

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

4 CAMBRIDGE UNIVERSITY PRESS,)
5 ET AL.,) DOCKET NO. 1:08-CV-1425-ODE
6 PLAINTIFFS,) ATLANTA, GEORGIA
7 V.) MAY 27, 2011
8 MARK P. BECKER, IN HIS)
9 OFFICIAL CAPACITY AS GEORGIA)
10 STATE UNIVERSITY PRESIDENT,)
11 ET AL.,)
12 DEFENDANTS.)

13 VOLUME 9
14 TRANSCRIPT OF BENCH TRIAL
15 BEFORE THE HONORABLE ORINDA D. EVANS
16 SENIOR UNITED STATES DISTRICT JUDGE

17 APPEARANCES OF COUNSEL:

18 FOR THE PLAINTIFFS:

JONATHAN BLOOM
EDWARD B. KRUGMAN
TODD D. LARSON
JOHN H. RAINS.
R. BRUCE RICH
RANDI W. SINGER

19 FOR THE DEFENDANTS:

ANTHONY B. ASKEW
JOHN W. HARBIN
RICHARD MILLER
NATASHA H. MOFFIT
KATRINA M. QUICKER
STEPHEN M. SCHAEITZEL

20 COURT REPORTER:

ANDY ASHLEY
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1 P R O C E E D I N G S

2 (ATLANTA, FULTON COUNTY, GEORGIA; MAY 27, 2011
3 IN OPEN COURT.)

4 THE COURT: GOOD MORNING. ARE YOU READY?

5 MS. MOFFITT: WE'RE READY.

6 THE COURT: GOOD MORNING, PROFESSOR. YOU'RE REMINDED
7 YOU'RE STILL UNDER OATH.

8 THE WITNESS: YES, MA'AM.

9 JANET GABLER-HOVER,
10 HAVING BEEN PREVIOUSLY FIRST DULY SWORN, WAS EXAMINED AND
11 TESTIFIED AS FOLLOWS:

12 THE COURT: YOU MAY PROCEED.

13 DIRECT EXAMINATION (CONTINUED)

14 MS. MOFFITT:

15 Q. GOOD MORNING, PROFESSOR, WELCOME BACK.

16 A. THANK YOU. GOOD MORNING TO YOU.

17 Q. WHEN WE CONCLUDED YESTERDAY, WE WERE TALKING A LITTLE BIT
18 ABOUT THE EXCERPT YOU SELECTED FROM THE HISTORY OF FEMINIST
19 LITERARY CRITICISM BOOK.

20 A. YES.

21 Q. ONE QUESTION I HAD ABOUT THAT BOOK HISTORY OF FEMINIST
22 LITERARY CRITICISM, DO YOU KNOW HOW MUCH THAT BOOK COST?

23 A. IT COST 140 DOLLARS.

24 Q. NOW, YOU REQUESTED THAT A COPY OF THE FEMINIST CRITICISM
25 EXCERPT FROM THIS BOOK BE LOADED TO ERES; IS THAT CORRECT?

1 A. I DID.

2 Q. AND HOW DID YOU GO ABOUT REQUESTING THAT THAT EXCERPT BE
3 LOADED TO ERES?

4 A. WELL, I HAD A HARD TIME FINDING ERES SO I SELDOM USE IT
5 BECAUSE I'M NOT ALL THAT COMPUTER FRIENDLY, BUT WHAT I DID WAS
6 TO GO ONTO THE ERESERVE PAGE, AND THEN I WAS TOLD THAT I HAD TO
7 DO A FAIR USE FOR IT BEFORE I WENT AHEAD AND ORDERED IT. SO
8 THE FIRST THING I DID WAS TO CLICK ONTO THAT OF COURSE AND THEN
9 TO COME BACK AND PUT IN MY ORDER.

10 Q. BEFORE REQUESTING THAT THE EXCERPT BE LOADED TO ERES, DID
11 YOU CONSIDER WHETHER YOUR USE OF THE EXCERPT WOULD BE A FAIR
12 USE?

13 A. YES, I DID BECAUSE I WENT ON THAT SHEET, AND IT ASKED ME
14 THOSE QUESTIONS, AND IT GAVE CAUSE TO THINK ABOUT WHAT I WAS
15 DOING.

16 Q. AND WHEN YOU'RE REFERRING TO A SHEET, WHAT ARE YOU
17 REFERRING TO?

18 A. WELL WHEN SOMETHING IS ON A COMPUTER I THINK OF IT
19 STILL -- SINCE I'M BOOK ORIENTED FROM WHENEVER, I THINK OF IT
20 AS A SHEET. IT WAS ONLINE. IT WAS A SERIES OF QUESTIONS.

21 Q. LET ME DIRECT YOUR ATTENTION TO DEFENSE EXHIBIT 213 WHICH
22 SHOULD BE IN YOUR NOTEBOOK. LET ME ASK YOU DO YOU RECOGNIZE
23 THIS DOCUMENT?

24 A. I DO.

25 Q. IS THIS THE SHEET THAT YOU'RE REFERRING TO IN YOUR

1 TESTIMONY?

2 A. YES.

3 MS. MOFFITT: YOUR HONOR, WE WOULD MOVE DEFENDANTS'
4 EXHIBIT 213 INTO EVIDENCE. I DON'T BELIEVE THE PLAINTIFFS HAVE
5 ANY OBJECTION TO THIS EXHIBIT.

6 MR. BLOOM: THIS IS ALREADY IN EVIDENCE AS A PART OF
7 THE POLICIES BUT NO OBJECTION.

8 THE COURT: I'M SORRY YOU SAY THE EXHIBIT IS ALREADY
9 IN EVIDENCE?

10 MR. BLOOM: THE SAME PAGES ARE ALREADY IN EVIDENCE IN
11 PART OF ANOTHER EXHIBIT. WE HAVE NO OBJECTION TO IT BEING
12 OFFERED AS A FREESTANDING DOCUMENT IN THIS FORM.

13 THE COURT: IT'S ADMITTED.

14 MS. MOFFITT: THANK YOU, YOUR HONOR.

15 BY MS. MOFFITT:

16 Q. NOW IN CONDUCTING YOUR FAIR USE ANALYSIS USING THIS
17 CHECKLIST, DID YOU ANALYZE EACH OF THE FOUR FACTORS OUTLINED?

18 A. YES, I DID.

19 Q. WITH RESPECT TO FACTOR 1, WHAT WAS YOUR CONCLUSION ABOUT
20 WHETHER FACTOR 1 WEIGHED IN FAVOR OF FAIR USE?

21 A. BY FACTOR 1 DO YOU MEAN NONPROFIT EDUCATIONAL?

22 Q. FACTOR 1 AS IN RIGHT HERE PURPOSE AND CHARACTER OF THE
23 USE?

24 A. YES. WHICH OF THOSE DID I CONSIDER OR HOW DID I CHECK ALL
25 OF THESE?

1 Q. WELL, DID YOU REACH AN ULTIMATE CONCLUSION ABOUT WHETHER
2 FACTOR 1 WEIGHED IN FAVOR OF FAIR USE?

3 A. YES.

4 Q. AND WHAT WAS THAT CONCLUSION?

5 A. IT WEIGHED IN FAVOR OF FAIR USE.

6 Q. AND HOW DID YOU REACH THAT CONCLUSION; IN OTHER WORDS,
7 WHAT FORMED THE BASIS FOR YOUR CONCLUSION?

8 A. CONSIDERING WHAT THIS SHEET DOES ACTUALLY IS MAKE ME --
9 PUT ME IN A POSITION OF REFLECTION WHERE I THINK ABOUT THE
10 IMPLICATIONS OF WHAT I'M DOING, AND IT MAKES ME THINK ABOUT THE
11 BOOK AS AN ARTIFACT, SOMETHING THAT NEEDS TO BE CONSIDERED. SO
12 DOING THAT SHEET HELPS ME TO DO THAT.

13 Q. DID YOU CONSIDER THE FACTORS LISTED HERE UNDER FACTOR 1?

14 A. YES.

15 Q. AND WHICH FACTORS DID YOU IDENTIFY AS BEING RELEVANT TO
16 YOUR ANALYSIS?

17 A. NONPROFIT, EDUCATIONAL, TEACHING, TRANSFORMATIVE, USE AS
18 NECESSARY.

19 Q. WERE THERE ANY FACTORS ON THE RIGHT-HAND SIDE UNDER WEIGHS
20 AGAINST FAIR USE THAT YOU CONCLUDED WERE RELEVANT?

21 A. NO.

22 Q. BUT YOU DID CONSIDER ALL THE FACTORS LISTED HERE UNDER
23 FACTOR 1?

24 A. RIGHT.

25 Q. LET ME ASK YOU ONE QUESTION ABOUT THE USE AS NECESSARY TO

1 ACHIEVE YOUR INTENDED EDUCATIONAL PURPOSE. WHY DID YOU BELIEVE
2 THAT TO BE THE CASE?

3 A. BECAUSE MY PURPOSE AS A PROFESSOR IN AN ENGLISH DEPARTMENT
4 IN PARTICULAR I THINK IS TO ENGAGE MY STUDENTS IN THOUGHT AND
5 ANALYSIS AND PROBLEM SOLVING. I TRY TO ARGUE TO THEM THAT THIS
6 ISN'T JUST ABOUT AN ENGLISH COURSE, BUT THESE ARE SKILLS THAT
7 THEY CAN TAKE AND APPLY IN ANY JOB THAT THEY WOULD GO INTO.

8 SO AS A CRITICISM SUCH AS THIS WHICH GETS THEM OFF
9 THE PAGE OF THE LECTURE NOTES OR EVEN A PIECE OF FICTION ITSELF
10 HELPS THEM TO THINK ANALYTICALLY. IT TAKES THEM INTO A PLACE
11 WHERE THEY THINK ABOUT THEIR OWN LIVES IN RELATIONSHIP TO IT.
12 SO I CONSIDER THE SOURCE VERY IMPORTANT, THAT KIND OF SOURCE
13 IMPORTANT.

14 Q. YOU ALSO INDICATED THAT YOU SELECTED OR FOUND
15 TRANSFORMATIVE TO BE RELEVANT TO YOUR ANALYSIS; CAN YOU EXPLAIN
16 THAT FOR US?

17 A. YES, BECAUSE THE ESSAY PER SE IN THIS INSTANCE IN A
18 JUNIOR/SENIOR LEVEL COURSE THEY'RE NOT GOING TO BE THINKING
19 AFTERWARD ABOUT WHO WROTE IT OR WHAT VENUE IT WAS IN. THEY'RE
20 GOING TO TAKE IDEAS THAT APPLY TO THEIR OWN LIVES AND THINK
21 ABOUT IT IN THAT WAY.

22 Q. WITH RESPECT TO FACTOR 2 ON THE SECOND PAGE OF THIS
23 EXHIBIT, DID YOU REACH A CONCLUSION ABOUT WHETHER FACTOR 2,
24 MAJOR COPYRIGHTED WORK, WEIGHED IN FAVOR OF FAIR USE?

25 A. YES, I DID. MY CONCLUSION WAS THAT IT DID WEIGH IN FAVOR

1 OF FAIR USE.

2 Q. AND WHAT WAS THE BASIS OF YOUR CONCLUSION OF FACTOR 2?

3 A. WELL, IT'S A PUBLISHED WORK. IT'S FACTUAL OR NONFICTION,
4 AND IT'S IMPORTANT TO MY EDUCATIONAL OBJECTIVES. IT WAS NOT AN
5 UNPUBLISHED WORK. IT WAS NOT HIGHLY CREATIVE, AND IT CERTAINLY
6 WASN'T A WORKBOOK OR A TEST.

7 Q. OKAY. WITH RESPECT TO FACTOR 3, WHAT WAS YOUR CONCLUSION
8 ABOUT WHETHER FACTOR 3 WEIGHED IN FAVOR OF FAIR USE?

9 A. SMALL PORTION OF WORK USED, PORTION USED IS NOT CENTRAL OR
10 SIGNIFICANT TO ENTIRE WORK AS A WHOLE, AMOUNT TAKEN IS NARROWLY
11 TAILORED TO EDUCATIONAL PURPOSE SUCH AS CRITICISM, COMMENT,
12 RESEARCH OR SUBJECT BEING TAUGHT.

13 Q. DID YOU CONSIDER ANY OF THE FACTORS LISTED ON THE
14 RIGHT-HAND SIDE?

15 A. YES, I SAW THAT THEY WERE IN OPPOSITION TO EACH OTHER, AND
16 KNEW THAT ANSWERING SOME, THE OTHERS WOULD NOT BE IN THE
17 POSITIVE. NO, IT WASN'T A LARGE PORTION. NO, IT WASN'T
18 CENTRAL TO THE HEART OF THE WORK, AND THE AMOUNT TAKEN WAS NOT
19 MORE THAN WAS NECESSARY.

20 Q. CAN YOU EXPLAIN TO US WHY YOU CONCLUDED THE PORTION USED
21 WAS NOT CENTRAL OR SIGNIFICANT TO THE ENTIRE WORK?

22 A. YES, IN THIS INSTANCE WE HAVE A SERIES OF ESSAYS WRITTEN
23 BY DIFFERENT FEMINIST CRITICS, AND WHAT THEY ARE ESSENTIALLY IS
24 BIBLIOGRAPHICAL ESSAYS. EACH OF THE ESSAYS TALKS ABOUT THE
25 STATE OF THE ART OR THE STATE OF FEMINIST CRITICISM AT A

1 PARTICULAR TIME PERIOD, MEDIEVAL AGES, 19TH CENTURY.
 2 THEN THERE ARE TOPICAL ONES SUCH AS FEMINISM AND
 3 QUEER THEORY OR FEMINIST AND TECHNOLOGY OF THE BODY, AND WHAT
 4 THEY DO IS THEY AMASS SOMETIMES 30 DIFFERENT CRITICS AND THEY
 5 SYNTHESIZE THEM. THEY TALK ABOUT THE RELATIONSHIPS BETWEEN
 6 THEM, AND THEY GIVE -- SO WHAT THIS DOES IS GIVES THE STUDENTS
 7 A GENERAL SENSE OF WHAT ISSUES ARE INVOLVED IN WHAT THEY'RE
 8 GOING TO BE TALKING ABOUT, AND SO ONE IS SAY SO DIFFERENT IN
 9 TOPIC FROM ALL THE OTHERS THAT THERE IS NO ACTUAL HEART TO THE
 10 BOOK. IT'S A SERIES OF ALMOST ENCYCLOPEDIA ESSAYS.

11 Q. WITH RESPECT TO THE AMOUNT TAKEN BEING NARROWLY TAILORED
 12 TO YOUR EDUCATIONAL PURPOSE, WHY DID YOU BELIEVE THAT TO BE
 13 APPLICABLE?

14 A. IT WAS A WONDERFUL OPPORTUNITY FOR ME TO SPEAK
 15 SPECIFICALLY TO NEUROMANCER WHICH IS ABOUT A GUY WHO IS WIRED
 16 INTO A VIRTUAL REALITY AND DOESN'T HAVE ANY CONNECTION WITH HIS
 17 BODY OR WITH SOCIETY.

18 THIS BOOK TALKS -- THIS ESSAY TALKS ABOUT -- THE
 19 FEMINIST ESSAY BY GILLIS TALKS ABOUT THE IMPLICATIONS OF THAT
 20 FOR WOMEN, WHAT HAPPENS WHEN -- BECAUSE MANY FEMINISTS BELIEVE
 21 THAT THE BODY HAS BEEN THE MEANS BY WHICH WOMEN HAVE BEEN
 22 SUBORDINATED, AND SO WHAT WOULD HAPPEN IF THE BODY WAS NO
 23 LONGER AN INTEGER AND HOW WE LIVE. SO IT'S A VERY PROVOCATIVE
 24 ISSUE.

25 AND SINCE THIS ESSAY DIRECTLY SLAMMED NEUROMANCER, IT

1 WAS A GREAT HE SAID/SHE SAID SO THAT THEY LEARN HOW TO REALIZE
 2 THINGS AREN'T JUST ONE WAY OR THE OTHER AND THEY ARE COMPLEX.
 3 Q. FOCUSING SPECIFICALLY ON THE AMOUNT TAKEN IS NARROWLY
 4 TAILORED TO THE EDUCATIONAL PURPOSE, HOW DID YOU CONCLUDE THAT
 5 THE AMOUNT TAKEN WAS NARROWLY TAILORED TO HOW YOU WERE USING
 6 THE WORK IN YOUR CLASSROOM?

7 A. BECAUSE THERE WAS ONLY ONE ESSAY IN THE ENTIRE BOOK THAT
 8 WAS APPLICABLE AND IT WAS THIS ONE. IT DIRECTLY RELATED TO THE
 9 TOPIC OF THE COURSE AND TO NEUROMANCER IN PARTICULAR WHICH IS
 10 ONE OF THE PRIMARY TEXTS THAT I WAS TAKING.

11 Q. TURNING NOW TO FACTOR 4, WITH RESPECT TO FACTOR 4 DID YOU
 12 REACH A CONCLUSION ABOUT WHETHER THIS FACTOR WEIGHED IN FAVOR
 13 OF FAIR USE?

14 A. I DID. I DETERMINED THAT IT WEIGHED IN FAVOR OF FAIR USE.

15 Q. AND WHAT FORMED THE BASIS OF YOUR CONCLUSION THAT THIS
 16 FACTOR WEIGHED IN FAVOR OF FAIR USE?

17 A. NO SIGNIFICANT EFFECT ON MARKET OR POTENTIAL MARKET FOR
 18 COPYRIGHTED WORK, NO SIMILAR PRODUCT MARKETED BY THE COPYRIGHT
 19 HOLDER, SUPPLEMENTAL CLASSROOM READING, ONE OR FEW COPIES MADE
 20 OR DISTRIBUTED. I DO OWN A COPY OF THE BOOK, AND THE STUDENTS
 21 HAVE RESTRICTED ACCESS.

22 THEY DON'T HAVE ACCESS TO IT AFTER A SEMESTER IS OVER
 23 TO MY UNDERSTANDING, AND THEY ONLY HAVE IT PASSWORD CODED. IT
 24 DOESN'T SIGNIFICANTLY IMPAIR MARKET POTENTIAL. I DO NOT KNOW
 25 IF LICENSING OR PERMISSION IS AVAILABLE. I ASSUMED IT WASN'T.

1 I DIDN'T UNDERSTAND WHAT THAT ACTUALLY MEANT.

2 I WOULDN'T SAY NUMEROUS COPIES WERE MADE OR
3 DISTRIBUTED. BECAUSE TO ME IT'S ONE CLASS, THEY TAKE FIVE
4 COURSES. I TEACH A NUMBER OF DIFFERENT COURSES. SO IT WAS
5 VERY MUCH LOCALLY AND TAILORED.

6 IT WAS REQUIRED CLASSROOM READING. THAT ON THE SIDE
7 AGAINST FAIR USE, AND THAT WOULD BE IT FOR THAT. SO FOR ME IT
8 CLEARLY WEIGHED IN FAVOR OF FAIR USE.

9 Q. LET ME ASK YOU ABOUT, YOU INDICATED THAT YOU SELECTED BOTH
10 SUPPLEMENTAL CLASSROOM READING AND REQUIRED CLASSROOM READING;
11 CAN YOU EXPLAIN THAT?

12 A. YES. WELL, AGAIN I DON'T KNOW HOW IT IS IN OTHER AREAS,
13 BUT IN ENGLISH WE HAVE A BODY OF TEXT WE TEACH. BY TEXT I MEAN
14 FICTION, PRIMARY FICTIONS, AND THEN ESPECIALLY IN THE
15 JUNIOR/SENIOR LEVEL WE PICK VERY FEW OUTSIDE ESSAYS BECAUSE
16 THEY ARE USUALLY TOO COMPLEX FOR STUDENTS TO UNDERSTAND.

17 BUT THOSE THAT WE PICK ARE -- I WOULD BE PUT IN A
18 STRANGLEHOLD AS A PROFESSOR IF I COULD NOT USE OUTSIDE SOURCES
19 IN MY CLASSROOM, IF I COULDN'T BRING IN OTHER VOICES TO HAVE
20 THEM UNDERSTAND THAT I'M NOT THE ONLY ONE WHO'S AN ARBITER OF
21 JUDGMENT.

22 SO IN THAT SENSE I HAVE TO REQUIRE THAT. PLUS IF I
23 DIDN'T REQUIRE IT, THEY WOULDN'T READ IT. IT'S HARD ENOUGH TO
24 GET THEM TO READ IT WHEN IT IS REQUIRED.

25 Q. YOU ALSO SELECTED NO SIGNIFICANT EFFECT ON THE MARKET --

1 A. YES.

2 Q. -- OR POTENTIAL MARKET. CAN YOU EXPLAIN WHY YOU SELECTED
3 THAT?

4 A. BECAUSE NONE OF THE STUDENTS IN THE -- NO STUDENT IN THE
5 UNDERGRADUATE LEVEL BUYS BOOKS, BUYS CRITICAL BOOKS THAT HAVE
6 BEEN INTRODUCED OR THEMES OR TOPICS HAVE BEEN INTRODUCED IN A
7 CLASSROOM, ESPECIALLY WHEN THE BOOK IS 140 DOLLARS, AND SO IN
8 THIS INSTANCE I DON'T SEE HOW IT COULD POSSIBLY IMPACT IT.

9 Q. NOW, BASED ON YOUR ANALYSIS OF EACH OF THE FOUR FACTORS IN
10 THIS CHECKLIST WHAT WAS YOUR OVERALL CONCLUSION WITH RESPECT TO
11 WHETHER YOUR USE OF THIS EXCERPT CONSTITUTED A FAIR USE FOR
12 THAT COURSE IN THE FALL OF 2009?

13 A. IT DID CONSTITUTE FAIR USE IN MY CONCLUSION.

14 Q. IF YOU WERE PROHIBITED FROM USING ERES, DO YOU BELIEVE
15 THAT THAT WOULD AFFECT YOUR ABILITY TO EDUCATE YOUR STUDENTS?

16 A. YES.

17 Q. IN WHAT RESPECT?

18 A. WELL, AGAIN, IN THE RESPECT THAT THEY WOULD NOT HAVE
19 ACCESS TO IDEAS OUTSIDE OF MY OWN IN A CLASSROOM, AND MY
20 ABILITY TO HELP THEM LEARN HOW TO ANALYZE AND PROBLEM SOLVE
21 THROUGH QUESTIONS, ETHICS, CLOSED READINGS.

22 BECAUSE WHEN THEY READ THAT ABOUT FEMINIST AND
23 TECHNOLOGY AND HER READING OF NEUROMANCER AND THEIR OWN READING
24 OF NEUROMANCER, THEY WERE ABLE TO ENGAGE MORE PROVOCATIVELY AND
25 MORE PROFOUNDLY WITH THE FICTIONAL TEXT.

1 MS. MOFFITT: YOUR HONOR, I DON'T HAVE ANY FURTHER
2 QUESTIONS AT THIS TIME.

3 MR. BLOOM: GOOD MORNING, YOUR HONOR.

4 THE COURT: ARE YOU MR. BLOOM?

5 MR. BLOOM: I'M MR. BLOOM.

6 THE COURT: OKAY. THANK YOU.

7 CROSS-EXAMINATION

8 BY MR. BLOOM:

9 Q. NOW, PROFESSOR GABLER-HOVER, IF I WERE TO ASK YOU
10 EVERYTHING I WANTED TO KNOW ABOUT CYBORGS, WE'D BE HERE FOR A
11 VERY, VERY LONG TIME AND I KNOW --

12 A. WELL, YOU'RE WELCOME TO AUDIT THE CLASS.

13 Q. -- THAT WOULD MAKE JUDGE EVANS VERY, VERY UNHAPPY. SO
14 I'LL MOVE ALONG.

15 YOU MENTIONED YESTERDAY HOW PLEASED YOU WERE WHEN AN
16 EXCERPT FROM YOUR 1990 BOOK WAS PLACED ON RESERVE BY A
17 PROFESSOR AT THE UNIVERSITY OF CALIFORNIA; DO YOU RECALL THAT?

18 A. I DO.

19 Q. AND THAT WAS YOUR BOOK TRUTH IN AMERICAN FICTION, THE
20 LEGACY OF RHETORICAL IDEALISM, CORRECT?

21 A. YES, SIR.

22 Q. AND THAT BOOK WAS PUBLISHED BY THE UNIVERSITY OF GEORGIA
23 PRESS, CORRECT?

24 A. IT WAS.

25 Q. AND ALTHOUGH YOU DID NOT RECEIVE ANY ROYALTIES AS I

1 BELIEVE YOU TESTIFIED, YOU ACKNOWLEDGED IN YOUR TESTIMONY
2 YESTERDAY THAT YOU BENEFITED PROFESSIONALLY FROM THE
3 PUBLICATION OF THAT BOOK, CORRECT?

4 A. YES.

5 Q. AMONG OTHER THINGS IT HELPED YOU TO GET TENURE, CORRECT?

6 A. YES.

7 Q. AND YOUR WORK DREAMING BLACK, WRITING WHITE, THE HAYGARTH
8 MYTH IN AMERICAN CULTURAL HISTORY WAS PUBLISHED BY THE
9 UNIVERSITY PRESS OF KENTUCKY IN 1999, CORRECT?

10 A. YES, IT WAS.

11 Q. NOW IT IS YOUR UNDERSTANDING, IS IT NOT, THAT UNLIKE YOU
12 THE UNIVERSITY OF GEORGIA PRESS AND THE UNIVERSITY PRESS OF
13 KENTUCKY NEED TO GENERATE REVENUE FROM THEIR PUBLICATIONS IN
14 ORDER TO CONTINUE TO PUBLISH LEARNED BOOKS SUCH AS YOURS; DO
15 YOU NOT?

16 A. I DO UNDERSTAND THAT IT'S A CRISIS IN NOT USING A
17 COMMERCIAL PRESS SUCH AS OXFORD BUT UNIVERSITY PRESSES WHO ARE
18 NO LONGER SUBSIDIZED BY THEIR UNIVERSITIES, AND YOU OFTEN
19 OPERATE IN THE RED AND GET BOOKS SENT BACK TO THEM BY
20 PROFESSORS WHO READ THEM AND SEND THEM BACK, YES.

21 Q. YOU WOULD ACCEPT MY REPRESENTATION I TAKE IT BASED ON THE
22 EVIDENCE THAT WE'VE HEARD SO FAR IN THIS CASE THAT CAMBRIDGE
23 UNIVERSITY PRESS AND OXFORD UNIVERSITY PRESS ALSO RELY ON
24 GENERATING REVENUE FROM THEIR PUBLICATIONS?

25 MS. MOFFITT: OBJECTION, YOUR HONOR, THIS WITNESS

1 ISN'T FAMILIAR WITH THE RECORD OR HASN'T --

2 THE COURT: SUSTAINED.

3 BY MR. BLOOM:

4 Q. BASED ON YOUR EXPERIENCE AS A PUBLISHED SCHOLAR, PROFESSOR
5 GABLER-HOVER, YOU WOULD ACKNOWLEDGE I TAKE IT THE IMPORTANT
6 ROLE THAT ACADEMIC PUBLISHERS PLAY IN PROMOTING THE ADVANCEMENT
7 OF LEARNING AS WELL AS HELPING TO ADVANCE THE CAREERS OF
8 PROFESSORS SUCH AS YOURSELF?

9 A. UNIVERSITY PRESSES, YES.

10 Q. BUT YOU DO NOT BELIEVE THAT UNIVERSITY PRESSES AND OTHER
11 ACADEMIC PRESSES SHOULD BE EXPECTED TO PUBLISH BOOKS AS A
12 SUBSIDY TO THE CAREERS OF PROFESSORS SUCH AS YOURSELF WITHOUT
13 ANY REVENUE TO COVER -- WITHOUT GENERATING ANY REVENUE TO COVER
14 THEIR COSTS, WOULD YOU?

15 A. MY UNDERSTANDING IS THAT MOST -- THAT LARGE UNIVERSITY
16 PRESSES WHO HAVE FICTIONAL BOOKS AS WELL MAKE THEIR MONEY
17 THROUGH THOSE FICTIONAL BOOKS. MOST UNIVERSITY PRESSES DON'T
18 MAKE THEIR MONEY THAT WAY AND HAVE A VERY HARD TIME KEEPING
19 AFLOAT, AND THERE HAVE ACTUALLY BEEN -- I GUESS I WOULD
20 ANSWER THAT WAY. SO I DON'T THINK THAT WHEN WE TALK ABOUT
21 OXFORD AND CAMBRIDGE WE'RE TALKING ABOUT YOUR TYPICAL
22 UNIVERSITY PRESS.

23 Q. BUT YOU DO NOT BELIEVE THAT UNIVERSITY PRESSES SHOULD BE
24 EXPECTED TO SUBSIDIZE THE CAREERS OF PROFESSORS SUCH AS
25 YOURSELVES BY NOT RECEIVING REVENUE FOR THE PUBLICATIONS, DO

1 YOU?

2 A. NO, I AGREE WITH YOU.

3 Q. NOW, THE ESSAY YOU ASSIGNED FROM THE CAMBRIDGE UNIVERSITY
4 PRESS BOOK A HISTORY OF FEMINIST LITERARY CRITICISM WHICH IS
5 PLAINTIFFS' EXHIBIT 103 AND THE TITLE OF THE ESSAY IS FEMINIST
6 CRITICISM AND TECHNOLOGIES OF THE BODY BY STACY GILLIS THAT WAS
7 REQUIRED READING FOR YOUR CLASS ENGLISH 4200 IN FALL OF 2009,
8 CORRECT?

9 A. YES.

10 Q. AND IT SAYS ON THE FIRST PAGE OF YOUR SYLLABUS WHICH IS
11 DEFENDANTS' EXHIBIT 599, IF WE COULD PULL THAT UP, IN THE ERES
12 SECTION IT INDICATES THAT MANY OF THE PROSE AND FICTION ITEMS
13 THAT YOU WILL NEED FOR THE COURSE ARE ON LIBRARY ERESERVES,
14 CORRECT?

15 A. YEAH, I WROTE THAT.

16 Q. OKAY. AND THIS ESSAY BY GILLIS WAS ONE OF THOSE ITEMS,
17 CORRECT?

18 A. YES, IT WAS. THERE WERE TWO ITEMS.

19 Q. OKAY. AND THIS ESSAY IS THE ONLY ESSAY BY GILLIS IN THIS
20 VOLUME OF ESSAYS, CORRECT?

21 A. YES, IT IS.

22 Q. OKAY. AND YOU WOULD AGREE THAT THIS ESSAY IS AN ORIGINAL
23 WORK OF ANALYTICAL SCHOLARSHIP BY GILLIS, CORRECT?

24 A. YES.

25 Q. AND I THINK YOU TESTIFIED YESTERDAY AS TO THE BOOK AS A

1 WHOLE THAT IT'S A CUTTING EDGE WORK; IS THAT CORRECT?

2 A. YES.

3 Q. OKAY. BUT YOU DID NOT OBTAIN PERMISSION FROM OR PAY ANY

4 FEE TO EITHER THE PUBLISHER OF THIS BOOK OR THE AUTHOR TO HAVE

5 THE GILLIS ESSAY POSTED ON ERESERVES, DID YOU?

6 A. WELL, I PURCHASED THE BOOK MYSELF.

7 Q. BUT TO PAY TO HAVE IT PLACED ON ERESERVES FOR YOUR

8 STUDENTS, YOU DID NOT PAY ANY FEES IN CONNECTION WITH THAT ACT,

9 DID YOU?

10 A. NO, BECAUSE IF I HAD I COULDN'T HAVE GOTTEN IT FOR MY

11 STUDENTS.

12 Q. I'M NOT SURE I UNDERSTAND THAT ANSWER, BUT IN OTHER WORDS,

13 THERE WAS NO FEE PAID --

14 A. NO.

15 Q. NO PERMISSIONS FEES PAID IN CONNECTION WITH THE PLACEMENT

16 OF THIS ESSAY?

17 A. NO, IT WAS MY UNDERSTANDING THEY WEREN'T NEEDED.

18 Q. OKAY. INSTEAD YOU RELIED ON FAIR USE, CORRECT?

19 A. I DID.

20 Q. OKAY. AND I TAKE IT YOU RELIED ON FAIR USE FOR OTHER

21 READINGS THAT YOU POSTED ON ERESERVES FOR THIS COURSE?

22 A. WELL, I'M LOOKING BACK AT THE COURSE AND I TEACH THIS

23 COURSE WITH DIFFERENT TEXTS EACH SEMESTER, AND AS I LOOK

24 THROUGH THIS SYLLABUS, THOSE ARE THE ONLY TWO SOURCES I PUT ON

25 ERESERVE.

1 SO I'M ALMOST -- KNOWING MYSELF WHAT I'M SURE THAT I
2 DID WHEN I TALKED ABOUT THAT WAS TO GET THEM TO UNDERSTAND THAT
3 ANY MATERIALS THEY GOT FROM ME OR FROM ERESERVE THEY NEEDED TO
4 KEEP BECAUSE THEY TEND NOT TO NECESSARILY KEEP THINGS, AND I
5 GIVE EXAMINATIONS THAT ARE BASED ON HANDOUTS, MY OWN TEACHING
6 AND THE ESSAYS THAT THEY READ.

7 Q. I'M JUST ASKING IF YOU RELIED ON FAIR USE --

8 A. YES, SIR, I DID.

9 Q. OKAY. YOU DID. AND I TAKE IT THAT IN CONDUCTING THE FAIR
10 USE ANALYSIS IN CONNECTION WITH THOSE READINGS THAT YOU POSTED
11 TO ERESERVES FOR THIS COURSE THAT YOU DID NOT CONSIDER THE FACT
12 THAT ONE OF THE REVENUE ITEMS ON WHICH PUBLISHERS RELY
13 INCLUDING CAMBRIDGE UNIVERSITY PRESS IS PERMISSIONS FEES FOR
14 THE RIGHT TO COPY AND DISTRIBUTE EXCERPTS FROM THEIR WORKS,
15 CORRECT?

16 MS. MOFFITT: YOUR HONOR, I'M GOING TO OBJECT. THE
17 QUESTION GOES BEYOND THE ACTUAL WORK WE'RE DISCUSSING AT HAND.

18 THE COURT: OBJECTION SUSTAINED.

19 MR. BLOOM: YOUR HONOR, IF I MAY, YESTERDAY

20 MS. MOFFITT ASKED AS TO OTHER WORKS THAT WERE ON THE
21 SYLLABUS --

22 THE COURT: YOU MEAN THE TEXTBOOKS THAT WERE
23 ASSIGNED?

24 MR. BLOOM: YES, CORRECT.

25 THE COURT: THAT'S A TOTALLY DIFFERENT BALL OF WAX.

1 I MEAN THERE'S NO CLAIM THAT THERE ARE ANY COPYRIGHT
2 INFRINGEMENTS INVOLVED IN HAVING STUDENTS PURCHASE TEXTBOOKS
3 FOR THE COURSES AND NOR COULD THERE BE. IT'S JUST A TOTALLY AN
4 APPLES AND ORANGES SITUATION.

5 MR. BLOOM: YOUR HONOR, I RESPECT YOUR RULING. I
6 JUST -- THE REASON THAT I BROUGHT IT UP WAS JUST I THOUGHT THAT
7 WE WERE TALKING ABOUT THE TOTALITY OF READINGS THAT WERE
8 ASSIGNED AND WHETHER STUDENTS WERE OR WERE NOT CHARGED FOR THE
9 READINGS.

10 THE COURT: WELL, I WONDERED WHETHER THAT'S REALLY
11 WHAT YOU WERE THINKING. I THINK YOU'RE TRYING TO CREATE A
12 RECORD, YOU AND OTHER COUNSEL FOR THE PLAINTIFFS, TRYING TO
13 SHOW THAT SOMEHOW IT'S INCONSISTENT TO ALLOW TESTIMONY ABOUT
14 THE SUBSTANTIVE EXCERPTS THAT WERE ALLEGEDLY INFRINGED BUT NOT
15 TESTIMONY ABOUT THE SUBSTANCE OF THE TEXTBOOKS THAT WERE
16 REQUIRED TO BE PURCHASED FOR THE COURSE.

17 I THINK THERE'S BEEN A VERY GOOD RECORD LAID THAT YOU
18 ALL DON'T AGREE WITH THE RULING I MADE, AND YOU DON'T NEED TO
19 PURSUE IT.

20 MR. BLOOM: I'LL MOVE ON, YOUR HONOR.

21 BY MR. BLOOM:

22 Q. NOW, PROFESSOR GABLER-HOVER YOU SAY ON THE SYLLABUS
23 LOOKING BACK AGAIN AT THE ERESERVES PARAGRAPH AND YOU TESTIFIED
24 AS TO THIS LANGUAGE YESTERDAY THAT MANY OF THE READINGS, QUOTE,
25 ARE ON LIBRARY ERESERVE FOR YOU TO PRINT OUT IMMEDIATELY

1 FORMING A DIGITAL COURSE PACKET FOR YOURSELF, CORRECT?

2 MS. MOFFITT: OBJECTION, YOUR HONOR, THAT'S NOT WHAT
3 THE DOCUMENT SAYS.

4 MR. BLOOM: I THOUGHT I WAS QUOTING FROM THE
5 DOCUMENT. I APOLOGIZE IF I MISSTATED IT.

6 BY MR. BLOOM:

7 Q. I'LL READ IT INTO THE RECORD AGAIN: ALTHOUGH I WILL
8 PROVIDE SEVERAL OF MY OWN HANDOUTS, MANY OF THE PROSE AND
9 FICTION ITEMS YOU WILL NEED FOR THE COURSE ARE ON LIBRARY
10 ERESERVE FOR YOU TO PRINT OUT IMMEDIATELY FORMING A COURSE
11 PACKET FOR YOURSELF; DO YOU SEE THAT?

12 A. I DO.

13 Q. AND YOU STATE AT PAGE 4 OF YOUR SYLLABUS AT THE TOP
14 SECTION DESIGNATED LIST OF WEEKLY READINGS, MAKE SURE TO BRING
15 YOUR BOOKS AND PHOTOCOPIES TO CLASS AND BE SURE TO BRING THE
16 RIGHT ONES; DO YOU SEE THAT?

17 A. I DO.

18 Q. AND FOR THE NOVEMBER 4TH CLASS SESSION THAT WOULD
19 HAVE MEANT BRINGING A COPY OF THE GILLIS ESSAY; IS THAT
20 CORRECT?

21 A. YES.

22 Q. NOW YOU USED THE LANGUAGE FORMING A DIGITAL COURSE PACKET
23 FOR YOURSELF --

24 MS. MOFFITT: OBJECTION, YOUR HONOR.

25 THE WITNESS: I DON'T SAY DIGITAL.

1 MR. BLOOM: I'M SORRY. I APOLOGIZE. THAT WAS MY
2 ERROR.

3 THE COURT: LET ME STRIKE THE QUESTION AND START OVER
4 AGAIN.

5 BY MR. BLOOM:

6 Q. YOU SAY FORMING A COURSE PACKET FOR YOURSELF, CORRECT?

7 THE COURT: I'M SORRY, WHAT ARE YOU READING FROM?

8 MR. BLOOM: I'M READING FROM THE ERESERVES PARAGRAPH
9 THAT WE JUST LOOKED AT ON PAGE 1.

10 THE COURT: AND WHAT IS YOUR QUESTION?

11 MR. BLOOM: I WAS JUST NOTING THE LANGUAGE THAT MANY
12 OF THE ITEMS YOU'LL NEED FOR THE COURSE ARE ON LIBRARY ERESERVE
13 FOR YOU TO PRINT OUT IMMEDIATELY FORMING A COURSE PACKET FOR
14 YOURSELF.

15 BY MR. BLOOM:

16 Q. AND MY QUESTION, PROFESSOR, IS WHAT YOU MEANT WAS THAT BY
17 PRINTING OUT THOSE ERESERVE READINGS STUDENTS COULD TAKE THE
18 DIGITAL FILES ON ERESERVES AND CREATE A KIND OF HOMEMADE
19 VERSION OF A COURSE PACKET FOR THEMSELVES; IS THAT CORRECT?

20 A. NO.

21 Q. AND WHY IS THAT NOT CORRECT?

22 A. BECAUSE THE WORDING WAS FOR THE STUDENTS, AND COURSE
23 PACKET TO THEM WAS MY WAY OF IMPARTING TO THEM AND I DID IT
24 VERBALLY IN CLASS THAT THEY HAD TO KEEP WHAT I GAVE THEM.

25 Q. BUT THAT COURSE PACKET THAT YOU REFER TO THERE, WAS IT NOT

1 THE FUNCTIONAL EQUIVALENT OF A COURSE PACKET THAT YOU COULD
2 HAVE CREATED FOR THEM AT THE SCHOOL LIBRARY?

3 A. NO.

4 MS. MOFFITT: OBJECTION, YOUR HONOR, I THINK THE
5 QUESTION IS VAGUE.

6 THE COURT: THE QUESTION HAS BEEN ANSWERED. GO
7 AHEAD.

8 BY MR. BLOOM:

9 Q. IT'S TRUE, IS IT NOT, THAT THE COURSE PACKET THAT YOU
10 INSTRUCTED STUDENTS THAT THEY COULD PRINT OFF OF ERESERVES DID
11 NOT COST THEM ANYTHING, CORRECT?

12 A. I WONDER WHAT YOU MEANT BY COURSE PACKET, SIR, BECAUSE IT
13 SEEMS LIKE YOU AND I HAVE DIFFERENT DEFINITIONS OF --

14 Q. I'M REFERRING TO WHAT YOU MEANT WHEN YOU WROTE THAT
15 LANGUAGE.

16 A. WHAT I MEANT BY COURSE PACKET -- IF YOU DON'T MIND, I'LL
17 TRY TO CLARIFY WHAT I MEANT BY COURSE PACKAGE WAS A NUMBER OF
18 THINGS, AND I PUT THE ADVERB IMMEDIATELY PROBABLY IN THE WRONG
19 PLACE. BECAUSE WHAT I MEANT TO SAY IS IMMEDIATELY START
20 ACCUMULATING THE MATERIALS THAT I'M GOING TO GIVE YOU AND THAT
21 YOU'RE GOING TO PRINT OUT FROM ERESERVE.

22 SO IT WAS A DISPARATE NUMBER OF VERY DIFFERENT KINDS
23 OF ITEMS. SOMETIMES STUDENTS DON'T KEEP THEIR NOTES, AND I
24 GIVE IN-CLASS EXAMINATIONS WHERE THEY NEED TO HAVE THEIR NOTES,
25 AND I WANTED THEM TO KEEP ALL OF THAT MATERIAL TOGETHER.

1 THEY'RE TAKING FIVE OR SIX CLASSES, AND THEY
2 SOMETIMES DON'T KEEP TRACK OF VARIOUS COURSE MATERIALS THEY
3 GET.

4 Q. AND WHAT WERE THE REQUIRED READINGS FROM THIS COURSE THAT
5 YOU INTENDED TO BE INCLUDED IN THAT COURSE PACKET THAT YOU
6 REFER TO IN THIS LANGUAGE?

