



PUBLIC.RESOURCE.ORG ~ *A Nonprofit Corporation*

Open Source “America’s Operating System”

“It’s Not Just A Good Idea—It’s The Law!”

September 16, 2022

Mr. Brendan Collins
CKG Law
The Foundry Building
1055 Thomas Jefferson Street, N.W., Suite 620
Washington, D.C. 20007

via email to prauscher@acgih.org and BCollins@gkglaw.com

Dear Mr. Collins:

I am in receipt of your letter of September 12, 2022, which is appended to this letter. I also have appended the exchange we had in 2013 with ACGIH regarding the same issue. I responded promptly to their request and never heard back from them.

You complained that we had posted the 23rd edition of the ACGIH’s Ventilation Manual (1998) but that only Chapters 3 and 5 of the manual had been incorporated into [40 CFR 63.14](#). Public Resource did in fact post a copy of the entire 23rd edition of the Ventilation Manual on both our web site and on the Internet Archive.

It is a well-accepted principle of incorporation by reference that where the CFR does not specify that only certain sections of a document are to be incorporated, then the entire document is incorporated. See [1 CFR 51](#); American Society for Testing and Materials v. Public.Resource.Org, Inc.; [Office of the Federal Register, Incorporation by Reference \(IBR\) Handbook](#), 2022-01.

[42 CFR 52b.12](#) fully incorporates the 23rd edition (1998) of the Ventilation Manual, the document I posted. On the cover page I prepend to all standards that have the force of law, I had incorrectly reference 40 CFR 63.14, and I have corrected that citation. Thanks for pointing that out to me.

The 22nd edition of the Ventilation Manual (1995) was fully incorporated into 29 CFR 1910.6.

You note in letter that the ACGIH sells its Ventilation Manuals at \$159.95 per book. More precisely, ACGIH sells the [Industrial Ventilation: A Manual of Recommended Practice for Design, 30th Edition](#) for \$159.95. This “Recommended Practice for Design” is what evolved from the older editions of the Manual. This volume is now accompanied by a new book, the Manual of Recommended Practice for Operation and Maintenance, and ACGIH [sells the combined set for \\$279.95](#).

However, as far as I can tell, ACGIH does NOT sell prior versions of the Manual. Importantly, it does not appear to sell the 22nd and 23rd editions which are part and parcel of federal law. Likewise, ACGIH has chosen not to participate in ANSI’s poorly conceived [“IBR portal”](#) and ANSI does not sell it in [their standards store](#). Likewise, Techstreet [does not carry](#) the standard, [nor does IHS](#).

Mr. Collins, I find it a bit venal that ACGIH would protest the noncommercial posting of this 1998 standard that they don't even sell anymore. Given that this entire document has been properly and duly incorporated into federal law, and given that ACGIH doesn't even sell the 24-year-old document anymore, I find your request and threats to be unfounded and respectfully decline to comply.

Sincerely,

Carl Malamud
Public.Resource.Org, Inc.

cc: Dr. Corynne McSherry, Legal Director, Electronic Frontier Foundation
Mr. Mitch Stoltz, Senior Attorney, Electronic Frontier Foundation
Mr. Andrew Bridges, Partner, Fenwick & West, LLP
Mr. Matthew Becker, Associate, Fenwick & West, LLP
Mr. David Halperin, Of Counsel, Public.Resource.Org
Mr. Phjillip Rauscher, MPH, CIH, CSP, Interim Executive Director, ACGIH



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September 12, 2022

VIA FEDERAL EXPRESS AND EMAIL (carl@media.org)

Carl Malamud
Public.Resource.Org, Inc.
95 Kennedy Lane
Healdsburg, CA 95448

Re: Public Resource's Unauthorized Use of ACGIH's Copyrighted Material

Dear Mr. Malamud:

GKG Law, P.C. is general counsel to the American Conference of Governmental Industrial Hygienists ("ACGIH®"). ACGIH learned that Public.Resource.Org, Inc. ("Public Resource") has downloaded ACGIH's publication, Industrial Ventilation: A Recommended Practice ("Ventilation Manual") on Public Resource's website, including those portions of the Ventilation Manual which are not incorporated by reference in the Code of Federal Regulations. Public Resource's publication of material which is not incorporated by reference in the Code of Federal Regulations without ACGIH's consent, and without paying for it, constitutes a clear violation of the Copyright Act and subjects Public Resource to penalties of up to \$150,000 per willful violation of the Act.

