

# EXHIBIT 7

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF COLUMBIA  
3 \_\_\_\_\_  
4 AMERICAN EDUCATIONAL RESEARCH    )  
5 ASSOCIATION, INC., AMERICAN       )  
6 PSYCHOLOGICAL ASSOCIATION, INC., )  
7 and NATIONAL COUNCIL ON            )  
8 MEASUREMENT IN EDUCATION, INC., ) Civil Action No.  
9                   Plaintiffs,         ) 1:14-cv-00857-TSC-DAR  
10                   v.                    )  
11 PUBLIC.RESOURCE.ORG,                )  
12                   Defendant.            )  
13 \_\_\_\_\_)

14

15

16                   VIDEOTAPED DEPOSITION OF CARL MALAMUD

17

18

19   DATE:                    May 12, 2015  
20   TIME:                    9:33 a.m.  
21   LOCATION:                  Fenwick & West  
22                               555 California Street  
23                               12th Floor  
24                               San Francisco, California 94104  
25   REPORTED BY:             Diane S. Martin, CSR 6464, CCR

Page 110

1 expertise or conclusion.  
 2 BY MR. HUDIS:  
 3 Q. Should I repeat the question, Mr. Malamud?  
 4 A. Yeah.  
 5 Q. Does Exhibit 18 indicate to you that  
 6 Public.Resource attained its nonprofit status in  
 7 September of 2007?  
 8 MR. BRIDGES: Same objections.  
 9 THE WITNESS: The date of the letter is  
 10 September 25th. That's not the date of the  
 11 nonprofit status.  
 12 BY MR. HUDIS:  
 13 Q. What is the date of the nonprofit status?  
 14 A. April 13th, 2007.  
 15 Q. Fair enough. And I see that date.  
 16 A. Yeah.  
 17 Q. Thank you very much.  
 18 (PLAINTIFFS' EXHIBITS 19-20 WERE MARKED.)  
 19 BY MR. HUDIS:  
 20 Q. Mr. Malamud, please take a moment to look  
 21 at Exhibits 19 and 20.  
 22 A. Okay.  
 23 Q. Have you looked at the exhibits?  
 24 A. Yes, I have.  
 25 Q. Could you tell me what Exhibit 19 is?

Page 111

1 A. It looks like an out of date copy of the  
 2 Public.Resource.Org home page.  
 3 Q. So since the time that my office printed  
 4 this web page of Exhibit 19, you have updated the  
 5 content since then?  
 6 MR. BRIDGES: Objection. Misstates  
 7 testimony; vague and ambiguous.  
 8 THE WITNESS: When did you print this?  
 9 BY MR. HUDIS:  
 10 Q. Our best recollection is January of 2015.  
 11 A. I don't know. I would have to  
 12 double-check.  
 13 Q. I amend that because Exhibit 20 was also  
 14 printed on the same date. So we probably printed  
 15 it in March of 2014.  
 16 A. Yeah. That makes sense.  
 17 Q. So this -- so Exhibit 19 and 20 appears to  
 18 you to be the content of the home page and the  
 19 about page of the Public.Resource.Org website in or  
 20 about March of 2014?  
 21 MR. BRIDGES: Objection. May call for  
 22 speculation if he doesn't have definite memory;  
 23 vague and ambiguous; compound; lacks foundation.  
 24 THE WITNESS: I'd have to speculate. It  
 25 has the look and feel of what those pages typically

Page 112

1 look like, but I don't know at specific points in  
 2 time.  
 3 BY MR. HUDIS:  
 4 Q. Now, Exhibit 19, in the center are these  
 5 some of the websites that Public.Resource provides  
 6 to the public?  
 7 A. Yes. And there's one more website that I  
 8 forgot to tell you about on there.  
 9 Q. Which one?  
 10 A. Bulk --  
 11 MR. BRIDGES: I'm sorry.  
 12 THE WITNESS: Pardon me.  
 13 MR. BRIDGES: I object on the grounds it  
 14 lacks foundation; very confusing to me.  
 15 What are you directing his attention to in  
 16 this exhibit?  
 17 MR. HUDIS: Sure. Counsel, do you see  
 18 where it says "Watch FedFlix" in the center of the  
 19 page on Exhibit 19?  
 20 MR. BRIDGES: Right.  
 21 MR. HUDIS: And there are a number of  
 22 websites listed below that?  
 23 MR. BRIDGES: Okay. I just wanted to be  
 24 clear.  
 25 MR. HUDIS: Yes.

Page 113

1 MR. BRIDGES: If that's what you're  
 2 referring to, fine.  
 3 MR. HUDIS: Yes.  
 4 BY MR. HUDIS:  
 5 Q. So continue, Mr. Malamud.  
 6 A. Bulk.resource.org is the website that I  
 7 forgot to tell you about.  
 8 Q. So what kind of information is provided on  
 9 the Bulk.resource.org website?  
 10 A. Its primary function is the home for  
 11 approximately 8 million IRS-exempt organization  
 12 filings.  
 13 Q. And when you say "exempt," do you mean tax  
 14 exempt?  
 15 A. Exempt organizations is a category that the  
 16 IRS has assigned. Many of them are tax exempt, but  
 17 it also includes political organizations.  
 18 Q. So if I remember my Internal Revenue Code,  
 19 those are 501(c)(3) and 501(c)(4) organizations?  
 20 MR. BRIDGES: Objection. May call for  
 21 legal expertise or conclusion.  
 22 THE WITNESS: Also section 527  
 23 organizations.  
 24 BY MR. HUDIS:  
 25 Q. So all three?

Page 146

1 Q. In what way would data files be considered  
 2 content for the Internet?  
 3 A. So content in my mind, and again, this is a  
 4 broad, philosophical topic, implies something that  
 5 a human being can look at and take some meaning  
 6 from.  
 7 So a data file might include a binary  
 8 image. Is that content or not? Again, that's --  
 9 it would be a fascinating essay.  
 10 Q. Which brings me to my next question.  
 11 What does it mean to view content on an  
 12 Internet website?  
 13 MR. BECKER: Objection. Vague.  
 14 THE WITNESS: So view to me sounds to me  
 15 like a human being at a computer using the  
 16 Internet. So I think that is an end user looking  
 17 at an item that is available from another computer.  
 18 BY MR. HUDIS:  
 19 Q. What does it mean to access content on an  
 20 Internet website?  
 21 MR. BECKER: Objection. Vague. Objection.  
 22 May also be argumentative. Objection. May call  
 23 for a legal conclusion.  
 24 THE WITNESS: So access is a more precise  
 25 technical term, and that to me implies that a

Page 147

1 computer, not necessarily a human being, but a  
 2 computer has requested some data from another  
 3 computer, and that request was successful and the  
 4 data was transferred.  
 5 BY MR. HUDIS:  
 6 Q. What does it mean to download content from  
 7 an Internet website?  
 8 MR. BECKER: Objection. Vague. Objection.  
 9 May call for a legal conclusion. Objection. May  
 10 be argumentative.  
 11 THE WITNESS: Again, that's a vague term,  
 12 like view. But from the standpoint of an  
 13 individual human being at a computer, download  
 14 implies taking some content from another location  
 15 and having it copied on your personal computer, for  
 16 example.  
 17 BY MR. HUDIS:  
 18 Q. Could you tell us what an HTTP question is,  
 19 otherwise known as a hypertext transfer protocol  
 20 request?  
 21 A. It is one of a series of operations --  
 22 protocol operations defined in the HTTP protocol  
 23 specification.  
 24 Q. And what does it do?  
 25 MR. BECKER: Objection. Vague.