7 A. THE TWO ESSAYS ON ERESERVE. I ENDED UP NOT PUTTING ANY
8 FICTION ON ERESERVE FOR THE COURSE. THOSE TWO ITEMS. I GIVE
9 VARIOUS HANDOUTS. FOR EXAMPLE, I GAVE A HANDOUT ON THE ORIGIN
10 OF THE CYBORG AND WHERE THE TERM CAME FROM. IT'S A RUSSIAN
11 WORD MEANING SURF -- THAT'S WHAT A ROBOT IS.

12 I GIVE THEM HANDOUTS ON DIFFERENT THEORETICAL
13 CONTEXTS WE'RE USING SUCH AS MYTH THEORY FOR EXAMPLE, OR THE
14 PROTECT THE FILM NOIR, DEFINITION OF FILM NOIR BECAUSE MANY OF
15 THESE SCIENCE FICTIONS ADAPT THE FORM OF FILM NOIR, AND THEN
16 THEIR NOTES.

17 SO THAT THEY HAVE A SENSE OF SOMETHING THEY CAN
18 ACCUMULATE. AFTER I LEAVE AFTER CLASS SOMETIMES AND THERE'S A
19 NOTEBOOK ON THE TABLE AND SOMEONE HAS FORGOTTEN TO TAKE THEIR
20 NOTES WITH THEM.

21 Q. ONE ALTERNATIVE AVAILABLE TO YOU TO MAKE READINGS,
22 ASSIGNED READINGS AVAILABLE TO YOUR STUDENTS WOULD HAVE BEEN TO
23 CREATE A COURSE PACKET FOR PURCHASE BY THEM AT THE UNIVERSITY
24 BOOKSTORE, CORRECT?

25 A. I DON'T KNOW BECAUSE -- I MEAN I GUESS SO. I'D LIKE TO

1 ELABORATE ON THAT --

2 Q. WELL, MY QUESTION IS IN THEORY YOU COULD HAVE DONE THAT,
3 CORRECT?

4 A. I COULD HAVE, BUT IT WOULD HAVE BEEN PROHIBITIVELY
5 EXPENSIVE FOR THEM.

6 Q. AND WHAT IS THE BASIS FOR YOUR STATEMENT THAT IT WOULD
7 HAVE BEEN PROHIBITIVELY EXPENSIVE?

8 A. BECAUSE TEN YEARS AGO PIECES OF FICTION WERE NOT
9 AVAILABLE, AS READILY AVAILABLE AS THEY ARE NOW ONLINE, AND I
10 MADE A COURSE PACKET, AND IT WAS NOT -- IT WAS A NUMBER OF
11 SHORT STORIES SO IT WASN'T A CENTRAL NOVEL IN THE COURSE, AND
12 IT COST ABOUT 40 DOLLARS. I WENT AHEAD AND DID IT.

13 AND ABOUT THREE YEARS AGO I TRIED TO MAKE A SIMILAR
14 COURSE PACKET AND IT COST 120 DOLLARS, AND THERE WAS JUST NO
15 WAY THAT I COULD DO THAT. I WENT TO THE LOCAL BOOKSTORE, AND
16 THEY TOLD ME THIS IS WHAT WE HAVE TO DO, AND IT WOULD HAVE COST
17 120 DOLLARS FOR THAT.

18 SO WHAT I TOLD THEM TO DO INSTEAD WAS GO ONLINE.
19 THEY COULD GO FOR A STORY BY STEPHEN CRANE. THEY COULD GO TO
20 THE STEPHEN CRANE SOCIETY WHERE THEY COULD FIND THE TEXT ON
21 THERE. YOU CAN PRINT OUT 600 PAGES OF MOBY DICK FROM THE
22 INTERNET.

23 BUT I CAN'T ASK MY STUDENTS TO SPEND 140 DOLLARS FOR
24 A BOOK SUCH AS A HISTORY OF FEMINIST LITERARY CRITICISM, AND I
25 CAN'T ASK MY STUDENTS TO SPEND 120 DOLLARS. HOPE HAS EVEN

1 DWINDLED IN OUR STATE SO THAT -- I MEAN HOPE SCHOLARSHIP. I
2 DON'T MEAN HOPE, AND SO STUDENTS CAN'T EVEN -- THEY DON'T EVEN
3 GET A TEXTBOOK STIPEND ANY MORE.

4 I REALLY CONSCIENTIOUSLY STRIVE TO GET THE LEAST
5 AMOUNT OF EXPENSE BECAUSE I USE A NUMBER OF DIFFERENT BOOKS IN
6 THE COURSE OF BEING AN ENGLISH PROFESSOR.

7 Q. AND YOU TESTIFIED IN RESPONSE TO QUESTIONING FROM MS.
8 MOFFITT THAT YOU -- THAT WITH RESPECT TO THE GILLIS ESSAY THAT
9 YOU ASSUME THAT NO LICENSING WAS AVAILABLE, CORRECT?

10 A. YES.

11 Q. BUT YOU DIDN'T KNOW WHETHER IT WAS OR WAS NOT BECAUSE YOU
12 DIDN'T INVESTIGATE WHETHER IT WAS OR WAS NOT, CORRECT?

13 A. NO, IT'S HARD TO DO SOMETHING YOU DON'T KNOW YOU CAN DO.

14 Q. IT WAS JUST A YES OR NO QUESTION.

15 A. YES.

16 Q. AND, IN FACT, YOU TESTIFIED THAT YOU DID NOT EVEN KNOW
17 WHAT THAT BOX ON THE CHECKLIST WAS REFERRING TO, CORRECT?

18 A. RIGHT.

19 Q. OKAY. IF WE COULD BRING UP JOINT EXHIBIT 5 PLEASE AT PAGE
20 C-8, AND I WILL REPRESENT TO YOU AS IS REFLECTED ON THIS
21 EXHIBIT THAT WE'VE CALCULATED THAT FOR ENGLISH 4200 IN THE FALL
22 OF 2009, THE COST PER STUDENT TO LICENSE THE ACCESS -- THE COST
23 PER STUDENT TO GIVE THEM ACCESS TO THIS ESSAY ON ERESERVES
24 THROUGH A LICENSE FROM THE COPYRIGHT CLEARANCE CENTER WOULD
25 HAVE COST \$2.10 FOR EACH STUDENT, AND MY QUESTION TO YOU

1 ACCEPTING THAT FACT IS WHETHER YOU STILL WOULD HAVE REQUIRED
2 STUDENTS TO READ THIS ESSAY HAD THEY INCURRED THAT CHARGE OF
3 \$2.10?

4 A. I DON'T KNOW.

5 Q. AND THAT'S YOUR TESTIMONY EVEN THOUGH YOU TESTIFIED
6 EARLIER IN RESPONSE TO QUESTIONS FROM MS. MOFFITT THAT THIS
7 ESSAY WAS IMPORTANT AND NECESSARY TO YOUR EDUCATIONAL
8 OBJECTIVES; IS THAT CORRECT?

9 A. MAY I ELABORATE ON MY ANSWER BECAUSE THINGS ARE NEVER VERY
10 SIMPLE?

11 Q. YOU MAY.

12 A. I ACTUALLY CONSTANTLY SEARCH ON AMAZON TO SEE IF THIS BOOK
13 GOES OUT ON PAPERBACK AND BECOMES LESS EXPENSIVE BECAUSE I
14 WOULD LOVE TO USE THIS TEXT IN MY CLASSROOMS. I WOULD LOVE TO
15 HAVE MY STUDENTS BE ABLE TO PURCHASE IT.

16 I DON'T KNOW HOW I FEEL BECAUSE THIS HAS NEVER BEEN
17 SOMETHING THAT I'VE THOUGHT ABOUT THE IDEA OF THEIR PAYING TWO
18 DOLLARS AND SOMETHING FOR ONE ESSAY, AND IT WOULD CERTAINLY
19 PROBABLY TRANSFORM ANY DECISION I MAKE ABOUT WHAT I'M GOING TO
20 DO WITH USING OUTSIDE SOURCES IN MY CLASSROOMS.

21 Q. OKAY. SO THE ANSWER -- JUST TO SUM UP IF I CAN, YOUR
22 TESTIMONY IS THAT CONFRONTED WITH THE CHOICE OF HAVING STUDENTS
23 CHARGED \$2.10 OR NOT ASSIGNING THE ESSAY, YOU'RE NOT SURE
24 SITTING HERE TODAY WHAT YOU WOULD HAVE DONE?

25 A. YES.

1 MR. BLOOM: OKAY. NO FURTHER QUESTIONS, YOUR HONOR.
2 THE COURT: SHALL THE WITNESS BE EXCUSED?
3 MS. MOFFITT: YES, YOUR HONOR.
4 THE COURT: YOU ARE EXCUSED. THANK YOU.
5 WHO'S NEXT?
6 MR. SCHAETZEL: PROFESSOR HARTWIG, YOUR HONOR.
7 THE CLERK: PLEASE RAISE YOUR RIGHT HAND TO TAKE THE
8 OATH.
9 MELINDA HARTWIG,
10 HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:
11 THE CLERK: IF YOU WILL HAVE A SEAT, PLEASE, AND
12 STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME
13 ALSO.
14 THE WITNESS: MELINDA HARD, H A R T W I G.
15 THE COURT: YOU MAY PROCEED, MR. MILLER.
16 DIRECT EXAMINATION
17 BY MR. MILLER:
18 Q. YOU'RE CURRENTLY A PROFESSOR IN THE ART HISTORY DEPARTMENT
19 AT GEORGIA STATE; IS THAT CORRECT?
20 A. THAT'S CORRECT.
21 Q. CAN YOU TELL ME A LITTLE BIT ABOUT YOUR EDUCATIONAL
22 BACKGROUND?
23 A. SURE. I HAVE A B.A. IN ART HISTORY AND ORGANIZATIONAL
24 STUDIES FROM PITZER COLLEGE IN CALIFORNIA. I HAVE AN M.A. IN
25 NEAR EASTERN STUDIES WITH A FOCUS ON EGYPTIAN ARCHEOLOGY AND

1 ART.

2 I HAVE A SECOND M.A. IN ART HISTORY AND ARCHEOLOGY

3 FROM NEW YORK UNIVERSITY INSTITUTE OF FINE ARTS, AND I HAVE A

4 PH.D. IN NEAR EASTERN STUDIES AND -- ACTUALLY IT'S NEAR EASTERN

5 ART ARCHEOLOGY WITH AN EMPHASIS ON EGYPTIAN ART AND THAT IS

6 ALSO FROM NYU INSTITUTE OF FINE ARTS.

7 Q. WHEN DID YOU GET YOUR PH.D.?

8 A. FROM NYU INSTITUTE OF FINE ARTS.

9 Q. WHEN, I'M SORRY?

10 A. 2000.

11 Q. OKAY. AND WHEN DID YOU START TEACHING AT GEORGIA STATE?

12 A. 2001.

13 Q. OKAY. CAN YOU TELL US A LITTLE BIT ABOUT THE COURSES YOU

14 TEACH AT GEORGIA STATE?

15 A. SURE. THEY ARE PRETTY VARIED. THEY GO FROM JUST A

16 GENERAL SURVEY OF WESTERN ARTS AND THAT'S FROM THE PREHISTORIC

17 PERIOD UP UNTIL JUST BEFORE THE BEGINNING OF THE RENAISSANCE,

18 AND THEN I TEACH A BUNCH OF EGYPTIAN ARCHEOLOGY COURSES AND

19 ALSO NEAR EASTERN ART AND ARCHEOLOGY, AND I ALSO TEACH A NUMBER

20 OF SEMINARS, UPPER DIVISION SEMINARS.

21 Q. WHAT DO YOU FEEL LIKE YOUR PROFESSIONAL FOCUS IS?

22 A. DEFINITELY EGYPTIAN ART AND ARCHEOLOGY.

23 Q. OKAY. HAVE YOU WRITTEN ANY BOOKS ON THE SUBJECT?

24 A. I HAVE. I HAVE A BOOK CALLED TOMB PAINTING AND IDENTITY

25 IN ANCIENT THEBES 1419 TO 1372. THAT WAS PUBLISHED BY BREPOLS

1 IN BELGIUM, AND I COAUTHORED A CHILDREN'S BOOK CALLED THE
2 SHIPWRECKED SAILOR, AND I'M CURRENTLY WORKING ON TWO BOOKS
3 RIGHT NOW, ONE OF WHICH IS FOR WILEY BLACKWELL CALLED A
4 COMPANION TO ANCIENT EGYPTIAN ART. I AM THE EDITOR, AND
5 ANOTHER ONE WHICH IS THE TOMB OF MENA, AND WE'RE CURRENTLY
6 LOOKING FOR A PUBLISHER FOR THAT PARTICULAR WORK.

7 Q. OKAY. HAVE YOU BEEN INVOLVED IN ANY OTHER KINDS OF
8 PUBLICATIONS OTHER THAN BOOKS?

9 A. YES. A NUMBER OF ENCYCLOPEDIA ARTICLES. MY SPECIALTY I
10 SHOULD SAY WITHIN EGYPTIAN ART IS ON PAINTING, AND SO I'VE
11 WRITTEN A NUMBER OF ENCYCLOPEDIA ARTICLES ON PAINTING.

12 THE FIRST ONE WAS REALLY ONCE I LITERALLY HAD JUST
13 GOTTEN OUT OF GRADUATE SCHOOL WAS FOR OXFORD UNIVERSITY PRESS.
14 IT WAS THE ENCYCLOPEDIA OF ANCIENT EGYPT, AND I DID AN ARTICLE
15 ON PAINTING.

16 I HAVE A COUPLE OF ARTICLES PENDING. ONE OF THEM IS
17 FOR THE OXFORD HANDBOOK OF EGYPTOLOGY. THAT'S ALSO PAINTING.
18 AND PAINT AND PAINTING WHICH IS FOR ANCIENT HISTORY, THE
19 ENCYCLOPEDIA OF ANCIENT HISTORY AND THAT'S FOR THE PHILONIC
20 SECTION.

21 Q. SO IN THE PROCESS OF ALL OF THESE PUBLICATIONS DO YOU HAVE
22 EXPERIENCE DEALING WITH COPYRIGHT RELATED ISSUES?

23 A. ABSOLUTELY I DO.

24 Q. CAN YOU EXPLAIN YOUR EXPERIENCE?

25 A. ABSOLUTELY. IF THERE IS AN EXCERPT OF 300 WORDS OR MORE

1 WE HAVE TO GET PERMISSION FROM THE PUBLISHER, ALSO FOR
 2 ILLUSTRATIONS AS WELL.

3 Q. NOW THESE BOOKS YOU'VE WORKED ON THOSE ARE COMMERCIAL;
 4 THOSE ARE FOR SALE; IS THAT RIGHT?

5 A. THAT'S CORRECT.

6 Q. NOW TO YOUR SPECIFIC COURSES THAT YOU TEACH, YOU TAUGHT A
 7 COURSE CALLED MATERIALITY OF EGYPTIAN PAINTINGS IN THE FALL OF
 8 2009; IS THAT RIGHT?

9 A. I DID.

10 Q. THAT'S AH 4900?

11 A. UH-HUH (AFFIRMATIVE).

12 Q. WAS THAT A GRADUATE COURSE?

13 A. NO -- WELL, IT WAS KIND OF MIXED. IT WAS UNDERGRAD AND
 14 GRADUATE.

15 Q. OKAY. ALL IN THE SAME CLASS?

16 A. ALL IN THE SAME CLASS.

17 Q. OKAY. TELL US A LITTLE BIT ABOUT WHAT THAT COURSE IS
 18 ABOUT?

19 A. WELL, YOU KNOW, THE COURSE WAS KIND OF A TEST FOR ME. I'M
 20 IN AN ART AND DESIGN DEPARTMENT, AND OFTEN THERE'S SORT OF
 21 SEPARATION BETWEEN THE STUDIO DISCIPLINE AND ALSO THE ART
 22 HISTORY DISCIPLINE.

23 SO I FIGURED LET'S GO AHEAD AND DO A CLASS THAT DEALS
 24 NOT ONLY WITH THE MATERIALITY OR THE ACTUAL PAINTING AND HOW
 25 THEY DID PAINTING IN ANCIENT EGYPT USING THE ACTUAL MATERIALS,

1 AND THEN ALSO LOOKING AT IT FROM AN ART HISTORICAL POINT OF
 2 VIEW WHICH WAS LOOKING AT THE ICONOGRAPHY, AND THEN ALSO I HAD
 3 ONE STUDENT THAT ENDED UP LOOKING AT SPECTROSCOPY. BASICALLY
 4 HOW GEOMETRY CAN BE APPLIED TO TRACING ARTISTS ACROSS THE WALL,
 5 THEIR STYLE ACROSS THE WALL. BECAUSE IN ANCIENT EGYPTIAN
 6 PAINTING -- ACTUALLY IN ALL OF EGYPTIAN ART, THEY ARE ANONYMOUS
 7 ARTISTS. SO WE REALLY DON'T HAVE ANY NAMES WHATSOEVER.

8 Q. CAN YOU DESCRIBE THE WAY THAT YOU CONDUCTED YOUR CLASS,
 9 YOUR TEACHING METHOD?

10 A. I CONDUCTED THE CLASS THE WAY THAT I USUALLY CONDUCT ALL
 11 MY CLASSES WHICH IS THAT I JUST GIVE THE STUDENTS A LOT OF
 12 MATERIAL. I PITCH THE CLASS VERY HIGH, AND IT'S UP TO THE
 13 STUDENT TO DECIDE WHETHER OR NOT THEY WANT TO BE ABLE TO ACCESS
 14 THE MATERIAL OR NOT.

15 SO, YOU KNOW, ON MY SYLLABI YOU'LL SEE THAT I HAVE
 16 ARTICLES IN FRENCH AND ALSO IN GERMAN AND ALSO ON THE SYLLABI
 17 FOR MATERIALITY THERE WERE A NUMBER OF SCIENTIFIC ARTICLES IN
 18 THERE AND ALSO ART HISTORY ARTICLES AND ALSO ABOUT THE PRACTICE
 19 OF PAINTING, TOO.

20 MR. MILLER: AND SPEAKING OF YOUR SYLLABUS, YOUR
 21 HONOR, IF I MAY APPROACH?

22 THE COURT: YOU MAY.

23 BY MR. MILLER:

24 Q. IF YOU CAN TURN IN THE BINDER THAT I'VE HANDED YOU TO
 25 DX-596, IS THAT A COPY OF THE SYLLABUS FOR AH 4900 FOR FALL

1 2009?

2 A. YES, IT IS.

3 Q. AND IS THAT THE SYLLABUS THAT YOU PREPARED FOR THIS

4 COURSE?

5 A. YES, IT IS.

6 MR. MILLER: YOUR HONOR, WE'D OVER DX-596 INTO

7 EVIDENCE.

8 MR. LARSON: NO OBJECTION.

9 THE COURT: IT'S ADMITTED.

10 BY MR. MILLER:

11 Q. IF YOU WOULD TURN WITH ME TO PAGE GA STATE 66258 IN

12 DX-596, YOUR SYLLABUS, THERE'S A SECTION CALLED CLASS LECTURE

13 TOPICS AND DISCUSSION AREAS; DO YOU SEE THAT?

14 A. YES, I'M THERE.

15 Q. CAN YOU TELL ME GENERALLY WHAT THAT SECTION IS ABOUT?

16 A. IT'S SORT OF A GENERAL GUIDELINE FOR THE COURSE JUST TO

17 KIND OF SET IT UP. THERE'S AN INTRODUCTION AND THEN THERE ARE

18 A NUMBER OF LECTURES THAT I GIVE TO GET EVERYBODY UP TO SPEED

19 BECAUSE YOU HAVE TO TAKE INTO ACCOUNT THAT THERE ARE NOT ONLY

20 HISTORIANS IN THIS CLASS BUT THERE ARE ALSO STUDIO ARTISTS IN

21 THIS CLASS, AND THEY DON'T HAVE A LOT OF ART HISTORY. SO

22 THAT'S WHAT THE BEGINNING IS.

23 AND THEN THERE WERE THREE PRESENTATIONS THAT WERE

24 REQUIRED. ONE WAS VISUAL ANALYSIS, WHAT CAN YOU TELL ME ABOUT

25 THE TECHNIQUES THAT WERE USED ON THESE PARTICULAR TOMB WALLS,

1 AND THEN THERE WAS A THEORETICAL ANALYSIS, AND THEN AS I FOUND
2 OUT THE STUDIO ARTISTS WERE NOT TOO KEEN ABOUT DOING
3 ARCHEOMETRIC ANALYSIS BECAUSE IT WAS HIGHLY SCIENTIFIC AND SO I
4 ONLY HAD ONE STUDENT THAT ENDED UP USING THAT.

5 MR. LARSON: I'M SORRY TO INTERRUPT. I'VE JUST BEEN
6 TOLD THAT APPARENTLY THE SYLLABUS HAS ALREADY BEEN ENTERED AS
7 PX-550 SO THE COURT KNOWS IN CASE WE WANT TO AVOID DUPLICATION.

8 THE COURT: CAN WE JUST STICK WITH THE PLAINTIFFS'
9 EXHIBIT?

10 MR. MILLER: WE CAN. THAT'S FINE.

11 THE COURT: OKAY. WE'LL WITHDRAW DX-596.

12 BY MR. MILLER:

13 Q. SO THERE'S SOME READINGS LISTED IN THE SECTION?

14 A. CORRECT.

15 Q. WERE ANY OF THEM REQUIRED?

16 A. NO, IT WAS SIMPLY TO FAMILIARIZE THE STUDENTS WITH WHAT I
17 WOULD BE LECTURING.

18 Q. OKAY. AND THAT WAS THE PURPOSE OF READINGS FOR THE CLASS
19 IS TO FAMILIARIZE STUDENTS WITH WHAT YOU WOULD BE LECTURING
20 ABOUT?

21 A. UH-HUH (AFFIRMATIVE).

22 Q. AND SO LET'S TURN A LITTLE BIT IN YOUR SYLLABUS HERE TO
23 PAGE GA STATE 66262.

24 A. OKAY.

25 Q. DO YOU SEE THAT THERE?

1 A. I DO.

2 Q. AND NEAR THE TOP THERE, THERE'S A REFERENCE TO AN ARTICLE

3 FROM LORNA LEE AND STEPHAN QUIRKE CALLED PAINTING MATERIALS?

4 A. CORRECT.

5 Q. AND THAT'S FROM A TEXT CALLED ANCIENT EGYPTIAN MATERIALS

6 AND TECHNOLOGY --

7 A. CORRECT.

8 Q. -- BY CAMBRIDGE UNIVERSITY PRESS? CAN YOU TELL ME WHAT

9 ANCIENT MATERIALS AND TECHNOLOGY IS, THE BOOK?

10 A. THE BOOK. THE BOOK IS STANDARD REFERENCE FOR ANYBODY IN

11 EGYPTOLOGY, AND IT'S A REFERENCE BOOK. IT CONTAINS A NUMBER OF

12 DIFFERENT ARTICLES ON JUST THAT, ON MATERIALS AND TECHNOLOGY,

13 AND IT RANGES FROM ARTICLES ON PAINTING MATERIALS, STONE,

14 BINDERS AND ADHESIVES, AND THEN ALSO HAS ARTICLES ON HAIR,

15 OSTRICH EGGSHELLS AND MEAT PROCESSING, BREWING, WINE MAKING.

16 Q. IT'S PRETTY BROAD?

17 A. YES.

18 Q. ARE BEER BREWING, HAIRSTYLING ARE THOSE RELEVANT TO YOUR

19 COURSE?

20 A. NO.

21 Q. OKAY. FINE. CAN YOU TELL ME WHAT EXCERPT YOU ASSIGNED

22 FROM ANCIENT EGYPTIAN MATERIALS AND TECHNOLOGY?

23 A. PAINTING MATERIALS.

24 Q. DID YOU CONSIDER USING ANY OTHER PORTIONS, OR DID YOU

25 THINK ABOUT --

1 A. I DID. I THOUGHT ABOUT USING STONE, JUST A SMALL SECTION
2 OF STONE, AND THAT WAS IT.

3 Q. OKAY. SO YOU ULTIMATELY DIDN'T PUT STONE ON YOUR
4 SYLLABUS?

5 A. NO, I DIDN'T BECAUSE THAT WAS SOMETHING THAT I COULD
6 EASILY COVER IN MY LECTURES. THE STONE COURSE WAS USED AS A
7 PAINTING GROUND.

8 THE COURT: I COULD NOT FIND THE EXCERPT THAT YOU ARE
9 REFERRING TO.

10 MR. MILLER: IT'S RIGHT ABOVE MY FINGER.

11 THE COURT: OKAY. YOU'RE TALKING ABOUT THE PAINTING
12 MATERIALS?

13 MR. MILLER: YES, YOUR HONOR.

14 THE COURT: WHICH IS FOUND IN APPARENTLY A BOOK
15 CALLED ANCIENT MATERIALS AND TECHNOLOGY?

16 MR. MILLER: RIGHT.

17 BY MR. MILLER:

18 Q. SO YOUR SYLLABUS HAS ANCIENT MATERIALS AND TECHNOLOGY --

19 A. YES.

20 Q. -- YOU WERE REFERRING TO A BOOK CALLED ANCIENT MATERIALS
21 AND TECHNOLOGY?

22 A. YES, I WAS.

23 MR. MILLER: IF I MAY APPROACH, YOUR HONOR?

24 THE COURT: YOU MAY.

25 BY MR. MILLER:

1 Q. I'M HANDING YOU WHAT'S BEEN MARKED AS PLAINTIFFS' EXHIBIT

2 6; DO YOU RECOGNIZE THAT BOOK?

3 A. YES, I DO.

4 Q. WHAT IS IT?

5 A. IT'S ANCIENT EGYPTIAN MATERIALS AND TECHNOLOGY.

6 Q. IS THAT A COPY OF THE EDITION OF THE BOOK THAT YOU

7 ASSIGNED THE PAINTING MATERIALS EXCERPT FROM?

8 A. YES, IT IS.

9 MR. MILLER: YOUR HONOR, WE'D MOVE PX-6 INTO
10 EVIDENCE.

11 MR. LARSON: I BELIEVE IT'S IN EVIDENCE.

12 MR. MILLER: I DIDN'T SEE IT IN THE CURRENT READOUT.

13 ALL RIGHT.

14 BY MR. MILLER:

15 Q. SO NOW YOU SAID YOU CONSIDERED USING A PORTION OF STONE.

16 DO YOU RECALL HOW MUCH OF THE STONE ARTICLE YOU CONSIDERED?

17 THE COURT: WHY IS IT RELEVANT TO ASK ABOUT SOMETHING
18 SHE CONSIDERED USING?

19 MR. MILLER: WELL, IT WAS PLACED ON ERESERVES, THE
20 PORTION OF STONE. SHE DIDN'T END UP PUTTING IT ON SYLLABUS.

21 THE COURT: ALL RIGHT. GO AHEAD.

22 BY MR. MILLER:

23 Q. CAN YOU TELL ME WHAT EXCERPTS OF STONE YOU PUT ON --

24 A. SPECIFICALLY ON THERE WERE REFERENCES TO MALACHITE WHICH

25 COULD BE GROUND UP AND USED AS PIGMENT, AND THERE IS SOMETHING

1 IN THERE ON OBSIDIAN QUARTZ WHICH WAS USED AS INLAYS IN RELIEF,
2 PAINTED RELIEF. SO, I MEAN, I WANTED TO GO AHEAD AND INCLUDE
3 THAT.

4 Q. OKAY. DO YOU RECALL WHICH PAGES THOSE WERE?

5 A. IT'S BEEN A WHILE. 44 TO 54.

6 Q. AND YOU ALSO PUT UP THE PAINTING MATERIALS ESSAY ON YOUR
7 SYLLABUS?

8 A. YES, I DID.

9 Q. OKAY. AND WHAT PAGES WERE THE PAINTING MATERIALS?

10 A. 104 TO 120.

11 Q. OKAY. AND APPROXIMATELY HOW MANY PAGES ARE IN THE BOOK
12 ITSELF?

13 A. I BELIEVE -- IF I CAN GO AHEAD AND TAKE A LOOK AT IT?

14 Q. YES, BY ALL MEANS.

15 A. IS THIS INCLUDING THE FRONT MATTER?

16 Q. WELL YOU TELL ME?

17 A. WELL, IF WE'RE JUST LOOKING AT THE TEXT, IT WOULD BE 673
18 PAGES. WITH THE FRONT MATTER AND THE INDEX 724.

19 Q. OKAY. SO YOU ROUGHLY ASSIGNED 28 PAGES OUT OF 724?

20 A. YES.

21 Q. RATHER THAN DOING THE MATH, IS THAT LESS THAN 5 PERCENT OF
22 THE BOOK?

23 A. YES.

24 MR. MILLER: YOUR HONOR, THE PLAINTIFFS ASSERTION IS
25 THAT SHE USED 4.2 PERCENT OF THE BOOK.

1 MR. RICH: YOUR HONOR, JUST LOOKING FOR WAYS TO
2 EXPEDITE THIS, MIGHT WE STIPULATE THAT THERE ARE NUMBERS THAT
3 ARE REGULARLY CALCULATED AND PAGE NUMBERS AND NOT HAVE TO GO
4 THROUGH THE FORMALITY WITH EACH WITNESS OF HOW MANY PAGES ARE
5 IN A BOOK AND IS IT APPROXIMATELY WHAT PERCENT. THIS IS SORT
6 OF MECHANICAL.

7 THE COURT: WELL IT IS MECHANICAL. OF COURSE, MR.
8 MILLER IS DOING THE SAME THING THAT YOU ALL DID. YOU'RE BOTH
9 TRYING TO CREATE A TRIAL RECORD THAT WILL STAND INDEPENDENTLY
10 OF THESE EXHIBITS, AND I HAVE BEEN FEELING PRETTY IMPATIENT
11 ABOUT IT, I'LL HAVE TO ADMIT.

12 MR. MILLER: YOUR HONOR, I WILL SAY THAT I WON'T DO
13 IT AGAIN FOR THIS WITNESS.

14 THE COURT: OKAY. GOOD. GO AHEAD, LET'S MOVE AHEAD
15 QUICKLY.

16 MR. MILLER: WE'RE ABOUT TO --

17 THE COURT: IS THIS THE ONLY ALLEGED INFRINGEMENT?

18 MR. MILLER: IT IS, YOUR HONOR.

19 THE COURT: WHAT ELSE COULD YOU WANT TO KNOW?

20 MR. MILLER: JUST A COUPLE OF THINGS.

21 BY MR. MILLER:

22 Q. DO YOU HAVE THE -- THE EXCERPTS FROM ANCIENT MATERIAL AND
23 TECHNOLOGY LOOKING BACK AT YOUR SYLLABUS APPEAR IN A LONG LIST
24 OF OTHER GROUPED TOGETHER READINGS UNDER A SINGLE HEADING; CAN
25 YOU TELL ME WHAT THE HEADING IS?

1 A. COULD YOU REPEAT THE QUESTION PLEASE?

2 Q. YES. IF YOU'LL LOOK AT YOUR SYLLABUS ANCIENT EGYPTIAN

3 MATERIALS AND TECHNOLOGY, THERE IS A GROUP OF FAIRLY LARGE

4 NUMBER OF READINGS --

5 A. YES, IT IS.

6 Q. -- AND LISTED UNDER A SINGLE HEADING, CAN YOU TELL ME WHAT

7 THAT HEADING IS?

8 A. THAT HEADING IS HELPFUL PUBLICATIONS.

9 Q. OKAY. AND WHY DID YOU GROUP ALL THESE TOGETHER UNDER

10 HELPFUL PUBLICATIONS?

11 A. BECAUSE IT'S REALLY UP TO THE STUDENT AS TO WHETHER OR NOT

12 THEY WANT TO GO AHEAD AND ACCESS OR READ THESE PUBLICATIONS,

13 AND SO THEREFORE THEY'RE HELPFUL.

14 Q. OKAY. AND ARE THEY REQUIRED FOR YOUR COURSE?

15 A. NO, THEY ARE NOT.

16 Q. SO YOU CONSIDER THEM SUPPLEMENTAL TO YOUR COURSE?

17 A. I DO.

18 MR. LARSON: OBJECTION, LEADING.

19 THE COURT: SUSTAINED.

20 BY MR. MILLER:

21 Q. CAN YOU TELL ME ARE THESE REQUIRED READING OR SUPPLEMENTAL

22 READINGS?

23 A. THEY ARE SUPPLEMENTAL READINGS.

24 Q. OKAY. THANK YOU. NOW, HOW DID YOU INTEND YOUR STUDENTS

25 TO ACCESS THE EXCERPTS OF ANCIENT EGYPTIAN MATERIALS AND

1 TECHNOLOGY?

2 A. I PUT IT ON ERES.

3 Q. OKAY. CAN YOU DESCRIBE THE PROCESS THAT YOU FOLLOWED WHEN

4 PUTTING THEM ONTO ERES?

5 A. OKAY. WHEN I UPLOADED THE DOCUMENTS, THERE WAS A -- YOU

6 HAD TO DECIDE ABOUT THE COPYRIGHT, AND I ENDED UP ACCESSING THE

7 FAIR USE CHECKLIST AFTER ASSESSING THAT IT DID FOLLOW FAIR USE

8 AND FILLED OUT THE FAIR USE CHECKLIST AND HIT THE BUTTON.

9 Q. OKAY. SO NOW DID YOU ACTUALLY PRINT OUT A FAIR USE

10 CHECKLIST?

11 A. I DID.

12 Q. AND DID YOU ACTUALLY CHECK THE BOXES?

13 A. I DID CHECK THE BOXES, AND YES. I ALSO LOOKED FOR IT WHEN

14 ASKED, AND WE SPENT A NUMBER OF HOURS TRYING TO FIND IT AND

15 YEAH.

16 Q. OKAY. SO YOU LOST YOUR FORM THAT DID YOU FILL OUT?

17 A. YES, I DID.

18 Q. COULD YOU LOOK IN YOUR NOTEBOOK AT TAB DX-436 PLEASE?

19 A. OKAY.

20 Q. DO YOU RECOGNIZE THIS DOCUMENT?

21 A. YES, I DO.

22 Q. CAN YOU TELL ME WHAT IT IS?

23 A. IT IS A FAIR USE CHECKLIST.

24 Q. OKAY. AND SPECIFICALLY CAN YOU TELL ME A LITTLE MORE

25 ABOUT IT?

1 A. THERE ARE A NUMBER OF FACTORS, FOUR FACTORS THAT WEIGH IN
2 FAVOR OF FAIR USE.

3 Q. LET ME BACK YOU UP A LITTLE BIT. DID YOU CREATE THIS
4 DOCUMENT?

5 A. YES, I DID.

6 Q. OKAY. WHY DID YOU CREATE THIS DOCUMENT?

7 A. I WAS ACTUALLY ASKED TO RECREATE IT, AND SO IN ORDER TO DO
8 SO, I PUT MYSELF BACK IN THE MINDSET THAT I HAD WHEN I WAS
9 DOING THIS CLASS AND THEN ALSO ASSESSED EACH ONE OF THE
10 QUESTIONS AS BEST I COULD.

11 Q. OKAY. SO YOU SORT OF DESCRIBED THE PROCESS THAT YOU JUST
12 FOLLOWED IN RECREATING YOUR LOST CHECKLIST; IS THAT RIGHT?

13 A. RIGHT.

14 Q. AND SO DO YOU BELIEVE THAT IS A FAIR AND ACCURATE
15 REPRESENTATION OF THE CHECKLIST THAT YOU HAD LOST?

16 A. I DO BELIEVE THAT THIS IS FAIR AND ACCURATE --

17 MR. LARSON: OBJECT TO THE LEADING QUESTIONS.

18 THE COURT: OVERRULED.

19 MR. MILLER: YOUR HONOR, WE WOULD OFFER DX-436 INTO
20 EVIDENCE AS A RECREATED CHECKLIST.

21 MR. LARSON: YOUR HONOR, WE'D OBJECT FOR THE REASONS
22 STATED BEFORE THAT IT FAILS THE BEST EVIDENCE TEST. THAT IT'S
23 IRRELEVANT GIVEN THAT IT WAS CREATED IN 2010.

24 THE COURT: I'LL ADMIT IT.

25 BY MR. MILLER:

1 Q. WHEN YOU ORIGINALLY CREATED YOUR CHECKLIST IN THE FALL OF
2 2009, DID YOU ATTEMPT TO GO THROUGH A FAIR USE ANALYSIS?

3 A. I DID.

4 Q. AND DID YOU UNDERTAKE THAT ANALYSIS IN GOOD FAITH?

5 A. I DID.

6 Q. NOW LET'S LOOK AT DX-436 IN PARTICULAR. THE CHECKLIST HAS
7 FOUR MAIN FACTORS; DO YOU SEE THAT?

8 A. I DO.

9 Q. AND CAN YOU TELL ME WHICH OF THE FOUR FACTORS YOU
10 EVALUATED FOR THE EXCERPTS OF ANCIENT EGYPTIAN MATERIALS AND
11 TECHNOLOGY THAT YOU USED?

12 A. I ASSESSED ALL FOUR FACTORS.

13 Q. OKAY. AND CAN YOU SEE THAT EACH OF THOSE FOUR FACTORS HAS
14 A LIST OF SUBFACTORS?

15 A. YES.

16 Q. CAN YOU TELL ME WHICH OF THOSE SUBFACTORS YOU EVALUATED?

17 A. ALL RIGHT. FOR FACTOR 1 I ASSESSED NONPROFIT OR I CHECKED
18 NONPROFIT EDUCATIONAL BECAUSE GSU IS A NONPROFIT INSTITUTION.
19 I CHECKED TEACHING BECAUSE I WAS USING IT IN THE CLASSROOM FOR
20 MY CLASS. I CHECKED PERSONAL STUDY BECAUSE I WAS USING IT TO
21 PUT MY LECTURES TOGETHER TO WRITE MY LECTURES.

22 I ALSO CHECKED USE IS NECESSARY TO ACHIEVE YOUR
23 INTENDED EDUCATIONAL PURPOSE BECAUSE IT WAS IMPORTANT NOT ONLY
24 FOR THE STUDENTS WHO WANTED TO GO AHEAD AND READ IT BUT ALSO
25 FOR ME WHEN I WAS PUTTING MY LECTURES TOGETHER.

1 Q. OKAY. AND THERE ARE SEVERAL BOXES HERE THAT YOU DIDN'T
2 CHECK. DID YOU EVALUATE THOSE BOXES AS WELL?

3 A. I DID.

4 Q. AND CAN YOU TELL ME WHAT YOUR CONCLUSION WAS AS TO
5 FACTOR 1?

6 A. FACTOR 1 THE FACTOR WEIGHED IN FAVOR OF FAIR USE.

7 Q. OKAY. NOW IF WE CAN GO ONTO THE NEXT PAGE OF THE
8 CHECKLIST PAGE 2, CAN YOU TELL ME WHICH SUBFACTORS YOU TOOK A
9 LOOK AT IN SUBFACTOR 2?

10 A. SUBFACTORS OF PUBLISHED WORK BECAUSE IT IS A PUBLISHED
11 WORK. IT IS A FACTUAL OR NONFICTION WORK BECAUSE IT'S LARGELY
12 SCIENTIFIC, AND IMPORTANT TO MY EDUCATIONAL OBJECTIVES BECAUSE
13 I WAS GOING TO BE USING FOR MY LECTURES AND ALSO FOR ANY
14 STUDENTS THAT WANTED TO READ THE ARTICLE.

15 Q. AND THERE ARE SEVERAL BOXES IN FACTOR 2 YOU DIDN'T
16 CHECK. DID YOU EVALUATE THOSE FACTORS IN PERFORMING YOUR
17 ANALYSIS?

18 A. YES, I DID.

19 Q. AND IF YOU CAN TELL ME WHAT WAS YOUR CONCLUSION AS TO
20 FACTOR 2 ON THE FAIR USE CHECKLIST?

21 A. MY CONCLUSION TO FACTOR 2 WAS THAT THE FACTORS WEIGHED IN
22 FAVOR OF FAIR USE.

23 Q. OKAY. ON THE SAME PAGE THERE'S FACTOR 3. CAN YOU
24 DESCRIBE FOR US THE ANALYSIS YOU PERFORMED WITH RESPECT TO
25 FACTOR 3?

1 A. ON FACTOR 3 I CHECKED SMALL PORTION OF WORK USED BECAUSE
2 IT WAS A VERY SMALL PORTION OF THE BOOK. I CHECKED PORTION
3 USED IS NOT CENTRAL OR SIGNIFICANT TO THE ENTIRE WORK AS A
4 WHOLE BECAUSE IT WAS JUST ONE PARTICULAR CHAPTER AND THEN PART
5 OF ANOTHER CHAPTER AND NOT CENTRAL OF COURSE TO THE BOOK.

6 I ALSO CHECKED AMOUNT TAKEN IS NARROWLY TAILORED TO
7 EDUCATIONAL PURPOSE SUCH AS CRITICISM, COMMENT, RESEARCH OR
8 SUBJECT BEING TAUGHT BECAUSE IT WAS NARROWLY TAILORED TOWARDS
9 JUST LOOKING AT PARTICULAR ASPECTS OF PAINTING, SPECIFICALLY
10 THOSE THAT WERE SCIENTIFIC.

11 Q. OKAY. AND LET'S TALK ABOUT THAT FOR JUST A SECOND. SO
12 YOU SAID YOU SELECTED SMALL PORTION, AND I THINK WE'D ALREADY
13 DISCUSSED THE SIZE OF THE PORTION.

14 DO YOU HAVE A RULE OF THUMB THAT YOU USE AS TO
15 WHETHER SOMETHING IS LARGE OR SMALL?

16 A. I DO. I WOULD SAY -- I MEAN WHAT I DO FOLLOW IS 10
17 PERCENT. BASICALLY THAT IT SHOULD BE 10 PERCENT OF THE WORK.
18 I TRY NOT TO GO OVER THAT.

19 Q. OKAY. WHERE DID YOU LEARN THAT RULE OF THUMB?

20 A. THAT'S MY OWN PERSONAL ASSESSMENT.

21 Q. OKAY. AND WHAT WOULD YOU DO IF YOU WERE CONSIDERING
22 WHETHER OR NOT A USE OF AN EXCERPT WAS FAIR USE AND YOU WERE
23 LOOKING AT SOMETHING THAT WAS MORE THAN 10 PERCENT?

24 A. I WOULD GO THROUGH THE COPYRIGHT CLEARANCE CENTER OR GO TO
25 THE PUBLISHER OR I WOULD BE IN TOUCH WITH THE AUTHOR.

1 Q. OKAY. I NOTICED ALSO THAT YOU SELECTED THAT THE WORK IS
2 NOT CENTRAL TO THE WORK; CAN YOU EXPLAIN YOUR THOUGHT PROCESS?

3 A. RIGHT, BECAUSE IT'S A VERY BROAD BASED WORK. ANCIENT
4 EGYPTIAN MATERIALS AND TECHNOLOGY REALLY COVERS A LOT OF
5 MATERIALS AND A LOT OF TECHNOLOGY, AND I DID STATE EARLIER
6 THINGS LIKE MEAT PROCESSING, YEAH, EXACTLY.

7 Q. ALL RIGHT. AND THERE IS A -- I CAN'T RECALL IF I ASKED,
8 BUT DID YOU EVALUATE ALL OF THE CHECK BOXES HERE FOR FACTOR 3?

