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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN EDUCATIONAL RESEARCH	)	Civil Action
ASSOCIATION, INC., et al.,	)	No. 14-857 (TSC-DAR)
	)	
Plaintiffs,	)	TELEPHONE STATUS
	)	CONFERENCE
vs.	)	
	)	Washington, DC
PUBLIC.RESOURCE.ORG, INC.,	)	Date: June 11, 2015
	)	Time: 3:01 P.M.
Defendant.	)	

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AUDIO TRANSCRIPTION OF TELEPHONE STATUS CONFERENCE  
HELD BEFORE  
THE HONORABLE MAGISTRATE JUDGE DEBORAH A. ROBINSON  
UNITED STATES MAGISTRATE JUDGE

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A P P E A R A N C E S

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Proceedings reported by FTR Gold audio recording, transcript produced by computer-aided transcription.

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Transcriber:	Annette M. Montalvo, CSR, RDR, CRR
	Official Court Reporter
	United States Courthouse, Room 6722
	333 Constitution Avenue, NW
	Washington, DC 20001
	202-354-3111



1 (WHEREUPON, commencing at 3:01 p.m., the following  
2 proceedings were had in open court via telephonic  
3 communications, and the following was transcribed from an  
4 FTR Gold audio recording, to wit:)

5 THE COURTROOM DEPUTY: Civil action 14-857.  
6 American Educational Research Association, Inc., et al., vs.  
7 Public.Resource.Org, Inc.

8 Kathleen Cooney-Porter, Jonathan Hudis, and Kate  
9 Cappaert representing the plaintiffs.

10 Matthew Becker, David Halperin, and Mitchell  
11 Stoltz representing the defendant.

12 This is a telephone status conference.

13 I forgot to mention, because the judge was already  
14 on the bench, Magistrate Judge Deborah Robinson is  
15 presiding.

16 THE COURT: Now, good afternoon to all of you.

17 PLAINTIFF ATTORNEYS (in chorus): Good afternoon,  
18 Your Honor.

19 DEFENDANT ATTORNEYS (in chorus): Good afternoon,  
20 Your Honor.

21 THE COURT: I am pleased that you have taken the  
22 opportunity to confer regarding the fact discovery which  
23 remains. The Court has, of course, reviewed the pending  
24 motion to extend the date for fact discovery. I have  
25 reviewed the opposition to the motion. I believe it is fair

1 to say that the Court's global concern is that none of the  
2 parties have identified what discovery from the plaintiffs'  
3 perspective remains to be completed, or for the defendant's  
4 perspective, the basis upon which the Court should conclude  
5 that fact discovery is over.

6 In the abstract, it may be that a request for a  
7 continuance of three weeks would be one that the Court would  
8 likely grant. However, in this instance, given the length  
9 of time that has already been consumed by the conduct of  
10 fact discovery, and the absence of any indication of the  
11 parameters of the remaining discovery that the plaintiffs  
12 contemplate, I suggested that you confer in an effort to  
13 articulate from the plaintiffs' perspective exactly what it  
14 is that is needed.

15 I am happy to hear you now, or if you believe you  
16 need a bit more time to confer, we can reconvene later today  
17 or at some point tomorrow.

18 MR. HUDIS: Your Honor, from plaintiffs'  
19 perspective -- this is Jonathan Hudis.

20 THE COURT: Mr. Hudis, good afternoon.

21 MR. HUDIS: Good afternoon, Your Honor.

22 We are ready to go right now, and our need for  
23 further discovery is very small indeed, and it will depend  
24 upon the Court's ruling of Your Honor's order issued on May  
25 20.

1           If you ruled in favor of defendant, then we have  
2 no need for the discovery. If you rule in our favor, then  
3 what we need is the production of what we seek, and then a  
4 very, very limited continued deposition of plaintiffs'  
5 principal -- excuse me, defendant's principal Carl Malamud,  
6 solely for the purpose of the document that would be  
7 produced.