Page 148

1 THE WITNESS: Well, there's different kinds  
 2 of requests.  
 3 BY MR. HUDIS:  
 4 Q. There are different kinds of HTTP requests?  
 5 A. Yes.  
 6 Q. All right. Could you tell me what they  
 7 are? Are there many?  
 8 MR. BECKER: Objection. Compound.  
 9 BY MR. HUDIS:  
 10 Q. Are there many types of HTTP requests?  
 11 A. Okay. Let me preface this by saying I  
 12 would want to review the HTTP protocol  
 13 specification, but there are several, I can say  
 14 that for a fact.  
 15 Q. All right. So if you could name me a few  
 16 of the ones that you recall at this time.  
 17 A. One of the more common requests is the get  
 18 request, g-e-t. And that request is how a client  
 19 asks for a particular URL from a server.  
 20 Q. All right. What's another type of HTTP  
 21 request?  
 22 A. The post request is used to add data to,  
 23 for example, a web form on the server.  
 24 Q. Can you tell us another type of HTTP  
 25 request?

Page 149

1 A. The head request asks for the metadata  
 2 associated with the document, such as the last  
 3 modified time or the number of bytes.  
 4 Q. Can you name another type of HTTP request?  
 5 A. There is a put request, and I would have to  
 6 consult for the precise definition of that one.  
 7 Q. What generally does a put request do?  
 8 MR. BECKER: Objection. Vague.  
 9 THE WITNESS: I'd want to --  
 10 MR. BECKER: Objection. Competence.  
 11 THE WITNESS: I'd want to look at the HTTP  
 12 protocol specification. It's not something I'm  
 13 familiar with.  
 14 BY MR. HUDIS:  
 15 Q. Is there any other type of HTTP request  
 16 that you can think of as we sit here now?  
 17 A. There are others, and I do not know what  
 18 they are right now.  
 19 Q. If an Internet user wants to obtain data  
 20 from a website, would that be a get request?  
 21 MR. BECKER: Objection. Hypothetical.  
 22 Objection. Vague.  
 23 THE WITNESS: A get request is one of the  
 24 more common mechanisms for accessing data from an  
 25 HTTP server.

Page 158

1 about standards made by quasi-governmental  
 2 organizations. A totally different topic.  
 3 BY MR. HUDIS:  
 4 Q. Could we turn to the next page. Page 3225  
 5 of Exhibit 22. It says two-thirds of the way down  
 6 the page, "I gave a little speech about the morals  
 7 necessity of disseminating standards."  
 8 What did you mean by that?  
 9 A. This was a --  
 10 MR. BECKER: Objection. Vague.  
 11 THE WITNESS: This was in the context of a  
 12 visit to the International Organization For  
 13 Standards or organization, known as --  
 14 International Organization For Standardization,  
 15 known as ISO. The acronym is different than the  
 16 name, which says something about them.  
 17 And this was the organization that was  
 18 attempting to have the whole Internet run on the  
 19 open systems interconnection protocol suite, and my  
 20 little speech to the gentlemen that I visited was  
 21 that if they wanted their protocol suite to be  
 22 ubiquitous, to be globally adopted, that would only  
 23 work if those standards were readily available for  
 24 people to read.  
 25 BY MR. HUDIS:

Page 159

1 Q. When you say "readily available," do you  
 2 mean -- did you mean readily available for free?  
 3 MR. BECKER: Objection. Vague. Objection.  
 4 Relevance.  
 5 THE WITNESS: The IETF made its protocol  
 6 specifications available for me. And my little  
 7 moral lecture to the International Organization For  
 8 Standardization was that if they wished to win this  
 9 race to become the basis for the modern Internet,  
 10 that would only happen if their standards were, in  
 11 fact, available for free, so anybody could read  
 12 them.  
 13 BY MR. HUDIS:  
 14 Q. The next paragraph says, "We then started  
 15 talking about applying Bruno to the ISO world."  
 16 First of all, what is Bruno?  
 17 A. Bruno was a project that I undertook with  
 18 the blessings of the secretary general of the  
 19 International Telecommunication Union to convert  
 20 and post the ITU specifications to the Internet so  
 21 anybody could read them for free.  
 22 Q. So it was basically wide dissemination of  
 23 documents on the Internet?  
 24 A. Of ITU specifications. And the ITU is  
 25 specifications for the telephone network.

Page 160

1 Q. What is an ITU specification?  
 2 A. How a modem works, for example.  
 3 Q. And please define ISO.  
 4 A. ISO is the International Organization for  
 5 Standardization.  
 6 Q. And the next sentence begins with Eicher.  
 7 Who is Eicher?  
 8 A. Eicher was the secretary general of the  
 9 International Organization for Standardization.  
 10 Q. Now, the rest of this paragraph reads,  
 11 "Eicher was quite frank. 25 percent of ISO  
 12 revenues came from the sale of standards documents.  
 13 How did I propose to replace that revenue? Even  
 14 more importantly, ISO was controlled by its member  
 15 organizations, which also made much money from  
 16 standards sales. How did I propose to convince  
 17 groups like ANSI that posting standards for free  
 18 would help them?"  
 19 Do you see that?  
 20 A. Yes, I do.  
 21 MR. BECKER: Objection. The document  
 22 speaks for itself. Objection. Relevance.  
 23 BY MR. HUDIS:  
 24 Q. In this context -- sorry. I'm sorry if I  
 25 spoke over you.

Page 161

1 In this context, what is ANSI?  
 2 A. ANSI is the American National Standards  
 3 Institute.  
 4 Q. So you pose a series of questions here on  
 5 page 32225, and then on the next page you say, and  
 6 this is on page 32226 of Exhibit 22, "I proposed my  
 7 high resolution/low resolution compromise. The  
 8 plan would post low resolution versions of  
 9 documents for free on the network and allow ISO and  
 10 ANSI to continue to sell high resolution versions  
 11 either on paper or electronically."  
 12 So was that your answer to the question  
 13 that you posed on the prior page, 32225?  
 14 MR. BECKER: Objection. The document  
 15 speaks for itself.  
 16 THE WITNESS: It was one of my thoughts in  
 17 1991 as to a way that ISO could function in a  
 18 modern world.  
 19 BY MR. HUDIS:  
 20 Q. Then in two paragraphs later, you say, "The  
 21 crucial assumption was that people with the free  
 22 version would then pay for documents." And at the  
 23 end of that paragraph it says, "Giving away  
 24 standards would lead to increased revenues."  
 25 So here is my question about that crucial

Page 170

1 acknowledge that the issue of copyright and  
 2 standards, after they've been incorporated into  
 3 law, is unsettled and that ACUS is not taking a  
 4 position on this subject?" What did you mean?  
 5 MR. BECKER: Objection. The document  
 6 speaks for itself. Objection. Vague.  
 7 THE WITNESS: I felt it inappropriate for  
 8 ACUS to be taking a strong position on what the  
 9 copyright status was of documents incorporated into  
 10 law.  
 11 BY MR. HUDIS:  
 12 Q. Why?  
 13 A. Frankly, there was a young staff member who  
 14 was doing the research for this recommendation who  
 15 felt very strongly that standards incorporated by  
 16 reference into law maintained their copyright, even  
 17 as a part of the Code of Federal Regulations. And  
 18 as I said in this paragraph here, I think it would  
 19 be fair to say this is above our pay grade. I felt  
 20 that the young staffer was -- was stretching.  
 21 Q. So that brings me to my next question.  
 22 The next sentence says, "There is obviously  
 23 a strong bias towards protecting and honoring  
 24 copyright on the one hand, but we also have the  
 25 Veeck," V-e-e-c-k, "decision and some ambiguity in

