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

CAMBRIDGE UNIVERSITY PRESS,)	CV. NO. 1:08-1425
ET AL.,)	ATLANTA, GA
)	JUNE 6, 2011
PLAINTIFF,)	
)	
)	
VERSUS)	
)	
J. L. ALBERT, IN HIS OFFICIAL)	
CAPACITY AS GEORGIA STATE)	
UNIVERSITY ASSOCIATE PROVOST)	
FOR INFORMATION SYSTEMS AND)	
TECHNOLOGY, ET AL.,)	
)	
DEFENDANTS.)	

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

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15 STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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1	INDEX	
2	KENNETH CREWS	
3	CROSS EXAMINATION CONTINUED BY MR. RICH	4
4	REDIRECT EXAM BY MR. SCHAE TZEL	60
5	RECROSS EXAM BY MR. RICH	83
6	RE-REDIRECT EXAM BY MR. SCHAE TZEL	89
7	WILLIAM POTTER	
8	DIRECT EXAM BY MR. ASKEW	91
9	CROSS EXAM BY MR. RICH	116
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 THE COURT: GOOD MORNING.

2 MR. RICH: WE ARE PREPARED TO CONTINUE OUR
3 CROSS-EXAMINATION OF DR. CREWS.

4 THE COURT: COME ON UP, DR. CREWS. YOU ARE
5 REMINDED YOU ARE STILL UNDER OATH.

6 YOU MAY PROCEED.

7 MR. RICH: THANK YOU.

8 CROSS EXAM CONTINUED

9 BY MR. RICH:

10 Q. GOOD MORNING, SIR, HOW ARE YOU?

11 A. THANK YOU, VERY WELL.

12 Q. ON FRIDAY, WE WERE DISCUSSING THE ADEQUACY, FROM YOUR
13 PERSPECTIVE, OF GSU'S REVIEW MECHANISMS AT THE LIBRARY LEVEL,
14 DO YOU RECALL THAT?

15 A. YES, I DO.

16 Q. TO BRING A BIT MORE CLARITY TO YOUR POSITION, WITH THE
17 COURT'S PERMISSION, I WANT TO READ ONE ADDITIONAL PASSAGE
18 FROM DEAN SEAMANS' TESTIMONY FROM LAST THURSDAY. WHEN ASKED
19 WHAT THE LIBRARY DOES TO ASSURE COMPLIANCE WITH THE POLICY
20 DEAN SEAMANS RESPONDED, THIS WAS IN THE THURSDAY, ROUGH
21 TRANSCRIPT AT PAGE 73, QUOTE, WE DO NOT CHECK TO SEE THAT
22 THEY, MEANING THE FACULTY, HAVE DONE ANYTHING. WE JUST
23 ASSUME THEY HAVE GONE THROUGH ALL OF THE FORMS AND DONE WHAT
24 THEY ARE SUPPOSED TO DO, UNQUOTE.

25 NOW, TAKING THAT TESTIMONY AS ACCURATE, DOES THAT

1 POSTURE COMPORT WITH YOUR STATED UNDERSTANDING THAT AN
2 IMPORTANT ASPECT OF GSU'S POLICY ENTAILS WHAT YOU TERMED STAFF
3 MEMBERS AT THE LIBRARY REVIEWING PROPOSED ERES CONTENT AT THE
4 TIME IT IS SUBMITTED FOR SCANNING?

5 A. I DON'T NECESSARILY SEE A CONFLICT BETWEEN THOSE TWO
6 STATEMENTS BECAUSE MY STATEMENT IS SOMETHING TO THE EFFECT
7 ABOUT THE SIGNIFICANCE OF HAVING A REVIEW. IF DEAN SEAMANS
8 WAS MAKING A STATEMENT ABOUT, AND AGAIN I WILL INVITE YOU TO
9 QUOTE IT BACK TO ME, IF HER STATEMENT IS ABOUT A FULL REVIEW
10 OF EXACTLY WHAT THE FACULTY MEMBER DID IN HIS OR HER ANALYSIS,
11 THAT DOESN'T PRECLUDE THAT THE LIBRARY HAS DONE WHATEVER ITS
12 OWN STANDARD OF REVIEW MAY ENTAIL.

13 Q. WHAT I WAS ASKING TO YOU FOCUS ON WHAT I THOUGHT WAS
14 REASONABLY STRAIGHTFORWARD ENGLISH.

15 A. I THINK SO, TOO.

16 Q. WHERE THE WITNESS STATED, QUOTE, WE DO NOT CHECK TO SEE
17 THEY THE FACULTY HAVE DONE ANYTHING, ANYTHING, WE JUST
18 ASSUME THEY HAVE GONE THROUGH ALL THE FORMS AND DONE WHAT THEY
19 ARE SUPPOSED TO DO?

20 A. THE GEORGIA STATE POLICY, AS I UNDERSTAND IT, CALLS
21 FOR THE FACULTY MEMBER TO MAKE AN ANALYSIS AND TO MAKE A
22 DECISION BEFORE SUBMITTING THE CONTENT TO THE LIBRARY. SO,
23 GIVEN THAT AND GIVEN THAT LIKE ALL POLICIES, WE ASSUME THAT
24 PEOPLE ARE GOING TO BE GOOD, LAW-ABIDING CITIZENS AND ADHERE
25 TO THE POLICY. THE LIBRARY THEN MAY BE MAKING THE ASSUMPTION

1 CONSISTENT WITH THE POLICY THAT THE FACULTY MEMBER HAS DONE
2 WHAT THE FACULTY MEMBER IS SUPPOSED TO DO. AND THEN THE
3 LIBRARY PROCEEDS WITH WHATEVER IT IS SUPPOSED TO DO.

4 Q. IS IT NOT THE CASE THEN, ON YOUR DIRECT EXAMINATION BY
5 MR. SCHAEZEL, YOU INDICATED IT TO BE YOUR UNDERSTANDING,
6 SIR, THAT AS A MATTER OF ORDINARY PRACTICE THE GSU LIBRARY
7 STAFF WOULD BE REVIEWING ERES CONTENT PRIOR TO IT SCANNING,
8 YOU DID TESTIFY TO THAT EFFECT?

9 A. I BELIEVE I DID.

10 Q. MY ONLY QUESTION, I AM NOT GOING TO BELABOR THIS, MY
11 ONLY QUESTION IS, DO YOU FIND DEAN SEAMANS, REPRESENTATIVE AS
12 THE LIBRARY PERSON WITH ULTIMATE RESPONSIBILITY FOR THE
13 ADMINISTRATION OF THE ERES SYSTEM, DO YOU FIND HER TESTIMONY
14 SAYING WE DON'T DO ANYTHING, WE RELY ON FACULTY, AS
15 CONSISTENT WITH THE UNDERSTANDING YOU EXPRESSED AS TO HOW IN
16 FACT THAT SYSTEM WORKS?

17 A. I AM BEING AS STRAIGHTFORWARD AS I THINK THAT LANGUAGE
18 IS. IT IS HER COMPLETE QUOTATION, AS I AM RECALLING IT FROM
19 YOU, IS THAT THEY DON'T DO ANYTHING TO REVIEW WHAT THE
20 FACULTY MEMBER DID, NOT THAT THEY DON'T DO ANYTHING. THEY
21 DO SOMETHING, BUT THEY DON'T REVIEW WHAT THE FACULTY MEMBER
22 DID. THAT IS HOW I UNDERSTAND YOUR TESTIMONY.

23 Q. THANK YOU.

24 NOW, TURNING TO THE ULEARN SYSTEM.

25 A. YES.

1 Q. YOU UNDERSTAND, DON'T YOU, THAT WITH RESPECT TO
2 ELECTRONIC POSTINGS TO ULEARN, ADMITTEDLY THERE IS NO LIBRARY
3 INTERVENTION, SUPERVISION, REVIEW, CALL IT WHATEVER YOU
4 WANT OF ANY KIND?

5 A. I BELIEVE THAT'S CORRECT.

6 Q. SO THAT FACULTY FAIR USE DETERMINATIONS WITH RESPECT TO
7 COURSE MATERIALS POSTED ON ULEARN GO TOTALLY UNREVIEWED,
8 CORRECT?

9 A. I BELIEVE THAT IS CORRECT.

10 Q. DOES THAT CAUSE YOU CONCERN AS TO ITS POTENTIAL FOR
11 MISUSE OF THE FAIR USE DOCTRINE, PARTICULARLY WHERE
12 ELECTRONIC COURSE READINGS WERE TO MIGRATE INCREASINGLY FROM
13 THE ERES PLATFORM TO THE ULEARN PLATFORM?

14 A. ACTUALLY NOT AND PARTICULARLY IN THE CONTEXT OF THE
15 GEORGIA STATE POLICY WHERE THE GEORGIA STATE POLICY BUILT AN
16 EXPECTATION AND PRACTICE. THAT FACULTY MEMBERS WHO
17 PARTICIPATE IN THE ELECTRONIC RESERVE ENVIRONMENT WILL DEVELOP
18 EXPERIENCE WORKING WITH FAIR USE, MAKING FAIR USE DECISIONS.
19 AND THAT THEY WILL, ACCORDINGLY, TRANSFER THAT EXPERIENCE TO
20 WHATEVER THEIR NEXT TASK MAY BE, WHICH COULD INCLUDE POSTING
21 AN ITEM TO ULEARN.

22 Q. SO NOW ARE YOU BACKING AWAY FROM YOUR REPORT AND YOUR
23 DIRECT TESTIMONY TO THE EFFECT THAT AN IMPORTANT CHECK AND
24 BALANCE AND COMPONENT THAT GIVES YOU COMFORT ABOUT THE
25 EFFICACY OF THE GSU POLICY IS THAT THERE IS IN FACT A REVIEW

1 MECHANISM IN THE LIBRARY, CORRECT?

2 A. I AM NOT BACKING AWAY FROM ANY OF MY TESTIMONY OR ANY
3 OF MY STATEMENTS.

4 Q. NOW, YOU STATED ON DIRECT THAT GSU'S CHECKLIST ENABLES
5 FACULTY TO THINK THROUGH THE CIRCUMSTANCES OF THEIR SITUATION
6 AND REACH WHAT YOU TERMED A BALANCED AND INFORMED CONCLUSION,
7 DOES THAT SOUND RIGHT?

8 A. THAT SOUNDS FAMILIAR.

9 Q. NOW, ARE YOU FAMILIAR, SIR, WITH THE RANGE OF TAKINGS
10 OF THE THREE PLAINTIFFS WORKS THAT ARE THE SUBJECT OF THIS
11 LITIGATION?

12 A. WELL, I AM NOT SURE I WOULD CALL THEM "TAKINGS," AND I
13 DON'T KNOW SPECIFICALLY WHAT THREE INSTANCES YOU ARE REFERRING
14 TO.

15 Q. LET'S TRY AGAIN. I OBVIOUSLY WAS NOT CLEAR. WHAT
16 WORD WOULD YOU PREFER OTHER THAN TAKINGS, USES?

17 A. USES.

18 Q. YOU USE "USES," NOT "TAKINGS."

19 ARE YOU FAMILIAR WITH THE THREE PEOPLES' WORK?

20 A. I HAVE SOME FAMILIARITY.

21 Q. ARE YOU AWARE DURING THE THREE 2009 TERMS AT ISSUE,
22 SOME 75 EXCERPTS FROM 64 DIFFERENT WORKS OF THE PLAINTIFFS
23 WERE POSTED ON ERES OR ULEARN BY DIFFERENT GSU PROFESSORS ALL
24 WITHOUT SEEKING AUTHORIZATION OR MAKING ANY PAYMENTS OR
25 PERMISSION FEES?

1 A. I HAVE HEARD FACTS VERY MUCH LIKE THAT.

2 Q. ARE YOU AWARE THAT THESE EXCERPTS RANGE FROM ABOUT 5500
3 WORDS AT THE LOW END TO MORE THAN 100,000 WORDS ON THE HIGH
4 END?

5 A. I HAVE NOT HEARD ANY SUCH NUMBERS.

6 Q. I WILL SO REPRESENT TO YOU FOR THE PURPOSE OF OUR
7 QUESTIONING THIS MORNING.

8 ARE YOU AWARE THAT MANY IMPLICATED TAKINGS OF MULTIPLE
9 CHAPTERS UP TO AS MANY AS SEVEN FROM A SINGLE WORK?

10 A. I DON'T BELIEVE I HAVE HEARD UP TO SEVEN.

11 Q. I WILL REPRESENT THAT TO YOU, AS WELL, FOR PURPOSE OF
12 OUR QUESTIONING.

13 ARE YOU AWARE THAT THE TAKINGS RANGE TO AS MUCH AS 35
14 PERCENT OF THE ORIGINAL WORKS?

15 A. I HAVE HEARD A PERCENTAGE SUCH AS THAT, YES.

16 Q. ARE YOU AWARE THAT MANY OF THESE TAKINGS HAVE BEEN USED
17 BY THE SAME PROFESSOR IN THE SAME COURSE OVER MULTIPLE TERMS?

18 A. AND I AM GOING TO ANSWER YOUR QUESTION, BUT FIRST I AM
19 UNCOMFORTABLE WITH THE WORD "TAKINGS," WE WILL SAY THAT AS A
20 DIFFERENCE.

21 Q. USES?

22 A. USES. REPEAT THE QUESTION.

23 Q. ARE YOU AWARE MANY OF THESE USES HAVE BEEN BY THE SAME
24 PROFESSOR OVER THE SAME COURSE OVER MULTIPLE TERMS?

25 A. I BELIEVE THAT, YES.

1 Q. ARE YOU AWARE THESE EXCERPTS HAVE TYPICALLY BEEN
2 COMBINED WITH NUMEROUS OTHER EXCERPTED COPYRIGHTED WORK FOR
3 WHICH NO PERMISSION PAYMENT HAS BEEN PAID AS WELL?

4 A. FROM OTHER SOURCES?

5 Q. YES.

6 A. YES, I BELIEVE THAT IS RIGHT.

7 Q. I TAKE IT YOU ARE AWARE THESE USES WERE IN THE NATURE
8 OF STRAIGHT DIGITAL COPIES, NOTHING TRANSFORMATIVE ADDED TO
9 THEM OR DONE WITH THEM IN THE WAY OF ADDING NEW PURPOSE OR
10 FUNCTION?

11 A. TRANSFORMATIVE IS A LEGAL CONCEPT, BUT IF YOU ARE --
12 WITH RESPECT TO THE QUESTION, NOT ANSWERING IT AS A LEGAL
13 MATTER, BUT ANSWERING IT AS A DIRECT SCAN, IMAGE OF THE PAGE
14 AND PERHAPS NO SIDE MARGIN COMMENTS, I BELIEVE THAT THAT IS
15 CORRECT IN MANY INSTANCES.

16 Q. ARE YOU ALSO AWARE THAT PERMISSIONS TO USE EXCERPTS
17 FROM EACH OF THESE WORKS WAS AVAILABLE EITHER FROM THE
18 COPYRIGHT CLEARANCE CENTER OR THE INDIVIDUAL PLAINTIFFS?

19 A. I COULD NOT TELL YOU IF IN FACT THAT WHAT TRUE.

20 Q. AND INDEED MOST WERE AVAILABLE INSTANTANEOUSLY?

21 A. I COULD NOT TELL YOU IF IN FACT THAT WAS TRUE.

22 Q. ARE YOU AWARE THE PER STUDENT FEES FOR SUCH PERMISSIONS
23 RANGE FROM, RECORD TESTIMONY, FROM 12 TO 15 CENTS PER PAGE?

24 A. I HAVE NOT HEARD THAT TESTIMONY.

25 Q. I WILL ALSO REPRESENT TO YOU AGAIN THESE FACTS THAT

1 EVERY SUCH USE, EVERY SUCH USE WAS DETERMINED UNDER THE GSU
2 POLICY TO BE A FAIR USE, OKAY, I WILL REPRESENT THAT TO YOU.
3 ASSUMING MY REPRESENTATION TO BE CORRECT, DOES THAT SOUND
4 RIGHT TO YOU AS A RESULT?

5 A. WHAT DOES "RIGHT" MEAN?

6 Q. CORRECT APPLICATION OF FAIR USE DOCTRINE TO THOSE USES?

7 A. FAIR USE DEPENDS ON AN APPLICATION OF MULTIPLE FACTS,
8 MULTIPLE VARIABLES, SO I AM GOING TO NOT REACH A CONCLUSION,
9 BUT I WILL TELL YOU THAT I BELIEVE THAT IT COULD BE.

10 Q. DOES THE FACT THAT NOT A SINGLE ONE OF THE 76 FAIR USE
11 CHECKLISTS PRODUCED BY GSU IN CONNECTION WITH THE WORKS AT
12 ISSUE, NOT ON A SINGLE ONE OF THOSE WAS A SINGLE STATUTORY
13 FAIR USE FACTOR FOUND TO WEIGH AGAINST FAIR USE? I WILL
14 REPRESENT TO YOU THAT TO BE THE CASE. WOULD THAT FACT
15 REFLECT IN YOUR JUDGMENT THE SORT OF BALANCED AND INFORMED
16 CONCLUSIONS YOU ENVISION ARE PROPOSED BY THE GSU POLICY?

17 A. JUST TO MAKE SURE I UNDERSTAND EXACTLY THE
18 CIRCUMSTANCES AND JUST STEP IN AND CORRECT ME WITH NUMBERS OR
19 ANYTHING ELSE. OF THE 75 --

20 Q. SEVENTY-SIX.

21 A. SEVENTY-SIX ITEMS, THERE ARE 76 CHECKLISTS ASSOCIATED
22 WITH THOSE 76 USES; IS THAT CORRECT?

23 Q. THERE IS ACTUALLY ONE FOR WHICH THERE WAS TWO, NOT
24 IDENTICAL CHECKLIST CHECKED.

25 A. THERE WAS AT LEAST A CHECKLIST ASSOCIATED WITH EACH OF

1 THOSE 76 USES, AND THOSE 76 USES IN FACT WERE INCLUDED IN THE
2 ERESERVE DURING THE TIME THAT THE POLICY WAS IN PLACE AT
3 GEORGIA STATE, AM I CORRECT WITH FACTS SO FAR?

4 Q. YEAH.

5 A. YEAH. I CAN'T RULE OUT THE POSSIBILITY THAT THE
6 POLICY MAY ACTUALLY BE WORKING AND THAT THE CHECKLIST AS
7 COMPLETED AND THE ITEMS AS INCLUDED ON ERESERVE WERE IN FACT
8 DONE CONSISTENT WITH THE POLICY AND PERHAPS EVEN CONSISTENT
9 WITH THE LAW.

10 Q. SO YOU WOULDN'T BE TROUBLED, EVEN AGAINST MY
11 REPRESENTATIONS OF TAKINGS OR USES OF AS LARGE AS A HUNDRED
12 THOUSAND WORDS, USES IN MULTIPLE SEMESTERS AND THE LIKE THAT
13 I HAVE ASKED YOU TO SIMPLY ACCEPT FOR PURPOSES OF THE
14 QUESTIONING, THAT ACROSS ALL OF THE CHECKLISTS COMPLETED BY
15 ALL OF THESE DIFFERENT PROFESSORS, NOT A SINGLE WEIGHS
16 AGAINST CHECKS FOR ANY SINGLE FACTOR OR ANY SINGLE FACTOR WAS
17 ENTERED ON A SINGLE CHECKLIST, THAT DOESN'T BOTHER YOU,
18 RIGHT?

19 A. I SEE YOUR QUESTION AS RAISING WHAT I HAVE SEEN IN MANY
20 CIRCUMSTANCES. THAT A WORD COUNT SOMEHOW IS A MEASURE OF
21 FAIR USE OR THAT REPEAT USE IS SOMEHOW A MEASURE OF FAIR USE.
22 WITHOUT HAVING SEEN THE CONTENT, BECAUSE I HAVE NOT EXAMINED
23 THESE PARTICULAR EXAMPLES, THAT EXACT SAMPLE THAT YOU MAY HAVE
24 IN MIND, I DON'T KNOW WHAT IS IN THOSE 100,000 WORDS. IT
25 COULD BE A VARIETY OF MATERIAL FROM OTHER SOURCES, PUBLIC

1 DOMAIN CONTENT AND SO ON. I DON'T KNOW WHAT IS IN IT.

2 Q. YOU ARE SPECULATING AS TO THAT?

3 A. AS WELL I SHOULD. I WOULD WANT MORE INFORMATION.

4 SO NOW TO GIVE YOU AN EXACT ANSWER, WOULD I COME TO THE
5 CONCLUSION THAT THOUGH THAT IS FAIR USE BASED UPON THE WORD
6 COUNTS OR REPEAT USE THAT YOU MENTIONED IN YOUR QUESTION? NO,
7 I WOULD NOT.

8 Q. NOW, DOES THE FACT THAT THE MAJORITY OF THE COMPLETED
9 CHECKLIST IN EVIDENCE HAD EITHER ZERO OR ONE CHECK IN THE
10 WEIGHS AGAINST COLUMN AGAINST ALL THE FAIR USE FACTORS, DOES
11 THAT AFFECT THE POLICY THAT AFFECTS BALANCE AND INFORMED
12 DECISION?

13 A. IT COULD.

14 Q. DOES THE FACT THAT NOT A SINGLE CHECKLIST FROM AMONG
15 THE 76 CHECKED, QUOTE, LARGE PORTION, UNQUOTE, OF WORKS USED
16 UNDER THE FACTOR THREE CRITERION, NOT EVEN FOR TAKINGS, OVER
17 A HUNDRED THOUSAND WORDS, AND SEVEN CHAPTERS OF A SINGLE WORK
18 REFLECT THE POLICY PROMOTIVE OF BALANCED AND INFORMED
19 DECISION-MAKING?

20 A. IT COULD.

21 Q. DOES THE FACT THAT FEWER THAN ONE-THIRD OF THE
22 CHECKLISTS CHECKED THE BOX NONTRANSFORMATIVE REFLECT THE
23 WORKINGS OF A FAIR AND BALANCED POLICY?

24 A. GO BACK TO THE FACT AGAIN, FEWER THAN ONE-THIRD, DID
25 WHAT?

1 Q. CHECKED THE NONTRANSFORMATIVE BOX?

2 A. WHAT IS THE QUESTION?

3 Q. DOES THAT REFLECT THE WORKINGS OF A FAIR AND BALANCED
4 POLICY?

5 A. IT COULD.

6 Q. DOES THE FACT THAT NUMEROUS PROFESSORS TESTIFIED THAT
7 THEY WERE GUIDED IN THEIR FAIR USE DETERMINATIONS BY
8 UNDERSTANDINGS THAT SO LONG AS THEY TOOK LESS THAN A CERTAIN
9 PERCENTAGE OF THE WORK, A NUMBER OF THEIR OWN INVENTION AND
10 THEIR OWN CHOOSING, AS LONG AS THEY DID THAT THEY WERE IN
11 SAFE TERRAIN, DOES THAT BOTHER YOU?

12 A. DID THOSE SAME FACULTY MEMBERS COMPLETE A CHECKLIST?

13 Q. I ASK THE QUESTIONS, SIR.

14 A. THEN LET ME HEAR THE QUESTION AGAIN, SIR.

15 Q. DOES THE FACT THAT NUMEROUS PROFESSORS TESTIFIED THAT
16 THEY WERE GUIDED IN THEIR FAIR USE DETERMINATIONS BY THEIR OWN
17 PERCENTAGE LITMUS TEST, DOES THAT BOTHER YOU AS A MATTER OF
18 PROPER APPLICATION OF FAIR USE?

19 A. I HAVE NEVER BEEN A STRONG FAN OF HAVING AN EXACT KIND
20 OF COUNT OF FAIR USE, BUT IF THAT IS A PIECE OF THE PUZZLE
21 THAT ONE USED, THAT MAY BE ACCEPTABLE.

22 Q. WHAT IF IT WAS THE DETERMINING FACTOR FOR ONE OR MORE
23 FACULTY MEMBERS?

24 A. IN CONCERT WITH OTHER FACTORS OR ALL BY ITSELF?

25 Q. WHAT IF IT WAS THE DETERMINING FACTOR FOR ONE OR MORE

1 FACULTY MEMBERS?

2 A. WELL, I NEED TO ANSWER THAT QUESTION TWO WAYS BECAUSE
3 I THINK IT IS AN AMBIGUOUS QUESTION. IF THE QUESTION IS THAT
4 IS MY SOLE FACTOR, THAT IS ALL I CONSIDERED, I WOULD SAY TO
5 THAT FACULTY MEMBER YOU HAVE MORE WORK TO DO. IF THAT
6 FACULTY MEMBER EVALUATED ALL FACTORS IN THE MIX AND AT THAT
7 POINT TO SAY IT IS THE FINAL FACTOR, FINAL ELEMENT I
8 CONSIDERED WAS SOME KIND OF PERCENTAGE ACCOUNT, THEN
9 REALISTICALLY WHAT THAT FACULTY MEMBER IS DOING IS CONSIDERING
10 THAT IN THE MIX OF EVERYTHING ELSE.

11 MR. RICH: YOUR HONOR, THAT WAS NONRESPONSIVE WITH
12 RESPECT TO MY QUESTION. I ASKED HIM TWICE IF IT WAS THE
13 DETERMINING FACTOR, HE IS SAYING ONE FACTOR ASSOCIATED WITH
14 OTHERS. SIR, PLEASE ANSWER MY QUESTION. I MOVE TO STRIKE.
15 I AM ASKING YOU TO ASSUME --

16 THE COURT: HOLD ON JUST A MINUTE.

17 MR. SCHAEZEL: I'M SORRY. IS THERE A MOTION TO
18 STRIKE THE ANSWER?

19 THE COURT: I WILL DENY THE MOTION TO STRIKE.

20 BY MR. RICH:

21 Q. YOU AGREE, DON'T YOU, THAT THE NOTION OF PERCENTAGE
22 USES BEING LEGAL, SAFE HARBOR FINDS NO SUPPORT IN THE LAW; IS
23 THAT CORRECT?

24 A. YES.

25 Q. DOES FACULTY TESTIMONY TO THE EFFECT THEY DID NOT GIVE

1 CONSIDERATION TO THE AVAILABILITY OF LICENSING FROM CCC OR
2 FROM THE PUBLISHER IN THEIR FACTOR FOUR EVALUATIONS BECAUSE
3 THEY KNEW LITTLE OR NOTHING ABOUT THAT MATTER REFLECT THE
4 WORKINGS OF A BALANCED AND INFORMED DECISION-MAKING PROCESS?

5 A. IT COULD.

6 MR. RICH: YOU DON'T STILL HAVE YOUR COPY OF YOUR
7 DEPOSITION?

8 THE WITNESS: I DON'T HAVE ANY PAPER UP HERE.

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

10 THE COURT: YES.

11 BY MR. RICH:

12 Q. TURN TO PAGE 236 OF YOUR DEPOSITION, PLEASE, SIR.
13 BEGINNING AT LINE 18, DO YOU SEE THAT? TWO HUNDRED
14 THIRTY-SIX, LINE 18?

15 A. (WITNESS COMPLIES.) YES.

16 Q. I WILL READ THE FOLLOWING QUESTION AND YOUR ANSWER.

17 "QUESTION, LET ME NARROW THE
18 QUESTION. TO THE AVAILABILITY OF A
19 LICENSED ALTERNATIVE TO SECURE THE
20 CONTENT AND THE QUESTION IS, WOULD
21 IT CONCERN YOU, LET ME BREAK IT
22 DOWN. IF AN INSTRUCTOR SAID, I
23 HAVE NO IDEA, THEREFORE, I AM JUST
24 GOING TO CHECK THE BOX, QUOTE, NO
25 LICENSE AVAILABLE?

1 ANSWER, THAT WOULD CONCERN ME
2 BECAUSE STATED THAT WAY, IT WOULD
3 LOOK LIKE THEY JUST GLOSSED OVER THE
4 ISSUE AND DIDN'T INVESTIGATE IT."

5 IS THAT YOUR ANSWER?

6 A. THAT APPEARS TO BE MY ANSWER, YES.

7 Q. DOES OTHER FACULTY TESTIMONY THAT THEY FAILED TO
8 CONSIDER THE AVAILABILITY OF LICENSING BECAUSE THEY HAD
9 ALREADY REACHED A CONCLUSION THAT THE USE WAS A FAIR USE
10 REFLECT THE WORKINGS OF A BALANCED AND INFORMED
11 DECISION-MAKING PROCESS?

12 A. IT COULD.

13 Q. IT COULD?

14 A. IT COULD.

15 Q. AND THAT -- YOU SAY THAT DESPITE THE FACT THAT WE PUT
16 UP ON THE SCREEN THE OTHER DAY COLUMBIA'S OWN POLICY THAT
17 ADVISES FACULTY TO MAKE WHAT YOU TERMED A SIMPLE INVESTIGATION
18 A PART OF THE FAIR USE CALCULUS?

19 A. IT IS NO QUESTION THAT IS A RELEVANT PART OF WHAT COULD
20 BE THE CALCULATION OF FAIR USE. BUT IT IS NOT NECESSARILY
21 RELEVANT IN ALL SITUATIONS.

22 Q. AND IF NOT A SINGLE FACULTY MEMBER MADE THE SIMPLEST
23 INVESTIGATION, NOT A SINGLE ONE OF THOSE ACCOUNTING FOR THE
24 76 CHECKLISTS MADE THAT SIMPLE INVESTIGATION, WOULD THAT
25 CONCERN THEM?

1 A. NOT AS A MATTER OF LAW. IN OTHER WORDS, THEIR
2 CONCLUSION ABOUT FAIR USE MAY STILL BE VALID, BUT I WOULD
3 PROBABLY WANT TO ADD SOME DISCUSSION OF THAT TO THE
4 EDUCATIONAL PROGRAMS THAT ARE AT THE UNIVERSITY.

5 Q. DOES FACULTY TESTIMONY, THE EFFECT THEY FILLED OUT THE
6 CHECKLIST FROM THE PERSPECTIVE THAT PAYING ANY PERMISSIONS FEE
7 WHATSOEVER WOULD BE CATEGORICALLY UNREASONABLE, REFLECT THE
8 WORKINGS OF A POLICY DESIGNED TO BRING ABOUT BALANCE AND
9 INFORMED FAIR USE DECISIONS?

10 A. IT MAY VERY WELL.

11 Q. DOES FACULTY TESTIMONY THAT THEY CONSIDERED FACTOR
12 FOUR'S PROSPECT OF MARKET HARM NOT IN RELATION TO THE WORK
13 INVOLVED BUT INSTEAD BASED ON ANECDOTAL RECOLLECTIONS OF THEIR
14 OWN STUDENT ACADEMIC EXPERIENCE IN PURCHASING OR LICENSING
15 TEXT MATERIAL, IS THAT AN APPROACH TO FAIR USE THAT IS
16 PROMOTIVE OF BALANCED AND INFORMED DECISION-MAKING?

17 A. IT IS JUST ONE FACT. I AM SURE THAT THERE WERE
18 OTHERS.

19 Q. INDEED THERE WERE. THERE IS FACULTY TESTIMONY THAT
20 THEY BASED THEIR FACTOR FOUR EVALUATION NOT ON ANY
21 INVESTIGATION AS TO THE COST OF LICENSING THE EXCERPT IN
22 ISSUE, BUT INSTEAD ON CONCERNS OVER IMPOSING FURTHER
23 EDUCATIONAL COSTS ON THEIR STUDENTS REFLECT THE WORKINGS OF A
24 POLICY DESIGNED TO BRING ABOUT A BALANCED AND FAIR USE
25 DETERMINATION?

1 A. I WILL GIVE YOU A VERY STRAIGHT ANSWER. REPEAT THE
2 QUESTION, PLEASE, MAKE SURE I GOT IT.

3 Q. DOES FACULTY TESTIMONY THAT THEY BASED THEIR FACTOR
4 FOUR EVALUATION NOT ON THEIR OWN INVESTIGATION AS TO THE
5 AVAILABILITY OR COST OF LICENSING THE EXCERPTS, BUT RATHER ON
6 THEIR PROJECTED CONCERNS OVER IMPOSING COSTS ON THEIR
7 STUDENTS, DOES THAT REFLECT THE WORKINGS OF A FAIR AND
8 INFORMED AND BALANCED FAIR USE DETERMINATION?

9 MR. SCHAEZEL: OBJECTION, YOUR HONOR. TO THE
10 EXTENT THAT THE QUESTION PURPORTS TO CAPTURE THE TESTIMONY, I
11 DO BELIEVE THAT IT MISSTATES IT. THERE WERE OTHER FACTORS
12 THAT WERE CONSIDERED. I WON'T GO INTO THAT BECAUSE I DON'T
13 WANT TO TAIN THE QUESTION. WE OBJECT TO IT.

14 THE COURT: I WILL ALLOW THE QUESTION.
15 BY MR. RICH:

16 Q. PLEASE.

17 A. IT COULD, IF I CAN RESPOND BRIEFLY.

18 Q. JUST AN ANSWER PLEASE, DOES IT CONCERN YOU?

19 A. DOES IT CONCERN ME? AND THE ANSWER IS IT COULD CONCERN
20 ME DEPENDING ON HOW I CONSTRUE THE QUESTION. I SEE SOME
21 QUESTIONS. I WOULD LIKE TO ASK ABOUT THE QUESTION.

22 Q. NOW, WITH RESPECT TO THOSE PROFESSORS WHO EVALUATED
23 POTENTIAL MARKET HARM BY CONSIDERING ONLY THEIR PARTICULAR USE
24 IN THE SETTING OF THEIR PARTICULAR CLASS AND FAILING IN THE
25 PROCESS TO CONSIDER THE POTENTIAL BROADER IMPLICATIONS OF

1 THOSE USED ON THE PLAINTIFFS' MARKETS FOR THEIR WORKS, TO THE
2 EXTENT THAT CONSIDERATION WAS LIMITED TO IMPACT ON AFFORDING
3 IT TO 10 OR 20 STUDENTS IN A COURSE, DO YOU AGREE THAT WAS A
4 MISAPPLICATION OF FAIR USE?

5 A. I DO NOT.

6 Q. NOW YOU BELIEVE THAT THE PROPER FOCUS OF THE FAIR USE
7 ANALYSIS IS LIMITED TO THE IMMEDIATE CIRCUMSTANCE IN WHICH THE
8 USE IS BEING MADE IN TERMS OF AN EVALUATION OF MARKET HARM?

9 A. IF YOU ARE ASKING ME A 100 PERCENT KIND OF QUESTION,
10 THE ANSWER IS NO, THERE ARE TIMES WHEN ONE NEEDS TO CONSIDER
11 BEYOND MY IMMEDIATE NEEDS. I THINK THAT IS MY ANSWER.

12 Q. TAKE A LOOK AT YOUR DEPOSITION AGAIN, PAGE 237.

13 A. (WITNESS COMPLIES.) ALL RIGHT. I AM THERE.

14 Q. BEGINNING AT LINE FOUR.

15 A. RIGHT.

16 Q.

17 "QUESTION: WOULD IT CONCERN YOU IF
18 INSTRUCTORS ANALYZE MARKET HARM
19 STRICTLY IN RELATION TO THE TERMS OF
20 THE NUMBER OF COPIES FOR THEIR
21 CLASS?

