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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 26, 2011
V.	)	
	)	
MARK P. BECKER, IN HIS	)	
OFFICIAL CAPACITY AS GEORGIA	)	
STATE UNIVERSITY PRESIDENT,	)	
ET AL.,	)	
	)	
DEFENDANTS.	)	

VOLUME 8  
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
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ANDRE G. ASHLEY, O.C.R.

1                                   P R O C E E D I N G S  
2 (ATLANTA, FULTON COUNTY, GEORGIA; MAY 26, 2011  
3 IN OPEN COURT.)

4                   THE COURT:   GOOD MORNING.

5                   MR. KRUGMAN:  I KNOW THAT I GUESS YESTERDAY AFTERNOON  
6 MS. SINGER INDICATED WE HAD OUR FINAL WITNESS.  WHEN WE GOT  
7 BACK TO THE OFFICE, WE HAD AN OPPORTUNITY TO READ A FILING THAT  
8 THE DEFENDANTS MADE YESTERDAY WHICH WAS A BENCH BRIEF ON  
9 ELEVENTH AMENDMENT IMMUNITY ISSUES.

10                   IT HAS BEEN FRANKLY -- WELL A COUPLE OF POINTS.  
11 NUMBER 1, OUR UNDERSTANDING HAS BEEN THAT -- FIRST OF ALL, THAT  
12 THE COURT WILL BE CONSIDERING THE ENTIRE TRIAL RECORD WITH  
13 RESPECT TO THAT ISSUE AS TO THEIR SOVEREIGN IMMUNITY DEFENSE.

14                   ALSO WE THINK WITH ALL THE STIPULATIONS AND REQUESTS  
15 TO ADMIT THAT WE'VE MADE MORE THAN AN ADEQUATE RECORD UNDER THE  
16 TEST OF THE SUPREME COURT AND ELEVENTH CIRCUIT TO ALLOW THIS  
17 CASE TO PROCEED UNDER EX PARTE YOUNG.

18                   THE DEFENDANTS' FILING YESTERDAY SEEMS TO SUGGEST  
19 THAT THE PLAINTIFFS HAD SOME AFFIRMATIVE OBLIGATION IN  
20 PRESENTING THEIR CASE --

21                   THE COURT:  WHAT DO YOU WANT ME TO DO?

22                   MR. KRUGMAN:  WHAT WE'RE DOING WE'RE PROPOSING TO  
23 PLAY AT THIS POINT BEFORE WE REST THE DEPOSITION OF PRESIDENT  
24 MARK BECKER.  IT WAS A TESTIMONIAL DEPOSITION TAKEN BY THE  
25 PLAINTIFFS.  THEY ARE PLANNING TO PLAY IT AFTER WE REST, AND SO

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1 JUST OUT OF AN ABUNDANCE OF CAUTION WE WANT TO GO AHEAD AND  
2 PLAY IT NOW.

3 I WILL TELL YOU THAT IN CONNECTION WITH THE PRETRIAL  
4 ORDER, NEITHER SIDE HAD DESIGNATED AT THAT POINT THE PORTIONS  
5 OF THE DEPOSITION TO READ. WE HAVE SINCE REACHED AGREEMENT ON  
6 THAT WHERE THE DEFENDANTS HAVE DESIGNATED A PORTION, WE HAVE  
7 DESIGNATED, AND WE PROPOSE TO GO AHEAD AND PLAY IT NOW RATHER  
8 THAN HAVING THE DEFENDANTS PLAY IT AFTER WE REST JUST SO THERE  
9 CAN BE NO QUESTION, AND THERE'S A PORTION OF PRESIDENT BECKER'S  
10 TESTIMONY THAT GOES TO SOVEREIGN IMMUNITY ISSUE. SO AT THIS  
11 POINT WE WOULD PLAY HIS DEPOSITION.

12 MR. SCHAETZEL: IF WE MAY BE HEARD, YOUR HONOR?

13 THE COURT: DO YOU OPPOSE IT?

14 MR. SCHAETZEL: YES, YOUR HONOR.

15 THE COURT: GO AHEAD AND MAKE A BRIEF PRESENTATION.

16 MR. SCHAETZEL: I WILL MARK A PART OF IT, AND MR.  
17 HARBIN WILL MAKE THE SUBSTANTIVE PRESENTATION --

18 THE COURT: I HAVE READ YOUR BRIEF.

19 MR. SCHAETZEL: THANK YOU, YOUR HONOR. IN REFERENCE  
20 TO PROFESSOR BECKER'S DEPOSITION WE WOULD LIKE FOR THE COURT TO  
21 UNDERSTAND THAT IT'S NOT MERELY A TESTIMONIAL DEPOSITION AS HAS  
22 BEEN DESCRIBED. WHAT WAS DONE IS THAT --

23 THE COURT: WHEN YOU SAID PROFESSOR BECKER --

24 MR. SCHAETZEL: I'M SORRY, PRESIDENT BECKER. WHAT  
25 WAS DONE AND THE COURT MAY RECALL THAT THE DEFENDANTS AND THE

1 PLAINTIFFS HAD NEGOTIATED A CERTAIN LIMIT ON THE NUMBER OF  
2 DEPOSITIONS. THAT LIMIT WAS REACHED.

3 A CONCERN WAS GIVEN TO US THAT THIS WOULD BE A TRIAL  
4 WITNESS WHO WAS NOT DEPOSED. SO IN LIEU OF A DISCOVERY  
5 DEPOSITION, WE AGREED THAT THE CROSS-EXAMINATION COULD EXCEED  
6 THE SCOPE. SO IT IS IN EFFECT PART DISCOVERY DEPOSITION AND  
7 PART A TRUE CROSS TO OUR TESTIMONIAL DEPOSITION. THAT'S THE  
8 PROCEDURAL ASPECT OF THIS. AS TO THE SUBSTANCE MR. HARBIN WILL  
9 ADDRESS THAT.

10 MR. HARBIN: YOUR HONOR, I WOULD JUST LIKE TO BRIEFLY  
11 ADDRESS THE ISSUE OF IT BEING A DEFENSE. WE WOULD DISAGREE  
12 WITH THAT. WE THINK IT IS THE PLAINTIFFS' BURDEN TO SHOW A  
13 SUFFICIENT CONNECTION OF THE DEFENDANTS UNDER PENNINGTON AND  
14 THE OTHER CASES WHICH THE COURT IS WELL AWARE OF. THIS IS NOT  
15 A NEW ISSUE IN THE CASE.

16 THE COURT: YOU'RE TALKING ABOUT EX PARTE YOUNG, AND  
17 YOUR MOTION AS I READ IT JUST ADDRESSES THE EX PARTE YOUNG  
18 ASPECT OF THE CASE.

19 MR. HARBIN: WELL, OTHERS ARE GOING TO ADDRESS THE  
20 DETAILS, AND THEY'RE TELLING ME THAT'S CORRECT, YOUR HONOR, BUT  
21 IT'S NOT -- AS I THINK IT IS APPROPRIATE THAT THE PLAINTIFF HAS  
22 NOT MET THEIR BURDEN AT THIS POINT OF PROVING THAT CONNECTION,  
23 THOSE REQUIRED ELEMENTS UNDER EX PARTE YOUNG AND THE RELATED  
24 CASES, THEN THE CASE SHOULD BE DISMISSED.

25 THE COURT: I'M GOING TO ALLOW WHAT THE PLAINTIFFS

1 ARE ASKING. I DOUBT -- OF COURSE I HAVEN'T SEEN THE  
2 DEPOSITION, BUT I DOUBT THAT IT'S GOING TO BE REALLY IMPORTANT  
3 ONE WAY OR THE OTHER ON MY RULING, BUT I'M AWARE OF THE FACT  
4 THAT I'M NOT THE ONLY FISH IN THE SEA. SO I DON'T -- I VIEW IT  
5 AS A PRETTY MODEST REQUEST AND I WILL ALLOW IT.

6 MR. HARBIN: WE WOULD ALSO LIKE TO BRIEFLY TAKE UP A  
7 HOUSEKEEPING MATTER, YOUR HONOR, REGARDING THE DEPOSITION OF  
8 CYNTHIA HALL WHICH I BELIEVE WILL BE OUR FIRST LIVE WITNESS.  
9 IT WAS TAKEN BY AGREEMENT YESTERDAY EVENING.

10 DURING THE DEPOSITION -- DURING THE PREPARATION FOR  
11 THE DEPOSITION IT'S MY UNDERSTANDING THERE WAS AN INADVERTENT  
12 VIOLATION OF THE SEQUESTRATION RULE. A VERY BRIEF COMMENT  
13 AFTER A QUESTION WAS ASKED I UNDERSTAND, ALTHOUGH I WASN'T  
14 THERE, BUT I UNDERSTAND BY MR. ASKEW ABOUT -- A COMMENT ABOUT  
15 ONE OF THE WITNESS' TESTIMONY VERY BRIEFLY. IT WASN'T A SIT  
16 DOWN, GO OVER IT, ET CETERA, ET CETERA --

17 THE COURT: I'M JUST NOT FOLLOWING YOU. YOU'RE  
18 SAYING THAT SOMETHING HAPPENED AT MS. HALL'S DEPOSITION THAT  
19 VIOLATED AN AGREED UPON RULE OF SEQUESTRATION FOR THE  
20 DEPOSITION?

21 MR. HARBIN: NO, I'M SORRY, YOUR HONOR. IN THE  
22 FILES -- ACTUALLY JUST A CONVERSATION AFTER REALLY, I THINK, I  
23 WASN'T THERE, THIS WAS BEFORE THE DEPOSITION STARTED IN  
24 PREPARATION FOR THE DEPOSITION, IN CONVERSATIONS BY DEFENSE  
25 COUNSEL WITH MS. HALL THERE WAS A COMMENT ABOUT ONE OF THE

1 WITNESS' TESTIMONY --

2 THE COURT: YOU MEAN A COMMENT ABOUT ANOTHER WITNESS'  
3 TESTIMONY?

4 MR. HARBIN: YES, YOUR HONOR.

5 THE COURT: WHAT WAS THE COMMENT?

6 MR. HARBIN: I BELIEVE IT WAS ABOUT PROFESSOR  
7 KAUFMANN'S TESTIMONY, AND I THINK THERE'S A QUESTION ABOUT DID  
8 YOU EVER BASICALLY SAY THERE WAS SOME NUMBER UNDER WHICH YOU'RE  
9 SAFE AS FAR AS QUANTITY, AND I THINK THERE WAS A COMMENT ABOUT  
10 WELL PROFESSOR KAUFMANN SAID X, AND I THINK THAT'S THE EXTENT  
11 OF IT, NOT TO MINIMIZE IT, BUT IF I MAY JUST REVIEW BRIEFLY --  
12 AND BY THE WAY PROFESSOR KAUFMANN TESTIFIED TO THAT BY  
13 DEPOSITION ALSO. SO HER TESTIMONY ON THE STAND WAS NOT NEW.  
14 WE VERY MUCH APOLOGIZE TO THE COURT AND PLAINTIFFS' COUNSEL FOR  
15 THIS.

16 I WOULD ALSO POINT OUT -- I MEAN, YOUR HONOR, IS  
17 AWARE OF MR. ASKEW AND HIS REPUTATION AND WORK INCLUDING IN THE  
18 RELEVANT AREAS OF ETHICS, BUT ALSO WHAT COMPLICATED THIS A  
19 LITTLE BIT IS MS. HALL WAS AN IN-HOUSE ATTORNEY FOR SEVERAL  
20 YEARS WITH GEORGIA STATE AND WORKED WITH MR. ASKEW AND OTHERS  
21 AND DISCUSSED THE CASE. SO I THINK THAT HELPS EXPLAIN THE --

22 THE COURT: RIGHT, SO YOU'RE GOING TO BE CALLING HER  
23 AS YOUR FIRST WITNESS, AND YOU ARE ANTICIPATING THAT THERE  
24 MIGHT BE AN OBJECTION TO HER TESTIMONY; IS THAT WHAT YOU'RE  
25 SAYING.

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1           MR. HARBIN: I DON'T KNOW ABOUT THAT. I THINK UNDER  
2 THE RULE IT JUST GOES TO THE WEIGHT, BUT WE WANTED TO INFORM  
3 THE COURT AND THE PLAINTIFFS' COUNSEL. THERE WAS A QUESTION  
4 ABOUT CONVERSATIONS AT THE DEPOSITION AND THE PRIVILEGE WAS  
5 ASSERTED AND WE CONFERRED INTERNALLY ABOUT THIS AFTERWARDS. WE  
6 DISCUSSED IT AFTERWARDS AND WE FELT LIKE WE NEEDED TO INFORM  
7 THE COURT AND PLAINTIFFS' COUNSEL WHETHER THERE'S AN OBJECTION  
8 OR NOT.

9           MS. SINGER: YOUR HONOR, I WOULD JUST NOTE THAT I DID  
10 ASK SOME QUESTIONS AT THE END OF THE DEPOSITION AIMED AT --

11           THE COURT: AT WHOSE DEPOSITION?

12           MS. SINGER: AT MS. HALL'S DEPOSITION LAST NIGHT  
13 AIMED AT --

14           THE COURT: WHEN?

15           MS. SINGER: LAST NIGHT ABOUT NINE O'CLOCK --

16           THE COURT: YOU WERE TAKING HER DEPOSITION LAST  
17 NIGHT?

18           MS. SINGER: WE SURE WERE.

19           THE COURT: WOW.

20           MS. SINGER: AND YOU'RE PROBABLY GOING TO HEAR LATER  
21 WE HAD A WHOLE BUNCH OF PRIVILEGED QUESTIONS WHICH WE DIDN'T  
22 THINK YOU'D APPRECIATE HEARING FROM US AT NINE O'CLOCK LAST  
23 NIGHT ON, BUT I DID ASK A FEW QUESTIONS AT THE END OF THAT  
24 DEPOSITION AIMED AT THE SEQUESTRATION ISSUE AND WHETHER THE  
25 RULE HAD BEEN FOLLOWED AND PRIVILEGE WAS ASSERTED AND SHE

1 WASN'T EVEN ALLOWED TO ANSWER THOSE QUESTIONS.

2           AND ACTUALLY EARLIER IN THE DEPOSITION I ASKED THE  
3 QUESTION WHETHER SHE HAD PROVIDED -- I STARTED TO TRY TO ASK  
4 SOME QUESTIONS ABOUT THE TRAINING SESSIONS WITH PROFESSOR  
5 KAUFMANN AND WAS TOLD THAT PRIVILEGE WAS GOING TO BE ASSERTED  
6 AS TO THOSE, THAT SHE WOULD BE INSTRUCTED NOT TO ANSWER.

7           SO TO THE EXTENT THERE'S INTENDED TO BE ANY TESTIMONY  
8 ALONG THIS LINE, I THINK IT SHOULD BE PRECLUDED. THAT WOULD  
9 SEEM TO BE USING THE PRIVILEGE AS A SWORD AND A SHIELD HERE.

10           THE COURT: OKAY. LET'S DEFER THIS ISSUE, WHATEVER  
11 THE ISSUE MAY BE, UNTIL WE GET TO RIGHT BEFORE HER TESTIMONY.  
12 LET'S GO AHEAD AND FINISH UP THE PLAINTIFFS' EVIDENCE AND THEN  
13 WE'LL GO FROM THERE.

14           MS. SINGER: SURE THING, YOUR HONOR.

15           THE COURT: SO THE NEXT THING YOU HAVE IS WHAT, SOME  
16 EXHIBITS OR THE DEPOSITION OR WHAT?

17           MR. KRUGMAN: YOUR HONOR, IT IS THE DEPOSITION OF  
18 PRESIDENT BECKER, AND I DON'T KNOW IF WE HAVE --

19           THE COURT: YOU SAID IT WAS EXCERPTS FROM THE  
20 DEPOSITION, RIGHT?

21           MR. KRUGMAN: IT'S PORTIONS OF IT. WE'RE GOING TO GO  
22 AHEAD WITH WHAT THE PLAINTIFFS DESIGNATED AND THEN WHAT WE  
23 DESIGNATED AND PLAY IT NOW RATHER THAN LATER RATHER THAN TRY TO  
24 DO IT IN BITS AND PIECES.

25           THE COURT: ALL RIGHT.



1 (VIDEOTAPED DEPOSITION WAS PLAYED IN OPEN COURT.)

2 MR. KRUGMAN: WITH THE COURT'S PERMISSION IN TERMS OF  
3 THE NEXT PORTION, IT MAY BE HELPFUL IF THE COURT WOULD LIKE FOR  
4 THE EXHIBITS THAT PRESIDENT BECKER IS BEING EXAMINED ON?

5 THE COURT: ALL RIGHT.

6 MR. KRUGMAN: AND FOR THE RECORD THEY ARE PLAINTIFFS'  
7 TRIAL EXHIBITS 970, 971, 972, 973, 974, AND THEN TRIAL EXHIBIT  
8 1002. THE PRETRIAL ORDER DOESN'T -- THERE'S A SEPARATE ENTRY  
9 ON THE PRETRIAL ORDER FOR ALL OF THESE EXHIBITS FOR PRESIDENT  
10 BECKER'S DEPOSITION WHICH INCLUDES PLAINTIFFS' TRIAL EXHIBIT  
11 1002.

12 THE COURT: ARE YOU OFFERING ME COPIES?

13 MR. KRUGMAN: YES. I WILL GO AHEAD AND MOVE  
14 INTO EVIDENCE PLAINTIFFS' TRIAL EXHIBITS 970 THROUGH 974 AND  
15 1002.

16 THE COURT: ANY OBJECTION?

17 MR. SCHAETZEL: SUBJECT TO THE CHANCE TO LOOK AT THEM  
18 IN SOME DETAIL, NO.

19 THE COURT: I'LL ADMIT THEM. LET ME KNOW IF THERE'S  
20 A PROBLEM.

21 MR. SCHAETZEL: YES, MA'AM.

22 MR. KRUGMAN: THANK YOU, YOUR HONOR.

23 (VIDEOTAPED DEPOSITION WAS PLAYED IN OPEN COURT.)

24 MR. RICH: YOUR HONOR, A LITTLE BIT OF HOUSEKEEPING  
25 AND WE WILL REST OUR CASE. GOOD MORNING.

1 THE COURT: GOOD MORNING.

2 MR. RICH: SEVERAL DAYS AGO YOUR HONOR INQUIRED OF US  
3 WHETHER WE COULD VERIFY THAT THE WORKS ON THE JOINT EXHIBIT  
4 LIST WERE ALL AVAILABLE FOR LICENSING THROUGH CCC. OUR  
5 COLLECTIVE NOTES AND RECOLLECTION IS REASONABLY CLEAR THAT THE  
6 ANSWER IS YES, BUT WITHOUT STILL THE AID OF THE WRITTEN  
7 TRANSCRIPTS WHICH ARE STILL BEING PREPARED, I'M NOT IN A  
8 POSITION A HUNDRED PERCENT TO REPRESENT THAT TO YOU.

9 IT'S CERTAINLY OUR UNDERSTANDING THAT EACH ENTRY ON  
10 THE JOINT EXHIBIT LIST WHICH INDICATED THE PER STUDENT FEE WAS  
11 COMPUTED BASED ON INFORMATION WE HAD OBVIOUSLY SECURED WITH THE  
12 PLAINTIFFS AS TO THE AVAILABLE FEE, BUT WE WILL IN DUE COURSE,  
13 IF YOUR HONOR WILL BEAR WITH US, PROVIDE YOU WITH FIRM  
14 EVIDENCE.

15 SPEAKING OF THE JOINT EXHIBIT LIST, WE ARE --

16 THE COURT: LET ME JUST STOP YOU FOR A SECOND. THE  
17 REASON I ASKED THAT IS IT'S DIFFICULT FOR ME TO GO BACK AND  
18 REMEMBER WHERE WE WERE AT DIFFERENT STAGES OF THE LITIGATION,  
19 BUT I WASN'T SURE WHEN YOU ALL SUPPLIED THE COST INFORMATION  
20 WHETHER THAT WAS BASED ON SIMPLY AN ASSUMPTION THAT IT WAS  
21 AVAILABLE THROUGH CCC OR WHETHER YOU DETERMINED THAT IT WAS  
22 AVAILABLE THROUGH CCC.

23 MR. RICH: HAVING BEEN DIRECTLY INVOLVED IN THAT, I  
24 CAN REPRESENT TO YOU THAT IT WAS LATTER. AGAIN WITH ONE VERY  
25 IMPORTANT FOOTNOTE TO THAT OR CAVEAT, YOUR HONOR, WHICH IS

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1 WITHOUT DOUBT EACH OF THOSE WORKS IS AVAILABLE FOR LICENSING,  
2 AND I BELIEVE WITH A HIGH DEGREE OF ASSURANCE AVAILABLE THROUGH  
3 CCC.

4           WHETHER A PARTICULAR LEVEL OF TAKING MIGHT HAVE  
5 TRIGGERED THAT WHAT MS. ARMSTRONG CALLED SPECIAL ORDER PROCESS,  
6 IN OTHER WORDS AS OPPOSED TO AUTOMATIC, AS OPPOSED TO OH,  
7 BECAUSE IT EXCEEDED 20 PERCENT, GO BACK AND CHECK WITH THE  
8 PUBLISHER, I CAN'T RULE OUT THERE WERE SEVERAL INSTANCES OF  
9 THAT.

10           BUT THE CATEGORICALLY CORRECT ANSWER I'M SURE IS YES,  
11 EACH OF THOSE WORKS IS WITHIN THE CCC LICENSING REPERTORY AT A  
12 MINIMUM UNDER WHAT WE CALL THE APS AND ECCS SERVICES MEANING  
13 THE TRANSACTIONAL -- APS WAS THE PAPER COURSEPACK RELATED  
14 SERVICE, AND THE ELECTRONIC COURSE CONTENT SERVICE WAS THE  
15 TRANSACTIONAL EQUIVALENT. ALL OF THOSE WORKS ARE AVAILABLE  
16 THROUGH CCC THERE --

17           THE COURT: RIGHT, BUT I WAS THINKING ABOUT THE DEAL  
18 WHERE THE PROFESSOR CAN, YOU KNOW, DIAL UP AND ORDER THINGS.

19           MR. RICH: THAT'S EXACTLY WHAT THOSE ARE, YOUR HONOR,  
20 THROUGH THE WEBSITE.

21           THE COURT: YOU'RE TALKING -- THE PARTICULAR SERVICES  
22 THAT YOU'RE SPEAKING OF DO INCLUDE THAT INDIVIDUAL ORDER KIND  
23 OF THINGS'.

24           MR. RICH: ALL OF THOSE WORKS, MANY OF WHICH WOULD BE  
25 INSTANTANEOUSLY AVAILABLE. THERE MAY BE THAT HANDFUL AS I

1 INDICATED BECAUSE OF THE MAGNITUDE OF THE PROPOSED TAKING THAT  
2 WOULD HAVE REQUIRED GOING THROUGH WHAT MS. ARMSTRONG  
3 DESCRIBED.

4 I'D LIKE TO BE CLEAR AGAIN THAT THAT REMAINING  
5 LICENSING OPTION OF THE CCC WHICH IS THE SO-CALLED ANNUAL  
6 LICENSE IS PRESENTLY SUBSCRIBED TO BY TWO OF THE THREE  
7 PLAINTIFFS AS YOUR HONOR HEARD OXFORD AND SAGE AND --

8 THE COURT: I REMEMBER THE ANNUAL LICENSING DEAL, AND  
9 IN MY MIND THAT OCCUPIES A SEPARATE TIER KIND OF THING.

10 MR. RICH: THE LAST THINK I WANT TO MENTION --

11 THE COURT: BUT LET ME SAY THIS. I DO RECOGNIZE THAT  
12 WHATEVER IS IN THE RECORD IS IN THE RECORD, AND I JUST WAS  
13 THINKING YOU ALL MIGHT CONVENIENTLY RECALL, BUT I UNDERSTAND  
14 WHAT YOU'RE SAYING. THANK YOU.

15 MR. RICH: AND WITH RESPECT TO THE WORKS REMAINING IN  
16 SUIT FROM THE PLAINTIFFS' PERSPECTIVE, THAT IS, FROM THE JOINT  
17 EXHIBIT AND HAVING NOW EXAMINED LABORIOUSLY THROUGH ALL OF  
18 THEM, WE HAD PROVIDED LAST SUNDAY EVENING TO THE OTHER SIDE A  
19 SOMEWHAT PARED DOWN LIST, AND WE ARE PREPARING TO PROVIDE YOUR  
20 HONOR WITH SINGLE SHEETS AS WE DID ONCE BEFORE FOR CONVENIENCE  
21 REFLECTING THAT NUMBER. IT'S STILL A VERY LARGE NUMBER  
22 REFLECTING IN OUR VIEW A VERY LARGE NUMBER OF INFRINGEMENTS.

23 I'M NOT PROPOSING ANY LONGER BASED ON CONVERSATION  
24 WITH THE OTHER SIDE THAT IT BE IN THE FORM OF A, QUOTE, JOINT  
25 LIST BECAUSE THE OTHER SIDE HAS INDICATED TO US A CONTINUING

1 SERIES OF TECHNICAL OBJECTIONS WHICH THE RECORD NOW WILL REVEAL  
2 WE BELIEVE TO BE WITHOUT MERIT, BUT CERTAINLY THEY WILL PRESS  
3 THEIR POINTS AS THEY WILL, BUT FOR YOUR HONOR'S PURPOSES AND  
4 CERTAINLY FOR OURS, WE WILL UNEQUIVOCALLY PROVIDE YOU AS WE  
5 ALREADY HAVE TO THE OTHER SIDE THE REMAINING WORKS WHICH WE  
6 BELIEVE HAVE BEEN SHOWN TO BE PRIMA FACIE INFRINGED THROUGH THE  
7 EVIDENCE WE'VE PRODUCED.

8 THE COURT: THANK YOU. LET ME JUST ASK YOU TO DEFER  
9 YOUR COMMENTS. WE DON'T NEED TO TALK ABOUT THIS RIGHT NOW, MR.  
10 HARBIN.

11 MS. SINGER: BECAUSE I GET ALL THE GLAMOROUS JOBS --

12 THE COURT: YOU KNOW THE SAYING ABOUT LAST BUT NOT  
13 LEAST.

14 MS. SINGER: I KNOW THAT YOU ARE PROBABLY LOSING  
15 SLEEP OVER THE FACT THAT WHEN WE PLAYED THE PROFESSOR DIXON  
16 VIDEO YESTERDAY, THERE WAS ONE LINE THAT SKIPPED. JUST BECAUSE  
17 IT WASN'T PLAYED IN COURT, SHE WAS ASKED DID THE GO SOLAR  
18 HANDOUT THAT INDICATED THAT THERE WERE 59 STUDENTS -- THIS IS  
19 PAGE 25, LINES 24 AND 25, QUESTION: DOES THAT SOUND RIGHT TO  
20 YOU. ANSWER: YES. IT'S ON THE FILING WE MADE THAT THOSE WERE  
21 PLAYED AND THEY WEREN'T. SO NOW THEY ARE IN THE RECORD. THEY  
22 WERE READ IN COURT.

23 AND THEN I HAVE A SERIES OF EXHIBITS TO READ IN.  
24 PLAINTIFFS' EXHIBITS 27 AND 28 THERE WAS AN OBJECTION ON THESE  
25 AS TO THE TIME PERIOD AT ISSUE. THE OBJECTION WAS WITHDRAWN AS

1 TO ALL OF THESE, ALL THE REST OF THESE. THESE ARE PERMISSIONS  
2 AND SALES REVENUES THAT INCLUDED THE TIME PERIOD BUT EXCEEDED  
3 THE TIME PERIOD. WE WOULD MOVE THESE TWO INTO EVIDENCE. THESE  
4 ARE TWO CAMBRIDGE WORKS THAT --

5 THE COURT: I'M SORRY, YOU'RE MOVING INTO EVIDENCE  
6 PLAINTIFFS' EXHIBITS 27 AND 28?

7 MS. SINGER: YES.

8 THE COURT: IS THERE ANY OBJECTION; ARE YOU SAYING  
9 THERE IS OR ISN'T?

10 MS. SINGER: THERE IS ON THE PRETRIAL ORDER. THESE  
11 WERE WITHDRAWN AS TO EVERY OTHER EXHIBIT IN THE CATEGORY.

12 MR. SCHAETZEL: I'M NOT SURE WHICH EXHIBITS THESE  
13 ARE?

14 MS. SINGER: 27 AND 28, THESE ARE LIFE TO DATE SALES  
15 REVENUE FOR ASSESSING LISTENING AND THE CCC PERMISSIONS REVENUE  
16 FOR ASSESSING LISTENING. YOU OBJECTED TO THESE BECAUSE IT'S  
17 MORE THAN 2009. THEY'RE SORT OF LIFE TO DATE SALES.

18 MR. HARBIN: WE DON'T HAVE ANY OBJECTION TO THOSE.

19 THE COURT: I WILL ADMIT.

20 MS. SINGER: PLAINTIFFS' EXHIBIT 233, NO OBJECTION.

21 THE COURT: IT'S ADMITTED.

22 MS. SINGER: PLAINTIFFS' EXHIBIT 322 WHICH IS THE  
23 PROFIT AND LOSS STATEMENT FOR THE SAGE HANDBOOK OF QUALITATIVE  
24 RESEARCH. THERE WAS AN OBJECTION. MS. RICHMAN TESTIFIED  
25 IN-DEPTH AS DID PROFESSORS KAUFMANN AND ESPOSITO ABOUT THE SAGE

1 HANDBOOK OF QUALITATIVE RESEARCH, AND WE WOULD JUST LIKE TO  
2 HAVE IN THERE THE PROFIT AND LOSS STATEMENT FROM THE BOOK.

3 MR. HARBIN: YOUR HONOR, WE WOULD OBJECT TO THAT. I  
4 WOULD LIKE -- WHAT I WOULD ASK IS IF DURING A BREAK WE COULD  
5 LOOK AT THIS, BUT IT'S NOT LIKE A BUSINESS RECORD, IT'S A  
6 PROFIT/LOSS THAT SOMEBODY CREATED. NOBODY HAS TESTIFIED ABOUT  
7 IT. I BELIEVE WE DO HAVE AN OBJECTION ABOUT THAT, BUT IF I  
8 COULD LOOK AT IT OVER THE MORNING BREAK --

9 THE COURT: WELL, I'M GOING TO BE NEEDING TO MAKE  
10 SOME FINAL RULINGS HERE. I'LL DEFER THAT ONE.

11 MS. SINGER: PLAINTIFFS' EXHIBIT 342 NO OBJECTION.

12 THE COURT: IT'S ADMITTED.

13 MS. SINGER: PLAINTIFFS' EXHIBIT 343 IS THE OXFORD  
14 FISCAL YEAR 2010 STATEMENT OF INCOME. THE OBJECTION WAS THAT  
15 IT LACKS RELEVANCE. YOUR HONOR HEARD MR. PFUND TESTIFY THAT  
16 THE OXFORD FISCAL YEAR DOESN'T GO TO THE CALENDAR YEAR. SO IT  
17 COVERS APRIL 1ST, 2009 TO MARCH 31ST, 2010.

18 THE COURT: ANY OBJECTION?

19 MR. HARBIN: YES, YOUR HONOR, IT IS OUTSIDE THE  
20 PERIOD. AGAIN WE HAVEN'T HAD TESTIMONY ABOUT IT. SO IT'S NOT  
21 A BUSINESS RECORD OR AN ACCOUNTING RECORD THAT SOME ACCOUNTANT  
22 PREPARED, BUT WE HAVEN'T BEEN ABLE TO EXAMINE IT.

23 THE COURT: I MAY NEED TO SEE IT.

24 MS. SINGER: SURE, YOUR HONOR, WE CAN DO THAT.

25 THE COURT: I'LL DEFER RULING ON THAT.

1 MS. SINGER: OKAY. PLAINTIFFS' EXHIBIT 436, THIS IS  
2 THE CCC PERMISSIONS REVENUE STATEMENT FOR THE OXFORD WORK  
3 NEWSPAPERS. AGAIN THE OBJECTION WAS IT ENCOMPASSES MORE THAN  
4 THE TIME PERIOD.

5 MR. HARBIN: I BELIEVE IT'S JUST A PERMISSIONS FEE,  
6 NO OBJECTION.

7 THE COURT: IT'S ADMITTED.

8 MS. SINGER: PLAINTIFFS' EXHIBIT 509, THIS IS THE  
9 OXFORD U.S./U.K. DISTRIBUTION AGREEMENT THAT MR. PFUND  
10 TESTIFIED TO, AND WE JUST DID NOT AT THAT TIME TRY TO MOVE IT  
11 INTO EVIDENCE AND WOULD LIKE TO FIX THAT OVERSIGHT AT THIS  
12 TIME.

13 MR. HARBIN: YOUR HONOR, I BELIEVE MR. PFUND'S  
14 TESTIMONY WAS HE WAS NOT FAMILIAR WITH IT, AND ALSO IT IS DATED  
15 IN NOVEMBER OF 2010 AFTER THE RELEVANT TIME PERIOD. SO I THINK  
16 IT'S IRRELEVANT. WE COULD CONFER AMONG OURSELVES AND GET  
17 BACK --

18 THE COURT: I'LL DEFER RULING ON THAT.

19 MS. SINGER: A BUNCH OF EASY ONES TO WHICH THERE IS  
20 NO OBJECTION, PLAINTIFFS' EXHIBITS 522, 528, 530, 533 THROUGH  
21 537. NO OBJECTION TO ANY OF THOSE.

22 THE COURT: THEY ARE ADMITTED.

23 MS. SINGER: PLAINTIFFS' EXHIBIT 539 IS A SYLLABUS  
24 FROM PROFESSOR GAINTY WHO I BELIEVE THE COURT WILL HEAR FROM AT  
25 SOME POINT FAIRLY SOON. THIS SYLLABUS IS DATED 2010, BUT THERE



1 WAS TESTIMONY AT HIS DEPOSITION THAT IT WAS EXACTLY THE SAME AS  
2 THE FALL 2009 COURSE, AND HE COULDN'T FIND THE 2009 COURSE.

3 THE COURT: ANY OBJECTION TO 539?

4 MR. SCHAETZEL: TO THE EXTENT IT REFLECTS 2009, NO,  
5 YOUR HONOR.

6 THE COURT: YOU'VE GOT TO GO WITH IT OR NOT. ANY  
7 OBJECTION TO IT?

8 MR. SCHAETZEL: NO OBJECTION.

9 THE COURT: IT'S ADMITTED. DID I GO AHEAD AND ADMIT  
10 522, 28, 30, 33 THROUGH 537?

11 MS. SINGER: YES, YOU DID.

12 THE COURT: SO 539 IS IN TOO.

13 MS. SINGER: ANOTHER SERIES WITH NO OBJECTIONS.

14 PLAINTIFFS' EXHIBITS 540, 542, 545, 549 THROUGH 550, 553 TO  
15 555, 557 TO 558, 563, 570.

16 THE COURT: HOLD ON JUST A MINUTE. 557 TO 558; IS  
17 THAT CORRECT?

18 MS. SINGER: YES.

19 THE COURT: AND THEN?

20 MS. SINGER: 563, 570, 592, 597 TO 603, 606, 608,  
21 613, 656 TO 662, NO OBJECTION TO ANY OF THOSE, YOUR HONOR.

22 THE COURT: THEY ARE ADMITTED.

23 MS. SINGER: PLAINTIFFS' EXHIBITS 700 TO 705 AND 710,  
24 THESE, YOUR HONOR, ARE THE ERES REPORTS FROM 2005 TO 2008.  
25 PLAINTIFFS SUBMIT -- THERE WAS AN OBJECTION TO THESE.

1 PLAINTIFFS SUBMIT THAT THEY REFLECT THE REPEATED USE OF MANY OF  
2 THE WORKS THAT ARE ON THE JOINT FILING AT ISSUE OVER MULTIPLE  
3 SEMESTERS. WE SUBMIT THAT THEY SHOW THE CONTEXT OF THE  
4 INFRINGING CONDUCT, AND WE WOULD LIKE TO SUBMIT THEM INTO  
5 EVIDENCE SO THAT THE RECORD IS COMPLETE.

6 MR. SCHAETZEL: WE MAINTAIN THE OBJECTION THAT THEY  
7 ARE OUTSIDE THE SCOPE.

8 THE COURT: I'LL SUSTAIN THE OBJECTION.

9 MS. SINGER: OKAY. ANOTHER SERIES WITH NO  
10 OBJECTIONS. PLAINTIFFS' EXHIBITS 733, 869, 871 AND 872, 877,  
11 885 TO 886, 896, 899 TO 901, 904, 906 TO 907, 913 TO 914. NO  
12 OBJECTION TO ANY THOSE ON THE PRETRIAL ORDER.

13 THE COURT: THEY ARE ADMITTED.

14 MS. SINGER: TWO MORE 931 AND 932. THIS IS THE BOOK  
15 PROPOSAL EVALUATION FOR THE SAGE HANDBOOK OF QUALITATIVE  
16 RESEARCH AND A PRODUCT SUMMARY FOR THE SAGE HANDBOOK OF  
17 QUALITATIVE RESEARCH. THESE ARE BUSINESS RECORDS. THE  
18 DEFENDANTS HAVE NOTED IN THE PRETRIAL ORDER A RELEVANCE  
19 OBJECTION.

20 MR. HARBIN: WHAT NUMBER IS THAT, I'M SORRY?

21 MS. SINGER: 931 AND 932.

22 THE COURT: STATE AGAIN WHAT THEY ARE?

23 MS. SINGER: IT'S THE BOOK PROPOSAL EVALUATION FOR  
24 THE SAGE HANDBOOK OF QUALITATIVE RESEARCH JUST SHOWING WHAT THE  
25 PROPOSAL WAS FOR THE BOOK. THE OTHER IS A PRODUCT SUMMARY

1 WHICH IS INFORMATION ABOUT THE BOOK.

2 MR. HARBIN: YOUR HONOR, IF WE COULD LOOK AT THAT  
3 ONE, I DO THINK IT GOES OUTSIDE THE TIME PERIOD, AND I DON'T  
4 THINK IT'S A BUSINESS RECORD. ALTHOUGH THERE IS NOT A  
5 FOUNDATION OBJECTION, THERE IS A RELEVANCE OBJECTION. IF WE  
6 COULD LOOK AT THAT.

7 THE COURT: I'LL DEFER RULING ON IT.

8 MS. SINGER: AND YOU'LL BE PLEASED TO HEAR THAT THE  
9 REMAINDER HAVE NO OBJECTION. PLAINTIFFS' EXHIBITS 938, 941 AND  
10 942, 946 AND 947, 949, 950 TO 955, 957, 959 TO 960, 965, 977 TO  
11 979, AND DEFENDANTS' EXHIBIT 195.

12 THE COURT: AND THERE ARE NO OBJECTIONS TO ANY OF  
13 THEM?

14 MS. SINGER: NO OBJECTIONS IN THE PRETRIAL ORDER.

15 THE COURT: THEY ARE ADMITTED.

16 MS. SINGER: AND WITH THAT, YOUR HONOR, THE  
17 PLAINTIFFS REST.

18 THE COURT: ALL RIGHT. LET'S TAKE A 15-MINUTE BREAK,  
19 LADIES AND GENTLEMEN.

20 (RECESS)

21 THE COURT: DO YOU WISH TO ARGUE YOUR MOTION?

22 MR. SCHAETZEL: WE DO, YOUR HONOR.

23 THE COURT: ALL RIGHT. GO AHEAD.

24 MR. SCHAETZEL: AT THIS TIME THE DEFENDANTS MOVE FOR  
25 JUDGMENT UNDER RULE 52(C). IN DOING SO WE WOULD FIRST RENEW

1 OUR MOTION TO DISMISS IN ACCORDANCE WITH THE COURT'S ORDERS,  
2 AND MS. KATRINA QUICKER WILL ARGUE THAT FOR US.

3 THE COURT: GOOD MORNING, MS. QUICKER.

4 MS. QUICKER: GOOD MORNING. MAY IT PLEASE THE COURT,  
5 WE WOULD LIKE TO RENEW OUR MOTION TO DISMISS, AND SPECIFICALLY  
6 BECAUSE WE FEEL THAT THE PLAINTIFFS HAVE NOT MET THE EXCEPTION  
7 TO THE ELEVENTH AMENDMENT IMMUNITY ENJOYED BY ALL THE  
8 DEFENDANTS IN THIS CASE.

9 SPECIFICALLY THE DEFENDANTS ARE THE 18  
10 REPRESENTATIVES OF THE BOARD OF REGENTS WHICH IS THE BOARD OF  
11 REGENTS THAT HAS AUTHORITY OVER THE 35 UNIVERSITIES IN THE  
12 GEORGIA SYSTEM, UNIVERSITY SYSTEM. THEY ALSO HAVE NAMED THE  
13 PRESIDENT OF GEORGIA STATE UNIVERSITY, THE PROVOST, THE  
14 ASSOCIATE PROVOST OF THE INFORMATIONAL SYSTEMS AND TECHNOLOGY  
15 DEPARTMENT AND THE DEAN OF LIBRARIES, AND ALL OF THESE  
16 DEFENDANTS ARE HIGH LEVEL ADMINISTRATORS THAT HAVE GENERAL  
17 SUPERVISORY AUTHORITY OVER GEORGIA STATE UNIVERSITY'S POLICIES,  
18 BUT NONE OF WHOM MADE THE VARIOUS DETERMINATIONS AT ISSUE IN  
19 THIS CASE.

20 WHILE THE AMENDED COMPLAINT ALLEGES THAT THESE  
21 DEFENDANTS BY SCANNING, COPYING, DISPLAYING AND DISTRIBUTING  
22 PLAINTIFFS' COPYRIGHTED MATERIAL DEFENDANTS' CONDUCT  
23 CONSTITUTES INFRINGEMENT OF PLAINTIFFS' COPYRIGHT, THERE'S NO  
24 EVIDENCE AT THIS TRIAL THAT ANY OF THE DEFENDANTS PERSONALLY  
25 DID ANY SCANNING, COPYING, DISPLAYING OR DISTRIBUTING OF

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1 PLAINTIFFS' COPYRIGHTED WORKS.

2 ACCORDING TO PLAINTIFFS' PROPOSED FINDINGS OF FACT  
3 THE ONLY INVOLVEMENT THAT THESE DEFENDANTS HAVE TO THE ACTIONS  
4 COMPLAINED OF WITH RESPECT TO THE INDIVIDUAL MEMBERS OF THE  
5 BOARD OF REGENTS IS, ONE, THEY HAVE SUPERVISORY AUTHORITY OVER  
6 GEORGIA STATE UNIVERSITY; TWO, THEY ELECT A PRESIDENT OF  
7 GEORGIA STATE UNIVERSITY; AND, THREE, THEY HAVE THE AUTHORITY  
8 TO ENSURE COMPLIANCE WITH A COURT-ORDERED INJUNCTION, AND THAT  
9 IS FROM PLAINTIFFS' FINDINGS OF FACT 103 TO 104.

10 WITH RESPECT TO PRESIDENT BECKER, WHAT THEY SAY THE  
11 CONNECTION IS IS THAT HE HAS, ONE, SUPERVISORY AUTHORITY OVER  
12 ALL OF THE ADMINISTRATORS OF THE GEORGIA STATE LIBRARY AND THE  
13 GEORGIA STATE INFORMATIONAL SYSTEMS AND TECHNOLOGY DEPARTMENT;  
14 AND, TWO, HE IS RESPONSIBLE FOR ENSURING THAT THE ERES SYSTEM  
15 COMPLIES WITH FEDERAL COPYRIGHT LAW. THAT IS FROM PLAINTIFFS'  
16 FINDINGS OF FACT 98 AND 99.

17 WITH RESPECT TO DEFENDANT PROVOST PALM, SHE'S  
18 RESPONSIBLE FOR MONITORING THE FUNCTIONS AND OFFICIALS OF THE  
19 UNIVERSITY'S ACADEMIC ADMINISTRATION INCLUDING CORRECTING  
20 NONCOMPLIANCE WITH FEDERAL COPYRIGHT LAW. THAT IS THE ONLY  
21 CONNECTION THAT PROVOST PALM HAS WITH THE ACTIONS COMPLAINED OF  
22 IN THIS CASE, AND THAT IS FROM PLAINTIFFS' PROPOSED FINDINGS OF  
23 FACT 100.

24 ASSOCIATE PROVOST FOR INFORMATIONAL SYSTEMS AND  
25 TECHNOLOGY DEPARTMENT, THE ONLY CONNECTIONS THAT HE HAS IS THAT

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1 HE IS RESPONSIBLE FOR THE TECHNICAL OPERATIONS AND MAINTENANCE  
2 OF THE ERES SYSTEM, AND HE HAS SUPERVISORY AUTHORITY OVER GSU  
3 STAFF WHO SUPPORT THE ULEARN COURSE MANAGEMENT SYSTEM.

4 FINALLY WITH RESPECT TO THE LAST DEFENDANT DEAN OF  
5 LIBRARIES, SHE HAS SUPERVISORY AUTHORITY OVER THE LIBRARY STAFF  
6 RESPONSIBLE FOR THE ERES SYSTEM, AND SHE IS RESPONSIBLE FOR  
7 ENSURING THAT THE ERES SYSTEM COMPLIES WITH THE POLICIES OF THE  
8 BOARD OF REGENTS AND GSU.

9 YOUR HONOR, THESE ARE THE VERY SAME FACTS THAT WERE  
10 BEFORE THE COURT IN PLAINTIFFS' OPPOSITION TO DEFENDANTS'  
11 MOTION TO DISMISS, AND ARGUABLY THE ONLY NEW INFORMATION  
12 THEY'VE PROVIDED THE COURT IS THAT SOME PROFESSORS IF THEY  
13 WERE CALLED FROM THE PRESIDENT OR ONE OF THE MEMBERS OF THE  
14 BOARD OF REGENTS OR THE PROVOST OR THE DEAN OF LIBRARIES AND  
15 THEY WERE ASKED BY THEM TO REMOVE SOMETHING FROM ERES THEY  
16 WOULD COMPLY.

17 AT BEST THEIR OVERSIGHT RESPONSIBILITIES OF ALL THE  
18 UNIVERSITY POLICIES AND THEIR ABILITY TO TAKE CORRECTIVE ACTION  
19 IF A POLICY IS IN FACT VIOLATED IS THE ONLY CONNECTION THEY  
20 HAVE TO THIS CASE. THEY HAVE NO OBLIGATION TO ENFORCE THE  
21 COPYRIGHT ACT, AND THEY HAVE NO OBLIGATION TO PREVENT A  
22 VIOLATION OF THE COPYRIGHT ACT.

23 PLAINTIFFS HAVE NOT ESTABLISHED THAT THE DEFENDANTS  
24 HAVE APPLIED ANY PRESSURE TO THESE PROFESSORS TO IGNORE THE  
25 COPYRIGHT POLICIES OR TO IGNORE FAIR USE. THERE'S NO EVIDENCE

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1 THAT THE COPYRIGHT POLICY IN AND OF ITSELF VIOLATES ANY FEDERAL  
2 LAW. IN FACT, IT ACTUALLY FACILITATES COMPLIANCE WITH FEDERAL  
3 LAW.

4 THE POLICY, BY THE WAY, YOUR HONOR, WAS ADOPTED BY  
5 THE BOARD OF REGENTS PURSUANT TO THEIR STATE AUTHORITY TO ADOPT  
6 POLICIES FOR THE UNIVERSITY.

7 THE EVIDENCE ALSO SHOWS THAT THE POLICY IS IN FACT  
8 BEING FOLLOWED BY THE LIBRARY. THERE'S NO EVIDENCE THAT ANY  
9 MATERIALS WERE POSTED WITHOUT AN AFFIRMATIVE REPRESENTATION  
10 FROM THE PROFESSOR THAT THEY IN FACT HAD CONSIDERED FAIR  
11 USE AND FOUND THE USE THAT THEY WERE PROPOSING TO POST TO BE  
12 FAIR.

13 SO THE TRUE COMPLAINT THAT PLAINTIFFS HAVE IS THAT  
14 THE FAIR USE ANALYSIS CONDUCTED BY THE PROFESSORS WAS WRONG,  
15 AND, YOUR HONOR, JUST SO YOU KNOW THE PROFESSORS AT ISSUE AT  
16 THIS TIME NOW ARE THERE'S 23 PROFESSORS, APPROXIMATELY 75 USES  
17 BY THOSE PROFESSORS OF 64 TOTAL BOOKS.

18 IF YOU TAKE PROFESSOR KIM AND PROFESSOR KAUFMANN,  
19 THEY ACCOUNT FOR 28 OF THE ALLEGED USES OR APPROXIMATELY 40  
20 PERCENT OF THE INFRINGEMENT. IF YOU ADD PROFESSORS ORR AND  
21 MURPHY TO THE PROFESSORS KIM AND KAUFMANN USE, NOW YOU ACCOUNT  
22 FOR 42 OF THE ALLEGED REMAINING INFRINGEMENT ALLEGATIONS OR 56  
23 PERCENT OF WHAT'S AT ISSUE IN THIS CASE. IF YOU ADD PROFESSOR  
24 ESPOSITO AND PROFESSOR DIXON NOW YOU'RE UP TO SIX PROFESSORS,  
25 APPROXIMATELY 70 PERCENT OF THE COMPLAINED INFRINGEMENT.