Page 171

1 the law. I think it would be fair to say this is,"  
 2 quote, "above our pay grade," period, unquote.  
 3 A couple of questions on that passage.  
 4 What did you mean in the third sentence by  
 5 "some ambiguity in the law"?  
 6 MR. BECKER: Again, same objections. The  
 7 document speaks for itself. It's beyond the scope  
 8 of the 30(b)(6) designation. And the objection on  
 9 relevance grounds. Again, objection that this may  
 10 call for a legal conclusion.  
 11 THE WITNESS: So I'm not a lawyer, but I  
 12 read the Veeck decision, and it seemed to me that  
 13 the researcher at ACUS was drawing conclusions from  
 14 the Veeck decision that while perhaps appropriate  
 15 for a federal judge to be making, were  
 16 inappropriate to be laying them down as categorical  
 17 statements. I felt she was reading into the Veeck  
 18 decision in ways that were perhaps not supported by  
 19 the language. And again, I'm not a lawyer.  
 20 BY MR. HUDIS:  
 21 Q. I understand.  
 22 What conclusions was the researcher drawing  
 23 from Veeck that concerned you?  
 24 MR. BECKER: Objection. Relevance.  
 25 Objection. Vague. Objection. Lacks foundation.

Page 172

1 THE WITNESS: So it's pronounced Veeck, by  
 2 the way. It's a Dutch name. P. Veeck. It -- the  
 3 preamble was taking at the time a strong position  
 4 that standards incorporated into reference by law  
 5 had copyright and that the law could have  
 6 copyright.  
 7 And again, I felt that this young staffer  
 8 was simply moving beyond what a body such as the  
 9 Administrative Conference of the United States  
 10 could say is the established truth. I felt she was  
 11 speculating, to use the language we use in  
 12 depositions.  
 13 BY MR. HUDIS:  
 14 Q. And what did you mean by "I think it would  
 15 be fair to say this is above our pay grade"?  
 16 MR. BECKER: Objection again. The document  
 17 speaks for itself. Objection. Asked and answered.  
 18 THE WITNESS: So I'm not a lawyer, but I  
 19 have looked at a number of documents that indicate  
 20 that in the United States the law has no copyright.  
 21 And that includes, in many formulations, materials  
 22 incorporated by reference into the law. Mr. Bhatia  
 23 from ANSI, for example, B-h-a-t-i-a, has stated  
 24 many times that standards incorporated by reference  
 25 are the law, and it seemed to me that that was a

Page 173

1 long-standing policy of the United States.  
 2 And again, this was something that if one  
 3 were to draw a different conclusion that a portion  
 4 of the law in fact, did maintain copyright and one  
 5 needed a license to access and use that material,  
 6 that was certainly not a statement that the  
 7 organization such as the Administrative Conference  
 8 of the United States should be making.  
 9 (PLAINTIFFS' EXHIBIT 24 WAS MARKED.)  
 10 BY MR. HUDIS:  
 11 Q. Mr. Malamud, I'll now show you what's been  
 12 marked as Exhibit 24. Before I ask you questions  
 13 about the document, what is On The Media?  
 14 A. Oh, that's a National Public Radio program.  
 15 Q. Who is Bob Garfield?  
 16 A. I assume he's a host or reporter.  
 17 Q. Do you recognize Exhibit 24?  
 18 A. No, I do not. I remember doing an  
 19 interview with On The Media, however.  
 20 Q. Did you do this interview with On The Media  
 21 on or about April 13, 2012?  
 22 A. That sounds about right.  
 23 Q. What was the purpose of the interview?  
 24 A. I think you'd have to ask On The Media.  
 25 Q. What was your purpose for giving the

Page 174

1 interview?  
 2 MR. BECKER: Objection for relevance.  
 3 THE WITNESS: If a well-respected program  
 4 such as On The Media by National Public Radio wants  
 5 me to talk to them, I will generally make myself  
 6 available.  
 7 BY MR. HUDIS:  
 8 Q. Exhibit 24 appears to be an interview that  
 9 you gave in April of 2012 to Mr. Garfield. I'd  
 10 like to ask you a couple of questions.  
 11 If you would turn in Exhibit 24 to  
 12 production page AERA\_APA\_NCME 32076.  
 13 A. Okay. Yes.  
 14 Q. Mr. Garfield in the middle of the page  
 15 asks, "There is an expense attached to developing  
 16 and codifying these standards. If we take the  
 17 revenue away from those who do this work, then what  
 18 happens?" And you provide two answers. I'll read  
 19 them.  
 20 "Well, there's two answers to that. One is  
 21 that the nonprofits that develop these standards  
 22 have a lot of different revenue streams. They do  
 23 conferences. They do certification. They develop  
 24 standards that aren't law. In fact, the vast  
 25 majority of their standards are not. And so maybe

Page 175

1 they need to adjust their business model,  
 2 particularly given the fact that they are a  
 3 nonprofit public charity."  
 4 You continue. "Answer number two is that  
 5 government has shirked its responsibilities. It  
 6 said 'Gee, we can just incorporate these privately  
 7 developed standards in the law and we won't have to  
 8 pay anything.' And the only people that get  
 9 screwed up by this are the citizens that need to  
 10 read the law."  
 11 Do you recall giving those answers to  
 12 Mr. Garfield at the interview of April 2012?  
 13 MR. BECKER: Objection. Mr. Malamud has  
 14 said that he does not recognize this document.  
 15 Objection to the extent that it's not clear how  
 16 this document was transcribed or its authenticity.  
 17 Objection with regards to relevance, particularly  
 18 on the grounds that the plaintiffs have said that  
 19 the finances and revenue of the plaintiffs, other  
 20 than directly related to the sale of the 1999  
 21 standards, is not at issue in this case as they so  
 22 claim.  
 23 Objection on the grounds that the question  
 24 assumes facts not in evidence.  
 25 MR. HUDIS: I don't mind the objections,

Page 176

1 Counsel. I just mind the ones that would try to  
 2 indicate the -- to the witness how he should answer  
 3 his questions.  
 4 BY MR. HUDIS:  
 5 Q. So my question about this document, do you  
 6 recall this interview?  
 7 A. Yes, I do.  
 8 Q. All right. Do you recall giving this  
 9 answer that I just read into the record?  
 10 A. No, I don't, but I'd be happy to discuss  
 11 the general topics that are addressed there.  
 12 Q. Sure.  
 13 So if standards development organizations  
 14 lose their copyright by incorporation by reference,  
 15 is it your theory that the standards  
 16 organization -- development organization should  
 17 make their money some other way?  
 18 MR. BECKER: Objection. Vague. Objection.  
 19 May call for a legal conclusion. Objection.  
 20 Hypothetical. Objection. May mischaracterize the  
 21 witness.  
 22 BY MR. HUDIS:  
 23 Q. You may answer.  
 24 A. I have testified on this subject before  
 25 Congress saying that I believe that when a standard

