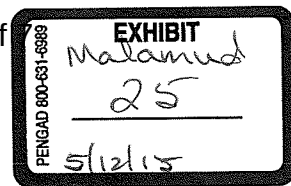


EXHIBIT H

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



Liberating America's secret, for-pay laws

Carl Malamud at 10:29 pm Mon, Mar 19, 2012



[Editor's note: This morning, I found a an enormous, 30Lb box waiting for me at my post-office box. Affixed to it was a sticker warning me that by accepting this box into my possession, I was making myself liable for nearly \$11 million in damages. The box was full of paper, and printed on the paper were US laws -- laws that no one is allowed to publish or distribute without permission. Carl Malamud, Boing Boing's favorite rogue archivist, is the guy who sent me this glorious box of weird (here are the unboxing pics for your pleasure). I was expecting it, because he asked me in advance if I minded being one of the 25 entities who'd receive this law-bomb on deposit. I was only too glad to accept -- on the condition that Carl write us a guest editorial explaining what this was all about. He was true to his word. -Cory]



BOING BOING OFFICIAL GUEST MEMORANDUM OF LAW

To: The Standards People

Cc: The Rest of Us People

From: Carl Malamud, Public.Resource.Org

In RE: Our Right to Replicate the Law Without a License

I. "Code Is Law"—Lessig

Did you know that vital parts of the US law are secret, and you're only allowed to read them if you pay a standards body thousands of dollars for the right to find out what the law of the land is?

Public.Resource.Org spent \$7,414.26 buying privately-produced technical public safety standards that have been incorporated into U.S. federal law. These public safety standards govern and protect a wide range of activity, from how bicycle helmets are constructed to how to test for lead in water to the safety characteristics of hearing aids and protective footwear. We have started copying those 73 standards despite the fact they are festooned with copyright warnings, shrinkwrap agreements, and other dire warnings. The reason we are making those copies is because citizens have the right to read and speak the laws that we are required to obey and which are critical to the public safety.

When Peter Veeck posted the Building Code of Savoy, Texas on the Web, the standards people came after him with a legal baseball bat. The standards people run private nonprofit organizations that draft model laws that states then adopt as law, through a mechanism known as incorporation by reference.

Peter thought the people of his town should be able to read the law that governed them. But the standards people were adamant that the model building codes were their copyright-protected property and that nobody could post this information without a license, nobody could copy their property without paying the tollmaster.

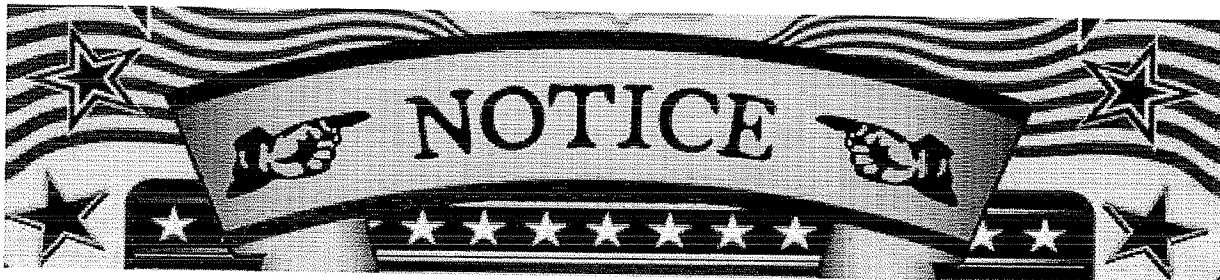
The U.S. Court of Appeals disagreed, saying that there is a "continuous understanding that 'the law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright." *Veeck v. Southern Building Code Congress, 293 F.3d 791 (5th Circuit, 2002)*.

II. "If a Law Isn't Public, It Isn't a Law"—Justice Stephen Breyer

Based on the Veeck decision—and a long line of other court opinions that steadfastly maintain that public access to the text of the laws that govern us is a fundamental aspect of our democratic system—Public.Resource.Org has been posting the building, fire, plumbing, and other state public safety codes since 2007. For the last two years, we've taken the public safety codes of California and converted them to HTML. A group of students in the RDC rural mentoring program have converted the formulas and graphics to SVG and MATHML, and we put the whole thing into an open code repository.