22 ANSWER: STRICTLY IN TERMS OF THE
23 NUMBER OF COPIES NOT NECESSARILY.

24 I THINK NOT NECESSARILY.

25 QUESTION: YOU ARE FAMILIAR WITH THE

1 CONCEPT UNDER FACTOR FOUR,
2 PROFESSOR, OF POTENTIAL HARM AND THE
3 POSSIBILITY THAT A PRACTICE COULD
4 REPLICATE ITSELF ELSEWHERE. HOW IS
5 IT INTENDED, IF AT ALL, THAT THE GSU
6 CHECKLIST AWARDS THAT CONSIDERATION
7 AS YOU UNDERSTAND IT?

8 ANSWER: OKAY. I SEE WHAT YOU MEAN.
9 IT WOULD BOTHER ME IF A PROFESSOR
10 JUST NARROWLY LOOKED AT JUST ONLY MY
11 IMMEDIATE ONE EXAMPLE TODAY AND
12 LOOKED NO FURTHER, IN SOME CASES
13 THAT WOULD BE PROBLEMATIC.

14 A. I BELIEVE THAT STATEMENT IS CONSISTENT WITH WHAT I JUST
15 SAID.

16 Q. BY THE WAY, I TAKE IT THAT YOU RECOGNIZE THAT ERES
17 TYPE SYSTEMS ARE QUITE PREVALENT AROUND THE COUNTRY, CORRECT?

18 A. THAT'S CORRECT.

19 Q. WHAT IS YOUR BALLPARK ESTIMATE OF HOW MANY OTHER
20 INSTITUTIONS USE ERES TYPE SYSTEMS?

21 A. WELL, INSTITUTIONS OF HIGHER EDUCATION OF DIFFERENT
22 TYPES AROUND THE UNITED STATES, THERE ARE MORE THAN 4,000,
23 PLUS THERE ARE HEAVEN KNOWS HOW MANY HIGH SCHOOLS AND SO ON.
24 I WOULD GUESS THAT PROBABLY MOST, SO WE MAY BE TALKING ABOUT
25 2,000 OR MORE.

1 Q. OKAY. LET'S TALK ABOUT THE GSU FAIR LIST CHECKLIST IN
2 A BIT MORE DETAIL. IF WE COULD PUT UP PAGES SEVEN AND EIGHT
3 ON THE SCREEN OF THAT CHECKLIST, PLEASE, LIKE TO PROVIDE THE
4 WITNESS WITH A COPY OF IT, AS WELL. UNLESS YOU ARE
5 COMFORTABLE WORKING FROM HERE, WOULD YOU LIKE A COPY?

6 A. I WOULD LIKE A COPY IN FRONT OF ME.

7 MR. RICH: MAY I, YOUR HONOR?

8 THE COURT: YES.

9 BY MR. RICH:

10 Q. I TAKE IT YOU UNDERSTAND AS INTERPRETED AND UNDERSTOOD
11 BY GSU FACULTY WHO HAVE TESTIFIED IN THIS CASE THE CHECKLIST,
12 WHICH UP ON THE SCREEN AND MARKED AS JTX 4 IS USED TO MAKE
13 FAIR USE DETERMINATIONS AS TO THE VARIOUS WORKS THAT THEY
14 PROPOSED TO PUT ON ERES OR ULEARN REQUIRES THEM TO WORK
15 THROUGH THE VARIOUS SUBFACTORS, CORRECT?

16 A. I BELIEVE IT -- THE POLICY REQUIRES THEM TO USE AND
17 APPLY THIS CHECKLIST.

18 Q. YES. AND THAT THEY ARE TO CHECK PHYSICALLY THE WEIGHS
19 IN FAVOR AND WEIGHS AGAINST BOXES WITHIN EACH FACTOR,
20 CORRECT?

21 A. I BELIEVE THAT IS CORRECT.

22 Q. AND THEN TALLY THE RESULTS, CORRECT?

23 A. WELL, I WOULDN'T USE THE WORD "TALLY."

24 Q. WHAT WOULD YOU USE?

25 A. BECAUSE FAIR USE, AS WE DISCUSSED ON FRIDAY, IS A

1 BALANCING TEST AND SO THERE IS ALSO AN ASPECT OF THE
2 PERSUASIVENESS OF DIFFERENT ELEMENTS AND THEIR EFFECT ON THE
3 OUTCOME OF A PARTICULAR FACTOR.

4 Q. NOW THAT IS YOUR EVALUATION OF HOW A CHECKLIST SHOULD
5 BE USED, CORRECT?

6 A. YES, IT IS.

7 Q. ARE YOU AWARE OF ANY TESTIMONY FROM ANY FACULTY MEMBER
8 IN THIS CASE INDICATING -- LET ME FINISH, INDICATING THAT HE
9 OR SHE DID THAT MORE NUANCED BALANCING AS OPPOSED TO A
10 MATHEMATICAL TALLYING?

11 A. I HAVE NOT WITNESSED ANY SUCH TESTIMONY.

12 Q. SO ONCE THEY HAVE ADDED UP THE LEFT AND RIGHT-HAND
13 COLUMN, THE FACULTY, IN DEALING WITH FILLING OUT THIS
14 CHECKLIST, UNDERSTOOD THEY SHOULD CHECK AT THE BOTTOM OF THE
15 FACTOR, FACTOR WEIGHS IN FAIR USE OR WEIGHS AGAINST FAIR USE,
16 IS THAT YOUR UNDERSTANDING?

17 A. THAT IS MY UNDERSTANDING.

18 Q. SO, THAT PROCEDURE, WHETHER IT IS ONE YOU PERSONALLY
19 ENDORSED HAS THE EFFECT OF MAKING QUITE IMPORTANT, DOES IT
20 NOT, BOTH THE NUMBER AND THE SELECTION OF VARIABLES LISTED IN
21 THE RIGHT-HAND AND LEFT-HAND COLUMNS, TRUE?

22 A. IF ONE USED IT AS YOU DESCRIBED, THEN IT COULD HAVE
23 THAT RESULT.

24 Q. YES, THE MORE ARGUABLY RELEVANT WEIGHS IN FAVOR
25 VARIABLES THAT ARE LISTED, THE MORE LIKELY IT IS THAT A WEIGHS

1 IN FAVOR DETERMINATION IS GOING TO BE MADE AND VICE VERSA,
2 CORRECT?

3 A. I SUPPOSE THAT IS RIGHT.

4 Q. BY WAY OF EXAMPLE, LET'S LOOK AT THE FACTOR FOUR
5 SUBFACTORS. NOW, AS CURRENTLY CONSTRUCTED, YOU WOULD AGREE,
6 I TAKE IT, THAT IF AN INSTRUCTOR DID NOTHING ELSE, NOTHING
7 OTHER THAN CHECK THE LAST TWO BOXES DOWN ON THE LEFT SIDE,
8 USER OWNS LAWFULLY ACQUIRED OR PURCHASED COPY OF THE ORIGINAL
9 WORK AND RESTRICTED ACCESS TO STUDENTS OR OTHER APPROPRIATE
10 GROUP, YOU WOULD GET TWO CHECKS OVER THERE, RIGHT?

11 A. I THINK THAT IS RIGHT.

12 Q. AND THAT WITHOUT MORE WOULD OUTWEIGH, WOULD IT NOT, A
13 CONCLUSION THAT SUCH USE GOING TO THE RIGHT SIDE AT THE TOP
14 SIGNIFICANTLY IMPAIRS THE MARKET OR POTENTIAL MARKET FOR THE
15 COPYRIGHTED WORK OR DERIVATIVE, CORRECT?

16 A. I BELIEVE THIS IS YOUR QUESTION. IF YOUR QUESTION IS
17 IF A USER OF THIS CHECKLIST SIMPLY DID A QUANTITY TALLYING,
18 THAT WAS YOUR WORD, THEN, YEAH, ONE WOULD COME TO THAT
19 CONCLUSION.

20 Q. YEAH. THAT WOULD BE PROBLEMATIC AS A RESULT OF A
21 COGENT AND REASONED APPLICATION OF FACTOR FOUR IF THAT
22 OCCURRED, WOULDN'T IT?

23 A. IT OPENS UP THE POSSIBILITY.

24 Q. LET'S GO BACK TO FACTOR ONE, PLEASE. FACTOR ONE IS
25 CURRENTLY POPULATED WITH CRITERIA. I REPRESENT TO YOU ALL

1 FACULTY, WITHOUT DIFFICULTY, ARRIVES AT A WEIGHS IN FAVOR OF
2 USE DETERMINATION BY VIRTUE OF CHECKING NONPROFIT EDUCATIONAL,
3 TEACHING, USUALLY CHECKING THE LAST COLUMN, THE LAST ENTRY
4 USE IS NECESSARY AND EVEN OCCASIONALLY CHECKING RESEARCH OR
5 SCHOLARSHIP, CRITICISM COMMENT, AND GENERALLY NOT CHECKING
6 AND EVEN PERSONAL STUDY OCCASIONALLY. LET'S EVEN FOR
7 PURPOSES OF THIS STAY WITH THE FIRST THREE, NONPROFIT,
8 TEACHING, AND USE AS NECESSARY, LOGICAL, RIGHT?

9 A. OKAY.

10 Q. NOW, LET'S CLEANUP THIS FIRST FACTOR CHECKLIST A
11 LITTLE BIT, OKAY? LET'S DO A LITTLE EXERCISE TOGETHER.

12 A. UH-HUH (AFFIRMATIVE RESPONSE).

13 Q. YOUR OWN MODEL CHECKLIST DOESN'T HAVE A USE IS
14 NECESSARY BOX IN FACTOR ONE, DOES IT?

15 A. I DON'T RECALL. I WOULD HAVE TO HAVE IT IN FRONT OF ME
16 TO COMPARE.

17 Q. WOULD YOU LIKE IT OR WOULD YOU TAKE MY WORD AS
18 REPRESENTATION?

19 A. I WOULD LIKE TO HAVE IT.

20 Q. GO BACK TO COLUMBIA POLICY THAT WE HAVE IN EVIDENCE.

21 MR. RICH: IF I MAY, YOUR HONOR.

22 THE COURT: YOU MAY.

23 BY MR. RICH:

24 Q. THIS IS IN EVIDENCE AS PLAINTIFFS' TRIAL EXHIBIT 1012.
25 IF YOU COULD LOCATE YOUR OWN FAIR USE CHECKLIST SOMEWHERE IN

1 THE MIDDLE OF THIS BODY OF MATERIAL.

2 A. (WITNESS COMPLIES.) I BELIEVE I HAVE FOUND IT.

3 Q. IF YOU WOULD LOOK AT THE FACTORS ON PURPOSE AS IT IS
4 LABELED, WHICH IS FACTOR ONE. DO YOU SEE ANY EQUIVALENT ENTRY
5 TO USE IS NECESSARY TO ACHIEVE YOUR INTENDED EDUCATIONAL
6 PURPOSE?

7 A. NO, I DON'T.

8 Q. SO LET'S FOR PURPOSE OF THIS EXERCISE, LET'S TAKE IT
9 OUT OF THERE, GET RID OF IT. LOOKING AT THE FIRST TWO
10 ENTRIES, NONPROFIT EDUCATIONAL AND TEACHING, WOULD YOU AGREE
11 WITH ME THAT IN THE SETTING IN WHICH A PROFESSOR IS BEING
12 ASKED TO FILL THIS OUT FOR ERES, THEY ARE SYNONYMOUS BY
13 DEFINITION, THEY ARE TEACHING IN A NONPROFIT EDUCATIONAL
14 ENVIRONMENT, CORRECT?

15 A. I WOULDN'T CALL THEM SYNONYMOUS, NO.

16 Q. IS THERE ANY SITUATION WHERE A GSU PROFESSOR OFFERING
17 HIS OR HER MATERIALS TO A CLASS OF STUDENTS WOULD PROPERLY
18 CHECK ONE OR THE OTHER AND NOT BOTH?

19 A. AND NOT BOTH? YES.

20 Q. WELL, WHAT WOULD BE THAT SITUATION?

21 A. WELL, A LOT OF EDUCATIONAL INSTITUTIONS DO FOR-PROFIT
22 KINDS OF ACTIVITIES.

23 Q. LET ME STIPULATE THAT FOR THIS PURPOSE, THIS IS AN
24 ORDINARY -- IN THE ORDINARY COURSE CURRICULUM OFFERING AT
25 GEORGIA STATE UNIVERSITY, WHICH IS IN FACT WHAT THESE 76

1 CHECKLISTS WERE FILLED IN IN RELATION TO, DO YOU AGREE WITH
2 THAT SITUATION THAT THOSE TWO WILL AUTOMATICALLY BE CHECKED?

3 A. I BELIEVE A FACULTY MEMBER WOULD RIGHTLY CHECK BOTH OF
4 THOSE.

5 Q. SO TO ELIMINATE DUPLICATION, I WILL PUT THEM TOGETHER
6 FOR PURPOSES OF MY ILLUSTRATION, MAKE THEM ONE COMBINED
7 FACTOR FOR PURPOSES OF THIS SETTING. WE CAN LEAVE RESEARCH,
8 CRITICISM, PERSONAL STUDY, ALTHOUGH I WOULD TAKE IT THAT IN
9 THE ORDINARY COURSE OF DUPLICATING MATERIALS AND OFFERING THEM
10 AS PART OF COURSE READINGS WITHOUT MORE, YOU WOULD AGREE WITH
11 ME, THESE CRITERIA WOULD BE INAPPLICABLE TO THIS CLASSROOM
12 SETTING, WOULDN'T YOU?

13 A. THERE ARE GOING TO BE TIMES IN A TYPICAL CLASSROOM
14 SETTING WHERE ONE OR MORE OF THOSE OTHER BOXES WOULD BE
15 RELEVANT.

16 Q. BUT IN THE ORDINARY SOURCE YOU WOULD AGREE THEY
17 WOULDN'T APPLY?

18 A. UNIVERSITIES ARE ENORMOUS COMPLEX ORGANIZATIONS. I AM
19 NOT SURE THERE IS AN ORDINARY SOURCE THAT FITS THAT
20 DESCRIPTION.

21 Q. DO YOU BELIEVE OFFERING COURSE READING MATERIALS TO
22 YOUR STUDENTS WITHOUT MORE CONSTITUTES PERSONAL STUDY WITHIN
23 THE MEANING OF YOUR FAIR USE CHECKLIST?

24 A. IN THE WAY THAT I PERSONALLY WOULD FILL OUT THE
25 CHECKLIST IF I WERE THAT INSTRUCTOR?

1 Q. YES.

2 A. I PROBABLY WOULD NOT CHECK PERSONAL STUDY.

3 Q. IF IT WAS SIMPLY OFFERED TO STUDENTS AS PART OF THEIR
4 OWN COURSE READING, WOULD YOU PRESUMPTIVELY CHECK IT AS
5 CRITICISM, COMMENT, NEWS REPORTING, OR PARODY?

6 A. IT MAY BE NEWS COMMENT.

7 Q. JUST BY OFFERING THE READING MATERIALS THEMSELVES?

8 A. YES.

9 Q. ALSO WOULD BE RESEARCH OR SCHOLARSHIP BECAUSE THE WORKS
10 ARE RESEARCH OR SCHOLARSHIP?

11 A. NOT FOR THAT REASON, I MAY CHECK IT FOR OTHER REASONS.

12 Q. OKAY. LET'S GO TO THE RIGHT SIDE. TO BE BALANCED
13 LET'S ELIMINATE THE LAST ENTRY ON THE RIGHT BECAUSE I TOOK IT
14 ON THE LEFT.

15 A. I DIDN'T GET A CHANCE TO READ IT.

16 Q. USE EXCEEDS, SO THAT WAS THE BALANCING CRITERION TO
17 THE ONE I TOOK OUT ON THE LEFT, I WILL TAKE IT OUT ON THE
18 RIGHT.

19 A. UH-HUH (AFFIRMATIVE RESPONSE).

20 Q. I AM GOING TO PROPOSE ONE MORE CLARIFYING CHANGE, DO
21 YOU SEE UNDER TRANSFORMATIVE, THE CHECKLIST AS IT CURRENTLY
22 READS SAYS PARENTHETICAL WORK BUT NONTRANSFORMATIVE DOESN'T
23 HAVE ANY DESCRIPTIVE?

24 A. YES.

25 Q. DIGITAL COPY, LITERAL PHOTOCOPY, OR DIGITAL COPY

1 SERVING SAME PURPOSE AS ORIGINAL?

2 A. OKAY. A QUESTION?

3 Q. I AM ASKING YOU IF YOU FOLLOW WHAT I AM DOING?

4 A. I SEE WHAT YOU ARE DOING.

5 Q. NOW, LET'S LOOK AT THIS REVISED CHECKLIST. WOULD YOU
6 AGREE WITH ME THAT A PROFESSOR MAKING A REASONABLE EFFORT TO
7 FILL OUT THIS SLIGHTLY REVISED CHECKLIST WOULD CHECK ONE
8 COLUMN ON THE LEFT, WHICH IS THE FIRST, NONPROFIT TEACHING,
9 RESERVE YOUR PRIVATE VIEW ABOUT WHETHER THIS IS IN SOME
10 CIRCUMSTANCES MIGHT BE RESEARCH OR MIGHT BE CRITICISM, I THINK
11 YOU AGREE IT IS NOT PERSONAL STUDY, AND IN THE ORDINARY
12 CIRCUMSTANCE, WOULD OR SHOULD CHECK NONTRANSFORMATIVE ON THE
13 RIGHT SIDE, THAT WOULD BE THE MOST TYPICAL READING OF THIS AS
14 I HAVE REVISED IT?

15 A. IF I WERE ADHERING STRICTLY TO THAT GUIDANCE IN THE
16 PARENTHETICAL ABOUT NONTRANSFORMATIVE AND NOT ANYTHING ELSE,
17 THEN I MAY VERY WELL BE MOTIVATED TO CHECK THAT BOX.

18 Q. AND SO UNDER MY REASONING, AT LEAST, OR MY SUPPOSITION,
19 ALL REASONING OF WHAT A REASONABLE PROFESSOR WOULD DO, WOULD
20 YOU GET A TIE UNDER THAT ANALYSIS?

21 A. WELL, THE WAY YOU HAVE COMPLETED IT, YES.

22 Q. I TAKE IT AS YOU THINK ABOUT THESE MATTERS, IF THERE IS
23 A TIE OF SORTS, ALTHOUGH I REALIZE YOU DON'T ADVOCATE THE
24 MATHEMATICAL TALLYING, I TAKE THAT AS A GIVEN YOU WOULD HOPE
25 IN THAT CIRCUMSTANCE THE FACULTY WOULD THINK HARD ABOUT WHAT

1 THE LAW HAS TO SAY ABOUT THE RELATIVE IMPORTANCE OF NONPROFIT
2 EDUCATIONAL VERSUS TRANSFORMATIVE OR NOT, CORRECT?

3 A. YES.

4 Q. BEARING IN MIND AS YOU HAVE TESTIFIED THAT SIMPLY
5 BECAUSE USE IS EDUCATIONAL DOESN'T AUTOMATICALLY MAKE IT A
6 FAIR USE, CORRECT?

7 A. I HAVE SAID THAT.

8 Q. ALSO BEARING IN MIND THAT FAIR USE IS MORE LIKELY WHEN
9 THE COPYRIGHTED WORK IS TRANSFORMED INTO SOMETHING NEW OR NEW
10 UTILITY, CORRECT?

11 A. I HAVE SAID THAT.

12 Q. COLUMBIA SITE SAYS THAT AS WELL, CORRECT?

13 A. I BELIEVE SO.

14 Q. NOW, LET'S GO TO FACTOR TWO. LET'S DO A LITTLE
15 CLEANUP OF FACTOR TWO. AS THE GSU CHECKLIST IS CONSTRUCTED,
16 THE FACULTY WILL INVARIABLY CHECK THE THREE ON THE RIGHT, NOT
17 THE LEFT FOR FACTUAL WORKS?

18 A. I AM NOT GOING TO BE ABLE TO ENDORSE YOUR WORDING.
19 INVARIABLY, ONE COULD, UNDER MANY CIRCUMSTANCES, CHECK ONE,
20 TWO OR THREE OF THOSE BOXES.

21 Q. AND THE RECORD WILL REFLECT THAT IS VIRTUALLY WHAT
22 EVERY FACULTY MEMBER DID, I SUBMIT THAT TO YOU. I PROPOSE
23 ELIMINATING FOR PURPOSES OF MY CLEANUP THE THIRD BOX ON THE
24 LEFT, IMPORTANT EDUCATIONAL OBJECTIVES, BECAUSE THAT REALLY
25 HAS NOTHING TO DO WITH THE NATURE OF THE COPYRIGHTED WORK

1 ITSELF, DOES IT?

2 A. OH, NO, IT HAS A LOT TO DO WITH IT.

3 Q. HOW SO?

4 A. COURTS HAVE FREQUENTLY LOOKED AT THE CHARACTER OR
5 NATURE OF THE WORK BEING USED AND ITS APPROPRIATENESS WITH
6 RESPECT TO FAIR USE, THAT IS A RELEVANT FACT.

7 Q. YOU WOULD RATHER LEAVE IT?

8 A. I WOULD RATHER LEAVE IT.

9 Q. STICK IT BACK IN. I WILL MAKE YOU A DEAL, IF YOU WILL
10 STICK THAT BACK IN, I AM GOING TO ADD SOMETHING TO THE RIGHT
11 SIDE. I AM GOING TO CALL IT, BECAUSE IT IS JUST AS RELEVANT
12 THEN AS YOU HAVE DEFINED IT, STICK IN A RIGHT SIDE BOX,
13 IMPORTANT TO MARKET SERVED BY PUBLISHER, THAT IS ALSO PART OF
14 THE NATURE OF THE WORK, ISN'T IT? IF IT IS IMPORTANT TO
15 EDUCATIONAL OBJECTIVES, IT WOULD BE UNOBJECTIONABLE TO ADD IT
16 IS IMPORTANT TO THE MARKET SERVED BY PUBLISHER, AN ACADEMIC
17 WORK IN?

18 A. THIS CONTEXT, THE REASON WHY I AM HESITATING AT ALL IS,
19 AS YOU CAN SEE FROM MY REPORTS, I STROVE TO IDENTITY SOME
20 AUTHORITATIVE SOURCE TO SUPPORT THE INCLUSION OF EACH FACT OR
21 EACH VARIABLE ON THE CHECKLIST. SITTING HERE TODAY, I DON'T
22 HAVE RECOLLECTION OF A -- OF CASE AUTHORITY TO SUPPORT PUTTING
23 THAT IN OR SOME OTHER AUTHORITY.

24 Q. I DON'T RECALL YOUR TESTIFYING ON DIRECT PERTAINING TO
25 AUTHORITY FOR IMPORTANT EDUCATIONAL OBJECTIVES AS A FACTOR IN

1 SUPPORT. MAYBE I MISSED HEARING IT. I WILL ASK YOU TO
2 HUMOR MY INTERPRETATION. YOU HAVE AGREED THERE CAN BE MANY
3 VARIATIONS OF THE CHECKLIST?

4 A. YES.

5 Q. THIS IS THE BRUCE RICH VARIATION.

6 A. YOU GOT IT.

7 Q. I WILL MAKE ONE MORE CHANGE ON THE LEFT SIDE JUST FOR
8 PURPOSES OF OUR COLLOQUY, WHICH IS FACTUAL OR NONFICTION WORK.
9 I AM GOING TO ADD CONSISTENT, SINCE YOU LIKEN TO CASE LAW,
10 CONSISTENT WITH PRINCETON UNIVERSITY PRESSES INTERPRETATION OF
11 THAT, I AM GOING TO ADD LACKING IN ANALYTICAL OR CREATIVE
12 MATERIAL TO THE LEFT SIDE JUST TO ROUND THAT OUT AND MAKE IT A
13 MORE FULSOME ANALYSIS, OKAY?

14 A. IS THAT LANGUAGE FROM THE CASE YOU MENTIONED?

15 Q. IT DOES. THEN ON THE RIGHT SIDE SO WE HAVE CORRECT
16 BALANCE, LET'S STRIKE HYPOTHETICAL IN FRONT OF CREATIVE AND
17 SAY SIMPLY CREATIVE OR ANALYTICAL WORK. SO I HAVE MADE A
18 SLIGHT TWEAK TO MAKE IT CONSISTENT WITH AT LEAST MY
19 UNDERSTANDING OF THE CASE LAW.

20 NOW, I AM GOING TO MAKE ONE LAST CHANGE ON THE RIGHT SIDE,
21 WHICH IS INSTEAD OF CONSUMABLE WORK, WORKBOOK, TEST,
22 BORROWING FROM THE COLUMBIA ADVICE, I AM GOING TO MAKE THAT
23 INSTEAD, WORK IS COMMERCIALY AVAILABLE SPECIFICALLY FOR THE
24 EDUCATIONAL MARKET, OKAY?

25 A. OKAY.

1 Q. NOW, SO REVISED, WOULD YOU AGREE WITH ME, THAT THE
2 SAME PROFESSOR EXAMINING FACTOR TWO FOR THE SAME WORKS MIGHT
3 REASONABLY CHECK ONE AND BY THAT I MEAN WORKS PUBLISHED BY THE
4 LIKES OF OXFORD UNIVERSITY PRESS, CAMBRIDGE UNIVERSITY PRESS
5 AND SAGE PRESTIGIOUS PUBLISHERS, SERIOUS ACADEMIC WORKS,
6 YES?

7 A. YES.

8 Q. MIGHT LOGICALLY CHECK PUBLISHED WORK ON THE LEFT SIDE?

9 A. CORRECT.

10 Q. AND ON THE RIGHT SIDE CHECK CREATIVE OR ANALYTICAL AND
11 CHECK WORK IS COMMERCIALY AVAILABLE SPECIFIC FOR THE
12 EDUCATIONAL MARKET, THAT WOULD BE A RATIONAL FILLING OUT OF
13 FACTOR TWO, WOULDN'T IT?

14 A. IT MAY NOT BE COMPLETE. I WOULD STILL GO BACK AND
15 HAVE A CLOSER LOOK AT THOSE OTHER TWO BOXES IN THE LEFT-HAND
16 COLUMN.

17 Q. OKAY. YOU WANT TO CHECK IMPORTANT TO EDUCATIONAL
18 OBJECTIVES? I WILL GIVE YOU THAT.

19 A. YES.

20 Q. WE HAVE TO CHECK ON THE RIGHT, IMPORTANT TO MARKET
21 SERVED BY PUBLISHER, INDULGING MY ADDITION ON THE RIGHT SIDE.

22 A. I MEAN, YOU DON'T FILL OUT THE CHECKLIST INDULGING ONE
23 ANOTHER, YOU FILL IT OUT BASED UPON WHAT THE FACTS REALLY ARE.
24 I KNOW WE ARE HERE FILLING OUT YOUR CHECKLIST.

25 Q. UNDER MY CHECKLIST, EITHER BY A CALCULATION OF ONE

1 FAVORS AGAINST TWO DISFAVORS OR TWO FAVOR THREE DISFAVORS, A
2 RATIONAL OR REASONABLE FACULTY MEMBER USING THE BRUCE RICH
3 CHECKLIST COULD DETERMINE THAT FACTOR TWO DOES NOT WEIGH IN
4 FAIR USE?

5 A. BASED ON THIS, YES, IT COULD ESCORT SOMEBODY TO THAT
6 CONCLUSION.

7 Q. WE WON'T SPEND FURTHER TIME RECONSTRUCTING, YOU WILL BE
8 HAPPY TO KNOW, FACTORS THREE AND FOUR. BUT YOU WOULD AGREE
9 WITH ME, WOULD YOU NOT, THAT WHERE A CHECKLIST IS USED
10 SIMPLY TO TALLY UP BOXES FAVORING AND DISFAVORING FAIR USE,
11 IT BECOMES ALL IMPORTANT WHAT THOSE BOXES SAY AND HOW MANY ARE
12 INSERTED IN WHICH COLUMN, TRUE?

13 A. NO.

14 Q. IT IS NOT IMPORTANT TO THE MATHEMATICAL TALLYING OF IT?

15 A. AGAIN, MAYBE I JUST MISUNDERSTOOD THE QUESTION.

16 Q. WANT ME TO ASK IT AGAIN?

17 A. PLEASE DO.

18 Q. I SAID, YOU WOULD AGREE WITH ME THAT WHERE A CHECKLIST
19 IS USED SIMPLY TO TALLY UP BOXES FAVORING AND DISFAVORING FAIR
20 USE, ISN'T IT TERRIBLY IMPORTANT WHAT THOSE BOXES ACTUALLY
21 SAY AND HOW MANY ARE INSERTED IN THE FAVORS, WEIGHS IN FAVOR
22 AND WEIGHS AGAINST COLUMN?

23 A. IF A FACULTY MEMBER USES IT AS A TALLYING UP, THEN IT
24 COULD HAVE THAT EFFECT.

25 Q. OKAY. NOW LET'S KEEP GOING. I TAKE IT YOU ALSO

1 UNDERSTAND THAT WHEN THE GSU FACULTY MEMBER HAS GONE THROUGH
2 EACH OF THESE SUBFACTORS AND AWARDED A GIVEN FACTOR
3 CONCLUSION, WE COME BACK TO THE JX 4, SEVEN AND EIGHT PLEASE.
4 SEE BOTH PAGES. THANK YOU. YOU AGREE THEY ARE SUPPOSED TO
5 CHECK UNDER EACH FACTOR WEIGHS FOR, WEIGHS AGAINST?

6 A. YES.

7 Q. I TAKE IT ALSO IT IS YOUR UNDERSTANDING THAT THE
8 CHECKLIST INSTRUCTS THAT THEY ARE TO THEN DETERMINE IF A
9 MAJORITY OF THE FACTORS, EITHER FAVORS FAIR USE OR DOESN'T,
10 CORRECT?

11 A. I AM TRYING TO RECALL THE USE OF THE WORD MAJORITY, IS
12 IT IN THERE? TOLD, I BELIEVE, TO BALANCE THE FACTORS.

13 Q. AND COME TO A CONCLUSION, ALL RIGHT?

14 A. AND COME TO A CONCLUSION.

15 Q. AND DO YOU HAVE ANY DIFFERENT UNDERSTANDING AS TO HOW
16 IN FACT THIS PROCESS HAS BEEN INTERPRETED BY ACTUAL GSU
17 FACULTY MEMBERS, NAMELY IF THEY DETERMINE THAT THREE OR FOUR
18 FACTORS FAVOR FAIR USE INDIVIDUALLY THAT LEADS TO A FAIR USE
19 CONCLUSION?

20 A. I HAVE NOT HEARD THE TESTIMONY ON THAT POINT, IF THAT
21 GOES TO YOUR QUESTION.

22 Q. HAVE YOU ANY UNDERSTANDING THAT THE FACULTY UNDERSTANDS
23 THAT IT IS THEIR JOB, NOT SIMPLY TO MATHEMATICALLY ADD UP HOW
24 MANY FACTORS FAVOR, BUT TO GIVE DIFFERENTIAL WEIGHT TO EACH
25 FACTOR?

1 A. I DON'T BELIEVE THAT IS THE CASE, BUT I BELIEVE THAT,
2 AS I HAVE SAID BEFORE, THE PERSUASIVENESS OF DIFFERENT FACTS
3 MAY TIP THE BALANCE ONE WAY OR THE OTHER.

4 Q. SLIGHTLY DIFFERENT QUESTION.

5 A. OKAY.

6 Q. IF AFTER GOING THROUGH THE SUBFACTOR ANALYSIS, FACULTY
7 MEMBER HAS CHECKED WEIGHS IN FAVOR OF FAIR USE FOR THE FIRST
8 FACTOR --

9 A. OKAY.

10 Q. -- WEIGHS IN FAVOR OF FAIR USE FOR THE SECOND FACTOR,
11 OKAY --

12 A. CORRECT.

13 Q. -- WEIGHS IN FAVOR OF FAIR USE FOR THIRD FACTOR, DO
14 YOU HAVE ANY REASON TO UNDERSTAND THAT IN PRACTICE AND AS
15 INTERPRETED THAT THAT FACULTY MEMBER WOULD NOT THEREBY REACH
16 THE CONCLUSION THAT IT WAS A FAIR USE OF THE MATERIALS?

17 A. I WOULD TELL THAT FACULTY MEMBER TO KEEP READING.

18 Q. MY QUESTION WAS SLIGHTLY DIFFERENT. UNDERSTANDING THE
19 PRACTICE AT GSU IS OTHER THAN WHAT I HAVE REPRESENTED TO YOU?

20 A. NO, I DON'T KNOW THAT TESTIMONY.

21 Q. AND YOU WOULD HAVE A PROBLEM HOWEVER; IS THAT CORRECT?
22 WHY WOULD YOU TELL THEM TO KEEP READING?

23 A. BECAUSE I BELIEVE THEY SHOULD CONSIDER ALL FOUR
24 FACTORS.

25 Q. AND IF A FACULTY MEMBER SAYS, WHY SHOULD I BOTHER, I

1 HAVE GOT THREE FACTORS FAVORING IT AND ONE AGAINST, IS THERE
2 ANYTHING TO YOUR KNOWLEDGE IN THE INSTRUCTIONS UNDER THE
3 CHECKLIST OR THROUGH THE EDUCATION PROCESS AT GSU WHICH
4 COUNSELS AGAINST THE FACULTY REACHING THAT CONCLUSION, THAT
5 THREE WORKS, I HAVE GOTTEN THREE, I AM THERE?

6 A. I DON'T RECALL EXACTLY THOSE WORDS, BUT THEN AGAIN I DO
7 RECALL OTHER ELEMENTS OF THE OVERALL GEORGIA POLICY THAT MAKES
8 CLEAR THAT ONE IS TO USE THE CHECKLIST, ONE IS TO CONSIDER
9 THE FOUR FACTORS AND APPLY THEM IN THE CONTEXT. SO BY
10 IMPLICATION, I BELIEVE IT IS THERE.

11 Q. CAN WE BLOWUP THE INSTRUCTIONS, PLEASE?

12 A. SURE, PLEASE.

13 Q. TAKE A LOOK AT THE FIRST TWO SENTENCES: "WHERE THE
14 FACTORS FAVORING FAIR USE OUT NUMBER THOSE AGAINST RELIANCE ON
15 FAIR USE IS JUSTIFIED," CORRECT?

16 A. IT DOES SAY THAT.

17 Q. "WHERE FEWER THAN HALF THE FACTORS FAVOR FAIR USE,
18 INSTRUCTORS SHOULD SEEK PERMISSION FROM THE RIGHTS HOLDER,"
19 CORRECT?

20 A. I DO SEE THAT.

21 Q. THEN IT SAYS, "FINALLY, WHERE THE FACTORS ARE EVENLY
22 SPLIT, INSTRUCTORS SHOULD CONSIDER THE TOTAL FACTS WEIGHING IN
23 FAVOR OF FAIR USE AS OPPOSED TO THE TOTAL FACTS WEIGHING
24 AGAINST FAIR USE IN DECIDING WHETHER FAIR USE IS JUSTIFIED,
25 CORRECT?

1 A. IT DOES SAY THAT.

2 Q. ONLY WHERE YOU HAVE THAT TIE, THAT TWO TO TWO FACTOR
3 TIE IS A MORE IN-DEPTH EXAMINATION OF SORTS CALLED FOR,
4 CORRECT, ON THE FACE OF THE FACTORS?

