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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| CAMBRIDGE UNIVERSITY PRESS, |) | |
| ET AL., |) | DOCKET NO. 1:08-CV-1425-ODE |
| |) | |
| PLAINTIFFS, |) | ATLANTA, GEORGIA |
| |) | MAY 17, 2011 |
| V. |) | |
| |) | |
| MARK P. BECKER, IN HIS |) | |
| OFFICIAL CAPACITY AS GEORGIA |) | |
| STATE UNIVERSITY PRESIDENT, |) | |
| ET AL., |) | |
| |) | |
| DEFENDANTS. |) | |

VOLUME 1
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ORINDA D. EVANS
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

| | |
|---------------------|-----------------------------|
| FOR THE PLAINTIFFS: | JONATHAN BLOOM |
| | EDWARD B. KRUGMAN |
| | TODD D. LARSON |
| | JOHN H. RAINS |
| | R. BRUCE RICH |
| | RANDI W. SINGER |
| FOR THE DEFENDANTS: | ANTHONY B. ASKEW |
| | JOHN W. HARBIN |
| | RICHARD MILLER |
| | NATASHA H. MOFFIT |
| | KATRINA M. QUICKER |
| | STEPHEN M. SCHAE TZEL |
| COURT REPORTER: | ANDY ASHLEY |
| | 1949 U. S. COURTHOUSE |
| | ATLANTA, GEORGIA 30303-3361 |
| | (404) 215-1478 |

1 P R O C E E D I N G S
2 (ATLANTA, FULTON COUNTY, GEORGIA; MAY 17, 2011
3 IN OPEN COURT.)

4 THE COURT: GOOD MORNING, EVERYBODY. ALL RIGHT.
5 COUNSEL, I TRUST EVERYBODY IS READY TO BEGIN. I KNOW WHO MANY
6 OF YOU ARE, BUT I WOULD APPRECIATE IT IF YOU WOULD IDENTIFY
7 YOURSELVES FOR THE RECORD STARTING WITH THE PLAINTIFFS.

8 MR. RICH: GOOD MORNING. I'M BRUCE RICH. I'M FROM
9 THE LAW FIRM OF WEIL, GOTSHAL & MANGES.

10 MS. SINGER: YOUR HONOR, RANDI SINGER FROM THE LAW OF
11 WEIL, GOTSHAL & MANGES.

12 MR. KRUGMAN: EDWARD KRUGMAN WITH BONDURANT MIXSON &
13 ELMORE.

14 MR. LARSON: TODD LARSON FROM WEIL, GOTSHAL & MANGES.

15 MR. BLOOM: JONATHAN BLOOM, WEIL, GOTSHAL & MANGES.

16 MS. MAYER: STACEY MAYER, WEIL, GOTSHAL & MANGES.

17 MR. RAINS: JOHN RAINS, BONDURANT MIXSON & ELMORE.

18 THE COURT: IS THAT ALL OF COUNSEL FOR THE
19 PLAINTIFFS?

20 MR. RICH: IT IS, YOUR HONOR.

21 THE COURT: ALL RIGHT. FOR THE DEFENSE?

22 MR. SCHAEZEL: THANK YOU, YOUR HONOR. I'M STEVE
23 SCHAEZEL WITH THE FIRM OF KING & SPALDING. IF I MAY FOR
24 CONVENIENCE I'LL INTRODUCE OUR GROUP. TO MY LEFT IS MR. JOHN
25 HARBIN ALSO WITH KING & SPALDING. MR. TONY ASKEW. BEHIND US

1 IS KATRINA QUICKER WITH BALLARD SPAHR, MR. RICHARD MILLER
2 BALLARD SPAHR AND THEN GLENDA SMITH OUR PARALEGAL FROM KING &
3 SPALDING, AND IN THE COURTROOM ALSO WITH US IS MS. CALEE
4 HAYWOOD WHO IS GENERAL COUNSEL FOR GEORGIA STATE AND MARY JO
5 VOLKERT WHO IS WITH THE AG'S OFFICE.

6 MR. RICH: YOUR HONOR, MAY I TAKE A MOMENT TO
7 INTRODUCE SEVERAL OTHERS IN THE COURTROOM?

8 THE COURT: CERTAINLY.

9 MR. RICH: WE HAVE FRANK SMITH FROM CAMBRIDGE
10 UNIVERSITY PRESS FROM WHOM YOU'LL BE HEARING. WE HAVE MR. TOM
11 ALLEN FROM THE ASSOCIATION OF AMERICAN PUBLISHERS WHICH IS
12 INVOLVED GENERALLY IN THIS EFFORT. MS. CAROL RICHMAN FROM SAGE
13 PUBLISHING FROM WHOM YOU'LL HEAR. NIKO PHUND FROM OXFORD FROM
14 WHOM YOU'LL HEAR AND BARBARA COHEN WHO IS THE GENERAL COUNSEL
15 AT OXFORD UNIVERSITY PRESS.

16 THE COURT: GOOD MORNING, EVERYBODY.

17 MR. KRUGMAN: I DON'T WANT TO LEAVE OUT OUR PARALEGAL
18 LINDSEY HARRISON.

19 THE COURT: I AGREE, PARALEGALS SHOULD NOT BE LEFT
20 OUT.

21 ALL RIGHT. COUNSEL, BEFORE WE TURN TO BRIEF OPENING
22 STATEMENTS, DOES EITHER SIDE WISH TO INVOKE THE RULE OF
23 SEQUESTRATION?

24 MR. KRUGMAN: WE DO, YOUR HONOR.

25 THE COURT: ALL RIGHT.

1 MR. SCHAETZEL: YOUR HONOR, WE WILL AS WELL. WE
2 WOULD ASK -- THERE ARE SEVERAL PEOPLE HERE WHO HAVE SOME
3 INTEREST IN THIS CASE. THEY WOULD LIKE TO STAY FOR OPENING
4 STATEMENT. THEY WOULD CERTAINLY UNDERSTAND THAT DURING THE
5 TESTIMONY OF WITNESSES THAT THEY WOULD BE SEQUESTERED, BUT IF
6 THAT WOULD BE APPROPRIATE.

7 THE COURT: WILL THEY BE TESTIFYING?

8 MR. SCHAETZEL: SOME MAY, YES, YOUR HONOR.

9 THE COURT: I THINK ABSENT SOME KIND OF AN AGREEMENT
10 WITH THE OTHER SIDE ANYBODY WHO IS GOING TO TESTIFY WOULD HAVE
11 TO ABSENT THEMSELVES ONCE THE RULE IS INVOKED. IF YOU ALL WISH
12 TO WORK SOMETHING OUT ON THAT, THAT'S OKAY WITH ME.

13 MR. KRUGMAN: I THINK WE WOULD JUST PREFER THE RULE
14 TO APPLY.

15 THE COURT: OKAY. NOW YOU ALL HELP ME IDENTIFY THE
16 PEOPLE IN THE COURTROOM CURRENTLY WHO ARE GOING TO TESTIFY, AND
17 I WANT ALL OF THEM TO COME FORWARD FOR SOME INSTRUCTIONS, AND
18 THEN WE'LL EXCUSE YOU AND YOU CAN GO TO THE WITNESS ROOM.

19 MR. KRUGMAN: YOUR HONOR, WE HAVE AS CORPORATE
20 REPRESENTATIVES THREE REPRESENTATIVES OF THE THREE PLAINTIFFS.
21 THEY WILL BE TESTIFYING, BUT THEY'RE PRESENT AS REPRESENTATIVES
22 OF THE PLAINTIFFS AND WOULD BE ALLOWED TO REMAIN IN THE
23 COURTROOM.

24 THE COURT: AND DO YOU ALL HAVE CORPORATE
25 REPRESENTATIVES WHO WOULD BE ALLOWED TO REMAIN?

1 MR. SCHAETZEL: POTENTIALLY ONE, YOUR HONOR, YES, BUT
2 AM I TO UNDERSTAND THAT BY VIRTUE OF THAT DESIGNATION THEY
3 WOULD NOT BE SUBJECT TO THE RULE?

4 THE COURT: THAT'S CORRECT. EACH PARTY WOULD BE
5 ENTITLED TO ONE REPRESENTATIVE WHO WOULD BE EXEMPT FROM THE
6 RULE.

7 MR. SCHAETZEL: VERY WELL, YOUR HONOR, WE
8 UNDERSTAND. THANK YOU.

9 THE COURT: OKAY. NOW, WE NEED EVERYBODY WHO'S GOING
10 TO TESTIFY AND WHO'S NOT EXEMPT TO COME UP TO THE FRONT OF THE
11 ROOM AT THIS TIME PLEASE.

12 THE CLERK: ALL WITNESSES ARE HEREBY INSTRUCTED AND
13 DIRECTED NOT TO DISCUSS YOUR TESTIMONY AMONG YOURSELVES OR WITH
14 ANYONE ELSE OTHER THAN COUNSEL FOR EITHER SIDE IN THE CASE.
15 YOU SHALL RETIRE FROM THE COURTROOM AT THIS TIME BUT SHALL
16 REMAIN IN ATTENDANCE UNTIL EXCUSED BY THE COURT. YOU SHALL NOT
17 RETURN TO THE COURTROOM UNTIL CALLED IN BY AN OFFICER OF THE
18 COURT. YOU MAY RETIRE TO THE WITNESS ROOM TO THE RIGHT, AND I
19 WILL BE THERE IN JUST A MINUTE TO OPEN IT UP.

20 THE COURT: COUNSEL, WOULD YOU KEEP YOUR WITNESSES
21 ADVISED THAT THE RULE HAS BEEN INVOKED AND THAT THEY ARE NOT TO
22 DISCUSS THIS CASE OR THEIR TESTIMONY WITH ANYONE EXCEPT FOR
23 COUNSEL FOR EITHER SIDE, AND LET ME JUST AGAIN EMPHASIZE, I'M
24 COUNTING ON YOU -- THERE ARE A LOT OF PEOPLE IN THE COURTROOM
25 RIGHT NOW, AND I'M COUNTING ON YOU TO MAKE SURE THAT EVERYONE

1 WHO NEEDS TO LEAVE IN LIGHT OF RULE SEQUESTRATION HAS LEFT,
2 OKAY?

3 MR. KRUGMAN: YOUR HONOR, I HATE TO MAKE AN
4 ADMISSION, BUT MS. SEAMANS IS ACTUALLY A PARTY IN THE LAWSUIT.

5 THE COURT: IF SHE'S A PARTY SHE WOULD BE ENTITLED TO
6 REMAIN.

7 MR. KRUGMAN: OUT OF FAIRNESS.

8 THE COURT: THAT'S CORRECT.

9 MR. SCHAETZEL: IT'S ALSO MY UNDERSTANDING THROUGH
10 AGREEMENT WITH COUNSEL -- OBVIOUSLY THESE PEOPLE ARE EMPLOYED,
11 SEVERAL OF THEM AT GEORGIA STATE, WITH THE COURT'S PERMISSION
12 AND GIVEN OUR UNDERSTANDING WE DO NOT BELIEVE THEY WILL BE
13 CALLED IN THE NEXT DAY OR TWO. I THINK IT'S APPROPRIATE FOR
14 THEM TO GO BACK TO THEIR OFFICES AND WORK. THEY WOULD BE
15 AVAILABLE ON SHORT INNOCENCE.

16 THE COURT: THAT'S FINE, AS LONG AS WE CAN GET THEM
17 HERE QUICKLY SO IT DOESN'T HOLD THINGS UP.

18 MR. SCHAETZEL: YES, MA'AM.

19 THE COURT: ALL RIGHT. COUNSEL, WE'RE READY NOW TO
20 TURN TO OPENING STATEMENTS. LET ME SAY THIS. I'M VERY
21 FAMILIAR WITH THIS CASE, AND I WOULD APPRECIATE IT IF YOU ALL
22 WOULD KEEP YOUR REMARKS REASONABLY SHORT. I THINK 30 MINUTES
23 PER SIDE OUGHT TO BE PLENTY. SO LET'S START WITH THE
24 PLAINTIFFS' SIDE AT THIS TIME.

25 MR. RICH: THANK YOU. OFFICIALLY GOOD MORNING, YOUR

1 HONOR. THIS CASE IS OF ENORMOUS SIGNIFICANCE AND CONSEQUENCE
2 FOR THE PLAINTIFFS, INDEED TO THE ENTIRE BOOK PUBLISHING
3 INDUSTRY.

4 THE PURPOSE OF THIS LAWSUIT IS TO ENJOIN CONDUCT AT
5 GSU UNDER THE DEFENDANTS' SUPERVISORY AUTHORITY CONSTITUTING
6 SYSTEMATIC TAKINGS OF PLAINTIFFS' INTELLECTUAL PROPERTY FOR
7 FREE UNDER THE GUISE OF THE FAIR USE DOCTRINE.

8 NOW BOTH LAW AND LOGIC, WE WOULD SUBMIT, CONDEMN AS
9 INFRINGEMENT TAKING FOR FREE IN DIGITAL FORM THE VERY SAME
10 KINDS OF MATERIAL THAT EVEN GSU ADMITS MUST BE PAID FOR IN
11 PAPER FORM.

12 IT DOESN'T SUFFICE, YOUR HONOR, THAT DEFENDANTS HAVE
13 PROMULGATED A NEW POLICY THAT PURPORTS TO FILTER THESE TAKINGS
14 THROUGH THE LENS OF THE FAIR USE DOCTRINE. THE TRIAL RECORD
15 WILL SHOW THE NEW POLICY'S UTTER INEFFECTIVENESS IN MODIFYING
16 PAST PRACTICE. RAMPANT INFRINGEMENT CONTINUES LARGELY UNABATED
17 INCLUDING WITH RESPECT TO JOINT FILING WORKS THAT WERE
18 IDENTIFIED IN OUR AMENDED COMPLAINT. SO THAT A NUMBER OF WORKS
19 ORIGINALLY IDENTIFIED STILL SHOW UP SEMESTER AFTER SEMESTER
20 INCLUDING IN THE JOINT FILING FOR THE THREE TERMS THAT YOUR
21 HONOR IS FAMILIAR WITH.

22 NOT A SINGLE COURT DECISION SUPPORTS GSU'S ALMOST
23 BOUNDLESS INTERPRETATION OF FAIR USE OR APPLICABLE JUDICIAL
24 PRECEDENT AS WELL AS THE TEXT AND THE LEGISLATIVE HISTORY OF
25 THE COPYRIGHT ACT LEAVE NO DOUBT THAT THE ROUTINE, UNAUTHORIZED

1 COPYING OF SIGNIFICANT PORTIONS FROM PLAINTIFFS' BOOKS FOR
2 GSU'S ONLINE COURSE READING SYSTEMS IS NOT A FAIR USE.

3 THE COURT: MY IMPRESSION IS THAT THERE REALLY AREN'T
4 ANY PUBLISHED CASES THAT NEGATIVE WHAT GEORGIA STATE IS DOING.
5 I MEAN THERE ARE A LOT OF FAIR USE CASES OUT THERE, BUT THERE
6 ARE NONE THAT ARE REALLY ON POINT IN A UNIVERSITY SETTING; DO
7 YOU AGREE WITH THAT?

8 MR. RICH: NO, YOUR HONOR, AS I'LL GET TO, THE ONLY
9 DISTINCTION WE WOULD ARGUE BETWEEN THE SO CALLED COURSEPACK
10 CASES AND THE INSTANT SETTING IS THAT THE DEFENDANTS IN THOSE
11 CASES WITH ONE EXCEPTION WERE FOR PROFIT INSTITUTIONS.

12 THE COURT: THAT'S A PRETTY MAJOR DIFFERENCE.

13 MR. RICH: IT'S A FACTOR.

14 THE COURT: BUT THAT'S NOT -- WHAT I'M SAYING IS
15 THAT'S REALLY NOT ON ALL FOURS WITH OUR SITUATION. IT SEEMS TO
16 ME WHAT HAS TO HAPPEN IN THIS CASE IS THAT A LOT OF DIFFERENT
17 FAIR USE FACTORS AND A LOT OF DIFFERENT FAIR USE CASES HAVE TO
18 BE SORT OF READ TOGETHER TO FIGURE OUT WHAT THE BOTTOM LINE IS.

19 MR. RICH: THERE'S NO DOUBT ABOUT IT, AND WE'VE
20 ATTEMPTED TO ASSIST, YOUR HONOR, WITH OUR MULTIPLE FILINGS AND
21 MOST RECENTLY OUR PROPOSED CONCLUSIONS OF LAW, BUT WE WOULD
22 ASSERT THAT FACTUALLY, LEGALLY AND IN TERMS ALL IMPORTANTLY OF
23 IMPACT ON OUR CLIENTS, YOU'LL HEAR FROM OUR PLAINTIFFS, THE
24 IMPACT OF THE PAPER COURSEPACK PROCESS IS NO DIFFERENT IN ITS
25 THREATENED NEGATIVE IMPACT ON THE CLIENTS, AND THAT'S A

1 CRITICAL ANALOGIZING FACT TO THOSE CASES, AND I WILL DISCUSS
2 THAT A BIT MORE AS I PROCEED.

3 THE COURT: WHEN I WAS LOOKING QUICKLY THROUGH THE
4 PRETRIAL ORDER, I NOTICED THERE WAS AN EXHIBIT THAT I THINK WAS
5 SUPPOSED TO SHOW HOW MANY HITS THERE WERE ON THE GEORGIA STATE
6 SYSTEM THAT DOWNLOAD THESE MATERIALS --

7 MR. RICH: YES, THE ERES REPORT.

8 THE COURT: -- BUT I COULDN'T FIGURE OUT WHAT THE
9 PERCENTAGES MEANT. COULD YOU ELABORATE ON THAT?

10 MR. RICH: WELL THE HITS BASICALLY MEAN ANY TIME
11 SOMEBODY, MOST OFTEN A STUDENT WE PRESUME, WOULD ACCESS THE
12 MATERIAL MEANING AT A MINIMUM THAT REQUIRED CALLING UP THE
13 MATERIAL FOR A DISPLAY --

14 THE COURT: I'M TALKING ABOUT THE PERCENTAGES. LIKE
15 THERE WAS ONE PERCENTAGE .02 PERCENT, I DON'T KNOW WHAT THAT
16 MEANT.

17 MR. RICH: I'M NOT SURE EXACTLY WHAT YOUR HONOR HAD
18 IN MIND. I'M HAPPY TO LOOK AT WHATEVER EXHIBIT YOU'D LIKE AND
19 WE CAN TRY AND WORK THAT THROUGH AND CLARIFY IT.

20 THE COURT: THAT'S ALL RIGHT. WE CAN GET TO IT
21 LATER, BUT IT JUST CAUGHT MY EYE AND I WONDERED WHAT IT MEANT.

22 MR. RICH: THANK YOU. YOUR HONOR, PLAINTIFFS WHO ARE
23 LEADING ACADEMIC PUBLISHERS RELY ON INCOME FROM SALES OF THEIR
24 BOOKS AND JOURNALS PARTICULARLY AT COLLEGES AND UNIVERSITIES
25 WHICH IS THEIR LARGEST MARKET, THAT'S STIPULATED, TO ENABLE

1 THEM TO CONTINUE TO PUBLISH HIGH QUALITY SCHOLARLY WORKS. THAT
2 ENTIRE STATEMENT IS STIPULATED IN THE RECORD. ALSO AS
3 STIPULATED, ACADEMIC PUBLISHERS PLAY AN IMPORTANT ROLE IN
4 HIGHER EDUCATION.

5 THE COURT WILL HEAR TESTIMONY AS TO THE CRITICAL
6 SUPPORT PUBLISHERS LIKE OUR PLAINTIFFS PROVIDE TO INSTITUTIONS
7 OF HIGHER LEARNING LIKE GSU IN FULFILLING THEIR EDUCATIONAL
8 MISSION AS WELL AS TO FACULTY AT THESE INSTITUTIONS WHOSE
9 AUTHORSHIP OF HIGH QUALITY SCHOLARLY PUBLICATIONS HELPS TO
10 ADVANCE THEIR CAREERS.

11 THE WORKS PUBLISHED BY THE PLAINTIFFS PROVIDE THE
12 INTELLECTUAL FUEL THAT SPARKS AND FEEDS THE FIRE OF LEARNING IN
13 COLLEGE CLASSROOMS, WHETHER IN THE STUDY OF SCIENCE OR SOCIAL
14 SCIENCE, HUMANITIES OR THE LIKE. PLAINTIFFS RIGOROUS SCREENING
15 OF SCHOLARLY WORKS FOR THEIR QUALITY AND CONTRIBUTIONS TO THEIR
16 FIELDS CREDENTIAL THE AUTHORS OF THOSE WORKS. IT ASSISTS
17 YOUNGER FACULTY IN TENURE DETERMINATIONS. IT BURNISHES THE
18 CREDENTIALS OF MORE SENIOR SCHOLARS.

19 PLAINTIFFS' PUBLISHING EFFORTS ARE COST INTENSIVE.
20 AS STIPULATED THE HIGH QUALITY OF THEIR WORK IS DIRECTLY
21 ATTRIBUTABLE TO THEIR INVOLVEMENT IN EVERY ASPECT OF THE
22 PUBLISHING PROCESS, AND YOU'LL HEAR A LOT MORE ABOUT IT.

23 AS MR. PFUND OF OXFORD UNIVERSITY PRESS WILL TESTIFY
24 THERE'S A MUTUALLY BENEFICIAL WHAT HE LIKES TO CALL ECOSYSTEM
25 THAT EXISTS BETWEEN SCHOLARLY PUBLISHING AND ACADEMIC

1 DEPARTMENTS. EACH CONTRIBUTES TO THE SUCCESS OF THE OTHER ALL
2 TO THE BENEFIT OF THE PUBLIC INTEREST IN THE CREATION AND
3 DISSEMINATION OF THE SCHOLARSHIP ON WHICH SCHOOLS LIKE GSU
4 DEPEND.

5 THERE'S ALSO A VERY FRAGILE ECOSYSTEM, YOUR HONOR.
6 IT CAN BE PROFOUNDLY DISRUPTED TO THE EXTENT THAT FACULTY FEEL
7 THEY'RE FREE TO COPY OR DISTRIBUTE WORKS OF SCHOLARLY
8 PUBLISHERS WITHOUT PURCHASE OR PAYMENTS OF PERMISSIONS FEES.

9 IN THE END WE WOULD SUBMIT THE DEFENDANTS' POSTURE AS
10 TO COPYRIGHT LAW OBLIGATIONS ON THEIR PART IS IRONIC AND
11 SHORTSIGHTED. GSU IS A RESEARCH UNIVERSITY. BY DEPRIVING
12 PLAINTIFFS OF REVENUE WHICH AS STIPULATED THEY RELY ON AND
13 WHICH AGAIN BY STIPULATION PLAY AN IMPORTANT ROLE IN THE HIGHER
14 EDUCATION PROCESS, GEORGIA STATE EFFECTIVELY UNDERMINES ITS
15 ABILITY TO CARRY OUT ITS TEACHING MISSION AND DEVELOP AND
16 MAINTAIN FACULTY WHO ARE LEADING SCHOLARS IN THEIR FIELDS.

17 NOW THE LAWSUIT, AS YOUR HONOR IS FULLY AWARE,
18 CENTERS AROUND THE SO-CALLED ERES AND ULEARN SYSTEMS AS USED TO
19 PROVIDE COURSE READINGS TO STUDENTS. THE SYSTEMS HAVE BEEN IN
20 PLACE FOR A NUMBER OF YEARS, BUT THE ACCELERATED RELIANCE ON
21 THOSE SYSTEMS IS WHAT OCCASIONED THE BRINGING OF THE LAWSUIT
22 WHEN IT WAS BROUGHT IN 2008.

23 NOW BY THESE SYSTEMS GSU FACULTY SELECT COURSE
24 READING MATERIALS FOR ENTIRE CLASSES OF STUDENTS. THEY TAKE A
25 SINGLE COPY EITHER IN THEIR OWN POSSESSION OR IN THE LIBRARY'S

1 COLLECTION AND IN THE CASE OF ERES HAVE THE LIBRARY SCAN WHICH
2 MEANS MAKE A COPY FOR COPYRIGHT LAW PURPOSES OF THE MATERIALS,
3 UPLOAD THE COPIES TO A GSU COMPUTER SERVER CREATING ANOTHER
4 COPY, CREATE ONLINE COURSE PAGES THROUGH WHICH THESE SINGLE
5 COPIES ARE THEN MULTIPLY DISTRIBUTED TO STUDENTS, AND IN THE
6 CASE OF ULEARN FACULTY THEMSELVES UPLOAD AND THEREFORE MAKE
7 COPIES OF THESE WORKS ONTO COURSE SPECIFIC ULEARN WEBPAGES
8 HOSTED ON A SERVER OWNED BY THE UNIVERSITY SYSTEM OF GEORGIA
9 AND LICENSED BY GSU.

10 NOW IN EITHER CASE STUDENTS RECEIVE COPIES OF THE
11 WORKS WHICH ARE DISPLAYED ON THEIR OWN COMPUTERS, CAN BE
12 DOWNLOADED TO THEIR COMPUTER HARD DRIVES AND PRINTED IN EACH
13 CASE CREATING PERMANENT ADDITIONAL COPIES.

14 THE TESTIMONY WILL SHOW IN ADDITION, YOUR HONOR, THAT
15 MANY STUDENTS BRING PHYSICAL PRINTOUTS OF THESE MATERIALS TO
16 THEIR COURSES OFTEN AS REQUESTED BY FACULTY MEMBERS. NONE OF
17 THE FACTS I'VE JUST CITED AS TO THESE MECHANICS ARE CONTESTED.
18 THEY'RE ALL IN THE STIPULATIONS.

19 NOW THE FOREGOING ACTIVITIES IMPLICATE AT LEAST THREE
20 EXCLUSIVE RIGHTS OF COPYRIGHT, YOUR HONOR, UNDER SECTION 106 OF
21 THE COPYRIGHT ACT. 106(1) GIVES THE COPYRIGHT OWNER THE RIGHT
22 TO REPRODUCE AND COPIES THE ORIGINAL WORK. 106(3) OF THE ACT
23 TO DISTRIBUTE COPIES TO THE PUBLIC, AND 106(5) TO MAKE A PUBLIC
24 DISPLAY. ALL OF THOSE ARE IMPLICATED.

25 FOCUSING SOLELY ON THE THREE ACADEMIC TERMS THE COURT

1 HAS ORDERED THAT SHOULD SERVE AS REPRESENTATIVE OF ONGOING
2 PRACTICE NOT A SINGLE SUCH COPY, DISTRIBUTION OR DISPLAY OF THE
3 MORE THAN 60 OR SO PLAINTIFFS' WORKS SO UTILIZED HAVE BEEN
4 AUTHORIZED BY THEM AS THE COPYRIGHT OWNER.

5 NOW WHAT ARE WE LOOKING AT FOR THESE THREE TERMS
6 ALONE KEEPING IN MIND THAT ONLY ONE OF THESE TERMS THE FALL OF
7 2009 WAS REALLY A FULL ACADEMIC TERM IN THE SENSE OF ITS
8 BREADTH AND TENURE? WE'RE LOOKING AT SIGNIFICANT TAKINGS BOTH
9 QUALITATIVELY AND QUANTITATIVELY. MANY PERENNIAL, WHAT OUR
10 CLIENTS WOULD CALL CANONICAL, THAT'S A MOUTHFUL OF WORKS THAT
11 FORM THE BACKBONE OF COURSE CURRICULA SEMESTER AFTER SEMESTER.

12 ALL OF THESE WORKS ARE SIGNIFICANT WORKS OF
13 SCHOLARSHIP IN THEIR FIELDS, AND THAT'S NOT SURPRISING. THAT'S
14 WHY THE FACULTY SELECT THEM IN THE FIRST PLACE. NEARLY ALL ARE
15 AT LEAST A CHAPTER IN LENGTH RANGING TO AS MANY AS EIGHT
16 CHAPTERS. AS MUCH AS 35 PERCENT OF ENTIRE WORKS APPEAR ON THE
17 JOINT FILING, AND IN THE CASE OF COPYRIGHTED CONTRIBUTIONS TO
18 COMPILATIONS, A HUNDRED PERCENT OF THOSE AUTHORS' COPYRIGHTED
19 WORKS HAVE BEEN TAKEN.

20 ACCORDING TO DEFENDANTS' OWN MATH IF YOU WERE TO JUST
21 DO A SIMPLE AVERAGE OF ALL OF IT, ALTHOUGH I DON'T KNOW THAT
22 THAT'S TERRIBLY MEANINGFUL, IT WOULD AVERAGE NEARLY 10 PERCENT,
23 9.6 PERCENT --

24 THE COURT: WHICH OF THE WORKS DO YOU RECALL THAT
25 WERE EITHER 35 PERCENT COPIED OR A HUNDRED PERCENT COPIED?

1 MR. RICH: THE 35 PERCENT WORKS THAT I HAVE IN MIND
2 APPEAR -- IT'S A CAMBRIDGE UNIVERSITY WORK THAT APPEARS IN THE
3 JOINT FILING AND WE CAN CALL IT UP AS I KEEP GOING.

4 THE COURT: OKAY.

5 MR. RICH: AND, BY THE WAY, IN ALMOST ALL CASES THESE
6 EXCERPTS AS YOU'VE READ ARE COMBINED WITH OTHER EXCERPTED
7 READINGS, AND ON THAT LIST AS MANY AS 35 COMBINE TO CREATE WHAT
8 WE WOULD CALL A DIGITAL COURSE ANTHOLOGY, AND THESE TAKINGS,
9 FINALLY, ARE ALMOST IN EVERY INSTANCE IN THE NATURE OF ASSIGNED
10 CLASSROOM READING. THESE AREN'T ANCILLARY. THEY'RE NOT
11 SUPPLEMENTAL IN THE SENSE THAT YOU MIGHT WANT TO READ IT IF YOU
12 WANT TO. THEY'RE CORE CURRICULA READING MATERIALS.

13 THE COURT: THAT IS DIFFERENT FROM MY SOMEWHAT VAGUE
14 RECOLLECTION OF WHAT'S IN THESE LISTS. I THOUGHT THAT MOST OF
15 THEM WERE -- THE ALLEGED INFRINGING EXCERPTS WERE NOT THE MAIN
16 ASSIGNMENT IN THE COURSE BUT RATHER A SUPPLEMENTAL TYPE READING
17 OR POSSIBLY A REQUIRED READING.

18 MR. RICH: YOUR HONOR, THE RECORD WILL SHOW
19 OTHERWISE, AND WE'LL HAVE CONCESSIONS FROM PROFESSORS, AND IF I
20 COULD JUST GLANCE AT A NOTE FOR A SECOND ON THIS? ONLY 38
21 PERCENT OF THE 102 CHECKLISTS THAT WERE FILLED OUT EVEN CHECKED
22 THE BOX CALLING IT FOR WHATEVER IT MEANS SUPPLEMENTAL CLASSROOM
23 READING, AND THE OVERWHELMING PERCENTAGE OF THESE INDICATED
24 THAT THESE WORKS WERE NECESSARY FOR THE TEACHING PURPOSE OF THE
25 COURSE.

1 THE COURT: BUT I'M THINKING ABOUT WHAT WAS IN THE
2 JOINT FILING, AND I THINK ONE OF THE PARTS OF THE JOINT FILING
3 CALLED FOR DESIGNATION OF WHETHER THE MATERIALS WERE
4 SUPPLEMENTAL --

5 MR. RICH: WHAT YOUR HONOR ASKED FOR AND WHAT'S
6 PROVIDED IN THE RIGHT-MOST COLUMN IS WERE THERE OTHER PURCHASED
7 TEXTBOOK TYPE MATERIALS. FOR A NUMBER OF THESE COURSES,
8 ALTHOUGH NOT ALL, THERE WERE ALSO BOOKSTORE PURCHASED
9 MATERIALS, BUT MAKE NO DOUBT ABOUT IT, I THINK THE RECORD WILL
10 BE ABSOLUTELY CLEAR ON THIS POINT, THERE MAY BE OTHER POINTS OF
11 CONTROVERSY, EACH OF THESE PROFESSORS ASSIGN THESE AS MANDATORY
12 REQUIRED ASSIGNED COURSE READINGS. THEY'RE SUPPLEMENTAL ONLY
13 IN THE SENSE THAT SUPPLEMENTAL MIGHT MEAN IN ADDITION TO OTHER
14 READING.

15 THE COURT: SO WHAT YOU'RE SAYING IS YOU'RE RELYING
16 ON TESTIMONY BESIDES WHAT'S IN THE JOINT FILING?

17 MR. RICH: ABSOLUTELY AND FROM DEPOSITIONS AND LIVE
18 TESTIMONY WILL CLARIFY THAT POINT.

19 THE COURT: ALL RIGHT.

20 MR. RICH: NOW INSTEAD OF REQUIRING STUDENTS TO
21 PURCHASE WORKS OR PAY PERMISSIONS FEES AUTHORIZING THE COPYING
22 OF THESE VARIOUS EXCERPTS AND THEIR ASSEMBLY INTO READING
23 ANTHOLOGIES, GSU HAS PERMITTED FACULTY MEMBERS TO PROVIDE
24 SIGNIFICANT PORTIONS OF THESE WORKS TO ENTIRE CLASSES OF
25 STUDENTS FOR FREE.

1 THE EFFECT OF THIS PRACTICE, YOUR HONOR, IS THAT A
2 SINGLE PURCHASED COPY OF ONE OF PLAINTIFFS' WORKS WHETHER BY
3 THE GSU LIBRARY OR BY THE INDIVIDUAL FACULTY MEMBER FULFILLS
4 THE DEMAND FOR THE WORK BY ENTIRE CLASSES OF STUDENTS, 10, 20,
5 AS MANY AS 50 OR MORE STUDENTS ON THE WORKS LISTED IN THE JOINT
6 FILING.

7 NOW GIVEN THAT THIS ACADEMIC MARKET IS PLAINTIFFS'
8 PRIMARY MARKET, IT'S NOT DIFFICULT TO DISCERN HOW THAT PRACTICE
9 UTILIZING A SINGLE PURCHASED COPY TO FULFILL THE DEMAND OF
10 COUNTLESS CLASSES OF STUDENTS SEMESTER AFTER SEMESTER AND YEAR
11 AFTER YEAR PARTICULARLY AS THE FOURTH FACTOR OF THE FAIR USE
12 ANALYSIS INSTRUCTS WERE THIS TO BECOME A NATIONAL PRACTICE
13 COULD LITERALLY DESTROY PLAINTIFFS' BUSINESS AND YOU'LL HEAR
14 TESTIMONY ON THAT.

15 SO, YOUR HONOR, GIVEN PLAINTIFFS' OWNERSHIP OF THE
16 COPYRIGHTS TO NUMEROUS OF THE WORKS INVOLVED FROM THE JOINT
17 FILING, ACTS OF COPYRIGHT INFRINGEMENT BY GSU EMPLOYEES MEANING
18 THE COPYING, DISPLAY, DISTRIBUTION FOR WHICH DEFENDANTS ARE
19 LEGALLY RESPONSIBLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR,
20 AND DEFENDANTS ACKNOWLEDGE RESPONSIBILITY AND DUTY TO ASSURE
21 THAT GSU AND ITS EMPLOYEES COMPLY WITH FEDERAL COPYRIGHT LAW,
22 PLAINTIFFS WE BELIEVE WILL AT TRIAL HAVE DEMONSTRATED THEIR
23 ENTITLEMENT TO AN INJUNCTION HALTING THE CONDUCT.

24 NOW HOW DO THEY DEFEND? THREE TYPE OF DEFENSES.
25 FIRST TRYING TO EVADE LEGAL RESPONSIBILITY ALTOGETHER. SECOND

1 BY TRYING TO WHITTLE DOWN THE NUMBER OF ASSERTED INFRINGEMENTS,
2 AND THIRD BY ASSERTING A SWEEPING FAIR USE DEFENSE.

3 LET ME TOUCH ON EACH OF THOSE VERY BRIEFLY.
4 SOVEREIGN IMMUNITY CLAIMS, STIPULATED FACTS IN THE CASE, YOUR
5 HONOR, AS WELL AS THE TRIAL TESTIMONY THAT WILL COME IN BY
6 DEPOSITION OF PRESIDENT BECKER ESTABLISHED THE NECESSARY
7 CONNECTION BETWEEN THE NAMED DEFENDANTS AND THE INFRINGING
8 ACTIVITY ARISING OUT OF FACULTY AND ADMINISTRATOR EFFORTS TO
9 IMPLEMENT THE FEBRUARY 2009 POLICY.

