

# EXHIBIT A

Case No. 1:14-cv-00857-TSC-DAR

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN EDUCATIONAL RESEARCH )  
ASSOCIATION, INC., AMERICAN )  
PSYCHOLOGICAL ASSOCIATION, INC., )  
and NATIONAL COUNCIL ON )  
MEASUREMENT IN EDUCATION, INC., ) Civil Action No.  
Plaintiffs, ) 1:14-cv-00857-TSC-DAR  
v. )  
PUBLIC.RESOURCE.ORG, )  
Defendant. )

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VIDEOTAPED DEPOSITION OF CARL MALAMUD

DATE: May 12, 2015  
TIME: 9:33 a.m.  
LOCATION: Fenwick & West  
555 California Street  
12th Floor  
San Francisco, California 94104  
REPORTED BY: Diane S. Martin, CSR 6464, CCRR

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2

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For the Defendant Electronic Frontier Foundation:

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15 Q. Without revealing the substance of

16 attorney-client communications, who did you speak

17 with to prepare to testify today?

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

2 --oOo--

3 THE VIDEOGRAPHER: Good morning. We're on  
4 the video record, ladies and gentlemen, at  
5 9:33 a.m. I am Anthony Hensley from Alderson Court  
6 Reporting in Washington D.C. The phone number is  
7 202-289-2260.

8 This is matter pending before the court of  
9 the United States District Court for the District  
10 of Columbia in the case captioned American  
11 Educational Research Association et al., versus  
12 Public.Resource.Org, Incorporated, case number  
13 1-14-cv-00857-TSC-DAR.

14 This is the beginning of Disc 1, Volume 1  
15 of the deposition of Carl Malamud on 5/11/2015.

16 We're located at address 555 California  
17 Street, San Francisco, California. This is taken  
18 on behalf of the plaintiffs.

19 Counsel, would you please identify  
20 yourselves starting with the questioning attorney.

21 MR. HUDIS: Jonathan Hudis, and Katherine  
22 Cappaert for the plaintiffs.

23 MR. BRIDGES: Andrew Bridges and Matt  
24 Becker of Fenwick & West for the defendant.

25 MR. SMITH: Corynne McSherry from the

1 Electronic Frontier Foundation for the defendant.

2 THE VIDEOGRAPHER: You may proceed.

3 MR. HUDIS: Just a correction for the  
4 record. Today is May 12th, 2015.

5 BY MR. HUDIS:

6 Q. Sir, could I have your full name and  
7 address for the record?

8 Oh, go ahead.

9 THE REPORTER: Thank you.

10 Sir, could I have you raise your right  
11 hand, please.

12 CARL MALAMUD,  
13 called as a witness, after having been duly sworn  
14 by the Certified Shorthand Reporter to tell the  
15 truth, the whole truth, and nothing but the truth,  
16 testified as follows:

17 EXAMINATION

18 BY MR. HUDIS:

19 Q. Sir, if I could have your full name and  
20 address for the record.

21 A. Carl Andrew Malamud, and my address is  
22 1005, Gravenstein Highway North in Sebastapol,  
23 California. Zip code is 95472.

24 Q. And is that your home address?

25 A. No, that's my work address.

1 Q. All right. And your home address, sir?

2 A. It's P.O. Box 361 in Bodega, California,  
3 94992.

4 Q. Mr. Malamud, we're here to take your  
5 deposition in the matter of American Educational  
6 Research Association and its co-plaintiffs versus  
7 Public.Resource.Org.

8 The parties all have long names. So I want  
9 to establish some working acronyms between the two  
10 of us.

11 So if I say AERA, do you understand that to  
12 mean the American Educational Research Association,  
13 Inc.?

14 A. Yes, I do.

15 Q. And if I use the acronym APA, that will  
16 refer to the American Psychological Association,  
17 Inc.

18 A. Yes.

19 Q. And if I use the acronym NCME, that will  
20 refer to National Council on Measurement and  
21 Education, Inc.

22 A. Yes.

23 Q. And if I refer to Public.Resource, that  
24 will be a shorthand version of Public.Resource.Org,  
25 Inc.?

1 A. That's correct.

2 Q. And a couple of housekeeping matters,  
3 Mr. Malamud.

4 You understand that today you're giving  
5 testimony under oath?

6 A. I do.

7 Q. And that the court reporter is taking down  
8 everything you are saying?

9 A. I do.

10 Q. And we will need audible responses from  
11 you. So no nods or gestures.

12 A. Yes.

13 Q. If at any point, Mr. Malamud, you don't  
14 understand a question, please let me know and I  
15 will try to clarify that question for you.

16 A. I will.

17 Q. If you need a break for any reason, please  
18 let me know and we can provide that break for you.  
19 Except if there is a question pending, you must  
20 answer the question before we take the break. Is  
21 that okay?

22 A. Yes, I understand.

23 Q. All right. If at any point you come to  
24 realize that an answer that you've already given is  
25 not completely correct, please let me know and I

1 will give you an opportunity to correct that  
2 answer. Do you understand?

3 A. I do.

4 Q. All right.

5 MR. BRIDGES: I would like to take the time  
6 to say that under the rules, we do request the  
7 opportunity to review and correct the deposition  
8 afterwards.

9 MR. HUDIS: Thank you, Counsel.

10 BY MR. HUDIS:

11 Q. Is there any reason, Mr. Malamud, either by  
12 your taking medication or by reason of illness,  
13 that you cannot testify completely, accurately and  
14 truthfully today?

15 A. There is no reason.

16 Q. Have you been deposed before?

17 A. Yes, I have.

18 Q. In what case or what cases?

19 A. That was in the case of --

20 MR. BRIDGES: Sorry. I need for you to  
21 give me time to --

22 THE WITNESS: Yes, sir.

23 MR. BRIDGES: That was not objectionable,  
24 but give me time.

25 THE WITNESS: That was the case ASTM et

1 al., versus Public.Resource.Org.

2 BY MR. HUDIS:

3 Q. Have you been deposed in any other cases?

4 A. No, I have not.

5 Q. One other housekeeping matter that your  
6 counsel just reminded me.

7 So for the benefit of the court reporter,  
8 wait until I finish my question before you start  
9 answering so that for one thing, the court reporter  
10 has a clean transcript. And the other, your  
11 counsel has time to object if he wants to.

12 Do you understand that?

13 A. Yes, I understand.

14 (PLAINTIFFS' EXHIBITS 13-14 WERE MARKED.)

15 BY MR. HUDIS:

16 Q. Mr. Malamud, I put in front of you what has  
17 now been marked as Plaintiff's Exhibit Malamud 13.

18 Have you seen this deposition notice  
19 before, Exhibit 13 that is directed to you?

20 MR. BRIDGES: I'm sorry, so which -- it  
21 appears as though two -- I received two. I just  
22 want -- 13 is -- okay.

23 THE WITNESS: It says 14.

24 MR. BRIDGES: Yes. The one he's looking at  
25 is -- this is 13. It came to me.

1 BY MR. SPEAR:

2 Q. All right. Are we good?

3 A. The document entitled notice of deposition  
4 of Carl Malamud.

5 Q. Right. And that's Exhibit 13?

6 A. Yes, it is.

7 Q. Have you seen this deposition notice of  
8 Exhibit 13 before?

9 A. Yes, I have.

10 Q. When for the first time?

11 A. When it was served, I believe.

12 Q. So if we gave it to your counsel on April  
13 9, that's the first time around which you probably  
14 saw Exhibit 13?

15 MR. BRIDGES: Objection. Calls for  
16 speculation.

17 BY MR. HUDIS:

18 Q. You may answer.

19 A. I saw it in April.

20 Q. What did you do to prepare to testify  
21 regarding the deposition notice of Exhibit 13?

22 MR. BRIDGES: Objection. Argumentative;  
23 lacks foundation; assumes facts not in evidence.

24 BY MR. HUDIS:

25 Q. You may answer.



1           A. I reviewed the deposition notice. I  
2 reviewed the materials that were disclosed to the  
3 plaintiffs during the discovery process.

4           Q. Do you remember which documents you  
5 reviewed?

6           A. It was the materials that were disclosed to  
7 the plaintiffs.

8           Q. Do you remember any specific documents that  
9 you reviewed?

10          A. There were a large number of such  
11 documents. Would you like a couple examples?

12          Q. Yes, please.

13          A. There was a California Code of Regulations.  
14 There were some -- there was a FOIA request. There  
15 was an electronic mail. There were some letters.

16          Q. Anything else that you can remember at this  
17 time?

18          A. I think that was the main material. There  
19 were some appendices to some of the -- the letters  
20 and electronic mail.

21          Q. All right. Do you remember in total how  
22 many documents you might have reviewed to prepare  
23 to testify?

24                 MR. BRIDGES: Objection. Calls for  
25 speculation.

1 THE WITNESS: I don't know how many  
2 exactly, no.

3 BY MR. HUDIS:

4 Q. In preparation for testifying today,  
5 pursuant to the personal deposition notice of  
6 Exhibit 13, did you talk with anybody?

7 MR. BRIDGES: Objection. To the extent it  
8 calls for the witness to reveal attorney-client  
9 communications, I'll object on that basis and  
10 instruct the witness not to answer.

11 BY MR. HUDIS:

12 Q. All right. Without revealing the substance  
13 of attorney-client communications, who did you  
14 speak with to prepare to testify today?

15 MR. BRIDGES: If -- if he had a  
16 conversation with attorneys, that answer would call  
17 for divulging of attorney-client communications  
18 itself. And I'd object and instruct the witness  
19 not to answer.

20 If you want to ask him about any  
21 conversations he had with persons other than  
22 attorneys, please do so.

23 MR. HUDIS: All right. So you're  
24 instructing the witness not to answer whether he  
25 spoke with attorneys regarding this preparation?

1 MR. BRIDGES: If you're asking about  
2 talking with attorneys regarding preparation, yes,  
3 that's correct.

4 MR. HUDIS: Mark that question for ruling.

5 BY MR. HUDIS:

6 Q. Besides counsel, who, if anyone, did you  
7 speak with to prepare to testify today?

8 A. I didn't speak to anybody.

9 Q. Did you speak with anyone at Internet  
10 Archive to prepare to testify today?

11 A. No, I did not.

12 Q. How long did you take to prepare for your  
13 deposition testimony today?

14 MR. BRIDGES: Objection. Argumentative;  
15 lacks foundation.

16 THE WITNESS: I spent several hours a day,  
17 all of last week. And I spent some time over the  
18 weekend and on Monday preparing.

19 BY MR. HUDIS:

20 Q. And how long in total do you think you  
21 spent preparing to testify?

22 MR. BRIDGES: Actually, same objections and  
23 also vague and ambiguous.

24 Are you referring to his personal  
25 deposition as opposed to his 30(b)(6) deposition?

1 MR. HUDIS: Yes.

2 MR. BRIDGES: Then it's -- lacks  
3 foundation; argumentative; vague and ambiguous.

4 BY MR. HUDIS:

5 Q. You may answer.

6 A. My preparation was for my deposition in  
7 both of my capacities. So I was unable to separate  
8 out which times were one or the other.

9 Q. That's fine. Then how long in total did  
10 you prepare to testify in all your capacities  
11 today?

12 MR. BRIDGES: Objection. Vague and  
13 ambiguous.

14 BY MR. HUDIS:

15 Q. You may answer.

16 A. Well, it was a few hours a day last week.  
17 It was tens of hours. I don't have an exact  
18 number.

19 MR. BRIDGES: Please give me time to  
20 object.

21 BY MR. HUDIS:

22 Q. Mr. Malamud, I'd like to now place in front  
23 of you what has been marked as Exhibit 14. And  
24 that is the deposition notice directed to  
25 Public.Resource.

1 Do you see that?

2 A. I do.

3 Q. Which topics of the deposition notice in  
4 Exhibit 14 are you prepared to testify to today?

5 MR. BRIDGES: I'm going to note for the  
6 record that there are objections which we as  
7 lawyers have interposed, and I will state for the  
8 record that we are not -- the defendant is not  
9 producing Mr. Malamud with respect to categories 4,  
10 10, 11, 19, 23, 29 and 30. And we will object to  
11 any questions on those topics.

12 Of course, questions to Mr. Malamud on  
13 those topics may proceed to the extent that they  
14 are otherwise unobjectionable. But they would not  
15 be pursuant to Rule 30(b)(6).

16 MR. HUDIS: So, Counsel, other than the  
17 ones that you specifically named, is Mr. Malamud  
18 prepared to testify on all the other deposition  
19 topics in the deposition notice of Exhibit 14?

20 MR. BRIDGES: Yes.

21 BY MR. HUDIS:

22 Q. Now, with respect to the deposition notice  
23 of Exhibit 14, what did you do to prepare to  
24 testify regarding these topics?

25 MR. BRIDGES: Objection. Vague and

1     ambiguous.

2     BY MR. HUDIS:

3             Q.    You may answer.

4             A.    The same thing that I recently described to  
5     you about my personal preparation.

6             Q.    And you reviewed the same documents and the  
7     same number of documents?

8             MR. BRIDGES:  Lacks foundation; vague and  
9     ambiguous.

10    BY MR. HUDIS:

11            Q.    You may answer.

12            A.    Yes.  My preparation was in toto.  It  
13    wasn't separate by the type of deposition.

14            Q.    And to prepare to testify for your  
15    deposition of Exhibit 14, did you speak with  
16    counsel?

17            MR. BRIDGES:  I will not object to that  
18    question exactly as phrased.

19            THE WITNESS:  I spoke with counsel.

20    BY MR. HUDIS:

21            Q.    Did you speak with anyone else besides  
22    counsel in order to prepare to testify on the  
23    deposition topics of Exhibit 14?

24            A.    No, I did not.

25            Q.    Did you speak with anyone at Internet

1 Archive to prepare to testify today?

2 A. No, I did not.

3 Q. And you spent the same number of hours in  
4 total to prepare to testify regarding Exhibits 13  
5 and 14, as you described before?

6 MR. BRIDGES: Objection. Vague and  
7 ambiguous.

8 BY MR. HUDIS:

9 Q. You may answer.

10 MR. BRIDGES: Lacks foundation.

11 THE WITNESS: My preparation was for the  
12 deposition. I did not separate my time out between  
13 the two roles that I play.

14 BY MR. HUDIS:

15 Q. To prepare to testify today with respect to  
16 both deposition notices of Exhibit 13 and 14, did  
17 you speak with Ms. Rebecca Malamud?

18 A. No, I did not.

19 Q. Mr. Malamud, what's the highest level of  
20 your education?

21 A. Highest degree?

22 Q. Yes.

23 A. I have an MBA.

24 Q. Do you have a bachelor's degree?

25 A. Yes, I do.

1 Q. All right. And from where?

2 A. Indiana University.

3 Q. And what was the degree in?

4 A. Business economics and public policy.

5 Q. And when did you receive that degree?

6 A. Which degree?

7 Q. The B.S. in business economics and public  
8 policy.

9 A. 1980.

10 Q. Towards your bachelor's degree, did you  
11 have any major concentration?

12 A. Business economics and public policy.

13 Q. Did you have a minor concentration?

14 A. No, that was the program.

15 Q. And you said you have an MBA?

16 A. I do.

17 Q. And from which institution did you receive  
18 your MBA?

19 A. Indiana University.

20 MR. BRIDGES: Again, I'll ask you to give  
21 me time to object.

22 THE WITNESS: Yes.

23 BY MR. HUDIS:

24 Q. And what type of -- what type of MBA degree  
25 was that?



1 MR. BRIDGES: Objection. Vague and  
2 ambiguous.

3 BY MR. HUDIS:

4 Q. You may answer.

5 A. It was an MBA granted as part of the  
6 doctoral program in business economics and public  
7 policy.

8 Q. And I believe you said you received your  
9 MBA from Indiana University?

10 A. That's correct.

11 Q. And what year did you receive your MBA?

12 A. I think it was 1982. It might have been  
13 early '83.

14 Q. Did you have any concentration towards your  
15 MBA, major concentration?

16 A. My doctoral course work was in anti-trust  
17 and regulation economics.

18 Q. Did you have a minor concentration?

19 A. No, I did not.

20 Q. Mr. Malamud, do you have any formal legal  
21 training?

22 MR. BRIDGES: Objection. Vague and  
23 ambiguous.

24 BY MR. HUDIS:

25 Q. You may answer.

1           A. I did a year at the Georgetown Law Center,  
2 the first year of law school.

3           Q. And what year was that?

4           A. 1984.

5           Q. And I take it you didn't go on to finish  
6 the degree?

7           A. No, I did not.

8           Q. Now, you said you did a doctorate. Do you  
9 have a Ph.D.?

10          A. No, I do not.

11          Q. Do you --

12               MR. BRIDGES: Again, I need time to object.

13               THE WITNESS: Yes, sir.

14               MR. BRIDGES: I'll object to that as  
15 misstating testimony.

16               Go ahead.

17 BY MR. HUDIS:

18          Q. Do you have any other degrees?

19          A. No, I do not.

20          Q. Do you possess any certificates of any kind  
21 for training?

22               MR. BRIDGES: Objection. Vague and  
23 ambiguous.

24               THE WITNESS: No.

25 BY MR. HUDIS:

1 Q. Mr. Malamud, I'd like you to define a term  
2 for me, "computer science."

3 MR. BRIDGES: Objection. Argumentative;  
4 vague and ambiguous.

5 BY MR. HUDIS:

6 Q. You may answer.

7 A. It's an academic discipline having to do  
8 with the study of computers.

9 Q. And how about "computer networks"?

10 MR. BRIDGES: Objection. Vague and  
11 ambiguous; argumentative; lacks foundation; assumes  
12 facts not in evidence.

13 THE WITNESS: Computer networks are -- is  
14 the discipline and study of how one computer  
15 communicates with another computer.

16 BY MR. HUDIS:

17 Q. Thank you.

18 Have you written any books on computer  
19 science or computer networks?

20 A. Yes.

21 MR. BRIDGES: Objection. Vague and  
22 ambiguous.

23 THE WITNESS: Yes.

24 BY MR. HUDIS:

25 Q. As your counsel said, give him time to

1 object.

2 A. I will try. Sorry.

3 Q. Thank you.

4 So do you consider yourself to have any  
5 expertise in computer science or computer networks  
6 or both?

7 MR. BRIDGES: Objection. Vague and  
8 ambiguous; compound; argumentative.

9 MR. HUDIS: Good point, Counsel.

10 MR. BRIDGES: Could call for a legal  
11 conclusion.

12 MR. HUDIS: Good point, Counsel.

13 BY MR. HUDIS:

14 Q. Do you consider yourself to have expertise  
15 in computer science?

16 MR. BRIDGES: Objection. Vague and  
17 ambiguous; argumentative; may call for a legal  
18 conclusion.

19 THE WITNESS: I have worked in the  
20 profession since 1980. I think it's up to others  
21 to decide whether I have expertise or not.

22 BY MR. HUDIS:

23 Q. And if you could briefly summarize your  
24 work in the profession over that 30 years.

25 MR. BRIDGES: Objection. Calls for a

1 narrative; vague and ambiguous.

2 BY MR. HUDIS:

3 Q. You may answer.

4 A. I'm not sure what you're asking for. Do  
5 you want to know what jobs I worked or --

6 Q. We'll take that later.

7 Do you consider yourself to have an  
8 expertise in computer networks?

9 MR. BRIDGES: Objection. Vague and  
10 ambiguous; argumentative; may call for a legal  
11 conclusion.

12 THE WITNESS: Again, I've worked in the  
13 profession since 1980, and I believe it's up to  
14 others to decide whether I have expertise or not.

15 (PLAINTIFFS' EXHIBIT 15 WAS MARKED.)

16 BY MR. HUDIS:

17 Q. Mr. Malamud, I show you a document that has  
18 now been marked as Exhibit 15. And I'd like you to  
19 look at the exhibit and tell me if that appears to  
20 be a representative list of books you have authored  
21 or co-authored?

22 MR. BRIDGES: Objection. Lacks foundation;  
23 vague and ambiguous.

24 THE WITNESS: It is some books by me, but  
25 there's a number of other items in this list.

1 BY MR. HUDIS:

2 Q. And the other items in the list, are they  
3 items that you co-authored with others?

4 MR. BRIDGES: Objection. Lacks foundation;  
5 vague and ambiguous.

6 THE WITNESS: This is a rather strange  
7 list. Item number 1, Gage, Bailey, Kahn, Malamud,  
8 I have no idea what that is. It may have been some  
9 conference proceedings.

10 MR. BRIDGES: I'll -- I'll ask the witness  
11 not to speculate.

12 And I would object to the question at this  
13 point on the grounds that may call for speculation  
14 and lacks foundation.

15 THE WITNESS: There are a number of items  
16 in here including pamphlets, and it looks like at  
17 least one video presentation.

18 BY MR. HUDIS:

19 Q. Do you recognize the titles on Exhibit 15  
20 as either authored by you or co-authored by you?

21 MR. BRIDGES: Objection. Lacks foundation;  
22 vague and ambiguous; potentially argumentative;  
23 compound.

24 Do you want him to identify particular  
25 titles?

1 MR. HUDIS: I'll --

2 BY MR. HUDIS:

3 Q. Well, first answer that question.

4 MR. BRIDGES: All those same objections  
5 apply.

6 THE WITNESS: At first glance, these do  
7 appear to be items that I was involved with, either  
8 as an author, a co-author or a producer.

9 BY MR. HUDIS:

10 Q. Are there any items on Exhibit 15 which you  
11 do not recognize your involvement as either an  
12 author, co-author or producer?

13 MR. BRIDGES: Objection. Lacks foundation;  
14 vague and ambiguous.

15 THE WITNESS: I'm not sure what item number  
16 1 is on that list, the number one, Gage, Bailey,  
17 Kahn.

18 MR. BRIDGES: Objection. The question  
19 was -- I'm sorry. Not objection.

20 The question is, are there any items which  
21 you do not recognize? That's the question.

22 THE WITNESS: Yes.

23 BY MR. HUDIS:

24 Q. Which one?

25 A. Item number 1.

1 Q. Any others?

2 A. No.

3 Q. Of the ones you recognize on Exhibit 15,  
4 what generally are the subject matters of these  
5 writings?

6 MR. BRIDGES: Objection. Massively lacks  
7 foundation; massively compound; vague and  
8 ambiguous, and misleading and assumes facts not in  
9 evidence.

10 THE WITNESS: There's a large number of  
11 topics. I'd be happy to discuss the individual  
12 items and tell you what they're about.

13 BY MR. HUDIS:

14 Q. Sure. Sure.

15 So the second item, "12 Tables of American  
16 Law." What -- what is that about?

17 MR. BRIDGES: Objection. Vague and  
18 ambiguous.

19 THE WITNESS: That is a lecture I gave at  
20 the Harvard Law School to a series -- to a  
21 collection of law librarians that had convened.

22 BY MR. HUDIS:

23 Q. And what was the topic?

24 MR. BRIDGES: Objection. Vague and  
25 ambiguous.



1 THE WITNESS: The topic was a history of  
2 the 12 tables of Roman law, and the application of  
3 the concept of promulgation of the law to current  
4 system of American justice.

5 BY MR. HUDIS:

6 Q. The next item, "Law.gov, a revolution in  
7 legal affairs." Could you tell me the subject  
8 matter of that item?

9 MR. BRIDGES: Objection. Vague and  
10 ambiguous.

11 THE WITNESS: That was a kickoff panel  
12 session for the Law.gov effort, which was a attempt  
13 to study the question of the availability of  
14 primary legal materials in the United States.

15 BY MR. HUDIS:

16 Q. Availability where?

17 A. Generally.

18 Q. On the Internet? Elsewhere?

19 MR. BRIDGES: Objection. Asked and  
20 answered.

21 THE WITNESS: Generally. The availability  
22 of legal materials in the United States.

23 BY MR. HUDIS:

24 Q. And the next item, "Cyberjockeying in the  
25 21st Century," what was that item about?

1 MR. BRIDGES: Objection. Vague and  
2 ambiguous.

3 THE WITNESS: That was a satellite-based  
4 video production that was produced by Mr. John Gage  
5 of Sun Microsystems, and I was a guest where I  
6 demonstrated the first radio station on the  
7 Internet and how it worked.

8 MR. BRIDGES: I'll just instruct the  
9 witness to answer the question.

10 That question was, what was that item  
11 about?

12 BY MR. HUDIS:

13 Q. The next item, "The currents of our time."  
14 What -- what was that publication about?

15 MR. BRIDGES: Objection. Vague and  
16 ambiguous.

17 BY MR. HUDIS:

18 Q. You may answer.

19 A. It was about the procurement of information  
20 technology by the federal government.

21 Q. What did you -- what did you mean in your  
22 last answer by "information technology"?

23 A. Computers, computer networks and software.

24 Q. The next item, "The future of the Internet  
25 protocol." What was that item about?

1 MR. BRIDGES: Objection. Vague and  
2 ambiguous.

3 THE WITNESS: That was a series of  
4 interviews that I conducted with Internet engineers  
5 about the future of the Internet protocol.

6 BY MR. HUDIS:

7 Q. And what did you mean by "Internet  
8 protocol"?

9 MR. BRIDGES: Objection. Vague and  
10 ambiguous.

11 THE WITNESS: The Internet protocol is a  
12 specific networking protocol known as IP, which is  
13 one of the foundations of the Internet.

14 BY MR. HUDIS:

15 Q. The next item, "Ten rules for radicals."  
16 What was that item about?

17 MR. BRIDGES: Objection. Vague and  
18 ambiguous.

19 THE WITNESS: That was a speech before the  
20 World Wide Web conference.

21 BY MR. HUDIS:

22 Q. And what was your speech about?

23 MR. BRIDGES: Objection. Asked and  
24 answered; vague and ambiguous.

25 THE WITNESS: It was a keynote speech about

1 my experiences in the past and some lessons that I  
2 had for the attendees.

3 BY MR. HUDIS:

4 Q. Could you summarize the lessons you  
5 imparted to the attendees?

6 MR. BRIDGES: Objection. Vague and  
7 ambiguous.

8 THE WITNESS: I can summarize one. I  
9 explained the story of how I put the Securities and  
10 Exchange Commission EDGAR database online and the  
11 efforts that we undertook in order to get the  
12 government to -- to -- to run that service  
13 themselves.

14 BY MR. HUDIS:

15 Q. And the EDGAR database, that's the database  
16 for the Securities and Exchange Commission?

17 MR. BRIDGES: Objection. Vague and  
18 ambiguous.

19 THE WITNESS: EDGAR is the Electronic Data  
20 Gathering, and I forget what AR is, and it is, in  
21 fact, the information dissemination database of the  
22 Securities and Exchange Commission.

23 BY MR. HUDIS:

24 Q. And the next item, "Concert in the park,  
25 Internet 1996 World Exposition," what -- what was

1 that item about?

2 MR. BRIDGES: Objection. Vague and  
3 ambiguous.

4 THE WITNESS: I was simply a producer on  
5 that item. It was a series of audio compositions  
6 by Martin Lucas and Corrine Becknell, and it was  
7 released as an audio CD.

8 BY MR. HUDIS:

9 Q. The next item, "Three revolutions in  
10 American law," what was that item about?

11 MR. BRIDGES: Objection. Vague and  
12 ambiguous.

13 THE WITNESS: It was a paper about the  
14 history of promulgation of the law in the United  
15 States beginning with the Wheaton v Peters  
16 decision.

17 BY MR. HUDIS:

18 Q. And what specific area of the law?

19 MR. BRIDGES: Objection. Lacks foundation;  
20 vague and ambiguous.

21 THE WITNESS: About promulgation of -- of  
22 the law. Of the laws.

23 BY MR. HUDIS:

24 Q. And what did you mean by "promulgation"?

25 A. Promulgation is the process of publication

1 and dissemination of primary legal materials.

2 Q. The next item, "Security and networks."

3 What was that item about?

4 MR. BRIDGES: Objection. Vague and  
5 ambiguous.

6 THE WITNESS: That was two different audio  
7 interviews I did as part of the radio station on  
8 the Internet that I ran, one with Jeffrey Schiller  
9 and one with John Romkey, about security and  
10 networks.

11 MR. BRIDGES: And I'll ask the witness  
12 simply to answer the question that is asked.

13 BY MR. HUDIS:

14 Q. Mr. Malamud, the next item, "By the  
15 people." What was that item about?

16 MR. BRIDGES: Objection. Vague and  
17 ambiguous.

18 THE WITNESS: It was a speech that I gave  
19 to the Gov 2.0 conference, I believe was the  
20 official name of that.

21 BY MR. HUDIS:

22 Q. What was the topic of that speech?

23 MR. BRIDGES: Objection. Vague and  
24 ambiguous.

25 THE WITNESS: It discussed the history of,

1 among other things, the government printing office.

2 BY MR. HUDIS:

3 Q. Do you remember what else that speech was  
4 about besides the government printing office?

5 MR. BRIDGES: Objection. Vague and  
6 ambiguous.

7 THE WITNESS: It was about the creation of  
8 the official journals of government.

9 BY MR. HUDIS:

10 Q. What did you mean by "official journals"?

11 A. The official journals of government in the  
12 United States include the Congressional Record, the  
13 Federal Register, the Code of Federal Regulation  
14 and the papers of the president.

15 Q. The next item, "Mobile IP networking."  
16 What was that item about?

17 MR. BRIDGES: Objection. Vague and  
18 ambiguous.

19 THE WITNESS: As with the security networks  
20 thing we discussed previously, it was an interview  
21 that I conducted as part of Internet talk radio  
22 with Internet engineers.

23 BY MR. HUDIS:

24 Q. The next item, "Global network operations,"  
25 what was that item about?

1 MR. BRIDGES: Objection. Vague and  
2 ambiguous.

3 THE WITNESS: Same as the previous. It was  
4 a discussion with Internet engineers about the work  
5 that they do.

6 BY MR. HUDIS:

7 Q. The next item, "Law.gov, the raw materials  
8 of our democracy, a shining city upon the hill, an  
9 appeal to the court." What was that item about?

10 MR. BRIDGES: Objection. Vague and  
11 ambiguous.

12 THE WITNESS: That was a pamphlet that  
13 contained prepared remarks that I delivered upon  
14 three occasions.

15 BY MR. HUDIS:

16 Q. And what is the subject matter of that  
17 pamphlet?

18 MR. BRIDGES: Objection. Vague and  
19 ambiguous.

20 THE WITNESS: There were -- the subject  
21 matter was the Law.gov effort and the question of  
22 promulgation of primary legal materials in the  
23 United States.

24 BY MR. HUDIS:

25 Q. As you described before?



1 MR. BRIDGES: Objection. Vague and  
2 ambiguous.

3 BY MR. HUDIS:

4 Q. What do you mean by "primary legal  
5 materials"?

6 A. Primary legal materials are edicts of  
7 government. Those are materials that have the  
8 force of law that are -- are -- originated from a  
9 governmental body.

10 Q. Could you give me some examples, please?

11 A. A supreme court opinion.

12 Q. So legal opinions?

13 MR. BRIDGES: Objection. Vague and  
14 ambiguous; misstates testimony.

15 THE WITNESS: A supreme court opinion is  
16 one example. There are other court opinions that  
17 also are edicts of government, yes.

18 BY MR. HUDIS:

19 Q. Would a statute passed by a legislature be  
20 another edict of government?

21 MR. BRIDGES: Objection. Vague and  
22 ambiguous; lacks foundation.

23 THE WITNESS: Yes, statutes are edicts of  
24 government.

25 BY MR. HUDIS:

1 Q. Would an agency regulation be another edict  
2 of government?

3 MR. BRIDGES: Objection. Vague and  
4 ambiguous; lacks foundation.

5 THE WITNESS: Any materials that have the  
6 force of law, and that includes a regulation.

7 BY MR. HUDIS:

8 Q. The next item, "DEC Networks and  
9 architectures." What was that item about?

10 A. That was a professional reference book  
11 about the computer networking protocols that were  
12 adopted by the Digital Equipment Corporation.

13 Q. What did you mean by "computer networking  
14 protocols"?

15 A. It's a suite of specifications that were  
16 known as DECnets, which is how Digital Equipment  
17 Corporation computers were able to communicate with  
18 each other.

19 Q. When you say the "suite of specifications,"  
20 do you mean software?

21 A. No, I mean protocol specifications.

22 Q. What do you mean by "protocol  
23 specifications"?

24 A. A detailed and formal description of the  
25 way that one computer communicates with another

1 computer.

2 Q. The next item, "The World's Fair For the  
3 Global Village." What was that item about?

4 MR. BRIDGES: Objection. Vague and  
5 ambiguous.

6 THE WITNESS: That was a book that I wrote  
7 about the Internet 1996 World Exposition.

8 This listing is incorrect in the sense of  
9 there were two additional contributors to that  
10 book.

11 BY MR. HUDIS:

12 Q. And who were the two additional  
13 contributors?

14 A. The afterword was by a musician named  
15 Laurie Anderson. The foreword was by his holiness,  
16 the Dalai Lama.

17 Q. And generally what was the book, "The  
18 World's Fair For the Global Village," about?

19 MR. BRIDGES: Objection. Vague and  
20 ambiguous.

21 THE WITNESS: It was a description of the  
22 Internet 1996 World Exposition, which I was a  
23 co-founder of, and served as secretary general.

24 BY MR. HUDIS:

25 Q. The next item, "Ingres: Tools for building

1 an information architecture." What was that item  
2 about?

3 MR. BRIDGES: Objection. Vague and  
4 ambiguous.

5 THE WITNESS: It is a professional  
6 reference book about the Ingres relational database  
7 management system.

8 BY MR. HUDIS:

9 Q. Could you describe the Ingres --

10 THE REPORTER: It is a professional book  
11 about the Ingres --

12 THE WITNESS: Professional reference book.

13 BY MR. HUDIS:

14 Q. Could you describe for me what is the  
15 Ingres information database management system?

16 A. That's the Ingres relational database  
17 management system.

18 Q. Thank you.

19 A. RDMS.

20 Q. And could you describe what it is, please?

21 A. It is one of the two early relational  
22 database management systems. Somewhat akin to a  
23 system called Oracle that is very popular today.

24 Ingres and DB2 were the original two  
25 relational database systems. That's capital D,

1 capital B letter 2.

2 Q. Could you tell me the next item, what it is  
3 about, "Analyzing DECnet/OSI phase Roman Numeral  
4 V"?

5 MR. BRIDGES: Objection. Vague and  
6 ambiguous.

7 THE WITNESS: My first book about DEC was  
8 about something known as DECnet phase IV. This  
9 book was about the successor to DECnet phase IV, a  
10 system of international protocols known as open  
11 systems interconnect, or OSI, and this was a  
12 professional reference book that discussed in  
13 detail the protocols inherent in that protocol  
14 suite.

15 BY MR. HUDIS:

16 Q. In simple terms, what -- what are -- what  
17 is the purpose of those protocols?

18 MR. BRIDGES: Objection. Vague and  
19 ambiguous.

20 THE WITNESS: OSI was an alternative to  
21 TCP/IP, which is the foundation of today's  
22 Internet. So it is a full protocol suite that  
23 goes -- that describes all the different  
24 capabilities that computers will have when they  
25 communicate with each other.

1 BY MR. HUDIS:

2 Q. So it's an Internet communications  
3 protocol?

4 MR. BRIDGES: Objection. Misstates  
5 testimony; vague and ambiguous.

6 THE WITNESS: It's a protocol suite, and  
7 that is a whole set of protocols.

8 BY MR. HUDIS:

9 Q. For Internet communications?

10 MR. BRIDGES: Objection. Vague and  
11 ambiguous.

12 THE WITNESS: No, because Internet  
13 communications is the Internet protocol suite.  
14 This was an alternative that was devised, and it  
15 was, in effect, a competitor to the Internet.

16 BY MR. HUDIS:

17 Q. All right. So it's computer-to-computer  
18 communications?

19 MR. BRIDGES: Objection. Vague; misstates  
20 testimony; vague and ambiguous.

21 THE WITNESS: Computer-to-computer  
22 communications, routing protocols, and a whole  
23 suite of other functions that make up a protocol  
24 suite. Again, equivalent to the Internet protocol  
25 suite.

1 BY MR. HUDIS:

2 Q. So the next item, "Exploring the Internet,  
3 a Technical Travelogue," t-r-a-v-e-l-o-u-g-e.

4 What was that item about?

5 MR. BRIDGES: Objection. Vague and  
6 ambiguous.

7 THE WITNESS: That was a book I wrote that  
8 described three trips I made around the world to  
9 visit people that were creating what has become our  
10 modern Internet.

11 BY MR. HUDIS:

12 Q. The next item in Exhibit 15, "Stacks:  
13 Interoperability in today's computer networks."  
14 What was that item about?

15 MR. BRIDGES: Objection. Vague and  
16 ambiguous.

17 THE WITNESS: That was a professional  
18 reference book that described a series of new and  
19 emerging topics in the field of computer networks  
20 aimed at advanced networking engineers. It was a  
21 way of letting them know what was coming around --  
22 around the corner.

23 BY MR. HUDIS:

24 Q. The next item on which you are co-author  
25 with many authors, what is the next item, "Law.gov

1 workshops"?

2 MR. BRIDGES: Objection. Lacks foundation;  
3 vague and ambiguous; assumption facts not in  
4 evidence.

5 THE WITNESS: Yeah, co-author is incorrect.  
6 And this really is not a bibliographic item.

7 BY MR. HUDIS:

8 Q. Then what is that item, "Law.gov  
9 workshops"?

10 A. I organized a series of 15 workshops around  
11 the country focused on the issue of promulgation of  
12 primary legal materials in the United States.

13 Q. And were these individuals who were named  
14 with you in this reference, lecturers with you on  
15 that same series of workshops?

16 MR. BRIDGES: Objection. Lacks foundation;  
17 assumes facts not in evidence; vague and ambiguous.

18 THE WITNESS: Lecturers would be an  
19 incorrect characterization. These were all  
20 participants in one or more of the workshops.

21 BY MR. HUDIS:

22 Q. What do you mean by "participants"?

23 A. In each case these people made a brief  
24 presentation and then participated in discussions.

25 Q. The next item, "Analyzing Novell networks."



1 What was that item about?

2 MR. BRIDGES: Objection. Vague and  
3 ambiguous.

4 THE WITNESS: It was a professional  
5 reference book about the Novell networking protocol  
6 suite. It was part of a three-volume series we had  
7 previously discussed analyzing DECnet OSI phase V.  
8 This was a companion volume to that.

9 BY MR. HUDIS:

10 Q. And what was the subject matter of that  
11 companion volume?

12 A. The Novell protocol suite, which was  
13 another mechanism for computers to communicate with  
14 computers, like OSI, or what we know of as the  
15 Internet today.

16 Q. And the next item, what is -- what was  
17 "Global network operations"?

18 MR. BRIDGES: Objection. Lacks foundation;  
19 vague and ambiguous.

20 THE WITNESS: That's another one of those  
21 audio interviews I did with network engineers as  
22 part of the program Geek of the Week.

23 BY MR. HUDIS:

24 Q. What was the subject of that interview?

25 MR. BRIDGES: Objection. Vague and

1     ambiguous.

2                   THE WITNESS:   There were four different  
3     interviews.   Each of these individuals was involved  
4     in one aspect or another of global network  
5     operations on the emerging Internet computer  
6     network.

7     BY MR. HUDIS:

8           Q.   And what was your involvement in this item?

9                   MR. BRIDGES:   Objection.   Vague and  
10    ambiguous.

11                  THE WITNESS:   I was the host and producer  
12    of Geek of the Week.

13    BY MR. HUDIS:

14           Q.   And the last item on this list, what was  
15    "Analyzing Sun networks"?

16                  MR. BRIDGES:   Objection.   Vague and  
17    ambiguous.

18                  THE WITNESS:   That was a professional  
19    reference book.   It was part of a three-volume  
20    series that included analyzing DECnet OSI,  
21    analyzing Novell networks.

22                  The analyzing Sun networks volume had to do  
23    with the TCP/IP protocol suite, which is known  
24    today as the Internet.

25    BY MR. HUDIS:

1 Q. Mr. Malamud, what experience do you have  
2 working with textual databases, converting them  
3 into new formats and making them available on the  
4 Internet?

5 MR. BRIDGES: Objection. Massively  
6 overbroad and vague; ambiguous; lacks foundation  
7 and compound.

8 THE WITNESS: I have -- I'm sorry, could  
9 you repeat that question?

10 BY MR. HUDIS:

11 Q. Yes.

12 A. There were a lot of parts to that.

13 Q. Yes.

14 What experience do you have working with  
15 textual databases, converting them into new formats  
16 and making them available on the Internet?

17 MR. BRIDGES: Same objections. And I'll  
18 add another objection of argumentative.

19 BY MR. HUDIS:

20 Q. You may answer.

21 MR. BRIDGES: And to the extent there's a  
22 legal conclusion implied in that, I would object on  
23 that basis as well.

24 THE WITNESS: So would you like a specific  
25 example? Is that what you're looking for?

1 BY MR. HUDIS:

2 Q. Yes.

3 A. Okay. In 1991 and '92, I worked with my  
4 colleague, Michael Swartz, a professor at the time  
5 at the University of Colorado, to convert the  
6 international telecommunication union protocol  
7 specifications into a format that was viewable on  
8 the Internet, and then I posted those standards on  
9 the Internet.

10 Q. And what do you mean by "posted"?

11 A. In those days, posting meant making textual  
12 files available using the FTP protocol.

13 Q. And when you say make available, do you  
14 mean make available on the Internet?

15 MR. BRIDGES: Objection. Lacks foundation;  
16 vague and ambiguous.

17 THE WITNESS: That database was distributed  
18 using a facility known as anonymous FTP, which was  
19 a mechanism that allowed anybody to access the  
20 material that was connected to the Internet.

21 BY MR. HUDIS:

22 Q. Can you give me any other examples that  
23 come to mind of your experience with working with  
24 textual databases, converting them into new formats  
25 and making them available on the Internet?

1 MR. BRIDGES: All the same objections as to  
2 earlier. Vague and ambiguous; lacks foundation;  
3 potentially -- and argumentative; potentially  
4 calling for a legal conclusion.

5 THE WITNESS: In 1993 and 1994 I headed a  
6 project that took magnetic tapes that we purchased  
7 from the Securities and Exchange Commission's  
8 vendor, and converted those files into a database  
9 accessible on the Internet using a variety of  
10 access mechanisms.

11 BY MR. HUDIS:

12 Q. Can you give me any other examples of your  
13 experience in working with textual databases,  
14 converting them into new formats and making them  
15 available on the Internet?

16 MR. BRIDGES: All the same objections.  
17 Vague and ambiguous; lacks foundation;  
18 argumentative; potentially calling for legal  
19 conclusion; compound.

20 THE WITNESS: A third example is I  
21 purchased the magnetic tapes that were produced by  
22 the United States Patent and Trademark Office  
23 consisting of the patent database and the trademark  
24 database. I then converted that data into a format  
25 that was compatible with Internet access and posted

1 that information using a variety of access  
2 mechanisms.

3 BY MR. HUDIS:

4 Q. Mr. Malamud, what experience, if any, do  
5 you have working with printed textual materials,  
6 converting them into new formats and making them  
7 available on the Internet?

8 MR. BRIDGES: Same objections. Vague and  
9 ambiguous; lacks foundation; argumentative;  
10 possibly calling for a legal conclusion.

11 THE WITNESS: I was responsible for  
12 procuring, scanning, processing and posting the  
13 historical opinions of the court of appeals known  
14 as the National Reporter System, as well as the  
15 federal cases, which was the predecessor to the  
16 National Reporter System.

17 BY MR. HUDIS:

18 Q. And what did you -- what did you do with  
19 those reporter systems?

20 MR. BRIDGES: Objection. Vague and  
21 ambiguous.

22 BY MR. HUDIS:

23 Q. In your last answer, you said you were  
24 responsible for procuring, scanning, processing and  
25 posting historical opinions. What did you mean by

1 "processing"?

2 A. Processing involved a number of steps,  
3 beginning with the scanning of the documents, and  
4 proceeded to include a process known as  
5 double-keying, which is a way of converting the  
6 printed page into, in our case, valid HTML files  
7 with proper metadata.

8 Q. In your last answer, what did you mean by  
9 double-keying?

10 A. Double-keying is a technical term of art  
11 used by legal publishers. It is the process of  
12 having the information typed independently twice,  
13 and then the two copies compared to each other as a  
14 way of looking for errors in the transcription.

15 Q. Is there such a thing as triple-keying?

16 MR. BRIDGES: Objection. Lacks foundation;  
17 vague and ambiguous.

18 THE WITNESS: Yes.

19 BY MR. HUDIS:

20 Q. And what is that process?

21 A. That process is independently typing the  
22 data three times and comparing the results.

23 Q. What did you mean by "valid HTML files"?

24 MR. BRIDGES: Objection. Lacks foundation.

25 THE WITNESS: A valid HTML file is one that

1 conforms to one of the HTML specifications that are  
2 produced by the W3C organization, which is the  
3 standards making body for HTML.

