT WITHOUT GIVING HER SUBSTANCE OF
21 WHAT IS IN THOSE POLICIES, THEN ASKED HER TO DO SOME SEARCHES
22 AND SOME SYSTEMATIC KEY WORD SEARCHES ON LINE THAT WOULD HAVE
23 RETRIEVED SOME AVAILABLE POLICIES. NOT ALL POLICIES ARE
24 READILY AVAILABLE, SOME COLLEGES AND UNIVERSITIES MAKE THEM
25 PUBLICLY AVAILABLE, SOME DO NOT. AND SO SHE DID A SEARCH

1 AND RETRIEVED A SET OF POLICIES THAT SHE THEN PROVIDED TO ME
2 AND I USED THOSE POLICIES IN CONNECTION WITH THIS PREPARATION
3 OF THIS REPORT.

4 Q. YOU SAID THAT SHE RETRIEVED SOME POLICIES AND PROVIDED
5 THEM TO YOU. COULD YOU PLEASE DESCRIBE WHAT IT WAS THAT
6 MS. CREWS PROVIDED TO YOU?

7 A. YES. SHE PROVIDED TO ME PRINTOUT OF THE POLICIES THAT
8 SHE IDENTIFIED. AND SHE IDENTIFIED THEM AS FAIR USE POLICIES
9 AT COLLEGES AND UNIVERSITIES FOR APPLICATION IN THE CONTEXT OF
10 ELECTRONIC RESERVES.

11 Q. ONCE SHE PROVIDED THESE POLICIES TO YOU, WHAT DID YOU
12 DO?

13 A. THEN I TOOK THE POLICIES AND BEGAN READING THEM. THAT
14 IS THE VERY FIRST THING I DID. BEGAN READING THEM TO SEE
15 WHAT WAS THERE AND TO SEE WHAT THESE POLICIES LOOK LIKE AND TO
16 BEGIN ON AN INITIAL READ TO SEE WHAT CHARACTERISTICS THEY HAD,
17 WHAT TRENDS MIGHT BE APPARENT IN THE POLICIES. I BEGAN
18 SORTING THEM AND EXAMINING THEM. AND THERE ARE MANY WAYS THAT
19 ONE COULD HAVE SORTED AND GROUPED AND ANALYZED THESE POLICIES,
20 BUT WHAT BECAME READILY APPARENT AND USEFUL, I THINK, IN MY
21 PRESENTATION OF THEM WAS TO FOCUS ON ONE PARTICULAR ELEMENT OF
22 THE POLICY AND THAT IS THE ISSUE OF HOW MUCH.

23 NOW, I COULD HAVE FOCUSED IN ON ANY OTHER PIECE BUT THAT
24 WAS PARTICULARLY INTERESTING. AND BY HOW MUCH, WHAT I
25 REALLY MEAN IS, HOW MUCH OF A WORK DOES THIS POLICY PERMIT TO

1 BE USED IN OF A WORK IN THE CONTEXT OF ELECTRONIC RESERVES.
2 I FOUND THAT TO BE INTERESTING AS A USEFUL TOOL FOR SORTING
3 THE POLICIES FOR A COUPLE OF BASIC REASONS. ONE, THAT POINT
4 WAS PREVALENT IN, I BELIEVE, ALL OF THE POLICIES IN ONE FORM
5 OR ANOTHER AND IT WAS ADDRESSED DIFFERENTLY IN THE POLICIES.
6 AND SO IT WAS THERE, BUT IT WAS DIFFERENT ACROSS THE SET OF
7 POLICIES, SO THAT BECAME AN INTERESTING WAY OF SORTING THEM
8 OUT.

9 Q. SO, MS. CREWS PROVIDED YOU WITH A UNIVERSE OF
10 POLICIES; IS THAT CORRECT?

11 A. A SET OF RAW DATA YOU COULD SAY.

12 Q. YOU READ THOSE POLICIES, CORRECT?

13 A. I DID.

14 Q. ONCE YOU READ THEM, DID YOU PUT ALL OF THEM INTO YOUR
15 REPORT?

16 A. I BEGAN THEN ANALYZING THEM, ANALYZING THEM, BREAKING
17 THEM OUT, FIRST SORTING INTO CATEGORIES THEN BREAKING THEM
18 OUT. AND NOT ONLY DID I SEE TRENDS, BUT AFTER AWHILE AND
19 ESPECIALLY UNDER THE PRESSURES OF DEADLINE OF GETTING THIS
20 REPORT FINISHED AND IN, I SAW A LOT OF REDUNDANCY.

21 Q. SO WHAT DID YOU DO?

22 A. THERE WERE SEVERAL POLICIES IN THE TOTAL STACK THAT I
23 DID NOT INCLUDE IN THE BREAKOUT SIMPLY BECAUSE THEY WERE
24 REDUNDANT OF EXAMPLES WE HAVE ALREADY SEEN.

25 Q. DO YOU RECALL HOW MANY POLICIES YOU RETAINED?

1 A. WELL, THERE ARE THIRTY-SEVEN BROKEN OUT IN THE REPORT.
2 AND TO THE BEST OF MY RECOLLECTION, YOU KNOW, CORRECT ME IF
3 I AM WRONG, I THINK I DID NOT INCLUDE MAYBE SIX, SEVEN,
4 EIGHT, IF THAT.

5 Q. IN YOUR EXPERIENCE, ARE THE 37 POLICIES THAT ARE IN
6 YOUR REPORT REPRESENTATIVE OF THE VARIETY OF COPYRIGHT
7 POLICIES ADOPTED BY ACADEMIC INSTITUTIONS IN THE 2009 TIME
8 FRAME?

9 A. THEY ARE REPRESENTATIVE FOR THE CONTEXT OF ELECTRONIC
10 RESERVES, YES.

11 MR. RICH: OBJECTION, YOUR HONOR, MOVE TO STRIKE.
12 THERE HAS BEEN ABSOLUTELY NO FOUNDATION LAID OF ANY
13 METHODOLOGICAL BASIS AS THE BASIS FOR HIM TO CONCLUDE TO FORM
14 ANY FORM OF REPRESENTATIVE SAMPLE OF ANY KIND.

15 THE COURT: WHAT IS YOUR RESPONSE?

16 MR. SCHAEZEL: YOUR HONOR, THE QUESTION THAT I
17 BELIEVE WAS ANSWERED WAS ARE THEY -- WERE THE POLICIES,
18 WITHIN HIS EXPERIENCE, REPRESENTATIVE OF THE VARIETY OF
19 POLICIES THAT ARE IN PLACE. WE DO NOT CONTEND AND DO NOT
20 OFFER THESE AS SOME SORT OF PROJECTABLE SAMPLE AS THERE ARE X
21 NUMBER OF POLICIES THAT YOU COULD PROJECT AGAINST THE
22 UNIVERSITIES. AS YOU KNOW, THEY PERMIT 20 PERCENT OR ANOTHER
23 X PERCENTAGE THAT PERMITS 25 PERCENT OR SOMETHING LIKE THAT.
24 WHAT THE WITNESS, I BELIEVE, HAS TESTIFIED TO IS THAT, BASED
25 ON HIS EXPERIENCE, HE LOOKED TO SHOW THE VARIETY OF POLICIES

1 THAT ARE OUT THERE, SOMETHING THAT IS REPRESENTATIVE OF THAT
2 VARIETY, NOT SOMETHING THAT IS STATISTICALLY PROJECTABLE.

3 THE COURT: OBJECTION IS SUSTAINED.

4 BY MR. SCHAEZEL:

5 Q. PLEASE EXPLAIN WHAT YOU HAVE FOUND CONCERNING COPYRIGHT
6 AND FAIR USE POLICIES IN HIGHER EDUCATION AS A PART OF THE
7 WORK THAT YOU DID.

8 A. I THINK I SHOULD BEGIN WITH THE SORTING OF THE
9 POLICIES. AND IN THAT REGARD, FOCUSING SPECIFICALLY ON THAT
10 ELEMENT OF THE POLICY, HOW MUCH OF A WORK MAY BE REPRODUCED,
11 I SAW GROUPS, I SAW THREE CATEGORIES OF GROUPS AND I
12 IDENTIFIED THEM IN MY REPORT. SOME POLICIES ALLOWED A
13 REPRODUCTION OF A WORK BASED UPON A PERCENTAGE OF THE BOOK,
14 FOR EXAMPLE. OTHERS HAD A MEASURE OF AMOUNT BASED UPON
15 TYPICALLY CHAPTERS OF THE BOOK. AND THEN OTHERS DIDN'T
16 SPECIFY ANY SPECIFIC QUANTITY, BUT RATHER RELIED ON THE FOUR
17 FACTORS OF FAIR USE TOGETHER, USUALLY WITH SOME ADDED
18 EXPLANATION ABOUT THE FACTORS AND THEN SAYING THE AMOUNT
19 REALLY DEPENDS UPON A BALANCING AND CONSIDERATION OF ALL OF
20 THE FOUR FACTORS TOGETHER.

21 Q. ALL RIGHT. YOU MENTIONED THAT YOU FOUND A CERTAIN
22 NUMBER OR GROUP OF POLICIES THAT YOU DIVIDED OUT BY PERCENTAGE
23 OF PORTION USED; IS THAT CORRECT?

24 A. THAT'S CORRECT.

25 Q. DO YOU RECALL OFF THE TOP OF YOUR HEAD WHAT THE SCHOOLS

1 ARE AND WHAT THOSE PERCENTAGES ARE?

2 A. WELL, I DO HAVE MY REPORT IN FRONT OF ME, RATHER THAN
3 REMEMBERING A LONG LIST OF NAMES AND NUMBERS.

4 Q. IF YOU WOULD, PLEASE, TURN TO YOUR REPORT TO REFRESH
5 YOUR RECOLLECTION TO SEE WHICH SCHOOLS YOU FOUND TO BE IN THAT
6 GROUP OF POLICIES THAT YOU IDENTIFIED AS PERCENTAGES.

7 A. I WILL PREFACE THIS VERY BRIEFLY BY SAYING, OF COURSE,
8 A TYPICAL POLICY DOESN'T SAY YOU MAY REPRODUCE X PERCENT,
9 THAT IS JUST A PIECE OF A LARGER POLICY, I WANTED TO MAKE
10 THAT VERY, VERY CLEAR. AND SO THERE ARE MANY OTHER ELEMENTS
11 IN THE POLICY. BUT WOULD YOU LIKE ME TO READ NAMES OF
12 INSTITUTIONS AND NUMBERS AND STATEMENTS?

13 Q. WHY DON'T YOU START WITH THE FIRST SCHOOL IN YOUR
14 REPORT, SIR, AND TELL US WHAT THAT NAME AND NUMBER IS.

15 A. WHEN I MAKE A STATEMENT FROM THE POLICY, IT IS A
16 PARAPHRASING. IF ANYBODY WANTS TO GO TO THE POLICY ITSELF,
17 THAT IS FINE. BUT THE FIRST IN MY REPORT IS WEBSTER
18 UNIVERSITY IN MISSOURI, COPYING LIMITED TO 25 PERCENT OF A
19 WORK. SHOULD I READ ON?

20 Q. EXPLAIN, IF YOU WOULD, FIRST, YOU INDICATED THAT YOU
21 COULD GO AND LOOK AT THE POLICY. IF YOU WERE GOING TO GO AND
22 LOOK AT THE POLICY FOR WEBSTER UNIVERSITY IN MISSOURI, WHAT
23 WOULD YOU DO, SIR?

24 A. WHAT WOULD I DO? I WOULD GO TO, IF I WERE LOOKING, IF
25 I, IF THE QUESTION --

1 Q. I'M SORRY, WITHIN THE CONTEXT OF YOUR REPORT.

2 A. THANK YOU.

3 IF I AM LOOKING AT THIS IN THE REPORT, I AM ON PAGE 29 OF
4 THE REPORT, AND IT IS THERE THAT I BEGIN THE BREAKOUT OF WHAT
5 I CALL TYPE ONE, TYPE TWO, TYPE THREE POLICIES. THE TYPE
6 ONE ARE POLICIES WITH QUANTIFIED LIMITS BASED ON A PERCENTAGE
7 OF THE WORK. AND SO IT HAPPENS THAT AT THE TOP IS WEBSTER
8 UNIVERSITY.

9 Q. AND SO WOULD YOU TURN TO AN APPENDIX IN YOUR REPORT AND
10 WOULD WE FIND WHAT YOU CONSIDERED AS PROVIDING THE INFORMATION
11 OF 25 PERCENT AS YOU JUST TESTIFIED TO?

12 A. THAT IS CORRECT.

13 Q. IF YOU TURN TO APPENDIX E IN YOUR REPORT, SIR, WOULD
14 THIS BE THE MATERIAL FOR WEBSTER UNIVERSITY TO WHICH YOU ARE
15 REFERRING?

16 A. YES, IT IS.

17 Q. AND WHERE IN THIS WOULD YOU HAVE FOUND THE INFORMATION
18 THAT WEBSTER UNIVERSITY WOULD PERMIT USE OF UP TO 25 PERCENT?

19 A. IF YOU MOVE ALMOST EXACTLY TO THE CENTER OF THAT BLOCK
20 OF TEXT, THERE IS A SENTENCE THAT LOOKS LIKE A SHORT
21 PARAGRAPH THAT BEGINS:

22 "THE LIBRARY WILL ADHERE TO THE
23 FOLLOWING PROCEDURES IN ORDER TO
24 INSURE THAT ITEMS PLACED ON
25 ELECTRONIC RESERVES CONFORM TO THE

1 SPIRIT AND LETTER OF THE 1976
2 COPYRIGHT LAW."

3 AND THEN THERE IS MORE.

4 Q. YES.

5 A. THEN THERE IS A LIST OF ELEMENTS THAT THE INSTITUTION
6 THAT WHEN, THIS CASE WEBSTER UNIVERSITY, SEES AS APPROPRIATE
7 TO INCLUDE IN THEIR STANDARDS OF PRACTICE RELEVANT AS THEY SEE
8 IT TO FAIR USE OR AS THEY PUT IT, "THE SPIRIT AND LETTER OF
9 THE 1976 COPYRIGHT LAW," THEY ARE NOT NUMBERED OR BULLETED,
10 BUT IT IS THE THIRD ITEM DOWN THAT LIST:

11 "NO MORE THAN 25 PERCENT OF AN
12 ENTIRE WORK MAY BE SCANNED FOR
13 PLACEMENT ON ELECTRONIC RESERVES
14 WITHOUT OBTAINING COPYRIGHT
15 CLEARANCE."

16 Q. ALL RIGHT. SO, IN VIEW OF THAT LANGUAGE, HOW DID
17 YOU CLASSIFY THE POLICY IN THE FRAMEWORK YOU BUILT FOR WEBSTER
18 UNIVERSITY?

19 A. THAT PUTS THIS POLICY IN A SO-CALLED TYPE ONE BASED
20 UPON PERCENTAGE OF THE WORK.

21 Q. AND IS THAT THE TYPE OF EXERCISE THAT YOU DID FOR THE
22 REMAINING UNIVERSITIES THAT YOU PLACED IN THE TYPE ONE
23 CATEGORY OF A PERCENTAGE OF THE WORK?

24 A. IT IS.

25 MR. RICH: YOUR HONOR, PERHAPS I AM STATING THE

1 OBVIOUS, BUT THE FACT THAT THIS GENTLEMAN OR WIFE FOUND THIS
2 ON A WEBSITE, PULLED IT OFF, DID NO OTHER VERIFICATION,
3 CERTAINLY DOESN'T VALIDATE THE TRUTH OF THE ASSERTIONS IN THAT
4 DOCUMENT, IS RANK HEARSAY. I DON'T HAVE AN OBJECTION FOR HIM
5 RELYING ON IT FOR WHATEVER FORM OF EXPERT TESTIMONY HE WANTS.
6 I TRUST MR. SCHAEZEL IS NOT ATTEMPTING TO ASSERT FOR THIS
7 COURT THAT THESE ARE IN FACT THE POLICIES OF THESE
8 UNIVERSITIES HERE BASED ON THIS PROFFER.

9 THE COURT: I WILL OVERRULE THE OBJECTION.

10 BY MR. SCHAEZEL:

11 Q. WHAT OTHER UNIVERSITIES DID YOU FIND APPROPRIATE TO
12 CLASSIFY IN THE TYPE ONE CATEGORY OF PERCENTAGE?

13 A. I WILL BEGIN READING. WOULD YOU LIKE ME TO READ NAMES
14 AND BRIEF STATEMENT OF NUMBERS? IS THAT HOW YOU WOULD LIKE ME
15 --

16 Q. THAT WILL BE FINE, THANK YOU, YES.

17 A. AFTER WEBSTER UNIVERSITY, AMERICAN UNIVERSITY. AGAIN
18 I AM PARAPHRASING FROM THE POLICY. COPYING LIMITED TO 25
19 PERCENT OF A BOOK.

20 UNIVERSITY OF COLORADO, COPYING LIMITED TO 25 PERCENT OF
21 MOST WORKS.

22 UNIVERSITY OF CALIFORNIA RIVERSIDE, BOOKS MAY BE COPIED
23 LIMITED TO 50 PERCENT OF THE TEXT, NOT TO EXCEED 30 PAGES.
24 AND THEN STATEMENT ABOUT JOURNALS AS WELL. MANY OF THESE
25 POLICIES HAVE A SEPARATE STATEMENT FOR JOURNALS AS WELL AS

1 BOOKS. SHOULD I FOCUS ON THE BOOKS?

2 Q. NO, PLEASE, ADDRESS BOTH.

3 A. I SHALL THEN. ALSO WITH CALIFORNIA RIVERSIDE,
4 JOURNALS COPIED LIMITED TO 50 PERCENT OF THE JOURNAL ISSUE,
5 NOT TO EXCEED 30 PAGES.

6 INDIANA UNIVERSITY NORTHWEST, BOOKS LIMITED TO 50
7 PERCENT, ARTICLES LIMITED TO 50 PERCENT.

8 CLARK ATLANTA UNIVERSITY, BOOKS MAY BE COPIED LIMITED TO
9 ONE CHAPTER OR NOT MORE THAN 20 PERCENT.

10 BROWN UNIVERSITY, BOOKS LIMITED TO TWO CHAPTERS OR 20
11 PERCENT. WEST TEXAS --

12 THE COURT: LET ME INTERRUPT YOU ON BROWN
13 UNIVERSITY, IS THERE SOMETHING ABOUT WHICHEVER IS LESS OR
14 WHICHEVER IS MORE?

15 THE WITNESS: I DON'T RECALL THAT AND I WOULD HAVE
16 BEEN LOOKING FOR THAT AND WE CAN ALWAYS TAKE A LOOK AT THE
17 POLICY ITSELF TO CONFIRM. I WOULD HAVE BEEN LOOKING FOR
18 THAT. I WOULD LIKE TO SAY I WOULD HAVE INCLUDED IT HERE IF
19 IT HAD BEEN THERE.

20 THE COURT: YOU ARE SAYING ON BROWN UNIVERSITY IT IS
21 TWO CHAPTERS OR WHAT IS IT 20 PERCENT?

22 THE WITNESS: OR 20 PERCENT.

23 BY MR. SCHAEZEL:

24 Q. ARE THERE MATERIALS IN THE APPENDIX FOR WHICH YOU COULD
25 BE MORE RESPONSIVE?

1 A. THERE ARE. IF WE CAN BE MORE SPECIFIC AND CONFIRM
2 ANYTHING WE MAY. SHALL WE GO TO BROWN UNIVERSITY?

3 Q. PLEASE.

4 A. WELL, IT MAY TAKE A MOMENT TO LOCATE IT.

5 I'M AT A PAGE THAT MAY BE THE CORRECT ONE. IN
6 APPENDIX E, IT IS PAGE 26 OF 120, LET'S SEE IF IT IS THE
7 CORRECT LOCATION: IF YOU TURN AHEAD TO PAGE 31 OF 120,
8 THERE IS A STATEMENT THAT BEGINS -- IT IS A ONE-PAGE DOCUMENT
9 AT THE TOP SAYS "BROWN UNIVERSITY RESERVES COPYRIGHT POLICY."
10 AND THAT WOULD BE MY TYPING BECAUSE I DO REMEMBER IN THIS CASE
11 THAT THERE WAS THE PAGES PRECEDING THIS WERE IN WHAT IS CALLED
12 HTML FORMAT ON A WEBSITE. THEN THERE WAS A CLICK LINK THAT
13 TOOK YOU OVER TO THIS, THIS DOCUMENT, THAT OPENED UP IN A
14 SEPARATE WINDOW AND, THEREFORE, WASN'T OTHERWISE SEPARATELY
15 IDENTIFIED. PARDON THE EXPRESSION, IT KIND OF FLOATED BY
16 ITSELF, BUT IT WAS ON THE BROWN SERVER LINKED FROM THE BROWN
17 POLICY. AND IT SAYS "FAIR USE GUIDELINES." THIRD ITEM DOWN
18 SAYS "REASONABLE AMOUNT. LIBRARY GUIDELINES." YOU SEE SOME
19 ITALICIZED LANGUAGE -- WELL LET'S START WITH THE
20 NONITALICIZED. THE AMOUNT OF THE WORK DIGITIZED IS
21 REASONABLE AND NO MORE THAN NECESSARY TO MEET THE COURSE
22 EDUCATIONAL OBJECTIVES. THEN PRECEDE, LIBRARY GUIDELINES:
23 A SINGLE ARTICLE FROM A JOURNAL ISSUE, A COMPLETE SHORT POEM,
24 NO MORE THAN TWO CHAPTERS (OR 20 PERCENT OF THE PAGES) OF A
25 BOOK.

1 Q. DID YOU CLASSIFY ANY OTHER UNIVERSITIES IN THIS FIRST
2 PERCENTAGE-BASED CATEGORY AFTER BROWN?

3 A. YES, I DID. WOULD YOU LIKE ME TO CONTINUE READING AS
4 I WAS BEFORE?

5 Q. PLEASE DO, YES.

6 A. WEST TEXAS A&M UNIVERSITY, MAY NOT COPY A SUBSTANTIAL
7 PORTION OF A WORK DEEMED TO BE 15 PERCENT OF THE WORK.

8 BUCKNELL UNIVERSITY, IN MOST CASES, FAIR USE COPIES WILL
9 BE LIMITED TO ABOUT 10 PERCENT TO 15 PERCENT.

10 Q. IN THAT PARTICULAR INSTANCE WHEN IT SAYS "IN MOST
11 CASES," IN YOUR EXPERIENCE, HOW IS THAT INTERPRETED?

12 A. I HAVE SEEN MANY INSTANCES WHERE A POLICY HAS A DEFINED
13 LIMIT OF ONE MEASURE OR ANOTHER. AND QUESTIONS COME UP ABOUT
14 THE UNUSUAL SITUATION WHERE MAYBE THAT DEFINED LIMIT LANDS IN
15 THE MIDDLE OF THE LAST PAGE OF A CHAPTER. ARE WE ALLOWED TO
16 ROUND IT UP? OR THE FOOTNOTES FOR THE CHAPTER ARE ELSEWHERE
17 IN THE BOOK, CAN I INCLUDE THOSE AS PART OF THE CHAPTER? OR
18 MAYBE THE WHOLE BOOK IS SHORT AND DOESN'T HAVE CHAPTERS. SO,
19 WHAT DO WE DO WITH THAT? SO, I HAVE SEEN MANY SITUATIONS THAT
20 ARE JUST ODD AND QUIRKY, BUT THEY ARE COMMON. AND,
21 THEREFORE, A LITTLE BIT OF FLEXIBILITY LIKE IN MOST CASES
22 ALLOWS THE LIBRARY TO DEAL WITH SUCH MATTERS AS THEY ARISE.

23 MR. RICH: OBJECTION. MOVE TO STRIKE THE WITNESS'S
24 TESTIMONY WHICH WAS NON-RESPONSIVE TO THE QUESTION IN WHICH
25 CAN'T POSSIBLY RESPOND ON BEHALF OF BUCKNELL UNIVERSITY OR

1 ANYBODY ELSE WITHOUT A BETTER FOUNDATION AS TO WHAT THEY MEANT
2 IN THEIR POLICIES BY WORDS IN MOST CASES.

3 THE COURT: OVERRULED.

4 BY MR. SCHAEZEL:

5 Q. WERE THERE ANY OTHER COLLEGES AND UNIVERSITIES THAT YOU
6 CLASSIFIED IN THIS FIRST CATEGORY OF PERCENTAGE BASE?

7 A. YES.

8 Q. WHAT WERE THEY?

9 A. CONTINUING READING. SALISBURY UNIVERSITY IN MARYLAND,
10 COPYING FROM BOOKS TYPICALLY LIMITED TO A SINGLE CHAPTER OR
11 BETWEEN 10 PERCENT AND 20 PERCENT OF THE ENTIRE WORK. ALSO
12 STATEMENT ABOUT JOURNALS: COPYING FROM JOURNALS TYPICALLY
13 ONLY A LIMITED NUMBER OF ARTICLES FROM JOURNAL, ESPECIALLY IN
14 THE MOST RECENT FIVE YEARS.

15 PENNSYLVANIA STATE UNIVERSITY, MATERIALS COPIED WILL NOT
16 EXCEED 15 PERCENT OF THE ORIGINAL WORK, NOT MORE THAN TWO
17 ARTICLES FROM A SINGLE ISSUE OF A JOURNAL.

18 CARLOW UNIVERSITY IN PENNSYLVANIA, COPIES FROM BOOKS
19 LIMITED TO ONE EXCERPT PER SEMESTER PER COURSE, NOT TO EXCEED
20 FIFTEEN PERCENT OF THE BOOK. ONLY ONE ARTICLE SCANNED FROM A
21 JOURNAL ISSUED PER COURSE. NO MORE THAN THREE ARTICLES FROM
22 A JOURNAL VOLUME PER COURSE.

23 ALABAMA STATE UNIVERSITY, COPIES FROM BOOKS GENERALLY
24 LIMITED TO ONE CHAPTER OR LESS THAN FIFTEEN PERCENT OF A BOOK.
25 COPIES FROM JOURNALS, GENERALLY LIMITED TO ONE ARTICLE FROM A

1 JOURNAL ISSUE OR NO MORE THAN THREE ARTICLES FROM A JOURNAL
2 VOLUME. COPIES OF POETRY GENERALLY LIMITED TO ONE POEM FROM
3 A COLLECTED WORK.

4 SAN DIEGO STATE UNIVERSITY, COPIES FROM BOOKS GENERALLY
5 LIMITED TO 15 PERCENT, COPIES FROM JOURNALS GENERALLY LIMITED
6 TO 15 PERCENT OF ANY SINGLE JOURNAL ISSUE.

7 ASHLAND UNIVERSITY IN OHIO, SMALL PORTIONS OF BOOKS OWNED
8 BY INSTRUCTOR MAY BE DIGITIZED FOR ERESERVES. BOOKS MAY BE
9 COPIED, TYPICALLY LIMITED TO A SINGLE CHAPTER OR NOT MORE THAN
10 20 PERCENT. ARTICLES MAY BE COPIED, TYPICALLY LIMITED TO A
11 SINGLE ARTICLE FROM AN ISSUE OF A JOURNAL.

12 THEN THERE ARE TWO MORE THAT I IDENTIFIED, UNIVERSITY OF
13 VERMONT, BOOKS MAY BE COPIED, LIMITED TO TWO CHAPTERS. NOW,
14 HERE IT IS A CHAPTER MEASURE. ONE COULD ARGUE I COULD HAVE
15 MOVED THAT TO THE NEXT CATEGORY, IT IS IN THIS FIRST CATEGORY
16 ABOUT PERCENTAGES BECAUSE NEXT LINE, ARTICLES MAY BE COPIED
17 LIMITED TO 25 PERCENT OF AN ISSUE OF A JOURNAL. NEWSPAPERS
18 ARE HELD TO THE SAME STANDARD.

19 AUBURN UNIVERSITY IN MONTGOMERY, BOOKS, AMOUNT OF
20 MATERIAL ON RESERVE IS REASONABLE IN RELATION TO THE TOTAL
21 READING FOR THE COURSE. BOOKS LIMITED TO TWO CHAPTERS
22 WITHOUT PERMISSION. ARTICLES LIMITED TO TWO ARTICLES AND NOT
23 MORE THAN 25 PERCENT OF A JOURNAL WITHOUT PERMISSION.
24 NEWSPAPERS ARE HELD TO THE SAME STANDARD. I SEE A MENTION IN
25 THIS ONE, YOU COULD SEE SIMILAR LANGUAGE IN A FEW OTHER

1 POLICIES, NO CONSUMABLE WORKS, THOSE ARE WORKBOOKS, THAT
2 KIND OF THING.

3 SO, THAT CONCLUDES THE LIST OF POLICIES THAT I HAD PUT IN
4 THIS SO-CALLED TYPE ONE PERCENTAGE BASED POLICIES.

5 Q. WHAT WAS THE TYPE TWO TYPE OF POLICY CATEGORY OR, I'M
6 SORRY, WHAT WAS THE TYPE TWO CATEGORY IN WHICH YOU CLASSIFIED
7 POLICIES?

8 A. I LABELED THOSE POLICIES WITH QUANTIFIED LIMITS BASED
9 ON ARTICLES OR CHAPTERS. NOW, WE HAVE ALREADY SEEN SOME OF
10 THAT WHERE A POLICY MAY REFERENCE A CHAPTER OR TWO CHAPTERS OR
11 SOME OTHER MEASURE OF CHAPTERS. BUT IF THEY COMBINED IT WITH
12 A PERCENTAGE, I TYPICALLY HAD THAT OVER IN TYPE ONE. BUT
13 NOW THESE ARE POLICIES THAT LOOK FIRST, AT LEAST WHEN IT COMES
14 TO AMOUNT, TO A MEASURE OF BASED UPON CHAPTERS TYPICALLY.
15 SHOULD I CONTINUE READING NAMES?

16 Q. YES. PLEASE TELL US WHAT UNIVERSITIES AND COLLEGES YOU
17 FOUND APPROPRIATELY CLASSIFIED AS HAVING POLICIES WITH A LIMIT
18 BASED ON A CHAPTER OR ARTICLE?

19 A. YALE UNIVERSITY, DIGITIZED BOOKS ALLOWED, LIMITED TO
20 ONE CHAPTER. ALSO AT YALE, DIGITIZED ARTICLES ALLOWED,
21 LIMITED TO ONE ARTICLE FROM A JOURNAL ISSUE. POEM, ONE POEM
22 FROM A COLLECTION. ONE ITEM FROM ANOTHER TYPE OF COLLECTIVE
23 WORK SUCH AS AN ENCYCLOPEDIA.