10 THIS RECORD MAKES CLEAR, AMONG OTHER THINGS,
11 DEFENDANTS' SUPERVISORY AUTHORITY OVER THE OPERATION AND
12 MAINTENANCE OF THE ERES SYSTEM AND THE STAFF THAT ADMINISTERS
13 IT. THAT'S STIPULATIONS 41, 44, AND 45.

14 DEFENDANTS' RESPONSIBILITY FOR THE FUNCTIONING OF
15 GSU'S ACADEMIC ADMINISTRATION INCLUDING, QUOTE, CORRECTING
16 NONCOMPLIANCE WITH FEDERAL COPYRIGHT LAW, UNQUOTE. THAT'S
17 STIPULATION 42.

18 DEFENDANTS' AUTHORITY TO ORDER THAT COPYRIGHTED WORKS
19 MAY BE DISTRIBUTED ELECTRONICALLY AT GSU, QUOTE, ONLY IF DONE
20 IN COMPLIANCE WITH POLICIES SET BY THE STATE OF GEORGIA BOARD
21 OF REGENTS, GEORGIA STATE UNIVERSITY OR A COURT-ORDERED
22 INJUNCTION, UNQUOTE. THAT'S STIPULATION 47.

23 DEFENDANTS' AUTHORITY TO DIRECT REMOVAL OF INFRINGING
24 MATERIALS AND THE CREATION OF ANY NECESSARY REPORTS TO ASSURE
25 COMPLIANCE WITH ANY COURT-ORDERED INJUNCTION. THAT'S

1 STIPULATION 49.

2 WE WOULD SUBMIT, YOUR HONOR, THAT WE NEED MAKE NO
3 MORE DETAILED SHOWING THAN THAT IN ORDER FOR THE CASE TO GO
4 FORWARD AGAINST THESE DEFENDANTS. THERE REMAIN NO TRIABLE
5 ISSUES REGARDING SOVEREIGN IMMUNITY. WHAT IS MORE UNDER BASIC
6 PRINCIPLES OF RESPONDEAT SUPERIOR AS APPLIED IN THE COPYRIGHT
7 SETTING AS THE COURT ALREADY OBSERVED IN ITS SUMMARY JUDGMENT
8 RULING, QUOTE, DEFENDANTS CANNOT ENCOURAGE INSTRUCTORS TO MAKE
9 THESE DIFFICULTY FACT-BASED DECISIONS REGARDING FAIR USE AND
10 THEN CLAIM THEMSELVES TO BE IMMUNE FROM LIABILITY AS A RESULT
11 OF FAIR USE DECISIONS. AS YOUR HONOR WROTE, THOSE DEFENDANTS
12 WHO FORMULATED THE CURRENT POLICY ARE ALSO RESPONSIBLE FOR
13 OVERSEEING ITS IMPLEMENTATION.

14 YOUR HONOR, TO YOUR EARLIER QUESTION I'VE BEEN HANDED
15 A NOTE. THE 35 PERCENT EXAMPLE IS A WORK CALLED ASSESSING
16 SPEAKING. THAT'S A CAMBRIDGE WORK AS I INDICATED, AND A
17 HUNDRED PERCENT WOULD REFER TO ANY FULL TAKING OF A CHAPTER IN
18 A COMPILATION OF WORKS; IN OTHER WORDS, WHERE EACH CHAPTER IS
19 WRITTEN BY A DISTINCT AUTHOR, AND THEREFORE LITERALLY AS TO
20 THAT AUTHOR OF COURSE THE TAKING IS A HUNDRED PERCENT OF THAT
21 AUTHOR'S WORK. I HOPE THAT CLARIFIES YOUR HONOR'S QUESTION.

22 NOW COPYRIGHT FORMALITIES. DEFENDANTS CHALLENGES TO
23 COPYRIGHT FORMALITIES NAMELY IS THEIR REGISTRATION CERTIFICATE
24 HERE, IS THERE AN ASSIGNMENT DOCUMENT THERE AND THE LIKE, THEY
25 ARE LARGELY UNFOUNDED AS YOU'LL SEE, BUT IN ANY EVENT WE WOULD

1 ARGUE THEY'RE BESIDE THE POINT FOR THE INSTANT EXERCISE.

2 THE COURT HAS DETERMINED THAT THE LEGALITY OF GSU'S
3 CURRENTLY POLICY IS TO BE TESTED BY EXAMINATION OF TAKINGS FROM
4 THE THREE TERMS IDENTIFIED BY YOUR HONOR. EVEN IF DEFENDANTS
5 WERE SUCCESSFUL IN EVERY ONE OF THEIR TECHNICAL CHALLENGES TO
6 THE JOINT FILING, WE WOULD BE LEFT WITH LITERALLY DOZENS OF
7 TAKINGS OF PLAINTIFFS' WORKS THAT WOULD REMAIN UNCHALLENGED AND
8 UNAFFECTED BY THAT.

9 THE COURT: I WOULD THINK IT WOULD BE MORE THAN THAT.

10 MR. RICH: MANY MORE. I DON'T WANT TO BELABOR THIS
11 POINT. IT SEEMS TO US THAT IT'S 50 OR 60 OR 70 --

12 THE COURT: IT'S BEEN ESTIMATED FOR MY BENEFIT IT
13 MIGHT BE AS MANY AS 80.

14 MR. RICH: YES, THAT'S ABOUT RIGHT, AND IT MAY BE
15 THAT WE'RE GOING TO DROP A FEW IN ORDER TO AVOID LENGTHY
16 CONTROVERSY OVER WHETHER THIS CERTIFICATE WAS FILED A DAY OR
17 TWO LATER. THE POINT IS THERE'S JUST PLENTIFUL EVIDENCE THERE.

18 AND WHAT'S EQUALLY IMPORTANT AND THE LAST POINT I
19 WANT TO MAKE BRIEFLY ON THIS SO AS TO MOVE THIS ALONG IS THAT
20 EVEN AS TO THOSE WORKS WHERE THERE MAY BE A TECHNICAL
21 DEFICIENCY IN TERMS OF THESE PLAINTIFFS' STANDING THAT SAYS
22 NOTHING ABOUT THE FAIR USE INQUIRY. THAT SIMPLY SAYS THAT
23 THERE MAY BE SOMEBODY ELSE PERHAPS THE AUTHOR OF THAT
24 CONTRIBUTION WHO WOULD HAVE HAD A VIABLE CLAIM THAT THERE WAS A
25 COPYRIGHT INFRINGEMENT.

1 THIS DOESN'T INFORM THE COURT'S JUDGMENT AS TO
2 WHETHER THOSE TAKINGS WHICH IS THE CENTRAL ISSUE HERE WERE
3 EXCESSIVE TAKINGS WITHIN THE MEANING OF THE FAIR USE DOCTRINE.
4 IT'S SORT OF A NARROW KIND OF AN ISSUE.

5 I ALSO WANT TO POINT OUT AS I THINK YOUR HONOR IS
6 AWARE HAVING READ THE RELEVANT CASES THAT IT'S IN THE NATURE OF
7 THESE CASES TO HAVE A SMALL SAMPLE TO TEST THE PRACTICE, AND I
8 THINK YOUR HONOR HAS APPRECIATED THAT. I'LL REMIND YOU THAT IN
9 THE BASIC BOOKS/KINKO'S CASE EIGHT PUBLISHERS BROUGHT A SUIT
10 BASED ON TWELVE REPRESENTATIVE WORKS.

11 IN THE PRINCETON UNIVERSITY CASE, WHAT WE CALL THE
12 MDS COPYING CASE, THREE PUBLISHERS BROUGHT A SUIT BASED ON SIX
13 TEST WORKS, AND THE TEXACO CASE YOUR HONOR MAY RECALL WAS ONE
14 REPRESENTATIVE JOURNAL, SOMETHING CALLED, HERE'S ANOTHER
15 MOUTHFUL, THE JOURNAL OF CATALYSIS BECAME THE TEST BED, AND
16 EVERYBODY UNDERSTOOD THESE WERE REPRESENTATIVE AND THAT ONE CAN
17 INFER FROM THAT WHETHER THERE'S A SYSTEMIC PROBLEM OR NOT, AND
18 THAT'S PRECISELY WHAT I TAKE IT YOUR HONOR IS ATTEMPTING TO DO
19 HERE.

20 NOW LOOKING AT EACH JOINT FILING WORK, YOUR HONOR,
21 THEY EACH REPRESENT THE FOLLOWING. EACH IS A SIGNIFICANT
22 TAKING FROM AN ORIGINAL WORK THAT IMPLICATES THE EXCLUSIVE
23 RIGHTS OF THE PLAINTIFFS TO AUTHORIZE THE COPYING, DISPLAY AND
24 DISTRIBUTION OF THOSE WORKS.

25 EACH IS A TAKING INVOLVING SCANNING TO COMPUTER

1 SERVERS AND DISTRIBUTIONS OF COPIES TO ENTIRE CLASSES OF
2 STUDENTS THAT ENABLED EACH OF THOSE STUDENTS TO OBTAIN
3 PERMANENT COPIES WHICH THEY COULD AND DID DISPLAY, DOWNLOAD AND
4 PRINT.

5 EACH IS A TAKING THAT SERVED THE PURPOSE OF
6 SUBSTITUTING FOR, OF SUPERSEDING USE OF THE ORIGINALS WHETHER
7 PURCHASED BOOKS OR LICENSED EXCERPTS CONCERNING WHICH
8 SUBSTITUTION NO COMPENSATION WAS PAID TO PLAINTIFFS EITHER IN
9 THE FORM OF PURCHASES OF THE WORKS BY STUDENTS OR THE PAYMENT
10 OF PERMISSIONS FEES FOR THE USE OF THE EXCERPTS IN
11 CIRCUMSTANCES IN EACH CASE WHERE NO FACULTY OR OTHER
12 INVESTIGATION OR DETERMINATION WAS MADE AS TO THE AVAILABILITY
13 OF SUCH LICENSING AND WHERE IN FACT IN EACH CASE LICENSES WERE
14 AVAILABLE EITHER THROUGH THE PLAINTIFFS OR THROUGH THEIR AGENT
15 THE COPYRIGHT CLEARANCE CENTER.

16 THE TRIAL RECORD WILL ALSO SHOW THAT THESE EXCERPTS
17 WERE TYPICALLY ASSIGNED TO STUDENTS TOGETHER WITH OTHER BOOK
18 AND JOURNAL EXCERPTS RANGING UP TO 37 IN NUMBER CREATING
19 DIGITAL COURSE READING ANTHOLOGIES RANGING UP TO 800 OR MORE
20 PAGES IN THE CASE OF ONE OF PROFESSOR KIM'S COURSES OF WHICH
21 541 WERE FROM PLAINTIFFS' WORKS ALONE.

22 AND FINALLY IN RESPECT TO THESE WORKS, USE BY GSU
23 FACULTY OF EACH OF THOSE WORKS WAS EXPRESSLY SUBJECT TO THE
24 COPYRIGHT POLICY UNDER EXAMINATION. WE WOULD SUBMIT THAT FROM
25 THIS SAMPLE THE COURT HAS EVERYTHING IT NEEDS TO APPRAISE THE

1 LEGALITY OF GSU'S COPYRIGHT PRACTICES UNDER DEFENDANTS'
2 SUPERVISORY AUTHORITY A VERY AMPLE RECORD.

3 NOW WHAT ABOUT THE HEART OF THE CASE, YOUR HONOR, THE
4 FAIR USE DEFENSES? OUR COPYRIGHT SYSTEM, AS YOUR HONOR IS
5 AWARE, IS DESIGNED TO CREATE A STIMULUS FOR AUTHORS TO CREATE
6 AND PUBLISHERS TO PUBLISH THE WIDEST RANGE OF WORKS FOR THE
7 PURPOSE OF ADVANCING THE SPREAD OF INFORMATION AND LEARNING.
8 THAT'S IN HARPER AND ROWE AND ALL OF THE SEMINAL COPYRIGHT
9 AUTHORITY.

10 WITH RESPECT SPECIFICALLY TO SCHOLARLY PUBLISHING,
11 THE SECOND CIRCUIT -- PARDON ME, THE COURT IN PRINCETON
12 UNIVERSITY PRESS WHICH IS THE SIXTH CIRCUIT OBSERVED, QUOTE,
13 PUBLISHERS OBVIOUSLY NEED ECONOMIC INCENTIVES TO PUBLISH
14 SCHOLARLY WORKS, AND SPECIFICALLY WITH RESPECT TO PERMISSIONS
15 INCOME WHICH IS VERY MUCH AT THE HEART OF THIS CASE, THAT COURT
16 COMMONSENSICALLY ADDED, QUOTE, IF PUBLISHERS CANNOT LOOK
17 FORWARD TO RECEIVING PERMISSIONS FEES WHY SHOULD THEY CONTINUE
18 PUBLISHING MARGINALLY PROFITABLE BOOKS --

19 THE COURT: HAVE YOU ALL ESTIMATED HOW MUCH IN
20 PERMISSIONS FEES WERE LOST DURING THE THREE SEMESTERS ON
21 ACCOUNT OF THE POLICY?

22 MR. RICH: YES, WE'VE DONE THE MATH IN ONE OF THE
23 COLUMNS ON THE JOINT FILING. WHAT YOU'LL SEE, YOUR HONOR, IS
24 THAT EACH PLAINTIFF CHARGES -- I DON'T HAVE THE -- I CAN'T
25 TIE -- THERE'S A 12 CENT, 14 CENT AND 15 CENT PER PAGE CHARGE,

1 AND I CAN'T IDENTIFY WHICH IS WHICH BUT THAT WILL COME OUT AS
2 WE MOVE FORWARD, AND EACH OF THOSE WORKS -- WE HAVE A PAGE
3 COUNT, AND WE'VE DONE THE MATH BASED ON THE NUMBER OF STUDENTS
4 IN THE CLASS, AND THEREFORE WE HAVEN'T LITERALLY TOTTED THOSE
5 COLUMNS, BUT ALL THE MATH IS THERE WITH RESPECT TO EACH OF
6 THOSE COURSES, IN OTHER WORDS HAD PERMISSIONS BEEN SECURED,
7 WE'VE DONE THE MATH, AND WE HAVE 12, 14 OR 15 CENTS TIMES THE
8 NUMBER OF STUDENTS TO YIELD WHAT THAT PERMISSION FEE WOULD HAVE
9 BEEN.

10 THE COURT: BUT YOU DON'T KNOW WHAT THE TOTALS ARE?

11 MR. RICH: WE CAN RAPIDLY FIND IT, BUT FOR A GIVEN
12 WORK IT COULD BE AS LOW THREE OR FOUR DOLLARS --

13 THE COURT: NO, I'M NOT TALKING ABOUT A GIVEN WORK.
14 IT DOESN'T MATTER. I WAS JUST CURIOUS.

15 MR. RICH: WE CAN EASILY TOT THE MATH, YOUR HONOR.
16 NOW ANOTHER PRINCIPLE THAT I THINK YOUR HONOR IS GOING TO NEED
17 TO THINK ABOUT A BIT IS ONE THAT THE ELEVENTH CIRCUIT IN THE
18 GREENBERG CASE ESTABLISHED AND REAFFIRMED WHICH IS COPYRIGHT
19 LAW IS MEDIA NEUTRAL, AND BY THAT WE MEAN THAT THE APPLICATION
20 OF COPYRIGHT PRINCIPLES AND THE FAIR USE DOCTRINE DOESN'T TURN
21 ON WHETHER WE'RE LOOKING AT A COPY MADE IN A PAPER FORMAT OR AN
22 ELECTRONIC FORMAT. THE PRINCIPLES ARE THE SAME, AND A DEFENSE
23 BASED SOLELY ON WELL WE'RE PROVIDING IT IN A DIFFERENT FORMAT
24 HAS BEEN CONCLUSIVELY DETERMINED INCLUDING BY THE COURT IN
25 GREENBERG AS IMMATERIAL TO THE COPYRIGHT ANALYSIS. THAT

1 PRINCIPLE IF IT HELD TO THE CONTRARY WOULD BE BREATHTAKING IN
2 ITS IMPLICATIONS BECAUSE IT WOULD MEAN THAT ANY TRANSFORMATIVE
3 TECHNOLOGY WOULD EXCUSE WORKS THAT CLASSICALLY WOULD BE VIEWED
4 AS SUBJECT TO INJUNCTIVE RELIEF.

5 NOW, INTERESTINGLY, YOUR HONOR, GSU RECOGNIZES ITS
6 COPYRIGHT LAW OBLIGATIONS WHEN DISSEMINATING COURSE READING
7 MATERIALS TO STUDENTS IN PAPER FORMAT. THERE IS NO PROFESSOR
8 GENERATED COURSEPACK AT GSU CONTAINING EXCERPTED READING
9 MATERIALS SIMILAR TO THOSE DISSEMINATED BY ERES AND ULEARN.
10 THERE'S NONE --

11 THE COURT: I DON'T WANT TO CUT YOU OFF UNDULY, BUT I
12 THINK YOU'RE KIND OF GOING OVER THINGS THAT ARE ALREADY OBVIOUS
13 IN TERMS OF ISSUES AT THIS POINT.

14 MR. RICH: I APOLOGIZE. IS THERE ANYTHING ELSE YOU'D
15 LIKE ME TO TOUCH ON BRIEFLY?

16 THE COURT: I CAN'T THINK OF ANYTHING. I'LL HAVE A
17 LOT OF QUESTIONS AS WE GO FORWARD DURING THE TRIAL, AND I
18 INTEND TO BE SORT OF INFORMAL ABOUT THIS, AND IF I HAVE A
19 QUESTION I'LL SPEAK UP. SO THANK YOU FOR YOUR PRESENTATION.

20 MR. RICH: THANK YOU VERY MUCH.

21 THE COURT: DO YOU PRONOUNCE YOUR LAST NAME
22 SCHAETZEL?

23 MR. SCHAETZEL: JUST LIKE PRETZEL, YOUR HONOR.

24 THE COURT: THANK YOU.

25 MR. SCHAETZEL: THIS CASE, YOUR HONOR, IS A CHALLENGE

1 TO THE UNIVERSITY'S RIGHT TO CONDUCT A FAIR USE ANALYSIS IN THE
2 VERY ENVIRONMENT THE STATUTE EXPRESSLY CONTEMPLATES. 17, USC,
3 SECTION 107, THE FAIR USE OF A COPYRIGHTED WORK FOR PURPOSES
4 SUCH AS CRITICISM, COMMENT, TEACHING, SCHOLARSHIP, RESEARCH IS
5 NOT AN INFRINGEMENT OF COPYRIGHT.

6 IN THE CASES THAT HAVE BEEN DISCUSSED THUS FAR, WE
7 AGREE WITH THE COURT. THIS IS A DIFFERENT FACT PATTERN. THIS
8 IS, IF YOU WILL, NEW GROUND BECAUSE WE ARE IN THE VERY
9 WHEELHOUSE THE STATUTE ADDRESSES.

10 FOR EXAMPLE, IN TERMS OF THE CASES -- AND IF I MAY,
11 YOUR HONOR, I'LL STEP OUT OF MY OUTLINE SO THIS MAY BE A TAD
12 DISJOINTED, I'LL TAKE YOU AT YOUR INFORMAL WORD, BUT SOME OF
13 THE CASES THAT WERE ADDRESSED ABOUT USING A SMALL NUMBER OF
14 INFRINGEMENTS AND HOW THAT COULD BE APPLIED TO A GREATER WHOLE,
15 THAT WASN'T DONE IN THE CONTEXT OF A PUBLIC UNIVERSITY WITH
16 ISSUES OF SOVEREIGN IMMUNITY. THAT'S NOT AN EX PARTE ONGOING
17 AND CONTINUOUS ENVIRONMENT THAT'S BEING ADDRESSED IN THOSE
18 CASES. THEY ARE VERY DIFFERENT THAN IN WHAT IS PRESENTED TO
19 THE COURT HERE.

20 THE FAIR USE STATUTE, YOUR HONOR, TO STEP BACK INTO
21 THAT IS AN AFFIRMATIVE STATUTE. NOT ONLY DOES IT TALK ABOUT
22 CRITICISM, COMMENT, TEACHING AND SO ON, IT TELLS US HOW TO
23 CONDUCT THAT FAIR USE ANALYSIS. IT PROVIDES THE FOUR FACTORS.

24 JUMPING WAY AHEAD TO THE INJUNCTION THAT HAS BEEN
25 PROPOSED IN THIS CASE, THOSE FOUR FACTORS ARE WHOLLY ABSENT

1 FROM THE INJUNCTION. THEY'RE NOT THERE. IN THAT INJUNCTION
2 THERE IS NO EVALUATION OF THE PURPOSE AND CHARACTER OF THE
3 USE.

4 WHY IS THAT IMPORTANT? BECAUSE THE STATUTE EXPRESSLY
5 SAYS THAT IN RELATION TO THAT FIRST ITEM WE'RE TO BE LOOKING AT
6 WHETHER OR NOT THE USE IS FOR COMMERCIAL PURPOSES OR FOR
7 NONPROFIT EDUCATIONAL PURPOSES.

8 THE COURT: LET ME ASK YOU THIS. WHEN WAS THAT ADDED
9 TO THE COPYRIGHT STATUTE?

10 MR. SCHAETZEL: OFF THE TOP OF MY HEAD, YOUR HONOR, I
11 DO NOT KNOW. I'LL HAVE TO FIND OUT FOR YOU.

12 THE COURT: WAS THAT THE SAME TIME WHEN THE
13 SO-CALLED CLASSROOM GUIDELINES WERE PROMULGATED OR WHATEVER THE
14 TERM IS?

15 MR. SCHAETZEL: THE CLASSROOM GUIDELINES WERE
16 ESSENTIALLY 1976, IN THE MID 1970'S. WHEN THE STATUTE WAS
17 AMENDED I DO NOT KNOW, BUT THE CLASSROOM GUIDELINES ARE A
18 DIFFERENT ANIMAL FROM THE STATUTE COMPLETELY. THE CLASSROOM
19 GUIDELINES HAVE NEVER BEEN GIVEN THE AFFECT OF LAW, AND IN FACT
20 THAT'S ANOTHER DIFFERENCE BETWEEN THIS CASE AND THE OTHER CASES
21 THAT HAVE BEEN CITED IN THAT THIS COURT IS BEING ASKED TO
22 EFFECTIVELY GIVE THEM THAT LEVEL OF RECOGNITION.

23 THE COURT: MY IMPRESSION, AND I COULD BE WRONG ABOUT
24 THIS, IS THAT THERE IS SOME DEBATE ABOUT THE EFFICACY OF THE
25 CLASSROOM GUIDELINES. IT WAS NOT -- THEY WERE NOT ENACTED INTO

1 LAW, AND I THINK THERE MAY BE SOME CASES THAT SAY THAT.

2 MR. SCHAETZEL: I BELIEVE THAT TO BE THE CASE, YOUR
3 HONOR.

4 THE COURT: BUT THE CLASSROOM GUIDELINES WERE
5 CERTAINLY DISCUSSED AND AGREED UPON BY I THINK SOME ACADEMIC
6 PEOPLE WHO WERE FOLLOWING THE LEGISLATION, AND I ALSO HAVE THE
7 IMPRESSION THAT THE CLASSROOM GUIDELINES ARE QUITE RESTRICTIVE
8 OR A LOT MORE RESTRICTIVE THAN WHAT YOU ALL WOULD LIKE.

9 SO I GUESS ONE OF MY QUESTIONS IS DOES THAT -- SHOULD
10 I CONSIDER THOSE CLASSROOM GUIDELINES IN ANY WAY IN DECIDING
11 WHETHER GEORGIA STATE'S USE IS A FAIR USE.

12 MR. SCHAETZEL: THE CLASSROOM GUIDELINES, YOUR HONOR,
13 IN OUR VIEW ARE MUCH MORE RESTRICTIVE. TO YOUR EXACT QUESTION
14 OF SHOULD THEY BE CONSIDERED, YES, THEY CAN BE CONSIDERED, BUT
15 THEY ARE AN HISTORICAL ARTIFACT. THE LAW HAS PROGRESSED QUITE
16 A BIT SINCE 1976. AS A VERY BRIEF EXAMPLE, THE PRETTY WOMAN
17 CAMPBELL/ACUFF-ROSE CASE WAS SIGNIFICANTLY LATER INTO THE 90'S,
18 I BELIEVE.

19 SO THE CLASSROOM GUIDELINES ARE CERTAINLY THERE AND
20 THEY CAN BE CONSIDERED, BUT IT WAS, AS YOU SAY, IT WAS A
21 CONSENT AGREEMENT, IF YOU WILL, BETWEEN VARIOUS PARTIES THAT
22 WAS PLACED INTO THE LEGISLATIVE HISTORY. IT'S NOT THE CLASSIC
23 ITEM OF LEGISLATIVE HISTORY WHERE WE SEE THE DEBATE GOING BACK
24 AND FORTH ABOUT A STATUTE.

25 THE COURT: RIGHT, I THINK WHAT YOU'RE SAYING IS IT'S

1 NOT A DISCUSSION BETWEEN MEMBERS OF CONGRESS. IT'S JUST AN
2 ACADEMIC GROUP THAT WAS INTERESTED IN WHAT WAS GOING ON AND
3 WANTED TO COME TO SOME AGREEMENT OF ITS OWN.

4 MR. SCHAETZEL: EXACTLY. THE COURT MAY HEAR
5 TESTIMONY ON THIS IF IT WISHES LATER IN THAT DR. CREWS IS VERY
6 MUCH AN AUTHORITY ON THE HISTORICAL ASPECT OF THE DEVELOPMENT
7 OF COPYRIGHT LAW AND IN HIS EXPERT REPORTS THAT ARE ON THE
8 PARTY'S EXHIBIT LIST, HE PROVIDES A DISCUSSION THAT RELATES TO
9 THE CLASSROOM GUIDELINES THAT SETS THAT HISTORICAL
10 PERSPECTIVE. SO HE WILL BE ABLE TO PROVIDE TESTIMONY TO THAT
11 EFFECT.

12 THE COURT: OKAY. THANK YOU.

13 MR. SCHAETZEL: THE PROPOSED INJUNCTION, YOUR HONOR,
14 DOES NOT INCLUDE ANY PROVISION FOR ANYONE AT GEORGIA STATE
15 UNIVERSITY TO EVALUATE ANY OF THE FOUR FACTORS, EVEN THE FIRST
16 ONE THAT EXPRESSLY CONSIDERS THE IDEA OF NONPROFIT EDUCATIONAL
17 USE.

18 THE PROPOSED INJUNCTION DOES NOT INVOLVE A
19 CONSIDERATION OF THE NATURE OF THE WORK, IS IT A FACT-BASED
20 WORK, SOMETHING THAT HAS A LOT OF BIBLIOGRAPHY, SOMETHING THAT
21 HAS SIGNIFICANT QUOTES, MANY CHARTS THAT MAY HAVE COME FROM
22 OTHER AREAS OR IS IT A PIECE OF FICTION.

23 THE VAST MAJORITY OF THE WORKS BEFORE THIS COURT ARE
24 FACT-BASED WORKS, AND THAT ALTERS, THAT AFFECTS THE FAIR USE
25 ANALYSIS. THERE WILL BE TESTIMONY TO THAT AFFECT.

1 THE COURT: WELL ARE THERE ANY CASES THAT SAY THAT A
2 WORK THAT IS BASICALLY A RESEARCH WORK, A RESEARCH-BASED WORK
3 WHICH IS PREPARED FOR ACADEMIC CONSUMERS DOES NOT QUALIFY FOR
4 FAIR USE?

5 I MEAN I KNOW THERE ARE SOME CASES THAT SAY GENERALLY
6 THAT THE LESS CREATIVE A WORK IS THE MORE APT IT IS NOT TO BE
7 ENTITLED TO FAIR USE, BUT IF YOU HAVE A WORK -- THIS IS AN
8 IMPRESSION ON MY PART -- THAT THE PLAINTIFFS' WORKS ARE
9 RESEARCH-BASED WORKS, AND I REMEMBER ONE WAS ABOUT SLAVERY IN
10 THE UNITED STATES, AND MY IMPRESSION IS THE AUTHOR HAD DONE A
11 LOT OF ORIGINAL RESEARCH AND HAD COMPILED IT TO COME UP WITH
12 THIS BOOK.

13 I WOULD THINK THAT THAT TYPE OF RESEARCH EFFORT WOULD
14 NECESSARILY INVOLVE QUALITATIVE CHOICES BY THE RESEARCHER SUCH
15 THAT IT WOULD BE HARD TO SAY THAT IT'S NOT CREATIVE, EVEN
16 THOUGH IT'S CREATIVE IN A DIFFERENT WAY FROM, LET'S SAY, A POEM
17 THAT'S SOMEBODY MIGHT WRITE.

18 DO YOU HAVE ANY CASES THAT REALLY, YOU KNOW, THAT
19 HELP YOU ON CLASSIFYING A RESEARCH-BASED WORK AS BEING A FAIR
20 USE OR NOT FAIR USE?

21 MR. SCHAETZEL: YOUR HONOR, I'M NOT AWARE AND WE WILL
22 DOUBLE-CHECK BUT I'M NOT AWARE OF ANY CASE THAT SAYS SIMPLY BY
23 THE FACTOR OF THE NATURE OF THE WORK, WHETHER IT'S RESEARCH OR
24 FACT BASED, THAT THAT NECESSARILY EXCLUDES IT FROM BEING THE
25 SUBJECT OF A PROPER FAIR USE. THAT'S THE BEAUTY OF THE FOUR

1 FACTORS. THERE ARE PLENTY OF CASES THAT SAY IT IS A
2 CASE-BY-CASE ANALYSIS. IT IS NECESSARILY A FLEXIBLE ANALYSIS.

3 IT IS ALSO THE REASON WHY THE PERSON THAT IS BEST
4 ABLE TO MAKE THE FAIR USE DETERMINATION IS IN FACT THE AUTHOR
5 THAT THE COURT DESCRIBES, OR IN THE PERSPECTIVE OF THIS CASE,
6 THE PROFESSOR THAT TEACHES THE COURSE.

7 WHEN THAT PERSON DOES HIS OR HER RESEARCH TO COME UP
8 WITH THE RESEARCH WORK, THEY WILL HAVE TO MAKE CERTAIN
9 DECISIONS ABOUT WHAT CAN THEY USE FROM THAT COPYRIGHTED
10 MATERIAL THAT THEY ARE RESEARCHING. ARE THEY MAKING A FAIR USE
11 OF IT? DO THEY NEED TO GET PERMISSION FROM THAT PERSON? AS
12 THEY GO THROUGH THAT CALCULUS, ONCE THEY COMPLETE THEIR
13 MANUSCRIPT THEY THEN COME TO THE PUBLISHER AND SAY I WOULD LIKE
14 TO PUBLISH THIS.

15 THERE WILL BE TESTIMONY IN THIS CASE THAT THE
16 PUBLISHER THEN TURNS BACK TO THAT AUTHOR AND SAYS YOU HAVE TO
17 DEMONSTRATE TO ME THAT IT'S APPROPRIATE FOR ME TO NOW PUBLISH
18 THE WORK THAT YOU HAVE DONE SO THAT I DO NOT INFRINGE THE
19 COPYRIGHT OF THE THIRD PERSON FROM WHOM YOU HAVE TAKEN
20 RESEARCH.

21 THAT EXERCISE IS EXACTLY IN A LITTLE DIFFERENT
22 CONTEXT WHAT HAPPENS AT GEORGIA STATE UNIVERSITY. THE
23 PROFESSOR WILL RESEARCH VARIOUS ITEMS, WILL DECIDE WHAT
24 EXCERPTS ARE APPROPRIATE FOR USE IN THE CLASSROOM AND DECIDE
25 WHETHER OR NOT THEY NEED TO HAVE PERMISSION OR WHETHER OR NOT

1 IT'S A PROPER FAIR USE.

2 THE COURT: LET ME SWITCH A LITTLE BIT, IF I COULD?

3 MR. SCHAETZEL: PLEASE.

4 THE COURT: IT SEEMS TO ME ONE OF THE BIG QUESTIONS
5 IN THIS CASE IS GIVEN THE FACTUAL SETUP AT A SCHOOL LIKE
6 GEORGIA STATE, HOW DOES ONE WEIGHT, PROPERLY WEIGHT THE FOUR
7 FACTORS?

8 I MEAN I THINK IT'S CLEAR THAT THE FACTORS HAVE TO BE
9 CONSIDERED, BUT I THINK IT'S KIND OF UP FOR GRABS AS TO WHICH
10 FACTORS OR FACTOR ARE MORE IMPORTANT IN THIS SITUATION.

11 MR. SCHAETZEL: IT USED TO BE --

12 THE COURT: SO WHAT DO YOU HAVE TO SAY ABOUT THAT?

13 MR. SCHAETZEL: IT'S A FLEXIBLE CASE-BY-CASE
14 ANALYSIS --

15 THE COURT: YEAH BUT THAT DOESN'T GET ME WHERE I NEED
16 TO GO.

17 MR. SCHAETZEL: I UNDERSTAND, YOUR HONOR, BUT
18 UNFORTUNATELY THAT'S WHERE IT'S AT.

19 THE COURT: BUT WE HAVE TO GET THERE. TO DECIDE THIS
20 CASE, WE'VE GOT TO DECIDE WHICH OF THE FACTORS SHOULD GET MORE
21 WEIGHT, IF ANY. I GUESS YOU COULD SAY THEY'RE ALL ENTITLED TO
22 THE SAME WEIGHT, BUT TO DECIDE THIS CASE, I THINK I'VE GOT TO
23 MAKE SOME ASSESSMENT ABOUT WHICH OF THE FACTORS SHOULD BE
24 EMPHASIZED MORE.

25 MR. SCHAETZEL: AND I THINK THE LEADING CASE IN TERMS

1 OF HOW TO WEIGHT FACTORS, YOUR HONOR, FROM OUR PERSPECTIVE
2 WOULD BE THE SUPREME COURT'S CASE IN PRETTY WOMAN. BECAUSE UP
3 UNTIL THE CAMPBELL/ACUFF-ROSE CASE, WE DID ATTRIBUTE MORE
4 WEIGHT TO CERTAIN FACTORS, BUT ALONG WITH THAT CASE, THE
5 SUPREME COURT STEPPED BACK FROM THAT.

6 IN THAT CASE, FOR EXAMPLE, WE HAVE A COMMERCIAL USE
7 BEING MADE WHICH USED TO BE A VERY, VERY KEY FACTOR BUT FOUND
8 COMMERCIAL PARODY TO BE AN APPROPRIATE FAIR USE. SO --

9 THE COURT: THE PARODY CASES ARE NOT GOING TO HELP.
10 I MEAN I THINK IT'S VERY CLEAR THAT PARODY IS A PROTECTED FAIR
11 USE.

12 IT'S MORE TO ME A QUESTION OF HOW MUCH DO YOU -- HOW
13 MUCH WEIGHT TO GIVE TO THE CONSIDERATION THAT WE'RE TALKING
14 ABOUT IN AN EDUCATIONAL SETTING? HOW MUCH WEIGHT TO GIVE TO
15 THE CONSIDERATION THAT THIS IS A NONCOMMERCIAL USE? HOW MUCH
16 WEIGHT TO GIVE TO THE AMOUNT OF THE EXCERPT THAT'S COPIED, AND
17 HOW MUCH WEIGHT TO GIVE TO THE EFFECT ON THE MARKET?

18 THERE ARE SOME CASES I THINK THAT SAY THAT AFFECT ON
19 THE MARKET IS THE MOST IMPORTANT CONSIDERATION.

20 MR. SCHAETZEL: THAT USED TO BE, BEFORE I THINK THAT
21 THAT WAS A VERY KEY FACTOR ESPECIALLY BEFORE THE PARODY CASE IN
22 CAMPBELL. I CERTAINLY AGREE WITH THAT.

