

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Videotaped deposition of JOHN C. JAROSZ taken at the law offices of Veritext Legal Solutions, 1250 I Street NW, Washington, DC, commencing at 10:09 a.m. THURSDAY, AUGUST 27, 2015, before Debbie Leonard, Registered Diplomate Reporter, Certified Realtime Reporter.

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<p>1 it.</p> <p>2 Objection to form. You're</p> <p>3 asking him to recall, without having</p> <p>4 all the materials in front of him?</p> <p>5 MR. BRIDGES: Yeah.</p> <p>6 MR. FEE: Okay.</p> <p>7 THE WITNESS: It's all laid out</p> <p>8 in my report, and the sources are</p> <p>9 provided in my report. I've not</p> <p>10 memorized all those.</p> <p>11 BY MR. BRIDGES:</p> <p>12 Q. But I don't think your report</p> <p>13 refers to upside-down materials, does it?</p> <p>14 A. I don't recall for sure, but I</p> <p>15 thought some of the documents that I cited</p> <p>16 make reference to those materials. I'm not</p> <p>17 sure that I cited the, for instance,</p> <p>18 upside-down materials, but I think I have</p> <p>19 discussions about that phenomenon.</p> <p>20 Q. With whom?</p> <p>21 A. In written materials that I've</p> <p>22 cited.</p> <p>23 Q. Have you had oral discussions</p> <p>24 about what you have referred to as that</p> <p>25 phenomenon?</p>	<p>1 beyond the document production to verify that</p> <p>2 information.</p> <p>3 Q. But you don't recall seeing any</p> <p>4 defective materials yourself, correct?</p> <p>5 A. That's correct. I do not.</p> <p>6 Q. You just relied upon the word</p> <p>7 of others, correct?</p> <p>8 MR. FEE: Objection. Vague.</p> <p>9 Mischaracterizes his testimony.</p> <p>10 THE WITNESS: I relied upon</p> <p>11 written documents I saw and</p> <p>12 conversations that I had.</p> <p>13 BY MR. BRIDGES:</p> <p>14 Q. What written documents did you</p> <p>15 see that discussed these issues?</p> <p>16 MR. FEE: Objection. Asked and</p> <p>17 answered.</p> <p>18 THE WITNESS: And I'm sorry. I</p> <p>19 can't point you to the particular</p> <p>20 ones. Perhaps, through the course of</p> <p>21 the day, my memory will be refreshed</p> <p>22 on that.</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. If you relied upon those</p> <p>25 written documents, would you have cited to</p>
<p>Page 22</p> <p>1 A. Yes.</p> <p>2 Q. With whom?</p> <p>3 A. Counsel here.</p> <p>4 Q. With anybody else?</p> <p>5 A. I don't think so. It's</p> <p>6 possible, but I'm not recalling anything</p> <p>7 else.</p> <p>8 Q. And when you say discussions</p> <p>9 with "counsel here," you're referring to the</p> <p>10 counsel at the table here today at the</p> <p>11 deposition?</p> <p>12 A. Correct.</p> <p>13 And we should add to that</p> <p>14 Jordana Rubel, who's been a person that I've</p> <p>15 had conversations with over the last several</p> <p>16 months.</p> <p>17 Q. What did you do to verify any</p> <p>18 of the statements to you from counsel about</p> <p>19 these facts you've referred to about the</p> <p>20 materials that the defendant has</p> <p>21 disseminated?</p> <p>22 A. I don't think I did separate</p> <p>23 verification. I may have seen some documents</p> <p>24 that provide or provided confirmation of that</p> <p>25 fact, but I don't recall separately going out</p>	<p>Page 24</p> <p>1 those written documents in your report?</p> <p>2 A. Perhaps.</p> <p>3 Q. Why do you say "perhaps"?</p> <p>4 A. I can't say with absolute</p> <p>5 certainty what I do. But often, if something</p> <p>6 is a direct support for a factual</p> <p>7 observation, I will often cite that source,</p> <p>8 but not always.</p> <p>9 Q. What previous -- strike that.</p> <p>10 What training or education have</p> <p>11 you ever received with respect to standards</p> <p>12 development organizations?</p> <p>13 MR. FEE: Objection to form.</p> <p>14 THE WITNESS: I don't recall if</p> <p>15 I've had a course in standard</p> <p>16 development. Probably it has been</p> <p>17 part of some of the economics courses</p> <p>18 that I've taken over the years.</p> <p>19 In my profession and the work</p> <p>20 that I've done in the last 30 years,</p> <p>21 I've had occasion to look at and</p> <p>22 evaluate standards organizations and</p> <p>23 the output from those organizations.</p> <p>24 So it is among the topics that</p> <p>25 I've investigated in the course of my</p>

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7 (Pages 22 - 25)

1 consulting career.
2 BY MR. BRIDGES:
3 Q. In what context?
4 A. There have been several matters
5 I've had, litigations, that have involved
6 standard setting organizations and the
7 outputs from those organizations.
8 Q. What organizations?
9 A. Well, some that come to mind
10 are ETSI, IEEE, the Blu-ray Association,
11 MPEG, MPEG L.A., the Philips 6C and Philips
12 3C organizations. Those are among the ones
13 that come to mind.
14 Q. And what types of litigation
15 did your work relating to those standard
16 setting organizations involve?
17 MR. FEE: Objection to form.
18 THE WITNESS: It was almost all
19 intellectual property litigation, with
20 probably the bulk of the analyses
21 undertaken with regard to patent
22 rights.
23 BY MR. BRIDGES:
24 Q. Do you recall --
25 A. I guess I should -- there were

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1 standards development organization that
2 you've worked on?
3 A. Again, I'd have to go back and
4 look at my records. I can't right now recite
5 any, but there very well could be one or
6 more.
7 Q. Did you review any of your work
8 in -- from earlier copyright cases involving
9 standards development organizations in
10 connection with your work in this case?
11 A. Not to the best of my memory,
12 no.
13 Q. What background do you have in
14 the creation of standards by standard
15 development organizations?
16 MR. FEE: Objection to form.
17 THE WITNESS: In the context of
18 some of my consulting assignments, I
19 have examined processes undertaken by
20 SDOs.
21 BY MR. BRIDGES:
22 Q. Anything else?
23 A. Nothing else comes to mind.
24 I've certainly looked at the output
25 associated with those processes, but there's

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1 probably some breach of contract matters as
2 well.
3 Q. Did you work on any matters
4 involving copyright law where you became
5 familiar with the work and outputs of
6 standards setting organizations before this
7 case?
8 A. Probably, but I cannot say that
9 with absolute certainty. I've been involved
10 in several matters over a course of many
11 years.
12 Q. Can you name any copyright
13 matter involving a standards development
14 organization that you recall?
15 A. Not now, without going back and
16 looking at my records.
17 Q. Would they be listed in the
18 cases attached to Exhibit 1?
19 A. That would summarize some of my
20 records. The cases that are embodied in my
21 tab 1 are those that led to deposition or
22 trial testimony. I've been involved in many
23 matters beyond those.
24 Q. But sitting here, you cannot
25 recall any copyright case involving a

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1 nothing else that comes to mind.
2 Q. What processes undertaken by
3 standards development organizations did you
4 examine?
5 MR. FEE: Objection. Are you
6 asking prior to the report still?
7 MR. BRIDGES: Yes.
8 MR. FEE: Okay.
9 THE WITNESS: I'm not quite --
10 MR. BRIDGES: Or other than in
11 this case.
12 MR. FEE: Okay.
13 THE WITNESS: I'm not quite
14 sure what you're asking. I've seen
15 discussion of the some of the
16 processes of various organizations.
17 I'm not -- I'm not quite sure what
18 you're asking. Perhaps you could ask
19 it somewhat differently.
20 BY MR. BRIDGES:
21 Q. Well, no. You said, quote, "I
22 have examined processes undertaken by SDOs."
23 So my question is, what
24 processes undertaken by standards development
25 organizations did you examine?

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8 (Pages 26 - 29)

<p>1 A. It sounds like the same 2 question to me.</p> <p>3 Q. Specifically, what processes 4 did you examine?</p> <p>5 A. That still sounds like the same 6 question, but let me try to answer it by 7 saying I've looked, for instance, at the 8 mechanisms that ETSI undertook in developing 9 standards. So I am familiar generally with 10 the processes that it follows. Similarly 11 with regard to other standard setting 12 organizations.</p> <p>13 Q. What other standard setting 14 organizations?</p> <p>15 A. Well, I think I identified 16 those a few moments ago. Do you want me to 17 repeat those?</p> <p>18 Q. Well, if -- are you saying 19 that, for all of those organizations, you 20 examined their processes?</p> <p>21 A. In some dimension, probably for 22 most of the organizations, I had at least 23 some knowledge of the process. I can't say 24 that I investigated in depth all of the 25 processes for all of the organizations that</p>	<p>1 manufacturers only. Others include a wider 2 array of companies.</p> <p>3 In all instances, though, the 4 companies are trying to -- the standards 5 setting organizations are trying to develop 6 at least some form of consensus -- sometimes 7 it's very broad consensus; sometimes it's 8 more narrow consensus -- about what would be 9 good for that standards setting organization.</p> <p>10 Sometimes the SSOs are 11 interested in what's best for the 12 manufacturers and the ability for them to 13 supply in an interoperable environment. In 14 some cases, the SSOs are very alert to the 15 needs of consumers and users of products and 16 services that comply with standards.</p> <p>17 Q. You've distinguished between 18 standards setting organizations and standard 19 development organizations. What is the 20 distinction that you -- that you identify 21 between the two?</p> <p>22 A. I think I said I didn't know if 23 there is for sure a distinction, but I think 24 an SSO is perhaps a broader concept than an 25 SDO, but I might be wrong on that.</p>
<p>Page 30</p> <p>1 have been involved in my consulting 2 assignments that are standards oriented.</p> <p>3 Q. What do you recall about your 4 investigation of the processes by which 5 standards development organizations create 6 their standards?</p> <p>7 A. I should say I -- SDO is 8 probably not the right term to use. I should 9 probably say standards setting organizations.</p> <p>10 There may be a distinction between an SSO and 11 an SDO.</p> <p>12 But, generally, each SSO has a 13 process that's unique to its organization.</p> <p>14 Some solicit input from a wide range of 15 constituents; some from a more narrow range.</p> <p>16 The ones that I have examined 17 have all been fairly careful in the work that 18 they've done, seeking input at many steps 19 along the way.</p> <p>20 Some organizations, like SDOs 21 at issue here, seek a broader array of inputs 22 than do others.</p> <p>23 Some organizations, standards 24 setting organizations, include primarily or 25 only manufacturers and sometimes large</p>	<p>Page 32</p> <p>1 I know the companies -- I -- 2 the plaintiffs here are SDOs. The 3 associations are, among other things, in the 4 business of creating and developing 5 standards.</p> <p>6 There could be other SSOs that 7 have different constituents that are of 8 interest to them. I don't know for sure that 9 an SSO is a broader concept than an SDO, but 10 it could be.</p> <p>11 Q. What do you understand to be 12 the constituents of the plaintiffs in this 13 case?</p> <p>14 MR. FEE: Objection to form.</p> <p>15 THE WITNESS: I laid that out 16 in my report. In summary, I believe 17 they try to include in the process 18 both those -- both supply-side 19 entities and demand-side entities.</p> <p>20 BY MR. BRIDGES:</p> <p>21 Q. Who else are plaintiffs' 22 constituents?</p> <p>23 MR. FEE: Same objection.</p> <p>24 THE WITNESS: I can't think of 25 anything that doesn't fall within</p>

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9 (Pages 30 - 33)

1 Q. So those would be harms caused
2 by a court decision?
3 MR. FEE: Same objection.
4 THE WITNESS: By continuing
5 activities by the defendant that are
6 not halted by the Court.
7 BY MR. BRIDGES:
8 Q. Well, it comes across, frankly,
9 in your report as though you're identifying
10 harms that would flow from a court decision.
11 MR. FEE: Objection.
12 BY MR. BRIDGES:
13 Q. Is that correct or not?
14 A. No, I think you --
15 MR. FEE: Mischaracterizes the
16 report.
17 THE WITNESS: -- you misread
18 it. I don't think I said that or
19 meant to say that.
20 BY MR. BRIDGES:
21 Q. So what harms have occurred
22 from the -- from the defendant's conduct to
23 date?
24 A. At the risk of repeating
25 myself, some of that is summarized in

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1 think basically what I'm saying is
2 what would -- or addressing, is what
3 would be the harm to the plaintiffs if
4 there's no permanent injunction.
5 BY MR. BRIDGES:
6 Q. Well, what did you mean by
7 "losing copyright protection" in the
8 paragraph -- in the heading VI on page 48?
9 A. In essence, you can think of it
10 as what would happen if there's no permanent
11 injunction. In other words, what the
12 defendant has done in the past and what it's
13 likely to do in the future is allowed to
14 continue.
15 Q. And you immediately go into
16 paragraph 112 talking about Emily Bremer,
17 correct?
18 A. I don't know what you mean by
19 "immediately." It's the first paragraph in
20 Section VI.
21 Q. Right. Was Emily Bremer in the
22 passage you referred to referring to the
23 presence or absence of a permanent injunction
24 in this case?
25 A. I don't think explicitly she

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1 paragraph 133, with regard to tangible
2 evidence on harm. With regard to other
3 evidence, it's throughout the report.
4 Q. So why would it make a
5 difference to what the defendant's harms
6 are -- strike -- strike that.
7 Why would it make a defendants
8 [sic] to the plaintiffs' harms if the
9 plaintiffs' harms were continue with --
10 strike that.
11 Is it your testimony that harms
12 to plaintiffs would be different depending on
13 the particular basis of the Court's ruling?
14 MR. FEE: Objection. Vague.
15 THE WITNESS: I -- I don't
16 understand your question.
17 BY MR. BRIDGES:
18 Q. It looks as though you're
19 stating what the harms would be if the Court
20 found that incorporation by reference would
21 cause the plaintiffs to lose copyright
22 protection; is that correct?
23 A. I don't --
24 MR. FEE: Objection. Vague.
25 THE WITNESS: -- think so. I

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1 was addressing that issue, no.
2 Q. Do you think implicitly she was
3 referring to this case?
4 A. No. I thought you were asking
5 about permanent injunction. I don't think
6 she was addressing the -- an injunction
7 issue. She was addressing the concept of
8 copyright protection.
9 Q. And that's what you quoted her
10 for, right, was for the concept of copyright
11 protection for standards?
12 MR. FEE: Objection. You're
13 referring just to paragraph 112?
14 BY MR. BRIDGES:
15 Q. You may answer.
16 MR. FEE: Objection to form.
17 THE WITNESS: I -- I don't
18 understand the question.
19 BY MR. BRIDGES:
20 Q. You quoted her in
21 paragraph 112, correct?
22 A. Yes. From one of her two
23 articles, yes.
24 Q. Right. Regarding the concept
25 of copyright protection?

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18 (Pages 66 - 69)

1 A. Generally. I think she's
2 talking about standards development and
3 incorporation by reference. I don't remember
4 if she said at the very beginning of the
5 article that it was about copyright
6 protection, but she certainly talks about
7 copyright protection.

8 Q. And you're quoting her about
9 losing copyright protection, and you're
10 placing it in the context of harms of the
11 loss of copyright protection, correct?

12 MR. FEE: Objection to form.

13 THE WITNESS: This excerpt
14 doesn't specifically talk about losing
15 copyright protection, but it talks
16 about the concept of it. If there was
17 no longer copyright protection granted
18 to the SDOs, what would be the
19 repercussions.

20 BY MR. BRIDGES:

21 Q. And that's the context that you
22 identified in the first line of
23 paragraph 112, correct?

24 A. Yes.

25 MR. FEE: Objection to form.

1 Q. "Such products" --
2 A. And in the next two sentences.
3 Q. And these are other products
4 that "could include more sophisticated
5 Web-based availability, published
6 compilations of incorporated standards, and
7 other ancillary products that incorporate the
8 standards"; isn't that correct?

9 A. You didn't read that right. It
10 starts "such products could include."

11 Q. Okay. Otherwise, that reading
12 is correct, correct?

13 A. I think so.

14 Q. You consider that to be harm to
15 the plaintiffs?

16 MR. FEE: Objection. Vague.

17 THE WITNESS: It could be, yes.
18 It's likely to be, if the copyright
19 infringement or the assumption of a
20 copyright infringement continues. It
21 could broaden.

22 BY MR. BRIDGES:

23 Q. Right. But the fact that these
24 other types of products would enter the
25 marketplace is part of the harm that you

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1 BY MR. BRIDGES:

2 Q. Let me direct your attention to
3 paragraph 35 of your report. It says, "With
4 regard to expansion beyond the specific
5 actions of Public Resource here, the
6 'product' offerings of Public Resource -
7 scans of paper copies of standards with some
8 rekeying of text and some redrawing of
9 diagrams (with some containing errors) -
10 represent a rudimentary first step in the use
11 of Plaintiffs' standards that is likely to
12 become much more sophisticated if the Court
13 holds that third parties are free to use
14 Plaintiffs' standards with impunity after
15 they are incorporated by reference into law."

16 Do you see that?

17 A. Yes, I do.

18 Q. That is your statement,
19 correct?

20 A. Yes.

21 Q. What are the steps that you're
22 envisioning there beyond the rudimentary
23 first step that you identify?

24 A. I think they're laid out in the
25 next sentence.

1 envision from the defendant in this case?

2 MR. FEE: Objection to form.
3 THE WITNESS: It's potential --
4 there's a potential that the defendant
5 could do that. There's also the
6 potential that other parties could do
7 that.

8 BY MR. BRIDGES:

9 Q. What --
10 A. I don't know for sure what the
11 defendant has in mind.

12 Q. Why did you take into account
13 harms caused by other parties in this case?

14 A. Because --
15 MR. FEE: Objection. Lack of
16 foundation.

17 Go ahead.
18 THE WITNESS: If no copyright
19 protection is allowed here, in other
20 words, there's no permanent
21 injunction, Public Resource and other
22 parties like it will have freedom to
23 do what the plaintiffs believe they
24 should not have freedom to do.

25 BY MR. BRIDGES:

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1 Q. In other words, if the Court
2 makes a decision in a certain way, there will
3 be harms from persons or entities other than
4 Public.Resource.Org to the plaintiffs? Is
5 that your testimony?

6 MR. FEE: Objection to form.

7 THE WITNESS: You used the
8 phrase "in a certain way." I don't
9 know what you mean by that. I'm
10 addressing the issue of whether there
11 should be a permanent injunction or
12 not.

13 BY MR. BRIDGES:

14 Q. So your view is that, if the
15 Court does not enter a permanent injunction,
16 the plaintiffs will suffer harms from parties
17 other than Public.Resource.Org. Is that your
18 testimony?

19 A. That potential exists. I don't
20 know for sure. That's, in part, why the harm
21 is irreparable or very difficult to quantify.

22 Q. The -- what harm?

23 A. Continuing activity of Public
24 Resource and others. I don't know exactly
25 what will happen, but the potential is that

1 standards.

2 Q. What further harm would
3 Public.Resource.Org cause to plaintiffs with
4 respect to the standards at issue in this
5 case if no -- if the Court does not
6 permanently enjoin Public.Resource.Org?

7 MR. FEE: Objection to form.

8 THE WITNESS: If there's no
9 permanent injunction, there will, in
10 essence, be a message sent to the
11 marketplace that the standards that
12 have already been disseminated are out
13 there and can be used by others.

14 So right now my expectation is
15 that some number of consumers of the
16 standards have been reluctant or
17 unknowing as to the standards
18 disseminated by Public Resource. Now
19 there will be more knowledge about
20 that and more approval of that
21 activity. That is if there's no
22 permanent injunction.

23 BY MR. BRIDGES:

24 Q. What harms will plaintiffs
25 suffer if the Court rules that the plaintiffs

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1 there could be very broad dissemination of
2 the standards, which would impact these SDOs
3 tremendously.

4 Q. What harm would
5 Public.Resource.Org cause to plaintiffs if
6 there is no permanent injunction?

7 A. A permanent injunction would --
8 lack of a permanent injunction would harm the
9 SDOs.

10 Q. That wasn't my question. My
11 question was, what harm would
12 Public.Resource.Org cause to plaintiffs if
13 there is no permanent injunction?

14 A. At the very least, it's
15 associated with its historical dissemination
16 of these standards, and there would be, in
17 essence, a carte blanche for other
18 organizations or individuals to access those.

