

**IN THE 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.,

Civil Action No. 1:14-cv-00857-TSC

Plaintiffs,

v.

PUBLIC.RESOURCE.ORG, INC.,

Defendant.

**UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF ON BEHALF OF LAW SCHOLARS IN SUPPORT OF
DEFENDANT-COUNTERCLAIMANT PUBLIC.RESOURCE.ORG'S
MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION**

On behalf of the *amici* identified in the accompanying appendix, herein referred to as “*Amici*,” the undersigned counsel respectfully moves for leave to file an *amicus curiae* brief in support of defendant-counterclaimant Public.Resource.org’s Motion for Summary Judgement and Opposition to Plaintiffs’ Motion for Summary Judgement and Permanent Injunction filed in the above referenced matter. A copy of the proposed brief accompanies this motion.

1. *Amici* are professors at major U.S. law schools, who teach and write about copyright, information law, intellectual property, the Internet, and related issues. *Amici* file solely as individuals and not on behalf of any institutions with which they are affiliated.¹

¹ As noted in the accompanying brief, *amici* Pamela Samuelson and Jonathan Zittrain are members of the Board of Directors of the Electronic Frontier Foundation (“EFF”), which represents defendant Public.Resource.org, Inc. in this case. Neither Professor Samuelson nor Professor Zittrain had any direct involvement in EFF’s representation of defendant in the case.

2. *Amici* do not have a financial interest in the outcome of the present litigation. *Amici*—as scholars and experts with knowledge and experience concerning copyright, information law, intellectual property, the Internet, and related issues—have an interest in ensuring the proper functioning and coherent development of the copyright system.
3. Further, as law professors, *Amici* are committed to ensuring robust and unfettered access by citizens to the laws with which they are required to comply.
4. This Court has permitted *amicus* briefs when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). As experts in the field, *Amici* offer the viewpoint of unbiased observers, a perspective that the Court could not otherwise get from the parties to this case.
5. *Amici* write to bring to the Court’s attention legal analysis relevant to the question of copyrightability of works authored by standards developing organizations and incorporated into operative law.
6. In particular, the proposed *amicus* brief provides historical context regarding the public domain status of operative law, legal analysis regarding the merger doctrine and its applicability to standards that have been adopted (like those in the present case), and policy analysis regarding the implications of a finding of copyrightability.
7. *Amici*’s extensive knowledge of copyright law and related intellectual property issues, developed through academic research and/or real world legal practice, combined with their understanding of the policy implications of enforcing a copyright in operative law, gives *Amici* valuable insight into the question of copyrightability at issue.

8. The parties have agreed that they will not oppose any *amicus* filing in support of either side. *See* Joint Report on Proposed Summary Judgment Briefing Schedule at 3, ECF No. 58 (October 30, 2015).

Date: February 11, 2016

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APPENDIX

Stacey L. Dogan
Law Alumni Scholar, Boston University School of Law
Professor of Law, Boston University School of Law

Professor Stacey Dogan is a leading scholar in intellectual property and competition law. Her recent articles explore cutting-edge topics in trademark, copyright, and right of publicity law, including questions of intermediary liability, the rights of trademark parodists, and evolving norms underlying trademark law.

Professor Dogan has presented her research at numerous national and international conferences, and her writings have appeared in journals including the *Stanford Law Review*, *Emory Law Journal*, *Iowa Law Review* and *Texas Law Review*. She has served as chair of the Intellectual Property Section of the Association of American Law Schools, and was co-editor-in-chief of the *Journal of the Copyright Society* from 2008 to 2011. Dogan is an active participant in educational programs with the local bar, leading seminars and discussions for the Boston Bar Association, Massachusetts Continuing Legal Education and the Massachusetts Volunteer Lawyers for the Arts.

Before joining the Boston University faculty, Professor Dogan taught for more than a decade at Northeastern University School of Law, where she focused on intellectual property and antitrust law. She came to teaching after several years of practicing law with the Washington, DC law firm of Covington & Burling, where she specialized in antitrust, trademark, and copyright law. After law school, she practiced with Heller, Ehrman, White & McAuliffe in San Francisco and served as a law clerk to the Honorable Judith Rogers of the U.S. Court of Appeals for the District of Columbia Circuit.

Pamela Samuelson

Richard M. Sherman Distinguished Professor of Law, UC Berkeley School of Law

Professor, UC Berkeley School of Information

Co-Director, Berkeley Center for Law & Technology

Pamela Samuelson is the Richard M. Sherman Distinguished Professor of Law and Information at the University of California, Berkeley. She is recognized as a pioneer in digital copyright law, intellectual property, cyberlaw and information policy. Since 1996, she has held a joint appointment at UC Berkeley School of Law and UC Berkeley's School of Information.

