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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

THE AUTHORS GUILD, INC., ET AL.,

Plaintiffs,

v.

HATHITRUST, ET AL.,

Defendants.

Case No. 11 Civ. 6351 (HB)

**DECLARATION OF CORY SNAVELY IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, Cory Snavely, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Manager of Library IT Core Services at the University of Michigan Library. I submit this declaration in opposition to Plaintiffs' motion for summary judgment. Unless otherwise noted, I make this declaration based upon my own personal knowledge.

2. As Manager of Library IT Core Services at the University of Michigan ("Michigan"), I am responsible for, among other things, the continued development and maintenance of the HathiTrust Digital Library ("HDL") server and storage infrastructure, which is where HDL content is stored and HDL services operate.

3. I have served as Manager of Library IT Core Services at Michigan for more than thirteen (13) years. During my tenure at Michigan, I have designed and overseen the development of the library's technology infrastructure. In or about December 2004, I began to oversee the development of the infrastructure that would ultimately underlie HDL when it launched in 2008.

4. My duties include ensuring the security of the works within the HDL. This entails, among other things, ongoing attention to a rigorous security program for the entire Michigan library's technology environment. I manage a team of five in connection with this work.

5. I have a degree in Systems Analysis which I received from Miami University in 1992. I have participated in numerous groups on campus to help guide Michigan's strategies for security and storage. For example, I am currently serving on the Information and Infrastructure Assurance Council, a key oversight and decision-making body, which provides guidance to the campus on security initiatives, programs, and policy relating to computer security.

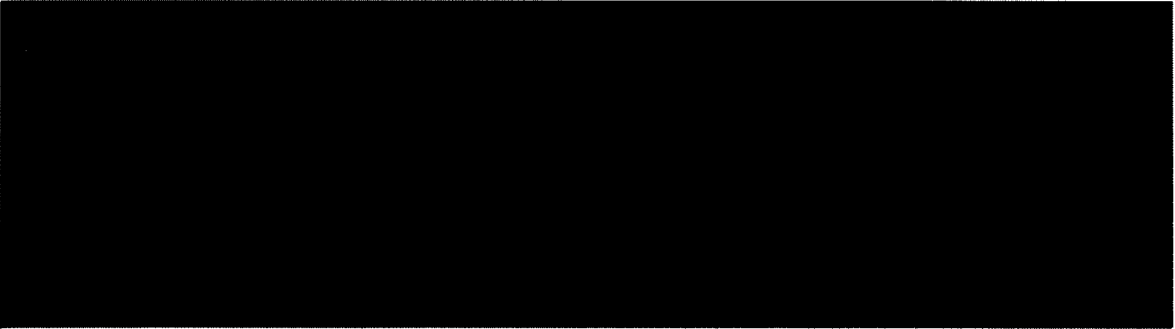
A. The Unblemished Security Record of the HDL

6. I have reviewed the declaration of Dr. Benjamin Edelman, which the Plaintiffs have submitted in connection with their motion for summary judgment. In that declaration, Dr. Edelman provides a list of generalized threats to the security of the HDL, but without regard to the steps already taken by the library defendants (the "Libraries") to minimize if not eliminate

altogether the threats he identifies. His approach is akin to assessing the safety of commercial air travel by summarizing the ways in which a plane may fall from the sky without taking note of all of the steps taken by the aviation industry to guard against such calamity.

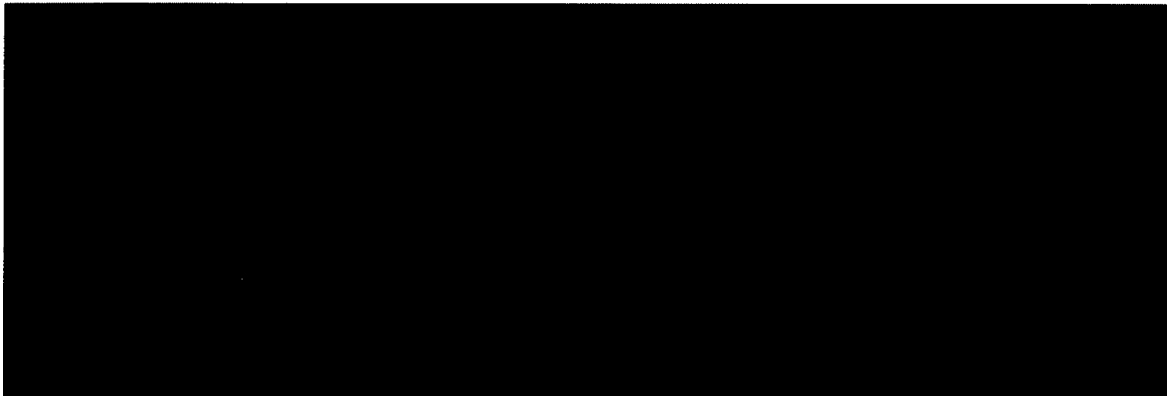
7. In fact, Dr. Edelman apparently had no choice but to limit his report to generalities. This is because he never attempted to study the specific security measures taken by Michigan to protect the HDL *and admits that he would not be qualified to conduct such a risk assessment in any event.*

8. Dr. Edelman, who has degrees in economics, not computer science, sat for a deposition in the Google lawsuit two weeks before submitting his declaration in this action. He confessed during that deposition that "I don't know about all of the security systems that [the Libraries] have." (Edelman Tr. at 248:11-12). He also conceded that apart from information contained in a risk assessment conducted by Michigan to improve the security of the HDL, "I don't think I have knowledge of [Michigan's] current security." (Edelman Tr. at 268:12-18). He testified that if a company asked him to conduct an evaluation of its security measures, "I don't think I would be the best person to evaluate their security systems, but I think I would be able to assist them in selecting an appropriate person." (Edelman Tr. at 288:15-18). True and correct copies of relevant excerpts of Dr. Edelman's deposition testimony are attached hereto as Exhibit A.





10. Based upon my experience in securing computer systems and first-hand knowledge of the security controls used to protect the HDL, I believe that the generalized risks identified by Dr. Edelman, which are customary and typical risks faced by the operators of any large service accessible through the Internet (including services demanding a high level of security such as Internet banking), do not render the works within the HDL corpus insecure.



B. The Security Measures Protecting the HDL From the General Risks Dr. Edelman Identifies.

12. Dr. Edelman, in paragraphs 16 through 26 of his declaration, sets out a number of generalized security risks associated with maintaining a digital library such as the HDL. The risks he identifies are, in fact, well known to experts in computer security and my team has taken a number of precautions to minimize them, if not eliminate them altogether.