19 So my expectation is that the
20 dissemination of the materials that have
21 already been disseminated will expand.

22 It could also be the case that
23 Public Resource will undertake further
24 activities that would disseminate either
25 already disseminated standards or other

1 do not own the copyrights in this case?
2 MR. FEE: Objection. Calls for
3 speculation.

4 THE WITNESS: In essence,
5 you're asking if there's no copyright
6 infringement?

7 BY MR. BRIDGES:

8 Q. No. What harms -- have you
9 identified what harms the plaintiffs would
10 suffer if the Court rules that the plaintiffs
11 do not own the copyrights at issue, that
12 there are no copyrights that the plaintiffs
13 own --

14 MR. FEE: Objection to form.

15 BY MR. BRIDGES:

16 Q. -- at issue in this case?
17 A. I haven't addressed or thought
18 about that issue. There are also, don't
19 forget, trademark issues.

20 Q. I'm asking about copyright, so
21 I ask you to confine your answers to my
22 questions.

23 My question is, what -- you
24 assume for purposes of your analysis that
25 plaintiffs own valid copyrights, correct?

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20 (Pages 74 - 77)

1 A. I assume that there's copyright
2 infringement. I don't know that I've made an
3 explicit assumption with regard to ownership.
4 Q. And you assume infringement
5 without assuming ownership of the copyrights?
6 A. I haven't made any explicit
7 assumption with regard to ownership. I know
8 that's an issue in this case, but it's well
9 beyond my expertise.
10 Q. So if it turns out that -- do
11 you understand your testimony to have any
12 bearing on whether plaintiffs' standards are
13 copyrightable?
14 MR. FEE: Objection. Calls for
15 speculation.
16 I would instruct you to not
17 disclose any communications you had
18 with counsel that weren't the basis
19 for any of your opinions in this case.
20 You can otherwise answer.
21 THE WITNESS: Could you read
22 that back or ask it again, please?
23 BY MR. BRIDGES:
24 Q. Do you understand your
25 testimony and opinions in this case to have

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1 plaintiffs deserve copyright protection for
2 these standards?
3 MR. FEE: Objection to form.
4 THE WITNESS: I don't have an
5 opinion on that one way or the other.
6 I have not thought about that topic.
7 BY MR. BRIDGES:
8 Q. Do you have any expertise in
9 copyright law as a field of law?
10 MR. FEE: Objection. Vague.
11 THE WITNESS: No, I don't have
12 legal expertise. I have expertise in
13 looking at harm associated with
14 copyright infringement.
15 BY MR. BRIDGES:
16 Q. Do you have any expertise with
17 respect to harm caused by invalidation of
18 copyrights?
19 MR. FEE: Same objection.
20 THE WITNESS: I'm not quite
21 sure I'm fully appreciating your
22 question. Again, I'm an expert in the
23 economics of IP protection. One of
24 the areas in which I do work is harm
25 associated with copyright protection.

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1 any bearing on whether plaintiffs' standards
2 are copyrightable?
3 MR. FEE: Same objection and
4 instruction. Plus objection, calls
5 for a legal conclusion.
6 THE WITNESS: I don't know one
7 way or the other. I've not taken on
8 that assignment.
9 BY MR. BRIDGES:
10 Q. Do you understand whether your
11 testimony and opinions in this case are
12 relevant to whether plaintiffs deserve
13 copyright protection in this case?
14 MR. FEE: Objection. Calls for
15 a legal conclusion.
16 And same objection with respect
17 to communications between you and
18 counsel that were not the bases for
19 your opinions or your report.
20 THE WITNESS: I don't know one
21 way or the other. I did not take on
22 that assignment.
23 BY MR. BRIDGES:
24 Q. Do you mean by your analysis
25 and opinions to suggest in any way that

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1 BY MR. BRIDGES:
2 Q. Have you done any work in this
3 case to quantify what harms plaintiffs would
4 suffer if a court were to rule that they
5 lacked copyright rights in the standards at
6 issue in this case?
7 MR. FEE: Objection to form.
8 Go ahead.
9 THE WITNESS: Not explicitly,
10 to my knowledge.
11 BY MR. BRIDGES:
12 Q. Have you done anything
13 implicitly?
14 MR. FEE: Same objection.
15 THE WITNESS: Not to my
16 knowledge.
17 BY MR. BRIDGES:
18 Q. Have you done any work in this
19 case to analyze the incentives that
20 participants have in the standards
21 development process?
22 MR. FEE: Objection to form.
23 Vague.
24 THE WITNESS: I have in the
25 sense that I've examined the materials

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1 Q. Right. Or approximately
2 \$3 million?
3 A. Are you limiting it just to
4 90.1 or all its standards?
5 Q. Well, that's a good question.
6 What -- what's -- what did you intend the
7 last sentence in paragraph 76 to refer to?
8 All of its standards or 90.1?
9 A. I think it's all of its
10 standards, but we could visit the screenshot
11 from the Web site to confirm that.
12 Q. Okay.
13 A. I -- I could be wrong. I don't
14 think I am, but I could be.
15 Q. Okay. In the previous
16 sentence, you say, "ASHRAE and its volunteer
17 members devoted more than 86,400 man-hours,
18 3,600 hotel nights, and 1,200 round-trip
19 flights as part of the process."
20 And that -- "the process"
21 appears to refer to updating the ASHRAE 90.1
22 standard, correct?
23 A. Yes.
24 Q. When you say "ASHRAE and its
25 volunteer members," and then you give those

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1 THE WITNESS: Again, I don't
2 have an estimate.
3 BY MR. BRIDGES:
4 Q. Do you know -- did ASHRAE pay
5 for the time, the hotel bills, and the plane
6 fares of its volunteer members in updating
7 the ASHRAE 90.1 standard?
8 A. I would expect rarely. It's
9 possible that there are certain instances in
10 which there was some set of out-of-pocket
11 expenses covered, but I would imagine the
12 bulk of the time it's the volunteer's
13 employer.
14 MR. BRIDGES: Sorry. How long
15 have we been going? I didn't get when
16 we went back on.
17 MR. FEE: 34 minutes.
18 BY MR. BRIDGES:
19 Q. Did you speak with Emily Bremer
20 at any point in this case?
21 A. No.
22 Q. How did you become acquainted
23 with her writings?
24 A. I think Kevin Fee and/or
25 Jordana Rubel brought to my attention that

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1 statistics, those statistics refer primarily
2 to the man-hours, hotel nights, and
3 round-trip flights of the volunteer members?
4 MR. FEE: Objection. Vague.
5 THE WITNESS: Probably. As
6 opposed to ASHRAE-employed staff.
7 BY MR. BRIDGES:
8 Q. Do you know how much ASHRAE's
9 volunteer members and their employers --
10 strike that.
11 Do you know how much ASHRAE's
12 volunteer members and their employers spent
13 in salaries and disbursements for the
14 man-hours, hotel nights, and round-trip
15 flights that were part of the process of
16 updating the ASHRAE 90.1 standard?
17 A. I don't know, but it -- I would
18 imagine it's a noticeable amount, but I don't
19 know the amount.
20 Q. What would be your best
21 estimate?
22 A. I don't have a best estimate.
23 Q. Would it be probably over
24 \$10 million?
25 MR. FEE: Objection to form.

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1 she had written on this topic. I don't
2 recall whether then we separately obtained
3 her two articles or Mr. Fee slash Ms. Rubel
4 provided those to us.
5 Q. What independent work did you
6 do to research writings regarding the
7 economics of standards development?
8 MR. FEE: Objection to form.
9 THE WITNESS: We did
10 independent research in the sense that
11 people that work with me did a
12 literature search to determine what
13 writings had been done in the area.
14 I was previously aware of some
15 amount of the scholarship to begin
16 with.
17 BY MR. BRIDGES:
18 Q. How is that literature search
19 reflected in any documents?
20 A. The results are shown in my
21 tab 2, and in particular it is page 2 of my
22 tab 2, at the bottom.
23 Q. And were these items found by
24 you or your team?
25 MR. FEE: Objection to form.

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24 (Pages 90 - 93)

<p>1 THE WITNESS: Yes, with the 2 exception that, in the first instance, 3 lawyers at Morgan Lewis brought to our 4 attention the Bremer -- the existence 5 of Bremer articles.</p> <p>6 BY MR. BRIDGES:</p> <p>7 Q. Did you study any of the 8 materials that Bremer -- strike that.</p> <p>9 Bremer's articles are law 10 review articles, correct?</p> <p>11 A. Yes.</p> <p>12 Q. Did any plaintiff -- did your 13 team's research identify any articles that 14 you chose not to include in tab 2?</p> <p>15 A. I don't think so.</p> <p>16 Q. Did any plaintiff or its 17 counsel furnish you with correspondence 18 between the plaintiffs and Emily Bremer for 19 review?</p> <p>20 A. No, not to my knowledge.</p> <p>21 Q. How many conversations with 22 representatives of the plaintiffs did you 23 have?</p> <p>24 MR. FEE: Objection.</p> <p>25 I would instruct you not to</p>	<p>1 the various plaintiffs.</p> <p>2 Q. With whom?</p> <p>3 A. They are all identified in 4 paragraph 10 of my report.</p> <p>5 Q. Which of those did you 6 personally have conversations with?</p> <p>7 A. All of them, as I recall. It's 8 possible there's someone I did not, but I'm 9 not remembering that being the case.</p> <p>10 Q. Approximately how long did you 11 spend with -- did you have conversations with 12 any of them together?</p> <p>13 A. Yes, several of them were 14 together.</p> <p>15 Q. Which ones?</p> <p>16 A. I don't recall all 17 combinations. I can say with some confidence 18 that there was never more than one plaintiff 19 on a call. In other words, there were 20 several people from a particular plaintiff on 21 a call, but not more than one plaintiff.</p> <p>22 So I had various combinations 23 of calls with ASTM that may have occurred on 24 three occasions; with NFPA, one or two 25 occasions; and with ASHRAE, one or two</p>
<p>Page 94</p> <p>1 answer questions regarding 2 communications with counsel, unless 3 they formed the basis of your 4 opinions, in which case you can answer 5 questions with respect to those 6 conversations.</p> <p>7 BY MR. BRIDGES:</p> <p>8 Q. So I -- I'll change my question 9 slightly.</p> <p>10 How many -- how many 11 conversations did you have with non-lawyer 12 employees or former employees of the 13 plaintiffs?</p> <p>14 A. None that the -- that did not 15 include the lawyers.</p> <p>16 Q. Right. I'm -- so I'm asking 17 you to tell me what they were. If the 18 presence of lawyer -- if you had a 19 conversation with a -- with an employee or 20 former employee of the plaintiff, I'd like to 21 know what that was. So the fact that lawyers 22 may have been present wouldn't excuse it from 23 the scope of the answer.</p> <p>24 A. I had somewhere between four 25 and six conversations with people who were at</p>	<p>1 occasions.</p> <p>2 Q. And approximately how long 3 total did you spend in conversations with 4 representatives of each plaintiff?</p> <p>5 MR. FEE: Objection to form.</p> <p>6 THE WITNESS: Cumulatively, 7 somewhere between three and five hours 8 is my best guess right now.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. When you say cumulative -- 11 "cumulatively," you mean for all plaintiffs?</p> <p>12 A. Yes. Meaning I'm -- I've added 13 up the conversations I had across all three 14 plaintiffs.</p> <p>15 Q. Right. What's your best 16 estimate as to the period of time you spent 17 with each plaintiff?</p> <p>18 A. With ASTM, it may have been two 19 to three hours. For NFPA, one to two hours. 20 For ASHRAE, one to two hours. That's my best 21 guess right now.</p> <p>22 * * *</p> <p>23 (Jarosz Exhibit 2 and Jarosz-3 24 marked for identification.)</p> <p>25 * * *</p>

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25 (Pages 94 - 97)

<p>1 record at 12:17. This is the end of 2 media unit number 1. 3 * * *</p> <p>4 (Recess from 12:17 p.m. to 5 12:32 p.m.) 6 * * *</p> <p>7 THE VIDEOGRAPHER: On the 8 record at 12:32. This is the 9 beginning of media unit 2 in the 10 deposition of John Jarosz.</p> <p>11 BY MR. BRIDGES:</p> <p>12 Q. Mr. Jarosz, your report, as I 13 referred to earlier, cites a number of 14 conversations with employees of the 15 plaintiffs. For what purpose did you have 16 conversations with the plaintiffs' employees?</p> <p>17 A. To learn more about the 18 organization and their view as to the impact 19 of continued copyright protection -- 20 continued copyright infringement and 21 trademark infringement.</p> <p>22 Q. What view did you learn from 23 them?</p> <p>24 MR. FEE: Objection to form.</p> <p>25 THE WITNESS: Well, I solicited</p>	<p>1 you interview?</p> <p>2 A. I don't think I interviewed any 3 members of the public either.</p> <p>4 Q. What steps did you do to 5 ascertain the views of the members of the 6 organizations, other than the employees?</p> <p>7 A. I read the materials that were 8 produced here. I read the deposition 9 testimony of the various individuals. I read 10 the articles published by Ms. Bremer. And I 11 read the other academic literature and 12 practical literature that I had.</p> <p>13 Q. Which of those sources stated 14 the views of the non-employee members of the 15 various organizations?</p> <p>16 A. I don't know that views of -- 17 that their views were explicitly addressed in 18 my report or represented. I understood what 19 the impacts of the lack of honoring the 20 copyrights and trademarks would have, but I 21 don't know that I saw non-employee member 22 views explicitly summarized.</p> <p>23 Q. So what steps did you do to 24 ascertain the views of the members of the 25 organizations --</p>
<p>Page 110</p> <p>1 and learned many facts about the 2 organizations. I also learned that 3 each one of them viewed continued 4 copyright infringement and trademark 5 infringement as quite detrimental to 6 their organizations, detrimental to 7 the members, detrimental to the 8 public. 9 They viewed continued IP 10 infringement as potentially 11 devastating to their organizations.</p> <p>12 BY MR. BRIDGES:</p> <p>13 Q. These were their views?</p> <p>14 A. Yes. I'm just paraphrasing, of 15 course.</p> <p>16 Q. What members did you interview?</p> <p>17 A. None, other than the employees. 18 I don't know if you call those "members" or 19 not. But the volunteer membership, I didn't 20 go to.</p> <p>21 THE VIDEOGRAPHER: Excuse me. 22 Counsel, could you move your 23 microphone to your lapel? Thank you.</p> <p>24 BY MR. BRIDGES:</p> <p>25 Q. What members of the public did</p>	<p>Page 112</p> <p>1 MR. FEE: Objection.</p> <p>2 BY MR. BRIDGES:</p> <p>3 Q. -- other than their employees?</p> <p>4 MR. FEE: Asked and answered.</p> <p>5 THE WITNESS: Well, I talked to 6 the employees, and they interact with 7 the members on a very regular basis, 8 so they gave me some sense of what the 9 views of the members were. 10 It also could be that some of 11 the perspectives of the members are 12 reflected in some of the documents I 13 identified in tab 2.</p> <p>14 BY MR. BRIDGES:</p> <p>15 Q. Well, I'm just trying to find 16 out where -- it sounds as though -- strike 17 that. 18 It sounds as though a minute 19 ago you said you couldn't recall anything 20 specifically calling out views of 21 non-employee members, correct?</p> <p>22 A. Correct. I think that's right.</p> <p>23 Q. What did you do to verify the 24 statements that employees of the plaintiffs 25 made about the views of the non-employee</p>

<p>1 members of their organizations?</p> <p>2 A. I did what I normally do in an</p> <p>3 assignment like this and look at the produced</p> <p>4 materials.</p> <p>5 Q. And the produced materials did</p> <p>6 not call out specifically any views of</p> <p>7 non-employee members of the plaintiff</p> <p>8 organizations, correct?</p> <p>9 A. I don't recall any specific</p> <p>10 views being summarized. My memory may not be</p> <p>11 perfect on that, though.</p> <p>12 Q. What research, if any, did you</p> <p>13 do among members of the public about whether</p> <p>14 lack of copyright protection for the</p> <p>15 plaintiffs' standards would be detrimental to</p> <p>16 the -- to the public?</p> <p>17 A. The information that I reviewed</p> <p>18 is in tab 2. I didn't have material beyond</p> <p>19 what is identified in tab 2.</p> <p>20 Q. So what in tab 2 reflects your</p> <p>21 steps to ascertain the views of members of</p> <p>22 the public?</p> <p>23 MR. FEE: Objection to form.</p> <p>24 THE WITNESS: I think the</p> <p>25 Bremer articles, in part, address</p>	<p>1 States other than law review articles by</p> <p>2 Emily Bremer?</p> <p>3 A. As I sit here right now, I'm</p> <p>4 not aware of any documents that discuss the</p> <p>5 deliberations, but my memory is not perfect.</p> <p>6 Q. Do you know if there was a</p> <p>7 consensus in any relevant committee of the</p> <p>8 Administrative Conference of the United</p> <p>9 States regarding the conclusions that</p> <p>10 Ms. Bremer states in her law review articles?</p> <p>11 A. I don't.</p> <p>12 MR. FEE: Objection. Vague.</p> <p>13 BY MR. BRIDGES:</p> <p>14 Q. Do you know whether there was</p> <p>15 any dissent in any relevant committee of the</p> <p>16 Administrative Conference of the United</p> <p>17 States regarding the conclusions that</p> <p>18 Ms. Bremer states in her law review articles?</p> <p>19 MR. FEE: Objection to form.</p> <p>20 THE WITNESS: I don't.</p> <p>21 BY MR. BRIDGES:</p> <p>22 Q. Do you know why persons get</p> <p>23 appointed to the Administrative Conference of</p> <p>24 the United States?</p> <p>25 A. I may have known that, but I</p>
<p>Page 114</p> <p>1 that. I think some of the federal</p> <p>2 government's circulars that I</p> <p>3 identify, in part, reflect the</p> <p>4 reviews, in particular the NTTAA of</p> <p>5 1995 and OMB Circular A-119. I think</p> <p>6 they, in part, reflect public views.</p> <p>7 There are probably other things.</p> <p>8 BY MR. BRIDGES:</p> <p>9 Q. Did you review OMB Circular</p> <p>10 A-119 personally?</p> <p>11 A. Yes. As I recall, I did.</p> <p>12 Q. Did you review any materials</p> <p>13 pertaining to the discussions or</p> <p>14 deliberations of the Administrative</p> <p>15 Conference of the United States in connection</p> <p>16 with your research or analysis?</p> <p>17 A. What particular materials or</p> <p>18 meetings are you referring to?</p> <p>19 Q. Any.</p> <p>20 A. I don't recall, but it's</p> <p>21 possible.</p> <p>22 Q. Does tab 2 refer you to any</p> <p>23 documents that would provide you information</p> <p>24 about the discussions or deliberations of the</p> <p>25 Administrative Conference of the United</p>	<p>Page 116</p> <p>1 don't recall that sitting here now.</p> <p>2 Q. Do you know whether</p> <p>3 Ms. Bremer's articles -- strike that.</p> <p>4 Do you know whether</p> <p>5 Ms. Bremer's law review articles reflect a</p> <p>6 view of the Administrative Conference of the</p> <p>7 United States --</p> <p>8 MR. FEE: Objection to form.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. -- or of any of its committees?</p> <p>11 MR. FEE: Objection to form.</p> <p>12 THE WITNESS: I'm not aware</p> <p>13 that they officially reflect that. I</p> <p>14 believe she gathered information, and</p> <p>15 they may, in fact, represent the views</p> <p>16 of some or all members, but I don't</p> <p>17 think that's -- that either article is</p> <p>18 an official representation --</p> <p>19 BY MR. BRIDGES:</p> <p>20 Q. Are you --</p> <p>21 A. -- of that body.</p> <p>22 Q. Are you aware of the fact that</p> <p>23 her articles -- her law review articles</p> <p>24 specifically disclaim her articles as the</p> <p>25 views of any government entity and indicate</p>

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30 (Pages 114 - 117)