23 THE COURT: REMIND ME, I DO RECALL THE MOVIE PRETTY
24 WOMAN, BUT I DON'T SPECIFICALLY REMEMBER WHAT THE SUPREME COURT
25 SAID IN IT.

1 MR. SCHAETZEL: UNFORTUNATELY THE SUPREME COURT DID
2 NOT APPEAR IN THE MOVIE PRETTY WOMAN, BUT IN THE CASE THE
3 GENERAL BACKGROUND IS THAT THE RAP ARTIST LUTHER CAMPBELL AND
4 HIS GROUP WANTED TO USE SOME OF THE FAMOUS ROY ORBISON SONG.
5 THEY ASKED PERMISSION TO USE IT. THAT PERMISSION WAS DENIED,
6 AND THE CASE WORKED IT'S WAY THROUGH THE SIXTH CIRCUIT AND THEN
7 UP TO THE SUPREME COURT WHERE THE SUPREME COURT FOUND THAT EVEN
8 THOUGH, YOU KNOW, IT WAS, IF YOU WILL, A COMMERCIAL USE, A
9 SUBSTANTIAL TAKING THAT IT WAS STILL NONETHELESS FAIR USE.

10 THE COURT: BECAUSE IT WAS A PARODY.

11 MR. SCHAETZEL: YES, IT'S A COMMERCIAL PARODY, THAT'S
12 CORRECT.

13 BUT TO YOUR QUESTION OF HOW MUCH TO WEIGHT A GIVEN
14 FACTOR, THE STATUTE BY ITSELF JUST STANDING ALONE IDENTIFIES
15 SEVERAL AREAS THAT IT LISTS, IF YOU WILL, AS CRITICAL. THE
16 FAIR USE OF A COPYRIGHTED WORK FOR PURPOSES SUCH AS CRITICISM,
17 COMMENT, TEACHING, SCHOLARSHIP AND RESEARCH. BY VIRTUE OF
18 THEIR INCLUSION IN THE STATUTE, YOUR HONOR, WE WOULD SUBMIT
19 THAT THOSE FACTORS ARE TO RECEIVE THE UTMOST WEIGHT. THAT'S
20 WHY THEY'RE IN THE STATUTE.

21 THE COURT WILL HEAR TESTIMONY FROM CERTAIN PEOPLE WHO
22 WERE INVOLVED IN THE CREATION AND ADOPTION OF THE GEORGIA STATE
23 2009 OR THE UNIVERSITY SYSTEM OF GEORGIA 2009 POLICY.

24 A COUPLE OF QUICK POINTS. THEY WILL BE PEOPLE, YOUR
25 HONOR, OF SUBSTANCE. THEY WILL BE PEOPLE WHO ARE CAREFUL.

1 THEY WILL BE DR. WILLIAM POTTER WHO IS THE UNIVERSITY LIBRARIAN
2 AND THE ASSOCIATE PROVOST AT THE UNIVERSITY OF GEORGIA. DR.
3 NAN SEAMANS WHO IS THE DIRECTOR OF LIBRARIES AT GEORGIA STATE
4 UNIVERSITY.

5 THEY ARE PEOPLE WHO MAKE A LIVING BASED UPON
6 COPYRIGHTED WORKS, AND BY THAT THEY ARE ON BOTH SIDES OF THE
7 COIN. THEY ARE NOT MERELY PROFESSORS WHO LOOK AT WORKS, DECIDE
8 WHAT EXCERPTS ARE APPROPRIATE AND THEN IMPART KNOWLEDGE.
9 THAT'S A SIGNIFICANT PART OF THEIR JOB WITHOUT QUESTION.

10 THEY ARE ALSO IN THEIR OWN RIGHT AUTHORS. THEY'RE
11 PH.D. PEOPLE. THEY HAVE PUBLISHED ON THEIR OWN. THEY'VE COME
12 TO THE DISCUSSION WITH A VERY UNIQUE PERSPECTIVE. THEY DON'T
13 HAVE ANY INTENT TO HURT OTHER AUTHORS BECAUSE THEY KNOW THEY'LL
14 WALK THOSE MILES IN THOSE SHOES. THEY ARE VERY CONCERNED ABOUT
15 BEING RESPECTFUL, AND THE POLICY WAS CRAFTED WITH THAT IN
16 MIND. THAT POLICY INCLUDES SEVERAL POINTS, SEVERAL THINGS THAT
17 NEED TO BE ADDRESSED IN THE COURSE OF THIS TRIAL, AND THERE
18 WILL BE TESTIMONY ON THAT.

19 FIRST OF ALL AS MR. RICH SAID, THERE HAS TO BE A COPY
20 OF THE WORK, A LAWFUL COPY OF THE WORK. IF SOMEONE COMES TO
21 THE LIBRARY AND SAYS I HAVE THESE PHOTOCOPIED PAGES, WOULD YOU
22 PLEASE PUT THESE ON ERESERVES, THE LIBRARY STAFF IS TRAINED TO
23 SAY NO, WE NEED TO KNOW THAT WE HAVE A VALID COPY OF THE WORK,
24 THE ENTIRE WORK.

25 IT'S A RESTRICTED ACCESS POLICY. IT'S A POLICY THAT

1 SAYS NOT EVERYONE CAN GO AND GET ONTO ERES. IF I'M TAKING
2 HISTORY AND YOUR HONOR IS TAKING PHILOSOPHY, I CAN'T SEE THE
3 ERES POSTINGS IN YOUR PHILOSOPHY CLASS.

4 IT'S A POLICY THAT HAS THE RED FLAG REVIEW THAT THE
5 COURT IS AWARE OF, AND THERE WILL BE CONVERSATION ABOUT THAT.
6 IT'S A POLICY THAT REVIEWS ACCESS TO THE WORKS AT THE END OF
7 EACH SEMESTER. IT'S A POLICY THAT SAYS NO CHARGE.

8 THE COURT ASKED FOR EXAMPLE WHAT'S THE APPROXIMATE
9 AMOUNT OF REVENUE THAT WE'RE TALKING ABOUT HERE. BY OUR COURT
10 SUBJECT TO WHAT WE HEAR IN THE COURTROOM, IT'S APPROXIMATELY
11 7,000 DOLLARS. IT'S NOT A LOT OF MONEY.

12 THE COURT: YOU MEAN IF PERMISSIONS FEES HAD BEEN
13 PAID FOR EACH STUDENT ENROLLED IN EACH OF THE COURSES?

14 MR. SCHAEZEL: ON THE JOINT FILING, YES, MA'AM, JUST
15 RUNNING THE NUMBERS, DOING THE MATH AS MR. RICH SAID, WE CAME
16 UP WITH APPROXIMATELY 7,000 DOLLARS.

17 THE POLICY ALSO INCLUDES THE FAIR USE CHECKLIST, AND
18 THAT IS, OF COURSE, THE CENTERPIECE OF THAT POLICY. THERE WILL
19 BE TESTIMONY THAT THE COMMITTEE REALIZED THAT OTHERS IN THE
20 ACADEMIC COMMUNITY WERE USING A CHECKLIST.

21 GEORGIA STATE UNIVERSITY IS NOT AN OUTLIER. THEY
22 WEREN'T THE FIRST ONES TO GO OUT AND USE A CHECKLIST. IT WAS
23 ALREADY BEING USED IN VARIOUS ACADEMIC INSTITUTIONS. IT WAS
24 ALSO BEING USED BY AN UNNAMED PARTY TO THIS LITIGATION, THE
25 COPYRIGHT CLEARANCE CENTER.

1 THIS IS A COPY OF THE FAIR USE CHECKLIST THAT WAS ON
2 THE COPYRIGHT CLEARANCE CENTER'S WEBSITE FOR SOME PERIOD OF
3 TIME. INTERESTINGLY ENOUGH IT BEARS A COPYRIGHT NOTICE OF 2008
4 TO THE COPYRIGHT CLEARANCE CENTER. IT'S BASED BY ITS TERMS ON
5 THE WORK OF DR. CREWS WHO IS THE EXPERT FOR THE UNIVERSITY IN
6 THIS CASE.

7 IT SAYS BASED ON THE FOUR FACTORS OF FAIR USE,
8 PURPOSE, NATURE, AMOUNT AND AFFECT, THE CHECKLIST WAS CREATED
9 TO HELP EDUCATORS, LIBRARIANS AND OTHERS EVALUATE CONTENT USES
10 TO DETERMINE IF FAIR USE APPLIES.

11 THE COURT: I THINK IT'S A FAIR POINT MADE BY THE
12 PLAINTIFFS THAT IT'S PRETTY TOUGH FOR INSTRUCTORS AND
13 PROFESSORS TO MAKE THESE DETERMINATIONS. I MEAN LAWYERS AND
14 JUDGES HAVE A VERY HARD TIME WITH FAIR USE DETERMINATIONS.

15 NOW I DON'T KNOW WHOSE SIDE THIS FAVORS, BUT IT'S
16 OCCURRED TO ME THAT IT WOULD BE IMPOSSIBLE TO COME UP WITH ANY
17 SYSTEM THAT WOULD SATISFY EVERYBODY.

18 MR. SCHAETZEL: WE CERTAINLY AGREE, YOUR HONOR, THAT
19 NO POLICY IS PERFECT.

20 THE COURT: IT'S NOT JUST A -- I THINK WHAT I'M
21 SAYING IS I DON'T SEE HOW YOU CAN COME UP WITH PERFECT POLICY
22 IF IT'S GOING TO BE APPLIED BY HUMAN BEINGS, ESPECIALLY THOSE
23 WHO DON'T HAVE LAW DEGREES.

24 MR. SCHAETZEL: WE CERTAINLY AGREE, YOUR HONOR, THAT
25 IT IS DIFFICULT, AND WITHOUT QUESTION THAT'S ONE OF THE

1 PLAINTIFFS' BIG ARGUMENTS, IF YOU WILL. THEY WANT TO ARGUE
2 THAT IT'S NOT RIGHT FOR THE PROFESSOR TO DO THAT. THAT THE
3 PROFESSORS IS UNABLE, LACKS THE REQUISITE SKILLSET --

4 THE COURT: I'M NOT SAYING THAT I THINK THE REGENTS
5 COULD DO IT EITHER. LET'S BE REAL ABOUT THIS. IT'S VERY HARD
6 TO MAKE FAIR USE DETERMINATIONS.

7 MR. SCHAETZEL: IT IS AND THAT DIFFICULTY IS
8 REFLECTED IN THE CHECKLIST THAT WAS PREPARED BY THE COMMITTEE.
9 FOR EXAMPLE, TO JUST PICK ONE, IN THE COPYRIGHT CLEARANCE
10 CENTER FAIR USE CHECKLIST THE AMOUNT TAKEN, THERE WAS ONE
11 LISTED AMOUNT IS APPROPRIATE FOR FAVORED EDUCATIONAL PURPOSE.
12 THAT IF YOU CHECK THAT BOX WAS IN FAVOR OF FAIR USE. THE
13 COMMITTEE LOOKED AT THAT RECOGNIZING THAT PROFESSORS HAD TO
14 MAKE DIFFICULT DECISIONS WANTED TO ENCOURAGE THOUGHTFUL
15 DECISIONS.

16 LOOK AT FACTOR 3 THERE, THE AMOUNT TAKEN IS NARROWLY
17 TAILORED TO THE EDUCATIONAL PURPOSE SUCH AS CRITICISM, COMMENT,
18 RESEARCH OR THE SUBJECT BEING TAUGHT AS OPPOSED TO THE AMOUNT
19 TAKEN IS MORE THAN NECESSARY FOR CRITICISM, COMMENT, RESEARCH
20 OR SUBJECT BEING TAUGHT. BY HAVING TO WORK THROUGH THAT
21 CALCULUS THE PROFESSOR IS GETTING HELP FROM THE CHECKLIST TO
22 MAKE THE DIFFICULT DETERMINATION.

23 THE COMMITTEE FELT THAT ITS CHECKLIST WAS MORE
24 THOUGHTFUL AND MORE BALANCED IN THAT IT TRIED TO FORCE THE
25 PROFESSOR TO WORK THROUGH THOSE TYPES OF CONSIDERATIONS. IS IT

1 DIFFICULT? YES, MA'AM, IT'S DIFFICULT.

2 THE COURT: LET ME ASK YOU THIS. I'M NOT SUGGESTING
3 TO YOU THAT I'VE DECIDED TO DO THIS AND I REALLY HAVEN'T GIVEN
4 IT MUCH THOUGHT AT ALL, BUT IF I WERE TO DECIDE THAT THE
5 PLAINTIFFS' REMEDY IS TO SUE THE PROFESSORS AND THE
6 INSTRUCTORS, FORGET ABOUT THE REGENTS AND THE PRESIDENT OF THE
7 SCHOOL, IN YOUR OPINION WOULD THE INSTRUCTORS AND PROFESSORS BE
8 ENTITLED TO CLAIM THE SOVEREIGN IMMUNITY DEFENSE?

9 MR. SCHAETZEL: I'D LIKE THE CHANCE TO THINK ABOUT
10 THAT, YOUR HONOR. I DON'T KNOW OFF THE TOP OF MY HEAD.

11 THE COURT: OKAY.

12 MR. SCHAETZEL: A COUPLE OF ADDITIONAL POINTS ON
13 TIMING, YOUR HONOR. THE COURT HAS, WE BELIEVE, APPROPRIATELY
14 DIRECTED US TO THOSE FIRST THREE ACADEMIC TERMS IN 2009
15 FOLLOWING ADOPTION OF THE POLICY. THE POLICY WAS ADOPTED IN
16 FEBRUARY OF 2009. THE TERMS ARE MAY, FALL -- MAY, SUMMER AND
17 FALL OF 2009. AT THAT POINT IN TIME, THE UNIVERSITY
18 COMMUNITY WAS LEARNING AND IMPLEMENTING THE POLICY ALL AT THE
19 SAME TIME.

20 IN ADDITION TO THE FACT THAT IT'S DIFFICULT TO CRAFT
21 THE PERFECT POLICY, IF IT CAN BE DONE, IT'S DIFFICULT TO
22 IMPLEMENT POLICY WHILE YOU'RE LEARNING IT.

23 SO ARE THERE INSTANCES THAT THE COURT WILL HEAR ABOUT
24 OVER THE NEXT FEW DAYS WHERE THINGS WEREN'T PERFECT? YES,
25 WITHOUT QUESTION, BUT THE CONTEXT WAS THAT WE WERE CLIMBING THE

1 LEARNING CURVE, WE WERE WORKING OUR WAY THERE, AND EVEN IN THAT
2 ENVIRONMENT THE COURT ASKED ABOUT PERCENTAGES.

3 I HAVE ONE LAST CHART. I DO NOT FOR A SECOND THINK
4 ANY OF US COULD READ ALL OF THESE.

5 THE COURT: I CAN VERIFY I CAN'T READ IT.

6 MR. SCHAETZEL: THIS IS A LIST OF ALL THE 99 WORKS
7 THAT ARE ON THE JOINT FILING OF MARCH 15TH. WHAT WE'VE DONE IS
8 TO USE THE PLAINTIFFS' CALCULATION OF PAGES. THERE ARE SOME
9 DIFFERENCES OF OPINION ABOUT THAT, WHAT ARE YOU GOING TO COUNT
10 AS TOTAL NUMBER OF PAGES IN A WORK.

11 THE COURT: YOU ALL COUNTED EVERYTHING FROM THE FIRST
12 PAGE, LITERALLY THE FIRST PAGE IN THE BOOK TO THE END WHICH
13 WOULD INCLUDE THE INDEX --

14 MR. SCHAETZEL: EVERY PAGE THAT WOULD HAVE BEEN
15 NUMBERED.

16 THE COURT: -- TABLE OF CONTENTS.

17 MR. SCHAETZEL: YES, BECAUSE THAT'S WHAT WAS FILED
18 AND CLAIMED AS THE COPYRIGHTABLE ITEM WITH THE COPYRIGHT.

19 THE COURT: RIGHT.

20 MR. SCHAETZEL: THE MEDIAN MEANING HALF OF THE
21 LISTINGS ARE ABOVE THIS AND HALF ARE BELOW, USING THEIR NUMBERS
22 7.6 PERCENT AS THE AMOUNT TAKEN. AS MR. RICH JUST SAID IF YOU
23 TAKE AN AVERAGE OF ALL OF THEM, IT COMES OUT BY OUR CALCULATION
24 TO ABOUT 9.6 PERCENT.

25 WHY ARE THOSE NUMBERS IMPORTANT? IF WE GET BACK TO

1 THE PROPOSED INJUNCTION BY THE PLAINTIFFS, IT ESSENTIALLY
2 DISTILLS THE FOLLOWING ITEMS. FIRST, WE AT GEORGIA STATE
3 UNIVERSITY DON'T GET TO MAKE COPIES OF ANYTHING. WE ARE
4 ENJOINED UNLESS, ONE, WE GET PERMISSION THROUGH THE COPYRIGHT
5 CLEARANCE CENTER OR OTHERWISE, OR WE GO BACK TO THE 1976
6 CLASSROOM GUIDELINES, AND IT'S A SPONTANEOUS, SHORT -- IT'S
7 CALLED THE BREVITY REQUIREMENT -- IT'S A SPONTANEOUS, BRIEF
8 FLASH OF GENIUS, IF YOU WILL, THAT COMES TO THE PROFESSOR WHO
9 SAYS I WANT TO USE THAT, AND THAT PROFESSOR COPIES NO MORE THAN
10 10 PERCENT. THAT'S IN THEIR PROPOSED INJUNCTION.

11 SO IF WE LOOK AT THESE NUMBERS, JUST FOCUSING ON THE
12 NUMBERS, SET ASIDE THE CLASSROOM GUIDELINES PORTION OF IT, JUST
13 FOCUSING ON THE NUMBER 10 PERCENT, THAT MEANS THE FIRST
14 APPROXIMATE TWO-THIRDS OF THESE WOULD BE BELOW THAT 10 PERCENT
15 THRESHOLD, AND THE AVERAGE OF ALL OF THEM, NOW THAT NEEDS --

16 THE COURT: BUT IT WOULD BE HARD FOR YOU TO MEET THAT
17 SPONTANEITY REQUIREMENT, WOULDN'T IT?

18 MR. SCHAETZEL: THERE WILL BE TESTIMONY THAT THE
19 PROPOSED INJUNCTION IS ESSENTIALLY NOT WORKABLE IN THE ACADEMIC
20 ENVIRONMENT. YES, IT WOULD BE VERY DIFFICULT, AND THE
21 RECORDKEEPING ALONE THAT'S REQUIRED BY THE PROPOSED INJUNCTION
22 WOULD BE INCREDIBLY ONEROUS, BUT THERE IS YET ADDITIONAL
23 CONTEXT THAT NEEDS TO BE GIVEN TO THIS.

24 AS THE COURT NOTED IN THE SEPTEMBER 30 ORDER, WHEN
25 THIS CASE WAS FIRST FILED THERE WAS TALK OF MASSIVE AMOUNTS OF

1 COPYING, VAST AMOUNTS OF WORKS. THAT'S WHAT WE HEARD AGAIN
2 THIS MORNING IN MR. RICH'S OPENING.

3 WHEN WE GOT TO THE SUMMARY JUDGMENT STAGE, WE BELIEVE
4 THAT THERE WERE APPROXIMATELY 30 OR 35 WORKS AT ISSUE. IN
5 RESPONSE TO OUR MOTION FOR SUMMARY JUDGMENT, WE GOT A REPLY
6 THAT SAID WELL, NO, WE'RE LOOKING AT APPROXIMATELY 270 WORKS.

7 WHEN WE GOT FOCUSED AFTER THE SEPTEMBER 30 ORDER ON
8 THE RELEVANT TIME PERIOD MEANING AFTER FEBRUARY OF 2009 AND WE
9 MET IN YOUR OFFICE IN NOVEMBER, WE WERE DOWN TO ABOUT 125 WORKS
10 AND ROUGHLY 50 PROFESSORS. WE THEN GOT TO MARCH 15 AND WE'RE
11 LOOKING AT 99 WORKS AND APPROXIMATELY 33 PROFESSORS. IN THE
12 PRETRIAL BRIEF AS YOUR HONOR NOTICED THERE'S SOMETHING NOW OF
13 MORE THAN 80 WORKS.

14 WHAT THAT SHOWS IS NOT ONGOING AND CONTINUOUS MASSIVE
15 COPYING OF VAST AMOUNTS OF COPYRIGHTED WORKS. IT SHOWS THAT
16 OVER THREE TERMS WHERE THE UNIVERSITY IS TEACHING THOUSANDS OF
17 CLASSES, YOU HAVE MORE THAN A THOUSAND PROFESSORS, HUNDREDS OF
18 ADJUNCT PROFESSORS THAT WE'RE TALKING ABOUT ROUGHLY 30 ALLEGED
19 ACTS OF INFRINGEMENT A TERM ON AVERAGE, AND SOMETHING ON THE
20 ORDER OF ALL THREE OF THEM 25 TO 30 PROFESSORS.

21 OF THOSE PROFESSORS IF WE LOOK, FOR EXAMPLE, THERE
22 WAS REFERENCE TO THE LARGEST ONE WHICH IS AS WAS NOTED 35.6
23 PERCENT ASSESSING SPEAKING, THAT'S PROFESSOR KIM. IF WE LOOK
24 AT THREE PROFESSORS PROFESSOR KIM, PROFESSOR ORR AND PROFESSOR
25 MURPHY, THOSE THREE PROFESSORS ALONE ARE RESPONSIBLE FOR MORE

1 THAN 30 OF THE EXCERPTS ON THIS LIST.

2 SO OF THOSE THOUSANDS OF PROFESSORS AND THOSE
3 HUNDREDS OF ADJUNCT PROFESSORS, WHEN WE START LOOKING SYSTEM
4 WIDE IT'S REALLY NOT A VERY LARGE NUMBER. IT CERTAINLY IS NOT
5 INDICATIVE OF A POLICY RUN AMOCK. IT'S NOT A POLICY THAT'S
6 ENCOURAGING INFRINGEMENT. IT'S A POLICY THAT'S DISCOURAGING
7 INFRINGEMENT. THEREFORE, WE SUBMIT THAT THE INJUNCTIVE RELIEF
8 HERE SHOULD BE DENIED BECAUSE IN FACT THE POLICY WORKS.

9 THE COURT: THANK YOU. MR. RICH.

10 MR. RICH: MAY I JUST CORRECT THE RECORD ON ONE
11 IMPORTANT POINT ABOUT THE PROPOSED INJUNCTION?

12 THE COURT: CERTAINLY.

13 MR. RICH: THERE ARE TWO MISAPPREHENSIONS ON THE PART
14 OF THE DEFENSE. ONE IS WE DO NOT ASSERT A SPONTANEITY
15 REQUIREMENT SHOULD BE AN ELEMENT OF THE RELIEF.

16 THE COURT: I DID LOOK AT YOUR PROPOSED INJUNCTION --

17 MR. RICH: IT WASN'T PART OF IT.

18 THE COURT: -- AND THAT WAS NOT ONE OF THE
19 EXCEPTIONS THAT --

20 MR. RICH: THAT'S CORRECT. IN OTHER WORDS, IT WASN'T
21 REQUIRED ON THEIR PART TO SHOW THAT IT WAS A SPONTANEOUS
22 SELECTION BY THE FACULTY IN ORDER TO MAKE THAT EXCEPTION. IT
23 WASN'T A PREREQUISITE, BUT MORE IMPORTANTLY, THERE IS NO 10
24 PERCENT SAFE HARBOR. THE LANGUAGE OF THE GUIDELINES --

25 THE COURT: THE 10 PERCENT ON YOUR PROPOSED

1 INJUNCTION CAME IN IN A -- I DO RECALL A DIFFERENT THING THAN
2 WHAT MR. SCHAETZEL IS TALKING ABOUT.

3 MR. RICH: THANK YOU. I WANT TO CLARIFY SO THE
4 RECORD IS COMPLETELY CLEAR WITH RESPECT TO ANY PARTICULAR
5 TAKING, THE PORTION OF THE CLASSROOM GUIDELINE THAT WE ARE
6 ADVOCATING BE ADOPTED AND INCORPORATED IS THE LESSER OF 1,000
7 WORDS OR 10 PERCENT OF A WORK, NOT A GREATER OF.

8 THE COURT: OKAY.

9 MR. RICH: THE SMALLEST TAKING ON THE JOINT EXHIBIT
10 LIST IS 5500 WORDS BY OUR ESTIMATE. THE LARGEST ABOUT 109,000
11 WORDS. SO THAT THE RANGE THAT MR. SCHAETZEL IS SHOWING YOUR
12 HONOR ON THIS DEMONSTRATIVE MEANS ANYWHERE FROM 5 TO 109 TIMES
13 THE SAFE HARBOR THAT WE ARE PROPOSING IN THE INJUNCTION.

14 THE OTHER 10 PERCENT, YOU'RE RIGHT, IS THAT THE
15 CUMULATIVE NUMBER OF UNLICENSED USES OF COPYRIGHTED WORKS THAT
16 WOULD BE COMBINED IN PROFESSOR KIM'S OR ANYBODY ELSE'S COURSE
17 WOULD NOT EXCEED MORE THAN 10 PERCENT OF THE ENTIRE COURSE
18 READINGS.

19 THE COURT: WHY ARE YOU ALL INTERESTED IN
20 INFRINGEMENTS OTHER THAN OF YOUR CLIENTS' COPYRIGHTED WORKS?

21 MR. RICH: WELL, IT'S VERY IMPORTANT TO UNDERSTANDING
22 THIS, YOUR HONOR, IS THAT PART OF THE MARKET HARM HERE TO OUR
23 CLIENTS IS BROUGHT ABOUT NOT SIMPLY BY THE PRECISE TAKING OF A
24 WORK THEY PUBLISH, THE SUBSTITUTION FOR THAT ACTUAL
25 PUBLISHING. MANY OF THOSE SAME WORKS ARE INCORPORATED IN

1 ANTHOLOGIES EITHER CREATED BY OUR OWN CLIENTS, SOMETIMES
2 INSTITUTIONS JUST LIKE GEORGIA STATE UNIVERSITY SAY COULD YOU
3 MAKE A CUSTOM PACKAGE FOR US JUST LIKE PROFESSOR KIM DECIDED TO
4 DO --

5 THE COURT: BUT NOW MY IMPRESSION IS THAT THE COPYING
6 THAT GOES ON WITH ERES, AND I'M LESS CERTAIN ABOUT ULEARN, ALL
7 GETS ERASED AFTER THE COURSE IS OVER. THERE'S NO INSTITUTIONAL
8 MEMORY THAT COULD BE USED TO CREATE A PERMANENT ANTHOLOGY.

9 MR. RICH: THE INSTITUTIONAL MEMORY, IF I MAY, YOUR
10 HONOR, THOUGH IS THE ABILITY OF THOSE SAME PROFESSORS, AND THIS
11 IS IN THE RECORD AND WILL BE, TO PULL UP THE SAME COURSE
12 SYLLABUS AND THEN REINSTATE THE SAME READING LESSON TERM AFTER
13 TERM --

14 THE COURT: I SEE WHAT YOU'RE SAYING.

15 MR. RICH: -- SOME OF THE SAME WORKS IN THE COMPLAINT
16 ARE STILL BEING OFFERED TODAY. SO, YES, TECHNOLOGICALLY I
17 THINK YOUR HONOR'S POINT IS CORRECT SOMEBODY PUSHES THE BUTTON,
18 BUT THERE IS NO BAR ON REPEAT USE WHICH IS AGAIN AGAINST THE
19 TENDENCY OF THE CHECKLIST.

20 THE LAST POINT I WANT TO MAKE, AND I KNOW YOU'RE NOT
21 LOOKING FOR POINT/COUNTERPOINT HERE, BUT THE LAST POINT I THINK
22 IS WORTH MAKING IS, I THINK IT'S AN APPLES TO ORANGES
23 COMPARISON TO TAKE THE ENTIRETY OF COURSE OFFERINGS UNIVERSITY
24 WIDE AND SAY OUT OF UMPTEEN THOUSAND COURSES ALL WE'VE BEEN
25 ABLE TO COME FORWARD WITH ARE 30, 50 OR 70 OR 90

1 INFRINGEMENTS. WE'RE ONLY TALKING ABOUT THREE TERMS BECAUSE
2 YOUR HONOR EXPRESSLY SAID THAT'S ALL WE NEED TO LOOK AT, AND
3 WE'RE ONLY TALKING ABOUT THREE PLAINTIFFS' WORKS.

4 IT'S A HUGE IMPOSITION ON ANY GIVEN COPYRIGHT OWNER
5 TO FIND DOZENS AND DOZENS OF INFRINGEMENTS JUST FOR THEM, AND I
6 THINK IT'S UNDOUBTED THAT YOUR HONOR HAS TO BE CONSIDERING AS
7 PART OF THIS CASE --

8 THE COURT: I THOUGHT IT WOULD BE HELPFUL TO SET SOME
9 PARAMETERS ON THE PERIOD FOR THE INFRINGEMENTS FOR A NUMBER OF
10 REASONS. ONE IS I THOUGHT IT WOULD MEAN THAT NEITHER SIDE
11 COULD CHERRY PICK, AND I THOUGHT WE HAD -- I THINK THAT
12 MAYMESTER TERM IS KIND OF AN ODDBALL. IT'S LOOKS LIKE THREE
13 WEEKS LONG, BUT I GUESS IT'S REPEATED EVERY YEAR, AND THEN WE
14 HAVE THE 2009 FALL TERM WHICH IS A FULL TERM, AND I THOUGHT IT
15 WOULD REPRESENT A FIELD THAT WOULD BE FAIR TO BOTH SIDES.

16 NOW I REALIZE THAT THE PLAINTIFFS' INTEREST IS NOT IN
17 WHAT HAPPENS IN ANY PARTICULAR SEMESTER, BUT IN TERMS OF
18 PROJECTING WHAT'S GOING TO HAPPEN IN THE FUTURE AND IN TERMS OF
19 TRYING TO QUANTIFY WHAT HAS HAPPENED IN THE PAST, I THINK IT'S
20 HELPFUL TO FOCUS ON CERTAIN TIMEFRAMES, AND I THOUGHT, YOU
21 KNOW, WHEN YOU ALL EARLIER IN THE LAWSUIT IN SOME OF YOUR
22 BRIEFS YOU WERE CLAIMING THAT GEORGIA STATE WAS -- HOW WOULD I
23 PUT IT? IT WAS ALMOST LIKE YOU WERE SAYING THAT THEY WERE
24 COPYING YOUR CLIENTS' WORKS AND USING THEM AS TEXTBOOKS, AND I
25 THINK IT HELPS TO LOOK AT SPECIFIC INSTANCES BECAUSE IT GIVES A

1 MUCH CRISPER FACTUAL FOCUS ON WHAT'S ACTUALLY BEEN GOING ON.

2 MR. RICH: WE APPRECIATE THAT.

3 THE COURT: YEAH.

4 MR. RICH: AND, YOUR HONOR, SO WE'RE PERFECTLY CLEAR,
5 WE ARE MORE THAN CONTENT TO HAVE YOUR HONOR MAKE A RULING AS TO
6 FAIR USE BASED ON THAT -- OR WHATEVER THE SUBSET OF THAT LIST
7 WHEN WE DEAL WITH COPYRIGHT NICETIES, WE DON'T HAVE ANY
8 PROBLEM. WE THINK THAT'S A MASSIVE SET OF TAKINGS FROM BUT
9 THREE PUBLISHERS HERE, AND YOUR HONOR CAN EASILY MENTALLY
10 EXTRAPOLATE THAT TO WHAT IS A SYSTEMIC PRACTICE HERE.

11 THESE ARE NOT UNUSUAL PUBLISHERS FROM ANYTHING WE'VE
12 SEEN IN THE RECORD, AND AGAIN COMPARED TO ANY NORMS, THE BASIC
13 BOOKS CASE SAID TAKINGS AS LITTLE AS FIVE PERCENT, THE
14 PRINCETON UNIVERSITY PRESS, A TAKING OF LESS THAN 5 PERCENT
15 WELL IN EXCESS OF ANY ESTABLISHED NORMS COUPLED WITH MARKET
16 HARM, COUPLED WITH SLAVISH COPYING, NO TRANSFORMATION, THOSE
17 COURTS HAVING NOTHING TO DO WITH THE COMMERCIAL AND
18 NONCOMMERCIAL STATUS SAID THAT'S DRAMATICALLY IN EXCESS OF ANY
19 REASONABLE CONCEPTION OF WHAT FAIR USE COULD BE.

20 SIMPLY BECAUSE A PROFESSOR NECESSARILY SAYS THIS IS
21 IMPORTANT FOR MY COURSE CAN'T BE A GREEN LIGHT TO SAY SO I'LL
22 TAKE 50 OR 60 PAGES.

23 THE COURT: WELL, WHY DON'T WE TAKE A 20-MINUTE
24 BREAK, AND THEN WE'LL COME BACK AND START WITH THE TESTIMONY.

25 (RECESS)

1 THE COURT: PLAINTIFFS MAY CALL YOUR FIRST WITNESS.

2 MS. SINGER: YOUR HONOR, IF I MAY, JUST A COUPLE OF
3 HOUSEKEEPING MATTERS BEFORE WE BEGIN. I'D LIKE TO MOVE INTO
4 EVIDENCE THE STIPULATED FACTS WHICH WERE PART OF THE PRETRIAL
5 ORDER, THE STIPULATIONS OF FACT REGARDING ERES AND ULEARN USAGE
6 AT GSU AND THOSE ARE ON THE DOCKET AS NUMBER 118.

7 THE COURT: SO ARE YOU SAYING YOU'RE MOVING IN JUST
8 PART OF THE STIPULATED FACTS?

9 MS. SINGER: NO, ALL OF THE STIPULATED FACTS. I'M
10 SORRY, THERE'S TWO DIFFERENT SETS OF STIPULATED FACTS.

11 THE COURT: OKAY.

12 MS. SINGER: THERE ARE THE ONES THAT WERE ATTACHMENT
13 E TO THE PRETRIAL ORDER, AND THEN THERE WAS AN EARLIER SET OF
14 STIPULATED FACTS THAT WERE ON THE DOCKET AT NUMBER 118, AND I
15 HAVE COPIES IF YOU'D LIKE.

16 THE COURT: I DON'T NEED THEM.

17 ANY OBJECTION?

18 MR. SCHAETZEL: CERTAINLY NO OBJECTION TO EXHIBIT E
19 TO THE PRETRIAL ORDER, YOUR HONOR, BUT I'M NOT CERTAIN OF WHAT
20 THE OTHER SET IS, AND I'D LIKE TO REVIEW THOSE AND WE'LL
21 COMMENT ON THOSE IN DUE COURSE.

22 THE COURT: WHAT'S THE OTHER SET?

23 MS. SINGER: THE OTHER SET IS STIPULATIONS OF FACT
24 REGARDING ERES AND ULEARN USAGE AT GEORGIA STATE UNIVERSITY,
25 AND THEY ARE SIGNED BY BOTH PARTIES.

1 THE COURT: COULD YOU JUST SHOW THEM TO MR.

2 SCHAETZEL?

3 MS. SINGER: I SURE WILL, YOUR HONOR.

4 MR. KRUGMAN: AND, YOUR HONOR, THEY ARE APPARENTLY
5 DEFENDANTS' EXHIBIT 111 ON THE DEFENDANTS' EXHIBIT LIST.

6 THE COURT: AND NO OBJECTIONS IN THE PRETRIAL ORDER?

7 MR. KRUGMAN: YES, YOUR HONOR.

8 MS. SINGER: AND THE OTHER DOCUMENT --

9 MR. SCHAETZEL: YOUR HONOR, I NEED A MINUTE TO REVIEW
10 THIS. I DON'T WANT TO HOLD UP THE EXAMINATION OF THE WITNESS
11 BUT I'D BE GLAD TO DO THAT AND --

12 THE COURT: I'LL GO AHEAD AND ADMIT AT THIS TIME THE
13 STIPULATIONS THAT ARE IN EXHIBIT E TO THE PRETRIAL ORDER.

14 WILL IT MESS YOU UP IF I JUST DEFER FOR A MINUTE ON
15 THE OTHER?

16 MS. SINGER: NOT AT ALL, YOUR HONOR.

17 THE COURT: AND THE EXHIBIT THAT'S BEING TENDERED YOU
18 SAID IS DEFENDANTS' EXHIBIT 11?

19 MS. SINGER: DEFENDANTS' EXHIBIT 111, AND ALSO
20 PLAINTIFFS' 975 WHICH IS THE DEFENDANTS' OBJECTIONS AND
21 RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION.
22 SO THESE ARE REQUESTS FOR ADMISSION, AND MR. SCHAETZEL HAS BEEN
23 HANDED A COPY OF THOSE AS WELL.