24 GEORGE MASON UNIVERSITY IN VIRGINIA. LIMITED NUMBER OF
25 ARTICLES PER COURSE, ENTIRE OUT-OF-PRINT BOOKS WILL NOT BE

1 COPIED. ARTICLES LIMITED TO THREE ARTICLES FROM A JOURNAL
2 VOLUME, BUT NOT, BUT NOT IF -- THAT SHOULD BE "IF" THE
3 ARTICLES HAVE BEEN PREVIOUSLY ON RESERVE OR IN A COURSEPACK,
4 ET CETERA.

5 UNIVERSITY OF PENNSYLVANIA REFERS TO THE FOUR FACTORS,
6 LIBRARY, AND THEN SAYS LIBRARY MAY DECLINE TO PLACE ON RESERVE
7 COPIES OF SEVERAL ARTICLES FROM A JOURNAL ISSUE OR SEVERAL
8 CHAPTERS FROM A BOOK.

9 Q. SO IF THE LIBRARY WOULD DECLINE TO PLACE ON RESERVE
10 COPIES OF SEVERAL ARTICLES FROM A JOURNAL ISSUE OR SEVERAL
11 CHAPTERS FROM A BOOK, DO YOU HAVE AN OPINION AS TO WHAT THAT
12 POLICY PROVIDES IN TERMS OF WHAT THE LIBRARY MAY ACCEPT, THE
13 FLIP SIDE OF THAT COIN?

14 MR. RICH: OBJECTION, LACK OF FOUNDATION. DOESN'T
15 WORK AT THE UNIVERSITY OF PENNSYLVANIA.

16 THE COURT: I DON'T THINK THIS IS REALLY AN OPINION
17 QUESTION. IT SAYS WHAT IT SAYS.

18 THE WITNESS: IN MY READING OF THAT POLICY, TELLS ME
19 THAT IF CERTAIN ACTIVITY IS NOT ALLOWED, I WOULD INFER THAT
20 OTHER ACTIVITY IS ALLOWED.

21 BY MR. SCHAEZEL:

22 Q. THANK YOU.

23 WERE THERE ANY OTHER UNIVERSITIES THAT YOU CLASSIFIED IN
24 THE SECOND CATEGORY ACCORDING TO CHAPTER OR ARTICLE?

25 A. YES.

1 Q. WHAT WERE THEY?

2 A. NEXT IS THE UNIVERSITY OF CHICAGO. ON THE AMOUNT
3 POINT, GENERALLY LIMITED TO BRIEF PORTIONS SUCH AS SINGLE
4 CHAPTER OR INDIVIDUAL ARTICLES.

5 UNIVERSITY OF OKLAHOMA, MAY INCLUDE SHORT ITEMS SUCH AS
6 ARTICLES, CHAPTERS, POEM, EXCERPTS OF LONGER WORKS.

7 UNIVERSITY OF ALABAMA AT BIRMINGHAM, MATERIALS MUST BE
8 WITHIN FAIR USE. NO LONGER WORKS BEYOND FIFTY PAGES.

9 AND THAT IS THE LAST UNIVERSITY I HAVE LISTED IN TYPE TWO.

10 Q. YOU MENTIONED THE THIRD CATEGORY, WHAT WAS THE THIRD
11 CATEGORY?

12 A. THIRD CATEGORY I HAVE LABELED POLICIES WITH QUANTIFIED
13 LIMITS BASED ON FAIR USE FACTORS, MEANING THE FOUR FACTORS
14 FROM THE STATUTE.

15 Q. CAN YOU DESCRIBE WHAT YOU MEAN BY A POLICY THAT WOULD
16 BE BASED ON THE FAIR USE FACTORS?

17 A. THAT WOULD BE -- WHILE MANY OF THESE POLICIES
18 REITERATE OR SAY SOMETHING ABOUT ALL FOUR OF THE FACTORS, THIS
19 WOULD BE A POLICY THAT SAYS ON THIS POINT OF AMOUNT TO
20 EVALUATE THE AMOUNT, YOU NEED TO CONSIDER THE WAY AMOUNT IS
21 ARTICULATED IN THE POLICY, NOT AS A PRESCRIBED MEASURE, BUT AS
22 A CONCEPT WITHIN THE DEVELOPMENT OF THE FOUR FACTORS OF THE
23 LAW AS APPEARS IN THE STATUTE AND PERHAPS AS EXPANDED UPON IN
24 CASE LAW.

25 Q. SO WOULD YOU INCLUDE IN THIS THIRD CATEGORY, LET'S

1 START WITH A POLICY THAT HAD A DEFINED PERCENTAGE.

2 A. WELL, A DEFINED PERCENTAGE, NO, THAT SOUNDS LIKE A
3 TYPE ONE.

4 Q. IN SO DOING, DO YOU MEAN TO SAY THAT A SCHOOL THAT WAS
5 IN TYPE ONE DID NOT RELY ON THE FOUR FAIR USE FACTORS?

6 A. I AM NOT SAYING THAT. AGAIN, EVERYTHING I HAVE SAID
7 HERE IS ABOUT ONE PIECE OF THE TOTAL POLICY. BUT WHEN IT
8 COMES TO THE QUESTION OF AMOUNT, DOES THE POLICY OFFER UP
9 SOMETHING FAIRLY SPECIFIC, LIKE A PERCENTAGE OR A NUMBER OF
10 CHAPTERS? OR DOES THE POLICY OFFER UP THE GUIDANCE OF
11 BALANCING OF THE FOUR FACTORS TO REACH A CONCLUSION, THAN
12 ABOUT WHAT IS ALLOWED?

13 Q. IN TERMS OF AN AMOUNT TO BE USED?

14 A. INCLUDING IN TERMS OF AN AMOUNT.

15 Q. ALL RIGHT. WHAT UNIVERSITIES AND COLLEGES DID YOU
16 FIND THAT FELL INTO THIS THIRD CATEGORY?

17 A. FOR EXAMPLE, EMORY UNIVERSITY, AND WHEN IT COMES TO --
18 THERE IS AN OVERVIEW OF THE FOUR FACTORS, STATEMENTS SUCH AS
19 THE MATERIALS ARE AT THE REQUEST OF THE INSTRUCTOR AND SO ON.
20 WE CAN SEE MANY OF THOSE CONCEPTS IN THE OTHER POLICIES.

21 SO, IF I MAY, JUST FOCUS ON THE AMOUNT ELEMENT, AMOUNT
22 APPROPRIATE FOR EDUCATIONAL PURPOSES, ENTIRE JOURNAL ARTICLE
23 LIKELY WITHIN FAIR USE, BRIEF EXCERPTS OF WORKS ALLOWED.

24 Q. NOW, HOW WOULD THE EMORY POLICY OVER AND ABOVE THAT
25 REQUIREMENT INCORPORATE THE OTHER FAIR USE FACTORS INTO THE

1 DETERMINATION?

2 MR. RICH: OBJECT TO THE FORM.

3 THE COURT: OVERRULED.

4 THE WITNESS: THE EMORY POLICY, I AM LOOKING AT MY
5 SUMMARY, WE CAN GO TO THE DOCUMENT ITSELF, INCLUDES AN
6 OVERVIEW OF THE FOUR FACTORS OF FAIR USE, THEN BREAKS THEM
7 OUT WITH RESPECT TO PURPOSE OF THE USE, IF THE MATERIALS ARE
8 AT THE REQUEST OF THE INSTRUCTOR AND FOR EDUCATIONAL PURPOSES.
9 THE NATURE OF THE WORK.

10 BY MR. SCHAEZEL:

11 Q. WHICH IS FACTOR TWO?

12 A. FACTOR TWO. FACTUAL WORKS ARE MORE LIKELY TO BE
13 WITHIN FAIR USE THAN ARE CREATIVE WORKS. THIRD FACTOR
14 AMOUNT, I READ IT ALREADY, AMOUNT APPROPRIATE FOR
15 EDUCATIONAL PURPOSES, ENTIRE JOURNAL ARTICLE LIKELY WITHIN
16 FAIR USE, BRIEF EXCERPTS OF WORKS. EFFECT ON THE MARKET,
17 THE ACCESS LIMITED TO STUDENTS, FACULTY AND STAFF. ACCESS
18 RESTRICTED TO STUDENTS IN A SPECIFIC COURSE. ACCESS
19 TERMINATED AT THE END OF THE SEMESTER. LIBRARY WILL NOT
20 PROVIDE COPIES OF MATERIALS TO STUDENTS OR INSTRUCTORS BY ANY
21 OTHER MEANS. MATERIALS MAY BE USED ONLY FOR EDUCATIONAL
22 PURPOSES.

23 Q. WERE THERE ANY OTHER UNIVERSITIES THAT YOU FOUND FELL
24 IN THIS THIRD CATEGORY THAT RELIED ON THE FAIR USE FACTORS?

25 A. YES. MERCER UNIVERSITY. COMPLETE BOOKS OR

1 SUBSTANTIAL PARTS OF WORKS NOT COPIED WITHOUT PERMISSION.
2 AND THEN OTHER ELEMENTS OF THE POLICY.

3 UNIVERSITY OF WISCONSIN AT MADISON, RELIES ON THE FOUR
4 FACTORS. IT HAS SOME OF THE ELEMENTS THAT WILL BE FAMILIAR
5 AND WE HAVE HEARD ABOUT FROM EMORY THAT THE MATERIALS ARE AT
6 THE INITIATIVE OF THE INSTRUCTOR AND SO ON. BUT THAT THE
7 AMOUNT THAT IS USED IS BASED UPON A VERSION OF THE FAIR USE
8 CHECKLIST THAT IS USED TO DETERMINE THE APPROPRIATENESS OF
9 PLACING A WORK ON RESERVES.

10 UNIVERSITY OF ILLINOIS AT URBANA CHAMPAIGN, A REVIEW OF
11 THE FOUR FACTORS. SUB BRIEF SUMMARY OF THEM, THE PURPOSE OF
12 THE USE, NONPROFIT EDUCATIONAL PURPOSE, MATERIALS POSTED
13 ONLY AT REQUEST OF INSTRUCTOR, NATURE OF THE WORK,
14 CONSIDERATION OF WHETHER THE WORK IS FACTUAL OR CREATIVE,
15 AMOUNT OF THE WORK, AMOUNT RELATED TO EDUCATIONAL PURPOSE,
16 EFFECT ON THE MARKET, RESTRICTED ACCESS FOR SPECIFIC COURSE,
17 MATERIALS ACCESSIBLE BY COURSE. AND WHAT I MEAN BY THAT IS,
18 YOU CAN ACCESS IT ONLY THROUGH THE COURSE CONNECTION, SO YOU
19 HAVE TO BE IN THAT COURSE. LIBRARY WILL PURCHASE MATERIALS
20 AT REASONABLE PRICE WHENEVER POSSIBLE.

21 PRINCETON UNIVERSITY HAS PASSWORD RESTRICTED SYSTEM AND
22 THEN LINKS TO THE GENERAL UNIVERSITY COUNSEL'S WEBSITE AT
23 PRINCETON FOR STATEMENT ABOUT FAIR USE, WHICH IS BUILT
24 PRINCIPALLY ON THE FOUR FACTORS IN THE LAW. NOT GIVING
25 NECESSARILY SPECIFIC STANDARDS FOR ELECTRONIC RESERVES.

1 CORNELL UNIVERSITY, THEY AGAIN FOCUS ON THE FOUR FACTORS,
2 USES VERSION OF THE CHECKLIST IN ORDER TO DETERMINE WHAT IS
3 APPROPRIATE AND THAT INCLUDES, OF COURSE, THE AMOUNT FACTOR.

4 DUKE UNIVERSITY, BOOKS ALLOWED, BUT NOT COMPLETE BOOKS OR
5 EXCERPTS BEYOND FAIR USE. JOURNAL ISSUES ALLOWED BUT NOT
6 COMPLETE ISSUES OR EXCERPTS BEYOND FAIR USE.

7 UNIVERSITY OF TENNESSEE, LIBRARY FOLLOWS PRINCIPLES OF
8 FAIR USE. COMPLETE BOOKS ARE NOT ALLOWED, CONSUMABLES SUCH
9 AS WORKBOOKS ARE NOT ALLOWED.

10 UNIVERSITY OF NORTH CAROLINA GREENSBORO, USERS MAY MAKE
11 ONE COPY OF THE MATERIALS AND THE LIBRARY -- MY APOLOGIES,
12 UNIVERSITY OF NORTH CAROLINA GREENSBORO, BOOKS AND LONGER
13 WORKS ALLOWED BUT NOT COMPLETE COPIES.

14 COLORADO STATE UNIVERSITY IN FT. COLLINS, LONGER WORKS
15 SUCH AS COMPLETE WORKS ARE NOT ALLOWED. AND AGAIN LIKE ALL
16 OF THESE POLICIES, THERE ARE MORE PARAMETERS THAN OTHER WAYS.

17 UNIVERSITY OF WASHINGTON, THE LIBRARY WILL COMPLY WITH
18 COPYRIGHT LAW, LIMIT MATERIALS ON RESERVE TO NECESSARY
19 READINGS IN ORDER TO MAKE APPROPRIATE USE OF STATE RESOURCES.
20 AND MOVING ON.

21 AUSTIN PEAY STATE UNIVERSITY IN TENNESSEE, LONGER WORKS
22 SUCH AS COMPLETE BOOKS ARE NOT COPIED. LIBRARY WILL NOT POST
23 MATERIALS WITHOUT PERMISSION IF IT JUDGES THAT THE NATURE,
24 SCOPE, OR EXTENT OF THE MATERIAL IS BEYOND THE REASONABLE
25 LIMITS OF FAIR USE. UNIVERSITY OF ALASKA AT FAIRBANKS,

1 COMPLETE BOOKS OR JOURNAL ARTICLES WILL NOT BE SCANNED, NO
2 WORKBOOK STANDARD TESTS, COURSEPACKS.

3 PACE UNIVERSITY IN NEW YORK ALLOWED MATERIALS, JOURNAL
4 ARTICLES, NEWSPAPER ARTICLES, BOOK CHAPTERS. NOT ALLOWED
5 COMPLETE OR LONGER WORKS SUCH AS BOOKS OR MONOGRAPHS.
6 MATERIAL BEYOND FAIR USE MAY BE PLACED ON RESERVE PROVIDED
7 PERMISSION IS BEING SOUGHT. INSTRUCTORS ARE RESPONSIBLE FOR
8 PERMISSION AND SO ON. AND THAT CONCLUDES MY LIST.

9 Q. YOU MENTIONED THAT YOU -- THAT CERTAIN UNIVERSITIES
10 RELY ON THE CHECKLIST?

11 A. I IDENTIFIED SOME ON THIS LIST, YES.

12 Q. YES. DO YOU HAVE ANY EXPERIENCE WITH UNIVERSITIES AND
13 USE OF A CHECKLIST?

14 A. YES, I DO.

15 Q. WHAT IS YOUR EXPERIENCE?

16 A. I THINK I SHOULD START WITH THE FACT THAT I WAS
17 INVOLVED WITH COLLEAGUES IN DEVELOPING ONE OF THE EARLIEST
18 VERSIONS OF A FAIR USE CHECKLIST IN 1997.

19 Q. AND THAT WAS WHILE YOU WERE AT INDIANA UNIVERSITY?

20 A. THAT IS WHILE I WAS AT INDIANA UNIVERSITY, YES.

21 Q. HAVE YOU BEEN INVOLVED WITH CHECKLISTS AT OTHER
22 UNIVERSITIES?

23 A. I HAVE.

24 Q. GENERALLY SPEAKING, PLEASE DESCRIBE.

25 A. GENERALLY SPEAKING CERTAINLY I HAVE USED IT IN MANY

1 WAYS AT THE WORK THAT I DO IN MY OWN WORK AND WHEN COLLEAGUES
2 APPROACH ME AT ORGANIZATIONS WHERE I HAVE BEEN EMPLOYED OR
3 WHERE SOMEBODY COMES TO ME WITH A PROJECT AND HAS SOME UNUSUAL
4 QUESTION OF FAIR USE, FOR EXAMPLE. I WILL REFER THEM
5 FREQUENTLY TO THE FAIR USE CHECKLIST THAT I HAVE POSTED ON MY
6 SITE OR VERSIONS THAT YOU CAN FIND ELSEWHERE. AND ONE MAY
7 USE THOSE AS A HELPFUL GUIDE FOR THINKING THROUGH THE ISSUES
8 OF A RELEVANT FAIR USE.

9 Q. WERE YOU APPROACHED BY THE COPYRIGHT CLEARANCE CENTER
10 REGARDING A CHECKLIST?

11 A. YES, I WAS.

12 Q. WHAT HAPPENED?

13 A. WELL, I GET APPROACHED BY MANY PEOPLE AND ORGANIZATIONS
14 CURIOUS ABOUT IT AND WANTING TO USE IT AND SOMETIMES THEY ASK
15 FOR MY CONSENT OR APPROVAL, WHETHER THEY NEED THAT OR NOT I
16 DON'T KNOW. BUT THE COPYRIGHT CLEARANCE CENTER APPROACHED
17 ME, AND I BELIEVE IT WAS 2004, I WAS CONTACTED BY PHONE OR
18 EMAIL BY SOMEBODY I HAVE KNOWN AND WORKED WITH AT THE
19 COPYRIGHT CLEARANCE CENTER FOR A WHILE AND HER NAME IS DREW
20 RIZETTI. SHE RUNS THE EDUCATIONAL PROGRAMS I BELIEVE, I
21 BELIEVE SHE IS STILL THERE DOING THAT. SHE APPROACHED ME AND
22 SAID THAT THEY ARE PUTTING SOMETHING LIKE THEY ARE PUTTING
23 TOGETHER MATERIALS AND SHE WOULD LIKE TO HAVE PERMISSION TO
24 USE THE COPYRIGHT FAIR USE CHECKLIST IN THEIR MATERIALS.

25 MR. RICH: OBJECTION. MOVE TO STRIKE, HEARSAY.

1 THE COURT: OVERRULED.

2 BY MR. SCHAEZEL:

3 Q. WHAT DID YOU SAY?

4 THE COURT: LET ME FOLLOW UP. I WILL ADMIT IT IN
5 ORDER TO EXPLAIN WHAT HAPPENED THEN OR WHY IT HAPPENED THEN.
6 GO AHEAD.

7 THE WITNESS: I WAS HAPPY TO GIVE PERMISSION. I AM
8 VERY HAPPY WHEN PEOPLE FIND MY MATERIALS TO BE USEFUL. AND
9 SO I SAID SOMETHING LIKE, SURE. AND SHE PUT ME THEN IN
10 TOUCH WITH A COLLEAGUE, ALSO AT THE COPYRIGHT CLEARANCE
11 CENTER, SOMEBODY WHOM I DON'T BELIEVE I HAVE EVER MET AND
12 SOMEBODY SHE WORKS WITH, PUT ME IN TOUCH WITH HER WHO THEN
13 RELAYED TO ME SOME CHANGES THAT THEY WANTED TO MAKE IN THE --
14 IN THE CHECKLIST AS THEY FOUND IT ON THE WEBSITE I
15 ADMINISTERED AT THAT TIME. AND THAT WAS FINE WITH ME.

16 I THINK IT IS IMPORTANT FOR ORGANIZATIONS TO MAKE
17 ADJUSTMENTS TO MEET THEIR PARTICULAR NEEDS AND SERVE THEIR
18 OBJECTIVES. SO I WAS HAPPY TO APPROVE ANY OF THAT. SHE
19 WANTED MY APPROVAL, I WAS HAPPY TO GIVE MY APPROVAL. I ASKED
20 FOR A CREDIT LINE IN RETURN BACK AND A LINK BACK TO OUR
21 WEBSITE. THEY WERE HAPPY TO GIVE THAT AND THAT WAS IT. IT
22 WAS A GOOD, CONSTRUCTIVE RELATIONSHIP.

23 Q. DO YOU HAVE AN OPINION REGARDING THE APPROPRIATENESS OF
24 A PUBLIC RESEARCH UNIVERSITY SUCH AS GEORGIA STATE
25 INCORPORATING A FAIR USE CHECKLIST INTO THEIR POLICY?

1 MR. RICH: OBJECTION. CALLS FOR A LEGAL CONCLUSION.

2 THE COURT: OVERRULED.

3 THE WITNESS: YES, I DO.

4 BY MR. SCHAEZEL:

5 Q. WHAT IS YOUR OPINION?

6 A. I BELIEVE THAT IT IS APPROPRIATE TO USE A FAIR USE
7 CHECKLIST IN MANY INSTANCES OF APPLICATION OF FAIR USE.

8 Q. WHY SO?

9 A. IN ITS RAWEST FORM, THE PURPOSE OF THE CHECKLIST, AS I
10 AM FAMILIAR WITH THE CHECKLIST, IS STARTING WITH THE ONE THAT
11 I DRAFTED YEARS AGO. THE MAIN PURPOSE OF IT IS TO GIVE
12 GUIDANCE TO USERS, TO POINT OUT TO THEM WHAT THE FOUR FACTORS
13 ARE, SOME OF THE FACTUAL VARIABLES THAT RELATE TO THOSE FOUR
14 FACTORS, AND JUST HELP PEOPLE WORK THROUGH THE RELEVANT
15 VARIABLES TO REACH AN INFORMED CONCLUSION. IT ACTUALLY IN
16 ITS BASIC FORM IS DESIGNED TO MAKE SURE THAT PEOPLE DO THINK
17 ABOUT THE ISSUES AND DON'T SKIP OVER SOMETHING AND DON'T JUMP
18 TO CONCLUSION.

19 Q. IN ITS BASIC FORM, DOES IT OFFER A SENSE OF
20 FLEXIBILITY TO THE USER IN YOUR EXPERIENCE?

21 A. YES, IT DOES.

22 Q. HOW SO?

23 A. WELL, IT DOESN'T DEFINE PERCENTAGES OR WORD COUNTS OR
24 ANY BOOK CHAPTER COUNTS OR ANYTHING SPECIFIC LIKE THAT. IT
25 DOESN'T ATTEMPT TO MANDATE ANYTHING LIKE THAT. IT ALSO AT THE

1 SAME TIME DOESN'T SAY -- IT DISPELS MYTHS, FOR EXAMPLE. ONE
2 OF THE MOST COMMON MYTHS THAT IS RELEVANT TO OUR WORK HERE IS
3 PEOPLE WHO SAY, JUST BECAUSE MY USE IS FOR EDUCATION
4 THEREFORE IT MUST BE FAIR USE. I WILL TELL YOU RIGHT NOW,
5 THAT IS WRONG. BUT I WILL ALSO TELL YOU RIGHT NOW THAT IF
6 YOUR USE IS FOR COMMERCIAL, IT DOESN'T MEAN IT CAN'T BE FOR
7 FAIR USE. SO, FAIR USE DOESN'T HAVE THESE KIND OF HARD AND
8 FAST RULES. AND THE PURPOSE OF THE CHECKLIST IS TO REALLY
9 PROVIDE AN OPPORTUNITY FOR USERS TO SEE THE VARIABLES, TO SEE
10 THE FACTORS, TO THINK THROUGH THE CIRCUMSTANCES OF THEIR
11 SITUATION AND REACH A BALANCED AND INFORMED CONCLUSION.

12 Q. DO YOU HAVE A VIEW AS IN THE APPLICATION OF FAIR USE
13 AND POLICY SUCH AS AT GEORGIA STATE WHETHER THE APPLICATION OF
14 THAT POLICY NEEDS TO BE FLEXIBLE?

15 MR. RICH: OBJECTION, ALSO CALLS FOR LEGAL
16 CONCLUSION.

17 THE COURT: OVERRULED.

18 THE WITNESS: I BELIEVE IT DOES NEED TO BE FLEXIBLE.

19 BY MR. SCHAEZEL:

20 Q. WHY?

21 A. BECAUSE WE CAN'T PREDICT THE FUTURE. ONE OF THE BASIC
22 PURPOSES OF FAIR USE, ONE OF THE BASIC REASONS WHY FAIR USE
23 IS A CONSIDERATION, QUOTING FROM, PARAPHRASING, ACTUALLY THE
24 WORD OF THE STATUTE CONSIDERATION OF THE FOUR FACTORS IS
25 BECAUSE CONGRESS KNEW THAT IT DIDN'T KNOW WHAT THE FUTURE WAS

1 GOING TO BRING. WHAT THE NEEDS WERE GOING TO BE, WHAT THE
2 WORKS WERE GOING TO BE, WHAT THE TECHNOLOGY WAS GOING TO BE,
3 WHAT THE CIRCUMSTANCES WERE GOING TO BE. AND SO THEREFORE
4 CONGRESS CHOSE TO KEEP FAIR USE FLEXIBLE IN ORDER TO
5 ACCOMMODATE THOSE CHANGING NEEDS.

6 Q. IN YOUR SECOND REPORT IN THIS CASE, DID YOU IDENTIFY
7 UNIVERSITIES THAT USED A FAIR USE CHECKLIST?

8 A. YES, I DID.

9 Q. WOULD YOU PLEASE IDENTIFY THOSE UNIVERSITIES? TURN IN
10 YOUR WITNESS BOOK TO I THINK IT IS THE SECOND PRIMARY TAB
11 AFTER THE LETTER TABS.

12 A. I AM LOOKING AT A REPORT CALLED "REBUTTAL EXPERT
13 REPORT" DATED NOVEMBER 2, 2009. AND COULD YOU REPEAT THE
14 QUESTION, PLEASE?

15 Q. YES. WOULD YOU PLEASE IDENTIFY THOSE SCHOOLS THAT YOU
16 LISTED AS INCORPORATING OR USING A CHECKLIST IN THEIR FAIR USE
17 OR COPYRIGHT POLICIES?

18 A. I AM STARTING AT THE BOTTOM OF PAGE 20, AT LEAST THE
19 PAGE NUMBERS AT THE BOTTOM OF THE PAGE, PAGE 20. MANY
20 EDUCATIONAL INSTITUTIONS HAVE POSTED TO THEIR WEBSITES FAIR
21 USE CHECKLIST, ET CETERA, ADOPTED -- SOME ADOPTED CHECKLIST,
22 SOME HAVE MADE CHANGES AND SO ON. AGAIN, I AM PARAPHRASING
23 MY OWN REPORT. DO YOU WANT ME TO ACTUALLY BEGIN READING?

24 Q. I WOULD LIKE FOR YOU TO IDENTIFY THE SCHOOLS THAT USE A
25 CHECKLIST OR A VARIATION OF THE CHECKLIST, YES, SIR.

1 MR. RICH: OBJECTION. MOST THIS WITNESS CAN TESTIFY
2 TO IS WHAT THEIR WEBSITES REPORT. HE CAN'T TESTIFY AS TO
3 WHAT INSTITUTIONS ACTUALLY USE, WHETHER THE INSTITUTION, AS
4 THE QUESTION IS POSED, WHETHER THE INSTITUTION ACTUALLY USES
5 THE CHECKLIST.

6 THE COURT: OVERRULED.

7 THE WITNESS: BEGINNING AT THE TOP OF PAGE 21, I
8 HAVE A LIST OF INSTITUTIONS AND WEB LINKS. AND SO AT THE TIME
9 OF PREPARING THIS REPORT IN 2009, I HAD VISITED EACH OF THOSE
10 WEB LINKS, HAD SEEN THAT THERE IS SOME VERSION OF A FAIR USE
11 CHECKLIST AT THAT LOCATION. SO READING FROM THE TOP.
12 UNIVERSITY OF MINNESOTA, THE LIBRARIES; NORTH CAROLINA STATE
13 UNIVERSITY, PROVOST OFFICE. I WILL JUST READ THE INSTITUTION
14 IF THAT IS ALL RIGHT.

15 BY MR. SCHAEZEL:

16 Q. THAT WILL BE FINE.

17 A. UNIVERSITY OF CHICAGO; MEDICAL UNIVERSITY OF SOUTH
18 CAROLINA; BOISE STATE UNIVERSITY; BALL STATE UNIVERSITY;
19 UNIVERSITY OF DENVER; CALIFORNIA STATE UNIVERSITY; VIRGINIA
20 TECH; KANKAKEE COMMUNITY COLLEGE IN ILLINOIS; SCHOOL CRAFT
21 COLLEGE IN MICHIGAN; BAYLOR COLLEGE; UNIVERSITY OF ROCHESTER.

22 Q. DR. CREWS FOR THE BENEFIT OF THE COURT REPORTER, COULD
23 I ASK YOU TO SLOW DOWN JUST A LITTLE BIT?

24 I BELIEVE THE LAST ONE WAS BAYLOR IN TEXAS?

25 A. THANK YOU. UNIVERSITY OF ROCHESTER; UNIVERSITY OF

1 ARIZONA; HAMLIN UNIVERSITY, MINNESOTA; CORNELL UNIVERSITY;
2 UNIVERSITY OF NORTH CAROLINA; UNIVERSITY OF CENTRAL MISSOURI,
3 PORTLAND COMMUNITY COLLEGE, YAKIMA VALLEY COMMUNITY COLLEGE;
4 UNIVERSITY OF CINCINNATI, I FOUND TWO LOCATIONS THERE, TWO
5 WEB LOCATIONS I MEAN; WESTERN UNIVERSITY OF HEALTH SCIENCES IN
6 CALIFORNIA; WRIGHT STATE UNIVERSITY; LUTHER COLLEGE; CENTRAL
7 MICHIGAN UNIVERSITY; ALBANY COLLEGE OF PHARMACY AND HEALTH
8 SCIENCES.

9 THEN I FOUND ANOTHER GROUP THAT HAD INSTITUTIONS THAT HAD
10 LINKS TO THE VERSION OF THE CHECKLIST THAT IS POSTED AT THE
11 COPYRIGHT ADVISORY OFFICE OF COLUMBIA UNIVERSITY. SALISBURY
12 UNIVERSITY IN MARYLAND, MUHLENBERG COLLEGE PENNSYLVANIA;
13 RUTGERS UNIVERSITY; SAM HOUSTON STATE UNIVERSITY; KENT STATE
14 UNIVERSITY; LYCOMING COLLEGE IN PENNSYLVANIA; UNIVERSITY OF
15 TENNESSEE; CALIFORNIA STATE UNIVERSITY, CHICO; STANFORD
16 UNIVERSITY; UNIVERSITY OF CALIFORNIA LOS ANGELES; WABASH
17 COLLEGE, INDIANA; OAKTON COMMUNITY COLLEGE, ILLINOIS; DRAKE
18 UNIVERSITY, IOWA; GEORGIAN COURT UNIVERSITY IN NEW JERSEY;
19 UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY; UNIVERSITY
20 OF WASHINGTON; UNIVERSITY OF CALIFORNIA SYSTEM WIDE OFFICE;
21 TAYLOR UNIVERSITY IN INDIANA.