4 BY MR. HUDIS:

5 Q. And what is a valid HTML file?

6 MR. BRIDGES: Objection.

7 BY MR. HUDIS:

8 Q. Under that protocol?

9 MR. BRIDGES: Objection. Lacks foundation;  
10 vague and ambiguous.

11 THE WITNESS: It is a file that --

12 MR. BRIDGES: May call for -- may be a  
13 hypothetical and call for speculation.

14 THE WITNESS: It's a file that conforms to  
15 the protocol specification, the contents of which  
16 conform to what the protocol says it should.

17 BY MR. HUDIS:

18 Q. And what's the significance of the HTML  
19 file conforming to the specification?

20 MR. BRIDGES: Objection. Lacks foundation;  
21 vague and ambiguous.

22 THE WITNESS: Well, it's important that a  
23 file posted on a web server conform to the HTML  
24 standard because that means that a browser or other  
25 client will correctly parse the data and display it



1 to the user or perform other actions on that HTML  
2 file.

3 BY MR. HUDIS:

4 Q. And what did you mean by "proper metadata"?

5 MR. BRIDGES: Objection. Lacks foundation.

6 THE WITNESS: There are a number of  
7 specifications that list the metadata that --  
8 specifications and best current practices that list  
9 the metadata that should be, in this case, in the  
10 header section of an HTML file. An example of that  
11 is the title of the document.

12 BY MR. HUDIS:

13 Q. Do you have any experience, Mr. Malamud,  
14 working with graphic design web tools?

15 MR. BRIDGES: Objection. Vague and  
16 ambiguous; lacks foundation.

17 THE WITNESS: Yes.

18 BY MR. HUDIS:

19 Q. Can you give me some examples of the types  
20 of graphic design web tools you've worked with?

21 A. So graphic design web tools is kind of a  
22 broad example. And I'm not a graphic designer, but  
23 I certainly have used programs such as Photoshop  
24 and tools for authoring, SVG graphics, for example.

25 Q. What about MathML?

1 MR. BRIDGES: Objection. Vague and  
2 ambiguous.

3 THE WITNESS: Well, that's not a graphic  
4 design tool. MathML is a specification for  
5 expressing mathematical formulas, and I am, in  
6 fact, familiar with that specification.

7 BY MR. HUDIS:

8 Q. And how long have you been working with  
9 graphic design web tools such as SVG and Photoshop?

10 MR. BRIDGES: Objection. Lacks foundation;  
11 vague and ambiguous; compound.

12 THE WITNESS: I've been using graphic  
13 design tools since the early '80s, but that's  
14 before the web, so ...

15 BY MR. HUDIS:

16 Q. All right. And have you been using graphic  
17 design web tools since the advent of the web, say,  
18 mid 1990s?

19 MR. BRIDGES: Objection. Lacks foundation;  
20 vague and ambiguous.

21 THE WITNESS: I've been building websites  
22 since the web began, and as part of that process  
23 one uses graphic design web tools, as you call  
24 them.

25 BY MR. HUDIS:

1 Q. Mr. Malamud, are you a member of any  
2 professional associations?

3 MR. BRIDGES: Objection. Vague and  
4 ambiguous.

5 THE WITNESS: Professional associations?

6 BY MR. HUDIS:

7 Q. For example, I am a member of the American  
8 Intellectual Property Law Association.

9 So are you a member of any professional  
10 associations?

11 A. Well, I'm a member of EFF. I don't know if  
12 that counts.

13 MR. BRIDGES: I'll ask the witness to  
14 testify as to what he knows. If he doesn't  
15 understand the question, then he should ask for a  
16 further explanation of the question.

17 THE WITNESS: Yes, sir.

18 BY MR. HUDIS:

19 Q. Do you understand my question?

20 A. Vaguely. It's a broad question.

21 "No" I think is the proper answer.

22 Q. Are you -- are you a member of any  
23 engineering societies?

24 MR. BRIDGES: Objection. Vague and  
25 ambiguous.

1 THE WITNESS: I was a participant in the  
2 Internet Engineering Task Force.

3 BY MR. HUDIS:

4 Q. When was that?

5 A. Late '80s to mid '90s. Later than that,  
6 actually. I was, all the way through 2005 I was a  
7 participant.

8 Q. Is that organization still in existence?

9 MR. BRIDGES: Objection. Lacks foundation;  
10 vague and ambiguous.

11 THE WITNESS: Yes.

12 BY MR. HUDIS:

13 Q. What was your affiliation with the Internet  
14 Engineering Task Force?

15 A. I played a number of roles. I was a  
16 creator of Internet drafts and requests for  
17 comments, which is the proposals for standards and  
18 standards that are created by the Internet  
19 Engineering Task Force.

20 Q. What's a standard?

21 MR. BRIDGES: Objection. Lacks foundation;  
22 vague and ambiguous.

23 THE WITNESS: A standard is a document that  
24 was marked by the Internet Engineering Task Force  
25 as being a standard. It's a decision made by the

1 management organization of the IETF.

2 BY MR. HUDIS:

3 Q. I don't think that answers my question.

4 What do you understand to be a standard?

5 MR. BRIDGES: Asked and answered. He did  
6 answer your question.

7 MR. HUDIS: I disagree, Counsel.

8 THE WITNESS: Well, are you --

9 MR. BRIDGES: Vague and ambiguous; lacks  
10 foundation.

11 THE WITNESS: Do you want to know what an  
12 IETF standards?

13 BY MR. HUDIS:

14 Q. No, I want to know generally what your  
15 understanding of a standard is?

16 MR. BRIDGES: Objection. Vague; lacks  
17 foundation in context; argumentative.

18 THE WITNESS: It is a very vague question  
19 in the sense that a standard is anything that the  
20 organization publishes or creates or says. It's a  
21 standard.

22 BY MR. HUDIS:

23 Q. Is a standard a set of norms that an  
24 organization would like others to follow?

25 MR. BRIDGES: Objection. Entirely lacks

1 foundation; vague and ambiguous.

2 THE WITNESS: It depends --

3 MR. BRIDGES: And may call for opinion  
4 testimony. It may call for legal conclusion. And  
5 may be argumentative.

6 THE WITNESS: Again, it depends on the  
7 organization. I can tell you what an IETF standard  
8 is.

9 BY MR. HUDIS:

10 Q. Give me an example of what an IETF  
11 standards is.

12 A. IETF standard is a document that the IETF  
13 believes should be widely adopted that describes a  
14 set of best practices or mechanisms involved in  
15 some aspect of computer networking.

16 MR. BRIDGES: I'll ask the witness to  
17 listen to the question and answer the question.

18 The question was, give me an example of an  
19 IETF standard.

20 BY MR. HUDIS:

21 Q. You said that you are a member of EFF and  
22 that in the past you were a member of the Internet  
23 Engineering Task Force.

24 Have you been a member of any other  
25 professional associations?

1 MR. BRIDGES: Objection. Misstates  
2 testimony; vague and ambiguous; lacks foundation.

3 THE WITNESS: IETF does not have members.  
4 It has participants. That's an important  
5 distinction.

6 And no, I have not.

7 BY MR. SPEAR:

8 Q. Mr. Malamud, I would like to discuss with  
9 you, your professional experience since you  
10 received your MBA from Indiana University in 1983  
11 or 1984.

12 After you received your MBA, what was the  
13 first gainful employment that you had?

14 A. So you just want to know about my  
15 employment after my MBA?

16 Q. Yes.

17 A. Okay. I -- after my MBA, my next job was  
18 as the Board of Governors of the Federal Reserve  
19 System.

20 Q. What did you do there?

21 A. I worked with a small group to create a  
22 plan and implement the plan for putting computer  
23 networks into the research division of the Board of  
24 Governors of the Federal Reserve System.

25 Q. Do you remember what your title was at the

1 Board of Governors of the Federal Reserve?

2 A. Senior systems analyst.

3 Q. How long did you hold that position?

4 A. One year as an employee.

5 Q. So was that 1983 to 1984?

6 A. It was 1984, I'm pretty sure.

7 Q. You said one year as an employee. At some  
8 point were you a consultant for the Board of  
9 Governors of the Federal Reserve?

10 A. Subsequent to my year of employment, I  
11 became a consultant to the Board of Governors of  
12 the Federal Reserve System.

13 Q. And how long were you a consultant?

14 A. Approximately a year.

15 Q. So that would have been 1985?

16 A. Approximately.

17 Q. What did you do for the Board of Governors  
18 of the Federal Reserve as a consultant?

19 A. The same thing I did as an employee.

20 Q. What was your next position of gainful  
21 employment?

22 A. I was a consultant to a number of  
23 government agencies.

24 Q. Do you remember which ones?

25 A. Yes, I do.



1 Q. Please --

2 MR. BRIDGES: Go ahead.

3 BY MR. HUDIS:

4 Q. Please tell me which ones they are. Or  
5 were.

6 A. The Department of Defense, the Joint Chiefs  
7 of Staff, Argon National Laboratory, Lawrence  
8 Livermore National Laboratory.

9 Q. Let's put some time frames on this.  
10 When were you a consultant for the  
11 Department of Defense?

12 A. I don't remember the exact dates. My  
13 consulting business was predominantly from 1985  
14 into the late 1980s.

15 Q. Approximate -- approximately what year?  
16 1989, your consulting business?

17 A. Yes, as a -- yes.

18 Q. So your consulting business was for all of  
19 these clients, the Department of Defense, the Joint  
20 Chiefs of Staff, Argon and Lawrence Livermore?

21 MR. BRIDGES: Objection. Vague and  
22 ambiguous.

23 THE WITNESS: My consulting business had  
24 two aspects. One was consulting with the  
25 government agencies.

1           The other was giving advanced seminars on  
2 computer networks and relational databases.

3           MR. BRIDGES: I'll ask the witness to  
4 answer the question. If he wants to invite you  
5 beyond the question, he can ask about those.

6 BY MR. HUDIS:

7           Q. And the part of your consulting business  
8 working with government agencies, what did that  
9 entail?

10           MR. BRIDGES: Objection. Vague and  
11 ambiguous.

12           THE WITNESS: I worked in the area of  
13 relational databases and computer networking.

14 BY MR. HUDIS:

15           Q. What do you mean by "relational databases"?

16           A. The Ingres relational database management  
17 system.

18           Q. That you described before?

19           A. Yes.

20           Q. All right. After your consulting business  
21 ended in approximately 1989, what did you do next  
22 for gainful employment?

23           A. In the late '80s, around 1988, I began  
24 writing, and by I'm pretty sure '89, I was making  
25 my living as a writer.

1 Q. And what was the subject of your writings?

2 MR. BRIDGES: Objection. Vague.

3 THE WITNESS: That's the documents that we  
4 went over, the professional reference books.

5 BY MR. HUDIS:

6 Q. That was the references in Exhibit 15?

7 A. That's correct.

8 MR. BRIDGES: I do want to note for the  
9 record an objection generally to Exhibit 15. It  
10 appears to be a printout of documents from a  
11 catalog. It appears to have been an incomplete set  
12 of results, pursuant to a selection that we assume  
13 was made by plaintiffs' counsel, rather than a  
14 straight printout of all responsive items.

15 BY MR. HUDIS:

16 Q. And how long did you make your living as a  
17 writer?

18 A. Through 1992.

19 Q. And what did you do for gainful employment  
20 starting in 1992?

21 A. I founded the Internet Multicasting  
22 Service.

23 Q. Is that company still in existence today?

24 A. No.

25 Q. How long was the Internet Multicasting

1 Service in existence?

2 A. It was active through 1997.

3 Q. What was the nature of the business of the  
4 Internet Multicasting Service?

5 A. The Internet Multicasting Service was a  
6 501(c)(3) nonprofit that was engaged in creating  
7 new services for the Internet.

8 Q. What types of new services?

9 A. One example was I created the first radio  
10 station on the Internet.

11 Q. Any other examples?

12 A. A second example is we took the Securities  
13 and Exchange Commission EDGAR database and made it  
14 available on the Internet for the public to use.

15 Q. Any others examples?

16 A. A third example is we took the U.S. patent  
17 And Trademark database and made it available on the  
18 Internet for the public to use.

19 Q. Any other examples?

20 A. A fourth example is we created the Internet  
21 1996 World Exposition, a World's Fair for the  
22 Internet.

23 Q. And what was that?

24 A. It --

25 MR. BRIDGES: Objection. Vague and

1     ambiguous.

2             THE WITNESS:  It was a set of activities  
3     taking place in 50 countries around the world  
4     modeled on the metaphor of a world's fair.

5     BY MR. HUDIS:

6             Q.  And what activities were taking place in  
7     the 50 countries?

8             MR. BRIDGES:  Objection.  Vague and  
9     ambiguous.

10            THE WITNESS:  A huge number of activities.  
11            In Japan there were street festivals, for  
12     example.

13            In Taiwan there were thousands of computers  
14     throughout the country that people could go up to  
15     and learn about the Internet, which was a new  
16     phenomenon in those days.  Those are two examples.

17     BY MR. HUDIS:

18            Q.  What was the general theme of Internet 1996  
19     a world's fair?

20            A.  A world's fair for the information age.

21            Q.  Was it a general theme of teaching people  
22     about the Internet?

23            MR. BRIDGES:  Objection.  Misstates the  
24     testimony; vague and ambiguous.

25            THE WITNESS:  There were two goals.  One

1 was teaching the world about the Internet and what  
2 it could do. The second was to make a substantial  
3 contribution to Internet infrastructure.

4 BY MR. HUDIS:

5 Q. What did you mean by "Internet  
6 infrastructure"?

7 A. I can give you two examples. One is, with  
8 a contribution of two terabytes of disc from  
9 Quantum and a set of large scale computers from Sun  
10 Microsystems, we were able to put large computers  
11 in different locations around the world, which were  
12 mirroring common Internet databases, such as the  
13 world's fair website.

14 Q. Have you told me all of the services you  
15 can remember that were conducted by the Internet  
16 Multicasting Service?

17 MR. BRIDGES: Objection. Vague and  
18 ambiguous; lack of foundation.

19 THE WITNESS: There's at least two more.  
20 We ran north.pole.org, which was the first home for  
21 Santa Claus on the Internet.

22 A second example is with my colleague  
23 Dr. Marshall T. Rose, we created a service called  
24 TPC.int, TPC standing for the phone company.

25 BY MR. HUDIS:

1 Q. And what was that service?

2 A. TPC.int was a mechanism that allowed an  
3 individual to send electronic mail which would then  
4 go to a fax machine that was addressed by its phone  
5 number.

6 Q. Have you told me all of the services you  
7 can remember that were performed by the Internet  
8 Multicasting Service?

9 MR. BRIDGES: Objection. Vague and  
10 ambiguous.

11 THE WITNESS: I'm sure we had a number of  
12 other small websites, what we would call a  
13 microsite today.

14 BY MR. HUDIS:

15 Q. Anything else?

16 MR. BRIDGES: Same objection.

17 THE WITNESS: Those were our main  
18 activities.

19 BY MR. HUDIS:

20 Q. And what did you do for gainful employment  
21 after the Internet Multicasting Service was no  
22 longer in business?

23 A. In 1996 I went to the MIT Media Lab where I  
24 was a visiting professor.

25 Q. How long were you a visiting professor at

1 the MIT Media Lab?

2 A. Maybe eight months. Eight or nine months.

3 Q. After your terms of term as visiting  
4 professor at the MIT Media Lab, what did you do  
5 next for gainful employment?

6 A. I was a visiting professor at Keio  
7 University, K-e-i-o, in Japan.

8 Q. What kinds of courses did you teach at the  
9 MIT Media Lab?

10 A. I did not. I consulted with students and I  
11 wrote a book.

12 Q. What was the book?

13 A. "The Internet 1996 World Exposition."

14 Q. How long were you a visiting professor at  
15 Keio University in Japan?

16 A. I'd say about six months.

17 Q. What year was that?

18 A. '97.

19 Q. What kinds of courses, if any, did you  
20 teach at Keio University?

21 A. I did not. I consulted with the faculty  
22 and with graduate students.

23 Q. What was the nature of the consultations?

24 A. Doctoral dissertations concerned with the  
25 Internet and networking protocols.



1 Q. Was that the same type of consultations  
2 that you did at the MIT Media Lab?

3 MR. BRIDGES: Objection. Lacks foundation;  
4 vague and ambiguous.

5 THE WITNESS: Yes, that's correct.

6 BY MR. HUDIS:

7 Q. After your employment with Keio University,  
8 what next did you do for gainful employment?

9 A. I spent a few months in Amsterdam at RIPE,  
10 which is the Internet numbering authority for the  
11 European region.

12 MR. BRIDGES: Mr. Hudis, I think I'm going  
13 to need a break in a minute or two. Is this a  
14 convenient time?

15 MR. HUDIS: Yes, let's take a break.

16 THE VIDEOGRAPHER: The time is 10:50, and  
17 we are off the record.

18 (Recess taken.)

19 THE VIDEOGRAPHER: The time is 11:01, and  
20 we are back on the record.

21 BY MR. HUDIS:

22 Q. Mr. Malamud, how long were you employed at  
23 RIPE?

24 A. I was not employed at RIPE. I was in  
25 residence at RIPE.

1 Q. How long were you in residence at RIPE?

2 A. Just a few months.

3 Q. So what year was that?

4 A. 1997.

5 Q. What did you do at RIPE?

6 MR. BRIDGES: Objection. Vague and  
7 ambiguous.

8 BY MR. HUDIS:

9 Q. What, if anything, did you do at RIPE?

10 A. I learned about the operation of Internet  
11 number registries.

12 Q. After RIPE, what was your next place of  
13 gainful employment?

14 A. I was the founder and chief executive  
15 officer of Invisible Worlds.

16 Q. What was the nature of that business,  
17 Invisible Worlds?

18 A. It was an Internet startup.

19 Q. What do you mean by Internet startup?

20 A. It was a new company that was attempting to  
21 create a new service for the Internet.

22 Q. And what service was that?

23 A. In today's parlance, it was a semantic web  
24 company.

25 Q. And what does that mean?

1           A. It's a little complicated. It was involved  
2 with transferring metadata between different  
3 computers on the Internet.

4           Q. Is that company still in existence?

5           A. No, it is not.

6           Q. How long was that company in existence?

7           A. It was formally dissolved, I believe, in  
8 2002.

9           Q. So it was in existence from 1997 to 2002?

10          A. 1998 through 2001 was the active period of  
11 the company.

12                   MR. BRIDGES: I'll ask the witness to  
13 answer the precise question asked.

14 BY MR. HUDIS:

15          Q. And it was just an inactive period from  
16 2001 to 2002?

17          A. Yes.

18          Q. What did you do next for gainful employment  
19 after Invisible Worlds?

20          A. I was a co-founder and CEO of a company  
21 called NetTopBox, Inc., all one word, capital N,  
22 capital T, capital B.

23          Q. Is that company still in existence?

24          A. No, it is not.

25          Q. When was it in existence?

1           A. I'm trying to refresh my memory here. I  
2 believe 2001 through 2003. I may be off a year on  
3 those dates.

4           Q. What was the nature of the business of  
5 NetTopBox, Inc.?

6           A. It was an attempt to create an electronic  
7 programming guide for the Internet.

8           Q. What do you mean by "electronic programming  
9 guide"?

10          A. In layman's terms, something like the T.V.  
11 Guide.

12          Q. After NetTopBox, Inc. was dissolved, what  
13 did you do next for gainful employment?

14          A. I was hired as a consultant by the Internet  
15 Architecture Board and Internet Engineering Task  
16 Force.

17          Q. How long were you a consultant for the  
18 Internet Architecture Board and Internet  
19 Engineering Task Force?

20                 MR. BRIDGES: Objection. Compound.

21                 THE WITNESS: A little over a year.

22 BY MR. HUDIS:

23          Q. So that would have been 2004?

24          A. Yeah, '04 to '05.

25          Q. And what was the nature of your consultancy

1 with these organizations?

2 A. I was charged with investigating and  
3 proposing mechanisms for the governance of the  
4 Internet standards-making process.

5 Q. And if you could briefly describe what that  
6 means, "mechanisms for the governance of the  
7 Internet standards-making process"?

8 A. The core issue I investigated was the  
9 proper institutional home for the Internet  
10 Engineering Task Force, which at the time was an  
11 unincorporated association.

12 Q. What did you mean by "proper institutional  
13 home"?

14 A. That was actually the question I was  
15 investigating, what should that institutional home  
16 be.

17 Q. Well, what did you mean by "institutional  
18 home"?

19 MR. BRIDGES: Objection. Lacks foundation.

20 THE WITNESS: I can tell you what the  
21 conclusion was of that process.

22 BY MR. HUDIS:

23 Q. What was the conclusion of that process?

24 A. That the Internet society would provide  
25 the -- the corporate framework that would then run

1 the Internet Engineering Task Force and the  
2 associated standards-making process.

3 Q. Back to your consultancy with the  
4 Architectural Board and the Internet Engineering  
5 Task Force. What did you do for gainful  
6 employment?

7 A. I worked at the Center for American  
8 Progress.

9 Q. What's the nature of that business?

10 MR. BRIDGES: Objection. Lacks foundation;  
11 vague and ambiguous.

12 THE WITNESS: It is a 501(c)(3) think tank.

13 BY MR. HUDIS:

14 Q. And what did you do there?

15 A. I was a senior fellow and the chief  
16 technology officer.

17 Q. And what years was that?

18 A. 2005 to 2006.

19 Q. What did you do next for gainful  
20 employment?

21 A. I founded Public.Resource.Org.

22 Q. And that was in 2007?

23 A. That's correct.

24 Q. Are you presently employed by  
25 Public.Resource?

1 A. I am.

2 Q. And you are the founder of Public.Resource?

3 A. I am.

4 Q. What is your current title with  
5 Public.Resource?

6 A. Founder and president.

7 Q. Is that the position you have held from  
8 2007 until today?

9 A. It is.

10 Q. What is your -- what are your duties and  
11 responsibilities as founder and president of  
12 Public.Resource?

13 MR. BRIDGES: Objection. Vague and  
14 ambiguous; compound.

15 THE WITNESS: I'm responsible for the  
16 activities of Public.Resource.Org.

17 BY MR. HUDIS:

18 Q. What are those activities?

19 A. Well, there's the governance of the  
20 corporation.

21 Q. What else?

22 A. There is the operation of websites and  
23 Internet services.

24 Q. What types of websites and services does  
25 Public.Resource provide?

1 A. There's a number of different services.

2 Q. Could you name them for me, please?

3 A. Sure. Public.Resource.Org is our main  
4 corporate website.

5 Q. And what kind of information is on the  
6 Public.Resource.Org site?

7 A. It has speeches by me. Correspondence.  
8 And governance information, such as financials.

9 Q. Anything else?

10 A. A number of web pages describing our  
11 interaction with a number of government agencies.

12 Q. What kinds of interactions?

13 A. Well, for example, there is a page devoted  
14 to USCourts.gov, which contains a number of letters  
15 back and forth with officials about the PACER  
16 system and court of appeals decisions.

17 Q. Does Public.Resource operate any other  
18 websites?

19 A. Yes, we do.

20 Q. Could you name another one, please?

21 A. House.resource.org.

22 Q. What is provided on House.resource.org?

23 A. That is a system that I created in  
24 cooperation with the United States House of  
25 Representatives at the request of Speaker Boehner



1 and Chairman Darrell Issa. It contains video from  
2 congressional hearings.

3 Q. Anything else?

4 MR. BRIDGES: Objection. Vague and  
5 ambiguous.

6 BY MR. HUDIS:

7 Q. Does the House.resource.org website provide  
8 anything else besides video from congressional  
9 hearings?

10 A. There's some correspondence that was back  
11 and forth between myself and Congress as part of  
12 this effort.

13 Q. Does Public.Resource operate any other  
14 websites?

15 A. Yes.

16 Q. Could you tell me another one?

17 A. WWLBD.org, which stands for what would  
18 Luther Burbank do?

19 Q. What kind of information is provided on the  
20 WWLBD.org site?

21 A. That is a site devoted to the seed catalogs  
22 that the Smithsonian Institution scanned.

23 Q. Spell, in that context, seed?

24 A. S-e-e-d.

25 Q. And literally is your website providing

1 information about seeds, plant seeds?

2 A. It is covers of seed catalogs, which the  
3 Smithsonian scanned and made available on a limited  
4 and restricted basis.

5 Q. Just so I understand, do you mean seed,  
6 literally plant seed catalogs?

7 A. Yes, like Burpee.

8 Q. Is that all generally that the WWLBD.org  
9 website provides?

10 MR. BRIDGES: Objection. Vague and  
11 ambiguous.

12 THE WITNESS: It is the seed catalog covers  
13 and essay discussing the restrictions on use that  
14 were imposed by the Smithsonian.

15 BY MR. HUDIS:

16 Q. Restrictions on use of what?

17 A. Of the seed catalog images.

18 Q. Does Public.Resource provide any other  
19 websites?

20 A. Yes, we do.

21 Q. Could you name another one, please?

22 A. YesWeScan.Org.

23 Q. What type of information does YesWeScan.Org  
24 provide?

25 A. It has gone through several different life

1 times, if you will. It began with a series of  
2 proposals that I authored about the operation of  
3 the government printing office, and my  
4 qualifications to be public printer of the United  
5 States.

6 Q. Does the YesWeScan.Org website provide any  
7 other information?

8 A. The second iteration of YesWeScan.Org was a  
9 letter from myself and John D. Podesta to President  
10 Obama discussing the digitization of federal  
11 archives.

12 Q. Does the YesWeScan.Org website provide any  
13 other information?

14 A. The third iteration of YesWeScan.Org was an  
15 effort to get individuals to fund, adopt the  
16 double-keying of volumes of the Federal Reporter.

17 Q. That's West Federal Reporter?

18 A. Fl. So yes, the -- yes.

19 Q. F first?

20 A. Yes.

21 Q. Does the YesWeScan.Org website provide any  
22 other information?

23 A. The most recent iteration was a crowd  
24 funding exercise for the scanning and posting of  
25 state statutes and codes.

1 Q. Does the YesWeScan.Org website provide any  
2 other information?

3 A. I think that's its four life times. I  
4 think that's correct.

5 Q. Does Public.Resource operate any other  
6 websites?

7 A. Law.Resource.Org.

8 Q. What information is provided on the  
9 Law.Resource.Org website?

10 A. Primary legal materials.

11 Q. Can you give me examples?

12 A. Court of appeals decisions.

13 Q. Anything else?

14 A. The federal cases.

15 Q. Anything else?

16 A. The California cases from Judge McAllister.

17 MR. BRIDGES: Just leave me time to object.

18 THE WITNESS: Yes.

19 BY MR. HUDIS:

20 Q. Anything else?

21 A. Materials incorporated by reference into  
22 state and federal law.

23 Q. What types of materials incorporated by  
24 state and federal law are provided on the  
25 Law.Resource.Org website?

1 MR. BRIDGES: Objection. Vague; ambiguous.

2 THE WITNESS: An example is California's  
3 Title 24.

4 BY MR. HUDIS:

5 Q. Is Title 24 a statute or a state  
6 regulation?

7 A. It's a regulation.

8 Q. Any other types of materials that are  
9 posted on the Law.Resource.Org website?

10 MR. BRIDGES: Objection. Vague and  
11 ambiguous.

12 THE WITNESS: I think that's a good  
13 description of what's on there, yes.

14 BY MR. HUDIS:

15 Q. Are standards posted on the  
16 Law.Resource.Org website?

17 MR. BRIDGES: Objection. Lacks foundation;  
18 vague and ambiguous; possibly argumentative.

19 THE WITNESS: Standards incorporated by  
20 reference into federal and state regulations are on  
21 the Law.Resource.Org website.

22 BY MR. HUDIS:

23 Q. What do you mean by incorporation by  
24 reference?

25 MR. BRIDGES: Objection. May call for a

1 legal conclusion.

2 BY MR. HUDIS:

3 Q. You may answer.

4 MR. BRIDGES: Vague and ambiguous.

5 BY MR. HUDIS:

6 Q. You may answer.

7 A. Incorporation by reference at the federal  
8 level is a formal process which is run by the  
9 Office of the Federal Register, which incorporates  
10 specific materials into the Code of Federal  
11 Regulations.

12 Q. And as a result of that formal process  
13 engaged in by the Office of the Federal Register,  
14 how are these materials incorporated by reference  
15 into the Code of Federal Regulations?

16 MR. BRIDGES: Objection. May call for  
17 legal conclusion; vague and ambiguous.

18 THE WITNESS: I'm not sure what you mean by  
19 "how are."

20 BY MR. HUDIS:

21 Q. How would I know that materials are  
22 incorporated into the Code of Federal Regulations?

23 MR. BRIDGES: Objection. Hypothetical;  
24 calls for speculation; vague and ambiguous.

25 THE WITNESS: The Code of Federal

1 Regulations itself will contain a very specific and  
2 formal statement signifying that a particular  
3 specific document was incorporated with the  
4 approval of the director of the Office of the  
5 Federal Register.

6 BY MR. HUDIS:

7 Q. And how are materials incorporated by  
8 reference at the state level?

9 MR. BRIDGES: Objection. Lacks foundation;  
10 may call for a legal conclusion; may call for  
11 opinion testimony; vague and ambiguous, and it may  
12 be argumentative.

13 THE WITNESS: That's a very broad question.  
14 I think it varies by state.

15 BY MR. HUDIS:

16 Q. Could you give me an example of how  
17 material has been incorporated by reference at the  
18 state level?

19 MR. BRIDGES: Same objections.

20 THE WITNESS: The State of California again  
21 has very specific language that will be shown in  
22 the California Code of Regulations, and it  
23 specifically is the phrase "incorporated by  
24 reference," and then a specific indicator to a very  
25 specific standard and edition of that standard or

1 other document.

2 BY MR. HUDIS:

3 Q. Is material incorporated by reference into  
4 state reg -- into federal regulations by the same  
5 methods that you just described for the California  
6 Code of Regulations?

7 MR. BRIDGES: Objection. Utterly lacks  
8 foundation; vague and ambiguous; competence; may  
9 call for speculation; may call for legal  
10 conclusion; argumentative.

11 THE WITNESS: They are two very separate  
12 processes.

13 BY MR. HUDIS:

14 Q. When material is incorporated by reference  
15 at the federal level, does it contain specific  
16 language that the material is incorporated by  
17 reference?

18 MR. BRIDGES: Objection. Lacks foundation;  
19 hypothetical; vague and ambiguous; competence; may  
20 call for speculation; may call for opinion and  
21 legal conclusion.

22 THE WITNESS: In order for the material to  
23 be incorporated by reference in the Code of Federal  
24 Regulations, it does require very specific  
25 language, including the phrase "incorporated by



1 reference."

2 BY MR. HUDIS:

3 Q. Now, you said part of your duties and  
4 responsibilities as founder and president of  
5 Public.Resource was its governance and the websites  
6 and services that it provides.

7 What are your other duties and  
8 responsibilities for Public.Resource, if any?

9 MR. BRIDGES: Objection. Vague and  
10 ambiguous.

11 THE WITNESS: I give a number of speeches.

12 BY MR. HUDIS:

13 Q. And you give these speeches on behalf of  
14 Public.Resource?

15 A. Yes, that's my only professional activity.

16 Q. Is there anything else that you do on  
17 behalf of Public.Resource?

18 A. I send letters.

19 Q. To whom?

20 A. To government officials, for example.

21 Q. For what purpose?

22 A. An example would be a FOIA request.

23 Q. Freedom of Information Act request?

24 A. That's correct.

25 Q. And what types of materials were you

1 looking for with these FOIA requests?

2 MR. BRIDGES: Objection. Vague and  
3 ambiguous.

4 THE WITNESS: An example was a FOIA request  
5 to the Internal Revenue Service for the particular  
6 format of the form 990, which is the filings of  
7 exempt organizations.

8 BY MR. HUDIS:

9 Q. Can you give me another example of a FOIA  
10 request that you made to a government agency?

11 A. I sent a large number of FOIA requests out  
12 asking how much agencies spent on PACER and retail  
13 legal information services.

14 Q. Have you told me all your duties and  
15 responsibilities that you're aware of on behalf of  
16 Public.Resource?

17 MR. BRIDGES: Objection. Argumentative;  
18 lacks foundation; vague and ambiguous.

19 THE WITNESS: No, I have other  
20 responsibilities.

21 BY MR. HUDIS:

22 Q. Could you name them for me, please?

23 A. I handle our finances. So bookkeeping and  
24 auditing and the -- the taxes. And I am engaged in  
25 supervising the litigation effort in which

1 Public.Resource is currently engaged in.

2 Q. Anything else?

3 A. That's a good overview. Yeah, no, I think  
4 that's a good overview of what I do.

5 Q. Do you report to anybody at  
6 Public.Resource?

7 MR. BRIDGES: Objection. Vague and  
8 ambiguous.

9 THE WITNESS: I report to our board of  
10 directors.

11 BY MR. HUDIS:

12 Q. Does anybody report to you at  
13 Public.Resource?

14 MR. BRIDGES: Objection. Vague and  
15 ambiguous.

16 THE WITNESS: What do you mean "report" to  
17 me?

18 BY MR. HUDIS:

19 Q. Somebody that you supervise as another  
20 officer of the corporation or employees.

21 A. No.

22 Q. Are there any other employees of  
23 Public.Resource, besides yourself?

24 A. No.

25 Q. Mr. Malamud, since you have been president

1 and CEO of Public.Resource, do you get a salary?

2 A. Yes, I do.

3 Q. And how much is that salary?

4 MR. BRIDGES: We'll presumptively mark the  
5 deposition confidential subject to --

6 THE WITNESS: We're 501(c)(3). My salary  
7 is published.

8 MR. BRIDGES: Okay, I withdraw that.

9 Go ahead.

10 THE WITNESS: \$180,000 a year.

11 BY MR. HUDIS:

12 Q. And how long have you taken that as an  
13 annual salary from Public.Resource? For how many  
14 years?

15 A. I think I've been at 180 for three years.

16 Q. And before that what was your annual  
17 salary?

18 A. I began at 144 and then -- yeah.

19 Q. And you've had increases since then in your  
20 annual salary up to 180,000 a year?

21 MR. BRIDGES: Objection. Misstates  
22 testimony; lacks foundation.

23 THE WITNESS: I had one increase, if I  
24 recollect.

25 BY MR. HUDIS:

1 Q. So in 2007 until 2011 your salary was  
2 approximately \$144,000, and then from 2011 until  
3 now your salary has been at approximately \$180,000?

4 A. That's not correct. My salary began at  
5 144. There was a step to 160 at some point. And  
6 then up to 180. And I don't recall the exact dates  
7 when those steps were.

8 Q. Presently, Mr. Malamud, do you have any  
9 other gainful employment besides your roles at  
10 public -- at Public.Resource?

11 A. I do not.

12 Q. Presently are you an officer of any other  
13 companies?

14 A. No.

15 Q. Presently are you a director of any other  
16 companies?

17 A. I am on the board of directors of Common  
18 Crawl.

19 Q. What is Common Crawl?

20 A. It is a 501(c)(3) nonprofit devoted to an  
21 open crawl of the Internet.

22 Q. What is an "open crawl of the Internet"?

23 A. A crawl is what a search engine such as  
24 Google does.

25 Q. And what is an open crawl?

1 A. That is a crawl of the Internet that's  
2 available to others to openly use.

3 Q. Without restriction?

4 MR. BRIDGES: Objection. Vague and  
5 ambiguous.

6 BY MR. HUDIS:

7 Q. When you say it is a crawl of the Internet  
8 that's available to others to openly use, what did  
9 you mean by for "others to openly use"?

10 A. The data is available on the Amazon hosting  
11 service for any organization to use for analysis.

12 Q. Are you an employee of any other companies  
13 today?

14 A. I am not.

15 Q. Besides Common Crawl and Public.Resource,  
16 do you have any roles in any other nonprofit  
17 organizations today?

18 MR. BRIDGES: Objection. Vague and  
19 ambiguous.

20 THE WITNESS: No, I do not.

21 BY MR. HUDIS:

22 Q. And Public.Resource is an IRS 501(c)(3)  
23 nonprofit corporation?

24 A. It is.

25 Q. And it was incorporated in California in

1 2007?

2 A. That's correct.

3 (PLAINTIFFS' EXHIBITS 16-18 WERE MARKED.)

4 MR. HUDIS: All right. Let's go off the  
5 record. There's ten minutes left. So let's go off  
6 the record.

7 MR. BRIDGES: Okay.

8 MR. HUDIS: And I'll do the marking with  
9 you, Andrew.

10 THE VIDEOGRAPHER: This marks the end of  
11 Disc 1, Volume 1 in the deposition of Carl Malamud.

12 The time is 11:34 and we are off the  
13 record.

14 (Discussion off the record.)

15 THE VIDEOGRAPHER: This marks the beginning  
16 of Disc 2, Volume 1 in the deposition of Carl  
17 Malamud.

18 The time is 11:40, and we are on the  
19 record.

20 BY MR. HUDIS:

21 Q. Mr. Malamud, what is the purpose of  
22 Public.Resource?

23 MR. BRIDGES: Objection. Vague and  
24 ambiguous and may lack foundation.

25 THE WITNESS: It's the creation and

1 maintenance of public works projects for the  
2 Internet.

3 BY MR. HUDIS:

4 Q. What do you mean by "public works  
5 projects"?

6 A. Operational services that have real  
7 information that people can access.

8 Q. What do you mean by "operational services"?

9 A. Public works is a term that refers to a  
10 creation of infrastructure that's used by the  
11 public. And that is what we attempt to do for the  
12 Internet.

13 Q. And in that regard what are the objectives  
14 of Public.Resource?

15 MR. BRIDGES: Objection. Vague; asked and  
16 answered; vague and ambiguous; lacks foundation.

17 THE WITNESS: I guess I don't understand  
18 the difference between purpose and objective.

19 BY MR. HUDIS:

20 Q. Do you make no distinction between the two  
21 terms, purpose and objectives?

22 MR. BRIDGES: Object -- objection.  
23 Counsel, he needs to understand your question.

24 MR. HUDIS: Okay.

25 MR. BRIDGES: You need to explain what you



1 mean.

2 MR. HUDIS: Fair enough, Counsel.

3 MR. BRIDGES: You can ask him -- he can  
4 answer the question.

5 MR. HUDIS: Fair enough.

6 BY MR. HUDIS:

7 Q. In creating an infrastructure for the  
8 Internet, what objectives does Public.Resource have  
9 towards that goal?

10 MR. BRIDGES: Objection. Vague and  
11 ambiguous; confusing.

12 THE WITNESS: To create something that is  
13 useful to the public.

14 BY MR. HUDIS:

15 Q. Could you give me an example?

16 A. Yes. The IRS database we created.

17 Q. Before the break you listed a number of  
18 websites that are operated by Public.Resource. I  
19 want to make sure that I have them all.

20 Public.Resource.Org, USCourts.gov,  
21 House.Resource.org, WWLBD.org, YesWeScan.Org,  
22 Law.Resource.Org.

23 Have I named them all?

24 MR. BRIDGES: Objection. Lacks foundation;  
25 vague and ambiguous.

1 THE WITNESS: USCourts.gov is not a  
2 website. It is a web page on Public.Resource.Org,  
3 and the answer to your question is no.

4 BY MR. HUDIS:

5 Q. What other websites does Public.Resource  
6 operate?

7 A. There is Yo.YourHonor.org.

8 Q. What kind of information is provided on  
9 Yo.YourHonor.org?

10 A. It is a discussion of the PACER system,  
11 P-A-C-E-R, which is the public access to court  
12 electronic records.

13 Q. You're not a fan of the PACER system; are  
14 you?

15 MR. BRIDGES: Objection. Argumentative;  
16 vague and ambiguous; lacks foundation.

17 THE WITNESS: I'm a big fan of the PACER  
18 system. I think it's an essential piece of  
19 information technology infrastructure.

20 BY MR. HUDIS:

21 Q. Do you have criticisms of how the PACER  
22 system is operated?

23 A. I do.

24 Q. And what are those criticisms?

25 MR. BRIDGES: Objection. Relevance.

1 THE WITNESS: There's a number of issues  
2 with the PACER system. We uncovered a systematic  
3 and pervasive set of violations of judicial  
4 conference privacy rules, and we furnished that  
5 information to the judicial conference in the form  
6 of an audit, is one example.

7 BY MR. HUDIS:

8 Q. Are your criticisms of the PACER system  
9 posted as information to the Yo.YourHonor.org  
10 website?

11 MR. BRIDGES: Objection. Vague and  
12 ambiguous.

13 THE WITNESS: There is a substantial essay  
14 on the website that discusses a number of issues  
15 having to do with the PACER system.

16 BY MR. HUDIS:

17 Q. Now, are these issues criticisms,  
18 commentary, extolling the virtues of PACER? What  
19 type of information concerning PACER is posted on  
20 Yo.YourHonor.org?

21 MR. BRIDGES: Objection. Extraordinarily  
22 compound; vague and ambiguous.

23 THE WITNESS: I would say all of the above.  
24 It's a discussion of the PACER system.

25 BY MR. HUDIS:

1 Q. Have we discussed today all of the web  
2 pages or websites operated today by  
3 Public.Resource?

4 MR. BRIDGES: Objection. Compound; vague  
5 and ambiguous.

6 THE WITNESS: Also continue to operate a  
7 number of the websites that originated with the  
8 Internet Multicasting Service.

9 BY MR. HUDIS:

10 Q. Could you name those websites for me,  
11 please?

12 A. North.pole.org. Park.org. Town.hall.org.  
13 My.phone.org. Museum.media.org.

14 I think that's all of them, but there could  
15 be a few that I'm missing.

16 Q. Is that all you remember today?

17 A. That's all I remember today.

18 Q. What kind of information is posted on the  
19 park.org website?

20 A. That was the website created for the  
21 Internet in the 1996 World Exposition.

22 Q. What kind of information is posted on the  
23 town.hall.org website?

24 A. That is the archives of Internet talk  
25 radio.

1 Q. What kind of information is posted at the  
2 my.phone.org website?

3 A. It's a single web page with the line, this  
4 is the web page for my phone. It's inactive right  
5 now.

6 Q. What kind of information is posted at the  
7 museum.media.org website?

8 A. That is the archives of the Internet  
9 Multicasting Service.

10 Q. And what kinds of archives are posted  
11 there?

12 A. It's things like historical essays about  
13 the EDGAR database.

14 There's one more website I just remembered.  
15 Mappa.mundi.net, M-a-p-p-a, dot m-u-n-d-i, dot net.

16 Q. What kind of information is posted at the  
17 mappa.mundi.net website?

18 A. Mappa, m-a-p-p-a. Mappa.mundi.net was an  
19 early EZ, an electronic magazine on the Internet.

20 Q. What kind of information is posted there?

21 MR. BRIDGES: Objection. Lacks foundation.

22 THE WITNESS: A series of columns I wrote  
23 for the EZ, for example.

24 BY MR. HUDIS:

25 Q. On what topics?

1 A. Mapping the Internet was one topic.

2 Q. Any others you can remember?

3 A. There is a tribute to my friend Jon Postel  
4 when he passed away called the Internet prayer  
5 wheel.

6 Q. For the record, who was Jon Postel?

7 A. Jon Postel was one of the early and  
8 instrumental creators of the Internet.

9 Q. Have you told me all of the websites that  
10 you can recall today operated by Public.Resource?

11 A. I think we still have undesign.net is still  
12 active.

13 Q. What -- what kind of information is posted  
14 at undesign.net?

15 A. It was a tribute to Tibor Kalman and a  
16 discussion of --

17 Q. Could you spell his name, please?

18 A. T-i-b-o-r, K-a-l-m-a-n. A tribute to Tibor  
19 Kalman, and a discussion of the role of  
20 advertising.

21 Q. Who is or was Tibor Kalman?

22 A. A famous designer.

23 Q. Of what?

24 A. You know, I don't know. That was done in  
25 conjunction with Rebecca Malamud.

1 Q. Earlier, Mr. Malamud, you said that  
2 Internet ar -- excuse me, that Public.Resource  
3 operates websites and provides services. What  
4 kinds of services does Internet -- excuse me, does  
5 Public.Resource provide? Or are the websites the  
6 provision of the services?

7 A. "Service" is a technical term of art, and  
8 it is the protocols that are used to access  
9 information. So a website is an example of a  
10 service.

11 Q. What other services does Public.Resource  
12 provide, other than the provision of these  
13 websites?

14 A. The websites are accessible using the HTTP  
15 service, and are also accessible using the FTP  
16 service. FTP stands for file transfer protocol.

17 Q. Other than providing the websites, the HTTP  
18 service and the FTP service, are there any other  
19 services that Public.Resource provides?

20 A. We did provide information access using the  
21 rsync protocol, r-s-y-n-c, and we terminated that  
22 in January.