<p>1 members of their organizations?</p> <p>2 A. I did what I normally do in an</p> <p>3 assignment like this and look at the produced</p> <p>4 materials.</p> <p>5 Q. And the produced materials did</p> <p>6 not call out specifically any views of</p> <p>7 non-employee members of the plaintiff</p> <p>8 organizations, correct?</p> <p>9 A. I don't recall any specific</p> <p>10 views being summarized. My memory may not be</p> <p>11 perfect on that, though.</p> <p>12 Q. What research, if any, did you</p> <p>13 do among members of the public about whether</p> <p>14 lack of copyright protection for the</p> <p>15 plaintiffs' standards would be detrimental to</p> <p>16 the -- to the public?</p> <p>17 A. The information that I reviewed</p> <p>18 is in tab 2. I didn't have material beyond</p> <p>19 what is identified in tab 2.</p> <p>20 Q. So what in tab 2 reflects your</p> <p>21 steps to ascertain the views of members of</p> <p>22 the public?</p> <p>23 MR. FEE: Objection to form.</p> <p>24 THE WITNESS: I think the</p> <p>25 Bremer articles, in part, address</p>	<p>1 States other than law review articles by</p> <p>2 Emily Bremer?</p> <p>3 A. As I sit here right now, I'm</p> <p>4 not aware of any documents that discuss the</p> <p>5 deliberations, but my memory is not perfect.</p> <p>6 Q. Do you know if there was a</p> <p>7 consensus in any relevant committee of the</p> <p>8 Administrative Conference of the United</p> <p>9 States regarding the conclusions that</p> <p>10 Ms. Bremer states in her law review articles?</p> <p>11 A. I don't.</p> <p>12 MR. FEE: Objection. Vague.</p> <p>13 BY MR. BRIDGES:</p> <p>14 Q. Do you know whether there was</p> <p>15 any dissent in any relevant committee of the</p> <p>16 Administrative Conference of the United</p> <p>17 States regarding the conclusions that</p> <p>18 Ms. Bremer states in her law review articles?</p> <p>19 MR. FEE: Objection to form.</p> <p>20 THE WITNESS: I don't.</p> <p>21 BY MR. BRIDGES:</p> <p>22 Q. Do you know why persons get</p> <p>23 appointed to the Administrative Conference of</p> <p>24 the United States?</p> <p>25 A. I may have known that, but I</p>
<p>Page 114</p> <p>1 that. I think some of the federal</p> <p>2 government's circulars that I</p> <p>3 identify, in part, reflect the</p> <p>4 reviews, in particular the NTTAA of</p> <p>5 1995 and OMB Circular A-119. I think</p> <p>6 they, in part, reflect public views.</p> <p>7 There are probably other things.</p> <p>8 BY MR. BRIDGES:</p> <p>9 Q. Did you review OMB Circular</p> <p>10 A-119 personally?</p> <p>11 A. Yes. As I recall, I did.</p> <p>12 Q. Did you review any materials</p> <p>13 pertaining to the discussions or</p> <p>14 deliberations of the Administrative</p> <p>15 Conference of the United States in connection</p> <p>16 with your research or analysis?</p> <p>17 A. What particular materials or</p> <p>18 meetings are you referring to?</p> <p>19 Q. Any.</p> <p>20 A. I don't recall, but it's</p> <p>21 possible.</p> <p>22 Q. Does tab 2 refer you to any</p> <p>23 documents that would provide you information</p> <p>24 about the discussions or deliberations of the</p> <p>25 Administrative Conference of the United</p>	<p>Page 116</p> <p>1 don't recall that sitting here now.</p> <p>2 Q. Do you know whether</p> <p>3 Ms. Bremer's articles -- strike that.</p> <p>4 Do you know whether</p> <p>5 Ms. Bremer's law review articles reflect a</p> <p>6 view of the Administrative Conference of the</p> <p>7 United States --</p> <p>8 MR. FEE: Objection to form.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. -- or of any of its committees?</p> <p>11 MR. FEE: Objection to form.</p> <p>12 THE WITNESS: I'm not aware</p> <p>13 that they officially reflect that. I</p> <p>14 believe she gathered information, and</p> <p>15 they may, in fact, represent the views</p> <p>16 of some or all members, but I don't</p> <p>17 think that's -- that either article is</p> <p>18 an official representation --</p> <p>19 BY MR. BRIDGES:</p> <p>20 Q. Are you --</p> <p>21 A. -- of that body.</p> <p>22 Q. Are you aware of the fact that</p> <p>23 her articles -- her law review articles</p> <p>24 specifically disclaim her articles as the</p> <p>25 views of any government entity and indicate</p>

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30 (Pages 114 - 117)

1 that they are her personal views?
2 A. I wouldn't be surprised and
3 may -- I may have read that, but I would
4 expect that that would be in the first
5 footnote of one or both articles.
6 Q. What did you do to examine the
7 alleged facts that the representatives of
8 plaintiffs stated to you in their
9 conversations with you?
10 MR. FEE: Objection to form.
11 THE WITNESS: I looked at --
12 MR. FEE: Asked and answered.
13 THE WITNESS: I'm sorry. I
14 looked at the document production and
15 the other materials shown in tab 2.
16 BY MR. BRIDGES:
17 Q. You looked at the document
18 production that the plaintiffs' counsel
19 furnished you?
20 A. In part. There were other
21 things in tab 2 that were not provided to me
22 by plaintiffs' counsel.
23 Q. What other materials in
24 tab 2 -- strike that.
25 Please identify for me in tab 2

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1 I believe counsel did not
2 provide the Web site screenshots, but I might
3 be wrong on that.
4 Q. And did you do anything --
5 what, if anything, did you do to test the
6 validity of the factual assertions that the
7 plaintiffs made to you in your conversations
8 with their employees?
9 MR. FEE: Objection to form.
10 Asked and answered.
11 THE WITNESS: Well, we looked
12 at materials. If we found things that
13 conflicted with what we learned, that
14 would prompt us to investigate
15 further. But I don't recall seeing
16 any documentary evidence that
17 conflicted with facts that were
18 provided by plaintiff personnel, but I
19 might be wrong.
20 BY MR. BRIDGES:
21 Q. Did you investigate
22 independently whether documents existed that
23 contradicted plaintiffs' statements of facts?
24 A. Not with that in mind. We
25 looked at the documents and were mindful of

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1 the materials that plaintiffs' counsel
2 furnished you.
3 A. I don't know with absolute
4 certainty, but let me give you my best guess.
5 I believe all the depositions that are shown
6 on page 1. I believe the Bates ranges at the
7 very top of the page were provided by
8 counsel.
9 The deposition transcripts and
10 exhibits were provided by counsel. I believe
11 the financial statements and plans were
12 provided by counsel. I believe the legal
13 documents were provided by counsel. I
14 believe the miscellaneous items were provided
15 by counsel.
16 I don't know about the cases
17 and laws. I just don't remember if we
18 separately gathered those or were provided
19 those.
20 The analyst reports, articles,
21 books, and presentations, I think we gathered
22 all of those, with the possible exception of
23 the two Bremer articles. I don't recall if
24 counsel provided that or we obtained those
25 separately.

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1 whether there were conflicts within documents
2 or conflicts between documents and other
3 information, but I don't recall that we saw
4 anything that gave us substantial pause.
5 There were probably some things
6 where there were some uncertainties whether
7 there was a conflict or not and some where
8 there were insignificant conflicts, but I
9 think mostly the information we saw did not
10 conflict with the information we learned from
11 plaintiff personnel.
12 Q. Did you investigate
13 independently whether other documents, apart
14 from the documents plaintiffs furnished you,
15 existed that contradicted plaintiffs'
16 statements of facts --
17 MR. FEE: Objection to form.
18 BY MR. BRIDGES:
19 Q. -- in conversations with you?
20 A. Yes, in the sense that we
21 gathered some information that we did not
22 receive from plaintiffs' counsel, but all of
23 that is identified in tab 2.
24 Q. Which part of tab 2?
25 A. Well, as I said, I think the

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1 Web sites we gathered ourselves, and I think
2 the reports and articles, with the exception
3 of the Bremer articles, we gathered
4 ourselves.

5 Q. Do you know why you got no
6 documents from NFPA, no Bates range documents
7 from NFPA?

8 MR. REHN: Object to form --

9 THE WITNESS: I don't know why
10 we did not receive Bates documents --

11 THE REPORTER: Wait.

12 MR. REHN: Sorry. Object to
13 the form. Lacks foundation.

14 THE WITNESS: I don't know for
15 sure that we didn't receive
16 Bates-stamped documents, but I believe
17 some of the documents we received were
18 NFPA documents.

19 BY MR. BRIDGES:

20 Q. Do you recall seeing any NFPA
21 documents that -- in which NFPA personnel
22 stated that they could not show any harm from
23 the defendant's activities?

24 A. Received any documents that
25 said that?

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1 Q. What did you hear about
2 overseas litigation involving Public
3 Resource?

4 A. I think I heard that there was
5 a German -- or a suit in Germany, but I'm not
6 sure that I learned much more than that. I
7 don't recall what status that suit -- what
8 the status of that suit is.

9 Q. Do you recall anyone disclosing
10 to you litigation involving NFPA in the
11 United States that pertained to standards and
12 copyright?

13 A. It's possible, but I don't
14 recall any, sitting here right now.

15 Q. Do you recall inquiring about
16 public statements of fact that NFPA has made
17 regarding copyright and standards in
18 litigation other than this litigation in the
19 United States?

20 MR. FEE: Objection to form.

21 THE WITNESS: I do not.

22 BY MR. BRIDGES:

23 Q. Are you familiar with a case
24 called Veeck, V-E-E-C-K?

25 A. I'm familiar with an opinion in

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1 Q. Uh-huh.

2 A. Perhaps you would have
3 something that would refresh my memory. I
4 don't recall, sitting here right now, but
5 it's possible.

6 Are you talking about
7 historical -- historically no harm, or are
8 you talking about prospectively?

9 Q. Either one. Did you -- do you
10 recall seeing any internal NFPA documents
11 that call into question where NF -- whether
12 NFPA has suffered any harm from the
13 defendant's activities?

14 A. I don't recall documents on it.
15 There may have been some deposition testimony
16 about past activities, but I don't know if it
17 was activities prior to Public Resource
18 actions here or after.

19 Q. Do you recall learning about
20 any litigation that NFPA had engaged in
21 pertaining to standards and copyright?

22 A. I think I heard that there's
23 some overseas litigation involving Public
24 Resource. Whether that involves NFPA, I
25 don't know.

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1 the Veeck case.

2 Q. What do you know about that
3 opinion?

4 MR. FEE: Objection.
5 I would instruct you not to
6 disclose anything you know about that
7 opinion that was a result of
8 communications with counsel and that
9 did not form the basis of any of the
10 opinions in your report or any of the
11 assumptions that you relied upon in
12 reaching your conclusions.

13 THE WITNESS: I did talk with
14 counsel about that case, and that case
15 didn't form any basis for any of my
16 observations or conclusions here.

17 BY MR. BRIDGES:

18 Q. Why did the Veeck case not form
19 any basis for any of your observations or
20 conclusions here?

21 A. I don't know how to answer that
22 question. I -- it didn't present any facts
23 that were specific to this case, as far as I
24 recall.

25 Q. What do you recall of the facts

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32 (Pages 122 - 125)

<p>1 answered.</p> <p>2 THE WITNESS: Again, I read the 3 case. I didn't do any analysis beyond 4 that of that particular case.</p> <p>5 BY MR. BRIDGES:</p> <p>6 Q. What steps did you take to 7 ascertain what public harms flowed from the 8 Court's decision in the Veeck case?</p> <p>9 A. Other than reading the case, 10 the opinion in the case, I didn't do anything 11 beyond that to understand the implications of 12 that holding.</p> <p>13 Q. You didn't do any investigation 14 as to the economic consequences to any 15 entity, industry, or person as a consequence 16 of the decision in the Veeck case, correct?</p> <p>17 MR. FEE: Objection to form.</p> <p>18 THE WITNESS: I think that's 19 correct, yes.</p> <p>20 BY MR. BRIDGES:</p> <p>21 Q. How has the process of 22 standards development changed in the last 100 23 years, to your knowledge?</p> <p>24 A. I don't know the specifics, and 25 I don't know that there is one standards</p>	<p>1 A. Not sitting here right now, I 2 don't.</p> <p>3 Q. Do you know whether ASHRAE took 4 over development of what became standard 90.1 5 from any other group or entity?</p> <p>6 A. No, I do not.</p> <p>7 Q. Have you ever quantified the 8 value of the contributions made by the 9 volunteers of the various organizations to 10 the standards at issue in this case?</p> <p>11 MR. FEE: Objection to form.</p> <p>12 THE WITNESS: Not other than 13 having some sense of hours or a 14 limited sense of dollars, but not 15 beyond that, no.</p> <p>16 BY MR. BRIDGES:</p> <p>17 Q. Can you put a rough dollar 18 value on the time and expenses of the 19 volunteers with respect to any of the 20 standards in this case?</p> <p>21 MR. FEE: Objection to form.</p> <p>22 THE WITNESS: Not sitting here 23 right now. That would entail a little 24 bit of a study. I have not done that.</p> <p>25 BY MR. BRIDGES:</p>
<p>Page 130</p> <p>1 development process. I think there are a 2 variety of processes pursued by a number of 3 SSOs or SDOs. I'm sure that there have been 4 changes on the margin. There may have been 5 larger changes. I just don't know. I have 6 not studied the trend in the standard 7 development process over time.</p> <p>8 Q. What changes are you aware of 9 in the standards development process of NFPA 10 over the past 100 years?</p> <p>11 A. I don't know. I've not studied 12 that topic.</p> <p>13 Q. What changes are you aware of 14 in the standards development process of the 15 ASHRAE 90.1 standard?</p> <p>16 A. I don't know. I've not studied 17 that.</p> <p>18 Q. How did ASHRAE come to develop 19 the 90.1 standard?</p> <p>20 A. I think, generally, a need was 21 identified and a group of constituents 22 convened to derive a standard, but I don't 23 know the specifics beyond that.</p> <p>24 Q. Do you know who identified the 25 need?</p>	<p>Page 132</p> <p>1 Q. What -- what would be required?</p> <p>2 A. To understand basically the 3 out-of-pocket expenses incurred and the 4 opportunity costs incurred. So among other 5 things, one would want to look at time 6 records, have an understanding of 7 compensation, have an understanding of the 8 activities of those individuals. Those 9 are -- would be among the inputs.</p> <p>10 Q. What changes are you aware of 11 in the distribution of standards in the past 12 100 years by the plaintiffs?</p> <p>13 MR. FEE: Objection to form.</p> <p>14 THE WITNESS: I haven't 15 investigated that particular issue, 16 but I understand that some of the 17 standards today are distributed 18 through the Internet that certainly 19 didn't exist 100 years ago.</p> <p>20 Some of the standards are 21 distributed for free with limitations.</p> <p>22 I don't know if that was true 100 23 years ago, but it might have been.</p> <p>24 I would expect some of the 25 copying and dissemination capabilities</p>

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<p>1 are much greater today than they were 2 in 1915, but I don't know that the 3 general methods of -- I don't know how 4 the general methods of distribution 5 have changed.</p> <p>6 BY MR. BRIDGES:</p> <p>7 Q. What changes are you aware of 8 in sales trends over the past 20 years?</p> <p>9 MR. FEE: Objection to form.</p> <p>10 THE WITNESS: I don't have data 11 going back as far as 20 years ago. I 12 have some information on publication 13 sales, for instance, in tabs 3, 4, and 14 5. They only -- that information only 15 goes back a few years, however.</p> <p>16 BY MR. BRIDGES:</p> <p>17 Q. Did you review any information 18 earlier than the dates shown in the documents 19 at tabs 3, 4, and 5?</p> <p>20 MR. FEE: Objection. Vague.</p> <p>21 THE WITNESS: It's possible 22 that some of the source documents had 23 earlier information, but I don't 24 recall that. I would need to look at 25 those source documents.</p>	<p>1 the right to reproduce, copy, or 2 disseminate those standards but can 3 look at them online.</p> <p>4 BY MR. BRIDGES:</p> <p>5 Q. Have you used the reading rooms 6 of any of the plaintiffs?</p> <p>7 A. No, I have not.</p> <p>8 Q. Have you reviewed the interface 9 that the -- have you reviewed the interfaces 10 that the plaintiffs offer to persons wishing 11 to view materials for free online?</p> <p>12 A. No, I don't think so.</p> <p>13 Q. Do you know what effect, if 14 any, the presence of those free materials on 15 the plaintiffs' Web sites has had on the 16 plaintiffs' revenues?</p> <p>17 MR. FEE: Objection to form.</p> <p>18 THE WITNESS: No, I don't.</p> <p>19 BY MR. BRIDGES:</p> <p>20 Q. Have you -- have you 21 investigated that?</p> <p>22 MR. FEE: Same objection.</p> <p>23 THE WITNESS: I've been 24 opening -- I've been open to learning 25 about that, but I haven't learned that</p>
<p>Page 134</p> <p>1 BY MR. BRIDGES:</p> <p>2 Q. And those source documents 3 would be within the Bates ranges identified 4 in tab 2 of your report?</p> <p>5 A. Within the Bates ranges or 6 identified elsewhere in tab 2. For instance, 7 the AS team -- ASTM audited -- audited 8 consolidated financial statements, I think, 9 may not all be Bates-stamped. I could be 10 wrong on that. But I would look in that set 11 of financial documents.</p> <p>12 Q. What do you know about what you 13 said -- strike that.</p> <p>14 You said earlier that some 15 standards are distributed for free with some 16 limitations; is that correct?</p> <p>17 A. Yes, that's my understanding.</p> <p>18 Q. What do you know about that?</p> <p>19 MR. FEE: Objection. Vague.</p> <p>20 THE WITNESS: I've written 21 about that in my report. I believe 22 that each one of the plaintiffs has 23 provided what is sometimes called a 24 "reading room" so that people can look 25 at those standards but are not given</p>	<p>1 there's a direct or indirect effect. 2 There might be, but I haven't seen 3 evidence of that.</p> <p>4 BY MR. BRIDGES:</p> <p>5 Q. My question was, have you 6 investigated that?</p> <p>7 MR. FEE: Same objection.</p> <p>8 THE WITNESS: Perhaps you could 9 read back my answer.</p> <p>10 BY MR. BRIDGES:</p> <p>11 Q. I've heard the answer. It was 12 not responsive to my question. The -- you 13 said you did not know what effect, if any, 14 the presence of those free materials on the 15 plaintiffs' Web sites has had on the 16 plaintiffs' revenues.</p> <p>17 And my question is, have you 18 investigated that?</p> <p>19 MR. FEE: Same objection.</p> <p>20 THE WITNESS: No, I've not 21 undertaken a separate investigation. 22 I've been alert to that topic, but I 23 haven't assigned myself that 24 investigation.</p> <p>25 BY MR. BRIDGES:</p>

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1 Q. Was something that was --
2 remained pending at the time you wrote this
3 report as something that you expected to do
4 in the future?

5 A. No.

6 MR. FEE: Objection. Vague.
7 THE WITNESS: I'm sorry.

8 No.

9 BY MR. BRIDGES:

10 Q. Did you study the practices of
11 any standards development organizations,
12 other than the plaintiffs, for purposes of
13 your work in this case?

14 MR. FEE: Objection. Vague.

15 THE WITNESS: Not that I
16 recall. I saw reference to other SDOs
17 in the Bremer articles, for instance,
18 but I didn't undertake a separate
19 investigation of the practices of any
20 other SDOs for purposes of my
21 assignment here.

22 BY MR. BRIDGES:

23 Q. Are you aware of practices or
24 policies of other SDOs with reference to
25 either copyright or free availability of

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1 SDOs, but the standard setting organizations
2 that are the candidates are the ones that I
3 identified earlier today.

4 Q. Which SDOs do you recall
5 treating copyright protection of their
6 standards as very important?

7 A. I just don't recall right now.
8 I -- I have some vague recollection that
9 copyright considerations are addressed by
10 ETSI, but I could be wrong on that.

11 Q. What do you know about policies
12 or practices of the Blu-ray organization with
13 respect to copyright protection?

14 A. I assume you're talking about
15 the Blu-ray Association? I may have known
16 when I was involved in that matter. I do not
17 remember, sitting here now.

18 Q. Do you recall that your report
19 actually refers to the Blu-ray Association?

20 A. I think I refer to Blu-ray
21 standards. I don't recall if I refer to the
22 Blu-ray Association, but perhaps you could
23 refresh my memory.

24 Q. I believe you point it out at
25 the bottom of page 62. "While certain SDOs

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1 their materials?

2 MR. FEE: Objection to form.

3 THE WITNESS: I may have been
4 aware through other assignments I've
5 undertaken in the past, but I didn't
6 undertake any separate investigation
7 for purposes of this matter.

8 BY MR. BRIDGES:

9 Q. What awareness do you have of
10 the practices or policies of other SDOs
11 through other assignments you've undertaken
12 in the past?

