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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CAMBRIDGE UNIVERSITY PRESS,)	
ET AL.,)	DOCKET NO. 1:08-CV-1425-ODE
)	
PLAINTIFFS,)	ATLANTA, GEORGIA
)	MAY 25, 2011
V.)	
)	
MARK P. BECKER, IN HIS)	
OFFICIAL CAPACITY AS GEORGIA)	
STATE UNIVERSITY PRESIDENT,)	
ET AL.,)	
)	
DEFENDANTS.)	

VOLUME 7
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 25, 2011
3 IN OPEN COURT.)

4 THE COURT: ARE YOU READY?

5 MR. ASKEW: YES.

6 THE COURT: YOU MAY PROCEED.

7 YOUJIN KIM,
8 HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTIFIED
9 AS FOLLOWS:

10 CROSS-EXAMINATION (CONTINUED)

11 BY MR. ASKEW:

12 Q. PROFESSOR KIM, I WANT TO TAKE A FEW MINUTES THIS MORNING
13 AND GO BACK THROUGH THIS FIRST GROUP OF BOOKS THAT WE HAVE
14 REVIEWED, AND I WANT YOU TO IDENTIFY FOR ME A COUPLE OF PIECES
15 OF INFORMATION QUICKLY SUCH AS THE NUMBER OF PAGES IN THE BOOK
16 AND THE NUMBER OF PAGES THAT WERE USED IN YOUR EXCERPTS.

17 SO IF YOU COULD LOOK AT THE BACHMAN AND PALMER BOOK
18 FIRST, THE LANGUAGE TESTING IN PRACTICE, HOW MANY PAGES ARE IN
19 THAT BOOK.

20 THE COURT: EXCUSE ME, JUST A MINUTE, I MEANT TO SAY,
21 I JUST FORGOT TO SAY, YOU'RE REMINDED YOU'RE STILL UNDER OATH.
22 THANK YOU. GO AHEAD.

23 BY MR. ASKEW:

24 Q. HOW MANY PAGES ARE IN THAT BOOK, DR. KIM?

25 A. 377 PAGES.

1 Q. AND HOW MANY PAGES ARE IN THE THREE CHAPTERS THAT YOU
2 CHOSE TO USE AS AN EXCERPT?

3 A. 126 PAGES FROM CHAPTERS 2 AND 3, AND 9 PAGES FROM
4 CHAPTER 5.

5 Q. WHAT WOULD THAT TOTAL BE?

6 A. ABOUT 35 PAGES.

7 Q. IS THAT ALL OF THE PAGES THAT WERE USED?

8 A. RIGHT, ALL OF THEM.

9 MR. ASKEW: THE PLAINTIFFS REPORT THAT AS 14.8
10 PERCENT, YOUR HONOR, BUT I THINK WE DISPUTE THAT NUMBER. THEY
11 COUNT 54 PAGES. SHE'S COUNTING 35.

12 BY MR. ASKEW:

13 Q. LET'S LOOK AT THE NEXT BOOK, PROFESSOR KIM, THAT WOULD BE
14 ASSESSING LANGUAGE FOR SPECIFIC PURPOSES, THAT'S THE DOUGLAS
15 BOOK. HOW MANY PAGES ARE IN THAT BOOK?

16 A. 311 PAGES.

17 Q. AND HOW MANY PAGES IN THE CHAPTER THAT YOU CHOSE FOR AN
18 EXCERPT?

19 A. 16 PAGES.

20 MR. ASKEW: THAT'S REPORTED AS 6 PERCENT BY THE
21 PLAINTIFFS, YOUR HONOR.

22 BY MR. ASKEW:

23 Q. THE NEXT BOOK IS THE FUNDAMENTAL CONSIDERATIONS IN
24 LANGUAGE TESTING, THAT'S THE BOOK BY BACHMAN.

25 A. YES.

1 Q. HOW MANY PAGES IN THAT BOOK?

2 A. 408.

3 Q. AND THEN HOW MANY PAGES IN THE CHAPTER THAT YOU CHOSE AS
4 AN EXCERPT, I THINK THAT'S CHAPTER 4?

5 A. 20 PAGES -- SORRY, 30 PAGES.

6 Q. 30 PAGES?

7 A. YES.

8 MR. ASKEW: THAT'S REPORTED AS 8.3 PERCENT BY THE
9 PLAINTIFFS, YOUR HONOR.

10 BY MR. ASKEW:

11 Q. BY THE WAY WITH RESPECT TO THE BACHMAN AND PALMER BOOK
12 THAT YOU LOOKED AT FIRST, DID YOU COUNT THE PAGES IN CHAPTERS
13 2, 3 AND 5? I WANT TO BE SURE THAT YOU GOT THE CORRECT COUNT ON
14 THE NUMBER OF PAGES THAT YOU USED IN YOUR EXCERPTS?

15 A. CHAPTERS 2 AND 3 WERE 43 PAGES, AND CHAPTER 5 WAS 9 PAGES.

16 Q. SO THE TOTAL OF THAT WOULD BE HOW MUCH?

17 A. 52 PAGES.

18 MR. ASKEW: THAT IS REPORTED BY THE PLAINTIFFS AS
19 14.8 PERCENT, YOUR HONOR.

20 BY MR. ASKEW:

21 Q. LET'S LOOK AT THE -- DID WE FINISH THE BACHMAN BOOK? YOU
22 HAD 30 PAGES I BELIEVE YOU SAID WERE USED AS AN EXCERPT?

23 A. YES.

24 MR. ASKEW: THAT WAS REPORTED BY THE PLAINTIFFS AS
25 8.3 PERCENT.

1 BY MR. ASKEW:

2 Q. LET'S LOOK AT ASSESSING GRAMMAR BY PURPURA, I THINK YOU
3 USED CHAPTERS 3 AND 5?

4 A. YES.

5 Q. HOW MANY PAGES DOES THAT REPRESENT?

6 A. CHAPTER 3 WAS 33 PAGES. CHAPTER 5 WAS 45 PAGES.

7 Q. AND THE TOTAL OF THAT WOULD BE?

8 A. 78 PAGES.

9 MR. ASKEW: THAT'S REPORTED BY THE PLAINTIFFS AS 29.2
10 PERCENT, YOUR HONOR.

11 BY MR. ASKEW:

12 Q. LET'S LOOK AT THE ASSESSING VOCABULARY BOOK BY READ; HOW
13 MANY PAGES IN THAT BOOK?

14 A. 279 PAGES.

15 Q. AND HOW MANY PAGES IN THE EXCERPT WHICH I THINK IS CHAPTER
16 6?

17 A. 32 PAGES.

18 MR. ASKEW: THAT'S REPORTED AS 15.1 PERCENT BY THE
19 PLAINTIFFS.

20 BY MR. ASKEW:

21 Q. THOSE ARE THE BOOKS I THINK WE COVERED YESTERDAY.

22 A. YES.

23 Q. NOW I WANT TO START WITH THE EVALUATION OF THE REMAINING
24 BOOKS THAT YOU USED, ALL RIGHT?

25 A. OKAY.

1 Q. LET'S LOOK FIRST AT THE NATION BOOK LEARNING VOCABULARY IN
2 ANOTHER LANGUAGE.

3 THE COURT: WHAT'S THAT EXHIBIT NUMBER?

4 MR. ASKEW: THAT EXHIBIT NUMBER --

5 MR. LARSON: I BELIEVE IT'S PX-125.

6 THE COURT: IS IT ALREADY IN EVIDENCE?

7 MR. ASKEW: YES, IT'S IN EVIDENCE PX-125.

8 THE COURT: BUT IT'S NOT, AS I RECALL, ONE OF THE
9 ONES THAT I HAD A CHANCE TO LOOK AT UP AT THE BENCH, RIGHT?

10 MR. ASKEW: I'M NOT SURE.

11 THE COURT: I DON'T RECALL SEEING IT. THAT'S OKAY,
12 WE MAY COME BACK TO THIS.

13 BY MR. ASKEW:

14 Q. PROFESSOR KIM, IT'S BEEN INDICATED THAT YOU USED CHAPTER
15 10 FROM THIS BOOK AS AN EXCERPT; IS THAT WHAT YOU RECALL?

16 A. YES.

17 Q. COULD YOU FIRST TELL ME WHAT WAS THE SUBJECT OF YOUR CLASS
18 THE DAY THAT THIS EXCERPT WAS ASSIGNED FOR REVIEW BY YOUR
19 STUDENTS?

20 A. IT WAS COVERED DURING WEEK 7, AND THE GOAL OF THE
21 PARTICULAR WEEK OF THE CLASS WAS TO HELP MY STUDENTS TO
22 UNDERSTAND HOW TO MAKE VOCABULARY TESTS IN CLASSROOM CONTEXT.

23 Q. WHAT DOES THIS EXCERPT HAVE -- WHAT'S THE SUBJECT MATTER
24 OF THIS EXCERPT, PROFESSOR KIM?

25 A. SO IN CHAPTER 10 NATION DESCRIBED DIFFERENT TYPES OF

1 QUESTIONS THAT TEACHERS WHERE STANDARDIZED TESTS USED TO

2 MEASURE STUDENTS' VOCABULARY KNOWLEDGE AND USE.

3 Q. AND WHY DID YOU SELECT THIS EXCERPT FOR REVIEW BY YOUR

4 STUDENTS FOR THIS CLASS?

5 A. BECAUSE THIS PARTICULAR CHAPTER INTRODUCES DIFFERENT TYPES

6 OF ITEMS, AND IT INTRODUCES DIFFERENT EXAMPLES FROM DIFFERENT

7 SOURCES.

8 Q. WAS THIS EXCERPT A REQUIRED READING OR WAS IT AN OPTIONAL

9 READING?

10 A. FIRST IT WAS REQUIRED, THE ENTIRE CHAPTER WAS REQUIRED

11 WHEN I DESIGNED THE SYLLABUS, BUT, AGAIN, JUST LIKE WITH OTHER

12 CHAPTERS THAT I TALKED ABOUT YESTERDAY, I PINPOINTED A COUPLE

13 OF EXAMPLES FROM THIS BOOK FOR STUDENTS TO TAKE A LOOK AT

14 BEFORE COMING TO THE CLASS.

15 Q. CAN YOU IDENTIFY FOR THE COURT WHAT PORTION OF THIS

16 EXCERPT YOU LEFT AS A REQUIRED READING FOR THE STUDENTS?

17 A. IT'S DIFFICULT TO SAY WHAT PORTION, BUT CAN I JUST

18 PINPOINT SOME EXAMPLES HERE?

19 Q. JUST GIVE US THE PAGE NUMBERS?

20 A. SO LIKE PAGE 344, 345, THESE ARE EXAMPLES, AND 347, 352,

21 353, 359, 360, 368, 369, 372, 376, 377.

22 Q. THOSE WERE REQUIRED OR WERE THEY OPTIONAL?

23 A. I ASKED THEM TO TAKE A LOOK AT THE EXAMPLES. IT WAS

24 REQUIRED.

25 Q. WITH RESPECT TO THIS EXCERPT, DID YOU DO A FAIR USE

1 ANALYSIS, PROFESSOR KIM?

2 A. YES.

3 Q. AND IS THAT ANALYSIS REPORTED IN THE CHECKLIST THAT YOU
4 DID FOR THIS EXCERPT?

5 A. YES.

6 Q. AND IN THE COURSE OF DOING THAT FAIR USE ANALYSIS, DID YOU
7 CONSIDER EACH AND EVERY ONE OF THE FACTORS WHICH YOU WOULD
8 EVALUATE FOR FAIR USE?

9 A. YES.

10 Q. AND AS A RESULT OF THAT EVALUATION DID YOU REACH A
11 CONCLUSION AS TO WHETHER YOU THOUGHT THE USE OF THIS MATERIAL
12 OUT OF THIS EXHIBIT WAS A FAIR USE?

13 A. IT WAS FAIR USE.

14 Q. LET'S GO TO THE NEXT BOOK, DR. KIM, AND THAT WOULD BE
15 ASSESSING READING BY ALDERSON; DO YOU HAVE THAT?

16 A. YES.

17 Q. WHAT'S THAT EXHIBIT NUMBER?

18 A. 29.

19 Q. PLAINTIFFS' EXHIBIT 29. HOW MANY PAGES ARE IN THIS BOOK,
20 DR. KIM?

21 A. 398.

22 Q. AND HOW MANY PAGES ARE IN THE CHAPTER WHICH YOU USED AS AN
23 EXCERPT?

24 A. 68 PAGES.

25 MR. ASKEW: THAT IS REPORTED BY THE PLAINTIFFS AS

1 19.3 PERCENT, YOUR HONOR.

2 BY MR. ASKEW:

3 Q. WHAT WAS THE SUBJECT OF THE CLASS THIS DAY, DR. KIM, WHICH
4 I THINK IS WEEK 8?

5 A. DURING WEEK 8 AFTER COVERING VOCABULARY, WE MOVED TO
6 ASSESSING READING. SO THE PURPOSE OF THIS CLASS WAS TO
7 INTRODUCE MY STUDENTS DIFFERENT TYPES OF READING TESTS, EXAM
8 ITEMS AND HOW TO SCORE TEST ITEMS ON THE READING TEST.

9 Q. AND WHAT WAS THE SUBJECT OF THIS EXCERPT THAT YOU CHOSE TO
10 USE FOR THE STUDENTS IN THE CLASS THAT DAY?

11 A. VERY SIMILAR TO OTHER CHAPTERS. THE TITLE OF THE CHAPTER
12 IS CALLED TECHNIQUES FOR TESTING READING. SO THIS PARTICULAR
13 CHAPTER INTRODUCES DIFFERENT TYPES OF ITEMS ON THE TESTS
14 INCLUDING MULTIPLE CHOICE QUESTIONS OR OPEN-ENDED QUESTIONS.

15 Q. AND WHY IS IT THAT YOU CHOSE THIS EXCERPT FOR THE STUDENTS
16 TO REVIEW AS A PART OF YOUR CLASS THAT DAY?

17 A. ACTUALLY I ALSO ASSIGNED ONE CHAPTER FROM THE REQUIRED
18 TEXTBOOK; HOWEVER, THIS CHAPTER WAS IMPORTANT BECAUSE THIS
19 CHAPTER PROVIDED A LOT OF EXAMPLES THAT STUDENTS CAN TAKE A
20 LOOK AT BEFORE THEY ACTUALLY DESIGN THEIR OWN TEST ITEMS. SO
21 THAT'S THE REASON WHY I CHOSE THIS CHAPTER.

22 Q. TELL ME THE PAGE NUMBER OF THE EXAMPLES YOU USED FROM THIS
23 BOOK, AND I'LL PUT THAT ON THE OVERHEAD PROJECTOR FOR THE COURT
24 TO SEE?

25 A. STARTING FROM PAGE 207, SO THIS CHAPTER BASICALLY GO OVER

1 DIFFERENT TYPES OF ITEMS, THE CLOSE TEST AND GAP TEST ARE
2 EXPLAINED, AND ON THE NEXT PAGE ON 208 IT SHOWS EXAMPLE.

3 Q. IS THAT THE INTENDED PORTION THAT WE SEE THERE?

4 A. YES, THAT'S AN EXAMPLE OF CLOSED TEST.

5 Q. HAVE YOU GOT SOME OTHER EXAMPLES?

6 A. YES, ON PAGE 211, THIS CHAPTER DESCRIBES MULTIPLE CHOICE
7 TECHNIQUE WHICH IS WIDELY USED IN READING EXAM, AND THE AUTHOR
8 PROVIDED EXAMPLE IN ITALICS WHICH WAS TAKEN FROM ANOTHER BOOK
9 BY EDISON.

10 Q. ARE THERE OTHER EXAMPLES?

11 A. ON PAGE 213, AGAIN EXAMPLE QUESTIONS FROM A DIFFERENT
12 BOOK, AND NEXT PAGE ON 214, ANOTHER EXAMPLE ON MULTIPLE CHOICE
13 QUESTIONS, AND NEXT EXAMPLE ON PAGE 215, WHICH IS THE NEXT
14 PAGE, AFTER TALKING ABOUT MULTIPLE CHOICE QUESTIONS, NOW IT
15 INTRODUCES MATCHING TECHNIQUES.

16 SO ON PAGE 216, AND THIS IS EXAMPLE OF THE MATCHING
17 TECHNIQUE TAKEN FROM CERTIFICATING ADVANCED ENGLISH TEST WHICH
18 IS AVAILABLE PUBLICLY ONLINE, AND ON PAGE 220, THAT'S ANOTHER
19 EXAMPLE, TOO.

20 ON PAGE 220 ANOTHER TASK TYPE WHICH IS CALLED
21 ORDERING TASK, AND AGAIN THIS TASK IS AN EXAMPLE OF PUBLISHED
22 EXAMS WHICH IS WIDELY USED IN STANDARDIZED TESTS, AND ON PAGE
23 223 ANOTHER EXAMPLE WHICH IS CALLED DICHOTOMOUS ITEMS. THIS IS
24 ALSO TAKEN FROM A DIFFERENT BOOK. SO THE ENTIRE CHAPTER KIND
25 OF GOES OVER DIFFERENT TYPES OF ITEMS.

1 Q. THANK YOU. BEFORE ASSIGNING THIS EXCERPT AND UPLOADING
2 IT, DID YOU UNDERTAKE A FAIR USE ANALYSIS WITH RESPECT TO THAT
3 EXCERPT?

4 A. YES.

5 Q. AND DID YOU DO THAT AND COMPLETE A CHECKLIST OF THE
6 PROCESS?

7 A. YES.

8 Q. AND WHEN YOU DID THAT DID YOU CONSIDER EACH AND EVERY ONE
9 OF THE FACTORS TO BE EVALUATED IN A FAIR USE ANALYSIS?

10 A. YES.

11 Q. AS A RESULT OF THAT ANALYSIS DID YOU REACH A CONCLUSION AS
12 TO WHETHER YOU THOUGHT THE USE OF THIS EXCERPT WAS A FAIR USE?

13 A. YES, IT WAS FAIR USE.

14 Q. WHAT WAS YOUR CONCLUSION?

15 A. IT WAS FOR FAIR USE.

16 THE COURT: TELL ME AGAIN WHAT THE EXHIBIT NUMBER OF
17 THE DOCUMENT IS THAT'S ON THE SCREEN?

18 MR. LARSON: PX-519, YOUR HONOR.

19 THE COURT: THANK YOU.

20 BY MR. ASKEW:

21 Q. LET'S GO TO THE NEXT BOOK FROM WHICH AN EXCERPT WAS TAKEN,
22 PROFESSOR KIM. IT'S ASSESSING LISTENING BY BUCK. FIRST WOULD
23 YOU TELL ME HOW MANY PAGES ARE IN THAT BOOK?

24 A. 274 PAGES.

25 Q. AND HOW MANY PAGES ARE IN THE EXCERPT THAT YOU USED?

1 A. 39 PAGES.

2 MR. ASKEW: THAT IS REPORTED AS 14.8 PERCENT BY THE
3 PLAINTIFFS, YOUR HONOR.

4 THE COURT: IS IT 14 PERCENT?

5 MR. ASKEW: 14.8 PERCENT IS WHAT THEY HAVE REPORTED
6 IN THE --

7 THE COURT: RIGHT, I UNDERSTAND. I'M JUST CURIOUS DO
8 YOU ALL AGREE THAT IT'S 14.8 PERCENT?

9 MR. ASKEW: WE HAVE A DISAGREEMENT.

10 THE COURT: YOU DO ON THAT ONE. OKAY.

11 MR. ASKEW: WELL, WE DISAGREE ON THEIR CALCULATION.
12 WE COUNT THE INTRODUCTORY MATERIAL. ACTUALLY TAKE THE WHOLE
13 BOOK. THEY TEND TO TAKE THE TEXT.

14 THE COURT: OKAY. THANK YOU.

15 BY MR. ASKEW:

16 Q. YOU'LL SEE THAT IN WEEK 9 IS WHERE THE BOOK BY BUCK WAS
17 BEING USED; IS THAT CORRECT?

18 A. YES.

19 Q. WHAT WAS THE SUBJECT OF YOUR CLASS ON WEEK 9, PROFESSOR
20 KIM?

21 A. DURING WEEK 9, AGAIN, THE PURPOSE OF THE CLASS WAS TO
22 INTRODUCE HOW TO MAKE LISTENING TESTS. WE COVERED READING AND
23 WE MOVED TO LISTENING TESTS.

24 Q. AND WHAT WAS THE SUBJECT OF THE CHAPTER FROM THE BOOK BY
25 BUCK THAT WOULD BE CHAPTER 5 THAT YOU HAD THE STUDENTS REVIEW

1 BEFORE CLASS?

2 A. SO CHAPTER 5 THE TITLE WAS CREATING TASKS, AGAIN CREATING
3 TEST ITEMS. SO VERY SIMILAR TO THE OTHER CHAPTERS THAT I
4 ASSIGNED FOR DIFFERENT SKILLS, THIS CHAPTER INTRODUCES
5 DIFFERENT TYPES OF TEST ITEMS FOR LISTENING TESTS.

6 Q. AND WHY IS IT YOU CHOSE THAT CHAPTER FOR THE STUDENTS TO
7 REVIEW, PROFESSOR KIM?

8 A. OKAY. THIS CHAPTER SHOWED DIFFERENT EXAMPLES OF EXISTING
9 LISTENING TEST ITEMS FROM DIFFERENT STANDARDIZED TESTS OR FROM
10 DIFFERENT PUBLISHED TEXTBOOKS IN OUR FIELD.

11 Q. CAN YOU IDENTIFY FOR US WHAT PORTION OF THAT EXCERPT WAS
12 REQUIRED AND WHAT PORTION WAS OPTIONAL?

13 A. SO ORALLY AT THE END OF WEEK 8, A WEEK BEFORE THE COURSE,
14 I AGAIN PINPOINT EXAMPLES SUCH AS PAGES 132, 133, 134, 135,
15 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 149 AND
16 150.

17 Q. GENERALLY SPEAKING WHAT WAS YOUR UNDERSTANDING OF THE
18 SOURCE OF THOSE EXAMPLES THAT ARE REPORTED IN THAT ARTICLE BY
19 BUCK?

20 A. SO THE AUTHOR BUCK ADOPTED A LOT OF TEST ITEMS USED IN
21 STANDARDIZED TESTS. BECAUSE THE PURPOSE OF THIS CHAPTER WAS TO
22 DESCRIBE DIFFERENT TYPES OF TEST ITEMS USED IN LISTENING
23 TESTS. SO HE USED A LOT OF EXAMPLES FROM PUBLISHED
24 STANDARDIZED TESTS OR PUBLISHED TEXTBOOKS AVAILABLE.

25 Q. BEFORE UPLOADING THIS CHAPTER FROM THE BUCK BOOK, DID YOU

1 UNDERTAKE A FAIR USE ANALYSIS, PROFESSOR KIM?
2 A. YES.
3 Q. DID YOU DO THAT AS A PART OF COMPLETION OF A CHECKLIST FOR
4 THIS EXCERPT?
5 A. YES.
6 Q. AND IN THE PROCESS OF DOING THAT ANALYSIS, DID YOU
7 CONSIDER EACH AND EVERY ONE OF THE FACTORS AS REPORTED ON THAT
8 CHECKLIST IN MAKING YOUR DETERMINATION WITH RESPECT TO FAIR
9 USE?
10 A. YES.
11 Q. WHAT WAS YOUR CONCLUSION AS TO WHETHER THE USE OF THIS
12 EXCERPT WAS A FAIR USE?
13 A. IT WEIGHS IN FAVOR OF A FAIR USE.
14 Q. LET'S LOOK AT THE NEXT BOOK WHICH IS ASSESSING SPEAKING BY
15 LUOMA. I THINK THAT'S REPORTED AT THE VERY BOTTOM OF THIS
16 EXHIBIT.
17 A. YES.
18 Q. DO YOU HAVE THAT BOOK?
19 A. YES.
20 Q. WHAT IS THAT EXHIBIT NUMBER?
21 A. 34.
22 Q. YES. WHAT WAS THE SUBJECT OF YOUR CLASS ON WEEK 10 WHERE
23 THE LUOMA EXCERPT WAS USED?
24 A. THE SUBJECT OF THE COURSE WAS HOW TO DESIGN SPEAKING
25 TESTS, AND SINCE SPEAKING IS SOMEWHAT DIFFERENT FROM READING

1 AND LISTENING WHICH INVOLVES STUDENTS' PERFORMANCE, ORAL
2 SPEAKING THE FOCUS WAS TO CREATE RATINGS, HOW TO RATE STUDENTS'
3 SPEAKING SAMPLES AS WELL AS HOW TO CREATE SPEAKING ITEMS, THE
4 PROMPT THAT IS PROVIDED TO STUDENTS.

5 Q. WHAT DOES THE CHAPTER -- THE TWO CHAPTERS IN LUOMA CONCERN
6 THAT HAD TO DO WITH YOUR CLASS ON WEEK 10?

7 A. SO I ASSIGNED CHAPTERS 4 AND 7. CHAPTER 4 THE TITLE IS
8 SPEAKING SCALES. SO THAT'S ONE OF MY OBJECTIVES FOR THE
9 COURSE. SO I WANTED TO INTRODUCE DIFFERENT SPEAKING SCALES
10 USED IN STANDARDIZED TESTS. SO I WANTED TO AGAIN PROVIDE SOME
11 EXAMPLES TO MY STUDENTS SO THAT THEY ARE FAMILIAR WITH THESE
12 EXISTING SCALES.

13 Q. BEFORE I GET FURTHER WITH THIS, HOW MANY PAGES ARE IN THIS
14 BOOK, PROFESSOR KIM?

15 A. 212 PAGES.

16 Q. AND HOW MANY PAGES ARE INCLUDED WITHIN THE TWO CHAPTERS
17 THAT YOU USED AS AN EXCERPT?

18 A. CHAPTER 4, 36 PAGES. CHAPTER 7, 31 PAGES.

19 Q. WHAT'S THE TOTAL OF THAT?

20 A. 67 PAGES.

21 MR. ASKEW: YOUR HONOR, THAT IS REPORTED AS 35.6
22 PERCENT BY THE PLAINTIFFS.

23 BY MR. ASKEW:

24 Q. NOW, BACK TO YOUR EVALUATION. WHY IS IT THAT YOU ASSIGNED
25 THESE TWO CHAPTERS FROM ASSESSING SPEAKING TO YOUR STUDENTS,

1 AND I HAVE A COPY OF THE BOOK SO I CAN DISPLAY PAGES TO THE
2 COURT, IF YOU'D LIKE?

3 A. MY STUDENTS ARE NOVICE TEACHERS, AND CREATING A SPEAKING
4 SCALE IS REALLY DIFFERENT FOR THEM. SO, AGAIN, I WANTED TO
5 SHOWS EXAMPLES OF SCALES WHICH ARE USED IN THE FIELD.

6 IF YOU CAN TAKE A LOOK ON PAGE 61 -- ACTUALLY
7 STARTING FROM PAGE 60, IT SAYS EXAMPLES OF SPEAKING SCALE. SO
8 THE AUTHOR GOES THROUGH DIFFERENT TYPES OF SCALES WHICH ARE
9 AVAILABLE PUBLICLY ONLINE.

10 SO THE FIRST EXAMPLE WAS THE NATIONAL CERTIFICATE
11 SCALE. SO THE ENTIRE SCALE IS PROVIDED IN PAGE 4.1, AND NEXT
12 PAGE ON PAGE 62, THE NEXT EXAMPLE IS THE ACTFL SPEAKING SCALE
13 WHICH IS ONE OF THE WIDELY USED SCALES IN THE WORLD, AND THE
14 AUTHOR PROVIDED THE ENTIRE SCALE IN THIS CHAPTER STARTING FROM
15 PAGES 63. SO THIS IS THE SCALE THAT ACTFL USED, AND IT
16 CONTINUES ON PAGE 64, PAGES 65, 66 AND PAGE 67. SO BASICALLY 6
17 TO 7 PAGES OF EXAMPLES WAS INCLUDED HERE FOR THE ACTFL
18 SPEAKING.

19 THE NEXT SCALE IS STARTING FROM PAGE 68. NEXT
20 EXAMPLE IS THE TEST OF SPOKEN ENGLISH SCALE. THIS SCALE IS
21 DEVELOPED BY EDUCATIONAL TESTING SERVICE THAT I TALKED ABOUT
22 YESTERDAY.

23 Q. THAT'S A GROUP AGAIN THAT --

24 A. GRE AND S.A.T. SO THE COMPANY DEVELOPS DIFFERENT TYPES OF
25 STANDARDIZED TESTS, AND THAT'S ONE OF THE WIDELY REFERRED

1 COMPANY IN OUR FIELD.

2 AGAIN ON PAGE 69 THE ENTIRE SCALE DEVELOPED BY THIS
3 COMPANY IS INCLUDED IN THIS CHAPTER. NEXT PAGE PAGE 70, THE
4 ENTIRE SCALE IS INCLUDED IN THIS CHAPTER, AND THE NEXT EXAMPLE
5 IS THE COMMON EUROPEAN FRAMEWORK OF SPEAKING SCALE STARTING
6 FROM THAT PAGE 71, AND THE DESCRIPTION STARTING FROM THAT PAGE
7 WHICH IS 72. 73 THE EXAMPLE CONTINUES. THAT'S 73. 74 THE
8 TABLE CONTINUES, AND THE NEXT ONE IS 75 ANOTHER EXAMPLE, AND
9 THE NEXT ONE NOW THE AUTHOR DESCRIBES ANOTHER SPEAKING SCALE
10 WHICH IS DEVELOPED IN MELBOURNE.

11 Q. WHAT PAGE IS THAT?

12 A. PAGE 76 AND THE EXAMPLE IS PAGE 77, YES. AND THEN 77 IS
13 AN EXAMPLE OF THAT SCALE, AND THE NEXT PAGE ON PAGE 78 AGAIN
14 MOVE TO ANOTHER PUBLICLY AVAILABLE SCALE, AND TABLE 4.8 WHICH
15 IS ON PAGE 79 THAT'S AN EXAMPLE, AND THEN THE AUTHOR --

16 Q. JUST A SECOND.

17 A. AND THEN ON PAGE 87, SO NOW THE AUTHOR STARTS TALKING
18 ABOUT HOW TO MEASURE FLUENCY IN SPEAKING. SO AGAIN THE TABLE
19 4.9 EXAMPLE OF FLUENCY SCALE. SAME AS IN TABLE 4.10 EXAMPLE OF
20 FLUENCY SCALE. 4.10 CONTINUES ON PAGE 88.

21 AND AFTER TALKING ABOUT FLUENCY ON PAGE 94, NOW THE
22 AUTHOR MOVES TO THE IDEA OF GRAMMAR IN SPEAKING. SO AGAIN
23 ANOTHER EXAMPLE OF HOW TO MEASURE GRAMMAR IN SPEAKING SAMPLES
24 IN SUMMARY, YES.

25 Q. NOW WE MOVE TO CHAPTER 7?

1 A. YES. SO THE PURPOSE OF CHAPTER 7 WAS DEVELOPING SPEAKING
2 TASKS. SO IN ORDER TO GET STUDENTS ORAL OUTPUT, TEACHERS NEED
3 TO PROVIDE PROMPT OR EXERCISE. SO THIS PARTICULAR CHAPTER
4 DESCRIBES DIFFERENT TYPES OF ACTIVITY THAT TEACHERS PROVIDE TO
5 STUDENTS, AND VERY SIMILAR TO THE OTHER CHAPTERS IN THIS
6 CHAPTER SHE PROVIDES VARIOUS ACTIVITIES THAT IS USED IN
7 CLASSROOM.

8 SO IT STARTS WITH EXAMPLES OF SPEAKING TASKS. THAT
9 SAME PAGE. IF YOU CAN TAKE A LOOK AT PAGE 140, EXAMPLES,
10 INTERACTION OUTLINE FOR PAIR TASK IN AN INTERVIEW TEST. SO
11 AGAIN THESE ARE THE EXAMPLES THAT TEACHERS PROVIDE STUDENTS SO
12 THAT THEY CAN TALK ABOUT THESE PICTURES AND PRACTICE THEIR
13 SPEAKING IN A SECOND LANGUAGE.

14 Q. AND WHAT DO YOU UNDERSTAND TO BE THE SOURCE OF THIS
15 INFORMATION THAT'S ON PAGE 140?

16 A. AS YOU CAN SEE ON PAGE 140, IT SAYS ADAPTED FROM HEATON,
17 1991. SO A LOT OF TIMES THESE AUTHORS WHEN THEY DESCRIBE
18 DIFFERENT ACTIVITIES OR TASKS, THEY TAKE EXAMPLES FROM
19 DIFFERENT SOURCES LIKE TEXTBOOKS OR TEST DEVELOPED EXERCISES.

20 Q. DO YOU HAVE A FEW MORE EXAMPLES FROM THIS CHAPTER?

21 A. SURE, ON PAGE 141 NARRATIVE TASKS GOING OVER DIFFERENT
22 ACTIVITIES. SO FOR THIS ACTIVITY TEACHERS ASK STUDENTS OKAY
23 DESCRIBE THESE PICTURES, THEN STUDENTS DESCRIBE THESE PICTURES
24 IN A SECOND LANGUAGE.

25 AND THE NEXT ONE 142, NOW FACE-TO-FACE PAIRED

1 INTERACTION CLASS. AGAIN ANOTHER EXAMPLE FROM DIFFERENT
2 TEXTBOOKS.

3 ON PAGE 143 AGAIN HERE THERE'S A COPYRIGHT SIGN
4 THERE. SO THIS AUTHOR AGAIN TOOK THE EXAMPLES FROM A DIFFERENT
5 VOLUME AND INTRODUCES THESE AS AN EXAMPLE FOR FACE-TO-FACE
6 PAIRED INTERACTION TESTS.

7 Q. WHAT DO YOU UNDERSTAND TO BE THE SOURCE OF THE INFORMATION
8 THAT'S ON PAGE 143?

9 A. IT'S FROM NORWAY, AND ONE PUBLISHED TEXTBOOK, SO THE
10 AUTHOR USED PICTURE PROMPTS FROM THE TEXTBOOK.

11 Q. DO YOU HAVE A FEW MORE EXAMPLES?

12 A. I'M JUST GOING THROUGH THE PICTURES BECAUSE IT'S EASY TO
13 SEE. STARTING FROM 144 INTERACTION OUTLINE FOR ONE-ON-ONE
14 INTERVIEW, YES, AND THEN THE NEXT PAGE AGAIN ANOTHER EXAMPLE OF
15 A FACE-TO-FACE PAIRED INTERACTION TEST, AND NOW STUDENTS HAVE
16 THOSE PICTURES AND THEY WERE ASKED TO CARRY OUT THESE
17 ACTIVITIES, AND THE AUTHOR PROVIDES EXAMPLES.

18 IF YOU TAKE A LOOK AT PAGE 146, AGAIN YOU CAN SEE
19 WHERE THE AUTHOR TOOK THE EXAMPLE FROM NORWAY TEXTBOOK, AND THE
20 NEXT ONE IS AGAIN DESCRIBING DIFFERENT TASKS WHICH IS CALLED
21 COMPARING AND CONTRASTING TASKS. SO PREVIOUS EXAMPLES WERE
22 BASICALLY RELATED TO NARRATION, HAVE STUDENTS TO DESCRIBE THE
23 PICTURES, BUT NOW FOR THIS EXAMPLE, YOU KNOW, TEACHERS ASK
24 STUDENTS TO COMPARE THE SITUATION.

25 SO THE AUTHOR AGAIN PROVIDE EXAMPLES. ON PAGE 147

1 THAT'S A PICTURE, THE BICYCLING PICTURES. AGAIN THIS ONE IS
2 EXAMPLE FROM THE STANDARDIZED TESTS WHICH IS CALLED UCLES, AND
3 NEXT ONE AGAIN, SO LET'S TAKE A LOOK AT THE FIGURE WHICH IS ON
4 149, AGAIN THE AUTHOR NOW GOING TO DIFFERENT TYPES OF
5 ACTIVITIES WHICH IS USED ON THE TESTS.

6 EDUCATION TESTING SERVICE WHICH I MENTIONED EARLIER,
7 SO THERE IS THE PUBLICLY USED SAMPLE ITEM TEST DEVELOPED BY
8 ETS, AND THE AUTHOR PROVIDES THE EXAMPLE FROM THAT WEBSITE.

9 Q. AND YOU UNDERSTAND ETS TO STAND FOR --

10 A. EDUCATIONAL TESTING SERVICE, AND THE NEXT PAGE 150, AFTER
11 TALKING ABOUT COMPARISON AND CONTRAST TASKS, NOW THE AUTHOR
12 MOVES TO DECISION TASKS. AGAIN ANOTHER EXAMPLE HOW TO MAKE
13 DECISION TASKS, AND PAGE 151, SO IT ALSO SAYS THE EXAMPLE
14 DECISION TASKS TAKEN FROM UCLES.

15 SO A LOT OF TIMES THIS CHAPTER JUST LIKE THE OTHER
16 CHAPTERS FOLLOWS A VERY SIMILAR PATTERN COMPILING ALL THE
17 EXAMPLES WHICH ARE USED IN THE TESTING BOOKS OR SAMPLES FROM
18 THE PUBLIC WEBSITE. SO THAT'S THE EXAMPLES IN THESE CHAPTERS.

19 Q. BEFORE YOU POSTED THESE EXCERPTS FROM THE LUOMA BOOK, DID
20 YOU UNDERTAKE A FAIR USE ANALYSIS, PROFESSOR KIM?

21 A. YES.

22 Q. AND IS THAT REPORTED IN THE CHECKLIST FOR THIS EXCERPT?

23 A. YES.

24 Q. AND WHEN YOU DID THAT FAIR USE ANALYSIS, DID YOU CONSIDER
25 EACH AND EVERY ONE OF THE FACTORS FOR EVALUATING FAIR USE AS

1 REPORTED ON THAT CHECKLIST?

2 A. YES.

3 Q. AND WHAT CONCLUSION DID YOU REACH WITH RESPECT TO WHETHER
4 YOUR USE OF THESE TWO CHAPTERS WAS A FAIR USE?

5 A. I BELIEVE IT WAS FAIR USE.

6 Q. LET'S GO TO THE NEXT BOOK WHICH IS ASSESSING WRITING BY
7 WEIGLE. HOW MANY PAGES ARE IN THIS BOOK?

8 THE COURT: EXCUSE ME JUST A MINUTE, WHICH BOOK ARE
9 WE TALKING ABOUT?

10 MR. ASKEW: THIS IS THE BOOK ASSESSING WRITING.

11 THE COURT: THANK YOU.

12 MR. ASKEW: SHE DOESN'T HAVE THE TITLE OF THE BOOKS.
13 SHE HAS THE AUTHOR OF THE BOOKS. YOU HAVE TO GO BACK TO THE
14 LIST OF ASSIGNED READING TO GET THE TITLE OF THE BOOK.

15 THE WITNESS: 268 PAGES.

16 BY MR. ASKEW:

17 Q. AND HOW MANY PAGES IN THE CHAPTER THAT YOU HAVE ASSIGNED
18 AS AN EXCERPT?

19 A. I ASSIGNED CHAPTERS 5 AND 6, 73 PAGES.

20 MR. ASKEW: THAT'S REPORTED AS 25.8 PERCENT, YOUR
21 HONOR, BY THE PLAINTIFFS.

22 BY MR. ASKEW:

23 Q. WHAT PORTION OF THIS EXCERPT, PROFESSOR KIM, DID YOU
24 ASSIGN AS REQUIRED READING, AND WHAT PORTION WAS OPTIONAL
25 READING?

1 A. BECAUSE THE PURPOSE OF THE CLASS WAS AGAIN INTRODUCING
2 TASK MATERIALS AND HOW TO SCORE STUDENTS' WRITING SAMPLES. SO
3 ON CHAPTER 5 -- DID YOU WANT ME TO GO THROUGH THE PAGES?

4 Q. FIRST I WANT TO KNOW WHAT YOUR CLASS WAS LIKE THAT DAY,
5 THE SUBJECT MATTER OF YOUR CLASS THAT DAY?

6 A. SO AFTER TALKING ABOUT SPEAKING FOR THAT WEEK, I WANTED TO
7 INTRODUCE HOW TO MAKE WRITING TESTS AND HOW TO SCORE STUDENTS'
8 WRITING SAMPLES. SO THOSE ARE THE TWO MAIN PURPOSES FOR THE
9 COURSE.

10 Q. AND HOW DO THE TWO CHAPTERS FROM THE WEIGLE BOOK RELATE TO
11 THE SUBJECT OF THE CLASS ON WEEK 11?

12 A. SO CHAPTER 5 THE TITLE IS DESIGNING WRITING ASSESSMENT
13 TASKS. SO THE REASON WHY I CHOSE THIS CHAPTER WAS AGAIN TO
14 SHOW DIFFERENT EXAMPLE OF TASKS USED IN WRITING TESTS.

15 CHAPTER 7 ILLUSTRATIVE TEST OF WRITING, THIS CHAPTER
16 SHOWS DIFFERENT SCALES THAT ARE USED BY TEACHERS WHO ARE
17 STANDARDIZED EXPERT WRITERS. SO I WANT MY STUDENTS TO TAKE A
18 LOOK AT THESE PUBLICLY USED SCALES SO THAT THEY CAN ADAPT
19 THESE IDEAS WHEN THEY CREATE THEIR OWN SCALES USING THEIR
20 CLASSROOMS.