5 A. NO. ONE ENDS UP WITH CHECKING OR CONCLUDING THAT A
6 FACTOR LEANS ONE WAY OR THE OTHER BASED ON THAT IN-DEPTH
7 EXAMINATION OF THE VARIABLES. SO YOU HAVE ALREADY DONE THAT
8 BY THIS TIME.

9 Q. I THINK WE WILL MOVE ON. I THINK THIS READS IN THE
10 APPLICATIONS VERY CLEAR HOW PEOPLE HAVE DONE THIS.

11 LET'S TALK ABOUT YOUR SO-CALLED SURVEY OF COPYRIGHT
12 POLICIES.

13 A. YES.

14 Q. AND DO YOU HAVE YOUR BIG BINDER IN FRONT OF YOU?

15 A. I DO NOT.

16 MR. RICH: MAY I, YOUR HONOR?

17 THE COURT: YES.

18 BY MR. RICH:

19 Q. YOUR SURVEY OF PRACTICE AT OTHER INSTITUTIONS CONSISTED
20 OF REVIEWING THE POLICY AT SEVERAL DOZEN COLLEGES AND
21 UNIVERSITIES AND THEN SELECTIVELY CULLING CERTAIN ASPECTS OF
22 THOSE POLICIES YOU BELIEVED RELEVANT TO COMMENT UPON,
23 CORRECT?

24 A. THAT'S CORRECT.

25 Q. THE POLICIES YOU INCLUDED IN YOUR SURVEY WERE SELECTED

1 BY YOUR WIFE, CORRECT?

2 A. SHE WORKED WITH ME TO SELECT THEM, THAT'S CORRECT.

3 Q. DID YOU WORK WITH HER TO SELECT THEM OR DID SHE SELECT
4 THEM?

5 A. SHE SELECTED THEM.

6 Q. AND NOW YOUR WIFE DID NOT SUBMIT AN EXPERT REPORT IN
7 THIS CASE, I DON'T THINK, DID SHE?

8 A. NO.

9 Q. DID SHE OTHERWISE PROVIDE THE COURT OR THE PARTIES WITH
10 A DESCRIPTION OF THE METHODOLOGY SHE ADOPTED?

11 A. NO.

12 Q. AND SHE DOESN'T HAVE EXPERTISE IN SURVEY METHODOLOGY,
13 DOES SHE?

14 A. SHE DID A MASTER'S DEGREE IN A THESIS THAT INVOLVED
15 SOME SURVEYING.

16 Q. IS SHE AN EXPERT IN SURVEYING METHODOLOGY?

17 A. I DON'T THINK SHE WOULD SAY SHE IS.

18 Q. SHE IS NOT AN EXPERT IN COPYRIGHT LAW, THAT IS NOT HER
19 FIELD?

20 A. WHEN YOU LIVE WITH ME, YOU WILL LEARN A LOT.

21 Q. OTHER THAN PILLOW TALK?

22 A. IT MAY BE EVEN A LITTLE BIT MORE.

23 Q. A LITTLE BIT MORE. AND THE PROCESS THAT SHE UNDERTOOK
24 ADMITTEDLY WAS NOT SCIENTIFIC, CORRECT?

25 A. I BELIEVE THAT ONE COULD SAY THAT, YES.

1 Q. YOU DID SAY THAT AT YOUR DEPOSITION?

2 A. I DID.

3 Q. AND YOU IN FACT, AS YOU SAID BOTH IN YOUR DEPOSITION I
4 BELIEVE AND ON DIRECT, YOU TURNED HER LOOSE, CORRECT?

5 A. I MAY HAVE USED THOSE WORDS, BUT AT THE END OF
6 INSTRUCTION, OF COURSE.

7 Q. WHILE ON DIRECT YOU TESTIFIED THAT YOU ASKED YOUR WIFE
8 TO UNDERTAKE THIS PROJECT TO AVOID ANY POSSIBLE BIAS. ISN'T
9 THE FACT OF THE MATTER THAT THE REASON YOU ASKED HER TO DO IT
10 WAS BECAUSE YOU WERE UNDER INTENSE DEADLINE PRESSURE TO GET
11 YOUR REPORT COMPLETED AND SHE VOLUNTEERED TO HELP YOU OUT?

12 A. IT IS CERTAINLY BOTH.

13 Q. BOTH?

14 A. CERTAINLY BOTH. SHE WAS HAPPY TO HELP OUT. I WAS
15 UNDER DEADLINE, NO QUESTION ABOUT IT. AND THAT I WAS HAPPY
16 TO HAVE A THIRD PARTY COLLECT THESE POLICIES FOR PURPOSES OF
17 REDUCING BITES.

18 Q. TURN TO YOUR DEPOSITION AT PAGE 61 BEGINNING AT LINE
19 NINE.

20 A. (WITNESS COMPLIES.)

21 Q. YOU TESTIFIED, QUOTE:

22 "IN PREPARING THE GATHERING OF
23 POLICIES THEMSELVES THAT ARE
24 REFLECTED IN THE REPORT NUMBER ONE,
25 MY WIFE HELPED ME OUT. AND SHE

1 WANTED TO BE HELPFUL. SHE SAW ME
2 BUSY WORKING NIGHTS AND WEEKENDS TO
3 PREPARE THIS REPORT AND SAID, WHAT
4 CAN I DO? AND I SAID, WELL, I NEED
5 AN ASSORTMENT OF POLICIES, NOT
6 SCIENTIFIC, JUST SHOWS A RANGE OF
7 DIFFERENT APPROACHES THAT DIFFERENT
8 UNIVERSITIES AND DIFFERENT LIBRARIES
9 HAVE TAKEN ON ELECTRONIC RESERVES.
10 AND I TURNED HER LOOSE WITH THAT
11 TASK AND SHE CAME BACK WITH A LONG
12 LIST OF POLICIES AND PRINTOUTS AND
13 THAT BECAME THE OVERVIEW. I
14 TRANSFORMED THAT RAW DATA INTO THE
15 OVERVIEW THAT YOU SEE IN REPORT
16 NUMBER ONE.

17 IS THAT CORRECT?

18 A. I DID SAY THAT.

19 Q. NOW, IN FACT, THE POLICIES SUMMARIZED VARIED WIDELY
20 FROM SCHOOL TO SCHOOL?

21 A. MANY CASES THEY DO, BUT THERE ARE OTHER SIMILARITIES.

22 Q. WE WILL GET TO THOSE. THE VARIETY ALONE DOESN'T TELL
23 US ANYTHING ABOUT THE LEGAL SOUNDNESS OF THE POLICIES,
24 CORRECT?

25 A. I HAVE MADE VERY CLEAR IN MY DEPOSITION THAT I AM NOT

1 HERE TO TESTIFY THAT THESE ARE LEGALLY SOUND, IF I CAN JUST
2 USE YOUR PHRASE.

3 Q. FOR EXAMPLE, YOU ARE NOT ADVOCATING, I TAKE IT, THE
4 UNIVERSITY OF CALIFORNIA AT RIVERSIDE OR INDIANA UNIVERSITY
5 POLICY OF ALLOWING COPYING OF UP TO 50 PERCENT OF A WORK
6 CONSTITUTES SOUND PRACTICE, ARE YOU?

7 A. THAT IS DIFFERENT FROM LEGALLY SOUND.

8 Q. LEGALLY SOUND PRINCIPLE?

9 A. I AM NOT HERE TO GIVE A LEGAL SEAL OF APPROVAL TO A
10 SPECIFIC POLICY.

11 Q. AND YOU DON'T KNOW ANYTHING ABOUT THE ACTUAL PRACTICE
12 AT ANY OF THE INSTITUTIONS SURVEYED INSOFAR AS ELECTRONIC
13 POSTINGS OF COPYRIGHTED MATERIALS ARE CONCERNED, TRUE,
14 ACTUAL PRACTICE?

15 A. ACTUAL PRACTICE AT THESE INSTITUTIONS?

16 Q. YES, SIR.

17 A. NO, I HAVE NOT INVESTIGATED THAT.

18 Q. YOU DON'T KNOW HOW FACULTY AT THESE INSTITUTIONS
19 ACTUALLY GO ABOUT MAKING FAIR USE DETERMINATIONS, DO YOU?

20 A. NO.

21 Q. WITH WHOM THEY CONSULT?

22 A. NO.

23 Q. WHAT LIBRARY OR OTHER REVIEW MECHANISMS EXIST?

24 A. SOMETIMES THOSE ARE STATED IN POLICY. SO SOMETIMES I
25 DO KNOW AS A MATTER OF POLICY.

1 Q. BUT APART FROM WHAT IS STATED ON THE FACE OF THE
2 POLICY, YOU DON'T KNOW IN PRACTICE WHAT OCCURS, CORRECT?

3 A. THAT IS CORRECT.

4 Q. YOU DON'T KNOW THE NATURE AND SCOPE OF THE MATERIALS
5 THAT ACTUALLY ARE PLACED ON THESE INSTITUTIONS' RESERVES
6 SYSTEMS, CORRECT?

7 A. THAT'S CORRECT.

8 Q. AND SO JUST AS YOU HAVE MADE NO DETERMINATION HERE AS
9 TO THE LEGALITY OF GSU'S OWN POLICY IN APPLICATION, I TAKE
10 IT, YOU SIMILARLY HAVE MADE NO SUCH DETERMINATIONS AS TO ANY
11 OF THOSE -- OF THESE OTHER SURVEYED SCHOOLS, CORRECT?

12 A. THAT'S CORRECT.

13 Q. ON DIRECT EXAMINATION YOU EXCLUSIVELY FOCUSED THE COURT
14 ON HOW THE DIFFERENT POLICIES YOU CITE ADDRESS THE QUANTITY OF
15 MATERIALS USED, CORRECT?

16 A. I DID.

17 Q. WHY IS THAT?

18 A. BECAUSE THAT IS WHAT I WAS ASKED TO DO.

19 Q. BY?

20 A. BY COUNSEL FOR THE DEFENSE.

21 Q. OKAY. SO YOU ACKNOWLEDGE THAT THE POLICIES ARE IN
22 FACT MUCH MORE MULTIFACETED, RIGHT?

23 A. OH, I BELIEVE I MAY HAVE EVEN SAID THAT.

24 Q. YOU SAID YOU WANT TO BE VERY, VERY CLEAR, I THINK WERE
25 YOUR WORDS, THAT THERE IS A LOT MORE TO THESE POLICIES THAN

1 JUST NUMBERS, CORRECT?

2 A. THAT'S CORRECT.

3 Q. AND YOU ALSO ACKNOWLEDGED THAT FAIR USE DETERMINATIONS
4 INVOLVE FAR MORE THAN AN EXAMINATION OF QUANTITY OF TAKINGS
5 PERMITTED, CORRECT?

6 A. I BELIEVE I SAID THAT.

7 Q. WHETHER EXPRESSED AS A PERCENTAGE OF THE ORIGINAL THAT
8 HAS BEEN TAKEN, CORRECT?

9 A. CORRECT.

10 Q. OR A NUMBER OF CHAPTERS TAKEN, CORRECT?

11 A. RIGHT.

12 Q. NOW, IN FACT, THERE ARE A NUMBER OF OTHER IMPORTANT
13 CRITERIA SET FORTH IN THE VERY POLICIES FROM WHICH YOU
14 EXTRACTED THIS QUANTITATIVE DATA, CORRECT?

15 A. THAT IS CORRECT.

16 Q. SO, FOR EXAMPLE, I COUNTED AT LEAST 12 POLICIES THAT
17 EXPLICITLY LIMIT THE USES FALLING WITHIN THE PRESCRIBED
18 PERCENTAGES OR CHAPTER PARAMETERS TO USE IN A SINGLE SEMESTER,
19 DOES THAT SOUND FAMILIAR TO YOU?

20 A. OR SOME VARIATION ON THAT, THAT DOESN'T SURPRISE ME.

21 Q. SUCH THAT IF A PROFESSOR WANTS TO REUSE THE SAME
22 MATERIALS IN A SECOND OR THIRD ACADEMIC TERM, THESE POLICIES
23 PRESCRIBE THAT PROFESSOR NEEDS TO SECURE PERMISSION EITHER
24 FROM COPYRIGHT OWNER OR SOMETIMES THEY SAY EXPLICITLY GO SEE
25 COPYRIGHT CLEARANCE CENTER?

1 A. I AM NOT GOING TO VOUCH WITHOUT GOING THROUGH ONE AT A
2 TIME EXACTLY WHAT THE POLICY SAID IN RESPONSE TO THE REPEAT
3 USE, BUT THERE IS SOMETHING LIKE THAT IN THOSE 12 OR SO
4 POLICIES.

5 Q. I WILL READ YOU THE NAMES OF THE 12 AND I AM NOT
6 ASKING, I KNOW THIS ISN'T A MEMORY TEST, I WILL REPRESENT TO
7 THE COURT THIS IS WHAT I FOUND. YOU ARE FREE TO, IF YOU WOULD
8 LIKE TO VERIFY THE 12 I IDENTIFIED THAT SAY USE ONLY ONCE ARE:
9 WEBSTER; AMERICAN UNIVERSITY, CALIFORNIA RIVERSIDE; CLARK
10 ATLANTA; WEST TEXAS A&M; PENN STATE UNIVERSITY; ALABAMA STATE,
11 SAN DIEGO STATE; UNIVERSITY OF VERMONT, UNIVERSITY OF ALABAMA
12 BIRMINGHAM; UNIVERSITY OF ALASKA; AND PACE UNIVERSITIES. I
13 AM NOT ASKING YOU TO SAY THAT IS RIGHT, I AM REPRESENTING TO
14 YOU AND THE COURT THAT IS MY RESEARCH, YOU HAVE NO REASON TO
15 DISBELIEVE THAT?

16 A. I DO NOT.

17 Q. NOW, IN FACT, IS IT NOT ALSO THE CASE THAT ALL THREE
18 OF THE EDUCATIONAL COPYING GUIDELINES YOU CITE IN YOUR REPORT,
19 NAMELY THE 1976 CLASSROOM COPYING GUIDELINES, THE 1996
20 AMERICAN LIBRARY ASSOCIATION MODEL POLICY, AND THE 1996
21 SO-CALLED CONFU CONFERENCE ON FAIR USE ERESERVE GUIDELINES,
22 THAT EACH OF THOSE PROHIBIT REPEAT USES OF THE SAME MATERIALS
23 IN SUCCESSIVE TERMS?

24 A. AND ONE FACTUAL CORRECTION, IF I MAY, I BELIEVE THE ALA
25 MODEL POLICY DATES FROM 1982.

1 Q. BEG YOUR PARDON? I MAY HAVE MISTAKEN.

2 A. AGAIN PARAPHRASING.

3 Q. CAN I GET AN ANSWER?

4 A. YES YOU CAN. YES YOU CAN. I WOULD LIKE TO GO BACK
5 AND READ EXACTLY HOW IT IS WORDED.

6 Q. LET'S TAKE A LOOK. HAVE YOU YOUR BIG BINDER?

7 A. THE QUESTION TO YOUR ANSWER, IS THAT KIND OF LANGUAGE
8 IS THERE?

9 Q. LET'S VERIFY, I DON'T WANT ANY AMBIGUITY ON THIS
10 SUBJECT.

11 A. ABSOLUTELY.

12 Q. I BEG YOUR PARDON, ALA IS 1982, I MISSPOKE. SOMEWHERE
13 IN HERE IS THESE GUIDELINES, I SEE IT AT TAB FOUR, IS THE
14 CLASSROOM GUIDELINES?

15 A. OKAY. GO TO THE ACTUAL DOCUMENTS.

16 Q. YEAH, LET'S DO IT. LOOK AT ROMAN THREE C, PLEASE,
17 VERY POOR COPY, UNFORTUNATELY.

18 A. ROMAN THREE C?

19 Q. AT THE BOTTOM OF WHAT IS LABELED PAGE 69 OF WHATEVER
20 EXTRACT THIS CAME FROM. SEE AT THE VERY BOTTOM OF THE PAGE,
21 IT IS ALMOST WHITED OUT.

22 A. I DO.

23 Q. I ASSUME YOU ARE QUITE FAMILIAR WITH THESE GUIDELINES
24 SINCE YOU SPOKE AT LENGTH ABOUT THEM FRIDAY?

25 A. YEAH.

1 Q. AM I RIGHT THAT IN THREE C THERE IS A PROHIBITION
2 AGAINST REPEATED USE WITH RESPECT TO THE SAME ITEM BY THE SAME
3 TEACHER FROM TERM TO TERM?

4 A. "COPYING SHALL NOT BE REPEATED WITH RESPECT TO THE SAME
5 ITEM BY THE SAME TEACHER FROM TERM TO TERM?"

6 Q. YES.

7 A. I SEE THAT.

8 Q. LOOK AT THE NEXT TAB, ALA MODEL POLICY, TAB FIVE,
9 ROMAN THREE D. IF YOU CAN READ THAT AND VERIFY THAT MY
10 INTERPRETATION IS ALSO CORRECT?

11 A. WHICH PAGE?

12 Q. I AM LOOKING, GIVE ME A SECOND. I BELIEVE IT IS AT
13 PAGE 6 OF THOSE AT THE BOTTOM.

14 A. "SEE USE OF PHOTOCOPIED MATERIAL REQUIRING PERMISSION."
15 I AM THERE.

16 Q. AND IT SAYS, "ONE REPETITIVE COPYING CLASSROOM OR
17 RESERVE USE OF PHOTOCOPIED MATERIALS IN MULTIPLE COURSES OR
18 SUCCESSIVE YEARS WILL NORMALLY REQUIRE ADVANCE PERMISSION FROM
19 THE OWNER OF THE COPYRIGHT," DO YOU SEE THAT?

20 A. YES.

21 Q. LOOK AT FINALLY APPENDIX DX, WHICH IS SO-CALLED CONFU
22 GUIDELINES FROM 1996.

23 A. YES.

24 Q. IF YOU WOULD TURN THERE, PLEASE, TO PAGE FIVE --
25 SORRY, BOTTOM OF PAGE 3, D-1, WHICH READS, "PERMISSION FROM

1 COPYRIGHT HOLDER IS REQUIRED IF THE ITEM IS TO BE REUSED IN A
2 SUBSEQUENT ACADEMIC TERM FOR THE SAME COURSE OFFERED BY THE
3 SAME INSTRUCTOR OR IF THE ITEM IS A STANDARD ASSIGNED OR
4 OPTIONAL READING FOR ANY INDIVIDUAL COURSE TAUGHT IN MULTIPLE
5 SECTIONS BY MANY INSTRUCTORS," CORRECT?

6 A. I SEE THAT LANGUAGE.

7 Q. OKAY. THANK YOU.

8 NOW, A NUMBER OF THE CITED POLICIES THAT YOUR WIFE
9 SELECTED ALSO PRESCRIBED THAT THE UNPERMISSIONED ERES USES
10 CAN CONSTITUTE ONLY A SMALL PROPORTION OF TOTAL ASSIGNED
11 COURSE READINGS; IS THAT CORRECT?

12 A. SOME OF THEM INCLUDE THAT, YES.

13 Q. AND, IN FACT, TWO OF THE THREE MODEL GUIDELINES WE JUST
14 LOOKED AT INCORPORATE THAT LIMITATION AS WELL; ISN'T THAT
15 CORRECT? AND BY THAT I MEAN SPECIFICALLY THE ALA AND CONFU
16 POLICIES?

17 A. I BELIEVE THAT IS CORRECT.

18 Q. FOR THE RECORD, I WILL REPRESENT THAT THE ALA POLICY
19 CONTAINS THAT LIMITATION IN ROMAN THREE C AND CONFU POLICY AT
20 PARAGRAPH A4. I INVITE TO YOU CONFIRM THAT IF YOU LIKE.

21 A. ALL RIGHT.

22 Q. LOOK AT ALA FIRST.

23 A. I AM AT TAB FIVE.

24 Q. THANK YOU.

25 CAN YOU POINT ME EXACTLY TO WHERE THE LANGUAGE IS?

1 A. THE MOMENT I GET THERE MYSELF I WILL BE HAPPY TO.

2 MR. RICH: APOLOGIZE, YOUR HONOR.

3 Q. YES, GO OVER TO PAGE 6 AT THE TOP, THE INDENTED NUMBER
4 ONE IN THE FIRST FULL PARAGRAPH WHERE IT SAYS, "THE AMOUNT OF
5 MATERIALS SHOULD BE REASONABLE IN RELATION TO THE TOTAL AMOUNT
6 OF MATERIAL ASSIGNED FOR ONE TERM OF A COURSE AND TAKING INTO
7 ACCOUNT THE NATURE OF THE COURSE, ITS SUBJECT MATTER AND
8 LEVEL"?

9 A. I SEE THAT.

10 Q. THAT IS ONE ELEMENT?

11 A. I SEE THAT LANGUAGE.

12 Q. THEN TURN OVER TO THE CONFU GUIDELINES AND LOOK AT A4,
13 WHICH IS AT PAGE 2 OF THOSE, PLEASE, STATES, "THE TOTAL
14 AMOUNT OF MATERIALS INCLUDED IN ELECTRONIC RESERVE SYSTEMS FOR
15 A SPECIFIC COURSE AS A MATTER OF FAIR USE SHOULD BE A SMALL
16 PROPORTION OF THE TOTAL ASSIGNED READING FOR A PARTICULAR
17 COURSE," CORRECT?

18 A. I SEE THAT LANGUAGE.

19 Q. OKAY.

20 THE COURT: COULD YOU SPELL CONFU?

21 MR. RICH: C-O-N-F-U, WHICH IS A CONTRACTION FOR
22 WHAT, CONFERENCE ON FAIR USE?

23 THE WITNESS: CONFERENCE ON FAIR USE, YOUR HONOR.

24 THE COURT: WHAT YEAR DID YOU SAY THAT WAS, '96?

25 MR. RICH: 1996, YOUR HONOR.

1 BY MR. RICH:

2 Q. JUST FOR THE RECORD, I WILL REPRESENT TO YOU,
3 DR. CREWS, THAT AMONGST YOUR NONSCIENTIFIC SAMPLE, THE SCHOOLS
4 I FOUND WHICH INCORPORATED A SIMILAR CONCEPT, NAMELY SMALL
5 PERCENTAGE OF ALL ASSIGNED READINGS ARE SALISBURY, SAN DIEGO
6 STATE, ASHLAND, AND THE UNIVERSITY OF OKLAHOMA. I WILL
7 REPRESENT THOSE ARE THE FOUR I FOUND ON MY PERUSAL.

8 I WOULD TAKE IT YOU WOULD AGREE OTHER SCHOOLS STATE THIS
9 LIMITATION IN A SLIGHTLY DIFFERENT WAY BY EXPRESSLY ENJOINING,
10 PLACING MULTIPLE SHORT READINGS WHICH TOGETHER FORM WHAT
11 SEVERAL TERM COURSEPACKS, ONE OR TWO WORDS, FROM BEING
12 PLACED ON ERES, CORRECT?

13 A. I WILL TAKE YOUR WORD FOR THAT.

14 Q. LET'S TAKE A FEW EXAMPLES IF WE COULD. YOU CITED AN
15 ASPECT OF THE BROWN UNIVERSITY POLICY ON YOUR DIRECT?

16 A. YES.

17 Q. I WOULD LIKE TO TAKE A LOOK AT ANOTHER PART OF BROWN'S
18 POLICY, IF WE COULD. THIS WILL APPEAR IN YOUR COPENDIUM,
19 TOP RIGHT OF PAGE 6 OF THAT COPENDIUM. SEE A SECTION LABELED
20 COURSEPACKS? IT IS ALSO UP ON THE SCREEN. I WANT YOU TO
21 VERIFY THIS IS FROM THE BROWN POLICY.

22 A. YES, IT IS.

23 Q. YOU WILL SEE THE COURSEPACKS STATEMENT SAYS:

24 "THE LIBRARY ENCOURAGES FACULTY TO
25 DEVELOP COURSEPACKS FOR MULTIPLE

1 SHORT READINGS INSTEAD OF PLACING
2 INDIVIDUAL PAPER COPIES ON COURSE
3 RESERVES. THE UNIVERSITY BOOKSTORE
4 PRODUCES AND SELLS SUCH PACKS. THE
5 LIBRARY DOES NOT PURCHASE
6 COURSEPACKS NOR WILL IT CREATE
7 ELECTRONIC RESERVES FOR COURSEPACKS.
8 FACULTY MAY PLACE ONE COPY OF A
9 COURSEPACK ON RESERVE AS A, QUOTE,
10 PERSONAL COPY, UNQUOTE, PROVIDED
11 THAT IT COMPLIES WITH COPYRIGHT."

12 CORRECT?

13 A. I DO SEE THAT.

14 Q. IF YOU FLIP OVER TO PAGE 48 OF THESE MATERIALS, WHICH
15 IS THE SAN DIEGO STATE POLICY YOU HAVE EXCERPTED FROM. I
16 DIRECT YOUR ATTENTION TO POLICY NINE.

17 A. (WITNESS COMPLIES.) I AM THERE.

18 Q. LITTLE BIT HARDER.

19 "THE ELECTRONIC COURSE RESERVE IS
20 NOT A SUBSTITUTE FOR COURSEPACKS.
21 THE TOTAL AMOUNT OF MATERIAL
22 INCLUDED ON ELECTRONIC COURSE
23 RESERVES SHOULD BE A SMALL
24 PERCENTAGE OF THE TOTAL ASSIGNED
25 READING MATERIAL FOR A PARTICULAR

1 COURSE. LARGER AMOUNTS OF MATERIAL
2 MAY BE SUITABLE FOR INCLUSION IN
3 COURSEPACKS, FOR WHICH ROYALTIES
4 MIGHT BE PAID TO COPYRIGHT HOLDERS."

5 CORRECT?

6 A. IT DOES SAY THAT.

7 Q. LET'S LOOK AT ASHLAND, A FEW PAGES LATER, AT PAGE 52 OF
8 YOUR COPENDIUM. I WANT TO DIRECT YOUR ATTENTION THREE
9 QUARTERS OF THE WAY DOWN, THE PARAGRAPH BEGINNING "ELECTRONIC
10 RESERVES," DO YOU SEE THAT? THREE PARAGRAPHS FROM THE
11 BOTTOM?

12 A. I SEE IT NOW, YES.

13 Q.

14 "ELECTRONIC RESERVES ARE NOT
15 INTENDED TO REPLACE A COURSEPACK OR
16 TRADITIONAL TEXTBOOK."

17 CORRECT?

18 A. CORRECT.

19 Q. THEN IT GOES ON TO QUOTE THE VERY SAME LANGUAGE FROM
20 THE CONFU GUIDELINES THAT WE JUST CITED A FEW MINUTES AGO,
21 CORRECT?

22 A. THAT IS CORRECT.

23 Q. AND CORNELL IS ANOTHER SCHOOL THAT OPERATES ON THIS
24 PREMISE; IS IT NOT?

25 A. I BELIEVE IT DOES.

1 Q. LET'S TAKE A LOOK AT PAGE 96 OF YOUR COPENDIUM.
2 LITTLE BIT PAST MIDWAY DOWN THERE IS A STATEMENT ABOUT
3 COURSEPACKS. IT SAYS:

4 "COURSE PACKETS AND EXCERPTS FROM
5 COURSE PACKETS CANNOT BE MADE
6 AVAILABLE ELECTRONICALLY WITHOUT
7 PERMISSION FROM THE COPYRIGHT
8 OWNER."

9 DO YOU SEE THAT?

10 A. I SEE THAT.

11 Q. THEN IF YOU FLIP TWO MORE PAGES IN TO THE COPENDIUM,
12 SECOND BULLET READS:

13 "THE COPYRIGHT PRINCIPLES THAT APPLY
14 TO INSTRUCTIONAL USE OF COPYRIGHTED
15 WORKS IN ELECTRONIC ENVIRONMENTS ARE
16 THE SAME AS THOSE THAT APPLY TO SUCH
17 USE IN PAPER ENVIRONMENTS. ANY USE
18 OF COPYRIGHTED ELECTRONIC COURSE
19 CONTENT THAT WOULD REQUIRE
20 PERMISSION FROM THE COPYRIGHT OWNER
21 IF THE MATERIALS WERE PART OF A
22 PRINTED COURSEPACK LIKewise REQUIRES
23 THE COPYRIGHT OWNER'S PERMISSION
24 WHEN MADE AVAILABLE IN ELECTRONIC
25 FORMATS."

1 DO YOU SEE THAT?

2 A. I DO SEE THAT.

3 Q. THAT IS PART OF THE CORNELL POLICY, RIGHT?

4 A. IT IS.

5 Q. INCIDENTALLY, SPEAKING OF PAPER COURSEPACKS, YOU HAVE
6 NO EVIDENCE THAT THE PAYMENTS WHICH GSU HAS MADE FOR
7 PERMISSIONS ASSOCIATED WITH THOSE HAS IN ANY WAY DIMINISHED
8 THE QUALITY OF GSU'S ACADEMIC OFFERINGS, HAVE YOU?

9 A. I HAVE NO SIGNIFICANT EVIDENCE OF THAT.

10 Q. FINALLY, I WANT TO JUST SPEND A COUPLE OF MINUTES ON
11 THE 1976 CLASSROOM GUIDELINES WHICH YOU TESTIFIED ABOUT ON
12 DIRECT. YOU OFFERED AN OPINION, DR. CREWS, THAT THE USE OF
13 THOSE IN CONNECTION WITH ERESERVES AT ANY COLLEGE OR
14 UNIVERSITY WOULD, I THINK IN YOUR WORDS, BE BAD FOR EDUCATION
15 AND TOTALLY INAPPROPRIATE, RIGHT?

16 A. I BELIEVE I SAID THAT OR SOMETHING LIKE IT.

17 Q. NOW, NOTWITHSTANDING THESE ARE THE ONLY SET OF
18 GUIDELINES AMONG THOSE YOU CITE IN YOUR EXPERT REPORT AND
19 WHICH APPEAR ON THE COLUMBIA WEBSITE THAT REFLECT, AT LEAST AT
20 THE TIME THEY WERE WRITTEN, A CONSENSUS OF THE RIGHTS HOLDERS
21 AND USER COMMUNITIES, CORRECT?

22 A. NO. NO. I THINK I WOULD QUESTION THAT STATEMENT IN
23 A FEW WAYS.

24 Q. WHO DO YOU UNDERSTAND WERE THE SIGNATORIES TO THE 1976
25 GUIDELINES?

1 MR. SCHAEZEL: YOUR HONOR, OBJECTION. I DON'T
2 BELIEVE THE WITNESS HAD AN OPPORTUNITY TO FINISH HIS ANSWER.

3 THE COURT: DID YOU FINISH YOUR ANSWER?

4 THE WITNESS: NO.

5 THE COURT: GO AHEAD AND FINISH YOUR ANSWER.

6 THE WITNESS: THANK YOU. THANK YOU, YOUR HONOR.

7 AT THE TIME IN 1976 WHEN THEY WERE OFFERED, THERE WERE
8 SOME ORGANIZATIONS THAT IN RESPONSE TO THEM LODGED THEIR
9 OBJECTIONS AND THOSE OBJECTIONS WERE NOTED IN THE HOUSE
10 REPORT. SECOND, SO TO THE EXTENT THAT THERE WAS SOME
11 AGREEMENT ABOUT THE 1976 GUIDELINES, WITH SOME OBJECTIONS,
12 ONE COULD ALSO SAY THAT THERE WAS SOME AGREEMENT WITH SOME
13 OBJECTIONS TO THE 1996 CONFU GUIDELINES AS WELL.

14 BY MR. RICH:

15 Q. IF YOU WOULD TURN TO THE TAB IN YOUR BIG BINDER WHICH
16 HAS THOSE GUIDELINES SET FORTH, ONCE AGAIN THAT IS TAB FOUR,
17 I BELIEVE.

18 A. (WITNESS COMPLIES.) YES.

19 Q. LOOK AT THE LAST PAGE.

20 A. (WITNESS COMPLIES.) YES.

21 Q. DO YOU SEE THE SIGNATORIES LISTED THERE?

22 A. YES.

23 Q. WHICH I WILL READ IN THE RECORD.

24 "AD HOC COMMITTEE ON COPYRIGHT LAW

25 REVISION BY SHELLEY; AUTHOR

1 PUBLISHER GROUP; AUTHOR LEAGUES OF
2 AMERICA; AND ASSOCIATION OF AMERICAN
3 PUBLISHERS, DO YOU SEE THAT?

4 A. YES.

5 Q. WHO CONSTITUTED THE AD HOC COMMITTEE ON COPYRIGHT
6 PROVISION?

7 A. AS I RECALL FROM MY STUDY OF THE DEVELOPMENTS AT THAT
8 TIME, THAT WAS AS IT SAYS AN AD HOC COMMITTEE, IT WAS A
9 CONSORTIUM OF DIFFERENT UNIVERSITIES OR HIGHER EDUCATION
10 RELATED ORGANIZATIONS.

11 Q. VERY SIGNIFICANT CONSORTIUM, WAS IT NOT?

12 A. I BELIEVE IT WAS.

13 Q. IF I MAY, YOUR HONOR, I WOULD LIKE TO APPROACH THE
14 WITNESS WITH THE DOCUMENT. WE HAVE MARKED THIS AS
15 PLAINTIFFS' TRIAL EXHIBIT 1014. WHAT YOU HAVE IN FRONT OF
16 YOU IS MARKED AS PLAINTIFFS' EXHIBIT 1014, AN EXTRACT FROM THE
17 COMMITTEE OF -- JUDICIARY COMMITTEE HEARING RECORD IN 1975.
18 IF YOU LOOK AT THE SECOND PAGE OF THIS, I HAVE JUMPED TO WHAT
19 IS PAGE 268 OF THAT SO AS NOT TO BURDEN THE RECORD OF THAT
20 WITH HUNDREDS OF PAGES OF EXTRANEIOUS MATTER. YOU SEE LISTED
21 THERE THE TESTIMONY OF SHELDON E. STEINBACH?

22 A. YES.

23 Q. HE INDICATES CHAIRMAN OF AD HOC COMMITTEE ON COPYRIGHT
24 LAW REVISION DO YOU SEE THAT?

25 A. YES.

1 Q. IF YOU FLIP THE PAGE THERE IS LISTED, FLIP TO THE TOP,
2 PLEASE, SCROLL DOWN SLOWLY, BLOW THAT UP A BIT, THERE IS
3 LISTED A GROUP OF SIGNATORIES?

4 A. I CAN'T VOUCH FOR WHETHER IT IS CORRECT, BUT I DO SEE
5 THIS LIST IT PURPORTS TO BE CORRECT.

6 Q. NO REASON THE HEARING RECORD WOULD DELIBERATELY BE
7 INCORRECT?

8 A. NO.

9 Q. IT INCLUDES AMONG OTHER SOURCES THE AMERICAN
10 ASSOCIATION OF LAW LIBRARIES?

11 A. YES.

12 Q. AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS?

13 A. YES.

14 Q. AMERICAN ASSOCIATION OF SCHOOL LIBRARIANS?

15 A. YES.

16 Q. AMERICAN COUNSEL ON EDUCATION?

17 A. YES.

18 Q. NATIONAL ASSOCIATION OF -- NATIONAL COMMISSION FOR
19 LIBRARIES AND INFORMATION SCIENCE?

20 A. YES, SIR.

21 Q. NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES?

22 A. I BELIEVE SO.

23 Q. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS?

24 A. YES.

25 Q. ASSOCIATION OF AMERICAN LAW SCHOOLS?

1 A. YES.

2 Q. ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT?

3 A. SEEMS TO, YES.

4 Q. AMONG NUMEROUS OTHERS?

5 A. YES.

6 Q. ANY REASON TO BELIEVE THAT IN SUBSCRIBING TO THOSE
7 GUIDELINES, THAT DIVERSE GROUP OF EDUCATION FACING
8 ORGANIZATIONS BELIEVED THEY WERE MAKING BAD POLICY?