13 MR. FEE: Objection to form.

14 THE WITNESS: I can only recall
15 most generally that they view
16 intellectual property protection as
17 being very important, but I can't be
18 any more specific than that.

19 BY MR. BRIDGES:

20 Q. Which SDOs you -- do you recall
21 treating intellectual property protection as
22 very important?

23 A. Well, again, I've -- I've dealt
24 with standards setting organizations. I
25 don't know if any of those are technically

1 (e.g., the Blu-ray disc association) provide
2 unrestricted access to their standard
3 publications for free, the Plaintiffs here do
4 not."

5 Do you recall that?

6 A. Now I do. Thank you for
7 refreshing my memory.

8 Q. What economic effects are you
9 aware of the fact that the Blu-ray Disc
10 Association provides unrestricted access to
11 its standard publications for free?

12 A. I have not investigated that
13 issue, so I don't know.

14 Q. What other SDOs have you
15 identified that provide unrestricted access
16 to their standards for free?

17 A. I don't think I've identified
18 any others in my report.

19 Q. Did you look for any others?

20 A. Not that I recall.

21 Q. Why not?

22 A. I don't know how to answer
23 that. I was aware of the Blu-ray Disc
24 Association's policy in this regard, so I
25 wrote about it here.

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36 (Pages 138 - 141)

1 Q. Why did you not consider the
2 economic effects of free distribution of
3 standards with respect to other
4 organizations?
5 A. I didn't quite see the
6 relevance to this matter.
7 Q. Why?
8 A. I don't know how to prove a
9 negative.
10 Q. What's the negative you were
11 thinking of that would need to be proved or
12 disproved?
13 A. That something is not relevant.
14 Q. You just didn't see the
15 relevance?
16 A. I don't understand how that
17 would be helpful in the assignment that I had
18 here.
19 Q. And what was the assignment you
20 had here?
21 A. Well, I've laid it out --
22 Q. I can read the report. I'm not
23 asking you to read -- read the report. I'd
24 like your own words now, sitting here.
25 MR. FEE: Objection.

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1 perspective.
2 BY MR. BRIDGES:
3 Q. And what is the relevance of
4 economic analysis to that question, as you
5 understand it?
6 MR. FEE: Objection to form.
7 Vague. Might also be construed to
8 require a legal conclusion.
9 THE WITNESS: Economists have a
10 view and perspective at looking at
11 issues that some courts have found to
12 be useful.
13 BY MR. BRIDGES:
14 Q. Well, I'm asking, with specific
15 relevance to this case, what do you
16 understand the importance of economic
17 analysis to be in this case --
18 MR. FEE: Objection. Calls --
19 BY MR. BRIDGES:
20 Q. -- as you have purported to
21 practice it?
22 MR. FEE: Calls for a legal
23 conclusion.
24 Also, to the extent that
25 responding to that would require you

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1 BY MR. BRIDGES:
2 Q. How do you -- how do you
3 view --
4 A. I'd like to answer it by
5 looking at my report.
6 Q. No, I'd like for you to give me
7 a straight answer, because if you're just
8 going to refer to the report, the report will
9 speak for itself, and I don't need you to
10 read it to me.
11 I'd like for you to tell me
12 what you understand, sitting here, to have
13 been your assignment in this case.
14 MR. FEE: Objection.
15 You can answer the question
16 however you deem appropriate.
17 THE WITNESS: I've aptly laid
18 it out in my report, so I defer to the
19 words in my report.
20 But I've, in essence, looked at
21 the topic of the impact of copyright
22 and trademark infringement here, and
23 asked myself the question whether a
24 permanent injunction would be
25 appropriate from an economic

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1 to disclose communications with
2 counsel that did not form the basis
3 for any of your opinions or
4 conclusions and did not provide any
5 assumptions that were the basis for
6 your opinions or conclusions, you
7 should not answer that portion of the
8 question.

9 THE WITNESS: I understand
10 that, generally, economists like me
11 are quite helpful in determining
12 questions of harm, particularly harm
13 as it relates to infringement of IP
14 rights.

15 BY MR. BRIDGES:
16 Q. How do you distinguish between
17 harms that are caused by an infringement by
18 the defendant versus harms that might be
19 caused by a court decision that plaintiffs
20 lack copyrights?

21 MR. FEE: Objection to the
22 extent it calls for a legal
23 conclusion.

24 THE WITNESS: I don't know how
25 to answer that question. I didn't ask

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37 (Pages 142 - 145)

1 Q. Why did you not consider the
2 economic effects of free distribution of
3 standards with respect to other
4 organizations?
5 A. I didn't quite see the
6 relevance to this matter.
7 Q. Why?
8 A. I don't know how to prove a
9 negative.
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11 thinking of that would need to be proved or
12 disproved?
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15 relevance?
16 A. I don't understand how that
17 would be helpful in the assignment that I had
18 here.
19 Q. And what was the assignment you
20 had here?
21 A. Well, I've laid it out --
22 Q. I can read the report. I'm not
23 asking you to read -- read the report. I'd
24 like your own words now, sitting here.
25 MR. FEE: Objection.

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23 conclusion.
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5 looking at my report.
6 Q. No, I'd like for you to give me
7 a straight answer, because if you're just
8 going to refer to the report, the report will
9 speak for itself, and I don't need you to
10 read it to me.
11 I'd like for you to tell me
12 what you understand, sitting here, to have
13 been your assignment in this case.
14 MR. FEE: Objection.
15 You can answer the question
16 however you deem appropriate.
17 THE WITNESS: I've aptly laid
18 it out in my report, so I defer to the
19 words in my report.
20 But I've, in essence, looked at
21 the topic of the impact of copyright
22 and trademark infringement here, and
23 asked myself the question whether a
24 permanent injunction would be
25 appropriate from an economic

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1 to disclose communications with
2 counsel that did not form the basis
3 for any of your opinions or
4 conclusions and did not provide any
5 assumptions that were the basis for
6 your opinions or conclusions, you
7 should not answer that portion of the
8 question.

9 THE WITNESS: I understand
10 that, generally, economists like me
11 are quite helpful in determining
12 questions of harm, particularly harm
13 as it relates to infringement of IP
14 rights.

15 BY MR. BRIDGES:
16 Q. How do you distinguish between
17 harms that are caused by an infringement by
18 the defendant versus harms that might be
19 caused by a court decision that plaintiffs
20 lack copyrights?

21 MR. FEE: Objection to the
22 extent it calls for a legal
23 conclusion.

24 THE WITNESS: I don't know how
25 to answer that question. I didn't ask

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37 (Pages 142 - 145)

<p>1 myself the question of ownership or 2 impact of ownership. I asked myself 3 the question here of impact of 4 infringement.</p> <p>5 BY MR. BRIDGES:</p> <p>6 Q. If it turns out that the Court 7 rules that the plaintiff -- sorry. Strike 8 that.</p> <p>9 If it turns out the Court rules 10 here that the defendant has engaged in fair 11 use, is it your understanding that none of 12 your harms analysis is relevant --</p> <p>13 MR. FEE: Objection.</p> <p>14 BY MR. BRIDGES:</p> <p>15 Q. -- because of a finding of 16 non-infringement?</p> <p>17 MR. FEE: Calls for a legal 18 conclusion.</p> <p>19 To the extent answering that 20 question would require you to disclose 21 communications you had with counsel 22 that don't form the basis for any of 23 your opinions or conclusions and don't 24 provide any assumptions that you 25 relied upon, you shouldn't disclose</p>	<p>1 under the assumption that the 2 activities violate the law.</p> <p>3 BY MR. BRIDGES:</p> <p>4 Q. If the activities -- do you 5 believe -- do you understand that your 6 analysis is relevant to a determination of 7 whether the defendant has violated the law?</p> <p>8 MR. FEE: Objection. Calls for 9 a legal conclusion.</p> <p>10 To the extent that your 11 understanding is based upon 12 communications with counsel, you 13 shouldn't disclose them, unless they 14 formed the basis for your opinions or 15 conclusions or provided assumptions 16 that you relied upon in reaching your 17 conclusions.</p> <p>18 THE WITNESS: I don't know.</p> <p>19 BY MR. BRIDGES:</p> <p>20 Q. Do you have any view as to 21 whether the defendant has violated copyright 22 law?</p> <p>23 MR. FEE: Objection. Calls for 24 a legal conclusion.</p> <p>25 THE WITNESS: No, I've not</p>
<p>Page 146</p> <p>1 those communications.</p> <p>2 THE WITNESS: You're asking for 3 a legal conclusion. I'm not an expert 4 on that.</p> <p>5 BY MR. BRIDGES:</p> <p>6 Q. I'm understanding your 7 understanding -- I'm asking for your 8 understanding of the relevance of your 9 contributions to this case.</p> <p>10 MR. FEE: Objection. Asked and 11 answered. Plus all the prior 12 objections and instructions.</p> <p>13 THE WITNESS: I believe my 14 testimony and report are relevant to 15 the issue of harm and potential harm.</p> <p>16 BY MR. BRIDGES:</p> <p>17 Q. From what?</p> <p>18 A. From continuing -- the 19 continuing activities and possible expanded 20 activities of the defendant here.</p> <p>21 Q. From activities or from 22 violations of law?</p> <p>23 MR. FEE: Objection. Vague. 24 Calls for a legal conclusion.</p> <p>25 THE WITNESS: I -- I'm working</p>	<p>Page 148</p> <p>1 taken on that assignment.</p> <p>2 BY MR. BRIDGES:</p> <p>3 Q. Do you have any view as to 4 whether the defendant's activities constitute 5 fair use?</p> <p>6 MR. FEE: Objection. Calls for 7 a legal conclusion.</p> <p>8 THE WITNESS: No, I've not 9 taken on that assignment.</p> <p>10 BY MR. BRIDGES:</p> <p>11 Q. If a court determines that the 12 defendant has not infringed upon plaintiffs' 13 copyrights, do you understand that the 14 decision would result in economic harm to the 15 plaintiffs?</p> <p>16 MR. FEE: Objection to the 17 extent it calls for a legal 18 conclusion.</p> <p>19 THE WITNESS: I'm not following 20 your question. Could you ask it a 21 little bit differently, please?</p> <p>22 BY MR. BRIDGES:</p> <p>23 Q. No, I'll restate it if you just 24 need to rehear it.</p> <p>25 A. No, I don't need to rehear it.</p>

1 If you could recast it, please.
2 Q. No. Then please answer my
3 question.
4 MR. FEE: Objection.
5 BY MR. BRIDGES:
6 Q. I get to ask the questions.
7 MR. FEE: He just said he
8 couldn't answer it.
9 THE WITNESS: I don't
10 understand the question.
11 BY MR. BRIDGES:
12 Q. What is it you don't
13 understand?
14 A. I understand each word but not
15 how you put them together.
16 Q. If a court determines that the
17 defendant has not infringed upon the
18 plaintiffs' copyrights, do you believe that
19 that decision would result in economic harm
20 to the plaintiffs?
21 MR. FEE: Objection to the
22 extent it calls for a legal
23 conclusion. Plus asked and answered.
24 THE WITNESS: It sounds like
25 exactly the same words, so I'm not

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1 that's fine.
2 A. I want to, but I cannot.
3 Q. Well --
4 A. I do not understand the
5 question.
6 Q. I'll say it again.
7 Would a decision by the Court
8 that the defendant has not infringed upon the
9 plaintiffs' copyrights result in economic
10 harm to the plaintiffs?
11 MR. FEE: Objection. Calls for
12 a legal conclusion. Asked and
13 answered.
14 THE WITNESS: I --
15 MR. FEE: Vague.
16 THE WITNESS: I cannot answer
17 it any differently. I'm sorry.
18 Is this a good time for a
19 break, or do you want to keep going?
20 MR. BRIDGES: Sure. We can
21 take one if you want.
22 THE VIDEOGRAPHER: Off the
23 record at 1:17.
24 * * *
25 (Recess from 1:17 p.m. to

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1 sure how to answer that question.
2 BY MR. BRIDGES:
3 Q. Would a decision that the
4 defendant has not infringed upon plaintiffs'
5 copyrights result in economic harm to the
6 plaintiffs?
7 MR. FEE: Objection. Calls for
8 a legal conclusion.
9 THE WITNESS: I'm just not
10 following. I under -- I'm worked --
11 I'm working under the assumption that
12 the activity here represents a
13 copyright infringement. I'm -- and
14 I'm being asked and answering the
15 question of the impact of that and
16 whether there would be harm and what
17 kind of harm and whether that's
18 reparable harm.
19 So I'm focusing on what has
20 been done and what may continue to be
21 done by the defendant.
22 BY MR. BRIDGES:
23 Q. That's non-responsive. I'll
24 ask you to answer my question. And if you
25 just don't want to answer the question,

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1 2:12 p.m.)
2 * * *
3 THE VIDEOGRAPHER: On the
4 record at 2:12.
5 BY MR. BRIDGES:
6 Q. Good afternoon, Mr. Jarosz.
7 A. Good afternoon.
8 Q. Could you outline for me,
9 please, what steps you took in your
10 engagement in this case? What are the
11 different activities you engaged in?
12 A. Generally, I had a discussion
13 with counsel about the matter. Then we
14 examined documents that would -- were
15 provided to us to give us background. We
16 then proceeded to gather our own information
17 from third-party sources, primarily through
18 Internet searches.
19 We obtained information that
20 had been produced as part of discovery. We
21 had conversations with people at the various
22 plaintiff organizations.
23 We outlined the report and
24 summarized some of the information that you
25 see in the tabs. We had discussions with

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39 (Pages 150 - 153)

1 If you could recast it, please.
2 Q. No. Then please answer my
3 question.
4 MR. FEE: Objection.
5 BY MR. BRIDGES:
6 Q. I get to ask the questions.
7 MR. FEE: He just said he
8 couldn't answer it.
9 THE WITNESS: I don't
10 understand the question.
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13 understand?
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6 plaintiffs?
7 MR. FEE: Objection. Calls for
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12 the activity here represents a
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14 I'm being asked and answering the
15 question of the impact of that and
16 whether there would be harm and what
17 kind of harm and whether that's
18 reparable harm.
19 So I'm focusing on what has
20 been done and what may continue to be
21 done by the defendant.
22 BY MR. BRIDGES:
23 Q. That's non-responsive. I'll
24 ask you to answer my question. And if you
25 just don't want to answer the question,

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1 2:12 p.m.)
2 * * *
3 THE VIDEOGRAPHER: On the
4 record at 2:12.
5 BY MR. BRIDGES:
6 Q. Good afternoon, Mr. Jarosz.
7 A. Good afternoon.
8 Q. Could you outline for me,
9 please, what steps you took in your
10 engagement in this case? What are the
11 different activities you engaged in?
12 A. Generally, I had a discussion
13 with counsel about the matter. Then we
14 examined documents that would -- were
15 provided to us to give us background. We
16 then proceeded to gather our own information
17 from third-party sources, primarily through
18 Internet searches.
19 We obtained information that
20 had been produced as part of discovery. We
21 had conversations with people at the various
22 plaintiff organizations.
23 We outlined the report and
24 summarized some of the information that you
25 see in the tabs. We had discussions with

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39 (Pages 150 - 153)

1 counsel. And then we finalized the report,
2 submitting it to counsel on June 5th, 2015.
3 Q. Do you know how many standards
4 of each plaintiff are at issue in this case?
5 A. How many -- I'm sorry --
6 standards are at issue?
7 Q. Yes.
8 A. I have that number written
9 down. It's in the hundreds, and I forget, as
10 I sit here right now, precisely the number.
11 I will look it up. And I was giving you an
12 answer that was a cumulation across the three
13 plaintiffs.
14 I am not seeing that number
15 right now. I'll keep looking.
16 Q. Do you know what --
17 A. You may be able to point me
18 quicker than I recall where it was.
19 Q. Do you -- do you know what
20 proportion of plaintiffs -- of each
21 plaintiffs' standards is at issue in this
22 case?
23 A. Are you asking me the ratio of
24 the standards at issue versus the total
25 standards developed by the organizations?

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1 Q. Have you analyzed any
2 differences in sales trends between those of
3 plaintiffs' standards that have been
4 incorporated into law and those of
5 plaintiffs' standards that have not been
6 incorporated into law?
7 A. I don't think so. I don't
8 think I have those data, and I'm not sure
9 that each plaintiff knows precisely how many
10 have been incorporated into law.
11 Q. Did you ask for any data
12 regarding the distinction between standards
13 incorporated by reference and standards not
14 incorporated by reference in the law?
15 A. I don't --
16 MR. FEE: Objection to form.
17 THE WITNESS: I'm sorry. I
18 don't recall.
19 BY MR. BRIDGES:
20 Q. You made observations about
21 sales trends earlier in your deposition. I
22 think you said that there's been a reduction
23 in sales of certain of plaintiffs' standards;
24 is that correct?
25 A. I'm not quite sure what the

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1 Q. Yes.
2 A. I think it's less than a
3 majority for each organization. I'm fairly
4 certain of that with regard to ASTM. I think
5 that's true with regard to NFPA. I think
6 it's true with regard to ASHRAE.
7 Q. Do you have any better
8 information than less than a majority --
9 A. Well, I --
10 Q. -- for each of them?
11 A. The precise numbers are in the
12 report. Let's see here. One can figure that
13 out. You may remember where I summarized the
14 number of standards. I just don't remember.
15 It's easy to determine because the data are
16 all here.
17 Q. Have you analyzed differences
18 in sales trends between standards that are at
19 issue in this case and plaintiffs' other
20 standards?
21 A. No, I don't think I have those
22 data at my disposal.
23 Q. Did you ever ask for those
24 data?
25 A. I don't recall.

