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1  
2 years, many decades. And they come in a couple  
3 of different varieties. One of the most  
4 standard would be it's a service that's -- where  
5 there's a physical location inside the library  
6 or other facility, but it's typically the  
7 library. The faculty members assigning reading  
8 to students may bring selected -- their own  
9 selection, whatever they select, of readings to  
10 the reserve operation. The staff of the reserve  
11 operation would either place the originals -- it  
12 could be and often is the book itself, for  
13 example, and place that original work at the  
14 reserve desk. Or in some cases, it's a  
15 photocopy of an item, very commonly a journal  
16 article or a book chapter. And then kept in a  
17 folder. The students come to the reserve desk  
18 or anybody typically is allowed to -- who is  
19 allowed to enter the building may come to the  
20 reserve desk, look at whatever list of materials  
21 are available, request that item. The staff  
22 member will hand that item, whether it's the  
23 physical book or a folder with some photocopied  
24 pages in it, and the student would very often  
25 sit down at a desk and start reading it and

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2 doing homework, taking notes, whatever the  
3 student may do. Or if the student feels so  
4 compelled, may walk over to a photocopy machine  
5 and put some money in and make some copies. Or  
6 what a student might do today, it wouldn't  
7 surprise me in the slightest, student pulls out  
8 a digital camera or a cell phone, takes pictures  
9 and hands the document back at the shelf. None  
10 of that would surprise me, and indeed, the  
11 reading it on location or selectively making  
12 copies is very common in a reserve operation.  
13 So it's a limited number of works, because they  
14 can't -- for whatever reason, they can't have  
15 everything at the desk. And making those items  
16 available for the students, and the students can  
17 read it on the spot and get their homework done.

18 Q Now, you say a limited number of  
19 works. Is the conception of physical reserves  
20 and the quantity of offerings limited only by  
21 space constraints or by concept and pedagogical  
22 and other needs?

23 A I've heard at some universities it's  
24 just simply space and management. There's only  
25 so much they'll take on. There's only so many

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2 types of things that they will take on because  
3 they just can't manage it. But usually it's  
4 limited by what happens to be brought to it.

5 Q And in your experience, if you have a  
6 course involving -- well, I don't want to do it  
7 quantitatively. What I'm trying to understand  
8 is what does your experience tell you the  
9 parameters of the percentage of total required  
10 and/or supplemental course readings that will or  
11 have in the past found their way into physical  
12 reserves stacks? What I'm trying to get at is  
13 how significant a portion of the entirety of  
14 course readings traditionally were available to  
15 students through a physical reserve system.  
16 What's your general experience?

17 A Yeah, I don't think I've ever seen any  
18 really good, you know, statistics to give us the  
19 answer we might want. But it's usually some  
20 fraction of the total reading. It wouldn't  
21 surprise me if it's anywhere from 10 percent to  
22 30 percent.

23 Q And so at least in conception,  
24 physical reserves have never been conceived as a  
25 means of generating wholesale access to course

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2 readings in any given course, right?

3 A You know, it can vary from course to  
4 course. I mean, there are instructors who have,  
5 over the years, relied dominantly, if not  
6 exclusively, on materials that are placed on  
7 reserve. But I think they are the minority.  
8 Then I know there are plenty of teachers who  
9 rely heavily on reserve. But I suspect for most  
10 it's -- whatever label we would put on it, it's  
11 a minority of the total readings.

12 Q If you look at Page 8 of your report,  
13 at the end of the first paragraph, you indicate  
14 that "reserves are not a means of generating  
15 wholesale access. Instead, they focus on  
16 providing access to selected materials  
17 individually identified by instructors to meet  
18 the educational needs of a particular course."

19 A And actually, what I mean by that,  
20 that sentence -- I remember writing that  
21 sentence. And what I'm making the distinction  
22 between in that sentence is reserves are a  
23 system for providing access to that work because  
24 the instructor said I want my students to read  
25 that work as opposed to some -- a library

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2 saying, well, we have frequent requests for this  
3 journal or articles on this subject. Let's just  
4 create a databank of those materials and just  
5 have them available so that when a professor  
6 wants it, it's already there and already  
7 accessible. That's not the purpose. The only  
8 point I'm making with that sentence is reserves  
9 are really used for purposes of providing access  
10 to materials chosen by the instructor for that  
11 particular course. That's really the whole  
12 point.

13 Q Now, if it were the normal practice  
14 that the entire curriculum of a course and the  
15 readings were offered on a physical reserve  
16 basis, where no materials were purchased at the  
17 campus bookstore, no materials were acquired via  
18 course packs, no materials were otherwise  
19 licensed via some other permissions process and  
20 instead originals or library first-generation  
21 copies of originals were put out allowing every  
22 student in the class every week to access every  
23 piece of reading material, would that be  
24 consistent with what you regard the norm of a  
25 physical reserve offering to be?

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2 A I think I'm with you on the question,  
3 and your question goes to just the critical --  
4 there I go, using that word "critical." It goes  
5 to the point of a professor happens to put  
6 100 percent of his or her readings on reserve.  
7 Now, we haven't said anything about the law or  
8 the lawfulness of those readings. Just the  
9 fact of -- I would say that would be unusual.  
10 But could it happen? Absolutely.

11 Q If that practice, rather than being  
12 sporadic or episodic or representing a distinct  
13 minority of practice became the prevalent  
14 practice, would you -- putting the law to one  
15 side, would you have concerns about the  
16 potential impact on the creation of materials  
17 for academic markets if the norm were one copy  
18 is then the foundation for access by -- or one  
19 copy per 25 students, or whatever the ratio  
20 might be, was the norm?

21 A And assuming it's perfectly lawful.  
22 putting the law aside.

23 Q For this per purpose.  
24 Would give you pause in terms of  
25 thinking of the economics of the academic

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2 publishing industry as you understand it?

3 A No.

4 Q And why not?

5 A No. Because I think that what we  
6 would find if we keep looking and explore the  
7 issue more fully, we would find that that  
8 material wouldn't have even made it into the  
9 library, into the hands of the instructor, into  
10 the reserve system without our having purchased  
11 it in the first place. Odds are overwhelmingly,  
12 we wouldn't have to look very far to realize  
13 that really all that we're doing at that point  
14 is taking some -- and again, perfectly lawfully,  
15 because that's the premise of the question,  
16 taking materials that we had to get from  
17 someplace, and chances are it was the library  
18 that bought that material. Could have been the  
19 instructor. But chances are it was the library  
20 that bought that material and made it available  
21 through the reserve system.

22 Q So if I'm a textbook publisher and I  
23 hire Professor Crews to write this seminal piece  
24 on emerging fair use concepts across the world,  
25 and I'm projecting sales, because I saying,

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2 well, there are X universities with X numbers of  
3 students and Y number of courses who are likely  
4 to buy this, wouldn't that publisher be  
5 concerned if that model was significantly  
6 altered such that its only expected sale might  
7 be as few as one sale into a given academic  
8 institution?

9 A You know, I think the answer is no.  
10 And I'll tell you why. Because if you had asked  
11 that question 20 years ago, before we had  
12 high-powered photocopy machines, before we had  
13 scanners, before we had any of that, they were  
14 only going to sell one then anyway. If I'm  
15 still selling that one, my calculation about  
16 publishing that scholarly book, for example,  
17 it's the same today as it was 20 years ago. And  
18 if the legal system -- because remember, your  
19 entire question is based on the premise that  
20 everything that's happening here is lawful. So  
21 I want to keep reminding myself that that's what  
22 we're talking about. And if the environment  
23 within which we work signals that you're going  
24 to make a sale to these libraries and you're  
25 going to sell this scholarly book that has a



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2 very modest demand, certainly -- it's not a best  
3 seller. It's only going to be sold into the  
4 scholarly community. Getting one sale here and  
5 one sale there, honestly, it's just about all I  
6 ever expected to get anyway.

7 Q Let's take Samuelson on Economics, a  
8 staple of economics 101 courses. Surely, the --  
9 that work is or had been primarily sold, at  
10 least in my era, you'd go to the bookstore if  
11 you were in the course, and that became the  
12 basic textbook and every student in the class, I  
13 assume, would be expected to buy it, correct?

14 A Correct.

15 Q Under my hypothetical, I'm saying that  
16 book is now placed on physical reserve instead  
17 and students access that. Are you saying there  
18 would be no impact on the publisher of that  
19 change in model, namely instead of in a survey  
20 course of 100 students, 100 students buying it,  
21 there's one sale of it?

22 A It's a very different set of facts,  
23 and you actually asked a very different  
24 question. Because if you were talking about --  
25 you used a critical element in your question of

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2 change. Yeah, if what you're saying is the  
3 state of affairs is like this, but then it  
4 changed into this, such that there is a  
5 reduction in number of sales, would I be  
6 concerned about that change? Well, sure. Sure,  
7 I'd be concerned. Naturally. That's normal, to  
8 be concerned about that change.

9 Your first set of questions didn't  
10 involve any change. If we just had an  
11 environment where there is -- where I'm allowed  
12 under the law to include this item over here in  
13 this kind of use, such as reserve use, and I'm  
14 the publisher, I'm just going to take that into  
15 consideration and make my business decisions  
16 accordingly.

17 Q Well, let's be clear. I don't agree  
18 with you that my questions didn't incorporate  
19 it. But you didn't understand it that way.  
20 That's fine.

21 Let's assume a changed environment,  
22 where the prevailing practice has been physical  
23 sales of hard copies of textbooks to each  
24 student in a particular course.

25 A I'm with you.

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2 Q And that that practice evolves with  
3 the institution saying, you know what, these  
4 textbooks are too darn expensive. We're going  
5 to save Johnny and Joanie the expense of going  
6 to the bookstore and not only getting a  
7 herniated disk from carrying all those heavy  
8 books home but also paying those exorbitant  
9 prices those publishers charge. We're just  
10 going to now systematically -- we're going to  
11 build out some new book shelves, we're going to  
12 open up a new annex to the physical reserve  
13 wing, and we're just going to have, you know,  
14 one copy per 25 students. We'll expand the  
15 opening hours of the reserve room till  
16 2:00 a.m., 4:00 a.m., whatever. And people now  
17 can consume and learn their lessons by that.  
18 And, you know, we'll buy one institutional  
19 subscription or one per 25 students. In that  
20 situation, would you not agree with me that  
21 there could be a significant impact on the  
22 economics of textbook publishing?

23 A And again, we're talking -- I'm going  
24 to give you an answer. And again, we're talking  
25 about perfectly lawful. For example, it could

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2 even be what's lawful today, what's clearly  
3 lawful today, of the library buys five copies of  
4 that Samuelson textbook and puts them on the  
5 shelf for the students to check out.

6 Q I'm saying without regard to legal  
7 issues. We're talking for the moment at an  
8 economic impact level.

9 A Yeah, I can imagine there could be  
10 economic impact on that.

11 Q You can only imagine or can you  
12 envision it?

13 A Sure. Can I envision it? Yes, I can  
14 envision it.

15 Q Now, you've described physical  
16 reserves to me. Describe your understanding of  
17 what course packs, as you would use that term  
18 understand and that term, to connote?

19 A Course packs?

20 Q Yes.

21 A Course packs are usually produced or  
22 managed by some other office, typically not the  
23 library. In fact, I can't even think of an  
24 example where libraries actually do this. And  
25 so some other office, usually the campus

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2 bookstore or an off-campus bookstore or a  
3 photocopy shop or an off-campus photocopy shop,  
4 somebody like that, receives, again in a typical  
5 situation, from the instructor a stack of  
6 materials and brings them in and says these are  
7 materials that I would like to have available  
8 for my students. I would like them to acquire  
9 their own on copies of these materials. And  
10 whatever shop that is says we have the service  
11 of making those copies and selling them --  
12 typical course packs are sold. Selling them to  
13 students who would walk in and purchase that  
14 course pack. And kind of like the question of  
15 reserves, it isn't necessarily just the students  
16 in the class, although, granted, that's going to  
17 be the primary readership, but it could have  
18 been anybody else. Because it's usually an  
19 open-door business. The course packs are in  
20 fact sometimes out on the open shelf where  
21 anybody could pick one up and walk over to the  
22 cash register and buy a copy and take it home.

23 Q What's the fundamental difference  
24 between course packs, as you described them, and  
25 physical reserve practices?

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2 A The convenience of the service of  
3 making the copy for the students is certainly  
4 one of those differences. Enabling the students  
5 in one stop to be able to come in and pick up  
6 that course pack, pay whatever the purchase  
7 price is and take it home, as opposed to in a  
8 reserved system, the items -- in a typical  
9 situation, the items that are on reserve, they  
10 themselves never leave the premises, and many  
11 students will just sit right there at a desk and  
12 read it and hand it back to the person running  
13 the desk.

14 Q Now, as a matter of copyright, there  
15 is also a difference, as you describe it, in  
16 that, putting aside for a moment the students  
17 that might push a button on a photocopy machine,  
18 in the physical reserve setting, many, as you  
19 point out, will borrow it, read it, make notes  
20 and return it. So the original remains the  
21 original. There has been no multiplying of  
22 copies in that situation, correct?

23 A In that situation, that's right.

24 Q So there is no copyrightable event  
25 occurring there that would cause anyone any

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2 concern? You don't even have to get a fair use  
3 analysis, right?

4 A Right. Especially if it's the book on  
5 the shelf, right?

6 Q For sale.

7 A For sale. We're fine.

8 Q Whereas in the course pack setting, by  
9 definition, we are creating multiple copies of  
10 those works, which at least raises at the  
11 threshold a fair use analysis, because you've  
12 got to decide whether those copies fall within  
13 or outside of fair use parameters; is that  
14 correct?

15 A That's correct.

16 Q Now let's talk about E-Reserves. How  
17 do you conceive the concept of E-Reserves?

18 A And then E-Reserves is a little  
19 different formula in that E-Reserves involves,  
20 once again, like both of those situations, an  
21 instructor makes selections of materials that --  
22 for the students to read, communicates that  
23 selection in a common situation by actually  
24 bringing the materials to whatever office is  
25 operating the E-Reserves. And that is in a

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1  
2 typical situation, inside of a library. And  
3 bringing the material or bringing a list --  
4 sometimes the instructor will only bring in a  
5 reading list with citations. But nevertheless,  
6 the items are selected by the instructor to  
7 read. And instead of being made available at a  
8 the desk to anybody who walks in and requests  
9 that item at the desk, they're made available  
10 through the electronic reserve system, which  
11 is -- which would be a computer interface  
12 system, where in a typical situation, a student  
13 enrolled in a class would be informed by the  
14 instructor that there are readings available for  
15 you over in this place that you can access  
16 online, and the students would then go to that  
17 place. Unlike either of the situations that we  
18 just described, there's a much stronger level of  
19 control and control of access, because in  
20 electronic reserves, the access is routinely  
21 restricted only to the students who are enrolled  
22 in that class.

23 Q When you look at the concept of one  
24 copy versus multiple copies, you would agree  
25 with me that an E-Reserves system certainly



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2 facilitates, indeed contemplates the generation  
3 of multiple copies of what, for lack of a better  
4 term, we could consider the original, and for  
5 this purpose the original is treated as a  
6 scanned material, correct?

7 A You know, a couple of years ago I  
8 might have said a quick yes to that. But you  
9 know what, I'm seeing things change. I'm seeing  
10 a few institutions, listening to conversations,  
11 finding out what other people are doing, where  
12 actually they're able to use the software so  
13 that students can see on the screen this item,  
14 but the print key is disabled and the download  
15 key is disabled. And this is a feature of some  
16 of the programs, such as Adobe Acrobat, as I  
17 understand. I'm not holding myself out as an  
18 expert on the technology of it. But I've had a  
19 few people at some of the workshops that I run  
20 happen to mention to me that they actually  
21 disable the download and disable the printing of  
22 this material. So it becomes just a view-only  
23 on the screen as part of E-Reserves.

24 Q How prevalent is that practice?

25 A I suspect that's a minority of

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2 situations but you know, its got to start  
3 somewhere.