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1 WE'RE TALKING ABOUT FAIR USE DETERMINATIONS BY SIX  
2 PROFESSORS OVER A COURSE OF THREE SEMESTERS OUT OF 1100 FACULTY  
3 MEMBERS. THE ENTIRE EX PARTE YOUNG ARGUMENT DEPENDS ON  
4 DEFENDANTS' ROLE IN OVERSEEING THEIR POLICY, IMPLEMENTING THEIR  
5 POLICY AND CORRECTING NONCOMPLIANCE, AND, YOUR HONOR, THAT  
6 DIRECTLY CONTRADICTS THE ELEVENTH CIRCUIT LAW AS WELL AS THE  
7 FEDERAL CIRCUIT'S HOLDING IN PENNINGTON SEED.

8 WE ALSO BELIEVE PENNINGTON SEED CAN BE READ IN  
9 CONJUNCTION WITH LUCKEY V. HARRIS, AND YOU CAN ARRIVE AT THE  
10 SAME DECISION IN THAT THIS OVERSEEING OF THE UNIVERSITY'S  
11 POLICIES AND CORRECTING NONCOMPLIANCE IS NOT SUFFICIENT IN  
12 ORDER TO ESTABLISH THE EX PARTE YOUNG EXCEPTION TO ELEVENTH  
13 AMENDMENT IMMUNITY.

14 SPECIFICALLY IN THE LUCKEY V. HARRIS CASE, WHICH IS  
15 THE PLAINTIFFS' LEAD CASE, IN THAT SITUATION YOU HAD SYSTEMATIC  
16 DELAYS IN JUDGES APPOINTING COUNSEL IN CRIMINAL PROCEEDINGS  
17 INITIATED BY THE GOVERNOR, AND THOSE DELAYS IN APPOINTING  
18 COUNSEL WERE DIRECTLY RESPONSIBLE FOR THE VIOLATION OF THE  
19 DEFENDANTS' SIXTH AMENDMENT RIGHT TO COUNSEL, EIGHTH AMENDMENT  
20 RIGHT TO BAIL, AND THEIR FOURTEENTH AMENDMENT RIGHT TO DUE  
21 PROCESS.

22 THE COURT: WHAT STATUTE WAS THAT CASE BROUGHT  
23 UNDER?

24 MS. QUICKER: IT WAS A SECTION 1983 CASE, YOUR HONOR,  
25 AND I HAVE A COPY OF THAT DECISION.

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1 THE COURT: I DON'T NEED IT.

2 MS. QUICKER: THE GOVERNOR AND JUDGES IN THAT CASE  
3 HAD A DIRECT ROLE IN THE ACTUAL ADMINISTRATION OF THE PUBLIC  
4 DEFENDER PROGRAM IN GEORGIA, AND IT WAS THEIR DIRECT ROLE IN IT  
5 THAT RESULTED IN THE VIOLATIONS OF THE INDIGENT DEFENDANTS'  
6 EIGHTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

7 THE DECISION IN LUCKEY HAS BEEN APPLIED BY THE  
8 ELEVENTH CIRCUIT IN AT LEAST TWO OTHER SITUATIONS. IT WAS  
9 APPLIED IN SUMMIT MEDICAL, AND IN THAT CASE YOU HAD A MEDICAL  
10 CORPORATION, A DOCTOR AND A PATIENT SEEKING TO CHALLENGE THE  
11 CONSTITUTIONALITY OF THE ALABAMA PARTIAL BIRTH ABORTION STATUTE  
12 AND SAYING IT VIOLATED THE FOURTEENTH AMENDMENT.

13 THEY SUED THE GOVERNOR, THE ATTORNEY GENERAL AND A  
14 DISTRICT ATTORNEY. THE DEFENDANTS THEN MOVED TO DISMISS UNDER  
15 THE ELEVENTH AMENDMENT, AND CITING LUCKEY FOR SUPPORT THE COURT  
16 DISMISSED THE ACTION SAYING THAT NONE OF THE DEFENDANTS HAD ANY  
17 RELATIONSHIP TO THE ENFORCEMENT OF THE PROVISIONS AT ISSUE IN  
18 THIS STATUTE, AND THUS THE EX PARTE YOUNG DOCTRINE DID NOT  
19 APPLY AND SPECIFICALLY HELD, QUOTE, ONLY IF A STATE OFFICER HAS  
20 THE AUTHORITY TO ENFORCE AN UNCONSTITUTIONAL ACT IN THE NAME OF  
21 THE STATE CAN THE SUPREMACY CLAUSE BE INVOKED TO STRIP THE  
22 OFFICER OF HIS OFFICIAL OR REPRESENTED CHARACTER AND SUBJECT  
23 HIM TO THE INDIVIDUAL CONSEQUENCES OF HIS CONDUCT.

24 HERE NONE OF THE NAMED DEFENDANTS HAVE THE POWER OR  
25 THE AUTHORITY TO PREVENT A VIOLATION OF COPYRIGHT LAW OR HAD

1 ANY INVOLVEMENT IN THE VIOLATION OF COPYRIGHT LAW.

2 LUCKEY WAS AGAIN USED IN WOMEN'S EMERGENCY NETWORK V.  
3 BUSH IN THE ELEVENTH CIRCUIT IN 2003 WHEN THERE WAS A FLORIDA  
4 STATUTE BEING CHALLENGED THAT PROVIDED FOR LICENSE PLATES TO  
5 SAY CHOOSE LIFE AND THEN ANY ADDITIONAL MONIES THAT WERE  
6 GENERATED FROM THE SALE OF THOSE LICENSE PLATES TO BE  
7 DISTRIBUTED.

8 THE PLAINTIFFS FILED THE LAWSUIT AND ARGUED IT  
9 VIOLATED THEIR FIRST AMENDMENT ESTABLISHMENT CLAUSE AND  
10 FOURTEENTH AMENDMENT RIGHTS. THEY SUED GOVERNOR BUSH AND THE  
11 EXECUTIVE DIRECTOR OF THE FLORIDA DEPARTMENT OF HIGHWAY SAFETY  
12 AND MOTOR VEHICLES, AND THE COURT DISMISSED THE ACTION AGAINST  
13 GOVERNOR BUSH BUT LEFT THE EXECUTIVE DIRECTOR.

14 THEY SAID THE CONTROLLING CASE WAS LUCKEY AND  
15 SPECIFICALLY SAID HIS SHARED AUTHORITY OVER THE DEPARTMENT IN  
16 CHARGE OF IMPLEMENTING THE STATUTE AT ISSUE IS, QUOTE, SIMPLY  
17 TOO ATTENUATED TO ESTABLISH THAT HE WAS RESPONSIBLE FOR THE  
18 STATUTE'S IMPLEMENTATION. IMPORTANTLY THE COURT ALSO NOTED THE  
19 GOVERNOR'S GENERAL EXECUTIVE POWER WAS NOT A SUFFICIENT BASIS  
20 TO CONFER JURISDICTION, AND WHILE THE ENFORCEMENT OF A STATUTE  
21 IS THE RESPONSIBILITIES OF PARTIES OTHER THAN THE GOVERNOR HERE  
22 IN THIS CASE THE CABINET, THE GOVERNOR'S GENERAL EXECUTIVE  
23 POWER IS INSUFFICIENT TO CONFER JURISDICTION.

24 THE PARTIES IN OUR CASE THAT ARE RESPONSIBLE FOR  
25 COMPLYING WITH COPYRIGHT LAW ARE THE PROFESSORS THEMSELVES.

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1 LUCKEY HAS ALSO BEEN APPLIED IN A NORTHERN DISTRICT  
2 OF OKLAHOMA CASE, YOUR HONOR, AND I WILL GIVE THE CASE FOR THE  
3 RECORD. I DON'T NEED TO PROBABLY GO INTO IT BUT IT'S D.G. V.  
4 HENRY WHICH IS 591 F.SUPP 2D 1186, AND THERE THEY DISMISSED THE  
5 ACTION AGAINST THE GOVERNOR AND ALLOWED THE DIRECTOR OF THE  
6 DEPARTMENT OF HUMAN RESOURCES TO STAY IN BECAUSE THE GOVERNOR  
7 WAS, QUOTE, TWO STEPS REMOVED FROM THE ACTUAL VIOLATIONS AT  
8 ISSUE.

9 WE BELIEVE THIS CASE IS FACTUALLY VERY SIMILAR TO  
10 PENNINGTON SEED WHERE THE COURT DISMISSED THE ACTION AGAINST  
11 THE CHAIRMAN OF THE BOARD OF THE UNIVERSITY SYSTEM, THE  
12 PRESIDENT OF THE UNIVERSITY SYSTEM AND THE CHANCELLOR OF THE  
13 UNIVERSITY SYSTEM IN A PATENT INFRINGEMENT SUIT BUT ALLOWED THE  
14 PROFESSOR TO STAY IN BECAUSE IT WAS THE PROFESSOR WHO DEVELOPED  
15 THE PATENTED FESCUE THAT WAS ALLEGEDLY VIOLATING ANOTHER  
16 PARTY'S PATENT, AND SPECIFICALLY THE FEDERAL CIRCUIT SAID THE  
17 NEXUS BETWEEN THE VIOLATION OF FEDERAL LAW AND THE INDIVIDUAL  
18 ACCUSED OF VIOLATING THAT LAW REQUIRES MORE THAN SIMPLY A BROAD  
19 GENERAL OBLIGATION TO PREVENT A VIOLATION.

20 THE ALLEGATIONS THAT THE UNIVERSITY OFFICIALS FAILED  
21 TO SUPERVISE A POLICY AT THE SCHOOL IS NOT AN ALLEGATION OF  
22 FEDERAL INFRINGEMENT AND DOES NOT RETAIN THE SUFFICIENT CAUSAL  
23 CONNECTION ACTIVITY TO WARRANT APPLICATION OF THE EX PARTE  
24 YOUNG.

25 DEFENDANTS HERE ARE SIMPLY NOT RESPONSIBLE FOR

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1 PREVENTING COPYRIGHT INFRINGEMENT AND AT MOST ARE RESPONSIBLE  
2 FOR CORRECTING NONCOMPLIANCE OF THE LAW, AND THAT HOWEVER IS  
3 NOT THE SAME AS WHAT'S REQUIRED TO PREVENT A COPYRIGHT  
4 INFRINGEMENT IN THE OTHER THREE CASES.

5 SO IN CLOSING, WE THINK THE EVIDENCE SHOWS THAT THE  
6 DEFENDANTS CREATED, ADOPTED AND IMPLEMENTED A COMPREHENSIVE  
7 COPYRIGHT POLICY THAT ON ITS FACE APPEARS TO COMPLY WITH THE  
8 LAW. THEY REQUIRED THE PROFESSORS TO PERFORM A FAIR USE  
9 ANALYSIS PRIOR TO POSTING ANYTHING ON ERES. THAT THE  
10 PROFESSORS IN FACT PERFORMED A FAIR USE ANALYSIS BEFORE POSTING  
11 ANYTHING ON ERES OR ULEARN. THEY CERTIFIED TO THE LIBRARY THAT  
12 THEY IN FACT PERFORMED A FAIR USE ANALYSIS BEFORE ANYTHING WAS  
13 IN FACT POSTED, AND THAT THERE'S NO EVIDENCE WHATSOEVER THAT  
14 ANY OF THESE DEFENDANTS HAD ANYTHING TO DO WITH THEIR FAIR USE,  
15 THE FAIR USE ANALYSIS OF THE PROFESSORS THAT ALLEGEDLY GOT IT  
16 WRONG ACCORDING TO PLAINTIFFS.

17 WE FEEL THAT THIS GENERAL POWER IS INSUFFICIENT TO  
18 ESTABLISH THE NECESSARY CONNECTION BETWEEN THE DEFENDANTS AND  
19 THE PROFESSORS ALLEGEDLY INCORRECT FAIR USE FINDINGS TO MEET  
20 THE EX PARTE YOUNG EXCEPTION TO THE ELEVENTH AMENDMENT IMMUNITY  
21 UNDER LUCKEY, UNDER THE WOMEN'S EMERGENCY NETWORK CASE AND  
22 UNDER SUMMIT MEDICAL AND WE RESPECTFULLY ASK THE COURT TO  
23 DISMISS THE ACTION.

24 THE COURT: THANK YOU. MR. KRUGMAN.

25 MR. KRUGMAN: THANK YOU, YOUR HONOR. I FIRST NOTE

1 THAT WE 'VE NOT SUED THE GOVERNOR OF THE STATE OF GEORGIA. WE  
2 SUED OFFICIALS DIRECTLY WITH THE UNIVERSITY.

3 AS THE COURT KNOWS UNDER EX PARTE YOUNG AN ACTION  
4 AGAINST A STATE OFFICIAL SEEKING PROSPECTIVE INJUNCTIVE RELIEF  
5 AS WE ARE DOING HERE IS NOT BARRED BY THE ELEVENTH AMENDMENT.  
6 BECAUSE WHEN THE OFFICIAL ACTS IN CONTRAVENTION OF FEDERAL LAW  
7 HE 'S STRIPPED OF HIS OFFICIAL OR REPRESENTATIVE CHARACTER AND  
8 IS SUBJECTED IN HIS PERSON TO THE CONSEQUENCES OF HIS  
9 INDIVIDUAL CONDUCT.

10 THUS WHERE PROSPECTIVE INJUNCTIVE RELIEF IS AGAINST  
11 INDIVIDUAL STATE OFFICERS IN A FEDERAL FORUM BASED ON A FEDERAL  
12 RIGHT, AND THE FEDERAL RIGHT HERE IS FEDERAL COPYRIGHT LAW, THE  
13 ELEVENTH AMENDMENT IN MOST CASES IS A BAR.

14 WE DO AGREE THAT LUCKEY V. HARRIS IS CONTROLLING  
15 HERE. IN THERE LUCKEY PLAINTIFFS BROUGHT AN ACTION AGAINST --  
16 ON BEHALF OF INDIGENT DEFENDANTS AS WELL AS THE ATTORNEYS  
17 REPRESENTING THEM SEEKING AN ORDER REQUIRING THE DEFENDANTS TO  
18 MEET MINIMAL STANDARDS IN THE PROVISION OF INDIGENT CRIMINAL  
19 DEFENSE SERVICES AND THAT CASE WAS BROUGHT AGAINST THE GOVERNOR  
20 JOE FRANK HARRIS AND THE JUDGES WHO WERE RESPONSIBLE FOR  
21 PROVIDING COUNSEL TO INDIGENT DEFENDANTS.

22 THE DISTRICT COURT GRANTED THE DEFENDANT 'S MOTION IN  
23 THAT CASE ON GROUNDS THAT THE COMPLAINT DID NOT ALLEGE THAT ANY  
24 DEFENDANT HAD PERSONALLY UNDERTAKEN THE WRONGFUL ACTION AS THE  
25 DEFENDANTS SEEM TO BE ARGUING HERE.

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1           ON APPEAL THE ELEVENTH CIRCUIT REVERSED AND REJECTED  
2 THE NOTION THAT AN EX PARTE DEFENDANT OFFICIAL MUST HAVE A  
3 TAKEN SOME ACTION PERSONALLY THAT VIOLATES THE CONSTITUTION OR  
4 FEDERAL LAW, AND THE COURT OF APPEALS HELD THAT IN AN ACTION  
5 AGAINST STATE OFFICERS IN THEIR OFFICIAL CAPACITIES PERSONAL  
6 ACTION BY DEFENDANTS INDIVIDUALLY IS NOT A NECESSARY CONDITION  
7 OF INJUNCTIVE RELIEF AGAINST STATE OFFICERS IN THEIR OFFICIAL  
8 CAPACITY. RATHER UNDER THE ELEVENTH CIRCUIT STANDARD ALL THAT  
9 IS NECESSARY IS THAT THE OFFICIAL BE RESPONSIBLE FOR THE  
10 CHALLENGED ACTION.

11           AND THE LUCKEY COURT STATED THAT THE STATE OFFICER IN  
12 THAT CASE IT WAS THE GOVERNOR OF THE STATE OF GEORGIA BY VIRTUE  
13 OF HIS OFFICE HAD SOME CONNECTION WITH THE CONDUCT COMPLAINED  
14 OF, AND IT'S ONLY WHEN THAT CONNECTION IS LACKING WHERE THE  
15 DEFENDANT IS MERELY A REPRESENTATIVE OF THE STATE WOULD THE  
16 ACTION BE IMPROPER.

17           AND THERE THE ELEVENTH CIRCUIT HELD THAT THE GOVERNOR  
18 WHO WAS RESPONSIBLE FOR LAW ENFORCEMENT AS PRESIDENT BECKER  
19 TESTIFIED HERE HE IS RESPONSIBLE FOR THE ENFORCEMENT OF AND  
20 COMPLIANCE WITH FEDERAL COPYRIGHT LAW AND HAD THE RESIDUAL  
21 POWER TO COMMENCE PROSECUTIONS AND TO DIRECT THE ATTORNEY  
22 GENERAL TO INSTITUTE AND PROSECUTE ON BEHALF OF THE STATE AND  
23 THE STATE JUDGES WHO WERE RESPONSIBLE FOR ACTUALLY  
24 ADMINISTERING THE SYSTEM OF REPRESENTATION SIMILAR TO THE DEAN  
25 OF LIBRARIES HERE, THEY WERE ALL PROPER PARTIES UNDER EX PARTE

1 YOUNG AGAINST WHOM PROSPECTIVE INJUNCTIVE RELIEF COULD BE  
2 ORDERED.

3           AND THE ELEVENTH CIRCUIT EARLIER THIS YEAR REAFFIRMED  
4 THE HOLDING IN LUCKEY AND THAT WAS IN MARCH IN GRIZZLE V. KEMP,  
5 AND I THINK WE CITED THAT IN OUR BRIEF 634 F.3D 1314, AND IN  
6 GRIZZLE TWO MEMBERS OF LOCAL SCHOOL BOARDS BROUGHT AN ACTION  
7 CHALLENGING A STATUTORY NEPOTISM POLICY THAT DISQUALIFIED  
8 FAMILY MEMBERS OF CERTAIN SCHOOL ADMINISTRATORS FROM SERVING ON  
9 LOCAL BOARDS OF EDUCATION, AND THE PLAINTIFFS SUED BOTH THE  
10 STATE ELECTION BOARD AND THE SECRETARY OF STATE IN HIS OFFICIAL  
11 CAPACITY.

12           THE DISTRICT COURT GRANTED THE BOARD'S MOTION TO  
13 DISMISS BUT DENIED THE MOTION FILED BY THE SECRETARY OF STATE,  
14 AND ON APPEAL THE ELEVENTH CIRCUIT AFFIRMED THE DENIAL OF THE  
15 SECRETARY OF STATE'S MOTION HOLDING THAT A STATE OFFICIAL IS  
16 SUBJECT TO SUIT IN HIS OFFICIAL CAPACITY WHEN HIS OFFICE IMBUES  
17 HIM WITH THE RESPONSIBILITY TO ENFORCE THE LAW OR LAWS AT ISSUE  
18 IN THIS SUIT.

19           AND IT WENT ON TO TALK ABOUT THAT ALTHOUGH THE  
20 SECRETARY OF STATE IN THAT CASE CANNOT DIRECTLY QUALIFY OR  
21 CHALLENGE CANDIDATES FOR LOCAL BOARDS OF EDUCATION OR CERTIFY  
22 THE RESULTS OF THOSE ELECTIONS, AS A MEMBER AND THE CHAIRPERSON  
23 OF THE STATE ELECTION BOARD HE HAS BOTH THE POWER AND DUTY TO  
24 ENSURE THAT THE ENTITIES CHARGED WITH THOSE RESPONSIBILITIES  
25 COMPLY WITH GEORGIA'S ELECTION CODE IN CARRYING OUT THOSE

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1 TASKS.

2           YOU'VE SEEN THE TESTIMONY FROM PRESIDENT BECKER. HE  
3 HAS THAT RESPONSIBILITY. THE INDIVIDUAL MEMBERS OF THE BOARD  
4 OF REGENTS HAVE THAT RESPONSIBILITY. PROVOST PALM HAS THAT  
5 RESPONSIBILITY, AND THE ELEVENTH CIRCUIT HELD THAT THE DISTRICT  
6 COURT DID NOT ERR IN HOLDING THAT THE SECRETARY OF STATE IS A  
7 PROPER PARTY TO THE ACTION.

8           SO ONE OF THE RELEVANT QUESTIONS IS THE  
9 RESPONSIBILITY AND ALSO WHETHER THE DEFENDANTS HAVE THE  
10 AUTHORITY TO STOP THE VIOLATIONS, AND AS YOU HEARD THE  
11 TESTIMONY OF PRESIDENT BECKER, HE HAS THAT AUTHORITY. HE  
12 CONCEDED THAT HE HAS THE AUTHORITY TO PREVENT VIOLATIONS OF  
13 FEDERAL COPYRIGHT LAW, AND THAT IS SUFFICIENT TO MAKE HIM A  
14 DEFENDANT IN THIS CASE.

15           WHY DON'T WE TAKE A LOOK AT THE EVIDENCE AND  
16 SUMMARIZE THE EVIDENCE THAT SUPPORTS THIS. FIRST WITH RESPECT  
17 TO PRESIDENT BECKER, IF YOU CAN BRING UP STIPULATION NUMBER 41,  
18 AND THESE ARE STIPULATIONS OF THE PARTIES, YOUR HONOR, 41, GSU  
19 PRESIDENT MARK P. BECKER IS THE HEAD OF GSU AND IS ITS CHIEF  
20 ADMINISTRATIVE OFFICER WITH SUPERVISORY AUTHORITY OVER THE  
21 ADMINISTRATORS OF THE GSU LIBRARY, THE GSU INFORMATION SYSTEMS  
22 AND TECHNOLOGY DEPARTMENT.

23           STIPULATION NUMBER 47, DEFENDANTS INCLUDING BECKER  
24 HAVE THE AUTHORITY TO ORDER THAT COPYRIGHTED WORKS MAY BE  
25 DISTRIBUTED ELECTRONICALLY AT GSU ONLY IF DONE IN COMPLIANCE

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1 WITH POLICIES SET BY THE STATE OF GEORGIA BOARD OF REGENTS,  
2 GEORGIA STATE UNIVERSITY OR A COURT-ORDERED INJUNCTION.

3 STIPULATION 49, DEFENDANTS WHICH INCLUDE PRESIDENT  
4 BECKER HAVE THE AUTHORITY TO DIRECT LIBRARY STAFF TO BLOCK  
5 ACCESS TO OR REMOVE SPECIFIC MATERIALS OR SPECIFIC COURSE PAGES  
6 ON THE ERES SYSTEM AND HAVE THE AUTHORITY TO ORDER THAT LIBRARY  
7 PERSONNEL PRODUCE REPORTS OF ERES AND ULEARN ACTIVITIES FOR A  
8 SPECIFIC TIME PERIOD, INCLUDING IF SO ORDERED BY THE COURT IN  
9 ORDER TO MONITOR COMPLIANCE WITH ANY COURT-ORDERED INJUNCTION.

10 IN ADDITION TO THE STIPULATIONS OF THE PARTIES, WE  
11 ALSO HAVE THE TESTIMONY OF PRESIDENT BECKER THAT YOUR HONOR  
12 JUST HAD THE OPPORTUNITY TO SEE. I PREPARED CLIPS OF THAT, BUT  
13 YOU'VE JUST SEEN IT AND YOU HEARD PRESIDENT BECKER TESTIFY THAT  
14 ULTIMATELY IT'S PART OF PROVOST PALM'S RESPONSIBILITIES TO  
15 ENSURE COMPLIANCE WITH FEDERAL COPYRIGHT LAW.

16 YOU HEARD HIS TESTIMONY THAT IT FALLS UNDER PRESIDENT  
17 BECKER'S RESPONSIBILITY AS DELEGATED TO HIM AS PRESIDENT OF THE  
18 UNIVERSITY TO ENSURE THAT THE LIBRARY AND USE OF THE ELECTRONIC  
19 RESERVE SYSTEM COMPORTS WITH FEDERAL COPYRIGHT LAW, AND THEN HE  
20 ACKNOWLEDGED AND YOU CAN CARRY THAT ALL THE WAY TO THE BOARD OF  
21 REGENTS AND ULTIMATELY THAT'S THE BOARD OF REGENTS'  
22 RESPONSIBILITY TO ENSURE THAT THE UNIVERSITY COMPLIES WITH  
23 FEDERAL COPYRIGHT LAW, AND THAT WAS AT PAGES 26,10 TO 27,6 OF  
24 DR. BECKER'S TESTIMONY, AND THEN HE WENT ON TO TALK ABOUT HIS  
25 POWER TO ORDER COMPLIANCE WITH FEDERAL COPYRIGHT LAW AND THAT

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1 HIS AUTHORITY TO DIRECT NOT JUST THE LIBRARY BUT THE FACULTY TO  
2 COME INTO COMPLIANCE.

3           THERE CAN BE NO QUESTION THAT UNDER EX PARTE YOUNG  
4 AND LUCKEY PRESIDENT BECKER IS A PROPER DEFENDANT. HE'S  
5 RESPONSIBLE TO ENSURE COMPLIANCE WITH FEDERAL COPYRIGHT LAW.  
6 HE HAS THE AUTHORITY TO DIRECT FACULTY AT THE UNIVERSITY TO  
7 COMPLY WITH FEDERAL COPY LAW, AND HE HAS THE AUTHORITY TO ORDER  
8 THE UNIVERSITY TO COME INTO COMPLIANCE.

9           PROVOST RISA PALM, STIPULATION NUMBER 42, THE GSU  
10 PROVOST CURRENTLY RISA PALM IS RESPONSIBLE FOR MONITORING THE  
11 FUNCTIONS AND OFFICIALS OF THE UNIVERSITY'S ACADEMIC  
12 ADMINISTRATION INCLUDING CORRECTING NONCOMPLIANCE WITH FEDERAL  
13 COPYRIGHT LAW.

14           AND THEN REQUEST FOR ADMISSION 18, IF YOU CAN TURN TO  
15 THE REQUEST TO ADMIT WHICH IS PLAINTIFF'S EXHIBIT 975, THIS IS  
16 NUMBER 18, I BELIEVE, ADMIT THAT PURSUANT TO ARTICLE 3 OF THE  
17 GEORGIA STATE UNIVERSITY STATUTES, PROVOST HENRY IS RESPONSIBLE  
18 FOR MONITORING THE FUNCTIONS AND OFFICIALS OF THE UNIVERSITY'S  
19 ACADEMIC ADMINISTRATION AND CORRECT ANY CONDUCT NOT CONSISTENT  
20 WITH THE PROFESSIONAL AND LEGAL FULFILLMENT OF THE UNIVERSITY'S  
21 PURPOSES AND OBJECTIVES.

22           AND THEN IN NUMBER 19 -- THAT WAS ADMITTED, AND ADMIT  
23 THAT PROVOST HENRY'S RESPONSIBILITIES DELINEATED IN THE  
24 PREVIOUS REQUEST INCLUDE RESPONSIBILITY FOR CORRECTING  
25 NONCOMPLIANCE WITH FEDERAL COPYRIGHT LAW, AND YOU HEARD

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1 PRESIDENT BECKER'S TESTIMONY REGARDING HER RESPONSIBILITIES.

2 AND THEN STIPULATION NUMBER 49, THIS IS ONCE AGAIN  
3 THE ONE WE LOOKED AT BEFORE, BUT DEFENDANTS WHICH INCLUDE  
4 PROVOST PALM HAVE THE AUTHORITY TO DIRECT LIBRARY STAFF TO  
5 BLOCK ACCESS TO OR REMOVE SPECIFIC MATERIALS OR COPIES, AND I  
6 WON'T READ THE ENTIRE STIPULATION.

7 IF YOU CAN NOW GO BACK TO REQUEST FOR ADMISSION 25,  
8 PLAINTIFF'S EXHIBIT 975, NUMBER 25, AND THIS WAS REQUEST -- THE  
9 REQUEST WAS SERVED AT A TIME WHEN PROVOST PALM'S PREDECESSOR  
10 WAS THE PROVOST, AND THE REQUEST WAS ADMIT THAT PROVOST HENRY  
11 AND NOW PROVOST PALM HAS THE AUTHORITY TO ORDER THAT  
12 COPYRIGHTED WORKS MAY BE DISTRIBUTED ELECTRONICALLY AT GSU ONLY  
13 IF DONE SO IN COMPLIANCE WITH POLICIES SET BY THE STATE OF  
14 GEORGIA BOARD OF REGENTS, GEORGIA STATE UNIVERSITY OR A  
15 COURT-ORDERED INJUNCTION AND DEFENDANTS ADMITTED THAT. CLEARLY  
16 PROVOST PALM IS A PROPER DEFENDANT UNDER EX PARTE YOUNG AND  
17 ELEVENTH CIRCUIT PRECEDENT.

18 DEAN OF LIBRARY NAN SEAMANS, WHOM YOU HAVE HEARD  
19 TESTIFY AT LEAST BY VIDEO DEPOSITION, AGAIN BACK TO STIPULATION  
20 NUMBER 45, DEFENDANT NANCY SEAMANS, THE DEAN OF LIBRARIES AT  
21 GSU, HAS SUPERVISORY AUTHORITY OVER THE LIBRARY STAFF  
22 RESPONSIBLE FOR THE ERES SYSTEM AND IS RESPONSIBLE THAT THE  
23 ERES SYSTEM COMPLIES WITH POLICIES OF THE BOARD OF REGENTS AND  
24 GSU.

25 SECONDLY, DEAN OF LIBRARY NANCY SEAMANS SERVED ON THE

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1 BOARD OF REGENTS SELECT COMMITTEE ON COPYRIGHT THAT CONVENED IN  
2 2008 AND RECOMMENDED THAT THE BOARD OF REGENTS ADOPT THE NEW  
3 POLICY ON COPYRIGHT, AND I BELIEVE THAT IS IN EVIDENCE IN HER  
4 DEPOSITION TESTIMONY, BUT I'M NOT 100 PERCENT SURE, BUT THAT  
5 WILL BE HER TESTIMONY AS WE PROCEED IN THE TRIAL.

6           STIPULATION 49, ONCE AGAIN THIS IS THE STIPULATION IN  
7 THIS TRIAL THAT DEFENDANTS WHICH IN THIS CASE INCLUDE DEAN OF  
8 LIBRARIES NANCY SEAMANS HAVE THE AUTHORITY TO DIRECT LIBRARY  
9 STAFF TO BLOCK ACCESS TO OR REMOVE SPECIFIC MATERIALS OR  
10 SPECIFIC COURSE PAGES ON THE ERES SYSTEM AND HAVE THE AUTHORITY  
11 TO ORDER THAT LIBRARY PERSONNEL PRODUCE REPORTS OF ERES AND  
12 ULEARN ACTIVITIES FOR A SPECIFIC TIME PERIOD INCLUDING IF SO  
13 ORDERED BY THE COURT IN ORDER TO MONITOR COMPLIANCE WITH ANY  
14 COURT-ORDERED INJUNCTION.

15           WITH RESPECT TO THE FIRST PART OF THAT STIPULATION,  
16 YOU HEARD DENISE DIMSDALE'S TESTIMONY AND PROFESSOR DIXON'S  
17 TESTIMONY ON THAT THAT ALTHOUGH THEY PERSONALLY CAN'T REMOVE  
18 WHAT'S BEEN POSTED ON THE ELECTRONIC RESERVE SYSTEM, THE DEAN  
19 OF LIBRARIES NANCY SEAMANS CAN DO SO. DEAN OF LIBRARIES NANCY  
20 SEAMANS IS A PROPER DEFENDANT UNDER EX PARTE YOUNG AND ELEVENTH  
21 CIRCUIT LAW.

22           THE BOARD OF REGENTS DEFENDANTS, IN STIPULATION 46  
23 THE BOARD OF REGENTS USG HAS SUPERVISORY AUTHORITY OVER GSU AND  
24 ELECTS THE PRESIDENT OF GSU. NUMBER 86, IT WAS THE BOARD OF  
25 REGENTS THAT INTRODUCED THE NEW COPYRIGHT POLICY THAT IS AT

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1 LEAST IN PART AT ISSUE IN THIS CASE FOR USG SCHOOLS ON FEBRUARY  
2 17TH, 2009.

3 STIPULATION 87, THE POLICY WAS THE RESULT OF EFFORTS  
4 BY THE BOARD OF REGENTS SELECT COMMITTEE ON COPYRIGHT WHICH  
5 CONVENEED IN LATE DECEMBER 2008, EIGHT MONTHS AFTER THE  
6 COMMENCEMENT OF THIS LAWSUIT.

7 REQUESTS FOR ADMISSION PLAINTIFF'S EXHIBIT 975, AND  
8 THIS IS, I'M SORRY, ADMISSION NUMBER 59, ADMIT THAT THE BOARD  
9 OF REGENTS DEFENDANTS HAVE THE ABILITY TO ORDER THE REMOVAL OF  
10 SPECIFIC MATERIALS POSTED ON ULEARN AND/OR SPECIFIC ULEARN  
11 PAGES INCLUDING IF REQUIRED TO DO SO BY THE COURT AND THAT  
12 REQUEST WAS ADMITTED.

13 NOW GO DOWN TO NUMBER 60. ADMIT THAT THE BOARD OF  
14 REGENTS DEFENDANTS HAVE THE AUTHORITY TO ORDER THAT COPYRIGHTED  
15 WORKS MAY BE DISTRIBUTED ELECTRONICALLY AT GSU ONLY IF DONE SO  
16 IN COMPLIANCE WITH POLICIES AND/OR RULES SET BY THEMSELVES,  
17 GEORGIA STATE UNIVERSITY OR A COURT-ORDERED INJUNCTION. THAT  
18 REQUEST WAS ADMITTED.

19 GO BACK TO STIPULATION NUMBER 49, AND ONCE AGAIN THIS  
20 WAS THE ONE WE LOOKED AT PREVIOUSLY. DEFENDANTS WHICH INCLUDE  
21 ALL OF THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES  
22 HAVE THE AUTHORITY, THIS INCLUDES THE INDIVIDUAL MEMBERS OF THE  
23 BOARD OF REGENTS, TO DIRECT LIBRARY STAFF TO BLOCK ACCESS TO OR  
24 REMOVE SPECIFIC MATERIALS OR SPECIFIC COURSE PAGES ON THE ERES  
25 SYSTEM AND HAVE THE AUTHORITY TO ORDER THAT LIBRARY PERSONNEL

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1 PRODUCE REPORTS OF ERES AND ULEARN ACTIVITIES FOR A SPECIFIC  
2 TIME PERIOD INCLUDING IF SO ORDERED BY THE COURT IN ORDER TO  
3 MONITOR COMPLIANCE WITH ANY COURT-ORDERED INJUNCTION.

4           AND THEN FINALLY WITH RESPECT TO THE BOARD OF REGENTS  
5 DEFENDANTS, YOUR HONOR HEARD THE TESTIMONY OF PRESIDENT BECKER  
6 WHO SAYS THAT THE BOARD OF REGENTS ULTIMATELY HAS THE  
7 RESPONSIBILITY TO ENSURE COMPLIANCE WITH FEDERAL -- THAT THE  
8 LIBRARY AND THE USE OF THE ELECTRONIC RESERVE SYSTEM COMPORTS  
9 WITH FEDERAL COPYRIGHT LAW.

10           AND THEN FINALLY WITH RESPECT TO DEFENDANT J. L.  
11 ALBERT, STIPULATION NUMBER 44, AND THIS HAS TO DO WITH HIS  
12 RESPONSIBILITIES WITH RESPECT TO THE ULEARN SYSTEM AS WELL AS  
13 ERES, GSU ASSOCIATE PROVOST FOR INFORMATION SYSTEMS AND  
14 TECHNOLOGY J. ALBERT IS RESPONSIBLE FOR THE TECHNICAL OPERATION  
15 AND MAINTENANCE OF THE ERES SYSTEM AT GSU AND HAS SUPERVISORY  
16 AUTHORITY OVER THE GSU STAFF WHO SUPPORT USE OF THE ULEARN  
17 COURSE MANAGEMENT SYSTEM AT GSU.

18           AND THEN FINALLY WITH RESPECT TO ASSOCIATE PROVOST  
19 ALBERT, STIPULATION 49 THAT WE HAVE BEEN LOOKING AT, THAT HE  
20 IS -- THAT HE HAS THE AUTHORITY TO DIRECT LIBRARY STAFF TO  
21 BLOCK ACCESS TO OR REMOVE SPECIFIC MATERIALS OR SPECIFIC COURSE  
22 PAGES ON THE ERES SYSTEM, AND ASSOCIATE PROVOST ALBERT AS WELL  
23 IS AN APPROPRIATE DEFENDANT IN HIS OFFICIAL CAPACITY UNDER EX  
24 PARTE YOUNG AND ELEVENTH CIRCUIT CASE LAW THAT IS CONTROLLING  
25 HERE, AND ACCORDINGLY UNDER EX PARTE YOUNG THE COURT CAN ORDER

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1 PROSPECTIVE RELIEF AGAINST THESE DEFENDANTS BASED UPON A  
2 SHOWING OF DIRECT INFRINGEMENTS COMMITTED BY GSU EMPLOYEES AND  
3 THERE'S LUCKEY AS WELL AS THE COURT'S SUMMARY JUDGMENT ORDER  
4 SEPTEMBER 30TH WHICH RECOGNIZED THERE'S A NEXUS BETWEEN  
5 DEFENDANTS AND THE VIOLATIONS OF FEDERAL LAW AT ISSUE IN THIS  
6 CASE AS THOSE DEFENDANTS WHO FORMULATED THE POLICY WERE ALSO  
7 RESPONSIBLE FOR OVERSEEING ITS IMPLEMENTATION.

8 THE FEDERAL CIRCUIT'S DECISION IN PENNINGTON SEED  
9 DOES NOT ALTER THE RESULT HERE. FIRST OF ALL, IT'S NOT THE LAW  
10 IN THIS CIRCUIT. IT'S NOT BINDING ON THIS COURT, AND THEY MAY  
11 NOT USE IT TO CIRCUMVENT THE ELEVENTH CIRCUIT'S EX PARTE  
12 PRECEDENCE WHICH WE'VE CITED TO THE COURT, AND INSTEAD THE  
13 APPLICABLE RULE OF LAW IS WHAT THE ELEVENTH CIRCUIT ARTICULATED  
14 IN LUCKEY AND GRIZZLE WHICH HELD THAT ALL THAT'S REQUIRED IS  
15 THAT THE OFFICIAL BE RESPONSIBLE FOR THE CHALLENGED ACTION AS  
16 DEFENDANTS INDISPUTABLY ARE HERE AS DEMONSTRATED BY THE  
17 UNCONTRADICTED EVIDENCE.

18 THE FEDERAL CIRCUIT IN PENNINGTON SEED, AND THAT  
19 INVOLVED A PATENT INFRINGEMENT CASE, FOUND THAT PLAINTIFFS  
20 THERE HAD NOT DEMONSTRATED A SUFFICIENT NEXUS, BUT EVEN UNDER  
21 PENNINGTON SEED IF THAT WERE THE STANDARD WHICH IT IS NOT, OUR  
22 CLAIMS HERE VOID SOVEREIGN IMMUNITY BAR.

23 FIRST OF ALL IN PENNINGTON SEED, IT WAS DECIDED  
24 SIMPLY ON A MOTION TO DISMISS AND WITHOUT THE FULLY DEVELOPED  
25 RECORD THAT WE HAVE HERE, AND ALSO IN PENNINGTON SEED THE

1 FEDERAL CIRCUIT HELD THERE THAT A FEDERAL COURT CANNOT ENJOIN A  
2 STATE OFFICIAL TO PERFORM HIS OR HER DUTY UNDER STATE LAW, BUT  
3 THERE'S NO DISPUTE HERE AS WE HAVE ALREADY DISCUSSED THAT THE  
4 DEFENDANTS HAVE THE AUTHORITY OR DUTY OR BOTH TO ENSURE  
5 COMPLIANCE WITH FEDERAL COPYRIGHT LAW, AND THERE IS A  
6 SUFFICIENT NEXUS. THEY'RE NOT SIMPLY RANDOM DEFENDANTS. WE'VE  
7 NOT SUED THE GOVERNOR. WE'VE NOT SUED THE LIEUTENANT  
8 GOVERNOR. WE'VE SUED THE BOARD OF REGENTS, THE PRESIDENT AND  
9 THOSE BELOW.

10 OTHER CIRCUITS INCLUDING THE SECOND CIRCUIT AND THE  
11 SEVENTH CIRCUIT APPLY THE SAME STANDARD AS THE ELEVENTH CIRCUIT  
12 AND WE'VE CITED THOSE IN OUR BRIEF, BUT A DISTRICT COURT CASE  
13 IN THE -- OUT OF THE SECOND CIRCUIT AND THIS WAS FROM THE  
14 SOUTHERN DISTRICT OF NEW YORK, IT WAS SALERNO V. CITY  
15 UNIVERSITY OF NEW YORK WHICH WE'VE CITED 191 F. SUPP. AT 352.

16 THERE THE SOUTHERN DISTRICT OF NEW YORK PERMITTED THE  
17 PLAINTIFFS TO SEEK INJUNCTIVE RELIEF UNDER EX PARTE YOUNG  
18 AGAINST THE OFFICER OF THE STATE UNIVERSITY FOR ONGOING  
19 COPYRIGHT INFRINGEMENT.

20 THE PLAINTIFFS THERE SUED CHANCELLOR OF THE CITY  
21 UNIVERSITY OF NEW YORK COMPARABLE HERE TO THE BOARD OF REGENTS,  
22 THE PRESIDENT AS WELL AS THE DIRECTOR OF THE STATE INSTITUTE  
23 ALLEGING THAT THE WORK OF ONE OF THE PLAINTIFFS WAS BEING  
24 INFRINGED BY EMPLOYEES OF THE UNIVERSITY AND OF THE INSTITUTE  
25 COMPARABLE TO WHAT WE HAVE HERE WHERE WE ARE ALLEGING THE

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1 INFRINGEMENTS OF WORKS OF SAGE, OXFORD AND CAMBRIDGE UNIVERSITY  
2 PRESS.

3 THE CHANCELLOR AND DIRECTOR MOVED TO DISMISS ON THE  
4 GROUND THAT THE PLAINTIFFS HAD NOT ALLEGED WITH SPECIFICITY HOW  
5 THE OFFICERS WERE CONNECTED WITH THE ENFORCEMENT OF THE ALLEGED  
6 VIOLATIONS OF THE PLAINTIFFS' COPYRIGHT. THE DEFENDANTS ALSO  
7 ARGUED THAT EX PARTE YOUNG WAS UNAVAILABLE BECAUSE THE STATE  
8 WAS A REAL PARTY IN INTEREST.

9 THE COURT REJECTED BOTH THOSE ARGUMENTS EXPLAINING  
10 THAT EX PARTE YOUNG ONLY REQUIRES A PLAINTIFF TO ALLEGE SOME  
11 CONNECTION BETWEEN THE OFFICIAL --

12 THE COURT: WHAT'S THE DATE OF SALERNO?

13 MR. KRUGMAN: IT IS 2001, YOUR HONOR, OUT OF THE  
14 SOUTHERN DISTRICT OF NEW YORK. THE COURT REJECTED -- EXPLAINED  
15 THAT EX PARTE YOUNG ONLY REQUIRES A PLAINTIFF TO ALLEGE SOME  
16 CONNECTION BETWEEN THE OFFICIAL AND THE ENFORCEMENT OF THE  
17 LEGAL ACT AND NOTING THAT THE DEFENDANT'S ARGUMENT MISSED THE  
18 POINT OF EX PARTE YOUNG WHICH IS TO PERMIT CLAIMS FOR  
19 PROSPECTIVE INJUNCTIVE RELIEF AGAINST STATE OFFICIALS TO ENSURE  
20 STATE COMPLIANCE WITH FEDERAL LAW.

21 I'LL ALSO NOTE THAT THE --

22 THE COURT: WHAT WAS THE PLAINTIFF'S SUBSTANTIVE  
23 ARGUMENT IN SALERNO?

24 MR. KRUGMAN: I BELIEVE IT WAS THAT THERE WAS A  
25 VIOLATION OF FEDERAL COPYRIGHT LAW OF THEIR RIGHTS BY

1 INDIVIDUAL EMPLOYEES OF THE UNIVERSITY, THE CITY UNIVERSITY OF  
2 NEW YORK AND THEN THEY BROUGHT AN ACTION AGAINST THE  
3 CHANCELLOR --

4 THE COURT: I MEAN WHAT WAS THE COPYRIGHT ISSUE,  
5 WHETHER A PARTICULAR ISSUE WAS A FAIR USE?

6 MR. KRUGMAN: I DON'T BELIEVE IN TERMS OF THE  
7 DISTRICT COURT'S OPINION IT WAS THAT DEVELOPED, YOUR HONOR, IN  
8 TERMS OF WHAT THE ACTUAL -- BUT I'LL TAKE A LOOK AT THE OPINION  
9 AND ADVISE YOUR HONOR OF THAT.

10 THE COURT: THAT'S ALL RIGHT.

11 MR. KRUGMAN: I DON'T THINK THAT PRECISE ISSUE WAS  
12 ADDRESSED, AND IT WAS SIMPLY WHETHER EX PARTE YOUNG APPLIED OR  
13 NOT.

14 I WILL NOTE THAT THE FEDERAL CIRCUIT IN PENNINGTON  
15 SEED WHICH WAS A THREE JUDGE PANEL ON THAT COURT, TWO OF THE  
16 JUDGES JOINED THE MAJORITY OPINION ON THE ISSUE OF SOVEREIGN  
17 IMMUNITY. THERE WAS A SECOND -- THE THIRD JUDGE ONLY CONCURRED  
18 IN THE JUDGMENT OF THE COURT AND DID NOT JOIN THE MAJORITY ON  
19 THE ISSUE OF SOVEREIGN IMMUNITY. THAT JUDGE SAID HE WOULD NOT  
20 HAVE ADDRESSED IT, AND SO YOU REALLY HAVE TWO JUDGES OF THE  
21 FEDERAL CIRCUIT DECIDING THAT ISSUE AND THE THIRD REFUSING TO  
22 JOIN IT.

23 PENNINGTON SEED ALSO RELIED HEAVILY ON THE FIRST  
24 CIRCUIT'S DECISION IN SHELL OIL V. NOEL, THIS IS AT 608 F.2D  
25 208, FOR THE PROPOSITION THAT A NEXUS BETWEEN THE VIOLATION OF

1 FEDERAL LAW AND THE INDIVIDUAL ACCUSED OF VIOLATING THAT LAW  
2 REQUIRES MORE THAN SIMPLY A BROAD OBLIGATION TO PREVENT A  
3 VIOLATION.

4 THE PENNINGTON COURT INCORRECTLY STATED THAT SHELL  
5 OIL -- HELD THAT THE GOVERNOR OR ATTORNEY GENERAL WERE NOT  
6 PROPER DEFENDANTS IN EVERY ACTION THERE. THAT WAS DICTA. THAT  
7 ISSUE WAS NEVER ACTUALLY DECIDED BY THE FIRST CIRCUIT IN THE  
8 CASE JUST CITED, AND THE FIRST CIRCUIT THERE SIMPLY AFFIRMED  
9 THE DISMISSAL BECAUSE THERE WAS NO CASE OR CONTROVERSY BECAUSE  
10 THE DEFENDANTS HAS DISCLAIMED ANY INTENTION OF EVER ENFORCING  
11 THE STATUTE THAT WAS BEING CHALLENGED.

12 THE COURT NEED NOT HAVE CONCERN ABOUT APPLYING EX  
13 PARTE YOUNG TO A COPYRIGHT CASE IN THIS CIRCUIT AGAINST THESE  
14 DEFENDANTS. THERE WAS A CASE COMING OUT OF THE MIDDLE DISTRICT  
15 OF GEORGIA, NATIONAL ASSOCIATION OF BOARDS OF PHARMACY V. BOARD  
16 OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, AND THE  
17 DISTRICT COURT CASE CITE IS 208 WESTLAW 1805439.

18 AND THERE THE PLAINTIFF FILED SUIT FOR COPYRIGHT  
19 INFRINGEMENT AGAINST THE BOARD OF REGENTS, ITS MEMBERS, SEVERAL  
20 UGA SCHOOL OF PHARMACY ADMINISTRATORS AND A PROFESSOR, AND THE  
21 PLAINTIFF WAS A COMPANY THAT DEVELOPS AND ADMINISTERS AN  
22 EXAMINATION THAT PHARMACY BOARDS USE TO EVALUATE APPLICANTS FOR  
23 PHARMACY LICENSE. THE MULTIPLE CHOICE QUESTIONS ON THE EXAMS  
24 WERE COPYRIGHTED.