9 A. YES.

10 Q. THEY WERE ACTING IN BAD FAITH?

11 A. NO, I DIDN'T SAY THAT.

12 Q. THEY BELIEVED THEY WERE MAKING BAD POLICY?

13 A. I BELIEVE AND I THINK IT IS THE SAME THING, I BELIEVE
14 THAT TWO OF THOSE ORGANIZATIONS, IF MY MEMORY SERVES ME
15 CORRECTLY, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
16 AND THE ASSOCIATION OF AMERICAN LAW SCHOOLS WENT ON THE RECORD
17 IN THAT SAME REPORT OBJECTING TO THE PROMULGATION OF THESE
18 PARTICULAR CLASSROOM GUIDELINES. AND IF I AM WORKING FROM
19 MEMORY, IF I INCORRECTLY REMEMBERED WHICH TWO ORGANIZATIONS
20 YOU MAY CORRECT ME.

21 Q. NOW YOU ACKNOWLEDGE THAT A NUMBER OF UNIVERSITIES IN
22 FACT INCORPORATE THE CLASSROOM GUIDELINES INTO THEIR COPYRIGHT
23 FAIR USE POLICIES, HAVEN'T YOU?

24 A. I HAVE SEEN THAT MANY TIMES.

25 Q. THESE INCLUDE INSTITUTIONS LIKE NEW YORK UNIVERSITY?

1 A. YES.

2 Q. CLEMSON?

3 A. I DON'T KNOW.

4 Q. UNIVERSITY OF TEXAS?

5 A. I COULDN'T TELL YOU.

6 Q. WASHINGTON AND LEE?

7 A. I COULDN'T TELL YOU.

8 Q. RANDOLPH MACON?

9 A. I COULDN'T TELL YOU.

10 Q. NONE OF THOSE I SAW IN YOUR WIFE'S SELECTED MATERIALS,
11 ERES USES, ANY REASON?

12 A. NO.

13 Q. I TAKE IT YOU ARE AWARE GSU ITSELF HAS REPUBLISHED AND
14 REFERENCED THESE GUIDELINES FAVORABLY IN ITS FACULTY HANDBOOK
15 AS A USE OF RESOURCE TO ASSIST FACULTY IN UNDERSTANDING FAIR
16 USE?

17 A. THE SUBJECT, IF THE SUBJECT IS ERESERVES, THAT IS A
18 VERY DIFFERENT CONTEXT.

19 Q. ARE YOU AWARE OF ITS EXISTENCE OR FIRST YOU EVER HEARD
20 OF IT?

21 A. FIRST I HAVE HEARD OF IT.

22 Q. COUNSEL DIDN'T INFORM YOU OF THAT?

23 A. NO.

24 MR. RICH: I HAVE NO FURTHER QUESTIONS.

25 THE COURT: ANYTHING FURTHER OF THIS WITNESS?

1 MR. SCHAETZEL: YES, YOUR HONOR. IF I COULD HAVE
2 FIVE OR SO MINUTES TO PREPARE THAT WOULD BE HELPFUL.

3 THE COURT: LET'S TAKE A FIFTEEN-MINUTE BREAK.
4 (WHEREUPON, A SHORT RECESS WAS HELD.)

5 MR. RICH: BEFORE MR. SCHAETZEL BEGINS, I THINK
6 WITHOUT OBJECTION FROM THE DEFENDANTS I WANT TO OFFER TRIAL
7 EXHIBIT 1014.

8 MR. SCHAETZEL: IT IS LEGISLATIVE HISTORY, BUT WE
9 HAVE NO OBJECTION.

10 THE COURT: IT IS ADMITTED. IS THAT FROM THE 1976
11 SESSION? WHICH LEGISLATIVE HISTORY IS IT? I AM JUST CURIOUS.

12 MR. RICH: IT WAS A 1975 HEARING OF THE SUBCOMMITTEE
13 ON COURTS CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF
14 THE COMMITTEE OF JUDICIARY OF HOUSE OF REPRESENTATIVES, HR
15 2223 COPYRIGHT LAW REVISION.

16 THE COURT: YOU MAY PROCEED.

17 MR. SCHAETZEL: THANK YOU.

18 REDIRECT EXAM

19 BY MR. SCHAETZEL:

20 Q. DR. CREWS, YOU WERE ASKED SEVERAL QUESTIONS ABOUT THE,
21 I BELIEVE YOU REFERRED TO THEM AS VARIABLES, OR THE ITEMS THAT
22 WERE UNDERNEATH THE FOUR FACTORS IN A CHECKLIST, DO YOU
23 RECALL THAT?

24 A. YES, I DO.

25 Q. WITH REFERENCE TO THE VARIABLES THAT ARE IN THE

1 UNIVERSITY SYSTEM OF GEORGIA CHECKLIST, DID YOU HAVE AN
2 OPPORTUNITY TO DETERMINE WHETHER SUPPORT WAS AVAILABLE FOR
3 EACH OF THOSE VARIABLES?

4 A. I CERTAINLY INCLUDED IN MY FIRST REPORT A BREAKOUT OF
5 THOSE VARIABLES AND WITH SUPPORT I COULD IDENTIFY ASSOCIATED
6 WITH EACH OF THOSE VARIABLES, YES.

7 Q. DO YOU RECALL ANY VARIABLE FOR WHICH YOU COULD NOT FIND
8 SUPPORT?

9 A. SUPPORT COMES IN DIFFERENT WAYS, BUT IF I CAN PAUSE
10 FOR JUST A MOMENT AND TAKE A LOOK. A COUPLE OF WHICH I HAD A
11 HARD TIME FINDING SOME KIND OF MEANINGFUL SUPPORT,
12 PARTICULARLY ISSUES, THERE IS LANGUAGE POINTED AT SUPPLEMENTAL
13 REPEATING AND ABOUT REPEAT USE, BUT IT IS NOT USE THAT I COULD
14 TAKE TO A PARTICULAR AUTHORITATIVE SOURCE. CERTAINLY THE
15 CONSUMABLE USE AND THE WORKBOOK USE.

16 Q. LET'S FIRST FOCUS ON ONE THAT MR. RICH ASKED YOU ABOUT
17 IN PARTICULAR. TURN TO PAGE 62 OF YOUR REPORT.

18 A. NUMBERING AT THE TOP OF THAT PAGE?

19 Q. IT WOULD BE 63 AT THE TOP OF THE PAGE, 62 AT THE
20 BOTTOM.

21 A. (WITNESS COMPLIES.) ALL RIGHT.

22 Q. YOU WERE ASKED A SERIES OF QUESTIONS ABOUT FACTOR TWO
23 AND IN PARTICULAR FACTUAL OR NONFICTION AS OPPOSED TO HIGHLY
24 CREATIVE WORK.

25 A. THAT'S CORRECT.

1 Q. YOU FIND THAT MENTION OF PAGE 62 PROPER?

2 MR. RICH: OBJECTION. REPORT IS NOT IN EVIDENCE,
3 JUDGE.

4 THE COURT: THE REPORT IS NOT IN EVIDENCE?

5 MR. SCHAEZEL: THAT'S TRUE.

6 BY MR. SCHAEZEL:

7 Q. DO YOU RECALL?

8 THE COURT: IN OTHER WORDS, I AM SUSTAINING THE
9 OBJECTION.

10 MR. SCHAEZEL: I UNDERSTAND, YOUR HONOR.

11 BY MR. SCHAEZEL:

12 Q. DO YOU RECALL FROM MEMORY EXACTLY THE SUPPORT THAT YOU
13 FOUND FOR THOSE ITEMS?

14 A. ABOUT FACTUAL, NONFICTION AS AN ITEM BEING ON THE LIST
15 UNDER NATURE OF THE WORK, IS THAT WHAT YOU ARE REFERENCING?

16 Q. SUPPORT YOU FOUND, FIRST OF ALL, FOR FACTUAL OR
17 NONFICTION WORK IN TERMS OF WEIGHING IN FAVOR OF FAIR USE?

18 A. YES, I DO, AS A MATTER OF FACT.

19 Q. WHAT DID YOU FIND?

20 A. THE KINKO'S CASE EXPLORED THAT ISSUE AND RESOLVED THAT
21 BECAUSE THESE WERE NONFICTION FACT-BASED WORKS THAT WERE BEING
22 REPRODUCED IN THE KINKO'S CASE, THAT WAS AN IMPORTANT PART OF
23 THE COURT'S ANALYSIS ON THAT SECOND FACTOR. AND THE SAME
24 THING WITH THE TEXACO CASE WHERE THE COURT EXAMINED THE
25 ARTICLE -- JOURNAL ARTICLE IN QUESTION AND CONCLUDED THAT IT

1 WAS A NONFICTION FACT-BASED WORK AND THAT WOULD BE A FACT
2 IMPORTANT IN ITS CONSIDERATION OF THAT FACTOR.

3 Q. DO YOU RECALL WHAT YOU FOUND IN TERMS OF SUPPORT IN
4 TERMS OF FAIR USE IN TERMS OF HIGHLY CREATIVE WORK?

5 A. YES.

6 MR. RICH: OBJECTION. OBJECT TO THIS ENTIRE LINE OF
7 QUESTIONING ON THE BASIS THIS IS HIM TESTIFYING AS A PURPORTED
8 COPYRIGHT LAW EXPERT, YOUR HONOR.

9 THE COURT: OVERRULED.

10 THE WITNESS: THE ISSUE AS CERTAINLY HAS BEEN
11 MENTIONED IN MANY CASES. A DELINEATION BETWEEN FACT-BASED
12 AND CREATIVE WORKS AND WORKING OFF THE TOP OF MY HEAD, I AM
13 TRYING NOT TO READ FROM THE REPORT, I FREQUENTLY REFER TO
14 CASES SUCH AS THE BILL GRAHAM ARCHIVES CASE WHICH INVOLVES
15 THE USE OF ARTISTIC POSTERS INCLUDING THOSE IN A BOOK OF
16 HISTORICAL INTERESTS. AND WHILE THEY ARE CREATIVE, THERE IS
17 LANGUAGE IN THE COURT THAT THEN -- THAT THAT IS A FACT TO BE
18 CONSIDERED IN LEANING THAT FACTOR AWAY FROM FAIR USE, NOT THE
19 BE ALL, END ALL OF THE ANALYSIS, BUT IT IS CERTAINLY A PIECE
20 OF THE PUZZLE.

21 BY MR. SCHAEZEL:

22 Q. IN YOUR EXPERIENCE, CAN CREATIVE WORKS SOMETIMES BE THE
23 SUBJECT OF FAIR USE?

24 A. OH, YES.

25 Q. FOR EXAMPLE?

1 A. OH, I WOULD JUST START WITH THAT BILL GRAHAM ARCHIVES
2 CASE WHERE IT DID INVOLVE ARTISTIC POSTERS, HIGHLY CREATIVE
3 POSTERS, THE COURT ACKNOWLEDGED THAT, TO MY MEMORY OF THE
4 CASE. AND YET AT THE SAME TIME THE COURT SAID, YES, THESE
5 ARE HIGHLY CREATIVE, BUT THEY ARE AN IMPORTANT PART OF TELLING
6 THIS HISTORICAL STORY. SO, THEY ARE HIGHLY CREATIVE FROM
7 ONE PERSPECTIVE, BUT PART OF THE HISTORICAL RECORD THAT WAS
8 THE SUBJECT OF THE BOOK FROM ANOTHER PERSPECTIVE.

9 Q. I WOULD LIKE TO SHOW YOU FROM JOINT TRIAL EXHIBIT 4 AND
10 IN PARTICULAR THE FAIR USE CHECKLIST FOCUSING ON FACTOR TWO ON
11 THE TWO ITEMS THAT I HAVE HIGHLIGHTED HERE.

12 A. AND ARE WE READING HERE THE GEORGIA STATE CHECKLIST?

13 Q. YES, THIS IS THE GEORGIA STATE UNIVERSITY SYSTEM OF
14 GEORGIA CHECKLIST. MY QUESTION, DR. CREWS, IS, DID YOU FIND
15 ANYTHING THAT INDICATED THAT THE DISTINCTION BETWEEN A FACTUAL
16 OR NONFICTION WORK WEARING IN FAVOR OF USE WAS IMPROPER AS
17 OPPOSED TO HIGHLY CREATIVE WORKS, ART, MUSIC, NOVELS,
18 FILMS, PLAYS, POETRY, FICTION, AS A FACTOR OR VARIABLE
19 THAT WEIGHED AGAINST FAIR USE?

20 MR. RICH: OBJECTION, LEADING.

21 THE COURT: SUSTAINED.

22 BY MR. SCHAETZEL:

23 Q. YOU UNDERSTAND THE DISTINCTION?

24 THE COURT: LET ME ASK THE WITNESS A QUESTION. TO
25 ME, LOOKING AT FACTOR TWO AND WHAT IS HIGHLIGHTED UP ON THE

1 SCREEN, IT SEEMS BACKWARDS. IT WOULD SEEM LIKE A HIGHLY
2 CREATIVE WORK WOULD BE MORE APT TO BE ENTITLED TO FAIR USE,
3 COULD YOU COMMENT ON THAT?

4 THE WITNESS: YEAH, IT IS AN INTERESTING
5 PERSPECTIVE, YOUR HONOR. BUT, IN FACT, THE WAY OTHER COURTS
6 WORKING WITH FAIR USE HAVE ADDRESSED THIS.

7 THE COURT: LET ME JUST ASK YOU, YOU DID MENTION
8 SOME CASES.

9 THE WITNESS: I DID.

10 THE COURT: WHAT WERE THE CASES WHERE THE COURT OR A
11 COURT, I DON'T THINK IT WAS SUPREME COURT, I COULD BE WRONG,
12 WHAT WERE THE CASES WHERE THE COURT -- A COURT SAID A HIGHLY
13 CREATIVE WORK IS LESS APT TO BE ENTITLED TO FAIR USE CREATION?

14 THE WITNESS: THERE IS, WHILE THE COURT RULED
15 ULTIMATELY THE OTHER WAY BECAUSE OF UNUSUAL CIRCUMSTANCES,
16 THAT LANGUAGE DOES APPEAR IN THAT BILL GRAHAM ARCHIVES CASE.
17 I BELIEVE IT APPEARS, YOU CAN FIND LANGUAGE ABOUT THAT. IN
18 FACT, THE SUPREME COURT DECISION ABOUT CAMPBELL, I BELIEVE IT
19 IS THERE. BUT ON THAT NATURE FACTOR, UNDER THE CAMPBELL
20 DECISION, THE COURT WAS VERY BRIEF IN ITS ANALYSIS,
21 ULTIMATELY RULING THAT THIS IS A NEUTRAL FACTOR GIVEN THAT IT
22 WAS A QUESTION OF PARODY, WHICH IS A FORM OF CRITICISM AND
23 COMMENT. THE COURT SAID YOU CAN HAVE CRITICISM AND COMMENT IN
24 ANY KIND OF WORKS, SO WE DON'T SEE A MAJOR DIFFERENCE BETWEEN
25 -- AMONG TYPES OF WORKS. WE COULD GO TO SOME OF THE MUSIC

1 CASES AND PROBABLY FIND EXAMPLES OF THIS LANGUAGE.

2 THE COURT: SO IN THE CAMPBELL CASE WAS THE ROY
3 ACUFF DEAL?

4 THE WITNESS: YES.

5 THE COURT: IT WAS A PARODY TYPE SITUATION?

6 THE WITNESS: YES.

7 THE COURT: AND SO I THINK WHAT YOU ARE SAYING IS, I
8 REALIZE THIS IS SOMETHING I AM GOING TO HAVE TO RESOLVE, I AM
9 JUST GOING ON MY RECOLLECTION OF THE CASE AT THIS POINT, BUT I
10 AM INTERESTED IN YOUR OPINION. SO THE SUPREME COURT
11 ULTIMATELY SAID THIS IS A PARODY, SO IT IS PROTECTED BY FAIR
12 USE. BUT YOU ARE SAYING THAT THE COURT ALSO WENT ON TO SAY OR
13 DID SAY THAT A HIGHLY CREATIVE WORK IS LESS APT TO BE ENTITLED
14 TO FAIR USE PROTECTION?

15 THE WITNESS: I AM NOT GOING TO TESTIFY HERE OFF THE
16 TOP OF MY HEAD THE LANGUAGE EXACTLY LIKE THAT IS IN THAT CASE,
17 BUT I BELIEVE IT IS THERE. AND IF IT IS NOT THERE, WE CAN
18 FIND A DOZEN OTHER CASES THAT DO AFFIRM THAT POINT. IF YOU
19 WOULD -- SHOULD I SAY MORE ABOUT THE RATIONALE?

20 THE COURT: YEAH, GO AHEAD. GO AHEAD.

21 THE WITNESS: THE GENERAL RATIONALE THAT COURTS HAVE
22 OFFERED IS THAT THE MORE FACT-BASED THE WORK IS, THE MORE OPEN
23 THE COURT WILL BE ABOUT THE FAIR USE OF IT.

24 THE COURT: THAT SEEMS ODD TO ME IN LIGHT OF THE
25 FEIST DECISION. I MEAN, THAT IS A FAR EXTREME WHERE THERE

1 WAS LITERAL A COPYING OF TELEPHONE BOOKS, I THINK THAT IS
2 FEIST.

3 MR. SCHAEZEL: YES, MA'AM.

4 THE WITNESS: FEIST IS NOT A FAIR USE DECISION, I'M
5 SORRY.

6 THE COURT: WELL, YOU ARE RIGHT ABOUT THAT. IT
7 JUST SEEMS TO ME, YOU KNOW, THAT FAIR USE, THAT COURT WOULD
8 WANT TO FOSTER CREATIVITY AND I AM NOT SAYING TO A FACTUAL OR
9 NONFICTION WORK COULD NOT BE, COULD NOT HAVE ITS OWN ELEMENTS
10 OF CREATIVITY, IF YOU DO A LET'S SAY A PIECE OF SCHOLARLY
11 RESEARCH, THERE ARE QUALITATIVE JUDGMENTS THAT GO INTO DOING
12 THAT RESEARCH WHICH ONE MIGHT SAY ARE CREATIVE. BUT I JUST,
13 THE WAY YOU HAVE IT ON THAT FAIR USE CHECKLIST JUST SEEMS
14 NONINTUITIVE TO ME, I GUESS.

15 THE WITNESS: VERY INTERESTING. I MEAN, YOU ARE
16 EXACTLY RIGHT, IF I MAY SAY SO, ABOUT PULLING IT IN THE
17 CONTEXT OF COPYRIGHT. AND HERE YOU COULD START WITH THE
18 FEIST DECISION, THAT THE PURPOSE OF COPYRIGHT IS TO PROMOTE,
19 FOR EXAMPLE, CREATIVITY.

20 THE COURT: SURE.

21 THE WITNESS: BUT THEN THE RATIONALE THAT COURTS USE
22 IS THAT ONCE THEN THAT CREATIVITY HAS BEEN PROMOTED, IF WE
23 TAKE, TAKE A SAFE EXAMPLE, PUBLIC DOMAIN WORK LIKE ROMEO
24 JULIET, IF I INVEST HEAVILY, COME UP WITH A HIGHLY CREATIVE
25 MOVIE VERSION OF IT, I HAD MY CREATIVITY, BUT SHAKESPEARE'S

1 WORDS, BUT MY CREATIVITY AS A FILMMAKER, THE COURT IS GOING TO
2 SAY THAT IS A HIGHLY CREATIVE WORK, WE ARE GOING TO GIVE YOU
3 GOOD, STRONG PROTECTION FOR THAT CREATIVITY, BUT NOT FOR THE
4 WORDS THEMSELVES.

5 SO THEN WE GO BACK TO FACTUAL AND THE RATIONALE THE COURTS
6 HAVE USED ABOUT NONFICTION WORKS IS IS THAT THE MORE
7 NONFICTION IT IS AS THE CASE WAS IN KINKO'S, THESE WERE BOOKS
8 ABOUT BUSINESS OR SOCIOLOGY, THAT THE COURT'S -- PART OF THE
9 COURT'S RATIONALE IS THAT THIS IS EXACTLY WHAT THE COPYRIGHT
10 LAW IS SUPPOSED TO ENCOURAGE TO COME INTO EXISTENCE, BUT ALSO
11 TOO AT THE SAME TIME ALLOW PEOPLE TO LEARN FROM AND BUILD
12 UPON, TO ENCOURAGE THE NEXT GENERATION OF CREATIVITY OR NEW
13 WORK. SOMETHING LIKE THAT IS PART OF THE RATIONALE THAT IS
14 OCCURRING IN THIS LINE OF CASES.

15 BY MR. SCHAEZEL:

16 Q. IN RESPONSE TO THE COURT'S QUESTION, WHY DO CREATIVE
17 WORKS ENTERTAIN A CREATIVE WORK? DO YOU KNOW WHY THIS WOULD
18 BE IN THE CHECKLIST?

19 A. WELL, THERE IS LANGUAGE IN THE CHECKLIST ITSELF AND MY
20 EXAMINATION OF IT IN THE REPORT AND THAT HIGHLY, I BELIEVE, I
21 HAVE SAID IN THE REPORT, IT REFLECTS, I BELIEVE, THAT GEORGIA
22 STATE POLICY THAT, GENERALLY SPEAKING, THE MORE CREATIVE WORK
23 THE MORE LIKELY IT IS OR THAT THE LESS FAIR USE WOULD APPLY TO
24 THAT WORK. AND THEREFORE THE MORE FACT-BASED, EVEN THE
25 KINKO'S DECISION AS I PROBABLY DO SUMMARIZE IN MY REPORT,

1 EVEN THE KINKO'S DECISION IN RULING THAT THAT PARTICULAR SET
2 OF ACTIVITIES WAS NOT WITHIN FAIR USE, DID SAY, AS I AM
3 RECALLING, THAT THIS NONFICTION-BASED MATERIAL IS THEREFORE
4 THE KIND OF MATERIAL, PUBLISHED WORK, FACT-BASED NONFICTION
5 THAT IS SUITABLE AND APPROPRIATE FOR FAIR USE. AND THOSE
6 BECOME FACTS THAT WEIGH USING THIS LANGUAGE THAT WEIGH IN
7 FAVOR OF FAIR USE.

8 Q. IN TERMS OF THE CHECKLIST, YOU ARE ASKED -- WELL,
9 LET'S -- FIRST OF ALL, LET'S LOOK AT THE COLUMBIA POLICY. DO
10 YOU RECOGNIZE THIS AS THE FACTOR TWO NATURE PORTION OF THE
11 COLUMBIA FAIR USE CHECKLIST ON TWO?

12 A. YES.

13 Q. DOES THE COLUMBIA CHECKLIST DRAW THE SAME DISTINCTION
14 BETWEEN FACTUAL OR NONFICTION AND HIGHLY CREATIVE AS GEORGIA
15 STATE?

16 A. YES. MAY BE A FEW WORD DIFFERENCE, BUT SUBSTANTIVELY
17 THE SAME.

18 Q. HOW DOES THE COLUMBIA POLICY CREATE THE PREAMBLE
19 ELEMENTS OF SECTION 107 IN TERMS OF THEIR DISCUSSION UNDER
20 FACTOR ONE OF THE FAIR USE CHECKLIST AT COLUMBIA?

21 A. TURNING TO THAT POLICY RIGHT NOW.

22 Q. YES, PLEASE, IT IS IN EVIDENCE.

23 A. IT BREAKS THEM OUT BECAUSE THE FAIR USE STATUTE ITSELF
24 REFERS TO THE FAIR USE OF A WORK FOR PURPOSES SUCH AS, AND
25 THEN THERE IS A LIST THAT THE FAIR USE OF A WORK FOR THESE

1 KIND OF PURPOSES -- NOW, I'M PARAPHRASING -- IS A FAIR USE OR
2 THE USE OF A WORK IS A FAIR USE, THEN PROCEEDS TO LIST. NOW,
3 I AM WORKING FROM MEMORY, I DON'T HAVE THE STATUTE IN FRONT
4 OF ME.

5 Q. YOU ARE WELCOME TO LOOK AT WHAT IS ON THE BOARD.

6 A. IT IS ALMOST WORD FOR WORD USE. THAT THE USE OF A
7 WORK FOR PURPOSES SUCH AS, AND THEN THE STATUTE RECITES:
8 TEACHING, RESEARCH, SCHOLARSHIP, CRITICISM, COMMENT, NEWS
9 REPORTING. AND IN CONNECTION WITH TEACHING, THERE IS IN THE
10 STATUTE FROM CONGRESS THE PARENTHETICAL THAT MAY EVEN BE
11 EXACTLY WORD FOR WORD WHAT IS HERE, INCLUDING MULTIPLE COPIES
12 FOR CLASSROOM USE IS NOT AN INFRINGEMENT, THE FAIR USE IS NOT
13 AN INFRINGEMENT.

14 Q. IN THE COLUMBIA FAIR USE CHECKLIST, THESE PREAMBLE
15 ELEMENTS ARE BROKEN OUT INDIVIDUALLY?

16 A. YES.

17 Q. WHAT IS YOUR RECOLLECTION AS TO HOW THEY ARE TREATED IN
18 THE GEORGIA STATE POLICY?

19 A. MAY WE TAKE A LOOK?

20 Q. YES.

21 A. MAY I TAKE A LOOK? THEY ARE SIMILARLY BROKEN OUT. I
22 SHOULD START WITH NONPROFIT EDUCATIONAL, WHICH WAS ON THE
23 COLUMBIA LIST AND I SEE IT HERE ON THE GEORGIA LIST. THAT
24 LANGUAGE APPEARS JUST A LITTLE BIT LATER IN THE STATUTE WHEN
25 IT COMES TO THE FIRST FACTOR, THE PURPOSE OF THE USE. AND

1 NONPROFIT EDUCATIONAL VERSUS COMMERCIAL APPEARS THERE ALSO IN
2 SECTION 107 OF THE STATUTE ITSELF. YOU SEE A SIMILAR KIND OF
3 LISTING, ALTHOUGH NOTICING SOME DIFFERENCES, WHEREAS THE
4 SO-CALLED COLUMBIA DOCUMENT BREAKS OUT RESEARCH SCHOLARSHIP AS
5 TWO SEPARATE ITEMS. GEORGIA STATE POLICY CHECKLIST COMBINES
6 THOSE INTO ONE. CRITICISM COMMENT, NEWS REPORTING, PARODY
7 ARE SEPARATE ELEMENTS UNDER THE SO-CALLED COLUMBIA CHECKLIST.
8 AND THEY ARE COMBINED INTO ONE CHECK BOX OVER ON THE GEORGIA
9 STATE POLICY.

10 Q. AND IN YOUR OPINION, WHAT WOULD BE THE RESULT OF SUCH
11 COMBINATION IN THE GEORGIA STATE CHECKLIST?

12 A. WELL, WE HAVE HEARD DISCUSSION THIS MORNING ABOUT
13 NUMBERS OF CHECKS AND, THEREFORE, COMBINING THESE WOULD
14 REDUCE THE NUMBER OF CHECKS AS A PRACTICAL MATTER.

15 Q. DO YOU HAVE AN OPINION WHETHER THAT RENDERS THE GEORGIA
16 STATE POLICY MORE LIBERAL OR MORE CONSERVATIVE?

17 A. FOR PEOPLE WHO ARE CONCERNED ABOUT TALLYING AND CHECK
18 MARKS, IT WOULD CERTAINLY BE A MORE CAUTIOUS APPROACH TO THE
19 MATTER.

20 Q. YOU WERE ASKED QUESTIONS ABOUT WHETHER OR NOT THE
21 CHECKLIST AT COLUMBIA WAS THE BE-ALL OR END-ALL, I BELIEVE WAS
22 THE TERM, ARE THERE OTHER ASPECTS OF THE POLICY AT GEORGIA
23 STATE THAT YOU FEEL SHOULD BE CONSIDERED OTHER THAN THE
24 CHECKLIST AS PART OF THAT POLICY?

25 MR. RICH: OBJECTION, LACK OF FOUNDATION THAT HE IS

1 CAPABLE OF ANSWERING THAT QUESTION.

2 BY MR. SCHAEZEL:

3 Q. YOU HAVE REVIEWED THE POLICY AT GEORGIA STATE, HAVE
4 YOU NOT?

5 A. I HAVE.

6 Q. ARE THERE OTHER PARTS OF THE POLICY THAT YOU FEEL BEAR
7 ON THE FAIR USE DETERMINATION OTHER THAN THE CHECKLIST?

8 A. YES.

9 THE COURT: OVERRULED.

10 BY MR. SCHAEZEL:

11 Q. WHAT ARE THOSE, SIR?

12 A. THERE WERE A FEW OTHER ELEMENTS OF THE POLICY THAT I
13 THINK ARE AN IMPORTANT PART OF THE PROCESS. THERE WAS A
14 GENERAL DISCUSSION OF COPYRIGHT. THERE WAS AN ADDITIONAL
15 DOCUMENT THAT IS A GENERAL DISCUSSION OF FAIR USE, AND THEN
16 WHEN THE SUBJECT IS ELECTRONIC RESERVES, THERE WAS AN
17 ADDITIONAL DOCUMENT THAT LAID OUT SOME REQUIREMENTS OF AN
18 ELECTRONIC RESERVE SYSTEM.

19 Q. AND, IN FACT, THE POLICY AT GEORGIA STATE UNIVERSITY
20 INSTRUCTS PROFESSORS THAT OR THOSE USING THE CHECKLIST TO
21 CONSIDER ALL FOUR FACTORS, DOES IT NOT?

22 A. I BELIEVE IT DOES.

23 Q. WOULD YOU PLEASE TURN TO, I BELIEVE YOU HAVE IT IN
24 FRONT OF YOU, JTX 4 WHICH IS STATEMENT OF POLICY?

25 A. I BELIEVE I HAVE IT.

1 Q. PARTICULARLY PAGE FIVE, PLEASE. DO YOU HAVE IT?

2 A. I BELIEVE I AM THERE.

3 Q. IF YOU LOOK AT THE VERY LAST SENTENCE OF THAT PAGE.

4 A. (WITNESS COMPLIES.) I DO.

5 Q. IT STARTS:

6 "ALL FOR FACTORS MUST BE CONSIDERED

7 IN DETERMINING WHETHER A USE OF A

8 WORK IS A FAIR USE."

9 DOES IT NOT?

10 A. IT DOES.

11 Q. DOES THAT COMPORT WITH YOUR UNDERSTANDING AS TO THE
12 LAW?

13 A. YES.

14 Q. DOES THAT COMPORT WITH YOUR UNDERSTANDING AS TO PROPER
15 USE OF THE CHECKLIST?

16 A. YES.

17 Q. DO YOU RECALL IF THE GEORGIA POLICY REQUIRES ANY SORT
18 OF ACCESS DETERMINATION AFTER THE END OF A SEMESTER?

19 A. I BELIEVE IT DOES. YES, FOR ERESERVES DOES. IS THAT
20 WHAT YOU MEAN?

21 Q. ERESERVES?

22 A. YES.

23 Q. WHAT IS YOUR RECOLLECTION?

24 A. RECOLLECTION ACCESS TO THE CONTENT BY STUDENTS WOULD BE
25 TERMINATED AT THE END OF THE SEMESTER.

1 Q. WOULD YOU PLEASE IN THAT SAME DOCUMENT TURN TO PAGE 9?
2 IF YOU LOOK AT THIS PAGE NEXT TO THE LAST BULLET POINT READS:

3 "LIBRARY RESERVES STAFF SHOULD
4 DELETE MATERIALS AVAILABLE ON
5 ELECTRONIC RESERVES AT THE
6 CONCLUSION OF EACH SEMESTER."

7 A. YES.

8 Q. DO YOU HAVE AN OPINION WHETHER OR NOT THAT COMPORTS
9 WITH GOOD ERESERVE POLICY?

10 A. YES. IN FACT, IT IS STRONGER THAN I SEE AT A LOT OF
11 UNIVERSITIES.

12 Q. HOW SO?

13 A. A LOT OF UNIVERSITIES WILL REFER TO LANGUAGES SUCH AS
14 WE TALKED ABOUT A MINUTE AGO, SHOULD NOT PROVIDE ACCESS.
15 THIS IS LANGUAGE ABOUT DELETING MATERIALS. SO TAKING THAT
16 LITERALLY, THAT IS A STRONGER POSITION THAN JUST TERMINATING
17 ACCESS.

18 Q. IF YOU LOOK AT THE BULLET POINT IMMEDIATELY ABOVE THAT
19 IT SAYS:

20 "LIBRARY RESERVE STAFF SHOULD CHECK
21 TO SEE WHETHER MATERIALS SUBMITTED
22 FOR ELECTRONIC RESERVES ARE
23 AVAILABLE THROUGH AN ELECTRONIC
24 DATABASE OR OTHERWISE LEGALLY
25 AVAILABLE. IF SO, STAFF SHOULD

1 PROVIDE A LINK RATHER THAN SCANNING
2 AND POSTING THE MATERIAL."

3 DO YOU SEE THAT?

4 A. I DO.

5 Q. DO YOU HAVE AN UNDERSTAND -- DO YOU HAVE AN OPINION AS
6 TO WHETHER OR NOT THAT COMPORTS WITH GOOD PRACTICE IN AN
7 ERESERVES POLICY?

8 A. YES, VERY MUCH SO.

9 Q. WHAT IS THAT OPINION?

10 A. YEAH, YEAH. I HAVE LONG ADVOCATED THIS, THAT ONE
11 SHOULD LINK WHEREVER POSSIBLE.

12 Q. DO YOU BELIEVE THAT THESE PROVISIONS, SUCH AS DENYING
13 ACCESS AT THE END OF EACH SEMESTER AND CHECKING TO SEE WHETHER
14 MATERIALS ARE AVAILABLE THROUGH AN ELECTRONIC DATABASE BENEFIT
15 COPYRIGHT OWNERS?

