

November 24, 2020  
Judicial Council of California  
Attention: Chief Counsel (Rule/Form Proposal)  
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San Francisco, California 94102-3688  
E-mail: [legal-services@jud.ca.gov](mailto:legal-services@jud.ca.gov); [judicialcouncil@jud.ca.gov](mailto:judicialcouncil@jud.ca.gov)  
Subject: Proposal to the Judicial Council for Changes to California Rule of Court 2.1050

Dear Chief Counsel:

Public.Resource.Org (“**Public Resource**”) writes to propose a rule change under California Rule of Court 10.21. Public Resource respectfully requests that the Judicial Council of California (“**JCC**”) revise California Rule of Court 2.1050, subdivision (c) (“**Rule 2.1050(c)**”) to clarify that the California Civil Jury Instructions (“**CACI**”) and the California Criminal Jury Instructions (“**CALCRIM**”) (collectively, the “**Jury Instructions**”) are in the public domain. Public Resource also respectfully requests that the JCC make the corresponding change of removing all copyright claims and notices from CACI, from CALCRIM, and from related web pages on the Judicial Branch web site. These changes are consistent with federal copyright law and with California’s enlightened policy of promoting public access to plain-English jury instructions.

Public Resource is a 501(c)(3) non-profit corporation, based in California, that seeks to increase public access to the law. Public Resource appreciates that the JCC has prioritized making the Jury Instructions both “understandable to the average juror” and “freely available” to the public. (Judicial Council of Cal., Criminal Jury Instructions (2020) p. ix; Cal. Rules of Court, rule 2.1050, subd. (c).) Public Resource shares these goals and submits this rule change proposal (“**Proposal**”) in service of them.

California has set an impressive and important precedent by rendering its Jury Instructions in “plain English.” (Judicial Council of Cal., Criminal Jury Instructions (2020) p. ix.) The JCC took this approach explicitly to increase access to the law for jurors. (See Judicial Council of Cal., Civil Jury Instructions (2020) p. xxiii.) The JCC additionally worked to increase public access to the law by posting the Jury Instructions on the Judicial Branch web site. (Cal. Rules of Court, rule 2.1050, subd. (c).) Public Resource applauds these efforts to increase Californians’ access to the law.

Unfortunately, Rule 2.1050(c)’s current language, and the various copyright notices associated with the Jury Instructions, prevent the full realization of these goals. The copyrights implied by Rule 2.1050(c), and asserted in notices in the text and web pages of the Jury Instructions, do not comport with federal copyright law. As the United States Supreme Court recently held in *Georgia v. Public.Resource.Org, Inc.*, under the government edicts doctrine, government

officials cannot author, and therefore cannot copyright, works they create in carrying out their official duties. ((2020) 140 S.Ct. 1498, 1504.) The Jury Instructions are government edicts, authored by the JCC in its judicial capacity, and are therefore ineligible for copyright protection. (See *ibid.*) In addition, the Jury Instructions are insufficiently original to warrant copyright protection.

Correcting this oversight is crucial. Access to the law is fundamental to California's administration of justice. "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." (Cal. Const. art. I, § 7, subd. (a).) Accordingly, " 'All are entitled to be informed as to what the State commands or forbids.' " (People ex rel. Gallo v. Acuna (1997) 14 Cal.4th 1090, 1115, quoting *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) Because " '[e]very citizen is presumed to know the law,' " " 'it needs no argument to show . . . that all should have free access' " to its contents. (*Georgia, supra*, 140 S.Ct. at p. 1507, quoting *Nash v. Lathrop* (1886) 142 Mass. 29, 35.) Jury instructions in particular "are important because together they state the law that [jurors] will use." (CACI No. 5000.) Providing the law and legal materials for viewing alone is inadequate. (See *Building Officials & Code Adm. v. Code Technology, Inc.* (1st Cir. 1980) 628 F.2d 730, 736 [stating that the right to freely access the law includes "a necessary right freely to copy and circulate all or part of a given law for various purposes"].) To ensure true public access to the law, the public must be free to analyze the Jury Instructions and reproduce them in other languages and formats.

