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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 7, 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

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15 STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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1 THE COURT: GOOD AFTERNOON, EVERYBODY. HOW ARE
2 Y'ALL DOING? I TRUST YOU HAD A NICE LUNCH TODAY. OKAY.
3 WELL, WE ARE READY NOW FOR CLOSING ARGUMENTS IN THIS CASE.
4 AND SO LET'S PROCEED, MR. RICH.

5 MR. RICH: THANK YOU, YOUR HONOR. YOUR HONOR, I
6 AM GOING TO TRY TO MOVE FAIRLY RAPIDLY THROUGH A LOT OF
7 MATERIAL SUBJECT TO YOUR HONOR'S QUESTIONS THIS AFTERNOON.
8 IF I SHOULD CONCLUDE BEFORE MY ALLOTTED HOUR AND FIFTEEN
9 MINUTES, I WOULD LIKE TO RESERVE A LITTLE BIT FOR REBUTTAL.

10 LET ME START FIRST BY THANKING YOU, YOUR HONOR, FOR YOUR
11 COURTESIES AND THAT OF YOUR CHAMBERS THROUGHOUT TRIAL AND
12 ESPECIALLY FOR US NON-ATLANTANS, IT WAS VERY MUCH
13 APPRECIATED.

14 THE COURT: YOU ARE VERY WELCOME. BEEN NICE HAVING
15 Y'ALL HERE.

16 MR. RICH: YOUR HONOR, THIS LAWSUIT WAS PROMPTED BY
17 A LONGSTANDING SYSTEMATIC INFRINGING CONDUCT ON THE PART OF
18 GEORGIA STATE UNIVERSITY UNDER DEFENDANT'S SUPERVISORY
19 AUTHORITY INVOLVING EXACT UNTRANSFORMED REPRODUCTIONS IN
20 DIGITAL FORM OF COPYRIGHTED WORKS PUBLISHED BY THE THREE
21 PLAINTIFF ACADEMIC PUBLISHERS AND USED FOR PURPOSES OF
22 SUPPLYING ENTIRE CLASSES OF STUDENTS COPIES OF THOSE WORKS FOR
23 FREE. THE EFFECT OF THESE PRACTICES HAS BEEN TO TAKE SINGLE
24 COPIES OF PLAINTIFFS WORKS, EITHER OWNED BY THE PROFESSOR OR
25 BY THE GSU LIBRARY AND MULTIPLYING THOSE BY THE NUMBERS OF

1 STUDENTS IN THE COURSES, AS MANY AS A HUNDRED AND FOURTEEN IN
2 ONE CASE, SUPERSEDING SALES OF THESE SAME WORKS TO THESE
3 CLASSES OF STUDENTS, AS WELL AS DEPRIVING THE PLAINTIFFS OF
4 VITAL PERMISSION INCOME FOR USES OF EXCERPTS FROM THEM.

5 THE LAWSUIT WAS BROUGHT UNDER A COPYRIGHT POLICY THAT WAS
6 SUPERSEDED AS OF FEBRUARY OF 2009. THE COURT'S PRIOR RULINGS
7 PLACED ON US, THE PLAINTIFFS, THE BURDEN OF COMING FORWARD
8 WITH EVIDENCE OF A SUFFICIENT NUMBER OF ONGOING INFRINGEMENTS
9 UNDER THE NEW POLICY TO WARRANT INJUNCTIVE RELIEF AGAINST THE
10 DEFENDANTS. IN TURN, YOUR HONOR PLACED UNDER THE DEFENDANTS
11 THE BURDEN OF JUSTIFYING EACH OF THESE SPECIFIED INFRINGEMENTS
12 AS A MATTER OF FAIR USE. WE SUBMIT, YOUR HONOR, THE TRIAL
13 RECORD NOW DEMONSTRATES THAT THE PLAINTIFFS HAVE CARRIED THEIR
14 BURDEN WHILE THE DEFENDANTS HAVE FAILED TO CARRY THEIRS.

15 WITH RESPECT TO 64 SEPARATE WORKS USED IN THREE SAMPLE
16 TERMS, 75 DIFFERENT TIMES BY 23 DIFFERENT GEORGIA STATE
17 UNIVERSITY FACULTY MEMBERS, PLAINTIFFS HAVE DEMONSTRATED THE
18 NECESSARY ELEMENTS OF INFRINGEMENT.

19 IN TERMS OF COPYRIGHT FORMALITIES, WE HAVE DEMONSTRATED
20 OWNERSHIP, WHETHER BY VIRTUE OF ASSIGNMENT FROM THE AUTHOR OR
21 AS A MATTER OF LAW BY VIRTUE OF WORK-FOR-HIRE RELATIONSHIPS
22 OR, AS THE CASE MAY BE, DEMONSTRATING THAT OUR CLIENTS ARE
23 THE OWNERS OF THESE SPECIFIC AND EXCLUSIVE RIGHTS AS LICENSEES
24 TO PUBLISH THE WORKS IN ELECTRONIC FORM.

25 WE HAVE ESTABLISHED, AS NECESSARY, COPYRIGHT REGISTRATIONS

1 AND WHERE OTHERWISE WORKS SUBJECT TO THE BURN CONVENTION FOR
2 FIRST PUBLISHED IN OTHER COUNTRIES WITHIN THE REQUISITE TIME
3 PERIOD, WE HAVE ESTABLISHED DOCUMENTATION AS WELL.

4 WITH RESPECT TO COPYING, THE NECESSARY OBVIOUSLY ACTS OF
5 COPYRIGHT, WE HAVE ESTABLISHED DISTRIBUTION, COPYING, AND
6 DISPLAY ALL PRESUMPTIVELY IN VIOLATION OF SECTION 106 OF THE
7 COPYRIGHT ACT. MOST, IF NOT ALL OF THESE ACTS, ARE
8 STIPULATED TO WITH RESPECT TO THE ERESERVE SYSTEM STIPULATIONS
9 53 THROUGH 57 AND WITH RESPECT TO ULEARN STIPULATIONS 74, 76
10 AND 78 THROUGH 81.

11 WE SUBMIT WE HAVE MORE THAN SHOWN THE LEVEL OF SUFFICIENCY
12 TO DEMONSTRATE THE KIND OF ONGOING INFRINGEMENT THAT IS
13 SUBJECT ONLY TO A SUCCESSFUL FAIR USE DEFENSE THAT WARRANTS
14 INJUNCTIVE RELIEF. WE HAVE 75 ACTS OF INFRINGEMENT FROM
15 THREE ACADEMIC TERMS AND ONLY ONE OF THOSE TERMS WAS A FULL
16 TERM, MAYMESTER WAS THREE WEEKS, SUMMER TERM IS AN
17 ABBREVIATED TERM, AND FALL TERM IS, FRANKLY, THE ONLY FULL
18 TERM OF THOSE THREE. AND AS WE UNDERSTAND IT, AT LEAST THE
19 REMAINING ARGUMENTS FROM THE DEFENDANTS GOING TO COPYRIGHT
20 OWNERSHIP AND FORMALITIES APPEARS TO US TO REDUCE POTENTIALLY
21 TO AN ARGUMENT OF ORIGINALITY, LACK OF ORIGINALITY.

22 I AM NOT GOING TO SPEND A LOT OF TIME ON IT, YOUR HONOR.
23 THE FEIST DECISION, WHICH I WILL JUST QUOTE A SENTENCE OR TWO
24 FROM, INDICATES THE VERY LOW BAR OF ORIGINALITY IN A COPYRIGHT
25 CASE. ORIGINALLY, THE SUPREME COURT SAID, AS THE TERM IS

1 USED IN COPYRIGHT MEANS ONLY THAT THE WORK WAS INDEPENDENTLY
2 CREATED BY THE AUTHOR AS OPPOSED TO COPIED FROM OTHER WORKS
3 AND THAT IT POSSESSES AT LEAST SOME MINIMAL DEGREE OF
4 CREATIVITY. THE REQUISITE LEVEL OF CREATIVITY IS EXTREMELY
5 LOW, SAID THE COURT, EVEN A SLIGHT AMOUNT WILL SUFFICE. AND
6 I THINK WHEN ONE TAKES THAT LIBERAL STANDARD OF ORIGINALITY
7 AND PLACES IT AGAINST THE TYPES OF WORKS PUBLISHED BY OXFORD
8 UNIVERSITY PRESS, CAMBRIDGE UNIVERSITY PRESS, AND SAGE, IT
9 SEEMS BEYOND ANY DOUBT WHATSOEVER THAT THE NECESSARY
10 ORIGINALITY --

11 THE COURT: WELL, I THINK IT IS CLEAR THAT ALL OF
12 THE ITEMS ARE COPYRIGHTABLE.

13 MR. RICH: EXACTLY.

14 THE COURT: I GUESS THAT IS WHAT FEIST DEALT WITH.

15 MR. RICH: EXACTLY RIGHT.

16 THE COURT: THERE IS SOME DIFFERENCE, ALTHOUGH I AM
17 NOT ADVOCATING THERE IS AN IMPORTANT AMOUNT OF DIFFERENCE
18 AMONG THE DIFFERENT WORKS, BUT WHEN YOU LOOK ACROSS THE
19 GROUP, YOU KNOW, YOU HAVE SOME WORKS OF ORIGINAL SCHOLARSHIP
20 AND THEN THERE IS SOME OTHER WORKS THAT ARE MORE IN THE NATURE
21 OF SORT OF DRAWING TOGETHER THE KNOWLEDGE THAT IS OUT THERE
22 AND PUTTING IT TOGETHER IN A WAY THAT WOULD BE EASY TO ABSORB.
23 I AM NOT SURE WHETHER IN THE CONTEXT OF FAIR USE THOSE
24 DIFFERENCES ARE GREAT OR NOT.

25 MR. RICH: I THINK YOUR OBSERVATIONS ARE CORRECT. I

1 WOULD SUBMIT TO YOU IN TERMS OF COPYRIGHTABILITY, IT MAKES NO
2 DIFFERENCE, THEY ARE ALL COPYRIGHTABLE. THE ARGUABLE PLACE
3 IT WOULD COME IN, YOUR HONOR, WOULD BE UNDER FACTOR TWO,
4 WHICH IS THE DEGREE OF CREATIVE INPUTS TO THE WORK ON THE
5 SPECTRUM OF, YOU KNOW, TELEPHONE DIRECTORY THEORY ON ONE END
6 OR PURELY FACTS TO A MORE CREATIVE VERSION. YOU HAVE HEARD A
7 LOT OF TESTIMONY AND SOME ARGUMENT BETWEEN COUNSEL AND AMONG
8 COUNSEL WITH THE COURT ON THAT SUBJECT. I THINK THAT IS
9 WHERE IT WOULD HAVE SOME BEARING ON THE ANALYSIS AND HOW MUCH
10 WEIGHT IN THE FACTOR TWO ANALYSIS A PARTICULAR WORK MIGHT BE
11 GIVEN ON THE FAIR USE EQUATION.

12 NOW, YOUR HONOR, SPEAKING OF FAIR USE, SECTION 107 OF THE
13 COPYRIGHT ACT CODIFIES THE FAIR USE STANDARD. AND IT
14 REQUIRES A SHOWING THAT OTHERWISE INFRINGING USE IS MEEK AT A
15 MINIMUM, THE FOUR FACTOR TEST SET FORTH IN 107. THE
16 DEFENDANTS ATTEMPT TO SKIRT AROUND THAT DOCTRINE, REALLY TO
17 AVOID MEETING THE COURT'S REQUIREMENT THAT THEY SHOW AS TO
18 EACH OF THE ALLEGED INFRINGEMENTS THAT THE CHALLENGED USES ARE
19 PROTECTED BY THE FAIR USE DOCTRINE.

20 THEIR FIRST EFFORT TOOK THE FORM OF ARGUING THAT THEY
21 WEREN'T RESPONSIBLE AT ALL, AS A MATTER OF LAW, FOR
22 INFRINGEMENTS. THAT IT WAS SOLELY THE PROVINCE OF THE
23 PROFESSORS AND MAYBE THE LIBRARY STAFF WHO ARE, AND AS YOUR
24 COURT -- AS THE COURT AND YOUR HONOR PREVIOUSLY RULED,
25 DEFENDANTS CANNOT ENCOURAGE INSTRUCTORS TO MAKE THESE

1 DIFFICULT FACT-BASED DECISIONS AND THEN CLAIM THEMSELVES TO BE
2 IMMUNE FROM LIABILITY FOR THE RESULTANT FAIR USE OF DECISIONS.
3 SO PROVIDED, YOUR HONOR, THE PLAINTIFFS HAVE MADE THE SHOWING
4 REQUIRED BY THE COURT THAT THERE EXISTS A SUFFICIENT NUMBER OF
5 INFRINGEMENTS OF THESE COPYRIGHTS TO SHOW ONGOING AND
6 CONTINUOUS MISUSE OF FAIR USE. WE UNDERSTAND THAT NO SUCH
7 IMMUNITY IS AVAILABLE.

8 THE COURT: SO YOU TAKE THE POSITION THAT ALL OF THE
9 75 INSTANCES, THEY ARE ALL INFRINGEMENTS?

10 MR. RICH: WE DO, YOUR HONOR. I WILL DISCUSS IN
11 MORE DETAIL THE RATIONALE FOR THAT.

12 THE COURT: ALL RIGHT.

13 MR. RICH: THE SECOND EFFORT ON THE PART OF THE
14 DEFENSE, I ARGUE, IS CLOSELY RELATED. IT IS WHAT I WILL CALL
15 A GOOD-FAITH DEFENSE. IT IS IN THE NATURE OF THE ARGUMENT
16 THAT THE BOARD OF REGENTS PROMULGATED THIS NEW POLICY IN GOOD
17 FAITH AND THAT IN THE PROCESS IT PROVIDED TOOLS TO THE FACULTY
18 TO ALLOW THOSE FACULTY TO MAKE GOOD-FAITH FAIR USE
19 DETERMINATIONS. AND THE IMPLICATION OF EITHER OR BOTH OF
20 THOSE ARGUMENTS, AS WE UNDERSTAND IT, IS THAT IRRESPECTIVE OF
21 THE ACTUAL RESULTS OF THESE FACULTY FAIR USE DETERMINATIONS IN
22 TERMS OF ONGOING INFRINGEMENTS, DEFENDANTS THEREBY SHOULD NOT
23 THEMSELVES BE HELD LIABLE. THE LAW SIMPLY DOESN'T SUPPORT
24 THIS LINE OF DEFENSE.

25 HARPER AND ROW IN THE SUPREME COURT STATED THAT FAIR USE

1 BY DEFINITION PRESUPPOSES GOOD FAITH AND FAIR DEALING. IT IS
2 A GIVEN THAT THAT DOCTRINE PRESUPPOSES THAT IT IS NOT AN
3 ANSWER, IT IS A STARTING POINT. WHILE ITS ABSENCE CAN
4 DISQUALIFY ONE FROM CLAIMING GOOD FAITH, THE OPPOSITE IS NOT
5 THE CASE. ITS PRESENCE IN ANY SITUATION SIMPLY DOESN'T WEIGH
6 IN FAVOR OF FAIR USE.

7 THE LETTERESE CASE IN THE 11TH CIRCUIT AGREES, STATES,
8 GOOD FAITH DOES NOT INSULATE A DEFENDANT FROM LIABILITY. YOU
9 HAVE HEARD OCCASIONAL REFERENCE IN THIS COURTROOM, MOST
10 RECENTLY FROM DR. CREWS, ABOUT A SECTION OF THE ACT WHICH CAN
11 MITIGATE DAMAGE AWARDS BY A SHOWING OF GOOD FAITH IN CERTAIN
12 CIRCUMSTANCES. IT IS OBVIOUSLY THIS IS NOT A DAMAGES CASE,
13 THIS IS AN INJUNCTION CASE AND THAT SECTION OF THE LAW IS
14 COMPLETELY INAPPOSITE.

15 I WOULD SAY A CONTRARY RULING, ONE GIVING A WEIGHT TO
16 THESE GOOD-FAITH ARGUMENTS, IRRESPECTIVE OF THE CONSEQUENCES
17 OF THE ACTIVITY IN TERMS OF ACTUAL INFRINGEMENT, WOULD
18 CONSTITUTE BAD PUBLIC POLICY. IT WOULD TAKE AWAY THE
19 INCENTIVE FOR SCHOOLS LIKE GSU TO ENSURE THAT THEIR FACULTY
20 ACTUALLY UNDERSTAND FAIR USE AND STRIVE TO MAKE FAIR USE
21 DETERMINATIONS CONCERNING COURSE READINGS THAT COMPORT WITH
22 THE LAW AND RESPECT THE RIGHTS OF COPYRIGHT OWNERS.

23 BUT EVEN IF THE LAW WERE OTHERWISE, THE POLICY DEVELOPED
24 BY THE UNIVERSITY SYSTEM AS IMPLEMENTED BY GSU WAS NOT ONE
25 PROMOTIVE OF RESPECT FOR FAIR USE PRINCIPLES. ITS PRINCIPLE

1 ATTRIBUTES WERE TO SHIFT THE ENTIRE RESPONSIBILITY FOR FAIR
2 USE DETERMINATIONS ON TO INDIVIDUALS ILL-EQUIPPED TO MAKE
3 MEANINGFUL FAIR USE DETERMINATIONS. THEY ARE WONDERFUL
4 SCHOLARS IN THEIR FIELD, BUT THEY ARE NOT NATURALLY ENDOWED
5 ANYMORE THAN ANYONE ELSE WOULD BE WITH THE ABILITY TO MAKE
6 WHAT CAN BE REASONABLY SOPHISTICATED FAIR USE DETERMINATIONS.
7 AND NOT ONLY DO THEY OFF-LOAD THAT RESPONSIBILITY ONTO THE
8 LADIES AND GENTLEMEN, SOME OF WHOM ARE SITTING IN THE BACK OF
9 THE COURTROOM, THEY FAILED TO PROVIDE THOSE INDIVIDUALS WITH
10 THE TRAINING OR OTHER SUPPORT NECESSARY TO MINIMIZE AT
11 BARRON'S FAIR USE DETERMINATIONS.

12 SO WHILE THE NEW POLICY MAY HAVE BEEN BUILT IN AN ATTEMPT
13 TO INSULATE DEFENDANTS FROM LIABILITY, IT WAS ALSO BUILT TO
14 FAIL AS A MATTER OF COMPLIANCE WITH COPYRIGHT LAW.

15 THE COURT: LET ME ASK YOU THIS. IT IS WELL
16 ESTABLISHED THAT THERE ARE FOUR FACTORS TO CONSIDER GENERALLY
17 IN CONNECTION WITH THE FAIR USE DEFENSE.

18 MR. RICH: YES.

19 THE COURT: IT SEEMS TO ME ONE OF THE BIG QUESTIONS
20 HERE IS WHAT WEIGHT SHOULD EACH OF THESE FACTORS CARRY IN A
21 CASE LIKE OURS, IN AN EDUCATIONAL SETTING, UNIVERSITY, HOW
22 SHOULD THESE -- HOW SHOULD THE COURT WEIGHT THESE DIFFERENT
23 FACTORS? WHAT DO YOU THINK?

24 MR. RICH: I AM CERTAINLY GETTING TO THAT. I WILL
25 GET TO IT RIGHT NOW SINCE YOU ASKED.

1 THE COURT: ALL RIGHT.

2 MR. RICH: YOUR HONOR, WE KNOW THAT ALL FOUR FACTORS
3 MUST BE EVALUATED, BUT WE AGREE WITH YOU OR THINK WE AGREE
4 WITH THE PREMISE OF YOUR QUESTION, IT IS NOT NECESSARILY THE
5 CASE THAT THEY WOULD ALL CARRY EQUAL WEIGHT. THE WEIGHT OF
6 THE LAW AS WE READ IT IS THAT THE CORE OF THE FAIR USE
7 DOCTRINE IS TO PROMOTE USES OF MATERIAL AS A PUBLIC PRIVILEGE
8 WITHOUT NECESSARILY MEETING THE REQUIREMENTS THAT 106 OF THE
9 ACT WOULD OTHERWISE IMPOSE, WHICH IS A BURDEN TO OBTAIN
10 PERMISSION. WHERE THERE IS SOCIAL UTILITY TO THE USE, WHERE
11 THERE IS SOMETHING DONE WITH THE MATERIALS OTHER THAN TO
12 SUPPLANT THE VERY PURPOSE FOR WHICH THOSE MATERIALS WERE
13 PUBLISHED IN THE FIRST PLACE. SO THE LAW TELLS US THAT IF
14 THERE IS A CORE INQUIRY UNDER THE FAIR USE DOCTRINE, IT IS TO
15 EXAMINE THE DEGREE TO WHICH THE USE IS TRANSFORMATIVE, THAT
16 IT DOES SOMETHING DIFFERENT, THAT IT CONSTITUTES LITERARY
17 CRITICISM, THAT IT CONSTITUTES A PARODIC USE.

18 THE COURT: YOU THINK FACTOR TWO SHOULD BE GIVEN
19 MORE WEIGHT THAN THE OTHERS?

20 MR. RICH: NO. TRANSFORMATIVENESS IS PART OF THE
21 FACTOR ONE INQUIRY, YOUR HONOR, AS IS COMMERCIAL USE. SO
22 THE TWO DOCUMENT ELEMENTS OF FACTOR ONE IS WHETHER THE USE IS
23 COMMERCIAL OR NONCOMMERCIAL AND WHETHER IT IS TRANSFORMATIVE
24 OR NONTRANSFORMATIVE. THEY ARE BOTH ELEMENTS OF FACTOR ONE.
25 AND SO THAT ASPECT OF FACTOR ONE, THE CASES TELL US, IS QUITE

1 IMPORTANT. AND I AM GOING TO GET TO IN A BIT THE SUGGESTION
2 BY THE DEFENDANTS THAT THAT RULE IS SOMEHOW INAPPLICABLE WHEN
3 YOU ARE DEALING WITH MULTIPLE COPYING IN THE CLASSROOM
4 SETTING, THAT IS JUST A MISREADING, YOU KNOW, OF THE LAW.
5 SO FACTOR ONE, TO ANSWER YOUR QUESTION, IS CRITICALLY
6 IMPORTANT AS IS FACTOR FOUR.

7 THE COURT: BUT FACTOR ONE, PURPOSE AND CHARACTER OF
8 THE USE, IS THE ONE THAT CONSIDERS SUCH FACTORS AS TO WHETHER
9 YOU ARE WITHIN AN EDUCATIONAL SETTING, WHETHER THE USE IS
10 COMMERCIAL OR NONCOMMERCIAL.

11 MR. RICH: CORRECT. AND ALSO -- AND ALSO WHETHER IT
12 IS TRANSFORMATIVE.

13 THE COURT: I THOUGHT THAT WAS FACTOR TWO.

14 MR. RICH: FACTOR TWO, YOUR HONOR, IS WHETHER IT IS
15 BASICALLY PUBLISHED OR UNPUBLISHED AND WHETHER IT IS FACTUAL
16 OR FICTION AND HOW MUCH CREATIVITY IS ASSOCIATED WITH IT.
17 AND SO WHAT YOU FIND IS CASES THAT SPEAK DIRECTLY TO THE
18 INTERPLAY BETWEEN A USE BEING EDUCATIONAL OR NONCOMMERCIAL AND
19 WHETHER OR NOT THAT USE IS ALSO TRANSFORMATIVE. AND THE
20 CASES INSTRUCT US THAT SIMPLY BECAUSE THE USE IS EDUCATIONAL
21 DOESN'T GIVE IT A FREE PASS, IT DOESN'T GIVE IT SPECIAL
22 MEANING.

23 THE COURT: I KNOW THAT. WE ARE JUST TALKING NOW
24 SINCE WE GOT A BUNCH OF CASES THAT DISCUSS THESE VARIOUS
25 FACTORS AND OF COURSE THEY ARE ALL IN THE STATUTE. SO WE

1 NEED TO START WORKING WITH THESE FOUR FACTORS.

2 MR. RICH: YES.

3 THE COURT: AND, YOU KNOW, ONE OF THE ISSUES HERE IS
4 HOW SHOULD THESE FOUR FACTORS BE WEIGHTED.

5 MR. RICH: YES.

6 THE COURT: ONCE WE GET AN ANSWER TO THAT QUESTION,
7 A LOT OF THINGS WILL FALL INTO PLACE.

8 MR. RICH: WE AGREE. THE DIRECT ANSWER TO YOUR
9 QUESTION, YOUR HONOR, IS THE INTERPLAY OF FACTORS ONE AND
10 FACTORS FOUR IN THIS TYPE OF CASE ARE CRITICAL.

11 THE COURT: YOU THINK FACTORS ONE AND FOUR ARE MORE
12 IMPORTANT THAN TWO AND THREE?

13 MR. RICH: WITHOUT ANY DOUBT. WITHOUT ANY DOUBT. I
14 WILL COME BACK TO THAT IN SOME DETAIL, IF YOU WILL BE A TAD
15 PATIENT IN THIS.

16 THE COURT: ALL RIGHT.

17 MR. RICH: I WANTED TO COME BACK BRIEFLY TO THE
18 BACKGROUND OF THE NEW POLICY AND JUST BRING OUT SEVERAL POINTS
19 ABOUT THAT PROCESS, IF I MAY.