13. Specifically, in paragraph 16, Dr. Edelman claims that “pirates could extract book copies through defects in the security of a provider’s system.” Dr. Edelman continues by

¹ Additional background on the security measures taken to protect the HDL is found in the June 28, 2012 declaration of the HathiTrust’s Executive Director, John Wilkin, submitted in support of the Libraries’ motion for summary judgment.

claiming that unauthorized individuals could gain access to digital copies of works through defects in the physical or virtual access controls guarding the servers housing the digital copies. Dr. Edelman also claims in this paragraph that “[d]efects could also arise through flaws in the operating system, database server, web server, or other software run on a provider’s servers; such flaws have been widespread in even the most popular server software” and claims that “defects could arise through the provider’s custom software.”

14. These are all well-known, common risks. The HDL uses industry best practices to greatly reduce the possibility of unauthorized access of the type discussed in paragraph 16 of Dr. Edelman’s declaration:



² Frequently, commercial enterprises do not apply updates because their business requirements demand that running systems be unchanged and untouched; this type of approach to security can, in fact, expose systems to some of the security risks identified by Dr. Edelman. HDL systems, in contrast, are designed to be maintained regularly and continuously kept up-to-date and secure.

[REDACTED]

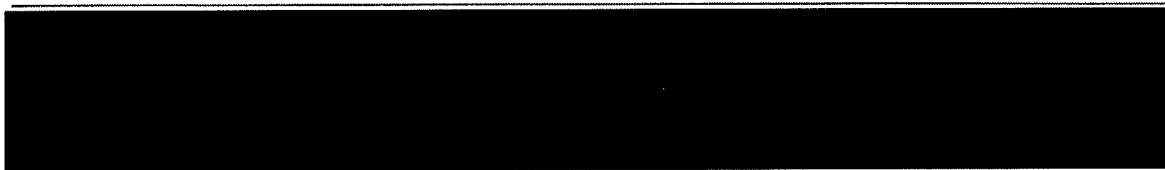
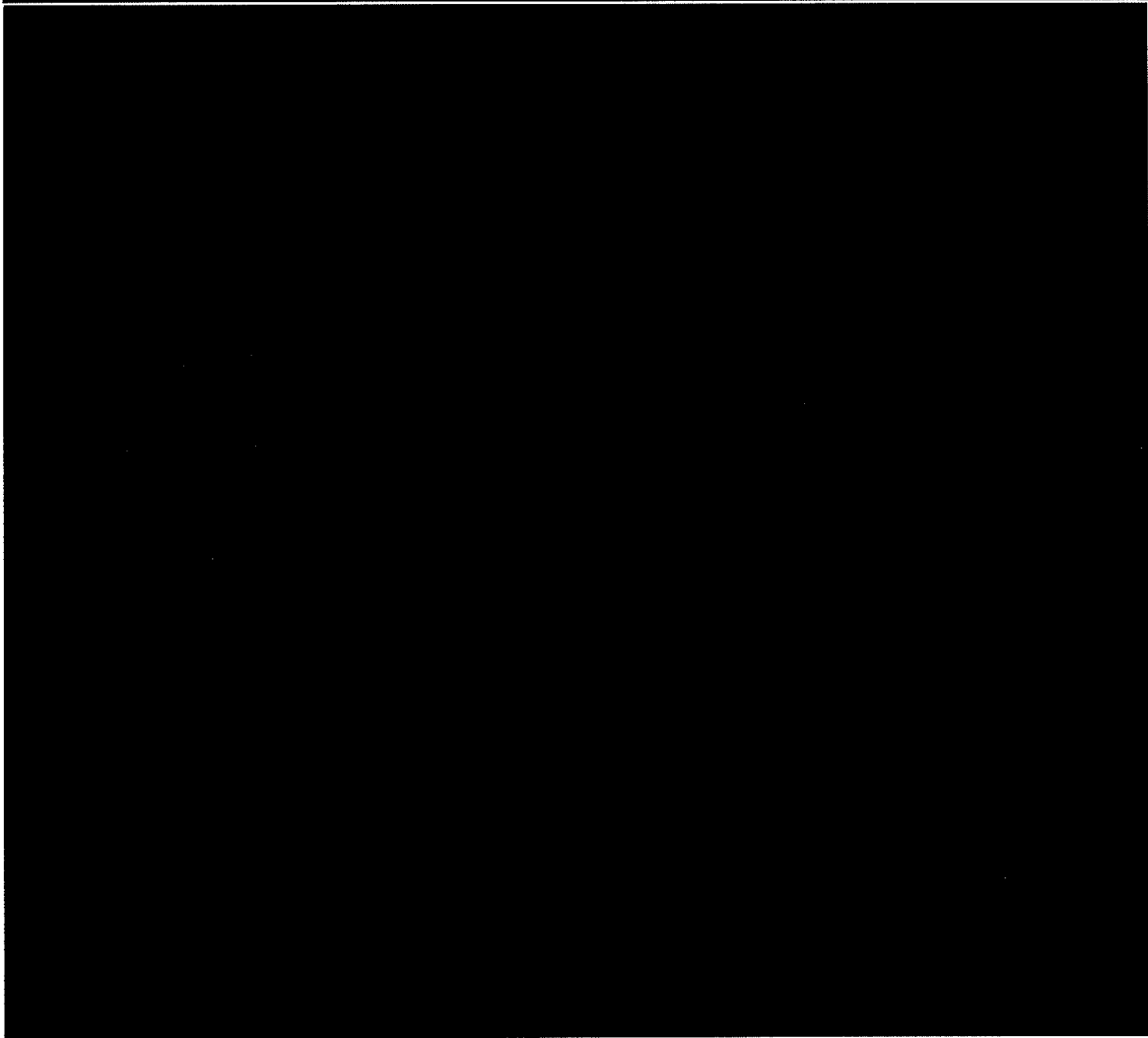
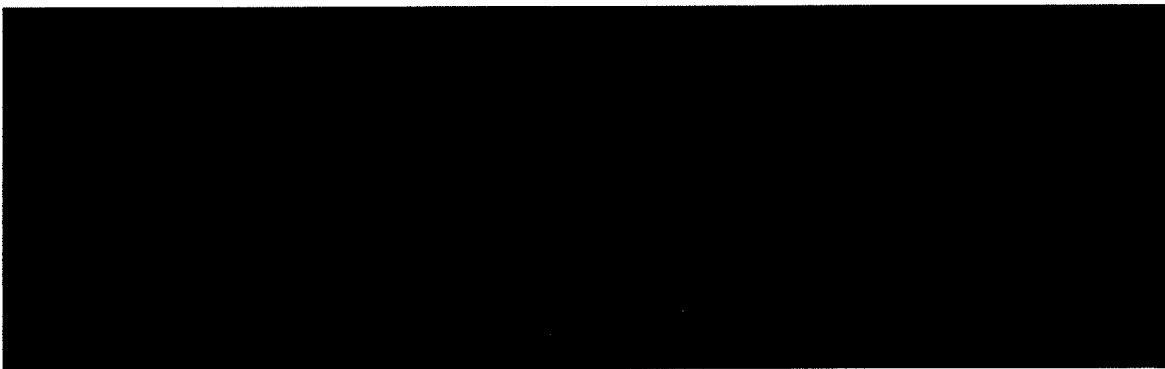
16. The security controls identified above (see paragraph 14), particularly the double perimeter firewalls, greatly minimize the risk of access through exploitation of errors in security configurations. Further, Dr. Edelman's selective use of Mr. Wilkin's testimony falsely suggests that the HDL experiences disproportionately frequent, targeted attacks as compared to similar