25 PLAINTIFF LEARNED THAT A PROFESSOR AT UGA HAD BEEN

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1 USING ACTUAL QUESTIONS FROM PLAINTIFF'S EXAM FOR USE IN A  
2 REVIEW COURSE HE WAS TEACHING. THE MIDDLE DISTRICT OF GEORGIA  
3 DISMISSED THE CLAIMS AGAINST THE OFFICIAL CAPACITY DEFENDANTS  
4 NOT BECAUSE THEY DID NOT HAVE A SUFFICIENT CONNECTION TO OR  
5 RESPONSIBILITY FOR ENSURING COMPLIANCE WITH THE FEDERAL  
6 COPYRIGHT LAW BUT BECAUSE THE COURT CONCLUDED THAT THE  
7 COMPLAINT THERE DID NOT SUFFICIENTLY ALLEGE AN ONGOING  
8 VIOLATION.

9 BUT IN SO HOLDING THE DISTRICT COURT STATED HERE  
10 THERE IS NO QUESTION THAT THE RELIEF SOUGHT AN INJUNCTION  
11 AGAINST FUTURE COPYRIGHT INFRINGEMENT BY THE OFFICIAL CAPACITY  
12 DEFENDANTS IS PROPERLY CHARACTERIZED AS PROSPECTIVE.  
13 FURTHERMORE, THERE ARE NO PARTICULAR AND SPECIAL CIRCUMSTANCES  
14 IN THIS CASE UNDER WHICH YOUNG IS INAPPLICABLE.

15 ON APPEAL THE ELEVENTH CIRCUIT REVERSED THE DISMISSAL  
16 OF THE CLAIMS AGAINST THE OFFICIAL CAPACITY DEFENDANTS HOLDING  
17 KIND OF RESTATING WHAT THE DISTRICT COURT HAD HELD AND SAID  
18 THAT THE ACTUAL BASIS FOR THE COURT'S RULING HAD BEEN THAT THE  
19 CLAIM FOR INJUNCTIVE RELIEF HAD BECOME MOOT BASED ON  
20 ALLEGATIONS OUTSIDE OF THE COMPLAINT, AND THE COURT REJECTED  
21 THAT AS AN APPROPRIATE BASIS FOR DISMISSAL OF THE CASE BECAUSE  
22 OF THE -- CERTAINLY THE POSSIBILITY OF REPEATED CONDUCT, THAT  
23 THE INFRINGEMENTS WOULD OCCUR AGAIN IN THE PAST.

24 AND THE ELEVENTH CIRCUIT ALLOWED THAT CASE TO PROCEED  
25 AGAINST THE OFFICIAL CAPACITY DEFENDANTS UNDER EX PARTE YOUNG,

1 BUT I WILL NOTE THAT THIS ISSUE, THIS PRECISE ISSUE WAS NOT ON  
2 APPEAL BEFORE THE ELEVENTH CIRCUIT, BUT IN THAT CASE THE  
3 ATTORNEY GENERAL OF THE STATE OF GEORGIA DID NOT EVEN SEE FIT  
4 TO ASSERT THAT THERE WAS SOME INSUFFICIENT CONNECTION BETWEEN  
5 THE INDIVIDUAL MEMBERS OF THE BOARD OF REGENTS AND OTHER STATE  
6 OFFICIALS TO ARGUE FOR DISMISSAL UNDER EX PARTE YOUNG.

7 IN ANY EVENT, UNDER EX PARTE YOUNG AND LUCKEY AND ITS  
8 PROGENY THE DEFENDANTS ARE PROPER PARTIES IN THIS CASE IN WHICH  
9 PLAINTIFFS ARE SEEKING PROSPECTIVE INJUNCTIVE RELIEF TO ENJOIN  
10 ONGOING AND WIDESPREAD COPYRIGHT INFRINGEMENT, AND WE REQUEST  
11 THAT THE COURT DENY THAT MOTION, THEIR RENEWED MOTION TO  
12 DISMISS AND MOTION FOR JUDGMENT.

13 JUST A COUPLE OF OTHER, FEW OTHER POINTS THAT I WOULD  
14 AT LEAST WANT TO ADDRESS FROM THE FILING THAT THE PLAINTIFFS  
15 SUBMITTED TO THE COURT YESTERDAY AFTERNOON THAT WE --

16 THE COURT: THE BRIEF?

17 MR. KRUGMAN: BRIEFLY, I'LL BE VERY BRIEF.

18 THE COURT: NO, I SAID THE BRIEF THEY FILED? YOU'RE  
19 TALKING ABOUT THE BRIEFS THEY FILED YESTERDAY?

20 MR. KRUGMAN: THANK YOU. I THOUGHT YOU WERE TELLING  
21 ME TO BE BRIEF, YOUR HONOR, WHICH I'VE NOT BE SO SUCCESSFUL AT  
22 AT LEAST SOMETIMES DURING THE TRIAL.

23 THE DEFENDANTS HAVE ARGUED THAT THE POLICY WAS  
24 ADOPTED IN GOOD FAITH, AND THAT SEEMS TO BE WHAT THEY'RE SAYING  
25 THAT THEY'RE SOMEHOW INSULATED FROM RESPONSIBILITY BECAUSE THE

1 POLICY WAS ADOPTED IN GOOD FAITH.

2 NUMBER 1, THAT'S NOT RELEVANT HERE. WE'RE NOT  
3 SEEKING DAMAGES. GOOD FAITH COULD BE RELEVANT TO WHERE DAMAGES  
4 ARE BEING SOUGHT, BUT IT'S NOT RELEVANT WHEN YOU'RE SEEKING  
5 PROSPECTIVE INJUNCTIVE RELIEF, BUT JUST TO BE ABUNDANTLY CLEAR,  
6 WE DO DISPUTE THAT THE POLICY WAS ADOPTED IN GOOD FAITH AND  
7 THAT EVIDENCE WILL COME IN DURING THE DEFENDANTS' CASE.

8 WE SUBMIT THAT THIS WAS PURELY A LITIGATION  
9 STRATEGY. MR. ASKEW AND MR. SCHAEZEL WERE SPECIAL COUNSEL TO  
10 THE SELECT COMMITTEE ON COPYRIGHT. THEY WERE COUNSEL TO THE  
11 BOARD OF REGENTS. WHEN WE HAVE SOUGHT TO EXAMINE INTO KIND OF  
12 WHAT WENT ON, WHAT WERE THE DELIBERATIONS WITH RESPECT TO THE  
13 ADOPTION OF THIS NEW POLICY, WERE THEY REALLY SEEKING WELL WE  
14 NEED TO MAKE SURE THAT THE UNIVERSITY COMPLIES WITH FEDERAL  
15 COPYRIGHT LAW, THE DEFENDANTS AT EVERY JUNCTURE HAVE ASSERTED  
16 THE ATTORNEY/CLIENT PRIVILEGE WITH RESPECT TO ALL DELIBERATIONS  
17 OF THE SELECT COMMITTEE, ALL DELIBERATIONS OF THE BOARD OF  
18 REGENTS WITH RESPECT TO THE NEW POLICY. THEY HAVE REFUSED TO  
19 PRODUCE DOCUMENTS. THEY HAVE INSTRUCTED WITNESSES NOT --

20 THE COURT: WELL, I DON'T THINK I HAVE ANY EVIDENCE  
21 ABOUT THAT, DO I?

22 MR. KRUGMAN: YOU WILL, YOUR HONOR.

23 THE COURT: YEAH, BUT WE'RE LOOKING RIGHT NOW AT WHAT  
24 I'VE GOT.

25 MR. KRUGMAN: OKAY. THAT WILL BECOME AN ISSUE OR IS

1 AN ISSUE IN THE CASE AND WE CHALLENGE THAT, BUT WE DON'T  
2 BELIEVE, FIRST OF ALL, THAT WHETHER IT WAS GOOD FAITH OR NOT IS  
3 RELEVANT TO THIS COURT'S DETERMINATION, A, AS TO WHETHER  
4 THERE'S BEEN A VIOLATION, BUT MORE IMPORTANTLY WHETHER THE  
5 OFFICIAL CAPACITY DEFENDANTS ARE ENTITLED TO IMMUNITY UNDER EX  
6 PARTE YOUNG, AND I BRING IT UP ONLY BECAUSE IT WAS REFERENCED  
7 IN THE PLAINTIFFS' FILING YESTERDAY.

8           THEY ALSO TOUT THE EDUCATION PROVIDED TO GSU AND  
9 STAFF AND PROFESSORS, AND AS YOU'VE SEEN FROM AT LEAST THE  
10 TESTIMONY THUS FAR THAT THERE ARE A NUMBER OF PROFESSORS WHO  
11 SIMPLY DECLINED TO AVAIL THEMSELVES OF THE OPPORTUNITY OF  
12 TRAINING SESSIONS, AND AT LEAST IN SOME INSTANCES THEY WERE  
13 COMPLETELY UNAWARE OF WHO TO SPEAK TO.

14           AND THEY'VE ARGUED ALSO THAT WELL THEY'VE ADOPTED  
15 THIS POLICY, A FAIR USE CHECKLIST WHICH PROVIDES THE PROFESSORS  
16 WITH NECESSARY TOOLS TO CONDUCT A MEANINGFUL FAIR USE ANALYSIS  
17 BEFORE USING COPYRIGHTED MATERIALS AND THEN THEY'RE PROMOTING  
18 THE POLICY THAT THAT SEEKS TO PREVENT VIOLATIONS, BUT THE  
19 CHECKLIST IS WE BELIEVE YOUR HONOR HAS SEEN FROM THE EVIDENCE  
20 IS NOT A MEANINGFUL TOOL TO ENSURE COMPLIANCE WITH FEDERAL  
21 COPYRIGHT LAW. IT'S A PREORDAINED RESULT. ANY PROFESSOR WHO  
22 FILLS OUT THAT CHECKLIST WILL ALWAYS CONCLUDE FAIR USE, AND WE  
23 THINK THAT IS AN APPROPRIATE INFERENCE FROM THE EVIDENCE THAT  
24 HAS ALREADY BEEN SUBMITTED TO YOUR HONOR.

25           ONE OTHER POINT THAT DEFENDANTS HAVE NOT ALLEGED MUCH

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1 LESS PROVEN THAT THE COPYRIGHT POLICY IS NOT ADEQUATELY FUNDED  
2 OR CONTEND THAT IT'S BEEN A FAILURE TO FUND, AND THIS IS AN  
3 ARGUMENT THAT THEY MADE IN CONNECTION WITH LUCKEY. WELL THERE  
4 THE ALLEGATION WAS THAT THERE WAS INSUFFICIENT FUNDING FOR  
5 INDIGENT DEFENSE, AND WE'RE NOT MAKING THAT ARGUMENT HERE.  
6 YOUR HONOR, WE DISPUTE THAT.

7 WE DO CONTEND THAT THERE IS A FAILURE TO FUND WITH  
8 RESPECT TO PERMISSIONS AT GEORGIA STATE UNIVERSITY, AND IF YOU  
9 CAN BRING UP STIPULATION NUMBER 59? GSU HAS NOT BUDGETED FOR,  
10 DOES NOT INTEND TO BUDGET FOR AND HAS NOT ESTABLISHED ANY  
11 PROCEDURES FOR OBTAINING LICENSES OR PERMISSIONS TO POST  
12 ELECTRONIC COURSE MATERIAL INCLUDING ON ELECTRONIC RESERVES,  
13 AND YOU HEARD EARLIER THIS MORNING PRESIDENT BECKER'S TESTIMONY  
14 ON THAT SUBJECT THAT THERE'S NO BUDGET FOR THAT. BECAUSE THEY  
15 DON'T NEED IT, EVERYTHING IS FAIR USE.

16 WHILE THE UNIVERSITY IS WILLING TO SPEND AS PROFESSOR  
17 BECKER TESTIFIED 180 DOLLAR PER YEAR OR CHARGE STUDENTS A FEE  
18 OF 180 DOLLARS PER YEAR FOR FOOTBALL AT THE UNIVERSITY, THEY  
19 PROVIDE ZERO MONEY FOR PERMISSIONS TO ALLOW PROFESSORS PROPERLY  
20 TO GO OUT AND OBTAIN PERMISSION WHEN NEEDED, AND IT'S OUR  
21 CONTENTION THAT THAT FAILURE TO PROPERLY FUND PERMISSIONS  
22 CONTRIBUTES TO THE UNIVERSITY'S NONCOMPLIANCE WITH  
23 FEDERAL COPYRIGHT LAW, AND IT'S OUR BELIEF IF THEY WERE TO  
24 PROVIDE APPROPRIATE FUNDING THAT PERHAPS WE WOULD NOT BE HERE  
25 TODAY.

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1           FOR THE REASONS STATED, YOUR HONOR, EX PARTE YOUNG  
2 APPLIES HERE. THE ELEVENTH CIRCUIT PRECEDENT IS DIRECTLY  
3 APPLICABLE. TO THE EXTENT THAT PENNINGTON SEED MAY BE IN  
4 CONFLICT WITH THAT PRECEDENT, THAT'S NOT THE LAW IN THIS  
5 CIRCUIT, AND WE RESPECTFULLY REQUEST THAT YOUR HONOR DENY  
6 DEFENDANTS' MOTION. THANK YOU.

7           THE COURT: THANK YOU. YOU WANT THE LAST WORD, MS.  
8 QUICKER?

9           MS. QUICKER: PLEASE. YOUR HONOR, THE FACT THAT THEY  
10 HAVE FRAMED THEIR COMPLAINT TO SEEK AN INJUNCTION AND ARE  
11 SEEKING PROSPECTIVE INJUNCTIVE RELIEF IS NOT A VALID ABROGATION  
12 OF ELEVENTH AMENDMENT IMMUNITY. ELEVENTH AMENDMENT IMMUNITY IS  
13 IMMUNITY FROM SUIT, AND THEY HAVE TO ESTABLISH THE MEANINGFUL  
14 CONNECTION TO ABROGATE THE ELEVENTH AMENDMENT IMMUNITY AND THEY  
15 HAVE NOT.

16           MR. BECKER DID NOT TESTIFY THAT HE WAS OBLIGATED TO  
17 PREVENT COPYRIGHT VIOLATIONS. THE COPYRIGHT POLICY IN AND OF  
18 ITSELF DOES NOT VIOLATE COPYRIGHT LAW. SO, THEREFORE, THE  
19 BOARD OF REGENTS' ADOPTION OF THE POLICY DOES NOT VIOLATE THEIR  
20 COPYRIGHT RIGHT.

21           THE FACT THAT YOU CAN HAVE -- THAT YOU TAKE  
22 CORRECTIVE ACTION ONCE THERE HAS BEEN A VIOLATION THAT IS NOT  
23 THE BASIS TO JUSTIFY AN EX PARTE YOUNG ACTION. THAT IS NOT A  
24 MEANINGFUL CONNECTION, AND THERE'S BEEN NO CASE AUTHORITY THAT  
25 SAYS THE FACT THAT ONCE THERE IS A VIOLATION YOU CAN REMEDY IT,

1 THAT'S SUFFICIENT UNDER EX PARTE YOUNG.

2 IN FACT IN THIS SITUATION THE PROFESSORS THEMSELVES  
3 COULD TAKE CORRECTIVE ACTION AND REMOVE THESE MATERIALS. YET  
4 THEY HAVEN'T SUED THE PROFESSORS.

5 THE ISSUE BEFORE THE COURT APPEARS TO BE A FAILURE TO  
6 SUPERVISE OUR COPYRIGHT POLICY AND THAT IS EXACTLY WHAT WAS AT  
7 ISSUE IN PENNINGTON SEED. SALERNO, A SOUTHERN DISTRICT OF NEW  
8 YORK CASE, IS NO MORE INSTRUCTIVE THAN PENNINGTON SEED, AND  
9 SPECIFICALLY THAT CASE DEALS WITH A WORK FOR HIRE, AND IN THAT  
10 PARTICULAR SITUATION THE COPYRIGHT HOLDER ENTERED INTO A WORK  
11 FOR HIRE AGREEMENT, BUT WITHIN THAT COPYRIGHTED VIDEO HAD SOME  
12 OF HER OWN OLDER COPYRIGHTED WORKS, AND SHE WAS ARGUING THAT BY  
13 DISTRIBUTING THE ULTIMATE VIDEO THEY WERE VIOLATING HER OTHER  
14 COPYRIGHTS THAT SHE DID NOT ASSIGN TO THE UNIVERSITY. IT WAS  
15 NOT A FAIR USE CASE.

16 WITH RESPECT TO THE NATIONAL BOARD OF PHARMACY CASE  
17 THAT THE ELEVENTH CIRCUIT JUST DECIDED, THOSE FACTS ARE VERY  
18 DIFFERENT. IN THAT SITUATION THE ADMINISTRATORS HAD LEARNED OF  
19 A PROPOSED VIOLATION, NEGOTIATED AND EXECUTED AN AGREEMENT THAT  
20 WAS THEN ALLEGEDLY SUBSEQUENTLY VIOLATED, AND THE ISSUE THERE  
21 IS THE COURT HAS SAID THAT THEY HAVE THE OPPORTUNITY TO DEVELOP  
22 MORE EVIDENCE TO SHOW THAT THERE IS THE REQUIRED ESTABLISHED  
23 CONNECTION IN ORDER TO PROCEED AGAINST THOSE ADMINISTRATORS  
24 BUT, YOU KNOW, ON THE COMPLAINT'S FACE THAT IT'S SUFFICIENT  
25 CONNECTION.

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1           IN SALERNO, YOUR HONOR, THE COMPLAINT ITSELF ALLEGED  
2 THAT THE NAMED UNIVERSITY OFFICIALS IN FACT DID THE VIOLATION  
3 OF THE COPYRIGHT. THAT WAS THE CONNECTION ON THE FACE OF THE  
4 COMPLAINT, AND THAT'S WHY IT SURVIVED THE MOTION TO DISMISS.  
5 WE HAVE NO IDEA WHAT HAPPENED ONCE THE COURT HAD ALL THE FACTS  
6 WITH RESPECT TO THAT.

7           AND, YOUR HONOR, THE FAILURE TO OBTAIN PERMISSION  
8 FEES IS NOT A VIOLATION OF COPYRIGHT LAW, AND THAT DOES CONFER  
9 THE REQUISITE CONNECTION THAT EX PARTE YOUNG REQUIRES, AND  
10 FINALLY, YOUR HONOR, THE LUCKEY V. HARRIS CASE THAT WAS JUST  
11 DISCUSSED BY MR. KRUGMAN IS NOT THE LAST WORD THAT THE ELEVENTH  
12 CIRCUIT HAD ON THIS ISSUE, AND I WOULD LIKE TO READ THE EXCERPT  
13 FROM THE CASE OUT OF THE ELEVENTH CIRCUIT THAT'S WOMEN'S  
14 EMERGENCY NETWORK VERSUS BUSH WHICH SPECIFICALLY PROVIDES -- IT  
15 PROVIDES THAT THE ARGUMENT THAT THEY'RE MAKING IS NOT EXACTLY  
16 WHAT THE ELEVENTH CIRCUIT MEANT BY LUCKEY.

17           AND SPECIFICALLY IT SAYS IN LUCKEY THIS COURT  
18 INTERPRETED EX PARTE YOUNG TO PERMIT SUITS AGAINST STATE  
19 OFFICERS ONLY WHEN THOSE OFFICERS ARE RESPONSIBLE FOR A  
20 CHALLENGED ACTION AND HAVE SOME CONNECTION TO THE  
21 UNCONSTITUTIONAL ACT AT ISSUE.

22           GOVERNOR BUSH'S ONLY CONNECTION WITH THE FLORIDA  
23 STATUTE IS THAT HE ALONG WITH SIX MEMBERS OF THE CABINET ARE  
24 RESPONSIBLE FOR THE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR  
25 VEHICLES. GOVERNOR BUSH'S SHARED AUTHORITY OVER THE DEPARTMENT

1 IS SIMPLY TOO ATTENUATED TO ESTABLISH THAT HE IS RESPONSIBLE  
2 FOR THE DISTRIBUTION OF FUNDS TO ADOPTION AGENCIES.

3 APPELLANTS ALSO CONTEND BUSH IS THE PROPER PARTY  
4 BECAUSE AS GOVERNOR HE IS RESPONSIBLE FOR THE ENFORCEMENT OF  
5 THE STATUTE. THE GOVERNOR'S GENERAL EXECUTIVE POWER IS NOT A  
6 BASIS FOR JURISDICTION IN MOST CIRCUMSTANCES.

7 IF THE GOVERNOR'S GENERAL EXECUTIVE POWER PROVIDED  
8 SUFFICIENT CONNECTION TO A STATE LAW TO PERMIT JURISDICTION  
9 OVER HIM, ANY STATE STATUTE COULD BE CHALLENGED SIMPLY BY  
10 NAMING THE GOVERNOR AS A DEFENDANT. WHERE THE ENFORCEMENT OF A  
11 STATUTE IS THE RESPONSIBILITY OF PARTIES OTHER THAN THE  
12 GOVERNOR, THE CABINET IN THIS CASE, THE GOVERNOR'S GENERAL  
13 EXECUTIVE POWER IS INSUFFICIENT TO CONFER JURISDICTION.

14 YOUR HONOR, WE RESPECTFULLY SUBMIT THEY HAVE NOT  
15 SATISFIED THE REQUIRED CONNECTION NECESSARY TO ABROGATE THE  
16 ELEVENTH AMENDMENT IMMUNITY OF THESE DEFENDANTS. THANK YOU.

17 THE COURT: THANK YOU. I'M GOING TO DENY THE  
18 DEFENDANTS' MOTION, AND I THOUGHT ABOUT THIS A LOT. IT'S A  
19 VERY COMPLICATED QUESTION, BUT HERE ARE MY THOUGHTS AND MY  
20 RULINGS.

21 I DO AGREE WITH THE DEFENDANTS THAT THE LAYERS OF  
22 AUTHORITY BETWEEN THE DEFENDANTS AND THE PROFESSORS ARE TOO  
23 INDIRECT TO PERMIT AN APPLICATION OF RESPONDEAT SUPERIOR WITH  
24 THE OBJECTIVE OF HOLDING THE DEFENDANTS RESPONSIBLE FOR  
25 INDIVIDUAL ACTS OF ALLEGED INFRINGEMENT BY THE PROFESSORS WHO

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1 MADE THE FAIR USE DETERMINATIONS.

2 I AGREE THAT THE LUCKEY V. HARRIS DECISION IS  
3 CONTROLLING, BUT I WOULD OBSERVE THAT IMPLICIT IN ANY EX PARTE  
4 YOUNG DETERMINATION IS THE QUESTION WHETHER THE DEFENDANTS WHO  
5 ARE NAMED ARE IN A POSITION TO DO SOMETHING MEANINGFUL TO STOP  
6 THE VIOLATION.

7 NOW THE PLAINTIFFS' POSITION IS THAT THE REGENTS AND  
8 THE OTHER DEFENDANTS DO HAVE THE POWER TO DO THAT BECAUSE THEY  
9 CAN STOP ANY COPYING FROM OCCURRING. IN OTHER WORDS, IF THE  
10 REGENTS WANTED TO THEY COULD SAY WELL WE'RE GOING TO ABOLISH  
11 THE ERES SYSTEM, AND NO QUESTION ABOUT IT, THE PROFESSORS WOULD  
12 ABIDE BY AND THE OTHER PEOPLE WOULD ABIDE BY THAT DECISION.

13 AND, SIMILARLY, IF IT WERE TO COME TO THE ATTENTION  
14 OF ONE OF THE DEFENDANTS THAT A PROFESSOR WAS ABUSING THE  
15 SYSTEM, THEN OBVIOUSLY THE DEFENDANTS OR ONE OF MORE OF THEM  
16 WOULD HAVE THE POWER TO DIRECT THE PROFESSOR TO CEASE WHATEVER  
17 CONDUCT IS INVOLVED.

18 BUT HAVING SAID THAT, IT SEEMS TO ME THAT THE HEART  
19 OF THIS CASE IS THE PROPER APPLICATION OF THE FAIR USE  
20 DOCTRINE, AND HERE IS WHERE WE RUN INTO, I THINK, THE GREATEST  
21 DIFFICULTY IN THE ANALYSIS.

22 THE EVALUATION OF THE EX PARTE YOUNG ISSUE, IT SEEMS  
23 TO ME, COALESCES WITH EVALUATION OF THE SUBSTANTIVE LAW ISSUE.  
24 THE SUBSTANTIVE LAW ISSUE BEING WHAT ARE THE PROPER CRITERIA  
25 FOR EVALUATING APPLICATION OF THE FAIR USE DOCTRINE IN A

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1 SITUATION LIKE OURS WHERE WE'RE DEALING WITH A UNIVERSITY AND  
2 CLAIMED FAIR USE APPLICATIONS ON A LARGE SCALE RESULTING FROM  
3 LARGE SCALE USE OF ELECTRONIC COPYING BY THE UNIVERSITY.

4           WHEN YOU LOOK AT THE FAIR USE CASES, IT SEEMS TO ME  
5 THERE IS PRACTICALLY NO GUIDANCE GIVEN TO A SCHOOL LIKE GEORGIA  
6 STATE UNIVERSITY ABOUT WHAT NEEDS TO GO INTO THIS POLICY. THE  
7 ONLY THING THAT THE CURRENT CASES TELL US IS THAT THERE IS  
8 SUPPOSED TO BE A DETERMINATION MADE BASED ON APPLICATION OF THE  
9 FOUR FACTORS, AND IT SEEMS TO ME THAT ANYBODY WHO'S FAMILIAR  
10 WITH THE FAIR USE DOCTRINE KNOWS HOW NOTORIOUSLY SUBJECTIVE IT  
11 IS.

12           I THINK IT'S JUST ABOUT IMPOSSIBLE TO COME UP WITH A  
13 POLICY FOR A UNIVERSITY THAT SAYS APPLY THE FOUR USE FACTORS  
14 THAT REALLY GIVES THE PROFESSORS ANY GUIDANCE ABOUT WHAT THEY  
15 ARE SUPPOSED TO DO.

16           WE CAN TELL THEM LIKE GEORGIA STATE DID THAT YOU  
17 APPLY THE FOUR USE FACTORS, AND GEORGIA STATE ACTUALLY WENT  
18 FURTHER AND TRIED TO COME UP WITH SOME SUBCATEGORIES TO HELP  
19 THE PROFESSOR GET TO THE BOTTOM LINE.

20           THE PROBLEM IS THERE AREN'T REALLY ANY CASES THAT SAY  
21 THIS IS WHAT A UNIVERSITY IS SUPPOSED TO DO, AND THERE AREN'T  
22 ANY CASES THAT SAY THIS IS WHAT A UNIVERSITY IS NOT SUPPOSED TO  
23 DO.

24           THE PLAINTIFFS HAVE ARGUED THAT IT WOULD BE BETTER IF  
25 SOMEBODY OTHER THAN THE PROFESSORS MADE THESE FAIR USE

1 DETERMINATIONS, AND, FRANKLY, I AM VERY SKEPTICAL THAT THAT IS  
2 TRUE. I THINK EVEN IF YOU WERE TO PUT IT IN THE HANDS OF A  
3 LAWYER TO MAKE THESE DETERMINATIONS FOR THE UNIVERSITY THAT WE  
4 COULD VERY WELL BE SITTING HERE TODAY TRYING TO FIGURE OUT  
5 WHETHER THE LAWYER MADE THE RIGHT DECISIONS. THE FACT IS IT IS  
6 NOTORIOUSLY SUBJECTIVE.

7 THE ONLY WAY I THINK THAT A WORKABLE POLICY CAN BE  
8 DONE IS WITH SOME KIND OF OBJECTIVE CRITERION BEING ADDED IN,  
9 AND I THINK, YOU KNOW, WHERE WE ARE IS TO DETERMINE  
10 SIMULTANEOUSLY WHAT THE SUBSTANTIVE LAW IS CONCERNING  
11 APPLICATION OF THE FAIR USE DOCTRINE IN A UNIVERSITY SETTING  
12 LIKE I SAID WHERE THE UNIVERSITY IS ALLOWING COPIES TO BE MADE  
13 OF COPYRIGHTED MATERIAL BASED ON SIFTING THROUGH THE FAIR USE  
14 DOCTRINE. WE HAVE TO DECIDE WHAT A UNIVERSITY LIKE GEORGIA  
15 STATE NEEDS TO DO.

16 NOW I DO REALIZE HOW PROBLEMATIC IT IS TO SAY WELL WE  
17 DON'T HAVE ANY CASES THAT ESTABLISH THAT GEORGIA STATE SHOULD  
18 HAVE DONE ITS EXAMINATION IN A CERTAIN WAY. I'M VERY  
19 SYMPATHETIC TO THE PLIGHT OF THE GEORGIA STATE OFFICIALS WHO  
20 REALLY DID NOT HAVE ANY DECISIONS, ANY COURT PRECEDENT THAT  
21 MAPPED OUT AN OBJECTIVELY WORKABLE BASIS FOR APPLYING THE FAIR  
22 USE DOCTRINE IN THE CONTEXT THAT WE'RE DEALING WITH.

23 BUT SAYING THAT THERE AREN'T ANY CASES THAT SAY YOU  
24 HAVE TO DO IT THIS WAY DOESN'T NECESSARILY MEAN THAT THE LAW IS  
25 NOT OR SHOULD NOT -- DOES NOT OR SHOULD NOT PROVIDE THAT YOU

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1 HAVE TO DO IT A PARTICULAR WAY.

2           IN OTHER WORDS WHAT I'M SAYING IS I THINK IN SOME  
3 INSTANCES THE LAW IS THERE TO BE DISCOVERED OR ESTABLISHED, AND  
4 I THINK THAT'S REALLY WHERE WE ARE IN THIS CASE. WE NEED TO  
5 TAKE WHAT WE HAVE FROM THE DOCTRINE OF FAIR USE, THE PRECEDENT  
6 THAT WE HAVE, APPLY IT TO THE FACTS OF OUR CASE AND DETERMINE  
7 WHAT AN OBJECTIVELY REASONABLE POLICY WOULD BE AND THEN  
8 DETERMINE WHETHER GEORGIA STATE'S CONDUCT MEASURES UP TO THAT  
9 STANDARD. SO THAT IS THE BASIS ON WHICH I AM DENYING THE  
10 DEFENDANTS' MOTION.

11           ARE YOU ALL READY?

12           MR. SCHAETZEL: WE ARE, YOUR HONOR. I HAVE A  
13 PROCEDURAL CONUNDRUM.

14           THE COURT: WHAT'S THAT?

15           MR. SCHAETZEL: TWO THINGS. FIRST AS TO THE COURT'S  
16 POINT ON THE SUBSTANTIVE LAW, WE WOULD ALSO LIKE TO MAKE A  
17 MOTION AT THIS TIME UNDER 52(C) FOR FAILURE TO PROVE THE  
18 MISUSE, ONGOING AND CONTINUOUS MISUSE OF THE FAIR USE DEFENSE.

19           THE COURT: YEAH, AND SINCE YOU BROUGHT IT UP, THAT'S  
20 STILL WHERE I AM. I THINK WHAT THE PLAINTIFFS' OBLIGATION HERE  
21 IS TO PROVE THAT THERE IS ONGOING AND CONTINUOUS MISUSE. THE  
22 CLAIM IS DIRECTED AT THE POLICY NOT AT INDIVIDUAL CLAIMS OF  
23 POLICY -- OF COPYRIGHTED INFRINGEMENT.

24           IF YOU WANT TO GO AHEAD AND MAKE YOUR MOTION AT THIS  
25 TIME, YOU MAY.



1           MR. SCHAETZEL: I WOULD LIKE TO MAKE THAT MOTION. MY  
2 CONUNDRUM IS THIS --

3           THE COURT: WHAT TIME IS IT?

4           MR. SCHAETZEL: IT'S 12:15.

5           THE COURT: GO AHEAD.

6           MR. SCHAETZEL: THE WITNESS THAT WAS DISCUSSED AND  
7 DEPOSED LAST NIGHT MS. HALL, CYNTHIA HALL IS A FORMER LAWYER AT  
8 GEORGIA STATE UNIVERSITY WHO WE WOULD LIKE TO CALL IN THE EVENT  
9 THAT OUR MOTION IS DENIED.

10           MS. HALL WAS GRACIOUS ENOUGH TO COME FROM FLORIDA.  
11 SHE'S NO LONGER WITH THE UNIVERSITY. SHE HAS A 3:30 FLIGHT  
12 BACK TO FLORIDA TODAY. I'M ASKING THE COURT'S AND THE  
13 PLAINTIFFS' INDULGENCE TO SEE IF WE MIGHT BE ABLE TO CALL MS.  
14 HALL, CONDUCT THAT EXAMINATION NOW, AND THEN RENEW THE MOTION  
15 ONCE WE FINISH WITH HER SO WE CAN ACCOMMODATE HER SCHEDULE.  
16 WE'LL PROCEED --

17           THE COURT: YOU KNOW I WOULD LIKE TO ACCOMMODATE HER  
18 SCHEDULE, BUT I THINK WHAT IS GOING TO HAPPEN IF WE GO AHEAD  
19 AND PUT HER ON THE WITNESS STAND RIGHT NOW, IT'S GOING TO GO AN  
20 HOUR AND A HALF BEFORE WE ARE READY TO MOVE FORWARD WITH  
21 ANYTHING.

22           MR. SCHAETZEL: I CAN ASSURE YOU THAT THE DIRECT WILL  
23 NOT, YOUR HONOR, BUT I UNDERSTAND --

24           THE COURT: YEAH, I KNOW AND I THINK QUITE FRANKLY IT  
25 HELPS ALL OF US TO STAY FRESH TO TAKE REGULAR BREAKS. I MEAN I

1 CERTAINLY NEED THEM.

2 MR. SCHAETZEL: UNDERSTOOD, YOUR HONOR.

3 THE COURT: I ASSUME YOU ALL ARE PAYING HER TRAVEL  
4 EXPENSES AND HER PLANE RESERVATION COULD BE REDONE.

5 MR. SCHAETZEL: YES, YOUR HONOR.

6 THE COURT: SO I THINK THAT'S WHAT WE NEED TO DO. WE  
7 NEED TO FOCUS ON WHERE WE ARE RIGHT NOW.

8 MR. SCHAETZEL: VERY WELL.

9 YOUR HONOR, THE PLAINTIFFS IN THIS CASE HAVE NOT  
10 PROVEN ONGOING AND CONTINUOUS SYSTEMATIC MISUSE OF THE FAIR USE  
11 DEFENSE FOR THREE BASIC REASONS. AS THE COURT HAS ALREADY  
12 NOTED, THIS IS AN INDIRECT INFRINGEMENT CLAIM. THIS IS THEIR  
13 CONTRIBUTORY COPYRIGHT INFRINGEMENT CLAIM.

14 IN ORDER TO SUCCEED IN A CONTRIBUTORY COPYRIGHT  
15 INFRINGEMENT CLAIM, THE LAW REQUIRES THAT ONE WITH KNOWLEDGE OF  
16 INFRINGING ACTIVITY INDUCES, CAUSES OR MATERIALLY CONTRIBUTES  
17 TO THE INFRINGING CONDUCT OF ANOTHER. IN THIS CASE THAT WOULD  
18 BE THE POLICY, IF YOU WILL. THAT THE POLICY INDUCES, CAUSES OR  
19 MATERIALLY CONTRIBUTES TO THE INFRINGING CONDUCT OF ANOTHER OR  
20 GSU THROUGH THE POLICY.

21 NOW EVEN BEFORE YOU GET TO THE INDIRECT INFRINGEMENT  
22 CLAIM THERE HAS TO BE AN ACT OF DIRECT INFRINGEMENT. WE DO  
23 SUBMIT THAT THERE ARE PROBLEMS WITH THE VARIOUS ACTS OF  
24 INDIRECT -- WITH THE VARIOUS CLAIMS OF DIRECT INFRINGEMENT.

25 FOR EXAMPLE, THERE ARE SOME PROBLEMS WITH

1 CONTRIBUTING AUTHOR AGREEMENTS. WE THINK THERE ARE PROBLEMS  
2 WITH SOME REGISTRATIONS AND WHETHER OR NOT THE REGISTRATION WAS  
3 OBTAINED TIMELY ENOUGH THAT THEY GET THE BENEFIT OF CERTAIN  
4 LEGAL PRESUMPTIONS.

5           FOR THIS MOTION, YOUR HONOR, WE'RE LARGELY SETTING  
6 THAT ASIDE. I SIMPLY NOTE IT FOR THE RECORD FOR THE FOLLOWING  
7 REASON. THAT AS THE CASE STANDS RIGHT NOW, IT'S OUR  
8 UNDERSTANDING THAT THERE ARE NO LONGER 99 INFRINGEMENTS ALLEGED  
9 BY 33 PROFS, BUT INSTEAD IT'S SOMETHING ON THE ORDER OF NOW 75  
10 AS MS. QUICKER SAID I BELIEVE 23 PROFS.

11           WE, TOO, NEED TO SORT THROUGH THE RECORD THAT'S BEEN  
12 DEVELOPED OVER THE LAST WEEK TO BE CERTAIN OF THOSE NUMBERS,  
13 BUT THE POINT OF THAT IS THAT IN AN INSTITUTION THAT HAS  
14 LITERALLY 1500, 2000 PROFESSORS, A THOUSAND OR 1100 FULL TIME  
15 FACULTY AND THEN HUNDREDS AS PROFESSOR BECKER SAID OF ADJUNCT  
16 OR PART-TIME FACULTY, WE'RE NOW TALKING ABOUT A VERY SMALL  
17 PERCENTAGE OF PEOPLE, AND WE'RE TALKING ABOUT A VERY SMALL --  
18 YOU KNOW, THOUSANDS OF COURSES TAUGHT EACH SEMESTER.

19           MAYMESTER WITHOUT QUESTION IS DIFFERENT. I HADN'T  
20 THOUGHT ABOUT THAT UNTIL THE COURT MENTIONED IT EARLIER, BUT  
21 WHEN YOU GET TO THE SUMMER AND FALL AN AWFUL LOT OF COURSES.  
22 WE'RE NOT TALKING ABOUT SOMETHING IS READILY APPLIED ACROSS THE  
23 ENTIRE TESTIMONY. WE'RE TALKING ABOUT A VERY SMALL NUMBER, AND  
24 EVEN WITHIN THAT SMALL NUMBER, WE BELIEVE THERE ARE PROBLEMS IN  
25 ESTABLISHING A DIRECT INFRINGEMENT CLAIM.

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1           AND THERE ARE TWO THINGS THAT WE'D ASK THE COURT TO  
2 NOTICE THAT HAVE NOT BEEN PROVIDED. FIRST, NO STUDENT HAS COME  
3 TO TESTIFY. IN THE COURT'S SEPTEMBER 30 ORDER THERE'S A  
4 FOOTNOTE THAT INDICATES THAT WE PRESUME THAT WHAT WE'RE TALKING  
5 ABOUT HERE IS THE STUDENT MAKES THIS COPY AND THAT PERSON IS  
6 THE DIRECT INFRINGER. NO STUDENT HAS BEEN CALLED TO TESTIFY;  
7 ALTHOUGH, THE PROPOSED INJUNCTION WOULD BE DIRECTED AT  
8 STUDENTS.

9           SECOND, NO AUTHOR HAS BEEN CALLED TO TESTIFY. THAT'S  
10 A PROBLEM FOR -- IT'S EVEN A DIFFERENT COIN. IT'S NOT A  
11 FLIPSIDE OF THE SAME. BECAUSE, FOR EXAMPLE, WHEN PROFESSOR KIM  
12 LOOKS AT THE BOOK AND SAYS I SEE AN AWFUL LOT OF THINGS HERE  
13 THAT ARE OF PUBLIC DOMAIN OR PROFESSOR ORR SEES SHEET MUSIC  
14 FROM THE 1500S OR THE 1800S, THERE ARE PORTIONS OF THESE WORKS  
15 THAT ARE GOING TO BE ORIGINAL TO CERTAIN AUTHORS AND PARTS THAT  
16 ARE NOT GOING TO BE ORIGINAL TO CERTAIN AUTHORS, AND  
17 ESTABLISHING THAT YOU HAVE A VALID COPYRIGHT INCLUDES  
18 ESTABLISHING ORIGINALITY, AND THAT'S NOT EASILY DONE WITHOUT AN  
19 AUTHOR, AND WE WOULD SUBMIT THAT THERE'S NO AUTHORS HERE FOR  
20 TWO REASONS.

21           FIRST, WHEN WE START LOOKING AT THESE PERMISSION FEE  
22 NUMBERS, THREE DOLLARS FOR THIS, FIVE DOLLARS FOR THAT, VERY,  
23 VERY LITTLE MONEY IS GOING TO GO BACK TO AN AUTHOR FOR  
24 PERMISSION.

25           THE COURT: IS THAT IN EVIDENCE?

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1           MR. SCHAETZEL: NO, YOUR HONOR, THAT'S MY STATEMENT.  
2 THAT IS NOT IN EVIDENCE.

3           THE COURT: BUT WE'RE TALKING NOW ABOUT WHAT WE GOT.

4           MR. SCHAETZEL: YES, MA'AM, AND WE'RE TALKING THERE  
5 WAS NO AUTHOR --

6           THE COURT: YOU'RE JUST POINTING OUT THAT'S NOT PART  
7 OF THE EVIDENCE?

8           MR. SCHAETZEL: YES, MA'AM, AND SECOND OF ALL AS WE  
9 DID SEE WITH THESE PROFESSORS, ONE OF THE WAYS THAT THEY  
10 ENHANCE THEIR REPUTATION IS FOR THEIR WORK TO BE RECOGNIZED.  
11 THAT AUTHOR WOULD MOST LIKELY APPRECIATE THAT THEIR WORK IS  
12 BEING USED. THE BOTTOM LINE IS THERE'S NO EVIDENCE FROM MY  
13 AUTHOR THAT'S BEEN PROVIDED THUS FAR.

14           WHEN IT COMES TO THE INDIRECT INFRINGEMENT CLAIMS,  
15 THERE ARE THREE POINTS THAT NEED TO BE ADDRESSED AS I STARTED  
16 TO MAKE ORIGINALLY. FIRST, WHEN GEORGIA STATE UNIVERSITY  
17 IMPLEMENTED THE ELECTRONIC RESERVE SYSTEM OR IMPLEMENTED THE  
18 ULEARN SYSTEM, THERE'S BEEN NO SHOWING AND NO EVIDENCE THAT AT  
19 THAT POINT IN TIME GEORGIA STATE HAD KNOWLEDGE THAT THOSE  
20 SYSTEMS WOULD BE USED ESSENTIALLY OR PRIMARILY OR ONLY TO  
21 COMMIT ACTS OF INFRINGEMENT, AND, IN FACT, THE EVIDENCE HAS  
22 BEEN CONTRARY.

23           ULEARN AND ERES AS THE COURT ALREADY FOUND IN THE  
24 SEPTEMBER 30 ORDER CAN BE USED FOR A MYRIAD OF OTHER THINGS,  
25 POSTING GRADES, POSTING SYLLABI, EVEN I BELIEVE MS. CHRISTOPHER

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1 TALKED ABOUT HOW ULEARN HAS A CHAT FEATURE WHERE THE STUDENTS  
2 AND THE PROF CAN CORRESPOND BACK AND FORTH TO EACH OTHER.

3           THERE ARE MANY NONINFRINGEMENT, SUBSTANTIAL  
4 COMMERCIALY VIABLE NONINFRINGEMENT APPLICATIONS THAT ARE USED ON  
5 THOSE SYSTEMS, AND SO, THEREFORE, THE FIRST POINT IS THAT THERE  
6 IS NO KNOWLEDGE THAT WHEN THOSE SYSTEMS WERE IMPLEMENTED THEY  
7 WERE GOING TO BE USED FOR AN INFRINGING PURPOSE.

8           AND THAT CORRESPONDS TO THE SONY CASE WHERE WE LOOK  
9 AT THE BETAMAX CASE. WE'RE SAYING OKAY, IN THAT CASE THE  
10 MACHINE DID NOT CONSTITUTE, IF YOU WILL, AN ACT OF CONTRIBUTORY  
11 INFRINGEMENT BECAUSE IT CAN BE USED FOR OTHER THINGS. THE SAME  
12 BASIC PRINCIPLE HERE.

13           SECOND POINT, WHEN GEORGIA STATE IMPLEMENTED THE  
14 POLICY IT HAD NO KNOWLEDGE THAT THAT POLICY WAS GOING TO BE  
15 USED FOR AN INFRINGING PURPOSE, ONLY PRIMARILY HOWEVER WE WANT  
16 TO TERM -- HOWEVER WE WANT TO LOOK AT IT.

17           THE POLICY ON ITS FACE WAS A BALD FACE ATTEMPT TO GET  
18 THE PERSON WHO IS IN THE BEST POSSIBLE SITUATION TO MAKE THE  
19 DETERMINATION TO GET THAT PERSON TO THINK THROUGH THE FOUR  
20 FACTORS. AS THE COURT MENTIONED, THERE WERE SOME SUBFACTORS  
21 THERE, AND WHAT WE SAW IN THE FORMER -- IT WAS TAKEN DOWN IN  
22 2008, THE CCC POLICY WHICH WAS EVEN MORE SO BASED ON THE WORK  
23 OF PROFESSOR CREWS.

24           A VERY SIMILAR, IF YOU WILL, THEORY IN TERMS OF ITS  
25 APPROACH. IT HAD TWO COLUMNS, ONE IN FAVOR OF FAIR USE, ONE

1 AGAINST FAIR USE. THE COURT PROBABLY RECALLS IT, BUT THE CCC'S  
2 ATTEMPT WAS VERY SIMILAR --

3 THE COURT: I DO REMEMBER IT.

4 MR. SCHAETZEL: THANK YOU. THE CCC'S ATTEMPT WAS  
5 VERY SIMILAR TO TRY TO GET THE AUTHOR OR GET THE PERSON MAKING  
6 THE DETERMINATION TO WORK DOWN THROUGH THE FOUR FACTORS TO SEE  
7 HOW THAT WOULD WORK AND SEE HOW THAT WOULD PLAY OUT.

8 IMPLEMENTING A SIMILAR METHODOLOGY FOR PEOPLE WHO ARE  
9 AT THE FOREFRONT OF MAKING THE DECISION IS NOT ONGOING AND  
10 CONTINUOUS MISUSE. AS WAS SAID IN MS. QUICKER'S ARGUMENT, THE  
11 ARGUMENT HERE IS THEY GOT IT WRONG OR THEY READ CERTAIN THINGS,  
12 THEY DIDN'T UNDERSTAND TRANSFORMATIVE OR THEY DIDN'T CHECK THIS  
13 BOX OR THEY DIDN'T CHECK THAT BOX. THAT'S FAR TOO MYOPIC OF A  
14 VIEW OF WHAT'S HAPPENING HERE.

15 WHAT THE EFFORT IS IS TO WORK THROUGH THE FOUR  
16 FACTORS TO GET THE PERSON TO WORK DOWN THROUGH THE VARIOUS  
17 ISSUES, AND THAT IS THE PERSON WHO'S IN THE BEST POSITION OF  
18 ANYONE AT THE UNIVERSITY TO MAKE THAT DETERMINATION.

19 AS A RESULT THERE IS NO SENSE WHEN THE POLICY WAS  
20 ADOPTED -- THERE'S NO KNOWLEDGE, EXCUSE ME, WHEN THE POLICY WAS  
21 ADOPTED THAT THERE WOULD BE ONGOING AND CONTINUOUS MISUSE.  
22 CLEARLY NOT THE INTENT.

23 THE COURT: ARE YOU STILL ON YOUR CONTRIBUTORY  
24 INFRINGEMENT OR THEIR CONTRIBUTORY INFRINGEMENT CLAIM?

25 MR. SCHAETZEL: YES, MA'AM. WE HAVE GOT TO PROVE

1 THAT WE HAVE THIS KNOWLEDGE, AND, FINALLY, THE THIRD POINT IS  
2 THAT IN PRACTICE THERE HAS BEEN NO SHOWING THAT WE'VE DEVELOPED  
3 SOME KNOWLEDGE THAT THE POLICY WAS GETTING US THERE. ALL FOR  
4 THE SAME REASONS AS BEFORE.

5 INSTEAD WHAT WE HAVE IS A POLICY, AND I REFER THE  
6 COURT TO -- IN THE INTEREST OF TIME, I WON'T PUT IT UP, BUT  
7 IT'S EXHIBIT 906, AND IT'S CCC'S MOST RECENT PROCLAMATION OF  
8 WHAT CONSTITUTES BEST PRACTICES IN ERES POLICIES.

9 SEVERAL THINGS THERE THAT THE CCC, ONE OF THE PARTIES  
10 FUNDING THE LITIGATION, SAYS THIS IS A BEST PRACTICE BEING  
11 APPLIED BY VARIOUS UNIVERSITIES, NOT JUST GEORGIA STATE. WHAT  
12 ARE SOME OF THOSE BEST PRACTICES? ONE, THAT YOU HAVE  
13 RESTRICTED ACCESS. THE GEORGIA STATE POLICY HAS RESTRICTED  
14 ACCESS.