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1 earlier testimony was, but I think I was
2 pointing you to paragraph 133 with regard to
3 downloads of -- and other measures of
4 activity, as I had at my disposal.
5 Q. Well, I'm trying to find out
6 what changes you have studied in plaintiffs'
7 economics that you attribute to defendant's
8 activities.
9 A. I'm not quite sure what your
10 question is.
11 Q. Well, I'm trying to find out
12 what information you have studied to
13 determine what changes in the finances of
14 each of the plaintiffs have occurred as a
15 consequence of the defendant's activities.
16 MR. FEE: Objection to form.
17 THE WITNESS: I'm still not
18 sure that I'm hearing a question. But
19 to the extent that I had information
20 on changes in activity level, I
21 summarized that in paragraph 133.
22 BY MR. BRIDGES:
23 Q. My question is, what
24 information did you study to determine any
25 changes in finances of each of the

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<p>1 plaintiffs?</p> <p>2 MR. FEE: Same objection.</p> <p>3 THE WITNESS: It's reflected in</p> <p>4 paragraph 133 and in the tabs,</p> <p>5 particularly 3, 4, and 5. But the</p> <p>6 tabs are not at the granular level</p> <p>7 that I think are of interest to you.</p> <p>8 BY MR. BRIDGES:</p> <p>9 Q. What do you mean by the</p> <p>10 "granular level" that would be of interest to</p> <p>11 me?</p> <p>12 A. I don't think it breaks out</p> <p>13 publications by standard, for instance.</p> <p>14 Q. Does it break out publications</p> <p>15 by whether a standard has been incorporated</p> <p>16 by reference or not?</p> <p>17 A. I don't think so.</p> <p>18 Q. Does it break out by whether a</p> <p>19 standard has been publicly made available by</p> <p>20 defendant or not?</p> <p>21 A. I don't think so. Not in</p> <p>22 tabs 3, 4, and 5.</p> <p>23 Q. How do you establish causation</p> <p>24 between defendant's activities and any of the</p> <p>25 data that you provide in section -- in</p>	<p>1 of certain of the standards. I've</p> <p>2 presented that.</p> <p>3 I don't have direct evidence of</p> <p>4 the precise impact historically of</p> <p>5 defendant's activities on plaintiffs'</p> <p>6 financials.</p> <p>7 BY MR. BRIDGES:</p> <p>8 Q. What evidence of any kind do</p> <p>9 you have of any kind of impact historically</p> <p>10 of the defendant's activities on plaintiffs'</p> <p>11 financials?</p> <p>12 MR. FEE: Objection to form.</p> <p>13 THE WITNESS: That which is</p> <p>14 reported in paragraph 133, that of</p> <p>15 which is contained in deposition</p> <p>16 testimony, and that of which I</p> <p>17 summarized in other parts of the</p> <p>18 report.</p> <p>19 BY MR. BRIDGES:</p> <p>20 Q. So when you're referring to</p> <p>21 deposition testimony, you're referring to the</p> <p>22 citations to the footnotes in paragraph 133?</p> <p>23 A. No, I don't think it's just</p> <p>24 limited to that. I think there's some other</p> <p>25 deposition transcripts that talk about the</p>
<p>1 paragraph 133?</p> <p>2 MR. FEE: Objection. Calls for</p> <p>3 a legal conclusion. Form.</p> <p>4 THE WITNESS: One can and</p> <p>5 should look at all evidence available,</p> <p>6 including circumstantial evidence. I</p> <p>7 don't have direct information about</p> <p>8 the precise impact of defendant's</p> <p>9 activities, but I have important</p> <p>10 information that bears on that issue,</p> <p>11 including information that's in</p> <p>12 deposition transcripts.</p> <p>13 BY MR. BRIDGES:</p> <p>14 Q. So my question is, how do</p> <p>15 you -- do you -- strike that.</p> <p>16 Are your conclusion -- are you</p> <p>17 making conclusions in paragraph 133 about the</p> <p>18 cause of changes in sales of the plaintiffs'</p> <p>19 products?</p> <p>20 MR. FEE: Objection to form.</p> <p>21 THE WITNESS: Not definitively.</p> <p>22 I have observations about the</p> <p>23 magnitude and trend of the downloads</p> <p>24 of -- through defendant's sites. I</p> <p>25 have some information on the downloads</p>	<p>1 impact or potential impact of defendant's</p> <p>2 activities on each one of the plaintiffs.</p> <p>3 Q. Did you make any independent</p> <p>4 assessment of causation of any financial</p> <p>5 effects on plaintiffs by the defendant's</p> <p>6 activities?</p> <p>7 MR. FEE: Objection to form.</p> <p>8 Calls for a legal conclusion.</p> <p>9 THE WITNESS: What do you mean</p> <p>10 by the term of "independent assessment</p> <p>11 of causation"?</p> <p>12 BY MR. BRIDGES:</p> <p>13 Q. You, as an expert, not relying</p> <p>14 just on what other people have said or</p> <p>15 speculated or thought.</p> <p>16 MR. FEE: Same objections.</p> <p>17 Plus compound.</p> <p>18 THE WITNESS: We experts rely</p> <p>19 on other information to draw the</p> <p>20 conclusions that we do, and then we</p> <p>21 bring our training to it. So our</p> <p>22 observations shouldn't be in a vacuum.</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. But they should be objective,</p> <p>25 correct?</p>

<p>1 plaintiffs?</p> <p>2 MR. FEE: Same objection.</p> <p>3 THE WITNESS: It's reflected in</p> <p>4 paragraph 133 and in the tabs,</p> <p>5 particularly 3, 4, and 5. But the</p> <p>6 tabs are not at the granular level</p> <p>7 that I think are of interest to you.</p> <p>8 BY MR. BRIDGES:</p> <p>9 Q. What do you mean by the</p> <p>10 "granular level" that would be of interest to</p> <p>11 me?</p> <p>12 A. I don't think it breaks out</p> <p>13 publications by standard, for instance.</p> <p>14 Q. Does it break out publications</p> <p>15 by whether a standard has been incorporated</p> <p>16 by reference or not?</p> <p>17 A. I don't think so.</p> <p>18 Q. Does it break out by whether a</p> <p>19 standard has been publicly made available by</p> <p>20 defendant or not?</p> <p>21 A. I don't think so. Not in</p> <p>22 tabs 3, 4, and 5.</p> <p>23 Q. How do you establish causation</p> <p>24 between defendant's activities and any of the</p> <p>25 data that you provide in section -- in</p>	<p>1 of certain of the standards. I've</p> <p>2 presented that.</p> <p>3 I don't have direct evidence of</p> <p>4 the precise impact historically of</p> <p>5 defendant's activities on plaintiffs'</p> <p>6 financials.</p> <p>7 BY MR. BRIDGES:</p> <p>8 Q. What evidence of any kind do</p> <p>9 you have of any kind of impact historically</p> <p>10 of the defendant's activities on plaintiffs'</p> <p>11 financials?</p> <p>12 MR. FEE: Objection to form.</p> <p>13 THE WITNESS: That which is</p> <p>14 reported in paragraph 133, that of</p> <p>15 which is contained in deposition</p> <p>16 testimony, and that of which I</p> <p>17 summarized in other parts of the</p> <p>18 report.</p> <p>19 BY MR. BRIDGES:</p> <p>20 Q. So when you're referring to</p> <p>21 deposition testimony, you're referring to the</p> <p>22 citations to the footnotes in paragraph 133?</p> <p>23 A. No, I don't think it's just</p> <p>24 limited to that. I think there's some other</p> <p>25 deposition transcripts that talk about the</p>
<p>1 paragraph 133?</p> <p>2 MR. FEE: Objection. Calls for</p> <p>3 a legal conclusion. Form.</p> <p>4 THE WITNESS: One can and</p> <p>5 should look at all evidence available,</p> <p>6 including circumstantial evidence. I</p> <p>7 don't have direct information about</p> <p>8 the precise impact of defendant's</p> <p>9 activities, but I have important</p> <p>10 information that bears on that issue,</p> <p>11 including information that's in</p> <p>12 deposition transcripts.</p> <p>13 BY MR. BRIDGES:</p> <p>14 Q. So my question is, how do</p> <p>15 you -- do you -- strike that.</p> <p>16 Are your conclusion -- are you</p> <p>17 making conclusions in paragraph 133 about the</p> <p>18 cause of changes in sales of the plaintiffs'</p> <p>19 products?</p> <p>20 MR. FEE: Objection to form.</p> <p>21 THE WITNESS: Not definitively.</p> <p>22 I have observations about the</p> <p>23 magnitude and trend of the downloads</p> <p>24 of -- through defendant's sites. I</p> <p>25 have some information on the downloads</p>	<p>1 impact or potential impact of defendant's</p> <p>2 activities on each one of the plaintiffs.</p> <p>3 Q. Did you make any independent</p> <p>4 assessment of causation of any financial</p> <p>5 effects on plaintiffs by the defendant's</p> <p>6 activities?</p> <p>7 MR. FEE: Objection to form.</p> <p>8 Calls for a legal conclusion.</p> <p>9 THE WITNESS: What do you mean</p> <p>10 by the term of "independent assessment</p> <p>11 of causation"?</p> <p>12 BY MR. BRIDGES:</p> <p>13 Q. You, as an expert, not relying</p> <p>14 just on what other people have said or</p> <p>15 speculated or thought.</p> <p>16 MR. FEE: Same objections.</p> <p>17 Plus compound.</p> <p>18 THE WITNESS: We experts rely</p> <p>19 on other information to draw the</p> <p>20 conclusions that we do, and then we</p> <p>21 bring our training to it. So our</p> <p>22 observations shouldn't be in a vacuum.</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. But they should be objective,</p> <p>25 correct?</p>

<p>1 A. Yes.</p> <p>2 Q. And that means perhaps not</p> <p>3 relying upon the views of the parties to the</p> <p>4 lawsuit alone, but doing independent analysis</p> <p>5 and research, correct?</p> <p>6 MR. FEE: Objection to form.</p> <p>7 THE WITNESS: I think one can</p> <p>8 and should evaluate and consider the</p> <p>9 views of the parties, but not limited</p> <p>10 investigation to that.</p> <p>11 BY MR. BRIDGES:</p> <p>12 Q. So what independent analysis</p> <p>13 and research did you do other than reviewing</p> <p>14 the views and statements of the parties in</p> <p>15 this case?</p> <p>16 MR. FEE: Objection. Vague.</p> <p>17 THE WITNESS: I reviewed and</p> <p>18 summarized the data, as you see in</p> <p>19 133, that I had at my disposal. I</p> <p>20 reviewed writings about the impacts.</p> <p>21 And I took important</p> <p>22 information from the fact that the</p> <p>23 plaintiffs have brought this lawsuit.</p> <p>24 The plaintiffs don't want this</p> <p>25 activity to continue. That is</p>	<p>1 A. I took all the data --</p> <p>2 MR. FEE: Objection. Form.</p> <p>3 Objection to form.</p> <p>4 THE WITNESS: I took all this</p> <p>5 data into account. That's why I</p> <p>6 reported it here.</p> <p>7 BY MR. BRIDGES:</p> <p>8 Q. And the data that you</p> <p>9 identified in the footnotes in</p> <p>10 paragraph 134 -- sorry -- 133?</p> <p>11 A. Yes, I considered that</p> <p>12 information.</p> <p>13 Q. Do you know in what year the</p> <p>14 defendant posted the 2008 version of the</p> <p>15 National Electrical Code on its Web site?</p> <p>16 A. I don't know with absolute</p> <p>17 certainty. I do know a number of the alleged</p> <p>18 activities occurred in late 2012. I don't</p> <p>19 know if it's specific to that code or not.</p> <p>20 Q. Does it matter to your analysis</p> <p>21 exactly when the defendant posted the 2008</p> <p>22 National Electrical Code on its Web site or</p> <p>23 to Internet Archive?</p> <p>24 A. I would --</p> <p>25 MR. FEE: Objection to form.</p>
<p>Page 162</p> <p>1 revealed preference information that's</p> <p>2 quite important.</p> <p>3 BY MR. BRIDGES:</p> <p>4 Q. Tell me about what you mean by</p> <p>5 repealed -- sorry. Strike that.</p> <p>6 Tell me what you mean by</p> <p>7 "revealed preference."</p> <p>8 A. What people do often provides</p> <p>9 information on what their preferences are.</p> <p>10 Q. And so the fact that plaintiffs</p> <p>11 brought this lawsuit has revealed to you that</p> <p>12 they prefer to bring the lawsuit, correct?</p> <p>13 MR. FEE: Objection. Vague.</p> <p>14 THE WITNESS: Given the cost,</p> <p>15 they prefer to bring the lawsuit</p> <p>16 rather than not bring it, yes.</p> <p>17 BY MR. BRIDGES:</p> <p>18 Q. What else -- strike that.</p> <p>19 What are the data you're</p> <p>20 referring to in page -- strike that.</p> <p>21 What are the data you're</p> <p>22 referring to in paragraph 133 that you took</p> <p>23 into account in discussing or analyzing</p> <p>24 effects of defendant's activities on</p> <p>25 plaintiffs?</p>	<p>Page 164</p> <p>1 THE WITNESS: I would consider</p> <p>2 that information if I had it, but I</p> <p>3 don't have any reason to think that it</p> <p>4 would change any of the conclusions</p> <p>5 that I drew.</p> <p>6 BY MR. BRIDGES:</p> <p>7 Q. The timing of when the</p> <p>8 defendant posted certain matters wouldn't</p> <p>9 change your conclusions?</p> <p>10 A. Not based on what I know right</p> <p>11 now. My understanding is that much of the</p> <p>12 activity occurred in 2012, the later half of</p> <p>13 2012, and I still have the whole body of</p> <p>14 evidence that I have considered. So I'm not</p> <p>15 sure if the precise timing would change, but</p> <p>16 I certainly would consider that.</p> <p>17 Q. Do you know in what year</p> <p>18 Public.Resource.Org posted the 2011 version</p> <p>19 of the National Electrical Code?</p> <p>20 A. Same answer to the question</p> <p>21 that you had with regard to the 2008 code.</p> <p>22 Q. Can you look at the data in</p> <p>23 your -- the tables attached to your report</p> <p>24 and see if that helps refresh your memory as</p> <p>25 to when the defendant posted NEC 2008 and</p>

1 NEC -- NEC 2011?
2 A. I can look, and I will.
3 No, it doesn't answer that
4 question, I don't think.
5 Q. Can you make a prediction as to
6 when the defendant posted NEC 2008 and
7 NEC 2011, based on the data attached to your
8 report in Exhibit 1?
9 MR. FEE: Objection to form.
10 THE WITNESS: No, I don't
11 think, based on just those data.
12 BY MR. BRIDGES:
13 Q. Can you make -- give an
14 estimate as to when the defendant posted
15 NEC 2008 and NEC 2011, based on the data
16 attached to your report as Exhibit 1?
17 MR. FEE: Same objection.
18 THE WITNESS: No, I don't
19 think, based on just that information.
20 BY MR. BRIDGES:
21 Q. Well, just looking at your
22 report, can you tell when defendant posted
23 NEC 2008 and NEC 2011?
24 A. My answer hasn't changed. I
25 still don't know precisely when those were

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1 appropriateness of a permanent
2 injunction here.
3 BY MR. BRIDGES:
4 Q. Is the appropriate of -- is the
5 appropriateness of a permanent injunction an
6 economic question?
7 A. I think, in part, economic
8 considerations can be and often are taken
9 into account in answering that question.
10 Q. Is it an economic question?
11 MR. FEE: Objection.
12 BY MR. BRIDGES:
13 Q. That was my question.
14 MR. FEE: Asked and answered.
15 THE WITNESS: Again, in part.
16 BY MR. BRIDGES:
17 Q. The propriety of
18 a preliminary -- of a -- strike that.
19 It's your testimony that the
20 propriety of a permanent injunction is, in
21 part, an economic question?
22 MR. FEE: Objection. Asked and
23 answered. Form. Calls for a legal
24 conclusion.
25 THE WITNESS: Yes. As I

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1 posted.
2 Q. But that doesn't make a
3 difference to your economic analysis of the
4 effects of defendant's activities on the
5 plaintiffs?
6 A. Well, I would be curious --
7 MR. FEE: Objection to form.
8 THE WITNESS: -- curious about
9 that information, but I don't have any
10 reason to think it would change the
11 conclusions that I drew, and that is
12 that a permanent injunction is
13 appropriate here.
14 BY MR. BRIDGES:
15 Q. Is it your job to determine
16 whether a permanent injunction is
17 appropriate? Is that what you were hired to
18 do?
19 A. No.
20 MR. FEE: Objection. Calls for
21 a legal conclusion. Form. Compound.
22 THE WITNESS: I think it's
23 ultimately the Court's decision to
24 make, but I've been asked what my
25 economic view is as to the

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1 understand it, one factor to consider
2 is the reparability or irreparability
3 of harm. I believe, at its core,
4 that's an economic question.
5 BY MR. BRIDGES:
6 Q. And what economic theories did
7 you rely upon to conclude that, as an
8 economic matter, a preliminary -- strike
9 that.
10 What economic theories did you
11 rely upon to conclude that, as an economic
12 matter, a permanent injunction is appropriate
13 in this case?
14 MR. FEE: Same objections.
15 THE WITNESS: I don't know what
16 candidates you have in mind for
17 economic theories.
18 BY MR. BRIDGES:
19 Q. Whichever ones you relied upon.
20 A. I --
21 MR. FEE: Same objections.
22 THE WITNESS: -- used all of my
23 training and applied it to the facts
24 of this case and drew the conclusions
25 that I did.

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43 (Pages 166 - 169)

<p>1 BY MR. BRIDGES:</p> <p>2 Q. And are there any particular 3 aspects of training that you have beyond what 4 a first-year college student would have 5 gotten in a first-year economics course that 6 you have brought to bear by applying 7 particular economic theories to this case?</p> <p>8 A. I think my training makes me 9 who I am and has helped me in assignments 10 like this. I have beyond a first-year-in- 11 college understanding of basic economics, but 12 they're very important concepts that are 13 taught and learned in first-year economics.</p> <p>14 Q. Well, I want to know if there 15 are any economic concepts beyond first-year 16 economics that you have brought to bear in 17 rendering your conclusions in this case.</p> <p>18 MR. FEE: Objection to form.</p> <p>19 Asked and answered.</p> <p>20 THE WITNESS: Generally, there 21 are, yes.</p> <p>22 BY MR. BRIDGES:</p> <p>23 Q. What economic concepts have you 24 brought to bear in your report and analysis 25 in this case?</p>	<p>1 THE WITNESS: We learn about 2 price theory. We learn about consumer 3 behavior. We talk -- we learn about 4 manufacturer and supplier actions. We 5 learn about game theory. We learn 6 about econometrics. We learn more 7 broadly about quantitative methods. 8 We learn about a variety of aspects of 9 industrial organization. There are 10 many things that we learn beyond the 11 first year of economics training.</p> <p>12 BY MR. BRIDGES:</p> <p>13 Q. No, I'm asking what you brought 14 to bear in your analysis in this case.</p> <p>15 A. All those.</p> <p>16 Q. Okay. What aspect of price 17 theory did you bring to bear in this case?</p> <p>18 A. I don't know how to answer that 19 question besides I understand basic price 20 theory and have researched it much and 21 applied that to the facts here.</p> <p>22 Q. What was the specific 23 application of price theory that you brought 24 to bear in this case?</p> <p>25 A. I can't be any more specific</p>
<p>1 A. I'm sorry, because I don't know 2 what you mean by "economic concepts." We get 3 trained in things like quantitative methods 4 and intermediate microeconomics, in price 5 theory, in econometrics, in consumer 6 behavior. All those things are beyond the 7 first year. I don't know if you're calling 8 those economic theories. Your -- your 9 questioning confuses me.</p> <p>10 Q. Well, you referred to the 11 important concepts in response to my question 12 to you about particular aspects of training 13 that you have beyond what a first-year 14 college student would have gotten in a 15 first-year economics course that you brought 16 to bear by applying economic theories to this 17 case, and your answer refers to very 18 important concepts that are taught and 19 learned.</p> <p>20 And so I'm asking you, what 21 very important economic concepts have you 22 brought to bear in your analysis of this 23 case?</p> <p>24 MR. FEE: Objection to form.</p> <p>25 Lack of foundation.</p>	<p>1 than that. I don't understand your question.</p> <p>2 Q. What aspect of training about 3 consumer behavior did you bring to bear in 4 this case?</p> <p>5 A. I can't be any more specific 6 than saying that.</p> <p>7 Q. What aspects of your training 8 about game theory have you brought to bear in 9 your work on this case?</p> <p>10 A. I can't be any more specific 11 than that.</p> <p>12 Q. What aspects of econometrics in 13 your training have you brought to bear on 14 this case?</p> <p>15 A. I can't be any more specific 16 than that.</p> <p>17 Q. What inform -- what aspects of 18 training in qualitative methods have you 19 brought to bear on this case?</p> <p>20 A. I didn't say "qualitative 21 methods," and so it may have been mis-keyed 22 in. I said "quantitative methods."</p> <p>23 Q. All right. What aspects of 24 quantitative methods of your training did you 25 bring to bear on this case?</p>

<p>1 A. I can't be any more specific 2 than that.</p> <p>3 Q. What aspect of your training 4 regarding aspects of industrial organization 5 have you brought to bear on this case?</p> <p>6 A. I can't be any more specific 7 than that.</p> <p>8 Q. But you did bring the theory of 9 reveal -- revealed preferences to bear on 10 this case, correct?</p> <p>11 A. Yes.</p> <p>12 Q. What other economic theories do 13 you recall bringing to bear on this case?</p> <p>14 MR. FEE: Objection. Asked and 15 answered.</p> <p>16 THE WITNESS: Everything that 17 I've --</p> <p>18 MR. FEE: And vague. 19 Go ahead.</p> <p>20 THE WITNESS: -- I've learned 21 in my training, both educational 22 training and career training.</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. Can you be more specific than 25 that?</p>	<p>1 just on this information.</p> <p>2 Q. What else would you need?</p> <p>3 A. I don't know, because I think 4 it's probably a very easy factual question to 5 determine when the downloading first 6 occurred, so I don't know why one would need 7 to back into it.</p> <p>8 Q. Well, when -- would one be able 9 to use sales trends as a way of identifying 10 likely effects of a posting of each standard 11 by the defendant?</p> <p>12 MR. FEE: Objection. Vague. 13 Compound.</p> <p>14 THE WITNESS: Maybe; maybe not.</p> <p>15 BY MR. BRIDGES:</p> <p>16 Q. Why do you say "maybe; maybe 17 not"?</p> <p>18 A. I just wouldn't think to do it 19 that way, so I don't know what you exactly 20 have in mind.</p> <p>21 Q. Do you associate the posting of 22 standards by defendant with changes in sales 23 volume of the standards that the defendant 24 has posted?</p> <p>25 MR. FEE: Objection to form.</p>
<p>1 A. No. 2 * * * 3 (Jarosz Exhibit 4 marked for 4 identification.) 5 * * *</p> <p>6 BY MR. BRIDGES:</p> <p>7 Q. Mr. Jarosz, do you recognize 8 Exhibit 4 as a document that you produced in 9 response to a subpoena in this case?</p> <p>10 A. Yes.</p> <p>11 Q. What is this document?</p> <p>12 A. It appears to be a summary over 13 the years 2009 through 2013 of dollars and 14 quantity of NFPA standards that were sold in 15 the marketplace.</p> <p>16 Q. Based upon the trends that you 17 see in this exhibit, can you estimate when 18 you believe it is most likely that the 19 defendant first published -- strike that.</p> <p>20 Based upon the trends that you 21 see in this Exhibit 4, can you estimate when 22 you believe it is most likely that the 23 defendant first posted each of the standards 24 identified here?</p> <p>25 A. I don't think so, not based</p>	<p>1 THE WITNESS: I don't know what 2 you mean by that question.</p> <p>3 BY MR. BRIDGES:</p> <p>4 Q. You don't understand the 5 question?</p> <p>6 A. I do not.</p> <p>7 Q. Can you correlate the posting 8 of standards by defendant with any changes in 9 sales volumes of the standards that the 10 defendant has posted?</p> <p>11 MR. FEE: Objection to form.</p> <p>12 THE WITNESS: I don't think 13 I've attempted to compute the 14 correlation coefficient here 15 associated with postings.</p> <p>16 BY MR. BRIDGES:</p> <p>17 Q. I'm not asking for a specific 18 correlation coefficient. I'm just asking, 19 generally, can you correlate the posting of 20 standards by defendant with any changes in 21 sales volumes of the standards that 22 defendants has -- that the defendant has 23 posted with reference to Exhibit 4?</p> <p>24 A. I don't know --</p> <p>25 MR. FEE: Objection. Form.</p>

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1 THE WITNESS: I don't recall
2 attempting to do that. And I wouldn't
3 necessarily think that the historical
4 impact would -- is the end of the
5 story as to the harm here.