8           Now what this concerns, Your Honor, and this is a  
9 document in general, and then very specifically, which we  
10 have been seeking since the beginning of this case.

11           The basis of the case goes back to the fact that  
12 plaintiff said defendant's principal, Mr. Malamud, took our  
13 client's copyrighted material, digitized them from print to  
14 digital form, and then took the PDF file of that digital  
15 copy and put it up on the Internet, and we believe that's  
16 copyright infringement.

17           During the period of time that the 1999 standards,  
18 which is the copyrighted material in this case, was up on  
19 Public.Resource's web site, it was accessed a number of  
20 times. And we asked in written discovery way back at the  
21 beginning of the case what documentation was available to  
22 show that. And we asked that specifically in the  
23 interrogatory question, we asked it in the document request.

24           After we filed the motion to compel back in mid  
25 December, we received supplemental discovery responses that

1 included an interrogatory list of the number of accesses of  
2 the 1999 standards for the almost two-year period of time  
3 that they were up on Public.Resource's web site. And this  
4 is what we had argued before you back in January. The  
5 answer came back with HTTP requests and RTP requests --  
6 excuse me, FTP requests and RSYNC requests.

7 We had asked for a further explanation of what  
8 that meant in English. Your Honor decided it was not worth  
9 it for us to get further explanation on that by a  
10 supplemental interrogatory answer so we asked that question  
11 of Mr. Malamud himself, and he provided that definition.

12 So what he had in real time, to the extent that he  
13 kept these records, was every time an access was made,  
14 whether by what they call an HTTP request or an FTP request  
15 or an RSYNC request, and in real time the identities of the  
16 people who accessed it and from where and on what date and  
17 what time was put into a log form as the accesses were made.  
18 We asked for that.

19 Public.Resource said no, they were concerned about  
20 the privacy concerns of the people who accessed the  
21 material. We said that there was a protective order in  
22 place. Public.Resource said that wasn't good enough. We  
23 asked whether we could receive that information on an  
24 attorneys' eyes only basis. Public.Resource said no, they  
25 were not willing to give up the documentation.

1           We have been discussing this matter back and forth  
2 with Public.Resource, not only before Your Honor, not only  
3 before you in written motion practice, but all the way up  
4 until today when we had a meet and confer at your court  
5 clerk's request.

6           The arguments are still the same. The answer that  
7 we believe that Public.Resource will give you, Your Honor,  
8 when it is their turn to speak, is that they have already  
9 given us that report in the form of an interrogatory answer.  
10 Well, we are entitled to see the business record  
11 documentation, which clearly exists, to determine whether  
12 the information that was given to us by way of interrogatory  
13 answers is accurate, and to see the extent of the damage  
14 that our clients have suffered by Public.Resource's  
15 activities, notwithstanding that this is a case for a  
16 permanent injunction and not for monetary relief.

17           We are entitled to give Judge Chutkan whatever  
18 arguments may come from the extent of our damage, given the  
19 number of accesses that were had of the document when it was  
20 published not only on Public.Resource's web site but on  
21 Internet Archive's web site, which they publish there as  
22 well. We have that documentation, we have had it for a long  
23 time by way of third party discovery. We do not understand  
24 the reluctance of Public.Resource to fail to give us this  
25 documentation. If Your Honor is to clarify your order of

1 May 20 that this is something they agreed to provide to us  
2 so they should have provided to us, then we would need just  
3 a limited video deposition of Mr. Malamud to talk about that  
4 document, and we are done.

5 THE COURT: Mr. Hudis, you have acknowledged that  
6 Public.Resource has served an answer to the interrogatory;  
7 is that correct?

8 MR. HUDIS: That is correct.

9 THE COURT: What is your characterization of the  
10 information included in the interrogatory answer?

11 MR. HUDIS: Incomplete because they even say in  
12 the interrogatory answer that they don't have complete  
13 records from the time period in question.