20 THE LAWSUIT WAS BROUGHT UNDER THE 1997 REGENTS POLICY,
21 THAT IS THE POLICY THAT DR. CREWS CHARACTERIZED AS THE ONE
22 THAT SAID YES TO JUST ABOUT EVERYTHING WHEN IT COMES TO FAIR
23 USE. THE COMMITTEE WAS CHAIRED BY THE SAME INDIVIDUAL WHO
24 CHAIRED THE COMMITTEE THAT SPAWNED THE 1997 POLICY. AND THIS
25 ONE WAS VERY HASTILY CONVENEED. ITS CHAIRMAN AND MEMBERS WERE

1 ADVISED BY THE VICE-CHANCELLOR FOR LEGAL AFFAIRS OF THE BOARD
2 OF REGENTS THAT THE LEGALITY OF THE THEN-EXISTING POLICY WAS
3 WHAT HE TERMED A CENTRAL FEATURE IN THIS LAWSUIT, THAT IS IN
4 PX 1004 AND DX 145.

5 THE BOARD OF REGENTS THEN PROCEEDED TO RETAIN KING AND
6 SPALDING, WHO APPARENTLY UNKNOWN TO THE COMMITTEE CHAIR, WAS
7 AT THE SAME TIME REPRESENTING THE DEFENDANTS IN THIS CASE.
8 THEY ATTENDED ALL OF THE MEETINGS. THEY WERE THE PRIMARY
9 DRAFTSMEN OF THE POLICY. THEY WERE THE INTERFACE WITH
10 DR. CREWS, PAID HIS CONSULTING FEES. AND IMMEDIATELY AFTER
11 THE COMMITTEE'S WORK CONCLUDED, RETAINED HIM AS A TESTIFYING
12 EXPERT IN THIS CASE.

13 COMMITTEE MEMBERS WERE WARNED THAT THE NEW POLICY WOULD BE
14 USED IN THIS LITIGATION AND WAS EXTREMELY SENSITIVE, AND IN
15 THE PROCESS SHROUDED IN SECRECY AND CERTAINLY KEPT FROM THE
16 PLAINTIFFS. THE COMMITTEE HELD THREE MEETINGS, A COUPLE OF
17 PHONE CALLS. AND AT THE URGING OF ITS LAWYERS COMPLETED ITS
18 REVIEW AND PROMULGATED THE NEW POLICY OVER A 60-DAY PERIOD
19 THAT INCLUDED CHRISTMAS AND THE NEW YEAR'S HOLIDAYS. THIS
20 COMPARES TO ABOUT A THREE TIME LONGER DELIBERATIVE PROCESS OF
21 THE PRIOR POLICY. AND THE EXPLANATION FOR THAT, OFFERED BY
22 MR. POTTER THE COMMITTEE CHAIR, WAS THAT THIS TIME KING AND
23 SPALDING WAS COUNSELING THE COMMITTEE. AT THE SAME TIME,
24 CURIOUSLY, THE COMMITTEE CHAIRMAN TESTIFIED YESTERDAY THAT THE
25 COMMITTEE WENT ABOUT ITS BUSINESS WITHOUT SO MUCH AS

1 DISCUSSING THIS LAWSUIT OR ANY OF THE PRACTICES AT ISSUE HERE.

2 THE COURT: SO WHAT? WHAT DIFFERENCE DOES THAT
3 MAKE? YOU ARE TALKING NOW ABOUT THE GIST OF IT IS, IS IF THEY
4 HAD TRIED HARDER, THEY COULD HAVE DONE A BETTER JOB, I DON'T
5 KNOW WHETHER THAT IS TRUE OR NOT.

6 MR. RICH: WHAT I AM TRYING TO ESTABLISH, I THINK
7 THE RECORD ESTABLISHES, YOUR HONOR, IT IS OBVIOUSLY HOW YOU
8 WEIGH, THAT IS OBVIOUSLY YOUR CALL, IS THAT THIS POLICY WAS
9 ISSUED WITHOUT ANY APPARENT CONSIDERATION FOR ITS IMPACT ON,
10 NOTWITHSTANDING THE COMMITTEE WAS FORMED OUT OF THIS
11 LITIGATION, THERE WAS NO EMPIRICAL WORK, THERE WAS NO SERIOUS
12 EFFORT MADE TO GAUGE OR EVALUATE HOW THE NEW TOOL PUT OUT BY
13 THIS NEW POLICY, THE CHECKLIST, WOULD IN FACT IMPACT ON
14 ONGOING PRACTICE IN RELATION TO ERESERVES AND ULEARN. IT IS
15 DIFFICULT FOR ME TO SAY THIS WAS A GOOD-FAITH EFFORT TO
16 REGULATE FAIR USES IN THE FACE OF A LITIGATION EXISTING HERE
17 WITHOUT HAVING ANY SENSE -- THE COMMITTEE CHAIR HAD NO SENSE
18 WHATSOEVER AS TO WHAT ITS LIKELY EFFECT WOULD BE IN TERMS OF
19 ACTUAL APPLICATION IN THE REAL WORLD BY FACULTY MEMBERS.

20 THE COURT: WHAT SHOULD THEY HAVE DONE? IF THEY HAD
21 DONE AN IDEAL JOB, AS YOU SEE IT, WHAT SHOULD THEY HAVE DONE?

22 MR. RICH: THERE IS NO ONE RIGHT POLICY, I THINK
23 THAT IS EVIDENT, YOUR HONOR. BUT, FOR EXAMPLE, WHAT THEY
24 SHOULD NOT HAVE DONE --

25 THE COURT: I WANT TO KNOW WHAT YOU THINK THEY

1 SHOULD HAVE DONE. HERE THEY HAVE GOT A SITUATION WHERE AS I
2 SEE IT THERE IS NOT A SINGLE CASE IN THE U.S. AT ANY LEVEL
3 THAT SPELLS OUT WHAT THE STANDARDS ARE FOR FAIR USE WITHIN A
4 UNIVERSITY LIKE GEORGIA STATE. YOU GOT CASES THAT DISCUSS
5 FAIR USE IN OTHER CONTEXTS, BUT THERE IS NO ROAD MAP OUT
6 THERE. SO IF A UNIVERSITY IS GOING TO DO ANYTHING, THERE
7 HAVE GOT TO BE SOME DECISIONS MADE ABOUT WHAT SHOULD BE DONE.
8 I JUST WONDER, WHAT DO YOU THINK THEY SHOULD HAVE DONE?

9 MR. RICH: THEY CERTAINLY SHOULD NOT HAVE -- I AM
10 ANSWERING YOU IN A DOUBLE NEGATIVE BUT I AM GETTING TO YOUR
11 ANSWER IT IS THE ONLY WAY I KNOW HOW TO DO IT. SHOULD NOT
12 HAVE MADE THE LITMUS TEST FOR FAIR USE DETERMINATIONS HANDING
13 A CHECKLIST OF ANY KIND LET ALONE THE ONE THAT WAS DEVELOPED
14 TO A THOUSAND FACULTY MEMBERS WITHOUT MORE.

15 THE COURT: ALL RIGHT.

16 MR. RICH: THEY SHOULD HAVE CREATED A MUCH RICHER
17 BODY OF SUPPORT MATERIAL IN ORDER TO PROVIDE A BETTER
18 DECISION-MAKING BASE FOR FACULTY MEMBERS AS FOR EXAMPLE
19 COLUMBIA DOES. DR. CREWS TESTIFIED UNEQUIVOCALLY THAT HE
20 WOULD NOT RECOMMEND DOING WHAT IN FACT THIS POLICY DOES, WHICH
21 IS USE AS THE LITMUS TEST FOR INFRINGEMENT FILLING OUT A
22 CHECKLIST, TALLYING UP THE PROS AND THE CONS, AND THEN ADDING
23 UP HOW MANY FACTORS FAVOR AND HOW MANY DISFAVOR. IT IS A
24 MECHANICAL PROCESS. IT MISAPPREHENDS THE PURPOSE OF HOW THE
25 CHECKLIST DEvised WAS INTENDED TO BE USED AS A RESOURCE,

1 SUPPLEMENTED BY MANY, MANY OTHER MATERIALS. THEY SHOULD
2 HAVE HAD MANDATORY TRAINING FOR FACULTY MEMBERS, NOT FACULTY
3 MEMBERS SAYING IT IS OPTIONAL, I KNOW WHAT I AM DOING, AND IF
4 I DON'T UNDERSTAND IT I WILL JUST MOVE FORWARD.

5 THE COURT: SO YOU THINK IF THERE HAD BEEN ENOUGH
6 TRAINING AND ENOUGH RESOURCES IT WOULD HAVE BEEN POSSIBLE FOR
7 PROFESSORS TO MAKE CORRECT FAIR USE DECISIONS?

8 MR. RICH: NO, I DON'T BELIEVE THAT, BECAUSE ANOTHER
9 PART OF THE CRITICAL -- ANOTHER CRITICAL PART OF THE POLICY
10 THAT I THINK WOULD HAVE RESULTED IN MANY FEWER INFRINGEMENTS
11 WOULD BE TO HAVE AN ADEQUATE SUPERVISORY REVIEW AND MONITORING
12 MECHANISM, WHICH THE RECORD MAKES CLEAR WAS TOTALLY LACKING
13 HERE. DR. CREWS TESTIFIED THAT HE SUPPORTS THAT. HE WAS
14 UNDER A MISAPPREHENSION THAT THERE WOULD BE A MORE ACTIVE
15 LIBRARY REVIEW PROCESS HERE, DEAN SEAMANS SAYS THEY DON'T DO
16 THAT. THIS POLICY SAYS, WE PROPOSE OUR CONFIDENCE IN THE
17 FACULTY MEMBER GETTING IT RIGHT. DR. CREWS'S ENTIRE POSITION
18 AT COLUMBIA UNIVERSITY IS INVOLVED IN HAVING THAT KIND OF
19 CONSULTIVE ROLE THROUGH THAT OFFICE THAT WAS CREATED. MANY
20 OTHER INSTITUTIONS, TO MY KNOWLEDGE --

21 THE COURT: YOU CAN'T DO THAT, THOUGH.

22 MR. RICH: THANK YOU. I WON'T.

23 THE COURT: WE HAVE TO STICK WITH THE RECORD THAT WE
24 GOT.

25 MR. RICH: BUT THE DIRECT ANSWER TO YOUR QUESTION IS

1 FAR MORE CHECKS AND BALANCES IN THE PROCESS, FAR MORE
2 EDUCATION, AND NOT A MECHANICAL USE OF A CHECKLIST. BECAUSE I
3 THINK IN COMBINATION WHAT THE RECORD HAS SHOWN IS, IT HAS
4 SPAWNED RANDOM DECISIONS. MANY, MANY TAKINGS THAT WE THINK
5 NO MATTER HOW ONE MIGHT DRAW A LINE OF FAIR USE ULTIMATELY
6 EXCEEDS ANY CONCEIVABLE RATIONALE FOR FAIR USE.

7 THE COURT: ONE OF THE FOUR FACTORS CONCERNS THE
8 EFFECT OF THE ALLEGED INFRINGEMENT ON THE MARKET. HOW COULD
9 A PROFESSOR WHO IS PLANNING A COURSE DETERMINE HOW TO RESOLVE
10 THAT FOURTH FACTOR?

11 MR. RICH: WELL, I THINK IT IS AN EXCELLENT
12 QUESTION, OF COURSE. I THINK THE ANSWER THERE, YOUR HONOR,
13 IS AGAIN FOUND IN POLICIES LIKE COLUMBIA'S, WHICH ARE NOW IN
14 THE RECORD, WHICH IS THAT WHERE YOU HAVE CURRICULUM MATERIALS
15 AND WHERE THERE IS AS IS REQUIRED TO BE EXAMINED UNDER THE
16 FOURTH FACTOR, THE RISK OF MARKET HARM, OBVIOUSLY A PROFESSOR
17 ISN'T SITTING THERE MONITORING THE PUBLISHING HISTORY OR
18 MONITORING THE SALES HISTORY, BUT THE COLUMBIA POLICY
19 PRUDENTLY RECOMMENDS FIND OUT IF THERE IS ALREADY IN EXISTENCE
20 A PERMISSIONS MARKET, VERY SIMPLE TO DO.

21 IN FACT, COLUMBIA'S MATERIALS DIRECT PEOPLE TO THE
22 COPYRIGHT CLEARANCE CENTER POTENTIALLY AND OTHER SOURCES. YOU
23 DON'T HAVE TO CHASE DOWN AS IN THE OLD DAYS EACH PUBLISHER'S
24 PERMISSION DEPARTMENT. BUT THE PRESUMPTION IS THAT IF THERE
25 WAS ALREADY A WELL-DEVELOPED MARKETPLACE FOR PERMISSIONS AND

1 FOR LICENSING, THAT THAT IS A MAJOR, A MAJOR ELEMENT IN
2 ACTUALLY MAKING THE EVALUATION IN THE FIRST PLACE.

3 THE COURT: LET'S SUPPOSE A PROFESSOR DOES KNOW THAT
4 A PARTICULAR ARTICLE, LET'S SAY, IS AVAILABLE THROUGH THE
5 COPYRIGHT CLEARANCE CENTER.

6 MR. RICH: YES.

7 THE COURT: THEN WHAT IS THE PROFESSOR SUPPOSED TO
8 DO WITH THAT FOURTH FACTOR EVALUATION?

9 MR. RICH: I THINK IT WOULD WEIGH VERY HEAVILY. THE
10 LEARNING TELLS US, THE CASE LAW TELLS US IT WOULD WEIGH VERY
11 HEAVILY AGAINST FAIR USE. COLUMBIA SITE AGAIN, I AM HARPING
12 ON IT PRINCIPALLY BECAUSE DR. CREWS WAS HERE TESTIFYING, IT
13 SAYS PARTICULARLY PUBLICATIONS OF ACADEMIC PUBLISHERS ADHERE
14 TO THE EDUCATIONAL MARKET, THAT IS A FACTOR TWO ELEMENT, NOT
15 EVEN A FACTOR FOUR ELEMENT, WEIGH HEAVILY AGAINST A FAIR USE
16 DETERMINATION.

17 AND IT IS FAIRLY LOGICAL, WHEN YOU THINK ABOUT IT, YOUR
18 HONOR, IF THESE ARE WORKS, THE SUSTENANCE OF WHICH THE ABILITY
19 TO MAINTAIN THEM AND TO CREATE NEW WORKS DEPENDS ON THE VERY
20 SALES AND LICENSES TO STUDENTS. IT IS REASONABLY
21 STRAIGHTFORWARD. I DON'T THINK IT IS COMPLEX AT SOME LEVEL TO
22 SURMISE THAT IF THERE IS A WAY TO OBTAIN AT LEAST REASONABLE
23 COMPENSATION OR RATHER MAKE REASONABLE COMPENSATION, THEN
24 THAT IS A HEAVY FACTOR THAT WEIGHS ON A SCALE AGAINST A FAIR
25 USE. I THINK THE RECORD HERE INDICATES THAT THIS

1 DECISION-MAKING WAS MADE MORE COMPLICATED BY THE FACT THAT
2 PROFESSORS, I TAKE IT, WERE AWARE THERE WAS NO BUDGET PER SE
3 AT THE UNIVERSITY.

4 THE COURT: BUT WE ARE TALKING HERE ABOUT EXCERPTS
5 FROM COPYRIGHTED WORKS.

6 MR. RICH: YES.

7 THE COURT: SOME VERY SMALL EXCERPTS, SOME NOT SO
8 SMALL. AND THE QUESTION WOULD BE, YOU KNOW, WHAT EFFECT THE
9 USE OF THAT EXCERPT WITHOUT GETTING PERMISSION HAS ON THE
10 MARKET FOR THE ORIGINAL WORK. NOW, GETTING A LITTLE EXCERPT
11 FROM A BOOK WITHOUT PAYING FOR THE EXCERPT, I THINK, DOESN'T
12 AFFECT THE MARKET FOR SALE OF THE BOOKS. PERHAPS, AND I
13 HAVEN'T FIGURED THIS OUT, BUT PERHAPS ONE WOULD CONSIDER THAT
14 THERE IS A MARKET FOR THE EXCERPTS OR ONE MIGHT SAY THAT THAT
15 IS KIND OF A SUBPART OF THE MARKET FOR THE BOOKS. BUT WITH
16 RESPECT TO THE LITTLE EXCERPTS, I MEAN, NOT EVERYBODY IS
17 AFTER THE SAME EXCERPT.

18 MR. RICH: WELL, I THINK --

19 THE COURT: SO, IT MAKES IT DIFFICULT, I THINK.
20 AND THEN THE OTHER THING IS, HOW DO WE KNOW IF A STUDENT WERE
21 FORCED TO PURCHASE THE EXCERPT OR COULD NOT GET THE EXCERPT
22 WITHOUT PURCHASING IT, HOW DO WE KNOW HOW A STUDENT WOULD
23 REACT TO THAT, YOU KNOW? WOULD THEY ORDER THE EXCERPT EVEN
24 THOUGH ARGUABLY THE PRICE IS REASONABLE, I THINK AROUND,
25 WHAT, FIFTEEN CENTS A PAGE?

1 MR. RICH: TWELVE TO 15 CENTS FROM THESE PLAINTIFFS.

2 THE COURT: HOW DO WE KNOW WHAT A STUDENT'S REACTION
3 MIGHT BE IN THAT SITUATION?

4 MR. RICH: WELL, THERE ARE A NUMBER OF ISSUES TIED UP
5 IN YOUR QUESTIONS, YOUR HONOR, IF I MAY ADDRESS THEM.

6 FIRST OF ALL, ONE OF THE REASONS WE HARPED AS MUCH AS WE
7 DID DURING THE TRIAL ABOUT THE NOTION OF COURSEPACKS AND
8 ANALOGY TO THE PAPER COURSEPACKS IS BECAUSE THE MARKET HARM
9 SHOULD NOT BE VIEWED STRICTLY IN TERMS OF WOULD A STUDENT HAVE
10 PURCHASED OR EVEN LICENSED THE EXCERPT AND WHETHER THAT
11 IMMEDIATE PURCHASE WOULD DO ANY HARM. YOU REMEMBER
12 MS. RICHMAN, THE EVIDENCE FROM SAGE, PROFESSOR KAUFMANN WAS
13 ON THE STAND, IT WAS ESTABLISHED SHE HAD TAKEN TEN SEPARATE
14 EXCERPTS FROM SAGE PUBLICATIONS FOR TEACHING ONE COURSE IN THE
15 MAYMESTER OF 2009, IT WAS EPRS8500, QUALITATIVE INTERPRETIVE
16 RESEARCH IN EDUCATION. AS DEMONSTRATIVE FOR TODAY, WE
17 ASKED, AND MS. RICHMAN TESTIFIED, THAT HAD SAGE BEEN
18 APPROACHED FOR A PERMISSION FEE OF ABOUT 28 DOLLARS, SAGE
19 MAKES A BUSINESS OF COLLECTING VARIOUS OF ITS OWN EXCERPTS AND
20 CUSTOM PUBLISHES. AND WHAT I AM HOLDING UP, YOUR HONOR, IS
21 PRECISELY THE KIND OF PUBLICATION THAT SAGE WOULD OFFER TO
22 STUDENTS IN A CLASS SUCH AS PROFESSOR KAUFMANN FOR 28 DOLLARS.
23 HERE YOU HAVE A TEXT, IT IS A TEXT COMPRISING TEN DIFFERENT
24 CHAPTERS IN THIS CASE. AND SO IT IS IMPORTANT THAT THE COURT
25 UNDERSTAND THAT THERE IS A MARKET TO WHICH EXCERPTS

1 CONTRIBUTE. IT IS A MARKET FOR ANTHOLOGICAL USES. MANY,
2 MANY LICENSES, MR. PFUND TESTIFIED, THAT OXFORD LICENSES MANY
3 TIMES THE USE OF EXCERPTS OF ITS WORKS, A CHAPTER HERE OR A
4 JOURNAL ARTICLE THERE INTO ANTHOLOGIES CREATED BY THIRD-PARTY
5 PUBLISHERS. THOSE ARE THE MATERIALS THAT GET SOLD INTO
6 ACADEMIC MARKETPLACES.

7 SO, IT IS A LITTLE BIT NARROW TO THINK ONLY IN TERMS OF,
8 WELL, THIS IS JUST A SMALL EXCERPT WHEN IN FACT THE MARKET
9 HARM IS NOT SIMPLY TO, WELL, WHAT IS THE EFFECT OF TAKING AN
10 EXCERPT? IT IS SUPPLANTING WHEN IT IS DONE, WRITTEN LARGE
11 ACROSS AN ENTIRE COURSE. WHEN PROFESSOR HASNER TAKES 37
12 SEPARATE EXCERPTS FROM DIFFERENT PUBLISHERS' WORKS AND THE
13 STUDENTS IN THAT COURSE PAY NO PERMISSIONS FEES FOR IT, THAT
14 IS A HUNDRED PLUS STUDENTS, 37 WORKS, SURELY THAT IS
15 SUPPLANTING SALES OF OTHER MATERIALS PUBLISHED BY OUR CLIENTS
16 AND PUBLISHED BY OTHERS.

17 THIS IS THE INSIGHT OF THE COPY SHOP CASES HAVING NOTHING
18 TO DO WITH WHO THE COPIER WAS. BUT IT WAS THE RECOGNITION
19 THAT THERE IS A SEPARATE HARM TO THE MARKET IN ALLOWING THIS
20 KIND OF GATHERING TOGETHER AND ACCUMULATING TOGETHER FOR A
21 MAJORITY OF COURSE OFFERINGS OF MATERIALS BECAUSE THERE IS A
22 SUPPLANTING EFFECT ON SALES, WHAT IS CALLED ANTHOLOGIZING IN
23 THOSE CASES. THERE IS A SUPPLANTING EFFECT ON SALES OF THESE
24 KIND OF WORKS AND LICENSINGS OF THESE KINDS OF WORKS, AND THE
25 SALES OF EXCERPTS TO OTHER PUBLISHERS FOR SALES OF THESE

1 ANTHOLOGIES IN THE COURSE ROOM SETTING, THAT IS ONE LEVEL.

2 I ALSO WANT TO SUGGEST, YOUR HONOR, THOUGH, THAT THE
3 TEST, AS YOUR HONOR KNOWS UNDER FACTOR FOUR, IS NOT PER SE
4 WHAT THE IMPACT OF A LICENSE OF X CENTS PER PAGE OR X DOLLARS
5 PER EXCERPT WOULD BE ON A PARTICULAR COURSE, BUT A PARTICULAR
6 CLASS OR USE IS WHAT IF THAT PRACTICE BECAME VIRAL? WHAT IF
7 IT MULTIPLIED OUT AND THE PRACTICE THAT IS UNDER EXAMINATION
8 IN THE COURT BECAME ONE THAT BECAME A PREVALENT PRACTICE? AND
9 THAT IS A CRITICAL ELEMENT HERE.

10 ONE OF THE REASONS THAT THE COURTS LOOK TO WHETHER THERE
11 IS AN ESTABLISHED PERMISSIONS MARKET IS TO RECOGNIZE THAT
12 MARKETS ORGANIZE AROUND CERTAIN EXPECTATIONS AND PRINCIPLES.
13 AND THAT IF THERE IS AN ORGANIZED MARKET, IT MEANS THAT THERE
14 PROBABLY IS SOME REASONABLE MECHANISM OUT THERE AS AN
15 ALTERNATIVE WHICH CAN SERVE BOTH THE NEEDS OF THE ACADEMY,
16 WHICH IS TO GET A QUICK AND EFFICIENT LICENSING, WHILE STILL
17 PROMOTING THE BOTTOM LINE OF THE PUBLISHING RIGHT INTEREST,
18 WHICH IS TO PROMOTE SALES AND ALLOW THE SUPPORT OF PUBLISHING
19 ENTERPRISE. I THINK IF ONE LOOKS MICROSCOPICALLY AT THE
20 QUESTION OF, WELL, SURELY FIFTEEN CENTS A PAGE TIMES 20
21 STUDENTS WON'T MAKE OR BREAK SAGE PUBLISHING, OR 28 DOLLARS
22 WON'T, MS. RICHMAN CANDIDLY SAID THAT IS NOT THE ISSUE TO ME.
23 WHAT I LOSE SLEEP OVER IS IF THIS BECAME A PREVALENT PRACTICE
24 ACROSS ACADEMIC INSTITUTIONS AND WE LOSE THE ABILITY
25 COMPREHENSIVELY TO FIND THE MARKETS WE USE AND STIPULATED

1 THESE ARE THE PRIMARY MARKETS OUR CLIENT SERVE, EACH OF OUR
2 CLIENTS SAID IT IS THE WIDESPREAD ADOPTION OF THE PRACTICE
3 THAT REALLY CREATES THE PROSPECT OF MARKET HARM. WE DON'T
4 NEED TO MAKE A DAMAGES PROFFER IN THIS SORT OF CASE BECAUSE BY
5 ITS NATURE THE INQUIRY IS WHAT IS THE POTENTIAL FOR HARM.

6 THE COURT: YOU THINK ALL OF THIS IS SOMETHING THAT
7 A PROFESSOR FILLING OUT A FAIR USE CHECKLIST WOULD BE ABLE TO
8 RESOLVE IN TERMS OF HOW MUCH EFFECT ON THE MARKET THERE WILL
9 BE IF HE GETS AHEAD WITH USING A PARTICULAR EXCERPT?