9 A. YES, I DID.

10 Q. AND WHAT WAS YOUR ULTIMATE CONCLUSION?

11 A. MY ULTIMATE CONCLUSION WAS THAT FACTOR 3 THE FACTORS
12 WEIGHED IN FAVOR OF FAIR USE.

13 Q. OKAY. AND FINALLY TURNING TO FACTOR 4, CAN YOU DESCRIBE
14 THE ANALYSIS YOU PERFORMED FOR FACTOR 4?

15 A. OKAY. FOR FACTOR 4 THE SUBFACTORS I CHECKED NO
16 SIGNIFICANT EFFECT ON MARKET OR POTENTIAL MARKET FOR
17 COPYRIGHTED WORK BECAUSE IT WAS JUST A SMALL PORTION OF THAT
18 WORK.

19 I ALSO CHECKED USED TO STIMULATE MARKET FOR ORIGINAL
20 WORK BECAUSE THOSE PEOPLE THAT WERE GOING TO GO ON TO BECOME
21 ARCHEOLOGISTS OR EGYPTOLOGISTS THIS IS A MANDATORY BOOK THAT
22 THEY NEED IN THEIR LIBRARY.

23 I ALSO CHECKED SUPPLEMENTAL CLASSROOM READING BECAUSE
24 IT'S IN THE HELPFUL READING SECTION, AND I CHECKED RESTRICTED
25 ACCESS TO STUDENTS OR OTHER APPROPRIATE GROUP BECAUSE IT WAS

1 JUST TO BE USED BY THE STUDENTS IN MY CLASS.

2 Q. OKAY. AND DID YOU EVALUATE ALL OF THE CHECKED BOXES

3 HERE AS TO WHETHER OR NOT YOU SHOULD CHECK THEM HERE UNDER

4 FACTOR 4?

5 A. YES, I DID.

6 Q. OKAY. AND WHAT WAS YOUR ULTIMATE CONCLUSION?

7 A. MY ULTIMATE CONCLUSION ON FACTOR 4 WAS THAT THE FACTORS

8 WEIGHED IN FAVOR OF FAIR USE.

9 Q. OKAY. AND SO NOW CONSIDERING ALL OF THE FACTORS, WHAT WAS

10 YOUR ULTIMATE DETERMINATION AS TO WHETHER OR NOT THE USE OF THE

11 EXCERPT WAS FAIR?

12 A. THAT ALL FOUR FACTORS WEIGHED IN FAVOR OF FAIR USE.

13 Q. OKAY. AND ONCE YOU FINISHED THIS CHECKLIST, WHAT DID YOU

14 DO TO GET YOUR EXCERPT LOADED TO RESERVES?

15 A. I CLICKED THE BUTTON.

16 Q. OKAY. AND SO DO YOU RECALL WHETHER IN CLICKING THAT

17 BUTTON YOU WERE INFORMING THE LIBRARY AS TO WHETHER OR NOT --

18 A. ABSOLUTELY, YES.

19 Q. OKAY. IF YOU DON'T MIND LET ME FINISH THE QUESTION.

20 WHETHER YOUR USE WAS FAIR, DID YOU INFORM THE LIBRARY

21 THAT THE USE WAS FAIR IN CLICKING THAT BUTTON?

22 A. I DID INFORM THE LIBRARY THAT MY USE WAS FAIR.

23 Q. DID YOU GET ANY KIND OF CONFIRMING E-MAIL FROM THE

24 LIBRARY?

25 A. I DID GET A CONFIRMING E-MAIL FROM THE LIBRARY.

1 Q. LET ME SHOW IN YOUR NOTEBOOK, IT'S BEEN MARKED AS DX-509,
2 AND SO IS THIS THE CORRESPONDENCE BETWEEN YOU AND THE LIBRARY
3 REGARDING YOUR POSTING TO ERESERVES WITH RESPECT TO THIS CLASS?

4 A. YES, IT IS.

5 MR. MILLER: YOUR HONOR, I WOULD MOVE DX-509 INTO
6 EVIDENCE.

7 MR. LARSON: NO OBJECTION.

8 THE COURT: IT'S ADMITTED.

9 MR. MILLER: I HAVE NOTHING FURTHER AT THIS TIME.

10 THE COURT: GOOD MORNING, MR. LARSON.

11 MR. LARSON: GOOD MORNING.

12 CROSS-EXAMINATION

13 BY MR. LARSON:

14 Q. GOOD MORNING. MY NAME IS TOM LARSON. I'M HERE ON BEHALF
15 OF THE PLAINTIFFS. JUST A FEW QUESTIONS FOR YOU.

16 DID YOU ATTEND A TRAINING SESSION RELATED TO THE GSU
17 COPYRIGHT POLICY AT ANY POINT?

18 A. NO, I DID NOT.

19 Q. AND JUST TO BE CLEAR WITH RESPECT TO THE EXCERPT WE'VE
20 BEEN TALKING ABOUT OR THE EXCERPTS FROM THE EGYPT ENCYCLOPEDIA,
21 YOU DIDN'T SEEK PERMISSION FROM THE PUBLISHER TO PLACE THIS
22 WORK OF ERESERVES, CORRECT?

23 A. I DID NOT.

24 Q. AND YOU DIDN'T PAY ANY FEES FOR PLACING THE WORK ON
25 ERESERVES, CORRECT?

1 A. I DID NOT.

2 Q. YOU MENTIONED BEFORE THAT YOU'VE PUBLISHED ACTUALLY WITH
3 OXFORD UNIVERSITY PRESS; IS THAT RIGHT?

4 A. I HAVE.

5 Q. AND I TAKE IT THAT BEING PUBLISHED IN AN OXFORD
6 PUBLICATION WAS IMPORTANT TO YOUR CAREER AND YOUR REPUTATION;
7 IS THAT RIGHT?

8 A. YES, IT'S ONE PUBLISHER THAT IS IMPORTANT.

9 Q. IF YOU CAN TAKE A LOOK AT DX-436 WHICH IS THE CHECKLIST.
10 DO YOU HAVE THAT THERE IN FRONT OF YOU?

11 A. YES.

12 Q. I JUST WANT TO CONFIRM A COUPLE OF THINGS. FIRST OF ALL,
13 CAN YOU CONFIRM THAT IN TOTAL ON THIS CHECKLIST THAT YOU HAD 14
14 CHECKS IN THE WAYS IN FAVOR OF FAIR USE COLUMN AND ZERO CHECKS
15 IN THE WAYS AGAINST FAIR USE COLUMN?

16 A. I CAN CONFIRM THAT.

17 Q. THANK YOU. AND CAN YOU ALSO CONFIRM -- I THINK YOU SAID
18 THAT WITH RESPECT TO PAGES 44 TO 54, YOU DIDN'T ULTIMATELY
19 INCLUDE THOSE ON YOUR SYLLABUS; IS THAT RIGHT?

20 A. I DID NOT INCLUDE THEM ON MY SYLLABUS.

21 Q. BUT THE EXCERPT THAT WAS POSTED TO ERESERVES DID INCLUDE
22 BOTH PAGES 44 TO 54 AND PAGES 104 TO 120?

23 A. YES.

24 Q. NOW YOU INDICATED UNDER THE FIRST FACTOR ON THE CHECKLIST
25 THAT THE USE WAS NECESSARY TO ACHIEVE YOUR INTENDED EDUCATIONAL

1 PURPOSE; IS THAT RIGHT?

2 A. I DID.

3 Q. I THINK YOU ALSO TESTIFIED JUST A MOMENT AGO THAT THE

4 READING WAS OPTIONAL?

5 A. I DID, YES.

6 Q. SO IS IT POSSIBLE THAT IF IT WAS OPTIONAL AND NOT REQUIRED

7 THAT IT WASN'T REALLY NECESSARY?

8 A. BUT THAT GOES TO HOW I TEACH MY CLASSES. I MEAN I GIVE

9 STUDENTS AS MUCH MATERIAL AS THEY WANT, AND THAT IT IS

10 NECESSARY FOR THOSE STUDENTS THAT WOULD LIKE TO GO ON AND

11 BECOME ARCHEOLOGISTS OR EGYPTOLOGISTS, AND THEREFORE IT WOULD

12 BE NECESSARY FOR THEM TO READ, AND THEN SUPPLEMENTARY OF COURSE

13 FOR THOSE STUDENTS LIKE STUDIO STUDENTS THAT WOULD NOT BE

14 INTERESTED IN GOING INTO THAT.

15 Q. SO IT WAS NECESSARY FOR SOME OF THE STUDENTS IN THE CLASS

16 BUT NOT FOR ALL OF THE STUDENTS IN THE CLASS?

17 A. WELL, IT'S UP TO EVERY STUDENT TO DECIDE WHAT THEY WANT,

18 ISN'T IT?

19 Q. BUT YOU CHECKED NECESSARY ON THE CHECKLIST; IS THAT RIGHT?

20 A. I DID.

21 Q. NOW WITH RESPECT TO FACTOR 2, I THINK YOU CHECKED

22 NONFICTION; IS THAT RIGHT?

23 A. I DID.

24 Q. AND YOU DID NOT CHECK HIGHLY CREATIVE WORK, CORRECT?

25 A. NO, I DID NOT.

1 Q. AND I TAKE IT, THOUGH, THAT THIS EXCERPT THAT YOU PLACED
2 ON ERESERVES FROM THIS BOOK IS NOT JUST SORT OF A PLAIN LIST OF
3 FACTS; IS THAT RIGHT?

4 A. ACTUALLY IT IS A VERY SCIENTIFIC APPROACH TO PAINTING
5 GOING OVER PIGMENT ANALYSIS, SPECTROSCOPY INFORMATION. IT'S
6 VERY SCIENTIFIC.

7 Q. SCIENTIFIC. IT INCLUDES THE AUTHOR'S DESCRIPTION OR
8 EXPLANATION OF THOSE TOPICS?

9 A. HE WOULD HAVE TO BECAUSE IF IT'S SO SCIENTIFIC HE NEEDS TO
10 EXPLAIN IT TO AN AUDIENCE THAT ARE NOT SCIENTISTS.

11 Q. LOOKING AT FACTOR 4, YOU DID NOT CHECK ON THE RIGHT-HAND
12 SIDE LICENSING AND PERMISSIONS READILY AVAILABLE. DID YOU
13 ACTUALLY CHECK TO SEE WHETHER LICENSING OR PERMISSION WAS
14 AVAILABLE FOR THIS EXCERPT?

15 A. I DID NOT BECAUSE I BELIEVED THIS WAS UNDER FAIR USE.

16 Q. I SEE. YOU CHECKED STIMULATES THE MARKET FOR THE
17 ORIGINAL, CORRECT?

18 A. UH-HUH (AFFIRMATIVE).

19 THE COURT: WAS THAT A YES?

20 THE WITNESS: YES.

21 BY MR. LARSON:

22 Q. NOW, YOU HAVEN'T PROVIDED THE COURT WITH ANY EVIDENCE THAT
23 ANY STUDENT IN THIS PARTICULAR CLASS ACTUALLY BOUGHT THIS BOOK
24 BECAUSE OF YOUR USE OF IT IN YOUR CLASS; IS THAT CORRECT?

25 A. UNFORTUNATELY I DO NOT HAVE THAT EVIDENCE, BUT CERTAINLY

1 THEY COULD IF THEY WANTED TO.

2 Q. I THINK YOU TALKED IN YOUR TESTIMONY ABOUT A 10 PERCENT
3 GUIDELINE THAT YOU FOLLOW?

4 A. UH-HUH (AFFIRMATIVE).

5 Q. JUST SO I'M CLEAR IS THAT A RULE THAT YOU FOLLOW SORT OF
6 SEPARATE AND APART FROM THE CHECKLIST?

7 A. COULD YOU REPEAT THAT QUESTION?

8 Q. YEAH. IS THAT A RULE THAT YOU FOLLOW SEPARATE AND APART
9 FROM FILLING OUT THE CHECKLIST; IN OTHER WORDS, IF THE EXCERPT
10 THAT YOU'RE INTERESTED IN USING IS OVER 10 PERCENT, DO YOU JUST
11 NOT USE IT IRRESPECTIVE OF FILLING OUT THE CHECKLIST?

12 A. IF IT IS OVER 10 PERCENT, I WOULD THEN GO THROUGH THE
13 COPYRIGHT CLEARANCE CENTER OR I WOULD GO TO THE PUBLISHER.

14 Q. YOU WOULDN'T ACTUALLY FILL OUT A CHECKLIST IN THAT
15 SITUATION; YOU WOULD DO WHAT YOU JUST INDICATED?

16 A. I WOULD.

17 Q. OKAY. SO WHEN YOU DID A CHECKLIST AND FILLED IT OUT, IT
18 WAS 14 TO ZERO IN FAVOR OF FAIR USE; IS THAT CORRECT?

19 A. THAT'S CORRECT.

20 Q. SO IT'S ONLY BY RESORTING TO THIS 10 PERCENT CRITERIA
21 THAT'S OUTSIDE THE CHECKLIST THAT YOU CONCLUDED THAT IT WAS NOT
22 A FAIR USE AND YOU COULDN'T USE THE MATERIAL?

23 A. COULD YOU PLEASE RESTATE THE QUESTION?

24 Q. YES. MY QUESTION IS IT'S ONLY BY USING THE 10 PERCENT
25 CRITERION OUTSIDE THE CHECKLIST THAT YOU CONCLUDE THAT YOU NEED

1 TO GET PERMISSION TO USE SOMETHING?

2 A. I'M SO SORRY I DON'T UNDERSTAND WHAT YOU'RE SAYING.

3 Q. MY QUESTION IS, I THINK YOU INDICATED A MOMENT AGO THAT
4 THIS 10 PERCENT RULE IS SOMETHING YOU DO IRRESPECTIVE OF THE
5 CHECKLIST, CORRECT?

6 IT'S A RULE YOU FOLLOW EVEN WHEN YOU HAVEN'T FILLED
7 OUT THE CHECKLIST?

8 A. THAT'S TRUE.

9 Q. AND SO ALL I'M ASKING IS IF IT'S THE CASE THAT TO CONCLUDE
10 THAT SOMETHING IS NOT A FAIR USE YOU ACTUALLY RELY ON SOMETHING
11 THAT'S OUTSIDE --

12 THE COURT: THIS IS REALLY GETTING OVER INTO
13 ARGUMENT. LET'S MOVE ON.

14 MR. LARSON: SURE, YOUR HONOR.

15 BY MR. LARSON:

16 Q. I THINK YOU TESTIFIED THAT YOUR CHECKLIST WAS RECREATED
17 SOMETIME LATE LAST YEAR; IS THAT RIGHT?

18 A. YES, IT WAS.

19 Q. COULD YOU JUST TAKE A LOOK AT THE CHECKLIST? YOU SEE IT'S
20 DATED 9-1-2009 ON THE FIRST PAGE?

21 A. YES.

22 Q. THAT'S NOT ACTUALLY CORRECT, RIGHT, IT WAS NOT CREATED ON
23 9-1-2009?

24 A. I WAS RECREATING THE CHECKLIST.

25 Q. AND HOW DID YOU KNOW THAT IT WAS CREATED ORIGINALLY ON

1 9-1-2009?

2 A. I WAS DOING MY BEST TO REMEMBER.

3 Q. IS IT YOUR TESTIMONY THAT THIS CHECKLIST THAT WE'RE
4 LOOKING AT HERE REFLECTS PRECISELY IN EVERY RESPECT WHAT YOU
5 DID IN SEPTEMBER 2009 AS TO EACH OF THE 50 BOXES ON THE
6 CHECKLIST?

7 A. I WOULD SAY IT'S A VERY GOOD APPROXIMATION.

8 Q. OKAY. BUT ONLY AN APPROXIMATION?

9 A. IT'S VERY CLOSE. IT'S VERY CLOSE TO HOW I ABSOLUTELY DID
10 IT.

11 MR. LARSON: YOUR HONOR, BASED ON THAT TESTIMONY, I
12 WOULD RENEW OUR OBJECTION TO ADMITTING THIS DOCUMENT INTO
13 EVIDENCE.

14 THE COURT: YOU MEAN THE RECREATED CHECKLIST?

15 MR. LARSON: YES.

16 THE COURT: OKAY. I'LL OVERRULE YOUR OBJECTION.

17 MR. LARSON: I HAVE NO MORE QUESTIONS.

18 MR. MILLER: JUST ONE.

19 THE COURT: BETTER BE GOOD.

20 MR. MILLER: THAT'S A LOT OF PRESSURE.

21 THE COURT: THAT'S WHAT I INTENDED.

22 REDIRECT EXAMINATION

23 BY MR. MILLER:

24 Q. ONE SINGLE QUESTION. MR. LARSON ASKED YOU ABOUT YOUR
25 CHECKLIST JUST NOW. DID YOU CONSIDER EVERY ITEM ON THIS

1 CHECKLIST WHETHER OR NOT YOU CHECKED THE BOX?

2 A. I CONSIDERED ABSOLUTELY EVERY ITEM ON THERE WHETHER OR NOT
3 I CHECKED THE BOX.

4 MR. MILLER: THAT'S ALL. THANK YOU.

5 THE COURT: SHALL THE WITNESS BE EXCUSED?

6 MR. LARSON: THAT'S FINE.

7 THE COURT: YOU ARE EXCUSED. THANK YOU.

8 WHO'S NEXT?

9 MR. SCHAEZEL: PROFESSOR DIXON, YOUR HONOR.

10 MR. KRUGMAN: YOUR HONOR, THIS IS JOHN RAINS. HE'S A
11 COLLEAGUE OF MINE AT BONDURANT MIXSON & ELMORE.

12 THE COURT: NICE TO HAVE YOU HERE.

13 MR. SCHAEZEL: BEFORE WE CONDUCT THE NEXT
14 EXAMINATION, WE NEED A FEW MINUTES TO SET UP AND WOULD ASK IF
15 THE COURT WOULD INDULGE A BREAK AT THIS POINT IN TIME?

16 THE COURT: WE'LL TAKE A 15-MINUTE BREAK.

17 (RECESS)

18 THE COURT: ARE YOU READY?

19 MR. HARBIN: YES, YOUR HONOR. THE DEFENDANTS WOULD
20 CALL PROFESSOR PATRICIA DIXON

21 PATRICIA DIXON,
22 HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS
23 FOLLOWS:

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

1 ALSO. SWORN WORN.

2 THE WITNESS: MY NAME IS PATRICIA DIXON.

3 MR. HARBIN: BEFORE WE BEGIN, YOUR HONOR, THE
4 DEFENDANTS WOULD OFFER INTO EVIDENCE DEFENDANT'S EXHIBIT NUMBER
5 335 WHICH IS THE SYLLABUS FOR THE FALL 2009 COURSE THAT
6 PROFESSOR DIXON TAUGHT AT ISSUE.

7 MR. RAINS: YOUR HONOR, I BELIEVE THAT'S ALREADY IN
8 EVIDENCE AS PLAINTIFFS' EXHIBIT 542.

9 THE COURT: CAN WE JUST STICK WITH THE PLAINTIFFS'
10 EXHIBITS?

11 MR. HARBIN: I'LL TRY, YOUR HONOR, I DID NOT REALIZE
12 THAT WAS IN. I'LL TRY EVERY TIME I REFER TO IT TO SAY
13 PLAINTIFFS' EXHIBIT 542. IS 542 RIGHT?

14 MR. RAINS: I BELIEVE THAT'S CORRECT.

15 THE COURT: ALL RIGHT.

16 MR. HARBIN: AND DEFENDANTS' EXHIBIT 749 WHICH IS
17 BEFORE THE WITNESS IS THE THIRD BOOK -- ONE OF THE BOOKS OF
18 WHICH SHE EXCERPTED BLACK FAMILIES THIRD EDITION.

19 MR. RAINS: NO OBJECTION.

20 THE COURT: IT'S ADMITTED.

21 MR. HARBIN: THE PLAINTIFFS HAVE INTRODUCED A FOURTH
22 EDITION, BUT I THINK YOU WILL FIND THE WITNESS USED THE THIRD
23 EDITION WHICH IS WHY WE INTRODUCING THE DEFENSE COPY OF THAT
24 BOOK DEFENSE EXHIBIT 749.

25 THE COURT: AND 741 IS ALREADY IN EVIDENCE?

1 MR. HARBIN: 749.

2 THE COURT: OKAY. IS IT ALREADY IN EVIDENCE?

3 MR. HARBIN: IT'S DEFENDANTS' EXHIBIT 749.

4 THE COURT: IT'S ADMITTED.

5 DIRECT EXAMINATION

6 BY MR. HARBIN:

7 Q. PROFESSOR DIXON, YOU ARE A PROFESSOR AT GEORGIA STATE; IS
8 THAT RIGHT?

9 A. YES.

10 Q. BRIEFLY GIVE THE COURT YOUR EDUCATIONAL BACKGROUND?

11 A. YES, I HAVE A MASTER'S OF BUSINESS ADMINISTRATION FROM
12 HOWARD UNIVERSITY AND A PH.D. IN AFRICAN-AMERICAN STUDIES FROM
13 TEMPLE UNIVERSITY.

14 Q. OKAY. AND HOW LONG APPROXIMATELY HAVE YOU TAUGHT AT
15 GEORGIA STATE?

16 A. APPROXIMATELY 17 YEARS.

17 Q. ARE YOU A TENURED PROFESSOR?

18 A. YES, I AM.

19 Q. AND IN WHAT DEPARTMENT DO YOU TEACH?

20 A. THE DEPARTMENT OF AFRICAN-AMERICAN STUDIES.

21 Q. AND HAVE YOU PUBLISHED ARTICLES IN YOUR FIELD?

22 A. YES, I HAVE.

23 Q. CAN YOU TELL THE COURT APPROXIMATELY HOW MANY?

24 A. TEN ARTICLES.

25 Q. HAVE YOU AUTHORED ANY BOOKS?

1 A. YES.

2 Q. AND HOW MANY?

3 A. APPROXIMATELY THREE.

4 Q. WHAT ARE THE NAMES OF THOSE BOOKS?

5 A. AFRICAN-AMERICAN RELATIONSHIPS, MARRIAGES AND FAMILIES, AN
6 INTRODUCTION; WE WANT FOR OUR SISTERS WHAT WE WANT FOR
7 OURSELVES; AND TLC, TALKING AND LISTENING WITH CARE.

8 Q. AND DID YOU TEACH A COURSE IN THE FALL OF 2009 AAS 3000
9 TITLED AFRICAN-AMERICAN FAMILY?

10 A. YES.

11 Q. AND LET'S LOOK AT WHAT HAS BEEN INTRODUCED AS PLAINTIFFS'
12 EXHIBIT 542 WHICH IS ALSO MARKED AS DEFENDANT'S EXHIBIT 335; IS
13 THIS THE SYLLABUS FOR THE COURSE?

14 A. YES, IT IS.

15 Q. DID YOU PREPARE IT?

16 A. YES, I DID.

17 Q. CAN YOU BRIEFLY SUMMARIZE FOR THE COURT WHAT IS COVERED IN
18 THAT COURSE?

19 A. ESSENTIALLY IT'S A COURSE ON AFRICAN-AMERICAN FAMILIES,
20 AND WHAT I DO IS LOOK AT THE HISTORY OF THE FAMILIES STARTING
21 FROM AFRICA TO CONTEMPORARY TIMES, AND WE ALSO LOOK AT ISSUES
22 AS THEY AFFECT AFRICAN-AMERICAN FAMILIES.

23 Q. WERE THERE REQUIRED TEXTBOOKS THAT YOU REQUIRED THE
24 STUDENTS TO PURCHASE?

25 A. YES.

1 Q. HOW MANY WERE THOSE?

2 A. THREE.

3 Q. CAN YOU NAME WHAT THEY WERE?

4 A. YES. ENSURING INEQUALITY, AFRICAN-AMERICAN FAMILY LIFE,

5 AS WELL AS THE STRESS OF AFRICAN-AMERICAN FAMILIES.

6 Q. AND THEY APPEAR ON THE FIRST PAGE OF THE SYLLABUS UNDER

7 REQUIRED TEXT READING?

8 A. YES.

9 Q. AND ONE OF THOSE YOU NAMED ENSURING INEQUALITY, IS THAT AN

10 OXFORD UNIVERSITY PRESS PUBLICATION?

11 A. YES, IT IS.

12 Q. AND DID YOU ALSO HAVE SELECTIONS FROM MCADOO AND STAPLES

13 THAT WERE REQUIRED READINGS?

14 A. YES.

15 Q. AND WHERE DID YOU POST THOSE SELECTIONS?

16 A. THE SELECTIONS WERE POSTED ON RESERVE IN THE LIBRARY.

17 Q. HARDCOPY PHYSICAL RESEARCH?

18 A. YES, PHYSICAL RESERVE.

19 Q. OKAY. IF YOU LOOK LOWER DOWN ON THE FIRST PAGE OF THE

20 SYLLABUS PLAINTIFFS' EXHIBIT 542, THERE IS A GROUP OF READINGS

21 THAT ARE CALLED RECOMMENDED READINGS ON PARENTING AND CHILDREN;

22 WERE THOSE REQUIRED READINGS?

23 A. NO.

24 Q. AND AT THE BOTTOM OF THAT FIRST PAGE OF THE SYLLABUS IS A

25 REFERENCE TO CERTAIN SOFTWARE AND IT'S SAYS ON ULEARN?

1 A. YES.

2 Q. WAS THE SOFTWARE ACTUALLY ON ULEARN?

3 A. NO, THOSE ARE LINKS TO SOFTWARE.

4 Q. DID YOU POST ANY READING MATERIAL FOR THE STUDENTS IN THIS

5 CLASS ON ULEARN?

6 A. NO, I DIDN'T.

7 Q. DID YOU EVER DO THAT?

8 A. NO.

9 Q. IF YOU LOOK AT THE SECOND PAGE OF THE SYLLABUS PLAINTIFFS'

10 EXHIBIT 542, THERE IS A REFERENCE TOWARD THE BOTTOM TO PANEL

11 PRESENTATIONS. CAN YOU BRIEFLY DESCRIBE FOR THE COURT WHAT

12 THAT WAS AS PART OF THIS COURSE?

13 A. YES. WHAT I DO IS HAVE STUDENTS COME TOGETHER IN GROUPS

14 OF TWO TO THREE STUDENTS, AND WHAT THEY'LL DO IS PREPARE A

15 PRESENTATION AND MAKE A PRESENTATION TO THE CLASS.

16 Q. OKAY. GENERALLY WHEN DID THOSE COME UP IN THE CLASS?

17 A. APPROXIMATELY SIX WEEKS TOWARD THE END OF THE CLASS OR THE

18 LAST SIX WEEKS.

19 Q. OKAY. THE PLAINTIFFS ARE CHALLENGING YOUR USE OF EXCERPTS

20 OF FOUR WORKS IN THAT CLASS, AND I WANT TO BRIEFLY REVIEW EACH

21 OF THEM. THE FIRST ONE IS, DID YOU USE A CHAPTER FROM THE BOOK

22 THE SLAVE COMMUNITY IN THE FALL 2009 COURSE?

23 A. YES.

24 Q. AND IF YOU LOOK AT PLAINTIFFS' EXHIBIT 460 WHICH IS BEFORE

25 YOU, I THINK YOU'VE GOT A COPY OF THE BOOK UP THERE?

1 A. OKAY.

2 Q. DO YOU RECOGNIZE THAT AS A COPY OF THE BOOK?

3 A. YES.

4 Q. DO YOU OWN A COPY OF THIS BOOK?

5 A. YES, I OWN SEVERAL COPIES OF IT.

6 Q. DID YOU IN 2009?

7 A. YES.

8 Q. AND IF YOU LOOK AT THE TABLE OF CONTENTS TO THE BOOK,

9 PLAINTIFFS' EXHIBIT 460, APPROXIMATELY HOW MANY PAGES IS THE

10 PUBLICATION?

11 A. APPROXIMATELY 400 PAGES.

12 Q. YOU USED ONE CHAPTER OF THAT BOOK CHAPTER 7, PLANTATION

13 REALITIES?

14 A. YES.

15 Q. AND THAT'S AT PAGES 249 TO 283; IS THAT RIGHT?

16 A. YES.

17 Q. APPROXIMATELY 35 PAGES?

18 A. YES.

19 Q. SO DID YOU USE LESS THAN 10 PERCENT OF THAT BOOK BY PAGES

20 IN THE COURSE?

21 A. YES.

22 MR. HARBIN: PER THE PLAINTIFFS' CALCULATION, YOUR

23 HONOR, IT'S 9.2 PERCENT.

24 BY MR. HARBIN:

25 Q. LET'S LOOK AT PAGE 3 OF THE SYLLABUS, DID YOU INCORPORATE

1 THAT CHAPTER OF THE SLAVE COMMUNITY, PLAINTIFFS' EXHIBIT 460,
2 IN THE AUGUST 25 TO 27 SESSION?

3 A. YES.

4 Q. AND WHAT WAS YOUR PURPOSE IN USING THAT CHAPTER IN THAT
5 SESSION?

6 A. TO GIVE STUDENTS SOME IDEA OF THE REALITY OF PLANTATION
7 LIFE; WHAT IT WAS LIKE TO BE A SLAVE.

8 Q. OKAY. AND WAS THIS REQUIRED READING, THAT CHAPTER WAS
9 THAT REQUIRED READING IN THE COURSE?

10 A. YES, IT WAS.

11 Q. FOR ALL THE STUDENTS?

12 A. YES.

13 Q. DID YOU VIEW THAT CHAPTER AS THE HEART OR CRITICAL PART OF
14 THE BOOK?

15 A. NO, I DIDN'T.

16 Q. WHY DO YOU SAY THAT?

17 A. BECAUSE IT'S A BOOK CALLED THE SLAVE COMMUNITY, AND SO
18 THERE ARE DIFFERENT ASPECTS OR COMPONENTS OF WHAT THAT IS, AND
19 SO THIS WAS JUST ONE ASPECT OF IT.

20 Q. AND LET'S TALK ABOUT THE SECOND EXCERPT ABOUT WHICH THE
21 PLAINTIFFS COMPLAIN FROM THE FALL 2000 COURSE. DID YOU USE AN
22 EXCERPT OF A BOOK CALLED AFRICAN-AMERICAN SINGLE MOTHERS,
23 UNDERSTANDING THEIR LIVES AND FAMILY?

24 A. YES, I DID.

25 MR. HARBIN: I BELIEVE THAT'S PLAINTIFFS' EXHIBIT

1 202, YOUR HONOR.

2 BY MR. HARBIN:

3 Q. DO YOU SEE THAT ON THE SHELF IN FRONT OF YOU, PROFESSOR
4 DIXON?

5 A. YES, I HAVE IT.

6 Q. IF YOU CAN LOOK AT THE TABLE OF CONTENTS, THE PUBLICATION
7 IS SOMETHING OVER 190 PAGES; IS THAT RIGHT?

8 A. YES.

9 Q. AND YOU USED ONE CHAPTER, THE CHAPTER BY RANDOLPH?

10 A. YES.

11 Q. AND THAT'S PAGES 117 TO 145?

12 A. YES.

13 Q. APPROXIMATELY 29 PAGES?

14 A. YES.

15 MR. HARBIN: PER THE PLAINTIFFS' CALCULATION, YOUR
16 HONOR, THAT'S 15.9 PERCENT OF THE WORK.

17 BY MR. HARBIN:

18 Q. LET'S LOOK BACK AT THE SYLLABUS PLAINTIFFS' EXHIBIT 542,
19 AT THE TOP OF PAGE 4, DID YOU INCORPORATE THIS CHAPTER IN YOUR
20 TEACHING IN THE SESSION OCTOBER 20 TO 22?

21 A. YES.

22 Q. AND THE REFERENCE TO IT IS AT THE VERY TOP OF THAT PAGE
23 RANDOLPH PAGE 117; IS THAT THE REFERENCE?

24 A. YES, THAT'S CORRECT.

25 Q. AND IT SAYS PANEL PRESENTATIONS GROUPS ONE AND TWO; WHAT

1 IS THAT REFERRING TO?

2 A. IT REFERS TO TWO GROUPS WHO WERE GOING TO MAKE
3 PRESENTATIONS THAT DAY, AND FOR THAT PARTICULAR CHAPTER WE
4 HAD -- IT WAS PART OF THE PANEL PRESENTATIONS, AND SO WE HAD
5 STUDENTS, TWO TO THREE STUDENTS WHO WERE GOING TO MAKE A
6 PRESENTATION TO THE CLASS FROM THAT CHAPTER.

7 Q. FOR USE OF THIS RANDOLPH CHAPTER OF PLAINTIFFS' EXHIBIT
8 202, THE AFRICAN-AMERICAN SINGLE MOTHER'S BOOK, WAS THAT
9 CHAPTER REQUIRED READING FOR THE WHOLE COURSE?

10 A. NO, IT WASN'T.

11 Q. HOW MANY STUDENTS WERE EXPECTED TO READ THAT CHAPTER?

12 A. TWO TO THREE STUDENTS.

13 Q. THE ONES MAKING THE PRESENTATION ON IT?

14 A. CORRECT.

15 Q. WHAT WAS YOUR PURPOSE IN OFFERING THAT CHAPTER AS ONE OF
16 THE PANEL PRESENTATIONS?

17 A. FOR STUDENTS TO GET SOME UNDERSTANDING OF THE OUTCOMES OF
18 CHILDREN IN SINGLE MOTHER FAMILIES WITH PARTICULAR FOCUS ON
19 THEIR STRENGTHS.

20 Q. OKAY. AND DID YOU VIEW THIS CHAPTER AS THE HEART OR
21 CRITICAL PART OF THE BOOK?

22 A. NO, I DIDN'T.

23 Q. WHY DO YOU SAY THAT?

24 A. BECAUSE IT'S AN EDITED BOOK, FIRST OF ALL; AND THEN SECOND
25 OF ALL, IT'S DIFFERENT ASPECTS AND PERSPECTIVES AND RESEARCH ON

1 SINGLE MOTHER FAMILIES. SO THIS IS JUST ONE ASPECT OF IT.

2 Q. AND LET'S BRIEFLY DISCUSS THE THIRD EXCERPT AT ISSUE. IN

3 THE FALL 2009 COURSE DID YOU USE AND INCORPORATE AN EXCERPT OF

4 A BOOK BLACK CHILDREN?

5 A. YES.

6 Q. IF YOU COULD LOOK AT PLAINTIFFS' EXHIBIT 209, IS THAT THE

7 BOOK?

8 A. YES.

9 Q. AND DO YOU OWN A COPY OF THAT BOOK?

10 A. YES, I DO.

11 Q. IF YOU CAN LOOK AT THE TABLE OF CONTENTS, APPROXIMATELY

12 HOW MANY PAGES IS THE BOOK?

13 A. IT'S APPROXIMATELY 235 PAGES.

14 Q. AND DID YOU USE ONE CHAPTER OF THAT BOOK IN THE FALL 2009

15 COURSE?

16 A. YES.

17 Q. IS THAT THE CHAPTER BY MURRAY AND MANDARA?

18 A. YES, IT IS.

19 Q. CHAPTER 6 ON RACIAL IDENTITY DEVELOPMENT?

20 A. YES.

21 Q. IS THAT PAGES 73 TO 96?

22 A. YES.

23 Q. SO IS THAT APPROXIMATELY 24 PAGES?

24 A. YES.

25 Q. SO YOU USED APPROXIMATELY 10 PERCENT OF THAT BOOK IN THE

1 COURSE BY PAGES?

2 A. YES.

3 MR. HARBIN: YOUR HONOR, PLAINTIFFS HAVE CALCULATED
4 7.1 PERCENT. WE'LL BE GLAD TO GO WITH THAT PERCENTAGES, BUT WE
5 THINK IT'S ROUGHLY 10 PERCENT.

6 MR. RAINS: WE'LL STIPULATE TO THAT, YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 BY MR. HARBIN:

9 Q. IF YOU LOOK BACK TO THE COURSE SYLLABUS FOR THE FOURTH
10 PAGE, DID YOU INCORPORATE THAT INTO THE NOVEMBER 17 TO 19
11 SESSION OF THE COURSE?

12 A. YES.

13 Q. AND WAS THE LAST PORTION -- HOW MANY WEEKS OF THE COURSE
14 WERE PANEL PRESENTATIONS?

15 A. SIX WEEKS.

16 Q. ALL THE LAST SIX WEEKS. SO THIS CHAPTER WAS INCORPORATED
17 AS ONE OF THE POTENTIAL PANEL PRESENTATIONS?

18 A. YES, IT WAS.

19 Q. OKAY. SO IN YOUR FALL 2009 COURSE WAS THIS CHAPTER, THE
20 MURRAY/MANDARA CHAPTER FROM BLACK CHILDREN, WAS THAT REQUIRED
21 READING FOR THE ENTIRE CLASS?

22 A. NO, IT WASN'T.

23 Q. HOW MANY STUDENTS DID YOU EXPECT TO READ IT?

24 A. ABOUT TWO TO THREE.

25 Q. OKAY. WHAT WAS YOUR PURPOSE; WHY DID YOU ASSIGN THAT

1 CHAPTER, PUT THAT CHAPTER IN THE LIST OF POTENTIAL PANEL
2 PRESENTATIONS FOR THE STUDENTS?
3 A. JUST SO THAT THE STUDENTS WOULD GET SOME IDEA AS TO HOW
4 CHILDREN DEVELOP THEIR IDEAS ABOUT RACE AND HOW THEY UNDERSTAND
5 RACE IN DIFFERENT STAGES IN THEIR DEVELOPMENT.
6 Q. SO WHAT YOU SAID IS TWO OR THREE STUDENTS WOULD READ THE
7 CHAPTER AND THEY WOULD IN TURN ANALYZE THE CHAPTER FOR THE
8 CLASS?
9 A. YES.
10 Q. IS THE CHAPTER OF PLAINTIFFS' EXHIBIT 209, THE BLACK
11 CHILDREN BOOK THAT YOU ASSIGNED CHAPTER 6 AS PART OF THE PANEL,
12 IN YOUR VIEW THE HEART OR CRITICAL PART OF THE BOOK?
13 A. NO, IT ISN'T.
14 Q. WHY DO YOU SAY THAT?
15 A. BECAUSE AGAIN IT'S AN EDITED WORK AND IT'S JUST ONE
16 COMPONENT OR ASPECT OF BLACK CHILDREN.
17 Q. AND THEN LET'S TALK ABOUT THE FOURTH EXCERPT AT ISSUE, DID
18 YOU USE THE CHAPTER IN THE FALL OF 2009 OF THE BOOK CALLED
19 BLACK FAMILIES?
20 A. YES.
21 Q. AND IF YOU CAN LOOK AT THE DEFENDANTS' EXHIBIT 749 WHICH
22 HAS BEEN INTRODUCED INTO EVIDENCE IS THAT THE BOOK --
23 A. YES.
24 Q. -- THIRD EDITION?
25 NOW WAS THE FOURTH EDITION OUT AT THAT TIME?

1 A. YES, IT WAS.

2 MR. HARBIN: IF I MAY APPROACH, YOUR HONOR?

3 THE COURT: YES.

4 BY MR. HARBIN:

5 Q. PLAINTIFFS' EXHIBIT 217 IS THAT THE FOURTH EDITION?

6 A. YES.

7 Q. WHY DID YOU USE THE THIRD EDITION?

8 A. WELL, THE FOURTH EDITION WAS ONE OF THE READINGS THAT I

9 HAD ON HARD RESERVE FOR THE CLASS IF THEY HAD INTEREST IN

10 READING BUT ALSO WE HAD CHAPTERS, BUT IT DIDN'T INCLUDE THIS

11 CHAPTER FROM THE THIRD EDITION. SO WHAT I DID WAS PUT THIS ON

12 RESERVES FOR THE TWO OR THREE STUDENTS WHO WERE GOING TO MAKE

13 THE PRESENTATION HAVE ACCESS TO IT.

14 Q. IS THE CHAPTER YOU WERE INTERESTED IN USING FROM THE THIRD

15 EDITION DOES THAT APPEAR IN THE FOURTH EDITION?

16 A. NO, IT DOESN'T.

17 Q. AND THE CHAPTER YOU USED IN THE FALL 2009 COURSE WAS

18 CHAPTER 12; IS THAT RIGHT?

19 A. YES.

20 Q. AND WHO'S THE AUTHOR OF THAT CHAPTER?

21 A. BEVERLY DANIEL TATUM.

22 Q. AND THAT COMPRISES PAGES 214 TO 233?

23 A. YES.

24 Q. APPROXIMATELY 20 PAGES?

25 A. YES.

1 Q. AND SO YOU USED LESS THAN 6 PERCENT OF THAT BOOK BY PAGES
2 IN THE COURSE IN THE FALL OF 2009?

3 A. YES.

4 MR. HARBIN: AND, YOUR HONOR, BY THE PLAINTIFFS'
5 CALCULATION THAT'S 5.5 PERCENT.

6 BY MR. HARBIN:

7 Q. LET'S LOOK AT THE SYLLABUS PLAINTIFFS' EXHIBIT 542, THE
8 FOURTH PAGE AGAIN, IS THAT CHAPTER REFERENCED HERE BLACK
9 FAMILIES PAGE 214; IS THAT A REFERENCE TO THAT CHAPTER?

10 A. YES, IT IS.

11 Q. OKAY. SO THIS IS PART OF THE NOVEMBER 17 TO 19 PANEL
12 PRESENTATION?

13 A. YES.

14 Q. SO HOW MANY STUDENTS WOULD YOU HAVE EXPECTED TO HAVE READ
15 THIS CHAPTER?

16 A. TWO TO THREE STUDENTS.

17 Q. OF THE 59, AND THEY WOULD HAVE REPORTED TO THE OTHER
18 STUDENTS THEIR VIEWS OF THE CHAPTER?

19 A. YES.

20 Q. OKAY. AND WHAT WAS YOUR PURPOSE IN INCLUDING THIS CHAPTER
21 12 FROM BLACK FAMILIES DEFENDANTS' EXHIBIT 749 AS PART OF ONE
22 OF YOUR PANEL PRESENTATIONS IN THE COURSE?

23 A. IT WAS TO GIVE THE STUDENTS SOME IDEA OF SOME OF THE
24 CHALLENGES FOR BLACK FAMILIES WHO WERE LIVING IN WHITE
25 COMMUNITIES.

1 Q. OKAY. DID YOU VIEW THIS CHAPTER AS THE HEART OR CRITICAL
2 PART OF THE BOOK?

3 A. NO.

4 Q. WHY DO YOU SAY THAT?

5 A. BECAUSE AGAIN AS WITH THE OTHER BOOK, IT'S AN EDITED WORK
6 AND IT JUST DEALS WITH DIFFERENT ASPECTS OF THE BLACK FAMILY,
7 AND THIS IS JUST ONE.

8 Q. OKAY. THANK YOU. HOW DID YOU POST EXCERPTS? JUST
9 SUMMARIZE HOW DID YOU GO ABOUT GETTING THE EXCERPTS YOU WANTED
10 TO USE POSTED?

