

EXHIBIT 8

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., ET)
AL.,)

Plaintiffs,)

Index No.
11 Civ. 6351 (HB)

vs.)

HATHITRUST, et al.,)

Defendants.)
-----)

CONFIDENTIAL - ATTORNEYS' EYES ONLY

DEPOSITION OF PETER HIRTLE

New York, New York

Wednesday, April 18, 2012

Reported by:

THOMAS A. FERNICOLA, RPR

JOB NO. 48688

Page 2

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4
5 April 18, 2012
6 9:24 a.m.
7
8
9 DEPOSITION of PETER HIRTLE, held at the
10 Offices of Frankfurt Kurnit Klein & Selz, PC,
11 488 Madison Avenue, New York, New York, before
12 Thomas A. Fernicola, a Registered Professional
13 Reporter and Notary Public of the State of New
14 York.
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1 P. Hirtle
2 P E T E R H I R T L E,
3 called as a witness, having been duly sworn
4 by a Notary Public, was examined and
5 testified as follows:
6 BY THE REPORTER:
7 Q. Please state your name and address
8 for the record.
9 A. Peter Hirtle, 415 Hanshaw Road,
10 Ithica, New York 14850.
11
12 EXAMINATION BY
13 MR. GOLDMAN:
14 Q. Good morning, Mr. Hirtle.
15 MR. POTTER: Actually, before we
16 begin, Jeremy, I just want to state
17 something for the record.
18 I understand that last week you had a
19 conversation with Mr. Hirtle, an ex parte
20 communication with a represented party
21 outside of counsel. Not only is he a
22 represented party, he is the very entity
23 that you will be deposing today and that
24 you knew less than a week when you spoke to
25 him, it's a pretty egregious ethical

Page 3

1
2 A P P E A R A N C E S:
3
4 FRANKFURT KURNIT KLEIN & SELZ
5 Attorneys for Plaintiffs
6 488 Madison Avenue
7 New York, New York 10022
8 BY: JEREMY GOLDMAN, ESQ
9 EDWARD ROSENTHAL, ESQ.
10
11
12
13 KILPATRICK TOWNSEND & STOCKTON
14 Attorneys for Defendants
15 1114 Avenue of the Americas
16 New York, New York 10036
17 BY: ROBERT POTTER, ESQ.
18
19
20
21 ALSO PRESENT:
22 PATRICIA A. McCLARY, ESQ., Cornell University
23 NELSON E. ROTH, ESQ., Cornell University
24 JAN CONSTANTINE, The Authors Guild, Inc.
25

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1 P. Hirtle
2 violation.
3 And in light of that and in light of
4 the fact that you will be taking his
5 deposition today, I just want to go on
6 record noting that, reserving all rights in
7 connection with that, including taking it
8 to the court and seeking whatever remedies
9 may be appropriate, including up to setting
10 his testimony aside and/or seeking his
11 disqualification as counsel.
12 MR. GOLDMAN: Your objection is
13 noted.
14 I would also just note for the
15 record, because it's on the transcript,
16 that we were at a cocktail party. We were
17 eating cheese and fruit. It was a very
18 casual, friendly conversation. I just
19 introduced myself and said hello, and that
20 was the extent of it. We didn't talk about
21 anything related to the case at all. We
22 were very careful about that.
23 MR. POTTER: We don't need to get
24 into all the details about it. It's not my
25 understanding. My understanding is that

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1 P. Hirtle
 2 Mr. Hirtle actually was unclear as to which
 3 firm you were from and to which parties you
 4 represented in this case, which is
 5 appropriate for a witness who's not on the
 6 front lines of this or for any party.
 7 And I do understand that the merits
 8 were discussed, perhaps not at length, but
 9 that briefs in this case were discussed and
 10 things like that. So I just wanted to note
 11 this irregularity for the record and to
 12 note our position on it.
 13 MR. GOLDMAN: Okay. Noted. Thank
 14 you.
 15 BY MR. GOLDMAN:
 16 Q. Good morning, Mr. Hirtle. My name is
 17 Jeremy Goldman. I'm an attorney with
 18 Frankfurt, Kurnit, Klein & Selz. We represent
 19 the plaintiffs in this lawsuit. The plaintiffs
 20 include The Authors Guild and a number of other
 21 authors' associations from around the world, as
 22 well as 12 individual authors. Thank you for
 23 coming here today.
 24 Have you ever been deposed before?
 25 A. No.

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1 P. Hirtle
 2 I'm going to be asking you a number
 3 of questions. Please wait until I'm finished
 4 asking the question before you answer, to give
 5 the court reporter a chance to write down and
 6 transcribe what we're saying here today.
 7 To the extent that your counsel
 8 objects to a question, you can wait until the
 9 objection is finished, and unless he instructs
 10 you not to answer, the normal course is to
 11 answer the question, notwithstanding an
 12 objection.
 13 If you don't understand a question as
 14 I ask it, please ask me to either repeat the
 15 question or rephrase it, and I'll do my best to
 16 do so. We can always have the court reporter
 17 read back the question, also, if you'd like it
 18 repeated.
 19 If you need to take a break at any
 20 time, please let me know, and I'm happy to
 21 pause the deposition for you to take a break.
 22 Just please wait until -- if a question is
 23 pending, please wait until you answer the
 24 question before we take a break.
 25 Are you currently employed?

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1 P. Hirtle
 2 Q. Have you ever testified at trial
 3 before?
 4 A. No.
 5 Q. Have you ever been an expert witness
 6 before?
 7 A. I have never been an expert witness.
 8 Q. Have you ever been asked to be an
 9 expert witness before in connection with a
 10 lawsuit?
 11 A. I have never been asked to be an
 12 expert witness.
 13 Q. Have you ever been consulted as an
 14 expert witness in a lawsuit?
 15 A. I have never been consulted as an
 16 expert witness in a lawsuit.
 17 Q. Have you ever done anything in
 18 connection with being an expert in a lawsuit?
 19 MR. POTTER: Objection, vague.
 20 You can answer if you understand the
 21 question.
 22 A. I have never been called to be any
 23 kind of witness in a lawsuit.
 24 Q. Given that, I just want to go over
 25 some ground rules for today.

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1 P. Hirtle
 2 A. Yes.
 3 Q. And who is your current employer?
 4 A. Cornell University.
 5 Q. And what is your current title?
 6 A. My current title at Cornell
 7 University is Archivist I.
 8 Q. I've seen on the Cornell website that
 9 you're sometimes described as a senior policy
 10 advisor.
 11 What does that mean?
 12 A. My working title is Senior Policy
 13 Advisor.
 14 Q. What's the difference between working
 15 title and your actual title?
 16 A. Well, the actual title is my title in
 17 the Cornell University Human Resources system
 18 is Archivist I.
 19 Q. And how long have you held the title
 20 of Archivist I?
 21 A. Almost 15 years now.
 22 Q. And how long have you held the
 23 working title of Senior Policy Advisor?
 24 A. I'm not sure.
 25 Q. Approximately how long?

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1 P. Hirtle
 2 A. I'm very bad on dates and my
 3 employment history. But if you held a gun to
 4 my head and forced me to guess, I would say
 5 three to four years.
 6 Q. Did you hold other working titles
 7 prior to Senior Policy Advisor?
 8 A. Yes.
 9 Q. And do you recall what your working
 10 title was prior to Senior Policy Advisor?
 11 A. Immediately prior to being Senior
 12 Policy Advisor, I was the selector for U.S.
 13 History, General European History, Genealogy,
 14 Naval Science and philately, and I was also the
 15 Cornell University Library intellectual
 16 property officer.
 17 Q. In your current position of Senior
 18 Policy Advisor, could you describe your primary
 19 duties and responsibilities?
 20 A. My primary duty is to advise the
 21 senior library administration on policy matters
 22 that the library faces.
 23 Q. What constitutes the senior library
 24 administration?
 25 A. The library director.

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1 P. Hirtle
 2 to Dr. Rieger?
 3 A. As long as I've been the Senior
 4 Policy Advisor.
 5 Q. How long have you been employed by
 6 Cornell University?
 7 A. To the best of my recollection, it's
 8 14-plus years now.
 9 Q. So were you hired in a position other
 10 than Archivist I?
 11 A. No. I came -- I've been an
 12 Archivist I since I arrived.
 13 Q. As part of your day-to-day
 14 responsibilities, do you consult with counsel
 15 at Cornell on intellectual property and other
 16 matters?
 17 A. Yes.
 18 Q. How regularly do you consult with
 19 counsel on intellectual property type matters?
 20 A. More than they probably wish.
 21 Q. Do you have somebody that you --
 22 sorry.
 23 A. It varies between a weekly and a
 24 monthly basis.
 25 Q. Depending on what issues are at hand?

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1 P. Hirtle
 2 Q. Who is that?
 3 A. Ann R. Kenney, K-E-N-N-E-Y, and her
 4 senior staff of associate university
 5 librarians.
 6 Q. When you say "policy matters," what
 7 do you mean by that?
 8 A. The policy matters that I advise on
 9 relate to intellectual property issues, privacy
 10 matters, legislation, the acquisitions of
 11 library material, the -- almost the whole gamut
 12 of library functions.
 13 Q. Do you have a direct supervisor?
 14 A. Yes.
 15 Q. Who is your direct supervisor?
 16 A. My direct supervisor is Oya Rieger,
 17 R-I-E-G-E-R. Oya is O-Y-A.
 18 Q. Is that Ms. Rieger?
 19 A. Yes, Dr. Rieger.
 20 Q. Dr. Rieger. Okay.
 21 And what is Dr. Rieger's function?
 22 A. Dr. Rieger is the Associate
 23 University Librarian for Digital Scholarship
 24 and Preservation Services.
 25 Q. And how long have you been reporting

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1 P. Hirtle
 2 A. Depending on what issues are at hand.
 3 Q. And is there somebody that you speak
 4 with more often than -- is there somebody that
 5 you speak with more regularly than other times?
 6 A. Yes.
 7 MR. POTTER: Objection, vague.
 8 You can answer if you understand.
 9 BY MR. GOLDMAN:
 10 Q. And who is that? Who do you consult
 11 with regularly?
 12 A. Patricia McClary.
 13 Q. What is Ms. McClary's function at
 14 Cornell?
 15 MR. POTTER: Objection, vague.
 16 You can answer if you understand.
 17 BY MR. GOLDMAN:
 18 Q. What is your best understanding of
 19 what her title or role is at Cornell?
 20 A. Ms. McClary is, I believe, a member
 21 of the General Counsel's office.
 22 Q. Are there other attorneys in the
 23 General Counsel's office that you consult with
 24 regularly?
 25 A. No.

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1 P. Hirtle
 2 MR. GOLDMAN: Let's mark this as
 3 PH-1.
 4 (PH Exhibit 1, Printout from
 5 Cornell website, was marked for
 6 identification.)
 7 (A Discussion was Held off the
 8 Record.)
 9 BY MR. GOLDMAN:
 10 Q. What I've marked as PH-1 is a
 11 printout from the Cornell.edu website. It's
 12 part of the VIVO section, and it appears to be
 13 a profile and biography of the witness.
 14 Mr. Hirtle, have you seen this
 15 document before?
 16 A. I haven't seen the document, but it
 17 appears to be a printout of the VIVO, my entry
 18 on the VIVO website. And I have seen the entry
 19 on the VIVO website.
 20 Q. Did you prepare the entry on the VIVO
 21 website?
 22 A. Yes.
 23 Q. What is the VIVO website?
 24 A. Well, I am not part of the VIVO
 25 initiative at Cornell, but I have been told

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1 P. Hirtle
 2 limiting the scope of your expertise, if you
 3 will, to intellectual property issues, but I
 4 wanted to know whether there was any special
 5 meaning behind the term "special mandate."
 6 A. I am not aware of any special meaning
 7 behind that term.
 8 Q. Are you an attorney, Mr. Hirtle?
 9 A. No, I am not.
 10 Q. But you do advise on intellectual
 11 property issues; correct?
 12 A. I advise on intellectual property
 13 issues.
 14 Q. And that includes issues pertaining
 15 to copyright?
 16 A. It includes issues relating to
 17 copyright.
 18 Q. And does it include issues relating
 19 to various sections of the U.S. Copyright Act?
 20 A. Because I'm not a lawyer, I can't
 21 interpret the U.S. Copyright Act. I will
 22 educate and I will advise on when we need to
 23 speak to our counsels to secure an
 24 interpretation of the Act.
 25 Q. I guess you sort of jumped ahead to

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1 P. Hirtle
 2 that VIVO is an initiative to try to identify
 3 Cornell staff and faculty and including their
 4 research interests and publications to foster
 5 cross-institutional collaboration.
 6 Q. Now, on the first page it says that
 7 "Peter Hirtle is a Senior Policy Advisor in the
 8 Cornell University Library," and it says "with
 9 a special mandate to address intellectual
 10 property issues."
 11 What does that mean, that you have a
 12 special mandate to address intellectual
 13 property issues?
 14 A. When I wrote this, I was trying to
 15 make it clear that I was primarily a policy
 16 advisor with regard to intellectual property
 17 issues, as opposed to, say, cataloging policy
 18 or other areas of concern to the library.
 19 Q. Does the word "special mandate" have
 20 a particular meaning or is it a term of art or
 21 anything like that or --
 22 MR. POTTER: Objection, vague.
 23 A. Could you rephrase what you mean,
 24 what you're asking?
 25 Q. Well, I understood that you were

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1 P. Hirtle
 2 what my next question was going to be, and
 3 maybe your prior answer will be the same answer
 4 to this question, but how does that work, the
 5 interplay between being a Senior Policy Advisor
 6 on intellectual property issues and the fact
 7 that you're not an attorney?
 8 MR. POTTER: Objection, vague.
 9 You can answer if you understand that
 10 question.
 11 A. I don't understand the question.
 12 Q. Well, you don't provide legal advice;
 13 correct?
 14 A. No.
 15 Q. But you do advise people at Cornell
 16 on legal issues; correct?
 17 MR. POTTER: Objection, vague.
 18 A. Can you explain what you mean by a
 19 "legal issue"?
 20 Q. You do advise people at Cornell on
 21 issues relating to intellectual property;
 22 correct?
 23 MR. POTTER: Objection. Asked and
 24 answered.
 25 A. As I said, my title is Senior Policy

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1 P. Hirtle
 2 Advisor with a special emphasis upon
 3 intellectual property.
 4 Q. I guess my question is: If you're
 5 not providing legal advice on intellectual
 6 property matters, what kind of advice are you
 7 providing?
 8 MR. POTTER: I'm going to object as
 9 vague, only because I believe the witness
 10 asked already for further clarification of
 11 legal advice. I don't know that he
 12 received that. So to the extent that this
 13 includes that same phrase, I assert the
 14 same objection.
 15 MR. GOLDMAN: Rob, I understand that
 16 you can object, but please limit your
 17 objections to objecting to the form. I
 18 would appreciate you not doing speaking
 19 objections.
 20 Thank you.
 21 A. Are you asking if I tell people
 22 whether what they're doing is legal or not?
 23 Q. Well, why don't you answer that
 24 question.
 25 A. I do not.

Page 20

1 P. Hirtle
 2 Does that make sense to you; is that
 3 clear?
 4 MR. POTTER: Mr. Hirtle is here as a
 5 fact witness, not as an expert witness and
 6 not as a lawyer. So to the extent that
 7 something calls for a legal conclusion, I
 8 reserve the right to object to any question
 9 that does so.
 10 BY MR. GOLDMAN:
 11 Q. I guess what I'm -- understood, I
 12 guess what I'm saying is I'm not asking you to
 13 make any legal conclusions, but I will be
 14 asking your opinion about various issues that
 15 relate to intellectual property and other
 16 matters on which you've written.
 17 A. Those opinions, opinions that I have
 18 are primarily in my personal capacity and as an
 19 academic employee of the University with the
 20 intellectual freedom that comes with being an
 21 academic employee, and are not part of my
 22 actual duties as a Senior Policy Advisor.
 23 Q. Okay.
 24 So why don't we proceed and then
 25 we'll try to clarify based on the question if

Page 19

1 P. Hirtle
 2 Q. Do you ever express opinions as to
 3 whether you believe something is legal or not?
 4 MR. POTTER: Objection, vague.
 5 A. I have opinions, but as a nonlawyer,
 6 I wouldn't expect anyone to necessarily accept
 7 them as legal advice.
 8 Q. Okay.
 9 So given your area of expertise and
 10 the topics on which you've written and the
 11 topics on which you've spoken, to the extent
 12 that I ask questions about intellectual
 13 property-related issues and I ask your opinion.
 14 I want it to be clear that I'm only asking your
 15 opinion in your role as Senior Policy Advisor,
 16 not as -- I'm not suggesting that you are
 17 providing legal advice and that you're
 18 answering as an attorney.
 19 I just want to make that clear so
 20 that we try to avoid running into these issues
 21 over and over again as this deposition
 22 proceeds. So is that clear when I'm asking
 23 questions about your opinion or if I ask do you
 24 believe, I'm asking only whether you believe in
 25 your capacity as a nonlawyer.

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1 P. Hirtle
 2 there's a difference between what your personal
 3 opinion is and what your opinion may be or what
 4 your position may be as a Senior Policy
 5 Adviser.
 6 Do you work in a particular
 7 department at Cornell University?
 8 A. Yes.
 9 Q. What department is that?
 10 A. I work in the Cornell University
 11 Library.
 12 Q. Are you part of any particular
 13 division within the Cornell University Library?
 14 A. Yes.
 15 Q. And what division is that?
 16 A. Digital Scholarship and Preservation
 17 Services.
 18 Q. And where is your office?
 19 MR. POTTER: Objection, vague.
 20 BY MR. GOLDMAN:
 21 Q. If you understand the question, you
 22 can answer it.
 23 A. My office is in Ithaca, New York.
 24 Q. What's the address of your office?
 25 A. The address of my office is 2B, 53

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1 P. Hirtle
 2 Crock Library.
 3 Q. Is there a central library at Cornell
 4 University?
 5 A. No.
 6 Q. Does anybody -- do any people report
 7 directly to you?
 8 A. No.
 9 Q. Does anybody indirectly report to
 10 you?
 11 MR. POTTER: Objection, vague.
 12 A. What do you mean by "indirectly
 13 report"?
 14 Q. Well, let's actually talk about,
 15 going the other direction, you said that your
 16 direct supervisor was Dr. Rieger.
 17 Do you indirectly report to anyone?
 18 MR. POTTER: Objection, vague.
 19 A. Again, what do you mean by
 20 "indirectly report"?
 21 MR. GOLDMAN: Could we mark as this
 22 as PH-2.
 23 (PH Exhibit 2, Organization Chart
 24 for Cornell University Library, was
 25 marked for identification.)

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1 P. Hirtle
 2 Q. Now, there's also a dotted line to
 3 the right that goes up to the level above
 4 Dr. Rieger and it goes to Ms. Kenney, I
 5 believe.
 6 I guess my question is: Does
 7 that mean that you -- what does that mean, what
 8 is your understanding of that dotted line?
 9 MR. POTTER: Objection, vague.
 10 You may answer, if you understand.
 11 A. I didn't prepare this organizational
 12 chart, so I don't know what was trying to be
 13 indicated by that dotted line.
 14 Q. Have you ever seen this chart before?
 15 A. I don't recall.
 16 Q. Are you surprised that there's a
 17 dotted line from you to Ms. Kenney?
 18 A. No.
 19 Q. Why weren't you surprised?
 20 A. Well, because I meet on a regular
 21 basis with Ms. Kenney.
 22 Q. And do you meet on a regular basis
 23 with Ms. Kenney without the knowledge of
 24 Dr. Rieger?
 25 A. Yes.

Page 23

1 P. Hirtle
 2 BY MR. GOLDMAN:
 3 Q. What I marked as PH-2 is a, what
 4 appears to be an organization chart for the
 5 Cornell University Library. It says on the
 6 bottom, "Updated September 2011." I can
 7 represent that I downloaded this from the
 8 Cornell University website.
 9 If I can direct your attention to the
 10 box in the middle that says "Digital
 11 Scholarship and Preservation Services," and
 12 under it it says Oya Rieger, Associate
 13 University Librarian, and below that it says
 14 Intellectual Property Officer.
 15 Is it your understanding that you are
 16 the Intellectual Property Officer on this
 17 organization chart?
 18 A. Yes.
 19 Q. And there's a contiguous line drawn
 20 from Intellectual Property Officer to
 21 Dr. Rieger; is that correct?
 22 A. Yes.
 23 Q. And that represents that you report
 24 directly to Dr. Rieger; is that right?
 25 A. Yes.

Page 25

1 P. Hirtle
 2 Q. Do you have to report your meetings
 3 with Ms. Kenney to Dr. Rieger?
 4 A. No.
 5 Q. Is there anything on this
 6 organizational chart that you believe is an
 7 inaccurate representation of the arrangement of
 8 the organization at the Cornell University
 9 Library?
 10 A. (Document Review.)
 11 I am not familiar with the entire
 12 structure of the Cornell University Library,
 13 but I do not see anything on here that I notice
 14 is -- that seems to be incorrect.
 15 Q. Are you still referred to as an
 16 Intellectual Property Officer at Cornell
 17 University Library, to your knowledge?
 18 A. Yes.
 19 Q. You previously described your duties
 20 and responsibilities as Senior Policy Advisor.
 21 Is there any difference between your
 22 duties and responsibilities as the Senior
 23 Policy Advisor from the duties and
 24 responsibilities that you had or have as
 25 Intellectual Property Officer?

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1 P. Hirtle
 2 A. Yes.
 3 Q. What are those differences?
 4 A. As the Senior Policy Advisor, I
 5 advise on more issues than strictly
 6 intellectual property.
 7 Q. Are there any differences between the
 8 advice you provided on intellectual property
 9 matters as an Intellectual Property Officer
 10 than the advice you provide on intellectual
 11 property matters as Senior Policy Advisor?
 12 A. Could you rephrase that or repeat
 13 that question?
 14 Q. As Intellectual Property Officer you
 15 provided advice on intellectual property
 16 matters; correct?
 17 A. Yes.
 18 Q. And as Senior Policy Advisor you
 19 continue to provide advice on intellectual
 20 property matters; correct?
 21 A. Yes.
 22 Q. Is there any difference in the advice
 23 that you give on intellectual property matters
 24 between those two positions?
 25 MR. POTTER: Objection, vague.