The proposed changes are thus essential to complying with federal copyright law, to serving the goals of the JCC, and to protecting public access to the law.

## **1. Text of the Proposed Rule**

The current language of Rule 2.1050(c) implies, and multiple notices on the Jury Instructions and associated web pages assert, copyrights in the Jury Instructions. As explained below in Section 2, however, these copyrights do not exist. Public Resource therefore respectfully requests the following changes.

### **1.a. Revisions to Rule 2.1050(c) to Reflect the Uncopyrightability of the Jury Instructions**

As currently written, Rule 2.1050(c) implies copyrights that do not exist under federal copyright law. While the rule states the JCC's intention to give the public access to the Jury Instructions, it also allows the JCC to take steps to protect a copyright interest in those same instructions. Public Resource therefore respectfully requests the following changes to the current rule (with strike-through indicating deletions and underlining indicating insertions):

The Judicial Council must provide copies and updates of the approved jury instructions to the public on the California Courts website. The Judicial Council may contract with an official publisher to publish the instructions in both paper and electronic formats. The Judicial Council intends that the instructions be freely available for use and reproduction by parties, attorneys, and the public. The Judicial Council Jury Instructions are in the public domain and the Judicial Council does not claim copyright in them. ~~except as limited by this subdivision. The Judicial Council may take steps necessary to ensure that publication of the~~

~~instructions by commercial publishers does not occur without its permission, including, without limitation, ensuring that commercial publishers accurately publish the Judicial Council's instructions, accurately credit the Judicial Council as the source of the instructions, and do not claim copyright of the instructions. The Judicial Council may require commercial publishers to pay fees or royalties in exchange for permission to publish the instructions. As used in this rule, "commercial publishers" means entities that publish works for sale, whether for profit or otherwise.~~

Public Resource commends the JCC for Rule 2.1050(c)'s stated intention, "that the instructions be freely available for use and reproduction by parties, attorneys, and the public." The proposed changes fulfill that intention, aligning Rule 2.1050(c) with copyright law by clarifying that the Jury Instructions are in the public domain. Specifically, the changes remove mention of permissions and royalties, which imply copyright protection, while maintaining the JCC's right to contract with an official publisher or otherwise certify the accuracy of its official version of the Jury Instructions.

### **1.b. Removal of Copyright Notices Within the Jury Instructions and on the Judicial Branch Web Site**

Public Resource also requests that the JCC conform its notices about the copyright status of the Jury Instructions with the law by removing all copyright claims from the Jury Instruction documents and corresponding web pages.

Multiple notices attribute copyrights in the Jury Instructions to the JCC or LexisNexis Matthew Bender & Company ("**Matthew Bender**"). These include notices in the CACI and CALCRIM documents themselves, a "Notice to Users" on the main web page hosting the Jury Instructions, and a notice on the web page for CACI. These notices assert copyrights that do not exist under federal copyright law. Accordingly, these notices are invalid, and potentially confusing to the public as to how individuals and organizations may "use" or "reproduce" the Jury Instructions. (Cal. Rules of Court, rule 2.1050, subd. (c).) Public Resource therefore requests the removal of all the notices and attributions described below and any other notices that may exist that assert copyright in the Jury Instructions.

#### **1.b.1. CACI Title Page Notices**

Public Resource requests that the JCC remove the following CACI Title Page Notices, which appear on the title pages of all print and digital editions of CACI:

© 2020 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Life Expectancy Tables, Table of Statutes, Table of Cases, Index, or the Tables of Related Instructions.

© 2020, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed by Matthew Bender & Company to the jury instructions, verdict forms, Directions for Use, Sources and Authority, Secondary Sources, User's Guide, Life Expectancy Tables, or Disposition Table.

(Judicial Council of Cal., Civil Jury Instructions (2020) p. ii.) These notices attribute various copyrights in CACI to the Judicial Council or Matthew Bender. (*Ibid.*) Public Resource requests removal of the CACI Title Page Notices because they assert copyrights that do not exist under federal copyright law.