10 MR. RICH: I THINK THIS IS WHY, AGAIN, WHY POLICIES
11 LIKE COLUMBIA SAY, DON'T DO A FANCY MARKET STUDY. OF COURSE
12 NOT, I AGREE WITH YOU. BUT RATHER WHILE THEY PRACTICALLY SAY
13 INVESTIGATE IF THERE IS AN EXISTING MARKETPLACE MAKING THESE
14 NEW MATERIALS AVAILABLE FOR LICENSE. IT IS FRANKLY WHY CCC
15 EXISTS. IT IS WHY MS. ARMSTRONG WAS ABLE TO TELL YOU
16 FOLLOWING THE KINKO DECISION THERE THAT PEOPLE DIDN'T, AS A
17 RULE, GO THROUGH THAT ANALYSIS, THEY INSTEAD MADE A
18 DETERMINATION, AT LEAST FOR SOME NUMBER OR SOME PERCENTAGE OF
19 THEIR WORKS, THAT THEY WOULD SECURE A LICENSE FROM, YOU KNOW,
20 THE COPYRIGHT CLEARANCE CENTER TO AVOID THE GRAY AREAS, TO
21 AVOID THE TRANSACTIONAL COSTS, AND TO AVOID, YOU KNOW, THE
22 RISKS OF IT HERE. I DON'T THINK IT IS THAT COMPLICATED.

23 THE COURT: LET ME ASK YOU A SPECIFIC QUESTION, WE
24 DISCUSSED THIS THE OTHER DAY. WITH RESPECT TO ALL OF THE
25 CLAIMED INFRINGEMENTS IN THIS CASE, IS IT CORRECT THAT ALL OF

1 THESE EXCERPTS WERE AVAILABLE FROM THE COPYRIGHT CLEARANCE
2 CENTER?

3 MR. RICH: WHAT DOES THE RECORD SHOW? THE RECORD
4 SHOWS THAT EVERY WORK IS AVAILABLE THROUGH THE COPYRIGHT
5 CLEARANCE CENTER. THERE ARE, I AM GUESSING, HALF A DOZEN
6 PERHAPS OF THE SET OF THE 64 WORKS WHERE THE AMOUNT REQUESTED
7 OR USED BY THE PROFESSOR EXCEEDED THE AUTOMATIC POINT OF
8 AUTHORIZATION. AND IN THOSE SITUATIONS, THE TESTIMONY OF
9 MR. PFUND AND MS. RICHMAN AND MR. SMITH WERE IN THOSE
10 SITUATIONS IT IS A CASE-BY-CASE DETERMINATION WHETHER WE WILL
11 AUTHORIZE IT OR INSTEAD WHETHER WE WILL COME BACK TO THE
12 PROFESSOR AND SAY, WE WOULD MUCH RATHER SELL, SINCE YOU WANT
13 TO TAKE SO MUCH, WE WOULD RATHER SELL. YOU SAID IT DOESN'T
14 SEEM SURPRISING IT IS OVER 20 PERCENT, YOU WANT TO MAKE A
15 SALE, THAT IS THE DIRECT ANSWER, YOUR HONOR.

16 PERHAPS IF IT MAKES SENSE TO YOU, I COULD SPEND A LITTLE
17 MORE TIME PARSING THROUGH EACH OF THE FOUR FACTORS A LITTLE
18 BIT AND OUR ANALYSIS OF WHAT THE LAW SUGGESTS.

19 THE COURT: IT SEEMS TO ME THAT I NEED TO COME TO
20 SOME RESOLUTION OF THE ISSUE OF WHAT THE PROPER WEIGHING OF
21 THE FACTORS IN A CASE IS LIKE OURS. I AM ESPECIALLY
22 INTERESTED IN YOUR COMMENTS ABOUT THAT, AS WELL AS ANY COMMENT
23 YOU MIGHT WANT TO MAKE ABOUT THE ACTUAL WAY IN WHICH THE
24 FACTORS WERE APPLIED IN THIS CASE. I KNOW WE HAD TESTIMONY
25 ABOUT A LOT OF DIFFERENT EXCERPTS.

1 MR. RICH: WE PUT TOGETHER A CHART FOR THE COURT'S
2 BENEFIT. LET ME SPEND A FEW MORE MINUTES ADDRESSING YOUR
3 HONOR'S ISSUES ABOUT WEIGHING THE FOUR FACTORS.

4 ONCE AGAIN, WE THINK IT IS CLEAR THAT THE DOMINANT FACTORS
5 THAT THE COURT SHOULD WEIGH ARE FACTORS ONE AND FACTORS FOUR.
6 NOW, THE OTHER SIDE WILL ARGUE THAT, OH, THAT IS GOOD FOR THEM
7 IN THE SENSE THAT FACTOR ONE INCLUDES THE ELEMENT OF
8 EDUCATIONAL USE AND IN FACT IT DOES. BUT CAMPBELL, IN THE
9 SUPREME COURT, LETTERESE IN THE 11TH CIRCUIT, A HOST OF CASES
10 WE HAVE CITED IN OUR PROPOSED CONCLUSIONS OF LAW SAY THAT IS
11 NOT DISPOSITIVE. THE FACT THAT IT IS A NONCOMMERCIAL USE IS
12 NOT DISPOSITIVE, IT IS AN ELEMENT, BUT IT IS ONLY AN ELEMENT
13 AND IT IS ONLY A SUBELEMENT, YOUR HONOR, OF THE FIRST
14 FACTOR.

15 THE DOMINANT ELEMENT OF THE FIRST FACTOR, THE CASES TELL
16 US, IS WHETHER OR NOT THE USE IS, AS WE BEGAN DISCUSSING, A
17 TRANSFORMATIVE USE. THE LESS TRANSFORMATIVE THE USE, THE
18 LESS THE FACT THAT IT IS NONCOMMERCIAL OR EDUCATIONAL IN AND
19 OF ITSELF JUSTIFIES IT. AS THE COURT IN HARPER AND ROW
20 INDICATED, THE MERE FACT THAT -- PARDON ME -- IN CAMPBELL
21 VERSUS ACUFF-ROSE INDICATED, THE MERE FACT THAT A USE IS
22 EDUCATIONAL AND NOT-FOR-PROFIT DOES NOT INSULATE IT FROM A
23 FINDING OF INFRINGEMENT. CAMPBELL COURT WENT ON TO SAY,
24 QUOTE, IT IS ONLY ONE ELEMENT OF THE FIRST FACTOR INQUIRY, AND
25 THAT WAS A SIMILAR VIEW OF THE SIXTH CIRCUIT IN THE PRINCETON

1 UNIVERSITY CASE.

2 NOW, I WOULD LIKE TO ADDRESS, AS PART OF THAT, WHAT I
3 ANTICIPATE YOU WILL BE HEARING FROM THE DEFENDANTS ABOUT THIS
4 PREAMBLE LANGUAGE IN 107. AND I THINK IT IS TERRIBLY
5 IMPORTANT THAT WE SPEND A FEW MINUTES ON THAT.

6 IT IS TRUE THAT THE COURT IN THE CAMPBELL CASE IN A
7 FOOTNOTE, I THINK IT WAS FOOTNOTE 11 OF THAT CASE, INDICATED
8 THAT THE STRAIGHT REPRODUCTION OF MULTIPLE COPIES IN THE
9 CLASSROOM DISTRIBUTION SETTING IS AN EXCEPTION TO WHAT THEY
10 CALLED THE CENTRAL PURPOSE INQUIRY OF THE ENTIRE FAIR USE
11 DOCTRINE, WHICH IS SOMETHING TRANSFORMATIVE. NOW, OUR
12 FRIEND ON THE OTHER SIDE WOULD SAY, WELL, THAT'S IT. END OF
13 THE INQUIRY BECAUSE THERE IS A FOOTNOTE IN THE SUPREME COURT
14 CASE THAT SAYS THERE IS AN EXCEPTION TO THE ALMOST DISPOSITIVE
15 NATURE OF TRANSFORMATIVENESS IN NORMAL SITUATIONS.
16 THEREFORE, IT MUST BE THAT YOU DON'T WORRY ABOUT IT BEING
17 TRANSFORMATIVE IN THE CURRENT SETTING. AND THAT SIMPLY BY
18 VIRTUE OF THE FACT THAT IT IS AN EDUCATIONAL USE IT MUST BE A
19 FAIR USE. THAT IS A COMPLETE DISTORTION OF THE LAW AND OF
20 ANY PROPER INTERPRETATION OF THAT FOOTNOTE.

21 THE FACT THAT THE COURT IN CAMPBELL IN A CASE THAT HAD
22 NOTHING TO DO WITH EDUCATIONAL FAIR USE THAT HAD TO DO WITH,
23 YOU KNOW, THE, AS YOU KNOW, 2 LIVE CREW PARODY, DID NOT SAY,
24 LET ALONE SUGGESTS THAT IF YOU ARE IN AN EDUCATIONAL COPYING
25 SETTING YOU DON'T LOOK AT TRANSFORMATIVENESS, THEY SIMPLY

1 SAID IT WILL HAVE SOMEWHAT LESS WEIGHT, IT IS LESS OF A
2 CENTRAL INQUIRY IN THAT CASE. LET ALONE DID THE COURT SUGGEST
3 THAT SUCH USES ARE PRESUMPTIVELY LAWFUL, MEANING JUST BECAUSE
4 IT IS IN THE PREAMBLE AND IT IS TERRIBLY IMPORTANT, YOUR
5 HONOR, THAT YOU SIMPLY LOOK AT THE PLAIN LANGUAGE ON ITS FACE
6 OF THE PREAMBLE TO SECTION 107. IT IS CRITICALLY IMPORTANT TO
7 RECOGNIZE THAT THE LANGUAGE OF SECTION 107 IN THE FRONT SAYS:

8 "NOTWITHSTANDING THE PROVISIONS OF
9 106 AND 106A, THE FAIR USE OF A
10 COPYRIGHTED WORK DOESN'T SAY THE USE
11 OF, THE FAIR USE OF A COPYRIGHTED
12 WORK, INCLUDING MULTIPLE COPIES FOR
13 CLASSROOM USE" -- TRYING TO FIND THE
14 END -- "IS NOT AN INFRINGEMENT OF
15 COPYRIGHT."

16 NEXT SENTENCE:

17 "IN DETERMINING WHETHER THE USE MADE
18 OF A WORK IN ANY PARTICULAR CASE IS
19 A FAIR USE, THE FACTORS TO BE
20 CONSIDERED SHALL INCLUDE."

21 IT DOESN'T EXEMPT IT FROM THE FOUR FACTOR ANALYSIS, IT
22 SIMPLY SAYS, IT IS A FAVORED USE IF IT IS FOUND TO BE A FAIR
23 USE. AND SO IT IS ONLY SETTING UP EXACTLY THE ISSUES YOU ARE
24 STRUGGLING WITH HERE, WHICH IS HOW MUCH WEIGHT YOU GIVE
25 EVERYTHING IN THE EQUATION. ANY SUGGESTION THAT IT HAS GOT A

1 TALISMANIC SIGNIFICANCE, WHICH IS READING THE
2 TRANSFORMATIVENESS ELEMENT OUT OF THE ANALYSIS, IS COMPLETELY
3 CONTRARY TO ALL OF THE PRECEDENT THAT WE HAVE CITED YOU IN OUR
4 BRIEFING. IT IS CONTRARY IN THE CLASSROOM SETTING.

5 AND I KNOW YOUR HONOR HAS HAD SOME RESISTANCE TO THE
6 RELEVANCE OF THE COPY SHOP CASES, BUT LET'S REMEMBER THE
7 SETTING OF THOSE CASES. THOSE INVOLVE COPYING IN THE
8 CLASSROOM. YES, THE COPYIST WAS A COMMERCIAL PHOTOSHOP, BUT
9 THE INTEREST THAT WAS ASSERTED BY THE DEFENDANTS THERE WAS THE
10 VERY SAME, UNSUCCESSFULLY, WHICH WAS THIS IS SERVING AN
11 EDUCATIONAL FUNCTION. AND THOSE COURTS IN DISCUSSING
12 CONCEPTS LIKE TRANSFORMATIVENESS AND THE WEIGHT TO BE GIVEN
13 EDUCATIONAL USE PUT THOSE IN THEIR PROPER FRAMEWORK AND SAID,
14 WHERE THE NET EFFECT OF THE COPYING ACTIVITY, EVEN IN THE
15 CLASSROOM SETTING, IS SIMPLY SUBSTITUTIVE, IT IS SIMPLY
16 MECHANICAL TRANSFORMATION, IN THE WORDS OF ONE OF THOSE
17 COURTS, IT IS SIMPLY NOT ADDING ANY ELEMENTS. THAT WEIGHS
18 HEAVILY AGAINST FAIR USE BECAUSE THE COURTS SAID, ALL IT IS
19 DOING IS SUPERSEDING AND SUPPLANTING SALES AND LICENSES OF
20 WORKS FROM THE TYPES OF PUBLISHERS THERETO, ACADEMIC
21 PUBLISHERS, WHO MAKE A LIVING MAKING THESE SALES AND OFFERING
22 THESE PERMISSIONS INCOMES.

23 AND THEY ALSO FOUND IN THAT CASE, BOTH OF THOSE CASES,
24 THE AVAILABILITY OF A FUNCTIONING, EXISTING, EFFICIENT
25 LICENSING MECHANISM, WHICH HAPPENED TO BE THE COPYRIGHT

1 CLEARANCE CENTER, WAS A SIGNIFICANT FACTOR TO BE WEIGHED NOW
2 ON FACTOR FOUR IN MAKING THE DETERMINATION.

3 SO WHEN I SAID EARLIER, YOUR HONOR, AS WE UNDERSTAND THE
4 ANALYSIS, FACTORS ONE AND FOUR ARE CRITICAL, THEY REALLY
5 COME TOGETHER IN MANY WAYS IN THE ANALYSIS. BECAUSE THE MORE
6 TRANSFORMATIVE A USE, THE MORE THE USE IS DIFFERENT IN NATURE
7 FROM THE USE THAT SAGE SELLS AND OUP SELLS AND CAMBRIDGE
8 SELLS, THE LESS LIKELY IT IS THERE WILL BE MARKET HARM. THERE
9 IS LESS OF A SUBSTITUTION RISK. BUT CONVERSELY, THE MORE
10 THAT THE USE JUST DOES THE VERY SAME THING THAT THE PURCHASE
11 OF THE LICENSE DOES, THE PROSPECT OF HARM IS MUCH LARGER.

12 YOUR HONOR, THAT IS WHY I STARTED WHERE I DID SUGGESTING
13 THAT IF EVERY EDUCATIONAL INSTITUTION IN THE UNITED STATES
14 PURCHASED ONE COPY AND THEN SIMPLY LIBERALLY MADE COPIES OF
15 ITS OWN OF THOSE FOR AN ENTIRE CLASS OF STUDENTS, IT IS HARD
16 TO BELIEVE THAT WOULD SUPPORT A VIABLE PUBLISHING ENTERPRISE,
17 NAMELY THE ONE SALE TO AN ENTIRE INSTITUTION. AND YET THAT
18 IS THE IMPLICATION OF A VERY BROAD FAIR USE POSITION TAKEN
19 HERE BY THE DEFENDANTS CERTAINLY AS INTERPRETED BY THE FACULTY
20 MEMBERS.

21 THE COURT: WHAT ABOUT THE AMOUNT AND SUBSTANTIALITY
22 OF THE PORTION USED?

23 MR. RICH: I WOULD LIKE TO MAKE THREE OR FOUR POINTS
24 ABOUT THAT, IF I MAY. FIRST OF ALL, ON THE RELATIVE SCALE,
25 I WILL READ YOU A SHORT QUOTE FROM THE UNIVERSITY PRESS, WITH

1 WHICH WE AGREE IN THE CONTRAST OF NONTRANSFORMATIVE USES AT
2 LEAST, AND ACCEPTING SO FAR AS THEY TOUCH ON THE FOUR FACTORS,
3 THE OTHER STATUTORY FACTORS SEEM CONSIDERABLY LESS IMPORTANT.
4 WE WOULD AGREE THAT AGAIN IN THE RELATIVE SCALE OF IMPORTANCE,
5 THE AMOUNT AND SUBSTANTIALITY, WHILE CLEARLY RELEVANT, IS NOT
6 AS IMPORTANT AS THE CORE DETERMINATION OF WHAT THE PRINCIPLE
7 PURPOSE OF THAT TAKING IS AND WHAT ITS DISPLACEMENT EFFECT ON
8 SALES OR LICENSING IS OR MAY BE. SECOND --

9 THE COURT: DO YOU THINK THAT A PROPER POLICY FOR A
10 UNIVERSITY SHOULD INCLUDE SOME LIMITATION ON THE AMOUNT THAT
11 CAN BE USED WITHOUT PAYING FEES?

12 MR. RICH: OUR INJUNCTIVE RELIEF DOES SUGGEST THAT OF
13 A SORT, BUT IT IS ALSO DESIGNED AS A REMEDIAL DEVICE. WE DO
14 SEE SOME DIFFERENCE IN TERMS OF THE LATITUDE IN SCOPE OF A
15 PROPER INJUNCTION, SHOULD YOUR HONOR FIND THERE TO BE
16 INFRINGEMENT, VERSUS THE ANSWER TO YOUR QUESTION. I DON'T
17 THINK THAT PER SE OUR CLIENTS WOULD SAY THAT THERE IS A
18 QUANTITATIVE LITMUS TEST EITHER IN THE COMMERCIAL SETTING OR
19 IN THE UNIVERSITY SETTING THAT IS THE MAGIC NUMBER. THERE
20 ISN'T ANY IN LAW. AND ANY SUGGESTION THAT IT SHOULD BE NOT
21 MORE THAN X AS A BRIGHT LINE RULE IS NOT SOMETHING OUR CLIENTS
22 HAVE EVER ARGUED TO BE THE CASE. IT CREATES A CERTAIN
23 CONUNDRUM, I REALIZE, WHICH IS, WELL, THEN, HOW DO YOU MEASURE
24 HERE?

25 THE COURT: IT MAKES IT REAL HARD FOR A PROFESSOR

1 WHO IS TRYING TO DECIDE WHETHER A PARTICULAR USE IS FAIR.

2 MR. RICH: IT DOES. THIS IS WHERE WE HAVE GUIDANCE
3 FROM THE REST OF THE CASE LAW, BECAUSE ONCE AGAIN, ONCE YOU
4 FIND THERE IS A NONTRANSFORMATIVE USE AND THAT THERE IS AN
5 AVAILABLE MARKETPLACE TO SECURE THE MATERIAL ON A REASONABLE
6 BASIS, THAT IS WHY I BELIEVE THE SIXTH CIRCUIT SAID THIS
7 FACTOR, THIS QUANTITATIVE FACTOR EXCEEDS IN ITS SIGNIFICANCE.
8 BECAUSE EITHER THEY ARE FIVE PERCENT, THEY SAY TAKINGS AS
9 LITTLE AS FIVE PERCENT WELL EXCEEDED THEIR CONCEPTION OF WHAT
10 A REASONABLE QUANTITY OF TAKING WOULD BE IN PART BY REFERENCE
11 TO THE CLASSROOM GUIDELINE, YOU KNOW, WORD COUNT. AND WE
12 AGREE WITH THAT HERE. THAT TAKINGS EVEN AS LITTLE AS FIVE
13 PERCENT HERE CONSTITUTE TAKINGS OF ANYWHERE FROM 14 PAGES TO
14 PERHAPS 36 PAGES OF WORKS, SO THAT IT IS A LITTLE MISLEADING
15 TO PLAY WITH PERCENTAGES, BECAUSE A SMALL PERCENTAGE OF A VERY
16 LARGE WORK, WHICH IS WHAT WE HAVE HERE, IS THE WAY IT ACTUALLY
17 PLAYS OUT, IS A VERY LARGE TAKING AS A MATTER OF WORD
18 INVOLVEMENT AND AGAINST MEASURES.

19 BUT THE POINT IS THAT EVEN THE SMALLER TAKINGS HERE,
20 YOUR HONOR, AND INDEED ALL OF THE TAKINGS OF FIVE PERCENT OR
21 LESS HERE WERE INDIVIDUAL AUTHORED CONTRIBUTIONS TO COLLECTED
22 WORKS. AND TO -- AND YOU HEARD THE DIALOGUE, AND IN A VERY
23 REAL SENSE, YOUR HONOR, THOSE TAKINGS WERE A HUNDRED PERCENT
24 THE ENTIRE CONTRIBUTION OF THAT INDIVIDUAL AUTHOR. IT MIGHT
25 NOT HAVE BEEN MATHEMATICALLY, OF COURSE, THAT PERCENTAGE OF

1 THE ENTIRE COLLECTIVE WORK OF WHICH IT IS A MATTER, BUT AS TO
2 THOSE TAKINGS IT WAS A HUNDRED PERCENT, YOU KNOW, OF THE WORKS
3 OF THOSE FOLKS.

4 BUT THE DIRECT ANSWER TO YOUR QUESTION, YOUR HONOR, IS
5 THERE ISN'T ANY BRIGHT LINE TEST AT WORK, THAT IS WHY THE FOUR
6 FACTORS HAVE TO WORK TOGETHER. I THINK WHAT THE COURT IS
7 LOOKING AT, COPYING IN THE EDUCATIONAL FIELD, YES, ONE STEP
8 REMOVED BECAUSE IT WAS INVOLVING A FOR-PROFIT COPYIST, GAVE
9 LESS WEIGHT, BUT SAID IT IS NOT A TRIVIAL OR *DE MINIMIS* WHEN
10 YOU TAKE FIVE PERCENT OR MORE.

11 YOU LOOK FOR GUIDANCE FROM THE COPYRIGHT ACT HERE BECAUSE
12 ON THE ONE HAND THE COPYRIGHT ACT SAYS IN THE PREAMBLE A
13 FAVORED USE IS MULTIPLE COPYING, BUT YOU CANNOT DETACH THAT
14 ANALYSIS FROM THE CORRESPONDING ENDORSEMENT IN 1976 BY THE
15 CONGRESS OF THE GUIDELINES AS A BIT OF A REAL WORLD CHECK ON
16 THAT.

17 THE COURT: WELL, YOU DID SUGGEST IN EARLIER
18 ARGUMENT THAT IF THE COURT WERE TO ENTER AN INJUNCTION, IT
19 SHOULD LIMIT THE AMOUNT OF COPYING TO AN AMOUNT THAT WOULD
20 HAVE BEEN ALLOWED UNDER THE SO-CALLED CLASSROOM GUIDELINES
21 FROM 1976.

22 MR. RICH: YES, YOUR HONOR. WE STAND BY THAT.

23 THE COURT: THAT IS A VERY, AS I SEE IT, VERY
24 RESTRICTED POLICY. BUT HERE IS WHAT I WANT TO ASK YOU ABOUT
25 THAT. I DIDN'T HEAR ANY EVIDENCE DURING THE TRIAL THAT ANY

1 COLLEGES AND UNIVERSITIES ARE APPLYING THAT, THOSE CLASSROOM
2 GUIDELINES.

3 MR. RICH: I THINK DR. CREWS ON MY CROSS-EXAMINATION
4 ACKNOWLEDGED, AND IN HIS REPORT DID ACKNOWLEDGE, THAT THERE
5 ARE SCHOOLS IN FACT USING THE GUIDELINES. I READ HIM THE
6 NAMES OF SEVERAL, HE ACKNOWLEDGED NYU IS A SCHOOL.

7 THE COURT: YOU ARE RIGHT ABOUT THAT. BUT THE ONLY
8 OTHER ONE I REMEMBER IS TEXAS.

9 MR. RICH: UNIVERSITY OF TEXAS, CLEMSON, SEVERAL
10 OTHERS.

11 THE COURT: THEY ARE UNDER THAT OMNIBUS PROGRAM WITH
12 CCC?

13 MR. RICH: RECENTLY, YOUR HONOR, FAIRLY RECENT
14 LICENSE, YOU ARE RIGHT ABOUT THAT. I DON'T THINK YOU WILL
15 FIND ANY ONE PREVALENT SET OF PRACTICES. WE DO NOTE THAT THE
16 INJUNCTIONS THAT WERE ISSUED IN THE KINKO'S AND IN THE MDS
17 CASES WERE EXTRAORDINARILY RESTRICTIVE, WE ARE NOT SUGGESTING
18 THAT.

19 THE COURT: THAT GETS BACK TO THE WHOLE QUESTION OF
20 THOSE CASES INVOLVE COMMERCIAL PRINT SHOPS.

21 MR. RICH: YES.

22 THE COURT: AND I KNOW YOU CONTEND THAT THEY APPLY
23 IN THIS SETTING THAT DEFENDANTS SAY OTHERWISE AND SO THAT IS A
24 BIG ISSUE.

25 MR. RICH: I UNDERSTAND.

1 THE COURT: BUT IT SEEMS TO ME THAT IF PROFESSORS
2 ARE GOING TO MAKE THESE DETERMINATIONS, AND FRANKLY I DON'T
3 KNOW WHO ELSE CAN DO IT, THERE REALLY NEEDS TO BE SOME TYPE OF
4 LIMITATION FACTORED IN ON THE AMOUNT THAT CAN BE COPIED.

5 MR. RICH: I THINK THERE ARE THREE DIMENSIONS, YOUR
6 HONOR, THAT BEAR THINKING OF. AND AGAIN THERE IS NO RIGHT
7 ANSWER OUT THERE, IT IS A JUDGMENT CALL AND IT WOULD BE
8 ULTIMATELY FOR YOUR HONOR. THE THREE DIMENSIONS I THINK ARE,
9 IS THERE AN ABSOLUTE LIMIT IN WORDS FOR ANY ONE TAKING BY ANY
10 ONE PROFESSOR IN ANY ONE COURSE? IS THERE A LIMIT TEMPORALLY,
11 NAMELY, CAN YOU DO IT YEAR AFTER YEAR AFTER YEAR, REPEAT USE?
12 AND I THINK I DID ELICIT FROM DR. CREWS THAT A NUMBER OF
13 POLICIES AND ALL THREE OF THE SO-CALLED MODEL GUIDELINES SAY
14 -- DRAW A SHARP LINE THERE SAYING THAT TERM AFTER TERM USE IS
15 REALLY POTENTIALLY DAMAGING EGG.