15 TWO, YOU SHOULD MAKE CERTAIN THAT YOU'RE WORKING FROM  
16 AN AUTHORIZED ORIGINAL. GEORGIA STATE'S POLICY MAKES CERTAIN  
17 THAT PEOPLE WORK FROM AN AUTHORIZED ORIGINAL.

18 THREE, GIVE PEOPLE GUIDANCE, WELL, THERE IS WRITTEN  
19 INSTRUCTION IN THE GEORGIA STATE POLICY TO TRY AND HELP THE  
20 INSTRUCTORS TO WORK THROUGH IT.

21 SHOULDN'T CHARGE FOR IT. AGREED WITH THAT, THERE'S  
22 NO CHARGE THAT'S BEING MADE HERE, AND MOST IMPORTANTLY THE CCC  
23 STATEMENT RECOGNIZES THAT RIGHT NOW MOST EXPERTS SAY THAT IT'S  
24 APPROPRIATE TO TAKE A CHAPTER OR A JOURNAL ARTICLE OR LESS.

25 MR. RICH'S POINT WHEN WE MENTIONED THAT LAST TIME WAS



1 WELL IF YOU READ ON INTO THE NEXT SENTENCE IT SAYS YOU CAN'T  
2 CREATE THE DIGITAL ANTHOLOGY, AND WE HEAR A LOT ABOUT  
3 ANTHOLOGIES.

4           SETTING THAT ASIDE, IT STILL RECOGNIZES THAT RIGHT  
5 NOW MOST EXPERTS SAY DON'T TAKE MORE THAN A CHAPTER OR A  
6 JOURNAL ARTICLE OR LESS, AND IF WE LOOK AT THESE NUMBERS THAT  
7 ARE BEING POSTED, PROFESSOR KAUFMANN 2 PERCENT HERE, 4 PERCENT  
8 THERE. PROFESSOR ORR 4 PERCENT OR 8 PERCENT. IN PROFESSOR  
9 ORR'S SITUATION, FOR EXAMPLE, HE DIDN'T TAKE ENTIRE CHAPTERS  
10 BECAUSE HE WOULD ONLY TAKE A PORTION OF THE CHAPTER THAT HE  
11 WANTED.

12           THE PROFESSORS ARE APPLYING THIS VERY CAREFULLY.  
13 THEY'RE APPLYING IT IN A WAY THAT THEY BELIEVE COMPORTS WITH  
14 FAIR USE AND, IN FACT, IN MANY CASES DOES. WE WOULD SUBMIT  
15 THAT WHEN YOU HAVE A PROFESSOR WHO'S AT 2 PERCENT OR 3 PERCENT  
16 OR 5 PERCENT, THAT'S A STRONG OBJECTIVE INDICIA OF FAIR USE.

17           IT MAY NOT IN ISOLATION DEMONSTRATE FAIR USE. DID  
18 THE PERSON NEED TO GO THROUGH THE CHECKLIST? YES. DOES IT  
19 NEED TO BE PASSWORD PROTECTED? DOES IT NEED TO BE NONPROFIT  
20 EDUCATIONAL USE? YES, BUT AT THOSE NUMBERS, THAT STARTING  
21 POINT ALONE IS A STRONG OBJECTIVE INDICIA OF THEIR BEING A FAIR  
22 USE MADE, AND MANY OF THE ALLEGED ALLEGATIONS ARE DOWN IN THAT  
23 RANGE.

24           NOW WITHOUT QUESTION THERE ARE SOME THAT ARE  
25 GREATER. THERE ARE SOME THAT ARE MORE. THOSE ARE WHERE THE

1 OTHER PARTS OF THE FACTORS COME INTO PLAY, AND THE COURT HAS  
2 ASKED US HOW WE SHOULD WEIGH THESE FACTORS. DO WE LOOK AT THE  
3 FOURTH FACTOR, THE FIRST FACTOR, WHICH ONE IS MORE.

4 THE POSITION OF THE DEFENDANTS ON THAT CASE, YOUR  
5 HONOR, IS THAT THE PREAMBLE WHICH TALKS ABOUT TEACHING, TALKS  
6 ABOUT CRITICISM, COMMENT, NEWS REPORTING, SO ON AND SO FORTH,  
7 THAT'S AN EXPRESSION FROM CONGRESS OF SOCIETAL BENEFIT. THAT'S  
8 AN EXPRESSION OF USES THAT CONGRESS LOOKS AT AND SAYS THAT'S  
9 WHAT WE WANT TO ENCOURAGE. THAT'S A STARTING POINT. IT'S IN  
10 THE PREAMBLE FOR A REASON.

11 YOU GO TO THE FIRST FACTOR, NATURE AND CHARACTER OF  
12 THE USE -- PURPOSE, THEN THE FIRST FACTOR NONPROFIT EDUCATIONAL  
13 USE OR IS IT COMMERCIAL USE. WHY DO WE BALANCE THOSE TWO OFF?  
14 BECAUSE NONPROFIT EDUCATIONAL USE IS A FAVORED SOCIETAL USE.  
15 IT'S SOMETHING THAT WE'RE TRYING TO ACCOMPLISH.

16 AGAINST THAT SOCIETAL BENEFIT WE HAVE TO WEIGH THE  
17 FOURTH FACTOR, FOR EXAMPLE, WHERE IN THIS CASE, AND IT'S AN  
18 INTERESTING HISTORICAL DEVELOPMENT TO ME, THE STATUTE SPEAKS IN  
19 TERMS OF THE USE OF A WORK, AND IF WE GO BACK TO THE PRINTING  
20 PRESS DAYS, THE WORK WOULD HAVE BEEN THE ENTIRE BOOK.

21 WHAT THE PLAINTIFFS HAVE DONE HERE IS FAIRLY CLEVER.  
22 THEY'VE CREATED, IF YOU WILL, KIND OF NEW MARKET IN  
23 PERMISSIONS. WHEREAS THE AUTHOR OR THE PERSON TRYING TO MAKE A  
24 FAIR USE MAY LOOK AT IT AND SAY AM I MAKING A FAIR USE OF THE  
25 ENTIRE WORK, ON THE FOURTH FACTOR THEY WANT TO SAY WELL YOU'RE

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1 AFFECTING THE MARKET FOR OUR WORK AND MAYBE WE WOULDN'T SELL  
2 ANOTHER BOOK BUT WE WOULD SELL A PERMISSION. WE COULD SELL  
3 JUST A LITTLE BLIP OR A LITTLE BLURB, AND THEREFORE YOU'RE  
4 AFFECTING THE MARKET FOR OUR WORK.

5 WE CAN DEBATE THAT AS TIME MOVES FORWARD WHETHER OR  
6 NOT THAT'S A VIABLE MARKET --

7 THE COURT: WHAT'S WRONG WITH THE ARGUMENT?

8 MR. SCHAETZEL: IT DOESN'T READILY MATCH UP WITH THE  
9 STATUTE, YOUR HONOR. THE ARGUMENT WAS FIRST ASSERTED AND QUITE  
10 HONESTLY WAS ASSERTED SUCCESSFULLY IN THE TEXACO CASE WHERE IT  
11 WAS TALKING ABOUT AN ARTICLE AND THE POINT THAT WAS MADE THAT  
12 YOU COULD GO AND GET A REPEAT ARTICLE, BUT EVEN IN THAT CASE IN  
13 TEXACO, THE COURT SAID THAT THE INQUIRY OUGHT TO BE LIMITED TO  
14 TRADITIONAL, REASONABLE OR LIKELY TO BE DEVELOPED NEW MARKETS,  
15 IF YOU WILL. TRADITIONAL, REASONABLE OR LIKELY TO BE  
16 DEVELOPED.

17 IS THIS TRADITIONAL, REASONABLE OR LIKELY TO BE  
18 DEVELOPED? IT'S A PRETTY NEW IDEA. IT'S NOT SOMETHING THAT A  
19 LOT OF PEOPLE CLEARLY KNOW ABOUT. IS IT REASONABLE TO THINK  
20 THAT PEOPLE ARE GOING TO START AND LATCH ONTO THAT? THEY WILL,  
21 OF COURSE, ARGUE THAT IT IS. OUR POSITION IS THAT IT'S NOT ALL  
22 THAT REASONABLE. BECAUSE AS MR. PFUND TESTIFIED OR AS THE  
23 PUBLISHERS TESTIFIED, THEY STILL MAKE THEIR MONEY BY SELLING  
24 BOOKS. THEY MAKE SOME MONEY, BUT IT'S ON A COMPLETELY  
25 DIFFERENT LEVEL THROUGH PERMISSIONS AND BY PERMISSIONS.

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1 HUNDREDS OF MILLIONS OF DOLLARS OF REVENUE ON BOOKS. HUNDREDS  
2 OF THOUSANDS OF DOLLARS ON PERMISSIONS.

3 HOW DO WE BALANCE THOSE FACTORS? WE GO BACK TO THE  
4 FIRST SOCIETAL BENEFIT THOUGHT TEACHING, CRITICISM, COMMENT,  
5 SCHOLARSHIP, RESEARCH. THOSE SHOULD OUTWEIGH SOME SORT OF NEW  
6 MARKET CREATION OR SOME MARKET AFFECT COMING OUT OF THE FOURTH  
7 FACTOR BECAUSE THAT'S THE PREFERRED USE. THAT'S WHAT WE'RE  
8 TRYING TO ACCOMPLISH.

9 AS MR. HARBIN TALKED ABOUT THE OTHER DAY, WHAT IS THE  
10 CONSTITUTIONAL PURPOSE HERE? TRYING TO SUPPORT THE PROGRESS OF  
11 LEARNING AND SCIENCE. HOW DO WE DO THAT? WE DO THAT BY  
12 GETTING INFORMATION TO THESE STUDENTS. WE DO THAT BY GETTING  
13 THEM TO LOOK AT THESE WORKS.

14 ANOTHER REASON THAT IT SHOULD BE FAVORED. TEACHING.  
15 IF I'M TAKING AN ART CLASS AND I WANT TO LEARN ABOUT A CERTAIN  
16 ARTIST OR A BRUSH STROKE OR HOW SOMETHING IS DONE, DO I WANT  
17 FOR MY PROFESSOR TO TAKE AN EXAMPLE OF THAT, MAKE A COPY,  
18 WHETHER IT'S ELECTRONIC OR WHATEVER, MAKE A FAIR USE OF IT AND  
19 SHOW IT TO THE CLASS BUT THEN SOMEHOW TRANSFORM IT? NO, I'M  
20 TRYING TO LEARN THE ORIGINAL. I DON'T WANT IT TO BE  
21 TRANSFORMED. I NEED TO BE TAUGHT THE ORIGINAL SUBJECT MATTER  
22 SO THAT THEN I CAN MAYBE GO OUT AND DO WHATEVER IT IS I DO ONCE  
23 I LEARN TO PAINT OR WHATEVER.

24 THE COURT: YOU NEED TO GO AHEAD AND WRAP IT UP.  
25 I'LL GIVE YOU TEN MORE MINUTES.

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1           MR. SCHAETZEL: I DON'T NEED THAT MUCH TIME. I  
2 APPRECIATE IT. IN TERMS OF DIGITAL ANTHOLOGIES, THERE IS AND  
3 THERE MUST BE A DIFFERENCE BETWEEN A BOUND INTENDED TO BE  
4 PERMANENT DOCUMENT AND A READING LIST.

5           COURSEPACK HAS BEEN USED AS ONE EXAMPLE. THAT IS ONE  
6 SORT OF AN ANTHOLOGY, IF YOU WILL. YOU PUT THEM ALTOGETHER,  
7 YOU BIND THEM, YOU INTEND FOR THAT TO BE USED AS A TEXTBOOK,  
8 LONG TERM HELD TOGETHER, AND THERE'S AN ORDER TO IT. AS YOU  
9 WORK THROUGH IT WHETHER IT'S CHRONOLOGICALLY OR BY SUBJECT  
10 MATTER, IT IS AN ANTHOLOGY.

11           WHEN THE PROFESSORS CITE ON THIS DAY WE'LL HAVE THIS  
12 READING OR THEY GO TO ANOTHER DAY AND POST ANOTHER READING,  
13 THAT'S JUST A LIST, YOUR HONOR. WILL THEY GO AND PRINT IT  
14 OUT? PERHAPS. ARE THEY GOING TO MAKE AN ANTHOLOGY OF THAT?  
15 NO.

16           A DIGITAL ANTHOLOGY WOULD BE PERHAPS AN ALBUM. IF WE  
17 PUT AN ALBUM ON SOMETHING LIKE SONGS ONE AFTER THE OTHER WHERE  
18 THE ARTIST OR THE COLLECTOR HAD INTENDED FOR THEM TO BE PLAYED  
19 IN A CERTAIN -- I'M STILL A 33 PERSON. THAT'S AN ANTHOLOGY, IF  
20 YOU WILL. A READING LIST IS NOT AN ANTHOLOGY.

21           SO THE COMPARISONS BETWEEN COURSEPACK AND ERESERVES  
22 IS NOT A DIRECT --

23           THE COURT: LET ME ASK YOU A QUESTION. THERE WAS  
24 SOME TESTIMONY ABOUT THE FACT THAT GEORGIA STATE DOES HAVE THE  
25 COURSEPACKS AVAILABLE, AND I HAD PERHAPS ASSUMED THAT GEORGIA

1 STATE HAD DECIDED TO GET PERMISSIONS AS A BUSINESS DECISION OF  
2 SOME KIND; ALTHOUGH, I WAS THINKING ARGUABLY THEY DIDN'T HAVE  
3 TO DO IT IF THEY WERE PRINTING THEIR OWN COURSEPACKS, BUT THEN  
4 I THOUGHT I HEARD PRESIDENT BECKER SAY SOMETHING ABOUT FAIR USE  
5 IN RELATION TO THE COURSEPACKS.

6 I MAY HAVE MISSED SOMETHING THERE, BUT IT ALMOST  
7 SOUNDED LIKE HE WAS SAYING THAT THEY FELT THAT THE COURSEPACKS  
8 WERE -- DIDN'T HAVE TO PAY PERMISSIONS BECAUSE OF FAIR USE. HE  
9 MENTIONED FAIR USE IN RELATION TO THE COURSEPACKS, AND IT WAS  
10 COUNTER -- IT WAS CONTRARY TO WHAT I HAD KIND OF ASSUMED THE  
11 FACTS WERE ON THE COURSEPACKS.

12 MR. SCHAETZEL: MY UNDERSTANDING, YOUR HONOR, AND  
13 WE'LL BE GLAD TO CONFIRM FOR THE COURT, MY UNDERSTANDING IS  
14 THAT GEORGIA STATE UNIVERSITY HAS TRADITIONALLY PAID  
15 PERMISSIONS FEES FOR COURSEPACKS.

16 THE COURT: RIGHT.

17 MR. SCHAETZEL: I DO NOT BELIEVE THAT MEANS THAT  
18 GEORGIA STATE UNIVERSITY HAS MADE A DETERMINATION AS TO WHETHER  
19 OR NOT THEY COULD CREATE THEIR OWN COURSEPACKS PURSUANT TO THE  
20 FAIR USE DOCTRINE. I DON'T THINK THEY HAVE EVER GOTTEN THAT  
21 FAR. THEY HAVE SIMPLY SAID, AS YOU SAID, A BUSINESS DECISION  
22 WAS MADE WE'LL JUST GET PERMISSIONS FOR COURSEPACKS AND THAT  
23 ISSUE IS RESOLVED AND MOVE ON.

24 THE COURT: RIGHT, I WAS KIND OF ASSUMING OR MAYBE  
25 INFERRING THAT, YOU KNOW, ONCE THE DECISIONS CAME OUT IN THE

1 COMMERCIAL COURSEPACK CASES THAT ALL THE UNIVERSITIES WERE --  
2 WELL, I GUESS IN MANY CASES IT WOULDN'T BE THE UNIVERSITY, BUT  
3 THE WORD WAS OUT THAT YOU'VE GOT TO HAVE PERMISSION ON THE  
4 COURSEPACKS, AND I THOUGHT MOST LIKELY GEORGIA STATE DECIDED,  
5 EVEN THOUGH APPARENTLY IT WAS PRINTING ITS OWN COURSEPACKS,  
6 THAT THEY WOULD JUST GO ALONG, GO WITH THE FLOW ON THAT.

7 MR. SCHAETZEL: I BELIEVE THAT THE -- THERE ARE SOME  
8 DIFFERENCES. FIRST OF ALL, I THINK GEORGIA STATE WAS A FOR-  
9 PROFIT BUSINESS THAT IT WAS IN, SO IT WAS MORE IN KEEPING WITH,  
10 IF YOU WILL, MICHIGAN DOCUMENTS --

11 THE COURT: SO YOU THINK THEY ACTUALLY WERE USING  
12 SOME COMMERCIAL AFFILIATE OF THE UNIVERSITY TO PRINT THE  
13 COURSEPACKS?

14 MR. SCHAETZEL: A COMMERCIAL AFFILIATE OF THE  
15 UNIVERSITY, YES.

16 THE COURT: OKAY. THAT EXPLAINS THE WHOLE THING  
17 THEN. GO AHEAD.

18 MR. SCHAETZEL: BUT OUR POINT WOULD BE, YOUR HONOR,  
19 THAT TO SIMPLY SAY YOU POST A READING LIST AND THEN CALL IT A  
20 DIGITAL ANTHOLOGY AND THEN TRY TO CORRESPOND THAT TO A  
21 COURSEPACK OR AN ELECTRONIC COURSEPACK, THAT'S NOT WHAT THE  
22 EVIDENCE HERE HAS SHOWN.

23 BUT WE DO BELIEVE THAT THE EVIDENCE HAS SHOWN THAT  
24 THE POLICY IS WORKING TO CAUSE INSTRUCTORS, TEACHERS TO WORK  
25 THROUGH THE FOUR FAIR USE FACTORS AND TO COME TO A REASONED

1 DECISION, AND THAT IT'S NOT -- THE COURT SHOULD NOT GET  
2 SIDETRACKED INTO THINKING THAT BECAUSE FOR EXAMPLE A GIVEN  
3 PROFESSOR DIDN'T KEEP A COPY OR -- COMPLIANCE WITH THE POLICY  
4 IS A SEPARATE ISSUE FROM WHETHER OR NOT IT'S A FAIR USE, AND AS  
5 WE LOOK AT WHETHER OR NOT THE POLICY IS ENCOURAGING THE FAIR  
6 USE DETERMINATION TO BE MADE, WE BELIEVE THAT THE EVIDENCE IS  
7 UNCONTROVERTED IT IS DOING THAT, AND THAT EVIDENCE DOES NOT  
8 SUPPORT THE PLAINTIFFS' CASE, AND SO THEREFORE WE WOULD MOVE  
9 FOR A JUDGMENT ON THOSE BASES.

10 THE COURT: HOW LONG DO YOU NEED, MR. RICH?

11 MR. RICH: DEPENDS ON HOW ACTIVE YOU ARE WITH YOUR  
12 QUESTIONS, YOUR HONOR. UNINTERRUPTED 20 MINUTES BUT I --

13 THE COURT: WHY DON'T WE GO AHEAD AND TAKE A LUNCH  
14 BREAK AND THEN WE'LL HEAR YOUR ARGUMENT. LET'S TAKE A LUNCH  
15 BREAK UNTIL 1:30.

16 (NOON RECESS)

17 MR. RICH: I'D LIKE TO START BY SUGGESTING THAT I  
18 DON'T THINK WE'RE NEARLY IN AS UNCHARTED TERRITORY WHEN IT  
19 COMES TO ISSUES OF LIABILITY IN THIS CASE AS WE ARE WHEN IT MAY  
20 COME TO ISSUES OF REMEDY. I THINK IT'S TERRIBLY IMPORTANT AS  
21 WE WORK THROUGH THE CASE AND YOUR HONOR WORKS THROUGH THE CASE  
22 THAT WE CONCEPTUALLY SEPARATE OUT WHAT THE COPYRIGHT LAW  
23 SUGGESTS AS TO OUTCOME AS TO LIABILITY, AND THEN AND ONLY THEN  
24 DEAL WITH HOW ONE APPLIES A PROPER REMEDY TO AN INSTITUTIONAL  
25 SETTING OF THE TYPE WE'RE DEALING WITH HERE.

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1 FROM THE PLAINTIFFS' PERSPECTIVE THE LIABILITY ISSUES  
2 IN THIS CASE ARE ACTUALLY STRAIGHTFORWARD. INDEED, WE WOULD  
3 ARGUE THEY ARE ONESIDED. FROM THE BEGINNING OF THIS CASE WHAT  
4 THE PLAINTIFFS HAVE CHALLENGED IS THE UNAUTHORIZED DIGITAL  
5 DISTRIBUTIONS OF THEIR COPYRIGHTED MATERIALS FOR USE AS COURSE  
6 MATERIALS AT GSU.

7 THE CASE NEVER WAS AND STILL IS NOT ABOUT WHATEVER  
8 POLICY SPAWNED, FRUSTRATED, ENCOURAGED OR OTHERWISE THOSE  
9 PRACTICES. WHAT COPYRIGHT LAW EXAMINES IS IS THERE AN  
10 INFRINGEMENT OF ONE OF THE EXCLUSIVE RIGHTS OF COPYRIGHT UNDER  
11 SECTION 106 OF THE ACT.

12 WE STARTED BY DEMONSTRATING FOR WHAT ARE NOW I THINK  
13 APPARENTLY EVERYBODY AGREES SOME 65 WORKS AND 75 OF THEM WERE  
14 INFRINGEMENTS THE TECHNICAL STANDING OF OUR CLIENTS TO BRING  
15 THIS CASE. OWNERSHIP HAS BEEN ESTABLISHED. REGISTRATION  
16 CERTIFICATES HAVE BEEN SHOWN. MANY OF THOSE CREATE A PRIMA  
17 FACIE CASE OF COPYRIGHT OWNERSHIP WHERE THE PERIOD IS WITHIN  
18 FIVE YEARS OF FIRST PUBLICATION.

19 AND WHAT SEEMS TO BE A MUCH BALLYHOOED TOPIC BY THE  
20 DEFENSE ABOUT ORIGINALITY, ONE NEEDS ONLY READ THE "PHEIST"  
21 DECISION TO UNDERSTAND THAT IF IT'S MUCH MORE THAN A TELEPHONE  
22 DIRECTORY OF LISTINGS OF NAMES THAT SUFFICES FOR COPYRIGHT  
23 PURPOSES. IT'S NOT A DAUNTING OR DEMANDING STANDARD.

24 THE SUGGESTION THAT WORKS PUBLISHED BY OXFORD,  
25 CAMBRIDGE AND SAGE DON'T MEET THE STANDARD OF ORIGINALITY, I

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1 DON'T THINK IS WORTH SPENDING MUCH OF ANY TIME ON. SO WITH  
2 RESPECT TO A VERY LARGE BODY OF WORKS, WE CLEARLY NOW MOVE TO  
3 THE NEXT EXAMINATION, WE WOULD SUGGEST, WHICH IS WHAT ARE THE  
4 TAKINGS, WHAT HAPPENED, ARE THERE COPYRIGHTABLE EVENTS THAT  
5 OCCURRED THAT GIVE --

6 THE COURT: BUT YOU DO HAVE TO CONNECT YOUR CASE TO  
7 YOUR DEFENDANTS.

8 MR. RICH: WELL, WE DO THAT BECAUSE THE COPYING  
9 OCCURRED, YOUR HONOR, THROUGH EMPLOYEES OF GEORGIA STATE  
10 UNIVERSITY.

11 THE COURT: YEAH, BUT I'VE ALREADY REJECTED THAT  
12 THEORY.

13 MR. RICH: WELL, YOU DIDN'T, YOUR HONOR, IN YOUR  
14 RECONSIDERATION RULING AS WE UNDERSTAND IT, YOU RESTORED IT.

15 THE COURT: NO. LET ME CLARIFY THAT. AT THIS POINT  
16 I DO BELIEVE THERE IS A DIRECT INFRINGEMENT CLAIM IN THE SENSE  
17 THAT THE DEFENDANTS OR SOME OF THE DEFENDANTS WERE THE  
18 ORIGINATORS OF THE POLICY. THAT IS WHAT I BELIEVE IS THE FOCUS  
19 OF THE CASE; ALTHOUGH, I HAVEN'T RULED ON MR. SCHAEZEL'S  
20 MOTION TO DISMISS THE CONTRIBUTORY INFRINGEMENT CLAIM YET.

21 MR. RICH: I UNDERSTAND THAT, BUT IF I MAY, YOUR  
22 HONOR, AT LEAST AS WE CONSTRUED YOUR RECONSIDERATION MOTION WE  
23 UNDERSTOOD YOU TO AGREE THAT THE DOCTRINE RESPONDEAT SUPERIOR  
24 WOULD CAUSE THE ACTS OF AN EMPLOYEE, FOR EXAMPLE, A FACULTY  
25 MEMBER WHO IN GOOD FAITH WAS TRYING TO IMPLEMENT A POLICY BUT

1 IN THE PROCESS FAILED TO COMPORT WITH FAIR USE THAT THAT WAS AN  
2 ACTIVITY FOR WHICH GSU THE EMPLOYER BY LAW WE WOULD ARGUE IS  
3 RESPONSIBLE.

4 THERE WE THINK THE LAW IS CLEAR, AND THEN BY  
5 EXTRAPOLATION UNDER EX PARTE YOUNG THE DEFENDANTS ARE  
6 RESPONSIBLE FOR SUPERVISING THE CONDUCT, AND WE THINK IT'S A  
7 REASONABLY STRAIGHTFORWARD APPLICATION OF PRINCIPLES OF DIRECT  
8 LIABILITY OR AS YOU PREFER TO STYLE IT INDIRECT LIABILITY.

9 THE COURT: NO, I'M AFRAID YOU MISCONSTRUED MY  
10 RULING. RESPONDEAT SUPERIOR DOES APPLY OR CAN APPLY IN THE  
11 COPYRIGHT CONTEXT. WHETHER IT DOES APPLY UNDER THE FACTS OF  
12 OUR CASE IS ANOTHER MATTER.

13 AS I SAID JUST A FEW MINUTES AGO BEFORE THE LUNCH  
14 BREAK, I DON'T BELIEVE THAT THE DEFENDANTS ARE RESPONSIBLE FOR  
15 INDIVIDUAL ACTS OF INFRINGEMENT THAT MAY HAVE BEEN COMMITTED BY  
16 PROFESSORS WHO MADE AN INCORRECT FAIR USE DETERMINATION.

17 I DO BELIEVE THAT AT THIS JUNCTURE THERE IS A DIRECT  
18 INFRINGEMENT CLAIM AGAINST THE DEFENDANTS BASED ON THE  
19 PLAINTIFFS' CLAIM THAT THE POLICY, GEORGIA STATE'S POLICY IS AN  
20 IMPROPER -- THAT IT IMPROPERLY REGULATES THE FAIR USE DEFENSE  
21 SO AS TO CAUSE VIOLATIONS TO OCCUR, AND THEN I RULED THAT IF  
22 THERE WAS A CONTINUING MISUSE UNDER THE POLICY THAT WAS CAUSED  
23 BY THE POLICY, THEN THE DEFENDANTS, THAT IS, OUR REGENTS, THE  
24 PRESIDENT OF THE UNIVERSITY AND SO FORTH COULD BE LIABLE.

25 MR. RICH: I APPRECIATE THAT, YOUR HONOR; ALTHOUGH, I

1 REACT WITH CANDIDLY SOME SURPRISE BECAUSE WE READ WITH CARE  
2 YOUR RECONSIDERATION RULING WHICH RESTORED, I BELIEVE,  
3 TECHNICALLY RESTORED ALTHOUGH RELABELED OUR FIRST CAUSE OF  
4 ACTION IN THE CASE.

5 THE COURT: I DID. I DID DO THAT, AND YOUR FIRST  
6 CAUSE OF ACTION GOING INTO THE TRIAL IS THERE.

7 MR. RICH: YES, I UNDERSTAND, AND AGAIN JUST SO I CAN  
8 BE CLEAR FOR THE RECORD AND OBVIOUSLY I THINK THE STORY WITHIN  
9 THE STORY IS EXACTLY THE ONE ON WHICH YOUR HONOR APPEARS  
10 FOCUSED. BECAUSE WHEN YOU DO HAVE 102 OUT OF 102 CHECKLISTS  
11 THAT ALL, YOU KNOW, DRAMATICALLY GO 19 TO NOTHING, 20 TO  
12 NOTHING IN ONE DIRECTION, THERE IS SOMETHING ROTTEN IN  
13 DENMARK IN FACT IN TERMS OF HOW COPYRIGHT POLICY IS BEING  
14 ADMINISTERED.

15 BUT WE WOULD ASSERT THAT THE MORE BASIC AND ELEMENTAL  
16 VIOLATION HERE AND THE ONE THAT'S A STRAIGHTFORWARD, EVEN MORE  
17 STRAIGHTFORWARD OF APPLICATION OF LAW IS THE VIOLATION THAT  
18 OCCURS BY THE ACTS OF DIRECT INFRINGEMENT, THE SCANNING AND THE  
19 COPYING AND THE DISPLAY ACTIVITIES WHICH ARE INITIATED BY  
20 FACULTY AND BY ADMINISTRATORS FOR WHICH BY LAW GSU IS  
21 ABSOLUTELY RESPONSIBLE.

22 THE COURT: WELL, I DON'T THINK THE DEFENDANTS THAT  
23 WE HAVE IN OUR CASE WOULD BE RESPONSIBLE IF WE WERE -- JUST TO  
24 TAKE AN EASY EXAMPLE, ALWAYS THE EASY EXAMPLE. IF WE WERE  
25 TALKING ABOUT 1, 2, 3 ACTS OF INFRINGEMENT OF A FACULTY MEMBER

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1 WHO HAD MISAPPLIED THE FAIR USE DOCTRINE, I DO NOT BELIEVE THAT  
2 THE DEFENDANTS IN THIS CASE WOULD BE RESPONSIBLE FOR THAT  
3 BECAUSE THEY WOULD HAVE NO ABILITY TO STOP IT FROM OCCURRING.

4 MR. RICH: WELL, THEY WOULD, YOUR HONOR. REMEMBER  
5 THAT THE POLICY ITSELF WAS GENERATED BY A BOARD CONSTITUTED BY  
6 THE REGENTS.

7 THE COURT: AND THAT'S WHY I'M SAYING YOU HAVE AS  
8 THINGS STAND RIGHT NOW WHAT I'M CALLING A DIRECT CAUSE OF  
9 ACTION FOR MISUSE -- FOR ABUSE OF THE POLICY, BUT IF YOU HAVE  
10 JUST AN INSTANCE, YOU KNOW, ISOLATED INSTANCES OF MISUSE OF THE  
11 POLICY, I DO NOT BELIEVE THAT WOULD BE SOMETHING THE COURT  
12 COULD ISSUE AN INJUNCTION ON GIVEN THE FACT THAT THE ONLY  
13 DEFENDANTS I HAVE IN THE CASE ARE PEOPLE WHO HAD NO DIRECT  
14 INVOLVEMENT IN THE INDIVIDUAL FAIR USE DECISIONS NOR COULD THEY  
15 HAVE DONE ANYTHING TO MAKE THOSE FAIR USE DECISIONS COME OUT  
16 CORRECTLY GIVEN THE PARAMETERS OF THE CURRENT POLICY.

17 MR. RICH: AT LEAST AS WE -- PARDON ME.

18 THE COURT: IT'S A VERY FACT INTENSIVE SITUATION, AND  
19 AS I SEE IT THE INDIVIDUAL PROFESSORS, YOU KNOW, THEY APPLIED  
20 THE COPYRIGHT POLICY.

21 YOU'VE PRODUCED EVIDENCE THAT IN SOME INSTANCES THEY  
22 MAYBE DIDN'T GET IT RIGHT, BUT I THINK CONSISTENT WITH THE  
23 RULINGS I'VE PREVIOUSLY MADE, IT WOULD TAKE MORE THAN JUST  
24 SPORADIC INSTANCES OF ERRORS BY THE FACULTY MEMBERS TO WARRANT  
25 THE ENTRY OF AN INJUNCTION UNDER THE THEORY OF EX PARTE YOUNG.

1           MR. RICH: I APPRECIATE THAT AND I REALIZE IT IS  
2 MULTILAYERED AND COMPLEX, BUT IT ALSO OCCURS TO ME STANDING  
3 HERE THAT THE IMPLICATIONS FOR ANY STATE INSTITUTION ALLOWING  
4 OR EVEN ENCOURAGING INFRINGING ACTIVITY BY FACULTY MEMBERS  
5 WOULD BE FAIRLY BREATHTAKING IN THIS SITUATION AS WE AT LEAST  
6 HAVE TRIED TO PARSE IT, AND WE'D HOPE TO CONTINUE TO TRY TO  
7 CONVINCED, YOUR HONOR, GEORGIA STATE UNIVERSITY, THE EMPLOYEES  
8 OF GEORGIA STATE UNIVERSITY ACT, YOU KNOW, IN BEHALF OF THE  
9 UNIVERSITY AND SO THEIR ACTIONS AS A MATTER OF LAW ARE THE  
10 ACTIONS OF THE UNIVERSITY --

11           THE COURT: WHAT YOU WANT IS AN INJUNCTION AGAINST  
12 THE PARTICULAR DEFENDANTS, AND I CAN'T DO A MEANINGFUL  
13 INJUNCTION -- IT WOULD NOT BE A MEANINGFUL INJUNCTION IF I JUST  
14 SAID TO THE DEFENDANTS YOU ARE HEREBY ENJOINED FROM ALLOWING  
15 ANY FURTHER INFRINGEMENTS. THAT WOULD TELL THE DEFENDANTS  
16 NOTHING ABOUT WHAT TO DO TO STRAIGHTEN OUT THE SITUATION.

17           I THINK WHAT THE CASE MAY ULTIMATELY TURN ON IS  
18 WHETHER A PROPER REGULATION OF THE FAIR USE DOCTRINE IN THIS  
19 CONTEXT REQUIRES SOME OBJECTIVE CRITERION OR CRITERIA WHICH BY  
20 ITS NATURE COULD BE REGULATED BY THE PARTICULAR DEFENDANTS THAT  
21 WE HAVE IN THIS CASE.

22           MR. RICH: YOUR HONOR, PRESIDENT BECKER'S TESTIMONY  
23 AND THE STIPULATED FACTS THAT MR. KRUGMAN REVIEWED INDICATED  
24 THAT THAT CONSISTENT WITH HOW WE READ EX PARTE YOUNG AND THE  
25 INTERPRETING AUTHORITY IN THE ELEVENTH CIRCUIT, ALL THAT'S

1 REQUIRED IS THAT THERE BE THE ABILITY TO REMEDY VIOLATIONS.

2           THERE IS NO SUGGESTION AND WE'VE NOT BUILT OUR CASE  
3 AROUND INDICATING OBVIOUSLY THAT ANY OF THE NAMED DEFENDANTS  
4 THEMSELVES WERE RESPONSIBLE FOR THE ACTIVITY; ALTHOUGH, YOU  
5 COULD ARGUE THAT THE PROMULGATION OF THE POLICY ITSELF BY THE  
6 BOARD HAD AN ELEMENT, BUT RATHER THAT IT SUFFICES THAT THEY CAN  
7 ACT IN THEIR OFFICIAL CAPACITIES TO REMEDY VIOLATIONS.

8           WE CRAFTED OUR PROPOSED INJUNCTION WITH THAT IN MIND,  
9 AND WE DID TAKING YOUR HONOR'S POINT WHICH I THINK IS RIGHT, WE  
10 DID TRY TO PUT IN SOME OBJECTIVE STANDARD. WE CHOSE, IT TURNS  
11 OUT, THE VERY SAME LITMUS TEST THAT APPEARS IN THE FACULTY  
12 HANDBOOK AT GSU AS A BASIS, THE CLASSROOM GUIDELINES. THOSE  
13 ARE --

14           THE COURT: I NOTICED THAT YOU DID THAT.

15           MR. RICH: AND THE POINT IS ONLY THAT IT DOESN'T SEEM  
16 TERRIBLY CHALLENGING TO HAVE A REQUIREMENT INSTITUTED IF YOUR  
17 HONOR WERE OTHERWISE TO FIND VIOLATIONS OF COPYRIGHT LAW COMING  
18 OUT OF THIS RECORD TO MANDATE THAT GEORGIA STATE UNIVERSITY  
19 IMPLEMENT PROCEDURES THAT ARE MODIFICATIONS OF THE CURRENT  
20 PRACTICE THAT REQUIRE A DIFFERENT FILTERING MECHANISM AS  
21 OPPOSED TO A FAIR USE CHECKLIST WHICH WE BELIEVE IS DEEPLY  
22 FLAWED --

23           THE COURT: HERE'S THE PROBLEM THOUGH. YOU CAN'T  
24 COME UP WITH A FAIR CHECKLIST -- A FAIR USE CHECKLIST THAT IS  
25 GOING TO SOLVE THE SITUATION BY ITSELF.

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1           MR. RICH: WE AGREE, AND OUR REMEDY DOESN'T SUGGEST  
2 THAT. OUR REMEDY SAYS THERE'S AN OBJECTIVE FILTER THROUGH  
3 WHICH THIS CAN BE PUT. BLUNTER TOOLS HAVE BEEN USED BY OTHER  
4 COURTS, AND WE FRANKLY ATTEMPTED TO BE A LITTLE MORE  
5 ACCOMMODATING RATHER THAN A LITTLE LESS ACCOMMODATING --

6           THE COURT: BUT AS A MATTER OF POLICY I DON'T DO  
7 INJUNCTIONS THAT SAY GO AND SIN NO MORE AND LEAVE THE  
8 DEFENDANTS WONDERING WHAT THEY'RE SUPPOSED TO DO.

9           MR. RICH: I HOPE WE GET TO THE POINT OF FASHIONING  
10 AN INJUNCTION. OUR CLIENTS CERTAINLY HOPE THAT, AND I DON'T  
11 THINK IT WOULD BE NEARLY BE SO DIFFICULT -- I WILL ALSO MAKE A  
12 PRACTICAL OBSERVATION WHICH IS I THINK THE BURDEN OF THE  
13 TESTIMONY FROM MS. ARMSTRONG FROM CCC AND THE EXPERIENCE IN THE  
14 COURSEPACK AREA DEMONSTRATES THAT AS A PRACTICAL MATTER WHILE  
15 THE INJUNCTION IS CLEARLY IMPORTANT, HAS THE FORCE OF LAW,  
16 NEEDS TO BE THOUGHTFUL, NEEDS TO BE SHAPED APPROPRIATELY AS A  
17 PRACTICAL MATTER IT'S VERY LIKELY THIS WOULD MOVE INTO A  
18 LICENSING POSTURE NOT DIFFERENTLY THAN COURSEPACKS.

19           I THINK YOUR HONOR'S SURMISE WAS BASICALLY CORRECT  
20 EARLIER BEFORE LUNCH WHICH IS IN THE AFTERMATH OF THOSE CASES  
21 EVEN THOUGH THE DEFENDANTS IN THOSE CASES WERE FOR PROFIT COPY  
22 SHOPS, THE LARGE VOLUME OF BUSINESS THAT COMES THROUGH THE CCC  
23 TODAY ARE UNIVERSITY ACCOUNTS FROM INSIDE THE UNIVERSITIES  
24 THEMSELVES.

25           READING THAT OPINION WE'RE ALL SPECULATING HOW AN



1 INDIVIDUAL UNIVERSITY READS IT, BUT OBVIOUSLY TAKING AS A CUE  
2 FROM THOSE DECISIONS THAT THE SAFER COURSE LEGALLY AND THE ONE  
3 THAT AVOIDS THE FAIR USE HAIRSPLITTING IS ONE WHICH INVOLVES  
4 SECURING PERMISSIONS FOR THE COURSEPACKS.

5 GSU ITSELF SECURES COURSEPACK PERMISSIONS WITH  
6 RESPECT TO EVERY USE. IT DOESN'T TRY TO MAKE THESE EXQUISITELY  
7 HARD CASE-BY-CASE DETERMINATIONS --

8 THE COURT: I THINK WE'RE GETTING OFF THE TRACK.  
9 THERE IS PENDING A MOTION TO DISMISS THE CONTRIBUTORY  
10 INFRINGEMENT CLAIM. MORE SPECIFICALLY I THINK A MOTION FOR  
11 JUDGMENT ON IT.

12 MR. RICH: YOUR HONOR, I'LL CERTAINLY TURN TO THAT.  
13 ALTHOUGH, AGAIN, I BELIEVE THE CORE CASE HERE OUGHT PROPERLY TO  
14 BE A DIRECT OR STYLED INDIRECT INFRINGEMENT CASE BASED ON  
15 ESTABLISHED DOCTRINES OF RESPONDEAT SUPERIOR, BUT I APPRECIATE  
16 YOUR HONOR'S PERSPECTIVE.

17 WITH RESPECT TO CONTRIBUTORY INFRINGEMENT, WE THINK  
18 THAT WE'VE MORE THAN ESTABLISHED THE FIRST PRONG WHICH IS  
19 KNOWLEDGE. AS ONE READS THE CASES, IT'S REALLY A KNOWLEDGE OR  
20 REASON TO KNOW TEST WHICH IMPLICATES NOT SIMPLY AND NECESSARILY  
21 ACTUAL KNOWLEDGE OF SPECIFIC INFRINGEMENTS BUT CONSTRUCTIVE  
22 KNOWLEDGE AS WELL.

23 WHERE YOU HAVE A POLICY WHICH HAS BEEN EFFECTIVELY  
24 SIMPLY PUT OUT THERE, WHERE THERE HAS BEEN NO MONITORING, NO  
25 SUPERVISION, NO SERIOUS REVIEW OR EVALUATION, WHERE THE

1 EVIDENCE IN THIS SUIT SHOWS THAT EVERY CHECKLIST THAT WILL BE  
2 IN EVIDENCE CAME DOWN CRASHINGLY ON THE SIDE OF A FAIR USE  
3 DETERMINATION WITH WORKS TAKEN AS MUCH AS 35 PERCENT OF ENTIRE  
4 WORKS, WHERE THE RED FLAG PROCESS THE EVIDENCE SHOWS FOR THE  
5 THREE TERMS GENERATED PERHAPS ONE REVIEW OF ONE WORK THAT WAS  
6 AN ENTIRE WORK, WHERE NO PERMISSIONS FEES HAVE EVER BEEN PAID  
7 AND CERTAINLY DURING THE THREE TERMS HAVEN'T BEEN PAID FOR ANY  
8 USES ACROSS THESE TAKINGS, WHERE THERE IS NO BUDGET IN THE  
9 UNIVERSITY, NO BUDGET AT ALL FOR THESE IN CONTRAST TO THE MULTI  
10 MILLION DOLLAR ELECTRONIC JOURNAL SUBSCRIPTION FEES PAID BY GSU  
11 AND BY THE UNIVERSITY SYSTEM OF GEORGIA AND WHERE IN THE PAPER  
12 COURSEPACK AREA IT'S WELL ESTABLISHED THAT PERMISSIONS FEES ARE  
13 PAID FOR EVERY SINGLE COPY, THE CONTRAST ALONE IN PRACTICE IS  
14 STRONGLY SUGGESTIVE EITHER OF KNOWLEDGE OR OF REASON TO KNOW  
15 THAT THIS PRACTICE SPAWNED BY THE NEW POLICY IS CERTAINLY  
16 ENCOURAGING, FOSTERING OR AT LEAST PERMITTING INFRINGEMENTS TO  
17 OCCUR. THAT'S BRANCH ONE.

18           BRANCH TWO WHICH IS MATERIAL CONTRIBUTION, IT SEEMS  
19 AS EASILY SATISFIED HERE, YOUR HONOR, BECAUSE IT INVOLVES  
20 HAVING --

21           THE COURT: LET ME STOP YOU ON THE KNOWLEDGE PRONG.  
22 IS THAT SAME THING AS INTENT?

23           MR. RICH: I'M SORRY?

24           THE COURT: INTENT.

25           MR. RICH: IT'S NOT EXACTLY THE SAME THING. IT CAN

1 BE ALSO SLIDING OVER MORE TO A WILLFUL BLINDNESS KIND OF  
2 ATTITUDE AND APPROACH, AND THE CASES WE CITE IN OUR BRIEFS  
3 BEGINNING AT PAGE 17 OF OUR PROPOSED CONCLUSIONS OF LAW ADDRESS  
4 THAT.

5           IT'S NOT LITERALLY IS IT STARING AT ME LABELED  
6 INFRINGEMENT. IT'S WHETHER AGAIN YOU HAVE CREATED AN  
7 ENVIRONMENT IN WHICH INFRINGEMENTS CAN THRIVE AND FOSTER AND  
8 BE ONGOING AND WHERE THERE IS A LACK OF ADEQUATE VIGILANCE  
9 WHICH MEANS IT'S TANTAMOUNT TO HAVING CONSTRUCTIVE KNOWLEDGE OF  
10 IT.

11           THE SECOND BRANCH, YOUR HONOR, WHICH IS MATERIAL  
12 CONTRIBUTION IS SATISFIED WHERE THE DEFENDANTS HAVE SET UP THE  
13 SITE AND FACILITIES THAT ALLOW THIS TO OCCUR. SO YOU HAVE THE  
14 POLICY THAT WAS DEVELOPED BY THE REGENTS. YOU HAVE THE  
15 MAINTENANCE. YOU HAVE SERVERS SOME OF WHICH ARE OWNED BY THE  
16 UNIVERSITY OF GEORGIA AND LEASED BY GSU THAT ALLOW THE ULEARN  
17 SYSTEM TO GO FORWARD. YOU HAVE ALL OF THE COMPUTER AND ALL  
18 SERVERS AND FACILITIES, AND YOU HAVE THE ABILITY, WHICH IS THE  
19 OTHER CRITICAL ELEMENT OF CONTRIBUTORY INFRINGEMENTS, TO STOP  
20 THE INFRINGEMENTS.

21           WE HAVE ALL OF THE EVIDENCE THAT AGAIN IF THERE WERE  
22 AN INJUNCTION ISSUED BY YOUR HONOR THERE'S NO DOUBT THAT THERE  
23 IS THE ABILITY AND IT'S STIPULATED THAT THEY WOULD TAKE THE  
24 NECESSARY STEPS TO STOP THE INFRINGEMENT.

25           SO EVEN ON THE BRANCH OF CONTRIBUTORY INFRINGEMENT, I

1 THINK WE HAVE HAD ALREADY IN THE RECORD AND I BELIEVE THERE'S  
2 GOING TO BE MORE MORE THAN ADEQUATE SHOWINGS OF BOTH BRANCHES  
3 OF THAT INFRINGEMENT DOCTRINE HAVE BEEN MET HERE.

4 I WAS GOING TO TALK A LOT MORE ABOUT THE INDIVIDUAL  
5 FAIR USE FACTORS, BUT I THINK GIVEN YOUR HONOR'S FOCUS, I'M NOT  
6 SURE IT WILL BE TERRIBLY PRODUCTIVE TO PARSE THROUGH THOSE FOUR  
7 FACTORS, ALTHOUGH I'M HAPPY TO.

8 THE COURT: I THINK ONE OF THE QUESTIONS THAT'S STILL  
9 OPEN IS HOW THE FAIR USE FACTORS SHOULD BE WEIGHTED IN A CASE  
10 LIKE OURS INVOLVING AN EDUCATION INSTITUTION THAT IS CAUSING  
11 COPIES TO BE MADE FOR AN EDUCATIONAL PURPOSE, AND, YET, THERE  
12 COULD BE SOME AFFECT ON THE MARKET FOR PERMISSIONS.

13 MR. RICH: I THINK THE LAW IS PRETTY WELL DEVELOPED  
14 EVEN HERE, YOUR HONOR. I DON'T THINK AGAIN THERE'S -- I DON'T  
15 THINK WE'RE IN UNCHARTED TERRITORY.

16 I THINK FACTOR ONE WHICH AS YOU KNOW FOCUSES  
17 PRINCIPALLY ON TWO ELEMENTS, THE NATURE OF THE TAKING, IS IT  
18 TRANSFORMATIVE IN NATURE OR NOT, AND IS IT FOR A COMMERCIAL OR  
19 NONCOMMERCIAL PURPOSE. THE LAW IS QUITE CLEAR THAT THE  
20 DOMINANT ELEMENT THERE IS WHAT'S BEING DONE WITH THE MATERIAL.  
21 WHAT IS THE PURPOSE FOR WHICH IT'S BEING USED IN TERMS OF IS IT  
22 BEING USED SIMPLY TO SUBSTITUTE FOR, TO SUPERSEDE THE ORIGINAL  
23 IN WHICH CASE THE OPPORTUNITY OF MARKET IMPAIRMENT IS MORE  
24 OBVIOUS, OR SOMETHING DIFFERENT BEING DONE WITH IT.