24 MR. SCHAETZEL: WE'LL REVIEW THESE AND GET RIGHT
25 BACK.

1 THE COURT: ALL RIGHT. I'LL RESERVE RULING ON
2 DEFENDANTS' EXHIBIT 111 WHICH HAS BEEN TENDERED BY PLAINTIFFS,
3 AND ALSO I'LL RESERVE RULING ON PLAINTIFFS' 975.

4 MS. SINGER: THANK YOU, YOUR HONOR. AT THIS TIME
5 WE'D LIKE TO CALL OUR FIRST WITNESS MR. FRANK SMITH.

6 THE CLERK: PLEASE RAISE YOUR RIGHT HAND TO TAKE THE
7 OATH.

8 FRANK SMITH,
9 HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

10 THE CLERK: IF YOU WILL HAVE A SEAT, PLEASE, AND
11 STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME
12 ALSO.

13 THE WITNESS: MY NAME IS FRANK SMITH.

14 DIRECT EXAMINATION

15 BY MS. SINGER:

16 Q. GOOD MORNING, MR. SMITH. BY WHOM ARE YOU CURRENTLY
17 EMPLOYED?

18 A. BY CAMBRIDGE UNIVERSITY PRESS.

19 Q. HOW LONG HAVE YOU BEEN EMPLOYED AT CAMBRIDGE UNIVERSITY
20 PRESS?

21 A. FOR THIRTY-TWO YEARS AND NINE MONTHS.

22 Q. WHAT IS YOUR CURRENT POSITION AT CAMBRIDGE UNIVERSITY
23 PRESS?

24 A. MY CURRENT POSITION IS THE DIRECTOR OF DIGITAL PUBLISHING
25 GLOBAL.

1 Q. AND WHAT ARE YOUR PRIMARY RESPONSIBILITIES IN THAT ROLE?

2 A. I'M RESPONSIBLE FOR ALL DIGITAL PUBLISHING ACTIVITIES FOR
3 OUR ACADEMIC BOOKS DIVISION AROUND THE WORLD.

4 Q. CAN YOU GIVE US A BRIEF FLAVOR OF WHAT THAT MEANS?

5 A. WE HAVE OUR OWN PROPRIETARY E-BOOK PLATFORM WHICH WE
6 USE -- CAMBRIDGE BOOKS ONLINE WHICH WE USE TO SELL E-BOOKS TO
7 INSTITUTIONS.

8 WE HAVE SEVERAL OTHER DIGITAL REFERENCE WORKS THAT WE
9 ALLOW INSTITUTIONS TO DESCRIBE TO. WE ALSO HAVE RELATIONSHIPS
10 WITH MANY OTHER THIRD PARTIES, MANY OF WHICH WILL BE FAMOUS
11 AMAZON, GOOGLE AND OTHERS PROBABLY LESS WELL KNOWN.

12 Q. HAVE YOU EVER HELD ANY OTHER POSITIONS AT CAMBRIDGE?

13 A. YES, I HAVE.

14 Q. WHAT OTHER POSITIONS?

15 A. UNTIL 2009, FROM 2004 TO 2009 I WAS THE EDITORIAL DIRECTOR
16 IN NEW YORK FOR ACADEMIC BOOKS. PRIOR TO THAT FROM 1993 TO
17 2004 I WAS THE PUBLISHING DIRECTOR OF THE SOCIAL SCIENCES IN
18 NEW YORK. PRIOR TO THAT FROM 1988 TO 1993 I WAS EXECUTIVE
19 EDITOR FOR SOCIAL SCIENCES, AND PRIOR TO THAT BACK TO 1991 I
20 WAS AN EDITOR FOR HISTORY.

21 Q. AND CAN YOU BRIEFLY DESCRIBE YOUR EDUCATIONAL BACKGROUND?

22 A. I HAVE B.A. FROM GRINNELL COLLEGE IN GRINNELL, IOWA, AND I
23 HAVE A M.A. FROM THE UNIVERSITY OF CAMBRIDGE.

24 Q. MR. SMITH, WERE YOU INVOLVED WITH THE DECISION BY
25 CAMBRIDGE TO JOIN THIS LAWSUIT?

1 A. YES, I WAS.

2 Q. AND WHY DID CAMBRIDGE DECIDE TO JOIN THIS LAWSUIT?

3 A. THE MATERIALS THAT WE SAW SEVERAL YEARS AGO RELATING TO
4 SCANNING AND POSTING OF OUR BOOKS WERE OF SUCH A VOLUME THAT WE
5 FELT THAT IT WAS IMPORTANT THAT WE TAKE ACTION.

6 Q. AND WHY DID YOU FEEL IT WAS IMPORTANT TO TAKE ACTION?

7 A. BECAUSE IT APPEARED TO US THAT THE SCANNING AND THE
8 POSTING WAS ON SUCH A SCALE AND BECAUSE IT WAS BEING REPEATED
9 OVER SEMESTERS THAT IT WAS A THREAT TO OUR INCOME BOTH IN TERMS
10 OF PERMISSIONS INCOME AND DIRECT BOOK SALES.

11 Q. OKAY. WE'LL GET TO IT IN A MOMENT, BUT COULD YOU JUST
12 BRIEFLY TELL US THE DIFFERENCE BETWEEN PERMISSIONS INCOME AND
13 BOOK SALES INCOME?

14 A. WELL, WE EARN INCOME IN SEVERAL WAYS. THE PRIMARY WAY IS
15 WE SELL BOOKS, BUT WE ALSO ALLOW THE COPYING OF PORTIONS OF OUR
16 WORKS IN CERTAIN CONTEXT, AND WHEN THAT TAKES PLACE WE RECEIVE
17 INCOME FOR THOSE -- FOR THAT COPYING. SO THAT'S WHAT WE REFER
18 TO AS PERMISSIONS INCOME.

19 Q. AND WHAT KINDS OF CAMBRIDGE WORKS WERE BEING COPIED AT
20 GSU?

21 A. THERE WAS A RANGE OF WORKS. SOME OF THEM WERE BOOKS
22 PUBLISHED BY OUR ENGLISH AS A SECOND LANGUAGE DIVISION. BOOKS
23 THAT WE CONSIDER STRAIGHT OUT FULL OUT TEXTBOOKS. OTHERS WERE
24 REFERENCE WORKS, AND OTHERS WERE MONOGRAPHS. SO IT WAS MORE OR
25 LESS WORKS ACROSS THE FULL SPECTRUM OF OUR PUBLISHING.

1 Q. WHAT IS A MONOGRAPH?

2 A. A MONOGRAPH IS THE FANCY WORD THAT THOSE OF US IN ACADEMIC
3 PUBLISHING USE TO DESCRIBE AN ORIGINAL WORK OF RESEARCH. THERE
4 IS IN A SENSE THERE'S NO CLEAN DEFINITION. A REVISED
5 DISSERTATION CAN BE A MONOGRAPH. ANY WORK WHICH INVOLVES
6 ORIGINAL RESEARCH AND ONE WOULD HOPE ORIGINAL IDEAS CAN BE A
7 MONOGRAPH.

8 Q. ARE THOSE MONOGRAPHS CONSIDERED FACTUAL WORKS?

9 A. YES, THEY ARE.

10 Q. IS THERE ANY ORIGINAL RESEARCH OR SCHOLARSHIP THAT GOES
11 INTO THOSE?

12 A. WELL, I WOULD SAY QUITE A LOT. AS AN EDITOR, AND I STILL
13 HANDLE A FEW BOOKS NOW, I'VE PUBLISHED HISTORY, AND THE AVERAGE
14 HISTORIAN WHEN THEY WRITE A BOOK IT'S A PROJECT OF ANYWHERE
15 BETWEEN 5 AND 10 OR 15 YEARS, AND THAT'S A GREAT DEAL OF OUR
16 TITLE RESEARCH BUT A GREAT DEAL OF THINKING AND WRITING AND
17 REWRITING. SO I WOULD SAY IT'S CREATIVE.

18 Q. LET'S STEP BACK FOR A MOMENT. WHAT IS CAMBRIDGE
19 UNIVERSITY PRESS?

20 A. CAMBRIDGE UNIVERSITY PRESS IS THE PUBLISHING DIVISION --
21 PUBLISHING ARM I WOULD SAY OF THE UNIVERSITY OF CAMBRIDGE IN
22 ENGLAND. WE HAVE NO OTHER SEPARATE CORPORATE STATUS. WE DO
23 HAVE NONPROFIT STATUS IN THE UNITED STATES, BUT WE ARE IN
24 PRACTICAL TERMS A DEPARTMENT OF THE UNIVERSITY.

25 Q. WHEN DID CAMBRIDGE FIRST BEGIN PUBLISHING BOOKS?

1 A. WE PUBLISHED OUR FIRST BOOK IN 1584. WE HAVE BEEN IN
2 CONTINUOUS OPERATION EVER SINCE.

3 Q. APPROXIMATELY HOW MANY BOOKS DOES CAMBRIDGE PUBLISH EACH
4 HERE?

5 A. WE PUBLISH APPROXIMATELY 1,000 NEW BOOKS PER YEAR.

6 Q. AND DO ANY OF THOSE BOOKS RECEIVE ANY AWARDS?

7 A. YES, FROM OUR NEW YORK PUBLISHING ALONE, WE PROBABLY
8 RECEIVE BETWEEN 75 AND 100 AWARDS ANNUALLY. THAT SOUNDS LIKE
9 IT'S SOMETHING WE EXPECT. IT ISN'T. IT'S JUST OUR GOOD
10 FORTUNE. WE'RE ALSO PROUD TO PUBLISH 22 OF THE WINNERS OF THE
11 NOBEL PRIZE IN ECONOMICS, AND I COULD LIST OTHER NOTEWORTHY
12 PEOPLE WE PUBLISH.

13 Q. WHAT IS CAMBRIDGE'S MISSION?

14 A. WELL OUR ORIGINAL MISSION WAS GIVEN IN LETTERS PATENT FROM
15 THE PRIVY COUNCIL OF KING HENRY THE VIII. THAT WAS SIMPLY TO
16 PUBLISH BOOKS. THAT WAS UPDATED IN THE 19TH CENTURY IN STATUTE
17 J OF THE UNIVERSITY WHICH SIMPLY SAID THAT WE EXIST TO PUBLISH
18 WORKS OF LEARNING AND SCHOLARSHIP, AND THAT HASN'T CHANGED.
19 THAT IS WHAT WE EXIST FOR. WE HAVE NO OTHER PURPOSE.

20 Q. WHAT KINDS OF WORKS DOES CAMBRIDGE PUBLISH?

21 A. WELL, WE PUBLISH MONOGRAPHS IN A VERY BIG WAY. WE PUBLISH
22 APPROXIMATELY 600 MONOGRAPHS EACH YEAR, ORIGINAL WORKS AND
23 SCHOLARSHIP. WE ALSO PUBLISH TEXTBOOKS. WE PUBLISH SCHOLARLY
24 REFERENCE WORKS. WE PUBLISH EDITED VOLUMES WHICH ARE
25 THEMSELVES SOMEWHERE IN THE HALFWAY HOUSE BETWEEN TEXTBOOKS AND

1 MONOGRAPHS.

2 Q. WHAT SUBJECT AREAS DO THOSE BOOKS COVER?

3 A. WE FLATTER OURSELVES THAT WE COVER ALMOST ALL SUBJECTS
4 THAT ARE TAUGHT IN THE UNIVERSITATES. SO HAVE EVERYTHING FROM
5 CLASSICS AND PHILOSOPHY TO ECONOMICS, POLITICS, PHYSICS,
6 MEDICINE, CHEMISTRY.

7 Q. WHAT DOES THE CAMBRIDGE IMPRIMATUR MEAN IN THE
8 MARKETPLACE?

9 A. WELL, WE HOPE THAT IT MEANS A REPUTATION FOR HIGH QUALITY
10 SCHOLARLY PUBLISHING. WHICH IS TO SAY AT OUR CORE WE ONLY
11 EXIST TO PUBLISH SCHOLARSHIPS AND WORKS OF LEARNING AND
12 KNOWLEDGE WHICH ARE IMPORTANT, AND WE HOPE WHAT IT MEANS IS IF
13 A BOOK HAS OUR NAME ON IT, IT IS A BOOK THAT SCHOLARS, STUDENTS
14 WOULD FEEL IS AT LEAST WORTH THEIR TIME. THAT DOESN'T MEAN
15 IT'S A BOOK THAT WILL LAST FOR ALL TIME, BUT IT'S PROBABLY A
16 BOOK THEY SHOULD THINK ABOUT READING.

17 Q. WHO BUYS CAMBRIDGE'S BOOKS?

18 A. THE LARGEST MARKET FOR US IS INSTITUTIONS THROUGH LIBRARY
19 SALES, BUT THAT'S BALANCED CLOSE TO FIFTY-FIFTY BY SALES
20 TO INDIVIDUAL SCHOLARS, PROFESSORS AND STUDENTS. A VERY
21 SMALL PERCENTAGE OF OUR BOOKS ARE BOUGHT ALAS BY THE GENERAL
22 PUBLIC.

23 Q. AND WHEN YOU SAY SALES TO STUDENTS, WHAT DO YOU MEAN BY
24 THAT?

25 A. THE BULK OF THOSE SALES WILL BE ASSIGNED SALES FOR

1 COURSES. SO A PROFESSOR WOULD --

2 THE COURT: NOW WHEN YOU'RE TALKING ABOUT THE TWO
3 DIFFERENT MARKETS, ARE YOU SAYING THAT THE AGGREGATE SALES
4 WOULD BE ABOUT THE SAME IN THOSE TWO DIFFERENT MARKETS?

5 THE WITNESS: YES, YOUR HONOR.

6 BY MS. SINGER:

7 Q. YOU MENTIONED BEFORE, MR. SMITH, THAT CAMBRIDGE HAS
8 NOT-FOR-PROFIT STATUS IN THE UNITED STATES. WHAT DOES THAT
9 MEAN TO CAMBRIDGE?

10 A. WELL, IT MEANS AT ITS CORE THAT WE HAVE NO SHAREHOLDERS,
11 THAT NO INDIVIDUALS TAKE PROFITS FROM CAMBRIDGE UNIVERSITY
12 PRESS. LIKE ANY NONPROFIT, ANY FUNDS WHICH ARE EARNED OVER AND
13 ABOVE A SURPLUS MUST BE GO FOR CERTAIN PARTICULAR PURPOSES, AND
14 IN OUR CASE THERE ARE ONLY TWO.

15 ONE IS THE PUBLICATION OF MORE WORKS OF SCHOLARSHIP.
16 MANY OF THEM ARE COMMERCIALY MARGINAL, AND THE OTHER IS IN
17 PARTICULARLY GOOD YEARS WE WILL GIVE MONEY TO OUR PARENT
18 UNIVERSITY FOR THEIR USE IN THEIR PROGRAMS.

19 Q. HOW DOES THIS NOT-FOR-PROFIT STATUS AFFECT CAMBRIDGE'S
20 APPROACH TO PUBLISHING?

21 A. WELL IN A SENSE WE'RE LIKE OTHER COMMERCIAL PUBLISHERS IN
22 THAT WE MUST MAKE SOMETHING THAT'S CALLED A PROFIT. WE DON'T
23 CALL IT THAT, BUT THERE HAS TO BE MORE MONEY AT THE END OF EACH
24 YEAR THAN THERE WAS AT THE BEGINNING BECAUSE OUR COSTS GO UP,
25 AND IF WE ARE TO BE SUSTAINING, WE MUST MAKE MONEY.

1 ON THE OTHER HAND, WE DO HAVE A HAND TIED BEHIND OUR
2 BACKS BECAUSE WE CANNOT PUBLISH BOOKS JUST TO MAKE MONEY, AND
3 WE QUITE REGULARLY DECLINE TO PUBLISH BOOKS THAT WE KNOW WOULD
4 MAKE MONEY BUT WHICH WE JUDGE ARE NOT NECESSARILY VALUABLE
5 WORKS IN SCHOLARSHIP AND LEARNING. I'M NOT COMPLAINING BUT
6 THAT'S WHAT MAKES US DIFFERENT.

7 Q. IF AT THE END OF ANY GIVEN YEAR CAMBRIDGE DID NOT MAKE
8 MORE MONEY THAN IT SPENT, WHAT WOULD HAPPEN?

9 A. WELL, THERE WOULD BE SOME SORT OF INQUEST IN THE
10 UNIVERSITY OF A VERY SERIOUS NATURE, AND ULTIMATELY STEPS WOULD
11 BE TAKEN WHICH I DON'T LIKE TO CONTEMPLATE, BUT ULTIMATELY THE
12 UNIVERSITY DOESN'T HAVE THE MEANS OR THE WILL TO CARRY US IF WE
13 WERE TO LOSE MONEY.

14 Q. SO IF YOU WERE TO LOSE MONEY CONSISTENTLY WHAT WOULD
15 HAPPEN?

16 MR. HARBIN: JUDGE, THERE'S NOT AN ADEQUATE
17 FOUNDATION, YOUR HONOR.

18 THE COURT: OVERRULED.

19 THE WITNESS: I WOULD HAVE TO GUESS THE UNIVERSITY
20 WOULD SELL OFF OUR ASSETS AND SHUT US DOWN. THAT'S WHAT
21 HAPPENED TO THE UNIVERSITY OF LONDON PRESS BACK IN 1970. THEY
22 WERE LOSING MONEY, AND THEY WERE SOLD OFF AND SHUT DOWN.

23 BY MS. SINGER:

24 Q. APPROXIMATELY ON AVERAGE HOW MUCH MORE MONEY DOES
25 CAMBRIDGE HAVE IN REVENUES THAN IT SPENDS; IF IT WERE A FOR

1 PROFIT, WHAT WOULD YOUR PROFIT MARGIN BE?

2 A. BETWEEN 2 AND IN A VERY GOOD YEAR POSSIBLY AS MUCH AS 5
3 PERCENT.

4 Q. HOW ARE CAMBRIDGE'S WORKS USED IN HIGHER EDUCATION?

5 A. WELL, THEY ARE USED IN A VARIETY OF WAYS. MONOGRAPHS ARE
6 FOR THE MOST PART BOUGHT BY ACADEMIC LIBRARIES AND BY
7 INDIVIDUAL PROFESSORS WHO WILL USE THEM.

8 SOME MONOGRAPHS, ON THE OTHER HAND, ARE USED AS
9 ASSIGNED COURSE READINGS AND FOR ALL PRACTICAL PURPOSES ARE
10 TEXTBOOKS. THERE ARE MANY MONOGRAPHS I PUBLISHED AS AN EDITOR
11 WHICH ARE FAIRLY NARROW IN SCOPE BUT WOULD SELL TWO OR THREE
12 THOUSAND COPIES A YEAR FOR USE IN COURSES BECAUSE PROFESSORS
13 JUDGE THAT THEY'RE IMPORTANT ENOUGH THAT THEY SHOULD BE READ BY
14 THEIR STUDENTS.

15 Q. AND HOW WOULD YOU CHARACTERIZE THE IMPACT OF THE SCHOLARLY
16 WORKS THAT CAMBRIDGE'S PUBLISHES ON THE ACADEMIC COMMUNITY?

17 A. THAT'S A HARD QUESTION, AND I GUESS WE FLATTER OURSELVES
18 THAT THE IMPACT IS IMPORTANT. THAT SCHOLARSHIP AND RESEARCH
19 ARE AT THE CORE OF WHAT GOES ON IN A RESEARCH UNIVERSITY.

20 THE BOOKS THAT WE PUBLISHED ARE ESSENTIAL FOR THE
21 CONTINUANCE OF LINES OF RESEARCH FOR THE SCHOLARLY
22 CONVERSATIONS IN DIFFERENT FIELDS, AND THAT TAKES PLACE BOTH AT
23 THE HIGH LEVEL OF RESEARCHERS AND ONE WOULD SAY THE RELATIVELY
24 LOW LEVEL OF A STUDENT'S LEARNING. SO IT'S A CONTINUOUS
25 PROCESS OF CONVERSATION AND DISCUSSION.

1 Q. WHY WOULD AN AUTHOR WANT TO PUBLISH WITH CAMBRIDGE?

2 A. WELL, AGAIN, WE WOULD FLATTER OURSELVES THAT THE STRENGTH
3 OF OUR IMPRINT IS SUCH THAT THEY WOULD SEE VALUE IN THAT. THEY
4 WOULD FEEL THAT IT WOULD BE A VALUE TO THEIR CAREER, AND ALSO
5 THAT THEIR BOOK WOULD THEN BE NOTICED WITHIN THOSE FIELDS WHERE
6 THEY'RE WORKING SUCH THAT IT WOULD BE A PART OF THAT SCHOLARLY
7 CONVERSATION GOING ON.

8 Q. WHEN YOU SAY IT WOULD BE A VALUE TO THEIR CAREER, WHAT DO
9 YOU MEAN BY THAT?

10 A. WELL, IN MY EXPERIENCES THE CASE AT MOST UNIVERSITIES,
11 CERTAINLY RESEARCH UNIVERSITIES THAT PUBLICATION IN -- A PEER
12 REVIEWED PUBLICATION IS ESSENTIAL FOR A SCHOLAR'S TENURE
13 DECISION AND ANOTHER PUBLICATION OF SOME KIND IS GENERALLY
14 ESSENTIAL FOR PROMOTION TO FULL PROFESSOR. SO IT'S GOING TO BE
15 THE RARE CASE THESE DAYS IF YOU'RE GOING TO HAVE A CAREER
16 TRAJECTORY WITHOUT PUBLISHING.

17 Q. DO YOU THINK IT'S IMPORTANT FOR AN AUTHOR OR PROFESSOR TO
18 BE PUBLISHED BY A UNIVERSITY PRESS AS OPPOSED TO JUST
19 SELF-PUBLISHING THEIR OWN WORK ON THEIR WEBSITE?

20 A. WELL APPARENTLY IT IS BECAUSE WE DO CONDUCT PEER REVIEW OF
21 EVERYTHING THAT WE PUBLISH. WHICH IS TO SAY ALL OF THE BOOKS
22 WE PUBLISH ARE VETTED BY OTHER SCHOLARS IN THE FIELD.

23 THEY TELL US IS THIS A WORK OF IMPORTANCE, AND IF IT
24 ISN'T, WE DON'T PUBLISH IT. WE DON'T PUBLISH ANYTHING THAT
25 DOESN'T PEER REVIEW OF A CERTAIN LEVEL OF AFFIRMATION. SO,

1 YES, IT IS IMPORTANT.

2 Q. LET'S TALK FOR A FEW MINUTES ABOUT THIS ACADEMIC
3 PUBLISHING PROCESS. HOW DO MANUSCRIPTS COME TO CAMBRIDGE?

4 A. WELL, I LIKEN IT IN SOME WAYS TO THE TIDE FLOWING UP.
5 EVERY DAY THERE ARE UNSOLICITED PROPOSALS THAT COME INTO OUR
6 EDITORS. SOMETIMES A DOZEN A DAY. VERY FEW OF THOSE WILL BE
7 BOOKS THAT WE'LL ACTUALLY DECIDE TO PUBLISH.

8 MOST OF THE BOOKS WE PUBLISH IN FACT COME ABOUT
9 THROUGH CONVERSATIONS THAT OUR EDITORS HOLD WITH ACADEMICS
10 EITHER BY MEETING THEM THROUGH E-MAIL, THROUGH THE TELEPHONE,
11 THROUGH VISITING UNIVERSITIES, THROUGH GOING TO ACADEMIC
12 CONFERENCES. SO IT'S A LARGE PROCESS OF DISCUSSION AND
13 SOLICITATION.

14 Q. HOW MANY EDITORS ARE THERE AT CAMBRIDGE?

15 A. WE HAVE 15 ACADEMIC EDITORS WHO WORK IN OUR NEW YORK
16 OFFICE AND AROUND 50 IN THE UNITED KINGDOM OFFICE.

17 Q. AND WHAT SORT OF QUALIFICATIONS DO THOSE EDITORS HAVE?

18 A. THIS MAY SOUND ODD BUT AT ITS MOST BASIC LEVEL ALL THEY
19 REALLY NEED IS A B.A., AN EAGERNESS TO READ A LOT AND A KEEN
20 INTEREST IN AN ACADEMIC SUBJECT.

21 WE'VE HAD VERY SUCCESSFUL EDITORS WHO HAD NO MORE
22 EDUCATION THAN THAT. WE'VE HAD VERY SUCCESSFUL EDITORS WHO HAD
23 PH.D.'S, BUT WHAT THEY MUST DO IS ENTER INTO THAT LARGER
24 CONVERSATION THAT SCHOLARS HAVE AND IMMERSE THEMSELVES IN A
25 SUBJECT, LEARN ABOUT IT AND BE INTERESTED IN IT.

1 Q. HOW DO THEY GO ABOUT SOLICITING MANUSCRIPTS?

2 A. WELL, THEY DO A LOT OF TRAVELING VISITING UNIVERSITIES,
3 TALKING TO INDIVIDUAL SCHOLARS. THEY GO TO A LOT OF ACADEMIC
4 CONFERENCES, AND THERE'S A FAIRLY LIVELY EXCHANGE OF E-MAILS
5 AND PHONE CALLS THAT GO ON EVERY DAY. THERE'S A LOT OF
6 NETWORKING. WE WORK -- ONE TENDS TO WORK WITH SENIOR
7 PROFESSORS WHO KNOW A GREAT DEAL ABOUT JUNIOR PROFESSORS AND
8 TELL YOU WHOSE WORK THAT YOU MIGHT WANT TO PURSUE.

9 Q. AFTER AN EDITOR HAS SOLICITED A PROPOSAL, WHAT'S THE NEXT
10 STEP IN THE PROCESS?

11 A. WELL, THE EDITOR HAS TO EVALUATE THAT PROPOSAL. THEY'RE
12 NOT ALL CREATED EQUAL. THERE MAY BE A DISCUSSION BETWEEN
13 THE AUTHOR AND THE EDITOR THAT WILL TAKE PLACE OVER WEEKS,
14 MONTHS.

15 THEREAFTER THEY WILL SEND IT TO TWO, THREE, FOUR,
16 ACADEMIC EXPERTS FOR THEIR REVIEW. THAT REVIEW MIGHT BE ON A
17 PROPOSAL PORTION OF A MANUSCRIPT, THE WHOLE MANUSCRIPT. IT
18 TAKES MANY FORMS DEPENDING ON THE PROJECT.

19 Q. AND WHEN YOU TALK ABOUT A PROPOSAL, WHAT WOULD A PROPOSAL
20 BE?

21 A. AT ITS BASIC LEVEL IT COULD BE AS MUCH AS TWO PAGES AND A
22 CHAPTER OUTLINE, OR IT MIGHT BE 50 PAGES. AGAIN IT VARIES WITH
23 THE SCHOLAR, WITH THE SUBJECT. IT'S A VERY INDIVIDUAL THING
24 THAT EDITORS KNOW HOW TO HANDLE.

25 Q. YOU MENTIONED IT WAS SENT OUT TO PEOPLE. WHO WOULD THE

1 EDITOR SEND THE PROPOSAL OR THE MANUSCRIPT OUT TO?

2 A. THEY WILL SEND THEM TO OTHER SCHOLARS WHO WORK IN THE
3 SUBJECT AND ASK THEM FOR THEIR REVIEW.

4 Q. AND WHAT DOES THAT REVIEW CONSIST OF?

5 A. WE'RE ASKING OTHER SCHOLARS TO LOOK AT THIS PROPOSAL OR
6 MANUSCRIPT AND TELL US DOES THIS MAKE AN IMPORTANT CONTRIBUTION
7 TO LEARNING AND SCHOLARSHIP, IS IT TAKING ACCOUNT OF THE LATEST
8 RESEARCH, DOES IT MAKE SENSE, IS IT WELL ORGANIZED, A WHOLE
9 HOST OF THINGS THAT GIVE US ASSURANCE AND WE HOPE IN TURN THE
10 PEOPLE WHO READ THE BOOKS ASSURANCE THAT THIS IS WORTH THEIR
11 ATTENTION.

12 Q. WHAT PERCENTAGE OF CAMBRIDGE'S WORKS ARE SENT OUT FOR THIS
13 EXTERNAL PEER REVIEW?

14 A. ONE HUNDRED PERCENT.

15 Q. AND HOW MANY PEER REVIEWERS ARE THERE FOR EACH WORK?

16 A. ANYWHERE FROM TWO TO FIVE.

17 Q. IN YOUR EXPERIENCE WHY DO PEER REVIEWERS ENGAGE IN THIS
18 PROCESS?

19 A. WELL, AT THE BEST END OF THE LEVEL BECAUSE THEY FEEL AN
20 OBLIGATION TO THE WORLD OF SCHOLARSHIP TO HELP PARTICIPATE IN
21 THE PUBLICATION OF MORE SCHOLARSHIPS. SO THEY KNOW THAT
22 REVIEWING THESE WORKS IS IMPORTANT IF THERE ARE GOING TO BE NEW
23 WORKS.

24 AT A SLIGHTLY MORE SELFISH LEVEL THEY KNOW THAT ONE
25 DAY THEY'RE GOING TO HAVE A BOOK AND THEY WILL WANT SOMEONE TO

1 EVALUATE THEIR BOOK.

2 Q. DOES CAMBRIDGE COMPENSATE IT'S PEER REVIEWERS?

3 A. WE DO. IT'S QUITE MODEST. WE PAY THEM GENERALLY AROUND
4 200 DOLLARS IN CASH AND DOUBLE THAT AMOUNT IN BOOKS AND MOST
5 PEOPLE TAKE BOOKS.

6 Q. WHAT, IF ANYTHING, WOULD AN EDITOR GET BACK FROM A PEER
7 REVIEWER; WHAT WOULD THE WORK PRODUCT LOOK LIKE?

8 A. IT WILL LOOK LIKE ANYTHING FROM A PAGE TO TWENTY PAGES OF
9 EVALUATION OF THE WORK THAT'S BEING CONSIDERED, AND IT CAN BE A
10 GENERAL ASSESSMENT AND OFTEN QUITE DETAILED COMMENTS DOWN TO
11 THE LINE LEVEL.

12 Q. WHAT HAPPENS NEXT?

13 A. THERE'S A CONVERSATION THEN THAT TAKES PLACE BETWEEN THE
14 EDITOR AND THE AUTHOR. WE SHARE AT OUR DISCRETION THE FULL
15 REPORT OR PORTIONS OF REPORTS WITH THE AUTHORS, AND WE ASK THEM
16 FOR THEIR REACTION. BECAUSE IT'S SELDOM THE CASE THAT A REPORT
17 SAYS THIS IS A GREAT WORK, YOU MUST PUBLISH IT NOW. THERE'S
18 ALWAYS A BUT, AND WE HAVE A DISCUSSION WITH THE AUTHOR TO MAKE
19 SURE THAT WE TAKE CARE OF WHATEVER CRITICISMS ARE LEVELED, AND
20 WE'RE ALL SURE THAT WE HAVE THE BEST POSSIBLE BOOK.

21 Q. HOW LONG DOES THIS WHOLE PROCESS TAKE UP TO THROUGH THE
22 PEER REVIEW PROCESS?

23 A. IT CAN TAKE ANYWHERE FROM A COUPLE OF MONTHS TO SEVERAL
24 YEARS. IT JUST DEPENDS ON THE BOOK. SOMETIMES WE CULTIVATE A
25 BOOK FOR A LONG TIME.

1 Q. WHAT'S THE NEXT STEP IN THE PROCESS AFTER THE PEER REVIEWS
2 AND THE REVIEWS HAVE BEEN INCORPORATED?

3 A. IF THE REVIEWS ARE POSITIVE AND WE FEEL WE SHOULD PUBLISH
4 THE BOOK, THE EDITOR PREPARES A FORMAL PROPOSAL WHICH HAS A
5 BUSINESS CASE ATTACHED TO IT, A PROJECTION OF SALES AND COSTS
6 OF PUBLISHING THE BOOK, AND THAT BUSINESS CASE, A SUMMARY BY
7 THE EDITOR AND THE REPORTS ALL GO TO OUR GOVERNING BODY IN
8 CAMBRIDGE WHO PASS ON IT.

9 Q. IF YOU'RE A NOT-FOR-PROFIT INSTITUTION, WHY WOULD YOU
10 PREPARE A BUSINESS CASE?

11 A. WELL, AGAIN, WE'RE OPERATING IN THE MARKETPLACE, AND WE
12 MUST BE SELF-SUSTAINING. SO IT'S ESSENTIAL THAT IF WE'RE GOING
13 TO SPEND MONEY WE HAVE SOME ASSURANCE WE'RE GOING TO GET BACK
14 SOME OF THAT MONEY.

15 Q. WHAT HAPPENS TO THAT PROPOSAL; WHAT'S THE NEXT STEP IN THE
16 PROCESS?

17 A. WE HAVE A GOVERNING BODY IN CAMBRIDGE WHICH IS KNOWN AS
18 THE PRESS SYNDICATE. THE UNIVERSITY OF CAMBRIDGE STARTING
19 USING THE TERM SYNDICATES BACK IN THE 17TH CENTURY. IT'S
20 REALLY JUST ANOTHER WORD FOR A COMMITTEE. IT'S MADE UP OF
21 SENIOR PROFESSORS FROM THE UNIVERSITY, AND THEY MEET EVERY TWO
22 WEEKS, AND THEY REVIEW ALL PROPOSALS FOR NEW BOOKS.

23 Q. IF THE SYNDICATE APPROVES THE BOOK, WHAT'S THE NEXT STEP
24 IN THE PROCESS?

25 A. THE EDITOR WOULD THEN NEGOTIATE A CONTRACT WITH THE

1 AUTHOR.

2 Q. AND HOW DOES THAT CONTRACTING PROCESS WORK?

3 A. WE HAVE A BASIC CONTRACT FOR MOST BOOKS. THERE WILL BE
4 SOME SMALL VARIATIONS IN THE TERMS PARTICULARLY RELATING TO
5 DETAILS ABOUT THE BOOK, THE LENGTH, THE DATE BY WHICH WE EXPECT
6 THE AUTHOR TO DELIVER IT, BUT FOR THE MOST PART THREE-QUARTERS
7 OF OUR CONTRACTS ARE MORE OR LESS THE SAME.

8 Q. WHAT ARE THE COPYRIGHT PROVISIONS OF THE STANDARD
9 CONTRACT?

10 A. FOR THE LAST TEN YEARS OR SO, WE HAVE DECIDED TO LEAVE
11 COPYRIGHT IN THE NAME OF THE AUTHOR; HOWEVER, THE CONTRACT
12 STIPULATES THAT THE AUTHOR ASSIGNS TO THE PRESS THE EXCLUSIVE
13 RIGHT TO PRINT AND PUBLISH. SO WE HAVE ALL RIGHTS OVER
14 REPRODUCTION.

15 Q. WHO LOOKS AT THOSE CONTRACTS ON THE CAMBRIDGE SIDE?

16 A. WELL THE EDITOR, THE EDITORIAL DIRECTOR AND THEN OUR LEGAL
17 DIRECTOR.

18 Q. WOULD A CAMBRIDGE BOOK EVER PROCEED TO PUBLICATION WITHOUT
19 A CONTRACT?

20 A. NO.

21 Q. WHY NOT?

22 A. BECAUSE WE WOULD NOT HAVE THE RIGHT TO PUBLISH THE BOOK.

23 Q. AFTER A CONTRACT IS SIGNED, WHAT'S THE NEXT STEP IN THE
24 PUBLISHING PROCESS?

25 A. THEREAFTER WE AGREE WITH THE AUTHOR ON A SCHEDULE FOR

1 PUBLICATION. THERE MAY BE REVISIONS THE AUTHOR HAS TO DO.
2 THERE MAY BE ANOTHER ROUND OF REVIEWING WITH THE PEER
3 REVIEWERS, BUT MOST LIKELY AFTER SOME PERIOD WE'LL START
4 PRODUCTION.