ACGIH is a professional society for practitioners in the industrial hygiene, occupational health, environmental health and safety professions. Its members worldwide represent virtually all segments of the occupational and environmental health professions.

ACGIH has technical committees which review and evaluate available scientific literature and disseminate scientific opinions regarding the protection of workers and the environment worldwide. Included among these technical committees is ACGIH's Industrial Ventilation Committee which prepares the Ventilation Manual. ACGIH sells its Ventilation Manuals at \$159.95 per book. The proceeds from the sale of ACGIH's Ventilation Manuals are among the cornerstone of ACGIH and its financial viability.



An International Association of Independent Law Firms in Major World Centers

GKG Law, P.C.

Carl Malamud
Public.Resource.Org, Inc.
September 12, 2022
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Although Chapters 3 and 5 of ACGIH's Ventilation Manual (23rd edition) are incorporated by reference in the Code of Federal Regulations at 40 CFR section 63.14, the remainder of the Ventilation Manual is not. Public Resource, nonetheless, has published the entirety of the Ventilation Manual on its website and on another website (archive.org). As you should be aware, such publications constitute a blatant violation of ACGIH's copyright.

When confronted with this very issue, the United States District Court for the District of Columbia in *American Society for Testing and Materials v. Public.Resource.Org, Inc.*, 2022 WL 971735 (D.D.C. March 31, 2022), recently granted summary judgment on behalf of the American Society for Testing and Materials ("ASTM") finding that Public Resource had violated ASTM's copyright by publishing technical standards that were not incorporated by reference in the Code of Federal Regulations. After weighing the applicable legal standards, the court determined that Public Resource Group's stated purpose of informing the public about the law was not significantly furthered by publishing standards that were not incorporated by reference into the law. *Id.* at 167. The court further held that standards not incorporated into law more squarely within the realm of copyright protection. *Id.* Finally, the court reasoned that incorporating one standard by reference does not justify posting provisions of a different standard that has not been incorporated into law. *Id.*¹ Based upon its careful analysis, the court ruled that Public Resource could not copy, reproduce, or distribute technical standards not incorporated by reference into law. *Id.* at * 17. The same analysis governs here.

Accordingly, within **ten (10)** business days, Public Resource must cease and desist from publishing or displaying the portions of ACGIH's Ventilation Manual not incorporated by reference into the Code of Federal Regulations

Your immediate attention to this matter is required.

Very truly yours,



Brendan Collins

¹ The court so held despite the fact that ASTM had not shown that Public Resource's republications had a substantial adverse impact on ASTM's market for its originals. Here, in contrast ACGIH can establish that Public Resource's dissemination of its Ventilation Manual is having a direct and substantial negative impact on ACGIH's revenue from its sales.

Amie Hahn <ahahn@acgih.org>
To: <carl@media.org>
Cc: "Rita Williams" <rwilliams@acgih.org>
ACGIH® Publication

September 17, 2013 10:39 AM

Carl Malamud, President
Public.Resource.Org
1005 Gravenstein Hwy North
Sebastopol, CA 95472

Dear Mr. Malamud:

It has come to our attention that the ACGIH® publication, Industrial Ventilation: A Manual for Recommended Practice, 23rd Edition, has been uploaded on the following website at <http://archive.org/details/gov.law.acgih.manual.1998> by Public.Resource.Org. Such usage appears to be in violation of U.S. and international copyright laws since based on our records, permission to use our copyrighted and proprietary material has not been granted for your use.

