

December 17, 2019

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BY EMAIL TO rgottwald@cganet.com AND U.S. MAIL

Richard Gottwald, President & CEO
Compressed Gas Association, Inc.
14501 George Carter Way, Suite 103
Chantilly, VA 20151

Re: Public.Resource.Org: demands by Compressed Gas Association, Inc.

Dear Mr. Gottwald:

Public.Resource.Org has retained Fenwick & West LLP to respond to your communications regarding its posting to the Internet of standards that your organization has successfully promoted to become federal regulations through the federal government's "incorporation by reference" procedure. As you may know, Fenwick & West is also co-lead counsel in *American Society for Testing and Materials v. Public.Resource.Org* and its related case, which were recently the subject of a relevant decision in Public Resource's favor by the United States Court of Appeals for the District of Columbia Circuit, 896 F.3d 437 (2018), and are now back before the district court on remand.

Public Resource respects the copyright law of the United States. It has studied copyright law deeply and understands its relevant statutes; its constitutional underpinning in Article I, section 8, clause 8; and its application in court decisions. It also has a strong commitment—core to its mission—to the rule of law and justice. That mission includes the furtherance of First Amendment, Fifth Amendment, and Fourteenth Amendment rights of the public to know the law by having unfettered access to laws and other edicts of government, to communicate laws and other edicts to others, to petition government with full and unrestricted knowledge of the laws, and to ensure proper application of the laws.

Public Resource's knowledge of, and respect for, copyright law includes its knowledge of and respect for the fair use doctrine and other limitations of the rights of a copyright holder. The fair use doctrine is a statutory limitation upon the rights of a copyright holder: those rights *do not extend* to uses that are fair. Sections 106 and 107 of the Copyright Act state explicitly that the rights of a copyright holder in section 106 are "subject to" the limitation in section 107 that "the fair use of a copyrighted work . . . is not an infringement of copyright." The fair use doctrine also ensures that copyright law does not trample upon the public's First Amendment rights. Moreover, the requirement that copyright protect expression, and not ideas or facts, is also a First Amendment accommodation. *See Golan v. Holder*, 565 U.S. 302, ___, 132 S.Ct. 873, 890 (2012). When a standard becomes a law, the government adopts it as a government edict. Both the adoption and the content of the edict itself are facts that anyone may freely convey. A long

history of Supreme Court decisions and United States Copyright Office policies has established that there can be no copyright monopoly on expression of the law or government edicts. As I trust you are aware, Public.Resource.Org recently won an important decision in the United States Court of Appeals for the Eleventh Circuit on that point in *Code Revision Commission v. Public.Resource.Org, Inc.*, 906 F.3d 1229 (11th Cir. 2018), *cert. granted*, No. 18-1150 (argued Dec. 3, 2019).

A lobbying firm that secures enactment into law of legislation that it drafted cannot enforce a copyright statutory monopoly over the text of the law merely because the lobbying firm first put the words on paper: when a government adopts a document as law, it transforms that document into the government's own expression and into an edict of government. Yet that is exactly what Compressed Gas Association, Inc. is trying to do by threatening to take action against Public Resource over its posting of the laws that began life as CGA-published standards.

The record is clear: Compressed Gas Association, Inc. regularly seeks to have government make its standards into law, no less than any other lobbying firm. It brags about its efforts and their success:

- “For decades, CGA has successfully petitioned agencies such as DOT [U.S. Department of Transportation] and OSHA [U.S. Occupational Safety and Health Administration] to request that certain CGA publications be Incorporated by Reference (“IBR’d”) into federal regulations.”
- “The Compressed Gas Association has enjoyed good success in having many of our publications incorporated by reference.”
- “For CGA’s purposes, IBR is an administrative drafting tool that enables federal agencies to take the voluntary consensus standards developed by the Compressed Gas Association, and make these published materials federally enforceable.”

I attach a copy of a page from CGA’s web site that contains those statements.

CGA has performed a public service in persuading the federal government make its standards federally enforceable. But that public service does not allow CGA to exploit the advantage that these standards now enjoy, as official governmental rules and edicts, with a copyright monopoly to limit the rights of others to engage with those governmental rules and edicts. The law belongs to the public. An effort to exploit a monopoly on the law by asserting copyright on standards and a right to veto others from engaging with the law, after having promoted their adoption as law, would subvert the public interest.

