

EXHIBIT Z

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



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CONFIDENTIAL

Transcript of **James R. Fruchterman**

Date: September 8, 2015

Case: American Educational Research Assoc., Inc., et al -v-
Public.Resource.Org., Inc.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN EDUCATIONAL RESEARCH
ASSOCIATION, INC., ET AL.,

PLAINTIFF,

vs.

No. 1:14-CV-00857-TSC-DAR

PUBLIC.RESOURCE.ORG, INC.,
DEFENDANT.

VIDEOTAPED DEPOSITION OF

JAMES R. FRUCHTERMAN

CONFIDENTIAL

Tuesday, September 8, 2015

Reported By:

KATHLEEN WILKINS, CSR #10068, RPR-RMR-CRR-CCRR-CLR

Confidential Videotaped Deposition of James R. Fruchterman
Conducted on September 8, 2015

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1 VIDEOTAPED DEPOSITION OF JAMES R. FRUCHTERMAN
2 BE IT REMEMBERED that on Tuesday,
3 September 8, 2015, commencing at the hour of
4 9:21 a.m. thereof, at FENWICK & WEST, LLP, 801
5 California Street, Mountain View, California,
6 before me, Kathleen A. Wilkins,
7 RPR-RMR-CRR-CCRR-CLR, a Certified Shorthand
8 Reporter, in and for the State of California,
9 personally appeared JAMES R. FRUCHTERMAN, a
10 witness in the above-entitled court and cause,
11 who, being by me first duly sworn, was thereupon
12 examined as a witness in said action.
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ALSO PRESENT:

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1	September 8, 2015	9:21 A.M.	
2	P R O C E E D I N G S		
3	THE VIDEOGRAPHER: Good morning. Here		09:16:23
4	begins Tape No. 1 in the video deposition of		09:20:44
5	James Fruchterman in the matter of American		09:20:47
6	Educational Research Association, Incorporated, et		09:20:49
7	al., versus Public.Resource.Org, Incorporated, in		09:20:53
8	the U.S. District Court of the District of		09:21:00
9	Columbia, Case Number 1:14-CV-00857-TSC-DAR.		09:21:02
10	Today's date is September 8th, 2015.		09:21:12
11	Time on the video monitor is 9:21 a.m. The		09:21:15
12	videographer today is Steve Patapoff representing		09:21:18
13	Planet Depos. The video deposition is taking		09:21:21
14	place at Fenwick & West, 801 California Street,		09:21:23
15	Mountain View, California.		09:21:26
16	Would counsel please voice-identify		09:21:29
17	themselves and state whom they represent.		09:21:31
18	MR. HUDIS: Jonathan Hudis,		09:21:35
19	Quarles & Brady, LLP, for plaintiffs.		09:21:36
20	MS. CAPPAERT: Katherine Cappaert from		09:21:41
21	Oblon, LLP, for plaintiffs.		09:21:46
22	MR. KAPLAN: Sebastian Kaplan,		09:21:48
23	Fenwick & West, LLP, for defendant		09:21:49
24	Public.Resource.Org, Incorporated.		09:21:52
25	THE VIDEOGRAPHER: Court reporter today		09:21:56

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1	is Kathleen Wilkins representing Planet Depos.	09:21:56
2	Would the reporter please swear in the	09:21:59
3	witness.	09:22:01
4	JAMES R. FRUCHTERMAN,	09:22:11
5	having been duly sworn,	09:22:11
6	was examined and testified as follows:	09:22:11
7	EXAMINATION BY MR. HUDIS	09:22:10
8	BY MR. HUDIS:	09:22:11
9	Q. Good morning, sir. Would you state your	09:22:13
10	full name and address for the record.	09:22:15
11	A. James Robert Fruchterman, Jr.	09:22:18
12	1850 Middlefield Road, Palo Alto, California.	09:22:20
13	Q. And is that your business address or	09:22:26
14	your home address?	09:22:28
15	A. My home address.	09:22:30
16	Q. Could I have your business address,	09:22:31
17	please.	09:22:33
18	A. My business address is 4780 California	09:22:33
19	Avenue, Palo Alto, California.	09:22:36
20	Q. Mr. Fruchterman, I am here -- my name is	09:22:39
21	Jonathan Hudis, representing the plaintiffs in an	09:22:41
22	action in which you've been designated as an	09:22:45
23	expert witness.	09:22:47
24	My colleague, Katherine Cappaert, is	09:22:48
25	here with me and will be working with me during	09:22:50

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1	the deposition.	09:22:53
2	Before we get started, a couple of	09:22:56
3	deposition rules which I'd like you to	09:22:58
4	acknowledge.	09:23:00
5	You understand you're giving testimony	09:23:00
6	under oath?	09:23:02
7	A. Yes.	09:23:05
8	Q. The court reporter, you understand, is	09:23:05
9	taking down everything that you're saying?	09:23:06
10	A. Yes.	09:23:08
11	Q. We'll need audible responses from you,	09:23:10
12	so no nods or gestures.	09:23:13
13	A. Yes.	09:23:15
14	Q. If at any point you do not understand a	09:23:16
15	question, please let me know, and I will try to	09:23:18
16	clarify the question for you.	09:23:20
17	A. Okay.	09:23:22
18	Q. All right. If you need a break for any	09:23:23
19	reason, please let me know, and we can provide you	09:23:24
20	that break. Except if there is a question	09:23:27
21	pending, you must answer the question before we	09:23:30
22	take the break.	09:23:32
23	A. Yes.	09:23:33
24	MR. KAPLAN: Unless it's about	09:23:35
25	privilege.	09:23:36

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1	BY MR. HUDIS:	09:23:37
2	Q. Correct. And your counsel is right,	09:23:37
3	unless it's about privilege.	09:23:39
4	If at any point you come to realize that	09:23:40
5	an answer that you've already given during the	09:23:43
6	day, Mr. Fruchterman, is not completely correct,	09:23:46
7	will you please let me know, and I will give you	09:23:48
8	an opportunity to correct that answer.	09:23:50
9	A. Yes.	09:23:53
10	Q. Is there any reason, whether by taking	09:23:53
11	medication or illness, that you cannot testify	09:23:55
12	completely, accurately and truthfully today?	09:23:58
13	A. No.	09:24:01
14	Q. Mr. Fruchterman, have you been deposed	09:24:02
15	before?	09:24:03
16	A. Yes.	09:24:04
17	Q. When?	09:24:05
18	A. In the last month or two, once.	09:24:07
19	Q. Was that in the ASTM case?	09:24:12
20	A. Yes.	09:24:15
21	Q. And that case is also pending in DC,	09:24:16
22	federal court?	09:24:20
23	A. I'm not familiar with what court it's	09:24:22
24	in.	09:24:27
25	Q. And that case is also pending against	09:24:28

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1	Public.Resource.Org, Inc.?	09:24:30
2	A. Yes, that's my understanding.	09:24:34
3	Q. Is that the only time you've been	09:24:35
4	deposed?	09:24:36
5	A. Yes.	09:24:37
6	Q. Have you ever testified at a trial	09:24:51
7	before?	09:24:52
8	A. No.	09:24:52
9	MR. HUDIS: I'd like the court reporter	09:25:01
10	to now mark as Plaintiff's Exhibit Fruchterman 48.	09:25:02
11	Counsel.	09:25:06
12	(Whereupon, Deposition Exhibit 48 was	09:25:14
13	marked for identification.)	09:25:14
14	BY MR. HUDIS:	09:25:14
15	Q. Mr. Fruchterman, I now place in front of	09:25:16
16	you what's been marked as Deposition Exhibit 48.	09:25:20
17	Have you seen this deposition subpoena	09:25:23
18	of Exhibit 48 that is directed to you before	09:25:25
19	today?	09:25:27
20	A. No, I don't believe so.	09:25:29
21	Q. How is it you were made aware that you	09:25:36
22	were testifying today?	09:25:38
23	A. Through counsel.	09:25:39
24	Q. All right. What did you do to prepare	09:25:40
25	for testifying today?	09:25:44

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1	MR. KAPLAN: And I'll object to the	09:25:45
2	extent that the question calls for privileged	09:25:47
3	communications or other information protected by	09:25:50
4	Federal Rule of Civil Procedure 26 and instruct	09:25:51
5	the witness to answer only to the extent that it	09:25:54
6	does not involve communications with counsel.	09:25:57
7	THE WITNESS: I reread my expert report.	09:26:01
8	I read the rebuttal report from plaintiff's	09:26:04
9	expert.	09:26:10
10	BY MR. HUDIS:	09:26:11
11	Q. Anything else?	09:26:14
12	A. Nothing beyond the things I can	09:26:17
13	disclose.	09:26:21
14	Q. Okay.	09:26:22
15	MR. KAPLAN: Jonathan, if you don't	09:26:23
16	mind.	09:26:25
17	To clarify my instruction, you can	09:26:25
18	mention the existence of conversations that we	09:26:27
19	had, just not their content.	09:26:29
20	THE WITNESS: So I have also spoken with	09:26:32
21	counsel.	09:26:33
22	BY MR. HUDIS:	09:26:33
23	Q. All right. And that was the	09:26:34
24	Fenwick & West counsel?	09:26:36
25	A. Correct.	09:26:37

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1	Q.	All right. Did you speak with any of	09:26:39
2		the counsel from EFF, Electronic Frontier	09:26:41
3		Foundation, to prepare to testify?	09:26:44
4	A.	No. Well, just to be accurate, not in	09:26:48
5		months. So ...	09:26:53
6	Q.	All right. So just to clarify, you were	09:26:59
7		told by counsel you were going to be testifying	09:27:04
8		today, but you haven't seen the deposition	09:27:06
9		subpoena of Exhibit 48 before?	09:27:09
10	A.	Correct.	09:27:10
11	Q.	Besides reviewing your expert report and	09:27:14
12		the rebuttal expert report, did you review any	09:27:16
13		other documents to prepare to testify today?	09:27:20
14	A.	Only those attached to those reports.	09:27:27
15	Q.	Okay. So let me ask it as a fuller	09:27:30
16		question.	09:27:32
17	A.	Mh-hmm.	09:27:33
18	Q.	Other than reviewing your expert report	09:27:33
19		and its attachments and the rebuttal report and	09:27:36
20		its attachments, did you read anything else in	09:27:38
21		order to prepare to testify today?	09:27:41
22	A.	No.	09:27:43
23	Q.	To prepare to testify today, did you	09:27:44
24		speak with anyone else except the lawyers at	09:27:45
25		Fenwick & West?	09:27:48

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1	A.	No.	09:27:49
2	Q.	Did you speak with Mr. Malamud to	09:27:50
3		prepare to testify today?	09:27:53
4	A.	No.	09:27:55
5		MR. KAPLAN: Objection. Asked and	09:27:55
6		answered.	09:27:56
7		THE WITNESS: I will try to pause.	09:27:58
8		Sorry.	09:27:59
9		MR. KAPLAN: Got to give me --	09:27:59
10		THE WITNESS: Yeah, you're not in that	09:28:01
11		rhythm yet.	09:28:02
12		MR. HUDIS: Come on. Got to catch up.	09:28:05
13	Q.	How long do you think you took to	09:28:07
14		prepare by reading the two reports and their	09:28:08
15		attachments?	09:28:11
16	A.	Less than two hours total for the	09:28:17
17		reading.	09:28:21
18	Q.	And that is the sum total of the	09:28:21
19		documents you reviewed to prepare to testify?	09:28:23
20	A.	Yes.	09:28:26
21		And I believe in this entire line of	09:28:31
22		questioning, we're talking about in preparation	09:28:33
23		for this deposition, since the creation of my	09:28:35
24		expert report.	09:28:37
25	Q.	That is correct, sir.	09:28:39

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1	A.	Okay. Then my -- my testimony has been	09:28:40
2		accurate so far.	09:28:42
3	Q.	All right. Since you were retained to	09:28:43
4		be an expert witness in this case, have you read	09:28:48
5		the pleadings, meaning the complaint, the answer	09:28:50
6		and the reply?	09:28:54
7	A.	No.	09:28:57
8	Q.	Mr. Fruchterman, what is the highest	09:29:14
9		level of your education?	09:29:15
10	A.	A master's degree.	09:29:16
11	Q.	Okay. And based upon reviewing some of	09:29:20
12		your papers and your expert witness report, you	09:29:22
13		received a bachelor's degree from the California	09:29:25
14		Institute of Technology?	09:29:28
15	A.	Correct.	09:29:30
16	Q.	And that was a bachelor's of science in	09:29:32
17		engineering in 1980?	09:29:34
18	A.	Correct.	09:29:35
19	Q.	What was your major?	09:29:40
20	A.	I would say electrical engineering.	09:29:41
21	Q.	Did you have a minor during your	09:29:46
22		undergraduate studies?	09:29:47
23	A.	No.	09:29:52
24	Q.	Did you have what's called a	09:29:53
25		concentration during your undergraduate studies?	09:29:54

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1	A.	I simultaneously got a master's in	09:29:58
2		applied physics while completing my bachelor's, so	09:30:00
3		I would say applied physics might fall in that	09:30:04
4		category.	09:30:08
5	Q.	So you also received a master's degree	09:30:18
6		from California Institute of Technology?	09:30:20
7	A.	Correct.	09:30:23
8	Q.	And that was in 1980?	09:30:24
9	A.	Correct.	09:30:25
10	Q.	And that was a master of science in	09:30:26
11		applied physics?	09:30:27
12	A.	Correct.	09:30:29
13	Q.	Now, for your master's, did you have a	09:30:29
14		major?	09:30:32
15	A.	Caltech didn't have a major under the	09:30:36
16		applied physics degree.	09:30:39
17	Q.	Do you have a minor for your master's?	09:30:41
18	A.	They didn't have minors.	09:30:42
19	Q.	And did you have a concentration for	09:30:44
20		your master's?	09:30:45
21	A.	Informally, I focused on optics and	09:30:50
22		lasers over other areas of applied physics.	09:30:53
23	Q.	Now, you did start studies towards a	09:31:01
24		Ph.D.?	09:31:04
25	A.	Correct.	09:31:05

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1	Q.	And that was at Stanford?	09:31:05
2	A.	Yes.	09:31:06
3	Q.	And that was from 1980 to 1981?	09:31:06
4	A.	Correct.	09:31:10
5	Q.	That was in electrical engineering?	09:31:10
6	A.	Yes.	09:31:12
7	Q.	Do you recall what courses you took	09:31:12
8		towards your Ph.D.?	09:31:14
9	A.	No. It would have been in the applied	09:31:19
10		physics and electrical engineering directions, for	09:31:21
11		the most part.	09:31:24
12	Q.	And you did not obtain your Ph.D.?	09:31:34
13	A.	Correct.	09:31:36
14	Q.	Why not?	09:31:37
15	A.	I took a leave of absence to join a	09:31:38
16		private rocket company.	09:31:40
17	Q.	And that was G.H.C., Inc.?	09:31:46
18	A.	G.C.H., Inc.	09:31:49
19	Q.	G.C.H., Inc. Sorry for my dyslexia.	09:31:51
20		And that was the -- I don't know if I'm	09:32:07
21		spelling -- pronouncing this right -- Percheron?	09:32:09
22	A.	Correct pronunciation, yes.	09:32:13
23	Q.	Thank you.	09:32:15
24		All right. And that was the Percheron	09:32:16
25		private enterprise rocket project, as an	09:32:18

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1	electrical engineer?	09:32:20
2	A. Yes.	09:32:22
3	Q. And that was the project where the	09:32:22
4	rocket blew up?	09:32:24
5	A. Correct.	09:32:29
6	Q. Mr. Fruchterman, just to outline the	09:32:30
7	extent of your formal school training, you do not	09:32:32
8	have any formal school training in psychology?	09:32:34
9	A. Correct.	09:32:36
10	Q. And you do not have any formal school	09:32:37
11	training in psychometrics?	09:32:40
12	A. Correct.	09:32:42
13	Q. You don't have any formal school	09:32:43
14	training in educational or achievement tests or	09:32:44
15	measures?	09:32:48
16	A. Correct.	09:32:49
17	Q. And you do not have any formal education	09:32:56
18	in psychological tests or measures?	09:32:59
19	A. Correct.	09:33:02
20	Q. Now, your resume notes that you have	09:33:06
21	several -- you had several engineering positions	09:33:10
22	with the following companies: Phoenix	09:33:12
23	Engineering, Inc.?	09:33:15
24	A. Yes.	09:33:18
25	Q. What years was that?	09:33:18

Confidential Videotaped Deposition of James R. Fruchterman
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1	A.	'81-'83.	09:33:21
2	Q.	1981 to 1983?	09:33:25
3	A.	Correct.	09:33:27
4	Q.	What type of company was it?	09:33:27
5	A.	It was a private enterprise rocket	09:33:29
6		company.	09:33:34
7	Q.	Where was it located?	09:33:35
8	A.	Santa Clara -- certainly -- Santa Clara	09:33:36
9		County. Certainly this area.	09:33:39
10	Q.	What was your job title at Phoenix?	09:33:41
11	A.	I had a -- I was vice president.	09:33:44
12	Q.	What were your job responsibilities?	09:33:46
13	A.	I don't recall.	09:33:53
14	Q.	What did you do there?	09:33:56
15	A.	Tried to raise money to start a rocket	09:33:57
16		company.	09:34:00
17	Q.	Do you remember anything else you did?	09:34:02
18	A.	I probably was involved with the	09:34:04
19		finances. We tested some prototype rocket	09:34:06
20		engines. And I spent most of my time trying to	09:34:12
21		raise money, which we were unsuccessful in doing.	09:34:17
22		MR. HUDIS: Off the record.	09:34:22
23		THE VIDEOGRAPHER: Going off the record	09:34:25
24		at 9:34.	09:34:26
25		(Whereupon, a recess was taken.)	09:34:28

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1	THE VIDEOGRAPHER: Back on the record at	09:37:31
2	9:37.	09:37:32
3	BY MR. HUDIS:	09:37:33
4	Q. So while we were off the record,	09:37:34
5	Mr. Fruchterman, my colleague noted that I was a	09:37:36
6	little dilatory in marking your resume. So we're	09:37:39
7	discussing your background. You might as well	09:37:42
8	have your resume in front of you.	09:37:44
9	A. Okay. Thank you.	09:37:46
10	MR. HUDIS: I'd like the court reporter	09:37:48
11	to mark as Deposition Exhibit Fruchterman 49.	09:37:49
12	(Whereupon, Deposition Exhibit 49 was	09:37:53
13	marked for identification.)	09:37:53
14	THE WITNESS: Okay. Thank you.	09:38:02
15	BY MR. HUDIS:	09:38:03
16	Q. Mr. Fruchterman, do you recognize this	09:38:03
17	document?	09:38:05
18	A. I do.	09:38:07
19	Q. What is it?	09:38:08
20	A. My resume.	09:38:08
21	Q. All right. So we were discussing your	09:38:09
22	background, and we finished discussing your	09:38:13
23	engineering position with Phoenix Engineering.	09:38:18
24	Let's go on to G.C.H., Inc.	09:38:21
25	A. All right.	09:38:25

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1	Q.	All right. And what type of company was	09:38:26
2		that?	09:38:27
3	A.	It was a private company, probably a C	09:38:29
4		corp, I'm guessing.	09:38:32
5	Q.	What business was it in?	09:38:33
6	A.	In the business of building a private	09:38:35
7		enterprise rocket.	09:38:38
8	Q.	How long were you with the company?	09:38:43
9	A.	Under one year.	09:38:44
10	Q.	What year -- what year was that?	09:38:45
11	A.	1981 -- probably -- I was probably only	09:38:49
12		employed during 1981.	09:38:54
13	Q.	What was your job title?	09:38:56
14	A.	Electrical engineer.	09:38:58
15	Q.	And what were your responsibilities at	09:39:01
16		G.H.C.?	09:39:03
17	A.	At G.C.H., my responsibilities --	09:39:05
18	Q.	G.C.H.	09:39:07
19	A.	No problem.	09:39:08
20		-- were to design remote fuel loading	09:39:10
21		systems to fuel up the rocket, telemetry systems	09:39:14
22		to collect data about the rocket's performance, a	09:39:19
23		remote igniting system and a command destruct	09:39:23
24		system to blow up the rocket if it went off	09:39:27
25		course. Yeah. That was my main -- top	09:39:30

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1	responsibilities.	09:39:34
2	Q. And you were employed at the IBM T.J.	09:39:41
3	Watson Research Center?	09:39:45
4	A. Correct.	09:39:47
5	Q. What type of company was that?	09:39:47
6	A. IBM is a large computer company.	09:39:49
7	Q. All right. What did -- was that a	09:39:51
8	division, the Watson Research Company?	09:39:53
9	A. The Watson Research Center --	09:39:56
10	Q. Center.	09:39:58
11	A. -- is -- was one of IBM's major research	09:39:58
12	centers.	09:40:02
13	Q. And at that research center, what did	09:40:05
14	they do at the time you were employed there?	09:40:07
15	A. Well, this is a large research center	09:40:11
16	with a couple thousand of employees, so they did a	09:40:14
17	whole bunch of different things.	09:40:17
18	Q. What did you do?	09:40:20
19	A. I worked on photoacoustic microscopy.	09:40:20
20	Q. And if you could define what that is,	09:40:25
21	please.	09:40:27
22	A. Making dust scream. So our task was to	09:40:28
23	detect dust on top of silicon wafers that would be	09:40:34
24	hard to see, sort of visual inspection, by hitting	09:40:39
25	them with a pulsed laser that would cause the dust	09:40:42

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1	to heat up and emit sound, which we could then	09:40:44
2	detect. So it was an inspection technique to	09:40:48
3	improve silicon wafer -- reduce defects,	09:40:53
4	basically.	09:40:57
5	MR. KAPLAN: Kathleen, I was wrong. We	09:41:04
6	are going to talk about semiconductors.	09:41:07
7	BY MR. HUDIS:	09:41:13
8	Q. What year was this? Or years.	09:41:14
9	A. This would have been '80, '81. This was	09:41:17
10	the summer -- it was a summer internship between	09:41:20
11	my master's and my -- starting up my Ph.D. program	09:41:22
12	at Stanford.	09:41:24
13	Q. So that was the summer of '80 or summer	09:41:25
14	or '81?	09:41:28
15	A. The summer of '80.	09:41:29
16	Q. Did you have a job title there?	09:41:34
17	A. Some variation on summer intern. I	09:41:38
18	don't recall the exact title.	09:41:40
19	Q. Have you told me all about your job	09:41:49
20	responsibilities at the Watson Research Center at	09:41:51
21	the time you were employed there?	09:41:54
22	MR. KAPLAN: Objection. Vague.	09:41:56
23	THE WITNESS: Certainly that was the	09:41:57
24	main project I worked on, and I wasn't engaged to	09:41:58
25	work on any other major projects.	09:42:01

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1	BY MR. HUDIS:	09:42:05
2	Q. And you were employed at the General	09:42:05
3	Motors Company?	09:42:06
4	A. Two summers, while -- while doing my	09:42:08
5	engineering degree.	09:42:10
6	Q. Which summers?	09:42:11
7	A. That would have been the summers of '78	09:42:15
8	and '79.	09:42:17
9	Q. You were an intern?	09:42:21
10	A. Yes.	09:42:23
11	Q. What projects did you work on?	09:42:25
12	A. I only remember one project, which was	09:42:27
13	to build a fast start system for a diesel engine,	09:42:32
14	so that the engine would start faster when you	09:42:38
15	turn on the ignition. Often called a glow plug.	09:42:42
16	Q. Do you remember any other projects you	09:42:52
17	worked on?	09:42:53
18	A. No.	09:42:54
19	Q. And you worked at the NASA Jet	09:42:58
20	Propulsion Laboratory?	09:42:59
21	A. Correct.	09:43:02
22	Q. When was that?	09:43:03
23	A. I'm going to say '77 through '79, but I	09:43:06
24	am not exactly sure. It was also during my	09:43:11
25	undergraduate work at -- at Caltech. I was a	09:43:14

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1	student research associate for Dr. Bruce Murphy --	09:43:18
2	Murray, who was then the director of JPL.	09:43:24
3	Q. Do you remember what you did for	09:43:33
4	Dr. Murray?	09:43:35
5	A. I worked on the Spacel photographic data	09:43:36
6	retrieval system which held imagery from the	09:43:40
7	Viking missions, primarily.	09:43:44
8	Q. I think for the court reporter, you're	09:43:47
9	going to have to spell out the name of that	09:43:48
10	device.	09:43:51
11	A. Spacel, like the word "space" plus an L	09:43:53
12	at the end. Are we otherwise good, or do you need	09:43:56
13	more?	09:43:57
14	THE REPORTER: I'm sorry?	09:43:57
15	THE WITNESS: Do you need any more or is	09:44:02
16	that enough?	09:44:04
17	(Discussion held off record.)	09:44:05
18	BY MR. HUDIS:	09:44:05
19	Q. Do you remember any other	09:44:23
20	responsibilities you had working for Dr. Murray at	09:44:24
21	the NASA Jet Propulsion Laboratory?	09:44:26
22	A. That was my primary project there, and I	09:44:29
23	don't recall any others.	09:44:31
24	Q. And you worked at the Fermi National	09:44:33
25	Accelerator Laboratory?	09:44:35

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1	A.	Correct.	09:44:38
2	Q.	When was that?	09:44:38
3	A.	The summer of 1977.	09:44:39
4	Q.	What did they do there at the Fermi	09:44:48
5		National Accelerator Laboratory while you were	09:44:50
6		there?	09:44:52
7	A.	They -- they ran a large accelerator,	09:44:53
8		and they designed physics experiments to detect	09:44:56
9		elementary particles.	09:45:02
10	Q.	What was your job title there?	09:45:18
11	A.	Something like student intern or summer	09:45:20
12		intern.	09:45:24
13	Q.	What did you do there?	09:45:25
14	A.	Primarily worked on instruments,	09:45:27
15		maintenance of instruments, upgrading of	09:45:30
16		instruments.	09:45:33
17	Q.	What kind of instruments?	09:45:37
18	A.	Well, the largest and longest-term	09:45:38
19		project was on a multiwire proportional chamber.	09:45:42
20	Q.	What did it do?	09:45:46
21	A.	Detected signals from elementary	09:45:50
22		particles.	09:45:52
23	Q.	Sounds?	09:45:55
24	A.	More electrical signals. The -- it was	09:45:57
25		a large frame, maybe four by six, that had many	09:45:59

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1 different wires. You put it in, I believe, a 09:46:09
2 noble gas environment with a bunch of other 09:46:11
3 things, and you detected the path of the particle 09:46:14
4 by hitting some of these gas atoms, and then that 09:46:16
5 would create a ionization that would create a 09:46:20
6 signal on the wires, so you would actually be able 09:46:23
7 to measure the track through the -- through the 09:46:25
8 space. 09:46:28

9 Q. So other than what is on your resume on 09:46:36
10 the first page, are there any other companies you 09:46:39
11 worked for that are -- that are not listed here 09:46:41
12 since graduating from Caltech? 09:46:43

13 A. Yes. There were additional positions, 09:46:49
14 all -- all either ones that I did while trying to 09:46:54
15 start companies or companies that didn't get 09:46:59
16 started. 09:47:02

17 Q. What field of endeavor were these 09:47:08
18 companies that you tried to get started? 09:47:10

19 A. Technology. 09:47:12

20 Q. Any particular technology? 09:47:14

21 A. Well, they would have related to either 09:47:17
22 electrical engineering or to computer science and 09:47:18
23 at least one semiconductor company. 09:47:27

24 Q. Any particular projects that you 09:47:38
25 remember working on in starting up these companies 09:47:39

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1	as you sit here today?	09:47:43
2	A. Oh, many ideas. Microfluidics, math and	09:47:46
3	science simulation software, more pattern	09:47:57
4	recognition companies, but none of these reached	09:48:06
5	the point of where I was actually employed,	09:48:10
6	because they never got started.	09:48:13
7	Q. Could you define for us microfluidics?	09:48:14
8	A. It's a semiconductor-based technology	09:48:18
9	for moving gases or fluids rather than electrical	09:48:22
10	current, but under the control of electrical	09:48:28
11	signals.	09:48:32
12	Q. Any other notable projects in your	09:48:41
13	working background that you haven't told us about?	09:48:44
14	MR. KAPLAN: Objection. Vague.	09:48:47
15	THE WITNESS: I taught night school, in	09:48:49
16	computer programming. I crawled under houses as	09:48:51
17	part of helping homeowners understand more of	09:48:59
18	their earthquake risks. But those were back in	09:49:03
19	the early '80s, when I was trying to get my first	09:49:08
20	company really going.	09:49:11
21	BY MR. HUDIS:	09:49:14
22	Q. Since it's a fair part of your expert's	09:49:20
23	report, Mr. Fruchterman, in simple terms could you	09:49:24
24	please define what is "optical character	09:49:28
25	recognition" and what does it do?	09:49:31

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1 A. So optical character recognition is the 09:49:36
2 process of having a machine recognizing letters 09:49:41
3 and words, generally from documents, though it can 09:49:44
4 be from other objects, and translating those into 09:49:49
5 the letter or word equivalent so that those things 09:49:53
6 can be processed. 09:49:59

7 So the most common application of 09:50:00
8 optical character recognition is scanning, let's 09:50:03
9 say, a page of a document and turning it into a 09:50:07
10 word processor file that is the equivalent of what 09:50:09
11 you would have done if you had typed it in, but 09:50:14
12 the machine, instead, had it scanned and then took 09:50:16
13 the picture of the page and turned it into the 09:50:19
14 text of the page. 09:50:23

15 Q. So for the remainder of this deposition, 09:50:25
16 if I use the initials "OCR," we'll understand that 09:50:28
17 to mean "optical character recognition"? 09:50:32

18 A. Yes. 09:50:35

19 Q. Is OCR a common method of creating 09:50:36
20 searchable digital copies of texts? 09:50:39

21 MR. KAPLAN: Objection. Competence. 09:50:47

22 Vague. 09:50:52

23 THE WITNESS: It is the most common form 09:50:55
24 when the source document is in physical or solely 09:50:56
25 image-based form, but it's probably not the most 09:51:02

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1	common.	09:51:07
2	BY MR. HUDIS:	09:51:07
3	Q. What is the most common?	09:51:07
4	A. Having digitally created content that	09:51:09
5	stays digital and then is searched.	09:51:11
6	Q. So, for example --	09:51:13
7	MR. KAPLAN: Can I just interject. For	09:51:14
8	the court reporter, you had my objection as	09:51:16
9	"compound." It was "competence." I just wanted	09:51:17
10	to make sure we had that on the record.	09:51:21
11	BY MR. HUDIS:	09:51:50
12	Q. So, for example, Mr. Fruchterman, a	09:51:50
13	document created in Microsoft Word would be a	09:51:52
14	method of creating searchable digital text?	09:51:58
15	MR. KAPLAN: Objection. Incomplete	09:52:01
16	hypothetical. Vague.	09:52:02
17	THE WITNESS: It would be a great source	09:52:06
18	document to put into a system that analyzed	09:52:07
19	documents for full text. I'm not sure -- could	09:52:12
20	you repeat the question.	09:52:18
21	BY MR. HUDIS:	09:52:19
22	Q. Yes.	09:52:20
23	So, for example, a document created in	09:52:23
24	Microsoft Word would be a method of creating	09:52:26
25	searchable digital text?	09:52:29

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1	MR. KAPLAN: Objection. Incomplete	09:52:32
2	hypothetical. Vague.	09:52:34
3	THE WITNESS: Yes. I would say that's	09:52:43
4	pretty true.	09:52:47
5	BY MR. HUDIS:	09:52:48
6	Q. Thank you for your candor.	09:52:53
7	Mr. Fruchterman, was the OCR process	09:52:56
8	first developed by Ray Kurzweil?	09:52:59
9	MR. KAPLAN: Objection. Vague.	09:53:03
10	Competence.	09:53:04
11	THE WITNESS: No, that's not my	09:53:06
12	understanding. But he was a noteworthy inventor	09:53:07
13	along a spectrum of inventors that progressively	09:53:12
14	improved the practice of optical character	09:53:17
15	recognition.	09:53:19
16	BY MR. HUDIS:	09:53:19
17	Q. Was the OCR process that was developed	09:53:20
18	by Ray Kurzweil used to create a reading machine	09:53:21
19	for the blind?	09:53:25
20	MR. KAPLAN: Objection. Vague.	09:53:29
21	Competence.	09:53:29
22	THE WITNESS: Yes.	09:53:30
23	BY MR. HUDIS:	09:53:30
24	Q. I'd like to turn back, Mr. Fruchterman,	09:53:41
25	to your resume and talk about the noted companies	09:53:43

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1	with which you have been associated, starting with	09:53:47
2	Calera Recognition Systems and working up towards	09:53:53
3	Benetech.	09:53:56
4	So is Benetech -- excuse me, is Calera	09:53:58
5	Recognition Systems, Inc., still in business	09:54:03
6	today?	09:54:06
7	A. It merged into a company that is still	09:54:08
8	extant today.	09:54:12
9	Q. All right. Is the company, Calera	09:54:13
10	Recognition Systems, Inc., as that company was	09:54:15
11	known between 1982 and 1989, still in existence	09:54:20
12	today?	09:54:25
13	MR. KAPLAN: Objection. Calls for a	09:54:26
14	legal conclusion. Competence.	09:54:26
15	THE WITNESS: Not by that name.	09:54:31
16	BY MR. HUDIS:	09:54:33
17	Q. All right. What type of company was	09:54:33
18	Calera Recognition Systems when it was in business	09:54:37
19	under that name?	09:54:40
20	A. It was a optical character recognition	09:54:41
21	company.	09:54:43
22	Q. What products did it make at the time	09:54:46
23	you were affiliated with Calera?	09:54:50
24	MR. KAPLAN: Objection. Argumentative.	09:54:51
25	Vague.	09:54:54

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1	THE WITNESS: A series of OCR products.	09:54:56
2	BY MR. HUDIS:	09:55:07
3	Q. What services, if any, did Calera	09:55:08
4	recognition systems render to customers?	09:55:11
5	A. Calera was primarily a product sales	09:55:16
6	company, but it did provide maintenance services	09:55:20
7	and product customization services to its	09:55:25
8	customers.	09:55:32
9	Q. And according to your resume, which	09:55:39
10	we've marked as Exhibit 49, you were the founder,	09:55:41
11	vice -- vice president of finance from 1982 to	09:55:45
12	1988?	09:55:49
13	A. Correct.	09:55:50
14	Q. What were your responsibilities as vice	09:55:51
15	president, finance?	09:55:52
16	A. I had, I'd say, the typical	09:55:57
17	responsibilities of a chief financial officer,	09:56:01
18	which was to participate in the raising of	09:56:03
19	capital, the accounting systems, financial	09:56:07
20	controls, reporting. So those were my primary	09:56:11
21	financial responsibilities while I was in that	09:56:17
22	role.	09:56:20
23	Q. Have you told me all the	09:56:20
24	responsibilities you can recall when you were in	09:56:22
25	that role?	09:56:23

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1	A.	No.	09:56:24
2	Q.	Are there other responsibilities you had	09:56:26
3		in that role as vice president of finance?	09:56:27
4	A.	Yes. I was also a technical founder.	09:56:30
5		So during that time period, I wrote software code.	09:56:33
6		I worked a great deal with customers.	09:56:38
7	Q.	In what capacity?	09:56:42
8	A.	In technology companies, there's usually	09:56:49
9		a salesperson and a tech person when you're doing	09:56:54
10		a major sale to a company like Hewlett-Packard. I	09:56:57
11		would have been that tech person. So an executive	09:57:00
12		with a technology background combined with a sales	09:57:04
13		executive, and together we would work on the care	09:57:08
14		and feeding of that account and hopefully getting	09:57:13
15		their business.	09:57:16
16	Q.	Have you told me all of your duties and	09:57:16
17		responsibilities as founder and vice president of	09:57:20
18		finance --	09:57:22
19		MR. KAPLAN: Objection. Vague.	09:57:24
20		BY MR. HUDIS:	09:57:24
21	Q.	-- at Calera at the time you were	09:57:25
22		employed there?	09:57:27
23	A.	That was a great majority of my	09:57:29
24		responsibilities. Nothing else occurs to me.	09:57:30
25	Q.	And you were the vice president of	09:57:32

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1	marketing for Calera from 1987 through 1989?	09:57:33
2	A. Correct.	09:57:37
3	Q. What were your responsibilities in that	09:57:38
4	role at that time?	09:57:40
5	A. Primarily product marketing. So what	09:57:43
6	features the product should have, how it should be	09:57:49
7	communicated to the customers, relationships with	09:57:53
8	the press. Those would be the primary	09:57:59
9	responsibilities.	09:58:04
10	Q. Are there any other responsibilities	09:58:05
11	that you had as vice president of marketing that	09:58:07
12	you haven't told me that you can recall now?	09:58:09
13	A. No.	09:58:11
14	Q. Mr. Fruchterman, what is or was	09:58:17
15	Omnifront Character Recognition Technology?	09:58:19
16	MR. KAPLAN: Objection. Compound.	09:58:29
17	THE WITNESS: Different vendors use that	09:58:31
18	term different ways. It was Calera's primary	09:58:33
19	initial claim to primacy in the OCR market, which	09:58:39
20	was that our character recognition recognized all	09:58:46
21	fonts without needing to be trained on those fonts	09:58:49
22	or having those fonts be in some way memorized in	09:58:53
23	memory. And so that was our primary edge, which	09:58:57
24	made a pretty powerful product.	09:59:00
25		

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1	BY MR. HUDIS:	09:59:05
2	Q. Just so we have a working definition,	09:59:05
3	please define, as you understand it, what a "font"	09:59:08
4	is.	09:59:11
5	A. So in the field of typography, when you	09:59:17
6	were preparing a printed document, you have font.	09:59:20
7	Designers design different looks for fonts, and	09:59:23
8	fonts have many different properties.	09:59:27
9	And so a font is a group of a complete	09:59:30
10	character set that might be all the different	09:59:38
11	letters or symbols that you might want to have be	09:59:41
12	represented in that font, and then a font is	09:59:43
13	essentially a -- has a similar design feeling	09:59:45
14	across all of those characters. For example, is	09:59:49
15	it tall and narrow or squat and wide or have	09:59:52
16	serifs, attached letters or not.	09:59:58
17	Q. By way of example, Times Roman is a type	10:00:01
18	of font?	10:00:04
19	A. Correct.	10:00:05
20	Q. And Courier New is a type of font?	10:00:05
21	A. Yes.	10:00:08
22	Q. And Helvetica is a type of font?	10:00:08
23	A. Yes.	10:00:11
24	Q. As a product of Calera Recognition	10:00:14
25	Systems, what is or was WordScan?	10:00:16

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1	MR. KAPLAN: Objection. Compound.	10:00:19
2	MR. HUDIS: Well, I don't know if it's	10:00:21
3	still in existence, Counsel.	10:00:23
4	THE WITNESS: So WordScan was -- was	10:00:26
5	Calera's software OCR product as opposed to one	10:00:29
6	that had hardware attached to it.	10:00:34
7	BY MR. HUDIS:	10:00:37
8	Q. As a product of Calera Recognition	10:00:38
9	Systems, what is or was TrueScan?	10:00:38
10	MR. KAPLAN: Objection. Compound.	10:00:43
11	THE WITNESS: TrueScan --	10:00:44
12	MR. KAPLAN: Just preserving.	10:00:46
13	MR. HUDIS: Go on, Counsel.	10:00:47
14	THE WITNESS: Whatever you guys are	10:00:50
15	doing.	10:00:50
16	TrueScan was the hardware version of OCR	10:00:52
17	that preceded WordScan in the product line	10:00:56
18	evolution of Calera.	10:01:00
19	BY MR. HUDIS:	10:01:02
20	Q. And was it the intent of Calera at that	10:01:02
21	time that TrueScan and WordScan would work	10:01:04
22	together as a software-hardware package?	10:01:06
23	A. No.	10:01:10
24	MR. KAPLAN: Objection. Vague.	10:01:10
25	Go ahead.	10:01:11

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1	THE WITNESS: Sorry.	10:01:12
2	BY MR. HUDIS:	10:01:12
3	Q. What was Calera's purpose of selling	10:01:14
4	WordScan and TrueScan to customers?	10:01:19
5	MR. KAPLAN: Objection. Vague.	10:01:22
6	Competence.	10:01:23
7	THE WITNESS: So this is -- Calera,	10:01:27
8	during this time period, released a series of	10:01:29
9	products, and the general characteristic of that	10:01:31
10	progression was that they got better and cheaper	10:01:38
11	and required less resources.	10:01:41
12	So the original product was 40- or	10:01:42
13	\$50,000 and was the size of three or four	10:01:45
14	breadboxes. TrueScan was a coprocessor card that	10:01:50
15	cost maybe \$5,000, and WordScan was an OCR	10:01:53
16	software product that required no hardware, that	10:01:56
17	was perhaps \$1,000 when it was launched.	10:01:57
18	So there was just the same capabilities	10:02:03
19	getting better in a different format for	10:02:05
20	delivering OCR to a customer.	10:02:08
21	BY MR. HUDIS:	10:02:10
22	Q. Okay. Now, you left Calera in 1989?	10:02:11
23	A. Correct.	10:02:14
24	Q. Okay. Why?	10:02:15
25	A. I was unhappy and wanted to do something	10:02:28

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1	new.	10:02:31
2	Q. Now, Calera Recognition Systems was	10:03:01
3	acquired by Caere, C-A-E-R-E, Recognition Systems	10:03:04
4	in 1994?	10:03:08
5	A. That's my rough understanding. And it's	10:03:12
6	pronounced "Caere."	10:03:14
7	Q. Caere?	10:03:16
8	A. As if it didn't have the extra "E," yes.	10:03:17
9	But, yes, I remember that they were	10:03:19
10	acquired in the early '90s.	10:03:21
11	Q. And that was for a sale price of	10:03:23
12	\$35 million?	10:03:26
13	MR. KAPLAN: Objection. Lack of	10:03:29
14	foundation. Competence.	10:03:29
15	THE WITNESS: That order of magnitude.	10:03:31
16	It varied on when you priced the deal, 'cause	10:03:33
17	Caere's stock as a public company varied from the	10:03:36
18	time the deal was announced to when it was	10:03:39
19	consummated.	10:03:42
20	BY MR. HUDIS:	10:03:44
21	Q. Is 35 million approximately the sale	10:03:44
22	price of the company?	10:03:46
23	MR. KAPLAN: Objection. Vague.	10:03:47
24	THE WITNESS: Yes. But I also heard	10:03:48
25	50 million when the stock price was higher.	10:03:49

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1	BY MR. HUDIS:	10:03:53
2	Q. So it could have been anywhere from 35	10:03:52
3	to \$50 million?	10:03:53
4	A. In that range, yeah.	10:03:55
5	Q. Were -- to the best of your knowledge,	10:03:57
6	were Calera's patents and trademarks part of the	10:03:58
7	assets that were sold to Caere?	10:04:01
8	A. I -- I'm assuming so. I don't have	10:04:05
9	knowledge to the contrary.	10:04:07
10	Q. Do you know whether Caere itself was	10:04:11
11	later acquired by a speech recognition company	10:04:13
12	called Nuance Communications?	10:04:17
13	A. Yes. It's my understanding that Nuance	10:04:18
14	is the surviving company of that merger.	10:04:19
15	(Whereupon, Deposition Exhibit 50 was	10:04:44
16	marked for identification.)	10:04:44
17	BY MR. HUDIS:	10:04:44
18	Q. Mr. Fruchterman, I've now put in front	10:04:48
19	of you what has been marked as Exhibit 50. And	10:04:49
20	we're going to go off the record for a few seconds	10:04:52
21	so that you can at least familiarize yourself with	10:04:54
22	the document.	10:04:56
23	MR. KAPLAN: No, we're not.	10:04:58
24	MR. HUDIS: We're not?	10:04:59
25	MR. KAPLAN: No.	10:05:00

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1	MR. HUDIS: I don't want to burn up time	10:05:00
2	for him just reading a document.	10:05:02
3	MR. KAPLAN: Well, if there's parts that	10:05:03
4	you want him to review --	10:05:04
5	MR. HUDIS: Yes, I do.	10:05:06
6	MR. KAPLAN: -- I mean, you can point	10:05:07
7	him to those parts if you want him to have a	10:05:08
8	general understanding of the document.	10:05:10
9	THE WITNESS: I'm ready to go if there's	10:05:11
10	questions.	10:05:13
11	BY MR. HUDIS:	10:05:13
12	Q. Okay. Sure. Okay. All right.	10:05:13
13	So, Mr. Fruchterman, do you -- let's	10:05:16
14	take the trademarks first.	10:05:18
15	Do you recognize the trademarks listed	10:05:20
16	on Exhibit 50 as trademarks of Calera Recognition	10:05:23
17	Systems?	10:05:27
18	A. Yes, I -- I recall those trademarks,	10:05:44
19	yes.	10:05:48
20	Q. And on pages 4 and 5, do you recognize	10:05:49
21	those as copyrights of Calera? This is in	10:05:53
22	Exhibit 50.	10:05:58
23	A. Yes. They are consistent with my	10:06:00
24	recollection of copyrightable material that Calera	10:06:03
25	would have produced.	10:06:08

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1	Q.	And if we can turn to the first page of	10:06:09
2		Exhibit 50, do you recognize the title of that	10:06:11
3		patent as being owned by Calera Recognition	10:06:14
4		Systems at one time?	10:06:16
5	A.	It's consistent with technology that was	10:06:27
6		in use at Calera while I was there, and	10:06:29
7		Mindy Bokser was an engineer who was there while I	10:06:32
8		was there. I don't know this precise content of	10:06:35
9		this particular patent.	10:06:41
10		MR. HUDIS: Let's go off the record.	10:06:48
11		THE VIDEOGRAPHER: Going off the record	10:06:49
12		at 10:06.	10:06:50
13		(Whereupon, a recess was taken.)	10:06:52
14		THE VIDEOGRAPHER: Back on the record at	10:12:36
15		12:10 -- I'm sorry, 10:12.	10:12:40
16		THE WITNESS: Time flies when you're	10:12:44
17		having fun.	10:12:45
18		THE VIDEOGRAPHER: Another dyslexic.	10:12:48
19		MR. KAPLAN: We'll take it.	10:12:50
20		MR. HUDIS: Two for two.	10:12:51
21		THE WITNESS: Okay.	10:12:53
22		THE VIDEOGRAPHER: 10:12.	10:12:55
23		BY MR. HUDIS:	10:12:56
24	Q.	Okay. So, Mr. Fruchterman, after you	10:12:57
25		left Calera Recognition Systems, you went to work	10:13:02

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1	for RAF Technology, Inc.?	10:13:07
2	A. Yes.	10:13:11
3	Q. What type of company was RAF?	10:13:13
4	A. An optical character recognition company	10:13:17
5	and pattern recognition company.	10:13:19
6	Q. Patent recognition?	10:13:22
7	A. Pattern. Pattern recognition.	10:13:24
8	Q. In this context, Mr. Fruchterman, what	10:13:30
9	is pattern recognition?	10:13:33
10	A. It's a more general form than optical	10:13:35
11	character recognition, where you're looking for	10:13:38
12	patterns rather than -- rather than just letters.	10:13:41
13	So, for example, RAF worked on recognizing rare	10:13:43
14	coins and whale tails.	10:13:47
15	Q. All right. And a whale tail is a?	10:13:52
16	MR. KAPLAN: Whale tail.	10:13:56
17	THE WITNESS: A tail of a whale. To	10:13:57
18	identify --	10:13:58
19	BY MR. HUDIS:	10:13:59
20	Q. Oh, a whale tail.	10:14:00
21	A. Yes.	10:13:59
22	Q. As in the big large mammal that swims in	10:13:59
23	the ocean?	10:14:02
24	A. That's right. To recognize individuals	10:14:02
25	by the scars on their tails as being able to	10:14:05

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1 identify them. So many different things that 10:14:08

2 pattern recognition can be used to do. 10:14:09

3 Q. What kinds of products, if any, did RAF 10:14:12

4 make? 10:14:15

5 A. So RAF did a lot of custom products, 10:14:16

6 which I've already described. The primary 10:14:21

7 products would be in the area of recognizing 10:14:24

8 letters and forms for large-scale document 10:14:32

9 processing, such as routing the mail or scanning 10:14:41

10 forms that might be used in business or 10:14:46

11 government. 10:14:48

12 Q. And in your last answer, when you said 10:15:01

13 "recognizing letters," do you mean letters of the 10:15:03

14 alphabet or as in I wrote a letter to so-and-so? 10:15:06

15 A. Well, both. We recognize letters as in 10:15:12

16 doing optical character recognition, and we 10:15:18

17 recognize addresses on letters that people want 10:15:22

18 routed to a certain destination by doing optical 10:15:25

19 character recognition plus doing a bunch of 10:15:29

20 processing related to knowing that it's an 10:15:32

21 address. 10:15:35

22 Q. And who were the major customers of 10:15:38

23 RAF's products at the time you were there? 10:15:41

24 A. Postal services and service bureaus that 10:15:51

25 process a lot of documents. 10:15:54

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1	Q.	When you say process documents, for what	10:15:59
2		purpose?	10:16:05
3	A.	Diverse purposes. But probably the most	10:16:06
4		common one was doing presorting of mass mailings	10:16:08
5		to get a postal discount.	10:16:12
6	Q.	What services, if any, do you recall RAF	10:16:23
7		rendering to its customers at the time you were	10:16:26
8		there?	10:16:28
9	A.	RAF is primarily a product company, and	10:16:32
10		so they would sell products. And then they would	10:16:35
11		sell associated services, such as maintenance,	10:16:38
12		database maintenance. If you were going to route	10:16:42
13		the mail, you have to repeatedly meet certain	10:16:46
14		postal standards about accuracy of routing the	10:16:49
15		mail, and so you would get a database update that	10:16:52
16		had passed the latest test.	10:16:54
17		Custom character sets. And I don't	10:16:58
18		remember if we did Icelandic, but if we did	10:17:01
19		Icelandic, you'd have to add a few characters that	10:17:04
20		the Icelanders use. Some custom products.	10:17:07
21		Handwriting recognition was a feature	10:17:14
22		that we developed for certain customers and	10:17:17
23		productized. And there were non-OCR or pattern	10:17:20
24		recognition -- well, there were non -- there were	10:17:30
25		also products and services around, I don't know,	10:17:32

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1 recognizing things as counterfeit, helping the 10:17:38
2 U.S. Treasury track fraud. And that's -- I've 10:17:45
3 described the majority of the customers and kinds 10:17:56
4 of services, but if someone came to RAF with 10:17:58
5 something that needed pattern recognition help, 10:18:01
6 they would probably have a great conversation and 10:18:03
7 take their money, so ... 10:18:05

8 Q. So you were the president, CEO and 10:18:07
9 founder from 1989 through 1995 at RAF? 10:18:09

10 A. Correct. 10:18:13

11 Q. And you were the vice president, 10:18:13
12 finance, and CFO from 1989 to 2004? 10:18:15

13 A. Yes. 10:18:20

14 Q. All right. Let's divide out your 10:18:20
15 responsibilities in the two roles. 10:18:23

16 What were your responsibilities at RAF 10:18:25
17 as president, CEO and founder? 10:18:27

18 A. Business strategy. Customer relations. 10:18:32
19 Some technology, but I was primarily more of a 10:18:35
20 relationship person than a developer at that 10:18:47
21 stage. So I made deals with customers, business 10:18:49
22 development. 10:18:56