#### 1.b.2. CACI “Footer Attributions”

Public Resource also requests that the JCC remove the attributions to either the JCC or Matthew Bender on the footer of each page of CACI. Currently, these “Footer Attributions” appear as follows in the PDF version of CACI available on the Judicial Branch web site (“**CACI PDF**”):

Copyright Judicial Council of California

(Judicial Council of Cal., Civil Jury Instructions (2020) p. 1.) Or:

This version provided by LexisNexis® Matthew Bender®, Official Publisher,  
800-533-1637, store.lexisnexis.com, for public and internal court use

(Judicial Council of Cal., Civil Jury Instructions (2020) p. xxxviii.) These footer attributions appear to express use rights.<sup>1</sup> (Footer attributions do not appear in CALCRIM and appear differently in CACI editions published by different platforms.<sup>2</sup>)

Public Resource requests removal of these footer attributions from each page of CACI because they suggest copyrights that do not exist under federal copyright law.

#### 1.b.3. CALCRIM Notices

Public Resource also requests that the JCC remove the following notices, which appear on the title pages of all print editions of CALCRIM and of the PDF of CALCRIM available on the Judicial Branch web site (“**CALCRIM PDF**”):

Copyright 2020 by the Judicial Council of California. No copyright is claimed in the Tables of Related Instructions, Table of Cases, Table of Statutes, or Index.

Copyright 2020, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed to the text of the jury instructions, bench notes,

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<sup>1</sup> Public Resource interprets these footer attributions as intending to claim copyright, though neither is in the form of a copyright notice: neither attribution includes a publication year; additionally, the Matthew Bender footers do not include the symbol ©, “copyright” or “copr.” to indicate a copyright. (See § 401.)

<sup>2</sup> (Compare Judicial Council of Cal., Civil Jury Instructions (August 2020) Instruction 1300 (West) [including footers “© 2020 by the Judicial Council of California. All rights reserved. See front matter for a listing of Judicial Council Task Force and Advisory Committee members who have contributed to these jury instructions.”; and “© 2020 Thomson Reuters. No claim to original U.S. Government Works.”] with Judicial Council of Cal., Civil Jury Instructions (2020) p. xxxviii [“This version provided by LexisNexis® Matthew Bender®, Official Publisher, 800-533-1637, store.lexisnexis.com, for public and internal court use.”].)

authority, other Task Force and Advisory Committee commentary, or references to secondary sources.

(Judicial Council of Cal., Criminal Jury Instructions (2020) p. ii.)

The new 2020 CALCRIM Supplement also includes the following notice:

© 2020 by the Judicial Council of California. No copyright is claimed in the Tables of Related Instructions, Table of Cases, Table of Statutes, or Index.

© 2020, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed to the text of the jury instructions, bench notes, authority, other Task Force and Advisory Committee commentary, or references to secondary sources.

(Judicial Council of Cal., Criminal Jury Instructions (Sept. 2020 supp.) p. ii.)

Similar to the CACI Title Page Notices, these CALCRIM Notices assert copyrights attributed to the JCC and Matthew Bender. (Judicial Council of Cal., Criminal Jury Instructions (Sept. 2020 supp.) p. ii.) Public Resource requests removal of the CALCRIM Notices because they assert copyrights that do not exist under federal copyright law.

#### 1.b.4. Web Page Notices

There are various additional copyright notices on the California Judicial Branch web site related to the Jury Instructions. Public Resource requests the removal of these notices. A “Notice to Users” appears on the California Jury Instructions homepage. It states:

The Judicial Council of California owns the copyright in the Jury Instructions, and in posting the Jury Instructions on the Worldwide Web, the Judicial Council seeks to make the instructions available to the public and hereby grants members of the public a nonexclusive license to reproduce or modify the jury instructions, except as limited hereinafter.