5 ALL MANUSCRIPTS ARE SENT TO AN OUTSIDE COPY EDITOR
6 FOR A THOROUGH REVIEW. ONCE WE HAVE PROOFS, ALL BOOKS ARE
7 PROOFREAD BY AN EXTERNAL PROOFREADER, AND THEN WE PRINT BOOKS
8 AND PUBLISH IT.

9 Q. ONCE THE BOOK IS PUBLISHED, WHAT DOES CAMBRIDGE DO WITH
10 IT?

11 A. WELL, WE MARKET ALL OF OUR BOOKS. WE MARKET THEM WITHOUT
12 DISTINCTION AROUND THE WORLD. ALL TEXTBOOKS ARE AVAILABLE IN
13 ALL COUNTRIES.

14 MARKETING HAS CHANGED QUITE DRAMATICALLY OVER THE
15 LAST FIVE OR SIX YEARS. WE USED TO HAVE A LARGE SALESFORCE
16 CALLING ON BOOK STORES, BUT THAT HAS ALL CHANGED. NOW A GREAT
17 DEAL OF OUR ACTIVITY INVOLVES INELEGANTLY WHAT'S CALLED
18 DATAFEEDS OUT TO A VARIETY OF DIFFERENT SERVICES. WE HAVE A
19 DEPARTMENT THAT BASICALLY ORGANIZES THAT ACTIVITY.

20 Q. WHAT'S A DATAFEED?

21 A. WELL AT THE MOST BASIC LEVEL, IT'S THE TITLE, THE AUTHOR'S
22 NAME, A BLURB ABOUT THE BOOK AND THE PRICE AND A PICTURE OF THE
23 COVER WHICH WE FOR EXAMPLE WOULD SEND IT TO AMAZON.

24 Q. DOES CAMBRIDGE DO ANYTHING TO TRY TO ENCOURAGE PROFESSORS
25 TO ADOPT BOOKS TO ASSIGN TO ITS STUDENTS?

1 A. YES, WE HAVE CAMPAIGNS IN WHICH WE PROMOTE BOOKS TO
2 PROFESSORS. WE SEND OUT IT USED TO BE BY MAIL, NOW IT'S BY
3 E-MAIL, WE'LL SEND OUT MESSAGES ANNOUNCING A NEW BOOK,
4 EXPLAINING WHY IT'S IMPORTANT AND WOULD BE USEFUL IN THEIR
5 CLASS.

6 THEY CAN REQUEST A COPY OF A BOOK FOR EXAMINATION
7 ONLY. WE ALLOW THEM TO LOOK AT A COPY IN THE HOPE THAT THEY
8 WILL ASK THEIR STUDENTS TO PURCHASE THE BOOK FOR THE COURSE.

9 Q. HOW BIG IS AN AVERAGE FIRST PRINT RUN FOR A CAMBRIDGE
10 WORK?

11 A. FOR MONOGRAPHS NOW IT'S AROUND 400 COPIES. FOR OTHER
12 WORKS, TEXTBOOKS, IT COULD BE ANYWHERE FROM 800 TO 5,000 OR
13 MORE. REFERENCE WORKS ANYWHERE FROM 1,000 TO 3,000.

14 Q. ARE YOU FAMILIAR WITH THE CONCEPT OF A BOOK BEING OUT OF
15 PRINT?

16 A. I AM FAMILIAR WITH THE CONCEPT. IT'S FOR THE MOST PART NO
17 LONGER A VALID CONCEPT IN OUR BUSINESS.

18 Q. WHY IS THAT?

19 A. NEW TECHNOLOGY THAT'S COME ON STREAM OVER THE LAST TEN
20 YEARS BUT PARTICULARLY THE LAST FOUR YEARS WHICH IS GENERALLY
21 KNOWN AS PRINT ON DEMAND MAKES IT POSSIBLE NOW FOR US TO KEEP
22 ALMOST ANY BOOK, 98 PERCENT OF OUR BOOKS IN PRINT INDEFINITELY.

23 Q. HAS THAT HAD ANY FINANCIAL IMPACT ON CAMBRIDGE?

24 A. IT HAS, YES.

25 Q. WHAT IS THAT IMPACT?

1 A. WELL SALES OF NEW BOOKS HAVE DECLINED QUITE DRAMATICALLY
2 OVER THE LAST DECADE. LUCKY FOR US THE RISE OF PRINT ON DEMAND
3 HAS ALLOWED US TO MAKE UP THE GAP IN A SENSE BETWEEN NEW BOOK
4 SALES WITH PRINT ON DEMAND SALES. SO WHAT WOULD HAVE BEEN A
5 PERIOD OF SOME DECLINE LOOKS IN THE AGGREGATE LIKE A PERIOD OF
6 SMALL STEADY GROWTH.

7 Q. WHAT IS CAMBRIDGE BOOKS ONLINE?

8 A. CAMBRIDGE BOOKS ONLINE IS OUR PROPRIETARY E-BOOK PLATFORM
9 FOR SALE OF E-BOOKS TO INSTITUTIONS.

10 Q. DOES CAMBRIDGE OFFER ANY OTHER ELECTRONIC PLATFORMS?

11 A. YES, WE HAVE ABOUT EIGHT. TWO ARE CAMBRIDGE COMPANIONS
12 ONLINE WHICH IS A REFERENCE PRODUCT THAT INSTITUTIONS CAN
13 SUBSCRIBE TO. WE PUBLISH MANY BOOKS ON COMPANIONS. THOSE ARE
14 ALL GATHERED ON THAT PLATFORM. INSTITUTIONS CAN SUBSCRIBE.
15 EVERYONE AT THE INSTITUTION CAN READ ANY BOOK AT ANY TIME IF
16 THEY'RE A SUBSCRIBER.

17 CAMBRIDGE HISTORIES ONLINE IS A SIMILAR PRODUCT. WE
18 PUBLISH -- FOR ABOUT A HUNDRED YEARS WE'VE PUBLISHED CAMBRIDGE
19 HISTORIES AS IN CAMBRIDGE HISTORY OF CHINA, CAMBRIDGE
20 HISTORY OF BLACK AMERICAN AND SO FORTH. THEY'RE MULTI VOLUME,
21 HIGH LEVEL REFERENCE WORKS. THOSE ARE ALL GATHERED IN THAT
22 PRODUCT.

23 Q. LET'S TALK A LITTLE BIT ABOUT THE SALES OF FULL BOOKS. IF
24 A PROFESSOR WANTED TO ASSIGN A PORTION OF A BOOK TO A STUDENT,
25 IS IT POSSIBLE TO GET RIGHTS TO HAVE JUST THAT PORTION OF THE

1 BOOK?

2 A. IT DEPENDS ON THE SIZE OF THE PORTION.

3 Q. WHAT DO YOU MEAN?

4 A. WELL, WE DO NOT PERMIT THE COPYING OF MORE THAN 20 PERCENT
5 OF ANY GIVEN BOOK.

6 Q. IF IT WAS LESS THAN 20 PERCENT WOULD IT BE POSSIBLE TO
7 GET -- INSTEAD OF HAVING TO BUY THE WHOLE BOOK ACCESS TO JUST A
8 PORTION?

9 A. YES.

10 Q. HOW WOULD THAT WORK?

11 A. IN MOST CASES IT'S DONE THROUGH THE COPYRIGHT CLEARANCE
12 CENTER. WE ESTIMATE ABOUT 95 PERCENT OR HIGHER OF PERMISSIONS
13 THAT ARE GRANTED WHERE WE RECEIVE INCOME COME THROUGH CCC.

14 THE COURT: LET ME JUST MAKE SURE I'M FOLLOWING YOU.
15 YOU'RE SAYING THAT CCC DOES NOT HAVE PERMISSION FROM YOU ALL TO
16 DUPLICATE MORE THAN 20 PERCENT OF ONE OF YOUR BOOKS?

17 THE WITNESS: YES, MA'AM.

18 BY MS. SINGER:

19 Q. IS THAT -- WHO DECIDES THAT 20 PERCENT THRESHOLD?

20 A. WELL THAT WAS DECIDED BY SENIOR MANAGEMENT SOME YEARS AGO.

21 Q. IS THAT A CAMBRIDGE DECISION OR IS THAT A COPYRIGHT
22 CLEARANCE CENTER DECISION?

23 A. THAT'S A CAMBRIDGE DECISION.

24 Q. WHO DETERMINES WHICH CAMBRIDGE WORKS --

25 THE COURT: IF I COULD INTERRUPT? I GUESS I'M

1 WONDERING WHY ANYBODY WOULD WANT TO GET COPIES OF MOST OF A
2 BOOK FROM CCC BECAUSE I'M GUESSING IT WOULD BE MORE EXPENSIVE
3 THAN BUYING THE BOOK.

4 THE WITNESS: YES, YOUR HONOR, IT WOULD BE, BUT WE DO
5 GET REQUESTS. I DON'T KNOW THE REASON.

6 THE COURT: RIGHT.

7 BY MS. SINGER:

8 Q. WHO DETERMINES WHICH CAMBRIDGE WORKS ARE AVAILABLE FOR
9 PERMISSIONS OR LICENSING THROUGH CCC?

10 A. THAT'S DETERMINED BY SENIOR MANAGEMENT AT CAMBRIDGE.

11 Q. HOW DOES THAT PERMISSIONS PROCESS WORK, IF YOU KNOW?

12 A. MY UNDERSTANDING IS THAT -- YOU MEAN AT CCC?

13 Q. LET'S DO CCC FIRST?

14 A. MY UNDERSTANDING IS THAT CCC NOW RECEIVES MOST OF ITS
15 REQUESTS VIA ITS WEBSITE OR BY E-MAIL. MY FURTHER
16 UNDERSTANDING THAT THOSE REQUESTS ARE DEALT WITH WITHIN A FEW
17 MINUTES AS LONG AS IT TAKES THE COMPUTER TO GENERATE A
18 RESPONSE.

19 IF THE REQUEST IS DENIED, THEN THEY ARE INSTRUCTED TO
20 E-MAIL OUR RIGHTS AND PERMISSIONS MANAGER. HE GENERALLY DEALS
21 WITH REQUESTS WITHIN TWO TO FOUR WORKING DAYS.

22 Q. DO PEOPLE EVER COME DIRECTLY TO CAMBRIDGE TO ASK FOR
23 PERMISSIONS WITHOUT GOING THROUGH CCC?

24 A. YES.

25 THE COURT: WHAT PERCENTAGE OF YOUR WORK IS CCC ABLE

1 TO HANDLE?

2 THE WITNESS: I CAN ONLY GUESS, YOUR HONOR. I'M
3 GOING TO SAY SOMETHING IN THE REALM OF 60 PERCENT. BECAUSE
4 MANY WORKS SUCH AS REFERENCE WORKS WE WOULD NOT ALLOW TO BE
5 HANDLED BY THEM. SOME OF OUR ENGLISH AND SECOND LANGUAGE WORKS
6 WE DON'T ALLOW TO GO THROUGH THEM.

7 THE COURT: I'M JUST CURIOUS WHAT THE REASONING IS.

8 THE WITNESS: TO BOIL IT DOWN IN ESSENCE BECAUSE WE
9 WANT TO SELL BOOKS, AND WE DON'T WANT TO ALLOW OTHER FORMS OF
10 DESEGREGATION OF A CONTENT. WE WANT TO DRIVE THE CONSUMER TO
11 BUY A BOOK IF POSSIBLE.

12 BY MS. SINGER:

13 Q. WHAT'S THE TYPICAL COST OF PERMISSIONS FEE FOR A CAMBRIDGE
14 WORK THROUGH CCC?

15 A. IT WOULD BE 11 CENTS PER PAGE PER USER FOR PHOTOCOPYING,
16 AND I BELIEVE IT'S 15 CENTS PER PAGE PER USER FOR DIGITAL
17 REPRODUCTION.

18 Q. AND WHO SETS THAT FEE?

19 A. THAT WAS SET BY CAMBRIDGE MANAGEMENT.

20 Q. MR. SMITH, WHAT ARE APPROXIMATELY CAMBRIDGE'S YEARLY
21 OPERATING EXPENSES?

22 A. WELL IN THE YEAR THAT WE'VE JUST COMPLETED, OUR FISCAL
23 YEAR ENDS IN APRIL, I WOULD SAY IT'S PROBABLY IN THE REALM OF
24 AROUND 240 MILLION DOLLARS U.S. GLOBALLY.

25 Q. AND OF THAT APPROXIMATELY HOW MUCH WAS ROYALTIES TO

1 AUTHORS?

2 A. ROYALTIES TO AUTHORS WOULD BE IN THE REALM OF JUST UNDER
3 10 PERCENT. SO LET'S SAY SOMEWHERE AROUND 24 MILLION DOLLARS.

4 Q. AND WHAT WOULD THE REST OF THE EXPENSES BE GENERALLY; WHAT
5 KIND OF EXPENSES?

6 A. WELL, THE LARGEST EXPENSE UNDOUBTEDLY IS STAFF SALARIES.
7 WE HAVE ABOUT 2,000 PEOPLE WHO WORK FOR US AROUND THE WORLD.
8 OFFICE EXPENSES, OF COURSE PRINTING, TYPESETTING, WAREHOUSING.
9 THOSE ARE THE MAIN THINGS.

10 Q. OKAY. HOW DOES CAMBRIDGE EARN REVENUE?

11 A. THROUGH THE SALE OF OUR BOOKS PRIMARILY, AND WE ARE A
12 PUBLISHER OF SCHOLARLY JOURNALS. SO WE HAVE SUBSCRIPTION
13 INCOME FROM THOSE JOURNALS AND THE BALANCE IS FROM PERMISSIONS
14 FEES.

15 Q. APPROXIMATELY HOW MUCH OF YOUR ANNUAL REVENUES COME FROM
16 PERMISSIONS FEES?

17 A. ROUGHLY 3 TO 5 PERCENT.

18 Q. WHAT WOULD HAPPEN IF THAT 3 TO 5 PERCENT WERE TO DRY UP,
19 IF THERE ARE NO PERMISSION FEES?

20 A. WELL THAT WOULD BE DELETERIOUS --

21 MR. HARBIN: EXCUSE ME, YOUR HONOR, I WOULD HAVE AN
22 OBJECTION BOTH TO FOUNDATION AND HIS QUALIFICATIONS TO OPINE,
23 AND ALSO PROCEDURALLY HE WASN'T DESIGNATED EVER AS AN EXPERT TO
24 OPINE ABOUT THE AFFECT OF LOSS OF PERMISSIONS FEE INCOME.

25 THIS MAY COME UP IN MORE DETAIL LATER. THE

1 PLAINTIFFS IN THIS CASE HAD ONE DESIGNATED EXPERT ON MARKET
2 HARM, AND AS AN ASIDE FOR THE LATER ARGUMENT THAT I ANTICIPATE,
3 THE ONLY ISSUE SHE OPINED ABOUT WAS PERMISSION FEES AND THE
4 AFFECT OF GSU'S PRACTICE ON PERMISSION FEES. THEY CHOSE NOT TO
5 PUT HER ON THE WITNESS LIST. THAT'S MS. MARINIELLO OF CCC.
6 SHE WAS NEVER DESIGNATED ON PERMISSION FEES OR ON THE AFFECT OF
7 CAMBRIDGE.

8 THE COURT: CLARIFY YOUR QUESTION? I'M NOT SURE HOW
9 TECHNICAL YOU'RE TRYING TO BE AT THIS POINT.

10 MS. SINGER: I WASN'T TRYING TO BE TECHNICAL AT ALL,
11 YOUR HONOR. HE IS A BUSINESSMAN. THIS IS IN THE ORDINARY
12 COURSE OF BUSINESS. WE'RE NOT TRYING TO GET TECHNICAL AT ALL.
13 HE HAS RESPONSIBILITIES, AND I'M TRYING TO GET AT IN THE
14 ORDINARY COURSE HERE AT A VERY HIGH LEVEL.

15 THE COURT: WELL, IT SEEMS OBVIOUS TO ME IF THE
16 PERMISSION FEES DRIED UP THAT THERE WOULD BE LESS INCOME; IS
17 THAT ALL YOU'RE SEARCHING FOR HERE OR WHAT?

18 MS. SINGER: BASICALLY IF IT'S ONLY 3 TO 5 PERCENT
19 WHO CARES IF IT DRIES UP.

20 THE COURT: I WILL ALLOW THAT. GO AHEAD. YOU MAY
21 ANSWER THE QUESTION.

22 THE WITNESS: YES. WELL, IF IT DRIED UP, THEN THAT
23 WOULD BE VERY DELETERIOUS TO OUR BUSINESS GIVEN THAT WE HAVE A
24 VERY SMALL OPERATING MARGIN. AGAIN IT'S DIFFICULT FOR ME TO
25 CONTEMPLATE. IT WOULD PROBABLY MEAN AT THE MOST BASIC LEVEL WE

1 WOULD PUBLISH FEWER MONOGRAPHS.

2 BY MS. SINGER:

3 Q. APPROXIMATELY WHAT PERCENTAGE OF YOUR ANNUAL REVENUE IS
4 FROM THE SALES OF BOOKS?

5 A. APPROXIMATELY 80 PERCENT.

6 Q. AND I THINK YOU -- JUST TO CLARIFY, I THINK YOU SPOKE
7 EARLIER WITH THE JUDGE, BUT OF THAT 80 PERCENT HOW MUCH OF IT
8 IS TO INSTITUTIONS AND HOW MUCH OF IT IS TO STUDENTS?

9 A. WELL VERY CRUDELY IT WOULD BE FIFTY-FIFTY LET US SAY.

10 Q. OKAY.

11 THE COURT: HOW WOULD YOU KNOW THAT IT'S TO
12 STUDENTS? I CAN SEE HOW YOU CAN IDENTIFY WHO THE INSTITUTIONS
13 ARE, BUT IT LOOKS TO ME LIKE IT WOULD ALL SALES TO INSTITUTIONS
14 AND THEN ALL SALES TO EVERYBODY ELSE.

15 THE WITNESS: WELL, YOUR HONOR, YOU'RE RIGHT TO
16 QUESTION IT, AND AS I SAY I'M GUESSING. WE DO KNOW THAT WHEN
17 WE SELL A HARDBACK COPY OF A BOOK THAT 90 PERCENT OR MORE OF
18 THOSE SALES ARE DIRECTED AT INSTITUTIONS. NOBODY ELSE BUYS
19 THEM. SO EFFECTIVELY WE'RE WEIGHING OUR HARDBACK AND OUR
20 PAPERBACK SALES. THAT'S ONE OF THE WAYS WE LOOK AT IT.

21 THERE ARE OTHER PATTERNS THAT WE OBSERVE IN SALES.
22 THE INSTITUTIONAL SALES TEND TO BE VERY SOON AFTER
23 PUBLICATION. WITHIN 18 MONTHS YOU'VE SOLD MOST OF WHAT YOU'RE
24 GOING TO SELL TO INSTITUTIONS. AFTERWARDS IT MIGHT BE 3 TO 4
25 PERCENT OVER TIME. SO THERE IS A CURVE VERY QUICKLY. ONGOING

1 SALES WHICH ARE STEADY WOULD BE STUDENTS. THOSE ARE SOME OF
2 THE WAYS THAT WE MEASURE IT.

3 THE COURT: I JUST DON'T KNOW HOW YOU KNOW THEY ARE
4 STUDENTS.

5 THE WITNESS: BECAUSE OF THE PATTERNS OF PURCHASING
6 YOU CAN SEE IT. WE HAVE TWO BIG MONTHS EACH YEAR FOR
7 PAPERBACKS AUGUST AND JANUARY. THOSE ARE THE MONTHS WHEN WE
8 SELL MOST OF THE BOOKS FOR COURSES.

9 BY MS. SINGER:

10 Q. HOW DO THE ERESERVES PRACTICES AT GSU AFFECT CAMBRIDGE?

11 A. WELL OUR CONCERN IS THAT --

12 MR. HARBIN: YOUR HONOR, I HAVE THE SAME OBJECTION TO
13 THE EXTENT THAT IT'S GETTING INTO MARKET OR FINANCIAL
14 INFORMATION, A, I BELIEVE IT'S OUTSIDE THE SCOPE OF HIS
15 EXPERTISE; AND, B, -- OR HIS EDUCATION, AND, B, PROCEDURALLY HE
16 WAS NEVER DESIGNATED TO TESTIFY ON THIS ISSUE. THEY HAD A
17 WITNESS DESIGNATED TO TESTIFY ON MARKET HARM.

18 SO IF THEY ARE GOING THERE WITH THAT OPENING
19 QUESTION, I DO OBJECT BOTH TO SUBSTANTIVELY AND PROCEDURALLY.

20 MS. SINGER: I'M REALLY NOT TRYING TO GET TO EXPERT
21 TESTIMONY.

22 THE COURT: WHAT DO YOU THINK HE'S GOING TO SAY?

23 MS. SINGER: I THINK HE'S GOING TO SAY THAT THEY'RE
24 NOT BEING PAID FOR THEIR INTELLECTUAL PROPERTY, AND IF THIS
25 INCOME GOES DOWN, THEIR PROFIT MARGIN IS 2 TO 5 PERCENT, THEIR

1 PERMISSIONS IS 2 OR 3 PERCENT, AND EVEN A LAWYER CAN DO THAT
2 MATH.

3 THE COURT: I'LL ALLOW IT.

4 THE WITNESS: YES, OUR CONCERN IS THAT -- OUR CONCERN
5 IS EFFECTIVELY BECAUSE OF THE PATTERN AS WELL AS THE SCALE.
6 BECAUSE IT APPEARS TO HAVE BEEN TAKING PLACE OVER REPEATED
7 SEMESTERS, WE'RE CONCERNED THAT THIS WILL BECOME CUSTOM AND
8 PRACTICE FOR HOW STUDENTS OBTAIN THEIR READINGS, AND OBVIOUSLY
9 WE'RE NOT PAID, AND SO, THEREFORE, IF THAT WERE TO TAKE PLACE
10 IT WOULD OVER TIME HAVE A VERY STRONG AFFECT ON OUR BOTTOM
11 LINE.

12 BY MS. SINGER:

13 Q. IF CAMBRIDGE'S MISSION IS TO ADVANCE SCHOLARSHIP AND GSU
14 IS GETTING SCHOLARSHIP IN THE HANDS OF STUDENTS AND TEACHING
15 THEM, WHY IS THAT A PROBLEM?

16 A. WELL, WE ARE BOTH -- THERE'S NO QUESTION WE'RE BOTH IN THE
17 BUSINESS IN A SENSE OF ADVANCING SCHOLARSHIP, AND IN A SENSE WE
18 ALSO BOTH HAVE THAT NEED FOR SUSTAINABILITY. SO WE MUST HAVE,
19 AS I SAID, A LITTLE MORE MONEY AT THE END OF THE YEAR THAN WE
20 HAD AT THE BEGINNING OR WE WON'T STAY IN BUSINESS, AND THAT
21 WOULD BE TRUE FOR GSU THROUGH ITS TUITION CHARGES. THEY HAVE
22 TO CHARGE THEIR STUDENTS TO SIT IN COURSES JUST AS WE HAVE TO
23 CHARGE FOR OUR BOOKS.

24 Q. IF CAMBRIDGE WASN'T SELLING BOOKS TO ACADEMIC INSTITUTIONS
25 OR TO STUDENTS, WHAT OTHER SOURCES OF REVENUE DOES IT HAVE?

1 A. WELL ALL WE HAVE LEFT THEN IS JOURNAL SUBSCRIPTIONS AND
2 PERMISSIONS IF WE'RE NOT SELLING BOOKS. WE'RE OUT OF BUSINESS.

3 Q. WHAT IF YOU'RE NOT SELLING BOOKS AND YOU'RE NOT GETTING
4 PERMISSIONS?

5 A. THEN WE'RE IN TROUBLE, YES.

6 Q. WHY DON'T WE WALK THROUGH A SPECIFIC CONCRETE EXAMPLE
7 HERE.

8 MS. SINGER: WE'RE GOING TO TAKE THESE, YOUR HONOR,
9 OFF THE JOINT FILING. WOULD YOU LIKE A COPY OF THAT?

10 THE COURT: NO.

11 BY MS. SINGER:

12 Q. ONE OF THE WORKS THAT WAS ON THE JOINT FILING WAS THE
13 CRITERION-REFERENCED LANGUAGE TESTING BY JAMES DEAN BROWN AND
14 THOM HUDSON; DO YOU RECOGNIZE THAT TITLE, MR. SMITH?

15 A. I DO.

16 Q. IS THAT A CAMBRIDGE WORK?

17 A. YES, IT IS.

18 Q. PROFESSOR KIM IN HER COURSE AL 8550, SECOND LANGUAGE
19 EVALUATION AND ASSESSMENT, IN THE FALL OF 2009 USED THIS WORK,
20 AND AS WE SCROLL TO THE RIGHT, WE SEE THAT THE LIST PRICE FOR
21 THE BOOK IS ABOUT 96 DOLLARS FOR THE HARDCOPY AND 37 DOLLARS
22 FOR THE PAPERBACK; DOES THAT SOUND ABOUT RIGHT TO YOU?

23 A. YES.

24 Q. AND WE SEE THAT 16 NUMBER THERE IS THE NUMBER OF STUDENTS
25 IN THE CLASS. SO IF THOSE 16 STUDENTS HAD PURCHASED THE BOOK,

1 AND I THINK WE ARE USING THE PAPERBACK COPY THERE, HOW MUCH
2 REVENUE WOULD CAMBRIDGE HAVE RECEIVED IN SALES REVENUE?

3 A. IN MY HEAD I'M GUESSING AROUND SOMEWHERE JUST OVER 500
4 DOLLARS.

5 Q. SO 16 STUDENTS TIMES THE 37 DOLLAR LIST PRICE IS ABOUT?

6 A. LET'S SAY IT WOULD BE ABOUT 500.

7 Q. OKAY. EXCELLENT. AND THAT'S ONE SEMESTER, ONE CLASS 16
8 STUDENTS, RIGHT?

9 A. YES.

10 Q. IF THIS SORT OF PRACTICE BECAME WIDESPREAD ACROSS MANY
11 UNIVERSITIES, WHAT WOULD THE EFFECT BE?

12 MR. HARBIN: YOUR HONOR, I AGAIN OBJECT. A, I THINK
13 THE QUESTION IS AMBIGUOUS ABOUT WHAT THIS SORT OF PRACTICE IS.
14 I MEAN COUNSEL CAN ARGUE TO THE COURT WITHOUT A WITNESS SAYING
15 IF STUDENTS WERE TO HAVE BOUGHT THIS BOOK AT 96 DOLLARS AND 16
16 OF THEM WOULD HAVE BOUGHT IT, THEY WOULD HAVE X NUMBER OF
17 DOLLARS IN REVENUE --

18 THE COURT: I THINK IT IS AN OBVIOUS POINT. I'LL
19 SUSTAIN THE OBJECTION.

20 MS. SINGER: THAT'S FINE, YOUR HONOR. THANK YOU.

21 BY MS. SINGER:

22 Q. MR. SMITH, IF PROFESSOR KIM ASSIGNED PAGES 101 TO 148,
23 THAT'S ABOUT 48 PAGES, SHE'S NOT GOING TO ASSIGN THE WHOLE BOOK
24 SO THE STUDENTS AREN'T GOING TO PURCHASE IT ANYWAY, THEN WHY
25 DOES IT MATTER IF GSU IS DISTRIBUTING COPIES OF THESE EXCERPTS

1 TO STUDENTS?

2 A. WELL, WHY DOES IT MATTER? BECAUSE, AGAIN, IT'S GOING TO
3 THE HEART OF OUR ABILITY TO PROTECT BEING ABLE TO PUBLISH
4 BOOKS. WE JUST CAN'T GIVE IT AWAY BECAUSE PEOPLE WANT TO TAKE
5 IT.

6 Q. IF SHE WANTED TO MAKE AVAILABLE THIS EXCERPT TO STUDENTS
7 IN A LICENSED OR PERMISSIONED WAY IS THAT POSSIBLE?

8 A. I'D HAVE TO DO THE ANALYSIS WHETHER THAT WOULD CONSTITUTE
9 MORE THAN 20 PERCENT OF THE BOOK. IF IT WERE LESS THAN 20
10 PERCENT OF THE BOOK, THEN THE ANSWER WOULD BE YES, THAT SHE
11 COULD MAKE IT AVAILABLE.

12 Q. OKAY. I'M NOT SURE THAT'S THE CASE. I THINK 16.5 IS --
13 AS YOU CAN SEE THE PERCENTAGE OF THE TAKING IS ACTUALLY ONE OF
14 THESE COLUMNS. I THINK IT'S 16.5 PERCENT OF THE BOOK IS WHAT
15 THIS TAKING IS HERE. SO THAT'S LESS THAN 20 PERCENT?

16 A. THAT'S CORRECT.

17 Q. OKAY. SO IF FOR 48 PAGES OF THIS BOOK TIMES -- SO THE
18 16.5 IS THE PERCENT COPIED. THE LICENSING COST PER STUDENT IF
19 YOU TAKE THE PHOTOCOPY PER PAGE IS ABOUT \$7.20 A STUDENT; DOES
20 THAT SOUND ABOUT RIGHT?

21 A. THAT DOES SOUND ABOUT RIGHT, YES.

22 Q. OKAY. WHAT IS THE LIFE CYCLE OF AN ACADEMIC BOOK, A
23 SCHOLARLY BOOK?

24 A. THE LIFE CYCLE -- WELL UPON PUBLICATION IT DEPENDS. IF
25 IT'S A BOOK WE PUBLISHED FIRST IN HARDBACK ONLY, ITS LIFE

1 CYCLES WILL COME OUT AT A FAIRLY EXPENSIVE PRICE BECAUSE IT'S
2 INTENDED MAINLY FOR INSTITUTIONAL PURPOSE.

3 WE PUBLISH PAPERBACK EDITIONS OF ALL OF OUR BOOKS NOW
4 WITHIN TWO YEARS AFTER THE FIRST PUBLICATION OF THE HARDBACK.
5 FOR ABOUT 30 PERCENT OF OUR BOOKS WE ACTUALLY PUBLISH A
6 PAPERBACK EDITION AT FIRST PUBLICATION. SO ONE WAY OR ANOTHER
7 AFTER TWO YEARS AT PRESENT THERE WILL BE A PAPERBACK EDITION
8 FOR ALL OF OUR BOOKS. DOES THAT HELP?

9 Q. HAVE YOU NOTICED ANY TRENDS IN THE PERMISSIONS REVENUE
10 THAT CAMBRIDGE RECEIVES FOR ITS BOOKS?

11 A. WELL, YES, OVER THE LAST --

12 MR. HARBIN: AGAIN, OBJECT, YOUR HONOR, THIS IS I
13 THINK TRENDING INTO EXPERT TESTIMONY FOR WHICH HE'S NOT
14 DESIGNATED. MS. MARINIELLO DID GIVE SOME RELATED TESTIMONY AS
15 TO THIS AND SHE'S NOT HERE.

16 THE COURT: OVERRULED.

17 THE WITNESS: YES, OVER THE LAST FOUR YEARS WE HAVE
18 SEEN OUR PERMISSIONS FOR PHOTOCOPY -- THE INCOME FOR PHOTOCOPY
19 PERMISSIONS HAS DECLINED. IT'S DECLINED ABOUT 10 PERCENT
20 OVERALL.

21 INCOME FOR ELECTRONIC PERMISSIONS HAS BEEN FLAT OVER
22 THE SAME PERIOD. THERE'S BEEN NO RISE OR DECLINE.

23 BY MS. SINGER:

24 Q. MR. SMITH, WHAT IS CAMBRIDGE'S VIEW OF FAIR USE?

25 A. WELL OUR VIEW OF FAIR USE IS WE'RE VERY SUPPORTIVE OF FAIR

1 USE. WE RECOGNIZE THAT FAIR USE IS AN ESSENTIAL PART OF HOW
2 OUR AUDIENCE, OUR CUSTOMERS INTERACT WITH BOOKS. I'M THINKING
3 OF PROFESSORS AND STUDENTS AS OUR AUDIENCE.

4 OF COURSE THEY HAVE TO HAVE FAIR USE, BUT WE SEE IT
5 MORE AS AN INDIVIDUAL MATTER NOT AS SOMETHING THAT SHOULD TAKE
6 PLACE AT THE LEVEL OF COURSES.

7 THE COURT: AT THE LEVEL OF WHAT?

8 THE WITNESS: OF COURSES, OF ORGANIZED COURSES.

9 THE COURT: I'M NOT SURE WHAT YOU MEAN BY THAT. YOU
10 DON'T THINK PROFESSORS SHOULD BE ABLE TO MAKE FAIR USE
11 DECISIONS THAT AFFECT THEIR CLASS OR WHAT?

12 THE WITNESS: NO, YOUR HONOR, I WOULD NOT ARGUE
13 THAT. WHAT I'M TRYING TO SAY IS IF AN INDIVIDUAL WISHES TO
14 COPY A PORTION OF A BOOK FOR INDIVIDUAL USE, WE WOULD SEEK NO
15 OBJECTION. IN FACT WE WOULD ENCOURAGE THAT. THAT'S GOOD.

16 WHAT WE WOULD OBJECT TO IS AN INDIVIDUAL PROFESSOR
17 MAKING COPIES FOR A LARGE GROUP OF PEOPLE WHO MIGHT OTHERWISE
18 PURCHASE THE MATERIAL OR OBTAIN IT IN ANOTHER WAY.

19 BY MS. SINGER:

20 Q. DO CAMBRIDGE AUTHORS EVER WANT TO USE EXCERPTS OF
21 COPYRIGHTED WORKS IN THEIR OWN WORKS, USE SOMEBODY ELSE'S
22 COPYRIGHTED WORK?

23 A. YES, QUITE FREQUENTLY.

24 Q. AND HOW DOES CAMBRIDGE ADDRESS THAT SITUATION?

25 A. WE ADDRESS IT SEVERAL WAYS. FIRST OF ALL, OUR CONTRACT

1 STIPULATES THAT THE AUTHOR IS RESPONSIBLE -- FOR ANY MATERIAL
2 IN THEIR BOOK, THEY'RE LIABLE. SO IF THERE IS ANYTHING THAT'S
3 COPYRIGHTABLE AND THEY HAVE NOT OBTAINED PERMISSION, THEY HAVE
4 THE PRIMARY RESPONSIBILITY.

5 HOWEVER, WE ENJOIN THEM THAT THEY MUST SEEK AND PROVE
6 TO US THAT THEY HAVE SOUGHT PERMISSION FOR ANY COPYRIGHT
7 MATERIAL IN THE BOOK, AND OUR COPY EDITORS AND OUR EDITORS ARE
8 ENJOINED TO CHECK ALL BOOKS TO MAKE SURE THAT THAT HAS
9 OCCURRED. SO WE WON'T PUBLISH A BOOK IF WE DON'T THINK THAT
10 THE AUTHOR HAS OBTAINED THE PERMISSIONS.

11 Q. DO YOU TAKE THE AUTHOR'S WORD FOR IT THAT THEY HAVE GOTTEN
12 ALL THE PERMISSIONS THEY NEED?

13 A. IN PRACTICE NO.

14 Q. WHAT DO YOU MEAN BY THAT?

15 A. WHEN I WAS EDITORIAL DIRECTOR, MY BIGGEST JOB WAS TO PUT
16 THE FEAR OF GOD IN EDITORS THAT THEY CHECK ALL MANUSCRIPTS TO
17 MAKE SURE THERE IS NOTHING IN THEM WHERE PERMISSION IS REQUIRED
18 THAT WHERE A PERMISSION HAS NOT BEEN OBTAINED.

19 IT'S A CORE PART OF THEIR ACTIVITY THAT THEY CAN TELL
20 US THAT THIS BOOK IS ONE WE CAN PUBLISH WITHOUT ANY DANGER OF
21 ANYONE CLAIMING INFRINGEMENT.