Page 177

1 is incorporated by reference, usually with the  
 2 active ascents of -- of the SDO, that organization  
 3 is given a gold seal of approval, right. They are  
 4 the original creator of what has become a portion  
 5 of American law, and that that is a unique  
 6 marketing opportunity.  
 7 That opportunity can be used to -- to sell  
 8 authenticated versions of the standard. To sell  
 9 auxiliary products. That there are a number, in  
 10 general, of business models that can emerge out of  
 11 this favored position.  
 12 As to how that specifically applies to a  
 13 specific SDO, again, we would want to look at -- I  
 14 would want to look at the very specific nature of  
 15 that organization. But I still talk in general  
 16 about the unique position of having a standard  
 17 incorporated by reference into federal law and how  
 18 favorable that is.  
 19 BY MR. HUDIS:  
 20 Q. And is it your view that once incorporated  
 21 by reference, the standard loses its copyright  
 22 enforcement ability and the standards development  
 23 organization that wrote that standard,  
 24 "incorporated by reference," would have to obtain  
 25 its income some other way than selling the

Page 178

1 standard?  
 2 MR. BECKER: Objection. Calls for a legal  
 3 conclusion. Objection. Argumentative. Objection.  
 4 Lacks foundation and assumes facts not in evidence.  
 5 Objection. Vague.  
 6 THE WITNESS: So I disagree with that  
 7 characterization. I -- I believe that even if the  
 8 law is available to citizens, that does not  
 9 preclude a standards development organization  
 10 continuing to sell that document. Particularly  
 11 selling an authenticated version, a redlined  
 12 version, a version with commentary. I believe  
 13 there are a number of ways one can continue to make  
 14 that -- that document available for sale.  
 15 BY MR. HUDIS:  
 16 Q. Is one of your alternative theories that  
 17 once a standard is incorporated by reference, that  
 18 the government should pay for it?  
 19 MR. BECKER: Objection. May call for a  
 20 legal conclusion. Objection. Lacks foundation.  
 21 Assumes facts not in evidence. Objection.  
 22 Argumentative.  
 23 THE WITNESS: So there are some things I  
 24 know and some things I can speculate on.  
 25 The thing that I know is that the law in

Page 179

1 the United States has no copyright, and one is free  
 2 to read and speak the law. Without needing a  
 3 license, without needing permission.  
 4 What I can speculate on is different ways  
 5 that one might go about handling issues such as  
 6 revenue and whether the government should be paying  
 7 or not, and I frankly don't have strong views as to  
 8 whether or not the -- this scenario that I posited  
 9 here is the right solution.  
 10 MR. BECKER: I would advise the witness not  
 11 to speculate and only to give those answers that  
 12 the witness knows.  
 13 THE WITNESS: Okay.  
 14 BY MR. HUDIS:  
 15 Q. Do you have any views, whether they're  
 16 strong or not, whether once a standard is  
 17 incorporated by reference into a government  
 18 regulation, the government should pay for that?  
 19 MR. BECKER: Objection. May call for a  
 20 legal conclusion. Objection. Vague. Objection.  
 21 Lacks foundation and assumes facts not in evidence.  
 22 And argumentative.  
 23 THE WITNESS: So the government is already  
 24 paying in many different revenue streams for  
 25 standards. They pay for access. They help fund

Page 180

1 development. And in many cases standards are  
 2 created, and there are other revenue streams that  
 3 go to the organization, such as the funding of  
 4 basic research.  
 5 So I don't think it's an either/or  
 6 proposition. I think there's already a lot of  
 7 money flowing.  
 8 BY MR. HUDIS:  
 9 Q. I don't believe your last answer,  
 10 Mr. Malamud, answered my question.  
 11 A. Okay. Could you restate the question?  
 12 Q. Sure. Do you have any views, whether they  
 13 are strong or not, whether once a standard is  
 14 incorporated by reference into a government  
 15 regulation, the government should pay for that?  
 16 MR. BECKER: All the same objections and  
 17 also asked and answered.  
 18 THE WITNESS: I believe I did answer your  
 19 question in the sense of the government is already  
 20 paying.  
 21 Now, my view is it proper for government  
 22 money to go to an SDO? In theory, yes.  
 23 MR. HUDIS: Just for the record Exhibit 24  
 24 bears production numbers AERA\_APA\_NCME 32075  
 25 through 32078.

Page 181

1 (PLAINTIFFS' EXHIBIT 25 WAS MARKED.)  
 2 BY MR. HUDIS:  
 3 Q. Mr. Malamud, I've placed in front of you a  
 4 document that's been marked as Exhibit 25, bearing  
 5 production numbers AERA\_APA\_NCME 31764 through  
 6 31768.  
 7 Do you recognize this document?  
 8 A. It appears to be an essay that I wrote for  
 9 boingboing. This appears to be a printout of that.  
 10 Q. Do you have any reason to doubt the  
 11 authenticity of this document, Exhibit 25?  
 12 A. No, but I'd want to double check. It  
 13 appears to be the essay that I wrote.  
 14 Q. And what is boingboing?  
 15 A. Boingboing is a blog.  
 16 Q. And do you recall posting this blog on  
 17 March 19th, 2012, to boingboing?  
 18 A. I'm not sure of the exact date, but I did,  
 19 in fact, author a boingboing official guest  
 20 memorandum of law.  
 21 Q. Why did you call it a memorandum of law?  
 22 A. Because it was talking about an obscure  
 23 topic in a publication that reaches a very general  
 24 audience.  
 25 Q. Under the first heading Roman numeral I,



Page 230

1 MR. BECKER: Objection. Vague.  
 2 Objection. To the extent that any of this  
 3 information has come from attorney-client  
 4 communications, I will instruct the witness not to  
 5 divulge any privileged information.  
 6 THE WITNESS: I'm aware that they are  
 7 updated. I'm not terribly clear on the exact  
 8 process that the organizations went through to do  
 9 that.  
 10 BY MR. HUDIS:  
 11 Q. Do you know who uses the standards?  
 12 MR. BECKER: Objection. Vague.  
 13 Again, to the extent that this answer  
 14 requires the divulging of any attorney-client  
 15 privileged communications, I'll instruct the  
 16 witness not to divulge that information.  
 17 Competence. Lacks foundation.  
 18 THE WITNESS: So I know some of the people  
 19 that use the standard. I know that the Department  
 20 of Education has incorporated by reference into its  
 21 regulations. So I am -- I know that the Department  
 22 of Education has people that use it.  
 23 I know a lot of state governments are  
 24 putting together tests that conform to the  
 25 standards.

Page 231

1 I believe there are a number of other  
 2 agencies, I believe Office of Personnel Management,  
 3 I believe Department of Defense, a number of state  
 4 organizations, are all users of the standard  
 5 because they specify that it shall be used.  
 6 BY MR. HUDIS:  
 7 Q. Do you know of any non-governmental users  
 8 of the standards?  
 9 MR. BECKER: All the same objections.  
 10 Vague.  
 11 To the extent that there is any information  
 12 that the witness has learned from his attorneys, I  
 13 will instruct him not to divulge this privileged  
 14 information.  
 15 THE WITNESS: I know that the Educational  
 16 Testing Service, ETS and a number of organizations  
 17 that create tests, are users of the standard, and  
 18 the reason I know that is there's been a series of  
 19 procurements by government organizations that  
 20 require the use of the standard.  
 21 BY MR. HUDIS:  
 22 Q. Do you know of any other non-governmental  
 23 users of the standards?  
 24 MR. BECKER: All the same objections. Also  
 25 object for competence.