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1 P. Hirtle
 2 Q. And where was that?
 3 A. At the National Library of Medicine.
 4 Q. Were you working as an archivist at
 5 both of these prior positions?
 6 A. No.
 7 Q. What was your position at the
 8 National Archives and Records?
 9 A. I was an archive specialist.
 10 Q. And what was your position at the
 11 National Library of Medicine?
 12 A. I was a technical information
 13 specialist.
 14 Q. And prior to working at the National
 15 Library of Medicine, did you have another
 16 employer?
 17 A. Yes.
 18 Q. And what was that?
 19 A. I worked for the American Society for
 20 Microbiology.
 21 Q. And what was your position there?
 22 A. I was the historian/archivist.
 23 Q. And before that, did you have another
 24 employment?
 25 A. Yes.

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1 P. Hirtle
 2 BY MR. GOLDMAN:
 3 Q. Do the two positions overlap on
 4 intellectual property matters?
 5 A. I'm still unclear as to what you mean
 6 by "overlap."
 7 Q. That's fine. We'll move on.
 8 Where did you work prior to Cornell?
 9 MR. POTTER: Objection, foundation.
 10 A. I worked at the National Archives and
 11 Records Administration.
 12 Q. And where was that located?
 13 A. It's headquartered in Washington,
 14 D.C.
 15 Q. And is that where you were located at
 16 the time that you worked there?
 17 A. I worked in the Washington, D.C.
 18 office. I also worked in the College Park
 19 office. College Park, Maryland.
 20 Q. I'm familiar with College Park,
 21 Maryland.
 22 And did you have any employment prior
 23 to working at the National Archives and
 24 Records?
 25 A. Yes.

Page 29

1 P. Hirtle
 2 Q. And what was that?
 3 A. I taught history at the University of
 4 Alabama in Birmingham.
 5 Q. Could you describe your educational
 6 background?
 7 A. Where would you like me to start?
 8 Q. Let's start with college.
 9 A. Carlton College, graduated 1974.
 10 Q. And did you attend any graduated
 11 schools?
 12 A. Yes. I got a master's in history at
 13 John's Hopkins University in 1978, and a
 14 master's in library and information science
 15 from the University of Maryland.
 16 Q. And what year was that?
 17 A. Again, you could look on the VIVO
 18 entry. I would guess 1987, but that is a
 19 guess.
 20 Q. Actually, if you look at this VIVO
 21 entry, which is still in front of you, it lists
 22 a number of publications.
 23 You've written a number of articles
 24 over the course of your career; is that fair to
 25 say?

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1 P. Hirtle
 2 A. I've published articles over the
 3 course of my career.
 4 Q. And the topics of those articles have
 5 included matters pertaining to libraries and
 6 archives; is that right?
 7 A. Yes.
 8 Q. And also issues pertaining to
 9 intellectual property?
 10 A. Yes.
 11 Q. And issues pertaining to copyright?
 12 A. Yes.
 13 Q. And issues pertaining to mass
 14 digitization?
 15 A. Yes.
 16 Q. And issues pertaining to fair use
 17 under the Copyright Act?
 18 A. I don't recall if I've ever written
 19 anything specifically singularly on fair use.
 20 Q. Have you written about fair use as it
 21 applies to libraries and archives?
 22 A. I have probably -- I would have
 23 mentioned fair use in some of my writings.
 24 Q. And have you written articles about
 25 the libraries and archives library and archives

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1 P. Hirtle
 2 article already?
 3 A. Yes.
 4 Q. What is that article about?
 5 A. It is about learning to live with
 6 risk.
 7 Q. And what does that mean?
 8 A. Well, I would hate to have to try to
 9 summarize a paper that took 20 minutes to
 10 deliver verbally and then is longer in its
 11 print form in just a few minutes at this
 12 particular talk.
 13 Q. Okay.
 14 I can ask a different question.
 15 That's fine.
 16 You said -- sorry, go ahead.
 17 A. No.
 18 Q. Could you provide an elevator speech,
 19 a quick overview of what the article is about?
 20 A. If I had to summarize it, I would say
 21 that what I have learned from -- over my career
 22 is that sometimes copyright law is unclear and
 23 that it is wise to consult with one's attorneys
 24 and university to see if -- how one should
 25 proceed, especially when digitizing.

Page 31

1 P. Hirtle
 2 exception under the Copyright Act?
 3 A. Yes.
 4 Q. And that's Section 108 of the
 5 Copyright Act?
 6 A. Yes.
 7 Q. You've written extensively about the
 8 history of aspects of Section 108; correct?
 9 A. No.
 10 Q. You wrote about the Gentleman's
 11 Agreement of 1935?
 12 A. Yes.
 13 Q. And you've written about some of the
 14 legislative history behind Section 108;
 15 correct?
 16 A. Yes.
 17 Q. You've also written articles about
 18 risk management for libraries and archives; is
 19 that right?
 20 A. Yes.
 21 Q. And there's actually an article
 22 listed here that says forthcoming, that's the
 23 first entry on the list, and it says "Learning
 24 to live with risk."
 25 Have you created a draft of that

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1 P. Hirtle
 2 MR. GOLDMAN: Mr. Potter, I'm going
 3 to request a copy of the draft of that
 4 article.
 5 MR. POTTER: I will take that under
 6 advisement.
 7 BY MR. GOLDMAN:
 8 Q. I'm sorry, you wanted to say
 9 something?
 10 A. Well, I know you don't have me here
 11 as an expert witness, and so I shouldn't be
 12 educating you about hyperlinks. But the fact
 13 that this is underlined means that it is linked
 14 to the preprint version of the article that's
 15 found in our e-commerce repository?
 16 And the journal has actually been
 17 published, as well, and you may purchase a copy
 18 from the Art Libraries Association in the UK.
 19 Q. In that article, do you discuss areas
 20 of copyright law that you believe are unclear?
 21 A. I don't recall.
 22 Q. You've also given lectures on the
 23 topics that we just went over, on some of the
 24 topics we just went over; is that correct?
 25 A. The topics being?

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1 P. Hirtle
 2 Q. I listed a number of topics, library
 3 and archives, copyright, digitalization,
 4 Section 108, Section 107 of the Copyright Act,
 5 fair use, risk management.
 6 A. I've given lectures on many of those
 7 topics.
 8 Q. Have you taught classes on those
 9 topics?
 10 A. I have taught workshops on copyright
 11 for archivists and librarians.
 12 Q. It says on your VIVO profile that you
 13 are a member of the Commission on Preservation
 14 and Access/Research Library Groups Task Force
 15 on Digital Archiving.
 16 What was that commission?
 17 A. It wasn't a commission. It was a
 18 task force that was sponsored by the Commission
 19 on Preservation and Access and by the Research
 20 Libraries Group.
 21 Q. And what was the nature of that task
 22 force?
 23 A. Task force was a group of experts
 24 that were brought together to identify the
 25 importance of digital preservation and identify

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1 P. Hirtle
 2 recommendations for changes to -- potential
 3 changes to Section 108?
 4 A. Yes.
 5 Q. Were any of those changes ever
 6 adopted?
 7 A. No.
 8 Q. Do you know what the status is of
 9 those recommendations at this time?
 10 MR. POTTER: Objection, vague.
 11 A. I know that the report was published.
 12 Q. It also says that you're a
 13 contributing author to the librarylaw.com blog.
 14 Is that accurate?
 15 A. Yes.
 16 Q. What is that blog?
 17 A. I'm going to assume you're not asking
 18 me what a blog is; is that correct.
 19 Q. That's correct.
 20 A. Okay.
 21 So the librarylaw.com blog is a blog
 22 that was started by Mary Minow to -- where
 23 posts on issues relating to libraries and the
 24 law could be published.
 25 Q. And there came a time where you

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1 P. Hirtle
 2 issues and problems with establishing a digital
 3 preservation program.
 4 Q. And did the task force present its
 5 research or findings to any body?
 6 A. It published a report.
 7 Q. Do you know when that, approximately
 8 when that report was published?
 9 A. I can't recall.
 10 Q. Approximately how long ago was this?
 11 A. Maybe 1995.
 12 Q. It also says here that you were a
 13 member of the Copyright Office's Section 108
 14 Study Group; is that true?
 15 A. Yes.
 16 Q. What was the Copyright Office's
 17 Section 108 Study Group?
 18 A. As I recall from the charge and
 19 mission that's on the Section 108 website, we
 20 were to look at Section 108 to see if it needed
 21 to be updated for the digital era and to make
 22 recommendations to the National Digital
 23 Information Infrastructure Preservation Program
 24 about possible changes to Section 108.
 25 Q. And did the study group make

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1 P. Hirtle
 2 joined Ms. Minow in connection with that blog?
 3 A. Yes.
 4 MR. POTTER: Objection, vague.
 5 Q. And you regularly -- from time to
 6 time you post -- you blog on that blog; is that
 7 correct?
 8 MR. POTTER: Objection, vague.
 9 BY MR. GOLDMAN:
 10 Q. You write on that blog?
 11 A. I post entries to that blog.
 12 Q. Just for the sake, if it comes up
 13 again, blog, my understanding is that "blog"
 14 can be both a verb and a noun. So I thought
 15 "blog" meant post entries on a blog.
 16 When you post entries on that blog,
 17 do you do so in your personal capacity or in
 18 your capacity as a Senior Policy Advisor for
 19 Cornell?
 20 A. I post in my personal capacity.
 21 THE WITNESS: Can we take a break for
 22 a moment?
 23 MR. GOLDMAN: Sure. Take five
 24 minutes or --
 25 THE WITNESS: That would be good.

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1 P. Hirtle
 2 (Recess taken from 10:14 a.m. to
 3 10:24 a.m.)
 4 BY MR. GOLDMAN:
 5 Q. Are you aware of any rules or
 6 regulations at Cornell that govern what
 7 employees are permitted to publish?
 8 MR. POTTER: Objection, vague.
 9 A. I guess I can't envision what you're
 10 talking about.
 11 Q. Are you allowed to publish whatever
 12 you want -- are you allowed to publish whatever
 13 you want or are there any rules that say you're
 14 not permitted to publish certain topics or
 15 certain areas or state certain opinions?
 16 MR. POTTER: Objection, vague.
 17 A. You're asking me if there are any
 18 rules at Cornell that govern what Cornell
 19 employees can publish.
 20 Q. Correct.
 21 A. I have not read the entire policy
 22 manual for the University nor all of the HR
 23 documents, but I am not aware of any rules that
 24 govern -- well, let me back up.
 25 Are you asking in one's personal

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1 P. Hirtle
 2 University concerning the publication of
 3 articles that are written in one's capacity as
 4 a Cornell employee?
 5 A. We're back to the vague place where
 6 we started. What are rules? What is
 7 concerning?
 8 Q. What do you understand the word
 9 "rules" to mean?
 10 A. Well, again, I am a nonlawyer, but as
 11 an individual, I think of a rule as being a
 12 general precept but a nonbinding obligation
 13 upon an individual.
 14 So we speak of the rules of good
 15 behavior, but someone is not going to send you
 16 to jail if you eat with the wrong fork at
 17 dinner.
 18 Q. Using that definition of rules, are
 19 there any rules concerning -- and maybe the
 20 word "concerning" is vague -- are there any
 21 rules that discuss or relate to the publication
 22 of articles by faculty as Cornell University?
 23 A. Well, again, I'm very -- seems like
 24 we're in a very vague area here. And I haven't
 25 read all the policy manuals, but I am not aware

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1 P. Hirtle
 2 capacity or in one's employment -- articles
 3 published as part of one's employee capacity?
 4 Q. Well, let's start with articles
 5 published as part of your employee capacity.
 6 Are there any rules governing
 7 articles published in your employee capacity?
 8 A. And by "rules," what do you mean?
 9 Q. Written policies or procedures.
 10 A. That govern --
 11 Q. The publishing of articles by Cornell
 12 employees in their capacity as employees.
 13 A. And by "governing," what do you mean?
 14 Q. By "governing," I mean rules that
 15 provide instructions or directions in terms of
 16 what is permissible and what is prohibited.
 17 A. Permissible to publish and prohibited
 18 to publish?
 19 Q. Or rules governing procedures that
 20 must be taken in connection with publications.
 21 MR. POTTER: Objection, vague.
 22 A. So I'm lost now. Let's rephrase --
 23 try to question again and in a very precise
 24 manner.
 25 Q. Are there any rules at Cornell

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1 P. Hirtle
 2 of any rules in place at the University that
 3 relate to the publication of works by
 4 University employees.
 5 Q. What if I used the word "guidelines,"
 6 would that change your answer?
 7 A. Again, I can't think of any formal
 8 guidelines.
 9 Q. Are there informal guidelines?
 10 A. I know of no informal guidelines.
 11 Q. Does anyone review publications prior
 12 to publication?
 13 MR. POTTER: Objection, vague.
 14 BY MR. GOLDMAN:
 15 Q. Do you want me to clarify the
 16 question?
 17 A. Could you, please.
 18 Q. Does anybody that's part of the
 19 Cornell administration review articles by
 20 Cornell faculty prior to publication as a
 21 matter of practice and ordinary course?
 22 A. I have no knowledge that articles are
 23 reviewed by the Cornell -- that the Cornell
 24 administration reviews faculty papers. But I
 25 would not -- I'm not in a position to do that,

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1 P. Hirtle
 2 it's not part of my job and it's not part of my
 3 area of expertise to know that.
 4 Q. What about just with respect to your
 5 papers, do your papers get reviewed by anyone
 6 in the Cornell administration?
 7 A. What do you mean by "papers"?
 8 Q. Your articles that you've written and
 9 published, your published articles.
 10 And let me clarify. As a matter of
 11 general practice, do your publications get
 12 reviewed by anyone at the Cornell, anyone
 13 that's part of the Cornell administration?
 14 A. As a --
 15 Q. Matter of general practice.
 16 A. And by "a matter of general practice"
 17 you mean -- well, could you explain what you
 18 mean?
 19 Q. By matter of general practice, I mean
 20 as part of a routine or procedure that occurs
 21 as a general matter and not based on a
 22 particular article that's published.
 23 A. No. My articles are not reviewed by
 24 someone in the Cornell administration as a
 25 matter of general practice, using that

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1 P. Hirtle
 2 If I use the term "mass
 3 digitization," I'm going to refer to the same
 4 thing and I'd like to be able to use these
 5 definition interchangeably unless you think
 6 there is a difference between those two terms.
 7 A. Okay.
 8 Q. Let me ask it this way: Have you
 9 heard of the same "mass digitization" before?
 10 A. Yes.
 11 Q. And what's your understanding of that
 12 term?
 13 A. The same as large scale digitization.
 14 Q. Did there come a time when the
 15 Cornell University Library began to participate
 16 in any mass digitization projects?
 17 A. Yes.
 18 Q. And when did that begin?
 19 A. I don't recall.
 20 Q. Have there been more than one mass --
 21 has there been more than one mass digitization
 22 project at Cornell?
 23 A. Yes.
 24 Q. Which projects can you recall?
 25 A. I would think that the Microsoft

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1 P. Hirtle
 2 definition.
 3 Q. Are they reviewed by anyone that's
 4 part of the Cornell University library as a
 5 matter of general practice?
 6 A. No.
 7 Q. Are you familiar with the term "large
 8 scale digitization initiative"?
 9 A. I've heard that term used, yes.
 10 Q. And what is your understanding of
 11 that term?
 12 A. At Cornell we used it to refer to
 13 digitization involving large numbers of items.
 14 Q. During this deposition if I use the
 15 term "mass digitization," would you
 16 understand -- as synonymous with large scale
 17 digitization initiative, would you understand
 18 what I mean by that?
 19 A. Would you define what you mean by
 20 "mass digitization."
 21 Q. I'm going to adopt the same
 22 definition that you used for large scale
 23 digitization initiative, which is, I believe
 24 you said digitizing -- digitization involving
 25 large number of items.

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1 P. Hirtle
 2 digitization project would fall within the
 3 definition we're using of mass digitization,
 4 and I think the Google digitization project
 5 would fall within that definition, as well.
 6 Q. Are there any others?
 7 A. Well, I have to qualify that I have
 8 not in charge of digitization initiatives at
 9 Cornell, nor do I have any direct
 10 responsibility for any of them; but I do not
 11 recall anyone telling me of other digitization
 12 projects that would qualify under the rubric
 13 we're using of mass digitization.
 14 But, again, you know, what may be
 15 mass to you may not be mass to me. So we're --
 16 there could be areas for disagreement here.
 17 MR. GOLDMAN: Let's mark this as
 18 PH-3.
 19 (PH Exhibit 3, Printout for
 20 Cornell.edu website, was marked for
 21 identification.)
 22 BY MR. GOLDMAN:
 23 Q. What kind of marked as PH-3 is a
 24 printout from the Cornell.edu website that is
 25 part of the confluence area of the Cornell

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1 P. Hirtle
 2 website, and it shows a project team and at the
 3 top it says "Project Team," and under that it
 4 says, "Large Scale Digitization Steering
 5 Group," and it lists eight members, and one of
 6 those members is Peter Hirtle.
 7 Are you a member of a large scale
 8 digitization steering group?
 9 A. I'm not sure.
 10 Q. Were you at any time a member of a
 11 large scale digitization steering group?
 12 A. Yes.
 13 Q. Okay.
 14 When did you become a member of the
 15 large scale digitization steering group?
 16 A. I don't recall.
 17 Q. Can you recall approximately when?
 18 A. No.
 19 Q. Was it before -- well, let's actually
 20 go back to the projects.
 21 You mentioned two projects, one
 22 involving Microsoft and one involving Google;
 23 is that correct?
 24 A. I did.
 25 Q. Okay.

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1 P. Hirtle
 2 Q. Do you recall whether you were made a
 3 member of that group prior to the commencement
 4 of the Google project?
 5 A. I don't recall.
 6 Q. What was the function of the steering
 7 group?
 8 A. I would suspect that there is a
 9 charge for the steering group on the confluence
 10 website that you looked at to find this
 11 particular document. I don't recall the exact
 12 details of the charge.
 13 Q. Well, I'm not asking what the charge
 14 was. I'm just asking what your understanding
 15 was of the function of that group.
 16 A. The group -- my understanding of the
 17 function is the group was supposed to
 18 coordinate the large scale -- well, coordinate.
 19 Because large scale digitization
 20 initiative touched on many areas of the
 21 library, this group became a forum for sharing
 22 information so that everyone who may be touched
 23 or impacted by a large scale digitization
 24 project would be aware of what was going on and
 25 be able to plan accordingly.

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1 P. Hirtle
 2 Which project came first to Cornell,
 3 Microsoft or Google?
 4 A. My recollection is that Microsoft
 5 came first.
 6 Q. Now, if during this deposition if I
 7 used the term "Microsoft Project" to refer to
 8 the large scale digital initiative at Cornell
 9 involving Microsoft, will you understand what I
 10 mean?
 11 A. Yes.
 12 Q. And if I use "Google Project" to
 13 refer to the corresponding project at Cornell,
 14 would you understand what I mean?
 15 And I'm happy to provide the full
 16 definition.
 17 A. Microsoft and Google aren't
 18 corresponding projects, but I will take what
 19 you mean.
 20 Q. Okay.
 21 Did you become part of the -- do you
 22 recall whether you were made a member of the
 23 large scale digitization steering group prior
 24 to the commencement of the Microsoft project?
 25 A. I don't recall.

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1 P. Hirtle
 2 Q. Were there meetings held by this
 3 group?
 4 A. Yes.
 5 Q. Those were in-person meetings?
 6 A. Yes.
 7 Q. Where did those meetings take place?
 8 A. In the library.
 9 Q. Which library?
 10 A. In the Cornell University Library.
 11 Q. The Cornell University Library
 12 comprises many libraries; is that correct?
 13 A. It comprises many library units.
 14 Q. How many library units does it
 15 comprise?
 16 A. No one knows.
 17 Q. Does it also comprise many different
 18 buildings?
 19 A. There are many buildings in the
 20 Cornell University Library.
 21 Q. Which building did you meet in as
 22 part of the steering group?
 23 A. I recall meeting in Olin Library for
 24 one meeting. There may have been meetings in
 25 other library buildings, as well.

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1 P. Hirtle
 2 Q. Were there agenda circulated prior to
 3 these meetings?
 4 A. I don't recall.
 5 Q. Were there minutes kept of the
 6 minutes?
 7 A. I don't recall anyone taking minutes,
 8 but -- during the meetings.
 9 Q. Now, you said earlier that you
 10 weren't -- I believe you said, and correct me
 11 if I am wrong, but I believe you said that you
 12 weren't sure whether you're currently a member
 13 of this group; is that correct?
 14 A. I don't believe that I said that
 15 earlier.
 16 Q. But are you currently a member of
 17 this group?
 18 A. I don't know.
 19 Q. Does the group still exist?
 20 A. I don't know.
 21 Q. When was the last time you met with
 22 the group?
 23 A. I can't recall.
 24 Q. You said that the Microsoft project
 25 came first to Cornell; is that right?

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1 P. Hirtle
 2 Q. Where did the scanning take place as
 3 part of that project?
 4 A. I never visited the scanning
 5 facility, but my understanding, from what I've
 6 been told, was that it was in Rochester, New
 7 York or Victor, New York.
 8 Q. And is it correct that books would be
 9 taken from various Cornell University libraries
 10 and moved to the scanning facility that you
 11 just described for digitization?
 12 A. That's what I've been told.
 13 Q. That project only involved the
 14 digitization of public domain works; is that
 15 correct?
 16 A. Yes.
 17 Q. How was it determined what was public
 18 domain?
 19 MR. POTTER: Objection, vague.
 20 A. I don't know.
 21 Q. As between Microsoft and Cornell, do
 22 you know which entity was responsible for
 23 determining whether a particular work was in
 24 the public domain?
 25 A. No.