16 THE COURT: BUT THERE HAS BEEN SOME CRITICISM OF
17 THAT APPROACH IN THE LITERATURE, PEOPLE SAYING IT IS REALLY
18 IMPRACTICAL TO KEEP UP WITH, YOU KNOW, WHAT HAS BEEN DONE IN
19 COURSES FROM YEAR TO YEAR.

20 MR. RICH: IT IS NOT THAT YOU CAN'T USE IT, THOSE
21 POLICIES ARE VERY CLEAR. IF YOU WANT TO USE IT AFTER THE
22 FIRST TERM, OBTAIN A PERMISSION FOR IT. REMEMBER, YOUR
23 HONOR, WE HAVE FOR GSU FOUR MILLION DOLLARS A YEAR CURRENTLY
24 BEING PAID FOR JOURNALS, SUBSCRIPTIONS. AND WHEN I ASKED
25 DEAN SEAMANS HOW \$114,000, I AM NOT SAYING THAT WOULD BE THE

1 LIMIT OF THE EXPENSE, BUT IT IS AN ORDER OF MAGNITUDE WOULD
2 COMPARE FOR AFFORDING SOME FLOW OF PERMISSIONS INCOME FOR BOOK
3 EXCERPTS, HER ANSWER WAS WE CAN'T FIND THAT KIND OF MONEY.
4 THIS IS NOT AT 12 CENTS A PAGE, 15 CENTS A PAGE, AT 28
5 DOLLARS HERE AT THE CCC LEVEL, THIS IS NOT -- I THINK WE ARE
6 NOT TALKING ANYTHING THAT IS OTHER THAN WHAT MOST PEOPLE WOULD
7 VIEW AS REASONABLE, AT LEAST AS AGAINST OTHER EXPENSES
8 INCURRED, STUDENT FEES INCURRED.

9 THE COURT: NOW, YOUR ANALYSIS PRESUMES THAT GEORGIA
10 STATE WOULD BE REQUIRED TO PAY THESE PERMISSION FEES, BUT
11 THERE IS NOTHING WRITTEN ABOUT THAT. I MEAN, IT COULD BE
12 THAT THE STUDENTS WOULD BE REQUIRED.

13 MR. RICH: I THINK PRESIDENT BECKER'S VIDEOTAPE
14 TESTIMONY SUGGEST HIS VIEW THAT IF PERMISSIONS WERE REQUIRED,
15 IT WAS HIS VIEW THAT IT WOULD LIKELY TAKE THE FORM OF STUDENT
16 FEES. OBVIOUSLY, THAT WOULD BE UP TO THE ADMINISTRATION OF
17 THE UNIVERSITY AND PERHAPS OTHERS TO MAKE THAT DETERMINATION.
18 SURELY THERE ARE OTHERS. THERE IS IN THE RECORD AND THERE IS
19 IN THE APPENDIX E MATERIALS THAT DR. CREWS TESTIFIED ABOUT,
20 THERE IS CERTAINLY ANY NUMBER OF UNIVERSITIES IN THAT GROUP
21 ALONE WHO SAY, WE WILL MAKE A BUDGET AVAILABLE. WE WILL MAKE
22 A LIBRARY BUDGET OF NOT MORE THAN X DOLLARS A COURSE
23 AVAILABLE, SO THAT IT DISCIPLINES PROFESSORS AGAINST USING
24 MORE THAN A LIMITED AMOUNT OF THAT MATERIAL, AT LEAST WITHOUT
25 HAVING TO THEMSELVES FINDING SOME OTHER MEANS TO FUND IT.

1 AND THE LAST POINT, THE THIRD DIMENSION, YOUR HONOR, THAT
2 I WANTED TO MENTION, THERE IS THE QUANTITY OF THE ACTUAL
3 TAKING, THERE IS THE REPEAT USE OF IT, AND THE THIRD
4 DIMENSION THAT I SIMPLY WANTED TO ALSO ASK YOUR HONOR TO KEEP
5 IN MIND IS WHAT PERCENTAGE OF ALL OF THE USES OF ASSIGNED
6 READINGS IN THE COURSE, THE UNPERMISSIONED MATERIALS,
7 CONSTITUTES? THAT COMES BACK TO THE ANTHOLOGIZING ASPECT.

8 THE COURT: BUT YOU DON'T REPRESENT PUBLISHERS
9 EVERYWHERE. YOU REPRESENT THREE CLIENTS IN THIS CASE. AND
10 THEY OCCUPY THEIR OWN DISTINCT NICHEs, IF THAT IS THE RIGHT
11 WORD.

12 MR. RICH: TRUE.

13 THE COURT: IN THE OVERALL SCHEME OF THINGS. AND I
14 AM NOT, I AM NOT SO SURE -- I KNOW THAT IN COPYRIGHT LAW
15 THERE IS THE QUESTION OF WHAT, WHAT THE POTENTIAL IMPACT ON
16 THE MARKET IS. IT IS NOT JUST HOW A PARTICULAR DEFENDANT'S
17 PRACTICES IMPACT A PARTICULAR PLAINTIFF THAT COUNTS. BUT IT
18 SEEMS TO ME YOU DO HAVE TO START WITH THE SPECIFIC
19 INFRINGEMENTS THAT ARE INVOLVED. AND THEN ONE WOULD GO FROM
20 THERE TO CONSIDER WHAT IF THOSE CIRCUMSTANCES WERE REPEATED.

21 MR. RICH: I AGREE AS TO THOSE PLAINTIFFS, THAT IS
22 WHAT I AM SAYING. I AM ONLY OBSERVING, WHEN ONE LOOKS AT
23 POLICIES, YOUR HONOR ASKED ME WHAT IS A GOOD POLICY. I SIMPLY
24 WANT TO SAY TO YOU THAT WITHIN THE EVIDENCE IN THIS CASE IS
25 ANOTHER DIMENSION THAT A NUMBER OF POLICIES INSTITUTE AND THAT

1 TWO OF THE THREE MODELED POLICIES INSTITUTE, WHICH IS ANOTHER
2 THRESHOLD CONSIDERATION. WHICH IS THAT THE CUMULATIVE
3 PERCENTAGES OF UNLICENSED WORKS AS A PERCENTAGE OF ALL
4 ASSIGNED READINGS, SOME OF THEM SAY SHALL BE IN A REASONABLE
5 AMOUNT OR A LIMITED AMOUNT BECAUSE THERE IS IN THOSE POLICIES
6 A RECOGNITION OF WHAT I WAS ATTEMPTING TO SUGGEST EARLIER,
7 WHICH IS THERE IS A REAL HARM THAT GOES BEYOND LOOKING SIMPLY
8 AT A GIVEN EXCERPT, BUT THERE IS A REAL HARM IF THE PRACTICE
9 OCCURS ACROSS LARGE TAKINGS, ACROSS COURSES THAT ENTIRE TEXT
10 WILL BE TAKEN, AT LEAST THREE OF THE PROFESSORS WHO TESTIFIED
11 ASSIGNED NO PURCHASE READINGS FOR THEIR COURSES. THEIR
12 ENTIRE COURSE READINGS WERE UNPERMISSIONED, UNPAID FOR
13 RESERVES READINGS. THAT IS A REAL RISK TO OUR CLIENTS. AND
14 I THINK THE POLICIES THAT SAY WE DON'T WANT TO ENCOURAGE THAT
15 INJURY TO THE MARKET, WE WANT A MORE DISCRETE AND LIMITED
16 TAKING, SOMETIMES, I AM NOT SAYING UNIVERSALLY, ALSO APPLY
17 THAT LIMITING PARAMETER IN TERMS OF, YOU KNOW, DEFINING USE.

18 THE COURT: LET ME ASK YOU ONE MORE QUESTION, THEN I
19 AM GOING TO BE QUIET AND GIVE YOU FIFTEEN MINUTES TO COMPLETE
20 YOUR ARGUMENT. IN THE PROPOSED FINDINGS THAT YOU FILED BEFORE
21 THE TRIAL, THERE WAS A REQUEST FOR AN AWARD OF ATTORNEYS'
22 FEES IF I AWARD A FINDING IN YOUR CLIENT'S FAVOR. AS I
23 UNDERSTAND THE EVIDENCE, YOUR CLIENTS HAVE NOT INCURRED ANY
24 ATTORNEYS' FEES. THE ATTORNEYS' FEES HAVE ALL BEEN PAID BY
25 THE AMERICAN ASSOCIATION OF --

1 MR. RICH: ASSOCIATION OF PUBLISHER AND COPYRIGHT
2 CLEARANCE CENTER.

3 THE COURT: UNDER THOSE CIRCUMSTANCES, WHY WOULD AN
4 AWARD OF ATTORNEYS' FEES TO YOUR CLIENTS BE APPROPRIATE?

5 MR. RICH: I DON'T HAVE AN ANSWER TO THAT. I DON'T
6 WANT TO GIVE YOU A FACILE ANSWER. I HAVEN'T THOUGHT ABOUT
7 IT. IF IT BECOMES RELEVANT, I DON'T WANT TO BE GLIB ABOUT
8 IT, I HAVEN'T THOUGHT ABOUT IT FROM THAT PERSPECTIVE.

9 THE COURT: FAIR ENOUGH.
10 YOU HAVE GOT FIFTEEN MINUTES.

11 MR. RICH: I HAVE A MODEL GOING TO THE PROFESSORS'
12 ACTIVITIES AND I THINK YOU INDICATED SOME INTEREST IN HOW THEY
13 FILLED OUT, HOW THEY THEMSELVES PERFORMED THE FAIR USE
14 ANALYSIS. LET ME VERY QUICKLY COURSE THROUGH WHAT WE HAVE
15 DONE HERE. I THINK IT IS IN A BINDER WE HAVE GIVEN TO
16 OPPOSING COUNSEL AND TO YOU AND YOUR LAW CLERK AS WELL.

17 WHAT WE HAVE DONE IS TO SUMMARIZE, YOUR HONOR. LISTED ON
18 THIS ARE THE NAMES OF THE 16 PROFESSORS WHO TESTIFIED EITHER
19 LIVE OR BY DEPOSITION IN THE CASE. THIS IS A SUBSET OF THE
20 23. THOSE ARE THOSE THAT YOUR HONOR EITHER SAW SITTING TO
21 YOUR RIGHT OR SAW ON VIDEOTAPE. AND WHAT WE DID WAS CULL A
22 NUMBER OF FACTORS AND PUT CHECK MARKS WHERE APPROPRIATE. THE
23 FIRST ONE WAS, WHICH OF THOSE PROFESSORS ATTENDED A TRAINING.
24 YOU WILL SEE THE ANSWER THERE IS ONLY FIVE OF THE 16 ATTENDED
25 ANY TRAINING.

1 THE NEXT TWO LINES DEAL WITH HOW WELL THEY COMPLIED OR THE
2 EXTENT TO WHICH THEY COMPLIED WITH THE STATED REQUIREMENT OF
3 THE GEORGIA STATE POLICY THAT EACH PROFESSOR FILL OUT AND
4 RETAIN PRIOR TO POSTING ERES READINGS CHECKLISTS. AND I
5 BELIEVE, I AM GOING TO CONSULT, SOMETIMES IT IS THERE,
6 PARENTHETICAL MEANS SOMETIMES, WHAT YOU SEE IS ONE, TWO,
7 THREE, FOUR, FIVE, SIX, SEVEN, EIGHT OF THE SIXTEEN
8 TESTIFIED THAT THEY FILLED OUT A CHECKLIST, AS THEY WERE, FOR
9 ALL OF THEIR PROPOSED READINGS. AN ADDITIONAL TWO SAID THEY
10 HAD DONE SO FOR AT LEAST SEVERAL OF THEIR COURSE READINGS.

11 IF YOU GO DOWN THE NEXT LINE YOU SEE THAT SOME BUT NOT ALL
12 OF THOSE WHO TESTIFIED THAT THEY FILLED OUT CHECKLISTS
13 ACTUALLY RETAINED THEM.

14 IF WE COULD GO TO THE NEXT LITTLE SLIDE PLEASE. IF YOU
15 LOOK AT THE TOTAL NUMBER OF PROFESSORS WHO BOTH TIMELY FILLED
16 OUT CHECKLISTS AND RETAINED THEM OUT OF THE 16, IT IS A TOTAL
17 OF THREE: DUFFIELD, MCCOY, AND GREENBERG, THREE OUT OF
18 SIXTEEN.

19 THE NEXT LINE, YOUR HONOR, SIMPLY RECOUNTS OR RECORDS
20 THOSE PROFESSORS WHO POSTED ONLY SUPPLEMENTAL READING TO THEIR
21 COURSE AS OPPOSED TO REQUIRED READING, AND THAT WAS TWO:
22 HARTWIG AND MURPHY, OUT OF SIXTEEN USED ERESERVES IN THE
23 FASHION THAT DEAN SEAMANS INDICATED IT WAS HER UNDERSTANDING
24 ERESERVES WAS INTENDED FOR AND EXCLUSIVELY INTENDED FOR WHICH
25 IS POSTING READINGS FOR SUPPLEMENTAL READING.

1 IF WE COULD CONTINUE, PLEASE. THE NEXT LINE RECORDS HOW
2 MANY PROFESSORS BROUGHT TO THE PROCESS THEIR OWN CONCEPTION OF
3 A PERCENTAGE LIMIT. YOU WILL SEE QUITE A FEW CHECKS THERE.
4 PROFESSOR ORR CARRIED A 20 PERCENT, NOT MORE THAN 20 PERCENT
5 RULE. PROFESSOR DAVIS, 12 PERCENT LIMIT. PROFESSOR HANKLA
6 HAD A STRICT 25 PERCENT RULE. PROFESSOR HARTWIG TRIES TO
7 STAY BELOW TEN PERCENT. PROFESSOR DUFFIELD, HE LIMITED
8 EXCERPTS TO NO MORE THAN 10 PERCENT. AND PROFESSOR KAUFMAN
9 TESTIFIED SHE WAS ADVISED BY MS. HALL, WHO HERSELF DID NOT
10 TESTIFY, SHE WOULD BE OKAY TO KEEP HER TAKINGS UNDER 15
11 PERCENT, BUT SINGLE DIGITS WOULD BE, QUOTE, SUPER SAFE.

12 LET'S GO TO THE NEXT ONE, PLEASE. NOW, WE HAVE
13 SUMMARIZED FOR ONE, TWO, THREE, FOUR, FIVE, SIX, OF THE
14 CHECKLIST ITEMS TO OUR DIALOGUE EARLIER, YOUR HONOR, THAT I
15 THINK ARE AMONG THE MOST SALIENT ASPECTS OF GETTING THE
16 CHECKLISTS RIGHT AND CRITICAL ASPECTS OF MAKING A RATIONALE
17 FAIR USE DETERMINATION.

18 THE FIRST WAS, IS IT TRANSFORMATIVE OR NOT. YOU HEARD
19 LOTS OF PROFESSORS TESTIFY, TO THEIR UNDERSTANDING, THAT THIS
20 WAS NOT TRANSFORMATIVE. WHAT THEY WERE DOING AND CONSISTENTLY
21 WITH WHAT ONE OR MORE REPORTED, MS. HALL REPORTED TO THEM IF
22 THEY WERE TRAINED. AND YET ONLY ONE OF THESE PROFESSORS,
23 PROFESSOR KAUFMANN, AND ONLY WITH RESPECT TO CERTAIN OF THE
24 CHECKLISTS THAT SHE FILLED OUT BOTHERED TO CHECK THE WEIGHS
25 AGAINST BOX FOR NONTRANSFORMATIVE.

1 GOING DOWN TO THE NEXT LINE, CHECKED LARGE PORTIONS. NO
2 MATTER HOW MUCH WAS TAKEN, WHETHER AS YOU SEE HERE, SEVEN
3 CHAPTERS FROM A BOOK OR IN THE CASE OF PROFESSOR ESPOSITO, 80
4 PAGES, OR IN PROFESSOR ORR 20 PERCENT, NOT A SINGLE ONE OF
5 THESE 16 PROFESSORS CHECKED LARGE PORTION OF THE WORK.

6 WITH RESPECT TO THE FACTOR FOUR INVESTIGATIVE LICENSING
7 OPTIONS, THIS IS THE ONE WHERE THE COLUMBIA POLICY, YOUR
8 HONOR, EXPRESSLY EXHORTS FACULTY TO MAKE WHAT DR. CREWS CALLED
9 A SIMPLE INVESTIGATION OF THE AVAILABILITY OF LICENSING.
10 ZERO. NOT ONE GSU PROFESSOR UNDERSTOOD THAT IT WAS INCUMBENT
11 ON HIM OR HER TO MAKE THAT INVESTIGATION. SEVERAL, YOU MAY
12 RECALL, TESTIFIED THAT BY THE TIME THEY REACHED THIS
13 SUBFACTOR, THEY HAD ALREADY CONCLUDED THE USE WAS A FAIR USE,
14 OBTAINING THE NEED TO DO IT, WHICH IS -- WHICH CONTRAVENES
15 THE VERY PURPOSE OF ITS APPEARANCE ON THE CHECKLIST, WHICH IS
16 TO HELP DETERMINING IN FACT WHETHER THE USE IS A FAIR USE.
17 SOME OTHERS IMPORTED THEIR OWN EXPERIENCE IN THEIR PRIOR LIVES
18 WITH RESPECT TO SEEKING PERMISSIONS, PAYING PERMISSION FEES,
19 AND DETERMINED FROM THAT WITHOUT ANY OBJECTIVE INVESTIGATION
20 AND IT WENT ON FROM THERE.

21 DOWN TO THE NEXT ONE, YOUR HONOR, EVEN THOUGH THESE
22 MATERIALS BY DEFINITION WERE POSTED AND MADE AVAILABLE TO
23 CLASSES OF AS MANY AS 59, 48 AND 30 STUDENTS, ONLY ONE,
24 PROFESSOR DUFFIELD, CHECKED NUMEROUS COPIES MADE FOR HIS
25 CLASS.

1 DOWN TO THE NEXT ONE, WE HIGHLIGHTED THERE FOUR PROFESSORS
2 AS TO WHICH THE RECORD INDICATES REPEAT USES IN MULTIPLE
3 TERMS, THAT IS KAUFMANN, ESPOSITO, ORR, AND DAVIS. NONE
4 OF THOSE FOUR, HOWEVER, CHECKED REPEATED USES, EVEN THOUGH
5 THEY CONCEDED DURING THEIR TESTIMONY AND THE DOCUMENTS
6 OTHERWISE REVEAL THAT THEY HAD USED THESE IN REPEATED TERMS.

7 AND FINALLY, IN TERMS OF REQUIRED READING, AGAIN, EVEN
8 THOUGH ALL BUT TWO, I BELIEVE, PROFESSORS TESTIFIED THAT IN
9 FACT THE READINGS WERE REQUIRED READINGS FOR THEIR COURSES,
10 YOU WILL SEE THAT A MINORITY OF THE 16 ACTUALLY CHECKED
11 REQUIRED READING.

12 I THINK WE MAY HAVE ONE MORE PIECE OF THIS, WHICH IS THE
13 TALLY FOR PROFESSOR KAUFMANN, FOR WHOM THERE WAS A LOT OF
14 WORKS, ONLY PICKED TWO EXAMPLES FOR THE OTHERS, YOU WILL SEE
15 THE WEIGHS IN FAVOR WEIGHS AGAINST TALLY. MANY HAVE ZERO
16 CHECKS GOING IN THE WAYS AGAINST COLUMN. ALMOST ALL HAVE AN
17 EXTRAORDINARILY HIGH NUMBER IN THE WEIGHS IN FAVOR COLUMN.

18 AS A WAY OF TYING THIS DEMONSTRATIVE TO OUR PRIOR
19 DISCUSSION, IT DOES SEEM TO ME THAT NO MATTER HOW ONE MIGHT
20 CONCLUDE AS TO ANY PARTICULAR USE WHICH SIDE OF THE FAIR USE
21 EQUATION IT FALLS ON, THIS DEMONSTRATES TO US A PATTERN OF
22 MISUNDERSTANDING AND A FUNDAMENTAL PATTERN OF
23 MISUNDERSTANDING. YOU HAVE A SEA OF BLANKS HERE ACROSS
24 TAKINGS THAT IN MANY CASES UNQUESTIONABLY SHOULD HAVE CARRIED
25 CHECK MARKS. AND SO YOU HAVE A LACK OF INFORMED

1 DECISION-MAKING BY FACULTY, A LACK OF TRAINING, A LACK OF
2 MONITORING TO TEST THE VALIDITY OF THESE. AND THE NECESSARY
3 AND INEVITABLE OUTCOME AND IN FACT THE OUTCOME THAT HAS
4 OCCURRED IS CONTINUED INFRINGEMENT OF OUR CLIENT'S WORKS.

5 THANK YOU VERY MUCH.

6 THE COURT: THANK YOU. LET'S TAKE A TEN-MINUTE
7 BREAK.

8 (WHEREUPON, A SHORT RECESS WAS HELD.)

9 THE COURT: MR. SCHAETZEL, YOU MAY PROCEED.

10 MR. SCHAETZEL: MAY IT PLEASE THE COURT. IF I MAY,
11 YOUR HONOR, I WOULD LIKE TO RESERVE 20 MINUTES THAT MR.
12 ASKEW WOULD HAVE TO CONCLUDE OUR ARGUMENT TODAY.

13 THE COURT: THAT IS FINE.

14 MR. SCHAETZEL: THANK YOU.

15 YOUR HONOR, LISTENING TO MR. RICH'S ELOQUENT DEFENSE
16 OF HIS CLIENT'S POSITION, IT IS EASY TO FORGET THAT WHAT THE
17 PLAINTIFFS IN THIS CASE SEEK IS TO DEPRIVE THE STUDENTS AND
18 THE FACULTY AT GEORGIA STATE THE OPPORTUNITY TO MAKE LAWFUL
19 USEFUL WORK, LAWFUL FAIR USE OF PUBLICIZED WORK. THE STATUTE
20 IDENTIFIED IN THE PREAMBLE CERTAIN, IF YOU WILL, PREFERRED
21 SOCIAL BENEFIT USES. FOR EXAMPLE, CRITICISM, COMMENT,
22 TEACHING, SCHOLARSHIP, AND RESEARCH. THAT IS WHERE WE BEGAN
23 THIS CASE, YOUR HONOR, AND THAT IS WHERE WE WILL END IT, IN
24 THE STATUTE WHICH GUIDES OUR THINKING AT GEORGIA STATE AND THE
25 PRESENTATION OF OUR CASE. BECAUSE THE STATUTE ALSO PROVIDES

1 THAT IN DETERMINING WHETHER THE USE MADE OF A WORK IS IN ANY
2 PARTICULAR CASE A FAIR USE, THE FACTORS TO BE CONSIDERED
3 SHALL INCLUDE THE FOUR FACTORS THAT WE HAVE SPOKEN OF.

4 IN DETERMINING WHETHER THE USE MADE OF A WORK IS IN ANY
5 PARTICULAR CASE A FAIR USE, THOSE FACTORS ARE TO BE
6 CONSIDERED. THAT IS EXACTLY THE STATUTORY RIGHT THAT THE
7 PLAINTIFFS SEEK TO TAKE AWAY FROM THE DEFENDANTS IN THIS CASE.
8 WE SUBMIT THAT THEY HAVE FAILED TO PROVE THEIR CASE AND THAT
9 IN FACT WHAT WE HAVE SHOWN IT IS FAIR USE. AND THAT THE USES
10 THAT HAVE BEEN MADE ARE FAIR USE.

11 FIRST, WITH REFERENCE TO THE WORK OF THE COMMITTEE, THE
12 COMMITTEE SET OUT TO DO EXACTLY WHAT WE UNDERSTOOD THE COURT
13 TO ASK ABOUT. THE COMMITTEE THOUGHT TO PROVIDE SOME
14 OBJECTIVE INDICIA. THE FORMER GUIDELINES, THEY WERE NOT A
15 POLICY, BUT GUIDELINES ARE A SERIES OF VIGNETTES THAT DID NOT
16 FUNCTION VERY WELL AS A POLICY. AND IN AN EFFORT TO PROVIDE
17 MORE GUIDANCE, THE COMMITTEE ARRIVED AT A POLICY. THAT
18 POLICY HAS SEVERAL ASPECTS, MANY OF WHICH WERE NOT MENTIONED
19 IN THE PRIOR ARGUMENT. FOR EXAMPLE, POLICY INCLUDES
20 RESTRICTED ACCESS. THE POLICY REQUIRES AN AUTHORIZED
21 ORIGINAL. THE POLICY REQUIRES THAT ACCESS BE TAKEN DOWN AT
22 THE END OF EACH SEMESTER. THE POLICY REQUIRES THAT A
23 COPYRIGHT NOTE BE PROVIDED ON THE MATERIALS THAT ARE POSTED TO
24 THE ERESERVES SYSTEM. THE POLICY INCLUDES WRITTEN
25 DOCUMENTATION, THAT IS DEFENDANT'S TRIAL EXHIBIT 528.