Page 232

1 THE WITNESS: My sister read it in the  
 2 course of her doctoral course work.  
 3 BY MR. HUDIS:  
 4 Q. And what was your sister's doctoral course  
 5 work?  
 6 A. On, I want to state this properly. I  
 7 believe physical and rehabilitative therapy. A  
 8 subset of psychology.  
 9 Q. How did the standards first come to your  
 10 attention?  
 11 MR. BECKER: Objection. Vague. Objection.  
 12 Ambiguous.  
 13 THE WITNESS: I was looking at the  
 14 standards incorporated by reference under the Code  
 15 of Federal Regulations, and the standards at issue  
 16 were one of the ones that were specified.  
 17 BY MR. HUDIS:  
 18 Q. And what year was that?  
 19 A. Probably 2012. Early 2012.  
 20 Q. When did Public.Resource --  
 21 A. Might have been earlier. Might have been  
 22 earlier. I'm not sure.  
 23 Q. Sometime in 20 -- in 2012?  
 24 A. Coming to my attention in the sense of  
 25 remembering it now, yes.

Page 233

1 Q. What, if anything, made you interested in  
 2 acquiring the standards?  
 3 A. It was --  
 4 MR. BECKER: Objection. Vague.  
 5 THE WITNESS: -- incorporated by reference  
 6 into the Code of Federal Regulations.  
 7 BY MR. HUDIS:  
 8 Q. When did Public.Resource first make the  
 9 decision to post the standards to one of its  
 10 websites?  
 11 MR. BECKER: Objection. Vague. Objection.  
 12 Lacks foundation. Objection. May call for a legal  
 13 conclusion.  
 14 THE WITNESS: So it would have been  
 15 sometime after obtaining a copy of the standard and  
 16 examining it and satisfying myself that, in fact,  
 17 it was the document that was incorporated by  
 18 reference, and sometime between the procurement,  
 19 which I believe was in May 2012, and the actual  
 20 posting, which I believe was in July 2012.  
 21 BY MR. HUDIS:  
 22 Q. So how did Public.Resource come to the  
 23 decision to post the standards on one of its  
 24 websites?  
 25 MR. BECKER: Objection. Vague and

Page 262

1 BY MR. HUDIS:  
 2 Q. Mr. Malamud, I show you a document that has  
 3 been marked as Exhibit 34, bearing production  
 4 numbers AERA\_APA\_NCME 31528 through 31738.  
 5 Do you recognize this document?  
 6 A. It appears to be a copy of the standards at  
 7 issue with the certificate of incorporation on the  
 8 top.  
 9 Q. All right. And is this the cover sheet  
 10 that you appended on top of the 1999 standards  
 11 posted on Public.Resource's website?  
 12 A. Yes, it appears to be.  
 13 Q. Who prepared this cover sheet?  
 14 A. I did.  
 15 Q. And who chose the language for the cover  
 16 sheet?  
 17 A. I did.  
 18 Q. What was your intention, Mr. Malamud, for  
 19 appending this cover sheet of Exhibit 34 on top of  
 20 the 1999 standards posted on Public.Resource's  
 21 website?  
 22 A. I wanted to be very clear that this was a  
 23 posting of a standard incorporated by reference  
 24 into the Code of Federal Regulations. I wanted to  
 25 place this document in context.

Page 263

1 Q. And what was your purpose on the cover  
 2 sheet of using the medallion that had the word  
 3 "Repeatedly Approved."  
 4 A. To signify that the executive director of  
 5 the Office of the Federal Register had explicitly  
 6 and deliberately approved this incorporation by  
 7 reference.  
 8 Q. We just went through the process that you  
 9 used. We asked you the question, did you digitize  
 10 or convert to a digital format the 1999 standards,  
 11 and we went through that process.  
 12 My question is, who participated in the  
 13 process of disassembling the paper version of the  
 14 1999 standards, scanning them and processing them,  
 15 as you described here in interrogatory answer  
 16 number 3 and posting them to the Internet?  
 17 MR. BECKER: Objection. Compound.  
 18 THE WITNESS: That was me.  
 19 BY MR. HUDIS:  
 20 Q. Did Point.B Studio participate in this  
 21 process?  
 22 A. No.  
 23 Q. Did Rebecca Malamud participate in this  
 24 process?  
 25 A. She did not.

Page 264

1 Q. Did HTC Global participate in this process?  
 2 A. They did not.  
 3 Q. Did anyone else besides yourself  
 4 participate in this process?  
 5 A. It's just me.  
 6 Q. I'd like you to look in Exhibit 29,  
 7 interrogatory answer number 4 on page 6.  
 8 So consistent with your -- your prior  
 9 testimony, does this interrogatory answer number 4  
 10 in Exhibit 29 accurately identify all the persons  
 11 and entities who were involved in disassembling the  
 12 paper version of the 1999 standards, scanning them,  
 13 processing them and posting them to the Internet?  
 14 MR. BECKER: Objection to form.  
 15 THE WITNESS: Yes, it was me.  
 16 BY MR. HUDIS:  
 17 Q. I just want to go a little bit into depth  
 18 about quality control.  
 19 So what quality control procedures did you  
 20 use to ensure the quality of the textual comment --  
 21 content of the 1999 standards that you posted to  
 22 the Internet?  
 23 MR. BECKER: Objection. Vague.  
 24 THE WITNESS: This is a scan of a document.  
 25 BY MR. HUDIS:

Page 265

1 Q. Mm-hm.  
 2 A. It's a pixel-by-pixel replication of what  
 3 was on the printed page.  
 4 Q. I'll be more specific.  
 5 Did you check for missing or incorrectly  
 6 scanned pages?  
 7 A. I believe I did.  
 8 Q. Did you check for pages that may have had  
 9 blurred text?  
 10 A. I believe I did.  
 11 Q. Now, you say, "I believe I did." Do you  
 12 know for sure that you did?  
 13 A. My standard procedure is to do those  
 14 things. I don't know this specific document simply  
 15 because I don't recollect back to that period in  
 16 May 2012. So I can't testify under oath that I  
 17 did, in fact, do that. But that certainly is my  
 18 standard procedure.  
 19 Q. Mr. Malamud, what is search engine  
 20 optimization?  
 21 A. Search engine optimization is a technical  
 22 term of art that has to do with how documents that  
 23 are on a web server show up in search engine  
 24 results.  
 25 Q. Please continue.

Page 266

1 A. In particular with the PDF document, what  
 2 you want in a search engine result is rather than,  
 3 for example, a snippet of OCR, you want the actual  
 4 title of the document to show up in a description.  
 5 It's what Google would cause a snippet.  
 6 So by embedding metadata in the header of  
 7 the PDF file, the attempt is to make sure that that  
 8 document title shows up in the search engine  
 9 results so people know what that document is.  
 10 Q. So, Mr. Malamud, did you check the metadata  
 11 you added to the PDF file comprising the 1999  
 12 standards for search engine optimization?  
 13 A. Well, when I created the script that embeds  
 14 the metadata in the header, I had in mind search  
 15 engine optimization.  
 16 So assuming I did my job right, and  
 17 remember search engines change over time. So if  
 18 you did something in one period of time, that  
 19 doesn't necessarily mean that a search engine will  
 20 react the same way later on.  
 21 But assuming that I wrote that initial  
 22 script properly, then this document would have  
 23 shown up in a meaningful fashion in search engine  
 24 results.  
 25 Q. And your answer just now said, "assuming."