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1 P. Hirtle
 2 A. That's my recollection.
 3 Q. Could you describe that project, to
 4 the best of your knowledge?
 5 A. The project involved the digitization
 6 of a -- about a little over 90,000 books from
 7 the Cornell library collection.
 8 Q. What was the Microsoft's role in
 9 connection with the project?
 10 A. Microsoft initiated the project, paid
 11 for the scanning.
 12 Q. Was the Internet Archive involved in
 13 that project?
 14 A. No.
 15 Q. Was the Open Content Alliance
 16 involved in that project?
 17 A. No.
 18 Q. Were there any parties other than
 19 Microsoft and Cornell that were involved in
 20 that project?
 21 A. The Microsoft scanning contractor was
 22 involved and a moving firm was involved.
 23 Q. Who was the Microsoft scanning
 24 contractor, do you recall?
 25 A. Kirtas Technologies.

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1 P. Hirtle
 2 Q. Do you know how books were selected
 3 as part of the Microsoft project?
 4 MR. POTTER: Objection, vague.
 5 A. No, I don't.
 6 Q. Do you know who would know the answer
 7 to those questions?
 8 MR. POTTER: Objection, vague.
 9 BY MR. GOLDMAN:
 10 Q. Well, let's start with the first one.
 11 Do you know who would know how the
 12 determination was made as to what was in the
 13 public domain?
 14 A. No, I don't know.
 15 Q. And do you know who would know which
 16 entity decided what was in the public domain?
 17 A. No, I don't.
 18 Q. And would your answer change if I
 19 didn't say who would know but who you believe
 20 might know?
 21 A. Nope. I couldn't even speculate.
 22 Q. Did you have any -- did you
 23 participate in any way in the Microsoft
 24 project?
 25 A. Yes.

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<p>1 P. Hirtle</p> <p>2 Q. What was the nature of your</p> <p>3 participation?</p> <p>4 A. I attended meetings with the</p> <p>5 Microsoft representatives to discuss the</p> <p>6 project.</p> <p>7 Q. Anything else?</p> <p>8 A. I reviewed lists of titles that</p> <p>9 Microsoft was contemplating scanning.</p> <p>10 Q. Anything else?</p> <p>11 A. I attended a conference that</p> <p>12 Microsoft held with library partners in a</p> <p>13 meeting in Seattle.</p> <p>14 Q. Anything else?</p> <p>15 A. I can't think of anything else.</p> <p>16 Q. You mentioned that you attended</p> <p>17 meetings with Microsoft representatives to</p> <p>18 discuss the project.</p> <p>19 Did you attend one or more than one</p> <p>20 meeting?</p> <p>21 A. I can remember one meeting very well.</p> <p>22 I believe there were -- there was at least one</p> <p>23 other meeting at Cornell.</p> <p>24 Q. What do you recall about the meeting</p> <p>25 that you recall very well?</p>	<p>1 P. Hirtle</p> <p>2 A. This was a meeting in which Microsoft</p> <p>3 laid out their vision of what they wanted to</p> <p>4 do, and the library talked about our collection</p> <p>5 strengths and how they might fit in with</p> <p>6 Microsoft's vision.</p> <p>7 Q. So this meeting took place prior to</p> <p>8 the commencement of digitization; is that</p> <p>9 correct?</p> <p>10 A. Yes.</p> <p>11 Q. And where was that meeting?</p> <p>12 A. At Cornell.</p> <p>13 Q. Do you remember approximately when</p> <p>14 this meeting took place?</p> <p>15 A. No.</p> <p>16 Q. Who was at this meeting, to the best</p> <p>17 of your recollection?</p> <p>18 A. Many of the senior library staff and</p> <p>19 subject selectors. I can't remember who from</p> <p>20 Microsoft was there.</p> <p>21 Q. What is a senior subject selector?</p> <p>22 A. There are librarians who have</p> <p>23 responsibility for acquiring materials in</p> <p>24 certain areas of the collection and then</p> <p>25 oversee those subject matters in the</p>
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<p>1 P. Hirtle</p> <p>2 collections. They're called bibliographers in</p> <p>3 some libraries. We call them selectors.</p> <p>4 So, for example, you would have the</p> <p>5 head of the Asian collections at the meeting.</p> <p>6 Q. Do I recall correctly that you once</p> <p>7 served in a similar function in your career?</p> <p>8 A. Yes.</p> <p>9 Q. When was that, just to refresh my</p> <p>10 recollection?</p> <p>11 A. When?</p> <p>12 Q. Yes. When was that or at which</p> <p>13 employment? It wasn't at Cornell; right?</p> <p>14 A. Yes.</p> <p>15 Q. So it was at Cornell. Okay.</p> <p>16 And what was -- okay, thank you.</p> <p>17 Do you remember any particular senior</p> <p>18 library staff that were at that meeting?</p> <p>19 A. The University librarian was at the</p> <p>20 meeting.</p> <p>21 Q. Was that Ms. Kenney?</p> <p>22 A. No.</p> <p>23 Q. Who was it at the time?</p> <p>24 A. It was Dr. Sarah Thomas.</p> <p>25 Q. And is Dr. Thomas still at Cornell?</p>	<p>1 P. Hirtle</p> <p>2 A. No.</p> <p>3 Q. Who else from the senior library</p> <p>4 staff was there that you recall?</p> <p>5 A. Ann Kenney was there.</p> <p>6 Q. What was her position at the time, if</p> <p>7 you recall?</p> <p>8 A. I don't recall her position at that</p> <p>9 time.</p> <p>10 Q. Anyone else?</p> <p>11 A. I can't say for sure who else was</p> <p>12 there.</p> <p>13 Q. At that meeting, was there a</p> <p>14 discussion about Microsoft's intent to digitize</p> <p>15 only works that are in the public domain?</p> <p>16 A. A discussion?</p> <p>17 Q. Did that topic arise during that</p> <p>18 meeting, to your recollection?</p> <p>19 A. I believe it was mentioned.</p> <p>20 Q. Do you remember who mentioned it?</p> <p>21 A. Microsoft.</p> <p>22 Q. And what did Microsoft say about it?</p> <p>23 A. My recollection is that they said</p> <p>24 that they would only digitize works that were</p> <p>25 in the public domain.</p>

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1 P. Hirtle
 2 Q. Did you have any reaction to that
 3 statement when they made it?
 4 MR. POTTER: Objection, vague.
 5 A. I can't recall if I had a
 6 recollection at that meeting.
 7 Q. Do you recall whether during that
 8 meeting there was any discussion about the
 9 option of digitizing copyrighted works, as
 10 well?
 11 A. I don't recall any discussion about
 12 digitizing copyrighted works at that meeting.
 13 Q. Do you recall any discussion about
 14 digitizing copyrighted works at any meeting
 15 with Microsoft?
 16 A. I don't recall that.
 17 Q. Do you recall having discussions with
 18 any person from Cornell regarding the fact that
 19 Microsoft intended to digitize only public
 20 domain works at any time?
 21 A. I'm sure it must have been mentioned
 22 at that point, but I can't recall any specific
 23 occasion in which we discussed that.
 24 Q. Do you have any general recollection
 25 of it?

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1 P. Hirtle
 2 that list?
 3 A. My recollection was it was to see if
 4 I had any concerns about sending these titles
 5 off campus to be digitized.
 6 Q. Did you have any concerns about
 7 sending any of those titles off campus for
 8 digitization?
 9 A. I can't recall.
 10 Q. What kind of concerns were you
 11 concerned about? What were you looking out
 12 for? Were you looking out for -- were you
 13 concerned about the physical book being out of
 14 the library or were you concerned about
 15 intellectual property issues? What kind of
 16 issues were you concerned about?
 17 A. Physical condition, rarity and,
 18 hence, the potential physical value of the used
 19 copy and, most of all, the likelihood that a
 20 work would be needed on campus and so would not
 21 want it to be missing from the collection for
 22 an extended period of time.
 23 Q. If I use the term "copyright status"
 24 during this deposition, will you know what I
 25 mean by that?

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1 P. Hirtle
 2 A. No.
 3 Q. What is BookSurge?
 4 A. BookSurge is the -- was a
 5 print-on-demand subsidiary of Amazon.
 6 Q. Was that part of any mass
 7 digitization project?
 8 A. No.
 9 Q. You said that you reviewed lists of
 10 titles that Microsoft was contemplating
 11 scanning.
 12 Who prepared those lists?
 13 A. I don't recall.
 14 Q. Do you recall whether it was somebody
 15 from Microsoft or somebody from Cornell?
 16 A. I don't recall.
 17 Q. Do you recall what types of titles
 18 were on that list?
 19 MR. POTTER: Objection, vague.
 20 A. The lists I reviewed were titles in
 21 American History.
 22 Q. To your knowledge, were there other
 23 lists prepared?
 24 A. I don't know.
 25 Q. What was the purpose of you reviewing

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1 P. Hirtle
 2 A. Would you please define that.
 3 Q. By "copyright status," I mean whether
 4 the work is in copyright or whether the work is
 5 in the public domain.
 6 Will you understand what I mean now
 7 if I use the word "copyright status"?
 8 A. Yes, I think so.
 9 Q. Did you consider the copyright
 10 status -- was one of the purposes of reviewing
 11 those titles to consider the copyright status
 12 of any of those books?
 13 A. No.
 14 Q. Did you believe that the books that
 15 were on that list to be in the public domain?
 16 A. It wasn't something that I had to
 17 consider.
 18 Q. Did you assume that those books were
 19 in the public domain?
 20 A. It wasn't something I had to consider
 21 or assume.
 22 Q. But did you assume that those books
 23 were in the public domain?
 24 A. I never assume a book is in the
 25 public domain.

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1 P. Hirtle
 2 Q. Why is that?
 3 A. Because it's so difficult to know
 4 whether something is in the public domain.
 5 Q. Is it ever possible to know whether a
 6 book is or is not in the public domain?
 7 MR. POTTER: I object to the extent
 8 that it calls for a legal conclusion.
 9 A. Are you asking for my expert opinion
 10 as a student of copyright?
 11 Q. I'm asking for your personal opinion.
 12 And let me limit the question a little bit,
 13 actually.
 14 Is it ever possible to know whether a
 15 work published between 1923 and 1963 -- let's
 16 start with 1962. I can't remember what the
 17 cut-off date is -- 1962 is in the public
 18 domain, to know with certainty?
 19 MR. POTTER: I'll object again to the
 20 extent it calls for a legal conclusion.
 21 A. I feel like I'm in one of my
 22 copyright workshops and that it's part of the
 23 copyright education that I conduct.
 24 I think you can establish that the
 25 preponderance of the evidence says that it

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1 P. Hirtle
 2 library officials on intellectual property
 3 issues when Microsoft commenced the project at
 4 Cornell?
 5 A. No.
 6 Q. What if I represented that the
 7 Microsoft project at Cornell commenced in
 8 approximately October 2005, would that help
 9 refresh your recollection?
 10 A. No.
 11 Q. Did the Internet Archive ever become
 12 involved in the Microsoft project at Cornell?
 13 A. Can you refresh my memory on what you
 14 mean by the "Microsoft project"?
 15 Q. By Microsoft project, I mean, the
 16 mass digitization of books from Cornell
 17 libraries that was funded by Microsoft.
 18 A. The Internet Archive was never
 19 involved in the scanning of the books by
 20 Microsoft.
 21 Q. What role, if any, did Internet
 22 Archive have?
 23 A. In the mass digitization of the
 24 Microsoft books, none.
 25 Q. Did they have any role following the

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1 P. Hirtle
 2 would be in the public domain and that the risk
 3 that it is not is very, very low; but there are
 4 plenty of -- and, again, my opinion as a
 5 nonlawyer -- plenty of exceptions and anomalies
 6 in copyright law that makes it impossible to
 7 say whether a work published in between 1923
 8 and 1962, I believe you said, is in the public
 9 domain.
 10 Q. Would your answer change if the date
 11 range were after 1922 and before 1964?
 12 A. No.
 13 Q. What was your working title, if you
 14 recall, at the time that the Microsoft project
 15 commenced at Cornell?
 16 A. I don't recall.
 17 Q. Were you Intellectual Property
 18 Officer at the time?
 19 A. I don't recall.
 20 Q. Were you performing the function of
 21 providing advice on intellectual property
 22 issues at the time?
 23 A. I don't recall.
 24 Q. You don't recall whether it was part
 25 of your responsibilities to provide advice to

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1 P. Hirtle
 2 digitization of the books?
 3 A. My understanding from reading our
 4 press release on the subject matter on our
 5 website, is that the books scanned by -- in the
 6 Microsoft project have been stored in the
 7 Internet Archive.
 8 MR. POTTER: Why don't we take five
 9 minutes.
 10 MR. GOLDMAN: Sure.
 11 (Recess taken from 11:13 a.m. to
 12 11:21 a.m.)
 13 BY MR. GOLDMAN:
 14 Q. We've been talking about -- we've
 15 talked about mass digitization and large scale
 16 digital initiatives at Cornell, and you said
 17 that it's digitization involving a large number
 18 of items.
 19 I want to know how many items do you
 20 consider a large number of items?
 21 A. I would think the 90,000 items
 22 volumes that we scanned for the Microsoft
 23 project at that time we considered a large
 24 number, would be a mass digitization project.
 25 Q. Are there any criteria other than the

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1 P. Hirtle
 2 number of items that would determine whether
 3 you consider something to be mass digitization?
 4 A. Me personally?
 5 Q. Yes.
 6 A. So the question again was?
 7 Q. Are there any criteria other than the
 8 number of items that would --
 9 A. That I personally --
 10 Q. -- would use to determine whether
 11 something is or is not a mass digitization
 12 project?
 13 A. No, I can't think of any.
 14 Q. It's just the number of items?
 15 So, for example, would the method
 16 of -- the method by which books are selected
 17 for digitization, would that inform whether
 18 something is a mass digitization project?
 19 Sorry. If you're struggling with the
 20 question, I can ask it differently, which is,
 21 let's give an example. If there was a library
 22 with 1,000 books in it and there was a plan to
 23 digitize of the books in the library, would you
 24 consider that a mass digitization project?
 25 MR. POTTER: Objection. Calls for

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1 P. Hirtle
 2 that you recall?
 3 A. Oh, a meeting of the large scale
 4 digitization steering committee, yes, I did.
 5 Q. Do you recall anything about those
 6 meetings?
 7 MR. POTTER: Objection, vague.
 8 A. Yes.
 9 Q. Do you recall whether there were
 10 discussions about whether to partner with
 11 Microsoft?
 12 A. No.
 13 Q. No, there were no discussions, or,
 14 no, you don't recall?
 15 A. No, I don't recall.
 16 Q. Do you recall whether there were
 17 discussions about whether to partner with
 18 Google?
 19 MR. POTTER: Objection, vague.
 20 A. Yes, I do recall.
 21 Q. And what do you recall was discussed?
 22 A. There were no discussions.
 23 Q. You recall that there were no
 24 discussions?
 25 A. That's right.

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1 P. Hirtle
 2 speculation.
 3 A. I think it would depend.
 4 Q. What would it depend on?
 5 A. Well, for 1,000 volumes, probably not
 6 ever be a mass digitization problem. If it
 7 took 1,000 years to do the project and they
 8 were doing one book a year, I would not
 9 consider that to be a mass digitization
 10 project. If they did it in one day, we're
 11 getting closer; but, again, I don't think even
 12 1,000 volumes in one day would necessarily be a
 13 mass digitization project.
 14 Q. What about 5,000?
 15 A. As I just indicated, it depends so
 16 much on the nature of the collection, the time
 17 frame, so many other variables, that I'd hate
 18 to speculate and try to come up with some sort
 19 of precise definition of what constitutes mass
 20 digitization.
 21 Q. Now, you said that you attended one
 22 or more meetings as a member of the large scale
 23 digitization steering committee.
 24 A. No, I didn't.
 25 Q. Did you say you attended one meeting

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1 P. Hirtle
 2 Q. Do you recall whether there were any
 3 discussions about whether to join HathiTrust?
 4 A. I do not recall any discussions in
 5 the large scale digitization initiative
 6 meetings on whether to join HathiTrust.
 7 Q. I assume you had other meetings about
 8 HathiTrust; is that correct?
 9 Withdrawn. We'll talk about
 10 HathiTrust later.
 11 A. Thank you.
 12 Q. Do you recall any topics at all that
 13 were discussed during those steering committee
 14 meetings?
 15 A. Yes.
 16 Q. What topics do you recall?
 17 A. One topic we discussed was the
 18 physical movement of items and the scheduling
 19 for when loading docks would be free and able
 20 to handle shipments.
 21 Q. Were those topics discussed in
 22 connection with the Microsoft project?
 23 A. No.
 24 Q. Were they discussed in connection
 25 with Google project?

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1 P. Hirtle
 2 A. Yes.
 3 Q. What else do you recall? What other
 4 topics do you recall being discussed?
 5 A. I recall discussing how to reflect
 6 the digitization of the books in the library's
 7 catalog.
 8 Q. Were there any discussions at those
 9 meetings about the copyright status of the
 10 books that were being digitized as part of the
 11 Google project?
 12 A. No.
 13 Q. What is your understanding of what
 14 the goals are of Cornell's large scale digital
 15 initiative?
 16 A. My understanding is that Cornell
 17 entered into the large scale digitization
 18 initiatives in order to preserve the
 19 collections that are in the library and to
 20 increase access to the materials that we own,
 21 either through full text in the Microsoft
 22 project or through searching with the Google
 23 project, in order to make the library holdings
 24 more useful to faculty staff and students at
 25 Cornell and to users around the world, as well.

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1 P. Hirtle
 2 BY MR. GOLDMAN:
 3 Q. PH-4 is a printout of a press release
 4 dated August 7, 2007, downloaded from the
 5 library section of the Cornell.edu website.
 6 The press release is entitled "Cornell
 7 University Library becomes newest partner in
 8 Google Book Search library project."
 9 It actually says on the second page
 10 that "Cornell is the 27th institution to join
 11 the Google Book Search library project which
 12 digitizes books from major libraries and makes
 13 it possible for internet users to search their
 14 collections online."
 15 So my question is: Had you become
 16 aware of Google's partnerships with other
 17 universities prior to partnering with Cornell?
 18 A. Yes.
 19 Q. And are there -- is there a
 20 particular university that you learned about
 21 their partnership with?
 22 A. No.
 23 Q. Did you have any discussions with
 24 anyone outside of Cornell regarding the Google
 25 project before they came to Cornell?

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1 P. Hirtle
 2 Q. There came a time when Google entered
 3 into any agreement with Cornell concerning the
 4 digitization of library books at Cornell; is
 5 that right?
 6 A. Yes.
 7 Q. Now, prior to Google partnering with
 8 Cornell or prior to Google entering into that
 9 agreement with Cornell, had you become aware of
 10 Google's library project?
 11 A. Yes.
 12 Q. When did you first learn about
 13 Google's library project?
 14 A. I don't remember.
 15 Q. Was it in connection with a
 16 particular university that you learned about
 17 it?
 18 MR. POTTER: Objection, vague.
 19 A. Could you rephrase that, please.
 20 Q. Sure.
 21 MR. GOLDMAN: Let's actually just
 22 mark this and make it easier.
 23 PH-4.
 24 (PH Exhibit 4, Printout of Press
 25 Release, was marked for identification.)

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1 P. Hirtle
 2 MR. POTTER: Objection, vague. I
 3 thought the Google project meant --
 4 MR. GOLDMAN: You're right. Let me
 5 clarify then.
 6 BY MR. GOLDMAN:
 7 Q. Did you have any discussions with
 8 anyone outside of Cornell regarding the Google
 9 Book Search library project prior to the
 10 commencement of that project at Cornell?
 11 A. I am sure I did.
 12 Q. Do you recall any discussions at all?
 13 A. Yes.
 14 Q. What do you recall?
 15 A. Of.
 16 Q. What discussions do you recall taking
 17 place?
 18 A. What discussions?
 19 Well, I can remember talking to a
 20 variety of my colleagues about the Google, both
 21 inside the library and outside the library,
 22 about the Google Book Search library project.
 23 Q. When you say "colleagues," do you
 24 mean other faculty at Cornell?
 25 A. I don't recall speaking to other

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1 P. Hirtle
 2 faculty at Cornell.
 3 Q. Do you distinguish between librarians
 4 and faculty?
 5 A. I do.
 6 Q. Okay.
 7 I'll use the term "employees" to
 8 describe any person that's employed by Cornell.
 9 Would that be the right way to describe it?
 10 You do recall having discussions with
 11 employees at Cornell regarding the Google Book
 12 Search library project; is that right?
 13 A. I can't recall any specific
 14 conversations with colleagues at Cornell about
 15 the Google Book Search library project.
 16 Q. Do you recall conversations with
 17 anyone outside of Cornell?
 18 A. Yes.
 19 Q. Who do you remember having a
 20 conversation with?
 21 A. I can remember talking to Dan
 22 Greenstein and to a program officer at the --
 23 at a foundation and a conversation with
 24 colleagues on the 108's study section; but all
 25 you need to do is to look at the library

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1 P. Hirtle
 2 discussing legal advice that you had
 3 received from counsel?
 4 THE WITNESS: No. No.
 5 MR. GOLDMAN: Sorry, could you read
 6 back my question.
 7 (The Record was Read.)
 8 A. I don't recall what I said to
 9 Mr. Greenstein.
 10 Q. And what did Mr. Greenstein say to
 11 you?
 12 A. I don't recall exactly what he said,
 13 but certainly my sense is that he maintained
 14 that the Google books project was a good thing
 15 and that's why the University of California was
 16 participating.
 17 Q. Do you recall what your opinion was
 18 at the time you spoke to Mr. Greenstein?
 19 MR. POTTER: Objection, vague.
 20 A. I don't think I had an opinion at the
 21 time I spoke with Mr. Greenstein.
 22 Q. You had no opinion on that topic at
 23 the time?
 24 A. No. Which is why I was asking about
 25 it.