21 Q. COULD YOU IDENTIFY FOR THE COURT JUST THE PAGE NUMBERS OF
22 THOSE PAGES IN THIS ARTICLE THAT HAVE THESE EXAMPLES THAT
23 YOU'RE REFERRING TO RATHER THAN TAKING THE TIME TO GO THROUGH
24 ANOTHER SERIES OF THESE EXEMPLARY PAGES?

25 A. OKAY. SO ON PAGE 84 THE AUTHOR TALKED ABOUT HOW TO WRITE

1 TASK SPECIFICATION FORMAT AGAIN WHICH IS ADAPTED FROM A
2 DIFFERENT SOURCE. SO BEFORE SHOWING THE EXAMPLES, THE AUTHOR
3 ACTUALLY TALKED ABOUT THE STEPS AND THE FACTORS THE TEACHERS
4 SHOULD TAKE INTO CONSIDERATION.

5 SO STARTING FROM THERE ON PAGE 85 WRITING MULTI
6 PARAGRAPH ESSAYS AGAIN TAKEN FROM DIFFERENT TEXTBOOKS AND
7 TALKED ABOUT THE STEPS AND THE EXAMPLES, AND ON PAGE 87, THAT'S
8 ONE OF THE EXAMPLES, THE WRITING TEST EXAMPLES, TEST LEVEL
9 STIMULUS AND RESPONSE, SO THE AUTHOR SHOWED EXAMPLES.

10 AND THE PROTOTYPE TASK, AGAIN THAT'S ANOTHER EXAMPLE
11 ADAPTED FROM A DIFFERENT LIKE PLACEMENT TESTS, AND THEN THE
12 AUTHOR EXPLAINED THESE TASKS.

13 AND IF YOU GET THE NEXT PAGE PAGE 88, AGAIN THE
14 AUTHOR IDENTIFIED THESE FIGURES FOR PLACEMENT TESTS. SO THE
15 AUTHOR DESCRIBES THESE EXAMPLES WHICH IS A SAMPLE ITEM FROM THE
16 PUBLISHED WORK.

17 Q. WHAT DO YOU UNDERSTAND TO BE THE SOURCE OF THE INFORMATION
18 ON THIS PAGE?

19 A. THAT'S FROM BUTLER SOURCE. SO ACTUALLY WHEN DR. WEIGLE,
20 WHO IS MY COLLEAGUE, SHE WORKED AT LOS ANGELES UCLA, SO BUTLER
21 ET AL. IS FROM THE TESTS DEVELOPED BY UCLA, AND THEY ALSO HAVE
22 DOCUMENTS WITH EXAMPLES FOR THE TESTS.

23 Q. DO YOU HAVE ONE OF TWO OTHER EXAMPLES THAT YOU'D LIKE TO
24 GIVE US?

25 A. SURE. SO PAGE 96 IN THIS CHAPTER A LOT OF TIMES STUDENTS

1 WERE PROVIDED WITH STIMULUS LIKE READING MATERIALS OR LISTENING
2 MATERIALS AS RESOURCES BEFORE THEY ACTUALLY WRITE ABOUT
3 DIFFERENT TOPICS. SO FOR THIS PART THE AUTHOR AGAIN PROVIDED
4 ALL THE EXAMPLES FROM THE LOS ANGELES READER WHICH IS THAT
5 EXAMPLE ABOVE, BEFORE THAT, CAN YOU SHOW? YES.

6 SO THAT'S THE EXAMPLE FROM THE LOS ANGELES READER.
7 SO BASICALLY THE AUTHOR IS DESCRIBING OKAY, STUDENTS WILL BE
8 PROVIDED WITH THIS READER, AND THEN THEY ARE GOING TO BE ASKED
9 TO WRITE ABOUT THESE READING MATERIALS. SO THAT'S THE EXAMPLE
10 FOR THAT PART.

11 Q. WHAT ABOUT ONE MORE EXAMPLE?

12 A. PAGE 99, AGAIN THE AUTHOR IS EXPLAINING DIFFERENT WRITING
13 TASKS. SO THESE ARE THE MATERIALS THAT STUDENTS WERE SOMETIMES
14 PROVIDED. POSTCARD ONE, POSTCARD TWO THAT'S WRITING TASKS FOR
15 SECONDARY LEARNERS.

16 Q. ARE THERE ADDITIONAL EXAMPLES IN THIS BOOK BEYOND THOSE
17 YOU'VE IDENTIFIED FOR US?

18 A. ALMOST ALL PAGES KIND OF PROVIDED EXAMPLES AND DESCRIBE
19 WHERE THESE TEST ITEMS ARE USED IN DIFFERENT CONTEXT.

20 Q. BEFORE YOU POSTED THIS EXCERPT FOR CONSIDERATION BY YOUR
21 STUDENTS, DID YOU UNDERTAKE A FAIR USE ANALYSIS, DR. KIM?

22 A. YES.

23 Q. AND IN THE COURSE OF DOING THAT, DID YOU FILL OUT A
24 CHECKLIST FOR THIS PARTICULAR EXCERPT?

25 A. YES.

1 Q. IN DOING THAT DID YOU CONSIDER EACH AND EVERY ONE OF THE
2 FAIR USE FACTORS IN REACHING YOUR DETERMINATION AS TO WHETHER
3 THE USE OF THIS EXCERPT WAS A FAIR USE?

4 A. YES, I BELIEVE IT WAS FAIR USE.

5 Q. WHAT WAS YOUR CONCLUSION?

6 A. IT WAS FAIR USE.

7 Q. LET'S LOOK AT THE LAST EXCERPT THAT YOU HAVE USED FOR THIS
8 CLASS. IT'S THE BROWN AND HUDSON BOOK WHICH I BELIEVE IS
9 IDENTIFIED AS CRITERION REFERENCED LANGUAGE TESTING?

10 A. YES.

11 Q. HOW MANY PAGES ARE IN THAT BOOK, PROFESSOR KIM?

12 A. 320 PAGES.

13 Q. AND HOW MANY PAGES IN THE EXCERPT? I THINK YOU USED
14 CHAPTER --

15 A. 48 PAGES.

16 MR. ASKEW: AND THAT'S REPORTED BY THE PLAINTIFFS AS
17 16.5 PERCENT, YOUR HONOR.

18 BY MR. ASKEW:

19 Q. WHAT WAS THE SUBJECT OF YOUR CLASS ON WEEK 14?

20 A. SO AFTER TALKING ABOUT DIFFERENT AREAS OF ASSESSMENT,
21 STUDENTS ARE DOING FINAL PROJECT. SO WE MET IN A COMPUTER LAB,
22 AND I EXPLAINED OR I DEMONSTRATED HOW TO ANALYZE TEST RESULTS.
23 SO AFTER MAKING THEM PROCTOR THE EXAM AND NOW IT WAS TIME FOR
24 THEM TO ANALYZE THEIR TEST RESULTS ON COMPUTER.

25 Q. WHAT WAS THE SUBJECT MATTER OF THE EXCERPT FROM THE BROWN

1 AND HUDSON BOOK ENTITLED CRITERION REFERENCED LANGUAGE TESTING
2 WHICH IS I THINK IS PLAINTIFFS' EXHIBIT 85, WHAT WAS THE
3 SUBJECT OF THAT EXCERPT?

4 A. SO IN ASSESSMENT WE HAD DIFFERENT TYPES OF TESTS, FOR
5 INSTANCE, ONE REFERENCE WAS CRITERION REFERENCE, THAT'S
6 BASICALLY WHETHER OR NOT YOU HAVE CUTOFF SCORE. FOR INSTANCE,
7 IF YOU GET BEYOND 70 PERCENT, YOU'RE ACTUALLY PASSING THE
8 COURSE OR FAILING THE COURSE.

9 SO BASICALLY I WAS TRYING TO EXPLAIN HOW THEY CAN
10 COME UP WITH THIS CRITERIA FAILING VERSUS PASSING WHICH IS VERY
11 IMPORTANT TOPIC IN CLASS FOR THEIR STUDENTS.

12 SO FOR THIS CHAPTER IT DESCRIBES DIFFERENT
13 DESCRIPTIVE ITEM STATISTICS. SO WE MET IN THE COMPUTER LAB AND
14 WE RAN DIFFERENT STATISTICS.

15 Q. AND CAN YOU IDENTIFY FOR US WHAT OF THIS EXCERPT WAS A
16 REQUIRED READING AND WHAT WAS OPTIONAL?

17 A. ACTUALLY THIS IS ONE OF THOSE CHAPTERS THAT I HAD TO
18 CANCEL A LOT OF PAGES BECAUSE I REALIZED THAT MY STUDENTS WERE
19 IN-SERVICE AND PRE-SERVICE TEACHERS, THEY ARE NOT
20 STATISTICIANS, SO I ONLY PICKED A COUPLE OF PAGES HERE.
21 SO, FOR INSTANCE, PAGES 104, 105, 106, 111, 115, 116, 117 AND
22 118.

23 Q. THOSE ARE THE PAGES THAT YOU ASSIGNED AS REQUIRED READING?

24 A. YES.

25 Q. AND THE REST OF THAT EXCERPT WAS REPORTED TO STUDENTS AS

1 OPTIONAL?

2 A. YES, IF THEY NEED THIS CONTENT FOR THEIR FINAL PROJECT, I
3 SAID THEY CAN TAKE A LOOK AT IT AS A REFERENCE.

4 Q. NOW BEFORE YOU ASSIGNED THIS EXCERPT, PROFESSOR KIM, DID
5 YOU UNDERTAKE A FAIR USE ANALYSIS OF THIS EXCERPT?

6 A. YES.

7 Q. AND DID YOU COMPLETE A CHECKLIST AS A PART OF THAT
8 ANALYSIS?

9 A. YES.

10 Q. AND IN THE COURSE OF DOING THAT, DID YOU CONSIDER EACH AND
11 EVERY ONE OF THE FACTORS FOR FAIR USE IN EVALUATING THE USE OF
12 THIS CHAPTER?

13 A. YES.

14 Q. AND WHAT WAS YOUR CONCLUSION WITH RESPECT TO WHETHER THE
15 USE OF THIS CHAPTER WAS A FAIR USE?

16 A. IT WAS IN FAVOR OF FAIR USE.

17 Q. JUST A FEW MORE QUESTIONS, DR. KIM. I HAVE NOTICED ON A
18 NUMBER OF YOUR CHECKLISTS, PARTICULARLY CHECKLISTS CARRYING
19 PLAINTIFF'S EXHIBIT NUMBERS 595, 647, 648, 654, 655, 649, 650,
20 651 AND 652, YOU HAVE CHECKED THE BOX THAT INDICATES YOU
21 THOUGHT -- IT'S UNDER FACTOR 4 THAT YOU THOUGHT THAT THE USE
22 WOULD STIMULATE THE MARKET FOR THESE PARTICULAR BOOKS THAT WERE
23 INVOLVED?

24 A. YES.

25 Q. WOULD YOU EXPLAIN TO THE COURT WHY YOU CHECKED THAT BOX;

1 IN OTHER WORDS, WHY DO YOU THINK THAT THE USE OF THESE EXCERPTS
2 WITH THE STUDENTS WOULD STIMULATE THE MARKET FOR THESE BOOKS?

3 A. BECAUSE WHEN I STARTED COMPLETING THIS CHECKLIST, AGAIN I
4 WAS A NOVICE TEACHER AT GEORGIA STATE AND THE ONLY EXPERIENCE
5 THAT I HAD WAS AS A STUDENT. OF COURSE, I TAUGHT CLASSES AS A
6 TEACHING ASSISTANT AT NORTHERN ARIZONA UNIVERSITY. SO A LOT OF
7 EXPERIENCE THAT I HAD WAS AS A STUDENT.

8 SO WHEN I TOOK ASSESSMENT COURSES WITH MY PROFESSOR
9 AT NORTHERN ARIZONA UNIVERSITY, THE SYLLABUS WAS BASICALLY VERY
10 SIMILAR. MY SYLLABUS IS REALLY SIMILAR TO WHAT MY PROFESSOR
11 HAD, AND AS A STUDENT MY PROFESSOR ASSIGNED THESE CHAPTER
12 EXCERPTS TO READ BESIDES THE MAIN TEXTBOOKS.

13 AND AS A STUDENT I WAS REALLY INTERESTED IN ASSESSING
14 SPEAKING, ASSESSING WRITING, AND I READ THESE CHAPTERS, AND
15 THAT'S ONE WAY THAT MY TEACHER INTRODUCED THESE REFERENCES, AND
16 I REALLY LIKED THEM, AND I THOUGHT IT WOULD BE REALLY USEFUL SO
17 I BOUGHT THESE TEXTBOOKS AND ALSO I TALKED WITH MY CLASSMATES.
18 SO IT WAS JUST BASICALLY BASED ON MY EXPERIENCE.

19 SO THAT'S WHY I THOUGHT IT COULD STIMULATE THE MARKET
20 BECAUSE THAT WAS MY EXPERIENCE AND MY CLASSMATES' EXPERIENCE.

21 MR. LARSON: YOUR HONOR, I'D OBJECT AND MOVE TO
22 STRIKE THAT LAST TESTIMONY AS IRRELEVANT AND HEARSAY AS TO THE
23 LAST PART OF IT.

24 THE COURT: OVERRULED.

25 MR. ASKEW: I HAVE NO FURTHER QUESTIONS FOR THE

1 WITNESS, YOUR HONOR.

2 REDIRECT EXAMINATION

3 BY MR. LARSON:

4 Q. GOOD MORNING, PROFESSOR KIM.

5 A. GOOD MORNING.

6 Q. A FEW QUESTIONS FOR YOU FOLLOWING UP ON MR. ASKEW'S
7 QUESTIONS. CAN YOU TURN IN YOUR BINDER TO PX-649, AND THAT'S A
8 RECREATED CHECKLIST FOR THE DOUGLAS EXCERPTS; IS THAT CORRECT?

9 A. YES.

10 Q. CAN YOU CONFIRM FOR ME THAT ON THAT CHECKLIST YOU CHECKED
11 20 BOXES ON THE LEFT-HAND SIDE WEIGHING IN FAVOR OF FAIR USE
12 AND ZERO BOXES ON THE RIGHT-HAND SIDE WEIGHING AGAINST FAIR
13 USE?

14 A. YES.

15 Q. AND COULD YOU TURN TO 650, PX-650, THAT'S A CHECKLIST FOR
16 ASSESSING SPEAKING; IS THAT RIGHT?

17 A. YES.

18 Q. AND CAN YOU CONFIRM FOR US THAT YOU CHECKED AGAIN 20 BOXES
19 IN THE WAYS IN FAVOR OF FAIR USE COLUMN AND ZERO IN THE WAYS
20 AGAINST FAIR USE COLUMN?

21 A. YES.

22 Q. IF YOU TURN TO PX-651 PLEASE, THAT'S THE RECREATED
23 CHECKLIST FOR LEARNING VOCABULARY IN ANOTHER LANGUAGE; IS THAT
24 RIGHT?

25 A. YES.

1 Q. CAN YOU CONFIRM THAT YOU CHECKED 20 BOXES ON THE WAYS IN
2 FAVOR OF FAIR USE COLUMN AND ZERO BOXES IN THE WAYS AGAINST
3 FAIR USE COLUMN?

4 A. YES.

5 Q. CAN YOU TURN TO PX-653 PLEASE, THAT'S THE CHECKLIST FOR
6 ASSESSING VOCABULARY; IS THAT RIGHT?

7 A. 653? THAT'S ASSESSING WRITING.

8 Q. I'M SORRY, 652. THAT'S THE CHECKLIST FOR ASSESSING
9 VOCABULARY?

10 A. YES.

11 Q. CAN YOU CONFIRM THAT ON THAT CHECKLIST YOU CHECKED 20
12 BOXES IN WAYS IN FAVOR OF FAIR USE COLUMN AND ZERO IN THE WAYS
13 AGAINST FAIR USE?

14 A. YES.

15 Q. NOW YOU TOLD MR. ASKEW IN RESPONSE TO HIS QUESTIONS THAT
16 YOU FILLED OUT A CHECKLIST FOR EVERY SINGLE WORK THAT YOU PUT
17 ON ULEARN; IS THAT CORRECT?

18 A. NO, AS I SAID YESTERDAY, I MISSED ONE OF TWO. OTHER THAN
19 THAT OUT I FILLED OUT ONE.

20 Q. SO YOU CAN'T SAY FOR SURE THAT YOU FILLED OUT A CHECKLIST
21 FOR EVERY WORK THAT YOU PUT ON ULEARN, CORRECT?

22 A. YES.

23 Q. AND YOU ALSO SAID THAT YOU CONSIDERED EVERY SINGLE FACTOR
24 ON EACH OF THESE CHECKLISTS AS YOU WALKED THROUGH THE QUESTIONS
25 WITH MR. ASKEW; DO YOU RECALL THAT?

1 A. YES.

2 Q. IT'S TRUE, ISN'T IT, FOR SOME OF THE FACTORS YOU ACTUALLY
3 LEFT THEM BLANK BECAUSE YOU DIDN'T KNOW WHAT THEY MEANT,
4 CORRECT?

5 A. I CONSIDERED IT ENOUGH, BUT I DIDN'T KNOW WHAT TO DO, SO I
6 LEFT THEM BLANK.

7 Q. LET'S LOOK AT PX-519, IF WE COULD, THAT'S YOUR SYLLABUS,
8 AND I'D LIKE TO TURN TO PAGE 3. IN THE MIDDLE SECTION THERE IS
9 SUBSECTION 3, DO YOU SEE THAT?

10 MR. ASKEW ASKED YOU SOME QUESTIONS ABOUT THESE WORKS
11 THAT YOU PLACED BOTH ON HARDCOPY RESERVE AND ALSO ON ULEARN; IS
12 THAT CORRECT, DO YOU REMEMBER?

13 A. YES.

14 Q. AND THE SECOND WORK ON THAT LIST IS A WORK BY MILLER, LINN
15 AND GRONLUND; DO YOU RECALL THAT OR DO YOU SEE THAT?

16 A. YES.

17 Q. IF YOU COULD TURN OVER -- YOU INDICATED THAT AN EXCERPT OF
18 THIS WORK WAS PLACED ON ULEARN AS WELL, CORRECT?

19 A. YES.

20 Q. COULD WE TURN TO PAGE 7 PLEASE AND LOOKING AT WEEK 5, CAN
21 YOU CONFIRM THAT THE MILLER, LINN AND GRONLUND EXCERPT WAS
22 CHAPTER 6 AND APPENDICES G AND H WERE PLACED ON ULEARN?

23 MR. ASKEW: I'M GOING TO OBJECT AGAIN. THAT'S A WORK
24 THAT'S NOT ON THE ACCUSED LIST OF INFRINGEMENTS.

25 MR. LARSON: YOUR HONOR, MR. ASKEW OPENED THE DOOR

1 AND ASKED QUESTIONS ABOUT THIS WORK BEING ON ULEARN TO THE
2 WITNESS YESTERDAY.

3 THE COURT: IS THAT TRUE? I DON'T REMEMBER.

4 MR. ASKEW: I THOUGHT I WAS ASKING HER ABOUT EACH OF
5 THOSE BOOKS THAT HAD EXCERPTS POSTED.

6 THE COURT: I THINK THAT IT IS CORRECT THAT OUR FOCUS
7 HERE SHOULD BE ON THE CLAIMED INFRINGEMENTS. I ALSO THINK IT
8 IS PROPER AND RELEVANT FOR THERE TO BE INQUIRY ABOUT WHAT THE
9 REGULAR TEXTBOOKS WERE THAT WERE ASSIGNED AND MY RULINGS HAVE
10 REFLECTED THAT.

11 BUT IF MR. ASKEW WENT INTO IT YESTERDAY, YOU'RE
12 RIGHT, HE OPENED THE DOOR, AND I TAKE IT YOU'RE SURE THAT HE
13 DID AND MR. ASKEW IS SAYING HE'S NOT SURE WHETHER HE DID OR
14 NOT; IS THAT CORRECT?

15 MR. ASKEW: I DIDN'T INTEND TO. I INTENDED TO ASK
16 HER ABOUT EACH OF THOSE BOOKS. IF I MENTIONED IT I DID THAT
17 INADVERTENTLY. MY PURPOSE WAS TO SHOW THE EXCERPTS CAME FROM
18 THE SAME BOOKS THAT THEY POSTED IN THAT SECTION.

19 THE COURT: WHAT WERE THE QUESTIONS HE WAS ASKING
20 ABOUT PLANNING AND DESIGNING TABLE OF SPECIFICATIONS?

21 MR. LARSON: MR. ASKEW POINTED TO THE SECTION OF THE
22 SYLLABUS WE WERE JUST LOOKING AT WHICH ESTABLISHED OR SHOWED
23 THAT THE WORKS WERE PLACED ON HARDCOPY RESERVE, AND THEN HE
24 ASKED THE WITNESS IF EXCERPTS FROM THOSE BOOKS WERE ALSO PLACED
25 ON ULEARN --

1 THE COURT: I THINK YOU MAY BE RIGHT. I'LL OVERRULE
2 THE OBJECTION.
3 BY MR. LARSON:
4 Q. PROFESSOR KIM, CAN YOU CONFIRM THAT THESE EXCERPTS THAT WE
5 SEE HERE IN WEEK 5 WERE PROVIDED WITHOUT ANY PAYMENT OR
6 PERMISSION FROM THE AUTHOR OR PUBLISHER?
7 A. YES.
8 Q. IF WE LOOK DOWN TO WEEK 12 WHICH I THINK IS ON THE NEXT
9 PAGE, AGAIN THIS SHOWS THAT FOR THIS BOOK YOU ASSIGNED AND
10 DISTRIBUTED THROUGH ULEARN CHAPTER 19; IS THAT RIGHT?
11 A. YES.
12 Q. AND THAT WAS DONE WITHOUT ANY PERMISSION FROM THE
13 PUBLISHER, CORRECT?
14 A. YES.
15 Q. AND WITHOUT ANY PAYMENT BEING MADE, CORRECT?
16 A. YES.
17 Q. LOOKING AT WEEK 13, DOES THIS REFLECT IN WEEK 13 YOU
18 ASSIGNED IS CHAPTERS 5 AND 14, PAGES 361 TO 366, APPENDIX A
19 FROM THE MILLER, LINN AND GRONLUND HANDBOOK TO THE STUDENTS?
20 A. YES.
21 Q. AND THAT WAS ON ULEARN?
22 A. YES.
23 Q. AND THAT WAS DONE WITHOUT ANY PAYMENT BEING MADE TO THE
24 PUBLISHER, CORRECT?
25 A. YES.

1 Q. LOOKING DOWN TO WEEK 16, YOU SEE THERE'S AN ENTRY FOR
2 STOYNOFF AND CHAPELLE; DO YOU SEE THAT?
3 A. YES.
4 Q. THAT'S ANOTHER WORK THAT WAS ON THAT LIST THAT YOU
5 DISCUSSED WITH MR. ASKEW, CORRECT?
6 A. YES.
7 Q. AND YOU ASSIGNED CHAPTER 4 FROM THAT WORK IN WEEK 16; IS
8 THAT RIGHT?
9 A. YES.
10 Q. AND THAT WAS DONE WITHOUT ANY PAYMENT TO THE PUBLISHER,
11 CORRECT?
12 A. YES.
13 Q. IF WE COULD GO BACK TO PAGE 7 AND LOOK AT WEEK 2 PLEASE,
14 DOES THAT REFLECT THAT IN WEEK 2 YOU ASSIGNED CHAPTER 1 OF THE
15 STOYNOFF AND CHAPELLE BOOK TO YOUR STUDENTS?
16 A. IT WAS AN OPTIONAL READING.
17 Q. BUT THE READING WAS PLACED ON ULEARN, CORRECT?
18 A. YES.
19 Q. AND THAT WAS DONE WITHOUT ANY PAYMENT TO THE PUBLISHER; IS
20 THAT RIGHT?
21 A. YES.
22 Q. NOW EVEN WHEN YOU PLACED THE BOOKS ON HARDCOPY RESERVE,
23 YOU ALSO PUT EXCERPTS OF THEM ON ULEARN; IS THAT RIGHT?
24 A. YES.
25 Q. AND THAT'S BECAUSE ULEARN SERVES A DIFFERENT PURPOSE THAN

- 1 HARDCOPY RESERVES, CORRECT?
- 2 A. I THINK THE PURPOSE IS THE SAME.
- 3 Q. WELL, LET'S ME ASK YOU A FEW QUESTIONS ABOUT THAT. WITH
- 4 HARDCOPY RESERVES THERE'S JUST ONE COPY, CORRECT?
- 5 A. YES.
- 6 Q. AND EACH STUDENT WOULD HAVE TO PHYSICALLY GO TO THE
- 7 LIBRARY TO CHECK OUT THAT COPY IN ORDER TO READ IT, CORRECT?
- 8 A. NOT NECESSARILY. BECAUSE SOMETIMES STUDENTS CAN MAKE ONE
- 9 COPY AT THE LIBRARY, AND CLASSMATES CAN BORROW THE COPY AND
- 10 MAKE COPIES WHICH IS BEYOND MY CONTROL.
- 11 Q. ALL RIGHT. BUT IN ORDER TO ACCESS THE COPY FROM THE
- 12 HARDCOPY RESERVES, IT HAS TO BE CHECKED OUT ONE AT A TIME; IS
- 13 THAT RIGHT?
- 14 A. YES.
- 15 Q. AND YOU ELECTED TO USE HARDCOPY RESERVES IN THOSE
- 16 SITUATIONS WHERE YOU WANTED A SINGLE STUDENT OR A SMALL NUMBER
- 17 OF STUDENTS TO HAVE ACCESS TO THE ENTIRE BOOK FOR THEIR FINAL
- 18 PROJECTS?
- 19 A. COULD YOU REPEAT THE QUESTION AGAIN?
- 20 Q. YES. YOU ELECTED TO USE THE HARDCOPY RESERVES IN THOSE
- 21 SITUATIONS WHERE YOU WANTED EITHER A SINGLE STUDENT OR MAYBE A
- 22 SMALL NUMBER OF STUDENTS TO HAVE ACCESS TO THE BOOK TO USE FOR
- 23 THEIR FINAL PROJECTS; IS THAT RIGHT?
- 24 A. OR GROUP PRESENTATIONS.
- 25 Q. IN SITUATIONS WHERE YOU WANTED THE ENTIRE CLASS TO HAVE

1 ACCESS TO THE ASSIGNED READINGS, YOU USED ULEARN OR ERES,
2 CORRECT?
3 A. YES.
4 Q. AND THAT'S BECAUSE FOR THE ASSIGNED READINGS 16 STUDENTS
5 REALLY NEED 16 COPIES OF THE READING, CORRECT?
6 A. CAN YOU REPEAT THE QUESTION?
7 Q. YES. YOU DID THAT YOU PUT IT ON ERES OR ULEARN BECAUSE
8 FOR ASSIGNED READINGS 16 STUDENTS REALLY NEED 16 COPIES OF THE
9 READING; IS THAT RIGHT?
10 A. YES.
11 Q. NOW, MR. ASKEW SHOWED YOU SOME INSTANCES WHERE BOOKS ON
12 ULEARN OR THE EXCERPTS THAT YOU PLACED ON ULEARN INCORPORATED
13 OR DISCUSSED SOME THIRD-PARTY MATERIAL; IS THAT RIGHT?
14 A. YES.
15 Q. AND I THINK ONE OF THE FIRST ONES THAT HE WALKED THROUGH
16 WAS THE PURPURA BOOK; DO YOU RECALL THAT? IT'S PX-15, I
17 BELIEVE.
18 A. YES.
19 Q. IF YOU WANT TO TAKE A LOOK AT THAT, I THINK YOU INDICATED
20 THAT YOU ASSIGNED PAGES 49 TO 82 AND 100 TO 145; ISN'T THAT
21 RIGHT?
22 A. CHAPTERS 3 AND 5.
23 Q. I'M GOING TO SHOW YOU PAGE 114 -- START AT 113, YOU'LL SEE
24 AT PAGE 113 I THINK THIS IS THE SECOND ONE YOU DISCUSSED WITH
25 MR. ASKEW; IS THAT RIGHT?

1 A. 113?

2 Q. YES.

3 A. YES.

4 Q. THE BACHMAN AND PALMER FRAMEWORK?

5 A. YES.

6 Q. AND YOU POINTED TO THE TABLE THAT WE SEE HERE ON 114,

7 CORRECT?

8 A. YES.

9 Q. THAT TABLE IS ACTUALLY A TABLE PREPARED BY THE AUTHOR OF

10 THIS MR. PURPURA, CORRECT?

11 A. YES. HOWEVER, ALL OF THESE MATERIALS THEY USE BACHMAN AND

12 PALMER FRAMEWORK AND MODIFIED THE FRAMEWORK FOR THE PARTICULAR

13 SKILLS LIKE GRAMMAR AND SPEAKING.

14 SO THE IDEA HERE THE STRUCTURE, FORMAT, CHANNEL, IT'S

15 LIKE ALMOST A WORD-BY-WORD WORK FROM BACHMAN AND PALMER, NOT

16 THE AUTHOR CREATING THIS IDEA.

17 Q. BUT MR. PURPURA HERE IN THIS EXAMPLE IS TAKING BACHMAN AND

18 PALMER AND ANALYZING IT OR APPLYING IT TO HIS DISCUSSION; IS

19 THAT RIGHT?

20 A. PARTLY, YES.

21 Q. IN OTHER WORDS, THIS ISN'T JUST A ROTE COPY OF BACHMAN AND

22 PALMER?

23 A. BUT THE ITEMS ARE ALL THE SAME.

24 Q. RIGHT, SOME ITEMS ARE THE SAME.

25 LET'S LOOK AT PAGE 127. I THINK THAT WAS ANOTHER

1 SECTION THAT YOU DISCUSSED WITH MR. ASKEW; IS THAT RIGHT?

2 A. YES.

3 Q. AND, AGAIN, THIS IS A TABLE PREPARED BY THE AUTHOR MR.
4 PURPURA; IS THAT RIGHT? IT'S NOT JUST A QUOTE FROM SOME THIRD-
5 PARTY SOURCE OR STRAIGHT COPY?

6 A. THE SIMILAR TABLES WERE IN OUR MAIN TEXTBOOK, AND THESE
7 TASKS ARE USED WIDELY IN OTHER TEXTBOOKS. SO THE AUTHOR
8 CREATED THE TABLE, BUT THE CONTENT IS NOT ACTUALLY FROM THE
9 AUTHOR.

10 Q. RIGHT. SO IT'S MR. PURPURA'S EXPRESSION OF SOME IDEAS OR
11 CONTENT FROM SOME THIRD-PARTY SOURCE; IS THAT RIGHT?

12 A. YES.

13 Q. AND JUST IF WE CAN LOOK AT PAGE 135 -- I'M SORRY, LOOK AT
14 141 AGAIN. YOU'LL SEE HERE THIS SAYS ADAPTED FOR PURPURA AND
15 PINKLY, CORRECT?

16 WE SAW THAT IN A NUMBER OF EXAMPLES WHERE IT
17 INDICATED THE MATERIAL WAS ADAPTED FROM SOME THIRD-PARTY
18 SOURCE, RIGHT?

19 A. YES.

20 Q. THAT'S NOT JUST A STRAIGHT COPY OF THAT THIRD-PARTY WORK,
21 BUT IT'S AN ADAPTATION BY THIS AUTHOR OF THAT THIRD-PARTY WORK?

22 A. I CANNOT SAY THAT BECAUSE SOMETIMES THESE AUTHORS WHEN
23 THEY SAID ADAPTED FROM, SOMETIMES THEY COPY EXACTLY THE SAME
24 MATERIALS. SO ADAPTED IS PRETTY VAGUE TERM IN THIS KIND OF
25 CONTEXT.

1 Q. SO FOR THIS EXAMPLE YOU ACTUALLY DON'T KNOW IF THIS IS A
2 STRAIGHT COPY FROM SOME THIRD-PARTY SOURCE, CORRECT?

3 A. I HAVEN'T CHECKED THE ORIGINAL SOURCE.

4 Q. NOW, THE EXCERPTS, I THINK YOU SAID THAT THE EXCERPTS FROM
5 THE PURPURA BOOK WERE 68 OR 70 PAGES; IS THAT RIGHT?

6 A. YEAH, WHEN I CALCULATED IT IN MY HEAD, YES.

7 Q. NOW BY MY COUNT THE ONLY EXAMPLES I SEE IN THOSE CHAPTERS
8 OR TABLES WHERE THERE'S A LITERAL COPYING OR INCLUSION OF SOME
9 THIRD-PARTY SOURCE IS ON PAGES 119 AND 51?

10 A. 119 AND --

11 Q. IF YOU WANT TO FLIP THROUGH IT AND LET ME KNOW IF YOU SEE
12 ANY OTHERS --

13 A. WHAT WERE THE PAGES, SORRY?

14 Q. 51 AND 119. HERE'S 51.

15 A. OKAY.

16 Q. THAT'S FROM LADO; IS THAT RIGHT?

17 A. YES.

18 Q. AND THEN 119 I THINK YOU TALKED ABOUT THIS WITH MR. ASKEW,
19 THIS IS FROM THE UCLA ESLPE?

20 A. YES.

21 Q. SO OUT OF THIS 68 OR 70 PAGES THAT ARE IN THIS EXCERPT
22 THAT YOU PROVIDED, WELL OVER 70 ARE ACTUALLY MR. PURPURA'S
23 EXPRESSION AND WRITING, CORRECT?

24 A. IT'S DIFFICULT TO SAY BECAUSE THE NATURE OF THIS CHAPTER
25 REVIEWS THE EXISTING TESTS. SO FOR THE CONVENIENCE I JUST

1 PINPOINTED EXAMPLES HERE LIKE TAKEN FROM TABLES. HOWEVER WHEN
2 YOU ACTUALLY READ THE ENTIRE CHAPTER, IT'S NOT LIKE DR. PURPURA
3 CREATED ALL OF THESE MATERIALS, AND AS YOU CAN TELL THERE ARE A
4 LOT OF REFERENCES. SO PURPURA REPORTED THESE REFERENCES.

5 SO I THINK IT'S REALLY HARD TO SAY BY QUANTITY LIKE
6 WHAT PERCENTAGE IS FROM PURPURA AND WHAT PERCENTAGE IS FROM
7 SOMEBODY ELSE BECAUSE OF THE NATURE OF THESE CHAPTERS.

8 Q. AND SO JUST WE'RE CLEAR, WHAT YOU'RE SAYING IS THAT IT'S
9 MR. PURPURA'S WRITING, HIS EXPRESSION, BUT HE'S DESCRIBING
10 THIRD-PARTY CONTENT OR IDEAS OF OTHER PARTIES, CORRECT?

11 A. THAT MIGHT BE BETTER WAY TO SAY IT THAT HE DESCRIBES OTHER
12 WORKS.

13 Q. AND THAT'S THE CASE WITH THE OTHER WORKS WE LOOKED AT AS
14 WELL, CORRECT?

15 A. YEAH, BECAUSE THE PURPOSE OF THIS SERIES IS ASSESSING
16 MATERIALS I GUESS ADDRESS THE SAME PURPOSE.

17 Q. AND GENERALLY WHEN THEY INCORPORATE THIRD PARTY EXAMPLES,
18 THEY DO SO TO DESCRIBE OR ANALYZE OR DISCUSS THOSE EXAMPLES,
19 CORRECT?

20 A. YES, DESCRIBE THE EXISTING EXAMPLES.

21 Q. ALL RIGHT. NOW YOU INDICATED ON YOUR EXAMINATION WITH MR.
22 ASKEW THAT FOR SOME OF THE EXCERPTS YOU INSTRUCTED STUDENTS TO
23 FOCUS IN ON CERTAIN PAGES, CORRECT, PINPOINT CERTAIN PAGES?

24 A. PINPOINT EXAMPLES IN CERTAIN PAGES.

25 Q. NOW IF WE COULD LOOK BACK AT PX-519, GO TO PAGE 7 PLEASE.

1 NOW YOU START -- CORRECT ME IF I'M WRONG, BUT AT THE BEGINNING
2 OF THE SEMESTER WHEN YOU PUT THE SYLLABUS TOGETHER, YOU PUT
3 STARS NEXT TO ITEMS THAT YOU CONSIDERED OPTIONAL, CORRECT?

4 A. YES.

5 Q. AND FOR CERTAIN OF THE READINGS WHICH YOU SUBSEQUENTLY
6 PINPOINTED PAGES, AT THE BEGINNING OF THE SEMESTER THEY ARE
7 INDICATED HERE AS BEING REQUIRED, CORRECT?

8 A. YES.

9 Q. AND IN THOSE SITUATIONS YOU SCANNED AND PUT ON ULEARN THE
10 ENTIRE CHAPTERS; IS THAT CORRECT?

11 A. THAT'S THE PRACTICE THAT I DID TO PREPARE FOR THE COURSE.

12 Q. AND WHEN STUDENTS ACCESS THESE READINGS, THEY ACCESSED THE
13 ENTIRE CHAPTERS, CORRECT?

14 A. IF THEY DECIDE TO READ. BECAUSE I REALIZED A LOT OF TIMES
15 STUDENTS DIDN'T READ THESE CHAPTERS.

16 Q. ALL RIGHT. BUT IF THEY ACCESSED THEM, THEY WOULD HAVE
17 RECEIVED THE ENTIRE CHAPTER, NOT JUST THOSE PAGES YOU
18 PINPOINTED, CORRECT?

19 A. YES, WHEN THEY OPEN THE FILE THEY WERE ABLE TO SEE THE
20 ENTIRE CHAPTER.

21 Q. JUST GOING BACK FOR A SECOND TO THE ISSUE OF THE AUTHORS
22 OF THESE BOOKS INCORPORATING OR DISCUSSING SOME THIRD-PARTY
23 MATERIAL, I TAKE IT IF THIS MATERIAL IS PUBLICLY AVAILABLE
24 ELSEWHERE YOU COULD HAVE ACTUALLY GONE TO THOSE THIRD PARTIES
25 YOURSELF AND OBTAINED THOSE EXAMPLES OF THE TEST QUESTIONS OR

1 WHATEVER, CORRECT?

2 A. YES AND, IN FACT, I DID THAT IN CLASS, TOO.

3 Q. BUT FOR THOSE --

4 THE COURT: I DIDN'T UNDERSTAND YOUR ANSWER. SAY IT
5 AGAIN.

6 THE WITNESS: IN FACT I ACTUALLY, YOU KNOW, BROUGHT
7 SOME EXAMPLES OUTSIDE OF THESE READINGS TO SHOW FURTHER
8 EXAMPLES FOR DIFFERENT EXAMPLES.

9 BY MR. LARSON:

10 Q. YOU ALSO COULD HAVE DONE THAT FOR THE EXAMPLES THAT ARE
11 WITHIN THESE READINGS, CORRECT?

12 A. I COULD HAVE DONE IT, BUT BASED ON MY EXPERIENCE, AGAIN MY
13 PROFESSOR USED THESE MATERIALS SO I KIND OF FOLLOWED WHAT I
14 RECEIVED AS A STUDENT, BUT I HADN'T THOUGHT ABOUT ACTUALLY
15 GETTING ALL THESE MATERIALS.

16 Q. I TAKE IT THAT IT WAS VALUABLE TO YOU THAT THE AUTHORS OF
17 THESE BOOKS WENT TO THE EFFORT OF COMPILING THOSE DIFFERENT
18 EXAMPLES IN THESE BOOKS; IS THAT RIGHT?

19 A. YES.

20 Q. NOW YOU CLAIM THAT IT WAS YOUR VIEW THAT STUDENTS IN THE
21 CLASS MIGHT PURCHASE WORKS BECAUSE OF YOUR USING THEM IN THE
22 CLASS; IS THAT RIGHT?

23 A. YES.

24 Q. AND I THINK IN YOUR DEPOSITION YOU MENTIONED -- I ASKED
25 YOU FOR SOME EXAMPLES OF WHERE YOU THOUGHT THAT MIGHT HAVE

1 HAPPENED, AND YOU REFERENCED CRITERION REFERENCE LANGUAGE
2 TESTING, ASSESSING GRAMMAR AND ASSESSING VOCABULARY AS THREE
3 EXAMPLES WHERE YOU THOUGHT THAT MIGHT HAVE HAPPENED; DO YOU
4 RECALL THAT?

5 A. NOT FOR THE CRITERION REFERENCE, BUT THE OTHER SKILL AREAS
6 TEXTBOOKS.

7 Q. OKAY. NOW FOR ASSESSING GRAMMAR AND FOR ASSESSING
8 VOCABULARY YOU CAN'T SAY FOR SURE WHETHER THE STUDENTS THAT YOU
9 SPOKE TO ABOUT THESE BOOKS ACTUALLY BOUGHT THEM BECAUSE OF THE
10 USE IN YOUR CLASS, CORRECT?

11 A. I DIDN'T HAVE A FOLLOW-UP DISCUSSION, BUT BECAUSE OF THE
12 NATURE OF THIS CLASS, I REQUIRED STUDENTS TO COME TO MY OFFICE
13 AND HAVE A MEETING BEFORE THEY ACTUALLY PRESENTED THESE
14 MATERIALS TO CLASS.