However, the building, fire, and plumbing codes are just a subset of the technical standards that have become law. Despite the 2002 Veeck decision, standards incorporated by reference continue to be sold for big bucks. Big bucks as in \$65 for a 2-page standard from the Society of Automotive Engineers, required as part of the Federal Motor Vehicle Safety Standards in 49 CFR § 571. Big bucks as in \$847 for a 48-page 1968 standard from Underwriters' Laboratories required as part of the OSHA workplace safety standards in 29 CFR § 1910.

Public.Resource.Org has a mission of making the law available to all citizens, and these technical standards are a big black hole in the legal universe. We've taken a gamble and spent \$7,414.26 to buy 73 of these technical public safety standards that are incorporated into the U.S. Code of Federal Regulations. We made 25 print copies of each of these standards and bound each document in a red/white/blue patriotic CERTIFICATE OF INCORPORATION stating that the documents are legally binding on citizens and residents of the United States and that "criminal penalties may apply for noncompliance!"



III. Our \$273.7 Million Gamble on Print

Why print copies you may ask? Frankly, because we're scared and wanted to take a cautious and prudent first step in duplicating these legal documents. With a print edition, we are able to limit distribution with none of those infinite-copy side effects we know and love about our digital world. Print seemed to be a medium the standards people and the legal people could relate to.

We know from all the copyright warnings, terms of use, scary shrink wrap agreements, and other red-hot rhetoric that accompanies these documents that the producers continue to believe that copies may not be made under any circumstances. Those of you familiar with copyright math know that statutory damages for unlawful replication of a document is \$150,000 per infraction. So, even though we strongly believe that the documents are not entitled to copyright protection, and moreover that our

limited print run is in any case definitely fair use, if a judge were to decide that what we did was breaking the law, 25 copies of 73 standards works out to \$273,750,000 in potential liability. While whales may make bigger bets, we draw the line at \$273 million.

Those copies were bound up in 27.9-pound boxed sets and dispatched to 3 classes of recipients:

10 sets were sent to the Standards Development Organizations (SDOs) with a NOTICE OF INCORPORATION, stating that comments must be received by Public.Resource.Org by May 1, 2012. The recipients include the American National Standards Institute, American Society of Mechanical Engineers, American Society for Testing and Materials, British Standards Institute, IEEE, International Organization for Standardization, National Fire Protection Association, National Sanitation Foundation, Society of Automotive Engineers, and the Underwriters' Laboratories. 7 sets were sent to U.S. government offices, including the White House, Senate (Senators Grassley and Whitehouse), House (Representatives Issa and Lofgren), National Archives, Administrative Conference of the United States, Federal Trade Commission, and the Copyright Office raising 21 points of law and policy ranging from excessive CEO compensation to cahootenizing in restraint of trade. The remaining copies have been reserved for public exhibition and legal defense, including copies furnished to EFF, the Harvard Law School faculty, two copies for the Mainstream Media, and one to our legal counselor, David Halperin.

Upon the close of the May 1 comment period, it is our intention to begin posting these 73 standards in HTML and begin the process of providing a unified, easy-to-use interface to all public safety standards in the Code of Federal Regulations. It is also our intention to continue this effort to include all standards specifically incorporated by reference in the 50 states. That the law must be available to citizens is a cardinal principle of law in countries such as India and the United Kingdom, and we will expand our efforts to include those jurisdictions as well.

IV. A Poll Tax on Access to Justice

The argument for the status quo is that it costs money to develop these high-quality standards and that it is the stated public policy of government that these standards shall be developed by the private sector using a voluntary, consensus-based approach. (Having spent a lot of time with these documents, we can vouch that many of these standards are very high-quality technical documents. This is important stuff and groups like ASME and NFPA do a great job.)

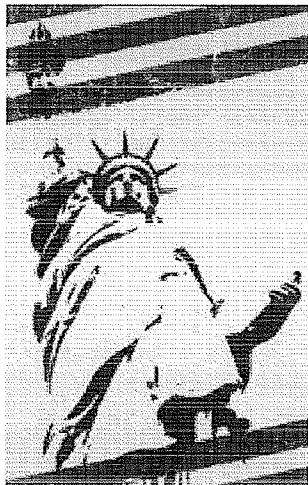
All nonprofits need money and SDOs are no exception. But, no matter how you slice the cheese, you can't do this on the backs of the informed citizenry. Access to the law is a fundamental legal right.