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1 P. Hirtle
 2 literature and -- to see that this was a major
 3 topic of conversation.
 4 And I'm sure at the time -- well,
 5 this is 2007. So we'd be talking about 2005,
 6 2006, there was probably not a week that didn't
 7 go by that you didn't talk to someone about it.
 8 Q. Dan Greenstein is employed by the
 9 University of California; is that right?
 10 A. Yes.
 11 Q. What does he do over there, do you
 12 know?
 13 A. I don't know.
 14 Q. What conversation did you have with
 15 him? What did you talk about?
 16 A. We talked about whether joining the
 17 Google books project was a good thing for
 18 libraries or not.
 19 Q. And what did you say to
 20 Mr. Greenstein?
 21 MR. POTTER: I assume there was no
 22 counsel present at this conversation.
 23 THE WITNESS: There was no counsel
 24 present.
 25 MR. POTTER: And you were not

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1 P. Hirtle
 2 Q. Is it fair to say that at that time
 3 you were unsure whether it was a good idea for
 4 libraries to do the Google book search library
 5 project?
 6 A. I don't know if -- I wouldn't want to
 7 say that I was unsure about that.
 8 Q. You had not yet decided; is that fair
 9 to say?
 10 A. I had not yet decided whether it was
 11 a good thing or not, is my recollection.
 12 Q. And you were trying to figure out
 13 whether you thought it was a good idea or not?
 14 A. Yes.
 15 Q. And did you talk to people other than
 16 Mr. Greenstein about -- to help you make that
 17 decision?
 18 A. I think I indicated I talked to many
 19 different people which would have helped with
 20 making that decision.
 21 Q. What concerns, if any, did you have
 22 that might make you think at the time that it
 23 wouldn't be a good idea?
 24 A. My recollection is that the questions
 25 I had concern primarily the usefulness of the

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1 P. Hirtle
 2 scans that Google was making, their quality,
 3 and whether the limitations imposed on the
 4 ownership of the digital files were acceptable.
 5 Q. What limitations were there
 6 concerning the ownership of the digital files?
 7 A. That's covered in the agreement that
 8 we have with Google.
 9 Q. Have you seen that agreement before?
 10 A. Yes.
 11 MR. GOLDMAN: I'm going to request
 12 that we get a copy of that agreement.
 13 MR. POTTER: I'll take that under
 14 advisement.
 15 BY MR. GOLDMAN:
 16 Q. Have you seen copies of that
 17 agreement before it was finalized?
 18 A. Yes.
 19 Q. Were you involved in discussions
 20 concerning the terms of that agreement?
 21 MR. POTTER: Objection, vague.
 22 I'll caution you to the extent you
 23 were involved in any discussions in the
 24 presence of counsel concerning the
 25 transmission of legal advice, I'll instruct

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1 P. Hirtle
 2 that he asked me, please.
 3 MR. GOLDMAN: Could you read that
 4 back.
 5 (The Record was Read.)
 6 A. Let me amend that answer.
 7 I was -- made the leap and was
 8 thinking we were still talking outside. And so
 9 the answer would be yes.
 10 Q. With whom did you have -- with whom
 11 do you recall having such discussions?
 12 A. Discussions came up in meetings with
 13 our counsel.
 14 Q. Did you have any discussions about
 15 that topic with anyone other than your counsel?
 16 Let me ask that differently.
 17 Did you ever have discussions about
 18 that topic on an occasion when counsel was not
 19 present?
 20 A. I cannot recall any specific instance
 21 when that happened.
 22 Q. Did that topic ever come up at any of
 23 the 108 study group meetings?
 24 A. Not in our discussions.
 25 Q. You're saying not in our discussions.

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1 P. Hirtle
 2 you not to reveal the content of those
 3 discussions.
 4 BY MR. GOLDMAN:
 5 Q. Right now all I'm asking is a year or
 6 no question.
 7 A. Thank you. That was what was giving
 8 me pause.
 9 So, yes, I was.
 10 Q. At the time when you were trying to
 11 figure out whether the Google Book Search
 12 library project was a good thing for libraries
 13 and, in particular, for Cornell, did you have
 14 any concerns regarding Google's decision to
 15 digitize copyrighted books and not only public
 16 domain books?
 17 A. No.
 18 Q. Did you ever talk about that topic
 19 with anyone?
 20 MR. POTTER: Consistent with my prior
 21 advice, yes or no answer.
 22 A. Not that I recall.
 23 MR. GOLDMAN: Let's mark this as --
 24 Q. Sorry, go ahead.
 25 A. Could you repeat the last question

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1 P. Hirtle
 2 Did it come up some other way?
 3 A. Yes.
 4 Q. How did it come up?
 5 A. In hallway conversations.
 6 Q. Do you recall a particular hallway
 7 conversation you had?
 8 A. Yes.
 9 Q. Can you tell me about it?
 10 A. I can recall one of the members of
 11 the study group saying that she was not sure
 12 that the Google scan of copyrighted works was a
 13 fair use or not.
 14 Q. Do you recall who that member was?
 15 A. Yes.
 16 Q. Who was it?
 17 A. It was June Besek.
 18 Q. And did you respond to Ms. Besek?
 19 A. Yes.
 20 Q. What did you say?
 21 A. I said I thought an argument could be
 22 made that it was a fair use.
 23 Q. Did you say anything else?
 24 A. I can't recall.
 25 Q. Other than in connection with this

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1 P. Hirtle
 2 lawsuit, did anyone at any time ever express to
 3 you a concern that the digitization of
 4 copyrighted books would not be a fair use?
 5 Did anyone express that to you
 6 directly, would not or might not be or just
 7 concerns over whether it was.
 8 MR. POTTER: Again, I'll caution you
 9 not to reveal the substance of any
 10 conversations with counsel.
 11 A. I talked to a lot of people, and this
 12 is a topic of great interest; but I can't
 13 recall any specific conversations right now.
 14 Q. It says in this press release, and I
 15 think I mentioned this, that Cornell was the
 16 27th institution to join the Google Book Search
 17 library project.
 18 And you can ask me to clarify this,
 19 but why were they the 27th, why did it take so
 20 long to join Google books project?
 21 MR. POTTER: Objection, vague
 22 foundation.
 23 A. I'm not in a position to know why it
 24 took so long.
 25 Q. Do you have an opinion as to why it

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1 P. Hirtle
 2 Q. How did it come about that the
 3 Google/Cornell partnership was formed? Who
 4 approached who first, to the best of your
 5 knowledge?
 6 A. I have no knowledge on that.
 7 Q. How did you first learn about it?
 8 MR. POTTER: Objection, vague.
 9 A. How did I first --
 10 Q. How did you first learn that there
 11 was the possibility of a partnership between
 12 Google and Cornell?
 13 MR. POTTER: Objection, vague.
 14 A. I don't recall.
 15 MR. GOLDMAN: Let's mark this as
 16 PH-5.
 17 (PH Exhibit 5, Printout of News
 18 Articles, was marked for identification.)
 19 BY MR. GOLDMAN:
 20 Q. What I marked as PH-5 is a printout
 21 of a news article from the Chronicle of Higher
 22 Education. The article is dated May 29, 2008,
 23 and it's entitled "Microsoft's Book Search
 24 project has a surprise ending."
 25 Now, this article, if you review it,

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1 P. Hirtle
 2 took so long?
 3 A. No.
 4 Q. Because the project started in 2004.
 5 Do you recall that?
 6 A. No.
 7 Q. This project, I'll represent the
 8 project was going on for three years before
 9 they came to Cornell.
 10 Do you know why it took three years
 11 before they came to Cornell?
 12 A. I don't know what Google's
 13 motivations were.
 14 Q. Did you have any discussions with
 15 anyone about that?
 16 A. I've never asked anyone at Google
 17 about why it took so long to get to us.
 18 Q. No. I'm asking whether you had any
 19 discussions at all about that?
 20 A. Not that I can recall.
 21 Q. Do you know when Google first
 22 approached Cornell to discuss partnering with
 23 them before the Google Book Search library
 24 project?
 25 A. Could you rephrase that?

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1 P. Hirtle
 2 is about Microsoft's cessation of its Book
 3 Search project, and it also discusses the
 4 Google project and Cornell's participation in
 5 the Google project.
 6 If you turn to the second page,
 7 there's a subheading, it's a very small
 8 subheading, and it says, "Microsoft's limited
 9 reach." And it says, "While Microsoft has been
 10 digitizing works that are out of copyright,
 11 Google has been including materials that are
 12 still under copyright. Many publishers and
 13 authors have criticized the search giant for
 14 this, and some groups representing them have
 15 sued Google for copyright infringement. But
 16 Ms. Kenney says Google strategy is one reason
 17 Cornell decided to form a partnership with the
 18 company."
 19 My question is: Did you ever speak
 20 to Ms. Kenney about that, that one of the
 21 reasons that they were going to work with
 22 Google was because of their strategy to
 23 digitize copyrighted books?
 24 MR. POTTER: Objection, vague.
 25 A. Let me read the article first,

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1 P. Hirtle
 2 please.
 3 Q. If you think it's necessary to answer
 4 the question, then go ahead. If not -- I don't
 5 think it's necessary to read the whole article,
 6 but you're welcome to review it.
 7 A. (Document Review.)
 8 Okay.
 9 Thank you. Now, the question again.
 10 Could you repeat your question?
 11 Q. Yes. Sure. Let me ask it this way.
 12 Did you have any discussions with
 13 Ms. Kenney regarding the fact that Google
 14 intended to digitize copyrighted books and not
 15 only public domain books?
 16 A. I don't recall any such discussions.
 17 Q. Do you ever recall Ms. Kenney saying
 18 that one of the reasons Cornell was partnering
 19 with Google was because of the fact that Google
 20 intended to digitize works that were still
 21 under copyright?
 22 A. I do not recall her ever saying that.
 23 Q. Do you recall having any discussions
 24 with any senior library staff regarding the
 25 fact that Google intended to digitize in

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1 P. Hirtle
 2 A. I have expressed it, but I can't say
 3 to whom.
 4 Q. Why do you think that argument could
 5 be made?
 6 A. So you want my -- this nonlawyer's
 7 analysis of the fair use factors.
 8 I've turned to the work done by
 9 Jonathan Band, James Grimmelmann and other
 10 legal scholars who have said that Google's
 11 digitization is arguably a fair use.
 12 Q. But you have no opinion independent
 13 of those scholars?
 14 A. Well, independent.
 15 I have learned from their arguments
 16 and think that they carry, in my personal
 17 opinion, that their arguments are
 18 well-reasoned.
 19 Q. Actually, I would like to know in
 20 your personal opinion why you think it is fair
 21 use. It can't be a legal conclusion, I
 22 understand.
 23 MR. POTTER: It calls for a legal
 24 conclusion and I object to the extent it
 25 does so.

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1 P. Hirtle
 2 copyright works?
 3 A. I don't recall any such meetings.
 4 Q. I don't mean just meetings. Do you
 5 recall any discussions or communications, any
 6 communication of any kind with any senior
 7 library staff on that topic?
 8 A. No.
 9 Q. You mentioned, I think you called it
 10 a hallway discussion with June Besek. And I
 11 believe you said that she -- I believe you said
 12 that you thought that an argument could be made
 13 that Google's digitization of copyrighted works
 14 could be fair use. Is that accurate? Please,
 15 correct me if I am wrong. I'll restate it if I
 16 didn't say it accurately.
 17 A. I recall saying to June in this
 18 hallway conversation that I thought an argument
 19 could be made that Google's scanning was a fair
 20 use.
 21 Q. Did you explain to her why you
 22 thought that?
 23 A. I don't recall doing that.
 24 Q. Do you recall expressing to anyone
 25 why you thought that?

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1 P. Hirtle
 2 MR. GOLDMAN: Okay. Okay. Objection
 3 noted.
 4 A. The Google book strikes me as the
 5 kind of transformative use of copyrighted
 6 materials that would not have an impact on the
 7 existing market that has been favored by the
 8 courts in fair use cases, especially in the
 9 cases since 2 Live Crew. And we have seen this
 10 in the Graham archives case most recently here
 11 in the Second Circuit.
 12 You can take a look at Neil Netanel's
 13 analysis of fair use cases, falling on burden
 14 BB's work, and Pamela Samuelson's work on
 15 trying to come up with functional
 16 characteristic of fair use.
 17 I think that they make a strong
 18 argument, but I'm an amateur at this; so, it's
 19 very easy I'm wrong and that's why we rely upon
 20 counsel to come up with the final decision on
 21 whether it's a fair use or not.
 22 Q. So your opinion, the digitization of
 23 copyrighted works is a transformative use, is
 24 that what you said, among other things?
 25 MR. POTTER: Objection to the extent

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1 P. Hirtle
 2 it mischaracterizes the witness's
 3 testimony.
 4 A. I would not say that digitization is
 5 itself a transformative use.
 6 Q. You did use the word "transformative"
 7 before, though; right?
 8 A. Yes.
 9 Q. Can you explain what you meant by
 10 that?
 11 MR. POTTER: Objection to the extent
 12 that it calls for a legal conclusion. He's
 13 not here as an expert witness. He's not a
 14 lawyer.
 15 MR. GOLDMAN: I heard your objection.
 16 A. Could you rephrase -- restate the
 17 question, please.
 18 Q. Maybe I can go back and read what
 19 your answer was.
 20 You said the Google book project -- I
 21 believe you said -- you said it strikes me as
 22 the -- a type of transformative use that would
 23 not impact the market.
 24 MR. POTTER: Objection to the extent
 25 it mischaracterizes his testimony.

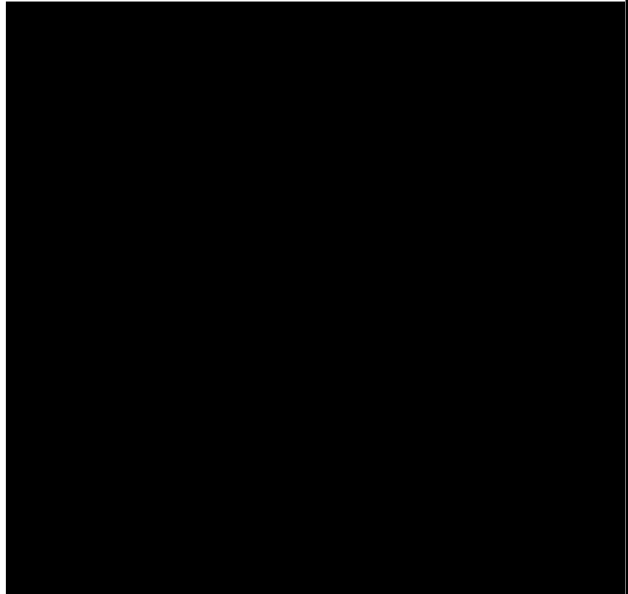
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1 P. Hirtle
 2 MR. GOLDMAN: Could you repeat that.
 3 Thank you.
 4 (The Record was Read.)
 5 A. Yes.
 6 MR. POTTER: I just want to state, as
 7 I did at the prior objection, that there is
 8 a nondisclosure agreement in place between,
 9 in this case, Cornell and Google. So to
 10 the extent that there's testimony about
 11 things that Mr. Hirtle may have learned by
 12 virtue of Cornell's participation in that
 13 agreement, we want to designate that as
 14 attorneys' eyes only pursuant to the
 15 protective order.
 16 And to the extent that there is
 17 questions about communications that
 18 Mr. Hirtle may have had with
 19 representatives of Google, whether in the
 20 presence of counsel or for the transmission
 21 of legal advice obtained from or to be
 22 given to counsel, we're going to assert the
 23 joint defense agreement that exists between
 24 the parties from the Google books cases.
 25 MR. GOLDMAN: Okay. Noted. We

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1 P. Hirtle
 2 BY MR. GOLDMAN:
 3 Q. Let me just ask a different question.
 4 You said that you do not believe that
 5 digitization alone is a transformative use; is
 6 that right?
 7 MR. POTTER: Objection to the extent
 8 it mischaracterizes the witness's
 9 testimony.
 10 A. Anytime you're trying to make a fair
 11 use determination, it is incredibly fact
 12 specific, and I would hate to have to sit
 13 down -- and should not have said something as
 14 bold as digitization by itself could never be a
 15 fair use, or even that it could never be
 16 transformative. We would need to sit down and
 17 look at very precisely the context and not
 18 speculate about things out of hand.
 19 Q. Prior to Google and Cornell entering
 20 into an agreement together regarding the
 21 digitization of books, had you participated in
 22 any discussions with Google concerning that
 23 project?
 24 A. Could you repeat the question,
 25 please.