15 SO, YOU KNOW, I HAD A PERSONAL CONVERSATION, INFORMAL
16 CONVERSATION IN MY OFFICE, AND THEY EXPRESSED HOW MUCH THEY
17 LIKED THESE READINGS, HOW MUCH THEY THINK IT WAS REALLY
18 VALUABLE TO READ THESE CHAPTERS, BUT, AGAIN, I DID NOT ASK THEM
19 DID YOU BUY THIS BOOK.

20 Q. AND YOU DON'T KNOW IF THEY DID OR NOT, CORRECT?

21 A. I DON'T KNOW WHETHER THEY DID IT OR NOT.

22 Q. AND IN THE SITUATION THAT YOU'RE DESCRIBING THAT WAS ONE
23 OR TWO STUDENTS OUT OF A CLASS OF 16; IS THAT RIGHT?

24 A. NO, BECAUSE I MET WITH ALMOST EVERYBODY BECAUSE THERE WAS
25 A REQUIREMENT FOR THEM TO COME TO MY OFFICE AND DISCUSS THESE

1 SKILLS. SO I CANNOT SAY IT WAS ONLY ONE OF TWO BECAUSE I MET
2 WITH ALMOST EVERYBODY.

3 Q. YOU MET WITH ALMOST EVERYBODY, BUT YOU DON'T KNOW WHETHER
4 ANY OF THESE 16 ENDED UP BUYING THE BOOK, CORRECT?

5 A. I DON'T HAVE THE DATA.

6 MR. LARSON: THAT'S ALL I HAVE, YOUR HONOR.

7 MR. ASKEW: THE WITNESS CAN BE EXCUSED, YOUR HONOR.

8 THE COURT: YOU ARE EXCUSED. THANK YOU. THAT'S

9 ALL. LET'S TAKE A 15-MINUTE BREAK.

10 (A RECESS WAS TAKEN.)

11 MR. RICH: MAY I ADDRESS ONE ASPECT OF THE COMMENTS
12 YOUR HONOR MADE BEFORE THE BREAK ABOUT YOUR THOUGHTS ABOUT
13 ALLOWING IN CERTAIN TEXTBOOK SALE MATERIAL AND JUST GIVE YOU A
14 BIT OF PERSPECTIVE FROM OUR SIDE SINCE WE HAVE A WAYS TO GO IN
15 THE CASE.

16 IT'S EVIDENT THAT THE DEFENDANTS WANT TO PUT IN THE
17 INFORMATION ON SALES OF TEXTBOOKS TO CONTEXTUALIZE IN SOME
18 FASHION, WHICH WE'LL LEARN ABOUT AS THE CASE PROGRESSES, THE
19 UNAUTHORIZED SALES. SO THEY WANT TO SHOW SOMEHOW THE CONTEXT
20 OF IT.

21 INTERESTINGLY THE CASE LAW BASICALLY INDICATES IT'S
22 COMPLETELY IRRELEVANT HOW MUCH A DEFENDANT DOESN'T TAKE OF
23 SOMEBODY ELSE'S INTELLECTUAL PROPERTY IN EVALUATING WHETHER THE
24 TAKING THEY DID MAKE IN FACT ARE OR ARE NOT FAIR USE.

25 SO ARGUABLY, ALTHOUGH I'M NOT QUARRELING WITH YOUR

1 HONOR ALLOWING IT IN, ARGUABLY IT'S MARGINAL TO IRRELEVANT, BUT
2 CONVERSELY THE CASES AND THE CLASSROOM GUIDELINE AND THE HOUSE
3 REPORT, THE 1967 HOUSE REPORT DEALING WITH COPYRIGHT MADE QUITE
4 EVIDENT THAT THE CONTEXT IN WHICH UNAUTHORIZED COPYING IS
5 OCCURRING ACCOMPANIED BY ACTUAL AND POTENTIAL OTHER ACTS OF
6 UNAUTHORIZED COPYING INCLUDING WHERE THE IMPACT MAY BE TO
7 CREATE COMPILATIONS, COLLECTIVE WORKS, ANTHOLOGIES, COURSEPACKS
8 IN THE VERNACULAR IN THE PAPER SETTING IS A DIRECTLY RELEVANT
9 ELEMENT IN THINKING ABOUT THE VIOLATION, IN THINKING ABOUT ITS
10 IMPACT IN TERMS OF WIDESPREAD USE.

11 AND THE ONLY REASON WE'VE BEEN ATTEMPTING TO
12 CONTEXTUALIZE OURSELVES THE WORKS OF THE PLAINTIFFS HERE IS TO
13 ALLOW US TO CREATE A FULL RECORD ON FACTOR 4, AND AS WE READ
14 THE CASES TO ALLOW US TO MAKE A ROBUST SHOWING THAT THE INJURY
15 IS NOT SIMPLY BY VIRTUE OF THE ACTUAL INFRINGEMENTS, ALTHOUGH
16 CLEARLY THERE IS ACTUAL INFRINGEMENT WE BELIEVE OF EACH OF
17 THESE WORKS PROVABLY, ET CETERA, AND WE'RE NOT SAYING YOUR
18 HONOR SHOULDN'T EVALUATE IT.

19 BUT WE FEEL PART OF THE EVALUATION AND PART OF THE
20 FULL RECORD THAT OUGHT TO BE AVAILABLE HERE IS A SHOWING OF THE
21 CONTEXT FROM OUR PERSPECTIVE IN WHICH IT'S OCCURRING WHICH IS
22 PART OF THESE SYLLABI, PART OF THESE BROADER OFFERINGS, AND
23 IT'S REALLY BEEN AT THE HEART OF A NUMBER OF THESE CASES.

24 THE HOUSE REPORT SAID, YOUR HONOR, IN ISOLATED
25 INSTANCES OF MINOR INFRINGEMENTS, ALTHOUGH THESE ARE NOT MINOR

1 BY ANY MEANS, WHEN MULTIPLIED MANY TIMES BECOME IN THE
2 AGGREGATE A MAJOR INROAD ON COPYRIGHT THAT MUST BE PREVENTED,
3 AND WE THINK THAT GOES RIGHT TO THE HEART OF WHAT FACTOR 4
4 LOOKS AT, AND I SIMPLY WANTED TO EXPLICATE BECAUSE PERHAPS
5 WE'VE NOT BEEN AS CLEAR AS WE OUGHT TO THE BASIS ON WHICH WE'VE
6 BEEN MAKING THESE PROFFERS AND URGE THE COURT AT LEAST TO
7 CONSIDER IT IN LIGHT OF THAT.

8 THE COURT: I AGREE WITH EVERYTHING THAT YOU HAVE
9 SAID EXCEPT THE WAY IN WHICH IT APPLIES TO OUR CASE. MY
10 PERCEPTION IS THAT THE PLAINTIFFS' VIEW IS THAT THE USE OF THE
11 EXCERPTS HAS BEEN SO -- THAT THE EXCERPTS HAVE BEEN USED TO
12 REPLACE WHAT OTHERWISE MIGHT HAVE BEEN TEXTBOOKS.

13 AND THE DEFENDANTS' POSITION IS NO, WE HAD TEXTBOOKS
14 FOR THESE COURSES, OR I DON'T ACTUALLY KNOW IF THEY HAD THEM
15 FOR ALL OF THEM, I'M NOT SURE AT THIS POINT, BUT CERTAINLY MOST
16 IF NOT ALL, AND THEIR POSITION IS THAT THE EXCERPTS WERE JUST
17 ADD-ONS. THAT THEY WERE JUST SORT OF FILL IN THE GAPS FOR THE
18 COURSES.

19 AND TO THAT END I THINK THE CONTEXT IS -- THAT IT IS
20 IMPORTANT TO KNOW DID EACH OF THESE CLASSES HAVE ASSIGNED
21 TEXTBOOKS, AND THEN TO WHAT EXTENT WERE THESE TEXTBOOKS
22 AUGMENTED BY THE EXCERPTS THAT ARE AT ISSUE IN THIS CASE.
23 THAT'S WHY I'VE BEEN LETTING THAT EVIDENCE IN. I DON'T HAVE
24 ANY MISPERCEPTION THAT IF TEXTBOOKS WERE USED THAT IT WOULD
25 CURE WHAT OTHERWISE WOULD BE VIOLATIONS OF THE FAIR USE

1 DOCTRINE. THAT'S WHERE I'M COMING FROM.

2 AND WHAT YOU'RE SAYING ABOUT THE COURT'S NEED TO LOOK
3 MORE BROADLY THAN JUST THE CLAIMED INFRINGEMENTS IN THIS CASE
4 IS TRUE AT A CERTAIN POINT, BUT BEFORE YOU GET TO THE POINT OF
5 THINKING ABOUT WHAT IS THE OVERALL MARKET IMPACT IF ONE LOOKS
6 BEYOND JUST WHAT THESE DEFENDANTS WERE DOING, I THINK IT IS
7 VERY HELPFUL TO PIN DOWN EXACTLY WHAT THE CLAIMED INFRINGEMENTS
8 WERE AND WHAT THE EXTENT OF THEM MAY HAVE BEEN AND, INDEED,
9 WHAT THE LIKELY AFFECT ON THE MARKET WAS WITH RESPECT TO THE
10 CLAIMED INFRINGEMENTS.

11 I THINK IF YOU START WITH A NARROW FOCUS WE'RE MUCH
12 MORE APT TO WIND UP WITH A CASE THAT IS DECIDED ON THE FACTS AS
13 WE KNOW THEM VERSUS SPECULATION, AND I REALIZE AT SOME POINT
14 THE DIFFERENCE BETWEEN INFERENCE AND SPECULATION IS HARD, BUT
15 THAT'S WHERE I'M COMING FROM ON THESE RULINGS. I WANT TO MAKE
16 BOTH SIDES ADDRESS THE SPECIFIC FACTS OF OUR PARTICULAR CASE
17 FIRST, AND THEN WE'LL GO FROM THERE.

18 MR. RICH: I FULLY APPRECIATE THAT AND APPRECIATE
19 YOUR CLARIFICATION. IF I MAY JUST ADD ONE ASPECT TO THAT FOR
20 CONSIDERATION, YOUR HONOR, WHICH IS THROUGH OUR PLAINTIFFS WE
21 ATTEMPTED TO DEMONSTRATE A VARIETY OF HARM, CERTAINLY NOT JUST
22 SUBSTITUTIONS OF TEXTBOOK SALES PER SE. CERTAINLY YOU'VE HEARD
23 AMPLY ABOUT PERMISSIONS INCOME AS A DERIVATIVE MARKET WHICH IS
24 HARMED. THAT'S A MAJOR AND ESTABLISHED BRANCH NOW OF FOURTH
25 FACTOR HARM. I DON'T THINK THAT'S REALLY DEBATABLE.

1 BUT IN ADDITION YOU HEARD TESTIMONY FROM MS. RICHMOND
2 AND OTHERS ABOUT CUSTOM PUBLISHING ACTIVITIES. YOU'VE HEARD
3 ABOUT OTHER FORMS OF HIGHER EDUCATION TEXTBOOKS MR. PFUND
4 TESTIFIED TO WHICH ARE THEMSELVES COLLECTIONS OF WORKS AND
5 COMPILATIONS OF WORKS, AND IT WAS VERY MUCH OUR CLIENT'S VIEW
6 THAT IN TERMS OF DISPLACEMENT OF SALES, IT'S NOT NECESSARILY
7 PER SE EVEN SIMPLY THE WORK WHICH MIGHT HAVE BEEN BOUGHT OR
8 LICENSED, BUT THERE IS A REAL POTENTIAL AS WELL AND WE FEEL
9 WE'D LIKE TO BE ABLE TO PRESERVE THE RECORD ON THAT. THAT IF A
10 WORK OF OUR CLIENT IS TAKEN AND ASSEMBLED TOGETHER EFFECTIVELY
11 INTO A DIGITAL COURSEPACK WHICH IS A SERIES OF COURSE READINGS
12 THAT ITSELF CAN SUBSTITUTE FOR A DIFFERENT COLLECTIVE WORK SOLD
13 BY ONE OR MORE OF OUR PUBLISHERS, A DIFFERENT COMPILATION, A
14 CUSTOM PUBLISHING PROJECT WHICH YOUR HONOR HEARD TESTIMONY.

15 THERE ARE PUBLISHERS WHO LITERALLY GO INTO THE MARKET
16 AND COME INTO ACADEMIA SAYING PROFESSOR SO AND SO, IF YOU WANT
17 TO USE PRECISELY THESE WORKS, I WILL ASSEMBLE THE PERMISSIONS,
18 WE'LL ASSEMBLE IT TOGETHER, AND WE'LL SELL IT AS A CUSTOM
19 TEXTBOOK THAT CAN HAVE YOUR NAME AS EDITOR OR SOMETHING.
20 THAT'S A DIRECT MARKETPLACE HARM.

21 AND IT SEEMS TO US THAT IF THE EVIDENCE FOCUSES
22 ALMOST EXCLUSIVELY ON THE ASPECT OF THE USES OF THE WORKS THAT
23 ONLY SHOWS OUR WORKS BUT NOT THE CONTEXT IN WHICH THEY ARE
24 ANTHOLOGIZED OR CREATED INTO COLLECTIVE WORKS, IT WON'T FULLY
25 OR ADEQUATELY PRESERVE, WE'RE CONCERNED IS THE ARGUMENT, THAT

1 THERE'S THIS OTHER POTENTIAL DISPLACEMENT WHICH IS WHY THE
2 CASES TALK ABOUT AND FROWN ON WHERE THE TOTAL AFFECT OF TAKINGS
3 THE PLAINTIFFS' WORKS AS WELL AS NONPLAINTIFF TAKINGS HAVE THE
4 AFFECT OF CREATING AN ANTHOLOGY.

5 THAT'S WHY THE CLASSROOM GUIDELINE SAYS THAT'S WHERE
6 WE DRAW THE LINE. THAT'S WHY THE HOUSE REPORT SAYS THAT'S
7 DANGEROUS. THAT'S WHY PRINCETON UNIVERSITY PRESS SAID IN ITS
8 ANTHOLOGICAL CHARACTER THAT WAS ANOTHER FACTOR WEIGHING
9 AGAINST, NOT DISPOSITIVE IN ITSELF, ANOTHER FACTOR WEIGHING
10 AGAINST, AND ALL WE WANT TO DO IS BE ABLE TO MAKE THOSE
11 ARGUMENTS ON A RECORD THAT ALLOWS US TO --

12 THE COURT: WHAT YOU WANT TO DO IS BROADEN THE FIELD
13 OF CLAIMED INFRINGEMENTS BY TALKING ABOUT OR BY INTRODUCING
14 EVIDENCE THROUGH THE WITNESSES OF WHEN THE PROFESSOR, FOR
15 EXAMPLE, USED AN EXCERPT FROM A WORK WHICH IS NOT COPYRIGHTED
16 BY ONE OF THE PLAINTIFFS, AND THE PROBLEM WITH THAT IS IT ONLY
17 GIVES US HALF A LOAF IN TERMS OF EVIDENCE. I THINK IT'S VERY
18 IMPORTANT FOR PURPOSES OF FAIRNESS TO BOTH SIDES THAT WE ALL
19 FOCUS ON THE SAME CLAIMED INFRINGEMENTS.

20 NOW, GETTING BACK TO THE POINT THAT YOU ARE -- YOU
21 KEEP TALKING ABOUT ANTHOLOGIES. I HAVEN'T HEARD THE ANTHOLOGY
22 EVIDENCE YET. I THINK WHAT YOU'RE SAYING IS THAT IT WOULD BE
23 POSSIBLE FOR THERE TO BE ANTHOLOGIES CREATED IF ONE GOT HOLD OF
24 THE LIST OF EXCERPTS THAT EACH PROFESSOR IS USING, BUT I
25 HAVEN'T HEARD ANYTHING YET TO SUGGEST THAT ANYBODY IS DOING

1 THAT AT GEORGIA STATE, AND AS I UNDERSTAND THE EVIDENCE AT THE
2 END OF EACH COURSE, THE MACHINE ERASES WHAT'S IN THERE ABOUT
3 THE EXCERPTS THAT WERE USED FOR THE LAST SEMESTER.

4 I THINK WHAT YOU'RE DOING IS REACHING OUT TO TRY TO
5 DRAW MORE COMPARISONS BETWEEN THE PRINTED COURSEPACKS THAT WERE
6 THE SUBJECT OF SOME VERY DEFINITIVE APPELLATE RULINGS, AND, YOU
7 KNOW, THAT MAY BE A FAIR ARGUMENT. WE'LL GET THERE EVENTUALLY,
8 BUT I THINK YOUR ARGUMENT IS A REAL STRETCH AT THIS POINT.

9 MR. RICH: YOUR HONOR, JUST TO BE CLEAR, WE'RE NOT
10 SEEKING TO ESTABLISH AND I WOULDN'T PRESUME TO WANT TO
11 ESTABLISH OTHER INFRINGEMENTS. IT SUFFICES FOR PURPOSES OF OUR
12 CASE, CERTAINLY OUR APPROACH TO THE CASE, AND IT'S SUFFICED AS
13 WE READ OTHER AUTHORITY SIMPLY TO SHOW THAT OTHER WORKS WERE
14 COMBINED WITH THE PLAINTIFFS' WORKS TO CREATE UNAUTHORIZED
15 ANTHOLOGIES. IN OTHER WORDS, IF SOMEBODY --

16 THE COURT: WHAT DO YOU MEAN BY AN UNAUTHORIZED
17 ANTHOLOGY? YOU MEAN THE FACT THAT ON THE COURSE GUIDE THAT THE
18 PROFESSOR PUTS OUT TO THE CLASS IT SAYS READ EXCERPTS A, B AND
19 C?

20 MR. RICH: YES.

21 THE COURT: AND LET'S SAY B AND C ARE PLAINTIFFS',
22 FROM PLAINTIFFS' WORKS, AND THEN YOU'RE CALLING A, B AND C AN
23 ANTHOLOGY; IS THAT RIGHT?

24 MR. RICH: WE COULD CALL IT A COMPILATION. WE COULD
25 CALL IT A COURSEPACK. BY LAW WHAT IT MEANS IS THE ASSEMBLY,

1 AND I DON'T KNOW THAT THE PHYSICAL ASSEMBLY IS RELEVANT, THE
2 ASSEMBLY OF PREEEXISTING COPYRIGHTED MATERIALS INTO A WHOLE; IN
3 OTHER WORDS, THAT'S WHAT A COURSEPACK IS AN ANTHOLOGY, AND IT'S
4 JUST PRODUCED IN PAPER FORM BY THE PROFESSOR ASSEMBLING IT.

5 IF SOMEBODY SEEKS A PERMISSION FROM A PUBLISHER, YOUR
6 HONOR, THE PUBLISHER SAYS HOW ARE YOU GOING TO USE IT, AND
7 THERE IS A DIFFERENCE AND CAN BE A DIFFERENCE BETWEEN SAYING I
8 WANT TO USE IT IN ISOLATION PAGES 5 TO 7, OR I WANT TO PUT IT
9 INTO AN ANTHOLOGY.

10 MR. PFUND TESTIFIED, IT IS IN THE RECORD, MR. PFUND
11 TESTIFIED THAT OXFORD SECURES PERMISSIONS INCOME REGULARLY BY
12 LICENSING TO THIRD-PARTY CUSTOM PUBLISHERS WHO ARE CREATING
13 ANTHOLOGIES FOR SALE TO THE UNIVERSITIES USE OF OXFORD EXCERPTS
14 INTO THOSE ANTHOLOGIES. EFFECTIVELY WHAT'S HAPPENING HERE IS
15 THAT'S HAPPENING WITHOUT PAYMENT TO OXFORD AS PART OF CREATING
16 THE ANTHOLOGIES.

17 I DON'T THINK IT APPROPRIATE THAT WE EXALT FORM OVER
18 SUBSTANCE AS TO WHAT'S OCCURRING HERE, AND THERE WILL BE MORE
19 TESTIMONY WHICH YOUR HONOR WILL EVALUATE ON THAT SUBJECT HERE
20 COMING UP SHORTLY, BUT THE POINT IS THAT WHERE YOU HAVE THE
21 AFFECT OF TAKING A DISCRETE NUMBER OF COPYRIGHTED WORKS BUT
22 THEY END UP CONSTITUTING A LARGE PROPORTION OF THE REQUIRED
23 COURSE READING, AS I THINK THE EVIDENCE IS INCREASINGLY
24 DEMONSTRATING TO BE THE CASE, THAT REALLY IS IN THE PARLANCE OF
25 COPYRIGHT LAW THAT'S AN ANTHOLOGY.

1 EVEN THOUGH IT MAY NOT BE VELO BOUND IN THE
2 ELECTRONIC SETTING, IT HAS THE SAME POTENTIAL OF MARKET
3 DISPLACEMENT THAT THE OTHER CASES FOUND TO BE THE CASE THERE,
4 AND ALL WE'RE SUGGESTING IS -- AND I'M SORRY TO BURDEN THIS.
5 ALL WE'RE TRYING TO DO IS CREATE THAT CONTEXTUAL BACKGROUND FOR
6 THE USE, AND IF YOUR HONOR DETERMINES WE'VE FAILED TO
7 DEMONSTRATE THAT ANALOGY SO BE IT, BUT WE WOULD LIKE THE
8 OPPORTUNITY OF SHOWING CONTEXT, NOT TO PROVE THAT THE OTHER
9 WORKS HAVE BEEN INFRINGED BUT SOLELY THAT OUR WORKS HAVE BEEN
10 OFFERED TOGETHER WITH A SERIES OF OTHER COPYRIGHTED WORKS IN
11 A FASHION THAT WE BELIEVE IS TANTAMOUNT TO CREATING AN
12 ANTHOLOGY.

13 THE COURT: I THINK I UNDERSTAND YOUR POSITION, AND
14 ALL I CAN SAY IS I'LL JUST RULE ON THE EVIDENCE AS IT COMES IN.

15 MR. RICH: THAT'S FAIR. THANK YOU VERY MUCH. MR.
16 BLOOM IS GOING TO TAKE THE NEXT WITNESS WHO IS PROFESSOR ORR.

17 MR. SCHAETZEL: YOUR HONOR, IF WE MIGHT HAVE BUT A
18 BRIEF REBUTTAL?

19 THE COURT: OKAY. GO AHEAD.

20 MR. SCHAETZEL: MR. HARBIN.

21 MR. HARBIN: I THINK IT'S BEEN CLEAR IN THE BRIEFING
22 IN THIS CASE THAT THE DEFENDANTS BELIEVE THE PLAINTIFFS ARE
23 RELYING OVERLY ON OLD EXCERPTS OF HOUSE REPORTS AND THE
24 CLASSROOM GUIDELINES VERSUS WE THINK MORE CONTROLLING CASE LAW,
25 BUT WE DON'T NEED TO BELABOR THAT.

1 JUST A FEW POINTS. WE DO DISAGREE WITH THIS ISSUE
2 ABOUT ANTHOLOGIES LEGALLY AND FACTUALLY AND AGAIN
3 PROCEDURALLY. PARTICULARLY IN THE EDUCATION CONTEXT IF A
4 PROFESSOR TAKES, APPROPRIATELY TAKES EXCERPTS OF WORKS THAT ARE
5 INDIVIDUALLY OR APPROPRIATELY FAIR USE AND ASSEMBLES THOSE INTO
6 PART OF A LARGER CLASS, WE THINK THAT'S ENTIRELY APPROPRIATE,
7 AND, IN FACT, I SUBMIT CAN BE TRANSFORMATIVE OF THE INDIVIDUAL
8 WORKS BECAUSE THEY'RE TALKING ABOUT A NEW POINT.

9 BUT CLEARLY WE THINK IT CAN BE -- IT IS STILL PROPER
10 FAIR USE, AND THE FACT THAT SOMEBODY MIGHT OFFER THIS THAT I
11 CAN SELL YOU THESE IS WE THINK IF AT ALL RELEVANT marginally
12 RELEVANT, IF NOT IRRELEVANT, AND WE'LL BRIEF THAT FURTHER
13 LATER, BUT I JUST WANTED TO MAKE THAT POINT.

14 BUT I ALSO AGAIN WOULD MENTION THAT WE TOOK THE
15 30(B)(6) DEPOSITION OF THE PLAINTIFFS ON THIS ISSUE, CAMBRIDGE
16 AND OXFORD, AND REVIEWED THE TESTIMONY AND THEY WERE ASKED TO
17 BE -- THEY WERE PRESENTED AS REPRESENTATIVES ON AMONG OTHER
18 ISSUES MARKET HARM, AND YOUR HONOR HEARD THE TESTIMONY, WHAT
19 DID THEY BOTH SAY? WELL YOU CAN ADD UP THE PERMISSION INCOME
20 AND DO THE CALCULATION.

21 AND I SUBMIT THIS IS AT LEAST IN PART WHAT
22 PLAINTIFFS' COUNSEL WAS SAYING IS AN ATTEMPT TO GO BACK AND
23 REORDER THEIR CASE LIKE THEY'RE TRYING TO DO WITH THE
24 INDIVIDUAL WORKS WHEN IT'S BEEN CLEARED EVERYBODY HAS TREATED
25 THE WORKS AS THE PUBLICATION OF BOOKS AS A WHOLE 2 PERCENT, 5

1 PERCENT, 7 PERCENT. NOW THEY'RE SAYING WELL WAIT A MINUTE, NOW
2 THAT WE'RE INTO THIS TRIAL IT'S A HUNDRED PERCENT OF AN
3 INDIVIDUAL CHAPTER.

4 WE DON'T AGREE WITH THAT LEGALLY AGAIN EITHER, BUT WE
5 REALLY OBJECT TO THEM NOW TRYING TO SAY WELL THIS IS ALSO NOW
6 NOT JUST PERMISSIONS FEE INCOME FROM GEORGIA STATE. YOU KNOW
7 ARGUABLY PERMISSIONS FEE INCOME EVERYWHERE, OTHER PLACES IF
8 IT'S MORE BROADLY ADOPTED THEY WOULD SAY.

9 THEN THEY STARTED TRYING TO SAY SALE OF BOOKS WHICH
10 THESE 30(B)(6) WITNESSES DIDN'T ADDRESS. NOW THEY'RE TRYING TO
11 ADD AND COURSEPACKS, THE CUSTOM PUBLISHING, AND NOT ONLY DID
12 THESE 30(B)(6) WITNESSES NOT ADDRESS IT, YOUR HONOR, BUT THEY
13 DID HAVE AN EXPERT FROM CCC, AND THE ONLY THING SHE OPINED ON
14 WAS AS I UNDERSTAND IT THE PERMISSIONS FEES INCOME WAS RISING
15 BUT IT WASN'T RISING AT THE LEVEL OF OTHER INCOME. NOTHING
16 ABOUT WE'RE LOSING DIGITAL CUSTOM PUBLISHING OR FOR THAT MATTER
17 SALES OF BOOKS. THANK YOU.

18 THE COURT: LET'S PROCEED, MR. BLOOM.

19 MR. BLOOM: GOOD MORNING, YOUR HONOR. PLAINTIFFS
20 CALL AS THEIR NEXT WITNESS DR. LEE ORR.

21 N. LEE ORR,
22 HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS
23 FOLLOWS:

24 THE CLERK: IF YOU WILL HAVE A SEAT, PLEASE, AND
25 STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME

1 ALSO.

2 THE WITNESS: NATHANIEL LEON ORR.

3 MR. BLOOM: YOUR HONOR, MAY I APPROACH WITH THE
4 WITNESS BINDER?

5 THE COURT: YES, YOU MAY.

6 MR. BLOOM: YOUR HONOR, BEFORE I START I'D LIKE TO
7 MOVE INTO EVIDENCE A COUPLE OF EXHIBITS THAT I'LL BE REFERRING
8 TO AS TO WHICH I'M NOT AWARE OF ANY OBJECTION. THOSE ARE
9 PX-523, PX-524 AND DX-521.

10 THE COURT: THEY ARE ADMITTED.

11 DIRECT EXAMINATION

12 BY MR. BLOOM:

13 Q. GOOD MORNING, DR. ORR.

14 A. GOOD MORNING.

15 Q. I'M JONATHAN BLOOM. I REPRESENT THE PLAINTIFFS. I'LL BE
16 ASKING YOU SOME QUESTIONS THIS MORNING.

17 DR. ORR, YOU'RE A PROFESSOR IN THE MUSIC HISTORY AND
18 LITERATURE DEPARTMENT AT GSU; IS THAT CORRECT?

19 A. YES, SIR.

20 Q. AND YOU'VE TAUGHT AT GSU SINCE 1978?

21 A. YES, SIR.

22 Q. AND WHEN DID YOU RECEIVE TENURE, IF YOU RECALL?

23 A. I BELIEVE IT WAS FIVE YEARS MAYBE SIX, 1983 MAYBE 1984.

24 Q. AND YOU HAVE A PH.D. FROM THE UNIVERSITY OF NORTH
25 CAROLINA; IS THAT CORRECT?

1 A. YES.

2 Q. AND YOU TAUGHT A COURSE DESIGNATED MUSIC 8860 WHICH WAS
3 ROMANTIC PERIOD 1800 TO 1900 IN THE SUMMER OF 2009; IS THAT
4 CORRECT?

5 A. YES.

6 Q. AND WAS THAT AN UNDERGRADUATE COURSE?

7 A. NO, IT WAS A GRADUATE COURSE.

8 Q. AND YOU PREPARED A SYLLABUS FOR THE COURSE, CORRECT?

9 A. YES.

10 Q. AND IF YOU TURN IN YOUR BINDER AND YOU'LL ALSO BE ABLE TO
11 FOLLOW IT ON THE SCREEN TO WHAT'S BEEN MARKED PX-523 ALREADY IN
12 EVIDENCE, YOU'LL SEE THE TABS IN YOUR BINDER ARE NUMBERED, AND
13 IS THIS THE SYLLABUS THAT YOU PREPARED FOR MUSIC 8860 FOR THE
14 FALL 2009 SEMESTER?

15 A. YES.

16 Q. AND IF YOU TURN TO THE SECOND PAGE OF THE DOCUMENT, YOU
17 SEE WHERE IT SAYS TEXTS THERE TOWARD THE BOTTOM OF THE FIRST
18 PART OF THE DOCUMENT, AND IT IDENTIFIES TWO BOOKS. ONE IS
19 PLANTINGA, ROMANTIC MUSIC AND ANOTHER IS TODD, 19TH CENTURY
20 PIANO MUSIC; DO YOU SEE THAT?

21 A. YES.

22 Q. AND THOSE WERE TEXTS THAT YOU REQUIRED STUDENTS TO
23 PURCHASE; IS THAT CORRECT?

24 A. YES.

25 Q. AND THEN IT SAYS OTHER READINGS ARE ONLINE AT AND THEN IT

1 HAS A WEBSITE ADDRESS; DO YOU SEE THAT?

2 A. YES.

3 Q. AND THOSE OTHER READINGS WERE AVAILABLE THROUGH ERESERVES;

4 IS THAT CORRECT?

5 A. YES.

6 Q. THAT WEBSITE ADDRESS IS FOR ERESERVES, CORRECT?

7 A. YES.

8 Q. AND THOSE OTHER READINGS THAT WERE PLACED ON ERESERVES FOR

9 THE STUDENTS IN THE CASE WERE REQUIRED READINGS FOR THE COURSE,

10 CORRECT?

11 A. YES.

12 Q. LET'S JUST LOOK BACK TO THE FIRST PAGE OF THIS DOCUMENT

13 FOR A MOMENT, AND JUST DIRECTING YOUR ATTENTION TO THE COURSE

14 DESCRIPTION SECTION TOWARD THE TOP, IT SAYS IN THAT SECTION

15 THAT THE COURSE, QUOTE, INVOLVES READING THE REQUIRED

16 MATERIALS, CLOSED QUOTE; DO YOU SEE THAT?

17 A. YES.

18 Q. AND THEN LOWER DOWN ON THE SAME PAGE, THERE'S A SECTION

19 DESIGNATING GRADES, AND IT SAYS THERE, QUOTE, ALL THE

20 ASSIGNMENTS MUST BE READ BEFORE CLASS; DO YOU SEE THAT?

21 A. RIGHT, YES.

22 Q. THAT'S THE LAST SENTENCE IN THAT SECTION ALL THE

23 ASSIGNMENTS MUST BE READ BEFORE CLASS. SO YOU MADE CLEAR TO

24 STUDENTS THAT THEY WERE EXPECTED TO READ THE MATERIALS POSTED

25 ON ERES FOR THE CORRESPONDING CLASS SESSIONS, CORRECT?

1 A. YES.

2 Q. OKAY. AND THEN IF WE JUST TURN TO THE SECOND PAGE OF THE
3 DOCUMENT AND THEN PAGE THROUGH YOU INDICATE FOR EACH CLASS
4 SESSION WHAT THE PORTIONS OF THE TEXTBOOKS AND THE PORTIONS OF
5 THE EXCERPTS THAT WERE PLACED ON ERES THAT THE STUDENTS WERE TO
6 READ FOR THOSE CLASS SESSIONS, CORRECT?

7 A. YES.

8 Q. LET'S JUST BRING UP JX-5. WE'RE GOING TO BE REFERRING TO
9 PAGES B-3 AND B-4. THIS IS A DOCUMENT, PROFESSOR ORR, THE
10 PARTIES HAVE STIPULATED TO THAT REFLECTS WORKS THAT WERE POSTED
11 ON ERES DURING PORTIONS OF THE 2009 CLASS YEAR, AND YOU'LL SEE
12 THE SECOND COLUMN IDENTIFIES YOUR NAME, THE FIRST COLUMN
13 IDENTIFIES THE COURSE, AND THERE ARE SEVERAL READINGS THAT YOU
14 POSTED ON ERES FOR MUSIC 8860 DURING THE SUMMER 2009 THAT WE'LL
15 BE DISCUSSING AND I JUST WANT TO IDENTIFY THEM. THEY ARE ON
16 THIS PAGE LIST --

17 A. IS THAT IN HERE?

18 Q. IT'S UP ON THE SCREEN. I DO NOT BELIEVE THAT THIS IS IN
19 YOUR BOOK. WE CAN ENLARGE THIS IF YOU HAVE TROUBLE READING
20 ANYTHING.

21 SO THERE'S THE LIST SONATA IN B MINOR WHICH IS A BOOK
22 PUBLISHED BY CAMBRIDGE. THE NEXT ONE IS THE CAMBRIDGE
23 COMPANION TO MENDELSSOHN WHICH IS ALSO PUBLISHED BY CAMBRIDGE,
24 AND THEN ON THE NEXT PAGE CAMBRIDGE COMPANION TO SCHUMANN, AND
25 BELOW THAT THE CAMBRIDGE COMPANION TO BEETHOVEN AND FINALLY THE

1 MUSIC OF BERLIOZ WHICH IS PUBLISHED BY OXFORD.

2 IF WE SORT OF BACK OUT, YOU CAN SEE THERE'S A COLUMN
3 WHICH INDICATES HOW MANY STUDENTS WERE IN A CLASS. THE CLASS
4 SIZE INDICATES THERE WERE TEN STUDENTS IN THE CLASS; DO YOU SEE
5 THAT?

6 A. YES.

7 Q. NOW, YOU DID NOT OBTAIN PERMISSION FROM OR MAKE ANY
8 PAYMENT TO THE PUBLISHER OR AUTHOR OF ANY OF THE WORKS WE JUST
9 IDENTIFIED TO PLACE EXCERPTS FROM THOSE WORKS ON ERESERVES; IS
10 THAT CORRECT?

11 A. YES.

12 Q. AND THAT'S BECAUSE YOU DETERMINED THAT POSTING EXCERPTS
13 FROM THESE WORKS ON ERES WAS FAIR USE; IS THAT CORRECT?

14 A. YES.

15 Q. AND SO AS A RESULT OF THAT DETERMINATION AND YOUR REQUEST
16 THAT THESE WORKS BE POSTED ON ERES, YOUR STUDENTS HAD FREE
17 ACCESS TO THESE EXCERPTS ON ERES; IS THAT CORRECT?

18 A. YES.

19 Q. AND IT WAS YOUR UNDERSTANDING THAT THIS WAS PERMITTED BY
20 GSU'S COPYRIGHT POLICY, CORRECT?

21 A. YES.

22 Q. NOW IT WAS YOUR UNDERSTANDING, DR. ORR, I TAKE IT AND
23 AGAIN WE'RE TALKING ABOUT THE 2009 TIMEFRAME, THAT YOU WERE
24 REQUIRED TO FOLLOW CERTAIN PROCEDURES BEFORE PLACING MATERIAL
25 ON ERES; IS THAT CORRECT?

1 A. YES.

2 Q. AND I'M SHOWING YOU WHAT'S BEEN MARKED AS JX-4. THIS IS
3 ALREADY IN EVIDENCE. THIS IS IN YOUR BINDER. I'LL ASK YOU TO
4 IDENTIFY THIS DOCUMENT?

5 A. YES.

6 Q. WHAT IS THIS DOCUMENT?

7 A. IT'S THE POLICY ON THE COPYRIGHTED WORKS FOR EDUCATION
8 RESEARCH.

9 Q. OKAY. AND DO YOU RECALL HOW YOU FIRST BECAME AWARE OF
10 THIS DOCUMENT?

11 A. YES, WHEN THEY REVISED THE POLICY TWO YEARS AGO, THEY SENT
12 THIS OUT, AND IT WAS EITHER -- I CAN'T RECALL WHETHER I READ IT
13 ONLINE WHICH I MAY HAVE, OR WHETHER I GOT IT FROM THE LIBRARY,
14 BUT I READ IT.

15 Q. AND YOU KIND OF SKIMMED THROUGH THE DOCUMENT; IS THAT
16 CORRECT?

17 A. YES.

18 Q. OKAY. AND AT THE TIME THAT YOU RECEIVED THIS DOCUMENT,
19 WHAT, IF ANYTHING, WERE YOU TOLD ABOUT YOUR OBLIGATIONS UNDER
20 THIS NEW POLICY?

21 A. TO READ THE DOCUMENT AND GO THROUGH THE CHECKLIST FAIR USE
22 POLICY.

23 Q. OKAY. AND IF WE GO AHEAD TO PAGE 7 OF THIS DOCUMENT, THIS
24 IS THE CHECKLIST; IS THAT CORRECT?

25 A. YES.

1 Q. AND YOU UNDERSTOOD THAT YOU WERE TO FOLLOW THIS IN MAKING
2 YOUR FAIR USE DETERMINATION?

3 A. YES.

4 Q. AND LOOKING THROUGH THE CHECKLIST, I TAKE IT AT THE TIME
5 YOU FOUND THAT THE TERMINOLOGY ON THE CHECKLIST WAS REASONABLY
6 CLEAR TO YOU?

7 A. YES.

8 Q. OKAY. SO YOU DIDN'T FEEL AS IF YOU NEEDED ANY SPECIAL
9 HELP IN UNDERSTANDING THE TERMINOLOGY AT THE TIME; IS THAT
10 CORRECT?

11 A. NO.

12 Q. THE ANSWER IS NO?

13 A. DID I NEED UNDERSTANDING?

14 Q. YOU FELT AT THE TIME THAT YOU DID NOT NEED ANY SPECIAL
15 HELP IN UNDERSTANDING THAT?

16 A. CORRECT.

17 Q. AND YOU DID NOT ATTEND ANY TRAINING SESSIONS CONCERNING
18 THE NEW POLICY; IS THAT CORRECT?

19 A. YES.

20 Q. AND I TAKE IT AT THE TIME YOU DIDN'T FEEL IT WAS NECESSARY
21 TO DO SO, IT SEEMED REASONABLY CLEAR TO YOU?

22 A. YES.

23 Q. OKAY. AND DO YOU RECALL EVER BEING TOLD THAT IT WAS
24 MANDATORY FOR YOU TO ATTEND SOME KIND OF A TRAINING SESSION?

25 A. NO.

1 Q. AND I TAKE IT YOU'VE NEVER STUDIED COPYRIGHT LAW; IS THAT
2 CORRECT?

3 A. YES.

4 Q. AND AT THE TIME I TAKE IT YOU WERE NOT AWARE OF ANY OTHER
5 RESOURCES AT GSU BEYOND THIS WRITTEN POLICY TO ASSIST YOU IN
6 MAKING FAIR USE DETERMINATIONS; IS THAT CORRECT?

7 A. YES.

8 Q. OKAY. AND ALTHOUGH IT STATES ON THE FIRST PAGE OF THE
9 CHECKLIST HERE JUST ABOVE FACTOR 1 THAT YOU ARE REQUIRED TO
10 RETAIN A COMPLETE CHECKLIST FOR EACH FAIR USE OF A COPYRIGHTED
11 WORK, YOU DID NOT ACTUALLY FILL OUT A CHECKLIST PHYSICALLY FOR
12 THE EXCERPTS OF THE WORKS THAT WE JUST IDENTIFIED THAT YOU HAD
13 POSTED ON ERES FOR MUSIC 8860 IN THE SUMMER OF 2009; IS THAT
14 CORRECT?

15 A. YES.

16 Q. AND I TAKE IT, IT DIDN'T SEEM NECESSARY TO YOU TO
17 PHYSICALLY FILL IT OUT SO LONG AS YOU THOUGHT THROUGH THE
18 FACTORS; IS THAT CORRECT?