6 BY MR. BRIDGES:

7 Q. Is historical impact part of
8 the story as to the harm here?

9 A. Yes.

10 Q. What -- what can you say by
11 looking at Exhibit 4 about the historical
12 impact of the posting of the defendant -- of
13 the plaintiffs' standards by the defendant?

14 A. I don't know that I can say
15 much, because I believe the postings largely
16 occurred in late 2012, and I only have one
17 period after that.

18 Q. If it turns out that
19 defendant's postings were well before 2012,
20 would that affect your analysis of the trends
21 in sales data of the plaintiffs'
22 publications?

23 MR. FEE: Objection to form.
24 Compound. Vague.

25 THE WITNESS: Maybe. I would

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1 Q. Have you determined in any way
2 the dates at which defendant posted various
3 standards to its Web site or to the Internet
4 Archive?

5 A. I don't recall doing a separate
6 analysis of that, no.

7 Q. How did you learn about the
8 dates at which defendant posted various
9 standards to its Web site or to Internet
10 Archive?

11 A. I had conversations with
12 counsel on that topic, and I may have seen
13 that information contained in certain
14 documents like the Complaint, but I don't
15 recall.

16 Q. Did you rely upon information
17 regarding those dates from conversations with
18 counsel?

19 MR. FEE: In arriving at his
20 opinions, you're asking?

21 MR. BRIDGES: Arriving at his
22 understanding of the facts.

23 THE WITNESS: I don't know that
24 I did, because I don't recall
25 reporting those specific dates

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1 consider that information in
2 conjunction with these data if you
3 wanted me to.

4 BY MR. BRIDGES:

5 Q. How -- what -- what would
6 change?

7 A. I don't know. I haven't done
8 that analysis.

9 Q. Have you verified the dates on
10 which plaintiffs -- strike that.

11 Have you verified the dates at
12 which defendant posted the various standards
13 to its Web site or to Internet Archive?

14 A. I don't --

15 MR. FEE: Objection. Vague.

16 THE WITNESS: I don't recall
17 verifying it.

18 And are you asking did I
19 separately go out and determine what
20 that date is and see if that was the
21 same as what was represented in the
22 Complaint, for instance?

23 BY MR. BRIDGES:

24 Q. Yes.

25 A. No, I don't recall doing that.

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1 anywhere in my report.

2 BY MR. BRIDGES:

3 Q. Do you recall taking specific
4 dates into account in analyzing the effect of
5 defendant's actions?

6 MR. FEE: Objection to form.

7 Vague.

8 THE WITNESS: I don't recall
9 one way or the other.

10 BY MR. BRIDGES:

11 Q. Do you know how -- strike that.

12 Do you know how much revenue
13 each plaintiff derives from the standards at
14 issue in this case?

15 A. I don't think I know that
16 precise number.

17 Q. Did you -- did you ever know
18 that number?

19 A. I don't think so.

20 Q. Did you ever know how much
21 revenue each plaintiff derives from standards
22 that have been incorporated into law?

23 A. As opposed to those that have
24 not been incorporated? Is that --

25 Q. Well, I'm -- I'm asking about

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1 those standards that have been incorporated
2 in the law. I'm asking if you know how much
3 revenue each plaintiffs derives -- each
4 plaintiff derives from those standards.

5 A. I don't --

6 MR. FEE: Objection. Form.

7 THE WITNESS: -- think I know
8 that number, and I'm not sure the
9 plaintiffs know that number.

10 BY MR. BRIDGES:

11 Q. Do you know the percentage of
12 revenue that each plaintiff derives from
13 standards that have been incorporated into
14 law?

15 MR. FEE: Objection to form.

16 THE WITNESS: I don't think I
17 do, and I don't believe the plaintiffs
18 do.

19 BY MR. BRIDGES:

20 Q. Are you aware of any difference
21 in profitability to plaintiffs between those
22 standards that have been incorporated into
23 law and those standards that have not been
24 incorporated into law?

25 MR. FEE: Objection to form.

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1 something just north of 50 percent for
2 ASHRAE.

3 BY MR. BRIDGES:

4 Q. What do you mean by "if you add
5 in memberships"?

6 A. I'm not -- I'm not quite sure
7 what you're asking me to define.

8 Q. I'm asking you to explain the
9 phrase that you just used, "if you add in
10 memberships." What did that mean?

11 A. I talked about that in my
12 report. Membership fees are a fairly good
13 recollect -- a fairly good reflection of
14 amount that would have been paid for
15 publications. In other words, publication
16 fees -- it -- let me start this over again.

17 It makes about as much sense to
18 become a member of ASHRAE as it is to buy
19 some of the individual publications. As a
20 result, many people choose to become members
21 rather than just buying the publication, as I
22 understand it.

23 Q. How did you learn that?

24 A. Having knowledge of the -- of
25 the price difference and through discussions

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1 THE WITNESS: I don't believe
2 so.

3 BY MR. BRIDGES:

4 Q. Do you know -- strike that.

5 Are you aware of any difference
6 in profitability to plaintiffs between those
7 standards that defendant has posted to the
8 Internet and those standards that defendant
9 has not posted to the Internet?

10 MR. FEE: Objection to form.

11 THE WITNESS: I don't believe
12 so. And as with the previous
13 question, I don't think the plaintiffs
14 have that information at their
15 disposal.

16 BY MR. BRIDGES:

17 Q. For each plaintiff, what do you
18 understand to be the percentage of gross
19 revenue from the sale of standards?

20 MR. FEE: Objection to form.

21 THE WITNESS: I -- I've
22 reported that in my report. My memory
23 is that it's something on the order of
24 66 percent for ASTM and for NFPA. And
25 if you add in memberships, it's

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1 with people at ASHRAE.

2 Q. How did you learn about the
3 price difference?

4 A. I don't recall how I learned
5 it, but I report it in my report based on
6 certain documents I've seen. Perhaps I
7 learned it from their Web site.

8 Q. Did you do any surveys of
9 ASHRAE members to validate that assumption?

10 A. I'm sorry. Validate what
11 assumption?

12 Q. About purchase of a membership
13 instead of buying the publication.

14 A. I'm not sure that there's an
15 assumption in there. My understanding is
16 that ASHRAE people are of the belief that
17 many people buy membership rather than
18 individual publications.

19 Q. And in your work, did you
20 assume that?

21 A. I didn't assume that. I worked
22 on that -- under that understanding.

23 Q. Oh, it's an understanding, but
24 not an assumption?

25 A. Yes.

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1 Q. Did that understanding make a
2 difference to your analysis?
3 A. It was a factual underpinning.
4 Q. An underpinning, but not an
5 assumption?
6 A. It was not an explicit
7 assumption.
8 Q. But it was an underpinning, not
9 an assumption, is your testimony?
10 MR. FEE: Objection. Asked and
11 answered.
12 THE WITNESS: Yes. I don't
13 know what or why you're arguing with
14 me on this.
15 BY MR. BRIDGES:
16 Q. I'm not arguing.
17 A. I don't understand.
18 Q. I'm just trying to understand
19 your testimony. That's all. So I'm asking
20 some follow-up questions.
21 You stated earlier some
22 percentages of revenue from the sale of
23 standards. Did you mean to be identifying
24 what you thought were the percentages of
25 revenue from the sale of standards or from

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1 are to copyrighted publications, correct?
2 A. With the exception of number 3,
3 which refers to copyrighted publications and
4 memberships.
5 Q. Okay. So my question wasn't
6 about copyrighted publications. My question
7 is, what percentage do you understand of
8 plaintiffs' revenues comes from the sale of
9 standards at issue in this case?
10 A. Thank you for that reminder of
11 what the question is.
12 I don't think I know that
13 precise percentage.
14 Q. What percentage of plaintiffs'
15 revenues, to your knowledge, comes from the
16 sale of standards incorporated into law?
17 A. I don't know that number.
18 Q. What percentage of plaintiffs'
19 revenues, to your understanding, comes from
20 the sale of all standards?
21 A. I'm sorry. I thought you asked
22 that question. I thought the immediate one
23 before that was standards.
24 Q. No. It was standards at issue
25 in this case. Then --

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1 the sale of all publications?
2 A. Let me -- let me double-check
3 that.
4 Well, in the case of ASTM, for
5 instance, I believe it's copyrighted
6 publications.
7 Q. What page are you referring to
8 in your report?
9 A. Right now I'm looking at
10 page 36, but I think I talk about it at other
11 areas.
12 Q. So page 36, you're talking
13 about which paragraph?
14 A. Well, right now I was --
15 Q. 83?
16 A. -- I was looking at 83, but I'm
17 turning back to, for more reliable
18 information, to paragraph 15, for instance,
19 which says in 2014, 67.1 percent of the
20 revenue was generated by the sale of
21 copyrighted publications. For NFPA, that
22 information is shown in paragraph 18. And
23 for ASHRAE, that information is shown in
24 paragraph 22.
25 Q. All three of those references

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1 A. The one before that.
2 Q. -- standards incorporated into
3 law. And now it's all standards.
4 A. Right. Thank you.
5 I don't know that number
6 either.
7 Q. What percentage of
8 plaintiffs' -- strike that.
9 What dollar value do you
10 associate with the investments that each
11 plaintiff has made in the development of the
12 standards at issue in this case?
13 A. I don't think I attributed a
14 dollar amount to that precise activity,
15 because I don't know that amount.
16 Q. What percentage of plaintiffs'
17 operating expenses do you associate with the
18 plaintiffs' development of the standards at
19 issue in this case?
20 A. I don't think I know that
21 number.
22 Q. What percentage of plaintiffs'
23 operating expenses do you associate with the
24 plaintiffs' development of standards
25 incorporated into law?

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1 A. I don't think I know that
2 number.
3 Q. What percentage of plaintiffs'
4 operating expenses do you associate with the
5 plaintiffs' development of standards
6 generally?
7 A. I don't think I know that
8 number.
9 Q. Do you have any estimates of
10 any of those numbers that you just said you
11 don't think you know?
12 MR. FEE: Objection to form.
13 THE WITNESS: Not sitting here
14 right now.
15 BY MR. BRIDGES:
16 Q. Did you at one point ever
17 determine those numbers?
18 A. Not that I recall.
19 Q. Do you know what percentage of
20 the staff or employees of each plaintiff has
21 worked on the development of standards at
22 issue in this case?
23 MR. FEE: Objection to form.
24 THE WITNESS: I don't think I
25 know that number.

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1 Q. Have you ever had access to any
2 information that I've asked in the last
3 several questions?
4 MR. FEE: Objection to form.
5 THE WITNESS: I don't believe
6 so.
7 BY MR. BRIDGES:
8 Q. Do you know whether plaintiffs
9 prepare standards through joint sponsorship
10 with any other organizations?
11 MR. FEE: Objection. Vague.
12 THE WITNESS: I think I may
13 have seen a reference to that. I
14 don't know the extent to which it
15 occurs, but I wouldn't be surprised to
16 be reminded that it does occur.
17 BY MR. BRIDGES:
18 Q. Are you aware of any, as you
19 sit here?
20 A. Not as I sit here right now,
21 but I think I'm aware that it has occurred.
22 Q. Do you know whether plaintiffs
23 receive grants, revenue, or stipends from
24 governments that use, reference, or adopt
25 their standards?

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1 BY MR. BRIDGES:
2 Q. Do you know what percentage --
3 do you have an estimate?
4 A. No.
5 MR. FEE: Objection to form.
6 THE WITNESS: Not as I sit
7 here, no.
8 BY MR. BRIDGES:
9 Q. Do you know what percentage of
10 the staff or employees of each plaintiff has
11 worked on the development of standards
12 incorporated into law?
13 MR. FEE: Objection to form.
14 THE WITNESS: Not as I sit here
15 right now.
16 BY MR. BRIDGES:
17 Q. Do you have an estimate?
18 A. Not as I sit here right now.
19 Q. Do you know what percentage of
20 the staff or employees of each plaintiff has
21 worked on the development of standards in
22 general?
23 A. Not as I sit here right now.
24 Q. Do you have an estimate?
25 A. Not as I sit here right now.

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1 MR. FEE: Objection to form.
2 THE WITNESS: There are grant
3 monies that go to NFPA. I don't know
4 the source of those grants. I don't
5 see a line for grant revenues for the
6 other two organizations.
7 BY MR. BRIDGES:
8 Q. Did you ask any of the
9 plaintiffs about the revenues or expenses
10 they have specifically attributable to the
11 standards that defendant has posted to the
12 Internet?
13 MR. FEE: Objection to form.
14 THE WITNESS: We generally
15 talked about that topic with each
16 plaintiff, and I don't think the
17 plaintiffs know that amount. They
18 undertake activities that are
19 standards oriented. They don't know
20 which of those standards will be
21 incorporated by reference.
22 BY MR. BRIDGES:
23 Q. Did you --
24 A. Or which have been. I don't
25 think they systematically track those.

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1 documents, but they provided them as
2 part of the discovery process.
3 BY MR. BRIDGES:
4 Q. Did you ask them for any
5 documents that they had not provided?
6 A. I think we generally described
7 the kinds of information that we find useful
8 or typically find useful in matters like
9 this.
10 Q. After you received documents
11 from plaintiffs' counsel, did you ask them
12 for any more?
13 A. That -- that's possible. I
14 don't recall that.
15 Q. You don't recall. Did you --
16 do you have any understanding as to the
17 dollar value of staff time and expenses that
18 the plaintiffs have incurred in promoting
19 incorporation of their standards into law?
20 MR. FEE: Objection to form.
21 Lack of foundation.
22 THE WITNESS: I don't think I
23 have that number, no.
24 BY MR. BRIDGES:
25 Q. Do you have an estimate?

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1 A. I looked at some parts of it.
2 I don't recall that I looked at all aspects
3 of the database.
4 Q. Did you verify how many
5 standards were incorporated by reference
6 according to that database?
7 A. No, I did not.
8 Q. What do you mean by, "This
9 database reports nearly 13,000 instances of
10 incorporation by reference"?

11 A. I don't know what you're asking
12 me to define.
13 Q. I'm not asking you to define
14 anything. I'm asking you to explain what you
15 meant by that clause, "This database
16 reports" --
17 A. I'm sorry. I'm just -- I'm
18 going to be just rearranging words a little
19 bit. There were 13,000 times that there was
20 incorporation by reference of a standard.
21 I -- I don't -- I'm sorry. I
22 don't understand what your confusion is.
23 Q. I'm not confused. I'm just
24 asking you questions. Okay? So please don't
25 understand -- please don't assume that I'm

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1 MR. FEE: Same objections.
2 THE WITNESS: Not as I sit here
3 now, no.
4 BY MR. BRIDGES:
5 Q. Did you discuss that issue with
6 anyone representing the plaintiffs?
7 MR. FEE: Same objections.
8 THE WITNESS: It's possible,
9 but I don't recall having that
10 discussion.
11 BY MR. BRIDGES:
12 Q. In paragraph 57 of your report,
13 you refer to "thousands of private-sector
14 standards." Was your sole support for the
15 statement in paragraph 57 the Bremer article
16 you cited in footnote 88?
17 A. No. You see I discuss and
18 provide support for that in subsequent
19 paragraphs in that section.
20 Q. And that includes in
21 paragraph 58?
22 A. Yes.
23 Q. And did you review the
24 Standards Incorporated by Reference Database
25 that you refer to in paragraph 58?

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1 confused. I'm trying to understand what you
2 meant by that.
3 You mean separate instances?
4 You mean separate laws? What do you mean?
5 A. Yes. Separate instances slash
6 separate laws.
7 Q. What did you count as an
8 instance?
9 A. Mention in a particular law of
10 a standard.
11 Q. Did you or anybody working with
12 you attempt to determine the number of
13 standards that those 13,000 instances of
14 incorporation by reference referred to?
15 A. Not entirely. But if you read
16 on that -- in that same section, it talks
17 about the number of ASTM standards, the
18 numbers of -- the number of NFPA standards,
19 and the number of ASHRAE standards.
20 Q. Well, please tell me where it
21 refers to the number of standards.
22 A. It says, "Including more than
23 2,400 instances involving ASTM standards."
24 So you're right. It doesn't
25 have the number of standards. It just has

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<p>1 mentions of standard. You're absolutely 2 right.</p> <p>3 Q. And the same thing is true of 4 the NFPA standards and ASHRAE standards?</p> <p>5 A. You're absolutely right, yes.</p> <p>6 Q. Do you know how many standards 7 that database shows as having been 8 incorporated by reference?</p> <p>9 A. Not sitting here right now.</p> <p>10 One could perhaps look at what I cited to 11 answer that question, but I don't know right 12 now.</p> <p>13 Q. Do you know whether anyone 14 working for you ever did that work to make 15 that determination?</p> <p>16 A. I don't recall that being done.</p> <p>17 Q. Paragraph 59, you say, "At the 18 state level, privately-developed standards 19 are incorporated by reference as part of the 20 exercise of a range of governmental 21 functions."</p> <p>22 Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. What do you mean by 25 "governmental functions" in that statement?</p>	<p>1 Q. What are the governmental 2 functions with respect to driving that you 3 have in mind?</p> <p>4 A. I don't have any particular 5 ones in mind.</p> <p>6 Q. In paragraph 59, you say, "At 7 least 44 states and territories have adopted 8 ASHRAE 90.1 as part of the commercial 9 building energy code."</p> <p>10 Do you see that?</p> <p>11 A. Yes, I do.</p> <p>12 Q. And that also has footnote 95 13 associated with that as well, correct?</p> <p>14 A. Yes, that's correct.</p> <p>15 Q. How do you explain the fact 16 that that reference in footnote 95 shows that 17 those 44 states, in fact, adopted the 18 International Energy Conservation Code that 19 merely has a reference to an option to use 20 ASHRAE 90.1?</p> <p>21 MR. FEE: Objection. Lack of 22 foundation.</p> <p>23 THE WITNESS: I don't have any 24 explanation for that.</p> <p>25 BY MR. BRIDGES:</p>
<p>1 A. Things that government agencies 2 do.</p> <p>3 Q. And you give a couple of 4 examples, but speaking broadly, what are 5 governmental functions that involve 6 incorporation by reference of privately 7 developed standards at the state level?</p> <p>8 MR. FEE: Objection to form.</p> <p>9 THE WITNESS: I can only answer 10 generally. Health and human services, 11 things that are related to that, 12 safety, driving rules and regulation. 13 Those are among the things that come 14 to mind.</p> <p>15 BY MR. BRIDGES:</p> <p>16 Q. What are the governmental 17 functions related to health and human 18 services that you have in mind?</p> <p>19 A. I don't have any particular 20 ones in mind.</p> <p>21 Q. What are the governmental 22 functions relating to safety that you have in 23 mind?</p> <p>24 A. I don't have any particular 25 ones in mind.</p>	<p>1 Q. Did you verify that?</p> <p>2 A. I did not, no.</p> <p>3 Q. Who did?</p> <p>4 A. I'm sorry. Who verified what?</p> <p>5 Q. On what -- on what did you rely 6 to make that statement with that footnote?</p> <p>7 A. I may not understand your 8 question. I relied on what's identified in 9 footnote 95.</p> <p>10 Q. But you didn't review foot -- 11 what's in footnote 95, right?</p> <p>12 MR. FEE: Objection. Lack of 13 foundation.</p> <p>14 THE WITNESS: I did.</p> <p>15 BY MR. BRIDGES:</p> <p>16 Q. You -- you reviewed that Web 17 site?</p> <p>18 A. Yes.</p> <p>19 Q. Personally?</p> <p>20 A. Yes, I believe so.</p> <p>21 Q. Do you have an explanation as 22 to why the resource cited in footnote 95 23 actually shows that the 44 states adopted the 24 International Energy Conservation Code?</p> <p>25 MR. FEE: Objection. Lack of</p>