16 MR. RICH: OBJECTION, LEADING.

17 THE COURT: OVERRULED.

18 THE WITNESS: YES, I DO.

19 BY MR. SCHAEZEL:

20 Q. WHAT IS THAT OPINION?

21 A. WELL, FIRST, ANY TIME WE DELETE OR "WE," MEANING A
22 UNIVERSITY, ANY TIME AN INSTITUTION DELETES OR REMOVING
23 MATERIALS OR CUTS OFF ACCESS TO MATERIAL, THAT REDUCES THE
24 RISKS OF ACCESS USE AND POSSIBLE MISUSE THAT COULD COME FROM
25 THAT. SO IT IS A WAY OF CONTAINING AND RESTRAINING

1 OPPORTUNITIES FOR IMPROPER USE OF THE MATERIAL AND LIMITING
2 THE PROPER USE OF THAT MATERIAL.

3 SECOND, WITH REGARD TO LINKING, UNIVERSITIES SPEND
4 LITERALLY MILLIONS, INDIVIDUAL UNIVERSITIES SPEND MILLIONS OF
5 DOLLARS EACH YEAR ACQUIRING ACCESS TO THE CONTENT TO A LOT OF
6 CONTENT IN ELECTRONIC FORM. JOURNALS, WE HAVE BEEN DOING IT
7 WITH JOURNALS FOR MANY YEARS AND INCREASINGLY THE ELECTRONIC
8 BOOK INDUSTRY HAS GROWN. IT HAS GROWN VERY RAPIDLY JUST IN
9 THE LAST YEAR OR TWO YEARS. AND THE RESULT IS THAT WE ARE
10 ACQUIRING MORE AND MORE CONTENT IN A DIGITAL DATABASE FORMAT.
11 WE WANT TO BUY WHAT WE CAN AND I THINK WE SHOULD BE LINKING TO
12 WHATEVER WE CAN THAT GENERATES USE OF THE MATERIAL, IT LETS
13 THE RIGHTS HOLDERS SEE HOW THEIR MATERIAL IS BEING USED. IT
14 ALLOWS THE RIGHTS HOLDERS TO ASSESS THE VALUE, THE RELATIVE
15 VALUE OF THE WORK AND USABILITY OF THE WORK. AND IT REDUCES
16 THE POSSIBILITY THAT ONE WILL CREATE A SUPPLEMENTAL, A SECOND
17 COPY. INSTEAD, JUST GO STRAIGHT TO THE SOURCE AND LINK TO IT
18 THERE. THAT IS A GOOD THING I THINK FOR EVERYBODY.

19 Q. DO YOU RECALL IF THE UNIVERSITY SYSTEM OF GEORGIA
20 POLICY PROVIDED FOR QUESTIONS TO BE RAISED WITH COUNSEL?

21 A. YES, IT DOES.

22 Q. DO YOU HAVE AN OPINION AS TO WHETHER OR NOT THAT IS A
23 GOOD PRACTICE IN RESERVE POLICY?

24 A. IT IS REALLY EXCELLENT PRACTICE TO HAVE LEGAL COUNSEL
25 AVAILABLE AT THE UNIVERSITY TO ANSWER QUESTIONS AS THEY ARISE

1 AS FACULTY ARE WORKING ON THESE ISSUES. IF THEY HAVE
2 QUESTIONS, IF THEY ARE STRUGGLING WITH SOMETHING, THEY WANT TO
3 HAVE A CHANCE TO KNOW WHAT SOMETHING MEANS FROM THE COUNSEL'S
4 PERSPECTIVE. THE INVITATION AND THE OPPORTUNITY TO CONTACT
5 COUNSEL IS REALLY AN EXCELLENT STEP FOR THE UNIVERSITIES TO
6 TAKE.

7 Q. IN YOUR EXPERIENCE, HOW DO THESE TYPES OF PROVISIONS
8 COMPARE TO THOSE AT OTHER SCHOOLS?

9 A. VERY FEW UNIVERSITIES PUT SUCH STATEMENTS IN THEIR
10 POLICIES, TO MY KNOWLEDGE. VERY FEW UNIVERSITIES HAVE TAKEN
11 THAT PARTICULARLY -- THAT EXTRAORDINARY STEP OF COMMITTING TO
12 HAVING UNIVERSITY COUNSEL AVAILABLE TO INDIVIDUAL FACULTY TO
13 ADDRESS THEIR QUESTIONS AS THEY ARISE IN CONNECTION WITH FAIR
14 USE AND ELECTRONIC RESERVES.

15 Q. IN REFERENCE TO OTHER SCHOOL POLICIES OF THE 37 THAT
16 ARE CITED TO YOUR REPORT, DO YOU RECALL THAT MR. RICH
17 INDICATED THAT TEN ADDRESSED REPEAT USE OR SOME SORT OF
18 PROHIBITION ON REPEAT USE, I'M SORRY, 12, I BELIEVE IS THE
19 CORRECT NUMBER?

20 A. I DO RECALL. I DON'T RECALL THE EXACT NUMBER, BUT
21 SOMETHING LIKE THAT.

22 Q. THAT LEAVES 25 OTHER SCHOOLS, IF MY MATH IS CORRECT; IS
23 THAT CORRECT? YOU DID 37, HE CITED YOU ONLY TO 12, CORRECT?

24 MR. RICH: OBJECTION TO THIS LINE AS RIDICULOUS AND
25 IRRELEVANT IN GIVEN THE NONSCIENTIFIC NATURE OF THE SURVEY TO

1 BEGIN WITH, YOUR HONOR.

2 THE COURT: OVERRULED. IT DOES START TO SOUND LIKE
3 CLOSING ARGUMENT, THOUGH.

4 MR. SCHAETZEL: WE WILL KEEP MOVING, YOUR HONOR,
5 THANK YOU.

6 BY MR. SCHAETZEL:

7 Q. YOU WERE ASKED WHAT YOU MEANT BY THE COMMENT THAT ANY
8 SUGGESTION THAT LICENSING SHOULD BE LEADING -- A LEADING OR
9 PRIMARY MEANS FOR COPYRIGHT COMPLIANCE IN CONNECTION WITH
10 ERESERVES IS MISPLACED, YOU WERE NOT ALLOWED TO ANSWER WHY.
11 WHY DID YOU MAKE THAT STATEMENT?

12 A. A FUNDAMENTAL REASON WHY I MAKE THAT STATEMENT, THE
13 LAW IS WHAT THE LAW IS. AND, OF COURSE, WE ARE HERE TO TRY
14 TO FIGURE OUT WHAT IT IS. BUT THE LAW GRANTS RIGHTS TO
15 COPYRIGHT OWNERS AND IT CARVES OUT FROM THOSE RIGHTS, CALL
16 THEM WHAT YOU WILL, RIGHTS OF USE, LIMITATIONS, EXCEPTIONS.
17 BUT BE THAT AS IT MAY, THE LAW GRANTS A SET OF RIGHTS TO
18 OWNERS AND IT LIMITS THOSE RIGHTS THROUGH FAIR USE AND A
19 ROSTER OF OTHER STATUTORY EXCEPTIONS OR LIMITATIONS ON THE
20 RIGHTS OF COPYRIGHT OWNERS. THE LAW STARTS THERE.

21 AND SO THE RESULT IS FOR A PERSON USING SOMEBODY ELSE'S
22 COPYRIGHT PROTECTED WORK, MY BASIC ADVICE AND MY BASIC
23 RECOMMENDATION IS TO EVALUATE WHAT THE LAW REALLY IS. AND IF
24 THE LAW PERMITS A PARTICULAR USE, THEN YOU MAY PROCEED WITH
25 THAT USE. IF THE LAW DOESN'T PERMIT THAT USE, THEN ONE

1 SHOULD CONSIDER ALTERNATIVES. THE ALTERNATIVES ARE ACTUALLY
2 MORE THAN JUST LICENSING, AS WELL. AND UNDER SOME
3 CIRCUMSTANCES, VERY OFTEN IN MY EXPERIENCE, I RECOMMEND OR
4 SOMEBODY DETERMINES ON THEIR OWN THAT MAYBE WHAT THEY WILL DO
5 IS CHANGE THEIR PLANS OR CHANGE THE WAY THEY ARE GOING TO USE
6 THE MATERIAL OR CHANGE WHAT MATERIAL THEY ARE USING, BUT THEY
7 HAVE THOSE KIND OF CHOICES. BUT IF THEY REALLY WANT TO USE
8 THAT PARTICULAR MATERIAL IN THAT PARTICULAR WAY AND IT DOESN'T
9 FIT WITHIN FAIR USE OR OTHER EXCEPTION AND THEY CAN'T CHANGE
10 THEIR PLAN FOR WHATEVER REASON, THEN YOU GO AND GET
11 PERMISSION.

12 AS YOU COULD SEE FROM MY TESTIMONY LAST WEEK, I HAVE NO
13 PROBLEM REFERRING PEOPLE OUT FOR AND HELPING THEM WITH
14 PERMISSION WHERE THEY NEED IT. BUT YOU DON'T BEGIN THERE.
15 YOU BEGIN WITH WHAT THE LAW REALLY PROVIDES.

16 Q. IN FACT, THE COLUMBIA WEBSITE PROVIDES FOR ASSISTANCE
17 FOR PROFESSORS FOR PERMISSION?

18 A. QUITE A BIT OF ASSISTANCE, I WOULD SAY.

19 MR. SCHAETZEL: IF I COULD PLEASE GET THIS MARKED AS
20 OUR NEXT EXHIBIT AS 911.

21 IF I MAY APPROACH, YOUR HONOR.

22 THE COURT: YOU MAY.

23 BY MR. SCHAETZEL:

24 Q. PROFESSOR CREWS, I AM HANDING YOU WHAT HAS BEEN MARKED
25 AS 911 EXHIBIT. WOULD YOU PLEASE CONFIRM THESE ARE PAGES FROM

1 THE COLUMBIA COPYRIGHT ADVISORY WEBSITE?

2 A. WELL, I AM AT IT VERY BRIEFLY FOR THE FIRST TIME. IT
3 SEEMS TO BE FROM THE COPYRIGHT ADVISORY OFFICE WEBSITE.

4 MR. SCHAEZEL: LAST FRIDAY WE OBJECTED TO SOME OF
5 THE OR TO THE EXHIBIT THAT WAS TENDERED INTO EVIDENCE AS BEING
6 INCOMPLETE IN TERMS OF MATERIALS ON THE COLUMBIA WEBSITE.
7 THIS COMPLETES THAT RECORD AND WE WOULD MOVE THE ADMISSION OF
8 EXHIBIT 911.

9 MR. RICH: NO OBJECTION.

10 THE COURT: IT IS ADMITTED.

11 BY MR. SCHAEZEL:

12 Q. DR. CREWS, YOU HAVE SPOKEN TO THE 37 POLICIES THAT WERE
13 SUMMARIZED IN PART OF YOUR REPORT. HOW WERE THE POLICIES
14 ACTUALLY COMPILED AND THEN ATTACHED TO YOUR REPORT?

15 A. WELL, THEY WERE COMPILED BY ME. YOU DON'T MEAN THE
16 BREAKOUT, WE HAVE TALKED ABOUT THAT ALREADY. BUT THE
17 BREAKOUT OF THE DIFFERENT ELEMENTS IN THE POLICY, YOU WANT ME
18 TO START THERE?

19 Q. PLEASE.

20 A. YES. AFTER I DID THE INITIAL REVIEW AND THEN THE
21 ORGANIZATION OF THEM INTO THE CATEGORIES AS WE HAVE DESCRIBED,
22 THEN I PROCEEDED WITH THE EXAMINATION OF THE DETAILS OF THE
23 POLICY AND THE INCLUSION OF SUMMARIES OF ITEMS FROM THOSE
24 POLICIES IN THE REPORT.

25 Q. AND ONCE YOU FINISHED THOSE SUMMARIES, WHAT DID YOU DO?

1 A. THEN I ALSO ATTACHED THE FULL POLICY. ONE COULD
2 EXAMINE THE ORIGINAL LANGUAGE IN FULL AS AN APPENDIX TO THE
3 REPORT.

4 MR. SCHAEZEL: MAY I APPROACH, YOUR HONOR?

5 THE COURT: YOU MAY.

6 BY MR. SCHAEZEL:

7 Q. LIKE TO HAND YOU WHAT HAS BEEN MARKED AS EXHIBIT 325
8 -- 335, I'M SORRY -- 325 FOR IDENTIFICATION.

9 CAN YOU PLEASE CONFIRM THAT THIS IS A COPY OF THOSE
10 POLICIES AS YOU COLLECTED THEM AND ATTACHED THEM TO YOUR
11 REPORT?

12 A. IT CERTAINLY APPEARS TO BE EXACTLY THAT.

13 MR. SCHAEZEL: YOUR HONOR, WE MOVE THE ADMISSION OF
14 WHAT IS APPENDIX E TO THE EXPERT REPORT OF DR. CREWS ENTITLED
15 "COPIES OF POLICIES SUMMARIZED" IN PART SEVEN OF THIS REPORT.

16 MR. RICH: WE WOULD OBJECT, YOUR HONOR. IT IS JUST
17 A SERIES OF SCREEN SHOTS, TETHERED TO A REPORT THAT IS NOT IN
18 EVIDENCE AND JUST CONTAINS PURPORTEDLY MUCH MORE ANALYSIS OF
19 IT. THE WITNESS TESTIFIED IT WAS SELECTED ON THE WHIMS OF
20 HIS WIFE OF A DEADLINE, A SERIES OF SCREEN SHOTS. HAS NO
21 PARTICULAR RELEVANCE OR COGENCY TO THIS CASE.

22 MR. SCHAEZEL: YOUR HONOR, THESE CONSTITUTE THE
23 POLICIES, THE 37 POLICIES THAT THE WITNESS HAS TESTIFIED TO ON
24 DIRECT, CROSS-EXAMINED REGARDING, AND NOW IDENTIFIED AGAIN
25 HOW THEY WERE PULLED TOGETHER. I AM PLEASED TO HAVE HIM GO

1 THROUGH THE INSTRUCTIONS THAT HE GAVE TO HIS WIFE WHO DOES
2 HAVE A MASTER'S IN LIBRARY SCIENCES, TO GET THEM PULLED
3 TOGETHER SO IT WASN'T JUST ARTIFICIAL HELP, IF YOU WILL.

4 MR. RICH: ON CROSS-EXAMINATION, THE WITNESS CONCEDED
5 THE ONLY THING HE TESTIFIED TO IS WHAT COUNSEL DIRECTED HIM TO
6 TESTIFY TO ABOUT THESE.

7 THE COURT: WHAT IS THE EXHIBIT NUMBER?

8 MR. SCHAEZEL: 325, YOUR HONOR.

9 THE COURT: PLAINTIFFS' EXHIBIT -- EXCUSE ME
10 DEFENDANT'S EXHIBIT 325, AS I SEE IT, DOES CONSTITUTE MATERIAL
11 THAT WAS RELIED ON BY DR. CREWS. NOW THAT DOESN'T MAKE IT
12 AUTOMATICALLY ADMISSIBLE, BUT APPARENTLY THIS CAME OFF THE
13 WEBSITES OF THESE VARIOUS INSTITUTIONS. SO I THINK AS FAR AS
14 IT GOES, I PRESUME IT TO BE CORRECT COPIES OF WHAT THEIR
15 STATED POLICIES ARE OR WERE, I GUESS, IN 2009. I AM GOING
16 TO ADMIT DEFENDANT'S EXHIBIT 325.

17 I THINK IT IS CORRECT AS PLAINTIFFS HAVE POINTED OUT THAT
18 IT HAS ITS LIMITATIONS BECAUSE WE DON'T REALLY KNOW ANYTHING
19 ABOUT HOW THESE POLICIES HAVE BEEN INTERPRETED OR APPLIED AT
20 THESE VARIOUS INSTITUTIONS, BUT I THINK THE INFORMATION IN
21 THE EXHIBIT IS ENTITLED TO SOME WEIGHT. AS I SAID, I THINK
22 IT IS RELIABLE AS FAR AS IT GOES; THEREFORE, I WILL ADMIT IT.

23 MR. SCHAEZEL: YOUR HONOR, GIVEN THE OBJECTIONS, IT
24 WOULD ALSO SEEM APPROPRIATE AT THIS TIME TO OFFER BOTH OF
25 DR. CREWS'S TWO REPORTS INTO EVIDENCE. THEY ARE ON

1 PLAINTIFFS' EXHIBIT LIST AT ITEMS 313, WHICH IS HIS FIRST
2 REPORT DATED JUNE 1, 2009 AND AT 331, WHICH IS HIS SECOND
3 REPORT DATED NOVEMBER 2, 2009.

4 MR. RICH: YOUR HONOR, WE OBJECT. IT IS RANK
5 HEARSAY. CUMULATIVE OF HIS TESTIMONY. THE LAW IS CLEAR,
6 EXPERT REPORTS DON'T COME IN.

7 THE COURT: IT IS NORMALLY TRUE THEY DON'T. WHAT
8 DO YOU HAVE IN RESPONSE?

9 MR. SCHAEZEL: WE BELIEVE THE CATCHALL APPLIES TO
10 THESE. NO REASON TO RELY ON THE RELIABILITY. IT
11 DEMONSTRATES THE METHODOLOGY OF THE WITNESS WHO PULLED
12 TOGETHER THE MATERIALS AND THEY IDENTIFY HOW THE MATERIALS
13 THAT ARE IN APPENDIX E WERE PUT TOGETHER AND RETAINED AND SO
14 ON, SO FORTH. SIMPLY UNDER THE CATCHALL.

15 THE COURT: I WILL SUSTAIN THE OBJECTION. AS I
16 UNDERSTAND IT, THESE REPORTS DO BASICALLY CONSTITUTE
17 DR. CREWS'S OPINIONS ABOUT WHICH HE HAS TESTIFIED EXTENSIVELY.
18 THE OBJECTION IS SUSTAINED.

19 MR. SCHAEZEL: BEAR WITH ME ONE MINUTE MORE.

20 WE HAVE NO FURTHER QUESTIONS.

21 MR. RICH: FEW FOLLOW UP.

22 THE COURT: THEY BETTER BE GOOD.

23 RE CROSS EXAM

24 BY MR. RICH:

25 Q. DR. CREWS, IN CONNECTION WITH THE COLLOQUY OF THE COURT

1 AND MR. SCHAEZEL ON FACTOR FOUR, DO YOU HAVE THE COPENDIUM
2 WE WORKED FROM ON YOUR EXAMINATION YESTERDAY AND TODAY?

3 A. YES.

4 Q. TURN VERY QUICKLY, PLEASE, TO THE ENCAPSULATION OF
5 SEVERAL OF THE CASES, YOUR CASE SUMMARY SECTION, PLEASE.

6 A. CAN YOU HELP ME IDENTIFY A PAGE HERE?

7 Q. WELL, I DON'T HAVE IT MARKED. IT IS ABOUT TWO-THIRDS
8 OF THE WAY THROUGH THE COPENDIUM, SAYS "CASE SUMMARIES."

9 A. I THINK I AM ALMOST THERE. YES, I AM THERE.

10 Q. YOU CITED THE KINKO'S CASE FOR SEVERAL PROPOSITIONS,
11 INCLUDING ABOUT THE NATURE OF THE WORK. WOULD YOU TURN TO
12 YOUR DISCUSSION OF THE PRINCETON UNIVERSITY PRESS CASE PLEASE?

13 A. YES.

14 Q. AM I CORRECT YOU SAY THERE UNDER NATURE OF THE WORK:

15 "ALTHOUGH THEY WERE NONFICTION
16 MATERIALS, COPIED EXCERPTS CONTAINED
17 SOME DEGREE OF CREATIVE EXPRESSION
18 CUTTING AGAINST FAIR USE?"

19 A. THAT IS EXACTLY WHAT I SAY THERE, YES.

20 Q. YOU DIDN'T CITE THAT AS AN EXAMPLE OF YOUR VIEW OF THE
21 NATURE, CORRECT?

22 A. A FEW MINUTES AGO, NO, DIDN'T COME TO MIND AT THAT
23 MOMENT.

24 Q. AND WHEN YOU WERE TALKING ABOUT LICENSING AND WHAT
25 SOUNDED LIKE A VARIATION OF THE CIRCULARITY ARGUMENT ON

1 LICENSING, TAKE A LOOK UNDER PRINCETON UNIVERSITY PRESS. I

2 TAKE IT YOUR SUMMARY THERE ACCURATELY NOTES:

3 "LICENSING OR POTENTIAL LICENSING
4 EXISTED FOR ALL COPIED WORKS, AND
5 OTHER COMMERCIAL COPY SHOPS
6 ROUTINELY REQUESTED PERMISSION TO
7 REPRODUCE COPYRIGHTED WORKS. SUCH
8 AN EXISTING LICENSING SYSTEM WAS
9 SAID TO WEIGH HEAVILY AGAINST FAIR
10 USE."

11 A. YES.

12 Q. YOUR UNDERSTANDING, THE SIXTH CIRCUIT *EN BANC* VIEWED
13 THE AVAILABILITY OF LICENSING GERMANE TO THE FOURTH FACTOR
14 FAIR USE ANALYSIS?

15 A. I WOULD HAVE NO WAY IN SAYING "GERMANE."

16 Q. AND IF YOU TURN TO THE NEXT PAGE, AMERICAN GEOPHYSICAL
17 UNION DISCUSSION, YOUR DISCUSSION OF FACTOR FOUR EFFECT, IS
18 TO THE SAME EFFECT THERE IN TERMS OF CHARACTERIZING THE
19 RELEVANCE OF VALUABLE LICENSING TO ACTUALLY MAKING THE FAIR
20 USE DETERMINATION, CORRECT?

21 A. I HAVE NO PROBLEM SAYING IT IS RELEVANT IN THE
22 ANALYSIS.

23 Q. YOU MENTIONED BRIEFLY THE PREAMBLE TO SECTION 107 AND I
24 WAS LISTENING CAREFULLY AND I WASN'T CLEAR, AT LEAST IT DIDN'T
25 SOUND CLEARLY, I WANT TO ESTABLISH WE HAVE NO DISAGREEMENT.

1 THAT PREAMBLE IS NOT A SELF-EXECUTING LIST OF PER SE FAIR
2 USES, CORRECT?

3 A. OH, THAT IS CORRECT. WE ARE IN AGREEMENT ON THAT.

4 Q. IN FACT, THE LANGUAGE OF THE PREAMBLE SAYS THAT FAIR
5 USES OF THE ENUMERATED USES CONSTITUTE FAIR USE, CORRECT?

6 A. THAT IS CORRECT. AND IN MY EFFORT TO STATE IT WITHOUT
7 HAVING IT IN FRONT OF ME, I THINK AT LEAST ONE OF THE TIMES
8 THROUGH I GOT IT RIGHT. YES, I WILL SAY IT AGAIN, WELL NO
9 I WON'T SAY IT AGAIN. CAN WE QUOTE FROM THE STATUTE TO MAKE
10 SURE WE ARE BOTH SAYING IT RIGHT?

11 Q. I WILL BE HAPPY.

12 A. PLEASE DO.

13 Q.

14 "NOTWITHSTANDING THE PROVISIONS OF
15 SECTIONS 106 AND 106A, THE FAIR USE
16 OF A COPYRIGHTED WORK INCLUDING SUCH
17 USE BY REPRODUCTION AND COPIES OF
18 PHONO RECORD OR ANY OTHER MEANS AS
19 SPECIFIED BY THAT SECTION FOR
20 PURPOSES SUCH AS IT GOES ON SHALL
21 CONSTITUTE."

22 SHALL, IT MEANS EVEN TO THOSE CATEGORIES, FULL BLOWN
23 FOUR FACTOR FAIR USE ANALYSIS HAS TO GO FORWARD.

24 A. LET'S GO TO THE NEXT SENTENCE.

25 Q. NO, I HAVE ASKED YOU TO ANSWER MY QUESTION?

1 A. I THINK.

2 Q. IS THAT CORRECT OR NOT CORRECT? FULL BLOWN FOUR FACTOR
3 ANALYSIS, AS YOU UNDERSTAND THE LAW, STILL HAS TO OCCUR WITH
4 RESPECT EVEN TO THE ENUMERATED USES, YES OR NO?

5 A. I WILL SAY NO TO THE WAY YOU ASKED THAT QUESTION.

6 Q. OKAY. I WANT TO BE CLEAR ABOUT TWO MORE SUBJECTS THAT
7 MR. SCHAEZEL COVERED WITH YOU, WHICH WAS PASSWORDS AND THE
8 FACT THAT AT THE END OF A SEMESTER WORKS ARE TAKEN DOWN,
9 OKAY. JUST SO WE ARE CLEAR. YOU AGREE THAT THE EFFECT OF
10 PASSWORD RESTRICTION IS TO ALLOW UNDER A FAIR USE
11 DETERMINATION BY A PROFESSOR EACH AND EVERY MEMBER OF HIS
12 CLASS TO RECEIVE A COPY OF THE WORKS DETERMINED TO BE FAIR USE
13 FOR PURPOSES OF THEIR CLASSROOM STUDY, CORRECT?

14 A. MY UNDERSTANDING IS THAT THE PASSWORD ALLOWS THE
15 STUDENTS TO HAVE ACCESS TO THE ERESERVES SYSTEM WHICH ALLOWS
16 THEM TO ACCESS THIS CONTENT AND SEE IT ON THE SCREEN OF THEIR
17 COMPUTER.

18 Q. WOULDN'T YES HAVE BEEN AN ANSWER TO THAT?

19 A. THERE ARE TECHNICAL ASPECTS OF THE QUESTION, WHAT IS A
20 COPY AND RECEIVING A COPY AND SO ON. BUT IT DOES ALLOW EACH
21 STUDENT TO ACCESS THAT CONTENT AND TO SEE IT ON THE SCREEN.

22 Q. AND TO PRINT IT, CORRECT?

23 A. THEY WILL HAVE TO TELL ME BECAUSE SOME SOFTWARE
24 CONTROLS CAN LIMIT PRINTING, BUT THAT WOULD BE UNUSUAL.

25 Q. AND NOT IN PLACE AT GSU, CORRECT?

1 A. I DON'T KNOW THE ANSWER TO THAT.

2 Q. YOU DON'T KNOW THE ANSWER TO THAT. OKAY. SO WHEN
3 PROFESSOR HASNER'S COURSE OF 114 STUDENTS, FOR EXAMPLE, THAT
4 IS ONE OF THE EXAMPLES IN ISSUE, EACH ONE OF THOSE 114
5 STUDENTS IN A PASSWORD-PROTECTED COURSE STILL WAS ABLE TO
6 DISPLAY THE MATERIALS, CORRECT?

7 MR. SCHAEZEL: OBJECTION, YOUR HONOR. PROFESSOR
8 HASNER'S WORK HAS BEEN WITHDRAWN, NO LONGER AT ISSUE.

9 MR. RICH: NOT TRUE. YOUR HONOR.

10 BY MR. RICH:

11 Q. SO EACH OF THOSE?

12 THE COURT: I THINK MR. RICH IS CORRECT ON THAT,
13 BUT IN ANY EVENT I WILL OVERRULE THE OBJECTION.

14 BY MR. RICH:

15 Q. EACH OF THE 114 STUDENTS CAN DISPLAY THE MATERIAL,
16 CORRECT?

17 A. YES.

18 Q. CAN DOWNLOAD IT TO HIS OR HER COMPUTER?

19 A. I COULDN'T TELL YOU FOR SURE, BUT PROBABLY, YES.

20 Q. AND CAN PRINTOUT A COPY AND BRING IT TO CLASS?

21 A. I COULDN'T TELL YOU FOR SURE, BUT PROBABLY, YES.

22 Q. NOW, WITH RESPECT TO END OF SEMESTER TAKEDOWNS, DO YOU
23 UNDERSTAND ANY POLICY TO BE IN PLACE UNDER THE NEW GEORGIA
24 STATE POLICY SIMILAR TO THOSE OF THE 12 SCHOOLS THAT I
25 IDENTIFIED FROM YOUR NONRANDOM SELECTION OF UNIVERSITIES THAT

1 FORBID REPEAT USE WITHOUT PERMISSION IN SUBSEQUENT SEMESTERS?

2 DO YOU UNDERSTAND GSU TO HAVE THAT RESTRICTION?

3 A. I UNDERSTAND THAT GSU DOES NOT HAVE THAT RESTRICTION;
4 HOWEVER, IF GSU DOES INCLUDE SOMETHING LIKE IT IN THE
5 CHECKLIST --

6 Q. SO THAT IF A PROFESSOR FILLS OUT THE CHECKLIST
7 IDENTICAL IN SUCCEEDING TERMS WANTING TO USE THE SAME MATERIAL
8 IN THE SAME COURSE WITH A NEW GROUP OF 114 STUDENTS, IN THE
9 CASE OF PROFESSOR HASNER, AND ASSUMING PROFESSOR HASNER FILLS
10 OUT THE CHECKLIST IDENTICALLY TO HOW HE DID IT BEFORE AND
11 COMES TO THE IDENTICAL CONCLUSION THAT THE USE IS A FAIR USE,
12 YOU DON'T UNDERSTAND ANYTHING IN THE GSU POLICY TO LIMIT THAT
13 FURTHER USE OF THOSE MATERIALS, CORRECT?

14 A. I THINK I AM GIVING YOU A STRAIGHT ANSWER. I DON'T
15 UNDERSTAND ANYTHING IN THE GSU POLICY THAT WOULD SAY THEREFORE
16 IT IS NOT PERMITTED.

17 MR. RICH: THANK YOU. I AM DONE, YOUR HONOR.

18 THE COURT: BETTER BE REALLY GOOD.

19 RE-REDIRECT EXAM

20 BY MR. SCHAEZEL:

21 Q. YOU WERE ASKED ABOUT A FULL-BLOWN FAIR USE ANALYSIS.
22 DOES THE -- DO THE FOUR FACTORS EXPRESSLY MENTION
23 TRANSFORMATIVE OR NONTRANSFORMATIVE?

24 A. NO, THEY DON'T.

25 Q. WHAT EFFECT DOES TRANSFORMATIVE AND NONTRANSFORMATIVE

1 HAVE IN A FULL-BLOWN ANALYSIS?

2 A. TRANSFORMATIVE OR PRODUCTIVE USE IS A RELATED CONCEPT
3 THAT YOU WILL SOMETIMES SEE EVOLVE THROUGH A SERIES OF COURT
4 RULINGS, PROBABLY GAINED ITS MOST ATTENTION IN 1994 IN THE
5 SUPREME COURT DECISION OF CAMPBELL, THAT IS THE PRETTY WOMAN
6 PARODY CASE, IN WHICH THE COURT DREW CONSIDERABLE ATTENTION TO
7 THE FACT THAT THIS WAS A TRANSFORMATIVE USE. COURTS SINCE
8 THEN HAVE EVALUATED IT IN A COUPLE OF DIFFERENT WAYS. THERE
9 IS A WAY OF TRANSFORMING THE WORK ITSELF, LIKE TAKING THE
10 SONG AND TURNING IT INTO A RAP PARODY. THERE IS ALSO A
11 TRANSFORMATION OF THE WORK FROM A CONTEXT TO ANOTHER CONTEXT,
12 EXCERPTS IT OUT OF HERE, PLACING IT OVER HERE WHERE IT IS
13 USED IN A DIFFERENT WAY. SO, THERE ARE A COUPLE OF
14 DIFFERENT VARIETIES OF TRANSFORMATIVE. BUT TRANSFORMATIVE,
15 WHATEVER IT IS, IF IT IS FOUND BY THE COURT TO EXIST AND IT
16 EXISTS IN DEGREES OF TRANSFORMATIVENESS AS WELL. BUT IF IT IS
17 FOUND TO EXIST IN THE FACTS OF A PARTICULAR CASE, THEN THAT
18 IS A FACT THAT IS RELEVANT IN THE ANALYSIS OF THE FIRST
19 FACTOR.

20 AND IS IT A REQUIRED PART OF THE ANALYSIS? ABSOLUTELY
21 NOT. NOT IN ANY CASE. IS IT REQUIRED SPECIFICALLY IN THE
22 CONTEXT OF CLASSROOM COPYING, AND THE ANSWER IS VERY FIRMLY,
23 NO, IT IS NOT. I SAY THAT FOR THE PRINCIPLE REASON THE
24 CAMPBELL CASE, IF I MAY CITE THAT AGAIN. A FOOTNOTE IN THE
25 CAMPBELL CASE IN ITS LENGTHY DISCUSSION OF TRANSFORMATIVENESS

1 HAS A FOOTNOTE, AGAIN, I AM PARAPHRASING SO APOLOGIES IF I AM
2 IMPRECISE IN ANY WAY. BUT THE COURT SAYS THAT THE ONE PLACE
3 WHERE TRANSFORMATIVENESS IS NOT IMPORTANT OR HOWEVER THE COURT
4 WORDED IT IS IN THE CASE OF REPRODUCTION OF MATERIALS FOR
5 CLASSROOM USE. WHY? BECAUSE THE STATUTE SAYS SO.

6 MR. SCHAEZEL: NO FURTHER QUESTIONS, YOUR HONOR.

7 THE COURT: SHALL THE WITNESS BE EXCUSED?

8 MR. RICH: YES, YOUR HONOR.

9 MR. SCHAEZEL: YES.

10 THE COURT: YOU ARE EXCUSED, THANK YOU, DR. CREWS.

11 WHO IS NEXT?

12 MR. SCHAEZEL: CALL DR. POTTER, YOUR HONOR.

13 THE CLERK: STEP FORWARD, BE SWORN, PLEASE. JUST
14 COME ON UP, PLEASE. RAISE YOUR RIGHT HAND TO BE SWORN.

15 WILLIAM POTTER, HAVING BEEN FIRST DULY SWORN,
16 TESTIFIED AS FOLLOWS:

17 THE CLERK: BE SEATED. STATE YOUR FULL NAME FOR THE
18 RECORD.

19 THE WITNESS: MY NAME IS WILLIAM GRAY POTTER.

20 THE COURT: YOU MAY PROCEED.

21 MR. ASKEW: YES, THANK YOU.

22 DIRECT EXAM

23 BY MR. ASKEW:

24 Q. WHO IS YOUR CURRENT EMPLOYER, DR. POTTER?

25 A. I'M EMPLOYED BY THE UNIVERSITY OF GEORGIA.

1 Q. WHAT IS YOUR POSITION WITH THE UNIVERSITY OF GEORGIA?

2 A. UNIVERSITY LIBRARY AND ASSOCIATE PROVOST.

3 Q. HOW LONG HAVE YOU HAD THAT POSITION AT THE UNIVERSITY
4 OF GEORGIA?

5 A. SINCE 1989.

6 Q. HAVE YOU SERVED ON A COMMITTEE KNOWN AS THE SELECT
7 COMMITTEE ON COPYRIGHT FOR THE UNIVERSITY SYSTEM?

8 A. YES.

9 Q. WHAT WAS YOUR POSITION ON THAT COMMITTEE?

10 A. I WAS THE CHAIR.

11 Q. WHEN DID THAT COMMITTEE -- WHEN WAS THAT COMMITTEE
12 FORMED, TO YOUR UNDERSTANDING?

13 A. IT WAS FORMED LATE OCTOBER, EARLY NOVEMBER OF 2008.

14 Q. HOW DID YOU BECOME INVOLVED IN THAT COMMITTEE?

15 A. I RECEIVED AN EMAIL FROM A MR. BURNS NEWSOME, WHO IS
16 THE VICE-CHANCELLOR FOR LEGAL AFFAIRS. I BELIEVE I RECEIVED
17 THAT TOWARD THE END OF OCTOBER, I THINK OCTOBER 27TH, 2008,
18 WHERE HE ASKED ME TO OR TOLD ME THIS COMMITTEE WOULD BE FORMED
19 AND ASKED ME WOULD I BE WILLING TO SERVE AS CHAIR.

20 Q. DID YOU RECEIVE ANY COMMUNICATIONS FROM THE CHANCELLOR
21 FOR THE UNIVERSITY SYSTEM?

22 A. YES. SHORTLY THEREAFTER I RESPONDED TO MR. NEWSOME I
23 WOULD BE WILLING TO SERVE AS CHAIR. AND SHORTLY THEREAFTER I
24 RECEIVED A LETTER FROM CHANCELLOR HAROLD DAVIS ASKING ME TO BE
25 THE CHAIR OF THIS COMMITTEE.