23 Q. Have you told me all of the services that  
24 Public.Resource provides?

25 A. The only service we provide is access via

1 the Internet. And again, the word "service" is a  
2 technical term of art denoting the protocols.

3 Q. Does Public.Resource sell any products?

4 A. No, we do not.

5 Q. Mr. Malamud, before the break we marked a  
6 few exhibits. I'd like you to look at them,  
7 please.

8 Exhibits 16, 17 and 18. Let's take them  
9 one at a time.

10 What is Exhibit 16?

11 A. It appears to be a copy of our articles of  
12 incorporation.

13 MR. HUDIS: Counsel, would you stipulate  
14 that Exhibit 16 is an authentic business record of  
15 Public.Resource?

16 MR. BRIDGES: I don't know. I think the  
17 witness should -- I'm nervous about stipulating  
18 when I don't have personal knowledge.

19 MR. HUDIS: Okay.

20 MR. BRIDGES: It looks to be a record of  
21 the Secretary of State of the State of California,  
22 given the file stamp.

23 MR. HUDIS: I'll ask the witness.

24 BY MR. HUDIS:

25 Q. Mr. Malamud, is Exhibit 16 an authentic



1 business record of Public.Resource?

2 MR. BRIDGES: I'll object to the extent it  
3 calls for any kind of legal conclusion.

4 You can testify as to whether you think  
5 it's an accurate reproduction of it.

6 THE WITNESS: This appears at first glance.  
7 Obviously, I would want to go check my originals.  
8 This appears at first glance to be a copy of our  
9 articles of incorporation, yes.

10 BY MR. HUDIS:

11 Q. And these articles of incorporation were  
12 prepared about the time of the founding of  
13 Public.Resource.Org, Inc.?

14 A. Well, yes.

15 Q. And is Exhibit 16, the articles of  
16 incorporation, kept on your company's website?

17 A. Yes.

18 Q. And is that website operated in the regular  
19 course of Public.Resource's business?

20 MR. BRIDGES: Objection. Lacks foundation;  
21 may call for a legal conclusion; argumentative.

22 BY MR. HUDIS:

23 Q. You may answer.

24 MR. BRIDGES: Vague and ambiguous.

25 BY MR. HUDIS:

1 Q. You may answer.

2 A. Yes.

3 Q. And the articles of incorporation were made  
4 at the time that you founded Public.Resource?

5 A. The articles of incorporation are what  
6 created the corporation.

7 Q. Let's look at Exhibit 17. What is this  
8 document?

9 MR. BRIDGES: Check it out.

10 THE WITNESS: This appears to be a copy of  
11 our bylaws.

12 BY MR. HUDIS:

13 Q. Do you have any reason to doubt that  
14 Exhibit 17 is an authentic document?

15 MR. BRIDGES: Objection. Lacks foundation;  
16 vague and ambiguous.

17 THE WITNESS: I do not.

18 MR. BRIDGES: Assumes facts not in  
19 evidence.

20 I will note that this document has lines  
21 without signatures on the final page.

22 THE WITNESS: The version of our bylaws  
23 posted on our website has no signatures on it.

24 I have no reason to doubt. I would  
25 obviously want to double-check this with the copy

1 that I have.

2 BY MR. HUDIS:

3 Q. I'll represent to you, Mr. Malamud, that I  
4 obtained Exhibits 16 and 17 from your website.

5 A. Mm-hm.

6 MR. HUDIS: Counsel, can you stipulate that  
7 Exhibit 17 is an authentic business record of  
8 Public.Resource?

9 MR. BRIDGES: Let me get back to you after  
10 a break when I'll have to confer with my client. I  
11 anticipate that will not be a problem.

12 MR. HUDIS: Because I'd rather not have to  
13 go through the foundation if I don't have to.

14 MR. BRIDGES: I understand. I just want to  
15 confirm with him during a break.

16 MR. HUDIS: Do you want to -- I'll allow  
17 you to do that right now if you'd like. We can go  
18 off the record.

19 MR. BRIDGES: Sure.

20 MR. HUDIS: Andrew, do you want us to step  
21 out of the room?

22 MR. BRIDGES: No. No. We need to go off  
23 the record though.

24 THE VIDEOGRAPHER: The time is 11:58, and  
25 we are off the record.

1 (Discussion off the record.)

2 THE VIDEOGRAPHER: The time is 12:02, and  
3 we are back on the record.

4 MR. BRIDGES: So, Mr. Hudis, 18 we can  
5 stipulate to the authenticity.

6 17 we can stipulate this does appear to be  
7 a copy of what is posted on the website, and we  
8 believe this is a genuine copy of the article of  
9 incorporation -- of the form of the articles of  
10 incorporation without the signatures.

11 So I think -- you know, if -- the problem  
12 is --

13 THE WITNESS: Bylaws.

14 MR. BRIDGES: The bylaws, thank you.

15 The concern is if -- it's a long document  
16 and needs to be compared. If there is an issue  
17 with that, we can get back and let you know that.

18 So the stipulation is sort of a conditional  
19 stipulation, subject to a correction at the time of  
20 the transcript if we find after comparing it, there  
21 is a material variance.

22 MR. HUDIS: Okay. So, Counsel, unless  
23 there is a material variance, we can stipulate that  
24 Exhibits 16 and 17 are authentic business records  
25 of Public.Resource?

1 MR. BRIDGES: Yes, subject to our right to  
2 correct the deposition to the extent we may need to  
3 correct that stipulation if there is a material  
4 variance on 17.

5 MR. HUDIS: Understood and agreed.

6 And Exhibit 18, you are stipulating that  
7 that's an authentic document.

8 MR. BRIDGES: Yes.

9 MR. HUDIS: Can we stipulate that it's a  
10 business record of Public.Resource?

11 MR. BRIDGES: We'll stipulate that it is a  
12 document in the possession of Public.Resource. I  
13 would consider it to be a business record, I would  
14 think, of the Internal Revenue service.

15 MR. HUDIS: Satisfied.

16 BY MR. HUDIS:

17 Q. Turning, Mr. Malamud, to Exhibit 16.

18 Does paragraph II B of the articles of  
19 incorporation accurately describe the purpose of  
20 Public.Resource?

21 MR. BRIDGES: Objection. Lacks foundation;  
22 vague and ambiguous and may call for legal  
23 expertise and legal conclusion.

24 THE WITNESS: Yes.

25 BY MR. HUDIS:

1 Q. Turning to Exhibit 17. Does section 2.1 of  
2 the bylaws of Public.Resource accurately describe  
3 the objectives and purposes of Public.Resource?

4 MR. BRIDGES: Same objections.

5 THE WITNESS: Yes.

6 BY MR. HUDIS:

7 Q. Mr. Malamud, I show you what's been marked  
8 as Exhibit 18. Could you please tell me what that  
9 document is?

10 MR. BRIDGES: I'll object to the extent it  
11 requires him to -- object to the extent it requires  
12 legal expertise to characterize it or seeks a legal  
13 conclusion.

14 The witness may testify as to what he  
15 knows.

16 THE WITNESS: I don't know the official  
17 title of this. It's a -- I believe it's called a  
18 Form 1045. It's a notification of nonprofit  
19 status.

20 BY MR. HUDIS:

21 Q. And does it indicate to you that  
22 Public.Resource attained its nonprofit status in  
23 September of 2007?

24 MR. BRIDGES: Objection. Vague and  
25 ambiguous; may call for a -- may call for legal

1 expertise or conclusion.

2 BY MR. HUDIS:

3 Q. Should I repeat the question, Mr. Malamud?

4 A. Yeah.

5 Q. Does Exhibit 18 indicate to you that  
6 Public.Resource attained its nonprofit status in  
7 September of 2007?

8 MR. BRIDGES: Same objections.

9 THE WITNESS: The date of the letter is  
10 September 25th. That's not the date of the  
11 nonprofit status.

12 BY MR. HUDIS:

13 Q. What is the date of the nonprofit status?

14 A. April 13th, 2007.

15 Q. Fair enough. And I see that date.

16 A. Yeah.

17 Q. Thank you very much.

18 (PLAINTIFFS' EXHIBITS 19-20 WERE MARKED.)

19 BY MR. HUDIS:

20 Q. Mr. Malamud, please take a moment to look  
21 at Exhibits 19 and 20.

22 A. Okay.

23 Q. Have you looked at the exhibits?

24 A. Yes, I have.

25 Q. Could you tell me what Exhibit 19 is?

1 A. It looks like an out of date copy of the  
2 Public.Resource.Org home page.

3 Q. So since the time that my office printed  
4 this web page of Exhibit 19, you have updated the  
5 content since then?

6 MR. BRIDGES: Objection. Misstates  
7 testimony; vague and ambiguous.

8 THE WITNESS: When did you print this?

9 BY MR. HUDIS:

10 Q. Our best recollection is January of 2015.

11 A. I don't know. I would have to  
12 double-check.

13 Q. I amend that because Exhibit 20 was also  
14 printed on the same date. So we probably printed  
15 it in March of 2014.

16 A. Yeah. That makes sense.

17 Q. So this -- so Exhibit 19 and 20 appears to  
18 you to be the content of the home page and the  
19 about page of the Public.Resource.Org website in or  
20 about March of 2014?

21 MR. BRIDGES: Objection. May call for  
22 speculation if he doesn't have definite memory;  
23 vague and ambiguous; compound; lacks foundation.

24 THE WITNESS: I'd have to speculate. It  
25 has the look and feel of what those pages typically



1 look like, but I don't know at specific points in  
2 time.

3 BY MR. HUDIS:

4 Q. Now, Exhibit 19, in the center are these  
5 some of the websites that Public.Resource provides  
6 to the public?

7 A. Yes. And there's one more website that I  
8 forgot to tell you about on there.

9 Q. Which one?

10 A. Bulk --

11 MR. BRIDGES: I'm sorry.

12 THE WITNESS: Pardon me.

13 MR. BRIDGES: I object on the grounds it  
14 lacks foundation; very confusing to me.

15 What are you directing his attention to in  
16 this exhibit?

17 MR. HUDIS: Sure. Counsel, do you see  
18 where it says "Watch FedFlix" in the center of the  
19 page on Exhibit 19?

20 MR. BRIDGES: Right.

21 MR. HUDIS: And there are a number of  
22 websites listed below that?

23 MR. BRIDGES: Okay. I just wanted to be  
24 clear.

25 MR. HUDIS: Yes.

1 MR. BRIDGES: If that's what you're  
2 referring to, fine.

3 MR. HUDIS: Yes.

4 BY MR. HUDIS:

5 Q. So continue, Mr. Malamud.

6 A. Bulk.resource.org is the website that I  
7 forgot to tell you about.

8 Q. So what kind of information is provided on  
9 the Bulk.resource.org website?

10 A. Its primary function is the home for  
11 approximately 8 million IRS-exempt organization  
12 filings.

13 Q. And when you say "exempt," do you mean tax  
14 exempt?

15 A. Exempt organizations is a category that the  
16 IRS has assigned. Many of them are tax exempt, but  
17 it also includes political organizations.

18 Q. So if I remember my Internal Revenue Code,  
19 those are 501(c)(3) and 501(c)(4) organizations?

20 MR. BRIDGES: Objection. May call for  
21 legal expertise or conclusion.

22 THE WITNESS: Also section 527  
23 organizations.

24 BY MR. HUDIS:

25 Q. So all three?

1 A. Yes.

2 Q. Do you have -- if you could please look at  
3 Exhibit 20. Do you see that?

4 A. Yes.

5 Q. Are the current trustees of Public.Resource  
6 Tim Stanley, Ed Walters and yourself?

7 A. Yes.

8 Q. Who is Tim Stanley?

9 A. Tim Stanley is the CEO of Justia.

10 Q. And what is Justia?

11 A. It is a company in the legal information  
12 services industry.

13 Q. What kind of service do they provide?

14 MR. BRIDGES: Objection. Vague and  
15 ambiguous.

16 THE WITNESS: One example is a directory  
17 for lawyers.

18 BY MR. HUDIS:

19 Q. Any other services that Justia provides  
20 that you're aware of?

21 MR. BRIDGES: Objection. Vague and  
22 ambiguous.

23 THE WITNESS: They provide a large number  
24 of files such as court opinions for public access.

25 BY MR. HUDIS:

1 Q. And who is Ed Walters?

2 A. Mr. Walters is the CEO of FastCase, all one  
3 word.

4 Q. And what is the business of FastCase?

5 A. FastCase is a company in the legal  
6 information services industry.

7 Q. What kind of information do they provide?

8 A. They provide access to court opinions,  
9 statutes, and other information.

10 Q. What kinds of other information?

11 A. You know, I don't know. Court opinions and  
12 statutes.

13 Q. Do the former trustees of Public.Resource  
14 also include Dale Dougherty, Marshall Rose and Hal  
15 Varian?

16 A. Yes.

17 Q. Who is Dale Dougherty?

18 A. Dale Dougherty is the founder of Maker  
19 Media.

20 Q. What is Maker Media?

21 A. It's a company that, among other things,  
22 operates the Maker Faire. That's all one word,  
23 dash F-a-i-r-e.

24 Q. What is Maker Faire?

25 A. It is a set of events around the world

1 devoted to the maker movement.

2 Q. What is the maker movement?

3 A. People that like to make things.

4 Q. Inventors?

5 A. For example, inventors.

6 Q. Who is Marshall Rose?

7 A. Dr. Rose is an Internet engineer.

8 Q. Who is Hal Varian?

9 A. Dr. Varian is the chief economist of  
10 Google.

11 Q. How long did Mr. Dougherty serve on  
12 Public.Resource's board?

13 A. Six years.

14 Q. What years?

15 A. 2007 to 2013.

16 Q. Why did he leave Public.Resource's board?

17 MR. BRIDGES: Objection. May call for  
18 speculation; vague and ambiguous.

19 THE WITNESS: He put in his time, and I  
20 thanked him very much.

21 BY MR. HUDIS:

22 Q. So he voluntarily left?

23 A. Absolutely.

24 Q. And Dr. Rose, how long was he on  
25 Public.Resource's board?

1 A. The same period of time, 2007 to 2013,  
2 June.

3 Q. Why did he leave Public.Resource's board?

4 MR. BRIDGES: Objection. May call for  
5 speculation; vague and ambiguous.

6 THE WITNESS: Dr. Rose created a new  
7 Internet startup, and I was assisting him in that,  
8 and we decided at the time that that would not have  
9 him be an outside director. And so again, I  
10 thanked him for his valuable service.

11 BY MR. HUDIS:

12 Q. And Hal Varian, when did he -- how long did  
13 he serve on Public.Resource's board?

14 A. The same period of time.

15 Q. Why did he leave the board?

16 MR. BRIDGES: Object.

17 THE WITNESS: He was an investor -- I'm  
18 sorry.

19 MR. BRIDGES: The same objections.

20 THE WITNESS: Okay.

21 MR. BRIDGES: May call for speculation and  
22 vague and ambiguous.

23 BY MR. HUDIS:

24 Q. Mr. Malamud, between you and myself, we're  
25 having a nice conversation. You have to give

1 Mr. Bridges time to object.

2 A. Thank you.

3 Q. All right. So I'm sorry. We were in the  
4 middle of your answer.

5 Why did Mr. Varian leave Public.Resource's  
6 board?

7 MR. BRIDGES: Same objection.

8 THE WITNESS: Dr. Varian was an investor in  
9 Dr. Rose's company.

10 BY MR. HUDIS:

11 Q. So that, is it true to say that they --  
12 Dr. Varian and Dr. Rose needed time to operate  
13 their startup company?

14 MR. BRIDGES: No. Objection. Misstates  
15 testimony.

16 THE WITNESS: Public.Resource.Org requires  
17 that the majority of the board of directors are not  
18 interested parties, and because I had a business  
19 relationship with Dr. Rose, that would have made  
20 him an interested party.

21 BY MR. HUDIS:

22 Q. And Dr. Varian as well?

23 A. Because he was an investor in Dr. Rose's  
24 company, yes.

25 Q. If we could turn back -- Mr. Malamud, if we

1 could turn back to the bylaws, Exhibit 17. Does  
2 section 3.3 accurately describe the functions of  
3 the Public.Resource trustees?

4 MR. BRIDGES: Objection. May call for a  
5 legal conclusion and lacks foundation and vague and  
6 ambiguous.

7 THE WITNESS: Yes. It's the specification  
8 of the duties of the trustees.

9 BY MR. HUDIS:

10 Q. What other duties, if any, besides those  
11 listed in section 3.3 of Exhibit 17, do the  
12 trustees perform for Public.Resource?

13 MR. BRIDGES: Objection. Lacks foundation;  
14 vague and ambiguous; confusing; argumentative.

15 THE WITNESS: These are the duties. It  
16 says, "Supervise all officers, agents and employees  
17 of the corporation."

18 BY MR. HUDIS:

19 Q. So besides what are listed here in section  
20 3.3, do the trustees of Public.Resource perform any  
21 other duties for the company?

22 MR. BRIDGES: Same objections. Lack of  
23 foundation; vague and ambiguous; confusing;  
24 argumentative.

25 THE WITNESS: I believe clause C,



1 "supervise all officers," is pretty inclusive, and  
2 I think that covers their duties.

3 BY MR. HUDIS:

4 Q. Does section 4.4 of the bylaws, Exhibit 17,  
5 accurately describe the president's duties?

6 MR. BRIDGES: Objection. May call for a  
7 legal conclusion; vague and ambiguous;  
8 argumentative; lacks foundation.

9 THE WITNESS: Yes.

10 BY MR. HUDIS:

11 Q. Mr. Malamud, do you perform any other  
12 duties on behalf of Public.Resource as its  
13 president, other than those that are stated in  
14 section 4.6 of Exhibit 17?

15 MR. BRIDGES: Objection. Argumentative;  
16 lacks foundation; vague and ambiguous; may call for  
17 a legal conclusion and construction of the  
18 document.

19 THE WITNESS: Section 4.6 says, "He or she  
20 shall perform all duties incident to his or her  
21 office." I think that's pretty inclusive.

22 BY MR. HUDIS:

23 Q. Mr. Malamud, section 4.1 of Exhibit 17, the  
24 bylaws, provides for the following officers. "A  
25 president, a secretary and a chief financial

1 officer who shall be designated the treasurer."

2 Today who is the secretary of  
3 Public.Resource?

4 A. That would be me.

5 Q. Today who is the chief financial  
6 officer/treasurer of Public.Resource?

7 A. That is me.

8 Q. Mr. Malamud, if you could turn to section  
9 5.1 of the bylaws, Exhibit 17. And 5.2.

10 Are there today operating committees of  
11 Public.Resource?

12 MR. BRIDGES: Objection. Vague and  
13 ambiguous; lacks foundation.

14 THE WITNESS: We have a small board. We  
15 operate as a committee of the whole. So yes, we  
16 do.

17 BY MR. HUDIS:

18 Q. Other than the board, does Public.Resource  
19 have any other committees?

20 MR. BRIDGES: Objection. Argumentative;  
21 lacks foundation; vague and ambiguous; asked and  
22 answered.

23 THE WITNESS: Yes. Again, the audit  
24 committee, for example, is a committee of the whole  
25 board.

1 BY MR. HUDIS:

2 Q. Okay. Other than the committee of the  
3 whole, which is the board and the audit committee,  
4 does Public.Resource -- Public.Resource have any  
5 other operating committees?

6 MR. BRIDGES: Objection. Asked and  
7 answered; lacks foundation; vague and ambiguous.

8 THE WITNESS: No.

9 BY MR. HUDIS:

10 Q. Mr. Malamud, could you turn to article 13  
11 of the bylaws, Exhibit 17? Are you there?

12 A. Yes.

13 Q. How many members does Public.Resource have  
14 in the Council of Public Engineers?

15 A. None.

16 Q. What is the Council of Public Engineers?

17 A. The bylaws were created in a fashion that  
18 allowed us to become a membership organization in  
19 the future. We have not activated that.

20 Q. Besides yourself, does Public.Resource have  
21 any employees?

22 A. No.

23 Q. Who is or was Joel Hardi, H-a-r-d-i?

24 A. He was an employee.

25 Q. What did he do?

1 A. He was a systems engineer.

2 Q. For how long was he a systems engineer at  
3 Public.Resource?

4 A. It was less than a year.

5 Q. Do you remember what year?

6 A. 2008.

7 MR. HUDIS: Let's go off the record.

8 MR. BRIDGES: Shall we break for lunch?

9 MR. HUDIS: Yeah. That's why I want to --  
10 we're at a good breaking point.

11 THE VIDEOGRAPHER: The time is 12:26. We  
12 are off the record.

13 (Lunch recess taken.)

14 THE VIDEOGRAPHER: The time is 1:11, and we  
15 are back on the record.

16 BY MR. HUDIS:

17 Q. Mr. Malamud, before we had the break you  
18 were telling me about Joel Hardi, and he was a  
19 systems engineer for Public.Resource in 2008?

20 A. That's correct.

21 Q. What did he do as systems engineer for the  
22 year he was with you?

23 A. He did systems administration and  
24 programming.

25 Q. Mr. Malamud, how does Public.Resource

1 obtain funding for its operations?

2 MR. BECKER: Objection. Relevance.  
3 Objection. This is beyond the scope of the  
4 30(b)(6) designation.

5 THE WITNESS: We receive contributions and  
6 grants.

7 And I wanted to add there was one more  
8 website that I remembered. When an appropriate  
9 time, I'd be happy to tell you what it is.

10 BY MR. HUDIS:

11 Q. You know what, Mr. Malamud? Why don't we  
12 do that right now?

13 A. All right.

14 Q. So there is another website that is  
15 provided by Public.Resource?

16 A. Yes.

17 Q. And what is the name of that website?

18 A. Betterdogfood.org.

19 Q. And what information is provided on the  
20 Betterdogfood.org website?

21 A. It's a spoof of Silicon Valley. It's a  
22 fake dot com. We give you the dog and sell you the  
23 dog food.

24 Q. So Public.Resource obtains funding for its  
25 operations by contributions and grants?

1 MR. BECKER: Objection. Again, beyond the  
2 scope of Mr. Malamud's 30(b)(6) designation. May  
3 misstate prior testimony.

4 THE WITNESS: We receive contributions and  
5 grants.

6 MR. HUDIS: It's deposition topic 4, and if  
7 I could put something into the record.

8 (PLAINTIFFS' EXHIBIT 21 WAS MARKED.)

9 BY MR. HUDIS:

10 Q. If we notice on item 2 on --

11 MR. BECKER: Counsel, what exhibit number  
12 is this?

13 MR. HUDIS: Yeah, 21. So I've marked as  
14 Exhibit 21 -- thank you, Counsel.

15 We have marked as Exhibit 21  
16 Public.Resource's initial disclosures pursuant to  
17 FRCP 26(a)(1), and under the items relating to the  
18 documents that Public.Resource may use to support  
19 its claims of defense, among them it says documents  
20 relating to Public.Resource's income and finances.

21 So we believe that Public.Resource has put  
22 its income and finances into -- into relevant play  
23 in the litigation, and we did notice it as a topic.

24 MR. BECKER: And we have had a discussion  
25 about this, and of course, Public.Resource

1 disagrees with your characterization.

2 This says documents that Public.Resource  
3 may use to support its claims for defenses. Any  
4 such documents that Public.Resource plans to use to  
5 support its claims for defenses have been produced  
6 to plaintiffs, and the -- I should also note that  
7 category 4 is far broader than simply documents  
8 relating to Public.Resource's income and finances.  
9 Its records and communications and information  
10 relating to Public.Resource's income and finances.

11 MR. HUDIS: So I'll ask the questions,  
12 Counsel. If you have objections, we can either  
13 take Mr. Malamud's testimony subject to your  
14 objections, or you're within your rights to tell  
15 him not to answer. I just want to make my record.

16 MR. BECKER: Mm-hm.

17 BY MR. HUDIS:

18 Q. Does Public.Resource sell any products?

19 MR. BECKER: I'm just going to take a  
20 moment to say that we have a standing objection to  
21 all questions that are related to the records,  
22 communications and information relating to  
23 Public.Resource's income and finances as being  
24 beyond the scope of the 30(b)(6) designation.

25 MR. HUDIS: Okay. So, Counsel --

1 MR. BECKER: And also being irrelevant.

2 MR. HUDIS: So, Counsel, we do disagree.

3 So I'll just make the record and ask my questions  
4 and we can proceed from there.

5 BY MR. HUDIS:

6 Q. So, Mr. Malamud, does product -- does  
7 Public.Resource sell any products?

8 MR. BECKER: Objection. Vague and  
9 ambiguous and all prior objections.

10 THE WITNESS: Some of our pamphlets are  
11 available for purchase on Lulu, but nobody's ever  
12 bought them.

13 BY MR. HUDIS:

14 Q. Does Public.Resource sell any services?

15 MR. BECKER: Same objections. Vague and  
16 ambiguous.

17 THE WITNESS: No.

18 BY MR. HUDIS:

19 Q. Now, you mentioned before that  
20 Public.Resource obtains grants. Do you recall  
21 that?

22 A. Yes.

23 Q. From let's say the five largest. From whom  
24 does Public.Resource obtain grants from the five  
25 largest that you can remember?



1 MR. BECKER: Objection. For the same  
2 objections prior. Vague and ambiguous, and also an  
3 objection on privacy grounds for any individuals or  
4 entities that are not publicly listed among their  
5 list of provided grants to Public.Resource.Org.

6 THE WITNESS: Our list of contributors is  
7 confidential. As part of the schedule B of our  
8 Form 990 we have listed some of our contributors on  
9 our "About" page.

10 BY MR. HUDIS:

11 Q. So if we could look at Exhibit 20,  
12 Mr. Malamud.

13 A. Okay.

14 Q. And you see under "Our Contributors"?

15 A. Yes.

16 Q. So are -- strike that.

17 Under the first bullet point where it says,  
18 "Pro bono legal support for our 2013 activities."  
19 Do you see that?

20 A. I do.

21 Q. And the pro bono legal support provided,  
22 these are all law firms?

23 A. No.

24 Q. Which one -- which one of these entities is  
25 not a law firm?

1 A. Christopher Sprigman is a professor of law.

2 Q. Except for Christopher Sprigman, all the  
3 rest of the pro bono legal supporters in 2013 are  
4 these law firms listed in here?

5 MR. BECKER: Objection. Vague.

6 What do you mean by law firm?

7 MR. HUDIS: It says, "the following law  
8 firms."

9 BY MR. HUDIS:

10 Q. You may answer.

11 A. Yes.

12 Q. Are there any other law firms that have  
13 provided pro bono legal support to Public.Resource  
14 that are not listed here on Exhibit 20?

15 MR. BECKER: Objection to the extent that  
16 this calls for anything that is attorney-client  
17 privilege, including the -- the type of legal  
18 support that any entity may or may not have  
19 provided to Public.Resource.Org.

20 BY MR. HUDIS:

21 Q. You may answer.

22 A. We have disclosed it. Morrison & Foerster  
23 represents us on a pro bono basis.

24 Q. Any other law firms?

25 A. Not that we have disclosed.

1 Q. And then on the next bullet it says, "Major  
2 support for our 2012 activities is provided by a  
3 grant from Google.Org with additional support from  
4 the Elbaz Family Foundation and the Cutts  
5 Foundation.

6 Do you see that?

7 MR. BECKER: Objection. The document  
8 speaks for itself.

9 THE WITNESS: I do.

10 BY MR. HUDIS:

11 Q. All right. And could you tell me the  
12 amounts of the grants of these three entities in  
13 2012?

14 MR. BECKER: Objection. Once again,  
15 renewing the objection that this is beyond the  
16 scope of the 30(b)(6) designation. Objection.  
17 Competence to the extent that the witness is in a  
18 position to state specific figures. Objection for  
19 relevance.

20 BY MR. HUDIS:

21 Q. You may answer.

22 A. Google.Org was a million dollar grant in  
23 2012.

24 The Cutts Foundation was \$10,000.

25 And I forget how much the Elbaz Family

1 Foundation was.

2 Q. Has Public.Resource obtained grants from  
3 any other entities larger than a hundred thousand  
4 dollars?

5 MR. BECKER: Objection. Vague and  
6 ambiguous. Objection. The -- may call for  
7 privileged information concerning the identities of  
8 donors, and their first amended rights in  
9 association and rights of free speech.

10 Objection. Relevance.

11 THE WITNESS: I'm willing to answer that  
12 question with respect to the publicly disclosed  
13 donors. As I explained before some of our donors  
14 have not been publicly disclosed.

15 And would you repeat the question? Make  
16 sure I get it right.

17 BY MR. HUDIS:

18 Q. Sure. Has Public.Resource obtained grants  
19 from any other entity at this time larger than a  
20 hundred thousand dollars?

21 MR. BECKER: All the same objections,  
22 including vague and ambiguous.

23 THE WITNESS: There are two individual  
24 grants that are greater than that sum. The Arcadia  
25 Foundation provided a grant of \$200,000.

1           The Omidyar Network provided a grant of  
2     \$500,000 plus \$750,000 in a matching funds  
3     challenge.

4           Let me add -- greater than a hundred  
5     thousand dollars. I believe that's the list.

6     BY MR. HUDIS:

7           Q. Could you spell Arcadia for me?

8           A. A-r-c-a-d-i-a.

9           Q. And could you spell Omidyar?

10          A. O-m-i-d-y-a-r.

11          Q. And is Arcadia a foundation?

12          A. I believe that's their formal name.

13          Q. And is Omidyar Network a foundation?

14          A. Yes, it is.

15          Q. Have you provided to us all of the publicly  
16     disclosed entities who have donated to  
17     Public.Resource in amounts greater than a hundred  
18     thousand dollars?

19           MR. BECKER: Objection. Vague and  
20     ambiguous. Objection. Relevance. Objection.  
21     Beyond the scope of the 30(b)(6) designation.  
22     Objection. Competence.

23           THE WITNESS: It's -- we've disclosed all  
24     of those on our about page, and you can simply  
25     refresh this document and you'll have the list.

1 BY MR. HUDIS:

2 Q. What is the Project 10 award?

3 MR. BECKER: Objection. Vague and  
4 ambiguous.

5 THE WITNESS: The project 10 to 100.

6 BY MR. HUDIS:

7 Q. Oh, Project 10 to 100 award?

8 A. Is a set of grants that Google gave out in  
9 celebration of their tenth anniversary.

10 Q. And what is the Mitchell Kapor Foundation?

11 A. It is a private foundation run by Mitchell  
12 Kapor.

13 Q. What is the Sunlight Foundation?

14 A. The Sunlight Foundation is a nonprofit  
15 organization based in Washington D.C.

16 Q. What is Creative Commons?

17 A. Creative Commons is a nonprofit  
18 organization based in San Francisco, which is the  
19 creator of the Creative Commons licenses.

20 Q. What are the creative commons licenses?

21 MR. BECKER: Objection. Vague and  
22 ambiguous; relevance.

23 THE WITNESS: I'm not a lawyer so I'm not  
24 sure the proper characterization, but it is a set  
25 of licenses that people can apply to content that

1 permit other people to use that content under  
2 certain conditions.

3 BY MR. HUDIS:

4 Q. Understanding you're not a lawyer, what are  
5 those conditions?

6 MR. BECKER: Objection. May call for a  
7 legal conclusion; vague and ambiguous. Objection  
8 for relevance. Objection for beyond the scope of  
9 the 30(b)(6) designation. Objection for  
10 competence.

11 THE WITNESS: One example of the creative  
12 commons license is attribution non-commercial use.  
13 And what that says is you may use this content as  
14 long as you provide attribution and only use it for  
15 non-commercial purposes.

16 BY MR. HUDIS:

17 Q. Does Public.Resource obtain funding for its  
18 operations from sources other than contributions or  
19 grants?

20 MR. BECKER: Objection for being beyond the  
21 scope of the 30(b)(6,) and objection for relevance.  
22 Objection to the extent that it calls for  
23 information concerning the identities of any  
24 private donors that have not been publicly  
25 disclosed and therefore would impact their privacy

1 rights.

2 THE WITNESS: We had a small in-kind  
3 contribution of a computer. And that would be it.

4 BY MR. HUDIS:

5 Q. So other than the donation of the in-kind  
6 computer and contributions and grants, does  
7 Public.Resource have any other sources of funding  
8 for its operations?

9 MR. BECKER: All the same objections.

10 THE WITNESS: No.

11 MR. BECKER: Vague and ambiguous.

12 THE WITNESS: Contributions and grants.

13 BY MR. HUDIS:

14 Q. Does Public.Resource retain any independent  
15 contractors?

16 MR. BECKER: Objection. Vague and  
17 ambiguous.

18 THE WITNESS: Yes.

19 BY MR. HUDIS:

20 Q. For what purpose?

21 MR. BECKER: Objection. Vague and  
22 ambiguous.

23 THE WITNESS: We -- one independent  
24 contractor is Point.B Studio, which does graphic  
25 design support.



1 BY MR. HUDIS:

2 Q. And that's -- that business Point.B Studio  
3 is operated by Rebecca Malamud?

4 MR. BECKER: Objection. Assumes facts not  
5 in evidence; vague and ambiguous.

6 THE WITNESS: She's the principal of  
7 Point.B Studio, yes.

8 BY MR. HUDIS:

9 Q. Who is or was Mike Kail, K-a-i-l?

10 MR. BECKER: Objection. Vague; compound.

11 THE WITNESS: Mike D. Kail provides system  
12 administration support to Public.Resource on a  
13 part-time basis.

14 BY MR. HUDIS:

15 Q. What is systems administration support?

16 A. That is the maintenance and operation of  
17 UNIX-based computers that we use as servers. UNIX  
18 is all capital letters.

19 Q. Who -- who or what is HTC Global?

20 A. A former contractor.

21 Q. What services did they provide to  
22 Public.Resource?

23 MR. BECKER: Objection. Vague.

24 THE WITNESS: Double-key services.

25 BY MR. HUDIS:

1 Q. Does Public.Resource retain any independent  
2 contractors today who provide double-key services  
3 to your company?

4 MR. BECKER: Objection. Irrelevance.  
5 Objection. Vague.

6 THE WITNESS: No.

7 BY MR. HUDIS:

8 Q. Mr. Malamud, could we turn back to the  
9 bylaws of Public.Resource, Exhibit 17?

10 A. Okay.

11 Q. Could we turn to section 7.6?

12 Since 2007 has Public.Resource issued any  
13 annual reports?

14 A. Yes.

15 Q. Are these reports published on  
16 Public.Resource's website?

17 A. I don't know.

18 Q. Since 2007 -- now I'm -- strike that.

19 So now we're on -- I'm looking at section  
20 7.7 of Exhibit 17, the bylaws of Public.Resource.

21 Since 2007 has Public.Resource issued any  
22 annual statements of specific transactions?

23 A. I think you left out a part of section 7.7.  
24 It's annual statement of specific transactions to  
25 members. We have no members. We have not issued

1 any statements.

2 Q. Thank you for the correction, Mr. Malamud.

3 I appreciate it.

4 Turning to section 9.4 of Exhibit 17, the  
5 bylaws.

6 Since 2007 has Public.Resource kept board  
7 meetings -- kept board meeting minutes?

8 A. We conduct all of our board business by  
9 electronic mail. And yes, in fact, that's part of  
10 our document retention.

11 Q. Are those meeting minutes published on  
12 Public.Resource's website?

13 A. No.

14 Q. Since 2007 has Public.Resource kept board  
15 committee meeting minutes?

16 A. As I said earlier, we function as a  
17 committee of the whole, and yes, we did.

18 Q. Where are these reports and minutes kept?

19 A. They're --

20 MR. BECKER: Objection. Relevance.

21 THE WITNESS: They're in electronic mail,  
22 and they were also furnished to our auditors and  
23 our accountant.

24 MR. HUDIS: Counsel, we would like  
25 production of Public.Resource's annual reports and

1 board minutes from 2007 until now.

2 MR. BECKER: Counsel, what is the basis for  
3 that request? Do you believe that any of your  
4 written document requests would include those  
5 documents?

6 MR. HUDIS: I'd have to look, and if they  
7 don't, we'll certainly propound more.

8 MR. BECKER: And, Counsel, what is the  
9 relevance of those documents that you're requesting  
10 to --

11 MR. HUDIS: Oh, any of the reports or  
12 meeting minutes that would discuss either the  
13 posting of the 1999 standards or this litigation.

14 MR. BECKER: Counsel, what is the basis for  
15 requesting them back to 2007?

16 MR. HUDIS: Good point. We'll amend our  
17 request back to 2012.

18 MR. BECKER: Counsel, what is the basis for  
19 requesting all -- all minutes as opposed to simply  
20 any that would mention the 1999 standards and this  
21 litigation?

22 MR. HUDIS: I agree. I agree. We'll limit  
23 our request to any board minutes and any annual  
24 reports of Public.Resource that mention either the  
25 1999 standards or this litigation from 2012 to the

1 present.

2 MR. BECKER: We will take this under  
3 advisement and reserve objections.

4 BY MR. HUDIS:

5 Q. Mr. Malamud, what is the Internet Archive?

6 MR. BECKER: Objection. Vague.

7 THE WITNESS: It's a nonprofit corporation  
8 based in San Francisco.

9 BY MR. HUDIS:

10 Q. What is the business of Internet Archive?

11 MR. BECKER: Objection. Vague and  
12 competence.

13 THE WITNESS: And I'm sorry, your question  
14 was, what --

15 BY MR. HUDIS:

16 Q. What is the business of Internet Archive?

17 A. So that is probably a question best asked  
18 of them. If I were to characterize it, I would say  
19 it is a public library on the Internet.

20 Q. And are you familiar with the URL of  
21 Public.Resource's website?

22 MR. BECKER: Objection. Vague.

23 THE WITNESS: I'm not sure what you're  
24 asking there.

25 BY MR. HUDIS:

1 Q. Is [www.archive.org](http://www.archive.org) the URL of  
2 Public.Resource's website?

3 MR. BECKER: Objection. Confusing.

4 THE WITNESS: No, it is not.

5 BY MR. HUDIS:

6 Q. Oh, thank you. I misspoke.

7 What is the URL of Internet Archive's  
8 website?

9 A. [Archive.org](http://archive.org).

10 Q. What relationship, if any, do you have with  
11 the Internet Archive?

12 MR. BECKER: I'd just like to note my --  
13 our objection that Mr. Malamud is not designated to  
14 discuss generally any interaction between the  
15 Internet Archive and [Public.Resource.Org](http://Public.Resource.Org).  
16 Mr. Malamud is only designated to discuss those  
17 interactions that may relate to the 1999 standards.

18 MR. HUDIS: Well, we -- he -- Mr. Malamud  
19 is appearing here not only in his Rule 30(b)(6)  
20 capacity, but he is also appearing here in his  
21 personal capacity.

22 So I will ask again.

23 BY MR. HUDIS:

24 Q. Mr. Malamud, what relationship, if any, do  
25 you have with Internet Archive?

1 MR. BECKER: And same objection, as well as  
2 vague.

3 BY MR. HUDIS:

4 Q. You may answer.

5 A. I'm a user.

6 Q. Mr. Malamud, are you a registered user with  
7 Internet Archive?

8 MR. BECKER: Objection. Vague.

9 THE WITNESS: Yes, I am.

10 BY MR. HUDIS:

11 Q. What rights does an Internet Archive  
12 registered user have?

13 MR. BECKER: Objection. Assumes facts not  
14 in evidence.

15 THE WITNESS: So again, the specific nature  
16 of the rights is something you would have to ask  
17 the Internet Archive, but a user can read content  
18 and can create what is known as an item.

19 BY MR. HUDIS:

20 Q. What -- in relation to the Internet  
21 Archive, what is an item?

22 A. An example of an item is a piece of video.

23 Q. Could the creation of an item be also  
24 written content?

25 MR. BECKER: Objection. Competence.

1     Objection.   Vague.

2                   THE WITNESS:   Items have types, and one  
3     type of an item is a text item.

4     BY MR. HUDIS:

5           Q.   Are there other types of items that one can  
6     create on Internet Archive?

7           A.   Yes.

8           Q.   And what are they?

9           A.   Audio.   What I would call an opaque item,  
10    just an arbitrary file, such as a zip file.   Data  
11    is actually the formal type name for that.

12          Q.   So generally these items could include  
13    video, text, audio and opaque data, such as a zip  
14    file?

15                  MR. BECKER:   Objection.   Compound.

16    Objection.   Vague.

17                  THE WITNESS:   I'm not sure that's the  
18    complete list, but that is certainly a subset of  
19    the items one can create.

20    BY MR. HUDIS:

21          Q.   Do you have administrator privileges with  
22    Internet Archive?

23                  MR. BECKER:   Objection.   Vague.   Objection.  
24    Competence.

25                  THE WITNESS:   Yes, although that's a



1 carefully defined term.

2 BY MR. HUDIS:

3 Q. And how would you define "administrator  
4 privileges"?

5 A. It allows me to create and edit items  
6 within the collections that I have created or have  
7 access to.

8 Q. You anticipated one of my later questions.

9 A. Sorry about that.

10 Q. No, that's -- that's actually very good.

11 With respect to the Internet Archive, what  
12 is a collection?

13 A. A collection is a set of items that are  
14 grouped together.

15 Q. Are these sets of items grouped together in  
16 a collection under a theme?

17 MR. BECKER: Objection. Vague.

18 THE WITNESS: Typically.

19 BY MR. HUDIS:

20 Q. Mr. Malamud, do you have an e-mail address?

21 A. Yes, I do.

22 Q. And is that e-mail address Carl@media.org?

23 A. Yes.

24 Q. Is your e-mail address also the user name  
25 that you use to log on to Internet Archive's

1 servers so that you can post content to their  
2 website?

3 A. Yes.

4 Q. For questions that are going to follow  
5 later, Mr. Malamud, I'd like to know your  
6 understanding of certain terms related to the  
7 Internet.

8 First, content. What is content in  
9 relation to the Internet?

10 MR. BECKER: Objection. Vague and  
11 ambiguous. Objection. Relevance. May be  
12 argumentative.

13 THE WITNESS: That's a broad philosophical  
14 question, sir. I mean, that sounds like the --  
15 something one would write an essay about.

16 BY MR. HUDIS:

17 Q. All right. So we'll -- we'll take the  
18 definition by way of example.

19 Can content include textual data?

20 A. Sure, yes.

21 Q. Can content include graphical data such as  
22 image -- images?

23 A. Images would be content, yes.

24 Q. Yes. And would data files be content?

25 A. Maybe or maybe not.

1 Q. In what way would data files be considered  
2 content for the Internet?

3 A. So content in my mind, and again, this is a  
4 broad, philosophical topic, implies something that  
5 a human being can look at and take some meaning  
6 from.

7 So a data file might include a binary  
8 image. Is that content or not? Again, that's --  
9 it would be a fascinating essay.

10 Q. Which brings me to my next question.

11 What does it mean to view content on an  
12 Internet website?

13 MR. BECKER: Objection. Vague.

14 THE WITNESS: So view to me sounds to me  
15 like a human being at a computer using the  
16 Internet. So I think that is an end user looking  
17 at an item that is available from another computer.

18 BY MR. HUDIS:

19 Q. What does it mean to access content on an  
20 Internet website?

21 MR. BECKER: Objection. Vague. Objection.  
22 May also be argumentative. Objection. May call  
23 for a legal conclusion.

24 THE WITNESS: So access is a more precise  
25 technical term, and that to me implies that a

1 computer, not necessarily a human being, but a  
2 computer has requested some data from another  
3 computer, and that request was successful and the  
4 data was transferred.

5 BY MR. HUDIS:

6 Q. What does it mean to download content from  
7 an Internet website?

8 MR. BECKER: Objection. Vague. Objection.  
9 May call for a legal conclusion. Objection. May  
10 be argumentative.

11 THE WITNESS: Again, that's a vague term,  
12 like view. But from the standpoint of an  
13 individual human being at a computer, download  
14 implies taking some content from another location  
15 and having it copied on your personal computer, for  
16 example.

17 BY MR. HUDIS:

18 Q. Could you tell us what an HTTP question is,  
19 otherwise known as a hypertext transfer protocol  
20 request?

21 A. It is one of a series of operations --  
22 protocol operations defined in the HTTP protocol  
23 specification.

24 Q. And what does it do?

25 MR. BECKER: Objection. Vague.

1 THE WITNESS: Well, there's different kinds  
2 of requests.

3 BY MR. HUDIS:

4 Q. There are different kinds of HTTP requests?

5 A. Yes.

6 Q. All right. Could you tell me what they  
7 are? Are there many?

8 MR. BECKER: Objection. Compound.

9 BY MR. HUDIS:

10 Q. Are there many types of HTTP requests?

11 A. Okay. Let me preface this by saying I  
12 would want to review the HTTP protocol  
13 specification, but there are several, I can say  
14 that for a fact.