23 Q. And what were your duties and 10:19:05
24 responsibilities as vice president of finance and 10:19:06
25 CFO at RAF? 10:19:09

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1 A. Similar to the standard ones of a chief 10:19:11
2 financial officer. So overseeing legal and 10:19:14
3 administrative and financial responsibilities for 10:19:19
4 the company. Maintaining the books. Preparing 10:19:22
5 reports. Negotiating contracts. 10:19:27
6 Retaining counsel -- which I left out of 10:19:35
7 my Calera list of things I was responsible for. I 10:19:39
8 was also overseeing all the legal affairs for 10:19:42
9 Calera as well as for RAF. 10:19:45
10 Q. To the best of your recollection, have 10:19:51
11 you told me all of the main duties and 10:19:52
12 responsibilities as your -- in your position as 10:19:55
13 vice president of finance and CFO of RAF? 10:20:00
14 A. Yes. 10:20:04
15 MR. KAPLAN: Objection. Vague. 10:20:04
16 THE WITNESS: Sorry. 10:20:05
17 BY MR. HUDIS: 10:20:05
18 Q. And have you told me, to the best of 10:20:06
19 your recollection, the main duties and 10:20:08
20 responsibilities you had at RAF as president, CEO 10:20:09
21 and founder? 10:20:12
22 MR. KAPLAN: Objection. Vague. 10:20:14
23 THE WITNESS: Yes. 10:20:16
24 BY MR. HUDIS: 10:20:16
25 Q. And you are currently a director of RAF 10:20:21

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1	Technology?	10:20:26
2	A. Correct.	10:20:26
3	Q. And you've been so since 1989?	10:20:26
4	A. Correct.	10:20:28
5	Q. As a product of RAF Technology, what is	10:20:32
6	or was Argosy Post?	10:20:35
7	MR. KAPLAN: Objection. Compound.	10:20:40
8	THE WITNESS: Argosy Post was the	10:20:41
9	address recognition product targeted at companies	10:20:44
10	that processed or were in the postal business. So	10:20:50
11	that included organizations called service bureaus	10:20:56
12	that do this presorting for postal, OEM customers,	10:21:00
13	like Pitney Bowes, that produce postal equipment,	10:21:03
14	that would want it.	10:21:08
15	BY MR. HUDIS:	10:21:09
16	Q. And "OEM" is original equipment	10:21:09
17	manufacturer?	10:21:11
18	A. Correct. So our technology would go	10:21:11
19	into their postal solution that they would sell to	10:21:15
20	postal services or to service bureaus as well.	10:21:19
21	Q. And in context of your last answer, a	10:21:23
22	"solution" is a product?	10:21:26
23	A. Yes.	10:21:29
24	Q. As a product of RAF Technology, what is	10:21:30
25	or was its complementary processing technology?	10:21:32

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1	MR. KAPLAN: Objection. Compound.	10:21:38
2	THE WITNESS: I actually don't recall	10:21:46
3	that particular term at RAF.	10:21:47
4	BY MR. HUDIS:	10:21:49
5	Q. Would it refresh your recollection if I	10:21:51
6	told you that complementary processing technology	10:21:53
7	was used by RAF Technology in mail recognition and	10:21:57
8	sorting operations?	10:22:02
9	A. I don't know the marketing terms they	10:22:14
10	use. We talk more about the customers and the	10:22:15
11	technical problems that we solve rather than sort	10:22:20
12	of the marketing content. But it would seem	10:22:23
13	consistent with what RAF does.	10:22:27
14	(Whereupon, Deposition Exhibit 51 was	10:22:48
15	marked for identification.)	10:22:48
16	BY MR. HUDIS:	10:22:49
17	Q. Mr. Fruchterman, I now place in front of	10:22:53
18	you what's been marked as Exhibit 51. And I'd	10:22:54
19	like you to just familiarize yourself with the	10:22:57
20	document.	10:22:59
21	MR. KAPLAN: Mr. Hudis, am I correct to	10:23:11
22	understand that this is something your office	10:23:13
23	created?	10:23:16
24	MR. HUDIS: Yes. From publicly	10:23:16
25	available information.	10:23:18

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1	MR. KAPLAN: And that would be the same	10:23:23
2	as Exhibit 50?	10:23:24
3	MR. HUDIS: That is true.	10:23:26
4	THE WITNESS: I'm ready to answer	10:23:40
5	questions about the document.	10:23:41
6	BY MR. HUDIS:	10:23:41
7	Q. Mr. Fruchterman, on pages 1 through 4,	10:23:42
8	do you recognize these as patents that were issued	10:23:49
9	to RAF Technology?	10:23:55
10	MR. KAPLAN: Objection. Vague.	10:23:59
11	Compound.	10:24:00
12	THE WITNESS: Without reading each one	10:24:03
13	line by line, they all seem -- the ones that I'm	10:24:04
14	spot-checking all seem consistent with the areas	10:24:08
15	that RAF works in and the names of engineers and	10:24:11
16	inventors at RAF that I am familiar with.	10:24:14
17	BY MR. HUDIS:	10:24:20
18	Q. And from pages 4 through 8 of	10:24:20
19	Exhibit 51, do you recognize these as pending	10:24:28
20	patent applications of RAF Technology?	10:24:33
21	MR. KAPLAN: Objection. Vague.	10:24:36
22	Compound.	10:24:37
23	THE WITNESS: Similar to my prior	10:24:39
24	answer, the topics and the inventors are all	10:24:40
25	familiar based on spot-checking these, without	10:24:44

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1	reading them comprehensively.	10:24:47
2	BY MR. HUDIS:	10:24:50
3	Q. On pages 8 and 9 of Exhibit 51, do you	10:24:51
4	recognize these as trademarks registered to RAF	10:24:55
5	Technology?	10:25:02
6	A. Yeah.	10:25:04
7	MR. KAPLAN: Objection. Vague.	10:25:04
8	Compound.	10:25:05
9	THE WITNESS: Yes. All of these	10:25:06
10	trademarks are familiar to me.	10:25:07
11	BY MR. HUDIS:	10:25:09
12	Q. And pages 9 through 10, do you recognize	10:25:10
13	that list as pending trademark applications of RAF	10:25:14
14	Technology?	10:25:18
15	MR. KAPLAN: Objection. Vague.	10:25:20
16	Compound.	10:25:21
17	THE WITNESS: Yes. They all look	10:25:23
18	familiar to me from my service on the board at	10:25:24
19	RAF.	10:25:27
20	BY MR. HUDIS:	10:25:43
21	Q. Okay. Done with that one.	10:25:44
22	Mr. Fruchterman, if you could pull out	10:25:44
23	your resume again. That was Exhibit 49.	10:25:44
24	A. Okay.	10:25:48
25	Q. Thank you.	10:25:50

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1	A.	All right.	10:25:56
2	Q.	According to your resume, Exhibit 49,	10:25:56
3		Mr. Fruchterman, you worked at a company called	10:25:59
4		Arkenstone, Inc., from 1989 through 2000?	10:26:02
5	A.	Yes.	10:26:07
6	Q.	What type of company was Arkenstone?	10:26:07
7	A.	It was a California public benefit	10:26:11
8		corporation that had 501(c)(3) charity status.	10:26:13
9	Q.	What types of products did it make?	10:26:17
10	A.	Primarily reading machines or systems	10:26:20
11		for people with disabilities.	10:26:22
12	Q.	What types of disabilities?	10:26:24
13	A.	Vision impairments, learning	10:26:27
14		disabilities, such as dyslexia, and physical	10:26:30
15		disabilities that might interfere with reading,	10:26:34
16		such as quadriplegia, fine motor control issues,	10:26:38
17		cerebral palsy, traumatic brain injury and others.	10:26:45
18	Q.	And these products that you just	10:27:25
19		described, they were sold to customers?	10:27:27
20	A.	Yes.	10:27:33
21	Q.	What services, if any, did Arkenstone	10:27:35
22		render to customers at the time you were there?	10:27:39
23	A.	It was primarily a product sales	10:27:48
24		company, and it rendered services associated with	10:27:50
25		the sale of the products, which included	10:27:53

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1	maintenance at one point in time, and customer	10:27:56
2	service and support.	10:28:02
3	Q. What was the range of the sale price of	10:28:07
4	these reading machines at Arkenstone?	10:28:09
5	MR. KAPLAN: Objection. Foundation.	10:28:13
6	THE WITNESS: The first price point was	10:28:15
7	under \$5,000 to turn a talking PC into a reading	10:28:18
8	machine. And prices fell over the time period.	10:28:24
9	BY MR. HUDIS:	10:28:29
10	Q. So it started around under 5,000. As	10:28:29
11	Arkenstone continued and the technology got	10:28:32
12	better, faster, cheaper, the products got less	10:28:35
13	expensive?	10:28:39
14	A. 5,000, 4,000, 3,000, 2500, 1800, 1500.	10:28:40
15	Q. And were the reading machines at	10:28:46
16	Arkenstone produced based upon Calera's OCR	10:28:48
17	technology?	10:28:54
18	MR. KAPLAN: Objection. Foundation.	10:28:55
19	THE WITNESS: Yes.	10:28:56
20	BY MR. HUDIS:	10:28:56
21	Q. And you were the president, CEO,	10:29:01
22	chairman and founder from Arkenstone from 1989	10:29:03
23	through 2000?	10:29:05
24	A. Correct.	10:29:08
25	Q. Is this company still in business today?	10:29:09

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1	Arkenstone.	10:29:11
2	A. Not under that name.	10:29:14
3	Q. What happened to the company?	10:29:18
4	A. It has been merged into the charity that	10:29:20
5	is now known commonly as Benetech.	10:29:22
6	Q. In 2000, did Arkenstone sell its --	10:29:30
7	repeat -- I'm going to rephrase the question.	10:29:38
8	In 2000, did Arkenstone sell some -- at	10:29:41
9	least some of its assets to Freedom Scientific?	10:29:43
10	MR. KAPLAN: Objection. Vague.	10:29:48
11	THE WITNESS: Yes.	10:29:49
12	BY MR. HUDIS:	10:29:49
13	Q. Do you remember the sale price?	10:29:50
14	A. Approximately \$5 million.	10:29:53
15	Q. And was the money from that sale of the	10:29:56
16	Arkenstone assets to Freedom Scientific used to	10:29:59
17	found Benetech?	10:30:05
18	MR. KAPLAN: Objection. Vague.	10:30:11
19	THE WITNESS: It was commonly described	10:30:12
20	as such.	10:30:13
21	BY MR. HUDIS:	10:30:13
22	Q. Do you agree with that assessment?	10:30:15
23	A. Yes. But technically you might parse it	10:30:18
24	more finely.	10:30:20
25	Q. As a product of Arkenstone, what is or	10:30:28

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1	was the Arkenstone Reader?	10:30:32
2	A. The Arkenstone Reader was a device	10:30:37
3	designed to turn a standard personal computer into	10:30:44
4	a reading machine by adding a Calera TrueScan	10:30:47
5	card, a Hewlett-Packard Scanjet scanner and some	10:30:52
6	specialized software to an existing PC that	10:30:58
7	already had a voice synthesizer and a screen	10:31:02
8	reader, so that the ensemble would be able to scan	10:31:06
9	a document and read it aloud.	10:31:16
10	Q. As a product of Arkenstone,	10:31:19
11	Mr. Fruchterman, what is or was the Arkenstone	10:31:21
12	portable hand scanner?	10:31:23
13	A. I barely recall this product, but I	10:31:33
14	assume it was substituting the Hewlett-Packard	10:31:35
15	desktop Scanjet scanner with a bar scanner that	10:31:38
16	could feed a sheet of paper through a scanner.	10:31:42
17	Q. Do you recall whether the Arkenstone	10:31:50
18	mark was registered with the U.S. Patent and	10:31:53
19	Trademark Office?	10:31:54
20	A. I believe it was.	10:32:01
21	Q. Were any parts of the Arkenstone Reader	10:32:08
22	sought for patent protection?	10:32:11
23	A. Yes.	10:32:14
24	Q. Which part?	10:32:15
25	A. Actually, no. Not that particular	10:32:19

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1	product. Not the Arkenstone Reader product.	10:32:25
2	Q. Were any parts of the Arkenstone	10:32:29
3	portable hand scanner sought for patent	10:32:32
4	protection?	10:32:35
5	A. No.	10:32:36
6	Q. Was the software code for the Arkenstone	10:32:43
7	Reader registered with the U.S. Copyright Office?	10:32:45
8	A. I don't recall.	10:32:53
9	Q. Is there anything that would refresh	10:32:55
10	your recollection?	10:32:57
11	A. Beyond a formal record, no.	10:33:00
12	Q. Was the software code for the Arkenstone	10:33:03
13	portable hand scanner registered with the U.S.	10:33:06
14	Copyright Office?	10:33:08
15	A. No.	10:33:10
16	Q. As a product of Arkenstone, what is or	10:33:14
17	was VERA, V-E-R-A?	10:33:17
18	MR. KAPLAN: Objection. Compound.	10:33:19
19	THE WITNESS: The Very Easy Reading	10:33:22
20	Appliance was designed for senior citizens who	10:33:26
21	were uncomfortable using a computer. So we	10:33:30
22	wrapped the computer in a fake wooden case and	10:33:32
23	said, "This isn't a computer. It's a reading	10:33:36
24	appliance, like a piece of hi-fi equipment."	10:33:39
25		

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1	BY MR. HUDIS:	10:33:47
2	Q. Was the VERA mark, to the best of your	10:33:48
3	recollection, registered with the U.S. Patent and	10:33:51
4	Trademark Office?	10:33:53
5	MR. KAPLAN: Objection. Vague.	10:33:54
6	THE WITNESS: No.	10:33:55
7	BY MR. HUDIS:	10:33:56
8	Q. Was the software code for the VERA	10:33:58
9	product registered with the U.S. Copyright Office?	10:34:03
10	A. No.	10:34:07
11	Q. As a product of Arkenstone, what is or	10:34:09
12	was Open Book?	10:34:11
13	MR. KAPLAN: Objection. Compound.	10:34:14
14	THE WITNESS: Similar to the transition	10:34:20
15	from the Calera TrueScan hardware card to the	10:34:21
16	WordScan software product, Open Book was a product	10:34:24
17	based on the WordScan technology to replace the	10:34:32
18	hardware coprocessor card with software running on	10:34:38
19	the computer's main CPU.	10:34:41
20	BY MR. HUDIS:	10:34:45
21	Q. And Open Book ran over Windows software?	10:34:45
22	A. Open Book was two different products	10:34:49
23	with a common name. Open Book itself was a	10:34:57
24	reading machine sold as a hardware unit plus	10:35:05
25	scanner plus keypad. And Open Book Unbound was	10:35:09

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1	the software-only version that was designed to	10:35:14
2	turn a PC into a reading system. And all of these	10:35:17
3	were based on Microsoft Windows technology.	10:35:23
4	Q. So if I understand your testimony, the	10:35:28
5	Open -- Open Book was marketed as two different	10:35:31
6	products, at least at one time, one as an	10:35:34
7	appliance and the other one called Open Book	10:35:37
8	Unbound, as software?	10:35:40
9	A. Correct.	10:35:42
10	MR. KAPLAN: Objection. Misstates	10:35:42
11	testimony.	10:35:43
12	THE WITNESS: Sorry.	10:35:43
13	BY MR. HUDIS:	10:35:45
14	Q. Was the Open Book mark registered with	10:35:45
15	the U.S. Patent and Trademark Office?	10:35:47
16	MR. KAPLAN: Objection. Foundation.	10:35:51
17	Vague.	10:35:54
18	THE WITNESS: I don't remember.	10:35:55
19	BY MR. HUDIS:	10:35:56
20	Q. Is there anything that would refresh	10:35:57
21	your recollection?	10:35:58
22	A. A formal registration indication.	10:36:00
23	Q. Was the software code for Open Book	10:36:04
24	registered with the U.S. Copyright Office?	10:36:06
25	MR. KAPLAN: Objection. Foundation.	10:36:09

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1	THE WITNESS: I don't recall.	10:36:11
2	BY MR. HUDIS:	10:36:13
3	Q. Is there anything that would refresh	10:36:18
4	your recollection?	10:36:19
5	A. Not beyond a registration statement.	10:36:20
6	Q. As a product of Arkenstone, what is or	10:36:24
7	was WYNN, What You Need Now?	10:36:26
8	MR. KAPLAN: Objection. Compound.	10:36:30
9	MR. HUDIS: That's all one product.	10:36:31
10	MR. KAPLAN: Yeah. But you're asking	10:36:34
11	him what it was.	10:36:35
12	MR. HUDIS: Or is.	10:36:37
13	MR. KAPLAN: What it is.	10:36:37
14	MR. HUDIS: All right.	10:36:38
15	THE WITNESS: WYNN was similar to Open	10:36:47
16	Book Unbound as -- in that it was a OCR-based	10:36:48
17	software product. It was specifically designed	10:36:56
18	for the needs of people with learning disabilities	10:36:57
19	rather than blind people.	10:36:59
20	BY MR. HUDIS:	10:37:03
21	Q. Would it be correct to characterize	10:37:03
22	WYNN, What You Need Now, as a customizable user	10:37:05
23	interface for the Open Book software?	10:37:11
24	MR. KAPLAN: Objection. Vague.	10:37:13
25	THE WITNESS: No.	10:37:17

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1	BY MR. HUDIS:	10:37:17
2	Q. How would you describe it?	10:37:20
3	MR. KAPLAN: Objection. Asked and	10:37:24
4	answered.	10:37:26
5	THE WITNESS: I thought of it as a	10:37:29
6	completely different user interface designed for	10:37:34
7	the needs of people with learning disabilities	10:37:39
8	and, to some extent, people with low vision, that	10:37:42
9	was built on top of the same OCR technology as the	10:37:46
10	Open Book product but was not simply grafted onto	10:37:50
11	the Open Book product.	10:37:57
12	BY MR. HUDIS:	10:38:04
13	Q. Did the Open Book -- did either of the	10:38:05
14	two Open Book products, whether it was the	10:38:08
15	appliance or the software, come with OCR	10:38:11
16	technology?	10:38:14
17	A. Yeah --	10:38:16
18	MR. KAPLAN: Objection. Foundation,	10:38:16
19	vague.	10:38:18
20	THE WITNESS: Yes. It was built in.	10:38:18
21	BY MR. HUDIS:	10:38:20
22	Q. Did the WYNN product come with OCR	10:38:23
23	technology?	10:38:27
24	MR. KAPLAN: Objection. Vague.	10:38:28
25	Foundation.	10:38:29

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1	THE WITNESS: The primary WYNN product	10:38:29
2	did come with OCR technology.	10:38:31
3	BY MR. HUDIS:	10:38:35
4	Q. Was the software code for the OCR	10:38:36
5	technology that was built into Open Book	10:38:41
6	registered with the U.S. Copyright Office?	10:38:43
7	MR. KAPLAN: Objection. Foundation.	10:38:45
8	Vague.	10:38:46
9	THE WITNESS: I believe that in the	10:38:48
10	documents that you've showed me, the companies	10:38:50
11	that make those OCR technologies did have	10:38:52
12	registrations and trademarks and patents.	10:38:57
13	Certainly my nonprofit didn't do anything separate	10:39:00
14	for the OCR technology.	10:39:03
15	BY MR. HUDIS:	10:39:04
16	Q. And that would be true of WYNN as well?	10:39:05
17	MR. KAPLAN: Objection. Vague.	10:39:07
18	Foundation.	10:39:07
19	THE WITNESS: Yes.	10:39:08
20	BY MR. HUDIS:	10:39:11
21	Q. As a product of Arkenstone, what is or	10:39:24
22	was Strider, S-T-R-I-D-E-R?	10:39:26
23	MR. KAPLAN: Objection. Compound.	10:39:30
24	THE WITNESS: It was a talking GPS	10:39:35
25	product designed to guide blind users to their	10:39:39

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1	destination.	10:39:45
2	BY MR. HUDIS:	10:39:47
3	Q. Was the Strider mark registered with the	10:39:47
4	U.S. Patent and Trademark Office?	10:39:48
5	MR. KAPLAN: Objection. Lacks	10:39:50
6	foundation. Vague.	10:39:51
7	THE WITNESS: I do not believe so.	10:39:53
8	BY MR. HUDIS:	10:39:58
9	Q. Was the software code for the Strider	10:39:59
10	product registered with the U.S. Copyright Office?	10:40:00
11	MR. KAPLAN: Objection. Lacks	10:40:02
12	foundation. Vague.	10:40:03
13	THE WITNESS: Not that I recall.	10:40:05
14	BY MR. HUDIS:	10:40:05
15	Q. Was any part of the Strider product	10:40:05
16	subject to U.S. patent protection?	10:40:08
17	MR. KAPLAN: Objection. Calls for a	10:40:11
18	legal conclusion. Lacks foundation. Vague.	10:40:11
19	THE WITNESS: Yes.	10:40:13
20	BY MR. HUDIS:	10:40:14
21	Q. As a product of Arkenstone, what is or	10:40:17
22	was Atlas Speaks?	10:40:19
23	MR. KAPLAN: Objection. Compound.	10:40:23
24	THE WITNESS: It was an accessible map	10:40:28
25	product for the blind, to look at maps and plot	10:40:32

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1	routes. It would be easy to characterize it as	10:40:35
2	Strider without the GPS.	10:40:38
3	MR. HUDIS: Off the record.	10:40:53
4	THE VIDEOGRAPHER: Coming off the record	10:40:54
5	at 10:40.	10:40:56
6	MR. KAPLAN: You need my consent to go	10:41:03
7	off the record.	10:41:03
8	Can you let me know why?	10:41:03
9	MR. HUDIS: I just want to take this	10:41:03
10	call.	10:41:03
11	MR. KAPLAN: Okay. Off the record is	10:41:08
12	fine.	10:41:09
13	(Discussion held off record.)	10:43:06
14	THE VIDEOGRAPHER: Back on the record at	10:43:29
15	10:43.	10:43:30
16	BY MR. HUDIS:	10:43:32
17	Q. Mr. Fruchterman, was the Atlas Speaks	10:43:35
18	mark registered with the U.S. Patent and Trademark	10:43:36
19	Office?	10:43:38
20	MR. KAPLAN: Objection. Lacks	10:43:39
21	foundation. Vague.	10:43:40
22	THE WITNESS: I don't believe so.	10:43:41
23	BY MR. HUDIS:	10:43:41
24	Q. Do you know if the software code for the	10:43:44
25	Atlas Speaks product was registered with the U.S.	10:43:47

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1	Copyright Office?	10:43:50
2	MR. KAPLAN: Objection. Lacks	10:43:51
3	foundation. Vague.	10:43:51
4	THE WITNESS: I don't know.	10:43:53
5	BY MR. HUDIS:	10:43:53
6	Q. And we discussed that Arkenstone had an	10:43:54
7	asset sale to Freedom Scientific in 2000.	10:44:10
8	Do you remember that?	10:44:14
9	A. Correct.	10:44:14
10	Q. All right. I'd like to know whether	10:44:15
11	each one of the following products was part of	10:44:17
12	that asset sale. And you can just say "yes" or	10:44:20
13	"no."	10:44:23
14	Open Book?	10:44:24
15	MR. KAPLAN: Objection. Lacks	10:44:26
16	foundation. Vague.	10:44:26
17	THE WITNESS: Yes.	10:44:28
18	BY MR. HUDIS:	10:44:28
19	Q. WYNN?	10:44:30
20	MR. KAPLAN: Objection. Lacks	10:44:30
21	foundation. Vague.	10:44:31
22	THE WITNESS: Yes.	10:44:32
23	BY MR. HUDIS:	10:44:34
24	Q. Strider?	10:44:34
25	MR. KAPLAN: Objection. Lacks	10:44:35

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1	foundation. Vague.	10:44:35
2	THE WITNESS: I don't believe so.	10:44:40
3	BY MR. HUDIS:	10:44:41
4	Q. Atlas Speaks?	10:44:41
5	MR. KAPLAN: Objection. Lacks	10:44:42
6	foundation. Vague.	10:44:43
7	THE WITNESS: I don't believe so.	10:44:44
8	BY MR. HUDIS:	10:44:46
9	Q. VERA?	10:44:46
10	MR. KAPLAN: Objection. Lacks	10:44:47
11	foundation. Vague.	10:44:48
12	THE WITNESS: Yes.	10:44:50
13	BY MR. HUDIS:	10:44:50
14	Q. The Arkenstone mark?	10:44:50
15	MR. KAPLAN: Objection. Lacks	10:44:52
16	foundation. Vague.	10:44:52
17	THE WITNESS: Yes.	10:44:53
18	BY MR. HUDIS:	10:44:55
19	Q. Okay. Now, of the products that you	10:44:57
20	listed, that was part of the asset sale, was the	10:45:07
21	code for those products part of the asset sale?	10:45:10
22	MR. KAPLAN: Objection. Lacks	10:45:15
23	foundation. Vague.	10:45:15
24	THE WITNESS: Yes.	10:45:17
25		

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1	BY MR. HUDIS:	10:45:19
2	Q. Were the copyright rights for those	10:45:29
3	products transferred as parts of the asset sale?	10:45:31
4	MR. KAPLAN: Objection. Calls for a	10:45:34
5	legal conclusion. Lacks foundation. Vague.	10:45:35
6	THE WITNESS: As a layman, I believe so.	10:45:39
7	BY MR. HUDIS:	10:45:44
8	Q. By yes or no, I'd like to know whether	10:45:46
9	the following technologies were sold to Freedom	10:45:49
10	Scientific by Arkenstone as part of the asset	10:45:53
11	sale.	10:45:58
12	Arkenstone Reader?	10:45:59
13	MR. KAPLAN: Objection. Vague. Lacks	10:46:00
14	foundation.	10:46:01
15	THE WITNESS: I'm not sure because I	10:46:13
16	don't think it was an active product. So they	10:46:14
17	probably could claim it, but I'm not sure we	10:46:17
18	actually did it because I don't think it was alive	10:46:20
19	at that time.	10:46:22
20	BY MR. HUDIS:	10:46:22
21	Q. Would your answer be the same for	10:46:23
22	Arkenstone portable scanner?	10:46:24
23	MR. KAPLAN: Objection. Vague. Lacks	10:46:27
24	foundation.	10:46:28
25	THE WITNESS: Yes.	10:46:29

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1	BY MR. HUDIS:	10:46:29
2	Q. Would your answer be the same for the	10:46:29
3	VERA product?	10:46:31
4	MR. KAPLAN: Objection. Vague. Lacks	10:46:32
5	foundation.	10:46:33
6	THE WITNESS: No. The VERA product was	10:46:34
7	active and sold as part of the asset sale.	10:46:36
8	(Whereupon, Deposition Exhibit 52 was	10:47:05
9	marked for identification.)	10:47:05
10	BY MR. HUDIS:	10:47:05
11	Q. Mr. Fruchterman, I show you now what has	10:47:05
12	been marked as Exhibit 52.	10:47:08
13	MR. KAPLAN: Counsel, you'll represent	10:47:13
14	that this is another document created by your	10:47:14
15	office?	10:47:16
16	MR. HUDIS: Yes. From publicly	10:47:17
17	available records.	10:47:20
18	BY MR. HUDIS:	10:47:21
19	Q. Mr. Fruchterman, do you recognize in the	10:47:22
20	top chart on the single page of Exhibit 52 the	10:47:29
21	titles of patents that were owned by Arkenstone,	10:47:33
22	Inc., at one time?	10:47:38
23	A. Yes.	10:47:40
24	Q. And in the bottom chart, a copyright	10:47:42
25	registration that was owned by Arkenstone at one	10:47:47

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1	time?	10:47:49
2	A. I don't recognize that work. And I'm	10:47:53
3	just -- the date predates the existence of	10:48:18
4	Arkenstone by seven years, so something's wrong	10:48:25
5	about this document.	10:48:30
6	Q. Okay.	10:48:32
7	MR. KAPLAN: Is that true for the second	10:48:33
8	patent as well?	10:48:35
9	THE WITNESS: I recognize the second	10:48:35
10	patent, but I think the date is wrong as well.	10:48:36
11	Whereas, the date on the first patent looks	10:48:40
12	vaguely right.	10:48:42
13	(Whereupon, Deposition Exhibit 53A and	10:49:34
14	53B were marked for identification.)	10:49:34
15	THE WITNESS: Thank you.	10:49:35
16	BY MR. HUDIS:	10:49:47
17	Q. Mr. Fruchterman, I show you what has	10:49:48
18	been marked as Exhibits 53A and 53B. Let's take a	10:49:49
19	look at Exhibit 53A.	10:49:56
20	Do you recognize this document?	10:50:00
21	A. Yes. It's a patent where I am listed as	10:50:03
22	an inventor.	10:50:06
23	Q. And was issued on November 28, 1995?	10:50:08
24	A. November 28th, 1995, yes.	10:50:17
25	Q. And the patent number is listed as	10:50:19

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1	5,470,233. I will refer to this as "the	10:50:22
2	'233 patent."	10:50:28
3	Do you understand that?	10:50:30
4	A. Yes.	10:50:31
5	Q. All right. What was the nature of the	10:50:31
6	invention claimed in the '233 patent of	10:50:33
7	Exhibit 53A?	10:50:36
8	MR. KAPLAN: Objection. Calls for a	10:50:38
9	legal conclusion. Lacks foundation.	10:50:39
10	THE WITNESS: In layman's term, it's a	10:50:45
11	patent on technology to help a blind person use	10:50:47
12	GPS to move around.	10:50:49
13	BY MR. HUDIS:	10:50:54
14	Q. Was that the product that was sold by	10:50:54
15	Arkenstone under the Strider mark?	10:50:57
16	MR. KAPLAN: Objection. Vague.	10:50:59
17	THE WITNESS: Yes. We -- the Strider	10:51:08
18	product incorporated the patented technology	10:51:10
19	subject to this patent.	10:51:15
20	BY MR. HUDIS:	10:51:16
21	Q. Who was the assigning owner of the	10:51:16
22	'233 patent when it issued in 1995?	10:51:19
23	MR. KAPLAN: Objection. Lacks	10:51:23
24	foundation. Vague. Calls for a legal conclusion.	10:51:23
25	THE WITNESS: Arkenstone.	10:51:25

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1	BY MR. HUDIS:	10:51:32
2	Q. Mr. Fruchterman, if we could turn for a	10:51:34
3	moment to Exhibit 53B.	10:51:36
4	And if you could turn to the last page.	10:51:55
5	Actually, it's bordering on the fifth and sixth	10:51:59
6	pages.	10:52:02
7	You notice that there was an assignment	10:52:02
8	of the inventor's interest to Arkenstone, Inc.?	10:52:04
9	A. Yes.	10:52:09
10	Q. And ultimately, the patent was assigned	10:52:30
11	from Arkenstone to Freedom Scientific?	10:52:34
12	MR. KAPLAN: Objection. Lacks	10:52:37
13	foundation. Calls for a legal conclusion. Vague.	10:52:37
14	THE WITNESS: No.	10:52:39
15	BY MR. HUDIS:	10:52:39
16	Q. It was not?	10:52:40
17	A. It was not.	10:52:40
18	Q. What happened -- today, as you sit here,	10:52:43
19	who is the current owner of the '233 patent of	10:52:50
20	Exhibit 53A?	10:52:57
21	MR. KAPLAN: Objection. Calls for a	10:52:58
22	legal conclusion. Lacks foundation.	10:52:58
23	THE WITNESS: The world. It's expired.	10:53:01
24	BY MR. HUDIS:	10:53:02
25	Q. Before its expiration, who was the owner	10:53:03

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1	of the '233 patent of Exhibit 53A?	10:53:06
2	MR. KAPLAN: Objection. Lacks	10:53:09
3	foundation. Calls for a legal conclusion.	10:53:11
4	THE WITNESS: Beneficent Technology,	10:53:14
5	Inc. which is the legal corporate name of	10:53:16
6	Benetech.	10:53:18
7	BY MR. HUDIS:	10:53:20
8	Q. So to the best of your recollection, the	10:54:04
9	'233 patent was not a part of the asset sale from	10:54:06
10	Arkenstone to Freedom Scientific?	10:54:10
11	A. That was --	10:54:12
12	MR. KAPLAN: Objection. Vague. Lacks	10:54:13
13	foundation.	10:54:13
14	THE WITNESS: That was my understanding,	10:54:14
15	yes.	10:54:15
16	BY MR. HUDIS:	10:54:18
17	Q. While it was still active, was the	10:54:18
18	'233 patent ever licensed to third parties?	10:54:20
19	MR. KAPLAN: Objection. Lacks	10:54:23
20	foundation. Vague. Calls for a legal conclusion.	10:54:23
21	THE WITNESS: Yes.	10:54:26
22	BY MR. HUDIS:	10:54:28
23	Q. Was it licensed for royalties?	10:54:28
24	MR. KAPLAN: Objection. Vague. Lacks	10:54:30
25	foundation.	10:54:31

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1	THE WITNESS: Yes.	10:54:33
2	BY MR. HUDIS:	10:54:33
3	Q. To whom was the '233 patent of	10:54:34
4	Exhibit 53A licensed at the time it was active?	10:54:36
5	MR. KAPLAN: Objection. Vague. Lacks	10:54:41
6	foundation.	10:54:41
7	THE WITNESS: I don't know their full	10:54:45
8	legal name, but it's like the Sendero Group.	10:54:46
9	BY MR. HUDIS:	10:54:49
10	Q. Spell Sendero.	10:54:50
11	A. S-E-N-D-E-R-O.	10:54:51
12	Q. Do you remember the financial terms of	10:54:55
13	the license?	10:54:58
14	A. It was a minimum -- a minimal royalty,	10:55:02
15	and the payments were not large.	10:55:05
16	Q. Define "not large."	10:55:13
17	A. I'd be stunned if we collected \$10,000	10:55:14
18	over the entire life of the patent in royalties.	10:55:17
19	Q. Was Sendero the only company to whom the	10:55:20
20	'233 patent of Exhibit 53A was licensed?	10:55:23
21	MR. KAPLAN: Objection. Calls for a	10:55:27
22	legal conclusion. Vague. Lacks foundation.	10:55:27
23	THE WITNESS: There was another company	10:55:32
24	that was -- and I do not know the legal term, but	10:55:34
25	sort of a co-owner, and they had rights to	10:55:38

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1	practice the patent without paying us a royalty.	10:55:41
2	BY MR. HUDIS:	10:55:43
3	Q. And who was that?	10:55:43
4	A. They've gone by different names. Their	10:55:48
5	current name is HumanWare.	10:55:51
6	Q. Do you know what the name of the company	10:55:59
7	was at the time they were co-owner of the	10:56:00
8	'233 patent while it was active?	10:56:04
9	MR. KAPLAN: Objection. Misstates	10:56:07
10	testimony. Argumentative.	10:56:08
11	THE WITNESS: VisuAide, V-I-S-U-A-I-D-E.	10:56:11
12	BY MR. HUDIS:	10:56:41
13	Q. Turning back to your resume of	10:56:41
14	Exhibit 49, Mr. Fruchterman, according to your	10:56:45
15	resume, Benetech was founded in 2000?	10:56:49
16	MR. KAPLAN: Objection. Misstates the	10:57:01
17	document.	10:57:02
18	THE WITNESS: My nonprofit activities	10:57:05
19	started operating under the Benetech name in 2000.	10:57:09
20	BY MR. HUDIS:	10:57:17
21	Q. Now, the official name of the company is	10:57:17
22	Beneficent Technology, Inc., correct?	10:57:20
23	A. Correct.	10:57:23
24	Q. And it's located in Palo Alto,	10:57:23
25	California?	10:57:25

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1	A.	Correct.	10:57:26
2	Q.	All right. And it's a nonprofit	10:57:27
3		California company?	10:57:29
4	A.	I believe it's structured as a	10:57:32
5		California public benefit corporation.	10:57:33
6	Q.	And tell me the nature of -- withdraw	10:57:51
7		the question.	10:57:56
8		When I refer to "Benetech," we will	10:57:57
9		understand that that is the trade name for	10:57:59
10		Beneficent Technology?	10:58:02
11	A.	Okay.	10:58:08
12	Q.	Would you understand it that way?	10:58:09
13	A.	During the current time period, yes.	10:58:15
14		We've had more complicated legal structures in the	10:58:17
15		past, where "Benetech" might refer to any one of	10:58:19
16		three different corporate entities. But I'm happy	10:58:23
17		just to call them all Benetech for the purposes of	10:58:25
18		this conversation.	10:58:27
19	Q.	Thank you.	10:58:28
20		What type of company is Benetech?	10:58:29
21		MR. KAPLAN: Objection. Vague.	10:58:31
22		THE WITNESS: It's a charity. And it	10:58:33
23		does technology for social good.	10:58:38
24		BY MR. HUDIS:	10:58:40
25	Q.	I've read, Mr. Fruchterman, that	10:58:59

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1	Benetech was started up from the result of the	10:59:00
2	asset sale from Arkenstone to Freedom Scientific.	10:59:04
3	Is that your understanding?	10:59:10
4	MR. KAPLAN: Objection. Asked and	10:59:11
5	answered. Vague.	10:59:12
6	THE WITNESS: There were a series of	10:59:14
7	legal transactions that, over time, have created	10:59:15
8	the Benetech we know today.	10:59:23
9	BY MR. HUDIS:	10:59:28
10	Q. What were those to the best of your	10:59:29
11	recollection?	10:59:30
12	A. The nonprofit that was formerly known as	10:59:31
13	Arkenstone changed its name, because the	10:59:38
14	Arkenstone name was sold to Freedom Scientific.	10:59:43
15	It had a charter limited to helping the disabled.	10:59:47
16	Beneficent Technology, Inc., was created	10:59:57
17	with as -- sorry, can't disclose -- let's just say	11:00:01
18	a vanilla charitable charter, so that it could do	11:00:04
19	a wider range of charitable activities.	11:00:08
20	A wholly owned for profit subsidiary	11:00:12
21	named Bengineering, Inc., was also created to	11:00:16
22	conduct services connected with the asset sale.	11:00:20
23	Q. And what were those services?	11:00:28
24	A. Primarily engineering services, to	11:00:29
25	continue the product development of the products	11:00:32

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1	that were sold for a period following the asset	11:00:34
2	sale.	11:00:38
3	MR. KAPLAN: Let me just interrupt here	11:00:40
4	for a second. I'm not sure exactly where you're	11:00:41
5	going with this, but if we get into areas that are	11:00:44
6	potentially confidential information of Benetech	11:00:47
7	or other entities, my understanding of the	11:00:50
8	protective order is that neither party will	11:00:51
9	disclose the deposition transcript until 30 days	11:00:54
10	have elapsed, giving the -- giving us the	11:00:57
11	opportunity to designate portions or the entire	11:00:59
12	transcript as confidential. Is that correct?	11:01:02
13	MR. HUDIS: Counsel, that's correct.	11:01:04
14	MR. KAPLAN: Okay. Good. Just glad we	11:01:05
15	had that on the record.	11:01:07
16	THE WITNESS: And nothing I've talked	11:01:08
17	about so far is, I believe, confidential.	11:01:09
18	BY MR. HUDIS:	11:01:11
19	Q. Mr. Fruchterman, your counsel raises a	11:01:11
20	good point. If anything I ask you in your mind	11:01:14
21	requires you to disclose confidential information,	11:01:19
22	would you let us all know, please?	11:01:22
23	A. Yes.	11:01:24
24	MR. KAPLAN: Thank you.	11:01:26
25	THE WITNESS: I'll let you decide if	11:01:31

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1	there's a follow-up question.	11:01:33
2	BY MR. HUDIS:	11:01:39
3	Q. So one of the products that has been	11:01:39
4	made by Benetech is a series of software tools for	11:01:46
5	people who are blind or have visual disabilities	11:01:51
6	to access printed information?	11:01:56
7	A. That is some of what we do. Sorry. I	11:01:59
8	thought you had -- I thought I had given the	11:02:02
9	pause.	11:02:05
10	MR. KAPLAN: I was wondering what the	11:02:05
11	question was going to be.	11:02:06
12	THE WITNESS: Okay. Okay.	11:02:08
13	BY MR. HUDIS:	11:02:09
14	Q. And you have been the president, CEO,	11:02:09
15	chairman and founder since 2000?	11:02:12
16	A. No.	11:02:14
17	Q. What part of my last question was	11:02:20
18	incorrect?	11:02:21
19	A. In 2000, I had all of those titles. At	11:02:26
20	present, I am the founder and CEO.	11:02:30
21	Q. I see. So from 2000 to 2014, you were	11:02:36
22	the president, CEO, chairman and founder, at least	11:02:39
23	according to your resume, Exhibit 49.	11:02:43
24	A. I believe so. Yes.	11:02:47
25	Q. And from 2015 -- well, to the present --	11:02:48

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1 we're still in 2015 -- you were the CEO and 11:02:53
2 founder? 11:02:55

3 A. Correct. 11:03:01

4 Q. Thank you. 11:03:02

5 What has been -- 11:03:05

6 MR. KAPLAN: Let me make sure the 11:03:06
7 witness's answer is finished. 11:03:07

8 THE WITNESS: Would you like me to 11:03:12
9 explain in more detail how finely graded that 11:03:13
10 answer is, or are we good? 11:03:19

11 BY MR. HUDIS: 11:03:22

12 Q. Well, my next question was going to be 11:03:22
13 the nature of your duties and responsibilities. 11:03:25
14 So if that would help you, please. 11:03:28

15 A. Okay. So I transferred the chairman's 11:03:36
16 responsibilities first in early 2014, and I ceased 11:03:41
17 being the president in the idea that we had a new 11:03:50
18 president in January of this year, though I 11:03:52
19 believe I stopped using the term "president" 11:03:56
20 somewhere during the last year at the suggestion 11:03:58
21 of one of my board members. 11:03:59

22 Q. So from 2000 to 2014, what were your 11:04:04
23 general duties and responsibilities at Benetech? 11:04:08

24 MR. KAPLAN: Objection. Vague. 11:04:12

25 THE WITNESS: I was the main guy. So in 11:04:15

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1	my role as chairman, I was responsible for the	11:04:22
2	standard duties of a chairman of a board of	11:04:25
3	directors, which I can elaborate if needed.	11:04:28
4	BY MR. HUDIS:	11:04:34
5	Q. You ran board meetings?	11:04:34
6	A. I did.	11:04:36
7	Q. You set the agenda?	11:04:36
8	A. I did.	11:04:38
9	Q. You set policy for the company?	11:04:38
10	A. In --	11:04:41
11	MR. KAPLAN: Objection. Vague.	11:04:43
12	THE WITNESS: I set policy for the	11:04:44
13	company in conjunction with either the board for	11:04:45
14	board-level issues or my management team for	11:04:48
15	issues that were the scope of the management	11:04:51
16	team's.	11:04:52
17	BY MR. HUDIS:	11:04:53
18	Q. Does that generally describe your duties	11:04:53
19	and responsibilities as chairman?	11:04:56
20	A. Yes.	11:04:57
21	Q. Okay. And up until 2015, starting in	11:04:58
22	2000, you were the president?	11:05:04
23	A. Correct.	11:05:06
24	Q. What were your duties and	11:05:06
25	responsibilities as president of --	11:05:08

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1	MR. KAPLAN: Objection.	11:05:10
2	BY MR. HUDIS:	11:05:10
3	Q. -- Benetech?	11:05:10
4	MR. KAPLAN: Objection. Vague.	11:05:12
5	THE WITNESS: During that time period,	11:05:18
6	the title "president" and "chief executive	11:05:20
7	officer" were essentially interchangeable, and our	11:05:22
8	bylaws specified that the president was the	11:05:25
9	executive chief officer.	11:05:28
10	So my responsibilities with those dual	11:05:30
11	titles was to be the chief executive officer of a	11:05:33
12	nonprofit corporation, a public benefit	11:05:38
13	corporation, and so I oversaw everything.	11:05:40
14	BY MR. HUDIS:	11:05:48
15	Q. Product development?	11:05:50
16	A. I was responsible for all aspects of the	11:05:51
17	operations of the organization, from legal and	11:05:53
18	administrative, to technical and product, to	11:05:56
19	fundraising, to public relations, to advocacy. I	11:05:58
20	was responsible for everything we did, ultimately,	11:06:04
21	in the role of chief executive officer.	11:06:08
22	Our chief financial officer had certain	11:06:14
23	statutory responsibilities and had a dotted line	11:06:16
24	to our board of directors, but I was her	11:06:20
25	supervisor.	11:06:21

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1	Q.	Mr. Fruchterman, what is Bookshare?	11:06:30
2		MR. KAPLAN: Objection. Vague.	11:06:32
3		THE WITNESS: It's a digital library for	11:06:35
4		people with print disabilities.	11:06:37
5		BY MR. HUDIS:	11:06:41
6	Q.	Is Bookshare part of Benetech?	11:06:41
7		MR. KAPLAN: Objection. Vague.	11:06:48
8		THE WITNESS: It's a project of	11:06:50
9		Benetech.	11:06:53
10		BY MR. HUDIS:	11:06:53
11	Q.	What do you mean by "project"?	11:06:54
12	A.	Benetech runs multiple projects that	11:06:59
13		target different social needs, and we have	11:07:04
14		programs that are a level-above project that	11:07:11
15		target an area of social need. So it's a project.	11:07:14
16	Q.	Is Bookshare a stand-alone corporation?	11:07:19
17	A.	No.	11:07:23
18	Q.	Is Bookshare an unincorporated division	11:07:24
19		of Benetech?	11:07:27
20		MR. KAPLAN: Objection. Vague. Calls	11:07:31
21		for a legal conclusion.	11:07:36
22		THE WITNESS: We wouldn't call it a	11:07:42
23		division, and the only active corporate entity at	11:07:43
24		Benetech today is Beneficent Technology, Inc., and	11:07:53
25		all the things I'm describing operate under that	11:07:57

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1	corporate entity.	11:08:00
2	BY MR. HUDIS:	11:08:01
3	Q. You would describe Bookshare as a	11:08:01
4	project of Benetech?	11:08:03
5	A. Yes.	11:08:07
6	Q. All right. And that Bookshare project	11:08:08
7	is still ongoing today?	11:08:11
8	A. Yes.	11:08:13
9	Q. And it has been operating as a project	11:08:14
10	of Benetech since 2002?	11:08:16
11	A. Publicly, yes.	11:08:21
12	Q. Why did you, in your last answer,	11:08:23
13	qualify it with "publicly"?	11:08:26
14	A. When a technology product is created,	11:08:32
15	it's often operating -- being tested before its	11:08:35
16	actual public release date. So its public release	11:08:40
17	date was, I believe, in 2002, but we were working	11:08:43
18	on Bookshare or doing initial testing or beta	11:08:46
19	testing probably in 2001.	11:08:55
20	Q. Now, you described the Bookshare project	11:08:56
21	as a technology product. Why?	11:08:58
22	A. If you look at what Bookshare is, you	11:09:05
23	can think of it as a web platform that operates a	11:09:10
24	large body of software that delivers an online	11:09:16
25	library. So I think of Amazon.com as a technology	11:09:19

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1	product as well, even though it's a whole bunch of	11:09:26
2	technology that looks like a web site.	11:09:31
3	Q. As a product of Benetech, what is or was	11:09:57
4	Read2Go?	11:10:00
5	MR. KAPLAN: Objection. Compound.	11:10:01
6	THE WITNESS: Read2Go is what people	11:10:05
7	would commonly call an iPad or iPhone app that	11:10:09
8	is designed primarily as an eBook reading	11:10:15
9	product for people with disabilities.	11:10:18
10	BY MR. HUDIS:	11:10:29
11	Q. Was the Read2Go mark registered with the	11:10:29
12	U.S. Patent and Trademark Office?	11:10:30
13	MR. KAPLAN: Objection. Lacks	11:10:32
14	foundation. Calls for a legal conclusion. Vague.	11:10:32
15	THE WITNESS: It may have been.	11:10:37
16	BY MR. HUDIS:	11:10:40
17	Q. What would refresh your recollection, if	11:10:42
18	anything?	11:10:44
19	A. A public record of the registration.	11:10:45
20	Q. Was the software code for Read2Go	11:10:48
21	registered with the U.S. Copyright Office?	11:10:50
22	MR. KAPLAN: Objection. Vague. Lacks	11:10:54
23	foundation. Calls for a legal conclusion.	11:10:54
24	THE WITNESS: I don't know.	11:10:57
25		

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1	BY MR. HUDIS:	11:10:58
2	Q. What would refresh your recollection?	11:11:05
3	A. A public registration statement.	11:11:07
4	Q. As a product of Benetech, what is or was	11:11:09
5	Go Read?	11:11:11
6	MR. KAPLAN: Objection. Compound.	11:11:14
7	Lacks foundation.	11:11:15
8	THE WITNESS: It's an Android app that	11:11:18
9	is designed as an eBook reader for people with	11:11:21
10	disabilities.	11:11:25
11	BY MR. HUDIS:	11:11:28
12	Q. When you say "people with disabilities,"	11:11:28
13	do you mean people with reading disabilities?	11:11:29
14	A. I -- it's designed primarily for people	11:11:40
15	with print disabilities.	11:11:43
16	Q. Could you define in this context people	11:11:47
17	with print disabilities?	11:11:48
18	A. People who have a disability that	11:11:52
19	functionally interferes with their ability to read	11:11:54
20	standard print.	11:11:57
21	Q. In this context, what do you mean by	11:12:04
22	"standard print"?	11:12:05
23	A. For example, one of the printed	11:12:10
24	documents that we are looking at here, if a person	11:12:12
25	with a disability can't pick that page up, can't	11:12:14

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1 look at it, can't read it, can't track along the 11:12:18
2 lines, can't recall what they've read when they've 11:12:22
3 completed reading -- so basically as a normal 11:12:26
4 person without a disability, I can pick up a print 11:12:31
5 document and acquire the knowledge that's there. 11:12:34
6 And a person with a print disability has 11:12:35
7 some limitation that interferes with that process. 11:12:38
8 Typically blindness or severe dyslexia or cerebral 11:12:44
9 palsy that keeps them from being able to hold the 11:12:50
10 page still or -- and I can could go on with a wide 11:12:53
11 range of disabilities that get in the way. 11:12:56
12 Q. So we would -- so people who have print 11:12:57
13 disabilities either have a finer gross motor 11:13:00
14 disability that keeps the person from picking up 11:13:06
15 the printed page and turning the pages; is that 11:13:10
16 one type of print disability? 11:13:12
17 MR. KAPLAN: Objection. Misstates 11:13:14
18 testimony. Vague. 11:13:16
19 THE WITNESS: That would be one type of 11:13:19
20 print disability. 11:13:22
21 BY MR. HUDIS: 11:13:22
22 Q. And another type of disability could be 11:13:23
23 total blindness? 11:13:25
24 A. Yes. 11:13:28
25 Q. Low vision? 11:13:29

