

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN EDUCATIONAL RESEARCH
ASSOCIATION, INC., AMERICAN
PSYCHOLOGICAL ASSOCIATION, INC., and
NATIONAL COUNCIL ON MEASUREMENT IN
EDUCATION, INC.,

Plaintiffs,

v.

PUBLIC.RESOURCE.ORG,

Defendant.

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

**DECLARATION OF CARL
MALAMUD IN SUPPORT OF
DEFENDANT-COUNTERCLAIMANT
PUBLIC.RESOURCE.ORG'S MOTION
FOR SUMMARY JUDGMENT AND
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND PERMANENT
INJUNCTION**

Action Filed: May 23, 2014

I, Carl Malamud, declare as follows:

1. I am over the age of 18 years and am fully competent to testify to the matters stated in this declaration.

2. This declaration is based on my personal knowledge. If called to do so, I would and could testify to the matters stated herein.

3. I am the President and sole employee of Public.Resource.Org, Inc. (“Public Resource”), which is a 501(c)(3) non-profit corporation headquartered in Sebastopol, California. I have worked at Public Resource since I founded the organization in 2007. It is my only source of employment.

4. Public Resource’s core mission is to make the law and other government materials more widely available so that people, businesses, and organizations can easily read and discuss our laws and the operations of government. Attached to Public Resource’s Consolidated Index of Exhibits as **Exhibit 1** is a true and correct copy of Public Resource’s Articles of Incorporation from our website at <https://public.resource.org/public.resource.articles.html>.

5. That mission grows out of my longtime professional commitment to improving public access to essential documents that shape our fundamental activities. In 1991, I convinced the Secretary-General of the International Telecommunication Union that the Blue Book, the specification for how telephone networks operate, should be freely available on the Internet. Working with Dr. Michael Schwartz, I transformed and posted the Blue Book into formats compatible with modern publication technologies and made it available on the Internet. The service was extremely popular, and the ITU today makes all of its standards documents freely available on the Internet. I wrote a book about

this experience called “Exploring the Internet” (Prentice Hall, 1993). That book can be viewed and read at http://museum.media.org/eti/Exploring_the_Internet.pdf.

6. I was privileged to be able to participate in the Internet Engineering Task Force, the standards body that has developed most of the standards that specify the functioning of the Internet, during the early 1990s, a period of very rapid development, both in the functionality of the Internet and its scope.

7. In 1993, when the Internet was beginning to grow explosively, I created the first radio station on the Internet, operating as a nonprofit corporation called the Internet Multicasting Service. In addition to transmitting audio and video programming, the service also provided the first high-speed Internet link into the White House, using a temporary infrared connection from our studios in the National Press Building. The radio service, which I dubbed “Internet Talk Radio,” became a member of the Public Radio Satellite System, received accreditation from the U.S. House and Senate Radio & Television Correspondents Galleries, sent out live audio from the floors of the House and Senate, streamed all National Press Club luncheons, and transmitted original programming. Many of those programs can still be listened to at <http://museum.media.org/radio/>.

8. At the Internet Multicasting Service, I also put a number of important government databases online, including the Securities and Exchange Commission EDGAR database and the U.S. Patent database. When the SEC took the EDGAR service over from me, I loaned it computers and donated all of our source code so they could be up and running quickly. The SEC ran the system on our software for several years. On

October 10, 1995, the Hon. Arthur Levitt, Chairman of the SEC, wrote to me thanking us for our efforts and calling the project an “extraordinary achievement.”

9. After I started Public Resource in 2007, one of our first efforts was to place online the historical opinions of the U.S. Courts of Appeals, material that was not previously available on the Internet. Public Resource also converted all of the opinions in the first 40 volumes of the Federal Reporter as well as the Federal Cases into Hypertext Markup Language (HTML) and placed those online. These materials are now used by numerous websites that provide access to legal materials.

10. Public Resource maintains an archive of laws and other government authored materials on several domains under the public.resource.org website.

11. Public Resource has helped increase access to many other court documents. We scanned approximately 3 million pages of briefs submitted to the U.S. Court of Appeals for the Ninth Circuit dating back to the creation of that court and have placed those materials online. The materials may be downloaded from <https://law.resource.org/pub/us/case/ca9/>.

12. Public Resource has conducted a number of other projects that have resulted in more government information being placed online. Using volunteers in Washington D.C. with the cooperation of the Archivist of the United States, we put approximately 6,000 government videos on YouTube and the Internet Archive for people to use with no restriction, a service we call FedFlix. It has had over 60 million views. The videos may be viewed at <https://www.youtube.com/user/PublicResourceOrg> and <https://archive.org/details/FedFlix>.