The nonexclusive public license granted in the preceding paragraph does not extend to any commercial publisher for purposes of reproducing the instructions (in any format), preparing derivative works based on them, or publicly distributing or displaying copies of them. The Judicial Council will consider licensing commercial publishers on a case-by-case basis. For purposes of this license, “commercial publishers” means entities that publish works for sale, whether for profit or otherwise.

(Cal. Jury Instructions, *Home*, <<https://perma.cc/M465-S2QZ>> [as of Oct. 8, 2020].) This notice asserts that the JCC owns a copyright in the Jury Instructions, *ibid.*, which is incorrect. Based on the asserted copyright, the Notice to Users also purportedly grants the public a nonexclusive license that does not extend to any “commercial publisher.” (*Ibid.*) The definition of commercial publisher is broad and unclear; more importantly, public domain materials are available to all, including commercial actors. Public Resource requests that this Notice to Users be removed or modified to state clearly that the Jury Instructions are in the public domain.

The web page that links to the CACI PDF includes another set of copyright notices:

© 2018-2019 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or the Tables of Related Instructions.

© 2018-2019, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed to the text of the jury instructions and verdict forms, Directions for Use, Sources and Authority, or other Advisory Committee commentary, User's Guide, Life Expectancy Tables, or Disposition Table.

(Cal. Civil Jury Instructions, *Home*, <<https://perma.cc/GK6H-756N>> [as of Oct. 8, 2020].) (The web page that links to CALCRIM does not include any copyright notice.) Public Resource requests removal of these notices because they assert copyrights that do not exist under federal copyright law.

To comport with copyright law and provide clarity to the public, Public Resource requests the proposed changes to Rule 2.1050(c) and the removal of all copyright notices and attributions in the Jury Instructions and all associated web pages.

## **2. Description of the Problem to Be Addressed**

The problem to be addressed is twofold. As currently written, Rule 2.1050(c) implies that copyright protection is available for the Jury Instructions. Following that implication, various notices on the Jury Instructions and on the corresponding Judicial Branch web pages claim copyright in the Jury Instructions.

But the Jury Instructions are not eligible for copyright protection, for at least three reasons. First, because law is not copyrightable, and the Jury Instructions are law, the Jury Instructions are not eligible for copyright protection. Second, because the JCC authored the Jury Instructions in its judicial capacity, the Jury Instructions, whether or not they are law, are not copyrightable under the government edicts doctrine. Third, the Jury Instructions are insufficiently original to warrant copyright protection.

The Supreme Court's recent decision in *Georgia v. Public.Resource.Org, Inc.*, *supra*, removed any ambiguity about whether documents such as the Jury Instructions are protectable by copyright law: they are not. (See 140 S.Ct. at p. 1504.) Following the Court's decision in that case, it is time for the JCC to revise Rule 2.1050(c) and remove the copyright notices on the Jury Instructions and related web pages.

### **2.a. The Jury Instructions Are Ineligible for Copyright Because the Law Belongs to the Public Domain.**

First, the Jury Instructions are not copyrightable because they constitute "a statement or compendium of the law." (Judicial Council of Cal., Civil Jury Instructions (2020) p. 1.) Under both longstanding and recent precedent, law is in the public domain.

It is well settled that “no one can own the law.” (*Georgia, supra*, 140 S.Ct. at p. 1507.) In 1834, the Supreme Court rejected a claim of copyright ownership in judicial opinions and stated that judges “cannot confer on any reporter any such right.” (*Wheaton v. Peters* (1834) 33 U.S. 591, 668.) In 1888, in *Banks v. Manchester*, the Court expanded on *Wheaton* to preclude copyright in all judicial works, including judicial opinions and nonbinding explanatory materials, whether “a declaration of unwritten law, or an interpretation of a constitution or statute.” ((1888) 128 U.S. 244, 253.)

Because the “authentic exposition and interpretation of the law” is “binding [for] every citizen,” *Banks, supra*, makes clear that the law must be “free for publication to all.” (128 U.S. at p. 253.) Drawing on this foundational principle, the Court of Appeals for the Fifth Circuit, in an en banc decision, “read *Banks, Wheaton*, and related cases consistently to enunciate the principle that ‘the law,’ whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.” (*Veeck v. Southern Bldg. Code Cong. Internat., Inc.* (5th Cir. 2002) 293 F.3d 791, 800.)