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1	MR. KAPLAN: Objection. Vague.	11:13:32
2	THE WITNESS: Yes.	11:13:33
3	BY MR. HUDIS:	11:13:34
4	Q. Dyslexia?	11:13:34
5	MR. KAPLAN: Objection. Vague.	11:13:36
6	THE WITNESS: Yes.	11:13:37
7	BY MR. HUDIS:	11:13:38
8	Q. Was the Go Read mark registered with the	11:13:42
9	U.S. Patent and Trademark Office?	11:13:44
10	MR. KAPLAN: Objection. Lacks	11:13:46
11	foundation. Vague. Calls for a legal conclusion.	11:13:47
12	THE WITNESS: I don't believe so.	11:13:50
13	BY MR. HUDIS:	11:13:54
14	Q. Was the software code for the Go Read	11:13:54
15	product registered with the U.S. Copyright Office?	11:13:57
16	MR. KAPLAN: Objection. Lacks	11:13:59
17	foundation. Vague. Calls for a legal conclusion.	11:14:00
18	THE WITNESS: No.	11:14:02
19	BY MR. HUDIS:	11:14:03
20	Q. As a product of Benetech, what is or was	11:14:05
21	the Bookshare Web Reader?	11:14:09
22	MR. KAPLAN: Objection. Compound.	11:14:13
23	Argumentative. Lacks foundation.	11:14:14
24	THE WITNESS: It's a set of technology	11:14:23
25	that is added into the Bookshare web site that	11:14:25

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1	allows for an eBook to be read while in a web	11:14:30
2	browser, either with associated assistive	11:14:38
3	technology or by itself.	11:14:43
4	BY MR. HUDIS:	11:14:48
5	Q. In this context, what did you mean by	11:14:48
6	"associated assistive technology"?	11:14:50
7	A. Some users of the web reader would be	11:14:56
8	using a screen reader to make what's on the screen	11:15:01
9	of their personal computer or device accessible.	11:15:06
10	Q. An example of a screen reader would be,	11:15:13
11	for example, JAWS?	11:15:16
12	MR. KAPLAN: Objection. Vague.	11:15:18
13	THE WITNESS: Yes.	11:15:19
14	BY MR. HUDIS:	11:15:22
15	Q. Was the Bookshare Web Reader mark	11:15:22
16	registered with the U.S. Patent and Trademark	11:15:25
17	Office?	11:15:26
18	MR. KAPLAN: Objection. Vague. Lacks	11:15:27
19	foundation. Calls for a legal conclusion.	11:15:28
20	THE WITNESS: I don't believe so.	11:15:31
21	BY MR. HUDIS:	11:15:31
22	Q. Was the software code for the Bookshare	11:15:32
23	Web Reader registered with the U.S. Copyright	11:15:35
24	Office?	11:15:39
25	MR. KAPLAN: Objection. Vague. Calls	11:15:39

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1	for a legal conclusion. And lacks foundation.	11:15:40
2	THE WITNESS: No.	11:15:47
3	BY MR. HUDIS:	11:15:48
4	Q. As a product of Benetech, what is or was	11:15:48
5	Bookshelf?	11:15:50
6	MR. KAPLAN: Objection. Compound.	11:15:51
7	Argumentative. Lacks foundation.	11:15:52
8	THE WITNESS: It was a feature of	11:15:56
9	individual accounts for a period of time on the	11:16:00
10	Bookshare web site.	11:16:03
11	BY MR. HUDIS:	11:16:08
12	Q. The product's no longer in use?	11:16:08
13	MR. KAPLAN: Objection. Vague.	11:16:11
14	THE WITNESS: Not by that name.	11:16:14
15	BY MR. HUDIS:	11:16:14
16	Q. What is it -- what does the product go	11:16:14
17	under today?	11:16:17
18	MR. KAPLAN: Objection. Lacks	11:16:20
19	foundation. Vague. Argumentative.	11:16:21
20	THE WITNESS: I believe Reading Lists.	11:16:23
21	BY MR. HUDIS:	11:16:32
22	Q. Was the Bookshelf mark registered with	11:16:32
23	the U.S. Patent and Trademark Office?	11:16:35
24	MR. KAPLAN: Objection. Vague. Lacks	11:16:38
25	foundation. Calls for a legal conclusion.	11:16:39

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1	THE WITNESS: Not by Benetech.	11:16:40
2	BY MR. HUDIS:	11:16:42
3	Q. Was the Bookshare -- excuse me.	11:16:44
4	Was the Bookshelf mark registered by	11:16:47
5	somebody else with the U.S. Patent and Trademark	11:16:50
6	Office?	11:16:50
7	MR. KAPLAN: Objection. Vague. Lacks	11:16:51
8	foundation. Calls for a legal conclusion.	11:16:53
9	THE WITNESS: That is my understanding.	11:16:56
10	BY MR. HUDIS:	11:16:57
11	Q. And who registered Bookshelf with the	11:16:58
12	U.S. Patent and Trademark Office, to the best of	11:16:59
13	your knowledge?	11:17:03
14	MR. KAPLAN: Objection. Vague and calls	11:17:03
15	for a legal conclusion.	11:17:08
16	THE WITNESS: This may be a place where	11:17:14
17	we're getting into confidential material. I'm	11:17:15
18	just going to put that on the record.	11:17:17
19	MR. HUDIS: We're almost out of tape,	11:17:23
20	but let's put the next question and answer on the	11:17:24
21	confidential portion of the record.	11:17:29
22	Let's go off the record so we can change	11:17:31
23	the tape.	11:17:33
24	MR. KAPLAN: Okay. Counsel, would this	11:17:35
25	be a good time to take a break --	11:17:36

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1	MR. HUDIS: Yes.	11:17:39
2	MR. KAPLAN: -- to stretch our legs?	11:17:39
3	MR. HUDIS: Yes.	11:17:41
4	THE VIDEOGRAPHER: Going off the record	11:17:42
5	at 11:17. This is the end of Tape No. 1.	11:17:43
6	(Whereupon, a recess was taken.)	11:17:48
7	THE VIDEOGRAPHER: Here begins Tape	11:30:57
8	No. 2 in the deposition of James Fruchterman. We	11:30:58
9	are back on the record at 11:31.	11:31:02
10	MR. KAPLAN: So, Counsel, pursuant to	11:31:08
11	paragraph 1E of the protective order in this	11:31:10
12	action, we agree to provisionally designate the	11:31:12
13	transcript as confidential for 30 days and shall	11:31:15
14	make such specific designations of the transcript	11:31:20
15	before the end of that time. I may have gotten	11:31:23
16	that paragraph number wrong, but under the	11:31:26
17	protective order.	11:31:28
18	MR. HUDIS: Agreed.	11:31:32
19	MR. KAPLAN: Thank you.	11:31:33
20	BY MR. HUDIS:	11:31:33
21	Q. So, Mr. Fruchterman, my last question to	11:31:34
22	you was whether the Bookshelf mark had been	11:31:36
23	registered with the U.S. Patent and Trademark	11:31:43
24	Office by someone else.	11:31:45
25	A. Yes.	11:31:47

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1	Q.	All right. And to the best of your	11:31:47
2		knowledge, who registered the mark with the	11:31:49
3		trademark office?	11:31:52
4	A.	I don't remember which company. It was	11:31:53
5		a big company.	11:31:56
6	Q.	But you don't remember whom?	11:32:04
7	A.	No. I -- I wouldn't care to guess.	11:32:06
8	Q.	Anything that would refresh your	11:32:10
9		recollection?	11:32:11
10	A.	A public registration of the term	11:32:13
11		"Bookshelf" as it applies in the digital world, or	11:32:16
12		something along those lines.	11:32:23
13	Q.	Was the software code for the Bookshelf	11:32:24
14		product registered with the U.S. Copyright Office?	11:32:25
15	MR. KAPLAN:	Objection. Vague. Lacks	11:32:28
16		foundation. Calls for a legal conclusion.	11:32:29
17	THE WITNESS:	No. And Bookshelf was a	11:32:32
18		feature, not really a product.	11:32:34
19	BY MR. HUDIS:		11:32:38
20	Q.	And why do you describe it as a feature?	11:32:39
21	A.	Well, it's part of the Bookshare site	11:32:43
22		code, and there are many, many things that the	11:32:48
23		Bookshare site code does, and this was just one	11:32:52
24		thing. It -- it -- it makes no sense apart from	11:32:56
25		Bookshare.	11:32:59

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1	Q.	And it's purpose is to organize	11:33:03
2		selections by the reader?	11:33:08
3		MR. KAPLAN: Objection. Vague.	11:33:11
4		THE WITNESS: I believe the primary	11:33:13
5		purpose of this feature was to make it easier for	11:33:14
6		teachers to assign a list of materials for a	11:33:18
7		student to read.	11:33:22
8		BY MR. HUDIS:	11:33:23
9	Q.	And Bookshelf, to the best of your	11:33:23
10		recollection, is now offered as a feature under	11:33:25
11		the name Reading Lists?	11:33:28
12	A.	Correct.	11:33:31
13	Q.	Are any of -- is the Read2Go product	11:33:35
14		offered for a fee?	11:33:46
15		MR. KAPLAN: Objection. Vague.	11:33:49
16		THE WITNESS: No.	11:33:53
17		BY MR. HUDIS:	11:33:57
18	Q.	Is the Go Read product offered for a	11:33:57
19		fee?	11:33:59
20	A.	Okay. I want --	11:34:00
21		MR. KAPLAN: Objection. Vague.	11:34:01
22		THE WITNESS: I want to correct my	11:34:02
23		testimony.	11:34:03
24		BY MR. KAPLAN:	11:34:04
25	Q.	Please.	11:34:04

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1	A.	Okay. We're talking about two different	11:34:04
2		eBook readers.	11:34:05
3	Q.	Right.	11:34:07
4	A.	And the first question you asked was is	11:34:08
5		the Read2Go product offered for a fee.	11:34:09
6	Q.	For a fee?	11:34:12
7	A.	And the correct answer is, yes. It's	11:34:14
8		listed in the Apple App Store for a fee.	11:34:16
9		And your -- the question that was	11:34:30
10		pending was whether Go Read was offered for a fee.	11:34:31
11		And the answer is, no, it is not offered for a	11:34:35
12		fee. It's available for free.	11:34:36
13	Q.	Is the Bookshare Web Reader offered for	11:34:46
14		a fee?	11:34:49
15	MR. KAPLAN:	Objection. Vague.	11:34:51
16	THE WITNESS:	Not for a separate fee.	11:34:53
17	BY MR. KAPLAN:		11:34:58
18	Q.	Is it part of the fee that one would pay	11:34:58
19		to become a member of Bookshare?	11:35:10
20	MR. KAPLAN:	Objection. Vague.	11:35:13
21	THE WITNESS:	The web reader is part of	11:35:21
22		the Bookshare web site. Whether or not you need	11:35:23
23		to pay a fee depends on the material you read and	11:35:27
24		whether or not a third party is effectively paying	11:35:31
25		for your fee, your subscription fee.	11:35:35

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1	BY MR. KAPLAN:	11:35:41
2	Q. So if a third party does not pay the	11:35:41
3	user subscription fee, would a Bookshare member	11:35:44
4	have to pay for the Bookshare Web Reader?	11:35:50
5	MR. KAPLAN: Objection. Incomplete	11:35:52
6	hypothetical. Vague. Lacks foundation.	11:35:55
7	Argumentative.	11:35:57
8	THE WITNESS: If they wish to read	11:35:58
9	copyrighted material.	11:36:00
10	BY MR. KAPLAN:	11:36:11
11	Q. If the user wishes to read copyrighted	11:36:12
12	material, then there would be a fee associated	11:36:15
13	with the user using the Bookshare Web Reader?	11:36:17
14	MR. KAPLAN: Objection. Incomplete	11:36:23
15	hypothetical. Misstates the testimony. Vague.	11:36:26
16	Lacks foundation.	11:36:28
17	THE WITNESS: Bookshare is a	11:36:30
18	subscription web site. If you are a subscriber,	11:36:31
19	the Bookshare Web Reader is a feature of that web	11:36:39
20	site that is included in your subscription, much	11:36:41
21	as your Reading Lists are included as a feature of	11:36:51
22	the web site's operation.	11:36:53
23	BY MR. KAPLAN:	11:36:55
24	Q. Separate and apart from the subscription	11:36:56
25	fee for Bookshare, does, in any circumstance, the	11:36:58

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1	user pay a separate fee for the Bookshare web	11:37:05
2	reader?	11:37:08
3	MR. KAPLAN: Objection. Vague.	11:37:08
4	Argumentative. Lacks foundation.	11:37:09
5	THE WITNESS: Not by Benetech.	11:37:15
6	BY MR. HUDIS:	11:37:17
7	Q. Would somebody else charge that fee?	11:37:17
8	MR. KAPLAN: Objection. Vague.	11:37:20
9	THE WITNESS: It's an open source	11:37:23
10	product, to my knowledge, and under open source	11:37:24
11	licensing, it is possible for someone to grab a	11:37:32
12	piece of open source code and, within the	11:37:34
13	constraints of that license, charge some fees.	11:37:37
14	I'm not aware of anyone doing that at this moment.	11:37:46
15	BY MR. HUDIS:	11:37:50
16	Q. And what used to be Bookshelf, now	11:37:50
17	Reading Lists, is a feature of the Bookshare	11:37:52
18	service?	11:37:56
19	MR. KAPLAN: Objection. Argumentative.	11:37:56
20	Vague.	11:37:58
21	THE WITNESS: Yes.	11:38:00
22	BY MR. HUDIS:	11:38:01
23	Q. Is a separate fee charged for Reading	11:38:02
24	Lists?	11:38:05
25	MR. KAPLAN: Objection. Vague. Lacks	11:38:05

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1	foundation. Argumentative.	11:38:06
2	THE WITNESS: No.	11:38:08
3	BY MR. HUDIS:	11:38:08
4	Q. Was a separate fee charged for	11:38:09
5	Bookshelf?	11:38:10
6	MR. KAPLAN: Objection. Vague. Lacks	11:38:11
7	foundation. Argumentative.	11:38:12
8	THE WITNESS: No.	11:38:14
9	BY MR. HUDIS:	11:38:16
10	Q. Do I understand correctly that Read2Go	11:38:37
11	is an eReader for an Apple product?	11:38:39
12	MR. KAPLAN: Objection. Vague.	11:38:43
13	THE WITNESS: Yes.	11:38:44
14	BY MR. HUDIS:	11:38:46
15	Q. All right. Can anyone acquire Read2Go	11:38:48
16	for use with an Apple product or must the person	11:38:51
17	show proof of a print disability?	11:38:55
18	MR. KAPLAN: Objection. Compound.	11:38:58
19	Lacks foundation. Vague.	11:39:01
20	THE WITNESS: Anyone can purchase the	11:39:07
21	product online without showing proof of	11:39:09
22	disability.	11:39:12
23	BY MR. HUDIS:	11:39:12
24	Q. Is that also true for Go Read?	11:39:13
25	MR. KAPLAN: Objection. Lacks	11:39:15

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1	foundation. Vague.	11:39:16
2	THE WITNESS: Anyone is able to download	11:39:20
3	Go Read and use it to read any material.	11:39:22
4	BY MR. HUDIS:	11:39:25
5	Q. Without -- without showing proof of	11:39:25
6	print disability?	11:39:29
7	A. That is correct.	11:39:29
8	(Whereupon, Deposition Exhibit 54 was	11:39:50
9	marked for identification.)	11:39:50
10	MR. HUDIS: Mr. Fruchterman, I now show	11:39:50
11	you what's been marked as Exhibit Fruchterman 54.	11:40:11
12	Counsel, just to speed up, I will	11:40:15
13	represent this was prepared by my office from	11:40:17
14	publicly available information.	11:40:20
15	MR. KAPLAN: Thank you.	11:40:23
16	BY MR. HUDIS:	11:40:24
17	Q. Mr. Fruchterman, could you please look	11:40:26
18	at pages 1 through 3 of Exhibit 54. And I ask	11:40:29
19	you, do you recognize these as registered	11:40:37
20	trademarks of Beneficent Technology, Inc.?	11:40:40
21	A. Yes.	11:40:49
22	Q. And on page 4 of Exhibit 54, do you	11:40:50
23	recognize Martus client software as a registered	11:40:53
24	copyright owned by Beneficent Technology, Inc.?	11:40:56
25	A. Yes.	11:41:02

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1	Q.	Mr. Fruchterman, what is Bookshare's	11:41:13
2		University Partnership Program?	11:41:16
3		MR. KAPLAN: Objection. Argumentative.	11:41:21
4		Lacks foundation. Vague.	11:41:23
5		THE WITNESS: It's a program where	11:41:31
6		universities that have scanned books for students	11:41:33
7		can add them to the Bookshare collection so that	11:41:38
8		other people don't have to scan the same work, to	11:41:43
9		make it accessible to people with disabilities.	11:41:46
10		BY MR. HUDIS:	11:41:50
11	Q.	Print disabilities?	11:41:50
12	A.	Correct.	11:41:51
13	Q.	When was the Bookshare University	11:41:52
14		Partnership Program started?	11:41:54
15		MR. KAPLAN: Objection. Lacks	11:41:58
16		foundation.	11:41:59
17		THE WITNESS: I don't know a precise	11:41:59
18		date. In the last six years.	11:42:00
19		BY MR. HUDIS:	11:42:03
20	Q.	Around 2009 maybe?	11:42:03
21		MR. KAPLAN: Objection. Asked and	11:42:07
22		answered. Lacks foundation.	11:42:07
23		THE WITNESS: I don't have an exact date	11:42:09
24		for you.	11:42:10
25			

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1	BY MR. HUDIS:	11:42:11
2	Q. To the best of your knowledge, which	11:42:11
3	major publishers have agreed to donate digital	11:42:14
4	files of their books to Bookshare?	11:42:16
5	MR. KAPLAN: Objection. Argumentative.	11:42:18
6	Lacks foundation. Vague.	11:42:19
7	THE WITNESS: More than 500 publishers	11:42:20
8	have done so. HarperCollins, Simon & Schuster,	11:42:23
9	Random House, Penguin. But I don't want to	11:42:30
10	characterize a publisher as not major by omission	11:42:36
11	from my list.	11:42:39
12	BY MR. HUDIS:	11:42:47
13	Q. Before becoming part of Bookshare's	11:42:47
14	University Partnership Program, did any of the	11:42:49
15	publishers express to you concern about the	11:42:51
16	sighted community taking unfair advantage by	11:42:56
17	downloading from Bookshare's -- from Bookshare the	11:42:59
18	digital files of their books without permission or	11:43:02
19	payment?	11:43:04
20	MR. KAPLAN: Objection. Vague.	11:43:06
21	THE WITNESS: Yes.	11:43:19
22	BY MR. HUDIS:	11:43:20
23	Q. Which of the publishers -- which of the	11:43:23
24	publishers expressed such a concern?	11:43:25
25	MR. KAPLAN: Objection. Lacks	11:43:28

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1	foundation.	11:43:29
2	THE WITNESS: To the best of my	11:43:35
3	recollection, it would have been a higher ed	11:43:36
4	publisher.	11:43:41
5	BY MR. HUDIS:	11:43:43
6	Q. Do you remember the name of the higher	11:43:43
7	ed publisher?	11:43:48
8	A. I do not.	11:43:50
9	Q. What, if anything, did they say to you?	11:43:50
10	MR. KAPLAN: Objection. Lacks	11:43:52
11	foundation.	11:43:53
12	THE WITNESS: We've had many	11:43:56
13	conversations with publishers. And your question	11:43:57
14	touches effectively on whether someone without a	11:44:11
15	qualifying disability can sign up for Bookshare.	11:44:14
16	And so publishers would ask us questions	11:44:24
17	about our sign-up process and about our mechanisms	11:44:28
18	to prevent nondisabled people from signing up for	11:44:36
19	Bookshare. So I'd say we certainly have had	11:44:42
20	conversations about those processes.	11:44:45
21	BY MR. HUDIS:	11:44:46
22	Q. And when such concerns were expressed to	11:44:47
23	you, what did you tell those publishers about	11:44:49
24	Bookshare's sign-up process?	11:44:53
25	MR. KAPLAN: Objection. Vague.	11:44:57

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1	THE WITNESS: We discussed at length the	11:44:59
2	mechanisms by which people provide proof of	11:45:02
3	disability.	11:45:08
4	BY MR. HUDIS:	11:45:09
5	Q. And after providing that explanation to	11:45:10
6	the publishers, were they satisfied with the	11:45:13
7	explanations and, as a result, went forward by	11:45:18
8	joining Bookshare's University Partnership	11:45:22
9	Program?	11:45:23
10	MR. KAPLAN: Objection. Vague. Calls	11:45:26
11	for speculation. Lacks foundation. Compound.	11:45:27
12	THE WITNESS: That question actually	11:45:32
13	doesn't make sense as structured.	11:45:32
14	BY MR. HUDIS:	11:45:34
15	Q. Okay.	11:45:34
16	A. Because the University Partners Program	11:45:34
17	is not a publisher program. It's a university	11:45:37
18	program separate from publishers and separate from	11:45:40
19	university presses. So the question doesn't hold	11:45:43
20	together.	11:45:46
21	Q. So -- so the entities that expressed	11:45:47
22	concerns with -- if any, with Bookshare's	11:45:52
23	University Partnership Program were not the	11:45:55
24	universities, but it was the publishers?	11:45:57
25	A. Correct.	11:45:58

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1	Q.	All right. And after you gave them an	11:45:59
2		explanation about the sign-up process for	11:46:06
3		Bookshare, did the publishers allow their	11:46:07
4		publications to be offered as part of the	11:46:11
5		University Partnership Program?	11:46:14
6	MR. KAPLAN:	Objection. Argumentative.	11:46:18
7		Vague. Lacks foundation.	11:46:20
8	THE WITNESS:	Still, that question	11:46:21
9		doesn't make sense.	11:46:21
10	BY MR. HUDIS:		11:46:23
11	Q.	Okay. What doesn't make -- what would	11:46:23
12		make your understanding of my question clearer?	11:46:24
13	MR. KAPLAN:	Objection. Calls for	11:46:32
14		speculation. Vague.	11:46:32
15	THE WITNESS:	Okay. You keep linking	11:46:36
16		the University Partners Program to publishers.	11:46:37
17	BY MR. HUDIS:		11:46:40
18	Q.	Right.	11:46:40
19	A.	They're not linked. So any time you ask	11:46:41
20		me a question about publishers and then the	11:46:44
21		University Partners Program, I just have to say,	11:46:45
22		sorry, that -- those don't go together. Those are	11:46:47
23		apples and oranges.	11:46:51
24		Do you want to just talk about	11:46:54
25		publishers?	11:46:55

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1	Q.	Sure.	11:46:56
2	A.	Let's talk about that.	11:46:57
3	Q.	Well -- fine.	11:46:57
4		So you had whole libraries as part of	11:46:58
5		the University Partnership Program who digitized	11:47:01
6		the works in their collections and made them	11:47:04
7		available as part of Bookshare, correct?	11:47:06
8	MR. KAPLAN:	Objection. Misstates	11:47:09
9		testimony. Vague.	11:47:10
10	THE WITNESS:	No, that's not what I've	11:47:11
11		said.	11:47:12
12	BY MR. HUDIS:		11:47:13
13	Q.	All right. How does the University	11:47:13
14		Partnership Program work?	11:47:15
15	A.	So let's break this into two halves.	11:47:20
16	Q.	Sure.	11:47:24
17	A.	The interaction with the disabled	11:47:24
18		student and the interaction with Bookshare.	11:47:26
19		So universities -- many universities	11:47:29
20		have a disabled student services center that is	11:47:32
21		responsible for responding to accommodation	11:47:35
22		requests from students with disabilities.	11:47:40
23		A common request is that a	11:47:43
24		print-disabled student will come to the disabled	11:47:47
25		student services office and say, "I need this book	11:47:50

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1	for my class."	11:47:53
2	There are many different ways that a	11:47:58
3	disabled student services office can fulfill that	11:48:00
4	request. One of the possible ways, and generally	11:48:04
5	one that they don't prefer to go for if they can	11:48:07
6	avoid it, is to scan the entire book. They scan	11:48:11
7	that entire book and provide it to the student,	11:48:14
8	satisfying their obligation to the student.	11:48:17
9	Now, a university disabled student	11:48:24
10	services office can voluntarily sign up for the	11:48:26
11	University Partners Program on behalf of their	11:48:31
12	university, going through whatever process, and	11:48:35
13	send Bookshare copies of accessible versions of	11:48:37
14	textbooks or books needed for education and add	11:48:43
15	them to the -- and we will add them to the	11:48:47
16	Bookshare collection as a way to save potentially	11:48:49
17	other universities from having to scan the same	11:48:56
18	book at expense and delay. So that's how that	11:48:58
19	program works.	11:49:02
20	Q. Thank you for that explanation.	11:49:09
21	A. Mh-hmm.	11:49:11
22	Q. Now, if I am a publisher of one of those	11:49:13
23	books --	11:49:16
24	A. Yes.	11:49:17
25	Q. -- I might have a problem with -- if	11:49:17

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1	there weren't proper safeguards in place -- having	11:49:21
2	my text made part of Bookshare so that the sighted	11:49:27
3	community takes unfair advantage.	11:49:38
4	Now, my question goes back to --	11:49:40
5	A. Mh-hmm.	11:49:42
6	Q. -- did any of the publishers express a	11:49:42
7	concern with the University Partnership Program by	11:49:46
8	having their books made available on Bookshare?	11:49:51
9	MR. KAPLAN: Objection. Vague.	11:49:57
10	Argumentative. Lacks foundation.	11:50:00
11	THE WITNESS: No.	11:50:06
12	BY MR. HUDIS:	11:50:07
13	Q. Why not?	11:50:07
14	MR. KAPLAN: Objection. Calls for	11:50:09
15	speculation. Lacks foundation. Vague.	11:50:10
16	THE WITNESS: In my earlier testimony	11:50:13
17	where we had conversations with publishers about	11:50:15
18	our qualification processes, the University	11:50:18
19	Partnership Program never came up.	11:50:21
20	BY MR. HUDIS:	11:50:26
21	Q. Okay. What is Benetech's Route 66	11:50:30
22	Literacy Project?	11:50:33
23	MR. KAPLAN: Objection. Argumentative.	11:50:35
24	Lacks foundation.	11:50:36
25	THE WITNESS: It's a project to help	11:50:40

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1	people with developmental disabilities learn how	11:50:41
2	to read.	11:50:45
3	BY MR. HUDIS:	11:50:49
4	Q. And is the program web-based?	11:50:50
5	MR. KAPLAN: Objection. Vague.	11:50:52
6	THE WITNESS: Yes.	11:50:53
7	BY MR. HUDIS:	11:50:54
8	Q. Is the uploading of copyrighted text	11:50:59
9	part of the Route 66 Literacy Project?	11:51:01
10	MR. KAPLAN: Objection. Vague. Calls	11:51:07
11	for a legal conclusion. Lacks foundation.	11:51:08
12	THE WITNESS: Route 66 focuses on openly	11:51:18
13	licensed content, both pictures and text. We --	11:51:24
14	sorry. I'll wait for your next question.	11:51:37
15	BY MR. HUDIS:	11:51:42
16	Q. Oh, I was going to let you finish your	11:51:42
17	answer. I'm sorry.	11:51:44
18	A. Maybe you should restate the question to	11:51:45
19	make sure I've answered it completely.	11:51:48
20	Q. Well, you said that Route 66 -- that the	11:51:50
21	Route 66 Literacy Project is deployed using openly	11:51:52
22	licensed content, pictures and text.	11:52:00
23	A. Correct.	11:52:03
24	Q. In what way?	11:52:05
25	MR. KAPLAN: Objection. Misstates	11:52:05

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1	testimony. Vague.	11:52:06
2	THE WITNESS: It's a community of people	11:52:13
3	that want to help people with developmental	11:52:14
4	disabilities learn to read.	11:52:17
5	BY MR. HUDIS:	11:52:18
6	Q. Using openly licensed content?	11:52:18
7	A. And if they provide the content to Route	11:52:21
8	66, it's on the understanding that it be openly	11:52:24
9	licensed.	11:52:29
10	Q. What is Martus?	11:52:29
11	MR. KAPLAN: Objection. Lacks	11:52:33
12	foundation.	11:52:34
13	THE WITNESS: Martus is our software for	11:52:35
14	human rights activists.	11:52:36
15	BY MR. HUDIS:	11:52:42
16	Q. And it's used to capture and effectively	11:52:42
17	use human rights violations data?	11:52:44
18	A. Primarily, yes.	11:52:49
19	Q. Now, let's turn to the specifics of	11:52:53
20	Bookshare.	11:52:56
21	A. Mh-hmm.	11:52:56
22	Q. Since its founding in 2002, who has been	11:52:57
23	eligible to join Bookshare?	11:53:01
24	MR. KAPLAN: Objection. Lacks	11:53:05
25	foundation. Vague.	11:53:06

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1	THE WITNESS: The primary beneficiary of	11:53:12
2	Bookshare is a person with a qualifying print	11:53:16
3	disability.	11:53:20
4	BY MR. HUDIS:	11:53:29
5	Q. And how is one who has a qualifying	11:53:29
6	print disability determined?	11:53:33
7	A. By a professional who meets the	11:53:39
8	competent authority requirements under U.S. law	11:53:44
9	and regulation as having the professional	11:53:49
10	credentials to make that assessment.	11:53:54
11	Q. So it's a medical professional?	11:53:56
12	A. No.	11:54:02
13	Q. Please, in this context, define	11:54:02
14	"competent authority."	11:54:04
15	A. I can't quote the precise language, but	11:54:06
16	it includes doctors, optometrists. Let's see.	11:54:11
17	People with specialized expertise in disabilities.	11:54:24
18	Educational psychologists.	11:54:29
19	But I'm not giving you the complete list	11:54:32
20	that comes from the statutory regulations. This	11:54:33
21	is publicly available regulatory information. And	11:54:38
22	the term of art is "competent authority."	11:54:44
23	Q. And that's defined by statute?	11:54:48
24	A. That's my understanding. Or the	11:54:50
25	supporting regulations.	11:54:51

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1	Q.	Is there an initial setup fee charged to	11:54:52
2		members when they join Bookshare?	11:54:55
3	MR. KAPLAN:	Objection. Vague. Lacks	11:54:57
4		foundation.	11:54:58
5	THE WITNESS:	A small proportion of our	11:55:01
6		users do pay an initial setup fee.	11:55:03
7	BY MR. HUDIS:		11:55:07
8	Q.	And that's \$25?	11:55:07
9	A.	In the United States and other wealthy	11:55:11
10		countries, yes.	11:55:13
11	Q.	Is there an ongoing membership fee	11:55:16
12		charged to Bookshare members?	11:55:18
13	MR. KAPLAN:	Objection. Vague. Lacks	11:55:20
14		foundation.	11:55:21
15	THE WITNESS:	For those that are paying	11:55:22
16		for their own membership, yes.	11:55:23
17	BY MR. HUDIS:		11:55:25
18	Q.	And that's \$50 a year?	11:55:25
19	MR. KAPLAN:	Objection. Vague.	11:55:28
20	THE WITNESS:	In the United States and	11:55:29
21		other wealthy countries.	11:55:29
22	BY MR. HUDIS:		11:55:32
23	Q.	Are some members eligible to receive	11:55:34
24		Bookshare services for free?	11:55:37
25	A.	Yes.	11:55:41

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1	Q.	Who?	11:55:41
2	A.	Those that have their membership paid	11:55:44
3		for by a third party.	11:55:47
4	Q.	If they're not paying on their own and	11:55:50
5		their fees are not paid by a third party, are	11:55:53
6		there members of Bookshare who can receive	11:55:57
7		Bookshare services for free?	11:56:01
8		MR. KAPLAN: Objection. Vague.	11:56:03
9		THE WITNESS: Yes. We occasionally give	11:56:12
10		someone who would otherwise have to pay a	11:56:15
11		complimentary membership.	11:56:17
12		BY MR. HUDIS:	11:56:21
13	Q.	Is that the exception or the rule?	11:56:21
14		MR. KAPLAN: Objection. Vague.	11:56:24
15		THE WITNESS: We sometimes run programs	11:56:26
16		where we say for the next 90 days, you can get a	11:56:27
17		free membership to Bookshare if you qualify. And	11:56:33
18		then we hope that you continue to subscribe,	11:56:36
19		so ...	11:56:38
20		BY MR. HUDIS:	11:56:41
21	Q.	Besides fees, from where else does	11:56:41
22		Bookshare get its funding, if anyplace?	11:56:44
23		MR. KAPLAN: Objection. Vague.	11:56:48
24		THE WITNESS: Government contracts.	11:56:51
25		Foundation grants. Individual donations. Similar	11:56:52

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1	philanthropy.	11:57:04
2	BY MR. HUDIS:	11:57:05
3	Q. And part of the Bookshare's funding has	11:57:06
4	come from the Department of Education special	11:57:09
5	education programs?	11:57:11
6	MR. KAPLAN: Objection. Vague. Lacks	11:57:13
7	foundation.	11:57:14
8	THE WITNESS: Correct. A major funder	11:57:15
9	is the Office of Special Education Programs at the	11:57:16
10	U.S. Department of Education.	11:57:20
11	BY MR. HUDIS:	11:57:23
12	Q. From where does Bookshare obtain the	11:57:23
13	textual reading content to provide to its members?	11:57:26
14	MR. KAPLAN: Objection. Vague.	11:57:31
15	Argumentative.	11:57:32
16	THE WITNESS: At this time, the majority	11:57:39
17	of the Bookshare collection has been supplied by	11:57:41
18	publishers under voluntary agreements.	11:57:44
19	BY MR. HUDIS:	11:57:54
20	Q. Was that always the case?	11:57:55
21	A. No.	11:57:58
22	Q. Prior to the publisher supplying their	11:58:01
23	content under voluntary agreements, how did	11:58:05
24	Bookshare obtain textual reading material to	11:58:09
25	provide to its members?	11:58:12

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1	MR. KAPLAN: Objection. Misstates	11:58:14
2	testimony. Argumentative. Vague. Lacks	11:58:15
3	foundation.	11:58:16
4	THE WITNESS: Volunteer scanning.	11:58:19
5	BY MR. HUDIS:	11:58:38
6	Q. If you know, how -- what portion of the	11:58:38
7	content available on Bookshare today is	11:58:41
8	copyrighted content?	11:58:45
9	MR. KAPLAN: Objection. Calls for a	11:58:47
10	legal conclusion. Lacks foundation. Vague.	11:58:47
11	THE WITNESS: I would estimate over	11:58:54
12	95 percent is copyrighted content.	11:58:55
13	BY MR. HUDIS:	11:59:08
14	Q. Once Bookshare obtains the textual	11:59:08
15	reading content, if it's in printed form, what	11:59:11
16	does Bookshare or its volunteers do with it?	11:59:14
17	MR. KAPLAN: Objection. Vague. Lacks	11:59:17
18	foundation.	11:59:23
19	THE WITNESS: If we receive a book in	11:59:24
20	printed form, we take off its binding, chop the	11:59:27
21	binding off, put it through a high-speed scanner,	11:59:35
22	perform optical character recognition on it, and	11:59:39
23	then someone proofreads it.	11:59:43
24	It goes through generally an automated	11:59:48
25	quality control assessment and then gets added to	11:59:52

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1	our collection of books available to our users.	11:59:56
2	BY MR. HUDIS:	11:59:58
3	Q. What's part of that quality control	11:59:59
4	assessment?	12:00:00
5	MR. KAPLAN: Objection. Argumentative.	12:00:02
6	Vague. Lacks foundation.	12:00:04
7	THE WITNESS: I'm not familiar with all	12:00:08
8	the tests, but if the book is supposed to have 600	12:00:08
9	pages and it has one page, or 10,000, someone's	12:00:15
10	going to look at it.	12:00:19
11	If it's a religious title, and it is	12:00:20
12	full of swear words, it's likely to get additional	12:00:24
13	quality control. So we're looking for is this	12:00:27
14	book as represented. And, you know, that tends to	12:00:30
15	be greater on completely voluntary copies as	12:00:38
16	opposed to one where we were actually operating	12:00:41
17	the process.	12:00:44
18	BY MR. HUDIS:	12:00:44
19	Q. Would that quality control include a	12:00:44
20	check to make sure none of the pages were scanned	12:00:50
21	upside down?	12:00:53
22	MR. KAPLAN: Objection. Incomplete	12:00:56
23	hypothetical. Lacks foundation. Vague.	12:01:00
24	THE WITNESS: I would say that part of	12:01:03
25	our quality control processes are designed to	12:01:05

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1	detect missing pages, low-quality character	12:01:08
2	recognition. So, yes, we're trying to spot common	12:01:15
3	errors.	12:01:21
4	BY MR. HUDIS:	12:01:25
5	Q. Would upside-down pages be one of those	12:01:25
6	common errors?	12:01:28
7	A. No.	12:01:29
8	MR. KAPLAN: Objection. Incomplete	12:01:29
9	hypothetical.	12:01:32
10	THE WITNESS: Sorry.	12:01:32
11	MR. KAPLAN: It's okay.	12:01:33
12	BY MR. HUDIS:	12:01:33
13	Q. How about off-centered scanned pages,	12:01:34
14	where they're not properly centered?	12:01:37
15	MR. KAPLAN: Objection. Incomplete	12:01:40
16	hypothetical. Vague.	12:01:41
17	THE WITNESS: No. The most common error	12:01:42
18	is a double feed, where two pages fed at once.	12:01:44
19	BY MR. HUDIS:	12:01:52
20	Q. What type of file does the Bookshare	12:01:52
21	scanning process produce?	12:01:56
22	MR. KAPLAN: Objection. Argumentative.	12:01:58
23	Lacks foundation. Vague.	12:01:59
24	THE WITNESS: Generally --	12:02:01
25		

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1	BY MR. HUDIS:	12:02:05
2	Q. Go ahead.	12:02:05
3	A. Generally, a Microsoft Word or RTF	12:02:05
4	format file.	12:02:09
5	Q. Not Adobe PDF?	12:02:14
6	A. No.	12:02:20
7	Q. And "RTF" stands for rich text format?	12:02:21
8	A. Correct.	12:02:25
9	Q. As part of the process you just	12:02:41
10	described, the digital scan from paper to	12:02:43
11	electronic, what is the initial file -- what type	12:02:46
12	of initial file is created?	12:02:50
13	MR. KAPLAN: Objection. Vague. Lacks	12:02:53
14	foundation.	12:02:55
15	THE WITNESS: I believe we acquire image	12:02:58
16	scans as TIFF images.	12:03:01
17	BY MR. HUDIS:	12:03:05
18	Q. Again, not PDF?	12:03:05
19	A. No.	12:03:06
20	Q. I should know this.	12:03:15
21	And "TIFF" stands for?	12:03:18
22	A. I believe it's tagged image file format.	12:03:20
23	Q. Once the TIFF process is created, apart	12:03:24
24	from the quality control that you just described,	12:03:29
25	what other processes, if any, does the file	12:03:32

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1	undergo?	12:03:36
2	MR. KAPLAN: Objection. Vague.	12:03:38
3	Unintelligible. Argumentative. Lacks foundation.	12:03:41
4	BY MR. HUDIS:	12:03:56
5	Q. I can ask the question another way if	12:03:56
6	you'd like, Mr. Fruchterman.	12:03:58
7	A. I don't think I have anything to add to	12:04:00
8	the description I gave earlier.	12:04:03
9	Q. All right. Which was you take the	12:04:05
10	printed material, chop it off from its bindings,	12:04:07
11	digitally scan it, employ the OCR process, have it	12:04:13
12	proofread and a quality control?	12:04:18
13	MR. KAPLAN: Objection. Misstates	12:04:20
14	testimony.	12:04:20
15	THE WITNESS: Yes. And, of course,	12:04:21
16	proofreading is a quality control step that has a	12:04:22
17	lot of elements to it as well as the final quality	12:04:26
18	control step I described.	12:04:28
19	BY MR. HUDIS:	12:04:39
20	Q. For the next series of questions,	12:04:39
21	Mr. Fruchterman, I need your definition of	12:04:42
22	"access." And that has been a term that we have	12:04:44
23	litigated over the course of this legal	12:04:48
24	proceeding.	12:04:52
25	So I am talking now about a print --	12:04:53

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1	print-disabled person having the ability to access	12:04:58
2	content. In that respect, how would you define	12:05:02
3	"access"?	12:05:07
4	MR. KAPLAN: Objection. Vague.	12:05:14
5	THE WITNESS: So accessibility -- which	12:05:20
6	is how I think of this term, as opposed to access,	12:05:28
7	per se -- I usually focus on functional tasks that	12:05:32
8	a person would use on a given piece of information	12:05:41
9	or material.	12:05:46
10	BY MR. HUDIS:	12:05:48
11	Q. And those functional tasks are?	12:05:48
12	A. Can they get the material? Can they	12:05:52
13	actually have some form of access to it without	12:05:56
14	regard to is it accessible or not? Can they find	12:05:59
15	it? Can they access it? So that might be can	12:06:02
16	they download it?	12:06:05
17	Q. So --	12:06:07
18	A. Can they --	12:06:07
19	Q. -- that part of it would you define as	12:06:08
20	acquisition, to obtain the content? I want -- I	12:06:10
21	want your definition without using the term	12:06:13
22	"access."	12:06:15
23	MR. KAPLAN: Objection. Vague.	12:06:19
24	Argumentative.	12:06:20
25	THE WITNESS: "Acquisition" does not	12:06:28

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1	seem like the right term. There's -- there's a	12:06:29
2	series of processes around obtaining an	12:06:41
3	information object. Depending on -- it could be	12:06:44
4	handed to you physically. It could be assigned to	12:06:50
5	you by your teacher with a link. It could be that	12:06:54
6	you have to search a web search engine to find it.	12:06:58
7	You might go to Amazon and try to buy it.	12:07:02
8	So -- so let's say --	12:07:07
9	BY MR. HUDIS:	12:07:13
10	Q. That's all obtaining the content?	12:07:14
11	A. Yes. Let's say obtaining. Okay.	12:07:18
12	Q. So that's the first functional task.	12:07:20
13	After you obtain the content, what's	12:07:21
14	next?	12:07:24
15	A. Can I read the content. If it's textual	12:07:25
16	material, especially. In other words, can I	12:07:29
17	actually acquire words in that content. For	12:07:33
18	example, if it's a novel, can I read it all the	12:07:36
19	way from the beginning to the end.	12:07:39
20	Q. Are those all the functional tasks? Are	12:07:41
21	there more?	12:07:44
22	A. There are more.	12:07:45
23	Q. Which -- what are they?	12:07:50
24	A. Accessing -- sorry. Using the structure	12:07:53
25	of the document to do tasks that other people	12:07:56

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1	might do on that document. For example, you said	12:08:02
2	look at page 5 of a given document. Can the	12:08:05
3	person go to page 5. Is page 5 actually in their	12:08:10
4	copy.	12:08:15
5	Q. That would be a search function?	12:08:17
6	A. It can be done either through structured	12:08:20
7	markup or it can be done by search. So, for	12:08:22
8	example, a table of contents, an index. It's not	12:08:27
9	a search function --	12:08:32
10	Q. That's a structured markup?	12:08:32
11	A. That's a structure markup.	12:08:33
12	And so if someone says, Go to	12:08:34
13	Section 7.1, you know, you can flip through and	12:08:36
14	get to Section 7.1, or you can search for 7.1, and	12:08:38
15	perhaps the first mention of 7.1 is maybe table of	12:08:43
16	contents. Maybe the second one is Section 7.1, if	12:08:47
17	the phrase "7.1" doesn't appear frequently in the	12:08:51
18	document otherwise.	12:08:55
19	Q. What is the next functional task?	12:08:59
20	MR. KAPLAN: Objection. Argumentative.	12:09:01
21	Vague.	12:09:02
22	BY MR. HUDIS:	12:09:02
23	Q. If any.	12:09:03
24	A. I -- in modern use, you might be looking	12:09:10
25	for certain phrases or content. So, for example,	12:09:15

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1	I might want to know pages that mention	12:09:18
2	Constitution and bananas on the same page.	12:09:24
3	Q. All right. So that would be a Boolean	12:09:27
4	search?	12:09:29
5	A. Yes. So there are searches you could	12:09:29
6	do. Those are easier to do on digital content,	12:09:31
7	obviously. But, you know, human beings often do	12:09:34
8	word spotting as well. Skimming. There's	12:09:38
9	skimming that people do.	12:09:41
10	And -- I mean, there are other tasks	12:09:42
11	that people do. I choose to focus on those as the	12:09:47
12	primary ones that encompass what 95 percent or	12:09:51
13	more people would want to do with a given	12:09:55
14	document.	12:09:57
15	Q. And those functional tasks, just to	12:09:57
16	summarize -- I've been listening very carefully --	12:10:00
17	to obtain the content, to read the content, to use	12:10:03
18	the structure of the document such as by markup or	12:10:06
19	by search, to skim the document and more	12:10:08
20	complicated phrase searches?	12:10:10
21	A. Yeah.	12:10:12
22	MR. KAPLAN: Objection. Misstates	12:10:13
23	testimony.	12:10:14
24	Go ahead.	12:10:15
25	THE WITNESS: More or less, yeah.	12:10:16

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1	BY MR. HUDIS:	12:10:17
2	Q. Okay. All right. Could Bookshare's	12:10:18
3	members with print disabilities access the content	12:10:26
4	in the TIFF file created by the process you	12:10:28
5	described earlier without having the file undergo	12:10:33
6	an OCR process?	12:10:36
7	MR. KAPLAN: Objection. Incomplete	12:10:39
8	hypothetical. Vague. Lacks foundation.	12:10:42
9	THE WITNESS: They could have a human	12:10:45
10	being read it to them.	12:10:46
11	BY MR. HUDIS:	12:10:54
12	Q. Without intervention by another human	12:10:56
13	being, could Bookshare's members with print	12:11:00
14	disabilities access the TIFF file created as we	12:11:05
15	discussed -- I'm going to rephrase the question.	12:11:08
16	Without human intervention, could	12:11:15
17	Bookshare's members with print disabilities access	12:11:17
18	the content in the TIFF file without having	12:11:19
19	undergone the OCR process?	12:11:23
20	MR. KAPLAN: Objection. Incomplete	12:11:24
21	hypothetical. Vague. Lacks foundation.	12:11:26
22	THE WITNESS: I think the answer is no.	12:11:28
23	They need either OCR or a human to access TIFF	12:11:31
24	images if they're completely blind.	12:11:36
25		

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1	BY MR. HUDIS:	12:11:41
2	Q. Now, what if they are a low-vision	12:11:41
3	reader?	12:11:43
4	MR. KAPLAN: Objection. Incomplete	12:11:44
5	hypothetical. Vague. Lacks foundation.	12:11:46
6	THE WITNESS: Then they could view the	12:11:48
7	TIFF image magnified or otherwise visually	12:11:52
8	processed and read the document.	12:11:56
9	BY MR. HUDIS:	12:11:58
10	Q. What do you mean by "visually	12:11:59
11	processed"?	12:11:59
12	A. An example -- one obvious example is	12:12:03
13	making it bigger. Another one is reversing the	12:12:06
14	contrast so that instead of being black text on a	12:12:09
15	white background, being white text on black	12:12:12
16	background. There are many other visual things	12:12:15
17	that people with low vision benefit from other	12:12:18
18	than those two. Those are the two most common.	12:12:22
19	Q. With the current state of technology as	12:12:26
20	you know it, how accurate is the OCR process in	12:12:27
21	recognizing words on a printed page?	12:12:32
22	MR. KAPLAN: Objection. Vague.	12:12:34
23	THE WITNESS: It's quite good.	12:12:38
24	BY MR. HUDIS:	12:12:39
25	Q. Is there a known error recognition rate?	12:12:39

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1	MR. KAPLAN: Objection. Vague.	12:12:42
2	THE WITNESS: It varies by content type.	12:12:48
3	So a text document, like my resume --	12:12:54
4	BY MR. HUDIS:	12:12:59
5	Q. Sure. Let's look at Exhibit 49.	12:12:59
6	A. -- I would -- yeah, I would expect	12:13:00
7	modern OCR to do that perfectly.	12:13:02
8	Q. With no error recognition --	12:13:05
9	A. With no errors. Or maybe one or two	12:13:07
10	just -- I should double-check, but I don't see	12:13:10
11	any. That's -- that's a very -- of course, I'm	12:13:13
12	not going to find it. There we go. Yeah. I	12:13:16
13	mean, this is --	12:13:19
14	Q. That's straight text?	12:13:20
15	A. Yeah. Well, the first page I would say	12:13:21
16	it would recognize perfectly. The second page, it	12:13:23
17	might have problems with some of the underlines.	12:13:27
18	Q. Right.	12:13:29
19	A. And --	12:13:30
20	Q. What about if it's in italics?	12:13:31
21	A. I think it's the combination of italics	12:13:33
22	and underlines that might give it the problem. I	12:13:36
23	think it should still do quite well, but I would	12:13:38
24	expect there's a possibility of an error -- of	12:13:43
25	error showing up with italics.	12:13:44

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1 So a novel, very few errors. A -- well, 12:13:46
2 a child's picture book that had no words in it 12:13:52
3 would be hard for a blind person to use, as 12:13:56
4 another example. So it just -- it varies by the 12:13:59
5 content. But modern OCR on straight text should 12:14:01
6 do quite well. 12:14:05
7 Q. And the events in question in this 12:14:06
8 litigation occurred between 2012 and 2014. 12:14:07
9 Would your answer still be the same 12:14:11
10 about the error recognition rate of OCR in that 12:14:13
11 time period? 12:14:17
12 MR. KAPLAN: Objection. Incomplete 12:14:18
13 hypothetical. Vague. Lacks foundation. 12:14:20
14 THE WITNESS: Yes. 12:14:22
15 BY MR. HUDIS: 12:14:22
16 Q. After the scanning and OCR processes and 12:14:25
17 the quality control, how does Bookshare decide 12:14:29
18 whether a book should be made available on its web 12:14:32
19 site? 12:14:35
20 MR. KAPLAN: Objection. Vague. 12:14:35
21 Unintelligible. Lacks foundation. Incomplete 12:14:37
22 hypothetical. 12:14:44
23 THE WITNESS: We wouldn't engage in that 12:14:47
24 process if we weren't planning on making it 12:14:49
25 available. It would be a waste of resources. 12:14:52

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1	BY MR. HUDIS:	12:14:54
2	Q. Is there a validation process that the	12:14:54
3	scanned book goes through before --	12:14:56
4	MR. KAPLAN: Object.	12:14:59
5	BY MR. HUDIS:	12:14:59
6	Q. -- before it is uploaded to Bookshare's	12:14:59
7	web site?	12:15:01
8	MR. KAPLAN: Objection. Vague. Lacks	12:15:03
9	foundation. Incomplete hypothetical.	12:15:05
10	THE WITNESS: I don't know what you mean	12:15:10
11	by "validation" beyond the quality control stuff	12:15:11
12	that we've already discussed.	12:15:13
13	Is there some other thing that --	12:15:15
14	BY MR. HUDIS:	12:15:16
15	Q. I saw that in some of the materials	12:15:16
16	discussing Bookshare, that there was a validation	12:15:18
17	process.	12:15:20
18	A. If a work is a play, we won't scan it.	12:15:34
19	Q. Why?	12:15:38
20	A. Because the copyright exception says it	12:15:40
21	only applies to nondramatic literary works. So	12:15:42
22	there is a process to not scan books that aren't	12:15:47
23	covered by the copyright exception.	12:15:51
24	Q. So, for example, if a student with print	12:16:07
25	disabilities needs to access a modern play that's	12:16:12