11 A. ARE YOU ASKING ME TO EXPLAIN THE PROCESS?

12 Q. JUST BRIEFLY.

13 A. GENERALLY WHEN WE WANT TO DO A RESERVE, WE GO ONLINE AND
14 WE FILL OUT -- DO A REQUEST, AND IF WE WANT TO DO SOMETHING
15 ON -- PUT SOMETHING ON ELECTRONIC RESERVE, THEN WE HAVE TO GO
16 THROUGH A PROCESS AND PART OF THAT PROCESS IS TO DO A FAIR USE
17 CHECKLIST.

18 Q. DID YOU UTILIZE THE FAIR USE CHECKLIST PROVIDED BY GEORGIA
19 STATE IN MAKING YOUR DECISION TO USE EACH OF THE FOUR BOOK
20 EXCERPTS WE JUST REVIEWED?

21 A. YES, I DID.

22 Q. AT THE TIME YOU WERE DOING THAT AND GETTING UP YOUR
23 READING LIST FOR THE FALL 2009 HAD YOU BEEN TRAINED IN THE
24 UNIVERSITY'S COPYRIGHT POLICY THAT INCORPORATES THE USE OF A
25 CHECKLIST?

1 A. YES.

2 Q. WHERE DID YOU ATTEND THE TRAINING?

3 A. AT GEORGIA STATE UNIVERSITY.

4 Q. HOW MANY PEOPLE APPROXIMATELY WERE THERE?

5 A. I CAN'T SAY FOR SURE. I JUST KNOW THE ROOM WAS FULL. I
6 WAS ONE OF THE PEOPLE WHO HAD A CHAIR OUTSIDE. SO IT WAS FULL
7 AND NOT ENOUGH CHAIRS ACTUALLY.

8 Q. OKAY. DID YOU HAVE ANY UNDERSTANDING ABOUT WHETHER OR NOT
9 THE TRAINING WAS MANDATORY FOR PROFESSORS?

10 A. YEAH, I THOUGHT IT WAS MANDATORY.

11 Q. OKAY. AND IF YOU CAN LOOK IN YOUR BOOK OF EXHIBITS IN
12 FRONT OF YOU AT DEFENDANTS' EXHIBIT 140, CAN YOU IDENTIFY -- DO
13 YOU RECOGNIZE WHAT THAT IS?

14 A. YES, I DO.

15 Q. WHAT IS THAT?

16 A. IT LOOKS LIKE THE POWERPOINT PRESENTATION FOR THE CLASS
17 THAT WE HAD TO ATTEND ON FAIR USE.

18 MR. HARBIN: AND THAT'S A PLAINTIFFS' EXHIBIT MARKED
19 FROM A DEPOSITION, YOUR HONOR, BUT IT'S MARKED AS DEFENDANTS'
20 EXHIBIT 140. YOUR HONOR, WE WOULD OFFER DEFENDANTS' EXHIBIT
21 140 INTO EVIDENCE.

22 MR. RAINS: OBJECTION, YOUR HONOR, NO FOUNDATION,
23 HEARSAY. MS. HALL HAS NOT TESTIFIED THAT IT'S HER POWERPOINT
24 PRESENTATION.

25 THE COURT: LET ME SEE DEFENDANTS' EXHIBIT 140 AGAIN?

1 I THOUGHT IT WAS THE COPYRIGHT POLICY.

2 MR. HARBIN: IT'S A POWERPOINT. WE'RE GOING TO HAVE
3 OTHER WITNESSES GO INTO MORE DETAIL, BUT THE WITNESS HAS SAID
4 IT WAS THE POWERPOINT THAT WAS USED IN THEIR TRAINING AND SHOWN
5 TO THEM SO I THINK THAT'S SUFFICIENT.

6 THE COURT: YOUR RESPONSE?

7 MR. RAINS: SHOWN TO HER BUT THESE ARE NOT HER
8 WORDS. THESE ARE THE WORDS OF A WITNESS WHO HAS NOT TESTIFIED
9 AND IS NOT IN COURT.

10 THE COURT: I WILL ADMIT DEFENDANTS' EXHIBIT 140.

11 BY MR. HARBIN:

12 Q. DID THE TRAINING YOU RECEIVED AT GEORGIA STATE AND YOUR
13 USE OF THE CHECKLIST AFFECT IN ANY WAY YOUR THINKING ABOUT FAIR
14 USE ISSUES?

15 A. YES, IT DID.

16 Q. HOW IS THAT?

17 A. WELL, FIRST OF ALL, IT CLARIFIED SOME THINGS THAT MAY HAVE
18 NOT BEEN CLEAR, AND THEN WE ALSO HAD TO START USING THE FAIR
19 USE CHECKLIST. SO IT DEFINITELY CHANGED HOW I THOUGHT ABOUT IT
20 IN MY PRACTICE.

21 Q. ALL RIGHT. DID IT AFFECT THE DEGREE YOU THOUGHT ABOUT
22 DIFFERENT ISSUES, YOU KNOW, IN ANALYZING FAIR USE?

23 A. IT JUST HELPED ME HAVE MORE CLARIFICATION BECAUSE I HAD
24 ALSO ALREADY PUBLISHED A BOOK AND I HAD SOME UNDERSTANDING
25 ABOUT IT PRIOR TO THAT.

1 Q. OKAY. DID YOUR PRACTICES REGARDING THE USE OF EXCERPTS OF
2 WORKS IN CLASSES CHANGE IN ANY WAY AFTER RECEIVING THE NEW
3 COPYRIGHT POLICY AFTER THAT WAS ENACTED AT GEORGIA STATE?

4 A. YES, IT DID.

5 Q. HOW DID YOUR PRACTICES CHANGE?

6 A. WELL, FIRST OF ALL, WE HADN'T HAD TO GO THROUGH THIS
7 PROCESS IF WE WANTED TO PUT ANYTHING ON RESERVES. SO THAT'S
8 THE ONE WAY IN WHICH IT CHANGED.

9 BUT THEN THE OTHER WAY IS THAT I DECIDED TO --
10 BECAUSE OF THE LENGTHY PROCESS THAT WE HAD TO GO THROUGH TO PUT
11 ANYTHING ON RESERVE, I DECIDED TO START USING HARDCOPIES OF THE
12 BOOKS, AND SO IT CHANGED IN BOTH OF THOSE WAYS. SO NOW I PUT
13 MORE OF MY BOOKS ON HARD RESERVE THAN I DO ON ERESERVE.

14 MR. RAINS: OBJECTION, YOUR HONOR, I MOVE TO STRIKE
15 THAT TESTIMONY AS IT'S OUTSIDE THE TIME PERIOD AT ISSUE IN THIS
16 LAWSUIT.

17 MR. HARBIN: YOUR HONOR, I THINK I CAN ADDRESS THAT.
18 I BELIEVE IT'S STILL RELEVANT. YOUR HONOR HAS INDICATED NOT
19 EVERYTHING CURRENT IS IRRELEVANT, BUT ALSO I CAN ESTABLISH WITH
20 HER WHEN THIS CHANGE STARTED IF YOUR HONOR WISHES.

21 THE COURT: STATE YOUR QUESTION AGAIN.

22 MR. HARBIN: THE QUESTION WAS DID HER PRACTICES
23 REGARDING THE USE OF EXCERPTS OF WORKS CHANGE AFTER THE
24 INSTALLATION OF THE NEW COPYRIGHT POLICY AT GEORGIA STATE, AND
25 I THINK SHE SAID YES AND I ASKED HER HOW THEY CHANGED.

1 THE COURT: OVERRULED.

2 BY MR. HARBIN:

3 Q. JUST SO THE RECORD IS CLEAR YOU SAID YOU STARTED PUTTING

4 MORE WORKS ON PHYSICAL RESERVE AT THE LIBRARY?

5 A. YES.

6 Q. AND THAT'S PUTTING HARDCOPIES ON RESERVE AT THE LIBRARY?

7 A. YES.

8 Q. REGARDING EACH OF THE CHAPTERS AT ISSUE THAT WE HAVE

9 REVIEWED ABOUT WHICH THE PLAINTIFFS COMPLAINED, THE FOUR

10 CHAPTERS, DID YOU FILL OUT A FAIR USE CHECKLIST, PHYSICALLY

11 FILL ONE OUT --

12 A. YES.

13 Q. -- IN PREPARATION FOR YOUR FALL OF 2009 COURSE?

14 A. YES, I DID.

15 Q. DID YOU KEEP COPIES?

16 A. YES.

17 Q. WERE YOU ABLE TO RETRIEVE THOSE COPIES WHEN REQUESTED?

18 A. NO, I WASN'T.

19 Q. WHAT HAPPENED?

20 A. I HAD SOME PROBLEMS WITH MY USB DRIVE. IT MALFUNCTIONED.

21 SO I WASN'T ABLE TO RETRIEVE THEM OR FIND THEM.

22 Q. YOU HAD THEM STORED ON A USB DRIVE?

23 A. YES.

24 Q. IS THAT A THUMB DRIVE?

25 A. YES.

1 Q. WERE YOU ASKED TO RECREATE THE CHECKLIST?

2 A. YES, I WAS.

3 Q. AND DID YOU DO SO?

4 A. YES.

5 Q. AND WHAT WAS YOUR INTENTION IN RECREATING THE CHECKLISTS?

6 A. I TRIED TO RECREATE THEM IN THE WAY HOW I WAS THINKING

7 ABOUT THEM WHEN I ORIGINALLY CREATED THEM.

8 Q. DO YOU KNOW IF THEY ARE EXACTLY ACCURATE TO WHAT YOU DID

9 IN 2009?

10 A. AS FAR AS I CAN TELL AS FAR AS I CAN REMEMBER, SO I TRIED

11 TO DO THEM AS CLOSE AS POSSIBLE AS TO HOW I WAS THINKING ABOUT

12 FAIR USE THEN.

13 Q. DID THE RECREATED CHECKLISTS YOU FILLED OUT GENERALLY

14 REFLECT THE ANALYSIS YOU WENT THROUGH IN 2009?

15 A. YES.

16 Q. OKAY. IF YOU CAN LOOK IN YOUR BOOK AT DEFENSE EXHIBITS

17 428 AND 429 AND HAVE YOU GOT THOSE IN YOUR BOOK? CAN YOU

18 IDENTIFY WHAT DEFENDANT'S EXHIBITS 428 AND 429 ARE?

19 A. 428 IS A FAIR USE CHECKLIST THAT I USED FOR THE SLAVE

20 COMMUNITY.

21 Q. AND WHEN DID YOU CREATE THIS CHECKLIST?

22 A. NOVEMBER 22ND.

23 Q. SO THIS IS A RECREATED CHECKLIST?

24 A. YES.

25 Q. OKAY. AND WHAT IS DEFENSE EXHIBIT 429?

1 A. IT'S A RECREATED CHECKLIST FOR THE SLAVE COMMUNITY,
2 NOVEMBER 29TH, 2010.

3 Q. SO THE SAME EXCERPT?

4 A. YES.

5 Q. NOVEMBER 29, 2010 IS THAT WHEN YOU COMPLETED THAT
6 RECREATION?

7 A. YES.

8 Q. AND WHY DID YOU DO TWO RECREATIONS OF THAT CHAPTER OF THE
9 SLAVE COMMUNITY?

10 A. WELL, IT HAD SOMETHING TO DO WITH HOW I SAVED IT, YOU
11 KNOW, I SAVED IT AND TRIED TO SEND IT AND I DID SOMETHING, IT
12 DIDN'T GO -- IT WASN'T SET UP RIGHT, SO I HAD TO DO IT AGAIN.

13 MR. HARBIN: WE WOULD OFFER, YOUR HONOR, DEFENDANTS'
14 EXHIBITS 428 AND 429 INTO EVIDENCE.

15 MR. RAINS: OBJECT, YOUR HONOR, ON FOUNDATION, BEST
16 EVIDENCE AND RELEVANCE GROUNDS, AND WITH RESPECT TO THIS
17 CHECKLIST, YOUR HONOR, THERE ARE TWO SEPARATE RECREATIONS OF
18 THE SAME CHECKLIST A WEEK APART THAT ARE DIFFERENT. SO I THINK
19 THE ARGUMENT IS EVEN STRONGER FOR THIS ONE.

20 THE COURT: THEY ARE ADMITTED.

21 BY MR. HARBIN:

22 Q. NOW, LET ME LOOK AT -- UNLESS THE COURT HAS ANY QUESTIONS,
23 I'M NOT GOING TO GO LINE BY LINE, BUT LET ME ASK YOU ABOUT A
24 FEW ITEMS ON THE CHECKLIST.

25 YOU CHECKED SMALL PORTION OF THE WORK USED UNDER

1 FACTOR 3?

2 A. YES -- WHICH ONE ARE YOU ON?

3 Q. THIS IS DEFENDANTS' EXHIBIT 428.

4 A. OKAY.

5 THE COURT: WHICH WORK ARE WE TALKING ABOUT?

6 MR. HARBIN: THIS IS THE SLAVE COMMUNITY CHAPTER,

7 CHAPTER 7 OF THE SLAVE COMMUNITY, YOUR HONOR.

8 BY MR. HARBIN:

9 Q. JUST BRIEFLY YOU CHECKED ON THE FIRST FACTOR IT'S

10 NONPROFIT EDUCATIONAL TEACHING AND USE IS NECESSARY TO ACHIEVE

11 YOUR INTENDED EDUCATIONAL PURPOSE?

12 A. YES.

13 Q. IF YOU LOOK AT THE SECOND FACTOR, YOU CHECKED PUBLISHED

14 WORK, IT IS A PUBLISHED WORK?

15 A. YES.

16 Q. YOU CHECKED FACTUAL OR NONFICTION WORK?

17 A. YES.

18 Q. AND THAT IT WAS IMPORTANT TO YOUR EDUCATIONAL OBJECTIVE?

19 A. YES.

20 Q. AND ON FACTOR 3 YOU CHECKED SMALL PORTION OF WORK USED?

21 A. YES.

22 Q. WHY DID YOU CHECK THAT?

23 A. BECAUSE I THOUGHT IT WAS A SMALL PORTION OF THE WORK. FOR

24 THE BLASSINGAME, IT WAS LESS THAN 10 PERCENT. SO I DIDN'T

25 THINK THAT -- I THOUGHT IT WAS A SMALL PORTION OF THE WORK.

1 Q. YOU'RE USING -- I THINK IT WAS 15 PERCENT. HOW MANY
2 CHAPTERS WERE YOU USING?

3 A. JUST ONE CHAPTER.

4 Q. OKAY. WAS THAT PART OF YOUR CONSIDERATION?

5 A. YES.

6 Q. AND YOU CHECKED PORTION USED IS NOT CENTRAL OR SIGNIFICANT
7 TO THE ENTIRE WORK AS WHOLE, IS THAT BECAUSE OF THE REASONING
8 YOU'VE ALREADY TESTIFIED ABOUT?

9 A. YES.

10 Q. YOU TESTIFIED AMOUNT TAKEN IS NARROWLY TAILORED TO YOUR
11 EDUCATIONAL PURPOSE?

12 A. YES.

13 Q. DID YOU BELIEVE THAT WAS THE CASE?

14 A. YES, I DID.

15 Q. UNDER FACTOR 4 YOU'VE CHECKED USER OWNS LAWFULLY ACQUIRED
16 WORK. YOU TESTIFIED ABOUT THAT.

17 RESTRICTED ACCESS, WAS IT YOUR UNDERSTANDING IT WAS
18 RESTRICTED ACCESS?

19 A. YES.

20 Q. AND YOU CHECKED NO SIGNIFICANT EFFECT ON THE MARKET OR
21 POTENTIAL MARKET?

22 A. YES.

23 Q. WHAT WAS YOUR THINKING ABOUT THAT?

24 A. I JUST DIDN'T THINK USING ONE CHAPTER FROM THE BOOK WOULD
25 AFFECT THE MARKET OR HAVE A SIGNIFICANT EFFECT ON IT.

1 Q. AND YOU WERE THINKING ABOUT -- WHAT WERE YOU THINKING
2 ABOUT AS FAR AS WHAT THE MARKET WAS, THE BOOK AS A WHOLE?

3 A. YES.

4 Q. AND YOU CHECKED USE STIMULATES MARKET FOR ORIGINAL WORK;
5 WHAT WAS YOUR THINKING ABOUT THAT?

6 A. MY THINKING THERE WAS THAT BY STUDENTS USING THE WORK THAT
7 IT WOULD GET THEM INTERESTED IN WANTING TO PURCHASE THE BOOK,
8 AND ALSO IN ALL MY COURSES WHEN I USE BOOKS THAT I THINK ARE
9 SIGNIFICANT WORKS, I PROMOTE THEM AND ENCOURAGE THE STUDENTS TO
10 PURCHASE THEM. SO I THINK THAT HAVING THEM READ A CHAPTER FROM
11 IT WOULD STIMULATE THEIR INTEREST IN THE BOOK.

12 Q. WHEN YOU WERE A STUDENT DID YOU EVER BUY CHAPTERS OR
13 EXCERPTS AFTER A PROFESSOR USED THEM IN A COURSE?

14 A. YES, I HAVE.

15 Q. WHAT WAS YOUR CONCLUSION, GOING BACK TO 2009 WHEN YOU
16 APPLIED THE CHECKLIST, WHAT WAS YOUR CONCLUSION ABOUT THE USE
17 OF CHAPTER 6 OF THE BOOK SLAVE COMMUNITY WOULD BE FAIR USE?

18 A. I THOUGHT THAT CONSIDERING ALL OF THE FOUR FACTORS THAT IT
19 WAS FAIR USE.

20 Q. LET'S LOOK AT -- IF YOU CAN LOOK IN YOUR BOOK AT DEFENSE
21 EXHIBIT 347, CAN YOU IDENTIFY WHAT 347 IS FOR THE COURT?

22 A. IT'S FOR THE BOOK BLACK CHILDREN.

23 Q. I'M SORRY, THIS IS DEFENSE EXHIBIT 347. CAN YOU IDENTIFY
24 WHAT DEFENSE 347 IS?

25 A. IT'S A FAIR USE CHECKLIST FOR THE BOOK BLACK CHILDREN.

1 Q. OKAY. AND FOR THAT BOOK YOU USED, AS I BELIEVE YOU'VE
2 ALREADY TESTIFIED, CHAPTER 6 BEGINNING AT PAGE 73?

3 A. YES.

4 Q. OKAY. AND IT BEARS A DATE OF NOVEMBER 29, 2010; WHAT DOES
5 THAT SIGNIFY?

6 A. THAT WAS THE SECOND TIME THAT I HAD FILLED IT OUT AGAIN.

7 Q. THIS IS A RECREATION?

8 A. RIGHT.

9 Q. OKAY. AND THE TITLE SAYS BLACK FAMILIES COLON BLACK
10 CHILDREN; IS THAT ACCURATE OR INACCURATE?

11 A. THAT'S A MISTAKE. IT SHOULD JUST BE BLACK CHILDREN.

12 Q. THERE'S ANOTHER PUBLICATION THAT YOU TALKED ABOUT BLACK
13 FAMILIES IN WHICH YOU EXCERPTED?

14 A. YES.

15 MR. HARBIN: YOUR HONOR, WE WOULD OFFER DEFENSE
16 EXHIBIT 347 INTO EVIDENCE.

17 MR. RAINS: OBJECTION, YOUR HONOR, ON FOUNDATION,
18 RELEVANCE AND BEST EVIDENCE GROUNDS.

19 THE COURT: IT'S ADMITTED.

20 BY MR. HARBIN:

21 Q. AND ON THIS CHECKLIST YOU FOLLOWED GENERALLY THE SAME
22 ANALYSIS THAT WE JUST WENT THROUGH?

23 A. YES.

24 Q. YOU DID NOT CHECK IF YOU LOOK AT FACTOR 4 USER OWNS
25 LAWFULLY ACQUIRED OR PURCHASED COPY ORIGINAL WORK; DO YOU SEE

1 THAT?

2 A. YES, THAT'S AN OVERSIGHT.

3 Q. YOU DID OWN THAT BOOK?

4 A. I DID CHECK IT HERE. WHICH ONE NOW?

5 Q. THIS IS BLACK CHILDREN.

6 A. RIGHT. OKAY.

7 Q. YOU DID NOT CHECK USER OWNS IT, BUT DID YOU OWN A COPY OF

8 THAT BOOK?

9 A. YES, I DO.

10 Q. I KNOW I ASKED ABOUT SLAVE COMMUNITY, BUT DID YOU OWN AT

11 LEAST ONE COPY OF THE BLACK FAMILIES BOOK?

12 A. YES, ACTUALLY I OWN A COUPLE OF COPIES OF THAT ONE.

13 Q. OKAY. AND DID YOU OWN THE AFRICAN-AMERICAN MOTHER'S BOOK?

14 A. YES, I OWN A COPY OF THAT ONE.

15 Q. OKAY. AND WHAT WAS YOUR CONCLUSION BACK IN 2009 WHEN YOU

16 APPLIED THE CHECKLIST ABOUT WHETHER OR NOT YOUR PROPOSED USE OF

17 CHAPTER 6 OF BLACK CHILDREN WOULD CONSTITUTE FAIR USE?

18 A. WELL, I THOUGHT CONSIDERING ALL THE FOUR FACTORS THAT IT

19 WAS FAIR USE.

20 Q. NOW IF YOU CAN LOOK IN YOUR BOOK AT DEFENSE EXHIBIT 348,

21 CAN YOU IDENTIFY WHAT DEFENSE 348 IS?

22 A. YES, IT'S AFRICAN-AMERICAN SINGLE MOTHERS, UNDERSTANDING

23 THEIR FAMILIES.

24 Q. IS THIS THE FAIR USE CHECKLIST FOR THE EXCERPT OF THAT

25 BOOK THAT YOU USED IN THE FALL OF 2009 CLASS?

1 A. YES.

2 Q. CHAPTER 7?

3 A. YES.

4 Q. IT'S DATED NOVEMBER 29, 2010. WHAT DOES THAT SIGNIFY?

5 A. THAT WAS THE SECOND TIME THAT I FILLED IT OUT IN TRYING TO

6 RECREATE IT IN TERMS OF HOW I WAS THINKING ABOUT IT WHEN I

7 ORIGINALLY FILLED IT OUT.

8 Q. SO THIS IS A RECREATED CHECKLIST?

9 A. YES, IT IS.

10 Q. AND NOT TO BELABOR IT, YOUR HONOR, YOU DID NOT CHECK USER

11 OWNS LAWFULLY ACQUIRED COPY; IS THAT ACCURATE OR INACCURATE?

12 A. THAT'S INACCURATE.

13 Q. AND WHAT WAS YOUR CONCLUSION APPLYING THE CHECKLIST IN

14 2009 ABOUT WHETHER YOUR PROPOSED USE OF CHAPTER 7 OF

15 AFRICAN-AMERICAN SINGLE MOTHER'S WOULD CONSTITUTE FAIR USE?

16 A. I CONCLUDED THAT IT WAS FAIR USE.

17 MR. HARBIN: YOUR HONOR, WE WOULD OFFER DEFENSE

18 EXHIBIT 348 INTO EVIDENCE.

19 MR. RAINS: YOUR HONOR, SAME OBJECTION, FOUNDATION,

20 RELEVANCE, BEST EVIDENCE.

21 THE COURT: IT'S ADMITTED.

22 BY MR. HARBIN:

23 Q. AND DO YOU HAVE THERE IN YOUR BOOK DEFENSE EXHIBIT 346, IF

24 YOU CAN LOOK AT THAT?

25 A. I THINK THAT WAS THE ONE YOU WERE GOING TO GIVE ME.

1 MR. HARBIN: EXCUSE ME, YOUR HONOR. MAY I APPROACH?

2 THE COURT: YOU MAY.

3 BY MR. HARBIN:

4 Q. LET ME SHOW YOU ON THE SCREEN DEFENDANT'S EXHIBIT 346, DO

5 YOU SEE THAT?

6 A. YES.

7 Q. CAN YOU IDENTIFY WHAT THIS DOCUMENT IS?

8 A. IT'S THE RECREATED LIST FROM BLACK FAMILIES, THE ARTICLE

9 BY TATUM.

10 Q. I BELIEVE YOU TESTIFIED YOU USED CHAPTER 12 IN THE COURSE

11 IN THE FALL OF 2009?

12 A. YES.

13 Q. DID YOU CREATE THIS RECREATION OF THE CHECKLIST ON OR

14 ABOUT NOVEMBER 29, 2010?

15 A. YES.

16 Q. DID YOU FOLLOW GENERALLY THE SAME ANALYSIS WE'VE BEEN

17 DISCUSSING?

18 A. YES.

19 Q. AND, AGAIN, YOU DID NOT CHECK USER OWNS LAWFULLY ACQUIRED

20 COPY; IS THAT AN ERROR?

21 A. THAT'S AN OVERSIGHT.

22 MR. HARBIN: YOUR HONOR, WE WOULD OFFER DEFENSE

23 EXHIBIT 346 INTO EVIDENCE.

24 MR. RAINS: YOUR HONOR, SAME OBJECTION, RELEVANCE,

25 FOUNDATION AND BEST EVIDENCE.

1 THE COURT: IT'S ADMITTED.

2 BY MR. HARBIN:

3 Q. WHAT WAS YOUR CONCLUSION BACK IN 2009 ABOUT WHETHER YOUR

4 PROPOSED USE OF CHAPTER 12 OF BLACK FAMILIES WOULD CONSTITUTE

5 FAIR USE?

6 A. THAT THE FACTORS WEIGHED IN FAVOR OF FAIR USE.

7 Q. ALL RIGHT. NOW TALKING ABOUT THE FIRST EXCERPT WE

8 DISCUSSED, WHAT WOULD YOU HAVE DONE IF YOU HAD DETERMINED OR

9 SOMEONE HAD TOLD YOU THAT THE USE OF CHAPTER 7 OF SLAVE

10 COMMUNITY IN 2009 WAS NOT FAIR USE?

11 A. ASK THAT QUESTION AGAIN?

12 Q. WHAT WOULD YOU HAVE DONE CONCERNING THE EXCERPT OF SLAVE

13 COMMUNITY CHAPTER 7, WHAT WOULD YOU HAVE DONE IF YOU APPLIED

14 THE ANALYSIS AND DETERMINED IN YOUR VIEW OR SOMEONE ELSE HAD

15 INSTRUCTED YOU IN AUTHORITY THAT THE USE OF THAT CHAPTER WOULD

16 NOT CONSTITUTE FAIR USE; WHAT WOULD YOU HAVE DONE?

17 A. THEN I WOULDN'T HAVE PUT IT ON ERESERVE.

18 Q. OKAY. WHAT WOULD HAVE BEEN THE ALTERNATIVES YOU WOULD

19 HAVE CONSIDERED?

20 A. PERHAPS LOOKING AT SOMETHING ELSE OR GETTING PERMISSION OR

21 LOOKING AT SOMETHING ELSE FOR THE WORK.

22 Q. DID YOU CONSIDER PHYSICAL HARDCOPY RESERVE?

23 A. WELL, THAT'S ON RESERVE ANYWAY. I DO HAVE THAT ON

24 PHYSICAL HARDCOPY ON RESERVE.

25 Q. AND REGARDING THE SECOND EXCERPT THE CHAPTER FROM

1 AFRICAN-AMERICAN SINGLE MOTHERS, PLAINTIFFS' EXHIBIT 202, WHAT
2 WOULD YOU HAVE DONE IF IN 2009 YOU FILLED OUT YOUR CHECKLIST
3 AND DETERMINED THAT WAS NOT FAIR USE?

4 A. I PROBABLY WOULDN'T HAVE USED THAT ONE.

5 Q. OKAY. FOUND SOMETHING ELSE?

6 A. THAT ONE IT'S SHAKY ANYWAY. SOMETIMES I USE IT.
7 SOMETIMES I DON'T.

8 Q. OKAY. AND WHAT WOULD YOU HAVE DONE IF YOU HAD DETERMINED
9 IN YOUR ANALYSIS IN 2009 THAT THE CHAPTER YOU USED CHAPTER 12
10 OF BLACK FAMILIES DID NOT IN YOUR VIEW CONSTITUTE FAIR USE;
11 WHAT WOULD YOU HAVE DONE?

12 A. I WOULDN'T HAVE PUT IT ON ERESERVE, AND MAY HAVE EITHER
13 REQUESTED PERMISSION OR FOUND SOMETHING ELSE OR NOT USED IT.

14 Q. AND WHAT ABOUT THE CHAPTER YOU USED FOR BLACK CHILDREN IN
15 FALL OF 2009, IF YOU WOULD DONE YOUR ANALYSIS AND CONCLUDED
16 THAT WAS NOT FAIR USE, WHAT WOULD YOU HAVE DONE?

17 A. THE SAME, EITHER NOT USED IT OR SOUGHT PERMISSION. I'D
18 JUST HAVE TO DECIDE HOW IMPORTANT IT IS.

19 MR. HARBIN: THAT'S ALL THE QUESTIONS I HAVE, YOUR
20 HONOR.

21 MR. RICH: YOUR HONOR, MR. RAINS WILL CROSS-EXAMINE.

22 THE COURT: ALL RIGHT.

23 CROSS-EXAMINATION

24 BY MR. RAINS:

25 Q. GOOD MORNING. I BELIEVE A FEW MINUTES AGO YOU TESTIFIED

1 WITH RESPECT TO THE BOOK THE SLAVE COMMUNITY WHICH IS
2 PLAINTIFFS' EXHIBIT 460 IN FRONT OF YOU THAT YOU BELIEVED THAT
3 10 PERCENT OF THAT WORK WAS A SMALL PORTION OF THE WORK; IS
4 THAT CORRECT?

5 A. YES.

6 Q. COULD WE HAVE DEFENDANT'S EXHIBIT 348 PLEASE? THIS IS THE
7 FAIR USE CHECKLIST YOU RECREATED FOR THE AFRICAN-AMERICAN
8 SINGLE MOTHERS WORK, CORRECT?

9 A. YES.

10 Q. AND I RECALL THAT YOU ANSWERED MR. HARBIN'S QUESTION THAT
11 YOU USED APPROXIMATELY 15 PERCENT OF THIS WORK; IS THAT
12 CORRECT?

13 A. YES.

14 Q. A MINUTE AGO I BELIEVE YOU TESTIFIED THAT YOU THOUGHT
15 USING THIS WORK WAS A BIT SHAKY; IS THAT RIGHT?

16 A. YES.

17 Q. TURN TO FACTOR 1, EVEN THOUGH YOU THINK USING THE WORK IS
18 A BIT SHAKY AND SOMETIMES YOU USE IT AND SOMETIMES YOU DON'T,
19 YOU CHECKED USE IS NECESSARY TO ACHIEVE YOUR INTENDED
20 EDUCATIONAL PURPOSE, CORRECT?

21 A. YES.

22 Q. ALL RIGHT. TURN TO PAGE 2 OF THIS EXHIBIT UNDER FACTOR 3,
23 YOU ALSO CHECKED THAT A SMALL PORTION OF THIS WORK WAS USED
24 EVEN THOUGH IT WAS 15 PERCENT OF THE WORK, CORRECT?

25 A. YES.

1 Q. HOW MUCH TIME DID YOU SPEND FILLING OUT THIS RECREATED
2 CHECKLIST?

3 A. MAYBE ABOUT 20 TO 25 MINUTES.

4 Q. ALL RIGHT. AND WHEN YOU WERE DOING THAT, WERE YOU SIMPLY
5 TRYING TO REMEMBER WHAT YOU HAD DONE IN 2009 WHEN YOU
6 ORIGINALLY FILLED IT OUT, OR WERE YOU REANALYZING THE WORK
7 UNDER THE FAIR USE FACTORS?

8 A. I WOULD SAY THAT I WAS TRYING TO THINK ABOUT HOW I DID IT,
9 BUT IN DOING THAT YOU STILL ARE GOING TO PROCESS. SO YOU'RE
10 STILL THINKING ABOUT THE QUESTIONS AND SO -- BUT FOR THE MOST
11 PART, I WAS TRYING TO RECREATE WHAT I HAD ALREADY CREATED.

12 Q. BUT WITH RESPECT TO DEFENDANT'S EXHIBIT 348, THE ANALYSIS
13 REFLECTED IN THIS EXHIBIT ENCOMPASSES NOT ONLY YOUR RECREATION
14 BUT ALSO SOME ADDITIONAL ANALYSIS THAT YOU WERE DOING AT THE
15 TIME YOU FILLED IT OUT, CORRECT?

16 A. WELL THAT'S GOING TO HAPPEN. YOU'RE GOING TO THINK AS
17 YOU'RE DOING IT. YOU'RE NOT GOING TO NOT THINK.

18 Q. IF WE COULD TURN TO PLAINTIFFS' EXHIBIT 542 WHICH I
19 BELIEVE IS THE SYLLABUS?

20 IF WE COULD LOOK AT THE REQUIRED TEXTS HEADING, THE
21 SECOND ONE DOWN, I BELIEVE YOU TESTIFIED ON DIRECT THAT
22 SELECTIONS FROM THE MCADOO AND STAPLES BOOK WERE ON HARDCOPY
23 RESERVE IN THE LIBRARY; IS THAT CORRECT?

24 A. YES.

25 Q. AND THOSE BOOKS ON HARDCOPY RESERVE WERE ALSO RECOMMENDED

1 READINGS, CORRECT?

2 A. YES.

3 Q. AS OPPOSED TO REQUIRED READINGS?

4 A. YES.

5 Q. ALL RIGHT. IF YOU TURN TO PAGE 4 OF THIS SYLLABUS AND YOU

6 LOOK AT THE EXCERPT FOR THE RANDOLPH CHAPTER WHICH I BELIEVE IS

7 OCTOBER 20TH THROUGH 22ND AT THE TOP, DICKERSON RANDOLPH; DO

8 YOU SEE THAT?

9 A. YES.

10 Q. I BELIEVE YOU TESTIFIED ON DIRECT THAT THIS EXCERPT WAS

11 ONLY REQUIRED READING FOR ONE OR TWO STUDENTS IN YOUR COURSE;

12 IS THAT CORRECT?

13 A. YES.

14 Q. BUT YOU MADE IT AVAILABLE ON ELECTRONIC RESERVE TO ALL 59

15 STUDENTS IN YOUR COURSE, DIDN'T YOU?

16 A. YES.

17 Q. AND THE SAME IS TRUE WITH RESPECT TO THE MURRAY AND

18 MANDARA CHAPTER WHICH IS PLAINTIFFS' EXHIBIT 209 OR EXCERPTED

19 FROM PLAINTIFF'S EXHIBIT 209 AND ALSO THE TATUM CHAPTER FROM

20 DEFENDANTS' EXHIBIT 749; IS THAT CORRECT?

21 A. YES, BUT YOU DON'T EXPECT STUDENTS TO READ THEM --

22 Q. ALL RIGHT. BUT YOU MADE IT AVAILABLE --

23 A. -- IF IT'S NOT REQUIRED.

24 Q. BUT YOU MADE IT AVAILABLE TO ALL 59 STUDENTS?

25 A. IT'S AVAILABLE BECAUSE THEY HAVE USER NAMES AND PASSWORDS

1 TO ACCESS IT.

2 Q. WERE YOU HOPING THAT THOSE STUDENTS WOULD READ IT EVEN

3 THOUGH IT WASN'T REQUIRED?

4 A. I DIDN'T EXPECT THAT THEY WOULD.

5 Q. SO YOU MADE IT AVAILABLE TO THEM BUT YOU DIDN'T EXPECT

6 THEM TO READ IT?

7 A. IT'S ON ULEARN -- NOT ULEARN, IT'S ON ERESERVE, BUT I

8 DON'T EXPECT STUDENTS TO READ IT IF THEY DON'T HAVE TO.

9 Q. DO YOU KNOW IF ANY OF THE STUDENTS DID IN FACT READ IT?

10 A. I SUSPECT THAT THE STUDENTS WHO MADE THE PRESENTATION,

11 THE TWO TO THREE STUDENTS WHO MADE THE PRESENTATION HAD TO READ

12 IT.

13 Q. BUT THE OTHER 56 OR 57 STUDENTS YOU DON'T KNOW?

14 A. I DON'T KNOW.

15 Q. AND WITH RESPECT TO THE RANDOLPH CHAPTER, AGAIN AT THE TOP

16 OF THE PAGE, THE RANDOLPH DICKERSON CHAPTER WAS THE ENTIRE

17 CONTRIBUTION OF RANDOLPH AND DICKERSON TO THE AFRICAN-AMERICAN

18 SINGLE MOTHERS WORK, CORRECT?

19 A. YES.

20 Q. ALL RIGHT. AND THE SAME WOULD BE TRUE WITH RESPECT TO THE

21 MURRAY AND MANDARA CHAPTER THAT'S A PORTION OF PLAINTIFFS'

22 EXHIBIT 209?

23 A. YES.

24 Q. ALSO WITH RESPECT TO THE TATUM CHAPTER WHICH IS A PORTION

25 OF DEFENDANT'S EXHIBIT 749?

1 A. YES, BUT THEY'RE ALL CHAPTERS IN THE BOOK.

2 Q. RIGHT, IT'S A COLLECTIVE WORK, BUT YOU PLACED THE ENTIRETY

3 OF THOSE INDIVIDUAL AUTHOR'S CONTRIBUTIONS TO THOSE WORKS ON

4 ERESERVE, CORRECT?

5 A. YES.

6 Q. AND YOU FELT WITH RESPECT TO EACH OF THOSE CHAPTERS, THE

7 DICKERSON CHAPTER, THE MURRAY AND MANDARA CHAPTER AND THE TATUM

8 CHAPTER THAT IT WAS NECESSARY TO YOUR EDUCATIONAL OBJECTIVES TO

9 PLACE THOSE ON ERESERVES FOR YOUR ENTIRE CLASS, CORRECT?

10 A. WELL, IT WAS NECESSARY FOR THE TWO TO THREE STUDENTS WHO

11 WERE GOING TO READ IT.

12 Q. BUT YOU DISTRIBUTED IT TO THE ENTIRE CLASS?

13 A. I DIDN'T DISTRIBUTE IT. I PUT IT ON ELECTRONIC RESERVE.

14 Q. BUT EVERYBODY IN THE CLASS HAD ACCESS TO IT?

15 A. YEAH, THEY HAD ACCESS TO IT.

16 Q. TO YOUR KNOWLEDGE DID ANYONE PAY PERMISSIONS FEES TO

17 EITHER OXFORD OR SAGE FOR THE WORKS YOU PUT ON ERESERVES DURING

18 THE FALL 2009 SEMESTER?

19 A. NO.

20 Q. OKAY. ARE YOU AWARE OF ANYONE EVER PAYING ANY PERMISSIONS

21 FEES FOR ANY WORKS YOU PLACED ON ERESERVE IN ANY SEMESTER?

22 A. I'M NOT AWARE.

23 Q. DID YOU CHECK TO SEE IF PERMISSIONS WERE AVAILABLE FOR THE

24 OXFORD AND SAGE WORKS THAT YOU PLACED ON ELECTRONIC RESERVE IN

25 THE FALL 2009 SEMESTER?

1 A. NO, I DIDN'T.

2 Q. IF WE COULD PULL BACK UP DEFENDANT'S EXHIBIT 348 WHICH I
3 BELIEVE IS THE FAIR USE CHECKLIST FOR THE AFRICAN-AMERICAN
4 SINGLE MOTHERS COURSE AND TURN TO PAGE 2, FACTOR 4, I BELIEVE
5 YOU TESTIFIED THAT YOU CONSIDERED ALL OF THE FACTORS.

6 IF YOU DIDN'T LOOK TO SEE IF PERMISSIONS WERE
7 AVAILABLE, HOW DID YOU KNOW WHETHER OR NOT TO CHECK THE
8 LICENSING OR PERMISSION READILY AVAILABLE BOX?

9 A. I DIDN'T KNOW.

10 Q. SO YOU DIDN'T CONSIDER THAT FACTOR?

11 A. I WASN'T INTERESTED IN GETTING LICENSING, SO I DIDN'T
12 CONSIDER IT, NO.

13 Q. SO YOU DIDN'T IN FACT CONSIDER ALL THE FACTORS ON THE FAIR
14 USE CHECKLIST?

15 A. I DID CONSIDER THEM, YEAH, I HAD TO READ IT.

16 Q. YOU READ IT BUT YOU DECIDED YOU DIDN'T WANT TO KNOW
17 WHETHER OR NOT LICENSING WAS AVAILABLE?

18 A. EXACTLY.

19 Q. THE PLAINTIFFS HAVE CALCULATED THAT YOU COULD HAVE
20 OBTAINED PERMISSION TO USE THE FOUR WORKS AT ISSUE IN THIS
21 LAWSUIT FROM YOUR FALL 2009 COURSE FOR \$14.42 PER STUDENT.

22 IF YOU KNEW YOUR STUDENTS HAD TO PAY THAT AMOUNT OF
23 MONEY TO USE THOSE FOUR WORKS WOULD YOU HAVE ASSIGNED THEM IN
24 YOUR FALL 2009 CLASS?