15 Q. All right. So if you could name me a few  
16 of the ones that you recall at this time.

17 A. One of the more common requests is the get  
18 request, g-e-t. And that request is how a client  
19 asks for a particular URL from a server.

20 Q. All right. What's another type of HTTP  
21 request?

22 A. The post request is used to add data to,  
23 for example, a web form on the server.

24 Q. Can you tell us another type of HTTP  
25 request?

1           A. The head request asks for the metadata  
2 associated with the document, such as the last  
3 modified time or the number of bytes.

4           Q. Can you name another type of HTTP request?

5           A. There is a put request, and I would have to  
6 consult for the precise definition of that one.

7           Q. What generally does a put request do?

8           MR. BECKER: Objection. Vague.

9           THE WITNESS: I'd want to --

10          MR. BECKER: Objection. Competence.

11          THE WITNESS: I'd want to look at the HTTP  
12 protocol specification. It's not something I'm  
13 familiar with.

14 BY MR. HUDIS:

15          Q. Is there any other type of HTTP request  
16 that you can think of as we sit here now?

17          A. There are others, and I do not know what  
18 they are right now.

19          Q. If an Internet user wants to obtain data  
20 from a website, would that be a get request?

21          MR. BECKER: Objection. Hypothetical.  
22 Objection. Vague.

23          THE WITNESS: A get request is one of the  
24 more common mechanisms for accessing data from an  
25 HTTP server.

1 BY MR. HUDIS:

2 Q. What is a file transfer protocol or an FTP  
3 transfer?

4 MR. BECKER: Objection. Vague. Objection.  
5 May be compound.

6 THE WITNESS: So the file transfer protocol  
7 is a protocol specification written by Jon Postel,  
8 which specifies a series of operations in which a  
9 client may get listings of files and transfer  
10 files.

11 Jon is J-o-n, by the way.

12 MR. HUDIS: Postel is P-o-s-t-e-l.

13 BY MR. HUDIS:

14 Q. What is an rsync data transfer?

15 A. Rsync is another mechanism for the transfer  
16 of files with a particular focus on replication of  
17 one archive on a system to an identical archive on  
18 another system.

19 Q. Does an archive -- does an F -- strike  
20 that.

21 Does an rsync data transfer ensure that the  
22 data on the source server and the destination  
23 server are the same?

24 MR. BECKER: Objection. Vague and  
25 ambiguous.

1           Objection. Assumes facts not in evidence.

2           Objection. Lacks foundation.

3           THE WITNESS: The intent of rsync is  
4 replication. However, the word assurance, I do not  
5 know what specific steps the rsync software takes  
6 to verify the identity. So it could be that the  
7 files are different, but again, I just don't know  
8 what those mechanisms are.

9           BY MR. HUDIS:

10          Q. Does an rsync transfer typically -- is an  
11 rsync transfer typically used to synchronize files  
12 and directories between two systems?

13          MR. BECKER: Objection. Vague and  
14 ambiguous. May assume facts not in evidence.

15          THE WITNESS: Rsync is typically used -- we  
16 use it internally to make a replica of one of our  
17 servers on another one as a backup.

18          BY MR. HUDIS:

19          Q. What does it mean to post content to an  
20 Internet website?

21          MR. BECKER: Objection. Vague and  
22 ambiguous.

23          THE WITNESS: I can think of two meanings  
24 of that term. So the first meaning is a user fills  
25 out a form such as a comment. And that data then



1 appears on that website, for example, at the end of  
2 a blog post. So that's example 1.

3 Example 2 would be taking a file and  
4 transferring it on to another system, which then  
5 becomes publicly visible, much as one would do if  
6 we were updating our blog and it is hosted on some  
7 other site.

8 BY MR. HUDIS:

9 Q. And what does it mean to publish content to  
10 an Internet website?

11 MR. BECKER: Objection. May call for --  
12 actually, objection. Does call for a legal  
13 conclusion; vague. Objection. Ambiguous;  
14 argumentative.

15 THE WITNESS: Publish is a vague term.  
16 Post is more precise, and it's a term that I prefer  
17 to use.

18 BY MR. HUDIS:

19 Q. You've never used the term publish with  
20 respect to transferring data to another website?

21 MR. BECKER: Objection. Argumentative.  
22 Objection. Vague as to time period.

23 THE WITNESS: I have used the word publish.  
24 Just like many laymen, I've used the term  
25 imprecisely at times.

1 BY MR. HUDIS:

2 Q. Okay. To you does post and publish mean  
3 the same thing, only post is a more precise term?

4 MR. BECKER: Objection. Argumentative.  
5 Objection. May call for a legal conclusion.  
6 Objection. Assumes facts not in evidence.

7 THE WITNESS: No.

8 BY MR. HUDIS:

9 Q. Have you ever posted content to Internet  
10 Archive's website?

11 A. Yes.

12 Q. Do you remember when for the first time?  
13 Just a year would be fine.

14 MR. BECKER: Objection. Relevance.

15 THE WITNESS: I don't remember the year. I  
16 think it probably had the numbers 19 at the  
17 beginning.

18 BY MR. HUDIS:

19 Q. So sometime in the 1990s, maybe?

20 A. I would be speculating, but that would be  
21 my guess.

22 Q. We discussed earlier the concept of  
23 incorporation by reference.

24 Is the mere listing of a standard in the  
25 government regulation incorporation by reference?

1 MR. BECKER: Objection. Calls for a legal  
2 conclusion. Objection. Vague. Objection.  
3 Argumentative. Objection. It assumes facts not in  
4 evidence. Objection. May be a hypothetical.

5 THE WITNESS: No, it is not.

6 BY MR. HUDIS:

7 Q. In your experience what types of documents  
8 have been incorporated by reference by a  
9 governmental agency?

10 MR. BECKER: Objection. Calls for a legal  
11 conclusion. Objection. Competence. Objection.  
12 Vague. Objection. Argumentative.

13 THE WITNESS: Are you talking about the  
14 Code of Federal Regulations, or is this kind of a  
15 general-purpose question?

16 BY MR. HUDIS:

17 Q. A general-purpose question.

18 A. I can give you specific examples.

19 Q. Please.

20 A. Well, in the Code of Federal Regulations, a  
21 number of agencies have incorporated documents.  
22 The Department of Education, for example, has  
23 incorporated by reference the standards at issue in  
24 this litigation.

25 Q. Other than standards, what other documents

1 have you observed incorporation by reference into  
2 governmental regulations?

3 MR. BECKER: Objection. Calls for a legal  
4 conclusion. Objection. Competence.

5 THE WITNESS: My focus has been on  
6 standards incorporated by reference into the Code  
7 of Federal Regulations. So that's what I'd look  
8 for.

9 BY MR. HUDIS:

10 Q. Which brings me to my next question. When  
11 did you first become interested in making available  
12 to the Internet public documents that have been  
13 incorporated by reference by some governmental  
14 agency?

15 MR. BECKER: Objection. Assumes facts not  
16 in evidence. Objection. Lacks foundation.  
17 Objection. Vague as to time period.

18 THE WITNESS: In 2008 I posted California's  
19 Title 24 to our website.

20 BY MR. HUDIS:

21 Q. And that is when you first became  
22 interested in this area?

23 A. It's when I became interested in technical  
24 standards that have the force of law.

25 (PLAINTIFFS' EXHIBIT 22 WAS MARKED.)

1 BY MR. HUDIS:

2 Q. Mr. Malamud, I've placed in front of you a  
3 document that we have marked as Exhibit 22 bearing  
4 production numbers AERA\_APA\_NCME 32079 through  
5 32228.

6 I'd like to know if you recognize the  
7 document.

8 A. Well, it appears to be an incomplete set of  
9 excerpts from a book I wrote. It appears to be.

10 MR. BECKER: I'd like to just object to the  
11 extent that this document may be incomplete, and to  
12 the extent that this document appears to have  
13 handwriting on page 32082, and may have other  
14 notations throughout it.

15 MR. HUDIS: Counsel, could I see your copy?  
16 It should not have -- okay. If you see any other  
17 handwritten notations, they shouldn't be there on  
18 your copy, and I don't think they are on  
19 Mr. Malamud's copy as the original exhibit.

20 So if it does contain handwritten notes, we  
21 can --

22 THE WITNESS: There are several handwritten  
23 notes on Bates number 32087, for example, has a  
24 series of handwritten notes. There is a mark under  
25 my name on 32086. There is writing on 32088.

1 MR. HUDIS: Oh, those are not our  
2 handwriting. It was on the document as we obtained  
3 it from the Internet.

4 So, Counsel, just to address your  
5 objections, this is only one chapter from the whole  
6 book.

7 BY MR. HUDIS:

8 Q. So, Mr. Malamud, could you please turn to  
9 production page 32224 of Exhibit 22.

10 A. Okay.

11 Q. And if you see the penultimate paragraph at  
12 the bottom where it starts with "Many  
13 jurisdictions"?

14 A. Yes.

15 Q. All right. The second sentence and the  
16 third sentence say, "Even a private standards body  
17 might be considered by the courts to be  
18 quasi-governmental. Many places such as the U.S.  
19 make standards a procurement requirement making  
20 copyright enforcement questionable at best."

21 Was this one of your early thoughts on  
22 incorporation by reference?

23 MR. BECKER: Objection. Vague.

24 THE WITNESS: I'm not a lawyer, and this is  
25 not about incorporation by reference. This is

1 about standards made by quasi-governmental  
2 organizations. A totally different topic.

3 BY MR. HUDIS:

4 Q. Could we turn to the next page. Page 3225  
5 of Exhibit 22. It says two-thirds of the way down  
6 the page, "I gave a little speech about the morals  
7 necessity of disseminating standards."

8 What did you mean by that?

9 A. This was a --

10 MR. BECKER: Objection. Vague.

11 THE WITNESS: This was in the context of a  
12 visit to the International Organization For  
13 Standards or organization, known as --  
14 International Organization For Standardization,  
15 known as ISO. The acronym is different than the  
16 name, which says something about them.

17 And this was the organization that was  
18 attempting to have the whole Internet run on the  
19 open systems interconnection protocol suite, and my  
20 little speech to the gentlemen that I visited was  
21 that if they wanted their protocol suite to be  
22 ubiquitous, to be globally adopted, that would only  
23 work if those standards were readily available for  
24 people to read.

25 BY MR. HUDIS:

1 Q. When you say "readily available," do you  
2 mean -- did you mean readily available for free?

3 MR. BECKER: Objection. Vague. Objection.  
4 Relevance.

5 THE WITNESS: The IETF made its protocol  
6 specifications available for me. And my little  
7 moral lecture to the International Organization For  
8 Standardization was that if they wished to win this  
9 race to become the basis for the modern Internet,  
10 that would only happen if their standards were, in  
11 fact, available for free, so anybody could read  
12 them.

13 BY MR. HUDIS:

14 Q. The next paragraph says, "We then started  
15 talking about applying Bruno to the ISO world."

16 First of all, what is Bruno?

17 A. Bruno was a project that I undertook with  
18 the blessings of the secretary general of the  
19 International Telecommunication Union to convert  
20 and post the ITU specifications to the Internet so  
21 anybody could read them for free.

22 Q. So it was basically wide dissemination of  
23 documents on the Internet?

24 A. Of ITU specifications. And the ITU is  
25 specifications for the telephone network.



1 Q. What is an ITU specification?

2 A. How a modem works, for example.

3 Q. And please define ISO.

4 A. ISO is the International Organization for  
5 Standardization.

6 Q. And the next sentence begins with Eicher.  
7 Who is Eicher?

8 A. Eicher was the secretary general of the  
9 International Organization for Standardization.

10 Q. Now, the rest of this paragraph reads,  
11 "Eicher was quite frank. 25 percent of ISO  
12 revenues came from the sale of standards documents.  
13 How did I propose to replace that revenue? Even  
14 more importantly, ISO was controlled by its member  
15 organizations, which also made much money from  
16 standards sales. How did I propose to convince  
17 groups like ANSI that posting standards for free  
18 would help them?"

19 Do you see that?

20 A. Yes, I do.

21 MR. BECKER: Objection. The document  
22 speaks for itself. Objection. Relevance.

23 BY MR. HUDIS:

24 Q. In this context -- sorry. I'm sorry if I  
25 spoke over you.

1 In this context, what is ANSI?

2 A. ANSI is the American National Standards  
3 Institute.

4 Q. So you pose a series of questions here on  
5 page 32225, and then on the next page you say, and  
6 this is on page 32226 of Exhibit 22, "I proposed my  
7 high resolution/low resolution compromise. The  
8 plan would post low resolution versions of  
9 documents for free on the network and allow ISO and  
10 ANSI to continue to sell high resolution versions  
11 either on paper or electronically."

12 So was that your answer to the question  
13 that you posed on the prior page, 32225?

14 MR. BECKER: Objection. The document  
15 speaks for itself.

16 THE WITNESS: It was one of my thoughts in  
17 1991 as to a way that ISO could function in a  
18 modern world.

19 BY MR. HUDIS:

20 Q. Then in two paragraphs later, you say, "The  
21 crucial assumption was that people with the free  
22 version would then pay for documents." And at the  
23 end of that paragraph it says, "Giving away  
24 standards would lead to increased revenues."

25 So here is my question about that crucial

1 assumption.

2 What if people who had copies of lower  
3 resolution versions of these documents were just  
4 fine with this quality? What if -- if I may  
5 finish. What if they did not want to pay for the  
6 high resolution copies?

7 MR. BECKER: Objection. Compound.  
8 Objection. Relevance. Objection. The document  
9 speaks for itself. Objection. Argumentative.  
10 Objection. Assumes facts not in evidence. And  
11 also hypothetical. Calls for speculation. And  
12 competence.

13 THE WITNESS: So this was a informal  
14 discussion in 1991. I have since gathered more  
15 experience on that particular topic, and I actually  
16 believe that that statement is true.

17 BY MR. HUDIS:

18 Q. On what basis?

19 A. When I put the SEC EDGAR database online  
20 for free, there was great speculation that that  
21 would destroy the revenues of those vendors that  
22 were selling the reports of public corporations.

23 And after I turned that service back over  
24 to the Securities and Exchange Commission, I  
25 donated my software and hardware and they begin --

1 began ranning it -- running it, I had the president  
2 of one of those vendors that was in the industry  
3 come up to me and say, "You know? Our business  
4 went way up because a lot more people were reading  
5 those EDGAR documents, and those that were serious  
6 about the financial industry began subscribing to  
7 all our commercial services, to have all the back  
8 copies, to have red lines, to have all the  
9 value-added things that the industrial folks can  
10 do." So that's my personal experience with that  
11 topic.

12 I'm glad people are still reading this  
13 book.

14 BY MR. HUDIS:

15 Q. Mr. Malamud, why did you become interested  
16 in making available to the public, documents that  
17 were incorporated by reference by a governmental  
18 agency?

19 MR. BECKER: Objection. Calls for a legal  
20 conclusion. Objection. Vague and ambiguous.  
21 Objection. Argumentative. Objection. Lacks  
22 foundation.

23 THE WITNESS: Public.Resource.Org was  
24 founded with the aim of making government  
25 information more accessible with the particular

1 focus on the law.

2 Information such as building codes and fire  
3 codes are, in fact, the law. And they are  
4 critically important legal documents. And that's  
5 why I became interested in them.

6 BY MR. HUDIS:

7 Q. What did you do -- strike that.

8 What did you decide to do about making  
9 available to the public, documents that were  
10 incorporated by reference by a governmental agency?

11 MR. BECKER: Objection. Calls for a legal  
12 conclusion. Objection. Vague and ambiguous.  
13 Objection. Vague as to time period.

14 THE WITNESS: Could you repeat that  
15 question?

16 BY MR. HUDIS:

17 Q. Yes. What did you do -- decide to do about  
18 making available to the public documents that were  
19 incorporated by reference by a governmental agency?

20 MR. BECKER: Same objections.

21 THE WITNESS: So making available, I don't  
22 know what that term means, but what I did is I  
23 posted California's Title 24 on our website at the  
24 time, Bulk.Resource.Org.

25 BY MR. HUDIS:

1 Q. That's exactly what I meant.

2 So after you posted Title 24, what other  
3 types of materials did you start posting after that  
4 of like kind?

5 MR. BECKER: Objection. Vague and  
6 ambiguous. What -- as to "like kind." Objection.  
7 Vague as to time period.

8 THE WITNESS: If by "like kind" you mean  
9 building codes and similar documents --

10 BY MR. HUDIS:

11 Q. I do.

12 A. I did a careful survey of state regulations  
13 and statutes looking for explicit and deliberate  
14 incorporation by reference, and posted a series of  
15 building electrical, fire, plumbing codes.

16 Q. What did you mean by "explicit and  
17 deliberate incorporation by reference"?

18 MR. BECKER: Objection. Calls for legal --  
19 may call for a legal conclusion. Additionally, a  
20 standing objection to this line of questioning to  
21 the extent that it is not asking about the 1999  
22 standards. It is beyond the 30(b)(6) designation.

23 THE WITNESS: I looked for a explicit  
24 mention of a specific standard for a particular  
25 year and the words "incorporated by reference," as

1     opposed to a passing mention of a document or a  
2     mention of the adoption of a document but not  
3     specifying which specific edition of that document  
4     they were talking about.

5                     (PLAINTIFFS' EXHIBIT 23 WAS MARKED.)

6     BY MR. HUDIS:

7             Q.   Mr. Malamud, do you recognize this  
8     document?

9             A.   Yes, I do.

10            Q.   This is Exhibit 23.  What is this document?

11            A.   This appears to be e-mail from me to  
12     Jonathan Siegel of the Administrative Conference of  
13     the United States.

14            Q.   And who is Jonathan Siegel?

15            A.   I don't remember his exact title.  He was  
16     in a capacity as a research director or a program  
17     director for the activities of ACUS, the  
18     Administrative Conference of the United States.

19            Q.   That brings me to my next question.  Who or  
20     what is ACUS?

21            A.   ACUS is a governmental body which is  
22     partially appointed by the president and partially  
23     appointed by the chairman, who is appointed by the  
24     president, and it is the -- a body that formulates  
25     recommendations on administrative law.

1 MR. HUDIS: We're going to go off the  
2 record.

3 THE WITNESS: Okay.

4 MR. HUDIS: He wants to switch media.

5 THE WITNESS: Yeah.

6 THE VIDEOGRAPHER: This marks the end of  
7 Disc 2, Volume 1 in the deposition of Carl Malamud.  
8 The time is 2:18, and we are off the  
9 record.

10 (Recess taken.)

11 THE VIDEOGRAPHER: This marks the beginning  
12 of Disc 3, Volume 1 in the deposition of Carl  
13 Malamud.

14 The time is 2:26, and we are on the record.

15 BY MR. HUDIS:

16 Q. Mr. Malamud, Exhibit 23, do you have any  
17 reason to doubt that this document is authentic?

18 THE VIDEOGRAPHER: Shoot, sorry, guys.  
19 I've got to stop. Can I stop? I'm so sorry. I  
20 had an accident here.

21 THE WITNESS: That's okay.

22 MR. HUDIS: Yep.

23 (Discussion off the record.)

24 THE VIDEOGRAPHER: This marks the beginning  
25 of Disc 3, Volume 1 in the deposition of Carl



1 Malamud.

2 The time is 2:28, and we are on the record.

3 BY MR. HUDIS:

4 Q. Mr. Malamud, do you have any reason to  
5 doubt the authenticity of Exhibit 23?

6 MR. BECKER: Objection to the extent that  
7 it is not clear where this document has come from.

8 THE WITNESS: It appears to be e-mail from  
9 me to Mr. Siegel, but I would want to check it. Is  
10 this something we disclosed to you or --

11 BY MR. HUDIS:

12 Q. It's something we found on the Internet.

13 A. Oh, okay. It appears to be the e-mail that  
14 I sent, yes.

15 Q. And what was the reason that you sent this  
16 e-mail of October 1, 2011 to Mr. Siegel?

17 A. I was a member of the committee that was  
18 looking at the issue of incorporation by reference  
19 for the Administrative Conference for the United  
20 States.

21 Q. And why did you write this particular  
22 e-mail to Mr. Siegel?

23 MR. BECKER: Objection to relevance as to  
24 ACUS and this line of questioning.

25 I'll note that for category 21,

1 Public.Resource has designated Carl Malamud only as  
2 to the -- its participation, if any, in Federal  
3 Government committees on the subject of  
4 incorporation by reference of the 1999 standards  
5 into any government laws, statutes, regulations or  
6 ordinances.

7 BY MR. HUDIS:

8 Q. You may answer.

9 A. I had some concerns about the -- the  
10 procedures and the way that the committee was going  
11 about doing its deliberations on incorporation by  
12 reference. So I wrote this e-mail to Mr. Siegel,  
13 who had overall direction over the committee  
14 process.

15 Q. And which committee was that?

16 A. The committee -- I don't know what the  
17 formal name was. It was the committee that was  
18 dealing with the issue of incorporation by  
19 reference.

20 Q. And in paragraph 1, what did you mean by  
21 the preamble?

22 A. The preamble to the proposed recommendation  
23 that the Administrative Conference was considering.

24 Q. And you say here in paragraph numbered 1  
25 for the preamble, "Would it make sense to

1 acknowledge that the issue of copyright and  
2 standards, after they've been incorporated into  
3 law, is unsettled and that ACUS is not taking a  
4 position on this subject?" What did you mean?

5 MR. BECKER: Objection. The document  
6 speaks for itself. Objection. Vague.

7 THE WITNESS: I felt it inappropriate for  
8 ACUS to be taking a strong position on what the  
9 copyright status was of documents incorporated into  
10 law.

11 BY MR. HUDIS:

12 Q. Why?

13 A. Frankly, there was a young staff member who  
14 was doing the research for this recommendation who  
15 felt very strongly that standards incorporated by  
16 reference into law maintained their copyright, even  
17 as a part of the Code of Federal Regulations. And  
18 as I said in this paragraph here, I think it would  
19 be fair to say this is above our pay grade. I felt  
20 that the young staffer was -- was stretching.

21 Q. So that brings me to my next question.

22 The next sentence says, "There is obviously  
23 a strong bias towards protecting and honoring  
24 copyright on the one hand, but we also have the  
25 Veeck," V-e-e-c-k, "decision and some ambiguity in

1 the law. I think it would be fair to say this is,"  
2 quote, "above our pay grade," period, unquote.

3 A couple of questions on that passage.

4 What did you mean in the third sentence by  
5 "some ambiguity in the law"?

6 MR. BECKER: Again, same objections. The  
7 document speaks for itself. It's beyond the scope  
8 of the 30(b)(6) designation. And the objection on  
9 relevance grounds. Again, objection that this may  
10 call for a legal conclusion.

11 THE WITNESS: So I'm not a lawyer, but I  
12 read the Veeck decision, and it seemed to me that  
13 the researcher at ACUS was drawing conclusions from  
14 the Veeck decision that while perhaps appropriate  
15 for a federal judge to be making, were  
16 inappropriate to be laying them down as categorical  
17 statements. I felt she was reading into the Veeck  
18 decision in ways that were perhaps not supported by  
19 the language. And again, I'm not a lawyer.

20 BY MR. HUDIS:

21 Q. I understand.

22 What conclusions was the researcher drawing  
23 from Veeck that concerned you?

24 MR. BECKER: Objection. Relevance.

25 Objection. Vague. Objection. Lacks foundation.

1 THE WITNESS: So it's pronounced Veeck, by  
2 the way. It's a Dutch name. P. Veeck. It -- the  
3 preamble was taking at the time a strong position  
4 that standards incorporated into reference by law  
5 had copyright and that the law could have  
6 copyright.

7 And again, I felt that this young staffer  
8 was simply moving beyond what a body such as the  
9 Administrative Conference of the United States  
10 could say is the established truth. I felt she was  
11 speculating, to use the language we use in  
12 depositions.

13 BY MR. HUDIS:

14 Q. And what did you mean by "I think it would  
15 be fair to say this is above our pay grade"?

16 MR. BECKER: Objection again. The document  
17 speaks for itself. Objection. Asked and answered.

18 THE WITNESS: So I'm not a lawyer, but I  
19 have looked at a number of documents that indicate  
20 that in the United States the law has no copyright.  
21 And that includes, in many formulations, materials  
22 incorporated by reference into the law. Mr. Bhatia  
23 from ANSI, for example, B-h-a-t-i-a, has stated  
24 many times that standards incorporated by reference  
25 are the law, and it seemed to me that that was a

1 long-standing policy of the United States.

2 And again, this was something that if one  
3 were to draw a different conclusion that a portion  
4 of the law in fact, did maintain copyright and one  
5 needed a license to access and use that material,  
6 that was certainly not a statement that the  
7 organization such as the Administrative Conference  
8 of the United States should be making.

9 (PLAINTIFFS' EXHIBIT 24 WAS MARKED.)

10 BY MR. HUDIS:

11 Q. Mr. Malamud, I'll now show you what's been  
12 marked as Exhibit 24. Before I ask you questions  
13 about the document, what is On The Media?

14 A. Oh, that's a National Public Radio program.

15 Q. Who is Bob Garfield?

16 A. I assume he's a host or reporter.

17 Q. Do you recognize Exhibit 24?

18 A. No, I do not. I remember doing an  
19 interview with On The Media, however.

20 Q. Did you do this interview with On The Media  
21 on or about April 13, 2012?

22 A. That sounds about right.

23 Q. What was the purpose of the interview?

24 A. I think you'd have to ask On The Media.

25 Q. What was your purpose for giving the

1 interview?

2 MR. BECKER: Objection for relevance.

3 THE WITNESS: If a well-respected program  
4 such as On The Media by National Public Radio wants  
5 me to talk to them, I will generally make myself  
6 available.

7 BY MR. HUDIS:

8 Q. Exhibit 24 appears to be an interview that  
9 you gave in April of 2012 to Mr. Garfield. I'd  
10 like to ask you a couple of questions.

11 If you would turn in Exhibit 24 to  
12 production page AERA\_APA\_NCME 32076.

13 A. Okay. Yes.

14 Q. Mr. Garfield in the middle of the page  
15 asks, "There is an expense attached to developing  
16 and codifying these standards. If we take the  
17 revenue away from those who do this work, then what  
18 happens?" And you provide two answers. I'll read  
19 them.

20 "Well, there's two answers to that. One is  
21 that the nonprofits that develop these standards  
22 have a lot of different revenue streams. They do  
23 conferences. They do certification. They develop  
24 standards that aren't law. In fact, the vast  
25 majority of their standards are not. And so maybe

1 they need to adjust their business model,  
2 particularly given the fact that they are a  
3 nonprofit public charity."

4 You continue. "Answer number two is that  
5 government has shirked its responsibilities. It  
6 said 'Gee, we can just incorporate these privately  
7 developed standards in the law and we won't have to  
8 pay anything.' And the only people that get  
9 screwed up by this are the citizens that need to  
10 read the law."

11 Do you recall giving those answers to  
12 Mr. Garfield at the interview of April 2012?

13 MR. BECKER: Objection. Mr. Malamud has  
14 said that he does not recognize this document.  
15 Objection to the extent that it's not clear how  
16 this document was transcribed or its authenticity.  
17 Objection with regards to relevance, particularly  
18 on the grounds that the plaintiffs have said that  
19 the finances and revenue of the plaintiffs, other  
20 than directly related to the sale of the 1999  
21 standards, is not at issue in this case as they so  
22 claim.

23 Objection on the grounds that the question  
24 assumes facts not in evidence.

25 MR. HUDIS: I don't mind the objections,



1 Counsel. I just mind the ones that would try to  
2 indicate the -- to the witness how he should answer  
3 his questions.

4 BY MR. HUDIS:

5 Q. So my question about this document, do you  
6 recall this interview?

7 A. Yes, I do.

8 Q. All right. Do you recall giving this  
9 answer that I just read into the record?

10 A. No, I don't, but I'd be happy to discuss  
11 the general topics that are addressed there.

12 Q. Sure.

13 So if standards development organizations  
14 lose their copyright by incorporation by reference,  
15 is it your theory that the standards  
16 organization -- development organization should  
17 make their money some other way?

18 MR. BECKER: Objection. Vague. Objection.  
19 May call for a legal conclusion. Objection.  
20 Hypothetical. Objection. May mischaracterize the  
21 witness.

22 BY MR. HUDIS:

23 Q. You may answer.

24 A. I have testified on this subject before  
25 Congress saying that I believe that when a standard

1 is incorporated by reference, usually with the  
2 active ascents of -- of the SDO, that organization  
3 is given a gold seal of approval, right. They are  
4 the original creator of what has become a portion  
5 of American law, and that that is a unique  
6 marketing opportunity.

7 That opportunity can be used to -- to sell  
8 authenticated versions of the standard. To sell  
9 auxiliary products. That there are a number, in  
10 general, of business models that can emerge out of  
11 this favored position.

12 As to how that specifically applies to a  
13 specific SDO, again, we would want to look at -- I  
14 would want to look at the very specific nature of  
15 that organization. But I still talk in general  
16 about the unique position of having a standard  
17 incorporated by reference into federal law and how  
18 favorable that is.

19 BY MR. HUDIS:

20 Q. And is it your view that once incorporated  
21 by reference, the standard loses its copyright  
22 enforcement ability and the standards development  
23 organization that wrote that standard,  
24 "incorporated by reference," would have to obtain  
25 its income some other way than selling the

1 standard?

2 MR. BECKER: Objection. Calls for a legal  
3 conclusion. Objection. Argumentative. Objection.  
4 Lacks foundation and assumes facts not in evidence.  
5 Objection. Vague.

6 THE WITNESS: So I disagree with that  
7 characterization. I -- I believe that even if the  
8 law is available to citizens, that does not  
9 preclude a standards development organization  
10 continuing to sell that document. Particularly  
11 selling an authenticated version, a redlined  
12 version, a version with commentary. I believe  
13 there are a number of ways one can continue to make  
14 that -- that document available for sale.

15 BY MR. HUDIS:

16 Q. Is one of your alternative theories that  
17 once a standard is incorporated by reference, that  
18 the government should pay for it?

19 MR. BECKER: Objection. May call for a  
20 legal conclusion. Objection. Lacks foundation.  
21 Assumes facts not in evidence. Objection.  
22 Argumentative.

23 THE WITNESS: So there are some things I  
24 know and some things I can speculate on.

25 The thing that I know is that the law in

1 the United States has no copyright, and one is free  
2 to read and speak the law. Without needing a  
3 license, without needing permission.

4 What I can speculate on is different ways  
5 that one might go about handling issues such as  
6 revenue and whether the government should be paying  
7 or not, and I frankly don't have strong views as to  
8 whether or not the -- this scenario that I posited  
9 here is the right solution.

10 MR. BECKER: I would advise the witness not  
11 to speculate and only to give those answers that  
12 the witness knows.

13 THE WITNESS: Okay.

14 BY MR. HUDIS:

15 Q. Do you have any views, whether they're  
16 strong or not, whether once a standard is  
17 incorporated by reference into a government  
18 regulation, the government should pay for that?

19 MR. BECKER: Objection. May call for a  
20 legal conclusion. Objection. Vague. Objection.  
21 Lacks foundation and assumes facts not in evidence.  
22 And argumentative.

23 THE WITNESS: So the government is already  
24 paying in many different revenue streams for  
25 standards. They pay for access. They help fund

1 development. And in many cases standards are  
2 created, and there are other revenue streams that  
3 go to the organization, such as the funding of  
4 basic research.

5 So I don't think it's an either/or  
6 proposition. I think there's already a lot of  
7 money flowing.

8 BY MR. HUDIS:

9 Q. I don't believe your last answer,  
10 Mr. Malamud, answered my question.

11 A. Okay. Could you restate the question?

12 Q. Sure. Do you have any views, whether they  
13 are strong or not, whether once a standard is  
14 incorporated by reference into a government  
15 regulation, the government should pay for that?

16 MR. BECKER: All the same objections and  
17 also asked and answered.

18 THE WITNESS: I believe I did answer your  
19 question in the sense of the government is already  
20 paying.

21 Now, my view is it proper for government  
22 money to go to an SDO? In theory, yes.

23 MR. HUDIS: Just for the record Exhibit 24  
24 bears production numbers AERA\_APA\_NCME 32075  
25 through 32078.

1 (PLAINTIFFS' EXHIBIT 25 WAS MARKED.)

2 BY MR. HUDIS:

3 Q. Mr. Malamud, I've placed in front of you a  
4 document that's been marked as Exhibit 25, bearing  
5 production numbers AERA\_APA\_NCME 31764 through  
6 31768.

7 Do you recognize this document?

8 A. It appears to be an essay that I wrote for  
9 boingboing. This appears to be a printout of that.

10 Q. Do you have any reason to doubt the  
11 authenticity of this document, Exhibit 25?

12 A. No, but I'd want to double check. It  
13 appears to be the essay that I wrote.

14 Q. And what is boingboing?

15 A. Boingboing is a blog.

16 Q. And do you recall posting this blog on  
17 March 19th, 2012, to boingboing?

18 A. I'm not sure of the exact date, but I did,  
19 in fact, author a boingboing official guest  
20 memorandum of law.

21 Q. Why did you call it a memorandum of law?

22 A. Because it was talking about an obscure  
23 topic in a publication that reaches a very general  
24 audience.

25 Q. Under the first heading Roman numeral I,

1 code is law, Lessig, L-e-s-s-i-g. In the second  
2 paragraph it says, "Public.Resource.Org spent  
3 \$7,414.26 buying privately produced, technical  
4 public safety standards that have been incorporated  
5 into U.S. Federal law."

6 And then I'm skipping a sentence. It then  
7 says, "We have started copying those 73 standards  
8 despite the fact" that -- "despite the fact they  
9 are festooned with copyright warnings, shrink wrap  
10 agreements and other dire warnings."

11 When did Public.Resource start copying  
12 these 73 standards?

13 MR. BECKER: Objection. Assumes facts not  
14 in evidence; lacks foundation; vague; argumentative  
15 as to "copying."

16 THE WITNESS: So these were printed  
17 documents, and it was a period of January through  
18 approximately March 19th. Actually, March 15th was  
19 the period.

20 BY MR. HUDIS:

21 Q. Of what year?

22 A. Of 2012.

23 Q. And could you turn to the next page, page  
24 31765 of Exhibit 25. Under Roman numeral II, "If a  
25 law isn't public, it isn't law." The middle

1 paragraph just before the picture that says,  
2 "Notice," you see where it says the paragraph  
3 starts "Public.Resource.Org has a mission"?

4 A. Yes, I do.

5 Q. The next sentence says, "We've taken a  
6 gamble and spent \$7,414.26 to buy 73 of these  
7 technical public safety standards that are  
8 incorporated into the U.S. Code of Federal  
9 Regulations. We made 25 print copies of each of  
10 these standards and bound each document in a red,  
11 white, blue patriotic certificate of incorporation  
12 stating that the documents are legally binding on  
13 citizens and residents in the United States, and  
14 that criminal penalties may apply for  
15 noncompliance."

16 In this paragraph why did you state "we've  
17 taken a gamble"?

18 MR. BECKER: Objection. The document  
19 speaks for itself.

20 THE WITNESS: \$7,414.26 is a lot of money  
21 to be spending on a program that I simply decided  
22 was important to do.

23 BY MR. HUDIS:

24 Q. And why was it important?

25 A. Because the law needs to be available in



1 the United States.

2 Q. At the bottom of this page, 31765, it says,  
3 "We know from all the copyright warnings, terms of  
4 use, scary shrink wrap agreements and other red hot  
5 rhetoric that accompanies these documents, that the  
6 producers continue to believe that copies may not  
7 be made under any circumstances."

8 Is this why you were taking a gamble on  
9 making the copies of the technical standards?

10 MR. BECKER: Objection. The document  
11 speaks for itself. Objection. I'll also note that  
12 it's not clear whether the highlighting that's on  
13 this page is on the authentic document or whether  
14 it's been added to the documents.

15 THE WITNESS: Yeah, I agree. There was no  
16 highlighting in the original. I'm not sure where  
17 that came from.

18 BY MR. HUDIS:

19 Q. Must have been from us.

20 A. Okay. So your question again?

21 Q. The question is, the passage that I just  
22 read, does this explain why you were taking a  
23 gamble by making the copies of the 73 standards?

24 MR. BECKER: All the same objections. Also  
25 objection for misstates prior testimony and asked

1 and answered.

2 THE WITNESS: The gamble was the financial  
3 risk. I mean, spending close to \$10,000 on  
4 something is a lot of money for a small nonprofit  
5 like mine.

6 (PLAINTIFFS' EXHIBIT 26 WAS MARKED.)

7 BY MR. HUDIS:

8 Q. I now mark as Exhibit 26 a document bearing  
9 production numbers AERA\_APA\_NCME pages 31832  
10 through 31847.

11 Mr. Malamud, do you recognize this  
12 document?

13 A. Yes, I do.

14 Q. What is this document?

15 A. It is a response to the Office of  
16 Management and Budget Requests for information on  
17 the -- as they put it, the development and use of  
18 voluntary consensus standards and in conformity  
19 assessment activities.

20 Q. Do you have any reason to doubt this letter  
21 is authentic?

22 A. No, I do not.

23 Q. And the date of the letter is April 11,  
24 2012?

25 A. That sounds about right, yes.

1 Q. What was your purpose of writing this  
2 letter to Cass Sunstein at the Office of  
3 Information of Regulatory Affairs?

4 MR. BECKER: Objection. Vague.

5 THE WITNESS: Ask for information. It was  
6 a request for information.

7 BY MR. HUDIS:

8 Q. And what type of information?

9 A. I believe I answered it. It was a request  
10 for information about federal participation in the  
11 development and use of voluntary consensus  
12 standards.

13 Q. And you co-wrote this letter with David  
14 Halperin?

15 A. Yes, I did.

16 Q. In the second paragraph on page 31832 of  
17 Exhibit 26, it says, "We believe that the  
18 fundamental law of the United States requires that  
19 the government make standards that are incorporated  
20 by reference into federal regulations widely  
21 available to the public without charge, and that  
22 such standards be deemed in the public domain,  
23 rather than subject to copyright restrictions."

24 In that sentence, what does "fundamental  
25 law" mean?

1 MR. BECKER: Objection. The document  
2 speaks for itself. Objection. May call for a  
3 legal conclusion.

4 THE WITNESS: That would be primary legal  
5 materials. That's materials that are emanating  
6 from a law-making entity, such as in the Code of  
7 Federal Regulations.

8 BY MR. HUDIS:

9 Q. So what is the fundamental law of the  
10 United States that requires standards incorporated  
11 by reference into federal law be made public  
12 without charge?

13 MR. BECKER: Objection. Misstates the  
14 document. Objection. May call for a legal  
15 conclusion. Objection. The document speaks for  
16 itself.

17 THE WITNESS: It is clearly established  
18 that the Code of Federal Regulations and  
19 Congressional statutes and supreme court opinions  
20 must be made available to the public without  
21 restrictions on use, and standards that are  
22 explicitly incorporated by reference into the Code  
23 of Federal Regulations are part and parcel of the  
24 Code of Federal Regulations, and that is a  
25 fundamental principle of American law, that this

1 material must be made available to the public.

2 BY MR. HUDIS:

3 Q. In the final paragraph of page 31832 of  
4 Exhibit 26, it says, Public.Resource --

5 "Public.Resource.Org, whose mission is to make law  
6 available to all citizens." Do you see that?

7 A. I'm sorry, what page are we on?

8 Q. The page -- the very first page of the  
9 document.

10 A. Yes, I see that.

11 Q. All right. And that mission is done by  
12 making the law available on the websites that you  
13 mentioned earlier?

14 MR. BECKER: Objection. The document  
15 speaks for itself. Objection. May mischaracterize  
16 previous testimony. Objection. May call for a  
17 legal conclusion.

18 THE WITNESS: Making the law available to  
19 all citizens, one mechanism is to post that on our  
20 website.

21 BY MR. HUDIS:

22 Q. Could you please turn to page 31836 of  
23 Exhibit 26.

24 A. Okay.

25 Q. In the middle of the page it says, "A

1 copyrighted work does not become law simply because  
2 the statute refers to it."

3 What did you mean by that?

4 MR. BECKER: Objection. The document  
5 speaks for itself. Objection. May call for a  
6 legal conclusion.

7 THE WITNESS: This, again, is a subject  
8 that we discussed previously when we were  
9 discussing incorporation by reference at the state  
10 level. It needs to be an explicit and deliberate  
11 incorporation into the law. Not simply a passing  
12 mention of some external document.

13 BY MR. HUDIS:

14 Q. Mr. Malamud, could you please turn to page  
15 31838 of Exhibit 26.

16 A. Okay.

17 Q. At the bottom of the page it says, "In  
18 order to be eligible for incorporation for a  
19 reference, a publication must meet standards  
20 including that the publication substantially  
21 reduces the volume of material published in the  
22 Federal Register and is reasonably available to and  
23 usable by the class of persons affected by the  
24 publication."

25 My question is --

1 MR. BECKER: I'm sorry, where are we,  
2 Counsel?

3 MR. HUDIS: Bottom of 31838.

4 BY MR. HUDIS:

5 Q. My question, Mr. Malamud, is this passage  
6 your understanding of a publication that is  
7 eligible for incorporation by reference?

8 MR. BECKER: Objection. This document  
9 speaks for itself, and unintelligible,  
10 incomprehensible question.

11 BY MR. HUDIS:

12 Q. You may answer.

13 A. We are quoting one CFR 51.7(a)(3) and  
14 (a)(4). That's what that sentence is doing, is  
15 it's simply restating what the CFR states.

16 Q. But is this your understanding of a  
17 document that would qualify for incorporation by  
18 reference?

19 MR. BECKER: Objection. Calls for a legal  
20 conclusion. Objection. Vague as to "this."

21 THE WITNESS: That section of the CFR  
22 states two conditions that must be met before a  
23 standard or other document can be incorporated by  
24 reference in the CFR.

25 BY MR. HUDIS:

1 Q. Could you turn to page 31839 of Exhibit 26.

2 A. I'm there.

3 Q. And do you see it refers to OMB Circular  
4 A-119 at the bottom of the page?

5 A. Yes, I see that.

6 Q. To the best of your knowledge has this  
7 circular changed in language since 1980 -- 1998, so  
8 far as you're aware?

9 MR. BECKER: Objection. Competence.  
10 Objection. Calls -- may call for a legal  
11 conclusion. Objection. Assumes facts not in  
12 evidence; lacks foundation.

13 THE WITNESS: The document is currently  
14 being revised by the Office of Management and  
15 Budget, and I believe they published a notice of  
16 proposed ruling.

17 BY MR. HUDIS:

18 Q. Today has OMB Circular-A119 changed since  
19 19 -- 1998?

20 MR. BECKER: All the same objections and  
21 asked and answered.

22 THE WITNESS: Yeah, I don't know. I would  
23 have to look at their website.

24 BY MR. HUDIS:

25 Q. On the next page, page 31840 of Exhibit 26,



1 in the second paragraph at the end of the paragraph  
2 it says, "Today the only thing impeding the broader  
3 availability to the public of standards  
4 incorporation by reference into the law is the  
5 interest of standards development organizations in  
6 making money by charging for the standards."

7 Do you see that?

8 A. I do.

9 Q. All right. Do you know how much the  
10 plaintiffs in this action charge for the 1999  
11 Standards of Educational and Psychological Testing?

12 MR. BECKER: Objection. Competence.  
13 Objection. Misleading.

14 BY MR. HUDIS:

15 Q. Go ahead, Mr. Malamud.

16 MR. BECKER: Excuse me. Argumentative and  
17 assumes facts not in evidence.

18 THE WITNESS: I don't believe they charge  
19 anything. I don't think it's available for sale;  
20 is it?

21 BY MR. HUDIS:

22 Q. At the time you purchased the standards, do  
23 you know how much you paid for them?

24 MR. BECKER: Objection. Assumes facts not  
25 in evidence.

1 THE WITNESS: In the \$60 range, I believe.

2 BY MR. HUDIS:

3 Q. Could you turn to page 31840. At the  
4 bottom on -- in Exhibit 26, it says, "Greater  
5 public access to standards" incorporation by  
6 reference -- "incorporated by reference into  
7 federal regulations might alert policy and industry  
8 communities to the fact that federal rules are too  
9 often connected to outdated private standards and  
10 are in need of updating to improve public safety."

11 What is your support for this statement?

12 MR. BECKER: Objection. The document  
13 speaks for itself. Objection. May call for a  
14 legal conclusion.

15 THE WITNESS: In surveying the Code of  
16 Federal Regulations, I was shocked by how old some  
17 of the standards that are still on the books.  
18 There are standards from the '40s and '50s and  
19 '60s. There is a crane safety standard from the  
20 1960s, which is still required.

21 And one has to believe that the state of  
22 the art in safety for cranes has probably advanced  
23 since that point in time.

24 BY MR. HUDIS:

25 Q. Do you know the plaintiffs' policies or

1 practices for updating the standards on the  
2 educational and psychological testing?