<p>1 Q. What other benefits do 2 plaintiffs gain from incorporation by 3 reference of their standards?</p> <p>4 A. I think that generally covers 5 it. I may be forgetting things that are laid 6 out in my report, but that's what covers it, 7 to the best of my memory right now.</p> <p>8 Are we at a good point for a 9 break?</p> <p>10 Q. If you want. Sure.</p> <p>11 A. Thanks.</p> <p>12 THE VIDEOGRAPHER: Off the 13 record at 3:12. This is the end of 14 media unit number 2.</p> <p>15 * * *</p> <p>16 (Recess from 3:12 p.m. to 17 3:41 p.m.)</p> <p>18 * * *</p> <p>19 THE VIDEOGRAPHER: On the 20 record at 3:41. This is the beginning 21 of media unit number 3 in the 22 deposition of John Jarosz.</p> <p>23 * * *</p> <p>24 (Jarosz Exhibit 5 marked for 25 identification.)</p>	<p>1 a particular period.</p> <p>2 Q. And then you do the same for 3 NFPA documents, correct?</p> <p>4 A. Yes.</p> <p>5 Q. What do you calculate as the 6 dollar value of harm to the -- to ASTM from 7 the accesses and downloads that you refer to 8 in paragraph 133?</p> <p>9 A. I haven't calculated that harm.</p> <p>10 Q. Why not?</p> <p>11 A. I'm not sure if I can at this 12 stage. One estimate would be those number of 13 downloads times the -- well, actually, no, 14 let me take that back. I just don't know how 15 to do it.</p> <p>16 Q. Can you be certain that these 17 accesses or down -- and downloads referred to 18 in paragraph 133, in fact, resulted in 19 economic loss to ASTM?</p> <p>20 MR. FEE: Objection to form.</p> <p>21 THE WITNESS: Not with absolute 22 certainty, but with reasonable 23 certainty I can say some -- in some 24 number of these instances, it's likely 25 the case that the -- that the</p>
<p>1 * * *</p> <p>2 BY MR. BRIDGES:</p> <p>3 Q. Mr. Jarosz, I've handed you 4 Exhibit 5. This is an article that you cited 5 in your report, correct?</p> <p>6 A. Yes, I believe so.</p> <p>7 Q. Do you recall how this article 8 came to your attention?</p> <p>9 A. I do not.</p> <p>10 Q. Is this an article that you 11 understand to have been published by 12 plaintiff ASHRAE in its journal?</p> <p>13 A. Yes, that's my understanding.</p> <p>14 Q. And this is an article you 15 relied upon with respect to the development 16 of standard 90, which became standard 90.1, 17 correct?</p> <p>18 A. Yes.</p> <p>19 Q. In paragraph 133 of your 20 report, you talk about a number of 21 downloads -- strike that -- you talk about a 22 number of documents accessed through Public 23 Resource's Web site. Do you see that?</p> <p>24 A. I talk about the number of ASTM 25 documents that are -- that were accessed over</p>	<p>1 information would have been obtained 2 from ASHRAE in -- or ASTM, rather, 3 in -- through legal means.</p> <p>4 BY MR. BRIDGES:</p> <p>5 Q. Would that -- in those 6 instances where you say that the information 7 would have been obtained from ASTM through 8 legal means, can you put a dollar value on -- 9 or even an estimate of the increased revenue 10 that ASTM would have gotten from those 11 instances where people obtained the 12 information from ASHRAE -- sorry -- from 13 AST --</p> <p>14 MR. FEE: Object --</p> <p>15 BY MR. BRIDGES:</p> <p>16 Q. -- from ASTM?</p> <p>17 MR. FEE: Objection to form.</p> <p>18 THE WITNESS: No, not based on 19 the information I have. I don't think 20 I have any indication of who was doing 21 the downloading and why.</p> <p>22 BY MR. BRIDGES:</p> <p>23 Q. And do you know what 24 alternatives persons who were doing the 25 downloading may have had for obtaining the</p>

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<p>1 information?</p> <p>2 A. Not with certainty, because I</p> <p>3 don't know who those persons were, but I</p> <p>4 would expect one alternative would be to</p> <p>5 obtain it properly, directly from ASTM.</p> <p>6 Q. Would that have resulted in</p> <p>7 more revenue to ASTM?</p> <p>8 A. It may have. If they're</p> <p>9 materials that were taken improperly that</p> <p>10 would have been paid for, then that would</p> <p>11 represent a loss of revenue to ASTM.</p> <p>12 Q. Do you know whether any of the</p> <p>13 persons who obtained this information from</p> <p>14 defendant would have paid for the information</p> <p>15 from ASTM?</p> <p>16 A. No, not with certainty, because</p> <p>17 I don't know the identity of the downloaders</p> <p>18 or the reasons for their downloading.</p> <p>19 Q. Moreover, those persons might</p> <p>20 have accessed the standards from ASTM's</p> <p>21 reading room for free and with no revenue to</p> <p>22 ASTM, correct?</p> <p>23 A. You mean in a but-for world?</p> <p>24 Had they not done what they actually did,</p> <p>25 alternatively they could have gone to the</p>	<p>1 more extended use of that document.</p> <p>2 Q. Do you have any evidence about</p> <p>3 wide distribution of plaintiffs' standards as</p> <p>4 a consequence of defendant's actions?</p> <p>5 A. I do not.</p> <p>6 Q. Have you reviewed any studies</p> <p>7 that would allow you to establish any</p> <p>8 connection between the number of accesses or</p> <p>9 downloads that Public Resource made possible</p> <p>10 and any financial harms to the plaintiffs?</p> <p>11 MR. FEE: Objection to form.</p> <p>12 THE WITNESS: I don't think</p> <p>13 I've seen any study on that, no.</p> <p>14 BY MR. BRIDGES:</p> <p>15 Q. Have you conducted any studies</p> <p>16 that would have allowed you to establish any</p> <p>17 connection between the number of accesses or</p> <p>18 downloads that Public Resource made possible</p> <p>19 and any financial harms to the plaintiffs?</p> <p>20 MR. FEE: Objection to form.</p> <p>21 THE WITNESS: Not other than</p> <p>22 what's contained in my report.</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. Please turn to page 45,</p> <p>25 paragraph 107, which spills into page 108.</p>
<p>Page 214</p> <p>1 free reading room?</p> <p>2 Q. Right.</p> <p>3 A. That's a possibility, yes.</p> <p>4 Q. Do you have an understanding as</p> <p>5 to why persons would want to download a file</p> <p>6 of a standard instead of viewing it at one of</p> <p>7 the plaintiffs' reading rooms?</p> <p>8 A. Not with absolute certainty,</p> <p>9 but I would imagine downloading would allow</p> <p>10 more flexibility in referring to the standard</p> <p>11 and using it and sharing that information</p> <p>12 with others, whereas reading it in -- through</p> <p>13 an Internet site is somewhat less flexible,</p> <p>14 provides less flexibility for the use of that</p> <p>15 information.</p> <p>16 Q. What did -- what do you</p> <p>17 understand to be the difference in</p> <p>18 flexibility between possession of a download</p> <p>19 and access to a standard through a reading</p> <p>20 room?</p> <p>21 A. Well, I think that a download</p> <p>22 typically has a document that's in hard-copy</p> <p>23 form. Copies can be made -- be made of that and</p> <p>24 distributed. Reading things just online</p> <p>25 doesn't allow for the wide distribution and</p>	<p>Page 216</p> <p>1 MR. FEE: Page 108?</p> <p>2 THE WITNESS: I'm sorry.</p> <p>3 Page 108 or paragraph?</p> <p>4 BY MR. BRIDGES:</p> <p>5 Q. I'm sorry. Paragraph -- strike</p> <p>6 that.</p> <p>7 Let me ask you to turn</p> <p>8 paragraph 107 on pages 45 to 46.</p> <p>9 A. Okay. I'm there.</p> <p>10 Q. I just want to make sure I</p> <p>11 understand your language correctly at the</p> <p>12 bottom of page 45 and the top of page 46.</p> <p>13 Is it your opinion that the</p> <p>14 copyright that the plaintiffs assert in their</p> <p>15 standards drives sales of other publications</p> <p>16 other than the standards themselves?</p> <p>17 MR. FEE: Objection. Form.</p> <p>18 Vague.</p> <p>19 THE WITNESS: I think they're</p> <p>20 important for driving sales of</p> <p>21 publications that embody those</p> <p>22 standards. I don't know that I've</p> <p>23 drawn a conclusion that it drives the</p> <p>24 sale of other products, but that makes</p> <p>25 some sense.</p>

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<p>1 BY MR. BRIDGES:</p> <p>2 Q. Well, doesn't that sentence at 3 the bottom of 45 and going on to 46 say that 4 copyright on plaintiffs' standards drive 5 sales of "handbooks that provide commentary 6 on the standards by referring to them"?</p> <p>7 A. You haven't read --</p> <p>8 MR. FEE: Objection.</p> <p>9 Mischaracterizes the document.</p> <p>10 THE WITNESS: You haven't read 11 the whole sentence. I see that 12 sentence to which you refer.</p> <p>13 BY MR. BRIDGES:</p> <p>14 Q. Right. I know I haven't read 15 the whole sentence, but didn't I fairly 16 capture one part of it, which is the sales 17 of -- strike that -- that copyright on 18 plaintiffs' standards drives sales of, among 19 other things, "handbooks that provide 20 commentary on standards by referring to 21 them"?</p> <p>22 MR. FEE: Same objection.</p> <p>23 THE WITNESS: I think you have 24 generally paraphrased it accurately, 25 yes.</p>	<p>1 whether plaintiffs have copyright in -- 2 rights in their value-added publications?</p> <p>3 MR. FEE: Objection. Vague.</p> <p>4 THE WITNESS: I would be 5 curious to know that, but I'm not sure 6 of the significance. I don't think it 7 would change my conclusions, but I 8 would be curious to know that.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. Do you know whether 11 incorporation into law drives -- strike that. 12 Do you know whether 13 incorporation into law of plaintiffs' 14 standards drives sales of plaintiffs' 15 standards?</p> <p>16 MR. FEE: Objection to form.</p> <p>17 Vague.</p> <p>18 THE WITNESS: I don't know with 19 absolute certainty, but it would make 20 some sense to me.</p> <p>21 BY MR. BRIDGES:</p> <p>22 Q. Is it your understanding that 23 it does?</p> <p>24 MR. FEE: Same objection.</p> <p>25 THE WITNESS: It would make</p>
<p>Page 218</p> <p>1 BY MR. BRIDGES:</p> <p>2 Q. And that plaintiffs' copyright 3 protection -- this is the top of -- strike 4 that.</p> <p>5 And turning to the top of 6 page 46, plaintiffs' copyright protection on 7 their standards provides plaintiff with a 8 competitive advantage with respect to what 9 you call value-added publications, correct?</p> <p>10 A. You've read part of a sentence, 11 but I do see that sentence, yes.</p> <p>12 Q. And I've fairly paraphrased it 13 correctly, correct?</p> <p>14 MR. FEE: Objection to form.</p> <p>15 THE WITNESS: I think, 16 generally, yes.</p> <p>17 BY MR. BRIDGES:</p> <p>18 Q. Do plaintiffs, to your 19 understanding, have separate copyrights in 20 those value-added publications, such as 21 commentaries and handbooks?</p> <p>22 A. I don't know.</p> <p>23 Q. You don't know?</p> <p>24 A. Correct. I do not know.</p> <p>25 Q. Is it important to you to know</p>	<p>1 some sense to me, yes.</p> <p>2 BY MR. BRIDGES:</p> <p>3 Q. Are you aware that, in some 4 instances, at least one plaintiff uses the 5 legal status of its code to promote the sale 6 of handbooks?</p> <p>7 MR. FEE: Objection to form.</p> <p>8 THE WITNESS: I don't know one 9 way or the other. I don't have reason 10 to dispute it, but there's not a 11 particular instance that comes to mind 12 right now. Maybe you have something 13 to refresh my memory.</p> <p>14 BY MR. BRIDGES:</p> <p>15 Q. Can you provide a dollar value 16 benefit that plaintiffs receive economically 17 from the incorporation of their standards by 18 reference?</p> <p>19 MR. FEE: Objection. Vague.</p> <p>20 Form.</p> <p>21 THE WITNESS: I want to make 22 sure that I'm understanding. Could 23 you read that back, please?</p> <p>24 BY MR. BRIDGES:</p> <p>25 Q. I'll restate it.</p>

<p>1 Can you provide a -- can you 2 put a dollar value, even an estimate, on the 3 economic benefit that plaintiffs receive from 4 incorporation of their standards into law?</p> <p>5 MR. FEE: Objection to form.</p> <p>6 THE WITNESS: I have not. And 7 I'm not sure how one would do that, 8 subject to thinking more about it.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. At the top of page 46, you say, 11 "The Plaintiffs' copyright protection on 12 their privately-developed standards provides 13 a competitive advantage with regard to the 14 sale of these value-added publications as the 15 copyright protection limits the ability of 16 others to sell those publications unless they 17 are unwilling [sic] to compensate the 18 Plaintiffs for such use."</p> <p>19 MR. FEE: Objection.</p> <p>20 Mischaracterizes the statement.</p> <p>21 BY MR. BRIDGES:</p> <p>22 Q. Is there something unfair about 23 my characterization of that statement?</p> <p>24 A. I think you read it wrong. You 25 read "willing" to read "unwilling" for some</p>	<p>1 Q. What else? 2 A. That's what comes to mind. 3 Q. Anything else? 4 A. Not this moment, no. I guess, 5 potentially, when I think some more about it, 6 training and seminars, for instance. 7 Q. Providers of training and 8 seminars? 9 A. Yes. So that's broader than 10 value-added publications, but there are 11 potentially alternative providers of training 12 and seminars.</p> <p>13 Q. In paragraph 109, you say, "In 14 addition to direct sales of copyrighted 15 materials, the Plaintiffs' materials 16 associated with their privately-developed 17 standards provide a competitive advantage 18 with regard to the sale of downstream 19 ancillary/complementary services and 20 products."</p> <p>21 Do you see that?</p> <p>22 A. Yes. That's what I had in 23 mind.</p> <p>24 Q. And who are the competitors you 25 have in mind in paragraph 109?</p>
<p>Page 222</p> <p>1 reason.</p> <p>2 Q. Oh, I'm sorry. Thank you. 3 I'll restate the sentence.</p> <p>4 "In particular, the Plaintiffs' 5 copyright protection on their 6 privately-developed standards provides a 7 competitive advantage with regard to the sale 8 of these value-added publications as the 9 copyright protection limits the ability of 10 others to sell those publications unless they 11 are willing to compensate the Plaintiffs for 12 such use."</p> <p>13 Do you see that statement?</p> <p>14 A. I do, yes.</p> <p>15 Q. And the competitive advantage 16 you've identified there, whom do you 17 understand to be the competition?</p> <p>18 A. Other potential providers of 19 these so-called value-added publications.</p> <p>20 Q. And what -- when you say 21 "value-added publications," please give me 22 more examples of what types of things fall 23 into that category, as you use the term.</p> <p>24 A. Examples would be handbooks 25 that provide commentary on the standards.</p>	<p>Page 224</p> <p>1 A. I don't know particular names, 2 but -- at least I don't recall any sitting 3 right now -- sitting here right now, but I 4 think there are other providers of these 5 downstream services and products.</p> <p>6 Q. And please give me examples of 7 what you're calling "downstream services and 8 products."</p> <p>9 A. Again, seminars and training, 10 for instance.</p> <p>11 Q. Anything else?</p> <p>12 A. That's what comes to mind right 13 now.</p> <p>14 Q. Turning to paragraph 110, you 15 state, "I understand that the ability to 16 control these downstream products and 17 services is particularly important to the 18 Plaintiffs here because the barriers to entry 19 in the marketplace for downstream products, 20 such as training and user manuals, are 21 relatively low. For example, according to 22 Mr. Comstock of ASHRAE, it is relatively easy 23 for unauthorized instructors to read a 24 standard and become (or think that they have 25 become) qualified to provide training or</p>

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1 guidance on that standard."

2 Do you see that?

3 A. I do, yes.

4 Q. What do you understand -- what

5 did you mean by "unauthorized instructors"?

6 A. People that have provided or

7 trying to provide services to the marketplace

8 that have not been explicitly approved by,

9 for instance, ASHRAE.

10 Q. What do you understand the --

11 the nature of -- strike that.

12 You called them "instructors,"

13 correct?

14 A. Yes.

15 Q. Does that mean that you

16 envision that these persons are providing

17 some kind of instruction?

18 A. Yes.

19 Q. What instruction do you

20 understand -- what instruction did you have

21 in mind when you referred to "unauthorized

22 instructors"?

23 A. Generally, how best to

24 implement standards or provisions of certain

25 standards.

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1 Q. You're just parroting what

2 Mr. Comstock said, or did you have an

3 independent view?

4 A. No, I heard what he said, and

5 it made sense to me.

6 Q. So you put it in your report?

7 A. Yes.

8 Q. What independent thought or

9 investigation did you do before you put that

10 in your report?

11 MR. FEE: Objection. Vague.

12 Compound.

13 THE WITNESS: I can't point to

14 anything in particular.

15 BY MR. BRIDGES:

16 Q. Would a law-school course on

17 the law and regulation of building

18 construction provide instruction to law

19 students?

20 MR. FEE: Objection. Vague.

21 Calls for speculation.

22 THE WITNESS: I guess it could.

23 I have a hard time imagining there

24 would be much demand for such a

25 course, but I'm in general agreement

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1 Q. What else?

2 A. Nothing else comes to mind

3 right now.

4 Q. Would your understanding of

5 "unauthorized instructors" include persons

6 who were instructing the public as to what

7 the standards require?

8 MR. FEE: Objection to form.

9 Vague.

10 THE WITNESS: I didn't have

11 that in mind. I guess that's a

12 possibility.

13 BY MR. BRIDGES:

14 Q. And would it be relatively easy

15 for unauthorized persons like that to read a

16 standard and think that they have become

17 qualified to provide training or guidance on

18 that standard?

19 MR. FEE: Objection. Vague.

20 BY MR. BRIDGES:

21 Q. Is that your understanding?

22 A. According to Mr. Comstock, I

23 believe that's correct.

24 Q. What do you believe?

25 A. I have no reason to doubt him.

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1 that that, in concept, could occur.

2 BY MR. BRIDGES:

3 Q. Would it be possible to

4 envision that, in the course of such

5 teaching, a teacher may wish to analyze some

6 of plaintiffs' standards that have been

7 incorporated into law as law and as

8 regulation?

9 MR. FEE: Objection. Calls for

10 speculation. Vague. Form.

11 THE WITNESS: I guess that's

12 possible, but I would expect a law

13 professor would be talking about legal

14 implications, not the technical

15 aspects of a standard. I think they

16 might talk about the implication in a

17 business that's different from a

18 vendor business.

19 BY MR. BRIDGES:

20 Q. Well, what about the legal

21 implications of a code for contractors?