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1 P. Hirtle
 2 reserve our rights in this regard. We
 3 don't assent to any such objection or
 4 agreement that any such objection has any
 5 basis, but I understand and we'll deal with
 6 it later.
 7 BY MR. GOLDMAN:
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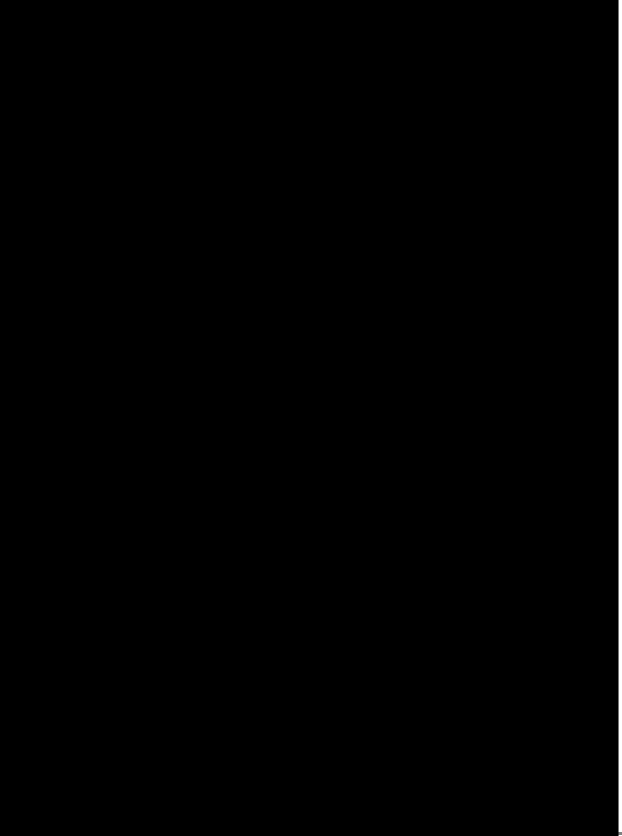
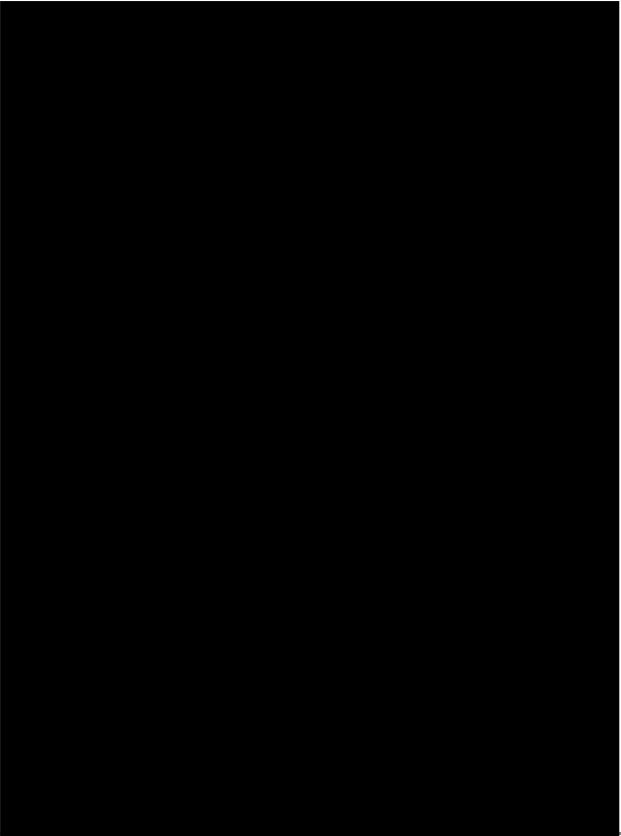
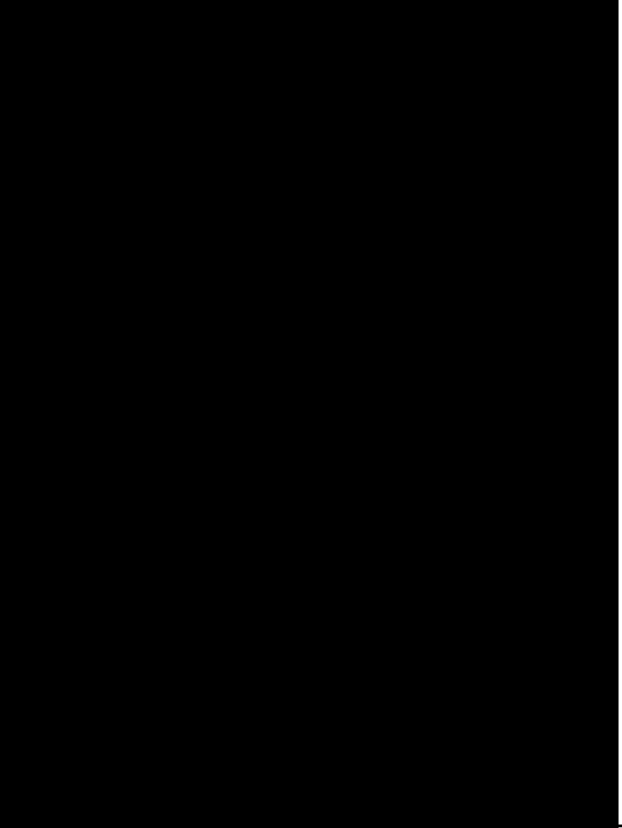
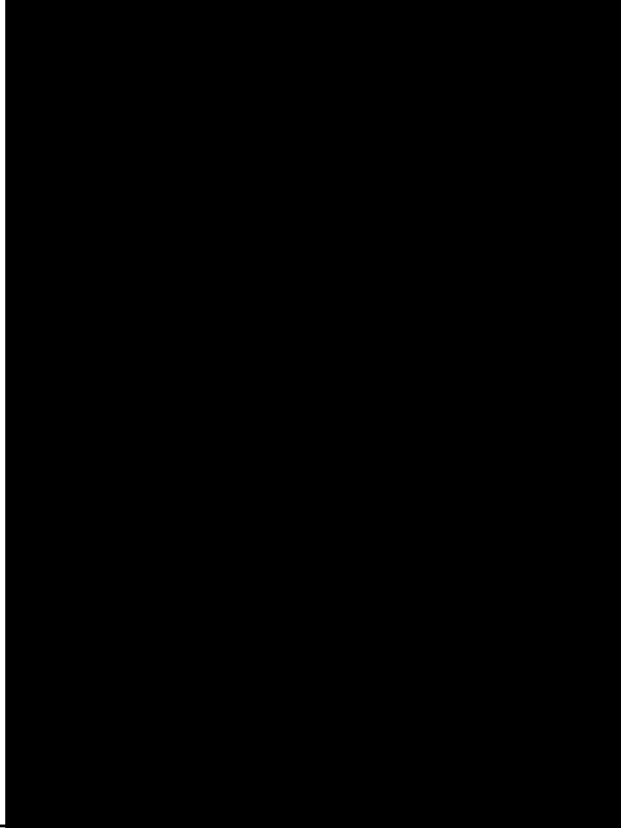
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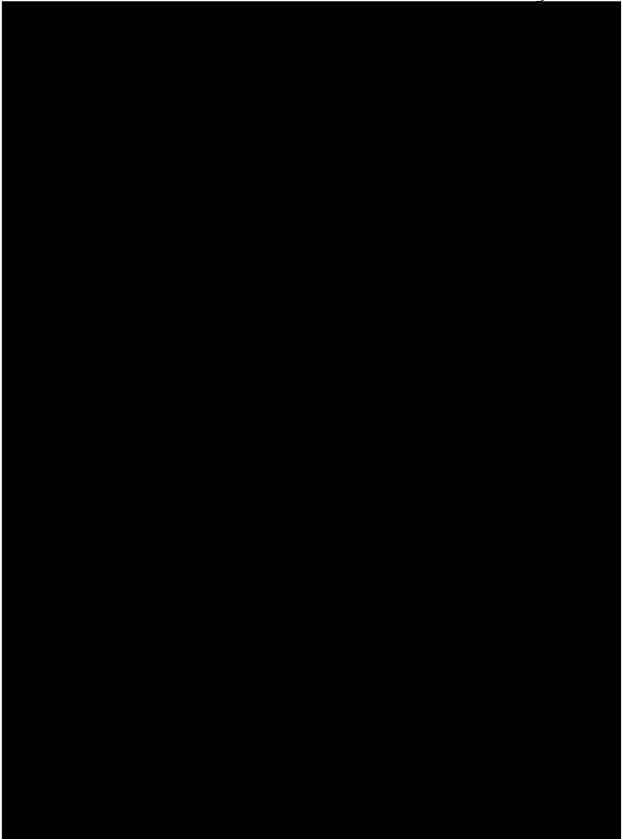
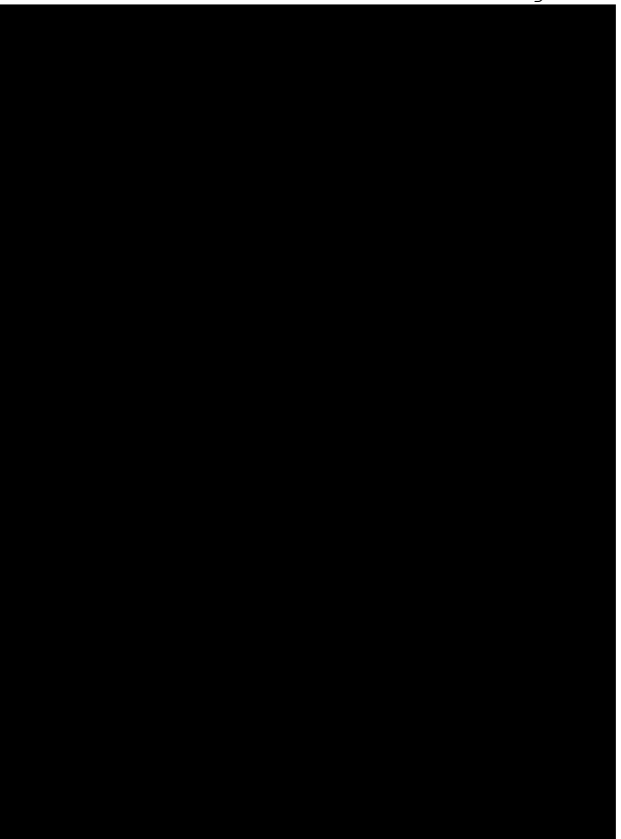
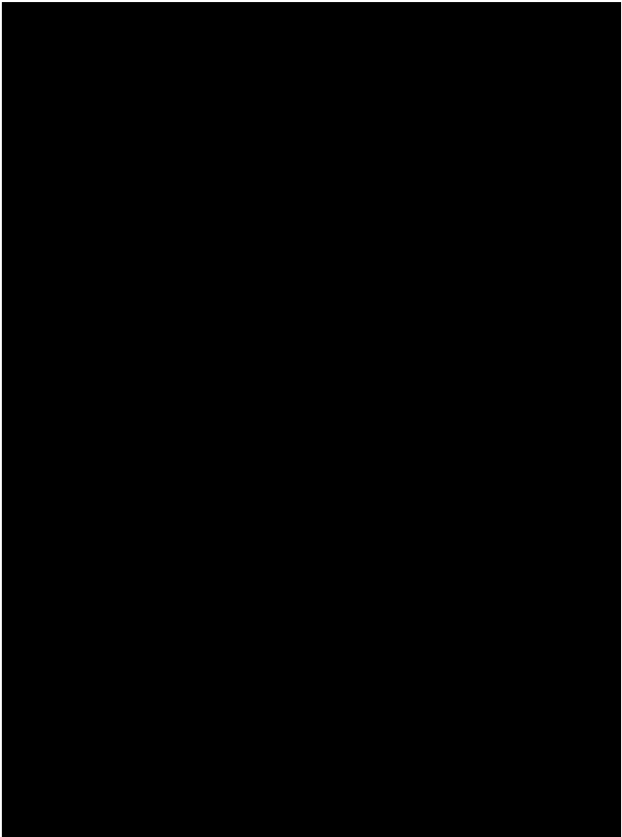
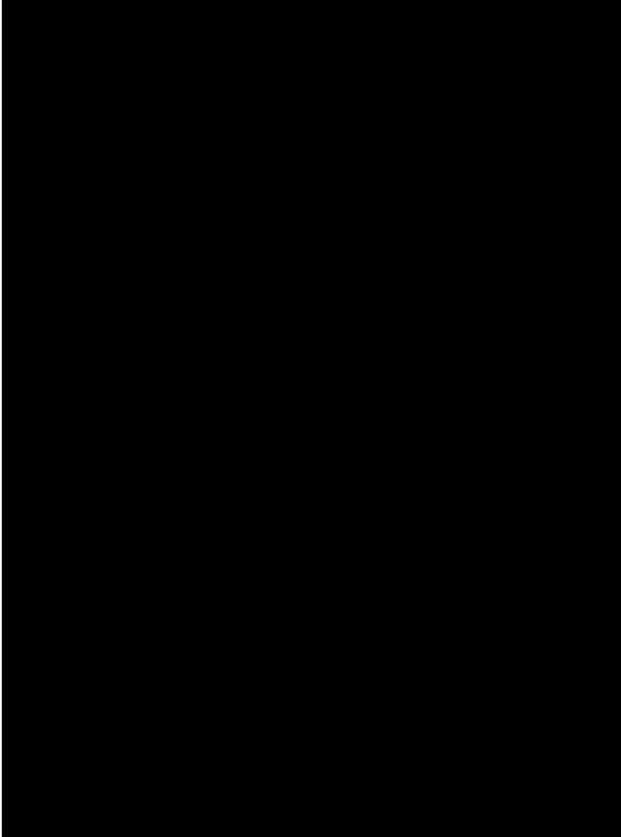
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1 P. Hirtle
 2 Q. Do you know when you first learned
 3 about HathiTrust?
 4 A. I can't recall.
 5 Q. I think we marked already the
 6 HathiTrust announcement, but -- it's in there.
 7 A. It's here somewhere. Was here.
 8 There it is. PH-6.
 9 Q. PH-6. Okay. Thank you.
 10 Did you learn about HathiTrust before
 11 this announcement that's marked as PH-6 was
 12 made?
 13 A. Yes.
 14 Q. Do you remember how you learned about
 15 HathiTrust?
 16 A. No.
 17 Q. HathiTrust launched in 2008 it says
 18 in this press release.
 19 Does that sound correct to you?
 20 A. I couldn't say.
 21 Q. Do you have any reason to believe
 22 that the press release is incorrect?
 23 A. No.
 24 Q. Okay.
 25 It says here that in the -- halfway

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1 P. Hirtle
 2 down the page, that "HathiTrust is delighted to
 3 have Cornell join us as the 35th HathiTrust
 4 partner."
 5 Do you know why it took so long for
 6 Cornell to join HathiTrust?
 7 MR. POTTER: Objection.
 8 A. No, I don't know.
 9 Q. Were you involved in any discussions
 10 regarding the decision -- regarding Cornell's
 11 decision whether to join HathiTrust?
 12 A. Yes.
 13 Q. What discussions were you involved
 14 in?
 15 MR. POTTER: To the extent that those
 16 discussion were with counsel or contain the
 17 transmission of legal advice, I would
 18 instruct you not to reveal the substance of
 19 those conversations.
 20 A. There were in general discussions
 21 about whether HathiTrust would be the right
 22 policy move for Cornell, and also discussion of
 23 the proposed agreement to be a member of
 24 HathiTrust.
 25 Q. Who did you have those discussions

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1 P. Hirtle
 2 with?
 3 A. I would assume -- I believe I have
 4 talked with my direct supervisor, the director
 5 of our Information Technology Unit, and the
 6 university librarian, as well as our counsel.
 7 Q. Did you ever have any reservations
 8 about joining HathiTrust?
 9 MR. POTTER: Objection.
 10 A. No, I can't recall any.
 11 Q. Now, there was a period of time
 12 during which Cornell was considering whether to
 13 join HathiTrust; is that right?
 14 A. Yes.
 15 Q. And you were involved in discussions
 16 regarding that consideration; right?
 17 A. That's what I just said.
 18 Q. So what concerns did you hear
 19 regarding why Cornell might not want to join
 20 HathiTrust?
 21 MR. POTTER: Objection.
 22 A. I won't talk about any objections our
 23 counsel may have had. The primary concern was
 24 the cost associated with being a member of
 25 HathiTrust.

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1 P. Hirtle
 2 A. Yes.
 3 Q. Was Cornell able to negotiate a lower
 4 price?
 5 A. No.
 6 Q. Okay.
 7 What I've marked as PH-8 is a
 8 document Bates marked COR000469 through
 9 COR000477, a document produced by counsel for
 10 defendants in discovery titled "HathiTrust
 11 Partnering Institution Agreement."
 12 Do you recognize this document,
 13 Mr. Hirtle?
 14 You haven't seen a copy. There you
 15 go.
 16 A. I'm not sure I've ever seen a copy of
 17 a finalized HathiTrust agreement.
 18 Q. Does this appear to be a finalized
 19 copy of the HathiTrust agreement?
 20 A. Yes.
 21 Q. If you turn to Schedule A, which is
 22 maybe the fourth to last page, it's 474 on the
 23 bottom. It says, "Cornell University shall pay
 24 \$3.86 for each gigabyte of data deposited in
 25 the first year of the term," that's like the

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1 P. Hirtle
 2 MR. GOLDMAN: Let's take a one-minute
 3 break.
 4 (Recess taken from 3:13 p.m. to
 5 3:14 p.m.)
 6 (PH Exhibit 8, Document bearing
 7 Bates Nos. COR000469 through COR000477,
 8 was marked for identification.)
 9 BY MR. GOLDMAN:
 10 Q. What was -- what costs were
 11 associated with being a member of HathiTrust?
 12 A. It's been -- it seems like many years
 13 now since I read the draft HathiTrust
 14 agreement, but my recollection is that you paid
 15 for -- you had to pay according to the size of
 16 the files that you were submitting to the
 17 HathiTrust.
 18 Q. And that understanding is based on a
 19 draft of the agreement that you saw?
 20 A. Yes. And I believe then that was --
 21 until this year, that was the pricing model for
 22 the HathiTrust.
 23 Q. And was the amount of money that
 24 Cornell would pay, was that the subject of
 25 negotiation with HathiTrust?

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1 P. Hirtle
 2 third sentence.
 3 Is that consistent with your
 4 understanding of what the costs were?
 5 A. I can't remember what the costs in
 6 the initial draft was. It may have been
 7 higher; it may have been lower.
 8 Q. Do you remember whether the costs
 9 have increased over time?
 10 A. I don't know.
 11 Q. Were you asked for your input
 12 regarding the draft of this agreement?
 13 A. Yes.
 14 Q. Who asked you for input?
 15 A. I believe it was my direct
 16 supervisor.
 17 Q. Why -- what is your understanding as
 18 to why you were asked for your input?
 19 A. In my role as Senior Policy Advisor
 20 I'm often asked for input on new agreements
 21 within the library.
 22 Q. And did you provide her with any
 23 comments?
 24 A. I'm sure I did.
 25 Q. Do you recall what you commented?

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1 P. Hirtle
 2 MR. POTTER: I assume that counsel
 3 was not also present in your communications
 4 with Dr. Rieger.
 5 THE WITNESS: That's right.
 6 A. No, I'm not sure if in my response, I
 7 don't know if I may have copied counsel or not.
 8 I don't think I did, but I may have.
 9 MR. GOLDMAN: Well, maybe I can ask
 10 the question in a way to avoid revealing
 11 any confidential communications.
 12 MR. POTTER: I'll welcome you try.
 13 BY MR. GOLDMAN:
 14 Q. When you reviewed the draft, did you
 15 have any reaction to it that warranted -- did
 16 you have any reaction to it, any problems with
 17 it?
 18 MR. POTTER: Objection.
 19 A. I had a reaction to it.
 20 Q. What was your reaction?
 21 A. I thought that it was a much simpler
 22 and more user-friendly agreement than the
 23 Google agreement with Cornell.
 24 Q. Was there anything that you didn't
 25 like about the draft agreement that you saw?

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1 P. Hirtle
 2 user in the world to read these works online.
 3 For other materials, HathiTrust will, where
 4 possible, provide search capabilities that
 5 these works can serve as a lawful index to the
 6 printed text."
 7 It's actually the next sentence that
 8 I have questions about. It says, "To
 9 facilitate only lawful access to digitized
 10 content, the repository employs a rights
 11 management mechanism that sets default rights
 12 based on publication place and date found in
 13 the bibliographic record provided by the
 14 partnering institution and stores other rights
 15 information as a result of specific overrides.
 16 This additional overriding information is
 17 typically the result of copyright determination
 18 work, but may also include the results of
 19 negotiations. Michigan assumes responsibility
 20 for the parameters for general access as
 21 outlined here. Cornell University assumes
 22 liability for errors in the bibliographic data
 23 it makes available to Michigan."
 24 My first question is: Do you have an
 25 understanding of what the contract is referring

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1 P. Hirtle
 2 A. Not that I can recall.
 3 Q. Do you recall your direct supervisor
 4 expressing any particular concerns to you about
 5 the agreement?
 6 A. No.
 7 MR. GOLDMAN: I'm going to call for
 8 all drafts of the HathiTrust agreement with
 9 Cornell.
 10 MR. POTTER: I'll take that under
 11 advisement.
 12 BY MR. GOLDMAN:
 13 Q. If you actually turn to the second
 14 page of the agreement, there's a paragraph
 15 entitled "Rights Management."
 16 I'm going to refer to the third
 17 sentence in, but why don't I just read the
 18 whole thing so we have the context for it.
 19 It says, "HathiTrust commits, where
 20 reasonable, to providing a lawful level of
 21 access to materials stored in the repository.
 22 For public domain materials and for materials
 23 where a rights holder has granted sufficient
 24 permissions, HathiTrust strives to provide a
 25 level of access that makes it possible for any

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1 P. Hirtle
 2 to when it says that the repository employs a
 3 rights management mechanism?
 4 MR. POTTER: I would object to the
 5 extent it calls for a legal conclusion.
 6 And also I note that paragraph read
 7 includes capitalized and what appear to be
 8 defined terms, the definition of which have
 9 not been addressed.
 10 BY MR. GOLDMAN:
 11 Q. And let me just respond briefly to
 12 that, just to say if you have trouble answering
 13 a question because a term is defined, then we
 14 can go back in the agreement and to try to help
 15 understand what the definition is, though, I
 16 think it's clear on the face of what they're
 17 referring to.
 18 A. So what is it that you want to know?
 19 Q. What is a rights management
 20 mechanism? Do you know what they're referring
 21 to?
 22 A. No, I do not.
 23 Q. Have you ever heard of the copyright
 24 management system at University of Michigan?
 25 A. The --

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1 P. Hirtle
 2 Q. CRMS, I think it's referred to.
 3 Copyright Review Management System, have you
 4 ever heard of that?
 5 A. Yes, I have.
 6 Q. Do you think that this is referring
 7 to that?
 8 MR. POTTER: Objection.
 9 A. I'm not the right person to interpret
 10 an agreement, but I would think that the rights
 11 management mechanism in the HathiTrust
 12 repository would be different than the
 13 Copyright Review Management System.
 14 Q. Is it your understanding that each
 15 digital work in the HathiTrust digital library
 16 has a copyright status associated with it?
 17 A. I have no idea.
 18 Q. Do you know whether Cornell's works
 19 have a copyright status associated with it at
 20 HathiTrust?
 21 A. I do not know how our works are
 22 stored in HathiTrust.
 23 Q. Do you know how the copyright status
 24 of works stored in HathiTrust -- and by
 25 "works," I mean, Cornell works -- is

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1 P. Hirtle
 2 A. So you don't mean works that were
 3 authored by Cornell University and are stored
 4 in HathiTrust?
 5 Q. No, I do not.
 6 A. So other works.
 7 So now the question is?
 8 Q. The question is --
 9 A. Have I looked at our books, works
 10 that were scanned from Cornell and are now
 11 found on HathiTrust?
 12 Q. That's my question.
 13 A. On their web site?
 14 Q. Correct.
 15 A. Yes. I've already said I have.
 16 Q. Okay.
 17 And were any of those books available
 18 for -- are we able to view the full view of
 19 those books?
 20 MR. POTTER: Objection.
 21 A. When the book is in the public
 22 domain, I'm able to view the full view.
 23 Q. My question is: How was it
 24 determined that a particular book was in the
 25 public domain?

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1 P. Hirtle
 2 determined?
 3 MR. POTTER: Objection.
 4 A. Try that again.
 5 Q. Do you know how the copyright status
 6 of Cornell works that are stored in HathiTrust
 7 is determined?
 8 MR. POTTER: Objection.
 9 A. No, I do not.
 10 Q. But you are aware that there's a
 11 copyright status associated with Cornell's
 12 works on HathiTrust; right?
 13 MR. POTTER: Objection.
 14 A. Only from what I've read just now in
 15 the agreement.
 16 Q. Well, you said before that you've
 17 used HathiTrust before; correct?
 18 A. That's correct.
 19 Q. And have you looked up Cornell works
 20 on HathiTrust before?
 21 A. Can you explain what you mean by
 22 "Cornell works"?
 23 Q. I mean, works that -- works that came
 24 from Cornell's libraries, were digitized by
 25 Google, and are now stored on HathiTrust.