22 Q. ARE THERE ANY CIRCUMSTANCES WHERE YOU COULD USE SOMEBODY
23 ELSE'S COPYRIGHTED WORK WITHOUT OBTAINING PERMISSION?

24 THE COURT: I'M NOT SURE HOW HELPFUL THIS IS. IT
25 SEEMS LIKE YOU'RE KIND OF OFF THE MAIN PATH.

1 MS. SINGER: THAT'S FINE, YOUR HONOR, WE'RE JUST
2 TRYING TO GET AT THE FACT THAT WE'RE NOT AGAINST FAIR USE.

3 THE COURT: OKAY. I THINK YOU COVERED THAT.

4 MS. SINGER: OKAY. EXCELLENT.

5 YOUR HONOR, I DON'T KNOW WHAT YOUR TIMING IS --

6 THE COURT: ONE O'CLOCK.

7 MS. SINGER: AT THIS POINT IF I MAY APPROACH WE HAVE
8 A BINDER OF EXHIBITS AND MAYBE I'LL ASK YOU HOW YOU'D LIKE TO
9 ADDRESS THIS. WE HAVE FOR CAMBRIDGE ALL OF THE WORKS ON THE
10 JOINT FILING WE HAVE THE BOOK. WE HAVE THE EDITOR OR THE
11 AUTHOR AGREEMENT. WE HAVE CONTRIBUTING AUTHOR AGREEMENTS. WE
12 HAVE EITHER THE COPYRIGHT REGISTRATION CERTIFICATE OR ELSE WE
13 HAVE A RECORD OF THE FACT THAT IT WAS PUBLISHED IN THE UNITED
14 KINGDOM MORE THAN 30 DAYS BEFORE IT WAS PUBLISHED IN THE U.S.
15 AND THUS IT'S PROTECTED BY THE BERNE CONVENTION.

16 THE COURT: THIS IS ONE OF YOUR EXHIBITS YOU'RE
17 SAYING?

18 MS. SINGER: IT'S A WHOLE LOT OF EXHIBITS. IT'S
19 PROBABLY SOMEWHERE IN THE RANGE OF TWO, THREE HUNDRED
20 EXHIBITS. IT'S A BIG BINDER. MR. SMITH IS PREPARED TO GO
21 THROUGH IT BECAUSE THERE'S BEEN SOME CHALLENGES TO WHETHER OR
22 NOT WE OWN THE COPYRIGHT.

23 I DON'T KNOW IF THERE'S A BETTER WAY TO DO THAT
24 BECAUSE IT'S A LITTLE BIT TEDIOUS. WE CAN GO THROUGH A COUPLE
25 AND YOU CAN MAKE A DECISION ONCE YOU SEE WHAT I'M TALKING

1 ABOUT.

2 THE COURT: THE ONLY THING I KNOW TO SUGGEST IS THAT
3 YOU JUST MAKE YOUR MOTION, AND I'LL HEAR IF THERE ARE ANY
4 OBJECTIONS. I DOUBT THAT I NEED TO ACTUALLY SEE THE EXHIBITS.
5 I MIGHT NEED TO SEE PARTICULAR ONES, BUT YOU'RE TALKING ABOUT
6 MOVING INTO EVIDENCE THINGS THAT ARE ON YOUR EXHIBIT LIST,
7 RIGHT?

8 MS. SINGER: FOR THE MOST PART, YOUR HONOR, THERE IS
9 NO OBJECTION TO THE BOOKS, THE CONTRACTS --

10 THE COURT: SO I WOULD THINK AS TO THE ONES THERE'S
11 NO OBJECTION WE DON'T NEED TO COVER THEM AT ALL.

12 MS. SINGER: OKAY.

13 THE COURT: AND THEN AS TO ANY WHERE THERE IS AN
14 OBJECTION, I MAY NEED TO -- I GUESS I WILL NEED TO MAKE RULINGS
15 ON.

16 MS. SINGER: OKAY. IF I MAY, THE ISSUE IS THAT THERE
17 IS NO OBJECTIONS TO MOST OF THE EXHIBITS. THEY ALL SHOW THAT
18 CAMBRIDGE IS THE OWNER, THE EXCLUSIVE LICENSEE OF THE
19 COPYRIGHT.

20 THE ISSUE IS THAT ON THE JOINT FILING THE DEFENDANTS
21 HAVE OBJECTED EITHER THAT WE HAVEN'T SHOWN THE ASSIGNMENT THAT
22 CAMBRIDGE ISN'T THE OWNER. SO I'M WONDERING IF THERE'S A WAY
23 THAT WE COULD JUST MOVE THEM ALL IN BECAUSE THE EVIDENCE IS ALL
24 THERE, OR IF WE FEED TO DEAL WITH THE OBJECTIONS ON THAT JOINT
25 FILING ONE BY ONE.

1 THE COURT: WELL, IF THERE ARE OBJECTIONS WE'LL NEED
2 TO DEAL WITH THEM.

3 MR. HARBIN: YOUR HONOR, OBVIOUSLY TO THE EXTENT WE
4 DIDN'T OBJECT TO EXHIBITS, WE'RE NOT GOING TO OBJECT. ON THE
5 WORKS, WE DON'T OBJECT TO THE PROPER WORKS. THERE HAS BEEN
6 SOME ISSUE THAT HAS COME UP ON SOME OF THE WORKS THAT THE
7 PLAINTIFF AT LEAST IN A COUPLE OF INSTANCES HAS A DIFFERENT
8 EDITION THAN WE BELIEVE THAT THE PROFESSOR USED, AND WE WOULD
9 RESERVE THE RIGHT TO BRING IT UP TO THE PLAINTIFF AND THE COURT
10 TO CLARIFY THAT.

11 WE HAVE A DIFFERENT INTERPRETATION ABOUT THE RESULT
12 OF SOME OF THESE CONTRACTS SO WE'RE NOT GOING TO BE ABLE TO
13 STIPULATE IF THEY'RE PROPOSING TO GO BEYOND THAT IF THEY HAVE
14 PROVEN OWNERSHIP OR LICENSE BECAUSE WE HAVE A DIFFERENT VIEW AS
15 TO SEVERAL OF THE WORKS.

16 THE COURT: I WOULD SUGGEST THAT YOU JUST START OUT
17 BY READING OUT THE EXHIBIT NUMBERS THAT YOU'RE MOVING INTO
18 EVIDENCE WHERE THERE ARE NO OBJECTIONS.

19 MS. SINGER: OKAY. AND JUST SO I'M CLEAR ON THE
20 UNDERSTANDING, SOME OF THE ONES THEY HAVEN'T OBJECTED TO THE
21 EXHIBITS, BUT THEY'RE STILL OBJECTING TO THE FACT THAT WHETHER
22 OR NOT CAMBRIDGE OWNS THE COPYRIGHT.

23 MY PREFERENCE WOULD OBVIOUSLY BE TO HAVE THE
24 KNOWLEDGE OF A WITNESS EXPLAIN THAT CAMBRIDGE DOES IN FACT OWN
25 THE COPYRIGHT ON THOSE. I DON'T KNOW HOW YOUR HONOR WOULD LIKE

1 TO PROCEED ON THAT.

2 THE COURT: WELL, I'M NOT FOLLOWING YOU WHEN YOU SAY
3 THERE ARE NO OBJECTIONS TO THE EXHIBITS BUT THERE ARE SOME
4 OBJECTIONS. I DON'T UNDERSTAND WHAT YOU MEAN BY THAT.

5 MS. SINGER: WELL, YOUR HONOR, ON, FOR EXAMPLE, THE
6 WORK WE WERE JUST LOOKING AT THE CRITERION-REFERENCED LANGUAGE
7 TESTING BY JAMES DEAN BROWN AND THOMAS HUDSON, THE --

8 THE COURT: SO WHAT EXHIBIT ARE WE TALKING ABOUT
9 HERE?

10 MS. SINGER: WHAT'S ON THE SCREEN IS THE JOINT
11 FILING, AND IF WE LOOK AT PAGE C-2 OF THAT FILING -- ACTUALLY
12 I'M SORRY, A BETTER EXAMPLE WOULD BE IF YOU LOOK AT THE VERY
13 FRONT OF THE JOINT FILING PAGE A-1, THE VERY FIRST WORK LISTED,
14 IT'S PROFESSOR MURPHY'S USE OF PRONUNCIATION GAMES, AND THE
15 OBJECTION THERE IS THAT THERE WAS NO COPYRIGHT REGISTRATION
16 PROVIDED. THERE IS ACTUALLY A COPYRIGHT CERTIFICATE --

17 THE COURT: YEAH, I HEAR WHAT YOU'RE SAYING, BUT I'M
18 HAVING A HARD TIME RELATING IT TO WHAT YOU WANT TO DO. THE
19 JOINT FILING I ASSUME EITHER IS IN EVIDENCE OR IT WILL BE, I'M
20 NOT SURE WHICH, BUT THAT DOESN'T GET YOU WHERE YOU WANT TO GO
21 WITH THIS PARTICULAR BOOK.

22 MS. SINGER: I THINK MY QUESTION IS, YOUR HONOR, WE
23 HAVE ALL THE EXHIBITS, WE HAVE THEM ALL. WHAT IS THE BEST WAY
24 TO GET A RULING FROM YOUR HONOR ON THE OBJECTIONS TO THE
25 COPYRIGHT OWNERSHIP?

1 THE COURT: I DON'T KNOW. I DON'T KNOW. I MEAN
2 BECAUSE --

3 MS. SINGER: I DON'T THINK YOU WANT TO GO THROUGH ALL
4 THIS.

5 THE COURT: I DON'T KNOW. I REALLY DON'T. I MEAN
6 HAVE I ADMITTED THIS JOINT FILING INTO EVIDENCE YET?

7 MS. SINGER: PROBABLY NOT YET.

8 THE COURT: WHAT'S THE EXHIBIT NUMBER?

9 MR. SCHAETZEL: I THOUGHT IT WAS ON THE JOINT LIST.

10 MS. SINGER: IT WAS MEANT TO BE JOINT EXHIBIT 5, BUT
11 I WOULD HOPE THAT MR. SCHAETZEL WOULDN'T HAVE AN OBJECTION IF I
12 MOVED THAT IN AS JOINT EXHIBIT 5.

13 MR. SCHAETZEL: NO OBJECTION.

14 THE COURT: IT'S ADMITTED.

15 MS. SINGER: THANK YOU. THEN WHY DON'T I GO AHEAD
16 AND READ INTO THE RECORD ALL OF THE EXHIBIT NUMBERS THAT WE
17 WOULD LIKE TO GET IN. IT STARTS WITH PLAINTIFFS' EXHIBITS 85,
18 86, 87, 88 AND 89 --

19 THE COURT: LET ME STOP RIGHT HERE. ALL OF THESE
20 THAT YOU'RE READING OUT NOW ARE SHOWN ON THE PRETRIAL ORDER AS
21 NOT BEING OBJECTED TO.

22 MS. SINGER: I BELIEVE 85, 86 AND 87 ARE NOT OBJECTED
23 TO.

24 THE COURT: AND WHAT I WANT YOU TO DO RIGHT NOW IS
25 RESTRICT THIS LIST TO THOSE WHERE THERE'S NO OBJECTION.

1 MS. SINGER: OKAY. PLAINTIFFS' EXHIBITS 85, 86 AND
2 87, PLAINTIFFS' EXHIBITS 15, 16, 17, PLAINTIFFS' EXHIBITS 29,
3 30, 31, PLAINTIFFS' EXHIBITS 24, 25, 26, 20, 21, 22, 34, 35,
4 36, 125, 126, 127, 44, 45, 46, 39, 40, 41, 108, 109, 110, 111,
5 103, 104, 105, 142, 143, 144, 145, 119, 120, 121, 122, 79, 80,
6 81, 82, 147, 148, 149, 150, 151, 6, 7, 8, 9, 10, 11, 12, 13,
7 138, 139, 140, 114, 115, 116, 100, 101, 90, 91, 92, 130, 131,
8 132, 65, 66, 67, 68, 75, 76, 77, 53, 54, 55, 56.

9 THOSE ARE ALL -- I BELIEVE THERE'S NO OBJECTION TO
10 ANY OF THOSE ON THE JOINT PRETRIAL ORDER.

11 THE COURT: IS THAT CORRECT, COUNSEL, MR. SCHAETZEL?

12 MR. SCHAETZEL: WE'RE CHECKING, YOUR HONOR.

13 MS. SINGER: IF YOU'D LIKE I CAN GIVE YOU A COPY OF
14 THE BINDER.

15 THE COURT: JUST TO MOVE THIS ALONG, I'M GOING TO
16 TAKE COUNSEL AT HER WORD THAT THERE IS NO OBJECTIONS IN THE
17 PRETRIAL ORDER. I'M GOING TO ADMIT ALL OF THE EXHIBITS AT THIS
18 TIME.

19 MS. SINGER: THERE IS ANOTHER CATEGORY. THERE IS
20 A -- IT'S SALES FOR THE LIFE OF THE BOOK. IT'S BASICALLY SALES
21 INFORMATION FOR EACH INDIVIDUAL BOOK, AND THEN THERE'S ALSO A
22 REPORT FROM CCC ABOUT THE PERMISSIONS REVENUE FOR THE BOOK.

23 THE OBJECTION TO ALL OF THESE EXHIBITS ON THE JOINT
24 PRETRIAL ORDER IS A RELEVANCE OBJECTION AND AN OBJECTION THAT
25 IT GOES BEYOND THE TIME PERIOD. THEY TEND TO BE SALES FOR THE

1 LIFE OF THE BOOK. SO IT'S OBVIOUSLY MORE THAN JUST 2009. I'D
2 LIKE TO MOVE ALL OF THOSE INTO EVIDENCE, BUT THAT'S THE
3 PROBLEM.

4 THE COURT: WHAT ARE THE EXHIBIT NUMBERS?

5 MS. SINGER: OKAY. THEY ARE 88, 89, 18, 19, 32, 33,
6 23, 37, 38, 128, 129, 42, 43, 112, 113, 106, 107, 146, 123,
7 124, 83, 84, 152, 153, 13, 14, 141, 117, 118, 137, 102, 93, 94,
8 133, 69, 70, 78, 57 AND 58.

9 THE COURT: OKAY. NOW THOSE EXHIBITS I ASSUME
10 PERTAIN TO WORKS WHERE THERE IS AN ALLEGATION OF INFRINGEMENT
11 THAT'S ON THE JOINT LIST?

12 MS. SINGER: YES, YOUR HONOR, THOSE ARE ALL WORKS ON
13 THE JOINT FILING.

14 THE COURT: OKAY. LET ME HEAR THE DEFENSES'
15 OBJECTION NOW.

16 MR. HARBIN: YOUR HONOR, WITH THE UNDERSTANDING THESE
17 ARE THE LIFE OF SALES FINANCIAL REPORT AND THE PERMISSION
18 FINANCIAL REPORT FOR THOSE WORKS WHICH WE CAN VERIFY, BUT WITH
19 THAT UNDERSTANDING WE WITHDRAW OUR OBJECTION. WE HAVE NO
20 OBJECTION.

21 THE COURT: OKAY. SO IS IT CORRECT THEN THAT ALL OF
22 THESE EXHIBITS ARE FINANCIAL REPORTS?

23 MS. SINGER: YES, YOUR HONOR, THEY'RE ALL EITHER
24 FINANCIAL REPORTS OF THE SALES OF THE BOOK OR PERMISSIONS
25 REVENUE FROM THE BOOK.

1 THE COURT: ALL RIGHT. I WILL ADMIT THESE DOCUMENTS.

2 MS. SINGER: YOUR HONOR, MY COLLEAGUES HAVE PASSED ME
3 A NOTE THAT I MISSPOKE, AND ACTUALLY OF THE ONES THAT I READ
4 INTO THE RECORD, THE DEFENDANTS DID OBJECT TO EXHIBIT 13 AND
5 EXHIBITS 75 TO 77.

6 THE COURT: 13 YOU DID INCLUDE ON YOUR LIST?

7 MS. SINGER: YES, I'M SORRY, I MISSPOKE.

8 THE COURT: BUT ARE YOU SAYING IT SHOULD NOT HAVE
9 BEEN ON THE LIST.

10 MS. SINGER: NO, I'M SAYING IT WAS -- 13, 75, 76 AND
11 77 I SHOULD NOT HAVE INCLUDED IN THE LIST OF THINGS TO WHICH
12 THEY HAVE NO OBJECTION BECAUSE THERE IS AN OBJECTION.

13 THE COURT: THIS IS YOUR FIRST LIST YOU'RE TALKING
14 ABOUT?

15 MS. SINGER: YES.

16 THE COURT: SAY THAT AGAIN NOW?

17 MS. SINGER: EXHIBIT 13, EXHIBIT 75, EXHIBIT 76 AND
18 EXHIBIT 77 IN FACT THE DEFENDANTS DID OBJECT.

19 THE COURT: ALL RIGHT. SO I WILL REVERSE THE RULING
20 I MADE A FEW MINUTES AGO REGARDING THESE PLAINTIFFS' EXHIBITS
21 AND THEY ARE NOT ADMITTED AT THIS TIME.

22 MR. HARBIN: JUST TO MOVE IT ALONG, YOUR HONOR, I
23 THINK PLAINTIFFS' EXHIBIT 13 DOES FALL WITHIN THE SECOND
24 CATEGORY --

25 THE COURT: IT DOES.

1 MR. HARBIN: -- WHICH IS THE LIFE OF DATE AND SALES
2 REVENUES, SO WE'RE WITHDRAWING OUR OBJECTIONS TO THAT ONE, BUT
3 WE MAINTAIN OUR OBJECTIONS TO THE OTHER ONES.

4 THE COURT: CONTINUING THE ZIGZAG PATTERN, 13 IS
5 ADMITTED, PLAINTIFFS' EXHIBIT 13.

6 MS. SINGER: EXHIBITS 75, 76 AND 77 RELATE TO THE
7 CAMBRIDGE COMPANION TO SCHUMANN. I'M NOT SURE EXACTLY -- MAY I
8 PROFFER THOSE AND WE CAN HEAR THE OBJECTION, OR HOW YOU WOULD
9 YOU LIKE TO ADDRESS THAT? THAT'S A WORK THAT'S ON THE JOINT
10 FILING.

11 THE COURT: I'M NOT UNDERSTANDING WHAT YOU'RE ASKING
12 ME TO DO.

13 MS. SINGER: MAY I ATTEMPT TO MOVE THOSE INTO
14 EVIDENCE WITH THIS WITNESS?

15 THE COURT: YOU WANT TO GO AHEAD AND RE-MOVE
16 PLAINTIFFS' EXHIBITS 75, 76 AND 77?

17 MS. SINGER: I WOULD LIKE TO MOVE THOSE IN. I WAS
18 INCORRECT IN MOVING THEM IN AS THOUGH THERE WERE NO
19 OBJECTIONS. I WOULD LIKE TO MOVE THEM IN NOW ACKNOWLEDGING
20 THAT THERE IS AN OBJECTION TO THOSE WORKS.

21 MR. HARBIN: YOUR HONOR, I BELIEVE SOME OF THEM HAVE
22 A FOUNDATION OBJECTION. OBVIOUSLY NO FOUNDATION HAS BEEN
23 LAID. WE WOULD OBJECT TO THOSE AT THIS TIME.

24 THE COURT: I DON'T KNOW WHAT YOU MEAN BY NO
25 FOUNDATION HAS BEEN LAID. WHAT'S THE PROBLEM HERE? ARE THEY

1 ON THE JOINT LIST?

2 MR. HARBIN: ONE FOR EXAMPLE AS I UNDERSTAND IS -- I
3 AM TOLD IT'S NOT ON THE JOINT LIST. FOR EXAMPLE, IT'S THE DATE
4 OF THE U.K. PUBLICATION PURPORTED TO BE REPRESENTED BY A
5 DOCUMENT. THAT'S ONE EXAMPLE. WE COULD CONFER ABOUT THIS, BUT
6 WE WOULD MAINTAIN OUR OBJECTION.

7 AND JUST WHILE I HAVE THE COURT'S ATTENTION, I THINK
8 IN OUR REVIEW THE PLAINTIFFS' UNDERSTANDING OF WHICH ONES WERE
9 NOT OBJECTED TO IS CORRECT WITH THE EXCEPTION OF PLAINTIFFS'
10 EXHIBIT 6 THE BOOK ANCIENT EGYPTIAN MATERIALS AND TECHNOLOGY,
11 AND PLAINTIFFS' EXHIBIT 34 WHICH IS THE ASSESSING SPEAKING BOOK
12 BECAUSE THEY WERE NOT PRODUCED IN DISCOVERY.

13 WE CAN LOOK AT THOSE AND COMPARE THEM TO OURS, YOUR
14 HONOR, AT A BREAK, AND IF THEY ARE THE CORRECT BOOKS, WE DON'T
15 HAVE AN OBJECTION BECAUSE THE WORKS WERE NOT OBJECTED TO, BUT
16 THEY WERE NOT --

17 THE COURT: NOW PLAINTIFFS' EXHIBIT 6 WAS ON THE LIST
18 THAT COUNSEL READ OUT AS BEING UNOBJECTED TO --

19 MR. HARBIN: I THINK THAT'S INCORRECT --

20 THE COURT: -- AND I HAVE ADMITTED IT. YOUR TIME TO
21 SPEAK UP WAS EARLIER, NOT NOW.

22 MR. HARBIN: I THOUGHT WE WERE RESERVING THE RIGHT TO
23 CHECK THEIR LIST BECAUSE --

24 THE COURT: I GUESS YOU'RE RIGHT.

25 MR. HARBIN: IF WE CAN CHECK THE EDITION OF THE BOOK,

1 WE JUST NEED TO CLARIFY IT.

2 THE COURT: MAYBE THIS IS AS GOOD A PLACE AS ANY TO
3 STOP FOR LUNCH. LET'S TAKE A LUNCH UNTIL 1:45.

4 MR. RICH: YOUR HONOR, MAY WE HAVE SOME GUIDANCE
5 ABOUT HOW LONG YOU'RE PROPOSING TO RUN THIS AFTERNOON?

6 THE COURT: WELL CERTAINLY NOT PAST THREE O'CLOCK. I
7 HOPE TO BE ABLE TO LENGTHEN THESE DAYS AS TIME GOES ON.

8 MR. RICH: WE UNDERSTAND.

9 (NOON RECESS)

10 THE COURT: COUNSEL, ARE YOU READY?

11 MR. RICH: YOUR HONOR, MAY I JUST ANSWER ONE OF THE
12 QUESTIONS THAT WAS PENDING FROM THE MORNING SESSION?

13 THE COURT: YES, SIR.

14 MR. RICH: YOU HAD ASKED ME ABOUT THIS ADMITTEDLY
15 MYSTERIOUS PERCENT OF TOTAL NUMBER THAT APPEARED ON THE ERES
16 REPORTS --

17 THE COURT: YES.

18 MR. RICH: I'M REMINDED THAT IT'S -- YOU'LL BE
19 PERHAPS HAPPY TO KNOW AMONG MANY THINGS THAT ARE RELEVANT, YOUR
20 HONOR, I THINK THIS ONE IS IRRELEVANT. THIS TAKES THE TOTAL
21 NUMBER OF HITS ON THE COLUMN TO THE LEFT OF IT JUST ACROSS ALL
22 OF THE REPORTED USES. SO IF THERE ARE A THOUSAND OF THEM, IT
23 MERELY REPORTS -- THAT IS SIMPLY A PERCENTAGE WHICH THE HIT
24 COUNT FOR A PARTICULAR COURSE REPRESENTS OF ALL OF THE HITS
25 ACROSS THE ENTIRE ERES REPORT.

1 THE COURT: I SEE. THANK YOU. THAT SOUNDS RIGHT.

2 MR. SCHAETZEL: IF I MAY, YOUR HONOR, AS TO THE
3 QUESTION OF ADMISSIBILITY OF DEFENDANTS' EXHIBIT 111, THIS IS
4 THE STIPULATIONS OF FACT REGARDING THE ERES --

5 THE COURT: RIGHT. OKAY.

6 MR. SCHAETZEL: NO OBJECTION TO THAT.

7 THE COURT: IT'S ADMITTED.

8 MR. SCHAETZEL: WE HAVE SOME QUESTIONS ABOUT COPYING
9 IT. IT LOOKS LIKE HALF OF A PAGE IS GONE. SO WE'LL LOOK AT
10 THE OTHER ONE, I BELIEVE IT'S PLAINTIFFS' 975, WE STILL NEED
11 TIME TO ADDRESS IT, AND WE'LL GET BACK TO THE COURT ON THAT
12 ONE.

13 THE COURT: ALL RIGHT. THANK YOU.

14 MS. SINGER: I BELIEVE ALSO, AND, MR. SCHAETZEL,
15 CORRECT ME IF I'M WRONG, THE OBJECTIONS TO PLAINTIFFS' 75, 76
16 AND 77 HAVE BEEN HAVE BEEN WITHDRAWN?

17 MR. SCHAETZEL: CORRECT.

18 THE COURT: SO PLAINTIFFS' 75, 76 AND 77 ARE
19 ADMITTED.

20 MS. SINGER: AND I BELIEVE THE OBJECTION ON
21 PLAINTIFFS' EXHIBIT 6 HAS ALSO BEEN WITHDRAWN?

22 MR. SCHAETZEL: YES.

23 THE COURT: IT'S ADMITTED.

24 MS. SINGER: AND WE WILL WITHDRAW PLAINTIFFS' EXHIBIT
25 34.

1 THE COURT: ALL RIGHT.

2 MR. KRUGMAN: AND PLAINTIFFS' 975 --

3 MR. SCHAETZEL: WE NEED SOMETIME ON THAT.

4 THE CLERK: THAT LEAVES 7 AND 8.

5 MS. SINGER: 7 AND 8 I DON'T BELIEVE THERE WAS ANY
6 OBJECTION TO. THERE IS NO OBJECTION TO THEM ON THE PRETRIAL
7 ORDER.

8 THE COURT: I BELIEVE I ADMITTED THEM.

9 MR. SCHAETZEL: I BELIEVE THAT'S CORRECT.

10 THE COURT: THEY'RE ADMITTED.

11 MS. SINGER: YOUR HONOR, COUNSEL CONFERRED AT THE
12 BREAK AND UNFORTUNATELY IT IS GOING TO BE NECESSARY TO GO
13 THROUGH THIS WHOLE THING BECAUSE WE WERE UNABLE TO REACH ANY
14 AGREEMENT AS TO THE PRIMA FACIE VALIDITY OF THE COPYRIGHTS FOR
15 ALL OF THE WORKS AT ISSUE. SO WE'RE GOING TO NEED TO GO WORK
16 BY WORK, AND I DO APOLOGIZE FOR THAT.

17 THE COURT: HAVE I RULED ON ANY OF THESE IN
18 CONNECTION WITH ONE OF THE MOTIONS IN LIMINE THAT WERE FILED?

19 MS. SINGER: YOUR HONOR, THERE'S A COUPLE OF THINGS.
20 FOR SEVERAL OF THESE WORKS --

21 THE COURT: JUST SAY YES OR NO?

22 MS. SINGER: I'M NOT SURE.

23 THE COURT: OKAY.

24 MS. SINGER: ON THE JOINT FILING WHICH I BELIEVE IS
25 JOINT EXHIBIT 5, THERE IS A COLUMN ON THERE IN WHICH IN MANY

1 CASES THE DEFENDANTS CHALLENGED WHETHER THERE WAS A
2 REGISTRATION MISSING OR AN ASSIGNMENT MISSING. THERE'S A
3 NUMBER OF CASES WHERE THERE'S NO CHALLENGE AT ALL TO THE
4 COPYRIGHT.

5 SO WE BELIEVE THAT ANY CHALLENGES TO THE COPYRIGHT
6 WOULD BE WAIVED IN THAT CASE AND THERE SHOULDN'T BE ANY
7 QUESTION THAT CAMBRIDGE OWNS THE COPYRIGHTS IN THOSE WORKS, AND
8 THERE SHOULD BE NO CHALLENGE TO THOSE UNDERLYING COPYRIGHTS.
9 WE BELIEVE IT'S WAIVED IF THEY DIDN'T MAKE THE OBJECTION.

10 THE COURT: SO WHAT?

11 MS. SINGER: SO FOR THOSE WORKS AT LEAST WE WOULD
12 HAVE MADE THE PRIMA FACIE CASE OF COPYRIGHT OWNERSHIP, AND WE
13 WOULDN'T NEED TO GO THROUGH THE DETAILS.

14 THE COURT: SO WHY ARE WE TALKING ABOUT THEM AT ALL?

15 MS. SINGER: I WOULD JUST LIKE TO CLARIFY THOSE
16 OBJECTIONS HAVE BEEN WAIVED BECAUSE IT'S NOT ENTIRELY CLEAR TO
17 ME --

18 THE COURT: I DON'T KNOW WHAT EXHIBITS YOU'RE TALKING
19 ABOUT.

20 MS. SINGER: YOUR HONOR, MAYBE THE EASIEST WAY TO DO
21 THIS, DO YOU HAVE A COPY OF THE JOINT FILING UP THERE?

22 THE COURT: I'M SURE I DO.

23 MS. SINGER: MAY I HAND ONE UP FOR EASE, OR WOULD YOU
24 LIKE TO USE WHAT YOU HAVE?

25 THE COURT: I'D LIKE TO WORK WITH WHAT I'VE GOT. LET

1 ME JUST THINK OUT LOUD FOR JUST A MINUTE WITH YOU. I MADE SOME
2 RULINGS ON THE MOTIONS IN LIMINE THAT I BELIEVE AFFECTED THE
3 STATUS OF CLAIMS OF INFRINGEMENT AS TO CERTAIN ITEMS, AND I
4 THINK WHAT YOU'RE TRYING TO DO NOW IS AN END RUN AROUND THOSE
5 RULINGS.

6 I THINK WHAT YOU'RE GETTING READY TO DO IS ASK THE
7 WITNESS WHETHER HE KNOWS IF THERE WERE CONTRACTS WITH SOME OF
8 THE AUTHORS ON SOME OF THESE WORKS.

9 MS. SINGER: I'M SORRY, YOUR HONOR, IT'S NOT A
10 QUESTION AS TO ANY OF THOSE. ALL OF THOSE CONTRACTS WERE ON
11 THE EXHIBIT LIST. THEY ARE ALL IN EVIDENCE. THERE'S NO
12 OBJECTION TO THEM.

13 THE COURT: SO I DON'T UNDERSTAND WHERE YOU'RE GOING
14 WITH THIS; WHAT IS IT YOU'RE TRYING TO ESTABLISH.

15 MS. SINGER: FOR EXAMPLE, FOR SOME OF THE CAMBRIDGE
16 WORKS, THERE WAS A LIMINE ON THIS, AND YOUR HONOR AS FAR AS THE
17 CAMBRIDGE WORKS DEFERRED THE ISSUE TO TRIAL.

18 WHAT HAPPENS IS CAMBRIDGE DOES NOT HAVE A PRACTICE OF
19 REGISTERING ITS WORKS IN THE UNITED STATES UPON PUBLICATION
20 BECAUSE THEY ARE PROTECTED BY COPYRIGHT EVEN WITHOUT
21 REGISTRATION.

22 THE COURT: YOU MEAN THE ONES THAT WERE FIRST
23 PUBLISHED ABROAD?

24 MS. SINGER: NO, I'M SORRY, THE ONES THAT WERE FIRST
25 PUBLISHED IN THE U.S. THE COPYRIGHT LAW IS THAT COPYRIGHT AS

1 SOON AS IT'S FIXED IN A TANGIBLE MEDIUM COPYRIGHT ENSUES.

2 THE COURT: CORRECT.

3 MS. SINGER: IT IS NOT CAMBRIDGE'S PRACTICE TO
4 REGISTER THOSE WORKS WITH THE U.S. COPYRIGHT OFFICE.

5 THE COURT: ALL RIGHT.

6 MS. SINGER: AT SOME POINT ONCE -- AND THE WORKS THAT
7 WE'RE TALKING ABOUT HERE WEREN'T WORKS THAT WERE ON THE AMENDED
8 COMPLAINT. SO ONCE THEY CAME INTO THE SUIT, ALL OF THEM WERE
9 REGISTERED ON AN EXPEDITED BASIS, AND FOR THE WORKS FIRST
10 PUBLISHED IN THE U.S. THERE IS A REGISTRATION CERTIFICATE.

11 THE COURT: RIGHT, AND ON THOSE I GUESS YOU'RE HOME
12 FREE, RIGHT?

13 MS. SINGER: THAT'S MY BELIEF, YOUR HONOR, BUT I
14 UNDERSTAND FROM THE DEFENDANTS THAT THEY ARE ACTUALLY GOING TO
15 CHALLENGE THE UNDERLYING COPYRIGHT IN SOME OF THOSE WORKS. SO
16 TO THE EXTENT THEY'RE --

17 THE COURT: HOW ARE THEY GOING TO CHALLENGE IT?

18 MS. SINGER: I'M NOT ENTIRELY SURE, BUT TO THE EXTENT
19 THAT THEY ARE GOING TO CHALLENGE THEM, I WOULD NEED TO ELICIT
20 FACTS FROM MY WITNESS AS TO THE FACT THAT THESE ARE ORIGINAL
21 WORKS OF AUTHORSHIP AND THAT CAMBRIDGE OWNS THE COPYRIGHT IN
22 THEM.

23 THE COURT: SO REALLY WHAT YOU'RE GETTING AT HERE IS
24 THE CASES WHERE THEY DON'T HAVE A WRITTEN CONTRACT WITH THE
25 AUTHOR, AND WHAT YOU WANT TO BRING OUT THROUGH THIS WITNESS IS

1 TESTIMONY THAT AS A MATTER OF FACT THEY AND THE AUTHOR DO HAVE
2 AN UNDERSTANDING OR SOMETHING LIKE THAT?

3 MS. SINGER: ACTUALLY, NO, YOUR HONOR, IT'S -- I
4 THINK YOU'RE WITH ME HERE. IT SEEMS THAT ONCE YOU HAVE A
5 COPYRIGHT REGISTRATION CERTIFICATE THAT SHOULD BE FOR THE PRIMA
6 FACIE EVIDENCE THAT YOU OWN IT.

7 MY UNDERSTANDING IS THAT THE DEFENDANTS ARE GOING TO
8 CHALLENGE PERHAPS THE ORIGINALITY OF THE WORK. THEY'RE GOING
9 TO CHALLENGE --

10 THE COURT: I THINK YOU'RE GETTING WAY OUT ON A LIMB
11 HERE.

12 MR. HARBIN: I THINK THE POINT IS WE ACTUALLY OFFERED
13 AND DID NAIL DOWN SPECIFICALLY WHAT WORK WE WERE CHALLENGING AS
14 TO REGISTRATION, LICENSING AND CONTRACTS. WE STILL DON'T THINK
15 ALL THE CONTRACTS ARE IN THE FILE. WE OFFERED TO NAIL THAT
16 DOWN, AND I THINK WHAT THEY'RE TRYING TO DO IS GO BEYOND THAT
17 AND SHORTCUT THE ELEMENTS THEY HAD THE BURDEN OF PROOF ON THAT
18 DON'T DEAL WITH THE SPECIFIC QUESTION OF DO YOU HAVE A
19 REGISTRATION OF THIS COPYRIGHT. YOU CAN ONLY COPYRIGHT BUT
20 WHAT IS WHAT YOU REALLY OWN IS STILL SOMETIMES IN QUESTION.

21 THE COURT: RIGHT, TO THE EXTENT THAT THE PLAINTIFFS
22 HAVE REGISTERED COPYRIGHTS, I REALIZE YOU DON'T HAVE TO DO IT
23 IN THE FIRST INSTANCE, BUT ONCE YOU GET TO THE LAWSUIT STAGE,
24 YOU'RE SUPPOSED TO DO IT. MAYBE --

25 MR. SCHAETZEL: YOUR HONOR, IF I MAY, I CAN'T

1 REMEMBER IF IT'S 411(B) OR 411(C), BUT UNDER WHATEVER THE
2 APPROPRIATE STATUTORY PROVISION IS IF THE WORK -- IF THE
3 REGISTRATION FOR THE WORK IS OBTAINED WITHIN FIVE YEARS OF
4 FIRST PUBLICATION, A PLAINTIFF ENJOYS CERTAIN PRESUMPTIONS OF
5 COPYRIGHT VALIDITY AS A RESULT OF THAT TIME.