1 MR. ASKEW: YOUR HONOR, MAY I APPROACH THE WITNESS?

2 THE COURT: YOU MAY.

3 BY MR. ASKEW:

4 Q. WOULD YOU TURN TO THE EXHIBIT MARKED DTX 130 IN YOUR
5 NOTEBOOK, DR. POTTER?

6 A. YES. (WITNESS COMPLIES.)

7 Q. IS THIS THE LETTER YOU RECEIVED FROM THE CHANCELLOR
8 CONCERNING THIS SELECT COMMITTEE ON COPYRIGHT?

9 A. YES, IT IS.

10 Q. WHEN YOU RECEIVED THIS LETTER, DID YOU RETAIN IT IN
11 YOUR RECORDS AT YOUR OFFICE?

12 A. YES.

13 Q. WAS IT YOUR POLICY TO RETAIN RECORDS LIKE THIS IN YOUR
14 OFFICE?

15 A. YES, IT IS.

16 Q. BUT THIS LETTER THAT YOU HAVE, DID IT COME FROM YOUR
17 RECORDS IN YOUR OFFICE?

18 A. BASED ON THE FAX NUMBER THAT IS PRINTED AT THE BOTTOM,
19 YES, IT CAME FROM MY OFFICE.

20 MR. ASKEW: YOUR HONOR, I MOVE THE ADMISSION OF THIS
21 DOCUMENT THAT HAS BEEN OBJECTED TO AS HEARSAY.

22 MR. RICH: NO OBJECTION.

23 THE COURT: IT IS ADMITTED.

24 BY MR. ASKEW:

25 Q. WAS THERE A TASK OR CHARGE FOR THIS SELECT COMMITTEE,

1 DR. POTTER?

2 A. THE LETTER FROM CHANCELLOR DAVIS DID NOT CONTAIN A
3 CHARGE. I TOOK THE CHARGE FROM THE EMAIL THAT WAS SENT TO ME
4 FROM MR. NEWSOME.

5 Q. WHAT WAS THAT CHARGE OR TASK FOR THIS SELECT COMMITTEE?

6 A. TO LOOK AT THE 1997 GUIDE TO -- REGENTS GUIDE TO
7 COPYRIGHT FAIR USE AND DETERMINE WHETHER IT SHOULD BE REVISED,
8 AND IF SO MAKE SOME RECOMMENDATIONS ON REVISION.

9 MR. RICH: OBJECTION. BEST EVIDENCE IS TESTIFYING
10 AS TO THE CONTENTS OF A DOCUMENT WHICH HAS NOT BEEN PROFFERED.

11 MR. ASKEW: YOUR HONOR, I JUST ASKED HIM TO SUMMARIZE
12 HIS RECOLLECTION OF THE DOCUMENT.

13 THE COURT: I WILL ALLOW IT.
14 BY MR. ASKEW:

15 Q. ON THE SECOND PAGE OF THIS DOCUMENT, DR. POTTER, IS A
16 LIST OF INDIVIDUALS, COULD YOU IDENTIFY THESE PEOPLE FOR US?

17 A. I AM LISTED AT THE TOP AS THE CHAIR.

18 Q. WHO ARE THESE PEOPLE BY THE WAY?

19 A. WITH ME. THEN THERE IS NANCY SEAMANS, DEAN OF LIBRARY
20 AT GEORGIA STATE UNIVERSITY; DR. TYANNA HARRINGTON, PROFESSOR
21 AT GEORGIA INSTITUTE OF TECHNOLOGY; PROFESSOR OF
22 COMMUNICATIONS LITERATURE AND CULTURE; CYNTHIA HALL, WHO, AT
23 THE TIME, REPRESENTED THE OFFICE OF LEGAL AFFAIRS AT THE
24 UNIVERSITY OF GEORGIA; MARY LASSITER, WHO WAS WITH THE CENTRAL
25 OFFICE OF THE UNIVERSITY SYSTEM OF GEORGIA, HER SPECIALTY IS

1 INSTRUCTIONAL TECHNOLOGY; THEN THERE WAS MR. TERRENCE
2 MCELWEE, WHO WAS THE GENERAL COUNSEL TO IN OFFICE OF VICE
3 PRESIDENT FOR RESEARCH AT UNIVERSITY OF GEORGIA, FOCUSED ON
4 INTELLECTUAL PROPERTY ISSUES FOR THE UNIVERSITIES RESEARCH
5 FOUNDATION; MS. BETH BRIGDON, WHO WAS CHIEF INFORMATION
6 TECHNOLOGY FOR THE MEDICAL COLLEGE OF GEORGIA. DR. THERESA
7 JOYCE, WHO WAS PROFESSOR OF BUSINESS AT KENNESAW STATE
8 UNIVERSITY AND ALSO ASSOCIATE PROVOST; THEN DR. SALLY
9 ATHERTON, THE CHAIR OF DEPARTMENT OF CELLULAR BIOLOGY AND
10 ANATOMY AT THE MEDICAL COLLEGE OF GEORGIA.

11 Q. WHAT INTEREST WITHIN THE UNIVERSITY SYSTEM DID THESE
12 VARIOUS PEOPLE REPRESENT?

13 A. WELL, THREE OF THEM WERE TEACHING FACULTY, ONE OF
14 THOSE WITH ADMINISTRATIVE ASSIGNMENT, AS WELL. TWO OF US WERE
15 LIBRARIANS, LIBRARY DIRECTORS. ONE WAS CHIEF INFORMATION
16 OFFICER FOR RESEARCH UNIVERSITY. SHE WOULD KNOW ABOUT BAR
17 SCALE INFORMATION SYSTEMS. THEN MARY WAS MORE OF A SPECIALIST
18 IN INSTRUCTIONAL TECHNOLOGY. AND THEN FINALLY THERE WAS THERE
19 WERE TWO ATTORNEYS.

20 Q. WHAT TYPES OF SCHOOLS WERE REPRESENTED ON THIS
21 COMMITTEE, DR. POTTER?

22 A. HEAVILY WEIGHTED TO WHAT WE CALL THE RESEARCH
23 UNIVERSITIES WITHIN THE UNIVERSITY SYSTEM OF GEORGIA: GEORGIA
24 TECH, GEORGIA STATE, UNIVERSITY OF GEORGIA AND MEDICAL
25 COLLEGE OF GEORGIA. AND THEN DR. JOYCE CAME FROM KENNESAW

1 STATE IS WHAT WE REFER TO AS REGIONAL UNIVERSITY, BUT IT WAS
2 HEAVILY WEIGHTED TO RESEARCH UNIVERSITIES.

3 Q. DID ANY SCHOOL OR COMMITTEE MEMBER HAVE AN INTEREST
4 THAT TENDED TO DOMINATE THIS COMMITTEE?

5 A. NO.

6 Q. WERE THERE ANY ADVISORS TO THIS COMMITTEE?

7 A. YES. MR. NEWSOME CONTINUED WITH US AS ADVISOR. THE
8 CHANCELLOR IN THE LETTER MENTIONS THAT AND THE CHANCELLOR ALSO
9 INFORMED ME THAT COUNSEL HAD BEEN RETAINED FROM KING AND
10 SPALDING TO ASSIST THE COMMITTEE.

11 Q. WERE THERE ANY OBSERVERS OR OTHER PARTICIPANTS THAT
12 FROM TIME TO TIME SAT IN ON THE MEETINGS?

13 A. MS. VULCAR FROM -- ATTORNEY VULCAR FROM THE GENERAL
14 OFFICE SAT IN ON OCCASION.

15 Q. DO YOU HAVE ANY INFORMATION, DR. POTTER, AS TO HOW THIS
16 COMMITTEE WAS FORMED?

17 A. NO, I DO NOT.

18 Q. DO YOU KNOW WHO CHOSE THE MEMBERS OF THIS COMMITTEE?

19 A. NO, I DON'T.

20 Q. DID THIS COMMITTEE HAVE A SERIES OF MEETINGS,
21 DR. POTTER?

22 A. YES.

23 Q. HOW MANY MEETINGS DID YOU HAVE?

24 A. THREE FACE-TO-FACE MEETINGS AND TWO CONFERENCE CALL
25 MEETINGS.

1 Q. WHERE WERE THESE MEETINGS HELD?

2 A. FACE-TO-FACE MEETINGS HELD IN THE LIBRARY AT GEORGIA
3 STATE UNIVERSITY.

4 Q. WHEN WAS THE FIRST MEETING FOR THIS SELECT COMMITTEE ON
5 COPYRIGHT, DR. POTTER?

6 A. FIRST MEETING WAS ON DECEMBER 3RD, 2008.

7 Q. WAS THAT AN IN-PERSON MEETING OR WAS THAT A TELEPHONE
8 CONFERENCE?

9 A. THAT WAS IN PERSON AT GEORGIA STATE.

10 Q. DO YOU REMEMBER WHO ATTENDED THAT MEETING?

11 A. MY RECOLLECTION OF THAT MEETING IS THAT EVERYONE WAS
12 ABLE TO ATTEND THAT MEETING.

13 Q. ALL OF THE MEMBERS ON THIS LIST?

14 A. ALL THE MEMBERS, ALL THE ADVISORS.

15 Q. ALL THE ADVISORS, ALL OTHERS THAT WERE INVOLVED WITH
16 THE COMMITTEE?

17 A. THAT'S CORRECT.

18 Q. PRIOR TO THIS FIRST MEETING, WHAT, IF ANYTHING, DID
19 THESE MEMBERS DO TO PREPARE FOR THIS FIRST MEETING?

20 MR. RICH: OBJECTION, LACK OF FOUNDATION.

21 THE COURT: SUSTAINED.

22 BY MR. ASKEW:

23 Q. DID THE MEMBERS OF THE COMMITTEE DO ANYTHING,
24 DR. POTTER, TO PREPARE FOR THIS FIRST MEETING AS YOU
25 UNDERSTAND IT?

1 A. YES.

2 Q. WHAT WAS IT THEY DID?

3 A. I ASKED THEM TO REVIEW WEBSITES ON COPYRIGHT FAIR USE
4 THAT WAS IN USE AT OTHER UNIVERSITIES, WEBSITES, POLICIES IN
5 USE AT OTHER UNIVERSITIES. WITH THE ASSISTANCE OF COUNSEL,
6 WE PROVIDED THEM WITH EITHER WEBSITES OR ACTUAL PRINTED
7 POLICIES FOR, I BELIEVE, TEXAS, DUKE, INDIANA UNIVERSITY,
8 PURDUE UNIVERSITY INDIANAPOLIS, VERA CRUZ, AND CORNELL.

9 Q. DURING THE COURSE OF THIS FIRST MEETING, DID OTHER
10 WEBSITES OF OTHER UNIVERSITIES, WERE THEY BROUGHT TO THE
11 ATTENTION OF THE COMMITTEE?

12 A. DURING THE COURSE OF THE FIRST MEETING, THERE WAS SOME
13 DISCUSSION. IT WAS REALLY AFTER THE FIRST MEETING THAT WE
14 STARTED LOOKING AT SOME OTHER ONES. AS I RECALL THE FIRST
15 MEETING, WE LOOKED AT THOSE FIVE AND QUICKLY DISCOVERED THAT
16 THERE SEEMED TO BE A PREVAILING PRACTICE OF USING A FAIR USE
17 CHECKLIST. AND WE THOUGHT WHAT WE SHOULD DO, THE APPROACH
18 WE SHOULD TAKE FROM HERE ON OUT IS TO LOOK IN INCORPORATING
19 THE FAIR USE CHECKLIST TO WHATEVER POLICY REGENTS, REGENTS
20 GUIDE WE WOULD HAVE IN THE FUTURE. WE DETERMINED FROM THAT
21 WE SHOULD LOOK FOR OTHER INSTANCES WHERE THE CHECKLIST WAS
22 USED OR CHECKLIST LIKE THAT WAS USED. AND DEAN SEAMANS,
23 DIRECTOR OF LIBRARIES AT GEORGIA STATE, VOLUNTEERED TO
24 IDENTIFY SOME ADDITIONAL SITES, WHICH SHE DID AFTER THE
25 MEETING. AT THE MEETING ON THE 8TH -- I MEAN THE 3RD OF

1 DECEMBER, WE DECIDED WE WOULD TAKE THE APPROACH OF TRYING TO
2 TAKE, TRYING TO INCORPORATE A CHECKLIST, FOUR FACTOR
3 CHECKLIST INTO THE REGENTS GUIDE, THAT WOULD BE THE WAY WE
4 WOULD MODIFY IT. SO COMING OUT OF THAT MEETING NAN VERY
5 QUICKLY PROVIDED US WITH A LIST OF ADDITIONAL UNIVERSITY SITES
6 TO LOOK AT AND THESE INCLUDED COLUMBIA, MINNESOTA, BRIGHAM
7 YOUNG UNIVERSITY.

8 Q. EMORY UNIVERSITY?

9 A. WE LOOKED AT EMORY. WE LOOKED AT CORNELL. WE LOOKED
10 AT FOUR FACTOR CHECKLIST THAT WAS ON THE SITE OF THE COPYRIGHT
11 CLEARANCE CENTER. ALSO FOUR FACTOR CHECKLIST THAT WAS SET UP
12 AS A MODEL BY ASSOCIATION OF RESEARCH LABORATORIES. I THINK
13 THAT WAS IT.

14 Q. AT THIS FIRST MEETING, WHAT WERE THE TOPICS OF
15 CONSIDERATION THAT WERE CONSIDERED BY THE COMMITTEE MEMBERS?

16 A. WELL, THE TOPIC WE CONSIDERED MAINLY WAS THE CHARGE WE
17 HAD TO REVISE THE 1997 GUIDE AND WE THOUGHT THAT BY TAKING
18 THIS APPROACH OF USING THE FOUR FACTOR CHECKLIST, WHICH WE SAW
19 MANY OTHER UNIVERSITIES WERE USING, WE COULD STREAMLINE THAT
20 PROCESS. WE TALKED A LITTLE BIT ABOUT A TIME FRAME AND
21 DECIDED THAT WE WOULD SHOOT FOR THE END OF JANUARY AS A WAY OF
22 COMPLETING THIS BECAUSE WE COULD BASE OUR WORK UPON THE WORK
23 THAT SEEMED TO BE THE PREVAILING PRACTICE OF THESE FOUR FACTOR
24 CHECKLIST.

25 WE TALKED ABOUT WHEN WE WOULD MEET NEXT, WHICH WOULD BE

1 EARLY JANUARY, AND THAT IN THE MEANTIME WE WOULD ALL LOOK
2 CAREFULLY AT THESE OTHER WEBSITES, OTHER POLICIES, AND THINK
3 ABOUT HOW WE WANTED TO REVISE THE 1997 GUIDE AND HOW WE WOULD
4 INCORPORATE THAT FOUR FACTOR CHECKLIST IN THE 1997 GUIDE.

5 Q. IS IT YOUR UNDERSTANDING THAT THE COMMITTEE MEMBERS
6 THEN DID LOOK AT THESE OTHER UNIVERSITIES' WEBSITES FOLLOWING
7 THAT FIRST MEETING?

8 A. YES, IT IS MY UNDERSTANDING THEY DID.

9 MR. ASKEW: YOUR HONOR, I HAVE ANOTHER EXHIBIT THAT
10 HAS BEEN OBJECTED TO AS HEARSAY BY THE PLAINTIFFS,
11 DEFENDANT'S EXHIBIT 132. IF THEY ARE GOING TO MAINTAIN THAT
12 OBJECTION, THEN I WILL NOT GO IN THE DOCUMENT, BUT THEY HAVE
13 OBJECTED TO IT AS HEARSAY. IF THEY MAINTAIN OBJECTION I
14 WON'T GO INTO IT.

15 MR. RICH: IF I COULD HAVE A MOMENT, YOUR HONOR.
16 WE WILL WAIVE THE OBJECTION.

17 THE COURT: IT IS ADMITTED.

18 BY MR. ASKEW:

19 Q. DR. POTTER, WOULD YOU LOOK AT DEFENDANT'S EXHIBIT 132?

20 A. YES.

21 Q. APPEARS TO BE AN EMAIL STRING THAT STARTS WITH THIS
22 MESSAGE FROM YOU TO VARIOUS MEMBERS OF THE COMMITTEE, DO YOU
23 SEE THAT?

24 A. YES.

25 Q. THERE IS AN ITALICIZED PORTION ON THIS LETTER. I AM

1 WONDERING IF THAT IS A PORTION OF THIS EMAIL THAT WAS TAKEN
2 FROM THE EMAIL FROM BURNS NEWSOME, WHO IS THE VICE-CHANCELLOR
3 FOR LEGAL AFFAIRS?

4 A. YES.

5 MR. RICH: SAME OBJECTION, YOUR HONOR. BEST
6 EVIDENCE. THAT DOCUMENT IS AVAILABLE AND COULD BE MARKED AND
7 INTRODUCED BY TESTIMONY OF HIS CLIENT.

8 THE COURT: NOT TALKING ABOUT THE DOCUMENT I JUST
9 ADMITTED? I AM CONFUSED.

10 MR. ASKEW: WE ARE TALKING ABOUT THE DOCUMENT JUST
11 ADMITTED.

12 MR. RICH: TALKING ABOUT HIS ASKING THIS WITNESS
13 WHETHER THE ITALICIZED LANGUAGE COMES FROM A DOCUMENT THAT MR.
14 ASKEW HAS NOT SHOWN THE WITNESS.

15 MR. ASKEW: JUST ASKING HIM ABOUT THIS DOCUMENT.

16 THE COURT: WHATEVER I SEE ON THE SCREEN IS
17 OBVIOUSLY IN DEFENDANT'S EXHIBIT 132, IS THAT WHAT IT IS?

18 MR. RICH: MY OBJECTION GOES TO THE QUESTION, ASKING
19 THIS WITNESS TO SUBSCRIBE TO THE FACT THAT ITALICIZED LANGUAGE
20 FROM ANOTHER DOCUMENT IN THE DEFENDANT'S POSSESSION, BUT
21 HASN'T BEEN MARKED OR OFFERED, STATES WHAT THIS DOCUMENT
22 PURPORTS TO SAY IT STATES.

23 MR. ASKEW: THE WITNESS -- IT IS JUST ABOUT THIS
24 DOCUMENT.

25 THE COURT: YOU WANT TO KNOW WHAT IS IN DEFENDANT'S

1 132? IT IS OBVIOUS WHAT IS IN IT.

2 MR. ASKEW: OKAY. I CAN MOVE ON, YOUR HONOR.

3 BY MR. ASKEW:

4 Q. AT THE TOP OF THIS EMAIL, DR. POTTER, THIS APPEARS TO
5 BE A RESPONSE FROM TERRY MCELWEE, WHO WAS THE GENERAL COUNSEL
6 OF THE UNIVERSITY OF GEORGIA RESEARCH FOUNDATION AND A
7 COMMITTEE MEMBER. IN IT HE REFERS YOU TO THE GEORGIA STATE
8 LITIGATION, WOULD LIKE TO GET A COPY OF THOSE PLEADINGS. DO
9 YOU KNOW WHAT MR. MCELWEE IS REFERRING TO THERE? DO YOU HAVE
10 AN UNDERSTANDING OF WHAT HE IS REFERRING THERE TO IN THE
11 GEORGIA STATE LITIGATION?

12 A. MY UNDERSTANDING IS REFERRING TO THE SUIT THAT WAS
13 FILED BY THE THREE PUBLISHERS AGAINST GEORGIA STATE UNIVERSITY
14 IN, I GUESS, THAT SPRING I THINK.

15 Q. IS IT YOUR UNDERSTANDING THE COMMITTEE MEMBERS HAD SOME
16 UNDERSTANDING THAT THERE WAS A LAWSUIT PENDING BETWEEN THE
17 PUBLISHERS AND GEORGIA STATE AND THE BOARD OF REGENTS?

18 A. IT IS MY UNDERSTANDING THEY HAD SOME SENSE OF IT, YES.

19 Q. WOULD YOU TURN TO TAB 139 IN YOUR BOOK,
20 DR. POTTER--EXCUSE ME 129? 129 THERE WAS NO OBJECTION.

21 THE COURT: IS IT ALREADY IN EVIDENCE?

22 MR. ASKEW: I MOVE IT.

23 MR. RICH: NO OBJECTION.

24 BY MR. ASKEW:

25 Q. IN THIS EMAIL TO -- FROM YOU TO BETH BRIGDON, ANOTHER

1 COMMITTEE MEMBER, IN THE SECOND LINE YOU WRITE:

2 "THE LAWYERS ARE PUSHING FOR US TO
3 MEET BEFORE THANKSGIVING SO WE NEED
4 TO GET THIS MOVING."

5 DO YOU SEE THAT? WHAT WERE YOU REFERRING TO THERE OR WHO
6 WERE YOU REFERRING TO FIRST IN THAT MESSAGE TO MS. BRIGDON AS
7 "THE LAWYERS"?

8 A. I WAS REFERRING TO COUNSEL FROM KING AND SPALDING WHO
9 WAS RETAINED TO ASSIST US.

10 Q. CAN YOU EXPLAIN FURTHER WHAT YOU ARE REFERRING TO THERE
11 ABOUT "THE LAWYERS ARE PUSHING FOR US TO MEET BEFORE
12 THANKSGIVING SO WE NEED TO GET THIS MOVING"?

13 A. WELL, THE COMMITTEE HAD BEEN APPOINTED EARLY DECEMBER
14 AND THE LAWYERS WERE ANXIOUS, AS I WAS ANXIOUS, TO GET THE
15 COMMITTEE MEETING AND STARTING OUR WORK. I THINK THAT IS ALL
16 I WAS REFERRING TO. THERE WAS SOME INTEREST IN GETTING THE
17 COMMITTEE TOGETHER. THAT IS WHAT I AM SAYING IN THIS MEMO,
18 TRYING FOR THE 21ST, COULDN'T WORK OUT. DIDN'T MEET UNTIL
19 THE THIRD OF DECEMBER.

20 Q. WAS THIS COMMITTEE UNDER ANY TIME CONSTRAINTS OR
21 DEADLINES, DR. POTTER, OTHER THAN THOSE THAT MIGHT BE SET BY
22 THE COMMITTEE ITSELF?

23 A. NO. I WAS GIVEN NO TIME LINE OR SCHEDULE FROM THE
24 REGENTS, FROM THE CHANCELLOR.

25 Q. WAS THERE A SECOND MEETING OF THIS COMMITTEE,

1 DR. POTTER?

2 A. YES. THIS COMMITTEE MET AGAIN EARLY IN JANUARY, I
3 BELIEVE IT WAS THE 8TH OF JANUARY 2009.

4 Q. WAS IT IN PERSON OR BY TELEPHONE?

5 A. THAT WAS AN IN-PERSON MEETING.

6 Q. DO YOU RECALL WHO ATTENDED THAT MEETING?

7 A. IT WAS WELL ATTENDED. CERTAINLY A MAJORITY OF THE
8 COMMITTEE WAS THERE AND THE ADVISORS WERE THERE.

9 Q. DO YOU RECALL WHAT THE TOPICS WERE THAT WERE DISCUSSED
10 AT THE SECOND MEETING OF THE SELECT COMMITTEE ON COPYRIGHT?

11 A. WE TALKED MAINLY ABOUT THE FOUR FACTOR CHECKLIST THAT
12 WE HAD RECEIVED FROM OTHER LIBRARIES -- I'M SORRY, OTHER
13 UNIVERSITIES. AND CONCLUDED THAT WE WOULD LIKE THE ONES USED
14 AT COLUMBIA AND MINNESOTA THE BEST. WE THOUGHT THEY WERE THE
15 MOST COMPREHENSIVE AND MOST STREAMLINED EASY TO USE THAT WERE
16 OUT THERE.

17 WE TALKED ABOUT WHAT WE MIGHT DO WITH THESE AND DECIDED
18 RATHER THAN TAKE THE FOUR FACTOR CHECKLIST AND INSERT IT INTO
19 THE 1997 GUIDE, WE WOULD INSTEAD TAKE ONE OF THOSE SITES AND
20 TRANSPOSE IT TO UNIVERSITY SYSTEM OF GEORGIA AND USE IT AS A
21 BASIS FOR A NEW POLICY. BUT RATHER THAN JUST INSERT
22 SOMETHING INTO THE 1997 GUIDE, WE WOULD IN EFFECT HAVE THIS
23 SUPERSEDE THE 1997 GUIDE AND COME UP WITH SOMETHING NEW THAT
24 WOULD BE BASED UPON ONE OF THESE OTHER SITES. WE TALKED
25 ABOUT WHICH OF THOSE SITES WE SHOULD USE AND CONCLUDED THAT

1 THE MINNESOTA SITE, WHILE IT WAS VERY INTERESTING, WAS
2 DEMANDING A LOT OF PROGRAMMING EFFORT BECAUSE IT WAS A VERY
3 INTERACTIVE SITE THAT REQUIRED -- THAT ALLOWED FACULTY TO MOVE
4 AROUND QUITE A BIT WITHIN THE SITE. BUT THE FACT WAS WE JUST
5 DIDN'T THINK WE HAD THE RESOURCES TO PUT UP A SITE LIKE THAT
6 AND MAINTAIN IT.

7 SO OUR ATTENTION FOCUSED ON THE COLUMBIA UNIVERSITY SITE.
8 AND WE DECIDED WHAT WE WANTED TO DO WAS TAKE THAT SITE,
9 TRANSPOSE IT PRETTY MUCH VERBATIM TO UNIVERSITY SYSTEM OF
10 GEORGIA WEBSITE, THAT WE WOULD THEN USE TO EDIT AND REFINE AND
11 MAKE INTO OUR SITE. WE ASKED COUNSEL TO APPROACH COLUMBIA TO
12 DETERMINE IF THEY WOULD BE WILLING TO LET US DO THAT, WHICH
13 THEY DID SUBSEQUENT TO THE MEETING AND WE DID GET PERMISSION
14 TO DO IT.

15 AND THE REST OF THE MEETING ON THE 8TH OF JANUARY WAS
16 WORKING UNDER THE ASSUMPTION THAT WE WOULD SOON HAVE THAT
17 TRANSPOSED WEBSITE TO WORK FROM AND THAT WE WOULD THEN FOCUS
18 ON HOW TO REFINE THAT. ONE ISSUE WE DECIDED TO HAVE
19 SUPERSEDE THE 1997 GUIDE, THERE WAS SOME COMMITTEE MEMBERS WHO
20 FELT WE SHOULD RETAIN PORTIONS OF THE 1997 GUIDES,
21 SPECIFICALLY SOME EXAMPLES AND SCENARIOS THAT HAVE BEEN
22 INCORPORATED IN THAT GUIDE, OTHERS OF US WHO FELT NO IT
23 REALLY WASN'T NECESSARY. BUT WE DECIDED AT THIS POINT WE
24 WOULD TRY TO INCORPORATE THE SCENARIOS INTO THE NEW POLICY AND
25 ASKED COUNSEL TO TAKE A STAB AT PULLING THE SCENARIOS OUT OF

1 THE OLD '97 GUIDE AND PUT IT IN THE NEW POLICY. THAT PRETTY
2 MUCH CONCLUDED THAT MEETING.

3 Q. WAS THE COMMITTEE LOOKING AT THE ENTIRE COLUMBIA SITE
4 OR JUST THE CHECKLIST FOR INCORPORATION INTO A NEW POLICY AT
5 THE UNIVERSITY SYSTEM OF GEORGIA?

6 A. AT THAT POINT WE WERE LOOKING AT THE ENTIRE WEBSITE.

7 Q. TURN TO TAB 128.

8 MR. ASKEW: THIS, YOUR HONOR, AGAIN IS AN EMAIL FROM
9 BETH BRIGDON TO DR. POTTER, AND IT HAS BEEN OBJECTED TO AS
10 HEARSAY. IF THAT OBJECTION WILL BE MAINTAINED I WILL NOT
11 PURSUE THE DOCUMENT.

12 THE COURT: WHAT IS THE EXHIBIT NUMBER?

13 MR. ASKEW: DX 128.

14 MR. RICH: WE WITHDRAW OUR OBJECTION, YOUR HONOR.

15 THE COURT: IT IS ADMITTED.

16 BY MR. ASKEW:

17 Q. CAN YOU IDENTIFY DEFENDANT'S EXHIBIT 128 FOR ME,
18 DR. POTTER?

19 A. THIS IS AN EMAIL FROM BETH BRIGDON, WHO WAS ON THE
20 COMMITTEE TO ME AND RAY LEE, WHO IS A PROGRAMMER AT UNIVERSITY
21 SYSTEM OF GEORGIA, COPIED TO TOM MAYER, WHO I BELIEVE AT THAT
22 POINT WAS RESPONSIBLE FOR INFORMATION TECHNOLOGY/INSTRUCTION
23 TECHNOLOGY AT UNIVERSITY SYSTEM. JUST SAYING, TELLING RAY
24 THAT SHE THOUGHT HE WOULD LIKE TO SEE WHAT WE WERE LOOKING
25 TOWARD. AT THIS POINT HE WAS AWARE IF WE SET UP A NEW

1 WEBSITE, HE WOULD BE THE ONE TO DO THE WORK, GIVING SOME
2 ADVANCE NOTICE. I THINK THAT IS BASED UPON THE TRAFFIC ON OUR
3 LIST SERVER, WHETHER TO USE COLUMBIA OR MINNESOTA. TELLING
4 HIM WE WILL PROBABLY USE COLUMBIA, MINNESOTA HE SHOULD BE
5 READY FOR THAT. HE SAYS COLUMBIA IS SIMPLER AND WILLING TO
6 MAKE DO WITH THIS KIND OF SITE INITIALLY; MINNESOTA IS WHERE
7 WE WOULD WANT TO BE EVENTUALLY, BECAUSE AS I MENTIONED
8 BEFORE, HIGHLY INTERACTIVE SOPHISTICATED SITE.

9 Q. YOU WILL SEE IN THE THIRD LINE OF THIS EMAIL OF THE
10 STATEMENT:

11 "YOUR TEAM'S HELP WILL BE CRITICAL
12 IN MEETING THE DEADLINE WE'VE BEEN
13 GIVEN, THE END OF JANUARY, TO HAVE
14 THE SITE READY INCLUDING CONTENT."

15 A. YES, SIR.

16 Q. DO YOU HAVE AN UNDERSTANDING OF WHAT MS. BRIGDON IS
17 REFERRING TO THERE AS "THE DEADLINE WE HAVE BEEN GIVEN THE END
18 OF JANUARY"?

19 A. REFERRING TO THE DEADLINE WE SET AT THE FIRST MEETING
20 OF THE COMMITTEE THAT WE WOULD HAVE THIS, AIM TO HAVE THIS
21 FINISHED, OUR WORK FINISHED BY THE END OF JANUARY.

22 Q. IF YOU COULD TURN TO EXHIBIT --

23 MR. ASKEW: EXCUSE ME. I MEANT TO SAY I AM ON DX 128
24 NOW, YOUR HONOR. I GUESS THAT IS THE ONE I WAS REFERRING TO
25 JUST A MINUTE AGO. IF I CAN GET THAT ADMITTED INTO EVIDENCE.

1 THE COURT: YES, IT HAS.

2 BY MR. ASKEW:

3 Q. IN THE NEXT TO LAST PARAGRAPH OF THIS LETTER, SEE THE
4 SENTENCE," THIS WILL BE USED IN LEGAL PROCEEDINGS AND IS
5 EXTREMELY SENSITIVE," DO YOU SEE THAT?

6 A. YES.

7 Q. DO YOU HAVE AN UNDERSTANDING AS TO WHAT MS. BRIGDON WAS
8 REFERRING TO IN THAT SENTENCE?

9 A. YOU WOULD HAVE TO ASK HER WHAT SHE MEANT BY IT.

10 Q. DO YOU HAVE AN UNDERSTANDING AS TO WHAT LEGAL
11 PROCEEDINGS SHE WOULD HAVE BEEN REFERRING TO IN THAT SENTENCE?

12 A. I CAN MAKE ASSUMPTIONS, BUT I NEVER TALKED TO HER
13 ABOUT IT. NOT SURE WHAT SHE IS REFERRING TO.

14 Q. WAS THERE A THIRD MEETING OF THE SELECT COMMITTEE ON
15 COPYRIGHT, DR. POTTER?

16 A. YES, WE MET BY CONFERENCE CALL ON THE 15TH OF JANUARY,
17 I BELIEVE.

18 Q. WHAT WAS THE TOPIC OF DISCUSSION FOR THIS CONFERENCE
19 CALL ON JANUARY 15TH OF 2009?

20 A. BY THAT TIME WE HAD TRANSPOSED THE COLUMBIA WEBSITE TO
21 UNIVERSITY SYSTEM OF GEORGIA'S WEB SERVER, MADE IT AVAILABLE
22 FOR THE COMMITTEE TO LOOK AT FOR THE LAST WEEK OR SO AND WE
23 MET TO TALK ABOUT HOW IT LOOKED AND WHAT WE NEEDED TO DO.
24 THE PROGRAMMERS HAD MADE SOME OBVIOUS CHANGES CHANGING
25 COLUMBIA TO UNIVERSITY SYSTEM OF GEORGIA, MADE SOME OTHER

1 CHANGES, AND WE WANTED TO TAKE A LOOK AT HOW IT LOOKED AT THAT
2 POINT, HOW YOU MANEUVER AROUND, WHAT YOU THOUGHT ABOUT IT.
3 LOOKED AT IT IN THE CONFERENCE CALL AND DECIDED, YES, THIS IS
4 THE WAY WE WANT TO GO IN DEVELOPING THE POLICY WITH
5 RETRIBUTION, TAKE THE COLUMBIA SITE AND USE IT AS OUR NEW
6 POLICY. I THINK WE HAD SOME SUGGESTED WORDING CHANGES AT
7 THAT POINT.

8 AT THAT TIME WE STILL HAD SOME SCENARIOS FROM THE OLD 1997
9 GUIDE IN THERE, BUT WE ASKED THE COMMITTEE TO GO, TO TAKE
10 THIS NOW AND LOOK AT IT IN MUCH MORE DETAIL, THINK ABOUT WHAT
11 WE WANTED TO LEAVE IN, WHAT WE WANTED TO TAKE OUT, WHAT WE
12 WANTED TO CHANGE IN PREPARATION FOR A MEETING A WEEK LATER ON
13 THE 22ND OF JANUARY. THAT WAS, I THINK, THE GIST OF THE
14 JANUARY 15TH MEETING.

15 Q. WERE ANY DECISIONS MADE ON THIS CONFERENCE CALL ON
16 JANUARY 15TH WITH RESPECT TO THE POLICY THAT WAS BEING
17 CONSIDERED BY THE SELECT COMMITTEE?

18 A. I DON'T THINK ANY DECISIONS WERE MADE AT THAT POINT.
19 I THINK IT WAS MORE OF A MATTER IT WAS SORT OF A MID TERM
20 MEETING PRELIMINARY TO THE JANUARY 22ND MEETING WHERE WE SAW
21 THE REAL WORK THAT THEY PUT IN PLACE.