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1 P. Hirtle
 2 MR. POTTER: Objection.
 3 A. I do not know how the HathiTrust
 4 determines that a book is in the public domain.
 5 Q. You don't know what steps are taken
 6 to make that determination?
 7 A. That is correct.
 8 Q. And you don't know who makes that
 9 determination?
 10 A. That is correct.
 11 Q. Have you ever had any discussions
 12 with anyone about that copyright status
 13 determination?
 14 Let's ask it differently. You said
 15 before that you had been aware of something
 16 called the Copyright Review Management System;
 17 correct?
 18 A. That's correct.
 19 Q. What was your understanding of what
 20 that is?
 21 A. From looking at the website from the
 22 Copyright Review Management System -- of the
 23 system at the University of Michigan, my
 24 understanding is that -- and from reading John
 25 Wilkins' study on bibliographic indeterminacy,

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<p>1 P. Hirtle</p> <p>2 my understanding is that they review the</p> <p>3 copyright status works published between 1923</p> <p>4 and 1964 and try to determine if those works</p> <p>5 may be -- are likely to be in the public</p> <p>6 domain.</p> <p>7 Q. Did you have any discussions with</p> <p>8 anyone at Michigan regarding that process?</p> <p>9 A. Yes.</p> <p>10 Q. Who did you have discussions with?</p> <p>11 A. I don't recall the name of the</p> <p>12 person.</p> <p>13 Q. Okay.</p> <p>14 You remember a particular person, you</p> <p>15 just don't his or her name; is that right?</p> <p>16 A. Her name.</p> <p>17 Q. Did you provide any input regarding</p> <p>18 that process?</p> <p>19 MR. POTTER: Objection.</p> <p>20 A. Did I --</p> <p>21 Q. Let me ask it a different way.</p> <p>22 Did anyone at Michigan ever ask for</p> <p>23 your advice regarding the procedures that would</p> <p>24 be used as part of the CRMS?</p> <p>25 A. Yes.</p>	<p>1 P. Hirtle</p> <p>2 Q. Did you provide any advice?</p> <p>3 A. I don't recall what I responded.</p> <p>4 Q. What advice were you asked to</p> <p>5 provide?</p> <p>6 A. I was sent some of their internal</p> <p>7 work flow documents and asked did these look</p> <p>8 okay.</p> <p>9 Q. Do you know approximately when that</p> <p>10 happened?</p> <p>11 A. No, I don't recall.</p> <p>12 Q. Do you know whether you were asked</p> <p>13 that after Cornell became a member of</p> <p>14 HathiTrust?</p> <p>15 A. I believe it was before Cornell</p> <p>16 became a member of HathiTrust.</p> <p>17 Q. Is there any program at Cornell that</p> <p>18 is roughly the equivalent of the CRMS at</p> <p>19 Michigan?</p> <p>20 MR. POTTER: Objection.</p> <p>21 BY MR. GOLDMAN:</p> <p>22 Q. And by "equivalent," I mean perform</p> <p>23 similar functions?</p> <p>24 A. And -- you'd better explain in more</p> <p>25 detail what exactly --</p>
Page 172	Page 173
<p>1 P. Hirtle</p> <p>2 Q. Is there any group or department or</p> <p>3 mechanism by which people at Cornell make --</p> <p>4 try to determine the copyright status of works</p> <p>5 in their library?</p> <p>6 A. At various times individuals in the</p> <p>7 Cornell library have tried to determine</p> <p>8 copyright status of works.</p> <p>9 Q. And are you one of those individuals?</p> <p>10 A. I have sometimes been asked to</p> <p>11 determine the copyright status of a work.</p> <p>12 Q. And are there any procedures that you</p> <p>13 follow when you're trying to make that</p> <p>14 determination?</p> <p>15 A. I do not have any written work flow</p> <p>16 that I follow.</p> <p>17 Q. Are you aware of any written work</p> <p>18 flow at Cornell regarding the copyright status</p> <p>19 determination process?</p> <p>20 A. I'm not aware.</p> <p>21 Q. Have you seen -- sorry, go ahead.</p> <p>22 A. The one exception is the work flow</p> <p>23 procedure outlined in the article by Sam Demus</p> <p>24 and Jenny Brogdon on determining copyright</p> <p>25 status and monographs that was developed in</p>	<p>1 P. Hirtle</p> <p>2 conjunction with a preservation project at Mann</p> <p>3 Library.</p> <p>4 Q. I just want to clarify. You said</p> <p>5 that you were sent the internal work flow that</p> <p>6 is used at Michigan as part of the CRMS; is</p> <p>7 that right?</p> <p>8 A. I was sent a work flow document that</p> <p>9 my understanding was that CRMS wanted to follow</p> <p>10 this work flow for part of its investigations,</p> <p>11 but I don't know. They may have other internal</p> <p>12 procedures and I don't know whether they</p> <p>13 adopted it or not.</p> <p>14 Q. Did you see any other documents</p> <p>15 reflecting the work flow used by Michigan as</p> <p>16 part of that process?</p> <p>17 A. I can't recall whether there's</p> <p>18 anything on their website. That would be the</p> <p>19 only place.</p> <p>20 MR. GOLDMAN: We're going to call for</p> <p>21 the production of that internal work flow</p> <p>22 document that Mr. Hirtle says he thinks he</p> <p>23 was sent.</p> <p>24 MR. POTTER: I'll take that under</p> <p>25 advisement.</p>

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1 P. Hirtle
 2 MR. GOLDMAN: I figured.
 3 BY MR. GOLDMAN:
 4 Q. In your opinion, what do you think
 5 the likelihood is that works on HathiTrust
 6 are -- that the copyright status of works on
 7 HathiTrust are misidentified?
 8 MR. POTTER: Objection to the extent
 9 it calls for a legal conclusion. To the
 10 extent you're asking for his opinion, that
 11 is speculation.
 12 A. So if I were to opine and speculate,
 13 my impression is that the work flow procedures
 14 that the HathiTrust Copyright Real Management
 15 System has implemented are topnotch, and in my
 16 experience, I haven't found any examples of
 17 works that I have thought have been
 18 misidentified as being full text when they're
 19 protected by copyright. If anything, the
 20 opposite is the case.
 21 So I would speculate that the
 22 occurrence of errors is very, very low. But
 23 that's pure speculation based on anecdotal
 24 evidence.
 25 Q. But you said before, though, didn't

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1 P. Hirtle
 2 Copyright Office is incredibly small.
 3 Q. And that's just one of many possible
 4 issues that could arise in connection with
 5 making a copyright status --
 6 A. That would make it impossible to say
 7 with 100 percent certainty that this work is in
 8 the public domain.
 9 Q. Now, if a -- if the copyright status
 10 of a book is identified as being in the public
 11 domain but the work is actually under
 12 copyright, would the effect of that be that the
 13 book would be available for full view on
 14 HathiTrust?
 15 MR. POTTER: Objection. Calls for
 16 speculation.
 17 A. My understanding from reading the
 18 website of the HathiTrust is that if a work is
 19 presumed to be in the public domain, then it's
 20 made available for full view.
 21 Q. And if the determination is wrong, so
 22 it would be available for full view; correct?
 23 MR. POTTER: Objection.
 24 A. If the HathiTrust has characterized a
 25 book as being in the public domain, then it

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1 P. Hirtle
 2 you that, it's nearly impossible to determine
 3 with certainty the copyright status of a
 4 work --
 5 MR. POTTER: Objection.
 6 Q. -- published between 1923 and 1964?
 7 A. I feel, I believe that it is almost
 8 impossible to say with 100 percent certainty
 9 that a work is entirely in the public domain,
 10 but you can be 99 percent certain that it's
 11 likely to be in the public domain.
 12 Since, after all, for some of that
 13 time period, a work that if it was published
 14 without a copyright notice would normally enter
 15 the public domain immediately. But it was
 16 possible to register with the Copyright Office
 17 and correct that fault. So that work would be
 18 protected by copyright, even though there is no
 19 easy way of telling, without checking the paper
 20 documents at the Copyright Office.
 21 And that's just one of a hundred
 22 different cases of that happening. And I think
 23 the number of works that were ever reported as
 24 not being -- of mistakenly not having a
 25 copyright notice being reported to the

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1 P. Hirtle
 2 would be made available for full view.
 3 Q. And we read in the agreement that
 4 part of that determination is made -- part of
 5 the determination HathiTrust has made based on
 6 bibliographic data that Cornell provides;
 7 correct?
 8 MR. POTTER: Objection.
 9 A. You read the document. Do you want
 10 me to tell you what the agreement says?
 11 Q. Well, I just asked you a question. I
 12 wanted to know whether --
 13 A. You asked me about the agreement.
 14 And the agreement says Cornell University
 15 assumes liability for errors in the
 16 bibliographic data it makes available to
 17 Michigan.
 18 Q. So in the event that Michigan has an
 19 error in its bibliographic data, that could
 20 also result in a copyrighted book from
 21 Cornell's library being made available for full
 22 view on HathiTrust; isn't that right?
 23 MR. POTTER: Objection.
 24 A. You'll have to rephrase that. I
 25 didn't understand that.

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1 P. Hirtle
 2 Q. Cornell provided bibliographic
 3 information to Google; correct?
 4 A. Yes. I've said we provided some
 5 bibliographic data to Google.
 6 Q. Was that bibliographic data -- isn't
 7 that the same bibliographic data that is used
 8 by HathiTrust to make copyright determinations,
 9 copyright status determinations?
 10 MR. POTTER: Objection. I believe he
 11 testified he wasn't aware how HathiTrust
 12 makes its determinations.
 13 A. I don't know if it's the same data as
 14 provided to HathiTrust.
 15 MR. GOLDMAN: Let's mark this 9.
 16 (PH Exhibit 9, Newsletter dated
 17 April 13, 2012, was marked for
 18 identification.)
 19 BY MR. GOLDMAN:
 20 Q. I've marked as PH-9 a HathiTrust
 21 digital library newsletter that's dated
 22 April 13, 2012. I downloaded this from the
 23 HathiTrust.org website. This says "Update on
 24 March activities."
 25 If you turn to the second page,

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1 P. Hirtle
 2 A. No.
 3 Q. Now, if approximately 28 percent of
 4 the total number of books -- volumes in
 5 HathiTrust are public domain, that would mean
 6 that 72 percent, approximately 72 percent of
 7 the works are copyrighted; is that right?
 8 A. No.
 9 Q. Why not?
 10 A. Why not what?
 11 Q. Why wouldn't that mean that
 12 approximately 72 percent of the works are in
 13 copyright?
 14 A. It would mean that those works may be
 15 public domain, but they have not gone through
 16 the Copyright Review Management System yet, so
 17 that they are -- their copyright status is
 18 indeterminate at this point.
 19 Q. So a portion of the remaining
 20 72 percent would include works whose copyright
 21 status is indeterminate; is that right?
 22 A. That's right. They may be
 23 copyrighted; they may be public domain.
 24 MR. GOLDMAN: I'd like to mark this
 25 as PH-10.

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1 P. Hirtle
 2 there's a table that lists what I believe are
 3 some of the members of HathiTrust. And the
 4 second entry is Cornell University and the
 5 number is 392,356.
 6 Do you have any reason to believe
 7 that number is incorrect?
 8 MR. POTTER: Objection.
 9 A. I have no basis for believing that's
 10 correct or incorrect.
 11 Q. On the bottom it says -- on the
 12 bottom of the table it says, "Public domain,
 13 approximately 28 percent of total." And then
 14 it shows that would be of the total number of
 15 works in HathiTrust, that would be 2,785,335
 16 works.
 17 Do you have any reason to believe
 18 that that number is incorrect?
 19 A. No, I have no reason to believe it's
 20 incorrect.
 21 Q. It shows, by the way, the total
 22 number of volumes in HathiTrust, as of
 23 March 2012, it says 10,090,382 works.
 24 Do you have any reason to believe
 25 that number is incorrect?

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1 P. Hirtle
 2 (PH Exhibit 10, Document entitled
 3 Copyright and Cultural Institution
 4 Guidelines for Digitization for U.S.
 5 Libraries Archives and Museums, was
 6 marked for identification.)
 7 THE WITNESS: Can we take a break,
 8 please.
 9 MR. GOLDMAN: Yes. Yes, we could.
 10 (Recess taken from 3:45 p.m. to
 11 3:55 p.m.)
 12 MR. ROTH: I see that you've made
 13 multiple copies of Mr. Hirtle's book.
 14 MR. GOLDMAN: Yes.
 15 MR. ROTH: That is in copyright and
 16 for sale in bookstores.
 17 MR. GOLDMAN: Okay. Yes.
 18 MR. POTTER: You don't think it
 19 raises any copyright concerns?
 20 MR. ROSENTHAL: I don't think this is
 21 an appropriate question.
 22 MR. GOLDMAN: No, I think it's
 23 also -- I'm not even going to engage in
 24 that.
 25 MR. ROTH: Note our objection. These

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1 P. Hirtle
 2 books could have been purchased. And given
 3 the subject matter of the lawsuit, it's
 4 quite ironic that you'd be using multiple
 5 copies of a book in copyright.
 6 MR. GOLDMAN: It's published under a
 7 creative common licenses. It's not
 8 attribution and noncommercial.
 9 MR. ROSENTHAL: Why don't we just
 10 destroy the copy that we gave Mr. Hirtle's
 11 lawyer and to anybody else in the room who
 12 wants a copy other than the one we marked
 13 for the thing. If they really don't want
 14 to have copies for purposes of fairness in
 15 the deposition, then we'll just get rid of
 16 the extra copies. That's fine.
 17 You want us to take back Mr. Potter's
 18 copy and destroy it?
 19 MR. ROTH: I'm not going to give you
 20 advice.
 21 MR. ROSENTHAL: Okay. I'm going
 22 to take these -- let the record show I'm
 23 taking these extra copies and I'm going to
 24 put them in our shredder which is in the
 25 next room. Anybody wants to come watch me

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1 P. Hirtle
 2 Hudson and Andrew T. Kenyon on the front.
 3 Is this a work that you helped
 4 author?
 5 A. Yes.
 6 Q. If you could turn to page 110,
 7 there's a flowchart that is entitled
 8 "Digitization under the Libraries and Archives
 9 Exception" -- sorry -- "Archives Provisions."
 10 Did you help prepare this flow chart?
 11 A. Yes.
 12 Q. And could you explain what the
 13 purpose of this flow chart is?
 14 A. The flow chart is to give a general
 15 overview of the provisions of Section 108 in
 16 the Copyright Act.
 17 Q. I wanted to try to go through this
 18 work flow with you with respect to the
 19 digitization that occurred as part of the
 20 Google project. And to --
 21 MR. POTTER: I'm going to object to
 22 that line of questioning. He's not here as
 23 an expert witness, he's here as a fact
 24 witness. And the application of his work
 25 to the facts of this case is inappropriate.

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1 P. Hirtle
 2 do it, may be welcome to come do it. And
 3 no one has even looked at those. So there
 4 you go.
 5 MR. POTTER: I guess if no one else
 6 looks at something, it's not infringement?
 7 That's an interesting theory.
 8 MR. GOLDMAN: I did think about this
 9 actually. It is published under creative
 10 commons licenses, attribution,
 11 noncommercial. I would think this is a
 12 noncommercial use and I'm certainly
 13 attributing the work to Mr. Hirtle.
 14 So I think this is perfectly fair to
 15 ask the witness about a work that he
 16 authored.
 17 MR. ROTH: That's a different
 18 question.
 19 MR. GOLDMAN: No.
 20 BY MR. GOLDMAN:
 21 Q. Looking at what's been marked as
 22 PH-10, it's a work entitled, "Copyright and
 23 Cultural Institution Guidelines for
 24 Digitization for U.S. Libraries Archives and
 25 Museums." It lists Peter B. Hirtle, Emily

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1 P. Hirtle
 2 The application of legal issues that may be
 3 raised in this work to the facts of this
 4 case is inappropriate. These are questions
 5 that seek legal conclusions from a witness
 6 that is not here or in the capacity to
 7 offer those.
 8 MR. GOLDMAN: Okay. Now, that you're
 9 speaking objection is done, are you
 10 instructing him not to answer?
 11 MR. POTTER: I will wait and see how
 12 the questions go. But to the extent that
 13 you're asking for the application -- for
 14 his opinions concerning legal aspects in
 15 this case, I will instruct him not to
 16 answer those. Those are improper
 17 questions. That's not the reason that he's
 18 here to testify today.
 19 MR. GOLDMAN: Okay. I wouldn't --
 20 okay. Let's proceed and we'll wait for you
 21 to ask him not to answer or not.
 22 BY MR. GOLDMAN:
 23 Q. You agree, Mr. Hirtle, you do agree
 24 that as part of the Google project at Cornell
 25 copyrighted works were digitized; correct?

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<p>1 P. Hirtle</p> <p>2 A. Yes.</p> <p>3 Q. Okay.</p> <p>4 So that first question --</p> <p>5 A. By Google.</p> <p>6 Q. By Google. Okay.</p> <p>7 So if we look at the first question</p> <p>8 on here, it says, "Identify the material you</p> <p>9 wish to digitize. Is the material</p> <p>10 copyrighted."</p> <p>11 So I'm going to ask questions about</p> <p>12 material that's been copyrighted, because you</p> <p>13 just said that there were materials that were</p> <p>14 digitized that were copyrighted.</p> <p>15 The next question says, "Is your</p> <p>16 institutional library or archives according to</p> <p>17 the Copyright Act. And is the work you propose</p> <p>18 to digitize part of the institution's</p> <p>19 collection."</p> <p>20 Is Cornell University Library, in</p> <p>21 your opinion, a library according the Copyright</p> <p>22 Act?</p> <p>23 MR. POTTER: Objection to the extent</p> <p>24 it calls for a legal conclusion.</p> <p>25 A. Could you repeat question again.</p>	<p>1 P. Hirtle</p> <p>2 Q. Do you believe that Cornell</p> <p>3 University Library is a library or archives</p> <p>4 according to the Copyright Act?</p> <p>5 MR. POTTER: I repeat the objection.</p> <p>6 A. Can you show me the definition of a</p> <p>7 library or archives in the Copyright Act.</p> <p>8 Q. I think it's a trick question, but I</p> <p>9 wanted just to know whether you believe that</p> <p>10 Cornell University Library is a library or</p> <p>11 archives under the Copyright Act.</p> <p>12 MR. POTTER: Objection to the extent</p> <p>13 that it calls for a legal conclusion.</p> <p>14 A. You're asking for my interpretation</p> <p>15 of the Copyright Act and what its definition of</p> <p>16 library and archives is.</p> <p>17 Q. Well, you drafted this chart, didn't</p> <p>18 you?</p> <p>19 A. Yes. I've said yes.</p> <p>20 Q. In fact, you drafted an entire book</p> <p>21 about guidelines for digitizations for U.S.</p> <p>22 libraries, archives and museums, with an entire</p> <p>23 section dedicated to Section 108, didn't you?</p> <p>24 A. Yes, I did.</p> <p>25 Q. Okay.</p>
Page 188	Page 189
<p>1 P. Hirtle</p> <p>2 I'm asking whether your understanding</p> <p>3 is whether Cornell University library is a</p> <p>4 library, as that term is used right here in the</p> <p>5 work that you prepared, according to the</p> <p>6 Copyright Act?</p> <p>7 MR. POTTER: Objection to the extent</p> <p>8 that it calls for a legal conclusion.</p> <p>9 BY MR. GOLDMAN:</p> <p>10 Q. Let me ask it a different way.</p> <p>11 In your role as a Senior Policy</p> <p>12 Advisor, have you treated Cornell University</p> <p>13 Library as if it is a library under the</p> <p>14 Copyright Act?</p> <p>15 MR. POTTER: Same objection.</p> <p>16 A. The issue of whether Cornell</p> <p>17 University Library is a library under Section</p> <p>18 108 is a matter I would take to our counsel's</p> <p>19 office for advice.</p> <p>20 Q. Okay.</p> <p>21 Are you aware whether Cornell</p> <p>22 University Library has made copies of</p> <p>23 copyrighted works under Section 108?</p> <p>24 MR. POTTER: Objection to the extent</p> <p>25 that it calls for a legal conclusion.</p>	<p>1 P. Hirtle</p> <p>2 A. Well, I suspect that there are times</p> <p>3 when copies may have been made under Section</p> <p>4 108 digital copies. I can't think of any</p> <p>5 digitization project that has done so, off the</p> <p>6 top of my head.</p> <p>7 Q. Are you saying that the Google -- off</p> <p>8 the top of your head, are you saying that the</p> <p>9 Google project is not being done under Section</p> <p>10 108?</p> <p>11 MR. POTTER: Objection to the extent</p> <p>12 that this calls for a legal conclusion.</p> <p>13 This whole line of questioning is</p> <p>14 inappropriate and irrelevant. He's a fact</p> <p>15 witness, he's not a lawyer. His feelings</p> <p>16 or opinions as to what may or may not be</p> <p>17 occurring in connection with certain</p> <p>18 sections of the Copyright Act is not an</p> <p>19 appropriate matter of testimony.</p> <p>20 MR. GOLDMAN: We can -- I'll depose</p> <p>21 you next, if you want. But that's an</p> <p>22 speaking objection. It's inappropriate.</p> <p>23 You can object to the form, or if you want</p> <p>24 to direct him not to answer, you can do so.</p> <p>25 But you're speaking and basically</p>

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1 P. Hirtle
 2 coaching the witness when you say things
 3 like that.
 4 MR. POTTER: I'm not coaching the
 5 witness. I'm laying out -- it's not an
 6 objection to form.
 7 MR. GOLDMAN: You can lay it out in
 8 court.
 9 MR. POTTER: It's an objection to the
 10 line of the inquiry.
 11 MR. GOLDMAN: And you know that it's
 12 part of the rules that you object to the
 13 form, and then we reserve those kinds of
 14 speeches for the judge. We need to do
 15 that.
 16 BY MR. GOLDMAN:
 17 Q. Mr. Hirtle, do you think that Cornell
 18 University Library is a library that can seek
 19 protection under Section 108 of the Copyright
 20 Act?
 21 MR. POTTER: I'm going to ask him not
 22 to answer this question.
 23 BY MR. GOLDMAN:
 24 Q. And do you believe that the
 25 digitization that occurred in connection with

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1 P. Hirtle
 2 digitized for purposes of placing a damaged,
 3 deteriorating, lost or stolen work or a work in
 4 an obsolete format?
 5 MR. POTTER: Objection.
 6 A. Can you repeat or rephrase the first
 7 part of your question.
 8 Q. Right. Why don't we break it down.
 9 Were any of the works that were
 10 digitized as part of the Google project at
 11 Cornell digitized for purposes of replacing a
 12 damaged work?
 13 MR. POTTER: Objection.
 14 A. I've already explained the primary
 15 purpose for digitizing works under the Google
 16 process was to preserve them and to increase
 17 the access to those works.
 18 Whether some of them may also have
 19 been damaged, deteriorating, probably not lost
 20 and probably not stolen, I'm not -- I'm not
 21 sure. Some may have been, I'm not aware.
 22 Q. But it's your understanding that that
 23 was not the purpose of the digitization;
 24 correct?
 25 A. I said that the primary purpose was

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1 P. Hirtle
 2 the Google project falls under Section 108?
 3 MR. POTTER: Same instruction.
 4 MR. GOLDMAN: You're instructing him
 5 not to answer. Okay.
 6 BY MR. GOLDMAN:
 7 Q. Do you -- I think I asked this
 8 before, but are any of the works that Google
 9 digitized from Cornell unpublished?
 10 MR. POTTER: Objection. Asked and
 11 answered.
 12 A. I'm not aware that any are
 13 unpublished, but there may be some.
 14 Q. Do you believe that at least the
 15 majority of the works that were digitized were
 16 published works?
 17 A. I would assume that they're published
 18 works, but I have never sat down and done an
 19 analysis to see if there's any basis for my
 20 assumption.
 21 Q. Were any of the copyrighted published
 22 works, and assuming that works that were
 23 digitized were -- that they did include
 24 copyrighted and published works, were any of
 25 those copies -- were any of those works

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1 P. Hirtle
 2 to preserve the works in our collections and to
 3 improve access to the holdings of the library.
 4 Q. So the answer is no?
 5 A. The answer is -- what are you
 6 suggesting I'm answering "no" to?
 7 Q. That the purpose of the digitization
 8 was not to replace a damaged, deteriorating,
 9 lost or stolen work.
 10 A. The digitization, there may have been
 11 instances of --
 12 MR. POTTER: Objection.
 13 A. -- digitization that also replaced a
 14 damaged or deteriorating work. But the primary
 15 purpose was to preserve, in general, our
 16 collections and improve access to the content
 17 of our holdings.
 18 Q. So putting aside whether works may
 19 have -- whether the digitization may have
 20 replaced a damaged, deteriorating, lost or
 21 stolen work, isn't it correct that the purpose
 22 of the large scale digital initiative with
 23 Google, that was the purpose was not to replace
 24 a damaged, deteriorating, lost or stolen work?
 25 MR. POTTER: Objection. Asked and

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1 P. Hirtle
 2 answered.
 3 MR. GOLDMAN: He hasn't answered
 4 that. That's why I'm going to keep asking.
 5 BY MR. GOLDMAN:
 6 Q. And if you can't answer, let me know
 7 which part of my question is causing you
 8 trouble to answer yes or no.
 9 A. What are the parts of your question?
 10 MR. GOLDMAN: Can you please repeat
 11 my question.
 12 (The Record was Read.)
 13 A. And you can see there the problem
 14 that I'm having that you say, first of all, I
 15 put aside the purpose being to replace a
 16 damaged or deteriorating work, and then say was
 17 the purpose to replace damaged or deteriorating
 18 works. And the first part of your question
 19 makes me put it aside, so I can't answer that
 20 question.
 21 Q. You did say, though, that the purpose
 22 of the -- go ahead.
 23 A. I said the primary purpose of the
 24 project was to preserve works in our holdings
 25 and to improve access to the works.