14 We do not know if that interrogatory answer is  
15 accurate at all. Until we get that information, we, as  
16 counsel, can make no value judgment whether for ourselves or  
17 before the court whether the information is accurate.

18 THE COURT: To what extent in the depositions,  
19 which the plaintiffs have already taken, has this matter  
20 been explored?

21 MR. HUDIS: There's nothing to explore,  
22 Your Honor. We explored the interrogatory answer and the  
23 basis from which it came. Mr. Malamud testified he gave --  
24 he got the information from the very record we are seeking.  
25 So we are going round and round in a tautology. Until we

1 find the records, we can't discuss it with him. Until we  
2 see the records, we can't decide the accuracy of the  
3 interrogatory answer.

4 THE COURT: What records have been produced in  
5 response to your discovery request?

6 MR. HUDIS: Generally or on this specific issue?

7 THE COURT: With regard to this specific issue.  
8 I'm sorry.

9 MR. HUDIS: None. Zero. Just the interrogatory  
10 answer.

11 THE COURT: To what extent have you and counsel  
12 for Public.Resource sought to resolve this dispute during  
13 your meet and confer sessions?

14 MR. HUDIS: Extensively, in writing, in motion  
15 practice, before you at oral argument in court, discussed  
16 outside of your courtroom in discussions, telephone  
17 discussions, numerous times.

18 We are at a loggerheads, Your Honor, and, really,  
19 it is for the Court's good graces to decide whether we are  
20 entitled to this documentation or not.

21 THE COURT: Very well. Thank you, Mr. Hudis.

22 Mr. Becker or Mr. Halperin?

23 MR. BECKER: Thank you, Your Honor. Mr. Becker  
24 for the defendant, Public.Resource.Org.

25 I think that what's being left out of this

1 discussion here is the fact that the plaintiffs have served  
2 specific requests for production with regards to the server  
3 logs, and Public.Resource has responded by saying that it  
4 will not produce those server logs, and does not believe  
5 that those server logs should be produced, be it due to the  
6 constitutional rights of privacy and association and free  
7 speech of its users.

8 Now, in Your Honor's order from May 20, if I may  
9 read the order, it says: With respect to a request for  
10 production of documents, which Public.Resource.Org, Inc. in  
11 the responses it served agreed to produce such documents,  
12 shall be served no later than June 3, 2015.

13 Public.Resource did not agree to produce these  
14 particular records. The plaintiffs want these records, and  
15 it is true that this has been a repeated source of  
16 discussion, including at the hearing in January with respect  
17 to the motion that Your Honor has ordered and has ruled on  
18 on May 20.

19 The order does -- has denied plaintiffs' requests  
20 for these particular server logs, but the plaintiffs are now  
21 trying to seek it in a roundabout fashion by saying that  
22 they think that it may be implicated by other responses.

23 It is not implicated by other responses. I'd  
24 simply like to note that plaintiffs have not provided an  
25 adequate justification as to why they think that they would

1 need these server logs.

2 Now, Public.Resource has provided an interrogatory  
3 response that details the number of accesses to the  
4 Public.Resource servers regarding the document in question,  
5 and that's a verified interrogatory response.

6 Plaintiffs have also had the opportunity to  
7 question Public.Resource at length about this at the  
8 deposition, discussing both the server log issues as well as  
9 Public.Resource's interrogatory responses.

10 Plaintiffs' complaint that the interrogatory  
11 response is incomplete as to earlier records regarding the  
12 accesses to the Public.Resource web site cannot be helped  
13 because that information no longer exists. That was  
14 information that wasn't kept prior to the filing of this  
15 complaint, and once the complaint was filed, Public.Resource  
16 diligently checked its records, but for a certain period  
17 extending prior to the filing of this complaint,  
18 Public.Resource did not have -- simply didn't have the  
19 server logs and so, therefore, it is unable to produce that  
20 information to plaintiffs.