4 Q And what's your understanding about  
5 whether that disabling function is in place at  
6 Georgia State University?

7 A I have no understanding of whether it  
8 is or isn't.

9 Q Let's assume you have an institution  
10 where it's not in place. You would agree with  
11 me that it would be common and certainly easily  
12 available for students to do those acts, not  
13 disable, namely to download and to print,  
14 correct?

15 A And I would say, yeah, probably is  
16 common and particularly is what I'm noticing  
17 with students, more just the downloading.  
18 They'll just put it into their computer and just  
19 let it be there for their future study.

20 Q But you would agree with me that the  
21 ability to make a convenience copy, to bring it  
22 to the classroom is there, correct?

23 A Oh, yeah.

24 Q And indeed the ability to E-mail  
25 that -- let's assume a password-restricted

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2 environment for E-Reserves, so that I am a  
3 student, and I can then download. What is your  
4 understanding at Georgia State with respect to  
5 my ability, having lawfully gained access that  
6 way or at least having gained access that way,  
7 the restriction on my emailing that to my buddy  
8 who goes to school across town?

9 A I don't have any specific awareness of  
10 the technological conditions at Georgia State  
11 University. So I don't want to answer to that  
12 question. Should I answer more generally?

13 Q No. My question was what is your  
14 knowledge as to Georgia State is.

15 A None.

16 Q And since your report features the  
17 importance of password protection as a feature,  
18 wouldn't that have been something relevant for  
19 you to consider in evaluating E-Reserves and its  
20 fair use, namely whether, in fact, that feature,  
21 without more, would have the practical effect of  
22 limiting the numbers of copies that could be  
23 made of the materials uploaded and indeed the  
24 population to which they could be sent?

25 A You use the word "important." Can we

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2 make the case that there is relevance to adding  
3 that as another fact? Yes. Is it important in  
4 the sense that does it tip the balance, does it  
5 change the equation? Is it important in the  
6 sense that of does it weigh my thinking and sway  
7 my thinking a certain direction? The answer is  
8 no.

9 Q You again asked yourself questions.  
10 My only question was whether it would have been  
11 relevant to the analysis to ascertain the answer  
12 about the ability of those with password access  
13 to further make copies and allow non-university,  
14 non-enrolled students to have access.

15 A Could you make that relevant? Yes,  
16 you could.

17 Q I didn't say "could you." Would you  
18 not find the answer to that relevant?

19 A Relevant, sure, yes.

20 Q But you did not make that  
21 investigation, did you?

22 A I did not make that investigation.

23 Q And you don't know the answer sitting  
24 here, correct?

25 A That's correct.

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2 Q Okay. Now, what analysis have you  
3 made of the migration of course materials at  
4 Georgia State University from the course pack  
5 process over to E-Reserves? And by that I mean,  
6 what knowledge have you gained as part of your  
7 expert retention about a practice of steering  
8 faculty away from course pack for their course  
9 readings in favor of posting the very same  
10 materials on the E-Reserves system? What is  
11 your knowledge of that?

12 A I don't recall seeing any indication  
13 of that at all.

14 Q Would you have any interest in what  
15 information?

16 A Oh, yes.

17 Q Why?

18 A Just as a matter of interest about the  
19 dynamic of what's going on inside universities.  
20 I study universities. I study these issues.  
21 Sure, I'd be interested in knowing how many  
22 instructors are doing this or doing that.

23 Q Would it be of any relevance to you as  
24 you conceive of these issues that if the effect  
25 of that practice was to see a diminution in --

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2 permissions payments with respect to a given set  
3 of copyrighted materials which had been made via  
4 the course pack process, as those materials  
5 instead were offered through E-Reserves, would  
6 that be of any relevance to you in the way you  
7 think about the fair use issues?

8 A No.

9 Q Because?

10 A It would be an interesting dynamic in  
11 the business of education, but it would leave me  
12 asking a series of questions before I could even  
13 begin to wonder if this is -- I think, please  
14 help me, your question was would I find it  
15 relevant? Is that your question?

16 Q Yes.

17 A There's a lot more that needs to be  
18 done to make that relevant. I mean, after all,  
19 your question did include the notion of fair  
20 use. So we're not talking about the  
21 hypothetical, where everything is -- you know,  
22 we've eliminated the legal barriers. In the  
23 issue of fair use, you know, I'm going to want  
24 to know what was copied, how was it copied and  
25 was that permission and payment that was done

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2 over in the course pack area, was it A,  
3 appropriate or B, was it done under  
4 circumstances where it would be appropriate over  
5 there but not necessarily appropriate in this  
6 other area, where the materials are made  
7 available. So I've got a lot of questions I'd  
8 want to ask before I'd make it even relevant.

9 Q Let's assume your investigation led  
10 you to conclude that it was appropriate for  
11 permissions to be paid for a given course pack  
12 quote, "over there." What different  
13 circumstance, if that same course pack were  
14 offered in the same course by the same professor  
15 to the same students, could lead you to reach a  
16 different conclusion as to its fair use in the  
17 E-Reserves setting?

18 A And your question said course packs  
19 over here, and then you said course packs here  
20 in the E-Reserves setting.

21 Q No, no. Let me do it again. Let me  
22 do it again, okay?

23 A Yeah.

24 Q I'm asking you to assume that you've  
25 investigated whether a given course pack

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2 offering traditionally made through the  
3 university bookstore, you say, well, that was  
4 properly the subject of permissions payments.  
5 I'm asking you to assume that for purposes of  
6 this hypothetical, okay?

7 A Got it.

8 Q The only thing that changes now is  
9 that that same body of material is offered by  
10 the same professor for the same course to the  
11 same students, but it is scanned and made  
12 available through the E-Reserves system. What  
13 facts or factors would or might lead you to  
14 conclude that that activity, while in the course  
15 pack setting warranting permission payments  
16 would not warrant permission payments and would  
17 be fair use in the E-Reserves setting? Do you  
18 understand the question?

19 A I do understand the question. I  
20 believe I understand the question, and please  
21 stop me if I get off track.

22 The very first thing that could make a  
23 difference and could make a very important  
24 difference would be the question of whether that  
25 course pack service was being provided by a



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2 commercial for-profit shop. And then in  
3 contrast, if we move over to the E-Reserves,  
4 then I would ask and look for confirmation of  
5 whether it's being run by the library as part of  
6 the nonprofit educational mission of the  
7 university. And that alone is a change of facts  
8 that's going to lead me to rethink the first  
9 factor, the purpose of the use. Starting with  
10 the fair use statute, the law is very clear  
11 about laying out a dichotomy between commercial  
12 purpose and education or nonprofit purpose. And  
13 so if you take those same facts and move them  
14 into the university and make it part of the  
15 nonprofit educational enterprise, then we may  
16 have a difference on the first factor.

17 Q From the standpoint of the impact of  
18 the publishers of the materials that comprised  
19 the course pack, is there any difference in  
20 market effect of how those materials are  
21 disseminated to students as between, on the one  
22 hand, through let us say a for-profit copy  
23 facility and on the other hand, through  
24 E-Reserves? If on the other hand, there are  
25 permissions payments flowing and on the other

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2 there aren't, does the distinction driven by the  
3 for-profit factor that you cite, from the  
4 standpoint of the publisher, is that at all  
5 meaningful in terms of the impact on its  
6 business?

7 A And so I don't -- I mean, I don't see  
8 the publisher -- I mean, the publisher may not  
9 like it. Some publishers don't mind. But the  
10 publisher may not like the fact that a nonprofit  
11 educational institution has a greater scope of  
12 fair use. But that's part of the very essence  
13 of the law. But your question -- and make sure  
14 I'm getting to your question properly. I'm  
15 trying to. Your question was about, all right,  
16 given that, isn't there still an impact on the  
17 market or the revenues for the author -- for the  
18 publisher, I mean.

19 Q Yes. Factor four, as it were.

20 A Factor four. We're moving out of  
21 factor four of the fair use equation. And, you  
22 know, there is a difference. Because when that  
23 off-campus commercial copy shop sells that set  
24 of course materials called the course pack, you  
25 know, it's in itself kind of a stand-alone

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1  
2 finished product. The student pays a price, the  
3 student walks away with it. The student turns  
4 to Page 133 of this set of photocopied material  
5 and reads the next 10 pages for class tomorrow  
6 morning. The student doesn't necessarily have  
7 much of a realization of exactly where that  
8 material came from. There may be a citation,  
9 but it's removed from context and so on. What  
10 I'm seeing in the electronic reserve environment  
11 is that the students see this not as necessarily  
12 as a separate part, a separate place to go and  
13 where in total isolation you're going to see  
14 those same 10 pages, but the system that I see  
15 in many policies requires a citation to the  
16 original. So we're going to see a reference  
17 back to the original work. I have seen some  
18 universities, even if it's a scan and not a  
19 link, provide a link to more information for  
20 that work. I certainly have seen students in  
21 the online environment, where they're not  
22 working with a stack of paper, but they're at  
23 their computer looking at something online and  
24 saying, that's interesting, these ten pages of  
25 reading, let me see what else is out there. Oh,

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2 it's by author Smith. Let me go over here to  
3 Amazon, let me see what it is. Let me take a  
4 look at that book. And actually, in many ways  
5 the facilitating access in that online  
6 environment creates a much more active  
7 relationship with the material and I would dare  
8 to say maybe generates some market interest for  
9 that same material.

10 Q What data have you ever seen about the  
11 degree of generation of market interest through  
12 that process?

13 A I've seen data not specifically in  
14 E-Reserves, but I have seen data involving  
15 public access to materials actually leading to  
16 greater sales.

17 Q Let's talk about E-Reserves. That's  
18 the environment in which this lawsuits pends.

19 What data, if any, have you seen,  
20 putting your reasoning process to one side,  
21 supporting the view that any number or  
22 percentage of students enrolled in a course for  
23 their exposure to E-Reserves materials will be  
24 prompted to make purchases of that author or  
25 publisher's work?

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2 A And have I seen specifically data  
3 studies percentages and so on? No, I have not  
4 seen that.

5 (Whereupon, a discussion was held off  
6 the record.)

7 BY MR. RICH:

8 Q Just a couple more questions on this  
9 area, and then we'll move on.

10 Modify the examples we've been talking  
11 about by assuming that the course pack operation  
12 operated by the University is a not-for-profit  
13 arm of the University. Everything else is the  
14 same. The course packs are still the same.  
15 They're generated for the same purposes, for the  
16 same courses by the same professors. Everything  
17 is the same except that the University bookstore  
18 is a not-for-profit arm where there is some copy  
19 facility. How, in your estimation, does that  
20 share the fair use analysis with respect to  
21 course packs?

22 MR. SCHAEZEL: Objection as to form.

23 Go ahead.

24 A That's a very important change of  
25 fact. And of course, I always keep telling my

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2 students is when you change the facts, you've  
3 got to go back to rethinking the four factors.  
4 And that's a change of fact that is clearly  
5 important to the first factor, the purpose of  
6 the use. And the general favoring, for lack of  
7 a better word, of nonprofit education under the  
8 fair use equation, at least favoring relative to  
9 the commercial user, and that does mean that  
10 it's very likely that what may not be fair use  
11 in the hands of the commercial shop may very  
12 well be fair use in the hands of the on-campus  
13 educational nonprofit shop.

14 Q That answer gives dispositive weight  
15 to the commercial/non-commercial distinction.  
16 But as you know so well, it is but one of four  
17 factors and a series of elements within those,  
18 correct?

19 A That is absolutely right.

20 Q But you nevertheless feel it is a  
21 pivotal distinction or may be?

22 A No. I think you're overreading my  
23 statement. What I said -- you can read it back  
24 to me, if you want. But I said that something  
25 that may not be fair use in the hands of the

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2 commercial shop may very well be fair use in the  
3 hands of the nonprofit educational shop. I  
4 didn't reach the conclusion that said it is. I  
5 certainly didn't say it all would be. I didn't  
6 say that at all. I said it could be.

7 Q If it were determined that in the  
8 not-for-profit setting, the course pack activity  
9 were determined on a balance of fair use factors  
10 not to be fair use --

11 A I think I just missed something.

12 Q You're taking the assumption that it's  
13 in a non-commercial setting?

14 A The nonprofit campus shop we're  
15 talking about.

16 Q So take a Kinko's and an MDS case in a  
17 not-for-profit setting. I'm just asking you to  
18 assume that a court would say or the courts  
19 would say still doesn't tilt the balance  
20 sufficiently in favor of fair use. In that  
21 hypothetical, would you then see a legal analogy  
22 from the standpoint of fair use and application  
23 to the use of the same materials in the E-Res  
24 setting?

25 A I'm just making sure I've got all --

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2 that I'm understanding everything, and I think I  
3 do. That if the facts of the Kinko's or MDS  
4 case instead of involving off-campus commercial  
5 shop and the only factual change involved a  
6 nonprofit education and the court came back and  
7 said no, sorry, but that's still not fair use,  
8 well, that would be something we would have to  
9 learn from, absolutely. And, you know, people  
10 like me would spend a lot of time studying that,  
11 gleaning whatever lessons we need to glean from  
12 it. I'm a realist, and I would study that and  
13 try to figure out what the court really meant by  
14 what it said in that opinion and then, also as a  
15 realist, look to see is somehow what's happening  
16 over here in electronic reserves somehow  
17 different from what's going on in the course  
18 pack, and there may very well be differences.

19 Q Sitting here today --

20 A I'm sorry --

21 Q Sitting here today, are you able to  
22 identify any of those differences, or would you  
23 think about it?

24 A Things that could make a difference?

25 Q Other than the profit/not for profit



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2 distinction or commercial/non-commercial.

3 A Sure. I mean some of the things that  
4 I would look for are the fact that in Kinko's  
5 and MDS, the parties in those cases were selling  
6 the course packs and charging money to the  
7 students. So there's a fact that was present in  
8 both of those. And that's not a fact that's  
9 present in the E-Reserves systems that I'm  
10 familiar with. I would look to that and wonder  
11 whether that might not make a difference. I  
12 would look to the fact that in the MDS and  
13 Kinko's situation anybody -- I believe, anybody  
14 could have walked in off the street, requested  
15 that item, purchased it and walked away with it.  
16 And in a typical E-Reserves setting, that is not  
17 the case. It's closed access. It's restricted  
18 access. So I would see that as a difference,  
19 and I would wonder, weigh in the balance, is  
20 that a difference that makes a difference.  
21 We're not at the conclusion here. But I would  
22 wonder that. And I would look for factual  
23 elements such as that.

24 Q Is it your conception of the -- is  
25 part of your conception of an E-Reserves system

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2 that no materials offered on any reserve system  
3 should ever carry with them a permission  
4 obligation?

5 A Oh, is that my position?

6 Q Yes.

7 A No, it is not.

8 Q If you were to be exposed to an  
9 institution's range of practice over multiple  
10 years involving E-Reserves offerings, thousands  
11 and thousands of offerings over hundreds and  
12 hundreds of courses, and if you were to discern  
13 that not a single penny of permissions income  
14 ever flowed with respect to the use of any  
15 single use of material over a multi-year period,  
16 would you be concerned as a matter of copyright  
17 law?

18 A No.

19 Q So it is consistent with your view  
20 that an E-Reserves system logically won't  
21 generate permissions income?

22 A No. I don't think you can reach the  
23 conclusion that you just reached from your own  
24 questions or from my answers. What I heard from  
25 one your questions was if I saw that no

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2 permission fees were being paid over a long  
3 period of practice, would I be concerned, and I  
4 think you said as a matter of copyright law, and  
5 the answer is no. Concerned is not at all is  
6 what I would be.

7 And then I think your next point was,  
8 so therefore, there's some inconsistency, and  
9 I'm not sure exactly how it was worded. And no,  
10 because I can think of reasons and circumstances  
11 why maybe people are choosing certain materials,  
12 using them in certain ways, screening them in  
13 certain ways, evaluating them in certain ways,  
14 and maybe all those years of practice in fact  
15 are very carefully within fair use. That's  
16 possible.

17 Q Do you have any knowledge today  
18 whether the practice under the existing GSU  
19 policy is uniformly within the bounds of fair  
20 use?

21 A The policy itself?

22 Q No. Practice, I said.

23 A What they're really doing behind the  
24 scenes, real individuals screening, reviewing,  
25 making their determination?

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2 Q Yes.

3 A Based upon what I have seen -- and  
4 again, I've only seen the information as I've  
5 detailed in my report. Based upon what I've  
6 seen, it looks to me like they're taking the  
7 proper steps to determine that this material is  
8 within fair use and this material is not. And  
9 so I think -- I think that gets to your  
10 question.

11 Q So your answer is yes, even given the  
12 extraordinarily limited diligence you've done on  
13 that issue?

14 A Well, now wait a minute.

15 Can you read the question back to me,  
16 please?

17 MR. RICH: Read my original question.

18 (Whereupon, the requested portion was  
19 read back by the court reporter: Do you  
20 have any knowledge today whether the  
21 practice under the existing GSU policy is  
22 uniformly within the boundaries of fair  
23 use?)

24 A And I think I misunderstood the word  
25 "uniformly." By "uniformly," do I have

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2 knowledge that everything that they're doing is  
3 within fair use?

4 Q Yes.

5 A If that's the question, then the  
6 answer is no, I don't have the information to  
7 give you an answer to that question.

8 Q Is it your view that trying to get  
9 there in good faith discharges an institution's  
10 copyright responsibilities?

11 A That's a very interesting question.  
12 Congress -- Congress included -- they didn't use  
13 the word -- Congress included in Section 504 a  
14 very interesting and, frankly, I would say an  
15 extraordinarily important provision that allows  
16 some protection from some damages for copyright  
17 infringement for nonprofit educational  
18 institutions, libraries and archives if they --  
19 and I'm paraphrasing; I don't have the statute  
20 in front of me -- if they believed that what  
21 they were doing was within fair use and if they  
22 had reasonable grounds for that belief. There's  
23 a subjective component to that provision that  
24 one must be -- must believe, as to have a  
25 certain state of mind, and then an objective

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2 component, have reasonable grounds for that  
3 belief. That provision does not exonerate the  
4 user from liability for infringement.

5 Q Or injunctive relief?

6 A Or injunctive relief. What it does is  
7 it reduces the damages. And in fact, the  
8 language says "must remit damages." And I read  
9 that -- because we don't have a court telling us  
10 exactly what that means. But I read that, I  
11 believe it means that reduces the statutory  
12 damages down to zero, down to zero. So it does  
13 leave injunctive relief and it does leave other  
14 possibilities based upon the plain reading of  
15 the statute. So if that's what the statute  
16 means. It doesn't -- the good-faith behavior,  
17 meaning I believed I was within fair use and I  
18 had reasonable grounds for that belief, does not  
19 mean you are therefore not an infringer. But it  
20 does mean that you get some credit for having  
21 done your homework. You get some credit for  
22 having learned a little bit about fair use,  
23 having applied it in a reasonable, I say,  
24 good-faith manner. And therefore, there's  
25 considerable protection from the dollar

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2 liabilities. And, you know, that's a pretty  
3 cool thing.

4 Q What is your understanding of the  
5 relief that the plaintiffs seek in this case?

6 A I believe it's limited to injunctive  
7 relief.

8 Q So your dissertation on good faith  
9 really doesn't have much bearing on the relief  
10 sought in this case, correct?

11 A It depends how the injunction is  
12 crafted. But it may not have bearing on it in  
13 terms of a 504(c)(2), which is the statutory  
14 provision, sense. But I think good faith is  
15 something -- I'm not an expert on injunctions,  
16 but I think that a court could take the  
17 good-faith practices of the parties into  
18 consideration in determining whether an  
19 injunction was appropriate.

20 Q If we get to that stage, it will be an  
21 interesting discussion.

22 If you look at Page 8 of your report,  
23 the last full paragraph, "These simple reserve  
24 operations."

25 Do you see that?

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2 A Yes.

3 Q Beginning with the second sentence,  
4 you make some assertions. They did not serve  
5 educational needs well. The risk was a lost  
6 opportunity for learning. Students were  
7 continuously frustrated by the need to wait in  
8 line at the library for another student. Heavy  
9 use of materials. I don't see any citations to  
10 any references for that. What is the source of  
11 all of this, these assertions?

12 A Well, there are a few things that, you  
13 know -- when I'm here as an expert, there are a  
14 few things I know from just my own experience  
15 and my own experience working at my own  
16 university but, probably more than that, my own  
17 experience in working and meeting with people at  
18 other universities and learning from them. So I  
19 can certainly tell you that when I do my  
20 workshops around the country and talk with  
21 people about reserves, these are some of the  
22 frustrations that arise frequently.

23 Q Why would the limitations of physical  
24 reserves create a lost opportunity for learning,  
25 in your words?



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2 A If, in fact, the access to the  
3 materials is confined to the physical material  
4 being available only in the one physical  
5 location, that's inherently limited; and if  
6 that's the way that the content has been made  
7 available, then that means that there will be  
8 times when a student either can't get to it, I'm  
9 sick, I have whatever other situation or it's  
10 I'm there at the library, waiting for the item,  
11 but it hasn't been returned and other students  
12 have it checked out and so on and so on and so  
13 on. So it's a limited system, inherently.

14 Q It would not have precluded purchase  
15 of the original, would it, by the student?

16 A No.

17 Q And it wouldn't have precluded seeking  
18 a publisher's permission to use the material,  
19 would it?

20 A No.

21 MR. RICH: Let's mark as Exhibit 304,  
22 the expert report of Robert B.K. Dewar.

23 (Whereupon, the expert report of  
24 Robert B.K. Dewar was marked as Plaintiff's  
25 Exhibit 304 for identification, as of this

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1  
2 date.)

3 BY MR. RICH:

4 Q Sorry. Just before I ask you to turn  
5 to this exhibit, if you would turn back to  
6 Page 9 of your report. There's one other  
7 question I want to ask you.

8 A Uh-huh.

9 Q There's a footnote, Footnote 3  
10 appearing there.

11 A Uh-huh.

12 Q In which you say, "Studies long have  
13 suggested that the higher price the  
14 institutional subscription paid for journals in  
15 print and now electronic form is an additional  
16 fee that covers at least in part the effects of  
17 copying for purposes such as education and  
18 research."

19 Do you see that?

20 A I do.

21 Q I take it that statement is not  
22 intended to convey that as a matter of legal  
23 conveyance or legal license, that such  
24 subscriptions entitle forms of copying not  
25 otherwise authorized either by fair use or by

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2 license, correct?

3 A It's only intended to convey that  
4 studies have suggested it, and that's all.

5 Q But what's the "it"?

6 A That studies have suggested that that  
7 higher institutional fee does at least cover --  
8 and I really was being very careful about  
9 this -- the effects of copying for certain  
10 purposes.

11 Q Meaning?

12 A Meaning it's there to say whatever the  
13 law may be, that's a separate question, that we  
14 know that when we sell this material at a higher  
15 price to -- well, let me even backup from that.  
16 We know that when we sell this material to a  
17 library, there are certain to be multiple users  
18 as opposed to selling it to an individual, where  
19 there's typically only one user. And in the  
20 hands of multiple users, there may also be some  
21 copying. And the suggestion from studies -- in  
22 other words, I'm not making the statement -- is  
23 that the higher fee is simply a way of  
24 compensating for the fact that this copying  
25 activity is taking place.

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2 Q It's an economic observation, not a  
3 legal observation?

4 A Yeah, I think that's right. It's a  
5 marketing observation.

6 Q And that's an observation of  
7 Ms. Gordon, a former colleague of mine at this  
8 law firm, not by you, per se, right?

9 A That's right.

10 Q You have not made a study of that  
11 topic?

12 A I have not made a study of that.

13 Q Okay. So you're not adopting --  
14 you're neither rejecting or adopting that  
15 premise, right?

16 A That's correct.

17 Q Now let's turn to Mr. Dewar. I take  
18 it you've had a chance to read Mr. Dewar's  
19 report?

20 A I have. I have.

21 Q Turn to the third page, please.

22 A Okay.

23 Q I would ask you to read to yourself  
24 the full paragraph under Roman III, first full  
25 paragraph, beginning with the "Georgia State

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2 University provides for students."

3 A Uh-huh.

4 Q And advise me what statements of fact,  
5 if any, in that paragraph you disagree with.

6 A I have no reason to refute any of it,  
7 although it doesn't necessarily mean I have  
8 reason to support all of it.

9 Q I, frankly, don't know what that  
10 means.

11 A Sure. I'll give you a good example.  
12 The system allows instructors or personnel at  
13 the library to scan in course reading materials.  
14 That's presented here as a simple statement of  
15 fact. But I don't know whether instructors are  
16 also able to do the scanning to add the  
17 material. I can't refute that. I can't confirm  
18 it, I can't refute it.

19 Q You have no knowledge to the contrary,  
20 do you?

21 A That's correct.

22 Q Turn to the next page, Page 4, and I  
23 will read you the following from the top of the  
24 page. "In addition to the electronic reserve  
25 system, professors can access uLearn, a general

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2 software system (commonly known as a 'course  
3 management system') for supporting a professor  
4 in a course and allowing a wide range of  
5 communication of information of all kinds to  
6 students. Of particular relevance here is  
7 uLearn's capability to allow users to upload  
8 materials to a class page, including music,  
9 movies and documents such as PDF files of  
10 scanned copyrighted reading materials."

11 Is there anything in what I've just  
12 read you with which you disagree or have  
13 knowledge as to its inaccuracy?

14 A I do not.

15 Q Let's continue down a sentence.

16 "There are no uploading restrictions of which I  
17 am aware, other than a file size limit. This  
18 would not in practice pose any limitation for  
19 PDF files, which could in any case be split into  
20 separate chapters. I understand that large  
21 amounts of materials" -- strike that. Let's  
22 just go with the sentence I read you.

23 Do you have any reason to disagree  
24 with the accuracy of that statement?

25 A I have no knowledge that would let me

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2 do that.

3 Q Okay. Turn to Page 5, please, and  
4 read to yourself the second and third paragraphs  
5 on the page. And my question to you is the  
6 same. Is there any statement in there with  
7 which you disagree? That is the paragraph  
8 beginning "The other common way" and the  
9 paragraph beginning "However created."

10 A Okay.

11 Q I had a question pending, which is:  
12 Is there any statement of fact in those two  
13 paragraphs with which you disagree?

14 A I have no reason, no grounds for  
15 refuting it.

16 Q Finally, if you turn, sir, to Page 6,  
17 beginning with the third paragraph, "When a PDF  
18 file is transferred," and if you would read  
19 through the balance of that section through the  
20 top of Page 7 up to conclusions. So that's  
21 three paragraphs in all.

22 A Uh-huh.

23 Q If you would tell me if there's  
24 anything in those three paragraphs with which  
25 you disagree.

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2 A Uh-huh.

3 Q The question pending was: Any  
4 disagreements?

5 A I said earlier in the day that I don't  
6 hold myself out as a technology expert. So  
7 certainly there's some of this that I can't  
8 confirm or refute because it's a description of  
9 the technology. Otherwise, in terms of --  
10 unlike the other paragraphs that we've commented  
11 on just in the last several minutes, I would  
12 want to investigate certain things, like the use  
13 of the word "copy." There's the casual sense of  
14 copy, and then there's a highly technical sense  
15 of the word "copy" in the U.S. Copyright Act. I  
16 don't have that in front of me, but I think  
17 that's a question I would want to explore. I  
18 know that there have been some cases involving  
19 the issue of RAM copies and just what exactly  
20 constitutes work that's, I believe the  
21 expression is, sufficiently stable to constitute  
22 a copy. I'm saying that looking at this through  
23 my legal copyright prism, where I usually see  
24 much of the world, it does leave me with wanting  
25 to investigate questions like that.



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2 But in terms of the basic mechanics of  
3 how a student might receive that item off of the  
4 server, receive it on his or her computer, and  
5 certain things, except for those maybe  
6 restrictions on printing and downloading we had  
7 talked about earlier, this is a basic  
8 description of the system as I know it.

9 Q Thank you.

10 Turn to Page 15 of your report,  
11 please.

12 A (Witness complies.)

13 Q You make some statements about the  
14 Basic Books/Kinko's case.

15 A Yes.

16 Q Do you believe that case was wrongly  
17 decided?

18 A No.

19 Q At the bottom of 15, over to 16, you  
20 say in the last sentence, "Moreover, the court  
21 rejected the urgings of the publishers to adopt  
22 one particular provision of the guidelines" --  
23 which is a reference, I take it, to the  
24 classroom guidelines of 1976?

25 A Yes.

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2 Q -- "that would bar all 'anthologies'  
3 of copied all materials. The court instead held  
4 'It is not clear that Congress intended strict  
5 application of this prohibition without fair use  
6 balancing.' The court in Kinko's in fact did  
7 not apply that element of the classroom  
8 guidelines to the facts of the case. The court  
9 instead determined that the fair use of each  
10 item must be evaluated individually. The fact  
11 that they are assembled into the course pack is  
12 not determinative of fair use."

13 Is that a correct reading of that?

14 A That is.

15 Q And that is a fair statement of your  
16 testimony, right?

17 A Yes, it is.

18 Q Now, is it your understanding from  
19 that decision, nonetheless, that the Kinko's  
20 court did weigh the practice of what it viewed  
21 as anthologizing as a relevant factor in the  
22 fair use balance?

23 A I honestly don't remember the court  
24 doing that. So if you would like to look at the  
25 case here, we can. But no, I'm not recalling

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2 that from the case at all.

3 Q Are you aware whether the injunctive  
4 relief awarded in that case expressly forbade  
5 Kinko's from engaging in anthologizing?

6 A The injunctive relief, as I've read  
7 it, was not in the case but was in a separate  
8 document that I'm recalling having read many  
9 years ago, and I don't believe it explicitly  
10 prohibited anthologizing. In fact, again, we're  
11 talking -- I haven't read this in years. But  
12 what I recall was that in fact the parties  
13 agreed that some small amount of a work would  
14 will in fact be within fair use, that Kinko's  
15 could go ahead and make anthologies or course  
16 packs or whatever they're called and that there  
17 was still a survival of fair use. But what I'm  
18 remembering -- and again, correct me. It's been  
19 years since I read that instrument. That it  
20 provided for a tiny amount, in fact, what comes  
21 to mind is a measure of something like two pages  
22 of a book, as within fair use. So that the  
23 anthology itself was not prohibited, but the  
24 fair use measure was just so small that, as a  
25 practical matter, Kinko's moved on from it.

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2 Q Well, let's take a look at both of  
3 those.

4 A Yes.

5 MR. RICH: Let's mark as Plaintiff's  
6 Exhibit 305 the opinion Judge Mottler, if I  
7 recall, in Basic Books v. Kinko's.

8 (Whereupon, the opinion Judge Mottler,  
9 if I recall, in Basic Books V Kinko's was  
10 marked as Plaintiff's Exhibit 305 for  
11 identification, as of this date.)

12 MR. RICH: And while we're at it,  
13 let's mark as Plaintiff's Exhibit 306 the  
14 judgment entered in that case.

15 (Whereupon, the judgment entered in  
16 that case was marked as Plaintiff's Exhibit  
17 306 for identification, as of this date.)

18 BY MR. RICH:

19 Q By all means, take the time you need.  
20 I will direct you to what I found to be  
21 pertinent to my questions, but you should  
22 certainly review as you will.

23 If you were to turn to Page 18 of the  
24 text of this printout of the decision, in the  
25 court's discussion of other factors in

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2 connection with its fair use analysis, in the  
3 second paragraph it states, "Additionally the  
4 classroom guidelines express a specific  
5 prohibition of anthologies. The fact that these  
6 excerpts were compiled and sold in anthologies  
7 weighs against defendant."

8 Then if you go on to Page 21, in the  
9 right-hand column in the first full paragraph  
10 midway down, the court writes, "We are convinced  
11 that this is the more prudent path than a  
12 bright-line pronouncement and refuse to hold  
13 that all unconsented anthologies are prohibited  
14 without a fair use analysis." And I'm assuming  
15 that's what you pulled out of the opinion.

16 It goes on. "However, the fact that  
17 these excerpts were placed in anthologies weighs  
18 significantly against defendant." Footnote.  
19 The 1966 House report noted, "Education is the  
20 textbook publisher's only market and many  
21 authors receive their main income from licensing  
22 reprints in anthologies and textbooks. If an  
23 unlimited number of teachers could prepare and  
24 reproduce their own anthologies, the cumulative  
25 effect would be disastrous."

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2 Do you see that?

3 A Unfortunately, I don't. I'm listening  
4 to you. I picked it up. I'm just wondering if  
5 we've actually got matching pages.

6 Q Sorry. So it would be on the top  
7 right-hand column, is what I read, under  
8 Headnote 1535.

9 A I see it now, right.

10 Q Then what I read next appears on your  
11 Page 19. And I had begun reading down in that  
12 first full paragraph on the left. Midway down  
13 it starts with "We are convinced that," and then  
14 the footnote accompanying it.

15 A I'm almost there. There it is.

16 Q So my earlier question had been,  
17 subject to your being refreshed, whether  
18 notwithstanding that the court didn't find the  
19 practice of anthologizing dispositive of the  
20 fair use analysis, it nonetheless held it very  
21 probative?

22 A And I would emphasize as part of that,  
23 too, the first of the language that you say  
24 "compiled and sold in anthologies," and  
25 especially that word "sold" I think is an

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2 important part of the equation.

3 Q But that really wasn't the focus of my  
4 questioning nor of the section of your report  
5 that I was examining on, which was assertions  
6 about the purported relevance of anthologizing  
7 to that decision.

8 A Uh-huh.

9 Q And you acknowledged the context in  
10 which that decision was reached.

11 Now, if you look at the injunctive  
12 relief provision.

13 A And that is the separate document?

14 Q That's Plaintiff's Exhibit 306.

15 A Now, remember, this is one I haven't  
16 read in several years.

17 Q This is fine. I'm simply showing it  
18 to you because you wanted to be refreshed.

19 Paragraph 1, "Ordered and adjudged  
20 that defendant Kinko's Graphics Corporation and  
21 its directors," et cetera, "are enjoined from  
22 creating, copying, distributing or selling or  
23 assisting or participating in creating, copying,  
24 distributing or selling any anthology  
25 compilation, collective work, course packet or

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2 similar collection to or for students, hereafter  
3 anthology or course pack, containing, without  
4 permission in writing or other fixed medium of  
5 expression, a copy of more than one page from  
6 any work in which plaintiffs or any of them now  
7 own or hereafter acquire a copyright or where  
8 exclusive right under copyright in the material  
9 copied where," and it goes on, as you can read  
10 to yourself, one, two, three and four.

11 A Okay.

12 Q And I assume that refreshes your  
13 recollection about a document you haven't looked  
14 at in a long time.

15 A That's right. And it actually, the  
16 one thing -- it's consistent with what I was  
17 remembering, except I was remembering it as two  
18 pages. It's actually one, and that was it.

19 Q Well, if you say consistent means you  
20 remembered it as specifically enjoining creation  
21 of anthologies subject only to a one-page  
22 limitation, then there is no dispute between us.

23 Now, back to your report, sir. At  
24 Page 16, you briefly reference Texaco and  
25 Princeton University Press cases, correct?



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2 A That's correct.

3 Q Do you believe Texaco was correctly  
4 decided?

5 A I've had a lot of problems with the  
6 Texaco decision. There are some aspects of it  
7 that I think were problematic. There was, in  
8 fact, a dissent in that case when it was decided  
9 by the full panel -- no, I'm sorry. There was a  
10 dissent in that case. I'm mixing it up with the  
11 Michigan case.

12 Let me stop. Let me stop and catch my  
13 breath, because I'm mixing up the two cases.

14 Q This was Judge Newman's majority  
15 opinion.

16 A Right. Right. There was a dissent in  
17 that case.

18 Q Judge Jacobs.

19 A And the difficulty that I had with  
20 that case is the heavy use of the concept of  
21 availability of permissions and the weight that  
22 it played in the calculation of fair use.

23 Q So-called circularity argument?

24 A So-called circularity.

25 Q Did you disagree with the MDS

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1  
2 decision?

3 A MDS decision.

4 Q The decision on rehearing en banc.

5 A That's right. That's right. Holding  
6 that it was not fair use. In principle and  
7 probably in the overall decision of the court, I  
8 had no particular reason to argue with the  
9 overall decision. I had problems with the  
10 internal reasoning of the decision, as I recall.  
11 But the general conclusion, not too surprising  
12 and not much to argue with.

13 Q In the first bullet on Page 16 of your  
14 report, you state in the last sentence, "The  
15 implication of the cases" -- and I believe  
16 you're referencing back to Texaco and MDS --  
17 "and the clear language of the fair use statute  
18 indicate that the outcome may be considerably  
19 different if photocopying were made by the  
20 educational institution."

21 Do you see that?

22 A I do.

23 Q Is that your recollection of the  
24 viewpoint of the en banc court in MDS?

25 A No, I'm not presenting it as a

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2 statement of what that court said. The lead-in  
3 says, "These cases allow the following  
4 observations about fair use." I'm not  
5 presenting these bullet points as a summary of  
6 what the courts may have actually said.

7 Q So when you state the implication of  
8 the cases indicate, you're not referring to what  
9 the cases -- you're not drawing on the text of  
10 the cases for that purpose?

11 A Yes. If your question is is this my  
12 statement that I'm drawing this implication from  
13 the cases, the answer is yes. If your question  
14 was is that a statement from the court, which is  
15 what I thought I heard --

16 Q I guess to say it differently, I  
17 assume you found some textural support --

18 A Oh, I did.

19 Q -- in MDS for the proposition that the  
20 outcome may be considerably different if  
21 photocopying were made by the educational  
22 institution?

23 A And for the statement that the  
24 implication is that it may be considerably  
25 different.

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2 Q I'm just going to show you the MDS  
3 decision.

4 A Please do.

5 Q And I want you to show me where you  
6 draw that from.

7 MR. RICH: Let's mark this as  
8 Plaintiff's Exhibit 307.

9 (Whereupon, MDS decision was marked as  
10 Plaintiff's Exhibit 307 for identification,  
11 as of this date.)

12 BY MR. RICH:

13 Q If it will expedite -- again, you can  
14 look where you want, but if you will turn to  
15 Page 9 of your text of the opinion, down the  
16 left column, there is a paragraph beginning "As  
17 to the proposition," which I'll read into the  
18 record.

19 "As to the proposition that it would  
20 be fair use for the students or professors to  
21 make their own copies, the issue is by no means  
22 free from doubt. We need not decide this  
23 question, however, for the fact is that the  
24 copying complained of here was performed on a  
25 profit-making basis by a commercial enterprise."

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2 And I'll represent to you that's the  
3 only discussion I saw bearing on this.

4 A Uh-huh. I don't recall much more, if  
5 any more than that.

6 Q So you interpret the court saying it's  
7 not free from doubt as expressing a -- the  
8 implication that the outcome may be considerably  
9 different?

10 A That's correct.

11 Q At the bottom of 16 over to 17 and I  
12 believe at other points in your report, although  
13 I don't have it flagged here, you make a number  
14 of observations about what you term the  
15 straightforward economics of decisions of copy  
16 shops not to invoke fair use. Do you see that  
17 at the bottom of Page 16 of your report?

18 A Yes. Yes, I'm with you now.

19 Q What's the source for those sets of  
20 opinions on your part or statements? I don't  
21 see any citations.

22 A Yeah, there too, I'm certainly  
23 bringing to this task the expertise of my many  
24 years of experience of working with people who  
25 are in this field. And I have honestly worked

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2 with, met with and had conversations with many  
3 individuals who are managers of or otherwise in  
4 the business of running course packs and book  
5 stores and photocopy shops, and many of these  
6 observations I have not seen documented  
7 anywhere. So there aren't articles to cite, for  
8 example. But they certainly come up frequently  
9 and have been expressed to me in my  
10 conversations with people who are in this  
11 business.

12 Q And how many such conversations would  
13 you estimate you've had on this topic?

14 A Sure. Over the last, say, 18 years,  
15 since the Kinko's decision?

16 Q Yeah.

17 A Oh, I've probably had close detailed  
18 conversations, I would have to say with 20 or  
19 more people who are in a position of authority.  
20 Plus having met in different kinds of sessions,  
21 the workshops that I do, question/answer  
22 sessions. Met with large and small groups of  
23 yet additional people who are in this kind of  
24 business to talk about what they do and how they  
25 do it, what some of their decision making is,

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2 what influences they feel coming to bear on how  
3 they run their business.

4 Q And do you believe that they  
5 reasonably, following Kinko's and MDS, would be  
6 able to sustain a position that course packs  
7 delivered to them of a type that were the  
8 subject matter of those cases could reasonably  
9 be justified under a fair use analysis?

10 A I can reasonably say that certainly  
11 some materials may be within fair use. I can  
12 certainly say, as we've already said earlier  
13 today, that the fair use equation may be  
14 different if you change the facts. And if one  
15 of those facts is change it from the off-campus  
16 commercial to the on campus educational, then  
17 you may also have a different fair use equation.

18 Q You're moving away from my question,  
19 sir.

20 A I'm sorry.

21 Q I'm focusing on this paragraph of your  
22 testimony and asking you the facts, which is:  
23 Is it your understanding from these many  
24 discussions over 18 years, that the 20 or so  
25 folks with whom you spoke in words or substance

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2 reported you to that while they believed they  
3 would have had viable fair use positions had  
4 they investigated further, even in the aftermath  
5 of MDS and Kinko's, that simply as a matter of  
6 economics, they would rather pay the fees?  
7 That's the burden of your testimony?

8 A I have heard that said by many people  
9 who are in the course pack business, that is  
10 correct.

11 Q Can you identify anyone by name?

12 A No.

13 Q Do you have any notes, records of  
14 those discussions?

15 A No. I can -- just in general, the  
16 fact that I went to this conference on the  
17 National Association of College Book Stores,  
18 that kind of thing.

19 Q Do you view it as legally inadvisable  
20 for someone who may in some situations have a  
21 fair use position and in others not to decide to  
22 remove any cloud of uncertainty by entering into  
23 a license arrangement that obviates the need for  
24 line drawing?

25 A I don't -- there are times when that's



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2 perfectly appropriate. I think that's your  
3 question.

4 Q Would the course pack setting be such  
5 a time?

6 A For the kind of situation where you're  
7 talking about the Kinko's like situation?

8 Q Yeah.

9 A Commercial shop? I would rather see  
10 them stop and pay a little bit more attention to  
11 the details. But I certainly understand the  
12 pressure of the business that they're needing to  
13 run and that while there may be opportunities to  
14 use materials, they may not have the staff or  
15 other reason to invest in investigating each of  
16 those works. If they turn to me and say yes, we  
17 know that we probably could do it without  
18 permission and without fees, but it's going to  
19 take this kind of practical business investment,  
20 therefore, I'm not going to do it, I'm going to  
21 rely on licensing and if they said that to me as  
22 a matter of business decision, I would honestly  
23 look at them and say more power to you, that you  
24 needed to make a business decision, it's not for  
25 me to question your business, and if that's the

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1 way you chose to do it, that's your choice.

2 Q What knowledge do you have about the  
3 extent to which certain materials which appear  
4 in course packs are, in fact, not the subject of  
5 copyright permissions requests and  
6 authorizations.  
7

8 A In terms of have I seen real examples?

9 Q I'm just asking you what your  
10 awareness of that is --

11 A Yeah.

12 Q -- as a practice.

13 A Yeah. I actually see quite a bit of  
14 it. I've had situations brought to me for  
15 question or just curiosity involving --  
16 sometimes it's material produced by the faculty  
17 member himself or herself. Sometimes it's  
18 material that they got from a colleague down the  
19 hall and maybe produced by the colleague, and  
20 it's just kind of a casual permission, a  
21 handshake and that's it. But it raises  
22 questions. I've seen things that are just  
23 dubious. I mean, I list an example in my report  
24 about something that was on electronic reserves,  
25 a kidnap ransom note. And this is the kind of

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2 thing that I've also seen in course packs. So  
3 there are a variety of ways that something -- a  
4 variety of examples where something appears or  
5 is proposed to be in a course pack, but the  
6 course pack office maybe doesn't have the  
7 facility or the inclination to investigate and  
8 determine how to proceed.

9 Q Are you aware in relation to one of  
10 CCC's offerings, which is clearing permissions  
11 requests for use in the academic setting on a  
12 transactional basis, whether there is any  
13 compulsion on the part of the user of that  
14 service to produce any material other than  
15 material it believes is not subject to fair use?

16 A So that the person presenting that  
17 material could say, well, I just withheld this  
18 for whatever reason?

19 Q Yes. What's your knowledge of that  
20 practice?

21 A I have asked about book stores that do  
22 the photocopy course packs and I've asked them,  
23 do you do that? Do you go through this? And,  
24 you know, routinely the answer is no, we don't  
25 go through the material at all. We just go

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2 through it, we see what's there, we fire off any  
3 requests that we can find where we can find  
4 somebody to request the permission from. We  
5 don't have the staffing to make the judgment  
6 that this is not copyrighted at all or that this  
7 doesn't need permission or that this is even  
8 pre-cleared, like with creative commons or it's  
9 fair use. We just don't have the staff to do  
10 that.

11 Q Reading the MDS and Kinko's  
12 injunctions, is it any wonder why people  
13 wouldn't spend any enormous amount of time  
14 seeing if individual pages of an otherwise  
15 anthological course pack might meet fair use?

16 A You know, the answer is no, it is no  
17 wonder.

18 Q If you would turn to Page 18, please,  
19 of your report.

20 A Uh-huh.

21 Q Under purpose of the use.

22 A Yes.

23 Q You say in the context of E-Reserves,  
24 "In some respects the use of some materials may  
25 be transformative. For example, an article in a

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2 scholarly journal was originally written and  
3 published for purposes of advancing scholarship.  
4 If the article is about medicine, the purpose is  
5 for advancing medical treatment and improving  
6 health conditions. If the same article is part  
7 of the assigned reading in a course, its use is  
8 transformed into a teaching tool. The article  
9 may be assigned for purposes of advancing  
10 medicine, but it might also be assigned as an  
11 example of research methods or even to study  
12 trends in research funding or scholarly  
13 publishing. In an electronic environment, the  
14 instructor may add questions and references for  
15 further study and students may add commentary  
16 and observations. In the hands of the teacher  
17 and student, the article takes on a new  
18 purpose."

19 Is that a correct statement of your  
20 testimony?

21 A Yes, it is.

22 Q So is it your position that the simple  
23 use of copyrighted material in the classroom  
24 setting qualifies that material as  
25 transformative, assuming it fulfills one or more

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2 of the functions you described?

3 A If it fits some of the patterns that I  
4 described, I think there's a transformative  
5 aspect to that use.

6 Q So you really believe, consistent with  
7 your scholarship and copyright law, that simply  
8 assigning an article in a classroom qualifies --  
9 for whatever purpose the teacher assigns to it,  
10 is a transformative use of that photocopy?

11 A Your second question goes many steps  
12 beyond your first question.

13 Q Let's take my second question.

14 A No. I will not say yes to your second  
15 question?

16 Q Second question.

17 A Yeah. I will not say yes to your  
18 second question.

19 Q When, then, is the material  
20 transformative within the meaning of copyright  
21 law?

22 A Sure. The easiest one may be the last  
23 that I give here, and that's where I take the  
24 work, whatever it might be, and I add to it some  
25 features. For example, we'll see instructors

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2 take a newspaper article and instead of saying  
3 just read the newspaper article, it's let's take  
4 the newspaper article and I'm going to add  
5 margin comments about what to look at, arrows to  
6 upon point to certain ways that something is  
7 communicated and so on. So somebody has  
8 actually added commentary, observations and  
9 other elements to the work to really transform  
10 it from its original purpose of being a news  
11 item to its new purpose of being specifically  
12 adapted to serving the educational needs of  
13 what's going on.

14 Q What if I lecture about it? What if  
15 my lecture is devoted to the topic of the  
16 assigned reading and the students take  
17 annotations along the side of the article,  
18 absorbing all the wisdom of their professor,  
19 does that make the photocopies of the article  
20 transformative within the meaning of the  
21 copyright act?

22 A All by itself, I'm having trouble  
23 worrying about when we're really going to care  
24 about that issue coming up.

25 Q We care if we're going through a fair

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1  
2 use analysis, don't we?

3       A       In other words, it would come up if  
4 somebody were to say, hey, student, you have  
5 taken that article and have turned it into a  
6 derivative work by virtue of your annotations.  
7 So is that one copy? Because it's not the  
8 student that's doing multiple copying or sharing  
9 or any of these things that we've talked about.  
10 I'm just really thinking of the instructor, and  
11 that's really what I'm imagining here. That the  
12 instructor takes that newspaper article, and  
13 maybe the newspaper article is about whatever  
14 diplomatic development in the world, but what  
15 the teacher is really teaching is something  
16 about, say, journalism. And now I'm going to  
17 use that article as a tool for teaching about  
18 journalism. Let's look at how the article is  
19 constructive. And my margin comments are going  
20 to be focused on that aspect of the article. I  
21 think that's a transformative use of that work.

22       Q       And then is it transformative for  
23 every student who would download, print, bring  
24 to class, a copy of that article and benefit  
25 from all of that, quote, transformative work



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2 from the professor? This is written in the  
3 context of E-Reserves, not in the context of a  
4 theoretical by a professor being sitting in a  
5 study, if I'm not mistaking you.

6 A That's right. But I'm having trouble  
7 understanding that. In other words, are you  
8 suggesting reframing the place where the fair  
9 use question arises so that it isn't arising in  
10 the context of getting a copy of the work,  
11 making it available on the E-Reserves system  
12 that students access, but will it be a second  
13 fair use analysis with each download by those  
14 students?

15 Q No. This isn't that complicated. The  
16 checklist which you endorse and believe to be,  
17 you know, spectacularly in conformance with the  
18 copyright act, has as part of an element whether  
19 the use of the work is transformative. And I  
20 take it --

21 A Yes.

22 Q -- the faculty member needs to check  
23 the box, yes, it is; no, it isn't, and that  
24 along with the other factors, it will weigh in  
25 the determination whether that work will be

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1  
2 uploaded and then, subject to everything that  
3 Professor Dewar's report, which you've generally  
4 endorsed, indicates can be done with respect to  
5 further dissemination of that work. So it  
6 puzzles that you would sit here saying I can't  
7 imagine why that's relevant, especially when  
8 you've written about it.

9 A No. No. I'm not here testifying at  
10 all to any subsequent downstream uses of that  
11 work by the student, if the situation is the  
12 student downloading and then look what the  
13 student can do, uploading and passing it along.  
14 When we looked at Dewar report, that was just a  
15 question of the matter of fact, can that, in  
16 fact, happen; and I believe my answer was yes,  
17 that can in fact, happen. But we didn't get to  
18 the question of can a student legally do that.  
19 You didn't ask that question at all.

20 And so let's back up from that  
21 question. I'm only saying here that if the  
22 instructor takes that newspaper article, let's  
23 stick with that example, and annotates it,  
24 circles different items, transforms it from a  
25 news item into how to deconstruct a news article

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2 for purposes of learning journalism, I think  
3 we've got a transformative use of that work.  
4 And therefore, that is a piece of the many  
5 different pieces that are possible in the  
6 evaluation of whether or not it's within fair  
7 use.

8 Q Would it surprise you that not a  
9 single professor who gave testimony in the GSU  
10 case, nor any librarian, remotely believed that  
11 any of the uses involved in E-Res are  
12 transformative in nature?

13 A No, that wouldn't surprise me at all.

14 Q Are they just ignorant of copyright  
15 law?

16 A No. I believe that the professors and  
17 so on were not -- I think they were professor of  
18 something else. They were not law professors.

19 Q That's true. So they're ignorant of  
20 copyright law?

21 A Well, I wouldn't say ignorant. I  
22 wouldn't say ignorant.

23 Q They don't know how to apply fair use  
24 correctly?

25 A No, no. Hang on a second. You're

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2 going back to your original question. They said  
3 that they didn't believe that that use, and  
4 you'll have to look at some specific uses, but  
5 whatever question they were asked, was not  
6 transformative. I think that was your  
7 statement. And that the professor was saying I  
8 believe that that use is not transformative.  
9 Maybe they're right.

10 Q But you criticize them, at least  
11 obliquely, for not being schooled in copyright?

12 MR. SCHAEZEL: Objection to form.

13 A No.

14 Q You said, well, that's not their  
15 discipline, didn't you, in so many words?

16 A That's not their discipline. But on  
17 the other hand --

18 Q Was that just a gratuitous statement  
19 or was there a reason to say that?

20 A Maybe there are two reasons for the  
21 response. Maybe they didn't know  
22 transformative/non-transformative or maybe  
23 they're right. Maybe that particular use that  
24 they were making was not transformative. I  
25 don't know which of those is true.

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2 Q If, in fact, they're wrong, what's the  
3 logic of remitting a system of fair use  
4 determinations to a bunch of people ignorant  
5 about copyright law, namely the professors? Is  
6 that a logical system?

7 A I'm bothered by the conclusions that  
8 you're jumping to.

9 Q I didn't make the conclusion. You  
10 said one of the possibilities that would explain  
11 why they have a mistaken conception as to  
12 transformativeness is that they're not  
13 knowledgeable about copyright. It is a  
14 foundation stone, is it not, of the GSU policy  
15 that fair use decisions first and foremost are  
16 made by the very people you admit it is feasible  
17 have no clue about copyright law?

18 MR. SCHAEZEL: Objection as to form.

19 A And I didn't say no clue.

20 Q Unknowledgeable.

21 A I didn't say unknowledgeable.

22 Q What words would you like to use?

23 A I don't know. Would you like to read  
24 it back? It may be too far back in our  
25 conversation.

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Q Why don't you restate it.

A Would you like me to restate it?

Q Please.

A They're not experts.

MR. SCHAETZEL: Objection to form.

Go ahead.

A They're not experts. They're not experts. In what we're -- certainly, what I like to encourage of my faculty colleagues is you don't need to be an expert in the sense that you are, that I might be, that somebody else in this room is. You don't have to be an expert on copyright. You need to know something about copyright. You need to learn some of the fundamentals, particularly as they apply to your kinds of situations, and you need to apply them in a reasoned, good-faith manner. And I will tell you even further that I feel very comfortable with that, especially knowing that there are the safeguards in the system, notably at Georgia State University, which we've already talked about.

Q What are those?

A That, for example, especially in the

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2 E-Reserves system, that the content is brought  
3 to the library. That we talked about multiple  
4 reviews at the library, an intake review. We  
5 talked about by whatever standard -- we don't  
6 need to return to that. But by whatever  
7 standard, certain materials may be flagged, and  
8 they're reviewed by somebody higher. And I  
9 believe we've said today -- if we didn't, we can  
10 say it right now -- that if that person needs  
11 further -- believes that the situation needs  
12 further review, there are others within the  
13 library, and University counsel has made itself  
14 available under this policy for reviewing any of  
15 these materials.

16 Q And you, sitting here today, don't  
17 have the remotest knowledge, do you, of how many  
18 times those review processes have been invoked  
19 under the current policy; isn't that true?

20 A At Georgia State University?

21 Q At Georgia State University.

22 A The only number that I would know are  
23 the examples given in the depositions.

24 Q And you made no investigation to  
25 support your conclusions as to the

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2 reasonableness of this policy as applied and in  
3 practice at Georgia State rather than assume  
4 that the review process with the librarian and  
5 an appeal to another librarian and legal counsel  
6 is in fact working. You just assumed it,  
7 correct?

8 A I've assumed that they're dedicated to  
9 making that work, that's right.

10 Q But you have no factual basis for that  
11 assumption, do you?

12 A Other than what the participants have  
13 said in the depositions.

14 Q And the participants in the  
15 depositions identified how many instances as of  
16 the date of those depositions, when the  
17 librarians reviewed one or more matters for  
18 copyright compliance?

19 A I don't recall any numbers.

20 Q What about the uLearn system, what  
21 librarian is involved in that process?

22 A The uLearn system is a course  
23 management service. I don't know. I don't  
24 recall from mention of the -- whether it was --  
25 I know it was described in the -- in the



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2 depositions, but I'm also not recalling  
3 systematically about the library's involvement,  
4 although I believe that they are available,  
5 certainly, for questions about that.

6 Q My question is: What's the basis for  
7 that assumption?

8 A I believe it was mentioned in the  
9 depositions.

10 Q You can't recall that?

11 A I'm not recalling it specifically.

12 Q You could be wrong about that,  
13 correct?

14 A I could be wrong about that.

15 Q In application, would it trouble  
16 you -- this is focusing on GSU now.

17 A Uh-huh.

18 Q An application of the fair use  
19 guidelines. Would it trouble you if factor one  
20 was almost always deemed by faculty to favor  
21 unlicensed classroom use of copyright materials?

22 A Yeah, yeah. Specifically in the  
23 context of electronic reserves for purposes of  
24 supporting the reading in connection with the  
25 courses at Georgia State University, no, that

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2 wouldn't trouble me.

3 Q Would it trouble you if the analysis  
4 was weighted such that a user would consider  
5 factor one to weigh in favor of fair use even  
6 where its evaluation of the use was that it was  
7 concededly non-transformative?

8 A No. That wouldn't bother me either.

9 Q Would it concern you if instructors  
10 using the checklist considered distribution of a  
11 copyrighted work to all students enrolled in a  
12 course not to be a "public distribution"?

13 A No, that wouldn't bother me either.

14 Q Would it concern you under factor two  
15 the checklist almost always resulted in an  
16 analysis favoring unlicensed use of published  
17 nonfiction works in the classroom context?

18 A I would question that.

19 Q Would it concern you if instructors  
20 determined that the "nature of the copyrighted  
21 work" favored fair use because the instructor  
22 deemed his or her use of the work to be  
23 "important" to his or her "educational  
24 objectives"?

25 A And they evaluated only that reason?

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2 That would bother me.

3 Q Would it trouble you under factor  
4 three if an instructor could use the checklist  
5 to reach a fair use outcome even where she  
6 concedes the portion used is a "large" one?

7 A Not necessarily all by itself. I'd  
8 look at the other factors.

9 Q Would it trouble you if instructors  
10 almost always considered their use of course  
11 material to qualify as "narrowly tailored" to  
12 their educational purpose?

13 A I'd like to talk to those professors  
14 and help them rethink what they're doing.

15 Q What if they don't avail themselves of  
16 mechanisms and just go and make those checklist  
17 determinations and feel comfortable about it?  
18 Is the system working well then?

19 A It's not bad if you have protection  
20 from the other -- looking at the other factors.  
21 I mean, again, we don't know what "narrowly  
22 tailored" means outside of the context of really  
23 what it is you're trying to teach. And so  
24 really that instructor is the one who has those  
25 facts and is best able to help with that

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2 decision.

3 But then again, one can't get away  
4 with anything. We'd go back to one of your  
5 earlier examples of the day and say what are the  
6 safeguards if somebody just shows up with what  
7 clearly is a questionable amount of material  
8 that would get reviewed and bounced back to the  
9 instructor.

10 Q You're saying if it flunked the  
11 quantitative test?

12 A And then if it flunked that  
13 quantitative test, somebody is likely to red  
14 flag it and send it back.

15 Q But if it was 19 percent of a work and  
16 had lots of other reasons objectively to cause  
17 concern, there's no reason the librarian will  
18 know that, correct?

19 A In some cases, that's right.

20 Q Well, in the record evidence, they say  
21 they don't care about any other factors. Does  
22 that disturb you?

23 MR. SCHAEZEL: Objection as to form.

24 A The librarians say they don't care  
25 about any of the other factors?

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2 Q They are not in a position to nor do  
3 they view it as their responsibility to evaluate  
4 any other fair use factor than an arbitrary,  
5 quantitative test. That's their words, not  
6 mine.

7 MR. SCHAEZEL: Objection as to form.

8 A Yeah.

9 Q Does that trouble you?

10 A I would look -- it troubles me if I  
11 don't find something else. What I would look  
12 for is I would go back to counsel and say, you  
13 know those workshops you're doing, are we  
14 covering these issues? Are we helping people  
15 understand these other issues? Because the  
16 workshops and your involvement may be on that  
17 point the more important safeguard.

18 Q You're saying if you were provost,  
19 you'd do that?

20 A Yeah.

21 Q But you're not.

22 A But I'm not.

23 Q And so if the system chugs along  
24 currently with high school educated often  
25 library clerks simply determining if they see a

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2 red flag of X percent or more and otherwise  
3 saying it looks good to me, you're copesetic  
4 with the practice?

5 A And if we have a system in place that  
6 says faculty members need to consider these  
7 other variables, and also at Georgia State  
8 University I believe they have -- and in fact,  
9 it's stated in their policy that we're going to  
10 investigate alternatives, particularly linking  
11 to data bases so that we don't have to make  
12 those copies and don't have to deal with these  
13 questions if they can be -- if we already posses  
14 the material in electronic form. I think I'm  
15 going to be okay with that.

16 Q But will publishers be okay with it  
17 when it's their materials that are being used  
18 here?

19 A Publishers need to speak for  
20 themselves.

21 Q They have.

22 A They have. But I'll tell you, I know  
23 other publishers that don't mind at all.

24 Q Who's that?

25 A Many scholarly publishers in

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2 particular are moving more toward an open-access  
3 system and allowing easier access, including  
4 download ability, including reuse. More and  
5 more materials are being available with creative  
6 commons license so that they can be accessed  
7 freely. And then the permission is preassigned  
8 for purposes of downloading and reuse,  
9 particularly, commonly, for non-commercial kinds  
10 of uses.

11 Q But you're not suggesting that  
12 publishers need to relinquish their copyright  
13 rights, including the right to a reasonable  
14 royalty if a use exceeds fair use, correct?

15 A No.

16 Q Would it trouble you if checklist  
17 users relied upon varying numerical rules to  
18 determine how much of an original work may be  
19 taken without permission, such as less than  
20 10 percent or 20 percent of the original?

21 A If that were the sole standard, that  
22 would trouble me. I think it's important to  
23 look at all four factors.

24 Q Would it concern you if in the factor  
25 three analysis, instructors considered multiple

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2 articles taken from an edited compilation as  
3 portions of one original rather than as the  
4 entirety of each individual article?

5 A And that compilation, it's a book, I  
6 assume, typically.

7 Q Yes.

8 A Please ask the question one more time.

9 Q Would it concern you in the factor  
10 three analysis if instructors considered  
11 multiple articles taken from an edited  
12 compilation as portions of one original rather  
13 than the entirety of each individual offering?

14 A No. I think if they are presented as  
15 effectively chapters in a book, they should be  
16 evaluated as individual -- as a whatever -- if  
17 you're looking at a portion limit, as a portion  
18 of the book rather than a portion of each  
19 chapter.

20 Q They should be cumulative?

21 A Correct.

22 Q Would it concern you if instructors  
23 considered factor three to potentially "take  
24 precedence" over the other factors?

25 A Oh, yeah. That would concern me.



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1  
2 Q Would it concern you if instructors  
3 considered it impossible or unlikely that any  
4 chapter in an edited compilation of independent  
5 articles could represent "the heart of the work"  
6 even where multiple articles were used in their  
7 entirety?

8 A I think I'm hearing two different  
9 questions. If it's just --

10 Q Strike the last part of that.

11 A Thank you. That's what was throwing  
12 me off.

13 Would you read it again and just leave  
14 that off?

15 Q Would it concern you if instructors  
16 considered it impossible or unlikely that any  
17 chapter in an edited compilation of independent  
18 articles could represent "the heart of the  
19 work"?

20 A You know what, my brain is turning to  
21 mush. It is absolutely true. This is a good  
22 time to take a break.

23 (Whereupon, a recess was taken.)

24 (Whereupon, the referred to portion  
25 was read back by the court reporter: Would

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2 it concern you if instructors considered it  
3 impossible or unlikely that any chapter in  
4 an edited compilation of independent  
5 articles could represent "the heart of the  
6 work"?)

7 A The work being the whole book, that  
8 chapter. Impossible? It's not impossible.  
9 Something might be the heart of the work. But  
10 would it concern me if a professor reached a  
11 conclusion and said this chapter is not the  
12 heart of this book?

13 Q No. A slightly different question was  
14 intended, which is: If as a matter of logic, a  
15 professor were to say it can't possibly be the  
16 heart of the work, it's only one contribution to  
17 a 20 work compilation --

18 A And therefore I'm going to say --

19 Q -- and, therefore, automatically it  
20 can't constitute the heart of the work within  
21 the meaning of the checklist.

22 A Phrased that way, the answer would be,  
23 yes, that would concern me.

24 Q On factor four, would it concern you  
25 if instructors failed to consider the impact on

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2 the market for the original if the proposed  
3 taking were to be repeated to a -- by a larger  
4 group of instructors? So that's now replicating  
5 the same taking across different instructors,  
6 different courses.

7 MR. SCHAEZEL: Objection as to form.

8 A That would not concern me, and the  
9 reason -- it would not concern me.

10 Q Would it concern you if instructors  
11 failed to consider or didn't know about the  
12 availability of licensed versions of the same  
13 content?

14 A And do you mean licensed versions that  
15 the, say, Georgia State already has, like the  
16 databases?

17 Q No. That's fair. Let me rephrase.  
18 Let me narrow the question to the  
19 availability of a licensed alternative to secure  
20 the content. And the question is: Would it  
21 concern you -- let me break it down -- if an  
22 instructor said I have no idea, therefore I'm  
23 just going to check the box "no license  
24 available"?

25 A That would concern me, because stated

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2 what way, it would look like they just glossed  
3 over the issue and didn't investigate it.

4 Q Would it concern you if instructors  
5 analyzed market harm strictly in terms of the  
6 number of copies made for their class?

7 A Strictly in terms of the number of  
8 copies. Not necessarily. I think -- not  
9 necessarily.

10 Q You're familiar with the concept under  
11 factor four, Professor, of potential harm and  
12 the possibility that a practice could replicate  
13 itself elsewhere. How is it intended, if at  
14 all, that the GSU checklist on board that  
15 consideration, as you understand it?

16 A Okay. I see what you mean. Yeah, it  
17 does -- it would bother me if a professor just  
18 very narrowly looked at just only my immediate  
19 one example today and looked no further. In  
20 some cases, that would be problematic.

21 Q Do you think it's appropriate for  
22 instructors to consider the posting of a  
23 copyrighted work on either E-Res or uLearn to  
24 constitute a single copy rather than the  
25 distribution of multiple copies, again, looking

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2 at checklist item that deals with that?

3 A Yeah. I'm going to try real hard not  
4 to be too legalistic, because, of course, all  
5 those words, like "copy" and "distribution" have  
6 technical legal terms. But if what you mean is  
7 a much more -- a much less formal sense of the  
8 words, then yeah, I think a professor needs to  
9 think of it in terms of I'm making this work  
10 available for the 25 students in my class.  
11 Needs to think in those terms. I think that's  
12 what you're looking for.

13 Q Would you be concerned if instructors  
14 considered factor four to be irrelevant to the  
15 ultimate fair use determination in cases where  
16 the previous three factors were evaluated by the  
17 professor to weigh in favor of fair use?

18 A I would still tell them you've got to  
19 do some thinking about that fourth factor. It's  
20 not irrelevant.

21 Q Do you understand the current preamble  
22 to the fair use checklist? And we can put it in  
23 front of you if you need it. To invite or, if  
24 not to invite, to permit that kind of reasoning,  
25 namely majority rules; if I get the first three

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2 factors, I don't need to get to the fourth?

3 A I see what you mean. One, I've always  
4 struggled with how one could infer that, not  
5 only from the checklist but from everything in  
6 fair use. I see people jumping to conclusions  
7 on single variables, whatever it might be. And,  
8 you know, we try, we try, we try, and we just  
9 have to keep trying. But, you know, even the  
10 courts themselves have trouble getting people to  
11 keep looking at all four factors.

12 Q Quickly turn to Page 19. And we're  
13 not going to literally go page by page of this,  
14 you'll be happy to know. There are big chunks.  
15 We're going to move along here.

16 On the first bullet on 19, which is  
17 "Amount of the work," here's the question you've  
18 been waiting for me to ask you. At the end of  
19 that, how do you determine the relevance of  
20 quantitative takings? In other words, how  
21 should a professor think about the concept of  
22 the percentage of a work or as part of its --  
23 his or her calculus?

24 A I don't know if I have been waiting  
25 for you to ask that, but I figured we'd get to

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1  
2 it sooner or later.

3           The law itself is where I would start  
4 with my answer. And the law itself calls for  
5 both a qualitative analysis, and that is the  
6 amorphous part of it. That is the heart of the  
7 work sort of concept. But then the one that  
8 really is much more realistically discussed,  
9 much more realistically pertinent, I think, in  
10 much of the discussion surrounding electronic  
11 reserves is the quantitative measure and being  
12 the amount that's used.

13           You know, here's how I've struggled  
14 with it over the years. That I will certainly  
15 say that, as a matter of law, the court has  
16 drawn -- the courts have drawn no lines. The  
17 statute draws no lines. One of the things I say  
18 to one -- to groups at workshops is I'll say  
19 something like, would you like me to show you a  
20 case where the court said quoting 300 words was  
21 too much?

22           Q       Harper and Rowe.

23           A       Harper and Rowe.

24                    Would you like me to show you a case  
25 where the court said quoting 7,000 words from a

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1  
2 shorter work was okay? I can show you that case  
3 too, Maxtone-Graham. And, you know, these are  
4 extreme examples, but they're examples that  
5 really demonstrate the point.

6           And so what does it really mean? It  
7 means that it does come down, really does in my  
8 reading of the law, that the courts are being  
9 very careful not to say -- not to say as a  
10 matter of law, 10 pages or 10 percent or  
11 25 percent or 50 percent, as we saw earlier. It  
12 just doesn't exist in the law. Word counts, as  
13 we've seen in some of those guidelines, they  
14 just do not exist in the law. And so this is  
15 one area where it's clearly coming back to us.  
16 I mean, the notion of how much has surfaced in  
17 our discussion here today in several different  
18 contexts. So much of the discussion keeps  
19 coming back to it. My own report takes the  
20 group of the 40 or so policies and breaks them  
21 out. I could've broken them out in a dozen  
22 different ways. But what did I do? I broke  
23 them out by how much. And one of the reasons  
24 being that it's very compelling to look at that  
25 as a salient piece of the discussion about fair



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2 use. And it's also -- it's also very compelling  
3 because we can see real differences. It's also  
4 very compelling because that how much not only  
5 is important in the question of what is the law,  
6 what is fair use, but it's also a prominent  
7 element -- I'm trying to get away from my over  
8 use of the word "important." Probably half the  
9 times I've said "important" today I mean it in  
10 some other sense.

11 But it's used -- it's a prominent  
12 element of the discussion because it's so  
13 instrumental to ultimately making the electronic  
14 reserve environment, or I could've also said  
15 print reserve or I could've also said course  
16 packs, making that environment useful to  
17 accomplishing the goals of education.

18 So that, in other words, let's clock  
19 it way back. That if you take those 1976  
20 guidelines with word counts and incorporated  
21 those, you know, if that ends up being the law,  
22 then it's a law that's also not very useful.  
23 And so it becomes -- it becomes a salient point  
24 for a discussion because it's part of the fair  
25 use equation that happens to correspond in a

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2 significant way with accomplishing just the very  
3 reason why a University would have an electronic  
4 service, electronic reserve service.

5 Now, somewhere in there I bet I didn't  
6 answer your question. Would you repeat the  
7 question?

8 Q Well, no. That's okay. In the  
9 interest of time, I want to just continue the  
10 dialogue on this.

11 I will represent to you that a lot of  
12 the testimony that we have taken of efforts to  
13 implement the new policy have resulted in fairly  
14 easy decisions -- I don't think I'm  
15 mischaracterizing it -- by the people filling in  
16 the new checklist as to where factors one and  
17 two end up. They crash in their estimation on  
18 the side of fair use because they believe that,  
19 as presented, the items line up with an  
20 educational purpose, not for profit and narrowly  
21 tailored for purposes and it's factual work, and  
22 they just say no-brainer on those two. Third, I  
23 don't think they have a conception on numbers.  
24 A number came with the following baggage from  
25 either prior GSU experience or from prior

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2 institutional experience. 20 percent rule.  
3 That's what they were trained in. Several of  
4 them testified that the only understanding they  
5 had up until the new policy at GSU, the only  
6 rule they were told, and indeed the rule that  
7 was enforced by the library, was 20 percent.  
8 That's was it, hard and fast.

9 Now let's assume under this -- sorry  
10 for the long exhortation -- they say it better  
11 be under 20, it's 18 percent. Factor four, what  
12 we come away with from the examination is how do  
13 we know effect on market, licensing. That's  
14 complicated stuff. But the first three favor  
15 me, all right? Because 18 percent, I think, is  
16 less than 20, so I'm in good shape. Or maybe  
17 I'll do 12 percent.

18 And so then it goes to this library  
19 review, such as it is, and the library says,  
20 well, we're just going to check 20 percent. So  
21 in my hypothetical, if it's 18 percent, they  
22 don't know how the professor cycled through  
23 factor one, don't know how the professor cycled  
24 through factor two, don't know how the professor  
25 cycled through factor four. But in my example,

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2 let's assume the professor was sensitive enough  
3 to this old 20 percent ceiling that, in fact,  
4 the offerings were all less, then they would  
5 meet the screen at the library. And so you  
6 would have this relatively unformed process of  
7 review with a quantitative review screen that is  
8 below what at least most, if not all of the  
9 librarians would flag, and that is what, so far,  
10 has come through to us as counsel for plaintiffs  
11 as the new system. And we say it leaves  
12 something, if not a lot of things, to be  
13 desired.

14 Do you have any reaction to that? I'm  
15 not asking you to adopt these as fact but as  
16 hypotheticals.

17 MR. SCHAEZEL: Objection to form.

18 A I do. I do. And, you know, let me  
19 start out by saying I understand. You know,  
20 everything you just said I understand. And if I  
21 were sitting in your seat, I might perceive it  
22 in the same way.

23 I would like to bring to the table a  
24 different -- an additional perspective to put on  
25 top of that. That the law of fair use is what

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2 it is. And we can always argue. And for this  
3 purposes, I'm not trying to say I see it this  
4 way, you see it that way, no. That's not my  
5 point right now. My point is that the law of  
6 fair use is what it is. It is, for reasons that  
7 Congress identified as important, a flexible,  
8 fluid doctrine, adaptable to changing needs,  
9 adaptable to changing technology, adaptable to  
10 changing circumstances of unpredictable types.  
11 And that's what we are working with.

12 And what I'm seeing -- actually from  
13 many of the same facts that you are emphasizing,  
14 what I'm seeing instead is a group of  
15 extraordinarily dedicated professionals. And I  
16 say this because I'm out there on the road  
17 meeting their peers. And the things that I'm  
18 seeing, however much there is room to question  
19 or criticize whatever they're doing, I can tell  
20 you, by comparison, they are extraordinarily  
21 dedicated professionals who are working with  
22 these issues to really do their best to  
23 absolutely understand and respect the interests  
24 of copyright owners. They know that.

25 In fact, you know, it's the

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2 librarians -- as you can see, I tried to explain  
3 it, just a brief part of my report. All over  
4 the country, the librarians are the ones who are  
5 often handed this issue. And there are a couple  
6 of reasons why. But, you know, one of the  
7 reasons why is they care. They just care. They  
8 care about the copyright that the publishers  
9 have. They care about the system of copyright.  
10 They care about fair use. They're paying  
11 attention.

12 And what I'm also seeing, compounding  
13 it, is that right now Georgia State University,  
14 whatever it's doing or whatever it's not doing,  
15 it's actually doing a whole lot, in large  
16 measure, because, you know, like the old story,  
17 how do you get the donkey to follow the orders,  
18 you gotta hit it over the head with a 2-by-4  
19 first. Well, you've hit them over the head with  
20 the 2-by-4. You filed a lawsuit against them.  
21 I get questions all the time and have for years,  
22 what are the chances that I'm going to get sued,  
23 says a librarian, says a professor, says the  
24 computer guy, and the answer's always been,  
25 well, you know, it's a little bit like

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2 lightening. The chances of your getting hit by  
3 lightening are just about zero. However, if you  
4 get hit by lightening, it just hurts like hell.

5 Q You tell them that Zeus is throwing  
6 some more bolts, correct?

7 A Yeah. And, you know, over the years  
8 we've been able to say people kind of like us  
9 have been sued. Kinko's, so we learned from  
10 that. It's not exactly us, but it's the closest  
11 we got, so we learned from it. MDS, it's not  
12 exactly us, but it's the closest we got, so we  
13 learned from it. But now it's Georgia State.  
14 The game has changed at this point.

15 And so what we're also seeing and I  
16 see when I look at Georgia State is you've  
17 got -- you have gotten their attention. You  
18 have gotten Georgia State to say we're going to  
19 put together a policy. Granted, it's not  
20 exactly what you would have written. But on the  
21 other hand, it's got a lot of pieces that the  
22 publishers were content with when they worked  
23 with Cornell and a few other universities, the  
24 fair use checklist, for example. So it's got a  
25 lot of component of that. And we got your

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1  
2 attention --

3 Q Don't take silence on that as my  
4 assent, but go ahead.

5 A We got you to revise policies. We got  
6 you to commit to University counsel to being  
7 available to everybody in the system with their  
8 questions that they have available. We got you  
9 to commit library staff to review and layers of  
10 review. And maybe there's room for improvement.  
11 There always is, of course. But we got them in  
12 place, and you've gotten their attention.

13 And you know, I'm going to tell you  
14 right now that from what I know from  
15 universities, working with many, many  
16 universities all over the country, what's going  
17 on at Georgia State University -- however much  
18 we might wish or could suggest changes, what's  
19 going on at Georgia State University is beyond,  
20 is right now beyond the capability and  
21 willingness of most colleges and universities  
22 around the country. And if what's going on  
23 there right now became the mandate for everybody  
24 across the country, there are lots of colleges  
25 that would say, consult with counsel? We don't



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2 even have counsel. What do you mean, consult  
3 with counsel? If that's part of our fair use  
4 equation, in other words, Georgia State may not  
5 have done everything that you would wish, that  
6 anybody else would wish, but Georgia State has  
7 done a tremendous amount. I'm confident that  
8 they're going to do more. I'm confident that  
9 they've committed themselves to doing more. And  
10 I think that there's important progress here.

11 Q I appreciate those comments. And in  
12 the spirit of them, we're getting a little bit  
13 afield with our mutual speechifying. But let me  
14 ask this question more narrowly.

15 What do you perceive the impact on a  
16 given faculty member's fair use determination  
17 and application of that checklist, what do you  
18 perceive the impact is of that instructor's  
19 knowledge that if that instructor makes a  
20 non-fair use determination, there is no  
21 permissions money available institutionally and  
22 that he or she will have to reach into his or  
23 her own pocket, how do you see that affecting  
24 the calculus that that individual will go  
25 through?

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2 A I'm expecting that individual to make  
3 that decision, to make that honest decision.  
4 And I think this really is your question. What  
5 will that -- how will that professor respond  
6 when she discovers that what I want to do is not  
7 within fair use and there's no budget at the  
8 university to pay for this, I gotta reach into  
9 my own pocket? What do I think will happen at  
10 that point, realistically? I try to stay  
11 optimistic. I try to say if that professor were  
12 talking to me right now, I would be as  
13 optimistic as I could and I would say let's have  
14 a look at what you're doing, how you're doing  
15 it, how you're accessing those materials, what  
16 those materials are, and let's think about your  
17 alternatives. And I've got a litany of  
18 different things we'd talk about. But if the  
19 professor comes back and says, no, this is what  
20 I need and there's no budget for it, I'm going  
21 to turn back to the professor and say then  
22 you've got a tough decision. You're going to  
23 either have to decide you really need it and  
24 you're going to pay the bill, because assuming  
25 in our facts there's no of university budget to

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2 pay for it, or you have to drop the material  
3 from the lesson.

4 Q I understand that if that individual  
5 came to you, that would be the response. But  
6 isn't it also at least likely that in some  
7 cases, facing that reality, the individual is  
8 going to slant the fair use analysis at least  
9 just a bit in favor of fair use?

10 A No. Honestly, in my experience, I  
11 don't have reason to believe that that would  
12 happen.

13 Q Okay. Now, given what you know about  
14 the prior University of Georgia policy and the  
15 fact that the only enforcement of it, I'll  
16 represent to you, was the so-called 20 percent  
17 test under the old policy versus the current  
18 one.

19 A Okay.

20 Q If experience demonstrated that  
21 comparatively the nature and volume and extent  
22 of unpermitted postings on the E-Reserves  
23 system service between the prior system and the  
24 current system remains fundamentally unchanged,  
25 would that give you concern?

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2 A Yeah, I'd want to take a look at the  
3 details and just see what's going on here.

4 MR. SCHAETZEL: Objection to form.

5 BY MR. RICH:

6 Q Down on 19, in the middle of the page,  
7 effect on the market.

8 A Yes.

9 Q In the middle, you say, "E-Reserves  
10 have, at most, limited effects on the market."  
11 What's the empirical foundation for that and/or  
12 your basis for a comprehensive statement of that  
13 sort?

14 A Sure. Sure. If E-Reserves -- if an  
15 item, A, let's stick with the most common, a  
16 journal article is available on E-Reserves,  
17 E-Reserves is behind -- as we typically have set  
18 it up, as we did at the beginning of the day,  
19 it's behind password control, limited access for  
20 only students enrolled in the course. It  
21 therefore, whatever effect on the market it  
22 might have, it will be limited only under those  
23 circumstances, that if you could say, for  
24 example, a student access has some measure of  
25 harm to the market, and if there are 20 students

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2 in the class, it's 20 times that, but that's it.  
3 That's the limit on the harm, as opposed to  
4 somebody who takes the same item and posts it  
5 publicly for all to see.

6 Q So that's a fairly limited statement  
7 intended here as opposed to the broader  
8 E-Reserves practiced nationally can't have  
9 untoward effects on publishers. That's not what  
10 you're intending, then, by this statement?

11 A No, I'm not saying that.

12 Q You're doing it in the narrower  
13 context of comparatively to other means of  
14 accessing material?

15 A That's right.

16 Q I see.

17 If you would turn, please, to Page 25.  
18 Beginning at the bottom of 25, you give, I  
19 think, three examples, Northwestern, Washington  
20 State University of Vancouver and University of  
21 Colorado, yes?

22 A That's correct. I see it, flowing  
23 over to Page 26.

24 Q And let me ask you, is the source of  
25 the information set forth strictly that you

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1  
2 derive from the sources which you footnote?

3 A That is correct.

4 Q Did you do any independent  
5 investigation of the facts, data, circumstances  
6 reported in those sources?

7 A I did not.

8 Q Did you ask to see any of the files or  
9 any of the data or anything of that sort?

10 A I did not.

11 Q So did you literally simply read and  
12 report on these?

13 A That's correct.

14 Q And so I might have done the same  
15 thing or Mr. Schaetzel could arguably have done  
16 the same thing, correct?

17 A That's possible.

18 Q In that respect, you have no  
19 particular expertise, sitting here today  
20 reporting on these activities, correct?

21 A Expertise about exactly what happened  
22 at Northwestern?

23 Q Yes.

24 A Not beyond citing the source.

25 Q Right. And the same with Washington

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2 State University Vancouver?

3 A That's correct.

4 Q And the same with University of  
5 Colorado?

6 A That's correct.

7 Q And how representative of the universe  
8 of experience with respect to, for example,  
9 pricing of permissions by the CCC do you  
10 represent these three examples to be?

11 A Well, I don't have access to the full  
12 roster of data of the copyright clearance  
13 center, and so I can't put it into the context  
14 of what their overall averages might be, for  
15 example. So I don't -- I can't tell you if  
16 these are outliers statistically.

17 Q And you've made no independent  
18 investigation to ascertain that, correct?

19 A That's right.

20 Q And you didn't contact CCC as part of  
21 your expert report, for example, saying give me  
22 your take on this, right?

23 A Yeah. Not in the five weeks that I  
24 had to prepare it.

25 Q I understand that.

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2 And so is it correct that, using these  
3 examples, you're only intending to give some  
4 anecdotal examples from which it would be  
5 inappropriate to derive broader conclusions?

6 A Well, they are what in the scientific  
7 literature one would call an anecdotal example.

8 Q Right.

9 A However, combined with what I do hear  
10 among other anecdotes in my discussion with  
11 people, they're not too surprising.

12 Q But those are all undisclosed?

13 A Those are undisclosed.

14 Q So you're not really asking a court to  
15 rely on --

16 A No, I'm not doing that.

17 Q So you're not really asking the court  
18 in this case to combine these three anecdotal  
19 experiences with otherwise undisclosed anecdotal  
20 evidence possessed by you to draw any broad  
21 conclusions, correct?

22 A I would not ask the court to do that.

23 Q Okay. Just to close out this little  
24 discussion, if you would turn to your rebuttal  
25 report at Page 6, please.



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2 MR. RICH: Have we marked that?

3 MR. SCHAETZEL: I don't think so.

4 MR. RICH: Okay, let's mark it.

5 We're marking Professor Crews'  
6 rebuttal report from November 2, 2009 as  
7 Plaintiff's 308.

8 (Whereupon, Professor Crews rebuttal  
9 report from November 2, 2009 was marked as  
10 Plaintiff's Exhibit 308 for identification,  
11 as of this date.)

12 BY MR. RICH:

13 Q I ask you to identify that as your  
14 rebuttal report in this proceeding. (Handing.)

15 A All indications are that it is.

16 Q Thank you.

17 And if you could turn, please, to  
18 Page 6 of that report, the top carry-over  
19 paragraph.

20 A The top of Page 6?

21 Q Yes. The carry-over paragraph. A  
22 little over halfway down, the sentence says,  
23 "Indeed, as I was able to document in my first  
24 report, many universities instead abandoned the  
25 use of certain works when faced with such fees,

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2 even fees that were considerably lower." And if  
3 you need the context, you should read higher.

4 And my question is: Is the reference  
5 to "many universities" in fact the three  
6 universities --

7 A Yeah.

8 Q -- that we just described from  
9 pages -- you know, Northwestern and the other  
10 two?

11 A And if I recall correctly, maybe there  
12 were one or two cites referenced earlier. I  
13 don't remember for sure. But yes, I think maybe  
14 we're quibbling over, just as we did this  
15 morning, what is several. The question right  
16 now is what is many. And if you're pegging it  
17 back to the original report, as I did, then many  
18 is documented as being the ones that are  
19 referenced in that report.

20 Q Barring your showing me anything else,  
21 the only ones that are referenced in the report  
22 on that subject?

23 A And I do tie it back to the report.

24 Q Over on Page 48 of the main report,  
25 please. In the second paragraph on that page,

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2 the paragraph speaks about the erratic nature of  
3 copyright permissions as evident in other  
4 studies.

5 Do you see that?

6 A I do.

7 Q And it refers again to the University  
8 of Colorado experiment, what's called an  
9 experiment.

10 A Okay.

11 Q Now, I'm just trying to see if my math  
12 is right.

13 A Uh-huh.

14 Q The paragraph references permission  
15 being sought for a total of 75 journal articles  
16 and book chapters; is that correct?

17 A That's what it says.

18 Q And then it says for two items,  
19 permission was denied, right?

20 A Correct.

21 Q For one item, the fee was in excess of  
22 a \$1,000 and the work was not included. So  
23 permission was offered but it was beyond that  
24 which the purchaser was willing to spend,  
25 correct?

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2 A Correct.

3 Q It says CCC was unable to process  
4 permission for 20 items, right?

5 A Okay.

6 Q And that the library succeeded in  
7 securing permission for 10 of the items from  
8 publishers, yes?

9 A Right.

10 Q On the other 10, the library received  
11 no response?

12 A Right.

13 Q So am I correct that, in all, of the  
14 75 works, permission was denied in two cases  
15 that -- pardon me. That in only 10 of the 75  
16 cases was there a failure of contact and  
17 response from the publisher, correct?

18 A That's how it's written here, and I'm  
19 assuming I got it right.

20 Q Right. And so in two of those cases,  
21 but only two out of the 75, was permission  
22 actually denied. One the fee was too high. And  
23 balance of the other 10, those were all  
24 permissioned, right? But in 65 of 75 cases,  
25 there was at least the process was engaged in

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2 and culminated in a decision either to license  
3 or not, correct?

4 A It sounds like it, that's right.

5 Q My math is right?

6 A Or at least a license was offered,  
7 whatever, or denied.

8 Q Okay. Does that strike you as a  
9 malfunctioning system?

10 A Well, what it tells me is that it's an  
11 imperfect system.

12 Q Isn't everything?

13 A Well, isn't that a good point? That,  
14 yeah, I'm not perfect. I think I've already  
15 said that at least once today. That it's -- but  
16 that it's an imperfect system, and there's a  
17 certain cautionary tale in that, too, about  
18 needing to rely on permissions, which is itself  
19 an imperfect system.

20 Q What's the implication for a fair use  
21 analysis that a permission system, for the sake  
22 of discussion, is imperfect as you measure that?

23 A Sure. Sure. The most important  
24 response that I can give -- there's that word  
25 "important" again. In my mind, really the

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2 primary response that I would have to that  
3 question is that it's, therefore, essential to  
4 keep all of these options on the table.

5 Q "These options" meaning?

6 A Meaning when you're looking to include  
7 materials in E-Reserves and make them available  
8 for students, you have to keep all of your  
9 options open for doing it in a proper, lawful  
10 manner. And among those options is permissions.  
11 Among those options is licensing. Among those  
12 options is linking to the license databases.  
13 Among those options is fair use. Among those  
14 options may be something else. But it's keeping  
15 it all on the table.

16 Q But I take it, however unreasonable a  
17 user might find the asking price from a content  
18 owner for permission, that fact by itself does  
19 not license that user, under fair use or any  
20 other principle of copyright, to go and arrogate  
21 use of that material to him- or herself,  
22 correct?

23 A That fact by itself does not make  
24 something fair use. I think that's your  
25 question.

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Q And you're advocating that, are you?

A I'm not, and I've never advocated that.

Q Let's now turn and conclude with a bit of examination on your rebuttal report, please.

A Okay.

Q And if you turn to Page 5 of that document.

Am I correct in remembering that you said this document was completely prepared by yourself, no assistance from third parties, spousal or otherwise?

A Spousal or otherwise? I believe I said that. And I'm going to take a quick look to make sure I wasn't overlooking anything.

I'll tell you one thing that was not exactly part of preparing the report, but just in the interest of full disclosure. There is a part of the report that is the listing of other universities that use the checklist and so on.

Q Yeah.

A That was prepared by one of my research assistants during the summer for an unrelated project. And then came the rebuttal

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2 report in whatever date leading up to  
3 November 2nd. And I thought, well, it would be  
4 nice to show what other universities have done,  
5 and I had that document already. And I think we  
6 disclosed that to you.

7 Q Yeah. Okay. Thank you.

8 And this morning, way back this  
9 morning, you indicated that -- I'm paraphrasing,  
10 but I think accurately -- there was relatively  
11 little substantive input from the outside law  
12 firm on the first report.

13 A That's correct.

14 Q Same question with respect to the  
15 degree of input with respect from outside  
16 counsel or anyone else at GSU or in the  
17 university system with respect to the rebuttal  
18 report. How much input was there?

19 A And nobody from GSU or the university  
20 system at Georgia. And one or two conversations  
21 with the lawyers at King & Spalding, just to  
22 make sure I was on a useful track. And then I  
23 think at some point we relayed drafts. If we  
24 did, we disclosed those. And that would be it.

25 Q And were there mark-ups of the draft



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2 offered --

3 A Oh, no.

4 Q -- or language changes offered?

5 Nothing of that kind?

6 A No, no. It was, again, mostly on the  
7 order of, you know, what did you mean by this  
8 kind of clarifications and so on.

9 Q Okay. So turn to Page 5 of the  
10 rebuttal report, please. And under Paragraph  
11 Number 2 there, you indicate that, "As outlined  
12 in greater detail later in this report, the  
13 economic model for E-Reserves at most  
14 universities does not allow for shifting the  
15 expense of copyright fees to the students, as  
16 may be true with respect to course packs.  
17 Consequently" -- this is the first paragraph  
18 under Number 2. "Consequently, the cost of the  
19 copyright royalty will be borne by the  
20 institution."

21 Do you see that?

22 A I do.

23 Q What is the basis for your conclusion  
24 that the economic model for E-Reserves at most  
25 universities does not allow for shifting the

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2 expense of fees to students?

3 A The basis for it would be the reading  
4 that I've done and, again, the years of  
5 experience of working with dozens, if not 100 or  
6 far more universities, comparing experiences,  
7 learning from them, how do they handle the  
8 E-Reserves, how do they handle the economics of  
9 it, and looking at how those issues of licensing  
10 and permission are budgeted and managed.

11 MR. RICH: Excuse me one second.

12 (Whereupon, a discussion was held off  
13 the record.)

14 BY MR. RICH:

15 Q And what did you learn from that  
16 experience and those exposures as to the  
17 economics of E-Reserves that leads you to this  
18 conclusion?

19 A I've seen repeatedly that where there  
20 are costs associated with the permission for  
21 putting something on electronic reserves, that  
22 the cost is borne by the budget of the library.  
23 And I've seen that repeatedly. What I have  
24 never seen is the example of where an  
25 institution is distributing that cost out to the

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2 students or charging a fee at the gate, if you  
3 will, for the use of the electronic reserve  
4 system.

5 Q What is it about the nature of that  
6 system that makes it less feasible for students  
7 to bear part or all of the cost of permission  
8 fees than is the practice with respect to course  
9 packs?

10 A Sure. Part of it may be the law  
11 itself, but a different part of the law. We'd  
12 run into different issues of unrelated business  
13 tax. We may run into different issues of sales  
14 tax. The course pack office charges sales tax  
15 in many jurisdictions. We may run into that  
16 issue. "We" meaning the sort of royal we of  
17 libraries and universities.

18 Q You're not testifying specifically as  
19 to considerations as to the University of  
20 Georgia system?

21 A That's correct.

22 Q Okay.

23 A I have a bad habit. It's just a  
24 lifelong habit of saying "we." I'm just an  
25 inclusive kind of person. So when I say that,

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2 it generally means that more royal we.

3 And so there is some issues that are  
4 far outside the scope of anything we've talked  
5 about that arise there.

6 It also raises a number of different  
7 issues about exactly how it would be budgeted,  
8 how it would be charged back to the students.  
9 Would it simply be imposed, like their  
10 recreation fee for using different facilities at  
11 the university? That would raise questions  
12 about, again, inclusiveness. Because many of  
13 those charges are for common facilities, where  
14 the rights to use are shared and everybody can  
15 choose to participate or not participate. You  
16 know, E-Reserves is not like that. In fact,  
17 it's deliberately not inclusive. It's a  
18 password-restricted system.

19 And moreover, logistically,  
20 pragmatically, managerially, I think we would be  
21 inviting a monstrous set of other issues by  
22 looking at how we would take whatever funds are  
23 charged to the students and allocate them and  
24 budget them for different types of courses.  
25 This professor is using the system more than

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2 that professor. This professor threw something  
3 in and it's got that high price tag and that  
4 skews the payment over to another organization.  
5 It skews the payment and takes funds away that  
6 could be used for yet a different professor in  
7 his or her course.

8 So I think it would be inviting a wide  
9 set of other pragmatic problems.

10 Q Have you discussed the thesis in this  
11 paragraph about the infeasibility in relation to  
12 E-Reserves of shifting the expense of copyright  
13 fees to students with anyone at Georgia State  
14 University?

15 A Not to my recollection, no.

16 Q So it's a purely hypothetical set of  
17 concerns as applied to GSU, correct?

18 A It's a generalized set of concerns.

19 Q It's a set of concerns uninformed by  
20 technology, history, practice, experience or  
21 predisposition at GSU, correct?

22 A At GSU, that's correct.

23 Q Okay. Do you know, for example,  
24 whether GSU already has a practice of making one  
25 or more charges directly to students in relation

1 KENNETH D. CREWS

2 to electronic reserves usage?

3 A I'm not aware of that.

4 Q Would that be information you might  
5 find useful and relevant to your broad  
6 conclusion here?

7 A I'd like to see it.

8 Q But nobody has shared that with you?

9 A That's correct.

10 Q And in reviewing your report and your  
11 conclusions, nobody offered that feedback to  
12 you, correct?

13 A That's correct.

14 Q And technologically, I take it you're  
15 aware that the Docutek system is already, quote,  
16 wired, in my way of speaking, to facilitate  
17 permissions payments, including to an  
18 organization like CCC; is that correct?

19 A I'm generally aware that that's true.

20 Q So you wouldn't cite that as a  
21 barrier, let alone an insuperable barrier, if  
22 other conditions favored it, to a licensing  
23 process whereby students paid, correct?

24 A In other words, mechanically, could it  
25 be done by some means?

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2 Q Yes.

3 A Yes, I think so.

4 Q And surely more complicated issues  
5 have been dealt with by universities such as  
6 Georgia State in terms of allocation of fees.  
7 For example, a per -- wouldn't E-Reserves allow  
8 the tracking on a per-page used basis by student  
9 easily through the software of their accessing  
10 E-Reserves materials? That wouldn't be so  
11 difficult, I assume, right?

12 A I can imagine that that could be done.  
13 Difficult or not difficult, I don't know.

14 Q But you've not investigated that?

15 A I have not investigated that.

16 Q So might it not be an overly strong  
17 conclusion to emphatically, categorically and  
18 without reservation state, as you do at Page 5  
19 of your rebuttal, that the cost of the copyright  
20 royalty in the E-Reserves setting will be borne  
21 by the institution? Isn't that uninformed by  
22 any knowledge as to what is or may be feasible  
23 at GSU?

24 A I think they're two different  
25 statements. In other words, I'm definitely

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2 saying that from experience, from where I have  
3 seen and what I have read and what I have  
4 learned, that that's not the case. But if you  
5 have additional information that could help me  
6 rethink that, let's have a look at that.

7 Q Well, I don't know that that's my job  
8 here. But what I am testing is the  
9 conclusiveness of the statement as it purports  
10 to apply to this circumstance. Might it not  
11 have been more accurate for you to state that  
12 while I have not investigated any of these  
13 issues of efficacy at Georgia State, my  
14 experience elsewhere indicates dot dot dot?

15 A I would be okay if I had said that.

16 Q So you really don't have any opinion  
17 you can offer the court that's informed as to  
18 the feasibility of shifting the cost to students  
19 at Georgia State University, correct?

20 A In that sense, yes.

21 Q Now, in the paragraph on Page 5 over  
22 to Page 6, discussing an aspect of the Marinello  
23 report -- she being a representative of the  
24 Copyright Clearance Center, you'll recall, yes?

25 A Yes.



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2 Q You indicate following your analysis  
3 of various potential cost implications of a CCC  
4 license -- and we already covered the many  
5 University points. You conclude that the real  
6 cost in that situation, meaning a situation  
7 where faced with unacceptably high fees, the  
8 user will decline the permission, you say, "The  
9 real cost in that situation is not monetary.  
10 The real cost is lost educational opportunity;"  
11 is that correct?

12 A That's correct.

13 Q But isn't it the fact that in that  
14 situation, for example, the works involved could  
15 be put on physical reserve desk loan?

16 A The answer is yes. But I think in  
17 that context when we were talking about the  
18 print reserves or the physical reserves, we also  
19 looked at the common situation that accessing  
20 those materials could be cumbersome, restricted.  
21 It's limited, there are lines, the materials are  
22 checked out. And therefore, also we incur lost  
23 opportunity if students are unable to obtain the  
24 material, even though it's from another cause  
25 rather than in this example, a price tag.

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2 Q Again, you wouldn't generalize to say  
3 that all physical reserve offerings are like  
4 standing on the unemployment line in terms of  
5 inconvenience and, therefore, non-use by  
6 students? Isn't that a broad generalization  
7 which is hard to bring to bear in any particular  
8 setting?

9 A That's a broad generalization. A lot  
10 of it works just fine, and a lot of it doesn't.

11 Q And you don't know how it works or  
12 would work at GSU, right?

13 A Not specifically at GSU.

14 Q Which is the institution on whose  
15 behalf you filed this expert report, correct?

16 A Correct.

17 Q And conceivably, another option would  
18 be the purchase of the content, correct?

19 A That's correct.

20 Q So that would not result in a lost  
21 educational opportunity, would it?

22 A That's correct.

23 Q And conceivably substituting for other  
24 comparable materials, assuming they were  
25 available, would be yet another option, right?

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2 A That's another option.

3 Q So whether is in fact a lost  
4 educational opportunity is at least open to  
5 those other potential options.

6 Now at Pages 7 and 8 -- pardon me,  
7 Page 8, you discuss a reported example involving  
8 Oxford University Press at the top of the page.

9 A I do.

10 Q What were your sources for that?

11 A The author of the book itself, where  
12 he's seeking to reprint the material. And I'm  
13 going to perhaps stumble over his name, but I  
14 believe it's Joel Valensky.

15 Q And in writing this paragraph, what  
16 other investigation did you make of his stated  
17 understanding of the facts?

18 A He sent me invoices that had some of  
19 the details about the materials.

20 Q Invoices from?

21 A From JAMA, the Journal of the American  
22 Medical Association.

23 Q Did you contact JAMA?

24 A No, I did not.

25 Q Did you contact Oxford University

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1  
2 Press?

3 A No, I did not.

4 Q Might you have been interested in, for  
5 example, Oxford University Press's take on the  
6 situation?

7 A I was very interested in their take on  
8 it.

9 Q Why didn't you call them?

10 A I thought that that would be  
11 inappropriate under the circumstances of the  
12 litigation.

13 Q What about JAMA, why didn't you call  
14 them?

15 A I saw the information that came to me  
16 from them, and it was fairly -- it was really  
17 quite detailed; and I felt that as an example of  
18 documented evidence of what their standard is  
19 and what they were adhering to, I had the  
20 information I needed to be able to present this.

21 Q And so you find it probative and the  
22 subject of expert testimony to make statements  
23 such as the penultimate sentence in the first  
24 paragraph, "According to the book author, OUP  
25 seemed to be urging him to accept that result."

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2 So double hearsay in that paragraph,  
3 you feel really comfortable putting that forward  
4 as part of an expert submission here, yes?

5 A Yes, I do.

6 Q In the absence of any investigation  
7 beyond talking, getting one party's perspective  
8 to a dispute?

9 A Actually, I do.

10 Q At Page 9, you discuss the phenomenon  
11 of what you term wrongful permissions or the  
12 possibility of wrongful permissions.

13 A Right.

14 Q And you give as an example your own --  
15 a couple of examples from your own private  
16 files?

17 A Right.

18 Q Did you ever complain to anyone about  
19 what you report here?

20 A No, I didn't.

21 Q Did you ever contact CCC to discuss  
22 it?

23 A No, I have not.

24 Q Your publishers?

25 A No, I have not.

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1  
2 Q So you're surfacing this for the very  
3 first time in connection with this expert  
4 report?

5 A Actually, yes, I am.

6 Q Was this a matter of great consequence  
7 to you before you filed this report?

8 A These particular examples?

9 Q Yes.

10 A No. I had never bothered to take a  
11 look and say let's take a look at what the CCC  
12 may be doing with my material.

13 Q And what other research have you done  
14 to expand from your own personal experience to  
15 the -- how broad a phenomenon of wrongful  
16 permissions exist out there?

17 A Specifically from the CCC?

18 Q From anywhere.

19 A From anywhere? Have I done systematic  
20 study? And the answer is no. But I do, again,  
21 see numerous examples and anecdotes come up over  
22 the years.

23 Q And where are they reported in here?

24 A They are not reported in here.

25 Q At Page 11, sir. In the last bullet

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2 at the bottom, you repeat the statement that  
3 E-Reserves services typically are not able to  
4 charge fees back to students, I think a concept  
5 we've discussed. And off of that you hang a  
6 footnote, 13, which states, "The libraries that  
7 operate E-Reserves encounter various challenges  
8 to setting fees for services. Libraries offer  
9 many services that incur individualized costs,  
10 but seldom do libraries charge those fees back  
11 to the user. Fees conflict with the library's  
12 role as an open information resource for the  
13 academic community. Libraries are also not  
14 administratively structured to charge and  
15 collect service fees for various reasons,  
16 including the possible need to account for state  
17 sales tax."

18 Do you see that?

19 A I do.

20 Q Again, isn't that a very broad  
21 generalization that may well misstate or  
22 misrepresent both the ability and willingness of  
23 libraries to take on the obligation to collect  
24 permissions fees in appropriate situations?

25 A And to collect permission fees? You

1 KENNETH D. CREWS

2 mean in connection -- are you speaking in  
3 connection with E-Reserves?

4 Q Yes. As they might be appropriate.

5 What were you attempting to convey in  
6 the second half of this notebook, fees conflict  
7 with the library's role, et cetera?

8 A Right. Right. There's a definite  
9 philosophical resistance in the library  
10 community to charging fees for the use of the  
11 library and of the basic services of the  
12 library. Fees have a tendency, of course, to  
13 differentiate those who can pay from those who  
14 can't. That's a fact of life in so many other  
15 areas. But it's a condition that most public  
16 and academic libraries tend to work hard to  
17 resist.

18 Q And what about GSU, what's its  
19 library's philosophy about charging fees to  
20 students?

21 A I have not investigated exactly GSU's  
22 position.

23 Q Have you bothered to go on their  
24 website to look and see if perhaps there already  
25 exist one or more library fees for students?



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2 A No, I have not.

3 Q Would it surprise you to know that  
4 there do exist such fees?

5 A I would like to know what they are.

6 Q And did you not in your survey, your  
7 wife's survey of 39 institutions, turn up a  
8 large number, a large percent of those, where  
9 among your bulleted summaries it indicated that  
10 the library is prepared to assist and even cover  
11 permissions fees for E-Reserves?

12 A Yes, but that's a very different  
13 topic. That's the payment by the library. I  
14 thought what we were talking about is the  
15 payment by the student to the library.

16 Q Well, I'm simply asking you to explain  
17 Footnote 13, which appeared to me to be the  
18 library's allergy, as a general practice, to  
19 collecting fees and administering them. That's  
20 what I understood the second half of Footnote 13  
21 to mean.

22 A And although what you just said aren't  
23 my words --

24 Q No, it's my characterization.

25 A -- I think that's right, that is

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1  
2 what -- that's the context of my footnote.  
3 Whereas the bullet point items over in the  
4 summaries of the E-Reserves policies, where fees  
5 come up over there in those bullet points,  
6 that's about the payment out of fees. I'm not  
7 recalling. If you want to draw my attention to  
8 one that's different, that's great. But I'm not  
9 recalling any of those. What I'm recalling is  
10 that all of those mention of fees over there are  
11 about whether or not the library will pay fees  
12 to outside third parties rather than collect  
13 fees in from students in exchange for services.  
14 Footnote 13 is about the fees coming in.

15 Q In all events, you have not discussed  
16 with anyone at Georgia State University in  
17 relation to preparing your reports whether they  
18 would view that or any other distinction as  
19 meaningful to them in terms of obligations to  
20 undertake payments for E-Reserves if the law  
21 required it, right?

22 A That's right. My statement here is a  
23 statement about the nature of library and  
24 library policy in general, not specifically  
25 about GSU.

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2 Q And in the course pack experience and  
3 in your survey of that activity over 18 years,  
4 is it -- do you have any data to demonstrate  
5 that the richness of the academic offerings at  
6 institutions which now require students to pay  
7 permissions fees for course packs has been  
8 diminished as a result of that obligation?

9 A No.

10 MR. SCHAEZEL: Objection as to form.

11 A No, no. I've never seen any data like  
12 that.

13 Q And have you any reason to believe  
14 that the quality of the academic experience at  
15 institutions where permissions fees are now  
16 being paid is a lesser standard than it was  
17 theretofore?

18 A Only in the extent of the examples of  
19 materials being dropped from the curriculum  
20 because of encountering fees where the fees  
21 exceed the budget, if there's any budget at all.

22 Q And that would happen in any number of  
23 situations, not limited to the academy, right?

24 A Right.

25 Q I might want a car that I'm not going

1 KENNETH D. CREWS

2 to pay for too, correct?

3 A That's right.

4 Q But I also don't steal it in that  
5 situation, correct?

6 A Yeah. But I'm not going to accept  
7 that analogy.

8 Q I'm not asking you to.

9 MR. RICH: I'd like to go off the  
10 record.

11 (Whereupon, a discussion was held off  
12 the record.)

13 MR. RICH: I have concluded my  
14 examination, and I want to thank you for  
15 your patience through a long day today.

16 THE WITNESS: I'd like to thank you.

17 (Continued on the next page to include  
18 jurat.)  
19  
20  
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22  
23  
24  
25

1 KENNETH D. CREWS

2 MR. SCHAEZEL: We have no questions,  
3 but we will reserve signature, read and  
4 sign.

5 MR. RICH: Thank you very much.

6 (Time noted 5:28 p.m.)

7 \_\_\_\_\_  
8 KENNETH D. CREWS  
9

Subscribed and sworn to before me

10 this day of , 2009  
11 \_\_\_\_\_  
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PROCEEDINGS

C E R T I F I C A T E

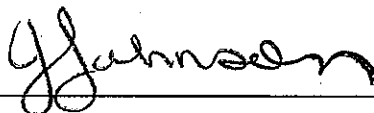
I, JUDI JOHNSON, RPR, CRR, CLR, a Notary Public in  
and for the State of New York, do hereby certify:

THAT the witness whose testimony is hereinbefore  
set forth, was duly sworn by me; and

THAT the within transcript is a true record  
of the testimony given by said witness. I further  
certify that I am not related, either by blood or  
marriage, to any of the parties to this action; and

THAT I am in no way interested in the outcome of  
this matter.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 16th day of December, 2009.



JUDI JOHNSON, RPR, CRR, CLR

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ERRATA SHEET

NAME OF CASE: CAMEBRIDGE V. BECKER  
DATE OF DEPOSITION: DECEMBER 10, 2009  
NAME OF WITNESS: KENNETH D. CREWS

Reason codes:

- 1. To clarify the record.
- 2. To conform to the facts
- 3. To correct the transcription errors.

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KENNETH D. CREWS