3 MR. BECKER: Objection. Competence.

4 THE WITNESS: I don't know what you mean by  
5 "practices."

6 BY MR. HUDIS:

7 Q. How often they do so; when they do so; the  
8 circumstances under which they do so?

9 A. Well, I can answer one part of that  
10 question. I believe there was an '85 standard, a  
11 '99 standard, and a 2014 standard has recently been  
12 issued.

13 Q. Right. Do you know the circumstances under  
14 which the standards for educational and  
15 psychological testing have been updated?

16 MR. BECKER: Objection. I'll simply note  
17 that the witness should not divulge any information  
18 that has resulted from attorney-client  
19 communications.

20 THE WITNESS: I read on a website that the  
21 plaintiffs put together having to do with the  
22 revision of the standards and was able to read a  
23 little bit about what they were doing and why they  
24 were doing it for the 2014 standard.

25 BY MR. HUDIS:

1 Q. And what is your understanding as a result  
2 of that reading?

3 MR. BECKER: Objection. Vague.

4 THE WITNESS: Oh, now, I'm not an expert in  
5 this area. My take-away was that the standard was  
6 old and they wanted to revise it.

7 BY MR. HUDIS:

8 Q. If you could turn to page 31845 in Exhibit  
9 26. In the middle of the page it says, "Defenders  
10 of upholding copyright protection" and charge --  
11 "protections and charging fees in this context  
12 claim that granting citizens more reasonable access  
13 to the law will destroy the economic incentives  
14 that today motivate private organizations to craft  
15 important standards."

16 Who have you heard say this?

17 MR. BECKER: Objection. The document  
18 speaks for itself. Objection. Relevance;  
19 argumentative.

20 THE WITNESS: I --

21 MR. BECKER: Assumes facts not in evidence.

22 THE WITNESS: I've heard that statement or  
23 a variant of that statement several times. For  
24 example, there was a hearing before the Pipeline  
25 Hazardous Materials Safety Administration known as

1 PHMSA, P-H-M-S-A, and I heard representatives from  
2 the National Fire Protection Association, ASTM and  
3 asked me all explain that this basic theory would  
4 hold in their view. It's a theory I disagree with,  
5 but it's what I've heard many times.

6 BY MR. HUDIS:

7 Q. Have you read this theory anywhere?

8 MR. BECKER: Objection. Vague.

9 THE WITNESS: Well, yes, we made a  
10 transcript of the PHMSA hearing, so I read it  
11 there.

12 BY MR. HUDIS:

13 Q. Any other writings on this theory besides  
14 the PHMSA hearing?

15 A. There's been a couple of speeches by the  
16 president of ANSI and by both the current and past  
17 president of the National Fire Protection  
18 Association of -- on this general line of thought.

19 Q. In that same paragraph the second to last  
20 sentence, it says, "We do recognize the importance  
21 of giving private SDO," that's standards  
22 development organizations?

23 A. That's correct.

24 Q. All right, "private SDOs adequate  
25 incentives to create standards."

1           What incentives did you mean?

2           MR. BECKER:  Objection.  The document  
3 speaks for itself.  This is a partial quoting out  
4 of context.  Objection.  Vague and ambiguous.  
5 Lacks foundation.

6           THE WITNESS:  As my lawyer said, that was  
7 taken out of context of a broader discussion of the  
8 importance of this area of activity, this society.

9           I do think it is important that SDOs  
10 continue to operate.  I believe they do valuable  
11 work.

12           One of the incentives is what I previously  
13 discussed with you, the gold seal of approval of  
14 the American government by deeming that a  
15 particular standard is, in fact, incorporated by  
16 reference in the law.  I believe that's a huge  
17 marketing advantage for an organization.

18 BY MR. HUDIS:

19           Q.  So how are the rights to these incentives  
20 to create standards to be protected?

21           MR. BECKER:  Objection.  Vague and  
22 ambiguous; confusing; hypothetical; calls for  
23 speculation.

24           THE WITNESS:  Yeah, you used the words  
25 rights.  Is that right really what you meant?

1 Could you repeat the question?

2 BY MR. HUDIS:

3 Q. How were the rights to these incentives to  
4 create standards to be protected?

5 MR. BECKER: All the same objections, and  
6 also objection that this calls for a legal  
7 conclusion.

8 THE WITNESS: It sounds to me like you're  
9 asking about a legal thing, and what I'm talking  
10 about here is the fact that our government has a  
11 number of relationships with the SDOs ranging from  
12 funding research directly relevant to a standard,  
13 to funding research in general for their members.  
14 Purchasing documents. Helping create a platform  
15 where different players can get together.

16 And so I think there are a number of  
17 different mechanisms that can lead the government  
18 and our SDOs to work together happily to continue  
19 to create these important standards, and yet still  
20 satisfy that fundamental requirement that the law  
21 must be available to those that must obey it.

22 MR. BECKER: I'd just like to renew my  
23 objections, my standing objection concerning the  
24 fact that this line of discussion is regarding  
25 standards other than the 1999 standards, and is

1 therefore outside of the scope of the 30(b)(6)  
2 designation.

3 BY MR. HUDIS:

4 Q. Mr. Malamud, could you please turn to page  
5 31846 in Exhibit 26. At the top it says, "We  
6 understand that SDOs need money to fund their  
7 standards development efforts."

8 Where is that money supposed to come from?

9 MR. BECKER: Objection. The document  
10 speaks for itself. Objection again that this is a  
11 selected and partial quoting of a much longer  
12 sentence. Objection. Hypothetical. Objection.  
13 Calls for speculation; argumentative.

14 THE WITNESS: So the sentence, you read the  
15 first half. "We understand that SDOs need money to  
16 fund their standards developing efforts. But  
17 perhaps these organizations have begun treating  
18 this revenue stream as an opportunity for a  
19 financial windfall at the expense of U.S.  
20 citizens."

21 BY MR. HUDIS:

22 Q. Do you have any basis to say that for the  
23 plaintiffs as to the Standards for Educational and  
24 Psychological Testing?

25 A. No. That was not an example I had in mind



1 when I wrote that sentence.

2 Q. All right. And so that's -- so we  
3 discussed the second half. And I'm still  
4 concentrating on the first half of that sentence.  
5 "We understand the SDOs need to fund their  
6 standards development efforts."

7 Where is this revenue supposed to come  
8 from?

9 MR. BECKER: Objection. Once again this  
10 calls for speculation. It's a hypothetical. It --  
11 the document speaks for itself.

12 THE WITNESS: So I do not have to do sharer  
13 responsibility for any of the three plaintiffs. So  
14 I am merely speculating when I say how they should  
15 run their businesses. It is not my area of  
16 expertise.

17 But it seems to me that these three  
18 organizations have a number of revenue streams,  
19 some of them quite substantial. Some of them  
20 related to the standards. Some of them not related  
21 to the standards. And I believe that it's  
22 important that as the Internet changes things, as  
23 we become able to make the law available to all  
24 people, that perhaps that might lead to some  
25 adjustments in the business models. But I believe

1 there's a lot of money, particularly at the APA,  
2 for example, is a very large organization. I just  
3 don't believe that these organizations would stop  
4 developing these standards, because I believe that  
5 it's an important and crucial part of their --  
6 their mission.

7 And this is my personal speculation about  
8 their models. Again, I don't run the APA. I'm not  
9 their CFO, and so it's not necessarily an area that  
10 I know a lot about.

11 BY MR. HUDIS:

12 Q. This next question basically goes to the  
13 rest of the theories posited on page 31846 and  
14 31847 of Exhibit 26. So I'll just ask it straight  
15 out.

16 Is it your view, Mr. Malamud, that once the  
17 standard is incorporated by reference, the SDO who  
18 created that standard should look to other sources  
19 for revenue than the sale of that standard?

20 MR. BECKER: Objection. Calls for a legal  
21 conclusion. Objection. Argumentative; assumes  
22 facts not in evidence; hypothetical; calls for  
23 speculation. Objection to the extent that there is  
24 a characterization of two entire pages of this  
25 document that have not been discussed, and assumes

1 facts not in evidence.

2 THE WITNESS: We previously discussed this  
3 topic, and I believe that when a standard has been  
4 incorporated by reference into law, the original  
5 creator of that standard, the SDO, as we say here,  
6 has a number of revenue opportunities, including  
7 continued sale of the standard, and particularly an  
8 authenticated version, a redlined version, a  
9 commentary, a manual. There's all sorts of things  
10 one can do.

11 And the fact that this organization was the  
12 original creator of that document gives a  
13 tremendous credibility.

14 And so I just don't believe that the  
15 revenue streams will go away. I do believe that  
16 there is a potential, at least, for an adjustment  
17 of business models as time progresses, but that's  
18 the case for any organization.

19 BY MR. HUDIS:

20 Q. And what did you mean by "adjustment of  
21 business models"?

22 A. I think the Internet has forced government,  
23 industry, to adjust the way they do business. And  
24 I believe that that is equally true for private  
25 nonprofit organizations engaged in public missions,

1 such as the APA or such as Public.Resource.Org.

2 Q. And what do you mean by "adjustment" by the  
3 way one does business in this context?

4 A. I believe a continual assertion that a  
5 document that is the law cannot be copied without a  
6 license and special permission is an unfounded  
7 assertion. And in this letter we are discussing  
8 here in Exhibit 26, I gave a series of examples of  
9 revenue streams that were possible or already exist  
10 in many of these nonprofit organizations. And  
11 again, this is something that I believe any  
12 organization continually faces as technology  
13 progresses.

14 The printing press forced an adjustment in  
15 the business models of legal publishers. The  
16 Internet has forced a dramatic change in the  
17 business models of a large number of organizations.  
18 And I just think that that -- that SDOs should not  
19 be surprised that they may need to adjust their  
20 business models over time.

21 Q. And that adjustment of a business model  
22 will include foregoing a revenue stream from a  
23 straight sale of the standards as incorporated by  
24 reference?

25 MR. BECKER: Objection. Misstates prior

1 testimony; argumentative; asked and answered.

2 THE WITNESS: I am not convinced that the  
3 revenue stream would go away. And that is based on  
4 my actual experience putting information online  
5 that at one time was charged for, and then became  
6 available at no cost to citizens.

7 And as we discussed earlier in the case of  
8 the Securities and Exchange Commission, making the  
9 documents more broadly available, vastly increased  
10 the number of readers, lead to increased revenue  
11 streams for those documents.

12 The Bible is sold, despite the fact that  
13 it's available. You can take the Bible. You can  
14 copy it. You can print your own edition, but a lot  
15 of people buy the Bible from publishers because  
16 they want the particular edition or version or --  
17 or form factor that that Bible has.

18 BY MR. HUDIS:

19 Q. Mr. Malamud, what is your understanding of  
20 what a code or a statute is?

21 MR. BECKER: Objection. Calls for a legal  
22 conclusion; vague and ambiguous; assumes facts not  
23 in evidence; lacks foundation.

24 THE WITNESS: Did you mean code or statute?

25 BY MR. HUDIS:

1 Q. Yes.

2 A. Okay. So a statute is a law passed by a --  
3 typically a legislature is one how would normally  
4 use the word statute as opposed to ordinance, for  
5 example.

6 A code is a much broader term. It's short  
7 for codification.

8 Q. And how is a code to be distinguished from  
9 a standard?

10 MR. BECKER: Objection. Calls for a legal  
11 conclusion; lacks foundation; assumes facts not in  
12 evidence; competence.

13 THE WITNESS: The two terms are often used  
14 interchangeably. And, in fact, when laymen are  
15 talking about standards and codes, they are  
16 definitely used interchangeably, and in this case  
17 by "laymen," I include lawyers and SDO executives.  
18 So the terms really are -- are basically conflated.

19 BY MR. HUDIS:

20 Q. Synonymous, in your view?

21 A. Oh --

22 MR. BECKER: Objection. Misstates prior  
23 testimony.

24 THE WITNESS: So I believe codes equals  
25 standards in common usage.

1 Statutes are different than codes in the  
2 sense that a code is a codification of the statute.  
3 Each statute is put into a different portion of the  
4 code, and therefore functions as a stand-alone  
5 document to a particular area of the law, as do  
6 many standards.

7 BY MR. HUDIS:

8 Q. And what is your understanding of what a  
9 regulation is?

10 MR. BECKER: Objection. Vague; calls for a  
11 legal conclusion; lacks foundation.

12 THE WITNESS: So I'm not a lawyer and I  
13 don't know the technical term, but a regulation is  
14 what the executive branch does. A statute is what  
15 the legislative branch does. Both have the force  
16 of law.

17 BY MR. HUDIS:

18 Q. Mr. Malamud, what is Kickstarter?

19 MR. BECKER: Objection. Relevance.  
20 Objection. Objection to the extent that this line  
21 of questioning is going to be -- asked for the  
22 identities of any donors or potential private --  
23 private donors to Public.Resource.Org that have  
24 sought to keep their identities anonymous, and  
25 therefore have a privacy interest.

1 THE WITNESS: It's a crowd-funding  
2 platform.

3 BY MR. HUDIS:

4 Q. What is a crowd-funding platform?

5 A. It is a place where people can create a  
6 thing or an idea or a mission and get other people  
7 to give them money to carry out that objective.

8 Q. Does Public.Resource use Kickstarter to  
9 raise operating funds?

10 MR. BECKER: Objection. Irrelevant.  
11 Objection. Beyond the scope of the 30(b)(6)  
12 designation. Objection to the extent that this  
13 answer implicates the identities of any private  
14 donors who have a privacy right.

15 THE WITNESS: We did not use it to raise  
16 operating funds. We did use it.

17 BY MR. HUDIS:

18 Q. For what purpose?

19 A. For raising money for a specific task,  
20 which was the double-keying of standards.  
21 Double-keying of standards incorporated by  
22 reference into law.

23 (PLAINTIFFS' EXHIBIT 27 WAS MARKED.)

24 BY MR. HUDIS:

25 Q. Mr. Malamud, I show you what has been



1 marked as Exhibit 27 bearing production pages  
2 AERA\_APA\_NCME 31480 through 31485.

3 Have you seen this document before?

4 A. It appears to be the posting I made on  
5 Kickstarter for the double-key campaign I just  
6 described to you.

7 Q. Do you have any reason to doubt its  
8 authenticity, Exhibit 27?

9 A. No.

10 Q. Now, it says at the top, Mr. Malamud,  
11 "Funding unsuccessful. This project's funding goal  
12 was not reached on October 28th."

13 Do you see that?

14 A. Yes, I do.

15 Q. October 28th of what year?

16 A. 2013.

17 Q. And it says below the picture, "We are  
18 converting 28,040 public safety standards into  
19 valid HTML files to make them freely accessible and  
20 more usable."

21 Was that the reason you were seeking to  
22 raise funds through Kickstarter?

23 MR. BECKER: Objection. The document  
24 speaks for itself.

25 THE WITNESS: We were raising funds

1 specifically for the double-key operation of  
2 documents.

3 BY MR. HUDIS:

4 Q. And further down on page 31480, it says,  
5 "In the last two years we've posted 28,040 public  
6 safety codes from around the world."

7 Did you mean codes, or did you mean  
8 standards?

9 MR. BECKER: Objection. The document  
10 speaks for itself.

11 THE WITNESS: The terms are interchangeable  
12 in this context.

13 BY MR. HUDIS:

14 Q. And then it says, "We post all these  
15 documents on Law.Resource.Org and make them  
16 available on the Internet Archive."

17 Did you do that project in 2013?

18 MR. BECKER: Objection. The document  
19 speaks for itself. Objection. Vague. Objection.  
20 Lacks foundation.

21 THE WITNESS: And the answer is no, we  
22 didn't do it in 2013. The paragraph says, "In the  
23 last two years we've posted these standards."

24 So ...

25 BY MR. HUDIS:

1 Q. So you -- so you conducted that activity in  
2 2011 -- in 2011 and 2012, you said the last two  
3 years?

4 MR. BECKER: Objection. The document  
5 speaks for itself. Objection. Misstates  
6 testimony.

7 THE WITNESS: What I was saying there is  
8 from the two-year period ending September 28th,  
9 2013, which is the date that I published this blog  
10 post, we had posted those documents.

11 BY MR. HUDIS:

12 Q. And then if you would please turn to the  
13 text that spans from production pages 31482 to  
14 31483.

15 At the bottom of 31482 it says, "Your help  
16 matters. Your support is what makes our work  
17 possible."

18 Do you see that?

19 A. Yes, I do.

20 Q. All right. And then on the next page, you  
21 set to raise at least a hundred thousand dollars  
22 for this Kickstarter campaign?

23 A. Kickstarter requires that you set a minimum  
24 amount, and the minimum amount we set was a hundred  
25 thousand dollars.

1 Q. And you were looking to raise up to 1.2  
2 million dollars for this campaign?

3 MR. BECKER: Objection. The document  
4 speaks for itself.

5 THE WITNESS: The way Kickstarter works is  
6 you may get a lot more than the minimum, and it's  
7 considered good form to say what you would do if  
8 you happened to be wildly successful, which, of  
9 course, we were not.

10 BY MR. HUDIS:

11 Q. And what did the contributors get for their  
12 contribution to this campaign?

13 A. So contributors to Kickstarter can, of  
14 course, say they don't want anything, but at  
15 different levels there are a different set of  
16 prizes, I guess is the right word, equivalent to a  
17 gift that NPR might give you in a pledging  
18 campaign. And those are listed on the page Bates  
19 numbered 31481.

20 MR. BECKER: I'd just like to state an  
21 objection to the question for vague and misleading  
22 to the extent it asks what did people get for this  
23 campaign, their contributions to this campaign.

24 BY MR. HUDIS:

25 Q. Mr. Malamud, so the goal of this

1 Kickstarter campaign by Public.Resource was to  
2 raise money so that Public.Resource could post  
3 standards on the Internet and make them available  
4 to Internet users for free?

5 MR. BECKER: Objection. May -- misstates  
6 prior testimony. The document speaks for itself.

7 BY MR. HUDIS:

8 Q. You may answer.

9 MR. BECKER: Objection. Compound.  
10 Objection. Argumentative. Objection. Assumes  
11 facts not in evidence.

12 BY MR. HUDIS:

13 Q. Go ahead, Mr. Malamud.

14 A. The purpose of the campaign was to fund the  
15 double-keying of the standards.

16 Q. And what happened with those standards that  
17 were double-keyed?

18 MR. BECKER: Objection. Misleading.  
19 Objection. Vague and ambiguous.

20 THE WITNESS: None of those standards were  
21 double-keyed as a result of this effort. Right?  
22 This was an unsuccessful effort. This led to  
23 nothing. Except a tremendous amount of my time  
24 maintaining the Kickstarter campaign, but it was  
25 unsuccessful.

1 BY MR. HUDIS:

2 Q. Mr. Malamud, have you testified before  
3 Congress regarding incorporation by reference  
4 issues?

5 A. Yes, I --

6 MR. BECKER: Objection. Vague.

7 THE WITNESS: Yes, I have.

8 BY MR. HUDIS:

9 Q. When was that?

10 MR. BECKER: Objection. Vague and  
11 ambiguous.

12 THE WITNESS: Was it January 2014? I'm  
13 assuming you have a set of my -- my testimony. You  
14 can probably tell me. I know it was January.

15 BY MR. HUDIS:

16 Q. Of 2014?

17 A. I think it was '14, but I'm not certain  
18 about that.

19 (PLAINTIFFS' EXHIBIT 28 WAS MARKED.)

20 BY MR. HUDIS:

21 Q. Mr. Malamud, I show you a document that's  
22 been marked as Exhibit 28 bearing production  
23 numbers AERA\_APA\_NCME 31208 through 31250.

24 Do you recognize the document?

25 A. It's a badly mangled version of my

1 testimony, which was posted on our website.

2 MR. BECKER: Objection to the extent that  
3 this document may have errors or other content in  
4 it or may have -- otherwise be incorrectly  
5 formatted.

6 BY MR. HUDIS:

7 Q. Do you have any reason to doubt that this  
8 document is authentic?

9 A. Yeah, it appears to be my testimony.

10 Q. Mr. Malamud, could you please turn to page  
11 31215 of Exhibit 28.

12 A. Okay.

13 Q. And at the bottom it says, "In 2008  
14 Public.Resource.Org began posting state-mandated  
15 public safety codes. Although the model codes as  
16 developed by the SDOs had copyright restrictions,  
17 we based our the actions on the ruling of the Veeck  
18 case," and then you quote from it.

19 My question is, here in 2008 were the text  
20 of these model codes written into state laws or  
21 were they incorporated by reference?

22 MR. BECKER: Objection. Relevance.  
23 Objection. Compound. Objection. Vague and  
24 ambiguous; may call for a legal conclusion; assumes  
25 facts not in evidence; lacks foundation.

1 THE WITNESS: California Title 24 is a  
2 publication of the State of California that  
3 actually has the codes as part of the state  
4 regulations. So it is not incorporated by  
5 reference into the CCR.

6 Most states use the incorporation by  
7 reference mechanisms. So the answer to your  
8 question is both.

9 BY MR. HUDIS:

10 Q. Mr. Malamud, could you turn to page 31217  
11 in Exhibit 28.

12 A. Okay.

13 Q. And in the second paragraph, second  
14 sentence it says, "When SDOs have offered copies of  
15 standards to read with or without a fee, that  
16 access has come with significant limitations on  
17 use, and SDOs have jealously guarded against the  
18 right of anyone but themselves to communicate these  
19 provisions to others."

20 Do you see that?

21 A. I do.

22 Q. When was the first time that you were aware  
23 that an SDO had such a policy?

24 MR. BECKER: Objection. Vague. Objection.  
25 Lacks foundation and assumes facts not in evidence.



1 THE WITNESS: When I bought California  
2 Title 24 and at the beginning there was a big  
3 notice saying that I couldn't repeat this part of  
4 the law because of what appeared to be copyright  
5 assertions by the State of California.

6 BY MR. HUDIS:

7 Q. That was 2008?

8 A. I don't know when I bought Title 24, but I  
9 posted it in 2008. But shortly before that.

10 Q. If you could turn to page 31218 in Exhibit  
11 28.

12 A. Okay.

13 Q. It says at the top, "In March 2012  
14 Public.Resource.Org began the process of making  
15 available technical standards incorporated by  
16 reference into the CFR." That's the Code of  
17 Federal Regulations?

18 A. That's correct.

19 Q. At this time in March 2012, was  
20 Public.Resource only providing these documents in  
21 print?

22 MR. BECKER: Objection. Vague and  
23 ambiguous; lacks foundation and assumes facts not  
24 in evidence.

25 THE WITNESS: In March 2012 we made 25

1 copies of 73 carefully selected standards and  
2 mailed them, FedEx, actually, to ten standards  
3 organizations, seven government officials and asked  
4 for their comment on a whole series of issues that  
5 were raised by the lack of availability of the law.

6 BY MR. HUDIS:

7 Q. And continuing in that same paragraph,  
8 towards the end it says, and I realize I'm starting  
9 mid sentence, "In May 2012 we began the process of  
10 posting these standards on our website. We have  
11 posted a total of 969 standards that are required  
12 by federal law."

13 My question is, as of today, May 2015, how  
14 many standards incorporated into law have you  
15 posted on Public.Resource's website?

16 MR. BECKER: I'll restate the objection  
17 that this is beyond the 30(b)(6) designation. And  
18 I will object to the extent that it calls for a  
19 legal conclusion. And that it assumes facts not in  
20 evidence. And lacks foundation.

21 THE WITNESS: Is your question federal law?  
22 Because that's what this statement was in the  
23 testimony.

24 BY MR. HUDIS:

25 Q. Yes.

1           A. I believe there's approximately 1,020  
2 standards incorporated by reference into the CFR on  
3 the Law.Resource.Org website. And that number is a  
4 guess based on the number of PDF files in that  
5 particular directory. So it may be a different  
6 number.

7           Q. Mr. Malamud, could you turn to page 31222  
8 of Exhibit 28.

9           A. Okay.

10          Q. In the first paragraph on that page the  
11 last sentence it says, "Standards incorporated by  
12 reference have the force of law and are no  
13 different than text authored" -- or -- "authored  
14 directly by the government."

15                   Do you see that?

16          A. I do.

17          Q. What is the basis for that statement?

18                   MR. BECKER: Objection. Calls for a legal  
19 conclusion.

20                   THE WITNESS: One basis for that statement  
21 is a speech Mr. Bhatia made, which was quoted on  
22 the ANSI website that said standards incorporated  
23 by reference into law are the law. Very clear.

24 BY MR. HUDIS:

25          Q. What other basis do you have for making

1 that statement?

2 A. There are several bases. One is the  
3 compendium of copyright office procedures, both the  
4 second and the third edition published by the U.S.  
5 copyright Office, which has a strong statement  
6 about edicts of government, that the law must be  
7 available and has no copyright.

8 The creation of the Federal Register and  
9 the Code of Federal Regulations contains a great  
10 deal of legislative history and language about how  
11 the purpose of the official journals of government  
12 is to make the law available to people, and how  
13 standards incorporated by reference into the code  
14 are part and parcel of the Code of Federal  
15 Regulations. They are as if they are contained in  
16 the actual document.

17 MR. BECKER: I'd like to state a further  
18 objection to this line of testimony in that  
19 Mr. Malamud has been designated as a 30(b)(6)  
20 representative for factual bases for issues such as  
21 these, but not for any legal bases.

22 THE WITNESS: Yes. And I want to be very  
23 clear. I am not a lawyer. This is based on my  
24 reading of -- I've read quite a bit about this  
25 subject, but I'm not a professional in this field.

1 But I have read court opinions and other documents  
2 and this is my -- my assessment as a layman of  
3 these materials.

4 BY MR. HUDIS:

5 Q. Could you turn to page 31223 of Exhibit 28.

6 A. Yes.

7 Q. And I am directing you to the second full  
8 paragraph where it starts, "Reading the law."

9 Do you see that?

10 A. I do.

11 Q. And it says in the second sentence,  
12 "Activities that our organization undertakes, such  
13 as putting all the standards required by law in one  
14 location with common access methods or rekeying the  
15 texts in order to make them searchable and  
16 available on new platforms, are purportedly  
17 prohibited under this scheme."

18 Do you see that?

19 A. I do.

20 Q. To what scheme were you referring?

21 MR. BECKER: Objection. The document  
22 speaks to itself -- excuse me. Objection. The  
23 document speaks for itself. Objection. Lacks  
24 foundation and assumes facts not in evidence.

25 THE WITNESS: If you go two paragraphs

1 back, the paragraph beginning on Bates number 31222  
2 and ending at the top of 31223, you'll see that my  
3 testimony describes the concept of the legal  
4 reading room in which standards development  
5 organizations have recently begun posting read-only  
6 copies of standards with restricted functionality  
7 such as no printing, terms of use, license  
8 agreements and a variety of other restrictions  
9 that.

10 BY MR. HUDIS:

11 Q. And that was the scheme to which you were  
12 referring?

13 A. The legal reading room scheme, yes.

14 Q. Mr. Malamud, on page 31227 of Exhibit 28,  
15 it says at the bottom, "As this committee considers  
16 revisions to the Copyright Act, there is one simple  
17 change that would make a world of difference to the  
18 functioning of our system of government, which is  
19 to specify, as the Copyright Office stated, that  
20 edicts of government are not copyrightable for  
21 reasons of public policy."

22 Do you see that?

23 A. I do.

24 Q. Has this suggested text ever been enacted  
25 as part of the U.S. Copyright Act, to the best of

1 your knowledge?

2 MR. BECKER: Objection. Calls for a legal  
3 conclusion.

4 THE WITNESS: This was January 2014  
5 testimony. Chairman Goodlatte has been undergoing  
6 a two-year process of revision of the Copyright  
7 Act, and that -- that process is currently  
8 underway. This testimony was invited as -- as part  
9 of that examination by the chairman.

10 BY MR. HUDIS:

11 Q. As you and I sit here today in May of 2015,  
12 has the language, "edicts of government are not  
13 copyrightable for reasons of public policy," been  
14 enacted into the U.S. Copyright Act?

15 MR. BECKER: Objection. Calls for a legal  
16 conclusion. Objection. Argumentative; lacks  
17 foundation; assumes facts not in evidence.  
18 Objection. Competence.

19 THE WITNESS: There was a long-standing  
20 public policy, and that's what the Copyright Office  
21 was talking about. There has not been a U.S.  
22 statute passed in the last couple years that deals  
23 specifically with this topic.

24 I believe, however, that if one looks  
25 carefully at the mechanisms of incorporation by

1 reference that are specified in statutes such as  
2 the APA, at least it's my reading, again, as an  
3 amateur, that the policy is that the law must be  
4 available and that that would include standards  
5 that are incorporated by reference.

6 BY MR. HUDIS:

7 Q. Thank you, Doc -- thank you, Mr. Malamud,  
8 but that does not answer my question.

9 My question is, yes or no, has the  
10 language, "as of today edicts of government are not  
11 copyrightable for reasons of public policy," been  
12 enacted into the U.S. Copyright Act?

13 MR. BECKER: All the same objections and  
14 asked and answered.

15 THE WITNESS: I did answer your question.  
16 I said that there had not been a statute in the  
17 last two years that -- that included -- in the  
18 Copyright Act that included this phrase.

19 BY MR. HUDIS:

20 Q. Mr. Malamud, generally what do you know  
21 about the American Educational Research  
22 Association?

23 MR. BECKER: Objection. Vague.

24 THE WITNESS: Oh, I don't know a huge  
25 amount. I know they're suing me.



1 BY MR. HUDIS:

2 Q. Besides that.

3 A. I've looked at their website briefly,  
4 particularly after the litigation commenced, to  
5 learn a little bit more about their activities.

6 Q. Do you know what they do?

7 MR. BECKER: Objection. Vague.

8 THE WITNESS: They hold meetings. They  
9 just had their annual meetings. They had all sorts  
10 of what appeared to be very interesting talks about  
11 education. They lobby for education funding to  
12 their membership is my impression, but again, I  
13 don't know the organization very well. But they  
14 advocate for more money flowing to research and  
15 education, a noble cause.

16 BY MR. HUDIS:

17 Q. What do you know about the American  
18 Psychological Association?

19 MR. BECKER: Objection. Vague; calls for a  
20 narrative.

21 THE WITNESS: Oh, I know a little bit about  
22 the APA. When I was in -- sophomore in college I  
23 did an internship with the National Association of  
24 Private Psychiatric Hospitals, and as part of that  
25 I spent a few months in Washington and attended

1 some APA functions. So I -- I got to see a little  
2 bit about what -- what they did and how they did  
3 it.

4 BY MR. HUDIS:

5 Q. What do you know about the National Council  
6 on Measurement and Education?

7 MR. BECKER: Objection. Vague; calls for a  
8 narrative.

9 THE WITNESS: Almost nothing.

10 BY MR. HUDIS:

11 Q. Do you know what kind of work the AERA  
12 does?

13 MR. BECKER: Objection. Vague.

14 THE WITNESS: Well, I know one piece of  
15 work they do, which is they coordinate and publish  
16 the Standards for Educational and Psychological  
17 Testing.

18 BY MR. HUDIS:

19 Q. Do you know what kind of work the APA does?

20 MR. BECKER: Objection. Vague.

21 THE WITNESS: I know they're a very large  
22 organization that is involved in a number of  
23 things. I recently read about their involvement in  
24 the torture program, for example. So I know about  
25 that from news reports.

1 BY MR. HUDIS:

2 Q. What do you know about the work that the  
3 NCME does?

4 MR. BECKER: Objection. Vague.

5 THE WITNESS: Nothing beyond the name of  
6 the organization. Measurement education.

7 BY MR. HUDIS:

8 Q. Besides the standards that we are  
9 discussing today, do you know anything about the  
10 publications of either the AERA, the APA or the  
11 NCME?

12 MR. BECKER: Objection. Vague; calls for a  
13 narrative.

14 THE WITNESS: I briefly looked at the AERA  
15 bookstore and saw a listing of the various  
16 publications that they did, but they don't mean  
17 much to me.

18 BY MR. HUDIS:

19 Q. Did you look at the APA bookstore?

20 MR. BECKER: Same objections.

21 THE WITNESS: I did, looking for the  
22 standards at issue, and found that they were not  
23 available on the APA bookstore, and that brought me  
24 over to the AERA bookstore. So that was the extent  
25 of that examination.

1 MR. HUDIS: Just for the benefit of the  
2 court reporter, AERA is A-E-R-A. Good.

3 BY MR. HUDIS:

4 Q. What do you know about the Standards for  
5 Educational and Psychological Testing?

6 MR. BECKER: Objection. Vague; calls for a  
7 narrative.

8 To the extent that any of the witness's  
9 knowledge comes from attorney-client  
10 communications, I'll instruct him not to answer,  
11 with that particular knowledge.

12 Lacks foundation.

13 THE WITNESS: So I'm not an expert in this  
14 area, but the standards at issue are standards that  
15 specify how to create tests that are valid and  
16 fair. So it is a standard for the creation of  
17 tests that are used in a variety of applications.

18 BY MR. HUDIS:

19 Q. What is your understanding of who prepared  
20 the standards? All right. So withdraw the  
21 question.

22 When I refer from now on to "the  
23 standards," I am referring to the Standards for  
24 Educational and Psychological Testing. Is that  
25 okay?

1 A. The 1999 version, or just in general?

2 Q. I will specify.

3 A. Okay.

4 Q. But so we have an understanding between the  
5 two of us, if I refer to "the standards," it's the  
6 Standards for Educational and Psychological  
7 Testing.

8 A. I'm fine with that.

9 Q. Do you know who prepared the standards?

10 MR. BECKER: Objection. Vague. Objection.  
11 May call for a legal conclusion.

12 To the extent that the answer to this  
13 question requires the witness to divulge any  
14 attorney-client confidential information, I will --  
15 I will instruct the witness not to divulge that  
16 privileged information.

17 Assumes facts not in evidence and lacks  
18 foundation.

19 THE WITNESS: So I know there was a  
20 committee involved in the preparation of the  
21 standards. It appears all three of the editions,  
22 '85, '99 and 2014.

23 My impression is that there were a large  
24 number of other individuals in the three  
25 organizations and others involved as well in this

1 process.

2 BY MR. HUDIS:

3 Q. Do you know who publishes the standards?

4 MR. BECKER: Objection. Calls for a legal  
5 conclusion.

6 Objection to the extent that the witness  
7 has learned this information from -- through  
8 attorney-client privileged communications, I'll  
9 instruct the witness not to divulge that  
10 information.

11 THE WITNESS: I believe it's AERA and the  
12 other two organizations are the ones certainly that  
13 are claiming to be the publisher and owner of the  
14 copyright, hence the litigation that we're  
15 currently engaged in.

16 BY MR. HUDIS:

17 Q. Do you know the purpose of the standards?

18 MR. BECKER: Objection. Vague.

19 THE WITNESS: Yeah. It's what we recently  
20 discussed, the creation of fair and accurate and  
21 valid tests that are used in a variety of  
22 applications.

23 BY MR. HUDIS:

24 Q. And are you familiar with how the standards  
25 are updated over time?

1 MR. BECKER: Objection. Vague.

2 Objection. To the extent that any of this  
3 information has come from attorney-client  
4 communications, I will instruct the witness not to  
5 divulge any privileged information.

6 THE WITNESS: I'm aware that they are  
7 updated. I'm not terribly clear on the exact  
8 process that the organizations went through to do  
9 that.

10 BY MR. HUDIS:

11 Q. Do you know who uses the standards?

12 MR. BECKER: Objection. Vague.

13 Again, to the extent that this answer  
14 requires the divulging of any attorney-client  
15 privileged communications, I'll instruct the  
16 witness not to divulge that information.

17 Competence. Lacks foundation.

18 THE WITNESS: So I know some of the people  
19 that use the standard. I know that the Department  
20 of Education has incorporated by reference into its  
21 regulations. So I am -- I know that the Department  
22 of Education has people that use it.

23 I know a lot of state governments are  
24 putting together tests that conform to the  
25 standards.

1 I believe there are a number of other  
2 agencies, I believe Office of Personnel Management,  
3 I believe Department of Defense, a number of state  
4 organizations, are all users of the standard  
5 because they specify that it shall be used.

6 BY MR. HUDIS:

7 Q. Do you know of any non-governmental users  
8 of the standards?

9 MR. BECKER: All the same objections.  
10 Vague.

11 To the extent that there is any information  
12 that the witness has learned from his attorneys, I  
13 will instruct him not to divulge this privileged  
14 information.

15 THE WITNESS: I know that the Educational  
16 Testing Service, ETS and a number of organizations  
17 that create tests, are users of the standard, and  
18 the reason I know that is there's been a series of  
19 procurements by government organizations that  
20 require the use of the standard.

21 BY MR. HUDIS:

22 Q. Do you know of any other non-governmental  
23 users of the standards?

24 MR. BECKER: All the same objections. Also  
25 object for competence.



1 THE WITNESS: My sister read it in the  
2 course of her doctoral course work.

3 BY MR. HUDIS:

4 Q. And what was your sister's doctoral course  
5 work?

6 A. On, I want to state this properly. I  
7 believe physical and rehabilitative therapy. A  
8 subset of psychology.

9 Q. How did the standards first come to your  
10 attention?

11 MR. BECKER: Objection. Vague. Objection.  
12 Ambiguous.

13 THE WITNESS: I was looking at the  
14 standards incorporated by reference under the Code  
15 of Federal Regulations, and the standards at issue  
16 were one of the ones that were specified.

17 BY MR. HUDIS:

18 Q. And what year was that?

19 A. Probably 2012. Early 2012.

20 Q. When did Public.Resource --

21 A. Might have been earlier. Might have been  
22 earlier. I'm not sure.

23 Q. Sometime in 20 -- in 2012?

24 A. Coming to my attention in the sense of  
25 remembering it now, yes.

1 Q. What, if anything, made you interested in  
2 acquiring the standards?

3 A. It was --

4 MR. BECKER: Objection. Vague.

5 THE WITNESS: -- incorporated by reference  
6 into the Code of Federal Regulations.

7 BY MR. HUDIS:

8 Q. When did Public.Resource first make the  
9 decision to post the standards to one of its  
10 websites?

11 MR. BECKER: Objection. Vague. Objection.  
12 Lacks foundation. Objection. May call for a legal  
13 conclusion.

14 THE WITNESS: So it would have been  
15 sometime after obtaining a copy of the standard and  
16 examining it and satisfying myself that, in fact,  
17 it was the document that was incorporated by  
18 reference, and sometime between the procurement,  
19 which I believe was in May 2012, and the actual  
20 posting, which I believe was in July 2012.

21 BY MR. HUDIS:

22 Q. So how did Public.Resource come to the  
23 decision to post the standards on one of its  
24 websites?

25 MR. BECKER: Objection. Vague and

1     ambiguous.

2             THE WITNESS: By determining that it was  
3     incorporated by reference and that this particular  
4     document that I held in my hand was the specific  
5     document that had been incorporated by reference.

6     BY MR. HUDIS:

7             Q. On which of its websites did  
8     Public.Resource post the standards?

9             A. Law.Resource.Org.

10            Q. Mr. Malamud, this question is directed to  
11     you personally.

12            Do you claim any copyright ownership  
13     interest in the Standards for Educational and  
14     Psychological Testing?

15            MR. BECKER: Objection. Calls for a legal  
16     conclusion. Objection. Argumentative; lacks  
17     foundation; competence.

18            THE WITNESS: I do not.

19     BY MR. HUDIS:

20            Q. Does Public.Resource claim any copyright  
21     ownership interest in the Standards for Educational  
22     and Psychological Testing?

23            MR. BECKER: All the same objections.

24            THE WITNESS: We do not. We do not.

25     BY MR. HUDIS:

1 Q. When did you first procure the standards?

2 A. May 2012.

3 Q. What was the year of the publication of the  
4 particular standards that you procured?

5 MR. BECKER: Objection. Vague; assumes  
6 facts not in evidence.

7 THE WITNESS: I don't know the year of the  
8 publication. I know it's a 1999 edition.

9 BY MR. HUDIS:

10 Q. That's what I wanted to know. Thank you.

11 Have you procured any earlier or subsequent  
12 versions of the standards?

13 A. Subsequent to the commencement of  
14 litigation, I purchased a copy of the 2014 and 1985  
15 standards because I wanted to see what was in them.  
16 I have not posted those documents.

17 Q. Mr. Malamud, did you personally procure the  
18 1999 standards?

19 A. I did.

20 Q. From -- from what source did you procure  
21 the 1999 standards?

22 A. It's --

23 MR. BECKER: Objection. Vague.

24 THE WITNESS: It's called the Amazon  
25 Marketplace. So I paid my money to Amazon, and

1 that was through a used book seller that actually  
2 had the document and sent it to me.

3 (PLAINTIFFS' EXHIBIT 29 WAS MARKED.)

4 BY MR. HUDIS:

5 Q. I marked the next document as Exhibit 29,  
6 and it is Defendant's Amended Responses to  
7 Plaintiff's Interrogatories.

8 Mr. Malamud, do you recognize this  
9 document?

10 A. I do.

11 Q. Mr. Malamud, if you could turn to the last  
12 page. On page 15, is that your signature?

13 A. Yes, it is.

14 Q. Mr. Malamud, could you please turn to the  
15 question and answer to interrogatory number 1 on  
16 page 4 of Exhibit 29.

17 A. I'm there.

18 Q. And it says in the third paragraph of that  
19 interrogatory answer, "Public.Resource purchased a  
20 printed copy from," quote, "The Book Grove,"  
21 unquote, "a used book seller on May 17, 2012."

22 And does this interrogatory answer verify  
23 the source from which you procured the 1999  
24 standards?

25 A. Yes. The Book Grove was the used book

1 seller on the Amazon marketplace.

2 Q. And does interrogatory answer number 1 also  
3 state the date of purchase?

4 A. It does.

5 Q. And that date is May 17th, 2012?

6 A. That is correct.

7 MR. BECKER: Objection. The interrogatory  
8 speaks for itself.

9 (PLAINTIFFS' EXHIBIT 30 WAS MARKED.)

10 BY MR. HUDIS:

11 Q. Mr. Malamud, have you taken the time to  
12 read what has now been marked as Exhibit 30?

13 A. I have.

14 Q. And the document Exhibit 30 bears  
15 production pages PROAERA 446 through 5 --  
16 through -- well --

17 A. 446.

18 MR. HUDIS: PROAERA 446, PROAERA 447 and  
19 PROAERA 544.

20 Counsel, just so we have an understanding,  
21 this is a part of a much larger document of many  
22 other purchases that Carl Malamud made. We are  
23 only concentrating on a specific purchase.

24 THE WITNESS: I don't have 544 here. I  
25 have two pages.

1 BY MR. HUDIS:

2 Q. Okay. So my colleague, Ms. Cappaert, has  
3 told me that I've misspoken. So I'm going to  
4 re-identify the document.

5 Exhibit number 30 should contain production  
6 pages PROAERA 446 and 447.

7 A. That's correct.

8 Q. I apologize, Mr. Malamud. That was my  
9 error.

10 A. Oh, that's okay.

11 Q. Okay. So, Mr. Malamud, if you could take a  
12 look at the document. Do you have any doubt that  
13 this document is authentic?

14 A. No, I do not.

15 MR. HUDIS: Counsel, can you stipulate that  
16 Exhibit 30 is a business record of  
17 Public.Resource?

18 MR. BECKER: It appears to be a document  
19 produced by Public.Resource that is a receipt.

20 MR. HUDIS: I'll take that representation.  
21 Thank you.

22 BY MR. HUDIS:

23 Q. Mr. Malamud, Exhibit 30, is this the  
24 receipt for the 1999 standards book that you  
25 purchased?

1 A. Yes, it is.

2 Q. And for what purpose did you procure the  
3 1999 standards?

4 A. To look at the document and ascertain that  
5 it was, in fact, the document incorporated by  
6 reference into the Code of Federal Regulations.

7 (PLAINTIFFS' EXHIBIT 31 WAS MARKED.)

8 BY MR. HUDIS:

9 Q. Mr. Malamud, I show you what's been marked  
10 as Exhibit 31. It bears production numbers  
11 AERA\_APA\_NCME 1 through 201.

12 A. Do you want me to read the document?

13 Q. No, I do not.

14 A. Okay.

15 Q. Mr. Malamud, is this the book that you  
16 purchased from The Book Grove on May 17, 2012?

17 MR. BECKER: Objection. Vague. Objection.  
18 The witness has been instructed not to read the  
19 document. Objection. Misleading.