Nor is it likely that Public Resource's actions have caused Compressed Gas Association, Inc. any harm:

- Public Resource posts only standards that *have become law*; its interest is solely in the law and not in disseminating standards that remain private.
- Public Resource posted the standards seven years ago. If the posting had caused CGA any appreciable harm, one would have expected CGA to have noticed, and complained, long ago.
- Most or all of the CGA standards that Public Resource has posted, dating from 1980 to 2009, are *obsolete as standards while still relevant as law and government edicts*.
- CGA's total revenue from publications (which are predominately private standards that have not become law) is dwarfed by its membership revenue. Those revenues have been steady for many years, showing no apparent effect from Public Resource's posting of a few standards that have become law. And CGA's members, who *pay* to belong to CGA and need no copyright incentive, are (with any members of the public who volunteer comments) are the creators of the standards that CGA now claims to protect.

For these reasons, Public Resource is confident that its own public service activities are entirely lawful, and it will continue to make the law available to the public.

To the extent CGA contemplates filing a lawsuit against Public Resource, please recognize that (1) Public Resource will vigorously defend its actions, as it has in other cases; (2) any lawsuit by CGA would be counterproductive to its own interests; and (3) Public Resource notifies CGA that CGA must preserve and not alter or dispose of any relevant documents and information with respect to the relevant standards and all previous versions of those standards, including but not limited to (a) the creation and revision of all the standards; (b) the identities and employment affiliations of all persons who participated in the creation and revision of the standards; (c) meetings and other communications relating to the preparation and revision of the standards; (d) communications and other documentation regarding authorship, or allocation or transfer or copyright rights, preceding the copyright registrations of each of the standards, including employment contracts, work made for hire agreements, licenses, and assignments; (e) copyright applications, registrations, and communications with the United States Copyright Office; (f) all finances pertaining to both the relevant standards and other standards (for comparison purposes in the case of other standards); (g) all harms that CGA believes it has suffered from Public Resource's posting of the standards; and (h) references to Public Resource, Carl Malamud, Internet Archive, or the postings at issue, including but not limited to evidence of the earliest awareness by CGA of the postings about which it now complains.

Richard Gottwald, President & CEO
December 17, 2019
Page 4

While Public Resource will vigorously defend its public service if necessary, it does not seek a confrontation with CGA. To the extent CGA believes that Public Resource has made any mistakes regarding the incorporation by reference of the standards it has posted, or if CGA has suggestions as to how Public Resource can better serve the public interest relating to these standards as enforceable law and as government edicts, Public Resource will carefully consider CGA's views.

Sincerely,

FENWICK & WEST LLP

A handwritten signature in blue ink that reads "Andrew P. Bridges". The signature is written in a cursive, flowing style.

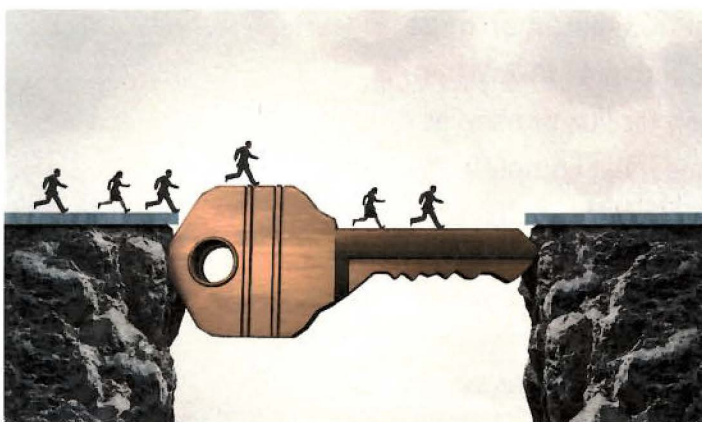
Andrew P. Bridges

Attachment

cc: Laura Brumsey lbrumsey@cganet.com
David Halperin



Decoding the Mysteries of 'IBR'



Decoding the Mysteries of 'IBR'

June 27, 2019

One important aspect of self-regulation in the compressed gas industry has long revolved around CGA's close interaction with our regulatory partners, including the U.S. Department of Transportation (DOT) and the Occupational Safety and Health Administration (OSHA).