22 I ALSO IDENTIFIED INSTITUTIONS THAT HAD A LINK TO THE SITE
23 WHERE THE CHECKLIST WAS POSTED AT THE COPYRIGHT MANAGEMENT
24 CENTER OF INDIANA UNIVERSITY. READING THAT LIST, BELLEVUE
25 UNIVERSITY IN NEBRASKA; VERA CRUZ UNIVERSITY; UNIVERSITY OF

1 ALASKA; THE MASTERS COLLEGE, CALIFORNIA; CAPITAL UNIVERSITY
2 IN OHIO; UNIVERSITY OF CALIFORNIA LOS ANGELES; ST. JOSEPH'S
3 UNIVERSITY, PENNSYLVANIA; SOUTHERN CONNECTICUT STATE
4 UNIVERSITY; CLAIRMONT GRADUATE UNIVERSITY; BERKELEY CITY
5 COLLEGE; CONNECTICUT COLLEGE; BUCKS COUNTY COMMUNITY COLLEGE;
6 UNIVERSITY OF WISCONSIN EXTENSION; UNIVERSITY OF WISCONSIN
7 LIBRARIES; UNIVERSITY OF MONTANA; WILLIAM PATTERSON
8 UNIVERSITY, NEW JERSEY; PENNSYLVANIA STATE UNIVERSITY; COLLEGE
9 OF SAN MATEO, CALIFORNIA; HARVARD UNIVERSITY OFFICE OF GENERAL
10 COUNSEL; SACRAMENTO STATE UNIVERSITY; CLAIRMONT COLLEGES,
11 CALIFORNIA; SOKA UNIVERSITY OF AMERICA, CALIFORNIA; MT.
12 CLAIRE STATE UNIVERSITY NEW JERSEY; GOVERNOR'S STATE
13 UNIVERSITY, ILLINOIS; ALFRED UNIVERSITY, NEW YORK; YESHIVA
14 UNIVERSITY, NEW YORK; JOHNS HOPKINS UNIVERSITY.

15 THEN I IDENTIFIED INSTITUTIONS THAT HAD CONTACTED ME TO
16 REQUEST PERMISSION TO USE AND SOMETIMES AS IS, SOMETIMES OF
17 VARIATION TO MAKE USES OF THE CHECKLIST. SOMETIMES IT WAS
18 FOR A SPECIFIC EVENT, SOMETIMES IT WAS FOR LONG-TERM USE.
19 BUT I IDENTIFIED THOSE ORGANIZATIONS THAT HAD CONTACTED ME SO
20 I AM AWARE THAT THEY TOO IN SOME MANNER WERE USING THE
21 CHECKLIST, WOULD YOU LIKE ME TO READ THAT LIST, AS WELL?

22 Q. PLEASE.

23 A. COPYRIGHT CLEARANCE CENTER; TRUMAN STATE UNIVERSITY;
24 IVY TECH COMMUNITY COLLEGE; ARIZONA WESTERN COLLEGE; NEW YORK
25 INSTITUTE OF TECHNOLOGY; LEE COLLEGE; UNIVERSITY OF IOWA,

1 GENERAL COUNSEL; RUTGERS UNIVERSITY, GENERAL COUNSEL; SCHOOL
2 DISTRICT OF PALM BEACH COUNTY; RUSH UNIVERSITY MEDICAL CENTER;
3 PIMA COMMUNITY COLLEGE; CALIFORNIA POLYTECHNIC UNIVERSITY
4 POMONA; ALLATOONA HIGH SCHOOL IN MARIETTA, GEORGIA; OKLAHOMA
5 CITY COMMUNITY COLLEGE; INDIANA UNIVERSITY SCHOOL OF NURSING;
6 UNIVERSITY OF KANSAS; ASSOCIATED MENNONITE BIBLICAL SEMINARY;
7 URSINUS COLLEGE; CAMPBELLSVILLE UNIVERSITY; VATTEROTT COLLEGE;
8 PORTLAND COMMUNITY COLLEGE; WEST KENTUCKY COMMUNITY AND
9 TECHNICAL COLLEGE; TROCAIRE COLLEGE; INDIANA STATE LIBRARY OF
10 LEGAL COUNSEL'S OFFICE. ST. PIOUS X, CATHOLIC HIGH SCHOOL IN
11 ATLANTA, GEORGIA; AUBURN UNIVERSITY; UNIVERSITY OF PUERTO
12 RICO; BUTLER UNIVERSITY; NORFOLK PUBLIC SCHOOLS IN NEBRASKA;
13 EL CAMINO COLLEGE; SOUTHERN ILLINOIS UNIVERSITY, GENERAL
14 COUNSEL; RIVERTON HIGH SCHOOL IN UTAH; THE ART INSTITUTION OF
15 CALIFORNIA; SPOKANE COMMUNITY COLLEGE; KENT STATE UNIVERSITY;
16 CALIFORNIA STATE UNIVERSITY, FRESNO; UNIVERSITY OF ALASKA;
17 CENTRAL MICHIGAN UNIVERSITY; MADISON AREA TECHNICAL COLLEGE;
18 PENNSYLVANIA STATE UNIVERSITY; SWEDISH MEDICAL CENTER;
19 SOUTHWEST WISCONSIN TECHNICAL COLLEGE; UNIVERSITY OF NORTH
20 CAROLINA AT WILMINGTON; UNIVERSITY OF CALIFORNIA, IRVINE;
21 UNIVERSITY OF SOUTHERN INDIANA; UNIVERSITY OF WASHINGTON;
22 MISSISSIPPI STATE UNIVERSITY; TARLTON STATE UNIVERSITY;
23 UNIVERSITY OF NORTH TEXAS, GENERAL COUNSEL; BOWIE INDEPENDENT
24 SCHOOL DISTRICT IN TEXAS; NEW OWNED AREA CATHOLIC SCHOOLS IN
25 MINNESOTA; BRIGHAM YOUNG UNIVERSITY; NORTH CAROLINA STATE

1 UNIVERSITY, GENERAL COUNSEL; NORTH HARRIS COLLEGE.

2 ADDITIONAL ORGANIZATIONS THAT ARE DIFFERENT FROM THOSE:
3 THE STATE CONNECTICUT JUDICIAL BRANCH; OHIO EDUCATIONAL
4 LIBRARY MEDIA ASSOCIATION.

5 Q. IF I CAN, DR. CREWS, BEFORE YOU CONTINUE, WHEN YOU SAY
6 THIS LIST THAT ARE DIFFERENT FROM THOSE, IN WHAT WAY ARE THEY
7 DIFFERENT, SIR?

8 A. THE OTHERS ARE K THROUGH 12, COLLEGES, UNIVERSITIES,
9 EDUCATIONAL INSTITUTIONS.

10 Q. PLEASE CONTINUE.

11 A. SO BACK TO OTHERS: STATE CONNECTICUT JUDICIAL BRANCH;
12 OHIO EDUCATIONAL LIBRARY MEDIA ASSOCIATION; MUSEUM OF WESTERN
13 COLORADO; SYMANTEC CORPORATION; DEWEY AND DEWEY, A LAW FIRM;
14 AND RENAISSANCE-PRINTING, A PRINTING SHOP.

15 THE COURT: LET'S TAKE A BREAK. WE WILL TAKE A
16 FIFTEEN-MINUTE BREAK.

17 (WHEREUPON, A SHORT RECESS WAS HELD.)

18 THE COURT: YOU MAY PROCEED.

19 MR. SCHAEZEL: THANK YOU, YOUR HONOR.

20 BY MR. SCHAEZEL:

21 Q. IN YOUR EXPERIENCE, WHAT TYPES OF USES DO VARIOUS
22 UNIVERSITIES AND COLLEGES MAKE OF THE CHECKLISTS?

23 A. WHAT I HAVE HEARD FROM DIFFERENT INSTITUTIONS AND SEEN
24 ON THEIR WEBSITES IS THAT THEY USE IT FOR A WIDE VARIETY OF
25 DIFFERENT CIRCUMSTANCES. VERY OFTEN FOR THE PREPARATION OF

1 MATERIALS IN CONNECTION WITH SOME KIND OF WORKSHOP OR
2 EDUCATIONAL PROGRAM OR COURSE THAT SOMEBODY IS TEACHING, AS
3 WELL AS FOR INCORPORATION INTO POWERPOINT SLIDE, MULTIMEDIA
4 STUDIES, OTHER KIND OF PLACES WHERE CUTTING AND PASTING OF
5 WORKS RAISES FAIR USE QUESTIONS. I HAVE SEEN MANY DIFFERENT
6 KIND OF USES.

7 Q. HAVE YOU SEEN INSTANCES WHERE UNIVERSITIES HAVE OFFERED
8 THE CHECKLIST AS A RESEARCH TOOL?

9 A. AS A RESEARCH TOOL OR?

10 Q. OR A REFERENCE TO I GUESS WOULD BE A BETTER?

11 A. AS A REFERENCE TOOL, CERTAINLY. WHERE AN INSTITUTION
12 WOULD SAY, HERE IS SOME INFORMATION TO HELP YOU WITH FAIR USE
13 DECISIONS, AND AMONG THAT INFORMATION HERE IS A FAIR USE
14 CHECKLIST TO HELP YOU WITH A FAIR USE DECISION.

15 Q. IN YOUR EXPERIENCE, DO ALL USERS OF THE CHECKLIST
16 REQUIRE THE USER TO PHYSICALLY COMPLETE THE CHECKLIST?

17 A. REQUIRE THAT COMPLETION?

18 Q. YES.

19 MR. RICH: OBJECTION, LEADING.

20 THE COURT: OVERRULED.

21 THE WITNESS: IF YOU COULD REPEAT THE QUESTION,
22 PLEASE.

23 BY MR. SCHAEZEL:

24 Q. IN YOUR EXPERIENCE, DO ALL UNIVERSITIES THAT USE A
25 CHECKLIST REQUIRE THE USER TO PHYSICALLY COMPLETE THE

1 CHECKLIST?

2 A. NO.

3 Q. WHAT IS YOUR EXPERIENCE?

4 A. MY EXPERIENCE IS THAT, FOR THE MOST PART, IT IS OFFERED
5 AS A TOOL, AS A RESOURCE. VERY OFTEN OPTIONAL. WE DO SEE
6 OR I HAVE SEEN EXAMPLES SUCH AS ONE THAT I MENTIONED AT THE
7 UNIVERSITY OF WISCONSIN WHERE THE TOOL -- WHERE THE CHECKLIST
8 IS PART OF THE DECISION-MAKING PROCESS INSIDE THE LIBRARY FOR
9 ELECTRONIC RESERVES. I DON'T RECALL WHETHER EVEN THERE THE
10 POLICY SAID YOU ARE REQUIRED TO COMPLETE, AND I THINK YOU MAY
11 HAVE SAID IN YOUR QUESTION KEEP A COPY OF THE CHECKLIST, BUT
12 EVEN COMPLETE A COPY. I DON'T RECALL SPECIFICALLY THAT
13 LANGUAGE. BUT IN THAT KIND OF INSTANCE IT IS CLEARLY IMPLIED
14 THAT YOU WILL USE THIS CHECKLIST AS PART OF THE
15 DECISION-MAKING PROCESS. THERE ARE SOME OF THOSE, YES.

16 Q. OKAY. SO THERE ARE SOME THAT REQUIRE COMPLETION, IF
17 YOU WILL, OF A CHECKLIST AND SOME THAT DO NOT?

18 A. AND SOME THAT DO NOT, YES.

19 Q. YOU HAVE REVIEWED GEORGIA STATE COPYRIGHT POLICY?

20 A. YES.

21 Q. OR UNIVERSITY OF GEORGIA COPYRIGHT POLICY?

22 A. YES.

23 Q. IN TERMS OF YOUR THREE CATEGORIES, PERCENTAGE,
24 CHAPTER, AND FOUR FACTORS, WHERE WOULD YOU PLACE THE GEORGIA
25 STATE POLICY?

1 A. I WOULD HAVE PUT THAT IN THE THIRD CATEGORY, ITS FAIR
2 USE MEASURE BASED UPON THE FOUR FACTORS.

3 Q. AND YOU HAVE ALSO REVIEWED THE GEORGIA STATE CHECKLIST,
4 HAVE YOU NOT?

5 A. I HAVE.

6 Q. WHERE DOES THE GEORGIA STATE CHECKLIST FALL IN TERMS OF
7 ITS RELATION TO OTHER CHECKLISTS THAT YOU HAVE SEEN?

8 MR. RICH: OBJECTION, VAGUE.

9 THE COURT: OVERRULED.

10 THE WITNESS: MANY OF THE CHECKLISTS AND TYPICALLY
11 THE CHECKLIST THAT I HAVE SEEN ARE BASED VERY CLOSELY ON THE
12 ORIGINAL CHECKLIST THAT I AND MY COLLEAGUES DEVELOPED BACK IN
13 THE LATE 1990'S. THEY OFTEN DO MAKE SOME MODIFICATIONS. I
14 MENTIONED EARLIER THAT THE COPYRIGHT CLEARANCE CENTER, IT HAS
15 INDICATED TO ME THEY WERE MAKING SOME CHANGES. THE GEORGIA
16 STATE CHECKLIST MAKES MANY MORE CHANGES THAN I TYPICALLY SEE.
17 SO, GEORGIA STATE HAS, BY THAT MEASURE, REALLY MODIFIED IT TO
18 MEET ITS OWN PARTICULAR OBJECTIVES.

19 Q. IN TERMS OF REQUIRING THAT ONE FILL OUT A CHECKLIST OR
20 NOT FILL OUT A CHECKLIST, DO YOU HAVE AN OPINION AS TO WHICH
21 IS PREFERABLE?

22 A. AS OPPOSED TO FILLING IT OUT VERSUS NOT FILLING IT OUT?

23 Q. YES.

24 A. FILLING IT OUT IS DEFINITELY PREFERABLE.

25 Q. WHY?

1 A. BECAUSE IT CREATES -- THE PROCESS OF FILLING OUT A
2 FORM LIKE THIS, A CHECKLIST LIKE THIS IS A PROCESS OF
3 THINKING THROUGH THE ISSUES. PHYSICALLY CHECKING BOXES AND
4 MAYBE EVEN MAKING COMMENTS IF ONE WANTED AND NOTES IN THE
5 MARGIN, I THINK, HELPS PEOPLE THINK MORE THOROUGHLY. PLUS,
6 I OFTEN SAY TO PEOPLE, FILL IT OUT AND PUT IT IN YOUR FILE.
7 IT BECOMES A RECORD OF WHAT YOU WERE THINKING AND THE DECISION
8 YOU MADE IN CASE ANYBODY QUESTIONS YOU ON IT IN THE FUTURE.

9 Q. ARE YOU AWARE THAT THE GEORGIA STATE POLICY PROVIDES
10 PROFESSORS TO MAKE THE FAIR USE DETERMINATION?

11 A. YES, I AM.

12 Q. ARE YOU AWARE THAT THAT DETERMINATION IS THEN REVIEWED,
13 TO SOME EXTENT, BY LIBRARY STAFF?

14 MR. RICH: OBJECTION, LEADING.

15 THE COURT: SUSTAINED.

16 BY MR. SCHAEZEL:

17 Q. TO YOUR KNOWLEDGE, AFTER THE PROFESSOR AT GEORGIA
18 STATE UNIVERSITY COMPLETES A CHECKLIST, WHAT HAPPENS AT THE
19 LIBRARY?

20 A. TO MY KNOWLEDGE, THE PROFESSOR FILLS OUT THE CHECKLIST
21 AND SUBMITS THE REQUEST FOR AN ITEM, ASSUMING AGAIN IN THE
22 PROFESSOR'S JUDGMENT BASED UPON POLICY, INFORMATION,
23 CHECKLIST, WHATEVER, THAT THE -- BASED UPON THAT PROFESSOR'S
24 JUDGMENT, IF HE OR SHE CONCLUDES THAT THIS CONTENT IS
25 APPROPRIATE UNDER THAT EVALUATION OF FAIR USE, SUBMITS THE

1 CONTENT TO THE LIBRARY FOR INCLUSION ON ELECTRONIC RESERVES,
2 TO MY KNOWLEDGE THEN THERE ARE STAFF MEMBERS AT THE LIBRARY
3 WHO REVIEW THAT CONTENT AT THAT POINT.

4 MR. RICH: OBJECTION. MOVE TO STRIKE. THE WITNESS
5 EARLIER TESTIFIED HE INTERVIEWED NOT A SINGLE PERSON AT
6 GEORGIA STATE UNIVERSITY CONCERNING HOW THE POLICY OPERATES.
7 HOW HE COULD TESTIFY AS TO PRACTICE BY PROFESSORS AND
8 LIBRARIANS IS -- CERTAINLY THERE IS NO FOUNDATION.

9 THE COURT: OVERRULED.
10 BY MR. SCHAEZEL:

11 Q. ARE YOU AWARE OF OTHER INSTITUTIONS WHERE SOMEONE AT
12 THE LIBRARY RATHER THAN THE PROFESSOR MIGHT BE RESPONSIBLE FOR
13 REVIEWING THE CHECKLIST?

14 A. TO MY UNDERSTANDING OF WHAT I HAVE SEEN, THE ANSWER
15 IS, YES.

16 Q. DO YOU HAVE AN OPINION AS TO WHICH OF THOSE TWO IS
17 PREFERABLE?

18 A. YES, I DO.

19 Q. WHAT IS THAT OPINION?

20 A. I BELIEVE THAT IT IS PREFERABLE FOR THE FACULTY MEMBER
21 TO MAKE THAT EVALUATION.

22 Q. WHY IS THAT?

23 A. COUPLE OF REASONS. THE FACULTY MEMBER HAS THE FACTS
24 IN HAND. THE FACULTY MEMBER HAS MORE FACTS ABOUT THE NEED,
25 ABOUT THE CIRCUMSTANCES, ABOUT THE WORK THAN PROBABLY ANYBODY

1 ELSE. THE FACULTY MEMBER KNOWS HOW HE OR SHE IS GOING TO USE
2 THIS MATERIAL, WHAT IS THE CONTEXT OF THE USE, PROBABLY IF
3 IT IS A BOOK CHAPTER FOR EXAMPLE, PROBABLY HAS THE BOOK IN
4 HAND. IT IS ABLE TO EVALUATE THAT PIECE RELATIVE TO THE
5 WHOLE. SO, THE FACULTY MEMBER, AS THE PERSON RESPONSIBLE FOR
6 THE TASK OR UNDERTAKING THE TASK OF MAKING THAT MATERIAL
7 AVAILABLE, IS CLOSER TO THE FACTS AND HAS MORE INFORMATION.

8 ANOTHER REASON IS I LIKE TO KEEP FACULTY MEMBERS INVOLVED.
9 I DON'T WANT THEM TO BE OUTSIDE OF THIS DECISION-MAKING
10 PROCESS. THEY CREATE WORKS, THEY USE WORKS ON A STEADY
11 BASIS, DAY-IN, DAY-OUT, THAT IS PART OF -- THAT IS
12 INVARIABLY RELATED TO AND AFFECTED BY COPYRIGHT. THE MORE
13 THAT THEY HAVE TO ADDRESS COPYRIGHT, THINK THROUGH THE
14 ISSUES, MAKE A DECISION, THE BETTER PREPARED THEY ARE FOR
15 THE NEXT QUESTION THAT IS GOING TO COME UP AND THERE WILL BE
16 ADDITIONAL QUESTIONS. I WANT THEM TO BE INVOLVED.

17 AND FRANKLY, FINALLY, I THINK HAVING THE FACULTY MEMBER
18 INVOLVED AND THEN HANDING THE MATERIAL OVER TO THE LIBRARY
19 ACTUALLY PROVIDES SOME IMPORTANT SAFEGUARDS. YOU HAVE GOT
20 ONE DECISION-MAKER MAKING A DECISION AND THEN YOU HAVE THE
21 OPPORTUNITY FOR SOMEBODY ELSE TO OVERSEE THAT DECISION AND
22 POSSIBLY RAISE QUESTIONS AS MAY BE APPROPRIATE.

23 Q. THERE IS A CONTENTION IN THIS CASE THAT THE FAIR USE
24 CHECKLIST AT GEORGIA STATE IS SLANTED OR PREORDAINS A
25 DETERMINATION OF FAIR USE. DO YOU HAVE AN OPINION ON THAT

1 CONVENTION?

2 A. YES.

3 Q. YES? WHAT IS IT?

4 A. THE FAIR USE CHECKLIST, AS I AND OTHERS HAVE CREATED,
5 WORKED, AND USED -- YOU ASKED SPECIFICALLY ABOUT THE FAIR USE
6 CHECKLIST AT GEORGIA STATE, I WOULD SAY THE SAME THING, THAT
7 THEY REALLY REFLECT THE FOUR FACTORS, THEY ARE WHAT THEY ARE.
8 THEY REFLECT THE VARIABLES THAT HAVE ARISEN IN COURT CASES, IN
9 PARTICULAR, THAT ARE RELEVANT TO THOSE FOUR FACTORS, THAT
10 THERE ARE SOME VARIABLES THAT THE COURT HAS SAID, THIS WEIGHS
11 IN FAVOR OF FAIR USE AND THIS WEIGHS AGAINST.

12 THE EFFORT OF THE CHECKLIST IS TO BRING TOGETHER THOSE,
13 PARTICULARLY THE ONES THAT ARE RELEVANT AND APPLICABLE IN A
14 GIVEN CONTEXT, AND PUT THOSE TOGETHER INTO A CHECKLIST TO HELP
15 PEOPLE THINK THROUGH THE ISSUES.

16 MR. RICH: OBJECTION, YOUR HONOR. MOVE TO STRIKE
17 TO THE EXTENT TESTIMONY PURPORTS TO REFLECT WHAT THE CASE LAW
18 REQUIRES AS EMBODIED IN THE CHECKLIST.

19 THE COURT: OVERRULED.

20 BY MR. SCHAEZEL:

21 Q. EARLIER THIS MORNING YOU TESTIFIED THAT THE CHECKLIST
22 USED AT GEORGIA STATE IS IN SOME WAYS MORE CONSERVATIVE OR
23 CAUTIOUS, I QUITE HONESTLY DON'T REMEMBER WHAT WORD YOU USED,
24 BUT IN WHAT WAYS DO YOU FIND THE CHECKLIST TO BE MORE
25 CONSERVATIVE OR CAUTIOUS, WHICHEVER WAS USED?

1 MR. RICH: OBJECTION TO FORM. CAUTIOUS THAN WHAT,
2 YOUR HONOR?

3 THE COURT: OVERRULED.

4 THE WITNESS: OUR UNDERSTANDING IN A GIVEN CONTEXT,
5 PARTICULARLY IN THE EDUCATIONAL CONTEXT ABOUT WHAT IS FAIR
6 USE, BUILDS UPON MANY DIFFERENT KINDS OF STATEMENTS AND
7 PERCEPTIONS AND STATEMENTS FROM COURTS AND OTHER SOURCES.
8 THE CHECKLIST AT GEORGIA STATE UNIVERSITY INCLUDES A FEW ITEMS
9 THAT FRANKLY, YOU KNOW, I AM NOT GOING TO BE ABLE TO CITE
10 YOU THAT CASE OR OTHER BINDING KIND OF LEGAL AUTHORITY TO
11 REALLY JUSTIFY HAVING IT IN THE CHECKLIST. IT IS THERE FOR
12 MAYBE BEING -- "BEING" IS THE WORD, WE USE CAUTIOUS, ABOUT THE
13 EXERCISE OF FAIR USE.

14 Q. CAN YOU GIVE AN EXAMPLE?

15 A. I WOULD BE HAPPY TO.

16 Q. PLEASE DO.

17 A. FOR EXAMPLE, UNDER EFFECT ON THE MARKET, THEIR
18 STATEMENT ABOUT SUPPLEMENTAL CLASSROOM READING IS A VARIABLE
19 THAT WOULD TIP IN FAVOR OF FAIR USE. REQUIRED CLASSROOM
20 READING IS A VARIABLE THAT WOULD TIP AGAINST FAIR USE. YOU
21 KNOW, THERE IS SOME AUTHORITY. THE KINKO'S CASE, AS I
22 MENTIONED IN MY REPORT, HAS SOME LANGUAGE ABOUT SUPPLEMENTAL
23 MATERIALS, BUT REACH NO CONCLUSION ON THAT. THE CONCEPT OF
24 SUPPLEMENTAL MATERIALS FLOATED AROUND IN SOME OF THE EARLY
25 DRAFT OR MODEL, CALL IT WHAT YOU WILL, GUIDELINES FROM DECADE

1 AGO, BUT THOSE CERTAINLY AREN'T THE LAW. AND SO THIS IS A
2 WAY, FOR EXAMPLE, THAT GEORGIA STATE HAS BEEN MORE CAUTIOUS
3 ABOUT BRINGING THIS CONCEPT IN AT LEAST AS A VARIABLE, TRYING
4 TO MAKE SURE THAT THEY ARE NOT STEPPING OVER THE LINE, IF YOU
5 WILL.

6 MR. RICH: OBJECTION. MOVE TO STRIKE PORTIONS OF HIS
7 TESTIMONY CHARACTERIZING KINKO 'S DECISION AND IMPORTING OF
8 WHAT THE LAW DOES OR DOESN'T REQUIRE WITH CERTAIN OTHER
9 CHECKLIST FACTORS.

10 THE COURT: OVERRULED.

11 BY MR. SCHAEZEL:

12 Q. IN WHAT WAY DOES THE GEORGIA STATE CHECKLIST IN TERMS
13 OF INCORPORATING THE CONCEPT OF A REQUIRED READING AS WEIGHING
14 AGAINST FAIR USE MAKE THAT CHECKLIST MORE CONSERVATIVE OR
15 CAUTIOUS?

16 MR. RICH: OBJECTION TO EXTENT IT CALLS FOR A LEGAL
17 CONCLUSION FROM THE WITNESS.

18 THE COURT: OVERRULED.

19 THE WITNESS: HONESTLY, I CAN'T CITE ANY AUTHORITY
20 TO SUPPORT THAT THERE WOULD BE A STANDARD THAT SAYS, BECAUSE
21 SOMETHING IS REQUIRED READING, THAT, THEREFORE, SOMEHOW THAT
22 MILITATES AGAINST FAIR USE. I CAN'T SUPPORT THAT PROPOSITION
23 FROM WHAT I KNOW ABOUT FAIR USE. IN FACT, I WOULD BE
24 HESITANT TO THINK THAT IT WOULD BE SUPPORTABLE FOR THE FACT
25 THAT FAIR USE IN THIS AREA IS DESIGNED TO SUPPORT EDUCATION.

1 MR. RICH: OBJECTION. MOVE TO STRIKE BASED ON LEGAL
2 TESTIMONY.

3 THE COURT: OVERRULED.
4 BY MR. SCHAEZEL:

5 Q. DR. CREWS, YOU INDICATED THAT YOU HAD FOLLOWED THE
6 DEVELOPMENT OF ERESERVES IN THE LIBRARY CONTEXT. IN TERMS OF
7 THE APPLICATION OF FAIR USE ERESERVES, HOW SIGNIFICANT IS THAT
8 DEVELOPMENT, IN YOUR OPINION, OF THE DEVELOPMENT OF ERESERVES?

9 A. HOW SIGNIFICANT IS ERESERVES FOR EDUCATION, IS THAT
10 WHAT YOU ARE ASKING?

11 Q. EXACTLY.

12 A. YEAH. YEAH. IT IS VERY IMPORTANT. IT IS VERY
13 IMPORTANT IN MANY WAYS BECAUSE ERESERVES IS NOT JUST A WAY OF
14 GETTING MATERIAL TO STUDENTS, IT IS A WAY OF REALLY MAKING
15 TEACHING MORE EFFECTIVE. IT EXPANDS ACCESS BECAUSE IF YOU
16 THINK BEFORE THERE WAS ELECTRONIC RESERVES, WE HAD PRINT
17 RESERVES, SO-CALLED PRINT RESERVES, WHERE THE STUDENTS WOULD
18 HAVE TO COME PHYSICALLY TO THE LIBRARY, LINE UP, CHECKOUT
19 THE BOOK FOR TWO HOURS OR CHECKOUT THE PHOTOCOPIED ITEM THAT
20 WAS USUALLY STAPLED INTO A FOLDER AND RECEIVE THAT FOR TWO
21 HOURS, THE OTHER STUDENTS WOULD HAVE TO WAIT. ELECTRONIC
22 RESERVES VASTLY IMPROVES THE EDUCATIONAL OPPORTUNITY. IT
23 EXPANDS THE ABILITY OF STUDENTS TO BE ABLE TO ACCESS THAT
24 CONTENT, TO GET THEIR HOMEWORK DONE. FOR FACULTY MEMBERS TO
25 BE MORE VERSATILE AND NIMBLE ABOUT GETTING FRESH MATERIALS AND

1 EXCITING MATERIALS THAT ARE NEW AND CAN INVIGORATE THE COURSE
2 AND GET THAT MATERIAL TO STUDENTS. AND STUDENTS CAN ACCESS IT
3 AT DIFFERENT TIMES AND DIFFERENT PLACES AND DON'T HAVE TO LINE
4 UP AT THE RESERVE DESK AND ALSO TAKE THE RISK THAT THEY MAY
5 NOT GET THE MATERIAL AT ALL IN TIME TO DO THEIR HOMEWORK.

6 ERESERVES ALSO EXPANDS ACCESS IN OTHER WAYS. IT MEANS
7 THAT WE CAN REACH A HIGH GROUP OF STUDENTS FROM THE
8 UNIVERSITY. WE CAN REACH STUDENTS WHO ARE FAR AWAY AND HAVE
9 A LONG COMMUTE, HAVE LONG WORK HOURS AND MAYBE CAN'T GET TO
10 THE LIBRARY, THAT HAVE KIDS AT HOME AND CAN'T LEAVE THEM AND
11 COME BACK TO CAMPUS. IT HELPS US REACH STUDENTS WHO HAVE
12 DISABILITIES, WHETHER VISUAL IMPAIRMENT OR PHYSICAL
13 DISABILITIES. WE CAN REACH OUT TO THEM.