25 A. I DIDN'T HEAR THE QUESTION. ASK THE QUESTION AGAIN?

1 Q. IF YOU HAD KNOWN THAT YOUR STUDENTS IN THE FALL 2009
2 COURSE COULD HAVE HAD ACCESS TO WITH PAID PERMISSIONS THE FOUR
3 WORKS YOU USED THAT ARE AT ISSUE IN THIS LAWSUIT FOR \$14.42
4 WOULD YOU HAVE ASSIGNED THOSE WORKS?
5 A. NO.
6 Q. EVEN THOUGH YOU CHECKED WITH RESPECT TO EACH ONE OF THOSE
7 WORKS THAT USING THOSE WORKS WAS NECESSARY TO ACHIEVE YOUR
8 EDUCATIONAL OBJECTIVES IN THOSE COURSES?
9 A. I STILL WOULDN'T HAVE DONE IT BECAUSE I THINK OTHER WORKS
10 COULD HAVE ALSO ACHIEVED THE PURPOSE.
11 Q. SO USING THOSE WORKS WASN'T NECESSARY THEN?
12 A. LET ME GO BACK AND SEE THAT FACTOR AGAIN?
13 Q. LET'S TURN TO PAGE 1 OF THIS CHECKLIST. THIS IS ONE OF
14 THE CHECKLISTS, AND I'LL REPRESENT TO YOU THAT YOU CHECKED THIS
15 BOX UNDER FACTOR 1 USE IS NECESSARY TO ACHIEVE YOUR INTENDED
16 EDUCATIONAL PURPOSE FOR EACH OF THESE WORKS?
17 A. I MIGHT RETHINK THAT.
18 Q. OKAY. I BELIEVE YOU TESTIFIED ON DIRECT THAT YOU BELIEVED
19 THAT ASSIGNING PORTIONS OF THESE WORKS TO YOUR STUDENTS
20 STIMULATED THE MARKET FOR THOSE WORKS; IS THAT CORRECT?
21 A. YES.
22 Q. DO YOU HAVE ANY EVIDENCE OR DO YOU KNOW OF ANY STUDENT IN
23 YOUR FALL 2009 COURSE PURCHASING ANY OF THOSE WORKS AS A RESULT
24 OF YOU MAKING THEM AVAILABLE ON THE ERESERVE SYSTEM?
25 A. I DON'T RECALL. I DON'T KNOW. I CAN'T SAY WHETHER OR NOT

1 I THOUGHT STUDENTS PURCHASED THE BOOK OR NOT.

2 Q. I BELIEVE YOU TESTIFIED ON DIRECT EXAMINATION THAT YOU

3 ATTENDED A TRAINING COURSE ON THE NEW COPYRIGHT POLICY AT

4 GEORGIA STATE UNIVERSITY; IS THAT CORRECT?

5 A. YES.

6 Q. DO YOU REMEMBER WHEN YOU TOOK THAT COURSE?

7 A. I DON'T. I THINK IT WAS SPRING 2008 BUT I'M NOT SURE.

8 Q. DO YOU RECALL HOW LONG THAT COURSE WAS?

9 A. I THINK IT WAS A COUPLE OF HOURS.

10 Q. I BELIEVE YOU TESTIFIED THAT THE ROOM YOU WERE IN WAS

11 CROWDED; HOW LARGE WAS THE ROOM?

12 A. IT WAS A -- I CAN'T TELL YOU THE SIZE. I REALLY DON'T

13 KNOW THE SIZE. IT WASN'T AS BIG AS THIS ROOM. IT WAS A ROOM

14 WITH A HUGE TABLE AND CHAIRS AROUND THE WALL.

15 Q. SO A CONFERENCE TABLE?

16 A. YEAH, IT COULD HAVE BEEN SOMETHING LIKE THAT.

17 Q. DO YOU REMEMBER WHERE THAT CONFERENCE ROOM WAS, WHICH

18 CLASSROOM BUILDING?

19 A. I REALLY DON'T REMEMBER.

20 Q. WAS IT IN THE OFFICE OF LEGAL AFFAIRS?

21 A. I DON'T THINK IT WAS THERE.

22 Q. I BELIEVE YOU TESTIFIED THAT YOU THOUGHT ATTENDING THE

23 TRAINING COURSE WAS MANDATORY; IS THAT CORRECT?

24 A. YES, I DID.

25 Q. WHY DID YOU THINK IT WAS MANDATORY?

1 A. IT JUST SOUNDED LIKE IT WAS MANDATORY.

2 Q. WHEN YOU SAY IT SOUNDED LIKE IT WAS MANDATORY, WHAT WORDS
3 OR TEXT DID YOU READ OR SEE THAT MADE YOU THINK THAT?

4 A. I JUST DON'T RECALL, BUT I JUST HAD THE FEELING THAT WE
5 HAD TO ATTEND THIS CLASS, AND ALSO I DID KNOW THAT GEORGIA
6 STATE WAS BEING SUED. SO THAT THERE HELPED ME SEE HOW SERIOUS
7 THIS WAS.

8 Q. IN THE SPRING OF 2009 DID YOU KNOW THAT YOU WERE
9 IDENTIFIED IN THE PLAINTIFFS' AMENDED COMPLAINT?

10 A. I DON'T KNOW WHEN I KNEW. I JUST KNOW I WAS IDENTIFIED.

11 Q. DO YOU RECALL WHETHER A WOMAN NAMED CYNTHIA HALL FROM
12 GSU'S OFFICE OF LEGAL AFFAIRS INVITED YOU AND SEVERAL OTHER
13 INDIVIDUAL PROFESSORS TO ATTEND THE TRAINING COURSE?

14 A. I KNOW SHE INVITED ME.

15 Q. DO YOU REMEMBER WHETHER SHE INVITED ANYBODY ELSE TO THAT
16 TRAINING COURSE?

17 A. I REALLY DON'T KNOW.

18 MR. RAINS: MAY I APPROACH, YOUR HONOR?

19 THE COURT: YES.

20 BY MR. RAINS:

21 Q. DOES THE DOCUMENT I'VE HANDED YOU REFRESH YOUR
22 RECOLLECTION AS TO WHETHER OTHER PROFESSORS WERE ALSO INVITED
23 BY MS. HALL TO ATTEND A TRAINING COURSE ON THE NEW COPYRIGHT
24 POLICY IN THE SPRING OF 2009?

25 A. WHAT ARE YOU ASKING?

1 Q. I ASKED YOU IF YOU RECALLED WHETHER MS. HALL HAD INVITED
2 ANY OTHER PROFESSORS TO THE TRAINING COURSE BESIDES YOURSELF,
3 AND YOU SAID THAT YOU DID NOT RECALL. I'M ASKING YOU IF THIS
4 DOCUMENT REFRESHES YOUR MEMORY?

5 A. NOT REALLY.

6 Q. DO YOU KNOW WHO CHRISTIN SWIFT IS?

7 A. NO, I DON'T.

8 Q. DO YOU KNOW LORA GARY IS?

9 A. NO.

10 Q. DID YOU KNOW THAT IN APRIL OF 2009 THE PARTIES IN THIS
11 CASE WERE DISCUSSING TAKING YOUR DEPOSITION IN EARLY MAY OF
12 2009?

13 A. DID I KNOW WHAT?

14 Q. DID YOU KNOW IN APRIL OF 2009 THAT THE PARTIES FOR THIS
15 LAWSUIT WERE DISCUSSING YOUR DEPOSITION BEING TAKEN IN MAY OF
16 2009?

17 A. NO, I DIDN'T OR I DON'T RECALL.

18 Q. I BELIEVE YOU TESTIFIED ON DIRECT EXAMINATION THAT AFTER
19 THE NEW POLICY WAS ADOPTED, YOUR PRACTICE WITH RESPECT TO
20 ELECTRONIC COURSE RESERVES CHANGED; IS THAT CORRECT?

21 A. YES.

22 Q. IS IT FAIR TO SAY THAT BEFORE THE NEW POLICY WAS ADOPTED
23 YOU REGULARLY PLACED WORKS ON ELECTRONIC RESERVES INCLUDING THE
24 FOUR PLAINTIFFS' WORKS AT ISSUE IN THIS LAWSUIT?

25 A. YES.

1 Q. AND YOU DID THAT IN MULTIPLE SEMESTERS?

2 A. YES.

3 Q. COULD WE CALL UP DEFENDANT'S EXHIBIT 348 PLEASE AND TURN
4 TO PAGE 2. UNDER FACTOR 4 IT'S CORRECT, ISN'T IT, THAT YOU
5 DIDN'T CHECK THE REPEATED OR LONG-TERM USE BOX UNDER WAYS
6 AGAINST FAIR USE?

7 A. YES.

8 MR. RAINS: ONE SECOND YOUR HONOR.

9 (PAUSE IN THE PROCEEDINGS.)

10 BY MR. RAINS:

11 Q. I BELIEVE YOU TESTIFIED A FEW MOMENTS AGO THAT YOU WOULD
12 NOT HAVE MADE THE FOUR WORKS AT ISSUE IN THIS LAWSUIT AVAILABLE
13 TO YOUR STUDENTS IF YOU'D HAD TO PAY PERMISSIONS FOR THOSE; IS
14 THAT CORRECT?

15 A. YES, CORRECT.

16 Q. IF USING OTHER WORKS WOULD HAVE ALSO REQUIRED YOU TO PAY
17 PERMISSIONS, WOULD YOU HAVE USED THOSE OTHER WORKS SIMPLY
18 BECAUSE THEY COULDN'T BE PLACED ON RESERVES EITHER?

19 A. NO, I WOULDN'T.

20 MR. RAINS: NOTHING FURTHER, YOUR HONOR.

21 THE COURT: SHALL THE WITNESS BE EXCUSED?

22 MR. HARBIN: I JUST HAVE ONE QUESTION, YOUR HONOR.

23 REDIRECT EXAMINATION

24 BY MR. HARBIN:

25 Q. YOU WERE ASKED A QUESTION ABOUT ONE OF THE WORKS WHERE I

1 BELIEVE YOU TESTIFIED ON DIRECT THAT THE USE WAS SHAKY, YOU
2 SOMETIMES TAKE IT OFF YOUR LIST --

3 A. UH-HUH (AFFIRMATIVE).

4 Q. -- DO YOU REMEMBER WHICH WORK YOU WERE TALKING ABOUT?

5 A. I WAS TALKING ABOUT AFRICAN-AMERICAN SINGLE MOTHERS, AND
6 I'D LIKE TO CLARIFY WHAT I MEAN BY SHAKY.

7 Q. THAT'S WHAT I WAS GOING TO ASK YOU. WHAT DID YOU MEAN
8 WHEN YOU TALKED ABOUT THE USE OF THIS EXCERPT BEING SHAKY?

9 A. WELL, I WAS JUST SAYING THAT BECAUSE THERE'S SO MUCH OUT
10 THERE ON SINGLE MOTHERS AND A LOT OF LITERATURE JUST FOCUSING
11 ON SINGLE MOTHERS, TO ME SOMETIMES I USE IT BECAUSE IT DEPENDS
12 ON WHETHER OR NOT I WANT TO CONTINUE TO TALK ABOUT THAT ISSUE.
13 SO THAT'S WHAT I MEAN BY THAT.

14 Q. WHETHER YOU WANTED TO USE THAT PARTICULAR WORK TO TALK
15 ABOUT IT?

16 A. EXCUSE ME.

17 Q. WHETHER YOU WANTED TO --

18 A. USE THAT PARTICULAR WORK, RIGHT.

19 Q. WERE YOU REFERRING AT ALL TO YOUR ESTIMATION OF YOUR LEGAL
20 RIGHT UNDER FAIR USE TO USE THE WORK --

21 MR. RAINS: OBJECTION, YOUR HONOR --

22 BY MR. HARBIN:

23 Q. -- WHEN YOU TALKED ABOUT THE USE BEING SHAKY?

24 A. NO, NOT AT ALL.

25 MR. HARBIN: THAT'S ALL I HAVE, YOUR HONOR.

1 THE COURT: YOU ARE EXCUSED. THANK YOU.

2 CALL YOUR NEXT WITNESS.

3 MR. SCHAETZEL: YOUR HONOR, FOR OUR NEXT WITNESS WE'D
4 LIKE TO READ IN THE EXCERPTS FROM THE TESTIMONIAL DEPOSITION OF
5 PROFESSOR GAINTY. WE HAVE ORGANIZED IT SUCH THAT MR. MILLER
6 WILL READ AND MR. WARENZAK WILL TAKE THE PLACE OF THE WITNESS
7 AND SUBJECT TO DEFENDANTS' REQUESTS THEY WILL READ THE
8 ENTIRE --

9 MR. KRUGMAN: JUST SO THEY READ IT EQUALLY AND DON'T
10 MUMBLE WHEN THEY HAVE OUR PORTION.

11 THE COURT: NO SPECIAL EMPHASIS ON ANY PART.

12 MR. SCHAETZEL: WITHOUT WAIVING THE PRIVILEGE, MR.
13 WARENZAK HAS BEEN SO INSTRUCTED.

14 (EXCERPTS OF THE DEPOSITION OF DENIS CHARLES GAINTY
15 WERE READ AS FOLLOWS)

16 DIRECT EXAMINATION

17 Q. PROFESSOR GAINTY, COULD YOU PLEASE STATE YOUR NAME FOR THE
18 RECORD?

19 A. DENIS CHARLES GAINTY --

20 THE COURT: LET ME ASK ABOUT THIS. YOU SAID EXCERPTS
21 FROM THE DEPOSITION?

22 MR. SCHAETZEL: YES, YOUR HONOR.

23 THE COURT: SO HOW ARE YOU GOING TO HANDLE THIS? ARE
24 YOU GOING TO SAY NOW GO TO PAGE SO AND SO AND CREATE THE RECORD
25 HERE?

1 MR. SCHAETZEL: WE CAN, YOUR HONOR. THESE WILL BE
2 THE EXCERPTS THAT ARE ALREADY IN THE PRETRIAL ORDER. THEY ARE
3 BEFORE THE COURT --

4 THE COURT: I THINK IT WOULD BE WELL JUST TO SAY
5 STARTING HERE ON PAGE 1 AS WE GO THROUGH.

6 MR. MILLER: SO THIS IS BEGINNING ON PAGE 5, LINE 22
7 OF THE DEPOSITION. THAT'S WHERE I BEGAN.

8 Q. AND DO YOU UNDERSTAND, PROFESSOR GAINY, THAT YOU ARE HERE
9 TO PROVIDE TESTIMONY TODAY UNDER OATH THAT IS IN CONNECTION
10 WITH THE COPYRIGHT INFRINGEMENT CASE BROUGHT BY CAMBRIDGE
11 UNIVERSITY PRESS, OXFORD UNIVERSITY PRESS AND SAGE PUBLICATIONS
12 AGAINST THE PRESIDENT OF GEORGIA STATE UNIVERSITY, CERTAIN
13 MEMBERS OF BOARD OF THE REGENTS OF THE UNIVERSITY SYSTEM OF
14 GEORGIA AND OTHERS?

15 A. YES.

16 THE COURT: I'M NOT SURE YOUR MICROPHONE IS WORKING.
17 THAT MIGHT BE BETTER.

18 Q. AND DO YOU UNDERSTAND THAT THIS CASE IS SCHEDULED FOR
19 TRIAL STARTING ON MAY 13TH, 2011?

20 A. YES.

21 Q. DO YOU PLAN TO BE IN THE ATLANTA AREA IN THE MAY-JUNE
22 TIMEFRAME?

23 A. NO.

24 Q. WHY NOT?

25 A. MY WIFE, OUR CHILDREN AND I ARE GOING ON A FAMILY VACATION

1 THAT WE'VE PLANNED FOR SOMETIME. WE'RE GOING TO BE IN UPSTATE
2 NEW YORK, IN THE FINGER LAKES AREA VISITING MY ELDERLY MOTHER
3 AND IN THE BALTIMORE AREA VISITING MY IN-LAWS.

4 THERE WILL ALSO BE SOMETIME AT BETHANY BEACH, AND I
5 HONESTLY DON'T KNOW IF THAT'S DELAWARE OR MARYLAND, AND THAT'S
6 ALSO BEEN PLANNED FOR SOMETIME FOR SEVERAL MONTHS INCLUDING
7 HAVING MADE PAYMENTS ON A RENTAL HOUSE.

8 Q. AND DO YOU KNOW APPROXIMATELY WHEN YOU WILL BE LEAVING ON
9 YOUR TRIP TO NEW YORK AND BALTIMORE?

10 A. IT'S SOMETIME EARLY MAY. I DON'T KNOW EXACTLY. THAT'S --
11 MY WIFE KNOWS.

12 Q. AND HOW LONG DO YOU PLAN TO BE AWAY?

13 A. UNTIL EARLY JULY, JULY 1ST OR 2ND OR SOMETHING LIKE THAT.
14 AGAIN MY WIFE KNOWS.

15 Q. AND HOW LONG DID YOU SAY THAT YOU BELIEVE THAT THIS TRIP
16 HAD BEEN PLANNED?

17 A. OH, FOR SEVERAL MONTHS. I KNOW THAT MY MOTHER-IN-LAW
18 NEEDED PARTICULARLY TO LOCK IN THE RENTAL OF THE PROPERTY
19 SOMETIME AGO.

20 Q. WHO DO YOU WORK FOR?

21 A. GEORGIA STATE UNIVERSITY.

22 Q. AND WHAT DO YOU DO FOR GEORGIA STATE UNIVERSITY?

23 A. I'M AN ASSISTANT PROFESSOR OF HISTORY.

24 Q. ARE YOU ASSOCIATED WITH ANY PARTICULAR DEPARTMENT AT
25 GEORGIA STATE UNIVERSITY?

1 A. I AM, THE HISTORY DEPARTMENT.

2 Q. WHEN DID YOU START TEACHING AT GEORGIA STATE UNIVERSITY?

3 A. IN THE FALL OF 2007. I WAS HIRED AS A VISITING LECTURER.

4 I HAD TWO YEARS AS A VISITING LECTURER, AND THEN I WAS HIRED IN

5 A TENURE TRACK CAPACITY IN THE FALL OF 2009.

6 Q. CAN YOU DESCRIBE FOR US GENERALLY WHAT TYPE OF COURSES

7 YOU'VE BEEN TEACHING AT GEORGIA STATE UNIVERSITY SINCE THE FALL

8 OF 2007?

9 A. AS A VISITING LECTURER, I TAUGHT ALMOST EXCLUSIVELY LOWER

10 LEVEL SURVEY COURSES IN WORLD HISTORY EITHER FROM 1500 TO THE

11 PRESENT OR FROM I GUESS THE BEGINNING OF THE TIME TO 1500. I

12 WAS HIRED IN 2009 SPECIFICALLY AS A WORLD HISTORIAN.

13 SO MY UNDERGRADUATE COURSES TEND TO FOCUS ON WORLD

14 HISTORY WHICH EMPHASIZES TRANSNATIONAL AND TRANSREGIONAL

15 CONTACT PROCESSES, MODES OF COMMUNICATION, THAT SORT OF THING.

16 I ALSO TEACH GRADUATE COURSES IN WORLD HISTORY AND IN PEDAGOGY.

17 Q. HAVE YOU EVER TAUGHT A COURSE CALLED CROSS-CULTURAL

18 ENCOUNTERS IN WORLD HISTORY?

19 A. YES.

20 Q. IS THE COURSE NUMBER ASSOCIATED WITH THAT COURSE H-I-S-T

21 OR HIST 4820?

22 A. YES.

23 Q. CAN YOU TELL US GENERALLY WHAT THAT COURSE IS ABOUT?

24 A. GENERALLY THE -- AND I HAVE A DESCRIPTION ON THE COURSE

25 SYLLABUS, BUT -- WHICH SAYS IT PROBABLY IN A MORE ELOQUENT WAY

1 THAN I CAN NOW, BUT GENERALLY THE COURSE IS CONCERNED WITH
2 LOOKING AT CONTACT BETWEEN AND AMONG DIFFERENT CULTURES AS A
3 WAY TO THINK ABOUT DIFFERENT NARRATIVES IN WORLD HISTORY.

4 IT FOCUSES ON CONTACT AMONG AND BETWEEN CULTURES
5 BEFORE COLUMBUS, BEFORE THE AGE OF EUROPEAN EXPLORATION TO
6 EMPHASIZE THE CONNECTIVITY OF DIFFERENT CULTURES BEFORE THAT
7 TIME, AND IT ALSO LOOKS AT CONTACT AFTER THE SORT OF COLUMBIAN
8 MOMENT, ESPECIALLY FOCUSING ON NONEUROPEAN KIND OF CENTERS OF
9 POWER OR CULTURAL EXCHANGE.

10 Q. HOW DO YOU GO ABOUT TEACHING YOUR STUDENTS IN THAT
11 PARTICULAR COURSE, HIST 4820, THE SUBJECT MATTER OF THE COURSE?

12 A. WELL, WE -- I ASSIGN READINGS, INCLUDING SEVERAL
13 MONOGRAPHS OR TYPICALLY SINGLE-AUTHORED SCHOLARLY WORKS, BOOKS
14 BASICALLY AND ALSO EXCERPTS OR ARTICLES THAT ARE SHORTER IN
15 LENGTH THAT ADDRESS ONE FACET OR ANOTHER OF INTERCULTURAL
16 CONTACT AND EVEN THE DEFINITION OF WHAT CULTURES ARE, AND I
17 LECTURE AND THEN DISCUSS THOSE READINGS WITH STUDENTS.

18 I ASK THEM TO WRITE PAPERS BASED ON THOSE READINGS
19 AND OTHER -- OTHER WORKS THAT THEY MAY DO OR THEIR OWN KIND OF
20 THOUGHTS ON THE MATTER.

21 Q. DID YOU TEACH THE HISTORY 4820 COURSE IN THE FALL OF 2009?

22 A. I DID NOT.

23 Q. WHY NOT?

24 A. THE COURSE WAS CANCELED DUE TO UNDERENROLLMENT.

25 Q. DO YOU KNOW APPROXIMATELY WHEN IT WAS CANCELED DUE TO

1 UNDERENROLLMENT?

2 A. THE -- I DON'T REMEMBER SPECIFICALLY. THE -- WE MET FOR
3 ONE DAY. THERE WAS ONLY ONE CLASS MEETING AT WHICH I THINK
4 EIGHT OR NINE STUDENTS SHOWED UP. I BELIEVE NINE OR TEN
5 STUDENTS WERE REGISTERED AT THAT POINT FOR THE COURSE. THAT
6 WAS UNDER THE NUMBER THAT WAS REQUIRED FOR THE COURSE TO MAKE,
7 WE SAY, TO CONTINUE, AND I KNOW WE WAITED FOR A DAY OR TWO.

8 I HOPED THAT MORE STUDENTS MIGHT REGISTER BUT THEY
9 DID NOT, AND AT THE SAME TIME I WANTED, IF WE WERE GOING TO
10 CANCEL, TO CANCEL QUICKLY SO THAT THOSE STUDENTS WHO ENROLLED
11 WOULD HAVE A CHANCE TO ENROLL IN ANOTHER COURSE BEFORE THOSE
12 COURSES FILLED UP.

13 Q. SO IS IT THE CASE THEN THAT YOU MET ONLY ONCE?

14 A. WE MET ONLY ONE TIME FOR THE INTRODUCTORY CLASS MEETING.
15 THERE WERE NO OTHER CLASS MEETINGS.

16 Q. IN ONE OF YOUR PREVIOUS ANSWERS YOU REFERENCED A SYLLABUS
17 FOR THE COURSE?

18 A. I DID.

19 Q. DID YOU PREPARE A SYLLABUS FOR THAT COURSE?

20 A. I DID.

21 MR. MILLER: YOUR HONOR, WE WILL HAND UP THE EXHIBITS
22 LATER. I WILL JUST CONTINUE READING.

23 Q. PROFESSOR GAINTY, THE COURT REPORTER HAS HANDED YOU A
24 DOCUMENT THAT HAS BEEN MARKED GAINTY TX-1, AND IT BEARS
25 PRODUCTION NUMBERS IN THE BOTTOM RIGHT-HAND CORNER GEORGIA

1 STATE 0066084 THROUGH 0066090. DO YOU RECOGNIZE THIS DOCUMENT?

2 A. I DO.

3 Q. WHAT IS IT?

4 A. THIS IS MY SYLLABUS FOR THE HIST 4820 CROSS-CULTURAL

5 ENCOUNTERS IN WORLD HISTORY COURSE.

6 Q. DID YOU PREPARE THIS DOCUMENT?

7 A. I DID.

8 Q. AND DOES THIS SYLLABUS RELATE TO A PARTICULAR SEMESTER THE

9 COURSE WAS TAUGHT?

10 A. THIS RELATES TO FALL 2010.

11 Q. HOW DOES THE FALL 2000 -- WELL, LET ME START BY ASKING,

12 WHEN DID YOU PREPARE THIS PARTICULAR SYLLABUS DATED FALL 2010?

13 A. THIS PARTICULAR SYLLABUS -- I DON'T -- MAYBE THE BEST WAY

14 TO ANSWER IS TO SAY I PREPARED MUCH OF THE TEXT OF THIS

15 SYLLABUS FOR THE FALL 2009 COURSE.

16 WHEN THE FALL 2009 COURSE WAS CANCELED

17 SUBSEQUENTLY -- I CAN'T REMEMBER EXACTLY WHEN -- I CHANGED THE

18 DATES AS APPROPRIATE AND THE CLASSROOM AND THE MEETING TIME.

19 IN THE UPPER LEFT-HAND CORNER OF THE FIRST PAGE YOU'LL SEE THE

20 CRN. THAT'S SOME KIND OF COMPUTER NUMBER. I BELIEVE THAT'S

21 DIFFERENT. MY OFFICE, I BELIEVE, MOVED.

22 SO THERE ARE DETAILS LIKE THAT THAT WERE CHANGED, BUT

23 FOR THE MOST PART, THE CONTENTS OF THE SYLLABUS WITH THE

24 EXCEPTION OF THOSE DETAILS IS THE SAME AS IT WAS FOR THE FALL

25 2009 COURSE.

1 Q. WHEN DID YOU PREPARE THE FALL 2009 SYLLABUS WITH RESPECT
2 TO THE 4820 COURSE YOU WERE GOING TO TEACH IN THE FALL OF 2009?

3 A. I CAN'T RECALL EXACTLY. I WOULD IMAGINE AT SOME POINT
4 AFTER FINDING OUT THAT I WAS HIRED AS A TENURE TRACK PROFESSOR
5 AND FINDING OUT THAT I WOULD BE TEACHING THIS COURSE AND BEFORE
6 THE COURSE ACTUALLY BEGAN.

7 Q. OKAY.

8 A. SO IT'S -- PERHAPS OVER THE SUMMER OF 2009.

9 Q. DO YOU STILL HAVE A COPY OF THAT ACTUAL SYLLABUS THAT WAS
10 USED OR INTENDED TO BE USED FOR THE FALL 2009 4820 COURSE?

11 A. I DO NOT.

12 Q. WHY NOT?

13 A. WHEN THE COURSE WAS CANCELED, I DIDN'T SEE ANY REASON TO
14 KEEP PAPER COPIES OF THE SYLLABUS, AND I CHANGED IN THE
15 ELECTRONIC VERSION THE DATES AND THE DETAILS THAT I MENTIONED
16 EARLIER AND THEN SAVED OVER THAT FILE.

17 Q. SO OTHER THAN PERHAPS THE CRN NUMBER AND YOUR CLASSROOM
18 INFORMATION AT THE TIME THAT THE COURSE WAS BEING OFFERED, DO
19 YOU BELIEVE THAT IN SUBSTANCE THE SYLLABUS IS IDENTICAL TO THE
20 SYLLABUS YOU USED FOR THE FALL 2009 COURSE?

21 A. THE DATES ARE ALSO DIFFERENT.

22 Q. WHICH DATES ARE YOU REFERRING TO?

23 A. I'M SORRY, THE SCHEDULE -- UNDER SCHEDULE OF CLASS
24 MEETINGS AND ASSIGNMENTS, THE DATES REFLECT 2010 DATES, BUT
25 OTHERWISE I BELIEVE -- I BELIEVE THE CONTENT IS THE SAME.

1 Q. AND THE DATES YOU'RE REFERRING TO, ARE THOSE DEPICTED ON
2 GEORGIA STATE 66087 THROUGH 90?
3 A. CORRECT.
4 Q. ON THE FIRST PAGE OF GAINTY TX-1, GEORGIA STATE 66084, YOU
5 HAVE A SECTION ENTITLED COURSE DESCRIPTION?
6 A. YES.
7 Q. EARLIER WHEN I ASKED YOU TO PROVIDE A GENERAL OVERVIEW OF
8 WHAT THE COURSE WAS ABOUT, YOU REFERENCED A DESCRIPTION IN YOUR
9 SYLLABUS; IS THAT CORRECT?
10 A. YES.
11 Q. IS THIS THE COURSE DESCRIPTION THAT YOU WERE REFERRING TO
12 IN THE SUBSTANCE OF YOUR ANSWER TO MY PREVIOUS QUESTION?
13 A. YES.
14 Q. TURNING TO PAGE 2 OF YOUR -- THE SECOND PAGE OF YOUR
15 SYLLABUS MARKED 66085, YOU HAVE A SECTION ENTITLED COURSE
16 READING; DO YOU SEE THAT?
17 A. YES.
18 Q. THERE ARE FIVE NUMBERED PARAGRAPHS WITHIN THAT SECTION; DO
19 YOU SEE THAT?
20 A. YES.
21 Q. WHAT ARE THOSE FIVE ITEMS THAT ARE LISTED IN THAT
22 PARAGRAPH UNDER COURSE READINGS?
23 A. THEY ARE COLLECTIVELY THE MONOGRAPHS THAT I ASSIGNED AS
24 REQUIRED READING FOR THE COURT. STUDENTS WERE DIRECTED TO
25 PURCHASE AND READ THEM IN THEIR ENTIRETY OR AT LEAST

1 OVERWHELMING PORTIONS OF THEM.

2 Q. WHY DID YOU REQUIRE STUDENTS TO PURCHASE THESE MONOGRAPHS?

3 A. BECAUSE I WANTED THEM TO READ ALL OR ALMOST ALL OF EACH
4 MONOGRAPH.

5 Q. AND CAN YOU EXPLAIN AGAIN WHAT A MONOGRAPH IS?

6 A. I'M SORRY, A MONOGRAPH, AS I UNDERSTAND IT, IS A BOOK
7 LENGTH SCHOLARLY WORK THAT CONSTRUCTS AND SUPPORTS A SINGLE
8 CORE ARGUMENT OR A SORT OF CLUSTER OF ARGUMENTS THAT ALL
9 REVOLVE AROUND A CENTRAL ISSUE.

10 IT'S DIFFERENT FROM A TEXTBOOK IN THAT IT'S DESIGNED
11 TO PUT AN ARGUMENT FORWARD RATHER THAN, I GUESS, COMMUNICATE
12 DATA WITH LESS THAN OF AN OVERT ARGUMENT.

13 Q. TURNING TO THE FOURTH PAGE OF YOUR SYLLABUS, WHICH IS
14 MARKED GEORGIA STATE 66087, YOU HAVE A SECTION THERE ENTITLED
15 SCHEDULE OF CLASS MEETINGS AND ASSIGNMENTS; DO YOU SEE THAT?

16 A. I DO.

17 Q. WHAT DOES THIS PARTICULAR SECTION IN YOUR SYLLABUS
18 REFLECT?

19 A. THIS SECTION OF THE SYLLABUS PAGES 66087 THROUGH 66090,
20 GIVES A LIST OF DATES ON WHICH THE CLASS WILL MEET, AND THEN
21 TELLS THE STUDENT ON WHICH DATE THEY ARE ASKED TO DO READINGS
22 AND/OR SUBMIT WRITTEN WORKS. ESSENTIALLY IT TELLS THEM WHAT
23 THE ASSIGNMENTS ARE AND WHEN THEY MUST COMPLETE THE
24 ASSIGNMENTS.

25 Q. AND WITH RESPECT TO THE READINGS THAT YOU HAVE ASSIGNED IN

1 THIS ACTION, WERE THOSE REQUIRED READINGS?

2 A. YES.

3 Q. ON THE PAGE MARKED GEORGIA STATE 66088 OF GAINTY TX-1
4 THERE IS AN ENTRY FOR TUESDAY, OCTOBER 5; DO YOU SEE THAT?

5 A. I DO.

6 Q. WHAT ARE THE TWO ITEMS THAT YOU HAVE -- OR WHAT ARE THE
7 ITEMS THAT YOU HAVE ESSENTIALLY LISTED FOR THAT DATE?

8 A. THE FIRST ITEM IS A SHORT PAPER THAT IS DUE, WHICH IS A
9 STUDENT PAPER THAT WAS ASSIGNED TO THEM ON READINGS IN THE
10 PREVIOUS UNIT.

11 THROUGHOUT THE SYLLABUS YOU'LL SEE DIFFERENT SHORT
12 PAPER ASSIGNMENTS IN BOLD. THE OTHER TWO PARTS ARE TWO
13 READINGS THAT I ASSIGNED TO THE STUDENTS.

14 THE FIRST IS A READING ENTITLED JAPAN IN THE CHINESE
15 DYNASTIC HISTORIES WHICH IS EXCERPTED FROM A BOOK CALLED
16 SOURCES OF JAPANESE TRADITION, VOLUME 1, AND THE SECOND IS A
17 READING ENTITLED SINO-KOREAN TRIBUTARY RELATIONS UNDER THE MING
18 WHICH IS EXCERPTED FROM THE CAMBRIDGE HISTORY OF CHINA VOLUME
19 8, PART 2.

20 Q. WITH RESPECT TO THE CAMBRIDGE HISTORY OF CHINA ENTRY
21 LISTED THERE, CAN YOU DESCRIBE FOR ME GENERALLY WHAT IS THE
22 CAMBRIDGE HISTORY OF CHINA?

23 A. THE CAMBRIDGE HISTORY OF CHINA IS A MULTIVOLUME, MULTIPART
24 SCHOLARLY WORK THAT CONTAINS, AS I UNDERSTAND IT, MANY
25 DIFFERENT WRITINGS BY DIFFERENT AUTHORS, ALL OF WHICH RELATE IN

1 SOME WAY TO THE HISTORY OF CHINA.

2 Q. DO YOU KNOW HOW MANY VOLUMES MAKE UP THE CAMBRIDGE HISTORY
3 OF CHINA?

4 A. HONESTLY I KNOW THAT THERE ARE AT LEAST 8, BUT I DO NOT
5 KNOW HOW MANY IN TOTAL.

6 Q. HOW DO YOU KNOW THERE ARE AT LEAST 8?

7 A. THE EXCERPT THAT I CHOSE TO ASSIGN TO MY STUDENTS COMES
8 FROM VOLUME 8. IT ALSO COMES FROM -- I'M SORRY. IT COMES FROM
9 VOLUME 8 PART 2 WHICH I ASSUME ALSO MEANS THAT THERE IS A
10 VOLUME 8, PART 1.

11 Q. WHAT PAGES DID YOU ASSIGN FOR THE PARTICULAR EXCERPT YOU
12 ASSIGNED FOR THIS READING?

13 A. 272 THROUGH 300.

14 Q. WHAT WAS THE TITLE OF THE WORK AGAIN THAT YOU ASSIGNED AS
15 A READING FOR THE THIS PARTICULAR CLASS?

16 A. SINO-KOREAN TRIBUTARY RELATIONS UNDER THE MING.

17 Q. DO YOU UNDERSTAND THAT PLAINTIFFS IN THIS CASE HAVE
18 ALLEGED THAT THE USE OF THIS PARTICULAR EXCERPT INFRINGES ON
19 ONE OR MORE OF THEIR COPYRIGHTS?

20 A. I DO.

21 Q. WHAT WAS THE SUBJECT MATTER OF THE CLASS THAT YOU INTENDED
22 TO TEACH WHERE YOU WERE USING THIS READING OR WHERE YOU PLANNED
23 TO USE THIS READING?

24 A. THE SUBJECT MATTER OF THE CLASS WAS AN INTRODUCTION TO A
25 HISTORICAL EXAMINATION OF THE PHENOMENON I GUESS OF CHINESE

1 HISTORIAN AND ITS CONNECTIONS TO OTHER EAST ASIAN AND ASIAN
2 CULTURES OR STATES OR POLITIES.

3 THIS PARTICULAR CLASS IN ADDITION TO INTRODUCING THAT
4 IDEA PRESENTED TWO EXAMPLES OF CONTACT BETWEEN CHINA AND
5 ANOTHER -- ANOTHER SUCH ASIAN CULTURE OR STATE.

6 Q. AND WHAT WERE THE OTHER -- THE ONE OR MORE OTHER ASIAN
7 CULTURES OR STATES THAT YOU WERE PRESENTING IN THIS PARTICULAR
8 CLASS?

9 A. IN THIS PARTICULAR CLASS ONE OF THEM IS JAPAN AND THE
10 OTHER IS KOREA. TO BE CLEAR HISTORICALLY KOREA AND JAPAN BOTH
11 AT DIFFERENT POINTS IN HISTORY HAVE MEANT DIFFERENT THINGS.
12 THEY MAY NOT HAVE GONE BY THE NAME OF JAPAN OR KOREA.

13 SO FOR CONVENIENCE WHAT I'M REFERRING TO IS THE GROUP
14 OF PEOPLE THAT LIVED AT THAT POINT IN THE PLACE THAT WE NOW
15 REFER TO AS JAPAN OR SIMILARLY THE GROUP OF PEOPLE THAT LIVE IN
16 THE PLACE THAT WE NOW REFER TO AS KOREA.

17 Q. WITH RESPECT TO YOUR READING SINO-KOREAN TRIBUTARY
18 RELATIONS UNDER THE MING, WHY DID YOU SELECT THAT PARTICULAR
19 READING FOR THIS CLASS?

20 A. THIS CLASS DEALT WITH CHINESE INTERACTIONS WITH OTHER
21 ASIAN STATES OR PEOPLE'S OR CULTURES, AND THE READING
22 SINO-KOREAN TRIBUTARY RELATIONS UNDER THE MING DEALS DIRECTLY
23 WITH THE QUESTION OF HOW CHINA INTERACTED WITH ONE OTHER SUCH
24 STATE OR PEOPLE OR POLITY OR WHAT HAVE YOU.

25 Q. HOW DOES THAT PARTICULAR READING COMPARE TO THE OTHER

1 READING YOU ASSIGNED THAT DAY, JAPAN IN THE CHINESE DYNASTIC
2 HISTORIES?

3 A. WELL, JAPAN IN THE CHINESE DYNASTIC HISTORIES DEALS
4 PARTICULARLY WITH HOW CHINA WAS INTERACTING WITH JAPAN, AND
5 SINO-KOREAN TRIBUTARY RELATIONS UNDER THE MING DEALS WITH
6 SPECIFICALLY WITH HOW CHINA DEALT WITH KOREA OR THE PEOPLES OR
7 CULTURES OR STATES IN KOREA ESPECIALLY THROUGH TRIBUTARY
8 RELATIONS.

9 Q. UNDERSTANDING THAT THE CLASS IN THE FALL OF 2009 OR THE
10 COURSE IN THE FALL OF 2009 WAS CANCELED, HOW DID YOU INTEND FOR
11 YOUR STUDENTS OF THAT COURSE, HAD IT NOT BEEN CANCELED, TO
12 OBTAIN A COPY OR ACCESS A COPY OF THE SINO-KOREAN TRIBUTARY
13 RELATIONS UNDER THE MING READING?

14 A. HAD THE CLASS NOT BEEN CANCELED, I WOULD HAVE TRIED TO
15 MAKE IT AVAILABLE. I WOULD HAVE -- I WOULD HAVE EXPECTED THEM
16 TO FIND IT THROUGH THE UNIVERSITY'S ERESERVE SYSTEM.

17 Q. AND WHAT IS THE ERESERVE SYSTEM?

18 A. IT'S BASED IN THE LIBRARY, AND AS I UNDERSTAND IT, IT'S A
19 MECHANISM BY WHICH SOME READINGS ARE MADE AVAILABLE IN
20 ELECTRONIC FORM TO STUDENTS.

21 THOSE STUDENTS IN A PARTICULAR CLASS MUST HAVE A
22 PASSWORD PROVIDED TO THEM SO THAT ONLY THE STUDENTS IN
23 THAT CLASS CAN ACCESS THE MATERIAL, AND THEY GO THROUGH THE
24 LIBRARY WEBSITE AND ARE ABLE TO SEE THOSE READINGS AND THEN
25 READ THEM.

1 Q. DO YOU RECALL WHETHER YOU REQUESTED IN ADVANCE OF THE
2 COURSE IN FALL 2009 THAT THIS EXCERPT BE LOADED TO THE ERESERVE
3 SYSTEM?

4 A. I BELIEVE I DID.

5 Q. WHAT STEPS DID YOU TAKE TO REQUEST THAT THIS EXCERPT
6 SINO-KOREAN TRIBUTARY RELATIONS UNDER THE MING BE LOADED TO
7 ERESERVE PRIOR TO YOUR FALL 2009 COURSE BEING OFFERED?

8 A. AT SOME POINT BEFORE 2009 THE UNIVERSITY CHANGED THE
9 MANNER IN WHICH THEY ASKED FACULTY TO MAKE ERESERVE REQUESTS.
10 PREVIOUSLY WE WOULD SIMPLY SEND AN E-MAIL WITH A LIST OF ALL OF
11 THE READINGS WITH IDENTIFYING INFORMATION SUCH AS TITLE,
12 AUTHOR, PAGE NUMBERS TO THE LIBRARY AS ONE DOCUMENT.

13 HOWEVER, WE THEN SWITCHED OVER BEFORE THIS POINT TO A
14 SYSTEM OF SUBMITTING ON THE LIBRARY WEBSITE AN INDIVIDUAL
15 REQUEST THROUGH A LIBRARY FORM FOR EACH INDIVIDUAL READING IN
16 ORDER TO -- OR WE ARE PROMPTED BY THE LIBRARY WEBSITE TO
17 COMPLETE A FAIR USE CHECKLIST TO DETERMINE WHETHER THE READING
18 THAT WE'RE REQUESTING MAY FAIRLY BE USED.

19 Q. AND IN CONNECTION WITH THIS PARTICULAR WORK, SINO-KOREAN
20 TRIBUTARY RELATIONS UNDER THE MING, DID YOU COMPLETE A FAIR USE
21 CHECKLIST PRIOR TO REQUESTING THAT THIS WORK BE LOADED ONTO
22 ERES?

23 A. I BELIEVE I DID.

24 Q. PROFESSOR GAINTY, THE COURT REPORTER HAS HANDED YOU WHAT'S
25 BEEN MARKED AS GAINTY TX-2; DO YOU RECOGNIZE THIS DOCUMENT?

1 A. I DO.

2 Q. AND WHAT IS IT?

3 A. THIS IS A FAIR USE CHECKLIST THAT I COMPLETED FOR --

4 ALTHOUGH IT'S VERY HARD TO READ UNFORTUNATELY ON THIS COPY

5 BUT IT -- AS I MAKE IT OUT FOR THE WORK SINO-KOREAN TRIBUTARY

6 RELATIONS UNDER THE MING.

7 Q. AND GIVEN THAT THIS PARTICULAR CHECKLIST APPEARS TO BE

8 SOMEWHAT ILLEGIBLE, ARE YOU ABLE TO ASCERTAIN FROM OTHER

9 INFORMATION CONTAINED IN THIS CHECKLIST THAT IT IS IN FACT THE

10 CHECKLIST RELATED TO THAT PARTICULAR WORK?

11 A. YES.

12 Q. WHAT INFORMED YOU ON THIS CHECKLIST THAT THIS CHECKLIST IN

13 PARTICULAR RELATES TO THAT PARTICULAR WORK?

14 A. I CAN READ MY NAME, THE NAME OF THE COURSE, THE AUTHOR AND

15 PUBLISHER AND PORTIONS TO BE USED, THE PAGE NUMBERS, ALL OF

16 THOSE MATCH THE WORK IN QUESTION.

17 Q. WHEN -- DID YOU FILL OUT THIS CHECKLIST?

18 A. I DID.

19 Q. WHEN DID YOU FILL OUT THIS FAIR USE CHECKLIST?

20 A. I FILLED OUT THIS FAIR USE CHECKLIST IN THE LAST FEW

21 MONTHS.

22 Q. NOW IN THE UPPER RIGHT-HAND CORNER IT'S DATED AUGUST 1,

23 2009; DO YOU SEE THAT?

24 A. YES.

25 Q. WHAT DOES THAT DATE REFLECT?

1 A. I TRIED AS BEST I COULD TO THE BEST OF MY ABILITY TO
2 RECREATE THE FAIR USE CHECKLIST THAT I WOULD HAVE FILLED OUT
3 AND I BELIEVE I DID FILL OUT FOR THE FALL 2009 SEMESTER.

4 Q. YOU STATED THAT YOU RECREATED THE CHECKLIST. CAN YOU
5 EXPLAIN WHY YOU RECREATED THE CHECKLIST?

6 A. I DID NOT HAVE ANY LONGER A COPY OF THE FAIR USE CHECKLIST
7 THAT I COMPLETED FOR 2009.

8 Q. AND WHY NOT? WHY DID YOU NO LONGER HAVE A COPY OF THAT
9 CHECKLIST?

10 A. I DISCARDED IT.

11 Q. WHY?

12 A. I BELIEVE THAT BECAUSE THE COURSE WAS CANCELED AFTER ONE
13 CLASS MEETING IT WAS NOT NECESSARY TO RETAIN THE FAIR USE
14 CHECKLIST.