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1	still within copyright, Bookshare couldn't help	12:16:19
2	them?	12:16:21
3	MR. KAPLAN: Objection. Incomplete	12:16:22
4	hypothetical. Calls for a legal conclusion.	12:16:23
5	Vague.	12:16:25
6	THE WITNESS: Bookshare couldn't help	12:16:27
7	them by scanning a printed version of that play,	12:16:28
8	no.	12:16:33
9	BY MR. HUDIS:	12:16:33
10	Q. Why is Bookshare permitted to digitally	12:16:59
11	copy and distribute copyrighted materials to the	12:17:02
12	print-disabled?	12:17:06
13	MR. KAPLAN: Objection. Calls for a	12:17:07
14	legal conclusion. Incomplete hypothetical.	12:17:08
15	Argumentative. Vague.	12:17:13
16	THE WITNESS: Because we avail ourselves	12:17:25
17	of copyright exceptions and license agreements and	12:17:27
18	the public domain. And I think that's it. Those	12:17:38
19	are the three ways that we are permitted.	12:17:42
20	BY MR. HUDIS:	12:17:54
21	Q. And when you say "copyright exceptions,"	12:17:54
22	are you familiar with the 1996 Chafee Amendment to	12:17:56
23	the U.S. Copyright Act?	12:18:01
24	MR. KAPLAN: Objection. Vague.	12:18:04
25	THE WITNESS: Yes.	12:18:05

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1	BY MR. HUDIS:	12:18:05
2	Q. What's your understanding of the Chafee	12:18:05
3	Amendment?	12:18:07
4	MR. KAPLAN: Objection. Vague.	12:18:10
5	THE WITNESS: Chafee is C-H-A-F-E-E. I	12:18:13
6	don't have all of the provisions of Chafee	12:18:23
7	memorized, but it allows an authorized entity,	12:18:26
8	defined in the statute, to make copies of	12:18:30
9	copyrighted works available to people with	12:18:36
10	qualifying disabilities, print disabilities.	12:18:39
11	There's more details, but those are, I'd say, the	12:18:45
12	primary points.	12:18:48
13	BY MR. HUDIS:	12:18:49
14	Q. And --	12:18:50
15	MR. KAPLAN: Just to be clear, you're	12:18:51
16	not seeking his legal opinion on this or legal	12:18:52
17	advice regarding this, correct?	12:18:54
18	MR. HUDIS: I am not. I am seeking the	12:18:56
19	witness's understanding vis-a-vis his operation of	12:18:58
20	Bookshare.	12:19:02
21	Q. So the three methods you just described	12:19:05
22	permitting Bookshare to digitally copy and	12:19:11
23	distribute materials on its web site is either,	12:19:14
24	one, a copyright exception; two, a license	12:19:17
25	agreement; and, three, a public domain; is that	12:19:20

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1	correct?	12:19:21
2	A. Yes, that's my understanding as someone	12:19:25
3	who operates Bookshare.	12:19:26
4	Q. And the copyright exception, we are now	12:19:29
5	talking about the Chafee Amendment?	12:19:32
6	MR. KAPLAN: Objection. Argumentative.	12:19:35
7	BY MR. HUDIS:	12:19:37
8	Q. What did you mean by "copyright	12:19:37
9	exception"?	12:19:39
10	A. I'm not a lawyer, but it's my	12:19:44
11	understanding that there are multiple copyright	12:19:48
12	exceptions that our work may be covered by.	12:19:50
13	Q. Well, let's concentrate on the Chafee	12:19:56
14	Amendment. All right.	12:19:57
15	A. Okay.	12:20:00
16	Q. So -- and that's what -- that's one of	12:20:00
17	the three rubrics under which Bookshare operates?	12:20:03
18	MR. KAPLAN: Objection. Vague.	12:20:10
19	Misstates testimony. Argumentative.	12:20:11
20	THE WITNESS: I agree that we actively	12:20:14
21	try to utilize the Chafee Amendment in our	12:20:16
22	operations.	12:20:20
23	BY MR. HUDIS:	12:20:20
24	Q. All right. And Bookshare, under the	12:20:21
25	Chafee Amendment, is an authorized entity?	12:20:22

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1	MR. KAPLAN: Objection. Calls for a	12:20:27
2	legal conclusion. Vague.	12:20:28
3	THE WITNESS: We believe that we qualify	12:20:29
4	as an authorized entity.	12:20:30
5	BY MR. HUDIS:	12:20:31
6	Q. And that you provide the content on	12:20:32
7	Bookshare's web site to people with qualifying	12:20:35
8	disabilities?	12:20:38
9	MR. KAPLAN: Objection. Calls for a	12:20:39
10	legal conclusion. Vague.	12:20:39
11	THE WITNESS: Yes.	12:20:41
12	BY MR. HUDIS:	12:20:41
13	Q. When you founded Bookshare, did you	12:20:44
14	inform the book publishers of your organization's	12:20:47
15	intentions?	12:20:50
16	MR. KAPLAN: Objection. Really vague.	12:20:52
17	THE WITNESS: Yes.	12:20:55
18	BY MR. HUDIS:	12:20:56
19	Q. Okay. All right. At that time, how did	12:20:56
20	the publishers react?	12:21:04
21	MR. KAPLAN: Objection. Really vague.	12:21:07
22	THE WITNESS: This is another	12:21:11
23	confidential segment.	12:21:11
24	BY MR. HUDIS:	12:21:15
25	Q. Well, the whole thing is confidential.	12:21:15

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1	A.	Okay. But -- I know. But I know that	12:21:17
2		we then go back and re-mark it as confidential.	12:21:17
3		So I figured I'd just get it right out there right	12:21:20
4		now.	12:21:23
5	MR. KAPLAN:	That's helpful for me. I	12:21:23
6		appreciate that, Jim.	12:21:25
7	THE WITNESS:	So I would say that	12:21:26
8		different segments of the publishing industry	12:21:26
9		reacted differently. The trade publishers were	12:21:29
10		pretty open to it. They had a tradition of	12:21:35
11		helping people with disabilities. The educational	12:21:38
12		publishers, especially those in higher ed, were	12:21:44
13		much more concerned about Bookshare.	12:21:50
14	BY MR. HUDIS:		12:21:57
15	Q.	Any other groups that reacted to your	12:21:57
16		initial concept of Bookshare?	12:22:00
17	MR. KAPLAN:	Objection. Still really	12:22:04
18		vague. Lack of foundation. Calls for	12:22:05
19		speculation.	12:22:07
20	THE WITNESS:	I'm -- I'm describing my	12:22:08
21		interaction with the main publishing industry --	12:22:10
22		publisher association which, in my mind,	12:22:12
23		represents the interests of those stakeholders.	12:22:15
24	BY MR. HUDIS:		12:22:17
25	Q.	All right. So you have --	12:22:17

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1	A.	So that was -- my interaction before the	12:22:18
2		launch of Bookshare with the publishing industry	12:22:20
3		was primarily through that group.	12:22:23
4		BY MR. HUDIS:	12:22:24
5	Q.	And it was the trade and higher	12:22:24
6		educational publishers?	12:22:26
7	A.	It was the Association of American	12:22:26
8		Publishers, which has divisions of different	12:22:28
9		segments of the publishing industry of which	12:22:32
10		trade, higher education, K-12, scientific, I	12:22:35
11		think -- there's a lot of different segments, but	12:22:42
12		the ones that were most noteworthy in their	12:22:44
13		reaction were the postsecondary publishers as	12:22:47
14		being less excited and the trade publishers being	12:22:50
15		more "eh" -- sorry, I guess that's not a technical	12:22:53
16		term -- more "sounds reasonable."	12:22:57
17	Q.	What concerns did the secondary	12:23:00
18		educational publishers relay to you?	12:23:02
19		MR. KAPLAN: Objection. Vague.	12:23:07
20		THE WITNESS: The primary concern	12:23:09
21		expressed by the postsecondary publishers were	12:23:10
22		that disabled students who obtained a copy of a	12:23:20
23		textbook from Bookshare might share that copy with	12:23:23
24		other nonqualifying students in an unauthorized	12:23:28
25		manner.	12:23:33

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1	BY MR. HUDIS:	12:23:39
2	Q. What did you do to allay their concerns?	12:23:40
3	MR. KAPLAN: Objection.	12:23:42
4	BY MR. HUDIS:	12:23:43
5	Q. If anything.	12:23:43
6	MR. KAPLAN: Vague.	12:23:44
7	THE WITNESS: We presented our	12:23:49
8	seven-point digital rights management plan to them	12:23:49
9	as the overarching structure of our plans to meet	12:23:59
10	our obligations under the Chafee Amendment.	12:24:05
11	BY MR. HUDIS:	12:24:13
12	Q. Where are the digital files of the books	12:24:20
13	scanned for Bookshare stored?	12:24:22
14	MR. KAPLAN: Objection. Vague. Lacks	12:24:24
15	foundation.	12:24:26
16	THE WITNESS: At present, in Amazon	12:24:29
17	cloud services.	12:24:34
18	BY MR. HUDIS:	12:24:35
19	Q. How about back then, at the founding?	12:24:35
20	MR. KAPLAN: Objection. Vague. Lacks	12:24:38
21	foundation.	12:24:40
22	THE WITNESS: We operated our own	12:24:41
23	servers.	12:24:42
24	BY MR. HUDIS:	12:24:43
25	Q. And were they secure?	12:24:43

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1	A.	Yes.	12:24:46
2	Q.	So they needed user name and password	12:24:47
3		protection?	12:24:49
4		MR. KAPLAN: Objection. Argumentative.	12:24:50
5		Vague.	12:24:53
6		THE WITNESS: In addition to other. So,	12:24:56
7		yes, user name and password, yes.	12:24:59
8		BY MR. HUDIS:	12:25:03
9	Q.	All right. And the content now that is	12:25:03
10		available on Amazon cloud, that is also secured	12:25:05
11		with user name and password protection?	12:25:10
12		MR. KAPLAN: Objection. Argumentative.	12:25:12
13		Vague.	12:25:14
14		THE WITNESS: At least that.	12:25:16
15		BY MR. HUDIS:	12:25:17
16	Q.	And more?	12:25:18
17	A.	And more.	12:25:18
18	Q.	All right. Do the digital files of the	12:25:19
19		books made available on the Bookshare site have	12:25:22
20		copyright and limited access notices on them?	12:25:25
21		MR. KAPLAN: Objection. Vague. Lacks	12:25:31
22		foundation. Calls for a legal conclusion. And	12:25:32
23		compound.	12:25:45
24		THE WITNESS: Yeah.	12:25:45
25			

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1	BY MR. HUDIS:	12:25:46
2	Q. All right. We'll do it one at a time.	12:25:46
3	A. Okay. When users get a copyrighted work	12:25:48
4	from Bookshare, it includes copyright and limited	12:25:52
5	access notices, yes.	12:26:00
6	Q. Are members of Bookshare obligated to	12:26:04
7	sign an agreement to abide by copy -- copyright	12:26:07
8	laws when accessing materials made available on	12:26:11
9	Bookshare's web site?	12:26:14
10	MR. KAPLAN: Objection. Vague. Lacks	12:26:18
11	foundation. Calls for a legal conclusion.	12:26:19
12	Incomplete hypothetical.	12:26:29
13	THE WITNESS: If a copyrighted work is	12:26:32
14	downloaded from Bookshare, there needs to have	12:26:34
15	been a responsible party signing an agreement with	12:26:40
16	respect to that work. For example, a parent or	12:26:46
17	guardian has to sign an agreement on behalf of a	12:26:51
18	minor. A teacher or educator or school district	12:26:56
19	can sign on behalf of the students that they serve	12:26:59
20	books to. But there always needs to be someone	12:27:02
21	who has -- with the ability to make an agreement	12:27:05
22	who has taken on that obligation.	12:27:12
23	BY MR. HUDIS:	12:27:15
24	Q. Whether it is the person who is	12:27:15
25	print-disabled him or herself or the responsible	12:27:18

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1	party on their behalf?	12:27:21
2	MR. KAPLAN: Objection. Vague.	12:27:23
3	Incomplete hypothetical.	12:27:24
4	THE WITNESS: Yes.	12:27:27
5	BY MR. HUDIS:	12:27:28
6	Q. What is Bookshare's fingerprint system?	12:27:30
7	MR. KAPLAN: Objection. Argumentative.	12:27:34
8	Lacks foundation. Vague.	12:27:35
9	THE WITNESS: We incorporate	12:27:38
10	fingerprints into copyrighted works, including the	12:27:40
11	name of the user or could be the name of the	12:27:46
12	school district or teacher that downloads the	12:27:51
13	work, and we also hide that identity in the work	12:27:54
14	itself in a way that's not easily seen by	12:27:58
15	inspection.	12:28:03
16	BY MR. HUDIS:	12:28:04
17	Q. What is the purpose for the fingerprint	12:28:04
18	system?	12:28:06
19	MR. KAPLAN: Objection. Vague.	12:28:08
20	THE WITNESS: If unauthorized copies	12:28:12
21	appear, say, online, that we can trace back the	12:28:13
22	source user that downloaded that work originally	12:28:20
23	from Bookshare.	12:28:28
24	BY MR. HUDIS:	12:28:30
25	Q. And if you can trace them, you tell	12:28:31

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1	them, You can't do that again or you're no longer	12:28:33
2	going to be a member of Bookshare; is that	12:28:35
3	correct?	12:28:37
4	MR. KAPLAN: Objection. Incomplete	12:28:38
5	hypothetical. Vague. Lacks foundation.	12:28:40
6	THE WITNESS: We have a disciplinary	12:28:42
7	process associated with that discovery, yes.	12:28:44
8	BY MR. HUDIS:	12:28:47
9	Q. And what is that disciplinary process?	12:28:47
10	A. Typically, we reach out and say, We	12:28:51
11	found a copyrighted work online that came from	12:28:54
12	you, and do you know how it happened to get out	12:28:57
13	there? And most frequently, it's inadvertent.	12:29:01
14	The majority of the works have the plain	12:29:11
15	text name of the person who downloaded the book in	12:29:13
16	the file still when we find it. So that tends to	12:29:16
17	be someone who doesn't understand how the Internet	12:29:21
18	works and uploaded a textbook to the school web	12:29:24
19	site so that their kid could get it easily, their	12:29:28
20	student, but didn't realize that Google could also	12:29:30
21	index that site.	12:29:33
22	If a person seems to have tried to cover	12:29:34
23	their tracks or delete the fingerprint or delete	12:29:37
24	things or doesn't have a very good answer on how	12:29:40
25	the work appeared, we discontinue services to that	12:29:42

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1 individual. And we check in with the industry 12:29:46
2 association occasionally about that. And some 12:29:50
3 large scale -- I think one large scale thing, 12:29:55
4 where we had 50 works by a single publisher, we 12:29:57
5 contacted the publisher. 12:30:00
6 Q. When you say "we," you're talking about 12:30:01
7 Bookshare? 12:30:02
8 A. Bookshare, yes. 12:30:03
9 Q. Once Bookshare makes -- 12:30:09
10 MR. KAPLAN: So are you saying that 12:30:11
11 interchangeably with "Benetech"? 12:30:11
12 MR. HUDIS: It's the Bookshare project 12:30:13
13 of Benetech as the witness testified. 12:30:15
14 THE WITNESS: Okay. So you want me to 12:30:21
15 be clear between Benetech, the organization, and 12:30:22
16 Bookshare the project? 12:30:25
17 MR. KAPLAN: Yeah. The actor is -- 12:30:26
18 BY MR. HUDIS: 12:30:27
19 Q. Who is the actor in this context when 12:30:28
20 you say "we"? 12:30:30
21 A. Well, Benetech employees. Benetech 12:30:31
22 operates the project. I've not -- I've not -- 12:30:32
23 I've not been distinguishing between Bookshare and 12:30:34
24 Benetech. I've just been treating them sort of 12:30:36
25 the same, even though -- 12:30:40

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1	Q.	So the actors in this context, to make	12:30:41
2		Counsel's question very clear, these are Benetech	12:30:43
3		employees acting under the auspices of the	12:30:47
4		Bookshare project?	12:30:50
5	A.	Correct.	12:30:51
6	Q.	All right. Once Bookshare makes textual	12:30:52
7		reading material available to its members in	12:30:55
8		digital format, how do its members access the	12:30:58
9		material?	12:31:01
10		MR. KAPLAN: Objection. Calls for	12:31:03
11		speculation. Lacks foundation. Vague.	12:31:04
12		Incomplete hypothetical.	12:31:08
13		THE WITNESS: Generally, they would use	12:31:11
14		some form of assistive technology to access that	12:31:12
15		material.	12:31:18
16		BY MR. HUDIS:	12:31:23
17	Q.	So let's take that assistive technology	12:31:24
18		one at a time.	12:31:25
19		Could the person access the material	12:31:30
20		directly on Bookshare's web site?	12:31:34
21		MR. KAPLAN: Objection. Incomplete	12:31:39
22		hypothetical. Lacks foundation. Vague.	12:31:40
23		THE WITNESS: Yes. Using the web	12:31:42
24		reader, a person could access the content either	12:31:44
25		using separate assistive technology running on top	12:31:49

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1	of their web browser or intrinsic technology built	12:31:53
2	into the combination of our web site and the web	12:31:57
3	browser.	12:32:00
4	BY MR. HUDIS:	12:32:01
5	Q. Could the user download the file?	12:32:02
6	MR. KAPLAN: Objection. Vague.	12:32:07
7	Incomplete hypothetical. Lacks foundation.	12:32:08
8	THE WITNESS: Yes, the user can download	12:32:10
9	the file.	12:32:12
10	BY MR. HUDIS:	12:32:12
11	Q. Could the user access the content using	12:32:12
12	a Braille reader?	12:32:15
13	MR. KAPLAN: Objection. Incomplete	12:32:17
14	hypothetical. Vague. Lacks foundation.	12:32:19
15	THE WITNESS: A blind person could	12:32:21
16	transfer the file into a Braille note taker or, in	12:32:23
17	some cases, download the file directly from their	12:32:27
18	Braille note taker into its memory and read it in	12:32:31
19	Braille.	12:32:34
20	BY MR. HUDIS:	12:32:34
21	Q. Could the user access the content	12:32:35
22	through an MP3 player?	12:32:37
23	MR. KAPLAN: Objection. Incomplete	12:32:39
24	hypothetical. Vague. Lacks foundation.	12:32:42
25	THE WITNESS: Yes. If they downloaded	12:32:44

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1	the work in an MP3 format from the Bookshare web	12:32:46
2	site, they could then transfer that into an MP3	12:32:52
3	player and listen to it.	12:32:56
4	BY MR. HUDIS:	12:32:57
5	Q. Could the user access the content	12:32:57
6	through a smartphone?	12:32:59
7	MR. KAPLAN: Objection. Incomplete	12:33:01
8	hypothetical. Vague. Lacks foundation.	12:33:02
9	THE WITNESS: Yes. There's quite a	12:33:03
10	number of ways that a user can use a smartphone to	12:33:04
11	access the content.	12:33:07
12	BY MR. HUDIS:	12:33:08
13	Q. Using assisted -- assistive technology?	12:33:09
14	A. Yes.	12:33:11
15	MR. KAPLAN: Objection. Vague.	12:33:12
16	BY MR. HUDIS:	12:33:13
17	Q. All right. Could -- could the user	12:33:15
18	access the content through a digital tablet?	12:33:16
19	MR. KAPLAN: Objection. Incomplete	12:33:19
20	hypothetical. Vague. Lacks foundation.	12:33:22
21	THE WITNESS: In similar ways to	12:33:23
22	smartphone, yes.	12:33:24
23	BY MR. HUDIS:	12:33:25
24	Q. And could the user access that content	12:33:26
25	through a talking book?	12:33:28

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1	MR. KAPLAN: Objection. Incomplete	12:33:29
2	hypothetical. Vague. Lacks foundation.	12:33:31
3	THE WITNESS: Much of what we've been	12:33:34
4	described would be commonly described as a talking	12:33:35
5	book, so I'm not sure what a separate talking book	12:33:38
6	might be.	12:33:40
7	BY MR. HUDIS:	12:33:41
8	Q. It's usually a combination of hardware	12:33:41
9	and software that is not a digital tablet, not a	12:33:44
10	smartphone, not an MP3 player.	12:33:48
11	You used -- one example was a Braille	12:33:51
12	reader or a Braille note taker. So I'm talking	12:33:56
13	about a talking book being a technology other than	12:33:59
14	the other -- others that I've listed in this	12:34:01
15	series of questions.	12:34:03
16	A. Okay.	12:34:04
17	MR. KAPLAN: Objection. Vague.	12:34:05
18	Incomplete hypothetical. Lacks foundation.	12:34:06
19	THE WITNESS: There are dedicated	12:34:09
20	eBook readers that have their own text-to-speech	12:34:11
21	that would be able to make a -- one of our works	12:34:17
22	talk, in addition to the other ways we've	12:34:20
23	discussed.	12:34:22
24	MR. HUDIS: Counsel, I think we should	12:34:24
25	take a break here.	12:34:25

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1	MR. KAPLAN: I -- I consent.	12:34:27
2	THE WITNESS: All right.	12:34:28
3	THE VIDEOGRAPHER: Going off the record	12:34:30
4	at 12:34.	12:34:31
5	(Whereupon, a lunch recess was taken.)	01:48:33
6	(Whereupon, Deposition Exhibit 55 was	01:48:33
7	marked for identification.)	01:48:33
8	AFTERNOON SESSION	12:34:40
9	THE VIDEOGRAPHER: Back on the record at	01:08:34
10	1:08.	01:08:36
11	BY MR. HUDIS:	01:08:36
12	Q. Mr. Fruchterman, I have marked a	01:09:03
13	document as Exhibit 55. Please take a moment to	01:09:05
14	just review the pages.	01:09:09
15	A. Looks like a lot of screen shots from	01:09:12
16	our web site.	01:09:16
17	Q. Okay. And when you say "our web site,"	01:09:17
18	that's Bookshare's web site?	01:09:18
19	A. The Bookshare project web site.	01:09:20
20	Q. And do you have any reason to doubt the	01:09:23
21	authenticity of those pages on Exhibit 55?	01:09:25
22	MR. KAPLAN: Objection. Calls for a	01:09:28
23	legal conclusion.	01:09:29
24	THE WITNESS: Not on a quick inspection.	01:09:29
25	MR. HUDIS: Okay. Counsel can we	01:09:32

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1	stipulate that Exhibit 55 comprises a business	01:09:33
2	record of Beneficent Technology, Inc.?	01:09:36
3	MR. KAPLAN: Let me get back to you on	01:09:40
4	that.	01:09:41
5	MR. HUDIS: Okay.	01:09:41
6	THE VIDEOGRAPHER: Mr. Kaplan, your mike	01:09:45
7	is not --	01:09:47
8	MR. KAPLAN: Oh, apologies.	01:09:50
9	Let me get back to you about that.	01:09:52
10	MR. HUDIS: Okay. I'll tell you what,	01:09:58
11	I'll ask Mr. Fruchterman questions about the	01:10:00
12	exhibit, and then when I'm done with the exhibit,	01:10:02
13	then I can address it then. If you can't, I'll	01:10:04
14	ask him the foundation questions.	01:10:07
15	Q. Okay. So, Mr. Fruchterman --	01:10:10
16	A. Yes.	01:10:12
17	Q. -- so I've numbered the pages so that we	01:10:12
18	can get a clear transcript. You'll see them in	01:10:15
19	the lower right-hand corner.	01:10:18
20	A. Okay.	01:10:21
21	Q. All right. So the page 1 of Exhibit 55,	01:10:21
22	that's the help page of the Bookshare web site?	01:10:24
23	A. Looks like it.	01:10:30
24	Q. Okay. Let's turn to page 2 of	01:10:30
25	Exhibit 55. I want to read for you -- read to you	01:10:33

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1	a few passages.	01:10:38
2	"Bookshare is the world's	01:10:40
3	largest accessible online library	01:10:41
4	for people with print	01:10:43
5	disabilities."	01:10:44
6	You would agree with that?	01:10:45
7	A. Yes.	01:10:47
8	Q. And then in the next paragraph it says:	01:10:48
9	"Bookshare is a global	01:10:50
10	literacy initiative of Benetech, a	01:10:51
11	leading Silicon Valley based	01:10:55
12	nonprofit technology company	01:10:57
13	founded by Jim Fruchterman."	01:10:59
14	You would agree with that?	01:11:00
15	A. Yes.	01:11:03
16	Q. And then dropping down two paragraphs,	01:11:03
17	it says:	01:11:06
18	"Bookshare operates in the	01:11:07
19	U.S. under a copyright exemption,	01:11:09
20	the Chafee Amendment, which grants	01:11:11
21	nonprofit organizations the	01:11:13
22	ability to make books available to	01:11:15
23	people with print disabilities	01:11:17
24	without publisher permission."	01:11:19
25	You'd agree with that?	01:11:21

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1	A.	I agree that that's a layman's	01:11:25
2		description of what we do, yes.	01:11:28
3	Q.	Let's turn to page 3 of Exhibit 55.	01:11:30
4		In the third paragraph it says:	01:11:38
5		"Our books are accessible" --	01:11:38
6		There's that word "accessible" again.	01:11:40
7	A.	Mh-hmm.	01:11:43
8	Q.	-- "which means you can read	01:11:43
9		our books many different ways."	01:11:45
10		Now, next to the picture of the children	01:11:49
11		in the classroom, it says:	01:11:52
12		"How can you read Bookshare	01:11:53
13		books?"	01:11:56
14		Do you see that?	01:11:57
15	A.	Mh-hmm.	01:11:58
16	Q.	Is that the ways that the books on	01:11:58
17		Bookshare's web site are accessible?	01:12:02
18		MR. KAPLAN: Objection. Vague.	01:12:05
19		THE WITNESS: That are -- that are some	01:12:09
20		of the ways, yes.	01:12:10
21		BY MR. HUDIS:	01:12:10
22	Q.	Now, at the bottom of that list it says,	01:12:11
23		"And more."	01:12:12
24		What does "and more" mean in this	01:12:13
25		context?	01:12:17

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1	MR. KAPLAN: Objection. Lacks	01:12:17
2	foundation.	01:12:18
3	THE WITNESS: Okay. I will pause and	01:12:25
4	try to divine what that might be, so ...	01:12:27
5	There are at least 40 assistive	01:13:07
6	technology products that support access to	01:13:10
7	Bookshare as well as other production means that	01:13:12
8	you could imagine. So I'm sure that there are	01:13:15
9	other accessible media that are created that don't	01:13:22
10	precisely align with the list here. For example,	01:13:26
11	tactile graphics is not mentioned here, and yet we	01:13:31
12	work on tactile graphics.	01:13:34
13	BY MR. HUDIS:	01:13:36
14	Q. Like Braille?	01:13:36
15	A. Tactile graphics are not Braille. But	01:13:37
16	let's say the Pythagorean theorem, you would be	01:13:40
17	able to feel a triangle. It wouldn't be Braille,	01:13:44
18	but would be tactile.	01:13:48
19	You might produce a book that has print	01:13:49
20	and Braille on it. But I would say that, you	01:13:51
21	know, these descriptions describe the majority of	01:13:54
22	ways that people interact with Bookshare books.	01:13:57
23	Q. Who are print-disabled?	01:14:02
24	A. Correct.	01:14:04
25	Q. Let's turn to page 4 of Exhibit 55.	01:14:06

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1	Under the title "Sign-up and Read," it	01:14:12
2	says:	01:14:15
3	"Get started with Bookshare.	01:14:16
4	In this section you will sign up	01:14:17
5	and learn how to read your first	01:14:19
6	book."	01:14:20
7	A. Mh-hmm.	01:14:21
8	Q. So my question is from this passage,	01:14:28
9	does a Bookshare user have to sign up as a member	01:14:30
10	before accessing the materials made available on	01:14:34
11	the Bookshare site?	01:14:36
12	A. No.	01:14:39
13	Q. In what instance would a user not sign	01:14:42
14	up as a member before accessing the materials on	01:14:46
15	Bookshare's site?	01:14:49
16	A. If they wanted to access public domain	01:14:50
17	or creative commons licensed works, there is no	01:14:53
18	requirement that they sign up.	01:14:55
19	Q. So the only sign-up is if it's	01:14:58
20	copyrighted material?	01:15:01
21	A. That would be the primary reason you	01:15:02
22	would sign up, would be to access copyrighted	01:15:04
23	material.	01:15:07
24	Q. Let's turn to page 5 of Exhibit 55. It	01:15:10
25	says:	01:15:13

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1	"Learn who can join. In	01:15:14
2	order for you to become a	01:15:17
3	Bookshare member, an expert must	01:15:18
4	confirm that you have a print	01:15:20
5	disability that prevents you from	01:15:22
6	reading traditional print	01:15:24
7	materials."	01:15:25
8	I'm skipping the rest of that paragraph	01:15:29
9	and going to the second paragraph.	01:15:31
10	"People with hearing loss,	01:15:33
11	autism, attention deficit	01:15:34
12	hyperactivity disorder (ADHD) or	01:15:37
13	emotion or intellectual	01:15:41
14	disabilities or whose first	01:15:43
15	language is not English generally	01:15:44
16	do not qualify based upon those	01:15:46
17	criteria unless they have a	01:15:47
18	qualifying vision, physical or	01:15:49
19	learning disability."	01:15:51
20	MR. KAPLAN: You missed an "also."	01:15:54
21	MR. HUDIS: Thank you.	01:15:55
22	"Unless they also have a	01:15:58
23	qualifying, vision or learning	01:15:59
24	disability."	01:16:01
25	Q. Are these qualifications for one to	01:16:02

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1	become a Bookshare member?	01:16:04
2	MR. KAPLAN: Objection. Vague.	01:16:06
3	BY MR. HUDIS:	01:16:08
4	Q. All right. I'll ask it a different way.	01:16:08
5	To be a Bookshare member, do you have to	01:16:11
6	have a qualifying vision, physical or learning	01:16:13
7	disability?	01:16:17
8	A. Yes.	01:16:20
9	Q. Let's turn to page 6 of Exhibit 55. And	01:16:22
10	there are some definitions and examples of people	01:16:32
11	who are low-vision blindness, physical	01:16:36
12	disabilities and learning disabilities. So it	01:16:39
13	says here at the top:	01:16:40
14	"A person who is blind or who	01:16:42
15	has low vision and who is unable	01:16:44
16	to read standard print qualifies	01:16:47
17	for Bookshare."	01:16:49
18	You agree with that?	01:16:50
19	A. Yes.	01:16:55
20	Q. Next:	01:16:57
21	"A person with a physical	01:16:57
22	disability who is unable to read	01:16:59
23	standard print qualifies for	01:17:02
24	Bookshare."	01:17:04
25	Do you agree with that?	01:17:05

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1	MR. KAPLAN: Counsel, is there a reason	01:17:06
2	you're omitting the full text of that sentence?	01:17:08
3	MR. HUDIS: Yeah. Because I don't want	01:17:11
4	to clutter -- I can read the whole text.	01:17:12
5	THE WITNESS: Yeah. Subject to the	01:17:14
6	qualification in that sentence, yes.	01:17:15
7	BY MR. HUDIS:	01:17:17
8	Q. Okay. All right. So I'll read the	01:17:17
9	whole thing.	01:17:18
10	"A person with a physical	01:17:19
11	disability who is unable to read	01:17:21
12	standard print qualifies for	01:17:23
13	Bookshare as long as a competent	01:17:24
14	authority confirms that the	01:17:28
15	physical disability significantly	01:17:29
16	interferes with reading."	01:17:30
17	Do you agree with that?	01:17:32
18	A. Yes.	01:17:33
19	Q. All right. Next on that page:	01:17:34
20	"A person with a learning	01:17:36
21	disability qualifies for Bookshare	01:17:39
22	as long as a competent authority	01:17:40
23	confirms that the learning	01:17:42
24	disability significantly	01:17:44
25	interferes with reading."	01:17:45

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1	Do you agree with that?	01:17:47
2	A. Yes.	01:17:48
3	Q. All right. Does each one of these print	01:17:49
4	disabilities have to be confirmed by a competent	01:17:57
5	authority?	01:17:59
6	MR. KAPLAN: Objection. Vague.	01:18:04
7	Incomplete hypothetical.	01:18:06
8	THE WITNESS: Not in general. But for	01:18:07
9	Bookshare membership, yes.	01:18:10
10	BY MR. HUDIS:	01:18:15
11	Q. Does this page, page 6 of Exhibit 55,	01:18:15
12	identify the types of competent authorities who	01:18:19
13	may confirm the vision and disabilities of	01:18:23
14	potential Bookshare members?	01:18:25
15	MR. KAPLAN: Objection. Vague.	01:18:28
16	Misstates the document.	01:18:31
17	THE WITNESS: This is not a	01:18:32
18	comprehensive list. It's a representative list of	01:18:33
19	examples of people who are competent authorities.	01:18:35
20	I can imagine that there are other professional	01:18:39
21	credentials that would also be recognized by us as	01:18:42
22	a competent authority.	01:18:45
23	BY MR. HUDIS:	01:18:45
24	Q. So this is a representative list of	01:18:45
25	competent authorities?	01:18:47

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1	A.	Yeah. That's why it says "examples of."	01:18:48
2	Q.	Let's turn to page 7 of Exhibit 55.	01:18:50
3		"If you are legally blind,	01:18:57
4		you qualify. In addition, if you	01:18:59
5		don't meet the legal blindness	01:19:02
6		standard, a functional vision	01:19:04
7		assessment that indicates a	01:19:06
8		significant problem accessing text	01:19:08
9		is also acceptable."	01:19:11
10		Does this statement accurately summarize	01:19:13
11		who may become a Bookshare member?	01:19:15
12	A.	Not --	01:19:20
13		MR. KAPLAN: Objection. Vague.	01:19:20
14		THE WITNESS: Not generally. But in the	01:19:21
15		area of a person who has a vision impairment who	01:19:22
16		wants to become a Bookshare member, they would	01:19:25
17		either have to be completely blind, legally blind	01:19:27
18		or have a functional vision problem. But other	01:19:30
19		people could qualify that don't have any of those	01:19:32
20		issues.	01:19:35
21		BY MR. HUDIS:	01:19:35
22	Q.	And let's explore who those people are.	01:19:35
23		Turn to page 8 of Exhibit 55.	01:19:38
24		"If you cannot pick up a	01:19:42
25		book, turn pages, maintain visual	01:19:44

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1	focus on a book or do not have the	01:19:47
2	physical stamina to work with	01:19:48
3	printed material, you most likely	01:19:50
4	qualify for Bookshare membership."	01:19:52
5	Does this statement also accurately	01:19:55
6	summarize who may become a Bookshare member?	01:19:57
7	MR. KAPLAN: Objection. Vague.	01:20:02
8	THE WITNESS: Yes, as phrased here.	01:20:03
9	BY MR. HUDIS:	01:20:05
10	Q. Let's turn to page 9 of Exhibit 55.	01:20:08
11	A. Mh-hmm. Under "So who doesn't qualify,"	01:20:11
12	it says:	01:20:14
13	"The 98 percent of the	01:20:14
14	population who can pick up a book	01:20:16
15	and read it or could if they	01:20:18
16	learned to read."	01:20:21
17	Q. I'm focusing on just this statement.	01:20:24
18	Does this page accurately summarize who can be --	01:20:26
19	who cannot become a Bookshare member?	01:20:29
20	MR. KAPLAN: Objection. Vague.	01:20:36
21	You're asking about the entire page?	01:20:36
22	THE WITNESS: Or just that one sentence?	01:20:39
23	BY MR. HUDIS:	01:20:41
24	Q. Just that one sentence.	01:20:41
25	A. That one sentence is an informal way of	01:20:43

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1	stating this. The number could be 97 percent.	01:20:49
2	And -- but, yeah, it's designed to get -- to have	01:20:58
3	most people realize that you actually have to have	01:21:02
4	a real disability that affects reading before you	01:21:05
5	can qualify for Bookshare to access copyrighted	01:21:07
6	material.	01:21:09
7	Q. Let's turn to page 10 of Exhibit 55.	01:21:11
8	I'm focusing on the second sentence of that	01:21:24
9	paragraph.	01:21:26
10	"If you are certifying	01:21:27
11	someone who has a physically based	01:21:29
12	disability (including dyslexia)	01:21:31
13	that makes it difficult to read	01:21:35
14	standard print effectively, he or	01:21:36
15	she should meet the technical	01:21:40
16	requirements and you should be	01:21:42
17	able to confirm this in writing if	01:21:43
18	your professional expertise is	01:21:45
19	applicable to such a	01:21:47
20	determination."	01:21:48
21	What's the intent of that sentence,	01:21:51
22	Mr. Fruchterman?	01:21:53
23	MR. KAPLAN: Objection. Lacks	01:21:53
24	foundation. Vague.	01:21:54
25	THE WITNESS: So we're in a section	01:22:07

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1	that's essentially frequently asked questions, and	01:22:08
2	we're trying to provide answers. And we're trying	01:22:10
3	to describe that if you're a professional with	01:22:18
4	some professional competence that allows you to	01:22:23
5	make this assessment, if someone has a disability	01:22:26
6	that gets in the way of them reading, you should	01:22:30
7	be able to sign the form saying that they have a	01:22:32
8	qualifying disability.	01:22:35
9	BY MR. HUDIS:	01:22:40
10	Q. Let's turn to page 11 of Exhibit 55. At	01:22:40
11	the top of the page, it says:	01:22:46
12	"Bookshare is a nonprofit	01:22:50
13	entity established with a	01:22:51
14	principal purpose of helping	01:22:52
15	people with disabilities. It	01:22:54
16	would very much like to see more	01:22:56
17	people with disabilities,	01:22:58
18	including more students, benefit	01:22:59
19	from our services. However, we	01:23:02
20	are bound first by copyright law	01:23:03
21	and, when it comes to serving	01:23:06
22	students, special education law."	01:23:08
23	What does this mean?	01:23:10
24	MR. KAPLAN: Objection. Vague. Lacks	01:23:13
25	foundation.	01:23:14

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1	BY MR. HUDIS:	01:23:17
2	Q. I'll ask it a different way.	01:23:17
3	What was the intent of this text that I	01:23:19
4	just read?	01:23:22
5	MR. KAPLAN: Objection. Vague. Lacks	01:23:24
6	foundation.	01:23:26
7	THE WITNESS: This is in a frequently	01:23:28
8	asked questions area, and the question being asked	01:23:29
9	is:	01:23:32
10	"Why doesn't Bookshare follow	01:23:32
11	special education law in	01:23:34
12	determining eligibility for	01:23:35
13	services?"	01:23:36
14	The reason we get that question is some	01:23:36
15	people say, My student's in special ed. Why don't	01:23:38
16	they get Bookshare?	01:23:43
17	And the answer is some students who are	01:23:43
18	in special ed don't meet the requirement of the	01:23:46
19	copyright exception.	01:23:51
20	BY MR. HUDIS:	01:23:53
21	Q. That's the Chafee Amendment.	01:23:53
22	A. That's the Chafee Amendment.	01:23:55
23	And some of those students might	01:23:58
24	actually benefit from our services, but we -- when	01:24:00
25	we're dealing with special ed students, we're --	01:24:03

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1 we're bound by actually multiple legal regimes, 01:24:06
2 and we have to operate at the intersection of 01:24:08
3 those. 01:24:11

4 Q. Which brings me to the next passage on 01:24:11
5 this page that I'd like to read to you, in the 01:24:13
6 second paragraph. 01:24:15

7 "The standards set in the 01:24:16
8 U.S. copyright laws which permit 01:24:17
9 copying and distribution of these 01:24:19
10 copyrighted materials apply only 01:24:21
11 to certain specified groups of 01:24:22
12 people. Bookshare qualifies under 01:24:24
13 the Chafee Amendment, 17 United 01:24:26
14 States Code Section 121, to 01:24:28
15 provide such services which 01:24:31
16 would" -- "which would otherwise 01:24:32
17 be copyright infringement. Thus, 01:24:34
18 Bookshare does not set the rules 01:24:38
19 for qualification. It is very 01:24:39
20 important that Bookshare respect 01:24:42
21 these rules to ensure we can 01:24:43
22 continue to serve people with the 01:24:46
23 most significant disabilities when 01:24:48
24 it comes to reading print. The 01:24:49
25 copyright law exemption." 01:24:52

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1	Do you agree with this?	01:24:54
2	A. Well, it looks like that extra clause,	01:24:56
3	"the copyright law exemption," is a typo that	01:24:58
4	needs to be deleted since it doesn't seem to be	01:25:03
5	part of the sentence.	01:25:05
6	But excluding that clause --	01:25:07
7	Q. Right.	01:25:09
8	A. -- I would say that I agree with this.	01:25:10
9	Q. So I'd like to skip down two paragraphs,	01:25:13
10	to the next passage I'd like to read to you.	01:25:15
11	"This copyright law exemption	01:25:18
12	is a social bargain which tries to	01:25:21
13	balance the needs of people who	01:25:23
14	are unable to read normal print	01:25:24
15	with the economic rights of	01:25:26
16	publishers and authors. It is not	01:25:27
17	simply based on who might benefit	01:25:30
18	from access to accessible	01:25:32
19	materials. It restricts the	01:25:35
20	exemption to a group of people who	01:25:37
21	are assumed to not be able to	01:25:38
22	access regular print materials	01:25:41
23	because of a severe disability.	01:25:43
24	Publishers and authors do not	01:25:46
25	receive a royalty under this	01:25:47

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1	copyright exemption, so they have	01:25:49
2	an economic interest in ensuring	01:25:51
3	it stays narrowly focused on the	01:25:54
4	2 percent of the population who	01:25:56
5	cannot read standard print."	01:25:58
6	Do you agree with this passage?	01:26:00
7	MR. KAPLAN: Objection. Vague.	01:26:06
8	THE WITNESS: As an informal expression	01:26:08
9	of how we operate, yes.	01:26:10
10	MR. KAPLAN: They didn't make this	01:26:16
11	exhibit very print accessible.	01:26:17
12	THE WITNESS: I'm -- I'm trying to	01:26:20
13	magnify it now.	01:26:21
14	BY MR. HUDIS:	01:26:26
15	Q. Let's turn to page 12 of Exhibit 55.	01:26:26
16	A. Okay.	01:26:31
17	Q. Before, Mr. Fruchterman, we were talking	01:26:33
18	about membership costs -- do you remember that? --	01:26:34
19	A. Yes.	01:26:37
20	Q. -- to join Bookshare.	01:26:38
21	So it says here:	01:26:39
22	"U.S. students free and other	01:26:40
23	individuals \$50 annual and a \$25	01:26:42
24	setup."	01:26:45
25	Is that still the normal individual cost	01:26:46

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1	to become a member of Bookshare?	01:26:49
2	A. If you're in wealthy countries and don't	01:26:55
3	have a third party paying for your service, or	01:26:58
4	we've comp'ed you for some reason on a very	01:27:03
5	limited basis, I think that's accurate.	01:27:07
6	Q. Okay.	01:27:09
7	MR. KAPLAN: Counsel, actually, I have a	01:27:10
8	question that goes to the stipulation.	01:27:11
9	When was this document created? When	01:27:16
10	did your office create this based on -- when did	01:27:18
11	you visit the Benetech web site to create this	01:27:21
12	document?	01:27:24
13	MR. HUDIS: We're in August? September?	01:27:25
14	MR. KAPLAN: September.	01:27:28
15	MR. HUDIS: August.	01:27:29
16	MR. KAPLAN: Okay. And is this a screen	01:27:30
17	shot or a PDF? How was it created?	01:27:32
18	MR. HUDIS: What's the program we use?	01:27:36
19	MS. CAPPAERT: We use?	01:27:38
20	MR. HUDIS: Yeah.	01:27:38
21	MS. CAPPAERT: Snagit.	01:27:39
22	MR. HUDIS: Snagit. These are Snagit	01:27:43
23	shots. Thank you.	01:27:44
24	MR. KAPLAN: Okay.	01:27:45
25	MR. HUDIS: So that was the software we	01:27:49

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1	used to do these captures.	01:27:50
2	Q. Now, if an organization were to join	01:28:01
3	Bookshare, your schools could be joining for free,	01:28:03
4	and then other organizations -- how is this charge	01:28:06
5	rendered on 6 to \$10 per book?	01:28:11
6	MR. KAPLAN: Objection. Vague.	01:28:16
7	THE WITNESS: So organizations can buy,	01:28:17
8	essentially, a package of downloads. And I think	01:28:20
9	that if you pay \$300, you can download 30 titles,	01:28:25
10	30 books. So that would be a fee associated with	01:28:31
11	getting a group of books. So instead of buying a	01:28:35
12	subscription for each student, you can just get a	01:28:40
13	package of books.	01:28:44
14	BY MR. HUDIS:	01:28:45
15	Q. And this -- and on page 12, it's	01:28:45
16	describing that package?	01:28:47
17	A. It has a link --	01:28:48
18	MR. KAPLAN: Objection. Vague.	01:28:50
19	THE WITNESS: Yeah. It has a link to	01:28:51
20	where those things are described, but it doesn't	01:28:55
21	actually describe those packages on this page.	01:28:57
22	BY MR. HUDIS:	01:28:59
23	Q. Let's turn to page 13 of Exhibit 55. It	01:28:59
24	says:	01:29:03
25	"Welcome to Bookshare. You	01:29:04

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1	must log in to use this page or	01:29:05
2	sign up for a Bookshare account."	01:29:07
3	My question, Mr. Fruchterman, is there a	01:29:09
4	log-in requirement to access Bookshare as a	01:29:11
5	member?	01:29:14
6	MR. KAPLAN: Objection. Vague.	01:29:15
7	THE WITNESS: If a person wishes to	01:29:19
8	download copyrighted materials, they need to have	01:29:20
9	a Bookshare account and have supplied proof of	01:29:23
10	disability and have paid the fee if applicable.	01:29:27
11	BY MR. HUDIS:	01:29:29
12	Q. And once you've done all of that, do you	01:29:29
13	get a user name and password?	01:29:31
14	A. Yes. You tend to use your e-mail plus a	01:29:37
15	password, yes.	01:29:39
16	Q. Could we turn to page 15, of Exhibit 55.	01:29:44
17	A. Okay.	01:29:47
18	Q. So the first paragraph:	01:30:00
19	"Bookshare is a Benetech	01:30:01
20	initiative. Benetech operates	01:30:03
21	Bookshare under an exception to	01:30:05
22	copyright law called the Chafee	01:30:07
23	Amendment, 17 United States Code	01:30:08
24	Section 121, which makes Bookshare	01:30:11
25	legally possible in the U.S. The	01:30:13

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1	Chafee Amendment allows us to	01:30:16
2	provide copyrighted digital books	01:30:19
3	as long as they are available only	01:30:20
4	to people with bona fide print	01:30:22
5	disabilities. The Bookshare site	01:30:24
6	does not provide access to	01:30:26
7	copyrighted works for the general	01:30:28
8	public."	01:30:29
9	Do you agree with this statement?	01:30:30
10	MR. KAPLAN: Objection. Vague.	01:30:32
11	THE WITNESS: Yes.	01:30:35
12	BY MR. HUDIS:	01:30:35
13	Q. All right. The next paragraph says --	01:30:35
14	and I'm not reading the whole thing.	01:30:38
15	"Although the requirements of	01:30:39
16	the copyright law exception are	01:30:40
17	clear, Benetech has gone beyond	01:30:43
18	these requirements to ensure broad	01:30:45
19	support for the project. We have	01:30:46
20	been working for more than a	01:30:49
21	decade with the Association of	01:30:50
22	American Publishers, the main	01:30:53
23	American industry group, to	01:30:55
24	address publishers' concerns about	01:30:56
25	the design of the service."	01:31:00

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1	In what ways, Mr. Fruchterman, did you	01:31:03
2	work with the Association of American Publishers	01:31:06
3	to address their concerns about the design of	01:31:07
4	Bookshare?	01:31:10
5	MR. KAPLAN: Objection. Vague.	01:31:12
6	Argumentative. Lacks foundation.	01:31:13
7	THE WITNESS: This is another	01:31:21
8	confidential segment.	01:31:22
9	We had the meeting that we discussed in	01:31:27
10	prior testimony with the AAP roughly a year before	01:31:28
11	the launch of Bookshare. As part of that meeting,	01:31:32
12	we made various agreements around engaging the	01:31:35
13	publishing industry. Agreements that still hold	01:31:38
14	today include not surprising their general	01:31:45
15	counsel.	01:31:50
16	So any significant policy changes or	01:31:50
17	changes to our legal agreements, we give the	01:31:52
18	counsel for the association an early copy of those	01:31:56
19	and allow them to comment.	01:32:00
20	I think -- I think, in general, checking	01:32:05
21	in with them before we make major changes to the	01:32:08
22	service is the number one way. But over the	01:32:10
23	years, we've made quite a number of changes or	01:32:13
24	accommodations based on those conversations.	01:32:16
25		

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1	BY MR. HUDIS:	01:32:17
2	Q. And that would include what we talked	01:32:18
3	about earlier; that's the storage of the content	01:32:20
4	on your service -- on your servers or, more	01:32:23
5	recently, the Amazon cloud --	01:32:26
6	MR. KAPLAN: Objection.	01:32:29
7	BY MR. HUDIS:	01:32:29
8	Q. -- in a secure manner?	01:32:29
9	MR. KAPLAN: Objection. Misstates	01:32:31
10	testimony. Vague.	01:32:32
11	THE WITNESS: I would differentiate	01:32:35
12	between things that are just the way we operate	01:32:36
13	the service and representations or changes we've	01:32:38
14	made in conversations with the publishers.	01:32:41
15	There are many, many things where we	01:32:44
16	simply say, We're doing it this way, and -- they	01:32:45
17	don't -- the association doesn't have any ability	01:32:50
18	to approve of our activities. It's not their	01:32:53
19	place, as it were.	01:32:57
20	BY MR. HUDIS:	01:32:59
21	Q. Right.	01:32:59
22	A. They're simply a way to effectively	01:33:01
23	converse with the industry association and with	01:33:03
24	the industry. And if they see an issue that they	01:33:06
25	think their members want to hear about, they'll go	01:33:08

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1 back to their members and talk to them. So it's 01:33:12

2 an efficiency mechanism. 01:33:14

3 But there is a difference between things 01:33:16

4 we just do and things we've explicitly conversed 01:33:17

5 with them and maybe made changes as a result of 01:33:21

6 that conversation. 01:33:23

7 Q. So what I'm concerned about is how you 01:33:24

8 worked with the American -- with the Association 01:33:27

9 of American Publishers to make them comfortable 01:33:30

10 that the Bookshare site would not be subject to 01:33:34

11 abuse. 01:33:37

12 MR. KAPLAN: Objection. Was there a 01:33:40

13 question? 01:33:43

14 MR. HUDIS: Yes. I'll phrase it a 01:33:44

15 different way. 01:33:48

16 Q. In what ways did you work with the 01:33:49

17 Association of American Publishers to ensure 01:33:50

18 that -- to make them comfortable that the 01:33:56

19 Bookshare site would not be the subject of abuse? 01:33:59

20 That people in the sighted community would not be 01:34:03

21 able to download their content without permission, 01:34:06

22 without compensation? 01:34:11

23 MR. KAPLAN: Objection. Argumentative. 01:34:13

24 Vague. 01:34:14

25 THE WITNESS: Okay. So we're now in a 01:34:19

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1 much narrower area, and I'd say the 01:34:21
2 representations in our seven-point digital rights 01:34:25
3 management plan were the primary mechanism that we 01:34:32
4 dealt with that particular concern of the 01:34:37
5 publishing industry. 01:34:40