21 Plaintiffs have said that they want server logs  
22 simply to confirm that Public.Resource's statements are  
23 accurate, but Public.Resource has made numerous statements  
24 on the record with regards to these -- the particular access  
25 numbers. And there's simply no reason to lie about this.

1 This is a -- it is a claim for an injunction, it is not a  
2 claim for damages.

3 So the particular number of individuals or the  
4 number of accesses to the servers don't matter. It is clear  
5 that the 1999 standards, as they existed on the  
6 Public.Resource web site, has been accessed, and that's  
7 clear from the statement that Public.Resource has made in  
8 deposition, it's also clear from the interrogatory  
9 responses. It is clear they have been accessed numerous  
10 times over multiple months and so there's simply -- there's  
11 no basis for trying to override the important privacy rights  
12 and rights of association and free speech that  
13 Public.Resource's users have in their identities which would  
14 be implicated in these server logs.

15 THE COURT: Very well. Thank you very much,  
16 Mr. Halperin [*sic.*].

17 Mr. Hudis?

18 MR. HUDIS: Yes.

19 THE COURT: Do you wish a brief reply?

20 MR. HUDIS: Yes.

21 With respect to the privacy concerns, Your Honor,  
22 there's a protective order in this case. We have our duties  
23 as counsel not to use these documents in contravention of  
24 that protective order, including the statements to which we  
25 agreed, that we would not use this information for any other

1 purpose except this litigation. And we know our ethical  
2 duties to adhere to that mandate, which was signed off by  
3 the Court.

4 The information clearly exists, the defendant  
5 clearly has access to this information. We have asked for  
6 this, and as Mr. Becker acknowledges, we have discussed this  
7 with counsel for defense numerous times. We simply  
8 disagree. We do not believe that the interrogatory answer  
9 is enough. We are entitled to the documentation to  
10 determine the interrogatory answers' adequacy and discuss  
11 the implications of that document and to make it evidentiary  
12 by way of a short deposition of Mr. Malamud, and then we are  
13 finished.

14 Your Honor, we think that the privacy concerns of  
15 defendant in their list of people who access their server,  
16 where the copyrighted material was, is addressed with the  
17 protective order. We will keep this information and use it  
18 as appropriate in litigation and for no other purpose. We  
19 believe we are entitled to this information, and we rest on  
20 our arguments.

21 THE COURT: Very well. Thank you very much,  
22 Mr. Hudis.

23 I am prepared to rule. I believe we have lost  
24 track of the status of the case.

25 On May 18, plaintiffs filed a motion to extend the

1 time for fact discovery. The sole basis of the motion was  
2 that the plaintiffs needed -- the plaintiffs required a  
3 ruling by the Court on Document No. 27, the plaintiffs'  
4 amended motion to compel before fact discovery could be  
5 completed.

6 The Court did rule on the motion bearing Document  
7 No. 27, and did so on May 20, in an order which now bears  
8 Document No. 49.

9 The Court at that time addressed all of the issues  
10 which were then presented in the motion to compel. In  
11 provision 2 of the May 20 order, the Court required that  
12 Public.Resource produce the documents, which it agreed to  
13 produce by June 30.

14 MR. HUDIS: June 3, Your Honor.

15 THE COURT: June 3, excuse me.

16 Fast forwarding past provision 3 and provision 4,  
17 which have no immediate bearing on our hearing this  
18 afternoon, the Court indicated that in all other respects  
19 the motion to compel was denied.

20 The time for seeking reconsideration of the order  
21 has passed, and to the extent that the only basis offered  
22 for extending fact discovery is that there has been no  
23 ruling on the motion to compel, the motion to extend fact  
24 discovery would appear to be moot, even if the Court were to  
25 use some term other than, quote, moot. Analyzing it another

1 way, the only basis offered by plaintiffs' counsel this  
2 afternoon for the need for further discovery has to do with  
3 the documents which the Court did not order the defendant to  
4 produce. Extending discovery for the purpose of requiring  
5 defendant to produce the document or to make a corporate  
6 representative available to be deposed regarding the  
7 document would essentially allow plaintiffs or afford  
8 plaintiffs reconsideration of the order beyond the time for  
9 seeking reconsideration, and where no ground for  
10 reconsideration has been offered.