The Jury Instructions are law: they restate what is contained in statutes and judicial opinions and communicate that law to juries, who use the Instructions to apply the law to the facts of a case to make decisions. Because the Jury Instructions are “an accurate statement of the law,” the Jury Instructions belong to the public domain. (Judicial Council of Cal., Civil Jury Instructions (2020) p. 1.)

## **2.b. The Jury Instructions Are Ineligible for Copyright Because They Are Government Edicts Authored by the JCC in Its Judicial Capacity.**

Under copyright law’s government edicts doctrine, the JCC cannot claim copyright in the Jury Instructions because the JCC authored them while acting in its official, judicial capacity. This is true whether the Jury Instructions are the law or simply legal materials that do not have the force of law. (See *Georgia, supra*, 140 S.Ct. at p. 1506.)

Copyright protection is only available for “original works of authorship.” (17 U.S.C. § 102(a).)<sup>3</sup> The government edicts doctrine provides that government officials cannot, for purposes of section 102, subdivision (a) of the Copyright Act, “author” the works they create in carrying out their official duties; they therefore cannot claim copyright in these works. (*Georgia, supra*, 140 S.Ct. at p. 1504.) “[C]opyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.” (*Id.* at p. 1508.) This applies regardless of whether the materials in question carry the force of law. (*Id.* at p. 1506.) The JCC, acting under authority given to it by § 6 of the California Constitution, produced the Jury Instructions while acting in its judicial capacity. The Jury Instructions as a whole are thus uncopyrightable government edicts that belong to the public domain.

In *Georgia, supra*, the United States Supreme Court considered the copyrightability of annotations in the Official Code of Georgia Annotated (“OCGA”). Neither party challenged that the statutory portions of the OCGA were in the public domain. (*Code Revision Com. for Gen.*

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<sup>3</sup> All further statutory references are to Title 17 of the United States Code unless otherwise indicated.

*Assem. of Georgia v. Public.Resource.Org, Inc.* (11th Cir. 2018) 906 F.3d 1229, 1232, *aff'd sub nom. Georgia*.) But while Georgia did not assert copyright in the statutory text or numbering of the OCGA, it claimed that the annotations were copyrightable because they did not carry the “force of law.” (*Georgia, supra*, 140 S.Ct. at p. 1511.) The Court disagreed, holding that the annotations, which were authored by the Georgia Code Revision Commission (“**Commission**”), were not copyrightable. (*Id.* at p. 1504.)

To determine whether the annotations in the OCGA were government edicts that belonged to the public domain, the Court first determined whether the Commission was a government entity or official ineligible for copyright authorship. (*Georgia, supra*, 140 S.Ct. at p. 1508.) It found that the Commission, a Georgia-state entity comprised of legislators and others, funded by the legislative branch and staffed by Georgia’s Office of Legislative Counsel, indeed qualified as a government entity (there, a legislator) engaged in the creation of law. (See *id.* at pp. 1504, 1508.) Second, the Court evaluated whether the Commission produced the OCGA within the course of its official duties. (*Id.* at p. 1509.) The Court found that it did because the Commission was acting in its legislative capacity when it produced the OCGA. (*Ibid.*) The Court found that the Commission authored the annotations in its official, legislative capacity even though Matthew Bender prepared them in the first instance pursuant to a work-for-hire agreement. (See *id.* at p. 1508.) Accordingly, the entire OCGA, including the annotations, was a government edict and therefore not copyrightable. (*Ibid.*)

Just as no copyright could be claimed in the statutory portions of the OCGA, the annotations to the OCGA, or in judicial opinions and their headnotes and syllabi, the JCC cannot copyright the Jury Instructions, because it authored them while acting in its official, judicial capacity. (See *Georgia, supra*, 140 S.Ct. at pp. 1508–1509; *Banks, supra*, 128 U.S. at p. 253.) This is true with respect to all the components of the Jury Instructions, not just the text of the jury instructions themselves: other components, such as forms, tables, indices, and guides, are analogous to the OCGA annotations in *Georgia* and the headnotes and syllabi in *Banks*. Accordingly, the Jury Instructions as a whole are government edicts and belong to the public domain.