6 BY MR. HUDIS: 01:34:41

7 Q. Okay. The last sentence on that page, 01:34:46
8 page 15 of Exhibit 55, it says: 01:34:49

9 "With the extensive input 01:34:51
10 from consumers, authors, 01:34:54
11 publishers and leading 01:34:56
12 organizations, we have created a 01:34:57
13 model for Bookshare that can be 01:34:59
14 supported by a broad array of 01:35:01
15 interests." 01:35:04

16 What model is this passage talking 01:35:05
17 about? 01:35:08

18 MR. KAPLAN: Objection. Lacks 01:35:09
19 foundation. 01:35:10

20 THE WITNESS: The Bookshare operational 01:35:14
21 model. 01:35:17

22 BY MR. HUDIS: 01:35:21

23 Q. How would you describe the Bookshare 01:35:21
24 operational model? 01:35:22

25 A. A package of technologies and policies 01:35:24

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1	and legal agreements and product features and -- I	01:35:27
2	mean, you know, it's a -- these things combined	01:35:33
3	create a service that delivers a value to people	01:35:38
4	with disabilities in a way that gets support from	01:35:46
5	these different stakeholders.	01:35:48
6	Q. Including the publishing industry?	01:35:53
7	A. Yes.	01:35:55
8	Q. Could we turn to page 16 of Exhibit 55.	01:35:57
9	Under copyright information, it says:	01:36:00
10	"Bookshare is an online	01:36:02
11	library that provides accessible	01:36:04
12	eBooks to people with print	01:36:06
13	disabilities. Bookshare meets the	01:36:07
14	requirements of the Chafee	01:36:09
15	Amendment which permits an	01:36:09
16	authorized entity like Benetech to	01:36:12
17	make books available to people	01:36:14
18	with print disabilities provided	01:36:16
19	that copies may not be reproduced	01:36:17
20	or distributed in a format other	01:36:19
21	than a specialized format	01:36:21
22	exclusively for use by blind or	01:36:23
23	other persons with disabilities.	01:36:25
24	Must bear a notice that any	01:36:27
25	further reproduction or	01:36:32

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1	distribution in a format other	01:36:33
2	than a specialized format is an	01:36:35
3	infringement. Must include a	01:36:37
4	copyright notice identifying the	01:36:39
5	copyright owner and the date of	01:36:43
6	the original publication.	01:36:45
7	'Specialized formats' means	01:36:46
8	Braille, audio or digital text	01:36:50
9	which is exclusively intended for	01:36:53
10	use by blind or other persons with	01:36:54
11	disabilities."	01:36:56
12	All right. So I've read this passage,	01:36:59
13	Mr. Fruchterman.	01:37:01
14	A. Right.	01:37:01
15	Q. Does this accurately describe the	01:37:01
16	overall way that Benetech makes reading materials	01:37:03
17	available to its members?	01:37:07
18	MR. KAPLAN: Objection. Vague.	01:37:08
19	Misleading.	01:37:09
20	THE WITNESS: I think that these bullet	01:37:14
21	points that you just read recapitulate the	01:37:16
22	provisions of the Chafee Amendment, which is the	01:37:19
23	primary copyright exception that we use for making	01:37:23
24	copyright material to people with qualifying	01:37:26
25	disabilities inside the United States.	01:37:28

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1	BY MR. HUDIS:	01:37:31
2	Q. If we could go to page 17 of Exhibit 55.	01:37:31
3	What is the purpose of this page on	01:37:36
4	Bookshare's web site?	01:37:38
5	MR. KAPLAN: Objection. Vague. Lacks	01:37:40
6	foundation.	01:37:41
7	THE WITNESS: This is part of our,	01:37:44
8	essentially, frequently asked questions, and it's	01:37:45
9	entitled "Digital Millennium Copyright Act."	01:37:49
10	And so as a -- and I'm not a lawyer, but	01:37:54
11	my understanding is is someone who provides access	01:37:58
12	to copyrighted material online, we are required to	01:38:02
13	have a DMCA agent to accept notices that there is	01:38:06
14	content on our web site that infringes the	01:38:12
15	copyright of others.	01:38:14
16	We frequently get DMCA notices from	01:38:17
17	authors or their agents or publishers saying, We	01:38:23
18	searched the web. This copyright work is on your	01:38:26
19	web site. Take it down.	01:38:29
20	And this is both explaining the DMCA	01:38:30
21	notice process at some level, as well as the, more	01:38:36
22	or less, if you don't know what the Chafee	01:38:40
23	Amendment is, you should look it up because we're	01:38:42
24	allowed to have it.	01:38:47
25	But I'm summarizing this in very direct	01:38:48

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1	terms, because it's very rare for someone to issue	01:38:54
2	us a DMCA notice that results in us actually	01:38:56
3	taking down the work because it's usually legally	01:39:01
4	permitted under the copyright amendment.	01:39:04
5	BY MR. HUDIS:	01:39:05
6	Q. The Chafee Amendment to the copyright?	01:39:06
7	A. The Chafee Amendment. Or often a	01:39:07
8	license from the author's publisher who gave us	01:39:10
9	the content, but the author and their agent	01:39:12
10	weren't aware this was one of the nice things that	01:39:14
11	their publisher did for their entire catalog of	01:39:17
12	books, not just that author.	01:39:21
13	Q. Mr. Fruchterman, could we turn to page	01:39:23
14	18 of Exhibit 55.	01:39:25
15	Is this text on page 18 Bookshare's	01:39:34
16	digital rights plan -- digital rights management	01:39:40
17	plan?	01:39:46
18	A. This is the current or, let's just say,	01:39:46
19	last month's current -- but I don't believe it's	01:39:49
20	changed since last month -- version of our	01:39:51
21	seven-point digital rights management plan that we	01:39:53
22	have discussed earlier.	01:39:56
23	Q. And what was the purpose of Bookshare	01:39:58
24	implementing this DRM plan?	01:39:59
25	MR. KAPLAN: Objection. Vague. Lacks	01:40:04

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1	foundation.	01:40:05
2	THE WITNESS: I would say that the	01:40:11
3	purpose of this was to represent to the	01:40:12
4	intellectual property industry, especially	01:40:17
5	publishers, that we were intending to follow the	01:40:19
6	law when it came to use of these materials. So it	01:40:22
7	was created for that original conversation we had	01:40:25
8	with the publishing industry quite a number of	01:40:27
9	years ago.	01:40:31
10	BY MR. HUDIS:	01:40:31
11	Q. And when you say "these materials,"	01:40:32
12	that's the copyrighted materials on the Bookshare	01:40:34
13	web site?	01:40:36
14	MR. KAPLAN: Objection. Misstates	01:40:39
15	testimony.	01:40:40
16	THE WITNESS: Yes.	01:40:42
17	BY MR. HUDIS:	01:40:43
18	Q. Could we turn to page 19.	01:40:43
19	A. Mh-hmm.	01:40:46
20	Q. What's the purpose of this sign-up page?	01:40:46
21	That's page 19 of Exhibit 55.	01:40:52
22	MR. KAPLAN: Objection. Vague. Lacks	01:40:54
23	foundation.	01:40:55
24	THE WITNESS: This is a screen shot that	01:41:15
25	appears to be of the individual sign-up for	01:41:16

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1	Bookshare that is collecting data about a	01:41:22
2	potential user in order to start the process of	01:41:24
3	becoming a Bookshare member.	01:41:29
4	BY MR. HUDIS:	01:41:32
5	Q. And at the bottom it says -- it has a	01:41:32
6	check box, and then you would sign your name or	01:41:34
7	its equivalent.	01:41:36
8	Do you see at the bottom?	01:41:38
9	A. Yes.	01:41:39
10	Q. And by doing so you're agreeing to the	01:41:39
11	terms and conditions of the Bookshare web site.	01:41:42
12	Do you see that?	01:41:44
13	MR. KAPLAN: Objection. Is the -- the	01:41:45
14	question is whether or not he sees that check box?	01:41:49
15	MR. HUDIS: Counsel, good.	01:41:53
16	Q. Is the purpose of this check box to have	01:41:55
17	the user acknowledge that he or she is agreeing to	01:42:02
18	the terms and conditions of the Bookshare web	01:42:04
19	site?	01:42:07
20	MR. KAPLAN: Objection. Vague. Lacks	01:42:08
21	foundation.	01:42:09
22	MR. HUDIS: Thank you, Counsel.	01:42:10
23	THE WITNESS: Yes. I believe that that	01:42:13
24	check box and the filling in of your name	01:42:14
25	indicates that you're agreeing to the terms and	01:42:17

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1	conditions of our -- of our -- of our agreement,	01:42:19
2	of our Bookshare individual membership agreement.	01:42:22
3	BY MR. HUDIS:	01:42:25
4	Q. And if you could turn to page 20 of	01:42:25
5	Exhibit 55. Are those the terms and conditions of	01:42:26
6	the -- of the Bookshare web site?	01:42:31
7	A. It appears to be our standard Bookshare	01:42:34
8	membership agreement of a recent date.	01:42:38
9	MR. HUDIS: Counsel, same request. Can	01:42:48
10	we stipulate this is a business record of	01:42:49
11	Benetech?	01:42:53
12	MR. KAPLAN: Subject to your	01:42:58
13	representation that this is -- each page	01:42:59
14	represents a complete Snagit screen shot of a	01:43:04
15	particular web site or web page of the Benetech	01:43:07
16	web site, I believe so.	01:43:12
17	But can we go off the record for just a	01:43:15
18	second?	01:43:18
19	MR. HUDIS: Yes. I consent. We can go	01:43:19
20	off the record.	01:43:20
21	THE VIDEOGRAPHER: Okay. Going off the	01:43:21
22	record at 1:43.	01:43:21
23	(Discussion held off record.)	01:43:40
24	THE VIDEOGRAPHER: Back on the record at	01:43:50
25	1:43.	01:43:51

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1	MR. KAPLAN: So subject to Counsel's	01:43:53
2	representation regarding the contents of this	01:43:55
3	exhibit, we stipulate to its authenticity as	01:43:57
4	select web pages from the Benetech web site.	01:44:03
5	MR. HUDIS: All right. Now, that's the	01:44:06
6	authenticity. What about business record? That	01:44:07
7	was what I was concerned about. You stipulated to	01:44:09
8	the authenticity. We do have -- I do --	01:44:14
9	MR. KAPLAN: You want a stipulation that	01:44:20
10	the statements in here are not hearsay for the	01:44:22
11	purpose of --	01:44:25
12	MR. HUDIS: For what they contain.	01:44:27
13	MR. KAPLAN: I don't believe we can	01:44:41
14	stipulate that -- to that because, as far as I	01:44:42
15	know, we don't represent Benetech.	01:44:45
16	BY MR. HUDIS:	01:44:49
17	Q. All right. So if you could -- if,	01:44:49
18	Mr. Fruchterman, you could put Exhibit 55 back in	01:44:52
19	front of you.	01:44:56
20	A. Yes.	01:44:58
21	Q. All right. So the pages on Exhibit 55,	01:44:58
22	I'm going to represent to you that they are Snagit	01:45:02
23	screen shots of the Bookshare web site.	01:45:04
24	So my question is are these pages items	01:45:08
25	of data compilations made by Benetech?	01:45:11

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1	A.	You used a term of --	01:45:18
2	Q.	Term of art.	01:45:20
3	A.	-- that I don't know.	01:45:22
4	Q.	Okay. This is -- all right.	01:45:23
5		Is this content on Exhibit 55 content	01:45:26
6		that was created by Benetech and its employees?	01:45:28
7		MR. KAPLAN: Objection. Vague.	01:45:36
8		THE WITNESS: We also had the assistance	01:45:55
9		of counsel in creating some of this material,	01:45:59
10		and --	01:46:03
11		BY MR. HUDIS:	01:46:04
12	Q.	That person would count as an employee	01:46:04
13		of Benetech.	01:46:11
14		(Reporter interruption.)	01:46:12
15		THE WITNESS: No.	01:46:14
16		BY MR. HUDIS:	01:46:14
17	Q.	No? All right.	01:46:15
18	A.	I mean, we use --	01:46:17
19		MR. KAPLAN: Maybe.	01:46:19
20		THE WITNESS: -- pro bono counsel --	01:46:19
21		(Reporter interruption.)	01:46:23
22		BY MR. HUDIS:	01:46:24
23	Q.	One person. Okay.	01:46:25
24	A.	Please frame a --	01:46:27
25	Q.	Better question?	01:46:28

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1	A. Yes, please.	01:46:29
2	Q. Okay. So with the assistance of	01:46:32
3	counsel, was the content of Exhibit 55 created by	01:46:33
4	employees of Benetech?	01:46:38
5	MR. KAPLAN: Objection. Lacks	01:46:42
6	foundation. Vague.	01:46:42
7	THE WITNESS: The content that we	01:46:45
8	reviewed in Exhibit 55 was created by employees,	01:46:47
9	contractors, pro bono counsel, paid counsel, of	01:46:56
10	Benetech. I believe that's a comprehensive list	01:47:03
11	of the people who helped created this content.	01:47:05
12	BY MR. HUDIS:	01:47:09
13	Q. Was the content created for the web	01:47:09
14	pages of Exhibit 55 made in the regular course of	01:47:12
15	Benetech's business?	01:47:15
16	MR. KAPLAN: Objection. Vague. Calls	01:47:16
17	for a legal conclusion. Lacks foundation.	01:47:17
18	THE WITNESS: In the common	01:47:22
19	understanding of what that would mean, yes.	01:47:22
20	BY MR. HUDIS:	01:47:24
21	Q. All right. Was the content on	01:47:24
22	Exhibit 55 kept by Benetech in the regular course	01:47:27
23	of its business?	01:47:31
24	MR. KAPLAN: Objection. Vague. Calls	01:47:32
25	for a legal conclusion. Lacks foundation.	01:47:32

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1	THE WITNESS: We maintain the web site	01:47:35
2	that serves these pages up, yes.	01:47:37
3	BY MR. HUDIS:	01:47:39
4	Q. And is it a regular practice of Benetech	01:47:39
5	to create web pages of the type shown in	01:47:45
6	Exhibit 55?	01:47:48
7	MR. KAPLAN: Objection. Vague. Lacks	01:47:50
8	foundation. Calls for a legal conclusion.	01:47:51
9	THE WITNESS: As far as I know, yes.	01:47:55
10	Should I have my general counsel here	01:48:06
11	for this part? Okay. All right.	01:48:08
12	MR. HUDIS: In my opinion, no. How's	01:48:16
13	that?	01:48:20
14	MR. KAPLAN: If you want to discuss it,	01:48:21
15	we should discuss it.	01:48:22
16	THE WITNESS: Let's see where else we go	01:48:25
17	with this.	01:48:28
18	MR. HUDIS: We're done with this	01:48:28
19	exhibit, so ...	01:48:29
20	THE WITNESS: Great.	01:48:31
21	MR. HUDIS: All right.	01:48:33
22	(Whereupon, Deposition Exhibit 56 was	01:48:47
23	marked for identification.)	01:48:47
24	THE WITNESS: Okay.	01:49:01
25		

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1	BY MR. HUDIS:	01:49:02
2	Q. Mr. Fruchterman, I show you what's been	01:49:02
3	marked as Exhibit 56.	01:49:04
4	Do you recognize the document?	01:49:06
5	A. Yes. It's an article I coauthored a	01:49:09
6	dozen years ago.	01:49:13
7	Q. You coauthored that with Alison Lingane?	01:49:14
8	A. Correct.	01:49:20
9	Q. At the bottom of the first page of	01:49:28
10	Exhibit 56, it says:	01:49:31
11	"The essence of the social	01:49:32
12	bargain between publishers and the	01:49:34
13	disability community was to	01:49:36
14	provide easier access to people	01:49:37
15	with disabilities while protecting	01:49:39
16	the economic interests of	01:49:41
17	publishers. Chafee" --	01:49:43
18	I gather that means Chafee Amendment?	01:49:45
19	A. Correct.	01:49:47
20	Q. "Chafee was drawn narrowly to	01:49:48
21	seal this bargain."	01:49:51
22	Do you still agree with this passage?	01:49:53
23	A. I do, though I was not present when the	01:49:55
24	Chafee Amendment was passed.	01:49:57
25	Q. If we could turn to page 2 of	01:49:59

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1	Exhibit 56. At the top it says:	01:50:02
2	"It is of course extremely	01:50:05
3	important that organizations	01:50:07
4	operating under Chafee do so with	01:50:08
5	the utmost integrity and with" --	01:50:10
6	"and within the strict letter of	01:50:13
7	the law to protect this important	01:50:15
8	amendment that has provided such a	01:50:17
9	big leap forward for access."	01:50:19
10	Do you still agree with this passage?	01:50:22
11	MR. KAPLAN: Objection. Vague.	01:50:24
12	THE WITNESS: Yes.	01:50:25
13	BY MR. HUDIS:	01:50:30
14	Q. I'd like you to drop down under the	01:50:31
15	title "How Has Chafee Affected Education," to the	01:50:32
16	second paragraph. And then it -- and in the	01:50:35
17	second sentence of that paragraph it says:	01:50:38
18	"The Chafee definition of	01:50:39
19	entities authorized to make	01:50:41
20	accessible books is a nonprofit	01:50:43
21	organization or a governmental	01:50:46
22	agency that has a primary mission	01:50:48
23	to provide specialized services	01:50:50
24	relating to training, education or	01:50:52
25	adaptive reading or information,	01:50:55

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1	access needs of blind or other	01:50:58
2	persons with disabilities."	01:51:00
3	Do you still agree with that?	01:51:02
4	MR. KAPLAN: Objection. Vague.	01:51:04
5	THE WITNESS: Yes. That's an informal	01:51:04
6	summary of the requirements of the Chafee	01:51:06
7	Amendment.	01:51:07
8	BY MR. HUDIS:	01:51:12
9	Q. And Bookshare complies with this	01:51:16
10	definition of "authorized entity"?	01:51:19
11	MR. KAPLAN: Objection. Calls for a	01:51:21
12	legal conclusion. Lacks foundation. Vague.	01:51:22
13	THE WITNESS: Yes.	01:51:26
14	BY MR. HUDIS:	01:51:26
15	Q. Do you know whether the defendant in	01:51:27
16	this case, Public.Resource, qualifies under this	01:51:29
17	definition?	01:51:32
18	A. I am --	01:51:35
19	MR. KAPLAN: Objection. Calls for a	01:51:36
20	legal conclusion. Vague.	01:51:36
21	THE WITNESS: I am not an attorney, and	01:51:39
22	I have not investigated that either.	01:51:41
23	BY MR. HUDIS:	01:51:47
24	Q. Mr. Fruchterman, could we turn to page 3	01:51:48
25	of Exhibit 56.	01:51:49

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1	A.	Yes.	01:51:53
2	Q.	I draw your attention to the second full	01:51:55
3		paragraph. It says, "Even with Chafee."	01:51:58
4		Are you following me?	01:52:01
5	A.	No.	01:52:02
6	Q.	Okay.	01:52:02
7	A.	So what page are we on again?	01:52:03
8	Q.	Three.	01:52:07
9	A.	Okay. All right. All right.	01:52:07
10		MR. HUDIS: Thank you. Thank you,	01:52:08
11		Counsel. Appreciate it.	01:52:09
12	Q.	It says, in the second sentence of that	01:52:11
13		paragraph:	01:52:16
14		"Working with publishers	01:52:16
15		directly (individually or legally	01:52:18
16		mandated as with the IMAA) to	01:52:21
17		create a secure distribution	01:52:25
18		system to qualifying individuals	01:52:28
19		from original digital files would	01:52:30
20		save work for everybody, while at	01:52:33
21		the same time make access by	01:52:35
22		people with disabilities faster,	01:52:37
23		higher quality, and more	01:52:39
24		comprehensive."	01:52:40
25		First of all, do you still agree with	01:52:43

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1	this?	01:52:45
2	MR. KAPLAN: Objection. Vague.	01:52:46
3	THE WITNESS: This is a very dated	01:52:50
4	document.	01:52:51
5	BY MR. HUDIS:	01:52:52
6	Q. Okay.	01:52:54
7	A. And I would say that this was making the	01:52:54
8	case for Bookshare roughly in its first year of	01:52:59
9	existence, and I would say that we have	01:53:02
10	accomplished many of the things we set out to	01:53:08
11	accomplish as expressed in this paragraph with the	01:53:10
12	Bookshare solution that exists today.	01:53:13
13	Q. Did you investigate whether	01:53:17
14	Public.Resource has done this?	01:53:18
15	MR. KAPLAN: Objection. Vague.	01:53:21
16	THE WITNESS: My scope of my expert	01:53:26
17	engagement was to evaluate the accessibility of	01:53:28
18	several documents. I didn't do any legal research	01:53:30
19	on Public.Resource.Org and whether or not it	01:53:32
20	qualified.	01:53:37
21	MR. KAPLAN: I think you can say that	01:53:47
22	out loud.	01:53:48
23	MR. HUDIS: Okay. Counsel, I'd like to	01:53:49
24	go off the record.	01:53:50
25	MR. KAPLAN: No problem.	01:53:51

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1	THE VIDEOGRAPHER: This is the end of	01:53:52
2	Tape Number 2 in the deposition of	01:53:53
3	James Fruchterman. The time is 1:53. Going off	01:53:57
4	the record.	01:53:59
5	(Whereupon, a recess was taken.)	01:59:14
6	(Whereupon, Deposition Exhibit 57 was	01:59:14
7	marked for identification.)	01:59:14
8	THE VIDEOGRAPHER: Here begins Tape	02:01:05
9	No. 3 in the deposition of James Fruchterman.	02:01:07
10	Back on the record at 2:01.	02:01:08
11	BY MR. HUDIS:	02:01:13
12	Q. Mr. Fruchterman, I've marked as	02:01:13
13	Exhibit 57 and ask if you recognize the document.	02:01:14
14	A. Yes. It's an article I wrote seven or	02:01:19
15	eight years ago.	02:01:24
16	Q. What is the article of Exhibit 57 about?	02:01:28
17	MR. KAPLAN: Objection. Vague.	02:01:34
18	THE WITNESS: It's a case study on the	02:01:35
19	creation of my nonprofit organization, Benetech.	02:01:37
20	BY MR. HUDIS:	02:01:40
21	Q. So you describe in the first paragraph	02:01:49
22	your organization Benetech. And, again, it's	02:01:50
23	dated 2007, 2008.	02:01:54
24	"We build innovation	02:01:57
25	technology solutions and widely	02:01:58

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1	promote entrepreneurial models for	02:01:59
2	developing projects in the	02:02:03
3	nonprofit community. Benetech was	02:02:04
4	founded as a nonprofit social	02:02:06
5	enterprise in 1989 to pursue the	02:02:08
6	making of affordable reading	02:02:11
7	machines for the blind."	02:02:12
8	And it continues. It says:	02:02:13
9	"Because the market wasn't"	02:02:16
10	-- "wasn't interesting to my	02:02:16
11	original venture capital-backed	02:02:19
12	company."	02:02:22
13	Now, you were referring to Arkenstone?	02:02:22
14	A. No. Calera.	02:02:27
15	Q. Calera. All right.	02:02:28
16	And is that an accurate description of	02:02:31
17	why you founded Benetech?	02:02:33
18	A. Yes.	02:02:35
19	Q. And then it says:	02:02:37
20	"We've since branched out	02:02:39
21	into three major fields in the	02:02:42
22	social sector: Helping provide	02:02:44
23	technology solutions to people	02:02:46
24	with disabilities, human rights	02:02:47
25	groups and environmental groups."	02:02:49

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1	So providing technology solutions to	02:02:52
2	people with disabilities, that's Bookshare?	02:02:54
3	A. That's one of our projects in the area	02:02:58
4	of helping people with disabilities, yes.	02:03:00
5	Q. And then the other one was Route 66?	02:03:02
6	A. That's another one.	02:03:06
7	Q. All right.	02:03:07
8	A. There are more.	02:03:08
9	Q. And then in the human rights arena, that	02:03:10
10	would be Martus?	02:03:14
11	A. That is our primary product in that	02:03:16
12	field.	02:03:18
13	MR. KAPLAN: Objection.	02:03:18
14	THE WITNESS: Sorry.	02:03:19
15	BY MR. HUDIS:	02:03:19
16	Q. And what is your project in the	02:03:19
17	environmental area?	02:03:21
18	MR. KAPLAN: Objection. Argumentative.	02:03:22
19	Vague.	02:03:23
20	THE WITNESS: At the time, it was the	02:03:25
21	Miradi software project. M-I-R-A-D-I.	02:03:27
22	BY MR. HUDIS:	02:03:32
23	Q. And what did Miradi do?	02:03:32
24	A. Essentially project management software	02:03:35
25	for environmental project managers.	02:03:37

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1	Q.	If you could turn to page 86 of	02:03:53
2		Exhibit 57. In the middle of the page it says,	02:03:55
3		"Our initial reading machine."	02:04:03
4		Do you see that?	02:04:05
5	A.	Yes.	02:04:05
6	Q.	All right.	02:04:05
7		"Our initial reading machine	02:04:06
8		had four major components: The	02:04:07
9		PC, the Calera OCR board, a	02:04:08
10		DECTalk voice synthesizer board	02:04:11
11		and a Hewlett-Packard scanner.	02:04:14
12		Together, these three additional	02:04:17
13		pieces turned the standard PC into	02:04:18
14		a reading machine."	02:04:20
15		My question is, Mr. Fruchterman, are	02:04:21
16		these the hardware elements of an OCR reading	02:04:24
17		machine?	02:04:28
18	MR. KAPLAN:	Objection. Vague. Calls	02:04:30
19		for speculation. Lacks foundation.	02:04:35
20	THE WITNESS:	This is a description of	02:04:43
21		our earliest reading system based on the Calera	02:04:49
22		TrueScan board.	02:04:56
23	BY MR. HUDIS:		02:05:22
24	Q.	Mr. Fruchterman, could you please turn	02:05:22
25		to page 95 of Exhibit 57.	02:05:23

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1	A.	Yes.	02:05:37
2	Q.	Now, we talked about this outside a very	02:05:37
3		narrow description, so I'd like to ask you here.	02:05:43
4		I am under Bookshare.org, the third full paragraph	02:05:45
5		which starts with "Jerry also came up with."	02:05:52
6	A.	Yes.	02:05:57
7	Q.	Okay. So I'm concentrating on the	02:05:57
8		second sentence of that paragraph.	02:05:59
9		"So a year before Bookshare	02:06:02
10		was ready" --	02:06:03
11		Who is Jerry?	02:06:06
12	A.	My counsel.	02:06:08
13	Q.	Okay.	02:06:09
14		-- "Jerry got us a meeting with the	02:06:11
15		copyright committee of the	02:06:12
16		Association of American Publishers.	02:06:13
17		This committee is made up of the top	02:06:15
18		lawyers from the major publishers.	02:06:17
19		We explained how we would honor the	02:06:19
20		social bargain in the legal	02:06:21
21		exception: Help people with	02:06:23
22		disabilities while not hurting the	02:06:25
23		business interests of publishers and	02:06:27
24		authors. Giving them a year to work	02:06:28
25		with us to keep this social bargain	02:06:31

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1	gained us tremendous credibility	02:06:34
2	with the publishers and convinced	02:06:35
3	them not to sue us."	02:06:37
4	So we talked about before,	02:06:40
5	Mr. Fruchterman, about why, when you were founding	02:06:41
6	Bookshare, you were talking with the publishers.	02:06:47
7	Does this passage that I just read	02:06:49
8	accurately state why you met with the publishers	02:06:52
9	before Bookshare was founded?	02:06:56
10	MR. KAPLAN: Objection. Vague. Lacks	02:06:59
11	foundation.	02:07:01
12	THE WITNESS: Yes. This is a public	02:07:08
13	description of the strategy that our counsel came	02:07:10
14	up with for us.	02:07:16
15	(Whereupon, Deposition Exhibit 58 was	02:07:40
16	marked for identification.)	02:07:40
17	BY MR. HUDIS:	02:07:40
18	Q. Mr. Fruchterman, I show you what's been	02:08:04
19	marked as Exhibit 58.	02:08:06
20	Are you familiar with the book	02:08:08
21	"Assistive" -- "Assistive Technology for Visually	02:08:09
22	Impaired and Blind People"?	02:08:13
23	A. Yes.	02:08:16
24	Q. Were you a contributing author to this	02:08:23
25	book of Exhibit 58?	02:08:25

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1	A.	I wrote a chapter for the book.	02:08:28
2	Q.	Was the title of that book "Accessing	02:08:33
3		Books and Documents"?	02:08:37
4		MR. KAPLAN: Objection. Form.	02:08:37
5		THE WITNESS: That was the title of the	02:08:39
6		chapter.	02:08:40
7		BY MR. HUDIS:	02:08:41
8	Q.	Thank you. I will reask the question	02:08:41
9		because it was very poorly asked.	02:08:43
10		Was your chapter of the book "Assistive	02:08:45
11		Technology for Visually Impaired and Blind People"	02:08:49
12		titled "Accessing Books and Documents"?	02:08:53
13	A.	Yes.	02:08:55
14	Q.	So, Mr. Fruchterman, I'm going to	02:09:02
15		represent to you that this Exhibit 58 is not the	02:09:04
16		entire book. The entire book --	02:09:07
17	A.	Great.	02:09:11
18	Q.	-- spans over 700 pages. So I have only	02:09:11
19		provided a copy to you of your chapter.	02:09:19
20	A.	Okay.	02:09:21
21		MR. KAPLAN: Is it Counsel's position	02:09:22
22		that this is fair use?	02:09:23
23		MR. HUDIS: It is Counsel's position	02:09:25
24		that it is fair use in the context of litigation	02:09:26
25		with this witness.	02:09:29

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1	Q.	Now, if you recall earlier today,	02:09:42
2		Mr. Fruchterman, we had discussed functional tasks	02:09:44
3		associated with a person with print disabilities	02:09:57
4		accessing content.	02:10:00
5		Do you remember that?	02:10:03
6	A.	Yes.	02:10:04
7	Q.	Okay. And you said that one of the	02:10:04
8		first functional tasks is to obtain the content?	02:10:05
9	A.	Yes.	02:10:09
10	Q.	All right. I'd like to read you here	02:10:09
11		from the -- from a portion of the first paragraph	02:10:15
12		of your Chapter 15 from Exhibit 58.	02:10:18
13		You see where it says, "Text	02:10:22
14		acquisition"?	02:10:23
15	A.	Okay. What page are we on?	02:10:26
16	Q.	Yes. It is the first page of your	02:10:28
17		chapter. So it's not numbered itself, but it is	02:10:31
18		page 555.	02:10:35
19	A.	Okay. So we're on the first page, which	02:10:38
20		is the titled "Chapter 15. Accessing"-- "Learning	02:10:40
21		Objectives."	02:10:43
22	Q.	Right.	02:10:44
23	A.	Where am I looking right now?	02:10:44
24	Q.	Okay. In the middle of that first	02:10:46
25		paragraph it says, "Text acquisition."	02:10:48

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1	A.	Yes.	02:10:54
2		"Text acquisition can be" --	02:10:55
3		(Reporter interruption.)	02:10:58
4	BY MR. HUDIS:		02:10:58
5	Q.	I'll read it. It says:	02:10:59
6		"Text acquisition can be as	02:11:01
7		varied as scanning the printed	02:11:02
8		page and doing the optical	02:11:04
9		character recognition to directly	02:11:06
10		downloading the text from the	02:11:08
11		Internet."	02:11:10
12		What were you describing here?	02:11:12
13	A.	Acquiring the text.	02:11:33
14	Q.	That's why I was -- I was curious as to	02:11:38
15		our conversation earlier today, where you said	02:11:41
16		text acquisition was not something you would use.	02:11:44
17		MR. KAPLAN: Objection. Confusing.	02:11:49
18	BY MR. HUDIS:		02:11:50
19	Q.	All right. So we had discussed the	02:11:50
20		functional tasks associated with accessing content	02:11:52
21		of a person with print disabilities. So I had	02:11:55
22		used "text acquisition." You said that was a	02:11:58
23		wrong phrase, so I'm -- I'm confused as to the	02:12:01
24		nature of text acquisition used here in	02:12:05
25		Exhibit 58.	02:12:08

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1	A.	The tasks described --	02:12:11
2		MR. KAPLAN: Wait.	02:12:13
3		THE WITNESS: Sorry. Please.	02:12:14
4		MR. KAPLAN: Counsel, there needs to be	02:12:16
5		a question.	02:12:16
6		MR. HUDIS: Okay.	02:12:20
7	Q.	What did you mean by "text acquisition"	02:12:20
8		in the context of the passage that I just read	02:12:22
9		from page 55 of Exhibit 58?	02:12:25
10	A.	Our earlier conversation encompassed	02:12:38
11		other tasks beyond the two listed here.	02:12:43
12	Q.	Okay. So the two listed here are text	02:12:53
13		acquisition and accessible presentations. And	02:12:56
14		that says:	02:12:58
15		"Accessible presentations	02:12:59
16		range from having a human reader	02:13:00
17		narrate the text to enlarged	02:13:03
18		print, to Braille, to synthetic	02:13:05
19		speech."	02:13:07
20		So what I'd like to know is what did you	02:13:07
21		mean by these two activities as described here on	02:13:09
22		page 55 of Exhibit -- 55 of Exhibit 58, "text	02:13:13
23		acquisition" and "accessible presentations"?	02:13:19
24		MR. KAPLAN: Objection. Confusing.	02:13:22
25		Vague. Misstates the document.	02:13:24

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1	THE WITNESS: The question appears to be	02:13:40
2	what did you mean by these two activities?	02:13:42
3	BY MR. HUDIS:	02:13:46
4	Q. (Nods head.)	02:13:46
5	A. Text acquisition and accessible	02:13:51
6	presentation is kind of what they mean. I'm a	02:13:55
7	little lost on --	02:13:59
8	Q. As used in this paragraph in page -- in	02:14:01
9	Exhibit 58, what did you mean by "text	02:14:04
10	acquisition"?	02:14:06
11	MR. KAPLAN: Objection. Vague and	02:14:13
12	confusing.	02:14:13
13	THE WITNESS: I'm rereading the	02:14:26
14	paragraph.	02:14:28
15	BY MR. HUDIS:	02:14:28
16	Q. Mh-hmm.	02:14:28
17	A. I'm still trying to figure out the	02:15:12
18	context here of all of this.	02:15:13
19	I think I was talking primarily about	02:15:26
20	scanning the page in order to potentially getting	02:15:28
21	the content directly from the Internet, which in	02:15:31
22	this case I'd be probably thinking about	02:15:34
23	Bookshare.	02:15:36
24	Q. And what did you mean in this context as	02:15:37
25	used on page 555 of Exhibit 58 of "accessible	02:15:39

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1	presentations"?	02:15:44
2	MR. KAPLAN: Objection. Confusing and	02:15:45
3	vague.	02:15:46
4	THE WITNESS: Well, I think this covers	02:15:49
5	territory that we've discussed before of how does	02:15:51
6	a person with a disability access an inaccessible	02:15:53
7	print document. One way is that a human being	02:15:59
8	reads it aloud, or it can be made larger, or it	02:16:02
9	can be made Braille, or it can be made synthetic	02:16:05
10	speech. And there are obviously other ones beyond	02:16:10
11	those as well as the four examples given here.	02:16:12
12	BY MR. HUDIS:	02:16:17
13	Q. Could we turn to page 556 of Exhibit 58.	02:16:17
14	Mr. Fruchterman, this book, "Assistive	02:16:25
15	Technology for Visually Impaired and Blind	02:16:28
16	People," was published in 2008.	02:16:31
17	So do you recall approximately what year	02:16:36
18	you wrote Chapter 15?	02:16:39
19	MR. KAPLAN: Objection. Confusing.	02:16:43
20	Argumentative.	02:16:45
21	THE WITNESS: I would assume either in	02:16:47
22	2008 or in 2007.	02:16:48
23	BY MR. HUDIS:	02:16:50
24	Q. Okay. So turning to page 556, it says:	02:16:51
25	"Magnification is the	02:16:54

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1	traditional method for addressing	02:16:56
2	vision loss and access to text."	02:16:58
3	Is this still true today?	02:17:00
4	MR. KAPLAN: Objection. Vague.	02:17:05
5	Confusing.	02:17:07
6	THE WITNESS: Yes, 'cause it's described	02:17:11
7	as a traditional method. So the fact that another	02:17:13
8	few years have gone by, it's still a traditional.	02:17:16
9	BY MR. HUDIS:	02:17:19
10	Q. The next paragraph describes Braille as	02:17:19
11	a -- one of -- was probably the most significant	02:17:23
12	adaptive technology advance for the blind of the	02:17:26
13	1800s.	02:17:29
14	Is Braille still used by blind people	02:17:30
15	today?	02:17:33
16	MR. KAPLAN: Objection.	02:17:34
17	Mischaracterizes the document. Vague.	02:17:35
18	But go ahead.	02:17:39
19	THE WITNESS: Yes.	02:17:40
20	BY MR. HUDIS:	02:17:41
21	Q. Skipping down another two paragraphs, it	02:17:41
22	says:	02:17:48
23	"These three alternative	02:17:49
24	techniques for accessing print,	02:17:50
25	magnification, tactile Braille and	02:17:52

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1	audible speech, are at the core of	02:17:55
2	almost all book and document	02:17:57
3	access technology for the visually	02:17:59
4	impaired."	02:18:01
5	So my question is are these still three	02:18:02
6	alternative techniques for accessing print by the	02:18:05
7	print-disabled?	02:18:09
8	MR. KAPLAN: Objection. Vague.	02:18:16
9	THE WITNESS: These are three -- these	02:18:19
10	are still three alternate techniques used for	02:18:20
11	accessing print by the print-disabled, yes.	02:18:25
12	BY MR. HUDIS:	02:18:27
13	Q. Okay. If we could now skip down two	02:18:27
14	paragraphs. It describes these transformations in	02:18:32
15	the past -- and the transformations, I gather, is	02:18:38
16	talking about what precedes this paragraph.	02:18:46
17	"These transformations in the	02:18:48
18	past have required human	02:18:49
19	intervention. Generally a sighted	02:18:52
20	person reworks the document into	02:18:54
21	accessible form."	02:18:56
22	And it says here:	02:18:57
23	"The original approach was to	02:18:58
24	have the sighted person read aloud	02:18:59
25	to the visually impaired person, a	02:19:02

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1	technique still in wide use today.	02:19:04
2	The Perkins Brailler and Braille	02:19:06
3	printing presses are important	02:19:10
4	tools for professionals to use to	02:19:11
5	create Braille books. And	02:19:16
6	human-narrated books are widely	02:19:17
7	available on audio cassettes."	02:19:20
8	We've replaced audio cassettes at this	02:19:23
9	point with technology, but the rest of it, are	02:19:25
10	these still document transformation methods in use	02:19:31
11	today?	02:19:33
12	MR. KAPLAN: Objection.	02:19:34
13	BY MR. HUDIS:	02:19:34
14	Q. All right. And that -- and the ones	02:19:34
15	that I'm pointing to are having the sighted person	02:19:35
16	read aloud, the Perkins Brailler and a Braille	02:19:39
17	printing press.	02:19:42
18	MR. KAPLAN: Objection. Vague.	02:19:46
19	THE WITNESS: All of these are still in	02:19:48
20	use today.	02:19:49
21	BY MR. HUDIS:	02:19:50
22	Q. Now, the next paragraph, it says:	02:19:55
23	"Technology in use today has	02:19:56
24	greatly expanded the options	02:19:58
25	available for accessible reading	02:19:59

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1	and lessened the need to have a	02:20:01
2	sighted person intervene in the	02:20:03
3	process. We now have Braille	02:20:04
4	transcription software, personal	02:20:06
5	Braille embossers, refreshable	02:20:08
6	electronic Braille displays for	02:20:11
7	audio. We have computer	02:20:13
8	synthesized voices to speak aloud	02:20:15
9	digital text, also known as text	02:20:19
10	to speech or TTS."	02:20:21
11	My question is, are these technologies	02:20:23
12	still in use today as nonhuman intervention	02:20:26
13	methods for the print-disabled to access printed	02:20:30
14	material?	02:20:36
15	MR. KAPLAN: Objection. Vague and	02:20:37
16	confusing.	02:20:38
17	THE WITNESS: Yes.	02:20:41
18	BY MR. HUDIS:	02:20:42
19	Q. The next sentence says:	02:20:47
20	"With reading systems that	02:20:49
21	use optical character recognition,	02:20:50
22	or OCR, we can provide access to	02:20:52
23	Braille, audio and customized	02:20:56
24	visual displays directly from the	02:20:58
25	printed page."	02:21:00

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1	Why is this important?	02:21:01
2	MR. KAPLAN: Objection. Vague.	02:21:02
3	THE WITNESS: Because we want to turn	02:21:11
4	inaccessible print books into forms where disabled	02:21:13
5	people can access them using OCR.	02:21:16
6	BY MR. HUDIS:	02:21:21
7	Q. Could we turn to page 557 of Exhibit 58.	02:21:21
8	At the bottom of page 50 -- 557 to the	02:21:34
9	top of 558 it says:	02:21:37
10	"Authors and publishers of	02:21:39
11	books are concerned about piracy	02:21:41
12	and worry about making books	02:21:43
13	easily available in electronic	02:21:45
14	form, although they rarely object	02:21:47
15	to access for people with	02:21:49
16	disabilities."	02:21:50
17	Do you believe this is still true?	02:21:51
18	MR. KAPLAN: Objection. Vague.	02:21:54
19	THE WITNESS: Yes.	02:22:10
20	BY MR. HUDIS:	02:22:11
21	Q. Mr. Fruchterman, could we turn to page	02:22:23
22	558.	02:22:25
23	A. Yes.	02:22:27
24	MR. KAPLAN: We were there.	02:22:29
25	MR. HUDIS: We were there. Okay. Thank	02:22:30

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1	you.	02:22:31
2	Q. I would like to direct your attention to	02:22:39
3	the middle of the page, where it starts "however."	02:22:40
4	A. Yes.	02:22:45
5	Q. All right. It says:	02:22:46
6	"However, the image cannot be	02:22:47
7	directly used to generate Braille	02:22:49
8	or synthetic voice output."	02:22:51
9	Why is that?	02:22:54
10	MR. KAPLAN: Objection. Vague. Lacks	02:22:55
11	foundation. Incomplete hypothetical.	02:22:56
12	THE WITNESS: You need to convert the	02:23:04
13	inaccessible image into a text file in OCR.	02:23:05
14	BY MR. HUDIS:	02:23:14
15	Q. Mr. Fruchterman, could you turn to page	02:23:24
16	560 of Exhibit 58.	02:23:26
17	This paragraph at the bottom of page 560	02:23:40
18	talks about the image processing steps of -- in	02:23:46
19	OCR. And it talks about despeckling, orienting	02:23:49
20	and straightening the page, recognition of	02:23:55
21	specialty fine characteristics and recognition of	02:23:57
22	a character or glyph.	02:24:01
23	Are those the --	02:24:02
24	MR. KAPLAN: You're talking about the	02:24:05
25	last full paragraph, not the last paragraph?	02:24:05

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1	MR. HUDIS: Yeah. Correct. Excuse me.	02:24:07
2	You're right, Counsel, it's the last two	02:24:08
3	paragraphs.	02:24:11
4	THE WITNESS: Two paragraphs.	02:24:12
5	MR. KAPLAN: Both paragraphs.	02:24:13
6	MR. HUDIS: Yeah.	02:24:14
7	Q. Are those the steps in OCR technology?	02:24:15
8	MR. KAPLAN: Objection. Vague.	02:24:17
9	THE WITNESS: Those are some steps in	02:24:20
10	OCR technology, yes.	02:24:22
11	BY MR. HUDIS:	02:24:22
12	Q. Mr. Fruchterman, could you turn to page	02:24:30
13	562 at the top. And I'd like to know, are these	02:24:33
14	typical types of OCR errors? And what's described	02:24:44
15	here are misrecs, nonrecs, drops and adds.	02:24:48
16	A. I --	02:24:57
17	MR. KAPLAN: Objection. Vague.	02:24:58
18	THE WITNESS: I would say those are	02:24:58
19	common OCR errors.	02:24:59
20	BY MR. HUDIS:	02:25:03
21	Q. What happens with these common OCR	02:25:04
22	errors are encountered?	02:25:05
23	MR. KAPLAN: Objection.	02:25:07
24	MR. HUDIS: I'll reask the question.	02:25:08
25	Q. If any of these OCR errors are	02:25:10

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1	encountered, what happens when the printed text is	02:25:12
2	converted to speech?	02:25:16
3	MR. KAPLAN: Objection. Vague.	02:25:19
4	Incomplete hypothetical.	02:25:22
5	THE WITNESS: Depending on what the	02:25:29
6	error is, a person listening to the text might	02:25:30
7	hear something different in the word.	02:25:35
8	BY MR. HUDIS:	02:25:39
9	Q. Could it be garbled text?	02:25:39
10	MR. KAPLAN: Objection. Vague.	02:25:43
11	THE WITNESS: Yeah, it really depends on	02:25:46
12	the error. I mean, humans listening to text, you	02:25:47
13	know, will they notice an error? It depends on	02:25:52
14	how extreme it is. For example, if R and N get	02:25:55
15	turned into M, you know, you might hear it was a	02:26:00
16	case of modem times. Person is going to say, Oh,	02:26:03
17	it's probably modern. But 'cause that's -- that	02:26:08
18	was a common error.	02:26:12
19	It gets -- it's been less common in	02:26:13
20	recent years because "modem" isn't as common a	02:26:16
21	word now as it was once. And the OCR engines do	02:26:20
22	tune themselves for statistics in language.	02:26:25
23	BY MR. HUDIS:	02:26:28
24	Q. Mr. Fruchterman, could you please turn	02:26:40
25	to page 565 of Exhibit 58.	02:26:41

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1	What is the DAISY standard?	02:26:50
2	A. The DAISY standard is a standard for	02:26:58
3	delivering accessible books to people with	02:27:01
4	disabilities.	02:27:05
5	Q. Is that standard still in use today?	02:27:06
6	A. It is.	02:27:11
7	Q. By whom?	02:27:11
8	MR. KAPLAN: Objection. Lacks	02:27:14
9	foundation. Vague.	02:27:14
10	THE WITNESS: The DAISY consortium is	02:27:17
11	essentially the leading libraries for people with	02:27:21
12	print-disabilities, and I believe almost all of	02:27:25
13	the DAISY members' libraries use the DAISY format	02:27:27
14	as part of their system of delivering accessible	02:27:32
15	books to their disabled patrons.	02:27:35
16	BY MR. HUDIS:	02:27:37
17	Q. Is this a proprietary format?	02:27:37
18	MR. KAPLAN: Objection. Vague.	02:27:41
19	Confusing.	02:27:41
20	MR. HUDIS: I'll ask -- I'll reask the	02:27:42
21	question.	02:27:44
22	Q. Is DAISY a proprietary format by the	02:27:44
23	participating libraries in the consortium?	02:27:47
24	MR. KAPLAN: Objection. Vague.	02:27:50
25	Confusing.	02:27:50

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1	THE WITNESS: My understanding is the	02:27:55
2	DAISY format is shared widely so that anyone can	02:27:57
3	use the standard and it is not proprietary to the	02:28:01
4	members.	02:28:04
5	BY MR. HUDIS:	02:28:04
6	Q. Does this technology require use of a	02:28:04
7	PDF file?	02:28:07
8	MR. KAPLAN: Objection. Vague and	02:28:11
9	confusing.	02:28:13
10	THE WITNESS: It's the antithesis of a	02:28:14
11	PDF file.	02:28:16
12	BY MR. HUDIS:	02:28:19
13	Q. Okay. And why do you say that?	02:28:20
14	A. Because PDFs are frequently not	02:28:22
15	accessible in the form that they present	02:28:25
16	themselves.	02:28:27
17	Q. Without OCR technology?	02:28:28
18	A. That's --	02:28:31
19	MR. KAPLAN: Objection. Vague.	02:28:31
20	THE WITNESS: That's one of the problems	02:28:32
21	with PDFs. Yes.	02:28:34
22	BY MR. HUDIS:	02:28:35
23	Q. All right. So does -- does the DAISY	02:28:36
24	technology require use of an OCR-processed PDF	02:28:38
25	file?	02:28:42

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1	MR. KAPLAN: Objection. Vague and	02:28:44
2	confusing.	02:28:45
3	THE WITNESS: No.	02:28:46
4	BY MR. HUDIS:	02:28:49
5	Q. What is required for use of DAISY	02:28:49
6	technology?	02:28:51
7	MR. KAPLAN: Objection. Vague.	02:28:53
8	THE WITNESS: Well, the DAISY standard	02:28:57
9	is a format for digitally delivering typically	02:29:01
10	books, but could be other kinds of documents. It	02:29:05
11	encompasses digital text, structure, audio, video,	02:29:08
12	pictures, tactile graphics.	02:29:12
13	And so a DAISY book might contain one or	02:29:17
14	all of those different elements without respect to	02:29:21
15	how it was created or how it will get used. It's	02:29:27
16	just a file format.	02:29:31
17	BY MR. HUDIS:	02:29:32
18	Q. And --	02:29:32
19	MR. KAPLAN: Can we, when you're done	02:29:33
20	with this line of questioning, take a very short	02:29:34
21	break?	02:29:37
22	MR. HUDIS: Yes.	02:29:37
23	MR. KAPLAN: Thank you.	02:29:38
24	BY MR. HUDIS:	02:29:39
25	Q. And DAISY -- DAISY-processed texts can	02:29:39

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1	be delivered either by an audio DAISY book or a	02:29:44
2	full-text DAISY book, correct?	02:29:47
3	MR. KAPLAN: Objection. Vague and	02:29:50
4	incomplete hypothetical.	02:29:52
5	THE WITNESS: Those are two ways a DAISY	02:29:58
6	book can be delivered.	02:30:02
7	MR. HUDIS: That's it for this, so let's	02:30:53
8	take a break.	02:30:55
9	THE VIDEOGRAPHER: Going off the record	02:30:56
10	at 2:30.	02:30:56
11	(Whereupon, a recess was taken.)	02:31:01
12	(Whereupon, Deposition Exhibit 59 and	02:38:28
13	60 were marked for identification.)	02:38:28
14	THE VIDEOGRAPHER: Going back on the	02:38:55
15	record at 2:38.	02:38:56
16	BY MR. HUDIS:	02:38:58
17	Q. Mr. Fruchterman, are you familiar with	02:39:04
18	the litigation titled "Authors Guild Versus	02:39:05
19	HathiTrust" which was litigated at the trial level	02:39:11
20	in New York Federal Court in Manhattan in 2011 and	02:39:13
21	2012?	02:39:18
22	MR. KAPLAN: Objection. Vague and	02:39:19
23	argumentative.	02:39:19
24	THE WITNESS: Yes.	02:39:22
25		