13. Public Resource also placed over eight million Form 990 exempt non-profit organization returns obtained from the IRS on the Internet. As part of that posting, we conducted an intensive privacy audit which led to fundamental changes in how the IRS deals with privacy violations. Through a Freedom of Information Act request and litigation, we obtained release of high-quality versions of Form 990 filings, which the IRS had refused to make available. The court decision in that case (*Public.Resource.Org v. United States Internal Revenue Service*, No. 3:13-cv-02789-WHO, ECF No. 62 (N.D. Cal. January 29, 2015)) led to a recent announcement by the IRS that all e-file returns will be made available in bulk in 2016. I am pleased to be working with the IRS as a member of the test group for this service.

14. In 2007, I wrote a report addressed to Speaker of the House Nancy Pelosi suggesting that video from Congressional hearings should be more broadly available on the Internet. On January 5, 2011, Speaker John Boehner and Representative Darrell Issa wrote to me asking me to assist them in carrying out that task. In a little over a year, Public Resource was able to put over 14,000 hours of video from hearings on the Internet, to assist the House Committee on Oversight and Government Reform in posting a full archive of their committee video and, for the first time ever for congressional hearings, to provide closed-captioning of those videos based on the official transcripts. The letter from Speaker Boehner may be found at <https://law.resource.org/rfcs/gov.house.20110105.pdf>.

15. Also in 2008, I examined the issue of availability of state-mandated safety codes, such as building, electric, plumbing, and fire codes. At the time, none of those documents were available freely on the Internet. I made a detailed survey of state

regulations and statutes, looking for direct and specific incorporation of particular model codes. Over the next few years, Public Resource posted many of the incorporated state safety codes for U.S. states.

16. Public Resource's process of posting these codes has been deliberate and careful and has grown in sophistication over time. First, we purchased paper copies of codes that are incorporated into law. Then, we scanned the documents, applied metadata and optical character recognition (OCR) to the PDF files, and placed a cover sheet on each document explaining that this was a posting of the law of a specific jurisdiction.

17. Over time, we also began converting some of these standards into modern HTML format, including setting the tables, converting formulas to Mathematics Markup Language (MathML), and converting graphics to the Scalable Vector Graphics (SVG) format. Coding formulas in MathML makes them significantly more accessible to people who are visually impaired. Converting the graphics to SVG means they can be resized smoothly, and can be incorporated into graphic editing programs and word processing programs. Converting the documents into standard HTML means the documents can be more readily used on different platforms, such as tablets and smartphones.

18. In late 2008, I was asked by the Obama-Biden Transition Project to consult on the subject of how the Official Journals of Government could be made more readily available. Many of my recommendations were adopted, including removing the subscription fee from bulk access to the Federal Register. That led to a dramatic transformation of the Federal Register, which is now based on open source software that was developed by three volunteers in California and then adopted by the government. That system can be viewed at <https://federalregister.gov/>. A copy of my memorandum to

the Obama Transition Project may be viewed at

<https://public.resource.org/change.gov/reboot.register.pdf>.

19. In 2011, I began to look seriously at the federal use of standards incorporated by reference into the Code of Federal Regulations. I was participating at the time as an appointed member of the Administrative Conference of the United States, and I carefully read materials such as the legislative history of the mechanism of incorporation by reference, the Code of Federal Regulations provisions for incorporation by reference, and cases such as the *Veeck* decision.

20. In 2012, I began a new initiative to make standards incorporated by reference into federal law available on the Internet. I examined the Code of Federal Regulations carefully and selected 73 standards that spanned a variety of agencies. I purchased physical copies of each of these standards. I created 25 paper replicas of each of these standards, and placed a cover sheet on each one indicating which section of the CFR incorporated the document.

21. To accompany the 73 standards, I also created a detailed cover memo, titled "Notice of Incorporation," which included letters addressed to seven senior government officials. The memo included a request for comments from each of the ten standards development organizations (SDOs) named in the document by May 1, 2012. The plaintiffs in this case were not among the ten SDOs named in the document. I packaged the 73 standards, the Notice of Incorporation, two posters, and other materials in 29-pound boxes and sent the boxes to the seven government officials and the ten SDOs. I sent the boxes by Federal Express on March 15, 2012. A copy of the Notice of

Incorporation memo may be found at https://law.resource.org/pub/us/cfr/notice.sdo.20120315_to.pdf.

22. After sending the standards, I received acknowledgements from several government addressees, including personal notes from the Chairman of the Federal Trade Commission, the Archivist of the United States, and the Chairman of the House Committee on Oversight and Government Reform. I did not receive any response from the SDOs.

23. On May 1, 2012, I posted the 73 documents on the Public Resource web site. I also began a process of examining the Code of Federal Regulations, the National Institute of Standards and Technology (NIST) database of Standards Incorporated by Reference (SIBR), and the Office of the Federal Register's incorporation by reference listings to put together a list of documents that are incorporated into the CFR. I then began the process of trying to procure these documents, many of which are unavailable for purchase from the SDOs and which I had to obtain on the used book market.

24. Every standard that I have posted on my website has been incorporated into law by a governmental authority. Public Resource does not impose any restrictions on the use of the standards. Public Resource has never charged for access to the standards or other legal materials, and has never asserted any intellectual property rights in them. We do not require people to log in or register before accessing content from Public Resource.

25. Public Resource posted a PDF version of the 1999 Standards on its website. The PDF version accurately appeared as a scan of a physical version of the incorporated standard. Public Resource's regular practice is to perform OCR on the

incorporated standards that it posts and to convert them further into standard Hypertext Markup Language (HTML) to make them still more accessible. I intended to do so for the 1999 Standards, but I suspended further work on the 1999 Standards when this lawsuit was filed. In May 2014, Plaintiffs sued Public Resource for posting on its website and the Internet Archive website the 1999 Standards. Subsequently, so as to ensure that this lawsuit would be decided on a full record, in June 2014 Public Resource agreed to take down the versions of the 1999 Standards that it had posted on its website and on the Internet Archive website, pending the resolution of this case

26. Public Resource has continued to develop techniques for making the documents that we post more usable, including double-keying and adding markup to HTML and SVG versions of the documents. Double-keying means having two separate typists copy the text of the incorporated standard; the results are then compared in order to eliminate any errors. We have also developed new markup techniques that increase the accessibility of the documents to people with visual impairments and print disabilities. We have also made significant advances in adding metadata to the documents, so each section, table, figure, and formula can be bookmarked and linked to, making internal navigation within the documents significantly friendlier for the user.

27. We have applied these markup techniques to a number of standards incorporated by reference, though not to the 1999 Standards. Public Resource's goal is to have the entire CFR, including all documents incorporated by reference, available in this new format so that users can seamlessly and transparently navigate the entire CFR. I believe this will be useful for employees of affected business enterprises, researchers and journalists covering public policy issues, government workers at the federal, state, and

local levels who must interact with the code as part of their daily activities, and for interested citizens.

28. We have made several examples of our new approach available on the Internet and submitted them as examples of how the law can be made better in formal comments to Notices of Proposed Rulemaking that propose to incorporate standards by reference.

29. Public Resource's website is structured for navigation by search engines and for bulk access. Data are organized by country (e.g., /pub/us/) then by type of data, such as standards incorporated by reference (/pub/us/cfr/ibr/).

30. Public Resource has one employee, myself, and three contractors who assist me in systems administration, conversion of graphics and formulas, and legal advice. Our core operating costs are under \$500,000 per year, and we are funded entirely by donations, contributions and grants. Rather than adding staff, I have prioritized capital expenses, such as the purchase of the U.S. Court of Appeals backfile for \$600,000 and the scanning of 3 million pages of Ninth Circuit briefs. Public Resource does not accept donations that are tied to the posting of specific standards or groups of standards. Public Resource's operating income is not based on the amount of traffic its websites receive. Though we are a small organization, we observe all current best practices of corporate governance and transparency. I am proud that we have been awarded the GuideStar Gold Seal for nonprofit transparency. A full repository of our financials and other disclosures is maintained at <https://public.resource.org/about>.

31. Public Resource has never sought benefit or compensation from its posting of the 1999 Standards. We have never used the 1999 Standards for marketing.

32. I pay a great deal of attention to quality control, including verifying the validity of the HTML, SVG, and MathML that I post. I respond immediately to any reports of errors from the public.

33. To Public Resource's knowledge, the 2014 edition of the Standards For Educational and Psychological Testing has not been incorporated by reference into law. Public Resource posts *only* those standards that have become law. Consistent with this policy, Public Resource has no plans to post the 2014 Standards on the Internet.

34. My work at Public Resource, including the posting of standards incorporated by reference into federal and state law and my efforts to post briefs, opinions, regulations, statutes, and other materials that are edicts of government, are based on a long-held belief that the primary legal materials of our country must be available to all, especially those who lack the means to access the law in the status quo, because an informed citizenry is the key to the functioning of our democracy.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 21st day of January, 2016 at Sebastopol, California.



Carl Malamud

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