15 Q. AND CAN YOU EXPLAIN WHY YOU WENT ABOUT RECREATING THIS
16 CHECKLIST?

17 A. I WAS INFORMED THAT THERE WAS A LAWSUIT AND ASKED BY THE
18 OFFICE OF LEGAL AFFAIRS AT GEORGIA STATE TO RECREATE THIS
19 CHECKLIST.

20 Q. AND WHEN YOU RECREATED THE CHECKLIST, DID YOU MAKE AN
21 EFFORT TO FILL IT OUT IN THE SAME WAY THAT YOU FILLED IT OUT IN
22 THE OFFICE -- OR IN THE 2009 TIMEFRAME BEFORE THE COURSE
23 STARTED?

24 A. YES.

25 Q. WHEN YOU ORIGINALLY FILLED THIS PARTICULAR CHECKLIST OUT

1 IN THE 2009 TIMEFRAME, DID YOU MAKE A GOOD FAITH EFFORT TO
2 CONDUCT A FAIR USE ANALYSIS IN THE ACCORDANCE WITH THE
3 CHECKLIST?

4 A. YES.

5 Q. AND THIS PARTICULAR CHECKLIST GAINITY TX-2 RELATES TO
6 WHICH PAGES OF THE SINO-KOREAN TRIBUTARY RELATIONS UNDER THE
7 MING?

8 A. PAGES 272 THROUGH 300.

9 Q. AND WERE THOSE THE PAGES THAT YOU INTENDED TO ASSIGN TO
10 YOUR STUDENTS TO READ IN THE HISTORY 4820 COURSE HAD IT NOT
11 BEEN CANCELED?

12 A. YES.

13 Q. I'M GOING TO DIRECT YOUR ATTENTION TO PAGE 1 THE FIRST
14 PAGE MARKED GEORGIA STATE 66119 OF THE FAIR USE CHECKLIST
15 GAINITY TX-2; ARE YOU THERE?

16 A. YES.

17 Q. PAGE 1 -- OR THIS FIRST PAGE OF GAINITY TX-2 REFERS
18 TO A FACTOR 1 PURPOSE AND CHARACTER OF THE USE; DO YOU SEE
19 THAT?

20 A. YES.

21 Q. DID YOU COMPLETE THIS SECTION OF THE FAIR USE CHECKLIST?

22 A. YES.

23 Q. AND I SHOULD -- SO UPON COMPLETING THAT SECTION OF FACTOR
24 1, DID YOU REACH A CONCLUSION ABOUT WHETHER FACTOR 1 WEIGHED IN
25 FAVOR OF FAIR USE?

1 A. YES, I DID.

2 Q. AND WHAT WAS YOUR CONCLUSION WITH RESPECT TO THAT FACTOR
3 1?

4 A. MY CONCLUSION WAS THAT THE SUBFACTORS IN FACTOR 1 WEIGHED
5 IN FAVOR OF FAIR USE.

6 Q. WHY?

7 A. I CHECKED ONE, TWO, THREE BOXES UNDER WEIGHS IN FAVOR OF
8 FAIR USE. I CHECKED NO BOXES IN THE COLUMN WEIGHS AGAINST FAIR
9 USE. SO IT SEEMED TO ME THAT A PREPONDERANCE OF FACTORS IN
10 FAVOR OF FAIR USE EXISTED, AND, THEREFORE, THE ENTIRE SECTION
11 WEIGHED IN FAVOR OF FAIR USE.

12 Q. WHICH FACTORS DID YOU SELECT THAT WEIGHED IN FAVOR OF FAIR
13 USE?

14 A. THE FIRST SUBFACTOR, I GUESS, NONPROFIT EDUCATIONAL, THE
15 SECOND SUBFACTOR TEACHING INCLUDING MULTIPLE COPIES FOR
16 CLASSROOM USE, AND THE FINAL SUBFACTOR USE IS NECESSARY TO
17 ACHIEVE YOUR INTENDED EDUCATIONAL PURPOSE.

18 Q. WHY DID YOU SELECT NONPROFIT EDUCATIONAL FOR THIS
19 PARTICULAR WORK?

20 A. BECAUSE GEORGIA STATE UNIVERSITY IS A NONPROFIT -- OR A
21 NOT-FOR-PROFIT INSTITUTION AND BECAUSE A UNIVERSITY IS ENGAGED
22 IN EDUCATION, AND I WAS TEACHING IN A CLASSROOM AND ENGAGED IN
23 EDUCATION.

24 Q. AND YOU ALSO SELECTED TEACHING INCLUDING MULTIPLE COPIES
25 FOR CLASSROOM USE. WHY DID YOU SELECT THAT SUBFACTOR FOR THIS

1 PARTICULAR WORK?

2 A. BECAUSE I PLANNED TO USE THE WORK FOR TEACHING. I PLANNED
3 TO DISCUSS THE WORK WITH STUDENTS IN THE CLASSROOM.

4 Q. AND YOU ALSO SELECTED USE IS NECESSARY TO ACHIEVE YOUR
5 INTENDED EDUCATIONAL PURPOSE. WHY DID YOU SELECT THAT
6 PARTICULAR SUBFACTOR FOR THIS PARTICULAR WORK?

7 A. I BELIEVED THAT THE USE OF THIS READING WAS NECESSARY IN
8 ORDER TO ILLUMINATE THE EDUCATIONAL PURPOSE OF THAT CLASS,
9 WHICH WAS PRESENTING CHINESE RELATIONS WITH OTHER CULTURES OR
10 STATES OR PEOPLES IN ASIA.

11 Q. AND WHY DID YOU BELIEVE THAT THE USE OF THIS READING
12 WAS NECESSARY TO ILLUMINATE THAT EDUCATIONAL PURPOSE OF THE
13 CLASS?

14 A. WELL, THIS READING TOUCHES DIRECTLY ON THE QUESTION OF
15 CHINESE RELATIONSHIPS WITH ANOTHER EAST ASIAN OR MORE BROADLY
16 ASIAN STATES OR PEOPLES OR CULTURE, AND AS SUCH IT SPEAKS
17 DIRECTLY TO THE LARGER QUESTION OF HOW CHINA INTERACTED IN ITS
18 HISTORY WITH OTHER PEOPLES OR CULTURES.

19 Q. I WANT TO DIRECT YOUR ATTENTION NOW TO FACTOR 2, WHICH
20 APPEARS ON GEORGIA STATE 66120 OF GAINY TX-2. DID YOU
21 COMPLETE THE SECTION UNDER FACTOR 2 ENTITLED NATURE OF THE
22 COPYRIGHTED WORK IN THE FALL OF 2009 TIMEFRAME?

23 A. I -- YES.

24 Q. UPON COMPLETING THAT SECTION FOR FACTOR 2, DID YOU REACH
25 A CONCLUSION ABOUT WHETHER FACTOR 2 WEIGHED IN FAVOR OF FAIR

1 USE?

2 A. I DID.

3 Q. WHAT WAS THAT CONCLUSION?

4 A. MY CONCLUSION WAS THAT THE FACTOR, THE NATURE OF

5 COPYRIGHTED WORKS, WEIGHED COMPLETELY IN FAVOR OF FAIR USE.

6 Q. AND HOW DID YOU REACH THAT CONCLUSION?

7 A. I READ THE SUBFACTORS ON BOTH SIDES, BOTH IN FAVOR OF FAIR

8 USE AND AGAINST FAIR USE, AND IN EACH CASE I SELECTED THE

9 SUBFACTOR IN FAVOR OF FAIR USE.

10 Q. AND SPECIFICALLY WHICH SUBFACTORS DID YOU SELECT IN FAVOR

11 OF FAIR USE?

12 A. I SELECTED THE FIRST SUBFACTOR PUBLISHED WORK. I SELECTED

13 THE SECOND SUBFACTOR FACTUAL OR NONFICTION WORK, AND I SELECTED

14 THE THIRD SUBFACTOR IMPORTANT TO EDUCATIONAL OBJECTIVE.

15 Q. WITH RESPECT TO THE FIRST SUBFACTOR, PUBLISHED WORK, WHY

16 DID YOU SELECT THAT SUBFACTOR FOR THIS PARTICULAR WORK?

17 A. BECAUSE THIS WORK IS -- IS PUBLISHED.

18 Q. WITH RESPECT TO THE SECOND SUBFACTOR, FACTUAL OR

19 NONFICTION WORKS, WHY DID YOU SELECT THAT PARTICULAR SUBFACTOR

20 FOR THIS PARTICULAR WORK?

21 A. BECAUSE -- I SELECTED THAT BECAUSE THIS IS NOT A WORK OF

22 FICTION AND -- BECAUSE IT'S A NONFICTION WORK.

23 Q. AND WITH RESPECT TO THE THIRD SUBFACTOR IN FAVOR OF FAIR

24 USE IMPORTANT TO EDUCATIONAL OBJECTIVES, WHY DID YOU SELECT

25 THAT SUBFACTOR?

1 A. SIMILAR TO MY PREVIOUS ANSWER REGARDING FACTOR 1
2 SUBFACTOR, USE IS NECESSARY TO ACHIEVE YOUR INTENDED
3 EDUCATIONAL PURPOSE, I BELIEVE THAT THIS WORK WAS IMPORTANT TO
4 MY EDUCATIONAL OBJECTIVES.

5 THOSE OBJECTIVES BEING TO INTRODUCE STUDENTS TO
6 DIFFERENT -- DIFFERENT EXAMPLES OF CHINESE INTERACTION WITH
7 OTHER ASIAN STATES OR PEOPLES OR CULTURES.

8 Q. AND CAN YOU EXPLAIN WHY THIS PARTICULAR READING WAS
9 IMPORTANT TO THAT OBJECTIVE?

10 A. THIS PARTICULAR READING DEALS WITH CHINA AND ITS
11 INTERACTIONS WITH KOREA WHICH IS A NEIGHBORING STATE OR A
12 NEIGHBORING CULTURAL REGION OR WHATEVER YOU WOULD LIKE TO CALL
13 IT, THROUGH THE TRIBUTARY SYSTEM WHICH WAS AN IMPORTANT
14 COMPONENT OF CHINESE RELATIONSHIPS WITH OTHER ASIAN STATES OR
15 PEOPLES OR CULTURES. SO I FELT THAT PRESENTING THIS WAS
16 IMPORTANT IN INTRODUCING THOSE IDEAS TO STUDENTS.

17 Q. ON PAGE 66120 OF GAINITY TX-2 THERE'S A FACTOR 3 ENTITLED
18 AMOUNT AND SUBSTANTIALITY OF PORTION USED. DID YOU COMPLETE
19 THAT PORTION OF THE CHECKLIST?

20 A. I DID.

21 Q. AND UPON COMPLETING THAT SECTION OF THE CHECKLIST RELATING
22 TO FACTOR 3, DID YOU REACH A CONCLUSION ABOUT WHETHER FACTOR 3
23 WEIGHED IN FAVOR OF FAIR USE?

24 A. I DID.

25 Q. AND WHAT WAS THAT CONCLUSION?

1 A. I CONCLUDED THAT THE FACTOR WEIGHED IN FAVOR OF FAIR USE.

2 Q. AND WHY DID YOU CONCLUDE THAT FACTOR 3 WEIGHED IN FAVOR OF

3 FAIR USE?

4 A. I READ ALL OF THE SUBFACTORS BOTH IN FAVOR OF FAIR USE AND

5 AGAINST FAIR USE, AND I CHECKED TWO OF THE THREE SUBFACTORS IN

6 FAVOR OF FAIR USE AND NONE OF THE SUBFACTORS AGAINST FAIR USE.

7 Q. WHAT WERE THE FACTORS THAT YOU SELECTED IN FAVOR OF FAIR

8 USE?

9 A. THE FIRST IS SMALL PORTION OF WORK USED, AND THE SECOND IS

10 AMOUNT TAKEN IS NARROWLY TAILORED TO EDUCATIONAL PURPOSE SUCH

11 AS CRITICISM, COMMENT, RESEARCH OR SUBJECT BEING TAUGHT.

12 Q. WHY DID YOU SELECT FOR THIS PARTICULAR WORK SMALL PORTION

13 OF WORK USED?

14 A. BECAUSE I -- IN -- I DEEMED THIS TO BE A SMALL PORTION OF

15 THE ENTIRE WORK, CERTAINLY A VERY SMALL PORTION OF THE ENTIRE

16 CAMBRIDGE HISTORY OF CHINA, WHICH IS, ALTHOUGH A MULTIVOLUME

17 SET, ONE TITLE, AS I UNDERSTAND IT BUT IT'S ALSO A SMALL

18 PORTION OF EVEN THAT VOLUME 8, PART 2 OF THE CAMBRIDGE HISTORY

19 OF CHINA.

20 Q. DO YOU KNOW ROUGHLY HOW MANY PAGES YOU ASSIGNED WITH

21 RESPECT TO THIS EXCERPT FROM THE CAMBRIDGE HISTORY OF CHINA?

22 A. I ASSIGNED 29 PAGES, IF I AM COUNTING CORRECTLY.

23 Q. DO YOU RECALL HOW MANY PAGES ARE CONTAINED WITHIN THAT

24 VOLUME 8, PART 2, FROM WHICH YOU ASSIGNED?

25 A. I DO NOT BUT I BELIEVE IT HAS AT LEAST 300 PAGES GIVEN

1 THAT MY SELECTION IS FROM PAGE 272 THROUGH 300.

2 Q. YOU ALSO SELECTED THAT THE AMOUNT TAKEN IS NARROWLY
3 TAILORED TO EDUCATIONAL PURPOSES SUCH AS CRITICISM, COMMENT,
4 RESEARCH OR SUBJECT BEING TAUGHT. WHY DID YOU SELECT THAT
5 SUBFACTOR FOR THIS PARTICULAR WORK?

6 A. I THOUGHT CAREFULLY ABOUT HOW MUCH OF BOTH THE CAMBRIDGE
7 HISTORY OF CHINA AND OF THIS PARTICULAR VOLUME AND, IN FACT, OF
8 THIS ARTICLE WAS NECESSARY FOR EDUCATIONAL PURPOSES, AND I
9 DETERMINED IN MY BEST JUDGMENT THAT PAGES 272 THROUGH 300 WERE
10 NECESSARY FOR MY EDUCATIONAL PURPOSE REGARDING THE SUBJECT
11 BEING TAUGHT AND THE GENERAL CONSTRUCTION OF AN HISTORICAL
12 ARGUMENT.

13 Q. WAS ANY PORTION OF THE EXCERPT THAT YOU SELECTED 272
14 THROUGH 300 UNRELATED TO THE SUBJECT MATTER THAT YOU WERE
15 TEACHING THAT DAY IN CLASS OR THAT YOU INTENDED TO TEACH THAT
16 DAY IN THIS PARTICULAR CLASS?

17 A. NO, NOT -- NOT -- NOT TO MY KNOWLEDGE.

18 Q. TURNING TO THE FOURTH FACTOR ENTITLED EFFECT ON MARKET FOR
19 ORIGINAL ON THAT SAME PAGE 66120 OF GAINTY TX-2, DID YOU
20 COMPLETE THAT SECTION ON THE CHECKLIST?

21 A. I DID.

22 Q. UPON COMPLETING THAT SECTION DID YOU REACH A CONCLUSION
23 ABOUT WHETHER FACTOR 4 WEIGHED IN FAVOR OF FAIR USE?

24 A. I DID.

25 Q. WHAT WAS THAT CONCLUSION?

1 A. I CONCLUDED THAT FACTOR 4 WEIGHED IN FAVOR OF FAIR USE.

2 Q. HOW DID YOU REACH THAT CONCLUSION?

3 A. I, AS IN THE OTHER FACTORS, READ ALL OF THE SUBFACTORS AND
4 USED MY BEST JUDGMENT TO DETERMINE WHICH ACCURATELY DESCRIBED
5 MY USE OF THE MATERIAL IN THIS CLASS.

6 I SELECTED THREE SUBFACTORS IN FAVOR OF FAIR USE AND
7 ONE SUBFACTOR AGAINST FAIR USE. BECAUSE -- NOT TO BE SILLY BUT
8 BECAUSE THREE IS GREATER THAN ONE, I FELT THAT THERE WERE SOME
9 FACTORS IN FAVOR OF FAIR USE AND THEREFORE THE AGGREGATE
10 OUTCOME OF FACTOR 4 WEIGHED IN FAVOR OF FAIR USE.

11 Q. WHICH THREE FACTORS DID YOU SELECT THAT WEIGHED IN FAVOR
12 OF FAIR USE?

13 A. I SELECTED NO SIGNIFICANT EFFECT ON THE MARKET OR
14 POTENTIAL MARKET FOR COPYRIGHTED WORK AND USE STIMULATES MARKET
15 FOR ORIGINAL WORK AND RESTRICTED ACCESS TO STUDENTS OR OTHER
16 APPROPRIATE GROUP.

17 Q. AND WHICH FACTORS DID YOU SELECT UNDER FACTOR 4 THAT DID
18 NOT WEIGH IN FAVOR OF FAIR USE?

19 A. REQUIRED CLASSROOM READING.

20 Q. I WANT TO STEP THROUGH EACH OF THESE SUBFACTORS AS WE HAVE
21 BEFORE. WITH RESPECT TO THE FIRST SUBFACTOR UNDER WEIGHS IN
22 FAVOR OF FAIR USE, NO SIGNIFICANT EFFECT ON MARKET OR POTENTIAL
23 MARKET FOR COPYRIGHTED WORKS, CAN YOU EXPLAIN WHY YOU SELECTED
24 THAT PARTICULAR SUBFACTOR?

25 A. I BELIEVE THAT WHETHER A STUDENT READS THIS EXCERPT OR NOT

1 WILL NOT HAVE A SIGNIFICANT NEGATIVE EFFECT ON THE POTENTIAL
2 MARKET FOR THE COPYRIGHTED WORK.

3 Q. WHY NOT?

4 A. THE COPYRIGHTED WORK CONTAINS MUCH MORE AND AS I
5 UNDERSTAND IT, VERY DIVERSE WRITING ON THE HISTORY OF CHINA.
6 THIS PARTICULAR EXCERPT FROM THE WORK DEALS SPECIFICALLY WITH
7 ONE SMALL COMPONENT OF THE MULTIMILLENNIA HISTORY OF CHINA.
8 BECAUSE OF THIS I FELT THE WORK I SELECTED IN NO WAY EXHAUSTED
9 THE ENTIRE RANGE OF IDEAS OR SCHOLARSHIP CONTAINED IN THE
10 LARGER WORK.

11 Q. YOU ALSO SELECTED THAT THE USE STIMULATES THE MARKET FOR
12 ORIGINAL WORK. CAN YOU EXPLAIN WHY YOU SELECTED THAT
13 SUBFACTOR?

14 A. YES, THE -- SELECTING USE STIMULATES MARKET FOR ORIGINAL
15 WORK REFLECTS MY BELIEF AND -- AT LEAST MY HOPE BUT MY BELIEF
16 THAT EXPOSING STUDENTS TO A SMALL PORTION OF THIS SORT OF
17 SCHOLARSHIP WILL ENCOURAGE STUDENTS TO CONTINUE TO BE EXCITED
18 BY AND SEEK OUT READINGS AND OTHER SCHOLARSHIP ON CHINESE
19 HISTORY AND ON HISTORY IN GENERAL.

20 IT WAS MY HOPE, THEREFORE, AND I THINK THE REASONABLE
21 BELIEF THAT STUDENTS WHO ARE EXCITED BY THIS PARTICULAR EXCERPT
22 WOULD THEN ON THEIR OWN POTENTIALLY TRY TO FIND MORE FROM THIS
23 PARTICULAR WORK.

24 Q. YOU ALSO SELECTED THE SUBFACTOR RESTRICTED ACCESS TO
25 STUDENTS OR OTHER APPROPRIATE GROUP. WHY DID YOU SELECT THAT

1 SUBFACTOR?

2 A. IT'S MY UNDERSTANDING THAT THE ERESERVE SYSTEM WHICH IS
3 PASSWORD PROTECTED ONLY ALLOWS STUDENTS WHO HAVE THE PASSWORD
4 FROM THE COURSE TO HAVE ACCESS TO THAT PARTICULAR COURSE'S PAGE
5 AND TO READ THOSE MATERIALS. THIS RESTRICTS ACCESS.

6 Q. DO YOU HAVE AN UNDERSTANDING OF WHAT HAPPENS TO THE
7 MATERIALS POSTED ON ERES ONCE A COURSE HAS CONCLUDED?

8 A. I DO.

9 Q. AND WHAT IS THAT UNDERSTANDING?

10 A. MY UNDERSTANDING IS THAT THE MATERIALS ARE NO LONGER
11 AVAILABLE THROUGH ERESERVE EVEN TO STUDENTS WITH THE PASSWORD.
12 THIS UNDERSTANDING IS BASED ON MY PERSONAL EXPERIENCE WHEN I
13 HAVE GONE ONTO THE LIBRARY'S ERESERVE WEBSITE.

14 THE ERESERVE SYSTEM CAN BE SEARCHED IN A NUMBER OF
15 WAYS. ONE OF THEM IS BY INSTRUCTOR NAME. WHEN I SEARCH BY
16 INSTRUCTOR NAME ONLY MY CURRENT COURSES FOR THAT SEMESTER ARE
17 VISIBLE AND COURSES FROM PREVIOUS SEMESTERS ARE NOT VISIBLE.

18 Q. ON THE RIGHT-HAND SIDE OF THE SECTION UNDER FACTOR 4 YOU
19 SELECTED REQUIRED CLASSROOM READING. CAN YOU EXPLAIN WHY YOU
20 SELECTED REQUIRED CLASSROOM READING?

21 A. I REQUIRED MY STUDENTS TO READ THIS WORK.

22 Q. SO ONCE YOU COMPLETED THE CHECKLIST FOR ALL FOUR OF THESE
23 FACTORS THAT WE JUST US DISCUSSED, DID YOU ARRIVE AT AN OVERALL
24 CONCLUSION ABOUT WHETHER YOUR USE OF THIS EXCERPT CONSTITUTED A
25 FAIR USE?

1 A. I DID.

2 Q. AND WHAT WAS YOUR OVERALL CONCLUSION WITH RESPECT TO FAIR
3 USE FOR THIS PARTICULAR EXCERPT THAT YOU ASSIGNED?

4 A. MY OVERALL CONCLUSION WAS THAT ALL OF THE FACTORS WEIGHED
5 IN FAVOR OF FAIR USE AND THAT MY USE OF THIS READING, THIS
6 EXCERPT, IN THIS CLASS WAS A FAIR USE OF THIS COPYRIGHTED WORK.

7 MR. MILLER: YOUR HONOR, THAT'S PAGE 35, LINE 14.
8 WE'VE MOVING TO PAGE 36, LINE 14.

9 Q. AFTER COMPLETED THIS FAIR USE CHECKLIST GAINITY TX-2, WHAT
10 STEPS DID YOU TAKE TO REQUEST THAT THIS EXCERPT BE LOADED TO
11 THE ERESERVE SYSTEM?

12 A. THERE IS A FORM ON THE LIBRARY WEBSITE THAT IS TO BE
13 COMPLETED BY THE FACULTY MEMBER FOR EACH COURSE IN ORDER TO
14 SUBMIT A REQUEST FOR A DOCUMENT OR A READING TO BE PLACED ON
15 ERESERVE. I BELIEVE I COMPLETED THIS FORM AND REQUESTED THAT
16 THIS BE LOADED ONTO THE ERESERVE SITE.

17 Q. AND WHAT TYPE OF INFORMATION ARE YOU REQUESTED TO SUBMIT
18 IN CONNECTION WITH THIS FORM THAT YOU COMPLETED?

19 A. I -- I DON'T REMEMBER EXACTLY, BUT IT WOULD BE SOME KIND
20 OF IDENTIFYING DATA ABOUT THAT WORK SO THAT LIBRARIANS KNOW
21 WHAT IT IS THAT I'M REQUESTING, SUCH AS AUTHOR OR EDITION OR
22 PAGE NUMBERS OR THAT SORT OF THING.

23 Q. ARE YOU -- DOES THE FORM PROMPT YOU TO SAY ANYTHING ABOUT
24 YOUR COMPLETION OF THE FAIR USE CHECKLIST?

25 A. IT DOES.

1 Q. AND SPECIFICALLY WHAT DOES IT PROMPT YOU TO SUBMIT WITH
2 RESPECT TO THE FORM?

3 A. THIS IS ONLY MY PARAPHRASING I DON'T REMEMBER EXACTLY, BUT
4 I BELIEVE THERE ARE BOXES TO BE CHECKED, ONE OF WHICH SAYS
5 SOMETHING LIKE, TO THE EFFECT OF, THIS -- THE USE OF THIS
6 READING CONSTITUTES FAIR USE ACCORDING TO A FAIR USE CHECKLIST
7 THAT I COMPLETED. I BELIEVE IT'S SOMETHING LIKE THAT.

8 Q. AND DO YOU RECALL WHETHER YOU SUBMITTED ANY INFORMATION
9 WITH RESPECT TO THAT PROMPT IN THE FORM FOR THIS PARTICULAR
10 WORK?

11 A. I BELIEVE, AGAIN, THAT I CHECKED THAT BOX.

12 Q. AND HAD YOU, IN FACT, COMPLETED A FAIR USE CHECKLIST FOR
13 THAT PARTICULAR WORK THAT YOU WERE REQUESTING TO BE POSTED FOR
14 THE FALL 2009 COURSE, THE WORK THAT WE HAVE BEEN DISCUSSING
15 FROM THE CAMBRIDGE HISTORY OF CHINA?

16 A. AS I RECALL, YES.

17 MR. MILLER: YOUR HONOR, THAT'S PAGE 37, LINE 18.
18 NOW MOVING AHEAD TO PAGE 39, LINE 1 --

19 THE COURT: LET ME INTERRUPT YOU, IF I CAN. HOW MUCH
20 MORE HAVE YOU GOT TO GO?

21 MR. MILLER: TWO AND A HALF PAGES OF DIRECT
22 EXAMINATION, YOUR HONOR, AND APPROXIMATELY ONE PAGE OF REDIRECT
23 EXAMINATION AND FROM THE PLAINTIFFS' DESIGNATIONS THIS LOOKS TO
24 AMOUNT TO APPROXIMATELY FIVE PAGES, FIVE OR SEVEN PAGES.

25 THE COURT: WHY DON'T WE GO AHEAD AND BREAK FOR

1 LUNCH. WE'LL BE IN RECESS UNTIL 1:30.

2 (NOON RECESS)

3 THE COURT: YOU MAY PROCEED.

4 MR. MILLER: BEGINNING WITH THE DEPOSITION OF
5 PROFESSOR GAINTY STARTING PAGE 39, LINE 1.

6 Q. WITH RESPECT TO THIS HISTORY 4820 COURSE THAT -- IN THE
7 FALL OF 2009 THAT WAS CANCELED DUE TO UNDERENROLLMENT, DID YOU
8 ASSIGN TO YOUR STUDENTS THE SINO-KOREAN TRIBUTARY RELATIONS
9 UNDER THE MING EXCERPT FROM THE CAMBRIDGE HISTORY OF CHINA?

10 A. I PLACED IT ON THE SYLLABUS THAT -- I'M NOW FEELING
11 SLIGHTLY UNSURE ABOUT THE DEFINITION OF ASSIGNMENT. I MEAN --

12 MR. MILLER: MR. BLOOM ASKS MAYBE -- I DON'T WANT TO
13 INTERRUPT YOU.

14 A. I APOLOGIZE FOR THAT. I -- ONE MIGHT SAY THAT ONE ONLY
15 ASSIGNS A WORK ON THAT GIVEN DAY. I CERTAINLY PLACED IT ON THE
16 SYLLABUS WITH THE INTENTION THAT STUDENTS WOULD READ IT.

17 MR. MILLER: THIS IS MR. BLOOM HERE, MAYBE WE CAN
18 JUST STIPULATE THAT HE SELECTED THIS READING FOR THAT COURSE.

19 MS. MOFFITT, YEAH.

20 MR. BLOOM, WHICH WAS SUBSEQUENTLY CANCELED.

21 MS. MOFFITT, OKAY.

22 MR. BLOOM, I JUST WANTED THE RECORD TO BE PRECISE.

23 Q. IS THAT A FAIR CHARACTERIZATION, YOU SELECTED THIS READING
24 FOR THAT COURSE?

25 A. YES.

1 MR. MILLER: BACK TO EXAMINATION BY MS. MOFFITT.

2 Q. I CAN ASK THE QUESTION FOR YOU SO YOU FEEL COMFORTABLE
3 ABOUT OUR EXCHANGE.

4 WOULD YOU SAY, PROFESSOR GAINY, THAT WITH RESPECT TO
5 THE HISTORY 4820 COURSE THAT WAS SCHEDULED TO BE TAUGHT IN THE
6 FALL OF 2009 THAT YOU SELECTED THE SINO-KOREAN TRIBUTARY
7 RELATIONS UNDER THE MING EXCERPT FROM THE CAMBRIDGE HISTORY OF
8 CHINA AS A READING FOR THAT PARTICULAR COURSE?

9 A. YES.

10 Q. ALL RIGHT. SO IF IT IS DETERMINED THAT YOUR USE OF THIS
11 EXCERPT SINO-KOREAN TRIBUTARY RELATIONS UNDER THE MING WAS NOT
12 A FAIR USE, WHAT WOULD YOU DO WITH RESPECT TO YOUR USE OF THIS
13 CHECKLIST IN THIS COURSE?

14 A. IF IT WERE DETERMINED ACCORDING TO THE FAIR USE CHECKLIST
15 THAT IT WAS NOT IN FACT FAIR USE, I SUPPOSE -- I CAN ONLY
16 SPECULATE, BUT I SUPPOSE I WOULD EITHER FIND A DIFFERENT
17 READING. I DON'T KNOW WHAT THE READING WOULD BE. I WOULD LOOK
18 FOR ONE, I SUPPOSE, OR I WOULD SPEAK WITH THE OFFICE OF LEGAL
19 AFFAIRS. I DON'T KNOW.

20 Q. WOULD YOU CONTINUE TO ASSIGN THE EXCERPT TO YOUR STUDENTS
21 IF IT WERE DETERMINED THAT YOUR USE OF THE EXCERPT WAS NOT A
22 FAIR USE?

23 A. IF IN ITS CURRENT FORM IT WERE NOT FAIR USE, THEN I WOULD
24 NOT ASSIGN IT. WHAT I'M TRYING TO SAY I GUESS IS THAT I WOULD
25 NOT ASSIGN A READING IN A FORM THAT WAS SPECIFICALLY DETERMINED

1 NOT TO BE FAIR USE.

2 MR. MILLER: YOUR HONOR, THAT'S PAGE 41, LINE 5 AND
3 THAT IS THE CONCLUSION OF DIRECT. NOW I'LL TURN TO
4 CROSS-EXAMINATION BY THE PLAINTIFFS BY MR. BLOOM. YOUR HONOR,
5 BEGINNING ON PAGE 43, LINE 24.

6 CROSS-EXAMINATION

7 Q. OKAY. AND ARE YOU -- YOU TESTIFIED ABOUT A CHANGE IN THE
8 UNIVERSITY'S COPYRIGHT POLICY IN 2009; DO YOU RECALL THAT?

9 A. I DO.

10 Q. OKAY. AND CAN YOU EXPLAIN HOW YOU BECAME AWARE OF THAT
11 CHANGE IN POLICY?

12 A. HONESTLY I DON'T RECALL SPECIFICALLY.

13 Q. DO YOU RECALL WHEN YOU BECAME AWARE OF IT?

14 A. NO, HONESTLY I DO NOT.

15 MR. MILLER: YOUR HONOR, THAT'S PAGE 44, LINE 7.

16 WE'LL MOVE DOWN A FEW LINES TO PAGE 44, LINE 14.

17 Q. LET ME JUST -- I'M GOING TO SHOW YOU WHAT I'M GOING TO
18 MARK GAINY PLAINTIFFS' EXHIBIT 1 AND JUST ASK YOU IF YOU
19 RECALL HAVING SEEN THAT DOCUMENT BEFORE?

20 MR. MILLER: AND, YOUR HONOR, THAT'S PAGE 44, LINE
21 16, THERE ARE SOME OBJECTIONS CUT OUT HERE, AND THEN WE BEGIN
22 AGAIN WITH THE ANSWER ON PAGE 44, LINE 23.

23 A. I DON'T RECALL SPECIFICALLY SEEING THIS DOCUMENT.

24 MR. MILLER: AND, YOUR HONOR, THAT'S PAGE 44, LINE

25 24. WE MOVE YOU AHEAD TO PAGE 45, LINE 17.

1 Q. DID YOU INTEND -- DID YOU ATTEND ANY KIND OF CLASS OFFERED
2 BY THE UNIVERSITY WITH RESPECT TO HOW TO FILL OUT THE
3 CHECKLIST?

4 A. NOT THAT I RECALL.

5 MR. MILLER: YOUR HONOR, THAT'S PAGE 45, LINE 20.
6 MOVING ON TO PAGE 46, LINE 10.

7 Q. LET ME JUST ASK GENERALLY AT ANY TIME DID YOU HAVE ANY
8 CONVERSATIONS WITH ANYONE IN THE LEGAL AFFAIRS DEPARTMENT ABOUT
9 HOW FAIR USE CHECKLISTS IN GENERAL NOT WITH RESPECT TO THIS
10 SPECIFIC WORK NECESSARILY SHOULD BE COMPLETED?

11 A. NOT THAT I RECALL. NOT THAT I RECALL.

12 MR. MILLER: THAT'S PAGE 46, LINE 15, YOUR HONOR.
13 MOVING AHEAD TO PAGE 47, LINE 13.

14 Q. BUT YOU TESTIFIED EARLIER, I BELIEVE, AND CORRECT ME IF
15 I'M WRONG, THAT YOU DON'T SPECIFICALLY RECALL COMPLETING THE
16 CHECKLIST IN 2009, CORRECT?

17 MR. MILLER: THAT'S PAGE 47, LINE 15, AN OBJECTION IS
18 SKIPPED AND THEN BEGINNING WITH THE ANSWER ON PAGE 47,
19 LINE 20.

20 A. CORRECT.

21 MR. MILLER: YOUR HONOR, PAGE 50, LINE 14.

22 Q. I UNDERSTAND. THAT'S FINE. LET ME ASK YOU ABOUT THE --
23 ONE OF THE FACTORS ON THE OTHER SIDE OF THE LEDGER
24 NONTRANSFORMATIVE, DO YOU HAVE AN UNDERSTANDING ONE WAY OR THE
25 OTHER AS TO WHETHER THIS PARTICULAR READING -- THE PLACEMENT OF

1 THIS PARTICULAR READING ON ERES WOULD BE TRANSFORMATIVE OR
2 NONTRANSFORMATIVE?

3 A. I HONESTLY WAS NOT SURE WHAT TRANSFORMATIVE MIGHT MEAN.
4 ON THE ONE HAND THE WORK -- MAYBE I SHOULD HAVE CHECKED
5 TRANSFORMATIVE THINKING NOW ABOUT IT. THE WORK WAS INTENDED
6 FOR MY CLASS. SO I SUPPOSE THAT'S A NEW UTILITY OR PURPOSE. I
7 DON'T KNOW.

8 MR. MILLER: YOUR HONOR, THAT'S PAGE 51, LINE 1.
9 MOVING AHEAD TO PAGE 51, LINE 20.

10 Q. SO YOU DIDN'T CONCEIVE OF A CHAPTER WITHIN A BOOK AS BEING
11 A SEPARATE WORK; IS THAT AN ACCURATE CHARACTERIZATION OF YOUR
12 THINKING?

13 A. YES.

14 Q. LOOKING DOWN AT FACTOR 4, YOU TESTIFIED AS TO YOUR OVERALL
15 EVALUATION OF THIS FACTOR THAT YOU CHECKED 3 BOXES IN THE
16 LEFT-HAND COLUMN AND ONE BOX IN THE RIGHT-HAND COLUMN, AND THAT
17 THERE WAS GREATER THAN ONE AS YOU STATED AND THAT LED -- AND
18 THAT THREE WAS GREATER THAN ONE AS YOU STATED, AND THAT LED YOU
19 TO CONCLUDE THAT THE FACTOR AS A WHOLE WEIGHED IN FAVOR OF FAIR
20 USE; DO YOU RECALL THAT TESTIMONY?

21 A. I DO.

22 Q. OKAY. WHEN YOU SAY THREE IS GREATER THAN ONE, DOES THAT
23 REFLECT AN UNDERSTANDING THAT EACH ONE OF THE SUBFACTORS IS TO
24 BE TREATED EQUALLY IN TERMS OF ITS WEIGHT IN THE ANALYSIS?

25 A. IT DOES.

1 Q. OKAY. AND DO YOU HAVE AN UNDERSTANDING WITH RESPECT TO
2 FACTORS 1 THROUGH 4, NOT THE SUBFACTORS BUT FACTORS 1 THROUGH
3 4, DO YOU HAVE AN UNDERSTANDING AS TO WHETHER THEY ARE ALSO TO
4 BE TREATED EQUALLY IN THE ANALYSIS?

5 A. HONESTLY I DO NOT.

6 Q. YOU DON'T HAVE AN UNDERSTANDING ONE WAY OR THE OTHER; IS
7 THAT YOUR TESTIMONY?

8 A. THAT'S CORRECT.

9 MR. MILLER: YOUR HONOR, THAT'S PAGE 52, LINE 20.
10 MOVING AHEAD TO PAGE 53, LINE 11.

11 Q. SO IS IT -- DO YOU HAVE AN UNDERSTANDING ONE WAY OR THE
12 OTHER AS TO WHETHER IT IS POSSIBLE TO GET PERMISSION TO USE A
13 PORTION OF A BOOK IN CONNECTION WITH THE ERES SYSTEM?

14 A. MY UNDERSTANDING IS THAT FAIR USE IS EXACTLY FAIR USE AND
15 THAT EITHER PERMISSION OR THE DETERMINATION OF FAIR USE WOULD
16 JUSTIFY THE USE OF A WORK.

17 Q. HAVE YOU EVER HEARD OF THE COPYRIGHT CLEARANCE CENTER?

18 A. I HAVE NOT.

19 MR. MILLER: YOUR HONOR, THAT'S PAGE 53, LINE 21 AND
20 THAT'S THE COMPLETION OF THE EXCERPTS FROM THE
21 CROSS-EXAMINATION AND ONE SHORT EXCERPT FROM REDIRECT
22 EXAMINATION BEGINNING ON PAGE 60, LINE 5, QUESTION BY MS.
23 MOFFITT.

24 Q. I BELIEVE YOU INDICATED IN RESPONSE TO ONE OF MR. BLOOM'S
25 QUESTIONS THAT THE UNIVERSITY ASKED PROFESSORS TO COMPLETE

1 CHECKLISTS FOR MATERIALS THAT THEY WANTED TO PLACE ON
2 ERESERVES; IS THAT CORRECT?

3 A. I BELIEVE SO, YES.

4 Q. AND IS IT YOUR PRACTICE, PROFESSOR GAINY, TO COMPLETE
5 CHECKLISTS FOR WORKS THAT YOU INTEND TO PLACE ON ERESERVE
6 FURTHER TO THE REQUEST OF THE UNIVERSITY?

7 A. YES.

8 Q. AND DO YOU HAVE ANY REASON TO BELIEVE THAT YOU DID NOT
9 COMPLETE A CHECKLIST FOR THE CLARK WORK IDENTIFIED IN YOUR
10 SYLLABUS TX-1 AS SINO-KOREAN TRIBUTARY RELATIONS UNDER THE MING
11 FROM THE CAMBRIDGE HISTORY OF CHINA IN THE FALL 2009 SOMETIME
12 PRIOR TO WHEN THE HISTORY 4820 COURSE STARTED?

13 A. I HAVE NO REASON TO BELIEVE THAT I DIDN'T COMPLETE A
14 CHECKLIST.

15 Q. AND WHEN YOU RECREATED THE CHECKLIST THAT WE MARKED AS
16 GAINY TX-2 A FEW MONTHS AGO AS YOU TESTIFIED, DID YOU USE YOUR
17 BEST EFFORTS TO RECREATE THE CHECKLIST AS YOU BELIEVED YOU HAD
18 FILLED IT OUT IN THE 2009 TIMEFRAME?

19 A. YES.

20 MR. MILLER: THAT'S ALL FROM THE READING. WE
21 WOULD -- WE'LL WORK WITH THE PLAINTIFFS ON THE EXHIBITS FROM
22 THIS AND BRING THOSE IN NEXT WEEK.

23 THE COURT: ALL RIGHT. FINE. THANK YOU. CALL YOUR
24 NEXT WITNESS?

25 MR. SCHAEZEL: THAT WOULD BE PROFESSOR MOLONEY, YOUR

1 HONOR.

2 THE CLERK: PLEASE RAISE YOUR RIGHT HAND TO TAKE THE
3 OATH.

4 MARGARET F. MOLONEY,
5 HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

6 THE CLERK: IF YOU WILL HAVE A SEAT, PLEASE, AND
7 STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST NAME
8 ALSO.