25 YOU'VE HEARD TESTIMONY AND YOU'RE GOING TO HEAR MORE

1 THAT THE PARADIGMATIC EXAMPLE GIVEN DURING THE LIMITED TRAINING  
2 SESSIONS THAT DID OCCUR WAS THE TWO LIVE CREW CASE AS BEING A  
3 PARADIGMATIC EXAMPLE OF TRANSFORMATIVENESS. WE DON'T HAVE THAT  
4 HERE. EVERY SINGLE WITNESS AND EVERY PROFESSOR HAS CONCEDED  
5 THAT IT IS NOT TRANSFORMATIVE.

6 THE LAW IS ALSO VERY, VERY CLEAR, YOUR HONOR, THAT  
7 WHILE A COMMERCIAL TAKING CAN BE A THUMB ON THE SCALE AGAINST  
8 FAIR USE, THE MERE FACT THAT THE ACTIVITY IS OCCURRING IN A  
9 NONCOMMERCIAL OR NONPROFIT EDUCATION ENVIRONMENT DOESN'T GIVE  
10 IT A FREE PASS OR DOESN'T GIVE IT ANY PER SE BRAND OF  
11 LEGALITY. IT'S BUT AN ELEMENT TO BE WEIGHED.

12 IF YOU HAVE A SYSTEMATIC TAKING OF COPYRIGHTED  
13 MATERIALS WHICH DEMONSTRABLY CAN CREATE SIGNIFICANT MARKET  
14 IMPAIRMENT, THE FACT THAT IT'S BEING DONE IN AN EDUCATIONAL  
15 SETTING, THE FACT THAT A TEACHER FEELS THAT IT'S NECESSARY FOR  
16 HIS OR HER EDUCATIONAL PURPOSE SIMPLY DOESN'T EXONERATE THE  
17 ACTIVITY UNDER THE FAIR USE DOCTRINE, PARTICULARLY WHERE IT'S  
18 ONLY SUBSTITUTING FOR THE SALE OR PERMISSIONING OF THE WORK,  
19 AND HERE IS WHERE NOTWITHSTANDING THAT SOME OF THESE OTHER  
20 CASES HAVE OCCURRED WHERE THE DEFENDANT IS A FOR PROFIT  
21 DEFENDANT, THEY HAVE OCCURRED IN THE EDUCATIONAL SETTING IN  
22 WHICH THE COURT HAS APPRECIATED THE ARGUMENT THAT THE ULTIMATE  
23 CONSUMER OF THESE WORKS WERE STUDENTS.

24 THE COURT: WHAT I'M THINKING MORE ABOUT IS WHAT  
25 GEORGIA STATE WOULD NEED TO TELL ITS PROFESSORS ABOUT HOW TO

1 WEIGHT THESE DIFFERENT FACTORS.

2 MR. RICH: WE'RE SUGGESTING THAT THEY TEAR UP THE  
3 CHECKLIST, YOUR HONOR. I COULD CONSTRUCT A CHECKLIST THAT  
4 WOULD 102 TIMES OUT OF 102 TIMES COME OUT THE OTHER WAY. I  
5 COULD TAKE THE CONCEPT OF NONTRANSFORMATIVENESS AND DEFINE IT  
6 THREE DIFFERENT WAYS --

7 THE COURT: WHAT SHOULD GEORGIA STATE TELL ITS PEOPLE  
8 ABOUT HOW TO WEIGHT THESE DIFFERENT FACTORS?

9 MR. RICH: IT SHOULDN'T, YOUR HONOR. WHAT GEORGIA  
10 STATE SHOULD DO AS NYU HAS DONE FOLLOWING ITS OWN LITIGATION IN  
11 THIS AREA PROVIDED THAT EITHER YOU GET PERMISSION TO AVOID THE  
12 ISSUE, OR YOU FOLLOW THE CLASSROOM GUIDELINES TO SEE IF THE  
13 AMOUNT OF YOUR TAKING DOES NOT EXCEED IT, OR GO TALK TO THE  
14 GENERAL COUNSEL LITERALLY OF THE UNIVERSITY OR HIS OR HER --

15 THE COURT: THAT'S NOT A SOLUTION JUST TO SAY GO TALK  
16 TO SOMEBODY ELSE.

17 MR. RICH: I UNDERSTAND, BUT THE PRINCIPAL ELEMENTS  
18 AT NYU ARE EITHER SECURE PERMISSIONS AND PROVIDE EVIDENCE THAT  
19 YOU HAVE WHICH BRINGS IT INTO CONFORMITY WITH THE PAPER  
20 COURSEPACK WORLD, OR CONFORM WITH THE IN OUR CASE LET'S SAY  
21 BREVITY REQUIREMENTS OF THE GUIDELINES. WE HAVE NOT SUGGESTED  
22 PUTTING A SPONTANEITY ELEMENT IN THERE, EVEN THOUGH THAT'S PART  
23 OF THE GUIDELINES.

24 AND SO THAT IS A THOUSAND WORD OR IN SOME CASES  
25 DEPENDING ON THE MATERIAL A 2500 WORD LIMITATION WHICH WAS NOT

1 MADE UP OUT OF WHOLE CLOTH. THE FACT THAT SOMETHING IS, QUOTE,  
2 OLD DOESN'T MEAN IT DOESN'T HAVE VITALITY OR PURPOSE. IT SITS  
3 IN THE FACULTY GUIDE AT GSU AND IT'S USED THROUGHOUT THE  
4 COUNTRY AS A LITMUS TEST.

5 IS THAT THE ABSOLUTE ONLY --

6 THE COURT: I HAVEN'T HEARD ANY EVIDENCE THAT IT'S  
7 USED THROUGHOUT THE COUNTRY. YOU MAY BE RIGHT. I DON'T KNOW,  
8 BUT I HAVEN'T HEARD ANY EVIDENCE TO THAT EFFECT.

9 MR. RICH: FAIR ENOUGH. I'M REPRESENTING TO YOU JUST  
10 BASED ON EXPERIENCE, YOUR HONOR, BUT THE FACT IS THERE IS SOME  
11 EVIDENCE OF THAT IN THE OTHER PUBLISHED OPINIONS. IT WAS  
12 DISCUSSED BY JUDGE MOTELY. IT WAS DISCUSSED BY THE EN BANC  
13 MAJORITY IN THE PRINCETON UNIVERSITY CASE, THE LINEAGE AND  
14 BACKGROUND OF IT.

15 AND THE FACT OF THE MATTER IS, IT WAS A BEST EFFORT  
16 BY ALL CONSTITUENCIES. THIS WASN'T STUCK UP THERE BY  
17 PUBLISHERS OR BY AUTHORS. THIS WAS A COLLECTIVE COLLEGIAL  
18 EFFORT INCLUDING BY THE ACADEMIC COMMUNITY TO SAY HERE'S  
19 SOMETHING AS A GUIDE TO SHOOT AT.

20 IS IT ABSOLUTELY THE ONLY WAY TO DRAW THE LINES, NO,  
21 BUT YOUR HONOR IS A HUNDRED PERCENT RIGHT. UNLESS THERE IS  
22 SOME OBJECTIVE TEST HERE AT LEAST REMEDIALY AT LEAST FOR SOME  
23 PERIOD OF TIME IN ORDER TO PURGE THE SYSTEM OF WHAT WE REGARD  
24 TO BE IN MANY CASES ABSOLUTELY EXCESSIVE TAKINGS THAT AGAIN IF  
25 LEFT UNCHECKED AND IF OTHER PEOPLE SAID WELL, IF GEORGIA STATE

1 CAN DO THIS WE CAN DO THIS, WELL OUR GUYS WILL CLOSE SHOP AND  
2 YOU'VE HEARD THAT FROM THE PLAINTIFFS. THEY DIDN'T WANT TO BE  
3 IN THIS LAWSUIT. THEY ARE UNIVERSITY PRESSES. THEY ARE  
4 UNIVERSITY PEOPLE WHO VERY RELUCTANTLY CAME INTO THIS  
5 COURTROOM --

6 THE COURT: I DON'T KNOW THAT THEY CAME IN VERY  
7 RELUCTANTLY.

8 MR. RICH: I BELIEVE IT TO BE THE FACT --

9 THE COURT: IT'S PRETTY EASY TO COME IN WHEN SOMEBODY  
10 ELSE IS PAYING THE BILL.

11 MR. RICH: NO, THERE'S REPUTATION. THEY'RE TAKING  
12 TREMENDOUS SHOTS OUT IN THE INDUSTRY FOR DOING WHAT THEY FELT  
13 WAS NECESSARY, AND THEY TRULY WERE RELUCTANT HERE TO DO IT.

14 MY POINT IS AGAIN NOT PSYCHOLOGY BUT IF THEY DIDN'T  
15 PERCEIVE TRULY SIGNIFICANT IMPAIRMENT OF IMPORTANT MARKETS LONG  
16 TERM BY THIS DEVELOPMENT, THIS MIGRATION OF COPYING INTO THE  
17 ELECTRONIC ENVIRONMENT THEY WOULD NOT BE HERE AND THIS LAWSUIT  
18 MIGHT NOT HAVE BEEN BROUGHT AT ALL.

19 AND SO I THINK AGAIN IF WE EVER GET TO REMEDY, YOU  
20 WOULD FIND THE PLAINTIFFS OPEN AND INTERESTED ABOUT SHAPING  
21 WHAT MAKES SENSE. WE WEREN'T INVITED TO THE TABLE WHEN THE  
22 LAST POLICY WAS DEVELOPED. IT WAS DONE WHILE THE CASE WAS  
23 BEING LITIGATED. IT WAS PRESENTED AS A FAIT ACCOMPLI TO US.  
24 IT MIGHT HAVE BEEN A VEHICLE BUT IT WASN'T, BUT IT'S THE BEST  
25 AND MOST THOUGHTFUL SOLUTION WE COULD ARRIVE AT BECAUSE IT



1 WASN'T OURS. IT WAS THERE. IT WAS AVAILABLE.

2 AND MY POINT, MY SUPPLEMENTAL POINT IS THAT WHEN YOU  
3 COMPARE THOSE TOUCHSTONES OF 10 PERCENT OR A THOUSAND WORDS  
4 WHICHEVER IS LESS AGAINST THE MINIMUM TAKING HERE 5,500 WORDS  
5 ESTIMATED AND THE MAXIMUM TAKING OF MORE THAN 100,000 WORDS,  
6 IT'S FRANKLY BREATHTAKING. THERE IS SOMETHING REALLY WRONG.

7 THE COURT: WE NEED TO MOVE ON. YOU WANT TO TAKE A  
8 COUPLE OF MINUTES TO WRAP UP ON THE CONTRIBUTORY INFRINGEMENT?

9 MR. RICH: I THINK I'VE GIVEN YOU OUR ESSENTIAL TAKE  
10 ON IT, YOUR HONOR, BECAUSE IT'S A TWO-PRONGED ANALYSIS. WE  
11 FEEL THE EVIDENCE AGAINST THAT COMFORTABLY SUPPORTS THAT THERE  
12 COULD BE LIABILITY ON THAT FRONT, AND AT THE RISK OF BEING A  
13 BIT OF A -- OF REPEATING MYSELF, YOUR HONOR, WE WOULD EARNESTLY  
14 ASK IF YOUR HONOR MIGHT RECONSIDER THE SECOND LEG OF THIS WHICH  
15 WE THINK IS THE CORE AND FUNDAMENTAL BASIS FOR THE VIOLATION  
16 HERE, AND WE THINK IT'S WELL SUPPORTED AT BOTH LEGS IN TERMS OF  
17 THE CHAIN OF CERTAINLY LIABILITY, IN TERMS OF RESPONDEAT  
18 SUPERIOR AT GSU TIED TOGETHER BY THE IMPLICATIONS OF EX PARTE  
19 YOUNG MEANING THAT THE ABILITY TO SUPERVISE AND REMEDIATE ANY  
20 FINDINGS OF VIOLATION ON THE PART OF GSU IS THE VERY VEHICLE  
21 THE LAW, WE WOULD ARGUE, PROVIDES TO AVERT SITUATIONS WHERE  
22 EXACTLY THIS KIND OF CONDUCT WOULD GO WITHOUT REMEDY, AND WE'RE  
23 VERY CONCERNED IF IT WERE OTHERWISE.

24 THE COURT: THANK YOU. VERY QUICKLY.

25 MR. SCHAETZEL: YES, MA'AM. I'D FIRST LIKE TO BE

1 CERTAIN I UNDERSTAND WHERE WE'RE AT. IT'S THE DEFENDANTS'  
2 UNDERSTANDING THAT THE PLAINTIFFS' CLAIM OF INDIRECT  
3 INFRINGEMENT VIA RESPONDEAT SUPERIOR HAS BEEN DETERMINED AND  
4 DECIDED AGAINST THE PLAINTIFFS?

5 THE COURT: CORRECT.

6 MR. SCHAETZEL: THANK YOU. AND THAT LEAVES  
7 CONTRIBUTORY INFRINGEMENT. MR. RICH SAID THAT WE HAD  
8 KNOWLEDGE -- HE GAVE THE TWO PRONGS. THE FIRST ONE --

9 THE COURT: BUT LET ME MAKE SURE WE'RE ON THE SAME  
10 WAVELENGTH HERE.

11 MR. SCHAETZEL: YES, MA'AM.

12 THE COURT: I DO BELIEVE THERE STILL IS AND I DO FIND  
13 THAT THERE STILL IS A DIRECT INFRINGEMENT CLAIM BASED ON THE  
14 DEVSING AND IMPLEMENTATION OF THE POLICY. I VIEW THAT AS A  
15 DIRECT INFRINGEMENT CLAIM.

16 THE REGENTS AND PERHAPS SOME OF THE OTHER DEFENDANTS,  
17 I DON'T REMEMBER, DEVISED THE POLICY, AND THEY ARE IN CHARGE OF  
18 IT BEING CARRIED OUT, AND TO THAT EXTENT I BELIEVE THERE IS  
19 WHAT I WOULD CALL A DIRECT INFRINGEMENT CLAIM. THAT CLAIM IS  
20 IN THE LAWSUIT.

21 MR. SCHAETZEL: OKAY. IF I UNDERSTAND THAT CORRECTLY  
22 THAT CLAIM -- THE REGENTS, FOR EXAMPLE, OR THE ADMINISTRATORS  
23 COULD BE LIABLE IF THE POLICY IS FOUND TO, FOR EXAMPLE AS MR.  
24 RICH HAS ARGUED, NECESSARILY LEAD THE PROFESSOR TO A FAIR USE  
25 DETERMINATION; IS THAT CORRECT?

1           THE COURT: IF THE POLICY CAUSED VIOLATIONS AND THE  
2 VIOLATIONS ARE OR WERE ONGOING AND CONTINUOUS WITHIN THE  
3 TIMEFRAME ESTABLISHED, THEN I BELIEVE THAT THE COURT COULD  
4 ENTER INJUNCTIVE RELIEF UNDER THE EX PARTE YOUNG LINE OF  
5 CASES.

6           MR. SCHAETZEL: OKAY. THANK YOU, YOUR HONOR. MY  
7 OTHER COMMENTS RELATE TO CONTRIBUTORY INFRINGEMENT BECAUSE I  
8 BELIEVE THAT IS STILL A CLAIM THAT WE CAN DISPOSE OF AT THIS  
9 STAGE, AND THE REASON FOR THAT IS BECAUSE THERE IS NO EVIDENCE  
10 ON KNOWLEDGE AND BECAUSE THE COURT HAS ALREADY DECIDED MATERIAL  
11 CONTRIBUTION.

12           TO TAKE THE LATTER FIRST. IN THE SUMMARY JUDGMENT  
13 ORDER, THE COURT NOTICED AND FOUND THAT FOR EXAMPLE ULEARN AND  
14 ERES HAD SUBSTANTIAL NONINFRINGING USES. AS A RESULT A LA THE  
15 SONY CASE, THE MATERIAL CONTRIBUTION LEG OF CONTRIBUTORY  
16 INFRINGEMENT WE BELIEVE SHOULD BE DECIDED AGAINST THE  
17 PLAINTIFFS. THESE SYSTEMS CAN BE USED FOR THINGS OTHER THAN  
18 POSTING EXCERPTS, AND AS A RESULT THERE IS NO CONTRIBUTORY  
19 INFRINGEMENT BECAUSE OF THOSE SUBSTANTIAL NONINFRINGING USES.

20           THAT TAKES US BACK UP TO THE FIRST LEG THAT MR. RICH  
21 ARGUED WHICH WAS KNOWLEDGE. IF I UNDERSTOOD CORRECTLY HE SAID  
22 WITH RELATION TO KNOWLEDGE THAT WE HAVE 102 CHECKLISTS OUT OF  
23 102 CHECKLISTS THAT END FAIR USE THAT THAT STRONGLY SUGGESTS  
24 THAT SOMETHING'S AMISS IN DENMARK.

25           IT DOES NOT, YOUR HONOR, BECAUSE THE EVIDENCE THAT

1 WE'VE HEARD ALSO SHOWED THAT THOSE PROFESSORS FILL OUT THE FAIR  
2 USE CHECKLIST BECAUSE THEY KNOW THEY MUST DO SO IN ORDER TO  
3 TAKE ADVANTAGE OF THE ERES SYSTEM.

4 IF THE PROFESSOR DETERMINES THAT IT IS NOT FAIR USE,  
5 THERE IS NO FAIR USE CHECKLIST. THE FAIR USE CHECKLIST AS WE  
6 SAW ON THE SCREENSHOTS IS SOMETHING THAT THE PROFESSOR MUST SAY  
7 I'VE COMPLETED IT AND CLICK THE BOX IN ORDER TO HAVE THE ITEM  
8 POSTED ON THE ERES SYSTEM.

9 SO THE FACT THAT IT'S 102 OUT OF A 102 IS REALLY NOT  
10 ALL THAT PROBATIVE. ALL IT SHOWS IS THAT WHEN THE PROFESSOR  
11 NEEDS A FAIR USE CHECKLIST IN ORDER TO HAVE THE MATTER POSTED,  
12 THEY EITHER RETAINED IT OR IT'S BEEN RECREATED. THEY JUST  
13 HAVEN'T -- THEY'RE NORMALLY CLICKING DOWN THROUGH IT AND SAY  
14 OKAY, IT'S NOT FAIR USE, THEY LET IT GO.

15 SECOND OF ALL, THE COURT ASKED ABOUT OBJECTIVE  
16 STANDARDS AND HOW WE WOULD INCORPORATE OBJECTIVE STANDARDS. WE  
17 UNDERSTAND THE COURT TO BE LOOKING AT THE UNIVERSE OF  
18 INFRINGEMENTS AS ALLEGED WHATEVER THEY MAY BE TO TRY AND MAKE  
19 SOME DETERMINATION AS TO HOW WELL THE POLICY IS FUNCTIONING, IF  
20 YOU WILL.

21 THE DOCUMENT THAT I AM PUTTING ON THE SCREEN IS FROM  
22 A DOCUMENT THAT I THOUGHT THAT THE PARTIES HAD NEGOTIATED. IT  
23 WILL ULTIMATELY BE A DIFFERENT FORM THAT I UNDERSTOOD FROM MR.  
24 RICH'S STATEMENTS TODAY THAT THEY WILL SUBMIT ON BEHALF OF THE  
25 PLAINTIFFS TO THE COURT, BUT IT IS A GOOD COMPILATION OF

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1 INFORMATION, AND IT'S A LITTLE BIT TOO BIG FOR THE SCREEN.

2 I'LL JUST REPRESENT TO THE COURT THAT THE FIRST TWO  
3 ENTRIES HERE ARE FOR PROFESSOR KAUFMANN. THIS IS EVIDENCE THAT  
4 WAS PRESENTED, AND THE COLUMN THAT I'M POINTING TO HERE, YOUR  
5 HONOR, THAT I HAVE HIGHLIGHTED IS STYLED PERCENT COPIED.

6 IN THESE FIRST TWO WORKS 3.5 AND 2.5 PERCENT FOR  
7 PROFESSOR KAUFMANN. WE GO DOWN TO THE NEXT FOUR WORKS. THESE  
8 ARE PROFESSOR ESPOSITO THAT YOU HEARD FROM, YOUR HONOR, 3.3  
9 PERCENT, 2.5, 3, 2.2. THE LAST ONE IS FROM A WITNESS THAT HAS  
10 NOT YET TESTIFIED PROFESSOR KRUGER 7.6 PERCENT.

11 WHEN WE LOOK AT THESE NUMBERS, THESE ARE INSTANCES  
12 WHERE PROFESSOR ESPOSITO OR PROFESSOR KAUFMANN DID THE FAIR USE  
13 CHECKLIST, DID THE ANALYSIS AND DETERMINED THAT THIS WAS FAIR  
14 USE. THAT TAKES US BACK TO THIS DEMONSTRATIVE --

15 THE COURT: AND THE DIFFERENCE BETWEEN YOU ALL'S  
16 FIGURES AND THOSE OF THE PLAINTIFFS IS THAT THE PLAINTIFFS  
17 TREATED INDIVIDUAL CHAPTERS AS A SEPARATE WORK?

18 MR. SCHAETZEL: NO, MA'AM. THERE IS A DIFFERENCE  
19 BETWEEN US IN THAT REGARD, BUT THAT'S NOT THE DIFFERENCE IN  
20 THESE FIGURES. IN THESE FIGURES WHAT WOULD HAPPEN IF WE TAKE  
21 THIS ONE, I'LL JUST POINT TO IT, THIS IS PROFESSOR ESPOSITO,  
22 THE HANDBOOK OF FEMINIST RESEARCH, COME ACROSS AND WE SEE IN  
23 THESE COLUMNS THAT THE EXCERPTS SHE USED WERE PAGES 155 TO PAGE  
24 172. I'M NOT CERTAIN HOW MANY PAGES ARE IN THAT BOOK, BUT OUR  
25 PROFESSORS COUNT BY COUNTING ALL THE PAGES IN THE BOOK. THEY

1 COUNT ONLY THE TEXT. SO IF THERE'S AN INDEX, IF THERE'S AN  
2 INTRODUCTION --

3 THE COURT: I PICKED UP ON THAT. ARE YOU SAYING  
4 THAT'S THE PRIMARY DIFFERENCE BETWEEN THE TWO SIDES IN THE  
5 CALCULATION OF THE PERCENTAGES?

6 MR. SCHAETZEL: YES, MA'AM, THAT'S THE DIFFERENCE.  
7 SO IN THIS CASE, FOR EXAMPLE, YOU CAN SEE WHERE 2.5 PERCENT IS  
8 THEIR CALCULATION. OURS IS 2.3. WE'VE ADDED 20 PAGES OR MORE  
9 TO IT.

10 NOW ON THE SEPARATE WORKS SITUATION, WE ALSO HAVE A  
11 DIFFERENCE OF OPINION THERE. THAT DIFFERENCE OF OPINION  
12 RELATES TO WHETHER OR NOT WE'RE LOOKING AT THE BOOK AS A WORK  
13 OR THE INDIVIDUAL CHAPTERS OR ARTICLES AS WORKS. SO THAT, TOO,  
14 IS A DIFFERENCE.

15 OUR POSITION BEING THAT IN THE JOINT FILING FOR  
16 EXAMPLE THERE WAS NEVER ANYTHING THAT SAID A HUNDRED PERCENT.  
17 IT WAS ALWAYS YOU KNOW HOWEVER. SO THAT MEANS THAT THEY WERE  
18 LOOKING AT LEAST WHEN THAT DOCUMENT WAS DONE AT THE WORK AS A  
19 WHOLE. IT'S WHEN WE GOT TO THIS STAGE OF THE TRIAL THAT ALL OF  
20 A SUDDEN IT BECAME FOCUSED ON THE WORK. SO THERE IS ALSO THAT  
21 DIFFERENCE.

22 IN EITHER EVENT, YOUR HONOR, THERE ARE A SIGNIFICANT  
23 NUMBER OF WHAT WE'VE HEARD ALREADY WHERE THE OBJECTIVE INDICIA  
24 ARE SO REMARKABLY SLIGHT THAT THAT'S EVIDENCE OF A FAIR USE.  
25 THEY OFFER THIS AS EVIDENCE OF AN ABUSIVE POLICY OF ONGOING AND

1 CONTINUOUS INFRINGEMENT. WE DON'T HAVE KNOWLEDGE -- EVEN  
2 GIVING THEM THE BENEFIT OF THE DOUBT THAT THE 20 PERCENT  
3 NUMBERS, THE 30 PERCENT NUMBERS, THOSE NUMBERS THAT ARE DOWN  
4 HERE, EVEN GIVING THEM THE BENEFIT OF THE DOUBT, THE FACT THAT  
5 ALL OF THIS -- I MEAN WE WERE ACCUSED ORIGINALLY OF FILM THEORY  
6 AND CRITICISM, PROFESSOR BARKER, 1.1 PERCENT. THAT WAS ALLEGED  
7 TO BE EVIDENCE OF AN ABUSIVE ONGOING AND CONTINUOUS POLICY.  
8 IT'S NOT.

9 THE FACT THAT WE HAVE -- GET DOWN A THIRD OF THE WAY  
10 ON THE PAGE AND WE'RE STILL AT 6.5 PERCENT. LOOKING AT IT FROM  
11 THE 30,000 FOOT VIEW OF THE POLICY, THERE MAY BE TIMES WHEN THE  
12 POLICY DOES NOT WORK WELL, AND WITHOUT QUESTION WOULD WE PREFER  
13 THAT EVERY PROFESSOR WENT TO CLASS. YES, THAT WOULD HAVE BEEN  
14 A GOOD THING, BUT THAT EVIDENCE DOES NOT SHOW THAT THIS GROUP  
15 OF DEFENDANTS HAS KNOWLEDGE THAT THE POLICY IS ACROSS THE BOARD  
16 A FAILURE --

17 THE COURT: WE NEED TO WRAP THIS UP. THANK YOU.

18 I'M GOING TO GRANT THE MOTION FOR JUDGMENT AS TO THE  
19 CONTRIBUTORY INFRINGEMENT CLAIM. I BELIEVE BASED ON THE  
20 EVIDENCE THAT'S BEEN PRESENTED UP TO THIS POINT NEITHER PRONG  
21 OF THE CONTRIBUTORY INFRINGEMENT CLAIM HAS BEEN PROVEN, AND I  
22 WOULD IN PARTICULAR COMMENT ON THE KNOWLEDGE PRONG. I DO NOT  
23 THINK THERE IS EVIDENCE THAT THE DEFENDANTS KNEW OR HAD ANY  
24 REASON TO KNOW THAT THE POLICY WOULD PROMOTE COPYRIGHT  
25 INFRINGEMENTS.

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1 I DO NOT BELIEVE THAT ANY INFERENCE OF INTENT IS  
2 WARRANTED BY REASON OF THE FACT THAT GEORGIA STATE MAINTAINS  
3 THE APPARATUSES, APPARATI, WHATEVER, THAT ARE NECESSARY TO  
4 CARRY OUT THE ERES AND ULEARN PROGRAMS. THEY DO HAVE  
5 SUBSTANTIAL NONINFRINGING USES.

6 SO WE HAVE THE ONE CLAIM LEFT THAT I TALKED ABOUT,  
7 AND WE'RE READY TO GO FORWARD.

8 MR. SCHAETZEL: YES, MA'AM. YOUR HONOR, DEPENDING ON  
9 WHO'S MOST READILY AVAILABLE, WE'LL CALL EITHER PROFESSOR  
10 HANKLA OR PROFESSOR GABLER-HOVER.

11 YOUR HONOR, I'LL BE GLAD TO WORK WITH MS. HANNA AND  
12 MR. KRUGMAN; HOWEVER, THE COURT HAS ALREADY HEARD PROFESSOR  
13 BECKER AND WE HAVE HIS I BELIEVE IT WAS SEALED DEPOSITION, AND  
14 I'D LIKE TO HAND THAT UP, IF I MIGHT?

15 THE COURT: ALL RIGHT. AND WE'RE PUTTING INTO  
16 EVIDENCE ONLY THE EXCERPTS THAT WERE IDENTIFIED. HOW IS THE  
17 RECORD GOING --

18 MR. KRUGMAN: WE'RE GOING TO DO A JOINT FILING THAT  
19 WILL IDENTIFY THE PAGES AND LINE NUMBERS THAT WERE PUT INTO  
20 EVIDENCE.

21 THE COURT: THANK YOU, THAT WOULD BE GREAT.

22 THE CLERK: PLEASE RAISE YOUR RIGHT HAND TO TAKE THE  
23 OATH.

24 CHARLES ROBERT HANKLA,  
25 HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

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1 THE CLERK: IF YOU WILL HAVE A SEAT, PLEASE, AND  
2 STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME  
3 ALSO.

4 THE WITNESS: CHARLES ROBERT HANKLA, H A N K L A.

5 THE COURT: YOU MAY PROCEED.

6 MS. MOFFITT: THANK YOU, YOUR HONOR.

7 DIRECT EXAMINATION

8 BY MS. MOFFITT:

9 Q. PROFESSOR HANKLA, YOU ARE CURRENTLY AN ASSOCIATE PROFESSOR  
10 AT GEORGIA STATE; IS THAT CORRECT?

11 A. THAT'S CORRECT.

12 Q. AND ARE YOU AFFILIATED WITH A PARTICULAR DEPARTMENT WITHIN  
13 GEORGIA STATE?

14 A. YES, I AM, POLITICAL SCIENCE.

15 Q. THE DEPARTMENT OF POLITICAL SCIENCE?

16 A. UH-HUH (AFFIRMATIVE).

17 Q. WHEN DID YOU START TEACHING AT GEORGIA STATE?

18 A. IN 2004.

19 Q. AND CAN YOU TELL US GENERALLY WHAT TYPES OF COURSES YOU  
20 TEACH AT GEORGIA STATE?

21 A. SURE. I TEACH COURSES IN INTERNATIONAL RELATIONS, IN  
22 COMPARATIVE POLITICS AND IN RESEARCH METHODS.

23 MS. MOFFITT: YOUR HONOR, MAY I APPROACH?

24 THE COURT: YOU MAY.

25 BY MS. MOFFITT:

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- 1 Q. IF YOU COULD TURN IN YOUR NOTEBOOK TO PTX-950?
- 2 A. YES.
- 3 Q. DO YOU RECOGNIZE THIS DOCUMENT?
- 4 A. YES.
- 5 Q. AND WHAT IS IT?
- 6 A. IT IS A COPY OF MY CV FROM FALL 2010.
- 7 Q. DID YOU PREPARE THIS CV?
- 8 A. I DID.
- 9 Q. AND APPROXIMATELY WHEN DID YOU CREATE IT?
- 10 A. I WOULD SAY NOVEMBER 2010.
- 11 Q. AND DO YOU MAINTAIN COPIES OF YOUR CV IN THE ORDINARY
- 12 COURSE OF WORKING AS A PROFESSOR AT GEORGIA STATE?
- 13 A. I DO.
- 14 MS. MOFFITT: YOUR HONOR, WE WOULD LIKE TO OFFER
- 15 PTX-950.
- 16 MR. KRUGMAN: NO OBJECTION, YOUR HONOR.
- 17 THE COURT: IT'S ADMITTED.
- 18 BY MS. MOFFITT:
- 19 Q. ON PAGE 1 OF YOUR CV THERE'S A SECTION HERE ENTITLED
- 20 RESEARCH AND PROFESSIONAL DEVELOPMENT; DO YOU SEE THAT?
- 21 A. I DO.
- 22 Q. AND THAT SECTION CARRIES OVER TO PAGE 6 OF YOUR CV; IS
- 23 THAT CORRECT?
- 24 A. THAT'S RIGHT, I COULD BE A LITTLE LONG-WINDED IN MY CV.
- 25 Q. CAN YOU TELL ME GENERALLY WHAT THIS SECTION OF YOUR CV

1 DESCRIBES?

2 A. SURE. IT DESCRIBES PORTIONS OF MY JOB THAT FALL UNDER  
3 WHAT WE CALL RESEARCH AND PROFESSIONAL DEVELOPMENT. THAT'S ONE  
4 OF THREE COMPONENTS OF THE JOB OF A PROFESSOR ALONG WITH  
5 INSTRUCTION AND SERVICE, AND UNDER RESEARCH AND PROFESSIONAL  
6 DEVELOPMENT, YOU HAVE PUBLICATIONS. YOU HAVE GRANTS. YOU HAVE  
7 PROFESSIONAL CONSULTING. YOU HAVE PRESENTATION, RESEARCH  
8 PRESENTATIONS, CONFERENCE PRESENTATIONS AND THINGS OF THAT  
9 NATURE.

10 Q. AND ROUGHLY HOW MANY PUBLICATIONS HAVE YOU AUTHORED OR  
11 COAUTHORED AS A PROFESSOR?

12 A. I HAVE AUTHORED OR COAUTHORED SEVEN REFEREED PUBLICATIONS,  
13 JOURNAL ARTICLES.

14 Q. AND HAVE YOU EVER SERVED AS AN EDITOR OR A REFEREE OF ANY  
15 WORKS?

16 A. CERTAINLY, YEAH, I HAVEN'T EDITED A JOURNAL, BUT I HAVE  
17 SERVED AS A REFEREE FOR PROBABLY NINE OR TEN DIFFERENT JOURNALS  
18 AND ALSO FOR OXFORD UNIVERSITY PRESS.

19 Q. AND HAVE YOU EVER RECEIVED ANY ROYALTIES FOR ANY OF THE  
20 PUBLICATIONS THAT YOU'VE EITHER AUTHORED OR REFEREED?

21 A. NO, I'VE NEVER RECEIVED ROYALTIES.

22 Q. NOW AS AN AUTHOR AND A REFEREE OF VARIOUS PUBLICATIONS, DO  
23 YOU HAVE EXPERIENCE DEALING WITH COPYRIGHT RELATED ISSUES?

24 A. I HAVE SOME LIMITED EXPERIENCE. ESSENTIALLY WHEN AN  
25 ARTICLE IS ACCEPTED FOR PUBLICATION, THE AUTHOR RECEIVES A

1 LEGAL STATEMENT IN WHICH THEY SIGN OVER THE COPYRIGHT TO THE  
2 PUBLISHER, AND SO I HAVE THE EXPERIENCE IN RECEIVING THESE AND  
3 READING THROUGH THEM CAREFULLY AND SIGNING THEM AND SO FORTH.

4 Q. DO YOU RESPECT THE COPYRIGHT RIGHTS OF OTHERS?

5 A. CERTAINLY.

6 Q. AND ARE YOU CONCERNED ABOUT MAKING SURE THAT YOUR USE OF  
7 THIRD-PARTY MATERIALS EITHER IN YOUR PUBLICATIONS OR OTHERWISE  
8 IN YOUR WORK AS A PROFESSOR CONSTITUTE A FAIR USE OF THOSE  
9 MATERIALS?

10 A. ABSOLUTELY.

11 Q. NOW DID YOU TEACH A COURSE CALLED U.S. FOREIGN POLICY  
12 POLS 3450 IN THE FALL OF 2009?

13 A. I DID.

14 Q. AND WAS THAT COURSE A GRADUATE LEVEL COURSE OR AN  
15 UNDERGRADUATE LEVEL COURSE?

16 A. THAT WAS AN UNDERGRADUATE LEVEL COURSE.

17 Q. AND CAN YOU TELL US GENERALLY WHAT THAT COURSE WAS ABOUT?

18 A. SURE. THAT IS SORT OF A JUNIOR OR SENIOR LEVEL  
19 UNDERGRADUATE COURSE. IT HAS ABOUT 45 PEOPLE IN IT, GIVE OR  
20 TAKE A FEW, AND THE COURSE BASICALLY CONSISTS OF THREE  
21 COMPONENTS.

22 THE FIRST COMPONENT IS AN HISTORICAL OVERVIEW OF U.S.  
23 FOREIGN POLICY. IT GOES BACK TO THE FOUNDING OF THE REPUBLIC  
24 AND UP THROUGH THE END OF THE COLD WAR.

25 THE SECOND SECTION WE LOOK AT DIFFERENT THEORETICAL

1 EXPLANATIONS FOR U.S. FOREIGN WHICH INCLUDES THINGS LIKE INTER-  
2 BRANCH POLITICS, YOU KNOW, RELATIONS BETWEEN THE EXECUTIVE AND  
3 THE LEGISLATURE, PUBLIC OPINION, PSYCHOLOGICAL EXPLANATIONS,  
4 BUREAUCRATIC POLITICS AND SO FORTH.

5           AND THEN THE THIRD SECTION WE LOOK AT SOME CURRENT  
6 ISSUES, AND THOSE I USUALLY CHANGE AROUND EVERY TIME I  
7 TEACH IT, AND THEY INCLUDE THINGS LIKE TERRORISM,  
8 HUMANITARIAN INTERVENTION, ECONOMIC GLOBALIZATION AND ISSUES OF  
9 THOSE SORTS.

10 Q.   AND WHAT TEACHING METHOD OR METHODS DO YOU USE FOR THE  
11 SUBJECT MATTER OF THIS PARTICULAR CLASS?

12 A.   I USE USUALLY SORT OF A PUNCTUATED LECTURE SLASH  
13 DISCUSSION. THE CLASS IS TOO LARGE FOR IT TO BE PURE  
14 DISCUSSION LIKE YOU WOULD HAVE IN A SEMINAR, BUT I BELIEVE  
15 STRONGLY IN INTERACTION WITH STUDENTS.

16           AND SO USUALLY I'LL INTRODUCE SOME CONCEPTS, AND THEN  
17 WE'LL DISCUSS THE CONCEPTS, AND THEN I'LL GO BACK AND INTRODUCE  
18 SOME MORE CONCEPTS. SO IT'S SORT OF A PUNCTUATED LECTURE  
19 DISCUSSION.

20 Q.   DO YOU ASSIGN READINGS TO YOUR STUDENTS OF THIS COURSE?

21 A.   YES.

22 Q.   AND DID YOU PREPARE A SYLLABUS FOR THIS COURSE IN THE FALL  
23 OF 2009?

24 A.   I DID. I PREPARED IT IN SUMMER.

25 Q.   COULD YOU TURN IN YOUR NOTEBOOK TO DEFENDANTS' EXHIBIT

1 623?

2 MS. MOFFITT: AND, YOUR HONOR, WE'D MOVE TO ADMIT  
3 THIS EXHIBIT INTO EVIDENCE. I DON'T BELIEVE THERE'S ANY  
4 OBJECTION TO IT.

5 MR. KRUGMAN: NO OBJECTION.

6 THE COURT: IT'S ADMITTED.

7 MS. MOFFITT: THANK YOU, YOUR HONOR.

8 BY MS. MOFFITT:

9 Q. IS THIS YOUR SYLLABUS FOR THE POLS 3450 CLASS FOR FALL OF  
10 2009?

11 A. IT IS.

12 Q. TURNING TO PAGE 4 OF YOUR SYLLABUS MARKED GEORGIA STATE  
13 66008 --

14 A. UH-HUH (AFFIRMATIVE).

15 Q. -- THERE'S A SECTION THERE ENTITLED READINGS; DO YOU SEE  
16 THAT?

17 A. I DO.

18 Q. AND CAN YOU DESCRIBE FOR US GENERALLY THE TYPES OF  
19 READINGS YOU ASSIGNED FOR THIS COURSE?

20 A. SURE. I BASICALLY ASSIGN -- WELL, I ASSIGN THE STUDENTS  
21 TO PURCHASE TWO BOOKS. AS YOU CAN SEE THEY'RE WRITTEN THERE  
22 MCDUGALL'S BOOK PROMISE, LAND CRUSADER STATE; AND THE WITTKOPH  
23 AND MCCORMICK BOOK DOMESTIC SOURCES OF AMERICAN FOREIGN  
24 POLICY. I ALSO ASSIGN A SERIES OF --

25 MR. KRUGMAN: YOUR HONOR, I WOULD OBJECT TO TESTIMONY

1 REGARDING WORKS OTHER THAN THOSE ON THE JOINT EXHIBIT.

2 THE COURT: THE OBJECTION IS OVERRULED.

3 THE WITNESS: IN ADDITION I ALSO ASSIGN SOME OTHER  
4 READINGS. THESE INCLUDE SOME JOURNAL ARTICLES WHICH ARE ON THE  
5 VARIOUS DATABASES THAT THE UNIVERSITY SUBSCRIBES TO JSTORE AND  
6 WHATNOT AND ALSO SOME BOOK CHAPTERS WHICH ARE AVAILABLE THROUGH  
7 ERES, AND YOU CAN SEE THOSE LISTED BY TOPIC AS YOU FLIP THROUGH  
8 THE SYLLABUS.

9 BY MS. MOFFITT:

10 Q. I'M SORRY, DID YOU INDICATE THAT THE TWO BOOKS BY  
11 MCDUGALL AND WITTKOPF WERE PURCHASED BY YOUR STUDENTS?

12 A. THOSE ARE TO BE PURCHASED BY THE STUDENTS. THAT'S  
13 CORRECT.

14 Q. DO YOU RECALL HOW MUCH EACH OF THESE BOOKS COST?

15 A. THE MCDUGALL BOOK IS FAIRLY INEXPENSIVE. I BELIEVE IT'S  
16 BETWEEN 15 AND 20 DOLLARS. I'D HAVE TO CHECK TO GET AN EXACT  
17 PRICE.

18 THE WITTKOPF MCCORMICK BOOK IS SOMEWHAT MORE  
19 EXPENSIVE. MAYBE ON THE ORDER OF 35 DOLLARS, AND I DON'T  
20 REMEMBER THE PRECISE PRICE, BUT SOMETHING BETWEEN 30 AND 40  
21 DOLLARS.

22 Q. AND WHY DID YOU REQUIRE YOUR STUDENTS TO PURCHASE THESE  
23 TWO BOOKS?

24 A. BECAUSE WE USE A LARGE PROPORTION OF THOSE BOOKS IN  
25 CLASS. SO THE MCDUGALL BOOK WE BASICALLY USE THE ENTIRE

1 BOOK. IT'S ABOUT A 200 PAGE BOOK, AND THEY READ THAT FOR THE  
2 HISTORICAL SECTION.

3 THE WITTKOPF MCCORMICK BOOK WE USE PERHAPS 40 OR 50  
4 PERCENT OF THE BOOK INTERSPERSED THROUGHOUT THE REMAINING  
5 TOPICS.

6 Q. NOW TURNING TO PAGE 2 OF YOUR SYLLABUS THAT'S MARKED  
7 GEORGIA STATE 66006, THERE'S A SECTION HERE ENTITLED NEWSPAPER?

8 A. RIGHT.

9 Q. DID YOU ALSO REQUIRE THAT YOUR STUDENTS KEEP UP TO DATE ON  
10 CURRENT READINGS FROM NEWSPAPERS?

11 A. I DID. THIS IS SOMETHING I DO IN ALL OF MY UNDERGRAD  
12 CLASSES. I BASICALLY ASK THEM TO FOLLOW THE NEWS TREATMENT OF  
13 U.S. FOREIGN POLICY IN A NEWSPAPER, AND WE DISCUSS THAT FOR THE  
14 FIRST TEN MINUTES OR SO OF CLASS, AND THE IDEA IS BASICALLY TO  
15 KEEP RELEVANT, TO ESSENTIALLY APPLY THE THEORIES THAT WE'RE  
16 LEARNING TO WHAT'S GOING ON RIGHT NOW, AND SO I ENCOURAGE  
17 STUDENTS TO FOLLOW ESPECIALLY A FOREIGN NEWSPAPER IF THEY'RE  
18 ABLE TO DO SO, AND I HAVE A LIST OF SOME EXAMPLES HERE.

19 Q. NOW I BELIEVE YOU MENTIONED YOU ASSIGNED SOME JOURNAL  
20 ARTICLES FOR YOUR STUDENTS TO READ. HOW ARE YOUR STUDENTS TO  
21 ACCESS THOSE JOURNAL ARTICLES?

22 A. WELL, I REQUESTED ALL OF THEM BE POSTED THROUGH ERES, AND  
23 THE REASON FOR THAT IS SIMPLY THAT THERE'S A SINGLE PAGE WHERE  
24 THEY CAN GET ALL OF THE READINGS WHICH THEY DON'T PURCHASE.  
25 BECAUSE I FIND THAT STUDENTS ARE MORE LIKELY TO DO THE READING



1 IF IT'S MADE FAIRLY SIMPLE TO GET TO.

2                   HOWEVER, YOU KNOW, THOSE ARE BASICALLY LINKS TO THE  
3 JOURNAL DATABASES THAT THE UNIVERSITY SUBSCRIBES TO. SO  
4 BASICALLY THE LIBRARY LINKS TO THOSE READINGS AND PUTS THE LINK  
5 ON ERES.

6 Q.   AND, I'M SORRY, DID YOU ALSO SAY THAT YOU ASSIGNED SOME  
7 BOOK EXCERPTS AS READINGS?

8 A.   THAT'S CORRECT.

9 Q.   AND HOW ARE YOUR STUDENTS TO ACCESS THOSE BOOK EXCERPTS?

10 A.   I ESSENTIALLY REQUESTED THAT THOSE BOOK EXCERPTS BE PLACED  
11 ONLINE THROUGH THE ERES SYSTEM.

12 Q.   OKAY. NOW ON PAGE 5 OF YOUR SYLLABUS MARKED 66009, WE  
13 HAVE A READING ASSIGNMENT LISTED FROM CONTEMPORARY CASES IN  
14 U.S. FOREIGN POLICY?

15 A.   YES.

16 Q.   DO YOU SEE THAT?

17 A.   YES.

18 Q.   CAN YOU DESCRIBE FOR ME GENERALLY WHAT IS CONTEMPORARY  
19 CASES IN U.S. FOREIGN POLICY?

20 A.   WELL, IT'S A BOOK THAT'S A COLLECTION OF ANALYSES OF  
21 DIFFERENT U.S. FOREIGN POLICY DECISIONS, AND THESE ANALYSES ARE  
22 BY A VARIETY OF DIFFERENT AUTHORS, AND THEY'RE COLLECTED  
23 TOGETHER IN THIS BOOK.

24 Q.   WOULD YOU CHARACTERIZE THE WORK AS FICTION OR NONFICTION?

25 A.   NONFICTION.

1 Q. NOW WHAT EXCERPT DID YOU ASSIGN FROM THIS BOOK  
2 CONTEMPORARY CASES IN U.S. FOREIGN POLICY?

3 A. I ASSIGNED A CHAPTER BY LANTIS AND MOSKOWITZ WHICH IS  
4 ENTITLED THE RETURN OF THE IMPERIAL PRESIDENCY, THE BUSH  
5 DOCTRINE AND U.S. INTERVENTION IN IRAQ.

6 Q. AND YOU UNDERSTAND THAT PLAINTIFFS IN THIS CASE HAVE  
7 ALLEGED THAT THE USE OF THIS EXCERPT INFRINGES ONE OF THEIR  
8 COPYRIGHTS?

9 A. YES.

10 MS. MOFFITT: YOUR HONOR, MAY I APPROACH?

11 THE COURT: YES.

12 BY MS. MOFFITT:

13 Q. PROFESSOR HANKLA, I'VE HANDED YOU WHAT'S BEEN MARKED  
14 DEFENDANTS' EXHIBIT 776. DO YOU RECOGNIZE THIS BOOK?

15 A. I DO.

16 Q. AND IS THIS A COPY OF THE EDITION OF THE BOOK FROM WHICH  
17 YOU ASSIGNED THIS EXCERPT THE RETURN OF THE IMPERIAL  
18 PRESIDENCY?

19 A. YES, IT IS.

20 Q. AND HOW DO YOU KNOW THAT'S THE CORRECT EDITION?

21 A. BECAUSE ON THE SYLLABUS I GIVE THE COPYRIGHT DATE WHICH IS  
22 2005, AND THAT'S THE PUBLICATION DATE OF THIS EDITION.

23 MS. MOFFITT: YOUR HONOR, WE'D LIKE TO MOVE DX-776  
24 INTO EVIDENCE.

25 MR. KRUGMAN: NO OBJECTION.

1 THE COURT: IT'S ADMITTED.

2 MS. MOFFITT: THANK YOU, YOUR HONOR.

3 BY MS. MOFFITT:

4 Q. WHICH SPECIFIC PAGES DID YOU ASSIGN AS A READING FROM THIS

5 BOOK?

6 A. I ASSIGNED -- I DIDN'T WRITE THE PAGE NUMBERS ON THE

7 SYLLABUS. SO LET ME TAKE A LOOK. THE LANTIS AND MOSKOWITZ

8 READING EXTENDS FROM PAGE 89 TO PAGE 122.

9 Q. THAT'S ROUGHLY 33, 34 PAGES; IS THAT RIGHT?

10 A. THAT'S RIGHT, 34 PAGES, I BELIEVE THAT'S RIGHT.

11 Q. HOW MANY PAGES ARE IN THE BOOK ITSELF?

12 A. THERE ARE 471.

13 Q. SO YOU ASSIGNED AS A READING ROUGHLY 34 PAGES OUT OF A

14 TOTAL OF 471; IS THAT CORRECT?

15 A. THAT'S CORRECT.

16 Q. DO YOU KNOW WHAT PERCENTAGE THAT IS OF THE BOOK YOU USED?

17 A. WELL BETWEEN 5 AND 10 PERCENT. I DON'T KNOW THE PRECISE

18 NUMBER.

19 Q. DID YOU ASSIGN THE RETURN OF THE IMPERIAL PRESIDENCY

20 EXCERPT FOR A PARTICULAR CLASS OF YOUR COURSE IN THE FALL OF

21 2009?