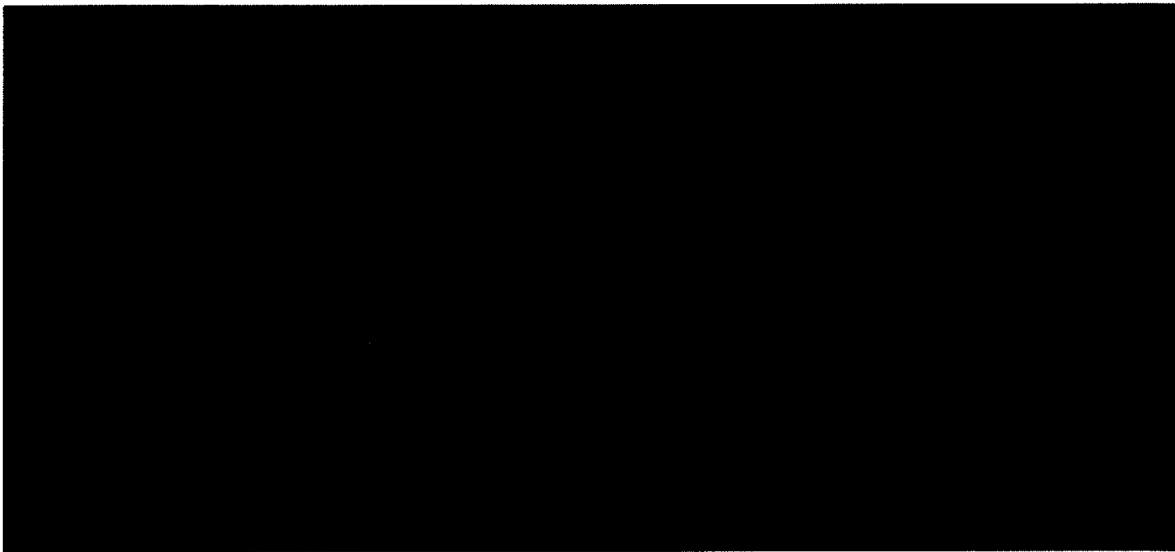
[REDACTED]

17. In paragraph 18 of his declaration, Dr. Edelman cites the risk of a "rogue employee" that "intentionally redistributes[s] book copies." In fact, employee access to in-copyright materials is far more restricted than Dr. Edelman suggests:

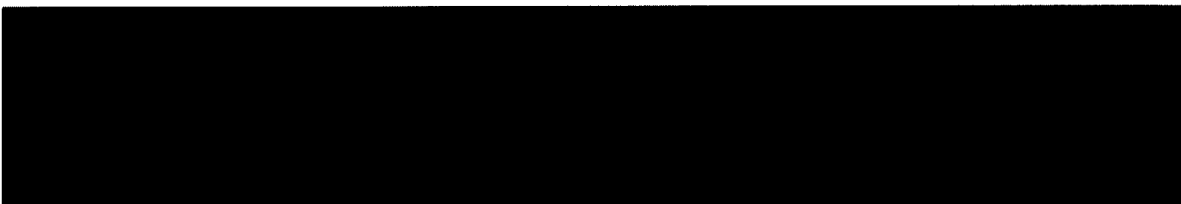
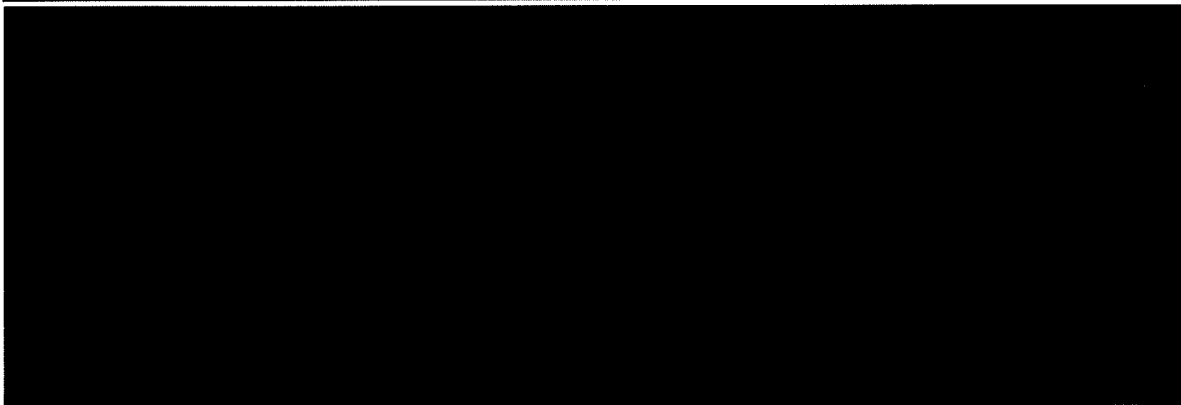
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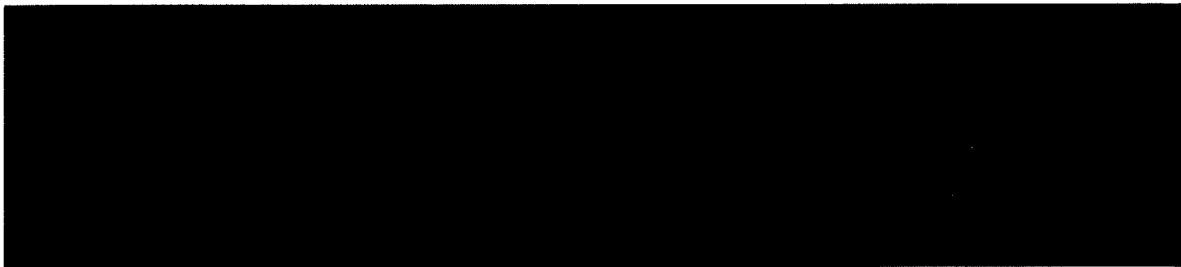
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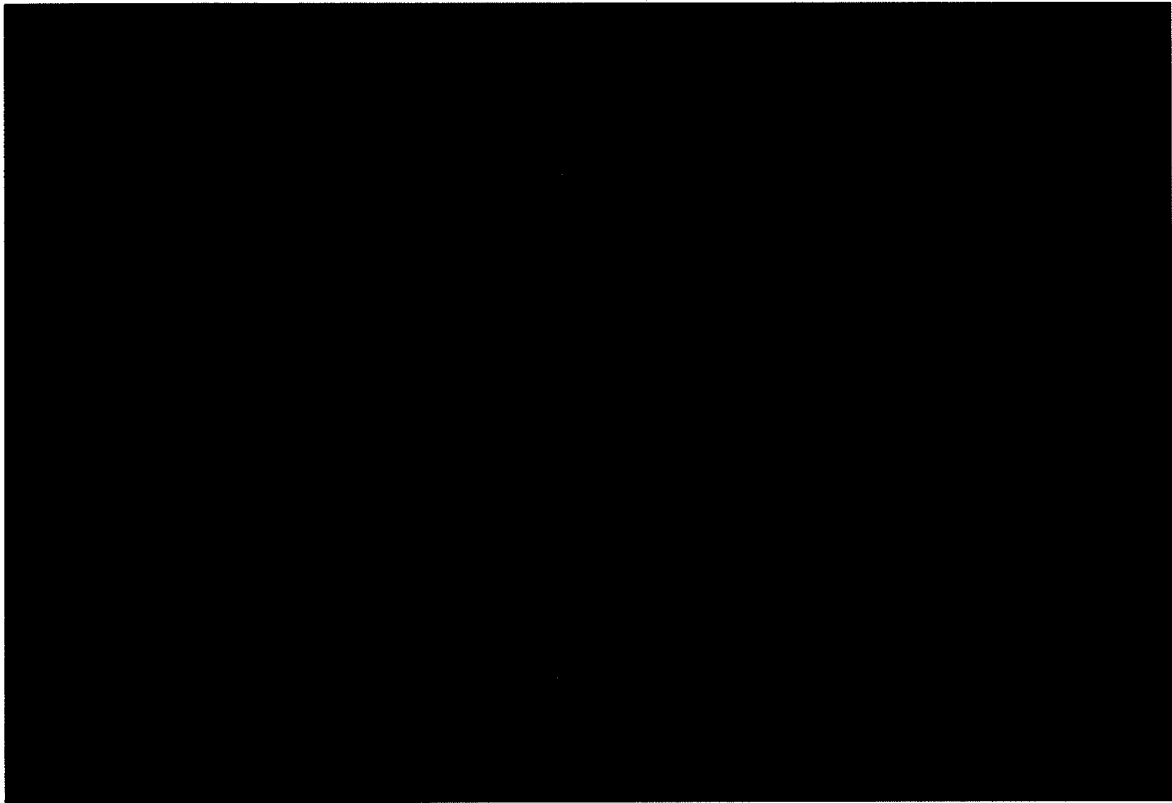