#### 2.b.1. The Jury Instructions Are Created by the JCC, Which Is a Judicial Entity.

The first step in determining whether the government edicts doctrine applies is whether the author was a judicial, legislative, or other qualifying governmental official or entity. (*Georgia, supra*, 140 S.Ct. at p. 1508.) The author of the Jury Instructions is the JCC. Specifically, the authors are committees of the JCC—the Advisory Committee on Civil Jury Instructions and the Advisory Committee on Criminal Jury Instructions (collectively, the “**JCC Advisory Committees**”)—which it established to perform “duties of the council authorized or imposed by law.” (Gov. Code § 68501; Judicial Council of Cal., Criminal Jury Instructions (2020) p. i; Judicial Council of Cal., Civil Jury Instructions (2020) p. i.) In addition, the JCC endorses the Jury Instructions, maintains the process for updating and amending the Jury Instructions, and circulates proposed amendments to the Jury Instructions for public comment before publication. (Cal. Rules of Court, rule 2.1050, subs. (b), (d).)

The JCC is a government entity for purposes of the government edicts doctrine. The California Constitution establishes the JCC under the judicial power of the Supreme Court. (Cal. Const. art.



VI, § 6.) The majority of voting members of the JCC are judges, including the Chief Justice, one other justice of the Supreme Court, three justices of the Court of Appeal, and ten Superior Court judges. (Cal. Const. art. VI, § 6, subd. (a).) The majority of the members of the JCC Advisory Committees are California Court of Appeal justices and Superior Court judges. (Judicial Council of Cal., Civil Jury Instructions (2020) p. xix; Judicial Council of Cal., Criminal Jury Instructions (2020) p. v.)

The JCC and the JCC Advisory Committees also have non-judge members. These include practicing attorneys, academics, and, in the case of the JCC, one member from each house of the Legislature. (Cal. Const. art. VI, § 6, subd. (a); Judicial Council of Cal., *Judicial Council Members*, <<https://perma.cc/TBJ3-Q9YA>> [as of Oct. 8, 2020]; Judicial Council of Cal., Civil Jury Instructions (2020) p. xix; Judicial Council of Cal., Criminal Jury Instructions (2020) p. v.) This membership make-up is analogous to that of the Commission in *Georgia*: the majority of Commission members were legislators, but it also included non-legislator members. (See *Georgia*, *supra*, 140 S.Ct. at p. 1504.) The Court nonetheless concluded that the Commission was a legislative entity. (*Id.* at p. 1508.) Similarly, the JCC is a judicial entity for purposes of the government edicts doctrine. (See *ibid.*)

The contributions of individual JCC Advisory Committee members to the Jury Instructions are also analogous to the *Georgia* Commission members' contributions to the OCGA. There, legislators, legislative staff, non-legislators, and representatives from the publisher Matthew Bender contributed to the OCGA. (*Georgia*, *supra*, 140 S.Ct. at p. 1505.) Here, in much the same way, the JCC Advisory Committees were “assisted by a group of staff attorneys” and by Matthew Bender. (See *id.*; Judicial Council of Cal., Criminal Jury Instructions (2020) p. ix; Judicial Council of Cal., Civil Jury Instructions (2020) p. xxiii.) Although, in *Callaghan v. Myers* (1888) 128 U.S. 617, 647, the United States Supreme Court protected a non-judge's copyright interest in “the result[s] of [the author's] intellectual labor,” the situation here is distinguishable because the staff attorneys and non-judges who assisted in the preparation of the Jury Instructions worked under the JCC's authority, as set forth in California Rule of Court 10.70. (See *id.* at pp. 645–647.)