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1	BY MR. HUDIS:	02:39:23
2	Q. Okay. What do you recall about who the	02:39:23
3	plaintiffs were in the HathiTrust litigation?	02:39:26
4	MR. KAPLAN: Objection. Argumentative.	02:39:30
5	THE WITNESS: I remember it was	02:39:37
6	primarily the Authors Guild. That was certainly	02:39:38
7	the public face. I believe there were some	02:39:41
8	foreign authors associations or publishing	02:39:44
9	associations. I'm a little confused, but I know	02:39:48
10	they were foreign entities. Probably a couple	02:39:51
11	specific authors. That's my recollection	02:39:54
12	primarily from reading the press coverage of the	02:39:56
13	case.	02:39:58
14	BY MR. HUDIS:	02:39:59
15	Q. Do you remember what the plaintiffs'	02:40:00
16	legal claims were in the HathiTrust case?	02:40:01
17	MR. KAPLAN: Objection. Vague.	02:40:04
18	THE WITNESS: The case was always	02:40:08
19	described as one over allegations of copyright	02:40:10
20	infringement.	02:40:13
21	BY MR. HUDIS:	02:40:15
22	Q. Do you remember who the defendants were	02:40:15
23	in the HathiTrust case?	02:40:16
24	A. The HathiTrust is an assemblage of	02:40:19
25	research libraries that basically had a large book	02:40:24

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1	scanning repository that they were using.	02:40:32
2	Q. Do you remember what legal defenses	02:40:34
3	those defendants asserted in the HathiTrust	02:40:36
4	litigation?	02:40:39
5	MR. KAPLAN: Objection. Vague. Calls	02:40:40
6	for a legal conclusion.	02:40:41
7	THE WITNESS: As publicly reported, it	02:40:47
8	was primarily defenses of fair use and	02:40:49
9	Section 121.	02:40:59
10	BY MR. HUDIS:	02:41:03
11	Q. And that's the Chafee Amendment?	02:41:03
12	A. Yes.	02:41:06
13	Q. What role, if any, did you play in the	02:41:11
14	HathiTrust litigation?	02:41:13
15	MR. KAPLAN: Objection. Vague.	02:41:14
16	THE WITNESS: I provided declarations in	02:41:19
17	the case and an amicus brief.	02:41:20
18	BY MR. HUDIS:	02:41:22
19	Q. Were you an expert witness for the	02:41:22
20	intervener, the National Federation for the Blind?	02:41:25
21	A. I don't believe I met the definition of	02:41:31
22	"expert witness."	02:41:32
23	Q. Why do you say that?	02:41:34
24	A. Because I prepared a declaration, which	02:41:39
25	I've been told is different than being an expert	02:41:40

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1	witness. But I'm not a lawyer, so -- but I	02:41:43
2	understand that that's not the same thing.	02:41:47
3	MR. KAPLAN: I think the issue is you	02:41:53
4	did not submit an expert report in that case.	02:41:53
5	THE WITNESS: Thank you, Counsel, for	02:41:58
6	the legal advice.	02:41:59
7	MR. KAPLAN: Yes.	02:42:01
8	BY MR. HUDIS:	02:42:01
9	Q. So, Mr. Fruchterman, is that true, what	02:42:01
10	Public.Resource's counsel said, that you did not	02:42:04
11	provide an expert's report in the HathiTrust case?	02:42:07
12	A. That is my understanding, yes.	02:42:09
13	Q. Okay. Now, these questions all have to	02:42:12
14	do with the HathiTrust case.	02:42:14
15	Did you testify at any deposition?	02:42:16
16	A. No.	02:42:17
17	Q. Did you testify at any trial?	02:42:18
18	A. No.	02:42:21
19	Q. Did you submit any expert's reports?	02:42:23
20	A. No.	02:42:25
21	Q. Okay. Did you submit any declarations?	02:42:27
22	A. Yes.	02:42:29
23	Q. Okay. Do you know what a summary	02:42:31
24	judgment motion is?	02:42:32
25	MR. KAPLAN: Objection. Vague.	02:42:34

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1	THE WITNESS: I have a decent idea as	02:42:41
2	someone who has been familiar with legal affairs	02:42:43
3	as a business and nonprofit executive.	02:42:47
4	BY MR. HUDIS:	02:42:49
5	Q. Okay. In that context, what's your	02:42:50
6	understanding of what a summary judgment motion	02:42:52
7	is?	02:42:54
8	A. That rather than going to trial, the	02:42:56
9	plaintiffs or defendants create a motion to the	02:42:59
10	judge saying, Based on what you've seen, are we	02:43:02
11	done?	02:43:06
12	Q. Did you submit any declarations in	02:43:09
13	support of a summary judgment motion in the	02:43:11
14	HathiTrust case?	02:43:14
15	A. Yes.	02:43:15
16	Q. Do you remember how the HathiTrust	02:43:19
17	Digital Library operated?	02:43:19
18	MR. KAPLAN: Objection. Vague.	02:43:24
19	THE WITNESS: I have a general	02:43:29
20	familiarity with how it operates, but I have not	02:43:31
21	studied its operation in detail.	02:43:34
22	BY MR. HUDIS:	02:43:36
23	Q. What's the nature of your general	02:43:36
24	familiarity?	02:43:38
25	MR. KAPLAN: Objection. Vague.	02:43:40

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1	THE WITNESS: That the HathiTrust	02:43:40
2	collection is made available to faculty, students	02:43:43
3	and staff of the member libraries.	02:43:46
4	BY MR. HUDIS:	02:43:52
5	Q. And what was the source of the materials	02:43:53
6	for the HathiTrust Digital Library?	02:43:54
7	MR. KAPLAN: Objection. Lacks	02:43:58
8	foundation. Vague. Calls for speculation.	02:43:58
9	THE WITNESS: I believe, based on press	02:44:02
10	reports, that the primary source is the Google	02:44:04
11	book scanning project.	02:44:07
12	BY MR. HUDIS:	02:44:08
13	Q. And what -- what were the sources of	02:44:08
14	material that were scanned as part of the Google	02:44:14
15	scanning project for the HathiTrust library?	02:44:19
16	MR. KAPLAN: Objection. Lacks	02:44:22
17	foundation. Vague. Calls for speculation.	02:44:23
18	THE WITNESS: My general understanding,	02:44:26
19	it was the collection of the libraries of these	02:44:28
20	research universities.	02:44:32
21	BY MR. HUDIS:	02:44:39
22	Q. Mr. Fruchterman, I placed in front of	02:44:40
23	you what's been marked Exhibits 59 and 60.	02:44:42
24	Do you recognize the documents?	02:44:46
25	A. Yes. I believe these -- first is my	02:44:51

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1	declaration, and then a supplemental	02:44:55
2	declaration -- declaration.	02:44:57
3	Q. So on Exhibit 59, is that your signature	02:45:00
4	on page 7?	02:45:02
5	A. Yes.	02:45:11
6	Q. And the date of the signature is	02:45:12
7	June 28th, 2012?	02:45:13
8	A. Yes.	02:45:15
9	Q. And Exhibit 60 on page 4, is that your	02:45:17
10	signature?	02:45:20
11	A. Yes.	02:45:29
12	Q. And is your signature in Exhibit 60	02:45:31
13	dated July 17, 2012?	02:45:35
14	A. Yes, it appears to be.	02:45:40
15	Q. Mr. Fruchterman --	02:45:46
16	MR. KAPLAN: Counsel, the docket number	02:45:47
17	is garbled in Exhibit 59.	02:45:48
18	MR. HUDIS: It is.	02:45:50
19	MR. KAPLAN: Do you happen to know what	02:45:51
20	that is?	02:45:52
21	MR. HUDIS: The problem is, the document	02:45:55
22	was submitted twice. I believe the documents in	02:45:56
23	the HathiTrust litigation are Document Numbers 80	02:46:01
24	and 118.	02:46:06
25	THE WITNESS: Looks like the exhibits	02:46:09

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1	aren't quite as garbled. If you go to --	02:46:10
2	MR. KAPLAN: 118.	02:46:15
3	MR. HUDIS: I believe, but cannot	02:46:21
4	confirm, that Mr. Fruchterman's declaration was	02:46:23
5	submitted once without the attachments as Document	02:46:26
6	Number 80 and then again with the attachments as	02:46:30
7	Document Number 118.	02:46:34
8	Q. Mr. Fruchterman, if you could tell me,	02:46:42
9	is there anything on pages 1 through 7 of	02:46:43
10	Exhibit 59 that you would change at this time.	02:46:47
11	Something that you believe is incorrect?	02:46:57
12	Something that you believe, upon further inquiry,	02:46:58
13	you would supplement? Is there anything you would	02:47:01
14	change in this declaration?	02:47:04
15	MR. KAPLAN: Objection. Vague.	02:47:07
16	THE WITNESS: I will read it. So ...	02:47:13
17	MR. HUDIS: That's why I wanted to do it	02:47:15
18	off the record.	02:47:17
19	Can we go off the record?	02:47:20
20	MR. KAPLAN: No. No.	02:47:22
21	MR. HUDIS: You want to burn the time	02:47:23
22	up?	02:47:24
23	MR. KAPLAN: It's your question.	02:47:25
24	MR. HUDIS: That is my question.	02:47:26
25	THE WITNESS: My first reaction -- and I	02:48:19

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1	will continue as I read the document, though -- is	02:48:21
2	that in the facts relied upon, these are dated	02:48:23
3	figures. And so if I was saying how many books we	02:48:27
4	had or how many members we had, I would update it	02:48:29
5	to a current number because this is a few years	02:48:32
6	old. So that's my first change of things that I	02:48:35
7	would -- I would change.	02:48:37
8	At Number 16, I guess -- what would you	02:49:14
9	call these numbers to the left here in the	02:49:15
10	declaration?	02:49:17
11	MR. HUDIS: Mh-hmm.	02:49:17
12	THE WITNESS: Item 16?	02:49:19
13	BY MR. HUDIS:	02:49:19
14	Q. Paragraph.	02:49:19
15	A. Paragraph 16.	02:49:20
16	In paragraph 16, at that time, it was	02:49:21
17	close to 200 publishers. Now it's over 500	02:49:23
18	publishers, so I would update the number.	02:49:27
19	In paragraph 23, we cite average numbers	02:50:25
20	of cost per book. I think these numbers are	02:50:27
21	dated. They're going to be higher now.	02:50:29
22	In paragraph 28, I talk about image	02:51:15
23	descriptions, K-12 textbooks in highest demand.	02:51:19
24	We actually -- I think that at this point in time,	02:51:25
25	we probably devote less towards image descriptions	02:51:34

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1	than we did at the time of this declaration three	02:51:38
2	years ago. That was in paragraph 28.	02:51:40
3	Okay. That's the end of that	02:52:04
4	declaration. So those are the items I would	02:52:05
5	update or change.	02:52:08
6	Q. Okay. So of the items that you mention	02:52:10
7	that you want to update, I'd like to talk about	02:52:12
8	paragraph 23 on page 5 of Exhibit 59.	02:52:20
9	You said that today, in contrast to when	02:52:26
10	you created this declaration in 2002 -- 2012, it	02:52:32
11	would cost more per book to make it accessible to	02:52:37
12	the print-disabled. My question is why?	02:52:42
13	A. So this paragraph cites two different	02:52:47
14	figures. One is an average cost across the books	02:52:50
15	that we're scanning. I believe that it's going to	02:52:54
16	cost more both because costs have gone up per unit	02:52:58
17	of effort and because the books that we're	02:53:01
18	converting on average are more complex than they	02:53:04
19	were three years ago. And so because the greater	02:53:07
20	complexity of book, the greater the cost.	02:53:10
21	So I wouldn't stand behind this current	02:53:12
22	number of \$40 a book because I'm quite certain	02:53:14
23	it's higher. I don't know exactly how much higher	02:53:18
24	unless I inquire of my team, but that's the	02:53:20
25	impression I've gotten from that.	02:53:23

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1	Q.	Well, so you cited two possible	02:53:25
2		increases in cost. One was more complex books.	02:53:27
3		Is the first one labor costs?	02:53:30
4	A.	The cost of our contractor to do a given	02:53:31
5		amount of work costs more today than it did three	02:53:34
6		years ago.	02:53:37
7	Q.	So it's outside contractor work?	02:53:37
8	A.	Yeah. Most of our paid costs are from	02:53:40
9		outside contractors.	02:53:45
10	Q.	I thought it was members who scan books	02:53:46
11		for Bookshare.	02:53:50
12	A.	At the origin of Bookshare, it was	02:53:55
13		mainly members scanning for each other. With our	02:53:58
14		Department of Education funding, we're required to	02:54:01
15		deliver high-quality books to students. We	02:54:05
16		actually pay outsourcers to proofread the books.	02:54:07
17		And that's a significant expense.	02:54:12
18	Q.	So excuse my rudeness, Mr. Fruchterman.	02:54:17
19		I cut off your answer on why it would cost more	02:54:19
20		than \$40 per book. I did not let you talk about	02:54:22
21		the \$400 per book on the next page.	02:54:26
22		Is there anything you would change about	02:54:32
23		that cost?	02:54:34
24	MR. KAPLAN:	Objection. Vague.	02:54:36
25	THE WITNESS:	Other than our costs per	02:54:41

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1	unit of work have gone up from our outsourcers and	02:54:43
2	it may be that our textbooks are getting more	02:54:47
3	complicated. So I'm not certain. That number	02:54:52
4	probably has changed. It's probably not less than	02:54:57
5	\$400 a book, but I would have to inquire since	02:55:01
6	this is a dated declaration.	02:55:05
7	BY MR. HUDIS:	02:55:07
8	Q. Mr. Fruchterman, if you could turn to	02:55:13
9	page 6, paragraph 25, of your declaration of	02:55:14
10	Exhibit 59. It says:	02:55:16
11	"Bookshare divides books into	02:55:22
12	six levels based upon their	02:55:25
13	complexity."	02:55:26
14	Is this -- does Bookshare use these	02:55:28
15	levels of complexity today?	02:55:34
16	MR. KAPLAN: Objection. Vague.	02:55:37
17	THE WITNESS: Yes.	02:55:38
18	BY MR. HUDIS:	02:55:39
19	Q. In what way?	02:55:39
20	A. Primarily as a --	02:55:46
21	MR. KAPLAN: Objection. Vague.	02:55:47
22	THE WITNESS: Primarily as a cost and	02:55:48
23	management tool for our outsourcers.	02:55:52
24	BY MR. HUDIS:	02:55:57
25	Q. So as I read paragraphs 25 and 26, I	02:55:58

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1	would like to know if this statement is true: As	02:56:04
2	the complexity of the books you are scanning	02:56:07
3	increases, it costs more to scan the book and make	02:56:10
4	it accessible to those with print disabilities.	02:56:16
5	MR. KAPLAN: Counsel, is this a	02:56:20
6	statement in paragraph 25 --	02:56:20
7	MR. HUDIS: No.	02:56:23
8	MR. KAPLAN: -- or 26?	02:56:23
9	MR. HUDIS: No. It's a summary, and I	02:56:25
10	want to know if he agrees with it.	02:56:25
11	MR. KAPLAN: Okay. I'm sorry. That was	02:56:28
12	my confusion. Do you want to try that again	02:56:29
13	and --	02:56:31
14	MR. HUDIS: I do.	02:56:31
15	MR. KAPLAN: -- I can state my	02:56:32
16	objections?	02:56:34
17	MR. HUDIS: Sure.	02:56:34
18	Q. Based upon what you've written here in	02:56:35
19	paragraphs 25 and 26, is it true that as the	02:56:37
20	complexity of the scanned material increases, it	02:56:41
21	costs more to scan the book and make it accessible	02:56:45
22	to those with print disabilities?	02:56:49
23	MR. KAPLAN: Objection. Vague.	02:56:51
24	Incomplete hypothetical.	02:56:52
25	Go ahead.	02:57:00

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1	THE WITNESS: It costs more to proofread	02:57:01
2	the book. And so if by "scan" you mean scan and	02:57:03
3	proofread, yes. But scanning, the complexity of	02:57:08
4	the page doesn't change the cost to scan a page.	02:57:13
5	BY MR. HUDIS:	02:57:20
6	Q. Mr. Fruchterman, you go into great	02:57:25
7	detail about how Bookshare operated, at least in	02:57:26
8	2012, in paragraphs 12 through the 29.	02:57:32
9	My question, why was there no discussion	02:57:46
10	in this declaration of Exhibit 59 of all the	02:57:49
11	security protocols Bookshare uses to prevent	02:57:52
12	unauthorized access by the sighted community to	02:57:56
13	Bookshare?	02:58:02
14	MR. KAPLAN: Objection. Privileged.	02:58:04
15	Calls for information protected by Rule 26 of the	02:58:09
16	Federal Rules of Civil Procedure. And I don't	02:58:12
17	think -- I think that I'm instructing the witness	02:58:19
18	not to answer. I instruct the witness not to	02:58:21
19	answer.	02:58:23
20	THE WITNESS: I agree.	02:58:26
21	BY MR. HUDIS:	02:58:33
22	Q. All right. And you're going to adhere	02:58:33
23	to Counsel's instruction?	02:58:34
24	A. I am.	02:58:37
25	Q. Okay. Mr. Fruchterman, could you turn	02:58:37

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1	to page 2 of Exhibit 59. It says, on paragraph	02:58:44
2	9 -- are you there?	02:58:53
3	MR. KAPLAN: Almost.	02:58:58
4	THE WITNESS: Page 2. Just the second	02:58:59
5	page.	02:59:02
6	MR. HUDIS: You've got it rolled over.	02:59:02
7	That's why.	02:59:04
8	THE WITNESS: You're at the back.	02:59:05
9	MR. HUDIS: You're at the back.	02:59:07
10	MR. KAPLAN: Which exhibit? Oh, I'm	02:59:08
11	sorry. I thought you meant the declaration. I'm	02:59:10
12	sorry. There's only one exhibit. Exhibit 59,	02:59:11
13	page 2.	02:59:13
14	MR. HUDIS: Right. Paragraph 9.	02:59:14
15	Q. You say:	02:59:16
16	"Having reviewed	02:59:16
17	Daniel Clancy's description of	02:59:17
18	Google's Book" -- "of the Google	02:59:19
19	Books project and the HathiTrust	02:59:21
20	web site, it is my opinion that	02:59:23
21	the HathiTrust provides the best	02:59:25
22	opportunity for [sic] blind	02:59:27
23	students will ever have to access	02:59:28
24	a comprehensive digital library of	02:59:30
25	university collections."	02:59:34

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1	What's your recollection of Mr. Clancy's	02:59:35
2	description of the HathiTrust web site?	02:59:38
3	MR. KAPLAN: Objection. Vague.	02:59:42
4	THE WITNESS: I don't think that's what	02:59:45
5	I said in this sentence.	02:59:46
6	BY MR. HUDIS:	02:59:48
7	Q. Okay. What did you say and what did you	02:59:48
8	mean in this sentence?	02:59:49
9	A. I reviewed Dan Clancy's description of	02:59:50
10	Google Books project. Stop. And I also reviewed	02:59:52
11	the HathiTrust web site. And based on those two	02:59:55
12	things, I concluded this opinion.	02:59:59
13	Q. Okay. So my question is, what do you	03:00:01
14	recall of -- I see what you're saying. Okay.	03:00:04
15	So what do you recall of your review of	03:00:10
16	the HathiTrust web site?	03:00:12
17	MR. KAPLAN: Objection. Vague.	03:00:14
18	THE WITNESS: I've looked at the	03:00:24
19	HathiTrust web site since this time, and so I'm	03:00:28
20	not sure I can distinguish between those.	03:00:30
21	But it discussed how they were going to	03:00:34
22	make available the full text of all of these works	03:00:37
23	to students who they provided access to.	03:00:43
24	BY MR. HUDIS:	03:00:51
25	Q. Okay. Do you recall what security	03:00:51

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1	measures the HathiTrust web site used to prevent	03:00:52
2	unauthorized access?	03:00:57
3	MR. KAPLAN: Objection. Argumentative.	03:00:58
4	Calls for a legal conclusion. Vague. Lacks	03:01:00
5	foundation.	03:01:01
6	THE WITNESS: I believe that they used	03:01:05
7	authentication protocols common in the university	03:01:08
8	systems for authenticating faculty, staff and	03:01:11
9	students.	03:01:16
10	BY MR. HUDIS:	03:01:16
11	Q. Was that a user name and password?	03:01:17
12	MR. KAPLAN: Objection. Vague. Lacks	03:01:19
13	foundation.	03:01:20
14	THE WITNESS: Yes. Primarily.	03:01:22
15	BY MR. HUDIS:	03:01:23
16	Q. Mr. Fruchterman, let's now turn to	03:01:31
17	Exhibit 60, your supplemental declaration in the	03:01:32
18	HathiTrust litigation. Please read through the	03:01:35
19	document and tell me if there's anything today you	03:01:44
20	would change about the document and what you wrote	03:01:46
21	here.	03:01:50
22	A. As before, I would change numbers that	03:02:58
23	are based on the date of this declaration.	03:03:01
24	Oh, you're having problems with the	03:03:19
25	captioning again.	03:03:28

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1	MR. HUDIS: No. I'm having problems	03:03:29
2	with --	03:03:30
3	MR. KAPLAN: Scrolling.	03:03:31
4	MR. HUDIS: -- what was put down as your	03:03:34
5	answer.	03:03:34
6	(Record read by the reporter	03:03:41
7	as follows:	03:03:41
8	ANSWER: As before, I would	03:03:41
9	change numbers that are based on	03:03:41
10	the date of this declaration.)	03:03:41
11	BY MR. HUDIS:	03:03:41
12	Q. So which numbers would you change?	03:03:42
13	MR. KAPLAN: Objection. Vague.	03:03:44
14	THE WITNESS: Yeah. Paragraph 1 -- 2 --	03:03:45
15	sorry, paragraph 2, I cite how many users, how	03:03:48
16	many books, what our monthly capacity is. I would	03:03:52
17	update those to current figures.	03:03:58
18	BY MR. HUDIS:	03:03:59
19	Q. So it would be more?	03:03:59
20	A. Yes.	03:04:01
21	MR. KAPLAN: Description.	03:04:01
22	THE WITNESS: Sorry.	03:04:02
23	That's it.	03:04:26
24	BY MR. HUDIS:	03:04:27
25	Q. Are paragraphs 4 through 12 of	03:04:27

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1	Exhibit 60 still today an accurate description of	03:04:32
2	Bookshare's seven-point digital rights management	03:04:36
3	plan?	03:04:40
4	MR. KAPLAN: Objection. Vague.	03:04:40
5	THE WITNESS: Yes.	03:04:47
6	BY MR. HUDIS:	03:04:49
7	Q. If we could turn to paragraph 1, page 1,	03:04:50
8	of Exhibit 60. You say:	03:04:53
9	"Based upon my experience	03:04:55
10	with the Bookshare online library	03:04:57
11	for people with print	03:04:59
12	disabilities, I believe that the	03:05:00
13	risk of online piracy or	03:05:02
14	unauthorized copying and	03:05:04
15	distribution of works made fully	03:05:05
16	available to individuals" --	03:05:07
17	"individuals with print	03:05:09
18	disabilities through the	03:05:12
19	HathiTrust is minimal."	03:05:13
20	What was the basis for this statement	03:05:17
21	that you made in paragraph 1?	03:05:19
22	MR. KAPLAN: Objection. Confusing. The	03:05:23
23	document speaks for itself. Vague.	03:05:25
24	THE WITNESS: My declaration explains	03:05:29
25	why, at length.	03:05:31

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1	BY MR. HUDIS:	03:05:34
2	Q. Why is there no discussion of the	03:05:34
3	HathiTrust security measures in this declaration	03:05:36
4	of Exhibit 60?	03:05:39
5	MR. KAPLAN: Objection. Argumentative.	03:05:44
6	Vague.	03:05:47
7	And I will instruct the witness not to	03:05:49
8	answer to the extent that it calls for privileged	03:05:50
9	communications or information protected by Rule 26	03:05:54
10	of the Federal Rules of Civil Procedure.	03:05:58
11	BY MR. HUDIS:	03:06:01
12	Q. Mr. Fruchterman, first of all, will you	03:06:01
13	adhere to counsel's instructions?	03:06:05
14	A. Yes.	03:06:07
15	MR. KAPLAN: First --	03:06:07
16	BY MR. HUDIS:	03:06:08
17	Q. And can you --	03:06:08
18	MR. KAPLAN: Yeah. Okay.	03:06:09
19	BY MR. HUDIS:	03:06:10
20	Q. And can you answer my question without	03:06:10
21	revealing the substance of attorney-client	03:06:13
22	communications?	03:06:16
23	A. No.	03:06:18
24	Q. In making the statement "I believe that	03:06:25
25	the risk of online piracy or unauthorized copying	03:06:29

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1	and distribution of works made fully available to	03:06:33
2	individuals with print disabilities through the	03:06:35
3	HathiTrust is minimal," did you review the	03:06:39
4	security measures on the HathiTrust web site?	03:06:42
5	MR. KAPLAN: Objection. Vague.	03:06:46
6	THE WITNESS: Not beyond previously	03:06:50
7	discussed.	03:06:52
8	BY MR. HUDIS:	03:06:55
9	Q. Mr. Fruchterman, do you recall what the	03:07:11
10	outcome was in the HathiTrust litigation?	03:07:13
11	MR. KAPLAN: Objection. Vague. Calls	03:07:17
12	for a legal conclusion. Lacks foundation.	03:07:18
13	THE WITNESS: I do.	03:07:20
14	MR. KAPLAN: I'm sorry. Scratch the	03:07:20
15	last objection.	03:07:22
16	THE WITNESS: I do.	03:07:24
17	BY MR. HUDIS:	03:07:26
18	Q. All right. What -- and what was -- what	03:07:27
19	is your understanding of the outcome of the	03:07:28
20	HathiTrust litigation?	03:07:30
21	A. That the motion for summary judgment by	03:07:34
22	the defendants was granted by the district court	03:07:38
23	judgment and upheld in an appellate court	03:07:46
24	decision.	03:07:51
25	Q. And did you -- did you review the	03:07:57

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1	district court's opinion after it was issued?	03:07:59
2	A. I did.	03:08:04
3	(Whereupon, Deposition Exhibit 61 was	03:08:34
4	marked for identification.)	03:08:34
5	BY MR. HUDIS:	03:08:40
6	Q. Mr. Fruchterman, I'd like you to turn to	03:08:41
7	page 4 of what's now been marked as Exhibit 61.	03:08:45
8	It is the district court's opinion in the Authors	03:08:50
9	Guild, Inc. versus HathiTrust, et al., reported at	03:08:52
10	902 F.Supp.2d 445 and the date of the decision is	03:08:58
11	October 10, 2012.	03:09:02
12	MR. KAPLAN: Counsel, it's a Westlaw	03:09:04
13	printout.	03:09:06
14	MR. HUDIS: Yes.	03:09:07
15	MR. KAPLAN: Including Westlaw's	03:09:07
16	commentary and descriptions and additional	03:09:08
17	material that was not contained in the original	03:09:10
18	decision.	03:09:12
19	MR. HUDIS: Noted.	03:09:14
20	Q. Mr. Fruchterman, could you please turn	03:09:17
21	to page 4 of the document.	03:09:19
22	A. Yes.	03:09:22
23	Q. And it says, under "Background,"	03:09:23
24	"Defendants"-- are you with me?	03:09:26
25	A. Yes.	03:09:29

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1	Q. All right.	03:09:30
2	"Defendants have entered into	03:09:31
3	agreements with Google Inc. that	03:09:31
4	allow Google to create digital	03:09:33
5	copies of works in the	03:09:35
6	universities' libraries in	03:09:38
7	exchange for which Google provides	03:09:39
8	digital copies to defendants, the	03:09:41
9	mass digitization product or MDP."	03:09:44
10	Was that your understanding of how the	03:09:47
11	HathiTrust library worked?	03:09:49
12	MR. KAPLAN: Objection. Vague.	03:09:53
13	Confusing.	03:09:56
14	THE WITNESS: Yes. Generally.	03:09:59
15	BY MR. HUDIS:	03:10:01
16	Q. All right. If we could turn to page 5	03:10:01
17	of Exhibit 61. At the top left-hand corner, it	03:10:03
18	says:	03:10:10
19	"After digitization, Google	03:10:10
20	retains a copy of the digital book	03:10:11
21	that is available through Google	03:10:13
22	Books, an online system through	03:10:14
23	which Google users can search the	03:10:17
24	content and view snippets of the	03:10:19
25	books. Google also provides a	03:10:21

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1	digital copy of each scanned work	03:10:23
2	to the universities which includes	03:10:25
3	scanned image files of the pages	03:10:28
4	and a text file from the printed	03:10:29
5	work."	03:10:31
6	Was that also your understanding of how	03:10:32
7	the HathiTrust Digital Library worked?	03:10:34
8	MR. KAPLAN: Objection. Vague.	03:10:37
9	THE WITNESS: This describes much more	03:10:41
10	of what Google does than what the HathiTrust does.	03:10:42
11	It simply says that it gave them a copy. It	03:10:45
12	doesn't actually describe what the HathiTrust does	03:10:48
13	with the copy.	03:10:52
14	BY MR. HUDIS:	03:10:52
15	Q. So -- and then it says:	03:10:52
16	"After Google provides the	03:10:53
17	universities with digital copies	03:10:53
18	of their works, the universities	03:10:55
19	then contribute these digital	03:10:56
20	copies to the HathiTrust Digital	03:10:58
21	Library."	03:11:00
22	Is that your understanding --	03:11:01
23	MR. KAPLAN: Objection. Vague.	03:11:02
24	BY MR. HUDIS:	03:11:03
25	Q. -- of how the HathiTrust Digital Library	03:11:03

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1	worked?	03:11:07
2	MR. KAPLAN: Still vague.	03:11:08
3	THE WITNESS: To the extent it's stated	03:11:09
4	here, yes.	03:11:10
5	BY MR. HUDIS:	03:11:11
6	Q. And then skipping below Footnote 4, it	03:11:11
7	says:	03:11:14
8	"For works with known	03:11:15
9	authors, defendants use the works	03:11:16
10	within the HDL or HathiTrust	03:11:18
11	Digital Library in three ways:	03:11:19
12	Full-text searches, preservation	03:11:22
13	and access for people with	03:11:23
14	certified print disabilities. The	03:11:25
15	full-text search capabilities	03:11:27
16	allow users to search for	03:11:29
17	particular terms" -- "a particular	03:11:31
18	term across all the works within	03:11:34
19	the HathiTrust Digital Library.	03:11:35
20	For works that are not in the	03:11:37
21	public domain or for which the	03:11:39
22	copyright owner has not authorized	03:11:41
23	use, the full-text search	03:11:43
24	indicates only page numbers on	03:11:45
25	which a particular term is found	03:11:46

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1	and the number of times the term	03:11:48
2	appears on each page."	03:11:50
3	Was that your understanding of how the	03:11:52
4	HathiTrust Digital Library worked?	03:11:53
5	MR. KAPLAN: Objection. Vague and	03:11:56
6	confusing.	03:11:56
7	THE WITNESS: This states my	03:11:59
8	understanding about how some of the Hathi digital	03:12:00
9	trust works.	03:12:10
10	BY MR. HUDIS:	03:12:10
11	Q. All right. At the bottom of page 5,	03:12:10
12	starting at the bottom of the left-hand column and	03:12:11
13	going to the top of the right-hand column, it	03:12:14
14	says:	03:12:15
15	"Since the digital text in	03:12:16
16	the HDL or" --	03:12:16
17	MR. KAPLAN: Wait. Wait. Okay. I	03:12:17
18	found it.	03:12:18
19	THE WITNESS: Okay.	03:12:19
20	(Reporter interruption.)	03:12:19
21	BY MR. HUDIS:	03:12:19
22	Q. "Since the digital texts in	03:12:19
23	the HathiTrust Digital Library	03:12:28
24	became available, print-disabled	03:12:31
25	students have had full access to the	03:12:33

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1	materials through a secure system	03:12:33
2	intended solely for students with	03:12:35
3	certified disabilities."	03:12:37
4	Was this also your understanding of how	03:12:40
5	the HathiTrust Digital Library worked?	03:12:41
6	MR. KAPLAN: Objection. Vague.	03:12:45
7	THE WITNESS: I didn't think they	03:12:48
8	excluded disabled faculty and staff from their	03:12:49
9	system. I thought it was not just students, but	03:12:54
10	also faculty and staff.	03:12:56
11	BY MR. HUDIS:	03:12:57
12	Q. But, otherwise, you would agree with	03:12:58
13	this statement?	03:12:59
14	A. I think I'm less familiar with what the	03:13:10
15	secure system actually was. I -- but that they	03:13:12
16	had access, I did understand.	03:13:14
17	Q. Which brings me to my next question.	03:13:17
18	Could you turn to page 15 of Exhibit 61.	03:13:20
19	A. Okay. I'm on page 15.	03:13:41
20	Q. I'm reading from the bottom of the	03:13:43
21	right-hand column.	03:13:47
22	It says:	03:13:49
23	"Defendants respond with a	03:13:49
24	declaration from the individual in	03:13:52
25	charge" --	03:13:53

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1	A.	Stop. Stop.	03:13:55
2		MR. HUDIS: Yep.	03:13:56
3		THE WITNESS: Okay. So it's the last	03:13:58
4		partial sentence there. All right.	03:13:59
5		BY MR. HUDIS:	03:14:00
6	Q.	Yes. So it says:	03:14:00
7		"Defendants respond with a	03:14:01
8		declaration from the individual in	03:14:03
9		charge of security for the works	03:14:05
10		in the HathiTrust Digital Library	03:14:07
11		who describes the security	03:14:10
12		measures in place" -- citing to	03:14:11
13		the Snavelly declaration -- "and	03:14:14
14		notes that the libraries have been	03:14:16
15		certified as a trustworthy	03:14:17
16		depository by the Center for	03:14:19
17		Research Libraries."	03:14:22
18		Do you see that?	03:14:23
19	A.	Yes.	03:14:24
20	Q.	All right. Is that your understanding	03:14:24
21		of how the security measures of the HathiTrust	03:14:26
22		Digital Library worked?	03:14:28
23		MR. KAPLAN: Objection. Vague and	03:14:31
24		confusing.	03:14:32
25		THE WITNESS: It's consistent with my	03:14:38

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1	understanding of the access control portion of the	03:14:40
2	system, yes.	03:14:43
3	BY MR. HUDIS:	03:14:43
4	Q. And that was -- the access control	03:14:44
5	portion of the system was a user name and password	03:14:46
6	access?	03:14:49
7	A. Yes.	03:14:50
8	MR. KAPLAN: Objection. Vague.	03:14:50
9	Misstates testimony. Lacks foundation.	03:14:52
10	THE WITNESS: Yes.	03:14:54
11	BY MR. HUDIS:	03:14:54
12	Q. Mr. Fruchterman, I'm done with	03:15:06
13	Exhibit 61.	03:15:07
14	A. Okay.	03:15:09
15	Q. Do you know, Mr. Fruchterman, if the	03:15:11
16	plaintiffs appealed the trial court's decision in	03:15:13
17	the HathiTrust litigation?	03:15:16
18	A. I do.	03:15:19
19	Q. And what's your understanding? Did	03:15:19
20	they -- did the plaintiffs appeal?	03:15:20
21	A. They did.	03:15:23
22	Q. Okay. What role, if any, did you play	03:15:26
23	in the HathiTrust appeal?	03:15:28
24	A. I filed an amicus brief with our chief	03:15:31
25	competitor/collaborator in the field.	03:15:38

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1	Q.	And who was that?	03:15:40
2	A.	Learning Ally.	03:15:41
3	Q.	Do you recall what the outcome was in	03:15:44
4		the HathiTrust appeal?	03:15:46
5	A.	That the appellate court sustained, for	03:15:52
6		the most part, the district court's decision to	03:15:55
7		grant a summary judgment.	03:15:57
8	Q.	Did you review the appeals court opinion	03:15:58
9		in the HathiTrust litigation after it was issued?	03:16:01
10	A.	Yes.	03:16:04
11		(Whereupon, Deposition Exhibit 62 was	03:16:25
12		marked for identification.)	03:16:25
13		BY MR. HUDIS:	03:16:25
14	Q.	Mr. Fruchterman --	03:16:28
15		MR. KAPLAN: It's getting confusing.	03:16:28
16		We're switching from Westlaw to Lexis?	03:16:28
17		MR. HUDIS: What can I tell you.	03:16:33
18		THE WITNESS: Okay.	03:16:35
19		BY MR. HUDIS:	03:16:43
20	Q.	So, Mr. Fruchterman, I now place in	03:16:44
21		front of you what's been marked as Exhibit 62. It	03:16:46
22		is, as Counsel noted, the Lexis reported version	03:16:49
23		of the Second Circuit Court of Appeals decision in	03:16:53
24		Authors Guild versus HathiTrust reported at 755	03:16:58
25		F.3d 87. The decision was issued on October 30,	03:17:01

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1	2013.	03:17:09
2	MR. KAPLAN: Is that --	03:17:17
3	BY MR. HUDIS:	03:17:19
4	Q. Mr. Fruchterman -- did I get something	03:17:19
5	wrong, Counsel?	03:17:21
6	MR. KAPLAN: I think it was decided on	03:17:23
7	June 10th, 2014.	03:17:24
8	MR. HUDIS: Oh, it says --	03:17:25
9	MR. KAPLAN: Argued October 30th, 2013.	03:17:28
10	MR. HUDIS: Counsel, thank you. All	03:17:30
11	right. So it was argued in October 2013. And the	03:17:31
12	decision was issued on June 10, 2014. Thank you.	03:17:35
13	Appreciate it.	03:17:40
14	Q. If you could turn to page 7 of	03:17:43
15	Exhibit 62. Mr. Fruchterman, I'm reading now from	03:17:47
16	the top of the right-hand column of page 7.	03:17:59
17	Are you with me? It says "second."	03:18:05
18	A. Yes.	03:18:08
19	Q. Okay. It says:	03:18:08
20	"Second, the HathiTrust	03:18:09
21	Digital Library allows member	03:18:10
22	libraries to provide patrons with	03:18:13
23	certified print disabilities	03:18:14
24	access to the full text of	03:18:16
25	copyrighted works. A 'print	03:18:17

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1	disability' is any disability that	03:18:22
2	prevents a person from effectively	03:18:25
3	reading printed material.	03:18:26
4	Blindness is one example, but	03:18:28
5	print disabilities also include	03:18:30
6	those that prevent a person from	03:18:32
7	physically holding a book or	03:18:34
8	turning pages."	03:18:36
9	First, Mr. Fruchterman, do you agree	03:18:40
10	with the court's description of what a print	03:18:42
11	disability is?	03:18:44
12	MR. KAPLAN: Objection. Vague.	03:18:47
13	THE WITNESS: Yes, in general.	03:18:55
14	BY MR. HUDIS:	03:18:58
15	Q. Continuing, the court says:	03:18:58
16	"To use this service, a	03:18:59
17	patron must obtain certification	03:19:00
18	of his disability from a qualified	03:19:02
19	expert. Through the HathiTrust	03:19:05
20	Digital Library, a print-disabled	03:19:06
21	user can obtain access to the	03:19:10
22	contents of works in the digital	03:19:11
23	library using adaptive	03:19:13
24	technologies such as software that	03:19:16
25	converts the text into spoken	03:19:17

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1	words or that magnifies the text.	03:19:19
2	Currently" -- I guess it means at	03:19:21
3	the time of this decision -- "the	03:19:25
4	University of Michigan's library	03:19:26
5	is the only HDL member that	03:19:28
6	permits such access, although	03:19:30
7	other member libraries intend to	03:19:31
8	provide it in the future."	03:19:34
9	With respect to individuals with print	03:19:35
10	disabilities, Mr. Fruchterman, do you agree with	03:19:37
11	the Court's description of how the HathiTrust	03:19:40
12	Digital Library worked?	03:19:43
13	MR. KAPLAN: Objection. Vague.	03:19:46
14	Compound. Confusing.	03:19:47
15	THE WITNESS: Yes. I think it's a	03:19:54
16	decent summary of my understanding of the state at	03:19:56
17	the time of the decision.	03:19:59
18	BY MR. HUDIS:	03:19:59
19	Q. Mr. Fruchterman, if you could now turn	03:20:02
20	to page 13 of Exhibit 62.	03:20:04
21	Now, starting towards the bottom of the	03:20:13
22	left-hand column and continuing to most of the	03:20:16
23	right-hand column of Exhibit 62, page 13, it	03:20:19
24	describes -- and the Court says:	03:20:27
25	"The record before us	03:20:28

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1	documents the extensive security	03:20:31
2	measures the libraries have	03:20:32
3	undertaken to safeguard against	03:20:33
4	the risk of a data breach."	03:20:35
5	And citing to the Wilkins' declaration.	03:20:40
6	As part of your work in the HathiTrust	03:20:42
7	litigation, did you ever review the Wilkins'	03:20:45
8	declaration?	03:20:48
9	MR. KAPLAN: Objection. Vague and	03:20:49
10	confusing.	03:20:50
11	THE WITNESS: No.	03:20:53
12	BY MR. HUDIS:	03:20:53
13	Q. As part of your work in the HathiTrust	03:20:54
14	litigation, did you review the security controls	03:20:56
15	that the HathiTrust Digital Library employed?	03:20:59
16	MR. KAPLAN: Objection. Vague.	03:21:06
17	THE WITNESS: No.	03:21:07
18	BY MR. HUDIS:	03:21:07
19	(Whereupon, Deposition Exhibit 63 was	03:21:43
20	marked for identification.)	03:21:43
21	BY MR. HUDIS:	03:21:43
22	Q. Mr. Fruchterman, I have now marked a	03:21:54
23	document as Fruchterman Exhibit 63. It's ten	03:21:56
24	pages. I'd like to know if you recognize the	03:22:06
25	document.	03:22:08

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1	A.	I recognize it as an article that I	03:22:17
2		believe I've read at least a portion of.	03:22:19
3	Q.	Now, it is entitled "The Internet	03:22:28
4		Archive's Open Library is violating authors'	03:22:31
5		copyrights," and it bears a date of July 10, 2013.	03:22:33
6		Mr. Fruchterman, did you provide any	03:22:37
7		comments to this article?	03:22:40
8		MR. KAPLAN: Objection. Vague.	03:22:42
9		THE WITNESS: I will take a moment to	03:22:46
10		examine the comments.	03:22:47
11		I think it's a possibility that I	03:23:09
12		submitted a comment on this, but I didn't find it	03:23:11
13		on the initial inspection. Maybe I need to reread	03:23:13
14		more carefully.	03:23:16
15		BY MR. HUDIS:	03:23:17
16	Q.	We're going to go over that.	03:23:17
17	A.	There we go. I just found my comment.	03:23:19
18	Q.	Okay.	03:23:22
19	A.	So, yes.	03:23:22
20	Q.	All right. So you recall Exhibit 63 as	03:23:23
21		being a blog post by Chris --	03:23:28
22		MR. KAPLAN: I'm going to ask the	03:23:32
23		witness to review the entire document.	03:23:33
24		MR. HUDIS: Sure.	03:23:35
25		THE WITNESS: Okay.	03:23:38

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1	MR. HUDIS: Thank you, Counsel.	03:23:40
2	MR. KAPLAN: For the sake of brevity and	03:24:18
3	to be clear, I just wanted to point out that	03:24:21
4	there's multiple comments.	03:24:23
5	MR. HUDIS: Right.	03:24:25
6	THE WITNESS: That I've written multiple	03:24:25
7	comments?	03:24:26
8	MR. HUDIS: Yes.	03:24:28
9	THE WITNESS: Okay. Sorry. Thank you.	03:24:28
10	MR. KAPLAN: I don't want you to be	03:24:29
11	misled.	03:24:30
12	MR. HUDIS: That wasn't my intention.	03:24:31
13	MR. KAPLAN: I know it wasn't.	03:24:32
14	BY MR. HUDIS:	03:24:38
15	Q. Mr. Fruchterman, just let me know when	03:24:38
16	you're ready.	03:24:40
17	A. All right. Read the rest of the	03:28:12
18	comments after my --	03:28:13
19	MR. KAPLAN: No.	03:28:14
20	MR. HUDIS: I'm not going to ask --	03:28:14
21	MR. KAPLAN: Advertisements after that.	03:28:16
22	THE WITNESS: All right. Cool. So the	03:28:18
23	question?	03:28:19
24	BY MR. HUDIS:	03:28:19
25	Q. Yes. Mr. Fruchterman, first of all, the	03:28:20

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1	author, Mr. Meadows, on page 2 refers to top of	03:28:23
2	the page -- third paragraph that starts with "and	03:28:36
3	some of those modern eBooks."	03:28:40
4	A. Okay. I'm -- on which page?	03:28:42
5	Q. Page 2.	03:28:44
6	A. Page 2.	03:28:45
7	Q. Okay. And the paragraph starting "and	03:28:46
8	some of those modern eBooks."	03:28:47
9	A. Yeah.	03:28:50
10	Q. All right. He says:	03:28:50
11	"And some of those modern	03:28:51
12	eBooks for the print-disabled are	03:28:52
13	only available in protected DAISY	03:28:55
14	format."	03:28:57
15	Do you see that?	03:28:58
16	A. Yes.	03:28:59
17	Q. Would you describe the DAISY format as a	03:28:59
18	protected format?	03:29:03
19	MR. KAPLAN: Objection. Vague.	03:29:05
20	THE WITNESS: There are DAISY format	03:29:10
21	books that have protections on them and those that	03:29:12
22	do not. DAISY by itself does not require	03:29:15
23	protection.	03:29:18
24	BY MR. HUDIS:	03:29:19
25	Q. Does the -- does the DAISY format come	03:29:22

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1	with protections, some of them?	03:29:25
2	A. Some --	03:29:28
3	Q. I'll reask the question.	03:29:28
4	Do some textual material available in	03:29:29
5	DAISY format come with access protections?	03:29:34
6	MR. KAPLAN: Calls for speculation.	03:29:37
7	Lacks foundation. Vague.	03:29:38
8	THE WITNESS: Some DAISY libraries use	03:29:43
9	digital rights management technical protection	03:29:47
10	mechanisms and some -- well, some -- we do, but I	03:29:51
11	would characterize our books as unprotected rather	03:29:58
12	than protected in the common understanding of what	03:30:01
13	"protected" means.	03:30:05
14	BY MR. HUDIS:	03:30:14
15	Q. In the context of the question I'm going	03:30:15
16	to ask you next, I'd like you to refer to, on	03:30:16
17	page 2, the text that Mr. Meadows has called out	03:30:20
18	in tan -- in a tan background.	03:30:27
19	Do you see that?	03:30:32
20	A. Yes.	03:30:33
21	Q. All right. And it says -- it's the	03:30:34
22	copyright page of X-COM PDF.	03:30:36
23	"No part of this book may be	03:30:39
24	reproduced or transmitted in any	03:30:41
25	form or by any means, electronic	03:30:43

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1	or mechanical, including	03:30:46
2	photocopying, recording or by any	03:30:47
3	information storage or retrieval	03:30:51
4	system without written permission	03:30:52
5	from Prima Publishing, except for	03:30:54
6	the inclusion of quotations in a	03:30:57
7	review. All products and	03:31:00
8	characters mentioned in this book	03:31:01
9	are trademarks of their respective	03:31:03
10	companies."	03:31:05
11	Do you see that?	03:31:06
12	A. Yes.	03:31:06
13	Q. In your comment of July 12, 2013, at	03:31:07
14	8:06 p.m. on page 4 --	03:31:13
15	A. Yes.	03:31:16
16	Q. -- of Exhibit 63, you say:	03:31:16
17	"Restricted language in a	03:31:19
18	printed book like that quoted from	03:31:21
19	the copyright page of the X-COM is	03:31:23
20	a useless gesture."	03:31:26
21	What did you mean by that, that it was a	03:31:28
22	useless gesture?	03:31:34
23	A. As a nonlawyer, I read it as asserting	03:31:36
24	powers that they don't have.	03:31:38
25	Q. Why?	03:31:41

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1	A.	Because, for example, if I believed	03:31:41
2		them, I could not operate the Bookshare library on	03:31:44
3		that title. And I think that's incorrect.	03:31:48
4	Q.	Mr. Fruchterman, I want to verify. Did	03:31:55
5		you write this post of July 12, 2013, at 8:06 p.m.	03:31:57
6		on page 4 of Exhibit 63?	03:32:03
7	A.	I would agree that I wrote these posts.	03:32:09
8	Q.	And did you also write the post on	03:32:13
9		July 12, 2013, at 10:45 p.m., which spans pages 4	03:32:17
10		and 5 of Exhibit 63?	03:32:24
11	A.	Yes.	03:32:28
12	Q.	I just want to get some context here	03:32:35
13		just to make sure.	03:32:38
14		"SFWA" stands for the Science and	03:32:39
15		Fantasy Writers of America?	03:32:42
16	A.	I believe it's Science Fiction and	03:32:44
17		Fantasy Writers of America.	03:32:49
18	Q.	Okay. And you say here at the bottom of	03:32:50
19		page 4 to the top of page 5:	03:32:52
20		"In the case of SFWA, we	03:32:55
21		committed ourselves to be against	03:32:58
22		digital piracy (already our	03:33:00
23		approach since we're an example of	03:33:05
24		legal copying without permission,	03:33:07
25		didn't want to support illegal	03:33:09

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1	copying without permission) and	03:33:11
2	increased respect for authors'	03:33:14
3	rights in the quality of their	03:33:16
4	accessible version of their work."	03:33:19
5	Mr. Fruchterman, what did you mean by	03:33:22
6	this sentence?	03:33:23
7	MR. KAPLAN: Objection. Vague.	03:33:26
8	Compound.	03:33:28
9	THE WITNESS: Benetech signed an	03:33:32
10	agreement with SFWA that contained many of the	03:33:32
11	things I'm summarizing here. So, yes, we had an	03:33:35
12	agreement with the Science Fiction and Fantasy	03:33:38
13	Writers of America that could be summarized with	03:33:41
14	this sentence.	03:33:45
15	MR. HUDIS: So, Sebastian, we're going	03:34:01
16	to go into Mr. Fruchterman's expert's report. I	03:34:04
17	think now would be a good time to take a break	03:34:05
18	before we dive into that.	03:34:08
19	MR. KAPLAN: Okay. I was wondering if	03:34:09
20	we were going to get there.	03:34:12
21	MR. HUDIS: Now --	03:34:13
22	THE VIDEOGRAPHER: Going off the record	03:34:14
23	at 3:34 p.m.	03:34:14
24	(Whereupon, a recess was taken.)	03:34:17
25	(Whereupon, Deposition Exhibit 64 was	03:34:17