20. Dr. Edelman, in paragraph 20 of his declaration, speculates that “any error made by an employer could create a security breach allowing hackers to access book copies and






23. Dr. Edelman, in paragraph 22 of his declaration, asserts that “[e]ven if Defendants attempt to implement security controls and other limitations on users’ ability to download book copies, experience suggests that users will exceed those limitations.” He juxtaposes this claim



26. Dr. Edelman asserts in paragraph 23 of his declaration that the Libraries permit “non-consumptive research” aimed at analyzing patterns in the texts found in the HDL and he



claims that this functionality increases the risk of a security breach. *The entire premise underlying this assertion is incorrect however.* The HDL only permits research on material determined to be in the public domain. If, in the future, the Libraries permit non-consumptive research over in-copyright text, security measures would be adopted to negate the security risks identified by Dr. Edelman, as well as other risks he did not .

27. In sum, Dr. Edelman's report offers the Court nothing more than a collection of hypothetical risks without any countervailing assessment of the ways in which the HDL is protected against such risks. A detailed assessment of the HDL's security protocols in fact establishes that the risk of a security breach is exceedingly low, well within the guidelines for a trustworthy repository of digital information.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: July 20, 2012

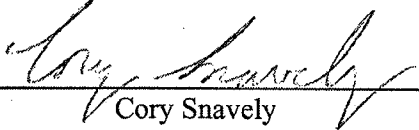

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EXHIBIT A

<p style="text-align: right;">Page 1</p> <p style="text-align: center;">UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK</p> <p>-----</p> <p>THE AUTHORS GUILD, INC.,) ASSOCIATIONAL PLAINTIFF,) BETTY MILES, JOSEPH) GOULDEN, AND JIM BOUTON,) INDIVIDUALLY AND ON) BEHALF OF ALL OTHERS) SIMILARLY SITUATED,) C.A. 05 CV 8136-DC Plaintiffs) Volume: I vs.) GOOGLE, INC.) Defendant) -----</p> <p>DEPOSITION OF EXPERT WITNESS, BENJAMIN G. EDELMAN, before Avis P. Barber, a Notary Public and Registered Professional Reporter, in and for the Commonwealth of Massachusetts, at the Harvard Business School, Baker Library, 25 Harvard Way, Boston, Massachusetts, on Thursday, June 14, 2012, commencing at 10:03 a.m.</p> <p>Job No. 148413 PAGES 1 - 312</p>	<p style="text-align: right;">Page 3</p> <p style="text-align: center;">I N D E X</p> <p>1 2 WITNESS DIRECT CROSS REDIRECT RECROSS 3 4 BENJAMIN G. EDELMAN 5 6 BY MR. GRATZ 6 7 8 E X H I B I T S 9 10 NUMBER PAGE 11 Exhibit 1 Expert Report of Benjamin Edelman 17 12 Exhibit 2 Whenu.com Emergency Motion 98 13 Exhibit 3 Initial Expert Report of Doctor 14 Benjamin Edelman Concerning Industry 15 Practices and Activities of 16 Valueclick 101 17 Exhibit 4 Expert Report of Benjamin Edelman 112 18 Exhibit 5 Document entitled "Google Toolbar 19 Tracks Browsing even after User 20 Choose Disable" 129 21 Exhibit 6 Search Engine Land, Blog Post, 131 22 1/26/10 23 Exhibit 7 Document entitled "Privacy Lapse at 24 Google JotSpot" 137 25 Exhibit 8 Document entitled "Google's JotSpot Exposes User Data" 139 Exhibit 9 Declaration of Benjamin Edelman 143 Exhibit 10 Supplemental Declaration of Benjamin Edelman 143</p>
<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES: 2 3 On behalf of the Plaintiffs: 4 BONI & ZACK, LLC 5 15 St. Asaphs Road 6 Bala Cynwyd, Pennsylvania 19004 7 By: Michael J. Boni, Esquire 8 Tel: 610-822-0201 9 Fax: 610-822-0206 10 mboni@bonizack.com 11 12 On behalf of the Defendant 13 DURIE TANGRI 14 217 Leidesdorff Street 15 San Francisco, California 94111 16 By: Joseph C. Gratz, Esquire 17 Tel: 415-362-6666 18 Fax: 415-236-6300 19 jgratz@durietangri.com 20 21 ALSO PRESENT: Jody Urbati, Videographer 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 2 E X H I B I T S (Continued) 3 NO. PAGE 4 Exhibit 11 Document entitled "The Online 5 Economy: Strategy and 6 Entrepreneurship" 156 7 Exhibit 12 Declaration of Benjamin G. Edelman 161 8 Exhibit 13 Document entitled "Advertisers Using 9 WhenU" 164 10 Exhibit 14 Exhibit 1 171 11 Exhibit 15 Document entitled "Google Books 12 Partner Program Standard Terms and 13 Conditions" 213 14 Exhibit 16 Search Inside, Publisher Sign-Up 221 15 Exhibit 17 Participating Authors' Reprint 16 Agreement v2.0 228 17 Exhibit 18 Cooperative Agreement 267 18 Exhibit 19 Document entitled "NDA Never Existed" 270 19 Exhibit 20 Benjamin Edelman's Thesis 306 20 21 EXHIBITS RETAINED BY THE COURT REPORTER 22 23 24 25</p>