22 MR. FEE: Objection.

23 BY MR. BRIDGES:

24 Q. Is that -- is that fair ground

25 for a law professor to discuss with law

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<p>1 Q. You can't point to any 2 particular investigation or fact that you're 3 relying on in paragraphs 117 to 119?</p> <p>4 MR. FEE: Objection to form. 5 Asked and answered.</p> <p>6 THE WITNESS: Everything that's 7 embedded in Exhibit 1 is, in part, a 8 basis for the observations that I draw 9 in those paragraphs.</p> <p>10 BY MR. BRIDGES:</p> <p>11 Q. What probability do you assign 12 to your prediction in the first sentence of 13 paragraph 119?</p> <p>14 MR. FEE: Objection. Form. 15 Lack of foundation.</p> <p>16 THE WITNESS: I'm not sure that 17 I've used the term "prediction," but I 18 wouldn't assign a particular 19 quantitative probability.</p> <p>20 BY MR. BRIDGES:</p> <p>21 Q. Can you give an estimate? 22 A. No. 23 Q. Why not? 24 A. I don't have a basis for that 25 estimate. I have reasoning underlying it,</p>	<p>1 Q. What probability do you assign 2 to the likelihood that you refer to in the 3 first sentence of paragraph 121?</p> <p>4 MR. FEE: Objection to form. 5 Lack of foundation.</p> <p>6 THE WITNESS: I don't have a 7 particular quantitative likelihood 8 measure.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. Can you give an estimate? 11 MR. FEE: Same objection. 12 THE WITNESS: No.</p> <p>13 BY MR. BRIDGES:</p> <p>14 Q. Turning to paragraph 126, you 15 refer to an "option available to Plaintiffs 16 to respond to the loss of protection for 17 incorporated standards."</p> <p>18 Is it your belief that, if the 19 plaintiffs lose this case, they will shut 20 down their creation of new standards?</p> <p>21 A. I think that's a possibility. 22 Q. What probability do you assign 23 to that?</p> <p>24 MR. FEE: Objection to form. 25 Lack of foundation.</p>
<p>1 but I don't have a basis to provide a 2 quantitative estimate of my level of 3 confidence.</p> <p>4 Q. You refer to "uncertainties" in 5 the second sentence of paragraph 119, 6 correct?</p> <p>7 A. I do, yes.</p> <p>8 Q. What probability do you assign 9 to the likelihood that you refer to with the 10 word "likely" in the first sentence of 11 paragraph 120?</p> <p>12 MR. FEE: Objection. Form. 13 Lack of foundation.</p> <p>14 THE WITNESS: I don't have a 15 particular quantitative measure of 16 that. And are you referring to my use 17 of the term "likely"?</p> <p>18 BY MR. BRIDGES:</p> <p>19 Q. Yes.</p> <p>20 A. Yes, I don't have a particular 21 quantification of that.</p> <p>22 Q. What particular facts are you 23 relying on for that paragraph?</p> <p>24 A. Everything that you see 25 reported in Exhibit 1.</p>	<p>1 THE WITNESS: I don't have a 2 particular quantitative measure of 3 probability for that.</p> <p>4 BY MR. BRIDGES:</p> <p>5 Q. What's your best estimate? 6 MR. FEE: Same objection.</p> <p>7 THE WITNESS: I don't have a 8 quantitative best estimate.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. Is it more or less than 11 50 percent?</p> <p>12 MR. FEE: Same objections. 13 THE WITNESS: I still don't 14 have a quantitative estimate.</p> <p>15 BY MR. BRIDGES:</p> <p>16 Q. Is it more or less than 17 80 percent?</p> <p>18 MR. FEE: Same objections. 19 THE WITNESS: Still don't have 20 a quantitative estimate.</p> <p>21 BY MR. BRIDGES:</p> <p>22 Q. Is it more or less than 23 5 percent?</p> <p>24 MR. FEE: Same objections. 25 THE WITNESS: Still don't have</p>

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<p>1 a quantitative estimate. I think that 2 there -- with reasonable probability I 3 can draw this conclusion, but I can't 4 be any more precise than that.</p> <p>5 BY MR. BRIDGES:</p> <p>6 Q. What do you mean, "with 7 reasonable probability"?</p> <p>8 A. Based on the information that I 9 have and the training and logic I bring to 10 it, I think there is a -- I say with some 11 confidence what I have said here.</p> <p>12 Q. And when you say "likely," do 13 you mean more than 50 percent likely?</p> <p>14 A. Not necessarily, no.</p> <p>15 Q. Are you aware of other 16 standards development organizations active in 17 the same field as the plaintiffs?</p> <p>18 MR. FEE: Objection. Vague. 19 Form.</p> <p>20 THE WITNESS: Perhaps you could 21 tell me what you have in mind with 22 your use of the term "fields."</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. Well, are you familiar with 25 AHRI?</p>	<p>1 to see what alternatives there are among 2 standards development organizations currently 3 in existence to carry forward the work of 4 plaintiffs if plaintiffs chose to stop 5 standards development as a result of the loss 6 of this case?</p> <p>7 MR. FEE: Same objection.</p> <p>8 THE WITNESS: Not that I 9 recall, but I am of the understanding 10 that each SDO has a different charter, 11 so I don't know that any SDO has an 12 identical charter to that of any of 13 the three plaintiffs.</p> <p>14 BY MR. BRIDGES:</p> <p>15 Q. Are you aware that these 16 plaintiffs compete with other SDOs in the 17 creation of standards in particular fields?</p> <p>18 MR. FEE: Objection to form. 19 Vague.</p> <p>20 THE WITNESS: What do you mean 21 by the term "compete with" in this 22 context?</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. That they consider others 25 rivals for the same market, in part.</p>
<p>Page 238</p> <p>1 A. I have perhaps seen reference 2 to that.</p> <p>3 Q. Do you know with which of these 4 plaintiffs it -- do you -- do you know what 5 field it's in?</p> <p>6 A. I don't recall, sitting here 7 right now, no.</p> <p>8 Q. Are you familiar with NFRC?</p> <p>9 A. I may have seen reference to 10 that acronym.</p> <p>11 Q. Do you know what field it's in?</p> <p>12 A. Not sitting here right now.</p> <p>13 Q. Are you familiar with ICC?</p> <p>14 A. I have seen reference to that.</p> <p>15 I don't recall what it is, sitting here now.</p> <p>16 Q. Do you know whether other 17 standards developments organizations would be 18 in a position to step forward and to continue 19 the maintenance and preservation and further 20 development of the standards of plaintiffs 21 here if plaintiffs lose this case?</p> <p>22 MR. FEE: Objection to form.</p> <p>23 THE WITNESS: I don't know.</p> <p>24 BY MR. BRIDGES:</p> <p>25 Q. Have you done any investigation</p>	<p>Page 240</p> <p>1 MR. FEE: Objection to form. 2 Vague.</p> <p>3 THE WITNESS: I don't recall 4 seeing reference to that, but my 5 memory is not perfect.</p> <p>6 BY MR. BRIDGES:</p> <p>7 Q. The -- in paragraph 131, you 8 say, "Simply put, freely-distributed, 9 unrestricted versions of Plaintiffs' 10 standards that are or could be incorporated 11 by reference can be expected to adversely 12 impact the market for Plaintiffs' standards 13 that are incorporated by reference and to 14 displace sales of these standards by the 15 Plaintiffs - which can be expected to have a 16 material adverse effect on Plaintiffs' 17 revenues."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. By "expected," do you mean more 21 than 50 percent likely?</p> <p>22 A. Not necessarily. I don't have 23 a quantitative assessment of what I mean by 24 "expected."</p> <p>25 Q. Do you mean more than 5 percent</p>

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<p>1 new in terms of a theory.</p> <p>2 Q. Do you have the same answer</p> <p>3 with respect to -- strike that.</p> <p>4 What facts do you have --</p> <p>5 strike that.</p> <p>6 What facts are you aware of to</p> <p>7 disprove -- to disprove Mr. Malamud's theory</p> <p>8 that you refer to in paragraph 144?</p> <p>9 A. Again, it's the same theory</p> <p>10 that's being referenced, but there's</p> <p>11 additional facts; and that is, the downstream</p> <p>12 products and services aren't particularly</p> <p>13 substantial to these plaintiffs and don't</p> <p>14 appear to be enhanced by a lack of copyright</p> <p>15 protection; that is, the plaintiffs have had</p> <p>16 copyright protection and have said -- had</p> <p>17 some downstream products and services. It's</p> <p>18 hard to imagine that elimination of that</p> <p>19 copyright protection will enhance that</p> <p>20 business.</p> <p>21 Q. It's hard to imagine, but are</p> <p>22 you aware of any studies to disprove</p> <p>23 Mr. Malamud's theory?</p> <p>24 A. No.</p> <p>25 MR. FEE: Objection. Vague.</p>	<p>1 rest of that paragraph?</p> <p>2 MR. FEE: Objection. Vague.</p> <p>3 THE WITNESS: I looked at the</p> <p>4 financial information, and I talked to</p> <p>5 people at the various plaintiffs.</p> <p>6 BY MR. BRIDGES:</p> <p>7 Q. You talked to people at the</p> <p>8 various plaintiffs?</p> <p>9 A. Yes.</p> <p>10 Q. What did you do to verify the</p> <p>11 truth and accuracy of the things that various</p> <p>12 plaintiffs said to you in their</p> <p>13 conversations?</p> <p>14 MR. FEE: Objection to form.</p> <p>15 THE WITNESS: I looked at the</p> <p>16 financial information, and I kept my</p> <p>17 eyes and mind open to the information</p> <p>18 in the rest of the record to determine</p> <p>19 if it conflicted with what I learned</p> <p>20 from the company personnel.</p> <p>21 BY MR. BRIDGES:</p> <p>22 Q. Whose financial information did</p> <p>23 you look at?</p> <p>24 A. All three of the plaintiffs.</p> <p>25 It's summarized in tabs 3, 4, and 5.</p>
<p>1 THE WITNESS: I'm sorry.</p> <p>2 BY MR. BRIDGES:</p> <p>3 Q. Have you conducted any studies</p> <p>4 to disprove Mr. Malamud's theory?</p> <p>5 MR. FEE: Same objection.</p> <p>6 THE WITNESS: Not other than</p> <p>7 what's reflected here in Exhibit 1.</p> <p>8 BY MR. BRIDGES:</p> <p>9 Q. What academic literature have</p> <p>10 you relied upon to criticize Mr. Malamud's</p> <p>11 theory in paragraph 144?</p> <p>12 A. Nothing specific comes to mind.</p> <p>13 Q. In paragraph 145, you state</p> <p>14 that, "Mr. Malamud's suggestion that the sale</p> <p>15 of downstream products and services</p> <p>16 represents an untapped and undeveloped</p> <p>17 opportunity for the Plaintiffs is incorrect."</p> <p>18 Do you see that?</p> <p>19 A. Yes, I do.</p> <p>20 Q. And then you go on and make</p> <p>21 some statements for the rest of the</p> <p>22 paragraph, correct?</p> <p>23 A. Yes.</p> <p>24 Q. What studies did you engage in</p> <p>25 to determine the facts that you stated in the</p>	<p>1 Q. Did you look at the financial</p> <p>2 information of any entities other than the</p> <p>3 plaintiffs?</p> <p>4 A. I looked at Public Resource</p> <p>5 financial information.</p> <p>6 Q. Apart from Public Resource and</p> <p>7 the plaintiffs, did you look at the financial</p> <p>8 information of any other entities in making</p> <p>9 the assertions that you made in</p> <p>10 paragraph 145?</p> <p>11 A. Not in undertaking my</p> <p>12 assignment here.</p> <p>13 Q. Did you consider the business</p> <p>14 models of any entities other than the</p> <p>15 plaintiffs and the defendant in making the</p> <p>16 statements criticizing Mr. Malamud's theory</p> <p>17 in paragraph 145?</p> <p>18 A. Nothing in particular comes to</p> <p>19 mind. I understand that there are</p> <p>20 front-loaded business models, but -- at DIN,</p> <p>21 for instance, but I don't recall undertaking</p> <p>22 an investigation of the downstream activities</p> <p>23 that they have.</p> <p>24 Q. Did you undertake any</p> <p>25 investigation of downstream activities of</p>

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<p>1 other US-based standards development 2 organizations that make their standards 3 freely available to the public? 4 A. Not that I recall. 5 Q. Would that have been relevant 6 to your analysis? 7 A. It wasn't necessary to do my 8 analysis, but I would be curious if I had 9 that information. If I -- if I had the 10 ability to examine that information, I would 11 be curious as to what that shows. 12 Q. In paragraph 146, you state, 13 "The loss of publications here will likely 14 reduce the Plaintiffs' sales of those 15 downstream products and services." 16 Do you see that? 17 MR. FEE: That's in 146? 18 THE WITNESS: Is that the last 19 sentence you were reading from? 20 BY MR. BRIDGES: 21 Q. Yes. 22 A. Yeah. 23 Q. Paragraph 146. 24 A. Yes, I do see that. 25 Q. Did you mean the loss of </p>	<p>unable to quantify that with great accuracy. 3 BY MR. BRIDGES: 4 Q. Have you considered any 5 comparable circumstances apart from this case 6 that would provide guidance for your 7 prediction in the last sentence of 8 paragraph 146? 9 MR. FEE: Objection to form. 10 Vague. 11 THE WITNESS: I kept my mind 12 and eyes open to that, but I didn't 13 see information of a good comparator. 14 BY MR. BRIDGES: 15 Q. Did you research whether there 16 might be good comparators? 17 A. I -- 18 MR. FEE: Same objection. 19 THE WITNESS: I did in the 20 sense of reading through the 21 literature and information to see if I 22 could learn of something that would be 23 a good comparator, but I didn't learn 24 of such comparator. 25 BY MR. BRIDGES: </p>
<p>Page 250</p> <p>1 copyright in the publications here? 2 A. Certainly the loss of 3 publications, but I believe it would probably 4 be better to put the loss of copyright in the 5 publications as more reflective of the 6 assignment that I undertook here. 7 Q. What probability do you assign 8 to the likelihood that you refer to in that 9 sentence? 10 MR. FEE: Objection to form. 11 Lack of foundation. 12 THE WITNESS: I haven't 13 assigned a quantitative probability to 14 that. 15 BY MR. BRIDGES: 16 Q. Have you any estimate? 17 MR. FEE: Same objections. 18 THE WITNESS: I do not. 19 BY MR. BRIDGES: 20 Q. Have you any estimate as to the 21 magnitude of the likely reduction of 22 plaintiffs' sales of downstream products and 23 services? 24 MR. FEE: Same objections. 25 THE WITNESS: No, I have been </p>	<p>Page 252</p> <p>1 Q. You looked only at the 2 information shown in tab 2 to Exhibit 1? 3 A. Yes, I think that's right. 4 Q. What economic effect are you 5 aware of to the Blu-ray Disc Association from 6 its providing unrestricted access to its 7 standard publications for free? 8 A. I don't know. I thought you 9 had asked that earlier. If not, I apologize. 10 Nonetheless, I don't recall knowing the 11 answer to that question or undertaking that 12 evaluation. 13 Q. Did Blu-ray Disc Association go 14 out of business? 15 A. I don't think it's out of 16 business, no. 17 Q. Has it suffered material harm, 18 to your knowledge, because of unrestricted 19 access to its standard publications for free? 20 A. I don't know. 21 Q. Do you believe that, on the 22 theory of revealed preference, Blu-ray Disc 23 Association has determined that unrestricted 24 access to its standard publications for free 25 is in its interest? </p>

<p>1 A. Yes. It's a different entity 2 than the SDOs here; but for its purposes, it 3 would appear that it's of the belief that 4 that's the optimal path to follow.</p> <p>5 MR. BRIDGES: I think -- I 6 think we may pause things now and 7 reserve the remainder of our time.</p> <p>8 Just a second. Oh, yes.</p> <p>9 BY MR. BRIDGES:</p> <p>10 Q. Do you believe that the 11 plaintiffs are harmed when the defendant 12 posts a standard that has been incorporated 13 by reference -- let me strike that.</p> <p>14 Do you believe that plaintiffs 15 suffer harm from defendant posting a standard 16 that is not the latest version of the 17 standard?</p> <p>18 MR. FEE: Objection. Form. 19 Compound.</p> <p>20 THE WITNESS: Potentially, it 21 could cause confusion in the 22 marketplace as to what's the latest 23 standard, and there may be some 24 entities out there that are interested 25 in obtaining an earlier standard that</p>	<p>1 MR. FEE: Objection. Lack of 2 foundation. Vague.</p> <p>3 THE WITNESS: I'm not -- I'm 4 not sure that I understand the concept 5 of a standard being out of print, so 6 maybe you could help me with that.</p> <p>7 BY MR. BRIDGES:</p> <p>8 Q. Do you know the term "out of 9 print"?</p> <p>10 A. Generally, I do, yes.</p> <p>11 Q. What do you understand it to 12 mean?</p> <p>13 A. That it's no longer provided in 14 print form.</p> <p>15 Q. All right. So what harm do you 16 understand plaintiffs would suffer if 17 defendants posted a standard that is out of 18 print?</p> <p>19 MR. FEE: Objection to form.</p> <p>20 THE WITNESS: Potentially, it 21 could be the harm similar to outdated 22 standards.</p> <p>23 BY MR. BRIDGES:</p> <p>24 Q. In other words, confusion in 25 the marketplace?</p>
<p>Page 254</p> <p>1 would be obtaining it free rather than 2 through the legal routes established 3 by the plaintiffs.</p> <p>4 BY MR. BRIDGES:</p> <p>5 Q. Have you done any studies to 6 determine what confusion may be likely in the 7 marketplace in that regard?</p> <p>8 MR. FEE: Objection to form.</p> <p>9 THE WITNESS: I have not done a 10 likelihood of confusion study, no.</p> <p>11 BY MR. BRIDGES:</p> <p>12 Q. What research have you done as 13 to whether -- strike that.</p> <p>14 What information do you have 15 about what market there is for earlier 16 versions of standards when there is a newer 17 version in the market?</p> <p>18 MR. FEE: Objection to form.</p> <p>19 THE WITNESS: I don't recall 20 undertaking specific research on that 21 topic.</p> <p>22 BY MR. BRIDGES:</p> <p>23 Q. What harm do you understand 24 plaintiffs would suffer if defendants post a 25 standard that is out of print?</p>	<p>Page 256</p> <p>1 A. Potential confusion in the 2 marketplace and potentially providing -- yes, 3 that -- that would be one form of it.</p> <p>4 Q. What other harms do -- would 5 you identify from the defendants posting a 6 standard that is out of print?</p> <p>7 A. Nothing else comes to mind this 8 moment, but there could be other things 9 that -- that I'm not thinking of right now.</p> <p>10 Q. What harms do you understand 11 plaintiffs would suffer if a condition of a 12 standard being incorporated into law is that 13 plaintiffs could not forbid other entities 14 from making that law available widely and 15 freely to the public?</p> <p>16 MR. FEE: Objection to form.</p> <p>17 Incomplete hypothetical. Compound. 18 Calls for speculation.</p> <p>19 THE WITNESS: I don't know. 20 I've not undertaken that assignment. 21 I've not given that particular 22 question any thought.</p> <p>23 It seems economically to be 24 quite similar to the actions that have 25 occurred here, but I don't know. I've</p>

1 not thought about that particular
2 topic.
3 MR. BRIDGES: Okay. I think
4 we'll pause here and reserve the rest
5 of the time for a later visit with
6 you, Mr. Jarosz.
7 Kevin, this is in reliance on
8 an exchange of correspondence between
9 Matt and you, I believe. If, for some
10 reason -- well, no. I think that's
11 all.
12 Anything else?
13 MR. FEE: Well, I don't have
14 any questions.
15 Do you guys have any questions?
16 MR. REHN: Not at this time.
17 MR. CUNNINGHAM: No.
18 MR. BRIDGES: Great. Thank
19 you.
20 THE WITNESS: Thank you.
21 THE VIDEOGRAPHER: All right.
22 Off the record at 4:31. This ends
23 media unit number 3 and ends testimony
24 for August 27th, 2015.
25 * * *

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1 C E R T I F I C A T E
2
3 I do hereby certify that I am a Notary
4 Public in good standing, that the aforesaid
5 testimony was taken before me, pursuant to
6 notice, at the time and place indicated; that
7 said deponent was by me duly sworn to tell
8 the truth, the whole truth, and nothing but
9 the truth; that the testimony of said
10 deponent was correctly recorded in machine
11 shorthand by me and thereafter transcribed
12 under my supervision with computer-aided
13 transcription; that the deposition is a true
14 and correct record of the testimony given by
15 the witness; and that I am neither of counsel
16 nor kin to any party in said action, nor
17 interested in the outcome thereof.
18
19 WITNESS my hand and official seal this
20 11th day of September, 2015.
21
22
23
24
25

<%signature%>
Detour Edward, NDR, CRR
Notary Public

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1 (Witness excused.)
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3 (Off the record at 4:31 p.m.)
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