9 THE WITNESS: MARGARET MOLONEY, M O L O N E Y.

10 DIRECT EXAMINATION

11 BY MS. QUICKER:

12 Q. WILL YOU PLEASE TELL US ABOUT YOUR UNDERGRADUATE
13 EDUCATION?

14 A. MY UNDERGRADUATE NURSING DEGREE, A BSN IN NURSING IS FROM
15 ILLINOIS WESLEYAN UNIVERSITY.

16 Q. AND DO YOU HAVE ANY GRADUATE DEGREES?

17 A. I HAVE A MASTER'S DEGREE IN NURSING FROM ST. LOUIS
18 UNIVERSITY, AND MY PH.D. IN NURSING IS FROM GEORGIA STATE.

19 Q. AND WHAT IS YOUR POSITION AT GEORGIA STATE?

20 A. I'M AN ASSOCIATE PROFESSOR IN THE SCHOOL OF NURSING, AND I
21 COORDINATE THE DOCTORAL PROGRAM.

22 Q. AND DID YOU ALSO PRACTICE AS A NURSE FOR SOME PERIOD OF
23 TIME?

24 A. YES, I'VE BEEN A NURSE PRACTITIONER FOR ABOUT 30 YEARS,
25 AND I PRACTICED IN OUTPATIENT AND INPATIENT SETTINGS AS A NURSE

1 PRACTITIONER BOTH IN INTERNAL MEDICINE AND WOMEN'S HEALTH.

2 Q. SO HOW LONG HAVE YOU BEEN TEACHING?

3 A. I'VE BEEN TEACHING FOR SEVEN YEARS HERE, AND I TAUGHT FOR

4 EIGHT YEARS AT EMORY. I TAUGHT IN SEVERAL OTHER PLACES IN ST.

5 LOUIS BEFORE THAT.

6 Q. AND CAN YOU GENERALLY DESCRIBE THE COURSES YOU TEACH AT

7 GEORGIA STATE UNIVERSITY?

8 A. I TEACH COURSES IN THE DOCTORAL PROGRAM. I ALSO TEACH

9 COURSES IN THE FAMILY NURSE PRACTITIONER PROGRAM.

10 Q. AND HAVE YOU AUTHORED ANY PUBLICATIONS?

11 A. YES.

12 Q. CAN YOU DESCRIBE THOSE JUST BRIEFLY?

13 A. MOST OF MY PUBLICATIONS HAVE BEEN AROUND CLINICAL AREAS

14 WITH IMPORTANCE TO NURSE PRACTITIONER PRACTICE AND WOMEN'S

15 HEALTH, AND I'VE ALSO PUBLISHED A NUMBER OF ARTICLES IN

16 RESEARCH -- FOR THE RESEARCH THAT I'VE DONE IN MIGRAINES IN

17 WOMEN, AND THOSE HAVE BEEN LIKE IN RESEARCH JOURNALS.

18 Q. OKAY. AND WERE YOU COMPENSATED FOR YOUR PUBLICATIONS?

19 A. YES.

20 Q. AND HOW WERE YOU COMPENSATED?

21 A. I WAS PAID 150 DOLLARS ALONG WITH THE TOTAL AMOUNT FOR

22 MYSELF AND MY COAUTHOR FOR THE ONE ARTICLE THAT I WROTE.

23 Q. AND DID YOU TEACH A COURSE CALLED THEORETICAL AND

24 PHILOSOPHICAL FOUNDATIONS OF NURSING 8035 IN FALL OF 2009?

25 A. YES.

1 Q. AND WAS NURSING 8035 AN UNDERGRADUATE OR GRADUATE COURSE?

2 A. GRADUATE.

3 Q. AND APPROXIMATELY HOW MANY STUDENTS WERE IN THAT CLASS IN
4 THE FALL OF 2009?

5 A. FOURTEEN.

6 Q. AND CAN YOU BRIEFLY DESCRIBE WHAT NURSING 8035 WAS ABOUT
7 IN THE FALL 2009?

8 A. WELL, THIS IS THE FIRST COURSE FOR STUDENTS IN -- FOR
9 DOCTORAL STUDENTS IN THEIR COURSE WORK, AND MOST OF THEM HAVE
10 BEEN PRACTICING NURSES. A LOT OF THEM ARE FROM OUT STATE
11 GEORGIA AND OTHER PARTS OF THE COUNTRY, AND THEY'VE NOT HAD
12 MUCH EXPOSURE TO THINGS LIKE PHILOSOPHY IN THE PAST.

13 SO IN THIS COURSE, I TRY TO GIVE THEM BOTH THE
14 FOUNDATION OF GENERAL PHILOSOPHY AND PHILOSOPHY WITH REGARD TO
15 SCIENCE WHERE -- HOW PHILOSOPHY EFFECTS SCIENCE, HOW SCIENCE
16 EFFECTS PHILOSOPHY, CULTURE ASPECTS OF IT, AND THEN ALSO HOW
17 THAT HAS INTERSECTED WITH NURSING PRACTICE AND RESEARCH AND
18 SOME OF THE ISSUES AROUND THAT FOR US TODAY.

19 Q. APPROXIMATELY HOW MANY DAYS A WEEK FOR THE COURSE DO THE
20 STUDENTS MEET?

21 A. ONE.

22 Q. AND WHERE DO THEY MEET?

23 A. MOST OF OUR STUDENTS ARE NOT FROM THIS AREA, AS I SAID,
24 AND WE HAVE A RELATIVELY NEW DOCTORAL PROGRAM THAT IS SUPPORTED
25 BY THE BOARD OF REGENTS IN ORDER TO PRODUCE FACULTY. THERE'S A

1 BIG NURSING FACULTY SHORTAGE, AND SO OUR STUDENTS ARE PEOPLE
2 WHO COME IN FROM OUT STATE GEORGIA PRIMARILY TO TAKE THESE
3 COURSES, AND SO WE'VE DEVELOPED AN INTERNET ENHANCED PROGRAM
4 FOR OUR DOCTORAL PROGRAM.

5 SO WE MEET ONE DAY A WEEK -- ONE DAY A MONTH, I'M
6 SORRY, ON CAMPUS FOR CLASSES, AND THEN WE HAVE -- THE REST OF
7 THE TIME WE HAVE OUR COURSES ON SYNCHRONOUS ONLINE COURSES WITH
8 OUR COMPUTER SO THAT WE'RE ALL MEETING AT THE SAME TIME ON OUR
9 COMPUTERS, BUT SOME OF THE STUDENTS ARE AT HOME, SOME OF THEM
10 ARE AT WORK, WE'RE IN OUR OFFICES, AND SO IT'S KIND OF A
11 COMBINATION OF REALTIME CLASSROOM AND ONLINE CLASSROOM.

12 Q. AND WAS A SYLLABUS PREPARED FOR THIS CLASS?

13 A. YES.

14 MS. QUICKER: YOUR HONOR, MAY I APPROACH?

15 THE COURT: YOU MAY.

16 BY MS. QUICKER:

17 Q. CAN YOU PLEASE TURN TO DX-621, WHICH I UNDERSTAND IS
18 PX-545 WHICH I THINK WAS MOVED INTO EVIDENCE YESTERDAY, SO I
19 APOLOGIZE FOR THE NUMBERS NOT MATCHING UP.

20 CAN YOU TURN TO PAGE 4 -- WELL, FIRST OF ALL, DO YOU
21 RECOGNIZE DX-621?

22 A. YES, THIS IS THE SYLLABUS FOR THIS COURSE.

23 Q. FOR THE FALL 2009?

24 A. YES.

25 Q. AND CAN YOU PLEASE TURN TO PAGE 4 OF YOUR SYLLABUS, AND

1 UNDER COURSE SCHEDULE AND SPECIFICALLY THE TOPIC AND READING
2 ASSIGNMENT COLUMN, CAN YOU TELL US IF THE READINGS UNDER THE
3 TOPIC AND READING ASSIGNMENT COLUMN WERE REQUIRED READINGS?

4 A. YES, THEY ARE -- THEY WERE.

5 Q. AND IN NURSING 8035 IN FALL OF 2009 WERE THERE ANY
6 REQUIRED TEXTBOOKS TO BE PURCHASED BY THE STUDENTS?

7 A. YES.

8 Q. AND APPROXIMATELY HOW MANY?

9 A. THREE.

10 Q. AND ARE THOSE TEXTBOOKS DESCRIBED IN YOUR SYLLABUS?

11 A. THEY ARE LISTED.

12 Q. AND WHERE ARE THEY LISTED?

13 A. ON PAGE 7.

14 Q. AND WHERE ARE THEY -- CAN YOU TELL US WHAT THE THREE
15 TEXTBOOKS WERE THAT WERE REQUIRED FOR PURCHASE?

16 A. THE FIRST WAS BY POLIFRONI AND WELCH, AND IT'S ENTITLED
17 PERSPECTIVES ON PHILOSOPHY OF SCIENCE IN NURSING, AN HISTORICAL
18 AND CONTEMPORARY ANTHOLOGY. THE SECOND IS BY REED AND SHEARER
19 AND THE TITLE IS PERSPECTIVES ON NURSING THEORY, AND THE THIRD
20 IS BY WALKER AND AVANT, AND IT'S ENTITLED STRATEGIES FOR THEORY
21 CONSTRUCTION IN NURSING.

22 Q. AND ON PAGE 6 OF YOUR SYLLABUS AT WEEK 14, THERE IS A
23 READING ASSIGNMENT LISTED AS TWINN 2003; DO YOU SEE THAT?

24 A. YES.

25 Q. AND FROM WHAT BOOKS IS THAT READING ASSIGNMENT?

1 A. THAT'S FROM THE HANDBOOK OF -- LET ME GET THE TITLE
2 RIGHT -- IT'S THE HANDBOOK OF MIXED METHODS IN SOCIAL AND
3 BEHAVIORAL RESEARCH.

4 MS. QUICKER: MAY I APPROACH, YOUR HONOR?

5 THE COURT: YES.

6 BY MS. QUICKER:

7 Q. I'VE HANDED YOU WHAT'S BEEN MARKED DX-773. DO YOU
8 RECOGNIZE THIS BOOK?

9 A. YES, IT'S THE TEXTBOOK THAT THIS READING CAME FROM.

10 Q. THE TWINN 2003 EXCERPT?

11 A. YES.

12 Q. IS IT THE CORRECT EDITION OF THE HANDBOOK?

13 A. YES.

14 MS. QUICKER: YOUR HONOR, WE'D LIKE TO OFFER INTO
15 EVIDENCE DX-773, THE TEXTBOOK.

16 MR. KRUGMAN: NO OBJECTION, YOUR HONOR.

17 THE COURT: IT'S ADMITTED.

18 BY MS. QUICKER:

19 Q. CAN YOU BRIEFLY DESCRIBE WHAT THE HANDBOOK OF MIXED
20 METHODS IN SOCIAL AND BEHAVIORAL RESEARCH IS ABOUT?

21 A. THIS IS AN INTERDISCIPLINARY SORT OF ANTHOLOGY BOOK, AND
22 SO IT HAS SEVERAL DIFFERENT THEMES. ONE IS CHAPTERS ABOUT HOW
23 TO DO A MIXED METHOD STUDY.

24 THERE'S ALSO CHAPTERS THAT ARE EXAMPLES OF MIXED
25 METHOD STUDIES IN VARIOUS DISCIPLINES, AND THEN THERE ARE SOME

1 CHAPTERS THAT TALK ABOUT MIXED METHOD RESEARCH IN DIFFERENT
2 DISCIPLINES.

3 THEN THE CHAPTER THAT I USED WAS THE CHAPTER THAT
4 THEY HAVE ABOUT THE STATUS OF NURSING IN USING MIXED METHODS
5 STUDIES.

6 Q. AND THE TWINN EXCERPT YOU ASSIGNED, WHAT CHAPTER IS
7 THAT?

8 A. THAT IS CHAPTER 20.

9 Q. AND APPROXIMATELY HOW MANY PAGES IS CHAPTER 20?

10 A. THAT CHAPTER IS -- STARTS ON PAGE 541 AND GOES TO 556. SO
11 I GUESS THAT WOULD BE 16 PAGES.

12 Q. AND APPROXIMATELY HOW MANY PAGES ARE IN THE BOOK?

13 A. THE BOOK HAS 768 PAGES, AND IT ALSO HAS SOME ROMAN NUMERAL
14 PAGES IN FRONT, SO THERE'S 15 OF THOSE SO ALMOST 800 PAGES.

15 Q. OKAY. SO THE TWINN EXCERPT IS APPROXIMATELY 2 PERCENT OF
16 THE ENTIRE BOOK?

17 A. YES.

18 Q. AND CAN YOU TELL US WHAT THE SUBJECT MATTER WAS TAUGHT
19 DURING WEEK 14 OF YOUR FALL 2009 NURSING 8035 CLASS?

20 A. YES. WHAT I WANTED TO DO WAS GIVE THE STUDENTS A
21 BACKGROUND WITH REGARD TO MIXED METHOD RESEARCH, AND MIXED
22 METHOD RESEARCH FOR WHAT I'M USING IT -- THE WAY THEY USE IT IN
23 NURSING, THE TERM, IS PRETTY MUCH THE USE OF QUALITATIVE
24 RESEARCH METHODS SUCH AS NARRATIVES AND INTERVIEWS AND FOCUS
25 GROUPS, AND THEN COMBINED WITH QUANTITATIVE METHODS LIKE

1 QUESTIONNAIRES AND OTHER INSTRUMENTS LIKE THAT AND WAYS IN
2 WHICH YOU MIGHT DO THAT IN ONE PARTICULAR STUDY OR OVER A
3 SERIES OF STUDIES.

4 AND ONE OF THE GOALS FOR THIS COURSE WAS THAT I WAS
5 GOING TO GIVE THEM A BACKGROUND ON SOME OF THE CONTEMPORARY
6 ISSUES ON THEORY AND RESEARCH THAT WOULD BE ADDRESSED IN OTHER
7 COURSES AND SO THIS WAS MY CLASS FOR THAT.

8 I WANTED THEM TO UNDERSTAND THE BACKGROUND OF MIXED
9 METHODS, HOW WE GOT TO THAT POINT IN NURSING, SOME OF THE
10 CURRENT AND PAST CONTROVERSIES OF USING MIXED METHOD APPROACHES
11 IN NURSING AND WHERE WE ARE NOW WITH REGARD TO THE STATUS OF
12 USING MIXED METHOD RESEARCH.

13 Q. AND SO WHY DID YOU ASSIGN THE TWINN EXCERPT THAT WEEK?

14 A. BECAUSE THAT CHAPTER WAS A GOOD EXAMPLE OF ALL OF THE
15 THINGS I WANTED TO COVER.

16 Q. AND HOW DID YOU INTEND FOR YOUR STUDENTS TO ACCESS THE
17 TWINN EXCERPTS IN FALL 2009?

18 A. I INTENDED FOR THEM TO GO ONTO ELECTRONIC RESERVES AND
19 ACCESS THE ARTICLE FROM THERE.

20 Q. AND WHAT STEPS DID YOU TAKE TO PUT THE TWINN EXCERPT ON
21 ELECTRONIC RESERVES IN FALL 2009?

22 A. SO WHAT I DID WAS FIRST I LOOKED AT THE TWINN ARTICLE,
23 COMPARED THAT AGAINST -- FIRST I FILLED OUT -- I WENT TO THE
24 ELECTRONIC RESERVES WEBSITE, FILLED OUT THE INFORMATION
25 REGARDING THE TWINN ARTICLE AS WELL AS THE OTHER READINGS ONE

1 AT A TIME.

2 I TOOK THE FAIR USE QUESTIONNAIRE AND LOOKED AT IT
3 WITH REGARD TO THE TWINN ARTICLE AND THEN ENTERED THAT IN AND
4 DID THAT FOR ALL THE SUBSEQUENT READINGS, AND THEN I SENT THAT
5 OFF TO THE LIBRARY.

6 Q. SO YOU ELECTRONICALLY FILLED OUT A FAIR USE CHECKLIST
7 DURING THE PROCESS OF REQUESTING --

8 A. YES.

9 Q. OKAY. AND DID YOU PRINT THE CHECKLIST THAT YOU FILLED OUT
10 ELECTRONICALLY?

11 A. WELL, WHAT HAPPENED WAS THAT I WENT AHEAD AND SENT IT
12 BECAUSE I WENT THROUGH ONE AT A TIME AND FILLED EACH ONE OF
13 THEM OUT FOR EACH ONE OF THE READINGS, AND THEN I TRIED TO
14 PRINT IT ALL AT ONCE, AND THAT WAS WHEN I REALIZED THAT YOU HAD
15 TO PRINT THEM ONE AT A TIME BECAUSE EVERY TIME YOU BEGAN A NEW
16 ONE THE OLD ONE DISAPPEARED.

17 SO I WAS UNABLE TO PRINT THEM ALL OFF THE ELECTRONIC
18 COPY THAT I HAD MADE WITHOUT GOING THROUGH AND COMPLETING IT
19 ALL ELECTRONICALLY AGAIN, AND SO WHAT I THEN DID -- SO THE NEXT
20 DAY -- I HAD ALREADY SENT IT IN TO THE LIBRARY, OF COURSE, AND
21 THE NEXT DAY WHAT I DID WAS I TOOK THE FAIR USE CHECKLIST. I
22 WENT DOWN IT. I HAD FILLED IT OUT THE PREVIOUS DAY
23 ELECTRONICALLY FOR ALL THE READINGS I HAD, SO I KNEW HOW I HAD
24 JUST DETERMINED THOSE FOR THE FAIR USE CHECKLIST.

25 AND I TOOK ONE COPY OF THE FAIR USE CHECKLIST AND

1 CHECKED OFF THE THINGS THAT APPLIED TO ALL OF THEM. SINCE THE
2 READINGS THAT I USED HAD SIMILAR PURPOSES FOR THE ENTIRE CLASS,
3 THERE WAS NOTHING THAT WAS REALLY DIFFERENT WITH REGARD TO THE
4 DIFFERENT READINGS THAT I HAD, AND I CHECKED OFF THE THINGS
5 THAT APPLIED TO THE READINGS I HAD AND DETERMINED THAT I STILL
6 HAD A PREPONDERANCE OF FAIR USE IN THE READINGS THAT I HAD FOR
7 THAT CLASS.

8 I CHECKED THAT OFF ON ONE SHEET, AND THEN I XEROXED
9 THAT COPY FOR THE NUMBER OF READINGS THAT I HAD. I TOOK EACH
10 ONE OF THOSE COPIES, AND I WROTE THE AUTHOR'S NAME ON THE FAIR
11 USE CHECKLIST FOR EACH ONE, EACH ONE OF THOSE SEPARATE SHEETS
12 AND GAVE THEM TO MY ADMINISTRATIVE ASSISTANT AND ASKED HER TO
13 FILL IN THE TOP PART OF THE SHEET FOR ME SO THAT IT WOULDN'T
14 TAKE ANY MORE OF MY TIME.

15 Q. AND WILL YOU PLEASE LOOK IN YOUR NOTEBOOK AT DX-477, WHICH
16 I UNDERSTAND IS ALSO PX-608? IS THIS THE CHECKLIST YOU WERE
17 JUST DESCRIBING?

18 A. YES.

19 Q. AND SO I UNDERSTAND, THE TWINN THAT'S FILLED OUT ON AUTHOR
20 AND PUBLISHER THAT'S YOUR HANDWRITING?

21 A. YES.

22 Q. AND THEN THE REST OF THIS IS FILLED OUT BY YOUR
23 ADMINISTRATIVE ASSISTANT?

24 A. YES.

25 Q. WHO ACTUALLY DID THE CHECKMARKS?

- 1 A. I DID.
- 2 Q. THANK YOU. AND DID YOU RETAIN A COPY OF THIS CHECKLIST?
- 3 A. YES.
- 4 Q. AND WHEN WAS THIS CHECKLIST COMPLETED?
- 5 A. IT WAS COMPLETED THE DAY AFTER I SENT IN ALL THE
- 6 ELECTRONIC STUFF TO THE LIBRARY FOR ELECTRONIC RESERVES.
- 7 Q. AND PRIOR TO POSTING THE TWINN 2003 EXCERPT ON THE ERES IN
- 8 THE FALL 2009, DID YOU DO A FAIR USE ANALYSIS?
- 9 A. YES.
- 10 Q. AND DID YOU CONSIDER FACTOR 1, THE PURPOSE AND CHARACTER
- 11 OF THE USE IN YOUR FAIR USE ANALYSIS?
- 12 A. YES.
- 13 Q. AND DID YOU REACH A CONCLUSION ABOUT FACTOR 1?
- 14 A. YES.
- 15 Q. AND WHAT WAS THAT CONCLUSION?
- 16 A. I CONCLUDED THAT IT WEIGHED IN FAVOR OF FAIR USE.
- 17 Q. CAN YOU TELL US WHY YOU FOUND THAT?
- 18 A. WELL, THE READINGS THAT I WAS USING, ALL THE READINGS THAT
- 19 I HAD LISTED ON ELECTRONIC RESERVE WERE USED IN A NONPROFIT,
- 20 EDUCATIONAL INSTITUTION WHICH GEORGIA STATE IS. IT WAS ALL TO
- 21 BE USED IN TEACHING. IT WAS FOR THE PURPOSE OF RESEARCH OR
- 22 SCHOLARSHIP, BOTH IN THE CASE OF MY STUDENTS, AND THE USE WAS
- 23 NECESSARY TO ACHIEVE MY INTENDED EDUCATIONAL PURPOSE FOR THE
- 24 CLASS.
- 25 Q. AND DID YOU CONSIDER FACTOR 2?

- 1 A. YES.
- 2 Q. AND DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR 2?
- 3 A. YES.
- 4 Q. AND WHAT WAS THAT CONCLUSION?
- 5 A. THAT IT WEIGHED IN FAVOR OF FAIR USE.
- 6 Q. CAN YOU EXPLAIN WHY YOU FOUND OUT THAT?
- 7 A. WELL, THE TWINN ARTICLE WAS A PUBLISHED WORK. IT WAS A
- 8 NONFICTION WORK, AND IT WAS IMPORTANT TO THE EDUCATIONAL
- 9 OBJECTIVES.
- 10 Q. AND DID YOU CONSIDER FACTOR 3?
- 11 A. YES.
- 12 Q. DID YOU REACH A CONCLUSION ABOUT FACTOR 3?
- 13 A. YES, THAT IT WEIGHED IN FAVOR OF FAIR USE.
- 14 Q. AND WHY DID YOU FIND IT WEIGHED IN FAVOR OF FAIR USE?
- 15 A. IT WAS A SMALL PORTION OF THE ENTIRE WORK, AND THE AMOUNT
- 16 WAS NARROWLY TAILORED TO MY EDUCATIONAL PURPOSE WHICH WAS
- 17 UNDERSTANDING THE BACKGROUND OF ONE PARTICULAR MODE OF
- 18 RESEARCH.
- 19 Q. AND WHY DID YOU THINK IT WAS A SMALL PORTION?
- 20 A. BECAUSE IT WAS ONLY ABOUT 2 PERCENT OF THE ENTIRE WORK.
- 21 Q. AND DID YOU CONSIDER FACTOR 4, THE EFFECT ON THE MARKET?
- 22 A. YES.
- 23 Q. AND DID YOU REACH A CONCLUSION WITH RESPECT TO FACTOR 4?
- 24 A. YES, I DID THAT IT WEIGHED IN FAVOR OF FAIR USE.
- 25 Q. AND WHY?

1 A. WELL BECAUSE I DID NOT FEEL THAT THAT WOULD HAVE A
2 SIGNIFICANT EFFECT ON MARKET OR POTENTIAL MARKET FOR THAT
3 BOOK. BECAUSE I ALSO FELT THAT THE USE STIMULATED THE MARKET
4 FOR THE ORIGINAL WORK, AND THAT'S BECAUSE -- ONE OF THE REASONS
5 I USED THAT PARTICULAR READING WAS BECAUSE ONE OF MY GOALS IN
6 THAT COURSE IS TO EXPOSE THOSE STUDENTS TO LOTS OF OTHER KINDS
7 OF REFERENCES AND READINGS THAT THEY MIGHT WANT TO USE
8 THROUGHOUT THEIR CAREER.

9 AND I LIKE THEM TO SEE THAT THERE ARE OTHER BOOKS OUT
10 THERE THAT THEY MAY NOT COME INTO CONTACT WITH IN OTHER WAYS,
11 AND THIS WAS AN EXAMPLE OF A BOOK THAT I THOUGHT MIGHT BE A
12 GOOD REFERENCE THEY MIGHT WANT TO GET LATER, AND THAT WAS WHY I
13 WANTED TO USE THIS PARTICULAR REFERENCE.

14 Q. ARE THERE ANY OTHER REASONS?

15 A. IT WAS A GOOD ARTICLE.

16 Q. IS THERE ANY OTHER REASONS YOU FOUND THAT FACTOR 4 WEIGHED
17 IN FAVOR OF FAIR USE?

18 A. YES, I OWNED A COPY OF THE BOOK AND SO DID THE
19 UNIVERSITY. SO IT WAS A LAWFULLY ACQUIRED BOOK, AND ALSO
20 ACCESS TO THE -- WAS RESTRICTED FOR THESE STUDENTS. IT ONLY
21 WENT TO THE STUDENTS IN THIS COURSE. IT SEEMED VERY, VERY
22 UNLIKELY TO ME THAT THEY WERE GOING TO BE HANDING IT OUT TO
23 THEIR FRIENDS TO READ.

24 Q. AND ONCE YOU CONSIDERED ALL FOUR FACTORS IN YOUR FAIR USE
25 ANALYSIS IN THE FALL OF 2009, DID YOU ARRIVE AT AN OVERALL

1 CONCLUSION AS TO WHETHER THE TWINN ARTICLE AND THE USE OF THE
2 TWINN ARTICLE IN YOUR NURSING 8035 CLASS IN THE FALL 2009 WAS A
3 FAIR USE?

4 A. YES.

5 Q. AND WHAT WAS YOUR CONCLUSION?

6 A. I CONCLUDED THAT IT WAS FAIR USE.

7 Q. AFTER YOU COMPLETED THE ONLINE REQUEST ON ERES FOR THE
8 TWINN ARTICLE TO BE USED, DID YOU RECEIVE ANY COMMUNICATIONS
9 FROM THE LIBRARY?

10 A. YES.

11 Q. AND WHAT DID YOU RECEIVE?

12 A. I RECEIVED AN E-MAIL NOTIFICATION FROM THEM THAT THEY HAD
13 ADDED THE FILES, AND THAT PRETTY MUCH SUMMARIZED WHAT I HAD
14 SENT.

15 Q. AND TURNING TO DX-519 IN YOUR NOTEBOOK, IS THAT THE E-MAIL
16 YOU'RE REFERRING TO?

17 A. YES.

18 Q. AND WHAT'S INCLUDED IN THAT E-MAIL?

19 A. THEY HAVE MY NAME, MY DEPARTMENT, MY PHONE NUMBER, MY
20 E-MAIL ADDRESS AND COURSE INFORMATION AS WELL AS THE
21 INFORMATION WITH REGARD TO EACH ONE OF THE READINGS THAT I HAD.

22 Q. AND HAVE YOU KEPT A COPY OF THIS E-MAIL IN YOUR FILES?

23 A. YES.

24 MS. QUICKER: YOUR HONOR, WE'D ASK DX-519 BE MOVED
25 INTO EVIDENCE.

1 MR. KRUGMAN: NO OBJECTION.

2 THE COURT: IT'S ADMITTED.

3 MS. QUICKER: I HAVE NO FURTHER QUESTIONS, YOUR
4 HONOR.

5 DIRECT EXAMINATION

6 BY MR. KRUGMAN:

7 Q. GOOD AFTERNOON, PROFESSOR MOLONEY. NOW YOU RECALL A NEW
8 COPYRIGHT POLICY CAME INTO EFFECT IN THE EARLY PART OF 2009; IS
9 THAT CORRECT?

10 A. YES.

11 Q. AND AM I CORRECT THAT YOU DID NOT RECALL ATTENDING A
12 TRAINING SESSION WITH RESPECT TO THAT NEW COPYRIGHT POLICY
13 PRIOR TO THE FALL OF 2009 WHEN YOU TAUGHT THE COURSE THAT YOU
14 DISCUSSED TODAY?

15 A. I MAY HAVE VERY WELL HAVE ATTENDED ONE. I DON'T REMEMBER.

16 Q. YOU RECALL THAT YOU DID ATTEND A TRAINING SESSION WITH
17 SOMEONE BY THE NAME OF GWEN; IS THAT CORRECT?

18 A. THAT'S CORRECT.

19 Q. AND THAT'S THE SESSION THAT YOU RECALL ATTENDING; IS THAT
20 CORRECT?

21 A. NO, THERE MAY HAVE BEEN AN EARLIER SESSION WHEN EVERYTHING
22 WENT UP ONLINE, BUT I HAD ASKED HER TO COME AND SPEAK TO US
23 SPECIFICALLY ABOUT IT.

24 Q. THE NURSING 8035 COURSE THAT YOU TAUGHT IN THE FALL
25 SEMESTER OF 2009 I BELIEVE YOU SAID IS A GRADUATE LEVEL

1 COURSE?

2 A. YES.

3 Q. AND IS IT CORRECT THAT YOU BELIEVED THAT THE ASSIGNED
4 READINGS WERE A CRITICAL PART OF THE STUDENTS' EDUCATION IN THE
5 COURSE?

6 A. YES.

7 Q. AND THAT INCLUDES THE ARTICLE BY TWINN THAT'S IN THE
8 HANDBOOK THAT YOU DISCUSSED ON DIRECT EXAMINATION; IS THAT
9 CORRECT?

10 A. YES.

11 Q. NOW YOU'VE TESTIFIED ABOUT THE ASSIGNED TEXTBOOKS IN THAT
12 COURSE; DO YOU RECALL THAT?

13 A. YES.

14 Q. I TAKE IT THOSE TEXTBOOKS WERE ASSIGNED READINGS OR,
15 EXCUSE ME, WERE REQUIRED READINGS; IS THAT CORRECT?

16 A. YES.

17 Q. AND THOSE WORKS WERE NECESSARY FOR TEACHING YOUR COURSE;
18 IS THAT CORRECT?

19 A. YES.

20 Q. THEY WERE IMPORTANT TO YOUR EDUCATIONAL OBJECTIVES,
21 CORRECT?

22 A. YES.

23 Q. THEY WERE PUBLISHED WORKS; IS THAT CORRECT?

24 A. YES.

25 Q. FACTUAL IN NATURE; IS THAT CORRECT?

- 1 A. YES.
- 2 Q. AND DO YOU OWN A PERSONAL COPY OF THE TEXTBOOKS THAT YOU
- 3 ASSIGNED TO YOUR STUDENTS FOR READING IN THAT COURSE?
- 4 A. YES.
- 5 Q. NOW, THE COURSES -- THE CLASSES THAT YOU TAUGHT WERE
- 6 WEEKLY CLASSES; IS THAT CORRECT?
- 7 A. YES.
- 8 Q. ONE WEEK A MONTH APPROXIMATELY THE STUDENTS WOULD MEET IN
- 9 PERSON FOR A CLASS WITH YOU; IS THAT CORRECT?
- 10 A. YES.
- 11 Q. AND THEN THE OTHER THREE WEEKS THE STUDENTS WOULD ATTEND
- 12 THE CLASS REMOTELY; IS THAT CORRECT?
- 13 A. YES.
- 14 Q. AND WHEN YOU HAD THE IN-PERSON CLASSES, YOU OBSERVED THAT
- 15 STUDENTS BROUGHT THE WORKS THAT WERE TO BE DISCUSSED THAT DAY
- 16 IN THE CLASS WITH THEM TO THE CLASS; IS THAT CORRECT?
- 17 A. USUALLY THEY DO.
- 18 Q. AND THAT INCLUDED THE MATERIALS THAT YOU HAD ASSIGNED TO
- 19 STUDENTS AND THAT WERE AVAILABLE TO THEM ON THE ELECTRONIC
- 20 RESERVE SYSTEM; IS THAT CORRECT?
- 21 A. USUALLY.
- 22 Q. THEY USUALLY WOULD PRINT OUT COPIES AND BRING THOSE WITH
- 23 THEM TO CLASS; IS THAT CORRECT?
- 24 A. YES.
- 25 Q. NOW YOU UNDERSTAND THAT COURSEPACKS ARE COMPILATIONS OF

1 ARTICLES OR CHAPTERS FROM DIFFERENT PUBLICATIONS THAT A FACULTY
2 PERSON PUTS TOGETHER?

3 MS. QUICKER: OBJECTION, YOUR HONOR, WE DID NOT GO
4 INTO COURSEPACKS ON DIRECT.

5 MR. KRUGMAN: I BELIEVE WE HAD AN UNDERSTANDING WITH
6 RESPECT TO PROFESSORS THAT WE COULD GO BEYOND THE SCOPE OF THE
7 DIRECT EXAMINATION RATHER THAN -- WE CAN HAVE THE PROFESSOR
8 COME BACK IN OUR REBUTTAL CASE, AND I WOULD ASSUME THAT THE
9 DEFENDANTS WOULD PREFER THAT NOT OCCUR.

10 THE COURT: OVERRULED.

11 BY MR. KRUGMAN:

12 Q. AND YOU UNDERSTAND THAT STUDENTS THEN PURCHASE THE
13 COURSEPACK; IS THAT CORRECT?

14 A. YES, THAT'S WHAT I UNDERSTAND THEY ARE.

15 Q. AND YOU DID NOT CONSIDER USING A COURSEPACK FOR THE
16 NURSING 8035 COURSE THAT YOU TAUGHT IN THE FALL OF 2009; IS
17 THAT CORRECT?

18 A. RIGHT.

19 Q. NOW FUNCTIONALLY YOU DO NOT UNDERSTAND THERE TO BE A
20 DIFFERENCE BETWEEN A STUDENT PRINTING THE MATERIALS THAT ARE
21 POSTED ON ELECTRONIC RESERVES VERSUS A COURSEPACK WHEN THE
22 MATERIALS ARE PRINTED BY SOMEONE ELSE AND THEN THE STUDENT
23 PURCHASES THEM, CORRECT?

24 A. THERE'S NO DIFFERENCE WITH REGARD TO THE FACT THAT THEY
25 BOTH OBTAIN -- HELP A STUDENT OBTAIN THE INFORMATION, NO

1 DIFFERENCE IN THAT WAY.

2 Q. IN BOTH INSTANCES STUDENTS GET THE ARTICLES OR CHAPTERS.

3 ONE THEY'RE ALREADY BOUND. THE OTHER THEY PRINT THEM OUT,

4 CORRECT?

5 A. YES. ALTHOUGH THEY DON'T NEED TO PRINT THEM OUT,

6 SOMETIMES THEY JUST KEEP THEM ONLINE.

7 Q. BUT YOU CERTAINLY, AS YOU TESTIFIED, OBSERVED STUDENTS

8 PRINTING OUT THE WORKS THAT YOU ASSIGNED TO THEM AND BRINGING

9 THOSE TO CLASS AS A PART OF THE DISCUSSIONS?

10 A. YES.

11 Q. NOW OTHER THAN THE FACT THAT -- WELL, FIRST OF ALL, WITH

12 RESPECT TO ELECTRONIC RESERVES, THE STUDENTS DON'T HAVE TO PAY

13 TO GET A COPY OF THE MATERIALS POSTED ON THE ELECTRONIC RESERVE

14 SYSTEM; IS THAT CORRECT?

15 A. THEY DON'T PAY DIRECTLY, BUT I WOULDN'T SAY THEY DON'T

16 PAY. THEY PAY IN INCREASED FEES. SOMEBODY PAYS FOR THE

17 LIBRARIAN TO DO SOME OF THAT WORK.

18 Q. WELL WITH RESPECT TO A STUDENT IN YOUR -- IN THIS NURSING

19 8035 COURSE, MATERIALS WERE POSTED ON ELECTRONIC RESERVES,

20 CORRECT?

21 A. RIGHT.

22 Q. AND IT'S YOUR UNDERSTANDING THAT THE STUDENTS COULD THEN

23 ACCESS THE ERESERVE WEBSITE; IS THAT CORRECT?

24 A. YES.

25 Q. AND THEN THE STUDENT -- THESE ARE GRADUATE STUDENTS. THEY

1 MAY HAVE GRADUATE DORMS OR LIVING OFF CAMPUS. IF THEY HAVE
2 THEIR OWN PERSONAL COMPUTER, THEY CAN THEN PRINT OUT THAT COPY
3 OF THE MATERIAL THAT YOU ASSIGN TO THEM AS REQUIRED READING AND
4 HAD POSTED ON ELECTRONIC RESERVE; IS THAT CORRECT?

5 A. YES.

6 Q. AND ISN'T IT TRUE THAT THERE IS NO COST TO THE STUDENT IN
7 THAT INSTANCE OF PRINTING OUT THE COPY OF WHATEVER ARTICLE OR
8 OTHER WORK THAT YOU HAD POSTED ON ELECTRONIC RESERVES, OTHER
9 THAN POSSIBLY THE COST OF THE INDIVIDUAL SHEETS OF PAPER
10 REQUIRED TO OBTAIN THE PRINTED COPY?

11 A. RIGHT.

12 Q. SO ISN'T IT TRUE THEN THAT THE ONLY DIFFERENCE BETWEEN THE
13 COURSEPACKS AND THE COLLECTION OF ARTICLES THAT THE STUDENT
14 PRINTS FROM ELECTRONIC RESERVES IS THAT IN ONE INSTANCE THE
15 STUDENT PAYS FOR IT, AND IN THE OTHER IN THE CASE OF ELECTRONIC
16 RESERVES, THE STUDENT DOESN'T PAY?

17 A. WELL, THERE ARE A LOT OF OTHER DIFFERENCES BETWEEN
18 COURSEPACKS AND ELECTRONIC RESERVES, A NUMBER OF OTHER
19 DIFFERENCES. IT ISN'T JUST THAT THEY DON'T PAY FOR THE PACK.

20 Q. SO THEY DON'T PAY -- ONE IS DIGITAL AND ONE IS INITIALLY
21 IN HARDCOPY, RIGHT?

22 A. AND I WOULD SAY THAT THE ANALOGY IS MUCH MORE IN THAT
23 ELECTRONIC RESERVES ARE MUCH MORE LIKE HAVING ACTUAL BOOKS AND
24 ARTICLES ON RESERVE IN THE LIBRARY AND COPYING THEM. IN BOTH
25 CASES YOU'RE COPYING IT DIRECTLY YOURSELF INSTEAD OF HAVING

1 SOMEBODY HAND YOU THE BOOK PUT TOGETHER.

2 Q. OKAY. SO IT REQUIRES SOME EFFORT BY THE STUDENT TO PRINT
3 OUT THE MATERIALS AND THEN PERHAPS STAPLE THEM TOGETHER?

4 A. THERE ARE OTHER DIFFERENCES WITH OUR STUDENTS, TOO, AND,
5 THAT IS, THAT THEY'RE NOT -- THEY'RE NOT ON CAMPUS, AND SO IT
6 ENABLES THEM FROM WHEREVER THEY ARE TO ACCESS THE ARTICLE
7 THAT'S THE READING FOR THAT WEEK AND PRINT IT OFF AND READ
8 IT.

9 WHEREAS IF THEY HAVE TO COME IN AND BUY A COURSEBOOK,
10 THEY MAY NOT GET THEIR READINGS DONE ON TIME.

11 Q. EXCUSE ME, PROFESSOR MOLONEY, I'LL FIRST MOVE TO STRIKE
12 THAT TESTIMONY AS BEING NONRESPONSIVE BECAUSE I WAS ASKING
13 ABOUT THE DIFFERENCE BETWEEN COURSEPACKS AND ELECTRONIC
14 RESERVES. I'M NOT TALKING ABOUT PHYSICAL RESERVES.

15 A. WELL, NO --

16 THE COURT: OVERRULE THE MOTION.

17 BY MR. KRUGMAN:

18 Q. WE'LL MOVE ON. NOW IF YOU OWN A WORK YOU BELIEVE THAT YOU
19 CAN COPY IT AND PROVIDE THAT TO STUDENTS; IS THAT CORRECT?

20 A. UNDER FAIR USE.

21 Q. IN FACT, YOU SUBSCRIBE TO THE NURSING RESEARCH JOURNAL
22 BECAUSE YOU THOUGHT THERE MIGHT BE ARTICLES IN IT YOU CAN USE;
23 IS THAT CORRECT?

24 A. YES, UNDER FAIR USE.

25 Q. AND THE ONLY REASON YOU SUBSCRIBE WAS SO THAT YOU COULD

1 PROVIDE COPIES TO YOUR STUDENTS; IS THAT CORRECT?

2 A. WELL THAT AND MY OWN LEARNING.

3 Q. NOW IN CONNECTION WITH YOUR ERESERVE POSTINGS FOR THE FALL

4 2009 NURSING COURSE THAT WE'VE BEEN TALKING ABOUT, I BELIEVE

5 YOU TESTIFIED THAT YOU COMPLETED THE FAIR USE CHECKLIST

6 PRIOR TO REQUESTING THAT THE WORKS BE POSTED ON ELECTRONIC

7 RESERVES?

8 A. YES.

9 Q. AND AS REFLECTED BY DEFENDANTS' EXHIBIT 519 WHICH IS --

10 THIS IS A PORTION OF YOUR ELECTRONIC E-MAIL COMMUNICATIONS WITH

11 THE LIBRARY; IS THAT CORRECT?

12 A. YES.

13 Q. AND YOU REQUESTED THAT NINE WORKS BE POSTED ON ERESERVES

14 FOR THE FALL 2009 COURSE; IS THAT CORRECT?

15 A. YES.

16 Q. AND ONE OF THOSE IS THE WORK BY TWINN THAT WE'VE BEEN

17 TALKING ABOUT WHICH IS THE HANDBOOK OF MIXED METHODS IN SOCIAL

18 AND BEHAVIORAL RESEARCH; IS THAT CORRECT?

19 A. YES.

20 Q. AND AM I CORRECT THAT YOU ARE UNAWARE OF ANY PERMISSIONS

21 THAT WERE PAID FOR THE COPYING AND POSTING OF THAT CHAPTER ONTO

22 ELECTRONIC RESERVES FOR THIS FALL 2009 COURSE?

23 A. IT MIGHT HAVE BEEN DONE IN THE LIBRARY, BUT I DIDN'T DO

24 ANYTHING LIKE THAT.

25 Q. YOU'RE NOT AWARE OF ANY PERMISSIONS HAVING BEEN PAID,

1 CORRECT?

2 A. YES.

3 Q. AND YOU'RE NOT AWARE OF PERMISSIONS HAVING BEEN PAID FOR
4 ANY OF THE OTHER WORKS THAT ARE ON DEFENDANTS' EXHIBIT 519,
5 CORRECT?

6 MS. QUICKER: OBJECTION, YOUR HONOR, OUTSIDE THE
7 WORKS AT ISSUE.

8 MR. KRUGMAN: YOUR HONOR, THEY PUT INTO EVIDENCE
9 DEFENDANTS' EXHIBIT 519 WHICH CONTAINS MANY OTHER WORKS. THE
10 ONLY QUESTION IS IS SHE AWARE --

11 THE COURT: IS 519 A CHAPTER BOOK?

12 MR. KRUGMAN: IT'S BASICALLY HER COMMUNICATIONS WITH
13 THE LIBRARY WITH RESPECT TO WORKS THAT WERE POSTED ON
14 ELECTRONIC RESERVES FOR THE 8035 COURSE THAT PROFESSOR MOLONEY
15 TAUGHT IN THE FALL OF 2009.

16 THE COURT: AND YOUR QUESTION IS WHAT?

17 MR. KRUGMAN: THE FIRST QUESTION WAS WHETHER SHE WAS
18 AWARE OF ANY PERMISSIONS HAVING BEEN PAID WITH RESPECT TO ANY
19 OF THE WORKS ON DEFENDANTS' EXHIBIT 519.

20 THE COURT: I WILL ALLOW THAT QUESTION.

21 THE WITNESS: WHAT WAS THE QUESTION?

22 BY MR. KRUGMAN:

23 Q. IF YOU'RE AWARE OF PERMISSIONS HAVING BEEN PAID FOR ANY OF
24 THE WORKS THAT ARE REFLECTED ON DEFENDANTS' EXHIBIT 519 THAT
25 YOU REQUESTED THE LIBRARY TO PROVIDE COPIES OF TO STUDENTS ON

1 ELECTRONIC RESERVE?

2 A. NO, I'M NOT AWARE OF THAT.

3 Q. NOW YOU COMPLETED THE CHECKLIST INITIALLY AND THEN YOU
4 DISCOVERED THAT YOU HAD LOST THE WORK; IS THAT CORRECT?

5 A. RIGHT.

6 Q. AND YOU MADE -- I THINK YOU TESTIFIED THAT YOU MADE THE
7 DISCOVERY THAT SAME DAY?

8 A. YES.

9 Q. AND THEN YOU WENT BACK EITHER THAT DAY OR THE NEXT AND
10 COMPLETED THE CHECKLIST JUST AS YOU HAD DONE BEFORE; IS THAT
11 CORRECT?