<p style="text-align: right;">Page 5</p> <p>1 PROCEEDINGS</p> <p>2 THE VIDEOGRAPHER: Good morning. We</p> <p>3 are on the record at 10:03 A.M. on June 14th,</p> <p>4 2012. This is the videotaped deposition of</p> <p>5 Benjamin Edelman. My name is Jody Urbati, here</p> <p>6 with our court reporter Barbara Avis. We are</p> <p>7 here from Veritext National Deposition and</p> <p>8 Litigation Services at the request of counsel.</p> <p>9 This deposition is being held at</p> <p>10 Harvard Business School in the city of Boston,</p> <p>11 Massachusetts. The caption of this case is the</p> <p>12 Authors Guild versus Google, Inc. Please note</p> <p>13 that the audio and video recording will take</p> <p>14 place unless all parties agree to go off the</p> <p>15 record. Microphones are sensitive and may pick</p> <p>16 up whispers, private conversations and cellular</p> <p>17 interference.</p> <p>18 At this time will counsel and all</p> <p>19 present identify themselves for the record.</p> <p>20 MR. GRATZ: Joseph Gratz from Durie</p> <p>21 Tangri, LLP in San Francisco for defendant</p> <p>22 Google.</p> <p>23 MR. BONI: Michael Boni from Boni &</p> <p>24 Zach, Bala Cynwyd, Pennsylvania for plaintiffs.</p> <p>25 THE WITNESS: Benjamin --</p>	<p style="text-align: right;">Page 7</p> <p>1 Q. You have an undergraduate degree and</p> <p>2 a Ph.D. in economics; is that right?</p> <p>3 A. Yes.</p> <p>4 Q. Do any of the opinions stated in your</p> <p>5 report apply economic analysis?</p> <p>6 A. I think they do broadly understood,</p> <p>7 yes.</p> <p>8 Q. How so?</p> <p>9 A. The report considers the incentives</p> <p>10 of various parties, the factors motivating them</p> <p>11 to act or not to act and the likely consequences</p> <p>12 of those incentives.</p> <p>13 Q. Are there any specific economic</p> <p>14 methods that are applied in your report?</p> <p>15 MR. BONI: Object to form.</p> <p>16 A. I'm not sure I understand what you</p> <p>17 mean.</p> <p>18 Q. What economic methods are applied in</p> <p>19 your report?</p> <p>20 MR. BONI: Same objection.</p> <p>21 A. My training and economics teaches me</p> <p>22 to understand and analyze incentives in</p> <p>23 considering the actions of any rational actor.</p> <p>24 That method of analysis of considering and</p> <p>25 applying incentives is applied throughout the</p>
<p style="text-align: right;">Page 6</p> <p>1 MR. BONI: I'm sorry, and here</p> <p>2 representing the witness.</p> <p>3 THE VIDEOGRAPHER: Thank you. The</p> <p>4 witness will be sworn in and we can proceed.</p> <p>5 BENJAMIN G. EDELMAN,</p> <p>6 A witness called for examination, having been</p> <p>7 duly sworn, testified as follows:</p> <p>8 DIRECT EXAMINATION</p> <p>9 BY MR. GRATZ:</p> <p>10 Q. Good morning.</p> <p>11 A. Good morning.</p> <p>12 Q. Could you state your name for the</p> <p>13 record, please.</p> <p>14 A. Benjamin Edelman.</p> <p>15 Q. And you're an assistant professor at</p> <p>16 Harvard Business School; is that right?</p> <p>17 A. Yes.</p> <p>18 Q. Do you have tenure?</p> <p>19 A. No.</p> <p>20 Q. You have a number of degrees from</p> <p>21 Harvard; is that right?</p> <p>22 A. Yes.</p> <p>23 Q. Are any of those degrees in computer</p> <p>24 science?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 8</p> <p>1 report.</p> <p>2 Q. Can you tell me more about that</p> <p>3 method?</p> <p>4 MR. BONI: Objection to form.</p> <p>5 A. Well, you know I think it's pretty</p> <p>6 intuitive. It can be structured in a formal</p> <p>7 algebraic model when a particular situation</p> <p>8 calls for that approach. It can be studied</p> <p>9 empirically through large sample or small sample</p> <p>10 data when the context calls for that approach.</p> <p>11 It can also inform understanding and analysis</p> <p>12 without specific application of modeling or of</p> <p>13 large sample data analysis.</p> <p>14 Q. Did you apply any algebraic modeling</p> <p>15 in preparing your report?</p> <p>16 A. No.</p> <p>17 Q. Did you apply any empirical large</p> <p>18 sample data analysis in preparing your report?</p> <p>19 A. I wouldn't call it large sample data</p> <p>20 analysis. There are sections that draw on</p> <p>21 specific examples considered individually which</p> <p>22 probably is a better example of small sample</p> <p>23 data analysis.</p> <p>24 Q. And those are the particular</p> <p>25 anecdotes that you set forth in your report?</p>

<p style="text-align: right;">Page 245</p> <p>1 it's pretty straightforward that if you have 2 more limited resources, your ability to expand 3 those resources on any given project is going to 4 be correspondently limited. 5 Q. In your view is it necessarily the 6 case that smaller and less sophisticated 7 entities have worse security than larger and 8 more sophisticated entities? 9 MR. BONI: Object to form. 10 A. Not always. Sometimes with simpler 11 systems or with less valuable contents to 12 safeguard, the security of a smaller entity can 13 be more than satisfactory. On the other hand, 14 when one flips around those conditions, a small 15 entity guarding a very large gem, one could 16 quickly get into trouble. 17 Q. Are your statements in Paragraph 18 18 of your report based on a survey of companies of 19 various sizes considering their security 20 measures? 21 A. No. 22 Q. Can you provide an example of one of 23 the smaller and less sophisticated companies to 24 which you refer? 25 A. For example, in the context of domain</p>	<p style="text-align: right;">Page 247</p> <p>1 report, you say that attackers can take 2 advantage of even a brief period when a single 3 book provider is insecure. You see that? 4 A. Yes. 5 Q. Is that true today? 6 A. Today there aren't so many book 7 providers. We've discussed only two today. 8 Both of them large, sophisticated companies with 9 impressive information security defenses; 10 whereas, the premise of this section, 11 Paragraph 13, is that there might be 12 significantly more in the future, and they might 13 look quite different. 14 Q. In the event of a fair use ruling? 15 A. Correct, which has been the premise 16 of the entire section where we've been here. 17 Q. Have you -- so it's your view that 18 today's book providers like Google and Amazon 19 have a different and higher level of security 20 than tomorrow's book providers might in event of 21 a fair use ruling, such that smaller entities 22 would enter the market and present the risks 23 discussed in this section; is that right? 24 A. That's right. 25 Q. Turning to Paragraph 20, you say, "I</p>
<p style="text-align: right;">Page 246</p> <p>1 names, there used to be one company, VeriSign 2 Network Solutions that was the sole vendor of 3 .com domain names. When that market was opened 4 up to competition, there were a variety of 5 benefits, but there have also been some 6 downsides, including that some of the smaller 7 guys have been hacked in various ways, have 8 allowed their servers to be taken down by 9 something as routine as a power outage and have 10 otherwise failed to lived up to their 11 contractual commitments. In contrast, the 12 larger vendors in that space have largely 13 succeeded in living up to their contractual 14 commitments. 15 Q. Are you aware of any in The Book 16 Space? 17 MR. BONI: Do you understand the 18 question? 19 A. I do, but I think it's a little bit 20 speculative at this point that there aren't that 21 many smaller sites holding digital copies of 22 books and presenting them in snippet form. If 23 there are any small such companies, I guess I 24 don't know about them. 25 Q. Turning to Paragraph 19 of your</p>	<p style="text-align: right;">Page 248</p> <p>1 understand that the Google Library Project 2 includes providing to the library partners a 3 full digital copy of the books the libraries 4 allowed Google to scan. Breaches at the 5 security systems at these libraries" -- excuse 6 me -- "breaches in the security systems at these 7 libraries, could facilitate book piracy." Do 8 you know what security systems the libraries who 9 store books such as the University of Michigan 10 have in place? 11 A. I don't know about all of the 12 security systems that they have. 13 Q. How do they compare to the security 14 systems that, for example, iUniverse which is 15 the party to the agreement in Exhibit 17 has in 16 place? 17 MR. BONI: Object to form. He just 18 said he's not sure what the security systems are 19 in the libraries. 20 A. I'm also not sure what the security 21 systems are at iUniverse, so I really don't 22 think I can make a comparison. 23 Q. You, likewise, couldn't make a 24 comparison to the security systems that Google 25 or Amazon has in place?</p>

<p style="text-align: right;">Page 249</p> <p>1 A. I don't know everything that I'd want 2 to know in order to make that comparison. In 3 general, I think there's good reason to suspect 4 that the libraries will have significantly lower 5 levels of security. 6 Q. But you don't know one way or the 7 other? 8 A. I don't know one way or the other, 9 and furthermore, I'm not sure the answer is 10 knowable just yet. We need to think about what 11 level of security libraries will have several 12 years from now. It's hard to say, sitting here 13 today what they'll do in several years. 14 Q. Are you aware of any books being 15 pirated or stolen from a research library 16 archived with scans made by Google? 17 A. No. 18 Q. Turning to Paragraph 21, you say, 19 "I've not been informed of all the ways that 20 libraries intend to use the book contents data 21 they receive from Google, nor have I been 22 informed how libraries intend to secure that 23 data. But the information currently available 24 indicates that libraries' actions present a risk 25 of book piracy." You see that?</p>	<p style="text-align: right;">Page 251</p> <p>1 Q. Did any of your work on the Multnomah 2 County case or the interviews with librarians 3 and other librarian staff members in that case 4 form a basis for any of the opinions you render 5 in your report in this case? 6 A. It's not a basis. It's part of my 7 overall professional background consistent with 8 expert service. 9 Q. Do you know whether the University of 10 Michigan is storing book scans in its normal 11 library information systems or in a separate 12 system? 13 MR. BONI: Object to form. 14 A. I don't know one way or the other. 15 Q. What information, additional to the 16 information you have about the library's 17 security measures, would permit you to better 18 assess the risks? 19 MR. BONI: What risks? 20 Q. The risks you discussed in Paragraphs 21 20 and 21. 22 A. Understanding both what they do now 23 and what they will do in the future, what they 24 commit in some sort of a binding contractual 25 sense to do or not to do. I need to understand</p>
<p style="text-align: right;">Page 250</p> <p>1 A. Yes. 2 Q. You don't know what security measures 3 the libraries have in place today; is that 4 right? 5 A. I don't know all of what they have in 6 place. 7 Q. What do you mean by "information 8 currently available" as you use it in Paragraph 9 21? 10 A. Yes, in Exhibit C, I cite the 11 Hathitrust materials which I did review. That 12 gives some information about some of the 13 libraries' security systems. I actually have 14 quite a bit of experience with library 15 information systems from the Multnomah County 16 Public Library case that we discussed 17 previously. 18 I've spent time interviewing 19 librarians. I've spent time with the CIOs of 20 libraries. I've spent time in the library 21 computer systems, understanding how they work 22 and how they interoperate and have come to have 23 a general understanding of the overall culture 24 and approach to information sharing that's 25 common in libraries.</p>	<p style="text-align: right;">Page 252</p> <p>1 the servers on which the data is to be stored, 2 the physical security, the network security, the 3 logical security, software level, user accounts, 4 credentialing. 5 This sounds like a full security 6 audit. I'm not sure I'm the best person to do 7 it, but in any event, it requires understanding 8 quite a bit about their practices, both in the 9 present and their future practices, which is a 10 little bit harder to investigate in 11 anticipation. 12 Q. Turning to Paragraph 22, you refer to 13 a student who used MIT library access to 14 download 4.8 million articles and other 15 documents. You see that? 16 A. Yes. 17 Q. Is that man named Aaron Swartz? 18 A. Yes. 19 Q. Aaron Swartz is being charged 20 criminally for that activity; is that right? 21 A. Yes. 22 Q. And those charges are currently 23 pending; is that right? 24 A. That's my understanding. 25 Q. What was the effect on the value of</p>

1 A. Yes.

2 Q. Do you consider that to be in
3 violation of intellectual property rights?

4 A. I think it's an infringement of the
5 trademark, and the question is whether a fair
6 use defense applies. There is a doctrine of
7 fair use for trademarks and stylized images. I
8 think it's a plausible fair use defense. There,
9 I'd really have to apply the factors and read
10 the cases. I'm much less familiar with the Fair
11 Use Doctrine as it applies to stylized images
12 and logos.

13 Q. The Apple prank which you refer
14 occurred in October of 2011; is that right?

15 A. I don't recall.

16 Q. Did it occur shortly after the death
17 of Steve Jobs?

18 A. If you say so.

19 Q. Did students display the Apple logo
20 in the clock tower of Maseeh Hall at MIT in
21 honor of Steve Jobs in the prank you referred to
22 in Paragraph 25?

23 A. Now, that could be. I don't recall.

24 Q. Do you think that that prank is
25 relevant to the issues in this case?

1 A. I can certainly see how it would seem
2 peripheral. On the other hand, the fact that
3 students are well known to disregard
4 intellectual property is anything but
5 peripheral. It's well known that Napster was
6 most used on college campuses. There were
7 distinctive trends. You could see the number of
8 users signed into Napster decrease when major
9 schools went onto spring break. So the
10 relationship between students, university
11 libraries and piracy is not peripheral.

12 Q. Could you tell me about the Red Sox
13 logo prank you referred to in Paragraph 25?

14 A. I don't recall. I went through the
15 site, looked at the distinctive images
16 memorializing the pranks, but I didn't note them
17 in great specificity.

18 Q. Do you consider that an instance of
19 piracy?

20 A. I'm not sure. I do think it's
21 probably an instance of trademark infringement,
22 and it might be subject to a fair use defense.

23 Q. The prank you referred to in
24 Paragraph 25 with respect to the logo of the
25 Boston Red Sox, did that prank occur in October

1 of 2004?

2 A. I don't know.

3 Q. Did it occur when the Red Sox made it
4 to the World Series?

5 A. I don't know.

6 Q. Were the -- do you think that the
7 students celebrating the Red Sox making it to
8 the World Series by displaying the logo on the
9 dome of the university building was intellectual
10 property infringement?

11 A. The law is what it is, and it's not
12 for me to rewrite trademark law. I wouldn't be
13 surprised if that is infringement as a matter of
14 law, and fair use defense might or might not
15 apply. It wouldn't shock me if you said that to
16 do that a license must be paid to the Red Sox,
17 and if you don't pay it, then you're in
18 violation of the law.

19 MR. GRATZ: Mark as Exhibit 19, this
20 document. I want to note for the record before
21 I hand it to the witness that despite the
22 confidential legend at the bottom of this
23 document, this is not a confidential document.

24 (Document marked as Exhibit No. 18
25 for identification.)

1 Q. You have before you what's been
2 marked as Exhibit 18. Do you recognize this
3 document?

4 A. Yes.

5 Q. Is this the document to which you
6 refer in Paragraph 26 of your report?

7 A. I think so.

8 Q. Do you know what security measures
9 the University of Michigan has in place?

10 A. That's discussed in part in this
11 document.

12 Q. Aside from this document, do you have
13 any knowledge other than what is in this
14 document of security measures that the
15 University of Michigan has in place?

16 A. Aside from what's discussed in this
17 document, I don't think I have knowledge of
18 their current security.

19 Q. Is it your opinion that an author
20 would not agree to have his work stored by the
21 University of Michigan without greater security
22 terms than those set forth in Exhibit 18?

23 MR. BONI: Object to form.

24 A. I'm not sure. It all depends on what
25 the author gets in exchange. If they get zero,

<p style="text-align: right;">Page 285</p> <p>1 to pass in the event of a fair use ruling in 2 favor of Google?</p> <p>3 MR. BONI: Object to form. You want 4 a mathematical response to that question?</p> <p>5 MR. GRATZ: Whatever the response the 6 witness has for me.</p> <p>7 MR. BONI: Object to form.</p> <p>8 A. I don't know. It would be easier to 9 say once that fair ruling resulted, if it did 10 result, once we see who comes along and scans 11 which books and stores them in what ways, until 12 then, it's just a little bit too speculative for 13 me to want to put a number on it, but it 14 certainly is a serious concern.</p> <p>15 Q. What's the magnitude of the harm in 16 dollars? The harm here, I mean the harm that 17 you were discussing in Paragraph 38.</p> <p>18 MR. BONI: Object to form.</p> <p>19 A. I'm not sure. It's difficult to put 20 a dollar value on it, but I do think it's 21 significant. If you asked a publisher what 22 would they be willing to pay to have a complete 23 protection against piracy, to be able to print 24 their books on uncopyable paper or with magical 25 ink, I think you'd find publishers would be</p>	<p style="text-align: right;">Page 287</p> <p>1 MR. BONI: Objection. You know he's 2 not a damages expert, Joe.</p> <p>3 Q. You can answer.</p> <p>4 A. I have not. I'm not a damages 5 expert.</p> <p>6 Q. Has a company ever come to you and 7 asked you to evaluate the risk of intrusion into 8 their computer systems which protects books?</p> <p>9 A. No.</p> <p>10 Q. Has a company ever come to you and 11 asked you to evaluate the risk of intrusion into 12 their computer systems at all?</p> <p>13 A. That seems like the kind of thing 14 someone would have asked me to do at some point. 15 I just need to take a moment to think about it.</p> <p>16 Certainly I've thought about that 17 question for the organizations which -- with 18 which I've had long-term relationships. So, for 19 example, when I was running the Berkman Center 20 server, that was a question I thought about. I 21 thought about it with ICANN. I've thought about 22 it as to portions of Harvard Business School. 23 I've thought about it with Wesley as to the 24 servers that we operate together, as to paying 25 clients that come specifically for that.</p>
<p style="text-align: right;">Page 286</p> <p>1 willing to pay a significant portion of their 2 enterprise values in order to get that magical 3 technology.</p> <p>4 Q. And you consider that to be the 5 measure of the magnitude of the harm set forth 6 in Exhibit -- in Paragraph 38?</p> <p>7 MR. BONI: Object to form.</p> <p>8 A. It's not that that's how you'd 9 measure it, but that's the sort of thought 10 experiment one would do.</p> <p>11 Q. How would you measure it?</p> <p>12 A. On thinking about the way that other 13 large harms are measured, how do we assess the 14 value of a life when a life is taken away from a 15 person? How do we assess the value of a plane 16 crash or a nuclear disaster? It's really not my 17 area of expertise. It's not something I've 18 opined on here. But here I consider the 19 totality of future lost profits. So I do my 20 best to figure out what profits would have been 21 and then what they will be as a result of the 22 loss, and I subtract those two numbers, and that 23 would be the starting point for the harm.</p> <p>24 Q. Have you done that in preparing your 25 report?</p>	<p style="text-align: right;">Page 288</p> <p>1 I think it would be unusual for 2 anyone to seek my assistance for that solely and 3 specifically, but if they already knew me from 4 something else, I can think of a couple of 5 clients who have sought assistance with problems 6 generally in that vein based on prior 7 relationships.</p> <p>8 Q. If a company came to you and asked 9 you to evaluate the risk of intrusion into its 10 computer systems which protect books, would you 11 accept the assignment?</p> <p>12 MR. BONI: Object to form. That's 13 the entire hypothetical?</p> <p>14 MR. GRATZ: That's the question.</p> <p>15 A. I don't think I would be the best 16 person to evaluate their security systems, but I 17 think I would be able to assist them in 18 selecting an appropriate person. I would be 19 able to guide that person towards the areas of 20 greatest concern, perhaps review their initial 21 report, and suggest areas for extension and 22 further inquiry.</p> <p>23 Q. What process would you recommend be 24 undertaken to evaluate the risk of intrusion 25 into those computer systems that protect books?</p>