11 So for all of these reasons, the motion to extend  
12 the deadline for fact discovery is denied.

13 Now, let's look at the scheduling order, please.  
14 Document No. 22, entered by Judge Cooper in October 2014,  
15 the date for the commencement of expert disclosures has, of  
16 course, passed, but we need to -- so, therefore, we need to  
17 adjust all of the dates which follow.

18 MR. HUDIS: Your Honor, this is Jonathan Hudis.

19 We did have a motion to extend those dates, which  
20 Your Honor granted.

21 THE COURT: Is there any need to revisit the dates  
22 this afternoon?

23 MR. HUDIS: I just want to make sure that we are  
24 all in agreement about the due dates for the cutoff of  
25 various things.

1           We, I believe, have agreed on that, and Mr. Becker  
2           is on the phone and can check me on this. I believe that  
3           the date for expert disclosures is Monday.

4           MR. BECKER: That's my understanding as well.

5           THE COURT: Does there need to be any adjustment  
6           to that date?

7           MR. BECKER: None from Public.Resource,  
8           Your Honor.

9           MR. HUDIS: None from plaintiff.

10          THE COURT: Are you satisfied then that we need  
11          not adjust any of the remaining dates?

12          MR. HUDIS: Looking for the dates that we all  
13          agreed to.

14          Matthew, do you remember what document number that  
15          is?

16          MR. BECKER: Yes, that's Docket No. 42. And I can  
17          read the dates, if it would be helpful to you and the Court.

18          MR. HUDIS: Thank you.

19          MR. BECKER: The date for opening expert  
20          disclosure is, of course, this Monday, June 15. The date  
21          for rebuttal expert disclosure is a month from now, July 15.

22                 The date for the reply to rebuttal disclosures are  
23                 due July 29, approximately a half a month later, and then  
24                 the final reply expert disclosures are due August 12, with  
25                 the close of discovery on September 11 and the post

1 discovery conference on September 15.

2 THE COURT: So is everyone satisfied that those  
3 dates can remain?

4 MR. BECKER: Yes, Your Honor.

5 MR. HUDIS: Yes, Your Honor.

6 THE COURT: Very well. We will ensure that the  
7 deadlines, which appear on ECF, are updated accordingly.

8 Very well. I thank all of you very much. Our ECF  
9 entry for today will indicate that we conducted a status  
10 conference by telephone, that the Court denied the  
11 plaintiffs' motion to extend the time for fact discovery,  
12 and that the parties shall comply with the dates previously  
13 set, which serve to modify the scheduling order of October  
14 14, and we will find the appropriate document number for  
15 that entry.

16 MR. HUDIS: Your Honor, fact discovery has closed  
17 as of May 18 then?

18 THE COURT: That is correct.

19 MR. HUDIS: Okay.

20 THE COURT: Is there anything further, while we  
21 are all together?

22 MR. HUDIS: No, Your Honor, for plaintiffs.

23 THE COURT: And for Public.Resource?

24 MR. BECKER: No, Your Honor, nothing for  
25 Public.Resource.

1 THE COURT: Very well. I thank all of you very  
2 much. Everyone have a good afternoon.

3 PLAINTIFF ATTORNEYS (in chorus): Thank you,  
4 Your Honor.

5 DEFENDANT ATTORNEYS (in chorus): Thank you, Your  
6 Honor.

7 THE COURT: Thank you so much.

8 (WHEREUPON, the audio recording ended, and at 3:27  
9 p.m. the proceedings were concluded.)

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