14 ELECTRONIC RESERVES ALSO HAS THE POTENTIAL, HAS THE
15 ABILITY TO REALLY IMPROVE ON THE WAY MATERIALS ARE USED AND
16 THE WAY THE PROCESS OF CREATING AND SHARING MATERIALS IS
17 IMPROVED. IT ALLOWS RESTRICTED ACCESS SO THAT ONLY THE
18 STUDENTS AND ALMOST EVERY INSTITUTION THEY HAVE SOME TYPE OF
19 RESTRICTED ACCESS SO THAT ONLY STUDENTS ENROLLED IN THAT
20 COURSE CAN ACCESS THAT MATERIAL, OTHERS CANNOT. SO THAT
21 RESTRICTS THE ABILITY OF OTHER PEOPLE TO DROP IN TO USE THE
22 MATERIAL, TO MISUSE THE MATERIAL. IT GIVES AN OPPORTUNITY
23 FOR THE LIBRARY, IF THE LIBRARY IS RUNNING THE SYSTEM, TO
24 OVERSEE WHAT THE CONTENT IS, HOW IT IS BEING USED. AS A
25 TEACHER, SOMETIMES IN DIFFERENT SYSTEMS I CAN SEE WHO LOGGED

1 IN AND WHO REALLY DID THE HOMEWORK, WHICH I CAN'T DO UNDER
2 TRADITIONAL PRINT SYSTEMS. AND IT ALSO LETS THE LIBRARY SEE
3 WHAT THE DEMAND IS SO THAT THEY KNOW WHAT MATERIALS ARE BEING
4 USED SO THEY KNOW WHAT TO BUY BECAUSE LIBRARIES DON'T WANT TO
5 PHOTOCOPY AND SCAN AND UPLOAD NECESSARILY. WE CAN SEE AT
6 MANY INSTITUTIONS THEY WANT TO HAVE THE CONTENT, THEY WANT TO
7 LINK TO THE CONTENT. AND ELECTRONIC RESERVES ALLOWS FOR
8 CLEARER INVENTORY OF WHAT THE DEMAND IS AND WHAT THE NEEDS ARE
9 SO THE LIBRARY CAN GO OUT AND BUY THE CONTENT.

10 Q. DO ERESERVES SERVE THE INTEREST OF THE COPYRIGHT OWNER?

11 A. YES, THEY DO.

12 Q. HOW SO?

13 A. BECAUSE IT IN FACT ALLOWS THE LIBRARY TO REVIEW WHAT
14 THE CONTENT IS THAT IS IN DEMAND, LIBRARIES WILL GO OUT AND
15 BUY IT. I HAVE HEARD LIBRARIANS TELL ME AT THE DIFFERENT
16 WORKSHOPS THAT I DO THAT THEIR FIRST CHOICE IS WHEN THEY GET
17 REQUESTS FOR MATERIALS TO BE POSTED ON ERESERVE IS THEY GO AND
18 BUY IT. BUT WE ALSO KNOW FROM THE EXPERIENCE AND THE GEORGIA
19 POLICY IS THAT THEY ACTIVELY ENCOURAGE LINKING TO MATERIALS,
20 SO THAT IF THE CONTENT IS ELECTRONICALLY ALREADY AVAILABLE IN
21 THE COLLECTION OF THE LIBRARY, THAT THE LIBRARY, UNDER THE
22 RESERVE SYSTEM, WILL LINK TO THAT CONTENT AND THAT IS GOOD.
23 THAT IS GOOD FOR AUTHORS, IT IS GOOD FOR PUBLISHERS,
24 PROBABLY GOOD FOR USERS, TOO.

25 MR. RICH: OBJECTION. MOVE TO STRIKE THE REFERENCES

1 TO WHAT LIBRARIES PURPORT TO BELIEVE AS RECANTED BY THE
2 WITNESS AS HEARSAY.

3 THE COURT: OVERRULED.

4 BY MR. SCHAEZEL:

5 Q. ARE ERESERVES SYSTEMS LIMITED TO COLLEGES AND
6 UNIVERSITIES?

7 A. NO, THEY ARE NOT.

8 Q. WHAT IS YOUR KNOWLEDGE IN THAT REGARD?

9 A. IF YOU GO BACK TO -- I'M SORRY, I MISUNDERSTOOD. ARE
10 ERESERVE SYSTEMS LIMITED --

11 Q. YES, SIR. ARE THEY LIMITED TO COLLEGES?

12 A. NO, THEY ARE NOT. NO THEY ARE NOT. I KNOW THAT
13 MANY K THROUGH 12 INSTITUTIONS, PROFESSIONAL ORGANIZATIONS,
14 VOCATIONAL SCHOOLS, I HAVE MET WITH MANY OF THEM AT DIFFERENT
15 TIMES AND THEY ARE USING ERESERVES OR SYSTEMS THAT ARE
16 ANALOGOUS TO ERESERVE SYSTEMS TO REACH OUT TO THEIR STUDENTS
17 AS WELL.

18 Q. AS A PART OF YOUR WORK IN THIS CASE, DID YOU UNDERTAKE
19 A REVIEW OF THE GEORGIA STATE UNIVERSITY CHECKLIST?

20 A. DID I REVIEW THE CHECKLIST? YES, I DID.

21 Q. DID YOU MAKE AN EFFORT TO FIND SUPPORT FOR THE
22 INDIVIDUAL ITEMS THAT ARE IN THE CHECKLIST, THE GEORGIA STATE
23 CHECKLIST?

24 A. YES, I DID. YES, I DID.

25 Q. WHAT DID YOU DO?

1 A. WELL, I TOOK THE CHECKLIST -- IN FACT, I HAVE INCLUDED
2 THIS IN MY FIRST REPORT AND BROKE OUT THE DIFFERENT ELEMENTS
3 OF THE CHECKLIST, QUOTED THOSE ELEMENTS, AND THEN ATTEMPTED
4 TO FIND AUTHORITY OF ONE FORM OR ANOTHER TO SUPPORT EACH OF
5 THOSE ELEMENTS.

6 MR. RICH: YOUR HONOR, OBJECTION. THIS IS REALLY
7 BEYOND THE PALE. THIS IS LITERALLY SAYING, I AM TAKING
8 SECTION X OF A CHECKLIST AND I AM GOING TO DO LEGAL RESEARCH
9 AND ADVISE THE COURT WHAT LEGAL SUPPORT THERE IS FOR IT.
10 THIS IS ABSOLUTELY INAPPROPRIATE EXPERT TESTIMONY.

11 THE COURT: OVERRULED.

12 MR. SCHAEZEL: YOUR HONOR, ALL I WOULD PURPORT TO
13 DO WITH THIS IS TO ASK THE WITNESS TO DESCRIBE WHAT HE DID AND
14 GIVE AN EXAMPLE TO THE COURT. IF THE COURT HAS QUESTIONS, WE
15 WILL BE HAPPY TO ANSWER THEM, BUT OTHERWISE WE ARE PREPARED
16 AND WERE ALREADY PLANNING TO MOVE PAST IT.

17 THE COURT: ALL RIGHT.

18 MR. SCHAEZEL: THANK YOU.

19 BY MR. SCHAEZEL:

20 Q. DR. CREWS, YOU JUST DESCRIBED WHAT YOU HAD DONE.
21 ONCE YOU COMPLETED THAT WORK, DID YOU COMPILE IT IN SOME
22 FASHION?

23 A. I DID. I DID. I CREATED TABLES THAT ARE IN THE --
24 MY FIRST REPORT, THAT DO BREAKOUT EACH ELEMENT, QUOTING THE
25 ELEMENT, AND THEN WITH SOME BULLET POINTS REFERRING AND

1 SOMETIMES SUMMARIZING A SOURCE THAT MAY BE RELEVANT TO THAT
2 PARTICULAR POINT.

3 Q. IS THAT ON PAGE 60 OF YOUR REPORT?

4 A. THAT BEGINS ON PAGE 60.

5 Q. AND ON PAGE 60, DOES THIS REFLECT THE WORK YOU DID SUCH
6 AS NONPROFIT EDUCATIONAL AND COMMERCIAL ACTIVITY?

7 A. YES, THAT LOOKS LIKE THE CHART RIGHT FROM MY REPORT.

8 Q. AND WHAT DID YOU DO, FOR EXAMPLE, IN TERMS OF NONPROFIT
9 EDUCATION?

10 MR. RICH: OBJECTION, YOUR HONOR. THIS REPORT IS NOT
11 IN EVIDENCE.

12 THE COURT: THAT'S TRUE.

13 MR. SCHAEZEL: THAT IS TRUE, YOUR HONOR.
14 BY MR. SCHAEZEL:

15 Q. DR. CREWS, WITHOUT REFERENCE TO THE REPORT, CAN YOU
16 DESCRIBE WHAT YOU DID IN TERMS OF LOOKING AT THE FACTOR OF
17 NONPROFIT IN TERMS OF SUPPORT?

18 A. YES, I CAN.

19 Q. WHAT DID YOU DO?

20 A. I DID INDEPENDENT RESEARCH. IT WAS SUPPLEMENTED BY ONE
21 OF MY LAW STUDENTS WHO WORKED WITH ME ON THIS PARTICULAR POINT
22 AND TOGETHER I GAVE THE FINAL REVIEW AND FINAL EXAMINATION OF
23 THE SOURCES. BUT WHAT I DID WAS I WANTED TO BE ABLE TO TAKE
24 EACH PIECE AND RELATE EACH PIECE TO SOME FORM OF SOURCE THAT
25 WOULD SUPPORT HAVING THAT PIECE ON THE CHECKLIST. SO, FOR

1 EXAMPLE, THE ITEM, AND AGAIN I AM TRYING TO NOT LOOK AT MY
2 REPORT, I AM JUST GOING TO TALK FROM MEMORY.

3 Q. ALL RIGHT.

4 A. AN EARLY ITEM UNDER THE FIRST FACTOR IS NONPROFIT
5 EDUCATION. WELL, THAT IS STRAIGHT OUT OF THE STATUTE.
6 THAT IS STRAIGHT OUT OF THE STATUTE. AND RESEARCH.
7 SCHOLARSHIP. THOSE ARE WORDS THAT ARE STRAIGHT OUT OF THE
8 FAIR USE STATUTE. SO THOSE ARE RELATIVELY EASY ONES TO
9 INCLUDE. THERE IS, AS I RECALL, AT THAT POINT SOME CASE
10 AUTHORITY THAT I WAS ABLE TO CITE. ALTHOUGH WE DON'T HAVE
11 COURT OPINIONS ADDRESSING MUCH ABOUT FAIR USE IN THE CONTEXT
12 OF REALLY PURELY EDUCATIONAL ACTIVITY, WE DO HAVE COURT CASES
13 THAT REFERENCE THE CONCEPT AND SO I WAS ABLE TO ADD SOME OF
14 THOSE AS WELL. PLUS I WENT TO OTHER TYPES OF SOURCES, HOUSE
15 REPORTS AND OTHER SOURCES THAT WOULD BE USEFUL FOR BETTER
16 UNDERSTANDING THE ORIGIN OR MEANING OF THAT PARTICULAR ITEM ON
17 THE CHECKLIST.

18 MR. RICH: YOUR HONOR, PLEASE NOTE MY CONTINUING
19 OBJECTION TO THIS LINE OF EXAMINATION THAT PURPORTS TO TIE THE
20 CHECKLIST TO THE LAW.

21 THE COURT: YES.

22 BY MR. SCHAEZEL:

23 Q. DR. CREWS, THE PLAINTIFFS IN THIS CASE HAVE TAKEN THE
24 POSITION THAT IN EVALUATING THE FOURTH FACTOR OF FAIR USE,
25 POTENTIAL HARM TO THE MARKET, THAT THE COURT SHOULD CONSIDER

1 NOT ONLY THE HARM TO THE SALE OF A BOOK, THE WORK, IF YOU
2 WILL, BUT FEES THAT MAY BE OBTAINED FOR PERMISSIONS OR
3 LICENSING, FOR EXAMPLE, THROUGH THE COPYRIGHT CLEARANCE
4 CENTER. DO YOU HAVE AN OPINION REGARDING THE APPROPRIATENESS
5 OF THE RELEVANCE OF THE PUBLISHER'S REVENUE STREAM FROM
6 PERMISSIONS AS IT RELATES TO THE FOURTH FACTOR OF FAIR USE?

7 MR. RICH: OBJECT TO THE FORM.

8 THE COURT: OVERRULED.

9 THE WITNESS: YES, I DO.

10 BY MR. SCHAEZEL:

11 Q. WHAT IS THAT OPINION?

12 A. THE REVENUE THAT MAY COME FROM LICENSING OF PORTIONS
13 OF, FOR EXAMPLE, OF A BOOK, BECAUSE I KNOW THAT IS WHERE MOST
14 OF OUR ATTENTION HAS BEEN THESE DAYS. IT IS AT BEST A PIECE
15 TO BE CONSIDERED, A VARIABLE TO BE CONSIDERED AS PART OF THE
16 FOURTH FACTOR, IDENTIFYING MARKETS, WHAT MIGHT BE THE
17 RELATIONSHIP OF THE ACTIVITY IN THE USE TO THE PARTICULAR
18 MARKET.

19 NOW, THAT MEANS THAT IT MAY AT BEST BE A PART OF THE
20 PUZZLE THAT ONE WEIGHS IN THE BALANCE WITH OTHER FACTS AND
21 OTHER VARIABLES AND THE FOUR FACTORS OVERALL IN REACHING A
22 CONCLUSION. IT IS A BIT OF A CHALLENGING ONE TO INCLUDE
23 BECAUSE THERE IS ALWAYS THE QUESTION OF IT LEAVES THE QUESTION
24 OF WHERE IS THAT LINE, WHERE IS THAT POINT WHERE THE BALANCE
25 IS OCCURRING.

1 FOR EXAMPLE, WE WOULD ALL AGREE, A BOOK EXISTS,
2 SOMEBODY OWNS THE COPYRIGHT OF IT, SOME USE, SOME
3 REPRODUCTION OF THAT BOOK IS FAIR USE. LET'S START WITH THAT
4 ASSUMPTION. IF THAT IS THE CASE, THE FACT THAT THERE IS A
5 PRICE TAG ON REPRODUCTION OF PIECES OF THAT WORK DOESN'T
6 NECESSARILY TAKE AWAY THAT RIGHT OF FAIR USE, WHATEVER IT MAY
7 BE. WE HAVEN'T DEFINED THAT YET. SO, FOR EXAMPLE, IF THE
8 BOOK IS AVAILABLE FOR SALE FOR A HUNDRED DOLLARS, BUT THE
9 RIGHT TO BE ABLE TO OR THE LICENSE FEE FOR BEING ABLE TO
10 REPRODUCE 25 PERCENT OF IT IS SOME NUMBER OF DOLLARS, THEN WE
11 WOULD LOOK AT THAT AND MAYBE WEIGH THAT IN THE BALANCE. BUT
12 THE FEES THAT ARE BEING DISCUSSED HERE, AND I THINK YOUR
13 QUESTION ADDRESSED THE COPYRIGHT CLEARANCE CENTER --

14 Q. IT COULD.

15 A. BUT IF IT DID, IF WE WERE TALKING ABOUT THAT, I COULD
16 GO TO THE COPYRIGHT CLEARANCE WEBSITE, I COULD IDENTIFY THE
17 BOOK, ASSUMING THE BOOK IS IN THE INVENTORY, THEN I COULD
18 IDENTIFY THE RANGE OF PAGES AND IT WOULD QUOTE ME A PRICE,
19 THAT IS THE WAY THE SERVICE WORKS. BUT IF I PUT IN 25
20 PERCENT OF THE BOOK, IT WILL QUOTE ME X DOLLARS. I AM
21 WILLING TO BET ON WHATEVER BOOK WE MIGHT BE TALKING ABOUT, I
22 COULD PUT IN A REQUEST FOR ONE PAGE AND IT WOULD COME BACK
23 WITH A FEE TO REPRODUCE THIS ONE PAGE, HERE IS THE STATED
24 FEE. I LOOK AT THAT AND I HAVE TO THINK THAT SOMEWHERE IN
25 BETWEEN THERE THAT ONE PAGE AND WHATEVER LARGE PORTION OF THE

1 BOOK THERE IS A FAIR USE TASK. JUST BECAUSE THERE IS A FEE
2 ON THE SINGLE PAGE DOESN'T MEAN THAT IT CAN'T BE FAIR USE. I
3 MEAN, IF THAT IS THE CASE, THEN HOW SMALL DO WE GET? IF I AM
4 WRITING A BOOK AND I AM PUBLISHING IT WITH SAY CAMBRIDGE
5 UNIVERSITY PRESS AND I AM QUOTING SENTENCES FROM OTHER
6 SOURCES, THAT IS A REPRODUCTION OF SOMEBODY ELSE'S
7 COPYRIGHTED WORK. SHOULD I BE CLEARING THOSE AND PAYING FEES
8 FOR SINGLE SENTENCES? JUST BECAUSE A FEE CAN BE SET ON
9 SOMETHING DOESN'T MEAN THAT IT THEREFORE IS NOT FAIR USE.

10 MR. RICH: OBJECTION, YOUR HONOR. IT IS A QUITE
11 JADED DISSERTATION OF THE LAW AND MOVE TO STRIKE.

12 THE COURT: OVERRULED.

13 BY MR. SCHAEZEL:

14 Q. DR. CREWS, WHAT ARE THE CLASSROOM GUIDELINES?

15 A. THE CLASSROOM GUIDELINES, IT IS A LABEL THAT IS GIVEN
16 TO A SET OF NEGOTIATED GUIDELINES THAT EMERGED IN 1976, THAT
17 IT MERGED OUT OF DIFFERENT DISCUSSIONS AMONG PRIVATE PARTIES
18 AS THEY WERE WATCHING THE COPYRIGHT ACT OF 1976 COME TO A VOTE
19 IN CONGRESS.

20 Q. IN THIS CASE, THE CLASSROOM GUIDELINES HAVE BEEN CITED
21 AS SOMETHING THAT WOULD HAVE APPLICABILITY TO FAIR USE OR THE
22 USE OF FAIR USE AT THE UNIVERSITY, FOR EXAMPLE, OF GEORGIA
23 STATE. DO YOU HAVE A RESPONSE TO THAT CONTENTION?

24 A. IF I AM HEARING THAT CONTENTION, THAT SOMEBODY IS
25 SUGGESTING THE CLASSROOM GUIDELINES MIGHT BE APPROPRIATE FOR

1 GEORGIA STATE OR FOR THAT MATTER PROBABLY ANY COLLEGE OR
2 UNIVERSITY FOR ERESERVES?

3 Q. YES.

4 A. I WOULD SAY THEY ARE TOTALLY INAPPROPRIATE.

5 Q. WHY?

6 A. WELL, A VARIETY OF REASONS. THEY ARE BAD FOR
7 EDUCATION. THE CLASSROOM GUIDELINES ARE A 1976 NEGOTIATED
8 DOCUMENT INVOLVING PARTIES WHO HAD NO LEGAL AUTHORITY TO STATE
9 WHAT THE LAW IS OR MAY BE. THEY ARE WORD COUNT GUIDELINES.
10 THEY WOULD HAVE WHOEVER THE USER IS COUNTING A THOUSAND WORDS
11 OUT OF THIS KIND OF WORK, THEN NEEDING TO DO SUCH THINGS AS
12 COUNT THE NUMBER OF TIMES DIFFERENT WORKS, UNRELATED WORKS
13 ARE USED ACROSS THE COURSE AND COUNT THAT. THERE ARE
14 ELEMENTS OF IT THAT REALLY BEAR LITTLE OR NO RELATIONSHIP TO
15 WHAT I AM FAMILIAR WITH AS TO WHAT FAIR USE MAY BE.

16 AND THEN CERTAINLY IN TERMS OF THEIR ORIGIN, THESE ARE
17 GUIDELINES THAT AROSE IN 1976 IN A VERY DIFFERENT ERA WITH A
18 LAW IN MANY OF ITS FUNDAMENTAL RESPECTS IS QUITE DIFFERENT
19 FROM THE LAW THAT WE HAVE TODAY. AND THE CONCEPT OF FAIR USE
20 WAS BEING DEBATED IN CONGRESS. CONGRESS HAD MADE CLEAR TO
21 THE VARIOUS INTERESTED PARTIES, IT IS 1976, MAY BE HARD TO
22 BELIEVE, BUT CONGRESS HAD BEEN WORKING ON COPYRIGHT REVISION
23 FOR 21 YEARS BY THAT TIME. AND THEY WERE FINALLY, AFTER 21
24 YEARS, GETTING READY TO PASS A NEW LAW. THEY FELT PRESSURE
25 BY NEW TECHNOLOGIES, THINGS LIKE PHOTOCOPY MACHINES AND

1 TELEVISIONS FROM 1955 THAT INITIATED THIS ENTIRE PROCESS.
2 AND SO THE CONGRESS HAD MADE CLEAR BY 1976, WE HAVE HEARD
3 ENOUGH, WE HAVE DRAFTED A STATUTE THAT IS FOUR FACTORS.
4 THERE WERE CONCERNS AMONG EDUCATORS, THAT IF YOU DON'T GIVE US
5 ENOUGH GUIDANCE, WE MIGHT RISK VIOLATING THE LAW AND ALL THE
6 PENALTIES THAT GO WITH THAT. THEN CONGRESS SAID, WELL, WE
7 WILL GIVE YOU SOME, AN OUNCE OF PROTECTION. WE WILL INCLUDE
8 IN THE STATUTE LANGUAGE ABOUT REPRODUCTION OF WORKS FOR
9 CLASSROOM USE. WE ARE GOING TO MAKE THAT EXPLICIT IN THE
10 STATUTE. WE ARE GOING TO ADD LANGUAGE ABOUT ITS APPLICATION
11 TO NONPROFIT EDUCATION UNDER THE PURPOSE FACTOR.

12 CONGRESS ALSO SAID, YOU KNOW, WE ARE GOING TO GIVE YOU A
13 REALLY GOOD DOSE OF PIECE OF MIND BY ADDING TO THE STATUTORY
14 DAMAGE PROVISION SOME PROTECTION. IF YOU, AS AN EDUCATOR,
15 EXERCISE FAIR USE AND MAYBE YOU WERE WRONG IN THE FINAL
16 ANALYSIS, BUT YOU ACTED IN GOOD FAITH, YOU BELIEVED WHAT YOU
17 WERE DOING WAS FAIR USE AND YOU HAD REASONABLE GROUNDS FOR IT.
18 SO THAT GAVE A LITTLE BIT OF PIECE OF MIND TO EDUCATORS.

19 Q. HOW SO WOULD THAT GIVE THE PIECE OF MIND --

20 MR. RICH: YOUR HONOR, BEFORE WE MOVE ONTO THE NEXT
21 DISSERTATION, A, I OBJECT. IT IS NONRESPONSIVE TO THE
22 QUESTION THAT WAS ASKED, WHICH WAS CLASSROOM GUIDELINES.
23 THIS WITNESS IS NO MORE QUALIFIED AS A LEGAL ASPIRING TO GIVE
24 A GLOSS ON THE LEGISLATIVE HISTORY OF THE COPYRIGHT ACT THAN
25 ANYBODY ELSE HERE IN THE COURTROOM.

1 THE COURT: OVERRULED.

2 BY MR. SCHAEZEL:

3 Q. WHAT WAS THE PIECE OF MIND GIVEN TO THE PROFESSOR IF
4 THEY HAD ACTED IN GOOD FAITH?

5 A. IF YOU GO TO THE STATUTORY DAMAGES PROVISION,
6 STATUTORY DAMAGES TODAY UNDER SOME CIRCUMSTANCES COULD BE AS
7 HIGH AS 150,000 DOLLARS OF EACH WORK INFRINGED. THAT IS A
8 PRETTY SCARY AMOUNT OF MONEY FOR SOMEBODY. SO WHAT THE
9 STATUTE SAID WAS THAT FOR NONPROFIT EDUCATIONAL INSTITUTION OR
10 LIBRARY OR ARCHIVES -- AND I AM PARAPHRASING AGAIN, IF I GET
11 SOMETHING NOT QUITE, MY APOLOGIES -- FOR THOSE ORGANIZATIONS
12 AND THEIR AGENTS AND EMPLOYEES THAT THE STATUTORY DAMAGES
13 WOULD BE REMITTED, THEY WOULD BE REDUCED TO ZERO IF THE
14 PERSON WHO ENGAGED IN THE FAIR USE ACTIVITY WAS BELIEVING THAT
15 THE USE WAS FAIR USE AND HAD REASONABLE GROUNDS FOR THAT
16 BELIEF.

17 I SEE THAT AS A VERY IMPORTANT SIGNAL FROM CONGRESS. IT
18 WAS PUT IN THE LAW IN 1976, IT IS STILL THE LAW TODAY. THAT
19 IS A VERY IMPORTANT SIGNAL FROM CONGRESS THAT WE KNOW YOU ARE
20 WORKING IN A WORLD OF UNCERTAINTY BECAUSE WE ARE NOT GOING TO
21 GIVE YOU ANY MORE CERTAINTY. WE ARE GOING TO LET FAIR USE BE
22 FLEXIBLE, CONGRESS SAID THAT REPEATEDLY IN THEIR REPORTS.
23 WE DON'T INTEND TO FREEZE THIS DOCTRINE. WE WANT IT TO BE
24 FLEXIBLE FOR CHANGING NEEDS, BUT WE ARE GOING TO GIVE YOU
25 SOME PIECE OF MIND BY SAYING, LEARN A LITTLE BIT ABOUT FAIR

1 USE, APPLY IT IN A REASONABLE GOOD-FAITH MANNER. AND EVEN IF
2 YOU ARE WRONG, WE ARE AT LEAST GOING TO TAKE AWAY THE STING
3 OF THE MOST SERIOUS PENALTIES AND I THINK THAT IS A VERY
4 INTERESTING AND I WAGER TO SAY VERY PRODUCTIVE IDEA THAT
5 CONGRESS HAD.

6 MR. RICH: OBJECTION, YOUR HONOR. RELEVANCE. THIS
7 IS NOT A DAMAGES CASE.

8 THE COURT: OVERRULED.

9 LET ME ASK YOU THIS. IS THERE PRINTED LEGISLATIVE
10 HISTORY THAT DISCUSSES THE NEED FOR FLEXIBILITY.

11 THE WITNESS: YES, THERE IS. YOU CAN FIND IT IN
12 MANY --

13 THE COURT: BECAUSE I HAVEN'T SEEN IT.

14 THE WITNESS: YOU CAN FIND IT IN MANY OF THE REPORTS.
15 IT CERTAINLY COMES UP IN HEARINGS OVER THE YEARS. I SAID
16 1955, WE HAVE A PAPER TRAIL.

17 THE COURT: I AM TRYING ABOUT 1997 -- WHAT WAS THE
18 YEAR, '76?

19 THE WITNESS: 1976.

20 THE COURT: HOW ABOUT IN THAT YEAR, IS THERE ANY
21 PRINTED HISTORY WHERE THE MEMBERS OF CONGRESS TALKED ABOUT THE
22 NEED FOR FLEXIBILITY?

23 THE WITNESS: SURELY. THE MOST CITED SOURCE ON THAT
24 POINT IS THE HOUSE REPORTS FROM THAT WOULD ACCOMPANY THE
25 PASSAGE OF THE COPYRIGHT REVISION ACT, IT WAS ISSUED IN 1976.

1 AND IT INCLUDES SUCH LANGUAGE, AGAIN I AM PARAPHRASING FROM
2 MEMORY SO BEAR WITH ME, BUT IT DOES SAY THAT WE DO NOT INTEND
3 TO FREEZE THIS DOCTRINE, THAT WE INTEND FOR IT TO BE
4 FLEXIBLE.

5 THE COURT: NOW, IS THAT THE SAME LEGISLATIVE
6 HISTORY OR LEGISLATIVE REPORT THAT CONTAINS THE CLASSROOM
7 GUIDELINES?

8 THE WITNESS: IT IS. IF I CAN SAY A WORD ABOUT
9 THAT. THE CLASSROOM GUIDELINES, IN THEIR ORIGINAL FORM AS
10 OPPOSED TO THE WAY THEY SOMETIMES APPEARED SINCE THEN, IN
11 THEIR ORIGINAL FORM INCLUDE A PARAGRAPH OR SO OF THE PREAMBLE
12 THAT IS PART OF THE GUIDELINES. THERE IS THE HEADING ON
13 PAPER OF THE GUIDELINES AND HERE IS THE PREAMBLE AND THE
14 PREAMBLE ITSELF EXPRESSES REPEATEDLY THE IMPORTANCE OF
15 FLEXIBILITY THAT THESE ARE MINIMUM STANDARDS, THAT THERE IS
16 OTHER ACTIVITY THAT MAY BE ALLOWED WITHIN FAIR USE, YOU NEED
17 TO GO BACK TO THE LAW ITSELF. AND THAT THE PREAMBLE
18 EMPHASIZES THAT THIS, THAT THESE GUIDELINES, THESE CLASSROOM
19 GUIDELINES ARE REALLY MEANT ONLY TO BE A SNAPSHOT, THAT IS
20 NOT THEIR WORD, THAT IS MY WORD, OF AN UNDERSTANDING OF A
21 PARTICULAR APPLICATION AT THAT TIME. AND THAT THEY WOULD
22 NEED TO BE REVISITED AND ADAPTED TO MEET CHANGING NEEDS IN THE
23 FUTURE. THAT IS PART OF IT.

24 THE COURT: DOES IT SAY THAT ADAPTED TO CHANGING
25 NEEDS IN THE FUTURE?

1 THE WITNESS: I AM TAKING THE RISK OF PARAPHRASING
2 BECAUSE I DON'T HAVE IT IN FRONT OF ME, BUT, YES. THAT IS
3 PART OF THE ACTUAL GUIDELINES, NOT IN SIMILAR LANGUAGE
4 REPEATED IN THE REPORT.

5 THE COURT: GO AHEAD.

6 BY MR. SCHAEZEL:

7 Q. DR. CREWS, HAVE YOU HAD AN OPPORTUNITY TO REVIEW THE
8 PROPOSED INJUNCTION IN THIS CASE?

9 A. YES, I HAVE.

10 MR. RICH: OBJECTION. OUTSIDE THE SCOPE OF EITHER OF
11 HIS EXPERT REPORTS.

12 MR. SCHAEZEL: THAT WOULD BE TRUE, YOUR HONOR,
13 BECAUSE THE PROPOSED INJUNCTION WAS ONLY PROVIDED TO US A
14 COUPLE OF DAYS BEFORE TRIAL. I WOULD SUBMIT THAT THERE HAS
15 BEEN LITTLE TO NO TIME FOR HIM TO PROVIDE ANY SORT OF A
16 SUPPLEMENT TO HIS REPORT. AND THAT NONETHELESS HE HAS HAD THE
17 OPPORTUNITY TO REVIEW IT AND HIS IMPRESSIONS IN TERMS OF HOW
18 IT INCORPORATES STANDARDS IN THE EDUCATIONAL ENVIRONMENT COULD
19 BE BENEFICIAL TO THE COURT.