1 A. I suppose it would all depend on what
2 books I was trying to protect, what I was trying
3 to protect them from, what access I needed to
4 allow. The easiest thing to do to prevent
5 unauthorized access is to prevent all access by
6 destroying the digital records, but I imagine
7 that wouldn't be what someone hired me to tell
8 them. They'd want some way to use it for some
9 purposes while disallowing use for other
10 purposes.

11 Q. If a company came to you and asked
12 you to evaluate the risk of an intrusion into
13 their computer systems which protect books and
14 which host books for the purpose of making
15 snippets available in response to searches, what
16 process would you take to under -- to make that
17 evaluation?

18 A. Well, I think I would -- I would
19 consider the sorts of security systems that
20 we've discussed a couple times today in
21 different parts of our time together as to
22 physical security, network security, software
23 security, application level security, human
24 resources and internal controls. I'd consider
25 each of those. Each would be significant. Each

1 would have multiple facets within it.

2 And then my analysis would be
3 informed, importantly, by the material that I
4 was holding. If it was unique and one of a kind
5 and highly sought after, then I would be
6 particularly concerned about the skills of my
7 intruders. And if I needed to allow massive,
8 high-volume access by a large number of
9 different users, potentially some of them fake
10 or automated or robotic, I would be even more
11 concerned, and I would need to be open to the
12 possibility, the very real possibility that I
13 couldn't do this with the required level of
14 quality and would need to revisit my plans.

15 Q. What information would you need to
16 evaluate the risk of intrusion into such a
17 system which stores books for the purpose of
18 making snippets available in response to
19 searches, for example?

20 A. One would need to think about each of
21 the aspects of security just discussed. So for
22 example, as to human resources security, making
23 sure that there isn't a rogue employee who takes
24 the data in the way that other rogue employees
25 have done other untoward things, including even

1 at Google. I'd look at my organizations's
2 experience or the client's organization's
3 experience with rogue employees.

4 When we have a thousand engineers,
5 how many of them turn out to be bad apples, how
6 many bad ones do you get out of a thousand? Is
7 there any way to prevent two of them from acting
8 together in concert? Could we have an audit
9 trail that prevents this kind of copying and
10 that kind of copying? Is it possible to make an
11 audit trail that's so robust that even a senior
12 engineer can't turn it off? Because we know
13 some of the problems occur from senior engineers
14 who can bypass the ordinary control.

15 So that's the kind of question I'd be
16 asking as to that facet, but to be sure, each of
17 the facets would require a different type of
18 analysis.

19 Q. Did you do any of that in preparing
20 your report in this case?

21 A. I considered those kinds of
22 approaches. The data and information required
23 aren't available to me and weren't necessary in
24 order to reach the conclusions set out in my
25 report.

1 Q. Why weren't they necessary? Would
2 having them have aided you in reaching your
3 conclusions?

4 A. Perhaps I could have reached
5 additional conclusions. I imagine that with
6 enough study, I might get to the point where I
7 was prepared to put a number on some of the
8 probabilities. There's this probability per
9 year of this kind of bad thing happening if you
10 use these controls. I think that is an
11 estimatable number. One can estimate even these
12 very small probabilities with enough analysis
13 and enough review, but it's quite difficult, and
14 I didn't consider it necessary or appropriate,
15 given what I was asked to do in this report at
16 this time.

17 Q. Did you run any bargaining
18 experiments in connection with your report?

19 A. No.

20 Q. Did you perform any statistical
21 analysis in connection with your report?

22 A. No.

23 Q. In signing your own consulting
24 agreements, have you performed market checks
25 regarding terms?

<p style="text-align: right;">Page 309</p> <p>1 Q. Turning to the references cited page 2 of your senior thesis on page 77, under G, do 3 you see a citation to a book by A. Greco called 4 The Book Publishing Industry? 5 A. Yes. 6 Q. And turning to page 33 of your senior 7 thesis, you see the bottom of page 33 it says, 8 "I further add two promotion-specific variables 9 to investigate market trends noted by Greco 10 (1997) in discussing clumping of book sales over 11 time"? 12 A. Yes. 13 Q. Is that a citation to the Greco work 14 titled The Book Publishing Industry cited in 15 your references cited section? 16 A. Seems to be. 17 Q. Do you have an opinion as to Albert 18 Greco's expertise regarding The Book Publishing 19 Industry? 20 A. Not really. 21 MR. BONI: Are you done with this, 22 Joe? 23 MR. GRATZ: Yes. Nothing further. 24 MR. BONI: I have nothing. 25 THE VIDEOGRAPHER: Here ends this</p>	<p style="text-align: right;">Page 311</p> <p>1 CERTIFICATE 2 COMMONWEALTH OF MASSACHUSETTS. 3 MIDDLESEX, SS. 4 I, Avis Barber, Registered Professional 5 Reporter and Notary Public, in and for the 6 Commonwealth of Massachusetts, do hereby certify 7 that: 8 BENJAMIN G. EDELMAN, the witness whose 9 deposition is hereinbefore set forth, was duly 10 sworn by me, that I saw a picture identification 11 for him in the form of his Harvard College 12 Identification card, and that the foregoing 13 transcript is a true and accurate transcription 14 of my stenotype notes to the best of my 15 knowledge, skill and ability. 16 I further certify that I am not related to 17 any of the parties in this matter by blood or 18 marriage and that I am in no way interested in 19 the outcome of this matter. 20 IN WITNESS WHEREOF, I have hereunto set my 21 hand and notarial seal this 20th day of June 22 2012. 23 _____ 24 Avis Barber, RPR 25 Notary Public My commission expires: July 30, 2015</p>
<p style="text-align: right;">Page 310</p> <p>1 deposition. Off the record, 6:18 p.m. 2 (Whereupon, the deposition was 3 concluded at 6:18 p.m.) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 312</p> <p>1 I declare under penalty of perjury 2 under the laws that the foregoing is 3 true and correct. 4 5 Executed on _____, 20____, 6 at _____, _____. 7 8 9 10 11 12 _____ 13 BENJAMIN G. EDELMAN 14 15 16 17 18 19 20 21 22 23 24 25</p>