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1 P. Hirtle
 2 not know one way or the other and no reason to
 3 know. No basis for knowing. Excuse me.
 4 Q. Is it possible that the works that
 5 were digitized did include works for which
 6 unused, replacement copies could be obtained at
 7 a fair price?
 8 A. Almost anything is possible, isn't
 9 it? So, yes, it's possible.
 10 Q. No works were withheld on that basis,
 11 were they, to your knowledge?
 12 A. Some may have been, but I don't know
 13 of any.
 14 Q. Putting aside the digitization
 15 programs at Cornell, Cornell does have a
 16 program to preserve certain books in its
 17 collection; correct?
 18 MR. POTTER: Objection.
 19 A. There is a -- there are two
 20 preservation departments in the Cornell
 21 University's library whose primary function is
 22 to protect and safeguard the library
 23 collections.
 24 Q. And are you aware whether those
 25 departments ever make copies of works as part

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1 P. Hirtle
 2 There may also be cases where there
 3 were damaged or deteriorating copyrighted works
 4 that were also scanned and preserved.
 5 Q. But in those instances, was that
 6 coincidental?
 7 MR. POTTER: Objection.
 8 A. I'm not sure what you mean by
 9 "coincidental."
 10 Q. Meaning that wasn't a purpose of the
 11 project, that was just a byproduct of the
 12 process.
 13 MR. POTTER: Objection.
 14 A. I would think that people at Cornell
 15 were hopeful -- and, again, I can't speak for
 16 Cornell, this is my own opinion from the
 17 meetings I've been in, but people were hopeful
 18 that damaged and deteriorating works would be
 19 preserved as part of this particular project.
 20 Q. And are you aware whether unused
 21 replacements copies of any of the copyrighted
 22 published works that were digitized could be
 23 obtained at a fair price?
 24 MR. POTTER: Objection.
 25 A. I have no basis -- I have no -- do

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1 P. Hirtle
 2 of their preservation efforts?
 3 A. They have made copies of works as
 4 part of their preservation efforts.
 5 Q. And do you know how those departments
 6 determine whether a particular work will be
 7 copied for preservation purposes?
 8 A. I don't know the procedures in our
 9 preservation and conservation laboratories that
 10 they follow.
 11 Q. And do you know why a particular work
 12 might be selected for preservation over other
 13 works?
 14 A. Conservation assessments are done at
 15 particular points in a book's lifespan. When
 16 it's returned from circulation, it may be
 17 noticed that it is in poor shape and be sent to
 18 the lab. If the materials are going up on
 19 exhibit, it may get conservation treatment.
 20 Q. Is one of the factors that's
 21 considered whether a replacement copy can be
 22 obtained from another source?
 23 MR. POTTER: Objection.
 24 A. What material are we talking about
 25 right now?

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<p>1 P. Hirtle</p> <p>2 Q. Works that are selected for</p> <p>3 preservation.</p> <p>4 A. Works that are selected for</p> <p>5 preservation. I don't know -- as I said, I</p> <p>6 don't know the work flow procedures in the</p> <p>7 preservation units.</p> <p>8 Q. Have you ever discussed the criteria</p> <p>9 that are found in Section 108 with the people</p> <p>10 that work at the preservation departments at</p> <p>11 Cornell University Library?</p> <p>12 MR. POTTER: I object to the extent</p> <p>13 it calls for a legal conclusion.</p> <p>14 A. Only to the extent that one of them</p> <p>15 may have been in a workshop that I taught, but</p> <p>16 no focused work just for them.</p> <p>17 But, of course, our preservation work</p> <p>18 is -- that they're doing is heavily based in</p> <p>19 public domain work.</p> <p>20 Q. Is that because they're dealing</p> <p>21 primarily with older works?</p> <p>22 A. Public domain works are older works</p> <p>23 and older works tend to need the most care.</p> <p>24 Q. Are you familiar with the Orphan</p> <p>25 Works Project?</p>	<p>1 P. Hirtle</p> <p>2 A. Yes, I am.</p> <p>3 Q. And what is the Orphan Works Project?</p> <p>4 A. Based on my reading of the press</p> <p>5 releases and web pages on the Orphan Works</p> <p>6 Project, the Orphan Works Project is an</p> <p>7 initiative to provide limited access to digital</p> <p>8 copies of copyrighted works to libraries that</p> <p>9 own a copy of that work when the copyright</p> <p>10 owner cannot be found after a reasonable</p> <p>11 search.</p> <p>12 Q. You said providing digital copies of</p> <p>13 works to libraries.</p> <p>14 What do you mean by "to libraries"?</p> <p>15 A. To a library member of the HathiTrust</p> <p>16 that elects to participate in their Orphan</p> <p>17 Works Project.</p> <p>18 Q. You don't mean that only librarians</p> <p>19 from the library can access those works, do</p> <p>20 you?</p> <p>21 A. No. It's made accessible to</p> <p>22 authorized users of the library, in which --</p> <p>23 Q. Who are -- what is your understanding</p> <p>24 of who authorized users of the library would</p> <p>25 include?</p>
Page 200	Page 201
<p>1 P. Hirtle</p> <p>2 A. It is a smaller subset than the</p> <p>3 people who could check out the physical book</p> <p>4 from the library. It would consist of current</p> <p>5 faculty students and staff. Whereas, people</p> <p>6 with library borrowing privileges, retirees,</p> <p>7 alumni, in certain cases residents of the state</p> <p>8 of New York, would be able to come and check</p> <p>9 out the physical book from our library.</p> <p>10 Q. When did you first learn about the</p> <p>11 Orphan Books Project?</p> <p>12 A. I can't recall.</p> <p>13 Q. There came a time when Cornell</p> <p>14 announced its intent to join the Orphan Works</p> <p>15 Project; is that correct?</p> <p>16 A. That's correct.</p> <p>17 MR. GOLDMAN: PH-11.</p> <p>18 (PH Exhibit 11, Press Release dated</p> <p>19 August 24, 2011, was marked for</p> <p>20 identification.)</p> <p>21 BY MR. GOLDMAN:</p> <p>22 Q. PH-11 is a press release dated</p> <p>23 August 24, 2011. The title is "Universities</p> <p>24 Band Together to Join Orphan Works Project,"</p> <p>25 this is -- I downloaded this from the news</p>	<p>1 P. Hirtle</p> <p>2 section of the library Cornell.edu website.</p> <p>3 Were you aware of the Orphan Works</p> <p>4 Project prior to the work announcement of</p> <p>5 Cornell joining it?</p> <p>6 A. Yes.</p> <p>7 Q. How did you become aware of it?</p> <p>8 A. I don't recall.</p> <p>9 Q. Did you have any discussions with</p> <p>10 anybody at University of Michigan regarding the</p> <p>11 Orphan Works Project at any time?</p> <p>12 A. At any time?</p> <p>13 Q. At any time.</p> <p>14 A. Yes.</p> <p>15 Q. What discussions did you have?</p> <p>16 A. I talked on the phone with Melissa</p> <p>17 Levine about the Orphan Works Project.</p> <p>18 Q. Was that before Cornell joined or</p> <p>19 after?</p> <p>20 A. I believe after.</p> <p>21 Q. Who is Melissa Levine?</p> <p>22 A. Melissa Levine is a copyright</p> <p>23 specialist in the University of Michigan</p> <p>24 Library.</p> <p>25 Q. And you said you had a phone</p>

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1 P. Hirtle
 2 conversation with her?
 3 A. Yes.
 4 Q. Did you have more than one phone
 5 conversation with her?
 6 A. I may have.
 7 Q. What was the nature of that
 8 discussion?
 9 A. I was curious as to the procedures
 10 that they were using to conduct the reasonable
 11 search for a copyright owner.
 12 Q. And did she -- what were you curious
 13 about, in particular?
 14 A. What those procedures were.
 15 Q. And did she tell you?
 16 A. She directed me to the website for
 17 the Orphan Works Project.
 18 Q. Did you engage in any e-mail
 19 exchanges about what the level of -- the proper
 20 level of searching should be in connection with
 21 the Orphan Works Project?
 22 MR. POTTER: Objection.
 23 A. Can you explain what you mean by the
 24 "proper level"?
 25 Q. Yes.

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1 P. Hirtle
 2 have been released to the public, nor would
 3 they have been.
 4 MR. GOLDMAN: I'm going to mark this
 5 DVD as PH-12.
 6 (PH Exhibit 12, Copy of DVD, was
 7 marked for identification.)
 8 BY MR. GOLDMAN:
 9 Q. Okay.
 10 What I've -- before I -- were you
 11 ever videotaped for an interview in connection
 12 with the Here and There Blog?
 13 A. Yes.
 14 Q. And was that in 2011, to the best of
 15 your recollection?
 16 A. I don't think it was videotaped. I
 17 don't think we've used videotape for quite a
 18 while.
 19 Q. Was it videographed?
 20 A. I think Deborah had a digital camera
 21 of some kind, and I don't know what storage
 22 mechanism she was using for it.
 23 Q. Fair enough.
 24 Was it recorded by videographic
 25 means?

Page 203

1 P. Hirtle
 2 A. I can say that we had e-mail
 3 exchanges about how the Orphan Works review
 4 system was operating and the procedures they
 5 were following.
 6 Q. You had e-mails with whom?
 7 A. With Melissa.
 8 Q. Did you express any concerns to
 9 Melissa about how the procedures were
 10 operating?
 11 A. I don't think "concerns" would be the
 12 right word. "Questions" would be the right
 13 word to use.
 14 Q. And what questions did you ask?
 15 A. One is -- this is -- what constitutes
 16 a diligent, a reasonable search is an
 17 interesting question that we've all been faced
 18 since the Copyright Office first proposed that
 19 in the Orphan Works legislation.
 20 And so we're engaged in discussions
 21 of what is a reasonable search. And so I had
 22 questions about how they were doing it. And it
 23 turns out that their solution was very
 24 effective, since no orphan works have been
 25 released to the -- no works that are not orphan

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1 P. Hirtle
 2 A. It was recorded with a digital moving
 3 image camera.
 4 Q. Okay.
 5 I'll try to do this. I'm just going
 6 to ask you some questions about the video.
 7 The video appeared on -- it was on
 8 YouTube and it was on her blog. So I'm going
 9 to show some clips from that video and ask you
 10 some questions about it, if that's okay.
 11 A. Do I have a choice?
 12 Q. There's always a choice.
 13 (DVD played.)
 14 BY MR. GOLDMAN:
 15 Q. I just wanted to first ask about that
 16 comment, when you said that you have to balance
 17 the fact that trying to look for an author as
 18 expense, how far do you want to go. What did
 19 you mean by that?
 20 A. What did I mean by that?
 21 Perhaps the best way to answer is to
 22 give an -- is to refer to Denise Troll Covey's
 23 study of trying to locate copyright owners that
 24 she did for -- at Carnegie Mellon. And in some
 25 cases that she would spend over a hundred

<p style="text-align: right;">Page 206</p> <p>1 P. Hirtle 2 dollars per title trying to locate a copyright 3 owner, and still only get a 50 percent or lower 4 response rate in trying to do that. 5 And so then the question is you've 6 spent \$100, do you spend \$200, do you send 7 \$500, do you hire a private investigator. At 8 some point the expense of trying to locate a 9 copyright owner no longer becomes -- is not 10 reasonable, and you don't meet the sense of a 11 reasonable search. 12 So that's what I meant. You know, in 13 that study she even had seven books that she 14 asked the publishers for permission to digitize 15 and the publishers denied that they had ever 16 published the books. And she had to send them 17 photocopies of the title pages showing that 18 they were the publishes in order to get them to 19 admit that. 20 Q. So is it fair to say that the amount 21 of funding that a library has could determine 22 whether an author/owner of an orphan work will 23 be located? 24 MR. POTTER: Objection. 25 A. I have a photograph of my grandfather</p>	<p style="text-align: right;">Page 207</p> <p>1 P. Hirtle 2 with his 11 brothers and sisters taken in about 3 1918. I have no idea who the photographer is 4 and no amount of money I spent -- could spend 5 or the library could spend could ever tell me 6 who was the owner of that orphan work. 7 Q. Now, are these the types issues that 8 were discussed when the Orphan Works 9 legislation was being considered in the 2000s? 10 MR. POTTER: Objection. 11 A. Normally I charge people when they 12 want to know about my copyright history 13 expertise, but I think if you go back and read 14 the Orphan Works report, and particularly the 15 commentary that goes along with the Orphan 16 Works reports, you'll see this is being a 17 concern. I know the Motion Picture Association 18 of America in its comments complained how often 19 they have to hire genealogists to try and go 20 find the owner of an orphan work, in -- for 21 fear that movie industry and their commercial 22 uses make them such ripe targets for a 23 potential infringement suit. 24 MR. GOLDMAN: Let's continue with the 25 DVD.</p>
<p style="text-align: right;">Page 208</p> <p>1 P. Hirtle 2 (DVD played.) 3 BY MR. GOLDMAN: 4 Q. When you referred to the e-mail 5 exchanges regarding the proper level of 6 searching, are you referring to the e-mails 7 that you had with Ms. Levine? 8 A. And others. 9 Q. Who are the others that you had 10 e-mail exchanges with? 11 A. Other intellectual property officers 12 in libraries, people interested in copyright. 13 Q. And were those e-mails part of a 14 process to refine or revise the review process 15 that was going on at Michigan? 16 A. No. 17 Q. What was the purpose of those e-mail 18 exchanges? 19 A. It was part of our -- as an 20 educational exercise. These are important and 21 difficult questions that can only be worked out 22 through free and open discussion and debate and 23 practical experience of actually trying to do 24 it, as the HathiTrust project set out to do. 25 Q. Now, in the course of those -- you</p>	<p style="text-align: right;">Page 209</p> <p>1 P. Hirtle 2 also had verbal discussions with people over 3 this topic; is that correct? 4 A. Yes. 5 Q. Okay. 6 Now, in the course of those 7 communications, were there disagreements 8 amongst people over the process that should be 9 followed to locate orphan work owners? 10 MR. POTTER: Objection. 11 A. I wouldn't characterize anything as a 12 disagreement. 13 Q. Did people have different opinions 14 about what procedure should be followed in 15 connection with that process? 16 MR. POTTER: Objection. 17 A. I don't think there was any other 18 procedures to follow, so they had no opinion, 19 or no one was saying and no one has said, oh, 20 you should have been doing Y rather than X as a 21 procedure. 22 Q. Okay. 23 Well, let's continue the video. 24 (DVD played.) 25</p>

Page 210

1 P. Hirtle
 2 BY MR. GOLDMAN:
 3 Q. First, do you remember the name of
 4 that individual who was involved in a famous
 5 lawsuit?
 6 A. No, I don't.
 7 Q. Do you know what book that you're
 8 referring to here?
 9 A. No, I don't.
 10 Q. Would you able to find that out if
 11 you looked through your records?
 12 A. Probably.
 13 MR. GOLDMAN: I'm going to call for
 14 the production of any records that identify
 15 the name of that author or work.
 16 Okay. Let's continue.
 17 (DVD played.)
 18 BY MR. GOLDMAN:
 19 Q. Do you remember now? Did that help
 20 refresh your recollection?
 21 A. No.
 22 (DVD played.)
 23 BY MR. GOLDMAN:
 24 Q. So isn't it correct that there was a
 25 disagreement about whether to search SSDI

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1 P. Hirtle
 2 tool. What is the process that's taking place.
 3 So there's not a disagreement. It's
 4 part of an academic dialogue of trying to
 5 figure out what is both efficient and
 6 respectful of the rights owner.
 7 Q. Do you know whether the process that
 8 was being followed at Michigan included a
 9 search of SSDI records?
 10 A. I do not know.
 11 Q. Do you know whether it included
 12 searching obituaries?
 13 A. I do not.
 14 MR. POTTER: Objection.
 15 A. I do not know.
 16 Q. But you said there was librarians who
 17 thought that was going too far; is that right?
 18 A. I had gotten --
 19 MR. POTTER: Objection.
 20 A. I had gotten an e-mail messages from
 21 other librarians that suggested for the
 22 reasons -- some of the reasons that I just
 23 outlined, that this -- that searching -- my
 24 approach was the wrong approach. And it very
 25 well -- and, as I just said, what I did in this

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1 P. Hirtle
 2 records and obituary records?
 3 A. I would say that -- I wouldn't argue
 4 that one would need to search SSDI and obituary
 5 records for every book in an orphan works case.
 6 In this case, that the fact that you're
 7 unlikely to find any -- that this particular
 8 case, it was an unusual name made it possible;
 9 but, in particular, if we're trying to scale
 10 what I might do as an archivist for one person
 11 whose papers I've gotten into my repository may
 12 not scale right if you're dealing with
 13 10 million books in a system and that we need
 14 to have automated tools to be able to deal with
 15 that.
 16 I am quite willing -- the exciting
 17 thing about this discussion is that there are a
 18 variety of approaches that one can take. And
 19 the HathiTrust process opened up in real terms
 20 the possibility of having a discussion about
 21 what is the -- constitutes a reasonable search.
 22 And would trying to search the SSDI records for
 23 John Smith when you're almost positive it's the
 24 publisher who owns the copyright in the printed
 25 work, is that really an effective and useful

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1 P. Hirtle
 2 case very well may not be appropriate for a
 3 reasonable search.
 4 And the fact that Michigan posting
 5 the materials on a public website and
 6 preventing -- which then prevented any
 7 non-orphan works from being released to the
 8 public, may actually be a much more cost
 9 effective and efficient mechanism for
 10 addressing orphan -- for locating rights owner
 11 than what I was proposing in that interview.
 12 Q. You said that you were -- you
 13 received e-mails from certain librarians that
 14 didn't agree that searching those indices was
 15 the right approach.
 16 Who sent you those e-mails?
 17 A. I can't recall who thought that this
 18 was -- that I was going too far.
 19 Q. Was it somebody from within Cornell?
 20 A. No.
 21 Q. It was a librarian at another school?
 22 A. Yes.
 23 Q. Do you remember which school?
 24 A. No.
 25 Q. Do you remember whether it was

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1 P. Hirtle
 2 Michigan?
 3 A. I don't recall. I don't believe so.
 4 Q. Was it Melissa Levine?
 5 A. I don't believe so.
 6 MR. GOLDMAN: I'm going to call for
 7 the production of those e-mails.
 8 MR. POTTER: Okay. I'll take it
 9 under advisement.
 10 BY MR. GOLDMAN:
 11 Q. By the way, do you recall how long it
 12 took you to search that index and to locate the
 13 identity of the heirs of this author?
 14 A. I didn't locate the heirs of the
 15 author. I located the names of the heirs of
 16 the author. I did not then attempt to actually
 17 locate those heirs themselves.
 18 Q. Right.
 19 But just to identify the names, how
 20 long did it take you to go from seeing the book
 21 on the candidate list to identifying the names
 22 of the heirs?
 23 A. I would estimate that putting this
 24 unusual name into the SSDI database, getting a
 25 likely candidate for or candidates for the

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1 P. Hirtle
 2 object. And, of course, one goal of this is to
 3 try to identify works that no one cares about.
 4 Q. Now, do your opinions about risk
 5 management come into play when you're deciding
 6 whether to make a work like that available for
 7 people to download?
 8 MR. POTTER: Objection.
 9 A. You're asking me to speculate. I
 10 would, if I was teaching, giving a presentation
 11 to people, to librarians, I would say this is
 12 something that you have to -- you should take
 13 into account. The biggest problem we have is
 14 that librarians want to follow copyright law,
 15 and are very, very risk adverse.
 16 And my experience in speaking to many
 17 lawyers over the years is that they don't say,
 18 oh, it's wrong to copy an entire copyrighted
 19 work that belongs to someone else and
 20 distribute it to my clients. They say, how
 21 likely is it that I'm going to be sued for this
 22 and how much risk do I do.
 23 And librarians tend not to work that
 24 way. And so I've been encouraged -- saying
 25 that there are some cases where it's

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1 P. Hirtle
 2 place of death of the likely candidates, and
 3 then looking to see if we had obituaries for
 4 those people. And, fortunately, in this case,
 5 it was a -- somebody who had died within, as I
 6 recall, within the last 10 years, so that there
 7 were online versions of the newspapers that
 8 were accessible to me.
 9 And so that then I could look at the
 10 obituaries and find one that indicated that he
 11 was an author and had published these books.
 12 So maybe 15 minutes for that.
 13 But, as I said, that's because
 14 everything fell into place perfectly and, quite
 15 frankly, I had the feeling that if I contacted
 16 the -- even if one did contact the family and
 17 they said, oh, this will be terrific, let's
 18 make it open. In my experience family members
 19 believe they have rights that they don't and
 20 assume that they own rights that still may
 21 belong to the publisher.
 22 And so you could spend all that
 23 effort and really not have good data. All you
 24 would know is that one way or the other there's
 25 a potential rights holder out there who might

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1 P. Hirtle
 2 appropriate to sit down and think about what
 3 are the risks that you're actually running.
 4 Q. Do you think there are instances in
 5 which --
 6 A. But, most of all, we want to be
 7 respectful to rights owners in a case like
 8 this.
 9 Q. Do you think there's instances in
 10 which an action by a librarian may technically
 11 constitute a copyright violation, but the
 12 library should consider engaging in it anyway?
 13 MR. POTTER: Objection to the extent
 14 it calls for a legal conclusion.
 15 A. I, unfortunately, can't do that
 16 because the policy at Cornell says that we
 17 follow the copyright law. So I would have to
 18 conclude that what I was doing was a fair use
 19 and non-infringing at that point.
 20 But even then, even if I think it's a
 21 fair use, one should, you know, as we all know,
 22 people bring lawsuits that have absolutely no
 23 reasonable basis or relationship to reality.
 24 And that's a risk that you have to weigh, as
 25 well, too.