22 A. NO, I ESSENTIALLY ASSIGNED IT AS BACKGROUND READING FOR

23 ALL OF THE COURSES IN THE SECOND SECTION OF THE CLASS WHICH IS

24 THE THEORETICAL EXPLANATION SECTION.

25 Q. AND WHAT WAS THE SUBJECT MATTER OF THAT SECTION THAT YOU

1 WERE TEACHING IN THIS COURSE?

2 A. WELL, THESE ARE THEORETICAL EXPLANATIONS THAT HAVE BEEN  
3 DEVELOPED OVER TIME FOR EXPLAINING U.S. FOREIGN POLICY  
4 OUTCOMES. AS YOU CAN SEE FROM THE LIST THAT I COVER FIVE OF  
5 THEM.

6 THERE'S THE INTERNATIONAL SYSTEM, PUBLIC OPINION,  
7 INTEREST GROUPS AND ELECTIONS, PSYCHOLOGICAL EXAMINATIONS,  
8 CONGRESSIONAL EXECUTIVE RELATIONS AND FINALLY EXECUTIVE BRANCH  
9 POLITICS, BUREAUCRATIC POLITICS EXPLANATIONS. SO THAT'S THE  
10 SECTION IN WHICH WE COVER THOSE THEORIES.

11 Q. AND WHY DID YOU ASSIGN THIS PARTICULAR EXCERPT RETURN OF  
12 THE IMPERIAL PRESIDENCY AS A READING FOR THIS SECTION?

13 A. WELL, I FOUND THAT IN THE PAST WHEN I HAVE TAUGHT THIS  
14 CLASS BEFORE THAT IT'S USEFUL TO HAVE A SINGLE CASE EXAMPLE  
15 THAT THE STUDENTS -- THAT WE CAN APPLY THE THEORIES TO IN ORDER  
16 TO MAKE THEM MORE CONCRETE.

17 BECAUSE ESSENTIALLY BEFORE I STARTED ASSIGNING THIS  
18 READING, I HAD THE PROBLEM THAT, YOU KNOW, IF I DIDN'T USE A  
19 CASE EXAMPLE THEN THE THEORY IS A LITTLE BIT TOO ABSTRACT FOR  
20 THE STUDENTS TO FOLLOW.

21 ON THE OTHER HAND, IF WE USE A VARIETY OF DIFFERENT  
22 EXAMPLES THAT THE STUDENTS MIGHT NOT KNOW ANYTHING ABOUT THOSE  
23 CASES, AND SO IT CAN BE MORE CONFUSING, AND SO AT SOME POINT  
24 BETWEEN FALL 2009 AND AFTER I FIRST TAUGHT THIS CLASS IN FALL  
25 2004, I DECIDED TO ADD THIS READING SO THAT WE COULD ALL HAVE A

1 SINGLE EMPIRICAL REFERENCE CASE TO APPLY EACH OF THE DIFFERENT  
2 THEORIES TO.

3 Q. AND WAS THIS EXCERPT LOADED ON ERES FOR YOUR STUDENTS?

4 A. IT WAS.

5 Q. WHAT STEPS DID YOU TAKE TO REQUEST THAT THIS EXCERPT BE  
6 LOADED ON THE ERESERVE SYSTEM?

7 A. WELL, I LOOKED AT THE READING, AND THEN I LOOKED AT THE  
8 FAIR USE CHECKLIST. I PERFORMED A FAIR USE ANALYSIS, AND THEN  
9 I CLICKED, YOU KNOW, THAT IT'S FAIR USE ACCORDING TO THE FAIR  
10 USE CHECKLIST AND ENTERED THE DETAILS AND CLICKED SEND.

11 Q. AND UPON CLICKING SEND, WHAT WAS YOUR UNDERSTANDING OF  
12 WHAT WOULD HAPPEN THEN IN THE SYSTEM THAT YOU'RE USING?

13 A. MY UNDERSTANDING IS THAT IT WOULD BE SCANNED AND POSTED ON  
14 MY ERES COURSE PAGE, AND THEN I WOULD RECEIVE AN E-MAIL LETTING  
15 ME KNOW IT WAS SCANNED AND POSTED WITH A PASSWORD THAT I COULD  
16 SHARE WITH MY STUDENTS WHO COULD THEN ACCESS IT.

17 Q. AND WHAT WAS YOUR UNDERSTANDING OF WHAT THAT PASSWORD WAS  
18 FOR THAT YOU RECEIVED?

19 A. MY UNDERSTANDING IS THAT IN ORDER FOR A READING TO BE  
20 CONSIDERED FAIR USE, IT NEEDS TO BE LIMITED TO STUDENTS IN THE  
21 CLASS, AND SO FOR THAT REASON THERE'S A -- THE READINGS ARE  
22 PASSWORD PROTECTED.

23 Q. IF YOU COULD TURN TO DEFENDANTS' EXHIBIT 480 IN YOUR  
24 NOTEBOOK, AND I WILL ASK YOU IF YOU RECOGNIZE THIS DOCUMENT?

25 A. YES.

1 Q. AND WHAT IS THIS?

2 A. THIS IS THE FAIR USE CHECKLIST FOR THE WORK IN QUESTION  
3 THAT WE'VE JUST BEEN TALKING ABOUT. IT'S A FAIR USE CHECKLIST  
4 THAT I COMPLETED MENTALLY IN THE SUMMER OF 2009 AND PHYSICALLY  
5 RECREATED IN NOVEMBER OF 2010.

6 Q. AND THE EXACT DATE ON THE CHECKLIST IS WHAT?

7 A. NOVEMBER 16TH, 2010.

8 Q. AND WHY DID YOU RECREATE THIS CHECKLIST IN NOVEMBER OF  
9 2010?

10 A. I WAS REQUESTED BY THE UNIVERSITY LEGAL AFFAIRS TO  
11 RECREATE -- IF I HAD IN FACT FILLED OUT THE CHECKLIST MENTALLY  
12 BEFORE COMPLETING THE CLASS WHICH I HAD TO PHYSICALLY RECREATE  
13 THAT CHECKLIST.

14 Q. AND HOW DID YOU GO ABOUT RECREATING THE CHECKLIST?

15 A. WELL, I LOOKED AT THE WORK, AND I TRIED TO THINK BACK TO  
16 MY LOGIC AS IT WAS IN THE SUMMER OF 2009 WHEN I COMPLETED IT  
17 MENTALLY.

18 Q. AND DO YOU BELIEVE THAT THIS RECREATED CHECKLIST IS A FAIR  
19 AND ACCURATE RECREATION OF THE CHECKLIST THAT YOU COMPLETED IT  
20 IN YOUR MIND IN THE SUMMER OF 2009 AFTER REVIEWING THE  
21 CHECKLIST IN CONNECTION WITH THIS PARTICULAR EXCERPT THE RETURN  
22 OF THE IMPERIAL PRESIDENCY?

23 A. I DO.

24 MS. MOFFITT: YOUR HONOR, WE OFFER DEFENSE EXHIBIT  
25 408 INTO EVIDENCE.

ANDRE G. ASHLEY, O.C.R.

1 MR. KRUGMAN: WE OBJECT ON RELEVANCE GROUNDS, LACK OF  
2 FOUNDATION AND BEST EVIDENCE.

3 THE COURT: IT'S ADMITTED.

4 BY MS. MOFFITT:

5 Q. NOW WHY YOU DID YOU CONDUCT A FAIR USE ANALYSIS IN JULY  
6 2009 OR IN THE SUMMER OF 2009?

7 A. BECAUSE I UNDERSTOOD THE UNIVERSITY POLICY TO HAVE CHANGED  
8 AT SOME POINT IN THE SPRING OF 2009 AND THE FAIR USE CHECKLIST  
9 WAS INTRODUCED TO ME. I BELIEVE IT WAS IN AN E-MAIL AT SOME  
10 POINT IN THE SPRING OF 2009, AND SO I UNDERSTOOD IT TO BE  
11 NECESSARY TO COMPLETE THE CHECKLIST IN ORDER TO DETERMINE  
12 WHETHER A READING WAS FAIR USE BEFORE REQUESTING THAT IT BE  
13 POSTED ON ERES.

14 Q. WHEN YOU CONDUCTED YOUR ANALYSIS IN 2009, DID YOU ATTEMPT  
15 TO CONDUCT THAT ANALYSIS THOROUGHLY?

16 A. YES.

17 Q. DID YOU ATTEMPT TO DO IT IN GOOD FAITH?

18 A. YES.

19 Q. NOW PAGE 1 OF THE FAIR USE CHECKLIST REFERS TO A FACTOR 1,  
20 PURPOSE AND CHARACTER OF THE USE; DO YOU SEE THAT?

21 A. I DO.

22 Q. AND UPON COMPLETING YOUR ANALYSIS OF THAT SECTION, DID YOU  
23 REACH A CONCLUSION ABOUT WHETHER FACTOR 1 WEIGHED IN FAVOR OF  
24 FAIR USE?

25 A. YES, I DID.

1 Q. AND WHAT DID YOU CONCLUDE WITH RESPECT TO FACTOR 1?

2 A. I CONCLUDED THAT IT WEIGHED IN FAVOR OF FAIR USE.

3 Q. HOW DID YOU REACH THAT CONCLUSION?

4 A. WELL, I EXAMINED EACH OF THE FACTORS AND FOUND THAT  
5 OVERALL THE FACTORS WEIGHING IN FAVOR OF FAIR USE WERE MORE  
6 PRESENT WITH RESPECT TO THE ARTICLE.

7 Q. AND WHEN YOU SAY --

8 A. TO THE BOOK CHAPTER.

9 Q. WHEN YOU SAY YOU EVALUATED THE FACTORS, WHICH FACTORS ARE  
10 YOU REFERRING TO?

11 A. THE FACTORS LISTED THERE ON THE FIRST PAGE; IN OTHER  
12 WORDS, I DETERMINED THAT THE READING WAS NONPROFIT,  
13 EDUCATIONAL, THAT IT WAS FOR TEACHING AND THAT IT WAS NECESSARY  
14 TO ACHIEVE MY INTENDED EDUCATIONAL PURPOSE.

15 Q. WHY DID YOU SELECT NONPROFIT EDUCATIONAL FOR THIS  
16 PARTICULAR WORK?

17 A. WELL ESSENTIALLY TWO REASONS. THE FIRST IS THAT ON A  
18 PERSONAL LEVEL THIS IS NONPROFIT BECAUSE I DON'T RECEIVE ANY  
19 PROFIT PERSONALLY FROM POSTING IT, AND, IN FACT, IT WOULD BE  
20 EASIER FOR ME JUST TO USE A SINGLE TEXTBOOK. SO IT WAS  
21 NONPROFIT IN THAT SENSE.

22 AND, OF COURSE, EDUCATIONAL BECAUSE IT WAS FOR A  
23 CLASS, AND THEN IN THE BROADER SENSE, THE UNIVERSITY IS A  
24 NONPROFIT UNIVERSITY AND AN EDUCATIONAL INSTITUTION.

25 Q. NOW YOU ALSO SELECTED TEACHING UNDER FACTOR 1. WHY DID



1 YOU SELECT THAT?

2 A. I SELECTED IT BECAUSE THE PURPOSE OF ASSIGNING IT WAS FOR  
3 TEACHING.

4 Q. AND YOU ALSO SELECTED USE AS NECESSARY TO ACHIEVE  
5 YOUR INTENDED EDUCATIONAL PURPOSE. WHY DID YOU SELECT THAT  
6 FACTOR?

7 A. WELL ESSENTIALLY FOR THE REASONS THAT I HIGHLIGHTED  
8 EARLIER, YOU KNOW, I'M VERY CAREFUL IN CONSTRUCTING MY SYLLABI,  
9 AND I LIKE TO GET A VARIETY OF READINGS TO PROVIDE THE STUDENTS  
10 WITH A VARIETY OF DIFFERENT VIEWPOINTS.

11 U.S. FOREIGN POLICY IS OBVIOUSLY A CONTESTED AND  
12 CONTROVERSIAL TOPIC. SO I WANT TO MAKE SURE THAT A WIDE  
13 VARIETY OF VIEWPOINTS ARE CONSIDERED, AND SO WHEN I MAKE THE  
14 SYLLABUS, I REVIEW A WIDE VARIETY OF READINGS, BOTH THOSE OWNED  
15 BY MYSELF AND BY THE LIBRARY, AND I DETERMINED THAT THIS  
16 PARTICULAR READING WAS NECESSARY BECAUSE, YOU KNOW, AS I SAID  
17 BEFORE IT'S NECESSARY TO EXPLAIN THE THEORIES TO HAVE A SINGLE  
18 CASE REFERENCE FOR THE STUDENTS SO THAT WE CAN SAY OKAY, WHAT  
19 WOULD A PSYCHOLOGICAL EXPLANATION OF THE IRAQ WAR LOOK LIKE,  
20 WHAT WOULD A CONGRESSIONAL EXECUTIVE POLITICAL EXPLANATION LOOK  
21 LIKE, AND SO THAT WAY THEY CAN UNDERSTAND THE THEORIES BETTER.

22 Q. OKAY. I NOTICED YOU DIDN'T SELECT CRITICISM, COMMENT,  
23 NEWS REPORTING OR PARODY. DO YOU HAVE A BELIEF AS TO WHETHER  
24 YOUR USE WENT TO ANY OF THOSE FACTORS LISTED THERE?

25 A. WELL, I DECIDED TO ERR ON THE SIDE OF CAUTION. I THINK

1 ONE COULD MAKE THE ARGUMENT THAT THIS PIECE WAS A PIECE OF  
2 CRITICISM OR COMMENT IN THE SENSE THAT THERE WAS AN ANALYSIS OF  
3 THE IRAQ WAR CONTAINED WITHIN IT.

4 BUT, ON THE OTHER HAND, I THOUGHT THAT IT WAS A  
5 FAIRLY SCHOLARLY STUDY, AND CRITICISM SOMETIMES IMPLIES  
6 SOMETHING LIKE AN EDITORIAL WHICH YOU MIGHT FIND IN A NEWSPAPER  
7 WHICH THIS ISN'T. IT'S FAIRLY BALANCED.

8 AND SO FAR THAT REASON TO ERR ON THE SIDE OF CAUTION,  
9 I DECIDED NOT TO CHECK THAT, BUT I THINK ONE COULD POTENTIALLY  
10 MAKE AN ARGUMENT FOR CHECKING IT.

11 Q. WOULD YOU SAY YOUR USE OF THAT WORK, I MEAN WOULD THAT  
12 FALL WITHIN EITHER COMMENT OR CRITICISM?

13 A. MY USE OF THE WORK?

14 Q. YOUR DISCUSSION OF THE WORK IN CLASS?

15 A. NO, WELL, THE WAY THAT WE USE THE WORK PRIMARILY WAS TO  
16 EXPLAIN THE THEORETICAL PERSPECTIVES. SO WE WEREN'T PRIMARILY  
17 INTERESTED IN DISCUSSING WHETHER THE IRAQ WAR WAS GOOD OR BAD  
18 POLICY. WE WERE TRYING TO UNDERSTAND THE DECISION WITHIN THE  
19 CONTEXT OF THESE DIFFERENT EXPLANATIONS. IN THAT SENSE I GUESS  
20 IT COULD BE COMMENT, PERHAPS NOT CRITICISM.

21 Q. FACTOR 1 OF THE CHECKLIST ALSO LISTS TRANSFORMATIVE ON THE  
22 LEFT-HAND SIDE OF THE CHECKLIST, BUT IT ALSO LISTS  
23 NONTRANSFORMATIVE ON THE RIGHT-HAND SIDE OF THE CHECKLIST,  
24 CORRECT?

25 A. THAT'S CORRECT.

1 Q. AND IS IT TRUE YOU DIDN'T SELECT EITHER ONE OF THOSE?

2 A. THAT'S CORRECT.

3 Q. CAN YOU EXPLAIN WHY YOU DID NOT SELECT EITHER  
4 TRANSFORMATIVE OR NONTRANSFORMATIVE?

5 A. WELL, THIS WAS AGAIN SORT OF ERRING ON THE SIDE OF  
6 CAUTION. MY SENSE WAS THAT THE USE OF THE READING COULD BE  
7 THOUGHT OF EITHER AS TRANSFORMATIVE OR NONTRANSFORMATIVE IN THE  
8 SENSE THAT THERE IS A THEORETICAL EXPLANATION CONTAINED WITHIN  
9 THE READING AND THAT'S THE -- YOU KNOW, AS IT'S ENTITLED THAT'S  
10 THE IMPERIAL PRESIDENCY ARGUMENT.

11 THE AUTHORS ARE TRYING TO DETERMINE WHETHER OR NOT  
12 THE IMPERIAL PRESIDENCY WHICH IS A TERM THAT'S USED TO DESCRIBE  
13 STRONGER PRESIDENTIAL POWER VIS-A-VIS CONGRESS THAT EXISTED  
14 DURING THE COLD WAR BUT THAT WENT AWAY IN THE POST COLD WAR  
15 PERIOD AS CONGRESS REASSERTED ITSELF.

16 THE AUTHORS ARE TRYING TO DETERMINE WHETHER IN THE  
17 POST SEPTEMBER 11TH WORLD WE'RE BACK TO AN IMPERIAL PRESIDENCY  
18 SITUATION. SO THERE IS THAT THEORETICAL ARGUMENT, BUT MOST OF  
19 THE READING IS ACTUALLY EMPIRICAL DETAIL ABOUT THE ACTUAL  
20 DECISION.

21 SO MY SENSE WAS THAT MY USE OF IT WAS TRANSFORMATIVE  
22 IN THE SENSE THAT MY PRIMARY PURPOSE IN ASSIGNING IT WAS NOT TO  
23 GET THE IMPERIAL PRESIDENCY ARGUMENT OUT THERE. MY PURPOSE WAS  
24 BASICALLY TO GET THE EMPIRICAL DETAIL OUT THERE SO WE COULD  
25 APPLY THE VARIOUS THEORETICAL PERSPECTIVES TO THAT EMPIRICAL

1 DETAIL. SO IN THAT SENSE I THOUGHT WELL THIS MAY BE  
2 TRANSFORMATIVE.

3 ON THE OTHER HAND, THE READING, A CENTRAL PART OF THE  
4 READING IS THE EMPIRICAL DETAIL OF THE DECISION, AND SO I  
5 THOUGHT WELL ONE COULD POTENTIALLY ARGUE THAT THIS IS  
6 NONTRANSFORMATIVE AS WELL IN THE SENSE THAT THE EMPIRICAL  
7 DETAIL WAS AN INTENDED, YOU KNOW, SOMETHING THAT WAS INTENDED  
8 TO BE IMPORTANT BY THE AUTHORS.

9 SO TO ERR ON THE SIDE OF CAUTION, I DECIDED NOT TO  
10 CHECK EITHER ONE AS OPPOSED I COULD HAVE CHECKED BOTH AND IT  
11 WOULD HAVE HAD THE SAME IMPACT.

12 Q. NOW LOOKING AT THE SECOND PAGE OF YOUR FAIR USE CHECKLIST,  
13 FACTOR 2, NATURE OF THE COPYRIGHTED WORK; DO YOU SEE THAT?

14 A. I DO.

15 Q. AND UPON COMPLETING THAT SECTION DID YOU REACH A  
16 CONCLUSION ABOUT WHETHER FACTOR 2 WEIGHED IN FAVOR OF FAIR USE?

17 A. I DID.

18 Q. WHAT DID YOU CONCLUDE?

19 A. I CONCLUDED THAT IT DID WEIGH IN FAVOR OF FAIR USE.

20 Q. AND WHAT WERE YOUR REASONS FOR CONCLUDING THAT THIS FACTOR  
21 2 WEIGHED IN FAVOR OF FAIR USE?

22 A. WELL, AS YOU SEE THERE THAT IT'S A PUBLISHED WORK, THAT  
23 IT'S A FACTUAL OR NONFICTION WORK AND THAT IT WAS IMPORTANT TO  
24 MY EDUCATIONAL OBJECTIVES.

25 Q. AND YOU SELECTED PUBLISHED WORK BECAUSE?

1 A. BECAUSE IT'S PUBLISHED.

2 Q. WHAT WAS YOUR REASON FOR SELECTING FACTUAL OR NONFICTION?

3 A. BECAUSE IT'S FACTUAL AND NONFICTION.

4 Q. AND NOW WHY DID YOU SELECT IMPORTANT TO EDUCATIONAL  
5 OBJECTIVES?

6 A. WELL, YOU KNOW, I EXAMINE A WIDE VARIETY OF DIFFERENT  
7 READINGS, AND IN LOOKING FOR -- I THOUGHT THE IRAQ WAR WOULD BE  
8 A GOOD EMPIRICAL REFERENCE FOR THE PURPOSES THAT I WANTED.

9 SO I LOOKED FOR A LOT OF READINGS ON THE IRAQ WAR,  
10 AND I FOUND THAT, NOT SURPRISINGLY, MANY OF THEM ARE QUITE  
11 POLITICAL, THEY TAKE ONE SIDE OR THE OTHER, AND I WANTED  
12 SOMETHING THAT WAS QUITE BALANCED AND THAT JUST SORT OF LAID  
13 OUT THE DECISIONMAKING PROCESS, AND I FOUND THIS TO BE THE BEST  
14 READING AVAILABLE FOR THAT TOPIC, AND SO FOR THAT REASON I  
15 CONSIDERED IT TO BE IMPORTANT.

16 Q. NOW ALSO ON PAGE 2 THERE IS A REFERENCE TO FACTOR 3,  
17 AMOUNT AND SUBSTANTIALITY OF THE PORTION USED; DO YOU SEE THAT?

18 A. I DO.

19 Q. UPON COMPLETING THAT SECTION DID YOU REACH A CONCLUSION  
20 ABOUT WHETHER FACTOR 3 WEIGHED IN FAVOR OF FAIR USE?

21 A. I DID.

22 Q. AND WHAT DID YOU CONCLUDE?

23 A. I CONCLUDED THAT IT DID.

24 Q. AND WHY DID YOU REACH THAT CONCLUSION; WHAT WAS THE BASIS  
25 FOR THAT?

1 A. WELL THAT A SMALL PORTION OF THE WORK WAS USED, THAT THE  
2 PORTION WAS NOT CENTRAL TO THE ENTIRE WORK, AND THAT THE AMOUNT  
3 TAKEN WAS NARROWLY TAILORED TO THE INSTRUCTIONAL PURPOSE.

4 Q. AND COULD YOU EXPLAIN TO US HOW YOU CAME ABOUT DECIDING  
5 THAT ONLY A SMALL PORTION OF THE WORK WAS USED?

6 A. WELL, I APPLY A VERY STRICT 20 PERCENT RULE WHICH WAS MY  
7 UNDERSTANDING OF UNIVERSITY POLICY, AND I'VE BEEN APPLYING THAT  
8 RULE, YOU KNOW, SINCE BEFORE THE NEW POLICY AND GOING FORWARD  
9 INTO THE NEW POLICY, AND SO I ESSENTIALLY NEVER REQUEST  
10 ANYTHING TO BE POSTED IF IT CONSTITUTES MORE THAN 20 PERCENT OF  
11 THE BOOK.

12 AND THE WAY THAT I PERFORM THAT ANALYSIS IS BY  
13 LOOKING AT THE LAST NUMBERED PAGE. SO MY ANALYSIS DOES INCLUDE  
14 INDICES FREQUENTLY, BUT IT DOESN'T INCLUDE THE ROMAN NUMERAL  
15 FRONT MATERIAL, AND THEN I OBVIOUSLY DIVIDE THAT BY FIVE AND I  
16 MAKE SURE THAT THE READING IS SMALLER THAN THAT.

17 SO IN THIS CASE AS WE SAID EARLIER THE READING WAS  
18 ACTUALLY LESS THAN 10 PERCENT OF THE BOOK AND SO FOR THAT  
19 REASON I CHECKED SMALL PORTION OF THE WORK USED.

20 Q. AND YOU ALSO SELECTED THAT THE PORTION USED WAS NOT  
21 CENTRAL OR SIGNIFICANT TO THE ENTIRE WORK AS A WHOLE. WHY DID  
22 YOU SELECT THAT FACTOR?

23 A. WELL, THIS IS A COLLECTION OF ANALYSES OF DIFFERENT U.S.  
24 FOREIGN POLICY DECISIONS AUTHORED BY DIFFERENT PEOPLE, AND SO  
25 MY SENSE WAS THAT BECAUSE THE PARTICULAR CHAPTER DID NOT

1 INCLUDE AN ANALYSIS OR DISCUSSION OF AN OVERARCHING THEORETICAL  
2 OR EMPIRICAL THEME OF THE BOOK THAT IT WASN'T CENTRAL TO THE  
3 OVERALL WORK AS A WHOLE.

4 Q. AND THEN, FINALLY, YOU SELECTED THE AMOUNT TAKEN IS  
5 NARROWLY TAILORED TO THE EDUCATIONAL PURPOSE SUCH AS CRITICISM,  
6 COMMENT, RESEARCH OR SUBJECT BEING TAUGHT. WHY DID YOU SELECT  
7 THAT FACTOR?

8 A. WELL AS I SAID BEFORE THERE IS SOME THEORETICAL MATERIAL  
9 THAT I WASN'T THAT INTERESTED IN ASSIGNING. THAT MATERIAL WAS  
10 VERY MUCH SORT OF INTERSPERSED WITH THE EMPIRICAL MATERIAL, AND  
11 SO I ONLY ESSENTIALLY ASSIGNED THE PORTIONS OF THE READING THAT  
12 WERE REALLY NECESSARY TO GET THE EMPIRICAL MATERIAL, AND IN  
13 FACT THAT WAS THE ENTIRE CHAPTER BECAUSE EVERY PAGE HAD SOME OF  
14 THAT EMPIRICAL MATERIAL ON IT.

15 Q. THE SECOND PAGE ALSO LISTS FACTOR 4, EFFECT ON MARKET FOR  
16 THE ORIGINAL?

17 A. YES.

18 Q. UPON COMPLETING THIS SECTION FOR FACTOR 4, DID YOU REACH A  
19 CONCLUSION ABOUT WHETHER FACTOR 4 WEIGHED IN FAVOR OF FAIR USE?

20 A. I DID.

21 Q. AND WHAT WAS YOUR CONCLUSION?

22 A. I CONCLUDED THAT IT DID WEIGH IN FAVOR OF FAIR USE.

23 Q. AND HOW DID YOU REACH THAT CONCLUSION WITH RESPECT TO  
24 FACTOR 4?

25 A. WELL, I LOOKED AT ALL THE FACTORS THERE, AND I CHECKED

1 THAT THERE WAS NO SIGNIFICANT EFFECT ON THE MARKET, AND THAT IN  
2 FACT THE USE WOULD STIMULATE THE MARKET OF THE ORIGINAL WORK,  
3 AND THEN I ALSO CHECKED THAT NO SIMILAR PRODUCT WAS MARKETED BY  
4 THE COPYRIGHT HOLDER, THAT PERMISSION WAS UNAVAILABLE AND THAT  
5 I OWNED THE WORK AND THAT THE ACCESS WOULD BEING RESTRICTED.

6 Q. OKAY. LET'S START WITH NO SIGNIFICANT EFFECT --

7 A. I ALSO CHECKED ON THE OTHER SIDE THAT IT WAS REQUIRED  
8 CLASSROOM READING BUT THAT WAS OUTWEIGHED.

9 Q. OKAY. LET'S START WITH NO SIGNIFICANT EFFECT ON THE  
10 MARKET OR POTENTIAL MARKET FOR THE COPYRIGHTED WORK. WHY DID  
11 YOU SELECT THAT FACTOR?

12 A. WELL, I SELECTED THAT FACTOR BECAUSE I WOULD NOT HAVE --  
13 IF UNABLE TO POST THIS CHAPTER TO ERES, I WOULD NOT HAVE  
14 ASSIGNED THE STUDENTS TO PURCHASE THE ENTIRE BOOK, AND SO IN MY  
15 JUDGMENT IT WASN'T AN EITHER/OR, AND SO I DIDN'T FEEL THAT BY  
16 ASSIGNING THIS I WAS REDUCING THE PROBABILITY OF PURCHASE.

17 Q. AND WHY DID YOU SELECT THAT THE USE STIMULATES THE MARKET  
18 FOR THE ORIGINAL WORK?

19 A. WELL, BECAUSE MY UNDERSTANDING AND MY BELIEF WAS THAT THE  
20 STUDENTS MIGHT READ THE WORK AND BE ATTRACTED BY IT. IT WAS A  
21 HIGH QUALITY WORK WHICH IS WHY I PUT IT ON THE SYLLABUS, AND  
22 THAT THEY MIGHT, YOU KNOW, WANT TO PURCHASE THE ENTIRE BOOK TO  
23 HAVE ACCESS TO THE REMAINING CHAPTERS.

24 AND I THINK IT'S WORTH NOTING IN THAT RESPECT THAT  
25 THERE IS A TERM PAPER -- THERE IS A TERM PAPER ASSIGNED IN THE



1 CLASS AS YOU CAN SEE IF YOU FLIP FURTHER IN THE SYLLABUS, AND  
2 THE TERM PAPER REQUIRES THAT THE STUDENTS SELECT ANY THREE OF  
3 THE THEORETICAL EXPLANATIONS AND USE THEM TO EXPLAIN ANY U.S.  
4 FOREIGN POLICY DECISION WITH THE EXCEPTION OF THE IRAQ WAR  
5 BECAUSE THAT WAS THE ONE WE USED IN CLASS.

6           AND SO IT SEEMS TO ME, YOU KNOW, THEY COULD --  
7 BECAUSE THE BOOK CONTAINS ANALYSES OF A VARIETY OF OTHER U.S.  
8 FOREIGN POLICY DECISIONS, THEY MIGHT HAVE BEEN INSPIRED TO  
9 PURCHASE THE BOOK IN ORDER TO USE IT AS A SOURCE FOR THE TERM  
10 PAPER WHICH DID REQUIRE SOURCES NOT ASSIGNED ON THE SYLLABUS.

11 Q.    YOU ALSO SELECTED NO SIMILAR PRODUCT MARKETED BY THE  
12 COPYRIGHT HOLDER. WHY DID YOU SELECT IS SUBFACTOR?

13 A.    WELL, I SELECTED THAT BECAUSE, AS I SAID BEFORE, BEFORE I  
14 CHOSE A READING TO PUT ON A SYLLABUS I LOOK AT A WIDE VARIETY  
15 OF READINGS TO TRY TO CHOOSE THE BEST ONE, AND SO I DIDN'T FIND  
16 ANY OTHER SIMILAR PRODUCT OR SIMILAR READING AVAILABLE IN MY  
17 LIBRARY OR IN THE UNIVERSITY LIBRARY.

18 Q.    AND THEN ALSO WITH RESPECT TO LICENSING OR PERMISSION  
19 UNAVAILABLE, WHY DID YOU SELECT THAT SUBFACTOR?

20 A.    WELL, I DON'T REMEMBER THE EXACT ANALYSIS THAT I USED  
21 THERE. MY SENSE IS THAT IT GOES BACK TO A BAD EXPERIENCE I HAD  
22 OR TWO BAD EXPERIENCES I HAD WITH COURSEPACKS. I ASSIGNED --  
23 INSTEAD OF USING ERES FOR TWO SEMESTERS FOR A DIFFERENT CLASS  
24 FROM THIS ONE, TWO DIFFERENT CLASSES, I USED A COURSEPACK --

25           MR. KRUGMAN: YOUR HONOR, I OBJECT ON RELEVANCE

1 GROUND AND TESTIFYING ON MATTERS THAT ARE NOT AT ISSUE IN THIS  
2 CASE WITH RESPECT TO THE WORKS ON THE JOINT EXHIBIT.

3 THE COURT: OVERRULED.

4 THE WITNESS: AND SO IN MY PRIOR EXPERIENCE WITH THE  
5 COURSEPACK, IT COST I BELIEVE MORE THAN 90 DOLLARS, BETWEEN 90  
6 AND A HUNDRED DOLLARS FOR A FAIRLY SMALL GROUP OF PHOTOCOPIED  
7 READINGS, AND I RECEIVED A LOT OF COMPLAINTS FROM STUDENTS.

8 GEORGIA STATE STUDENTS ARE PRETTY PRICE SENSITIVE.  
9 MANY OF THEM ARE PAYING THEIR WAY THROUGH COLLEGE, AND SO I  
10 RECEIVED A LOT OF COMPLAINTS, AND ALSO, IF I REMEMBER  
11 CORRECTLY, THE COURSEPACK WAS DELIVERED A BIT LATE AFTER THE  
12 CLASS HAD STARTED BECAUSE OF THE TIME IT TOOK TO PUT IT  
13 TOGETHER, AND SO I BELIEVE THAT THAT WAS RUNNING THROUGH MY  
14 HEAD WHEN I CHECKED THAT PARTICULAR FACTOR.

15 Q. YOU SELECTED USER OWNS LAWFULLY ACQUIRED OR PURCHASED COPY  
16 OF THE ORIGINAL WORK. DO YOU OWN A COPY OF THIS WORK?

17 A. YES.

18 Q. AND YOU SELECTED RESTRICTED ACCESS. WHY DID YOU SELECT  
19 THAT PARTICULAR FACTOR?

20 A. BECAUSE THE ACCESS IS PASSWORD PROTECTED TO STUDENTS IN  
21 THE CLASS, AND ALSO BECAUSE AT THE END OF THE SEMESTER THE  
22 ACCESS IS TAKEN DOWN FROM THE WEBSITE FROM THE SERVER.

23 Q. NOW ON RIGHT-HAND SIDE OF THE CHECKLIST AS YOU POINTED  
24 OUT, YOU HAD SELECTED REQUIRED CLASSROOM READING. WHY DID YOU  
25 SELECT THAT?

1 A. BECAUSE IT WAS A REQUIRED READING.  
2 Q. FOR YOUR COURSE?  
3 A. FOR MY CLASS, YEAH.  
4 Q. SO ONCE YOU COMPLETED THE CHECKLIST FOR ALL OF THESE FOUR  
5 FACTORS, DID YOU ARRIVE AT AN OVERALL CONCLUSION ABOUT WHETHER  
6 YOUR USE OF THIS PARTICULAR EXCERPT WOULD CONSTITUTE A FAIR  
7 USE?  
8 A. I DID. CAN I MENTION THAT NO LONGER IN PRINT, SOMETHING  
9 ABOUT THAT OR IS THAT --  
10 Q. SURE. YOU DIDN'T SELECT NO LONGER IN PRINT?  
11 A. I DIDN'T SELECT NO LONGER IN PRINT. WELL JUST LOOKING AT  
12 IT NOW, WHICH I HADN'T REALIZED AT THE TIME, BUT I BELIEVE THE  
13 BOOK -- I HAVEN'T VERIFIED IT, BUT IT'S POSSIBLE THAT THE BOOK  
14 IS NO LONGER IN PRINT AND I MAY HAVE BEEN ABLE TO CHECK THAT  
15 BECAUSE I BELIEVE THERE'S A NEW EDITION.  
16 SO IT'S POSSIBLE THAT THAT ALSO COULD HAVE BEEN  
17 CHECKED, BUT IN ANY CASE, YOU KNOW, GOING BACK TO YOUR EARLIER  
18 QUESTION, THE OVERALL ANALYSIS ONE WAY OR THE OTHER WEIGHED IN  
19 FAVOR OF FAIR USE.  
20 Q. OKAY. NOW TURNING BACK TO YOUR SYLLABUS ON PAGE 6, THERE  
21 WAS ANOTHER READING ASSIGNMENT THAT YOU HAD ASSIGNED I BELIEVE  
22 FROM A BOOK CALLED U.S. FOREIGN POLICY?  
23 A. THAT'S RIGHT, IT'S BY HOOK.  
24 Q. SO PAGE 6 MARKED GEORGIA STATE 66010 OF DEFENDANTS'  
25 EXHIBIT 623, THERE IS A WORK THERE BY HOOK AS YOU POINTED OUT

1 U.S. FOREIGN POLICY; DO YOU SEE THAT?  
2 A. I DO.  
3 Q. CAN YOU DESCRIBE FOR ME GENERALLY WHAT IS U.S. FOREIGN  
4 POLICY?  
5 A. WHAT THE BOOK IS?  
6 Q. WHAT THE BOOK IS.  
7 A. WE'RE GOING TO BE HERE ALL DAY.  
8 Q. IN THE CONTEXT OF YOUR CLASS.  
9 A. YEAH, NEVER ASK A PROFESSOR TO TALK LIKE THAT.  
10 THE BOOK IS ESSENTIALLY A BOOK THAT COVERS ALL  
11 ASPECTS OF U.S. FOREIGN POLICY. THERE'S AN HISTORICAL SECTION  
12 AT THE BEGINNING, AND THEN THERE'S AN ANALYSIS OF A VARIETY OF  
13 TOPICS THAT INCLUDE THE FOREIGN POLICY BUREAUCRACY, BUT ALSO  
14 THE PRESIDENCY, CONGRESS, I BELIEVE PUBLIC OPINION IS IN THERE,  
15 AND THEN THERE'S A DISCUSSION OF ECONOMICS, STATE CRAFT AND  
16 STRATEGIC AND MILITARY ISSUES.  
17 Q. I'M SORRY DID YOU SAY IT WAS FICTION OR NONFICTION?  
18 A. NONFICTION.  
19 Q. WHAT EXCERPT DID YOU ASSIGN FROM THIS BOOK U.S. FOREIGN  
20 POLICY?  
21 A. CHAPTER 6 WHICH WAS ENTITLED -- A CHAPTER ENTITLED FOREIGN  
22 POLICY BUREAUCRACY.  
23 Q. AND YOU UNDERSTAND THAT THE PLAINTIFFS HAVE ALLEGED THAT  
24 YOUR USE OF THIS PARTICULAR EXCERPT FROM THIS BOOK INFRINGES  
25 ONE OF THEIR COPYRIGHTS?

1 A. I DO.

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

3 THE COURT: YES.

4 BY MS. MOFFITT:

5 Q. I'VE HANDED YOU WHAT'S BEEN MARKED DEFENSE EXHIBIT 777.

6 DO YOU RECOGNIZE THAT BOOK?

7 A. I DO.

8 Q. OKAY. AND IS THIS A COPY OF THE EDITION OF THE BOOK

9 FROM WHICH YOU ASSIGNED THE FOREIGN POLICY BUREAUCRACY EXCERPT?

10 A. IT IS.

11 MS. MOFFITT: YOUR HONOR, WE'D MOVE DEFENSE EXHIBIT

12 777 INTO EVIDENCE.

13 MR. KRUGMAN: NO OBJECTION.

14 THE COURT: IT'S ADMITTED.

15 BY MS. MOFFITT:

16 Q. DO YOU RECALL WHAT SPECIFIC PAGES YOU ASSIGNED AS A

17 READING FROM THIS BOOK?

18 A. 153 TO 186.

19 Q. HOW MANY PAGES IS THAT ROUGHLY?

20 A. 34, JUST LIKE THE OTHER ONE.

21 Q. AND HOW LONG IS THE BOOK; HOW MANY PAGES ARE IN THAT BOOK?

22 A. 487.

23 Q. PERCENTAGE WISE ROUGHLY HOW MUCH WOULD YOU SAY YOU USED OF

24 THAT PARTICULAR BOOK FOR A READING IN THIS CLASS?

25 A. AGAIN BETWEEN 5 AND 10 PERCENT.

1 Q. NOW DID YOU ASSIGN THE FOREIGN POLICY BUREAUCRACY EXCERPT  
2 FOR A PARTICULAR CLASS OF YOUR COURSE?

3 A. I DID.

4 Q. AND WHAT WAS THE SUBJECT MATTER OF THE CLASS -- WHICH  
5 CLASS?

6 A. THE EXECUTIVE BRANCH DEPARTMENTS, ROLES, TENSIONS AND  
7 REFORM.

8 Q. OKAY. AND WHAT WAS THE SUBJECT MATTER OF THAT PARTICULAR  
9 CLASS IN THIS COURSE?

10 A. WELL, WE WERE ESSENTIALLY BEGINNING BY EXPLAINING HOW THE  
11 EXECUTIVE BRANCH WORKS WITH RESPECT TO FOREIGN POLICY WHICH IS  
12 ACTUALLY PRETTY COMPLICATED, BUT, YOU KNOW, WHAT IS THE STATE  
13 DEPARTMENT, WHAT IS THE DEFENSE DEPARTMENT, THE INTELLIGENCE  
14 COMMUNITY AND SO ON AND HOW THEY INTERACT.

15 AND THEN SORT OF THE MEAT OF IT WAS TO LOOK AT A  
16 COUPLE OF THEORETICAL PERSPECTIVES THAT ARE OUT THERE FOR  
17 EXPLAINING HOW DIFFERENT STRUCTURES IN THE EXECUTIVE BRANCH  
18 EFFECT HOW DECISIONS ARE MADE.

19 SO THE PURPOSE -- THAT WAS BASICALLY THE PURPOSE OF  
20 THE CLASS TO EXPLAIN HOW THE EXECUTIVE BRANCH FUNCTIONS AND  
21 THEN TO EXPLAIN THEORETICAL PERSPECTIVES ON UNDERSTANDING HOW  
22 IT EFFECTS DECISIONMAKING.

23 Q. NOW WHY DID YOU ASSIGN THIS PARTICULAR READING FOREIGN  
24 POLICY BUREAUCRACY FOR THAT CLASS?

25 A. WELL, AGAIN, I LOOK AT A WIDE VARIETY OF READINGS TO MAKE

1 SURE I GET THE BEST ONE, AND I THOUGHT THIS WAS THE BEST OUT  
2 THERE FOR ESSENTIALLY EXPLAINING THE NUTS AND BOLTS OF HOW THE  
3 FOREIGN POLICY BUREAUCRACY WORKS. IT DOES A VERY GOOD OF DOING  
4 THAT. SO THE PRIMARY PURPOSE OF THIS READING WAS TO GET THE  
5 NUTS AND BOLTS DOWN OF THE FOREIGN POLICY BUREAUCRACY.

6 THE OTHER READINGS FOCUS A LITTLE BIT MORE ON  
7 SPECIFIC ASPECTS, AND THEY ALSO FEED A LITTLE BIT MORE INTO THE  
8 THEORETICAL DISCUSSIONS THAT WE WERE HAVING.

9 Q. WAS THIS EXCERPT LOADED ON ERES?

10 A. IT WAS.

11 Q. AND WHAT STEPS DID YOU TAKE TO REQUEST THAT THIS EXCERPT  
12 BE LOADED ON ERESERVES?

13 A. WELL AS WITH THE OTHER ONE, I LOOKED AT THE -- PERFORMED A  
14 FAIR USE CHECK ANALYSIS, LOOKED AT THE FAIR USE CHECKLIST, AND  
15 THEN I ENTERED THE RELEVANT DETAILS, CLICKED THAT IT WAS FAIR  
16 USE AND CLICKED SEND.

17 Q. IF YOU COULD TURN TO DEFENSE EXHIBIT 481 IN YOUR NOTEBOOK,  
18 I'LL ASK YOU WHETHER YOU RECOGNIZE THAT DOCUMENT?

19 A. I DO.

20 Q. AND WHAT IS THIS?

21 A. IT'S THE FAIR USE CHECKLIST THAT I RECREATED PHYSICALLY  
22 FROM THE MENTAL FAIR USE CHECKLIST I DID IN SUMMER 2009, AND  
23 THIS I FILLED OUT IN NOVEMBER 2010.

24 Q. AND WHY DID YOU RECREATE THIS CHECKLIST AGAIN?

25 A. BECAUSE I WAS ASKED BY THE UNIVERSITY LEGAL AFFAIRS TO

1 RECREATE THE CHECKLIST THAT I HAD DONE MENTALLY BEFORE TEACHING  
2 THE CLASS.

3 Q. AND HOW DID YOU GO ABOUT COMPLETING THIS CHECKLIST FOR  
4 THIS PARTICULAR EXCERPT FOREIGN POLICY BUREAUCRACY?

5 A. WELL, I LOOKED AT THE READING AND AT THE CHECKLIST AND  
6 TRIED TO THINK BACK TO THE ANALYSIS THAT I PERFORMED IN 2009.

7 Q. AND YOU BELIEVE THAT THIS RECREATED CHECKLIST IS A FAIR  
8 AND ACCURATE RECREATION OF THE CHECKLIST YOU COMPLETED IN  
9 YOUR MIND BACK IN THE SUMMER OF 2009 FOR THIS PARTICULAR  
10 EXCERPT?

11 A. I DO.

12 MS. MOFFITT: YOUR HONOR, WE OFFER DEFENDANTS'  
13 EXHIBIT 481 INTO EVIDENCE.

14 MR. KRUGMAN: OBJECTION ON RELEVANCE GROUNDS, LACK OF  
15 PROPER FOUNDATION AND BEST EVIDENCE RULE.

16 THE COURT: I WILL ADMIT IT.

17 WE NEED TO TAKE A BREAK SOMEWHERE ALONG IN HERE.  
18 LET'S TAKE A 15-MINUTE BREAK NOW.

19 (RECESS)

20 THE COURT: BEFORE WE GET STARTED THERE ARE A COUPLE  
21 OF THINGS. ONE IS CONCERNING NEXT WEEK'S SCHEDULE. MONDAY IS  
22 A HOLIDAY. ON TUESDAY WE'LL START AT 11:00 AND WE'LL GO TO  
23 4:30. ON WEDNESDAY AND THURSDAY 9:30 TO 4:30, AND ON FRIDAY  
24 I'M THINKING ABOUT 9:30 TO 2:30, BUT I COULD BE TALKED INTO  
25 GOING LATER IF YOU ALL REALLY WANT TO.



1 I MEAN IT'S ALWAYS A TRADE OFF BETWEEN DO YOU WANT TO  
2 PRESS FORWARD AND FINISH THE CASE A LITTLE EARLY OR DO YOU WANT  
3 FRIDAY AFTERNOON OFF TO RECOVER FROM THE WEEK. I'M SAYING 9:30  
4 TO 2:30, AND IF YOU ALL HAVE OTHER THOUGHTS LET MS. HANNA KNOW.

5 MR. KRUGMAN: WE WILL, YOUR HONOR. THANK YOU.

6 THE COURT: THE OTHER THING, WE ARE GOING TO NEED TO  
7 MOVE FORWARD MORE QUICKLY THAN WE HAVE BEEN. I PERCEIVE THAT  
8 THERE WILL BE A LOT OF PROFESSOR WITNESSES. I'M JUST GUESSING  
9 THAT'S TRUE.

10 AND WHILE I REALIZE THE NEED TO GO OVER THESE  
11 CHECKLISTS, AND I'M SURE THAT THE DEFENDANTS WANT TO TRY TO  
12 SHOW THAT THE PROFESSORS DID A GOOD JOB OR AT LEAST A GOOD  
13 FAITH JOB.

14 MY PERCEPTION IS THAT THE QUESTIONING COULD BE A  
15 GREAT DEAL MORE COMPRESSED THAN IT HAS BEEN, AND I WOULD LIKE  
16 TO URGE BOTH SIDES TO THINK ABOUT HOW TO SHORTEN UP THE  
17 QUESTIONING OF EACH OF THESE WITNESSES, AND I WOULD LIKE FOR  
18 YOU ALL TO GIVE THAT A TRY AND SEE IF WE CAN MAKE IT WORK. I  
19 DON'T WANT TO IMPOSE TIME LIMITS. I DON'T LIKE TO DO THAT BUT  
20 I COULD DO THAT.

21 SO YOU ALL JUST TRY TO PICK UP THE PACE AND GET  
22 BEFORE -- YOU KNOW, MAYBE THE DAY BEFORE GET READY AND GET REAL  
23 ORGANIZED SO THAT YOU CAN MOVE THROUGH YOUR QUESTIONING  
24 RAPIDLY. I MEAN THE SUBJECT MATTER IS NOT COMPLEX. NONE OF US  
25 HAVE TO THINK TOO HARD TO TAKE IT IN.

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1 ALL RIGHT. YOU MAY PROCEED.

2 MS. MOFFITT: THANK YOU, YOUR HONOR. I WILL DO MY  
3 BEST TO COMPRESS THIS.

4 BY MS. MOFFITT:

5 Q. TURNING YOUR ATTENTION TO DEFENSE EXHIBIT 481 WHICH IS  
6 YOUR CHECKLIST FOR THE U.S. FOREIGN POLICY WORK, UNDER FACTOR  
7 1, PURPOSE AND CHARACTER OF THE USE, YOU CHECKED NONPROFIT  
8 EDUCATIONAL AND TEACHING. IS FOR THE SAME REASONS AS WE  
9 DISCUSSED BEFORE WITH YOUR OTHER CHECKLIST DX-480?

10 A. YES.

11 Q. YOU ALSO SELECTED HERE USE IS NECESSARY TO ACHIEVE YOUR  
12 INTENDED EDUCATIONAL PURPOSE. CAN YOU TELL ME WHY YOU SELECTED  
13 THAT PARTICULAR FACTOR?