19 A. YES.

20 Q. AND YOU WERE NOT REQUIRED TO TURN IN COMPLETED CHECKLISTS,
21 RIGHT?

22 A. YES.

23 Q. AND SO WHEN YOU WERE DOING YOUR FAIR USE EVALUATIONS, DID
24 YOU GO FACTOR BY FACTOR AND THOUGHT ABOUT THEIR APPLICATION TO
25 THE READING IN QUESTION?

1 A. SAY THAT AGAIN?

2 Q. YES, WHEN YOU WERE MAKING YOUR FAIR USE EVALUATIONS, DID
3 YOU GO THROUGH FACTOR BY FACTOR IN YOUR MIND AS TO WHETHER IT
4 APPLIED OR NOT TO THE PROPOSED READINGS?

5 A. YES, I HAD PRINTED THIS OUT AND HAD A COPY THAT I HAD TO
6 REMIND MYSELF AS I LOOKED AT THE BOOKS.

7 Q. OKAY. AND YOUR REVIEW OF THE CHECKLIST LED YOU TO
8 CONCLUDE THAT THE READINGS THAT WE JUST LOOKED AT ON JX-5 WERE
9 FAIR USE, CORRECT?

10 A. YES.

11 Q. OKAY. AND DID YOU REPRESENT TO LIBRARY RESERVES THAT YOU
12 HAD COMPLETED A FAIR USE CHECKLIST AND THAT YOU FOUND THOSE
13 READINGS TO BE FAIR USE?

14 A. IT SAID USE THIS AND, YES, I HAD. I DIDN'T FILL IT OUT AS
15 YOU SAID.

16 Q. IF YOU WOULD FLIP TO DEFENDANTS' EXHIBIT 521 IN YOUR
17 BINDER AND THIS IS ALREADY IN EVIDENCE?

18 A. WHICH ONE?

19 Q. DX-521.

20 A. YES, I HAVE IT.

21 Q. OKAY. THIS IS A SERIES OF E-MAILS BETWEEN YOU AND LIBRARY
22 RESERVES. THE FIRST ONE IS DATED JUNE 5TH, 2009; DO YOU SEE
23 THAT?

24 A. YES.

25 Q. THIS IS A RESPONSE TO YOUR REQUEST TO HAVE READINGS PLACED

1 ON ERESERVES, CORRECT?

2 A. YES.

3 Q. OKAY. AND FOR EACH OF THE READINGS IN THIS FIRST E-MAIL,
4 IF YOU COULD JUST SCROLL DOWN, YOU'LL SEE IT SAYS IN YOUR
5 COMMUNICATION TO LIBRARY RESERVES THAT YOU INDICATE FOR EACH
6 WORK THERE THAT IT FALLS UNDER FAIR USE ACCORDING TO THE FAIR
7 USE CHECKLIST I COMPLETED, CORRECT?

8 A. YES.

9 Q. AND IF WE GO TO THE NEXT PAGE, THE BOTTOM OF THE PAGE 2,
10 YOU SEE IT LISTS THE CAMBRIDGE COMPANION TO BEETHOVEN?

11 A. YES.

12 Q. AND THEN ON THE NEXT PAGE THERE'S AN E-MAIL FROM LIBRARY
13 RESERVES TO YOU DATED JUNE 22, 2009; DO YOU SEE THAT?

14 A. YES.

15 Q. OKAY. AND IF WE SCROLL DOWN TO THE BOTTOM OF THAT PAGE,
16 WE'LL SEE THE LIST SONATA IN B MINOR BY KENNETH HAMILTON IS
17 LISTED?

18 A. YES.

19 Q. AND IF WE GO BACK TO THE TOP OF THE PAGE -- ACTUALLY LET'S
20 STAY THERE. IT SAYS COPYRIGHT STATUS IT IS PUBLIC DOMAIN OR
21 ALLOWED UNDER CREATIVE COMMONS LICENSE; DO YOU SEE THAT?

22 A. YES.

23 Q. THE LIBRARY HAS FLAGGED FOR YOU THE FACT THAT YOU
24 INDICATED IT WAS IN THE PUBLIC DOMAIN?

25 A. YES.

1 Q. AND THAT WAS JUST AN ERROR ON YOUR PART, CORRECT?

2 A. THAT WAS MISTAKE.

3 Q. RIGHT, YOU MEANT TO INDICATE THAT IT FALLS UNDER FAIR USE,
4 CORRECT?

5 THE COURT: WHAT'S THIS EXHIBIT NUMBER?

6 MR. BLOOM: I'M SORRY, YOUR HONOR, THIS IS DX-521.

7 THE WITNESS: THAT WAS AN ERROR ON MY PART.

8 BY MR. BLOOM:

9 Q. OKAY. BUT THE LIBRARY FLAGGED THIS ERROR IT DID NOT
10 INDICATE THAT YOU WERE PROPOSING TO USE MORE PAGES THAN WAS
11 ALLOWED UNDER FAIR USE, DID IT?

12 A. HUH-UH (NEGATIVE).

13 THE COURT: WHAT DID YOU SAY?

14 THE WITNESS: THIS WAS A MISTAKE. I CHECKED THE
15 WRONG BOX.

16 BY MR. BLOOM:

17 Q. RIGHT, AND THEN I ASKED YOU WHETHER THE LIBRARY HAD
18 FLAGGED WHETHER YOU USED MORE THAN FAIR USE ALLOWED, AND I
19 THINK YOUR ATTENTION WAS NO, CORRECT?

20 A. RIGHT.

21 Q. NOW IF I COULD DIRECT YOUR ATTENTION TO AN EXHIBIT WHICH
22 IS ALREADY IN EVIDENCE THAT'S PX-130, AND YOU'LL SEE IN YOUR
23 BINDER WE HAVE JUST THE COVER AND THE TABLE OF CONTENTS, AND
24 I'M GOING TO GIVE YOU A COPY OF THE BOOK.

25 MR. BLOOM: YOUR HONOR, MAY I APPROACH?

1 THE COURT: YES.

2 MR. BLOOM: THANK YOU.

3 BY MR. BLOOM:

4 Q. SO I'VE HANDED YOU A COPY OF PLAINTIFFS' EXHIBIT 130 WHICH
5 IS THE BOOK TITLED LISZT SONATA IN B MINOR. THIS IS A
6 MONOGRAPH BY KENNETH HAMILTON, CORRECT?

7 A. UH-HUH (AFFIRMATIVE).

8 Q. AND IF WE GO BACK TO JX-5 AT PAGE B-3, THIS INDICATES THAT
9 YOU POSTED -- YOU HAD PAGES 28 TO 48 POSTED ON ERESERVES; DO
10 YOU SEE THAT?

11 A. YES.

12 Q. OKAY. SO THAT'S 21 PAGES, AND AM I CORRECT THAT THERE ARE
13 84 PAGES OF TEXT IN THE BOOK; CAN YOU JUST CONFIRM THAT,
14 PROFESSOR ORR?

15 A. LET'S SEE, I ALWAYS GO TO THE BEGINNING WITH THE PREFACE
16 AND THE ACKNOWLEDGMENTS. FROM THE VERY BEGINNING, LET'S SEE,
17 THAT'S 12 PLUS 89.

18 Q. OKAY.

19 A. THE PAGES IN THE BOOK.

20 Q. OKAY. AND THE TEXTURAL PORTION OF THE BOOK I THINK IS
21 SOMEWHAT SMALLER?

22 A. YES.

23 Q. OKAY. IF WE LOOK JUST AT THE TEXT YOU USED APPROXIMATELY
24 A QUARTER OF THE BOOK; IS THAT CORRECT?

25 A. THAT'S NOT HOW I DID IT. SO AT THE TIME I THOUGHT I WAS

1 AROUND 20 PERCENT.

2 Q. OKAY. AND IF YOU COULD JUST REFER TO THE TABLE OF
3 CONTENTS OF THE BOOK, AND CAN YOU CONFIRM FOR ME THAT PAGES 28
4 TO 48 CORRESPOND TO CHAPTER 3 WHICH IS UNDERSTANDING THE SONATA
5 IN B MINOR?

6 A. YES.

7 Q. OKAY. AND IF WE COULD GO BACK TO THE SYLLABUS WHICH IS
8 PLAINTIFFS' EXHIBIT 523 ALREADY IN EVIDENCE, AND IF WE GO TO
9 THE JUNE 24TH CLASS TOWARD THE MIDDLE, AM I CORRECT THAT THIS
10 IS REQUIRED READING FOR THE JUNE 24TH CLASS?

11 A. YES.

12 Q. OKAY. AND WHY DID YOU ASSIGN THIS CHAPTER FOR THAT CLASS,
13 PROFESSOR ORR?

14 A. THIS CHAPTER DEALS WITH THE -- IT TREATS DIFFERENT
15 THEORIES OF THE FORM OF THE B MINOR SONATA. THERE ARE VARIOUS
16 INTERPRETATIONS OF THE FORM. IT'S ONE LONG PIECE. IT'S NOT IN
17 FOUR SEPARATE MOVEMENTS, AND THERE ARE VARIOUS CONTRASTING
18 INTERPRETATIONS OF THE FORM.

19 SO BASICALLY THIS IS A REVIEW OF THOSE THREE OR FOUR
20 VARIOUS THEORIES. IN FACT HE HAS A CHART -- GIVE ME ONE SECOND
21 PLEASE -- PAGE 32 THAT HE LISTS HIS THREE MAJOR SOURCES FOR
22 THOSE THEORIES.

23 Q. OKAY. AND LET'S TURN BACK TO JOINT EXHIBIT 4 TO PAGE 7,
24 THIS IS THE CHECKLIST, AND I'D LIKE TO WALK THROUGH WITH YOU
25 HOW YOU THOUGHT THROUGH THE CHECKLIST WITH RESPECT TO THIS

1 EXCERPT.

2 A. OKAY.

3 Q. SO JUST FOCUSING FIRST ON THE LEFT-HAND COLUMN, I TAKE IT
4 THAT YOU MENTALLY CHECKED NONPROFIT EDUCATIONAL BECAUSE THAT'S
5 THE NATURE OF GSU, IT'S A NONPROFIT INSTITUTION; IS THAT
6 CORRECT?

7 A. YES.

8 Q. AND YOU MENTALLY CHECKED TEACHING BECAUSE THAT WAS YOUR
9 PURPOSE IN USING THE WORK, CORRECT?

10 A. YES.

11 Q. OKAY. AND YOU MENTALLY CHECKED RESEARCH AND SCHOLARSHIP
12 BECAUSE THIS PORTION OF THE BOOK WAS AN EXAMPLE OF RESEARCH AND
13 SCHOLARSHIP, CORRECT?

14 A. YES.

15 Q. AND YOU MENTALLY CHECKED CRITICISM, COMMENT, NEWS
16 REPORTING, PARODY BECAUSE THE CHAPTER HAD CRITICISM, CORRECT?

17 A. YES.

18 Q. AND YOU ALSO MENTALLY CHECKED PERSONAL STUDY BASED ON THE
19 FACT THAT THE STUDENTS WERE TO TAKE THE BOOK AND USE IT FOR
20 STUDY OUTSIDE OF CLASS, CORRECT --

21 A. YES.

22 Q. -- IN CONNECTION WITH THE CLASS? AND YOU CHECKED USE AS
23 NECESSARY TO ACHIEVE YOUR EDUCATIONAL PURPOSE BECAUSE YOU HAD
24 SELECTED IT AS BEING A WORK THAT YOU NEEDED TO COVER THE
25 SUBJECT MATTER IN CLASS, CORRECT?

1 A. YES.

2 Q. OKAY. AND LOOKING AT THE RIGHT-HAND SIDE, I BELIEVE YOU
3 MENTALLY CHECKED NONTRANSFORMATIVE; IS THAT CORRECT?

4 A. YES.

5 Q. OKAY. BUT I TAKE IT THAT NO ONE AT GSU TOLD YOU THAT AN
6 EXACT DIGITAL COPY OF A PORTION OF A BOOK IN CONNECTION WITH
7 ERES WAS NONTRANSFORMATIVE, CORRECT?

8 A. YES.

9 Q. AND SO YOU THOUGHT THAT THROUGH ON YOUR OWN, AND, INDEED,
10 YOU TESTIFIED AT YOUR DEPOSITION YOU PUZZLED OVER IT A BIT,
11 CORRECT?

12 A. YES.

13 Q. OKAY. BUT YOU ULTIMATELY CONCLUDED IN YOUR OWN MIND THAT
14 IT WAS NONTRANSFORMATIVE, CORRECT?

15 A. IT WAS IN FAVOR OF FAIR USE, IS THAT WHAT YOU'RE SAYING?
16 OKAY. YES, IT'S NONTRANSFORMATIVE.

17 Q. THANK YOU. HOWEVER, AS YOU RAN THROUGH THIS ANALYSIS BACK
18 IN 2009 THAT FACTOR NONTRANSFORMATIVE ON THE RIGHT-HAND SIDE
19 WAS OUTWEIGHED BY THE MENTAL CHECKS ON THE LEFT-HAND SIDE; IS
20 THAT CORRECT?

21 A. YES.

22 Q. AND THE TALLY WAS SIX TO ONE UNDER FACTOR 1, CORRECT?

23 A. YES.

24 Q. AND WITH RESPECT TO THE FACTORS NONPROFIT EDUCATIONAL
25 TEACHING AND USE IS NECESSARY TO ACHIEVE YOUR INTENDED

1 EDUCATIONAL PURPOSE, THOSE THREE FACTORS WOULD APPLY TO ANY
2 READING THAT YOU DECIDED WAS APPROPRIATE FOR YOUR CLASS AT GSU,
3 CORRECT?

4 A. YES.

5 Q. OKAY. AND THAT WOULD ALSO BE TRUE OF PERSONAL STUDY -- I
6 MEAN ANY READING YOU ASSIGNED WOULD BE INTENDED FOR THE
7 PERSONAL STUDY OF YOUR STUDENTS, CORRECT?

8 A. YES.

9 Q. AND YOUR EVALUATION OF FACTOR 1 WAS THE SAME WITH RESPECT
10 TO THE FACTORS THAT YOU MENTALLY CHECKED FOR ALL OF THE
11 READINGS THAT WE REVIEWED PREVIOUSLY ON JX-5, CORRECT?

12 A. SAY THAT AGAIN?

13 Q. LET ME REPHRASE THAT. FOR ALL OF THE EXCERPTS FROM THE
14 BOOKS THAT WE IDENTIFIED ON THE CHART YOUR REASONING UNDER
15 FACTOR 1 WAS THE SAME FOR ALL OF THOSE WORKS; IS THAT CORRECT?

16 A. YES.

17 Q. LET'S TURN TO FACTOR 2. SO AS TO FACTOR 2 YOU MENTALLY
18 CHECKED PUBLISHED, CORRECT?

19 A. YES.

20 Q. AND FACTUAL OR NONFICTION, CORRECT?

21 A. YES.

22 Q. AND IMPORTANT TO EDUCATIONAL OBJECTIVES, CORRECT?

23 A. YES.

24 Q. AND AS TO THE IMPORTANT TO EDUCATIONAL OBJECTIVES, I TAKE
25 IT YOUR THINKING WAS THE SAME AS IT WAS UNDER FACTOR 1 FOR USE

1 AS NECESSARY TO ACHIEVE THE INTENDED EDUCATIONAL PURPOSE,
2 CORRECT?
3 A. YES.
4 Q. AND YOUR REASONING UNDER FACTOR 2 WAS THE SAME WITH
5 RESPECT TO THIS WORK AS WITH THE OTHERS THAT WE IDENTIFIED; IS
6 THAT CORRECT?
7 A. YES.
8 Q. OKAY. NOW ALL OF THE READINGS THAT WE'VE IDENTIFIED ON
9 JX-5 ARE FACTUAL, NONFICTION WORKS, CORRECT?
10 A. YES.
11 Q. BUT YOU WOULD AGREE, I TAKE IT, THAT THERE IS AN ELEMENT
12 OF CREATIVITY IN ALL OF THE WORKS, CORRECT, INCLUDING THIS
13 CHAPTER FROM SONATA IN B MINOR?
14 A. YES.
15 Q. BUT AS BETWEEN FACTUAL OR NONFICTION WORK AND HIGHLY
16 CREATIVE WORK, YOU MENTALLY CHECKED FACTUAL OR NONFICTION AS
17 WE'VE SEEN?
18 A. YES.
19 Q. LET'S TURN TO FACTOR 3. YOU MENTALLY CHECKED SMALL
20 PORTION OF WORK USED, NOT NOTWITHSTANDING THE FACT THAT THIS
21 WAS IN THE AREA OF 20 OR A BIT MORE PERCENT OF THE ENTIRE WORK,
22 CORRECT?
23 A. YES. MAY I POINT SOMETHING OUT?
24 Q. WELL, IS IT -- YES. GO AHEAD.
25 A. A MAJOR QUALIFIER IN MY OPINION AS YOU LOOK THROUGH THE

1 EXAMPLES THERE ARE 1, 2, 3, 4, 5, 6 EXTENDED EXAMPLES FROM
2 LISZT B MINOR SONATA WHICH ARE IN PUBLIC DOMAIN.
3 Q. UNDERSTOOD. OKAY. BUT YOU WERE GIVEN NO GUIDELINES AS TO
4 HOW TO THINK ABOUT WHETHER AN EXCERPT WAS A SMALL PORTION OF
5 THE WORK USED, WERE YOU?
6 A. EVER SINCE WE WENT ON RESERVES 10, 12 YEARS AGO WHENEVER
7 THEY STARTED, I'VE ALWAYS UNDERSTOOD TO NOT EXCEED 20 PERCENT,
8 BUT MY AVERAGE OVER THE LAST 10 OR 12 YEARS, I SUGGEST AS I --
9 THERE ARE A FEW EXCEPTIONS OF COURSE, BUT WHEN I LOOK AT A BOOK
10 IF I CAN'T KEEP IT AROUND 10 PERCENT, THEN I DON'T USE THAT
11 BOOK.
12 Q. AND THIS WAS AN EXCEPTION BECAUSE YOU BELIEVED IT WAS A
13 PARTICULARLY EXCELLENT TREATMENT OF THE SUBJECT, CORRECT?
14 A. YES, AND ALSO I FELT THAT SINCE THE MUSIC WAS PUBLIC
15 DOMAIN, IT WAS -- I DIDN'T INCLUDE IT IN THE 20 PAGES. THAT'S
16 A TECHNICALITY.
17 Q. OKAY. LET'S TURN TO FACTOR 4?
18 A. YES.
19 Q. AND LOOKING AT THE LEFT-HAND SIDE COLUMN, YOU MENTALLY
20 CHECKED NO SIGNIFICANT EFFECT ON THE MARKET, CORRECT?
21 A. YES.
22 Q. AND YOU CHECKED STIMULATES MARKET, CORRECT?
23 A. YES.
24 Q. AS TO THAT CRITERION YOU SURMISED THAT SOME STUDENTS MIGHT
25 GO OUT AND BUY THE BOOK?

1 A. INDEED, THAT HAPPENS ON A -- NOT A FREQUENT --
2 Q. THIS IS A YES OR NO QUESTION, PROFESSOR.
3 A. YES.
4 Q. AND YOU DID NOT MENTALLY CHECK LICENSING OR PERMISSION
5 UNAVAILABLE; IS THAT CORRECT?
6 A. SAY THAT AGAIN?
7 Q. YOU DID NOT MENTALLY CHECK LICENSING OR PERMISSION
8 UNAVAILABLE; YOU DIDN'T KNOW WHETHER IT WAS OR NOT; IS THAT
9 CORRECT?
10 A. YES.
11 Q. OKAY. AND AM I CORRECT THAT YOU DID NOT INVESTIGATE
12 WHETHER LICENSING WAS OR WAS NOT AVAILABLE BECAUSE YOU DIDN'T
13 BELIEVE IT WAS NECESSARY TO DO SO IF YOU CONCLUDED THAT THE
14 READING WAS FAIR USE; IS THAT CORRECT?
15 A. YES.
16 Q. OKAY. AND AM I ALSO CORRECT THAT AT THE TIME YOU WERE NOT
17 FAMILIAR WITH THE COPYRIGHT CLEARANCE CENTER; IS THAT CORRECT?
18 A. I DON'T KNOW WHEN I HEARD OF THE COPYRIGHT CLEARANCE
19 CENTER.
20 Q. BUT, IN ANY EVENT, YOU DID NOT INVESTIGATE WHETHER THIS
21 WORK WAS AVAILABLE THROUGH THE COPYRIGHT CLEARANCE CENTER WHEN
22 YOU WERE MENTALLY COMPLETING THIS CHECKLIST, CORRECT?
23 A. YES.
24 Q. OKAY. AND YOU DID MENTALLY CHECK SUPPLEMENTAL READING,
25 CORRECT?

1 A. YES.

2 Q. BUT YOU DID NOT UNDERSTAND THAT TO MEAN THAT IT WAS IN
3 ADDITION TO THE -- THAT IT WAS NOT REQUIRED; IN OTHER WORDS,
4 YOU DID NOT INTERPRET SUPPLEMENTAL TO MEAN OPTIONAL, CORRECT?
5 YOU INTERPRETED IT TO MEAN IN ADDITION TO THE TEXTBOOK; IS THAT
6 CORRECT?

7 A. YES.

8 Q. AND YOU MENTALLY CHECKED NO SIMILAR PRODUCT MARKETED; IS
9 THAT CORRECT?

10 A. YES.

11 Q. AND WAS THAT BECAUSE YOU DETERMINED THAT THIS WAS THE ONLY
12 BOOK ON THE SUBJECT?

13 A. WELL, DID IT -- ESPECIALLY CERTAINLY ONE BY CAMBRIDGE, BUT
14 THAT DID IT IN THIS FASHION, YES.

15 Q. OKAY. WAS IT YOUR UNDERSTANDING BASED ON A READING OF THE
16 CHECKLIST THAT IF A WORK WAS NOT READILY REPLACEABLE BY ANOTHER
17 WORK THAT THAT WEIGHED IN FAVOR OF FAIR USE?

18 A. SAY THAT AGAIN?

19 Q. I TAKE IT BASED ON THE ANSWER YOU JUST GAVE THAT IF YOU
20 FOUND THAT A WORK WAS NOT READILY REPLACEABLE BY ANOTHER WORK
21 THAT THAT WAS A FACTOR THAT WEIGHED IN FAVOR OF FAIR USE; IS
22 THAT CORRECT?

23 A. YES.

24 Q. AND YOU MENTALLY CHECKED RESTRICTED ACCESS, CORRECT?

25 A. YES.

1 Q. AND YOU MENTALLY CHECKED USER OWNS A COPY BECAUSE YOU DID
2 OWN A COPY OF THE BOOK, CORRECT?

3 A. YES.

4 Q. OKAY. AND AM I CORRECT THAT THE ONLY CHECK ON THE
5 RIGHT-HAND COLUMN AS YOU THOUGHT THIS THROUGH WAS REQUIRED
6 CLASSROOM READING, CORRECT?

7 A. YES.

8 Q. AND AM I CORRECT THAT YOUR THINKING AS TO FACTOR 4 WAS THE
9 SAME WITH RESPECT TO THIS WORK AS FOR THE OTHER WORKS THAT WE
10 IDENTIFIED ON JX-5?

11 A. YES.

12 Q. AND IF WE COULD TURN BACK TO JX-5 FOR A MOMENT, PAGE B-3,
13 AND SO BASED ON YOUR REVIEW OF ALL FOUR FACTORS YOU CONCLUDED
14 THAT HAVING THIS WORK POSTED ON ERES WOULD BE FAIR USE,
15 CORRECT?

16 A. YES.

17 Q. AND IF YOU'LL LOOK AT THE COLUMN UNDER LISZT SONATA B
18 MINOR THAT INDICATES THAT -- THIS IS A CALCULATION THAT WE'VE
19 STIPULATED TO, PROFESSOR ORR, THAT OBTAINING A LICENSE TO POST
20 EXCERPTS OF THIS WORK ON ERES FOR THE STUDENTS IN YOUR CLASS AT
21 THE TIME WOULD HAVE BEEN \$3.10 PER STUDENT; DO YOU SEE THAT
22 FIGURE?

23 A. YES.

24 Q. AND MY QUESTION IS IF AT THE TIME YOUR STUDENTS WOULD HAVE
25 HAD TO INCUR A COST OF \$3.10 TO HAVE ACCESS TO THE PORTION OF

1 THIS BOOK ON ERESERVES, WOULD YOU STILL HAVE ASSIGNED IT AT THE
2 TIME?

3 A. I MIGHT HAVE DONE IT DIFFERENTLY. I WOULD HAVE RETURNED
4 TO WHAT I DID BEFORE ERESERVES POSSIBLY, OR I'D PUT THE
5 HARDCOPY IN THE LIBRARY WHICH IS WHAT WE DID BEFORE ERESERVES,
6 THEY HAD TO GO OVER THERE, OR IT MIGHT NOT BE USED AT ALL.
7 BECAUSE IN SPITE OF BEING THE TEACHER, IN SPITE OF GIVING THE
8 GRADES, THE COMPLIANCE USED TO GETTING STUDENTS TODAY TO WALK
9 TO THE LIBRARY AND READ MORE THAN A HANDFUL OF MATERIALS IS
10 VERY DIFFICULT, AND YOUR OPTION THEN IS IT TO FLUNK
11 THREE-QUARTERS OF YOUR CLASS.

12 SO THE ONLY ANSWER I CAN GIVE YOU IS THE BROAD ONE, I
13 WOULD GREATLY REDUCE THE NONTEXTBOOK READINGS AND PUT THOSE
14 FOUR OR FIVE HARDCOPY BOOKS ON RESERVE.

15 Q. SO EVEN THOUGH YOU CONCLUDED THAT YOUR USE OF THIS EXCERPT
16 ON ERESERVES WOULD STIMULATE THE MARKET FOR THE WORK, YOU WOULD
17 BALK AT ASKING YOUR STUDENTS TO PAY \$3.10; IS THAT YOUR
18 TESTIMONY?

19 A. YES, I WOULD TELL A STUDENT IF THEY SHOWED MORE INTEREST
20 IN THE B MINOR SONATA TO GO LOOK AT THIS OR TO BUY IT.

21 Q. LET'S TURN TO THE NEXT EXHIBIT IN THE BINDER WHICH IS
22 PLAINTIFFS' EXHIBIT 65 ALREADY IN EVIDENCE. THIS IS THE
23 CAMBRIDGE COMPANION TO BE MENDELSSOHN?

24 MR. BLOOM: YOUR HONOR, MAY I APPROACH?

25 THE COURT: YES.

1 BY MR. BLOOM:

2 Q. PROFESSOR ORR, PLAINTIFFS' EXHIBIT 65, CAMBRIDGE COMPANION
3 TO MENDELSSOHN, THIS IS A COMPILATION OF ESSAYS BY DIFFERENT
4 AUTHORS. IT'S EDITED BY PETER MERCER-TAYLOR; IS THAT CORRECT?

5 A. YES.

6 Q. IF WE COULD GO BACK TO JX-5 AT PAGE B-3, WE SEE THAT YOU
7 POSTED -- YOU HAD PAGES 96 TO 111 OF THIS WORK POSTED ON
8 ERESERVES; DO YOU SEE THAT?

9 A. YES.

10 Q. OKAY. AND IF YOU WOULD REFER TO THE TABLE OF CONTENTS,
11 CAN YOU CONFIRM THAT THOSE PAGES -- YOU CAN OBVIOUSLY REVIEW
12 THE ACTUAL TEXT OF THE BOOK -- THAT THOSE PAGES CORRESPOND TO A
13 PORTION OF CHAPTER 6 WHICH IS SYMPHONY AND OVERTURE BY DOUGLASS
14 SEATON?

15 A. YES.

16 Q. AND THAT CHAPTER ACTUALLY STARTS ON PAGE 91, CORRECT?

17 A. YES.

18 Q. AND DID YOU OMIT THE FIRST FIVE PAGES OF THE CHAPTER IN
19 WHAT YOU HAD POSTED ON ERESERVES?

20 A. LET ME LOOK ONE SECOND. YES, BECAUSE THOSE ARE EARLY
21 SYMPHONIES.

22 Q. OKAY. SO YOU ASSIGNED APPROXIMATELY 80 PERCENT OF THE
23 CHAPTER FOR YOUR STUDENTS, CORRECT?

24 A. YES.

25 Q. AND IF WE CAN REFER BACK 523 ALREADY IN EVIDENCE, THIS IS

1 THE SYLLABUS, AND IF WE LOOK AT JULY 13 WHICH I THINK IS DOWN
2 AT THE BOTTOM THERE, WAS THIS REQUIRED READING FOR THE JULY 13
3 CLASS SESSION?

4 A. YES.

5 Q. AND WHY DID YOU ASSIGN THIS READING BRIEFLY?

6 A. MENDELSSOHN WROTE THE FIRST IMPORTANT EARLY ROMANTIC
7 GERMAN SYMPHONIES, OKAY, OR AMONG THE FIRST, AND THE
8 CHARACTERISTIC PIECES ARE IMPORTANT ELEMENTS OF HIS OVERALL
9 WORK. THERE ARE MANY OTHER ELEMENTS.

10 Q. OKAY. AND IN RUNNING MENTALLY THROUGH THE FAIR USE
11 CHECKLIST, I TAKE IT YOUR ANALYSIS WITH RESPECT TO THIS EXCERPT
12 WAS ESSENTIALLY THE SAME AS WITH THE LISZT BOOK THAT WE JUST
13 LOOKED AT?

14 A. YES.

15 Q. OKAY. AND I TAKE IT IN THINKING ABOUT WHETHER THE AMOUNT
16 TAKEN WAS SMALL IN RELATION TO THE WHOLE, YOU DID NOT THINK
17 ABOUT THAT IN RELATION TO THE SEATON ESSAY BUT RATHER IN
18 RELATION TO THE ENTIRE BOOK; IS THAT CORRECT?

19 A. YES, THAT'S MY PRACTICE FOR EACH BOOK.

20 Q. OKAY. AND YOU WOULD AGREE, I TAKE IT, THAT THERE IS SOME
21 ELEMENT OF CREATIVITY IN THE SEATON ESSAY?

22 A. YES.

23 Q. OKAY. AND IF WE LOOK BACK AT JOINT EXHIBIT 5, YOU'LL SEE
24 WE'VE CALCULATED THE COST PER STUDENT TO LICENSE THE RIGHT TO
25 POST THIS EXCERPT FROM THE CAMBRIDGE COMPANION TO MENDELSSOHN

1 FROM THE COPYRIGHT CLEARANCE CENTER WOULD HAVE BEEN \$2.40 PER
2 STUDENT; DO YOU SEE THAT?

3 A. YES.

4 Q. AND IS YOUR ANSWER THE SAME TO THE QUESTION OF WHETHER HAD
5 YOUR STUDENTS INCURRED THAT COST AT THE TIME YOU WOULD HAVE
6 STILL ASSIGNED THE WORK; WOULD YOUR ANSWER BE THE SAME?

7 A. I WOULD STILL WHAT?

8 Q. WOULD YOUR ANSWER AS TO WHETHER YOU WOULD HAVE STILL
9 ASSIGNED THIS CHAPTER HAD STUDENTS INCURRED THIS CHARGE BE THE
10 SAME AS IT WAS WITH RESPECT TO THE LISZT WORK?

11 A. YES.

12 Q. LET'S TURN TO THE NEXT EXHIBIT WHICH IS PLAINTIFFS'
13 EXHIBIT 75, THE CAMBRIDGE COMPANION TO SCHUMANN, THIS IS
14 ALREADY IN EVIDENCE.

15 MR. BLOOM: MAY I APPROACH, YOUR HONOR?

16 THE COURT: YES.

17 BY MR. BLOOM:

18 Q. IF WE LOOK AT THE SYLLABUS WHICH IS PLAINTIFFS' EXHIBIT
19 523 ALREADY IN EVIDENCE, PROFESSOR ORR, I WILL JUST ASK YOU IF
20 REVIEWING THE SYLLABUS IT REFRESHES YOUR RECOLLECTION AS TO
21 WHAT PORTION OF THIS BOOK YOU HAD POSTED ON ERESERVES FOR THIS
22 COURSE IN THE SUMMER OF 2009?

23 A. WOULD WHAT?

24 Q. IF YOU COULD LOOK AT THE BOOK AND TELL ME IF IT REFRESHES
25 YOUR RECOLLECTION AS TO WHAT PORTION OF THE BOOK YOU PLACED ON

1 RESERVES FOR YOUR STUDENTS FOR THIS CLASS?

2 A. I BELIEVE SO, YES.

3 Q. OKAY. AND CAN YOU IDENTIFY WHAT PORTION YOU BELIEVE YOU
4 ASSIGNED?

5 A. KNOWING ABSOLUTELY HERE WITHOUT SEEING THE PAGES LISTED,
6 NO. I CAN TELL YOU WHAT I THINK I WOULD HAVE DONE.

7 Q. THAT'S FINE.

8 A. OKAY. I PROBABLY WOULD HAVE -- PROBABLY PAGE 105 TO PAGE
9 119, 14 PAGES.

10 Q. SO THAT'S A PORTION OF CHAPTER 6, CORRECT?

11 A. YES, AS I RECALL.

12 Q. OKAY. AND THAT'S A CHAPTER THAT'S TITLED WHY SING, LIEDER
13 AND SONG CYCLES BY JONATHAN DUNSBY, CORRECT?

14 A. YES.

15 Q. AND YOU BELIEVE YOU ASSIGNED 15 PAGES FROM THAT CHAPTER;
16 IS THAT CORRECT?

17 A. TO THE BEST OF MY RECOLLECTION.

18 Q. OKAY. AND AM I CORRECT THAT THERE ARE 291 PAGES OF TEXT
19 IN THE BOOK?

20 A. WELL, I WOULD HAVE COUNTED FROM THE BEGINNING, 302 PLUS
21 5 -- WHATEVER THE PREFATORY MATTER IS.

22 Q. OKAY. BUT IF YOU GO TO THE END OF THE TEXT, I THINK IT'S
23 291; IS THAT FAIR?

24 A. YES.

25 Q. AND, AGAIN, AS WITH THE MENDELSSOHN BOOK THIS IS A

1 COMPILATION OF ESSAYS EACH SEPARATELY AUTHORED AND EDITED BY
2 BEATE PERREY; IS THAT CORRECT?

3 A. YES.

4 Q. AND I TAKE IT IN WORKING THROUGH THE FAIR USE CHECKLIST AS
5 TO THIS WORK, YOUR THINKING WAS THE SAME AS WITH THE WORKS WE
6 JUST LOOKED AT?

7 A. YES.

8 Q. OKAY. AND I TAKE IT YOU WOULD AGREE THAT THERE IS AN
9 ELEMENT OF CREATIVITY IN THE DUNSBY ESSAY, CORRECT?

10 A. YES.

11 Q. AND IF WE -- AND IF I ASK YOU WHETHER IF YOUR STUDENTS HAD
12 TO INCUR A SMALL FEE OF SAY IN THE 3 TO 5 DOLLAR RANGE TO
13 ACCESS THIS EXCERPT AT THE TIME, WOULD YOUR ANSWER BE THE SAME
14 AS TO WHETHER YOU WOULD HAVE STILL ASSIGNED IT?

15 A. YES.

16 Q. LET'S TURN TO THE NEXT WORK. THIS IS PLAINTIFFS' EXHIBIT
17 53 ALREADY IN EVIDENCE. THIS IS THE CAMBRIDGE COMPANION TO
18 BEETHOVEN.

19 MR. BLOOM: YOUR HONOR, MAY I APPROACH?

20 THE COURT: YES.

21 BY MR. BLOOM:

22 Q. AND LET'S REFER BACK TO JOINT EXHIBIT 5 AT PAGE B-4,
23 AND THIS REFLECTS THAT YOU PLACED PAGES 165 TO 185, 21 PAGES
24 ON ERESERVES FOR MUSIC 8860 IN THE SUMMER 2009; DO YOU SEE
25 THAT?

1 A. YES.

2 Q. OKAY. AND BY OUR COUNT THERE ARE 305 PAGES OF TEXT IN THE
3 BOOK, THAT'S UP TO THE NOTES AT THE END; DO YOU SEE THAT?

4 A. YES.

5 Q. AND AGAIN THIS BOOK --

6 A. I NEED TO SAY I WOULD HAVE COUNTED TO THE END --

7 Q. NO, I UNDERSTAND. AND THIS BOOK IS ALSO A COMPILATION OF
8 SEPARATELY AUTHORED CHAPTERS EDITED BY GLENN STANLEY, CORRECT?

9 A. YES.

10 Q. AND CAN YOU CONFIRM THAT PAGES 165 TO 815 CORRESPOND TO
11 CHAPTER 10 WHICH AN ESSAY SOUND AND STRUCTURE IN BEETHOVEN'S
12 ORCHESTRAL MUSIC BY LEON BOTSTEIN?

13 A. YES.

14 Q. OKAY. AND IF WE LOOK BACK AT THE SYLLABUS WHICH IS
15 PLAINTIFFS' EXHIBIT 523, AND IF WE LOOK AT -- I THINK IT'S ON
16 THE SECOND PAGE, THE JUNE 8TH AND 10TH CLASS SESSIONS, THIS
17 DOES NOT APPEAR AS A READING THERE, DOES IT, PROFESSOR ORR?

18 A. NO, .

19 Q. DID YOU DECIDE NOT TO ASSIGN THE WORK?

20 A. MY SYLLABI ARE FLUID GIVEN VARIOUS TIME CONSTRAINTS.

21 Q. YOU WERE THINKING OF ASSIGNING IT, AND AS WE SAW IF WE CAN
22 REFER BACK TO DX-521, THE BOTTOM OF THE SECOND PAGE, WE SAW
23 BEFORE YOU ACTUALLY DID MAKE THE REQUEST THAT THE WORK BE
24 POSTED ON ERESERVES, CORRECT?

25 A. YES.

1 Q. AND IN WORKING THROUGH THE FAIR USE CHECKLIST, I TAKE IT
2 YOUR THINKING AS TO THE BOTSTEIN ESSAY BEING PLACED ON
3 RESERVES WAS THE SAME AS WITH THE WORKS WE'VE ALREADY LOOKED
4 AT IN TERMS OF YOUR FAIR USE ANALYSIS?

5 A. YES.

6 Q. AND YOU CONCLUDED THAT WAS A FAIR USE, CORRECT?

7 A. YES.

8 Q. AND I TAKE IT AGAIN AS YOU HAVE TESTIFIED YOU WERE
9 CONSIDERING IN TERMS OF THE PORTION OF THE WORK THE WORK AS A
10 WHOLE RATHER THAN JUST THE BOTSTEIN ESSAY?

11 A. YES.

12 Q. AND YOU WOULD AGREE THAT THERE'S AN ELEMENT OF CREATIVITY
13 IN THE BOTSTEIN ESSAY?

14 A. YES.

15 Q. OKAY. TURNING TO PLAINTIFFS' EXHIBIT 427, THIS IS THE
16 MUSIC OF BERLIOZ. THIS IS ALREADY IN EVIDENCE.

17 MR. BLOOM: YOUR HONOR, MAY I APPROACH?

18 THE COURT: YES.

19 BY MR. BLOOM:

20 Q. I WILL TELL YOU I LISTENED TO SOME OF THIS MUSIC WHILE I
21 WAS PREPARING FOR THIS EXAMINATION. IT WAS VERY ENJOYABLE.

22 THIS IS A MONOGRAPH BY JULIAN RUSHTON; IS THAT
23 CORRECT?

24 A. YES.

25 Q. IF WE LOOK BACK AT JOINT EXHIBIT 5 AT PAGE B-4, IT

1 INDICATES THAT YOU PLACED PAGES 250 TO 267 ON ERESERVES; DO YOU
2 SEE THAT?

3 A. YES.

4 Q. OKAY. AND SO THAT'S 18 PAGES, AND I BELIEVE THERE ARE 347
5 PAGES OF TEXT IN THE BOOK. MAYBE JUST TO MOVE THINGS ALONG
6 I'LL ASK YOU TO ACCEPT MY REPRESENTATION IN THAT REGARD.

7 CAN YOU REFER TO THE TABLE OF CONTENTS AND CONFIRM
8 THAT PAGES 250 TO 267 CORRESPOND TO TWO SECTIONS OF CHAPTER 9?

9 A. YES.

10 Q. SYMPHONIE FANTASTIQUE AND BRIGANDS IN THE MOUNTAINS,
11 HAROLD EN ITALIE?

12 A. IT GOES UP TO THAT, YES.

13 Q. OKAY. SO IT'S THOSE TWO SECTIONS?

14 A. WELL, THEY DID 267, BUT THE READING THAT I INTENDED FOR
15 THEM STOPPED AT 266.

16 Q. I SEE.

17 A. THE OTHER ONE GOT INCLUDED SOMEHOW.

18 Q. SO IT WAS THE SYMPHONIE FANTASTIQUE WAS THE SECTION THAT
19 YOU ASSIGNED?

20 A. YES.

21 Q. AND IN WORKING THROUGH THE FAIR USE CHECKLIST YOUR
22 ANALYSIS WAS THE SAME AS WITH THE OTHER WORKS, CORRECT?

23 A. YES.

24 Q. OKAY. AND IF WE JUST REFER BACK TO JX-5, YOU SEE THAT THE
25 COST OF LICENSING THIS EXCERPT FROM CCC WOULD HAVE COST \$2.16

1 PER STUDENT, AND I TAKE IT YOUR THINKING AS TO WHETHER YOU
2 WOULD HAVE ASSIGNED THIS HAD YOUR STUDENTS HAD TO INCUR THAT
3 CHARGE WOULD HAVE BEEN THE SAME AS YOU DESCRIBED EARLIER WITH
4 RESPECT TO THE LISZT WORK?

5 A. YES.

6 Q. TURNING TO A COURSE THAT YOU TAUGHT IN THE FALL OF 2009 IN
7 MUSIC 8840 BAROQUE MUSIC; DO YOU RECALL TEACHING THAT IN THE
8 FALL 2009?

9 A. YES.

10 Q. AND WAS THAT ALSO A GRADUATE CLASS?

11 A. YES.

12 Q. AND IF WE LOOK AT JX-5 AT PAGE C-14, YOU'LL SEE THERE WERE
13 18 STUDENTS IN THAT CLASS?

14 A. YES.

15 Q. OKAY. AND IF WE LOOK AT A DOCUMENT THAT'S BEEN MARKED
16 PX-524, THIS IS THE NEXT DOCUMENT IN YOUR BINDER. THIS IS
17 ALREADY IN EVIDENCE, AND THIS IS YOUR SYLLABUS FOR THAT COURSE,
18 CORRECT?

19 A. YES.

20 Q. AND IN THE FIRST PARAGRAPH THE LAST SENTENCE READS THE
21 ASSIGNED READINGS PARALLEL THE CLASS WORK AND ARE EXPECTED TO
22 BE READ PRIOR TO CLASS MEETINGS; DO YOU SEE THAT?

23 A. YES.

24 Q. AND DID YOU PLACE REQUIRED READINGS ON ERESERVES FOR THIS
25 CLASS?

1 A. YES.

2 Q. OKAY. AND IF WE LOOK BACK AT JOINT EXHIBIT 5, PAGE C-14,
3 THE ROW FOR THIS -- YOU'LL SEE THAT IT REFLECTS THAT YOU POSTED
4 EXCERPTS FROM THE ORGAN AS A MIRROR OF ITS TIME, NORTH EUROPEAN
5 REFLECTION 1600 TO 2000 WHICH IS PUBLISHED BY OXFORD AND NORTH
6 GERMAN CHURCH MUSIC IN THE AGE -- IS IT BUXTEHUDE?

7 A. VERY GOOD, YES.

8 Q. THANK YOU, SIR. YOU SEE THAT. CAN WE HIGHLIGHT THAT? I
9 BELIEVE THAT IS RIGHT UNDERNEATH --

10 A. SIR?

11 Q. I JUST WANT TO HIGHLIGHT THAT, AND THAT'S ALSO A BOOK
12 PUBLISHED BY OXFORD, AND IF YOU TURN BACK TO PX-521, THIS IS
13 THE SERIES OF E-MAILS TO LIBRARY RESERVES, THERE IS AN E-MAIL
14 DATED AUGUST 26TH, 2009. THIS IS THE PAGE THAT'S NUMBERED THE
15 GEORGIA STATE NUMBER IS 0065662, SO IT'S ABOUT 7 PAGES IN.

16 A. YES.

17 Q. AT THE BOTTOM OF THE PAGE YOU'LL SEE BOTH OF THESE WORKS
18 LISTED WITH AN INDICATION THAT YOU FOUND EACH OF THEM FALLS
19 WITHIN FAIR USE; DO YOU SEE THAT?

20 A. YES.

21 Q. OKAY. AND THIS INDICATES THAT YOU HAD PORTIONS OF BOTH OF
22 THESE WORKS POSTED ON ERESERVES WITHOUT OBTAINING PERMISSION
23 FROM OR PAYING ANY FEE TO THE PUBLISHER OR AUTHOR OF THE WORKS,
24 CORRECT?

25 A. YES.

1 Q. OKAY. NOW JUST GETTING TOWARD THE END HERE, LET'S LOOK TO
2 PLAINTIFFS' EXHIBIT 441. THIS IS THE SECOND TO THE LAST TAB IN
3 THE BINDER.

4 MR. BLOOM: YOUR HONOR, IF I MAY APPROACH?

5 THE COURT: YOU MAY.

6 BY MR. BLOOM:

7 Q. AND THIS BOOK IS A COMPILATION OF SEPARATELY AUTHORED
8 ESSAYS EDITED KERALA J. SNYDER, CORRECT?

9 A. YES.

10 Q. OKAY. AND IF WE LOOK BACK AT JOINT EXHIBIT 5 AT PAGE
11 C-14, IT INDICATES YOU HAD PAGES 78 TO 91 POSTED ON ERESERVES
12 WHICH IS 14 PAGES, AND CAN YOU CONFIRM THAT THOSE PAGES
13 CORRESPOND TO CHAPTER 6 WHICH IS TITLED THE ORGAN IN
14 SEVENTEENTH-CENTURY COSMOLOGY BY HANS DAVIDSSON?

15 A. YES.

16 Q. AND ACCORDING TO OUR CALCULATION THERE ARE 346 PAGES OF
17 TEXT IN THE BOOK. LET'S JUST LOOK BACK AT PX-524 ALREADY IN
18 EVIDENCE WHICH IS THE SYLLABUS, AND CAN YOU CONFIRM THAT THIS
19 WAS A REQUIRED READING FOR THE SEPTEMBER 28TH CLASS?

20 A. YES.

21 Q. AND IN WORKING THROUGH THE FAIR USE CHECKLIST, I ASSUME
22 YOUR ANALYSIS OF THE FOUR FACTORS WAS THE SAME AS WITH THE
23 OTHER WORKS?

24 A. YES.

25 Q. OKAY. AND UNDER FACTOR 4 -- ACTUALLY I MEANT TO ASK YOU

1 THIS WITH RESPECT TO THE READINGS FOR THE SUMMER CLASS MUSIC
2 8860. IF WE COULD JUST PULL UP JOINT EXHIBIT 4 AT PAGE 8, JUST
3 THE SECOND PAGE OF THE CHECKLIST AGAIN, AND YOU'LL SEE ON THE
4 RIGHT-HAND COLUMN ABOUT HALFWAY DOWN UNDER FACTOR 4, THERE IS A
5 FACTOR THAT SAYS REPEATED OR LONG-TERM USE THAT DEMONSTRABLY
6 AFFECTS THE MARKET FOR THE WORK; DO YOU SEE THAT?

7 A. YES.

8 Q. AND YOU DID NOT MENTALLY CHECK THAT FOR ANY OF THE WORKS
9 THAT WE DISCUSSED, DID YOU?

10 A. NO.

11 Q. REFERRING BACK TO THE MUSIC 8860, IS THAT A COURSE THAT
12 YOU HAD TAUGHT BEFORE?

13 A. YES.

14 Q. HAD YOU PLACED ANY OF THE SAME EXCERPTS THAT WE REVIEWED
15 EARLIER ON ERESERVES FOR THOSE PRIOR SEMESTERS?

16 A. PROBABLY AS FAR AS I REMEMBER.

17 MR. SCHAETZEL: YOUR HONOR, WE WOULD OBJECT. I THINK
18 WE ARE MOVING OUTSIDE OF THE TIMEFRAME IN 2009 THAT IS AT ISSUE
19 IN THE CASE.

20 THE COURT: YOUR RESPONSE?

21 MR. BLOOM: WELL, YOUR HONOR, I BELIEVE THAT THERE
22 ARE MANY FLAWS IN THE CHECKLIST, BUT INCLUDING THIS FACTOR IS
23 NOT ONE OF THEM. I BELIEVE IT'S DIRECTLY RELEVANT TO THE
24 INTERPRETATION OF THIS FACTOR AS TO WHETHER THE WORK WAS
25 ASSIGNED IN PRIOR SEMESTERS. THAT'S THE REASON I ASKED.

1 THE COURT: OBJECTION SUSTAINED.

2 MR. BLOOM: THANK YOU, YOUR HONOR.

3 BY MR. BLOOM:

4 Q. AND YOU WOULD AGREE, I TAKE IT, THERE IS AN ELEMENT OF
5 CREATIVITY IN THE DAVIDSSON ESSAY?

6 A. YES.

7 Q. OKAY. AND IF WE TURN BACK TO JOINT EXHIBIT 5 AT PAGE
8 C-14, IT INDICATES THAT IT WOULD HAVE COST YOUR STUDENTS IN
9 THIS CLASS A \$1.68 APIECE TO HAVE ACCESS TO THIS WORK ON
10 RESERVES BY LICENSE FROM CCC; DO YOU SEE THAT?

11 A. YES.

12 Q. AND YOUR ANSWER, I TAKE IT, IS THE SAME AS TO WHETHER THAT
13 WOULD HAVE CAUSED YOU TO RECONSIDER ASSIGNING IT, CORRECT?

14 A. YES.

15 Q. OKAY. FINALLY IF WE TURN IN YOUR BINDER YOU HAVE THE
16 COVER PAGE AND TABLE OF CONTENTS TO PLAINTIFFS' EXHIBIT 437
17 ALREADY IN EVIDENCE. THIS IS NORTH GERMAN CHURCH MUSIC IN THE
18 AGE OF BUXTEHUDE?

19 MR. BLOOM: YOUR HONOR, IF I CAN APPROACH?

20 THE COURT: YOU MAY.

21 BY MR. BLOOM:

22 Q. PROFESSOR ORR, THIS BOOK WHICH IS PUBLISHED BY OXFORD
23 UNIVERSITY PRESS IS A MONOGRAPH BY GEOFFREY WEBBER, CORRECT?

24 A. YES.

25 Q. AND IF WE TURN BACK TO JOINT EXHIBIT 5, PAGE C-15, THIS

1 INDICATES THAT YOU HAD PAGES 9 TO 26 POSTED ON ERESERVES,
2 THAT'S 18 PAGES; DO YOU SEE THAT?

3 A. YES.

4 Q. AND BY OUR CALCULATION THERE ARE 224 PAGES IN THIS BOOK,
5 AND IF YOU WOULD REFER TO THE BOOK AND THE TABLE OF CONTENTS,
6 CAN YOU CONFIRM THAT THOSE PAGES CORRESPOND TO CHAPTER 1 WHICH
7 IS ENTITLED MUSIC IN RELIGIOUS THOUGHT IN EDUCATION?

8 A. YES.

9 Q. OKAY. AND IF WE LOOK BACK AT THE SYLLABUS WHICH IS
10 PLAINTIFFS' EXHIBIT 524 ALREADY IN EVIDENCE, CAN YOU CONFIRM
11 THAT THIS ALSO WAS AN ASSIGNED READING FOR THE SEPTEMBER 28TH
12 CLASS SESSION?

13 A. YES.

14 Q. AND YOUR FAIR USE ANALYSIS WAS THE SAME AS WITH THE OTHER
15 WORKS WHEN YOU MENTALLY RAN THROUGH THE CHECKLIST FOR THIS
16 EXCERPT, I TAKE IT?

17 A. YES.

18 Q. OKAY. AND LOOKING BACK AT JOINT EXHIBIT 5 AT PAGE C-15,
19 IT INDICATES THAT IT WOULD HAVE COST STUDENTS \$2.16 EACH TO
20 LICENSE THIS WORK OR ACCESS THIS WORK THROUGH THE CCC; DO YOU
21 SEE THAT?

22 A. YES.

23 Q. AND YOUR ANSWER IS THE SAME AS TO WHETHER THAT WOULD HAVE
24 CAUSED YOU TO RECONSIDER ASSIGNING THIS BOOK EXCERPT, I ASSUME,
25 CORRECT?

1 A. YES.

2 Q. NOW, PROFESSOR ORR, YOU COULD HAVE MADE THE SAME EXCERPTS
3 FOR EACH OF THESE CLASSES THAT YOU POSTED ON ERESERVES
4 AVAILABLE TO STUDENTS IN A BOUND PHYSICAL PAPER COURSEPACK,
5 CORRECT?

6 A. YES.

7 Q. BUT INSTEAD YOU PLACED THEM ON ERESERVES SO STUDENTS COULD
8 ACCESS THEM FOR FREE, CORRECT?

9 A. YES.

10 Q. AND YOU COULD IN THEORY HAVE PLACED THESE BOOKS ON LIBRARY
11 RESERVES, HARDCOPY RESERVES AT THE LIBRARY, CORRECT?

12 A. YES.

13 Q. BUT THAT WOULD NOT HAVE GIVEN ALL THE STUDENTS ACCESS TO
14 THE MATERIAL AT THE SAME TIME, CORRECT?

15 A. YES.

16 Q. DO YOU RECALL EVER SEEING STUDENTS CARRYING PHYSICAL
17 PRINTOUTS OF THE PORTIONS OF THESE BOOKS THAT YOU POSTED
18 ON ERESERVES FOR EITHER OF THESE COURSES WE'VE BEEN
19 DISCUSSING?

20 A. YES.

21 Q. AND IS THAT TRUE WITH RESPECT TO BOTH CLASSES?

22 A. YES.

23 MR. BLOOM: NO FURTHER QUESTIONS AT THE MOMENT, YOUR
24 HONOR.

25 THE COURT: HOW LONG WILL YOUR EXAMINATION TAKE, MR.

1 SCHAETZEL?

2 MR. SCHAETZEL: NOT VERY LONG.

3 THE COURT: GO AHEAD.

4 CROSS-EXAMINATION

5 BY MR. SCHAETZEL:

6 Q. PROFESSOR ORR, I'M STEVE SCHAETZEL. IT'S GOOD TO SEE YOU
7 AGAIN.

8 A. GOOD TO SEE YOU.

9 Q. IF YOU CAN, SIR, PLEASE TURN TO THESE LISTS WHICH IS
10 DEFENDANTS' EXHIBIT 743. DURING THE EXAMINATION YOU MENTIONED
11 THAT IN THE PAGES THAT YOU PROVIDED ACCESS TO FOR THE STUDENTS
12 THAT THERE WERE CERTAIN SCORES, I BELIEVE YOU REFERRED TO;
13 COULD YOU IDENTIFY A PAGE FOR ME THAT CONTAINS ONE SUCH SCORE?

14 A. PAGE 43.

15 Q. WHEN YOU USED THE TERM SCORE, SIR, DID YOU MEAN AS IN A
16 MUSICAL SCORE LIKE A STAFF?

17 A. SAY THAT AGAIN?

18 Q. YES. WHEN YOU USED THE WORD SCORE, DID YOU MEAN A MUSICAL
19 SCORE SUCH AS WE SEE HERE LIKE A STAFF?

20 A. YES.

21 Q. WHAT IS THE TIME PERIOD OF THE MUSIC THAT IS BEING TAUGHT
22 IN YOUR CLASS?

23 A. ABOUT 1815 TO ABOUT 1860.

24 Q. WOULD THAT BE TRUE FOR BOTH CLASSES, BOTH THE ROMANTICS
25 AND THE BAROQUE?

1 A. NO, THE BAROQUE WOULD BE ABOUT 1580 TO ABOUT 1730.

2 Q. THE BAROQUE IS SUBSTANTIALITY EARLIER, IS IT NOT, A COUPLE
3 OF HUNDRED YEARS?

4 A. YES.

5 Q. YOU TALKED ABOUT THAT YOU'RE A PROFESSOR IN THE MUSIC
6 SCHOOL. COULD YOU DESCRIBE FOR THE COURT WHERE THE MUSIC
7 SCHOOL IS AT GEORGIA STATE?

8 A. IT'S IN THE FAIRLIE POPLAR DISTRICT, TWO BLOCKS OVER FROM
9 PEACHTREE AND WOODRUFF PARK, AND IT'S THE BLOCK WITH THE
10 RIALTO. THE MUSIC SCHOOL IS -- THE RIALTO IS IN THE GROUND
11 FLOOR OF THE HAAS HOWELL BUILDING WHICH IS MINE, AND ON THE
12 OTHER SIDE IS THE STANDARD BUILDING, AND WE ALSO HAVE USE OF
13 THE RECITAL HALL ON THE MAIN CAMPUS, AND WE HAVE SOME
14 CLASSROOMS IN THE ADERHOLD CLASSROOM BUILDING.

15 Q. YOU MENTIONED THAT IT WAS YOUR PRACTICE TO TRY TO STAY
16 AROUND 10 PERCENT IN TERMS OF THE AMOUNT THAT YOU HAD USED FROM
17 ANY GIVEN WORK; DO YOU RECALL THAT?

18 A. YES.

19 Q. LOOKING, FOR EXAMPLE, AT MENDELSSOHN, THIS IS DEFENDANTS'
20 EXHIBIT 798, I'M NOT SURE WHICH ONE YOU HAVE THERE, ARE YOU
21 ABLE TO CALCULATE OFF THE TOP OF YOUR HEAD APPROXIMATELY HOW
22 MUCH BY TERMS OF PERCENTAGE WAS USED IN THIS WORK?

23 A. REMIND ME THE PAGES?

24 Q. SURE. IT'S PAGES 96 -- LET ME USE THE SAME CHART.

25 A. 96.

1 Q. THROUGH 111.

2 A. TO 111, OKAY, THAT WOULD BE 15 PAGES.

3 Q. AND I BELIEVE YOU SAID HOW WOULD YOU CALCULATE THE NUMBER
4 OF PAGES?

5 A. I'D GO TO THE END OF THE BOOK, 314 PLUS PREFATORY MATTER
6 WHICH IS JUST AN ESTIMATION FIVE OR SIX PAGES, 320 PAGES.

7 Q. SO IT WOULD BE 15 OUT OF 320 PAGES. JUST OFF THE TOP OF
8 YOUR HEAD WOULD THAT BE UNDER YOUR 10 PERCENT THRESHOLD?

9 A. YES.

10 Q. IS THAT AN EXAMPLE, SIR, OF HOW YOU WOULD DO THESE
11 CALCULATIONS WHEN YOU TRIED TO DETERMINE HOW MUCH OF A GIVEN
12 WORK TO USE?

13 A. YES.

14 Q. YOU MENTIONED TO MR. BLOOM THAT ON THE CHECKLIST THAT YOU
15 HAD AT ONE POINT THOUGHT THAT THE USE OF THE WORK COULD
16 STIMULATE THE MARKET FOR THE WORK; WHY DID YOU THINK THAT?

17 A. ON A REGULAR BASIS, THOUGH NOT FREQUENTLY, STUDENTS WILL
18 READ THE ORGAN AS THE MIRROR OF THE TIME AND PURCHASE IT.
19 OFTEN IT'S A VOCALIST BECAUSE WE DO THE ROMANTIC CLASS. WE DO
20 A GREAT DEAL ABOUT 19TH CENTURY GERMAN SONG, AND MOST, YOU
21 KNOW, STUDENTS WILL SAY WELL, I LIKE THIS DISCUSSION THAT WE
22 HAD SO MUCH I BOUGHT THE BOOK. THAT IS NOT INFREQUENT.

23 MR. SCHAEZEL: ONE SECOND, YOUR HONOR. I MAY BE
24 COMPLETED.

25 (PAUSE IN THE PROCEEDINGS.)

1 MR. SCHAETZEL: WE HAVE NO FURTHER QUESTIONS FOR THIS
2 WITNESS, YOUR HONOR.

3 THE COURT: SHALL THE WITNESS BE EXCUSED?

4 MR. BLOOM: YES, YOUR HONOR.

5 THE COURT: YOU ARE EXCUSED, SIR. THANK YOU.

6 LET'S TAKE A LUNCH BREAK UNTIL 1:45.

7 (NOON RECESS)

8 THE COURT: WHO'S NEXT?

9 MR. KRUGMAN: MARNI DAVIS, YOUR HONOR.

10 MARNI ELLEN DAVIS,
11 HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS
12 FOLLOWS:

13 THE CLERK: IF YOU WILL HAVE A SEAT, PLEASE, AND
14 STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME
15 ALSO.

16 THE WITNESS: MY FULL NAME IS MARNI ELLEN DAVIS.

17 DIRECT EXAMINATION

18 BY MR. KRUGMAN:

19 Q. GOOD AFTERNOON, PROFESSOR DAVIS. YOU'RE CURRENTLY AN
20 ASSISTANT PROFESSOR IN THE DEPARTMENT OF HISTORY AT GEORGIA
21 STATE; IS THAT CORRECT?

22 A. I AM.

23 Q. AND YOU BECAME AN ASSISTANT PROFESSOR IN THE HISTORY
24 DEPARTMENT AT GEORGIA STATE AROUND 2008; IS THAT CORRECT?

25 A. THAT'S CORRECT.

1 Q. AND IF YOU COULD JUST VERY BRIEFLY JUST TELL THE COURT
2 WHAT YOUR AREA OF FOCUS IS WITHIN THE HISTORY DEPARTMENT?

3 A. AMERICAN HISTORY AND ETHNIC AND IMMIGRATION HISTORY
4 SPECIFICALLY JEWISH HISTORY IN THE UNITED STATES.

5 Q. WHEN YOU CAME TO WORK AT THE UNIVERSITY, PROFESSOR HUGH
6 HUDSON WAS THE DEPARTMENT HEAD FOR THE DEPARTMENT OF HISTORY;
7 IS THAT CORRECT?

8 A. THAT'S CORRECT.

9 Q. AND HE REMAINS THE HEAD OF THE DEPARTMENT TODAY; IS THAT
10 CORRECT?

11 A. TODAY. HE'S OUTGOING.

12 Q. AND IN 2008 WHEN YOU CAME TO WORK YOU AND DR. HUDSON HAD
13 SOME DISCUSSIONS ABOUT HOW MUCH OF A WORK WOULD BE PERMISSIBLE
14 TO POST ON THE ELECTRONIC RESERVE SYSTEM AT GEORGIA STATE THAT
15 WOULD BE ACCESSED BY STUDENTS, CORRECT?

16 A. YES.

17 Q. AND YOU UNDERSTOOD FROM THOSE DISCUSSIONS THAT THERE WAS A
18 12 PERCENT LIMIT ON THE AMOUNT OF WORK YOU COULD USE?

19 A. YES.

20 Q. IF YOU COPIED LESS THAN 12 PERCENT, IT WAS FAIR USE; IS
21 THAT CORRECT?

22 A. AS I UNDERSTOOD IT, THERE WERE MULTIPLE CATEGORIES UNDER
23 WHICH I HAD TO APPLY MY OWN -- THE DOCUMENTS THAT I CHOSE, FOR
24 INSTANCE, THE 12 PERCENT WAS THE VOLUME AMOUNT. BEYOND THAT IT
25 HAD TO BE FOR NONCOMMERCIAL USE. I COULDN'T SELL THE DOCUMENTS

1 TO MY STUDENTS. THAT SEEMED TO BE A BIG ONE AS WELL.

2 OFFHAND, I THINK THAT THAT WAS THE EXTENT OF THE
3 CONVERSATION THAT HE AND I HAD HAD, BUT 12 PERCENT WAS THE
4 BENCHMARK NUMBER THAT HE GAVE ME.

5 Q. OKAY. AND YOU CERTAINLY BELIEVED AT THAT TIME THAT IF YOU
6 USED MORE THAN 12 PERCENT THEN THAT WOULD BE IMPERMISSIBLE AT
7 LEAST AS COMMUNICATED TO YOU BY DR. HUDSON?

8 A. CORRECT.

9 Q. OTHER THAN WHAT DR. HUDSON MAY HAVE RELATED TO YOU, YOU
10 HAD NO OTHER INSTRUCTIONS WITH RESPECT TO COPYRIGHT LAW AND
11 FAIR USE WHEN YOU BECAME AN ASSISTANT PROFESSOR AT GEORGIA
12 STATE; IS THAT CORRECT?

13 A. THAT'S CORRECT.

14 Q. AND YOU'VE HAD NO SPECIAL TRAINING IN COPYRIGHT LAW, HAVE
15 YOU?

16 A. NONE.

17 Q. AND AT LEAST TO YOUR KNOWLEDGE DR. HUDSON HAS NOT EITHER;
18 IS THAT CORRECT?

19 A. NOT TO MY KNOWLEDGE.

20 Q. IN EARLY 2009, FEBRUARY OF 2009, YOU LEARNED THAT A NEW
21 POLICY ON COPYRIGHT HAD BEEN ADOPTED FOR GEORGIA STATE
22 UNIVERSITY; IS THAT CORRECT?

23 A. YES.

24 Q. AND YOU RECEIVED AN E-MAIL THAT REFERENCED THE NEW POLICY
25 AND CONTAINED A LINK TO IT; IS THAT CORRECT?

1 A. YES, I BELIEVE THAT IT WAS IN FEBRUARY OF 2009, BUT I
2 DON'T REMEMBER SPECIFICALLY.

3 MR. KRUGMAN: IF I MAY APPROACH THE WITNESS, YOUR
4 HONOR?

5 THE COURT: YOU MAY.

6 BY MR. KRUGMAN:

7 Q. DR. DAVIS, I'VE HANDED YOU A NOTEBOOK WHICH HAS SOME OF
8 THE DOCUMENTS THAT WE'LL BE LOOKING AT TODAY JUST TO MAKE IT A
9 LITTLE BIT EASIER FOR YOU, AND IF YOU COULD BRING UP JOINT
10 EXHIBIT 4, AND YOU RECALL RECEIVING AT LEAST A DOCUMENT THAT
11 APPEARED SIMILAR TO JOINT EXHIBIT 4 WITH THE E-MAIL THAT YOU
12 RECEIVED ADVISING YOU THAT A NEW POLICY HAD BEEN ADOPTED?

13 A. THAT'S CORRECT.

14 Q. WHEN YOU RECEIVED THE E-MAIL, YOU READ THROUGH THE POLICY,
15 AND YOU PAID ATTENTION TO THE CHECKLIST THAT WAS IN THE POLICY;
16 IS THAT CORRECT?

17 A. THAT'S CORRECT.

18 Q. WHEN YOU RECEIVED THE NEW POLICY, YOU WERE INVITED BY THE
19 UNIVERSITY TO ATTEND A TRAINING SESSION ON THE NEW POLICY; IS
20 THAT CORRECT?

21 A. THAT'S CORRECT.

22 Q. YOU DID NOT UNDERSTAND THAT THERE WAS A REQUIREMENT THAT
23 YOU AS A PROFESSOR AT THE UNIVERSITY ATTEND ONE OF THE TRAINING
24 SESSIONS; IS THAT CORRECT?

25 A. THAT'S CORRECT, I WAS UNDER THE IMPRESSION THAT IT WAS

1 VOLUNTARY.

2 Q. OKAY. YOU SAID YOU HAVE NO SPECIAL TRAINING IN COPYRIGHT
3 LAW, CORRECT?

4 A. THAT'S CORRECT.

5 Q. AND NOTWITHSTANDING THE LACK OF ANY SPECIAL TRAINING
6 IN COPYRIGHT LAW, YOU DECIDED NOT TO ATTEND ANY OF THE
7 TRAINING SESSIONS THAT WERE AVAILABLE TO PROFESSORS; IS THAT
8 CORRECT?

9 A. THAT'S CORRECT.

10 Q. NOW TODAY IF YOU HAD ANY QUESTIONS ABOUT COPYRIGHT POLICY
11 AT GEORGIA STATE, YOU WOULD GO TO YOUR DEPARTMENT HEAD DR. HUGH
12 HUDSON; IS THAT CORRECT?

13 A. YES, I WOULD.

14 Q. AND YOU WOULD DO THAT NOTWITHSTANDING AT LEAST TO YOUR
15 KNOWLEDGE HE HAS NO SPECIAL TRAINING IN COPYRIGHT LAW; IS THAT
16 CORRECT?

17 A. THAT'S CORRECT. I UNDERSTAND -- IT WOULD BE MY
18 UNDERSTANDING THAT IF HE DIDN'T KNOW THE ANSWER TO ONE OF MY
19 QUESTIONS, HE COULD DIRECT ME TOWARD SOMEONE WHO WOULD.

20 Q. YOU'RE NOT SURE WHO THAT SOMEONE WOULD BE, CORRECT?

21 A. NO, NOT OFFHAND.

22 Q. NOW YOU HAVE POSTED OR YOU'VE REQUESTED THE RESERVE STAFF
23 AT THE LIBRARY TO POST IN ELECTRONIC FORM MATERIALS THAT YOU
24 WANT TO USE IN CONNECTION WITH CLASSES THAT YOU HAVE TAUGHT AT
25 GEORGIA STATE; IS THAT CORRECT?

1 A. YES.

2 Q. AND WHEN YOU MAKE THAT REQUEST, IT'S DONE ELECTRONICALLY
3 THROUGH YOUR COMPUTER; IS THAT CORRECT?

4 A. YES.

5 Q. IF YOU CAN BRING UP DEFENDANTS' EXHIBIT 160 WHICH IN
6 EVIDENCE, AND THIS EXHIBIT CONTAINS A SERIES OF SCREENSHOTS
7 THAT A PROFESSOR LIKE YOU WOULD SEE WHEN REQUESTING A WORK TO
8 BE PLACED ON ERESERVE; IS THAT CORRECT?

9 A. YES.

10 Q. AND PAGE 1 IS THE ELECTRONIC RESERVES REQUEST FORM WHICH
11 TELLS YOU THAT BEFORE SUBMITTING A REQUEST FORM YOU MUST
12 DETERMINE UNDER WHAT CIRCUMSTANCES EACH ITEM CAN BE PLACED ON
13 ELECTRONIC RESERVES; IS THAT CORRECT?

14 A. YES.

15 Q. AND NUMBER 1 IS TO CHECK TO SEE IF THE LIBRARY ALREADY HAS
16 A LICENSE FOR THE ELECTRONIC VERSION OF THE JOURNAL OR BOOK; IS
17 THAT CORRECT?

18 A. YES.

19 Q. AND MANY OF THE WORKS THAT YOU ASSIGNED TO STUDENTS AND
20 THE COURSES THAT YOU TEACH AT GEORGIA STATE ARE ARTICLES FROM
21 JOURNALS FOR WHICH THE LIBRARY HAS A LICENSE TO USE THE
22 ELECTRONIC VERSION; IS THAT CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND YOU ALSO ASSIGNED STUDENTS CHAPTERS FROM BOOKS FOR
25 WHICH THE LIBRARY DOES NOT HAVE A LICENSE TO USE THE ELECTRONIC

1 VERSION; IS THAT CORRECT?

2 A. I SUPPOSE. I MEAN I DON'T KNOW -- YES, IT'S TRUE.

3 Q. OKAY. AND THEN UNDER ITEM 2 THAT TALKS ABOUT PUBLICATIONS

4 OR BOOKS THAT MAY BE IN THE PUBLIC DOMAIN, YOU SEE THAT?

5 A. I DO.

6 Q. AND AM I CORRECT THAT IF THE BOOK THAT YOU'RE SEEKING TO

7 HAVE PORTIONS OF COPIED ONTO ERES AND MADE AVAILABLE TO

8 STUDENTS IS NOT IN THE PUBLIC DOMAIN, THE FORM DIRECTS YOU TO

9 USE THE BOARD OF REGENTS FAIR USE CHECKLIST TO DETERMINE IF

10 YOUR USE OF THE ITEM FOR THE COURSE IS CONSIDERED FAIR USE; IS

11 THAT CORRECT?

12 A. THAT'S CORRECT.

13 Q. AND THERE IN BOLD IN PARAGRAPH 3 YOU AS A PROFESSOR ARE

14 INSTRUCTED TO PRINT AND SAVE A COPY OF THE COMPLETED CHECKLIST

15 FOR YOUR RECORDS; IS THAT CORRECT?

16 A. THAT'S CORRECT.

17 Q. AT THE TOP, IF YOU CAN SCROLL UP A LITTLE HIGHER, IT TALKS

18 ABOUT PROVIDING -- I THINK IT'S ON THIS FORM -- BIBLIOGRAPHIC

19 INFORMATION FOR ALL MATERIAL THAT YOU'RE SUBMITTING; IS THAT

20 CORRECT?

21 A. YES.

22 Q. YOU UNDERSTAND THAT'S INFORMATION THAT YOU NEED TO PROVIDE

23 TO THE LIBRARY IN ORDER TO HAVE A PARTICULAR WORK POSTED ON THE

24 ERESERVE SYSTEM; IS THAT CORRECT?

25 A. YES.

1 Q. AND THEN THE FORM STATES -- THERE'S A PLACE WHERE YOU CAN
2 CLICK AGREED THAT YOU AGREE TO FOLLOW THE COPYRIGHT GUIDELINES
3 ESTABLISHED BY THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF
4 GEORGIA, THEN YOU CHECK I AGREE; IS THAT CORRECT?

5 A. YES.

6 Q. AND WHEN YOU HAVE POSTED WORKS ON ELECTRONIC RESERVES, YOU
7 HAVE CLICKED THAT BOX THAT I AGREE TO FOLLOW THE COPYRIGHT
8 GUIDELINES; IS THAT CORRECT?

9 A. YES.

10 Q. AND WHEN YOU CLICK THAT I AGREE THEN THAT TAKES YOU TO A
11 DIFFERENT SECTION ON THE WEBSITE?

12 A. YES.

13 Q. OKAY. IF WE COULD TURN TO PAGE 9 OF THIS EXHIBIT
14 DEFENDANTS' EXHIBIT 160, AND AM I CORRECT THAT THIS IS THE
15 SCREEN YOU FILL IN FOR EACH PORTION OF A BOOK THAT YOU REQUEST
16 OR REQUESTING TO BE POSTED ON ELECTRONIC RESERVE?

17 A. YES.

18 Q. AND YOU SEE YOU HAVE TO FIRST OF ALL KIND OF IN THE MIDDLE
19 AREA YOU HAVE TO PROVIDE CERTAIN INFORMATION ABOUT THE WORK,
20 THE AUTHOR, THE TITLE, THE PUBLISHER, THE YEAR PUBLICATION AND
21 THE CHAPTER OR PAGE NUMBERS THAT YOU ARE REQUESTING BE COPIED
22 ONTO ELECTRONIC RESERVES AND PROVIDED TO STUDENTS?

23 A. YES.

24 Q. NO OTHER INFORMATION ABOUT THE PARTICULAR WORK IS
25 REQUIRED; IS THAT CORRECT?

1 A. OTHER THAN THE INFORMATION THAT'S REQUESTED ON THIS PAGE,
2 YES.

3 Q. UP AT THE TOP YOU HAVE TO CLICK WHETHER THE BOOK IS
4 LIBRARY OWNED, AND IF NOT THE DATE THAT YOU AS THE PROFESSOR
5 WHO PRESUMABLY OWNS THE COPY WOULD DELIVER IT TO THE LIBRARY;
6 IS THAT CORRECT?

7 THE COURT: HASN'T THIS FORM BEEN GONE OVER BEFORE?
8 WHY DO YOU NEED TO READ ALL THIS INTO THE RECORD?

9 MR. KRUGMAN: I'M ABOUT DONE --

10 THE COURT: I MEAN THERE'S A BOTTOM LINE QUESTION
11 HERE SOMEWHERE.

12 BY MR. KRUGMAN:

13 Q. THE BOTTOM LINE IS THAT YOU'RE THEN REQUIRED TO CLICK --
14 BASICALLY CHECK ONE OF THOSE BOOKS FOR BEING PERMITTED TO
15 PROVIDE A COPY OF THE WORK ON ERESERVES TO EACH OF YOUR
16 STUDENTS; IS THAT CORRECT?

17 A. YES.

18 Q. AND AM I CORRECT FOR THE WORKS THAT YOU POSTED TO
19 ELECTRONIC RESERVES DURING 2009 THAT ARE NOT COVERED BY A
20 LICENSE AND FOR WHICH YOU CHECKED THAT YOU HAD COMPLETED A FAIR
21 USE CHECKLIST THAT WAS NOT TRUE, CORRECT?

22 A. I HADN'T PHYSICALLY FILLED OUT A CHECKLIST AND SAVED IT
23 FOR MY RECORDS.

24 Q. NOW YOU'RE FAMILIAR WITH THE CONCEPT OF PERMISSIONS; ARE
25 YOU NOT?

1 A. I AM.

2 Q. AND YOU UNDERSTAND THAT IF YOU'RE SEEKING TO USE A
3 COPYRIGHTED WORK YOU HAVE TO OBTAIN PERMISSION FROM THE
4 COPYRIGHT OWNER, CORRECT?

5 A. YES.

6 Q. AND YOU ARE AWARE THAT COLLECTIVE LICENSING AGENCIES EXIST
7 WHICH GRANT PERMISSIONS FOR WORKS THAT MAY BE OWNED BY MANY
8 DIFFERENT PUBLISHERS OR AUTHORS; IS THAT CORRECT?

9 A. YES.

10 Q. BUT AT LEAST --

11 THE COURT: WHAT WOULD BE SOME EXAMPLES OF THOSE?

12 THE WITNESS: THE EXAMPLE THAT COMES TO MIND

13 IMMEDIATELY IS SOMETHING LIKE ASCAP OR BMI FOR MUSIC.

14 BY MR. KRUGMAN:

15 Q. BUT AT LEAST WHEN YOUR DEPOSITION WAS TAKEN IN THIS CASE I
16 BELIEVE ON APRIL 13TH YOU WERE NOT AWARE OF THE EXISTENCE OF
17 COPYRIGHT CLEARANCE CENTER; IS THAT CORRECT?

18 A. THAT'S CORRECT.

19 Q. AND THAT WAS THE CASE NOTWITHSTANDING THE FACT THAT, IF
20 YOU CAN BRING UP JOINT EXHIBIT 4 AGAIN ON PAGE 15, THAT
21 COPYRIGHT CLEARANCE CENTER WAS EXPRESSLY REFERENCED IN THE
22 POLICY THAT YOU HAD BEEN PROVIDED IN FEBRUARY OF THAT YEAR; IS
23 THAT CORRECT?

24 A. IT'S ON THIS PAGE. I SEE IT, YES.

25 Q. NOW DURING THE FALL 2009 SEMESTER, YOU TAUGHT A HISTORY

- 1 COURSE HISTORY 2010, CORRECT?
- 2 A. NO.
- 3 Q. IT'S NOT -- I APOLOGIZE. BAD TYPING. HISTORY 7010?
- 4 A. YES.
- 5 Q. AND THAT WAS A GRADUATE SEMINAR ISSUES AND INTERPRETATIONS
- 6 IN AMERICAN HISTORY, CORRECT?
- 7 A. THAT'S CORRECT.
- 8 Q. AND YOU WERE ORIGINALLY SCHEDULED TO TEACH TWO SECTIONS OF
- 9 THE CLASS THAT SEMESTER, BUT YOU DID NOT HAVE SUFFICIENT
- 10 ENROLLMENT FOR THE TWO SECTIONS, AND YOU ENDED UP TEACHING ONE;
- 11 IS THAT CORRECT?
- 12 A. THAT'S CORRECT.
- 13 Q. AND THERE WERE APPROXIMATELY 15 STUDENTS ENROLLED IN THE
- 14 SECTION THAT YOU TAUGHT THAT SEMESTER; IS THAT CORRECT?
- 15 A. THAT'S CORRECT.
- 16 Q. AND IF YOU COULD TAKE A LOOK AT PLAINTIFFS' EXHIBIT 512,
- 17 AND IS PLAINTIFFS' EXHIBIT 512 THE FINAL SYLLABUS THAT YOU USED
- 18 FOR THE SEMINAR?
- 19 A. THIS IS MY SYLLABUS, YES.
- 20 Q. AND YOU HAD A HARDCOPY OF THE SYLLABUS AVAILABLE FOR
- 21 STUDENTS ON THE FIRST DAY OF CLASS; IS THAT CORRECT?
- 22 A. THAT'S CORRECT.
- 23 Q. AND YOU ALSO POSTED THE SYLLABUS ON ULEARN; IS THAT
- 24 CORRECT?
- 25 A. THAT'S CORRECT.

1 Q. AND THAT MADE IT AUTOMATICALLY AVAILABLE TO STUDENTS WHO
2 HAD ENROLLED IN THE CLASS; IS THAT CORRECT?

3 A. YES, THAT'S CORRECT.

4 Q. ON PAGE 1 YOU WROTE UNDER OBJECTIVES THAT THIS SEMINAR IS
5 A READING COURSE THAT EXAMINES A SELECTION OF SCHOLARLY WORKS
6 ABOUT THE SOCIAL, CULTURAL, POLITICAL AND ECONOMIC HISTORY OF
7 THE UNITED STATES FROM COLONIZATION TO THE PRESENT; IS THAT
8 CORRECT?

9 A. YES.

10 Q. DOES THAT DESCRIBE THE SEMINAR?

11 A. YES, IT DOES.

12 Q. AND IN THE NEXT PARAGRAPH UNDER OBJECTIVES, YOU WROTE THAT
13 THE MISSION OR OUR MISSION IN THE SEMINAR IS TWOFOLD. ONE IS
14 TO READ EACH OF THESE MONOGRAPHS AND ARTICLES CLOSELY AND
15 CAREFULLY AND TO EVALUATE THEIR ARGUMENTS. I HAVE CHOSEN THESE
16 READINGS NOT ONLY BECAUSE THEY REPRESENT A TOPICAL RANGE BUT
17 ALSO BECAUSE THEY WILL HELP US TO THINK ABOUT DIFFERENT WAYS OF
18 DOING HISTORY.

19 NOW THE READINGS THAT YOU ASSIGNED TO STUDENTS IN THE
20 CLASS IN YOUR VIEW WERE A CRITICAL PART OF THE CLASS, CORRECT?

21 A. YES.

22 Q. AND, IN FACT, YOU BELIEVED THAT THE READINGS WERE THE MOST
23 IMPORTANT PART OF THE CLASS?

24 A. IT WAS MOST IMPORTANT TO ME THAT STUDENTS LEARN HOW TO
25 READ CLOSELY AND CAREFULLY AT THE GRADUATE LEVEL.

1 Q. AND THOSE READINGS WERE EXTREMELY IMPORTANT FOR THAT?

2 A. YES.

3 Q. AND YOU THOUGHT THE WORKS YOU ASSIGNED WERE SUFFICIENTLY
4 IMPORTANT TO MAKE THEM ALL REQUIRED READINGS WITH ONE
5 EXCEPTION, CORRECT?

6 A. YES.

7 Q. AND ULTIMATELY STUDENTS' GRADES WERE IN PART BASED UPON
8 WHETHER THEY HAD ACTUALLY READ THE WORKS AND OTHER ASSIGNMENTS
9 THAT YOU HAD GIVEN THEM?

10 A. IN PART, YES.

11 Q. AND AT VARIOUS TIMES THROUGHOUT THE SEMESTER THE STUDENTS
12 WERE EXPECTED TO PREPARE A TIMELINE OF U.S. HISTORY, SHORT
13 ESSAY AND THREE PAPERS EACH BASED UPON VARIOUS WORKS ASSIGNED
14 TO THEM; IS THAT CORRECT?

15 A. YES, THE FIRST THREE ASSIGNMENTS, THE TIMELINE AND SHORT
16 ESSAY, EACH OF THOSE WERE OBLIGATORY. THE THREE PAPERS THAT
17 THEY WROTE OVER THE COURSE OF THE SEMESTER WAS OF THEIR
18 CHOOSING.

19 Q. THEY COULD SELECT WHICH WORKS TO WRITE PAPERS ON BUT WERE
20 EXPECTED TO READ ALL OF THEM, CORRECT?

21 A. CORRECT.

22 Q. AND THE STUDENTS' GRADES ULTIMATELY WERE BASED AT LEAST IN
23 PART ON YOUR EVALUATION OF THEIR WRITTEN WORK PRODUCT AFTER
24 HAVING READ THE WORKS ASSIGNED TO THEM?

25 A. THAT'S CORRECT.

1 Q. AND THE STUDENTS WERE REQUIRED TO BRING WITH THEM A
2 DISCUSSION QUESTION FOR THE CLASS BASED UPON EACH DAY'S
3 READINGS, CORRECT?

4 A. YES, THAT'S CORRECT.

5 Q. AND THEY WERE ALSO REQUIRED TO BRING TO CLASS A COPY OF
6 EACH OF THE WORKS ASSIGNED FOR EACH WEEK, CORRECT?

7 A. YES.

8 Q. TURN TO PAGE 3 OF EXHIBIT 512 UNDER THE THIRD BULLET POINT
9 AT THE BOTTOM, YOU WROTE THAT YOU MUST ALWAYS BRING THAT DAY'S
10 ASSIGNED TEXT TO CLASS. THIS IS CRUCIAL SINCE THE BULK OF OUR
11 TIME TOGETHER WILL BE SPENT DISCUSSING THE LANGUAGE THESE TEXTS
12 AND YOU WILL NEED TO BE ABLE TO REFER DIRECTLY TO THEM IN ORDER
13 TO PARTICIPATE INTELLIGENTLY; IS THAT CORRECT?

14 A. THAT'S WHAT IT SAYS.

15 Q. NOW THIS SEMINAR AND PRESUMABLY OTHERS THEY'RE TAUGHT IN A
16 TECHNOLOGY FREE ENVIRONMENT?

17 A. I CAN'T SPEAK FOR OTHERS. ALL I KNOW IS THAT WITH
18 THE EXCEPTION OF STUDENTS WHO HAVE SOME SORT OF DISABILITY
19 THAT REQUIRES THEM TO HAVE ELECTRONIC DEVICES, NO LAPTOPS
20 ALLOWED.

21 Q. MY QUESTION MAY HAVE BEEN LITTLE BIT VAGUE, BUT AT
22 LEAST FOR YOUR COURSES YOU LIKE TO HAVE A TECHNOLOGY FREE
23 CLASSROOM?

24 A. I DO.

25 Q. AND AS STATED ON PAGE 2 OF THE SYLLABUS, THE LAST BULLET

1 POINT ON PAGE 2 -- I'M SORRY, THE SECOND TO THE LAST BULLET
2 POINT, THAT ALL CELLPHONES, BLACKBERRIES, COMPUTERS, IPODS AND
3 OTHER ELECTRONIC DEVICES MUST BE TURNED OFF FOR THE ENTIRETY OF
4 THE CLASS MEETING.

5 AND TO THE EXTENT THAT STUDENTS ACCESSED ANY OF THE
6 ASSIGNED TEXTS USING THE ERESERVE SYSTEM AT GEORGIA STATE IT
7 WAS YOUR EXPECTATION THAT THOSE STUDENTS WOULD PRINTOUT THE
8 ASSIGNED WORK AND BRING THAT WORK WITH THEM TO CLASS; IS THAT
9 CORRECT?

10 A. FOR THE ESSAYS ASSIGNED, NOT FOR THE BOOKS.

11 Q. THEY HAD SOME BOOKS THEY WOULD PURCHASE, BUT THEN THERE
12 WERE READINGS AVAILABLE ON ELECTRONIC RESERVE THAT YOU EXPECTED
13 THE STUDENTS TO PRINT THOSE OUT AND BRING THE PHYSICAL COPY
14 WITH THEM TO CLASS?

15 A. YES.

16 Q. AND, IN FACT, THE STUDENTS DID THAT, IS THAT CORRECT,
17 BASED ON YOUR OBSERVATIONS?

18 A. BASED UPON MY OBSERVATION, YES.

19 Q. NOW ALL OF THE READINGS LISTED ON THE SYLLABUS WITH THE
20 EXCEPTION OF A BOOK THAT'S REFERENCED ON PAGE 3 IN THE MIDDLE
21 THE GREAT REPUBLIC, A HISTORY OF AMERICAN PEOPLE, WERE REQUIRED
22 READINGS?

23 A. YES.

24 Q. AND THAT WAS SIMPLY RECOMMENDED FOR THE STUDENTS; IS THAT
25 CORRECT?

1 A. THAT'S CORRECT.

2 Q. AND THEN AT THE FINAL BULLET POINT ON PAGE 3, YOU ADVISE
3 THE STUDENTS THAT ALL OF THE ASSIGNED BOOKS ARE AVAILABLE FOR
4 PURCHASE AT THE GEORGIA STATE BOOKSTORE. THEY ARE ALSO ON
5 RESERVE AT THE UNIVERSITY LIBRARY, AND THEN ANY ADDITIONAL
6 READINGS ARE AVAILABLE AT ERESERVE OR WILL BE DISTRIBUTED AS
7 HANDOUTS?

8 A. THAT'S CORRECT.

9 Q. AND ALL THOSE ADDITIONAL READINGS WERE REQUIRED READINGS
10 FOR THE COURSE; IS THAT CORRECT?

11 A. YES.

12 Q. NOW IF YOU COULD TURN TO PAGE 5 OF THE SYLLABUS, AND ONE
13 OF THE -- THIS IS FOR THE OCTOBER 7TH CLASS. ONE OF THE
14 REQUIRED READINGS WAS A PORTION OF A BOOK BY LAWRENCE LEVINE;
15 IS THAT CORRECT?

16 A. THAT'S CORRECT.

17 Q. AND THIS WAS A CHAPTER OF THAT BOOK ENTITLED SLAVE SONGS
18 AND SLAVE CONSCIOUSNESS, AN EXPLORATION IN NEGLECTED SOURCES;
19 IS THAT CORRECT?

20 A. THAT'S CORRECT.

21 Q. AND TAMARA HAREVEN WAS THE EDITOR OF THAT BOOK; IS THAT
22 CORRECT?

23 A. THAT MIGHT BE AN ERROR ON MY PART. IT'S DEFINITELY FROM
24 THE UNPREDICTABLE PAST.

25 MR. KRUGMAN: IF I MAY APPROACH THE WITNESS?

1 THE COURT: YOU MAY.

2 BY MR. KRUGMAN:

3 Q. AND IS PLAINTIFFS' EXHIBIT 948 A COPY OF THE UNPREDICTABLE
4 PAST?

5 A. YES, IT IS.

6 Q. IT'S NOT IMPORTANT ABOUT THE EDITOR HERE, BUT IT WAS
7 PUBLISHED BY OXFORD UNIVERSITY PRESS; IS THAT CORRECT?

8 A. YES.

9 Q. AND YOU ASSIGNED PAGES 35 TO 58?

10 A. YES.

11 Q. AND THAT WAS A COMPLETE CHAPTER OF THE BOOK, CORRECT?

12 A. YES.

13 Q. IF YOU CAN NOW TAKE A LOOK AT PLAINTIFFS' EXHIBIT 945, AND
14 TELL ME WHEN YOU'RE READY?

15 A. I AM READY.

16 Q. THIS IS A COPY OF AN E-MAIL EXCHANGE BETWEEN YOU AND THE
17 LIBRARY RESERVE STAFF AT GEORGIA STATE WITH RESPECT TO THE
18 MATERIALS THAT YOU REQUESTED BE MADE AVAILABLE TO STUDENTS ON
19 ELECTRONIC RESERVE FOR THIS CLASS THAT WE'RE TALKING ABOUT FOR
20 THE FALL OF 2009; IS THAT CORRECT?

21 A. THAT'S CORRECT.

22 Q. THE TOP E-MAIL IS DATED JUNE 9TH OF 2009, AND THAT CAME
23 FROM THE RESERVE STAFF AND PROVIDED YOU WITH THE PASSWORD FOR
24 STUDENTS TO ACCESS THE MATERIALS; IS THAT CORRECT?

25 A. YES.

1 Q. BELOW THAT IN THE PORTION DATED APRIL 28TH, 2009 AND THEN
2 BELOW THAT IS BASICALLY THE VARIOUS WORKS THAT YOU REQUESTED
3 THE LIBRARY TO POST ON ERESERVE FOR THIS COURSE; IS THAT
4 CORRECT?

5 A. YES, THAT'S CORRECT.

6 Q. AND IF YOU TURN TO THE THIRD PAGE OF THIS EXHIBIT UNDER
7 ELECTRONIC BOOK, THERE'S INFORMATION FOR THE CHAPTER PROVIDED
8 FROM THE LAWRENCE LEVINE WORK THAT WAS A REQUIRED READING FOR
9 THE COURSE; IS THAT CORRECT?

10 A. YES.

11 Q. AND IF YOU'LL SCROLL BACK TO THE PAGE RIGHT BEFORE THAT AT
12 THE VERY BOTTOM OF PAGE 2 THAT LAST LINE WHERE IT SAYS UNDER
13 COPYRIGHT STATUS IT FALLS UNDER FAIR USE ACCORDING TO THE FAIR
14 USE CHECKLIST I COMPLETED; DO YOU SEE THAT?

15 A. YES.

16 Q. AND, IN FACT, YOU HAD NOT COMPLETED A CHECKLIST?

17 A. I HADN'T WRITTEN OUT A CHECKLIST, BUT I DID USE THE
18 CHECKLIST IN THE PROCESS OF PUTTING THINGS ONLINE.

19 Q. NOW WITH RESPECT TO THE LEVINE WORK YOU'RE NOT AWARE OF
20 ANY PAYMENT HAVING BEEN MADE TO THE PUBLISHER FOR THE
21 PERMISSION TO PROVIDE COPIES OF THIS WORK TO STUDENTS ON
22 ELECTRONIC RESERVE; IS THAT CORRECT?

23 A. I'M NOT AWARE.

24 Q. AND YOU CERTAINLY DIDN'T MAKE ANY PAYMENT?

25 A. NO, I DIDN'T.

- 1 Q. AND YOU DID NOT SEEK PERMISSION FOR ITS USE EITHER
2 DIRECTLY FROM THE PUBLISHER OR THROUGH A LICENSING AGENCY,
3 CORRECT?
- 4 A. NO, I DIDN'T, THAT'S CORRECT.
- 5 Q. TURN BACK TO PAGE 4 OF THE SYLLABUS, IF YOU WOULD PLEASE,
6 WHICH IS PLAINTIFFS' EXHIBIT 552?
- 7 A. 552?
- 8 Q. I'M SORRY, 948 -- NO, IT IS 512, PAGE 4 OF THE SYLLABUS.
9 A. OKAY.
- 10 Q. AND ONE OF THE REQUIRED READINGS FOR THE SEPTEMBER 16TH
11 CLASS WAS A WORK BY BARBARA JEANNE FIELDS, IDEOLOGY AND RACE IN
12 AMERICAN HISTORY; IS THAT CORRECT?
- 13 A. THAT'S CORRECT.
- 14 Q. AND THAT WAS FROM A BOOK PUBLISHED BY OXFORD UNIVERSITY
15 PRESS REGION RACE AND RECONSTRUCTION ESSAYS IN HONOR OF C. VANN
16 WOODWARD; IS THAT CORRECT?
- 17 A. YES.
- 18 Q. EDITED BY KOWSER AND MCPHERSON?
- 19 A. YES.
- 20 Q. AND YOU ASSIGNED PAGES 143 TO 177 OF THIS BOOK; IS THAT
21 CORRECT?
- 22 A. YES.
- 23 Q. AND THAT WAS A COMPLETE CHAPTER OF THE BOOK; IS THAT
24 CORRECT?
- 25 A. IT WAS AN ESSAY IN A COLLECTION OF ESSAYS.

1 Q. AND THOSE PAGES THAT WAS THE ONLY ESSAY THAT WAS AUTHORED
2 BY BARBARA JEANNE FIELDS IN THE BOOK; IS THAT CORRECT?

3 A. THAT'S CORRECT.

4 Q. AND YOU DID NOT COMPLETE A FAIR USE CHECKLIST PHYSICALLY
5 FOR THIS WORK?

6 A. THAT'S CORRECT, PHYSICALLY I DID NOT.

7 Q. AND FOR THIS NO PERMISSIONS WERE PAID FOR USE OF THE WORK;
8 IS THAT CORRECT?

9 A. AS FAR AS I KNOW.

10 Q. AND AS YOU'VE INDICATED STUDENTS WERE EXPECTED TO PRINT
11 AND BRING A COPY OF THIS WORK.

12 IF YOU CAN TURN TO PAGE 4 OF THE SYLLABUS FOR THE
13 SEPTEMBER 23RD CLASS, YOU ASSIGNED A WORK BY GARY NASH ENTITLED
14 SOCIAL CHANGE AND THE GROWTH OF PREREVOLUTIONARY URBAN
15 RADICALISM; IS THAT CORRECT?

16 MR. MILLER: OBJECTION, YOUR HONOR, THIS IS OUTSIDE
17 THE SCOPE OF THE WORKS ON THE JOINT FILING.

18 MR. KRUGMAN: YOUR HONOR, WE'RE OFFERING IT FOR THE
19 POINT THAT MR. RICH MADE AFTER THE FIRST BREAK IN THE MORNING
20 TO DEMONSTRATE THAT ESSENTIALLY WHAT THE PROFESSOR HAS DONE IS
21 CREATED A DIGITAL COURSEPACK OR ANTHOLOGY BY USING THE
22 PLAINTIFFS' WORKS ALONG WITH THE WORKS OF OTHER PUBLISHERS.

23 THE COURT: OBJECTION SUSTAINED.

24 MR. KRUGMAN: AND JUST TO MAKE THE RECORD, THERE'S
25 ANOTHER WORK BY MR. NASH THAT'S REFLECTED ON THE SYLLABUS.

1 MR. MILLER: SAME OBJECTION.

2 THE COURT: SUSTAINED.

3 BY MR. KRUGMAN:

4 Q. YOU CURRENTLY HAVE NO UNDERSTANDING OF WHO ENFORCES
5 COPYRIGHT POLICY AT GEORGIA STATE; IS THAT CORRECT?

6 A. THAT'S CORRECT. I ASSUME THAT IT'S LEGAL AFFAIRS, BUT I
7 DON'T KNOW FOR SURE.

8 Q. AND YOU DON'T KNOW WHAT THE CONSEQUENCES WOULD BE FROM A
9 FAILURE TO FOLLOW THE POLICY; IS THAT CORRECT?

10 A. NO, I DON'T, THAT'S CORRECT.

11 Q. BUT IT'S TRUE THAT IF THE PRESIDENT OF THE UNIVERSITY OR
12 THE PROVOST OR THE DEAN OF LIBRARIES OR THE BOARD OF REGENTS
13 DIRECTED YOU TO REMOVE CERTAIN WORKS FROM THE ELECTRONIC
14 RESERVE SYSTEM YOU WOULD COMPLY WITH THAT DIRECTIVE, CORRECT?

15 A. THIS IS SOMETHING THAT WE HAD TALKED ABOUT IN MY
16 DEPOSITION, AND WHAT I SAID AND I STILL FEEL THIS TO BE THE
17 CASE IS THAT THE FIRST THING THAT I WOULD IS COMPLY, AND THEN I
18 WOULD GO TO HUGH HUDSON, THE CHAIR OF MY DEPARTMENT, AND
19 INVESTIGATE FURTHER HOW I HAD FAILED TO COMPLY AND TO, YOU
20 KNOW, JUST SEE IF I COULD LEARN SOMETHING OR IF IN FACT I HAD
21 COMPLIED AND IF I NEEDED TO ACT FURTHER.

22 Q. BUT THE FIRST THING YOU WOULD DO IS COMPLY?

23 A. THAT'S TRUE.

24 Q. YOU ARE FAMILIAR WITH COURSEPACKS, ARE YOU NOT?

25 A. YES, I AM.

1 Q. IT'S A SELECTION OF READINGS CHOSEN BY A PROFESSOR
2 COLLECTED AND PRINTED BOUND TOGETHER AND MADE AVAILABLE TO
3 STUDENTS FOR PURCHASE AT BOOKSTORES; IS THAT CORRECT?

4 A. YES.

5 Q. YOU HAVE NOT USED COURSEPACKS AS A PROFESSOR; IS THAT
6 CORRECT?

7 A. NEVER HAVE.

8 Q. AND THE REASON IS THAT ELECTRONIC RESERVES WERE AVAILABLE
9 AND YOU LIKE PROVIDING READINGS TO STUDENTS ELECTRONICALLY; IS
10 THAT CORRECT?

11 A. THAT'S CORRECT.

12 Q. NOW OTHER THAN THE FACT THAT ONE IS MADE AVAILABLE
13 ELECTRONICALLY AND THE OTHER IS BOUND IN HARDCOPY, YOU SEE NO
14 FUNCTIONAL DIFFERENCE BETWEEN PROVIDING READINGS TO STUDENTS
15 USING ELECTRONIC RESERVE AND PROVIDING THE READINGS AS A
16 PHYSICAL COURSEPACK, CORRECT?

17 A. THAT'S TRUE.

18 Q. AND DO YOU UNDERSTAND THAT WITH RESPECT TO A PHYSICAL
19 COURSEPACK THAT PERMISSIONS ARE PAID TO THE COPYRIGHT HOLDER
20 FOR PERMISSION TO USE THOSE WORKS IN THE PHYSICAL COURSEPACK?

21 A. HONESTLY I HAVEN'T INVESTIGATED THE COURSEPACK SITUATION
22 DEEPLY ENOUGH TO KNOW HOW THAT WOULD WORK.

23 Q. BUT YOU KNOW WITH RESPECT TO THE ELECTRONIC RESERVES USE
24 OF EXCERPTS FROM COPYRIGHTED MATERIALS, BOOKS, IT'S YOUR
25 UNDERSTANDING THAT PERMISSIONS ARE NOT PAID; IS THAT CORRECT?

1 A. THAT'S MY UNDERSTANDING.

2 Q. NOW YOU'VE USED THE ULEARN SYSTEM AT GEORGIA STATE; HAVE
3 YOU NOT?

4 A. I HAVE.

5 Q. AND YOU WERE ABLE AS A PROFESSOR TO POST COPIES OF
6 ARTICLES AND OTHER WORKS ON THE ULEARN SYSTEM; IS THAT CORRECT?

7 A. THAT'S CORRECT.

8 Q. AND ULEARN POSTINGS ARE SOMETHING THAT YOU DO PERSONALLY
9 WITHOUT ANY INVOLVEMENT BY THE LIBRARY?

10 A. THAT'S TRUE, THERE'S NO MEDIATOR.

11 Q. IF YOU WANT TO POST MATERIAL, AN ARTICLE ON ULEARN, YOU
12 SCAN THE ARTICLE, DOWNLOAD THE PDF AND THEN UPLOAD THE PDF TO
13 THE ULEARN SYSTEM; IS THAT CORRECT?

14 A. THAT'S CORRECT.

15 Q. AND YOU FOLLOW THE SAME PROCESS IF YOU WANT TO POST A
16 CHAPTER OF A BOOK ON ULEARN, YOU SCAN IT, CREATE THE PDF AND
17 THEN UPLOAD IT; IS THAT CORRECT?

18 A. YES.

19 Q. NOW IT'S YOUR UNDERSTANDING THAT THE CHECKLIST APPLIES TO
20 ALL COPYRIGHTED MATERIALS THAT ARE BEING POSTED AND MADE
21 AVAILABLE TO STUDENTS WHETHER ON ERES OR ULEARN, CORRECT?

22 A. THAT'S HOW I MADE THE CHOICES OF WHAT I PUT ON ULEARN,
23 YES.

24 Q. BUT IT'S ALSO YOUR UNDERSTANDING THAT YOU'RE NOT REQUIRED
25 TO COMPLETE A CHECKLIST PRIOR TO POSTING MATERIALS ON ULEARN;

1 IS THAT CORRECT?

2 A. YES, ALTHOUGH MY UNDERSTANDING IS THAT SINCE THE RULES
3 APPLY REGARDLESS OF THE MEDIUM, THE RULES APPLY. SO THOUGH I'M
4 NOT PHYSICALLY OBLIGATED TO FILL OUT THE CHECKLIST FOR ULEARN,
5 I'M OBLIGATED TO FOLLOW THOSE RULES.

6 Q. I UNDERSTAND AND, IN FACT, WHEN YOU'VE POSTED MATERIALS ON
7 ULEARN, COPYRIGHTED MATERIALS ON ULEARN YOU'VE NOT ACTUALLY
8 PHYSICALLY FILLED OUT A CHECKLIST FOR THOSE MATERIALS; IS THAT
9 CORRECT?

10 A. THAT IS CORRECT.

11 Q. FOR ONE OF YOUR COURSES YOU POSTED A COMPLETE SHORT STORY
12 ON ULEARN; IS THAT CORRECT?

13 A. THAT IS CORRECT.

14 Q. THE SHORT STORY IS FROM PHILLIP ROTH'S BOOK GOOD-BYE
15 COLUMBUS IT IS ENTITLED DEFENDER OF THE FAITH; IS THAT CORRECT?

16 MR. MILLER: OBJECTION, YOUR HONOR, SAME OBJECTION
17 THIS WORK IS OUTSIDE THE SCOPE OF THE WORKS ON THE JOINT
18 FILING.

19 MR. KRUGMAN: YOUR HONOR, THE PROFESSOR -- I'LL TELL
20 YOU WHAT THE POINT IS AND THEN YOUR HONOR CAN RULE. PROFESSOR
21 DAVIS UTILIZED THE ULEARN SYSTEM TO POST A COMPLETE SHORT
22 STORY, A FICTIONAL WORK ON THE ULEARN SYSTEM AND MADE IT
23 AVAILABLE TO ALL THE STUDENTS IN THE CLASS.

24 THE CHECKLIST, THE FAIR USE CHECKLIST SEEMS TO MAKE A
25 CONTRAST BETWEEN WORKS OF NONFICTION AND WORKS OF FICTION, AND

1 THAT'S A POINT THAT DEFENDANTS HAVE MADE THROUGHOUT THE CASE,
2 AND I THINK I'M ENTITLED TO AT LEAST PROVIDE THE EVIDENCE OF
3 THIS PROFESSOR DAVIS HAVING -- BASED ON HER OWN TESTIMONY
4 CONSIDERED THE FAIR USE CHECKLIST AND NONETHELESS POSTED THIS
5 MATERIAL ON ULEARN FOR ONE OF HER CLASSES.

6 THE COURT: NOW I TAKE IT THIS IS NOT A PUBLICATION
7 THAT WAS PUT OUT BY ONE OF OUR PLAINTIFFS?

8 MR. KRUGMAN: NO, YOUR HONOR.

9 THE COURT: AND SO YOUR POINT IN THIS IS JUST TO SHOW
10 WHAT HER UNDERSTANDING OF THE FICTION VERSUS NONFICTION
11 CATEGORY?

12 MR. KRUGMAN: REALLY TO PROVIDE FURTHER EVIDENCE THAT
13 TO THE EXTENT THAT THE PROFESSOR DID IN FACT COMPLETE MENTALLY
14 THE CHECKLIST THAT EVEN WITH A CREATIVE WORK OF FICTION SHE
15 STILL CONCLUDED THAT IT COMPORTED WITH FAIR USE.

16 MR. MILLER: YOUR HONOR, I THINK IF THEY WANT TO
17 ESTABLISH HOW SHE THINKS ABOUT THE FAIR USE CHECKLIST, THEY CAN
18 JUST ASK HER HOW SHE THINKS ABOUT THE FAIR USE CHECKLIST. I
19 DON'T THINK THERE'S ANY NEED TO GO TO WORKS OUTSIDE THE JOINT
20 FILING AND OUTSIDE THE SCOPE OF THIS COURT'S ORDER ON MOTION IN
21 LIMINE TO DO SO.

22 THE COURT: OBJECTION SUSTAINED.

23 MR. KRUGMAN: JUST TO COMPLETE MY PROFFER, THE
24 TESTIMONY WOULD BE THAT SHE DID NOT COMPLETE A FAIR USE
25 CHECKLIST FOR THE WORK AS REQUIRED BY THE POLICY, BUT SHE HAD

1 LOOKED AT THE CHECKLIST IN THE PAST AND FELT CONFIDENT THAT THE
2 CHAPTER WAS COMPLIANT.

3 THE COURT: ALL RIGHT. THANK YOU.

4 BY MR. KRUGMAN:

5 Q. YOU'VE WRITTEN A BOOK THAT IS SCHEDULED FOR PUBLICATION
6 LATER THIS YEAR; IS THAT CORRECT?

7 A. THAT'S CORRECT.

8 Q. IF YOU CAN TAKE A LOOK AT PLAINTIFFS' EXHIBIT 944 AND IS
9 THIS A COPY OF YOUR CV AT LEAST AS OF -- IT SHOWS REVISED
10 JANUARY 11, 2011 WHICH WAS JANUARY OF THIS YEAR?

11 A. THAT'S CORRECT.

12 Q. AND IF YOU LOOK UNDER PUBLICATIONS, YOUR CV SHOWS THAT YOU
13 HAVE A PUBLICATION THAT WILL BE COMING OUT IN LATE 2011, A BOOK
14 CALLED JEWS AND BOOZE, ETHNICITY AND COMMERCE IN THE
15 PROHIBITION ERA TO BE PUBLISHED BY NEW YORK UNIVERSITY PRESS;
16 IS THAT CORRECT?

17 A. THAT'S CORRECT. THE SUBTITLE HAS CHANGED SINCE JANUARY
18 BUT JEWS AND BOOZE REMAINS.

19 Q. I WILL REFRAIN FROM COMMENTING ON IT, YOUR HONOR.

20 YOU SIGNED A CONTRACT WITH THE PUBLISHER OF THE BOOK
21 NEW YORK UNIVERSITY PRESS; IS THAT CORRECT?

22 A. I DID.

23 Q. AND AS REFLECTED ON YOUR CV, WHEN YOU ENTERED INTO THE
24 CONTRACT THE TITLE WAS TO BE JEWS AND BOOZE, ETHNICITY AND
25 COMMERCE IN THE PROHIBITION ERA; IS THAT CORRECT?

1 A. YES.

2 Q. AND BY THE TIME OF PUBLICATION THAT TITLE HAS CHANGED

3 SOMEWHAT?

4 A. WELL, THE PUBLICATION IS GOING TO BE HAPPENING IN

5 DECEMBER, BUT IT CHANGED AROUND MARCH.

6 Q. AROUND MARCH OF THIS YEAR?

7 A. YES.

8 Q. SO FROM THE TIME OF CONTRACTING UNTIL THE DATE OF

9 PUBLICATION THE NAME OF THE WORK CHANGED?

10 A. YES, THAT HAPPENS FREQUENTLY.

11 Q. NOW THE TITLE IS NOW BECOMING AMERICAN IN THE AGE OF

12 PROHIBITION --

13 A. JEWS AND BOOZE BECOMING AMERICAN IN THE AGE OF

14 PROHIBITION.

15 Q. AND THE SUBJECT OF THIS WORK IS THE HISTORY OF JEWISH

16 INVOLVEMENT IN THE AMERICAN ALCOHOL TRADE?

17 A. IN PART, YES.

18 Q. AND IT'S ALSO IN PART ABOUT THE HISTORY AND THE

19 INTERACTIONS BETWEEN AMERICAN JEWS AND TEMPERANCE AND

20 PROHIBITION MOVEMENTS; IS THAT CORRECT?

21 A. THAT'S CORRECT.

22 Q. AND HOW ANTIALCOHOL IDEOLOGY AFFECTED AMERICAN JEWISH

23 CULTURATION OVER THE PERIOD OF THE AMERICAN REVOLUTION; IS THAT

24 CORRECT?

25 A. NO, IN THE LATE 19TH AND EARLY 20TH CENTURY.

1 Q. OKAY. NOW YOU CONSIDER THIS BOOK TO BE A WORK OF
2 NONFICTION, CORRECT?
3 A. YES.
4 Q. IT CONTAINS YOUR ORIGINAL ANALYSIS ON THE SUBJECT MATTER,
5 CORRECT?
6 A. YES.
7 Q. IT'S NOT SIMPLY A RECITATION OF FACTS, CORRECT?
8 A. THAT'S CORRECT.
9 Q. AND YOU WOULD DESCRIBE THE EXPRESSION AND ANALYSIS IN THIS
10 BOOK AS CREATIVE, CORRECT?
11 A. SURE, I GUESS IT DEPENDS ON HOW YOU DEFINE CREATIVE,
12 THOUGH.
13 Q. HOW WOULD YOU DEFINE CREATIVE WITHOUT REFERENCE TO THE
14 CHECKLIST?
15 A. OKAY. WITHOUT REFERENCE TO THE CHECKLIST, THEN, YES, IT
16 IS INTERPRETATIVE I GUESS I WOULD SAY IN THAT IT REQUIRES SOME
17 AMOUNT OF CREATIVITY.
18 Q. AND YOU WOULD AGREE THAT THE FACT THAT IT'S NONFICTION
19 DOES NOT DISQUALIFY IT FROM BEING CREATIVE AT LEAST UNDER YOUR
20 DEFINITION?
21 A. YES.
22 Q. NOW THE PUBLISHER OF THE BOOK IS NEW YORK UNIVERSITY
23 PRESS. THAT'S A UNIVERSITY PRESS; IS THAT CORRECT?
24 A. THAT'S CORRECT.
25 Q. ALONG THE LINES OF TWO OF THE PLAINTIFFS IN THIS CASE

1 CAMBRIDGE UNIVERSITY PRESS AND OXFORD UNIVERSITY PRESS; IS THAT
2 CORRECT?

3 A. YES.

4 Q. AND IN YOUR VIEW NEW YORK UNIVERSITY PRESS IS PROVIDING A
5 VALUABLE SERVICE THAT WILL ALLOW YOUR BOOK TO BE MADE AVAILABLE
6 TO OTHERS IN ACADEMIA?

7 A. YES.

8 Q. BOTH STUDENTS AND FACULTY?

9 A. YES.

10 Q. AND A LARGE PERCENTAGE OF ACADEMIC WORKS THAT ARE USED BY
11 PROFESSORS SUCH AS YOURSELF ARE PUBLISHED IN UNIVERSITY PRESSES
12 SUCH AS NYU, OXFORD AND CAMBRIDGE?

13 MR. MILLER: OBJECTION, YOUR HONOR, ASKING FOR
14 SPECULATION.

15 BY MR. KRUGMAN:

16 Q. IT'S YOUR UNDERSTANDING, IS IT NOT, PROFESSOR DAVIS, THAT
17 A LARGE PERCENTAGE OF ACADEMIC WORKS THAT ARE USED BY
18 PROFESSORS SUCH AS YOURSELF ARE PUBLISHED IN UNIVERSITY PRESSES
19 SUCH AS OXFORD, CAMBRIDGE --

20 THE COURT: WHAT DO YOU MEAN BY SUCH AS, THAT'S --

21 MR. KRUGMAN: OKAY. THERE ARE SCORES OF UNIVERSITY
22 PRESSES AND THAT'S ALL I'M ASKING. IT'S NOT A CRITICAL POINT.

23 THE COURT: YOU MEAN THAT A LOT OF ACADEMIC WORKS ARE
24 PUBLISHED IN --

25 MR. KRUGMAN: UNIVERSITY PRESSES.

1 THE COURT: OKAY.

2 MR. KRUGMAN: MAYBE THAT'S A BETTER WAY. IS THAT
3 CORRECT BASED ON YOUR UNDERSTANDING?

4 THE WITNESS: COULD YOU REPEAT THE QUESTION?

5 BY MR. KRUGMAN:

6 Q. IS IT YOUR UNDERSTANDING THAT A LARGE PERCENTAGE OF
7 ACADEMIC WORKS THAT ARE USED BY PROFESSORS SUCH AS YOURSELF ARE
8 PUBLISHED BY UNIVERSITY PRESSES?

9 A. A LARGE PERCENTAGE I CAN'T SAY. I MEAN I DON'T KNOW EXACT
10 STATISTICS BECAUSE ACADEMICS DO PUBLISH ON TRADE PRESSES AND SO
11 ON, BUT I WOULD SAY THAT THERE ARE -- YOU KNOW, THAT IS
12 SOMETHING THAT HAPPENS FREQUENTLY.

13 MR. KRUGMAN: IF I MAY APPROACH, YOUR HONOR?

14 THE COURT: YES.

15 BY MR. KRUGMAN:

16 Q. I'VE HANDED YOU A COPY OF YOUR DEPOSITION IN THIS CASE,
17 AND YOU RECALL YOUR DEPOSITION BEING TAKEN IN THIS CASE ON
18 APRIL 13TH, 2011?

19 A. YES.

20 Q. IF YOU COULD TURN TO PAGE 22, LINES 13 TO 19, AND YOU WERE
21 ASKED THE FOLLOWING QUESTION.

22 (EXCERPT OF VIDEOTAPED DEPOSITION WAS PLAYED IN OPEN
23 COURT.)

24 BY MR. KRUGMAN:

25 Q. WAS THAT YOUR TESTIMONY IN YOUR DEPOSITION?

1 A. YES.

2 Q. YOU ARE HOPEFUL THAT THIS BOOK THAT IS COMING OUT AT THE
3 END OF 2011 A CREATIVE WORK OF NONFICTION WILL ENHANCE YOUR
4 REPUTATION AND HELP YOU ATTAIN TENURE AS A PROFESSOR OF HISTORY
5 AT GEORGIA STATE; IS THAT CORRECT?

6 A. YES.

7 Q. AND IT'S A BENEFIT TO YOU AS A PROFESSOR TO HAVE
8 UNIVERSITY PUBLISHERS SUCH AS NYU, OXFORD, CAMBRIDGE AVAILABLE
9 TO PUBLISH AND RELEASE THE COMPILATION OF CHAPTERS THAT MAKE UP
10 THE BODY OF WORK THAT IS CONTAINED IN YOUR FORTHCOMING BOOK?

11 A. YES.

12 Q. NOW IF PUBLISHERS WERE NOT AVAILABLE, IF THE UNIVERSITY
13 PUBLISHERS AND OTHERS WERE NOT AVAILABLE TO PUBLISH AND RELEASE
14 ACADEMIC BOOKS SUCH AS YOURS, ONE OPTION YOU WOULD HAVE WOULD
15 BE TO SEEK TO PUBLISH THE INDIVIDUAL CHAPTERS IN ACADEMIC
16 JOURNALS; IS THAT CORRECT?

17 A. THAT'S CORRECT.

18 Q. AND, IN FACT, TWO OF THE CHAPTERS IN YOUR UPCOMING BOOK
19 ALREADY ARE FREESTANDING JOURNALS -- EXCUSE ME, ARE ALREADY
20 FREESTANDING ARTICLES IN JOURNALS; IS THAT CORRECT?

21 A. ONE IS IN A JOURNAL. ONE WILL BE IN A COLLECTION OF
22 ESSAYS THAT WILL BE RELEASED NEXT YEAR.

23 Q. OKAY. SO ONE OF THOSE IS IN A JOURNAL. WHAT IS THAT
24 JOURNAL?

25 A. AMERICAN JEWISH HISTORY.

1 Q. AND IF LET'S SAY THAT NEW YORK UNIVERSITY PRESS WENT UNDER
2 AND WAS NOT AVAILABLE TO PUBLISH YOUR BOOK, WHAT YOU WOULD DO
3 IS TURN THE REST OF THE CHAPTERS IN THE BOOK INTO FREESTANDING
4 ARTICLES; IS THAT CORRECT?

5 A. THAT WOULD BE ONE OPTION.

6 Q. NOW, CERTAINLY HAVING TO SEEK TO HAVE EACH OF THE CHAPTERS
7 OF THIS BOOK PUBLISHED IN JOURNALS WOULD BE A VERY DIFFERENT
8 PROJECT FOR YOU THAN HAVING ALL OF THOSE CHAPTERS PUBLISHED
9 COLLECTIVELY IN ONE BOOK; IS THAT CORRECT?

10 A. THAT'S CORRECT.

11 Q. AND YOU WOULD AGREE THAT THE UNIVERSITY PUBLISHERS SUCH AS
12 NYU PRESS IN THIS INSTANCE PROVIDE A TREMENDOUS BENEFIT TO THE
13 ACADEMIC WORLD?

14 A. YES.

15 Q. WHAT IS THE CHAPTER FROM YOUR BOOK THAT WAS PUBLISHED
16 PREVIOUSLY IN AMERICAN JEWISH HISTORY?

17 A. THE TITLE OF THE ESSAY IS -- IT'S ON MY CV -- NO WHISKEY
18 AMAZONS IN THE TENTS OF ISRAEL, AMERICAN JEWS AND THE GILDED
19 AGE TEMPERANCE MOVEMENT.

20 Q. OKAY. THAT'S THE PEER REVIEW ARTICLE NO WHISKEY AMAZONS
21 IN THE TENTS OF ISRAEL, OKAY.

22 A. THAT'S IT.

23 Q. AND IT WAS PUBLISHED IN SEPTEMBER OF 2008?

24 A. THAT'S THE ISSUE, YES.

25 Q. DO YOU KNOW WHETHER THE GEORGIA STATE UNIVERSITY LIBRARY

1 LICENSED DATABASE THAT PROVIDES THAT JOURNAL IN ELECTRONIC
2 FORM --
3 A. THIS IS A FAIRLY RECENT DEVELOPMENT. I THINK IT'S ON
4 EBSCO. I THINK.
5 Q. HAVE YOU ASSIGNED THAT PARTICULAR WORK TO STUDENTS IN
6 CLASSES THAT YOU HAVE TAUGHT AT GEORGIA STATE?
7 A. I HAVE.
8 Q. AND HOW WAS THAT PARTICULAR WORK MADE AVAILABLE TO THE
9 STUDENTS TO WHOM YOU ASSIGNED THAT WORK?
10 A. WELL, THIS WAS NOT IN THE CLASS THAT'S UNDER DISCUSSION.
11 IT WAS IN ANOTHER SECTION OF 7010 THAT I TAUGHT A YEAR LATER,
12 AND IT WAS MADE AVAILABLE VIA ERESERVES.
13 Q. AND WAS THAT BECAUSE IT WAS AVAILABLE IN AN ELECTRONIC
14 DATABASE?
15 A. YES.
16 Q. THAT THE LIBRARY HAD LICENSED?
17 A. I BELIEVE SO.
18 Q. NOW ONCE YOUR BOOK IS PUBLISHED, AS I UNDERSTAND IT THAT
19 ESSAY NO WHISKEY AMAZONS IN THE TENTS OF ISRAEL THAT WILL
20 BECOME A CHAPTER OF YOUR BOOK; IS THAT CORRECT?
21 A. YES, BUT UNDER A DIFFERENT TITLE, AND THERE WILL BE SOME
22 MODIFICATIONS, BUT MORE OR LESS, YEAH.
23 Q. MORE OR LESS THE ESSAY THAT CURRENTLY IS IN THE AMERICAN
24 JEWISH HISTORY JOURNAL; IS THAT CORRECT?
25 A. YES.