1 IN THAT WRITTEN DOCUMENTATION, NOT ONLY ARE THERE
2 EXPLANATIONS GIVEN OF WHAT CONSTITUTES FAIR USE, NOT ONLY IS
3 THERE THE INSTRUCTION THAT ALL FOUR FACTORS MUST BE CONCLUDED,
4 BUT THERE ARE LINKS PROVIDED TO VARIOUS INTERNAL AND EXTERNAL
5 RESOURCES. ONE OF THOSE EXTERNAL RESOURCES IS THE
6 PERMISSIONS AGENCY, THE COPYRIGHT CLEARANCE CENTER. IN THE
7 SAME WAY THAT COLUMBIA, THE POLICY THAT HAS BEEN TOUTED SO
8 FAR AS BEING SOMETHING OF A BELLWETHER, PROVIDE INSTRUCTION OR
9 ASSISTANCE TO ITS PROFESSORS THROUGH LINKAGE OUT TO THE
10 COPYRIGHT CLEARANCE CENTER WEBSITE, THE GEORGIA STATE OR THE
11 UNIVERSITY SYSTEM OF GEORGIA'S POLICY DOES THE VERY SAME
12 THING.

13 THAT POLICY ALSO REQUIRES THAT THERE BE NO CHARGE TO
14 STUDENTS. UNLIKE ANY OF THE COPY SHOP CASES, THIS IS NOT A
15 PROFIT-MAKING ENTERPRISE. THAT POLICY PROVIDED TRAINING.
16 TRAINING CAN BE ATTACKED IN HINDSIGHT, BUT NONETHELESS IT
17 PROVIDED IT. AND AS A PART OF THAT TRAINING AND AS A PART OF
18 THE WRITTEN POLICY, THE COMMUNITY WAS INFORMED THAT IF THERE
19 WERE QUESTIONS, THEY COULD GO TO COUNSEL. AT GEORGIA STATE
20 UNIVERSITY, THEY COULD GO TO THE DEPARTMENT OF LEGAL AFFAIRS.
21 IF YOU WERE AT ANOTHER MEMBER OF THIS INSTITUTION, YOU COULD
22 CALL THE VICE-CHANCELLOR TO THE BOARD OF REGENTS AND GET LEGAL
23 ASSISTANCE.

24 THAT POLICY INCLUDES A LIBRARY REVIEW. NOW, AGAIN, IN
25 HINDSIGHT, PLAINTIFFS ATTACKED THAT LIBRARY REVIEW AS SOMEHOW

1 INSUFFICIENT, BUT NONETHELESS IT IS PART OF THE POLICY.

2 AND FINALLY, THAT POLICY ALSO INCLUDES A CHECKLIST.

3 THE FIRST DOCUMENT WE WOULD REMIND THE COURT OF IS ONE

4 THAT COMES FROM A SHADOW CLIENT, IF YOU WILL. ONE OF THE

5 PEOPLE OR ONE OF THE COMPANIES PAYING THE BILL, THE COPYRIGHT

6 CLEARANCE CENTER. THIS IS EXHIBIT 906. IN THE UPPER

7 LEFT-HAND CORNER, YOUR HONOR, THE EXHIBIT SAYS "WHITE PAPER:

8 USING ELECTRONIC RESERVES GUIDELINES AND BEST PRACTICES FOR

9 COPYRIGHT COMPLIANCE." THIS IS THE COPYRIGHT CLEARANCE

10 CENTER'S OPINION OF WHAT CONSTITUTES BEST PRACTICES IN A

11 POLICY SUCH AS THIS. ERESERVES ARE NOT A SUBSTITUTE FOR A

12 PURCHASE OF TEXTBOOKS.

13 OF ALL OF THE PROFESSORS THAT TESTIFIED, MR. RICH

14 IDENTIFIED THREE WHO DID NOT HAVE A TEXTBOOK. TO MY

15 EXPERIENCE IN CERTAIN GRADUATE-LEVEL COURSES, THAT IS NOT AN

16 UNUSUAL EVENT. THEY ARE WORRIED ABOUT CURRENT EVENTS,

17 WORRIED ABOUT CURRENT DEVELOPMENTS IN A GIVEN AREA, SO THEY GO

18 OUTSIDE TRADITIONAL TEXTS. THAT ALSO MEANS THAT IN ALL OF

19 THE OTHER INSTANCES, TEXTBOOKS WERE PROVIDED.

20 THERE HAS BEEN NO TESTIMONY HERE THAT THE PUBLISHERS'

21 ABILITY TO SELL TEXTBOOKS HAS BEEN DAMAGED, THAT THE

22 PUBLISHERS ARE LOSING THE ABILITY TO SELL TEXTBOOKS. TO THE

23 CONTRARY, THE ROUTINE SITUATION IS THAT THE PROFESSORS AT

24 GEORGIA STATE ASSIGNS TEXTBOOKS.

25 FOURTH DOWN ON THE LIST, PASSWORDS ARE A GOOD START.

1 RESTRICTING ACCESS TO ERESERVES THROUGH PASSWORD OR OTHER
2 AUTHENTICATION MEASURES IS A HELPFUL, GOOD-FAITH PRACTICE,
3 AND SO ON. THE GEORGIA STATE POLICY INCLUDES THAT. KNOW
4 WHAT YOU HAVE PAID FOR.

5 REUSE RIGHTS INCLUDED IN SUBSCRIPTIONS VARY GREATLY BY
6 PUBLISHER. IN OTHER WORDS, KNOW WHAT YOU HAVE PAID FOR.
7 PART OF THE LIBRARY FUNCTION IN THE GEORGIA STATE POLICY IS TO
8 TAKE A LOOK AT WHAT THE PROFESSOR SEEKS TO ADD TO ERESERVES,
9 DETERMINE IF THERE IS ALREADY ANOTHER SOURCE THAT THE LIBRARY
10 IS PAYING FOR THROUGH WHICH THAT MATERIAL CAN BE PROVIDED.
11 THAT WAS SOMETIMES CALLED A LINK TO A JOURNAL ARTICLE, FOR
12 EXAMPLE. THAT IS A PART OF THE GEORGIA STATE POLICY. THAT
13 IS A BEST PRACTICE, ACCORDING TO THE COPYRIGHT CLEARANCE
14 CENTER.

15 WORK FROM AUTHORIZED ORIGINALS, ANOTHER BEST PRACTICE
16 FROM THE COPYRIGHT CLEARANCE CENTER. THAT IS A PART OF THE
17 POLICY AT GEORGIA STATE.

18 REMOVE EXPIRED ERESERVES PROMPTLY. AT THE END OF EACH
19 SEMESTER AT GEORGIA STATE, ACCESS TO WHAT IS ON ERESERVES IS
20 TERMINATED TO THE STUDENTS IN THAT CLASS. THAT IS A PART OF
21 THE GEORGIA STATE POLICY.

22 INCLUDE COPYRIGHT NOTICES. THAT ALSO IS A PART OF THE
23 GEORGIA STATE POLICY. MANY OF THE BEST PRACTICES BY THE
24 COPYRIGHT CLEARANCE CENTER EFFECTIVELY OF PLAINTIFF IN THIS
25 CASE ARE ALREADY IN PLACE AT GEORGIA STATE. INTERESTINGLY,

1 THE COPYRIGHT CLEARANCE CENTER DOESN'T MENTION TRAINING OR
2 ACCESS LAWYER OR LIBRARY REVIEW. SO, FROM THE COPYRIGHT
3 CLEARANCE CENTER, THOSE ACTIVITIES AT GEORGIA STATE ARE OVER
4 AND ABOVE THE BEST PRACTICE REQUIREMENT, INTERESTINGLY OF THE
5 COPYRIGHT CENTER. NONETHELESS, THEY ARE ATTACKED HERE. WE
6 WILL ADDRESS EACH OF THOSE IN A MINUTE.

7 IT LEADS TO THE CHECKLIST. THE CHECKLIST IS SOMETHING OF
8 A FIRESTORM ISSUE OF SORTS. IT IS AN EASY ITEM TO POINT AT.
9 AS ALL GOOD LAWYERS, WE CAN TRY TO FIND A WAY TO WORDSMITH IT.
10 WE CAN SAY WE NEED TO DO THIS, NEED TO DO THAT TO IT. THE
11 FIRST THING TO LOOK AT ON THE CHECKLIST, IT IS GROUNDED IN
12 TWO THINGS: FIRST, THE FOUR FACTORS, SECOND, APPLICABLE
13 LAW.

14 THE FOUR FACTORS ARE OBVIOUSLY SET FORTH PROMINENTLY
15 BOLDED, EASY TO SEE. THERE WAS NO TESTIMONY THAT ANY
16 PROFESSOR HAD ANY DIFFICULTY UNDERSTANDING THAT THERE WERE
17 FOUR FACTORS TO BE ADDRESSED. THE CHECKLIST PROVIDED FOR IT.
18 UNDERNEATH EACH OF THOSE FOUR FACTORS ARE WHAT DR. CREWS
19 TERMED CERTAIN VARIABLES. THOSE ARE WHAT WE CAN PLAY LAWYER
20 ON. WE CAN TRY AND WORDSMITH THEM. BUT THERE ARE --

21 THE COURT: I DON'T THINK -- I CAN'T REALLY READ
22 ALL OF THAT, THAT IS ALL RIGHT, NO PROBLEM. I DON'T NEED
23 IT. AS I RECALL, IT DOESN'T SAY ANYTHING ABOUT HOW TO WEIGHT
24 THESE FOUR DIFFERENT FACTORS.

25 MR. SCHAETZEL: NO, MA'AM, IT DOES NOT.

1 THE COURT: WELL, HOW IS A PROFESSOR SUPPOSED TO
2 KNOW HOW TO TALLY IT UP? HOW IS A PROFESSOR SUPPOSED TO KNOW
3 HOW MUCH WEIGHT TO GIVE EACH OF THESE FOUR FACTORS AFTER HE OR
4 SHE HAS MADE A DECISION ABOUT THE TALLIES WITHIN EACH OF THE
5 FACTORS?

6 MR. SCHAETZEL: YOUR HONOR, IT IS OUR POSITION THAT
7 THE FOUR FACTORS ARE TO BE WEIGHED EQUALLY. THAT THERE IS
8 NOT ONE THAT IS, IF YOU WILL, MORE IMPORTANT THAN THE OTHER.
9 LET'S WORK THROUGH THAT FOR A SECOND, IF WE CAN, AND SEE WHAT
10 HAPPENS IN THE EVENT OF A TIE.

11 THE COURT: I WOULD BE INTERESTED IN SEEING WHAT
12 WOULD HAPPEN IN THE EVENT OF A TIE.

13 MR. SCHAETZEL: THE FIRST FACTOR GOES TO THE PURPOSE
14 AND CHARACTER OF THE USE. THIS IS A NONPROFIT EDUCATIONAL
15 INSTITUTION. THESE PROFESSORS ARE USING THESE WORKINGS, NOT
16 FOR THEIR OWN PERSONAL BENEFIT, NOT FOR THEIR OWN
17 PUBLICATION, THEY ARE USING IT AS A PART OF THEIR JOB AS
18 TEACHERS. GIVEN THAT THE STATUTE ITSELF, SECTION 107,
19 IDENTIFIED NONPROFIT EDUCATIONAL USE AS A FAVORED SOCIAL
20 BENEFIT, IT IS NOT SURPRISING THAT THAT FACTOR WILL MOST
21 LIKELY BE IN FAVOR OF FAIR USE. IN FACT, WE WOULD SUBMIT
22 THAT IT IS THE INTENDED STATUTORY PURPOSE.

23 THE COURT: IT IS TRUE, THOUGH, AS I RECALL NONE
24 OF THE USES OR TAKINGS THAT WERE CLAIMED IN THIS CASE INVOLVED
25 TRANSFORMATIVE USES. AND I THINK THE PLAINTIFFS ARE RIGHT

1 THAT THAT IS A FACTOR THAT CUTS AGAINST Y'ALL ON THE FACTOR
2 ONE.

3 MR. SCHAEZEL: I WOULD LIKE TO ADDRESS THAT, IF I
4 MIGHT. THINK BACK TO THE SONY CASE. SONY IS A CASE WHERE
5 THE ISSUE WAS WHETHER OR NOT THERE WAS CONTRIBUTORY COPYRIGHT
6 INFRINGEMENT BY VIRTUE OF THE PROVISION OF THE VIDEOTAPE
7 PLAYER OR THE DVD PLAYER, IF YOU WILL. COULD YOU TIME
8 SHIFT? COULD YOU CAPTURE A SHOW AT 7:00 O'CLOCK AT NIGHT AND
9 WATCH AT THIS TIME THE NEXT DAY WHEN YOU CAME BACK HOME? THAT
10 USE, YOUR HONOR, IS NONTRANSFORMATIVE. IF YOU WILL, IT IS
11 VERBATIM COPYING. IT IS ONLY BEING TIME SHIFTED FROM ONE SPOT
12 TO THE OTHER.

13 THE COURT: YOU ARE RIGHT ABOUT THAT. BUT I DON'T
14 KNOW HOW IMPORTANT THAT IS SINCE OUR CASE IS FACTUALLY SO
15 DIFFERENT FROM THE SONY CASE. AS I SEE IT, AND I WOULD BE
16 INTERESTED IF YOU THINK DIFFERENTLY, WHAT WAS HAPPENING IN
17 EACH OF THE INSTANCES OF CLAIMED INFRINGEMENT IN THIS CASE WAS
18 THAT PROFESSORS WERE ASSIGNING EXCERPTS AS SUPPLEMENTS FOR THE
19 STUDENTS, THINGS TO ENRICH THE EXPERIENCE IN EACH CLASS, TO
20 BROADEN WHAT THE STUDENT MIGHT HAVE OTHERWISE GOTTEN. BUT
21 THE READINGS THAT WERE BEING SUGGESTED OR ASSIGNED, DEPENDING
22 ON YOUR PERSPECTIVE, WERE JUST BEING PRESENTED IN OR OFFERED
23 IN A VERY STRAIGHTFORWARD WAY. THE STUDENT WAS SUPPOSED TO
24 READ THE EXCERPTS AND THEN, I GUESS, IN SOME CASES THEY WERE
25 DISCUSSED IN CLASS. AND THAT IS NOT A TRANSFORMATIVE USE,

1 IT IS JUST THE MATERIALS BEING USED IN THE WAY THE AUTHOR
2 INTENDED FOR THEM TO BE USED.

3 AND IF YOU AGREE THAT THAT COVERS ALL OF THE INSTANCES OF
4 CLAIMED INFRINGEMENT IN THIS CASE, THEN IT SEEMS, TO ME, YOU
5 WOULD HAVE TO AGREE THAT THAT IS SOMETHING ON THE PLAINTIFFS'
6 SIDE OF THE LEDGER, EVEN THOUGH WE ARE TALKING ABOUT A USE
7 WITHIN THE EDUCATIONAL NONPROFIT, NONCOMMERCIAL SECTOR,
8 WHICH ADMITTEDLY IS ON Y'ALL'S ASIDE OF THE LEDGER.

9 MR. SCHAETZEL: WE CERTAINLY AGREE, YOUR HONOR, IN
10 THOSE INSTANCES WHERE A NONTRANSFORMATIVE USE WAS MADE, THAT
11 THAT WOULD BE, AS YOU SAY, ON THE PLAINTIFFS' SIDE OF THE
12 LEDGER. THE ISSUE, AND WE WILL ADDRESS THIS AT POST-TRIAL,
13 ON THOSE INSTANCES, FOR EXAMPLE, A PROFESSOR ASSIGNED A
14 READING, STUDENTS COME TO CLASS AND THEY NOW CRITICIZE OR
15 THEY COMMENT, IF YOU WILL, ON THE READING, IS THAT USE NOW
16 TRANSFORMATIVE?

17 THE CLASSIC TRANSFORMATIVE USE WOULD BE PERHAPS AN
18 ELECTRONIC ENVIRONMENT WHERE IF, AND THIS WOULD BE SOMETHING
19 MY CHILDREN MIGHT HAVE DONE, I DON'T THINK IT WOULD HAVE
20 HAPPENED TO ME, BUT IF A READING WERE ASSIGNED AS SUCH AS A
21 CASE OR SOMETHING AND YOU COULD MAKE MARGIN NOTES. AND SO AS
22 THE PROFESSOR SENT THE ASSIGNMENT ON ERES NOTES, I DON'T
23 BELIEVE THAT HAPPENED IN ANY INSTANCE IN THIS CASE. SO I
24 BELIEVE THAT THE MAJORITY OF CASES WERE, AS YOU SAY,
25 NONTRANSFORMATIVE. I DON'T RECALL OFF THE TOP OF MY HEAD

1 WHICH OF THE PROFESSORS TESTIFIED THIS WAY. IT IS MY
2 RECOLLECTION, SUBJECT TO THE CHANCE TO REVIEW, THAT ONE OR TWO
3 DID TALK ABOUT HOW THEY WOULD HAVE COPY AND CRITICISM ABOUT
4 READING IN THE CLASSROOM. THE ONES THAT COME TO MIND WERE
5 THE POLITICAL SCIENCE READINGS, BUT I AM NOT CONFIDENT OF
6 THAT, BUT I WOULD HAVE TO READ THE RECORD TO BE CERTAIN.

7 THE POINT, NONETHELESS, BEING THAT WE WOULD AGREE WITH THE
8 COURT IN THOSE CASES WHERE THERE IS A NONTRANSFORMATIVE USE,
9 THAT IS A FACTOR THAT TENDS TO WEIGH AGAINST FAIR USE AND IT
10 IS IN THE PLAINTIFFS' LEDGER, AS YOU SAY. THAT IS NOT,
11 HOWEVER, THE END OF THE INQUIRY. BECAUSE IF WE GO BACK TO
12 SECTION 107, THE FIRST FACTOR EXPRESSLY STATES THAT THE
13 QUESTION IS WHETHER IT IS A COMMERCIAL USE OR KNOWN PROFIT
14 EDUCATIONAL USE, WHICH IS IN OUR CAMP. AND WE WOULD SUBMIT
15 THAT THE NON -- FIRST OF ALL, THE PLAINTIFF SEEKS -- THE
16 PLAINTIFFS SEEK TO ELEVATE THE TRANSFORMATIVE WELL BEYOND THE
17 LANGUAGE OF THE STATUTE. THEY WANT TO MAKE IT THE BE-ALL AND
18 END-ALL. IF IT IS TRANSFORMATIVE, THEN EVERYTHING CHANGES.

19 THEY ALSO WANT TO ARGUE THAT IF IT IS NOT TRANSFORMATIVE,
20 THERE IS NO WAY THAT IT CAN BE FAIR USE. THAT IS THE, SO ANY
21 CASE. NO, IF IT IS NONTRANSFORMATIVE, IT CAN STILL BE FAIR
22 USE. THE FIRST FACTOR COULD STILL WEIGH IN OUR ADVANTAGE AS
23 THE SO ANY CASE FOUND FAIR USE. NONETHELESS, THE OVERRIDING
24 CONCERN THERE NEEDS TO BE THE LANGUAGE OF THE STATUTE, WHICH
25 IS NONPROFIT EDUCATIONAL USE. SO IN THAT CASE, EVEN IF THERE

1 IS A TIE, WE WOULD SUBMIT IT IS ONE-TO-ONE TRANSFORMATIVE OR
2 NONTRANSFORMATIVE AS OPPOSED TO EDUCATIONAL USE.

3 THE COURT: IS THE WORD "TRANSFORMATIVE" IN THE
4 STATUTE?

5 MR. SCHAETZEL: NO, MA'AM. THEIR POSITION COMES
6 FROM CAMPBELL. THEIR POSITION COMES FROM THE PRETTY WOMAN 2
7 LIVE CREW CASE. THEY TAKE THAT AND RUN FULL BOARD WITH IT.

8 THE COURT: I THINK THAT IS PRETTY WELL ESTABLISHED,
9 BE AN IMPORTANT CONCEPT IN FAIR USE, BUT IT SEEMS TO ME THAT
10 IN AN EDUCATION, IN A UNIVERSITY SETTING LIKE WE HAVE HERE,
11 THERE IS RARELY GOING TO BE AN ISSUE ABOUT TRANSFORMATIVE USE.
12 WE ARE TALKING ABOUT ELECTRONICALLY DISTRIBUTING EXCERPTS FROM
13 COPYRIGHTED MATERIALS FOR STUDENTS TO READ. SO I AM THINKING
14 WHILE WE RECOGNIZE FAIR USE IS ALWAYS A FACT-INTENSIVE
15 ANALYSIS, THAT FACTOR ONE AND THE RELATIVE IMPORTANCE OF IT
16 IN A CASE LIKE OURS CAN BE ESTABLISHED WITHOUT A FACT
17 INTENSIVE REVIEW. I MEAN, WE HAVE HEARD A LOT OF EVIDENCE IN
18 THIS CASE ABOUT HOW THE PROFESSORS DID REVIEW EACH ONE OF THE
19 VARIOUS ALLEGED INFRINGEMENTS AND THOUGHT ABOUT IT IN A FACT
20 INTENSIVE WAY, BUT IT SEEMS TO ME THAT ONE COULD GENERALIZE TO
21 A PRETTY GOOD EXTENT ABOUT HOW FACTOR ONE SHOULD BE ANALYZED
22 IN A CASE LIKE OURS.

23 MR. SCHAETZEL: THE ISSUE ON SOMETHING LIKE THIS IS
24 ALWAYS, OF COURSE, HOW FAR YOU GENERALIZE. THE POLICY --
25 LET ME BACK UP.

1 THE CASE INVOLVES PRINCIPALLY, IN EFFECT, COMPLETELY, IF I
2 REMEMBER THE TEXTUAL MATERIAL, TALKING ABOUT BOOKS. VERY
3 DIFFERENT.

4 THE COURT: MAYBE SOME JOURNALS.

5 MR. SCHAEZEL: SOME JOURNALS AND SOME MUSIC, FOR
6 EXAMPLE, PROFESSOR ORR. IT CAN BE A VERY DIFFERENT ANALYSIS
7 AS WE BEGIN LOOKING AT MUSIC, SOME WERE REMOVED, FOR
8 EXAMPLE, MOVIES. THERE IS A DIFFERENCE BETWEEN PLAYING A
9 MOVIE IN A CLASS FOR PURPOSES OF JUST ENJOYMENT AND
10 ENTERTAINMENT AS OPPOSED TO PLAYING A MOVIE IN ORDER TO TEACH
11 SOME SORT OF AN ACTING STYLE OR TO TEACH SOMETHING ABOUT MOVIE
12 MAKING IN THE SAME WAY THAT YOU MAY PLAY, AS PROFESSOR ORR
13 TESTIFIED, HE MAY WANT STUDENTS TO LEARN SOMETHING ABOUT A
14 GIVEN SONATA, THAT IS DIFFERENT. AND SO I THINK WHEN WE
15 START TO TALK ABOUT GENERALIZING --

16 THE COURT: I AM NOT SO SURE ABOUT THAT. HE
17 ASSIGNED EXCERPTS FROM CERTAIN BOOKS ABOUT MUSIC. AND I
18 REMEMBER HE POINTED OUT THAT ONE OF THE BOOKS REPRINTED A LOT
19 OF SHEET MUSIC FROM MOZART, WHICH HE CONSIDERED TO NOT BE
20 COPYRIGHTED PROTECTED. BUT STILL WE ARE TALKING ABOUT AN
21 EXCERPT FROM CERTAIN SCHOLARLY WORK, I GUESS. AND I DON'T
22 SEE WHY THERE WOULD BE ANY TRANSFORMATIVE USE THERE. THE
23 STUDENTS WERE SUPPOSED TO GET THE EXCERPTS AND READ IT.

24 MR. SCHAEZEL: AGAIN, READING AN EXCERPT, I TEND TO
25 AGREE WITH THE COURT. I WOULD LIKE TO THINK ABOUT THAT. I

1 DON'T WANT TO LOSE SIGHT OF THE FACT THAT THE POLICY IS JUST
2 BIGGER THAN TEXTURAL WORKS. CERTAINLY THE UNIVERSITY IS JUST
3 BIGGER THAN THE COURSES THAT HAVE BEEN ADDRESSED HERE. FOR
4 EXAMPLE, THE FIRST ONE COMES TO MIND IS A MUSIC CLASS, THE
5 ANALYSIS COULD BE VERY DIFFERENT. WE MAY ASSIGN THE STUDENT,
6 YOU KNOW, SOMETHING ON ERES THAT MIGHT BE A CLIP THAT WOULD
7 SHOW SOME SORT OF -- SOME SCENE FROM A MOVIE OR SOMETHING AND
8 THAT COULD BE A DIFFERENT ANALYSIS.

9 THE COURT: IT IS POSSIBLE. I MEAN, ALL OF THE
10 INSTANCES OF CLAIMED INFRINGEMENT HERE WERE FROM GEORGIA
11 STATE. BUT, OF COURSE, THE GEORGIA SYSTEM DOES INCLUDE A LOT
12 OF OTHER DIFFERENT KINDS OF SCHOOLS: MEDICAL SCHOOLS, LAW
13 SCHOOLS. SO MAYBE THERE IS SOME REASON TO BE CAUTIOUS ABOUT
14 THAT. BUT AS FAR AS GEORGIA STATE GOES, I THINK THAT SOME
15 RESOLUTION CAN BE MADE OF HOW FACTOR ONE WORKS. I AM JUST
16 THROWING THAT OUT. OKAY. GO AHEAD.