22 Q. WAS THERE A FOURTH MEETING OF THE SELECT COMMITTEE ON
23 COPYRIGHT?

24 A. MEETING ON THE 22ND OF JANUARY, FACE-TO-FACE MEETING AT
25 GEORGIA STATE UNIVERSITY.

1 Q. THAT WAS FACE-TO-FACE MEETING DID YOU SAY?

2 A. YES, FACE-TO-FACE.

3 Q. WHO ATTENDED THAT MEETING?

4 A. I THINK VIRTUALLY EVERYBODY DID. MIGHT HAVE BEEN ONE
5 OR TWO PEOPLE THAT DIDN'T MAKES IT, I CAN'T REMEMBER NOW.

6 Q. WHAT WERE THE TOPICS OF THE MEETING ON THE 22ND OF
7 JANUARY 2009?

8 A. ENTIRE FOCUS OF THAT MEETING WAS TO GO THROUGH THE
9 POLICY AS IT NOW STOOD AND RECOMMEND EDITS AND CHANGES TO IT.
10 WE STARTED DOING THAT. THE FIRST THING WE DID IS LOOK AT THE
11 SET OF SCENARIOS WE CARRIED OVER FROM THE 1997 GUIDE AND
12 QUICKLY DECIDED WE DIDN'T NEED IT AND DIDN'T WANT IT AFTER
13 ALL. SO WE TOOK OUT. THAT WAS A FAIRLY LARGE SECTION THAT WE
14 JUST REMOVED FROM THE NEW POLICY SITE. THEN WE STARTED GOING
15 THROUGH IT PRETTY MUCH PAGE BY PAGE.

16 I DON'T RECALL MANY SUBSTANTIVE CHANGES APART FROM THE
17 CHECKLIST ITSELF UNDER THE FOUR FACTORS. THE WAY COLUMBIA HAD
18 IT THERE MIGHT BE A NUMBER ONE OF THE FACTORS, THERE MIGHT BE
19 FOUR SUBFACTORS, FOUR AND THREE AGAINST, OR SIX SUBFACTORS,
20 FOR AND TEN AGAINST. WE DECIDED IT WOULD BE BETTER TO HAVE AN
21 EQUAL NUMBER ON EACH SIDE, PAIR THOSE SUBFACTORS WHENEVER
22 POSSIBLE, THE IDEA BEING THAT WOULD HELP THE FACULTY MEMBER
23 WHEN THEY WERE FILLING OUT THIS FORM TO WORK THROUGH BOTH
24 SIDES OF THE QUESTION. SO WE CAME UP WITH SOME LANGUAGE THAT
25 -- AND SOME SUGGESTED POINTS FOR HOW WE WERE GOING TO BALANCE

1 THAT. WE WENT THROUGH THE REST OF THE DOCUMENT. AND AFTER
2 SEVERAL HOURS CAME UP WITH A FAIRLY SUBSTANTIAL LIST OF
3 CHANGES WE WANTED MADE AND GAVE THOSE TO COUNSEL AND ASKED
4 COUNSEL TO GO IN THE WEBSITE AND EDIT FOR US. THE REASON WE
5 ASKED COUNSEL TO DO IT RATHER THAN DO IT -- HAVE COMMITTEE
6 MEMBERS DO IT, WE WANTED TO ENSURE THAT THE LANGUAGE USED WAS
7 THE BEST LEGAL LANGUAGE THAT COULD BE USED FOR THIS. SO, WE
8 ASKED COUNSEL TO GO OFF AND DO THAT AND I THINK WITHIN A WEEK
9 OR SO THEY HAD MADE THE CHANGES.

10 Q. AND WHAT WAS THE DECISION, IF ANY, WITH RESPECT TO
11 THE REGENTS GUIDE AND THESE SCENARIOS OR EXAMPLES THAT WERE
12 INCLUDED AT ONE TIME AT THE REGENTS GUIDE?

13 A. WE HAD ELIMINATED THEM FROM THE NEW POLICY.

14 Q. WAS THERE A FIFTH MEETING OF THE SELECT COMMITTEE?

15 A. YES, THERE WAS. I AM TRYING TO REMEMBER THE EXACT
16 DATE, IT WAS RIGHT AROUND THE FIRST OF FEBRUARY, I CAN'T
17 REMEMBER THE EXACT DATE. IT WAS A CONFERENCE CALL.

18 Q. IT WAS A TELEPHONE CONFERENCE CALL?

19 A. TELEPHONE CONFERENCE CALL.

20 Q. DO YOU RECALL WHO PARTICIPATED IN THAT CALL?

21 A. THAT WAS AGAIN WELL TENDED BY THE COMMITTEE AND BY
22 ADVISORS, IT WAS PROBABLY TWO OR THREE PEOPLE WHO COULDN'T
23 ATTEND, BUT A MAJORITY OF THE COMMITTEE WAS THERE. WE HAD
24 FEEDBACK FROM THE OTHER MEMBERS OF THE COMMITTEE. THE
25 PURPOSE OF THAT MEETING WAS TO FINALIZE THE NOW-REVISED POLICY

1 GUIDE, POLICY WEBSITE TO SEE IF -- MAKE SURE THE COUNSEL MADE
2 ALL OF THE CHANGES WE WANTED MADE AND TO SEE IF THERE WAS
3 ANYTHING ELSE WE WANTED TO ADD.

4 WE DID DECIDE, I CAN'T REMEMBER, WE DECIDED TO ADD A
5 COMMENT PAGE THAT WOULD BE DIRECTED, COMMENTS BE DIRECTED TO
6 MR. NEWSOME. AND THEN ALSO I THINK THERE WAS SOME
7 NAVIGATIONAL ISSUES, SOME THINGS WE THOUGHT CHANGING THE ORDER
8 ON HOW YOU WOULD PROCEED THROUGH THE WEBSITE. BUT THOSE WERE
9 THE EXTENT OF THE CHALLENGES. AT THE CONCLUSION OF THAT
10 CONFERENCE CALL WE FELT THAT WE HAD CONCLUDED OUR WORK, WE
11 HAD DEVELOPED A NEW POLICY THAT REFLECTED BEST PRACTICES USED
12 AT OTHER UNIVERSITIES, AND THAT WE WOULD COMMUNICATE THIS TO
13 THE CHANCELLOR THROUGH VICE-CHANCELLOR NEWSOME. AND THAT IF
14 THE CHANCELLOR ACCEPTED IT, THAT WOULD CONCLUDE OUR WORK. WE
15 FINISHED THE PHONE CALL SAYING, ASSUMING IF EVERYTHING IS
16 APPROVED AND ASSUMING THAT THESE MINOR EDITS WERE COMPLETED
17 AND EVERYTHING WAS APPROVED, THAT THIS COMMITTEE WOULD CEASE
18 TO BE.

19 Q. WAS IT YOUR UNDERSTANDING THOSE MINOR EDITS WERE MADE?

20 A. YES. I DOUBLE CHECKED OVER THE NEXT FEW DAYS,
21 DETERMINED THAT THOSE CHANGES HAD BEEN MADE, COMMUNICATED
22 THAT TO MR. NEWSOME AND HE TOOK THE POLICY FORWARD TO THE
23 CHANCELLOR FROM THERE.

24 Q. DO YOU HAVE AN UNDERSTANDING AS TO WHETHER THE
25 CHANCELLOR SUBSEQUENTLY ADOPTED YOUR RECOMMENDATION AS THE

1 POLICY ON COPYRIGHTS FOR THE UNIVERSITY SYSTEM?

2 A. YES, HE DID.

3 Q. BEFORE I LEAVE THE SUBJECT FOR THESE VARIOUS IN-PERSON
4 MEETINGS, DR. POTTER, APPROXIMATELY HOW LONG DID THOSE
5 MEETINGS LAST, THE FIRST MEETING, THE SECOND MEETING, AND I
6 THINK IT WAS THE FOURTH MEETING WAS IN PERSON?

7 A. THE FIRST TWO IN-PERSON MEETINGS LASTED ABOUT
8 TWO-AND-A-HALF HOURS. THE LAST ONE PROBABLY WENT ABOUT FOUR
9 HOURS.

10 Q. DO YOU RECALL HOW LONG THE TELEPHONE CONFERENCES
11 LASTED?

12 A. THE FIRST ONE WAS ABOUT AN HOUR, THE SECOND ONE MAYBE
13 AN HOUR AS WELL.

14 Q. I WANT YOU TO TURN TO EXHIBIT 528 IN YOUR BOOK.

15 THE COURT: I JUST REALIZED IT IS QUARTER TO ONE.
16 LET'S GO AHEAD AND BREAK UNTIL 1:45.

17 (WHEREUPON, A LUNCH RECESS WAS HELD.)

18 THE COURT: YOU MAY PROCEED.

19 BY MR. ASKEW:

20 Q. DR. POTTER, IF YOU WOULD TURN TO THAT TAB IN YOUR BOOK
21 THAT IS MARKED DX 528.

22 A. (WITNESS COMPLIES.) YES.

23 Q. THAT DOCUMENT HAS A STIPULATION ON TOP OF IT WHICH IS
24 PART OF THIS DOCUMENT THAT WAS PRESENTED TO THE COURT. I
25 WANT TO GET PAST THAT STIPULATION AND LOOK AT WHAT IS BEHIND

1 THE STIPULATION.

2 A. ALL RIGHT.

3 Q. CAN YOU IDENTIFY THAT DOCUMENT FOR ME, SIR?

4 A. THIS IS THE UNIVERSITY OF SYSTEM GEORGIA USE OF
5 COPYRIGHT WORK AND RESEARCH.

6 Q. IS THIS POLICY DOCUMENT THE ONE THAT WAS DEVELOPED BY
7 THE SELECT COMMITTEE?

8 A. YES.

9 Q. AND DOES IT HAVE ATTACHED TO IT SUPPORTING MATERIALS
10 WHICH ARE LINKED TO THAT POLICY THROUGHOUT THE BODY OF THE
11 POLICY?

12 A. YES.

13 Q. DR. POTTER, WHAT ROLE DID THE COMMITTEE ENVISION FOR
14 FACULTY TO HAVE IN FAIR USE DETERMINATIONS?

15 A. THE COMMITTEE BELIEVED THAT FACULTY WOULD BE IN THE
16 BEST POSITION TO DETERMINE WHETHER A USE OF COPYRIGHTED
17 MATERIAL WAS A FAIR USE OR NOT A FAIR USE BECAUSE THEY KNEW
18 THE COURSE CONTENT, THEY KNEW THEIR STUDENTS, THEY KNEW THE
19 MATERIALS, THEY KNEW WHAT PURPOSE THEY WANTED TO, THEY WERE
20 IN THE BEST POSITION TO MAKE THAT DETERMINATION.

21 Q. WHY WERE THESE LINKS, DR. POTTER, ATTACHED TO THE
22 POLICY DOCUMENT MARKED AS DX 528?

23 A. SOME OF THE LINKS WERE PLACED THERE FOR FOOTNOTING OR
24 ATTRIBUTION PURPOSES. FOR EXAMPLE THE LINK TO THE -- BACK TO
25 THE COLUMBIA SITE, WHICH APPEARS FREQUENTLY, ACKNOWLEDGES THAT

1 WE DERIVE MUCH OF THE POLICY FROM COLUMBIA. WE PROVIDE A LINK
2 BACK AS MUCH AS A FOOTNOTE. THE OTHER LINKS ARE TO SUPPORTING
3 INFORMATION, FOR EXAMPLE, A LINK TO THE COPYRIGHT LAW ITSELF.
4 WE PROVIDED LINKS TO THOSE MATERIALS FOR FACULTY IF THEY
5 WANTED TO DO ADDITIONAL INFORMATION, DO ADDITIONAL READING.

6 Q. I WANT TO CHANGE SUBJECTS WITH YOU JUST A SECOND NOW,
7 DR. POTTER.

8 WERE ANY INDIVIDUAL MEMBERS OF THE BOARD OF REGENTS
9 MEMBERS OF THE SELECT COMMITTEE ON COPYRIGHT?

10 A. NO.

11 Q. DID ANY INDIVIDUAL MEMBERS OF THE BOARD OF REGENTS HAVE
12 A ROLE IN THE SELECT COMMITTEE ON COPYRIGHT?

13 A. NO.

14 Q. WERE ANY INDIVIDUAL MEMBERS OF THE BOARD OF REGENTS IN
15 ANY WAY INVOLVED IN THE WORK OF THE SELECT COMMITTEE ON
16 COPYRIGHT?

17 A. NO.

18 Q. WERE ANY INDIVIDUAL MEMBERS OF THE BOARD OF REGENTS
19 INVOLVED IN THE IMPLEMENTATION OF THE NEW COPYRIGHT POLICY?

20 A. NO.

21 Q. A FEW FINAL QUESTIONS FOR YOU, DR. POTTER.

22 DURING ANY COMMITTEE MEETING, WERE THERE ANY DISCUSSIONS
23 AMONG THE MEMBERS OF THE SELECT COMMITTEE ON COPYRIGHT ABOUT
24 THE LITIGATION BETWEEN GEORGIA STATE UNIVERSITY, THE BOARD OF
25 REGENTS, AND THE PUBLISHERS?

1 A. NO.

2 Q. WAS THERE CONSIDERATION OF THE LAWSUIT IN COMMITTEE
3 MEETINGS OR DURING COMMITTEE DECISIONS REGARDING THE NEW
4 POLICY?

5 A. NO.

6 Q. WERE ANY DECISIONS MADE BY THE SELECT COMMITTEE ON
7 COPYRIGHT BASED ON A DISCUSSION OF THE LAWSUIT?

8 A. NO.

9 Q. WERE ANY DECISIONS MADE BY THE SELECT COMMITTEE BASED
10 ON HOW THOSE DECISIONS MIGHT IN SOME FASHION AFFECT THE
11 LAWSUIT BETWEEN THE PUBLISHERS, THE BOARD OF REGENTS, AND
12 GEORGIA STATE UNIVERSITY?

13 A. NO.

14 MR. ASKEW: YOUR HONOR, THAT CONCLUDES MY
15 EXAMINATION OF DR. POTTER.

16 THE COURT: YOU MAY PROCEED.

17 CROSS EXAM

18 BY MR. RICH:

19 Q. GOOD AFTERNOON, DR. POTTER. NICE TO SEE YOU AGAIN.
20 AS YOU RECALL, WE MET AT THE TIME OF YOUR DEPOSITION.

21 A. I DO.

22 Q. NOW, IN ADDITION TO THE RESPONSIBILITIES YOU TESTIFIED
23 TO ON YOUR DIRECT EXAMINATION TODAY, THAT IS CHAIRING THE MOST
24 RECENT COMMITTEE, YOU ALSO CHAIRED THE PRIOR COMMITTEE THAT
25 DEVELOPED THE 1997 REGENTS GUIDE TO UNDERSTANDING COPY GUIDE

1 AND EDUCATIONAL FAIR USE; IS THAT CORRECT?

2 A. YES, IT IS.

3 Q. AND THAT GUIDE PURPORTED TO DEAL WITH COPYRIGHT ISSUES
4 AMONG OTHER SUBJECTS IMPLICATED BY ADVANCED INFORMATION
5 TECHNOLOGY, RIGHT?

6 A. YES.

7 MR. ASKEW: YOUR HONOR, I WILL OBJECT TO THE
8 RELEVANCE OF THIS INQUIRY, THAT IS THE REGENTS GUIDE. THAT
9 IS WAY BEYOND THE TIME LIMITS THAT WE HAVE BEEN DISCUSSING
10 DURING THE COURSE OF THIS LITIGATION, BACK IN THE LATE
11 NINETIES. IT IS A GUIDE THAT IS NO LONGER IN EFFECT AND NOT
12 INVOLVED IN THIS. I WILL OBJECT ON RELEVANCE GROUNDS.

13 MR. RICH: A, IT IS CONTEXTUAL, YOUR HONOR; B, MR.
14 ASKEW, ON EXAMINATION, CITED THE DOCUMENTS WHICH I WILL BE
15 GOING BACK THROUGH VERY BRIEFLY IDENTIFYING TWEAKS THAT WOULD
16 BE MADE TO THE NEW POLICY, WHICH IN FACT DID NOT HAPPEN. I
17 AM SIMPLY BRIEFLY, GOING TO PUT IT IN ITS PROPER CONTEXT.

18 THE COURT: I AM NOT QUITE SURE WHAT YOU ARE SAYING.
19 IT IS TRUE THAT WHAT IS IN THE NINETY-SEVEN POLICY IS NOT
20 RELEVANT.

21 MR. RICH: A PART OF WHAT I AM DOING IS
22 CREDENTIALING, PROBING A BIT THE WITNESS'S OWN UNDERSTANDING
23 OF THESE ISSUES CARRYING BACK INTO THAT PERIOD. IT IS REALLY
24 NOT A DETAILED EXAMINATION ON THE OLD POLICY AND IN FACT NO
25 QUESTIONS ABOUT THE SUBSTANCE OF THE OLD POLICY AT ALL.

1 THE COURT: IF YOU ARE REFERRING -- I AM GOING TO
2 SUSTAIN THE OBJECTION.

3 MR. RICH: VERY WELL.

4 BY MR. RICH:

5 Q. YOUR PROFESSIONAL TRAINING IS IN LIBRARY AND
6 INFORMATION SCIENCES; IS THAT CORRECT?

7 A. THAT'S CORRECT.

8 Q. YOU HAVE NO LEGAL TRAINING?

9 A. THAT'S RIGHT.

10 Q. AND WHILE YOU HAVE SOME WORKING FAMILIARITY WITH
11 COPYRIGHT LAW AS IT APPLIES TO THE ACADEMIC LIBRARY SETTING,
12 YOU DON'T HOLD YOURSELF OUT AS AN EXPERT IN COPYRIGHT LAW;
13 ISN'T THAT TRUE?

14 A. THAT'S TRUE.

15 Q. IN FACT, IN YOUR TENURE SINCE 1989 AT THE UNIVERSITY
16 OF GEORGIA, YOU HAVE ROUTINELY DELEGATED MATTERS RELATING TO
17 COPYRIGHT POLICY TO OTHER ADMINISTRATORS, RIGHT?

18 A. THAT'S CORRECT.

19 Q. AND SPECIFICALLY, WITH RESPECT TO THE MAKING OF COURSE
20 MATERIALS AVAILABLE TO STUDENTS, YOU HAVE NO CONCEPTION OF
21 WHAT A COURSEPACK IS; IS THAT RIGHT?

22 A. THAT IS WHAT I SAID IN MY DEPOSITION, THAT'S CORRECT.

23 Q. YES. AND THAT IS THE CASE, EVEN THOUGH COURSEPACKS
24 WERE EXPLICITLY ADDRESSED IN THE PRIOR POLICY WHOSE PROCESS
25 FORMATION YOU CHAIRED, CORRECT?

1 MR. ASKEW: YOUR HONOR, I WILL OBJECT AGAIN TO
2 RELEVANCE TO THE PRIOR REGENTS.

3 THE COURT: SUSTAINED. THE OBJECTION IS SUSTAINED.
4 BY MR. RICH:

5 Q. YOU HAVE NEVER ADVISED FACULTY CONCERNING THE USE OF
6 COURSEPACKS, HAVE YOU?

7 A. NO.

8 Q. YOU HAVE NO IDEA WHAT THE PRACTICE AT THE UNIVERSITY OF
9 GEORGIA, YOUR INSTITUTION, HAS BEEN WITH RESPECT TO SEEKING
10 OR OBTAINING PUBLISHER PERMISSIONS FOR CREATION AND
11 DISSEMINATION OF COURSEPACKS; IS THAT CORRECT?

12 MR. ASKEW: YOUR HONOR, I WILL OBJECT AGAIN. NO
13 ALLEGATIONS WITH RESPECT TO ANY CONDUCT OF UNIVERSITY OF
14 GEORGIA AS ALLEGED ACCUSED VIOLATION, USED INFRINGEMENT, NO
15 ALLEGATION WITH RESPECT TO COURSEPACKS AT UNIVERSITY OF
16 GEORGIA. UNIVERSITY OF GEORGIA DOES NOT HAVE ANYTHING TO DO
17 WITH THIS LAWSUIT. I WILL OBJECT ON RELEVANCE GROUNDS.

18 THE COURT: OVERRULED.

19 MR. RICH: DO YOU HAVE THE QUESTION IN MIND?

20 THE WITNESS: COULD YOU REPEAT IT, PLEASE?

21 THE COURT: WHEN YOU SAID "UNIVERSITY OF GEORGIA,"
22 WERE YOU TALKING ABOUT THE INSTITUTION IN ATHENS?

23 MR. RICH: YES, THE INSTITUTION OF WHICH HE IS THE
24 HEAD LIBRARIAN.

25 THE COURT: OKAY. GO AHEAD.

1 BY MR. RICH:

2 Q. YOU HAVE NO IDEA AS TO WHAT THE PRACTICE OF THE
3 UNIVERSITY OF GEORGIA HAS BEEN WITH RESPECT TO SEEKING OR
4 OBTAINING PUBLISHER PERMISSION FOR CREATION AND DISSEMINATION
5 OF COURSEPACKS, RIGHT?

6 A. THAT'S RIGHT.

7 Q. AND WHILE YOU HAVE SUPERVISORY RESPONSIBILITY OVER THE
8 OPERATION OF ERES SYSTEM AT THE UNIVERSITY OF GEORGIA, YOU
9 DON'T REMEMBER IN RELATION TO THOSE RESPONSIBILITIES EVER
10 ADDRESSING A COPYRIGHT POLICY ISSUE AS IT RELATES TO ERES; IS
11 THAT CORRECT?

12 A. THAT'S CORRECT.

13 Q. YOU HAVE ONLY BEEN ACKNOWLEDGED AS TO THE WORKINGS OF
14 COPYRIGHT CLEARANCE CENTER?

15 MR. ASKEW: I WILL OBJECT. NO TESTIMONY OF CONDUCT
16 OF UNIVERSITY OF GEORGIA ERES SYSTEM WITH ANY ALLEGATIONS OF
17 INFRINGEMENT IN THIS CASE. OBJECT ON RELEVANCE.

18 THE COURT: THAT IS TRUE, BUT WE ARE TALKING ABOUT
19 A SYSTEM-WIDE POLICY IS MY UNDERSTANDING.

20 MR. RICH: TALKING ABOUT THE KNOWLEDGE, YOUR HONOR,
21 THIS WITNESS BROUGHT AS CHAIRMAN OF THIS EFFORT.

22 THE COURT: I WILL ALLOW THE QUESTION, GO AHEAD.

23 BY MR. RICH:

24 Q. YOU HAVE ONLY VAGUE KNOWLEDGE OF THE WORKING OF THE
25 COPYRIGHT CLEARANCE CENTER, CORRECT?

1 A. THAT'S CORRECT.

2 Q. YOU HAD NO PERSONAL DEALINGS WITH THE COPYRIGHT
3 CLEARANCE CENTER?

4 A. THAT'S CORRECT.

5 Q. AT LEAST AS OF THE DATE OF THE DEPOSITION YOU DIDN'T
6 KNOW THE EXTENT OF THE MEMBERS OF THE GEORGIA UNIVERSITY
7 COMMUNITY HAVE AVAILED THEMSELVES OF THE SOURCES OF THAT
8 ORGANIZATION?

9 A. CORRECT.

10 Q. YOU TESTIFIED ON DIRECT YOU WERE ASKED BOTH BY
11 CHANCELLOR DAVIS AND VICE CHAIR OF THE BOARD OF LEGAL AFFAIRS
12 FOR THE BOARD OF REGENTS, BURNS NEWSOME, TO SERVE AS CHAIR OF
13 THE MORE RECENT COMMITTEE; IS THAT CORRECT?

14 A. CORRECT THAT. MR. NEWSOME IS VICE CHANCELLOR, NOT
15 VICE CHAIR.

16 Q. IT IS IN MY NOTES, I MISLEAD.

17 A. THAT'S CORRECT.

18 Q. IT IS YOUR UNDERSTANDING THE IMPETUS FOR FORMATION OF
19 THE COMMITTEE CAME FROM THE BOARD OF REGENTS OF THE UNIVERSITY
20 SYSTEM OF GEORGIA?

21 A. I DON'T KNOW.

22 Q. YOU DON'T KNOW. AT THE END OF THE DAY, WHAT WAS YOUR
23 UNDERSTANDING AS WHO WAS REQUIRED TO APPROVE THE POLICY ONCE
24 YOUR COMMITTEE HAD CONCLUDED ITS WORK?

25 A. THE CHANCELLOR.

1 Q. NOW, YOU WERE APPROACHED IN OR AROUND OCTOBER 2008, I
2 BELIEVE IS YOUR TESTIMONY?

3 A. THAT'S RIGHT.

4 Q. AND THAT WOULD HAVE BEEN ABOUT SIX MONTHS AFTER THIS
5 LAWSUIT WAS COMMENCED, DO YOU KNOW THAT?

6 A. I BELIEVE THAT IS CORRECT.

7 Q. AND I AM GOING TO SHOW YOU A DOCUMENT MARKED AS
8 PLAINTIFFS' TRIAL EXHIBIT 1004.

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

10 THE COURT: YOU MAY.

11 BY MR. RICH:

12 Q. I AM GOING TO ASK YOU IF YOU RECOGNIZE AS THE DOCUMENT
13 TO WHICH YOU REPEATEDLY REFERRED DURING YOUR DIRECT
14 EXAMINATION AS THE DOCUMENT YOU RECEIVED FROM MR. NEWSOME,
15 THIS IS DATED OCTOBER 27, 2008, ASKING YOU TO BE AVAILABLE
16 AND TO CHAIR THIS NEW COMMITTEE EFFORT?

17 A. THAT'S CORRECT.

18 Q. AND --

19 MR. RICH: I WOULD OFFER THAT INTO EVIDENCE AT THIS
20 POINT.

21 MR. ASKEW: NO OBJECTION.

22 THE COURT: STATE THE EXHIBIT NUMBER AGAIN.

23 MR. RICH: PLAINTIFFS' TRIAL EXHIBIT 1004.

24 THE COURT: ADMITTED.

25

1 BY MR. RICH:

2 Q. TAKE A LOOK AT THE BEGINNING OF THE SECOND PARAGRAPH OF
3 THIS LETTER, STATES:

4 "AS YOU MIGHT BE AWARE, THE BOARD OF
5 REGENTS GUIDE TO COPYRIGHT," AND
6 THEN IT GIVES THE URL, "IS A
7 CENTRAL PART OF A LAWSUIT FILED BY
8 THE PUBLISHING INDUSTRY AGAINST THE
9 BOARD AND GEORGIA STATE UNIVERSITY."

10 AND CONTINUES.

11 "GIVEN THAT THE REGENTS GUIDE IS
12 MORE THAN 11 YEARS OLD AND YOU DID
13 NOT CONTEMPLATE MANY OF THE DIGITAL
14 TECHNOLOGIES AVAILABLE TO RESEARCH
15 LIBRARIES, WE BELIEVE IT IS TIME TO
16 REVISIT THE REGENTS'S GUIDELINES."

17 THEN IT GOES ON TO INDICATE THAT THE CHANCELLOR DESIRED TO
18 CONVENE A TASK FORCE, DO YOU SEE THAT?

19 A. YES.

20 Q. SO IN OR AROUND LATE OCTOBER, HAVING RECEIVED THIS
21 COMMUNICATION FROM MR. NEWSOME, I TAKE IT YOU WERE AWARE THAT
22 THIS LAWSUIT WAS PENDING?

23 A. YES.

24 Q. AND YOU WERE AWARE THAT THIS LAWSUIT INVOLVED
25 EXAMINATION OF COPYRIGHT POLICY AND PRACTICE AT GEORGIA STATE

1 UNIVERSITY?

2 A. YES.

3 Q. AND I TAKE IT THEN FROM THIS COMMUNICATION YOU ALSO
4 UNDERSTOOD THAT AN IMPETUS FOR FORMATION OF THE COMMITTEE WAS
5 THE EVENT OF THAT LAWSUIT, CORRECT?

6 A. I DON'T READ THAT NECESSARILY AS AN IMPETUS. I READ
7 IT AS HIM ASKING ME TO CHAIR THIS COMMITTEE, THE GUIDE IS
8 MORE THAN 11 YEARS OLD. PRIOR TO THAT HE DOES SAY THE GUIDE
9 IS PART OF THE LAWSUIT. I DON'T KNOW. I WAS NOT PRIVY TO
10 DISCUSSION THAT SAID THERE WAS AN IMPETUS OR THIS CAUSED IT,
11 I DON'T KNOW.

12 Q. YOU DREW NO INFERENCE FROM THE VERY SAME PARAGRAPH THAT
13 MR. NEWSOME INDICATES IT WAS A GOOD TIME TO REVISIT THE OLD
14 POLICY AND THAT IT WAS A GOOD TIME TO CONVENE A COMMITTEE OF
15 WHICH HE WANTED YOU TO BE CHAIR , THAT THE LEAD SENTENCE OF
16 THAT PARAGRAPH IS A REFERENCE TO THIS LAWSUIT?

17 A. NO. AGAIN, I DIDN'T QUESTION OR ASK WHAT HIS IMPETUS
18 WAS. I JUST KNEW THEY WANTED TO REVISIT THE GUIDELINES, '97
19 GUIDELINES.

20 Q. AND DO I UNDERSTAND THAT YOU WERE INVOLVED IN THE
21 SELECTION OF COUNSEL FOR THE COMMITTEE?

22 A. NO.

23 Q. DO YOU KNOW WHO SELECTED COUNSEL?

24 A. NO.

25 Q. DID YOU UNDERSTAND THAT WHEN YOU CAME TO KNOW THAT KING

1 AND SPALDING WAS SELECTED AS COUNSEL, WERE YOU ADVISED THAT
2 THEY WERE SIMULTANEOUSLY SERVING AS COUNSEL FOR THE DEFENDANTS
3 IN THIS LITIGATION?

4 A. I BECAME AWARE OF THAT AT ONE POINT, WHEN I BECAME
5 AWARE I DON'T REMEMBER.

6 Q. YOU DIDN'T KNOW IT AT THE TIME?

7 A. NO.

8 Q. DO YOU REMEMBER HOW YOU BECAME AWARE OF IT?

9 A. NO, I DO NOT.

10 Q. AND THEY PLAYED AN IMPORTANT ROLE IN THE DELIBERATIONS
11 OF THE COMMITTEE, CORRECT?

12 A. THEY PLAYED AN IMPORTANT ADVISORY ROLE TO US, YES.

13 Q. THEY ATTENDED ALL MEETINGS?

14 A. YES.

15 Q. THEY DID MOST OF THE DRAFTING?

16 A. THEY TOOK OUR IDEAS AND PUT THOSE IDEAS INTO THE
17 POLICY, YES.

18 Q. THEY WEREN'T PASSIVE, I TAKE IT, IN THE PROCESS?

19 A. THEY WEREN'T AGGRESSIVE IN THE PROCESS.

20 Q. WELL, I WOULDN'T USE THAT AS THE OPPOSITE, LET ME
21 REPHRASE THE QUESTION.

22 BY "PASSIVE," I MEAN, THEY DID OFFER THEIR ADVICE IN THE
23 PROCESS I TAKE IT, YES?

24 A. YES.

25 Q. AND THIS COMMITTEE PROCESS TOOK ABOUT SIXTY DAYS FROM

1 START TO FINISH, CORRECT?

2 A. YES.

3 Q. DO YOU RECALL HOW LONG THE PROCESS TO DEVELOP THE PRIOR
4 POLICY TOOK?

5 A. I BELIEVE IT WAS SEVEN OR EIGHT MONTHS.

6 Q. AND THE REASON THAT THIS ONE WENT FASTER, TO YOUR
7 KNOWLEDGE, IS BECAUSE YOU HAD THE EXPERT ADVICE OF KING AND
8 SPALDING?

9 A. AS I TOLD YOU IN MY DEPOSITION, THAT WAS ONE REASON.
10 ANOTHER REASON WAS THAT I HAD MORE EXPERIENCE DOING THIS, IT
11 HAD BEEN 11 YEARS. A THIRD REASON, WHICH UPON REFLECTION I
12 WOULD LIKE TO ADD, IF I COULD, IS THAT WE DECIDED TO DRAW
13 UPON WORK FROM OTHER UNIVERSITIES, AND I THINK THAT IS
14 PROBABLY THE CRITICAL ROLE, MAJOR CRITICAL ROLE IN REDUCING
15 THE AMOUNT OF TIME TO PRODUCE THE POLICY. WE WERE DRAWING
16 UPON WHAT WE CAME TO SEE AS ESTABLISHED BEST PRACTICE AT A
17 NUMBER OF OTHER UNIVERSITIES.

18 Q. THAT IS A REALIZATION THAT CAME TO YOU SINCE THE
19 INTERVENING PERIOD SINCE YOUR DEPOSITION WAS TAKEN?

20 A. YES.

21 Q. IS IT YOUR UNDERSTANDING THAT THE TIMING UNDER WHICH
22 THE COMMITTEE CONDUCTED ITS DELIBERATIONS AND ULTIMATELY
23 DEVELOPED A POLICY, IT WAS UNRELATED IN ANY WAY TO ANYTHING
24 OCCURRING IN THE LITIGATION?

25 A. YES.

1 Q. IS THAT TO YOUR KNOWLEDGE OR IS IT POSSIBLE THAT YOUR
2 UNDERSTANDING WAS LIMITED IN THAT RESPECT?

3 A. I CAN ONLY SPEAK TO THE WORK OF THE COMMITTEE AND IN
4 THE WORK OF THE COMMITTEE WE DID NOT DISCUSS IT.

5 Q. YOU WERE SHOWN A DOCUMENT ON YOUR DIRECT ABOUT THE
6 LAWYERS PRESSING TO CONVENE THE FIRST MEETING, DO YOU RECALL
7 THAT?

8 A. YES.

9 Q. AND YOUR UNDERSTANDING IS THAT, WAS THAT KING AND
10 SPALDING, WAS THAT A REFERENCE TO KING AND SPALDING?

11 A. I BELIEVE IT WAS, YES.

12 Q. AND YOUR UNDERSTANDING WAS THEY JUST WANTED TO GET THE
13 PROCESS GOING?

14 A. I THINK, YES. THEY THOUGHT WE SHOULD, IN ORDER TO DO
15 THIS, WE SHOULD GET GOING WITH IT.

16 Q. IF THEY HAD REASONS IN ADDITION, THAT IS WEARING THEIR
17 OTHER HAT TO COUNSEL OF LITIGATION, THOSE ARE REASONS YOU ARE
18 UNAWARE OF?

19 A. THAT'S CORRECT.

20 Q. AND WHEN THE COMMITTEE, AS REPORTED IN ANOTHER DOCUMENT
21 YOU WERE SHOWN, DTX 129, WAS PRESSING TO COMPLETE ITS
22 DELIBERATIONS IN LATE JANUARY, AGAIN, WAS IT YOUR
23 UNDERSTANDING THAT THAT TIMETABLE WAS UNRELATED TO, IN ANY
24 RESPECT, THE ONGOING LITIGATION?

25 A. YES.

1 Q. WERE YOU EVER BRIEFED ABOUT THE TIMETABLE OF EVENTS IN
2 THIS LITIGATION?

3 A. I DON'T RECALL THAT, NO.

4 Q. WERE YOU EVER MADE AWARE THAT BEGINNING OF FEBRUARY
5 THERE WERE GOING TO BE A SERIES OF DEPOSITIONS CONDUCTED OF
6 GSU PERSONNEL IN THIS LITIGATION FOR THE FIRST TIME?