1 Q. HOW MANY CHAPTERS ARE THERE IN THE BOOK?

2 A. THERE'S AN INTRODUCTION AND A CONCLUSION AND SIX BODY
3 CHAPTERS.

4 Q. SO INTRO, CONCLUSION AND THEN SIX CHAPTERS IN BETWEEN?

5 A. YES, AND ALSO I MEAN THERE'S ACKNOWLEDGMENTS, AND I'M
6 ACTUALLY PUTTING TOGETHER THE INDEX LATER THIS SUMMER.

7 Q. YOU'RE STILL WORKING ON IT?

8 A. IT'S AT ITS VERY LAST STAGES.

9 Q. WITH RESPECT TO THE INTRODUCTION AND CONCLUSION AND THE
10 SIX CHAPTERS, CAN YOU TELL ME APPROXIMATELY HOW MANY PAGES ARE
11 IN THE BOOK?

12 A. I BELIEVE THAT IT'S LISTED IN THE CATALOG AS 272 PAGES,
13 BUT THAT'S AGAIN WITHOUT ACKNOWLEDGMENTS AND TITLE PAGES AND
14 INDEX AND ALL THAT.

15 Q. AND DO YOU KNOW WHAT PORTION OF THE BOOK IS REPRESENTED BY
16 THE ESSAY NO WHISKEY AMAZONS IN THE TENTS OF ISREAL
17 APPROXIMATELY?

18 A. I DON'T ACTUALLY.

19 Q. DO YOU THINK IT'S LESS THAN 10 PERCENT?

20 A. HONESTLY I DON'T KNOW. BECAUSE THE PAGINATION THAT I'M
21 WORKING ON NOW WHICH IS A WORD DOCUMENT IS GOING TO BE
22 DIFFERENT FROM THE PAGINATION WHEN IT GOES INTO GALLIES, AND I
23 DON'T KNOW THE RATIO. SO I REALLY CAN'T SAY.

24 Q. IF YOU COULD BRING UP JOINT EXHIBIT 4, AND THIS IS THE
25 POLICY AGAIN, PROFESSOR DAVIS, AND IF YOU CAN GO TO PAGE 7 AND

1 8. THIS IS THE BLANK FAIR USE CHECKLIST; DO YOU SEE THAT?
2 A. YES, I DO.
3 Q. ONCE THIS ESSAY BECOMES A PART OF YOUR BOOK IF A PROFESSOR
4 SOUGHT TO USE THAT CHAPTER THAT WAS PUBLISHED PREVIOUSLY AS AN
5 ESSAY, THE PROFESSOR WOULD NEED TO FILL OUT A FAIR USE
6 CHECKLIST FOR THAT; IS THAT YOUR UNDERSTANDING?
7 A. YES.
8 Q. NOW LET'S LOOK AT THIS UNDER FACTOR 1, FOR PURPOSE AND
9 CHARACTER OF THE USE, IF A PROFESSOR AT GEORGIA STATE WERE
10 SEEKING TO USE THAT CHAPTER, THAT ESSAY, FOR TEACHING PURPOSES
11 IT WOULD BE NONPROFIT -- IT WOULD BE TEACHING INCLUDING
12 MULTIPLE COPIES FOR CLASSROOM USE AND THEN NONPROFIT EDUCATION;
13 IS THAT CORRECT?
14 A. YES.
15 Q. AND AM I CORRECT THAT IT WOULD NOT BE COMMERCIAL ACTIVITY?
16 A. THAT IS CORRECT.
17 Q. IT WOULD NOT BE PROFITING FROM USE?
18 A. ALSO CORRECT.
19 Q. WOULD NOT BE ENTERTAINMENT; IS THAT CORRECT?
20 A. I SUPPOSE THAT'S TRUE.
21 Q. SKIPPING NONTRANSFORMATIVE, IT WOULD NOT BE FOR
22 PUBLICATION OR FOR PUBLIC DISTRIBUTION?
23 A. CORRECT.
24 Q. AND THEN OBVIOUSLY THE PROFESSOR WOULD HAVE TO DECIDE
25 WHETHER THE USE IS NECESSARY OR WHETHER IT EXCEEDS, BUT

1 ASSUMING THE PROFESSOR CONCLUDED IT WAS NECESSARY, YOU WOULD
2 AGREE THAT FACTOR 1 WOULD WEIGH IN FAVOR OF FAIR USE?

3 MR. MILLER: YOUR HONOR, I'M GOING TO OBJECT TO THIS
4 LINE OF QUESTIONING. RATHER THAN HAVING HER TESTIMONY ABOUT
5 WHAT SOME OTHER PROFESSOR THINKS, PERHAPS HE SHOULD ASK HER
6 WHAT SHE THINKS.

7 MR. KRUGMAN: IN TERMS OF WHAT YOU -- LET'S TALK
8 ABOUT WHAT YOU THINK. I WILL REPHRASE THE QUESTION.

9 BY MR. KRUGMAN:

10 Q. IF YOU WERE USING THIS WORK FOR YOUR CLASS, YOU WOULD
11 AGREE THAT IT WOULD BE NONPROFIT, EDUCATIONAL AND TEACHING?

12 MR. MILLER: YOUR HONOR, I'M GOING TO CONTINUE WITH
13 THE OBJECTION. WHY DOESN'T HE ASK ABOUT ONE OF THE WORKS THAT
14 THIS PROFESSOR ACTUALLY DID PERFORM A FAIR USE ANALYSIS ON
15 RATHER THAN SORT OF AN ABSTRACT SERIES OF QUESTIONS ABOUT A
16 WORK THAT'S NOT EVEN COMPLETED YET.

17 MR. KRUGMAN: THIS ESSAY IS COMPLETED AND HAS BEEN
18 PUBLISHED, AND I WANT TO POINT OUT --

19 THE COURT: IS THIS ALL LEADING UP TO A QUESTION OF
20 WHETHER SHE FEELS IF SOMEBODY HAD USED THIS EXCERPT WHETHER SHE
21 THINKS IT WOULD BE FAIR USE?

22 MR. KRUGMAN: NO, I'M NOT GOING TO ASK HER THAT
23 QUESTION.

24 THE COURT: WHAT'S THE POINT OF THE EXAMPLES THEN?

25 MR. KRUGMAN: THE POINT OF THIS, YOUR HONOR, I THINK

1 AS WE GO THROUGH THIS THE CONCLUSION WILL BE THAT PROFESSOR
2 DAVIS WOULD CONCLUDE THAT IT IS A, QUOTE, FAIR USE, BUT BECAUSE
3 IT APPEARS IN A BOOK, THE PROFESSOR IS ABLE TO PROVIDE COPIES
4 FREE OF CHARGE WITHOUT THE PAYMENT OF PERMISSIONS TO STUDENTS
5 IN THE CLASS --

6 THE COURT: WELL THAT POINT IS MADE AMPLY BY
7 QUESTIONS THAT YOU'VE BEEN ASKING OTHER WITNESSES.

8 MR. KRUGMAN: AND THAT'S CONTRASTED WITH ITS
9 APPEARANCE IN AN ACADEMIC JOURNAL WHERE THE UNIVERSITY LICENSES
10 A DATABASE FOR USE OF THAT JOURNAL AND THE PUBLISHER IN THOSE
11 INSTANCES WOULD ACTUALLY RECEIVE PAYMENT.

12 THE COURT: WE KNOW THAT'S A COMMON THREAD WITH THESE
13 OTHER WITNESSES, TOO. THE ONLY THING I CAN SEE -- WHERE I
14 REALLY THOUGHT YOU WERE GOING WITH THIS WAS TO GO OVER THIS
15 FAIR USE CHECKLIST WITH HER, AND THEN SAY IF SOMEBODY HAD USED
16 AND PUBLISHED CHAPTER WHATEVER IT WAS ON SOMETHING LIKE ERES
17 WOULD YOU FEEL THAT THAT WAS A PERMISSIBLE FAIR USE, BUT YOU
18 SAY THAT'S NOT WHERE YOU'RE GOING?

19 MR. KRUGMAN: NO, THAT'S NOT. IT'S MERELY --

20 THE COURT: IF THAT'S NOT WHERE YOU'RE GOING WITH IT,
21 WHAT PURPOSE DOES IT SERVE?

22 MR. KRUGMAN: IT WILL BECOME APPARENT AS UNIVERSITY
23 WITNESSES TESTIFY, BUT GEORGIA STATE HAS AN ENORMOUS, HUGE
24 BUDGET AVAILABLE FOR LICENSING ACADEMIC JOURNALS, BUT FOR
25 PROFESSOR DAVIS AND OTHER PROFESSORS AT THE UNIVERSITY, THERE

1 IS ZERO DOLLARS ALLOCATED FOR OBTAINING PERMISSIONS FOR
2 EXCERPTING CHAPTERS AND AS YOU'VE SEEN MULTIPLE CHAPTERS OF
3 BOOKS WITHOUT OBTAINING PERMISSION.

4 THE COURT: I DON'T SEE HOW THIS TIES IN WITH THE
5 QUESTIONS THAT YOU'RE ASKING ABOUT THIS FAIR USE CHECKLIST,
6 THOUGH. IT DOESN'T --

7 MR. MILLER: YOUR HONOR, THIS IS STARTING TO SOUND A
8 LITTLE BIT LIKE CLOSING ARGUMENT. HE'S GOT A WITNESS HERE WHO
9 TAUGHT A CLASS AND HAS DONE SOME WORK, AND HE CAN ASK HER
10 QUESTIONS ABOUT THAT, BUT HYPOTHETICALS AND STARTING TO LEAD
11 TOWARD QUESTIONS ABOUT PERMISSION FEES AVAILABLE --

12 THE COURT: I DON'T KNOW WHAT THE WITNESS MAY BE IN A
13 POSITION TO TESTIFY TO. I JUST QUESTION WHY WE'RE GOING OVER
14 THIS FAIR USE CHECKLIST WITH HER IF IT DOESN'T COME TO SOME
15 BOTTOM LINE QUESTION.

16 MR. KRUGMAN: BOTTOM LINE IS IF SHE AS A PROFESSOR
17 COMPLETED THE CHECKLIST, THEN SHE COULD USE IT WITHOUT THE
18 PAYMENT OF ANY PERMISSIONS, AND THAT'S CONTRASTED WITH
19 SITUATIONS THAT EXIST MERELY BECAUSE THAT SAME, VERY SAME ESSAY
20 APPEARED IN AN ACADEMIC JOURNAL AND THE --

21 THE COURT: WE ALREADY KNOW THAT IT WAS ALREADY
22 PUBLISHED IN A JOURNAL.

23 MR. KRUGMAN: WE DO.

24 THE COURT: SO THAT DOESN'T REALLY HAVE ANYTHING TO
25 DO WITH YOUR QUESTIONS HERE EITHER, BUT YOU DON'T WANT TO HER

1 WHETHER SHE THINKS IT WOULD BE A FAIR USE; IS THAT WHAT YOU'RE
2 SAYING?

3 MR. KRUGMAN: WELL, I THINK I WAS GOING TO ESTABLISH
4 THAT SHE CONSIDERED IT. USING THE GEORGIA STATE CHECKLIST THAT
5 WE'VE SEEN THAT HER ANALYSIS WOULD END UP AT FAIR USE, BUT
6 THERE IS NO RATIONAL DISTINCTION MERELY BECAUSE OF THE FACT
7 THAT IT APPEARS IN A BOOK AS DISTINGUISHED FROM AN ACADEMIC
8 JOURNAL THAT PERMISSIONS WOULD NOT BE PAID.

9 MR. MILLER: YOUR HONOR, WE'RE NOT SURE WHAT THE
10 RELEVANCE IS OF THE FACT THAT IT APPEARS IN A JOURNAL VERSUS
11 WHETHER A FAIR USE --

12 THE COURT: I DON'T SEE WHERE THIS LINE OF
13 QUESTIONING IS GOING. LET'S GO ON TO SOMETHING ELSE. THAT IS,
14 I DON'T HOW IT'S GOING ANYWHERE THAT WOULD HELP YOU.

15 MR. KRUGMAN: THEN I HAVE NO FURTHER QUESTIONS.

16 CROSS-EXAMINATION

17 BY MR. MILLER:

18 Q. GOOD AFTERNOON, PROFESSOR DAVIS.

19 A. HELLO.

20 Q. MY NAME IS RICH MILLER, AND I'M HERE ON BEHALF OF THE
21 DEFENDANTS IN THIS CASE, AND I BELIEVE WE'VE MET BEFORE?

22 A. WE HAVE.

23 MR. MILLER: IF I MAY, YOUR HONOR, I WILL BEGIN JUST
24 BY ADDRESSING A FEW THINGS THAT MR. KRUGMAN AND YOU ALL WERE
25 DISCUSSING JUST A MOMENT AGO.

1 BY MR. MILLER:

2 Q. FIRST OF ALL, MR. KRUGMAN WAS ASKING YOU A LITTLE BIT
3 ABOUT YOUR BOOK; IS THAT CORRECT?

4 A. YES.

5 Q. AND HE WAS ASKING YOU ABOUT A CHAPTER YOU USED IN YOUR
6 BOOK; DO RECALL THAT?

7 A. THE --

8 Q. I'M SORRY, THE CHAPTER THAT WAS PUBLISHED. THE CHAPTER
9 THAT YOU HAD TAKEN OUT OF YOUR BOOK, AND THEN HE WAS ASKING YOU
10 A LITTLE BIT ABOUT YOUR BOOK, HOW MANY CHAPTERS WERE IN, THAT
11 KIND OF THING?

12 A. YES.

13 Q. YOUR BOOK IS NOT QUITE COMPLETE YET, IS IT?

14 A. THAT CORRECT.

15 Q. BUT IS YOUR BOOK GOING TO HAVE A PREFACE?

16 A. YES.

17 Q. AND IS YOUR BOOK GOING TO HAVE AN INDEX?

18 A. YES.

19 Q. AND IS YOUR BOOK GOING TO HAVE A TABLE OF CONTENTS?

20 A. YES.

21 Q. WHO IS GOING TO CREATE THOSE THINGS FOR YOUR BOOK?

22 A. I WILL CREATE THE INDEX -- I SHOULD SAY THE DIFFERENCE
23 BETWEEN A PREFACE AND ACKNOWLEDGMENTS I'M NOT QUITE SURE. IT
24 WILL HAVE ACKNOWLEDGMENTS. THAT'S WHAT IT WILL SAY ON THE TOP
25 OF THE PAGE, AND THE TABLE OF CONTENTS IS BEING FORMATTED BY

1 THE PRESS, BUT THE CHAPTER TITLES ARE ALL OF MY OWN DEVISING.

2 SO I WROTE IT.

3 Q. OKAY. WOULD YOU CONSIDER THOSE CONTRIBUTIONS TO THE WORK,

4 THE TABLE OF CONTENTS, THE INDEX, THE ACKNOWLEDGMENTS PART OF

5 YOUR ORIGINAL CONTRIBUTION TO THE WORK?

6 A. YES.

7 Q. OKAY. NOW MOVING ON TO YOUR SYLLABUS WHICH I BELIEVE MR.

8 KRUGMAN WAS USING AT PLAINTIFFS' EXHIBIT 512 IN THE BINDER THAT

9 HE GAVE YOU, AND I'LL JUST CONTINUE TO REFER TO THAT NUMBER.

10 A. OKAY.

11 Q. HE WAS TALKING ABOUT THE READINGS THAT YOU ASSIGNED IN

12 YOUR COURSE; DO YOU RECALL THAT?

13 A. YES.

14 Q. AND IN YOUR VIEW THE READINGS THAT YOU ASSIGNED TO YOUR

15 STUDENTS ARE REQUIRED; IS THAT RIGHT?

16 A. YES.

17 Q. I'D LIKE TO EXPLORE THAT JUST A LITTLE BIT. SO IF YOU'LL

18 TURN TO PAGE 4 OF YOUR SYLLABUS AT PLAINTIFFS' EXHIBIT 512 --

19 I'M SORRY, LET ME BACK UP A LITTLE BIT.

20 LET'S START WITH PAGE 1, AND CAN YOU JUST TELL ME A

21 LITTLE BIT ABOUT HOW YOU ESTABLISH THE GRADE FOR THE STUDENTS

22 IN YOUR CLASS?

23 A. I HAVE THE STUDENTS WRITE THREE BOOK REVIEWS, AND ON WEEKS

24 THAT STUDENTS ARE READING BOTH A BOOK AND OTHER READING

25 MATERIALS, IT'S SUPPOSED TO BE A SYNTHESIS. THEY'RE WRITING

1 THREE OF THOSE PAPERS OVER THE COURSE OF THE SEMESTER. THAT IS
2 ALTOGETHER WORTH 60 PERCENT OF THEIR GRADE.

3 THEY HAVE TO CHOSE AMONG WEEKS 5 THROUGH 15. FOR THE
4 FIRST THREE WEEKS OF THE CLASS WHERE THEY'RE ACTUALLY READING
5 TEXTS, THEY'RE OBLIGATED TO PUT TOGETHER A TIMELINE BASED ON
6 SORT OF GRAND NARRATIVE SURVEYS OF AMERICAN HISTORY. THEY'RE
7 PUTTING TOGETHER A TIMELINE BASED ON THE BOOK AND THEN WRITING
8 AN ESSAY ABOUT THEIR CHOICES. THEY ARE OBLIGATED TO DO ALL
9 THREE OF THOSE.

10 THE REST OF THE SEMESTER THEY ARE FREE TO CHOOSE, AND
11 THEN 10 PERCENT FOR THAT AND THAT'S 10 PERCENT EACH AND THAT
12 COMES TO 90 PERCENT, AND THE REMAINING 10 PERCENT IS
13 PARTICIPATION AND THAT COMES TO A HUNDRED.

14 Q. I'M GOING TO BREAK THAT DOWN A LITTLE BIT SO IT'S VERY
15 CLEAR. LET'S GO TO PAGE 4 OF YOUR SYLLABUS.

16 A. YES.

17 Q. THERE ARE THREE WEEKS LISTED IN PART ONE, THREE SURVEYS;
18 DO YOU SEE THAT THERE?

19 A. I DO.

20 Q. SO TELL ME ABOUT HOW YOU HAVE YOUR STUDENTS READ AND WRITE
21 ABOUT THAT SECTION, THE BOOKS IN THAT SECTION OF YOUR SYLLABUS,
22 AND HOW THAT CALCULATES INTO THEIR GRADE?

23 MR. KRUGMAN: OBJECT, YOUR HONOR, THE MATERIALS THAT
24 HE'S ASKING PROFESSOR DAVIS ABOUT ARE NOT AMONG THE ONES THAT
25 ARE ON THE JOINT EXHIBIT.

1 THE COURT: OVERRULED.

2 BY MR. MILLER:

3 Q. YOU CAN GO AHEAD AND ANSWER.

4 A. SURE. JUST TO CLARIFY, YOU'RE ASKING ME WHAT I EXPECT OF
5 THE STUDENTS WHEN THEY WRITE THESE THREE PAPERS?

6 Q. THE QUESTION IS WHAT IS THE ASSIGNMENT AS TO WEEKS 2, 3
7 AND 4 IN YOUR COURSE?

8 A. THEY ARE TO COME TO CLASS HAVING READ THE TEXT ASSIGNED,
9 AND ALSO PREPARE TO HAND IN A SHORT ESSAY, ONE OR TWO PAGES
10 DOUBLE SPACED ABOUT A TIMELINE THAT THEY HAVE CREATED BASED ON
11 EACH OF THESE TEXTS, AND THEY ALSO ARE SUPPOSED TO HAND IN THE
12 TIMELINE.

13 AND MY EXPECTATION IS OVER THE COURSE OF READING
14 THESE THREE BOOKS, THEY WILL SEE HOW DIFFERENT HISTORIANS
15 CREATE GRANDMASTER NARRATIVES IN AMERICAN HISTORY AND DIFFERENT
16 WAYS OF LOOKING AT HISTORY.

17 Q. OKAY. AND THEY ARE REQUIRED TO READ EACH OF THESE WEEKS
18 AND THAT ADDS UP TO 30 PERCENT OF THEIR GRADE; IS THAT CORRECT?

19 A. CORRECT.

20 Q. NOW THERE IS A 60 PERCENT PORTION AND A 10 PERCENT PORTION
21 REMAINING IN THE GRADE, RIGHT?

22 A. YES.

23 Q. SO FOR THE 60 PERCENT PORTION THAT COMES FROM PARTS 2, 3,
24 4 AND 5, IS THAT CORRECT, OF YOUR SYLLABUS?

25 A. THAT'S CORRECT.

1 MR. KRUGMAN: OBJECTION LEADING.

2 THE COURT: I'LL ALLOW IT. I THINK THERE'S ALREADY
3 BEEN TESTIMONY THAT'S THE EQUIVALENT OF THAT.

4 BY MR. MILLER:

5 Q. HOW DO THE STUDENTS WRITE ABOUT THE REMAINING WORKS FOR
6 THAT 60 PERCENT?

7 A. BY THEIR OWN CHOOSING BASED ON MAYBE THEIR OWN INTEREST,
8 BASED ON -- THEY ARE SUPPOSED TO HAVE I BELIEVE -- I WOULD HAVE
9 TO READ BACK IN MY SYLLABUS, BUT GENERALLY I HAVE THEM CHOOSE
10 WHAT THEY'RE GOING TO WRITE ABOUT IN ADVANCE IN THE BEGINNING
11 OF THE SEMESTER.

12 SO BASED ON THEIR INTEREST, IF THEY'RE INTERESTED IN
13 GENDER HISTORY THEY WILL TAKE GENDER HISTORY BOOKS. IF THEY'RE
14 INTERESTED IN POLITICAL HISTORY, BOOKS OF POLITICAL HISTORY AND
15 SO ON.

16 THE COURT: AND THEN YOU APPROVE THE TOPIC CHOICE IN
17 ADVANCE?

18 THE WITNESS: IT'S BASICALLY A BOOK REVIEW SO --

19 THE COURT: I'M TALKING ABOUT THE 60 PERCENT NOW.

20 THE WITNESS: YES.

21 THE COURT: THEY JUST PICK A BOOK TO REVIEW?

22 THE WITNESS: THEY PICK THREE BOOKS TO REVIEW.

23 THE COURT: THEN I'M CONFUSED. I THOUGHT YOU SAID
24 WHEN THEY REVIEW THE THREE BOOKS THAT'S 30 PERCENT?

25 THE WITNESS: NOT EACH, IT'S 30 PERCENT ALTOGETHER.

1 SO EACH OF THESE WEEKS IS 10 PERCENT, AND THEN EACH OF THE
2 SUBSEQUENT PAPERS IS 20 PERCENT EACH. SO THAT'S 60 PERCENT
3 ALTOGETHER FOR THESE BOOK REVIEWS.

4 THE COURT: ALL RIGHT.

5 BY MR. MILLER:

6 Q. SO YOU WILL RECALL MR. KRUGMAN MENTIONED AN ESSAY TO YOU
7 BY FIELDS IDEOLOGY AND RACE IN AMERICAN HISTORY, WHAT WEEK DOES
8 THAT APPEAR IN?

9 A. THAT'S IN WEEK 5.

10 Q. AND THERE WAS ANOTHER ONE MENTIONED BY LAWRENCE LEVINE,
11 SLAVE SONGS; WHAT WEEK DID THAT APPEAR IN?

12 A. THAT'S WEEK 8.

13 Q. SO READINGS THAT APPEAR IN WEEK 5 AND WEEK 8, STUDENTS DO
14 NOT NECESSARILY HAVE TO WRITE ABOUT IT; IS THAT CORRECT?

15 A. THAT'S CORRECT.

16 Q. SO A STUDENT DOES NOT NECESSARILY HAVE TO WRITE ABOUT THE
17 FIELDS READING OR THE LEVINE READING; IS THAT CORRECT?

18 A. THAT'S CORRECT.

19 Q. TO GET FULL POINTS OUT OF THE 60 PERCENT, CORRECT?

20 A. THAT'S TRUE.

21 Q. NOW THERE'S A REMAINING 10 PERCENT AND THAT'S DISCUSSION,
22 RIGHT?

23 A. YES.

24 Q. AND HOW DO YOU DECIDE WHAT THE SCORING IS FOR DISCUSSION?

25 A. PART OF IT IS BASED ON OTHER REQUIREMENTS THAT STUDENTS

1 COME TO CLASS EVERY WEEK WITH A DISCUSSION QUESTION READY TO
2 POSE TO THE CLASS, AND WE WRITE ALL THE DISCUSSION QUESTIONS UP
3 ON THE BOARD AND USE THOSE AS A SPRINGBOARD FOR STARTING THE
4 SEMINAR CONVERSATION. THAT'S A BIG PART OF IT.

5 Q. OKAY. SO ON WEEK 5 ALONG WITH THE FIELDS ESSAY THERE IS
6 ANOTHER ASSIGNMENT; IS THAT CORRECT?

7 A. YES.

8 Q. A STUDENT COULD COME WITH A DISCUSSION QUESTION FOR THAT
9 OTHER READING; ISN'T THAT CORRECT?

10 A. THAT'S CORRECT.

11 Q. AND NOT FROM THE FIELDS --

12 A. I THINK IT'S FAIR TO SAY THAT MOST OF THEM DO COME WITH
13 DISCUSSION QUESTIONS BASED ON THE BOOK.

14 Q. WHY IS THAT?

15 MR. KRUGMAN: OBJECTION, LACK OF FOUNDATION.

16 THE COURT: SUSTAINED.

17 BY MR. MILLER:

18 Q. BUT IT'S CORRECT THAT THEY DON'T HAVE TO ASK A QUESTION
19 ABOUT THE FIELDS ESSAY, RIGHT?

20 A. THAT'S CORRECT.

21 Q. AND IS THAT SAME THING TRUE FOR THE LEE ESSAY?

22 A. YES.

23 Q. SO PUTTING ALL THIS TOGETHER, CAN A STUDENT GET AN A IN
24 YOUR CLASS WITHOUT EVER READING LEVINE OR FIELDS?

25 A. YES.

1 Q. CAN A STUDENT --

2 A. IT'S A TERRIBLE THING TO HAVE TO ADMIT.

3 Q. AND I AM SORRY TO ASK THAT.

4 A. I AM SURE IT'S ACTUALLY HAPPENED IN MY CLASS.

5 THE COURT: IT SOUNDED LIKE A YES MAYBE.

6 THE WITNESS: YES.

7 BY MR. MILLER:

8 Q. AND, IN FACT, A STUDENT COULD GET FULL CREDIT, A HUNDRED
9 PERCENT IN YOUR CLASS WITHOUT EVER READING FIELDS OR LEVINE,
10 CORRECT?

11 A. YEAH.

12 Q. LET ME MOVE ON TO SOMETHING ELSE HERE.

13 MR. MILLER: I'M NOT SURE THAT'S BEEN MOVED INTO
14 EVIDENCE. I WOULD MOVE PLAINTIFFS' EXHIBIT 512, HER SYLLABUS,
15 INTO EVIDENCE?

16 MR. KRUGMAN: NO OBJECTION, YOUR HONOR.

17 THE COURT: IT'S ADMITTED.

18 BY MR. MILLER:

19 Q. OKAY. NOW I'D LIKE TO TALK TO YOU JUST A LITTLE BIT MORE
20 ABOUT THE LEVINE AND FIELDS ESSAY, IF I MIGHT?

21 A. OKAY.

22 MR. MILLER: IF I MAY APPROACH, YOUR HONOR?

23 THE COURT: YES.

24 BY MR. MILLER:

25 Q. FIRST BACK TO YOUR SYLLABUS, YOU ASSIGNED THE FIELDS ESSAY

1 IN WEEK 5, CORRECT?

2 A. YES.

3 Q. WHAT WERE YOU TEACHING IN WEEK 5?

4 A. WELL, THE BOOK THAT THE WEEK WAS BASED ON IS MORGAN'S
5 AMERICAN SLAVERY, AMERICAN FREEDOM WHICH IS ABOUT THE CREATION
6 OF RACIAL IDEOLOGY IN THE UNITED STATES IN THE COLONIAL
7 PERIOD. THIS BOOK IS ABOUT VIRGINIA IN PARTICULAR.

8 SO THAT CLASS SESSION IS ABOUT RACIAL IDEOLOGY IN
9 AMERICAN AND WHERE THEY COME FROM.

10 Q. OKAY. AND WHY DID YOU SELECT THE ESSAY FROM FIELDS FOR
11 THAT CLASS?

12 A. BECAUSE SHE DEALS WITH THE SAME SUBJECT FROM A DIFFERENT
13 ANGLE. I THOUGHT IT WAS A NICE -- THE FIELDS ESSAY IS QUITE
14 GOOD, AND IT'S MORE THEORETICAL THAN THE MORGAN BOOK IS, AND SO
15 I THOUGHT IT WAS A NICE WAY FOR STUDENTS TO GET SOME IDEA OF
16 HOW HISTORIANS THEORIZE ABOUT RACE THEORY BEFORE THEY JUMP INTO
17 A BOOK ABOUT -- BASED ON ARCHIVAL EVIDENCE WHICH IS WHAT MORGAN
18 DOES.

19 Q. OKAY. AND HOW MANY PAGES ARE IN -- THAT FIELDS ESSAY
20 COMES FROM A TEXT, CORRECT?

21 A. IT COMES FROM A COLLECTION OF ESSAYS.

22 MR. MILLER: MAY I APPROACH, YOUR HONOR?

23 THE COURT: YOU MAY.

24 BY MR. MILLER:

25 Q. I HAVE HANDED YOU WHAT'S MARKED DEFENDANTS' EXHIBIT 769.

1 CAN YOU TELL ME WHAT THAT IS?

2 A. IT'S A BOOK, A COLLECTION OF ESSAYS CALLED REGION, RACE
3 AND RECONSTRUCTION ESSAYS IN HONOR OF C. VANN WOODWARD.

4 Q. AND IS THAT THE EDITION OF REGION, RACE AND RECONSTRUCTION
5 FROM WHICH YOU ASSIGNED THE FIELDS ESSAY?

6 A. YES.

7 MR. MILLER: YOUR HONOR, I MOVE DEFENDANTS' EXHIBIT
8 769 INTO EVIDENCE.

9 MR. KRUGMAN: NO OBJECTION.

10 THE COURT: REMIND WHO C. VANN WOODWARD IS?

11 THE WITNESS: HE IS AN HISTORIAN OF THE AMERICAN
12 SOUTH. HE HAS WRITTEN ABOUT THE CREATION OF JIM CROW. HE'S
13 WRITTEN ABOUT TOM WATSON. HE'S WRITTEN ABOUT SOUTHERN HISTORY
14 RECONSTRUCTION, RACIAL IDEOLOGIES IN THE UNITED STATES. A VERY
15 CRUCIALLY IMPORTANT HISTORIAN OF THE SOUTH.

16 BY MR. MILLER:

17 Q. WHAT PAGES OF THE READING THAT YOU ASSIGNED FROM THAT
18 TEXT?

19 A. 143 THROUGH 177.

20 Q. OKAY. ABOUT HOW MANY PAGES IS THAT?

21 A. 34.

22 Q. AND HOW MANY PAGES ARE IN THE BOOK?

23 A. THE LAST PAGINATED PAGE IS 463, AND THEN PREVIOUS TO THAT,
24 THERE ARE ABOUT 25, 30 SOME ODD PAGES OF INTRODUCTION BEFORE
25 THE ESSAYS BEGIN AND TITLE PAGE AND SO ON.

1 Q. SO YOU ASSIGNED ROUGHLY 34 PAGES OUT OF 463 PLUS 30
2 SOMETHING?
3 A. ROUGHLY 500 PAGES.
4 Q. I WON'T ASK YOU TO DO THE MATH ON THE STAND --
5 A. THANK YOU.
6 Q. BUT CAN YOU TELL ME APPROXIMATELY HOW MUCH THAT IS; WHAT
7 PERCENTAGE THAT MIGHT BE.
8 LET ME ASK A BETTER QUESTION. IS THAT LESS THAN 10
9 PERCENT?
10 A. YES.
11 MR. MILLER: NOW, YOUR HONOR, THE PLAINTIFFS' ASSERT
12 THAT 7.8 PERCENT WAS USED FOR FROM THIS BOOK.
13 BY MR. MILLER:
14 Q. SO HOW DID YOU INTEND FOR YOUR STUDENTS TO ACCESS THE
15 ESSAY, THE FIELDS ESSAY?
16 A. VIA ERESERVE.
17 THE COURT: I'M SORRY?
18 THE WITNESS: ERESERVE.
19 BY MR. MILLER:
20 Q. AND DID YOU ASK THE LIBRARY TO LOAD THIS EXCERPT ONTO
21 ERESERVES?
22 A. YES, I DID.
23 Q. WHAT STEPS DID YOU TAKE BEFORE YOU ASKED THE LIBRARY TO
24 LOAD THAT ONTO ERESERVES?
25 A. I CHOSE THE ESSAY. I WENT TO THE ERESERVE WEBSITE AND --

1 I SHOULD SAY THAT AT THIS POINT I ALSO -- TO BE HONEST I DON'T
2 REMEMBER IF I HAD A HARDCOPY OF THE CHECKLIST OR I LINKED TO
3 THE CHECKLIST. THERE'S A LINK AVAILABLE AT THE ERESERVE
4 WEBSITE, BUT I KNOW THAT WHEN I WAS PUTTING STUFF UP ON
5 ERESERVES, I LOOKED AT THE CHECKLIST AS I WAS DOING SO.

6 THEN ONCE I CLICKED ON, IT FALLS UNDER FAIR USE, THE
7 RESTRICTIONS OF FAIR USE. I CLICKED ON PART OF BOOK WHICH IS
8 ONE OF THE OPTIONS WHICH TOOK ME TO A PAGE THAT ASKED ME FOR
9 THE INFORMATION THAT WE'VE ACTUALLY ALREADY DISCUSSED. SO THE
10 CITATIONAL INFORMATION, THE PAGINATION THAT I WANTED UP ONLINE
11 AND THEN I SENT IT OFF.

12 Q. OKAY. YOU MENTIONED A CHECKLIST. ARE WE TALKING ABOUT A
13 FAIR USE CHECKLIST?

14 A. YES.

15 Q. IF YOU'LL LOOK IN THE BINDER THAT I JUST HANDED YOU, THERE
16 IS SOMETHING MARKED DEFENDANTS' EXHIBIT 473.

17 A. YES.

18 Q. JUST BEFORE I GET TO THAT, DID YOU ACTUALLY PHYSICALLY
19 FILL OUT A FAIR USE CHECKLIST?

20 A. NO, I DIDN'T.

21 Q. OKAY. HOW DID YOU GO ABOUT ANALYZING FAIR USE THEN FOR
22 THIS WORK?

23 A. I READ IT OVER BASED ON MY UNDERSTANDING OF THE TERMS IN
24 THE CHECKLIST AND DETERMINED THAT TO THE BEST OF MY ABILITY I
25 HAD DECIDED THAT IT FELL UNDER THE CATEGORY OF FAIR USE.

1 Q. JUST SO I'M CLEAR, YOU HAD A CHECKLIST THAT YOU LOOKED AT?

2 A. I DID.

3 Q. AND YOU ANALYZED EVERY FACTOR ON THE CHECKLIST?

4 A. YES.

5 MR. KRUGMAN: OBJECTION, LEADING.

6 THE COURT: SUSTAINED.

7 BY MR. MILLER:

8 Q. ONCE YOU HAD THE CHECKLIST IN FRONT OF YOU, WHAT DID YOU
9 DO WITH IT?

10 A. I READ THROUGH THE CATEGORIES THAT WEIGHED EITHER IN FAVOR
11 OF FAIR USE OR AGAINST FAIR USE AND MADE MY DECISION BASED ON
12 MY UNDERSTANDING OF THE TERMS.

13 Q. AND DO YOU FEEL LIKE YOU MADE A FULL EVALUATION OF ALL OF
14 THE FAIR USE FACTORS IN GOOD FAITH?

15 A. YES.

16 Q. AND WHAT WAS YOUR CONCLUSION AS TO WHETHER OR NOT YOUR USE
17 WAS FAIR?

18 A. I DECIDED THAT THE USE WAS FAIR.

19 Q. OKAY. AND NOW LET ME DIRECT YOU TO DEFENDANTS' EXHIBIT
20 473.

21 A. OKAY.

22 Q. WHAT IS THAT DOCUMENT?

23 A. THIS IS THE FAIR USE CHECKLIST THAT I FILLED OUT IN LATE
24 NOVEMBER OF 2010.

25 Q. WHY DID YOU CREATE THIS DOCUMENT?

1 A. I WAS ASKED TO.

2 Q. OKAY. AND WHY DID YOU HAVE A NEED TO FILL IT OUT?

3 A. BECAUSE --

4 Q. THAT'S NOT A GOOD QUESTION. LET ME BACK UP.

5 WHEN YOU MENTALLY FILLED OUT YOUR CHECKLIST FOR THIS
6 FIELDS WORK, DID YOU COMPLETE AND RETAIN A COPY OF THE FAIR USE
7 CHECKLIST AT THE TIME?

8 MR. KRUGMAN: OBJECTION, I DON'T KNOW HOW YOU CAN
9 RETAIN A COPY OF SOMETHING THAT'S BEEN COMPLETED MENTALLY.

10 THE COURT: I DON'T SEE HOW YOU CAN EITHER.

11 MR. MILLER: SO I THINK WE KNOW WHAT THE ANSWER WILL
12 BE THEN.

13 THE COURT: I SEE. OKAY. GO AHEAD THEN.

14 BY MR. MILLER:

15 Q. GO AHEAD.

16 A. REPEAT THE QUESTION?

17 Q. WHEN YOU MENTALLY FILLED OUT THE FAIR USE CHECKLIST PRIOR
18 TO ASKING THE LIBRARY TO POST THE FIELDS ESSAY ON ERESERVES,
19 DID YOU PRINT OUT A COPY OF THE COMPLETED CHECKLIST?

20 A. NO, I DIDN'T.

21 Q. OKAY.

22 THE COURT: AND THAT WOULD BE BECAUSE YOU HAD NOTHING
23 TO COPY?

24 THE WITNESS: I'M NOT SURE WHY I DIDN'T FILL OUT A
25 CHECKLIST. I FELT THAT BY HAVING DONE THIS IN GOOD FAITH

1 MENTALLY THAT I HAD FULFILLED THE OBLIGATIONS.

2 THE COURT: WE NEED TO MOVE FORWARD WITH MORE
3 DISPATCH.

4 MR. MILLER: FAIR ENOUGH.

5 BY MR. MILLER:

6 Q. DO YOU BELIEVE THAT DEFENDANTS' EXHIBIT 473 IS A FAIR AND
7 ACCURATE REPRESENTATION OF THE FAIR USE EVALUATION THAT YOU
8 MADE AT THE TIME YOU WERE POSTING THE FIELDS ESSAY ON
9 ERESERVES?

10 A. YES, I DO.

11 MR. MILLER: YOUR HONOR, I WOULD MOVE DEFENDANTS'
12 EXHIBIT 473 INTO EVIDENCE AS A RECREATED CHECKLIST.

13 MR. KRUGMAN: YOUR HONOR, WE OBJECT BASED ON
14 RELEVANCE. IT WAS NOT CREATED AT OR ABOUT THE TIME. BEST
15 EVIDENCE RULE, AND THAT ON ITS FACE IT SHOWS THAT IT WAS NOT
16 PREPARED UNTIL NOVEMBER OF 2010.

17 THE COURT: I'LL ADMIT IT.

18 BY MR. MILLER:

19 Q. I JUST WANT TO LOOK VERY QUICKLY AT A COUPLE OF THINGS
20 THAT YOU CHECKED IN YOUR CHECKLIST -- I'M GOING TO MOVE ALONG.

21 LET'S MOVE ONTO THE OTHER EXCERPT THAT YOU USED IN
22 YOUR COURSE. IT'S IN WEEK 8 I BELIEVE. TURNING BACK TO YOUR
23 SYLLABUS?

24 A. UH-HUH (AFFIRMATIVE).

25 Q. AND THAT IS AN EXCERPT FROM THE UNFORGETTABLE PAST; IS

1 THAT CORRECT?

2 A. UNPREDICTABLE PAST.

3 Q. YES. CAN YOU TELL ME GENERALLY WHAT THE BOOK IS; WHAT THE
4 UNPREDICTABLE PAST IS?

5 A. IT IS A COLLECTION OF ESSAYS BY LAWRENCE LEVINE. HE'S A
6 CULTURAL HISTORIAN, AND THE BOOK DEALS WITH A LOT OF DIFFERENT
7 TOPICS.

8 THE ESSAY THAT I CHOSE WAS ABOUT NEGRO SPIRITUALS
9 FROM THE SLAVE ERA AS A WAY OF TRYING TO UNDERSTAND WHAT LIFE
10 WAS LIKE FOR SLAVES UNDER SLAVERY, BUT THE BOOK ALSO INCLUDES
11 ESSAYS ON THE DEPRESSION, THE NEW DEAL AND ANTEBELLUM NORTH.