For decades, CGA has successfully petitioned agencies such as DOT and OSHA to request that certain CGA publications be Incorporated by Reference ("IBR'd") into federal regulations.

Recent News

Satoshi Hasaka of
JIMGA Receives 2019
IOMA International
Harmonization
Award
ISO Meetings –
October 2019 Recap
Meeting Recap:
CGA's 2019 Safety &
Reliability Seminar
CGA's October 2019
Safety Publications
(New Releases &
Revisions)
CGA Regulatory Alert
(RA-220): DOT
PHMSA-Safety
Advisory Notice:
Unapproved Foreign-
Made DOT Cylinders

Specifically in relation to DOT and OSHA, we focus on the following:

- For DOT: Title 49 (Transportation) of the Code of Federal Regulations (CFR); also referred to as "49 CFR"
- For OSHA: Title 29 (Labor) of the CFR; also known as "29 CFR"

For example, when a cylinder containing a compressed or liquefied gas is shipped from a filling site to a consumer use site, that transportation must comply with DOT regulations found in 49 CFR. When a cylinder is filled at a production facility, or used at a customer's site, these functions must comply with the regulations found in 29 CFR.

The Compressed Gas Association has enjoyed good success in having many of our publications incorporated by reference. These publications cover a variety of topics, such as the proper labeling of a compressed gas cylinder, or how to select the proper pressure relief device for a compressed gas cylinder or mixture.

IBR Defined

But what does "Incorporated by Reference" mean, exactly? For CGA's purposes, IBR is an administrative drafting tool that enables federal agencies to take the voluntary consensus standards developed by the Compressed Gas Association, and make these published materials federally enforceable.

Congress originally authorized the process of IBR in the Freedom of Information Act, to reduce the

volume of material published in the Federal Register and Code of Federal Regulations.

In the compressed gas industry, the IBR process avails the general public of the collective expertise of CGA's membership and the work output of many of our CGA committees. Arguably, this represents the essence of self-regulation, when government agencies recognize the value of publications produced by the Compressed Gas Association, and leverage these resources to enhance public safety.

Currently Referenced CGA Publications

CGA publications that are incorporated by reference include, but are not limited to:

*CGA C-1 – Methods for Pressure Testing
Compressed Gas Cylinders*

*CGA C-6 – Standards for Visual Inspection of Steel
Compressed Gas Cylinders*

*CGA S-1.1 – Pressure Relief Device Standards-Part
1-Cylinders for Compressed Gases*

*CGA S-7 – Standard Method for Selecting Pressure
Relief Devices for Compressed Gas Mixtures in
Cylinders*

For a complete list of CGA standards incorporated by reference by DOT, see: Code of Federal Regulations, Title 49 (Transportation), 171.7.

For a full list of CGA standards incorporated by reference by OSHA, see: Code of Federal Regulations, Title 29 (Labor), 1910.6.

Each of the above includes a listing of CGA publications that are referenced by name and the year of publication.

Compressed Gas Association

Petitions for Change: How Regulations Evolve Over Time

When a CGA publication that is currently referenced by DOT or OSHA is revised and updated, a petition is submitted requesting that the reference be updated to the most current revision.

This process enables members of CGA committees to identify opportunities to enhance existing regulations in 49 CFR or 29 CFR, by petitioning for a change.

An interesting case in point took place some years ago with the advent of the pneumatically operated cylinder valve. These valves were initially used with gases that are toxic when inhaled. At the time, the governing mandate in 49 CFR 173 required that a valve used in this type of service have a handwheel to open and shut the valve. Yet, pneumatically operated valves did not require a handwheel.

Consequently, a petition was written and DOT modified the wording to allow for this new technology. This change benefited both the packager and the user, while enhancing overall safety.

Petitions in Development

CGA currently has 18 petitions before the U.S. Department of Transportation and OSHA that are awaiting a final decision.

An additional 11 petitions are being worked on at the committee level. Once completed and approved by CGA's Standards Council, these new petitions will be forwarded to the appropriate government agency for review.

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