14 A. I SELECTED THAT FACTOR BECAUSE AFTER REVIEWING A VARIETY  
15 OF POSSIBLE READINGS FOR EXPLAINING EXECUTIVE BRANCH POLITICS  
16 AND HOW THE EXECUTIVE BRANCH FUNCTIONS, IN MY JUDGMENT THIS WAS  
17 THE BEST ONE, AND IT WAS NECESSARY TO ACHIEVE THE PURPOSE OF  
18 EXPLAINING HOW THE EXECUTIVE BRANCH FUNCTIONS WHICH IS A KEY  
19 THING TO DO IN ANY U.S. FOREIGN POLICY CLASS.

20 Q. AND IN THIS SITUATION WITH RESPECT TO TRANSFORMATIVE AND  
21 NONTRANSFORMATIVE, I NOTICE YOU DIDN'T SELECT EITHER; IS THAT  
22 CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND CAN YOU EXPLAIN TO US WHY YOU DID NOT SELECT EITHER  
25 TRANSFORMATIVE OR NONTRANSFORMATIVE?

1 A. WELL SIMILAR TO THE LAST ONE, IN MY JUDGMENT THERE WERE  
2 ELEMENTS THAT WERE TRANSFORMATIVE IN THE SENSE THAT I WAS  
3 PUTTING FORWARD THE EMPIRICAL DATA AS TO HOW THE EXECUTIVE  
4 BRANCH WORKS FOR THE PURPOSE OF ANALYZING THEORIES THAT WERE  
5 EITHER NOT DISCUSSED OR NOT DISCUSSED IN DEPTH IN THE READING.  
6 SO I WAS USING IT FOR A DIFFERENT SORT OF PURPOSE.

7 ON THE OTHER HAND I THINK PROBABLY VIS-A-VIS THE LAST  
8 READING, THIS ONE WEIGHS A LITTLE MORE IN THE NONTRANSFORMATIVE  
9 SENSE BECAUSE THE PURPOSE WAS TO GET ACROSS THE EMPIRICAL  
10 READING. SO IN MY SENSE, YOU KNOW, IT WAS THE BEST THING TO DO  
11 WAS TO CHECK NEITHER OR POTENTIALLY TO CHECK BOTH.

12 Q. UPON EVALUATING ALL OF THE SUBFACTORS OF FACTOR 1, DID YOU  
13 REACH A CONCLUSION AS TO WHETHER FACTOR 1 WEIGHED IN FAVOR OF  
14 FAIR USE?

15 A. I DID.

16 Q. WHAT WAS THAT CONCLUSION?

17 A. THAT IT DID.

18 Q. AND TURNING TO PAGE 2 OF YOUR CHECKLIST DX-481, FACTOR 2,  
19 YOU SELECTED PUBLISHED WORK, FACTUAL OR NONFICTION WORK  
20 AND IMPORTANT TO EDUCATIONAL OBJECTIVES; WAS IT A PUBLISHED  
21 WORK?

22 A. YES.

23 Q. AND FACTUAL OR NONFICTION, WAS IT A FACTUAL OR NONFICTION  
24 WORK?

25 A. YES.

1 Q. WAS IT IMPORTANT TO YOUR EDUCATIONAL OBJECTIVES?

2 A. IT WAS IMPORTANT. I CONSIDERED IT TO BE IMPORTANT TO MY  
3 EDUCATIONAL OBJECTIVES.

4 Q. WHY IS THAT?

5 A. WELL GETTING ACROSS THE EMPIRICAL INFORMATION AS TO HOW  
6 THE EXECUTIVE BRANCH FUNCTIONS.

7 Q. OKAY. AND UPON EVALUATING FACTOR 2 OF THIS CHECKLIST, DID  
8 YOU REACH A CONCLUSION ABOUT WHETHER FACTOR 2 WEIGHED IN FAVOR  
9 OF FAIR USE?

10 A. I DID.

11 Q. TURNING THE FACTOR 3, AMOUNT AND SUBSTANTIALITY OF THE  
12 PORTION USED, UPON EVALUATING THAT SECTION DID YOU REACH A  
13 CONCLUSION AS TO WHETHER FACTOR 3 WEIGHED IN FAVOR OF FAIR USE?

14 A. I CONCLUDED THAT IT DID.

15 Q. OKAY. AND WHY IS THAT?

16 A. BECAUSE, AGAIN, A SMALL PORTION OF THE WORK WAS USED. I  
17 APPLY A STRICT 20 PERCENT RULE, AND IN THIS CASE THE READING  
18 CONSTITUTED LESS THAN 10 PERCENT OF THE BOOK.

19 I CONSIDERED THE PORTION USED NOT TO BE CENTRAL OR  
20 SIGNIFICANT TO THE ENTIRE WORK BECAUSE THE WORK IS NOT ENTIRELY  
21 ABOUT EXECUTIVE BRANCH POLITICS BUT RATHER FOCUSES ON A WIDE  
22 VARIETY OF DIFFERENT ASPECTS OF U.S. FOREIGN POLICY.

23 AND, FINALLY, I NARROWLY TAILORED THE CHAPTER TO MY  
24 EDUCATIONAL PURPOSE. THE CHAPTER BASICALLY COVERED ALL OF THE  
25 ASPECTS OF THE EXECUTIVE BRANCH STRUCTURE THAT I WANTED TO

1 COVER, AND I ASSIGNED THAT PORTION THAT DID.

2 Q. AND WAS THERE ANY PORTION IN THAT CHAPTER THAT YOU  
3 ASSIGNED THAT YOU DIDN'T NEED FOR YOUR PARTICULAR CLASS THAT  
4 YOU WERE TEACHING IN YOUR VIEW?

5 A. NO.

6 Q. TURNING TO FACTOR 4, EFFECT ON MARKET FOR THE ORIGINAL,  
7 UPON EVALUATING FACTOR 4 ON THE CHECKLIST, DID YOU REACH A  
8 CONCLUSION ABOUT WHETHER THAT FACTOR WEIGHED IN FAVOR OF FAIR  
9 USE?

10 A. I CONCLUDED THAT IT DID.

11 Q. AND WHAT WAS THE BASIS FOR YOUR CONCLUSION THAT IT DID  
12 WEIGH IN FAVOR OF FAIR USE?

13 A. WELL, I CONCLUDED THAT IT WOULD HAVE NO SIGNIFICANT EFFECT  
14 ON THE MARKET, AND THAT IT WOULD IN FACT STIMULATE THE MARKET  
15 FOR THE WORK, AND, AGAIN, AS YOU CAN SEE THERE THAT THERE WAS  
16 NO SIMILAR PRODUCT MARKETED, THAT LICENSING WAS NOT REASONABLY  
17 AVAILABLE AND THAT I OWNED THE BOOK AND THAT THE ACCESS WOULD  
18 BE RESTRICTED.

19 WITH RESPECT TO OWNING THE BOOK OR THE LIBRARY OWNING  
20 THE BOOK, JUST TO NOTE THAT FOR ME I'VE ALWAYS APPLIED THAT AS  
21 A STRICT RULE. IF I DON'T OWN THE BOOK OR THE LIBRARY DOESN'T  
22 OWN THE BOOK, I DON'T GET TO THE FAIR USE STAGE.

23 Q. AND WHAT DO YOU MEAN BY THAT YOU DON'T GET TO THE  
24 CHECKLIST STAGE?

25 A. WELL, I SIMPLY WOULDN'T PUT THE READING ON MY SYLLABUS,

1 AND, THEREFORE, I WOULDN'T FILL OUT A CHECKLIST IN ORDER TO  
2 DETERMINE WHETHER IT COULD BE REQUESTED.

3 Q. IS IT THE CASE THAT YOU ALWAYS FILL OUT A CHECKLIST FOR  
4 WORKS THAT YOU'RE CONSIDERING USING IN YOUR CLASS, OR ARE THERE  
5 INSTANCES WHERE YOU MIGHT CONSIDER USING A PARTICULAR READING  
6 FOR YOUR CLASS BUT THEN DECIDE NOT TO FILL OUT A FAIR USE  
7 CHECKLIST FOR THAT WORK?

8 MR. KRUGMAN: OBJECTION, LACK OF FOUNDATION. THE  
9 WITNESS TESTIFIED THAT HE DIDN'T FILL OUT THE CHECKLIST.

10 THE COURT: OVERRULED.

11 THE WITNESS: THE LATTER OF WHAT YOU SAID. I WOULD  
12 ONLY FILL OUT A CHECKLIST IF I HAD A REASONABLE -- IF I WANTED  
13 TO USE THE WORK SUBSTANTIVELY AND IF I HAD A REASONABLE  
14 EXPECTATION THAT IT WOULD BE CONSIDERED FAIR USE.

15 AND THE TWO SORT OF STRICT STANDARDS THAT I APPLY ARE  
16 THE OWNERSHIP PART. IF I DON'T OWN IT OR THE LIBRARY DOESN'T  
17 OWN IT, I DON'T PUT IT ON THE LIST, AND THE LENGTH OF THE WORK,  
18 I DON'T REQUEST ANYTHING MORE THAN 20 PERCENT.

19 Q. SO IF YOU WERE CONSIDERING A WORK AND YOU WANTED TO USE  
20 MORE THAN 20 PERCENT OF THAT PARTICULAR WORK, WOULD THERE EVER  
21 BE A SITUATION WHERE YOU WOULD FILL OUT A CHECKLIST FOR THAT  
22 READING AND REQUEST THAT IT BE LOADED TO ERES?

23 MR. KRUGMAN: SAME OBJECTION AS BEFORE, YOUR HONOR,  
24 HIS TESTIMONY IS HE DOESN'T PHYSICALLY COMPLETE CHECKLISTS.

25 THE COURT: OVERRULED.

1 THE WITNESS: COULD YOU SAY THE QUESTION AGAIN?

2 BY MS. MOFFITT:

3 Q. I'LL TRY. IF YOU WERE CONSIDERING A READING THAT YOU  
4 WANTED TO USE IN CLASS AND THAT READING WAS 20 PERCENT OR MORE  
5 OF THE ACTUAL WORK AT ISSUE, WOULD YOU FILL OUT A CHECKLIST FOR  
6 THAT READING THAT CONSTITUTED 20 PERCENT OR MORE OF THE BOOK?

7 A. NO, I WOULDN'T. IF IT CONSTITUTED MORE THAN 20 PERCENT, I  
8 WOULDN'T FILL OUT A CHECKLIST OR CONSIDER POSTING IT. I WOULD  
9 REDUCE THE LENGTH OR FIND A DIFFERENT READING.

10 Q. OKAY. WITH RESPECT TO FACTOR 4, NO SIGNIFICANT EFFECT ON  
11 THE MARKET OR POTENTIAL MARKET, WHY DID YOU SELECT THAT FACTOR?

12 A. I SELECTED THAT FACTOR BECAUSE IN MY JUDGMENT I WOULD NOT  
13 HAVE ASSIGNED THE TEXTBOOK FOR PURCHASE HAD I NOT BEEN ABLE TO  
14 POST THE READING ON ERES.

15 Q. AND IN TERMS OF USE STIMULATING THE MARKET FOR THE  
16 ORIGINAL WORK, WHAT WAS YOUR THINKING THERE?

17 A. WELL AS WITH THE LAST ONE, I THOUGHT THAT THE READERS  
18 MIGHT BE STIMULATED BY THE QUALITY OF THE READING TO PURCHASE  
19 THE ENTIRE WORK TO HELP THEM WITH STUDYING.

20 AND, AGAIN, IT'S WORTH NOTING THE PAPER THAT'S  
21 ASSIGNED FOR THE CLASS WHICH REQUIRED, AS I SAID BEFORE, THAT  
22 THE STUDENTS APPLY THREE OF THE THEORETICAL PERSPECTIVES TO ANY  
23 FOREIGN POLICY DECISION, AND JUST AS THE PREVIOUS READING COULD  
24 HAVE HELPED THEM WITH THE EMPIRICAL ANALYSIS OF THE DECISION,  
25 THIS READING COULD HELP THEM WITH UNDERSTANDING THE THEORIES

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1 THAT WE COVER BETTER BECAUSE THERE ARE OTHER PORTIONS OF THE  
2 BOOK THAT COVER IN A DIFFERENT ANGLE SOME OF THE THEORIES THAT  
3 WE'VE LOOKED AT.

4 Q. NO SIMILAR PRODUCT MARKETED BY THE COPYRIGHT HOLDER, WHY  
5 DID YOU SELECT THAT FACTOR?

6 A. BECAUSE I DID A CAREFUL LOOK AT A VARIETY OF SOURCES TO  
7 DETERMINE WHETHER THERE WERE PRODUCTS OF THIS QUALITY OR  
8 CHAPTERS OF THIS QUALITY ON THIS TOPIC AVAILABLE, AND I  
9 DETERMINED THAT THERE WEREN'T.

10 Q. AND FINALLY WITH RESPECT TO LICENSING OR PERMISSION  
11 UNAVAILABLE, WHAT WERE YOUR REASONS FOR SELECTING THAT FACTOR?

12 A. WELL AGAIN I DON'T REMEMBER THE SPECIFIC ANALYSIS, BUT I  
13 BELIEVE THAT IT RELATES BACK TO MY BAD EXPERIENCES WITH  
14 COURSEPACKS AND THE COST AND TIME INVOLVED THERE LED ME TO  
15 CONCLUDE, I BELIEVE, THAT THEY WERE NOT REASONABLY AVAILABLE.

16 Q. NOW UPON ANALYZING THE FOUR FACTORS OUTLINED IN THIS  
17 PARTICULAR CHECKLIST, DID YOU REACH AN OVERALL CONCLUSION WITH  
18 RESPECT TO THE FOUR FACTORS ABOUT WHETHER YOUR USE OF THIS  
19 EXCERPT WOULD BE A FAIR USE?

20 A. I DID. I CONCLUDED THAT IT WOULD BE.

21 Q. WOULD BE A FAIR USE?

22 A. WOULD BE FAIR USE.

23 Q. OKAY. AND AT SOME POINT IN TIME DID YOU COMMUNICATE TO  
24 THE LIBRARY THAT YOU WANTED THESE TWO EXCERPTS LOADED ONTO  
25 ERESERVES?

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1 A. I DID.

2 Q. IF YOU COULD TURN TO DEFENDANTS' EXHIBIT 508 IN YOUR  
3 NOTEBOOK, AND I'M GOING TO ASK YOU IF YOU RECOGNIZE THIS  
4 DOCUMENT?

5 A. I DO.

6 Q. WHAT IS IT?

7 A. IT APPEARS TO BE AN E-MAIL FROM THE LIBRARY RESERVES DESK  
8 TO ME DATED JULY 21ST, 2009 STATING THAT THEY HAD FINISHED  
9 UPLOADING ALL OF MY REQUESTED MATERIAL TO MY COURSE PAGE FOR  
10 U.S. FOREIGN POLICY GIVING ME THE PASSWORD AND NOTING THAT THE  
11 PAGE WOULD BE AVAILABLE TO ME FOR REVIEW ON AUGUST 10TH WHICH  
12 IS RIGHT AT THE BEGINNING OF FALL SEMESTER WHICH IS THE  
13 SEMESTER THAT THE READINGS WOULD BE UP.

14 Q. IN YOUR EXPERIENCE IS THIS A REGULAR PRACTICE OF THE  
15 LIBRARY TO SEND THIS TYPE OF AN E-MAIL TO YOU AFTER YOU'VE  
16 REQUESTED THAT CERTAIN READINGS BE LOADED TO ERES?

17 A. YES.

18 Q. AND IS IT YOUR REGULAR PRACTICE TO KEEP E-MAIL RECORDS  
19 SUCH AS THIS ONE IN THE ORDINARY COURSE OF YOUR WORK AS A  
20 PROFESSOR AT GEORGIA STATE WITH RESPECT TO YOUR READINGS?

21 A. YES.

22 MS. MOFFITT: YOUR HONOR, WE WOULD MOVE DEFENDANTS'  
23 EXHIBIT 508.

24 MR. KRUGMAN: NO OBJECTION.

25 THE COURT: IT'S ADMITTED.

1 BY MS. MOFFITT:

2 Q. I'D LIKE TO DIRECT YOUR ATTENTION TO THE FIRST PAGE OF  
3 DX-508. THERE'S A SECTION THERE ENTITLED MATERIAL NOT OWNED BY  
4 THE LIBRARY; DO YOU SEE THAT?

5 A. YES.

6 Q. AND UNDER THAT THERE IS A SECTION ENTITLED ELECTRONIC  
7 BOOK; DO YOU SEE THAT?

8 A. YES.

9 Q. AND THE FIRST ITEM LISTED IN THAT SECTION IS A BOOK TITLED  
10 CONTEMPORARY CASES IN U.S. FOREIGN POLICY; DO YOU SEE THAT?

11 A. YES.

12 Q. AND IS THAT ONE OF THE BOOKS THAT WE'VE BEEN DISCUSSING  
13 TODAY?

14 A. THAT'S CORRECT.

15 Q. AND A FEW LINES UP FROM THAT TITLE THERE'S A LINE THAT  
16 SAYS COPYRIGHT STATUS, IT FALLS UNDER FAIR USE ACCORDING TO THE  
17 FAIR USE CHECKLIST I COMPLETED; DO YOU SEE THAT?

18 A. YES.

19 Q. WHAT DOES THAT SENTENCE IN THIS PARTICULAR EXCERPT  
20 INDICATE TO YOU?

21 A. WELL, IT INDICATES WHEN I CLICKED THE ITEM SAYING THAT  
22 WHEN I SUBMITTED IT, IT INDICATED TO ME THAT I HAD COMPLETED A  
23 FAIR USE ANALYSIS AND DETERMINED THAT IN MY BEST JUDGMENT THE  
24 READING WAS FAIR USE.

25 Q. OKAY. TURNING TO THE SECOND PAGE OF THIS EXHIBIT MARKED

1 65539, THERE IS AN ENTRY FOR THE U.S. FOREIGN POLICY WORK BY  
2 STEPHEN HOOK; DO YOU SEE THAT?

3 A. I DO.

4 Q. AND IS THAT THE SAME BOOK THAT WE'VE BEEN TALKING ABOUT  
5 TODAY?

6 A. YES.

7 Q. A FEW LINES UP FROM THE TITLE U.S. FOREIGN POLICY THERE'S  
8 AN ENTRY THERE COPYRIGHT STATUS, IT FALLS UNDER FAIR USE  
9 ACCORDING TO THE FAIR USE CHECKLIST I COMPLETED; DO YOU SEE  
10 THAT?

11 A. YES.

12 Q. WHAT DOES THAT SENTENCE INDICATE TO YOU?

13 A. WELL AS WITH THE LAST ONE, WHEN I CLICKED THAT BOX IT  
14 INDICATED TO ME THAT I HAD FILLED OUT OR COMPLETED A FAIR USE  
15 CHECKLIST, AND THAT IN MY BEST JUDGMENT THE READING WAS FAIR  
16 USE.

17 Q. NOW IF IT WERE DETERMINED THAT YOUR USE OF THE RETURN OF  
18 THE IMPERIAL PRESIDENCY EXCERPT WAS NOT A FAIR USE, WHAT WOULD  
19 YOU DO FOR THAT PARTICULAR CLASS?

20 A. I WOULD REQUEST THAT IT BE TAKEN DOWN AND NOT USED AGAIN.

21 Q. WHAT WOULD YOU USE INSTEAD, DO YOU THINK, FOR YOUR  
22 PARTICULAR COURSE?

23 A. I'D HAVE TO REFLECT. I COULDN'T POINT TO ANY SPECIFIC  
24 THING, BUT I WOULD FIND ANOTHER READING TO USE.

25 Q. AND IF IT WERE DETERMINED THAT YOUR USE OF THE FOREIGN

1 POLICY BUREAUCRACY EXCERPT WAS NOT A FAIR USE, WHAT WOULD YOU  
2 DO WITH RESPECT TO YOUR CLASS?

3 A. WELL, I'D ALSO TAKE IT DOWN AND NOT USE IT AGAIN.

4 Q. WOULD YOU USE ANOTHER WORK INSTEAD?

5 A. I WOULD PROBABLY LOOK FOR AN ALTERNATIVE WORK THAT COULD  
6 BE POSTED UNDER FAIR USE.

7 Q. AND IF YOU WERE GENERALLY PROHIBITED FROM USING THE ERES  
8 SYSTEM WOULD THAT AFFECT YOUR ABILITY TO EDUCATE YOUR STUDENTS?

9 A. I THINK IT WOULD. I THINK THE ERES SYSTEM HAS BEEN VERY  
10 IMPORTANT FOR MY COURSES BECAUSE THE COURSES THAT I TEACH  
11 INCLUDING THIS ONE INVOLVE VERY CONTROVERSIAL TOPICS IN WHICH  
12 PEOPLE HAVE A WIDE VARIETY OF DIFFERENT VIEWS AND OPINIONS.

13 AND SO I THINK TO TEACH THE COURSE AS EFFECTIVELY  
14 IT'S IMPORTANT TO HAVE A WIDE VARIETY OF DIFFERENT READINGS BY  
15 DIFFERENT AUTHORS, AND SO ERES IS THE ONLY WAY THAT I'VE FOUND  
16 THAT'S PRACTICAL AND COST EFFECTIVE FOR STUDENTS TO BE ABLE TO  
17 ACCESS A WIDE VARIETY OF DIFFERENT PERSPECTIVES ON THE TOPIC,  
18 AND SO WITHOUT THAT I THINK IT WOULD BE DIFFICULT TO TEACH THE  
19 CLASS AT THE SAME LEVEL OF QUALITY THAT I'D LIKE TO.

20 MS. MOFFITT: I DON'T HAVE ANY FURTHER QUESTIONS.

21 CROSS-EXAMINATION

22 BY MR. KRUGMAN:

23 Q. GOOD AFTERNOON.

24 A. GOOD TO SEE YOU AGAIN.

25 Q. ON DIRECT YOU TESTIFIED THAT YOU'VE NOT RECEIVED ROYALTIES

1 FROM THE SALES OF PUBLICATIONS THAT YOUR WORKS HAVE APPEARED  
2 IN; IS THAT CORRECT?  
3 A. THAT'S CORRECT.  
4 Q. YOU'VE NOT PUBLISHED A BOOK; IS THAT CORRECT?  
5 A. THAT'S CORRECT.  
6 Q. AND YOU WOULD AGREE THAT THEY'RE BENEFITS TO BEING  
7 PUBLISHED APART FROM ROYALTIES?  
8 A. THERE CERTAINLY ARE. THERE'S SALARY BENEFITS AND  
9 PROMOTION -- THE BENEFITS COMING FROM BEING FINANCED BY THE  
10 UNIVERSITY.  
11 Q. AND REPUTATION IS ONE OF THOSE BENEFITS, CORRECT?  
12 A. YES.  
13 Q. AND, IN FACT, YOU RECENTLY BECAME A TENURED ASSISTANT  
14 PROFESSOR OF HISTORY AT GEORGIA STATE; IS THAT CORRECT?  
15 A. ASSOCIATE PROFESSOR OF POLITICAL SCIENCE.  
16 Q. YES?  
17 A. RECENTLY TENURED, SO THAT'S GOOD.  
18 Q. IT'S SOMETIMES HARD TO KEEP ALL OF THE PROFESSORS  
19 STRAIGHT.  
20 A. YEAH, WE HAVE OUR OWN WAY OF TALKING.  
21 Q. YOUR BELIEF IS THAT THE WORKS YOU PUBLISHED CONTRIBUTED TO  
22 YOUR ATTAINING TENURE AT GEORGIA STATE; IS THAT CORRECT?  
23 A. I BELIEVE IT DID.  
24 Q. IN FEBRUARY OF 2009 YOU LEARNED THAT A NEW POLICY ON  
25 COPYRIGHT HAD BEEN ADOPTED FOR GEORGIA STATE?

ANDRE G. ASHLEY, O.C.R.

1 A. SOMETIME DURING THAT FULL SEMESTER, YES.

2 Q. AND FEBRUARY WOULD BE THE SPRING SEMESTER?

3 A. SPRING, I'M SORRY, SPRING SEMESTER.

4 Q. AND YOU LEARNED OF THE NEW POLICY VIA AN E-MAIL FROM

5 SOMEONE AT THE UNIVERSITY; IS THAT CORRECT?

6 A. THAT'S MY RECOLLECTION.

7 Q. AND YOU READ A SUMMARY OF THE POLICY THAT WAS IN THE

8 E-MAIL; IS THAT CORRECT?

9 A. YES.

10 Q. AND YOU DON'T RECALL WHETHER YOU READ THE ENTIRE POLICY;

11 IS THAT CORRECT?

12 A. I'M NOT SURE WHAT WOULD CONSTITUTE THE ENTIRE POLICY, BUT

13 WHAT I RECALL READING IS A SUMMARY IN THE E-MAIL AND ALSO THE

14 FAIR USE CHECKLIST ITSELF.

15 Q. YOU RECALL ONE OR MORE E-MAILS DETAILING THE AVAILABILITY

16 OF TRAINING SESSIONS FOR THE NEW POLICY FOLLOWING ITS ADOPTION,

17 CORRECT?

18 A. I DO.

19 Q. BUT YOU UNDERSTOOD ATTENDANCE AT THOSE SESSIONS WAS NOT

20 MANDATORY, CORRECT?

21 A. MY UNDERSTANDING OF IT WAS THAT IT WAS NOT MANDATORY.

22 Q. AND YOU HAVE NO SPECIAL TRAINING IN COPYRIGHT LAW,

23 CORRECT?

24 A. NO SPECIAL TRAINING BEYOND THE EXPOSURE I'VE HAD THAT WE

25 TALKED ABOUT EARLIER.

ANDRE G. ASHLEY, O.C.R.

1 Q. AND NOTWITHSTANDING THAT YOU OPTED NOT TO ATTEND ANY ONE  
2 OF THE TRAINING SESSIONS BEING OFFERED; IS THAT CORRECT?

3 A. MY SENSE WAS THAT I COULD FILL OUT THE FAIR USE CHECKLISTS  
4 EFFECTIVELY WITHOUT THE ADDITIONAL TRAINING, THAT IT WAS CLEAR  
5 ENOUGH FOR ME TO DO THAT.

6 Q. IF YOU COULD TAKE A LOOK AT THE SYLLABUS DEFENDANTS'  
7 EXHIBIT 623, THIS IS THE SYLLABUS FOR THE 3450 COURSE THAT YOU  
8 TAUGHT IN THE FALL 2009 SEMESTER; IS THAT CORRECT?

9 A. THAT'S CORRECT.

10 Q. AND ON PAGE 2 OF THIS UNDER EXAMS, YOU SAID BOTH THE  
11 MIDTERM AND FINAL WILL BE BASED ON LECTURE CONTENT AND  
12 READINGS; IS THAT CORRECT?

13 A. THAT'S CORRECT.

14 Q. AND ANYTHING I SAY IN CLASS IS FAIR GAME FOR EXAMS ALONG  
15 WITH ANYTHING IN THE ASSIGNED READINGS, CORRECT?

16 A. THAT'S CORRECT.

17 Q. AND YOU EXPECTED THE STUDENTS TO READ ALL OF THE ASSIGNED  
18 READINGS; IS THAT CORRECT?

19 A. I DID.

20 Q. AND THOSE ASSIGNED READINGS, AS YOU SAID, WERE FAIR GAME  
21 FOR EXAMS YOU GAVE YOUR CLASS?

22 A. YES.

23 Q. IN OTHER WORDS, STUDENTS WERE TO BE TESTED ON THOSE  
24 READINGS, CORRECT?

25 A. YES, IN ADDITION TO THE LECTURE, YES.

- 1 Q. AND THE GRADE AT LEAST IN PART WOULD DEPEND ON WHETHER OR  
2 NOT THEY HAD READ THOSE WORKS, CORRECT?
- 3 A. YES.
- 4 Q. AND THE ASSIGNED WORKS INCLUDED THE ESSAYS AND THE WORKS  
5 IN THE BOOKS BY HOOK AND JACKSON DEFENDANTS' EXHIBIT 777 AND  
6 776; IS THAT CORRECT?
- 7 A. BY HOOK ON THE ONE HAND, AND BY LANTIS AND MOSKOWITZ ON  
8 THE OTHER.
- 9 Q. YES, I'M SORRY, AND THE EXAMS INCLUDED THE ESSAYS THAT --  
10 THE READINGS INCLUDED THE ESSAYS IN THOSE WORKS, CORRECT?
- 11 A. YES.
- 12 Q. AND STUDENTS WERE ASSIGNED TWO REQUIRED TEXTS THAT WERE  
13 AVAILABLE FOR PURCHASE, CORRECT?
- 14 A. THAT'S CORRECT.
- 15 Q. AND THE OTHER ASSIGNED READINGS WERE EQUALLY IMPORTANT AS  
16 YOU WROTE ON PAGE 4 OF THE SYLLABUS AT DEFENDANTS' EXHIBIT 623?
- 17 A. YES, I REMEMBER WRITING THAT.
- 18 Q. THAT ALL THE READINGS WERE EQUALLY IMPORTANT WHETHER PART  
19 OF THE ASSIGNED TEXT OR THE READINGS THAT WERE AVAILABLE ON  
20 ERES, CORRECT?
- 21 A. YES.
- 22 Q. NOW YOU ARE VERY CAREFUL WITH SYLLABI FOR THE COURSES THAT  
23 YOU TEACH; IS THAT CORRECT?
- 24 A. YES.
- 25 Q. YOU TAKE A LOT OF TIME TO TRY TO FIND THE BEST READINGS ON



- 1 EACH PARTICULAR TOPIC?
- 2 A. I DO.
- 3 Q. AND YOU'RE NOT SOMEBODY WHO JUST ASSIGNS A SINGLE TEXTBOOK  
4 AND USES A DIFFERENT CHAPTER EACH WEEK, CORRECT?
- 5 A. THAT'S RIGHT.
- 6 Q. AND YOU BELIEVE A CLASS IS BETTER IF YOU TRY TO SEEK OUT  
7 THE VERY BEST READINGS FOR THE CLASS?
- 8 A. A CLASS OF THIS TYPE CERTAINLY. I MEAN I COULDN'T SPEAK  
9 TO SAY A PHYSICS CLASS WHERE THERE'S FEWER CONTROVERSIES AT THE  
10 INTRODUCTORY LEVEL, BUT IN THIS CLASS I CERTAINLY THINK SO.
- 11 Q. FOR THE CLASSES YOU TEACH?
- 12 A. FOR THE CLASSES I TEACH, YES.
- 13 Q. AND THAT'S PRECISELY WHAT YOU DID FOR THIS CLASS, YOU WENT  
14 OUT AND SELECTED THE VERY BEST READINGS THAT YOU COULD FIND,  
15 CORRECT?
- 16 A. THAT'S WHAT I TRIED TO DO, YES.
- 17 Q. NOW YOUR OUTLINE FOR THE COURSE WAS DIVIDED INTO THREE  
18 PARTS. THE FIRST ONE IS ON PAGE 4 OF THE SYLLABUS, AND THAT  
19 WAS THE HISTORICAL ROOTS; IS THAT CORRECT?
- 20 A. THAT'S CORRECT.
- 21 Q. AND THAT COVERED THE FIRST THREE WEEKS OF THE COURSE?
- 22 A. YES.
- 23 Q. AND THEN WHEN YOU GO TO THE NEXT PAGE ON PAGE 5 OF THE  
24 SYLLABUS, PART 2 OF THE COURSE WAS ENTITLED EXPLANATIONS; IS  
25 THAT CORRECT?

1 A. THAT'S RIGHT.

2 Q. AND IT WAS FOR THIS PART 2 OF THE COURSE THAT YOU ASSIGNED  
3 THE LANTIS AND MOSKOWITZ WORK THAT IS IN EVIDENCE; IS THAT  
4 CORRECT?

5 A. THAT'S CORRECT.

6 Q. DEFENDANTS' EXHIBIT 776; IS THAT CORRECT?

7 A. YES.

8 Q. NOW, ON DIRECT I BELIEVE YOU TESTIFIED THAT THIS WAS  
9 BACKGROUND READING FOR THIS PART OF THE COURSE; IS THAT  
10 CORRECT?

11 A. YES.

12 Q. BUT YOU WERE NOT SAYING THAT YOU DID NOT EXPECT STUDENTS  
13 TO READ THIS WORK?

14 A. NO, I EXPECTED THEM TO READ IT.

15 Q. AND YOU, IN FACT, BELIEVED THAT IT WAS NECESSARY TO  
16 ACHIEVE YOUR EDUCATIONAL OBJECTIVES FOR THIS COURSE; IS THAT  
17 CORRECT?

18 A. YES.

19 Q. AND AM I CORRECT THAT THIS ESSAY BY LANTIS AND MOSKOWITZ  
20 IS THE ONLY ESSAY IN THAT COLLECTION OF ESSAYS DEFENDANTS'  
21 EXHIBIT 776 THAT WAS EDITED BY RALPH CARTER?

22 A. I'M SORRY, CAN YOU SAY THE QUESTION AGAIN?

23 Q. I APOLOGIZE. THE ESSAY THE RETURN OF THE IMPERIAL  
24 PRESIDENCY, THE BUSH DOCTRINE AND U.S. INTERVENTION IN IRAQ IS  
25 THE ONLY ESSAY IN THAT COLLECTION OF ESSAYS THAT WAS AUTHORED

ANDRE G. ASHLEY, O.C.R.

1 BY LANTIS AND MOSKOWITZ?

2 A. I'D ACTUALLY HAVE TO LOOK TO SEE WHETHER THEY MIGHT HAVE  
3 WRITTEN A DIFFERENT ONE, BUT TO MY RECOLLECTION IT'S THE ONLY  
4 ONE.

5 Q. IF YOU FEEL IT NECESSARY, THE BOOK IS IN FRONT OF YOU?

6 A. OKAY.

7 YES, IT APPEARS TO BE THE ONLY ESSAY WRITTEN BY THEM  
8 IN THE BOOK.

9 Q. NOW IF YOU COULD GO TO THE TOPIC FOR WEEK 8 OF THE COURSE  
10 AND THAT WAS THE EXECUTIVE BRANCH DEPARTMENTS, ROLES, TENSIONS  
11 AND REFORM; DO YOU SEE THAT?

12 A. I DO.

13 Q. AND ONE OF THE ASSIGNED READINGS FOR THIS WEEK WAS THE  
14 WORK BY STEPHEN W. HOOK, CHAPTER 6, THE FOREIGN POLICY  
15 BUREAUCRACY IN U.S. FOREIGN POLICY, WASHINGTON DC, CQ PRESS,  
16 AND THAT WAS PAGES 153 TO 186; IS THAT CORRECT?

17 A. YES.

18 Q. AND THAT WAS I BELIEVE CHAPTER 6 OF THE WORK BY HOOK; IS  
19 THAT CORRECT?

20 A. YES, THAT'S CORRECT.

21 Q. NOW YOU REVIEWED A NUMBER OF POSSIBLE READINGS FOR THAT  
22 ASSIGNMENT; IS THAT CORRECT?

23 A. YES.

24 Q. AND ON THIS PARTICULAR TOPIC EXECUTIVE BRANCH POLITICS, IN  
25 YOUR JUDGMENT THAT CHAPTER FROM THE HOOK BOOK WAS THE BEST

1 SUBSTANTIVE SUMMARY OF HOW THE FOREIGN POLICY BUREAUCRACY  
2 WORKS; IS THAT CORRECT?  
3 A. THAT'S CORRECT.  
4 Q. AND FOR THAT REASON YOU ASSIGNED THAT CHAPTER AS A  
5 REQUIRED READING FOR WEEK 8 OF YOUR COURSE; IS THAT CORRECT?  
6 A. THAT'S CORRECT.  
7 Q. AND COPIES OF BOTH OF THOSE WORKS THAT WE'VE JUST LOOKED  
8 AT DEFENDANTS' EXHIBIT 777 AND 776, PORTIONS FROM THOSE WERE  
9 MADE AVAILABLE TO STUDENTS ON ERESERVE, CORRECT?  
10 A. YES.  
11 Q. AND THOSE COPIES WERE MADE AVAILABLE TO THE STUDENTS IN  
12 YOUR CLASS WITHOUT PAYMENT OF ANY PERMISSIONS TO THE OWNER OF  
13 THE RIGHTS TO THE COPYRIGHT TO THOSE WORKS, CORRECT?  
14 A. WELL, THAT'S SOMETHING YOU'LL PROBABLY HAVE TO TALK TO THE  
15 LIBRARY ABOUT. MY UNDERSTANDING IS ESSENTIALLY THAT I  
16 PERFORMED THE FAIR USE ANALYSIS, DETERMINED THAT IN MY BEST  
17 JUDGMENT IT WAS FAIR USE AND REQUESTED THAT THEY BE POSTED, AND  
18 THEN I DO KNOW THAT THEY WERE IN FACT POSTED ONLINE THROUGH THE  
19 ERES DESK, AND THEN BEYOND THAT, I THINK IS PROBABLY NOT -- I  
20 MEAN THAT'S BASICALLY WHAT MY UNDERSTANDING IS AS THE  
21 PROFESSOR.  
22 Q. AS A PROFESSOR YOU KNOW THAT YOU DID NOT PAY ANY  
23 PERMISSIONS TO THE PUBLISHERS OF THOSE TWO BOOKS FOR PERMISSION  
24 TO POST PORTIONS OF THOSE BOOKS ON ELECTRONIC RESERVES,  
25 CORRECT?

ANDRE G. ASHLEY, O.C.R.

1 A. NO, I DID NOT.

2 Q. AND YOU HAVE NO KNOWLEDGE ONE WAY OR ANOTHER, I GUESS IS  
3 WHAT YOU'RE SAYING, AS TO WHETHER THE LIBRARY PAID PERMISSIONS  
4 TO THE PUBLISHERS IN ORDER TO POST THOSE TWO CHAPTERS FROM  
5 THOSE BOOKS ON ERESERVE?

6 A. I HAVE NO SPECIFIC KNOWLEDGE, BUT MY SENSE IS THAT BECAUSE  
7 THEY WERE AT LEAST IN MY JUDGMENT FAIR USE PAYMENT WOULD NOT  
8 NORMALLY BE REQUIRED.

9 Q. SO AT LEAST IT'S YOUR UNDERSTANDING BASED ON YOUR OWN  
10 PERSONAL KNOWLEDGE WITH RESPECT TO YOURSELF AND YOUR BELIEF AS  
11 TO THE LIBRARY THAT NO PERMISSIONS WERE PAID TO THE PUBLISHERS  
12 FOR THE ABILITY, FOR THE RIGHT TO PUT COPIES OF THOSE TWO WORKS  
13 ON ELECTRONIC RESERVE AND PROVIDED TO STUDENTS IN THAT CLASS,  
14 CORRECT?

15 A. I DON'T HAVE ANY SPECIFIC KNOWLEDGE EITHER WAY, BUT MY  
16 UNDERSTANDING, WHICH IS LIMITED OF THE FAIR USE DOCTRINE, IS  
17 THAT IF SOMETHING IS FAIR USE THEN IT'S NOT REQUIRED TO BE  
18 PAID.

19 Q. IF YOU DETERMINE IT'S FAIR USE, YOU DON'T HAVE TO PAY  
20 ANYBODY TO PUT IT UP ON ELECTRONIC RESERVE; THAT'S YOUR  
21 UNDERSTANDING, CORRECT?

22 A. WELL IF IT IS FAIR USE WHICH IN MY JUDGMENT IT WAS.

23 Q. AND IT WAS FAIR USE IN YOUR JUDGMENT BASED ON YOUR  
24 COMPLETION MENTALLY OF THE FAIR USE CHECKLIST THAT YOU  
25 TESTIFIED TO EARLIER?

ANDRE G. ASHLEY, O.C.R.

1 A. YES.

2 Q. NOW IF YOU CAN TURN TO DEFENDANTS' EXHIBIT 480, THE FIRST  
3 PAGE OF DEFENDANTS' EXHIBIT 480, AND THIS DOCUMENT IS SOMETHING  
4 THAT COMES UP ON YOUR COMPUTER, IS THAT CORRECT, AND YOU'RE  
5 ABLE TO COMPLETE IT ELECTRONICALLY; IS THAT CORRECT?

6 A. THAT'S RIGHT.

7 Q. AND WHEN YOU MENTALLY COMPLETED THE CHECKLIST FOR EACH OF  
8 THESE TWO WORKS, WERE YOU LOOKING AT THE CHECKLIST ON THE  
9 COMPUTER, HAD YOU PRINTED OUT A COPY; I JUST WANT TO UNDERSTAND  
10 HOW YOU WENT ABOUT DOING IT?

11 A. I WAS LOOKING AT THE CHECKLIST ON THE COMPUTER.

12 Q. NOW ON PAGE 1 OF DEFENDANTS' EXHIBIT 480 IT STATES DOWN AT  
13 THE BOTTOM COMPLETE AND RETAIN A COPY OF THIS CHECKLIST FOR  
14 EACH FAIR USE OF A COPYRIGHTED WORK IN ORDER TO ESTABLISH A  
15 REASONABLE AND GOOD FAITH ATTEMPT AT APPLYING FAIR USE SHOULD  
16 ANY DISPUTE REGARDING SUCH USE ARISE.

17 AND YOU DID NOT IN CONNECTION WITH YOUR USE OF ANY  
18 MATERIALS FOR THE 3450 COURSE THAT YOU TAUGHT IN THE FALL OF  
19 2009 COMPLETE AND RETAIN A COPY OF THE CHECKLIST FOR WORKS THAT  
20 YOU SOUGHT TO HAVE POSTED ON ELECTRONIC RESERVE, CORRECT?

21 A. WELL AS I SAID BEFORE I COMPLETED THE FAIR USE CHECKLIST  
22 MENTALLY, BUT I DID NOT PRINT AND RETAIN A PHYSICAL COPY.

23 Q. INSTEAD YOU JUST FILLED IT OUT SORT OF IN YOUR HEAD BY  
24 LOOKING AT THE CHECKLIST, CORRECT?

25 A. I FILLED IT OUT BY LOOKING AT THE CHECKLIST AND CAREFULLY

1 LOOKING AT EACH OF THE LINES, EACH OF THE FACTORS.

2 Q. AM I CORRECT THAT YOU DID NOT BOTHER TO FILL OUT A  
3 PHYSICAL CHECKLIST FOR THE WORKS BECAUSE THE MENTAL CHECKLISTS  
4 THAT YOU WERE FILLING OUT WERE OVERWHELMINGLY IN THE LEFT-HAND  
5 COLUMN AND IT SEEMED A RATHER STRAIGHTFORWARD DETERMINATION IN  
6 YOUR JUDGMENT?

7 A. RIGHT. ESSENTIALLY I FOUND THE READINGS TO BE  
8 OVERWHELMINGLY FAIR USE AND OVERWHELMINGLY IN THOSE COLUMNS,  
9 AND, THEREFORE, AS YOU SAID IT SEEMED STRAIGHTFORWARD TO ME.

10 Q. AND THERE WAS REALLY NO NEED AS YOU SAW IT AT THE TIME TO  
11 PHYSICALLY COMPLETE ONE AND PRINT IT OUT AND RETAIN IT?

12 A. WELL, I DIDN'T APPRECIATE AT THE TIME THE IMPORTANCE OF  
13 MAINTAINING THE PHYSICAL COPY AS PROOF, BUT CERTAINLY GOING  
14 FORWARD I WILL DO SO.

15 Q. WHICH IS I THINK WHAT YOU TOLD ME WHEN YOUR DEPOSITION WAS  
16 TAKEN?

17 A. THAT'S RIGHT, AND THAT'S STILL WHAT I THINK.

18 THE COURT: YOU NEED TO MOVE AHEAD MORE RAPIDLY.

19 MR. KRUGMAN: YES, I'M SORRY, YOUR HONOR, I WILL  
20 ENDEAVOR TO DO SO.

21 BY MR. KRUGMAN:

22 Q. I TAKE IT YOU LEARNED OF THE IMPORTANCE OF COMPLETING AND  
23 PRINTING OUT THE CHECKLIST WHEN IN NOVEMBER OF 2010 YOU WERE  
24 REQUESTED BY LEGAL AFFAIRS FOR THE CHECKLIST THAT YOU HAD  
25 COMPLETED FOR THE COURSE THAT YOU TAUGHT IN THE FALL OF 2009

1 THAT WE'VE BEEN DISCUSSING?

2 A. THAT TIME AND ALSO, YOU KNOW, LATER AS I UNDERSTOOD A  
3 LITTLE BIT BETTER ABOUT WHAT, YOU KNOW, WHAT WAS GOING ON IN  
4 TERMS OF THE LITIGATION AND THE NECESSITY OF PROVING THE USE OF  
5 THE FAIR USE CHECKLIST.

6 BUT I SHOULD SAY THAT COMPLETING THE FAIR USE  
7 CHECKLIST IS SOMETHING THAT I DID AT THE BEGINNING NOT BECAUSE  
8 OF THE LITIGATION WHICH WAS NOT REALLY ON MY RADAR SCREEN, I  
9 KIND OF HAD SOME SENSE, BUT IT WAS BECAUSE I TOOK SERIOUSLY THE  
10 NEED TO PROTECT THE COPYRIGHTS AND WANTED TO DO A GOOD FAITH  
11 EFFORT.

12 SO FOR ME THERE WAS A DISTINCTION BETWEEN THE GOOD  
13 FAITH EFFORT OF FILLING OUT THE CHECKLIST ON THE ONE HAND WHICH  
14 I DID FROM THE START AND THE NECESSITY OF RETAINING IT AS SORT  
15 OF PHYSICAL PROOF WHICH I APPRECIATE MUCH BETTER NOW.

16 Q. WHAT WAS YOUR UNDERSTANDING AS TO WHY YOU WERE BEING  
17 REQUESTED TO INITIALLY PROVIDE COPIES OF THE CHECKLISTS THAT  
18 YOU HAD COMPLETED?

19 A. IN NOVEMBER 2010?

20 Q. YES, SIR.

21 A. WELL, I KNEW THAT IT WAS RELATED TO THE ONGOING  
22 LITIGATION, BUT I DIDN'T KNOW THE DETAILS OF WHAT WAS BEING  
23 CONTESTED. I'VE LEARNED, I GUESS, A LITTLE BIT MORE SINCE, BUT  
24 AT THE TIME I KNEW IT WAS RELATED TO THE LITIGATION BECAUSE IT  
25 WAS THE LEGAL AFFAIRS OFFICE THAT REQUESTED IT.

ANDRE G. ASHLEY, O.C.R.



- 1 Q. AND I TAKE IT WHEN THE REQUEST WAS MADE YOU ADVISED  
2 SOMEONE WELL I ACTUALLY DON'T HAVE THE PHYSICAL COPIES OF THE  
3 CHECKLIST?
- 4 A. I RESPONDED TO THE E-MAIL TO SAY THAT WHILE I HAD  
5 COMPLETED THE CHECKLIST MENTALLY, I HAD NOT RETAINED A PHYSICAL  
6 COPY.
- 7 Q. AND IT WAS AT THAT POINT YOU WERE ASKED TO RECREATE THE  
8 CHECKLISTS THAT YOU HAD COMPLETED MENTALLY?
- 9 A. THAT'S CORRECT.
- 10 Q. AND WERE THE CHECKLISTS THAT YOU WERE ASKED TO COMPLETE  
11 THE CHECKLISTS FOR THE TWO WORKS THAT WE HAVE BEEN SPEAKING  
12 ABOUT TODAY?
- 13 A. THAT'S RIGHT.
- 14 Q. AND THOSE WERE THE ONLY TWO THAT YOU COMPLETED PHYSICALLY  
15 IN NOVEMBER OF 2010; IS THAT CORRECT?
- 16 A. YES.
- 17 Q. NOW IF WE CAN TAKE A LOOK AT DEFENDANTS' EXHIBIT 508, AND  
18 I'LL BE VERY BRIEF WITH THIS, AND I THINK YOU TESTIFIED THAT  
19 THIS REFLECTS YOUR COMMUNICATIONS WITH THE RESERVE DESK WITH  
20 RESPECT TO THE ELECTRONIC RESERVE POSTINGS FOR THE FALL  
21 SEMESTER OF THE 3450 COURSE; IS THAT CORRECT?
- 22 A. THAT'S CORRECT.
- 23 Q. AND I THINK IT REFLECTS THAT YOUR REQUEST TO THE LIBRARY  
24 WAS MADE JULY 6TH, 2010?
- 25 A. 2009.

ANDRE G. ASHLEY, O.C.R.

1 Q. I'M SORRY, 2009, AND THERE ARE FOUR WORKS NOT OWNED BY THE  
2 LIBRARY THAT YOU WERE REQUESTING TO BE PROVIDED TO THE  
3 STUDENTS; IS THAT CORRECT?