6 IF, HOWEVER, THE REGISTRATION IS OBTAINED MORE THAN
7 FIVE YEARS, THE STATUTE PROVIDES THAT THE COURT HAS THE
8 DISCRETION TO GRANT WHATEVER EVIDENTIARY VALUE THE REGISTRATION
9 MAY PRESENT. THAT IS THE COURT'S DECISION.

10 WE DO NOT WANT TO BE IN A POSITION AS TO THE
11 REGISTRATION ISSUE OF WAIVING OUR RIGHT TO TAKE THE POSITION
12 THAT THOSE REGISTRATIONS, FOR EXAMPLE, THESE ONES THAT WERE
13 JUST RECENTLY OBTAINED BUT THE WORK WAS PUBLISHED MORE THAN
14 FIVE YEARS AGO ARE ENTITLED TO NO EVIDENTIARY WEIGHT IN
15 ACCORDANCE WITH THE STATUTE.

16 THE ONLY WAY I CAN THINK THROUGH THIS TO GET A
17 QUICKER RESOLUTION IS IF PERHAPS WE CAN BOTH BRIEF THAT ISSUE
18 OVERNIGHT AND PROVIDE IT TO THE COURT AND YOU CAN MAKE A
19 DETERMINATION ON A GENERIC BASIS FOR ALL THESE WORKS AS TO HOW
20 YOU'RE GOING TO ADDRESS REGISTRATIONS THAT WERE OBTAINED
21 OUTSIDE OF THE FIVE YEAR WINDOW.

22 THE COURT: WELL THAT MAY BE AN ISSUE AS YOU SAY, BUT
23 MY SUSPICION IS THAT THAT'S NOT JUST WHAT THE PLAINTIFFS ARE
24 TALKING ABOUT. THEY ARE ALSO TALKING ABOUT THE ABSENCE OF
25 CONTRACTS WITH THE AUTHORS.

1 MR. SCHAETZEL: YES, MA'AM, THERE ARE OTHER ISSUES.

2 THE COURT: AND MY FEELING ABOUT THAT ISSUE IS THAT
3 IF WE'VE GOT THE CONTRACTS, WE'VE GOT THE CONTRACTS. IF WE
4 DON'T, WE DON'T, AND IF WE DO HAVE THEM THEY SHOULD BE IN THE
5 PRETRIAL ORDER, AND I THINK WHAT YOU'RE TRYING TO DO IS NIBBLE
6 AROUND THAT.

7 MS. SINGER: I ASSURE YOU, YOUR HONOR, I'M NOT. FOR
8 CAMBRIDGE'S WORKS WE'RE NOT MISSING AGREEMENTS. FOR
9 CAMBRIDGE'S WORKS THE ISSUES ARE TWOFOLD --

10 THE COURT: YOU COULD BE RIGHT ABOUT THAT. IT COULD
11 BE OXFORD. I'M NOT AT ALL SURE ABOUT THAT.

12 MS. SINGER: I ASSURE YOUR HONOR I'M NOT TRYING TO
13 TRYING TO NIBBLE AROUND THE LIMINES. I'M MERELY TRYING TO
14 CLARIFY TO THE EXTENT THAT THE DEFENDANTS ARE TRYING TO RESERVE
15 SOME SORT OF LEGAL ARGUMENT THAT THESE AREN'T VALID
16 COPYRIGHTS --

17 THE COURT: WELL, I DON'T THINK WE'RE AT THE POINT IN
18 THE LITIGATION WHERE ANYBODY IS GOING TO RESERVE ANYTHING.
19 I'VE GOT TO RULE ON EVERYTHING.

20 I DON'TKNOW WHETHER THERE IS ANY SIMPLE WAY TO DO
21 THIS. I'M NOT SURE YET. MAYBE THE BEST WAY TO PROCEED IS FOR
22 US TO TRY A FEW OF THESE EXHIBITS. YOU PULL IT OUT, TELL ME
23 WHAT THE DEFENDANTS' OBJECTION TO IT IS AND THEN WE'LL GO FROM
24 THERE.

25 MS. SINGER: OKAY. SOUNDS GOOD, YOUR HONOR, AND WHEN

1 YOU HAVE HEARD ENOUGH, YOU JUST STOP ME.

2 MAY I APPROACH THE WITNESS WITH EXHIBITS? ALL OF
3 THEM HAVE BEEN ADMITTED.

4 THE COURT: OKAY. GO AHEAD, LET'S TRY ONE, GO AHEAD.

5 MS. SINGER: YOUR HONOR, WE CAN DO IT ON THE SCREEN.

6 THE COURT: LET'S DO IT ON THE SCREEN.

7 MS. SINGER: OKAY.

8 BY MS. SINGER:

9 Q. MR. SMITH, IGNORING THE BOOK THAT I JUST HANDED YOU, IF
10 YOU WOULD TURN IN YOUR BINDER TO TAB C AND PLAINTIFFS' EXHIBIT
11 29; DO YOU SEE THAT?

12 A. YES, MA'AM, I DO.

13 Q. WHAT IS PLAINTIFFS' EXHIBIT 29?

14 A. THAT'S A PHOTOCOPY OF THE COVER OF ASSESSING READING BY J.
15 CHARLES ALDERSON.

16 Q. AND IS THIS AN ORIGINAL WORK OF AUTHORSHIP?

17 A. YES.

18 THE COURT: HOLD ON JUST A MINUTE, THIS IS NOT WHAT I
19 HAD IN MIND. YOU ARE TENDERING INTO EVIDENCE WHAT, PLAINTIFFS'
20 EXHIBIT 29?

21 MS. SINGER: YES.

22 THE COURT: AND YOU WANT TO TENDER IN JUST THE COVER
23 OF THE BOOK.

24 MS. SINGER: NO, I'M SORRY, I HAVE THE ACTUAL BOOK.

25 THE COURT: ALL RIGHT. NOW PLAINTIFFS' 29 IS ON THE

1 PRETRIAL ORDER. IS THERE AN OBJECTION TO IT?

2 MR. HARBIN: YOUR HONOR, WE DON'T OBJECT TO ANY OF
3 THE WORKS WITH THE CAVEAT WE'D LIKE TO MAKE SURE THEIR EDITIONS
4 ARE THE EDITIONS WE USED BECAUSE WE'VE RUN INTO A COUPLE OF
5 INSTANCES WHERE THEY WERE USING A MORE RECENT EDITION THAT
6 WASN'T THE ONE THAT WAS USED, BUT SUBJECT TO THAT, THAT WOULD
7 BE OUR ONLY CONCERN.

8 THE COURT: SO YOU HAVE NO OBJECTION TO PLAINTIFFS'
9 EXHIBIT 29 SUBJECT TO THE CHECK YOU WANT TO MAKE BEING IN
10 EVIDENCE?

11 MR. HARBIN: THAT'S CORRECT.

12 THE COURT: IT'S ADMITTED. LET'S GO ON.

13 BY MS. SINGER:

14 Q. IS PLAINTIFFS' EXHIBIT 29 --

15 THE COURT: WHY ARE YOU ASKING QUESTIONS ABOUT IT
16 SINCE I JUST ADMITTED IT?

17 MS. SINGER: WELL, I'M ASKING TO ESTABLISH THE FACT
18 THAT THERE IS A COPYRIGHT. I'M ASKING IS IT AN ORIGINAL WORK
19 OF AUTHORSHIP.

20 THE COURT: WELL IS THERE A COPYRIGHT ON THIS BOOK?

21 MS. SINGER: THERE IS, YOUR HONOR.

22 THE COURT: THEN WHY ARE YOU ASKING ABOUT IT?

23 MS. SINGER: WELL BECAUSE THERE'S NOT A COPYRIGHT --
24 WELL LET ME DO THIS. I'M SORRY.

25 BY MS. SINGER:

1 Q. IF YOU WOULD TURN TO PLAINTIFFS' EXHIBIT 31 WHICH IS IN
2 EVIDENCE. WHEN WAS PLAINTIFFS' 29 ASSESSING READING FIRST
3 PUBLISHED IN THE UNITED KINGDOM?

4 A. 24TH OF FEBRUARY THE YEAR 2000.

5 Q. WHEN WAS IT FIRST PUBLISHED IN THE UNITED STATES?

6 A. 28TH OF MARCH THE YEAR 2000.

7 Q. IS 28TH OF MARCH 2000 MORE THAN 30 DAYS AFTER THE 24TH OF
8 FEBRUARY OF 2000?

9 A. YES, IT IS.

10 Q. IF YOU WOULD TURN TO --

11 THE COURT: SO LET ME JUST BACKTRACK FOR A MINUTE.
12 ARE YOU TELLING ME PLAINTIFFS' EXHIBIT -- THAT THERE IS NOT A
13 U.S. COPYRIGHT REGISTRATION ON PLAINTIFFS' EXHIBIT 29?

14 MS. SINGER: THAT'S CORRECT, YOUR HONOR, UNDER THE
15 BERNE CONVENTION IF IT'S PUBLISHED MORE THAN 30 DAYS IN A BERNE
16 COUNTRY YOU NEED NOT REGISTER IT IN THE UNITED STATES TO HAVE
17 COPYRIGHT PROTECTION.

18 THE COURT: THAT'S CORRECT. SO THIS IS A WORK WHERE
19 THERE IS NO REGISTERED -- NO U.S. REGISTRATION, BUT YOU ARE
20 CLAIMING THAT IT'S PROTECTED UNDER THE BERNE CONVENTION. SO
21 YOU ARE SEEKING TO ESTABLISH THAT BY SHOWING THAT IT WAS FIRST
22 PUBLISHED IN THE UNITED KINGDOM, NOT FIRST PUBLISHED IN THE
23 UNITED STATES?

24 MS. SINGER: THAT'S CORRECT.

25 THE COURT: LET'S MOVE ON. HOLD ON JUST A MINUTE, I

1 MAY HAVE SPOKEN TOO SOON.

2 MR. HARBIN: I'M TRYING TO EXPEDITE MATTERS, YOUR
3 HONOR. WE STIPULATED THAT THESE -- ON THE ASSUMPTION THAT
4 THEY'RE BUSINESS RECORDS, WE STIPULATED WITH COUNSEL DURING THE
5 BREAK THAT THESE RECORDS OF U.K. PUBLICATIONS SUCH AS
6 PLAINTIFFS' EXHIBIT 31 THAT WE JUST INTRODUCED CAN COME INTO
7 EVIDENCE.

8 THE COURT: SO WHY DO WE NEED TO GO THROUGH THIS
9 TESTIMONY?

10 MS. SINGER: OKAY. YOUR HONOR, WE JUST WANT TO BE
11 CLEAR THAT WHATEVER -- AS YOU SAID THE TIME HAS COME TO STOP
12 RESERVING LEGAL ARGUMENTS. SO I WANT TO BE VERY CLEAR THAT WE
13 HAVE HELD -- SUSTAINED OUR BURDEN OF THAT PROOF ON OWNING THE
14 COPYRIGHT ON ALL OF THESE WORKS.

15 SO TO THE EXTENT THERE'S GOING TO BE CHALLENGES --
16 THE RECORDS ARE IN. TO THE EXTENT THERE'S GOING TO BE ANY
17 CHALLENGE THAT IT WAS FIRST PUBLISHED IN THE U.K. OR ANY
18 CHALLENGE ABOUT WHETHER THESE ARE ORIGINAL WORKS OF AUTHORSHIP,
19 I'D LIKE TO GET THAT SETTLED NOW SO THAT IT DOESN'T COME BACK
20 TO HAUNT US.

21 THE COURT: IS THERE ANY CHALLENGE ON THE BASIS THAT
22 THESE ARE NOT ORIGINAL WORKS OF AUTHORSHIP?

23 MR. HARBIN: WE DO HAVE THAT CHALLENGE TO SOME, AND
24 IT'S A PRETTY LEGALLY OPEN TERM WHAT THAT MEANS. THAT'S THE
25 ULTIMATE UNDERLYING FACTS WITH SOME OF THESE ISSUES ABOUT

1 GETTING REGISTRATIONS AND I THINK WE HAVE RESOLVED ALL OF THAT.

2 THE COURT: OKAY. SO AS TO PLAINTIFFS' EXHIBIT 29,
3 FOR EXAMPLE, ARE YOU CONTENDING THIS IS NOT AN ORIGINAL WORK OF
4 AUTHORSHIP?

5 MR. HARBIN: THAT'S THE BOOK?

6 THE COURT: CORRECT.

7 MR. HARBIN: YES, YOUR HONOR, I'M NOT SURE ABOUT THIS
8 BOOK, BUT I KNOW SOME HAVE BEEN AT ISSUE WITH THIS, SO I WOULD
9 HAVE TO SAY YES AT THIS TIME. WE'LL TRY TO NAIL THAT DOWN OVER
10 THE EVENING.

11 THE COURT: OKAY. SO ON PLAINTIFFS' EXHIBIT 29 IT
12 APPEARS TO ME THERE IS EVIDENCE IN THE RECORD THAT ESTABLISHES
13 THAT THE BOOK WAS FIRST PUBLISHED IN THE UNITED KINGDOM IN 2000
14 BEFORE IT WAS PUBLISHED IN THE UNITED STATES. SO THE ONLY
15 THING THAT WOULD BE POSSIBLY LEFT ON PLAINTIFFS' EXHIBIT 29 IS
16 WHETHER IT IS AN ORIGINAL WORK, AND I THINK THE WITNESS SAID IT
17 WAS.

18 MS. SINGER: THAT'S CORRECT.

19 THE COURT: SO WE'RE FINISHED WITH PLAINTIFFS'
20 EXHIBIT 29.

21 MS. SINGER: I WISH THAT WERE THE CASE, YOUR HONOR,
22 BELIEVE ME I DO. THERE'S ALSO BEEN A CHALLENGE TO THE FACT
23 THAT THERE IS NO ASSIGNMENT OF COPYRIGHT TO THE PUBLISHER
24 PROVIDED, AND IF THE WITNESS WOULD TURN HIS ATTENTION TO
25 PLAINTIFFS' EXHIBIT 30 --

1 THE COURT: WAS THAT AN OBJECTION MADE BY --

2 MS. SINGER: IT'S AN OBJECTION. I'M SORRY, IT'S ON
3 THE JOINT EXHIBIT 5. IT'S AN OBJECTION THAT WAS MADE TO THIS
4 WORK.

5 MR. HARBIN: I DON'T THINK --

6 MS. SINGER: IF I COULD DIRECT YOUR ATTENTION TO
7 PARAGRAPH 8A --

8 MR. HARBIN: YOUR HONOR, WE DID NOT OBJECT TO THE
9 EXHIBIT. THERE IS -- I THINK THERE IS SOME ISSUES ON SOME OF
10 THESE ABOUT WHAT THE INTERPRETATION OF AN AGREEMENT IS THAT I
11 DON'T THINK WE'RE GOING TO BE ABLE TO AGREE TO IN ALL CASES,
12 BUT WE DIDN'T OBJECT TO THE EXHIBIT.

13 MS. SINGER: YOUR HONOR, THIS ISN'T A MATTER OF THE
14 EXHIBITS. THIS IS A COPYRIGHT CASE. SO TO THE EXTENT WE NEED
15 TO PROVE THAT THESE ARE ORIGINAL WORKS OF OWNERSHIP AND THAT
16 OUR PLAINTIFFS OWN THEM, THAT'S WHAT I'M TRYING TO DO HERE.

17 TO THE EXTENT THAT THOSE ARE BEING CHALLENGED AND
18 HONESTLY I DIDN'T THINK THAT THAT WAS CHALLENGED BUT APPARENTLY
19 IT IS.

20 THE COURT: WHAT DOES THE OBJECTION TO PLAINTIFFS'
21 EXHIBIT 29 SAY; READ IT TO ME?

22 MS. SINGER: IT SAYS NO COPYRIGHT REGISTRATION
23 INFORMATION PROVIDED. WORK HAS 413 PAGES RATHER THAN 357
24 PAGES. PERCENTAGE USED IS 16.7 PERCENT RATHER THAN 19.3
25 PERCENT. NO ASSIGNMENT OF COPYRIGHT TO PUBLISHER PROVIDED.

1 I'M TRYING TO CURE -- I BELIEVE WE'VE JUST CURED THAT
2 FIRST ONE WITH PLAINTIFFS' EXHIBIT 33.

3 THE COURT: RIGHT, SO THE ISSUE IS THE ASSIGNMENT TO
4 THE PUBLISHER. NOW DID I RULE ON THIS ISSUE WHEN I RULED ON
5 THE MOTIONS IN LIMINE?

6 MS. SINGER: NO, YOU DIDN'T, YOUR HONOR.

7 THE COURT: ALL RIGHT. GO AHEAD.

8 BY MS. SINGER:

9 Q. SO IF YOU WOULD LOOK AT PLAINTIFFS' EXHIBIT 8A OF
10 PLAINTIFFS' EXHIBIT EXHIBIT 30, MR. SMITH, WHAT DOES PARAGRAPH
11 8A DO?

12 A. IT SAYS THAT THE AUTHOR HAS SIGNED THE FULL COPYRIGHT IN
13 THE WORK TO THE PRESS SYNDICATE.

14 Q. AND THE PRESS SYNDICATE IS WHO?

15 A. THE GOVERNING BODY OF THE CAMBRIDGE UNIVERSITY PRESS.

16 Q. DOES CAMBRIDGE OWN THE COPYRIGHT IN PLAINTIFFS' EXHIBIT 29
17 ASSESSING READING?

18 A. YES.

19 THE COURT: WHAT'S THE DATE OF EXECUTION OF THIS
20 AGREEMENT?

21 (DATE WAS SHOWN ON THE SCREEN)

22 THE COURT: THANK YOU.

23 BY MS. SINGER:

24 Q. I BELIEVE THAT THE NEXT ONE THAT WAS CHALLENGED IS
25 ASSESSING LANGUAGES FOR A SPECIFIC PURPOSES WHICH IS FOUND

1 BEHIND TAB E OF YOUR BINDER?

2 MS. SINGER: MAY I APPROACH, YOUR HONOR?

3 THE COURT: YES.

4 MS. SINGER: THE OBJECTION IS FOUND AT PAGE C-5 OF
5 THE JOINT FILING, AND IT IS NO COPYRIGHT REGISTRATION
6 PROVIDED. OBJECTIONS AS TO THE PAGES AND THE PERCENTAGE AND
7 THAT THERE WAS NO ASSIGNMENT OF COPYRIGHT TO PUBLISHER
8 PROVIDED.

9 THE COURT: AND THE EXHIBIT NUMBER IS?

10 MS. SINGER: THE EXHIBIT NUMBER OF THE BOOK IS
11 PLAINTIFFS' EXHIBIT 20. WHAT'S BEING SHOWN ON THE SCREEN, THE
12 OBJECTIONS ARE FOUND ON PAGE C-5 OF JOINT EXHIBIT 5.

13 IF YOU WOULD PLEASE DIRECT YOUR ATTENTION TO
14 PLAINTIFFS' EXHIBIT 21, AND IF YOU WOULD TURN TO
15 PARAGRAPH 8A --

16 THE COURT: NOW PLAINTIFFS' EXHIBIT 21 IS THAT IN
17 EVIDENCE?

18 MS. SINGER: YES, ALL OF THESE ARE IN EVIDENCE, YOUR
19 HONOR. WE WERE HOPING THAT BY GETTING IT INTO EVIDENCE WE
20 COULD AVOID DOING THIS BUT APPARENTLY NOT.

21 THE COURT: PLAINTIFFS' 20 IS NOT IN EVIDENCE?

22 MS. SINGER: YES, IT IS.

23 THE COURT: AND PLAINTIFFS' 20 IS THE WORK ITSELF?

24 MS. SINGER: IS THE BOOK ITSELF.

25 BY MS. SINGER:

1 Q. IF YOU WOULD TURN TO PARAGRAPH 8A OF PLAINTIFFS' EXHIBIT
2 21, WHAT DOES PARAGRAPH 8A DO?

3 A. IT SAYS THAT THE AUTHOR HAS ASSIGNED TO THE SYNDICATE THE
4 FULL COPYRIGHT IN THE WORK.

5 Q. DOES CAMBRIDGE OWN THE COPYRIGHT TO ASSESSING LANGUAGES
6 FOR SPECIFIC PURPOSES?

7 A. YES, IT DOES.

8 Q. THERE'S BEEN AN OBJECTION TO NO COPYRIGHT REGISTRATION
9 PROVIDED. IF YOU WOULD TURN TO PLAINTIFFS' EXHIBIT 22, WHERE
10 WAS PLAINTIFFS' EXHIBIT 20, ASSESSING LANGUAGES FOR SPECIFIC
11 PURPOSES, FIRST PUBLISHED?

12 A. FIRST PUBLISHED IN THE UNITED KINGDOM.

13 Q. WHEN WAS IT FIRST PUBLISHED IN THE UNITED KINGDOM?

14 A. DECEMBER 9TH, 1999.

15 Q. WAS IT SUBSEQUENTLY PUBLISHED IN THE U.S.?

16 A. YES.

17 Q. WHEN WAS THAT?

18 A. FEBRUARY 28TH, 2000.

19 Q. IS THAT MORE THAN 30 DAYS AFTER THE FIRST PUBLICATION IN
20 THE U.K.

21 A. YES, IT IS.

22 Q. IS PLAINTIFFS' EXHIBIT 20, ASSESSING LANGUAGES FOR
23 SPECIFIC PURPOSES, AN ORIGINAL WORK OF AUTHORSHIP?

24 MR. HARBIN: I WOULD JUST OBJECT ON FOUNDATION AND
25 HEARSAY GROUNDS.

1 THE COURT: HOLD ON JUST A MINUTE. WOULD YOU ADDRESS
2 THAT OBJECTION?

3 MS. SINGER: MAY I VOIR DIRE THE WITNESS FOR
4 FOUNDATION?

5 THE COURT: YES.

6 BY MS. SINGER:

7 Q. MR. SMITH, ARE YOU FAMILIAR WITH PLAINTIFFS' EXHIBIT 20?

8 A. YES, I AM.

9 Q. AND WHAT SORT OF AUTHORITY WOULD YOU HAVE HAD OVER THE
10 PROCESS OF HAVING THE WORK PUBLISHED BY CAMBRIDGE?

11 THE COURT: YOU MEAN WHAT AUTHORITY DID HE HAVE?

12 MS. SINGER: WHAT AUTHORITY DID YOU HAVE?

13 THE WITNESS: I HAD NONE OVER THIS SPECIFIC WORK.

14 BY MS. SINGER:

15 Q. DO YOU HAVE ANY -- AT THE TIME THAT THIS WORK WAS
16 PUBLISHED, WHICH I THINK WE JUST DECIDED WAS 1999, WHAT WAS
17 YOUR ROLE AT CAMBRIDGE UNIVERSITY PRESS?

18 A. I WAS PUBLISHING DIRECTOR FOR THE SOCIAL SCIENCES.

19 Q. OKAY. IS ENGLISH AS A SECOND LANGUAGE PART OF THE SOCIAL
20 SCIENCES?

21 A. NO, IT'S NOT.

22 Q. IT'S NOT. DO YOU HAVE ANY FAMILIARITY WITH THIS WORK?

23 A. I DO, YES.

24 Q. HOW DID YOU GAIN THAT FAMILIARITY?

25 A. BECAUSE IT'S BEEN ONE OF THE WORKS THAT WE'VE BEEN

1 DISCUSSING AS PART OF THIS LAWSUIT.

2 Q. DID THERE COME A TIME WHEN YOU MADE AN ASSESSMENT AS TO
3 WHETHER OR NOT IT WAS AN ORIGINAL WORK OF AUTHORSHIP?

4 A. YES.

5 Q. AND WHAT WAS YOUR ASSESSMENT AS TO WHETHER OR NOT THIS WAS
6 AN ORIGINAL WORK OF AUTHORSHIP?

7 MR. HARBIN: SAME OBJECTIONS, YOUR HONOR.

8 THE COURT: HOW DID YOU HAPPEN TO MAKE THAT
9 ASSESSMENT?

10 THE WITNESS: BASICALLY BY PERUSING THE BOOK VERY
11 QUICKLY.

12 THE COURT: I'LL SUSTAIN THE OBJECTION.

13 BY MS. SINGER:

14 Q. MR. SMITH, DOES CAMBRIDGE HAVE ANY POLICIES ABOUT THE
15 LEVEL OF ORIGINALITY FOR THE SCHOLARSHIP THAT IT PUBLISHES?

16 A. WELL, IT WOULDN'T BE A POLICY PER SE. EVERYTHING WE
17 PUBLISH HAS TO GO OUT TRANSPARENT. SO IT WOULD NOT BE POSSIBLE
18 TO PUBLISH A BOOK IN WHICH SOMEONE CLAIMED EVEN IMPLICITLY
19 WORDS TO BE THEIR OWN IF THEY WERE NOT. I DON'T KNOW IF THAT
20 HELPS. IT'S DIFFICULT FOR ME TO IMAGINE HOW THIS BOOK COULD
21 NOT BE THE AUTHOR'S BOOK.

22 THE COURT: WHAT YOU'RE SAYING IS THAT EVERYTHING
23 YOU ALL PUBLISH IS ORIGINAL?

24 THE WITNESS: YES, YOUR HONOR, UNLESS IT'S SO
25 DESIGNATED. THERE WOULD BE WORDING THROUGHOUT THE BOOK THAT

1 INDICATED WHERE SOMETHING WAS NOT ORIGINAL.

2 THE COURT: LET'S MOVE ON. WHAT'S THIS EXHIBIT
3 NUMBER?

4 MS. SINGER: THIS IS EXHIBIT NUMBER 20.

5 THE COURT: I'LL SUSTAIN THE OBJECTION TO EXHIBIT 20.

6 MS. SINGER: I'M SORRY, YOU SUSTAINED --

7 THE COURT: THE DEFENDANTS' OBJECTION.

8 MS. SINGER: SO YOU'RE WITHDRAWING IT FROM EVIDENCE?

9 I BELIEVE IT WAS ALREADY IN EVIDENCE. SO IT'S WITHDRAWN NOW?

10 THE COURT: WELL, IF I HAVE ALREADY ADMITTED IT INTO
11 EVIDENCE --

12 MS. SINGER: I'M NOT GOING TOWARDS, YOUR HONOR,
13 ANYTHING ABOUT THE EXHIBITS. I'M JUST TRYING TO GO TO THE
14 COPYRIGHT HERE WHICH IS SEPARATE THAN THE ACTUAL EXHIBITS.

15 THE COURT: WELL, IF IT'S NOT SUBJECT TO COPYRIGHT
16 PROTECTION, YOU HAVE NO NEED OF IT IN EVIDENCE, RIGHT?

17 MS. SINGER: YOUR HONOR, I BELIEVE IT IS SUBJECT TO
18 COPYRIGHT PROTECTION. THEY ARE ALL PROTECTED BY COPYRIGHT.

19 THE COURT: EVEN IF IT'S NOT AN ORIGINAL?

20 MS. SINGER: THEY ALL ARE ORIGINAL WORKS.

21 THE COURT: I THOUGHT THAT'S WHAT YOU WERE
22 QUESTIONING THE WITNESS ABOUT.

23 MS. SINGER: ALL WE ESTABLISHED IS THAT THIS ISN'T A
24 BOOK THAT MR. SMITH PUBLISHED --

25 THE COURT: HE CAN'T SAY WHETHER IT'S AN ORIGINAL.

1 MS. SINGER: RIGHT, THAT DOESN'T MEAN IT'S NOT AN
2 ORIGINAL. HE JUST TESTIFIED THAT ALL OF CAMBRIDGE'S WORKS ARE
3 ORIGINALS --

4 THE COURT: HE DID SAY THAT, BUT I PERCEIVE THAT YOU
5 ARE INTERESTED IN THIS PARTICULAR WORK, RIGHT?

6 MS. SINGER: WE WERE DISCUSSING THIS ORIGINAL WORK.
7 BY MS. SINGER:

8 Q. LET'S SEE IF WE CAN TAKE A LOOK AT -- GOING BACK TO
9 PLAINTIFFS' EXHIBIT 21, AND IF WE COULD LOOK ON THE LAST -- AT
10 PARAGRAPH 15, THE WARRANTY AND INDEMNITY CLAUSE, MR. SMITH,
11 WHAT DOES THE WARRANTY AND INDEMNITY CLAUSE SAY?

12 A. IT SAYS SEVERAL THINGS. FIRST OF ALL, IT SAYS THAT THE
13 WORK IS ORIGINAL WITH THE AUTHOR. THAT IT IS NOT COPIED BY
14 ANYONE ELSE. IT ALSO ESSENTIALLY SAYS THAT NOTHING IN THE WORK
15 IS INFRINGING ANY OTHER COPYRIGHTS, AND THAT THE AUTHOR IS
16 RESPONSIBLE -- IN THE EVENT THAT THEY HAVE NOT BEEN TRUTHFUL
17 WITH US, THEY ARE RESPONSIBLE FOR ANY ACTIONS WHICH MIGHT
18 RESULT OF THEIR NOT BEING TRUTHFUL.

19 MS. SINGER: YOUR HONOR, WITH THE FACT THAT IT'S IN
20 THE CONTRACT THAT THIS IS AN ORIGINAL WORK OF AUTHORSHIP WHICH
21 IS A VERY, VERY LOW THRESHOLD, I WOULD AGAIN MOVE -- IT'S
22 ALREADY IN EVIDENCE. I WOULD SUBMIT THAT THERE IS COPYRIGHT IN
23 THIS WORK OWNED BY CAMBRIDGE BASED ON THE AGREEMENTS WE'VE
24 SEEN.

25 THE COURT: IS THE DEFENSE READY FOR ME TO RULE ON

1 THIS? I DON'T KNOW IF YOU ALL HAVE QUESTIONS OF THIS WITNESS
2 ABOUT THIS WORK OR NOT.

3 MR. HARBIN: I'M READY FOR YOUR HONOR TO RULE. I
4 DON'T KNOW IF THAT CONTRACT BY MY VIEW CHANGES ANYTHING, BUT
5 WE'RE READY FOR YOUR HONOR TO RULE.

6 THE COURT: I'LL ADMIT IT.

7 MS. SINGER: THANK YOU, YOUR HONOR.

8 SO, YOUR HONOR, WE'VE ADDRESSED THE ISSUE THAT --
9 WE'VE ADDRESSED THE COPYRIGHT REGISTRATION ISSUE. WE'VE
10 ADDRESSED THE ASSIGNMENT OF THE COPYRIGHT OBJECTION TO
11 PLAINTIFFS' EXHIBIT 20.

12 THE NEXT ONE WOULD BE ASSESSING SPEAKING WHICH IS
13 PLAINTIFFS' EXHIBIT 34. IT'S ALREADY IN EVIDENCE. THE
14 OBJECTION IS NO COPYRIGHT REGISTRATION INFORMATION IS
15 PROVIDED.

16 BY MS. SINGER:

17 Q. MR. SMITH, IF YOU WOULD TURN TO PLAINTIFFS' EXHIBIT 36
18 WHICH IS ALREADY IN EVIDENCE --

19 MR. HARBIN: I'M SORRY TO INTERRUPT, YOUR HONOR, BUT
20 I UNDERSTOOD THIS IS THE BOOK THAT THE PLAINTIFFS' WITHDREW.

21 MS. SINGER: YOU'RE CORRECT, WE WITHDREW THE
22 EXHIBIT. WE DIDN'T WITHDRAW THE BOOK.

23 MR. HARBIN: I THOUGHT YOU JUST REFERRED TO EXHIBIT
24 34. I'M SORRY.

25 MS. SINGER: I'VE REFERRED TO EXHIBIT 36.

1 BY MS. SINGER:

2 Q. MR. SMITH, WHO OWNS -- BASED ON PLAINTIFFS' EXHIBIT 36 WHO
3 OWNS THE COPYRIGHT IN ASSESSING SPEAKING?

4 A. CAMBRIDGE UNIVERSITY PRESS.

5 Q. THERE WAS ALSO AN OBJECTION THAT THERE WAS NO ASSIGNMENT
6 OF THE COPYRIGHT TO PUBLISHER PROVIDED. IF YOU WOULD PLEASE
7 TURN YOUR ATTENTION TO PLAINTIFFS' EXHIBIT 35 AND PARAGRAPH 3A
8 OF PLAINTIFFS' EXHIBIT 35, WHAT DOES EXHIBIT 35 PARAGRAPH 3A
9 SAY?

10 A. THIS SAYS THAT THE AUTHOR ASSIGNS THE FULL COPYRIGHT IN
11 THE WORK TO THE PRESS SYNDICATE.

12 Q. AND IF WE TAKE A LOOK AT PARAGRAPH 16, WHAT DOES
13 PARAGRAPH 16 SAY?

14 A. THIS SAYS THAT THE AUTHOR WARRANTS TO THE SYNDICATE THAT
15 THE WORK IS ORIGINAL. THAT IT'S NOT BEEN PREVIOUSLY PUBLISHED,
16 AND THAT NOTHING IN THE WORK IS AN INFRINGEMENT OF ANY OTHER
17 COPYRIGHTS, AND IT'S THE AUTHOR'S DUTY TO SECURE ANY
18 PERMISSIONS, AND THEY'RE HELD LIABLE SHOULD THEY NOT BE
19 TRUTHFUL.

20 Q. ON JOINT FILING PAGE C-6, WE SEE THERE'S A CHALLENGE FOR
21 THE BOOK LEARNING VOCABULARY IN ANOTHER LANGUAGE. THERE IS A
22 CHALLENGE THAT THERE'S NO COPYRIGHT REGISTRATION PROVIDED.
23 THAT CAMBRIDGE LACKS STANDING IN THAT IT HAS NOT OBTAINED A
24 COPYRIGHT REGISTRATION, AND THAT THERE WAS NO ASSIGNMENT OF THE
25 COPYRIGHT, THE PUBLISHER PROVIDED A LICENSE ONLY.

1 IF YOU WOULD TURN TO PLAINTIFFS' EXHIBIT 126, AND IF
2 YOU LOOK AT PARAGRAPH 3A, WHAT DOES PARAGRAPH 3A SAY?

3 A. IT SAYS THAT THE AUTHOR HAS ASSIGNED THE FULL COPYRIGHT OF
4 THE WORK TO THE PRESS SYNDICATE.

5 Q. AND IF YOU LOOK AT PARAGRAPH 16, WHAT DOES THAT SAY?

6 A. IT SAYS THAT THE AUTHOR WARRANTS THAT IT IS AN ORIGINAL
7 WORK. THAT IT'S NOT BEEN PREVIOUSLY PUBLISHED. THERE IS
8 NOTHING INFRINGING OTHER COPYRIGHTS, AND THEY ARE RESPONSIBLE
9 LEGALLY FOR ANY UNTRUTHFULNESS.

10 Q. IF YOU WOULD TURN PLEASE TO PLAINTIFFS' EXHIBIT 127 WHICH
11 IS ALREADY IN EVIDENCE, WHO OWNS THE COPYRIGHT REGISTRATION IN
12 LEARNING VOCABULARY IN ANOTHER LANGUAGE?

13 A. CAMBRIDGE UNIVERSITY PRESS.

14 Q. THE NEXT OBJECTION IS ON PAGE C-6 OF THE JOINT FILING TO
15 THE WORK ASSESSING VOCABULARY. THE OBJECTION IS THAT THERE IS
16 NO COPYRIGHT REGISTRATION PROVIDED. CAMBRIDGE LACKS STANDING
17 AS IT HAS NOT OBTAINED A COPYRIGHT REGISTRATION. THERE IS NO
18 ASSIGNMENT OF THE COPYRIGHT TO THE PUBLISHER PROVIDED.

19 IF YOU WOULD PLEASE TURN TO PLAINTIFFS' EXHIBIT 45,
20 AND IF YOU TURN ACTUALLY TO THE THIRD PAGE OF THAT PARAGRAPH
21 8A, WHAT DOES PARAGRAPH 8A SAY?