20 THE COURT: I WOULD LIKE TO MOVE ON PAST THIS. I
21 THINK I KNOW WHAT HE IS GOING TO SAY. I MEAN, THIS IS
22 ULTIMATELY A QUESTION FOR THE COURT. I JUST DON'T WANT TO
23 OPEN THAT DOOR ABOUT THINGS THAT ARE NOT IN THE REPORT. SO
24 LET'S GO ON.

25 MR. SCHAEZEL: VERY WELL.

1 YOUR HONOR, AT THIS TIME WE HAVE NO FURTHER QUESTIONS FOR
2 THIS WITNESS.

3 MR. RICH: MAY I PROCEED?

4 THE COURT: YES.

5 CROSS EXAM

6 BY MR. RICH:

7 Q. IF I SAY IT QUICKLY ENOUGH CAN I STILL SAY "GOOD
8 MORNING"? I MADE IT BY A MINUTE. NICE TO SEE YOU AGAIN.

9 A. THANK YOU. NICE TO SEE YOU AGAIN.

10 Q. YOU ARE DIRECTOR OF THE COPYRIGHT ADVISORY OFFICE AT
11 COLUMBIA UNIVERSITY; IS THAT RIGHT?

12 A. THAT'S RIGHT.

13 Q. YOU ARE ALSO AN ADJUNCT FACULTY MEMBER AT COLUMBIA LAW
14 SCHOOL; IS THAT RIGHT?

15 A. I HAVE A LECTURER TITLE IN THAT.

16 Q. A LECTURER IN LAW?

17 A. YES.

18 Q. IT IS NOT A TENURED POSITION, IS IT?

19 A. NO, IT IS NOT.

20 Q. I THINK YOU AGREED THAT THE SOLE COPYRIGHT CLASS WHICH
21 YOU TEACH AT COLUMBIA IS, I BELIEVE, TWO CREDIT COURSE IN
22 INTERNATIONAL COPYRIGHT LAW; IS THAT CORRECT?

23 A. ON A REGULAR BASIS, YES, THAT IS THE COURSE I HAVE
24 TAUGHT AT COLUMBIA LAW SCHOOL, YES.

25 Q. YOU HAVE A PH.D. IN LIBRARY AND INFORMATION SCIENCE,

1 YES?

2 A. YES.

3 Q. ACCORDING TO YOUR CURRICULUM VITAE, I BELIEVE YOU
4 TESTIFIED ON DIRECT, YOU HAVE AUTHORED SEVERAL BOOKS, RIGHT?

5 A. I AM NOT SURE I USED THE WORD "SEVERAL," I COUNT THEM
6 AS FOUR.

7 Q. I COUNT AS THREE THOSE WHO FOCUS ON COPYRIGHT ISSUES;
8 IS THAT CORRECT?

9 A. DEPENDS ON HOW YOU COUNT THEM. THERE IS A 1993 BOOK
10 FROM THE USE --

11 Q. I DIDN'T ASK YOU TO TELL ME WHAT THEY ARE YET.
12 HAVE YOU AUTHORED MORE THAN THREE COPYRIGHT BOOKS?

13 A. NO.

14 Q. AND THE THREE THAT I BELIEVE I AM AWARE OF, IF THERE
15 ARE MORE PLEASE SUPPLEMENT, IF THESE ARE INCORRECT PLEASE TELL
16 ME: "COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS" PUBLISHED BY
17 THE AMERICAN LIBRARY ASSOCIATION, IS THAT ONE OF THEM?

18 A. THAT IS ONE OF THEM.

19 Q. SECOND IS "COPYRIGHT ESSENTIALS FOR LIBRARIANS AND
20 EDUCATORS," ALSO PUBLISHED BY THE AMERICAN LIBRARY
21 ASSOCIATION?

22 A. THAT'S RIGHT.

23 Q. AND THE THIRD APPEARS ON YOUR VITAE IS CALLED
24 "COPYRIGHT FAIR USE AND THE CHALLENGE FOR UNIVERSITIES:
25 PROMOTING THE PROGRESS OF HIGHER EDUCATION," AND THAT ONE I

1 TAKE IT WAS PUBLISHED BY THE UNIVERSITY OF CHICAGO PRESS; IS
2 THAT CORRECT?

3 A. THAT'S CORRECT.

4 Q. YOUR PH.D. DISSERTATION WAS TITLED "COPYRIGHT POLICIES
5 OF AMERICAN RESEARCH UNIVERSITIES: BALANCING INFORMATION
6 NEEDS AND LEGAL LIMITS," CORRECT?

7 A. CORRECT.

8 Q. AND YOU ARE A RECIPIENT, I TAKE IT, OF THE AMERICAN
9 LIBRARY ASSOCIATION L. RAY PATTERSON COPYRIGHT AWARD, QUOTE,
10 IN SUPPORT OF USER RIGHTS, UNQUOTE?

11 A. I BELIEVE THAT IS THE FULL NAME OF THE AWARD.

12 Q. AND AM I CORRECT THAT THE NAMESAKE FOR THAT AWARD IS
13 THE SAME L. RAY PATTERSON WHO SERVED AS AN INFLUENTIAL MEMBER
14 OF THE REGENTS COMMITTEE OF THE UNIVERSITY SYSTEM OF GEORGIA
15 THAT DEVELOPED THE 1997 REGENTS GUIDE FOR USE BY STATE
16 INSTITUTIONS OF HIGHER LEARNING, INCLUDING GEORGIA STATE
17 UNIVERSITY?

18 A. I DON'T KNOW HOW TO USE THE WORD "INFLUENTIAL."

19 Q. STRIKE THAT.

20 A. STRIKING THAT, I BELIEVE THAT THE REST IS CORRECT.

21 Q. YOU ARE AWARE, HOWEVER, THAT HE HAD A SIGNIFICANT ROLE
22 IN THE SHAPING OF THAT POLICY; ARE YOU NOT?

23 A. I BELIEVE THAT.

24 Q. IN FACT, YOU AND HE CORRESPONDED ABOUT THAT POLICY,
25 DIDN'T YOU?

1 A. YES, WE DID.

2 Q. IN THAT CORRESPONDENCE -- PARDON ME -- YOU FOUND IN
3 FACT THAT POLICY TO BE MORE A BRIEF ARGUING FOR A POSITION ON
4 FAIR USE THAN ONE THAT WOULD SERVE THE NEEDS OF A DIVERSE
5 UNIVERSITY COMMUNITY LOOKING FOR WORKABLE APPLICATION OF FAIR
6 USE, DIDN'T YOU?

7 A. I TAKE YOUR WORD FOR IT. I DON'T HAVE THAT LETTER IN
8 FRONT OF ME.

9 Q. I BELIEVE AT YOUR DEPOSITION YOU CHARACTERIZED THE
10 FORMER POLICY THAT JUST SAID "YES" TO EVERYTHING; ISN'T THAT
11 CORRECT?

12 A. I REMEMBER SAYING SOMETHING CLOSE TO THAT.

13 Q. BY THAT YOU MEANT JUST SAYING USE AS TO FAIR USE AS TO
14 JUST ABOUT EVERYTHING, CORRECT?

15 A. I THINK WE ARE SAYING THE SAME THING. I DON'T HAVE ANY
16 HESITATION CONFIRMING SOMETHING LIKE THAT.

17 Q. NOW, YOUR VIEW, INSTEAD, I TAKE IT, IS THAT A PROPER
18 FAIR USE POLICY ALSO HAS TO GIVE A USER A HEADS UP ABOUT WHAT
19 THE USER CANNOT DO UNDER THE RUBRIC OF FAIR USE, CORRECT?

20 A. I THINK THAT IS HELPFUL, YES.

21 Q. I TAKE IT YOU ARE ALSO FREQUENTLY INVITED TO SPEAK ON
22 COPYRIGHT EDUCATIONAL INSTITUTIONS?

23 A. YES, I AM.

24 Q. AND YOU LEAD WORKSHOPS AT UNIVERSITIES FOCUSED ON
25 TEACHING FACULTY LIBRARIANS AND OTHER MEMBERS OF THE ACADEMIC

1 COMMUNITY ABOUT COPYRIGHT LAW, CORRECT?

2 A. THAT'S CORRECT.

3 Q. IF THERE IS A COMMON THREAD TO YOUR CONSULTING
4 ACTIVITIES, IT IS THAT MOST OF THE ORGANIZATIONS AND
5 INSTITUTIONS THAT HAVE HIRED YOU HAVE SOME SORT OF CONNECTION
6 TO HIGHER EDUCATION OR RESEARCH OR LIBRARIES, CORRECT?

7 A. IF YOU ARE SAYING "MOST," I THINK I WOULD AGREE WITH
8 THAT.

9 Q. YOU HAVE ADVISED LIBRARY ASSOCIATIONS IN CONNECTION
10 WITH CERTAIN LITIGATIONS, CORRECT?

11 A. THAT'S CORRECT.

12 Q. INCLUDING THE SECOND CIRCUIT APPEAL IN THE TEXACO --
13 AGU TEXACO CASE?

14 A. THAT'S CORRECT.

15 Q. YOU ALSO BELIEVE THAT THESE COMMUNITIES OF USERS HAVE,
16 AS A RULE, UNDERUTILIZED THE FAIR USE DOCTRINE, TRUE?

17 A. NO, I AM NOT SO SURE I DO BELIEVE THAT.

18 Q. YOU DO CRITICIZE A CULTURE OF LICENSING, HAVEN'T YOU?

19 A. CRITICIZED?

20 Q. YOU SEE AS A HAZARD WHAT YOU VIEW AS A TENDENCY AS A
21 PART OF A NUMBER OF ACADEMIC USERS OF COPYRIGHTED MATERIALS TO
22 BUILD SYSTEMS THAT RELY PRINCIPALLY ON LICENSING AND
23 PERMISSIONS AS OPPOSED TO MAXIMIZING RESORT TO THE FAIR USE
24 DOCTRINE?

25 A. ARE YOU QUOTING FROM SOMETHING?

1 Q. I AM ASKING YOU.

2 A. I AM NOT SURE I WOULD SAY ANY OF THAT.

3 MR. RICH: OKAY. LET'S GIVE YOU YOUR DEPOSITION.

4 MAY I APPROACH, YOUR HONOR?

5 THE COURT: YES.

6 BY MR. RICH:

7 Q. IF YOU WOULD LOOK AT PAGE 140 OF YOUR DEPOSITION,
8 PLEASE?

9 A. (WITNESS COMPLIES.)

10 Q. ACTUALLY, IF YOU WANT TO START BACK AT LINE 22 ON PAGE
11 139, I WILL READ THE FOLLOWING INTO THE RECORD.

12 "QUESTION: YOU USED THE PHRASE IN
13 YOUR REPORT SOMEWHERE ONE OF YOUR
14 REPORTS 'THE CULTURE OF LICENSING,'
15 DOES THAT RING A BELL WITH YOU?

16 ANSWER: IT DOES. I DON'T REMEMBER
17 ACTUALLY PUTTING IT IN THE REPORT,
18 BUT IF I DID, THAT DOESN'T SURPRISE
19 ME.

20 QUESTION: WHAT DO YOU HAVE IN MIND
21 BY THAT?

22 ANSWER: IT IS A CONCEPT OF COMING
23 TO A TASK, I NEED TO DO THIS
24 WHATEVER THE TASK MAY BE. AND
25 WHERE IS YOUR MIND GOING TO GO?

1 WHERE IS OUR THINKING GOING TO GO?
2 HOW ARE WE GOING TO FRAME OR BEGIN
3 TO PURSUE THE OBJECTIVE OF
4 ACCOMPLISHING OUR GOALS? AND VERY
5 OFTEN IN THIS AREA OF ACADEMIC USES
6 OF COPYRIGHTED MATERIALS, THERE
7 SEEMS TO BE THIS KIND OF TENSION
8 BETWEEN THE TURNING TO THE LAW AND
9 UNDERSTANDING HOW COPYRIGHT APPLIES,
10 UNDERSTANDING HOW FAIR USE APPLIES
11 VERSUS TURNING TO GETTING
12 PERMISSIONS. AND YOU SEE DIFFERENT
13 PLAYERS IN THE SYSTEM TURNING FIRST
14 TO ONE OR FIRST TO THE OTHERS. AND
15 ONE OF THE HAZARDS THAT I AM TRYING
16 TO POINT OUT IS BY REALLY BUILDING A
17 SYSTEM THAT RELIES PRINCIPALLY ON
18 LICENSING AS A MECHANISM TOWARD
19 ACCOMPLISHING A GOING IS IN EFFECT
20 BUILDING A CULTURE OF LICENSING.
21 BUILDING A SET OF EXPECTATIONS, A
22 SET OF FORMS THAT ARE, THAT
23 SURROUND AND ARE PREMISED ON THE
24 CONCEPT OF LICENSING, IN CONTRAST
25 TURNING TO FAIR USE AND DETERMINING

1 IF FAIR USE APPLIES IT MAY BE THEN
2 TURNING TO LICENSING AS PART OF THE
3 OVERALL STRATEGY RATHER THAN JUST
4 PICKING ONE OR THE OTHER."

5 DO YOU SEE THAT?

6 A. I DO.

7 Q. THAT WAS ACCURATE TESTIMONY, RIGHT?

8 A. I BELIEVE IT IS.

9 Q. I TAKE IT THAT YOU BELIEVE THAT ANY SUGGESTION THAT
10 LICENSING SHOULD BE THE LEADING OR EVEN THE PRIMARY MEANS FOR
11 COPYRIGHT COMPLIANCE IN CONNECTION WITH ERESERVES IS
12 MISPLACED; IS THAT CORRECT?

13 A. LET ME MAKE SURE I UNDERSTAND YOUR QUESTION.

14 Q. YES.

15 A. YOU SAID "PRIMARY MEANS."

16 Q. LEADING OR PRIMARY.

17 A. LEADING OR PRIMARY MEANS. AND IF BY THAT DO YOU MEAN
18 AS A LIBRARY CREATES AN ERESERVES SYSTEM IN ORDER TO ADDRESS
19 THE COPYRIGHT FAIR USE QUESTION, SHOULD THEY TURN FIRST TO
20 LICENSING BEFORE TURNING TO FAIR USE? I AM JUST TRYING TO MAKE
21 SURE I UNDERSTAND YOUR QUESTION.

22 Q. YOU HAVE YOUR BIG BINDER IN FRONT OF YOU?

23 A. I DO.

24 Q. WHY DON'T WE TAKE A QUICK LOOK AT PAGE 12 OF YOUR
25 REBUTTAL REPORT, PLEASE.

1 A. OKAY.

2 Q. UNDER PARAGRAPH 7 OVERVIEW, CAN YOU READ THE FIRST
3 SENTENCE INTO THE RECORD?

4 A.

5 "FOR THE FOREGOING REASONS, ANY
6 SUGGESTION THAT LICENSING SHOULD BE
7 THE LEADING OR PRIMARY MEANS FOR
8 COPYRIGHT COMPLIANCE IN CONNECTION
9 WITH ERESERVES IS MISPLACED."

10 Q. YES. YOU WROTE THAT, RIGHT?

11 A. I DID.

12 Q. SO YOU UNDERSTAND WHAT YOU MEANT?

13 A. I KNOW WHAT I MEAN BY THAT.

14 Q. NOW, YOUR RETENTION IN APRIL, YOU WERE RETAINED IN
15 APPROXIMATELY APRIL 2009 IN CONNECTION WITH YOUR TESTIMONY
16 TODAY?

17 A. I BELIEVE THAT'S RIGHT.

18 Q. AND THAT WASN'T YOUR FIRST INVOLVEMENT WITH THE NEW
19 UNIVERSITY SYSTEM OF GEORGIA COPYRIGHT POLICY, WAS IT?

20 A. WITH THE NEW POLICY?

21 Q. YEAH.

22 A. NO, IT WASN'T.

23 Q. AS EARLY AS MAY OF 2008, A MONTH OR SO AFTER THIS
24 LAWSUIT WAS COMMENCED, YOU WERE CONTACTED FOR ADVICE BY MARYJO
25 VULCAR OF THE STATE ATTORNEY GENERAL'S OFFICE; IS THAT

1 CORRECT?

2 A. I DON'T REMEMBER THE EXACT DATE, BUT IT WAS ABOUT THEN.

3 Q. YEAH. AND YOU AND SHE THEREAFTER HAD A SERIES OF
4 CONVERSATIONS IN THE ENSUING MONTHS ABOUT THE LITIGATION
5 INCLUDING THE RELATIONSHIP OF THE FAIR USE DOCTRINE TO
6 ERESERVES PRACTICES, RIGHT?

7 A. WELL, "SERIES" IS A DIFFICULT WORD TO PUT IN THERE.
8 I REMEMBER ONE, TWO, MAYBE THREE CONVERSATIONS.

9 Q. OKAY. WELL, LET'S SAY YOU HAD ONE, TWO, OR THREE
10 CONVERSATIONS; IS THAT ACCURATE?

11 A. I THINK SO.

12 Q. THREE CONVERSATIONS SOUNDS ACCURATE?

13 A. IT COULD BE ACCURATE, SURE.

14 Q. YOU AND SHE DISCUSSED WHAT YOU MIGHT BE ABLE TO DO TO
15 HELP OUT THE UNIVERSITY, CORRECT?

16 A. NO.

17 Q. TAKE A LOOK AT PAGE 28 OF YOUR DEPOSITION BEGINNING AT
18 LINE 12.

19 A. (WITNESS COMPLIES.) ALL RIGHT.

20 Q.

21 "QUESTION: AND WHAT IS YOUR
22 RECOLLECTION OF WHAT HAPPENED NEXT
23 IN TERMS OF ANY INTERACTION WITH ANY
24 REPRESENTATIVE OF EITHER GEORGIA
25 STATE UNIVERSITY OR THE UNIVERSITY

1 SYSTEM OF GEORGIA?

2 ANSWER: I HAD ONE, MAYBE TWO MORE
3 PHONE CALLS, I WOULD BE SURPRISED IF
4 IT WAS MORE THAN THAT, WITH
5 MS. VULCAR. AND WE TALKED ABOUT
6 LATER, SOME TIME LATER, MAYBE IT WAS
7 JUNE, MAYBE IT WAS JULY, ABOUT
8 WHAT I MIGHT BE ABLE TO DO TO HELP
9 THE UNIVERSITY. WE TALKED ABOUT
10 SOME POSSIBILITIES AND THAT IS AS
11 FAR AS IT WENT."

12 CORRECT?

13 A. FAIR ENOUGH.

14 Q. AND YOU ALSO OFFERED TO CONDUCT SOME EDUCATIONAL
15 WORKSHOPS IF DESIRED?

16 A. I BELIEVE I DID BECAUSE I DO THAT FOR MANY
17 INSTITUTIONS.

18 Q. NOW THEREAFTER, IN THE SUMMER OF 2008, YOU WERE
19 CONTACTED BY MR. SCHAEZEL OF KING AND SPALDING; IS THAT
20 CORRECT?

21 A. I BELIEVE THAT TIMING IS CORRECT.

22 Q. HE REACHED YOU AS OUTSIDE COUNSEL FOR THE DEFENDANTS IN
23 THIS LITIGATION?

24 A. YES.

25 Q. MR. SCHAEZEL INVITED YOU TO A MEETING TO DISCUSS

1 POLICY OPTIONS THAT MIGHT BE CONSIDERED BY GEORGIA STATE
2 UNIVERSITY IN CONNECTION WITH ITS CONSIDERATION OF A NEW
3 COPYRIGHT POLICY, CORRECT?

4 A. AT THIS MOMENT I DON'T REMEMBER THE EXACT CONTENT OF
5 THAT CONVERSATION, BUT IT WAS THE INVITATION TO A MEETING
6 ABOUT SOMETHING RELATED TO THIS MATTER.

7 Q. THAT IS ALL YOU REMEMBER IS AN "INVITATION"?

8 A. IT IS ALL I REMEMBER RIGHT NOW. IT IS ALL I AM
9 REMEMBERING RIGHT NOW.

10 Q. YOU WERE PAID A CONSULTING FEE FOR THAT WORK -- LET ME
11 BACK UP. THAT MEETING OCCURRED, CORRECT?

12 A. WELL, THE MEETING THAT I AM THINKING OF DID OCCUR, WAS
13 IN EARLY OCTOBER OF 2008. AND THAT MEETING OCCURRED AND IT
14 WAS A VISIT WITH MR. SCHAEZEL AND OTHERS.

15 Q. ALL DAY MEETING?

16 A. I WAS HERE FOR A DAY, YES.

17 Q. YOU WERE PAID FOR IT?

18 A. I WAS PAID FOR THAT.

19 Q. THEREAFTER, IN JANUARY OF 2009, YOU WERE RETAINED BY
20 THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA TO
21 REVIEW CERTAIN MATERIALS WHICH YOU CAME TO UNDERSTAND HAD BEEN
22 DEVELOPED BY A COMMITTEE WHICH HAD BEEN CONVENED TO REVISE THE
23 1997 REGENT GUIDE, RIGHT?

24 A. I AM REMEMBERING SOMETHING JUST LIKE THAT, RIGHT.

25 Q. YOU DID UNDERTAKE SUCH A REVIEW, DID YOU NOT?

1 A. I DID REVIEW THE DOCUMENTS THAT WERE SENT TO ME.

2 Q. PURSUANT TO A RETENTION, CORRECT?

3 A. I BELIEVE THAT IS RIGHT.

4 Q. AND AGAIN YOU WERE PAID FOR SUCH ACTIVITY, CORRECT?

5 A. I BELIEVE I WAS.

6 Q. DO YOU HAVE ANY DOUBT?

7 A. YEAH. I AM NOT SURE HOW I ADDED UP THOSE HOURS. IF
8 YOU HAVE GOT SOMETHING TO SHOW ME THAT IS FINE.

9 Q. YOU WANT TO BE SHOWN OR PREPARED TO BELIEVE IT TO BE
10 TRUE?

11 A. I WILL BELIEVE IT IS TRUE.

12 Q. OKAY.

13 AND THE DOCUMENTS YOU WERE ASKED TO REVIEW CONSISTED OF
14 PORTIONS OF THE NEW POLICY DOCUMENTS THAT WERE THEN UNDER
15 CONSIDERATION, CORRECT?

16 A. I BELIEVE THAT'S RIGHT.

17 Q. AMONG THESE WAS A DRAFT OF A FAIR USE CHECKLIST,
18 CORRECT?

19 A. YES.

20 Q. AM I CORRECT THAT AT SOME POINT PRECEDING THIS
21 RETENTION IN JANUARY OF 2009, YOU HAD RECEIVED A DIFFERENT
22 CALL FROM MR. SCHAEZEL REQUESTING PERMISSION TO USE SOME
23 MATERIALS APPEARING ON THE COLUMBIA UNIVERSITY WEBSITE IN
24 CONNECTION WITH THE COMMITTEE'S WORK, CORRECT?

25 A. THAT'S CORRECT.

1 Q. I BELIEVE YOU TESTIFIED TO THAT ON YOUR DIRECT?

2 A. THAT'S CORRECT.

3 Q. AMONG THOSE MATERIALS WAS A FAIR USE CHECKLIST AS IT
4 APPEARS ON THE COLUMBIA WEBSITE, CORRECT?

5 A. THAT'S CORRECT.

6 Q. YOU PROVIDED CONSENT TO MR. SCHAEZEL INDICATING IN
7 THE PROCESS THAT YOU WERE THE AUTHOR OF THAT MATERIAL,
8 CORRECT?

9 A. YES.

10 Q. INCLUDING THE CHECKLIST ITSELF, RIGHT?

11 A. THAT'S RIGHT. I HAVE EXPLAINED THAT THE AUTHORSHIP
12 REALLY CAME FROM ME AND MY COLLEAGUES WORKING TOGETHER ON THAT
13 IN ITS ORIGIN.

14 Q. I AM GOING TO SHOW YOU A DOCUMENT NOW MARKED AS
15 DEFENDANT'S TRIAL EXHIBIT 320.

16 MR. RICH: MAY I APPROACH, YOUR HONOR?

17 THE COURT: YES.

18 BY MR. RICH:

19 Q. DO YOU RECOGNIZE WHAT YOU HAVE BEEN HANDED AS
20 DEFENDANT'S EXHIBIT 320?

21 A. YES, I DO.

22 Q. I TAKE IT THIS WAS -- WHO IS MS. GARY WHO YOU DIRECTED
23 THIS EMAIL TO, LAURA GARY?

24 A. LAURA GARY WAS AN ATTORNEY AT KING AND SPALDING, SHE
25 MAY STILL BE THERE.

1 Q. I TAKE IT THAT THIS REPRESENTED YOUR TRANSMITTAL OF
2 COMMENTS IN RESPONSE TO THE COMMITTEE'S PROPOSED FAIR USE
3 CHECKLIST?

4 A. IT READS EXACTLY LIKE THAT. ATTACHED IS MY CHECKLIST
5 WITH MY SUGGESTIONS. THE CHECKLIST WITH MY SUGGESTION.

6 Q. IF YOU TURN TO PAGE TWO OF THIS DOCUMENT, PLEASE.

7 A. (WITNESS COMPLIES.) UH-HUH (AFFIRMATIVE RESPONSE).

8 Q. WHICH APPEARS TO BE A MARKUP OF SORTS?

9 A. UH-HUH (AFFIRMATIVE RESPONSE).

10 Q. YES. IS IT CORRECT THAT YOU PROPOSED INSERTING THE
11 LANGUAGE WHICH APPEARS UNDERLINED TOWARD THE END OF THE FIRST
12 PARAGRAPH, QUOTE, REACH A CONCLUSION ONLY AFTER CONSIDERING
13 ALL RELEVANT FACTS AND ALL FOUR FACTORS, DOES THAT REFLECT
14 YOUR PROPOSED INSERTION?

15 A. IT APPEARS THAT WAY, YES.

16 Q. THAT IS BECAUSE YOU BELIEVE THAT TO BE CONSISTENT WITH
17 THE LAW OF FAIR USE, CORRECT?

18 A. THAT'S RIGHT.

19 Q. IN FACT, IT IS YOUR VIEW, IS IT NOT, THAT THE
20 APPLICATION OF THE FAIR USE DOCTRINE CAN BE DISTORTED BY A
21 FAILURE TO EVALUATE ALL FOUR FAIR USE FACTORS, TRUE?

22 A. ONE MUST CONSIDER ALL FOUR FACTORS.

23 Q. TO YOUR KNOWLEDGE, DID THE COMMITTEE AND NOW YOU HAVE
24 STUDIED THE EVENTUAL FAIR USE CHECKLIST IN ITS FINAL FORM AS
25 PROMULGATED BY THE UNIVERSITY SYSTEM OF GEORGIA, HAVEN'T YOU?

1 STUDIED THE FINAL VERSION OF THE POLICY CHECKLIST?

2 A. YES.

3 Q. TO YOUR KNOWLEDGE, DOES IT INCORPORATE THIS PROPOSED
4 CHANGE?

5 A. I CAN'T TELL YOU WHETHER IT DOES OR NOT.

6 Q. SITTING HERE TODAY YOU DON'T REMEMBER?

7 A. I DON'T REMEMBER.

8 Q. NOW, OVERALL, WHEN YOU HAD OCCASION TO SEE THE FINAL
9 PRODUCT OF THE COMMITTEE PROCESS, WHICH AS YOU HAVE TESTIFIED
10 INCLUDED ACKNOWLEDGING YOU AS A SOURCE, YOU RECOGNIZED THAT
11 IN SUBSTANCE, DIDN'T YOU, IN SOME WORDS AND SOME PIECES
12 REFLECTING YOUR OWN WORK PRODUCT, CORRECT?

13 A. IN SOME WAYS, YES.

14 Q. YOU WERE HAPPY TO SEE THAT, WEREN'T YOU?

15 A. WELL, CERTAINLY, YES.

16 Q. SOURCE OF PRIDE TO YOU THAT THE UNIVERSITY SYSTEM OF
17 GEORGIA WOULD HAVE ADOPTED A CHECKLIST AS SORT OF AN
18 ENDORSEMENT OF YOUR WORK?

19 A. LET'S NOT GET CARRIED AWAY. I THINK I HAVE SAID
20 BEFORE I AM HAPPY TO HAVE PEOPLE USE MY WORK AND I AM HAPPY TO
21 SHARE IT.

22 Q. YOU ARE PROUD OF THE CONTRIBUTIONS YOU MAKE WHEN PEOPLE
23 BORROW FROM THINGS LIKE YOUR CHECKLIST, THAT IS A SOURCE OF
24 PRIDE TO YOU, ISN'T IT?

25 A. SURE.

1 Q. NOW, THAT SAID, NOT ALL OF WHAT THE UNIVERSITY OF
2 GEORGIA ADOPTED AND PROMULGATED TRACKED COLUMBIA'S POLICY; IS
3 THAT CORRECT?

4 A. THAT'S CORRECT.

5 Q. THEY TOOK BITS AND PIECES?

6 A. THAT'S CORRECT.

7 Q. BOTH WITH RESPECT TO THE CHECKLIST I TAKE IT, YES?

8 A. YES.

9 Q. AND WITH RESPECT TO OTHER ATTRIBUTES OR ASPECTS OF THE
10 COLUMBIA POLICY DOCUMENTS?

11 A. I BELIEVE THAT IS RIGHT.

12 Q. TELL US IN A LITTLE MORE DETAIL WHAT YOUR ROLE IS AS
13 DIRECTOR OF THE COPYRIGHT ADVISORY OFFICE AT COLUMBIA.

14 A. UH-HUH (AFFIRMATIVE RESPONSE). MY ROLE AT COLUMBIA IN
15 DIRECTING THE OFFICE IS TO PROVIDE SUPPORT AND GUIDANCE ACROSS
16 THE UNIVERSITY WHERE NEEDED, WHERE DESIRED, TO BE ABLE TO
17 ADDRESS COPYRIGHT IN A RESPONSIBLE AND SOMETIMES CREATIVE WAY,
18 TO ADDRESS THE NEEDS OF HIGHER EDUCATION.

19 Q. DO YOU THINK YOU SERVE A LEGITIMATE PURPOSE?

20 A. YES, I DO.

21 Q. NOT JUST A FIGURE HEAD, ARE YOU?

22 A. NO, I'M NOT.

23 Q. YOUR SERVICES ARE SOUGHT OUT?

24 A. THEY ARE.

25 Q. YOUR WEEKS ARE BUSY?

1 A. VERY.

2 Q. MANY VISITORS?

3 A. MOSTLY BY EMAIL.

4 Q. INCLUDING VISITORS BROADLY BY EMAIL INCLUDING FACULTY?

5 A. YES, FACULTY REACH OUT TO ME ABOUT DIFFERENT PROJECTS.

6 Q. DO THEY REACH OUT TO YOU ABOUT FAIR USE ADVICE?

7 A. YES, THEY DID.

8 Q. WITH SOME REGULARITY?

9 A. YES.

10 Q. AND AMONG OTHER ACTIVITIES, I TAKE IT, THAT THE
11 COLUMBIA ADVISORY COPYRIGHT ADVISORY OFFICE MAINTAINS A
12 WEBSITE, CORRECT?

13 A. THAT'S CORRECT.

14 Q. PRETTY ROBUST WEBSITE, ISN'T IT?

15 A. I WILL LET YOU JUDGE THAT.

16 Q. IT CARRIES BOTH A LOT OF CONTENT GENERATED BY THE
17 OFFICE ITSELF, YES?

18 A. RIGHT.

19 Q. AND LOTS OF LINKS TO THIRD PARTY CONTENT AS WELL,
20 CORRECT?

21 A. THAT'S CORRECT.

22 Q. WHAT IS YOUR RELATIONSHIP TO THE ACTUAL CONTENT WHICH
23 HAS BEEN GENERATED BY COLUMBIA THAT APPEARS ON THAT SITE?
24 WHAT IS YOUR RELATIONSHIP WITH THE AUTHORSHIP OF THAT?

25 A. MUCH OF IT I HAVE AUTHORED, MUCH OF IT HAS BEEN

1 AUTHORED BY STUDENTS AND COLLEAGUES WORKING WITH ME. SOME OF
2 IT IS -- I AM TRYING TO THINK OF WHETHER SOME OF IT HAS BEEN
3 CONTRIBUTED BY COLLEAGUES OF OTHER INSTITUTIONS AND NONE OF
4 THAT COMES TO MIND AT THIS POINT. SO, A LOT OF IT COMES
5 FROM ME, COMES FROM THE STUDENTS WHO WORK WITH ME,
6 ASSOCIATES WHO WORK WITH ME.

7 Q. I TAKE IT IT REFLECTS, THOUGH, FAIRLY, WHETHER YOU
8 WERE LITERALLY AUTHORED -- WHETHER YOU HAVE LITERALLY AUTHORED
9 IT OR OTHERWISE ARE ASSOCIATED WITH IT AS DIRECTOR, I TAKE IT
10 IT CARRIES ADVICE THAT YOU FOUND TO -- FIND TO BE SOUND,
11 ACCURATE, AND REASONABLE?

12 A. I WILL NOT VOUCH FOR EVERY SPECK OF IT BECAUSE I DO
13 LIKE TO LINK TO DIVERSE SOURCES. AND I THINK THAT YOU CAN
14 FIND SOME EXAMPLES OF THAT WHERE I ALLOW PEOPLE TO --
15 ENCOURAGE PEOPLE TO REACH OUT AND LOOK AT DIFFERENT SOURCES.
16 AND SO I LIKE PEOPLE TO HAVE A DIFFERENT AND WIDE RANGING
17 POINT.

18 Q. I APOLOGIZE, MY QUESTION WASN'T SHARP ENOUGH.
19 I AM REFERRING, STRICTLY SPEAKING TO THE INDIGENOUS IN
20 CONTEXT THAT IS APPLICABLE TO COLUMBIA AND ITS OWN POLICIES,
21 AS OPPOSED TO RELATING TO THIRD PARTY. YOU ARE COMFORTABLE
22 AND SUPPORTIVE OF THAT CONTENT?

23 A. I BELIEVE THAT IS GOING TO BE RIGHT. IF YOU WANT TO
24 SHOW ME SOMETHING AND ASK ME ABOUT SOMETHING IN PARTICULAR.

25 Q. JUST ESTABLISHING A FOUNDATION THAT YOU ARE FAMILIAR

1 WITH THAT CONTENT.

2 A. CERTAINLY FAMILIAR WITH IT.

3 Q. AND THAT YOU ENDORSE THAT CONTENT?

4 A. I AM GOING TO ENDORSE THAT CONTENT. IN SOME CASES IT
5 IS ENDORSING THE CONTENT WHERE WE WORK, NOT ONLY WITH ME, BUT
6 I CAN THINK OF OTHER -- SOME EXAMPLES WHERE I HAVE WORKED WITH
7 COUNSEL TO DEVELOP SOME MATERIAL. SO SOMETIMES IT IS KIND OF
8 A GROUP PROCESS.

9 Q. AS A GENERAL PROPOSITION, THOUGH, THE SUITE OF
10 MATERIALS THAT ARE OFFERED, BOTH INDIGENOUS AND LINKS ARE
11 ALLOWED TO LET THE MEMBERS OF THE COMMUNITY GAIN A BETTER
12 UNDERSTANDING OF COPYRIGHT PRINCIPLE AND FAIR USE DOCTRINE AS
13 IT APPLIES TO THE ACADEMIC SETTING, CORRECT?

14 A. THAT'S CORRECT.

15 MR. RICH: YOUR HONOR, AS PART OF THIS VERY LARGE
16 EXHIBIT THAT DEFENDANTS MOVED IN WITH DEAN SEAMANS, THERE WAS
17 ONE TAB THAT HAD EXCERPTS FROM THE COLUMBIA WEBSITE. WE HAVE
18 COLLATED A SLIGHTLY LARGER VERSION OF THAT. I WANT TO PRESENT
19 THAT NOW IF I MAY.

20 BY MR. RICH:

21 Q. YOU HAVE IN FRONT OF YOU PLAINTIFF'S TRIAL EXHIBIT
22 1012, DO YOU SEE THIS?

23 A. YES.

24 Q. I WILL REPRESENT TO YOU THAT THIS REFLECTS OUR CAPTURE
25 THIS WEEK OF SIGNIFICANT PORTIONS, ALTHOUGH I WON'T REPRESENT

1 TO YOU EVERY SINGLE PAGE FROM THE COPYRIGHT RELATED MATERIALS
2 AS THEY APPEAR AND ARE AVAILABLE TO THE PUBLIC FROM THE
3 COPYRIGHT ADVISORY OFFICE.

4 WHAT I WOULD ASK YOU TO DO IS JUST QUICKLY, IF YOU COULD,
5 RUN THROUGH THESE AND PERHAPS IN SUMMARY FORM ADVISE THE COURT
6 JUST BY TOPICS FOR THE MOMENT, WE WILL DRILL DOWN A LITTLE
7 BIT LATER.

8 A. SURE.

9 Q. JUST BY TOPICS WHAT THESE MATERIALS COVER. FIRST OF
10 ALL, DO YOU RECOGNIZE THESE MATERIALS?

11 A. I DO.

12 Q. OKAY. IF YOU COULD QUICKLY COURSE THROUGH IN SUMMARY
13 FORM AS TO WHAT WE ARE LOOKING AT HERE.

14 A. UH-HUH (AFFIRMATIVE RESPONSE). FIRST PAGE IS CALLED
15 "ABOUT" -- IT IS "ABOUT THE COPYRIGHT OFFICE." NEXT PAGE IS
16 CALLED "GETTING STARTED." I BELIEVE THAT IS THE FRONT PAGE SO
17 IF A VISITOR GOES TO THE MAIN ADDRESS, THIS IS WHERE THEY WILL
18 LAND. NEXT IS THE "COPYRIGHT QUICK GUIDE," WHICH IS MEANT TO
19 WALK A READER THROUGH SOME OF THE FUNDAMENTAL PRINCIPLES OF
20 COPYRIGHT. I GET QUESTIONS REGULARLY WHERE SOMEBODY JUST
21 NEEDS CLARIFICATION OF BASICS, PLEASE START HERE. SO I HAVE
22 SOME OF THAT. THAT SPANS OVER THE NEXT FEW PAGES. THE NEXT
23 IS A SET OF LINKS OUT TO THE DIFFERENT POLICIES THAT ARE BOTH
24 AT COLUMBIA ABOUT FAIR USE AND COPYRIGHTS AND PATENTS AND
25 OTHER SUCH ISSUES. THE NEXT IS, WELL IT CONTINUES ON FOR A

1 COUPLE OF PAGES. KIND OF A MIX OF DIFFERENT LINKS THAT HAVE
2 BEEN GATHERED TOGETHER AT DIFFERENT TIMES OVER THE YEARS, YOU
3 KNOW. IT IS NOT SOMETHING THAT I AM SAYING IS PERFECT OR
4 CURRENT OR UP-TO-DATE. SAME THING WITH LAW RESOURCES. I
5 ACTUALLY WISH I COULD HAVE HAD TIME TO WORK ON THAT, BUT AT
6 LEAST SEND A READER OUT TO DIFFERENT SITES FOR SOME BASIC
7 SOURCES ABOUT COPYRIGHT LAW IN THE NATIONAL AND INTERNATIONAL
8 LEVEL.

9 TURNING A COUPLE OF PAGES, THERE IS A DOCUMENT THAT IS
10 LABELED "FUNDAMENTALS OF COPYRIGHT," AND IT HAS A SERIES OF
11 BRIEF PARAGRAPHS. AND THESE ARE ACTUALLY SOME PODCASTS THAT
12 I HAVE RECORDED THAT WHEN THEY LISTEN TO ONLINE OR DOWNLOAD
13 AND TAKE WITH YOU.

14 TURNING A COUPLE OF PAGES, THERE IS A PAGE LABELED "FAIR
15 USE." IT IS A BRIEF SUMMARY OF FAIR USE, AND THEN SOME LINKS
16 TO MORE SPECIFIC DOCUMENTS, SUCH AS THERE APPEARING ON THE
17 NEXT COUPLE OF PAGES WHAT IS FAIR USE, OTHER RIGHTS OF USE
18 BECAUSE FAIR USE IS NOT THE ONLY STATUTE. THE FAIR USE
19 CHECKLIST AND THEN SOME LINKS OUT TO -- WELL, FAIR USE
20 CHECKLIST IN PDF FORM, WHICH I SEE YOU HAVE PRINTED AND HAVE
21 ATTACHED HERE. A VERY WEAKLY DEVELOPED SECTION ABOUT
22 PRACTICAL APPLICATIONS POSTING MATERIALS ONLINE.

23 Q. LET ME PAUSE THERE. WHEN I TRIED TO CALL UP THE LINKS
24 SCENARIOS, IT BASICALLY SAID "SITE UNDER CONSTRUCTION"; IS
25 THAT ACCURATE?

1 A. YES, THAT IS ACCURATE. YOU KNOW, I AM DOING A CLEAN
2 SWEEP AND JUST GOT RID OF ALL THAT OLD STUFF. IT HADN'T BEEN
3 TOUCHED FOR YEARS.

4 Q. WHEN DID YOU GET RID OF IT?

5 A. PROBABLY THREE YEARS AGO. I THINK I HAD IT UP BRIEFLY
6 AFTER ARRIVING AT COLUMBIA AND THEN GOT RID OF IT.

7 Q. WOULD YOU KEEP GOING THEN?

8 A. SURE. I DO HAVE A PAGE THAT THAT WOULD LINK FROM
9 CALLED "POSTING MATERIALS ONLINE."

10 Q. WOULD THAT COME BACK TO SOME OF THIS -- WOULD THAT
11 TOPICALLY COVER USES OF ERES AND ULEARN TYPE USES?

12 A. IT COULD COVER ERES, BUT DEFINITELY IN THE KIND OF
13 ULEARN ENVIRONMENT, YES.

14 Q. WOULD ITS PRINCIPLES ALSO APPLY OVER IN THE ERES
15 ENVIRONMENT?

16 A. SOME OF THEM. THEN I HAVE A SECTION OF CASE SUMMARIES.

17 Q. JUST STAY WITH THAT ONE A MINUTE. FLIP TO THE SECOND
18 PAGE. I TAKE IT THERE IS A DISCUSSION OR ALSO A FAIR USE
19 PRINCIPLE AS IT RELATES TO THE ONLINE ENVIRONMENT WITHIN THAT
20 SECTION, CORRECT? LOOKING AT THE SECOND PAGE UNDER POSTING
21 COURSE MATERIALS ONLINE?

22 A. YES, FAIR USE PRINCIPLES IS A BIG HEADING CALLED "FAIR
23 USE."

24 Q. OKAY.

25 A. THAT'S CORRECT.

1 NEXT DOCUMENT, TURNING A COUPLE OF PAGES, "CASE
2 SUMMARIES." AND THESE ARE A VERY CURSORY BREAKOUT OF THE WAY
3 COURTS HAVE ADDRESSED THE FOUR FACTORS IN THE CONTEXT OF REAL
4 CASES, REAL COURT DECISIONS.

5 Q. WHAT ARE THE LEAD CASES THAT YOU CITE AS HAVING
6 PERTINENCE TO EDUCATIONAL FAIR COPYING DECISIONS?

7 A. WELL, RIGHT OFF THE TOP, WHEN IT COMES TO UNDER THE
8 HEADING THAT I CALL "TEACHING," I CITE THE BASIC BOOKS VERSUS
9 KINKOS GRAPHICS, I CITE PRINCETON ENVIRONMENT PRESERVATIONS
10 MICHIGAN DOCUMENT SERVICE.

11 Q. YOU FIND THOSE PEOPLE, ALTHOUGH PEOPLE MIGHT DEBATE
12 THEIR DEGREE OF RELEVANCE?

13 A. THEY ARE RELEVANT, YES, WE LEARN FROM THEM.

14 Q. OKAY. YOU CAN KEEP GOING. AND THEN THERE ARE
15 OTHERS?

16 A. AND THEN THERE ARE OTHER CATEGORIES, CASES RELATED TO
17 RESEARCH, QUOTATIONS AND IMAGES IN PUBLICATION, A COUPLE OF
18 OTHER CATEGORIES MAY OR MAY NOT WANT TO GET TO.

19 Q. RIGHT, I AGREE.

20 A. LET'S SEE WHAT ELSE.

21 Q. SECTION CALLED "GUIDELINES," A FEW PAGES ON?

22 A. I AM ALMOST THERE. YES, SECTION CALLED "GUIDELINES."

23 Q. LEAD REFERENCE GUIDELINE IS "CLASSROOM GUIDELINES
24 1976," CORRECT?

25 A. YES.

1 Q. YOU STILL FIND IT RELEVANT TO POST THAT, CORRECT?

2 A. WELL, IT IS INFORMATION. IF SOMEBODY WANTS TO SEE IT,
3 THERE IT IS.

4 Q. RIGHT.

5 A. NO PROBLEM.

6 Q. UH-HUH (AFFIRMATIVE RESPONSE). THEN A SECTION CALLED
7 "PERMISSIONS"?

8 A. A SECTION CALLED "PERMISSIONS."

9 Q. AND WITHIN THAT "PERMISSION" SECTION, I TAKE IT, THERE
10 IS A LINK TO "COLLECTIVE LICENSING AGENCIES"?

11 A. YES, THERE IS.

12 Q. AND IF WE COULD FLIP A FEW MORE AGES I THINK YOU WILL
13 FIND THAT.

14 A. UH-HUH (AFFIRMATIVE RESPONSE).

15 Q. AND THERE IS A REFERENCE DOWN ABOUT TWO-THIRDS OF THE
16 WAY DOWN, "COPYRIGHT CLEARANCE CENTER"; IS THAT CORRECT?

17 A. THAT'S CORRECT.

18 Q. WHICH SAYS:

19 "THE CCC SHOULD BE YOUR STARTING
20 POINT IF YOU ARE LOOKING TO GET
21 PERCENT FIGURES FOR A TEXT-BASED
22 WORK. THE CCC CAN GRANT PERMISSION
23 FOR THOUSAND OF WORKS, MANY
24 INSTANTLY ONLINE."

25 YES?

1 A. THAT IS EXACTLY WHAT IT SAYS.

2 Q. OKAY. AND I TAKE IT ON THE NEXT PAGE THERE IS A
3 SIMILAR IDENTICAL TEXTURAL REFERENCE TO THE CCC UNDER
4 PERMISSIONS FOR ONLINE WORKS?

5 A. YES.

6 Q. THAT IS THE LEAD SOURCE THAT IS CITED, CORRECT?

7 A. THAT IS WHAT IT SAYS.

8 Q. AND THEN IF YOU GO ON A FEW PAGES THERE IS A SECTION OF
9 THIS WEBSITE THAT IS CALLED "REQUESTING PERMISSION"?

10 A. THAT'S RIGHT.

11 Q. AND WHAT IS THE PURPOSE OF THAT SECTION?

12 A. PERMISSION -- SEARCHING FOR PERMISSION CAN BE
13 COMPLICATED, DIFFICULT, RAISE A LOT OF QUESTIONS, AND THIS IS
14 DESIGNED TO WALK SOMEBODY THROUGH THE PROCESS IF THEY ARE
15 SEEKING PERMISSION.

16 Q. AND FINALLY WE INCLUDED SOMETHING CALLED "CONTACT US,"
17 WHICH IS, I GUESS, THE VARIOUS MEANS BY WHICH MEMBERS OF THE
18 COLUMBIA COMMUNITY CAN REACH OUT FOR THE RESOURCE ASSISTANCE
19 THAT THEY MIGHT SEEK IN RESPECT TO COPYRIGHT MATTERS?

20 A. YES, OR YOU COULD FIND ME AS WELL.

21 Q. NOW, AM I CORRECT THAT I THINK WE HAVE ESTABLISHED THE
22 PURPOSE OF THESE TOOLS, I CALL THEM TOOLS, IS TO PROVIDE A
23 SERIES OF RESOURCES TO THE COLUMBIA COMMUNITY, CORRECT?

24 A. YES.

25 Q. I BELIEVE ON DIRECT YOU TESTIFIED THAT THE UTILITY YOU

1 SEE IN A FAIR USE CHECKLIST IS THAT IT IS ONE OF -- IT IS A
2 USEFUL TOOL, BUT ONE OF REALLY A SERIES OF SUPPORT MECHANISMS
3 TO ENABLE FACULTY MEMBERS TO MAKE THE BEST FAIR USE DECISIONS,
4 CORRECT?

5 A. I BELIEVE I SAID SOMETHING JUST LIKE THAT.

6 Q. THAT IS CONSISTENT WITH THE APPROACH OF COLUMBIA DOCS,
7 RIGHT?

8 A. YES.

9 Q. I TAKE IT COLUMBIA DOES NOT HOLD OUT THE CHECKLIST AS
10 THE BE ALL AND END ALL LITMUS TEST FOR DETERMINING WHETHER A
11 WORK INFRINGES OR NOT?

12 A. NO.

13 Q. YOU WOULD NEVER RECOMMEND THAT, WOULD YOU?

14 A. NO, I DON'T THINK I WOULD.

15 Q. NOW, I WOULD LIKE TO TURN BACK TO WHAT IS THE FAIR USE
16 SECTION.

17 A. ALL RIGHT. I AM ON A PAGE THAT IS HEADED "WHAT IS FAIR
18 USE."

19 Q. I DON'T KNOW IF, YOUR HONOR, THE QUALITY OF THIS IS
20 NOT WHAT IT MIGHT BE. WOULD YOU PREFER YOUR OWN COPY?

21 A. WELL, WHEN YOU BLOW IT UP.

22 MR. RICH: I THINK THAT IS A LITTLE BETTER.
23 BY MR. RICH:

24 Q. ON THE FIRST PAGE, WHICH IS WHAT I THINK WE ARE ALL ON,
25 THERE IS, AND IF WE WOULD SCROLL DOWN A BIT, PLEASE, TO A

1 DISCUSSION OF "PURPOSE AND CHARACTER OF THE USE," DO YOU SEE
2 THAT?

3 A. YES.

4 Q. BY NOW I THINK EVERYBODY IN THE COURTROOM RECOGNIZES
5 THAT TO BE DEALING WITH THE SO-CALLED FIRST FACTOR, FACTOR
6 ONE UNDER FAIR USE; IS THIS CORRECT?

7 A. THAT'S CORRECT.

8 Q. YOU WILL SEE A STATEMENT THERE WHICH IS THE FAIR USE
9 STATUTE ITSELF INDICATES THAT NONPROFIT EDUCATIONAL PURPOSES
10 ARE GENERALLY FAVORED OVER COMMERCIAL USES, DO YOU SEE THAT?

11 A. I DO.

12 Q. A FEW SENTENCES DOWN IT GOES ON TO CAUTION, I THINK
13 CONSISTENTLY WITH YOUR DIRECT EXAMINATION QUOTE:

14 "BUT BE CAREFUL, NOT ALL NONPROFIT
15 EDUCATIONAL USES ARE FAIR. A
16 FINDING OF FAIR USE DEPENDS ON AN
17 APPLICATION OF ALL FOUR FACTORS,
18 NOT MERELY THE PURPOSE."

19 CORRECT?

20 A. CORRECT.

21 Q. YOU BELIEVE THAT IS A FAIR AND ACCURATE STATEMENT OF
22 COPYRIGHT LAW AS YOU UNDERSTAND IT?

23 A. I WOULD SAY THAT AGAIN, YES.

24 Q. NOW, WHILE WE KEEP THIS DOCUMENT OUT, I AM GOING TO
25 SHOW YOU WHAT IS IN EVIDENCE AS JOINT EXHIBIT 4, WHICH IS THE

1 POLICY STATEMENT PROMULGATED BY THE UNIVERSITY SYSTEM OF
2 GEORGIA.

3 MR. RICH: IF I MAY APPROACH, YOUR HONOR.

4 THE COURT: YES.

5 BY MR. RICH:

6 Q. I WILL REPRESENT TO YOU, YOU ARE PROBABLY FAMILIAR WITH
7 THIS, THIS IS THE BODY AND TEXT OF THE NEW POLICY, YOU ARE
8 FAMILIAR WITH THIS DOCUMENT I TAKE IT?

9 A. I AM.

10 Q. AND IF YOU WOULD LOOK AT PAGE 4 OF JX 4, WHICH THERE IS
11 A SUBHEADING CALLED "UNDERSTANDING THE FOUR FACTORS," DO YOU
12 SEE THAT?

13 A. I SEE THAT.

14 Q. IF YOU WOULD READ TO YOURSELF THE PURPOSE AND CHARACTER
15 OF THE USE SECTION, MY QUESTION IS WHETHER YOU SEE THERE ANY
16 SIMILAR CAUTIONARY LANGUAGE ABOUT THE LIMITATIONS IN RELYING
17 ON THE NONPROFIT EDUCATIONAL USES AS PRESUMPTIVE FAIR USES TO
18 THAT WHICH APPEARS IN THE COLUMBIA SITE?

19 A. (WITNESS COMPLIES.) I DO NOT.

20 Q. YOU RECOGNIZE OTHER LANGUAGE AS LITERALLY OR
21 SUBSTANTIALLY COMING FROM THE COLUMBIA POLICY STATEMENT IN
22 HERE, THOUGH, DO YOU NOT? SECTIONS OF IT?

23 A. I SEE SOME PARALLELS.

24 MR. SCHAEZEL: OBJECTION, YOUR HONOR. UNDER THE
25 RULE OF COMPLETENESS, I BELIEVE WE NEED TO LOOK ON THE SAME

1 PAGE THERE, A SECOND PARAGRAPH, ALL FOUR FACTORS SHOULD BE
2 EVALUATED. IN EACH CASE IS THE PARAGRAPH I AM REFERRING TO,
3 THE WITNESSES ATTENTION BE DIRECTED TO THE COMPLETENESS OF IT.

4 MR. RICH: REDIRECT. I AM FOCUSING ON ANALYSIS
5 FACTOR.

6 BY MR. RICH:

7 Q. WAS THAT OMISSION FROM THE DISCUSSION OF THE UNIVERSITY
8 SYSTEM OF GEORGIA FACTOR ONE SUMMARY A RESULT OF ADVICE THAT
9 YOU PROVIDED EITHER THE COMMITTEE OR TO ITS COUNSEL?

10 A. NO.

11 Q. NOW, IF YOU TURN BACK TO COLUMBIA --

12 MR. SCHAEZEL: WE WILL OBJECT TO THE QUESTION, YOUR
13 HONOR, AS MISSTATING WHAT IS IN THE DOCUMENT AND IN THE
14 RECORD.

15 MR. RICH: RECORD SPEAKS FOR ITSELF.

16 THE COURT: I HAVEN'T SEEN -- YOU ARE TALKING ABOUT
17 THE SECOND PARAGRAPH THAT I CAN'T SEE?

18 MR. SCHAEZEL: YES, MA'AM.

19 BY MR. RICH:

20 Q. TURN BACK TO COLUMBIA DISCUSSION OF THE FAIR USE
21 FACTORS AT THE BOTTOM OF PAGE ONE, PLEASE, UNDER NATURE OF
22 THE COPYRIGHTED WORK. TAKE YOUR TIME. WE ARE WORKING WITH
23 SEVERAL DOCUMENTS. THAT IS THE SO-CALLED SECOND FAIR USE
24 FACTOR?

25 A. THAT'S CORRECT.

1 Q. YOU WILL SEE THAT IT STATES THAT AND THIS IS AT THE TOP
2 OF THE THIRD PAGE OF THIS, I GUESS, OR PARDON ME THE SECOND
3 PAGE AS PART OF THAT, THERE IS A SENTENCE THAT READS ON THE
4 COLUMBIA SITE, QUOTE, USE OF A WORK THAT IS COMMERCIALY
5 AVAILABLE, SPECIFICALLY FOR THE EDUCATIONAL MARKET IS
6 GENERALLY DISFAVORED, CLOSE QUOTE. DO YOU SEE THAT?

7 A. YES.

8 Q. AND THAT IS AN ACCURATE AGAIN SENTIMENT, CORRECT?

9 A. I BELIEVE IT IS. NOW, AGAIN, ONLY WITH RESPECT TO
10 THE FACTOR, NOT WITH RESPECT TO THE OVERALL CONCLUSION.

11 Q. I UNDERSTAND. IF YOU TURN BACK TO JX 4 AND THE NATURE
12 OF THE COPYRIGHTED WORK SECTION, THAT WAS, I TAKE IT, AN
13 EDITED VERSION FROM THE COLUMBIA VERSION, DO YOU SEE THAT THE
14 STATEMENT THERE READS INSTEAD:

15 "INSTRUCTORS SHOULD CAREFULLY REVIEW
16 USES OF 'CONSUMABLE' MATERIALS SUCH
17 AS TEST FORMS AND WORKBOOK PAGES
18 THAT ARE MEANT TO BE USED AND
19 REPURCHASED AS THEIR USE IS LESS
20 LIKELY TO QUALIFY AS FAIR USE."

21 DO YOU SEE THAT?

22 A. I DO SEE THAT.

23 Q. THAT IS A DIFFERENT FORMULATION OF THAT CONCEPT?

24 A. WAIT, I AM NOT EVEN SURE. IT IS JUST A DIFFERENT
25 FORMULATION. I DON'T KNOW IF IT IS THE SAME CONCEPT OR NOT.

1 Q. IT IS A DIFFERENT FORMULATION?

2 A. JUST A DIFFERENT FORMULATION.

3 Q. DO YOU SEE A STATEMENT EQUIVALENT IN SUBSTANCE TO THAT
4 APPEARING IN THE COLUMBIA CITE STATING USE OF A WORK THAT IS
5 COMMERCIALY AVAILABLE SPECIFICALLY FOR THE EDUCATIONAL MARKET
6 IS GENERALLY DISFAVORED?

7 A. DO I SEE THAT IN THE GEORGIA?

8 Q. SUM OR SUBSTANCE IN THE SECOND FACTOR IN THE GEORGIA
9 STATEMENT?

10 A. I DO NOT AND I AM FOCUSED ONLY ON THAT ONE PARAGRAPH
11 WHERE YOU DREW MY ATTENTION.

12 Q. IN THAT PARAGRAPH?

13 A. I DO NOT SEE IT IN THAT PARAGRAPH.

14 Q. WAS THAT OMISSION A RESULT OF DISCUSSIONS THAT YOU HAD
15 WITH THE COMMITTEE OR WITH ITS COUNSEL?

16 A. NO.

17 Q. IF YOU LOOK AT FACTOR THREE ON THE COLUMBIA SITE WHICH
18 IS THE AMOUNT OR SUBSTANTIALITY OF THE PORTION USED, THERE IS
19 A STATEMENT IN THE FOURTH LINE BEGINNING THE FOURTH LINE,
20 QUOTE, A BOOK CHAPTER MIGHT BE A RELATIVELY SMALL PORTION OF
21 THE BOOK, BUT THE SAME CONTENT MIGHT BE PUBLISHED ELSEWHERE
22 AS AN ARTICLE OR ESSAY AND BE CONSIDERED THE ENTIRE WORK IN
23 THAT CONTEXT, CORRECT?

24 A. I DO SEE THAT SENTENCE, THAT'S CORRECT.

25 Q. CAN YOU LOOK BACK AT THE VERSION OF THIS ADOPTED IN THE

1 UNIVERSITY SYSTEM OF GEORGIA POLICY, PLEASE?

2 A. ALL RIGHT.

3 Q. I WOULD ASK YOU IF YOU SEE ANY REFERENCE TO THAT
4 CONCEPT RETAINED IN THE AMOUNT OF WORK USED SECTION IN SECTION
5 5 OF JX 4?

6 A. GIVE ME A MOMENT TO READ THEN. I DO NOT SEE A
7 COMPARABLE SENTENCE.

8 Q. WAS ITS OMISSION A RESULT OF ANY DISCUSSIONS YOU HAD
9 WITH EITHER THE COMMITTEE OR ITS COUNSEL?

10 A. NO.

11 Q. FINALLY, IN TERMS OF THIS COMPARATOR, LOOK AT FACTOR
12 FOUR, THE EFFECT OF THE USE ON THE POTENTIAL MARKET FOR OR
13 VALUE OF THE WORK, DO YOU SEE THAT ON THE COLUMBIA SITE?

14 A. YES, I DO.

15 Q. AND HERE I AM GOING TO READ YOU THE FIRST SECTION
16 WHICH IS, QUOTE, EFFECT ON THE MARKET IS PERHAPS MORE
17 COMPLICATED THAN THE OTHER THREE FACTORS. THIS FACTOR MEANS
18 FUNDAMENTALLY THAT IF YOU MAKE A USE FOR WHICH A PURCHASE OR
19 LICENSE OF THE COPYRIGHTED WORK COULD REALISTICALLY HAVE BEEN
20 MADE, THAT FACT WEIGHS AGAINST A FINDING OF FAIR USE. TO
21 EVALUATE THIS FACTOR, YOU MAY NEED TO MAKE A SIMPLE
22 INVESTIGATION OF THE MARKET TO DETERMINE IF THE WORK IS
23 REASONABLY AVAILABLE FOR PURCHASE OR LICENSING?