7 A. I DO NOT RECALL THAT, NO.

8 Q. WERE YOU EVER MADE AWARE THAT THREE DAYS AFTER THE
9 POLICY WAS PROMULGATED, THE VERY SAME LAW FIRM, KING AND
10 SPALDING, WROTE TO COUNSEL FOR THE PLAINTIFFS ASKING FOR AN
11 ADJOURNMENT OF THOSE DEPOSITIONS IN LIGHT OF THE NEW POLICY?

12 A. WAS I EVER AWARE OF IT DID YOU SAY?

13 Q. YES. WELL, FIRST, WERE YOU AWARE AT THE TIME?

14 A. I WASN'T AWARE OF THE TIME.

15 Q. BE AROUND FEBRUARY 20TH, 2009?

16 A. NO.

17 Q. DID YOU SUBSEQUENTLY BECOME AWARE OF THAT?

18 A. I DON'T RECALL. I HAVE A SENSE THAT I KNOW THAT NOW,
19 BUT WHEN I BECAME AWARE OF THAT, I DON'T KNOW.

20 Q. YOU WERE SHOWN A DOCUMENT ALSO BY MR. ASKEW IN WHICH
21 IT WAS INDICATED THAT THIS, MEANING THE NEW POLICY, WILL BE
22 USED IN LEGAL PROCEEDINGS AND IS EXTREMELY SENSITIVE, DO YOU
23 REMEMBER BEING SHOWN THAT BLANK PAGE?

24 A. YES.

25 Q. YOU PROFESS TO HAVE NO IDEA WHAT THAT MEANS OR WHAT IT

1 MEANT AT THE TIME?

2 A. YOU WOULD HAVE TO ASK THE WOMAN WHO WROTE THAT WHAT SHE
3 MEANT, I DON'T KNOW.

4 Q. YOUR TESTIMONY AND YOUR BEST RECOLLECTION IS THE
5 COMMITTEE, ALTHOUGH REPRESENTED BY THE SAME LAW FIRM THAT WAS
6 SIMULTANEOUSLY HANDLING LITIGATION, WENT ABOUT ITS TASK
7 INDEPENDENT OF AND WITHOUT ANY CONSIDERATION OF THAT
8 LITIGATION, IS THAT YOUR TESTIMONY?

9 A. THAT'S CORRECT.

10 Q. NOW, I BELIEVE YOU AGREE THAT A FUNDAMENTAL ELEMENT OF
11 THE NEW POLICY IN RELATION TO ELECTRONIC COURSE READINGS IS TO
12 REPOSE IN FACULTY MEMBERS THE RESPONSIBILITY FOR MAKING FAIR
13 USE EVALUATIONS ON A CASE-BY-CASE BASIS; IS THAT CORRECT?

14 A. YES.

15 Q. AND THE COMMITTEE'S REASONING ENDORSED BY YOU, I TAKE
16 IT, WAS THAT WE HAVE TO HAVE FAITH IN OUR FACULTY TO DO THE
17 RIGHT THING GIVEN THE RIGHT TOOLS AND THE RIGHT INFORMATION,
18 CORRECT?

19 A. YES.

20 Q. AND THE ONLY TOOL PROVIDED THE FACULTY BY THE COMMITTEE
21 TO ACCOMPLISH THIS WAS A FAIR USE CHECKLIST, CORRECT?

22 A. FAIR USE CHECKLIST, PLUS THE SUPPORTING MATERIAL IN THE
23 POLICY.

24 Q. AT THE TIME OF YOUR DEPOSITION, YOU BELIEVE, FRESH OFF
25 THE COMMITTEE WORK, THAT THE ONLY TOOL YOU PROVIDED FACULTY

1 WITH WAS THE CHECKLIST, CORRECT?

2 A. I DON'T RECALL.

3 Q. WHY DON'T WE TAKE A QUICK LOOK.

4 MR. RICH: MAY I, YOUR HONOR?

5 THE COURT: YOU MAY.

6 THE WITNESS: IT IS NOT THE VIDEOTAPE.

7 BY MR. RICH:

8 Q. I WOULD ASK YOU TO TURN TO PAGE 142 BEGINNING AT LINE 9
9 THROUGH 142 LINE 19. DO WE HAVE THAT? I WILL JUST READ IT IN
10 TO THE RECORD. ARE YOU WITH ME?

11 A. YES.

12 Q.

13 "QUESTION: SECOND BULLET SAYS,
14 QUOTE, DEVELOPS AND MAKES AVAILABLE
15 TOOLS AND RESOURCES FOR FACULTY AND
16 STAFF TO ASSIST IN DETERMINING
17 COPYRIGHT STATUS AND OWNERSHIP AND
18 DETERMINING WHETHER USE OF A WORK IN
19 A SPECIFIC SITUATION WOULD BE A FAIR
20 USE AND THEREFORE NOT AN
21 INFRINGEMENT UNDER COPYRIGHT LAW.

22 WHAT ARE THESE REFERENCE TO?

23 ANSWER: THIS IS A REFERENCE TO THE
24 CHECKLIST THAT IS NOW PART OF THE
25 POLICY.

1 QUESTION: ANYTHING ELSE?

2 ANSWER: NO.

3 DO YOU RECALL THAT TESTIMONY?

4 A. I OBVIOUSLY SAID IT.

5 Q. NOW, THE COMMITTEE GATHERED NO -- THAT WAS YOUR
6 DEPOSITION, WAS CONDUCTED SHORTLY AFTER THE COMMITTEE
7 CONCLUDED ITS DELIBERATIONS, CORRECT?

8 A. YES.

9 Q. THE COMMITTEE GATHERED NO EMPIRICAL DATA AS TO
10 PRE-EXISTING COPYING ACTIVITY ACROSS UNIVERSITY SYSTEMS; IS
11 THAT CORRECT?

12 A. THAT'S CORRECT.

13 Q. NOR DID IT TEST OUT HOW THE POLICY, HOW THE NEW POLICY
14 AND SPECIFIC APPLICATION OF THE NEW CHECKLIST WOULD WORK IN
15 PRACTICE, TRUE?

16 A. THAT'S CORRECT.

17 Q. INCLUDING BY REACHING OUT TO ANY FACULTY OUTSIDE OF
18 THOSE WHO WERE ON THE COMMITTEE ITSELF?

19 A. CORRECT.

20 Q. SUCH THAT AT THE TIME THE NEW POLICY WAS ROLLED OUT,
21 YOU HAD NO IDEA, DID YOU, HOW INDIVIDUAL FACULTY WOULD APPLY
22 THE CHECKLIST TO INDIVIDUAL CIRCUMSTANCES?

23 A. WE HAD THE ADVICE OF THE FACULTY MEMBERS ON THE
24 COMMITTEE WHO FELT IT WAS AN ADEQUATE TEST.

25 Q. BUT YOU HAD NO INPUT OR FEEDBACK FROM OUTSIDE THAT

1 GROUP, CORRECT?

2 A. THAT'S RIGHT.

3 Q. SO, IF YOU WOULD TURN TO PAGE 148 OF YOUR DEPOSITION,
4 LINE 24.

5 "I WANT TO ASK YOU QUESTIONS. SO
6 SITTING HERE TODAY, YOU REALLY HAVE
7 NO IDEA HOW INDIVIDUAL FACULTY WILL
8 APPLY THESE IN ANY INDIVIDUAL
9 SITUATION?

10 YOU ANSWERED, NO."

11 CORRECT?

12 A. THAT'S CORRECT.

13 Q. NOR DID THE COMMITTEE PUT INTO PLACE ANY PLAN TO
14 EVALUATE ONGOING PRACTICE UNDER THE NEW POLICY; IS THAT TRUE?

15 A. THAT'S CORRECT.

16 Q. AND SO, FOR EXAMPLE, WHILE MR. ASKEW SHOWED YOU A VERY
17 THICK DOCUMENT SHOWING LOTS OF LINKS TO DIFFERENT SITES AND SO
18 FORTH, THE COMMITTEE REALLY HAD NO IDEA IN FACT THE EXTENT TO
19 WHICH ANY OF THOSE LINKS OR OTHER RESOURCES IN FACT WERE
20 AVAILED OF BY FACULTY MEMBERS, CORRECT?

21 A. THAT'S CORRECT.

22 Q. INDEED, IN YOUR VIEW, THE VERY USE OF THE CHECKLIST
23 ACROSS THE UNIVERSITY SYSTEM WOULD PROMOTE A DEGREE OF
24 UNIFORMITY IN ITS APPLICATION, TRUE?

25 A. THAT'S CORRECT.

1 Q. NOW, DID YOU OR OTHER MEMBERS OF THE COMMITTEE
2 CONTEMPLATE THE POSSIBILITY THAT THIS UNIFORMITY WOULD
3 MANIFEST ITSELF BY UNIFORM DETERMINATIONS, THAT ALL MANNERS
4 OF USES OF COPYRIGHT MATERIALS CONSTITUTE FAIR USE?

5 A. NO.

6 Q. IT WAS, HOWEVER, IMPORTANT TO THE COMMITTEE THAT
7 FACULTY ACTUALLY FILL OUT AND RETAIN A CHECKLIST, TRUE?

8 A. CORRECT.

9 Q. DID THE COMMITTEE CONTEMPLATE THAT THIS OBLIGATION
10 WOULD BE SATISFIED BY SHORTCUTS IN THE NATURE OF PERFORMING
11 FAIR USE ANALYSIS IN ONE'S HEAD IN LIEU OF ACTUALLY FILLING
12 OUT A CHECKLIST?

13 A. NO.

14 Q. ANOTHER TOPIC NOT DISCUSSED BY THE COMMITTEE WAS THE
15 IMPACT ON FACULTY FAIR USE DETERMINATIONS OF UNIVERSITY
16 BUDGETARY CONSTRAINTS ON PERMISSIONS FUNDING, TRUE?

17 A. TRUE.

18 Q. THE COMMITTEE THUS GAVE NO CONSIDERATION TO THE
19 INCENTIVES, SUCH AS LACK OF A BUDGET MIGHT PROVIDE FACULTY TO
20 APPLY THE NEW CHECKLIST IN A FASHION THAT WOULDN'T PUT THEM IN
21 A POSITION OF HAVING TO PAY FOR PERMISSIONS OUT-OF-POCKET,
22 RIGHT?

23 A. RIGHT.

24 Q. ANOTHER TOPIC THAT THE COMMITTEE DID NOT CONSIDER WAS
25 THE IMPACT, IF ANY, ON A FAIR USE ANALYSIS OF WHETHER A

1 COURSEPACK IS BEING CREATED AS PART OF THE USE OF COPYRIGHTED
2 MATERIAL, TRUE?

3 A. COURSEPACKS WERE NOT A TOPIC OF CONVERSATION.

4 Q. THE COMMITTEE ALSO DETERMINED THAT SOME FORM OF
5 EDUCATIONAL EFFORT WAS APPROPRIATE, CORRECT?

6 A. YES.

7 Q. BUT IMPLEMENTING THAT INITIATIVE WAS VIEWED AS OUTSIDE
8 OF THE COMMITTEE'S CHARGE; IS THAT CORRECT?

9 A. THAT'S CORRECT.

10 Q. INSTEAD, IT WAS THE PROVINCE OF THE CHANCELLOR?

11 A. THAT'S CORRECT.

12 Q. COMMITTEE MADE NO RECOMMENDATIONS TO THE CHANCELLOR AS
13 TO THE NATURE OF THOSE EDUCATIONAL EFFORTS, CORRECT?

14 A. IT IS NOT PART OF OUR CHARGE.

15 Q. AS SOON AS THE POLICY WAS PROMULGATED AND APPROVED BY
16 THE CHANCELLOR, I TAKE IT THE COMMITTEE DISBANDED, CORRECT?

17 A. YES.

18 Q. IT DISBANDED WITHOUT ANY KNOWLEDGE AS TO HOW ITS WORK
19 WOULD PLAY ITSELF THROUGH THE UNIVERSITY SYSTEM OF GEORGIA
20 THEREAFTER; IS THAT CORRECT?

21 A. THAT'S CORRECT.

22 Q. INCLUDING WHETHER THERE WOULD BE EDUCATIONAL POLICIES
23 IMPLEMENTED, RIGHT?

24 A. RIGHT.

25 Q. NOW, YOU UNDERSTAND THAT THE ANALYSIS OF WHETHER A

1 PARTICULAR USE IS A FAIR USE, PURSUANT TO THE POLICY, ENTAILS
2 A FACULTY MEMBER CALCULATING THE NUMBER OF WEIGHS IN FAVOR
3 VERSUS WEIGHS AGAINST CHECK MARKS WITHIN EACH FAIR USE FACTOR;
4 IS THAT CORRECT?

5 A. YES.

6 Q. AND BASED ON THAT TALLY, THAT FACULTY MEMBER IS TO
7 REACH A CONCLUSION FIRST WITHIN EACH FACTOR, RIGHT?

8 A. RIGHT.

9 Q. AND THEN BASED ON HOW THIS FOUR FACTOR ANALYSIS PLAYS
10 OUT, TO COME TO AN OVERALL FAIR USE DETERMINATION, RIGHT?

11 A. YES.

12 Q. SO IF, FOR EXAMPLE, THREE OF THE FOUR FACTORS SO
13 CALCULATED WEIGH IN FAVOR OF FAIR USE, THE FACULTY MEMBER
14 PROPERLY MAY CONCLUDE THAT HE CAN MAKE FAIR USE OF A MATERIAL,
15 RIGHT?

16 A. NO.

17 Q. IF OUT OF THIS PROCESS A PROFESSOR CONCLUDE AS FACTORS
18 ONE, TWO, THREE ALL WEIGH IN FAVOR OF FAIR USE, YOU WOULD
19 AGREE THE OUTCOME OF FACTOR FOUR ANALYSIS IS OF NO
20 CONSEQUENCE, CORRECT?

21 A. NO.

22 Q. TAKE A LOOK AT YOUR DEPOSITION, PAGE 169 LINE 14.
23 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS PLAYED.)

24 "Q. OKAY. NOW, AM I RIGHT,
25 THEREFORE, THAT IF ON ANY GIVEN FAIR

1 USE DETERMINATION THE PROFESSOR
2 CONCLUDES THAT FACTORS ONE, TWO,
3 AND THREE ALL FAVOR FAIR USE, THE
4 OUTCOME OF THE FACTOR FOUR ANALYSIS
5 EFFECT ON THE MARKET IS NOT OF
6 CONSEQUENCE?

7 A. THE WAY WE HAVE WRITTEN IT,
8 YES.

9 Q. AND YOU BELIEVE THAT'S A CORRECT
10 APPLICATION OF FAIR USE LAW?

11 A. YES, I DO.

12 Q. AND, LIKEWISE, IF FACTORS,
13 ONE, TWO AND FOUR ARE EVALUATED AS
14 FAVORING FAIR USE, THE AMOUNT AND
15 SUBSTANTIALITY OF THE TAKING BECOMES
16 IRRELEVANT?

17 A. YES.

18 Q. EVEN IF ENTIRE WORKS ARE TAKEN?

19 A. WELL, AS I'VE SAID SEVERAL
20 TIMES BEFORE, IT IS HARD FOR ME TO
21 CONCEIVE OF AN INSTANCE WHERE THAT
22 WOULD WORK, WHERE THAT WOULD BE THE
23 CASE, BUT I THINK IT IS POSSIBLE."

24 (WHEREUPON, THE VIDEOTAPED DEPOSITION WAS STOPPED.)

25 Q. DO YOU RECALL GIVING THAT TESTIMONY?

1 A. YES.

2 Q. NOW, YOU WOULD EXPECT, WOULD YOU NOT, THAT A GSU
3 PROFESSOR WISHING TO USE, SAY, 10 PERCENT OF A COPYRIGHTED
4 BOOK EXCERPT FOR HIS COURSE WOULD LOGICALLY FILL OUT THE
5 UNIVERSITY SYSTEM OF GEORGIA CHECKLIST SUCH THAT FACTORS ONE,
6 TWO AND THREE AT A MINIMUM WEIGHED IN FAVOR OF FAIR USE,
7 WOULDN'T YOU?

8 A. I'M SORRY, I AM NOT FOLLOWING THAT.

9 Q. YOUR UNDERSTANDING, FROM HAVING STUDIED THE CHECKLIST,
10 THAT IF A PROFESSOR WERE CONSIDERING USING AN EXCERPT OF A
11 COPYRIGHTED BOOK OF SAY 10 PERCENT OR LESS, THAT AS APPLIED
12 TO THE CHECKLIST FACTORS WHICH YOUR COMMITTEE CREATED IN THE
13 NORMAL COURSE WITHOUT MORE BUT FOR TEACHING THAT IN HIS CLASS
14 AT GEORGIA STATE UNIVERSITY, I SHOULD ADD THAT FACTOR, THE
15 SIMPLE FACT THAT OFFERING A COPYRIGHTED WORK OF 10 PERCENT OR
16 LESS OF THE ENTIRE WORK FOR PURPOSES OF TEACHING IN HIS
17 COURSE, IT IS YOUR UNDERSTANDING, IS IT NOT, THAT IT WOULD
18 BE EXPECTED THAT THAT FACULTY MEMBER WOULD FIND THAT THE
19 APPLICATION OF CHECKLIST FACTORS, ONE, TWO, AND THREE WOULD
20 FAVOR FAIR USE; ISN'T THAT CORRECT?

21 MR. ASKEW: I WILL OBJECT. I THINK HE IS ASKING THE
22 WITNESS TO SPECULATE AS TO WHAT FACULTY MEMBER MIGHT DO, IF
23 HE OR SHE IS FILLING OUT THE CHECKLIST.

24 MR. RICH: ASKED WHAT HIS EXPECTATION WAS.

25 THE COURT: OVERRULED.

1 THE WITNESS: YES, I WOULD EXPECT THEY WOULD.

2 MR. RICH: I HAVE NO FURTHER QUESTIONS.

3 MR. ASKEW: I HAVE NO FURTHER QUESTIONS OF THE
4 WITNESS.

5 THE COURT: THANK YOU, SIR. YOU ARE EXCUSED.

6 MR. SCHAEZEL: YOUR HONOR, WE HAVE NO FURTHER
7 WITNESSES TO CALL. WE DO HAVE SOME HOUSEKEEPING MATTERS WE
8 WOULD LIKE TO ATTEND TO.

9 FIRST, THE FOLLOWING DOCUMENTS ARE ADMITTED WITHOUT
10 OBJECTION, PLEASE CORRECT ME IF I MISSPEAK: DEFENDANT'S
11 EXHIBIT 497, DEFENDANT'S 501, DEFENDANT'S 504, I'M SORRY I
12 SKIPPED ONE, DEFENDANT'S EXHIBIT 50 -- OOPS, 505 IS THE
13 NEXT ONE AND DEFENDANT'S 518. I DID SKIP ONE, DEFENDANT'S
14 513. THOSE ARE TO BE ENTERED WITHOUT OBJECTION.

15 THE COURT: THEY ARE ADMITTED.

16 MS. SINGER: NO OBJECTIONS.

17 MR. SCHAEZEL: WE HAVE THE FOLLOWING ONES TO BE
18 ADDRESSED. THESE ARE RECREATED CHECKLISTS, DEFENDANT'S 490,
19 DEFENDANT'S 495, AND DEFENDANT'S 496. WE ARE OFFERING
20 THESE, NO OBJECTION MADE TO THEM ON THE PRETRIAL ORDER.

21 MS. SINGER: YOUR HONOR, I AM NOT SURE WHOSE
22 CHECKLIST THOSE ARE, BUT I BELIEVE THAT THEY ARE RECREATED
23 CHECKLISTS FOR PROFESSORS WHO WERE NOT CALLED, SO WERE UNABLE
24 TO LAY ANY KIND OF FOUNDATION WHATSOEVER ABOUT THE, QUOTE,
25 UNQUOTE, CREATION OR RECREATION PROCESS, SO WE WOULD OBJECT TO

1 THOSE.

2 MR. SCHAEZEL: HER RECOLLECTION IS CORRECT. THEY
3 ARE FOR PROFESSOR HARVEY AND TWO FOR PROFESSOR OHMER. THEY
4 WERE NOT CALLED, ALSO NO OBJECTION TO THEIR ENTRY ON THE
5 PRETRIAL ORDER.

6 THE COURT: I WILL SUSTAIN THE OBJECTIONS, THE
7 CURRENT OBJECTION TO THEM.

8 MR. SCHAEZEL: THEN WE HAVE A SYLLABUS TO BE MOVED
9 IN, DEFENDANT'S 335. THIS IS A DUPLICATE, I APOLOGIZE FOR
10 THAT, DUPLICATE TO PLAINTIFFS' 542, BUT WE HAVE NOTICED IN
11 OUR EXAMINATION WE REFER TO DEFENDANT'S 335, TO MAKE THE
12 EXAMINATION READ A BIT MORE EASY OR EASIER, WHATEVER THE
13 CORRECT WORD IS.

14 THE COURT: ADMITTED.

15 MR. SCHAEZEL: THEN ANOTHER SYLLABUS FOR PROFESSOR
16 MARKEL, WHICH IS 545, NO OBJECTION TO THIS ON THE PRETRIAL
17 ORDER.

18 MS. SINGER: NO OBJECTION, YOUR HONOR.

19 THE COURT: IT IS ADMITTED.

20 MR. SCHAEZEL: HAD ANOTHER SYLLABUS WHICH WAS FOR
21 DEFENDANT'S EXHIBIT 610, THIS IS FOR PROFESSOR AN ANGORRO,
22 A-N-G-O-R-R-O.

23 MS. SINGER: NO OBJECTION.

24 THE COURT: IT IS ADMITTED.

25 MR. SCHAEZEL: FINAL SYLLABUS, DEFENDANT'S EXHIBIT

1 532, THIS IS FOR PROFESSOR RANGO, THERE WAS AN OBJECTION
2 HEARSAY. OFFERING IT, A LITTLE UNCERTAIN AS TO WHETHER OR
3 NOT THIS WORK IS STILL AN ISSUE. WE WILL OFFER IT. IF IT IS
4 NOT AN ISSUE IT WOULD INFLUENCE OUR THINKING, BUT IF IT IS AT
5 ISSUE --

6 MS. SINGER: IF IT IS JUST A SYLLABUS, WE HAVE NO
7 OBJECTION.

8 THE COURT: ALL RIGHT. IT IS ADMITTED. IS THAT
9 ALL OF THE SYLLABI?

10 MR. SCHAEZEL: I BELIEVE SO.

11 THE COURT: HERE IS MY QUESTION. I WAS JUST
12 WONDERING ABOUT THIS. DO WE HAVE AN EVIDENCE SYLLABI, IF IN
13 FACT THERE IS A RIGHT WORD, FOR ALL OF THE COURSE OFFERINGS
14 THAT HAVE DRAWN INTO QUESTION BY THE CLAIMS OF INFRINGEMENT?

15 MR. SCHAEZEL: I BELIEVE SO, YOUR HONOR.

16 THE COURT: IN OTHER WORDS, WHETHER OR NOT THE
17 PROFESSOR TESTIFIED?

18 MR. SCHAEZEL: I WILL HAVE TO DOUBLE CHECK. MY
19 FIRST HESITATION, THE PARTIES HAVE BEEN WORKING TO TRY TO
20 NARROW THE FOCUS, SO I AM NOT CERTAIN. FIRST ISSUE I NEED TO
21 DOUBLE CHECK, BASED ON THE ORIGINAL 99 THAT WERE AT ISSUE,
22 NOW DOWN TO 75, I AM NOT CERTAIN OF THOSE 24, I WILL HAVE TO
23 DOUBLE CHECK ON THAT. I BELIEVE THE OTHERS, WE HAVE ALL OF
24 THEM FOR THE 75, I WILL HAVE TO CHECK ON THE 99.

25 THE COURT: ALL RIGHT. THANK YOU.

1 MR. SCHAETZEL: MOVE INTO EVIDENCE DEFENDANT'S
2 EXHIBIT 765, WHICH IS THE BOOK, "FILM LANGUAGE, A SEMIOTICS
3 OF THE CINEMA," THIS IS PROFESSOR BARKER.

4 THE COURT: ANY OBJECTION TO DEFENDANT'S 765?

5 MS. SINGER: NO. ASSUMING THIS IS THE BOOK, WE HAVE
6 NO OBJECTION, YOUR HONOR.

7 THE COURT: IT IS ADMITTED.

8 MR. SCHAETZEL: THANK YOU.

9 WE THEN HAVE CERTAIN E-MAILS THAT I BELIEVE THE
10 PARTIES AGREE CAN GO IN WITHOUT OBJECTION. ALREADY COVERED
11 THOSE, THANK YOU.

12 AND THEN TWO OTHERS WE HAVE, DEFENDANT'S EXHIBIT 1, WHICH
13 IS THE 30(B)6 NOTICE OF DEPOSITION FOR OXFORD.

14 MS. SINGER: YOUR HONOR, I DON'T KNOW THE RELEVANCE
15 OF PUTTING IN THE 30(B)6 NOTICE.

16 MR. SCHAETZEL: GO TO SHOW -- THERE ARE OTHER
17 DOCUMENTS IN EVIDENCE GO TO SHOW WHAT THE WITNESS WAS CALLED
18 TO TESTIFY TO.

19 THE COURT: IS THAT NOT OTHERWISE IN THE RECORD?

20 MR. SCHAETZEL: I AM NOT CERTAIN, YOUR HONOR,
21 WITHOUT LOOKING AT THE TRANSCRIPT. I BELIEVE THAT WAS DONE
22 THE FIRST TWO WEEKS AND I DON'T KNOW THAT I CAN READ THE
23 TRANSCRIPT YET TO SEE IF THE CATEGORIES FOR THE 30(B)6
24 DESIGNATION WERE ACTUALLY READ INTO THE RECORD. I KNOW ANDY
25 TOLD ME ON THE BREAK HE HAS DONE THE FIRST COUPLE OF DAYS, I

1 DON'T KNOW IF IT IS IN THAT OR NOT.

2 MS. SINGER: MR. PFUND WAS HERE. TO THE EXTENT THEY
3 WANTED TO GET IN ANY OF HIS TESTIMONY, THEY COULD HAVE GOTTEN
4 THAT IN. I JUST DON'T SEE AT THIS STAGE OF THE PROCEEDINGS
5 WHAT THE RELEVANCE IS OF KNOWING WHAT HE WAS DEPOSED ABOUT IN
6 A 30(B)6 NOTICE TWO YEARS AGO.

7 MR. SCHAETZEL: I AM NOT CERTAIN, I DIDN'T TAKE THAT
8 DEPOSITION.

9 THE COURT: I AM NOT SURE WHAT TO DO ON THIS ISSUE.
10 I AM GOING TO GO AHEAD AND ADMIT IT. I'M NOT SURE IT HAS ANY
11 RELEVANCE, BUT I DON'T SEE THAT IT COULD HURT ANYTHING EITHER.

12 MR. SCHAETZEL: AND WE COULDN'T FIND A LIST AND
13 PERHAPS WE JUST MISSED IT, WAS DEFENDANT'S EXHIBIT 905
14 ACTUALLY ADMITTED?

15 THE CLERK: NO.

16 MR. SCHAETZEL: WE OFFERED IT AND WE THOUGHT THAT IT
17 WAS ADMITTED, BUT THIS IS THE COPYRIGHT CLEARANCE CENTER BEST
18 PRACTICES DOCUMENT -- I HAVE IT, IT IS MORE RECENT ONE OFF
19 THE WEBSITE.

20 LOOKS LIKE A NUMERIC MESS UP, 906, IS 906 IN
21 EVIDENCE?

22 THE CLERK: YES, THAT IS.

23 MR. SCHAETZEL: OKAY. WITH THAT, SUBJECT TO THE
24 CHANCE I THINK BOTH PARTIES ARE TRYING TO DO SOME LAST MINUTE
25 CHECKING TO BE CERTAIN WE ALL HAVE OUR DOCUMENTS, I THINK WE

1 WILL BE ABLE TO HAVE THAT CLEANED UP. I UNDERSTAND WE ARE
2 GOING TO ARGUE TOMORROW, WE SHOULD BE ABLE TO FINISH OUT THIS
3 AFTERNOON. SUBJECT TO THAT, WE HAVE NOTHING FURTHER.

4 THE COURT: ALL RIGHT. THANK YOU.

5 IS THERE ANY REBUTTAL?

6 MR. RICH: THERE IS NO REBUTTAL.

7 MS. SINGER: DEPENDS ON WHAT YOU CALL REBUTTAL.

8 THE COURT: I WAS THINKING IN TERMS OF WARM, LIVE
9 WITNESSES.

10 MS. SINGER: I DON'T KNOW WHAT THAT SAYS TO ME.

11 THE COURT: AS OPPOSED TO WARM, LIVE LAWYERS.

12 MS. SINGER: WE DO NOT HAVE ANY REBUTTAL WITNESSES.

13 YOUR HONOR, WE HAVE JUST TWO DOCUMENTS. THERE HAD BEEN, AT
14 THE CLOSE OF OUR CASE, THERE WERE SEVERAL DOCUMENTS THAT WE
15 NEEDED TO GET BACK TO YOUR HONOR ON. I BELIEVE THERE IS NO
16 OBJECTION TO PLAINTIFFS' EXHIBIT 509, WHICH IS THE OXFORD
17 UK/U.S. AGREEMENT.

18 MR. SCHAEZEL: NO OBJECTION, YOUR HONOR.

19 THE COURT: IT IS ADMITTED.

20 MS. SINGER: AND WE HAVE ONE ADDITIONAL EXHIBIT, IT
21 IS PLAINTIFFS' EXHIBIT 1015. THIS IS A CONTRIBUTOR AGREEMENT,
22 CAMBRIDGE UNIVERSITY PRESS, A CONTRIBUTOR AGREEMENT FOR A
23 CONTRIBUTION BY PROFESSOR JONATHAN DUNSBY TO THE CAMBRIDGE
24 COMPANION TO SCHUMANN. AT THE TIME THAT THE PARTIES DID A
25 JOINT FILING, JX 5, FOR PROFESSOR ORR, THERE WAS AN ENTRY THAT

1 JUST SAID "SELECTIONS." SO WE DIDN'T KNOW THE PAGE NUMBERS
2 AND COULDN'T COME UP WITH A CONTRIBUTOR AGREEMENT, BUT WE
3 DIDN'T KNOW WHAT IT WAS. PROFESSOR ORR THEN TESTIFIED THAT
4 HE DISTRIBUTED PAGES 105 TO 119 TO STUDENTS IN HIS COURSE,
5 MUSIC 8860, DURING THE SUMMER 2009 ACADEMIC TERM, WHICH IS
6 PART OF THE CHAPTER, "WHY SING LEADER AND SONG CIRCLES"
7 WRITTEN BY PROFESSOR JONATHAN DUNSBY. SO I BELIEVE THERE IS
8 NO OBJECTION TO THIS CONTRIBUTOR AGREEMENT COMING IN.

9 MR. SCHAETZEL: CORRECT, NO OBJECTION.

10 THE COURT: IT IS ADMITTED.

11 MS. SINGER: AND WITH THAT, YOUR HONOR, I BELIEVE
12 THAT CONSTITUTES OUR REBUTTAL. SO WE ARE NOW DONE.

13 THE COURT: ALL RIGHT. THANK YOU. BEEN MEANING
14 TO ASK Y'ALL THIS QUESTION. BASED ON THE RECORD WE HAVE,
15 CAN I TELL FROM LOOKING AT THE COURSE TITLES AND COURSE
16 NUMBERS IN THIS CASE WHICH OF THESE COURSES ARE GRADUATE LEVEL
17 AND WHICH ARE UNDERGRAD? I KNOW WE HAVE TESTIMONY FROM SOME
18 PROFESSORS WHO SAID THAT THEIR COURSE WAS A PARTICULAR KIND OF
19 COURSE, BUT I JUST -- A LOT OF SCHOOLS HAVE NUMBERING SYSTEMS
20 THAT TELL YOU SOMETHING ABOUT THIS.

21 MR. SCHAETZEL: I BELIEVE THE ANSWER TO THAT QUESTION
22 IS NO, YOUR HONOR, YOU CANNOT TELL JUST FROM THE NUMBER. I
23 ALSO BELIEVE THAT IS SOMETHING -- THERE IS NOT A LOT OF
24 DISPUTE ABOUT. WE OUGHT TO BE ABLE TO GET THAT WORKED OUT
25 BETWEEN THE PARTIES.

1 THE COURT: I DON'T KNOW FOR SURE THAT IT IS
2 IMPORTANT. IT IS JUST SOMETHING THAT OCCURRED TO ME.

3 MR. KRUGMAN: IF I MAY BE, WE ARE STILL GETTING
4 TRANSCRIPTS FROM THE FIRST TWO WEEKS OF THE TRIAL AND I THINK
5 FOR PURPOSES OF THE CLOSING, I THINK WE ARE GETTING SOME MORE
6 THIS AFTERNOON AND THIS EVENING. WE HAVEN'T HAD A CHANCE TO
7 DISCUSS IT BUT I THINK IT MAY BE, AT LEAST FROM OUR SIDE, WE
8 CAN PROBABLY BE MORE EFFICIENT AND EFFECTIVE TOMORROW IF YOUR
9 HONOR IS WILLING TO DO IT.

10 THE COURT: THAT IS FINE.

11 MR. KRUGMAN: HAVE CLOSING AFTER LUNCH IN THE
12 AFTERNOON?

13 THE COURT: DO IT IN THE AFTERNOON?

14 MR. KRUGMAN: YEAH.

15 THE COURT: THAT IS FINE, TOO.

16 MR. KRUGMAN: GIVE US TIME TO ASSIMILATE THAT
17 INFORMATION.

18 THE COURT: WHAT TIME DO YOU SUGGEST?

19 MR. KRUGMAN: ONE.

20 MR. ASKEW: TWO O'CLOCK.

21 MR. SCHAETZEL: DOES IT MATTER TO US?

22 MR. KRUGMAN: WE WANT TO MAKE SURE WE CAN HAVE
23 ANOTHER MEAL HERE.

24 MR. SCHAETZEL: MR. KRUGMAN HAS COMPLETELY READ MR.
25 ASKEW, SO TWO O'CLOCK MIGHT BE A LITTLE BIT BETTER TO LET

1 EVERYBODY GET LUNCH.

2 THE COURT: TWO O'CLOCK IS FINE.

3 MR. SCHAEZEL: BE FINISHED BY FOUR, FOUR THIRTY.

4 MR. KRUGMAN: WE HAD PROPOSED AN HOUR A SIDE. I
5 KNOW THAT YOUR HONOR HAS INDICATED THAT YOU EXPECT TO HAVE A
6 NUMBER OF QUESTIONS.

7 THE COURT: I PROBABLY WILL, YES.

8 MR. KRUGMAN: I WAS WONDERING IF AN HOUR FIFTEEN PER
9 SIDE WOULD BE ACCEPTABLE?

10 THE COURT: THAT IS FINE.

11 MR. SCHAEZEL: OKAY.

12 THE COURT: WELL, DON'T WORK TOO HARD. I WILL SEE
13 YOU TOMORROW AFTERNOON AT TWO O'CLOCK.

14 *** END OF REQUESTED TRANSCRIPT ***

15 * * * * *

16 CERTIFICATE OF REPORTER

17 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
18 MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED MATTER.

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S/DEBRA R. BULL, RPR, CRR

JULY 11, 2011
DATE