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1	marked for identification.)	03:34:17
2	THE VIDEOGRAPHER: Here begins -- here	03:48:21
3	begins Tape No. 4 in the deposition of	03:48:23
4	James Fruchterman. We're back on the record at	03:48:25
5	3:48.	03:48:30
6	BY MR. HUDIS:	03:48:31
7	Q. Mr. Fruchterman, I place in front of you	03:48:32
8	what's been marked as Exhibit Fruchterman 64.	03:48:34
9	This is your expert's report?	03:48:38
10	A. Yes.	03:48:41
11	Q. And you've reviewed it before testifying	03:48:42
12	today?	03:48:47
13	A. Correct.	03:48:47
14	Q. Mr. Fruchterman, I'd like you to turn to	03:48:48
15	page 1.	03:48:49
16	A. Yes.	03:48:52
17	Q. In the first paragraph at the top, it	03:48:52
18	says:	03:48:55
19	"As an expert in	03:48:55
20	accessibility of written materials	03:48:57
21	for people who have disabilities	03:48:58
22	that affect using standard print,	03:49:01
23	people who are print-disabled, I	03:49:04
24	have been retained by	03:49:09
25	Public.Resource.Org to evaluate	03:49:10

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1	the accessibility of certain	03:49:12
2	content that had been available on	03:49:15
3	the web site of the defendant in	03:49:17
4	this case."	03:49:20
5	Do you see that?	03:49:22
6	A. Yes.	03:49:23
7	Q. All right. And as you use	03:49:23
8	"accessibility" in this report at the top of	03:49:26
9	page 1, that's consistent with the definition of	03:49:31
10	"accessible" or "access" that we discussed this	03:49:34
11	morning?	03:49:37
12	MR. KAPLAN: Objection. Vague.	03:49:38
13	THE WITNESS: Yes.	03:49:40
14	BY MR. HUDIS:	03:49:43
15	Q. And when you discuss people who are	03:49:43
16	print-disabled, that's consistent with the	03:49:48
17	definition of "print-disabled" that you testified	03:49:52
18	to this morning?	03:49:55
19	MR. KAPLAN: Objection. Vague.	03:49:56
20	THE WITNESS: Yes.	03:49:57
21	BY MR. HUDIS:	03:49:57
22	Q. All right. You are not offering your	03:50:01
23	expertise on any other topic related to this	03:50:04
24	litigation?	03:50:06
25	MR. KAPLAN: Objection. Vague.	03:50:09

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1	THE WITNESS: Not in this report.	03:50:13
2	BY MR. HUDIS:	03:50:14
3	Q. Do you intend to offer any expert	03:50:16
4	opinions in this litigation other than that's	03:50:20
5	contained in your expert's report of Exhibit 64?	03:50:24
6	A. Am I?	03:50:46
7	MR. HUDIS: Note, Counsel has pointed to	03:50:50
8	the --	03:50:52
9	THE WITNESS: To my expert report.	03:50:53
10	MR. HUDIS: To his expert's report.	03:50:55
11	THE WITNESS: I don't -- I believe that	03:50:59
12	I'm here to talk about the matter of accessibility	03:51:00
13	of this document, but --	03:51:03
14	MR. KAPLAN: Sorry.	03:51:04
15	THE WITNESS: -- if I'm asked some other	03:51:05
16	question and it's okay with the Court, I will	03:51:07
17	answer any other question.	03:51:09
18	MR. KAPLAN: I'm just pointing you to	03:51:11
19	the last sentence of the second full paragraph of	03:51:13
20	your expert report.	03:51:16
21	THE WITNESS: "I reserve the right	03:51:16
22	to change or supplement this	03:51:17
23	report if additional evidence comes	03:51:19
24	to my attention and to prepare	03:51:20
25	demonstrative and/or exhibits to	03:51:22

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1	explain my opinions as appropriate."	03:51:25
2	BY MR. HUDIS:	03:51:26
3	Q. Other than the reservation in your	03:51:26
4	expert's report that you just read into the	03:51:28
5	record, do you intend to provide any other expert	03:51:31
6	opinions in this case other than what's in your	03:51:34
7	expert's report of Exhibit 64?	03:51:37
8	A. I do not intend to.	03:51:40
9	Q. So you're offering your opinion or	03:51:51
10	evaluation on the accessibility of certain content	03:51:54
11	that had been posted at one time on	03:51:57
12	Public.Resource's web site?	03:52:01
13	MR. KAPLAN: Objection. Vague and	03:52:09
14	compound.	03:52:10
15	THE WITNESS: Yes.	03:52:11
16	BY MR. HUDIS:	03:52:11
17	Q. Your evaluation on the accessibility of	03:52:14
18	content that had been posted on the	03:52:17
19	Public.Resource's web site concerns the 1999	03:52:19
20	edition of the Standards for Educational and	03:52:22
21	Psychological Testing.	03:52:25
22	A. Yes.	03:52:32
23	Q. And if we refer to that document as "the	03:52:34
24	1999 standards," you'll understand what I mean?	03:52:36
25	A. Yes.	03:52:39

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1	Q.	You are not offering your evaluations on	03:52:46
2		the Internet posting of any other content related	03:52:47
3		to this litigation, other than the 1999 standards?	03:52:50
4	A.	On two different web sites, yes.	03:52:57
5		Although, I will note that I searched for them on	03:53:12
6		other web sites.	03:53:14
7	Q.	So apart from the Public.Resource web	03:53:24
8		site and the Internet archive web site, you were	03:53:26
9		not offering your evaluations on the Internet	03:53:28
10		posting of the 1999 standards to any other web	03:53:31
11		site?	03:53:34
12		MR. KAPLAN: Objection. Vague.	03:53:37
13		THE WITNESS: I didn't find them on any	03:53:41
14		other web site.	03:53:42
15		BY MR. HUDIS:	03:53:43
16	Q.	That's not what I asked, though.	03:53:43
17		So what I asked was you are not offering	03:53:48
18		your evaluations on the Internet posting of the	03:53:51
19		1999 standards to any other web site besides	03:53:53
20		Public.Resource's web site and the Internet	03:53:55
21		Archive web site?	03:53:58
22		MR. KAPLAN: Objection. Vague.	03:54:00
23		THE WITNESS: Yes, I am offering my	03:54:02
24		evaluation on the availability of the 1999	03:54:05
25		standards on other web sites where I did not find	03:54:08

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1	them.	03:54:11
2	(Reporter clarification.)	03:54:15
3	THE WITNESS: 1999.	03:54:16
4	MR. HUDIS: 1999.	03:54:17
5	Q. Mr. Fruchterman, your entire	03:54:19
6	participation in this litigation is pro bono?	03:54:21
7	MR. KAPLAN: Objection. Calls for a	03:54:24
8	legal conclusion. Vague.	03:54:25
9	THE WITNESS: I am offering my time pro	03:54:31
10	bono, yes.	03:54:32
11	BY MR. HUDIS:	03:54:34
12	Q. You are not receiving any compensation	03:54:34
13	for your participation in this litigation?	03:54:35
14	MR. KAPLAN: Objection. Vague.	03:54:41
15	THE WITNESS: Not for my time, no.	03:54:42
16	BY MR. HUDIS:	03:54:46
17	Q. Are you receiving compensation for any	03:54:47
18	other purpose for your participation in this	03:54:49
19	litigation?	03:54:52
20	MR. KAPLAN: Objection. Vague.	03:54:52
21	THE WITNESS: I have not been offered	03:54:55
22	any compensation up till this point for any	03:54:56
23	expenses I have incurred with respect to this,	03:55:01
24	though, in theory, you sent me a check for \$40,	03:55:03
25	but I didn't get it.	03:55:09

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1	MR. KAPLAN: Because you sent it to us.	03:55:13
2	MR. HUDIS: We actually --	03:55:16
3	MR. KAPLAN: I think.	03:55:17
4	MR. HUDIS: Well, no.	03:55:18
5	MR. KAPLAN: Actually, I don't know.	03:55:19
6	Matt handled that part of it.	03:55:19
7	MR. HUDIS: Yeah. We actually -- all	03:55:21
8	the counsel waived the expert fee for all experts.	03:55:22
9	MR. KAPLAN: Yeah, that may have been	03:55:26
10	the other case.	03:55:27
11	THE WITNESS: I don't know. It said \$40	03:55:29
12	on the thing that I was shown this morning. And	03:55:31
13	so -- which I didn't remember seeing.	03:55:34
14	MR. KAPLAN: Okay.	03:55:38
15	BY MR. HUDIS:	03:55:40
16	Q. Whether for compensation or not,	03:55:43
17	Mr. Fruchterman, did you enter into any agreement	03:55:46
18	with Public.Resource in connection with your	03:55:49
19	participation in this litigation?	03:55:54
20	MR. KAPLAN: Objection. Vague.	03:56:01
21	THE WITNESS: Yes.	03:56:01
22	BY MR. HUDIS:	03:56:01
23	Q. Was it a written agreement?	03:56:05
24	MR. KAPLAN: Objection. Argumentative	03:56:07
25	and vague.	03:56:10

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1	THE WITNESS: Yes.	03:56:11
2	MR. HUDIS: Counsel, just noted, we have	03:56:12
3	never been provided with that agreement. We	03:56:13
4	didn't think that it was necessary to ask for it	03:56:19
5	by way of subpoena since that's part of what's	03:56:21
6	required under Federal Rules 26.	03:56:24
7	BY MR. HUDIS:	03:56:47
8	Q. Mr. Fruchterman --	03:56:49
9	MR. KAPLAN: Where is that required	03:56:49
10	by --	03:56:51
11	MR. HUDIS: Well, it's part -- that's	03:56:52
12	what's part of the expert's report.	03:56:54
13	MR. KAPLAN: I'm sorry. I don't know	03:56:58
14	what you mean by that.	03:56:59
15	MR. HUDIS: Part of the --	03:57:02
16	MR. KAPLAN: Looking at	03:57:02
17	Rule 26(a)(2)(B)?	03:57:04
18	MR. HUDIS: (a)(2)(B).	03:57:09
19	MR. KAPLAN: I don't see it.	03:57:10
20	MR. HUDIS: It's -- I believe it's the	03:57:11
21	last item.	03:57:12
22	MR. KAPLAN: The statement of the	03:57:13
23	compensation to be paid for the study and	03:57:14
24	testimony in the case is what the rule says.	03:57:16
25	MR. HUDIS: So anyway, Counsel, I just	03:57:45

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1	note that the agreement that Mr. Fruchterman has	03:57:47
2	just testified to was not produced. We think it	03:57:49
3	should be.	03:57:53
4	Q. Mr. Fruchterman, if you could turn to	03:57:56
5	page 3 of your expert's report. And when I say	03:57:59
6	"expert's report," just note for the record that I	03:58:02
7	am constantly referring to Exhibit 64 so I don't	03:58:05
8	have to constantly say it over and over again.	03:58:09
9	A. Yes.	03:58:11
10	Q. Are you there? All right.	03:58:11
11	So, Mr. Fruchterman, you limited the	03:58:13
12	focus of your report to accessibility challenges	03:58:16
13	faced by totally blind people.	03:58:17
14	MR. KAPLAN: Is there a question?	03:58:25
15	MR. HUDIS: Yes.	03:58:28
16	MR. KAPLAN: What is the question?	03:58:28
17	BY MR. HUDIS:	03:58:31
18	Q. You limited the focus of your report to	03:58:32
19	accessibility challenges faced by totally blind	03:58:34
20	people.	03:58:37
21	A. That sounds like a statement.	03:58:37
22	Q. All right. Do you --	03:58:39
23	A. Do you want to reframe it as a question?	03:58:40
24	Q. Sure. Mr. Fruchterman --	03:58:43
25	A. Thank you.	03:58:43

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1	Q.	-- did you limit the focus of your	03:58:43
2		report to accessibility challenges based -- faced	03:58:45
3		by totally blind people?	03:58:48
4	MR. KAPLAN:	Objection. Vague.	03:58:50
5	THE WITNESS:	I believe that I talked	03:58:53
6		about a variety of people with different	03:58:55
7		disabilities and that I focused my report on the	03:58:57
8		needs of people with -- who are blind, because	03:59:01
9		they generally have the most severe needs. But I	03:59:04
10		did discuss the needs of other people with print	03:59:07
11		disabilities.	03:59:09
12	BY MR. HUDIS:		03:59:10
13	Q.	Well, Mr. Fruchterman, you did not	03:59:10
14		consider print accessibilities -- accessibility	03:59:12
15		problems faced by the visually impaired.	03:59:15
16	A.	That sounds like a statement again.	03:59:19
17		Do you want to reframe it as a question.	03:59:21
18	Q.	All right. Well, that's either a yes or	03:59:24
19		no.	03:59:26
20		Isn't it true, you did not consider	03:59:26
21		print accessibility problems faced by the visually	03:59:29
22		impaired?	03:59:32
23	A.	I believe I did consider the	03:59:36
24		accessibility problems of people who are visually	03:59:39
25		impaired.	03:59:43

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1	Q.	Can you find that in your expert's	03:59:44
2		report?	03:59:45
3	A.	Reading from the page that we're	03:59:53
4		referring to:	03:59:55
5		"The other groups of people	03:59:55
6		with print disabilities use	03:59:56
7		similar technologies to access	03:59:59
8		print, such as having it read	04:00:00
9		aloud, and experience similar	04:00:02
10		challenges as blind people. In	04:00:07
11		the accessibility field, it is	04:00:08
12		generally understood that if you	04:00:10
13		make information accessible to a	04:00:11
14		blind person, it will probably	04:00:13
15		also meet the accessibility needs	04:00:15
16		of the great majority of people	04:00:17
17		with other print disabilities."	04:00:19
18		I can continue to search my report for	04:00:21
19		other references that I feel address that need.	04:00:23
20		Would you like me to do that?	04:00:25
21	Q.	Go ahead. I don't think you'll find	04:00:27
22		them, but please go ahead.	04:00:28
23	A.	Okay. On page 6:	04:00:58
24		"The unavailability of a	04:01:00
25		version of the 1999 standards that	04:01:02

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1	is accessible to people who are	04:01:04
2	blind or print-disabled is	04:01:05
3	problematic because the 1999	04:01:07
4	standards are important references	04:01:10
5	for those making tests that are	04:01:11
6	accessible to students who are	04:01:13
7	print-disabled as well as those	04:01:15
8	impacted by these tests."	04:01:17
9	Q. And that's your -- that, in your view,	04:01:20
10	is a discussion of making print content available	04:01:29
11	to people with -- who are visually impaired?	04:01:35
12	MR. KAPLAN: Objection. Argumentative.	04:01:42
13	Vague.	04:01:43
14	THE WITNESS: I include them in the	04:01:44
15	definition of people with print disabilities. I	04:01:45
16	have an additional line I can read from this page.	04:01:48
17	BY MR. HUDIS:	04:01:50
18	Q. Please.	04:01:51
19	A. I will look for more references to print	04:01:52
20	disabilities, but as a starting point,	04:01:55
21	"This also means that it is	04:01:56
22	an important resource to any	04:01:58
23	students or other individuals with	04:01:59
24	print disabilities who want to	04:02:03
25	assess compliance with the 1999	04:02:04

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1	standards. The unavailability of	04:02:07
2	the 1999 standards means that some	04:02:08
3	of those who are most impacted,	04:02:11
4	people who are blind or	04:02:13
5	print-disabled, are unable to	04:02:15
6	independently access the 1999	04:02:16
7	standard."	04:02:18
8	Q. So in that -- in that passage that you	04:02:19
9	just read, you are equating people who are totally	04:02:23
10	blind with people who have print disabilities?	04:02:26
11	MR. KAPLAN: Objection. Vague.	04:02:29
12	Misstates the document and the testimony.	04:02:31
13	Confusing.	04:02:35
14	THE WITNESS: My phrase is "people who	04:02:36
15	are blind or print-disabled." That way I was	04:02:37
16	including people who are print-disabled who aren't	04:02:41
17	blind, but I wasn't meaning to say that blind	04:02:44
18	people are not print-disabled.	04:02:47
19	BY MR. HUDIS:	04:02:49
20	Q. Just so we have a working context here,	04:02:49
21	so "print-disabled" can mean the following:	04:02:51
22	Totally blind?	04:02:55
23	A. Correct.	04:02:57
24	Q. Somebody who has low vision?	04:02:58
25	A. Right.	04:03:00

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1	Q.	Somebody who is learning-disabled?	04:03:01
2	A.	Okay.	04:03:05
3	Q.	Someone who is brain-injured?	04:03:06
4	A.	Mh-hmm.	04:03:07
5	Q.	And someone who is physically disabled	04:03:08
6		so that the person cannot pick up text?	04:03:10
7		MR. KAPLAN: Objection. Vague and	04:03:14
8		misleading.	04:03:15
9		THE WITNESS: That describes, I'd say,	04:03:16
10		over 95 percent of people with print disabilities,	04:03:17
11		but there are quite another -- other diagnoses	04:03:22
12		that would qualify as print disabilities beyond	04:03:23
13		those.	04:03:27
14		BY MR. HUDIS:	04:03:27
15	Q.	All right.	04:03:28
16	A.	For example, cortical blindness would be	04:03:28
17		an example of something where the eyes work fine,	04:03:30
18		but they still can't perceive.	04:03:32
19	Q.	All right. So, Mr. Fruchterman, I turn	04:03:34
20		now back to page 3, the second paragraph. What I	04:03:36
21		want to know is why did you say:	04:03:40
22		"I focused on the	04:03:42
23		accessibility challenges that	04:03:43
24		would be experienced by blind	04:03:44
25		people"?	04:03:46

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1	MR. KAPLAN: Objection. Asked and	04:03:49
2	answered. Vague, confusing.	04:03:49
3	MR. HUDIS: I don't believe he's	04:03:53
4	answered the question.	04:03:53
5	MR. KAPLAN: That's your opinion,	04:03:54
6	Counsel.	04:03:55
7	THE WITNESS: So the question, why did I	04:03:56
8	focus on that?	04:03:59
9	BY MR. HUDIS:	04:04:00
10	Q. Yes.	04:04:01
11	A. I think from our extensive discussion	04:04:04
12	today, that taking an inaccessible print document	04:04:11
13	and turning it into text is a fundamental element	04:04:15
14	of accessibility.	04:04:19
15	A person with a physical disability who	04:04:22
16	cannot turn a page can greatly benefit from having	04:04:25
17	a digital copy of that book so that they can, for	04:04:32
18	example, use electronic controls to turn the page.	04:04:36
19	So when I say that I focused on the	04:04:40
20	needs of blind people, is if you solve the needs	04:04:43
21	of blind people, you solve the needs of every	04:04:46
22	other one of the categories of print-disabled	04:04:49
23	persons that are in that definition.	04:04:52
24	Please. And I note that I haven't	04:04:59
25	actually gone through the rest of the report to	04:05:04

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1	look for more examples of this. There may be	04:05:06
2	more. But I'll let you manage the time of how I	04:05:08
3	spend that time.	04:05:13
4	Q. Thank you, Mr. Fruchterman.	04:05:14
5	A. Certainly.	04:05:15
6	Q. All right. Now, looking at page 3, at	04:05:16
7	the bottom, it's the third full paragraph, which	04:05:20
8	also spans to page 4, you say:	04:05:23
9	"The most common technology	04:05:28
10	used by a blind person for	04:05:29
11	accessibility is called a screen	04:05:31
12	reader."	04:05:34
13	First of all, what is a screen reader?	04:05:34
14	A. Quoting from the report, a screen reader	04:05:41
15	is a program that runs on a personal computer or a	04:05:43
16	smartphone that reads the information on the	04:05:45
17	screen aloud using a computer-synthesized voice.	04:05:48
18	Q. Is that also known as text to speech or	04:05:56
19	TTS?	04:05:58
20	A. It utilizes text to speech as the most	04:05:59
21	common way of outputting information from a screen	04:06:04
22	reader.	04:06:06
23	Q. In your report, did you consider the	04:06:08
24	accessibility of the 1999 standards through screen	04:06:10
25	magnification systems?	04:06:15

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1	MR. KAPLAN: Objection. Vague.	04:06:23
2	THE WITNESS: I don't believe that I	04:07:44
3	discussed screen magnification in this report.	04:07:45
4	BY MR. HUDIS:	04:07:47
5	Q. In your report, Mr. Fruchterman, did you	04:07:48
6	consider the accessibility of the 1999 standards	04:07:50
7	through a portable magnifier?	04:07:53
8	MR. KAPLAN: Objection. Vague.	04:08:01
9	THE WITNESS: No, I did not.	04:08:02
10	BY MR. HUDIS:	04:08:02
11	Q. In your report, did you consider the	04:08:03
12	accessibility of the 1999 standards through a	04:08:04
13	video magnifier?	04:08:07
14	MR. KAPLAN: Objection. Vague.	04:08:13
15	THE WITNESS: No, I did not.	04:08:14
16	BY MR. HUDIS:	04:08:15
17	Q. In your report, did you consider the	04:08:16
18	accessibility of the 1999 standards through	04:08:17
19	closed-circuit television technology?	04:08:20
20	MR. KAPLAN: Objection. Vague.	04:08:24
21	THE WITNESS: No, I did not.	04:08:27
22	BY MR. HUDIS:	04:08:29
23	Q. Okay. In your report, did you consider	04:08:30
24	the accessibility of the 1999 standards through	04:08:32
25	Braille display technology?	04:08:36

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1	MR. KAPLAN: Objection. Vague.	04:08:39
2	THE WITNESS: I might have. Yes, I did.	04:08:49
3	BY MR. HUDIS:	04:08:52
4	Q. Where?	04:08:53
5	A. On page 11, second sentence.	04:08:54
6	"Because the text is provided	04:08:58
7	in the standard format, such as	04:09:00
8	Microsoft Word, a blind person is	04:09:02
9	able to listen to the text or	04:09:03
10	access it using a digital Braille	04:09:05
11	device. This kind of text content	04:09:07
12	is also highly accessible to	04:09:11
13	people with other print	04:09:12
14	disabilities and the assistive	04:09:14
15	telling technology they use to	04:09:17
16	access print. For example, people	04:09:19
17	with low vision or dyslexia often	04:09:21
18	use a screen reader to read text	04:09:23
19	aloud."	04:09:25
20	Q. Mr. Fruchterman, in your report, did you	04:09:31
21	consider the accessibility of the 1999 standards	04:09:32
22	through writing Braille?	04:09:34
23	MR. KAPLAN: Objection. Vague.	04:09:37
24	THE WITNESS: As phrased, that question	04:09:43
25	doesn't make sense to me.	04:09:44

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1	BY MR. HUDIS:	04:09:46
2	Q. It's Braille technology using a slate	04:09:46
3	and stylus.	04:09:48
4	MR. KAPLAN: Objection. Vague.	04:09:49
5	THE WITNESS: The question still doesn't	04:09:55
6	make any sense to me.	04:09:57
7	BY MR. HUDIS:	04:09:58
8	Q. In your report, did you consider the	04:09:58
9	accessibility of the 1999 standards through a	04:10:01
10	Braille embosser?	04:10:05
11	MR. KAPLAN: Objection. Vague.	04:10:06
12	THE WITNESS: Yes, because you emboss	04:10:17
13	text by sending it -- basically, you create a	04:10:18
14	Braille document by sending text to the Braille	04:10:22
15	embosser, like a printer.	04:10:26
16	BY MR. HUDIS:	04:10:29
17	Q. Text in what form? Digital text?	04:10:29
18	A. Yes.	04:10:31
19	Q. And that would have to be OCR scanned	04:10:32
20	digital text or text recognized?	04:10:34
21	MR. KAPLAN: Objection. Compound.	04:10:37
22	Vague.	04:10:38
23	THE WITNESS: Any text can be sent to a	04:10:38
24	Braille printer, much as any text can be sent to a	04:10:40
25	print printer.	04:10:44

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1	BY MR. HUDIS:	04:10:46
2	Q. Did you consider the accessibility of	04:10:46
3	the 1999 standards through refreshable Braille?	04:10:47
4	MR. KAPLAN: Objection. Vague.	04:10:52
5	THE WITNESS: Yes, when I use the phrase	04:10:54
6	"a digital Braille device," I was referring it --	04:10:55
7	basically to all types of digital Braille devices,	04:11:00
8	which would include an embosser, a note taker, a	04:11:03
9	Braille display. It would not include slate and	04:11:07
10	stylus.	04:11:10
11	BY MR. HUDIS:	04:11:10
12	Q. Mr. Fruchterman, now I'd like to know	04:11:14
13	your understanding of the following terms we've	04:11:16
14	used.	04:11:18
15	What is a screen magnification system?	04:11:19
16	A. It is software that operates on top of a	04:11:25
17	PC or device to magnify what's on the screen.	04:11:30
18	Q. And what is your understanding of a	04:11:34
19	portable magnifier?	04:11:36
20	A. Most commonly, a magnifying glass. But	04:11:40
21	there are other variations on the theme.	04:11:43
22	Q. Can it include a video magnifier with a	04:11:50
23	handheld camera?	04:11:53
24	A. It can.	04:11:55
25	Q. And what's your understanding of what a	04:11:58

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1	video magnifier is?	04:12:01
2	A. It would be a -- most commonly a device	04:12:07
3	with a camera and a monitor attached to it that	04:12:11
4	would magnify what's in the field of view of the	04:12:14
5	camera.	04:12:17
6	Q. Is that also known as closed-circuit	04:12:17
7	television technology?	04:12:20
8	A. That's another term for the same.	04:12:21
9	Q. And you said that you considered the use	04:12:29
10	of Braille display technology.	04:12:31
11	What is your understanding of Braille	04:12:33
12	display technology?	04:12:35
13	A. Do you want to know how it works?	04:12:41
14	Q. No. Just your understanding.	04:12:42
15	A. It takes text and displays Braille to	04:12:47
16	the reader in a tactile form.	04:12:53
17	Q. Mr. Fruchterman, I'm turning again now	04:13:07
18	to page 3 of your expert's report at the bottom.	04:13:08
19	Please describe generally how screen	04:13:15
20	reader technology works.	04:13:17
21	A. Screen reader is a separate software	04:13:21
22	program that operates on top of the program that	04:13:25
23	the person is using at that moment and changes	04:13:33
24	generally the visual and auditory presentation of	04:13:38
25	that material, most commonly by reading what's on	04:13:43

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1	the screen aloud.	04:13:47
2	Q. All right. And is that example of text	04:13:49
3	to speech?	04:13:52
4	MR. KAPLAN: Objection. Vague.	04:13:54
5	THE WITNESS: Different users use their	04:13:56
6	screen reader with different forms of information.	04:13:58
7	The most common is text to speech. But, for	04:14:04
8	example, a deaf/blind person uses a screen reader	04:14:06
9	with a Braille display, and the text is -- that's	04:14:11
10	on the screen is presented on the Braille display.	04:14:15
11	BY MR. HUDIS:	04:14:18
12	Q. And, again, so that -- if it's a blind	04:14:20
13	and deaf person, it would be a tactile Braille?	04:14:22
14	A. All Braille is tactile. Or at least all	04:14:26
15	sensible uses of Braille are tactile, though there	04:14:33
16	are sighted people who can read Braille visually,	04:14:38
17	so ...	04:14:42
18	Q. I'd like to know if you recognize these	04:14:43
19	as brand names of screen reader technology.	04:14:45
20	JAWS from Freedom Scientific?	04:14:48
21	A. Yes.	04:14:50
22	Q. Window-Eyes from GW Micro?	04:14:52
23	A. Yes.	04:14:54
24	Q. Okay. Dolphin SuperNova from Dolphin	04:14:55
25	Computer Access?	04:14:59

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1	A.	Yes.	04:15:00
2	Q.	System Access from Serotek?	04:15:00
3	A.	Yes.	04:15:02
4	Q.	ZoomText from Ai Squared?	04:15:04
5	A.	ZoomText is a combination screen reader,	04:15:08
6		but most people think of it as a screen	04:15:10
7		magnification product.	04:15:13
8	Q.	And NVDA open source screen reader.	04:15:14
9	A.	Yes.	04:15:17
10	Q.	Would screen reader technology work with	04:15:21
11		an image-only PDF document?	04:15:24
12		MR. KAPLAN: Objection. Incomplete	04:15:29
13		hypothetical. Vague.	04:15:31
14		THE WITNESS: Some do. Some screeners	04:15:32
15		also have image magnification as well as screen	04:15:33
16		reading. So you can make it big or change the	04:15:37
17		contrast by reversing the contrast or changing the	04:15:40
18		colors, so -- but that would be not the typical	04:15:43
19		use.	04:15:50
20		BY MR. HUDIS:	04:15:50
21	Q.	What is the typical use of screen reader	04:15:51
22		technology?	04:15:53
23		MR. KAPLAN: Objection. Vague.	04:15:53
24		Confusing.	04:15:54
25		THE WITNESS: Generally, to read what's	04:15:56

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1	on the screen aloud in words.	04:15:57
2	BY MR. HUDIS:	04:15:59
3	Q. So text to speech?	04:15:59
4	A. Yes.	04:16:00
5	Q. So would screen reader technology for	04:16:01
6	text to speak -- text to speech work with an	04:16:04
7	image-only PDF document?	04:16:12
8	MR. KAPLAN: Objection. Incomplete	04:16:16
9	hypothetical. Vague.	04:16:17
10	THE WITNESS: No.	04:16:19
11	BY MR. HUDIS:	04:16:22
12	Q. Mr. Fruchterman, please turn to page 4	04:16:33
13	of your report. And I'm focusing in on the first	04:16:35
14	full paragraph of that page. The paragraph starts	04:16:40
15	"For the purpose of this report."	04:16:46
16	Do you see that?	04:16:49
17	A. Mh-hmm.	04:16:49
18	Q. And the second sentence says:	04:16:50
19	"Based on the information the	04:16:51
20	screen reader can glean from the	04:16:52
21	pages displayed on the screen, can	04:16:55
22	a blind person locate the standard	04:16:57
23	and read it."	04:17:00
24	In this context, what did you mean by	04:17:01
25	"locate the standard"?	04:17:03

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1	A.	In this context, I was focusing on web	04:17:07
2		searches.	04:17:10
3	Q.	And in this context, what did you mean	04:17:17
4		by "read the standard"?	04:17:19
5	A.	Basically, read it aloud, generally,	04:17:29
6		would be the most common use.	04:17:31
7	Q.	Which, if the person was blind, could	04:17:37
8		not do?	04:17:39
9		MR. KAPLAN: Objection. Vague and	04:17:40
10		confusing.	04:17:41
11		THE WITNESS: Well, if they located a	04:17:54
12		text version of the standard, they certainly could	04:17:56
13		read it aloud.	04:17:59
14		BY MR. HUDIS:	04:18:01
15	Q.	They'd need assistive technology to do	04:18:02
16		so?	04:18:05
17	A.	Yes. But when -- when I use the term	04:18:08
18		"can a blind person read it," I'm presuming that	04:18:10
19		they're using technology to read it as opposed to	04:18:16
20		something else.	04:18:22
21	Q.	And when you say "use technology," what	04:18:23
22		did you mean?	04:18:25
23		MR. KAPLAN: Objection. Vague.	04:18:27
24		THE WITNESS: Okay. Taking a step back.	04:18:29
25			

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1	BY MR. HUDIS:	04:18:31
2	Q. Sure.	04:18:31
3	A. When a blind person says "I've read a	04:18:31
4	book," they mean that they have ingested the	04:18:35
5	content of that book in a way that would be	04:18:38
6	similar to what a sighted person would do. And	04:18:40
7	whether they did that in Braille or by listening	04:18:44
8	to it, or if they're low vision, seeing it	04:18:47
9	enlarged, they, in the common use of "I read that	04:18:49
10	book," a blind or vision-impaired person would	04:18:53
11	mean those things without describing the	04:18:56
12	technology that they happen to use to read that	04:18:59
13	book.	04:19:01
14	Q. Mr. Fruchterman, I'm looking now at the	04:19:14
15	second full paragraph on page 4.	04:19:16
16	"The accessibility tasks I	04:19:19
17	tested were designed to assess	04:19:22
18	whether a blind user with basic	04:19:24
19	assistive technology skills could	04:19:26
20	perform the same kind of tasks one	04:19:28
21	might expect a user without a	04:19:30
22	disability to perform in accessing	04:19:32
23	a given standard without requiring	04:19:34
24	the intervention of a third	04:19:36
25	party."	04:19:37

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1	In the context of that sentence, what	04:19:38
2	did you mean by "assistive technology"?	04:19:41
3	A. I would include all the different	04:19:59
4	technology that people, in this case blind users,	04:20:01
5	would use to -- to access information.	04:20:06
6	Q. And that would include the technologies	04:20:17
7	we discussed previously?	04:20:19
8	MR. KAPLAN: Objection. Vague.	04:20:21
9	THE WITNESS: Yes.	04:20:23
10	BY MR. HUDIS:	04:20:23
11	Q. All right. All right. So in the	04:20:27
12	context of a totally blind person, that would	04:20:28
13	include screen reader technology?	04:20:31
14	A. Most commonly, yes.	04:20:35
15	Q. But it would not include screen	04:20:37
16	magnification systems because that would be of no	04:20:38
17	use to a blind person?	04:20:42
18	A. Many of the tasks that I examined, I was	04:20:46
19	also considering whether other people with print	04:20:50
20	disabilities could use that same content because,	04:20:53
21	as I've noted, people with low vision and dyslexia	04:20:56
22	often use screen readers as well.	04:21:01
23	Q. My question was screen magnification	04:21:09
24	systems would not be of use to a blind person;	04:21:16
25	isn't that correct?	04:21:19

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1	MR. KAPLAN: Objection. Incomplete	04:21:20
2	hypothetical. Vague.	04:21:22
3	THE WITNESS: A screen magnification	04:21:29
4	system would not be useful to a completely blind	04:21:32
5	person, that is correct.	04:21:35
6	BY MR. HUDIS:	04:21:36
7	Q. All right. And closed-circuit	04:21:36
8	television technology would not be of any use to a	04:21:38
9	completely blind person --	04:21:41
10	MR. KAPLAN: Objection.	04:21:43
11	BY MR. HUDIS:	04:21:43
12	Q. -- that is also correct?	04:21:44
13	MR. KAPLAN: Objection. Vague.	04:21:46
14	THE WITNESS: Yes.	04:21:47
15	BY MR. HUDIS:	04:21:48
16	Q. Mr. Fruchterman, at the bottom of page 4	04:22:09
17	of your report, what did you mean by "the	04:22:10
18	functional approach as a method of assessing	04:22:14
19	accessibility"?	04:22:19
20	MR. KAPLAN: Objection. Vague.	04:22:22
21	THE WITNESS: Can a person with a	04:22:26
22	disability functionally do tasks similar to those	04:22:29
23	of people who do not have a disability?	04:22:34
24	BY MR. HUDIS:	04:22:37
25	Q. So that's to obtain the content, to read	04:22:37

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1	the content, and make structural use of the	04:22:40
2	document?	04:22:44
3	MR. KAPLAN: Objection. Confusing.	04:22:46
4	Misstates testimony. Vague.	04:22:48
5	THE WITNESS: I included do a full-text	04:22:51
6	search and find specific mentions of terms of	04:22:53
7	interest.	04:22:56
8	BY MR. HUDIS:	04:22:59
9	Q. Now, you call the functional approach	04:22:59
10	"the most common method of assessing	04:23:01
11	accessibility."	04:23:07
12	Do you see that?	04:23:07
13	A. Yes.	04:23:08
14	Q. Are there any other methods of assessing	04:23:08
15	print accessibility?	04:23:11
16	MR. KAPLAN: Objection. Vague.	04:23:12
17	THE WITNESS: There are, let's say,	04:23:17
18	attempts to say do these ten things, and your	04:23:23
19	document will be accessible. And those approaches	04:23:28
20	have often fallen short of actually being usable	04:23:31
21	by disabled people.	04:23:35
22	So when implementing accessibility,	04:23:37
23	people usually focus on functional elements, like	04:23:40
24	can a person with a disability actually do this	04:23:45
25	task, as opposed to did you follow a checklist,	04:23:48

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1	which might end up in resulting in them not being	04:23:50
2	able to do that task.	04:23:53
3	BY MR. HUDIS:	04:23:55
4	Q. Are there any other usable methods of	04:23:55
5	assessing print accessibility besides the	04:23:57
6	functional method?	04:24:01
7	MR. KAPLAN: Objection. Vague.	04:24:03
8	THE WITNESS: Yes. You could design a	04:24:08
9	completely automated tool that purported to	04:24:10
10	access -- to assess accessibility.	04:24:12
11	BY MR. HUDIS:	04:24:19
12	Q. And what would such an automated tool	04:24:19
13	do?	04:24:21
14	MR. KAPLAN: Objection. Incomplete	04:24:24
15	hypothetical. Vague.	04:24:26
16	THE WITNESS: It might show -- okay.	04:24:31
17	These tools do exist. And like any pattern	04:24:36
18	recognition system, they have errors. They pick	04:24:44
19	up problems that aren't problems. They miss	04:24:48
20	problems that are problems. And they don't see	04:24:51
21	things that they weren't designed to see.	04:24:55
22	BY MR. HUDIS:	04:24:57
23	Q. Could you give me an example of such an	04:24:57
24	automated tool?	04:25:00
25	MR. KAPLAN: Objection. Argumentative.	04:25:02

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1	Vague.	04:25:03
2	THE WITNESS: I would do a Google search	04:25:07
3	on "automated accessibility tools" and I would	04:25:08
4	find a bunch of them.	04:25:10
5	BY MR. HUDIS:	04:25:12
6	Q. Are there any ones that you know of as	04:25:12
7	we sit here today?	04:25:15
8	MR. KAPLAN: Objection. Vague.	04:25:16
9	THE WITNESS: I have certainly used them	04:25:16
10	in the past, and I find them through Google	04:25:17
11	searches. And I've certainly -- I've used one in	04:25:21
12	the last year. I just don't memorize their brand	04:25:25
13	names because they're generally free on the	04:25:28
14	Internet.	04:25:31
15	BY MR. HUDIS:	04:25:31
16	Q. Can you recall any such automated tools	04:25:31
17	by their -- by its brand name?	04:25:34
18	MR. KAPLAN: Objection. Vague.	04:25:37
19	THE WITNESS: I know early on, the	04:25:41
20	Center on Applied Special Technology, CAST, had an	04:25:43
21	elevated tool for assessing this, and it had a	04:25:48
22	name like Willie (phonetic) or Sammy (phonetic) or	04:25:51
23	something. But, no, I don't. I know -- I can	04:25:53
24	remember a brand name, CAST, who was the original	04:25:55
25	publisher of this accessibility tool.	04:26:00

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1	BY MR. HUDIS:	04:26:04
2	Q. So other than automated tools and the	04:26:04
3	functional approach for assessing print	04:26:10
4	accessibility, can you name any other method as	04:26:12
5	you sit here now for assessing print	04:26:16
6	accessibility?	04:26:18
7	MR. KAPLAN: Objection. Vague.	04:26:20
8	THE WITNESS: Well, I would certainly	04:26:26
9	refer you to the W3C web content accessibility	04:26:28
10	guidelines that specify a standard for	04:26:34
11	assessing -- I would say that they primarily	04:26:35
12	follow a functional approach, but they also have a	04:26:39
13	proscriptive approach.	04:26:44
14	BY MR. HUDIS:	04:26:46
15	Q. What is the proscriptive approach?	04:26:46
16	A. I think I've kind of alluded to it	04:26:48
17	earlier. It's to follow a set of specifications	04:26:50
18	without actually testing them.	04:26:53
19	An example of a proscriptive approach is	04:26:58
20	don't have flashing lights that go at a certain	04:27:00
21	number of hertz because it might trigger an	04:27:04
22	epileptic seizure. So that's something, for	04:27:07
23	example, that -- don't do this. And there's no	04:27:10
24	need to test this on an epileptic person to see if	04:27:12
25	it generates a seizure. Just don't do this.	04:27:15

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1	Q.	So as I understand your definition of "a	04:27:18
2		proscription approach to assessing print	04:27:20
3		accessibility," it is a checklist of items without	04:27:25
4		testing them in context?	04:27:29
5	MR. KAPLAN:	Objection. Misstates	04:27:33
6		testimony. Vague.	04:27:34
7	THE WITNESS:	Correct.	04:27:35
8	BY MR. HUDIS:		04:27:47
9	Q.	In your report, what distinction do you	04:27:47
10		make, Mr. Fruchterman, between one who is blind	04:27:49
11		and one who is otherwise print-disabled?	04:27:52
12	MR. KAPLAN:	Objection. Argumentative.	04:27:56
13		Vague.	04:27:58
14	THE WITNESS:	I consider blind people to	04:28:02
15		be a subset of those people with print	04:28:03
16		disabilities.	04:28:05
17	BY MR. HUDIS:		04:28:09
18	Q.	In what way is a blind person a subset	04:28:10
19		of people with print disabilities?	04:28:11
20	A.	Let me rephrase that more carefully.	04:28:17
21		There are, let's say, a population of	04:28:24
22		people who have print disabilities, which I would	04:28:26
23		generally define functionally as having a	04:28:29
24		limitation when it comes to accessing print.	04:28:31
25		People who have a visual impairment that is	04:28:34

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1	commonly described as blindness are one of those	04:28:36
2	people.	04:28:38
3	But there are many people with other	04:28:40
4	print disabilities that do not meet the definition	04:28:42
5	of blindness as its commonly understood.	04:28:46
6	Q. Mr. Fruchterman --	04:28:52
7	MR. KAPLAN: Jonathan, we've been going	04:28:53
8	almost an hour. Do you want to take a break when	04:28:55
9	you've reached the end of a line of questions?	04:28:58
10	MR. HUDIS: Actually, now is a good	04:28:59
11	time.	04:29:01
12	MR. KAPLAN: Okay.	04:29:01
13	THE WITNESS: Okay.	04:29:03
14	MR. KAPLAN: Go off the record at	04:29:15
15	4:28 --	04:29:16
16	THE WITNESS: I guess I moved, huh?	04:29:17
17	THE VIDEOGRAPHER: You did, but people	04:29:19
18	do.	04:29:20
19	THE WITNESS: Right after saying that I	04:29:21
20	didn't move, I, of course --	04:29:22
21	THE VIDEOGRAPHER: Going off the record	04:29:24
22	at 4:29.	04:29:25
23	(Whereupon, a recess was taken.)	04:29:27
24	THE VIDEOGRAPHER: We are back on record	04:37:43
25	at 4:37.	04:37:44

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1	BY MR. HUDIS:	04:37:49
2	Q. Mr. Fruchterman, I'd like to create a	04:37:50
3	shorthand so that we can be efficient in the rest	04:37:52
4	of your testimony.	04:37:55
5	So referring back to your expert's	04:37:58
6	report at page 5, the first paragraph:	04:38:03
7	"I was asked to review the	04:38:05
8	accessibility of the 1999 edition of the	04:38:07
9	standards for people who are blind or	04:38:11
10	otherwise print-disabled."	04:38:12
11	I'm going to use the term "accessibility	04:38:14
12	review."	04:38:17
13	Can you -- can we use that as a	04:38:22
14	shorthand for the work you did in the report you	04:38:24
15	have given us?	04:38:31
16	MR. KAPLAN: Objection. Calls for	04:38:31
17	speculation.	04:38:32
18	THE WITNESS: Fine.	04:38:35
19	BY MR. HUDIS:	04:38:36
20	Q. Okay. What tools did you use for your	04:38:39
21	accessibility review of the 1999 standards?	04:38:43
22	MR. KAPLAN: Objection. Vague.	04:38:47
23	THE WITNESS: A variety of technological	04:38:49
24	tools, usually using a computer, assistive	04:38:52
25	technology, web browsers, commonly available	04:38:56

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1	software.	04:39:00
2	BY MR. HUDIS:	04:39:01
3	Q. Was the ABBYY FineReader one of those	04:39:02
4	tools?	04:39:09
5	A. Yes.	04:39:09
6	Q. And was Window-Eyes one of those tools?	04:39:10
7	A. Yes.	04:39:13
8	Q. And you used those pieces of software on	04:39:17
9	a Windows-based PC?	04:39:19
10	A. Yes.	04:39:22
11	Q. As part of your accessibility review,	04:39:25
12	what did you use the ABBYY FineReader software	04:39:27
13	for?	04:39:31
14	MR. KAPLAN: Objection. Vague.	04:39:32
15	THE WITNESS: One of the two standards I	04:39:38
16	was examining was an image-based PDF, and I used	04:39:40
17	the ABBYY FineReader software to do optical	04:39:43
18	character recognition on the image-based PDF to	04:39:47
19	create a text version of the standard.	04:39:51
20	BY MR. HUDIS:	04:39:56
21	Q. And when you use the term "the	04:39:56
22	standard," you're talking about the 1999	04:39:58
23	standards?	04:40:02
24	A. Correct.	04:40:02
25	Q. Do you remember what version of the	04:40:04

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1	ABBY FineReader software you used?	04:40:07
2	A. No. But a recent one from this year.	04:40:11
3	Q. Do you know how the price of the ABBYY	04:40:16
4	FineReader program that you use compares with	04:40:19
5	competitor OCR software programs on the market?	04:40:22
6	MR. KAPLAN: Objection. Vague.	04:40:27
7	THE WITNESS: I'm familiar that they	04:40:29
8	range from free or nearly free to many thousands	04:40:31
9	of dollars.	04:40:37
10	BY MR. HUDIS:	04:40:38
11	Q. And where would the ABBYY FineReader	04:40:41
12	program fall in that spectrum?	04:40:44
13	A. I don't know. I didn't buy it.	04:40:48
14	Q. Mr. Fruchterman, in your report, you use	04:41:01
15	two different terms, and I'd like to know if there	04:41:03
16	is a distinction with a difference or a	04:41:05
17	distinction without a difference.	04:41:07
18	On page 8, the first full paragraph at	04:41:10
19	the bottom, you use the term "recognized text."	04:41:16
20	Do you see that?	04:41:22
21	A. As in the resulting word processor file,	04:41:28
22	a recognized text --	04:41:30
23	Q. Yes.	04:41:32
24	A. -- could then be read using a screen	04:41:32
25	reader?	04:41:34

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1	Q.	Yes.	04:41:35
2	A.	Okay.	04:41:35
3	Q.	And then on page 10 at the top, you use	04:41:37
4		the term "accessible text." It's the sentence	04:41:40
5		just before the picture.	04:41:44
6	A.	Accessible --	04:41:58
7		MR. KAPLAN: That's the end of the	04:41:58
8		question.	04:41:59
9		MR. HUDIS: I wanted him to look at the	04:42:00
10		two different terms for reference.	04:42:02
11		THE WITNESS: I've looked at the two	04:42:04
12		terms.	04:42:05
13		BY MR. HUDIS:	04:42:05
14	Q.	All right. Now, here's the question:	04:42:06
15		Do you make any distinction between "recognized	04:42:09
16		text" and "accessible text"?	04:42:11
17		MR. KAPLAN: Objection. Vague.	04:42:13
18		THE WITNESS: Yes.	04:42:14
19		BY MR. HUDIS:	04:42:14
20	Q.	What is the distinction?	04:42:14
21	A.	Recognized text is a subset of	04:42:16
22		accessible text.	04:42:19
23	Q.	So let's have these definitions one at a	04:42:25
24		time.	04:42:27
25		What is recognized text and what is	04:42:27

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1	accessible text?	04:42:30
2	A. Recognized text is text that has been	04:42:33
3	created through a process using recognition.	04:42:35
4	Accessible text is digital text without regard to	04:42:44
5	its source production mechanism. For example, it	04:42:47
6	could be created digitally by typing it into a	04:42:53
7	word processor, and it would be accessible text	04:42:56
8	without it ever having been recognized.	04:42:59
9	Q. So recognized text, for example, would	04:43:11
10	be to use OCR technology on a PDF image-only	04:43:13
11	document?	04:43:17
12	MR. KAPLAN: Objection. Incomplete	04:43:19
13	hypothetical. Vague.	04:43:21
14	THE WITNESS: That would be one way to	04:43:24
15	produce recognized text.	04:43:25
16	BY MR. HUDIS:	04:43:28
17	Q. All right. Now, accessible text, an	04:43:28
18	example would be creating a Word document, but	04:43:30
19	that's not necessarily using recognition	04:43:33
20	technology?	04:43:36
21	MR. KAPLAN: Objection. Vague.	04:43:37
22	Incomplete hypothetical.	04:43:40
23	THE WITNESS: There are many ways you	04:43:41
24	can create a Word document.	04:43:42
25		

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1	BY MR. HUDIS:	04:43:44
2	Q. And using --	04:43:44
3	A. And they would generally be accessible.	04:43:46
4	Q. All right. So one way to create	04:43:49
5	accessible text would be to use Microsoft Word?	04:43:52
6	MR. KAPLAN: Objection. Incomplete	04:43:59
7	hypothetical. Vague.	04:44:01
8	THE WITNESS: There are many ways to use	04:44:02
9	Microsoft Word, but typing into Microsoft Word	04:44:03
10	would be an example of a way to create accessible	04:44:07
11	text.	04:44:10
12	Copying, pasting from an Internet	04:44:10
13	document web page into a Word document would be	04:44:13
14	taking accessible text in one program, a web	04:44:16
15	browser, and putting it into a different program,	04:44:21
16	a web or processor.	04:44:23
17	BY MR. HUDIS:	04:44:25
18	Q. And the distinction with -- you're	04:44:26
19	making with recognized text is you are taking text	04:44:27
20	that's in an image document, using technology to	04:44:29
21	recognize it and make it accessible?	04:44:33
22	MR. KAPLAN: Objection. Vague and	04:44:35
23	confusing.	04:44:37
24	THE WITNESS: Yes. That's one way to	04:44:38
25	create recognized text.	04:44:41

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1	BY MR. HUDIS:	04:44:43
2	Q. If you know, how commonly is the ABBYY	04:44:43
3	FineReader software used by the blind or visually	04:44:47
4	impaired to convert textual material to recognized	04:44:51
5	text?	04:44:53
6	MR. KAPLAN: Objection. Vague.	04:44:53
7	Compound.	04:44:54
8	THE WITNESS: I think of it as one of	04:44:58
9	the top two commercial OCR products that are	04:44:59
10	frequently used in the production of recognized	04:45:04
11	text.	04:45:07
12	Many blind consumers have OCR products	04:45:10
13	that are built into assistive technology products.	04:45:14
14	Many of those license the ABBYY FineReader or	04:45:21
15	other leading commercial products. So the	04:45:24
16	technology is the same, but the product	04:45:28
17	presentation would be different.	04:45:30
18	BY MR. HUDIS:	04:45:31
19	Q. Referring to the top of page 5, why did	04:45:31
20	you also use the free online OCR service as part	04:45:35
21	of your accessibility review?	04:45:39
22	MR. KAPLAN: Objection. Vague.	04:45:46
23	THE WITNESS: I just chose to use	04:45:50
24	another OCR engine. And by doing a Google search	04:45:52
25	on OCR, I found a free online OCR, and I thought,	04:45:57