22 A. IT STATES THAT THE AUTHOR ASSIGNS THE FULL COPYRIGHT IN
23 THE WORK TO THE PRESS SYNDICATE.

24 Q. IF YOU WOULD TURN TO PARAGRAPH 15, WHAT DOES THAT SAY?

25 A. THAT STATES THAT THE AUTHOR WARRANTS THAT THE WORK IS

1 ORIGINAL, HAS NOT BEEN PREVIOUSLY PUBLISHED AND NOTHING IN IT
2 IS IN ANY WAY INFRINGING OF A COPYRIGHT AND THE AUTHOR IS
3 ENTIRELY RESPONSIBLE LEGALLY.

4 Q. IF YOU WOULD TURN TO PLAINTIFFS' EXHIBIT 46 WHICH IS IN
5 EVIDENCE, WHO OWNS THE COPYRIGHT REGISTRATION IN ASSESSING
6 VOCABULARY?

7 A. CAMBRIDGE UNIVERSITY PRESS.

8 Q. THE NEXT OBJECTION IS TO ASSESSING WRITING ON PAGE C-7 OF
9 THE JOINT FILING. THE OBJECTION IS NO COPYRIGHT REGISTRATION
10 PROVIDED. CAMBRIDGE LACKS STANDING AS IT HAS NOT OBTAINED A
11 COPYRIGHT REGISTRATION, AND NO ASSIGNMENT OF COPYRIGHT TO THE
12 PUBLISHER IS PROVIDED.

13 IF YOU WOULD TURN TO PLAINTIFFS' EXHIBIT 40 WHICH IS
14 ALREADY IN EVIDENCE, AND IF YOU TAKE A LOOK AT PARAGRAPH 3A OF
15 PLAINTIFFS' EXHIBIT 40, WHAT DOES THAT SAY?

16 A. IT STATES THAT THE AUTHOR ASSIGNS THE FULL COPYRIGHT IN
17 THE WORK TO THE PRESS SYNDICATE.

18 Q. AND IF YOU WOULD TURN TO PARAGRAPH 16, WHAT DOES PARAGRAPH
19 16 SAY?

20 A. THIS STATES THAT THE AUTHOR WARRANTS THAT THE WORK IS
21 ORIGINAL. THAT IT HAS NOT BEEN PREVIOUSLY PUBLISHED AND
22 THERE'S NOTHING IN IT THAT IS IN ANY WAY AN INFRINGEMENT OF ANY
23 OTHER COPYRIGHTS, AND THE AUTHOR IS FULLY LEGALLY RESPONSIBLE.

24 Q. IF YOU WOULD TURN TO PLAINTIFFS' EXHIBIT 41 ALREADY IN
25 EVIDENCE, WHO OWNS THE COPYRIGHT TO ASSESSING WRITING?

1 A. CAMBRIDGE UNIVERSITY PRESS.

2 Q. IF YOU COULD TURN BACK FOR A MOMENT ACTUALLY TO
3 PLAINTIFFS' EXHIBIT 40, THE FIRST PAGE OF IT, IT'S BETWEEN THE
4 SYNDICATE OF THE PRESS OF THE UNIVERSITY OF CAMBRIDGE AND DR.
5 SARA C. WEIGLE; DO YOU SEE THAT?

6 A. YES.

7 Q. AND WHERE IS DR. SARA C. WEIGLE A PROFESSOR?

8 A. GEORGIA STATE UNIVERSITY.

9 Q. SO WE SEE THAT -- AND DR. WEIGLE WOULD SHE RECEIVE EITHER
10 ROYALTIES FROM THE SALE OF THE BOOK OR WOULD SHE RECEIVE A
11 SHARE OF PERMISSIONS FEES THAT WERE PAID TO USE THIS WORK?

12 A. SHE WOULD RECEIVE 50 PERCENT OF ANY PERMISSIONS FEES IF
13 PERMISSION WERE GRANTED FOR PORTIONS OF THE WORK TO BE
14 PHOTOCOPIED OR OTHERWISE.

15 Q. SO IF HER COLLEAGUE DR. KIM WHO USED PAGES 77 TO 139, 63
16 PAGES OF THAT DURING THE FALL OF 2009, HAD SOUGHT PERMISSION
17 AND RECEIVED PERMISSION PROFESSOR WEIGLE OF GEORGIA STATE
18 UNIVERSITY WOULD HAVE SHARED IN THOSE PERMISSIONS FEES?

19 A. YES.

20 Q. THE NEXT WORK TO WHICH THERE IS A CHALLENGE IS THE HISTORY
21 OF FEMINIST LITERARY CRITICISM, AND THE CHALLENGE IS THAT THERE
22 WAS NO COPYRIGHT REGISTRATION PROVIDED.

23 IF YOU WOULD PLEASE TURN TO PLAINTIFFS' EXHIBIT 104
24 ALREADY IN EVIDENCE, WHAT COUNTRY WAS THE HISTORY OF FEMINIST
25 LITERARY CRITICISM FIRST PUBLISHED?

1 A. FIRST PUBLISHED IN THE UNITED KINGDOM.

2 Q. AND WHEN WAS IT FIRST PUBLISHED IN THE UNITED KINGDOM?

3 A. AUGUST 30, 2007.

4 Q. WAS IT SUBSEQUENTLY PUBLISHED IN THE UNITED STATES?

5 A. YES.

6 Q. WHEN WAS IT PUBLISHED IN THE UNITED STATES?

7 A. ON OCTOBER 8TH, 2007.

8 Q. SO IT WAS FIRST PUBLISHED IN THE UNITED STATES MORE THAN

9 30 DAYS AFTER FIRST PUBLICATION IN THE UNITED KINGDOM?

10 A. YES.

11 Q. IF YOU WOULD TURN IN PLAINTIFFS' EXHIBIT 105 ALREADY IN

12 EVIDENCE PARAGRAPH 14 -- NEVER MIND. THERE IS NO CHALLENGE TO

13 THE ASSIGNMENTS OF THIS WORK.

14 NEXT ONE IS IN THE MAYMESTER 09, PRONUNCIATION GAMES,

15 PAGE A-1, THE CHALLENGE IS THAT THERE WAS NO COPYRIGHT

16 REGISTRATION PROVIDED.

17 IF YOU WOULD TURN TO EXHIBIT -- BEHIND EXHIBIT TAB Q

18 OF YOUR BOOK, PLAINTIFFS' EXHIBIT 140, ALREADY IN EVIDENCE,

19 WHERE WAS PRONUNCIATION GAMES FIRST PUBLISHED?

20 A. IT WAS FIRST PUBLISHED IN THE UNITED KINGDOM.

21 Q. WHEN WAS IT FIRST PUBLISHED IN THE UNITED KINGDOM?

22 A. DECEMBER 7TH, 1995.

23 Q. WHEN WAS IT FIRST PUBLISHED IN THE UNITED STATES?

24 A. FEBRUARY 23RD, 1996.

25 Q. AND THAT'S MORE THAN 30 DAYS AFTER THE FIRST PUBLICATION

1 IN U.K.; IS THAT CORRECT?

2 A. YES, THAT'S CORRECT.

3 Q. NEXT CHALLENGE IS TO THE WORK KEEP TALKING COMMUNICATIVE
4 FLUENCY ACTIVITIES FOR LANGUAGE TEACHING. THERE IS AN
5 OBJECTION THAT NO COPYRIGHT REGISTRATION WAS PROVIDED, AND THAT
6 THERE IS NO ASSIGNMENT OF COPYRIGHT TO THE PUBLISHER PROVIDED.

7 IF YOU WOULD PLEASE TAKE A LOOK AT PLAINTIFFS'
8 EXHIBIT 116 ALREADY IN EVIDENCE, WHERE WAS KEEP TALKING FIRST
9 PUBLISHED?

10 A. FIRST PUBLISHED IN THE UNITED KINGDOM.

11 Q. WHEN?

12 A. FEBRUARY 14TH, 1985.

13 Q. WAS IT SUBSEQUENTLY PUBLISHED IN THE UNITED STATES?

14 A. YES.

15 Q. AND WHEN WAS THAT?

16 A. ON APRIL 26TH, 1985.

17 Q. MORE THAN 30 DAYS AFTER THE FIRST PUBLICATION IN THE U.K.

18 A. THAT'S CORRECT.

19 Q. AND IF YOU WILL TURN BACK TO PLAINTIFFS' EXHIBIT 115,
20 DIRECTING YOUR ATTENTION TO PARAGRAPH 1, WHAT DOES PARAGRAPH 1
21 SAY?

22 A. IT STATES THAT THE PROPRIETORS WHICH IS VERLAG LAMBERT
23 LENSING, A GERMAN PUBLISHER, HAS GRANTED TO THE SYNDICATE SOLE
24 AND EXCLUSIVE LICENSE TO PRINT AND PUBLISH THE WORK IN THE
25 ENGLISH LANGUAGE THROUGHOUT THE WORLD WITH THE EXCEPTION OF

1 FEDERAL REPUBLIC OF GERMANY, AUSTRIA AND SWITZERLAND.

2 Q. SO WHAT RIGHTS DOES CAMBRIDGE HAVE IN KEEP TALKING?

3 A. CAMBRIDGE HAS FULL PUBLICATION RIGHTS IN THE WORK IN THE
4 ENGLISH LANGUAGE THROUGHOUT THE WORLD WITH THE EXCEPTION OF THE
5 COUNTRIES I JUST MENTIONED.

6 Q. IS THAT AN EXCLUSIVE LICENSE?

7 A. YES, IT'S EXCLUSIVE.

8 Q. THE NEXT ONE IS GRAMMAR PRACTICE ACTIVITIES. THE
9 CHALLENGE HERE, THE OBJECTION IS THERE'S NO COPYRIGHT
10 REGISTRATION PROVIDED. THE NO DEPOSIT COPY IS ACTUALLY -- YOUR
11 HONOR ALREADY RULED THAT THAT WAS NOT -- THAT OBJECTION WAS
12 OVERRULED, AND THAT NO ASSIGNMENT OF COPYRIGHT TO THE PUBLISHER
13 WAS PROVIDED.

14 IF YOU WOULD TAKE A LOOK AT PLAINTIFFS' EXHIBIT 100,
15 AND IF YOU WOULD FLIP A COUPLE OF PAGES BACK TO THE PAGE THAT
16 IS BATES STAMPED CUPX 118 --

17 MR. HARBIN: I'M SORRY TO INTERRUPT BUT IS 100 IN
18 THIS BOOK?

19 MS. SINGER: IT'S SORT OF HIDDEN BEHIND TAB T.

20 MR. HARBIN: THANK YOU.

21 BY MS. SINGER:

22 Q. AND YOU SEE THIS IS FOR GRAMMAR PRACTICE ACTIVITIES, AND
23 IF YOU TURN TO LOOK AT PARAGRAPH 3A, WHAT DOES PARAGRAPH 3A
24 SAY?

25 A. I'M SORRY.

1 Q. CUPX 119, THE FIRST EDITION IS THE FRONT CONTRACT, AND
2 THEN THE RIGHT EDITION IS RIGHT BEHIND IT?

3 A. 3A STATES THAT THE AUTHOR HAS ASSIGNED TO THE SYNDICATE
4 THE FULL COPYRIGHT IN THE WORK.

5 Q. THROUGHOUT THE WORLD IN ALL FORMS AND MEDIA?

6 A. CORRECT.

7 Q. TAKE A LOOK AT PLAINTIFFS' 101, WHERE WAS THIS WORK FIRST
8 PUBLISHED?

9 A. FIRST PUBLISHED IN UNITED KINGDOM.

10 Q. WHEN WAS THAT?

11 A. 15TH DECEMBER 1988.

12 Q. AND WAS IT SUBSEQUENTLY PUBLISHED IN THE UNITED STATES?

13 A. YES.

14 Q. WHEN WAS THAT?

15 A. ON FEBRUARY 24TH, 1989.

16 Q. THE NEXT ONE TO WHICH THERE IS AN OBJECTION IS THE
17 CAMBRIDGE COMPANION TO MENDELSSOHN. IF YOU LOOK BEHIND THAT
18 THE OBJECTION IS -- THIS IS PAGE B-3 OF THE JOINT FILING. THE
19 IS OBJECTION NO COPYRIGHT REGISTRATION PROVIDED.

20 IF YOU LOOK BEHIND TAB W OF YOUR BOOK AT PLAINTIFFS'
21 EXHIBIT 68, WHERE WAS THE CAMBRIDGE COMPANION TO MENDELSSOHN
22 FIRST PUBLISHED?

23 A. IT WAS FIRST PUBLISHED IN THE UNITED KINGDOM.

24 Q. AND WHEN WAS THAT?

25 A. OCTOBER 21ST, 2004.

1 Q. WAS IT SUBSEQUENTLY PUBLISHED IN THE UNITED STATES?

2 A. YES, IT WAS.

3 Q. AND WHEN WAS THAT?

4 A. ON NOVEMBER 29TH, 2004.

5 Q. THEN I BELIEVE THE REMAINING CHALLENGE WAS A DEPOSIT COPY
6 CHALLENGE WHICH YOUR HONOR HAS ALREADY OVERRULED.

7 IF I COULD JUST HAVE A MOMENT TO CONFER WITH MY
8 COLLEAGUES, YOUR HONOR?

9 (PAUSE IN THE PROCEEDINGS.)

10 MS. SINGER: YOUR HONOR, SUBJECT TO MY UNDERSTANDING
11 THESE ARE THE ONLY OBJECTIONS THAT WERE SET FORTH IN THE JOINT
12 FILING. THESE ARE THE ONLY OBJECTIONS ON RECORD. SUBJECT TO
13 MY UNDERSTANDING THAT THOSE ARE THE ONLY OBJECTIONS TO THESE
14 THAT HAVE BEEN PRESERVED IN ANY WAY, SHAPE OR FORM AND I WOULD
15 HOPE THAT IF THAT TURNS OUT NOT TO BE THE CASE, WE MAY NEED
16 SOME ADDITIONAL EVIDENCE, BUT, OTHERWISE, I THINK WE'RE DONE
17 WITH MR. SMITH.

18 THE COURT: LET ME JUST CLARIFY ONE THING. THE
19 EXHIBIT STICKERS FOR THE VARIOUS WORKS WERE PUT ON THE FRONT
20 PAGE --

21 MS. SINGER: THAT'S CORRECT.

22 THE COURT: -- OF EACH OF THE BOOKS, BUT YOU ARE
23 ACTUALLY TENDERING INTO EVIDENCE THE WHOLE BOOK, NOT JUST THE
24 FRONT PAGE?

25 MS. SINGER: THAT'S CORRECT, YOUR HONOR. FOR THE

1 SAKE OF THE FORESTS IN THE EXHIBIT BOOK WE ONLY PUT THE COVER
2 AND TABLE OF CONTENTS, BUT WE HAVE COPIES OF ALL OF THE BOOKS
3 WITH STICKERS.

4 THE COURT: ALL RIGHT. THANK YOU.

5 MR. HARBIN: YOUR HONOR, MY UNDERSTANDING IS -- I'M
6 RELATIVELY NEW TO THE CASE. WE HAVE OTHER WORKS THAT WERE
7 OBJECTED TO THAT WE'D BE GLAD TO DISCUSS WITH OPPOSING COUNSEL
8 AND TRY TO WORK THAT OUT.

9 THE COURT: OH, THAT WOULD BE GREAT.

10 MR. HARBIN: WE TALKED ABOUT THAT DURING LUNCH
11 BREAK. I HAVE SOME CROSS-EXAMINATION QUESTIONS TO POSE ON
12 OTHER WORKS, BUT WE'LL TRY TO RESOLVE THAT BEFORE TOMORROW
13 MORNING.

14 THE COURT: DO YOU HAVE ANY QUESTIONS FOR THIS
15 WITNESS ON CROSS-EXAMINATION?

16 MR. HARBIN: YES, BUT I DIDN'T KNOW IF YOU WANTED TO
17 WAIT UNTIL TOMORROW.

18 THE COURT: THIS IS THE TIME, NO, I WANT TO GO
19 AHEAD.

20 MR. HARBIN: SHE MAY WANT TO FIRST QUESTION HIM
21 BEFORE I STARTED CROSS-EXAMINING HIM ON THE WORKS.

22 THE COURT: WELL, NO, I MEAN IT'S UP TO THEM WHAT
23 THEY WANT TO DO AS FAR AS EXAMINING HIM ON PARTICULAR WORKS,
24 AND THEN UP TO YOU TO CROSS TO THE EXTENT YOU WISH.

25 MR. HARBIN: I WAS TALKING ABOUT HER UNDERSTANDING

1 THAT SHE THINKS WE DON'T HAVE OBJECTIONS TO OTHER WORKS. THERE
2 ARE A HANDFUL OF OTHER WORKS THAT I'LL BE GLAD TO NAIL DOWN
3 WITH THEM AND THEN THEY CAN DECIDE WHETHER THEY WANT TO
4 QUESTION HIM ABOUT THOSE, BUT I CAN GO FOR 10 OR 15 MINUTES IF
5 YOUR HONOR WISHES.

6 THE COURT: LET'S DO THAT.

7 MS. SINGER: JUST TO BE CLEAR, MY UNDERSTANDING IS
8 BASED ON THE FACT THAT THERE ARE NO OTHER OBJECTIONS THAT ARE
9 INTERPOSED ON THE JOINT FILING WHICH WAS THE PLACE TO INTERPOSE
10 WHATEVER OBJECTIONS THERE WERE TO THE COPYRIGHTS.

11 THE COURT: WELL, THE JOINT FILING IN THE PRETRIAL
12 ORDER, I DON'T KNOW IF THERE ARE ANY DISCREPANCIES OR NOT.

13 MS. SINGER: THIS IS THE JOINT FILING THAT WENT IN IN
14 MARCH IN RESPONSE TO YOUR HONOR'S ORDER, AND THE PRETRIAL ORDER
15 REFERENCED THAT AND INCORPORATED IT, AND THERE WAS NO
16 ADDITIONAL COPYRIGHT OBJECTIONS IN THE JOINT PRETRIAL ORDER.

17 THE COURT: ALL RIGHT. MR. HARBIN, YOU MAY GO AHEAD.

18 MR. HARBIN: THANK YOU, JUDGE.

19 CROSS-EXAMINATION

20 BY MR. HARBIN:

21 Q. GOOD AFTERNOON, MR. SMITH.

22 A. GOOD AFTERNOON.

23 Q. WE HAVEN'T MET. MY NAME IS JOHN HARBIN WITH KING &
24 SPALDING. I JUST HAVE SOME FOLLOW-UP QUESTIONS TO ASK YOU.

25 YOU SAID YOU HAD RECEIVED A B.A. DEGREE THAT WAS IN

1 HISTORY; IS THAT RIGHT?

2 A. YES, SIR.

3 Q. AND YOU DID A YEAR'S GRADUATE STUDY IN HISTORY; IS THAT

4 RIGHT?

5 A. YES, I DID.

6 Q. OKAY. AND PRIOR TO YOUR WORK AT CAMBRIDGE UNIVERSITY

7 PRESS, YOU WORKED FOR HOLIDAY INN AND THE STATE DEMOCRATIC

8 PARTY IN TEXAS, AND YOU HAD SOME COLLEGE TYPE AND HIGH SCHOOL

9 JOBS?

10 A. NO, SIR, I WORKED FOR THE STATE DEMOCRATIC PARTY OF

11 KANSAS.

12 Q. I'M SORRY, THAT'S WHAT I THOUGHT I SAID. OKAY. AND YOUR

13 WORK AT CAMBRIDGE HAS BEEN EDITORIAL STARTING AS EDITORIAL

14 ASSISTANT PROGRESSING TO ASSOCIATE EDITOR, THEN EDITOR, THEN

15 EXECUTIVE DIRECTOR AND ON FROM THERE, CORRECT?

16 A. YES, SIR.

17 Q. YOU DO NOT HAVE ANY FINANCE OR ACCOUNTING DEGREES OR

18 TRAINING, CORRECT?

19 A. THAT'S CORRECT.

20 Q. AND YOU'VE NOT WORKED IN FINANCE OR ACCOUNTING?

21 A. NOT DIRECTLY, NO.

22 Q. AND YOU HAVE NO LEGAL DEGREES OR LEGAL TRAINING, CORRECT?

23 A. NO, SIR, I DO NOT.

24 Q. GENERALLY BEFORE ASSERTING AGAINST A THIRD PARTY CONCERNS

25 ABOUT POTENTIAL COPYRIGHT INFRINGEMENT CAMBRIDGE PERFORMS A

1 FAIR USE ANALYSIS?

2 A. THAT'S A QUESTION, YES?

3 Q. YES.

4 A. YES.

5 Q. IS THAT CORRECT?

6 A. YES, THAT'S CORRECT.

7 Q. CAMBRIDGE LOOKS AT THE AMOUNT THAT HAS BEEN TAKEN AND DOES

8 NOT CONSIDER ANY OTHER FACTOR, CORRECT?

9 A. CORRECT.

10 Q. AND CAMBRIDGE TAKES IN YOUR WORDS A QUITE CONSERVATIVE

11 APPROACH TO FAIR USE, CORRECT?

12 A. THAT'S CORRECT.

13 Q. AND MEANING QUITE CONSERVATIVE AS TO WHAT WOULD QUALIFY AS

14 A PROPER USE UNDER FAIR USE, CORRECT?

15 A. WELL, IF I MAY QUALIFY WHEN I SAID CONSERVATIVE IT WAS

16 WITH REGARD TO WHAT WE DO WITH THE BOOKS WE PUBLISH BECAUSE

17 THOSE BOOKS QUITE OFTEN CONTAIN COPYRIGHTABLE MATERIAL.

18 I BELIEVE YOU'RE REFERRING BACK TO MY DEPOSITION,

19 SIR?

20 Q. WHERE YOU SAID YOU HAD A CONSERVATIVE APPROACH TO FAIR

21 USE?

22 A. YES.

23 Q. AND YOU DID THE ANALYSIS -- PRIOR TO LEGAL COUNSEL YOU DID

24 THE ANALYSIS ON BEHALF OF CAMBRIDGE TO DETERMINE WHETHER IN

25 YOUR VIEW, IN CAMBRIDGE'S VIEW THE USE BY GEORGIA STATE

1 CONSTITUTED A FAIR USE?

2 A. CORRECT, YES.

3 Q. YOU'VE NOT BEEN INVOLVED IN DEVELOPING ANY FAIR USE
4 POLICIES FOR CAMBRIDGE, CORRECT?

5 A. NO, I WOULD SAY THAT'S NOT TRUE. INsofar AS OUR
6 DISCUSSIONS OF -- SORRY, WE HAVE TWO APPROACHES TO FAIR USE. I
7 WANT TO BE CLEAR. THERE IS A FAIR USE POLICY WE IMPOSE ON
8 OURSELVES, AND THEN THERE'S THAT WHICH WE'RE CONCERNED WITH IN
9 THIS LAWSUIT. THEY'RE SEPARATE UNRELATED.

10 WHAT I TESTIFIED ABOUT IN MY DEPOSITION WAS MAINLY
11 ABOUT OUR POLICIES RELATING TO OUR OWN BOOKS, AND I HAVE BEEN
12 INVOLVED IN SETTING THOSE POLICIES. SO THE ANSWER THERE WOULD
13 BE YES.

14 Q. LET ME HAND YOU YOUR DEPOSITION.

15 MR. HARBIN: IF I MAY APPROACH, YOUR HONOR?

16 THE COURT: YOU MAY.

17 BY MR. HARBIN:

18 Q. DO YOU RECALL YOUR DEPOSITION WAS TAKEN JULY 1, 2009?

19 A. YES.

20 MR. HARBIN: YOUR HONOR, WE HAVE THE ORIGINAL IF YOUR
21 HONOR WISHES I CAN HAND IT UP TO THE COURT.

22 THE COURT: NO, BUT WE'LL GO AHEAD AND OPEN IT THOUGH
23 AND FILE IT. YOU CAN JUST GIVE IT TO MS. HANNA WHEN YOU'RE
24 THROUGH WITH IT.

25 MR. HARBIN: THANK YOU.

1 BY MR. HARBIN:

2 Q. IF YOU COULD JUST LOOK AT PAGE 149, SIR, YOU WERE ASKED AT
3 LINES 21 TO 24 HAVE YOU PERSONALLY BEEN INVOLVED IN DEVELOPING
4 ANY FAIR USE POLICIES FOR CAMBRIDGE UNIVERSITY PRESS, AND YOUR
5 ANSWER THEN WAS NO, CORRECT?

6 A. SORRY, IF I MAY JUST FIND WHERE YOU'RE REFERRING TO.

7 Q. PAGE 149 BEGINNING AT LINE 21.

8 A. THAT'S CORRECT, THAT WAS MY ANSWER, YES.

9 Q. YOU'VE ATTENDED SOME SEMINARS OR WORKSHOPS ON COPYRIGHT
10 FAIR USE WITHIN CAMBRIDGE, CORRECT?

11 A. YES.

12 Q. OKAY. NOW WHEN YOU DID YOUR INTERNAL FAIR USE ANALYSIS AT
13 CAMBRIDGE, THE ONLY MATERIALS YOU LOOKED AT WERE THE
14 SPREADSHEETS YOU HAD BEEN PROVIDED BY THE AMERICAN ASSOCIATION
15 OF PUBLISHERS; IS THAT RIGHT?

16 A. THAT'S CORRECT.

17 Q. AND THE ONLY CRITERIA YOU APPLIED IN MAKING YOUR
18 DETERMINATION WAS CONSISTENT WITH YOUR PRIOR TESTIMONY THE
19 NUMBER OF PAGES USED; IS THAT RIGHT?

20 A. THAT'S CORRECT.

21 Q. YOU DID NOT CONSIDER, FOR EXAMPLE, ANY FACTOR OF WHETHER
22 THE PORTION USED WAS THE HEART OR CRITICAL PART OF THE WORK?

23 A. NO, SIR, DID NOT.

24 Q. IS IT CORRECT WITHIN CAMBRIDGE YOU DON'T RECOGNIZE THAT
25 PHRASE AS HAVING A BEARING ON THE FAIR USE ANALYSIS?

1 A. THAT IS CORRECT.

2 Q. NOW EVEN UNDER CAMBRIDGE'S ADMITTEDLY CONSERVATIVE
3 APPROACH TO FAIR USE, YOU AGREE THAT SOME USES WOULD BE FAIR
4 AND THAT PROFESSORS COULD USE PORTIONS OF A WORK WITHOUT PAYING
5 ANY PERMISSION FEES?

6 A. YES.

7 Q. AND CAMBRIDGE UNIVERSITY PRESS DOES NOT PUBLISH ANY
8 FICTIONAL WORKS, CORRECT?

9 A. WE HOPE WE DON'T.

10 Q. SOME OF MY UNDERGRAD WORK USING YOUR PUBLICATIONS WAS
11 FICTION, BUT THAT'S A DIFFERENT STORY.

12 ALL THE FACTUAL WORKS, ALL THE WORKS AT ISSUE ARE
13 FACTUAL WORKS, CORRECT?

14 A. YES, SIR.

15 THE COURT: NOW WHEN YOU'RE TALKING HERE ABOUT FAIR
16 USE POLICIES FOR CAMBRIDGE UNIVERSITY PRESS, YOU MEAN THE
17 POLICY THAT WOULD DETERMINE WHETHER YOU ALL FEEL THAT SOMEONE
18 ELSE'S USE OF YOUR WORK IS A FAIR USE OR NOT?

19 THE WITNESS: I'M SORRY, COULD YOU SAY THAT AGAIN? I
20 LOST THE TREND.

21 THE COURT: YOU SAID YOU'VE BEEN INVOLVED IN
22 PROMULGATING FAIR USE POLICIES FOR CAMBRIDGE UNIVERSITY PRESS?

23 THE WITNESS: YES, YOUR HONOR.

24 THE COURT: BY THAT YOU MEAN, I THINK, THE POLICY
25 THAT CAMBRIDGE UNIVERSITY PRESS WOULD APPLY IN DETERMINING

1 WHETHER SOMEONE ELSE'S USE OF YOUR MATERIAL IS PROTECTED BY
2 FAIR USE?

3 THE WITNESS: WELL, YOUR HONOR --

4 THE COURT: I'M ASKING YOU.

5 THE WITNESS: YES, I SUPPOSE THE ANSWER IS YES.
6 POLICY SOUNDS LIKE A GRAND WAY OF PUTTING IT. SO THAT'S WHY I
7 WAS HESITANT. IT REALLY BOILS DOWN TO IT'S A BUSINESS DECISION
8 IN A SENSE FOR US. WE LOOK AT SOMETHING AND WE SAY WHAT DO WE
9 THINK ABOUT THAT. SO I AM HESITANT TO CALL IT A POLICY.

10 BY MR. HARBIN:

11 THE COURT: NOW IS THIS LEADING UP TO A QUESTION OF
12 WHAT IS YOUR POLICY?

13 MR. HARBIN: NO, YOUR HONOR.

14 THE COURT: I'M CURIOUS ABOUT THAT.

15 MR. HARBIN: I WAS NOT PLANNING TO ASK THAT. I'LL
16 THINK ABOUT THAT OVERNIGHT, YOUR HONOR.

17 BY MR. HARBIN:

18 Q. YOUR AUTHORS INITIALLY MAKE A DETERMINATION OF WHETHER A
19 USE OF A MATERIAL IS FAIR USE, CORRECT?

20 A. YES.

21 Q. OKAY. AND WE'VE LOOKED AT CONTRACTS WHERE YOU GENERALLY
22 REQUIRE THE AUTHORS TO INDEMNIFY CAMBRIDGE IF, FOR EXAMPLE, A
23 FAIR USE DETERMINATION IS INCORRECT AND THE PUBLISHER AND/OR
24 THE AUTHOR ARE HIT WITH AN INFRINGEMENT SUIT, CORRECT?

25 A. THAT'S CORRECT.

1 Q. AND YOU ADVISE THE AUTHORS TO GET PERMISSIONS WHERE THEY
2 CAN AT LEAST IF IT'S NOT A FAIR USE; IS THAT CORRECT?

3 A. THAT IS CORRECT, UH-HUH (AFFIRMATIVE).

4 Q. AND SOMETIMES, THOUGH, THEY CAN'T GET PERMISSIONS. THEY
5 CAN'T, FOR EXAMPLE, FIND THE COPYRIGHT HOLDER?

6 A. THAT DOES HAPPEN, YES.

7 Q. OKAY. AND SOMETIMES THEY STILL USE THE PRIOR AUTHOR'S OR
8 PRIOR RIGHTSHOLDER'S WORK, CORRECT?

9 A. NO, THAT WOULD NOT BE CORRECT, SIR, NOT TO MY KNOWLEDGE.

10 Q. LET ME HAND YOU -- DO YOU STILL -- DID YOU ACTUALLY GET
11 THE BOOK PLAINTIFFS' EXHIBIT 20?

12 A. YES.

13 Q. IF YOU COULD OPEN THAT TO THE INDEX ACKNOWLEDGMENTS SMALL
14 ROMAN NUMERAL 11 AND 12.

15 A. YES.

16 Q. DO YOU SEE, SIR, WHERE IT SAYS AT THE BOTTOM OF PAGE ROMAN
17 NUMERAL 12, THE PUBLISHERS AND I ARE GRATEFUL TO THE AUTHORS,
18 PUBLISHERS AND OTHERS WHO HAVE GIVEN PERMISSION FOR THE USE OF
19 COPYRIGHTED MATERIAL IDENTIFIED IN THE TEXT. IT HAS NOT BEEN
20 POSSIBLE TO IDENTIFY OR TRACE SOURCES OF ALL THE MATERIALS USED
21 AND IN SUCH CASE THE PUBLISHERS WOULD WELCOME INFORMATION FROM
22 COPYRIGHT OWNERS, CORRECT?

23 A. YES, THAT'S WHAT IT READS, YES, SIR.

24 Q. SO AUTHORS OF CAMBRIDGE BOOKS DO SOMETIMES USE WORKS OF
25 PRIOR AUTHORS EVEN WHEN THEY FEEL LIKE THEY SHOULD TRY TO GET

1 PERMISSION IF THEY CAN'T LOCATE THE RIGHTSHOLDER?

2 A. THAT'S THE CASE FOR THIS BOOK.

3 Q. THIS IS ACKNOWLEDGMENT THAT CAMBRIDGE WORKED OUT WITH THE
4 AUTHOR, THAT LANGUAGE, CORRECT?

5 A. NO, SIR, I WOULD SAY PROBABLY NOT. WE DON'T TEND TO
6 WRITE -- THOSE OF US WHO WORK FOR THE PRESS DON'T WRITE WHAT'S
7 IN THE BOOKS. THAT'S ENTIRELY THE AUTHOR'S WRITING THUS THEIR
8 NAME ON THE BOOK.

9 Q. ALTHOUGH IT SAYS THE PUBLISHERS AND I ARE GRATEFUL, ET
10 CETERA, YOUR TESTIMONY --

11 A. BUT THAT'S THE AUTHOR'S VOICE. IN OTHER WORDS, THEY ARE
12 SPEAKING OF THE PUBLISHER IN THE THIRD PARTY.

13 Q. IF I CAN FINISH THE QUESTION, SIR.

14 A. BEG YOUR PARDON.

15 Q. IT'S YOUR TESTIMONY, IT'S YOUR UNDERSTANDING THE PUBLISHER
16 HAD NO ROLE IN EDITING THAT LANGUAGE?

17 A. I DON'T KNOW IS THE HONEST ANSWER.

18 Q. SORRY?

19 A. I DON'T KNOW.

20 Q. OKAY. NOW THIS BOOK ASSESSING LANGUAGES FOR SPECIFIC
21 PURPOSE, ISN'T THIS AN ENGLISH AS A SECOND LANGUAGE BOOK?

22 A. YES.

23 Q. OKAY. AND THE BOOK ASSESSING SPEAKING, ONE OF THE OTHER
24 WORKS AT ISSUE, IS ALSO ENGLISH AS A SECOND LANGUAGE BOOK?

25 A. YES, IT IS.

1 Q. AND THERE ARE SEVERAL WORKS THAT PROFESSOR KIM USED THAT
2 ARE AT ISSUE ASSESSING VOCABULARY, ASSESSING LISTENING,
3 CRITERION-REFERENCED LANGUAGE TESTING, THOSE ARE ALL ENGLISH AS
4 A SECOND LANGUAGE BOOK, CORRECT?

5 A. YES.

6 Q. AND AS YOU'VE TESTIFIED CAMBRIDGE DOESN'T MAKE THESE TYPES
7 OF BOOKS AVAILABLE TO THE COPYRIGHT CLEARANCE CENTER OR CCC FOR
8 PROMOTING AND DEALING WITH EXCERPTS, CORRECT?

9 A. WELL, NO, I SAID SOME OF OUR ENGLISH AS SECOND LANGUAGE
10 BOOKS, AT LEAST I HOPE I SAID THAT BECAUSE THAT WOULD BE MORE
11 ACCURATE. THERE'S A GREAT RANGE OF SUCH BOOKS.

12 Q. DO YOU KNOW IF IN FACT THESE ARE OFFERED THROUGH CCC OR
13 NOT?

14 A. I DO NOT KNOW.

15 Q. SO THE HYPOTHETICAL I BELIEVE THAT YOU TESTIFIED ABOUT IF
16 MS. KIM HAD ASKED FOR PERMISSION, YOU DON'T KNOW IF IN FACT SHE
17 COULD HAVE ASKED FOR PERMISSION FOR THESE BOOKS, DO YOU?

18 A. I DO NOT KNOW.

19 MR. HARBIN: YOUR HONOR, THIS WOULD BE A GOOD POINT
20 TO BREAK IF YOU WANT TO.

21 THE COURT: TOMORROW MORNING LET'S START AT 9:30, AND
22 WE'LL CERTAINLY GO UNTIL THREE. WE MIGHT GO A LITTLE BIT
23 BEYOND THAT. WE'LL JUST HAVE TO WAIT AND SEE. YOU ALL HAVE A
24 NICE EVENING.

25 (PROCEEDINGS ADJOURNED)

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REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

ANDRE G. ASHLEY
OFFICIAL COURT REPORTER
UNITED DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

DATE: