

EXHIBIT 3

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC.,)
et al.,)
Plaintiffs,)

vs.) Index No.: 11 CIV. 6351 (HB)

HATHITRUST, et al.,)
Defendants.)

_____)

DEPOSITION OF TIMOTHY J. STILES
San Francisco, California
Thursday, May 31, 2012

BY: HEIDI BELTON, CSR, RPR, CRR, CCRR, CLR
CSR LICENSE NO. 12885
JOB NO. 50217

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1 May 31, 2012
 2 9:59 a.m.
 3 Deposition of TIMOTHY J. STILES, held at the
 4 offices of KILPATRICK, TOWNSEND & STOCKTON,
 5 LLP, Two Embarcadero Center, 8th Floor, San
 6 Francisco, California 94111, before Heidi
 7 Belton, a Certified Shorthand Reporter,
 8 Registered Professional Reporter, Certified
 9 Realtime Reporter, California Certified
 10 Realtime Reporter, Certified LiveNote
 11 Reporter, and NCRA Realtime Systems
 12 Administrator.
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1 SAN FRANCISCO, CALIFORNIA
 2 THURSDAY, MAY 31, 2012 9:59 a.m.
 3 EXAMINATION
 4 BY MS. ROACH:
 5 Q. Good morning, Mr. Stiles. 09:59:52
 6 A. Good morning.
 7 Q. As I mentioned earlier, my name is Allie
 8 Roach, and I'll be taking your deposition today. I
 9 represent the university libraries in the HathiTrust
 10 trust. 10:00:03
 11 Could you please state your full name and
 12 address for the record.
 13 A. Timothy Judd Stiles. 1549 Pershing Drive,
 14 Apartment E, San Francisco, California 94129-1219.
 15 Q. Great. Thank you. 10:00:21
 16 Have you ever been deposed before, Mr. Stiles?
 17 A. No, I have not.
 18 Q. If it's all right with you, I'll go over some
 19 of the deposition ground rules then just so we all
 20 understand how it works and we can all be on the same 10:00:31
 21 page. Is that okay?
 22 A. Yes.
 23 Q. I will be taking your deposition and I'll be
 24 asking you a series of questions. And Ms. Belton here
 25 will be taking down the questions and the answers. And 10:00:42

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1 A P P E A R A N C E S:
 2
 3 For the Plaintiff The Authors Guild, Inc., et al.:
 4 FRANKFURT KURNIT KLEIN & SELTZ, P.C.
 5 488 Madison Avenue
 6 New York, New York 10022
 7 By: Jeremy Goldman, Esq.
 8
 9
 10
 11 For the Defendant HathiTrust, et al.:
 12 KILPATRICK, TOWNSEND & STOCKTON, LLP
 13 1100 Peachtree Street, NE
 14 Atlanta, Georgia 30309
 15 By: Allison Scott Roach, Esq.
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1 because of that, if you could please speak up and speak 10:00:45
 2 clearly with oral answers and not nod or shake your
 3 head. Does that make sense?
 4 A. Yes.
 5 Q. And it's also helpful for Ms. Belton if we 10:00:55
 6 don't speak at the same time. So I will try to wait
 7 until you're completely finished with an answer before I
 8 begin speaking. And if you could also wait until I
 9 finish my question before you begin your answer. That
 10 will help -- help her be able to keep track of it 10:01:09
 11 because she can't take things down if we're speaking at
 12 the same time.
 13 A. That is fine.
 14 Q. If you don't understand a question that I've
 15 asked -- I may ask some questions that are unclear, 10:01:20
 16 don't make sense -- please tell me. Because the goal
 17 today is to find out what you know about the facts that
 18 are relevant to the case. And so it's important that
 19 you understand my questions. So if I say something
 20 that's unclear to you for any reason, tell me and I'll 10:01:35
 21 try my best to rephrase it so that you understand. Does
 22 that make sense?
 23 A. Yes.
 24 Q. I will try to take a break every hour. If you
 25 need another break for any reason, tell me. If there's 10:01:47

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1 a question pending, please answer that question or 10:01:50
 2 finish your answer, and then we can see about taking a
 3 break.
 4 A. Fine.
 5 Q. Similarly, if you want to speak to your 10:01:59
 6 attorney, that's fine, but please wait until you've
 7 answered a question if there's one pending or finish
 8 that answer before you speak with him.
 9 A. (Witness nods.)
 10 Q. And as the deposition goes on, there may be a 10:02:11
 11 point where you realize that there's something that you
 12 answered a question about earlier that wasn't complete
 13 or something that was said earlier is inaccurate. If
 14 that occurs to you later, please tell me and feel free
 15 to make the corrections and clarifications that need to 10:02:27
 16 be made. Does that make sense?
 17 A. Yes.
 18 Q. Are all these instructions clear; they make
 19 sense?
 20 A. Yes. 10:02:38
 21 Q. Is there any reason that you're aware of that
 22 you wouldn't be able to give accurate testimony today?
 23 A. Not to my knowledge.
 24 Q. Mr. Stiles, are you currently employed?
 25 A. Yes. 10:02:51

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1 A. History. 10:04:04
 2 Q. History? And did you achieve a degree in
 3 history?
 4 A. Yes. I received a bachelor of arts in history
 5 from Carleton College. 10:04:11
 6 Q. And what year did you achieve that degree?
 7 A. 1986.
 8 Q. And after achieving your degree at Carleton in
 9 history, did you pursue employment at that time?
 10 A. I went directly to graduate school at Columbia 10:04:21
 11 University and enrolled in the European -- modern
 12 European history program at Columbia undergraduate
 13 school of arts and sciences.
 14 Q. Did you achieve a degree from Columbia?
 15 A. I received two degrees from Columbia 10:04:38
 16 University. I received a master of arts, which I
 17 believe I got in 1989 to the best of my knowledge. And
 18 I also received a master of philosophy which is
 19 colloquially known as the ABD or All-But Dissertation
 20 degree in 1991. Then I terminated my studies and went 10:05:02
 21 to work outside of academia.
 22 Q. When you finished your studies at Columbia,
 23 what work did you go into at that point?
 24 A. I had been working part-time as a marketing
 25 copyrighter in publishing. And I found full-time 10:05:22

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1 Q. How are you employed? 10:02:52
 2 A. I am a full-time author.
 3 Q. How long have you been a full-time author?
 4 A. About 10 years. Maybe 12 years.
 5 Q. Okay. And do you work from home? 10:03:04
 6 A. Yes.
 7 Q. Are there any other ways besides being an
 8 author that you earn income?
 9 A. I do some freelance writing, business writing.
 10 I write some short-form journalism, book reviews, short 10:03:24
 11 essays or articles for both digital and print media.
 12 Q. And you said freelance writing at the
 13 beginning of that. Do all of those fall under the
 14 heading of freelance writing?
 15 A. Yes, I would say so. I was attempting to 10:03:44
 16 distinguish between commercial writing as opposed to
 17 writing that appears under my byline.
 18 Q. Understood. Did you attend college,
 19 Mr. Stiles?
 20 A. Yes, I did. 10:03:55
 21 Q. Where did you attend college?
 22 A. Carleton College in Northfield, Minnesota.
 23 Q. When did you begin college there?
 24 A. 1982.
 25 Q. What did you study while you were there? 10:04:02

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1 employment at Oxford University Press. This was 1989 10:05:25
 2 after I had finished my coursework but not all of my --
 3 had not received my final degree from Columbia.
 4 Q. So you were working part-time at Oxford
 5 University Press while you were engaged in your studies 10:05:40
 6 and then moved to full-time employment after you
 7 graduated?
 8 A. No. I was working for another publisher. And
 9 then after I finished my coursework and passed my oral
 10 examinations, then I found full-time employment at 10:05:52
 11 Oxford University Press.
 12 Q. What press did you work at while you were at
 13 Columbia University?
 14 A. I believe it was called Routledge, Chapman &
 15 Hall. 10:06:06
 16 Q. Other than Carleton College and Columbia
 17 University, are there any other colleges or universities
 18 that you studied at?
 19 A. No.
 20 Q. Are there any other degrees besides the ones 10:06:17
 21 you described at Carleton and Columbia that you've
 22 received?
 23 A. Not that I'm aware of.
 24 Q. And besides your part-time employment at
 25 Routledge, I believe you said when you were at Columbia, 10:06:34

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<p>1 were there any other jobs that you held while you were 10:06:35 2 in school? 3 A. Which level of school, college or graduate 4 school? 5 Q. Let's start with college. 10:06:43 6 A. I worked in student aid jobs as a part of my 7 financial aid. So I worked as a departmental clerical 8 assistant. I worked as a computer lab monitor, whatever 9 the term was at the time. I worked in the summers. 10 I've worked pouring concrete for hog pens. I did 10:07:16 11 janitorial work. I was in telemarketing. I cleaned 12 bathrooms in an Indian restaurant. I worked on an 13 assembly line in an electroplating plant. I -- also in 14 graduate -- then after I graduated -- the summer I 15 graduated I was a bookkeeper at a credit bureau. 10:07:45 16 When I was in graduate school I worked for a 17 temporary employment service doing office work at 18 various offices. I spent a summer working for an 19 investment bank as clerical staff. I was a janitor for 20 a short time in the basement in the American Standard 10:08:13 21 building in New York. 22 I think that covers the highlights. 23 Q. And so a wide range of experience then. 24 A. Yes, I would say so. 25 Q. After you -- did you take another job after 10:08:27</p>	<p>1 working at the Oxford University Press immediately after 10:08:30 2 leaving -- after completing your studies at Columbia? 3 A. I should add before I answer that that I also 4 worked for a summer as a summer assistant for a rural 4H 5 program as well. 10:08:46 6 Could you please restate your question? 7 Q. Absolutely. 8 After you completed your degree at Columbia, 9 you mentioned you worked at Oxford University Press 10 full-time? 10:08:55 11 A. Yes. 12 Q. Did you take another job working at Oxford 13 University Press? 14 A. I was at Oxford for five and a half or six 15 years. And then I worked for another three and a half 10:09:03 16 to four years -- or, rather, four to four and a half 17 years as the copy chief for advertising at Ballantine 18 Books. 19 Q. And how long did you work at Ballantine Books? 20 A. As I just stated, it was about three and a 10:09:29 21 half years I believe, perhaps four. 22 Q. And after you worked at Ballantine Books, did 23 you take another job? 24 A. No. At that point I left salaried employment 25 and began to work full-time. 10:09:40</p>
Page 12	Page 13
<p>1 Q. Have you ever taught any classes in writing? 10:09:42 2 A. I have taught twice. Once was a master class 3 in nonfiction creative writing at Columbia University 4 School of Arts and Sciences. That was in the spring of 5 '04. I also taught an independent class, 10:10:02 6 noninstitutional class, at the San Francisco Writers' 7 Grotto, which would have been the fall of '11, I 8 believe. 9 Q. And in connection with teaching those classes, 10 did you assign readings to your students? 10:10:23 11 A. Yes. 12 Q. How did you determine what readings to assign 13 to your students? 14 A. It was material I was familiar with in my own 15 reading. 10:10:36 16 Q. And were they books that you assigned them to 17 read; a textbook, for example? 18 A. There were a number of books or selections 19 from books; in some cases, essays that had been 20 published in magazines or other periodicals. 10:10:56 21 Q. And how did the students obtain these 22 materials to read for the class? 23 A. If the material was available on-line -- for 24 example, a New Yorker essay that was available to all, I 25 provided them with links. If the material was in a book 10:11:17</p>	<p>1 or was a book itself, then I provided them with ISBN 10:11:24 2 information and information on how and where they could 3 obtain it. 4 Q. And you said that the materials that you 5 assigned were materials you were familiar with already; 10:11:34 6 is that correct? 7 A. Yes. 8 I should amend that. At Columbia University 9 the -- there was -- the department handled providing 10 selections from some works. It was my impression, 10:11:50 11 though, not my certain knowledge, that they cleared 12 rights for reproduction with publishers. When I taught 13 an independent course, I did not provide photocopies, to 14 the best of my knowledge. I directed students to the 15 works. 10:12:11 16 Q. And you said that you were already aware of 17 these materials that you assigned. Were there any of 18 them that you did some research to discover or research 19 into them to determine whether you should assign them or 20 whether they'd be beneficial for your students? 10:12:26 21 A. I don't believe so. 22 Q. And I'm going to back up to something you 23 mentioned earlier. You talked about the freelance 24 writing that you've done as well. Have you ever been a 25 staff writer? 10:12:46</p>

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<p>1 A. No, I never have. 10:12:48</p> <p>2 Q. And you mentioned teaching at Columbia and at</p> <p>3 the Writers Grotto, reviewing books for publications,</p> <p>4 you mentioned, writing freelance. Are there any other</p> <p>5 sources of income that you've had? 10:13:11</p> <p>6 A. That I've had in the recent past? I'm</p> <p>7 represented by the Random House Speakers Bureau. For a</p> <p>8 year or so, perhaps two, a significance portion of my</p> <p>9 income came from speaking fees. Also -- I would say</p> <p>10 that is the only other significant source of income that 10:13:43</p> <p>11 I had overlooked in my first answer. Virtually all of</p> <p>12 my writing derives directly from the sale of my writing</p> <p>13 itself or from public engagements which are pursuant to</p> <p>14 my role as a writer.</p> <p>15 Q. And these speaking engagements through the 10:14:04</p> <p>16 Random House Speakers Bureau, what topics do you speak</p> <p>17 about?</p> <p>18 A. I usually would speak about one of three</p> <p>19 topics, generally speaking. One is the life and impact</p> <p>20 of my most recent subject, Cornelius Vanderbilt. Second 10:14:21</p> <p>21 would be Jesse James, the subject of my first biography.</p> <p>22 Third would be the craft of writing itself, writing</p> <p>23 biography, often with reference to those two specific</p> <p>24 lives but, you know, focused more generally on the topic</p> <p>25 of writing biography. 10:14:47</p>	<p>1 Q. Are you involved in any professional 10:14:49</p> <p>2 organizations or societies?</p> <p>3 A. I'm an elected member of the Society of</p> <p>4 American Historians. I am a member of the American</p> <p>5 Historical Association, the Organization of American 10:15:00</p> <p>6 Historians, the Western History Association. I've</p> <p>7 previously been a member of the Missouri Historical</p> <p>8 Society or, rather, perhaps it was the State Historical</p> <p>9 Society of Missouri. To be honest, I couldn't answer</p> <p>10 that with 100 percent confidence right now. But I'm not 10:15:27</p> <p>11 a member at the moment. I am also a member of The</p> <p>12 Authors Guild and serve on its board of directors. I am</p> <p>13 a member of the advisory council of the Biographers</p> <p>14 International Organization.</p> <p>15 That's all that I can think of at the moment. 10:15:49</p> <p>16 Q. You mentioned Society of American Historians.</p> <p>17 You said you're an elected member?</p> <p>18 A. Mm-hmm.</p> <p>19 Q. How do you become eligible to be elected as a</p> <p>20 member of that society? 10:16:02</p> <p>21 A. The stated purpose of the Society of American</p> <p>22 Historians is to recognize and encourage excellence in</p> <p>23 both historical scholarship and also literary</p> <p>24 achievement. So its purpose is to encourage fine</p> <p>25 scholarship and also literary -- a high level of 10:16:22</p>
Page 16	Page 17
<p>1 literary attainment. 10:16:29</p> <p>2 The society is by invitation only. So the</p> <p>3 members vote on whom should be selected. I was,</p> <p>4 recently this spring, invited to join and elected by the</p> <p>5 members to join the Society of American Historians. It 10:16:43</p> <p>6 is a relatively small organization with only a -- I'm</p> <p>7 not sure -- two or three hundred members. As opposed</p> <p>8 to, for example, the Organization of American Historians</p> <p>9 or the American Historical Association, which anyone can</p> <p>10 join simply by paying the dues. 10:17:03</p> <p>11 Q. What about the Biographers International</p> <p>12 Organization that you mentioned. You said you were on</p> <p>13 the advisory council of that organization?</p> <p>14 A. That is correct. I'm not a dues-paying</p> <p>15 member, but there is a group of authors who are 10:17:15</p> <p>16 biographers who are supportive of the organization and</p> <p>17 are called upon from time to time to assist. For</p> <p>18 example, at the first conference of the Biographers</p> <p>19 International Organization I took part in a panel. I</p> <p>20 was invited to take part in their recent meeting in 10:17:32</p> <p>21 Los Angeles but was unable to for family reasons. This</p> <p>22 is the sort of thing that the -- the sort of duties that</p> <p>23 are entailed in being a member of the advisory council.</p> <p>24 Q. And so is your role -- or your being on the</p> <p>25 advisory counsel, was that an invitation- -- 10:17:52</p>	<p>1 A. Yes. 10:17:55</p> <p>2 Q. -- only type of situation as well?</p> <p>3 A. (Witness nods.)</p> <p>4 Q. Do you hold any honorary positions?</p> <p>5 A. Oh. I should say -- I should ask a question 10:18:15</p> <p>6 before I answer that.</p> <p>7 My -- the question is are you interested in</p> <p>8 all associations that I might belong to or only those</p> <p>9 pertaining to my writing?</p> <p>10 Q. I was asking more about professional 10:18:27</p> <p>11 associations that pertain to your writing. But thank</p> <p>12 you for that clarification. That's -- that's helpful.</p> <p>13 A. Now your most recent question, if I'm correct,</p> <p>14 was are there any honorary positions that I hold.</p> <p>15 Q. Mm-hmm. 10:18:41</p> <p>16 A. The closest thing to that would be the</p> <p>17 advisory council, which does not -- unlike for example</p> <p>18 the Authors Guild board of directors does not meet and</p> <p>19 make policy for the association. But, rather, it serves</p> <p>20 almost as a pool of talent that the Biographers 10:18:55</p> <p>21 International Organization may draw upon to assist.</p> <p>22 It's a relatively new organization. They have annual</p> <p>23 conferences in which young career-wise biographers come</p> <p>24 to learn about the craft and engage in various other</p> <p>25 professional-building activities. So that is -- that is 10:19:17</p>

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1 the closest that I would come to being in an honorary 10:19:21
 2 position.
 3 Q. Have you been awarded any grants or
 4 fellowships in connection with your research?
 5 A. Yes. I recently in 2011 was named a fellow of 10:19:32
 6 the John Simon Guggenheim Foundation, generally known as
 7 the Guggenheim Fellowship.
 8 From '04 to '05, I was the Gilder Lehrman
 9 fellow in American history at the Dorothy and Lewis B.
 10 Cullman Center for Scholars and Writers at the New York 10:19:58
 11 Public Library. I don't believe I've received any other
 12 fellowships or grants to support my work.
 13 Q. And starting with the Guggenheim Fellowship,
 14 could you tell me about the nature of that award, what
 15 that's for, how you've used it. 10:20:20
 16 A. The Guggenheim Fellowship, its stated purpose,
 17 as I understand it, is to assist scholars and creative
 18 artists who have demonstrated a level of excellence and
 19 are approximately at the midpoint in their careers. It
 20 is not a residential fellowship. It is a grant of 10:20:45
 21 assistance and of recognition. And it can be for a
 22 range of months up to a full year. And the amount of
 23 the fellowship is determined by the Guggenheim
 24 Foundation. How their internal process works exactly I
 25 could not state. But it is a fluctuating amount of 10:21:11

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1 research on my still forthcoming book on George 10:22:40
 2 Armstrong Custer. One of the major purposes was to
 3 support such costly activities as traveling to archives
 4 to consult primary sources. So with the fellowship
 5 from -- money from the Guggenheim Fellowship, I believe 10:22:58
 6 I traveled to New York, Washington, D.C., to Monroe,
 7 Virginia -- not Monroe, Virginia -- excuse me -- Monroe,
 8 Michigan. I have been able to pay for copies and --
 9 digital and physical photocopies from various archives
 10 which charge for those services. And also it provides 10:23:28
 11 living money to help support me while I work on the book
 12 full-time.
 13 Q. And you also mentioned -- I can't remember
 14 exactly the name of it -- a grant or fellowship with the
 15 New York Public Library -- associated with the New York 10:23:46
 16 Public Library?
 17 A. That is correct, the Dorothy and Lewis B.
 18 Cullman Center for Scholars and Writers.
 19 Q. What was the nature of that fellowship?
 20 A. That was a residential fellowship which I 10:23:57
 21 received when I was living in New York, as I did from
 22 1986 to 2006. And the Dorothy and Lewis B. Cullman
 23 Center for Scholars and Writers is located on the second
 24 floor of the main research library, 42nd Street and
 25 Fifth Avenue in New York. 10:24:16

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1 money to assist one in one's work. 10:21:14
 2 I applied for it. I was not invited, but I
 3 applied. I had to provide samples of my work. And I
 4 had to provide letters of recommendation. I had to
 5 provide a narrative of my career to date. I had to make 10:21:29
 6 a clear statement of my plans and what I would be doing
 7 with any funding that they would provide. And after
 8 making the application, you know, a number of months
 9 passed and I received word that I had received it. I
 10 had applied for it before and had not succeeded. It is 10:21:44
 11 a prestigious fellowship. So above and beyond the
 12 financial support, it is highly sought after. And it
 13 was particularly valuable for me, because I have a
 14 family and cannot take up residential fellowships so
 15 easily with young children. 10:22:02
 16 Q. And what was the amount of the fellowship
 17 award that you received?
 18 A. I believe I received \$39,000. I would have to
 19 confirm that to be sure but I believe that was the
 20 amount. It was made in two payments. 10:22:16
 21 Q. And did you have a specific -- was there a
 22 specific plan of research or specific activity that had
 23 to be completed with that funding? Or was it not --
 24 A. It's a support research -- pardon me for
 25 speaking over you. The purpose of it was to support my 10:22:37

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1 The director when I was there, and still I 10:24:18
 2 believe is current director, was Jean Strouse
 3 S-T-R-O-U-S-E. First name J-E-A-N. There were 14 or 15
 4 fellows who included a range of independent writers and
 5 scholars like myself, academic scholars, and creative 10:24:36
 6 artists. My year there were -- creative artists
 7 included a number of novelists.
 8 The fellowship goes to support one's work and
 9 it also brings people together in the hopes they will
 10 have a creative interplay. It was very important for me 10:24:56
 11 because I was working on a book about Cornelius
 12 Vanderbilt, the -- one of the creators of the New York
 13 Central Railroad system. And all of the executive
 14 papers are held by the New York Public Library, among
 15 many other important archival sources. It also included 10:25:13
 16 a stipend as well as an office in the library.
 17 Q. And what was the amount of that stipend?
 18 A. I would have to speak, without claiming
 19 precise accuracy, I believe it was 50 or 55 thousand
 20 dollars for an academic year. 10:25:34
 21 Q. I'm going to move now to a slightly different
 22 subject. Have you ever been involved as a plaintiff or
 23 defendant in any copyright lawsuits other than this one?
 24 A. No.
 25 Q. Have you ever been -- have you ever threatened 10:25:56

Page 22	<p>1 anyone with litigation in copyright litigation? 10:25:58</p> <p>2 A. No.</p> <p>3 Q. Have you ever been threatened with copyright</p> <p>4 litigation?</p> <p>5 A. No. 10:26:07</p> <p>6 Q. How did you come to be named as a plaintiff in</p> <p>7 this lawsuit?</p> <p>8 A. As a member of The Authors Guild board of</p> <p>9 directors, which I serve on because copyright issues and</p> <p>10 authors' rights are very important to me, both as a 10:26:27</p> <p>11 matter of my direct financial and professional interests</p> <p>12 and the future of my livelihood, but also as a general</p> <p>13 principle -- someone who believes in supporting</p> <p>14 authors -- who have been -- who have yet to be</p> <p>15 successful in attaining a relatively prominent position 10:26:43</p> <p>16 to the degree that I have I wish to support other</p> <p>17 authors as well. So I belong to The Authors Guild board</p> <p>18 of directors where such issues are a major topic of</p> <p>19 conversation during our regular board meetings.</p> <p>20 I also speak regularly with other authors and 10:27:01</p> <p>21 discuss such matters. And so as a result of those</p> <p>22 discussions, I became aware of what the HathiTrust was</p> <p>23 doing and the -- when we were discussing possible</p> <p>24 responses, it came to my attention that my book was</p> <p>25 digitally -- a digital edition was created without my 10:27:33</p>	Page 23	<p>1 express permission, despite the existence of an easily 10:27:40</p> <p>2 available and rather inexpensive digital edition of my</p> <p>3 book. And that it was exposed to a number of other</p> <p>4 serious potential -- that I was exposed to potential</p> <p>5 damage to my own rights and interests. And so the 10:27:59</p> <p>6 subject of my taking part in this lawsuit came up during</p> <p>7 my -- our discussions with The Authors Guild. And I was</p> <p>8 very happy to do so.</p> <p>9 Q. Was the subject brought up by The Authors</p> <p>10 Guild to you about becoming a plaintiff in the lawsuit? 10:28:17</p> <p>11 Or did you raise the issue with The Authors Guild?</p> <p>12 MR. GOLDMAN: Objection to the form.</p> <p>13 Go ahead; you can answer.</p> <p>14 THE WITNESS: Answer?</p> <p>15 MR. GOLDMAN: (Counsel nods.) 10:28:28</p> <p>16 THE WITNESS: The actual idea of my taking</p> <p>17 part was brought up by one of the other members of The</p> <p>18 Authors Guild, either board of directors or executive</p> <p>19 management, the full-time staff. I could not speak with</p> <p>20 any accuracy as to who specifically brought it up. But 10:28:50</p> <p>21 I will state that I did not initiate the idea of my</p> <p>22 taking part.</p> <p>23 BY MS. ROACH:</p> <p>24 Q. Do you remember when that conversation</p> <p>25 occurred, that the idea was brought to you about 10:29:03</p>
Page 24	<p>1 becoming a plaintiff in this lawsuit? 10:29:10</p> <p>2 A. In all honesty I couldn't tell you when that</p> <p>3 happened.</p> <p>4 Q. Do you remember if it was an in-person</p> <p>5 conversation? 10:29:17</p> <p>6 A. In all likelihood it was -- it was either in</p> <p>7 person or over the phone and it probably was over the</p> <p>8 phone because I live in San Francisco and The Authors</p> <p>9 Guild offices are in New York. And though I do attend</p> <p>10 meetings in person, I more frequently attend and also 10:29:40</p> <p>11 interact with the executive director, the council and</p> <p>12 other staff members by phone. I occasionally do so by</p> <p>13 e-mail. But I have a recollection of specifically</p> <p>14 discussing this issue rather than exchanging e-mails</p> <p>15 about it. 10:30:01</p> <p>16 Q. And it's your recollection that it probably</p> <p>17 occurred in a phone conversation, not at one of the</p> <p>18 council meetings?</p> <p>19 MR. GOLDMAN: Objection to the form. Go</p> <p>20 ahead. 10:30:13</p> <p>21 BY MS. ROACH:</p> <p>22 Q. If you understand the question.</p> <p>23 A. It's total guesswork. It's an important issue</p> <p>24 in my participation. It's something that both I and</p> <p>25 members of the Guild treated seriously. And to be 10:30:29</p>	Page 25	<p>1 honest, I have no idea whether it was by phone. Authors 10:30:31</p> <p>2 Guild meetings, directors meetings -- board meetings, I</p> <p>3 should say -- are usually held in person, but those of</p> <p>4 us who are unable to attend take part by teleconference</p> <p>5 over speakerphone. So the meeting may have been an 10:30:47</p> <p>6 in-person meeting, but I may have been interacting by</p> <p>7 phone. Or I may have been on the phone to someone at</p> <p>8 The Authors Guild. To be honest with you, I really</p> <p>9 could not honestly answer that question.</p> <p>10 Q. Understood. Thank you. 10:31:03</p> <p>11 Are you paying your own legal fees in this</p> <p>12 case?</p> <p>13 A. Only to the extent that I'm a dues-paying</p> <p>14 member of The Authors Guild.</p> <p>15 Q. But you're not paying any additional funds for 10:31:16</p> <p>16 the -- specifically for the legal fees in this case?</p> <p>17 A. No.</p> <p>18 Q. Do you know who is paying the legal fees in</p> <p>19 this case?</p> <p>20 A. It's my understanding that The Authors Guild 10:31:29</p> <p>21 is footing the largest share of the bill. I know that</p> <p>22 The Authors Guild is funding this litigation. But</p> <p>23 beyond that I could not give you any idea of what the</p> <p>24 figures are of percentages or who else might be paying.</p> <p>25 Q. And do you know if the money that The Authors 10:31:51</p>

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1 Guild will be using to cover the legal fees, would that 10:31:57
 2 come from the dues of members to The Authors Guild or do
 3 you know?
 4 MR. GOLDMAN: Objection to the form.
 5 If you can answer. 10:32:07
 6 THE WITNESS: The Authors Guild has various
 7 sources of income. But money is fungible. I don't know
 8 if they have set aside a specific source of income for a
 9 litigation fund; that would be a level of financial
 10 management which I do not participate in, despite my 10:32:32
 11 active participation and deep personal interest in the
 12 issues that are pursued by The Authors Guild.
 13 BY MS. ROACH:
 14 Q. Understood.
 15 Are you familiar with Google Inc.'s book 10:32:45
 16 search project or library book project? It's been
 17 referred to as several names. Are you familiar with a
 18 book search project by Google Inc.?
 19 MR. GOLDMAN: Object to the form.
 20 THE WITNESS: Should I answer it? 10:33:03
 21 MR. GOLDMAN: It was just a compound question,
 22 so I'm not sure which question --
 23 MS. ROACH: I can rephrase.
 24 Q. Are you familiar with Google Inc.'s book
 25 search project? 10:33:12

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1 generally? 10:35:09
 2 A. I'm unfamiliar when it began.
 3 Q. You mentioned The Authors Guild litigation
 4 against Google with respect to the Google project. Do
 5 you know when that was instituted? 10:35:20
 6 A. I could not give you the date off the top of
 7 my head.
 8 Q. You mentioned the Google book settlement. Do
 9 you remember generally when that was submitted to Judge
 10 Chin? 10:35:32
 11 A. Again, off the top of my head I couldn't give
 12 you the details. I could look it up for you, if you
 13 would like.
 14 Q. I'm just trying to get an idea of your general
 15 understanding of when those events happened. 10:35:40
 16 A. I -- quite honestly, I -- I'm not being
 17 obstinate; I just don't know.
 18 Q. Understood.
 19 A. You must understand, I have a seven-month-old
 20 daughter and a four-and-a-half-year-old son. And so for 10:35:55
 21 about four and a half years everything has become
 22 somewhat of a blur. So pardon me for being inexact.
 23 Q. I understand.
 24 When you were describing earlier your
 25 understanding of the Google book project, you mentioned 10:36:14

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1 A. "Familiar" is a broad term. I believe I am 10:33:14
 2 familiar with it, though if you wish me to describe it
 3 and provide detailed information about it, I would not
 4 trust myself to be an authority on it.
 5 Q. And I'm not going to ask you detailed 10:33:31
 6 questions. More wondering if you had heard of it.
 7 A. Yes.
 8 Q. And you have some awareness of what it is?
 9 A. Some awareness.
 10 Q. What is your understanding of what the Google 10:33:42
 11 book project is?
 12 A. Well, if I understand you correctly, the
 13 Google book project has been an effort made by Google to
 14 digitize vast numbers of books and make them available
 15 either through Google's own services or possibly through 10:34:05
 16 libraries and other outlets as a product for which they
 17 would receive remuneration.
 18 Also, it's my understanding that this has been
 19 the subject of litigation between The Authors Guild and
 20 Google. And that a settlement was reached, which 10:34:33
 21 unfortunately was upended by Judge -- I believe it's
 22 Denny Chin of the -- formerly Southern District of
 23 New York and now with the Court of Appeals. So -- is
 24 there more detailed information you wish from me or --
 25 Q. Do you know when the Google book project began 10:35:04

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1 the libraries being involved. What is your 10:36:17
 2 understanding of libraries' involvement with the Google
 3 book project?
 4 A. Their current involvement? I am unclear about
 5 what their current involvement is. It's my 10:36:33
 6 understanding that despite the ongoing litigation, which
 7 is now -- must be renewed because of the unsuccessful
 8 results with the settlement, that despite the ongoing
 9 litigation, that digitized editions of copyrighted works
 10 have been made available to or have been -- as a result 10:37:00
 11 of this project have been taken or made available to the
 12 libraries that are taking part in the HathiTrust
 13 project. As far as what might have happened, that's an
 14 entirely different subject.
 15 It's my impression that The Authors Guild was 10:37:21
 16 attempting to reach a settlement with Google which would
 17 protect authors' rights, provide remuneration and also
 18 recognize the principle of licensing of authors' control
 19 of copyright and any licensing that results from that.
 20 With the possibilities of digital media and that books 10:37:48
 21 could be made more available while still protecting
 22 authors' rights if the proper settlement was reached.
 23 And that if that settlement had gone forward, there
 24 would have been a Google product that would have been
 25 available through participating libraries. 10:38:07

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<p>1 Now, the current state of affairs, quite 10:38:09</p> <p>2 frankly, I couldn't tell you exactly where things stand.</p> <p>3 Beyond my impression of the HathiTrust's use of</p> <p>4 digitized editions that were made by Google.</p> <p>5 Q. And what is your understanding of the uses 10:38:22</p> <p>6 that are being made of the HathiTrust digital works?</p> <p>7 A. Well, again, my understanding is that there</p> <p>8 are different levels of uses that are being made</p> <p>9 available. That for books that are clearly in the</p> <p>10 public domain, that full availability is being made to 10:38:43</p> <p>11 the full text to students and faculty members and other</p> <p>12 recognized members of university communities that are</p> <p>13 taking part in the HathiTrust. That initially the</p> <p>14 HathiTrust had planned to make available in the same way</p> <p>15 books that they had deemed to be orphan works; that is, 10:39:12</p> <p>16 books that are still copyright protected but for whom</p> <p>17 the copyright holders could not be located or</p> <p>18 identified.</p> <p>19 It is, to my understanding, that the</p> <p>20 HathiTrust had made a great fuss about how they had been 10:39:29</p> <p>21 very careful in identifying orphan works and that The</p> <p>22 Authors Guild was able to locate the authors of several</p> <p>23 used orphan works with Google searches in a matter of</p> <p>24 minutes. Which then created the impression that the</p> <p>25 HathiTrust was not being very careful and that its 10:39:50</p>	<p>1 representations were not entirely accurate in terms of 10:39:54</p> <p>2 what they were doing and what their own security</p> <p>3 measures were.</p> <p>4 And then finally, that the HathiTrust has</p> <p>5 digital editions of books that are copyright protected 10:40:06</p> <p>6 that are still available for sale ultimately from the</p> <p>7 publishers -- the publishers are keeping in print and</p> <p>8 available such as my own work Jesse James: Last Rebel of</p> <p>9 the Civil War -- and that the stated purpose of this is</p> <p>10 for archival purposes, to maintain a digital copy in 10:40:27</p> <p>11 case of loss or damage of a -- the physical copy. And</p> <p>12 that searches which in an analog world would be similar</p> <p>13 to index searches, are possible to -- through the</p> <p>14 HathiTrust system. And that also the HathiTrust is</p> <p>15 attempting to make these works available for research 10:40:59</p> <p>16 that relies upon what it calls non-consumptive research:</p> <p>17 Digital searches of bits of data from a broad range of</p> <p>18 books as well; again, without any permission or</p> <p>19 licensing from the -- the authors of those works.</p> <p>20 Q. Are there any other uses that you're aware of 10:41:24</p> <p>21 that --</p> <p>22 A. Not that I'm aware of. Those are the ones</p> <p>23 that come to mind.</p> <p>24 Q. You mentioned that public domain works were</p> <p>25 available to users who are at universities that are 10:41:37</p>
Page 32	Page 33
<p>1 associated with the HathiTrust? 10:41:40</p> <p>2 A. Mm-hmm.</p> <p>3 Q. Is it your understanding that the general</p> <p>4 public cannot view those works -- public domain works?</p> <p>5 A. I could not answer that statement accurately. 10:41:52</p> <p>6 It would not surprise me if they were available to the</p> <p>7 general public because Google itself makes such works</p> <p>8 available through their website to the general public.</p> <p>9 And since it's my impression that Google is the source</p> <p>10 of these digital editions, it would be logical to me 10:42:09</p> <p>11 that the HathiTrust would make the general public --</p> <p>12 give them access to books that are clearly and</p> <p>13 uncontroversially in the public domain. But it's not to</p> <p>14 my certain knowledge that that's the case.</p> <p>15 Q. Have you ever gone to the HathiTrust website? 10:42:26</p> <p>16 A. Yes, I have.</p> <p>17 Q. Have you used the search function that's</p> <p>18 available on the HathiTrust website?</p> <p>19 A. I have not used it professionally. I have</p> <p>20 used it out of curiosity for my own work. 10:42:37</p> <p>21 Q. Did you conduct searches of your own -- for</p> <p>22 the titles of your own works?</p> <p>23 A. Yes.</p> <p>24 Q. And were you able to access the full view of</p> <p>25 your own works? 10:42:51</p>	<p>1 A. Well, the only work that I could say for 10:42:52</p> <p>2 certain that I have -- I've looked at it more than once,</p> <p>3 the website. But the most recent search, the only one</p> <p>4 that I could swear to is a search of the book that's</p> <p>5 currently at issue, Jesse James: Last Rebel of the 10:43:07</p> <p>6 Civil War. And I was not able to access the text.</p> <p>7 Q. Did you conduct a category search to identify</p> <p>8 that work?</p> <p>9 A. Yes.</p> <p>10 Q. Have you used the full text search 10:43:20</p> <p>11 functionality on the HathiTrust website?</p> <p>12 A. I may have before, but I -- to be honest, I</p> <p>13 could not tell you right now if I have. To my</p> <p>14 recollection, no.</p> <p>15 Q. Do you have an understanding of how that 10:43:36</p> <p>16 works?</p> <p>17 A. No.</p> <p>18 Q. Do you have an understanding of what the</p> <p>19 results of a search through that full text search</p> <p>20 functionality looked like to the user? 10:43:44</p> <p>21 A. Are you speaking of a copyright protected work</p> <p>22 or of a non-copyright protected work?</p> <p>23 Q. That's a great clarification. For a copyright</p> <p>24 protected work.</p> <p>25 A. Then the results of my own search, for 10:43:58</p>

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1 example, of my book brought up numbers of pages and 10:44:00
 2 numbers of hits for specific search terms. It did not
 3 show sentences, excerpts. It simply showed the --
 4 again, something analogous to an index search -- what
 5 page, how often a search term would come up. 10:44:20
 6 Q. And when we were talking about the use, you
 7 also mentioned non-consumptive research.
 8 A. Mm-hmm.
 9 Q. What is non- --
 10 MR. GOLDMAN: Wait. You have to give verbal 10:44:31
 11 answers. Just as a reminder.
 12 THE WITNESS: Yes.
 13 BY MS. ROACH:
 14 Q. And what is your understanding of the term
 15 "non-consumptive research"? 10:44:37
 16 A. This is -- I must say that I have never
 17 conducted non-consumptive research, I find the term to
 18 be -- to be rather contradictory. The impression I have
 19 is that it is -- some scholars find it useful to conduct
 20 an analysis across broad ranges of books through the 10:45:13
 21 statistical methods that are possible through the
 22 digitalization and character recognition software of
 23 large numbers of texts. But for what purposes they
 24 would carry out such research, I'm unclear.
 25 Q. And one of the other uses that you mentioned 10:45:36

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1 authored identified as potential orphan works 10:47:00
 2 candidates --
 3 A. Not to --
 4 Q. -- for the orphan works project?
 5 A. Not to my knowledge. 10:47:08
 6 Q. And do you have any understanding as to
 7 whether any works were made available through the orphan
 8 works project?
 9 MR. GOLDMAN: Could you read back that
 10 question. 10:47:28
 11 (Record read.)
 12 MR. GOLDMAN: Just note my objection to the
 13 form of the question.
 14 THE WITNESS: Can you clarify it, please? Any
 15 works? Meaning my own works or any works in general? 10:47:35
 16 And do you mean --
 17 MR. GOLDMAN: What do you mean by "made
 18 available"?
 19 THE WITNESS: What do you mean by "made
 20 available"? 10:47:43
 21 BY MS. ROACH:
 22 Q. I'll back up a little bit.
 23 Earlier you talked about the orphan works
 24 project. And you said that it was your understanding
 25 that it was the intention of HathiTrust to make works 10:47:51

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1 when we were going through the list of uses you were 10:45:38
 2 aware of you talked about the orphan works project.
 3 Were any of your works identified for possible inclusion
 4 in the orphan works project?
 5 MR. GOLDMAN: Objection to the form. 10:45:54
 6 THE WITNESS: May I go back and add to my
 7 previous statement about non-consumptive research?
 8 MS. ROACH: Mm-hmm.
 9 THE WITNESS: Despite my own uncertainty about
 10 the actual means and uses of non-consumptive research, I 10:46:04
 11 must add that I think it's a very exciting field, it's
 12 very interesting and as an author, it sounds like a
 13 tremendous emerging market that I would love to license
 14 my book to be -- my books to be taken advantage of in
 15 such a manner. And so as a potentially important 10:46:24
 16 emerging market, I certainly have no difficulties or
 17 problems with non-consumptive research. In fact I find
 18 that there may be great market potential in it. And so
 19 it interests me as a creator of works in terms of
 20 potential licensing. 10:46:44
 21 Could you please restate your question?
 22 MS. ROACH: Sure. And I'll try to state it
 23 better this time.
 24 Q. I was recalling earlier when you were talking
 25 about the orphan works project. Were any works that you 10:46:54

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1 available through the orphan works project the same way 10:47:56
 2 that public domain works are available through the
 3 orphan works project. Did you state that as your
 4 understanding of their intention through the orphan work
 5 project? 10:48:09
 6 MR. GOLDMAN: I object to the form and the
 7 characterization of prior testimony.
 8 MS. ROACH: I'll back up.
 9 Q. What is your understanding of the orphan works
 10 project? 10:48:18
 11 A. To restate what I said earlier without
 12 necessarily negating what I said it's my understanding
 13 that the HathiTrust wished to make the full text of
 14 orphan works available. That it had declared -- again,
 15 according to my subjective understanding -- that it had 10:48:43
 16 declared a date at which if no one came forward and it
 17 had been unable to identify the authors of these
 18 designated works, it would make the full text available
 19 as to members of the university system, possibly to the
 20 public. I'm uncertain about that. To any -- I have no 10:49:03
 21 degree of certainty at all about that. But that the
 22 full text would be made available in a similar manner to
 23 the way books that are no longer -- public domain works,
 24 books that are no longer copyright protected or were
 25 already available. 10:49:20

Page 38	<p>1 It's my understanding that when The Authors 10:49:21 2 Guild was able to identify a number of still-living 3 authors of these works, despite the HathiTrust's public 4 assurances that they had conducted due diligence and had 5 been very careful searching for these authors, that when 10:49:38 6 they were publicly embarrassed by The Authors Guild's 7 rapid uncovering of several authors, that they 8 forestalled this impending availability. And at that 9 point the chronology is not precise in my own memory, 10 but at that point it's my impression that litigation was 10:50:01 11 begun, and that the orphan works' availability was not 12 actually consummated. 13 Now, I may be wrong about that. Again, since 14 my own works are not included in that, I did not have a 15 direct personal financial or copyright interest at 10:50:19 16 stake. So I may be wrong. But that's my general 17 impression. 18 MS. ROACH: I'm trying to decide if this would 19 be a good time to take a short break. I'm about to go 20 into a slightly different topic. So would it be an okay 10:50:40 21 time for a five-minute break? 22 THE WITNESS: It's certainly fine with me. 23 MR. GOLDMAN: Fine with me. 24 (Recess taken from 10:50 a.m. to 11:00 a.m.) 25 BY MS. ROACH: 11:00:23</p>	Page 39	<p>1 Q. Mr. Stiles, you mentioned that you've been a 11:00:24 2 full-time writer for many years now. What type of works 3 do you author? 4 A. I describe myself primarily as a biographer. 5 I write nonfiction. I write American history, but I see 11:00:40 6 myself as a literary writer and simultaneously as a 7 creator of historical scholarship. And the medium 8 through which I attempt to integrate those two aspects 9 of my writing is biography. 10 Q. How many biographies have you written? 11:01:07 11 A. I have published two. 12 Q. Have you written others? 13 A. Unpublished? 14 Q. Yes, sir. 15 A. No. I did work on a book for hire when I was 11:01:21 16 a graduate student which was a juvenile work. And the 17 contract allowed me to take my name off the work. The 18 publisher published it with certain changes to the text 19 but also a great number of questionable photographs and 20 captions. And I asked them to remove my name from the 11:01:45 21 text. So it was a work which I never held copyright and 22 which I have repudiated. The publisher -- I don't 23 believe it's in print. And the publisher agreed that 24 they would take my name off the work. So that work 25 exists, but I do not claim authorship over it. 11:02:03</p>
Page 40	<p>1 Q. What was the title of that work? 11:02:08 2 A. It was Jesse James. 3 Q. And you said it was a juvenile work? 4 A. That is correct. It was young adult. It was 5 published in the early 1990s. It was a very basic 11:02:19 6 secondary-source research project. 7 Q. It was a nonfiction book? 8 A. That is correct. 9 Q. You mentioned you've published two 10 biographies. Could you list them? 11:02:36 11 A. The first book was Jesse James. Jesse James: 12 Last Rebel of the Civil War, published by Alfred A. 13 Knopf in 2002. Published in paperback by Vintage in 14 '03. 15 The second work was The First Tycoon: The 11:02:53 16 Epic Life of Cornelius Vanderbilt, which was also 17 published by Knopf in '09 and was published in paperback 18 by Vintage in '10, 2010. 19 The First Tycoon was made available as a 20 digital work, I believe, in '09, possibly 2010. At my 11:03:14 21 urging the publisher also published a digital edition at 22 roughly the same time. It might have been 2010, 23 possibly '09, but I believe it was 2010 -- of Jesse 24 James: Last Rebel of the Civil War. 25 And I'm currently working on another 11:03:45</p>	Page 41	<p>1 biography. 11:03:47 2 Q. I think you mentioned that earlier. What's 3 the subject of that biography? 4 A. George Armstrong Custer and the Transfer of 5 the United States during the Civil War era. 11:03:54 6 Q. Is that -- do you expect that that book will 7 be published by Knopf? 8 A. It's pronounced Knopf, with a hard K. 9 Q. Sorry. 10 A. That's all right. 11:04:10 11 MR. GOLDMAN: I made that mistake this 12 morning. 13 THE WITNESS: There is a contract for that 14 work with Knopf as well. And the contract calls for 15 Knopf to publish a -- or rather, I should say, the Knopf 11:04:24 16 Publishing Group -- which I believe includes Vintage as 17 well -- will publish a paperwork and digital edition of 18 this work, so the contract states. 19 BY MS. ROACH: 20 Q. Do you have an expectation of when that book 11:04:44 21 will be completed? 22 A. That is always an embarrassing and socially 23 awkward question to ask an author. 24 Q. I apologize. 25 A. The book will hopefully be written 11:05:01</p>

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1 approximately 12 months from now, which would make the 11:05:04
 2 publication somewhere in the neighborhood of 24 months
 3 from now.
 4 Q. Thank you. Sorry.
 5 I'm going to start with Jesse James since 11:05:22
 6 chronologically it's the first published biography that
 7 you referred to. You said that was published by Knopf.
 8 Do you -- were you paid in connection with that book?
 9 A. Yes, I was.
 10 Q. Were you paid an advance for that book? 11:05:39
 11 A. Yes. I was paid in advance in three
 12 installments. The advance was \$100,000, not including
 13 the commission that went to my -- rather, that does
 14 include the commission that went to my agent. And there
 15 was a -- one portion paid upon signing of the contract, 11:06:01
 16 another portion paid upon publication and another
 17 portion paid upon publication of the paperback.
 18 Q. Do you also receive royalties in connection
 19 with that one?
 20 A. As is standard in commercial publishing, the 11:06:17
 21 royalties -- the advance, I should say, is an advance
 22 against royalties. So with an escalating scale of
 23 royalty payments for the hardcover work I was paid
 24 royalties once the advance was earned back according to
 25 the schedule of royalty percentages from each list price 11:06:37

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1 biographies? 11:08:24
 2 A. I published -- before Jesse James was
 3 published in '02, I did a total of six books. The first
 4 book was a project for hire called The Citizen's
 5 Handbook, which was a compilation of important speeches 11:08:44
 6 and documents from American history. That was a work
 7 for hire published by Perigee, which was an imprint of
 8 -- it's since been taken over by Penguin. I'm just
 9 drawing a blank on the name. Putnam Berkleys' was the
 10 name of the house. And then also for Putnam Berkley 11:09:11
 11 published by Perigee -- oh, I'm sorry. I should correct
 12 that. The Citizen's Handbook, I believe, was just a
 13 Berkley book, no relation to the university. There's no
 14 final E as there is in -- or is it a middle E? It's
 15 spelled differently from the university. 11:09:31
 16 The next set of books were part of a series
 17 called In Their Own Words. And they were anthologies
 18 from public domain works, primary sources, accounts from
 19 the first -- first-person accounts from the period with
 20 my own connecting narrative. And those were original 11:09:55
 21 trade paperworks with small print runs. They're now all
 22 out of print.
 23 Q. For The Citizen's Handbook, you mentioned that
 24 was a work for hire.
 25 A. Mm-hmm. 11:10:09

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1 sale. 11:06:40
 2 Q. And was there a similar -- I'll just ask.
 3 For the Cornelius Vanderbilt biography, were
 4 you paid in connection with that book as well?
 5 A. Yes, I was. As is standard in commercial 11:06:59
 6 publishing, I was paid an advance against royalties. I
 7 also received a bonus payment when -- as a part of the
 8 contract for Cornelius Vanderbilt -- the Cornelius
 9 Vanderbilt biography, when Jesse James earned back its
 10 advance, I received a payment. But that was 11:07:23
 11 contractually under the -- as a part of the contract for
 12 The First Tycoon, my Vanderbilt biography, since it was
 13 with the same publisher which was an inducement to sign
 14 a second book with them. Then -- it was a larger
 15 advance. It was \$150,000. I believe it was in three 11:07:42
 16 payments as well, not including that payment as a bonus
 17 for the financial success of the first biography Jesse
 18 James.
 19 Q. And today are both the Jesse James biography
 20 and the Cornelius Vanderbilt biography still in print? 11:08:03
 21 A. Yes.
 22 Q. And do you continue to receive royalties
 23 against the advance on both of those works?
 24 A. Not enough, but yes, I do.
 25 Q. Have you authored any books that aren't 11:08:21

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1 Q. So you do not hold the copyright on that one? 11:10:10
 2 A. That is correct, yes.
 3 Q. For the In Their Own Words series, do you hold
 4 the copyright in those works?
 5 A. Yes, I do. 11:10:18
 6 Q. And just to complete it. And for the Jesse
 7 James biography, Last Rebel of the Civil War, do you
 8 hold the copyright in that --
 9 A. Yes.
 10 Q. -- work? 11:10:29
 11 MR. GOLDMAN: Let me just say I object --
 12 THE WITNESS: Pardon me.
 13 MR. GOLDMAN: -- to the extent these questions
 14 about copyright call for a legal conclusion. But that's
 15 fine. 11:10:37
 16 THE WITNESS: Yes, subject of course to
 17 licensing and agreements for publication, and whatever
 18 legal effect that may have on the technical status of my
 19 copyright, colloquially speaking as I understand it I'm
 20 the copyright holder for Jesse James: Last Rebel of the 11:10:54
 21 Civil War.
 22 BY MS. ROACH:
 23 Q. Right. And I'm just asking for your
 24 understanding.
 25 To close the loop with respect to the 11:11:01

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1 Cornelius Vanderbilt biography, is it your understanding 11:11:03
 2 that you hold the copyright in that work?
 3 A. Yes. The First Tycoon: The --
 4 Q. I'm sorry.
 5 A. -- Epic Life of Cornelius Vanderbilt, I'm the 11:11:12
 6 copyright holder for that as well.
 7 Q. Are there any works that have been published
 8 that you were not the author of but were the editor or
 9 served some other role?
 10 A. Books? 11:11:33
 11 Q. Books.
 12 A. No.
 13 Q. Were there other --
 14 A. Other than those I've already identified here,
 15 I've already identified all of the books over which I 11:11:39
 16 claim any degree of authorship or have control of the
 17 copyright. And I've also mentioned the book which I've
 18 repudiated, which I drafted at least, a work for hire.
 19 Apart from those, I don't believe I've taken part in any
 20 other published book. 11:12:04
 21 Q. So the remainder of your published writings
 22 are articles or book reviews that you mentioned earlier?
 23 A. Yes, that's correct.
 24 Q. Do you receive payment in connection with
 25 those types of works that you author? 11:12:21

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1 recollection -- I don't believe that I've written 11:14:03
 2 anything specifically about this legal action. Now, I
 3 could be wrong. I don't want to say with 100 percent
 4 certainty. And I certainly have not published an
 5 article or essay or any other longer sort of reflection 11:14:15
 6 on it.
 7 BY MS. ROACH:
 8 Q. I'm not trying to prove you wrong. I'm just
 9 trying to get an understanding about what you've
 10 written. And it was a good clarification. What I was 11:14:25
 11 speaking to was published things you've written.
 12 Published work, including on-line, websites, that sort
 13 of thing.
 14 You touched on this a little bit earlier. In
 15 what formats have your works been published? And that's 11:14:45
 16 probably too broad so let me back that up.
 17 What formats has the Jesse James biography
 18 Last Rebel of the Civil War been published?
 19 A. Originally hardcover. A year later in '03 it
 20 was published as a trade paperback. I should also add 11:15:05
 21 that the rights to a leather-bound edition were sold and
 22 it was published -- I forgot -- Easton's Press in a
 23 leather-bound edition. It's atrocious. It has been
 24 published in the United Kingdom under license. It has
 25 been translated into Italian and published as a trade 11:15:33

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1 A. Yes. As Samuel Johnson said, no one ever 11:12:23
 2 writes -- no one ever writes -- only a blockhead writes
 3 except for money. I'm mangling the quote. An editor of
 4 mine, when I quoted that to him asking for payment said,
 5 from my experience as a freelancer, only a blockhead 11:12:43
 6 writes for money. But money is a key part of the
 7 equation.
 8 I have published, you know, reflections unpaid
 9 on a blogs before. And I've drafted my own promotional
 10 material or other material which I've posted on my 11:13:06
 11 website as a part of the promotion of my copyrighted
 12 works. But these are not in the same category of
 13 considered polished writing that's made available for
 14 market. All of the writing that I've done for any sort
 15 of periodical or outlet have all been paid. 11:13:26
 16 Q. Have you written anything about this lawsuit?
 17 A. No, I have not.
 18 MR. GOLDMAN: Well, let me object to the form
 19 of that question. When you say "have you written
 20 anything about this lawsuit," that could encompass a lot 11:13:44
 21 of different things.
 22 THE WITNESS: I should state, for example, on
 23 my author Facebook page I have made statements about
 24 author copyright and threats to it. But I do not
 25 believe -- and I'm only speaking to my current 11:13:59

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1 paperback in Italy. And I believe in 2010 it was 11:15:36
 2 published as a digital edition.
 3 Q. Who published the digital edition?
 4 A. I believe Vintage is the publisher. It's
 5 certainly the same -- same corporate entity as published 11:15:54
 6 it in paperback in the United States -- in paperback and
 7 in hardcover. I believe Vintage is the specific arm or
 8 division that published it as an e-book.
 9 Q. Is it available in any other formats such as
 10 audio? 11:16:16
 11 A. Yes, I'm sorry. Excuse me. Thank you very
 12 much. It is available through the Library of Congress'
 13 National Library Service For the Blind. They have a
 14 Talking Books program. And I was asked to -- if I would
 15 allow it to be published as an audiobook for the blind 11:16:33
 16 without remuneration and I authorized that use of it.
 17 And it was licensed for that use.
 18 Q. To your knowledge does it continue to be
 19 available in that format?
 20 A. To my knowledge. But I must speak honestly; I 11:16:54
 21 have not tracked its career as an audiobook for the
 22 blind. I have recently checked the National Library
 23 Services for the Blind website and the book came up with
 24 a catalog number. So I assume it is. But I have no
 25 idea whether that was a current listing or if I came 11:17:16

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<p>1 across an older one. So it's possible I'm wrong. 11:17:19</p> <p>2 Q. Are there any other formats that the Jesse</p> <p>3 James: Last Rebel of the Civil War is available in, to</p> <p>4 your knowledge?</p> <p>5 A. I don't think so. 11:17:45</p> <p>6 Q. Is it available in Braille, to your knowledge?</p> <p>7 A. I'm not sure. I don't think so, but I</p> <p>8 couldn't be absolutely certain of that.</p> <p>9 Q. The First Tycoon, the Cornelius Vanderbilt</p> <p>10 biography -- and I apologize for not reciting the entire 11:18:00</p> <p>11 title properly --</p> <p>12 A. It's quite all right.</p> <p>13 Q. -- what formats has that work been distributed</p> <p>14 in?</p> <p>15 A. I read off the entire title just to be clear, 11:18:09</p> <p>16 not to correct you.</p> <p>17 Q. Okay.</p> <p>18 A. It was published as a hardcover by Knopf. It</p> <p>19 was published as a trade paperback by Vintage. It was</p> <p>20 made available as an audiobook by Books on Tape, which 11:18:23</p> <p>21 purchased the rights for an audiobook. I believe it may</p> <p>22 be available through the National Library Service also,</p> <p>23 but I couldn't right now off the top of my head speak to</p> <p>24 that with 100 percent certainty. Certainly I'm very</p> <p>25 supportive of making my books available without charge 11:18:49</p>	<p>1 to the blind. So I believe I approved that use as well. 11:18:53</p> <p>2 I should also state that -- to correct my previous</p> <p>3 answer, that Jesse James, I believe, as well as</p> <p>4 Cornelius Vanderbilt, was licensed to ebrary, the</p> <p>5 proprietary digital database service. And that also The 11:19:17</p> <p>6 First Tycoon, I believe was licensed to get abstract,</p> <p>7 which provides extensive information and excerpts from</p> <p>8 the books -- the book; though the full extent of what</p> <p>9 they offer, I could not testify to.</p> <p>10 Q. And I do not believe you mentioned digital for 11:19:41</p> <p>11 The First Tycoon. Is The First Tycoon available in</p> <p>12 electronic format?</p> <p>13 A. Yes. I'm sorry. It certainly is available in</p> <p>14 electronic format. And it's also available or will be</p> <p>15 at some point as a Chinese translation. 11:19:53</p> <p>16 Q. Do you know if The First Tycoon is available</p> <p>17 in Braille?</p> <p>18 A. I could not answer that question.</p> <p>19 Q. You talked earlier about the extensive</p> <p>20 research you conduct in connection with the biographies 11:20:15</p> <p>21 that you've written. What types of research do you do?</p> <p>22 Could you tell me a little bit about the kinds of</p> <p>23 research that you do?</p> <p>24 A. I do extensive reading in secondary sources.</p> <p>25 Making heavy use of research libraries. I conduct -- 11:20:31</p>
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<p>1 the nature of my research has changed very rapidly as 11:20:37</p> <p>2 both proprietary services -- actually, I shouldn't say</p> <p>3 proprietary. As expensive databases of material become</p> <p>4 available to research libraries, and as Google, for</p> <p>5 example, has made available public domain material 11:21:02</p> <p>6 through its website, there's a great deal that can be</p> <p>7 done digitally now that, you know, five years ago could</p> <p>8 not be done, 10 years ago could not be done. So I take</p> <p>9 advantage of those resources.</p> <p>10 Often, since I'm an independent scholar, I 11:21:18</p> <p>11 have to go on-site to a research library. So, you know,</p> <p>12 a member of a university staff with a password could</p> <p>13 access databases from their university if they subscribe</p> <p>14 to it. I usually have to go on-site to a library to</p> <p>15 obtain those citations and obtain access to material 11:21:37</p> <p>16 that has been digitized. I extensively travel to</p> <p>17 manuscript archives.</p> <p>18 There is an enormous amount of material that</p> <p>19 has never been digitized, original manuscript material</p> <p>20 or microfilm material that has not been digitized. So I 11:21:59</p> <p>21 spend a great deal of time at places like the National</p> <p>22 Archives in Washington, D.C. in College Park, Maryland;</p> <p>23 the New York Public Library. In the case of Jesse</p> <p>24 James, the State Historical Society of Missouri in</p> <p>25 Columbia, Missouri. And other facilities that have 11:22:18</p>	<p>1 original material that is not available digitally. 11:22:26</p> <p>2 Q. When you go on-site to do the research that</p> <p>3 you just talked about, is part of the reason that you</p> <p>4 need to be on-site that you can't check out a lot of</p> <p>5 these types of materials that you use? 11:22:38</p> <p>6 A. Yeah, of course. People do not make available</p> <p>7 for checking out the original handwritten letters of</p> <p>8 George Armstrong Custer. The New York County Clerk's</p> <p>9 office, its old records division has a vast trove of</p> <p>10 original civil lawsuits going back to the 1600s. They 11:22:57</p> <p>11 have the original red-tape-tied-up manuscript material.</p> <p>12 It would be highly irresponsible of them to allow people</p> <p>13 to take it home with them.</p> <p>14 So archival research involves accessing rare</p> <p>15 and valuable material. And frankly, there's -- most 11:23:16</p> <p>16 archives their security should be even higher.</p> <p>17 So occasionally material is available</p> <p>18 digitally on-line. For example, the Library of Congress</p> <p>19 has digitized and made available for search certain</p> <p>20 manuscript collections which is the Abraham Lincoln 11:23:36</p> <p>21 papers. That's a wonderful public service. But there</p> <p>22 are many collections that can only be accessed on-site.</p> <p>23 Q. And when you're on-site researching, how do</p> <p>24 you identify the materials that are relevant to your</p> <p>25 research? 11:23:52</p>

Page 54	<p>1 A. Well, that was one of the first areas in which 11:23:53</p> <p>2 the Internet made a big dent in the research process.</p> <p>3 The -- pardon me for mixing up some of the words in the</p> <p>4 title, but the National Union Manuscript Catalog, which</p> <p>5 I believe is published by the Library of Congress in its 11:24:15</p> <p>6 original bound form, it would fill an entire room of</p> <p>7 shelves which list by index by subject and by</p> <p>8 correspondent and other factors the holdings of all</p> <p>9 participating manuscript collections in the country by</p> <p>10 archive. Now that is a searchable database on-line. 11:24:38</p> <p>11 Many individual archives and libraries put</p> <p>12 finding aids or have searchable catalogs, which they</p> <p>13 post on-line. And so it allows me to identify which</p> <p>14 libraries I need to visit or perhaps which ones I can</p> <p>15 request copies of letters from. That's the sort of -- 11:25:00</p> <p>16 fine-tuning my research and targeting it more precisely</p> <p>17 has been much easier due to catalogs that are available</p> <p>18 on-line.</p> <p>19 Q. In addition to this primary source original</p> <p>20 manuscript research you talked about, use of secondary 11:25:22</p> <p>21 sources, what type of secondary sources did you mean?</p> <p>22 A. Secondary source is -- a primary source is</p> <p>23 something that is written at the time or by -- and/or by</p> <p>24 a participant in an event or period I'm investigating.</p> <p>25 An example might be a newspaper -- if I'm investigating 11:25:45</p>	Page 55	<p>1 something that happened in 1865, a newspaper from 11:25:48</p> <p>2 April 1, 1865. A letter by my subject or someone close</p> <p>3 to him. That sort of material.</p> <p>4 Secondary source material is what others have</p> <p>5 written about that subject. So I'm talking about 11:26:01</p> <p>6 histories, biographies, studies of specific themes. For</p> <p>7 example, in writing about George Armstrong Custer, I'm</p> <p>8 consulting books about West Point before the Civil War,</p> <p>9 about American higher education -- the history of</p> <p>10 American higher education, the antebellum military and 11:26:24</p> <p>11 what its culture was like. So that's the sort of</p> <p>12 secondary source work that I'm speaking of.</p> <p>13 Q. In determining how to -- how to approach the</p> <p>14 biographies that you're writing, do you look at what</p> <p>15 other biographies have been written on your subject 11:26:41</p> <p>16 matter?</p> <p>17 A. Yes, of course.</p> <p>18 Q. And then how do you identify those works?</p> <p>19 A. Well, research is an accretive process; the</p> <p>20 more you read, the more you know what to read. The 11:26:58</p> <p>21 story is a scholar reads the book from the back; in</p> <p>22 other words, the back matter. What once appeared at the</p> <p>23 bottom of the page as footnotes now usually delegated to</p> <p>24 the back as endnotes, is something that always someone</p> <p>25 with a scholarly purpose or an academic scholar is 11:27:19</p>
Page 56	<p>1 reading the main text and then is also looking at what 11:27:27</p> <p>2 the sources cited were.</p> <p>3 So these are secondary sources, these are</p> <p>4 primary sources. This is one of the main ways in which</p> <p>5 we find out what's available. It might be as simple as 11:27:36</p> <p>6 doing a library search. For example, San Francisco</p> <p>7 Public Library is also linked to a number of university</p> <p>8 libraries in the area. So now that I'm far from my</p> <p>9 former stomping grounds of Columbia University and the</p> <p>10 New York Public Library, if I'm looking for a certain 11:28:00</p> <p>11 work or if I'm looking for works about a certain</p> <p>12 subject, I type in the search terms at the library site,</p> <p>13 find out what actually is going to be available to me.</p> <p>14 Search the affiliated university libraries, find out</p> <p>15 what I can get through interlibrary loan, and then I 11:28:17</p> <p>16 will look at those books. If I order 10 books, maybe 8</p> <p>17 of them will be useless to me, maybe 6 of them will be</p> <p>18 useful to me. But I put in a wide to net find out</p> <p>19 what's useful and then going through those books</p> <p>20 depending on the depth to which I wish to pursue a 11:28:38</p> <p>21 particular element of my topic of research I may go to</p> <p>22 my sources and find out what they look at.</p> <p>23 So, for example, if I look at biographies</p> <p>24 of -- there are very view biographies of Vanderbilt and</p> <p>25 very few scholarly biographies of Jesse James, very, 11:28:55</p>	Page 57	<p>1 very few. But I would look at their notes and find out 11:28:59</p> <p>2 what they looked at and then go to those places.</p> <p>3 So, for example, before going to a collection</p> <p>4 of newspapers on microfilm or print that are not</p> <p>5 available remotely through digital means, with Jesse 11:29:12</p> <p>6 James I created a database of previous citations of</p> <p>7 newspaper reports from small local newspapers in</p> <p>8 Missouri. Then when I went to Columbia University and I</p> <p>9 had just two weeks in my budget to stay there and do</p> <p>10 research, I was able to work from my list of what I knew 11:29:35</p> <p>11 I had to look at. And then when I got through the list</p> <p>12 I was able to expand my search and look at other things</p> <p>13 and just kind of blindly stumble around. Blindly</p> <p>14 stumbling around is a part of the process.</p> <p>15 Q. Would or is full text searching within sources 11:29:52</p> <p>16 something that is helpful to your research?</p> <p>17 A. I think that in general searching -- searching</p> <p>18 capability made available by digitizing is a wonderful</p> <p>19 thing. And I think that there is -- that, again, as an</p> <p>20 author, this is one of the most exciting things, in 11:30:17</p> <p>21 terms of both my own consumption of books for research</p> <p>22 and also for licensing potential, that the idea that</p> <p>23 there are new uses that are being available of my work</p> <p>24 is very exciting and opens up new possibilities in terms</p> <p>25 of licensing and income streams. And also in terms of 11:30:39</p>

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1 my own consumption, you know, it opens up a whole new 11:30:43
 2 functionality and facilitates my research in new ways.
 3 So yes, of course.
 4 Q. And could there be works that you could
 5 identify as relevant to your research using full text 11:30:56
 6 searching that would be much more difficult to do by
 7 reading through the entire text?
 8 A. Well, yes, of course. That -- if I'm looking
 9 through a work that is about a broader subject but
 10 touches upon something I'm specifically interested in 11:31:18
 11 that came up when the author was writing about a broader
 12 subject, then of course I want to identify those --
 13 those discussions within the larger context. That is
 14 absolutely the case.
 15 And, you know, again, to take an example, 11:31:35
 16 ProQuest, which is a firm which sells a database that it
 17 is compiled of, among other things, historical
 18 newspapers in which university libraries pay -- and
 19 research libraries -- pay very large amounts of money to
 20 access these databases. And I found they were immensely 11:31:59
 21 valuable because I could search across thousands of
 22 issues of newspapers for the word "Vanderbilt," for
 23 example. And then discovered that there is a great deal
 24 of property for sale on Vanderbilt Avenue in Brooklyn.
 25 But I kept drilling down and put in the time and then 11:32:18

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1 individual I'm able to access these things. It is 11:33:39
 2 certainly more difficult for me as an individual than if
 3 I was an academic historian. But it is still possible.
 4 Q. Turning now to your involvement with The
 5 Authors Guild. You mentioned earlier that you were a 11:34:02
 6 member of The Authors Guild and also on the board of
 7 directors of The Authors Guild; is that correct?
 8 A. That is correct.
 9 Q. How long have you been a member of The Authors
 10 Guild? 11:34:10
 11 A. That's a difficult question.
 12 Q. And just generally.
 13 A. I don't know if I -- where my membership card
 14 is. It has been -- I would guess it is somewhere around
 15 15 years. 11:34:28
 16 Q. How does one become a member of The Authors
 17 Guild?
 18 A. One has to have a commercially published book.
 19 By "commercial" I mean published by a -- you know, some
 20 sort of publisher, not self-published. And then you 11:34:42
 21 apply for membership. My original interest was both
 22 because of the fact that I supported their work but also
 23 it's possible to buy into, you know, group health plans
 24 and other benefits that they make available. They have
 25 services that are -- member services that are available 11:35:05

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1 I'd find the citations that I'm interested in. I could 11:32:20
 2 have narrowed the net if I wanted to; that's the
 3 wonderful thing about it.
 4 It also taught me the fact that when I
 5 contacted ProQuest and found that an individual could 11:32:30
 6 not subscribe to these services, that told me how
 7 expensive and how valuable these subscriptions were,
 8 which also tells me that this functionality is of great
 9 value. And so it's something that I'm very interested
 10 in protecting my own licensing rights to my work in this 11:32:48
 11 respect. Because there's a demonstrated market for it
 12 and a growing and emerging market for it that's of great
 13 interest to me.
 14 Q. How are you able to use ProQuest if an
 15 individual can't subscribe to it? 11:33:02
 16 A. As I mentioned before, I have to go on-site to
 17 a university library that -- or research library that
 18 allows individuals to go. So, for example, if I'm at,
 19 you know, Berkeley and it's a state -- state university,
 20 public university, I can walk in the door and use a 11:33:20
 21 terminal. Columbia University, I'm an alumnus; I can
 22 walk in the door and use a terminal. New York Public
 23 Library, when I'm in New York or when I lived in
 24 New York, I can walk in the door and use a terminal.
 25 And that's one of the means in which the -- as an 11:33:35

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1 as well for -- you know, if you're a dues-paying member. 11:35:09
 2 So there are a number of interests I had in
 3 taking part. And in terms of my initial motivation I
 4 couldn't give you an exact percentage and how it breaks
 5 down, but -- 11:35:23
 6 Q. And you just mentioned that members pay dues.
 7 A. That's correct.
 8 Q. How often do they pay dues?
 9 A. It's annual.
 10 Q. And how -- what is the amount of dues that a 11:35:30
 11 member pays?
 12 A. I think it ranges by your estimated income. I
 13 couldn't give you a schedule right now. You --
 14 Q. The --
 15 A. I'm not sure. 11:35:45
 16 Q. The estimated income from your published
 17 works?
 18 A. I think so. Again, I -- that's something I
 19 couldn't answer for certain right now. I'm not on a
 20 dues-setting committee or anything, so I don't know. 11:36:01
 21 Q. How long have you been on the board of
 22 directors?
 23 A. That's -- it started when I was somewhere in
 24 that blur of the last four and a half years. I think
 25 about two years, maybe years. That's an estimate. 11:36:17

Page 62	<p>1 Q. How did you become a member of the board? 11:36:25</p> <p>2 A. Well, I have served as a member of the</p> <p>3 nominating committee. So I can tell you the process</p> <p>4 which I believe is the same one by which I was selected.</p> <p>5 Usually three members of the board are 11:36:40</p> <p>6 appointed to a nominating committee. And they try to</p> <p>7 identify authors who are interested in these issues.</p> <p>8 There are a range of factors that go into the decision</p> <p>9 of who to approach. And then authors -- they aren't</p> <p>10 necessarily members when they're asked. I was; I had 11:37:06</p> <p>11 been a long-standing member. And they're approached to</p> <p>12 see if they'd be interested in taking part.</p> <p>13 That's exactly how I was approached. A member</p> <p>14 of the board -- and I had -- already had some friends</p> <p>15 who were members of the board and who I had spoken to 11:37:21</p> <p>16 about Guild issues because of my interest. So they knew</p> <p>17 I was interested in these -- the issues that the Guild</p> <p>18 deals with -- approached me and asked if I wanted to</p> <p>19 serve. And I was honored and proud to be asked and very</p> <p>20 honored and proud to be on the board to this day. 11:37:38</p> <p>21 Q. And you mentioned that you are or were a part</p> <p>22 of the nominating committee.</p> <p>23 A. Mm-hmm.</p> <p>24 Q. What other roles or responsibilities have you</p> <p>25 had on the board of directors? 11:37:48</p>	Page 63	<p>1 A. Well, there aren't many specified tasks 11:37:57</p> <p>2 that -- there aren't a range of committees, there</p> <p>3 aren't -- there's not some elaborate hierarchy of</p> <p>4 responsibility. So I wouldn't say I've had any</p> <p>5 particular responsibility. The board is a very -- plays 11:38:18</p> <p>6 a very active role in running the organization. It</p> <p>7 is -- and making policy and deciding what to put up to</p> <p>8 vote for members or which direction the full-time staff</p> <p>9 management of the Guild should take. It is the --</p> <p>10 members who are on the board of directors are very 11:38:45</p> <p>11 involved and very vocal and discuss these issues</p> <p>12 extensively with each other. So being a member of the</p> <p>13 board is not simply a formality. Active participation</p> <p>14 is expected. And in my experience, active</p> <p>15 participation is par -- certainly in my part but I have 11:39:03</p> <p>16 witnessed among most other members -- is par for the</p> <p>17 course.</p> <p>18 Q. Can you explain to me the difference between</p> <p>19 The Authors Guild council and The Authors Guild board of</p> <p>20 directors? 11:39:26</p> <p>21 A. They're interchangeable terms.</p> <p>22 Q. Okay.</p> <p>23 A. In fact I've had this discussion myself with</p> <p>24 other members of the Guild: Are we the council, or are</p> <p>25 we the board of directors. And I believe the website 11:39:36</p>
Page 64	<p>1 lists us as members of the board of directors. So when 11:39:41</p> <p>2 I saw that in print, that -- I started to use in</p> <p>3 describing it. Colloquially, though, we often refer to</p> <p>4 ourselves as The Authors Guild council. So it is in</p> <p>5 fact a complete -- it's not a synonym, it's two names 11:39:59</p> <p>6 for the same thing.</p> <p>7 Q. Okay. Are there meetings of The Authors Guild</p> <p>8 council or The Authors Guild board of directors in</p> <p>9 addition to the meetings that members might attend?</p> <p>10 A. Well, there's an annual meeting of members and 11:40:24</p> <p>11 there are certain issues which according to the bylaws</p> <p>12 must be put up to a vote by the membership, including</p> <p>13 election to the board of directors or the council. But</p> <p>14 the full membership only takes part in those votes which</p> <p>15 can be made by proxy, by ballot; or by showing up in 11:40:46</p> <p>16 person at the annual meeting.</p> <p>17 The council -- again, I'm using this as</p> <p>18 another word for the board of directors -- the council</p> <p>19 meets both by phone and in person and with the</p> <p>20 participation of several members through teleconference. 11:41:09</p> <p>21 It meets on a more regular basis. Sometimes meetings</p> <p>22 are called to deal with issues as they arise. There's a</p> <p>23 regular -- there are regularly scheduled meetings in</p> <p>24 addition.</p> <p>25 Q. About how often does the council meet? 11:41:27</p>	Page 65	<p>1 A. That's a good question, because we have these 11:41:33</p> <p>2 extra meetings. Certainly there's at a minimum</p> <p>3 quarterly meetings. But we've had them much more</p> <p>4 frequently than that in the last two years. In addition</p> <p>5 to -- and, again, I -- I'm not speaking authoritatively. 11:41:49</p> <p>6 I'm just drawing upon my own imprecise recollections.</p> <p>7 We have regular quarterly meetings, and then we have had</p> <p>8 a number of extra meetings that have been called either</p> <p>9 by the president, Scott Turow, or else by the executive</p> <p>10 director and the general council for the The Authors 11:42:10</p> <p>11 Guild.</p> <p>12 Q. That may have partially answered my next</p> <p>13 question, but who in addition to the council also</p> <p>14 attends the meetings of the council?</p> <p>15 A. Apart from the members, the executive director 11:42:29</p> <p>16 and the general council for The Authors Guild.</p> <p>17 Q. Has the council discussed this lawsuit in its</p> <p>18 meetings?</p> <p>19 A. Yes, extensively.</p> <p>20 Q. In meetings you have attended? 11:42:45</p> <p>21 A. Yes. As I mentioned earlier, it's through</p> <p>22 official discussions both with the council and then</p> <p>23 individually with members of the council and also the</p> <p>24 executive director and general counsel that --</p> <p>25 MR. GOLDMAN: T.J. -- 11:43:04</p>

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1 THE WITNESS: -- I learned of -- 11:43:05

2 MR. GOLDMAN: T.J., I'm going to cut you off

3 just to advise you that to the extent that any of your

4 discussions involved discussions of legal issues with

5 counsel present in the room and when you were there, I 11:43:16

6 would advise you not to reveal the substance of any of

7 those discussions regarding legal issues that came up in

8 regard to this case or any legal matter at all.

9 THE WITNESS: Mm-hmm.

10 MR. GOLDMAN: So I -- I just caution you 11:43:30

11 because I felt like you were going down that road of

12 possibly revealing privileged information.

13 THE WITNESS: Then I retract my partial

14 answer.

15 MS. ROACH: Mark this as 1. 11:44:25

16 (Whereupon Exhibit Stiles-1

17 marked for identification.)

18 BY MS. ROACH:

19 Q. Do you recognize this document that's been

20 marked as Stiles-1? 11:44:31

21 A. This entire document is --

22 Q. Yes, sir. Do you recognize that document?

23 A. It has a form that is familiar, but I have no

24 specific recollection of this document.

25 Q. At the top it says, "Authors Guild Council 11:45:11

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1 (Whereupon Exhibit Stiles-2 11:46:54

2 marked for identification.)

3 BY MS. ROACH:

4 Q. Do you recognize this document?

5 A. Again, this is of a form that is familiar, but 11:47:15

6 I don't have a specific recollection of receiving this

7 document.

8 Q. And the title is "Authors Guild Council

9 Meeting, November 9, 2011." Do you see that?

10 A. State that again? I'm sorry. 11:47:33

11 Q. "Authors Guild Council Meeting, November 9,

12 2011."

13 A. Yes, I do see that.

14 Q. Do you recall if you attended that meeting?

15 A. I can only state that, A, I have no specific 11:47:42

16 recollection; and, B, this is only several days after

17 the birth of my daughter. And so if I did not attend,

18 it would not be a surprise because, like many parents of

19 newborn children just recently out of the hospital, I

20 was rather overwhelmed at that time. 11:48:05

21 Q. Understood. Understood. Do you recall

22 whether you received a copy of this document?

23 A. Again, I can -- as I stated before, I have no

24 specific recollection of receiving this document.

25 Though minutes of meetings are, as a rule, circulated at 11:48:20

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1 Meeting, September 15, 2011." 11:45:14

2 A. Mm-hmm.

3 Q. Did you attend that meeting?

4 A. I have no specific recollection of attending

5 this meeting. 11:45:22

6 Q. Did you receive a copy of these minutes

7 unredacted?

8 A. As a general rule, the minutes of meetings are

9 presented at the following meeting. So I can only state

10 that I would assume that -- whether I attended or not -- 11:45:44

11 I would have received a copy of the minutes. But I have

12 no specific recollection of receiving them because it is

13 such a standard procedure. And reading minutes of

14 previous meetings is not a particular pastime of mine,

15 as much as I'm thinking of taking it up now, so 11:46:03

16 recalling this in particular would be -- it would be

17 beyond my -- beyond the limit of truth for me to say I

18 specifically recall receiving this.

19 Q. And you don't recall whether you attended this

20 meeting? 11:46:20

21 A. I don't recall.

22 MS. ROACH: You can put that aside.

23 THE WITNESS: It appears this is dated a month

24 before the birth of my daughter.

25 MS. ROACH: Stiles-2. 11:46:53

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1 the beginning of new meetings. 11:48:23

2 MS. ROACH: And you can put that aside.

3 Mark this as Stiles-3.

4 (Whereupon Exhibit Stiles-3

5 marked for identification.) 11:48:53

6 BY MS. ROACH:

7 Q. Do you recognize this document that's marked

8 as Stiles-3?

9 A. Again, I recognize the form. I do not have a

10 specific recollection of this document. 11:49:02

11 Q. The title is "Authors Guild Council Meeting,

12 December 6, 2011 Minutes." Do you see that?

13 A. Yes, I do.

14 Q. Do you recall if you attended that meeting?

15 A. Yes, I do specifically recall this meeting. 11:49:16

16 Q. Did you receive a copy of these minutes after

17 the meeting?

18 A. I could not state specifically that I did.

19 Generally speaking, minutes of meetings are circulated

20 at the beginning of the following meeting and so I would 11:49:32

21 assume that I received a copy of these minutes, but I

22 can't say specifically that I remember receiving them.

23 MS. ROACH: And I just have a question for

24 counsel about the redactions on this document. Why was

25 there information redacted from this document? 11:49:50

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<p>1 MR. GOLDMAN: As I indicated to your 11:49:52 2 co-counsel Joe Peterson in a prior deposition, the 3 redactions were made to remove material relating to 4 matters that did not relate in any way to any of the 5 matters in this suit or in any way, shape, or form. 11:50:07 6 They were confidential internal Authors Guild matters, 7 and so they were redacted for that purpose.</p>	<p>1 A. I recall the discussion. 11:51:21 2 Q. Does this statement accurately reflect that 3 discussion? 4 A. I would rather -- I'm -- I believe that it may 5 be covered to a certain extent by discussion with -- 11:51:33 6 regarding legal representation for this lawsuit. So I'm 7 concerned about violating -- not -- not violating my own 8 privilege by discussing the contents of that discussion.</p>
<p>8 MS. ROACH: Thanks. I wanted to clarify for 9 the record on this deposition.</p>	<p>9 Q. Well, with respect to this specific statement, 10 this was provided to us in discovery and not claimed 11:51:54 11 as -- this particular statement as being privileged. So 12 we can talk about this particular statement here. Do 13 you understand what that statement means that I read to 14 you? And I can read it again if that would be helpful.</p>
<p>10 Q. Mr. Stiles, if you'll turn to the second page 11:50:24 11 of Stiles-3. You'll see in the middle portion of the 12 page -- I'm sorry -- in the middle portion of the page 13 there's a paragraph and the second sentence says, 14 "Mr. Akin added that the discovery requests may be 15 onerous, but the Guild will work to avoid 11:50:47 16 inconveniencing our plaintiffs, including board members 17 Pat Cummings, Roxanas Robinson, and T.J. Stiles."</p>	<p>15 A. The statement that begins in this upper 11:52:10 16 paragraph that's not redacted "Mr. Akin added" -- 17 Q. Yes. 18 A. -- that sentence? Yes, I understand it. 19 Q. And what is your understanding of what that 20 statement means? 11:52:22</p>
<p>18 Do you see that statement?</p>	<p>21 A. It states that the side represented by your 22 firm had made discovery requests. That it would be 23 possible that they would be seen as onerous. And that 24 the Guild would -- and, you know, counsel representing 25 the side that we were all a part of -- would attempt to 11:52:51</p>
<p>19 A. Yes.</p>	
<p>20 Q. First of all, who is Mr. Akin? 11:50:57</p>	
<p>21 A. Paul Akin is -- I believe his title is 22 executive director, which makes him a full-time 23 administrator of The Authors Guild.</p>	
<p>24 Q. Do you recall the discussion that's referenced 25 by this statement in the minutes here that I just read? 11:51:15</p>	
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<p>1 see that they were not onerous or unduly burdensome. 11:52:55</p>	<p>1 MR. GOLDMAN: As to further detail on the 11:54:02 2 statement that's on this piece of paper.</p>
<p>2 Q. Did Mr. Akin explain what he meant by how they 3 would work to avoid inconveniencing --</p>	<p>3 MS. ROACH: Okay. Well, I'd like to table the 4 issue and address it later, but I do not believe the 5 issue that the subject matter in the statement that was 11:54:17 6 provided to us in discovery is protected by the 7 privilege. And that privilege has essentially been 8 waived.</p>
<p>4 MR. GOLDMAN: I'm actually going to instruct 5 you not to answer that question. I don't want to go 11:53:10 6 into the substance of this any more. I think that 7 Mr. Akin, A, is an attorney; and, B, was offering legal 8 advice in that regard. I mean, talking about what -- 9 what was going to be done in order to ease the burden of 10 discovery. I think it's protected by the 11:53:30 11 attorney-client privilege.</p>	<p>9 THE WITNESS: Is it allowed for me to discuss 10 this briefly with counsel before I answer it? 11:54:23 11 MR. GOLDMAN: We can -- let's table it and 12 then we can talk. And I'll talk with counsel also and 13 we can come back to it. 14 THE WITNESS: Certainly. I abide by your 15 advice and instruction. 11:54:33 16 BY MS. ROACH:</p>
<p>12 MS. ROACH: But this statement in that 13 particular subject matter was provided to us in 14 discovery and not redacted for privileged reasons, and 15 so I believe I'm free to explore that particular subject 11:53:40 16 of that statement.</p>	<p>17 Q. Can I direct your attention to the second 18 paragraph that's on this redacted page. The paragraph 19 starts with "Mr. Turow." And I believe you mentioned 20 earlier that Scott Turow is the president of the Guild; 11:54:45 21 is that correct? 22 A. That is correct. 23 Q. And is that the Mr. Turow that's referred to 24 here in this statement?</p>
<p>17 Q. And so, Mr. Stiles --</p>	
<p>18 MR. GOLDMAN: I agree and I instruct him not 19 to answer. So --</p>	
<p>20 MS. ROACH: On the basis that this statement 11:53:51 21 that's here --</p>	
<p>22 MR. GOLDMAN: That additional statements 23 exploring this topic are privileged.</p>	
<p>24 MS. ROACH: As to the same subject matter as 25 the statement that was provided to us in discovery? 11:54:01</p>	<p>25 A. Yes. Interestingly, I learned upon meeting 11:54:53</p>

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<p>1 him that it's pronounced Turow. 11:54:56</p> <p>2 Q. Turow.</p> <p>3 A. I spent my entire life pronouncing it Turow,</p> <p>4 as you have. So again I -- just an interesting point of</p> <p>5 fact. 11:55:06</p> <p>6 Q. It's a learning experience for me. Turow.</p> <p>7 A. Not published by Knopf.</p> <p>8 Q. I'll work on my pronunciation.</p> <p>9 A. It's quite all right.</p> <p>10 Q. And if I could just read this paragraph or a 11:55:17</p> <p>11 portion of it. "Mr. Turow then invited questions from</p> <p>12 board members. A lively and varied discussion followed</p> <p>13 covering the timing of the HathiTrust and Google cases."</p> <p>14 And then the sentence goes on to list other topics.</p> <p>15 Do you recall the lively and varied discussion 11:55:33</p> <p>16 that's referenced here?</p> <p>17 A. I have a general recollection that there was a</p> <p>18 lively and varied conversation.</p> <p>19 Q. With respect to the timing of the HathiTrust</p> <p>20 and Google cases what -- what was discussed with respect 11:55:48</p> <p>21 to that?</p> <p>22 A. Well --</p> <p>23 MR. GOLDMAN: And, again, I'm going to caution</p> <p>24 you not to reveal the substance of any discussions that</p> <p>25 came from counsel at that -- at that meeting that you 11:56:02</p>	<p>1 were involved in to the extent that it involved advice 11:56:07</p> <p>2 from counsel.</p> <p>3 THE WITNESS: Yeah, it's difficult for me to</p> <p>4 provide much more substance in any event about this</p> <p>5 specific discussion. Part of the problem in my making a 11:56:20</p> <p>6 specific recollection is that -- as you might imagine,</p> <p>7 both individually in individual discussions and at board</p> <p>8 meetings, this specific litigation, the Google</p> <p>9 litigation, and issues that are related to it are a</p> <p>10 major topic of discussion and that we have had 11:56:48</p> <p>11 wide-ranging discussions about both -- that blend</p> <p>12 together -- for example, very well may have and probably</p> <p>13 was a blend of legal advice and general discussions</p> <p>14 about the topic "public perceptions."</p> <p>15 So I could not in all honesty give you a 11:57:14</p> <p>16 specific breakdown of this particular discussion. It is</p> <p>17 not so distinct in my memory from a broad range of</p> <p>18 discussions. And second of all, because I know that</p> <p>19 there was discussion about specific legal advice and</p> <p>20 approaches that was a part of this discussion, it would 11:57:34</p> <p>21 be very difficult for me to pick out -- again,</p> <p>22 considering the fact that I'm not trying to be obstinate</p> <p>23 or indirect -- but I'm unable to specifically break down</p> <p>24 this discussion given the broad context of how often we</p> <p>25 discussed this. And in this case I know that there was 11:57:51</p>
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<p>1 discussion of -- you know, that involves what I believe 11:57:56</p> <p>2 would probably be privileged discussions with counsel</p> <p>3 and about, you know, actual litigation discussions, that</p> <p>4 it would be very difficult for me to pick apart sort of</p> <p>5 general discussion of these issues from anything that 11:58:16</p> <p>6 might be governed by a privilege.</p> <p>7 BY MS. ROACH:</p> <p>8 Q. I'm not trying to focus on -- then on specific</p> <p>9 things that you may not be able to parse out which</p> <p>10 meeting that conversation was had or that sort of thing. 11:58:26</p> <p>11 And putting aside any statements made by counsel on</p> <p>12 these topics, just focusing on conversations among board</p> <p>13 members at these meetings, what discussions do you</p> <p>14 recall amongst board members at these meetings regarding</p> <p>15 the timing of the HathiTrust and Google cases? 11:58:47</p> <p>16 A. Well --</p> <p>17 MR. GOLDMAN: And, again, I'm going to caution</p> <p>18 you not to reveal any substance of those discussions to</p> <p>19 the extent that they were -- may have been formed by</p> <p>20 legal counsel. If you have -- and I'll say that with 11:58:59</p> <p>21 respect to this and with respect to the other issue that</p> <p>22 I was talking about before, if you have concerns that it</p> <p>23 might mix both, what I would suggest is that you tell me</p> <p>24 what they are off-line -- I mean, when we're on a break,</p> <p>25 and then if I feel that they don't implicate anything 11:59:16</p>	<p>1 privileged, then I'll -- you can answer them at that 11:59:18</p> <p>2 point.</p> <p>3 THE WITNESS: Yeah, I would like to table that</p> <p>4 and discuss whether it is privileged before giving you</p> <p>5 any more expansive answer. I mean, for example, I know 11:59:32</p> <p>6 that there were discussions that I was very actively a</p> <p>7 part of that did not relate specifically to issues you</p> <p>8 related. Like, for example, that the public is under a</p> <p>9 misperception. That there are millions and millions of</p> <p>10 huge number of orphan works. When in fact there are 11:59:50</p> <p>11 relatively few, since the -- most books that exist were</p> <p>12 published comparatively recently, much more recently</p> <p>13 than people generally realize. So there were</p> <p>14 discussions -- you know, this is the sort of discussion,</p> <p>15 public misperception. 12:00:08</p> <p>16 The idea that there is, you know, a public</p> <p>17 perception that copyright is some sort of outdated idea</p> <p>18 and that new -- new technology's made it outdated and</p> <p>19 how we need to actually represent that no, it should be</p> <p>20 part of the same healthy ecosystem and how should we 12:00:32</p> <p>21 approach the public with this that what we are trying to</p> <p>22 do is -- that licensing -- that they're not in</p> <p>23 opposition if the authors are included in the process</p> <p>24 and their rights are respected and that they're licensed</p> <p>25 properly. That this is something we need to have a 12:00:54</p>

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<p>1 strategy for talking to the public and making them 12:00:57 2 understand where The Authors Guild comes from, apart 3 from litigation alone. So these are the kinds of 4 discussions that took place.</p>	<p>1 MR. GOLDMAN: Objection. I don't think he 12:02:34 2 used the term "very recently."</p>
<p>5 Then there is the whole question of, you know, 12:01:09 6 specific ideas of what is going to happen with this 7 litigation that took part in the same discussion. And 8 so that is something that I suspect, as I've been 9 advised that discussions of timing and of relationships 10 between the Google and HathiTrust litigation that may 12:01:31 11 fall under the privileged -- under attorney-client 12 privilege.</p>	<p>3 MS. ROACH: Okay. I apologize. And I'll let 4 you go ahead --</p>
<p>13 BY MS. ROACH: 14 Q. Have you had any discussions -- have you had 15 any discussions on those topics where counsel was not -- 12:01:44 16 counsel for the Guild was not present at all?</p>	<p>5 THE WITNESS: What I said is "comparatively 12:02:40 6 recently."</p>
<p>17 A. Not that I recall, to be honest. That -- 18 those were topics that were very specifically brought up 19 when counsel was present.</p>	<p>7 BY MS. ROACH: 8 Q. Comparatively recently.</p>
<p>20 Q. And just a second ago you were talking about 12:02:08 21 that there was a misperception about orphan works. And 22 you said that this is because most -- and I apologize if 23 I'm misstating it; please correct me. But I believe you 24 said something to the effect that most books that are 25 published were published very recently? 12:02:32</p>	<p>9 A. Yes. That copyright -- that there was an 10 explosion of publishing -- and again, I'm speaking very 12:02:46 11 impressionistically -- and this is a matter brought up 12 not as a result of my own research -- that my 13 recollection of that discussion is that really there was 14 an explosion of publishing in the 20th Century. And so 15 when you look at the number of titles that are in 12:03:01 16 existence today -- number of books not in print but 17 number of books whose text exists somewhere -- that 18 there has not been a steady even growth from 18th 19 Century to today. But that in fact there's an 20 exponential growth of the number of titles published 12:03:22 21 within the frame -- time frame -- framework of time in 22 the United States under which they would be covered by 23 copyright, but also within that window, a time frame in 24 which the authors or their assigns would be -- immediate 25 assigns would be alive. And that the idea that there 12:03:43</p>
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<p>1 are all these books published, you know, with whatever 12:03:48 2 the earliest date for copyright-protected works is -- 3 and I can't tell you off the top of my head; let's say 4 it's 1923 -- that there are millions of books published 5 from 1923 to 1933, and those authors are all dead and 12:04:02 6 there's no one alive who owns the copyright or knows 7 about it.</p>	<p>1 MR. GOLDMAN: Objection to form. 12:05:08</p>
<p>8 That's just not true. 9 That there are vastly more -- at least in 10 comparative terms, vastly more that have been published 12:04:15 11 since 1950 or 1960 or 1970 than were published in this 12 earlier period but still covered by a copyright. 13 Because, again, there has been an exponential growth 14 really in the last few decades.</p>	<p>2 THE WITNESS: -- at all.</p>
<p>15 This was a discussion which was held -- I 12:04:31 16 cannot cite statistics, I cannot verify the truth or 17 falsehood of the statements that were made. But this 18 was a discussion that was made; that there's a 19 misperception that The Authors Guild is trying to 20 prevent these -- this huge percentage of works from 12:04:44 21 reaching the public.</p>	<p>3 BY MS. ROACH: 4 Q. I'm just trying to understand. You gave an 5 explanation about your perception that there is a 12:05:13 6 misperception about orphan works. And you said that you 7 hadn't done research and you couldn't cite statistics. 8 And I'm just trying to understand where this 9 understanding came from, if it came out of discussions 10 with colleagues at The Authors Guild council meeting or 12:05:27 11 if it came from reading an article or some other source.</p>
<p>22 Q. And your understanding that you just described 23 of the -- of this misperception, your understanding of 24 that came from council meeting discussion?</p>	<p>12 A. No, this was from -- something that came up -- 13 I believe at this meeting. But it may have come up 14 earlier. Because members of The Authors Guild staff and 15 some individual authors look into these matters. You 12:05:43 16 know, these are points of discussion in the public 17 domain that we all -- that we are discussing these 18 issues; that there's policy that's being framed as well 19 as of course the specific litigation issues, which we're 20 not going into. And that there's a public misperception 12:06:01 21 that a vast majority of the works that are copyright 22 protected are orphan when, you know, as a percentage of 23 the whole, they're much smaller than people realize. 24 This was a discussion that came up in terms of public 25 perceptions, about things that go beyond specific 12:06:18</p>
<p>25 A. I don't understand that question -- 12:05:07</p>	

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<p>1 litigation. Because The Authors Guild plays a number of 12:06:23</p> <p>2 roles; and one of them is advocacy in the public</p> <p>3 domain -- in the public square, I should say.</p> <p>4 Q. Is it your understanding that the public</p> <p>5 believes that most -- or that a large number of 12:06:36</p> <p>6 copyrighted works are orphans?</p> <p>7 MR. GOLDMAN: Objection to the form.</p> <p>8 THE WITNESS: I have no idea what the public</p> <p>9 thinks. I mean -- and also I wouldn't think that most</p> <p>10 of the public cares. But there's a public discussion. 12:06:50</p> <p>11 And so that's all I would say. My understanding of what</p> <p>12 the public thinks is unclear.</p> <p>13 BY MS. ROACH:</p> <p>14 Q. Right. You said it was a public perception so</p> <p>15 I was trying to understand that you heard there was a 12:07:03</p> <p>16 public perception, so I was trying to understand if you</p> <p>17 agreed there was a public perception of that nature?</p> <p>18 MR. GOLDMAN: Objection to the form of the</p> <p>19 question.</p> <p>20 THE WITNESS: To be honest, I could not answer 12:07:16</p> <p>21 that question. I don't know what the public thinks.</p> <p>22 And it is my -- yes, I agree to the extent that people</p> <p>23 who discuss this issue in public forums represent the</p> <p>24 orphan books issue to be a larger problem than in</p> <p>25 comparative terms than it really is. I would say that 12:07:44</p>	<p>1 is my impression. Not that I'm saying that it's my 12:07:48</p> <p>2 understanding that it is -- orphan books don't exist.</p> <p>3 I'm not taking an extreme position. I'm talking about</p> <p>4 relative -- relatively vague term -- idea of relative</p> <p>5 weight and that the orphan-books issue sometimes is 12:08:06</p> <p>6 given excessive weight in public debates about book</p> <p>7 availability. That's my general impression, subjective</p> <p>8 impression.</p> <p>9 BY MS. ROACH:</p> <p>10 Q. Are you aware of any research that helps 12:08:22</p> <p>11 clarify the extent of the so-called orphan works</p> <p>12 problem?</p> <p>13 A. No.</p> <p>14 MR. GOLDMAN: Objection. Objection to the</p> <p>15 form. 12:08:34</p> <p>16 THE WITNESS: No. I -- I could not list any</p> <p>17 research. I've not conducted any research into the</p> <p>18 issue.</p> <p>19 BY MS. ROACH:</p> <p>20 Q. In this case you've alleged that the 12:08:58</p> <p>21 university defendants in this lawsuit have infringed</p> <p>22 your copyright; is that correct?</p> <p>23 A. Yes.</p> <p>24 MS. ROACH: Actually, we are about an hour in</p> <p>25 from our last break. Now would be -- I'm about to 12:09:20</p>
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<p>1 launch into a new subject. If now would be a good time 12:09:24</p> <p>2 to take a break?</p> <p>3 THE WITNESS: Let's take a break.</p> <p>4 MS. ROACH: We could do a relatively short</p> <p>5 lunch break so we don't -- I don't want to prolong this 12:09:33</p> <p>6 any more than necessary.</p> <p>7 MR. GOLDMAN: Okay.</p> <p>8 MS. ROACH: But I wanted you to have an</p> <p>9 opportunity to have lunch.</p> <p>10 THE WITNESS: Sure. 12:09:43</p> <p>11 MR. GOLDMAN: So you want to do lunch now</p> <p>12 or --</p> <p>13 MS. ROACH: Is that okay?</p> <p>14 MR. GOLDMAN: That's fine.</p> <p>15 MS. ROACH: Or would you rather go another 12:09:46</p> <p>16 hour and do lunch?</p> <p>17 MR. GOLDMAN: We could also go another half an</p> <p>18 hour and do lunch.</p> <p>19 MS. ROACH: Okay.</p> <p>20 MR. GOLDMAN: We do have to do breaks every 12:09:52</p> <p>21 hour -- you're still taking notes now; aren't you?</p> <p>22 THE REPORTER: (Reporter nods.)</p> <p>23 MR. GOLDMAN: Can we go off the record?</p> <p>24 (Recess taken from 12:10 p.m. to 1:36 p.m.)</p> <p>25 MR. GOLDMAN: During the break counsel and I 13:36:44</p>	<p>1 discussed an issue regarding privilege that arose 13:36:46</p> <p>2 previously in the deposition. It was regarding the</p> <p>3 document that was marked Stiles-3. On the page Bates</p> <p>4 marked AG 0003871, that document and that page contains</p> <p>5 statements regarding a discussion that was purportedly 13:37:04</p> <p>6 had at an Authors Guild Council Meeting on December 6,</p> <p>7 2011. I had instructed the witness not to answer</p> <p>8 questions regarding certain statements on that document.</p> <p>9 I now wish to clarify that instruction and to hopefully</p> <p>10 resolve this issue. The two statements that I was 13:37:25</p> <p>11 concerned implicated the attorney-client privilege, the</p> <p>12 first one was the statement that says Mr. Akin added</p> <p>13 that the discovery requests may be onerous. And I was</p> <p>14 concerned that questions regarding the substance -- the</p> <p>15 further substance of that statement would implicate 13:37:45</p> <p>16 attorney-client privilege.</p> <p>17 And the second statement was -- in the second</p> <p>18 paragraph on that page that says "A lively and varied</p> <p>19 discussion followed following the discussion of the</p> <p>20 HathiTrust and Google cases," I am going to allow 13:38:04</p> <p>21 Mr. Stiles to answer any questions that -- regarding</p> <p>22 those topics, if there were any -- withdrawn. I'm now</p> <p>23 going to allow Mr. Stiles to answer any questions</p> <p>24 regarding those topics that do not reveal communications</p> <p>25 by Jan's Constantine, the general counsel of The Authors 13:38:30</p>

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1 Guild. And to the extent that there were communications 13:38:32
 2 regarding those topics by anyone other than Jan
 3 Constantine, general counsel for The Authors Guild, he
 4 may answer those questions if there were in fact any
 5 such communications. 13:38:44
 6 MS. ROACH: And I just also wanted to note
 7 that just to clarify and our understanding and part of
 8 our discussion is that Mr. Akin is not an attorney for
 9 the Guild and not providing legal advice in the
 10 statement that's in this document. The statement was 13:39:02
 11 also included in a document produced to us in discovery.
 12 And the topic about Mr. Akin's statement about the
 13 discovery requests may be onerous and the Guild working
 14 to avoid inconveniencing plaintiffs was discussed in a
 15 previous deposition as well. 13:39:19
 16 And so -- but we are in agreement now that
 17 that -- that that objection I believe is withdrawn about
 18 privilege with respect to the statement Mr. Akin made
 19 at -- at a meeting as reflected in this document,
 20 Stiles-3. 13:39:34
 21 MR. GOLDMAN: Let me just clarify. The
 22 statement that Mr. Akin purportedly made, as we may soon
 23 find out.
 24 MS. ROACH: Right.
 25 Q. So with that predicate, Mr. Stiles, just to go 13:39:42

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1 Q. Yes. 13:40:53
 2 A. No.
 3 Q. Other than Jan Constantine, were there any
 4 discussions among the board about those topics?
 5 A. My specific recollection is that those topics 13:41:02
 6 to the extent they were discussed was with board members
 7 and Jan Constantine as the other interlocutor in this
 8 conversation. In other words, it was not -- these
 9 questions of legal strategy and specific details of
 10 litigation, discovery, what have you -- were not a back 13:41:23
 11 and forth among board members, but were made to and from
 12 Jan Constantine.
 13 Q. Okay. So when the minutes state that Mr. Akin
 14 made these statements, these minutes are incorrect?
 15 A. I would say yes. To my -- best of my 13:41:38
 16 recollection, yes.
 17 Q. And we already had some discussion about the
 18 second paragraph of this document, Stiles-3 at the
 19 bottom of page 2. And you talked some about some of
 20 these topics there were discussion among some of the 13:42:01
 21 members. You talked about potential misconceptions
 22 about the orphan works problem, which is addressed here,
 23 as well as sort of the Guild's public response to that.
 24 With respect to the statement here that the discussion
 25 included the timing of the HathiTrust and Google cases, 13:42:21

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1 back and revisit this issue very briefly, this document 13:39:45
 2 that's marked as Stiles-3 -- do you have a copy of that
 3 before you?
 4 A. Yes.
 5 Q. On page 2 of that document in the middle it 13:39:54
 6 states, "Mr. Akin added that the discovery requests may
 7 be onerous, but the Guild will work to avoid
 8 inconveniencing our plaintiffs including board members
 9 Pat Cummings, Roxana Robinson, and T.J. Stiles."
 10 Do you see that? 13:40:08
 11 A. Yes, I do.
 12 Q. To your recollection, does this statement in
 13 the minutes that are Exhibit Stiles-3 accurately reflect
 14 the statement that was made at that meeting?
 15 A. No. My specific recollection is that all 13:40:21
 16 discussion of legal matters, including litigation and
 17 legal strategy, was made specifically by Jan
 18 Constantine, counsel for the Guild.
 19 Q. And you do not recall Mr. Akin making
 20 statement about discovery requests may be onerous? 13:40:40
 21 A. Specifically about that, no.
 22 Q. And you do not recall Mr. Akin making any
 23 statements about the Guild working to avoid
 24 inconveniencing the plaintiffs?
 25 A. From Mr. Akin? 13:40:51

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1 was there any discussion of that topic by anyone other 13:42:27
 2 than Jan Constantine?
 3 A. To the best of my recollection, again, as I
 4 mentioned with the previous paragraph, discussions
 5 having to do with legal strategy and specific 13:42:39
 6 litigation, those discussions were between individual
 7 board members and Jan Constantine rather than being
 8 discussions among board members that the board members
 9 were making -- including myself -- were making inquiry
 10 and receiving advice and other -- what I would consider 13:43:04
 11 privileged discussions with Jan Constantine about these
 12 matters.
 13 Q. What about the other topics that are mentioned
 14 here, the differing reactions to the HathiTrust case
 15 from public and academic libraries? Do you recall a 13:43:18
 16 discussion of that topic at this meeting?
 17 A. Yes, absolutely.
 18 Q. And did that discussion involve members of the
 19 board?
 20 A. Yes, it did. 13:43:32
 21 Q. And what was discussed with respect to that
 22 topic?
 23 A. Well, we -- there was -- my distinct
 24 recollection is that there were two sorts of discussions
 25 that were taking place; that when it came to any actual 13:43:42

Page 90	<p>1 litigation, that there was a sense that we have a 13:43:46</p> <p>2 counsel for the Guild and that I and other board members</p> <p>3 as plaintiffs have legal strategy conversations with our</p> <p>4 counsel. And that that is -- was something that -- of</p> <p>5 not just a general topic for discussion. 13:44:05</p> <p>6 There was discussions of courses of action,</p> <p>7 et cetera. So it then bounced back and forth amongst</p> <p>8 the board. When it came to matters of public relations,</p> <p>9 the public debate, those sorts of things, those are</p> <p>10 activities that are not carried out by a highly 13:44:21</p> <p>11 technical -- you know, a qualified person -- an attorney</p> <p>12 in a courtroom or legal proceedings. That's a very</p> <p>13 specific thing. That's not something anybody says well,</p> <p>14 maybe I'll go into court; whereas, any one of us could</p> <p>15 write an op-ed or discuss what our thoughts would be. 13:44:42</p> <p>16 We all felt qualified to discuss those issues and were</p> <p>17 all participants in public debate. As opposed to our</p> <p>18 being -- you know, we -- there's a different thing</p> <p>19 between a legal case and what the Guild and individual</p> <p>20 plaintiffs are doing in that case and sort of what board 13:44:58</p> <p>21 members can do, what the debate is, brainstorming in a</p> <p>22 way that I -- my clear recollection is that it was a</p> <p>23 very different sense in discussing legal strategy versus</p> <p>24 discussing public debate and whatnot.</p> <p>25 Q. Right. My question is what topics were 13:45:19</p>	Page 91	<p>1 discussed with respect to the differing reactions to the 13:45:22</p> <p>2 HathiTrust case from public and academic libraries.</p> <p>3 That topic that was listed as one of the topics as</p> <p>4 discussed has nothing to do with legal strategies.</p> <p>5 A. Yes, I see your point. The idea was discussed 13:46:05</p> <p>6 that there is a need for the Guild to appeal to the</p> <p>7 public and to try to shift the public debate and clear</p> <p>8 up any misperception that the Guild was actually hostile</p> <p>9 to or in opposition to libraries; that in fact, we see</p> <p>10 us as authors as having a shared mission with libraries 13:46:38</p> <p>11 and within that mission preserving our rights and</p> <p>12 encouraging the creation of new knowledge and new</p> <p>13 creative work.</p> <p>14 So a discussion was made about the</p> <p>15 possibility -- about what should be done beyond the 13:46:55</p> <p>16 legal strategy. So here are specific legal issues,</p> <p>17 specific litigation, specific legal strategies. And</p> <p>18 then as I recall, I was one of the people who actually</p> <p>19 brought this up, here is the inside question and here is</p> <p>20 the outside question. And there -- isn't there a sense 13:47:12</p> <p>21 that libraries are being picked on by greedy authors, a</p> <p>22 misperception, I would say. And perhaps we need to be</p> <p>23 more active and more persuasive in the public debate</p> <p>24 about why we're having litigation or why our rights are</p> <p>25 at issue, and why that -- why these questions have 13:47:40</p>
Page 92	<p>1 implications for our broader culture, the creation of 13:47:44</p> <p>2 new works of literary matter and creation of new</p> <p>3 knowledge.</p> <p>4 So, again, the debate was I think -- as I</p> <p>5 recall it, it was very consciously framed in two 13:47:57</p> <p>6 separate ways. Here's our legal discussion, now what</p> <p>7 else should we talk about? So I talked about -- and</p> <p>8 other people talked about, you know, whether we should</p> <p>9 as a Guild enlist public relations advice, if we as</p> <p>10 individual members should be writing op-ed pieces, if we 13:48:18</p> <p>11 should have a coordinated strategy or we should have --</p> <p>12 individually go out and do what we can. It was a</p> <p>13 general discussion of what we can do to make an impact</p> <p>14 on public perceptions.</p> <p>15 Q. And this -- part of it is just me trying to 13:48:35</p> <p>16 understand the statement here to the extent you can shed</p> <p>17 some light of it because you were there in part of the</p> <p>18 discussion when it says "the differing reactions in the</p> <p>19 HathiTrust case from public and academic libraries."</p> <p>20 I'm trying to understand what the "differing" is 13:48:49</p> <p>21 referring to. Is it saying that that there were</p> <p>22 different reactions from public and academic libraries?</p> <p>23 A. I must tell you, I honestly don't recall what</p> <p>24 that specifically refers to.</p> <p>25 Q. Okay. Okay. 13:49:03</p>	Page 93	<p>1 A. That's an interesting clause because it is a 13:49:05</p> <p>2 little unclear. But I have to tell you, I don't</p> <p>3 remember any detail that would shed light on it.</p> <p>4 Q. I'm just trying to understand why it would say</p> <p>5 that rather than "varying reactions. "Differing" 13:49:18</p> <p>6 sounded more opposed to each other.</p> <p>7 Before the break I asked you this question but</p> <p>8 if it's all right with you I'll ask it again.</p> <p>9 You've alleged that the university defendants</p> <p>10 in this lawsuit have infringed your copyright; is that 13:49:43</p> <p>11 correct?</p> <p>12 A. Yes.</p> <p>13 MS. ROACH: This will be Stiles-4.</p> <p>14 (Whereupon Exhibit Stiles-4</p> <p>15 marked for identification.) 13:50:09</p> <p>16 BY MS. ROACH:</p> <p>17 Q. Showing you what -- you've been handed what's</p> <p>18 marked Stiles-4. Do you recognize this document?</p> <p>19 A. Yes, I believe so.</p> <p>20 Q. What I've handed you as Stiles-4 is the first 13:50:22</p> <p>21 amended complaint that's filed in the case that we're</p> <p>22 discussing here today. Have you reviewed this document</p> <p>23 before?</p> <p>24 A. Yes, I believe I have.</p> <p>25 Q. When did you review this document? 13:50:37</p>

Page 94	<p>1 A. I could not tell you specifically. 13:50:38</p> <p>2 Q. Generally?</p> <p>3 A. Well, I'm not sure. It would have been last</p> <p>4 year sometime. Quite frankly I'm drawing a blank on</p> <p>5 when I reviewed it. 13:51:00</p> <p>6 Q. Do you recall if you reviewed it before it was</p> <p>7 filed?</p> <p>8 A. My general recollection is yes.</p> <p>9 Q. At the end of this document there's an</p> <p>10 exhibit, Exhibit A, and it has separately paginated -- 13:51:17</p> <p>11 separately numbered pages. If you could turn to page 2</p> <p>12 of Exhibit A at the end of Stiles-4.</p> <p>13 A. Yes.</p> <p>14 Q. You see there is one row in the exhibit that</p> <p>15 bears your name in the left-hand column. 13:51:36</p> <p>16 A. Yes.</p> <p>17 Q. And it identifies your work Jesse James: Last</p> <p>18 Rebel of the Civil War.</p> <p>19 A. Yes.</p> <p>20 Q. Is this the only work in which you hold 13:51:49</p> <p>21 copyright that you claim is infringed by the defendants</p> <p>22 in this case?</p> <p>23 MR. GOLDMAN: Objection to the form to the</p> <p>24 extent it calls for legal conclusion.</p> <p>25 You can answer. 13:52:00</p>	Page 95	<p>1 THE WITNESS: Speaking not as a lawyer, I 13:52:04</p> <p>2 would say yes.</p> <p>3 BY MS. ROACH:</p> <p>4 Q. Is the information in this row about the</p> <p>5 publisher, publication date, is that information 13:52:14</p> <p>6 correct?</p> <p>7 A. Yes.</p> <p>8 Q. How did you discover that this work was</p> <p>9 allegedly digitized by the libraries in this case?</p> <p>10 A. I found out from, I believe, Jan Constantine. 13:52:36</p> <p>11 Q. Do you recall when that conversation happened?</p> <p>12 A. No.</p> <p>13 Q. Do you remember generally when that</p> <p>14 conversation happened?</p> <p>15 A. I have to say I'm not sure. The way I recall 13:53:12</p> <p>16 it -- and I would -- I would not want to stake my life</p> <p>17 on it -- it was some point last year. I don't recall</p> <p>18 specifically and I -- maybe -- I could easily be wrong</p> <p>19 about that.</p> <p>20 Q. After you heard that your work may have been 13:53:34</p> <p>21 digitized and included in the HathiTrust, did you check</p> <p>22 to see if that was true?</p> <p>23 MR. GOLDMAN: Objection to the form. I think</p> <p>24 it misstates his testimony. But you can -- you can</p> <p>25 answer. 13:53:50</p>
Page 96	<p>1 BY MS. ROACH: 13:53:50</p> <p>2 Q. There came a time that you were advised or</p> <p>3 told that your work Jesse James: Last Rebel of the</p> <p>4 Civil War was included as a digitized work in the</p> <p>5 HathiTrust Digital Library; is that correct? 13:53:59</p> <p>6 A. Yes.</p> <p>7 Q. After you were told that that was the case,</p> <p>8 did you check to see if it was true?</p> <p>9 A. I did go to the HathiTrust website and found</p> <p>10 that my book was listed. But of course it is not made 13:54:15</p> <p>11 full-text available, so it did not provide -- I don't</p> <p>12 recall a specific confirmation that the entire book had</p> <p>13 been digitized, as I recall.</p> <p>14 Now, again, that's -- I'm referring to a</p> <p>15 specific incident in which when I found out about this 13:54:32</p> <p>16 and I went to the HathiTrust and looked it up. So</p> <p>17 that's a subjective recollection of one specific</p> <p>18 incident. I've gone to the Internet many times in the</p> <p>19 last year or two, and so I couldn't -- I could be</p> <p>20 mistaken. But I -- as I recall it, I did in fact look 13:54:51</p> <p>21 it up and find it on the HathiTrust site. That's what I</p> <p>22 would say.</p> <p>23 MS. ROACH: Mark this next.</p> <p>24 (Whereupon Exhibit Stiles-5</p> <p>25 marked for identification.) 13:55:38</p>	Page 97	<p>1 BY MS. ROACH: 13:55:38</p> <p>2 Q. You're being handed a document that's marked</p> <p>3 Stiles-5. Have you seen this document before?</p> <p>4 A. Yes.</p> <p>5 Q. Are these your responses to the first set of 13:56:00</p> <p>6 interrogatories and document request served on you by</p> <p>7 the university defendants in this case?</p> <p>8 A. Yes.</p> <p>9 Q. If you could, please turn to the last page.</p> <p>10 It does not have a page number. It says "Verification." 13:56:15</p> <p>11 A. Mm-hmm.</p> <p>12 Q. And it states that you've read and are</p> <p>13 familiar with the contents of the responses to</p> <p>14 interrogatories 1 through 7 and that the matters are</p> <p>15 true to your knowledge. Do you see that? 13:56:30</p> <p>16 A. Yes.</p> <p>17 Q. And is that your signature at the bottom of</p> <p>18 the page there --</p> <p>19 A. Yes.</p> <p>20 Q. -- dated January 5, 2012? 13:56:38</p> <p>21 A. Yes.</p> <p>22 Q. And you signed under penalty of perjury, is</p> <p>23 that correct?</p> <p>24 A. Yes.</p> <p>25 Q. So on January 5, 2012 you verified that the 13:56:47</p>

Page 98	<p>1 responses in Stiles-5 are true and correct? 13:56:50</p> <p>2 A. Yes.</p> <p>3 Q. Okay. Could you please turn to page 5.</p> <p>4 A. Yes.</p> <p>5 Q. And in interrogatory 1 it asks you to identify 13:57:04</p> <p>6 each work for which you are the legal or beneficial</p> <p>7 owner of a copyright or an exclusive right under a</p> <p>8 copyright that you claim has been infringed by one or</p> <p>9 more of the defendants in this lawsuit. Do you see</p> <p>10 that? 13:57:21</p> <p>11 A. Yes.</p> <p>12 Q. And there's a list of objections at the</p> <p>13 beginning of the response, but the response begins at --</p> <p>14 the true response begins at the end of that page and it</p> <p>15 says that the response to this interrogatory is in 13:57:34</p> <p>16 Schedule A. Do you see that?</p> <p>17 A. Yes.</p> <p>18 Q. If you would turn to the second-to-last page</p> <p>19 of this document; you'll see a page titled Schedule A.</p> <p>20 A. I have it. 13:57:50</p> <p>21 Q. Is this the Schedule A that's referred to in</p> <p>22 the response to interrogatory 1?</p> <p>23 A. Yes.</p> <p>24 Q. And there is only one work listed here; is</p> <p>25 that correct? 13:58:01</p>	Page 99	<p>1 A. Yes. 13:58:02</p> <p>2 Q. And it's Jesse James: Last Rebel of the Civil</p> <p>3 War?</p> <p>4 A. Yes.</p> <p>5 Q. And does this page accurately list the 13:58:13</p> <p>6 information regarding that work, publication, dates?</p> <p>7 A. To the best of my knowledge, yes.</p> <p>8 Q. It lists two publishers, Knopf and Vintage. I</p> <p>9 believe you have testified earlier that they are</p> <p>10 related? 13:58:31</p> <p>11 A. Yes.</p> <p>12 Q. And it lists three different publication</p> <p>13 dates. Are there any other publication dates that</p> <p>14 aren't listed here?</p> <p>15 A. To my knowledge if we were discussing US 13:58:41</p> <p>16 publication, then the only other possible publication</p> <p>17 date would have been the edition that was licensed for</p> <p>18 the National Library Service for the Blind that --</p> <p>19 again, I -- without making any legal statement as to</p> <p>20 whether it constitutes a separate edition, that might be 13:59:15</p> <p>21 considered another publication.</p> <p>22 Q. Do you know when that happened?</p> <p>23 A. I do not know. I know that I authorized it</p> <p>24 when the book was being published. I don't recall when.</p> <p>25 Since it was -- I allowed it and it's non-remunerative, 13:59:31</p>
Page 100	<p>1 it was licensed without any compensation to myself. So 13:59:39</p> <p>2 I have to say as a result I did not follow it as closely</p> <p>3 as the publications and editions which actually</p> <p>4 generated revenue.</p> <p>5 Q. And what was the format of that potential 13:59:50</p> <p>6 publication or the -- what is the format that was made</p> <p>7 available to the National Library Service for the Blind?</p> <p>8 A. It was an audiobook.</p> <p>9 I should also correct myself by saying there</p> <p>10 was another edition that was licensed that was not 14:00:06</p> <p>11 published by my primary publisher which was the limited</p> <p>12 edition leather-bound edition by Easton Press, I think</p> <p>13 it's called. And, again, that was a small grant for a</p> <p>14 limited print run, a small number of books. And I could</p> <p>15 not tell you off the top of my head the publication 14:00:40</p> <p>16 date.</p> <p>17 Q. Are there any documents that would help you</p> <p>18 remember when -- the publication date?</p> <p>19 A. There probably are, but at this point I would</p> <p>20 probably have to request the information from my 14:00:58</p> <p>21 publisher.</p> <p>22 Q. So in addition to the publications that are</p> <p>23 listed here, you noted the National Library Service for</p> <p>24 the Blind and Easton Press. Are there any others?</p> <p>25 A. I -- Easton Press I'm speaking off the cuff. 14:01:13</p>	Page 101	<p>1 It slipped my mind before because it was a very small 14:01:17</p> <p>2 unusual grant. The only other publications that I can</p> <p>3 think of were overseas. There was an edition published</p> <p>4 in the United Kingdom, both hardcover and paperback.</p> <p>5 There was also an Italian translation. 14:01:38</p> <p>6 Q. And do you know the year that the UK hardcover</p> <p>7 and paperback editions were published?</p> <p>8 A. The UK hardcover was published in 2010, I</p> <p>9 believe. And the paperback, I believe, came out in</p> <p>10 2011. 14:01:54</p> <p>11 Q. And who was the publisher for those editions?</p> <p>12 A. It's -- I would have to look it up. It's a UK</p> <p>13 branch of Random House International, I believe. You'll</p> <p>14 have to pardon me. It's slipping my head at the moment.</p> <p>15 Q. That's fine. And the Italian translation, do 14:02:18</p> <p>16 you recall when that edition was published?</p> <p>17 A. I'm not sure. It would have been probably '06</p> <p>18 or '07, but I'm guessing at that point.</p> <p>19 Q. Do you recall who the publisher was for that</p> <p>20 edition? 14:02:45</p> <p>21 A. My Italian pronunciation is horrible. I think</p> <p>22 it's Il Saggiatore. But I -- again, I could be -- as</p> <p>23 with Easton Press, I could be mistaken.</p> <p>24 Q. And then do you see the column here that says</p> <p>25 most recent hard copy or electronic? 14:03:17</p>

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1 A. Mm-hmm. 14:03:21

2 Q. And in the space below it says electronic?

3 A. Yes.

4 Q. What does that mean?

5 A. Jesse James: Last Rebel of the Civil War was 14:03:30

6 published as a digital book in 2010. It is available

7 through I believe all major retailer outlets as an --

8 what is commonly called an e-book.

9 Q. Having the word "electronic" in this box, does

10 that mean that the most recent publication was 14:03:51

11 electronic as opposed to being hard copy?

12 A. That is correct. And the original contract

13 for the book in '02 did not specifically assign

14 electronic rights. And I, however, was aware that I had

15 these electronic rights. I was very concerned that as 14:04:08

16 the electronic book market or e-book market blossomed,

17 that I use these rights in the most profitable manner to

18 myself. And I myself broached discussions with my

19 publisher to -- in order to bring out the digital

20 version and electronic version of the book, and at my 14:04:31

21 urging a -- an amendment to the original contract was

22 signed and a digital version was published and it's

23 still available today. Two clicks away on Amazon.

24 Q. Do you recall when you requested from your

25 publisher that an electronic version of your book be 14:04:50

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1 they're concerned in this case. 14:07:09

2 The second thing I would add is that the

3 damages that are listed --

4 Q. Could you tell me what page or response?

5 A. This is on page 8. It lists, "Loss or 14:07:23

6 potential loss of control with the reproduction or

7 distribution of plaintiff's copyrighted works. Exposure

8 of plaintiff's copyrighted work in virtually unlimited

9 piracy. Loss or potential loss of revenue from sale of

10 hard copies, and digital copies of works to libraries." 14:07:50

11 And on page 9, "Loss or potential loss of

12 revenue from licensing digital copies of works to

13 libraries."

14 These are all quite true, and I would add one

15 more, which is the loss of one sale of one easily 14:08:07

16 available and inexpensive digital edition of my book,

17 which the University of Michigan library and the

18 HathiTrust chose to create their own digital edition of

19 the book, which is inexpensive and readily available as

20 a commercially marketed e-book. And so that is the 14:08:33

21 first harm was done to me for which all these others

22 flow.

23 Q. Do you know when the digitized -- let me

24 withdraw that.

25 Are you aware when the HathiTrust obtained a 14:08:58

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1 made available? 14:04:54

2 A. This would have been -- I have to speak

3 without any documentation to validate my memories, but

4 it would have been one to two years before the actual

5 publication date. So it would have been '08 or '09 that 14:05:17

6 I brought the subject up. And then it was sometime

7 before the edition was prepared and was actually

8 marketed.

9 Q. And then I have one last question I should

10 have asked earlier when we were talking about the 14:05:38

11 verification. So if you could, please turn to the last

12 page of this document again. And you confirmed earlier

13 that on January 5, 2012 you verified that the responses

14 to the interrogatories in this document were true and

15 correct to the best of your knowledge; is that right? 14:05:55

16 A. Yes.

17 Q. Are they still true and correct, as you sit

18 here today?

19 A. I would add or amend two things. One is that

20 if it is of legal significance, that I would add the 14:06:32

21 additional editions of the book that were published

22 that -- which I've discussed here. I consider those to

23 be notably secondary to these three editions. And so

24 these are the three primary editions as far as US

25 copyright is concerned and my own income and rights as 14:07:01

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1 digital copy of your work? 14:09:02

2 A. No. But I'm also not aware that -- of -- I'm

3 also aware -- I'm not aware of when they created a

4 digital edition, but I am aware of the fact that I

5 retained the digital rights. And that not only did I 14:09:22

6 retain the digital rights, but I was also keenly aware

7 of their value and in fact aggressively pursued their

8 commercial exploitation in order to make my book widely

9 and generally available in this format.

10 I'm also under the impression -- not speaking 14:09:37

11 as a lawyer but merely as a layman -- that -- that this

12 does not cease to become the appropriation of my work

13 simply because it was done before the book was completed

14 in an e-book form. And had I been contacted by the 14:10:00

15 University of Michigan in advance, had I been contacted

16 by HathiTrust in advance and was my licensing and

17 permission requested in advance, whether or not it was

18 before the publication of my digital book, there's

19 always the possibility that I would not be a party to

20 this lawsuit. However, they did not do that. Nor have 14:10:18

21 they chosen to destroy their, what I would call a

22 pirated copy and then purchase a legal licensed

23 commercially available edition for their collection for

24 whatever use they wish to make of it, archival or

25 otherwise. Instead, they have an edition that was not 14:10:37

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1 authorized by myself. So no, I'm not aware of the 14:10:40
 2 timing, but nor am I aware that it has any bearing upon
 3 the right or wrong of the case. Again, speaking as a
 4 layman, not as an attorney.
 5 Q. I'm really just asking for the fact actually, 14:10:52
 6 if you knew about the timing. But thank you.
 7 (Whereupon Exhibit Stiles-6
 8 marked for identification.)
 9 BY MS. ROACH:
 10 Q. You've been handed what's been marked as 14:11:27
 11 Stiles-6. Have you seen this document before?
 12 A. Yes.
 13 Q. Is this document your responses to the second
 14 set of interrogatories and document requests served on
 15 you by the university defendants in this case? 14:11:38
 16 A. Yes.
 17 Q. If you could, please, turn to the last page
 18 titled "Verification." This also states that you have
 19 read and are familiar with the contents of the responses
 20 to interrogatories 1 through 7 and they are true and 14:11:54
 21 correct to your knowledge; is that correct?
 22 A. Yes.
 23 Q. And is that your signature there?
 24 A. Yes.
 25 Q. And it's dated April 9, 2012? 14:12:02

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1 A. Yes. 14:13:25
 2 Q. And that you'll conduct a reasonable search
 3 and produce documents, if any, concerning royalties
 4 generated from distribution of the work in electronic
 5 format. Yes? 14:13:33
 6 A. Yes.
 7 Q. Just to help clarify that answer, what
 8 particular digital electronic or machine-readable format
 9 was your work Jesse James: Last Rebel of the Civil War
 10 distributed in? 14:13:47
 11 MR. GOLDMAN: Objection to the form. And I
 12 don't understand the question. Maybe you do. But --
 13 BY MS. ROACH:
 14 Q. The question is here the response is only that
 15 it was distributed in digital electronic or 14:13:55
 16 machine-readable format?
 17 MR. GOLDMAN: I see.
 18 MS. ROACH: And I'm asking for clarification
 19 of which of those it was.
 20 THE WITNESS: Well, again, without claiming 14:14:04
 21 perfect memory, I would say one is that it was published
 22 in -- as an electronic book for e-book reading devices
 23 that are available in the general marketplace. And,
 24 two, that it was also licensed to ebrary, which is an
 25 electronic database company. And those are the two 14:14:31

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1 A. Yes. 14:12:06
 2 Q. So on April 9, 2012 you verified under penalty
 3 of perjury that the responses in this document are
 4 correct; is that right?
 5 A. Yes. 14:12:12
 6 Q. And as you sit here today, are they still
 7 correct?
 8 A. To the best of my knowledge, yes.
 9 Q. If you could please turn to page 6 of this
 10 document to interrogatory number 4 which asks that for 14:12:36
 11 each work you claim was infringed by the university
 12 libraries, you indicate whether the work has been
 13 distributed pursuant to your authorization in digital
 14 electronic or other machine-readable format at any time
 15 since 2001. Do you see that? 14:12:55
 16 A. Yes.
 17 Q. And your response, which at the very bottom of
 18 this page, it says, "Plaintiff will conduct a reasonable
 19 search and produce" -- I'm sorry. Above that. "Subject
 20 to and without waiving the foregoing, plaintiff responds 14:13:11
 21 that the work on Schedule A has been distributed
 22 pursuant to plaintiff's authorization and digital
 23 electronic or other machine-readable format at any time
 24 since 2001."
 25 Do you see that response? 14:13:24

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1 primary formats of which I'm aware of it being sold as 14:14:38
 2 or licensed to in electronic digital or machine-readable
 3 formats.
 4 BY MS. ROACH:
 5 Q. I'll start with the e-book part of that. How 14:14:51
 6 was your work converted into e-book format for
 7 distribution through Amazon?
 8 A. I must say I'm not sure how to answer that
 9 question. It could have been elves, as far as I know.
 10 I wasn't present in the publishing house when they 14:15:13
 11 generated the digital format.
 12 Q. Well, that's part of my question first was who
 13 did it?
 14 A. Oh, it was my publisher, pursuant to an
 15 amendment to our contract, my agreement. 14:15:27
 16 Q. And the digital electronic or machine-readable
 17 format that was authorized and given to ebrary, is that
 18 the same digital version that is available through
 19 Amazon?
 20 A. That is a technical detail that I'm unequipped 14:15:51
 21 to answer.
 22 Q. Do you know if an additional digital version
 23 was created for ebrary?
 24 A. I'm afraid I do not know. That was -- I --
 25 that was licensed through my publisher. But the details 14:16:09

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<p>1 of how the format was created, technical matters, I have 14:16:14 2 no idea.</p>	<p>1 are there any other written agreements that you have 14:17:43 2 authorizing electronic distribution of your book?</p>
<p>3 Q. So your publisher handled that --</p>	<p>3 A. Well, first I would say that it's not just</p>
<p>4 A. Yes, they did.</p>	<p>4 Amazon, of course.</p>
<p>5 Q. -- related to the digitalization? 14:16:23</p>	<p>5 Q. I'm sorry. 14:17:56</p>
<p>6 With respect to the e-book did you execute any 7 written agreements allowing for the publication of your 8 work Jesse James: Last Rebel of the Civil War in 9 electronic format --</p>	<p>6 A. It's for the general electronic book market. 7 Second of all, the publisher, under the -- 8 what I have licensed the publisher to do, the publisher 9 has had a certain latitude to negotiate with outlets</p>
<p>10 A. Yes. 14:16:38</p>	<p>10 for -- to allow, for example, Amazon to provide 14:18:19</p>
<p>11 Q. -- as an e-book?</p>	<p>11 searching within the book, or Google to allow -- these</p>
<p>12 Did you execute a written agreement allowing</p>	<p>12 are -- there are certain things the publisher negotiates</p>
<p>13 for ebrary's electronic version of the work?</p>	<p>13 without my specifically extending those rights directly,</p>
<p>14 A. Without answering no, I don't recall a</p>	<p>14 an indirect grant of certain -- certain limited rights.</p>
<p>15 specific agreement that I signed. The rights would have 14:16:56</p>	<p>15 Q. Do you have copies of any written agreements 14:18:42</p>
<p>16 been negotiated by the publisher. But, again, I'm just</p>	<p>16 entered into by your publisher on your behalf for those</p>
<p>17 speaking about my own recollection. Unlike the</p>	<p>17 particular uses?</p>
<p>18 agreement for the publication of an e-book through</p>	<p>18 A. I -- no, I would not be able to produce any</p>
<p>19 regular retailer outlets, such as Barnes & Noble and</p>	<p>19 documents of that sort. Nor off the top of my head do I</p>
<p>20 Amazon, that I clearly recall and have seen recently 14:17:22</p>	<p>20 recall seeing them. 14:18:56</p>
<p>21 my -- the amendment to the contract that I signed. In</p>	<p>21 Q. Okay.</p>
<p>22 the case of ebrary, I'm not sure.</p>	<p>22 A. I must add, of course, that this book was</p>
<p>23 Q. Are there any other written agreements other</p>	<p>23 negotiated initially in approximately 1998. And the</p>
<p>24 than the one you just mentioned -- the amendment to</p>	<p>24 paperwork -- and it was paperwork -- is -- not all of it</p>
<p>25 allow the distribution of the e-book through Amazon -- 14:17:41</p>	<p>25 is accessible or perhaps even in existence in my 14:19:18</p>
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<p>1 specific records as opposed to perhaps the publisher's. 14:19:23</p>	<p>1 Q. And the first non-indented paragraph towards 14:21:03</p>
<p>2 So not all of the documentation that existed at one time</p>	<p>2 the bottom of this document -- I'm not quite sure how to</p>
<p>3 is accessible to me. However, I do not recall any --</p>	<p>3 identify it -- the document states that it will serve as</p>
<p>4 signing any specific agreements along those lines.</p>	<p>4 amendment to our agreement dated November 9, 1998 for</p>
<p>5 (Whereupon Exhibit Stiles-7 14:20:11</p>	<p>5 Jesse James. Do you see that statement? The paragraph 14:21:19</p>
<p>6 marked for identification.)</p>	<p>6 begins, "If these terms are acceptable." And then it</p>
<p>7 BY MS. ROACH:</p>	<p>7 continues, "Please sign each copy of this letter which</p>
<p>8 Q. Handing you what's marked as Stiles-7. Is</p>	<p>8 will serve as an amendment to our agreement dated</p>
<p>9 this the amendment to your publishing agreement that you</p>	<p>9 November 9, 1998 for Jesse James." The agreement being</p>
<p>10 referred to earlier -- 14:20:18</p>	<p>10 referred to, the November 9, 1998 agreement for Jesse 14:21:36</p>
<p>11 A. Yes, it is.</p>	<p>11 James, is that the original publication agreement that</p>
<p>12 Q. -- with respect to electronic books?</p>	<p>12 you referred to for your book that's now titled Jesse</p>
<p>13 A. I'm sorry to speak over you. Yes, this is</p>	<p>13 James: Last Rebel of the Civil War?</p>
<p>14 indeed the amendment I referred to earlier.</p>	<p>14 A. Yes.</p>
<p>15 Q. And it's signed by you at the bottom; is that 14:20:32</p>	<p>15 Q. And you may have indicated this in your 14:21:49</p>
<p>16 correct?</p>	<p>16 earlier answer, but do you have a copy of that</p>
<p>17 A. Yes.</p>	<p>17 November 9, 1998 agreement?</p>
<p>18 Q. And it's dated February 23, 2010?</p>	<p>18 A. I believe I do. It is possible that at this</p>
<p>19 A. Yes.</p>	<p>19 point I would need to contact the agency that represents</p>
<p>20 Q. Is this agreement still in effect? 14:20:38</p>	<p>20 me for that book to acquire a copy at this point. But I 14:22:12</p>
<p>21 A. Yes.</p>	<p>21 believe I have one or could get access to one.</p>
<p>22 Q. Has it been amended in any way?</p>	<p>22 MS. ROACH: We request production of that</p>
<p>23 A. Since this time?</p>	<p>23 document. This document on its face is an amendment to</p>
<p>24 Q. Yes.</p>	<p>24 that agreement and doesn't -- and on its own does not</p>
<p>25 A. Not to my knowledge. 14:20:46</p>	<p>25 provide necessary information to understand the terms of 14:22:34</p>

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1 the agreement and includes defined terms without 14:22:36
 2 explaining them in full. And I think to be fully
 3 responsive to the request for the agreement it would
 4 need to be the full agreement with this amendment, not
 5 just the amendment by itself. 14:22:50
 6 MR. GOLDMAN: Okay. I'll take it under
 7 advisement.
 8 MS. ROACH: Thank you.
 9 For example, this agreement doesn't speak --
 10 doesn't mention electronic rights. It just mentions 14:23:02
 11 only electronic book. And it doesn't describe an
 12 electronic book as being particularly electronic or
 13 digital. It talks about distribution or transmission by
 14 any means. And it doesn't really provide the terms that
 15 you would expect or that would explain the electronic 14:23:21
 16 rights surrounding the book.
 17 MR. GOLDMAN: Okay. We can talk later about
 18 why you -- what you're possibly disputing or what you
 19 want out of this.
 20 MS. ROACH: I'm just looking for a full 14:23:33
 21 production. If he does have a copy of this November 9,
 22 1998 agreement, which he indicated that he might, I
 23 believe it's responsive to our document request for
 24 agreements regarding the electronic rights. Because
 25 this is only an amendment. So the agreement constitutes 14:23:51

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1 page are made pursuant to your authorization; is that 14:25:21
 2 correct?
 3 A. Yes.
 4 Q. And pursuant to the February 23, 2010
 5 amendment agreement that we just discussed as Stiles-7; 14:25:30
 6 is that correct?
 7 A. Yes.
 8 Q. Do you see on the page where it says "Click To
 9 Look Inside" above the image of the cover of your book
 10 on the first page? 14:25:44
 11 A. Yes.
 12 (Whereupon Exhibit Stiles-9
 13 marked for identification.)
 14 BY MS. ROACH:
 15 Q. You've been handed what's been marked as 14:26:11
 16 Stiles 9. Do you recognize the images shown in this
 17 exhibit?
 18 A. Yes.
 19 Q. Are these screenshots of the images that you
 20 can view if you click on the "Look Inside" button on the 14:26:32
 21 Amazon web page?
 22 MR. GOLDMAN: Objection to the form. I'm not
 23 sure how he would know that.
 24 MS. ROACH: Right. I'll withdraw.
 25 Q. I'll represent to you that these are printouts 14:26:45

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1 that agreement in this amendment together. 14:23:53
 2 MR. GOLDMAN: Okay. I don't agree. But I'll
 3 take it under advisement --
 4 MS. ROACH: Okay.
 5 MR. GOLDMAN: -- and we can talk about it 14:23:59
 6 later.
 7 MS. ROACH: Thank you.
 8 Q. I guess except for this amendment, this
 9 Stiles-7, were there any other amendments to the 1998
 10 agreement for your book Jesse James: Last Rebel of the 14:24:28
 11 Civil War?
 12 A. No.
 13 MS. ROACH: Mark this 8.
 14 (Whereupon Exhibit Stiles-8
 15 marked for identification.) 14:24:59
 16 BY MS. ROACH:
 17 Q. And Ms. Belton is handing you what's marked as
 18 Stiles-8. Do you recognize what's depicted on this
 19 page?
 20 A. Yes. 14:25:11
 21 Q. This is a printout from the Amazon document
 22 sales page for your book Jesse James: Last Rebel of the
 23 Civil War, correct?
 24 A. Yes.
 25 Q. And the sales of the book through this web 14:25:19

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1 of images that you can view if you click on the "Look 14:26:47
 2 Inside" button shown on the last exhibit we just
 3 reviewed.
 4 Were you aware that these portions of your
 5 book are available through the Amazon Look Inside 14:26:59
 6 feature?
 7 A. Not these specific sections. But I'm aware
 8 that it's possible to pull up entire pages from the Look
 9 Inside feature.
 10 Q. And I will clarify that this is the Look 14:27:14
 11 Inside feature for the Kindle book. If you look at the
 12 top of the page there are tabs for Kindle book and print
 13 book. So the document you're holding right now is --
 14 Stiles-9 -- is the -- they're printouts of the images
 15 that you can view on the Look Inside feature for the 14:27:32
 16 Kindle book.
 17 And did you authorize the use of these
 18 portions of your work through this Look Inside feature?
 19 A. Yes, indirectly. I did not negotiate
 20 personally with Amazon, retailer. As is the custom in 14:27:50
 21 commercial publishing, my publisher negotiates with the
 22 retailers. As is -- has also been the custom for quite
 23 some time, excerpts are often made available. This is
 24 all conducted -- in this case and as is generally the
 25 custom, this was negotiated by the publisher with my 14:28:09

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<p>1 grant of licensing of the right to do so. 14:28:16</p> <p>2 Q. Were you made aware how many pages would be</p> <p>3 made available through this feature on the Kindle Look</p> <p>4 Inside?</p> <p>5 A. I don't recall being told specifically. 14:28:27</p> <p>6 Q. And why did you authorize or authorize your</p> <p>7 publisher to authorize this use?</p> <p>8 A. Because it's seen as a useful marketing tool.</p> <p>9 Since it appears within the context of the commercial</p> <p>10 distribution of the book and experience with the -- the 14:28:49</p> <p>11 publisher's experience and the retailer's experience is</p> <p>12 that this drives up sales. As opposed to, oh, for</p> <p>13 example, someone posting the book in an unauthorized</p> <p>14 format without my participation, which would be a very</p> <p>15 different story. So I authorize it because it can be 14:29:08</p> <p>16 very useful and also because it was a part of my</p> <p>17 contractual relationship with my publisher and within</p> <p>18 the context of a licensed commercial retail environment.</p> <p>19 Q. Do you believe that making certain pages</p> <p>20 available to be viewed by consumers like this will help 14:29:28</p> <p>21 stimulate sales of the book?</p> <p>22 A. Yes.</p> <p>23 Q. And how would it do that?</p> <p>24 A. Well, don't you think it's very well written?</p> <p>25 I'm sorry. That was unresponsive. 14:29:42</p>	<p>1 I should say that if the book has any merit on 14:29:44</p> <p>2 the face of it, then it should be apparent. And if</p> <p>3 these pages are made available within a context which I</p> <p>4 authorize and in which the legitimate purchase of the</p> <p>5 book which will then generate royalties for myself is 14:30:03</p> <p>6 immediately possible, I note also on this page "Buy with</p> <p>7 One Click" is immediately to the left of these pages.</p> <p>8 So this appears within a context in which the retail</p> <p>9 sale and distribution of this book was authorized and in</p> <p>10 which this marketing tool was made in a context in which 14:30:25</p> <p>11 purchase of the book was made quite easy and expedient.</p> <p>12 So in that context providing content, it is believed,</p> <p>13 will draw the reader in and make them interested in</p> <p>14 buying the book.</p> <p>15 (Whereupon Exhibit Stiles-10 14:30:59</p> <p>16 marked for identification.)</p> <p>17 BY MS. ROACH:</p> <p>18 Q. Ms. Belton is handing you what's been marked</p> <p>19 Stiles 10. Do you recognize the images shown in this</p> <p>20 exhibit? 14:31:16</p> <p>21 A. Yes, this appears to be the hardcover jacket</p> <p>22 of the book, Jesse James: Last Rebel of the Civil War.</p> <p>23 Q. And then the following pages include text from</p> <p>24 inside that book, is that correct, images of pages from</p> <p>25 that book? 14:31:38</p>
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<p>1 A. Yes. In fact, it even hopefully says 14:31:39</p> <p>2 "Copyrighted Material" on the pages.</p> <p>3 Q. And I will represent to you, as I did before,</p> <p>4 that this -- these are printouts of images that you can</p> <p>5 view when you click on the Look Inside feature on Amazon 14:31:55</p> <p>6 for your book for Jesse James: Last Rebel of the Civil</p> <p>7 War and click on the print book option.</p> <p>8 And, again, did you authorize or authorize</p> <p>9 your publisher to authorize Amazon to allow these</p> <p>10 portions of your book to be viewed on-line? 14:32:16</p> <p>11 A. Yes.</p> <p>12 Q. Were you aware which portions of your book</p> <p>13 would be viewable on-line?</p> <p>14 A. No, not specifically.</p> <p>15 Q. And I expect your answer will be very similar, 14:32:34</p> <p>16 but why did you authorize or authorize your publisher to</p> <p>17 authorize these pages to be viewed by consumers on-line?</p> <p>18 A. As I mentioned before, that if the writing in</p> <p>19 the story has any other photocopies, that the reader</p> <p>20 will be able to detect that by viewing portions of the 14:32:55</p> <p>21 book.</p> <p>22 I would note that it appears to me that this</p> <p>23 is an attempt to simulate to some extent the reader's</p> <p>24 experience in a physical bookstore in which one may go</p> <p>25 in and browse the book but one is not expected to walk 14:33:13</p>	<p>1 out with the entire book without paying for it. So 14:33:17</p> <p>2 making this available next to the cash register, as it</p> <p>3 were in a digital environment may encourage purchase</p> <p>4 which is why within the context of consent and legal</p> <p>5 licensing this was allowed and why I acquiesced. 14:33:33</p> <p>6 Q. And you had mentioned earlier the Search</p> <p>7 Inside the Book feature I believe. And if you look on</p> <p>8 the left side, you can see the "Search Inside This Book"</p> <p>9 search box.</p> <p>10 A. Yes. 14:33:52</p> <p>11 Q. Is that the function you were referring to</p> <p>12 earlier when you mentioned the Search Inside the Book</p> <p>13 feature?</p> <p>14 A. Yes.</p> <p>15 Q. And what is your understanding of how that 14:33:59</p> <p>16 feature works?</p> <p>17 A. My understanding is that it doesn't -- the</p> <p>18 Search Inside This Book function does not negate the</p> <p>19 little message at the top of each book which says</p> <p>20 "Copyrighted material." That it allows someone to find 14:34:12</p> <p>21 out, for example, if a book discusses a subject of</p> <p>22 particular interest to them. Perhaps, for example, I</p> <p>23 might surmise, that a reader with a particular interest</p> <p>24 in Cole Younger or in the Pinkerton detectives may be</p> <p>25 interested in my book with a specific angle. And they 14:34:35</p>

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<p>1 can find out if the book discusses those things in 14:34:37</p> <p>2 detail. Again, analogous experience to going into a</p> <p>3 bookstore, pulling a book off the shelf and consulting</p> <p>4 the index. Again, one is not expected to walk out the</p> <p>5 door simply because one has found -- been able to look 14:34:51</p> <p>6 at a few pages. No one assumes that that authorizes the</p> <p>7 theft of the entire book. But that's a feature that</p> <p>8 allows somebody to get a feel for what's inside the</p> <p>9 book, which hopefully will drive sales.</p> <p>10 Q. And more specifically, what is your 14:35:08</p> <p>11 understanding of how this feature works? When you type</p> <p>12 words into the Search Inside the Book box and hit go,</p> <p>13 what happens?</p> <p>14 A. Well, in my experience when I've used it, for</p> <p>15 example, to purchase books, it will call up specific 14:35:21</p> <p>16 pages but not all pages. Often it will say this page</p> <p>17 may not be viewed. But it will call up some specific</p> <p>18 examples of the actual usage of a search term within the</p> <p>19 book and that some, but hardly all, of the pages in</p> <p>20 which that search term appears will appear in the 14:35:43</p> <p>21 "Search Inside This Book" screen. It's my impression</p> <p>22 that a similar functionality is available for my own</p> <p>23 book on Amazon.</p> <p>24 Q. This -- on the page that we're discussing</p> <p>25 right now -- 14:36:03</p>	<p>1 A. Yes. 14:36:07</p> <p>2 Q. -- with respect to this book? When you say</p> <p>3 your book, you mean the Jesse James --</p> <p>4 A. Yes.</p> <p>5 Q. -- Last Rebel of the Civil War? 14:36:10</p> <p>6 A. That is correct.</p> <p>7 Q. Okay.</p> <p>8 A. Again, that is my impression. I have not</p> <p>9 conducted a systematic test.</p> <p>10 Q. And you alluded to it in your answers to my 14:36:19</p> <p>11 earlier question, but what is the purpose of allowing</p> <p>12 people to search for text in the book using this</p> <p>13 feature?</p> <p>14 MR. GOLDMAN: Objection to the form.</p> <p>15 THE WITNESS: I believe I answered that 14:36:32</p> <p>16 question previously. It is to provide the reader with</p> <p>17 an analogous experience to going into a physical</p> <p>18 bookstore in which one may look at the index of the</p> <p>19 book, find out if topics of interest are within the</p> <p>20 book, and decide if it's sufficiently relevant to the 14:36:51</p> <p>21 reader's interest to actually purchase.</p> <p>22 So the Search Inside This Book feature often</p> <p>23 will not give the reader every page that mentions it,</p> <p>24 but gives an idea of the extent and coverage of topics</p> <p>25 that might be brought up in a specific search term. 14:37:05</p>
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<p>1 BY MS. ROACH: 14:37:08</p> <p>2 Q. When you analogize this function to an index,</p> <p>3 are there some ways in which this function may be more</p> <p>4 helpful in identifying information than a traditional</p> <p>5 index in a book? 14:37:18</p> <p>6 A. Well, if it was the -- if the full text of the</p> <p>7 book was available -- and I know this from conducting</p> <p>8 research or using, for example, the Google Books feature</p> <p>9 with books that are in the public domain -- that it is</p> <p>10 immensely valuable. Often indexes are incomplete or 14:37:36</p> <p>11 less accurate than a character recognition text search,</p> <p>12 a software feature. So this actually -- yes, it can be</p> <p>13 more useful than an index. It is not a replacement for</p> <p>14 the index, of course, but that's beside the point. The</p> <p>15 answer is yes. 14:37:56</p> <p>16 Q. Do you believe that allowing the Search Inside</p> <p>17 the Book feature for your work will help stimulate sales</p> <p>18 of the book?</p> <p>19 A. Yes, as long as it is authorized by the</p> <p>20 author; and is licensed directly or indirectly as 14:38:12</p> <p>21 authorized by the author; and is licensed, you know,</p> <p>22 through the original publishing agreement and the</p> <p>23 publisher's agreement with retailers, then yes.</p> <p>24 Q. Right. And I'm speaking about your book which</p> <p>25 you have authorized the use of this function, you 14:38:29</p>	<p>1 testified so -- 14:38:32</p> <p>2 A. The answer is yes.</p> <p>3 Q. Yes, that the use of this function you believe</p> <p>4 will help stimulate sales of your book?</p> <p>5 A. Yes. 14:38:42</p> <p>6 Q. Are any of your -- I'm sorry. Is your other</p> <p>7 published biography, The First Tycoon, is it available</p> <p>8 on Amazon in electronic format?</p> <p>9 A. Not only is it available on Amazon, it is also</p> <p>10 available through -- 14:38:59</p> <p>11 Q. Right. I --</p> <p>12 A. -- other retailers as well.</p> <p>13 Q. That's a clarification I should have said. Is</p> <p>14 it available in electronic format?</p> <p>15 A. Yes, it is. 14:39:04</p> <p>16 Q. And is it also available on Amazon in</p> <p>17 electronic format?</p> <p>18 A. Yes. I don't want to drive the court reporter</p> <p>19 or other readers of this material to only shop at Amazon</p> <p>20 but yes, it is in fact available on Amazon. 14:39:19</p> <p>21 Q. And the reason I asked is to ask whether the</p> <p>22 Look Inside and Search Inside features are also enabled</p> <p>23 for The First Tycoon biography?</p> <p>24 A. It is my understanding that yes, it is.</p> <p>25 Q. And you've authorized or authorized your 14:39:34</p>

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1 publisher to authorize that use? 14:39:38
 2 A. Yes.
 3 Q. And you just said it right now with respect to
 4 The First Tycoon, but for both Jesse James: Last Rebel
 5 of the Civil War and the First Tycoon, are those books 14:39:55
 6 available in electronic form in places other than
 7 Amazon?
 8 A. Yes.
 9 Q. What other -- where else is Jesse James: Last
 10 Rebel of the Civil War available electronically? 14:40:09
 11 MR. GOLDMAN: Objection to the form. It's
 12 ambiguous what you mean by "available."
 13 BY MS. ROACH:
 14 Q. Where else besides Amazon can Jesse James:
 15 Last Rebel of the Civil War be purchased in electronic 14:40:19
 16 format under your authorization?
 17 A. It's my understanding -- and, again, I have
 18 what I would call indirect knowledge because I -- as
 19 obsessive as authors are, I have not tried to track down
 20 every place on earth where it is available for sale. So 14:40:41
 21 I haven't searched for it. But I -- I believe, it's my
 22 impression, that it's available certainly through the
 23 Barnes & Noble website, that it's available through I
 24 believe through Kobo, that it's available I think,
 25 though I'm less certain of this, through the Apple 14:41:03

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1 legal licensing and legal conversations and agreements 14:42:41
 2 that ultimately come back to me, even though I don't
 3 deal with those matters directly myself.
 4 Q. Have you ever inquired about their -- Amazon's
 5 security measures with respect to your digital work? 14:42:54
 6 A. No. Because every party involved has a
 7 financial interest in preserving the security of my
 8 book. That because this is a legally licensed and
 9 commercial process, that everyone involved has an
 10 interest in maintaining a healthy balance between making 14:43:16
 11 the book commercially available and also between
 12 protecting the security from being copied.
 13 So as -- just as I don't complain to my
 14 publisher about the typeface being used, I don't go into
 15 bookstores and complain because my book is on the middle 14:43:36
 16 shelf and it should be on the top shelf. These are the
 17 level of detail that as an author I'm not involved
 18 negotiating and I don't track every single detail. It
 19 is a matter of concern, but it's not something that I
 20 take specific responsibility for. But, again, since it 14:43:55
 21 is within a -- in an environment in which all the people
 22 involved are licensed and have a financial stake in
 23 preserving security, I certainly have a level of comfort
 24 with it even though I'm aware of the fact that digital
 25 security is never perfect. Far from it. 14:44:14

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1 iBooks store. I believe it's available through all the 14:41:06
 2 major digital booksellers, as well as can be
 3 purchased -- now, many retailers also now sell e-books
 4 and they can be purchased at a brick-and-mortar
 5 storefront. So they would be available through any 14:41:29
 6 store that takes part in that sort of program as well.
 7 Q. And forgive me. You said Kobo?
 8 A. Yes.
 9 Q. What is that? I apologize.
 10 A. I believe that's an e-book online retailer. 14:41:39
 11 Q. I wasn't sure if that was an acronym or if
 12 that was a name.
 13 A. To be honest, I don't shop there. So I think
 14 K-O-B-O is one of the outlets. If I'm mistaken, I'm
 15 mistaken. I don't want to be -- go to court for perjury 14:41:55
 16 because I said it was on Kobo. I'm not sure.
 17 Q. You won't.
 18 Starting first with Amazon. Do you have any
 19 understanding regarding the security employed by Amazon
 20 with respect to the digital copy of -- version of your 14:42:10
 21 work that they have?
 22 A. No, but whatever security measures it does
 23 have, those are -- again occur within the context of
 24 being negotiated by my publisher. And I'm compensated
 25 for the risk. And, you know, that's within a format of 14:42:34

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1 Q. Do you know if your publisher has inquired of 14:44:17
 2 Amazon regarding the security they have with respect to
 3 your digital work?
 4 A. I have no idea. I have -- that is a matter of
 5 conversation between my publisher and Amazon and you 14:44:32
 6 would have to ask them.
 7 Q. Have you asked your publisher whether that --
 8 whether the security that Amazon employs was a part of
 9 the negotiation to offer e-book through Amazon?
 10 A. No, but, again, I'm very aware from 14:44:47
 11 conversations with people in publishing in general that
 12 piracy and security are major issues for publishers and
 13 retailers. So my presumption is that for me to raise
 14 this issue would be redundant.
 15 Q. But you have not raised the issue with your 14:45:07
 16 publisher?
 17 A. No.
 18 Q. You mentioned earlier that there was a
 19 concern -- do you have concerns regarding Amazon's
 20 security with respect to your digital work, Jesse James: 14:45:20
 21 Last Rebel of the Civil War?
 22 A. To the extent that all digital media have some
 23 level of security concerns, that no one has created a
 24 perfect system, otherwise everyone would have adopted a
 25 perfect system and there would be no piracy. So the 14:45:41

Page 130	<p>1 very fact that piracy continues to exist means that 14:45:44</p> <p>2 there continue to be security concerns. Of course. So</p> <p>3 to that extent there's always a concern. I'm always</p> <p>4 concerned about piracy. But, again, specifically with</p> <p>5 Amazon and other retail outlets, there's a distinct 14:46:04</p> <p>6 difference which is one that the security risks that are</p> <p>7 involved are both -- the editions are both licensed. I</p> <p>8 receive compensation, which admittedly my agreeing for a</p> <p>9 book to be sold digitally involves risk, yet I get</p> <p>10 compensation. 14:46:28</p> <p>11 And, finally, since it takes place within a</p> <p>12 licensed and legal commercial environment, there are</p> <p>13 financial incentives for people to preserve some level</p> <p>14 of security. Does that mean that I think it's a perfect</p> <p>15 system? Of course not. I -- with that I should be 14:46:40</p> <p>16 tried for perjury on if I said there were never any</p> <p>17 concerns. That would be ridiculous. But am I more</p> <p>18 comfortable with the system that I authorized that is</p> <p>19 conducted with my participation and for which I'm</p> <p>20 compensated and which there are financial stakes for all 14:46:57</p> <p>21 parties involved? Yes, I'm more comfortable with that.</p> <p>22 Q. And you said that you are compensated for the</p> <p>23 risk with respect to Amazon's distribution of your</p> <p>24 electronic version of your book. Is there an increase</p> <p>25 in the price that accounts for the risk for the 14:47:14</p>	Page 131	<p>1 electronic version of your book? 14:47:19</p> <p>2 A. No, the concept of risk being specifically</p> <p>3 compensated is not what I meant. What I meant is that</p> <p>4 the risk is involved with releasing and commercially</p> <p>5 distributing an electronic edition. What I mean is that 14:47:31</p> <p>6 in that creation and distribution of an electronic book,</p> <p>7 it is within a system in which I'm compensated</p> <p>8 financially for the creation and distribution of that</p> <p>9 digital edition. I did not mean to imply -- and I</p> <p>10 apologize if I did -- that there was a specific 14:47:50</p> <p>11 subpayment within that larger compensation scheme that</p> <p>12 was applied against the risk that I would incur. Again,</p> <p>13 I think that that would be unnecessary because it is a</p> <p>14 risk that is also shared by other parties who have a</p> <p>15 financial stake in the commercial sale and distribution 14:48:09</p> <p>16 of my book, since revenue is generated for other parties</p> <p>17 as well and they share in some of the economic benefit.</p> <p>18 So I didn't mean to imply that there was a specific</p> <p>19 breakout of risk in the compensation scheme.</p> <p>20 Q. Understood. And the other parties that you 14:48:26</p> <p>21 refer to that have a financial stake, I understand you</p> <p>22 to mean your publisher and Amazon; is that correct?</p> <p>23 A. Not only Amazon but also independent</p> <p>24 bookstores, Barnes & Noble, Apple, other retailers who</p> <p>25 sell digital books as well. 14:48:43</p>
Page 132	<p>1 Q. And this is a general question: What is the 14:48:51</p> <p>2 approximate average annual revenue that you receive from</p> <p>3 your book Jesse James: Last Rebel of the Civil War?</p> <p>4 A. I can only approximate. At this point the</p> <p>5 revenue is probably about -- I would guess around \$3,000 14:49:06</p> <p>6 a year.</p> <p>7 Q. And does it vary significantly year to year?</p> <p>8 Or is it pretty close to that each year?</p> <p>9 A. It has not varied significantly in several</p> <p>10 years. Now it's called a back-list book. Again, I have 14:49:28</p> <p>11 discussed with my publisher and others other ways to</p> <p>12 reassert its place in the marketplace. It is a book</p> <p>13 that continues to receive attention with respect to</p> <p>14 people who are interested in the period. So though it</p> <p>15 is a back-list book, it is not a recent release, it 14:49:52</p> <p>16 continues to have a very vital life as a specific</p> <p>17 commercial property and then also within the larger</p> <p>18 context of my standing as a serious biographer. And so</p> <p>19 it has imparted a larger value to the -- by being a part</p> <p>20 of the trajectory of my career and has great value to me 14:50:15</p> <p>21 in that respect.</p> <p>22 Q. Did you see any increase in revenue when you</p> <p>23 released -- let me back up.</p> <p>24 Did you see any increase in revenue from sales</p> <p>25 of the Jesse James biography when you released your 14:50:34</p>	Page 133	<p>1 second biography of Cornelius Vanderbilt? 14:50:38</p> <p>2 A. I would have to go back and check the royalty</p> <p>3 statements to be honest. I'm not sure. I couldn't</p> <p>4 recall that off the top of my head.</p> <p>5 Q. I was just trying to understand the trajectory 14:50:49</p> <p>6 type of statement you were making and trying to flush</p> <p>7 that out a little bit.</p> <p>8 A. Well, that has to do with the fact that Jesse</p> <p>9 James was relatively successful in the market but more</p> <p>10 importantly it was respected, if I may sound self- -- 14:51:05</p> <p>11 boastful for a moment. The fact that it received such a</p> <p>12 warm critical reception and it was well-regarded by both</p> <p>13 authorities and also by general readers. It was</p> <p>14 reviewed on the cover of the New York Times Book Review,</p> <p>15 for example, which only happens about 50 times a year. 14:51:25</p> <p>16 50 books a year get selected that way. So what that</p> <p>17 meant is that, you know, I was taken seriously. And my</p> <p>18 next book was -- came out. That reviewers were</p> <p>19 attentive to it. It's very difficult for bookkeeping to</p> <p>20 get reviewed these days, let alone get stocked on 14:51:49</p> <p>21 bookstore shelves, to be discussed in media outlets to</p> <p>22 discuss new books. And because of the reception and the</p> <p>23 weight which was given to my first book, my second</p> <p>24 book -- which was more commercially successful --</p> <p>25 benefited enormously as a result that people expected it 14:52:06</p>

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1 to be a book that would be taken seriously and also 14:52:10
 2 might be worth reading as adding experience on its own.
 3 MS. ROACH: I see. I see.
 4 Now would be a good time to take a break, if
 5 that would be something that everyone -- 14:52:22
 6 MR. GOLDMAN: Sure.
 7 MS. ROACH: -- is on board with?
 8 MR. GOLDMAN: I'm on board.
 9 MS. ROACH: Thank you.
 10 (Recess taken from 2:52 p.m. to 2:58 p.m.) 14:52:30
 11 BY MS. ROACH:
 12 Q. If you could refer back to -- I'm trying to
 13 figure out what number it was. The responses to the
 14 interrogatory requests. And I apologize. I didn't --
 15 MR. GOLDMAN: It's Stiles-6. 14:59:14
 16 MS. ROACH: Stiles-6. Thank you. I should
 17 have written these on here.
 18 Q. And if you could turn to page 5. And it's
 19 interrogatory 2. Do you see that on the page?
 20 A. Yes. 14:59:35
 21 Q. And at the end of your response to this
 22 interrogatory you state that you'll conduct a reasonable
 23 search and produce documents if any concerning royalties
 24 generated for the works listed on Schedule A. And as we
 25 discussed earlier and if you can verify as well here, 14:59:55

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1 A. I see the date at the top, January 28, 2012 15:01:47
 2 which would make it the most recent royalty statement.
 3 Royalty statements appear twice a year. And so the
 4 second royalty statement for the year has yet to arrive
 5 in the mail. And so this would be the most recent 15:02:00
 6 royalty statement.
 7 Q. Does your second annual royalty statement
 8 arrive in June then?
 9 A. It depends. It goes to my agent. The agent
 10 for this book which is Scovil, Galen, Ghosh -- or Ghosh; 15:02:22
 11 I'm not sure how it's pronounced -- literary agency.
 12 Then with a royalty check. Then as is customary in
 13 commercial publishing, the agent deposits the check,
 14 deducts 15 percent and then sends me a check for
 15 85 percent. As the old joke goes, the agent saw his 15:02:47
 16 author walking down the street and says, there's goes
 17 the thief that takes 85 percent of my money.
 18 Then the royalty statement is forwarded to me
 19 with my net check by the agent. So since there is some
 20 processing that's involved, there's a little variation. 15:03:05
 21 So this is dated the end of January. I would guess --
 22 and I -- what happens usually, I'm not sure. Usually
 23 around July or August is when I see the second
 24 statement, depending on how efficient everyone is being
 25 in this process. 15:03:24

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1 that the work listed on Schedule A is Jesse James: Last 14:59:58
 2 Rebel of the Civil War?
 3 A. Yes.
 4 Q. And then did you conduct that search?
 5 A. Yes. 15:00:11
 6 Q. And did you find any documents?
 7 A. My most recent royalty statement which
 8 includes both current and cumulative sales, subsidiary
 9 rights income, all -- basically all income without any
 10 deductions from royalties -- agents, commissions, or 15:00:32
 11 whatnot but the sales that come to me through my -- to
 12 my agent, rather.
 13 Q. Did you find any other documents besides your
 14 most recent royalty statement?
 15 A. Apart from my most recent royalty statement 15:00:47
 16 there, are no other documents that would provide
 17 up-to-date information about revenue generated from that
 18 book.
 19 MS. ROACH: Okay.
 20 (Whereupon Exhibit Stiles-11 15:01:37
 21 marked for identification.)
 22 BY MS. ROACH:
 23 Q. You're being handed what's marked as
 24 Stiles-11. Is this the royalty statement that you just
 25 referred to that you identified? 15:01:42

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1 Q. Do you believe that this report to be 15:03:26
 2 accurate?
 3 A. Yes.
 4 Q. Is there any reason to believe that it's not
 5 accurate? Is there anything missing? 15:03:34
 6 A. No.
 7 MR. GOLDMAN: I'm going to object to that last
 8 question.
 9 MS. ROACH: I'll re-ask it.
 10 Q. Is there anything missing from this statement, 15:03:44
 11 to your knowledge?
 12 MR. GOLDMAN: And I'm going to object to --
 13 oh, to your knowledge. That's fine.
 14 THE WITNESS: To my knowledge, no.
 15 MS. ROACH: The entire deposition is to his 15:03:51
 16 knowledge.
 17 Q. And I believe you referenced this earlier, but
 18 to be clear, is there any income generated by the book
 19 Jesse James: Last Rebel of the Civil War that would not
 20 be reflected in a royalty statement from Knopf? 15:04:05
 21 A. If -- and it has not happened but under the
 22 terms of this agreement if the book were, for example,
 23 optioned or purchased for -- to be adapted as a dramatic
 24 or -- a dramatic work or a film or television
 25 production, then those rights would be negotiated 15:04:49

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1 directly by me through my agent. That has not happened 15:04:52
 2 with Jesse James. If there were, I believe first serial
 3 rights are retained under this agreement. But there
 4 were no first serial agreements.
 5 In this case there was a second serial 15:05:16
 6 adaptation. It was a very short sequence. You'll
 7 notice on Stiles-11, page 4 of 4 there is a list of
 8 licensees. And one of them is AARP, the American
 9 Association of Retired Persons, I believe. Their annual
 10 magazine which is -- I forget the title. What is it? 15:05:40
 11 Old People or something -- whatever the title of their
 12 magazine is. They paid a small sum to the publisher.
 13 And then I received -- I don't even remember what my
 14 percentage of it was. So they could run a short
 15 excerpt. But it appeared late enough that it counted as 15:05:58
 16 second serial. And it was negotiated by the publisher.
 17 But as I said the rights that I retained for adaptations
 18 or for first serial were not in fact exercised and to
 19 this date have not been.
 20 Q. So this statement accurately reflects the 15:06:17
 21 income accurately stated that you received for the work?
 22 A. To the best of my knowledge, yes.
 23 Q. Did you receive the net check that accompanied
 24 this statement when you received it from your --
 25 A. Yes. 15:06:32

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1 Q. On this document Stiles 11 there is a column 15:07:33
 2 that's labeled cumulative and it includes both copies
 3 and earnings. Do you see that on the document?
 4 A. Yes, I do.
 5 Q. Do you believe those cumulative numbers to be 15:07:49
 6 accurate as of the date of this statement?
 7 A. To the best of my knowledge they're accurate.
 8 Q. And on the first row that's labeled
 9 "Hardcover" under the "Current" column, there are zeros
 10 under copies and earning. Do you see that? 15:08:11
 11 A. Yes, I do.
 12 Q. Does that mean that there are no hardcover
 13 copies sold during the period ending September 30, 2011?
 14 A. Yes. At the moment the publisher has -- the
 15 hardcover edition only. It is out of print. That they 15:08:28
 16 are now selling -- they see, in their judgment no
 17 particular market worthy of printing and warehousing the
 18 titles, I assume -- I can only state my assumption --
 19 and so they no longer print and maintain a stock of the
 20 hardcover editions of the book. 15:08:52
 21 Q. And that was going to be my next question
 22 which is whether the book was no longer available in
 23 hardcover. Do you know when the book stopped being
 24 available in hardcover to be purchased?
 25 A. My recollection is that as is hugely the case 15:09:04

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1 MR. GOLDMAN: I'm going to object. When you 15:06:32
 2 say "net check," you mean minus the amount that
 3 his agent took?
 4 MS. ROACH: Net check is the phrase that he
 5 used earlier -- 15:06:38
 6 THE WITNESS: That was the phrase I used --
 7 pardon me for speaking over you. Yes, you are correct;
 8 it was the phrase I used just referring to my personal
 9 net result after the agent's commission. The publisher
 10 would consider net to be something different. That's 15:06:50
 11 not a technical term.
 12 MS. ROACH: Right.
 13 MR. GOLDMAN: Can I ask something actually on
 14 the record? I notice that there's no Bates number on
 15 this. 15:07:04
 16 MS. ROACH: There is. It's teeny tiny.
 17 MR. GOLDMAN: Look at that.
 18 MS. ROACH: It's not my doing.
 19 MR. GOLDMAN: It wasn't my personal doing
 20 either, but okay. I see it now. Thank you. 15:07:15
 21 MS. ROACH: It was such that I couldn't read
 22 it on the airplane because it was moving too much.
 23 MR. GOLDMAN: I apologize for that. I don't
 24 know what happened.
 25 BY MS. ROACH: 15:07:31

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1 or was at the time when this book was published -- that 15:09:09
 2 may have been changed somewhat -- that approximately
 3 around the time or shortly after the time that the
 4 paperback was published, roughly a year after the
 5 hardcover was published, that they stopped distributing 15:09:23
 6 the hardcover and allowed sales to go exclusively in
 7 trade paperback. Speaking very roughly, it was around
 8 the time the trade paperback was published.
 9 Q. If you could turn to page 2 of Stiles 11 which
 10 is titled "Royalty Detail Statement." Do you see that? 15:09:45
 11 A. Yes.
 12 Q. And this appears to break out hardcover e-book
 13 and trade paperback into separate categories.
 14 A. Yes.
 15 Q. And do you see above where it says "e-book" -- 15:09:57
 16 and the way I read this is that it's the portion above
 17 where it says e-book that's pertaining to e-book. Is
 18 that a correct way to read this document?
 19 A. I'm sorry. Could you say that again? That --
 20 oh, I see. What you're saying is that, for example, it 15:10:14
 21 says "Hardcover," which actually refers to the
 22 information above the word "Hardcover."
 23 Q. Yes. Is that a --
 24 A. And then there are two separate ISBNs listing
 25 two different editions. Actually, they're the same ISBN 15:10:30

Page 142	Page 143
<p>1 but there appear to be two different prices above the 15:10:34 2 word "e-book."</p>	<p>1 list price was also lowered. 15:12:06 2</p>
<p>3 Q. Right. And I just wanted to confirm that I 4 was reading that properly. And, actually, my question 5 is directed at the two ISBNs in the e-book section of 15:10:44 6 this --</p>	<p>3 under the \$17 price, which is very limited, and then 4 when I look at the numbers sold under the lower \$12.99 5 price, it occurs to me that it initially went on sale 15:12:22 6 just before the switch over to the agency model. Now, 7 I'm making an educated guess. Again, I'm not privy to 8 the specific decisions that were made by the publisher.</p>
<p>7 A. Yes.</p>	<p>9 Q. And I'm just trying to understand this</p>
<p>8 Q. -- document? They do share the same ISBN, but 9 they have different prices. What do those different 10 prices represent? 15:10:58</p>	<p>10 document really. It appears that both of those have the 15:12:39 11 same on-sale date, October 27, 2010.</p>
<p>11 A. I can only speak to my judgment, not to my 12 knowledge, since I was not involved in the pricing 13 decision of this book. It appears to me that this 14 reflects the changeover to the agency model of pricing.</p>	<p>12 A. Yes. That is confusing. And, again, it is 13 the same ISBN, so it's actually the same book, but it 14 appears that the price was lowered and the format for</p>
<p>15 And that \$17 was, in fact, the list price of the trade 15:11:17 16 paperback. That Random House, much longer than other 17 major publishers, continued the practice of selling</p>	<p>15 how much -- how the royalty should be -- the formula, I 15:13:02 16 should say, for which the -- under which the royalties 17 were calculated changed. And so they made a separate 18 listing as if it were a new edition but in fact it was</p>
<p>18 e-books in the same -- along the same business model as 19 they did physical books; that they were taking 20 50 percent, roughly, of the list price and then -- and 15:11:36 21 they were still selling the e-book at the same list 22 price as the current print edition. And then they</p>	<p>19 the same edition. The sales date appears on this -- 20 this is actually a relatively clean royalty statement. 15:13:22 21 That is a relatively rare glitch. So we don't know 22 exactly when the price changed from this royalty 23 statement.</p>
<p>23 switched over to the agency model under which they 24 received a much larger percentage of the list price, but 25 there was no discounting allowed by retailers. And the 15:12:03</p>	<p>24 Q. And if you look from page 2 to page 3, are the 25 entries of the detailed statement that pertain to trade 15:13:37</p>
Page 144	Page 145
<p>1 paperback; is that correct? 15:13:41</p>	<p>1 A. My guess is that it refers to special 15:15:20</p>
<p>2 A. It appears to be trade paperback, yes.</p>	<p>2 discount. It could mean spectacular disk toss, but I</p>
<p>3 Q. And there are three -- there are three 4 repetitions of the same ISBN number with different 5 prices listed, at least two different prices -- no, 15:13:57 6 three different prices listed and the same on-sale date. 7 Do you know what that represents?</p>	<p>3 think it's special discount. And -- I don't know. I 4 mean, it appears to be a handful of books that were sold 5 under special discount. For all I know they were for 15:15:39 6 example employees who took advantage of buying looks at 7 a lower rate or -- I mean, there's any number of ways in 8 which a small number of books could have been sold at a 9 special discount. But I have no knowledge of what that</p>
<p>8 A. I can only guess. I can guess that it is a 9 similar factor. That is a book that in trade paperback 10 has been in the market now for nine years. So the 15:14:20 11 market has changed. There has been consumer price 12 inflation. There have been other factors -- the onset</p>	<p>9 actually represents. 15:15:56 10 11 Q. And do you see underneath where it says 12 "Premium" in that same column?</p>
<p>13 of e-books -- that have affected pricing decisions. 14 So I think it's only natural for the price to 15 have changed over that course of time. But my guess is 15:14:36 16 that that reflects changes in pricing over the years, 17 but beyond that I could not give you any specific 18 information, and that is actually just an educated guess 19 on my part.</p>	<p>13 A. Mm-hmm. 14 Q. Do you have an understanding of what that 15 represents with respect to this particular edition of 15:16:03 16 the trade paperback? Of your book?</p>
<p>20 Q. And on page 3 on the last entry on the trade 15:14:55 21 paperback section there's a place where it says "SPCL 22 DISCT." Do you see that in the left-hand column? 23 A. Yes, I do.</p>	<p>17 A. No, I'm not sure. That again -- premium I 18 remember from my days in working in direct mail on 19 publishing often refers to a special promotion. But I 20 can only guess. I mean, you know, perhaps for a while 15:16:25 21 they thought it was a really nice book and then they 22 changed their minds. I really don't know.</p>
<p>24 Q. Do you have an understanding what that refers 25 to? 15:15:13</p>	<p>23 Q. If you could turn to page 4. This is a page 24 you directed our attention to earlier, but I'd like to 25 focus on it a little bit. "Subsidiary Income Rights" 15:16:38</p>

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<p>1 page. Do you see that? 15:16:41</p> <p>2 A. Yes.</p> <p>3 Q. What does subsidiary income rights mean?</p> <p>4 A. Subsidiary rights -- subsidiary, as the name</p> <p>5 implies, means rights which fall underneath the sort of 15:16:56</p> <p>6 I'm the initial rights holder. And I'm speaking not as</p> <p>7 an attorney. So I -- this is -- please accept a</p> <p>8 colloquial common-sense understanding of the terms I</p> <p>9 use.</p> <p>10 I'm the primary rights holder. I license the 15:17:12</p> <p>11 publisher to publish and distribute the book. Then the</p> <p>12 publisher under our agreement has the right to then sell</p> <p>13 subsidiary rights under their right. As I mentioned</p> <p>14 there were some rights that I retained: The right to</p> <p>15 sell a film or TV adaptation of the book or a play. It 15:17:32</p> <p>16 would make a lovely play if you're interested. No one</p> <p>17 has bought the rights. The publisher however had the</p> <p>18 right to sell overseas translations. Under our</p> <p>19 agreement I receive a certain percentage of that sale.</p> <p>20 And then the publisher keeps a certain percentage. So 15:17:51</p> <p>21 the first line you see this -- this gives me the answer</p> <p>22 to your earlier question.</p> <p>23 RHUK, that's Random House United Kingdom.</p> <p>24 Cape refers to Jonathan Cape. That's the name</p> <p>25 of the publisher of the UK edition. As you can see on 15:18:08</p>	<p>1 the far right, they actually paid a substantial sum, a 15:18:12</p> <p>2 portion of which came to me.</p> <p>3 Italians, please forgive me, Il Saggiatore,</p> <p>4 they're the Italian publisher who paid for translation</p> <p>5 rights. 15:18:27</p> <p>6 Easton Press, that is the publisher that</p> <p>7 publishes a handful of leather-bound books. And, again,</p> <p>8 the cumulative earnings are \$1,000.</p> <p>9 The Association of American -- American</p> <p>10 Association of Retired Persons, AARP. Their magazine 15:18:40</p> <p>11 ran a short excerpt long enough after the book was</p> <p>12 published it was considered second-serial excerpt.</p> <p>13 Bookspan, that is the old book-of-the-month</p> <p>14 club, history book club all under the firm Bookspan.</p> <p>15 They offered the book and they paid a small sum, as you 15:19:02</p> <p>16 can see here. Well, small to some, significant to me.</p> <p>17 The Globe, I'm not sure exactly what that was.</p> <p>18 As you can see, none of this is current, so this is all</p> <p>19 quite a -- I'm speaking from memory.</p> <p>20 Q. Right. 15:19:22</p> <p>21 A. You see ebrary, a ProQuest company. They also</p> <p>22 have licensed the book. And that actually is generating</p> <p>23 current earnings.</p> <p>24 Q. If I could just focus on a couple of these.</p> <p>25 In the "Cumulative Copies" column on this 15:19:38</p>
Page 148	Page 149
<p>1 document, the only -- the Il Saggiatore, the Italian 15:19:41</p> <p>2 translation that you referred there, there is a number</p> <p>3 in the column under cumulative copies. And for Bookspan</p> <p>4 there's a number in the column under cumulative copies.</p> <p>5 For RHUK, Cape, Easton Press, AARP, and the Globe/PEQ 15:19:59</p> <p>6 there is not. Does that mean that the number</p> <p>7 represented in cumulative earnings for those items was</p> <p>8 an upfront payment as opposed to a per-sale or per-book?</p> <p>9 A. That is the way it appears to me.</p> <p>10 Now, as I mentioned, subsidiary rights by 15:20:23</p> <p>11 their very definition are rights that are negotiated by</p> <p>12 the publisher. And so their documentation, the details</p> <p>13 of their negotiations and in fact the details of their</p> <p>14 agreements are not something that I am privy to. So by</p> <p>15 definition I cannot give you a -- an answer from 15:20:42</p> <p>16 firsthand knowledge.</p> <p>17 Q. Right.</p> <p>18 A. I can only agree with you that that's what it</p> <p>19 appears to be.</p> <p>20 Q. Okay. For any of these would you receive 15:20:51</p> <p>21 additional -- would you receive additional monies per</p> <p>22 copy sold by these licensees to the extent they are</p> <p>23 selling copies?</p> <p>24 A. I have to tell you I'm not sure.</p> <p>25 Again, with Jesse James it is a title which 15:21:07</p>	<p>1 this -- this document, this royalty statement shows is 15:21:12</p> <p>2 both alive in the marketplace in generating revenue that</p> <p>3 is significant to me. At the same time, it is, as I</p> <p>4 mentioned, a book that has existed in the marketplace</p> <p>5 for 10 years. Many of these agreements are customarily 15:21:25</p> <p>6 made close to the time when the book is published and so</p> <p>7 many of them are not -- have not generated revenue for</p> <p>8 me in some time. I have not been privy to details in</p> <p>9 some time. And again I was never privy to the specific</p> <p>10 negotiations. So frankly I don't know. 15:21:43</p> <p>11 Q. With respect to ebrary -- and it says</p> <p>12 "PROQUE" -- and I understand that to be ebrary ProQuest;</p> <p>13 is that correct?</p> <p>14 A. That's my understanding.</p> <p>15 Q. And you referenced that earlier, I believe. 15:22:00</p> <p>16 A. That is correct.</p> <p>17 Q. Could you explain to me to the extent you</p> <p>18 understand it the arrangement with ebrary ProQuest for</p> <p>19 your book Jesse James: Last Rebel of the Civil War?</p> <p>20 A. Well, again, I could not speak to the specific 15:22:16</p> <p>21 details of the agreement. It's my understanding just in</p> <p>22 general terms that a lot of the functionality of</p> <p>23 electronic databases, in terms of searching and being</p> <p>24 able to digitally access information in new and</p> <p>25 innovative ways is a licensing right that has been 15:22:39</p>

Page 150	<p>1 exploited by -- on the purchasing side by ProQuest 15:22:42</p> <p>2 through ebrary and on the selling side by Random House,</p> <p>3 which has sold the rights, to allow scholars or patrons</p> <p>4 of subscribing libraries, many of which I would imagine</p> <p>5 take part in the HathiTrust, that they see this as a 15:23:02</p> <p>6 valuable functionality that they're willing to pay for.</p> <p>7 And so ebrary makes the book available for a wide range</p> <p>8 of innovative content searches and uses. Now, I have to</p> <p>9 tell you, I have not used ebrary myself. So I can only</p> <p>10 speak to my impression and the fact that I have used 15:23:30</p> <p>11 other ProQuest databases as well. I may actually have</p> <p>12 used ebrary in the past. I haven't recently. And I</p> <p>13 haven't used it on my own books. But certainly ProQuest</p> <p>14 databases allow very powerful ability to access content</p> <p>15 and to sometimes search interesting and otherwise 15:23:55</p> <p>16 inexpedient means ways of exploiting content of a book.</p> <p>17 Q. I'm just trying to understand how -- what</p> <p>18 service ebrary offers and how it works. So to the</p> <p>19 extent you have an understanding about that. What</p> <p>20 content is included in ebrary ProQuest services, to your 15:24:15</p> <p>21 knowledge?</p> <p>22 A. As it relates to my book, I wouldn't want to</p> <p>23 characterize it specifically in terms of my book.</p> <p>24 Again, I haven't gone into -- when I go into a research</p> <p>25 library, my time is precious. I'm on the clock, as it 15:24:33</p>	Page 151	<p>1 were. Because I'm not a member of a research 15:24:37</p> <p>2 institution. And so as much as I would like to go</p> <p>3 through and find out how my book is being made</p> <p>4 available, I haven't done it. It's something that I</p> <p>5 haven't had the luxury of doing. Certainly not in some 15:24:51</p> <p>6 time.</p> <p>7 So, you know, again, I can only characterize</p> <p>8 in a general way what database digitization allows, what</p> <p>9 this sort of search functions allow for the search of</p> <p>10 juxtaposition of words, for juxtaposing names and dates, 15:25:13</p> <p>11 for example, for -- you know, there's ways in which an</p> <p>12 index entry in a physical index can be exploited by in</p> <p>13 the sense of overlapping indexes and in which, you know,</p> <p>14 references can be found which can then lead to citations</p> <p>15 which provide interesting paths for further 15:25:43</p> <p>16 investigation. But I'm speaking in a general sense.</p> <p>17 Q. Right. And actually you're answering --</p> <p>18 you're giving me a much more detailed answer than I'm</p> <p>19 looking for.</p> <p>20 A. Excuse me. 15:25:57</p> <p>21 Q. I'm just trying to understand on a much more</p> <p>22 general level.</p> <p>23 Does ebrary ProQuest, does the content that</p> <p>24 that service provides focus on books, as opposed to</p> <p>25 journals, as opposed to individual articles? I'm just 15:26:06</p>
Page 152	<p>1 trying to understand, do you know what kind of content 15:26:10</p> <p>2 that that service includes?</p> <p>3 A. I wouldn't want to characterize ebrary in</p> <p>4 general. And do I know that -- to pose a rhetorical</p> <p>5 question to myself, do I know that those services exist 15:26:26</p> <p>6 for journals and other content? Yes. Do I know</p> <p>7 specifically what the weight of content available</p> <p>8 through ebrary is? No, I don't know.</p> <p>9 Q. And I don't know. So I'm just asking if you</p> <p>10 know what type of material is available through ebrary. 15:26:42</p> <p>11 Do you know what type of material?</p> <p>12 A. I wouldn't want to characterize it, no.</p> <p>13 Q. Do you have any understanding of the specific</p> <p>14 services ebrary offers?</p> <p>15 A. (No response.) 15:27:02</p> <p>16 Q. For example, if I was a staff member at a</p> <p>17 university whose library subscribes to this ebrary</p> <p>18 service, could I use that to read a book that was</p> <p>19 included in their service? Or can I just search? I'm</p> <p>20 trying to understand what services they offer on the 15:27:18</p> <p>21 content that they have. Do you know what type of</p> <p>22 services they offer?</p> <p>23 A. I don't think I could in all honesty give a</p> <p>24 characterization of the services they offer.</p> <p>25 Q. Okay. 15:27:32</p>	Page 153	<p>1 A. As I mentioned, I have used -- I'm fairly 15:27:33</p> <p>2 certain I've used ebrary in the past. I haven't</p> <p>3 recently, though. And products have been changing</p> <p>4 rapidly as well. As more material becomes digitally</p> <p>5 available and as new electronic services are -- 15:27:49</p> <p>6 electronic services are being changed and updated in</p> <p>7 such a way that even if I used ebrary extensively four</p> <p>8 years ago, I wouldn't want to characterize it now.</p> <p>9 Q. Okay.</p> <p>10 A. And to be honest, I don't have specific 15:28:06</p> <p>11 memories of having used ebrary, even though I know I</p> <p>12 have. I've been to the ebrary site. But it wouldn't be</p> <p>13 honest for me to sit here and characterize it.</p> <p>14 Q. Okay. And so you don't know the specific uses</p> <p>15 of your work that are available through ebrary? 15:28:22</p> <p>16 A. No. I couldn't say that right now.</p> <p>17 Q. Is there a written agreement that you're aware</p> <p>18 of between your publisher and ebrary?</p> <p>19 A. I don't know of a specific agreement and yet</p> <p>20 for it to be listed under subsidiary rights implies that 15:28:36</p> <p>21 there has been a formal agreement. And it would be -- I</p> <p>22 should say this. It would be absolutely extraordinary</p> <p>23 if they included a purely oral subsidiary rights</p> <p>24 agreement and simply trusted each other to calculate the</p> <p>25 amount without any written agreement. That would be 15:28:59</p>

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1 remarkable. 15:29:02
 2 Q. Right.
 3 A. And it would be a great vote for the
 4 possibilities of man's trust in one's fellow man --
 5 Q. I was trying to get to have you seen -- 15:29:10
 6 A. -- and that would be a great day.
 7 I have not seen it.
 8 Q. Have you seen a copy of it?
 9 A. Again, I would characterize in general
 10 anything that falls under subsidiary rights, generally 15:29:18
 11 speaking I'm often made aware of them especially the
 12 larger agreements such as Jonathan Cape, the UK edition.
 13 I was certainly made aware of that as that was
 14 transpiring. But generally speaking, these are
 15 negotiated by the publisher. It is within their right 15:29:36
 16 to negotiate and sell them. And the details and
 17 agreements you -- I never see.
 18 Q. So you didn't initiate the idea to have your
 19 book be made available through ebrary?
 20 A. Initiate it? No. 15:29:51
 21 Q. Okay. Do you know whether the digital version
 22 available -- do you know whether the digital version
 23 licensed by ebrary is the same digital version that's
 24 available for purchases in e-book?
 25 A. No, that's a detail that I would not be aware 15:30:10

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1 has sought such a license? 15:31:45
 2 A. No.
 3 Q. Are you aware of any entity that offers such
 4 license agreements?
 5 A. You're speaking of digitization for archival 15:32:06
 6 purposes only?
 7 Q. Yes.
 8 A. No, I'm not aware of such entity.
 9 Q. Okay.
 10 A. Then again I'm also unaware of any entity that 15:32:14
 11 purchases books in physical form really to be held and
 12 preserved for no -- with no one being allowed access to
 13 them. I've never heard of that in any format, digital
 14 or otherwise.
 15 Q. Have you ever licensed any of your works to be 15:32:33
 16 digitized so that they can be included in a database
 17 that allows full text searching?
 18 A. I believe that's what ebrary is; isn't it?
 19 Q. Well, we didn't really get into what ebrary
 20 does or their services offered. 15:32:48
 21 A. That's true.
 22 Q. So I wasn't sure what services are offered on
 23 your digital work through ebrary.
 24 A. I should say that I believe that -- I
 25 believe -- again, not having negotiated the contract 15:32:59

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1 of. 15:30:13
 2 Q. Okay. Do you have an understanding of the --
 3 how the income -- how the revenue is structured for that
 4 ebrary arrangement?
 5 A. No. Again, that's a detail that I'm not aware 15:30:24
 6 of.
 7 Q. Have you ever licensed any of your works to be
 8 digitized so they could be included in a database
 9 created for the purpose of preserving written works?
 10 A. For that purpose? 15:31:05
 11 Q. (Counsel nods.)
 12 A. Not to my knowledge.
 13 Q. Have you ever sought out such a license?
 14 A. Try to find someone who would purchase the
 15 rights to digitize a book for archival purposes. 15:31:22
 16 Q. Is that a question?
 17 A. Is that what you're asking?
 18 Q. I'm asking if you ever sought a license. If
 19 you sought out to license your book for that license.
 20 A. Oh, I see. 15:31:34
 21 Q. Because first I asked you if you had ever
 22 licensed it. And then my next question is have you ever
 23 sought out a license?
 24 A. No.
 25 Q. To your knowledge -- do you know anyone who 15:31:42

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1 myself -- that the full text of the book is searchable 15:33:02
 2 through ebrary, I believe. Certainly, though, though
 3 the specific details and functionality of ebrary, the
 4 details of the contract and the functionality of the
 5 book within ebrary, these may be details which I cannot 15:33:23
 6 characterize with any precision for you. And yet that
 7 does nothing to limit my desire to protect and exploit
 8 my rights, my sense that that is an important and
 9 growing market for licensing of my book and my next book
 10 and the book after that. 15:33:47
 11 That these -- this is a -- ebrary was the
 12 first drop in the bucket for me. And I may not be able
 13 to characterize financially and I may not be able to
 14 characterize it fully and yet what it represents is, you
 15 know, the desire on the part of my authorized publisher 15:34:04
 16 and myself to find new and emerging markets and exploit
 17 them and make the book available in new ways through
 18 means that also generate revenue for myself.
 19 Q. Okay. And just to clarify, it's your
 20 understanding that ebrary offers full text searching of 15:34:25
 21 the digital works?
 22 A. I -- it's my impression.
 23 Q. Okay.
 24 A. It's my impression.
 25 Q. Do you have any understanding of how that 15:34:40

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1 service works or how that full text searching function 15:34:42
 2 operates?
 3 A. I'm not sure I understand how that differs
 4 from --
 5 Q. Just -- do you -- 15:34:52
 6 A. Are you searching for something specific? I
 7 don't understand.
 8 Q. I'm just trying to -- originally you indicated
 9 you didn't have a very good understanding of how ebrary
 10 works. But then when we started talking about 15:35:05
 11 specifics, it seemed to help remind you of a few things.
 12 So I was trying to think if there was anything else that
 13 you can think of that you're aware that ebrary offers,
 14 specific types of services that it offers, specific
 15 types of uses that it offers on the works that it 15:35:20
 16 licenses.
 17 A. Well, I have to say that I don't trust my
 18 memory to be precise about ebrary because it exists
 19 within a context now of proprietary databases that offer
 20 a number of services that I would prefer to characterize 15:35:42
 21 such services in general. You know, because in my own
 22 use, it's not as if I say today's the ebrary day, if I'm
 23 looking up this and I go through various databases.
 24 So in my memory, you know, Read-X is fully
 25 text searchable, congressional serial reports from the 15:36:08

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1 example, if I go to Google Books through my web browser 15:37:29
 2 at home, the books that I can access are going to be
 3 primary sources. They're books in the public domain.
 4 For example, I'm writing about Custer. So there are
 5 books, memoirs published in the 1850s about life at West 15:37:45
 6 Point. So you can pull up the full text and that's a
 7 very good service; I appreciate that very much.
 8 But when it comes to something like recent
 9 works about life in the military that have been
 10 published by historians in the last 10 years or 15:38:03
 11 something, then a database like ebrary is -- that's
 12 where its functionality comes into play.
 13 Q. After you conducted a search on ebrary, can
 14 you read some portion of the results that you return?
 15 Or can you access the book that you identify with your 15:38:20
 16 research?
 17 A. It's my impression that -- again, you know, I
 18 haven't used it recently. It's my impression that yes,
 19 you can. But, you know, as I said, you know, had I used
 20 it recently, I could have -- you know, in the last 15:38:42
 21 several months I could give you a much clearer answer.
 22 Q. Well, that was helpful. I'm just trying to
 23 get some understanding of it.
 24 If you could -- actually, you mentioned
 25 earlier that your work Jesse James: Last Rebel of the 15:39:13

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1 19th century, you know, blurs in my memory with looking 15:36:12
 2 up -- doing searches through ebrary or ProQuest
 3 historical newspaper database or Read-X's historical
 4 newspaper database. That these are all -- if I'm
 5 sitting in a research library, there are these array of 15:36:27
 6 proprietary databases which research libraries subscribe
 7 to. And it's not as if I use any one of them in
 8 isolation from the other.
 9 Q. Right.
 10 A. So my characterization of the way in which 15:36:44
 11 ebrary and these other services work has to be a little
 12 more general if I'm going to be honest.
 13 Q. Okay. Just then you were able to give me some
 14 kind of generalities about Read-X and some other
 15 generalities about -- I can't remember the other service 15:36:58
 16 you mentioned. But you mentioned that they had
 17 newspapers and sort of the scope and what type of search
 18 you could do. So maybe it indicates why you go to those
 19 sources and how you use them. Do you have any memory of
 20 what would -- directed you to use ebrary that indicates 15:37:10
 21 what type of content it has or how you can use that for
 22 research? I'm just trying to jog your memory a little
 23 bit what ebrary is and how it works?
 24 A. Yeah, sure. In terms of recent, it's valuable
 25 in terms of recent published secondary works. For 15:37:25

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1 Civil War has been made available as an audiobook for 15:39:16
 2 use by individuals who are blind; is that correct?
 3 A. That is correct. The Talking Books program
 4 from the National Library Service for the Blind.
 5 Q. Are there any other formats that are 15:39:30
 6 accessible to people with print disabilities in which
 7 your work has been made available?
 8 A. Could you give me a specific example?
 9 Q. Well, I think earlier I mentioned Braille as
 10 one possible -- as one possible format or a digital 15:39:48
 11 format that is -- I'm trying to think -- formatted in
 12 such a way that it works very well for a text to speech
 13 or for other sorts of devices that someone with print
 14 disability might use to read.
 15 A. I must say that the one that I'm familiar with 15:40:14
 16 is the Talking Books audiobook.
 17 Q. Okay.
 18 A. It is possible there that I or my publisher
 19 agreed or that there is a legally authorized use of the
 20 book in a braille -- you know, conversion to a braille 15:40:34
 21 edition. So I don't want to -- I don't wish to be
 22 categorical.
 23 Q. Right. I guess what I meant, that you have
 24 licensed.
 25 A. To my recollection, the only one that I recall 15:40:53

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<p>1 licensing is the Talking Books edition. 15:40:55</p> <p>2 Q. If you could turn back to the responses to the</p> <p>3 first set of interrogatories which should be Stiles-5,</p> <p>4 if I noted this to myself properly.</p> <p>5 If you could please turn to page 8 to 15:41:29</p> <p>6 interrogatory number 6. Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And it asks that for each work you claim was</p> <p>9 infringed in this lawsuit you identify any harm that has</p> <p>10 occurred or is expected to occur to any market or 15:41:43</p> <p>11 potential market for that work by virtue of the</p> <p>12 defendant's alleged conduct. Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. Turn to page 9, the end of this response. It</p> <p>15 says, "Plaintiff has to date not been able to quantify 15:42:12</p> <p>16 any specific revenues lost as a result of defendant's</p> <p>17 infringing conduct and plaintiff is not aware of any</p> <p>18 documents in plaintiff's possession, custody, or control</p> <p>19 that could be employed to quantify any specific damages</p> <p>20 incurred as a result of defendants' infringing conduct." 15:42:26</p> <p>21 Do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. Is this still the case?</p> <p>24 A. No.</p> <p>25 Q. Okay. 15:42:34</p>	<p>1 A. In fact I can identify very specifically the 15:42:39</p> <p>2 loss of the revenue to be derived from the sale of one</p> <p>3 digital edition of the book. Which as mentioned is</p> <p>4 commercially available, has been for approximately two</p> <p>5 years, and which could easily have been legally acquired 15:42:55</p> <p>6 for archival or other purposes. And yet the HathiTrust</p> <p>7 instead has without my permission digitized my book when</p> <p>8 it could very easily and very inexpensively have</p> <p>9 purchased a legal copy. So in a sense, speaking</p> <p>10 colloquially, one copy of my book has been stolen. 15:43:15</p> <p>11 Q. Are there any documents that could be used to</p> <p>12 help quantify?</p> <p>13 A. I would like to refer the counsel to exhibit</p> <p>14 Stiles 9. Here it indicates that the Kindle edition of</p> <p>15 Jesse James: Last Rebel of the Civil War is available 15:43:43</p> <p>16 for sale with one click at \$13.99.</p> <p>17 Q. Okay.</p> <p>18 A. And then if you wish to understand my personal</p> <p>19 revenue that would be derived from that, you may consult</p> <p>20 my royalty statement. And from there you can calculate 15:43:59</p> <p>21 my actual take from one individual copy of this book.</p> <p>22 Q. If I could refer you to the Stiles-6 exhibit,</p> <p>23 which is the second set of interrogatories -- the</p> <p>24 responses to the second set of interrogatories and</p> <p>25 request for production. I believe the page I'm 15:44:32</p>
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<p>1 referring you to is page 9. 15:44:42</p> <p>2 A. Page 9?</p> <p>3 Q. Mm-hmm. I'm sorry. Could you please go to</p> <p>4 page 7.</p> <p>5 A. Of course. 15:45:20</p> <p>6 Q. To interrogatory number 5. Which asks that</p> <p>7 for each work you claim was infringed in this lawsuit</p> <p>8 you identify any harm you have suffered or will suffer</p> <p>9 from the inclusion of your work in the HathiTrust.</p> <p>10 A. I see it. 15:45:38</p> <p>11 Q. And I'm going to try to find your answer.</p> <p>12 After the break in the response, it states</p> <p>13 that, "Plaintiff has not identified any specific</p> <p>14 quantifiable past harm or any documents relating to any</p> <p>15 such past harm." And I'm guessing based on the response 15:45:55</p> <p>16 that you just gave me that that is not still the case;</p> <p>17 is that correct?</p> <p>18 A. That is correct.</p> <p>19 Q. And for the reasons you just discussed?</p> <p>20 A. That is correct, that the public university 15:46:07</p> <p>21 libraries under cover of sovereign immunity have in dark</p> <p>22 of night stolen a copy of my book and have now told me</p> <p>23 that I should like it. So certainly the direct harm can</p> <p>24 be quantified at the retail cost of one digital book.</p> <p>25 And the harm then to me would be the royalties that 15:46:27</p>	<p>1 would be derived from the sale of one copy of my book. 15:46:30</p> <p>2 Q. Okay. And if you'd turn to page 8 of the same</p> <p>3 document. There is a bulleted list of potential harms</p> <p>4 that are enumerated. And I believe there's eight bullet</p> <p>5 points that are identified as, I guess, the effect of 15:46:58</p> <p>6 the potential market for or value of the copyrighted</p> <p>7 work. Do you see that at the top of page 8?</p> <p>8 A. Yes.</p> <p>9 Q. Did you draft the language in this response</p> <p>10 yourself? 15:47:17</p> <p>11 A. That is a very interesting question. I'm very</p> <p>12 sorry to say that no, I have not made legal history by</p> <p>13 drafting a response in a formal document to be filed</p> <p>14 with the court as a plaintiff who has no training or</p> <p>15 standing as an attorney. In fact, I provided 15:47:40</p> <p>16 information that allowed my attorney to draft a response</p> <p>17 that's in keeping with the expected format. So I'm</p> <p>18 sorry that we can't make history here today but in fact</p> <p>19 I've done it the way everyone does.</p> <p>20 Q. That's fine. But you verified these 15:47:57</p> <p>21 interrogatories as we discussed earlier?</p> <p>22 A. Yes, absolutely.</p> <p>23 Q. And you said you believe that they're still</p> <p>24 correct except for the things that you've already</p> <p>25 identified to us so far? 15:48:10</p>

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1 A. I would say yes. 15:48:11

2 Q. If we could run through several of these

3 bullet points.

4 The first one is "Loss or potential loss of

5 revenue from sale or licensing of digital copies of 15:48:18

6 plaintiff's copyrighted works for inclusion in the

7 digital archive for preservation purposes."

8 Do you have an understanding of what that

9 statement means?

10 A. Yes. That the HathiTrust libraries have taken 15:48:31

11 a copy of my book and they have declared the reason why

12 they have stolen it. And yet their use of my book and

13 their acquisition of my book begins with what again -- I

14 can't make a legal characterization, but speaking

15 colloquially -- begins with that. What that says to me 15:48:55

16 is that the representations about the use of my book and

17 the potential uses of my book are not to be trusted.

18 I also see that the potential exists for my

19 book to not be purchased or licensed to the individual

20 libraries that comprise the trust. But there is a 15:49:17

21 possibility that at a future date they will decide

22 they're all going to share one digital copy and allow as

23 many people as possible to view it. Certainly their

24 actions lead me to fear that this could result.

25 Also, and this begins to step on some of the 15:49:33

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1 or potential loss of revenue from sale or licensing of 15:51:27

2 digital copies of plaintiff's copyrighted works for use

3 purely in connection with non-consumptive research."

4 Do you have an understanding of what that

5 statement refers to? 15:51:40

6 A. Yes. As I believe we've discussed earlier,

7 non-consumptive research appears to be an exciting new

8 area of research, one that appears to be creating a

9 potentially important market and I would like to exploit

10 in the future. 15:51:56

11 So non-consumptive research again, if I

12 understand it correctly, allows scholars or others to

13 conduct searches across large quantities of books that

14 have been digitized and then to generate statistical or

15 otherwise interesting analysis of multiple works in the 15:52:12

16 same piece of research. And, again, I would be very

17 interested in licensing my book for use in

18 non-consumptive research. So I'm very excited to have

19 this emerging market identified for me.

20 Q. You said you're interested in licensing your 15:52:32

21 book for non-consumptive research; is that correct?

22 A. Absolutely.

23 Q. Why have you not done that so far?

24 A. Not all markets are as mature as others. And

25 not every market is determined by the -- in this case 15:52:49

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1 other points, that it is possible that piracy and other 15:49:36

2 authorized and unauthorized access could lead to the

3 book being illegally distributed through means that I've

4 not authorized. Certainly I've not authorized this

5 particular incident of the creation of a digital edition 15:50:00

6 of my book whether for archival purposes or other

7 purposes. And certainly I'm afraid that uses that I

8 have not authorized above and beyond that first

9 unauthorized use could potentially result. So I do see

10 that as a potential damage resulting from this. 15:50:21

11 Q. You mentioned earlier that you had not

12 licensed your book for digitization for inclusion in

13 digital archives for preservation purposes; is that

14 correct?

15 A. Yes. 15:50:40

16 Q. And that you haven't sought out that type of

17 license; is that correct?

18 A. You mean sought to sell such a license?

19 Q. Mm-hmm.

20 A. That is correct. Nor for that matter has the 15:50:56

21 HathiTrust approached me requesting such a license.

22 Q. Has anyone ever, to your knowledge, solicited

23 such a license on your behalf?

24 A. Not to my knowledge.

25 Q. Let's move on to the second item here. "Loss 15:51:24

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1 the owner of an intellectual property going out and 15:52:54

2 seeking to create that market.

3 In non-consumptive research, my book, this

4 individual title, would be by definition, you know, one

5 small element. Non-consumptive research, to my 15:53:09

6 understanding, requires large numbers of books. So

7 for -- it would not make any sense at all for me to take

8 a backlist title of mine and try to go out and create a

9 market. But that fact that it makes no sense for me to

10 spend a lot of time trying to create this market does 15:53:29

11 not mean that I in any way give up my rights to a

12 potential market as it emerges, to take part as a

13 licensor of rights. I think that it's very interesting

14 and potentially very powerful. But it's certainly not

15 incumbent upon me to create that market in order to 15:53:48

16 preserve my rights within it.

17 Q. Have you ever solicited a license of your work

18 for non-consumptive research purposes?

19 A. No.

20 MR. GOLDMAN: Objection; asked and answered. 15:54:00

21 BY MS. ROACH:

22 Q. Has anyone ever done so on your behalf?

23 A. Not to my knowledge.

24 Q. Are you aware of any entities that license

25 works for those purposes? 15:54:10

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1 A. Well, again, it's possible that ProQuest 15:54:15
 2 through ebrary allows such a functionality, but I can't
 3 speak to that specifically.
 4 Again, this is a rapidly changing marketplace.
 5 And that very fact, that these are still emerging 15:54:28
 6 markets and this is still newly emerging functionality,
 7 which six months from now is going to look different
 8 from what it does today, the very fact that we can't
 9 predict where this new technology, this new type of
 10 research is going, to me, increases the -- my -- what is 15:54:47
 11 incumbent upon me, my desire to preserve my rights to
 12 license my work for use within that market, I'm not
 13 hostile to it. I find it to be exciting. But at the
 14 same time, you know, that doesn't mean that I know a lot
 15 about the market, nor do I have to be interested in 15:55:07
 16 preserving my rights within it.
 17 Q. Right. And I understand that. I'm just
 18 trying to find out more about this statement if this is
 19 a potential for your work or a potential market
 20 generally speaking, whether others have taken advantage. 15:55:24
 21 I'm just trying to have more of an understanding of your
 22 knowledge of this area.
 23 Are you aware of any copyright holders that
 24 have licensed their works for non-consumptive research?
 25 A. No, but I have not had a lot of discussions 15:55:40

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1 A. I believe so. But, you know, that's my 15:57:10
 2 impression. That certainly -- what I should say is
 3 certainly there are works for which that has been
 4 licensed. That's my impression.
 5 Q. Do you know if that -- if full text searching 15:57:26
 6 is provided through ProQuest ebrary for your work?
 7 A. I believe so. But I would have to refer to my
 8 earlier statement that I haven't spent a lot of time
 9 monkeying around with ebrary to indulge myself with my
 10 own book on ebrary. 15:57:48
 11 Q. Have you received any offers to sell or
 12 license digital copies of your work purely for full text
 13 searching purposes?
 14 A. Have I received any? Well, there's the ebrary
 15 subsidiary rights sale. And apart from that, I couldn't 15:58:06
 16 name any.
 17 Q. But we're not -- we haven't really established
 18 what ebrary offers or if it's purely full text
 19 searching.
 20 A. If you wish to characterize it that way, 15:58:19
 21 certainly.
 22 Q. Have you ever sought out opportunities to
 23 license your work purely for full text searching
 24 purposes?
 25 A. Not that I can recall. 15:58:28

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1 with authors about their various rights, negotiations 15:55:43
 2 for databases of research. To be honest, it's not a
 3 topic that comes up a lot.
 4 Q. Has it been discussed at all by Authors Guild?
 5 A. Well, yes, we have discussed the fact that, 15:55:59
 6 you know, these are new markets that are emerging and
 7 that we have rights that we're very interested -- we're
 8 both friendly to the new uses that technology allows of
 9 our works, we're very excited about the relevance of our
 10 work in the changing -- rapidly changing digital world, 15:56:16
 11 and we wish to encourage that while preserving our
 12 rights.
 13 So can I point to a specific conversation?
 14 No. Has it come up in conversation with others at
 15 Authors Guild meetings? Yes. 15:56:33
 16 Q. I think the third bullet point here is, "Loss
 17 or potential loss of revenues from sale or licensing of
 18 digital copies of plaintiff's copyrighted works for use
 19 purely in connection with full text searching."
 20 We discussed this a little bit earlier. And 15:56:43
 21 then again with respect to ProQuest we talked about this
 22 a little bit. And it's my understanding from what
 23 you've said that -- do you believe that ProQuest offers
 24 this full text searching service on works that it
 25 licenses? 15:57:09

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1 Q. Are you aware of any entities that buy or 15:58:29
 2 license digital works to offer full text searching only?
 3 A. Well, again, this is a rapidly changing
 4 marketplace and there's also a lot of turmoil. For
 5 example, you know, Google, when it was on its way to 15:58:45
 6 doing this, when it scanned millions of books without
 7 authorization from the copyright holders and -- it
 8 offers full text searching on its public domain books
 9 already to the public -- and if The Authors Guild's
 10 settlement with Google had been approved, then that 15:59:05
 11 would be a commercially available process right now.
 12 So do I know that it's in play and that this
 13 is what people want to offer? Yes. Do I know that it's
 14 available for public domain works already? Yes. Do I
 15 know the exact status of where things stand right now? 15:59:25
 16 No.
 17 Q. And I guess I should clarify. When I say
 18 "purely for full text searching purposes," I don't mean
 19 to include being able to view the pages of the work, but
 20 just to run a search on the text itself without being 15:59:37
 21 able to view the work as you can in a Google word
 22 search.
 23 A. Well, the HathiTrust does that with my book
 24 right now without my authorization or participation.
 25 Q. And what I'm asking is have you received any 15:59:50

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1 offers to sell or license any digital copies of your 15:59:53
 2 work purely for full texting searching purposes without
 3 viewing --
 4 A. Not to my knowledge.
 5 Q. -- the work? 16:00:00
 6 And have you solicited any of those --
 7 A. Not to my knowledge.
 8 Q. Are you aware of any copyright holders who
 9 have sold or licensed their digital works purely for
 10 purposes of full text searching without being able to 16:00:14
 11 view the work itself?
 12 A. No.
 13 Can we take just a short break here?
 14 MS. ROACH: Absolutely. Absolutely.
 15 (Recess taken from 4:01 p.m. to 4:04 p.m.) 16:01:23
 16 BY MS. ROACH:
 17 Q. I think I was going to direct your attention
 18 to this fourth bullet. And it's kind of long, so bear
 19 with me for one second.
 20 "Loss or potential loss of revenue from sale 16:04:30
 21 or licensing of derivative uses, including derivative
 22 uses made possible by artificial intelligence and other
 23 technologies to create translations, anthologies,
 24 abridgments and versions suited for new and emerging
 25 platforms and devices." 16:04:45

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1 assert the right to make a digital edition without even 16:06:36
 2 asking me, raises up into all sorts of possibilities
 3 that there -- that there will be a cascading effect of
 4 lost rights down the road. That these digital editions
 5 were created without my authorization and may be used or 16:06:55
 6 exploited in ways that I can't even foresee at this
 7 point which could then result in loss of possible, you
 8 know, exploitation of licensing rights by myself.
 9 So again, this says "loss or potential loss."
 10 The artificial intelligence market is not so big right 16:07:17
 11 now, but the whole point is this is a potential emerging
 12 market that we can see the possibility for. Even though
 13 it may not exist now, five years from now it could be
 14 huge. That's what it means to me.
 15 Q. And what I'm trying to understand is how the 16:07:34
 16 uses being made by HathiTrust harm this potential
 17 market. Is there anything you can point to to help
 18 explain that?
 19 A. One, HathiTrust established its -- from my
 20 perspective, its lack of good faith by creating its own 16:08:07
 21 digital edition of a book that is in print, that is
 22 commercially available and that even if they created it
 23 before it was available as a commercial e-book, one
 24 exists now. They did not approach me. They did not ask
 25 my permission, they did not come to me and say we have 16:08:27

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1 Do you have an understanding of what that 16:04:46
 2 means?
 3 A. This to my best understanding is either --
 4 refers to new markets created by the arrival of alien
 5 robots or -- 16:05:00
 6 Q. Which is what I was wondering. Continue.
 7 A. -- or it refers to the fact that the -- again,
 8 we must allow room for -- when we think about rights --
 9 for the way things will change in ways that we can
 10 barely grasp now. So already there are automatic 16:05:22
 11 translation services, for example, for web pages through
 12 web browsers that are -- while they're often cumbersome,
 13 they're at a level unimaginable five years ago. Well,
 14 imaginable but didn't seem practical.
 15 So the point is that artificial intelligence 16:05:43
 16 might allow the creation of translations, that it might
 17 allow for sort of auto-anthologizing, for pulling out --
 18 for abridging a book without any human intervention.
 19 That this is the sort of thing that could happen, but it
 20 should happen through a licensed authorized means. In 16:06:08
 21 other words, that this is something that could be an
 22 important revenue stream for an author.
 23 And so having digital books -- unauthorized
 24 digital editions of my book floating around and have
 25 a -- you know, again a state university library system 16:06:31

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1 these exciting ideas. They did not say, "We're 16:08:31
 2 concerned that one day our libraries will all burn down
 3 and we'll lose our physical copy of the book; may we
 4 make a copy."
 5 Who knows. For all I know -- and this is not 16:08:45
 6 a statement of declaration of fact, but a potential I
 7 might have -- I might have given permission if they'd
 8 asked. They did not ask.
 9 So for me this very -- this act of theft and
 10 this act of bad faith from my perspective -- and, again, 16:08:55
 11 I'm not speaking legally but as a -- colloquial terms --
 12 this means that this work has been created by people who
 13 don't recognize my rights; who believe that the uses
 14 they see for it trump any of -- any need for my
 15 participation and any need to request my permission and 16:09:16
 16 to compensate me for any potential uses of the work.
 17 Now currently they tell me this is -- your
 18 book is here for archival purposes only. We just stole
 19 it to keep it, not let anyone see it. But when -- the
 20 reason I'm here begins with an act -- again, 16:09:34
 21 colloquially speaking -- of theft. Then what is my
 22 grounds of saying, "Oh, well, from now on I will trust
 23 you"? The fact that this work exists outside of any
 24 framework which I have authorized and participated in,
 25 that this digital edition exists, means that it opens 16:09:51

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1 the door to a whole cascade of effects. 16:09:54

2 There was a well-known case not too long ago

3 in which an Information Wants To Be Free activist

4 released digital versions of the J-Store, all these

5 journals which can only be accessed digitally by 16:10:13

6 subscribers. Why would that not happen? Now of course

7 that doesn't mean there aren't security risks in the

8 authorized channels, but they're authorized; I'm getting

9 paid. That's something I'm taking part in. This is

10 something I'm not taking part in. 16:10:30

11 So basically my work has been stolen and then

12 I'm told to trust HathiTrust. To me that establishes a

13 relationship of mistrust. The very premise of it is

14 excluding me from any participation. That is the

15 premise at which we begin, from my perspective. So all 16:10:48

16 of these potential losses, you know, harm to me is --

17 seems to me to be a natural potential result from this.

18 I don't know what the next step will be with

19 HathiTrust, because they've already told me in essence

20 we're not including you in any of our decisions 16:11:04

21 regarding this edition of your book. That is my

22 perspective on these potential harms.

23 Q. Okay. And just so I can understand your

24 colloquial use of the word "theft," is any use of a

25 copyrighted work that's not authorized theft? 16:11:19

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1 talked about, is there any kind of specific way you can 16:13:01

2 help me understand how full text searching without being

3 able to see the work harms -- is a harm to you and to

4 your work?

5 MR. GOLDMAN: I'm going to object to the form 16:13:21

6 of the question.

7 MS. ROACH: Right. I can try to rephrase it.

8 MR. GOLDMAN: No, you can -- if you understand

9 you can answer.

10 THE WITNESS: Well, from what I'm saying, 16:13:28

11 you're saying now that we've got -- you would not

12 characterize it this way, but I will -- now that we've

13 illegally made a copy of your book, what harm is it to

14 you how we use it? That's -- that's sort of the way it

15 strikes me. 16:13:45

16 First of all, we have the illegal act. You

17 shouldn't have it in the first place. Not you, your

18 clients. You shouldn't have it in the first place.

19 It's like saying now that I've stolen your baseball,

20 what harm is it to you that we go and play a ballgame 16:13:57

21 with it? Well, you've taken it from me. Even worse, I

22 sell these products for a living. You know, through my

23 publisher. So it's not taking a baseball if I'm a

24 baseball vendor and you're stealing off my baseball cart

25 and saying, well, hey, now that I've got it, why can't I 16:14:13

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1 A. They did not -- it's not use. It's creation 16:11:23

2 of a digital edition. They copied it. They or they

3 acquired a copy that was not as authorized.

4 Q. Okay. Is any copy of a copyrighted work

5 that's not specifically authorized by the copyright 16:11:39

6 holder a theft?

7 A. I don't wish to characterize copyright law in

8 general. But in this case, yes. I mean, clearly they

9 have -- to my understanding of the law and of basic

10 morality under which we operate and usually the academic 16:12:00

11 environment operates as well -- certainly I'm a

12 supporter of libraries and academic studies; I'm not

13 against information being distributed -- but in this

14 case, yes, there was a clear case where they wanted to

15 create a new edition of my book, they had to come to me. 16:12:21

16 That's illegal. They created an edition of my

17 book and put it in their digital archive. So to me

18 that's no different than coming to my house and taking a

19 book off my shelf. You can't do that. And I'm fairly

20 certain I wouldn't be involved in this case if I didn't 16:12:42

21 believe that was illegal as well.

22 Again, I realize that I'm not an attorney, but

23 I know I'm not the only one with that belief.

24 Q. And just to kind of explore this question with

25 respect to the other types of potential markets we 16:12:57

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1 play a ballgame? Why can't I play catch? What harm is 16:14:19

2 it to you; you're not playing with it. But that's my

3 livelihood. I sell these things. I make them for sale.

4 So what that means is -- that's one thing. So

5 we begin with an act of theft. Second thing is that in 16:14:30

6 this very challenging time for authors, we have a need

7 to -- you know, to take part in and fully participate in

8 the new digital environment that exists. If our choice

9 is to either relinquish all rights or to resist all

10 digital uses, those are -- that's a false dichotomy. 16:14:58

11 And those are absurd extremes. So, you know, a

12 reasonable and, in fact, I believe, lawful way to go

13 about this is licensing. And so as new and emerging

14 markets emerge, you know, authors are -- including me,

15 are not getting rich. There are -- a tiny handful are. 16:15:20

16 The rest of us are struggling. And I'm a professional

17 writer. So to say to me well, you know, this is really

18 exciting. We see value in this non-consumptive full

19 text searching/non-consumptive research. We think this

20 is a really valuable thing, so therefore why should we 16:15:37

21 pay you for it -- that's what you're telling me. That's

22 what I hear, I should say. So to me the harm is that

23 you are identifying an emerging market and then saying

24 but you shouldn't take part in this as a licensor.

25 Now we're not talking about enormous sums of 16:15:53

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1 money. I'm not talking about the right to -- or the 16:15:56
 2 possibility that I'll be charging a prohibitive sum.
 3 I'm talking about participating as a partner in full
 4 texting searching in non-consumptive research. So the
 5 harm to me is that these markets are new, they're 16:16:12
 6 emerging, they're changing, and I want to participate.
 7 I want to continue. But I want to be a participant. So
 8 full texting searching? Great thing. Wonderful thing.
 9 But if you're going to take an edition of my book to do
 10 that, it's got to be with my participation. That's the 16:16:27
 11 harm to me.
 12 Q. Okay. And I guess I'm trying to speak at a
 13 lower level than that. To the extent we -- and I know
 14 we don't know for sure what ebrary does, we haven't
 15 really established that exactly, but it's our kind of 16:16:44
 16 working understanding that they offer -- they may offer
 17 full texting searching and that your work has been
 18 licensed for that. And so I'm trying to understand how
 19 the particular type of full texting searching that
 20 HathiTrust offers, how that has impacted your ability to 16:17:00
 21 license your work. I am just trying to understand more
 22 concretely what the harm is.
 23 MR. GOLDMAN: I'm going to object to the form
 24 of the question. I'm also going to object as asked and
 25 answered. I understand that you may not be getting an 16:17:17

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1 to pay for and then just don't pay any more for it? 16:18:42
 2 Well, the harm is you basically destroyed the market and
 3 saying everything is free.
 4 So can I give you a specific amount? No. Can
 5 I tell you this basically recognizes a market and then 16:18:53
 6 there's an argument that we should then destroy the
 7 compensation mechanism that exists? We're talking about
 8 the mechanism, not the specific amounts. Yes, that's
 9 where I see the harm.
 10 You know, again, what ebrary specifically 16:19:08
 11 does, the specifics of that, you know, okay. So I've
 12 established that, you know, I can't sit here and give
 13 you a list as an expert on ebrary. I do not claim to
 14 be. But the fact is is that these services clearly have
 15 a value because people were paying for it. I mean, 16:19:22
 16 that's the definition of a recognized market value. And
 17 that I am paid a small amount to par- -- take part in
 18 that market as a supplier. And then now I'm being asked
 19 to supply something, have it taken for free, and then
 20 have it be exploited in ways that clearly have a market 16:19:40
 21 value and to be completely excluded from any market for
 22 it and to have the entire compensation structure be
 23 destroyed. I see that as major harm.
 24 BY MS. ROACH:
 25 Q. And how do you know that there's a market 16:19:53

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1 answer that you want, but he has answered that question 16:17:20
 2 several times.
 3 MS. ROACH: He hasn't answered it in the
 4 context of the -- there's a concern that he's not able
 5 to take advantage of licensing his work for certain 16:17:27
 6 types of full texting searching, is what I hear you to
 7 be saying. So I'm trying to understand that in the
 8 context of the ProQuest ebrary license. And it may be
 9 that that's a different type of license and maybe that's
 10 the answer, but I'm just trying to understand how those 16:17:45
 11 two things fit together.
 12 THE WITNESS: Let me put it this way.
 13 ebrary and other archival and text searching services,
 14 libraries pay for. Research libraries pay a lot of
 15 money for them. So now they want to find a way of not 16:18:03
 16 paying for them. That's what it looks like to me. So
 17 can I give you a dollar and cents amount? No, of course
 18 not. I cannot. That would be absurd for me to say that
 19 I can identify X number of dollars that I will lose.
 20 What I can say is that libraries have shown 16:18:21
 21 this is a value. The fact that people pay for this
 22 service at the -- from the library end, you know, that
 23 ProQuest makes money providing this service says it has
 24 a market value. And then to be told what harm is there
 25 if we take this thing which we've proven we're willing 16:18:38

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1 value for the use that HathiTrust makes of -- in the 16:19:57
 2 full texting searching?
 3 MR. GOLDMAN: Objection to the form.
 4 THE WITNESS: How do I know there's a market
 5 value? I would assume that -- first of all, that 16:20:06
 6 HathiTrust is a result of an expenditure of money,
 7 perhaps significant money. Therefore, clearly it's a
 8 value. It's worth spending money on. I'm told they
 9 even have HathiTrust flags. That means they've really
 10 spent money; they even have flags. I don't even have my 16:20:27
 11 own flag.
 12 These services, as I mentioned, you know, that
 13 it mimics and perhaps it adds new functionality -- I'm
 14 not saying that the functionality it provides is bad.
 15 I'm not saying that the ideas, the concepts of 16:20:42
 16 exploiting published works are bad. I'm not a Luddite
 17 in here to stop the Internet. What I'm saying is that,
 18 you know, the fact that money has -- and probably
 19 significant -- I assume significant amounts of money --
 20 have been expended in creating this system. That tells 16:20:59
 21 me that it has value.
 22 The fact that ebrary and other searches --
 23 searchable databases, libraries are paying for access to
 24 those or J-Store or other subscription services that
 25 allow text searching and whatnot, they're being paid 16:21:18

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1 for, there's a market value there. And so is 16:21:21
 2 HathiTrust -- for me to assume that there is no market
 3 value in what HathiTrust is providing would mean I would
 4 have to ignore all of this other evidence and just
 5 assume that this is a great exception to what I see in 16:21:36
 6 the full context of what a HathiTrust exists in; you
 7 know, that it's -- money's been spent in creating it,
 8 that other services that provide text searching and
 9 other functionality are being paid for right now by
 10 research libraries. So I would have to make a great 16:21:51
 11 leap of faith to assume there is no market value. And I
 12 always believe that the obvious answer is usually the
 13 right one. They're spending money on it, they're
 14 spending money on similar services. That means this
 15 probably has a market value. 16:22:07
 16 MS. ROACH: I was just trying to understand
 17 what was underlying your statement there.
 18 If I could just have one second to look at my
 19 notes.
 20 I don't think I have any further questions. 16:23:22
 21 Thank you very much for your time; I really appreciate
 22 it.
 23 THE WITNESS: I hope I wasn't too combative.
 24 You've been an able advocate and questioner. And thank
 25 you very much for being so pleasant. 16:23:25

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1 Q. Do you see any harm or potential harm that 16:24:38
 2 could arise from defendant's orphan work program? To
 3 you. Harm to you.
 4 A. Yes.
 5 Q. And what is that? 16:24:46
 6 A. Absolutely. Well, first of all, it erodes the
 7 principle of -- it -- HathiTrust is arrogating to itself
 8 the right to determine what works should be published
 9 that are still covered by copyright.
 10 I mean, again, this -- my participation in 16:25:06
 11 this action begins with the fact that, as I see it, they
 12 stole a book that is commercially available. And at
 13 this point -- and then, furthermore, after making great
 14 declarations about their diligence about establishing
 15 who the -- which works are orphan works, it very quickly 16:25:27
 16 turned out that a number of books they had identified
 17 have easily-found authors. So, you know, this shows
 18 sloppiness; this shows a lack of due diligence; this
 19 shows, in essence, a larger pattern of disregard for the
 20 rights of authors; and a -- it shows that insufficient 16:25:49
 21 weight is being given to the rights of the copyright
 22 holder.
 23 So I have -- for example, existing books that
 24 are out of print, they at some future point could be
 25 determined -- I mean, if we -- if the process we've seen 16:26:10

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1 MS. ROACH: I'm sorry that it took so long. 16:23:25
 2 But I'm glad that you're out of here on time.
 3 THE WITNESS: Yes. I really appreciate that.
 4 MR. GOLDMAN: I actually might have a couple
 5 of questions. 16:23:41
 6 MS. ROACH: Sorry. I didn't give you a
 7 chance. I apologize.
 8 MR. GOLDMAN: That's okay.
 9 Okay. Let's just go for it.
 10 EXAMINATION 17:25:44
 11 BY MR. GOLDMAN:
 12 Q. Mr. Stiles, I just have a couple follow-up
 13 questions to clarify a couple of points that were made
 14 during this deposition.
 15 First of all, you discussed earlier some 16:24:07
 16 issues related to orphan works; do you recall that?
 17 A. Yes.
 18 Q. And you said during that discussion, if I
 19 recall correctly, that you do not believe that your work
 20 had been identified as an orphan work; is that correct? 16:24:21
 21 A. Yes.
 22 Q. Now, and you also said that you do not believe
 23 you were directly harmed as a result of the defendant's
 24 orphan works program; is that correct?
 25 A. I believe that's what I said. 16:24:37

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1 previously is the same level of due diligence -- lack of 16:26:15
 2 due diligence continues in the future, my works may be
 3 determined to be orphan works while I'm still up and
 4 walking around. Or while they're still in copyright and
 5 my assigns have the rights to them. That -- that, you 16:26:31
 6 know, this damages the value -- the economic value of
 7 copyrighted works in the marketplace. And it lowers --
 8 it feels like an attempt to ignore and disregard the
 9 rights of copyright holders. So, you know, as somebody
 10 who makes a living by creating new works, it does feel 16:27:00
 11 like it harms my interests not directly in the sense of
 12 I have specific titles that they've identified as orphan
 13 works but it has a larger impact about my profession.
 14 Q. We also -- not we also spoke. But you also
 15 testified earlier and were asked questions regarding 16:27:21
 16 full texting searching and ways that your work has or
 17 has not been made available for full texting searching.
 18 Do you recall that discussion?
 19 A. Yes.
 20 Q. I wanted to see if I could refresh your memory 16:27:40
 21 regarding some other uses for full texting searching
 22 that may have occurred with your work. In particular,
 23 if I could turn your attention to Exhibit Stiles 10,
 24 which you were shown before. Stiles 10 is a -- has been
 25 represented to be a printout from the Look Inside 16:27:59

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<p>1 feature on Amazon document. 16:28:01</p> <p>2 A. Specifically with the print book page.</p> <p>3 Q. Correct. And on that page there's a feature</p> <p>4 that's shown that says Search Inside This Book. What do</p> <p>5 you understand that feature to be, if you do at all? 16:28:16</p> <p>6 A. That -- I understand that to be a means of</p> <p>7 giving readers a chance to get a sense of what the</p> <p>8 content is of a book in the same way that if you walk</p> <p>9 into a bookstore you can pick a book off a table or</p> <p>10 shelf and leaf through it and take a look and see if 16:28:41</p> <p>11 there are -- things that you're specifically interested</p> <p>12 in are in here.</p> <p>13 Q. Is it your understanding that this feature</p> <p>14 allows users to conduct a full text search of your book?</p> <p>15 A. Not in the sense that we're talking about with 16:28:53</p> <p>16 the HathiTrust searching. You know, there are many</p> <p>17 pages which, for example, are blacked out or not</p> <p>18 accessible through this. It is a sampling only, rather</p> <p>19 than a database search function which allows you to</p> <p>20 derive statistical information or to actually -- to 16:29:18</p> <p>21 derive information about the content of the book in any</p> <p>22 systematic manner.</p> <p>23 Q. No, but isn't it -- isn't it true that that</p> <p>24 Search Inside feature on Amazon, whether it allows --</p> <p>25 whether it allows you to see all the pages is one thing, 16:29:33</p>	<p>1 but isn't it your understanding that using this feature 16:29:35</p> <p>2 you can search for the occurrence of key words in the</p> <p>3 entire book?</p> <p>4 A. Oh, yes, that's true. It does actually -- it</p> <p>5 won't show you the page, but it does say, you know, 16:29:43</p> <p>6 pages 500 -- and it will list the pages where it occurs,</p> <p>7 that is true.</p> <p>8 Q. And isn't that in some way similar to the</p> <p>9 feature that exists on HathiTrust?</p> <p>10 A. Yeah, it would seem to be, yeah. 16:29:56</p> <p>11 Q. And do you receive compensation from Amazon</p> <p>12 when -- do you receive compensation from purchases of</p> <p>13 your work through Amazon?</p> <p>14 A. Yes, absolutely.</p> <p>15 Q. Do you receive compensation from any use 16:30:09</p> <p>16 that's made of your work on HathiTrust?</p> <p>17 A. None whatsoever.</p> <p>18 Q. You testified earlier about a settlement</p> <p>19 agreement that had been entered into in connection with</p> <p>20 The Authors Guild case against Google. Do you recall 16:30:42</p> <p>21 that?</p> <p>22 A. Yes.</p> <p>23 Q. And is it your understanding that pursuant to</p> <p>24 that agreement authors like yourself would have received</p> <p>25 compensation for various uses of your work? 16:31:00</p>		
<p data-bbox="665 1008 795 1039" style="text-align: right;">Page 192</p> <p>1 A. Yes. 16:31:04</p> <p>2 Q. And is it your understanding that that</p> <p>3 compensation would have included for uses involving full</p> <p>4 texting searching?</p> <p>5 A. Yes. It's my understanding. 16:31:16</p> <p>6 Q. And what about non-consumptive research uses?</p> <p>7 A. I would assume so, though I don't have</p> <p>8 specific knowledge about that.</p> <p>9 Q. So --</p> <p>10 A. It's my understanding that the Google -- 16:31:37</p> <p>11 proposed Google settlement was a far-reaching attempt to</p> <p>12 allow the digital exploitation of books, establishing</p> <p>13 that within the framework of, you know, compensation for</p> <p>14 all these uses for authors.</p> <p>15 Q. Do you believe -- do you believe that the 16:31:53</p> <p>16 structure that was proposed as part of that settlement</p> <p>17 agreement represented a potential way to exploit your</p> <p>18 work in ways that hadn't been done before?</p> <p>19 A. Yes.</p> <p>20 MS. ROACH: Objection -- 16:32:11</p> <p>21 THE WITNESS: Sorry. Go ahead.</p> <p>22 MS. ROACH: -- to form. It was a little</p> <p>23 convoluted.</p> <p>24 THE WITNESS: Yes, I think the Google book</p> <p>25 settlement would have allowed for my book to be used in 16:32:20</p>	<p data-bbox="1331 1008 1461 1039" style="text-align: right;">Page 193</p> <p>1 new and innovative ways and would have allowed for 16:32:25</p> <p>2 searching and culling of information in a manner that</p> <p>3 had not been seen before.</p> <p>4 BY MR. GOLDMAN:</p> <p>5 Q. And is it your understanding that you would 16:32:37</p> <p>6 have been compensated for those uses?</p> <p>7 A. Yes.</p> <p>8 Q. And is it your understanding that the</p> <p>9 defendants in this case are making uses of your work</p> <p>10 that would have been covered by that settlement 16:32:52</p> <p>11 agreement?</p> <p>12 A. Yes.</p> <p>13 Q. Are you receiving any compensation for any of</p> <p>14 those uses by defendants?</p> <p>15 A. By defendants? 16:33:05</p> <p>16 Q. (Counsel nods.)</p> <p>17 A. No.</p> <p>18 MR. GOLDMAN: I have no further questions.</p> <p>19 (The proceeding adjourned at 4:33 p.m.)</p> <p>20 _____</p> <p>21 TIMOTHY J. STILES</p> <p>22 Subscribed and sworn to before me</p> <p>23 this day of 2012.</p> <p>24</p> <p>25</p>		

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CERTIFICATE
STATE OF CALIFORNIA)
: Ss
COUNTY OF CONTRA COSTA)

I, Heidi Belton, a Certified Shorthand Reporter, a Registered Professional Reporter, a Certified Realtime Reporter, Certified Realtime Professional, and Certified LiveNote Reporter within and for the State of California, do hereby certify:

That TIMOTHY J. STILES, the witness whose deposition is herein before set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 12th day of June, 2012.

HEIDI BELTON, CSR, RPR, CRR, CCRR, CLR
Certified Shorthand Reporter No. 12885

1 NAME OF CASE: The Authors Guild, Inc., et al. v
2 HathiTrust, et al.
3 DATE OF DEPOSITION: Thursday, May 31, 2012
4 NAME OF WITNESS: Timothy J. Stiles
5 Reason Codes:
6 1. To clarify the record.
7 2. To conform to the facts.
8 3. To correct transcription errors.
9 Page _____ Line _____ Reason _____
10 From _____ to _____
11 Page _____ Line _____ Reason _____
12 From _____ to _____
13 Page _____ Line _____ Reason _____
14 From _____ to _____
15 Page _____ Line _____ Reason _____
16 From _____ to _____
17 Page _____ Line _____ Reason _____
18 From _____ to _____
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21 Page _____ Line _____ Reason _____
22 From _____ to _____
23 _____
24 TIMOTHY J. STILES
25

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