20 BY MR. HUDIS:

21 Q. Mr. --

22 A. I don't know if this is the one that I  
23 bought, but this appears to be a copy of the  
24 standards at issue.

25 Q. Did you buy the standards at issue from the



1 Book Grove?

2 A. Yes.

3 Q. Mr. Malamud, according to Exhibit 30, you  
4 paid \$64.48 for the book plus shipping and  
5 handling.

6 A. 68.47, including shipping and handling,  
7 yes.

8 Q. Mr. Malamud, did you ever attempt to  
9 acquire a copy of the 1999 standards for free?

10 A. I think the answer to that is yes.

11 Q. From where?

12 A. See, I'm not sure "free" is the right term.  
13 I submitted a Freedom of Information Act request  
14 that included the standards at issue. That request  
15 was denied. So I have no idea if there would have  
16 been a charge or not in making that data available.  
17 So that's a qualified yes.

18 (PLAINTIFFS' EXHIBIT 32 WAS MARKED.)

19 BY MR. HUDIS:

20 Q. Mr. Malamud, I show you what's been marked  
21 as Exhibit 32 bearing pro -- pages PROAERA 10153  
22 through 10195.

23 Do you recognize the document?

24 A. It appears to be a Freedom of Information  
25 Act request I submitted to Mr. Stern, who is the

1 general counsel of the National Archives.

2 Q. Is the National Archives and Records  
3 Administration also known as NARA, N-A-R-A?

4 A. Yes, it is.

5 Q. And this letter of July 14th, 2009, Exhibit  
6 32, this was a freedom of information request by  
7 Public.Resource?

8 A. Yes, it was.

9 MR. HUDIS: Counsel, can you stipulate that  
10 Exhibit 32 is a business record of Public.Resource?

11 MR. BECKER: I'm not certain if it  
12 constitutes a business record by Public.Resource,  
13 but it is a document produced by Public.Resource.

14 BY MR. HUDIS:

15 Q. Mr. Malamud, so was this document, Exhibit  
16 32, created on or about July 14th, 2009?

17 A. It's when I sent it, it is.

18 Q. Have you kept a copy of Exhibit 32 in  
19 Public.Resource's records?

20 A. Yes, we disclosed it to you.

21 Q. And writing such letters such as Exhibit 32  
22 is the regular practice of Public.Resource?

23 MR. BECKER: Objection. Vague.

24 THE WITNESS: I don't know about regular  
25 practice, but it was certainly not unusual for me

1 to write a letter.

2 BY MR. HUDIS:

3 Q. A letter like this, Exhibit 32?

4 A. Well, that particular FOIA request was  
5 fairly unique at the time, and I don't believe we  
6 did that again for quite a while. So ...

7 Q. You've done it on more than one occasion?

8 A. FOIA requests?

9 Q. Yes.

10 A. Oh, yeah, I've submitted a lot of FOIA  
11 requests over time.

12 Q. And that's part of what you do during your  
13 business at Public.Resource?

14 A. If -- if there is a reason to request  
15 government information that is not otherwise  
16 available, yes.

17 Q. What types of materials were you attempting  
18 to obtain by this FOIA request of Exhibit 32?

19 A. Standards incorporated by reference into  
20 the Code of Federal Regulations.

21 Q. Mr. Malamud, could you turn to production  
22 page 10154 of Exhibit 32.

23 A. Okay.

24 Q. Do you see the text under "What I am  
25 specifically asking for"?

1 A. I do.

2 Q. So reading this first paragraph and its  
3 bullet points that follow, were you asking  
4 Mr. Stern that either the government post these  
5 items to the Internet or allow Public.Resource to  
6 do it?

7 MR. BECKER: Objection. Vague and  
8 ambiguous. The document speaks for itself.  
9 Possibly compound.

10 THE WITNESS: I outlined three different  
11 ways that the FOIA request could be satisfied.

12 BY MR. HUDIS:

13 Q. And in the next paragraph you say, "I am  
14 particularly interested in technical standards for  
15 Underwriters Laboratories, the American National  
16 Standards Institute and other standards that are  
17 expensive and unavailable on the Internet and in  
18 public libraries."

19 Do you see that?

20 A. I do.

21 Q. Would you consider the 1999 standards to be  
22 expensive?

23 MR. BECKER: Objection. Vague. Objection.  
24 Lacks foundation; assumes facts not in evidence.

25 THE WITNESS: I think a \$50 document is

1 expensive. Whether it's unduly expensive is  
2 another question. But I think \$50 is a lot of  
3 money.

4 BY MR. HUDIS:

5 Q. Do you think the price for which you paid  
6 for the standards, to be unduly expensive?

7 A. Of this particular standard?

8 Q. Yes.

9 A. Well, I guess it's by comparison to what?  
10 And who was doing the purchasing; right? So --

11 Q. While you were doing the purchasing?

12 A. I was doing the purchasing, and I have  
13 spent considerable funds purchasing standards that  
14 are much more expensive, and so by comparison to  
15 the Underwriters Laboratory \$800 price, 50 is  
16 certainly less.

17 I do think that's a lot of money though.

18 Q. And on page 10155 of Exhibit 32, you were  
19 requesting a public-interest fee waiver. Do you  
20 see that?

21 A. I do.

22 Q. All right. So by this public-interest fee  
23 waiver, were you asking NARA to provide the  
24 standards, whose list is attached at the back of  
25 Exhibit 32, to Public.Resource for free?

1 MR. BECKER: Objection. The document  
2 speaks for itself; assumes facts not in evidence  
3 and lacks foundation.

4 THE WITNESS: That's a standard mechanism  
5 in a FOIA request is if the request is in the  
6 public interest, to request a fee waiver and yes,  
7 we did, in fact, request one.

8 BY MR. HUDIS:

9 Q. So you were asking for NARA to provide  
10 copies of these standards for free?

11 A. Well, no. We were asking for a  
12 public-interest fee waiver, and it's up to the  
13 government to decide if they're going to waive all  
14 or some of the fees.

15 MR. BECKER: Let me just say, give me a  
16 moment to object.

17 THE WITNESS: Sorry about that.

18 MR. BECKER: All the same objections and  
19 also asked and answered and mischaracterizes  
20 testimony.

21 BY MR. HUDIS:

22 Q. Mr. Malamud, could you look at production  
23 page 10156 of Exhibit 32.

24 A. Okay.

25 Q. Up at the top of the page it says in the

1 first bullet point, "Public.Resource.Org maintains  
2 one of the most popular and visible document  
3 servers on the Internet for legal information and  
4 have demonstrated public expertise to disseminate  
5 this information to a broad spectrum of the  
6 public."

7 What was the basis for you making that  
8 statement?

9 MR. BECKER: Objection. Misquotes the  
10 document. The document speaks for itself. Vague.

11 THE WITNESS: It's based on the fact that  
12 we were at the time serving the opinions of the  
13 court of appeals of the United States, which were  
14 unavailable in any other location on the Internet,  
15 and the service was very popular.

16 BY MR. HUDIS:

17 Q. And what did you mean by "very popular"?

18 A. When I would go to a conference, a lot of  
19 people would come up to me and say, "This is really  
20 great that the court of appeal opinions are  
21 available on the Internet."

22 Q. Mr. Malamud, could you look at page 10157  
23 of Exhibit 32. At the top of that page it says,  
24 "Given the lack of any specific regulations  
25 governing disclosure of materials incorporated by

1 reference, given the importance of these core  
2 materials, and given the clear unqualified language  
3 of the president, NARA should disclose this  
4 material."

5 Do you see that?

6 A. I do.

7 Q. All right. I'm concentrating on just the  
8 first part of that sentence.

9 What is the basis for saying "there is a  
10 lack of any specific regulations concerning  
11 disclosure of materials incorporated by reference"?

12 MR. BECKER: Objection. The document  
13 speaks for itself; calls for speculation;  
14 competence; assumes facts not in evidence.

15 THE WITNESS: I meant that the Office of  
16 the Federal Register on their website had taken --  
17 not addressed the issue of public availability of  
18 these -- these documents.

19 BY MR. HUDIS:

20 Q. "These documents," meaning what, standards?

21 A. The standards incorporated by reference  
22 under the Code of Federal Regulations.

23 Q. Mr. Malamud, attached to the letter of  
24 Exhibit 32 is an appendix. What is this an  
25 appendix of?



1 MR. BECKER: Objection. The document  
2 speaks for itself.

3 THE WITNESS: It is a listing of standards  
4 incorporated by reference, which I obtained by  
5 looking at the National Institute of Standards and  
6 Technology database of standards incorporated by  
7 reference.

8 BY MR. HUDIS:

9 Q. And was this a list of standards that  
10 Public.Resource was asking NARA to provide?

11 MR. BECKER: Objection. The document  
12 speaks for itself.

13 THE WITNESS: Yes. This is standards  
14 incorporated by reference, and this was a FOIA  
15 request for all standards incorporated by  
16 reference.

17 BY MR. HUDIS:

18 Q. And you were asking that NARA provide these  
19 standards incorporation by reference pursuant to a  
20 fee waiver?

21 MR. BECKER: Objection. The document  
22 speaks for itself; mischaracterizes -- potentially  
23 mischaracterizes prior testimony.

24 THE WITNESS: There was a fee waiver, but  
25 there was also an offer to pay funds as well. So

1 there was -- this is a standard FOIA request in  
2 which you say, "I'm willing to pay a certain amount  
3 of money. If it costs more than that amount of  
4 money, please contact me." And by the way, this is  
5 also in the public interest.

6 BY MR. HUDIS:

7 Q. Where in --

8 A. On Bates number 10156, the section  
9 limitation of fees. "If you decide that we qualify  
10 neither as news media or for a public interest fee  
11 waiver, we agree to pay fees up to a maximum of  
12 \$5,000. If \$5,000 is not sufficient," and it goes  
13 on to say, "please provide a partial response with  
14 \$5,000 worth of documents."

15 Q. So you were willing to pay up to \$5,000 to  
16 procure the standards listed on appendix A?

17 MR. BECKER: Objection. Mischaracterizes  
18 prior testimony; vague and ambiguous; misleading.

19 THE WITNESS: It says "\$5,000 worth of  
20 documents." So as to how many documents that would  
21 end up being, we don't know. And since FOIA didn't  
22 grant the FOIA request -- NARA didn't grant the  
23 FOIA request, it's really moot.

24 BY MR. HUDIS:

25 Q. And on page 10167 of Exhibit 32, is the

1 1999 edition of the standards one of the documents  
2 you were asking NARA for?

3 MR. BECKER: Objection. The document  
4 speaks for itself.

5 THE WITNESS: 10167? Is that the right  
6 number?

7 BY MR. HUDIS:

8 Q. Yes, sir.

9 A. Because I'm not seeing a 10167. I'm  
10 looking here to see if it's someplace else. Can  
11 you direct me to where on that page?

12 Q. It's the equivalent of appendix A, page 10.

13 A. I'm on that page. I'm just not seeing it.  
14 I'm sorry. I may be missing it.

15 Q. Do you see --

16 A. I see a bunch of ANSI.

17 Q. Keep going.

18 A. AOAC, the officials methods. APA. Oh, I  
19 see. It's listed under APA. That's because the  
20 NIST database listed it under the American  
21 Psychological Association. Yes, I do see -- in  
22 fact, see the standards at issue here.

23 Q. All right. So just so we have a clean  
24 record, and on page 10167 of Exhibit 32, is the  
25 1999 edition of the standards one of the documents

1 you were asking NARA for?

2 MR. BECKER: Objection. Misstates prior  
3 testimony; the document speaks for itself; asked  
4 and answered; vague.

5 THE WITNESS: The standards at issue are,  
6 in fact, listed on page 10 of appendix A of my FOIA  
7 request.

8 BY MR. HUDIS:

9 Q. Which is the equivalent of production  
10 page --

11 A. 10167.

12 Q. Thank you, sir.

13 (PLAINTIFFS' EXHIBIT 33 WAS MARKED.)

14 BY MR. HUDIS:

15 Q. So, Mr. Malamud, I show you Exhibit 33,  
16 which has been -- Exhibit 33, which bears  
17 production numbers PROAERA 10247 through 10249.

18 Do you recognize the document?

19 A. It appears to be the response from the  
20 Office of the Federal Register to my FOIA request.

21 Q. So Exhibit 33 is the response to your  
22 letter of Exhibit 32?

23 A. Yes.

24 Q. Do you have any reason to doubt the  
25 authenticity of Exhibit 33?

1 A. I do not.

2 Q. Mr. Malamud, I'm looking now at  
3 Mr. Mosley's letter of Exhibit 33. And I draw your  
4 attention to the third paragraph, the last sentence  
5 in that paragraph.

6 "While the standards themselves are not set  
7 out in their entirety in the CFR text, there was  
8 enough information set out in the regulation text  
9 that affected parties can obtain or inspect these  
10 standards in order to comply with the regulation."

11 Do you agree with that statement, with  
12 respect to the 1999 standards?

13 MR. BECKER: Objection. Potentially seeks  
14 legal conclusion; argumentative; lacks foundation.

15 THE WITNESS: No, I do not believe that  
16 there is enough information set out in the CFR  
17 text. I believe one would need to consult the  
18 standards at issue in order to understand what they  
19 specify.

20 MR. BECKER: I'm sorry, are we going off  
21 the record?

22 MR. HUDIS: He has to. We've got five  
23 minutes left.

24 THE VIDEOGRAPHER: This marks the end of  
25 Disc 3, Volume 1 in the deposition of Carl Malamud.

1 The time is 4:23 and we are off the record.

2 (Recess taken.)

3 THE VIDEOGRAPHER: This marks the beginning  
4 of Disc 4, Volume 1 in the deposition of Carl  
5 Malamud.

6 The time is 4:33, and we are on the record.

7 BY MR. HUDIS:

8 Q. Mr. Malamud, I'm referring you to Exhibit  
9 33, page 10247 at the bottom. And in his letter to  
10 you, Mr. Mosley says, "Contrary to your  
11 suggestions, there is no federal law, regulation or  
12 presidential memorandum that requires the standards  
13 incorporated by reference to be set out in full  
14 text in the CFR or posted verbatim on the National  
15 Archives and Records Administration, NARA,  
16 website."

17 Mr. Malamud, do you agree or disagree with  
18 that statement?

19 A. I disagree with that statement.

20 Q. Why?

21 A. There are certainly a series of  
22 presidential memoranda having to do with the  
23 availability of government information. President  
24 Obama has been extremely aggressive in his  
25 open-government platform in a series of memoranda

1 on availability of documents.

2 In terms of federal law, I believe very  
3 strongly that it is a long-standing public policy  
4 in the United States that the law has no copyright.  
5 That goes back to the decision of Wheaton v.  
6 Peters.

7 Again, I'm not a lawyer, but I have read  
8 fairly extensively on this very specific topic, and

9 I believe if you look at everything from  
10 supreme court decisions to U.S. Copyright Office  
11 policy, it's very clear that the law has no  
12 copyright and must be available to citizens to  
13 inform themselves as to their rights and their  
14 obligations.

15 Q. Another comment that -- or another  
16 statement that Mr. Mosley made in his letter of  
17 Exhibit 33, you already said you disagreed with.  
18 "There is enough information set out in the  
19 regulation text that affected -- that affected  
20 parties can obtain or inspect these standards in  
21 order to comply with the regulation."

22 And you said you disagreed with that;  
23 correct?

24 A. That is correct.

25 Q. Why do you disagree with that statement?

1 MR. BECKER: Objection to the extent that  
2 calls for a legal conclusion.

3 THE WITNESS: Because I believe the  
4 standards incorporated by reference are integral  
5 parts of the documents, of the Code of Federal  
6 Regulations. And one cannot understand the Code of  
7 Federal Regulations based on a very brief summary.  
8 One needs to actually read the text.

9 BY MR. HUDIS:

10 Q. That's not what Mr. Mosley is saying here.  
11 He says that "There is enough information set out  
12 in the regulation text that affected parties can  
13 obtain or inspect these standards in order to  
14 comply with the regulation."

15 A. I believe the provisions to obtain them are  
16 difficult. They involve high costs and  
17 restrictions on use. I believe the inspection  
18 facility provided by the National Archives and  
19 the -- the regulatory agencies doing the  
20 incorporation, are not nearly adequate.

21 One has to travel to Washington D.C. with a  
22 roll of quarters in your pocket to -- to inspect  
23 the documents. That's just not the way one needs  
24 to make the law available in this day and age.

25 MR. BECKER: I'll instruct the witness to



1 wait for a question to be asked by counsel.

2 THE WITNESS: Yes.

3 BY MR. HUDIS:

4 Q. Mr. Malamud, at the end -- well, it's not  
5 the end. On page 10248 of Exhibit 33 at the  
6 bottom, Mr. Mosley says in his letter to you,  
7 "Although many of our library holdings are in the  
8 public domain as products of employees or agents of  
9 the federal government, some documents incorporated  
10 by reference do or may have copyright protection.  
11 You are responsible for obtaining any necessary  
12 permission for use, copying and publication from  
13 copyright holders and for -- and for any other  
14 applicable provisions of the Copyright Act." And  
15 he cites Title 17 of the United States code.

16 Do you agree or disagree with that  
17 statement?

18 MR. BECKER: Objection. Calls for a legal  
19 conclusion. Objection. Form.

20 THE WITNESS: It says, "some documents  
21 incorporated by reference do or may have copyright  
22 protection." It is my understanding that the law  
23 in the United States has no copyright. It is owned  
24 by the people. Not by the government agencies.

25 BY MR. HUDIS:

1 Q. So the moment any standard is incorporated  
2 by reference into a federal regulation, it loses  
3 its copyright protection; is that correct,  
4 according to your view?

5 MR. BECKER: Objection. Calls for a legal  
6 conclusion. Objection. Argumentative. Objection.  
7 May misstate prior testimony.

8 THE WITNESS: I think words like "loses its  
9 copyright" are loaded. I do believe that the Code  
10 of Federal Regulations has no copyright. It's a  
11 law. And that standards incorporated by reference  
12 into the Code of Federal Regulations are an  
13 integral part of the code and therefore have no  
14 copyright.

15 BY MR. HUDIS:

16 Q. Mr. Malamud, once you procured the 1999  
17 standards in May of 2012, what, if anything, did  
18 you do with them?

19 MR. BECKER: Objection. Form.

20 THE WITNESS: I examined the standard to  
21 determine that it was, in fact, the document that  
22 was specified and incorporated by reference.

23 BY MR. HUDIS:

24 Q. What else did you do with the standards  
25 once you had them?

1           A. I scanned the standard and turned it into a  
2 PDF file.

3           Q. So I would like to draw your attention back  
4 to Exhibit 29, which is the interrogatory answers.  
5 And I draw your attention to interrogatory answer  
6 number 3 at the bottom of page 5 in Exhibit 29. Do  
7 you see that?

8           A. Yes, I see that.

9           Q. All right. Now, do you see  
10 Public.Resource's answer that starts at the bottom  
11 of page 5 and continues on page 6?

12          A. I do.

13          Q. Does this interrogatory answer accurately  
14 state what you did with the 1999 standards once you  
15 procured them?

16                 MR. BECKER: Objection. Form.

17                 THE WITNESS: It does.

18 BY MR. HUDIS:

19          Q. All right. So as I understand, you  
20 disassembled the book; correct?

21          A. Mm-hm.

22                 MR. BECKER: Objection. Form.

23 BY MR. HUDIS:

24          Q. You removed the spine and any other  
25 extraneous materials. You trimmed the document.

1 Do you see that?

2 A. I do.

3 Q. All right. And then you scanned it on a  
4 Xerox 4250 scanner at 30 or 40 dots per inch. Do  
5 you see that?

6 A. At 300 or 400 dots per inch. Yes, I do.

7 Q. And then you named the file  
8 AERA.standards.1999.PDF?

9 A. That's correct.

10 Q. Now, the book that you got from the  
11 reseller on Amazon, you said it was a used book?

12 A. I really don't recall if it was used or  
13 new.

14 Q. Did you check the quality of the pages of  
15 the book before you scanned them?

16 A. Yes, I did.

17 Q. Did you notice -- did you compare your  
18 copy -- your procured copy of the 1999 standards to  
19 a new version of the standards?

20 MR. BECKER: Objection. Vague and  
21 ambiguous; possibly misleading and misstates the  
22 testimony.

23 THE WITNESS: So again, I'm not sure  
24 whether it was new or used. I simply have no  
25 recollection. I know I was able to obtain it on

1 the Amazon Marketplace.

2 What was the rest of your question?

3 BY MR. HUDIS:

4 Q. Did you compare the used version that you  
5 procured with a new version of the standards?

6 MR. BECKER: Same objections.

7 THE WITNESS: So again, I'm not sure if it  
8 was a used or a new. Did I compare it to another  
9 copy of the standards?

10 BY MR. HUDIS:

11 Q. Correct.

12 A. No, I did not.

13 Q. And in interrogatory answer number 3 you  
14 talk about a quality check process. Could you tell  
15 me what that quality check process was?

16 A. In the case of a scan, making sure all the  
17 pages are there and that the scan was successful.

18 Q. Did you check to make sure all the pages  
19 were there?

20 A. I believe I did, yes.

21 Q. And then you say, "The files are post  
22 process to optimize the scan and to generate  
23 optical character recognition on the text."

24 Did you do that?

25 A. Yes, I believe I did.

1 Q. And then it says, "Public.Resource then  
2 double checks the IBR." That's incorporation by  
3 reference?

4 A. That's correct.

5 Q. "The incorporation by references, puts a  
6 cover sheet on the files and stamps metadata into  
7 the headers."

8 What kind of metadata did you stamp into  
9 the headers?

10 A. I have not examined the AERA standard  
11 recently, but the normal practice is to stamp in  
12 the name of the standard and possibly the CFR site  
13 that we have there. And the name of the original  
14 publisher, I believe, was also in the metadata.

15 Q. Did you or anyone on Public.Resource's  
16 behalf use graphic design web tools to post the  
17 1999 standards to the Internet?

18 MR. BECKER: Objection. Compound.  
19 Objection. Vague.

20 THE WITNESS: I created the cover sheet,  
21 the certificate of incorporation using graphic  
22 design tools. I did not apply any graphic design  
23 tools to the core document, because it was simply a  
24 scan.

25 (PLAINTIFFS' EXHIBIT 34 WAS MARKED.)

1 BY MR. HUDIS:

2 Q. Mr. Malamud, I show you a document that has  
3 been marked as Exhibit 34, bearing production  
4 numbers AERA\_APA\_NCME 31528 through 31738.

5 Do you recognize this document?

6 A. It appears to be a copy of the standards at  
7 issue with the certificate of incorporation on the  
8 top.

9 Q. All right. And is this the cover sheet  
10 that you appended on top of the 1999 standards  
11 posted on Public.Resource's website?

12 A. Yes, it appears to be.

13 Q. Who prepared this cover sheet?

14 A. I did.

15 Q. And who chose the language for the cover  
16 sheet?

17 A. I did.

18 Q. What was your intention, Mr. Malamud, for  
19 appending this cover sheet of Exhibit 34 on top of  
20 the 1999 standards posted on Public.Resource's  
21 website?

22 A. I wanted to be very clear that this was a  
23 posting of a standard incorporated by reference  
24 into the Code of Federal Regulations. I wanted to  
25 place this document in context.

1 Q. And what was your purpose on the cover  
2 sheet of using the medallion that had the word  
3 "Repeatedly Approved."

4 A. To signify that the executive director of  
5 the Office of the Federal Register had explicitly  
6 and deliberately approved this incorporation by  
7 reference.

8 Q. We just went through the process that you  
9 used. We asked you the question, did you digitize  
10 or convert to a digital format the 1999 standards,  
11 and we went through that process.

12 My question is, who participated in the  
13 process of disassembling the paper version of the  
14 1999 standards, scanning them and processing them,  
15 as you described here in interrogatory answer  
16 number 3 and posting them to the Internet?

17 MR. BECKER: Objection. Compound.

18 THE WITNESS: That was me.

19 BY MR. HUDIS:

20 Q. Did Point.B Studio participate in this  
21 process?

22 A. No.

23 Q. Did Rebecca Malamud participate in this  
24 process?

25 A. She did not.



1 Q. Did HTC Global participate in this process?

2 A. They did not.

3 Q. Did anyone else besides yourself  
4 participate in this process?

5 A. It's just me.

6 Q. I'd like you to look in Exhibit 29,  
7 interrogatory answer number 4 on page 6.

8 So consistent with your -- your prior  
9 testimony, does this interrogatory answer number 4  
10 in Exhibit 29 accurately identify all the persons  
11 and entities who were involved in disassembling the  
12 paper version of the 1999 standards, scanning them,  
13 processing them and posting them to the Internet?

14 MR. BECKER: Objection to form.

15 THE WITNESS: Yes, it was me.

16 BY MR. HUDIS:

17 Q. I just want to go a little bit into depth  
18 about quality control.

19 So what quality control procedures did you  
20 use to ensure the quality of the textual comment --  
21 content of the 1999 standards that you posted to  
22 the Internet?

23 MR. BECKER: Objection. Vague.

24 THE WITNESS: This is a scan of a document.

25 BY MR. HUDIS:

1 Q. Mm-hm.

2 A. It's a pixel-by-pixel replication of what  
3 was on the printed page.

4 Q. I'll be more specific.

5 Did you check for missing or incorrectly  
6 scanned pages?

7 A. I believe I did.

8 Q. Did you check for pages that may have had  
9 blurred text?

10 A. I believe I did.

11 Q. Now, you say, "I believe I did." Do you  
12 know for sure that you did?

13 A. My standard procedure is to do those  
14 things. I don't know this specific document simply  
15 because I don't recollect back to that period in  
16 May 2012. So I can't testify under oath that I  
17 did, in fact, do that. But that certainly is my  
18 standard procedure.

19 Q. Mr. Malamud, what is search engine  
20 optimization?

21 A. Search engine optimization is a technical  
22 term of art that has to do with how documents that  
23 are on a web server show up in search engine  
24 results.

25 Q. Please continue.

1           A. In particular with the PDF document, what  
2 you want in a search engine result is rather than,  
3 for example, a snippet of OCR, you want the actual  
4 title of the document to show up in a description.  
5 It's what Google would cause a snippet.

6           So by embedding metadata in the header of  
7 the PDF file, the attempt is to make sure that that  
8 document title shows up in the search engine  
9 results so people know what that document is.

10          Q. So, Mr. Malamud, did you check the metadata  
11 you added to the PDF file comprising the 1999  
12 standards for search engine optimization?

13          A. Well, when I created the script that embeds  
14 the metadata in the header, I had in mind search  
15 engine optimization.

16                So assuming I did my job right, and  
17 remember search engines change over time. So if  
18 you did something in one period of time, that  
19 doesn't necessarily mean that a search engine will  
20 react the same way later on.

21                But assuming that I wrote that initial  
22 script properly, then this document would have  
23 shown up in a meaningful fashion in search engine  
24 results.

25          Q. And your answer just now said, "assuming."

1 You don't know for sure with respect to this  
2 particular document?

3 A. I don't recollect looking at this document  
4 in Google or Bing or other search engine results to  
5 determine that fact.

6 Q. Did you check the quality of the optical  
7 character recognition process for accuracy for the  
8 1999 standards?

9 MR. BECKER: Objection. Form.

10 THE WITNESS: Hold on a second. I'd like  
11 to double-check something.

12 OCR is inherently prone to certain errors.  
13 And what I used was the best available OCR that I  
14 had, which was in Adobe Acrobat Pro. But I did not  
15 pull up the underlying text. The underlying OCR  
16 text is used to search a file; not to read a file.

17 Does that answer your question?

18 BY MR. HUDIS:

19 Q. So in doing a quality check of the optical  
20 character recognition process for accuracy, did you  
21 attempt to pull up the underlying text after the  
22 scan was completed?

23 A. No.

24 MR. BECKER: Objection. Form.

25 THE WITNESS: No. And I never said that I

1 did do that on a consistent basis. It's not part  
2 of our normal workflow, no.

3 BY MR. HUDIS:

4 Q. Was the PDF file of the 1999 standards that  
5 you created ever converted from PDF to any other  
6 format before posting to the Internet?

7 MR. BECKER: Objection. Form.

8 THE WITNESS: I don't think so.

9 BY MR. HUDIS:

10 Q. So the 1999 standards that you scanned and  
11 created a PDF file, was it ever converted to JPEG?

12 MR. BECKER: Objection. Form.

13 THE WITNESS: I'm not sure what that means.

14 BY MR. HUDIS:

15 Q. Was it converted from PDF format to a JPEG  
16 format?

17 MR. BECKER: Same objection.

18 THE WITNESS: I don't think that would make  
19 any sense on a document like that. You'd end up  
20 with, you know, a couple hundred JPEG files.

21 No. I certainly wouldn't have done that.

22 BY MR. HUDIS:

23 Q. Okay. Did you convert it to SBG format?

24 A. No. That wouldn't make any sense at all.

25 Q. And would you have any -- would you have

1 had any reason to convert the PDF file of the 1999  
2 standards to a MathML format?

3 MR. BECKER: Objection. Form.

4 THE WITNESS: I don't -- well, first of  
5 all, MathML is embedded in an HTML file.

6 And second of all, at least to the best of  
7 my recollection, I don't think there's any  
8 mathematical formulas in the standards at issue.

9 BY MR. HUDIS:

10 Q. So that brings me to my next question.

11 Was the PDF file that you created from the  
12 1999 standards ever converted to HTML format?

13 MR. BECKER: Objection. Form.

14 THE WITNESS: No, we didn't do that.

15 BY MR. HUDIS:

16 Q. Was the PDF file of the 1999 standards that  
17 you created ever converted from PDF to a format  
18 making the standards accessible to the visually  
19 impaired?

20 MR. BECKER: Objection. Form. Objection.  
21 Competence; lacks foundation and assumes facts not  
22 in evidence.

23 THE WITNESS: The OCR procedure does, in  
24 fact, make the document accessible to the visually  
25 impaired.

1 BY MR. HUDIS:

2 Q. In what way?

3 A. A screen reader is able to read the  
4 underlying text, granted with potential OCR errors,  
5 but the vast majority of the text is accessible to  
6 those that are visually impaired.

7 Q. Are you familiar with the format,  
8 refreshable Braille?

9 A. No, I'm not.

10 Q. Did you convert the PDF file of the 1999  
11 standards that you made to refreshable Braille  
12 format?

13 A. We don't do that. We convert to HTML.

14 Q. Did -- and you didn't convert --

15 A. So no. No is the answer.

16 Q. All right. And you didn't convert the PDF  
17 file to HTML either?

18 A. This particular standard, no, we did not.

19 Q. Okay. And did you convert the PDF file  
20 that you created from the 1999 standards to large  
21 print?

22 MR. BECKER: Objection. Form.

23 THE WITNESS: It is an unencumbered PDF,  
24 and so a viewer can, in fact, magnify the text that  
25 is there.

1           So in that sense, large print, we did not  
2     retype the documents into a large print edition.

3     BY MR. HUDIS:

4           Q.   Mr. Malamud, do you have any materials in  
5     your -- in Public.Resource's possession documenting  
6     the process you went through of disassembling the  
7     paper version of the 1999 standards, scanning them,  
8     processing them and posting them to the Internet?

9           MR. BECKER:  Objection.  Compound.

10          THE WITNESS:  No, there's no intermediate  
11     process.  That's a book and then it gets scanned.

12          THE REPORTER:  Did you say "there's no  
13     intermediate product"?

14          THE WITNESS:  Intermediate process.

15     BY MR. HUDIS:

16          Q.   Mr. Malamud, once you converted the 1999  
17     standards from paper to the PDF format, what did  
18     you do with the contents of the file?

19          A.   I posted the file to Law.Resource.Org and  
20     to the Internet Archive.

21          Q.   Mr. Malamud, could you please return your  
22     attention to Exhibit 29, interrogatory answer  
23     number 2.

24          A.   Okay.

25          Q.   Does interrogatory answer number 2



1 accurately state when and where you posted the 1999  
2 standards to the Internet?

3 A. It does.

4 Q. And what was the date that you posted the  
5 standards to the Internet?

6 MR. BECKER: Objection. Form.

7 THE WITNESS: As our interrogatory says,  
8 July 11, 2012 on Law.Resource.Org and ...

9 BY MR. HUDIS:

10 Q. All right. And --

11 A. Yeah.

12 Q. And as you said, you posted the standards  
13 to Law.Resource.Org, and you also posted the  
14 standards to the Internet Archive; correct?

15 A. That is correct.

16 Q. Mr. Malamud, what is the name of the  
17 Public.Resource web server to which you saved the  
18 file containing the contents of the 1999 standards?

19 A. Law.Resource.Org.

20 Q. That's the name of the server?

21 A. Yes.

22 MR. BECKER: Please give me time to object.

23 MR. HUDIS: I'm sorry.

24 THE WITNESS: That was my fault.

25 MR. HUDIS: I don't want to be rude,

1 Counsel, seriously. Okay.

2 BY MR. HUDIS:

3 Q. Is the file containing the 1999 standards  
4 still saved on that web server?

5 MR. BECKER: Objection. Vague and  
6 ambiguous; assumes facts not in evidence.

7 THE WITNESS: It is not in the document  
8 tree of the web server, no.

9 BY MR. HUDIS:

10 Q. Do you still have that file still saved  
11 somewhere within Public.Resource's computer  
12 systems?

13 A. Yes, I do.

14 Q. Where?

15 A. One copy on my desktop. One copy in the  
16 not published directory. I don't know what the  
17 exact name of it is. Someplace on our server, but  
18 it's a private area that's not accessible to -- to  
19 anybody but myself and our systems administrator.

20 Q. Mr. Malamud, does Public.Resource have any  
21 logs from its web servers documenting the date on  
22 which the 1999 standards were posted to  
23 Public.Resource's website?

24 MR. BECKER: Objection. Vague and  
25 ambiguous. Objection. Lacks foundation. And

1 assumes facts not in evidence.

2 THE WITNESS: There's no logs, but there  
3 was a file creation date on the file.

4 BY MR. HUDIS:

5 Q. Has any documentation noting the file  
6 creation date ever been produced to us?

7 A. I don't know.

8 MR. HUDIS: Counsel, if that document has  
9 not been provided to us, it should be provided to  
10 us now.

11 THE WITNESS: So the file creation date was  
12 the date that the standard was posted. And when at  
13 your request we removed that standard and replaced  
14 it with a stub, that's going to be the new creation  
15 date. So I don't believe there's going to be a  
16 record.

17 BY MR. HUDIS:

18 Q. What about the old creation date when the  
19 original standards file was -- was posted to your  
20 web server?

21 A. I moved it to a different area. I mean,  
22 you can make the request and we'll go look and see  
23 if that's there, but it's --

24 Q. Thank you, Mr. Malamud, I appreciate that.

25 Did you post the entirety of the 1999

1 standards to Public.Resource's website?

2 A. Yes.

3 Q. Mr. Malamud, as it pertains to the Internet  
4 Archive, what is a collection?

5 MR. BECKER: Objection. Asked and  
6 answered.

7 THE WITNESS: A collection is a set of  
8 items that often have a common theme.

9 BY MR. HUDIS:

10 Q. And you said you posted the 1999 standards  
11 to Internet Archive's website; correct?

12 A. That is correct.

13 Q. And did you post the entirety of the 1999  
14 standards to Internet Archive's website?

15 A. I did.

16 Q. Under which collection at the Internet  
17 Archive did you post the 1999 standards?

18 MR. BECKER: Objection. Form.

19 THE WITNESS: The current name of that  
20 collection is Codes of the World.

21 BY MR. HUDIS:

22 Q. How did you choose this particular  
23 collection to which to post the 1999 standards?

24 A. It's the --

25 MR. BECKER: Objection. Assumes facts not

1 in evidence.

2 THE WITNESS: It's the collection I created  
3 to hold the standards incorporated by reference.

4 BY MR. HUDIS:

5 Q. All right. So you created the Codes of the  
6 World collection on Internet Archive's website?

7 A. I did.

8 Q. Mr. Malamud, I show you what was previously  
9 marked at Internet Archive's deposition in this  
10 case as Butler Exhibit 6.

11 Do you see that?

12 A. I do. Let me correct a misstatement. It  
13 wasn't called Codes of the World. It was called  
14 Global Public Safety Codes is the name of the  
15 collection.

16 Q. And what types of materials did you post to  
17 the Global Public Safety Codes collection on  
18 Internet Archive?

19 A. Standards incorporated by reference in the  
20 law.

21 Q. Do you recognize Butler Exhibit 6?

22 A. This is a document you created?

23 Q. It's a document we printed from the  
24 Internet Archive.

25 A. This appears to be a series of screen dumps

1 from that item in which you are paging through the  
2 standards at issue, is what this appears to be.

3 Q. That's exactly correct. And you just saved  
4 me about five minutes of explanation.

5 A. Oh, sorry about that.

6 Q. That's fine. Thank you very much,  
7 Mr. Malamud.

8 What is the web tool, if you know, that  
9 creates the ability for a user to turn the pages of  
10 the 1999 standards like a book?

11 MR. BECKER: Objection. Vague and  
12 ambiguous; confusing.

13 THE WITNESS: I have heard it called book  
14 reader, but I don't know the details of what the  
15 code is or how it's embedded or anything of that  
16 sort.

17 BY MR. HUDIS:

18 Q. So you've heard it referred to as a book  
19 reader application?

20 A. Yes.

21 Q. All right. Have you ever heard of a DjVu  
22 Reader?

23 A. Yes, I have.

24 Q. And what -- what is its function, to the  
25 best of your knowledge?

1           A. DjVu is another format for creating  
2 documents, and a DjVu Reader is one that enables  
3 one to page through a document in a DjVu format.

4           Q. When you posted the 1999 standards --  
5 skip -- strike that.

6                   Looking at Exhibit Butler 6, does this look  
7 like the '99 -- 1999 standards --

8           MR. BECKER: Objection. Form.

9           MR. HUDIS: I didn't finish.

10          BY MR. HUDIS:

11          Q. -- were presented in page-turning format  
12 using either book reader or DjVu Reader?

13          MR. BECKER: Same -- same objection.

14          THE WITNESS: Yeah, if this is the standard  
15 Internet Archive screen, this is a PDF file that is  
16 being used for the -- the page turning capability.

17          BY MR. HUDIS:

18          Q. Now I'll continue with my next question.

19                   When you posted the 1999 standards to the  
20 Internet Archive website, did you input the  
21 following information to go with the file? And  
22 I'll take them one at a time. Author?

23          A. I did. That's actually a standard Internet  
24 Archive field that I believe is required.

25          Q. And did you input that information?

1           A. I did in the sense of the API call that  
2     created this -- this item.

3           Q. The API call is?

4           A. API is application programming interface,  
5     and it is a mechanism to write a command script  
6     that talks to a remote system and creates an item,  
7     in this case at the Internet Archive.

8           Q. So when you use the API call to post the  
9     1999 standards to the Internet Archive website, did  
10    you input the information under author?

11           MR. BECKER: Objection. Form.

12           THE WITNESS: Yes, although I believe in  
13    the API call, it's called creator. And the  
14    Internet Archive images it as author.

15    BY MR. HUDIS:

16           Q. And did you input the language for subject?

17           A. I did.

18           Q. Did you input the language for language?

19           A. Yes.

20           Q. Did you input the language for collection?

21           A. I specified which collection this item  
22    would be, and this field here is automatically  
23    generated, I believe, by the Internet Archive.

24           Q. Now, if you would please turn to the next  
25    page of Exhibit Butler 6.



1           Did you input the information for  
2    identifier?

3           A.   Yes, I specified the identifier.

4           Q.   Did you input the information for the  
5    credits?

6           A.   The phrase uploaded by Public.Resource.Org,  
7    yes, I did.

8           Q.   Did you input the information for license  
9    URL?

10          A.   Yes, I did.

11          Q.   And what was the purpose of you inputting  
12    the URL for CreativeCommons.org?

13          MR. BECKER:  Objection.  Form.

14          THE WITNESS:  Any specification of  
15    providence on the Internet Archive uses the  
16    Creative Commons mechanism.

17    BY MR. HUDIS:

18          Q.   And what is the significance of using the  
19    Creative Commons mechanism?

20          MR. BECKER:  Objection.  Vague and  
21    ambiguous.

22          THE WITNESS:  In this case it's a Creative  
23    Commons CC0 license.

24    BY MR. HUDIS:

25          Q.   What is a Creative Commons 0 license?

1 A. CC.

2 MR. BECKER: Objection. Vague and  
3 ambiguous; may call for a legal conclusion.

4 THE WITNESS: CC0, again, I'm not a lawyer,  
5 is no rights asserted. The creator of this  
6 identifier is not asserting any rights over this  
7 item.

8 BY MR. HUDIS:

9 Q. And that would have been you?

10 A. That's correct.

11 Q. And did you insert the language for media  
12 type?

13 A. Yes, I specified in the API call that this  
14 was a object of type text.

15 Q. And did you insert the information for  
16 identifier access?

17 A. That's automatically generated based on the  
18 name of the identifier.

19 Q. And what is identifier ark?

20 A. I have no idea.

21 Q. Did you insert that information for  
22 identifier ark?

23 A. No, I don't know what that is.

24 Q. In what format did you post the 1999  
25 standards to the Internet Archive website?

1 MR. BECKER: Objection. Form.

2 THE WITNESS: A PDF document.

3 BY MR. HUDIS:

4 Q. Did you post the 1999 standards to the  
5 Internet Archive website in any other format?

6 A. The API call that created that item ID  
7 uploaded a PDF file.

8 Q. When Public.Resource posts standards  
9 incorporated by reference by a governmental agency  
10 to one of its websites, is it Public.Resource's  
11 policy to always post the same standard to a  
12 collection on the Internet Archive website?

13 MR. BECKER: Objection. Vague and  
14 ambiguous; may assume facts not in evidence.

15 THE WITNESS: Not always, but it's a  
16 general practice.

17 BY MR. HUDIS:

18 Q. Turning back to Exhibit Butler 6. Please  
19 turn to the first page, Mr. Malamud.

20 A. Okay.

21 Q. And I'd like you to look on the left-hand  
22 side of the page. I'd like to know what the  
23 following entries mean, if you know.

24 PDF 4.2 M?

25 A. Where does it say that?

1 Q. To the very --

2 A. Oh, I see. I see what you're talking  
3 about.

4 Q. All right. What does the entry PDF 14.2 M  
5 mean?

6 A. 14.2 M is 14.2 megabytes.

7 And PDF is the item in PDF format. In this  
8 case it's the one that I uploaded.

9 Q. And then the next entry is EPUB 335.4 K.  
10 What does that entry mean?

11 A. It is the same item in EPUB format, which  
12 is an e-book format.

13 Q. And what does the next entry mean here,  
14 full text 6.86. -- I'll start again. 68 -- full  
15 text 686.0 K. What does that mean?

16 MR. BECKER: Objection for  
17 mischaracterizing the document.

18 THE WITNESS: That file is 686 kilobytes in  
19 size. And the full text is derived from an OCR  
20 process that the Internet Archive conducts on all  
21 text items.

22 BY MR. HUDIS:

23 Q. And the next entry I believe is a shorthand  
24 for DjVu. Do you understand that?

25 A. I do.

1 MR. BECKER: Objection. Form.

2 BY MR. HUDIS:

3 Q. And so the next entry DjVu 8.2 M, what does  
4 that mean?

5 A. It's the item in DjVu format 8.2 megabytes.

6 Q. And then what does -- what does it mean  
7 when it says, "All files HTTPS"?

8 A. By clicking on that link, you can see all  
9 the files in that item, such as the PDF file, the  
10 EPUB file, but also a metadata file, for example.

11 Q. Besides Law.Resource.Org and Internet  
12 Archive, did you post the 1999 standards to any  
13 other website?

14 A. I did not.

15 Q. Mr. Malamud, in your opinion what value did  
16 Public.Resource add to the 1999 standards by  
17 disassembling the paper version, scanning it,  
18 processing it, as you described in interrogatory  
19 answer number 3, and posting the file to the  
20 Internet?

21 MR. BECKER: Objection as compound -- the  
22 question is compound; may misstate prior testimony;  
23 vague and ambiguous.

24 THE WITNESS: The value we provided is to  
25 make a document that was incorporated by reference

1 under the Code of Federal Regulations available on  
2 the Internet for people to read.

3 BY MR. HUDIS:

4 Q. For free?

5 MR. BECKER: Also object as argumentative  
6 to that last question.

7 BY MR. HUDIS:

8 Q. For free?

9 A. We never charge for content.

10 Q. Mr. Malamud, did Public.Resource anticipate  
11 incurring legal liability for posting the 1999  
12 standards on the Internet?

13 MR. BECKER: Objection. I will instruct  
14 the witness not to answer as to any attorney-client  
15 privileged communications. And moreover, object to  
16 any legal conclusions.

17 THE WITNESS: We did not.

18 BY MR. HUDIS:

19 Q. Mr. Malamud, you scanned and posted the  
20 1999 standards to the -- to the Internet, did you  
21 consult with educational or psychological  
22 professionals?

23 MR. BECKER: Objection as vague and  
24 ambiguous; argumentative; potentially objection  
25 towards competence.

1 THE WITNESS: No.

2 BY MR. HUDIS:

3 Q. Before you scanned and posted the 1999  
4 standards to the Internet, did you check the  
5 records of the U.S. copyright Office to determine  
6 whether the 1999 standards were registered?