If, however, you have received permission to use this material, we ask that you send a copy of the permission letter. Note that permissions are not granted in perpetuity; they must be renewed annually or whenever the reproduced information is updated.

If verification of permission cannot be provided, please remove the ACGIH® copyrighted and proprietary material until permission is appropriately requested and granted.

Permission must be requested in writing, either by U.S. mail or via email to my attention at the email or delivery address listed below. You may also visit the ACGIH® website (www.acgih.org) and click on the "Copyright Permission Request" button on the left-hand side of the home page and complete the Permission Request form. The request must include the specific material you would like to reproduce (in this case, the entire publication), the manner in which it will be displayed (in this case, internet), who has access to the material, whether it is password-protected or whether its access is available to the general public, and whether there is any cost associated with accessing the material.

We would appreciate your immediate attention to this matter and thank you for your anticipated cooperation.

Sincerely,

Rita L. Williams
Communications Manager
ACGIH®
1330 Kemper Meadow Drive
Cincinnati, Ohio 45240-1634
rwilliams@acgih.org



PUBLIC.RESOURCE.ORG ~ *A Nonprofit Corporation*

Open Source America's Operating System

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

September 18, 2013

Ms. Rita L. Williams
Communications Manager
ACGIH®
1330 Kemper Meadow Drive
Cincinnati, Ohio 45240-1634

Dear Ms. Williams:

I am receipt of your communication of September 17 regarding the publication of the ACGIH® publication, "Industrial Ventilation: A Manual of Recommended Practice," 23rd Edition at <http://archive.org/details/gov.law.acgih.manual.1998>. We are responsible for uploading this document. In addition, you will find this document on our web site at <https://law.resource.org/pub/us/cfr/ibr/001/acgih.manual.1998.pdf>.

The 23rd Edition of "Industrial Ventilation: A Manual of Recommended Practice" was Incorporated by Reference by the Environmental Protection Agency at 40 CFR 63.1506(c)(1) and 40 CFR 63.2984(e) and by HHS/PHS at 42 CFR 52b.12(c)(9). Incorporation by reference is not a casual affair and requires a carefully followed procedure by the governmental agency and the explicit approval of the Director of the Office of the Federal Register.

As this vital public safety standard has been incorporated into law, the standard contained in this document is the law of the United States, and people in the United States are compelled to obey it. Long-standing precedent of the United States Supreme Court holds that copyright claims cannot prevent citizens from reading and speaking the law. See *Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888).

While the standards drafted by the American Conference of Governmental Industrial Hygienists, now known as ACGIH®, were entitled to copyright protection when issued, once they were incorporated into regulations these standards became the law, and thus have entered the public domain. Chief Judge Edith H. Jones of the 5th Circuit expressed this principle clearly in her opinion in *Veeck v. Southern Building Code Congress*, which concerned a model building code incorporated in the law of two Texas towns:

"The issue in this en banc case is the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become "the law." Specifically, may a code-writing organization prevent a website operator from posting the text of a model code where the code is identified simply as the building code of a city that enacted the model code as law? Our short answer is that as law, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives. As model codes, however, the organization's works retain their protected status." 293 F.3d 791 (5th Cir. 2002) (en banc).

As you can see by looking at the document in question, a cover sheet has been prepended to each clearly spelling out the section of the Code of Federal Regulations that has incorporated by reference this document into law. Please note that we were careful to only publish the specific document incorporated by law, and that ACGIH® sells the 25th and subsequent editions of the Manual but does not appear to sell the 23rd Edition. As the 23rd Edition is the one required by law and as it has been duly incorporated into law, we respectfully decline to remove this document and respectfully decline to request permission.

Sincerely yours,



Digitally signed by Carl
Malamud
DN: cn=Carl Malamud,
o=Public.Resource.Org, ou,
email=carl@media.org,
c=US
Date: 2013.09.18 11:01:51
-07'00'

Carl Malamud