4 A. THAT'S CORRECT, OWNED BY MYSELF.

5 Q. AND YOU OWNED THEM BUT NOT THE LIBRARY?

6 A. CORRECT.

7 Q. AND I TAKE IT YOU DELIVERED THOSE PHYSICAL BOOKS TO THE  
8 LIBRARY?

9 A. THAT'S RIGHT.

10 Q. AND THEY CONTAINED ONE OF THOSE AS YOU TESTIFIED ON DIRECT  
11 THE LANTIS MOSKOWITZ WORK; IS THAT CORRECT?

12 A. THAT'S CORRECT.

13 Q. AND IF YOU TURN THE PAGE, I GUESS THE FOURTH WORK IN THIS  
14 GROUP IS THE STEPHEN HOOK WORK --

15 A. THAT'S RIGHT.

16 Q. -- THAT WE'VE BEEN TALKING ABOUT? THEN BELOW THAT THERE  
17 IS A CATEGORY FOR ELECTRONIC ARTICLES?

18 A. CORRECT.

19 Q. AND THEN BELOW THAT IS A CATEGORY FOR BOOKS THAT ARE OWNED  
20 BY THE LIBRARY; IS THAT CORRECT?

21 A. CORRECT.

22 Q. AND IT'S YOUR UNDERSTANDING THAT WITH RESPECT TO THE BOOKS  
23 THAT ARE REFLECTED ON DEFENDANTS' EXHIBIT 508 THAT NO  
24 PERMISSIONS WERE PAID TO THE COPYRIGHT HOLDERS OF THOSE WORKS  
25 WITH RESPECT TO THE POSTINGS OF THOSE MATERIALS ON ELECTRONIC

1 RESERVE?

2 MS. MOFFITT: OBJECTION, YOUR HONOR, TO THE EXTENT  
3 THAT THE QUESTION GOES BEYOND THE TWO ACTUAL BOOKS AT ISSUE IN  
4 THAT SECTION.

5 THE COURT: OBJECTION SUSTAINED.

6 BY MR. KRUGMAN:

7 Q. AM I CORRECT THAT -- GO BACK TO THE FIRST PAGE OF THIS  
8 EXHIBIT, AND YOUR RESPONSE FROM THE LIBRARY AT THE TOP CAME ON  
9 JULY 21ST, 2009; IS THAT CORRECT?

10 A. IT WOULD APPEAR SO, YES.

11 Q. DO YOU RECALL THAT THIS WAS THE ONLY RESPONSE THAT YOU  
12 RECEIVED FROM THE RESERVE DESK WITH RESPECT TO THE WORKS THAT  
13 YOU HAD REQUESTED BE POSTED?

14 A. I COULDN'T REALLY SAY THAT. SOMETIMES THERE ARE MULTIPLE  
15 COMMUNICATIONS IF THERE ARE QUESTIONS ABOUT WHAT I HAVE  
16 REQUESTED, BUT I DON'T KNOW ONE WAY OR THE OTHER.

17 Q. LET ME ASK IT THIS WAY. NO ONE FROM THE LIBRARY ADVISED  
18 YOU OF ANY CONCERN WITH THE NUMBER OF WORKS THAT YOU WERE  
19 REQUESTING TO BE POSTED ON ELECTRONIC RESERVE; IS THAT CORRECT?

20 A. THE NUMBER OF WORKS?

21 Q. YES, SIR.

22 A. LIKE THE COUNT NUMBER? NO, I DON'T RECALL ANYONE  
23 OBJECTING TO THAT.

24 Q. AND NO ONE FROM THE LIBRARY INDICATED IN ANY WAY TO YOU  
25 THAT YOUR REQUEST HAD RAISED A RED FLAG OF ANY SORT AT THE

1 LIBRARY?

2 A. NO.

3 Q. IF WE CAN GO NOW TO DEFENDANTS' EXHIBIT 480, AND AS YOU  
4 TESTIFIED ON DIRECT, YOU DID NOT CHECK THE BOX FOR  
5 NONTRANSFORMATIVE?

6 A. THAT'S CORRECT.

7 Q. BUT YOU PROVIDED A COPY OF A COMPLETE ESSAY FOR STUDENTS?

8 A. YES, A COMPLETE CHAPTER, THAT'S CORRECT.

9 Q. NOW I TAKE IT BASED ON THE TESTIMONY THAT YOU GAVE ON  
10 DIRECT THAT IT IS YOUR BELIEF THAT SIMPLY PROVIDING A COPY OF A  
11 CHAPTER, OF A COMPLETE CHAPTER TO STUDENTS ON ELECTRONIC  
12 RESERVES CAN BE A TRANSFORMATIVE USE OF THE WORK UNDER THE FAIR  
13 USE CHECKLIST?

14 A. MY SENSE IS THAT IT COULD BE DEPENDING ON HOW IT'S  
15 ACTUALLY USED IN THE CLASS. AS I SAID IN THIS CASE, I THOUGHT  
16 THERE WAS AN ARGUMENT ON BOTH SIDES, AND SO I SIMPLY DIDN'T  
17 CHECK EITHER ONE FOR THAT REASON, BUT IT SEEMS TO ME IN THEORY  
18 DEPENDING ON HOW A WORK IS USED IN THE CLASS, IT COULD BE  
19 EITHER TRANSFORMATIVE OR NONTRANSFORMATIVE.

20 Q. THAT UNDERSTANDING WAS NOT BASED ON ANYTHING THAT YOU MAY  
21 HAVE LEARNED FROM ANY TRAINING SESSION AT GEORGIA STATE BECAUSE  
22 YOU DIDN'T ATTEND ANY OF THE TRAINING SESSIONS; IS THAT  
23 CORRECT?

24 A. I DID NOT ATTEND ANY TRAINING SESSION.

25 Q. AND THEREFORE YOUR UNDERSTANDING WAS BASED INDEPENDENTLY

1 OF ANYTHING THAT MAY HAVE BEEN DISSEMINATED AT ANY OF THE  
2 TRAINING SESSIONS, CORRECT?

3 A. IT'S BASED ON MY EXPERIENCE AS A PROFESSOR.

4 THE COURT: YOU KNOW, IF HE DIDN'T ATTEND THE  
5 TRAINING SESSION, HOW COULD HIS UNDERSTANDING BE BASED ON  
6 SOMETHING FROM A TRAINING SESSION? THIS IS JUST SOUNDING  
7 LITMUS.

8 MR. KRUGMAN: OKAY. I WILL MOVE --

9 THE COURT: GO AHEAD AND FINISH UP.

10 BY MR. KRUGMAN:

11 Q. NOW ON FACTOR 2 YOU DID NOT CHECK THE BOX FOR HIGHLY  
12 CREATIVE; IS THAT CORRECT?

13 A. THAT'S CORRECT.

14 Q. AND THAT'S BECAUSE YOU BELIEVED THAT WORKS OF NONFICTION  
15 CAN BE CREATIVE TO THE EXTENT THEY ARE PRODUCING NEW  
16 PERSPECTIVES AND NEW ARGUMENTS THAT DID NOT EXIST BEFORE,  
17 CORRECT?

18 A. WELL, I THINK WHETHER THEY'RE CREATIVE OR NOT WOULD DEPEND  
19 ON YOUR DEFINITION. IF YOUR DEFINITION OF CREATIVE WAS THAT  
20 SOMETHING IS A NEW PERSPECTIVE OR NEW ARGUMENT, THEY WOULD BE.

21 BUT MY SENSE BASED ON THE READING OF THE CHECKLIST, I  
22 THINK IT'S WRITTEN FAIRLY CLEARLY THERE WITH THE EXAMPLES ART,  
23 MUSIC, NOVELS, FILMS, PLAYS, POETRY AND FICTION AND ON THE  
24 OTHER SIDE IT SAYS FACTUAL OR NONFICTION, MY UNDERSTANDING WAS  
25 THAT A DIFFERENT DEFINITION, A MORE TRADITIONAL DEFINITION OF

1 CREATIVE WAS APPLIED.

2 Q. THAT'S FINE. JUST BASED ON YOUR UNDERSTANDING OF THE  
3 CHECKLIST, WORKS OF NONFICTION ARE BY DEFINITION NOT CREATIVE  
4 FOR PURPOSES OF THIS, OF THE COMPLETION OF THE FAIR USE  
5 CHECKLIST, CORRECT?

6 A. WORKS OF NONFICTION?

7 Q. YES.

8 A. RIGHT. I SUPPOSE BASED ON MY READING OF IT, YES, IF  
9 SOMETHING IS A NONFICTION WORK, I WOULD CHECK THE BOX IN THE  
10 LEFT.

11 I SUPPOSE ONE COULD ALSO INTERPRET IT THAT YOU COULD  
12 CHECK BOTH, BUT THE WAY THAT I PERSONALLY SAW IT WAS THAT A  
13 NONFICTION WORK WOULD CHECK THE BOX ON THE LEFT.

14 Q. AND IT'S YOUR UNDERSTANDING THAT THE DEFINITION FOR HIGHLY  
15 CREATIVE WORK CONTAINED UNDER THE NATURE OF THE COPYRIGHTED  
16 WORK NECESSARILY EXCLUDES WORKS OF NONFICTION, CORRECT?

17 A. THAT THE HIGHLY CREATIVE BOX --

18 Q. YES, SIR.

19 A. MY READING OF IT WOULD BE THAT SOMETHING THAT WAS  
20 NONFICTION WOULD NOT FALL UNDER THAT ON THE FAIR USE CHECKLIST.

21 Q. THANK YOU. FACTOR 3, PORTION OF WORK USED IS NOT CENTRAL  
22 OR SIGNIFICANT TO ENTIRE WORK AS A WHOLE, AND YOU TESTIFIED  
23 THAT YOU BELIEVED THAT BOTH OF THESE ESSAYS THAT YOU HAD  
24 ASSIGNED WERE NOT CENTRAL TO THE ENTIRE COLLECTION OF ESSAYS  
25 THAT THEY'RE CONTAINED IN; IS THAT CORRECT?

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1 A. THAT'S CORRECT.

2 Q. BUT IS IT YOUR BELIEF THAT THE WORK BY MOSKOWITZ --

3 A. AND LANTIS.

4 Q. -- AND LANTIS COULD HAVE BEEN PUBLISHED AS A STANDALONE

5 ESSAY AS A JOURNAL ARTICLE?

6 A. I COULD IMAGINE THAT IT COULD BE.

7 Q. ON FACTOR 4, EFFECTIVE MARKET FOR ORIGINAL, WHAT YOU WERE

8 CONSIDERING THERE WAS THE MARKET FOR THE POTENTIAL SALE OF THE

9 BOOKS; IS THAT CORRECT?

10 A. THAT'S WHAT I WAS THINKING OF, YES.

11 Q. YOU DID NOT CONSIDER PERMISSIONS AS A SEPARATE MARKET

12 UNDER FACTOR 4, CORRECT?

13 A. WELL, I MAY ALSO HAVE CONSIDERED THE COURSEPACK OPTION

14 WHICH, YOU KNOW, AS I MENTIONED BEFORE I HAD A COUPLE OF BAD

15 EXPERIENCES WITH AND I AM RELUCTANT TO DO AGAIN, BUT I CAN'T

16 REMEMBER SPECIFICALLY WHETHER I CONSIDERED THAT. I THINK MY

17 PRIMARY CONSIDERATION WAS WHETHER OR NOT I WOULD ASSIGN THE

18 BOOK FOR PURCHASE.

19 Q. LET ME ASK IT THIS WAY. YOU DID NOT CONSIDER THE

20 POTENTIAL IMPACT ON THE MARKET FOR PERMISSIONS TO USE THE WORKS

21 WHEN YOU WERE COMPLETING FACTOR 4, CORRECT?

22 A. ONLY TO THE EXTENT THAT I MAY HAVE CONSIDERED THE

23 POSSIBILITY OF USING A COURSEPACK FOR PURCHASE AND BASICALLY

24 PLACING MY READINGS IN A COURSEPACK AS I'VE DONE TWICE IN THE

25 PAST, AND THAT I SUPPOSE WOULD BE THE MARKET FOR PERMISSIONS.

1 I DON'T THINK I CONSIDERED THE INDIVIDUAL MARKET FOR  
2 THIS ONE READING. I MAY HAVE CONSIDERED THE POSSIBILITY OF  
3 PUTTING ALL OF THE READINGS IN A COURSEPACK AND REJECTED THAT  
4 BECAUSE BY THIS POINT I WAS INCLINED NOT TO USE COURSEPACKS  
5 BECAUSE OF MY PRIOR EXPERIENCE.

6 AND FOR THAT REASON MY SENSE WAS -- I MEAN THE BOTTOM  
7 LINE FOR ME ON THIS CHECKED FACTOR MY SENSE WAS THAT IF I WAS  
8 NOT ALLOWED TO POST IT ON ERES I WOULD NOT HAVE ASSIGNED IT IN  
9 ANY OTHER WAY. I WOULD HAVE FOUND ANOTHER READING IF IT WAS  
10 NOT FAIR USE.

11 Q. EVEN THOUGH THEY MAY HAVE BEEN THE BEST WORK OUT THERE  
12 AFTER YOUR EXTENSIVE SEARCH; IS THAT CORRECT?

13 A. THERE MAY BE A SECOND BEST THAT WOULD BE MORE LIKELY TO BE  
14 READ BY STUDENTS BECAUSE OF GREATER EASE OF PUTTING IT OUT  
15 THERE. I DO CONSIDER A VARIETY OF FACTORS. YOU HAVE TO BE  
16 PRACTICAL.

17 ON THE OTHER HAND, I SUPPOSE THAT -- I GUESS I WOULD  
18 HAVE TO CONSIDER THE INDIVIDUAL CASE AND SEE WHAT THE  
19 ALTERNATIVE READINGS WERE, BUT MY SENSE IS THAT I WOULD FIND  
20 SOMETHING ELSE.

21 Q. ARE YOU TELLING THE COURT -- IF YOU CAN BRING UP EXHIBIT  
22 C-16 OF THE JOINT FILING AND FOCUSING ON FIRST OF ALL  
23 CONTEMPORARY CASES IN U.S. FOREIGN POLICY FROM TERRORISM IN  
24 TRADE AND THE SELECTION FROM THAT WORK THAT YOU POSTED FROM  
25 MOSKOWITZ AND LANTIS, IS IT YOUR TESTIMONY THAT -- IF YOU CAN

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1 GO TO THE LICENSING COST PER STUDENT. THIS EXHIBIT IF YOU CAN  
2 FOCUS ON THE 476. IT'S VERY HARD TO READ. THAT IF YOU COULD  
3 HAVE OBTAINED PERMISSION FOR USE OF THAT WORK FOR A CHARGE OF  
4 \$4.76 PER STUDENT THAT YOU WOULD HAVE NOT CHOSEN THAT WORK FOR  
5 INSTRUCTION IN YOUR COURSE?

6 A. RIGHT. WELL, I THINK YOU HAVE TO THINK IN THE AGGREGATE  
7 IN THE SENSE THAT THERE WERE A NUMBER OF READINGS THAT I POSTED  
8 ON ERES, AND IF EACH OF THEM COST ABOUT FIVE DOLLARS AND YOU  
9 ADDED ALL THAT UP, IT WOULD EQUAL CLOSE TO A HUNDRED DOLLARS  
10 WHICH IS WHAT MY PREVIOUS COURSEPACK DID, AND SO IN THAT SENSE  
11 LOOKING AT IT IN THE AGGREGATE, I DID NOT CONSIDER THAT TO BE A  
12 REASONABLE ALTERNATIVE.

13 Q. SO YOU'RE TELLING THE COURT THAT YOU WOULDN'T HAVE USED  
14 THAT WORK IF IT COSTS \$4.76 PER STUDENT?

15 A. I WOULD BE RELUCTANT. MY SENSE IS I WOULD NEED TO THINK  
16 SPECIFICALLY ABOUT WHAT THE ALTERNATIVE WORKS ARE, BUT I THINK  
17 THERE'S A GOOD CHANCE THAT I WOULD NOT USE THE WORK.

18 Q. OKAY. IF YOU COULD SCROLL DOWN TO THE NEXT WORK WHICH IS  
19 THE WORK BY HOOK WHICH IN YOUR JUDGMENT WAS THE VERY BEST  
20 SUBSTANTIVE SUMMARY OF HOW FOREIGN POLICY BUREAUCRACY WORKS,  
21 AND ASSUMING YOU COULD HAVE OBTAINED PERMISSION FROM THE  
22 PUBLISHER TO USE THIS WORK FOR \$5.32 PER STUDENT, IS IT YOUR  
23 TESTIMONY THAT YOU WOULD NOT HAVE ASSIGNED THIS VERY BEST WORK  
24 TO STUDENTS IN YOUR COURSE BECAUSE THE COST WOULD HAVE BEEN  
25 \$5.32 PER STUDENT?

1 A. WELL, AGAIN, I THINK I WOULD HAVE TO DO A FULL ANALYSIS OF  
2 WHAT THE ALTERNATIVES WERE, BUT, YOU KNOW, THINKING IN THE  
3 AGGREGATE OF ALL OF THE VARIETY OF READINGS THAT I USE ERES  
4 FOR, I THINK THAT IT WOULD BE COST PROHIBITIVE TO CHARGE THAT  
5 AMOUNT OF MONEY WHEN YOU ADD IT TOGETHER, AND I THINK THAT IF I  
6 HAD AS WAS MY EXPERIENCE PRIOR WITH THE COURSEPACK, THE  
7 PROBABILITY OF STUDENTS DOING THE READINGS AND PURCHASING THE  
8 COURSEPACK WOULD GO DOWN CONSIDERABLY.

9 Q. ISN'T IT TRUE, PROFESSOR HANKLA, THAT YOU DID NOT  
10 INVESTIGATE WHETHER LICENSING OR PERMISSIONS WERE AVAILABLE FOR  
11 THESE TWO WORKS?

12 A. I DID NOT SPECIFICALLY INVESTIGATE LICENSING FOR THESE TWO  
13 WORKS.

14 Q. YOU DID NOT CONTACT COPYRIGHT CLEARANCE CENTER OR THE  
15 PUBLISHER --

16 A. NO.

17 Q. -- TO DETERMINE WHETHER PERMISSIONS WERE AVAILABLE,  
18 CORRECT?

19 A. CORRECT.

20 Q. AND I THINK YOU TESTIFIED THAT ONE OF THE PROBLEMS THAT  
21 YOU HAD WITH COURSEPACKS IS THAT IT HAD TAKEN SO LONG FOR THE  
22 MATERIALS TO BE ASSEMBLED AND THEY WEREN'T RECEIVED UNTIL TWO  
23 OR THREE WEEKS I BELIEVE INTO THE COURSE?

24 A. YES.

25 Q. AND SO YOU DIDN'T DETERMINE WHETHER PERMISSION TO USE

1 THESE WORKS COULD HAVE BEEN OBTAINED IMMEDIATELY FROM THE  
2 PUBLISHER; IS THAT CORRECT?

3 A. I DID NOT SPECIFICALLY INVESTIGATE THESE WORKS.

4 Q. IF YOU CAN BRING BACK UP JUST BRIEFLY THE CHECKLIST WHICH  
5 IS DEFENDANT'S EXHIBIT 480, AND YOU CHECKED -- UNDER FACTOR 4  
6 PLEASE, AND YOU CHECKED THE BOX FOR NO SIMILAR PRODUCT MARKETED  
7 BY THE COPYRIGHT HOLDER; IS THAT CORRECT?

8 A. THAT'S CORRECT.

9 Q. AND BY THAT YOU MEANT THAT IT WASN'T IN YOUR LIBRARY AND  
10 NOT IN THE GSU LIBRARY, CORRECT?

11 A. I MEANT THAT AFTER MY INVESTIGATION OF MY LIBRARY AND THE  
12 GSU LIBRARY, YES.

13 Q. YOU DID NOT CONTACT THE PUBLISHER OF THIS WORK OR THE --  
14 YOU DID NOT CONTACT THE COPYRIGHT HOLDER OF THIS WORK TO  
15 DETERMINE WHETHER THERE WAS A SIMILAR PRODUCT MARKETED BY THE  
16 HOLDER, CORRECT?

17 A. THAT'S CORRECT, I DID NOT CONTACT THEM. ALTHOUGH I WOULD  
18 ADD THAT THE NEXT LINE, I THINK I PROBABLY COULD HAVE CHECKED  
19 NO LONGER IN PRINT, ALTHOUGH I CAN'T ABSOLUTELY SAY FOR SURE,  
20 BUT THIS WAS A 2005 PUBLICATION AND I WAS PUTTING IT ON IN  
21 2009.

22 Q. AND YOU ALSO CHECKED THE BOX FOR USE STIMULATES MARKET FOR  
23 ORIGINAL WORK; IS THAT CORRECT?

24 A. THAT'S CORRECT.

25 Q. AND I BELIEVE YOU TESTIFIED THAT STUDENTS MIGHT HAVE BEEN

1 INSPIRED TO PURCHASE THE BOOK FROM HAVING READ A PORTION OF IT  
2 IN YOUR CLASS, IS THAT CORRECT, OR WORDS TO THAT AFFECT?

3 A. YES, SIR.

4 Q. NOW YOU KNOW OF NO STUDENTS IN YOUR POLITICAL SCIENCE 3450  
5 CLASS THAT PURCHASED EITHER OF THE TWO WORKS THAT WE HAVE BEEN  
6 TALKING ABOUT FOR WHICH YOU COMPLETED THE FAIR USE CHECKLIST,  
7 CORRECT?

8 A. I DON'T HAVE SPECIFIC KNOWLEDGE, BUT I DON'T KNOW THEIR  
9 PURCHASING HABITS.

10 THE COURT: YOU'VE GOT NINE MINUTES LEFT.

11 MR. KRUGMAN: OKAY. I'M NOT GOING TO TAKE THE NINE  
12 MINUTES. I WAS GOING TO ASK ONE MORE, AND YOU KNOW WHAT, I  
13 THINK I'M DONE.

14 THE COURT: I'M SORRY THAT I SAID ANYTHING.

15 MR. KRUGMAN: THAT'S OKAY, I WAS NOT GOING ANYWHERE  
16 NEAR NINE MINUTES.

17 MS. MOFFITT: YOUR HONOR, WE DON'T HAVE ANY  
18 QUESTIONS.

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

20 SHALL WE GET STARTED ON THE NEXT WITNESS?

21 MR. SCHAETZEL: YES, MA'AM.

22 THE CLERK: PLEASE RAISE YOUR RIGHT HAND TO TAKE THE  
23 OATH.

24 JANET GABLER-HOVER,

25 HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

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1 THE CLERK: IF YOU WILL HAVE A SEAT, PLEASE, AND  
2 STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME  
3 ALSO.

4 THE WITNESS: MY FULL NAME IS JANET GABLER-HOVER.  
5 IT'S G A B L E R HYPHEN H O V AS IN VICTOR E R.

6 DIRECT EXAMINATION

7 BY MS. MOFFITT:

8 Q. YOU'RE CURRENTLY A PROFESSOR AT GEORGIA STATE, CORRECT?

9 A. YES.

10 Q. AND ARE YOU AFFILIATED WITH A PARTICULAR DEPARTMENT WITHIN  
11 GEORGIA STATE?

12 A. YES, I TEACH IN THE DEPARTMENT OF ENGLISH AT GEORGIA  
13 STATE.

14 Q. AND WHEN DID YOU START TEACHING AT GEORGIA STATE?

15 A. TWENTY-EIGHT YEARS AGO.

16 Q. CAN YOU DESCRIBE FOR US GENERALLY WHAT TYPES OF COURSES  
17 YOU TEACH AT GEORGIA STATE?

18 A. I GENERALLY TEACH 19TH CENTURY AMERICAN LITERATURE AND  
19 FEMINIST THEORY.

20 Q. ARE YOU THE AUTHOR ANY BOOKS?

21 A. I'M THE AUTHOR OF TWO BOOKS, AND THE EDITOR OF A MULTI  
22 VOLUME SCRIVENER'S LITERARY ENCYCLOPEDIA.

23 Q. HOW WOULD YOU CHARACTERIZE THE NATURE OF THE BOOKS THAT  
24 YOU'VE PUBLISHED?

25 A. THE TWO BOOKS THAT I AUTHORED ARE SINGLE-AUTHOR BOOKS, AND

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1 THEY'RE BOTH CULTURAL LITERARY EXAMINATIONS THAT ARE IN THE  
2 19TH CENTURY.

3 Q. ARE YOU AWARE OF ANY OF YOUR BOOKS EVER BEING USED BY  
4 OTHER PROFESSORS FOR PURPOSES OF TEACHING?

5 A. YES, I WAS DELIGHTED TO FIND OUT WHEN MY FIRST BOOK CAME  
6 OUT IN 1990 I WAS JUST ECSTATIC TO FIND OUT FROM ANOTHER  
7 COLLEAGUE THAT A PROFESSOR AT THE UNIVERSITY OF CALIFORNIA  
8 IRVINE HAD PUT A CHAPTER OF MY BOOK ON RESERVE FOR HIS STUDENTS  
9 BECAUSE THAT MEANT THAT HE KNEW MY WORK, AND I COULD CITE HIM  
10 BECAUSE IN PROMOTION AND TENURE DECISIONS YOU HAVE TO SHOW HOW  
11 MANY TIMES YOU'VE BEEN CITED TO PROVE NATIONAL AND  
12 INTERNATIONAL REPUTATION, AND EXCITED AS WELL THAT HIS GRADUATE  
13 STUDENTS WERE GOING TO BECOME FAMILIAR WITH MY WORK BECAUSE  
14 THAT'S ABOUT THE ONLY WAY THAT THAT SORT OF THING HAPPENS.

15 Q. SO DO YOU BELIEVE YOU RECEIVED A BENEFIT FROM THIS OTHER  
16 PROFESSOR USING YOUR BOOK IN HIS CLASS?

17 A. ABSOLUTELY. I MEAN MONETARY IN THE SENSE THAT IT WAS ONE  
18 OF THE CONVENTIONS THAT WAS INVOLVED IN MY GETTING TENURE  
19 BECAUSE THAT WAS THE FIRST BOOK, GETTING TENURE AS AN ASSOCIATE  
20 PROFESSOR AT GEORGIA STATE.

21 Q. HAVE YOU EVER RECEIVED ANY ROYALTIES FOR THE BOOKS THAT  
22 YOU'VE AUTHORED AND PUBLISHED?

23 A. NO, THE EDITED BOOK I HAVE, THE EDITED ENCYCLOPEDIA I DID,  
24 BUT NOT FOR UNIVERSITY PRESS BOOKS, NO.

25 Q. SO THE BOOKS YOU ACTUALLY AUTHORED YOU DID NOT RECEIVE ANY

1 ROYALTIES?

2 A. NEITHER OF THEM, NO.

3 Q. NOW DID YOU TEACH A COURSE CALLED CYBORGS IN AMERICAN  
4 CULTURE ENGLISH 4200 IN THE FALL OF 2009?

5 A. YES, I DID.

6 Q. WAS THAT COURSE A GRADUATE LEVEL COURSE OR AN  
7 UNDERGRADUATE LEVEL COURSE?

8 A. IT WAS AN UNDERGRADUATE LEVEL COURSE.

9 Q. GENERALLY WHAT LEVEL OF STUDENTS?

10 A. JUNIOR AND SENIOR.

11 Q. CAN YOU TELL US GENERALLY WHAT THAT COURSE WAS ABOUT?

12 A. YES, IT WAS SORT OF A DEPARTURE FOR ME. I HAVE A  
13 FASCINATION WITH CYBORG MOVIES, AND I DECIDED THAT IT MIGHT BE  
14 RELEVANT TO THE STUDENTS TO LOOK AT THOSE MOVIES OF SCIENCE  
15 FICTION, SOME OF WHICH HAS GOT VERY GOOD REPUTATIONS BEYOND  
16 SIMPLY POPULAR CULTURE, AND TO SEGUE THAT WITH CURRENT  
17 INVESTIGATIONS INTO CYBERNETICS AND THE DIFFERENT WAYS IN WHICH  
18 HUMANS ARE CONSIDERED CYBORGS THROUGH THE SORT OF ARTIFICIAL  
19 LIMBS AND SO FORTH THAT THEY GET.

20 SO THAT IT BECOMES QUESTIONS OF JUST EXACTLY WHAT IS  
21 HUMANITY AND HOW IS IT CONSTITUTED, AND SO IT WAS A VERY -- IT  
22 WAS REALLY INTENDED TO BE PHILOSOPHICAL AND ENGAGED WITH THEIR  
23 OWN LIVES WHICH THEY LIVE IN NOW AND HAVE THEM THINK CRITICALLY  
24 ABOUT THE IMPLICATIONS OF WHAT HAPPENS WHEN THEY USE A COMPUTER  
25 OR IMPLICATIONS OF WHAT HAPPENS WHEN THEY CONSIDER THINGS LIKE

1 ARTIFICIAL LIMBS AND JUST PROSTHETICS IN GENERAL.

2 THE COURT: WHAT IS A CYBORG?

3 THE WITNESS: THAT'S THE FIRST THING I SAY IN CLASS.

4 A CYBORG IS A CYBERNETIC ORGANISM WHICH IS MEAT/METAL FUSION IS  
5 THE WAY THAT THE ESSAY THAT I USED THAT I RESERVED IS CALLED A  
6 COMBINATION -- IT'S A VARIABLE TERM. IT REALLY MEANS A MACHINE  
7 THAT HAS A FACADE OF HUMAN SKIN.

8 HOWEVER, HUMANS ARE NOW CONSIDERED CYBORGIC. ONE OF  
9 THE CRITICS ARGUES THAT EVEN PUTTING YOUR HAND ON A STEERING  
10 WHEEL AND DRIVING CONNECTS YOU TO A MACHINE IN SUCH A WAY THAT  
11 YOU BECOME CYBORGIC.

12 SO IT'S A VERY INTERESTING, I THINK, FULL RANGE OF  
13 POSSIBILITIES FOR HOW WE JUST WANT TO THINK ABOUT OURSELVES ON  
14 THE INTERNET AND IN A SCIENTIFICALLY ADVANCED WORLD SUCH AS WE  
15 HAVE.

16 BY MS. MOFFITT:

17 Q. ARE THERE ANY MOVIES THAT WOULD BE FAMILIAR TO US THAT --

18 A. YEAH, I'M RELUCTANT TO SAY IT BECAUSE WHEN I REALIZED I  
19 WAS GOING TO BE TALKING ABOUT THIS COURSE, I REMEMBER THAT ONE  
20 OF MY STUDENTS WHEN I TAUGHT IT LAST SEMESTER SAID HE TOLD HIS  
21 FATHER HIS WAS TAKING THIS COURSE AND HE SAID SO THAT WHAT'S  
22 THEY TEACH YOU AT GEORGIA STATE UNIVERSITY. SO BEING AN  
23 ENGLISH PROFESSOR I DON'T KNOW IF THAT'S WHAT I WANT TO BE  
24 KNOWN BY.

25 I ACTUALLY START WITH METROPOLIS, A FRITZ LANE



1 CLASSIC FILM THAT CAME OUT IN THE 1930'S THAT HAD THE FIRST  
2 FEMALE ROBOTIC IN IT AND GOING FROM THERE LOOKING AT SUCH  
3 MOVIES AS CULT CLASSICS LIKE BLADE RUNNER. I TEACH ISAAC  
4 ASIMOV' I, ROBOT, THE BOOK, AND THEN WE SEE BLADE RUNNER WHICH  
5 IS AN ADAPTATION OF THAT, AND THEY SEE HOW VERY DIFFERENT THOSE  
6 TWO THINGS ARE, AND THEY DO CERTAIN TEXTURAL ANALYSES. THEY  
7 READ FILMS AS LITERATURE. BECAUSE I WANT THEM TO BE AWARE THAT  
8 EVERYTHING THAT THEY GET IN POPULAR CULTURE IS ITSELF TEXT TO  
9 READ, NOT SOMETHING THAT THEY SHOULD SIMPLY SUCK IN BUT  
10 SOMETHING THAT THEY SHOULD SIT BACK AND ANALYZE.

11 Q. HOW MANY STUDENTS DO YOU HAVE IN YOUR CLASS?

12 A. 30.

13 Q. AND THAT WAS IN THE FALL OF 2009?

14 A. YES.

15 Q. AND DID YOU PREPARE A SYLLABUS FOR THIS COURSE?

16 A. I DID.

17 MS. MOFFITT: YOUR HONOR, MAY I APPROACH?

18 THE COURT: YES.

19 BY MS. MOFFITT:

20 Q. IF YOU COULD TURN TO THE EXHIBIT MARKED DX-599 WHICH IS  
21 YOUR SYLLABUS FOR THE CYBORGS IN AMERICAN CULTURE COURSE.

22 MS. MOFFITT: YOUR HONOR, I WOULD MOVE THIS SYLLABUS  
23 DX-599 INTO EVIDENCE. I DON'T BELIEVE THERE IS ANY OBJECTION.

24 MR. BLOOM: NO OBJECTION.

25 THE COURT: IT'S ADMITTED.

1 BY MS. MOFFITT:

2 Q. TURNING TO THE FIRST PAGE OF YOUR SYLLABUS DEFENDANTS'  
3 EXHIBIT 599, THERE'S A SECTION HERE ENTITLED COURSE TEXT; DO  
4 YOU SEE THAT?

5 A. YES, I DO.

6 Q. WHAT DOES THIS SECTION IN YOUR SYLLABUS GENERALLY REFLECT?

7 A. THE COURSE TEXT INVOLVED THE PRIMARY FICTION THAT THEY ARE  
8 GOING TO BE READING.

9 Q. SO THESE ARE BOOKS?

10 A. THESE ARE BOOKS, YES, THEY ARE.

11 Q. AND WERE ANY OF THESE BOOKS LISTED HERE REQUIRED BOOKS FOR  
12 READING?

13 A. THEY WERE ALL REQUIRED.

14 Q. HOW WERE THE STUDENTS TO OBTAIN COPIES OF THESE SPECIFICS  
15 BOOKS?

16 A. THEY PURCHASED THEM FROM THE BOOKSTORE.

17 Q. AND DO YOU RECALL ROUGHLY EACH OF THESE BOOKS COST?

18 A. I TRIED VERY HARD TO GIVE THEM THE LEAST EXPENSIVE ONES.  
19 BECAUSE IN ENGLISH YOU CAN'T JUST GIVE ONE MAJOR TEXTBOOK, ONE  
20 MAJOR BOOK, YOU HAVE TO USE A VARIETY MATERIALS. YOU HAVE TO  
21 READ A NUMBER OF NOVELS.

22 I DO INSIST THAT THEY ALL USE THE SAME EDITION. SO I  
23 WANT TO MAKE SURE IT'S AFFORDABLE. SO USUALLY THE AVERAGE  
24 PRICE IS \$ 4.95 PER BOOK.

25 I'D LIKE THE STUDENTS TO BE ABLE TO SPEND ONLY ABOUT

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1 60 OR 65 DOLLARS IN A COURSE, ESPECIALLY AT THE UNDERGRADUATE  
2 LEVEL, AND STUDENTS ARE OFTEN THANKFUL. THEY THANK ME FOR IT  
3 BECAUSE THEY'RE TAKING FIVE CLASSES.

4 MR. BLOOM: YOUR HONOR, I JUST WANT TO OBJECT TO THE  
5 QUESTION DIRECTED TO THE READINGS THAT ARE NOT AT ISSUE ON THE  
6 JOINT FILING AND TO STRIKE THE TESTIMONY AND RESPONSE TO THAT  
7 QUESTION.

8 THE COURT: OVERRULED.

9 BY MS. MOFFITT:

10 Q. YOU HAVE A SECTION IN YOUR SYLLABUS ENTITLED ERESERVES.  
11 DID YOU PUT ANY READINGS OR REQUEST ANY READINGS BE PUT ON  
12 ERESERVES FOR THIS CLASS?

13 A. YES, I DID.

14 Q. DO YOU RECALL ROUGHLY HOW MANY?

15 A. TWO.

16 Q. OKAY. IN THE SECTION UNDER ERESERVES, YOU STATE THAT --  
17 YOU ASK YOUR STUDENTS HERE TO PRINT OUT WHAT YOU HAVE ON  
18 ERESERVE, QUOTE, FORMING A COURSE PACKET FOR YOURSELF.

19 WHAT DID YOU MEAN BY THAT?

20 A. WELL, WHAT I MEANT BY THAT IS NOT WHAT YOU CALL A COURSE  
21 TEXT IN A TRADITIONAL SENSE. WHEN I THINK OF A COURSEPACK IN A  
22 TRADITIONAL SENSE, I THINK ABOUT IT AS A GROUP OF PRIMARY  
23 TEXTS, LIKE THE FICTIONS THEMSELVES THAT HAVE BEEN AUTHORED BY  
24 AUTHORS.

25 WHEN I THINK OF A COURSE PACKET IN THIS SENSE, IT'S

1 REALLY MORE A TURN THROUGH WHICH I WANT THEM TO UNDERSTAND WHAT  
2 IT IS I WANT THEM TO DO, AND WHAT I WANT THEM TO DO IS NOT  
3 SIMPLY LOOK AT SOMETHING ON A COMPUTER AND THEN DELETE IT BUT  
4 HAVE A COPY IN FRONT OF THEM THAT THEY CAN MAKE NOTES ON AND  
5 ENGAGE WITH AND THAT AT THE BEGINNING OF THE SEMESTER I WANT  
6 THEM TO START DOING THAT AND USING IT.

7 I WANT THEM TO BRING -- IT'S HARD ENOUGH TO GET THEM  
8 TO BRING TEXTBOOKS TO CLASS. SO I WANT TO GIVE THEM THE IDEA  
9 OF SOMETHING PALPABLE THAT CAN ENCOURAGE THEM TO ACTUALLY DO  
10 WHAT IT IS THEY'RE SUPPOSED TO BE DOING.

11 Q. OKAY. IF I CAN DIRECT YOUR ATTENTION THEN TO PAGE 5 OF  
12 YOUR SYLLABUS, THERE IS A READING ASSIGNMENT LISTED HERE FOR  
13 HISTORY OF FEMINIST LITERARY THEORY?

14 A. YES. IT'S ON WEEK 12.

15 Q. WEEK 12, THERE IT IS. THANK YOU. CAN YOU DESCRIBE  
16 GENERALLY WHAT IS HISTORY OF FEMINIST LITERARY THEORY; IS IT A  
17 BOOK?

18 A. YES, IT'S A BOOK, A CUTTING EDGE --

19 Q. COULD YOU MOVE YOUR MICROPHONE CLOSER?

20 A. SORRY. IT'S A CUTTING EDGE BOOK THAT CAME OUT IN 2007  
21 WHICH IS A COMPILATION OF EXPERTS IN DIFFERENT BRANCHES OF  
22 FEMINIST LITERARY THEORY OF WHICH THERE ARE MANY, BLACK  
23 FEMINIST LITERATURE, QUEER THEORY LITERATURE, SECOND WAVE  
24 FEMINISM.

25 THE ESSAY IN QUESTION HERE IS FEMINISTS AND

1 TECHNOLOGY AND FEMINISTS AND PSYCHOANALYSIS, AND EACH OF THESE  
2 ESSAYS IS A BIBLIOGRAPHICAL ESSAY. IT'S LIKE AN ANNOTATED  
3 BIBLIOGRAPHY WHERE THEY DO INDEED GIVE -- THEY DRAW SYNTHESSES  
4 AND COMPARISONS AND TALK ABOUT ALL OF THE MAJOR THOUGHTS AND  
5 MAJOR ARGUMENTS THAT CRITICS, ESPECIALLY UPDATED CRITICS OF THE  
6 TIME HAVE MADE.

7 Q. DOES THE BOOK CONSIST OF MULTIPLE CHAPTERS?

8 A. IT DOES.

9 Q. AND IS THE BOOK AUTHORED BY A SINGLE AUTHOR OR --

10 A. MULTIPLE AUTHORS, YEAH, I THINK ABOUT 30.

11 Q. AND WOULD YOU CONSIDER IT TO BE A FICTION, NONFICTION --

12 A. NONFICTION.

13 Q. WHAT EXCERPT DID YOU ASSIGN FROM THIS BOOK; DO YOU RECALL?

14 A. IT'S THE ONE ON FEMINIST AND TECHNOLOGY BY STACY GILLIS.

15 Q. AND DO YOU UNDERSTAND THAT THE PLAINTIFFS IN THIS CASE  
16 ALLEGE THAT YOUR USE OF THIS PARTICULAR EXCERPT INFRINGES ONE  
17 OF THEIR COPYRIGHTS?

18 A. I THINK THAT'S BEEN MADE CLEAR TO ME.

19 MS. MOFFITT: YOUR HONOR, MAY I APPROACH?

20 THE COURT: YES.

21 MS. MOFFITT: I'VE HANDED YOU A BOOK THAT'S BEEN  
22 MARKED DEFENDANTS' EXHIBIT 812.

23 I'D LIKE TO MOVE THAT INTO EVIDENCE.

24 MR. BLOOM: NO OBJECTION.

25 THE COURT: IT'S ADMITTED.

1 BY MS. MOFFITT:

2 Q. IS THIS A COPY OF THE EDITION OF THE BOOK FROM WHICH YOU  
3 ASSIGNED THE EXCERPT YOU JUST REFERENCED?

4 A. YES.

5 Q. NOW, I JUST WANT TO NOTE IT SEEMS LIKE ON YOUR SYLLABUS  
6 YOU REFERENCE HISTORY OF FEMINIST LITERARY THEORY, BUT THE BOOK  
7 IS ENTITLED HISTORY OF FEMINIST LITERARY CRITICISM?

8 A. MY MISTAKE ON THE SYLLABUS. I DO A NEW SYLLABUS EVERY  
9 SEMESTER, AND SOMETIMES STUDENTS HAVE TO CORRECT ME  
10 DR. GABLER-HOVER, DON'T YOU MEAN THIS, AND THAT'S ONE TIME I  
11 GUESS.

12 Q. AND WHICH SPECIFIC PAGES OUT OF THIS BOOK DID YOU ASSIGN  
13 FOR YOUR CLASS?

14 A. PAGES 322 THROUGH 335.

15 Q. IS THAT ROUGHLY 14 PAGES?

16 A. YES.

17 Q. HOW MANY PAGES ARE IN THAT BOOK?

18 A. 352 PAGES.

19 Q. AND WHAT PERCENTAGE OF THE BOOK DID YOU USE IF YOU USED 14  
20 PAGES ROUGHLY?

21 A. I DON'T USUALLY CALCULATE PERCENTAGES. I HAVE A SENSE OF  
22 WHAT IS APPROPRIATE AND HOW MUCH IT SHOULD BE ALMOST  
23 INTUITIVELY, AND THE SAME WAY THAT WHEN I LOOK AT SOMETHING  
24 THAT I'M GOING TO BUY, I KNOW WHAT PRICE IT OUGHT TO BE, AND SO  
25 I THOUGHT THAT 14 PAGES OUT OF A 350 PAGE BOOK WOULD BE

1 APPROPRIATE.

2 I START GETTING NERVOUS IF IT STARTS GETTING MORE  
3 THAN THAT BECAUSE I FEEL AS IF I'M ENCROACHING ON THE WORK.

4 Q. I THINK YOU SAID YOU ASSIGNED THIS EXCERPT FOR THIS  
5 PARTICULAR CLASS IN WEEK 12; IS THAT RIGHT?

6 A. YES.

7 Q. WHAT WAS THE SUBJECT MATTER OF THE CLASS THAT YOU WERE  
8 TEACHING DURING THAT WOULD WEEK?

9 A. THAT WEEK I WAS TEACHING THE NOVEL NEUROMANCER WHICH IS  
10 WHAT THEY CALL A CYBERPUNK FICTION WHICH IS A MALE, SORT OF A  
11 MALE ROMANCE FANTASY SET IN THE FUTURE OF WHAT IS CALLED A  
12 CYBERPUNK COWBOY WHO RIDES THE WAVES OF THE INTERNET AND PLUGS  
13 INTO THEM IN SUCH A WAY THAT A SURREAL WORLD IS BEING CREATED  
14 AND PRETTY MUCH -- AND THERE ARE -- IT COMES OUT OF ACTUALLY  
15 DETECTIVE FICTION, AND SO YOU HAVE HEROINES WHO ARE SORT OF  
16 FEMME FATALE.

17 AND THE ARGUMENT THAT GILLIS IS MAKING IN HER BOOK IS  
18 AN ATTACK DIRECTLY ON NEUROMANCER AS THE WORST OF THESE  
19 EXAMPLES AND ON SEVERAL DIFFERENT MOVIES AS WELL TALKING ABOUT  
20 HER VIEW THAT THESE ARE MISOGYNISTIC.

21 THERE WAS A CRITIC NAMED DONNA HARRAWAY WHO WROTE  
22 THIS VERY FAMOUS ESSAY CALLED THE CYBORG MANIFESTO, AND IN IT  
23 SHE ARGUED THAT THE INTERNET WAS A VERY POSITIVE THING FOR  
24 WOMEN BECAUSE IT WASN'T EMBODIED -- THEIR BODIES WOULD NOT BE  
25 CALLED INTO ATTENTION, AND, THEREFORE, THEY COULD HAVE A

1 NEUTRAL VOICE ON THE INTERNET.

2 GILLIS WAS VERY CONCERNED ABOUT -- AND THEN THERE HAD  
3 BEEN FEMINISTS WHO CAME ON BOARD THAT GILLIS HAD BEEN VERY  
4 CONCERNED ABOUT THAT IMPLICATION BECAUSE OF THE PREDOMINANTLY  
5 YOUNG WHITE MALE USER OF THE INTERNET AND THE KINDS OF THINGS  
6 ABOUT WOMEN THAT ARE BEING PUT ON THE INTERNET, INCLUDING  
7 SOMETHING CALLED A RAPE ON THE MOVE WHICH WAS A MULTIMODEL  
8 COMMUNITY IN WHICH WOMEN -- ONE WOMAN WAS RAPED MULTIPLY BY A  
9 NUMBER OF THE DIFFERENT MALE AVATARS IN IT, AND THE ARGUMENT  
10 THAT SHE WAS MAKING IS THIS IS THE SAME AS VIRTUAL RAPE.

11 AND SO USING THE ESSAY, I'M ABLE TO TALK ABOUT  
12 WHETHER OR NOT -- WHAT DO THEY FEEL A VIRTUAL RAPE ACTUALLY IS  
13 AND IN WHAT SENSE HOW DO WE LIVE ON THE INTERNET. THERE ARE  
14 PEOPLE THAT SUBSTITUTE VIRTUAL REALITY FOR REALITY AND FEEL IT  
15 IS JUST AS REAL, AND SO HER ESSAY --

16 Q. WHEN YOU SAY HER ESSAY, ARE YOU REFERRING TO THIS EXCERPT?

17 A. YES, GILLIS' EXCERPT. IT IS A TALKING POINT. IT'S A  
18 POINT OF ENTRY. IT'S AN ANTAGONISTIC HERE'S THE -- THEY LOVE  
19 THE NEUROMANCER AND ALL OF A SUDDEN THEY ARE STANDING BACK FROM  
20 IT AND FORCING TO ANALYZE IT IN TERMS OF ITS IMPLICATIONS BY  
21 HAVING SEEN THIS OTHER SOURCE THAT MENTIONED IT, AND TYPICALLY  
22 THEY HAVEN'T READ OR UNDERSTOOD THROUGHOUT THE ESSAY, SO I WILL  
23 POINT TO SALIENT SECTIONS IN IT AND READ A SENTENCE OR TWO FROM  
24 IT, BUT MOSTLY I'M USING IT AS A SPRINGBOARD FOR THE  
25 DISCUSSION --

ANDRE G. ASHLEY, O.C.R.



1 THE COURT: I'M AFRAID WE'RE GOING TO HAVE TO STOP  
2 FOR TODAY. DID YOU HAVE SOMETHING TO SAY?

3 MR. BLOOM: JUST A HOUSEKEEPING MATTER, YOUR HONOR,  
4 THIS BOOK WAS PREVIOUSLY ADMITTED AS PLAINTIFFS' EXHIBIT 103.  
5 I DON'T KNOW IF WE NEED TO ADMIT IT A SECOND TIME UNDER THE  
6 DEFENDANT'S EXHIBIT NUMBER 812.

7 MS. MOFFITT: I GUESS I HAVEN'T SEEN YOUR VERSION.  
8 AS LONG AS IT'S THE RIGHT VERSION THEN --

9 THE COURT: I THINK IF IT IS THE SAME VERSION WE  
10 SHOULD STICK WITH JUST THE ONE EXHIBIT.

11 MS. MOFFITT: THAT'S FINE.

12 THE COURT: THE EXHIBIT YOU IDENTIFIED IS WHAT?

13 MS. MOFFITT: THE ONE I IDENTIFIED WAS 812,  
14 DEFENDANTS' EXHIBIT 812.

15 THE COURT: LET'S PULL IT OUT.

16 MS. MOFFITT: SURE, I'M HAPPY TO USE YOURS.

17 THE COURT: I'LL SEE YOU ALL TOMORROW MORNING AT  
18 9:30.

19 (PROCEEDINGS ADJOURNED)

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REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

ANDRE G. ASHLEY  
OFFICIAL COURT REPORTER  
UNITED DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA

DATE:

ANDRE G. ASHLEY, O.C.R.