



PUBLIC.RESOURCE.ORG ~ *A Nonprofit Corporation*

Open Source America's Operating System

"It's Not Just A Good Idea—It's The Law!"

March 30, 2021

Hon. Lawrence Denney, Secretary of State
R. Daniel Bowen, Esq., Member
Jill S. Holinka, Esq., Member
Andrew Paul Doman, Esq. Member
Idaho Code Commission
PO Box 83720
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via Electronic Mail

Dear Members of the Idaho Code Commission:

I am writing to you today regarding copyright restrictions and barriers to access currently placed on the Idaho Code. My purpose in writing is two-fold: to respectfully request that the Idaho Code Commission remove these copyright restrictions and to inform the Commission that our not-for-profit organization, Public.Resource.Org, has posted the Code for use without restriction.

As you know, the Idaho Code contains a provision asserting copyright:

"Copyright of all compilations shall be taken by and in the name of the publishing company which shall thereupon assign the same to the state of Idaho, and thereafter the same shall be owned by the state of Idaho. The commission is authorized and empowered to grant the use of the copyrights of the Idaho Code published pursuant to Session Laws of 1947, Chapter 224, and of all compilations authorized by this act, in connection with the performance of its said duties and obligations." Idaho Statute § 73-210

The Legislature provides a free but unannotated, unofficial version of the code **on its web site**, but the Official Idaho Code can only be obtained by purchase on the **vendor's web site**. The Official Idaho Code comes with extensive terms of use and technical digital rights management measures. Each volume clearly states that it is "Compiled Under the Supervision of the Idaho Code Commission" and a notice of copyright that reads "© 2020 State of Idaho. All rights reserved."

The vendor also sells for \$515 to in-state purchasers (\$608 for out-of-state), the Idaho Code as an electronic "e-book" which contains the following terms of use:

Your use of this electronic publication ("eBook") from LexisNexis, a division of RELX Inc., a Massachusetts corporation, or its affiliates, is subject to the following terms and conditions. This eBook is for your personal use only. All access to and use of this eBook is subject to U.S. and international copyright law. All intellectual property rights are reserved to the copyright holder. Redistribution or duplication of this eBook to any other electronic media or a third party is strictly prohibited. Under no circumstances may you redistribute

this eBook commercially or post this eBook on an intranet, internet or SharePoint site. Finally, use of this eBook is further subject to the terms and conditions of use which were accepted at the time you completed your purchase of this eBook from the point of purchase.

In the past, these kinds of restrictions on use of the laws of Idaho have not been ignored or waived by the State of Idaho.

On **May 30, 2013**, I informed Speaker of the House Scott Bedke and Mr. Jeff Youtz of the Legislative Services Office that my organization had posted the Idaho Code “so that public servants, members of the bar, citizens, and members of the business community have ready access to the laws that govern them.” In that letter I referred to a long line of U.S. Supreme Court decisions and U.S. Copyright Office procedures that “the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.” **Banks v. Manchester, 128 U.S. 244 (1888)**

My letter was met with a **July 12, 2013**, response from Mr. Bradlee R. Frazer, an attorney hired by the State, demanding that the immediate removal of the Idaho Code and stating that “Pursuant to the DMCA, your expeditious removal of or prevention of access to the Idaho Code, as defined, may result in limiting your liability for your possible direct involvement in and/or contribution to the above-described acts of copyright infringement.”

Public Resource wrote a **July 15, 2013**, response to Mr. Frazer’s letter which we sent to Secretary of State Ben Ysursa, President Pro Tempore of the Senate Brent Hill and Speaker of the House Scott Bedke. In that letter we spelled out the reasons we believed the copyright assertions were in error. We respectfully declined to comply with the request to remove the materials, and I offered for the second time to travel to Idaho to discuss the issue.

This correspondence continued for some time, including an **April 2, 2014**, public records act response from the office of Secretary of State Ysursa containing minutes of four Code Commission meetings and the contract with Lexis Nexis. On **July 26, 2014**, I wrote again to Secretary of State Ysursa and included a copy of my **testimony before the Judiciary Committee** of the U.S. House of Representatives on edicts of government in which I discussed the Idaho situation.

In the meantime, the State of Georgia had sued Public Resource over our posting of the Official Code of Georgia Annotated. In the U.S. District Court, the case of **Code Revision Commission, et al v. Public.Resource.Org, Inc.** had resulted in summary judgment against Public Resource and an injunction order against posting the Official Code of Georgia Annotated. The U.S. Court of Appeals for the Eleventh Circuit **heard our case** and reversed the District Court judgment. In a 58–page opinion, the Hon. Stanley Marcus wrote:

Thus, we conclude that the annotations in the OCGA are attributable to the constructive authorship of the People. To advance the interests and effect the will of the People, their agents in the General Assembly have chosen to create an official exposition on the meaning of the laws of Georgia. In creating the annotations, the legislators have acted as draftsmen giving voice to the sovereign’s will. The resulting work is intrinsically public domain material, belonging to the People, and, as such, must be free for publication by all.

As a result, no valid copyright can subsist in these works. [Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc.](#), 906 F.3d 1229 (11th Cir. 2018)

After the State of Georgia [appealed the decision](#) to the U.S. Supreme Court, the State of Idaho joined Arkansas in urging the court to [grant certiorari](#). After the Supreme Court granted certiorari, the State of Idaho joined Arkansas once again to submit [another amicus brief](#). Public Resource also asked the Supreme Court to hear the case.

The U.S. Supreme Court granted certiorari and heard argument. It then rejected the claims of Georgia and Idaho ~~ß~~that they could assert copyright over these codes. Writing for the Court, Chief Justice Roberts said:

The Copyright Act grants potent, decades-long monopoly protection for “original works of authorship.” 17 U. S. C. §102(a). The question in this case is whether that protection extends to the annotations contained in Georgia’s official annotated code.

We hold that it does not. Over a century ago, we recognized a limitation on copyright protection for certain government work product, rooted in the Copyright Act’s “authorship” requirement. Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties. [Georgia, et. al. v. Public.Resource.Org, Inc.](#) 590 U.S. __ (2020)

My purpose in writing to you today is, as I said, two-fold. First, I believe it is inappropriate for the Code Commission to continue to assert copyright over edicts of government. In the wake of the U.S. Supreme Court decision in the Georgia case, the U.S. Copyright Office has clearly stated that it “will not register a government edict that has been issued by any federal, state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials.” [Compendium of U.S. Copyright Office Practices, Third Edition, § 313.6\(C\)\(2\), U.S. Copyright Office, January 28, 2021](#)

We thus request that the Code Commission take affirmative steps to remove all copyright assertions and barriers to use, including taking legislative action to remove those provisions authorizing such assertions from the Idaho Code.

The second reason for writing to you today is to notify you that Public Resource will once again commence posting updated, electronic versions of the Idaho Code for free and unrestricted distribution. Our purpose in this noncommercial endeavor is to further the law by helping to inform citizens of their rights and obligations.

As in my previous communications with you, I would like to once again offer to discuss these matters with you. I would also be happy to brief your technical staff on how we’ve transformed the codes and would be delighted if the Code Commission would be able to make use of these materials to post the Official Code of Idaho for access on government web sites.

I believe we all share a common goal, which is to further our democratic system of government by informing our fellow citizens of their rights and their obligations. The rule of law is founded on the principle of promulgation of the law, and an informed citizenry is crucial to the furtherance of these common goals.

However, if the Code is still uncertain as to the clear and compelling language of the Supreme Court, may I respectfully suggest that the Code Commission avail itself of the provisions of **Idaho Code § 67-1401(6)** and consult the Opinions Division of the Office of the Attorney General. I believe what you will hear from them is that copyright assertions over the Idaho Code are contrary to law.

Please do let me know if I can be of assistance and I look forward to affirmative steps by the Code Commission.

With best regards,

DocuSigned by:
Carl Malamud
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Carl Malamud, President
Public Resource

cc: Mr. David Halperin, Of Counsel, Public Resource