7 MR. BECKER: Objection. Calls for -- it  
8 may call for a legal conclusion. Objection as to  
9 being potentially misleading. And objection as to  
10 competence, and argumentative and lacks foundation.

11 THE WITNESS: I did not.

12 BY MR. HUDIS:

13 Q. Before you scanned and posted the 1999  
14 standards to the Internet, did you consult with  
15 counsel to determine whether the scanning and  
16 posting of this work to the Internet would not be a  
17 violation of U.S. copyright law?

18 MR. BECKER: Objection. I will instruct  
19 the witness not to provide any information about  
20 privileged communications between the witness and  
21 counsel.

22 THE WITNESS: I'm not going to discuss my  
23 discussions with counsel.

24 BY MR. HUDIS:

25 Q. Before you scanned and posted the 1999

1 standards on the Internet, did you obtain  
2 permission from either AERA, APA or NCME to do so?

3 MR. BECKER: Objection. Argumentative;  
4 assumes facts not in evidence; may call for a legal  
5 conclusion.

6 THE WITNESS: I did not.

7 (PLAINTIFFS' EXHIBITS 35A-35B WERE MARKED.)

8 BY MR. HUDIS:

9 Q. Mr. Malamud, do you recall giving a speech  
10 at MIT entitled Yo! Your Honor in April of this  
11 year?

12 A. I do.

13 Q. And who co-hosted your speech?

14 MR. BECKER: Objection. Assumes facts not  
15 in evidence.

16 THE WITNESS: It was the MIT Center for  
17 Civic Media and the Laboratory for Social Machines.

18 BY MR. HUDIS:

19 Q. Mr. Malamud, that speech was -- was made  
20 available on the Internet. We had it transcribed.  
21 What I gave you was the text of the speech, and the  
22 CD is the download of the audio and video, just so  
23 you can -- you and your counsel can assure yourself  
24 that the transcription was accurate. I only have a  
25 few questions for it.



1 MR. BECKER: And I'll just state an  
2 objection that we are unable at this moment to view  
3 the contents of this CD. So we have no knowledge  
4 as to what is actually on that CD, nor does the  
5 deponent.

6 And also state an objection to the -- to  
7 the extent that this document 35-A has been  
8 transcribed by counsel for plaintiffs, and at  
9 present we do not know whether it is accurate or  
10 not.

11 BY MR. HUDIS:

12 Q. Mr. Malamud, on Exhibit 35-A if you could  
13 turn to page AERA -- well, let me just identify the  
14 document.

15 Exhibit 35-A bears production numbers  
16 AERA\_APA\_NCME 32036 through 32074.

17 Mr. Malamud, could you please turn to  
18 production page 32039.

19 A. Okay. I want to note, however, that there  
20 appears to be a large number of transcription  
21 errors, but I'm on page 32039.

22 Q. Thank you, Mr. Malamud.

23 In the middle of that page it says, "So we  
24 did two things that were fairly significant in 2007  
25 and 2008. I began posting all the building codes

1 for the country because these are the law. These  
2 are not advisory codes. These are incorporated in  
3 the law in all our states. Things like the  
4 national electric code, and I began posting those  
5 and nothing happened."

6 What did you expect to happen?

7 MR. BECKER: Objection again to the fact  
8 that the witness has noted that there are  
9 transcription errors in this document. The  
10 document may not accurately reflect what is  
11 purported to be Mr. Malamud's April 7th speech.  
12 And objection to the extent that this document  
13 otherwise speaks for itself, and vague and  
14 ambiguous; argumentative.

15 THE WITNESS: If you look at the statement  
16 that you read it says, "I began posting these and  
17 nothing happened." Nobody sent me take-down  
18 notices, and there are copyright assertions on  
19 these documents. I dealt with that a little later  
20 in the speech, if I remember right.

21 So nothing happened. Nobody sent me  
22 take-down notices. And just as importantly, nobody  
23 picked up the phone and called me up and said,  
24 "Let's talk about these building codes."

25 BY MR. HUDIS:

1 Q. So continuing that same answer here as you  
2 were talking with a moderator, going down lower on  
3 the page it says, "And so I did that for a few  
4 years and nothing much happened. I began posting  
5 all the safety standards that are required by law  
6 at the federal level and the Code of Federal  
7 Regulations. And then the shit kind of hit the fan  
8 on that one. We got sued in two district court  
9 cases by six plaintiffs, and we're currently in  
10 court. It's an intense legal battle."

11 Were you speaking of the AERA lawsuit and  
12 the ASTM lawsuit?

13 A. I was.

14 Q. If you could turn to page -- production  
15 page 32066 in Exhibit 35-A.

16 A. Okay.

17 Q. At the top of the -- at the top of the page  
18 it says, "So to me it's about education. But also  
19 about justice and democracy and, you know, those  
20 kinds of little things, because I think that's an  
21 important thing in the United States. We are  
22 overly lawyered, and one of the reasons is you have  
23 to be part of the guild in order to access the  
24 material, and I've been doing this issue for a  
25 while. There are so many people that are

1 non-lawyers that are intensely interested in the  
2 operation of our system of justice, and I think  
3 those people should have the same access as those  
4 that are actually practicing inside."

5 Do you see that?

6 A. I do.

7 Q. What did you mean by "part of the guild"?

8 MR. BECKER: Objection. Same objections  
9 concerning the authenticity of this document, as  
10 well as the document speaking for itself; vague.

11 THE WITNESS: I was discussing the PACER  
12 system, first of all. Not the standards at issue  
13 or incorporation by reference.

14 I meant that there is a feeling within the  
15 legal profession that the only people that need to  
16 access the PACER system are those in the legal  
17 profession, and I believe that feeling is misguided  
18 and wrong.

19 BY MR. HUDIS:

20 Q. Let's then return to the 1999 standards.

21 Do you know whether AERA, APA or NCME  
22 restrict access to the 1999 standards?

23 MR. BECKER: Objection. To the extent that  
24 any of Mr. Malamud's knowledge comes from  
25 discussion with counsel, I will instruct him not to

1 answer, as to any knowledge that he has that has  
2 come from counsel.

3           Objection to the extent that this may call  
4 for a legal conclusion. Objection to the extent  
5 that it's argumentative and vague and ambiguous.

6           THE WITNESS: If by "restrict" you mean  
7 impose conditions on people attempting to make  
8 documents incorporated by reference in the law,  
9 yes, I believe they do restrict.

10 BY MR. HUDIS:

11           Q. In what way?

12           A. You're suing me for having posted this  
13 document that was incorporated by reference in the  
14 law. I think that's evidence of an attempt to  
15 restrict that process.

16           Q. Mr. Malamud, if the three plaintiffs that  
17 have brought this lawsuit charged 50 or \$60 for a  
18 printed copy of the 1999 standards, do you believe  
19 that is a restriction to the access of the 1999  
20 standards by the public?

21           MR. BECKER: Objection. Misleading.  
22 Objection. Hypothetical; calls for speculation;  
23 lacks foundation and assumes facts not in evidence  
24 and argumentative.

25           THE WITNESS: The issue is not whether the

1 plaintiffs are charging \$60 for purchasing a  
2 printed copy. The issue is whether the plaintiffs  
3 are restricting the ability of Public.Resource to  
4 make documents incorporated by reference into the  
5 Code of Federal Regulations available to citizens  
6 on the Internet.

7 BY MR. HUDIS:

8 Q. Do you believe that charging \$60 a copy for  
9 the 1999 standards is a restriction on the public's  
10 access to the 1999 standards?

11 MR. BECKER: Objection. Asked and  
12 answered. Objection. Argumentative; calls for  
13 speculation; assumes facts not in evidence.

14 THE WITNESS: Charging \$60 for a document  
15 and only making it available on that basis,  
16 certainly restricts the ability of citizens to  
17 easily find and read that particular portion of the  
18 Code of Federal Regulations.

19 (PLAINTIFFS' EXHIBIT 36 WAS MARKED.)

20 BY MR. HUDIS:

21 Q. Mr. Malamud, I show you what's been marked  
22 as Exhibit 36, bearing production numbers PROAERA  
23 830 through PROAERA 837.

24 Do you recognize the document?

25 A. I do. It appears to be a copy of table 12

1 of the 12 tables.

2 Q. What are the 12 tables?

3 A. It is the directory, if you will, on  
4 Law.Resource.Org to standards incorporated by  
5 reference.

6 Q. Do you have any reason to doubt the  
7 authenticity of Exhibit 36?

8 A. I do not.

9 MR. HUDIS: Counsel, can you stipulate that  
10 Exhibit 36 is a business record of Public.Resource?

11 MR. BRIDGES: Well, I will respond to this.  
12 You're saying Exhibit 36 as an -- as a directory is  
13 a business record? I'm not -- I'm not clear what  
14 the stipulation is that you're asking for.

15 MR. HUDIS: Yeah, so I just want to know,  
16 this is a document that Mr. Malamud said he's  
17 created during his work at Public.Resource. He's  
18 identified the document as authentic. And I would  
19 like to know if you can stipulate that Exhibit 36  
20 is a business record of Public.Resource.

21 MR. BRIDGES: What -- what do you mean by  
22 "business record" in this context?

23 MR. HUDIS: A business record under Federal  
24 Rules of Evidence 8036.

25 MR. BRIDGES: Let me look at that rule.

1 I don't think we're going to stipulate to  
2 that. I don't think this is a record of a  
3 regularly conducted activity.

4 MR. HUDIS: All right. Let me just ask  
5 Mr. Malamud the questions.

6 BY MR. HUDIS:

7 Q. Mr. Malamud, did you create Exhibit 36?

8 A. I did.

9 Q. Okay. And did -- from what information did  
10 you create Exhibit 36?

11 A. It is a record of correspondence with --  
12 related to the Law.Resource.Org documents.

13 Q. And has this document been kept in the  
14 regularly -- in the regular course of  
15 Public.Resource's business?

16 MR. BECKER: Objection. Ambiguous;  
17 possibly argumentative.

18 THE WITNESS: Yeah, I don't know regularly  
19 kept. It was created at the end of December 2012,  
20 and I have updated it on occasion.

21 BY MR. HUDIS:

22 Q. And making records of the type shown in  
23 Exhibit 36 is a regular practice of  
24 Public.Resource's business?

25 MR. BECKER: Objection. Vague and



1     ambiguous; argumentative; lacks foundation.

2             THE WITNESS:   Yeah, I don't know about a  
3     regular practice, but in the case of letters  
4     received and sent relating to Law.Resource.Org,  
5     this is a place where I've posted some of that  
6     correspondence.

7     BY MR. HUDIS:

8             Q.   As Exhibit 36 was produced to us by your  
9     counsel, we could not tell whether these columns  
10    had any particular headings because it's all black.

11            Mr. Malamud, are there column heading  
12    designations to this table of Exhibit 36?

13            A.   I don't know. I would have to check. It  
14    certainly doesn't appear to be so, however, from  
15    the formatting. You'll notice that the text in the  
16    column above that is in white, right. When there's  
17    a dark header. So I don't know. I mean we can go  
18    check. It's online.

19            Q.   Let's take a break. Can you check that  
20    online?

21            A.   Well, I can't. I don't have a computer.  
22    But you can if you'd like. Do you want me to give  
23    you the URL?

24            Q.   We'll check.

25            A.   Okay.

1 THE VIDEOGRAPHER: Take a break?

2 MR. HUDIS: Yes. Just so she can get  
3 there.

4 THE WITNESS: Sure.

5 MR. BECKER: Off the record.

6 THE VIDEOGRAPHER: The time is 5:36 and we  
7 are off the record.

8 (Recess taken.)

9 THE VIDEOGRAPHER: The time is 5:45, and we  
10 are back on the record.

11 BY MR. HUDIS:

12 Q. Mr. Malamud, while we were on a break, we  
13 checked the color version of Exhibit 36 on  
14 Public.Resource's website, and could you please  
15 tell us for the record what the column headings are  
16 for the four columns of Exhibit 36?

17 A. The four columns are "Date," "RFC,"  
18 "Initiator" and "Description."

19 Q. What does RFC refer to?

20 A. Request for comment.

21 Q. And that was -- and so the second column  
22 labeled RFC, that is a request for comment from  
23 whom to whom?

24 A. RFC is a term used in the Internet  
25 Engineering Task Force for numbering documents.

1 And so it's simply a sequential numbering  
2 mechanism.

3 Q. So other than the sequential numbering, RFC  
4 has no other significance?

5 A. (Witness shaking head from side to side.)

6 MR. BRIDGES: Objection. Lacks foundation;  
7 vague and ambiguous.

8 THE WITNESS: No, it's just a term I used.

9 BY MR. HUDIS:

10 Q. Okay. And the column labeled initiator,  
11 what did you mean by initiator?

12 A. The organization that authored the  
13 correspondence or other information that is listed  
14 in the next column.

15 Q. And what information did you put in the  
16 description column?

17 A. Well, it depends. If it was a -- a grayed  
18 out section, it's a section divider. And then the  
19 other components are individual documents.

20 Q. Overall, what did you collect in Exhibit  
21 36?

22 MR. BRIDGES: Objection. Lacks foundation;  
23 vague and ambiguous; argumentative.

24 THE WITNESS: Two things. One are blog  
25 posts that are relevant to the Law.Resource.Org

1 activities.

2 BY MR. HUDIS:

3 Q. And you say there was a second item?

4 A. Letters received from institutions having  
5 to do with the Law.Resource.Org activities.

6 Q. Were some of these letters that were  
7 received from institutions complaining about  
8 Public.Resource posting standards incorporated by  
9 reference on to its website?

10 MR. BRIDGES: Objection. Compound;  
11 argumentative; vague and ambiguous.

12 THE WITNESS: Yes.

13 BY MR. HUDIS:

14 Q. And could you tell me what information is  
15 provided in the row on page PROAERA 832 at the  
16 bottom bearing the date 12/16/2013?

17 A. That was the take-down notice from AERA  
18 regarding the standards at issue.

19 Q. The 1999 standards?

20 A. That's correct.

21 Q. Mr. Malamud, at some time after you posted  
22 the 1999 standards to the Internet, did you remove  
23 them from public view?

24 MR. BRIDGES: Objection. Lacks foundation;  
25 vague and ambiguous.

1 THE WITNESS: Yes.

2 BY MR. HUDIS:

3 Q. When did you do this?

4 MR. BRIDGES: Same objection.

5 THE WITNESS: I believe that would be June  
6 2014. That date is specified in the interrogatory  
7 answers.

8 BY MR. HUDIS:

9 Q. I was just going to direct you there.

10 So if you could go back to Exhibit 29.  
11 Interrogatory answer number 2, page 5.

12 A. I'm there.

13 Q. All right. And so June 10, 2014 is when  
14 you removed the 1999 standards from public view  
15 from Law.Resource.Org and from the Internet  
16 Archive?

17 MR. BRIDGES: Objection. Compound; lacks  
18 foundation and all the other objections I gave to  
19 the earlier question along this line.

20 THE WITNESS: That's correct.

21 BY MR. HUDIS:

22 Q. What, if anything, did you put in place of  
23 the content of the 1999 standards on  
24 Public.Resource's website once the standards were  
25 removed?

1 MR. BRIDGES: Objection. Vague and  
2 ambiguous; lacks foundation.

3 THE WITNESS: I put what I call a stub  
4 document, with the cover sheet and a single page  
5 explaining the document had been removed from view.

6 (PLAINTIFFS' EXHIBIT 37 WAS MARKED.)

7 BY MR. HUDIS:

8 Q. Mr. Malamud, I show you what's been marked  
9 as Exhibit 37 bearing production numbers PROAERA  
10 822 through PROAERA 823.

11 Is this the stub document that you were  
12 referring to?

13 A. It is.

14 Q. Do you have any reason to doubt the  
15 authenticity of this document?

16 A. I do not.

17 MR. BRIDGES: Objection. Vague and  
18 ambiguous; lacks foundation.

19 THE WITNESS: I do not.

20 BY MR. HUDIS:

21 Q. What was the purpose of posting this single  
22 page where the content of the 1999 standards  
23 previously was on Public.Resource's website?

24 MR. BRIDGES: I'm sorry. I -- it's  
25 misleading; confusing question. I'll ask the court

1 reporter to reread it. You may have misspoken.

2 MR. HUDIS: No, it's mistranscribed. I'm  
3 going to ask it again, Counsel. Thank you.

4 MR. BRIDGES: I heard it the same way the  
5 transcription.

6 MR. HUDIS: Okay.

7 BY MR. HUDIS:

8 Q. What was the purpose of posting this single  
9 page where the content of the 1999 standards  
10 previously was on the Public.Resource's website?

11 MR. BRIDGES: Objection. Vague and  
12 ambiguous; lacks foundation.

13 THE WITNESS: So anybody accessing that URL  
14 knew that the document had been removed and it was  
15 not a technical error.

16 BY MR. HUDIS:

17 Q. When did you post this stub page to  
18 Public.Resource's website?

19 A. June 10th, 2014.

20 Q. And on page 823 why did you use the word  
21 "temporarily"?

22 MR. BRIDGES: Objection. Argumentative.

23 THE WITNESS: Because it's pending the  
24 resolution of this litigation.

25 MR. HUDIS: Turning back to Exhibit 29,

1 interrogatory number 2, the answer on page 5 of  
2 Exhibit 29.

3 So June 10th, 2014 was the date that you  
4 removed the 1999 standards from public view on  
5 Public.Resource.Org's website and on Internet  
6 Archive's website?

7 MR. BRIDGES: I'm sorry, are you --  
8 objection. Are you asking him if that's what the  
9 interrogatory says?

10 MR. HUDIS: No, I'm asking him the date of  
11 removal.

12 MR. BRIDGES: I think it's asked and  
13 answered.

14 THE WITNESS: June 10th, 2014. It's in the  
15 interrogatory.

16 BY MR. HUDIS:

17 Q. Mr. Malamud, do you know what a make-dark  
18 command is?

19 MR. BRIDGES: Objection. Lacks foundation;  
20 vague and ambiguous.

21 THE WITNESS: Yes, although you need to  
22 place that in context. I mean, I have a general  
23 impression of what you mean.

24 BY MR. HUDIS:

25 Q. All right. What is a make -- what is your



1 understanding of a make-dark command?

2 MR. BRIDGES: Objection. Lacks foundation.

3 THE WITNESS: Yeah, do you have a specific  
4 instance of -- of that and I'd be happy to --

5 BY MR. HUDIS:

6 Q. Sure.

7 A. -- to talk about it.

8 Q. Did you remove the 1999 standards from  
9 public view on Internet Archive's website by  
10 issuing a make-dark command to their server as a  
11 registered user having administrative privileges to  
12 do so?

13 MR. BRIDGES: Objection. Lacks foundation;  
14 vague and ambiguous.

15 THE WITNESS: I used the item manager, and  
16 I pressed the make-dark button on that form.

17 BY MR. HUDIS:

18 Q. All right. All right. And what is the  
19 purpose of the make-dark button?

20 MR. BRIDGES: Objection. May lack  
21 competence.

22 THE WITNESS: It makes the document  
23 inaccessible for public view.

24 (PLAINTIFFS' EXHIBIT 38 WAS MARKED.)

25 BY MR. HUDIS:

1 Q. Mr. Malamud, I show you a document that's  
2 been marked Exhibit 38 bearing production number  
3 PROAERA 824.

4 Do you recognize the document?

5 A. I do.

6 Q. What is this document of Exhibit 38?

7 A. It is e-mail to the Internet Archive  
8 informing them that I have made an item go dark.

9 Q. Do you remember sending this e-mail of  
10 Exhibit 38?

11 A. I do.

12 Q. And why did you send this e-mail to Alexis  
13 Rossi at -- why did you send this e-mail to Alexis  
14 Rossi on June 11, 2014?

15 A. Alexis is responsible for the collections  
16 on the Internet Archive.

17 Q. And Alexis Rossi is an employee of Internet  
18 Archive?

19 MR. BRIDGES: Objection. May lack  
20 competence.

21 THE WITNESS: She is.

22 BY MR. HUDIS:

23 Q. And in your e-mail you carbon copy to  
24 collections-service@Archive.org.

25 Why did you add this e-mail address as a cc

1 in your e-mail to Alexis Rossi?

2 A. Because that's the proper address to inform  
3 the Internet Archive about matters pertaining to a  
4 collection.

5 Q. And what do you mean by matters relating to  
6 a collection?

7 A. If you have technical problems with your  
8 collection or other issues or problems, that would  
9 be the address that you would write to.

10 Q. And at the end of this e-mail there's a  
11 URL. Do you see that?

12 A. I do.

13 Q. And it ends with AERA.standards.1999?

14 A. I see that.

15 Q. All right. Is this the URL where you  
16 posted the 1999 standards on Internet Archive's  
17 website?

18 A. It is.

19 Q. Mr. Malamud, if Public.Resource succeeds in  
20 this lawsuit brought by AERA and its co-plaintiffs,  
21 will Public.Resource repost the 1999 standards on  
22 its website?

23 MR. BRIDGES: Objection. Hypothetical.

24 THE WITNESS: I guess I'd have to read the  
25 decision and make my determination based on that.

1 BY MR. HUDIS:

2 Q. Well, if you're totally successful?

3 MR. BRIDGES: Again, hypothetical.

4 THE WITNESS: Our goal is to post all  
5 standards incorporated by reference into the Code  
6 of Federal Regulations. So yes.

7 BY MR. HUDIS:

8 Q. If Public.Resource is successful in this  
9 litigation, how easy or difficult would it be for  
10 you to repost the 1999 standards on  
11 Public.Resource's website?

12 MR. BRIDGES: Hypothetical; lacks  
13 foundation; assumes facts not in evidence; vague  
14 and ambiguous; compound.

15 THE WITNESS: It wouldn't be difficult.

16 BY MR. HUDIS:

17 Q. If the next version of the Standards on  
18 Educational and Psychological Testing, the 2014  
19 version, is ever incorporated by reference by a  
20 state or federal agency, will you post that version  
21 of the standards to the Internet as well?

22 MR. BRIDGES: Objection. Hypothetical;  
23 compound; vague and ambiguous.

24 THE WITNESS: I don't know.

25 BY MR. HUDIS:

1 Q. How would you make that determination?

2 MR. BRIDGES: Objection. May call for  
3 speculation; vague and ambiguous; argumentative.

4 THE WITNESS: I would want to look at the  
5 specific nature of the incorporation by reference.  
6 I would want to look at that specific standard, and  
7 I'd want to make a determination if that was an  
8 area that I wanted to continue to invest resources  
9 in. So I don't know. It would depend on the  
10 specifics.

11 BY MR. HUDIS:

12 Q. If you looked at the 2014 standards and  
13 made a determination that it was an area in which  
14 you wanted to continue to invest resources, if  
15 Public.Resource is successful in this litigation  
16 and the 2014 standards are incorporated by  
17 reference by a state or federal agency, would you  
18 post the 2014 standards to the Internet?

19 MR. BRIDGES: Entirely hypothetical; lacks  
20 foundation; argumentative; vague and ambiguous.

21 THE WITNESS: So I really don't know about  
22 the states.

23 If the federal government did a deliberate  
24 and explicit incorporation by reference in what I  
25 felt was a substantive rule, right, not an offhand

1 thing, then I would certainly consider strongly  
2 posting that document.

3 BY MR. HUDIS:

4 Q. What is -- what distinction do you make  
5 between substantive and offhand?

6 A. I look for an explicit and deliberate  
7 incorporation by reference.

8 Q. If I asked you this before, Mr. Malamud,  
9 and certainly your counsel will tell me, I  
10 apologize.

11 Even though the 1999 standards have been  
12 removed from public view on Public.Resource's  
13 website, is the digital file containing the text of  
14 the 1999 standards still stored somewhere on  
15 Public.Resource's computer systems?

16 MR. BRIDGES: Objection. Vague and  
17 ambiguous.

18 THE WITNESS: Yes.

19 BY MR. HUDIS:

20 Q. Even though the 1999 standards were removed  
21 from public view on Internet Archive's website, to  
22 the best of your knowledge is the digital file  
23 containing the text of the 1999 standards still  
24 stored somewhere on Internet Archive's computer  
25 systems?

1 A. I do not --

2 MR. BRIDGES: Same objection. Vague and  
3 ambiguous.

4 THE WITNESS: I don't --

5 MR. BRIDGES: And lacks foun -- I'm sorry.

6 THE WITNESS: I'm sorry.

7 MR. BRIDGES: And maybe competence and may  
8 call for speculation.

9 THE WITNESS: I do not have access to that  
10 document. And so I do not know.

11 (PLAINTIFFS' EXHIBIT 39 WAS MARKED.)

12 BY MR. HUDIS:

13 Q. Mr. Malamud, I show you what's been marked  
14 as Exhibit 39 bearing production number  
15 AERA\_APA\_NCME 5129.

16 Do you recognize this document?

17 A. I do.

18 Q. What is this document of Exhibit 39?

19 A. It is a take-down notice from John S.  
20 Neikirk.

21 Q. I believe he pronounces it Neikirk.

22 A. I've never met the gentleman.

23 Q. Do you have any reason to doubt the  
24 authenticity of Exhibit 39?

25 MR. BRIDGES: Objection. Lacks foundation.

1 THE WITNESS: I do not.

2 BY MR. HUDIS:

3 Q. Do you recall receiving this e-mail from  
4 Mr. Neikirk?

5 A. I do.

6 Q. When you received this e-mail from  
7 Mr. Neikirk, do you know with which organization he  
8 was affiliated?

9 MR. BRIDGES: Objection. You're asking  
10 him -- sorry. Objection. Competence; may call for  
11 speculation; lacks personal knowledge.

12 THE WITNESS: His signature line said  
13 American Educational Research Association.

14 BY MR. HUDIS:

15 Q. And do you remember receiving this e-mail  
16 of Exhibit 39 --

17 A. I do.

18 Q. -- from Mr. Neikirk?

19 A. I received this e-mail, yes.

20 Q. What did you do in response to  
21 Mr. Neikirk's e-mail?

22 MR. BRIDGES: Objection. Argumentative;  
23 lacks foundation.

24 THE WITNESS: I sent him a letter a couple  
25 days later.



1 BY MR. HUDIS:

2 Q. In either December 2013 or January 2014 did  
3 you consult with counsel after receiving  
4 Mr. Neikirk's e-mail?

5 MR. BRIDGES: Objection. That's --  
6 contains the -- an implication that the  
7 consultation would be regarding the e-mail.

8 Further, the question calls for  
9 attorney-client privileged information. Objection.  
10 I instruct the witness not to answer.

11 BY MR. HUDIS:

12 Q. In either December 2013 or January 2014 did  
13 you remove the 1999 standards from public view  
14 where you had posted them on the Internet?

15 MR. BRIDGES: Objection. Vague and  
16 ambiguous; lacks foundation.

17 THE WITNESS: I did not.

18 BY MR. HUDIS:

19 Q. Did you reply to Mr. Neikirk's e-mail?

20 MR. BRIDGES: Objection. I think that's  
21 asked and answered.

22 THE WITNESS: Yes, I did.

23 MR. BRIDGES: Vague and ambiguous and  
24 argumentative.

25 BY MR. HUDIS:

1 Q. Do you remember -- do you remember when you  
2 responded to Mr. Neikirk's e-mail of Exhibit 39?

3 A. I believe it was on December 19th.

4 (PLAINTIFFS' EXHIBIT 40 WAS MARKED.)

5 BY MR. HUDIS:

6 Q. Mr. Malamud, I show you what has been  
7 marked as Exhibit 40 bearing production numbers  
8 AERA\_APA\_NCME 5127 through 5128.

9 Do you recognize Exhibit 40?

10 A. I do.

11 Q. Is Exhibit 40 your response to  
12 Mr. Neikirk's e-mail of Exhibit 39?

13 A. It is.

14 Q. Is this your digital signature at the  
15 bottom of the second page of the letter of Exhibit  
16 39 on page 5128?

17 MR. BRIDGES: Objection. Misformed  
18 question; lacks foundation.

19 THE WITNESS: It is.

20 BY MR. HUDIS:

21 Q. Did anyone --

22 MR. BRIDGES: Sorry, I'll ask the witness  
23 to listen carefully to the question. That was a  
24 question about Exhibit 39.

25 MR. HUDIS: Thank you, Counsel. I

1 appreciate it.

2 BY MR. HUDIS:

3 Q. Is this your digital signature at the  
4 bottom of the second page of the letter of Exhibit  
5 40, page 5128?

6 A. Yes, it is.

7 Q. Did anyone help you write this letter of  
8 Exhibit 40?

9 MR. BRIDGES: Objection. To the extent  
10 this calls for an implicit revelation of  
11 attorney-client communications, I would object on  
12 the grounds that it's privileged, and I would  
13 instruct the witness not to answer. But only to  
14 that extent.

15 THE WITNESS: I'm not going to be able to  
16 answer that question.

17 BY MR. HUDIS:

18 Q. In the first paragraph of Exhibit 40 on the  
19 first page, there is a word missing. I believe it  
20 should say, "I am in." Do you see that?

21 A. I do.

22 Q. All right. So I'm going to read the  
23 sentence with the word "in" in it.

24 "Dear Mr. Neikirk, I am in receipt of your  
25 communication of December 16 regarding the

1 publication of the AERA publication standard for  
2 Educational and Psychological Testing," in parens  
3 1999, at  
4 [HTTPS://Law.Resource.Org/pub/US/US/IBR/001/AERA.  
5 standards.1999.PDF."](https://law.resource.org/pub/US/US/IBR/001/AERA_standards.1999.pdf)

6 "We are responsible for uploading this  
7 document. In addition, you will find this document  
8 at [HTTPS://archive.org/details/thegov.law.AERA.  
9 standards.1999."](https://archive.org/details/thegov.law.AERA_standards.1999)

10 Do you see that?

11 MR. BRIDGES: Objection. Misquotes the  
12 letter.

13 THE WITNESS: I do.

14 BY MR. HUDIS:

15 Q. Specifically in this first paragraph what  
16 did you mean when you used the term "publication"  
17 the first time it appears in the sentence?

18 MR. BRIDGES: Objection to the extent it  
19 may imply a legal conclusion or legal expertise or  
20 opinion; vague and ambiguous.

21 THE WITNESS: There's a couple typos in  
22 this sentence. I meant posting.

23 BY MR. HUDIS:

24 Q. All right. So when you used the term  
25 publication, you meant posting?

1 A. In this sentence, yes.

2 Q. What did you mean by "We are responsible  
3 for uploading this document"?

4 A. It meant that I was the person that  
5 uploaded that document.

6 Q. To where? The two URLs in that paragraph?

7 A. Yes, that's what the --

8 MR. BRIDGES: Object.

9 THE WITNESS: Sorry.

10 MR. BRIDGES: Objection. Lacks foundation;  
11 vague and ambiguous.

12 THE WITNESS: Yes.

13 BY MR. HUDIS:

14 Q. If you could on Exhibit 40 please go on  
15 page 5127 to the third paragraph.

16 A. Okay.

17 Q. And I will read the first sentence. "While  
18 the standards drafted by the American Educational  
19 Research Association were entitled to copyright  
20 protection when issued, once they were incorporated  
21 into regulations, these standards became the law,  
22 and thus, have entered the public domain."

23 Do you see that?

24 A. I do.

25 Q. What did you mean when you said, "the

1 standards drafted by the American Educational  
2 Research Association were entitled to copyright  
3 protection when issued"?

4 MR. BRIDGES: Objection to the extent it  
5 calls for a legal opinion; legal expertise; legal  
6 conclusion; vague and ambiguous; lacks foundation.

7 THE WITNESS: So I'm not a lawyer. I know  
8 one thing. That the law in the United States has  
9 no copyright. And thus a standard incorporated by  
10 reference into the Code of Federal Regulations has  
11 no copyright.

12 BY MR. HUDIS:

13 Q. Mr. Malamud, could you turn to the next  
14 page of Exhibit 40. Page 5128. And I am directing  
15 your attention to the last paragraph of the letter.

16 As you can see by looking at the document  
17 in question, a cover sheet has been prepended  
18 clearly spelling out the section of the Code of  
19 Federal Regulations that has incorporated by  
20 reference this document into law.

21 Do you see that?

22 A. I do.

23 Q. And referring you back to Exhibit 34, is  
24 this the cover sheet to which you were referring in  
25 your letter of Exhibit 40?

1 A. 34?

2 Q. Yes.

3 A. Yes, it is.

4 Q. Mr. Malamud, at the end of your letter of  
5 Exhibit 40, did you decline to remove the 1999  
6 standards from the websites where you posted the  
7 document on the Internet?

8 MR. BRIDGES: Objection. Are you asking  
9 him if that's what the letter says?

10 MR. HUDIS: Yes.

11 MR. BRIDGES: Or are you asking him  
12 something -- okay.

13 MR. HUDIS: No. Yes. Yes, I am asking him  
14 if that's what the letter says.

15 MR. BRIDGES: The letter -- objection. The  
16 letter speaks for itself. The document speaks for  
17 itself.

18 THE WITNESS: The letter says, "We  
19 respectfully decline to remove this document."

20 BY MR. HUDIS:

21 Q. At the end of your letter of Exhibit 40,  
22 did you also decline to seek permission from anyone  
23 to post the 1999 standards on the Internet?

24 MR. BRIDGES: Objection. Argumentative;  
25 lacks foundation; vague and ambiguous.

1 THE WITNESS: The letter states, "We  
2 respectfully decline to request permission."

3 BY MR. HUDIS:

4 Q. Mr. Malamud, had Mr. Neikirk sent you his  
5 e-mail of Exhibit 39 a year earlier in 2012, would  
6 Public.Resource have removed the 1999 standards  
7 from where you posted the document on the Internet?

8 MR. BRIDGES: Objection. A hypothetical;  
9 calls for speculation; vague and ambiguous.

10 THE WITNESS: So you're asking if the date  
11 of his letter was December 19th, 2012, we would  
12 have changed our answer?

13 BY MR. HUDIS:

14 Q. Correct.

15 MR. BRIDGES: Same objections.

16 THE WITNESS: No.

17 (PLAINTIFFS' EXHIBIT 41 WAS MARKED.)

18 BY MR. HUDIS:

19 Q. Mr. Malamud, I show you a document marked  
20 Exhibit 41 bearing production number PROAERA 810.

21 Do you recognize the document?

22 A. I do.

23 Q. What is this document?

24 A. It is -- it's an incomplete electronic  
25 mail. So it is a electronic mail from me to



1 Mr. Butler at the Internet Archive.

2 Q. All right. So Mr. -- to the best of your  
3 knowledge Mr. Butler, Christopher Butler, is an  
4 employee of Internet Archive?

5 A. I believe --

6 MR. BRIDGES: Objection. Calls for --  
7 sorry. Objection. Lacks competence.

8 THE WITNESS: Yes.

9 BY MR. HUDIS:

10 Q. And you cc'd Brewster -- how do you  
11 pronounce that?

12 A. Kahle.

13 Q. Kahle. And you cc'd Brewster Kahle in your  
14 e-mail to Mr. Butler of Exhibit 41?

15 A. I did.

16 Q. And who is Brewster Kahle?

17 A. He is the founder and librarian of the  
18 Internet Archive.

19 Q. What, if anything, was attached to this  
20 e-mail of Exhibit 41?

21 MR. BRIDGES: I instruct the witness not to  
22 speculate. I object to the extent it calls for  
23 speculation.

24 THE WITNESS: The attachments line in the  
25 header says AERA.org, and a date. So this appears

1 to be the correspondence with Mr. Neikirk.

2 BY MR. HUDIS:

3 Q. And is that the correspondence of exhibits  
4 39 and 40?

5 A. Based on the file names, I would say yes.

6 Q. Why did you send this e-mail of Exhibit 41  
7 to Mr. Butler at the Internet Archive?

8 A. Because I keep Mr. Butler informed on any  
9 take-down activity, and he keeps me informed on any  
10 take-down activity.

11 Q. What do you mean by take-down activity?

12 A. A letter invoking the DMCA or otherwise  
13 complaining about copyright violations.

14 Q. At this time in December 2013 did you make  
15 the 1999 standards go dark on Internet Archive's  
16 website?

17 MR. BRIDGES: Objection. Lacks foundation;  
18 vague and ambiguous.

19 THE WITNESS: No, I did not.

20 BY MR. HUDIS:

21 Q. Why not?

22 MR. BRIDGES: Objection. Argumentative;  
23 lacks foundation; vague and ambiguous.

24 THE WITNESS: Because I did not believe  
25 there was any copyright violation involved.

1 BY MR. HUDIS:

2 Q. So after you refused to remove the 1999  
3 standards from public view on the Internet in  
4 December 2013, why did you then remove the 1999  
5 standards from public view on Public.Resource's  
6 website and the Internet Archive's website in June  
7 2014?

8 MR. BRIDGES: Objection. To the extent the  
9 question might call for disclosure of  
10 attorney-client privileged communications, I would  
11 object on the grounds of privilege and instruct the  
12 witness not to answer.

13 If he can answer beyond that objection and  
14 instruction, he may.

15 THE WITNESS: That would involve  
16 discussions with counsel. I'm not going to answer  
17 that question.

18 (PLAINTIFFS' EXHIBIT 42 WAS MARKED.)

19 BY MR. HUDIS:

20 Q. Mr. Malamud, I show you what's been marked  
21 as Exhibit 42 bearing production numbers PROAERA  
22 820 and PROAERA 821.

23 Do you recognize the document?

24 A. I do.

25 Q. Do you have any reason to doubt the

1 authenticity of Exhibit 42?

2 MR. BRIDGES: Objection. Vague and  
3 ambiguous; lacks foundation.

4 THE WITNESS: I do not.

5 BY MR. HUDIS:

6 Q. Do you remember receiving this e-mail of  
7 Exhibit 42 from me on June 10th, 2014?

8 A. I do.

9 Q. What did you do after receiving this e-mail  
10 of Exhibit 42?

11 MR. BRIDGES: Objection. To the extent  
12 this question calls for an answer that would  
13 disclose attorney-client communications, I would  
14 object on the grounds of privilege and instruct the  
15 witness not to answer.

16 In addition, it's vague and ambiguous and  
17 lacks foundation.

18 BY MR. HUDIS:

19 Q. Can you answer my question, Mr. Malamud,  
20 without revealing the substance of attorney-client  
21 communications?

22 A. No.

23 Q. Mr. Malamud, could you return to Exhibit  
24 38. Why did you send the e-mail of Exhibit 38 to  
25 Alexis Rossi the day after receiving my e-mail of

1 Exhibit 42?

2 MR. BRIDGES: Object. Asked and answered,  
3 and argumentative and lacks foundation.

4 THE WITNESS: Because that was the day that  
5 I made that item go dark.

6 (PLAINTIFFS' EXHIBIT 43 WAS MARKED.)

7 BY MR. HUDIS:

8 Q. Mr. Malamud, I show you what's been marked  
9 as Exhibit 43.

10 Do you recognize this document?

11 A. I do.

12 Q. What is this document of Exhibit 43?

13 A. This is a memorandum concerning the posting  
14 of the standards at issue.

15 Q. Is that your signature at the bottom left  
16 of Exhibit 43?

17 A. It is.

18 Q. Did anyone help you write this memo Exhibit  
19 43?

20 MR. BRIDGES: Objection. To the extent the  
21 question calls for disclosure of attorney-client  
22 communications, I would object on the grounds of  
23 privilege and would instruct the witness not to  
24 answer.

25 THE WITNESS: I'll be unable to answer that

1 question.

2 BY MR. HUDIS:

3 Q. Who was this memo of Exhibit 43 intended  
4 for?

5 MR. BRIDGES: Objection. Lacks foundation.

6 THE WITNESS: I believe it was for you.

7 BY MR. HUDIS:

8 Q. "You," meaning me, plaintiff's counsel?

9 A. Plaintiffs.

10 Q. Thank you.

11 Mr. Malamud, could you read the first  
12 paragraph of the memo to yourself. Tell me when  
13 you're done.

14 A. Okay.

15 Q. I am not going to read the whole paragraph.  
16 "This memorandum is in reference to the lawsuit  
17 named above," and I'm skipping, "and specifically  
18 in response to the stated intention to file a  
19 preliminary injunction motion."

20 What did you mean?

21 A. Well, I believe you had said you were going  
22 to file a preliminary injunction motion.

23 Q. And I will read in full the second sentence  
24 of the second paragraph of Exhibit 43.

25 "Public.Resource also believes that this

1 case deserves the Court's fullest attention without  
2 a rush to reach an interim ruling in the absence of  
3 a full record."

4 What did you mean by that?

5 MR. BRIDGES: Objection. Lacks foundation;  
6 vague and ambiguous.

7 THE WITNESS: As I state in the next  
8 paragraph, "In order to focus this case on  
9 developing an appropriate record for a decision on  
10 the merits, Public.Resource.Org has voluntarily  
11 removed the document in question from the websites  
12 under its control."

13 And as you had stated in a previous  
14 sentence, this was so it was done without a rush to  
15 reach an interim ruling in the absence of a full  
16 record.

17 BY MR. HUDIS:

18 Q. I'd like to now direct your attention,  
19 Mr. Malamud, to the fourth paragraph of Exhibit 43.  
20 And it says, "Until the conclusion at trial on the  
21 merits in this case, Public.Resource.Org will keep  
22 the document in question off of the websites under  
23 its control and will not disseminate the document  
24 in whole or in part, including any revisions, and  
25 will maintain the status on the Internet Archive to

1 prevent any public access to the document from the  
2 archive's websites." Do you see that?

3 MR. BRIDGES: Objection. The document  
4 speaks for itself.

5 THE WITNESS: I do.

6 BY MR. HUDIS:

7 Q. What did you mean by that sentence?

8 MR. BRIDGES: Objection. The document  
9 speaks for itself; lacks foundation; vague and  
10 ambiguous; argumentative.

11 THE WITNESS: I think the sentence is very  
12 clear; right?

13 BY MR. HUDIS:

14 Q. What did you mean?

15 A. I meant "Until the conclusion of trial on  
16 the merits of this case, Public.Resource.Org will  
17 keep the document in question off of the websites  
18 under its control and will not disseminate the  
19 document in whole or in part, including any  
20 revisions, and will maintain the status on the  
21 Internet Archive to prevent any public access to  
22 the document from the archive's websites."

23 Q. And this memo was written by you on June  
24 12th, 2014?

25 MR. BRIDGES: Objection. Lacks foundation;



1 vague and ambiguous.

2 THE WITNESS: Yes.

3 BY MR. HUDIS:

4 Q. Since the time of this memo of Exhibit 43,  
5 have the 1999 standards been reposted to a website  
6 under Public.Resource's control?

7 MR. BRIDGES: Objection. Vague and  
8 ambiguous; argumentative.

9 THE WITNESS: Yes.

10 BY MR. HUDIS:

11 Q. Why?

12 A. There was a technical malfunction in one of  
13 our servers and by mistake a copy of the full  
14 standard was posted in place of the stub.

15 Q. And when was that?

16 A. That was in January 2015.

17 Q. Mr. Malamud, during the two-year period  
18 that the 1999 standards were posted to  
19 Public.Resource's website, was a record kept of how  
20 many Internet users viewed or accessed the  
21 standards from that website location?

22 MR. BRIDGES: Objection. Utterly lacks  
23 foundation; argumentative; vague and ambiguous,  
24 and -- yeah. And competence.

25 THE WITNESS: Our server log's document

1 retention policy was a two-week window until  
2 litigation commenced in the ASTM case when we began  
3 keeping the logs permanently. And so we -- we did  
4 not keep a record prior to that.

5 BY MR. HUDIS:

6 Q. Do you know the earliest date on which you  
7 kept such logs?

8 MR. BRIDGES: Objection. Again, lacks  
9 foundation; argumentative; vague and ambiguous and  
10 competence.

11 THE WITNESS: So again, the document  
12 retention policy was a two-week window on the logs,  
13 and in September -- August or September of 2013 we  
14 changed that policy because litigation had  
15 commenced. And so at that point we began keeping  
16 the logs permanently.

17 BY MR. HUDIS:

18 Q. And do you still have those logs today?

19 MR. BRIDGES: Same objections. I think I  
20 missed a compound objection to the underlying  
21 question.

22 THE WITNESS: Yes.

23 BY MR. HUDIS:

24 Q. In what form are the logs kept?

25 MR. BRIDGES: Same objections.

1 THE WITNESS: In log format. Standard.

2 Apache web server log format.

3 BY MR. HUDIS:

4 Q. Are they kept in print format or electronic  
5 format?

6 MR. BRIDGES: Same objections.

7 THE WITNESS: Electronic.

8 BY MR. HUDIS:

9 Q. Has Public.Resource produced these logs to  
10 us?

11 MR. BRIDGES: Objection. Competence; may  
12 call for speculation; may call for some form of  
13 legal conclusion; vague and ambiguous.