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1	Wow, let's see, let's see if it works as well on	04:46:02
2	that one. Yeah, it does.	04:46:04
3	BY MR. HUDIS:	04:46:05
4	Q. In the context of your accessibility	04:46:05
5	review, how did the OCR conversion process using	04:46:07
6	the free online OCR service compare with the	04:46:11
7	conversion process you used using the ABBYY	04:46:14
8	FineReader software?	04:46:17
9	MR. KAPLAN: Objection. Vague.	04:46:19
10	Confusing.	04:46:20
11	THE WITNESS: I visually inspected the	04:46:25
12	pages and didn't see a noticeable difference in	04:46:28
13	OCR accuracy.	04:46:31
14	BY MR. HUDIS:	04:46:34
15	Q. And what is your definition of "OCR	04:46:34
16	accuracy"?	04:46:37
17	A. Well, in this context, do I spot a bunch	04:46:43
18	of errors or not. And I didn't spot very many	04:46:45
19	errors at all, actually.	04:46:50
20	Q. You did spot a few?	04:46:53
21	MR. KAPLAN: Objection. Vague.	04:46:56
22	Confusing.	04:46:58
23	BY MR. HUDIS:	04:46:59
24	Q. Did you spot any errors?	04:46:59
25	A. I am sure I spotted at least one error	04:47:02

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1	in the ABBYY FineReader, one which I looked at	04:47:08
2	more pages on. But it didn't seem like a	04:47:12
3	significant number.	04:47:16
4	Q. As part of your accessibility review,	04:47:19
5	what did you use the Window-Eyes software for?	04:47:21
6	MR. KAPLAN: Objection. Vague.	04:47:26
7	THE WITNESS: Window-Eyes is one of the	04:47:28
8	leading screen readers, and so I was confirming	04:47:30
9	that functional element of being able to do the	04:47:36
10	process and read the recognized text aloud.	04:47:41
11	BY MR. HUDIS:	04:47:44
12	Q. Do you recall what version of	04:47:44
13	Window-Eyes software you used?	04:47:46
14	A. No. But it would have been a current	04:47:49
15	one from this year.	04:47:51
16	Q. Do you know how the price of the	04:47:56
17	Window-Eyes program that you use compares with	04:47:59
18	competitor screen reader software programs on the	04:48:01
19	market?	04:48:04
20	MR. KAPLAN: Objection. Vague.	04:48:04
21	THE WITNESS: I'm aware that it's free	04:48:06
22	to people who have Microsoft Office. That's	04:48:07
23	probably why I chose it.	04:48:10
24	BY MR. HUDIS:	04:48:20
25	Q. Is Window-Eyes sold as a stand-alone	04:48:20

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1	program?	04:48:23
2	MR. KAPLAN: Objection. Lacks	04:48:24
3	foundation.	04:48:24
4	THE WITNESS: It historically has been.	04:48:28
5	But I had read of this offer through Microsoft,	04:48:29
6	buying it for all Microsoft Office users, and saw	04:48:34
7	that, well, I'll use the free one.	04:48:39
8	BY MR. HUDIS:	04:48:46
9	Q. Do you know what the price of the	04:48:46
10	stand-alone product is for Window-Eyes?	04:48:47
11	MR. KAPLAN: Objection. Vague.	04:48:53
12	Argumentative.	04:48:55
13	THE WITNESS: I don't recall a current	04:48:56
14	price. In the past, it was generally cheaper than	04:48:56
15	JAWS. Hundreds of dollars as opposed to a	04:49:00
16	thousand dollars or more than a thousand dollars.	04:49:05
17	BY MR. HUDIS:	04:49:09
18	Q. Generally, without going into minute	04:49:09
19	detail, what steps does the Window-Eyes program go	04:49:11
20	through to convert textual material into	04:49:16
21	synthesized speech?	04:49:19
22	MR. KAPLAN: Objection. Vague.	04:49:20
23	THE WITNESS: So think of the	04:49:25
24	synthesized speech as a printer for words. You	04:49:26
25	send a stream of words to it, and it says them	04:49:31

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1 aloud, much like a printer puts them on a page. 04:49:32

2 So a screen reader has a bunch of 04:49:36

3 controls so the user can kind of say what they 04:49:43

4 want spoken, the stop speech, that's the most 04:49:48

5 important control. It also analyzes the structure 04:49:55

6 of a document if that structure is available to 04:49:57

7 it. Analyzes what's on the screen. 04:49:59

8 And so, you know, a screen reader will 04:50:04

9 tell you different things depending on whether 04:50:09

10 you're examining a Word document, a web page, an 04:50:11

11 Excel spreadsheet. But the goal is through the 04:50:16

12 use of your -- generally, your keyboard as your 04:50:20

13 input mechanism to control things and listening, 04:50:24

14 you glean the information from the program and the 04:50:27

15 content in the program that you need to access the 04:50:32

16 information. 04:50:37

17 BY MR. HUDIS: 04:50:39

18 Q. How commonly is Window-Eyes software 04:50:39

19 used by the blind or visually impaired to convert 04:50:43

20 textual material into synthesized speech? 04:50:46

21 A. I think of it as the number two screen 04:50:49

22 reader. 04:50:53

23 Q. Which is the number one? 04:50:53

24 A. JAWS. 04:50:55

25 Q. What other tools, if any, besides the 04:51:08

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1	ABBY FineReader program, the free OCR service,	04:51:17
2	Window-Eyes and a Windows-based computer did you	04:51:25
3	use as part of your accessibility review?	04:51:29
4	MR. KAPLAN: Objection. Vague.	04:51:34
5	THE WITNESS: Web browser. Web search	04:51:34
6	engines. The web sites of different	04:51:52
7	organizations.	04:51:59
8	BY MR. HUDIS:	04:51:59
9	Q. And you listed them in your report?	04:51:59
10	A. Yes. I think that covers -- did I say	04:52:01
11	Microsoft Word?	04:52:37
12	Q. You have now.	04:52:38
13	A. Yeah. Certainly those seem to be all	04:52:39
14	the significant ones that come to mind.	04:52:43
15	Q. I just want to make sure that I have a	04:52:47
16	list of all the tools that you've used as part of	04:52:49
17	your accessibility review for this report. So I'm	04:52:51
18	going to list them --	04:52:54
19	A. Add one more?	04:52:55
20	Q. Yes.	04:52:56
21	A. Adobe Acrobat Reader.	04:52:57
22	Let me pause for a second.	04:53:10
23	Okay. Continue.	04:53:11
24	Q. So I'm going to list them, and I want to	04:53:13
25	make sure I have a complete list.	04:53:14

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1	MR. KAPLAN: Objection. Vague.	04:53:16
2	MR. HUDIS: I haven't asked a question	04:53:18
3	yet. You like that.	04:53:19
4	Q. So the tools that you used as part of	04:53:23
5	your accessibility review included the ABBYY	04:53:25
6	FineReader software?	04:53:28
7	A. Mh-hmm.	04:53:30
8	Q. The free OCR service?	04:53:30
9	MR. KAPLAN: Are we doing it this way?	04:53:32
10	Okay. Objection. Vague.	04:53:35
11	BY MR. HUDIS:	04:53:36
12	Q. Do you want to do it one at a time and	04:53:37
13	say yes or no or --	04:53:39
14	MR. KAPLAN: That's how you started	04:53:40
15	doing it, but you're the questioner.	04:53:41
16	MR. HUDIS: Okay. Right.	04:53:43
17	Q. I'm going to list the tools I believe	04:53:53
18	that you have used as part of your accessibility	04:53:54
19	review, Mr. Fruchterman, and I'd like to know at	04:53:57
20	the end of my list if I have mentioned them all.	04:54:00
21	The ABBYY FineReader software; the free	04:54:09
22	OCR service; the Window-Eyes screen reader	04:54:13
23	program; the third-party web sites mentioned in	04:54:16
24	your report, which is on page 5; a web browser;	04:54:21
25	web search engines; Microsoft Word; and Adobe	04:54:25

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1	Acrobat Reader.	04:54:31
2	MR. KAPLAN: Objection. Vague.	04:54:34
3	THE WITNESS: I think my report also	04:54:35
4	mentions going to Amazon.com.	04:54:36
5	BY MR. HUDIS:	04:54:43
6	Q. Anything else?	04:54:43
7	MR. KAPLAN: Objection. Vague.	04:54:44
8	THE WITNESS: Public -- sorry. Internet	04:54:53
9	Archive.	04:54:56
10	BY MR. HUDIS:	04:54:59
11	Q. Any other tools?	04:54:59
12	MR. KAPLAN: Objection. Vague.	04:55:00
13	THE WITNESS: Not that I recollect.	04:55:05
14	BY MR. HUDIS:	04:55:08
15	Q. Mr. Fruchterman, on pages 5 through 6 of	04:55:17
16	your report, it says you searched library catalogs	04:55:19
17	that serve the print-disabled and conducted an	04:55:21
18	online Google search to find electronic versions	04:55:24
19	of the 1999 standards; is that true?	04:55:26
20	MR. KAPLAN: Are you summarizing or are	04:55:31
21	you quoting?	04:55:36
22	MR. HUDIS: Summarizing.	04:55:37
23	MR. KAPLAN: Objection. Vague.	04:55:38
24	Misstates the document. Confusing.	04:55:39
25	THE WITNESS: Yes.	04:55:41

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1	BY MR. HUDIS:	04:55:41
2	Q. What -- in this context, what did you	04:55:45
3	mean by an "electronic version"?	04:55:46
4	MR. KAPLAN: Objection. Vague.	04:55:49
5	THE WITNESS: A version that a person	04:55:57
6	could find and download, ideally, in a text	04:55:59
7	format. But an image-only format would have been	04:56:08
8	the next best thing.	04:56:12
9	And then, I guess, the print version	04:56:23
10	would have been the third best thing. And then I	04:56:24
11	did find a used version of the book available for	04:56:26
12	sale on Amazon.	04:56:28
13	BY MR. HUDIS:	04:56:31
14	Q. All right. So you did not find an	04:56:31
15	electronic version for download either in text	04:56:31
16	format or image format?	04:56:34
17	MR. KAPLAN: Objection. Vague.	04:56:36
18	THE WITNESS: Correct.	04:56:38
19	BY MR. HUDIS:	04:56:38
20	Q. You did find a print version of the 1999	04:56:39
21	standards for sale on Amazon.com?	04:56:41
22	A. Correct.	04:56:48
23	Q. Did you capture the Amazon.com web pages	04:56:48
24	showing the 1999 standards for sale on that site?	04:56:52
25	MR. KAPLAN: Objection. Vague.	04:56:55

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1	THE WITNESS: No.	04:56:56
2	BY MR. HUDIS:	04:56:57
3	Q. All right. Did you document the	04:57:00
4	availability of the 1999 standards for sale on	04:57:01
5	Amazon.com in some other way?	04:57:04
6	MR. KAPLAN: Objection. Vague and	04:57:07
7	confusing.	04:57:08
8	THE WITNESS: Not beyond noting it in my	04:57:11
9	report.	04:57:12
10	BY MR. HUDIS:	04:57:16
11	Q. Did you document your searches for the	04:57:16
12	1999 standards online?	04:57:18
13	MR. KAPLAN: Objection. Vague and	04:57:20
14	confusing.	04:57:22
15	THE WITNESS: No, I did not document	04:57:27
16	them beyond stating in my expert report that I	04:57:28
17	performed them.	04:57:31
18	BY MR. HUDIS:	04:57:33
19	Q. Do you know the demand for the 1999	04:57:33
20	standards by persons who are blind or visually	04:57:37
21	impaired?	04:57:39
22	MR. KAPLAN: Objection. Vague.	04:57:40
23	THE WITNESS: Not beyond the mentions by	04:57:47
24	a couple of the leading organizations in the field	04:57:50
25	that this is a relevant document in test	04:57:52

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1	preparation for people with disabilities.	04:57:55
2	BY MR. HUDIS:	04:57:57
3	Q. Did you determine -- did you attempt to	04:57:58
4	determine the level of the demand for the 1999	04:58:00
5	standards by the -- by persons who are blind or	04:58:03
6	visually impaired?	04:58:05
7	MR. KAPLAN: Objection. Vague.	04:58:07
8	THE WITNESS: Not beyond the sites at	04:58:14
9	the web sites that I mentioned and plus the fact	04:58:16
10	that it wasn't on any of the web sites was at	04:58:20
11	least some indication that -- I guess what would	04:58:23
12	you say -- there are many, many books that people	04:58:31
13	with disabilities desire that are not available in	04:58:34
14	accessible formats. So -- but if it was already	04:58:37
15	available in accessible format, that would have	04:58:40
16	been an indicator that someone had requested it or	04:58:44
17	that someone had thought it was worth doing	04:58:46
18	proactively.	04:58:48
19	BY MR. HUDIS:	04:58:49
20	Q. So is the converse true, the fact that	04:58:50
21	it was not available in electronic format on the	04:58:51
22	Internet, as you searched for it, means there was	04:58:54
23	not a high demand for it in digital form?	04:58:58
24	MR. KAPLAN: Objection. Vague.	04:59:01
25	Confusing.	04:59:02

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1	THE WITNESS: I don't think you can	04:59:19
2	reach that conclusion by its lack of availability	04:59:19
3	alone.	04:59:22
4	BY MR. HUDIS:	04:59:22
5	Q. What other facts would you need?	04:59:23
6	MR. KAPLAN: Objection. Incomplete	04:59:25
7	hypothetical. Vague.	04:59:26
8	THE WITNESS: I might measure if	04:59:31
9	Google -- like, for example, how many times it was	04:59:35
10	searched for on Google. That would be some	04:59:40
11	indication of -- of demand for this particular	04:59:42
12	document.	04:59:45
13	The fact that I was able to find the	04:59:46
14	document cited at blindness organizations made me	04:59:48
15	think that it was, relatively speaking to other	04:59:52
16	books and education, more important than many	04:59:53
17	other books. So let's just say middling	04:59:57
18	importance.	05:00:02
19	BY MR. HUDIS:	05:00:08
20	Q. I'm sorry, Mr. Fruchterman, I've never	05:00:08
21	heard the word before.	05:00:10
22	What is your definition of "middling"?	05:00:12
23	A. This book --	05:00:17
24	Q. The 1999 standards?	05:00:19
25	A. -- was referred to in documents on both	05:00:20

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1	the American Printing House for the Blind and the	05:00:26
2	American Foundation for the Blind's web sites.	05:00:29
3	MR. KAPLAN: You just want to answer his	05:00:34
4	question, which is define "middling."	05:00:35
5	THE WITNESS: Definition of "middling."	05:00:38
6	Above zero. Below infinity.	05:00:40
7	MR. KAPLAN: That defines it as moderate	05:00:45
8	or average in size of note to rank.	05:00:47
9	THE WITNESS: It's not a "Harry Potter"	05:00:50
10	book. It's not the political history of Albania	05:00:52
11	from 1960 to 1980.	05:00:55
12	BY MR. HUDIS:	05:01:01
13	Q. So the fact that the 1999 standards are	05:01:01
14	mentioned in publications for the blind does not	05:01:06
15	tell you the level of demand for the 1999	05:01:14
16	standards by people who are blind or otherwise	05:01:17
17	print-disabled?	05:01:22
18	MR. KAPLAN: Objection. Vague.	05:01:25
19	Argumentative.	05:01:28
20	THE WITNESS: I disagree.	05:01:32
21	BY MR. HUDIS:	05:01:36
22	Q. Why?	05:01:37
23	A. Because there are many blind educators	05:01:37
24	and many blind students. And testing of blind	05:01:39
25	people is a very big issue in the blindness field.	05:01:43

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1	The number of books specifically mentioned as	05:01:49
2	relevant to the blindness field is very small	05:01:51
3	because the publishing of the American Printing	05:01:57
4	House on topics concerning blind people or the	05:01:59
5	American Foundation for the Blind is very small.	05:02:02
6	The fact that it's mentioned at two	05:02:04
7	different web sites as an important reference work	05:02:07
8	to me is a statement that it is far more likely to	05:02:11
9	be interesting to a blind person, knowing what I	05:02:15
10	know about the blindness field, than some random	05:02:19
11	other title. It's an indication that this is a	05:02:23
12	relevant book.	05:02:28
13	I am certain that some blind person has	05:02:33
14	said, I wish I had a copy of this book in an	05:02:35
15	accessible format, though no one has actually said	05:02:38
16	that to me. I'm quite certain that that has	05:02:41
17	occurred to a blind person in the United States.	05:02:46
18	Q. So the fact that the 1999 standards are	05:02:48
19	relevant to some blind people does not tell you	05:02:50
20	whether the demand for the 1999 standards are	05:02:54
21	something that blind people would want to acquire	05:03:02
22	in the tens, the hundreds, the thousands, the	05:03:07
23	hundred thousand, is it?	05:03:10
24	MR. KAPLAN: Vague. Argumentative.	05:03:12
25	THE WITNESS: I could tell you with	05:03:18

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1	certainty that it's not in the hundred thousands.	05:03:19
2	BY MR. HUDIS:	05:03:24
3	Q. And you could probably say with	05:03:24
4	certainty that it's not in the hundreds.	05:03:25
5	MR. KAPLAN: Objection.	05:03:30
6	THE WITNESS: I'm not --	05:03:31
7	MR. KAPLAN: Misleading.	05:03:33
8	THE WITNESS: -- really certain of that.	05:03:34
9	BY MR. HUDIS:	05:03:36
10	Q. You have no knowledge as you sit here	05:03:36
11	about the level of demand for the 1999 standards	05:03:40
12	by the blind or the visually impaired?	05:03:43
13	MR. KAPLAN: Objection. Asked and	05:03:46
14	answered. Vague.	05:03:47
15	THE WITNESS: Not beyond the	05:03:52
16	considerations I've already expressed.	05:03:52
17	MR. HUDIS: Counsel, what I'm about to	05:04:14
18	put in front of the witness was already marked	05:04:15
19	during Mr. Malamud's deposition. Do you want us	05:04:19
20	to re-mark it as a separate exhibit for this	05:04:21
21	deposition?	05:04:24
22	MR. KAPLAN: I think we can use the same	05:04:25
23	exhibit number. In this case, not in that case?	05:04:26
24	MR. HUDIS: Yes.	05:04:30
25	I'm going to give a copy to the court	05:04:33

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1	reporter. Just note for the record that the	05:04:36
2	document I'm now putting in front of the witness	05:04:38
3	was marked as Exhibit 34 during Mr. Malamud's	05:04:42
4	deposition on May 12, 2015.	05:04:45
5	THE WITNESS: Do you need to do anything	05:04:55
6	with it? Okay. And the mike got kind of knocked.	05:04:55
7	I don't know if that matters. Okay. All right.	05:04:59
8	BY MR. HUDIS:	05:05:09
9	Q. Mr. Fruchterman, could you please pull	05:05:11
10	out Exhibit 59 that was previously marked at your	05:05:12
11	deposition today. It's in the pile of documents	05:05:16
12	in front of you.	05:05:20
13	That's your declaration from the	05:05:21
14	HathiTrust litigation?	05:05:23
15	A. Okay. Was it a truck or an earthquake?	05:05:32
16	MR. KAPLAN: I don't think that was an	05:05:55
17	earthquake.	05:05:56
18	MR. HUDIS: I think that was a truck.	05:05:58
19	Bite your tongue.	05:06:04
20	Q. Mr. Fruchterman, let's turn back to your	05:06:08
21	declaration from the HathiTrust litigation that's	05:06:09
22	Exhibit 59.	05:06:12
23	A. Yes.	05:06:13
24	Q. At pages 6 through 7, paragraphs 25 and	05:06:13
25	26.	05:06:18

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1	A. Yes.	05:06:19
2	Q. All right. And that's where you	05:06:20
3	discover the levels of complexity of documents?	05:06:22
4	A. Yes.	05:06:28
5	MR. KAPLAN: It's paragraph 25.	05:06:33
6	BY MR. HUDIS:	05:06:38
7	Q. And then it goes to 26.	05:06:38
8	A. Talks about costs.	05:06:40
9	Q. Costs.	05:06:41
10	A. Yeah. Yes. Okay.	05:06:41
11	Q. Now, Mr. Fruchterman, I've put in front	05:06:46
12	of you what was previously marked during	05:06:50
13	Mr. Malamud's deposition as Exhibit 34. And I'm	05:06:53
14	really focusing you on the textual material after	05:06:58
15	the certificate on the front and after the cover.	05:07:02
16	So I want you to concentrate on the textual	05:07:08
17	material.	05:07:10
18	MR. HUDIS: All right. And just note	05:07:12
19	for the record, the witness is thumbing through	05:07:14
20	Malamud Exhibit 34 to review the textual material.	05:07:16
21	Let me know when you're ready.	05:07:26
22	While the witness is reading through the	05:07:34
23	document, Exhibit 34 is the 1999 Standards for	05:07:35
24	Educational and Psychological Testing.	05:07:40
25	THE WITNESS: Okay. I'm ready for a	05:07:44

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1	question.	05:07:46
2	BY MR. HUDIS:	05:07:46
3	Q. Using the complexity levels discussed in	05:07:46
4	your HathiTrust declaration, Exhibit 59, what	05:07:48
5	level of complexity would you assign to the 1999	05:07:52
6	standards?	05:07:55
7	A. Probably a Level 2. It could be a Level	05:07:58
8	3. It would be in that range.	05:08:03
9	Q. With that complexity level, how much	05:08:07
10	would it cost to make the 1999 standards	05:08:09
11	accessible to persons who are blind or visually	05:08:13
12	impaired?	05:08:16
13	A. Low hundreds of dollars.	05:08:19
14	Q. To put a finer point on that, when you	05:08:26
15	say "low hundreds," do you mean 100 to \$200?	05:08:28
16	A. I'd say 100 to \$400.	05:08:31
17	Q. Turning back to your expert's report, on	05:08:49
18	pages 5 through 6 --	05:08:50
19	A. Yes.	05:08:52
20	Q. -- that's Exhibit 64 --	05:08:52
21	MR. KAPLAN: Objection.	05:08:53
22	Mischaracterizes the document.	05:08:54
23	MR. HUDIS: Okay.	05:08:56
24	MR. KAPLAN: Oh, are we talking about --	05:08:59
25	THE WITNESS: Pages 5 and 6?	05:09:02

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1	MR. KAPLAN: I'm sorry. I'm getting	05:09:03
2	confused about numbers.	05:09:06
3	THE WITNESS: Oh, are we on my expert	05:09:07
4	report now?	05:09:09
5	MR. HUDIS: Yes.	05:09:10
6	THE WITNESS: Oh, okay.	05:09:10
7	BY MR. HUDIS:	05:09:12
8	Q. Yes.	05:09:12
9	A. All right. All right. So a third	05:09:12
10	document. Okay. Great. 5 and 6.	05:09:13
11	Q. And I'm pointing you now to the sentence	05:09:16
12	that spans from the bottom of page 5 to the top of	05:09:18
13	page 6.	05:09:22
14	A. Yes.	05:09:28
15	Q. So, Mr. Fruchterman, you were told by	05:09:28
16	defense counsel that an electronic version of the	05:09:30
17	1999 standards was hosted on the	05:09:33
18	Public.Resource.Org web site but has since been	05:09:35
19	removed during the course of this litigation.	05:09:40
20	A. Yes, that is a fact that I was informed	05:09:44
21	of by counsel.	05:09:46
22	Q. All right. You did not obtain this	05:09:47
23	information from Carl Malamud?	05:09:49
24	A. No, I did not.	05:09:55
25	Q. Did you attempt to locate a historical	05:09:56

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1	version of the Public.Resource.Org web site to	05:09:58
2	determine whether an electronic version of the	05:10:02
3	1999 standards was previously hosted there?	05:10:05
4	MR. KAPLAN: Objection. Vague.	05:10:08
5	THE WITNESS: I did discover in	05:10:11
6	Google-searching a placeholder noting the	05:10:13
7	voluntary takedown of the file.	05:10:16
8	BY MR. HUDIS:	05:10:19
9	Q. So other than the placeholder that you	05:10:20
10	just described, did you conduct, say, using the	05:10:22
11	Wayback Machine historical search of the	05:10:31
12	Public.Resource.Org web site to determine whether	05:10:33
13	an electronic version of the 1999 standards, in	05:10:38
14	its full form, was previously hosted there?	05:10:41
15	MR. KAPLAN: Objection. Vague and	05:10:44
16	confusing.	05:10:45
17	THE WITNESS: I did not examine the	05:10:46
18	Wayback Machine as you've described.	05:10:47
19	BY MR. HUDIS:	05:10:49
20	Q. Did you use any other method to	05:10:49
21	determine whether an historical version of the	05:10:52
22	1999 standards was at any time hosted on the	05:10:55
23	Public.Resource.Org web site?	05:10:58
24	MR. KAPLAN: Objection. Vague and	05:11:01
25	confusing.	05:11:02

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1	THE WITNESS: Not beyond the two points	05:11:04
2	already mentioned.	05:11:05
3	BY MR. HUDIS:	05:11:13
4	Q. Turning to page 9 now at the top of your	05:11:16
5	report, Exhibit 64, and I am focused on the first	05:11:18
6	full paragraph under the title "The	05:11:22
7	Public.Resource.Org Version of the 1999	05:11:24
8	Standards."	05:11:28
9	A. Yes.	05:11:29
10	Q. Mr. Fruchterman, you were provided by	05:11:32
11	defense counsel with a PDF file containing the	05:11:33
12	content of the 1999 standards.	05:11:35
13	A. That's my recollection.	05:11:43
14	Q. And it was represented to you by defense	05:11:47
15	counsel that this PDF file containing the 1999	05:11:50
16	standards was the version that had been made	05:11:53
17	available on the Public.Resource.Org web site at	05:11:55
18	one time?	05:11:59
19	A. That was my understanding, yes.	05:12:01
20	Q. You were informed Public.Resource	05:12:05
21	created this PDF file by purchasing a printed copy	05:12:08
22	of the 1999 standards, chopping off the binding	05:12:11
23	and scanning the pages?	05:12:15
24	A. I am not sure I was informed of that	05:12:23
25	fact by anyone in particular. I might have read	05:12:25

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1 it in a deposition 'cause I read the deposition 05:12:28
2 reports. So I don't recall exactly, but that 05:12:32
3 makes a lot of sense to me, that that would be 05:12:34
4 what they would do. 05:12:37

5 Q. So you were either informed of that fact 05:12:38
6 either by defense counsel or by reading a 05:12:40
7 deposition transcript in this case? 05:12:43

8 A. Yes. 05:12:48

9 Q. The OCR process had not been performed 05:12:55
10 on the electronic PDF file of the 1999 standards 05:13:00
11 that defense counsel gave to you? 05:13:03

12 MR. KAPLAN: Objection. Vague. 05:13:07

13 THE WITNESS: Correct. The 05:13:11
14 Public.Resource.Org version of the 1999 standards 05:13:11
15 was an image-only PDF format. 05:13:15

16 BY MR. HUDIS: 05:13:21

17 Q. Okay. In your report, Mr. Fruchterman, 05:13:21
18 on page 9, in that same full paragraph, you 05:13:22
19 describe the content of the 1999 standards within 05:13:26
20 the PDF file given to you by defense counsel to be 05:13:29
21 the result of a high-quality image scan. 05:13:33

22 A. Mh-hmm. Yes. 05:13:39

23 Q. What did you mean by "high-quality image 05:13:40
24 scan"? 05:13:42

25 MR. KAPLAN: Objection. Vague and 05:13:43

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1	confusing.	05:13:44
2	THE WITNESS: I was able to easily read	05:13:57
3	the content, and it looked like an OCR device	05:13:59
4	would be able to recognize the characters.	05:14:02
5	BY MR. HUDIS:	05:14:04
6	Q. As part of your work for the report of	05:14:05
7	Exhibit 64, did you compare the text of the PDF	05:14:10
8	file given to you of 1999 standards with the	05:14:14
9	printed version?	05:14:16
10	MR. KAPLAN: Objection. Vague.	05:14:19
11	THE WITNESS: Not side-by-side.	05:14:20
12	BY MR. HUDIS:	05:14:23
13	Q. Did you check for any missing pages in	05:14:24
14	the PDF file?	05:14:27
15	MR. KAPLAN: Objection. Vague.	05:14:28
16	THE WITNESS: No.	05:14:30
17	BY MR. HUDIS:	05:14:31
18	Q. Did you check for any misaligned pages	05:14:31
19	in the PDF file?	05:14:33
20	MR. KAPLAN: Objection. Vague.	05:14:35
21	THE WITNESS: I scanned quite a number	05:14:35
22	of pages looking for misalignments and didn't see	05:14:36
23	any.	05:14:39
24	BY MR. HUDIS:	05:14:40
25	Q. Did you review the entire document to	05:14:40

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1	look for PDF misaligned pages?	05:14:41
2	MR. KAPLAN: Objection. Vague.	05:14:44
3	THE WITNESS: I did not review every	05:14:44
4	page.	05:14:46
5	BY MR. HUDIS:	05:14:46
6	Q. After you were provided with the	05:14:49
7	image-only PDF file of the 1999 standards by	05:14:51
8	defense counsel, you used the ABBYY FineReader	05:14:54
9	software and free online OCR service to OCR	05:14:57
10	process selected pages of the document; isn't that	05:15:03
11	right?	05:15:07
12	A. Correct.	05:15:07
13	Q. All right. You did not OCR process the	05:15:07
14	entire 212 pages of the PDF-scanned 1999	05:15:10
15	standards?	05:15:14
16	A. Correct.	05:15:15
17	Q. And it is common that OCR processing of	05:15:24
18	scanned text results in text recognition errors?	05:15:27
19	MR. KAPLAN: Objection. Argumentative.	05:15:30
20	And vague.	05:15:34
21	THE WITNESS: Depending on the quality	05:15:37
22	of the scan and the complexity of the material,	05:15:38
23	you would see a variety of OCR error levels, yes.	05:15:41
24	BY MR. HUDIS:	05:15:44
25	Q. After you subjected the selected pages	05:15:49

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1	of the 1999 standards from the PDF document you	05:15:52
2	were given, did you check for the following	05:15:55
3	errors, yes or no.	05:15:59
4	Misrec errors?	05:16:03
5	MR. KAPLAN: Objection. Vague.	05:16:08
6	THE WITNESS: Yes.	05:16:12
7	BY MR. HUDIS:	05:16:12
8	Q. Did you find any?	05:16:12
9	A. Yes.	05:16:13
10	Q. Did you check for nonrec errors?	05:16:16
11	MR. KAPLAN: Objection. Vague.	05:16:19
12	THE WITNESS: Yes.	05:16:20
13	BY MR. HUDIS:	05:16:20
14	Q. Did you find any?	05:16:20
15	A. Yes.	05:16:21
16	Q. Did you check for drops?	05:16:22
17	MR. KAPLAN: Objection. Vague.	05:16:23
18	THE WITNESS: Yes.	05:16:25
19	BY MR. HUDIS:	05:16:25
20	Q. Did you find any?	05:16:25
21	A. Yes.	05:16:25
22	Q. Did you check for adds?	05:16:26
23	MR. KAPLAN: Objection, vague.	05:16:29
24	THE WITNESS: I didn't see any adds.	05:16:31
25		

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1	BY MR. KAPLAN:	05:16:35
2	Q. So let's take that one at a time.	05:16:35
3	So you checked for adds?	05:16:37
4	A. Well, I examined the document, and I'm	05:16:39
5	talking about errors I observed as opposed to	05:16:41
6	errors I didn't observe. So if I had seen an add,	05:16:44
7	I would have been seeing it. I don't know.	05:16:47
8	Q. So --	05:16:50
9	A. I was looking for errors.	05:16:51
10	Q. Right. So my first question is, did you	05:16:52
11	check for adds errors?	05:16:55
12	MR. KAPLAN: Objection. Vague.	05:16:58
13	THE WITNESS: If I -- if an add had been	05:16:59
14	there and I had been looking at it, I would have	05:17:01
15	been checking for them, yes. But --	05:17:03
16	BY MR. KAPLAN:	05:17:05
17	Q. And you didn't find any?	05:17:06
18	A. I didn't see any adds.	05:17:07
19	Q. And did you check the entire 212 pages	05:17:08
20	of the document for adds errors?	05:17:11
21	A. No.	05:17:13
22	Q. So now we're at page 10, at the bottom	05:17:22
23	of page -- of Exhibit 64, your expert's report.	05:17:24
24	A. Yes.	05:17:28
25	Q. After you OCR-processed select pages	05:17:29

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1	from the image-only PDF file of the 1999 standards	05:17:32
2	given to you by defense counsel, you used the	05:17:35
3	Window-Eyes software tool to read text aloud and	05:17:39
4	to conduct full-text searches by keyword?	05:17:43
5	A. Right.	05:17:47
6	Q. All right. Now, Mr. Fruchterman, you	05:17:48
7	could not use the Window-Eyes software tool to	05:17:51
8	read text of the 1999 standards aloud or to	05:17:54
9	conduct full-text searches by keyword before the	05:17:58
10	PDF pages were OCR processed.	05:18:01
11	MR. KAPLAN: Objection. Vague.	05:18:04
12	Compound.	05:18:05
13	THE WITNESS: You're making a statement.	05:18:10
14	What's the question?	05:18:10
15	BY MR. KAPLAN:	05:18:13
16	Q. All right. I will ask the question a	05:18:13
17	different way.	05:18:14
18	Could you use the Window-Eyes software	05:18:16
19	tool to read the text of the 1999 standards aloud	05:18:18
20	before the PDF pages were OCR processed?	05:18:22
21	MR. KAPLAN: Objection. Vague.	05:18:25
22	Confusing.	05:18:26
23	THE WITNESS: No.	05:18:30
24	BY MR. KAPLAN:	05:18:30
25	Q. Could you use the Window-Eyes software	05:18:31

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1	to conduct full-text searches by keyword before	05:18:34
2	the PDF pages were OCR processed?	05:18:37
3	MR. KAPLAN: Objection. Vague and	05:18:41
4	confusing.	05:18:41
5	THE WITNESS: No.	05:18:46
6	BY MR. KAPLAN:	05:18:46
7	Q. And, in fact, Mr. Fruchterman, you could	05:18:53
8	not use any screen reader software tool to read	05:18:54
9	the text of the 1999 standards aloud before the	05:18:57
10	PDF pages were OCR processed?	05:19:01
11	MR. KAPLAN: Objection. Vague and	05:19:04
12	confusing.	05:19:05
13	THE WITNESS: That's correct. But some	05:19:09
14	screen readers have OCR software built in and	05:19:10
15	would be able to do that process inside the screen	05:19:13
16	reader. But I did not do that process inside the	05:19:15
17	screen reader. I did it in a separate product.	05:19:18
18	BY MR. KAPLAN:	05:19:21
19	Q. And you could not use a screen reader	05:19:21
20	software tool to conduct full-text searches by	05:19:23
21	keyword before the PDF pages were OCR processed?	05:19:26
22	MR. KAPLAN: Objection. Vague and	05:19:31
23	confusing.	05:19:32
24	THE WITNESS: Correct.	05:19:33
25		

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1	BY MR. KAPLAN:	05:19:33
2	Q. Let's turn to pages 11 and 12 of your	05:19:39
3	report. And I'm focusing on the textual material	05:19:42
4	in your report, Mr. Fruchterman, under the title	05:19:50
5	"The Archive.Org Version of the 1999 Standards."	05:19:53
6	A. Yes.	05:19:57
7	Q. Now, it's true you were -- it's true you	05:19:59
8	were told by a representative of the Internet	05:20:09
9	Archive that an electronic text or txt version of	05:20:11
10	the '99 standards was hosted on the Internet	05:20:15
11	Archive web site at one time?	05:20:18
12	A. Yes.	05:20:20
13	Q. You did not attempt to locate a	05:20:21
14	historical version of the Internet Archive web	05:20:24
15	site to determine whether an electronic text	05:20:26
16	version of the 1999 standards was previously	05:20:29
17	hosted on Internet Archive?	05:20:32
18	MR. KAPLAN: Objection. Vague and	05:20:34
19	confusing.	05:20:40
20	THE WITNESS: Not beyond doing a Google	05:20:41
21	search, which I don't believe turned it up for me.	05:20:43
22	But it might have if I kept going in the results.	05:20:45
23	BY MR. HUDIS:	05:20:47
24	Q. But if you did, you didn't document it	05:20:48
25	in your report.	05:20:50

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1	MR. KAPLAN: Objection. Vague.	05:20:51
2	THE WITNESS: What's your question?	05:20:59
3	BY MR. KAPLAN:	05:21:00
4	Q. Well, you said if you had a Google	05:21:01
5	search, you would have kept going. You would have	05:21:04
6	found an historical version of the 1999 standards	05:21:05
7	on the Internet Archive web site. You didn't	05:21:08
8	document that in your report, did you?	05:21:11
9	A. I didn't say that.	05:21:14
10	MR. KAPLAN: Objection. Vague.	05:21:15
11	BY MR. HUDIS:	05:21:16
12	Q. What did you say?	05:21:16
13	A. I said I did conduct a Google search for	05:21:17
14	the report. I found it on the Internet Archive	05:21:21
15	site. I did not see a link -- I'm sorry.	05:21:25
16	I found it on the Public.Resource.Org	05:21:29
17	site with a takedown notice that it was gone. I	05:21:32
18	did not see a link to the Internet Archive. All I	05:21:36
19	said is it might have been in the Google results	05:21:42
20	beyond the place where I stopped looking.	05:21:44
21	Q. So my question, then, is did you use any	05:21:47
22	method to determine whether an historical version	05:21:52
23	of the '99 standards was hosted on the Internet	05:21:57
24	Archive web site at one time in the past?	05:22:01
25	MR. KAPLAN: Objection. Vague.	05:22:04

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1	THE WITNESS: No.	05:22:09
2	BY MR. HUDIS:	05:22:09
3	Q. And you didn't use the Wayback Machine	05:22:09
4	for that purpose either?	05:22:11
5	MR. KAPLAN: Objection. Vague.	05:22:13
6	THE WITNESS: No.	05:22:14
7	BY MR. HUDIS:	05:22:21
8	Q. And on that same page, page 11, at the	05:22:22
9	bottom paragraph, you were provided by an Internet	05:22:24
10	Archive representative with a text or txt file	05:22:29
11	containing the content of the 1999 standards?	05:22:33
12	A. Correct.	05:22:37
13	Q. All right. And it was represented to	05:22:38
14	you by the Internet Archive representative that	05:22:40
15	this txt file containing the 1999 standards was	05:22:42
16	the version that had been made available on the	05:22:46
17	Internet Archive web site at one time?	05:22:48
18	A. Yes.	05:22:51
19	Q. All right. And now continuing on that	05:22:54
20	same explanation on pages 11 and 12 of Exhibit 64,	05:22:55
21	your report, by reviewing the Archive.Org	05:22:59
22	derivatives page, you were able to determine that	05:23:03
23	when a PDF file is uploaded to the Internet	05:23:06
24	Archive web site, that web site automatically	05:23:09
25	creates derivative file types that are also	05:23:13

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1	accessible on that web site, including in the txt	05:23:16
2	format?	05:23:19
3	MR. KAPLAN: Objection. Vague and	05:23:20
4	confusing.	05:23:21
5	THE WITNESS: Yes. I read that at that	05:23:37
6	link. And I believe I also saw mention of that in	05:23:39
7	some of the depositions that I reviewed.	05:23:43
8	BY MR. HUDIS:	05:23:45
9	Q. You just anticipated my next question.	05:23:45
10	Thank you, Mr. Fruchterman.	05:23:47
11	So from reading -- from your reading of	05:23:49
12	the transcripts from the depositions of	05:23:50
13	Carl Malamud of Public.Resource and	05:23:52
14	Christopher Butler of Internet Archive, when	05:23:54
15	Public.Resource uploaded the PDF file of the 1999	05:23:57
16	standards to the Internet Archive web site, that	05:24:01
17	web site automatically created a txt file of the	05:24:04
18	1999 standards?	05:24:07
19	MR. KAPLAN: Objection. Vague.	05:24:11
20	THE WITNESS: That's my understanding.	05:24:12
21	BY MR. HUDIS:	05:24:14
22	Q. Okay. And this txt file of the 1999	05:24:15
23	standards, in your view, had been created by	05:24:19
24	optical character recognition because the txt file	05:24:21
25	contained uncorrected errors typical of the OCR	05:24:25

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1	process?	05:24:28
2	MR. KAPLAN: Objection. Vague.	05:24:28
3	THE WITNESS: Correct.	05:24:29
4	BY MR. HUDIS:	05:24:30
5	Q. What were those errors?	05:24:30
6	A. Well, looking at Malamud 34, the first	05:24:39
7	page is a very stylized cover sheet. And the	05:24:43
8	second page has the word "standards" bridging the	05:24:49
9	entire page. Those didn't recognize well. It's	05:24:55
10	quite typical of OCR that it doesn't do well --	05:24:58
11	so, for example, I remember specifically the word	05:25:01
12	"standards," I think, had errors in it as it	05:25:04
13	appeared on the top of this.	05:25:09
14	Q. Continuing through the rest of	05:25:12
15	Malamud 34, did you notice any other errors	05:25:13
16	typical of the OCR process?	05:25:16
17	A. Those were the -- certainly that cover	05:25:23
18	page kind of material was the thing that stuck in	05:25:25
19	my mind as having obvious OCR errors. Once I got	05:25:27
20	down to, say, the copyright section, you know, I	05:25:31
21	zeroed to that, and I saw very few errors.	05:25:33
22	Q. But you did see errors?	05:25:36
23	MR. KAPLAN: Objection. Vague and	05:25:41
24	confusing.	05:25:42
25	THE WITNESS: I don't remember any	05:25:45

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1	particular errors. I could conceive of that there	05:25:46
2	might be one or two in that amount of text, but	05:25:50
3	perhaps zero.	05:25:52
4	BY MR. HUDIS:	05:25:54
5	Q. When you engaged in your accessibility	05:25:54
6	to review, in particular, the txt file, access --	05:25:57
7	accessible at one time from the Internet Archive	05:26:00
8	web site, did you go through the rest of the 1999	05:26:03
9	standards to look for OCR errors?	05:26:07
10	MR. KAPLAN: Objection. Vague and	05:26:09
11	confusing.	05:26:12
12	THE WITNESS: I did go through more	05:26:13
13	pages and performed the same tests that -- that I	05:26:15
14	had performed on the earlier one, but I had the	05:26:21
15	benefit of the entire text file instead of just	05:26:24
16	the handful of pages I'd recognized.	05:26:28
17	BY MR. HUDIS:	05:26:30
18	Q. And I did notice OCR errors throughout	05:26:30
19	the document?	05:26:34
20	MR. KAPLAN: Objection. Vague.	05:26:34
21	THE WITNESS: A few. But I felt like	05:26:35
22	the OCR was working quite well on this document.	05:26:37
23	BY MR. HUDIS:	05:26:46
24	Q. Mr. Malamud, let's --	05:27:00
25	A. I'm not --	05:27:02

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1	Q.	I'm sorry. It's late.	05:27:02
2		Mr. Fruchterman --	05:27:04
3	A.	Yes.	05:27:04
4	Q.	-- if you could turn to page 7 of your	05:27:04
5		expert's report, Exhibit 64.	05:27:07
6		MR. KAPLAN: That one almost slipped	05:27:10
7		past me.	05:27:10
8		(Reporter interruption.)	05:27:10
9		MR. HUDIS: Sure. What he said was I	05:27:11
10		blew past him.	05:27:20
11		MR. KAPLAN: Yes.	05:27:22
12		BY MR. HUDIS:	05:27:22
13	Q.	Are you there, Mr. Fruchterman?	05:27:23
14	A.	I am.	05:27:24
15	Q.	Thank you.	05:27:25
16		As part -- now, looking at page 7, the	05:27:26
17		top paragraph of your expert's report, as part of	05:27:29
18		your accessibility review for the purposes of your	05:27:34
19		expert's report, you reviewed the	05:27:35
20		Public.Resource.Org web site?	05:27:38
21		MR. KAPLAN: Objection. Vague.	05:27:41
22		THE WITNESS: Yes.	05:27:44
23		BY MR. HUDIS:	05:27:46
24	Q.	Did you observe on Public.Resource's web	05:27:46
25		site any place where Public.Resource held itself	05:27:49

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1	out as making the materials posted on its site	05:27:51
2	accessible to the blind or print-disabled?	05:27:55
3	MR. KAPLAN: Objection. Vague.	05:27:59
4	THE WITNESS: I did not.	05:28:02
5	BY MR. HUDIS:	05:28:03
6	Q. Except for a placeholder noting the	05:28:04
7	voluntary takedown of the 1999 standards, you	05:28:05
8	could not locate this document on the	05:28:12
9	Public.Resource web site, correct?	05:28:14
10	MR. KAPLAN: Objection. Vague.	05:28:17
11	THE WITNESS: Correct.	05:28:18
12	BY MR. HUDIS:	05:28:18
13	Q. However, you did search for and access	05:28:18
14	other standards posted on the Public.Resource web	05:28:20
15	site?	05:28:22
16	MR. KAPLAN: Objection. Vague.	05:28:24
17	THE WITNESS: Correct.	05:28:26
18	BY MR. HUDIS:	05:28:27
19	Q. Mr. Malamud -- I did it again. My	05:28:29
20	apologies.	05:28:32
21	Mr. Fruchterman, there were no sign-up	05:28:34
22	procedures in order for an Internet user to access	05:28:36
23	the content on the Public.Resource web site,	05:28:38
24	correct?	05:28:41
25	MR. KAPLAN: Objection. Vague. Calls	05:28:41

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1	for speculation. Lacks foundation.	05:28:43
2	THE WITNESS: Correct.	05:28:46
3	BY MR. HUDIS:	05:28:46
4	Q. During your review of Public.Resource's	05:28:51
5	web site, you were able to access standards	05:28:53
6	produced by other companies, such as the NFPA,	05:28:56
7	without restriction?	05:29:01
8	MR. KAPLAN: Objection. Vague.	05:29:04
9	THE WITNESS: Yes.	05:29:08
10	BY MR. HUDIS:	05:29:08
11	Q. There were no requirements that a user	05:29:10
12	be visually impaired to access these other	05:29:11
13	standards documents on Public.Resource's web site?	05:29:15
14	MR. KAPLAN: Objection. Vague.	05:29:19
15	THE WITNESS: Correct.	05:29:20
16	BY MR. HUDIS:	05:29:20
17	Q. Mr. Fruchterman, for the next series of	05:29:32
18	questions, I would like you to pull out	05:29:34
19	Exhibit 60, which was your supplemental	05:29:36
20	declaration from the HathiTrust litigation.	05:29:40
21	A. Okay.	05:29:42
22	Q. And I'd also like you to pull out	05:29:43
23	Exhibit 55, which is the materials we reviewed	05:29:47
24	from the Bookshare web site.	05:29:52
25	A. Good. Do I get to put the rest of them	05:29:59

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1	away?	05:30:02
2	Q. Soon.	05:30:02
3	A. Or are these the only two I need to have	05:30:03
4	out now?	05:30:05
5	Q. Those are the only two you have to have	05:30:07
6	out now.	05:30:09
7	A. Okay. I have those two documents in	05:30:18
8	front of me, Exhibit 55 and 60.	05:30:19
9	Q. Okay. So I would like to focus your	05:30:25
10	attention on -- in the supplemental declaration,	05:30:25
11	Exhibit 60, to pages 2 and 3, where you talk about	05:30:28
12	the digital rights management plan.	05:30:33
13	A. Yes.	05:30:37
14	Q. Okay. And similarly, an explanation of	05:30:38
15	the DRM plan on page 18 of Exhibit 55. And that's	05:30:43
16	the Bookshare web site.	05:31:04
17	A. Okay.	05:31:13
18	Q. During your review of Public.Resource's	05:31:13
19	web site, how did their web site compare with the	05:31:16
20	Bookshare web site in terms of employing a digital	05:31:20
21	rights management or DRM plan to protect the	05:31:23
22	digital copies of standards posted on	05:31:27
23	Public.Resource's web site from unauthorized	05:31:30
24	copying?	05:31:35
25	MR. KAPLAN: Objection. Vague. Calls	05:31:35

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1	for a legal conclusion. Confusing.	05:31:36
2	THE WITNESS: I didn't find a DRM plan	05:31:43
3	in evidence on the Public.Resource.Org site.	05:31:45
4	MR. HUDIS: I'd like to take a break for	05:31:52
5	five minutes.	05:33:18
6	THE VIDEOGRAPHER: Going off the record	05:33:19
7	at 5:33.	05:33:20
8	(Whereupon, a recess was taken.)	05:33:27
9	THE VIDEOGRAPHER: Back on the record at	05:39:35
10	5:39.	05:39:37
11	BY MR. HUDIS:	05:39:38
12	Q. Mr. Fruchterman, when you examined	05:39:40
13	Public.Resource's web site, you noticed a number	05:39:44
14	of standards that were hosted on that web site?	05:39:48
15	A. Correct.	05:39:58
16	MR. KAPLAN: Objection. Vague. Asked	05:39:59
17	and answered.	05:40:00
18	BY MR. HUDIS:	05:40:00
19	Q. Did you notice any restrictions on the	05:40:01
20	ability of an Internet user to copy any of the	05:40:02
21	standards that you saw on Public.Resource's web	05:40:11
22	site?	05:40:13
23	MR. KAPLAN: Objection. Vague.	05:40:14
24	THE WITNESS: No.	05:40:17
25		

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1	BY MR. HUDIS:	05:40:17
2	Q. Did you notice any restrictions on the	05:40:19
3	ability of an Internet user to download any of the	05:40:20
4	standards hosted on the Public.Resource's web	05:40:28
5	site?	05:40:31
6	MR. KAPLAN: Objection. Vague.	05:40:31
7	THE WITNESS: No.	05:40:32
8	BY MR. HUDIS:	05:40:32
9	Q. Did you notice any restrictions on the	05:40:32
10	ability of an Internet user to print any of the	05:40:35
11	standards hosted on the Public.Resource web site?	05:40:37
12	MR. KAPLAN: Objection. Vague.	05:40:40
13	THE WITNESS: No.	05:40:41
14	MR. HUDIS: Thank you, Mr. Fruchterman.	05:40:43
15	That's all I have.	05:40:43
16	THE WITNESS: Okay. Thank you.	05:40:46
17	MR. KAPLAN: I have no questions at this	05:40:52
18	time.	05:40:53
19	THE WITNESS: Okay. Oh, that's right.	05:40:53
20	You get a chance, huh.	05:40:54
21	THE VIDEOGRAPHER: This marks the end of	05:40:56
22	the deposition of James Fruchterman. Going off	05:40:56
23	the record at 5:41.	05:40:59
24	(Whereupon, the deposition concluded	05:41:00
25	at 5:41 p.m.)	05:41:00

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CERTIFICATE OF REPORTER

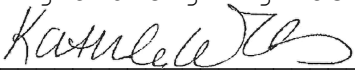
I, Kathleen A. Wilkins, Certified Shorthand Reporter licensed in the State of California, License No. 10068, hereby certify that the deponent was by me first duly sworn, and the foregoing testimony was reported by me and was thereafter transcribed with computer-aided transcription; that the foregoing is a full, complete, and true record of proceedings.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceeding and caption named or in any way interested in the outcome of the cause in said caption.

The dismantling, unsealing, or unbinding of the original transcript will render the reporter's certificates null and void.

In witness whereof, I have hereunto set my hand this day:

- Reading and Signing was requested.
- Reading and Signing was waived.
- Reading and Signing was not requested.



KATHLEEN A. WILKINS

CSR 10068, RPR-RMR-CRR-CCRR-CLR

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