24 A. I SEE THAT.

25 Q. THAT IS A FAIR STATEMENT OF COLUMBIA'S POLICY?

1 A. IT IS A FAIR STATEMENT ON WHAT IS ON THE WEBSITE THAT
2 IS HERE TO PROVIDE GUIDANCE FOR MEMBERS OF THE COLUMBIA
3 COMMUNITY.

4 Q. YOU THINK THAT IS SOUND GUIDANCE WITH THE LAW AS YOU
5 UNDERSTAND IT?

6 A. I MIGHT WANT TO EDIT IT A LITTLE BIT.

7 Q. I THOUGHT YOU MIGHT SAY THAT TODAY.

8 IF YOU WOULD TAKE A LOOK BACK AT JX 4, THE FOURTH FACTOR,
9 THE EFFECT ON THE VALUE OF OR MARKET FOR THE WORK. DO YOU
10 SEE ANYTHING COMPARABLE IN SUM OR SUBSTANCE, LANGUAGE OR
11 SUBSTANCE FROM THE LANGUAGE WE JUST READ FROM THE COLUMBIA
12 SITE?

13 A. ALL RIGHT. I WILL READ IT. I DON'T SEE A COMPARABLE
14 STATEMENT THERE.

15 Q. WAS THAT THE RESULT OF ANY DISCUSSIONS YOU HAD WITH
16 EITHER THE COMMITTEE OR COUNSEL?

17 A. NO.

18 Q. SO, IN FACT, THE UNIVERSITY SYSTEM OF GEORGIA DID
19 EXHIBIT A FAIR AMOUNT OF WHAT YOU WOULD TERM FLEXIBILITY IN
20 ADAPTING LANGUAGE FROM THE COLUMBIA SITE, DID IT NOT?

21 A. I AM NOT SURE I AM MAKING THAT SAME CONNECTION.

22 Q. OKAY.

23 THE COURT: WE NEED TO STOP SOMEWHERE.

24 MR. RICH: THIS IS A GOOD MOMENT, YOUR HONOR.

25 THE COURT: ALL RIGHT. DR. CREWS, SINCE YOU WILL

1 BE RETURNING TO TESTIFY FURTHER ON CROSS-EXAMINATION AFTER THE
2 BREAK AND COUNSEL HAVE AGREED THAT IN THIS CIRCUMSTANCE YOU
3 SHOULD NOT DISCUSS THE CASE, YOU ARE INSTRUCTED NOT TO
4 DISCUSS THIS CASE OR YOUR TESTIMONY WITH ANYONE DURING THE
5 LUNCH BREAK.

6 THE WITNESS: THANK YOU.

7 THE COURT: I WILL SEE YOU AT 1:45.

8 (WHEREUPON, A LUNCH RECESS WAS HELD.)

9 THE COURT: YOU MAY PROCEED.

10 MR. RICH: IF I MAY MOVE TWO EXHIBITS INTO EVIDENCE
11 IN THIS CASE. I WOULD LIKE TO OFFER DEFENDANT'S EXHIBITS 320
12 AND PLAINTIFFS' TRIAL EXHIBIT 1012.

13 MR. SCHAEZEL: NO OBJECTION TO 320. I AM NOT SURE
14 PLAINTIFFS' EXHIBIT 1012, I AM NOT SURE WHAT PURPOSE IT IS
15 BEING INTRODUCED, IT IS A NEW EXHIBIT JUST BEING INTRODUCED
16 TO US.

17 THE COURT: WHAT IS IT?

18 MR. RICH: THAT IS THE FULLER WEB PAGES FROM THE
19 COLUMBIA ADVISORY OFFICE SITE FROM WHICH DEFENDANTS ITSELF
20 TOOK AN EXCERPT. IT WAS ADMITTED INTO EVIDENCE AS PART OF
21 DEAN SEAMANS' TESTIMONY, SO WE JUST, FOR THE SAKE OF
22 COMPLETENESS, WE WOULD LIKE TO ROUND IT OUT.

23 MR. SCHAEZEL: OUR DIFFICULTY WITH IT IS, YOUR
24 HONOR, IT WOULD NOT BE COMPLETE. THE EXHIBIT 528 THAT IS
25 BEING REFERENCED TO WAS, I BELIEVE, JUST THE FIRST PAGE OF

1 COLUMBIA WEBSITE THAT WAS PUT IN AS, IF YOU WERE, A
2 PLACEHOLDER. THIS IS BEING OFFERED FOR THE SUBSTANCE OF
3 MATERIAL ON THE COLUMBIA WEBSITE AND IT IS NOT THE COMPLETE
4 COLUMBIA WEBSITE.

5 THE COURT: I WILL TELL YOU IT IS NOT COMPLETE. YOU
6 CAN OFFER THE REST OF IT AND WE WILL MAKE IT COMPLETE. I
7 WILL GO AHEAD AND ADMIT IT.

8 MR. RICH: THANK YOU. MAY I PROCEED?

9 THE COURT: YOU MAY.

10 CROSS EXAM CONTINUED

11 BY MR. RICH:

12 Q. GOOD AFTERNOON, DR. CREWS.

13 A. GOOD AFTERNOON.

14 Q. JUST A COUPLE MORE QUESTIONS ON THIS WEBSITE MATERIAL,
15 YES, PLEASE. IF YOU WOULD, STAYING WITHIN WHAT IS FAIR USE
16 SECTION.

17 A. I AM THERE.

18 Q. IF YOU WOULD TURN TO THE THIRD PAGE OF THAT SECTION,
19 WHICH IS THE LAST PORTION OF IT AND THAT IS UNDER A HEADING
20 "REMEMBER FAIR USE IS A BALANCING TEST," YES?

21 A. YES, I SEE IT.

22 Q. AND THE SENTENCE I WOULD LIKE TO COMMENT ON READS
23 MIDWAY THROUGH, "ALSO THE RELATIVE IMPORTANCE OF THE FACTORS,"
24 WHICH IS, I TAKE IT, A REFERENCE TO THE FAIR USE FACTORS, "IS
25 NOT ALWAYS THE SAME," DO YOU SEE THAT?

1 A. I DO.

2 Q. CAN YOU EXPLAIN WHAT IS MEANT BY THAT?

3 A. I DO. WHILE ONE SHOULD CONSIDER ALL FOUR OF THE
4 FACTORS, THEY DON'T IN EVERY INSTANCE, EVERY EXAMPLE WEIGH
5 EQUALLY. SOME WILL WEIGH ONE WAY OR THE OTHER MORE
6 CONVINCINGLY THAN OTHERS.

7 Q. SO IN APPLICATION, IF SOMEBODY IS GOING THROUGH A FAIR
8 USE ANALYSIS AND ATTEMPTING TO APPLY THE FACTORS, DO I
9 UNDERSTAND THAT COMMENT TO SAY THAT IT DOESN'T MEAN THAT
10 AUTOMATICALLY THE OUTCOME AS TO THAT FACTOR SHOULD BE GIVEN,
11 EACH OUTCOME SHOULD BE EQUAL WEIGHT TO EVERY OTHER FACTOR? I
12 DIDN'T STATE THAT VERY WELL I'M AFRAID.

13 A. ACTUALLY MAYBE YOU DID.

14 Q. ALL I WANT TO KNOW IS, DO YOU AGREE WITH THAT?

15 A. I THINK I AGREE WITH IT IF YOU ARE SAYING THE SAME
16 THING, HOW IS THAT?

17 Q. THIS IS AFTER LUNCH SETTING. WITH THAT, WOULD THAT
18 -- BY THAT STATEMENT THAT I THINK MAKE SURE WE ARE ON THE SAME
19 WAVELENGTH, TALKING FOR THIS MOMENT AT FACTORS ONE VERSUS TWO,
20 VERSUS THREE, VERSUS FOUR, CORRECT?

21 A. CORRECT.

22 Q. NOW, FOR EXAMPLE, LOOKING AT YOUR CHECKLIST OR THE GSU
23 CHECKLIST, THERE ARE WITHIN EACH FACTOR A SERIES OF CALL THEM
24 WHAT YOU WANT SUBFACTORS CRITERIA?

25 A. VARIABLES I CALLED IT AT ONE TIME.

1 Q. TAKE YOUR PHRASEOLOGY, DOES THAT RATIONALE, NAMELY
2 THAT THE RELATIVE IMPORTANCE OF THE FACTORS IS NOT ALWAYS THE
3 SAME AS YOU THINK ABOUT THOSE VARIABLES WITHIN EACH FACTOR,
4 DO YOU THINK ABOUT THOSE IN SIMILAR FASHION?

5 A. NO, I DON'T MAKE A CONNECTION THERE.

6 Q. OKAY. YOU WOULD GIVE EACH OF THOSE EQUAL WEIGHT IN A
7 DETERMINATION OR LET ME PHRASE IT DIFFERENTLY. WHAT IS YOUR
8 CONCEPTION OF HOW THOSE VARIABLES SHOULD BE UTILIZED IN
9 CONNECTION WITH THE FACTOR ANALYSIS?

10 A. OKAY. I WILL DO THE BEST I CAN PUTTING TOGETHER A FEW
11 PIECES HERE. THAT ONE LOOKS AT THE FACTS BECAUSE FAIR USE IS
12 DETERMINED IN THE CONTEXT OF A GIVEN SET OF FACTS, WHAT IS THE
13 PURPOSE, YOU KNOW, I AM AVOIDING LEGAL CONCEPTS. I AM
14 SAYING, UNDER WHAT CIRCUMSTANCES AM I USING THE WORK, WHAT IS
15 THE WORK AND SO ON. AND THOSE ARE ARTICULATED IN THE FOUR
16 FACTORS. AND THEN IN THE CONTEXT OF A CHECKLIST THERE ARE
17 STATEMENTS OF THOSE SUBFACTORS OR VARIABLES UNDER EACH ONE.
18 SO AN INITIAL PROCESS WOULD BE IDENTIFYING WHICH ONES ARE
19 APPLICABLE IN THE CONTEXT OF THE GIVEN SET OF FACTUAL
20 CIRCUMSTANCES. BUT GOING TO YOUR POINT ABOUT THE RELATIVE
21 IMPORTANCE OR SOMEONE MIGHT SAY THE WEIGHTING OF THE FACTORS
22 OR I SUPPOSE EVEN THE SUBFACTORS, IT REALLY DEPENDS ON THE
23 WEIGHT OR THE CONVINCINGNESS OF THE EVIDENCE, OF THE FACTS OF
24 THE CIRCUMSTANCES. ARE THERE STRONG POINTS? I'M AVOIDING
25 LEGAL WORDS. BUT ARE THERE STRONG CIRCUMSTANCES AND POINTS

1 TO MAKE THAT WOULD ARGUE THAT THIS FACTOR WEIGHS HEAVILY OR
2 VERY SLIGHTLY ONE DIRECTION OR THE OTHER? AND WE SEE THAT IN
3 COURT DECISIONS, AS WELL.

4 Q. OKAY. AND WHAT IS THE PROCESS BY WHICH THOSE WHO GO
5 -- WHO ARE CHARGED WITH GOING THROUGH THAT ANALYSIS, IN YOUR
6 EXPERIENCE, WHAT IS THE PROCESS BY WHICH A SUFFICIENT LEVEL OF
7 UNDERSTANDING AND NUANCE DEVELOPS TO ALLOW THAT WEIGHING AND
8 MENTAL WEIGHING TO GO FORWARD? WHAT ARE THE INPUTS, IN YOUR
9 EXPERIENCE, THAT ENABLE THAT PROCESS TO GO FORWARD WITH SOME
10 MEANING AND TO PRODUCE SOME RATIONAL OUTCOMES?

11 A. THAT WILL VARY FROM SITUATION TO SITUATION, BUT IN
12 GENERAL, YOU KNOW, FAIR USE IS SOMETHING THAT CONGRESS MEANT
13 FOR CITIZENS TO USE, NOT JUST LAWYERS. SO I LIKE TO CALL ON
14 THE CITIZENS THAT I WORK WITH TO LEARN A LITTLE BIT.

15 NOW, IN A VARIETY OF CIRCUMSTANCES, THAT MAY ACTUALLY
16 MEAN LEARNING A LITTLE BIT. IF THEIR SITUATION IS MORE
17 COMPLEX OR MORE NUANCED, THEY MAY HAVE TO READ A LITTLE BIT
18 MORE. BUT IN GENERAL, LET ME GIVE YOU A STRAIGHT ANSWER.
19 IN A TYPICAL TYPE OF SITUATION WHERE SOMEBODY IS JUST GETTING
20 STARTED ON THE PROCESS, NOT SURE WHERE IT IS GOING TO GO, I
21 WOULD SAY TAKE A LOOK, WHETHER IT IS ON THE GEORGIA SIDE OR
22 MY SIDE OR SOMEBODY ELSE'S SIDE, WHICHEVER SIDE IS
23 APPROPRIATE FOR YOU TO USE, AND IF THERE IS AN EXPLANATION OF
24 THE FOUR FACTORS, WE CAN SEE THAT ON LOTS OF SOURCES, FIRST
25 FACTOR MEANS KIND OF THIS, SECOND FACTOR MEANS KIND OF THAT,

1 READ A LITTLE BIT ABOUT WHAT IT MEANS. MAYBE IF YOUR
2 SITUATION IS SPECIFIC AND THERE HAS BEEN A COURT RULING ON IT,
3 I HAVE GOT THOSE SUMMARIES OF COURT RULINGS AND HOW THE COURTS
4 HAVE ADDRESSED THE FOUR FACTORS IN VERY GENERAL TERMS AND I
5 SAY TAKE A LOOK AT THOSE RELEVANT CASES AND THEN SEE IF THAT
6 HELPS YOU BEGIN TO MAKE A DETERMINATION.

7 Q. THE KEY IS EDUCATION AS I AM HEARING YOU?

8 A. I AM AN EDUCATOR BY PASSION AND PROFESSION AND SO I
9 WILL NOT BACK AWAY FROM THAT.

10 Q. SO IF SOMEBODY, FOR LACK OF TIME OR INTEREST OR
11 WHATEVER, HAVING NEVER DONE THE PROCESS BEFORE DECIDES I DON'T
12 HAVE A LOT OF TIME TO READ A LOT OF LEGALESE AND A LOT OF
13 SUMMARIES FROM DR. CREWS OR SOMEBODY ELSE, I AM JUST GOING TO
14 PICK UP A CHECKLIST, I AM GOING TO DO MY BEST, MAYBE THERE
15 ARE A FEW TERMS I DON'T UNDERSTAND, I WILL JUST SKIP THOSE,
16 AND I WILL CHECK THE BOXES AND I AM DOING THIS IN GOOD FAITH
17 WITHIN THE LIMITS OF MY EXPERTISE, WHAT DEGREE OF CONFIDENCE
18 WOULD THAT GIVE YOU IN THE OUTCOME OF THAT?

19 A. FOR THAT UNINITIATED USER, I WOULD PUSH THAT PERSON TO
20 READ A LITTLE BIT MORE, THAT IS WHAT I WOULD DO.

21 Q. WHERE DOES MORE FORMAL TRAINING FIT INTO THE PARADIGM,
22 THAT IS, ANY SEMINARS? IF YOU ARE RECOMMENDING TO AN
23 INSTITUTION THAT THEY SHOULD ROLL OUT A NEW POLICY OR INDEED
24 ASK YOU FOR ADVICE, WHAT OTHER TRAINING TOOLS DO YOU
25 RECOMMEND TO ASSURE OUTCOMES?

1 A. I'M NOT SURE ABOUT ASSURE.

2 Q. PROMOTE?

3 A. I WILL TELL YOU A VERY SIMPLE REACHABLE EXAMPLE. AND
4 I WOULD SAY TO AN INSTITUTION, YOU SHOULD HAVE RESOURCES
5 AVAILABLE THAT EXPLAIN SOME OF THE FUNDAMENTALS IN
6 APPROACHABLE, UNDERSTANDABLE LANGUAGE, READILY AVAILABLE TO
7 YOUR COMMUNITY. NOW THAT SOUNDS LIKE A WEBSITE. SO YOU
8 SHOULD HAVE SOMETHING AVAILABLE FOR THEM.

9 IN AN IDEAL SENSE, I WOULD LOVE TO SEE INSTITUTIONS RUN
10 WORKSHOP PROGRAMS, EDUCATION PROGRAMS THAT MEMBERS OF THAT
11 COMMUNITY WOULD HAVE AN OPPORTUNITY TO ATTEND. I WOULD LOVE
12 TO SEE THAT.

13 Q. IF YOU WOULD TURN NEXT IN THIS EXHIBIT, PLAINTIFFS'
14 TRIAL EXHIBIT 1012, TO THE SECTION "POSTING COURSE MATERIAL
15 ONLINE."

16 A. YES. I BELIEVE I AM THERE.

17 Q. I TAKE IT THAT, I THINK WE MAY HAVE ESTABLISHED THIS
18 BEFORE LUNCH, THIS SECTION IS DEVOTED SPECIFICALLY TO
19 COPYRIGHT ISSUES RELATING TO USES OF A COURSE WEBSITE OR
20 COURSE MANAGEMENT SYSTEM, AGAIN AKIN TO THE ULEARN SYSTEM AND
21 EVEN TO THE ERES TYPE SYSTEM OFFERED BY GSU?

22 A. I WOULD SAY MORE SPECIFICALLY IT IS WHERE THE FACULTY
23 MEMBER HAS THE DISCRETION, AND I DO TITLE RIGHT UP TOP IN THE
24 OPENING SENTENCE, USING A COURSE WEBSITE OR UNIVERSITY COURSE
25 MANAGEMENT SYSTEM, SUCH AS COURSE WORKS, IN GEORGIA STATE

1 TERMS I BELIEVE THAT WOULD BE ULEARN, YOU WOULD HAVE TO TELL
2 ME.

3 Q. OKAY. ALL RIGHT. AND THEN I THINK WE ESTABLISHED,
4 IF YOU TURN TO THE NEXT PAGE, THERE ARE SOME FAIR USE
5 GUIDELINES ALSO THAT ARE SET FORTH WITHIN THAT SECTION; IS
6 THAT CORRECT?

7 A. ARE YOU, YES, YOU ARE LOOKING ABOUT TWO-THIRDS DOWN
8 THE PAGE WHERE IT SAYS "FAIR USE"?

9 Q. YES.

10 A. YEAH, I DON'T KNOW IF YOU WANT TO CALL THEM
11 GUIDELINES, BUT THEY ARE GUIDANCE.

12 Q. IF YOU TURN, MOVING THROUGH THAT TO THE FOURTH FACTOR,
13 DISCUSSED THERE ARE SOME BULLET POINTS THAT YOU SEE UNDER THE
14 EFFECT OF THE USE ON THE MARKET FOR THE ORIGINAL. LOOK AT
15 THE LAST BULLET PLACING MATERIALS ONLINE. MATERIALS PLACED
16 ONLINE SHOULD NOT INCLUDE -- HERE WE GO.

17 "MATERIALS PLACED ONLINE SHOULD NOT
18 INCLUDE WORKS THAT ARE REASONABLY
19 AVAILABLE AND AFFORDABLE FOR
20 STUDENTS TO PURCHASE, WHETHER AS A
21 BOOK, AS A COURSEPACK, OR IN OTHER
22 FORMAT."

23 IS THAT CORRECT? THAT IS CORRECTLY STATED THERE?

24 A. I BELIEVE IT IS.

25 Q. AND WHAT IS MEANT BY "OTHER FORMAT" THERE?

1 A. IN YOUR EDUCATIONAL SETTING, WE USE A LOT OF MATERIALS
2 OTHER THAN BOOKS AND COURSEPACKS. WE USE JOURNALS, WE USE
3 DVD'S OF MOVIES, WE USE SOUND RECORDINGS OF SONGS, WE USE A
4 WIDE VARIETY OF DIFFERENT TYPES OF WORKS AND I AM ANTICIPATING
5 ALL OF THOSE TYPES OF MATERIALS THAT COULD BE AVAILABLE.

6 Q. YES, BY LICENSED ELECTRONICALLY I AM ASSUMING?

7 A. I DIDN'T SAY ANYTHING ABOUT LICENSING, AVAILABLE FOR
8 STUDENTS TO PURCHASE IS WHAT THE DOCUMENT SAYS.

9 Q. DO YOU SEE A DISTINCTION THERE FOR PURPOSES OF THE
10 POINT BEING MADE THOUGH IF SOMETHING IS AVAILABLE AS A
11 COMPONENT OF A COURSEPACK SAY ELECTRONICALLY OR EXCERPT OF A
12 BOOK ELECTRONICALLY, IS IT CONTEMPLATED, IN YOUR VIEW, THAT
13 THIS PRINCIPLE SET FORTH HERE WOULD APPLY TO THAT AS WELL?

14 A. I WOULD CONTEMPLATE IT AS A VARIABLE JUST AS WE TALKED
15 BEFORE LUNCH THAT ONE MAY INCLUDE IN THE OVERALL EQUATION.
16 LET ME, IF I MAY --

17 Q. PLEASE.

18 A. -- PREFACE THIS LIST. I MEAN, THESE ARE POINTS OF
19 GUIDANCE TO HELP PEOPLE MAKE DECISIONS. RARELY IF EVER WOULD
20 ANYBODY IN CONNECTION WITH POSTING AN ITEM ONLINE DO
21 EVERYTHING ON THIS LIST.

22 Q. I UNDERSTAND.

23 A. IT IS PART OF THE BALANCE.

24 Q. I DON'T WANT TO GET INTO A DISSERTATION. LET ME ASK
25 YOU THIS. FOLLOW ME WITH THE WORDING AS IT EXISTS, I AM

1 GOING TO CHANGE ONE WORD.

2 A. ALL RIGHT.

3 Q. MATERIALS PLACED ONLINE SHOULD NOT INCLUDE WORKS THAT
4 ARE REASONABLY AVAILABLE AND AFFORDABLE FOR STUDENTS TO
5 LICENSE. WOULD THERE BE ANY PRINCIPLED DISTINCTION IN YOUR
6 MIND IF IT READ THAT WAY OR IF IT ADDITIONALLY HAD READ TO
7 PURCHASE OR TO LICENSE IN TERMS OF THE DIDACTIC POINT OR THE
8 POINT BEING MADE HERE?

9 A. YES, THERE WOULD.

10 Q. THERE WOULD BE A DIFFERENCE?

11 A. YES.

12 Q. YOUR UNDERSTANDING IS THIS IS NOT MEANT TO ENCOMPASS A
13 SITUATION WHERE WORKS ARE REASONABLY AVAILABLE FOR LICENSE OR
14 FOR PURCHASE?

15 A. I HAVE NOT EXPRESSED THAT POINT HERE.

16 Q. I UNDERSTAND THAT.

17 A. I THINK THAT ANSWERS THE QUESTION ACTUALLY.

18 Q. IF YOU LOOK UNDER ALTERNATIVE MEANS OF DELIVERY, DO
19 YOU SEE THAT?

20 A. RIGHT, I DO.

21 Q. THE FIRST BULLET READS:

22 "USING TRADITIONAL COURSEPACKS.

23 CONSIDER USING COURSEPACKS IF

24 PERMISSION TO POST MATERIALS

25 ELECTRONICALLY IS DENIED BY THE

1 COPYRIGHT OWNER, BUT PERMISSION IS
2 AVAILABLE FOR CREATING HARD COPIES
3 OF THE SAME MATERIALS."

4 DO YOU SEE THAT?

5 A. I DO SEE THAT.

6 Q. THAT IS PART OF COLUMBIA'S POLICY?

7 A. CERTAINLY PART OF THE STATEMENT I PROVIDE OFF OF THIS
8 WEBSITE, THAT'S CORRECT.

9 Q. THE NEXT BULLET READS:

10 "REQUIRING STUDENTS TO PURCHASE
11 MATERIALS: ENCOURAGE STUDENTS TO
12 PURCHASE MATERIALS IF AVAILABLE AT
13 REASONABLE COST, ESPECIALLY WHEN
14 ASSIGNING SUBSTANTIAL READING.
15 SIMPLE PURCHASES SELDOM RAISE
16 COPYRIGHT ISSUES, ESPECIALLY IF THE
17 MATERIALS ARE ORDERED THROUGH THE
18 BOOKSTORE, ONLINE, OR THROUGH OTHER
19 ORDINARY MEANS."

20 THAT TOO EXPRESSES COLUMBIA UNIVERSITY POLICY, CORRECT?

21 A. OH, YEAH. I HAVE NO PROBLEM WITH THAT STATEMENT.

22 Q. WE ARE GOING TO MOVE AWAY FROM THIS DOCUMENT NOW AND
23 INTO OTHER TESTIMONY.

24 NOW, I TAKE IT THE PURPOSE OF YOUR TESTIMONY IS TO
25 PROVIDE FROM YOUR OWN BACKGROUND SOME CONTEXT FOR THE COURT'S

1 EVALUATION OF GSU'S COPYRIGHT POLICY IN RELATION TO THE
2 PRACTICES AT ISSUE IN THIS CASE, CORRECT?

3 A. IF THE COURT WOULD LIKE TO TAKE THAT AWAY, THAT IS
4 FINE.

5 Q. AND YOUR TESTIMONY WITH RESPECT TO GEORGIA STATE
6 UNIVERSITY RELATES ONLY TO THE MERITS OF GEORGIA STATE
7 UNIVERSITY AND THE UNIVERSITY SYSTEM OF GEORGIA, TO SOME
8 EXTENT, CURRENT COPYRIGHT POLICY, CORRECT?

9 A. YES, AS I HAVE UNDERSTOOD THAT, YES.

10 Q. YOU ARE NOT HERE OFFERING ANY OPINION, I TAKE IT, AS
11 TO THE DEGREE OF GEORGIA STATE UNIVERSITY'S ACTUAL COMPLIANCE
12 WITH ITS POLICY, CORRECT?

13 A. I HAVE SOME EVIDENCE OF COMPLIANCE OF IMPLEMENTATION OF
14 THE POLICY, WHICH I HAVE ACKNOWLEDGED BECAUSE OF MY REVIEW OF
15 SOME DOCUMENTS, SUCH AS SOME DEPOSITIONS THAT WERE AVAILABLE
16 BACK IN 2009. I HAVE LEARNED A LITTLE BIT MORE SINCE THEN.
17 FRANKLY, I HAVE RARELY BEEN IN THIS ROOM, SO I AM NOT
18 COGNIZANT OF MUCH OF THE TESTIMONY AT ALL THAT HAS HAPPENED IN
19 THIS TRIAL. BUT I HAVE LEARNED A LITTLE BIT MORE. SO I CAN
20 CERTAINLY SPEAK IN SOME RESPECTS TO WHAT I HAVE SEEN AND
21 LEARNED.

22 Q. YOU DON'T SIT HERE TODAY PURPORTING TO HAVE A
23 COMPREHENSIVE UNDERSTANDING OF HOW GEORGIA STATE UNIVERSITY
24 HAS IMPLEMENTED ITS POLICY, DO YOU?

25 A. I AM NOT GOING TO CLAIM A COMPREHENSIVE UNDERSTANDING

1 OF THAT.

2 Q. IF I REPRESENT TO YOU THAT THERE IS TESTIMONY FROM 20
3 OR MORE PROFESSORS -- AS I RECALL AT THE TIME OF YOUR
4 DEPOSITION YOU HAD REVIEWED THE DEPOSITIONS OF PERHAPS TWO
5 PROFESSORS AT THE TIME; IS THAT CORRECT?

6 A. VERY FEW, I DON'T REMEMBER THE EXACT NUMBER, BUT IT
7 IS VERY FEW.

8 Q. AND I TAKE IT YOU ARE NOT HERE TO OFFER REVIEW, EITHER
9 WHETHER ANY OF THE ACTUAL PRACTICES DO OR MIGHT CONSTITUTE
10 COPYRIGHT INFRINGEMENT WHEN TESTED AGAINST FAIR USE
11 PARAMETERS, THAT IS NOT PART OF YOUR TESTIMONY EITHER, IS IT?

12 A. I AM NOT SURE TO TAKE INDIVIDUAL EXAMPLES AND RUN THE
13 FULL SCRUTINY AND OFFER AN OPINION ABOUT WHETHER ANY GIVEN
14 SPECIFIC EXAMPLE IS OR IS NOT FAIR USE.

15 Q. JUST TO BE CLEAR, APART FROM THE LIMITED RECORD
16 PORTIONS THAT YOU REVIEWED AT THE TIME OF YOUR DEPOSITION IN
17 DECEMBER OF 2009 AND APART FROM YOUR DISCUSSIONS WITH OUTSIDE
18 COUNSEL FOR THE DEFENDANTS, YOU DIDN'T INTERVIEW ANY
19 ADMINISTRATORS AT GEORGIA STATE UNIVERSITY; IS THAT CORRECT?

20 A. THAT IS CORRECT.

21 Q. NOT MS. SEAMANS?

22 A. THAT'S CORRECT.

23 Q. NOT MS. BURTLE?

24 A. THAT'S CORRECT.

25 Q. NOT MS. DIMSDALE?

1 A. THAT'S CORRECT.

2 Q. NOT ANYONE ELSE?

3 A. ANYONE ELSE.

4 Q. ANYBODY IN THE LIBRARY OPERATION WHO INTERFACES WITH
5 THE ERES SYSTEM?

6 A. CORRECT.

7 Q. MR. PALMER?

8 A. NO.

9 Q. ANYBODY WHO INTERFACES WITH THE ULEARN SYSTEM?

10 A. NO.

11 Q. ANY FACULTY MEMBERS WHO HAVE FILLED OUT FAIR USE
12 CHECKLISTS?

13 A. NO.

14 Q. ANY FACULTY MEMBERS WHO, WHETHER OR NOT THEY FILLED OUT
15 CHECKLISTS, HAVE UTILIZED EITHER THE ERES OR ULEARN SYSTEM?

16 A. NO.

17 Q. ANY STUDENTS WHO HAVE ACCESSED ANY MATERIALS VIA EITHER
18 THE ERES OR ULEARN SYSTEM?

19 A. NO.

20 Q. INSIDE LEGAL COUNSEL UNTIL SHE DEPARTED, CYNTHIA HALL?

21 A. NO. OTHER THAN I WOULD SAY I DID HAVE THAT ONE
22 MEETING BACK IN OCTOBER OF 2008, IF I AM CORRECT.

23 Q. THANK YOU, FAIR ENOUGH.

24 IN PREPARING YOUR EXPERT REPORT, YOU DIDN'T REVIEW ANY
25 ERES REPORTS GENERATED BY GEORGIA STATE UNIVERSITY; IS THAT

1 CORRECT?

2 A. THAT IS CORRECT.

3 Q. NOR DID YOU REVIEW ANY COURSE SYLLABI SETTING FORTH
4 READINGS POSTED EITHER ON THE ULEARN OR ERES SYSTEMS,
5 CORRECT?