14 THE WITNESS: No, we did not.

15 MR. HUDIS: Counsel, we've had discussions  
16 about this. We're again demanding the logs that  
17 provide documentation of the information  
18 Public.Resource gave us in its amended response to  
19 interrogatory number 6.

20 MR. BRIDGES: I believe that there's a  
21 motion to compel pending. Am I correct on that  
22 issue, Mr. Hudis?

23 MR. HUDIS: You are correct.

24 MR. BRIDGES: And I believe we gave you an  
25 opportunity to -- first of all, I believe that this

1 was mentioned for the first time in your reply  
2 brief; is that correct?

3 MR. HUDIS: That's not correct.

4 MR. BRIDGES: That's my understanding.

5 That motion has been pending, and you elected to  
6 proceed with this deposition in the absence of a  
7 ruling on that motion to compel.

8 I'm not sure what you mean by the fact that  
9 you are demanding the logs. You have chosen to  
10 proceed with this deposition in the absence of a  
11 ruling on that motion. And so the demand -- your  
12 demand appears to be moot. It is a question that  
13 is before the court.

14 BY MR. HUDIS:

15 Q. Mr. Malamud, I'd like you to turn your  
16 attention back to Exhibit Number 29.

17 A. Okay.

18 Q. Does Public.Resource's answer to exhibit --  
19 to interrogatory number 6, accurately state the  
20 number of Internet users who viewed or accessed the  
21 1999 standards posted to Public.Resource's website  
22 from June 2013 to October 2014?

23 MR. BRIDGES: Objection. That objection --  
24 that interrogatory is itself subject to a number of  
25 objections, and is a competence issue, and it's

1 vague and ambiguous; may lack foundation.

2 Are you asking him if that's what the  
3 interrogatory says? Or are you asking him whether  
4 that is his memory sitting here today? I'd like to  
5 know where you're going, what you're looking for.

6 MR. HUDIS: Sure. I want to know whether  
7 Mr. Malamud, in looking at the answer to  
8 interrogatory number 6, can verify the accuracy of  
9 the information provided.

10 MR. BRIDGES: The verification was  
11 furnished on page 16 of Exhibit 29 at the time of  
12 the response. Are you asking him if this is his  
13 independent memory today?

14 MR. HUDIS: Yes.

15 MR. BRIDGES: Objection. Objection. You  
16 can ask him the questions of what -- what numbers  
17 he believes there are independently.

18 If you're -- if you're asking him to look  
19 at the document, then you need to find out if it  
20 refreshes an independent recollection.

21 BY MR. HUDIS:

22 Q. Mr. Malamud, does the answer in  
23 interrogatory number 6 refresh your independent  
24 recollection of the number of Internet users who  
25 viewed or accessed the 1999 standards posted to

1 Public.Resource's website from June 2013 to October  
2 2014?

3 MR. BRIDGES: Objection. The same  
4 objections on vagueness, and lacks foundation and  
5 argumentativeness.

6 THE WITNESS: And so again, the document  
7 retention policy was a two-week policy until that  
8 period in August when litigation commenced.

9 The standard at issue was removed in June  
10 of 2014. And so this interrogatory, as it says in  
11 the answer, is, in fact, a complete record from  
12 September of 2013 to June of 2014.

13 BY MR. HUDIS:

14 Q. So then with respect to the number of FTP  
15 requests for the file name AERA.standards.1999.PDF,  
16 why does the information go back to June of 2013?

17 A. Because we had an FTP log hanging around  
18 that was not conforming with our document retention  
19 policy, and since that data was there, we furnished  
20 it to you.

21 Q. So now I'd like to take you one at a time  
22 as to the information provided in interrogatory --  
23 answer -- amended interrogatory answer number 6.

24 Mr. Malamud, on page 9, the information is  
25 stated as the number of HTTP requests. Do you see

1 that?

2 A. Yes.

3 Q. All right. What do these numbers  
4 represent?

5 MR. BRIDGES: Objection. The document  
6 speaks for itself. It's been verified.

7 THE WITNESS: It's the number --

8 MR. BRIDGES: If he's testifying -- it's  
9 not clear whether you're asking him to explain this  
10 document or to give percipient testimony.

11 MR. HUDIS: To explain the document.

12 MR. BRIDGES: Objection.

13 BY MR. HUDIS:

14 Q. So what --

15 MR. BRIDGES: Objection on the grounds that  
16 it lacks foundation; vague and ambiguous;  
17 misleading and fails to account for objections, and  
18 the document speaks for itself.

19 BY MR. HUDIS:

20 Q. So what do these numbers represent in HTTP  
21 requests?

22 MR. BRIDGES: Same objections.

23 THE WITNESS: The number of accesses to the  
24 standards at issue using the HTTP protocol.

25 BY MR. HUDIS:

1 Q. By month and year?

2 MR. BRIDGES: Same objections.

3 THE WITNESS: Yes.

4 BY MR. HUDIS:

5 Q. Okay. And what do the numbers of H -- of  
6 FTP requests represent?

7 MR. BRIDGES: Same objections.

8 THE WITNESS: Number of file transfers by  
9 month and year.

10 BY MR. HUDIS:

11 Q. And what do the number of rsync requests  
12 represent?

13 MR. BRIDGES: Objection. The document --  
14 same objections and the document speaks for itself.

15 THE WITNESS: Number of rsync accesses by  
16 month and year.

17 BY MR. HUDIS:

18 Q. So if there are accountings of HTTP  
19 requests or FTP requests in interrogatory answer  
20 number -- amended interrogatory answer number 6  
21 after June of 2014, were those requests for the  
22 stub document?

23 A. That's correct.

24 MR. HUDIS: Andrew, he's got to change the  
25 video, so we're off.



1 THE VIDEOGRAPHER: This marks the end of  
2 Disc 4, Volume 1 in the deposition of Carl Malamud.  
3 The time is 6:38 and we are off the record.  
4 (Recess taken.)

5 THE VIDEOGRAPHER: This marks the beginning  
6 of Disc 5, Volume 1 in the deposition of Carl  
7 Malamud.

8 The time is 6:46, and we are on the record.

9 BY MR. HUDIS:

10 Q. Mr. Malamud, in your last answer we  
11 discussed referrals to the stub document.

12 Is that the document of Exhibit 37?

13 A. It is.

14 Q. Mr. Malamud, during the two-year period  
15 that the 1999 standards were posted by you to  
16 Internet Archive's website, do you know whether a  
17 record was kept of how many Internet users viewed  
18 or accessed the standards from that website?

19 MR. BRIDGES: Objection. Vague and  
20 ambiguous.

21 THE WITNESS: I don't know if they kept a  
22 record. There is a view count number that I  
23 believe was there.

24 (PLAINTIFFS' EXHIBIT 44 WAS MARKED.)

25 BY MR. HUDIS:

1 Q. Mr. Malamud, I show you a document that has  
2 been marked as Exhibit 44 bearing a single  
3 production number PROAERA 827, and it says, "This  
4 document has been produced in native format." So  
5 what follows it looks like an Excel spreadsheet.

6 Do you see that?

7 A. I do.

8 Q. Do you know what this document is, Exhibit  
9 44?

10 A. I'm not totally sure.

11 MR. BRIDGES: Object on the grounds of  
12 competence and may call for speculation.

13 THE WITNESS: Was this a document produced  
14 by us or the Internet Archive?

15 BY MR. HUDIS:

16 Q. It was produced by your counsel.

17 A. It appears --

18 MR. BRIDGES: I'll direct the witness to  
19 testify as to what he knows.

20 MR. HUDIS: Fair enough, Counsel.

21 THE WITNESS: Well, this is a spreadsheet.  
22 I can tell you what -- what I see here on this  
23 document, if that's useful to you.

24 BY MR. HUDIS:

25 Q. Please.

1           A. It's a spreadsheet that's got a series of  
2     identifiers and downloads as well as the title  
3     creator of documents. Clearly documents  
4     incorporated by reference. And there is a date  
5     field.

6           Q. Mr. Malamud, to the best of your knowledge  
7     what does the creator column represent?

8           MR. BRIDGES: Objection. Competence; may  
9     call for speculation.

10          THE WITNESS: This is clearly a set of  
11     technical standards incorporated by reference, and  
12     so the creator is the original creator of the  
13     standard. And then there is a title.

14     BY MR. HUDIS:

15          Q. Do you know -- do you know what the date  
16     column represents?

17          MR. BRIDGES: I'd ask the witness -- object  
18     to the extent I think the witness may not be  
19     competent and this may call for speculation.

20          THE WITNESS: I don't know what the date  
21     field says.

22     BY MR. HUDIS:

23          Q. Do you know what the downloads column  
24     represents?

25          MR. BRIDGES: Objection. Competence; vague

1 and ambiguous; may call for speculation -- or calls  
2 for speculation.

3 THE WITNESS: Yeah, I'd have to speculate,  
4 sir. I'm sorry. This is just not a document that  
5 I -- I remember. So no.

6 BY MR. HUDIS:

7 Q. Do you know what the identifier column  
8 represents?

9 MR. BRIDGES: Objection. Competence; calls  
10 for speculation.

11 THE WITNESS: That is the naming scheme  
12 that I used for Internet Archive identifiers.

13 BY MR. HUDIS:

14 Q. Do you know what the title column  
15 represents?

16 MR. BRIDGES: Objection. Competence; may  
17 call for speculation; vague and ambiguous.

18 THE WITNESS: Yeah, that's what I had  
19 explained previously, that this appears to be a  
20 listing of standards incorporated by reference, and  
21 so there's the creator and the name -- the title of  
22 the document.

23 BY MR. HUDIS:

24 Q. Do you know the source of this document of  
25 Exhibit 44?

1 MR. BRIDGES: Objection. I think that may  
2 be asked and answered.

3 THE WITNESS: No, I do not. I -- like I  
4 said, I do not recall this. That --

5 BY MR. HUDIS:

6 Q. Do you know who created this document?

7 MR. BRIDGES: Objection. Competence; calls  
8 for speculation.

9 THE WITNESS: I simply don't recall this  
10 document.

11 BY MR. HUDIS:

12 Q. Mr. Malamud, if you would turn to the  
13 bottom of the first spreadsheet page of Exhibit 44.

14 A. Reads American Architectural Manufacturers  
15 Association?

16 Q. No. It -- so for the -- for the page I'm  
17 looking at of Exhibit 44, it says American  
18 Educational Research Association.

19 MR. BRIDGES: That's not -- that's not the  
20 case on our -- on our exhibits.

21 BY MR. HUDIS:

22 Q. Could you find on the document American  
23 Educational Research Association?

24 A. Yes. It's on page 2 in the middle of the  
25 page.

1 Q. Thank you. If you go to -- on that row, if  
2 you go to the identifier. Is that -- is  
3 gov.log.AERA.standards. 99 -- dot 1999, is that the  
4 identifier that you used for the 1999 standards  
5 that you posted to the Internet Archive?

6 MR. BRIDGES: Objection. Vague and  
7 ambiguous; may call for speculation.

8 THE WITNESS: It is.

9 BY MR. HUDIS:

10 Q. Do you believe that Exhibit 44 came from  
11 the Internet Archive?

12 MR. BRIDGES: Objection. Calls for  
13 speculation; competence. He's testified he doesn't  
14 know where this came from. He hasn't seen it  
15 before.

16 THE WITNESS: I really don't recollect this  
17 spreadsheet.

18 BY MR. HUDIS:

19 Q. Mr. Malamud, we had asked Public  
20 research -- Resource to search for and produce  
21 materials relating to its posting or publication of  
22 the 1999 standards on one of its websites. What  
23 materials did you search for?

24 MR. BRIDGES: Objection. May call for  
25 attorney-client communications, in which case it

1 would be privileged, and I would object on the  
2 grounds of privilege, and I would instruct the  
3 witness not to answer.

4 If you're asking what Mr. Malamud -- it's  
5 also vague and ambiguous; lacks foundation.

6 BY MR. HUDIS:

7 Q. I'd like to know, Mr. Malamud, what records  
8 you searched for, independent of your discussions  
9 with counsel?

10 MR. BRIDGES: All the other objections  
11 still apply.

12 THE WITNESS: Having to do with the posting  
13 of the standards on Public.Resource.Org websites?

14 BY MR. HUDIS:

15 Q. Yes.

16 MR. BRIDGES: Same objections.

17 THE WITNESS: Well, we've gone over that  
18 process of the posting of the standards at issue on  
19 the Law.Resource.org website.

20 BY MR. HUDIS:

21 Q. What I want to know is what documents did  
22 you search for?

23 MR. BRIDGES: Objection. Argumentative;  
24 lacks foundation; vague and ambiguous.

25 THE WITNESS: Well, the number of accesses

1 information I searched are logs, and computed the  
2 number of accesses per month based on the criteria  
3 that I indicated in the interrogatory answers.

4 BY MR. HUDIS:

5 Q. Interrogatory -- amended interrogatory  
6 answer number 6?

7 A. That's correct.

8 Q. And what else did you search for?

9 MR. BRIDGES: Objection. Vague and  
10 ambiguous.

11 I think there's some confusion going on  
12 here. You were talking about in response to a  
13 document request?

14 MR. HUDIS: Yes.

15 MR. BRIDGES: Can you show him the document  
16 requests?

17 MR. HUDIS: I can read it to him, sure.

18 MR. BRIDGES: You're asking what he  
19 searched for in response to a document request?

20 MR. HUDIS: Mm-hm.

21 MR. BRIDGES: These are interrogatories.  
22 He was asking about document requests.

23 THE WITNESS: The discovery process.

24 BY MR. HUDIS:

25 Q. Yes, sir.



1 MR. BRIDGES: Searching for documents.

2 THE WITNESS: I did not conduct those  
3 searches. I gave materials to our legal team and  
4 their discovery engine and they did the searches.  
5 So I didn't search for anything.

6 BY MR. HUDIS:

7 Q. So you said you gave the materials to your  
8 legal team. What I want to know is from  
9 Public.Resource's records, what materials did you  
10 search for to give to your counsel?

11 I do not want to know your communications  
12 with counsel. I want to know the materials you  
13 searched for.

14 MR. BRIDGES: Here's the difficulty.

15 MR. HUDIS: Sure.

16 MR. BRIDGES: I think the legal team did  
17 the searching. He turned -- he gave access to the  
18 legal team. The legal team did the searching.  
19 So ...

20 MR. HUDIS: Thank you for the  
21 clarification.

22 MR. BRIDGES: Yeah.

23 BY MR. HUDIS:

24 Q. Did -- Mr. Malamud, did you do any  
25 independent searches for discovery records,

1 independently yourself?

2 A. No, I didn't.

3 MR. BRIDGES: Objection. Lacks foundation;  
4 vague and ambiguous.

5 THE WITNESS: No, I did not.

6 BY MR. HUDIS:

7 Q. So the document request, Mr. Malamud, was  
8 "Produce those documents, things and/or items,  
9 electronically stored information regarding  
10 Public.Resource posting or publishing the 1999  
11 standards to a Public.Resource website."

12 And just to clarify, you're saying that  
13 your counsel did the search of Public.Resource's  
14 records. You did not do that search yourself?

15 A. That's correct.

16 Q. Mr. Malamud, before or after  
17 Public.Resource posted the 1999 standards to the  
18 Internet, did you ever hear someone complain that  
19 he or she could not obtain a copy of the 1999  
20 standards on his or her own?

21 MR. BRIDGES: Objection. Vague and  
22 ambiguous; lacks foundation; compound.

23 THE WITNESS: I did not.

24 BY MR. HUDIS:

25 Q. Before or after Public.Resource posted the

1 1999 standards to the Internet, did you ever  
2 receive written correspondence complaining that  
3 someone could not obtain a copy of the 1999  
4 standards on his or her own?

5 MR. BRIDGES: Same objections;  
6 argumentative.

7 THE WITNESS: I did not.

8 BY MR. HUDIS:

9 Q. During the two-year period that the 1999  
10 standards were posted to Public.Resource's website,  
11 was a record kept of how many Internet users  
12 downloaded the standards from that website location  
13 to their computer hard drives?

14 MR. BRIDGES: Objection. Lacks foundation;  
15 argumentative; assumes facts not in evidence; vague  
16 and ambiguous.

17 THE WITNESS: We would have no way of  
18 determining that.

19 BY MR. HUDIS:

20 Q. During the two-year period that the 1999  
21 standards were posted to Public.Resource's website,  
22 did Public.Resource deploy any protocols or use any  
23 settings on its web server to prevent Internet  
24 users from downloading the 1999 standards to their  
25 computer hard drives?

1 MR. BRIDGES: Objection. Argumentative;  
2 lacks foundation; possibly competence; vague and  
3 ambiguous.

4 THE WITNESS: The only thing we know about  
5 is access to the data and the fact that the data  
6 left our computer in response to a request. So I  
7 don't know about downloads. It's technically  
8 impossible to determine that.

9 BY MR. HUDIS:

10 Q. I didn't want to -- my last question was  
11 not about logging downloads. What I wanted to know  
12 is once an HTTP request or an FTP request or an  
13 rsync request was made of Public.Resource's server  
14 where the 1999 standards were, did Public.Resource  
15 deploy any protocols or use any settings on its web  
16 server to prevent Internet users from downloading  
17 the 1999 standards to their computer hard drives?

18 MR. BRIDGES: Objection. Argumentative;  
19 lacks foundation; assumes facts not in evidence.

20 THE WITNESS: I have no idea how one would  
21 do that.

22 BY MR. HUDIS:

23 Q. During the two-year period that the 1999  
24 standards were posted to Public.Resource's website,  
25 did Public.Resource deploy any protocols or use any

1 settings on its web server to prevent Internet  
2 users from printing to paper the 1999 standards  
3 accessed from that website?

4 MR. BRIDGES: All the same objections,  
5 plus, Mr. Hudis, I've been -- you've been prefacing  
6 many of your questions with the phrase, "During the  
7 two-year period that the 1999 standards were posted  
8 to Public.Resource's website." It's not clear to  
9 me that they were posted to the website for two  
10 years.

11 So every time you ask that question, I'm  
12 going to object on the grounds that it lacks  
13 foundation; argumentative and misstates -- it  
14 misstates evidence.

15 So in addition to that, the other  
16 objections apply to this question. Mainly lacks  
17 foundation; argumentative; vague and ambiguous;  
18 possibly competence.

19 THE WITNESS: No, we did not.

20 MR. HUDIS: Counsel, just for the record,  
21 so we can avoid some disagreements, if possible,  
22 interrogatory answer number 2 says the 1999  
23 standard was first posted to the Law.Resource.Org  
24 website on July 11, 2012. And then it says the  
25 1999 standard was last posted to a Public.Resource

1 website on June 10, 2014.

2 BY MR. HUDIS:

3 Q. Mr. Malamud, during the two-year period  
4 that the 1999 standards were posted to  
5 Public.Resource's website, or any time after that  
6 until today, did Public.Resource receive any  
7 communications from people who claimed to have  
8 accessed a copy of the 1999 standards from  
9 Public.Resource's website?

10 MR. BRIDGES: Mr. Hudis, you've just given  
11 me dates that are not two years. And then you  
12 immediately ask a question that says, "during the  
13 two-year period."

14 I'm not sure why you insist on using  
15 two-year period, but every time you ask a question  
16 that says "during the two-year period," I'm going  
17 to object as misleading, misstating the facts, and  
18 deceptive.

19 MR. HUDIS: Counsel.

20 MR. BRIDGES: Yes.

21 MR. HUDIS: Would you accept an  
22 introductory phrase "approximate two-year period"?

23 MR. BRIDGES: I will not. If you want to  
24 say, "during the period," fine.

25 MR. HUDIS: I'll accept that.

1 MR. BRIDGES: But if you want to start  
2 making a characterization, I'm going to object,  
3 unless it's accurate.

4 MR. HUDIS: Counsel, I'll accept that.  
5 Thank you very much.

6 MR. BRIDGES: The -- there are other -- you  
7 might want to restate your question because I had  
8 other objections that I didn't get around to on  
9 that.

10 BY MR. HUDIS:

11 Q. During the period that the 1999 standards  
12 were posted to Public.Resource's website, or at any  
13 other time after that until today, did  
14 Public.Resource receive any communications from  
15 people who claimed to have accessed a copy of the  
16 1999 standards from Public.Resource's website?

17 MR. BRIDGES: Objection. Lacks foundation;  
18 competence; vague and ambiguous. Also  
19 argumentative and may call for a legal conclusion  
20 to the extent you were trying to give "copy" a  
21 copyright term. And argumentative. I said that.

22 THE WITNESS: No.

23 MR. HUDIS: Counsel, instead of the word  
24 "copy," would you prefer I use the term  
25 reproduction? I don't want to use a charged word

1 here. I just want to get some information.

2 MR. BRIDGES: You could use a -- accessed a  
3 file containing. I would accept that.

4 MR. HUDIS: Thank you, Counsel.

5 BY MR. HUDIS:

6 Q. Does Public.Resource know what people do  
7 with their files containing the 1999 standards that  
8 they obtained from Public.Resource's website?

9 MR. BRIDGES: Objection. Utterly lacks  
10 foundation; assumes facts not in evidence;  
11 argumentative; vague and ambiguous and competence.

12 THE WITNESS: No.

13 BY MR. HUDIS:

14 Q. Does Public.Resource know what people do,  
15 if anything, with their file containing the 1999  
16 standards that they obtained from Internet  
17 Archive's website after you posted the standards  
18 there?

19 MR. BRIDGES: Same objections. Lacks  
20 foundation; assumes facts not in evidence;  
21 argumentative; vague and ambiguous; competence;  
22 calls for ...

23 THE WITNESS: No.

24 (PLAINTIFFS' EXHIBIT 45 WAS MARKED.)

25 BY MR. HUDIS:



1 Q. Mr. Malamud, I show you what has been  
2 marked as Exhibit 45. It is Public.Resource's  
3 responses to plaintiff's second set of  
4 interrogatories.

5 A. Okay.

6 Q. Is that your signature at the bottom of  
7 page 10?

8 A. It is.

9 MR. BRIDGES: I'm sorry. Whoa.

10 MR. HUDIS: Everything okay, Counsel?

11 MR. BRIDGES: No, it's not okay.

12 THE WITNESS: There's two page 10s. The  
13 document goes up to 12 and then there is a 10 at  
14 the end. Is it the same on your copy?

15 MR. HUDIS: Mm-hm. That's how it was given  
16 to us.

17 Counsel, should we stay on the record or go  
18 off the record?

19 MR. BRIDGES: We'll stay on the record.

20 I think you can get his testimony that's  
21 his signature on the final page of Exhibit 45.

22 BY MR. HUDIS:

23 Q. Sure. Mr. Malamud, is that your signature  
24 on the final page of Exhibit 45?

25 A. It is.

1 Q. Now, Mr. Malamud, I'd like you to read  
2 Public.Resource's answers to interrogatory numbers  
3 9 and 11. You don't have to read them into the  
4 record. I just want you to familiarize yourself  
5 with the information contained in those  
6 interrogatory answers. Tell me when you're done.

7 A. 9 and 11 or 9 and 10?

8 Q. 9 and 11.

9 A. Okay.

10 Okay.

11 Q. Do interrogatory answers numbers 9 and 11  
12 identify all of the state and federal regulations  
13 of which Public.Resource is currently aware in  
14 which the 1999 standards have been incorporated by  
15 reference?

16 MR. BRIDGES: Objection. Competence, in  
17 terms of recalling all of the instances that may  
18 exist; vague and ambiguous; may call for a legal  
19 conclusion.

20 THE WITNESS: I would have to disclose  
21 communications with counsel to answer that  
22 question.

23 BY MR. HUDIS:

24 Q. I want your -- your independent knowledge;  
25 not substance of attorney-client communications.

1           A. Well, my knowledge is based on my  
2 attorney-client communications. So I can't really  
3 answer that.

4           Q. All right. So you cannot answer my  
5 question without revealing substance of  
6 attorney-client communications?

7           A. Yeah.

8           Q. Mr. Malamud, could you read in Exhibit 45  
9 interrogatory answer number 10?

10          A. Okay.

11          Q. Does interrogatory answer number 10  
12 identify all the instances of which a state or  
13 federal agency cited the 1999 standards of which  
14 Public.Resource is aware?

15                 MR. BRIDGES: Objection. May -- may lack  
16 competence; lacks foundation; vague and ambiguous.

17                 And to the extent that the answer would  
18 depend upon attorney-client communications, I would  
19 object on the grounds of privilege and instruct him  
20 not to answer to that extent.

21                 THE WITNESS: I would have to divulge my  
22 communications with counsel to answer that  
23 question.

24          BY MR. HUDIS:

25          Q. So you can't answer my question without

1 revealing the substance of attorney-client  
2 communications?

3 A. That's correct.

4 Q. The citations in interrogatory number 10,  
5 are these examples of incorporation by reference of  
6 the 1999 standards?

7 MR. BRIDGES: I'm sorry? I think  
8 interrogatory number -- interrogatory -- the answer  
9 to interrogatory number 10 speaks for itself.

10 THE WITNESS: The interrogatory asks for  
11 times it has been cited by a government agency; not  
12 times that it was incorporated by reference.

13 BY MR. HUDIS:

14 Q. So what I want to know is, in the answer  
15 are these examples or are they not examples of the  
16 1999 standards incor -- being incorporated by  
17 reference into law --

18 MR. BRIDGES: Objection.

19 MR. HUDIS: Let me finish.

20 BY MR. HUDIS:

21 Q. -- in interrogatory answer number 10?

22 MR. BRIDGES: Objection. Competence; may  
23 call for speculation; lacks foundation; may require  
24 legal conclusion or legal expertise; legal opinion.

25 THE WITNESS: So incorporation by reference

1 is a technical process that would involve the  
2 Federal Register and the Code of Federal  
3 Regulations at the federal level.

4 Would involve potentially a statute or a  
5 regulation at the state level.

6 So a number of these documents cited here  
7 are papers, right. So that wouldn't be an  
8 incorporation by reference issue.

9 There are a series of Federal Register  
10 publications that are listed in the interrogatory.  
11 I would have to pull up those individual documents  
12 and look at them to see whether or not that was, in  
13 fact, an incorporation by reference, in addition to  
14 the citation, which is what you asked for.

15 BY MR. HUDIS:

16 Q. Mr. Malamud, does Public.Resource claim  
17 that any of the plaintiffs have promoted the 1999  
18 standards as being incorporated by reference into  
19 law?

20 MR. BRIDGES: Objection to the extent it  
21 calls for a legal conclusion or -- or attorney work  
22 product or for attorney-client privilege, and also  
23 vague and ambiguous.

24 THE WITNESS: So can you repeat that  
25 question?

1 BY MR. HUDIS:

2 Q. Yes. Does -- does Public.Resource claim  
3 that any of the plaintiffs have promoted the 1999  
4 standards as being incorporated by reference into  
5 law?

6 MR. BRIDGES: Same objections to the extent  
7 it calls for a legal conclusion or attorney work  
8 product or attorney-client privilege. Also vague  
9 and ambiguous.

10 THE WITNESS: Yeah, I don't know the  
11 official positions of the plaintiffs for promoting  
12 things. I just don't know what that means.

13 I know individuals associated with the  
14 standards at issue have discussed the fact that the  
15 standards have been incorporated by reference.  
16 Promoted seems like a loaded term.

17 BY MR. HUDIS:

18 Q. Does Public.Resource claim that any of the  
19 plaintiffs have encouraged the 1999 standards as  
20 being incorporated by reference into law?

21 MR. BRIDGES: All the same objections.

22 THE WITNESS: I don't know the answer to  
23 that. I believe that's something that -- that  
24 would require an examination of the discovery  
25 materials and depositions and that. That's exactly

1 the kind of issue that I believe is going to be  
2 discussed and brought out as we continue this  
3 litigation. I don't know the answer to that.

4 BY MR. HUDIS:

5 Q. Does Public.Resource claim that any of the  
6 plaintiffs have consented to, accepted or  
7 acquiesced in the 1999 standards as being  
8 incorporated by reference into law?

9 MR. BRIDGES: Objection. Calls for legal  
10 conclusions; calls for attorney work product; lacks  
11 foundation; competence; vague and ambiguous.

12 THE WITNESS: I don't know the answer  
13 either way to that.

14 (PLAINTIFFS' EXHIBIT 46 WAS MARKED.)

15 BY MR. HUDIS:

16 Q. Mr. Malamud, I have marked as Exhibit 46  
17 Public.Resource's answer and counterclaim to the  
18 plaintiffs' complaint in this action. I'd like you  
19 to turn to page 25.

20 A. Okay.

21 Q. And I would like you to look at the top of  
22 page 25, and numbered paragraph 2. Do you see  
23 that?

24 A. The one that reads "Plaintiffs have no  
25 copyrights in works that government entities have

1 incorporated by reference into law"?

2 Q. Yes.

3 And what is the factual basis for that  
4 statement?

5 MR. BRIDGES: Objection. Calls for a legal  
6 conclusion; calls for attorney work product;  
7 competence and may call for attorney-client  
8 communications.

9 To that extent I would object on the  
10 grounds of privilege and instruct the witness not  
11 to answer. If he feels that he can answer  
12 otherwise for that instruction, then he may  
13 proceed.

14 THE WITNESS: So you would like my personal  
15 opinion as a layman as to why standards  
16 incorporated by reference in the law have no  
17 copyright; is that correct?

18 BY MR. HUDIS:

19 Q. Well, specifically directed to plaintiffs'  
20 work here, the 1999 standards.

21 MR. BRIDGES: All the same objections and  
22 partial instruction.

23 THE WITNESS: I can't speak to the specific  
24 standard at issue. I can tell you why I believe  
25 that standards incorporated by reference under the



1 Code of Federal Regulations have no copyright.

2 BY MR. HUDIS:

3 Q. What -- what is Public.Resource's basis for  
4 making that statement?

5 MR. BRIDGES: I'm sorry?

6 BY MR. HUDIS:

7 Q. Public.Resource's basis for making that  
8 statement?

9 MR. BRIDGES: What statement? The basis  
10 for making the -- for asserting the second  
11 affirmative defense?

12 MR. HUDIS: Yes, sir.

13 MR. BRIDGES: Okay. I think that's asked  
14 and answered, and all the same objections and  
15 partial instruction from earlier.

16 THE WITNESS: So I can't speak to the  
17 specific standards at issue. I can speak in  
18 general terms as to why I believe the standards  
19 incorporated by reference under the CFR have no  
20 copyright.

21 BY MR. HUDIS:

22 Q. And why is that?

23 MR. BRIDGES: Same objections and partial  
24 instruction. The instruction he may answer to the  
25 extent it doesn't depend upon any attorney-client

1 privileged communication.

2 THE WITNESS: So as a layman; not a lawyer,  
3 I have read widely on this subject, and looked at a  
4 number of supreme court decisions on the question  
5 of copyright into the law.

6 I have examined the compendium of Copyright  
7 Office practices issued by the U.S. copyright  
8 Office.

9 I participated in the Administrative  
10 Conference of the U.S. deliberations on this issue.

11 I have read fairly widely in the history of  
12 promulgation of the law, both in the United States  
13 and in the common-law system more generally, and I  
14 have read the legislative history, and  
15 congressional hearings that led to the creation of  
16 the Federal Register and the official journals, as  
17 well as the incorporation-by-reference mechanism,  
18 which was in the 1960s, and based on this reading,  
19 it is my feeling that the law has no copyright in  
20 the United States. A standard deliberately and  
21 explicitly incorporated by reference into law is  
22 the law. And therefore the standards have no  
23 copyright.

24 BY MR. HUDIS:

25 Q. If you could turn back to Exhibit 46, page

1 25, numbered paragraph 3. It says, "Lack of  
2 ownership of the alleged copyrights bars  
3 plaintiffs' claim."

4 What is Public.Resource's factual basis for  
5 that statement?

6 MR. BRIDGES: Objection. Attorney work  
7 product; attorney-client privilege and instruct --  
8 instruct the witness not to answer.

9 THE WITNESS: I won't be able to answer  
10 that question.

11 BY MR. HUDIS:

12 Q. Mr. Malamud, on page 25 of Exhibit 46, the  
13 fourth paragraph says, "The doctrine of copyright  
14 fair use bars plaintiffs' claim." What is the  
15 factual basis for this statement?

16 MR. BRIDGES: I'll object on the grounds of  
17 attorney work product and attorney-client  
18 privilege.

19 And to the extent this would depend upon  
20 attorney-client communications, I would object on  
21 the grounds of privilege and would instruct the  
22 witness not to answer.

23 Also calls for a legal conclusion and  
24 object on the grounds of competence.

25 If the witness can answer beyond the

1 instruction I've given, he is free to.

2 THE WITNESS: I'm not a lawyer. This is  
3 beyond my competence.

4 BY MR. HUDIS:

5 Q. Mr. Malamud, on page 25 of Exhibit 46, the  
6 paragraph says, "The doctrine of unclean hands bars  
7 plaintiffs' claim -- claims."

8 What is the factual basis for that  
9 statement?

10 MR. BRIDGES: All the same objections as to  
11 the previous line of questions.

12 THE WITNESS: I don't even know what the  
13 doctrine of unclean hands is. I'm not qualified to  
14 answer that question.

15 BY MR. HUDIS:

16 Q. On page 25 of Exhibit 46, the sixth  
17 paragraph says, "The doctrine of copyright misuse  
18 bars plaintiffs' claims."

19 What is the factual basis for that  
20 statement?

21 MR. BRIDGES: All the same objections and  
22 partial instruction as to the previous questions.

23 THE WITNESS: I'm not familiar with the  
24 doctrine of copyright misuse. I'm not qualified to  
25 answer that question.

1 BY MR. HUDIS:

2 Q. Mr. Malamud, on page 25 of Exhibit 46, the  
3 seventh paragraph says, "Waiver and estoppel bars  
4 plaintiffs's claims." What is the factual basis  
5 for that statement?

6 MR. BRIDGES: All the same objections and  
7 partial instruction apply here as to the previous  
8 questions.

9 THE WITNESS: I'm not familiar with how  
10 waiver and estoppel work. I'm not qualified to  
11 answer that question.

12 BY MR. HUDIS:

13 Q. Mr. Malamud, on page 25 of Exhibit 46 the  
14 eighth paragraph reads, "Lack of irreparable injury  
15 bars plaintiffs' demand for injunction." What is  
16 the factual basis for that statement?

17 MR. BRIDGES: All the same objections and  
18 partial instruction apply here as to the previous  
19 questions.

20 THE WITNESS: I don't know what lack of  
21 irreparable injury bars means in a legal context.  
22 I'm not qualified to answer that.

23 BY MR. HUDIS:

24 Q. On page 25 of Exhibit 46, the ninth  
25 paragraph reads, "Injunction would greatly harm the

1 public interest, and thus, the public interest bars  
2 plaintiffs' demand for an injunction."

3 What's the factual basis for that  
4 statement?

5 MR. BRIDGES: All the same objections and  
6 partial instruction apply here as to the previous  
7 questions.

8 If he -- if he can answer beyond that  
9 partial instruction, he may.

10 THE WITNESS: I'm not sure I understand the  
11 implications of an injunction and what specifically  
12 that would mean in this context. Again, that's a  
13 legal question. I would need to know what that  
14 means before I could answer that.

15 BY MR. HUDIS:

16 Q. Mr. Malamud, who is Dr. David Michaels?

17 A. Dr. David Michaels is the assistant  
18 Secretary of Labor and the administrator of the  
19 Occupational Health and Safety Administration.

20 Q. Who is Mr. Shems, S-h-e-m-s, Peterson?

21 A. Mr. Peterson is the retired chief building  
22 inspector for Sonoma County, California.

23 Q. Who is Mr. Raymond Mosley?

24 A. Mr. Mosley is the former executive director  
25 of the Office of the Federal Register at the

1 National Archives and Records Administration.

2 Q. Who is Benjamin Goldstein?

3 A. Mr. Goldstein is a former official at the  
4 Department Of Energy.

5 Q. Have any of these gentlemen, Dr. Michaels,  
6 Mr. Peterson, Mr. Mosley or Mr. Goldstein, provided  
7 any statements to Public.Resource discussing  
8 incorporation by reference in this case?

9 MR. BRIDGES: Objection. Vague and  
10 ambiguous; lacks foundation.

11 THE WITNESS: I don't know. I'm letting  
12 our legal team handle that issue. I really don't  
13 know.

14 (PLAINTIFFS' EXHIBIT 47 WAS MARKED.)

15 BY MR. HUDIS:

16 Q. Mr. Malamud, I show you what's been marked  
17 as Exhibit 47, bearing a document production  
18 numbers AERA\_APA\_NCME 31807 through 31809.

19 Please take a moment to review the  
20 document.

21 A. Okay.

22 MR. BRIDGES: I need to hold on for a  
23 second.

24 MR. HUDIS: Sure.

25 MR. BRIDGES: I need to go off the record

1 briefly to consult with my client about this  
2 document.

3 THE VIDEOGRAPHER: The time is 7:32, and we  
4 are off the record.

5 (Discussion off the record.)

6 THE VIDEOGRAPHER: The time is 7:37, and we  
7 are back on the record.

8 BY MR. HUDIS:

9 Q. Mr. Malamud, I'll show you what's been  
10 marked as Exhibit 47. Do you recognize this  
11 document?

12 A. Yes, I do.

13 Q. What is it?

14 A. It is a notice from the American Petroleum  
15 Institute that was sent from the Internet Archive  
16 and forwarded along to me.

17 Q. So do you recall receiving API's e-mail  
18 correspondence to Internet Archive being forwarded  
19 to you at the end of 2012?

20 MR. BRIDGES: Objection. You're referring  
21 to this document?

22 MR. HUDIS: Yes.

23 THE WITNESS: Are you objecting or --

24 MR. BRIDGES: No.

25 THE WITNESS: Oh, yes. I do remember.



1 BY MR. HUDIS:

2 Q. Okay. And Mr. Butler, Chris Butler, is an  
3 employee of Internet Archive?

4 MR. BRIDGES: Objection. Competence.

5 THE WITNESS: Yes.

6 BY MR. HUDIS:

7 Q. Do you know why Mr. Butler forwarded API's  
8 cease-and-desist copyright notice to you?

9 MR. BRIDGES: Objection. Competence; calls  
10 for speculation.

11 THE WITNESS: I am the creator of that  
12 particular collection, and any take-down notices go  
13 to my attention.

14 BY MR. HUDIS:

15 Q. All right. That was my next question. Did  
16 you post API's technical standards to a collection  
17 on the Internet Archive?

18 MR. BRIDGES: Objection. Lacks foundation;  
19 vague and ambiguous.

20 THE WITNESS: I did.

21 BY MR. HUDIS:

22 Q. When did you post API's technical standards  
23 to a collection on Internet Archive?

24 MR. BRIDGES: Objection. Lacks foundation;  
25 vague and ambiguous.

1 THE WITNESS: Before November 2nd, 2012.

2 BY MR. HUDIS:

3 Q. So around that time?

4 MR. BRIDGES: Objection. Misstates  
5 testimony.

6 THE WITNESS: I don't know.

7 MR. BRIDGES: Vague and ambiguous; lacks  
8 foundation.

9 THE WITNESS: I don't know when I posted  
10 them.

11 BY MR. HUDIS:

12 Q. At the time that you posted API's technical  
13 standards to a collection on the Internet Archive,  
14 did you also post API's technical standards to a  
15 Public.Resource website?

16 MR. BRIDGES: Objection. Lacks foundation;  
17 vague and ambiguous.

18 THE WITNESS: I did.

19 BY MR. HUDIS:

20 Q. What did you do, if anything, in response  
21 to receiving API's e-mail correspondence to  
22 Internet Archive after it was forwarded to you by  
23 Mr. Butler?

24 MR. BRIDGES: Objection. Vague and  
25 ambiguous; argumentative; lacks foundation.

1 THE WITNESS: I sent a response to the  
2 author of that letter, Mr. Brett Heavner.

3 BY MR. HUDIS:

4 Q. Did you forward Mr. Butler's e-mail and the  
5 API e-mail to anyone affiliated with  
6 Public.Resource?

7 MR. BRIDGES: Objection. Vague and  
8 ambiguous; may call for speculation.

9 THE WITNESS: I would have to speculate. I  
10 don't remember.

11 BY MR. HUDIS:

12 Q. Well, who are all members of the  
13 Public.Resource legal staff?

14 MR. BRIDGES: Objection. Lacks foundation.

15 THE WITNESS: Well, that's an interesting  
16 question because we don't really have a legal  
17 staff. I have one part-time of counsel. So this  
18 was clearly my attempt at some form of humor.

19 MR. BRIDGES: Jonathan, they were an Army  
20 you never want to see.

21 MR. HUDIS: Or never could.

22 BY MR. HUDIS:

23 Q. After receiving Mr. Heavner's e-mail, did  
24 you remove API's technical standards from public  
25 view, either from Public.Resource's website or

1 Internet Archive's website?

2 MR. BRIDGES: Objection. Lacks foundation;  
3 vague and ambiguous; argumentative.

4 THE WITNESS: We did not.

5 BY MR. HUDIS:

6 Q. Did you respond to Mr. Heavner -- strike  
7 that.

8 Did you respond to Mr. Heavner's e-mail of  
9 November 2nd, 2012?

10 MR. BRIDGES: Objection. Vague and  
11 ambiguous; also asked and answered.

12 THE WITNESS: I did.

13 BY MR. HUDIS:

14 Q. Mr. Malamud, in response to Mr. Heavner's  
15 e-mail of November 2, 2012 as shown in Exhibit 47,  
16 did you send him a letter similar to the one you  
17 sent to John Neikirk reflected in Exhibit 40?

18 MR. BRIDGES: Objection. Totally  
19 argumentative; lacks foundation; vague and  
20 ambiguous.

21 THE WITNESS: I sent him a letter  
22 explaining that the standards were incorporated by  
23 reference into federal law, and respectfully  
24 declined to remove the standards.

25 BY MR. HUDIS:

1 Q. Did anyone from API follow up with you  
2 after receiving that letter?

3 MR. BRIDGES: Objection. Lacks foundation;  
4 vague and ambiguous.

5 THE WITNESS: No, they dropped the matter.  
6 We didn't hear from them again.

7 MR. HUDIS: Mr. Malamud, that's all the  
8 questions I have for you at this point, subject to  
9 our outstanding discovery motion pending with the  
10 court. Thank you for your time.

11 THE WITNESS: Great. Thank you, sir.

12 MR. BRIDGES: I'll just say that you had an  
13 opportunity to postpone this deposition until after  
14 the motion to compel. The choice to proceed with  
15 the motion to compel pending, and to take I think  
16 over eight-and-a-half hours of deposition was --  
17 was a choice that was the plaintiffs' own decision.  
18 And so if there are no more questions, the  
19 depositions of Public.Resource.Org and Mr. Malamud  
20 have, in fact, concluded.

21 MR. HUDIS: We would disagree, Counsel.

22 MR. BRIDGES: Well, then ask whatever  
23 questions you want for the next 25 minutes and then  
24 it's over.

25 MR. HUDIS: Counsel, we don't have to

1 argue. There are questions that we would like to  
2 ask Mr. Malamud, but we cannot until the court  
3 rules on our pending motion to compel. We don't --

4 MR. BRIDGES: You have chosen to proceed  
5 now without waiving a -- a ruling by the court.

6 If at some time you wish to seek what I  
7 suppose would be something like 20 more minutes of  
8 Mr. Malamud's deposition, the costs attendant to  
9 that for the defendant -- well, we would oppose.  
10 And in any event if -- if you are unwilling to  
11 proceed, we would insist on being paid the  
12 extraordinary costs of the second session.

13 MR. HUDIS: We would respectfully disagree  
14 with that position.

15 THE VIDEOGRAPHER: This marks the end of  
16 Disc 5, Volume 1 and ends today's deposition of  
17 Carl Malamud.

18 The time is 7:47, and we are off the  
19 record.

20 (The deposition of CARL MALAMUD  
21 was adjourned at 7:47 p.m. this date.)

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CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me. Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

\_\_\_\_\_

Signature of Deponent

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this \_\_\_\_ day of \_\_\_\_\_, 2015, and executed the above certificate in my presence.

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NOTARY PUBLIC IN AND FOR

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REPORTER'S CERTIFICATE

The undersigned Certified Shorthand Reporter licensed in the State of California does hereby certify:

I am authorized to administer oaths or affirmations pursuant to Code of Civil Procedure, Section 2093(b), and prior to being examined, the witness was duly administered an oath by me.

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in the outcome of this action.

I am the deposition officer who stenographically recorded the testimony in the foregoing deposition, and the foregoing transcript is a true record of the testimony given by the witness.

Before completion of the deposition, review of the transcript [X] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

In witness whereof, I have subscribed my name this 14<sup>th</sup> day of May, 2015.

Diane S. Martin  
DIANE S. MARTIN, CSR No. 6464