12 A. I DID IT BY HAND, YES.

13 Q. YOU INITIALLY HAD DONE IT ELECTRONICALLY?

14 A. YES.

15 MR. KRUGMAN: IF I MAY APPROACH THE WITNESS, YOUR
16 HONOR?

17 THE COURT: YOU MAY.

18 BY MR. KRUGMAN:

19 Q. I'VE HANDED YOU A COPY OF YOUR DEPOSITION THAT WAS TAKEN
20 IN THIS CASE ON APRIL 15TH, 2011; DO YOU SEE THAT?

21 A. YES.

22 Q. AND YOU RECALL YOUR DEPOSITION BEING TAKEN AND YOU
23 TESTIFIED UNDER OATH IN THAT DEPOSITION, CORRECT?

24 A. YES.

25 Q. AND I WOULD DIRECT YOUR ATTENTION TO PAGE 82, LINES 13 TO

1 23, AND IF YOU COULD PLEASE PLAY THAT PORTION OF THE
2 EXAMINATION.

3 (VIDEOTAPED DEPOSITION WAS PLAYED IN OPEN COURT.)

4 BY MR. KRUGMAN:

5 Q. THAT WAS YOUR TESTIMONY IN THE DEPOSITION; IS THAT
6 CORRECT?

7 A. YES.

8 Q. AND THEN LATER IN THE DEPOSITION, I SHOWED YOU WHAT I WILL
9 HAND YOU IN JUST A MOMENT AS PLAINTIFFS' EXHIBIT 607?

10 MR. KRUGMAN: IF I MAY APPROACH, YOUR HONOR?

11 THE COURT: YOU MAY.

12 BY MR. KRUGMAN:

13 Q. I'VE HANDED YOU WHAT HAS BEEN MARKED PLAINTIFFS' EXHIBIT
14 607, AND THIS IS A FAIR USE CHECKLIST THAT YOU COMPLETED FOR A
15 DIFFERENT WORK THAT HAD BEEN POSTED ON ELECTRONIC RESERVES FOR
16 THE FALL OF 2009 COURSE; IS THAT CORRECT?

17 A. THIS IS A DIFFERENT ARTICLE THAN THE ONE WE'RE
18 DISCUSSING --

19 MS. QUICKER: OBJECTION, YOUR HONOR --

20 MR. KRUGMAN: I'M SORRY, I DIDN'T --

21 THE WITNESS: I SAID THIS IS A DIFFERENT READING THAN
22 THE ONE WE'RE DISCUSSING I THINK.

23 MR. KRUGMAN: YES, I REALIZE THAT, BUT IN YOUR
24 DEPOSITION --

25 MS. QUICKER: OBJECTION, THIS WORK IS NOT AT ISSUE IN

1 THIS CASE.

2 MR. KRUGMAN: THE PURPOSE OF IT IS THAT SHE TESTIFIED
3 THAT SHE NEVER WOULD HAVE DONE IT, AND THEN IN THE DEPOSITION I
4 PROVIDED HER WITH AN EXAMPLE OF ANOTHER CHECKLIST THAT WAS
5 COMPLETED THAT WAS PRECISELY IDENTICAL TO THE ONE THAT SHE
6 ACTUALLY HAD PHOTOCOPIED IT. I'M SIMPLY ASKING HER TO IDENTIFY
7 WHETHER THIS IS THE CHECKLIST THAT I SHOWED HER IN HER
8 DEPOSITION.

9 MS. QUICKER: YOUR HONOR, SHE ALSO TESTIFIED ON
10 DIRECT THAT IN THE FALL 2009 SHE IN FACT DID A FAIR USE
11 ANALYSIS, SUBMITTED IT ONLINE, AND THAT ONCE HER -- SHE
12 REALIZED THERE WAS AN INABILITY TO PRINT THE CHECKLIST THAT SHE
13 HAD JUST COMPLETED ONLINE THAT SHE WENT AND PRINTED A FAIR USE
14 CHECKLIST, A BLANK ONE, COMPLETED THE FACTORS AS SHE THOUGHT
15 WERE APPROPRIATE FOR EACH ARTICLE, AND THEN FILLED IN THE
16 PUBLISHERS NAME IN HER HANDWRITING AND GAVE IT TO HER
17 ADMINISTRATIVE ASSISTANT TO FILL IN THE OTHER IDENTIFYING
18 INFORMATION.

19 MR. KRUGMAN: LET ME COME AT IT JUST A LITTLE BIT
20 DIFFERENT.

21 BY MR. KRUGMAN:

22 Q. WHEN YOU TESTIFIED IN YOUR DEPOSITION THAT SIMPLY
23 COMPLETING A CHECKLIST AND THEN HAVING IT PHOTOCOPIED AND THEN
24 FILLING IN THE INFORMATION AT THE TOP THAT THAT WAS SOMETHING
25 THAT YOU WOULD NEVER DO, CORRECT?

1 A. YES, I DID SAY THAT.

2 Q. AND IN THE DEPOSITION I THEN SHOWED YOU PLAINTIFFS' TRIAL
3 EXHIBIT 607, AND YOU COMPARED THAT TRIAL EXHIBIT TO PLAINTIFFS'
4 TRIAL EXHIBIT 608, AND THEN YOU LOOKED AT IT, AND THEN YOU
5 REALIZED THAT WAS EXACTLY WHAT YOU HAD DONE; IS THAT CORRECT?

6 MS. QUICKER: OBJECTION, YOUR HONOR, WE HAVE THE SAME
7 OBJECTION. THIS IS ABOUT AN IRRELEVANT WORK AND HER TESTIMONY
8 IS CONSISTENT.

9 THE COURT: WELL, THE FACT THAT IT WAS A DIFFERENT
10 WORK, I'M NOT TOO CONCERNED ABOUT THAT, BUT HERE'S WHERE I'M
11 CONFUSED -- I'M CONFUSED BY YOUR QUESTION BECAUSE IT SOUNDS
12 LIKE WHAT YOU'RE SAYING IS THAT IT'S WRONG TO FILL OUT THE
13 BOTTOM PART OF THE CHECKLIST AND THEN FILL OUT THE TOP PART. I
14 DON'T SEE THAT THERE WOULD BE ANYTHING WRONG WITH THAT.

15 MR. KRUGMAN: THE POINT IS, YOUR HONOR, SHE FILLED
16 OUT ONE CHECKLIST FOR EVERY SINGLE WORK THAT IS REFLECTED ON
17 DEFENDANTS' EXHIBIT 519. SHE COMPLETED ONE AND THEN HAD, AS
18 HER TESTIMONY IS, THEN HAD HER ASSISTANT JUST FILL IN AT THE
19 TOP OF --

20 THE COURT: WELL HOW -- I THINK FOR ME TO BE ABLE TO
21 FIGURE OUT WHETHER THAT IS A FLAWED PROCEDURE, I NEED TO KNOW
22 MORE ABOUT HOW SHE WENT ABOUT IT. I MEAN I WOULD NEED TO KNOW
23 WHETHER SHE LOOKED AT ALL OF THE DIFFERENT WORKS BEFORE SHE
24 FILLED OUT THE FIRST CHECKLIST.

25 MR. KRUGMAN: I'LL MOVE ON, YOUR HONOR. IT'S NOT

1 THAT BIG OF A POINT. LET ME MOVE ON.

2 MS. QUICKER: I WOULD LIKE THE RECORD TO BE CLEAR
3 THAT THAT WAS NOT HER TESTIMONY. HER TESTIMONY WAS SHE DID A
4 FAIR USE CHECKLIST FOR EACH ONE OF THOSE ITEMS ELECTRONICALLY,
5 WAS UNABLE TO PRINT THEM, AND SUBSEQUENTLY THE NEXT DAY DID A
6 FAIR USE CHECKLIST, A BLANK ONE AND HAD THEM XEROXED AND HAD
7 HER ASSISTANT -- ADMINISTRATIVE ASSISTANT FILL OUT THE TOP
8 PART, BUT HAD PREVIOUSLY DONE A FAIR USE CHECKLIST AS SHE WAS
9 SUBMITTING THE REQUESTS TO ERES.

10 MR. KRUGMAN: THAT'S THE TESTIMONY. I WOULD ALSO
11 LIKE THE RECORD TO REFLECT THAT WHEN SHE TESTIFIED UNDER OATH
12 ON APRIL 15 THAT SHE WOULD NEVER DO THAT, THAT TESTIMONY WAS
13 NOT TRUE, AND I CAN MOVE ON. IT'S IN THE RECORD.

14 THE COURT: LET'S MOVE ON.

15 MR. KRUGMAN: YES.

16 BY MR. KRUGMAN:

17 Q. GOING BACK TO DEFENDANTS' EXHIBIT 477, AND THIS IS THE
18 ACTUAL CHECKLIST FOR THE TWINN ARTICLE, AND THIS IS FROM THE
19 HANDBOOK OF MIXED METHODS IN SOCIAL AND BEHAVIORAL RESEARCH; IS
20 THAT CORRECT?

21 A. YES.

22 Q. AND THAT'S A SINGLE ARTICLE FROM THE HANDBOOK; IS THAT
23 CORRECT?

24 A. A CHAPTER, YES.

25 Q. IT'S THE ONLY CHAPTER IN THAT HANDBOOK BY TWINN; IS THAT

1 CORRECT?

2 A. YES.

3 Q. NOW YOU PROVIDED A COMPLETE COPY OF THE ARTICLE TO YOUR
4 STUDENTS ON ELECTRONIC RESERVES; IS THAT CORRECT?

5 A. YES.

6 Q. AND YOU CONCLUDED THAT YOUR USE OF THE ARTICLE FOR THIS
7 CLASS WAS NONTRANSFORMATIVE; IS THAT CORRECT?

8 A. YES. I'M HAVING A LITTLE TROUBLE SEEING THAT.

9 OKAY. YES.

10 Q. BUT YOU DIDN'T CHECK THE BOX FOR NONTRANSFORMATIVE; IS
11 THAT CORRECT?

12 A. RIGHT.

13 Q. AND THE REASON IS THAT YOU DIDN'T BOTHER TO CHECK BOXES ON
14 THE WAYS AGAINST FAIR USE BECAUSE IF YOU HAVE A PREPONDERANCE
15 OF CHECKS ON THE LEFT SIDE THAT OVERWHELM THE OTHER SIDE, THERE
16 WAS NO NEED TO DO THAT, CORRECT?

17 A. YES, I LOOKED TO SEE IF I HAD ENOUGH THAT WEIGHED ON THE
18 SIDE OF FAIR USE, AND I KNEW I DID BECAUSE I HAD ALREADY FILLED
19 IT OUT ONCE BEFORE AND I DID.

20 SO I DIDN'T GO DOWN AND CHECK THOSE. I HAD LOOKED
21 THROUGH THEM BEFORE. I KNEW THAT NONE OF THEM WERE GOING TO
22 OUTWEIGH THIS BECAUSE I HAD JUST DONE IT.

23 Q. YEAH, THERE WAS OVERWHELMING CHECKS ON THE LEFT SIDE, SO
24 THERE WAS NO NEED EVEN TO FILL OUT THE ONES ON THE RIGHT,
25 CORRECT?

1 A. RIGHT.

2 Q. NOW YOU ALSO CHECKED THE BOX FOR USE IS NECESSARY TO
3 ACHIEVE YOUR INTENDED EDUCATIONAL PURPOSE UNDER FACTOR 1; IS
4 THAT CORRECT?

5 A. YES.

6 Q. AND IF YOU CAN TURN TO FACTOR 2, AT THE BOTTOM YOU ALSO
7 CHECKED IMPORTANT TO EDUCATIONAL OBJECTIVES; IS THAT CORRECT?

8 A. YES.

9 Q. ISN'T IT TRUE THAT YOU COULD NOT THINK OF AN INSTANCE
10 WHERE YOU WOULD CONCLUDE THAT THE USE IS NECESSARY TO ACHIEVE
11 YOUR EDUCATIONAL OBJECTIVE WHERE YOU WOULD ALSO NOT CONCLUDE
12 THAT IT WAS IMPORTANT TO YOUR EDUCATIONAL OBJECTIVES?

13 A. YES, I WOULD. I WOULD SAY, THOUGH, THAT IT WASN'T -- THIS
14 ARTICLE WASN'T NECESSARY ESSENTIAL BY ITSELF. I COULD HAVE
15 FOUND A DIFFERENT ARTICLE TO USE.

16 Q. WE'LL GET TO THAT -- WELL, YOU SAID THAT THIS ARTICLE WAS
17 NOT NECESSARY?

18 A. I NEEDED AN ARTICLE TO DISCUSS THESE ISSUES. THERE ARE
19 OTHER ARTICLES THAT I COULD ALSO HAVE USED. IT DIDN'T HAVE TO
20 BE THIS PARTICULAR ONE.

21 Q. OKAY. SO WHEN YOU CHECKED UNDER FACTOR 1 THAT THE USE OF
22 THIS ARTICLE WAS NECESSARY TO ACHIEVE YOUR INTENDED EDUCATIONAL
23 PURPOSE, IN FACT THAT WAS NOT THE CASE?

24 A. NO, THAT'S NOT TRUE. THE USE OF AN ARTICLE LIKE THIS IS
25 NECESSARY TO ACHIEVE MY PURPOSE, AND THIS WAS THE ARTICLE I

1 PICKED.

2 Q. SO WHAT YOU'RE SAYING IS IT WAS USE OF AN ARTICLE IS
3 NECESSARY?

4 A. AN ARTICLE LIKE THIS, AND THIS WAS A GOOD ARTICLE, AND SO
5 I USED IT, BUT IT DIDN'T HAVE TO HAVE BEEN THAT ARTICLE. THERE
6 ARE OTHER ONES I COULD HAVE USED. SO IT WAS NECESSARY BUT IT
7 DIDN'T HAVE TO BE THAT ONE.

8 Q. SO IT REALLY WASN'T NECESSARY TO USE THIS PARTICULAR
9 ARTICLE, CORRECT?

10 A. WELL THAT WAS THE ONE THAT I WAS GOING TO USE, SO IT WAS
11 NECESSARY.

12 Q. NOW, LET'S LOOK AT FACTOR 4, THE MARKET THAT YOU
13 CONSIDERED UNDER THIS FACTOR WAS THE MARKET FOR THE POTENTIAL
14 SALE OF THE BOOK; IS THAT CORRECT?

15 A. YES.

16 Q. AND YOU UNDERSTOOD THAT TO MEAN WHETHER OR NOT YOUR USE OF
17 AN ARTICLE FROM THE BOOK SIGNIFICANTLY AFFECTS PEOPLE BUYING
18 THE ORIGINAL BOOK?

19 A. YES.

20 Q. AND YOU CONCLUDED THAT YOUR USE OF THAT ARTICLE IN THIS
21 INSTANCE OR CHAPTER, AS YOU CALL IT, WOULD NOT HAVE A NEGATIVE
22 AFFECT OF PURCHASES OF THE BOOK; IS THAT CORRECT?

23 A. YES.

24 Q. IF YOU CAN BRING UP STIPULATED FACT 95 PLEASE? AND THESE
25 ARE FACTS, PROFESSOR MOLONEY, THAT THE PARTIES HAVE STIPULATED

1 TO AND THAT ARE NOW ESTABLISHED AS FACTS IN THIS CASE.

2 MS. QUICKER: OBJECTION, YOUR HONOR, SHE HAD NO
3 INVOLVEMENT IN THESE STIPULATED FACTS. THERE'S NO FOUNDATION
4 FOR HER TO TESTIFY ABOUT THEM.

5 THE COURT: SUSTAINED.

6 MR. KRUGMAN: YOUR HONOR, IF MAY BE HEARD, WE'RE
7 TALKING ABOUT THE MARKET THERE AND --

8 THE COURT: YOU CAN ASK HER QUESTIONS, BUT SHE
9 DOESN'T KNOW WHAT'S IN THE STIPULATIONS.

10 REPHRASE YOUR QUESTION.

11 MR. KRUGMAN: OKAY. I WILL REPHRASE.

12 BY MR. KRUGMAN:

13 Q. DID YOU IN CONNECTION WITH FILLING OUT THE FAIR USE
14 CHECKLIST UNDER FACTOR 4, ISN'T IT TRUE THAT YOU DID NOT
15 CONSIDER THE MARKET FOR PERMISSIONS?

16 IN OTHER WORDS, YOU DID NOT CONSIDER THE MARKET FOR
17 LICENSES TO MAKE AND DISTRIBUTE COPIES OF EXCERPTS OF THE WORKS
18 TO STUDENTS?

19 A. I'M NOT SURE WHAT YOU MEAN. DO YOU MEAN DID I -- WELL,
20 I'M NOT SURE WHAT YOU MEAN.

21 Q. DID YOU -- THE MARKET YOU TESTIFIED TO THAT YOU CONSIDERED
22 WAS THE POTENTIAL MARKET FOR THE SALE OF THE BOOK?

23 A. RIGHT.

24 Q. YOU DIDN'T CONSIDER A POTENTIAL MARKET WITH RESPECT TO
25 OBTAINING A PERMISSION FROM EITHER THE PUBLISHER OR COPYRIGHT

1 CLEARANCE CENTER TO PERMIT YOU TO USE A PORTION OF THAT BOOK

2 AND PROVIDE THAT PORTION TO STUDENTS; IS THAT CORRECT?

3 A. NO, BECAUSE I HAD IT ON ELECTRONIC RESERVE, AND I WOULDN'T
4 HAVE DONE THAT ANYWAY.

5 Q. OKAY. SO THE ANSWER IS NO, YOU DID NOT?

6 A. NO, I DID NOT.

7 Q. AND YOU DID NOT CONSIDER THE PERMISSIONS MARKET, EVEN

8 THOUGH THE MARKET FOR PLAINTIFFS' WORKS INCLUDES COPYING AND

9 DISTRIBUTION OF EXCERPTS OF THEIR WORKS IN DIGITAL FORMAT ON

10 GEORGIA STATE'S ELECTRONIC RESERVES SYSTEM; IS THAT CORRECT?

11 A. I DIDN'T CONSIDER MARKETS FOR LICENSING. I CONSIDERED

12 WHETHER IT WOULD HAVE A DAMPENING AFFECT OF SALES OF THE

13 BOOK.

14 Q. NOW DID YOU NOT CHECK -- IF YOU GO BACK TO THE

15 CHECKLIST UNDER FACTOR 4 ON THE RIGHT, YOU DID NOT CHECK THE

16 BOX UNDER LICENSING OR PERMISSIONS REASONABLY AVAILABLE; IS

17 THAT CORRECT?

18 A. RIGHT, I DIDN'T.

19 Q. AND YOU CONDUCTED NO INVESTIGATION TO DETERMINE WHETHER

20 LICENSING OR PERMISSIONS FOR THE WORK WERE REASONABLY

21 AVAILABLE; IS THAT CORRECT?

22 A. MY EXPERIENCE IS THAT THINGS ARE NOT REASONABLY AVAILABLE,

23 BUT, NO, I DID NOT CONDUCT AN INVESTIGATION.

24 Q. YOU ASSUMED IT WOULD BE DIFFICULT?

25 A. YES, BUT THAT WASN'T AN ISSUE AT ALL IN THIS.

1 Q. AND YOU SAY IT WAS NOT AN ISSUE BECAUSE YOU HAD ALREADY
2 CONCLUDED THAT IT WAS FAIR USE?

3 A. WELL, I HAD DONE THE ANALYSIS AND DECIDED IT WAS FAIR USE,
4 AND SO I KNEW IT WOULD WORK ON ELECTRONIC RESERVES.

5 Q. DID YOU IN COMPLETING THE FAIR USE CHECKLIST CONSIDER THE
6 POTENTIAL IMPACT ON PERMISSIONS INCOME OF THE PUBLISHER OF THAT
7 WORK SAGE PUBLICATIONS?

8 A. NO, BUT I DID CONSIDER THE FACT THAT IF THEY SOLD BOOKS
9 BECAUSE MY STUDENTS KNEW ABOUT IT, THEY MIGHT GET SOME MILEAGE
10 FROM THAT.

11 Q. NOW BRING UP JOINT FILING C-15? AND I WILL REPRESENT TO
12 YOU, PROFESSOR MOLONEY, THAT THE EVIDENCE IN THIS CASE HAS
13 ESTABLISHED THAT YOU COULD HAVE OBTAINED PERMISSION TO USE THE
14 TWINN ARTICLE FROM THE SAGE HANDBOOK FOR ROUGHLY ABOUT \$2.24
15 PER STUDENT --

16 MS. QUICKER: OBJECTION, YOUR HONOR, I DON'T KNOW
17 THAT THE EVIDENCE ESTABLISHED THAT IN THIS CASE.

18 MR. KRUGMAN: THAT'S PART OF THE JOINT FILING WHICH I
19 THOUGHT HAD BEEN SUBMITTED BY THE PARTIES. I DON'T THINK THERE
20 IS ANY REAL DISPUTE AS TO THAT BUT --

21 THE COURT: THERE IS SOME LACK OF CLARITY ABOUT
22 WHETHER THE JOINT FILING MEANS THAT THE PARTICULAR COPIES
23 WERE -- THE PARTICULAR PERMISSIONS WOULD HAVE BEEN GRANTED FOR
24 A PARTICULAR PRICE OR JUST WHETHER IF THE PERMISSIONS WERE
25 AVAILABLE THE PRICE WOULD HAVE BEEN A CERTAIN THING. THIS

1 WITNESS DOESN'T KNOW ANYTHING ABOUT THAT.

2 MR. KRUGMAN: YEAH, LET ME REPHRASE THE QUESTION.

3 BY MR. KRUGMAN:

4 Q. PROFESSOR MOLONEY, ASSUME THAT YOU COULD HAVE OBTAINED
5 PERMISSION FOR PROVIDING A COPY OF THAT ARTICLE FOR EACH OF
6 STUDENTS IN YOUR CLASS FOR THE COST OF \$2.24 PER STUDENTS,
7 WOULD YOU HAVE DONE THAT?

8 A. NO.

9 Q. IN FACT THERE IS NO AMOUNT OF PAYMENT THAT YOU WOULD HAVE
10 CONSIDERED FOR PROVIDING A COPY OF THAT WORK TO STUDENTS IN
11 YOUR CLASS; IS THAT CORRECT?

12 A. WELL, I WOULDN'T SAY THAT, BUT IF I HAD TEN ARTICLES AND
13 EACH OF THEM WAS \$2.54, THAT'S ALMOST 30 DOLLARS. IF THEY DO
14 THAT IN EVERY COURSE AND THEY TAKE THREE OR FOUR COURSES A
15 SEMESTER, THAT'S A SIGNIFICANT AMOUNT OF MONEY.

16 SO ONE OF MY GOALS FOR MY STUDENTS WHO DON'T HAVE
17 MUCH MONEY IS TO FIND WAYS FOR THEM TO BE IN CLASS AND TO GET
18 WHAT THEY NEED WITHOUT PAYING ANY EXTRA MONEY THAT THEY DON'T
19 HAVE TO.

20 Q. IF YOU COULD PLEASE TURN TO PAGE 98 OF YOUR DEPOSITION
21 BEGINNING AT LINE 4 AND CONTINUING TO PAGE 99, LINE 2.

22 (VIDEOTAPED DEPOSITION WAS PLAYED IN OPEN COURT.)

23 BY MR. KRUGMAN:

24 Q. SO OBVIOUSLY IF YOU WOULDN'T PAY 25 CENTS, YOU WOULDN'T
25 PAY THE \$2.24?

1 A. RIGHT.

2 Q. AND THAT'S THE CASE EVEN THOUGH YOU HAD CHECKED THE BOX

3 UNDER FACTOR 1 THAT THE USE OF THIS WORK WAS NECESSARY FOR YOUR

4 INTENDED EDUCATIONAL PURPOSE?

5 A. THIS WORK -- MY INTERPRETATION OF THAT IS USE -- IT

6 DOESN'T SAY OF THIS WORK. USE IS NECESSARY TO ACHIEVE YOUR

7 INTENDED EDUCATIONAL PURPOSE, MY INTERPRETATION OF THAT FOR

8 MYSELF WOULD BE THE USE OF THIS OR SOMETHING LIKE IT IS

9 NECESSARY. IT DOESN'T CLARIFY THAT THIS PARTICULAR WORK HAS TO

10 BE THE ONE USED.

11 Q. THIS CHECKLIST THAT YOU COMPLETED, PROFESSOR MOLONEY, DOES

12 IT CONCERN ANY WORK OTHER THAN THE CHAPTER BY TWINN?

13 A. THIS CHECKLIST?

14 Q. THIS CHECKLIST.

15 A. YES, OKAY, SO YOU'RE ASKING IS THIS THE SAME CHECKLIST,

16 THE SAME WAY THAT I USED IT FOR THE OTHER ARTICLES?

17 Q. NO, I'M ASKING YOU, YOU JUST TESTIFIED WELL IT'S NOT

18 REALLY ABOUT JUST THIS WORK, BUT THIS CHECKLIST THAT YOU

19 COMPLETED DEFENDANTS' EXHIBIT 477, DOES IT CONCERN ANY OTHER

20 WORK THAT YOU OFFERED TO STUDENTS ON ELECTRONIC RESERVES IN

21 YOUR FALL 2009 CLASS OTHER THAN THE CHAPTER BY TWINN ENTITLED

22 STATUS OF MIXED METHODS RESEARCH IN NURSING -- HANDBOOK OF

23 MIXED METHODS IN SOCIAL AND BEHAVIORAL RESEARCH BY SAGE

24 PUBLICATIONS, IF YOU LOOK AT THE TOP --

25 A. YES.

1 Q. IF YOU CAN TELL ME DOES THIS CHECKLIST CONCERN ANY OTHER
2 WORK?

3 A. I GUESS I DON'T UNDERSTAND WHAT YOU'RE ASKING. BECAUSE
4 YOU KNOW THAT I USED THE CHECKLIST, I CHECKED IT OFF AND FILLED
5 OUT THE OTHER PARTS FOR THE OTHER ARTICLES.

6 Q. I'M ASKING ABOUT THIS CHECKLIST --

7 A. THIS CHECKLIST.

8 Q. -- DEFENDANTS' EXHIBIT 477 --

9 A. OKAY.

10 Q. -- THAT'S WHAT WE'RE TALKING ABOUT.

11 A. ALL RIGHT.

12 Q. AND WHEN YOU CHECKED USE IS NECESSARY TO ACHIEVE YOUR
13 INTENDED EDUCATIONAL PURPOSE, ISN'T IT TRUE THAT THE ONLY, THE
14 ONLY WORK THAT YOU WERE CONSIDERING WAS THIS CHAPTER BY TWINN?

15 MS. QUICKER: OBJECTION, YOUR HONOR, HE'S ASKED HER
16 SEVERAL TIMES ABOUT THIS PARTICULAR FACTOR.

17 THE COURT: OVERRULED.

18 THE WITNESS: I LIKE THIS ARTICLE. THAT'S WHY I USE
19 IT, AND SO THAT'S WHAT I'M REFERRING WHEN I DO THIS. THIS IS
20 THE ONE I WAS ADDRESSING, BUT IT DIDN'T HAVE TO BE THAT
21 ARTICLE.

22 I COULD HAVE USED ANOTHER ONE, AND IT PROBABLY WOULD
23 HAVE BEEN VERY SIMILAR BECAUSE THAT'S THE POINT OF USING IT
24 BECAUSE IT ADDRESSES THOSE AREAS I WANT TO ADDRESS, BUT THIS
25 CHECKLIST REFERS TO THIS ARTICLE. THE USE IS NECESSARY DOES

1 NOT MEAN EXCLUSIVE.

2 Q. SO WHAT YOU'RE SAYING IS THAT WHEN YOU CHECKED THE BOX FOR
3 USE IS NECESSARY TO ACHIEVE YOUR INTENDED EDUCATIONAL PURPOSE
4 THAT YOU WERE JUST THINKING ABOUT ANY POSSIBLE ARTICLE?

5 A. NO.

6 MS. QUICKER: OBJECTION, ASKED AND ANSWERED.

7 THE COURT: SUSTAINED.

8 BY MR. KRUGMAN:

9 Q. WAS THE USE OF THIS ARTICLE NECESSARY OR NOT, THIS
10 SPECIFIC ARTICLE; IF YOU CAN JUST ANSWER YES OR NO, AND THEN
11 WE'LL MOVE ON?

12 MS. QUICKER: OBJECTION, ASKED AND ANSWERED.

13 THE COURT: SUSTAINED.

14 BY MR. KRUGMAN:

15 Q. NOW, YOU TESTIFIED THAT EVEN IF YOU HAD TO PAY 25 CENTS
16 YOU WOULDN'T HAVE USED THIS ARTICLE?

17 MS. QUICKER: OBJECTION, ASKED AND ANSWERED.

18 MR. KRUGMAN: I'M LEADING INTO MY NEXT SUBJECT
19 MATTER.

20 THE COURT: ALL RIGHT. OVERRULED.

21 THE WITNESS: YES.

22 BY MR. KRUGMAN:

23 Q. AND IF YOU HAD TO PAY THE 25 CENTS, YOU WOULD HAVE GONE
24 OUT AND FOUND SOMETHING ELSE TO USE; IS THAT CORRECT?

25 A. YES, I COULD HAVE DONE THAT.

1 Q. NOW, ASSUME THAT THE ONLY OTHER ARTICLE THAT YOU WENT OUT
2 AND FOUND AS A SUBSTITUTE WAS ONE THAT REQUIRED YOU TO PAY
3 PERMISSION FOR ITS USE, YOU HAD TO PAY 25 CENTS TO USE IT;
4 WOULD YOU HAVE PAID THAT 25 CENTS?

5 MS. QUICKER: OBJECTION, ASSUMES FACTS NOT IN
6 EVIDENCE. NOW WE'RE IN HYPOTHETICALS.

7 MR. KRUGMAN: I THINK IT'S AN APPROPRIATE QUESTION
8 WHERE SHE SAYS SHE WOULDN'T PAY 25 CENTS, AND SHE'D GO OUT AND
9 FIND SOMETHING ELSE, AND I THINK IT'S APPROPRIATE ON
10 CROSS-EXAMINATION TO BE ABLE TO PROBE INTO WHAT THE PROFESSOR
11 WOULD HAVE DONE.

12 THE COURT: I'LL ALLOW IT.

13 THE WITNESS: WELL, I DO THINK IT'S A BIG
14 ASSUMPTION. THERE ARE A LOT OF OTHER ARTICLES OUT THERE, BUT I
15 GUESS I WOULD SAY TO YOU NO, I WOULDN'T HAVE DONE THAT BECAUSE
16 I WOULDN'T HAVE INCORPORATED THE MATERIAL INTO MY LECTURE.

17 BY MR. KRUGMAN:

18 Q. OKAY. SO YOU WOULD HAVE JUST DONE AWAY WITH THE ARTICLE?

19 A. YEAH.

20 Q. OKAY. SO IT REALLY WASN'T NECESSARY?

21 A. IT WAS NECESSARY TO GET THE POINT ACROSS OR I WOULD HAVE
22 HAD TO DO SOMETHING DIFFERENT. THIS WAY THEY HAD THE
23 BACKGROUND. I DIDN'T HAVE TO SAY IT IN A LECTURE.

24 Q. NOW YOU CONSIDERED THE PROCESS OF COMPLETING THE FAIR USE
25 CHECKLIST AND HAVING THE MATERIALS POSTED ON ELECTRONIC

1 RESERVES TO BE VERY CUMBERSOME; IS THAT CORRECT?

2 A. THAT PARTICULAR DAY IT TOOK ME A LONG TIME TO DO THAT, AND
3 I HAD A LOT OF OTHER STUFF GOING ON. IT WAS AN UNUSUAL TIME.
4 I'M QUITE COMPULSIVE, AND THE REASON I HAD SAID THAT I WOULD
5 HAVE NOT DONE IT THAT WAY IS BECAUSE ORDINARILY I WOULD NEVER
6 HAVE GIVEN SOMEBODY ELSE WORK TO DO OR COMPLETED SOMETHING IN A
7 SHORTCUT FASHION THE WAY I DID.

8 BUT WHEN I WENT BACK AND LOOKED AT THE PAPERWORK FOR
9 THIS AFTER THE DEPOSITION AND I LOOKED AT THE DATES, I REALIZED
10 THAT THAT WAS ABOUT TWO WEEKS AFTER I HAD UNDERGONE SURGERY AND
11 RADIATION FOR A MALIGNANT MELANOMA, AND I WAS AT WORK AND
12 HAVING TO DO ALL THIS WORK. I WAS STILL FULL TIME. THERE WERE
13 NO OTHER FACULTY, AND I NEEDED TO TAKE SHORTCUTS AND THAT WAS
14 WHY I DID WHAT I DID.

15 MR. KRUGMAN: FIRST OF ALL, I MOVE TO STRIKE THE
16 RESPONSE TO THAT QUESTION AS BEING NONRESPONSIVE.

17 THE COURT: I'LL GRANT THE MOTION.

18 BY MR. KRUGMAN:

19 Q. AND LET ME ASK YOU AGAIN, PROFESSOR MOLONEY. YOU
20 CONSIDERED THE PROCESS OF COMPLETING THE FAIR USE CHECKLIST AND
21 HAVING THE MATERIALS POSTED ON ELECTRONIC RESERVES TO BE VERY
22 CUMBERSOME, CORRECT?

23 A. YES, IT IS, BUT WE DO LOTS OF THINGS THAT ARE CUMBERSOME
24 AND I DO THEM.

25 Q. IN THIS INSTANCE YOU HAD TO FILL OUT THE FAIR USE

1 CHECKLIST FOR EACH ARTICLE YOU WANTED COPIED ON ELECTRONIC
2 RESERVES, CORRECT?

3 A. I HAD ALREADY DONE IT ONCE --

4 Q. BUT IT HAD --

5 A. BUT I HAD TO DO IT AGAIN, YES, I WOULD HAVE HAD TO DO IT
6 AGAIN.

7 Q. AND THEN SOME BOOKS THAT -- MANY OF THE BOOKS THE LIBRARY
8 OWNED, CORRECT?

9 A. YES.

10 Q. BUT SOME THEY DIDN'T, CORRECT?

11 MS. QUICKER: OBJECTION, YOUR HONOR, NOW WE'RE
12 TALKING ABOUT BOOKS THAT ARE NOT AT ISSUE IN THIS CASE.

13 MR. KRUGMAN: WE'RE TALKING ABOUT THIS WITNESS'
14 TREATMENT --

15 THE COURT: OVERRULED. ARE WE GETTING CLOSE TO THE
16 END?

17 MR. KRUGMAN: YES, YOUR HONOR, A FEW MORE MINUTES.

18 THE WITNESS: AND WHAT WAS THE QUESTION AGAIN?

19 BY MR. KRUGMAN:

20 Q. SOME OF THE BOOKS THAT YOU HAD -- FROM WHICH YOU HAD
21 CHAPTERS POSTED ON ELECTRONIC RESERVES WERE OWNED BY THE
22 LIBRARY, CORRECT?

23 A. YES.

24 Q. AND THERE WERE SOME THAT WERE NOT, CORRECT?

25 A. YES.

1 Q. AND THOSE YOU HAD TO -- I THINK YOU TOLD ME IN
2 DEPOSITION -- CART THOSE BOOKS TO THE LIBRARY THAT THE LIBRARY
3 DIDN'T OWN, CORRECT?
4 A. YES.
5 Q. AND THEN YOU HAD TO WAIT THE TIME FOR SOMEONE TO COPY THE
6 WORKS; IS THAT CORRECT?
7 A. WELL, I DIDN'T WAIT THERE. YOU LEFT THEM AND THEN YOU
8 PICKED THEM UP LATER, AND I BELIEVE I HAD MY ADMINISTRATIVE
9 ASSISTANT DO THAT IN THIS CASE. I DID SAY THAT.
10 Q. YOU DID TESTIFY TO THAT, CORRECT?
11 A. YES.
12 Q. THANK YOU. AND IT SOMETIMES TOOK A COUPLE OF DAYS TO GET
13 IT ALL DONE; IS THAT CORRECT?
14 A. YES.
15 Q. AND THAT YOU SAID WAS VERY CUMBERSOME; IS THAT CORRECT?
16 A. YES.
17 Q. BASED ON THE EXPERIENCE YOU HAD WITH ELECTRONIC RESERVES
18 IN THE FALL OF 2009 YOU JUST DECIDED YOU WEREN'T GOING TO USE
19 IT ANY MORE, CORRECT?
20 A. I HAVEN'T USED ELECTRONIC RESERVES SINCE THEN.
21 Q. YOU DECIDED YOU DIDN'T NEED TO USE IT, CORRECT?
22 A. I DECIDED THAT THERE WERE OTHER WAYS OF DOING IT, YEAH.
23 Q. YOU HAD READ FAIR USE AND FELT LIKE YOU HAD A PRETTY GOOD
24 UNDERSTANDING OF IT?
25 A. YES.

1 Q. SO AT THAT POINT BECAUSE OF THE EXPERIENCE YOU HAD, THE
2 CUMBERSOME PROCESS OF POSTING -- OF HAVING MATERIALS POSTED ON
3 ERESERVE, YOU DECIDED THAT FOR CHAPTERS THAT YOU WANTED TO
4 USE YOU WOULD SIMPLY MAKE A PDF OF THOSE WORKS; IS THAT
5 CORRECT?

6 A. YES.

7 MS. QUICKER: OBJECTION, ARE WE TALKING ABOUT
8 CHAPTERS OR THE TWINN CHAPTER?

9 MR. KRUGMAN: WE'RE TALKING ABOUT THE WORKS THAT
10 PROFESSOR MOLONEY POSTED ON ELECTRONIC RESERVES IN THE FALL OF
11 2009.

12 MS. QUICKER: THAT GOES BEYOND THE SCOPE OF THE ISSUE
13 IN THIS CASE. THE ONLY ISSUE IN THIS CASE IS THE TWINN
14 ARTICLE.

15 MR. KRUGMAN: WE COULD TALK ABOUT THE TWINN ARTICLE.
16 I THINK WE HAVE -- YOU KNOW, WE CAN TALK ABOUT THE TWINN
17 ARTICLE OR ANY OF THEM. IT DOESN'T REALLY MATTER. WITH
18 RESPECT TO THE TWINN ARTICLE --

19 THE COURT: AT THIS POINT I WILL SUSTAIN THE
20 OBJECTION TO THE SCOPE OF YOUR QUESTION.

21 BY MR. KRUGMAN:

22 Q. I WILL NARROW IT TO THE TWINN ARTICLE. YOU DECIDED THAT
23 IT WAS REALLY TOO MUCH TROUBLE TO PROVIDE EVEN THE TWINN
24 ARTICLE TO STUDENTS ON ELECTRONIC RESERVE, CORRECT?

25 A. YES.

1 Q. AND SO INSTEAD OF PROVIDING THAT ARTICLE ON ELECTRONIC
2 RESERVE, YOU INSTEAD DECIDED TO JUST MAKE A COPY OF IT YOURSELF
3 AND CREATE A PDF AND THEN E-MAIL THAT TO STUDENTS; IS THAT
4 CORRECT?

5 A. FOR MY THREE STUDENTS, YES.

6 Q. AND THE REASON YOU BEGAN DOING THAT WAS BECAUSE --

7 THE COURT: WE'VE BEEN OVER THAT.

8 MR. KRUGMAN: OKAY.

9 BY MR. KRUGMAN:

10 Q. AND AM I CORRECT THAT FOR -- THAT WITH RESPECT TO THE
11 TWINN WORK WHEN YOU PROVIDED A COPY OF THAT WORK TO STUDENTS IN
12 A PDF FORM, YOU DID NOT COMPLETE A FAIR USE CHECKLIST?

13 A. I HAD ALREADY DONE IT. I KNEW IT WAS FAIR USE.

14 Q. SO THE ANSWER IS --

15 A. I DID NOT DO IT AGAIN.

16 MR. KRUGMAN: THANK YOU. THAT'S ALL I HAVE.

17 THE COURT: SHALL THE WITNESS BE EXCUSED?

18 MR. KRUGMAN: IT'S OKAY WITH US. I HAVE NO

19 OBJECTION.

20 MS. QUICKER: YOUR HONOR, IF --

21 THE COURT: VERY QUICKLY.

22 REDIRECT EXAMINATION

23 BY MS. QUICKER:

24 Q. ONE LAST QUESTION. WHY DID YOU ASK YOUR ADMINISTRATIVE
25 ASSISTANT TO FILL OUT THE TOP PART OF THE WRITTEN CHECKLIST FOR

1 THE TWINN ARTICLE IN THE FALL 2009?

2 A. IT WAS BECAUSE I HAD ALREADY DONE THE FAIR USE CHECKLIST
3 FOR THAT ARTICLE. I KNEW THAT WHAT I CHECKED OFF ON THE BOTTOM
4 WAS ACCURATE FOR THAT, AND I ASKED HER TO FILL IT OUT TO SAVE
5 ME SOME TIME BECAUSE I HAD TOO MUCH ELSE TO DO.

6 MS. QUICKER: NO FURTHER QUESTIONS.

7 THE COURT: YOU ARE EXCUSED. THANK YOU. WELL, IT'S
8 TIME TO QUIT. WE WILL START AGAIN ON TUESDAY AT ELEVEN
9 O'CLOCK. I HOPE YOU ALL HAVE A NICE WEEKEND.

10 (PROCEEDINGS ADJOURNED)

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22

23

24

25

INDEX

1		
2		
3	JANET GABLER-HOVER	
	DIRECT EXAMINATION (CONTINUED)	
4	MS. MOFFITT:.....	2
	CROSS-EXAMINATION	
5	BY MR. BLOOM:.....	12
6	MELINDA HARTWIG	
	DIRECT EXAMINATION	
7	BY MR. MILLER:.....	26
	CROSS-EXAMINATION	
8	BY MR. LARSON:.....	46
	REDIRECT EXAMINATION	
9	BY MR. MILLER:.....	52
10	PATRICIA DIXON	
	DIRECT EXAMINATION	
11	BY MR. HARBIN:	55
	CROSS-EXAMINATION	
12	BY MR. RAINS:.....	83
	REDIRECT EXAMINATION	
13	BY MR. HARBIN:.....	94
14	(EXCERPTS OF THE DEPOSITION OF DENIS CHARLES GAINY WERE	
	READ AS FOLLOWS).....	96
15	MARGARET F. MOLONEY	
16	DIRECT EXAMINATION	
	BY MS. QUICKER:.....	132
17	DIRECT EXAMINATION	
	BY MR. KRUGMAN:.....	146
18	REDIRECT EXAMINATION	
	BY MS. QUICKER:.....	175
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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21
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C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA

I, ANDRE G. ASHLEY, DO HEREBY CERTIFY THAT I AM A
U.S. DISTRICT REPORTER FOR THE NORTHERN DISTRICT OF GEORGIA,
THAT I REPORTED THE FOREGOING AND THE SAME IS A TRUE AND
ACCURATE TRANSCRIPTION OF MY MACHINE SHORTHAND NOTES AS TAKEN
AFORESAID.

IN TESTIMONY WHEREOF I HAVE HEREUNTO SET MY HAND ON
THIS 5TH DAY OF JULY, 2011.

ANDRE G. ASHLEY
OFFICIAL COURT REPORTER
NORTHERN DISTRICT OF GEORGIA