Samuelson has written and published extensively in the areas of copyright, software protection and cyberlaw. Her recent publications include: *The Google Book Settlement as Copyright Reform*, 2011 Wisc. L. Rev. 478 (2011); *Statutory Damages in U.S. Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439 (2009) (with Tara Wheatland); and *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 Berkeley Technology L. J. 1255 (2010) (with Stuart J.H. Graham, Robert P. Merges, & Ted Sichelman). Other notable publications include: *Why Copyright Excludes Systems and Processes From the Scope of Its Protection*, 85 Tex. L. Rev. 1921 (2007); *Questioning Copyright in Standards*, 48 B.C. L. Rev. 193 (2007); *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537 (2007); *Enriching Discourse on Public Domains*, 55 Duke L. J. 783 (2006); *Privacy as Intellectual Property?*, 52 Stan. L. Rev. 1125 (2000); *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. 51 (1997) (co-authored with J.H. Reichman); and *Benson Revisited: The Case Against Patent Protection for Algorithms and Other Computer Program-Related Inventions*, 39 Emory L. J. 1025 (1990).

Jessica M. Silbey
Professor of Law, Northeastern University School of Law

Jessica Silbey is a leading scholar and nationally recognized expert on intellectual property and the use of film to communicate about law. Silbey has altered the national conversation about creativity with her new book, *The Eureka Myth* (Stanford University Press). Based on a set of 50 interviews with authors, artists, inventors and lawyers, Silbey's work challenges the traditional notion of intellectual property as merely creating financial incentives necessary to spur innovation.

Silbey earned her undergraduate degree with honors from Stanford University and her J.D. *cum laude* from the University of Michigan, where she also earned a PhD in comparative literature. She served as law clerk to Judge Robert E. Keeton of the U.S. District Court for the District of Massachusetts and Judge Levin H. Campbell of the U.S. Court of Appeals for the First Circuit. She also spent three years in private law practice, focusing on intellectual property.

Rebecca L. Tushnet
Professor of Law, Georgetown Law

Professor Tushnet has taught at Georgetown since 2004. Previously, she was on the faculty at New York University School of Law. She also has worked at Debevoise & Plimpton in Washington, D.C., where she specialized in intellectual property. She clerked for Chief Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit and Associate Justice David H. Souter of the U.S. Supreme Court.

Professor Tushnet graduated from Harvard University in 1995 and from Yale Law School in 1998. At Yale, Professor Tushnet served as an articles editor for the *Yale Law Journal* and as an editor of the *Yale Journal of Law and Feminism*. During her law school summers, she worked for the Center for Reproductive Law & Policy and for Bredhoff & Kaiser.

Professor Tushnet's publications include: *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683 (2012); *Gone in 60 Milliseconds: Trademark Law and Cognitive Science*, 86 Tex. L. Rev. 507 (2008); and *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L. J. 535 (2004).

Jennifer Urban

Clinical Professor of Law, UC Berkeley School of Law
Director, Samuelson Law, Technology & Public Policy Clinic, UC Berkeley School of Law
Co-Director, Berkeley Center for Law & Technology

Jennifer M. Urban is a Clinical Professor of Law and Director of the Samuelson Law, Technology & Public Policy Clinic at the UC Berkeley School of Law. Broadly, her research considers how values such as free expression, freedom to innovate, and privacy are mediated by technology, the laws that govern technology, and private-ordering systems.

Her clinic students represent clients in numerous public interest cases and projects at the intersection of technological change and societal interests such as civil liberties, innovation, and creative expression. Recent Clinic projects include work on individual privacy rights, copyright and free expression, artists' rights, free and open source licensing, government surveillance, the "smart" electricity grid, biometrics, and defensive patent licensing.

Professor Urban comes to Berkeley Law from the University of Southern California's Gould School of Law, where she founded and directed the USC Intellectual Property & Technology Law Clinic. Prior to joining the USC faculty in 2004, she was the Samuelson Clinic's first fellow and visiting assistant professor. Prior to that, she was an attorney with the Venture Law Group in Silicon Valley. She graduated from Cornell University with a B.A. in biological science (concentration in neurobiology and behavior) and from UC Berkeley School of Law with a J.D. (intellectual property certificate). She was the *Annual Review of Law and*

Technology editor while a student at Berkeley Law, and received the Berkeley Center for Law and Technology Distinguished Alumni Award in 2003.

Jonathan Zittrain

George Bemis Professor of International Law, Harvard Law School

Vice Dean for Library and Information Resources, Harvard Law School

Faculty Director, Berkman Center for Internet and Society

Professor of Computer Science, Harvard School of Engineering and Applied Sciences

Professor, Harvard John F. Kennedy School of Government

Jonathan Zittrain is the George Bemis Professor of International Law at Harvard Law School and the Harvard Kennedy School of Government, Professor of Computer Science at the Harvard School of Engineering and Applied Sciences, Director of the Harvard Law School Library, and Faculty Director of the Berkman Center for Internet & Society. His research interests include battles for control of digital property and content, cryptography, electronic privacy, the roles of intermediaries within Internet architecture, human computing, and the useful and unobtrusive deployment of technology in education.

He performed the first large-scale tests of Internet filtering in China and Saudi Arabia, and as part of the OpenNet Initiative co-edited a series of studies of Internet filtering by national governments: *Access Denied: The Practice and Policy of Global Internet Filtering* (2008); *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (2010); and *Access Contested: Security, Identity, and Resistance in Asian Cyberspace* (2011).