12 SO IT'S A COLLECTION OF ESSAYS THE OVERARCHING THEME
13 OF WHICH IS CULTURAL HISTORY IN A VERY GENERAL SENSE.

14 Q. OKAY. AND THEN SPECIFICALLY YOU CHOSE AN ESSAY CALLED
15 SLAVE SONGS AND SLAVES CONSCIOUSNESS. WHAT IS THAT ABOUT?

16 A. IT'S ABOUT -- WELL, IT'S ABOUT SLAVE SPIRITUAL MUSIC, BUT
17 THE LARGER QUESTION THAT IT ASKS IS HOW IF WE ARE TRYING TO
18 UNDERSTAND A CULTURE THAT LEFT BEHIND SUCH LITTLE WRITTEN
19 RECORD, WHAT SORT OF EVIDENCE CAN WE USE, AND HOW CAN WE
20 INTERPRET IT. SO THE ESSAY IS BOTH ABOUT THE SUBJECT BUT IT'S
21 ALSO ABOUT METHOD.

22 Q. HOW DID YOU ORIGINALLY BECOME AWARE OF THE SLAVE SONGS
23 ESSAY BY LEVINE?

24 A. IT WAS INTRODUCED TO ME AS A GRADUATE STUDENT WHEN I WAS
25 DOING MY COURSE WORK AT EMORY.

1 Q. HOW WAS IT PROVIDED TO YOU AT THAT TIME?

2 A. IN WHAT FORM OR --

3 Q. YES.

4 A. I DON'T RECALL IF IT WAS HANDED TO ME AS A COLLECTION OF
5 PIECES OF PAPER OR IF IT WAS MADE AVAILABLE TO ME ON AN EMORY
6 ERESERVE SITE, BUT IT WAS REQUIRED IN THE SYLLABUS BY MY
7 ADVISOR AND SO I READ IT.

8 Q. OKAY. AND AFTER IT WAS ASSIGNED IN YOUR CLASS YOU WENT
9 OUT AND BOUGHT A COPY, RIGHT?

10 MR. KRUGMAN: OBJECTION, LEADING AND RELEVANCE.

11 THE COURT: SUSTAINED ON LEADING. I DON'T KNOW
12 WHETHER IT'S RELEVANT OR NOT. I'M NOT SURE WHERE YOU'RE GOING
13 WITH THIS. I'M GOING TO NEED TO HEAR MORE.

14 MR. MILLER: OKAY. THE SIMPLE DIRECTION, YOUR HONOR,
15 IS THAT AS SHE JUST TESTIFIED SHE WAS GIVEN THIS EXCERPT WHEN
16 SHE WAS A GRADUATE STUDENT AND WENT OUT AND THEN PURCHASED IT
17 TO USE IN HER OWN TEACHING AS A PROFESSOR.

18 THE WITNESS: JUST TO CLARIFY, I USED THE LIBRARY
19 COPY BECAUSE I DID BUY IT, AND THEN I LOANED IT OUT TO SOMEBODY
20 AND NEVER SAW IT AGAIN, BUT I BOUGHT THE BOOK.

21 THE COURT: I'M NOT SURE I SEE THE RELEVANCE. WHAT'S
22 THE RELEVANCE?

23 MR. MILLER: I THINK THE RELEVANCE, YOUR HONOR, IS
24 THAT THERE ARE PROFESSORS WHO HAVE TESTIFIED THAT THEY HAVE
25 SOME KNOWLEDGE OF STUDENTS PERHAPS BUYING WORKS. HERE'S AN

1 INSTANCE WHERE AN EXCERPT WAS GIVEN TO A GRADUATE STUDENT, AND
2 THEY, IN FACT, WENT OUT AND PURCHASED THE WORK.

3 AND TO SOME DEGREE THAT'S THE KIND OF THING THAT
4 HAPPENS AS GRADUATE STUDENTS ARE IN THE PROCESS OF COLLECTING
5 WORKS FOR THEIR OWN LIBRARIES WHEN THEY'RE GOING TO BECOME
6 PROFESSORS, THEY TAKE WHAT THEY LEARNED ABOUT IN UNDERGRAD TO
7 COMPILE THOSE LIBRARIES THEY USE.

8 MR. KRUGMAN: OBJECT AGAIN ON RELEVANCE GROUNDS.
9 WHAT THIS PROFESSOR MAY HAVE DONE AT ONE POINT IS IRRELEVANT
10 AND OUTSIDE THE TIME PERIOD THAT WE'RE FOCUSED ON.

11 THE COURT: I'LL SUSTAIN THE OBJECTION.

12 MR. MILLER: THANK YOU, YOUR HONOR.

13 BY MR. MILLER:

14 Q. NOW CAN YOU TELL ME WHY YOU ASSIGNED SLAVE SONGS AND SLAVE
15 CONSCIOUSNESS FOR WEEK 8?

16 A. WELL, THE MAIN TEXT FOR WEEK 8 WAS EUGENE GENOVESE THE
17 WORLD THE SLAVES MADE WHICH IS ALSO AN EXAMINATION, AN ATTEMPT
18 TO UNDERSTAND WHAT LIFE WAS LIKE FOR SLAVES UNDER SLAVERY IN
19 THE UNITED STATES.

20 GENOVESE AND LEVINE HAVE VERY DIFFERENT METHODS OF
21 DOING THIS. THEY COME TO THEIR MATERIAL FROM INTERPRETIVE
22 ANGLES, AND I WANTED MY STUDENTS TO SEE HOW HISTORIANS LOOK AT
23 THE SAME TOPIC IN DIFFERENT WAYS.

24 Q. SO IN THAT REGARD IT'S ACTUALLY SOMEWHAT SIMILAR TO
25 THE REASON YOU ASSIGNED THE PRIOR EXCERPT THAT WE WERE JUST

1 TALKING ABOUT AS COMPLIMENTARY TO THE PRIMARY READING FOR THAT
2 WEEK?

3 MR. KRUGMAN: OBJECTION, LEADING.

4 THE WITNESS: YES.

5 THE COURT: SUSTAINED.

6 BY MR. MILLER:

7 Q. DO YOU BELIEVE THAT YOU ASSIGNED IT FOR A SIMILAR REASON
8 AS THE PRIOR EXCERPTS WE JUST DISCUSSED?

9 MR. KRUGMAN: OBJECTION, LEADING.

10 THE COURT: SUSTAINED.

11 BY MR. MILLER:

12 Q. HOW MANY PAGES ARE IN REGION, RACE AND RECONSTRUCTION?

13 A. 463. SO I THINK WE HAD DECIDED THAT IT WAS ABOUT
14 SOMETHING JUST UNDER 500.

15 Q. OKAY. AND YOU ASSIGNED WHAT PAGES OUT OF THAT?

16 A. 143 THROUGH 177.

17 Q. WAIT A MINUTE. I'M SORRY. I SWITCHED BOOK TITLES.

18 OUT OF THE UNPREDICTABLE PAST HOW MANY PAGES IS THAT
19 BOOK?

20 A. IT'S 372 PAGINATED PAGES, AND THEN ABOUT 12, MAYBE A
21 LITTLE BIT MORE MAYBE 14 PAGES IN ADDITION, SO A LITTLE LESS
22 THAN 400 PAGES.

23 Q. AND WHAT PAGES DID YOU ASSIGN THE STUDENTS TO READ FROM
24 THAT TEXT?

25 A. PAGES 35 THROUGH 58.

1 Q. OKAY. AND ROUGHLY DO YOU BELIEVE THAT'S LESS THAN 10
2 PERCENT?
3 A. I DO.
4 Q. OKAY. NOW, DID YOU FOLLOW THE SAME PROCESS FOR LOADING
5 THIS EXCERPT ONTO ERESERVES AS YOU DID FOR THE PRIOR EXCERPT?
6 A. I DID.
7 Q. OKAY. DID THAT INCLUDE MENTALLY FILLING A FAIR USE
8 CHECKLIST?
9 A. YES.
10 Q. AND WHEN YOU FILLED OUT THAT FAIR USE CHECKLIST, DID YOU
11 EVALUATE ALL OF THE FACTORS ON THE FAIR USE CHECKLIST?
12 A. YES.
13 Q. AND DID YOU ARRIVE AT A CONCLUSION AS TO WHETHER OR NOT
14 YOUR USE OF THE LEVINE ESSAY WAS FAIR?
15 A. I DID.
16 Q. AND WHAT WAS YOUR CONCLUSION?
17 A. THAT IT WAS FAIR USE. IT FELL INTO THOSE PARAMETERS.
18 Q. OKAY. AND I'M GOING TO SHOW YOU WHAT'S BEEN MARKED AS
19 DEFENDANTS' EXHIBIT 474. IT'S IN YOUR BINDER.
20 A. YEP.
21 Q. DO YOU RECOGNIZE THAT DOCUMENT?
22 A. YES.
23 Q. WHAT IS IT?
24 A. IT IS THE FAIR USE CHECKLIST THAT I FILLED OUT FOR THE
25 LEVINE ESSAY SLAVE SONGS AND SLAVES CONSCIOUSNESS.

1 Q. AND YOU HAD NOT COMPLETED AND PRINTED OUT A FAIR USE
2 CHECKLIST WHEN YOU ORIGINALLY DID YOUR FAIR USE ANALYSIS FOR
3 SLAVE SONGS AND SLAVES CONSCIOUSNESS WHEN YOU POSTED IT
4 ORIGINALLY; IS THAT CORRECT?

5 A. THAT'S CORRECT.

6 Q. DOES DEFENDANTS' EXHIBIT 474 -- DO YOU BELIEVE THAT
7 DEFENDANTS' EXHIBIT 474 IS A FAIR AND ACCURATE RECREATION OF
8 THE EVALUATION THAT YOU MADE PRIOR TO POSTING THE LEVINE
9 EXCERPT ONTO ERESERVE?

10 A. YES.

11 MR. KRUGMAN: OBJECTION, LEADING.

12 THE COURT: SUSTAINED.

13 BY MR. MILLER:

14 Q. TELL ME HOW YOU WENT ABOUT CREATING THE DOCUMENT DX-474?

15 A. I HAD CHOSEN THE ESSAY. I GATHERED ALL OF THE CITATIONAL
16 MATERIALS. I WENT TO THE ERESERVE WEBSITE. AGAIN, AS I HAD
17 SAID BEFORE, EITHER VIA A HARDCOPY OR VIA THE HYPERLINK
18 AVAILABLE ON THE ERESERVE WEBSITE, I LOOKED OVER THE VARIOUS
19 CHECKLISTS AND DETERMINED THAT IT FELL WITHIN THE PARAMETERS OF
20 FAIR USE, AND SO I CLICKED ON THE BOX THAT SAID SO, THAT IT'S
21 FAIR USE. I CLICKED ON THE SECTION THAT SAID OR THE BOX THAT
22 SAID SECTION OF BOOK -- PART OF BOOK, I THINK ARE THE EXACT
23 WORDS, WHICH TOOK ME TO THE PAGE WHERE I COULD ENTER THE
24 CITATIONAL MATERIAL, AND I CLICKED IT AND SENT IT TO THE
25 LIBRARY.

1 Q. OKAY. NOW, SPECIFICALLY WITH REGARD TO THE DOCUMENT
2 THAT'S MARKED DEFENDANTS' EXHIBIT 474, HOW DID YOU GO ABOUT
3 FILLING OUT THE BOXES ON THIS DOCUMENT IN NOVEMBER OF 2010?

4 A. I'M NOT SURE I UNDERSTAND THE QUESTION.

5 Q. WHAT WAS YOUR THOUGHT PROCESS WHILE YOU WERE FILLING OUT
6 THIS ACTUAL DOCUMENT, THE ONE WE'RE LOOKING AT HERE?

7 A. MY THOUGHT PROCESS WAS UNDERSTANDING THE DEFINITIONS OF
8 THE TERMS AS BEST AS I DID AND CHECKING THE BOXES. I'M REALLY
9 NOT SURE --

10 Q. DID YOU CHECK THE BOXES IN THE SAME WAY THAT YOU DID WHEN
11 YOU DID THE ANALYSIS THE FIRST TIME AROUND WHEN YOU POSTED THIS
12 WORK TO ERESERVES?

13 A. BETWEEN 2009 WHEN I INITIALLY PUT THIS MATERIAL UP ON
14 ERESERVES AND THE END OF 2010 WHEN I FILLED OUT THIS CHECKLIST,
15 MY UNDERSTANDING OF THE TERMS DID NOT CHANGE.

16 Q. SO WAS YOUR ANALYSIS THE SAME FOR DX-474 AS IT WAS PRIOR
17 TO POSTING ON ERESERVES?

18 A. YES.

19 MR. KRUGMAN: OBJECTION, LEADING.

20 THE COURT: SUSTAINED.

21 BY MR. MILLER:

22 Q. CAN YOU TELL ME WHETHER OR NOT YOU CHANGED YOUR ANALYSIS
23 BETWEEN THE TIME YOU PUT IT ON ERESERVES AND WHEN YOU FILLED
24 OUT THIS CHECKLIST?

25 A. I DID NOT CHANGE MY ANALYSIS.

1 Q. OKAY. CAN YOU TELL ME WHETHER OR NOT DEFENDANTS' EXHIBIT
2 474 IS A FAIR AND ACCURATE RECREATION OF THE CHECKLIST THAT YOU
3 MENTALLY CREATED PRIOR TO POSTING ON ERESERVES?

4 A. YES.

5 MR. MILLER: YOUR HONOR, I WOULD MOVE DEFENDANTS'
6 EXHIBIT 474 INTO EVIDENCE AS A RECREATED CHECKLIST.

7 MR. KRUGMAN: OBJECTION, RELEVANCE, LACK OF
8 APPROPRIATE FOUNDATION, BEST EVIDENCE.

9 THE COURT: IT'S ADMITTED.

10 BY MR. MILLER:

11 Q. I'D LIKE TO DISCUSS THE TWO BOOKS TOGETHER SO WE CAN MOVE
12 THROUGH THIS QUICKLY, IF YOU DON'T MIND, OR JUST AT LEAST WITH
13 RESPECT TO THESE FACTORS AT THE SAME TIME. THERE'S REALLY JUST
14 ONE THAT I WANT TO TALK ABOUT IN DETAIL.

15 IF YOU'LL LOOK AT THE FAIR USE CHECKLIST DEFENDANTS'
16 EXHIBIT 473, AND THIS IS -- I'M NOT TRYING TO CONFUSE YOU OR
17 ANYONE ELSE, BUT THIS IS FLIPPING BACK TO THE EXCERPT FROM
18 RACE, REGION AND RECONSTRUCTION.

19 A. OKAY.

20 Q. OKAY. YOU CHECKED UNDER FACTOR 3 THAT THE PORTION USED
21 WAS NOT CENTRAL OR SIGNIFICANT TO THE ENTIRE WORK AS A WHOLE?

22 A. CORRECT.

23 Q. WHY DID YOU CHECK THAT?

24 A. BOTH OF THESE BOOKS ARE COLLECTIONS OF FREESTANDING
25 ESSAYS. THEY ARE NOT COLLECTIONS OF CHAPTERS THAT MAKE AN

1 ARGUMENT THAT ONE NEEDS TO READ FROM THE BEGINNING TO THE END
2 IN ORDER TO GET THE HISTORIAN'S POINT OF VIEW. EACH ONE IS
3 SORT OF SELF-CONTAINED.

4 AND SO IT SEEMED TO ME AND IT STILL SEEMS TO ME THAT
5 EITHER OF THESE ESSAYS COULD BE REMOVED FROM THE BOOK IN WHICH
6 THEY ARE CURRENTLY BOUND, AND THE BOOK -- BOTH OF THESE BOOKS
7 WOULD STILL BE TREMENDOUSLY VALUABLE AND STILL CONTAIN ESSAYS.
8 THEY WOULD STILL BOTH BE COHERENT AND COGENT AS THEY ARE, YOU
9 KNOW, WITH OR WITHOUT THE ESSAYS IN THEM.

10 Q. IT SOUNDS LIKE YOUR ANSWER WAS DISCUSSING BOTH YOUR VIEW
11 OF THE LEVINE WORK AND THE --

12 A. I'M SORRY, WE WERE JUST TALKING ABOUT THE FIELDS, BUT,
13 YES, THAT'S TRUE AS TO BOTH.

14 Q. AT SOME POINT YOU SWITCHED TO BOTH, AND I JUST WANT TO
15 MAKE SURE THE RECORD IS CLEAR.

16 A. YES.

17 Q. NOW, AS TO THE LEVINE WORK, THAT IS A SINGLE BOOK BY A
18 SINGLE AUTHOR; IS THAT CORRECT?

19 A. YES.

20 Q. OKAY. AND YOU USED ONE ESSAY FROM THAT; IS THAT CORRECT?

21 A. YES.

22 Q. NOW TURNING TO DEFENDANTS' EXHIBIT 474 WHICH IS THE FAIR
23 USE CHECKLIST FOR THE LEVINE EXCERPT, YOU ALSO CHECKED THAT THE
24 PORTION USED IS NOT CENTRAL TO THE ENTIRE WORK AS A WHOLE.

25 CAN YOU TELL ME WHY YOU CHECKED THAT?

1 A. FOR THE SAME REASON THAT THE ESSAY COULD BE REMOVED FROM
2 THE BOOK ENTIRELY AND THE BOOK WOULD STILL -- AN HISTORIAN WHO
3 READS THIS COULD GET A VERY GOOD IDEA ABOUT WHAT CULTURAL
4 HISTORY IS.

5 IT'S NOT NECESSARY TO READ THAT PARTICULAR CHAPTER IN
6 ORDER TO UNDERSTAND THE LARGER CLAIMS THAT LEVINE IS MAKING OR
7 THE BROADER STORY HE'S TRYING TO TELL.

8 THE COURT: LET ME ASK YOU THIS. DID YOU SAY THAT
9 LEVINE IS A BOOK OR A WORK?

10 THE WITNESS: OKAY. I THINK I SAID BOOK, BUT NOW I'M
11 NOT SURE. THERE IS A BOOK.

12 THE COURT: THERE IS A BOOK?

13 THE WITNESS: THERE IS A BOOK, BUT IT IS A COLLECTION
14 OF FREESTANDING ESSAYS.

15 THE COURT: I THOUGHT YOU SAID THE LEVINE BOOK IS A
16 SINGLE WORK BY A SINGLE AUTHOR.

17 THE WITNESS: IT IS, BUT THE ESSAYS ARE ALL
18 SEPARATE.

19 THE COURT: ALL OF THE ESSAYS ARE BY LEVINE?

20 THE WITNESS: ALL OF THE ESSAYS ARE BY LEVINE, YES.

21 MR. MILLER: HERE'S THE BOOK IF YOUR HONOR WOULD BE
22 INTERESTED IN A QUICK READ.

23 THE COURT: NOT AT THIS POINT I DON'T THINK.

24 BY MR. MILLER:

25 Q. LET ME TALK ABOUT SOME OF THESE FACTORS THAT ARE COMMON TO

1 YOUR ANALYSIS TO YOUR USE TOGETHER. FOR BOTH BOOKS IN BOTH
2 DX-473 AND 474 YOU CHECKED THAT UNDER FACTOR 1 THAT THEY
3 WERE FOR NONPROFIT EDUCATIONAL AND TEACHING USE; IS THAT
4 CORRECT?

5 A. THAT'S CORRECT.

6 Q. WHY IS THAT?

7 A. BECAUSE I WAS USING IT FOR CLASSROOM USE, AND SO IT WAS
8 FOR EDUCATIONAL PURPOSES, AND IT WASN'T FOR PROFIT.

9 Q. OKAY. NOW UNDER FACTOR 2 FOR BOTH ESSAYS YOU CHECKED THAT
10 IT WAS A PUBLISHED WORK. I'M NOT GOING TO GO INTO THAT, BUT
11 YOU DID NOT CHECK THAT THEY WERE FACTUAL OR NONFICTION WORKS;
12 IS THAT RIGHT?

13 A. THAT'S CORRECT.

14 Q. WHY IS THAT?

15 A. TO BE QUITE HONEST I'M NOT QUITE SURE. HAD I TO DO IT
16 AGAIN, I WOULD CERTAINLY CHECK THAT BOX.

17 Q. OKAY. AND NOW I NOTICED THAT YOU DID NOT CHECK IN EITHER
18 ONE OF THESE IMPORTANT TO YOUR EDUCATIONAL OBJECTIVES OR
19 NECESSARY TO YOUR EDUCATIONAL OBJECTIVES, THOSE ARE IN FACTORS
20 2 AND 1 RESPECTIVELY; WHY IS THAT?

21 A. MY UNDERSTANDING OF THOSE QUESTIONS BOTH THE WORDS
22 NECESSARY AND IMPORTANT SUGGESTED TO ME THAT THE WORKS WERE I
23 GUESS NECESSARY IS SORT OF A USEFUL WORD. THAT WITHOUT THESE
24 SPECIFIC WORKS I COULDN'T TEACH THE MATERIAL. I COULDN'T TEACH
25 THE SUBJECT THAT I WANTED.

1 AND AS I UNDERSTOOD IT, EITHER OF THESE ESSAYS, IN
2 FACT ANY OF THE ESSAYS AND EVEN ANY OF THE BOOKS ON MY SYLLABUS
3 IF I COULDN'T USE THEM I COULD REPLACE THEM WITH OTHER EQUALLY
4 EXCELLENT AND IMPORTANT HISTORICAL WORKS. SO THAT WAS MY
5 INTERPRETATION OF THE LANGUAGE OF IMPORTANCE AND NECESSITY.

6 THE COURT: WE NEED TO TAKE A BREAK. LET'S TAKE A
7 15-MINUTE BREAK.

8 (RECESS)

9 MR. MILLER: JUST ONE LAST QUESTION AND THEN SOME
10 EXHIBITS AND CLEAN UP.

11 BY MR. MILLER:

12 Q. PROFESSOR DAVIS, IF YOU WOULD QUICKLY TURN TO PLAINTIFFS'
13 EXHIBIT 512, THAT'S YOUR SYLLABUS?

14 A. OKAY.

15 Q. LOOKING FROM YOUR SYLLABUS CAN YOU TELL ME WHICH OF THE
16 BOOKS YOU REQUIRED YOUR STUDENTS TO PURCHASE FOR THIS COURSE?

17 MR. KRUGMAN: OBJECTION, YOUR HONOR, FOR THE REASONS
18 WE'VE STATED PREVIOUSLY THAT THESE ARE NOT WORKS ON THE JOINT
19 EXHIBIT.

20 THE COURT: OVERRULED.

21 THE WITNESS: THEY ARE -- WOULD YOU LIKE ME TO READ
22 THEM?

23 BY MR. MILLER:

24 Q. YES.

25 A. PAUL JOHNSON A HISTORY OF THE AMERICAN PEOPLE; ERIC FONER

1 THE STORY OF AMERICAN FREEDOM; THOMAS BENDER A NATION AMONG
2 NATIONS, AMERICA'S PLACE IN WORLD HISTORY; EDMUNC MORGAN
3 AMERICAN SLAVERY, AMERICAN FREEDOM, THE ORDEAL OF COLONIAL
4 VIRGINIA; GORDON WOOD THE RADICALISM OF THE AMERICAN
5 REVOLUTION; DAVID ROEDIGER THE WAGES OF WHITENESS, RACE AND THE
6 MAKING OF THE AMERICAN WORKING CLASS; EUGENE GENOVESE ROLL
7 JORDAN ROLL, THE WORLD THE SLAVES MADE; EDWARD JONES THE KNOWN
8 WORLD; ROBERT WIEBE THE SEARCH FOR ORDER; GAIL BEDERMAN
9 MANLINESS AND CIVILIZATION, A CULTURAL HISTORY OF RACE AND
10 GENDER IN THE UNITED STATES; JOHN KASSON AMUSING THE MILLION,
11 CONEY ISLAND AT THE TURN OF THE CENTURY; C. VANN WOODWARD THE
12 STRANGE CAREER OF JIM CROW; KEVIN KRUSE WHITE FLIGHT, ATLANTA
13 AND THE MAKING OF MODERN CONSERVATISM AND TIMOTHY TYSON BLOOD
14 DONE SIGN MY NAME.

15 MR. MILLER: THANK YOU. YOUR HONOR, JUST VERY
16 QUICKLY WE TALKED ABOUT HER CV. IT'S PLAINTIFFS' EXHIBIT 944.
17 I'D OFFER THAT INTO EVIDENCE.

18 MR. KRUGMAN: NO OBJECTION.

19 THE COURT: IT'S ADMITTED.

20 MR. MILLER: AND THEN WE TALKED OR MR. KRUGMAN
21 BROUGHT UP PLAINTIFFS' EXHIBIT 945. IT'S THE E-MAIL FROM THE
22 ERES SYSTEM. I WOULD MOVE INTO THAT EVIDENCE.

23 MR. KRUGMAN: NO OBJECTION, YOUR HONOR.

24 THE COURT: IT'S ADMITTED.

25 MR. MILLER: AND THEN FINALLY THE TEXT AND WE'RE NOT

1 SURE IF THE OTHER TEXT IS IN EVIDENCE THAT IS PLAINTIFFS'
2 EXHIBIT 477 AND DEFENDANTS' EXHIBIT 770 THAT'S THE
3 UNFORGETTABLE PAST, I MOVE THOSE INTO EVIDENCE.

4 MR. KRUGMAN: NO OBJECTION, YOUR HONOR.

5 THE WITNESS: THE UNPREDICTABLE PAST. SORRY.

6 MR. MILLER: DID I SAY UNFORGETTABLE PAST AGAIN?

7 THE COURT: STATE THE EXHIBIT NUMBER AGAIN?

8 MR. MILLER: PLAINTIFFS' 477 AND DEFENDANTS' EXHIBIT
9 770.

10 THE COURT: THEY ARE ADMITTED. WHEN I SAID THEY'RE
11 ADMITTED, YOU DON'T WANT TO TENDER TWO COPIES OF THE SAME
12 THING?

13 MR. MILLER: NOT NECESSARILY, I JUST WANTED TO AVOID
14 CONFUSION. WE'VE BEEN TALKING I BELIEVE ABOUT 770. IT'S UP TO
15 YOUR HONOR. I JUST WANTED TO AVOID CONFUSION AND HAVE
16 EVERYTHING IN THE RECORD, AND THAT CREATES MORE CONFUSION,
17 DOESN'T IT?

18 THE COURT: WHAT IS PLAINTIFFS' EXHIBIT 945; IS THAT
19 ALREADY IN EVIDENCE?

20 MR. KRUGMAN: IT IS NOW. 945 IS THE E-MAIL
21 EXCHANGE --

22 THE COURT: ALL RIGHT. SO IT IS IN EVIDENCE, AND
23 THEN IN ADDITION YOU'RE TENDERING WHAT NOW, MR. MILLER?

24 MR. MILLER: THE UNPREDICTABLE PAST THAT IS -- I HAVE
25 THAT AS DEFENDANTS' EXHIBIT 770. WE WILL BE HAPPY TO TENDER

1 JUST THAT ONE.

2 THE COURT: I'LL ADMIT IT.

3 MR. KRUGMAN: 477 IS IN EVIDENCE ALREADY, AND, YOUR
4 HONOR, I THINK I MISTAKENLY REFERRED TO IT AS 948 BECAUSE I WAS
5 USING ANOTHER COPY, BUT IT'S THE EXACT SAME BOOK AND IT'S IN
6 EVIDENCE.

7 THE COURT: IT'S THE SAME AS DEFENDANTS' EXHIBIT 770;
8 IS THAT WHAT YOU'RE SAYING?

9 MR. KRUGMAN: I BELIEVE SO.

10 THE COURT: IF PLAINTIFFS' 477 AND DEFENDANTS'
11 EXHIBIT 770 ARE THE SAME BOOK WHICH I THINK THEY ARE, THEN I
12 THINK IT IS SUFFICIENT JUST TO HAVE PLAINTIFFS' 477.

13 MR. MILLER: THAT'S CERTAINLY FINE WITH US. THE
14 OTHER THING I MOVED INTO WAS HER CV WHICH IS PLAINTIFFS'
15 EXHIBIT 944.

16 THE COURT: AND I THOUGHT I ADMITTED THAT.

17 MR. MILLER: YOU HAD. NOTHING FURTHER FOR THIS
18 WITNESS.

19 MR. KRUGMAN: VERY, VERY BRIEF, YOUR HONOR.

20 REDIRECT EXAMINATION

21 BY MR. KRUGMAN:

22 Q. PROFESSOR DAVIS, YOU WERE ASKED ON DIRECT OR YOU SAID THAT
23 WITH RESPECT TO THE TWO CHECKLISTS THAT YOU PREPARED IN
24 NOVEMBER OF 2010 YOU WERE ASKED TO CREATE THOSE DOCUMENTS.

25 AM I CORRECT THAT IT WAS GEORGIA STATE'S LEGAL

1 AFFAIRS DEPARTMENT THAT ASKED YOU TO PREPARE THOSE TWO
2 DOCUMENTS?

3 A. THAT'S CORRECT.

4 Q. AND IS IT YOUR UNDERSTANDING THAT YOU WERE ASKED TO
5 PREPARE THOSE TWO DOCUMENTS BECAUSE YOU WOULD BE A WITNESS IN
6 THIS LITIGATION?

7 A. THAT WAS UNKNOWN.

8 Q. WERE YOU ASKED TO PREPARE ANY CHECKLISTS OTHER THAN
9 DEFENDANT'S EXHIBIT 473 AND DEFENDANTS' EXHIBIT 474?

10 A. I ASSUME THAT -- IN FACT, I AM POSITIVE THAT I WAS ASKED
11 TO FILL OUT CHECKLISTS FOR EVERYTHING THAT I HAD PUT ON
12 ERESERVE.

13 Q. FOR THE FALL 2009 COURSE?

14 A. CORRECT.

15 Q. WERE YOU ASKED TO PREPARE CHECKLISTS FOR ANY OTHER
16 COURSES?

17 A. THIS WAS THE ONLY COURSE THAT I TAUGHT THAT SEMESTER, SO
18 NO.

19 Q. AND YOUR BEST RECOLLECTION IS THAT YOU PREPARED CHECKLISTS
20 FOR THE OTHER WORKS THAT YOU REQUESTED BE POSTED ON ERESERVE
21 FOR THE FALL 2009 CLASS THAT WE HAVE BEEN TALKING ABOUT?

22 MR. MILLER: OBJECTION, THERE ARE NO OTHER WORKS FROM
23 HER HISTORY 7010 CLASS THAT ARE IN ISSUE AS FAR AS BEING PLACED
24 ON ERES IN THE CASE.

25 MR. KRUGMAN: I BELIEVE THE WITNESS JUST TESTIFIED

1 AND I JUST WANTED TO CLARIFY THAT SHE SAID SHE PREPARED SOME
2 ADDITIONAL CHECKLISTS OTHER THAN THE TWO THAT RELATE TO THE TWO
3 SPECIFICS WORKS THAT --

4 THE COURT: SO YOUR QUESTION GOES TO CHECKLISTS THAT
5 SHE PREPARED FOR ITEMS OTHER THAN THE ITEMS AT ISSUE IN THIS
6 LITIGATION?

7 MR. KRUGMAN: WELL, CHECKLISTS THAT SHE PREPARED FOR
8 OTHER THAN THE TWO SPECIFIC WORKS.

9 THE COURT: RIGHT, AND WHAT DO YOU THINK THOSE OTHER
10 WORKS WERE?

11 MR. KRUGMAN: I COULD GO TO THE SYLLABUS AND TELL YOU
12 WHAT THEY WERE. I MERELY WANTED TO FIND OUT IF SHE COMPLETED
13 OTHER CHECKLISTS THAN SIMPLY THE TWO FOR THE WORKS AT ISSUE.

14 THE COURT: SHE SAID THAT SHE DID.

15 MR. KRUGMAN: YES, AND IF SHE CAN TELL ME WHAT THOSE
16 OTHER WORKS ARE.

17 THE COURT: WHAT ARE THEY?

18 THE WITNESS: IF I RECALL CORRECTLY, THEY WOULD BE
19 GARY NASH SOCIAL CHANGE AND THE GROWTH OF PREREVOLUTIONARY
20 URBAN RADICALISM; HERBERT G. GUTMAN, BUT I BELIEVE THAT I USED
21 A DIFFERENT COPY, A DIFFERENT VERSION OF THIS ESSAY THAN THE
22 ONE THAT I HAVE PUT ON THIS SYLLABUS. JAMES GOODMAN FOR THE
23 LOVE OF STORIES; JOAN SCOTT GENDER, A USEFUL CATEGORY OF
24 HISTORICAL ANALYSIS; NAN ENSTAD FASHIONING POLITICAL IDENTITIES,
25 CULTURAL STUDIES AND THE HISTORICAL CONSTRUCTION OF POLITICAL

1 SUBJECTS; HOWARD RABINOWITZ MORE THAN THE WOODWARD THESIS,
2 ASSESSING THE STRANGE CAREER OF JIM CROW.
3 THAT SHOULD COVER IT.

4 THE COURT: WHO WERE THE PUBLISHERS OF THOSE ITEMS;
5 DO YOU KNOW?

6 THE WITNESS: MOST OF THEM WERE JOURNAL ESSAYS. THE
7 GARY NASH CAME FROM A COLLECTION OF ESSAYS THAT WAS PUBLISHED
8 BY NORTHERN ILLINOIS UNIVERSITY PRESS.

9 THE COURT: LET ME SHORTEN IT UP A LITTLE BIT. WERE
10 ANY OF THEM CAMBRIDGE, OXFORD OR SAGE PUBLICATIONS?

11 THE WITNESS: NO, THEY WERE NOT.

12 THE COURT: AT THIS POINT I'LL SUSTAIN THE OBJECTION.
13 BY MR. KRUGMAN:

14 Q. IF YOU COULD BRING UP DEFENDANTS' EXHIBIT 473, AND THIS IS
15 THE CHECKLIST THAT YOU PREPARED FOR THE ESSAY BY BARBARA
16 FIELDS; IS THAT CORRECT?

17 A. YES.

18 Q. IF YOU CAN TURN TO THE SECOND PAGE OF THIS AND FOCUSING
19 ON -- I JUST WANT TO TALK ABOUT FACTOR 4 WHICH DEALS WITH THE
20 EFFECT ON MARKET FOR ORIGINAL, AND YOU CHECKED NO SIGNIFICANT
21 EFFECT ON MARKET OR POTENTIAL MARKET FOR COPYRIGHTED WORK; IS
22 THAT CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND THE MARKET YOU CONSIDERED WAS HISTORIANS WHO WERE
25 INTERESTED IN CULTURAL HISTORICAL METHODS AS WELL AS ASPIRING

1 HISTORIANS; IS THAT CORRECT?

2 A. YES.

3 Q. AND THE MARKET YOU CONSIDERED DID NOT INCLUDE PERMISSIONS
4 FOR USE OF THIS WORK; IS THAT CORRECT?

5 A. I'M NOT SURE I UNDERSTAND THE QUESTION.

6 Q. LOOK ON THE RIGHT SIDE, THERE'S A BOX, THE SECOND BOX
7 THERE'S LICENSING OR PERMISSION REASONABLY AVAILABLE UNDER
8 FACTOR 4.

9 A. YES.

10 Q. AM I CORRECT THAT YOU MADE NO EFFORT TO DETERMINE WHETHER
11 LICENSING OR PERMISSIONS FOR THE FIELDS WORK WERE REASONABLY
12 AVAILABLE?

13 A. YOU MEAN IN OTHER FORM?

14 Q. NO. YOU DID NOT CONTACT THE PUBLISHER OF THE WORK OR THE
15 COPYRIGHT CLEARANCE CENTER TO DETERMINE WHETHER A LICENSE TO
16 USE THE WORK OR PERMISSION TO USE THE WORK WAS AVAILABLE,
17 CORRECT?

18 A. THAT'S CORRECT, I DIDN'T MAKE THOSE CONTACTS.

19 Q. AND THE MARKET YOU WERE LOOKING AT WAS THE MARKET FOR
20 SALES OF THE BOOK AS DISTINGUISHED FROM FEES THAT MIGHT BE
21 NECESSARY IN ORDER TO OBTAIN PERMISSION TO USE THAT SELECTION?

22 A. YES.

23 Q. IS THAT CORRECT?

24 A. THAT'S CORRECT.

25 MR. KRUGMAN: THAT'S ALL I HAVE, YOUR HONOR.

1 THE COURT: SHALL THE WITNESS BE EXCUSED?

2 MR. MILLER: SHE SHALL YOUR HONOR.

3 THE COURT: YOU ARE EXCUSED. THANK YOU. WHO'S
4 NEXT?

5 MS. SINGER: YOUR HONOR, AS OUR LAST WITNESS, AS I
6 KNOW YOU'VE BEEN WAITING TO HEAR US SAY, WE WOULD LIKE TO PLAY
7 SOME DEPOSITION EXCERPTS FROM PROFESSOR DIXON.

8 THE COURT: AND YOU'RE GOING TO FILE SOMETHING?

9 MS. SINGER: I AM GOING TO FILE IT, AND I CAN EVEN
10 HAND A COPY UP.

11 THE COURT: ALL RIGHT. WE NEED TO MAKE IT A PART OF
12 THE RECORD. YOU HAVEN'T FILED THIS YET?

13 MS. SINGER: WE WILL AT THE END OF THE DAY.

14 THE COURT: WHY DON'T YOU DO THAT. FILE IT AT THE
15 END OF THE DAY. I DON'T NEED IT.

16 MR. HARBIN: YOUR HONOR, IF I MAY, THE DEFENDANTS AND
17 THE PLAINTIFFS HAVE DISCUSSED THIS, AND WE EXPECT TO PUT ON
18 PROFESSOR DIXON LIVE AND AGREED THEY COULD CROSS HER OUTSIDE
19 THE SCOPE OF OUR DIRECT BUT WOULD OBJECT TO PUTTING ON THE
20 DEPOSITION WHEN WE BELIEVE SHE CAN TESTIFY LIVE ON FRIDAY.

21 THE COURT: WELL, WE ARE IN THE PLAINTIFFS' SIDE OF
22 THE CASE SO --

23 MR. HARBIN: BUT SHE'S NOT A PARTY.

24 THE COURT: WELL THAT'S TRUE.

25 MS. SINGER: YOUR HONOR, SHE WAS REPRESENTED TO US AS

1 BEING UNAVAILABLE, AND THERE WAS NO OBJECTION TO THE DEPOSITION
2 DESIGNATIONS THAT WERE PUT IN THE PRETRIAL ORDER.

3 MR. HARBIN: IF I MAY BRIEFLY RESPOND, YOUR HONOR, WE
4 TOOK AN EVIDENTIARY DEPOSITION OF HER BECAUSE WE UNDERSTOOD
5 UNAVAILABILITY MAY BE AN ISSUE. AS SHE TESTIFIED IN HER
6 DEPOSITION SHE HAS A FAMILY MEMBER WHO HAS CANCER. SHE THOUGHT
7 SHE MIGHT BE OUT OF TOWN, AND THEREFORE WE TOOK AN EVIDENTIARY
8 DEPOSITION IN CASE WE HAD TO USE IT.

9 THE DEFENDANTS OBJECTED TO THE STATEMENT THAT SHE'S
10 UNAVAILABLE, ALTHOUGH WE CAN PUT THAT ON THE RECORD WITH THE
11 DEPOSITION. WE LISTED HER AS A MAY CALL WITNESS AND SAID WE
12 MAY HAVE TO USE THE DEPOSITION. SHE HAS WORKED HER SCHEDULE
13 WHERE SHE CAN APPEAR FRIDAY. SO SHE WILL BE AVAILABLE.

14 THE COURT: I GUESS WHAT CONCERNS ME MOST IS IS THERE
15 GOING TO BE UNNECESSARILY PROLONGATION OF THE TRIAL. I DON'T
16 CARE OTHERWISE WHETHER HER DEPOSITION IS USED IN ADDITION TO
17 HER LIVE TESTIMONY.

18 WHAT'S THE LENGTH OF THESE EXCERPTS?

19 MS. SINGER: IT IS, YOUR HONOR, 26 MINUTES AND 5.078
20 SECONDS.

21 THE COURT: OKAY. I'LL ALLOW IT.

22 MS. SINGER: THANK YOU, YOUR HONOR.

23 (VIDEOTAPED DEPOSITION WAS PLAYED IN OPEN COURT.)

24 MS. SINGER: YOUR HONOR, BY WAY OFF EXPLANATION
25 PROFESSOR DIXON ACTUALLY FILLED OUT TWO SEPARATELY RECREATED

1 CHECKLISTS.

2 I HAVE BY WHAT I CHOOSE TO BELIEVE IS POPULAR DEMAND
3 A LIST OF EXHIBITS TO READ INTO THE RECORD AND THAT SHOULD BE
4 IT.

5 THE COURT: LET'S DO IT FIRST THING IN THE MORNING.

6 I'LL SEE YOU ALL AT 9:30.

7 (PROCEEDINGS ADJOURNED)

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C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA

I, ANDRE G. ASHLEY, DO HEREBY CERTIFY THAT I AM A
U.S. DISTRICT REPORTER FOR THE NORTHERN DISTRICT OF GEORGIA,
THAT I REPORTED THE FOREGOING AND THE SAME IS A TRUE AND
ACCURATE TRANSCRIPTION OF MY MACHINE SHORTHAND NOTES AS TAKEN
AFORESAID.

IN TESTIMONY WHEREOF I HAVE HEREUNTO SET MY HAND ON
THIS 20TH DAY OF JUNE, 2011.

ANDRE G. ASHLEY
OFFICIAL COURT REPORTER
NORTHERN DISTRICT OF GEORGIA