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1 P. Hirtle
 2 Q. But, in your opinion, does the level
 3 of risk that a library will get sued for making
 4 a particular use of a work, impact whether the
 5 use is or is not copyright infringement?
 6 MR. POTTER: Objection.
 7 A. Well, it sounds like you're asking me
 8 to interpret copyright law. And my
 9 understanding of copyright, as imperfect as it
 10 is, is that that sort of risk analysis doesn't
 11 enter into the legality issue.
 12 Q. I could play the video, but I don't
 13 want to waste everyone's time.
 14 You said at one point that -- you
 15 said during this interview that, quote, "I want
 16 archivists to knowingly violate the copyright
 17 law."
 18 What did you mean by that? And I
 19 know -- just what did you mean by that?
 20 A. I want them to -- what in many cases
 21 I think archivists do things that are of
 22 uncertain legality. And I think that their
 23 actions are fine, and no one has ever
 24 complained about it and there's never been any
 25 lawsuits about it; but I still think it's good

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1 P. Hirtle
 2 Undue Diligence dated Fall 2010, was
 3 marked for identification.)
 4 BY MR. GOLDMAN:
 5 Q. Okay.
 6 I've marked as PH-13 an article
 7 entitled "Undue Diligence," dated Fall 2010,
 8 from the Columbia Journal of Law and the Arts
 9 authored by Peter Hirtle.
 10 Does this appear to be an article
 11 that you wrote? You just have to answer for
 12 the reporter.
 13 A. Did you ask a question?
 14 Q. Oh. Does it appear to be an article
 15 that you wrote?
 16 A. Yes.
 17 Q. What does the term "undue diligence"
 18 mean?
 19 MR. POTTER: Did you not give me a
 20 copy out of copyright concerns?
 21 THE WITNESS: You probably have the
 22 license to Westlaw.
 23 BY MR. GOLDMAN:
 24 Q. I think I asked, what does "undue
 25 diligence" mean?

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1 P. Hirtle
 2 for people to know that what they are doing
 3 willy-nilly is potentially someone could at
 4 some point step forward and say that's not
 5 kosher.
 6 So it is the kind of -- I want them
 7 to know the copyright law. I don't actually
 8 want them to engage in copyright infringement.
 9 I want them to know that something is
 10 copyrighted, and then they have to say that
 11 it's a fair use or come up with another
 12 exception in order to be able to use it.
 13 MR. GOLDMAN: Let's mark this,
 14 actually.
 15 MR. ROTH: Would this be a good time
 16 for a bathroom break?
 17 MR. GOLDMAN: I mean, if you have to
 18 go to the bathroom, I'll take a bathroom
 19 break. Do you have to use the restroom?
 20 MR. ROTH: I do.
 21 MR. GOLDMAN: Okay. Then let's take
 22 a five-minute break.
 23 (Recess taken from 4:52 p.m. to
 24 4:55 p.m.)
 25 (PH Exhibit 13, Article entitled

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1 P. Hirtle
 2 MR. POTTER: Objection.
 3 A. My recollection is that the term came
 4 from a conference sponsored by the Research
 5 Libraries Group that had this name. And I
 6 liked it and so used it for this.
 7 It's the same, what I explained
 8 earlier, that if one spent -- if I spent \$5,000
 9 looking for the photographer of my
 10 grandparents' photo, that would be -- that
 11 might be a diligent search, but it's really --
 12 it's beyond diligence. It's undue. It's gone
 13 too far.
 14 And so what constitute a diligent
 15 search and when does one go too far. And
 16 that's why there's a question mark in the
 17 title.
 18 Q. If you turn to the last page, the
 19 last paragraph, I'm going to ask some questions
 20 about some statements made in this paragraph.
 21 The first sentence says, "While that
 22 there is talk of fundamental copyright reform
 23 in the wind, I see little chance any time soon
 24 that the law will change in meaningful ways to
 25 aid archival repositories."

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1 P. Hirtle
 2 First, I wanted to know, what
 3 fundamental copyright reform in the wind are
 4 you referring to?
 5 A. I believe at 2010 was when Pam
 6 Samuelson's copyright fundamentals initiative
 7 was underway. Is that what she called it?
 8 But an effort to try to
 9 reconceptualize copyright.
 10 Q. Are you also referring to proposed
 11 revisions to Section 108?
 12 A. No.
 13 Q. Or to Orphan Works legislation?
 14 A. No.
 15 Q. Or to legislation relating to mass
 16 digitization?
 17 A. No.
 18 Q. And then you say, "I see little
 19 chance any time soon that the law will change
 20 in meaningful ways."
 21 Did you write that because you feel
 22 frustrated about the failure for the law to
 23 change?
 24 MR. POTTER: Objection.
 25 A. No.

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1 P. Hirtle
 2 We don't have them now and we're not
 3 going to have them in the future. And we
 4 shouldn't hope that there will be hard and fast
 5 boundaries on what is acceptable and what's not
 6 acceptable.
 7 Q. There were proposed amendments --
 8 there was a proposed Orphan Works bill;
 9 correct?
 10 MR. POTTER: Objection.
 11 A. Well, again, you're talking to my --
 12 all of this discussion this afternoon has been
 13 about my personal opinions and my passion for
 14 matters related to copyright on a personal
 15 basis. So I do know that we've had Orphan
 16 Works legislation introduced twice. The Sean
 17 Bentley Act, and I can't remember the other
 18 one, and that the Register of Copyright is
 19 intending on introducing a new Orphan Works
 20 legislation bill in 2013.
 21 Q. If those Orphan Works bill, if that
 22 Orphan Works bill that had been proposed in
 23 Congress had passed, wouldn't that have made it
 24 clear that libraries are permitted to engage in
 25 the Orphan Works project like the one that

Page 223

1 P. Hirtle
 2 Q. So are you advocating for self-help
 3 by archives?
 4 MR. POTTER: Objection.
 5 A. I think the words here are exactly as
 6 I said, that I saw little chance that the law
 7 will soon change. I wrote this in 2010 and it
 8 hasn't. So I was right.
 9 Q. Now, it continues, "We need a
 10 different approach. Just as the great
 11 documentary editing projects of the last
 12 century ignored the copyright laws in order to
 13 make access to the papers of the founding
 14 fathers more widely available, so, too, must
 15 archivists give up their hope of black letter
 16 rules on copyright and instead embrace
 17 responsible risk management as the appropriate
 18 way of managing our social goals."
 19 Are you suggesting that librarians
 20 should ignore copyright law in some way?
 21 A. No. I'm suggesting that archivists
 22 hope that there will be -- black letter rules
 23 on copyrights, absolute rules that say that
 24 this is permissible, this is okay, and this is
 25 an infringement.

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1 P. Hirtle
 2 Michigan is engaged in now?
 3 MR. POTTER: Objection.
 4 A. It's very difficult to interpret a
 5 law that hadn't passed and one doesn't know
 6 what it would look like.
 7 But I will point out to you that the
 8 Society of American Archivists tried to develop
 9 diligent search guidelines in the expectation
 10 that one of these bills would pass. And even
 11 those are far from being black letter rules
 12 that archivists could follow even in the face
 13 of the new legislation.
 14 Q. But you think that it's -- it was
 15 okay for Cornell to participate in the Orphan
 16 Works project even though no Orphan Works
 17 legislation passed; is that right?
 18 MR. POTTER: Objection to the extent
 19 it calls for legal conclusion.
 20 A. Cornell elected to participate in the
 21 Orphan Works project from the University of
 22 Michigan.
 23 Q. Were you involved in that decision in
 24 any way?
 25 A. Yes.

<p style="text-align: right;">Page 226</p> <p>1 P. Hirtle</p> <p>2 Q. What was your involvement?</p> <p>3 A. I was asked my opinion. I made a</p> <p>4 recommendation that I shared with our counsel</p> <p>5 and then conveyed --</p> <p>6 MR. POTTER: I'll caution you not to</p> <p>7 further reveal the substance of any</p> <p>8 communications with counsel.</p> <p>9 A. And I conveyed my recommendation to</p> <p>10 the University librarian.</p> <p>11 Q. And did you have -- what did you tell</p> <p>12 the University librarian?</p> <p>13 MR. POTTER: Again, I'll ask you not</p> <p>14 to real the substance of legal</p> <p>15 communications to the --</p> <p>16 A. I recommended that Cornell should</p> <p>17 join the Orphan Works project.</p> <p>18 Q. And did you say why you believed so?</p> <p>19 A. Yes.</p> <p>20 Q. What were your reasons why?</p> <p>21 A. I felt that the project accorded with</p> <p>22 the mission and goals of the University</p> <p>23 library.</p> <p>24 Q. And what were those mission and</p> <p>25 goals?</p>	<p style="text-align: right;">Page 227</p> <p>1 P. Hirtle</p> <p>2 A. To provide ready access to research</p> <p>3 materials for Cornell faculty students and</p> <p>4 staff.</p> <p>5 MR. GOLDMAN: Let's take five</p> <p>6 minutes. I can go over my notes and I'll</p> <p>7 see -- I think I have one more line of</p> <p>8 questions, but I'll just take a break now</p> <p>9 and try to finish that up and then we'll be</p> <p>10 done. Take five minutes.</p> <p>11 (Recess taken from 5:06 p.m. to</p> <p>12 5:11 p.m.)</p> <p>13 MR. GOLDMAN: All right. Let's mark</p> <p>14 this.</p> <p>15 (PH Exhibit 14, Document entitled</p> <p>16 Checklist for Conducting a Fair Use</p> <p>17 Analysis before Using Copyrighted</p> <p>18 Materials, was marked for</p> <p>19 identification.)</p> <p>20 BY MR. GOLDMAN:</p> <p>21 Q. I marked as PH-14 a document</p> <p>22 entitled, "Checklist for Conducting a Fair Use</p> <p>23 Analysis before Using Copyrighted Materials."</p> <p>24 I downloaded this from the Cornell University</p> <p>25 website. Actually, if you see on the second</p>
<p style="text-align: right;">Page 228</p> <p>1 P. Hirtle</p> <p>2 page, it says -- in a footnote it says,</p> <p>3 "Revised for use by Cornell University from the</p> <p>4 Checklist for Fair Use, a project of the IUPUI</p> <p>5 Copyright Management Center."</p> <p>6 Have you ever seen this document</p> <p>7 before?</p> <p>8 A. Yes.</p> <p>9 Q. Okay.</p> <p>10 Do you know who created this</p> <p>11 document?</p> <p>12 A. Yes.</p> <p>13 Q. Who did?</p> <p>14 A. Patricia McClary.</p> <p>15 Q. Do you know how this document is used</p> <p>16 at Cornell?</p> <p>17 MR. POTTER: Objection.</p> <p>18 A. I know that it is used in conjunction</p> <p>19 with course teaching.</p> <p>20 Q. Anything else?</p> <p>21 A. I'm not aware of other uses.</p> <p>22 Q. Do you know whether this Checklist</p> <p>23 for Conducting a Fair Use Analysis was used at</p> <p>24 any point during the digitization process that</p> <p>25 occurred as part of the Google project?</p>	<p style="text-align: right;">Page 229</p> <p>1 P. Hirtle</p> <p>2 A. I'm not aware of that.</p> <p>3 Q. Do you know whether -- if you look at</p> <p>4 this list, there's -- there appear to be four</p> <p>5 categories that are to be examined, the purpose</p> <p>6 of the use, the nature of the copyrighted</p> <p>7 material, the amount copied, and the effect on</p> <p>8 the market for the original.</p> <p>9 Do you know whether anyone ever</p> <p>10 examined those factors with respect to any</p> <p>11 particular work that was digitized as part of</p> <p>12 the Google project?</p> <p>13 A. Someone may have, but I'm not aware</p> <p>14 of that.</p> <p>15 Q. Do you know whether those factors</p> <p>16 were examined with respect to the project as a</p> <p>17 whole -- withdrawn. I'll withdraw that</p> <p>18 question.</p> <p>19 MR. GOLDMAN: I have no further</p> <p>20 questions.</p> <p>21 MR. POTTER: Give me a couple of</p> <p>22 minutes to talk to my people and see if</p> <p>23 there's any redirect.</p> <p>24 MR. GOLDMAN: Absolutely.</p> <p>25 (Recess taken from 5:14 p.m. to</p>

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1 P. Hirtle
 2 5:17 p.m.)
 3 MR. POTTER: No questions from me.
 4 MR. GOLDMAN: Okay.
 5 (The deposition was concluded at
 6 5:17 p.m.)
 7 (The exhibits were retained by the
 8 court reporter to be attached to the
 9 transcript.)
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19 _____
 20 PETER HIRTLE
 21 Subscribed and sworn to before me
 22 this day of 2012.
 23
 24 _____
 25

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1 ----- EXHIBITS -----
 2
 3 PH EXHIBITS
 4 DESCRIPTION PAGE LINE
 5 Exhibit 1 Printout from Cornell 14 3
 6 website,
 7 Exhibit 2 Organization Chart for 22 22
 8 Cornell University Library,
 9 Exhibit 3 Printout for Cornell.edu 45 19
 10 website,
 11 Exhibit 4 Printout of Press 71 24
 12 Release,
 13 5 Printout of News Articles, 84 17
 14 Exhibit 6 Press Release dated 112 6
 15 October 20, 2010,
 16 Exhibit 7 Document bearing Bates 136 25
 17 No. COR000463 to 468,
 18 Exhibit 8 Document bearing Bates 159 6
 19 Nos. COR000469 through COR000477,
 20 Exhibit 9 Newsletter dated April 178 16
 21 13, 2012,
 22
 23
 24
 25

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1
 2
 3 C E R T I F I C A T E
 4
 5 STATE OF NEW YORK)
 6) ss.:
 7 COUNTY OF NEW YORK)
 8
 9 I, THOMAS A. FERNICOLA, Registered
 10 Reporter and Notary Public within and for
 11 the State of New York, do hereby certify
 12 that the within is a true and accurate
 13 transcript of the proceedings held on
 14 April 18, 2012.
 15 That I am not related to any of the
 16 parties to this action by blood or
 17 marriage; and that I am in no way
 18 interested in the outcome of this matter.
 19 IN WITNESS WHEREOF, I have hereunto
 20 set my hand this 30th day of April 2012.
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 23 _____
 24 THOMAS A. FERNICOLA, RPR
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1 ----- EXHIBITS (Cont'd) -----
 2
 3 PH EXHIBITS
 4 DESCRIPTION PAGE LINE
 5 Exhibit 10 Document entitled 181 2
 6 Copyright and Cultural Institution
 7 Guidelines for Digitization for
 8 U.S. Libraries Archives and
 9 Museums,
 10 Exhibit 11 Press Release dated 200 18
 11 August 24, 2011,
 12 Exhibit 12 Copy of DVD, 204 6
 13 Exhibit 13 Article entitled Undue 219 25
 14 Diligence dated Fall 2010,
 15 Exhibit 14 Document entitled 227 15
 16 Checklist for Conducting a Fair Use
 17 Analysis before Using Copyrighted
 18 Materials,
 19
 20
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1
2 ERRATA SHEET FOR THE TRANSCRIPT OF:
3 Case Name: Authors Guild v. HathiTrust
4 Dep. Date: April 18, 2012
5 Deponent: PETER HIRTLE
6 Reason codes:
7 1. To clarify the record.
8 2. To conform to the facts.
9 3. To correct transcription errors.
10 Page ___ Line ___ Reason _____
11 From _____ to _____
12 Page ___ Line ___ Reason _____
13 From _____ to _____
14 Page ___ Line ___ Reason _____
15 From _____ to _____
16 Page ___ Line ___ Reason _____
17 From _____ to _____
18 Page ___ Line ___ Reason _____
19 From _____ to _____
20
21 _____
22 PETER HIRTLE
23
24 Subscribed and sworn to before me
25 this day of _____ 2012.

Confidential Attorneys' Eyes Only

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P. Hirtle

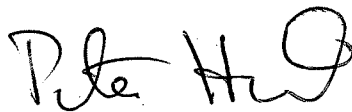
5:17 p.m.)

MR. POTTER: No questions from me.

MR. GOLDMAN: Okay.

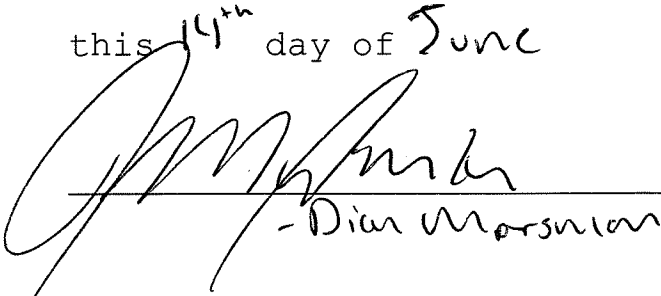
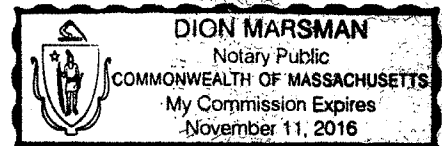
(The deposition was concluded at
5:17 p.m.)

(The exhibits were retained by the
court reporter to be attached to the
transcript.)



PETER HIRTLE

Subscribed and sworn to before me
this 14th day of June 2012.


-Dion Marsman

ERRATA SHEET

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name: Authors Guild v. HathiTrust

Dep. Date: April 18, 2012

Deponent: PETER HIRTLE

Reason codes:

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

I hereby certify that I have read the foregoing deposition and that said transcript is true and accurate, with the exception of the following changes noted below, if any:

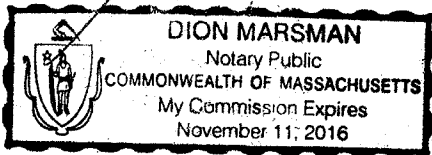
Page	Line	Should Read:	Reason
4	10	"Ithica" should be "Ithaca"	3
10	14	"philately" should be capitalized	3
11	3	"Ann" is "Anne"	3
11	4-5	"Associate University Librarians" should be capitalized. It is a formal title.	3
21	25	Office address is "2B53 Kroch Library," not "2B 53	1
22	2	Crock Library"	
28	9	"archive" should be "archives"	3
29	13	"John's" should be "Johns"	3
33	15	"e-commerce repository?" should be "eCommons repository."	1
45	8	"been" should be inserted into the phrase "not <i>been</i> in charge"	1
45	25	"confluence" should be capitalized as "Confluence" (it is a brand name)	3
48	9	Capitalize "confluence"	3
57	5	"Ann" should be "Anne"	3
58	6	"recollection" should be "reaction"	1
74	24	"108", not "108's"	3
77	25	"concerned," not "concern"	3
77	5	"yes," not "year"	3
89	13-14	"falling on burden BB's work" should be "on Barton Beebe's work,"	1
94	11	"Berger," not "Burger"	3
127	17	"METS" not "metz"	3

139	21	Answer should be "No," not "Yes"	1
143	9	143: "METS," not "metz"	3
151	3	"way," not "we"	1
169	25	"Wilkin's", not "Wilkins"	3
170	3	"copyright status of works"	1
172	23	"Demas," not "Demus"	3
172	25	"status of monographs," not "status and monographs"	3
182	7	"Creative Commons" is capitalized.	3
183:	9-10	"Creative Commons"	3
183	24	"Libraries, Archives, and Museums"	3
186	16	"institution a", not institutional	3
187	7	End with question, not period	3
194	13-18	Needs the following punctuation: And you can see there the problem that I'm having. You say, first of all, "put aside the purpose being to replace a damaged or deteriorating work," and then ask "was the purpose to replace damaged or deteriorating works?"	3
206	18	"publishers," not "publishes"	3

Peter Hirtle
 PETER HIRTLE

Subscribed and sworn to before me
 this 14th day of 2012. *June 2012*

[Signature]
 - Dion Marsman



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