17 MR. SCHAETZEL: LET'S GO TO THE SECOND FACTOR THEN,
18 YOUR HONOR, AS WE WORK FORWARD TO SEE WHAT HAPPENS IF THERE
19 IS A TIE. IN THE SECOND FACTOR, THE NATURE OF THE WORK.
20 THE PARTIES HAVE GONE BACK AND FORTH AS TO WHETHER OR NOT A
21 FACT-BASED WORK CAN BE, IN A SENSE, CREATIVE AND SO ON AND SO
22 FORTH. THE NATURE OF THE WORK IN THIS CASE IS PREDOMINANTLY
23 FACTUAL, WHERE THE COURSEPACK CASES DO HAVE SOME RELEVANCE TO
24 US IN LOOKING AT FACTOR TWO. BECAUSE IF YOU LOOK AT THE
25 COURSEPACK CASES, FOR EXAMPLE, MICHIGAN DOCUMENT SERVICE OR

1 THE KINKO'S CASE, IN THOSE CASES, THE COURT FOUND THAT FACTOR
2 TWO WEIGHED IN FAVOR OF FAIR USE BECAUSE THEY WERE FACT-BASED
3 WORKS.

4 THE COURT: IN WHICH CASE?

5 MR. SCHAETZEL: MICHIGAN DOCUMENT SERVICES AND
6 KINKO'S, I BELIEVE, YOUR HONOR.

7 THE COURT: IT WASN'T THAT IT WAS PRIMARILY
8 COMMERCIAL.

9 MR. SCHAETZEL: THAT IS A DIFFERENT FACTOR.

10 THE COURT: I THOUGHT THAT WAS SORT OF THE BOTTOM
11 LINE ON THE CASE.

12 MR. SCHAETZEL: I THINK IT IS BOTTOM LINE. AS WE
13 WORK THROUGH THE FACTORS AS THOSE COURTS DID, THERE IS
14 AUTHORITY OUT THERE FOR THE PRINCIPLE THAT OR FOR THE
15 PROPOSITION THAT YOU LOOK AT A FACT-BASED WORK AND IT FAVORS
16 FAIR USE. AND THERE IS NO ISSUE HERE THAT THE WORKS HERE ARE
17 FACTS-BASED WORKS. SO, AS WE TRY TO GENERALIZE OUR
18 POSITION, WOULD BE FACTOR ONE AND FACTOR TWO ARE GOING TO
19 GENERALLY FAVOR FAIR USE AT GEORGIA STATE UNIVERSITY.

20 THE COURT: BUT ISN'T IT IMPORTANT ON FACTOR TWO TO
21 LOOK TO WHAT AUDIENCE THE AUTHOR OF THE ORIGINAL WORK WAS
22 TRYING TO REACH? AND HERE YOU TELL ME, IF YOU THINK THIS IS
23 RIGHT, IT LOOKS LIKE WE ARE DEALING WITH COPYRIGHTED WORKS
24 THAT WERE AUTHORED BY PEOPLE IN THE ACADEMIC COMMUNITY FOR AN
25 AUDIENCE OF OTHERS IN THE ACADEMIC COMMUNITY? AND IF THAT IS

1 CORRECT, I THINK THERE WOULD BE AN ARGUMENT THAT FACTOR TWO
2 FAVORS THE PLAINTIFFS.

3 MR. SCHAETZEL: FACTOR TWO ADDRESSES THE NATURE OF
4 THE WORK. I THINK IT FOCUSES ON THE INQUIRY OF WHETHER OR
5 NOT THE WORK IS MORE CREATIVE IN ITS NATURE AS OPPOSED TO MORE
6 FACTUAL IN ITS NATURE. I CERTAINLY AGREE THAT THE AUTHORS
7 HERE, FOR THE MOST PART, WERE INTENDING THEIR WORK WOULD BE
8 SOLD AND WOULD BE OFFERED TO THE ACADEMIC MARKETPLACE, NO
9 QUESTION ABOUT IT. I THINK THAT TENDS TO GO MORE TO THE
10 FOURTH FACTOR THAN TO THE SECOND FACTOR. BUT THE POINT THAT
11 WE WOULD MAKE IN TERMS OF TRYING TO DRAW GENERAL STATEMENTS
12 FROM THIS IS THAT THAT FACTOR, EVEN THOUGH THESE AUTHORS MAY
13 HAVE INTENDED THEIR WORK TO BE SOLD IN THE ACADEMIC
14 MARKETPLACE, THAT FACTOR WOULD TEND TO FAVOR FAIR USE BECAUSE
15 THESE ARE FACT-BASED WORKS. THAT IS THE NATURE OF THESE
16 CASES.

17 THE COURT: I FIND THAT THE TERMINOLOGY IS VERY
18 CONFUSING THERE. I MEAN, YOU TAKE IT, I DON'T REMEMBER THE
19 NAME OF THE WORK, BUT THERE WAS ONE SCHOLARLY WORK ABOUT
20 SLAVERY IN THE UNITED STATES DURING A CERTAIN PERIOD OF TIME
21 AND IT WAS A RESEARCH WORK. AND I GUESS THAT IS SOMETHING
22 YOU WOULD CALL FACT BASED, IS THAT WHAT YOU ARE SAYING?

23 MR. SCHAETZEL: YES, MA'AM.

24 THE COURT: AT THE SAME TIME IT WOULD BE A CREATIVE
25 WORK IN THE SENSE THAT THE PERSON WHO WROTE THE BOOK HAD TO GO

1 OUT AND DO THE RESEARCH AND EVALUATE THE FACTS THAT SHE FOUND,
2 I THINK IT IS A SHE, AND DECIDE WHAT TO PUT ON THE BOOK AND
3 WHATNOT TO PUT ON THE BOOK?

4 MR. SCHAETZEL: IT IS NOT, AS MR. RICH SAID, IT IS
5 NOT A BINARY DETERMINER, IT IS NOT FACT BASED OR NOT FACT
6 BASED. THERE ARE SHADES OF GRAY HERE. BUT ON BALANCE,
7 AGAIN, AS I TRY TO GENERALIZE ACROSS THE CASE, THAT ONE MAY
8 BE MORE CREATIVE THAN SOME OTHERS THAT WERE, FOR EXAMPLE, IN
9 THE SAGE HANDBOOK OF QUANTITATIVE.

10 THE COURT: I WANTED TO ASK YOU ABOUT THOSE SAGE
11 BOOKS. AS I UNDERSTAND IT, THE WORK CLAIMED TO BE INFRINGED
12 IN THIS CASE ARE COLLECTED WORKS. ARE THEY ALL COLLECTED
13 WORKS?

14 MR. SCHAETZEL: NO, MA'AM. THEY ARE NOT ALL
15 COLLECTED WORKS.

16 THE COURT: BUT THEY ARE BASICALLY MATERIALS THAT
17 ARE INTENDED FOR TRAINING, ASPIRING TEACHERS OR TEACHERS THAT
18 MIGHT WANT TO PROGRESS MORE IN THE PROGRESSIVE?

19 MR. SCHAETZEL: SOME OF THEM ARE.

20 THE COURT: I HAVEN'T LOOKED AT THEM YET. THAT IS
21 MY IMPRESSION. I THINK ONE OF THE WITNESSES WAS THAT WAS
22 SORT OF SAGE'S SPECIALTY TO PRODUCE WORKS THAT WOULD BE
23 HELPFUL IN TRAINING TEACHERS. NOW MY GUESS IS THAT THOSE
24 WORKS DON'T REINVENT THE WHEEL. THAT THEY GATHER TOGETHER
25 THE IDEAS THAT THE AUTHORS THINK ARE THE BEST IN THAT

1 PARTICULAR FIELD AND PUT THEM TOGETHER IN A WAY THAT WOULD BE
2 HELPFUL IN TEACHING A CLASS OF PEOPLE WHO ARE ASPIRING TO BE
3 TEACHERS. WHERE DO YOU THINK, I MEAN, WHERE ON THE SPECTRUM
4 WOULD THAT KIND OF WORK FALL?

5 MR. SCHAETZEL: I THINK THAT IS MORE FACT BASED,
6 YOUR HONOR. WHAT YOU HAVE DESCRIBED, IT SOUNDS, FOR
7 EXAMPLE, A LOT LIKE PROFESSOR KIM SPOKE ABOUT A WORK THAT SHE
8 USED THAT WOULD HELP TRAIN TEACHERS TO TEACH ENGLISH AS A
9 SECOND LANGUAGE. AND THERE WERE MULTIPLE CHARTS AND GRAPHS
10 THAT CITED TO OTHER WORKS THAT HAD TO THE BEST, WE COULD TELL,
11 BEEN LIFTED FROM THOSE OTHER WORKS AND PUT TOGETHER IN A
12 CERTAIN WAY. THE AUTHOR IN THAT CASE IS CLAIMING THEIR
13 CREATIVITY IN TERMS OF HOW THEY PUT THEM TOGETHER, HOW THEY
14 MIGHT ILLUSTRATE A GIVEN POINT AS OPPOSED TO A SITUATION WHERE
15 YOU SIT DOWN AND JOHN GRISHAM WRITES A NOVEL FROM SCRATCH.
16 IT IS A DIFFERENT LEVEL OF CREATIVITY. IT IS MORE ON THE
17 FACT-BASED SIDE.

18 THE COURT: SO YOU ARE SAYING BOOKS, ASSUMING I
19 HAVE CORRECTLY DESCRIBED THE SAGE BOOKS, YOU ARE SAYING BOOKS
20 LIKE THAT ARE ENTITLED TO FAIR USE PROTECTION UNDER THE SECOND
21 FACTOR OR THAT THEY ARE NOT?

22 MR. SCHAETZEL: I AM SAYING UNDER THE SECOND FACTOR
23 OF FACT-BASED WORK, SUCH AS THE ONE WE ARE DESCRIBING, I
24 DON'T BELIEVE PROFESSORS KIM WAS A SAGE WORK, I THOUGHT IT WAS
25 CAMBRIDGE, I COULD BE WRONG ABOUT THAT, THAT FACT-BASED

1 WORKS, THAT IS A FACTOR THAT WEIGHS IN FAVOR OF MAKING FAIR
2 USE UNDER THE SECOND FACTOR WHICH IS WHY IN THE CHECKLIST --

3 THE COURT: LET ME ASK YOU THIS THEN, ASSUMING THAT
4 IS RIGHT, WHAT WORKS DO WE HAVE IN QUESTION HERE THAT DON'T
5 WEIGH IN FAVOR OF FAIR USE UNDER THE SECOND FACTOR?

6 MR. SCHAETZEL: WE THINK ALL OF THEM, UNDER THE
7 SECOND FACTOR, WEIGH IN FAVOR OF FAIR USE BECAUSE THESE ARE
8 FACT-BASED WORKS. WE BELIEVE THE TESTIMONY ON THAT POINT WAS
9 VERY CONSISTENT. FOR EXAMPLE, MANY OF THESE CHAPTERS, YOUR
10 HONOR, AT THE TAIL END OF THE CHAPTER WOULD HAVE THREE,
11 FOUR, FIVE PAGES OF BIBLIOGRAPHIC CITES. THEY HAVE GONE TO
12 ANOTHER COURSE, COLLECTED THE INFORMATION, PUT IT TOGETHER.
13 THERE IS NO ARGUMENT THAT THERE IS --

14 THE COURT: YOU ARE SAYING THAT ALL OF THE WORKS IN
15 QUESTION HERE ARE WHAT YOU ARE CALLING FACT BASED?

16 MR. SCHAETZEL: YES, MA'AM. I BELIEVE SUBJECT TO THE
17 CHANCE TO REVIEW EACH OF THEM INDIVIDUALLY, THAT IS MY
18 RECOLLECTION OF THE WORKS. THE TESTIMONY WAS CONSISTENT THAT
19 THEY WERE FACT-BASED WORKS. AND, THEREFORE, THAT WAS A FACT
20 THAT WEIGHED IN FAVOR OF FAIR USE UNDER FACTOR TWO.

21 THE COURT: WELL, WHY WOULD A CREATIVE WORK NOT BE
22 ENTITLED TO -- WHY WOULD IT NOT WEIGH IN FAVOR OF FAIR USE?
23 I DON'T UNDERSTAND THAT.

24 MR. SCHAETZEL: BECAUSE, YOUR HONOR, IT IS A LITTLE
25 COUNTERINTUITIVE. LET'S TAKE A COMPARISON BETWEEN THE BOOK

1 THAT COMPILES A LOT OF CHARTS THAT SHOWS HOW TO GIVE TESTS TO
2 STUDENTS WHO WANT TO LEARN ENGLISH AS A SECOND LANGUAGE AND
3 COMPARE THAT AS "GONE WITH THE WIND" OR A NOVEL THAT HAS BEEN
4 WRITTEN BY JOHN GRISHAM. THE CALCULUS GOES THAT IN THE
5 INSTANCE WHERE WE HAVE SOMETHING THAT IS MORE OF A FACT-BASED
6 WORK, THAT FAIR USE IS MORE PERMISSIBLE AND MORE LIKELY TO BE
7 MADE IN THAT SITUATION BECAUSE THE OTHER WORK, IF YOU START
8 TAKING 25, 50, 75 PERCENT OF THAT, YOU ARE APPROPRIATING
9 THAT PERSON'S CREATIVITY.

10 IN THE FIRST INSTANCE, HOWEVER, IN THE FACT-BASED WORK,
11 WHAT YOU ARE DOING IS, IN A SENSE, EXTRACTING THE FACTS FROM
12 THE WORKS SO THAT YOU CAN USE THEM TO TEACH THE CLASS. SO WE
13 PROVIDE A GREATER FAIR USE RIGHT IN THE INSTANCE OF A
14 FACT-BASED WORK.

15 THE COURT: OKAY. LET'S MOVE ON.

16 MR. SCHAE TZEL: FACTOR FOUR.

17 THE COURT: SO WITH RESPECT TO FACTOR TWO, AGAIN IT
18 SOUNDS LIKE IF YOU CONSIDER THE EVIDENCE THAT HAS COME IN IN
19 THE CASE THAT THERE OUGHT TO BE -- IT OUGHT TO BE POSSIBLE TO
20 MAKE SOME SORT OF A GENERALIZED DETERMINATION ABOUT HOW FACTOR
21 TWO FIGURES INTO THE WORKS AT ISSUE IN THIS CASE.

22 MR. SCHAE TZEL: YES, MA'AM. I BELIEVE THAT IS
23 CORRECT. WORKS AT ISSUE IN THIS CASE.

24 THE COURT: THIS IS YOUR TYPICAL SCENARIO THEN, ONE
25 COULD PROBABLY GENERALIZE EVEN FARTHER ABOUT HOW THAT WOULD

1 WORK IN AN EDUCATIONAL SETTING?

2 MR. SCHAETZEL: I BELIEVE THAT TO BE TRUE IN THE
3 SENSE IT IS PROJECTABLE OUT AGAINST OTHER FACT-BASED WORKS.

4 THE COURT: BUT ACCORDING TO YOU, WHAT WE HAVE TO DO
5 IS CONSIDER THE AUDIENCE THAT THE AUTHOR OF THE ORIGINAL WORK
6 WAS TRYING TO REACH. AND YOU SAY, BUT THEN ON THE OTHER
7 HAND, TAKE INTO ACCOUNT THE FACT THAT THESE ARE FACT-BASED
8 WORKS WHICH CUTS THE OTHER WAY.

9 MR. SCHAETZEL: WHERE I AM NOT SURE I UNDERSTAND YOUR
10 HONOR IS IN TERMS OF LOOKING AT WHETHER OR NOT THE AUTHOR WAS
11 TRYING TO REACH A GIVEN SET OF PEOPLE.

12 THE COURT: IN TERMS OF NATURE OF THE WORK, IF YOU
13 HAVE A WORK THAT IS WRITTEN BY ACADEMIC PEOPLE FOR AN ACADEMIC
14 AUDIENCE, AND WE ARE IN OUR CASE DEALING WITH AN ACADEMIC
15 AUDIENCE.

16 MR. SCHAETZEL: YES.

17 THE COURT: YOU CAN ARGUE THAT THE NATURE OF THE
18 WORK IS SUCH THAT IT CUTS AGAINST FAIR USE, BUT THE PERSON WHO
19 WROTE THE ORIGINAL WORK WAS THINKING IN TERMS OF MARKETING IT,
20 SELLING IT TO PEOPLE IN OUR GROUP.

21 MR. SCHAETZEL: AGAIN, THE INTENDED AUDIENCE, TO ME,
22 HAS VERY LITTLE TO DO WITH THE NATURE OF THE WORK ITSELF. IT
23 MAY WELL BE THAT I AM WRITING A BOOK THAT HAS A LOT OF BASIC
24 FACTS COLLECTED THAT I INTEND TO OFFER JUST TO THE ACADEMIC
25 COMMUNITY, BUT THE FACT THAT I AM ONLY OFFERING IT TO THE

1 ACADEMIC COMMUNITY DOES NOT CHANGE THE FACT THAT IT IS STILL A
2 FACT-BASED WORK.

3 AND IN THE FAIR USE CALCULUS, THE FACT-BASED WORK WEIGHS
4 IN FAVOR OF FAIR USE. IT IS STILL NOT A CREATIVE WORK, EVEN
5 THOUGH I MAY INTEND IT FOR THE ACADEMIC MARKETPLACE. I
6 BELIEVE THAT CAN BE A FACTOR TO LOOK AT BECAUSE IT CAN TELL
7 YOU SOMETHING ABOUT THE NATURE OF THE WORK. BUT THE FACT THAT
8 IT IS INTENDED TO GO TO A GIVEN MARKETPLACE, GIVEN GROUP OF
9 PEOPLE, I THINK HAS, YOU KNOW, ONLY THAT INFLUENCE ON THE
10 SECOND FACTOR, IF AT ALL.

11 THE COURT: HOW ABOUT ON THE THIRD FACTOR?

12 MR. SCHAEZEL: IF I MAY, YOUR HONOR, CAN I JUMP TO
13 THE FOURTH AND COME BACK TO THE THIRD?

14 THE COURT: SURE.

15 MR. SCHAEZEL: THE FOURTH FACTOR IS THE RELEVANT
16 MARKET. FIRST AND FOREMOST, WE WOULD REPEAT, IN THIS CASE,
17 THERE HAS BEEN NO EVIDENCE OF A LOSS OF A SALE OF ANY BOOK,
18 THAT IS NOT THE EVIDENCE. THE MARKET HARM THAT IS PROMOTED
19 HERE IS, IF YOU WILL, HARM TO THE PERMISSIONS MARKET. ONE
20 OF THE THINGS NOT MENTIONED BY MR. RICH, BUT WAS ROUTINELY
21 SAID BY PROFESSORS, IS THAT THEIR USE CAN STIMULATE, FIRST OF
22 ALL, THE MARKET FOR THE BOOK WITHOUT DOING HARM TO THE MARKET
23 FOR THE EXCERPTS OR THE MARKET FOR THE SMALL, THE PERMISSIONS
24 MARKET, IF YOU WILL. IN TERMS OF THE MARKET FOR THE BOOK,
25 THERE WAS EVIDENCE THAT THE PUBLISHERS ROUTINELY GIVE AWAY A

1 LOT OF BOOKS, THOUSANDS OF BOOKS INTO THE ACADEMIC
2 MARKETPLACE SO THAT PROFESSORS AND OTHERS WILL SEE THEM AND
3 THAT WILL STIMULATE THE MARKET FOR THE WORK. THEY ARE HOPING
4 THAT THE PROFESSOR WILL SEE THE WORK, LIKE IT, AND USE IT AS
5 A TEXT FOR THE CLASS.

6 IN A VERY SIMILAR FASHION, WHEN THE PROFESSOR ASSIGNS AN
7 EXCERPT THAT, AS THE TESTIMONY PROVIDED, GIVES EXPOSURE TO
8 THE BOOK OR TO THE WORK TO THE STUDENT, A LOT OF THESE
9 STUDENTS ARE GRADUATE STUDENTS WHO ARE BUILDING THEIR
10 LIBRARIES, AS THEY LOOK TO BUILD THEIR OWN PERSONAL LIBRARIES,
11 THEY SEE SOMETHING THAT THEY LIKE, THEY GO OUT AND THEY BUY
12 THAT BOOK. I THINK ALL OF US STILL HAVE SOME BOOKS FROM
13 COLLEGE OR EVEN LAW SCHOOL OR WHATEVER THAT WERE LIKE, OKAY,
14 IT STIMULATED ME TO GO OUT AND BUY THAT BOOK.

15 THE COURT: YOU DON'T THINK UNDERGRADUATES WILL DO
16 THAT? IT MIGHT HAPPEN SPORADICALLY. I KNOW WE DID HAVE SOME
17 TESTIMONY ABOUT IT. THERE AREN'T TOO MANY UNDERGRADUATES THAT
18 WILL READ A SMALL EXCERPT FROM A BOOK, PROBABLY AN EXPENSIVE
19 BOOK.

20 MR. SCHAETZEL: YOUR HONOR, WITH ALL DUE RESPECT, I
21 AM A GRADUATE OF GEORGIA TECH. I STRUGGLED AND CONTINUE TO
22 STRUGGLE WITH MANY ELECTRICAL ENGINEERING CONCEPTS. IF WE
23 WENT BACK TO MY OFFICE, WE WOULD FIND MY INTRODUCTORY BOOK ON
24 ELECTRICAL ENGINEERING ON MY SHELF BECAUSE I BOUGHT THE BOOK
25 AND RETAINED IT, QUITE FRANKLY, HOPING I WOULD NEVER HAVE TO

1 OPEN IT AGAIN. BUT WHEN I DO, I HAVE IT THERE. AND SO DO I
2 THINK A LOT OF UNDERGRADUATE STUDENTS DO THAT? BUT IS IT
3 VIABLE?

4 THE COURT: IT IS POSSIBLE. YOU HAVE TO SAY IT IS
5 POSSIBLE.

6 MR. SCHAE TZEL: IT HAPPENS.

7 THE COURT: IT WOULD HAVE A NEGLIGIBLE EFFECT, I
8 WOULD THINK.

9 MR. SCHAE TZEL: THERE WAS ALSO TESTIMONY HERE, YOUR
10 HONOR, THAT EVEN AS TO THE EXCERPTS AND EVEN IF THERE WAS, AS
11 THE PLAINTIFFS WOULD HAVE US BELIEVE, A REASONABLE CHARGE FOR
12 THOSE EXCERPTS, THAT THE PROFESSOR STILL WOULD NOT NECESSARILY
13 ASSIGN IT IF IT CAUSED THEM TO HAVE TO CHARGE EITHER THE
14 STUDENTS OR THE UNIVERSITY FOR THE WORK. SO THERE IS STILL
15 NO DAMAGE TO THE PERMISSIONS MARKET THERE BECAUSE THE
16 PROFESSOR, AS MANY SAID, I COULD JUST LECTURE THIS MATERIAL.
17 I COULD FIND ANOTHER WORK WHERE I THINK I COULD MAKE FAIR USE
18 AND SO ON.

19 SO, WHILE WE CONTEST WE BELIEVE THAT IN MANY INSTANCES
20 THE FOURTH FACTOR CAN FAVOR FAIR USE, IN ORDER TO PROVOKE OUR
21 TIE FOR THE PURPOSE OF THIS DISCUSSION, WE WILL GIVE THAT TO
22 THE PLAINTIFF. WE WILL SAY THE FOURTH FACTOR WEIGHS IN THEIR
23 FAVOR IN THIS CASE.

24 ONE LAST COMMENT THERE AS TO WHAT THE EVIDENCE SHOWED, AND
25 I THINK DR. CREWS MADE A VERY IMPORTANT POINT ON THIS FACTOR.

1 AND THAT IS IT CAN'T BE SOMETHING THAT DEGENERATES INTO, IF I
2 CAN SELL IT, THERE THEREFORE IS THE MARKET HARMED. JUST
3 BECAUSE I CAN GO TO ONE OF THE PUBLISHERS OR I CAN GO TO THE
4 COPYRIGHT CLEARANCE CENTER AND ORDER ONE PAGE OUT OF ONE BOOK,
5 THAT SOMEHOW ISN'T DETERMINATIVE OF MY FAIR USE RIGHT. THE
6 FACT THEY CAN SELL THAT TO ME FOR FIFTEEN CENTS AND WHETHER IT
7 IS EASY, HARD, OTHERWISE, THAT DOESN'T DETERMINE MARKET
8 HARM. SO, AT SOME POINT IN TIME, THE PERMISSIONS MARKET
9 HAS TO BE VIEWED, AS THE STATUTE SAYS, IN VIEW OF THE TOTAL
10 WORK.

11 THEY WILL CITE TEXACO FOR THEIR ARGUMENT THAT THERE IS A
12 PERMISSIONS, VIABLE PERMISSIONS MARKET OUT THERE AND THAT IS
13 WHAT IT IS. BUT IT HAS TO HAVE SOME SORT OF A REASONABLE
14 LIMITATION ON IT. IT CAN'T DEPRIVE ONE OF FAIR USE JUST
15 BECAUSE THEY CAN FIND A WAY TO CHARGE YOU FOR SOME VERY SMALL
16 PART OF IT.

17 WHICH BRINGS ME TO FACTOR THREE, THE AMOUNT OF THE USE.
18 LET'S LOOK AT WHERE THE POLICY AND IMPLEMENTATION OF THE
19 POLICY HAS ACTUALLY TAKEN GEORGIA STATE AS A UNIVERSITY. IT
20 IS NOT MY INTENT THAT THE COURT BE ABLE TO READ EACH AND EVERY
21 LINE. WHAT WE SEE HERE, HOWEVER, IS THE CHART WE PROVIDED AT
22 THE BEGINNING OF THE CASE THAT LISTED ALL OF WHAT WERE THEN 99
23 WORKS AT ISSUE. THE RED LINES THAT GO THROUGH ARE WORKS THAT
24 WE UNDERSTAND TO BE WITHDRAWN, THAT NOW GET US DOWN TO MR.
25 RICH'S 75 WORKS WITH 23 PROFESSORS. USING --

1 THE COURT: WHEN YOU SAY "WITHDRAWN," I AM NOT SURE I
2 KNOW WHAT YOU MEAN. I KNOW THAT I MADE SOME RULINGS, EITHER
3 PRETRIAL OR MAYBE WHEN WE STARTED THE CASE. I AM NOT SURE
4 THAT I ESSENTIALLY RULED OUT CERTAIN CLAIMS OF INFRINGEMENT.
5 IS THAT WHAT YOU MEAN BY THEY HAVE BEEN RULED OUT OR DROPPED?

6 MR. SCHAE TZEL: NO, MA'AM. MIDWAY THROUGH THE
7 TRIAL, THE PLAINTIFFS PROVIDED A DOCUMENT THAT IDENTIFIED THE
8 WORKS THAT ARE AT ISSUE, IF YOU WILL, IN THE CASE. IT IS A
9 LITTLE BIT SIMILAR TO THE JOINT TRIAL EXHIBIT, I DON'T
10 REMEMBER THE NUMBERS, IS IT FIVE, JT 5, THAT THE PARTIES
11 SUBMITTED? THIS ONE WAS DONE JUST BY THE PLAINTIFFS. AS PART
12 OF OUR POST-TRIAL WORK WE ARE PREPARING, IF YOU WILL, A
13 SUPPLEMENT TO THAT THAT WILL PUT THE DEFENDANT'S POSITION IN
14 FOR EACH OF THOSE REMAINING WORKS AS A RESULT OF THE TRIAL.

15 BUT IN THE PRESENTATION OF THAT DOCUMENT, YOUR HONOR,
16 THE TOTAL NUMBER OF ALLEGED INFRINGEMENTS, WHICH STARTED OUT
17 AS A JOINT ALLEGED INFRINGEMENTS AT 99, AS A RESULT OF THE
18 PLAINTIFFS' SUBMISSION FELL TO 75, WHICH INVOLVED THE 23
19 PROFESSORS THAT MR. RICH REFERRED TO. SO WHAT ARE LINED OUT
20 ARE THE WORKS THAT WERE ON THE FIRST LIST, BUT NOT ON THE
21 PLAINTIFFS' SECOND LIST. IN OTHER WORDS, THEY HAVE BEEN
22 WITHDRAWN BY THE PLAINTIFF. AND IT IS DIFFERENT FROM WHAT
23 THE COURT ORDERED AT THE BEGINNING OF THE TRIAL.

24 EVEN CONTINUING TO USE THE PLAINTIFFS' NUMBERS, WE HAVE
25 CALLED IT AN ADJUSTED MEDIAN, 50 PERCENT OF THE WORKS ABOVE,

1 FIFTY PERCENT BELOW. EIGHT POINT ZERO PERCENT WAS THE MIDWAY
2 POINT, IF YOU WILL, OF WHAT WAS THE TAKING. IN THE USE HERE
3 OF THE ADJUSTED MEAN, THE AVERAGE OF ALL OF THESE WORKS,
4 USING THE PLAINTIFFS' NUMBERS, 10.1 PERCENT, ESSENTIALLY 10
5 PERCENT. THE POLICY TOOK US TO A NUMBER THAT IS BY ALMOST
6 ALL COUNTS IN THE ACADEMIC COMMUNITY VIEWED AS VERY
7 REASONABLE.

8 THE COURT HEARD FROM DR. CREWS'S WORK THAT THERE WERE
9 SCHOOLS WHO WOULD HAVE POLICIES, SOME AS HIGH AS 50 PERCENT,
10 OTHERS THAT WERE AT 25 PERCENT, 20 PERCENT, 15 PERCENT.
11 ACROSS-THE-BOARD OF ALL OF THE WORKS, THE AVERAGE HERE WAS 10
12 PERCENT. SO THE FIRST PLACE THE POLICY TOOK US WAS TO A VERY
13 REASONABLE NUMBER.

14 THE COURT: SO WHAT IT MEANS IS IS THE LONGER WORKS,
15 THE LONGER EXCERPTS, HAVE BEEN MORE OF THEM HAVE BEEN
16 WITHDRAWN SO AS TO CAUSE THE ADJUSTED MEAN TO GO FROM NINE
17 POINT FIVE PERCENT TO TEN POINT ONE PERCENT?

18 MR. SCHAETZEL: IT IS THE FLIP SIDE OF THAT, YOUR
19 HONOR, BECAUSE SO MANY OF THE SHORTER EXCERPTS HAVE BEEN
20 WITHDRAWN, THE MEAN WENT UP FROM 9.5 TO 10.1. THIS IS THE
21 LATER FIGURE, IF YOU WILL.

22 THE COURT: OKAY. THE GREEN.

23 MR. SCHAETZEL: FOR EXAMPLE, THE PLAINTIFFS HAD
24 ORIGINALLY CONTENDED THAT PROFESSOR BARKER AND RAENGO, 1.1
25 PERCENT USE OF THE WORK FILM THEORY AND CRITICISM WAS NOT FAIR

1 USE.

2 THE COURT: SO WHAT I AM SAYING IS, I THINK WE ARE
3 SAYING THE SAME THING IN DIFFERENT WAYS, BECAUSE OF THE ONES
4 THAT HAVE BEEN WITHDRAWN, YOUR ADJUSTED MEAN FIGURE HAS GONE
5 UP?

6 MR. SCHAETZEL: YES, MA'AM.

7 THE COURT: OKAY.

8 MR. SCHAETZEL: EVEN SO, STILL A VERY REASONABLE
9 NUMBER WITHIN CONTEXT.

10 BUT EVEN IF WE WERE TO PRESUME FOR PURPOSES OF THE TIME
11 THAT WE WERE TRYING TO PROMOTE, LET'S, FOR EXAMPLE, TAKE ONE
12 AT THE VERY BOTTOM AND SAY THE NUMBER IS SO HIGH THAT IT
13 FAVORS, IT FAVORS THE PLAINTIFF, FACTORS THREE AND FOUR
14 WOULD THEREFORE FAVOR THE PLAINTIFF, FACTORS ONE AND TWO
15 WOULD FAVOR THE DEFENDANTS. HOW DO WE RESOLVE THAT TIE? I
16 THINK, YOUR HONOR, THAT WE ASK A VERY SIMPLE QUESTION ABOUT
17 THAT. IN THE EVENT OF A TIE, IS THE USE BEING MADE ONE THAT
18 IS FAVORED BY THE STATUTE? IS THE USE BEING MADE ONE WHERE THE
19 DEFENDANT'S USE FALLS INTO ONE OF THE CATEGORIES THAT ARE SET
20 FORTH IN THE PREAMBLE AS THE SOCIAL BENEFICIAL CATEGORIES? IS
21 IT CRITICISM, TEACHING, SO FORTH AND SO ON? IF IT IS EVEN
22 IN THE TIE, WE SUBMIT IT FAVORS US, IT FAVORS FAIR USE.

23 THE COURT: HOW DO WE COME UP WITH A TIE? YOU ARE
24 SAYING ONE AND TWO FACTORS, ONE AND TWO FAVOR THE DEFENSE.

25 MR. SCHAETZEL: YES, MA'AM. IN MY HYPOTHETICAL, I

1 CONCEDED THREE AND FOUR COULD FAVOR THE PLAINTIFFS.

2 THE COURT: FACTORS THREE AND FOUR CONSIDER FAVOR
3 THE PLAINTIFFS? ARE YOU CONCEDED THAT?

4 MR. SCHAETZEL: NO. THAT IS FOR PURPOSES OF SHOWING
5 HOW IT COULD WORK. MR. RICH TALKED A GOOD BIT ABOUT THE
6 CHECKLIST. IN HIS WORDS, HE DIDN'T CRITICIZE THE CHECKLIST.

7 THE COURT: I THOUGHT HE DID.

8 MR. SCHAETZEL: IF THAT IS THE CASE, THEN WE RELY ON
9 THE TESTIMONY OF DR. CREWS THAT THERE ARE OVER A HUNDRED
10 SCHOOLS THAT ARE MAKING USE OF THE CHECKLIST. WE ARE IN VERY
11 GOOD UNIVERSITIES: UNIVERSITY OF MINNESOTA; NORTH CAROLINA
12 STATE; UNIVERSITY OF CHICAGO; UNIVERSITY OF NORTH CAROLINA;
13 UNIVERSITY OF ARIZONA; BAYLOR; CALIFORNIA STATE; BOISE STATE.
14 THESE ARE NOT INSTITUTIONS THAT TAKE EDUCATION OR COPYRIGHT
15 LIGHTLY. THE COMMITTEE UNDERSTANDABLY LOOKED OUT AND TRIED
16 TO SEE WHAT ELSE WAS BEING DONE IN THE COMMUNITY. NOT ONLY
17 DID THEY FIND OTHER SCHOOLS, THEY FOUND THE COPYRIGHT
18 CLEARANCE CENTER.

19 THE COURT: ON FACTORS THREE AND FOUR, DO YOU THINK
20 A COPYRIGHT POLICY SHOULD HAVE SOME TYPE OF LIMITATION ON THE
21 AMOUNT OF USE?

22 MR. SCHAETZEL: IT WOULD BE EASIER TO ADMINISTER. WE
23 AGREE WITH THE PLAINTIFFS, IT WOULD BE DIFFICULT AND
24 PROBLEMATIC TO HAVE. SO THE SHORT ANSWER WOULD BE, NO. IT
25 IS NOT NECESSARY TO HAVE IT.

1 THE COURT: WHY WOULD IT BE DIFFICULT AND
2 PROBLEMATIC?

3 MR. SCHAETZEL: IT COULD CREATE THE PERCEPTION, IF
4 YOU ARE BELOW A GIVEN NUMBER, YOU ARE IN A, QUOTE, UNQUOTE,
5 SAFE HARBOR, WHICH YOU MAY NOT BE IN. I THINK BOTH SIDES
6 WOULD LOOK AT THE FORD MEMOIR CASE, SAY THERE WAS A RELATIVELY
7 TAKING THERE, 300 WORDS OUT OF A MUCH LARGER AND SAY THAT
8 AMOUNT ALONE, A NUMBER OF THAT CANNOT BE DETERMINED ON THE
9 ISSUE.

10 THE COURT: WHAT IF THE POLICY, FOR EXAMPLE, GAVE
11 SOME GUIDANCE ABOUT FACTORS ONE, TWO, AND FOUR IN THE CONTEXT
12 OF A CASE LIKE OURS WHERE YOU HAVE A UNIVERSITY, WE ARE
13 TALKING ABOUT EDUCATIONAL USE? WHAT IF THE POLICY GAVE SOME
14 GUIDANCE ABOUT THE WEIGHT THAT THOSE SHOULD HAVE AND HOW THEY
15 SHOULD BE CONSIDERED? WOULD YOU THEN BE IN FAVOR OF PUTTING
16 SOME LIMITATION ON THE AMOUNT OF THE USE?

17 MR. SCHAETZEL: IT WOULD BE A QUESTION OF WHAT THAT
18 LIMITATION WOULD BE, YOUR HONOR. IN OTHER WORDS, IF WE ARE
19 GOING TO SAY THAT YOU NECESSARILY CANNOT USE MORE THAN 25
20 PERCENT OF A WORK, JUST TO PICK A NUMBER HYPOTHETICALLY, FOR
21 EXAMPLE, THE BILL GRAHAM CASE, WHICH IS THE CASE WHERE THERE
22 WERE GRATEFUL DEAD ROCK IN ROLL POSTERS THAT WERE PUT INTO A
23 COFFEE TABLE TYPE BOOK, THAT WAS A COMPLETE TAKING. HE TOOK
24 ALL 100 PERCENT OF THE POSTERS AND PUT THEM IN. SO, IT
25 BECOMES PROBLEMATIC IN THAT AREA.

1 THE COURT: ASSUME WE WERE GOING TO ASSIGN SOME
2 PERCENTAGE, WHAT DO YOU THINK IT SHOULD BE?

3 MR. SCHAETZEL: WE HAVEN'T EVER COME TO A CONCLUSION,
4 YOUR HONOR, BUT WE HAVE SOME IDEAS ON A METHODOLOGY. FOR
5 EXAMPLE, IT WOULD HAVE TO CONSIDER WHETHER OR NOT THE
6 PROFESSOR BELIEVED THAT THEY WERE TAKING THE HEART OF THE
7 WORK. BECAUSE IF THEY THOUGHT IT WAS THE HEART OF THE WORK,
8 THAT MIGHT JUSTIFY A LOWER NUMBER AS OPPOSED TO A HIGHER.

9 THE COURT: I NOTICED IN LOOKING OVER THE LIST OF
10 DIFFERENT SCHOOLS AND WHAT THEY DO, I THINK, AS I RECALL THE
11 YALE'S WEBSITE OR SOMETHING THAT IS PRINTED ABOUT THEIR
12 POLICY, SAYS YOU CAN USE UP TO A CHAPTER. I THINK THAT IS
13 RIGHT. WOULD YOU BE IN FAVOR OF SOMETHING LIKE THAT?

14 MR. SCHAETZEL: WE WOULD CERTAINLY NOT BE OPPOSED TO
15 IT, YOUR HONOR. BUT BEFORE WE GO THERE, LET'S LOOK AT WHAT
16 THIS POLICY HAS DONE IN TERMS OF USE OF A CHAPTER. WHEN WE
17 HAVE A CHANCE TO DO OUR POST-TRIAL MATERIALS, WHAT WE WILL BE
18 ABLE TO SHOW THE COURT IS THAT OF THE 75 ALLEGATIONS OF
19 INFRINGEMENT, 56 OF THEM ARE FOR A CHAPTER OR LESS. SO IN
20 APPROXIMATELY THREE-QUARTERS OF ALL THE ALLEGED INFRINGEMENTS,
21 THE ALLEGED NOT FAIR USE IS ONE CHAPTER OR LESS. SO, EVEN
22 WITHOUT HAVING A ONE-CHAPTER LIMITATION IN THIS POLICY,
23 THREE-QUARTERS OF THE WORKS ARE ALREADY IN THAT BALLPARK.
24 THEY ARE ALREADY THERE. IT INDICATES TO US THAT WHILE THAT
25 IS CERTAINLY A BRIGHT LINE TEST IS EASIER --

1 THE COURT: YOU SAY THREE-QUARTERS OF WHAT?

2 MR. SCHAETZEL: THREE-QUARTERS OF 75 ALLEGED
3 INFRINGEMENTS. FIFTY-SIX, BY MY COUNT, YOUR HONOR, WERE ONE
4 CHAPTER OR LESS.

5 THE COURT: OKAY. SO WHAT ABOUT PAGE LIMITATION?
6 WOULD YOU DO SOMETHING LIKE ONE CHAPTER OR SO MANY PAGES,
7 WHICHEVER IS LESS? OR WHAT WOULD YOU DO?

8 MR. SCHAETZEL: WE HAVEN'T GIVEN ANY THOUGHT, QUITE
9 FRANKLY, YOUR HONOR, TO A PAGE LIMITATION BECAUSE IT IS NOT
10 CONTEXTUAL. THERE ARE SOME POLICIES LIKE THAT. THEY WILL
11 SAY 20 PERCENT OR NO MORE THAN 50 PAGES OR SOMETHING LIKE
12 THAT. THERE ARE SOME WHO THINK THAT YOU WILL SEE WHAT IS
13 ATTACHED OR WHAT WAS EXHIBIT E TO PROFESSOR CREWS'S REPORT.
14 THE SYSTEM HAS NOT ADDRESSED THAT, YOUR HONOR. AND I CANNOT
15 TELL YOU THAT WE THOUGHT THAT ONE THROUGH.

16 THE COURT: IT JUST SEEMS SENSIBLE TO ME THAT IT
17 WOULD MAKE THE PROFESSORS' JOB A LOT EASIER. I DON'T SEE HOW
18 PROFESSORS IN EVERY CASE CAN JUST MIX ALL OF THESE FACTORS
19 TOGETHER AND DECIDE HOW IT SHOULD COME OUT. ALTHOUGH I DO
20 THINK IT WOULD MAKE THEIR JOB A LOT EASIER IF SOME OF -- IF
21 THERE COULD BE SOME GENERALIZATIONS ABOUT SOME OF THESE OTHER
22 FACTORS, AGAIN, IN AN EDUCATIONAL SETTING LIKE OURS.

23 MR. SCHAETZEL: CERTAINLY IN THE EDUCATIONAL SETTING,
24 YOUR HONOR, THERE ARE SCHOOLS THAT ARE USING SIMPLY THE FOUR
25 FACTORS AS THEIR EVIDENCE OF OBJECTIVE INDICIA THAT RELY

1 WHOLLY ON THE FOUR FACTORS. THEY ARE IN DR. CREWS'S
2 MATERIAL. AND, YOU KNOW, AGAIN, IT IS NOT AN UNUSUAL WAY TO
3 APPROACH IT. SO, CERTAINLY THE FACULTY AND ACADEMIC
4 COMMUNITY ARE ABLE TO MAKE THOSE DETERMINATIONS, WHICH WE
5 BELIEVE WE HAVE SEEN HERE.

6 THE COURT: WHY DON'T YOU TAKE A FEW MINUTES TO
7 FINISH UP?

8 MR. SCHAE TZEL: YOUR HONOR, VERY QUICKLY ON A COUPLE
9 OF CRITICISMS. IN TERMS OF HOW THE CHECKLIST WORKS, UNTIL
10 THIS CASE IN 2008, THIS CHECKLIST WAS ON THE COPYRIGHT
11 CLEARANCE WEBSITE. THE COPYRIGHT CLEARANCE CENTER, ONLY
12 AFTER IT GOT INVOLVED IN A LAWSUIT INVOLVING THIS CHECKLIST,
13 SUBSEQUENTLY AS MR. RICH SAID, THIS IS FEBRUARY OF 2009,
14 THIS WAS TAKEN DOWN IN 2008, THEY WERE IN FAVOR OF A
15 CHECKLIST. AND WHAT THEY DID IS THEY CONTACTED DR. CREWS AND
16 SAID, WE WOULD LIKE TO MODIFY YOUR CHECKLIST A LITTLE BIT.
17 WE WOULD LIKE TO PUT OUR SPIN ON IT. THAT IS WHAT, IN EFFECT,
18 WAS A PUBLISHER'S CHECKLIST. THAT WAS THE COPYRIGHT
19 CLEARANCE CENTER CHECKLIST. AND IT HAS MANY OF THE SAME
20 ATTRIBUTES THAT IS ON THIS CHECKLIST.

21 ANOTHER POINT IN TERMS OF CRITICISM THAT IS LODGED AT THE
22 CHECKLIST. THE SO-CALLED DIGITAL ANTHOLOGY, AND MR. RICH
23 TALKED ABOUT THAT JUST A LITTLE BIT. AT NO TIME WAS A
24 STUDENT CALLED TO TESTIFY IN THIS CASE TO COME IN AND SAY, I
25 MADE AN ANTHOLOGY OF THESE MATERIALS. WHAT WE HEARD WAS THE

1 STUDENT MAY PRINT IT OUT OR THE STUDENT MAY READ IT ON A
2 COMPUTER SCREEN OR WHATEVER. ANTHOLOGY IS A COLLECTION OF
3 MATERIALS PUT TOGETHER IN A CERTAIN ORDER. THERE HAS BEEN NO
4 EVIDENCE THAT THERE HAS BEEN ANY MAKING OF ANY ANTHOLOGY IN
5 THIS CASE. AND MOST OF WHAT WE HAVE HEARD IS THAT THE
6 STUDENT MAY DO SOMETHING WITH IT, BUT WE HAVE CERTAINLY NEVER
7 HEARD THAT THE STUDENTS MAY PUT ALL OF THIS TOGETHER INTO A
8 COLLECTION. IT IS NOT A DIGITAL ANTHOLOGY.

9 ANOTHER POINT, YOUR HONOR, THE SEPTEMBER 30 ORDER
10 MENTIONS THE FEIST CASE. WE DO BELIEVE FEIST IS NOT A FAIR
11 USE CASE, NO QUESTION ABOUT THAT. BUT IT DOES HAVE SOME
12 APPLICABILITY. MR. RICH SAID FACTOR TWO, IT HAS SOME
13 APPLICABILITY TO FACTOR THREE. IN OTHER WORDS, WHEN YOU
14 START TO LOOK AT HOW MUCH OF THE MATERIAL HAS BEEN USED, THEY
15 SHOULD NOT GET CREDIT FOR MATERIAL THAT IS NOT ORIGINAL TO
16 THEIR AUTHOR. SO, FOR EXAMPLE, WHEN PROFESSOR KIM IS
17 ACCUSED OF TAKING 35 PERCENT, WHEN WE LOOK AT HER MATERIAL AND
18 SAY, WELL, THIS CHART AND THIS TEST AND THIS EDUCATIONAL
19 TESTING SERVICE MATERIAL THAT IS IN THIS BOOK, THAT IS NOT
20 ORIGINAL TO THAT AUTHOR, THAT NUMBER 35 PERCENT DROPS DOWN
21 BELOW 10 PERCENT. WE WILL BRIEF THAT FOR THE COURT TO SHOW
22 HOW IT HAPPENS. BUT THE POINT OF THAT IS IT WAS INCUMBENT ON
23 THEM TO SHOW WHAT ARE THE PROTECTED ELEMENTS HERE. AND WE
24 DID NOT HEAR FROM A SINGLE AUTHOR, NOT ONE AUTHOR CAME AND
25 SAID, THIS PART IS MINE. IT WAS ASKING OUR PROFESSORS,

1 COULD IT BE CREATIVE? THAT IS NOT THE SAME AS ASKING YOUR
2 AUTHOR TO COME IN AND SAY THIS PART IS CREATIVE AND THIS IS MY
3 ORIGINAL.

4 THE COURT: HOW ABOUT THE CASE OF PROFESSOR ORR? HE
5 POINTED OUT ALL THIS SHEET MUSIC HAD BEEN REPRODUCED. HAVE
6 Y'ALL TRIED TO FIGURE OUT IF YOU TAKE THE SHEET MUSIC OUT WHAT
7 PERCENTAGE HE COPIED?

8 MR. SCHAETZEL: FIFTEEN PERCENT. PROFESSOR ORR IS
9 AN INTERESTING CASE BECAUSE HE STARTED AT 25 PERCENT, AS
10 ACCUSED BY THE PLAINTIFFS. HE SAID, WELL, WAIT. WHEN I COUNT
11 THE PAGES, I COUNT ALL THE PAGES, NOT JUST SOME OF THEM. SO
12 HE COUNTED, AS WE COUNT, AND THAT PULLED HIM DOWN TO 20
13 PERCENT. AND THEN WHEN YOU TAKE OUT THE SHEET MUSIC FROM THE
14 1,800 I BELIEVE, OR MAYBE 1,500, THAT PULLS IT DOWN TO FIFTEEN
15 PERCENT.

16 YOUR HONOR, FINALLY, SO I CAN LEAVE MY REMAINING TIME FOR
17 MR. ASKEW, WE INDICATED THAT WE WANTED TO FINISH WHERE WE
18 STARTED. BUT TODAY WE FINISH WITH MANY PROFESSORS HERE.
19 THESE PROFESSORS ARE TEACHERS, THEY ARE EDUCATORS, THEY ARE
20 INTERESTED IN THIS CASE BECAUSE THEY ARE WORRIED ABOUT HOW IT
21 INFLUENCES THEM AND HOW IT INFLUENCES THEIR ABILITY TO TEACH
22 STUDENTS. THE DECISIONS OF THIS COURT ARE GOING TO BEAR
23 DIRECTLY ON HOW THEY WILL CONDUCT THEIR CLASSROOMS. THEY
24 CARRY THE BURDEN, NOT ONLY OF TEACHING STUDENTS BUT OF TRYING
25 TO COMPLY WITH THE LAW. WE SUBMIT THE REASON WE ASKED SO

1 MANY PROFESSORS TO TESTIFY, EACH OF THESE PROFESSORS HAVE
2 DEMONSTRATED THAT INTEREST AND THAT COMMITMENT TO DOING THE
3 RIGHT THING, IF YOU WILL. THEIR ATTENDANCE HERE TODAY ONLY
4 CONFIRMS THAT. IT LEAVES ONE TOPIC, YOUR HONOR, AND THAT,
5 IN PARTICULAR, IS THE RELIEF THAT THE PLAINTIFFS SEEK. I
6 WOULD ASK MR. ASKEW TO ADDRESS THAT.

7 THE COURT: IS ANYONE GOING TO DISCUSS EX PARTE
8 YOUNG OR IS THAT NO LONGER IMPORTANT?

9 MR. ASKEW: I HADN'T PLANNED TO DO THAT. THAT WOULD
10 BE MS. QUICKER'S TOPIC. IF WE WERE GOING TO ADDRESS YOU, I
11 DON'T THINK SHE WAS GOING TO ADDRESS YOU.

12 I WAS GOING TO ADDRESS ONE SUBJECT. AS I HEARD MR.
13 RICH, WHAT HE REALLY COMPLAINED ABOUT IS THAT THERE HAS NOT
14 BEEN ENOUGH EDUCATION AND THERE HADN'T BEEN ENOUGH OVERSIGHT
15 REVIEW OF WHAT IS BEING DONE. IN ONE OF THE QUESTIONS TO
16 DR. POTTER, THERE WAS A SUGGESTION THAT SHORTLY AFTER THIS NEW
17 POLICY WAS ADOPTED, THERE WAS AN EFFORT TO POSTPONE SOME
18 DEPOSITIONS. THERE WAS MORE THAN THAT, YOUR HONOR.