Page 267

1 You don't know for sure with respect to this  
 2 particular document?  
 3 A. I don't recollect looking at this document  
 4 in Google or Bing or other search engine results to  
 5 determine that fact.  
 6 Q. Did you check the quality of the optical  
 7 character recognition process for accuracy for the  
 8 1999 standards?  
 9 MR. BECKER: Objection. Form.  
 10 THE WITNESS: Hold on a second. I'd like  
 11 to double-check something.  
 12 OCR is inherently prone to certain errors.  
 13 And what I used was the best available OCR that I  
 14 had, which was in Adobe Acrobat Pro. But I did not  
 15 pull up the underlying text. The underlying OCR  
 16 text is used to search a file; not to read a file.  
 17 Does that answer your question?  
 18 BY MR. HUDIS:  
 19 Q. So in doing a quality check of the optical  
 20 character recognition process for accuracy, did you  
 21 attempt to pull up the underlying text after the  
 22 scan was completed?  
 23 A. No.  
 24 MR. BECKER: Objection. Form.  
 25 THE WITNESS: No. And I never said that I

Page 268

1 did do that on a consistent basis. It's not part  
 2 of our normal workflow, no.  
 3 BY MR. HUDIS:  
 4 Q. Was the PDF file of the 1999 standards that  
 5 you created ever converted from PDF to any other  
 6 format before posting to the Internet?  
 7 MR. BECKER: Objection. Form.  
 8 THE WITNESS: I don't think so.  
 9 BY MR. HUDIS:  
 10 Q. So the 1999 standards that you scanned and  
 11 created a PDF file, was it ever converted to JPEG?  
 12 MR. BECKER: Objection. Form.  
 13 THE WITNESS: I'm not sure what that means.  
 14 BY MR. HUDIS:  
 15 Q. Was it converted from PDF format to a JPEG  
 16 format?  
 17 MR. BECKER: Same objection.  
 18 THE WITNESS: I don't think that would make  
 19 any sense on a document like that. You'd end up  
 20 with, you know, a couple hundred JPEG files.  
 21 No. I certainly wouldn't have done that.  
 22 BY MR. HUDIS:  
 23 Q. Okay. Did you convert it to SBG format?  
 24 A. No. That wouldn't make any sense at all.  
 25 Q. And would you have any -- would you have

Page 269

1 had any reason to convert the PDF file of the 1999  
 2 standards to a MathML format?  
 3 MR. BECKER: Objection. Form.  
 4 THE WITNESS: I don't -- well, first of  
 5 all, MathML is embedded in an HTML file.  
 6 And second of all, at least to the best of  
 7 my recollection, I don't think there's any  
 8 mathematical formulas in the standards at issue.  
 9 BY MR. HUDIS:  
 10 Q. So that brings me to my next question.  
 11 Was the PDF file that you created from the  
 12 1999 standards ever converted to HTML format?  
 13 MR. BECKER: Objection. Form.  
 14 THE WITNESS: No, we didn't do that.  
 15 BY MR. HUDIS:  
 16 Q. Was the PDF file of the 1999 standards that  
 17 you created ever converted from PDF to a format  
 18 making the standards accessible to the visually  
 19 impaired?  
 20 MR. BECKER: Objection. Form. Objection.  
 21 Competence; lacks foundation and assumes facts not  
 22 in evidence.  
 23 THE WITNESS: The OCR procedure does, in  
 24 fact, make the document accessible to the visually  
 25 impaired.

Page 270

1 BY MR. HUDIS:  
 2 Q. In what way?  
 3 A. A screen reader is able to read the  
 4 underlying text, granted with potential OCR errors,  
 5 but the vast majority of the text is accessible to  
 6 those that are visually impaired.  
 7 Q. Are you familiar with the format,  
 8 refreshable Braille?  
 9 A. No, I'm not.  
 10 Q. Did you convert the PDF file of the 1999  
 11 standards that you made to refreshable Braille  
 12 format?  
 13 A. We don't do that. We convert to HTML.  
 14 Q. Did -- and you didn't convert --  
 15 A. So no. No is the answer.  
 16 Q. All right. And you didn't convert the PDF  
 17 file to HTML either?  
 18 A. This particular standard, no, we did not.  
 19 Q. Okay. And did you convert the PDF file  
 20 that you created from the 1999 standards to large  
 21 print?  
 22 MR. BECKER: Objection. Form.  
 23 THE WITNESS: It is an unencumbered PDF,  
 24 and so a viewer can, in fact, magnify the text that  
 25 is there.

Page 271

1 So in that sense, large print, we did not  
 2 retype the documents into a large print edition.  
 3 BY MR. HUDIS:  
 4 Q. Mr. Malamud, do you have any materials in  
 5 your -- in Public.Resource's possession documenting  
 6 the process you went through of disassembling the  
 7 paper version of the 1999 standards, scanning them,  
 8 processing them and posting them to the Internet?  
 9 MR. BECKER: Objection. Compound.  
 10 THE WITNESS: No, there's no intermediate  
 11 process. That's a book and then it gets scanned.  
 12 THE REPORTER: Did you say "there's no  
 13 intermediate product"?  
 14 THE WITNESS: Intermediate process.  
 15 BY MR. HUDIS:  
 16 Q. Mr. Malamud, once you converted the 1999  
 17 standards from paper to the PDF format, what did  
 18 you do with the contents of the file?  
 19 A. I posted the file to Law.Resource.Org and  
 20 to the Internet Archive.  
 21 Q. Mr. Malamud, could you please return your  
 22 attention to Exhibit 29, interrogatory answer  
 23 number 2.  
 24 A. Okay.  
 25 Q. Does interrogatory answer number 2

Page 272

1 accurately state when and where you posted the 1999  
 2 standards to the Internet?  
 3 A. It does.  
 4 Q. And what was the date that you posted the  
 5 standards to the Internet?  
 6 MR. BECKER: Objection. Form.  
 7 THE WITNESS: As our interrogatory says,  
 8 July 11, 2012 on Law.Resource.Org and ...  
 9 BY MR. HUDIS:  
 10 Q. All right. And --  
 11 A. Yeah.  
 12 Q. And as you said, you posted the standards  
 13 to Law.Resource.Org, and you also posted the  
 14 standards to the Internet Archive; correct?  
 15 A. That is correct.  
 16 Q. Mr. Malamud, what is the name of the  
 17 Public.Resource web server to which you saved the  
 18 file containing the contents of the 1999 standards?  
 19 A. Law.Resource.Org.  
 20 Q. That's the name of the server?  
 21 A. Yes.  
 22 MR. BECKER: Please give me time to object.  
 23 MR. HUDIS: I'm sorry.  
 24 THE WITNESS: That was my fault.  
 25 MR. HUDIS: I don't want to be rude,