6 A. CORRECT.

7 Q. YOU DIDN'T REVIEW ANY COMPLETED FAIR USE CHECKLIST
8 RELATING TO ANY OF THE CLAIMED INFRINGEMENTS AT ISSUE IN THIS
9 CASE, DID YOU?

10 A. NO, I DIDN'T.

11 Q. I TAKE IT YOU UNDERSTAND THAT IT IS THE OBLIGATION OF
12 FACULTY MEMBERS WISHING TO POST MATERIALS TO THE ERES OR
13 ULEARN SYSTEM TO COMPLETE THE GSU FAIR USE CHECKLIST FOR EACH
14 READING BEFORE IT IS SUBMITTED FOR POSTING ON ERES; IS THAT
15 CORRECT?

16 A. THAT IS MY UNDERSTANDING.

17 Q. AND I TAKE IT YOU ARE AWARE THAT THE INSTRUCTORS ARE
18 REQUIRED TO REPRESENT TO THE LIBRARY THAT THEY HAVE IN FACT
19 COMPLETED A CHECKLIST WITH RESPECT TO READINGS THEY WISH TO
20 POST, CORRECT?

21 A. THAT IS CORRECT.

22 Q. AND THAT THEY CONCLUDED, I BELIEVE, THEY ARE TO
23 REPRESENT THAT THEY CONCLUDED BASED ON THAT ANALYSIS THAT IT
24 IS WITHIN MERITS?

25 A. ABSOLUTELY.

1 Q. I TAKE IT THAT YOU WOULD UNDERSTAND THAT GOING THROUGH
2 THE PROCESS WE JUST DESCRIBED OF ACTUALLY FILLING OUT -- I
3 WILL ADD YOU ALSO UNDERSTAND THEY ARE TO RETAIN COPIES?

4 A. I DON'T THINK THE POLICY SPECIFICALLY SAYS THEY SHOULD
5 RETAIN, BUT IT MAY.

6 Q. YOU DON'T KNOW FOR SURE. I AM GOING TO REPRESENT TO
7 YOU THAT YOU ARE WRONG, THAT THERE IS A REQUIREMENT. I WILL
8 ASK YOU JUST FOR PURPOSES OF MY QUESTIONING TO ACCEPT THAT.

9 A. I WILL ACCEPT THAT.

10 Q. I TAKE IT THE PURPOSE OF THAT PROCESS IS TO FORCE
11 PROFESSORS TO THINK THROUGH THE FAIR USE ANALYSIS BEFORE THEY
12 HAVE A WORK POSTED ON THESE SYSTEMS, CORRECT?

13 A. WELL, YOU KNOW, WHEN I TALK TO FACULTY AND EXPLAIN
14 WHAT THE POLICY -- IF THIS WERE MY POLICY I MIGHT WORD IT A
15 LITTLE DIFFERENTLY, BUT THE MAIN POINT IS, YES, IT IS TO
16 MOTIVATE THEM TO WORK THROUGH THE FACTORS.

17 Q. WITH RESPECT TO RETENTION, I WILL SIMPLY REMIND YOU
18 YOUR REPORT AT PAGE 59 I THINK DICTATES THAT RETAINING --
19 QUOTE, RETAINING A COPY OF THE CHECKLIST FOR FUTURE REFERENCE
20 IS IMPORTANT, UNQUOTE. AT THAT TIME ANYWAY YOU WERE CLEARER?

21 A. I WILL STAND BY THAT.

22 Q. WOULD IT BE CONSISTENT WITH THE OBJECTIVES OF THE
23 POLICY AS YOU UNDERSTAND IT, A FACULTY MEMBER HAVING FAILED TO
24 COMPLETE A CHECKLIST PRIOR TO HAVING MATERIAL POSTED ON THE
25 ERES OR ULEARN SYSTEM AS MUCH AS A YEAR OR TWO YEARS LATER TO

1 CREATE A CHECKLIST PURPORTING TO RECREATE HIS MENTAL PROCESS
2 AT THE TIME THE MATERIALS WERE POSTED?

3 A. NOW, I GOT THE GIST OF THE FACTUAL SITUATION, TELL ME
4 WHAT THE QUESTION IS.

5 Q. I SAID, DO YOU BELIEVE IT WOULD BE CONSISTENT WITH THE
6 POLICY, AS YOU UNDERSTAND IT, AND ITS OBJECTIVES FOR THAT TO
7 OCCUR, A YEAR OR TWO LATER, TO CREATE A CHECKLIST FOR THE
8 FIRST TIME?

9 A. IF THE FACULTY MEMBER COMPLETED THE CHECKLIST AT THE
10 ORIGINAL TIME, AND IF THAT IS WHAT THE POLICY CALLS FOR AND
11 MORE THAN THAT IF IN FACT IT IS DONE IN A SINCERE, HONEST,
12 GOOD-FAITH MANNER, WHICH I AM ASSUMING WE ALL DO WHEN WE
13 FOLLOW ALL OF OUR POLICIES, THAT IN THAT EVENT THE PERSON HAS
14 IN FACT COMPLIED WITH THE POLICY. THE RECREATION TO MEET
15 SOME OTHER OBJECTIVE, I THINK WE JUST HAVE TO LOOK AT
16 SEPARATELY.

17 Q. I THINK I ASSUMED AWAY MY QUESTION IS THAT THE FACULTY
18 MEMBER HAD IN FACT COMPLETED A CHECKLIST INITIALLY?

19 A. I THOUGHT THAT WAS PART OF THE QUESTION.

20 Q. MY QUESTION WAS, A FACULTY MEMBER HAVING FAILED TO
21 COMPLETE A CHECKLIST PRIOR TO POSTINGS CREATES ONE A YEAR OR
22 TWO YEARS LATER PURPORTING TO RECREATE HIS MENTAL PROCESS --

23 A. RIGHT.

24 Q. -- AT THE TIME THE POSTINGS WERE MADE. DO YOU THINK
25 THAT IS CONSISTENT WITH YOUR UNDERSTANDING OF THE OBJECTIVES

1 OF THE POLICY, THE PROCESS UNDERLYING THIS POLICY?

2 A. IT IS NOT PERFECT. IT IS NOT PERFECT.

3 Q. IS THAT THE BEST YOU CAN SAY?

4 A. YOU KNOW, THAT IS ABOUT AS BEST I CAN SAY. I HAVE
5 SEEN A WHOLE LOT IN THIS WORLD. I SEE A LOT OF THINGS THAT
6 AREN'T PERFECT. BUT IT IS NOT IDEAL. I WOULD GO AND POKE
7 THAT FACULTY MEMBER FIGURATIVELY AND SAY, DO IT BETTER NEXT
8 TIME.

9 Q. WHY IS IT NOT IDEAL?

10 A. PARDON ME?

11 Q. WHY IS IT NOT IDEAL?

12 A. BECAUSE IT SHOULD BE DONE UP FRONT.

13 Q. WHAT IS THE LOSS IN NOT DOING IT UP FRONT? WHAT IS THE
14 POTENTIAL LOSS OR FAILURE?

15 A. MAY BE SOME INCONSISTENCY OR LACK OF MEMORY ABOUT THE
16 EXACT FACTS AND CIRCUMSTANCES. I WANT TO CAPTURE THOSE WHILE
17 WE CAN.

18 Q. IT MAY BE THAT UNDER MY HYPOTHETICAL IT WAS NEVER DONE
19 IN THE FIRST PLACE, THAT WOULD HAVE INDICATED THEN NO
20 OBSERVANCE OF FAIR USE ANALYSIS IN THE FIRST INSTANCE, TRUE?

21 A. I AM NOT GOING TO MAKE THAT SAME ASSUMPTION. YOU
22 ASKED ME NOT TO MAKE SOME OTHER ASSUMPTION EARLIER IN THE
23 QUESTIONING, I AM NOT GOING TO MAKE THAT SAME ASSUMPTION.

24 Q. DO YOU ALLOW THE POSSIBILITY THAT ONE EXPLANATION FOR
25 FACULTY MEMBER FAILING TO COMPLETE THE CHECKLIST IN THE FIRST

1 INSTANCE IS BECAUSE IN FACT THAT FACULTY MEMBER DIDN'T GO
2 THROUGH THE REQUIRED ANALYSIS?

3 A. IN THE CONTEXT OF IS ANYTHING POSSIBLE, SURE IT IS
4 POSSIBLE.

5 Q. YOU DON'T THINK THAT IS A POSSIBILITY IN THE REAL
6 WORLD?

7 A. WELL, THAT IS NOT. I THINK I ANSWERED THAT QUESTION.

8 Q. WHAT WAS YOUR ANSWER?

9 A. IN THE SENSE OF ANYTHING IS POSSIBLE, I THINK WHAT YOU
10 JUST DESCRIBED IS POSSIBLE. I AM NOT GOING TO JUMP TO THAT
11 CONCLUSION, THOUGH.

12 Q. IF YOU WERE TO LEARN THAT THE ONLY FOLLOW-UP CONDUCTED
13 BY GSU'S OFFICE OF LEGAL AFFAIRS WITH RESPECT TO MISSING
14 CHECKLISTS WAS TO REQUIRE ONLY THOSE FACULTY MEMBERS WHOSE
15 DEPOSITIONS WERE TO BE TAKEN OR WHO WERE TO BE CALLED AS TRIAL
16 WITNESSES IN THIS CASE TO PREPARE WHAT HAVE BEEN TERMED
17 RECREATED CHECKLISTS AND HAD TO DO SO ONLY WITH RESPECT TO THE
18 WORKS AT ISSUE IN THIS CASE, NOT WITH RESPECT TO ANY OTHER
19 WORKS THEY DIDN'T FILL OUT CHECKLISTS FOR, WOULD THAT CONCERN
20 YOU?

21 A. NOT IN ITSELF, NO.

22 Q. I THINK WE CHATTED A BIT ABOUT YOUR SENSE THAT HAVING A
23 GROUNDING IN COPYRIGHT SUFFICIENT TO INTELLIGENTLY PREPARE
24 THESE CHECKLISTS IS DESIRABLE; IS THAT CORRECT?

25 A. THAT IS CORRECT.

1 Q. WITHOUT THAT KIND OF GUIDANCE, I ASSUME YOU WOULD AGREE
2 CERTAIN CONCEPTS THAT YOU MIGHT AND I MIGHT BE FLUENT IN SUCH
3 AS THE MEANING OF TRANSFORMATIVENESS UNDER COPYRIGHT LAW WOULD
4 NOT LEAP OFF THE PAGE TO SOMEONE ELSE, CORRECT?

5 A. I AM NOT SURE IT LEAPS OFF THE PAGE TO ME.

6 Q. FAIR ENOUGH.

7 AND EVEN CONCEPTS OF ARGUABLE PLAIN ENGLISH LIKE CONCEPTS
8 OF SMALL TAKINGS WOULD NOT BE OBVIOUSLY INTUITIVELY OBVIOUS
9 WITHOUT SOME GROUNDING?

10 A. I THINK IT MAY HAVE MEANING, IT PROBABLY DOES HAVE
11 MEANING TO MOST PEOPLE READING IT. IS IT THE EXACT SAME
12 MEANING YOU HAVE, I HAVE. DO WE HAVE THE SAME MEANING AS ONE
13 ANOTHER? PROBABLY NOT. SO THERE ARE DIFFERENCES IN THE WAY
14 THESE TERMS ARE UNDERSTOOD UNDER DIFFERENT CIRCUMSTANCES.

15 Q. MY QUESTION WAS DIFFERENT, WHICH IS, ARE YOU OF THE
16 VIEW THAT THE KIND OF READING THAT YOU RECOMMEND OR THE KIND
17 OF SEMINARS THAT YOU RECOMMEND OR THE KIND OF TRAINING THAT
18 YOU RECOMMEND WILL CREATE A BETTER BODY OF INFORMATION, A MORE
19 INFORMED PROCESS TO COMPLETE THE FAIR USE ANALYSIS OF WHICH
20 YOU SAY THE CHECKLIST SHOULD BE ONLY ONE PART?

21 A. THANK YOU.

22 Q. LET ME JUST FINISH THE QUESTION. SO THAT THAT IS
23 SOMETHING THAT YOU, I TAKE IT, STRONGLY RECOMMEND OCCUR,
24 CORRECT?

25 A. THE FIRST PART OF YOUR QUESTION, YES. THAT THOSE

1 MATERIALS AND PROCESSES WOULD INFORM. THAT I STRONGLY
2 RECOMMEND, WHEN I GET A CHANCE AND WHEN SOMEBODY IS
3 LISTENING, YEAH, I WILL RECOMMEND IT. I DON'T KNOW HOW
4 STRONGLY IN DIFFERENT CIRCUMSTANCES, BUT I RECOMMEND IT.

5 Q. SITTING HERE TODAY, DO YOU KNOW HOW MUCH TRAINING THE
6 PROFESSORS WHOSE WORKS ARE THE SUBJECT OF THIS LAWSUIT
7 RECEIVED UNDER THE NEW POLICY?

8 A. I WON'T PRETEND TO GO THROUGH AND REALLY SAY THAT I
9 UNDERSTOOD --

10 Q. IS THAT A NO?

11 A. -- THAT I KNOW AS A MATTER OF FACT.

12 Q. IS THAT A NO?

13 A. FOR ALL EIGHTY OR SO IN QUESTION, THE ANSWER IS NO.

14 Q. DO YOU HAVE ANY IDEA IF THE TRAINING OPPORTUNITIES SUCH
15 AS THEY ARE HAVE BEEN MANDATORY OR OPTIONAL FOR FACULTY AT
16 GSU?

17 A. I BELIEVE THAT THEY HAVE BEEN OPTIONAL FOR SOME MEMBERS
18 OF THE COMMUNITY AND I THINK THEY HAVE BEEN MANDATORY FOR SOME
19 INSIDE THE LIBRARY IN PARTICULAR.

20 Q. IF THE FACTS WERE TO REVEAL THAT THE DISTINCT MINORITY
21 OF FACULTY MEMBERS ACTUALLY REACHED OUT AND READ ANY RESOURCES
22 BEFORE THEY FILLED OUT THE CHECKLIST OR AVOIDED THEMSELVES OF
23 ANY TRAINING SESSIONS, WOULD YOU FIND THAT A SHORTCOMING IN
24 THE IMPLEMENTATION OF THE POLICY?

25 A. I WOULD FIND IT TO BE A CHALLENGE FOR HOW I AM GOING TO

1 IMPROVE AND HOW I AM GOING TO IMPLEMENT THAT POLICY IN THE
2 VERY NEAR FUTURE.

3 Q. YOU WOULD AGREE WITH ME THAT IT WOULD BE PROMOTIVE OF
4 LESS INFORMED FAIR USE DECISIONS, CORRECT?

5 A. LESS INFORMED THAN WHAT?

6 Q. THAN HAVE AVAILED THEMSELVES OF SUCH RESOURCES?

7 A. LESS INFORMED THAN IT COULD HAVE BEEN, YES.

8 Q. AND, THEREFORE, RAISING A HIGHER PROSPECT OF DECISIONS
9 THAT COULD BE VIEWED AGAINST A REASONABLE INTERPRETATION OF
10 FAIR USE AS TO COPYRIGHT INFRINGEMENTS, YES?

11 A. I THINK IF SOMEBODY IS APPROACHING THE INFORMATION AND
12 THE DECISION-MAKING WITH NO AWARENESS OF WHAT THE WORD MEANS,
13 OF COURSE, THAT PERSON IS GOING TO BE LESS LIKELY TO MAKE AN
14 INFORMED, REASONED DECISION.

15 Q. AND, THEREFORE, THERE IS A GREATER PROSPECT THAT ONE
16 WILL FIND ACTS NOT DELIBERATE, BUT ACTS OF INFRINGEMENT
17 ARISING OUT OF THAT FAILURE TO BE ADEQUATELY KNOWLEDGEABLE?

18 A. IF CIRCUMSTANCES AT THAT POINT ARE HAPHAZARD, I WOULD
19 SUPPOSE SO.

20 Q. I BELIEVE YOU ALSO TESTIFIED ON DIRECT THAT IT IS YOUR
21 UNDERSTANDING -- WELL, FIRST OF ALL, LET ME BE MORE GENERAL.
22 YOU BELIEVE THAT AN IMPORTANT CHECK AND BALANCE ON
23 UNDISCIPLINED OR POTENTIALLY UNREASONED FACULTY FAIR USE
24 DETERMINATION IS HAVING A REVIEW PROCEDURE, CORRECT?

25 A. A REVIEW PROCEDURE, FOR EXAMPLE, BY SOMEBODY IN THE

1 LIBRARY BEFORE IT GOES OUT?

2 Q. YES.

3 A. YES, I THINK THAT IS IMPORTANT.

4 Q. I BELIEVE YOU TESTIFIED ON DIRECT, IF I HEARD YOU
5 CORRECTLY, THAT YOU UNDERSTAND THAT THE ORDINARY PROCESS AT
6 GEORGIA STATE UNIVERSITY IS FOR STAFF MEMBERS TO REVIEW THE
7 CONTENT PROVIDED TO THEM BEFORE IT IS UPLOADED, IS THAT THE
8 GIST OF YOUR TESTIMONY?

9 A. IT IS MY UNDERSTANDING THAT STAFF MEMBERS INSIDE THE
10 LIBRARY REVIEW THE CONTENTS SUBMITTED TO THEM.

11 Q. AND WHAT IS YOUR UNDERSTANDING ABOUT THE NATURE OF THAT
12 REVIEW PROCESS?

13 A. I BELIEVE IT IS WHAT I HAVE HEARD CALLED A RED FLAG
14 REVIEW. AND IT MAY NOT BE A FULL-BLOWN START FROM SCRATCH
15 LEGAL ANALYSIS, BUT RATHER IS AN EXAMINATION OF THE MATERIAL
16 LOOKING FOR SIGNALS THAT MAYBE THIS ONE NEEDS FURTHER
17 EXAMINATION.

18 Q. AND TO THE EXTENT THAT THE RED FLAG EXAMPLE AND THE
19 ONLY ONE IN THE RECORD THAT TRIGGERED A REVIEW AND TRIGGERED A
20 REJECTION WAS ONE WHERE AN ENORMOUS PIECE OF THE WORK WAS
21 TAKEN, DO YOU THINK THAT LEVEL OF DISCRIMINATING REVIEW OR DO
22 YOU THINK THAT LEVEL OF REVIEW IS SUFFICIENTLY DISCRIMINATING
23 TO BE MEANINGFUL?

24 MR. SCHAETZEL: OBJECTION YOUR HONOR. THE QUESTION
25 ASSUMES FACTS NOT IN EVIDENCE. IT IS NOT CONSISTENT WITH THE

1 RECORD BEFORE THE COURT.

2 THE COURT: STATE YOUR QUESTION AGAIN, MR. RICH.

3 MR. RICH: I WILL.

4 BY MR. RICH:

5 Q. WERE YOU IN COURT WHEN MS. BURTLE OF THE LIBRARY SYSTEM
6 TESTIFIED?

7 A. I WAS NOT.

8 Q. SHE IS IN CHARGE OF THIS AREA, OKAY. AND HER
9 TESTIMONY, IF I MAY, YOUR HONOR, MAY I READ ONE PASSAGE?

10 THE COURT: YES.

11 BY MR. RICH:

12 Q.

13 "QUESTION: DO YOU RECALL EVER
14 HAVING BEEN CONTACTED BY YOUR STAFF
15 SINCE THE NEW POLICY WAS IMPLEMENTED
16 IN 2009, FOCUSING ON THE 2009 TIME
17 FRAME -- LET ME REPHRASE THE
18 QUESTION. FOCUSING ON THE 2009
19 TIME FRAME, DO YOU RECALL EVER
20 HAVING BEEN CONTACTED BY YOUR STAFF
21 REGARDING A POTENTIAL ISSUE THAT
22 SEEMED TO BE OUT OF THE NORM WITH
23 RESPECT TO AN ERES REQUEST?
24 ANSWER: I CAN THINK OF ONE SPECIFIC
25 EXAMPLE.

1 QUESTION: WHAT IS THAT SPECIFIC
2 EXAMPLE?

3 ANSWER: IT WAS A BIG PIECE OF A
4 BOOK. IT WAS A HUGE EXCERPT, MOST
5 OF THE BOOK."

6 I REPRESENT TO YOU THAT WAS THE ONE EXAMPLE CITED BY
7 MS. BURTLE. DO YOU FEEL THAT A RED FLAG REVIEW, WHICH IS
8 LIMITED TO FLAGGING HUGE PIECES OF A BOOK WITHOUT ANY OTHER
9 REVIEW MECHANISM, CONSTITUTES THE KIND OF SUFFICIENT CHECK AND
10 BALANCE THAT YOU HAVE IN MIND?

11 MR. SCHAEZEL: OBJECTION, YOUR HONOR. THAT IS
12 MS. BURTLE'S TESTIMONY. TO THE EXTENT THE QUESTION PURPORTS
13 TO SAY THAT THAT IS THE ONLY EVIDENCE OF THE RECORD AS TO A
14 REVIEW OR WAS DONE AS A REVIEW, IT DOES NOT ACCURATELY STATE
15 THE RECORD. FOR EXAMPLE, MS. DIMSDALE TESTIFIED TO REVIEWS
16 THAT SHE HAS AS MANY AS ONE PER DAY IN THE FALL QUARTER SHE
17 SENT TO LEGAL. E-MAILS IN THE RECORD THAT SHOW THAT OTHER
18 REVIEWS THAT WENT UP.

19 MR. RICH: I WILL REPHRASE IT. EVEN THOUGH WE ARE
20 NOT GOING TO DEBATE THE RECORD, MS. DIMSDALE WAS NOT REFERRING
21 AT ALL TO THIS TYPE OF ACTIVITY AS THE RECORD WILL SHOW. I
22 WILL REPHRASE IT AS HYPOTHETICAL.

23 BY MR. RICH:

24 Q. IF THE RECORD WERE TO DEMONSTRATE THAT THAT WAS THE
25 EXTENT OF THE RED FLAG REVIEW PROCESS, IS THAT CONSISTENT

1 WITH YOUR CONCEPTION OF A MEANINGFUL LIBRARY-REVIEWED PROCESS?

2 A. I AM GOING TO GIVE YOU A VERY DIRECT ANSWER.

3 Q. I WOULD LIKE THAT.

4 A. I WOULD LIKE TO PROVIDE IT. AND THE ANSWER IS, NO.

5 Q. THANK YOU.

6 A. OKAY.

7 Q. AND IF IT WERE THE CASE AS THE DEAN OF LIBRARIES
8 TESTIFIED WHEN YOU WERE IN COURT, THAT THERE REALLY IS NO FORM
9 OF ACTIVE SUPERVISION FROM PAGE 118 OF THE TRANSCRIPT, DEAN
10 SEAMANS QUESTION WAS:

11 "IN THAT WITH THE POSSIBLE
12 EXCEPTION" --

13 COURT REPORTER: I'M SORRY. YOU HAVE TO GO SLOWER.
14 BY MR. RICH.

15 Q.
16 "EXCEPTION OF SOMETHING ONE OF YOUR
17 COLLEAGUES MENTIONED ON REVIEW OF A
18 RED FLAG REVIEW, YOU ACKNOWLEDGED
19 THERE IS NO FORM OF ACTIVE
20 SUPERVISION OR AUDITING OR OTHER
21 REVIEW BY THE LIBRARY STAFF OF THESE
22 FAIR USE DETERMINATIONS FOR THEIR
23 REASONABLENESS, CORRECT?
24 ANSWER YES."

25 IS THAT CONSISTENT WITH YOUR CONCEPT OF A ROBUST, ACTIVE,

1 MEANINGFUL LIBRARY CHECK AND BALANCE?

2 A. I WILL ANSWER THE QUESTION. BEFORE I DO, YOU SAID
3 SOMETHING ABOUT I WAS IN THE ROOM. IT IS TRUE I WAS IN THE
4 COURTROOM FOR PART OF HER TESTIMONY, I AM NOT SURE IF I WAS
5 IN THE ROOM.

6 Q. STRIKE THAT. I DON'T THINK THE RECORD NEEDS TO
7 REFLECT THAT.

8 I AM REPRESENTING TO YOU THIS WAS HER TESTIMONY, OKAY.
9 THANK YOU. NOW IF YOU WOULD ANSWER THE QUESTION.

10 A. I WOULD LIKE TO ANSWER THE QUESTION. CAN YOU,
11 PLEASE, JUST READ HER QUOTATION BACK TO ME? YOU CAN
12 SUPPLEMENT.

13 Q. IT WAS IN MY QUESTION WAS:

14 "YOU ACKNOWLEDGE THAT THERE REALLY
15 IS NO FORM OF ACTIVE SUPERVISION OR
16 AUDITING OR OTHER REVIEW BY THE
17 LIBRARY STAFF OF THESE FAIR USE
18 DETERMINATIONS FOR THEIR
19 REASONABLENESS, CORRECT?
20 ANSWER YES."

21 A. IF THE RED FLAG REVIEW IS LOOKING FOR SIGNALS THAT
22 SOMETHING DOESN'T LOOK RIGHT, THAT SEEMS TO ME TO BE
23 FUNDAMENTALLY DIFFERENT FROM WHAT I AM HEARING FROM THE
24 STATEMENT THAT YOU READ, WHICH IS AN ACTIVE REVIEW OF THE FAIR
25 USE DETERMINATION. SEPARATING THOSE TWO, I WOULD NOT WANT OR

1 EXPECT NECESSARILY THE LIBRARY TO BE DOING ACTIVE REVIEWS OF
2 THE FAIR USE DETERMINATION IN FULL. BUT I WOULD SAY THEN
3 THERE SHOULD BE AT LEAST THAT RED FLAG REVIEW WATCHING FOR
4 SIGNALS THAT MAYBE THIS ONE, THIS ONE, THIS ONE NEEDS FURTHER
5 EXAMINATION.

6 Q. BUT ABOUT THREE QUESTIONS AND ANSWERS AGO I UNDERSTOOD
7 YOU TO SAY THAT THE NATURE OF THE RED FLAG REVIEW, WHICH I
8 HYPOTHESIZED TO YOU HAD OCCURRED NAMELY FLAGGING ONLY A
9 GIGANTIC PORTION OF A WORK, WAS NOT TO YOUR MIND A
10 SATISFACTORY ONE, CORRECT?

11 A. I AM NOT SURE I REALLY ANSWERED THAT THAT WAY.

12 Q. WE WILL LET THE RECORD SPEAK FOR ITSELF. I THINK I GOT
13 AN ANSWER FROM YOU.

14 MR. RICH: IS THIS A CONVENIENT BREAKING POINT FOR
15 THE DAY? I'M ABOUT TO MOVE TO A DIFFERENT TOPIC.

16 THE COURT: WELL, IT IS ABOUT 2:30. GIVE ME YOUR
17 BEST ESTIMATE HOW LONG YOU ARE GOING TO BE ON MONDAY.

18 MR. RICH: I WOULD SAY I WOULD BE UNDER AN HOUR.

19 THE COURT: YOU DON'T HAVE ANY OTHER WITNESSES, DO
20 YOU?

21 MR. SCHAEZEL: I DON'T BELIEVE WE HAVE ANY OTHER
22 WITNESSES. THE PLAINTIFFS HAVE INDICATED THEY WOULD LIKE TO
23 HAVE MR. POTTER TESTIFY, SO THERE WILL BE ANOTHER WITNESS,
24 BUT I THINK IT WILL BE IN THEIR REBUTTAL CASE.

25 MR. RICH: MR. POTTER WAS CHAIR OF THE COMMITTEE.

1 WE WOULD EXPECT TO HAVE A SHORT DIRECT EXAMINATION OF HIM
2 WHICH WE HOPE COULD BE EASILY ACCOMMODATED ON MONDAY AS WELL.

3 THE COURT: ALL RIGHT. I HOPE YOU HAVE A GREAT
4 WEEKEND.

5 MR. KRUGMAN: IF WE MAY, YOUR HONOR, BEFORE YOU GET
6 AWAY, THIS IS JUST REFERENCE TO THE ISSUE OF CLOSINGS. MY
7 SENSE IS THAT WITH THE REMAINDER OF DR. CREWS AND THE
8 REBUTTAL, THINGS TENDED TO MOVE ALONG MORE SLOWLY, TAKEN A
9 LITTLE LONGER THAN THE PARTIES ANTICIPATE, BUT I THINK OUR
10 EXPECTATION IS WE ARE PROBABLY LOOKING AT ABOUT, YOU KNOW, A
11 HALF A DAY OR AT LEAST UP TO LUNCH, CLOSE TO LUNCH FOR
12 TESTIMONY. THE QUESTION IS IN TERMS OF THE CLOSING. I
13 THINK OUR PREFERENCE, THE PLAINTIFFS' PREFERENCE IN TERMS OF
14 BEING ABLE TO PRESENT TO THE COURT THE MOST EFFECTIVE CLOSING
15 WOULD BE TO COME BACK ON TUESDAY TO PRESENT IT. I KNOW THAT
16 MR. SCHAETZEL, WE SPOKE ABOUT IT, HE INDICATED THEY HAVE NO
17 OBJECTION TO THAT, BUT WE WILL DO WHAT THE COURT OBVIOUSLY
18 PREFERS, IF I THINK I HAVE STATED --

19 MR. SCHAETZEL: THAT'S CORRECT. IF YOU PREFER
20 CLOSING MONDAY AFTERNOON.

21 THE COURT: TUESDAY WILL BE FINE. HOW LONG DO YOU
22 WANT?

23 MR. RICH: ABOUT AN HOUR.

24 THE COURT: TOTAL?

25 MR. RICH: FOR US.

1 MR. SCHAEZEL: I UNDERSTAND THEM TO SAY HOUR TOTAL
2 FOR THEM.

3 MR. KRUGMAN: AN HOUR FOR US AND NONE FOR THEM.

4 THE COURT: WE ARE SAYING THE SAME THING. EACH
5 SIDE WANTS AN HOUR.

6 MR. SCHAEZEL: THAT WILL BE FINE, YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 DR. CREWS, SINCE YOU WILL COMING BACK TO TESTIFY
9 FURTHER ON CROSS EXAMINATION MONDAY, YOU ARE INSTRUCTED TO NOT
10 DISCUSS THE CASE OR YOUR TESTIMONY WITH ANYONE.

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.

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20 S/DEBRA R. BULL, RPR, CRR

JULY 7, 2011
DATE

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