19 WHEN THAT POLICY WAS ADOPTED, I PROPOSED TO THE
20 PLAINTIFFS THAT WE STAY THIS LITIGATION FOR ONE YEAR SO THAT
21 THE SCHOOL WOULD HAVE ENOUGH TIME TO EDUCATE THE PROFESSORS
22 AND IMPLEMENT THIS POLICY. THAT WAS REFUSED. AS A PART OF
23 THAT, I WAS ALSO PROPOSING WE POSTPONE THE DEPOSITIONS AND I
24 CAN REMEMBER DURING YOUR RESOLUTION TO THE SUMMARY JUDGMENT
25 MOTION, YOU POINTED OUT THEY CHOSE TO TAKE THOSE DEPOSITIONS

1 EARLY. AND THEY COMPLAIN ABOUT HOW THE PROFESSORS WEREN'T
2 VERY KNOWLEDGEABLE ABOUT THE NEW POLICY, SOME OF THEM HAD NOT
3 EVEN TRIED TO APPLY IT. THAT WAS A DECISION THEY MADE, A
4 STRATEGIC DECISION THAT THEY MADE. WE PROPOSED SOME WAY OF
5 PROVIDING AN OPPORTUNITY FOR MORE EDUCATION, IT WAS DENIED.

6 THE MAYMESTER STARTED TWO MONTHS AFTER THIS POLICY WAS
7 ADOPTED. FALL SEMESTER WAS EIGHT MONTHS LATER. HAD
8 THOUSANDS OF PROFESSORS TO EDUCATE, WE WENT ABOUT IT, DID NOT
9 GET THEM ALL. I DON'T THINK WE SHOULD BE BLAMED ABOUT THAT,
10 YOUR HONOR.

11 NOW, WITH RESPECT TO THE RELIEF THAT IS BEING REQUESTED.
12 IT IS CLEAR FROM THE PROPOSED INJUNCTION THAT THE PLAINTIFFS,
13 AND ESPECIALLY THE UNNAMED PARTIES, THE COPYRIGHT CLEARANCE
14 CENTER AND ASSOCIATION OF AMERICAN PUBLISHERS, SEEK TO DENY
15 THE UNIVERSITY, SEEK TO DENY TO THOSE PROFESSORS THE
16 STATUTORY RIGHT TO MAKE A FAIR USE OF PUBLISHED WORKS. I
17 MEASURE THOSE WORDS CAREFULLY.

18 THE PROPOSED INJUNCTION WOULD PERMIT ONLY THE MOST NOMINAL
19 OF USES UNDER THE MOST ONEROUS OF CIRCUMSTANCES. ONE
20 THOUSAND WORDS, THREE PAGES OR SO, OR 10 PERCENT OF A WORK,
21 WHICHEVER IS LOWER. SUPERVISION BY PERIODIC AUDITS OF
22 UNIVERSITY COMPUTERS, SNOOPING, YOUR HONOR. APPLICATION OF
23 THE INJUNCTION TO FACULTY, STAFF, AND STUDENTS. AND EVEN
24 SOME CIRCUMSTANCES, APPLICATION OF INJUNCTION TO PARTIES WHO
25 ARE NOT EVEN SUBJECT OF LITIGATION. EVEN COPY OF ANY WORK

1 WOULD BE SUBJECT TO REVIEW BY THIS INJUNCTION AS PROPOSED BY
2 THE PLAINTIFFS. THE UNIVERSITY SIMPLY COULD NOT COMPLY WITH
3 THESE PROVISIONS, AND, THEREFORE, WOULD BE FORCED TO OBTAIN
4 BLANKET PERMISSION FOR ALL USES WITHOUT REGARD TO AN
5 ACCOMMODATIONS FOR FAIR USE.

6 THUS IT IS CLEAR THAT THE PLAINTIFFS SEEK TO FORCE THE
7 UNIVERSITY SYSTEM AND GSU TO TAKE A BLANKET LICENSE FROM THE
8 CCC WITHOUT REGARD TO FAIR USE. AND PAY PERMISSION FEES FOR
9 ALL USES OF PUBLISHED WORKS. THE PROPOSED INJUNCTION
10 REPRESENTS A RIGID AND FROZEN SET OF RULES WHICH CANNOT BE
11 MODIFIED FOR A PARTICULAR SITUATION. SUCH A FREEZE ON THE
12 FAIR USE DOCTRINE IS CLEARLY NOT WHAT WAS CONTEMPLATED BY
13 CONGRESS AS EXPLAINED IN THE HOUSE REPORT NUMBER 941476. I
14 WAS GOING TO READ IT TO YOU, YOUR HONOR, IT IS LATE. BUT IT
15 POINTS OUT THAT YOU SHOULDN'T HAVE FROZEN RULES IN PLACE.
16 WITH TECHNOLOGICAL CHANGES OCCURRING, THERE HAS GOT TO BE SOME
17 -- IT DOESN'T USE THE WORD FLEXIBILITY -- WHEN I THINK YOU
18 READ THAT PARAGRAPH, IT IS AT PAGE 66 OF THE OFFICIAL
19 VERSION, IT IS CLEARLY TALKING ABOUT THIS, GOT TO BE SOME
20 FLEXIBILITY.

21 FURTHERMORE, AS POINTED OUT IN THE CAMPBELL CASE, THAT IS
22 THE MOST RECENT DECISION OF THE SUPREME COURT ON FAIR USE, THE
23 KIND OF RIGIDITY EMBODIED IN THE PROPOSED INJUNCTION IS NOT
24 FAVORED. AS OBSERVED BY THE COURT, THE FAIR USE DOCTRINE
25 THUS PERMITS AND EVEN REQUIRES COURTS TO AVOID RIGID

1 APPLICATION OF THE COPYRIGHT STATUTE WHEN ON OCCASION IT WOULD
2 STIFLE THE VERY CREATIVITY WHICH THAT LAW IS DESIGNED TO
3 FOSTER.

4 CAMPBELL CONTINUES BY EMPHASIZING THAT ALL FOUR FACTORS
5 MUST BE EXAMINED UNDER THE FAIR USE ANALYSIS. THUS, ONE
6 FACTOR, SUCH AS A COMMERCIAL USE, CANNOT SWALLOW BEING
7 REFERENCED TO ALL OF THE ILLUSTRATIVE EXAMPLES IN THE
8 PREAMBLE, SUCH AS CRITICISM IN THE FORM OF PARODY. IT IS
9 WHERE THEY ENDED UP. CAMPBELL WAS A PARODY CASE. IT WAS IN
10 ONE OF THOSE RECOGNIZED PREFERRED USES. CAMPBELL THEN
11 EXPLAINS THAT A NEW USE DOES NOT HAVE TO BE TRANSFORMATIVE,
12 AN IMPORTANT POINT HERE, YOUR HONOR. CAMPBELL MAKES IT CLEAR
13 A NEW USE DOES NOT HAVE TO BE TRANSFORMATIVE TO BE A FAIR USE
14 AS ILLUSTRATED IN FOOTNOTE 11. MR. RICH REFERRED TO IT, BUT
15 IT IS AN INCREDIBLY IMPORTANT FOOTNOTE.

16 IN FOOTNOTE 11, THE STATEMENT IS MADE, THE OBVIOUS
17 STATUTORY EXCEPTION TO THE FOCUS ON TRANSFORMATIVE NATURE OF A
18 USE AS BEING DISCUSSED IN THE CAMPBELL DECISION IS THE
19 STRAIGHT REPRODUCTION OF MULTIPLE COPIES FOR CLASSROOM
20 DISTRIBUTION. THE SUPREME COURT WAS CAREFUL TO POINT OUT IN
21 ITS DISCUSSION ABOUT TRANSFORMATIVE AND THE VALUE OF A
22 TRANSFORMATIVE USE THAT THE OBVIOUS STATUTORY EXCERPT TO THE
23 FOCUS ON A TRANSFOR -- ON THE TRANSFORMATIVE NATURE OF USE IS
24 THE STRAIGHT REPRODUCTION OF MULTIPLE COPIES FOR CLASSROOM
25 DISTRIBUTION CONDUCT, I WOULD SUBMIT, IS FULLY ANALOGOUS BY

1 THE USE MADE OF GSU PROFESSORS OF ELECTRONIC RESERVES.

2 FINAL ANALYSIS, PROPOSED INJUNCTION SIMPLY BUT
3 EMPHATICALLY DENIES TO THE PROFESSORS AND THE SCHOOLS THE
4 RIGHT TO MAKE A STATUTORY FAIR USE OF PUBLISHED WORKS.

5 NOW, WHAT THEN IS THE CONCERNS OF THE PROFESSOR -- OF
6 THE PUBLISHERS? WHAT ARE THE CONCERNS OF THE PUBLISHERS HERE
7 AND THE COPYRIGHT CLEARANCE CENTER AND THE ASSOCIATION OF
8 AMERICAN PUBLISHERS? ARE THEY CONCERNED THAT THE PROFESSORS
9 DID NOT DO A GOOD JOB IN THEIR FAIR USE ANALYSIS? NO. I
10 DON'T THINK THAT IS IT, YOUR HONOR. DO THEY WANT THE
11 PROFESSORS TO DO A BETTER JOB IN FAIR USE ANALYSIS? I DON'T
12 THINK THAT IS IT, EITHER. WHAT THE PUBLISHERS AND THE
13 COPYRIGHT CLEARANCE CENTER AND THE ASSOCIATION OF AMERICAN
14 PUBLISHERS FEAR IS NOT THAT THE PROFESSORS GOT IT WRONG, YOUR
15 HONOR. WHAT THEY FEAR AND THEIR CONCERN IS THE PROFESSORS
16 GOT IT RIGHT. THEY GOT IT RIGHT. AND WILL CONTINUE TO GET
17 IT RIGHT AS THEY MAKE A FAIR USE OF PUBLISHED WORKS. UNDER
18 THOSE CIRCUMSTANCES, PERMISSION FEES WILL NOT BE DUE AND WILL
19 NOT BE PAID. CLEARLY, THE OBJECTIVE OF THE PUBLISHERS AND
20 THE COPYRIGHT CLEARANCE CENTER AND ASSOCIATION OF AMERICAN
21 PUBLISHERS IS TO BE PAID PERMISSION FEES WITHOUT REGARD TO
22 FAIR USE AND FOR VIRTUALLY ALL USES OF PUBLISHED WORKS BY THE
23 PROFESSORS.

24 WITH RESPECT TO ELECTRONIC RESERVES, THE OBJECTIVE OF THE
25 COPYRIGHT CLEARANCE CENTER IS TO BE PAID EVEN WHEN THE WORK IS

1 NOT USED BY THE STUDENTS, NOT USED BY THE STUDENTS. WHILE A
2 COURSEPACK SALE RESULTS IN A PERMISSION FEE BEING PAID FOR
3 EACH SALE, ELECTRONIC RESERVES, A PERMISSION FEE, IS PAID FOR
4 ALL STUDENTS IN THE CLASS, EVEN WHEN LESS THAN ALL AND
5 SOMETIMES VERY FEW. YOU LOOK AT THE HIT COUNT REPORTS, YOU
6 WILL SEE SOME VERY SMALL NUMBERS.

7 THE COURT: DID THOSE HIT COUNT REPORTS INCLUDE THE
8 ULEARN SYSTEM OR IS THAT JUST HIT COUNTS FOR ERES?

9 MR. ASKEW: RE ERES, YOUR HONOR. ONLY ONE ASKED FOR
10 REQUESTED BY THE PLAINTIFFS WAS ERES.

11 THE COURT: WE DON'T KNOW HOW MUCH USE THE STUDENTS
12 MADE OF ULEARN?

13 MR. ASKEW: WE HAVE ONLY ONE ACCUSED INFRINGEMENT
14 WITH RESPECT TO ULEARN, THAT WAS DR. KIM. NO OTHER
15 ALLEGATIONS OF INFRINGEMENT AS TO ULEARN.

16 THE COURT: OKAY. THANK YOU.

17 MR. ASKEW: ELECTRONIC RESERVES, A PERMISSION FEE IS
18 PAID FOR ALL STUDENTS IN THE CLASS, EVEN WHEN LESS THAN
19 SOMETIMES VERY FEW OF THE STUDENTS ACTUALLY ACCESS THE
20 ELECTRONIC RESERVES EXCERPT. THESE OBJECTIVES OF THE
21 PUBLISHERS AND THE COPYRIGHT CLEARANCE CENTER AND THE
22 ASSOCIATION OF AMERICAN PUBLISHERS FULLY, COMPLETELY EXPRESSED
23 IN THE PROPOSED INJUNCTION. SO, WITHOUT FAIR USE, THE
24 CONSTITUTIONAL MANDATE OF PROMOTING PROGRESS AND SCIENCE IN
25 THE ARTS WILL NOT BE MET. THE EXCLUSIVE RIGHT OF THE WORK,

1 AS A WHOLE, IS SECURED TO THE AUTHOR BY THE CONSTITUTION, BUT
2 WITHOUT REASONABLE ACCESS BY VIRTUE OF FAIR USE PROGRESS WILL
3 NOT BE ACHIEVED THROUGH TEACHING COMMENT, CRITICISM,
4 RESEARCH, AND SCHOLARSHIP.

5 FAIR USE PROVIDES THE MEANS BY WHICH TEACHERS CAN EDUCATE
6 AND PUBLISHERS CAN BE COMPENSATED WHEN USE EXCEEDS THE BOUNDS
7 OF FAIR USE. DISRUPTING THAT BALANCE, YOUR HONOR,
8 DISRUPTING THAT BALANCE, AS PROPOSED BY THE PUBLISHERS, IS
9 SIMPLY NOT REQUIRED BY THE LAW OF FAIR USE AND IT IS CONTRARY
10 TO THE CONSTITUTIONAL MANDATE.

11 THAT WILL CONCLUDE OUR REMARKS.

12 THE COURT: THANK YOU.

13 MR. RICH, YOU GET THE LAST WORD.

14 MR. RICH: THANK YOU. I WILL BE BRIEF, I PROMISE.

15 YOUR HONOR, SEVERAL COMMENTS MADE BY MR. SCHAEZEL
16 ABOUT THE PREFERRED SO-CALLED PREFERRED STATUS OF THE
17 MULTIPLE COPYING. THERE IS A SECTION OF THE HARPER AND ROW
18 DECISION -- I KNOW WE ARE THROWING A LOT OF AUTHORITY AT YOU
19 -- I THINK THIS IS VERY IMPORTANT BECAUSE NOT ONLY IS IT THE
20 CASE AS I ESTABLISHED I THINK DURING OUR OWN COLLOQUY THAT
21 SO-CALLED FAVORED WORKS STILL HAVE TO PASS THE LITMUS TEST OF
22 THE FOUR FACTOR TEST, IT IS NOT AN EXEMPTION OR END-RUN AROUND
23 IT, SOCIAL DESIRABILITY ITSELF BECOMES A PARAMOUNT FAIR USE
24 CONSIDERATION THAT TRUMPS THE OTHER PURPOSES OF THE COPYRIGHT
25 WAS ADDRESSED DIRECTLY IN THE HARPER AND ROW DECISION. AND

1 THE COURT SAID IT IS FUNDAMENTALLY AT ODDS WITH THE SCHEME OF
2 COPYRIGHT TO ACCORD LESSER RIGHTS IN THOSE WORKS THAT ARE OF
3 GREATEST IMPORTANCE TO THE PUBLIC. WE COULD SUBSTITUTE TO
4 EDUCATION FOR THE PUBLIC HERE.

5 TO PROPOSE FAIR USE BE IMPOSED, WHATEVER THE SOCIAL VALUE
6 OF THE DISSEMINATION OUTWEIGHS ANY DETRIMENT TO THE ARTIST
7 WOULD BE TO PROPOSE DEBRIEFING COPYRIGHT OWNERS OF THEIR RIGHT
8 IN THE PROPERTY PRECISELY WHEN THEY ENCOUNTER THOSE USERS WHO
9 COULD AFFORD TO PAY FOR IT.

10 I THINK THAT IS A VERY IMPORTANT THING FOR YOUR HONOR TO
11 KEEP IN MIND AS YOU GO THROUGH THIS WEIGHING PROCESS. WHEN
12 MR. SCHAETZEL SAID, I KNOW HOW TO BREAK THE TIE TO YOUR
13 QUESTION, WE BREAK THE TIE IN FAVOR OF THIS FAVORED USE. IT
14 IS PRECISELY WHAT THE SUPREME COURT SAID ONE NEEDS TO CAUTION
15 AGAINST.

16 AND I WILL OFFER MY VIEW NOW, YOUR HONOR, HOW YOUR HONOR
17 MIGHT WANT TO BREAK THE TIE. THAT COMES BACK TO THE FIRST
18 QUESTION YOU ASKED ME THIS AFTERNOON, WHICH ARE, WHAT ARE THE
19 MORE IMPORTANT FACTORS? I WOULD SUGGEST TO YOU THAT THE MORE
20 IMPORTANT FACTORS HERE ARE THE INTERPLAY OF FACTORS ONE AND
21 FOUR. AND I APPRECIATE MR. SCHAETZEL SEEDING US FOR
22 DISCUSSION ON ONE OF THOSE TWO, FACTOR FOUR, I WOULD SUBMIT,
23 ON THE ANALYSIS OF THE NONTRANSFORMATIVE NATURE OF THE USE.
24 THE SUPPLANTING OF THE PRIMARY MARKETS OF PUBLISHERS ALSO
25 WARRANTS A WARNING OF FACTOR ONE. IF IT WERE TO TURN OUT, I

1 THINK, WE SHOULD WIN TO FACTOR THREE, SHOULDN'T GET TO A TIE;
2 IF WE DO GET TO A TIE, I THINK YOUR HONOR'S EXAMINATION OF THE
3 PREVAILING IMPORTANCE OF FACTORS ONE AND FOUR SHOULD SUBJECT
4 AWARDING THE TIE TO THE PLAINTIFFS.

5 JUST ONE OR TWO MORE POINTS. MR. SCHAEZEL, I'M SURE,
6 INADVERTENTLY SPOKE TO THE RESOLUTION OF FACTOR TWO IN THE MDS
7 CASE. IT WAS AWARDED TO THE PLAINTIFF, NOT THE DEFENDANTS, ON
8 THE GROUNDS, AS YOUR HONOR WAS QUERYING MR. SCHAEZEL, THAT
9 THERE WAS SUFFICIENT CREATIVITY TO ALBEIT FACTUAL WORKS TO
10 EASILY TILT THAT FACTOR IN FAVOR OF THE PLAINTIFFS IN THAT
11 CASE.

12 THE CCC CHECKLIST, JUST ONE WORD YOU HEARD MS. ARMSTRONG
13 TESTIFY ABOUT, THE PROPOSED CONTEXT IN WHICH THAT WAS USED,
14 YOUR HONOR. NOT INCONSISTENTLY WITH DR. CREWS, FROM WHOM
15 THEY BORROWED. IT WAS DESIGNED, AS SHE TESTIFIED, TO BE A
16 RESOURCE OUT THERE. THIS WASN'T A CCC CHECKLIST, IT WASN'T A
17 HERE IS THE END-ALL, BE-ALL DEVICE AS THIS ONE IS. IT WAS OUT
18 THERE. OFFERED OUT THERE AMONG A SUITE OF OTHER RESOURCES FOR
19 UNIVERSITIES AND INSTITUTIONS TO CONSIDER.

20 WHEN MR. SCHAEZEL SUGGESTED THAT A HUNDRED OR MORE OTHER
21 UNIVERSITIES ARE USING, WE DON'T KNOW THE FOGGIEST THING FROM
22 THIS RECORD ABOUT HOW THEY ARE USING IT. IN FACT, DR. CREWS
23 STRONGLY SUGGESTED THESE TOOLS ARE USED IN A MUCH MORE NUANCED
24 WAY, NOT AS A LITMUS TEST FOR IT. HE SAID HE WOULD BE
25 UNCOMFORTABLE WITH USING IT IN THE VERY FASHION THAT IN FACT

1 GEORGIA STATE UNIVERSITY IS USING IT.

2 LAST POINT I WANT TO MAKE, YOUR HONOR, IS THAT WITH
3 RESPECT TO MR. SCHAETZEL'S ARGUMENT THAT THIS IS APPARENTLY A
4 BENIGN PRACTICE BECAUSE STUDENTS IN THE MAJORITY OF THESE
5 COURSES ALSO PURCHASED TEXTBOOKS, THAT IS A RATHER DANGEROUS
6 ARGUMENT. IT SEEMS TO ME THAT IS LITERALLY AN ARGUMENT THAT
7 SAYS, BECAUSE I PURCHASED SOME WORKS, I APPARENTLY HAVE THE
8 AUTHORITY TO USE WITHOUT COMPENSATION UNRELATED IN DIFFERENT
9 WORKS. TO THE EXTENT THAT IS THE IMPLICATION OF THAT
10 ARGUMENT, I DON'T THINK THERE IS ANY SUPPORT WHATSOEVER IN
11 COPYRIGHT LAW OR IN OTHER BODIES OF LAW FOR THAT KIND OF --
12 THAT KIND OF DOCTRINE.

13 I REALLY HAVE NOTHING ELSE UNLESS YOUR HONOR WANTS TO ASK
14 ME ANY QUESTIONS.

15 THE COURT: I DON'T THINK SO. THANK YOU.

16 MR. RICH: THANK YOU VERY MUCH.

17 THE COURT: LET'S TALK ABOUT SOME DEADLINES. IT IS
18 MY UNDERSTANDING THAT Y'ALL HAVE BEEN GETTING ROUGH DRAFTS OF
19 THE TRANSCRIPT. THE COURT REPORTER SAYS THAT SHE CAN HAVE
20 THE FINAL TRANSCRIPT DONE IN THREE WEEKS AND THAT WOULD BE, I
21 THINK, JUNE 28TH. WHAT I AM HOPING TO DO IS NOT GIVE Y'ALL
22 TOO MUCH TIME TO DO YOUR PROPOSED FINDINGS BEYOND THAT. I
23 WAS HOPING YOU COULD GO AHEAD AND WORK WITH THE ROUGH DRAFT
24 THAT YOU GOT AND THEN MAYBE HAVE A WEEK OR SO BEYOND THAT TO
25 FINALIZE IT.

1 MR. KRUGMAN: JUST TO SAY WE HAVE GOTTEN ROUGH DRAFTS
2 FROM THE LAST WEEK, BASICALLY BEGINNING LAST WEEK OF THE
3 TRIAL. WE HAVE ONLY SMALL PORTIONS FROM THE FIRST TWO WEEKS.

4 THE COURT: I DON'T KNOW HOW YOU ALL ACTUALLY DO IT.

5 I THINK I MAY NEED TO TALK TO MR. ASHLEY TO SEE WHAT
6 POSSIBILITIES ARE ON HIS PART OF THE TRANSCRIPT, BUT I GUESS
7 WHAT I WOULD LIKE TO DO IS TRY TO GET Y'ALL TO WORK WITH THE
8 ROUGH DRAFT AS MUCH AS YOU CAN AND THEN MAYBE I COULD. BUT
9 NOW HOW ARE WE GOING TO DO -- COULD Y'ALL BOTH FILE YOUR STUFF
10 AT THE SAME TIME AND THEN MAYBE DO REPLIES?

11 MR. SCHAEZEL: SURE.

12 MR. RICH: WE HAVEN'T TALKED. I WAS HOPING TO DO IT
13 AS EFFICIENTLY AND WITH AS FEW MULTIPLE FILINGS AS POSSIBLE,
14 YOUR HONOR. YOU ARE INUNDATED ALREADY FROM FILINGS FROM US,
15 YOUR HONOR.

16 THE COURT: WHAT ABOUT SETTING TWO WEEKS BEYOND JUNE
17 28TH FOR BOTH SIDES TO FILE THEIR MAIN BRIEFS? SO THAT
18 WOULD MAKE JULY 15TH THE FILING DATE. I AM SURE EACH SIDE
19 WILL WANT TO FILE SOME KIND OF RESPONSE. COULD WE GO MAYBE A
20 WEEK BEYOND THAT TO JULY 22ND, MAKE THAT WORK? LET'S
21 TENTATIVELY PLAN TO DO THAT. WE WILL TALK TO MY COURT
22 REPORTER.

23 MR. RICH: IS THERE ANY PARTICULAR FOCUS OR EMPHASIS
24 THAT WOULD HELP YOU OUT IN THOSE FILINGS AS OPPOSED TO A
25 BLUNDERBUSS KIND OF FILINGS?

1 THE COURT: I THINK DOING IT AS PROPOSED FINDINGS OF
2 FACT AND CONCLUSIONS OF LAW IS THE FORMAT THAT WOULD BE MOST
3 HELPFUL TO ME. AND TO THE EXTENT POSSIBLE, I WOULD APPRECIATE
4 CITES TO THE RECORD IN TERMS OF EXHIBITS AND SO FORTH.
5 BEYOND THAT I DON'T HAVE ANY SPECIFIC IDEAS.

6 MR. RICH: THANK YOU.

7 THE COURT: OKAY. WELL, THANK YOU VERY MUCH. AND
8 IT HAS BEEN A PLEASURE TO HAVE ALL OF YOU BEFORE ME IN THIS
9 CASE. I WILL LOOK FORWARD TO GETTING YOUR WORK.

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