Page 273

1 Counsel, seriously. Okay.  
 2 BY MR. HUDIS:  
 3 Q. Is the file containing the 1999 standards  
 4 still saved on that web server?  
 5 MR. BECKER: Objection. Vague and  
 6 ambiguous; assumes facts not in evidence.  
 7 THE WITNESS: It is not in the document  
 8 tree of the web server, no.  
 9 BY MR. HUDIS:  
 10 Q. Do you still have that file still saved  
 11 somewhere within Public.Resource's computer  
 12 systems?  
 13 A. Yes, I do.  
 14 Q. Where?  
 15 A. One copy on my desktop. One copy in the  
 16 not published directory. I don't know what the  
 17 exact name of it is. Someplace on our server, but  
 18 it's a private area that's not accessible to -- to  
 19 anybody but myself and our systems administrator.  
 20 Q. Mr. Malamud, does Public.Resource have any  
 21 logs from its web servers documenting the date on  
 22 which the 1999 standards were posted to  
 23 Public.Resource's website?  
 24 MR. BECKER: Objection. Vague and  
 25 ambiguous. Objection. Lacks foundation. And

Page 274

1 assumes facts not in evidence.  
 2 THE WITNESS: There's no logs, but there  
 3 was a file creation date on the file.  
 4 BY MR. HUDIS:  
 5 Q. Has any documentation noting the file  
 6 creation date ever been produced to us?  
 7 A. I don't know.  
 8 MR. HUDIS: Counsel, if that document has  
 9 not been provided to us, it should be provided to  
 10 us now.  
 11 THE WITNESS: So the file creation date was  
 12 the date that the standard was posted. And when at  
 13 your request we removed that standard and replaced  
 14 it with a stub, that's going to be the new creation  
 15 date. So I don't believe there's going to be a  
 16 record.  
 17 BY MR. HUDIS:  
 18 Q. What about the old creation date when the  
 19 original standards file was -- was posted to your  
 20 web server?  
 21 A. I moved it to a different area. I mean,  
 22 you can make the request and we'll go look and see  
 23 if that's there, but it's --  
 24 Q. Thank you, Mr. Malamud, I appreciate that.  
 25 Did you post the entirety of the 1999

Page 275

1 standards to Public.Resource's website?  
 2 A. Yes.  
 3 Q. Mr. Malamud, as it pertains to the Internet  
 4 Archive, what is a collection?  
 5 MR. BECKER: Objection. Asked and  
 6 answered.  
 7 THE WITNESS: A collection is a set of  
 8 items that often have a common theme.  
 9 BY MR. HUDIS:  
 10 Q. And you said you posted the 1999 standards  
 11 to Internet Archive's website; correct?  
 12 A. That is correct.  
 13 Q. And did you post the entirety of the 1999  
 14 standards to Internet Archive's website?  
 15 A. I did.  
 16 Q. Under which collection at the Internet  
 17 Archive did you post the 1999 standards?  
 18 MR. BECKER: Objection. Form.  
 19 THE WITNESS: The current name of that  
 20 collection is Codes of the World.  
 21 BY MR. HUDIS:  
 22 Q. How did you choose this particular  
 23 collection to which to post the 1999 standards?  
 24 A. It's the --  
 25 MR. BECKER: Objection. Assumes facts not

Page 276

1 in evidence.  
 2 THE WITNESS: It's the collection I created  
 3 to hold the standards incorporated by reference.  
 4 BY MR. HUDIS:  
 5 Q. All right. So you created the Codes of the  
 6 World collection on Internet Archive's website?  
 7 A. I did.  
 8 Q. Mr. Malamud, I show you what was previously  
 9 marked at Internet Archive's deposition in this  
 10 case as Butler Exhibit 6.  
 11 Do you see that?  
 12 A. I do. Let me correct a misstatement. It  
 13 wasn't called Codes of the World. It was called  
 14 Global Public Safety Codes is the name of the  
 15 collection.  
 16 Q. And what types of materials did you post to  
 17 the Global Public Safety Codes collection on  
 18 Internet Archive?  
 19 A. Standards incorporated by reference in the  
 20 law.  
 21 Q. Do you recognize Butler Exhibit 6?  
 22 A. This is a document you created?  
 23 Q. It's a document we printed from the  
 24 Internet Archive.  
 25 A. This appears to be a series of screen dumps

Page 277

1 from that item in which you are paging through the  
 2 standards at issue, is what this appears to be.  
 3 Q. That's exactly correct. And you just saved  
 4 me about five minutes of explanation.  
 5 A. Oh, sorry about that.  
 6 Q. That's fine. Thank you very much,  
 7 Mr. Malamud.  
 8 What is the web tool, if you know, that  
 9 creates the ability for a user to turn the pages of  
 10 the 1999 standards like a book?  
 11 MR. BECKER: Objection. Vague and  
 12 ambiguous; confusing.  
 13 THE WITNESS: I have heard it called book  
 14 reader, but I don't know the details of what the  
 15 code is or how it's embedded or anything of that  
 16 sort.  
 17 BY MR. HUDIS:  
 18 Q. So you've heard it referred to as a book  
 19 reader application?  
 20 A. Yes.  
 21 Q. All right. Have you ever heard of a DjVu  
 22 Reader?  
 23 A. Yes, I have.  
 24 Q. And what -- what is its function, to the  
 25 best of your knowledge?

Page 306

1 in your e-mail to Alexis Rossi?  
 2 A. Because that's the proper address to inform  
 3 the Internet Archive about matters pertaining to a  
 4 collection.  
 5 Q. And what do you mean by matters relating to  
 6 a collection?  
 7 A. If you have technical problems with your  
 8 collection or other issues or problems, that would  
 9 be the address that you would write to.  
 10 Q. And at the end of this e-mail there's a  
 11 URL. Do you see that?  
 12 A. I do.  
 13 Q. And it ends with AERA.standards.1999?  
 14 A. I see that.  
 15 Q. All right. Is this the URL where you  
 16 posted the 1999 standards on Internet Archive's  
 17 website?  
 18 A. It is.  
 19 Q. Mr. Malamud, if Public.Resource succeeds in  
 20 this lawsuit brought by AERA and its co-plaintiffs,  
 21 will Public.Resource repost the 1999 standards on  
 22 its website?  
 23 MR. BRIDGES: Objection. Hypothetical.  
 24 THE WITNESS: I guess I'd have to read the  
 25 decision and make my determination based on that.

Page 307

1 BY MR. HUDIS:  
 2 Q. Well, if you're totally successful?  
 3 MR. BRIDGES: Again, hypothetical.  
 4 THE WITNESS: Our goal is to post all  
 5 standards incorporated by reference into the Code  
 6 of Federal Regulations. So yes.  
 7 BY MR. HUDIS:  
 8 Q. If Public.Resource is successful in this  
 9 litigation, how easy or difficult would it be for  
 10 you to repost the 1999 standards on  
 11 Public.Resource's website?  
 12 MR. BRIDGES: Hypothetical; lacks  
 13 foundation; assumes facts not in evidence; vague  
 14 and ambiguous; compound.  
 15 THE WITNESS: It wouldn't be difficult.  
 16 BY MR. HUDIS:  
 17 Q. If the next version of the Standards on  
 18 Educational and Psychological Testing, the 2014  
 19 version, is ever incorporated by reference by a  
 20 state or federal agency, will you post that version  
 21 of the standards to the Internet as well?  
 22 MR. BRIDGES: Objection. Hypothetical;  
 23 compound; vague and ambiguous.  
 24 THE WITNESS: I don't know.  
 25 BY MR. HUDIS:

Page 308

1 Q. How would you make that determination?  
 2 MR. BRIDGES: Objection. May call for  
 3 speculation; vague and ambiguous; argumentative.  
 4 THE WITNESS: I would want to look at the  
 5 specific nature of the incorporation by reference.  
 6 I would want to look at that specific standard, and  
 7 I'd want to make a determination if that was an  
 8 area that I wanted to continue to invest resources  
 9 in. So I don't know. It would depend on the  
 10 specifics.  
 11 BY MR. HUDIS:  
 12 Q. If you looked at the 2014 standards and  
 13 made a determination that it was an area in which  
 14 you wanted to continue to invest resources, if  
 15 Public.Resource is successful in this litigation  
 16 and the 2014 standards are incorporated by  
 17 reference by a state or federal agency, would you  
 18 post the 2014 standards to the Internet?  
 19 MR. BRIDGES: Entirely hypothetical; lacks  
 20 foundation; argumentative; vague and ambiguous.  
 21 THE WITNESS: So I really don't know about  
 22 the states.  
 23 If the federal government did a deliberate  
 24 and explicit incorporation by reference in what I  
 25 felt was a substantive rule, right, not an offhand

Page 309

1 thing, then I would certainly consider strongly  
 2 posting that document.  
 3 BY MR. HUDIS:  
 4 Q. What is -- what distinction do you make  
 5 between substantive and offhand?  
 6 A. I look for an explicit and deliberate  
 7 incorporation by reference.  
 8 Q. If I asked you this before, Mr. Malamud,  
 9 and certainly your counsel will tell me, I  
 10 apologize.  
 11 Even though the 1999 standards have been  
 12 removed from public view on Public.Resource's  
 13 website, is the digital file containing the text of  
 14 the 1999 standards still stored somewhere on  
 15 Public.Resource's computer systems?  
 16 MR. BRIDGES: Objection. Vague and  
 17 ambiguous.  
 18 THE WITNESS: Yes.  
 19 BY MR. HUDIS:  
 20 Q. Even though the 1999 standards were removed  
 21 from public view on Internet Archive's website, to  
 22 the best of your knowledge is the digital file  
 23 containing the text of the 1999 standards still  
 24 stored somewhere on Internet Archive's computer  
 25 systems?

Page 326

1 case deserves the Court's fullest attention without  
 2 a rush to reach an interim ruling in the absence of  
 3 a full record."  
 4 What did you mean by that?  
 5 MR. BRIDGES: Objection. Lacks foundation;  
 6 vague and ambiguous.  
 7 THE WITNESS: As I state in the next  
 8 paragraph, "In order to focus this case on  
 9 developing an appropriate record for a decision on  
 10 the merits, Public.Resource.Org has voluntarily  
 11 removed the document in question from the websites  
 12 under its control."  
 13 And as you had stated in a previous  
 14 sentence, this was so it was done without a rush to  
 15 reach an interim ruling in the absence of a full  
 16 record.  
 17 BY MR. HUDIS:  
 18 Q. I'd like to now direct your attention,  
 19 Mr. Malamud, to the fourth paragraph of Exhibit 43.  
 20 And it says, "Until the conclusion at trial on the  
 21 merits in this case, Public.Resource.Org will keep  
 22 the document in question off of the websites under  
 23 its control and will not disseminate the document  
 24 in whole or in part, including any revisions, and  
 25 will maintain the status on the Internet Archive to

Page 327

1 prevent any public access to the document from the  
 2 archive's websites." Do you see that?  
 3 MR. BRIDGES: Objection. The document  
 4 speaks for itself.  
 5 THE WITNESS: I do.  
 6 BY MR. HUDIS:  
 7 Q. What did you mean by that sentence?  
 8 MR. BRIDGES: Objection. The document  
 9 speaks for itself; lacks foundation; vague and  
 10 ambiguous; argumentative.  
 11 THE WITNESS: I think the sentence is very  
 12 clear; right?  
 13 BY MR. HUDIS:  
 14 Q. What did you mean?  
 15 A. I meant "Until the conclusion of trial on  
 16 the merits of this case, Public.Resource.Org will  
 17 keep the document in question off of the websites  
 18 under its control and will not disseminate the  
 19 document in whole or in part, including any  
 20 revisions, and will maintain the status on the  
 21 Internet Archive to prevent any public access to  
 22 the document from the archive's websites."  
 23 Q. And this memo was written by you on June  
 24 12th, 2014?  
 25 MR. BRIDGES: Objection. Lacks foundation;

Page 328

1 vague and ambiguous.  
 2 THE WITNESS: Yes.  
 3 BY MR. HUDIS:  
 4 Q. Since the time of this memo of Exhibit 43,  
 5 have the 1999 standards been reposted to a website  
 6 under Public.Resource's control?  
 7 MR. BRIDGES: Objection. Vague and  
 8 ambiguous; argumentative.  
 9 THE WITNESS: Yes.  
 10 BY MR. HUDIS:  
 11 Q. Why?  
 12 A. There was a technical malfunction in one of  
 13 our servers and by mistake a copy of the full  
 14 standard was posted in place of the stub.  
 15 Q. And when was that?  
 16 A. That was in January 2015.  
 17 Q. Mr. Malamud, during the two-year period  
 18 that the 1999 standards were posted to  
 19 Public.Resource's website, was a record kept of how  
 20 many Internet users viewed or accessed the  
 21 standards from that website location?  
 22 MR. BRIDGES: Objection. Utterly lacks  
 23 foundation; argumentative; vague and ambiguous,  
 24 and -- yeah. And competence.  
 25 THE WITNESS: Our server log's document

Page 329

1 retention policy was a two-week window until  
 2 litigation commenced in the ASTM case when we began  
 3 keeping the logs permanently. And so we -- we did  
 4 not keep a record prior to that.  
 5 BY MR. HUDIS:  
 6 Q. Do you know the earliest date on which you  
 7 kept such logs?  
 8 MR. BRIDGES: Objection. Again, lacks  
 9 foundation; argumentative; vague and ambiguous and  
 10 competence.  
 11 THE WITNESS: So again, the document  
 12 retention policy was a two-week window on the logs,  
 13 and in September -- August or September of 2013 we  
 14 changed that policy because litigation had  
 15 commenced. And so at that point we began keeping  
 16 the logs permanently.  
 17 BY MR. HUDIS:  
 18 Q. And do you still have those logs today?  
 19 MR. BRIDGES: Same objections. I think I  
 20 missed a compound objection to the underlying  
 21 question.  
 22 THE WITNESS: Yes.  
 23 BY MR. HUDIS:  
 24 Q. In what form are the logs kept?  
 25 MR. BRIDGES: Same objections.

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CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me. Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

\_\_\_\_\_  
Signature of Deponent

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this \_\_\_\_ day of \_\_\_\_\_, 2015, and executed the above certificate in my presence.

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NOTARY PUBLIC IN AND FOR

\_\_\_\_\_  
County Name

MY COMMISSION EXPIRES:

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REPORTER'S CERTIFICATE

The undersigned Certified Shorthand Reporter licensed in the State of California does hereby certify:

I am authorized to administer oaths or affirmations pursuant to Code of Civil Procedure, Section 2093(b), and prior to being examined, the witness was duly administered an oath by me.

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in the outcome of this action.

I am the deposition officer who stenographically recorded the testimony in the foregoing deposition, and the foregoing transcript is a true record of the testimony given by the witness.

Before completion of the deposition, review of the transcript [X] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

In witness whereof, I have subscribed my name this \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
DIANE S. MARTIN, CSR No. 6464