Do these organizations need the revenue from standards sales in order to keep making high-quality standards? While SDOs have come to rely on this very lucrative monopoly over pieces of the public domain, a look at their revenue streams and executive compensation levels indicates that perhaps they don't need quite as much as they're getting. They all have a variety of revenue streams in addition to document sales ranging from membership fees to conferences to training and directed research (often done with grants, subsidies, or direct support from government). As 501(c)(3) nonprofits with an explicit goal of making their standards into law, SDOs have moral and legal obligations to make those standards that have already become law available to the public and in no case can they prohibit others from doing so.

The scale of these operations is indicated in Table 1, which lists the CEO compensation for ten leading standards-making nonprofits. (ISO refuses to divulge executive compensation despite their status as a nongovernmental organization based in Switzerland.)

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**Table 1: Compensation of Major Nonprofits Involved in Standards Setting**

Rank	Name of Nonprofit Organization	Name of Leader	Year	Amount
1.	<u>Underwriters' Laboratories</u>	K. Williams	2009	\$2,075,984
2.	National Sanitation Foundation	Kevin Lawlor	2009	\$1,140,012
3.	British Standards Institution	Howard Kerr	2010	\$1,029,161
4.	National Fire Protection Association	James M. Shannon	2009	\$926,174
5.	American National Standards Institute	Saranjit Bhatia	2010	\$916,107
6.	ASTM International	James A. Thomas	2009	\$782,047
7.	IEEE	James Prendergast	2009	\$422,412
8.	Society of Automotive Engineers	David L. Schutt	2009	\$422,128
9.	American Society of Mechanical Engineers	Thomas G. Loughlin	2009	\$420,960
10.	The United States of America	<u>Barack Obama</u>	2011	\$400,000

The status quo assumes that the only way to fund a standards-making process is to charge lots of money for the end product. But that is a self-serving self-delusion. The SDOs would actually grow and prosper in an open environment, and they would certainly carry out their mission more effectively. They might need to change their business models, but hasn't the Internet made the rest of us change our business models?

V. "Let Every Sluice of Knowledge Be Set A-Flowing"—John Adams

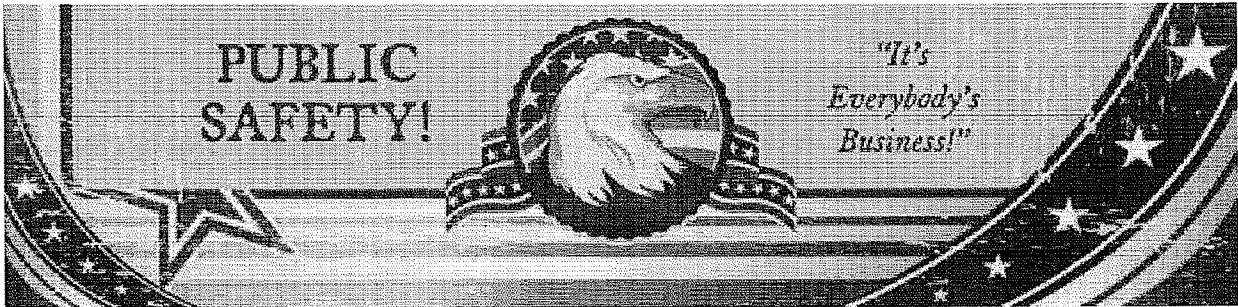
The Internet was built on open standards that are freely available. Many readers may not realize it, but there were originally two Internets. The one we use is based on TCP/IP and was developed by the IETF and other groups such as the W3C. But, there was another Internet called Open Systems Interconnection (OSI) which was being pushed in the 1980s and early 1990s by the International Organization for Standardization (ISO) and other SDOs. The OSI Internet was based on very expensive standards and it failed miserably. It was open that won and open that scaled.

It is our contention that the physical standards that we're posting are just as important as Internet standards. By making things like the National Fuel and Gas Code, the standard for safety in wood and metal ladders, or the standards for safety and hygiene in water supplies readily available to all without restriction, we make society better. People can read the standards and learn, they can improve upon them by making searchable databases or better navigational tools, they can build new kinds of businesses.

Innovation and education are just two of the benefits of opening up this world, but at the root are basic issues of democracy and justice. We cannot tell citizens to obey laws that are only available for the rich to read. The current system acts as a poll tax on access to justice, a deliberate rationing and restriction of information critical to our public safety. That system is morally wrong and it is legally unconstitutional.

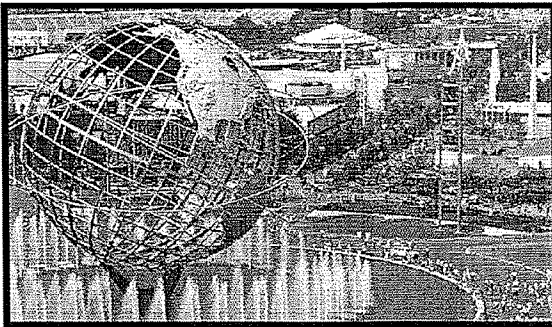
VI. Supporting Materials

In response to a petition drafted by Professor Strauss of Columbia Law School, the Office of the Federal Register is taking comments from the public as to whether they should provide greater public access to standards incorporated by reference. **You have until March 28 to respond. Please let them know what you think!** The Administrative Conference of the United States recently considered the issue of Incorporation by Reference, but ended up not taking any significant action. A particularly strong letter of protest was submitted by EFF. For makers and doers interested in the craft of public printing, we posted photographs of the construction of these boxes of in our print factory. A copy of the packing slip that was in the boxes, including the NOTICE OF INCORPORATION, the shipping manifest, and the 7 letters of transmittal to government officials is available for your review as a PDF file as is a sample CERTIFICATE OF INCORPORATION.



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The 1964 World's Fair opened 50 years ago today

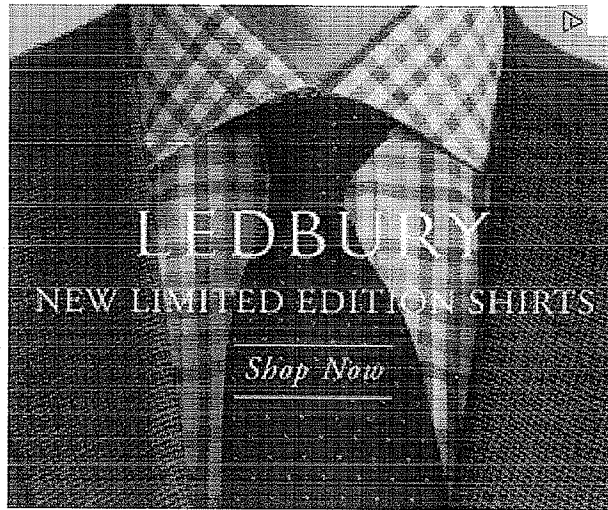


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121 Responses to "Liberating America's secret, for-pay laws"



Gene Poole says:

March 19, 2012 at 9:47 pm

Either make all laws freely available to the public or accept ignorance of the law as a valid defense. Seems cheaper to make the law available.

Reply



Lemoutan says:

March 20, 2012 at 12:03 am

By the principle of "*If you want to achieve something, legislate for its opposite*" I suppose you could also level the playing field by making *all* laws pay-per-view. And you wouldn't get a free pass simply because you were a law-maker.

Reply



quanto says:

March 20, 2012 at 12:08 am

They are not exactly laws. It's more along the lines of a law saying, "If you want to make protective shoes you have to adhere to standard 123 by standards organization XYZ." This is, of course, still outrageous but is typically intended for professionals and enterprises for whom this isn't a huge expense.

There are real secret (criminal) laws whose mere existence is completely hidden from the public. Not sure if we should use the same words to describe those and standards.

Edit: Also, read Bahumat's comment below; he's spot-on, standards are important and expensive to produce. Difficult to solve; if everything were funded by the public you'd have people complaining that they shouldn't have to pay just so some protective shoe manufacturer (evil