The approval processes for the OCGA and the Jury Instructions are also analogous. Just as the legislature approved the OCGA in *Georgia*, *supra*, the JCC is responsible for approving the Jury Instructions and issues them in its own name. (See 140 S.Ct. at p. 1508.) This further demonstrates that the JCC is ultimately in charge and is therefore the author of the Jury Instructions, regardless of any participation by non-judges.

Finally, the JCC's funding source also indicates that it acts as an extension of the judiciary when it writes the Jury Instructions. The JCC's funding is appropriated under California's judicial branch. Like in *Georgia*, *supra*, where the Commission received funding through appropriations “provided for the legislative branch of state government,” Section 1 of the California Budget Act of 2020 lays out appropriations “[f]or support of [the] Judicial Branch,” then specifies the California Supreme Court, the Courts of Appeal, and the JCC. (See 140 S.Ct. at p. 1504; Assem. Bill No. 89 (2019–2020 Reg. Sess.) § 1.)

The JCC is established by the California Constitution, receives its funding through the Judicial Branch, has a majority-judges membership, and authored the Jury Instructions through JCC

Advisory Committees charged to “perform duties of the JCC authorized or imposed by law.” (Cal. Rules of Court, rule 10.70; Gov. Code § 68501.) The JCC is therefore an extension of the judicial branch and an official government entity for purposes of the government edicts doctrine.

#### 2.b.2. The JCC Produced the Jury Instructions in the Discharge of Its Judicial Duties.

The second step of the government edicts doctrine inquiry is to consider whether the JCC produced the Jury Instructions in the “discharge” of its judicial “duties.” (*Georgia, supra*, 140 S.Ct. at p. 1509.) The JCC did produce the Jury Instructions in the discharge of its judicial duties, because it was acting in its judicial capacity. (*Id.* at p. 1507.)

As explained above, the Jury Instructions are law and therefore cannot be owned. (See *Georgia, supra*, 140 S.Ct. at p. 1507.) But even if the Jury Instructions, or portions of the Jury Instructions, are seen as legal materials, rather than as law itself, they would still be uncopyrightable. (*Id.* at p. 1509.) Just as the non-binding annotations in *Georgia* were uncopyrightable because they were produced by the Commission in its legislative capacity (*ibid.*), here, the Jury Instructions are produced by the JCC in its judicial capacity, making them uncopyrightable government edicts.

The Jury Instructions are essential to the California judicial process: they communicate law from statutes and opinions for juries to apply to facts in making their decisions. Consequently, writing the Jury Instructions requires the JCC to “make and interpret law” and therefore to act in its judicial capacity, resulting in a government edict. (*Georgia, supra*, 140 S.Ct. at p. 1507.) As the JCC says, it “makes every effort to ensure that [the Jury Instructions] accurately state existing law.” (Cal. Rules of Court, rule 2.1050, subd. (b).) The members of the JCC’s Instructions Advisory Committees draw from their judicial expertise when evaluating case law and statutes to inform their recommended changes to the Jury Instructions. (Cal. Rules of Court, rule 10.58; *id.*, rule 10.59.) The JCC’s efforts to ensure the legal accuracy of the Jury Instructions demonstrate that it is interpreting law and therefore serving in its judicial capacity when it produces and reviews the Jury Instructions.

Under the government edicts doctrine, the JCC is a judicial entity that authored the Jury Instructions in its official, judicial capacity. The JCC therefore cannot claim copyright in the Jury Instructions because the Jury Instructions are governments edicts that belong to the public domain. Rule 2.1050(c) and the copyright notices on the Jury Instructions are therefore inaccurate.

#### 2.c. The Jury Instructions Are also Ineligible for Copyright Because They Lack Sufficient Originality.

In addition to being uncopyrightable as government edicts, the Jury Instructions are uncopyrightable because they lack sufficient originality to warrant copyright protection. Copyright protection is only available for “original works of authorship.” (§ 102(a).) The Jury Instructions, however, comprise uncopyrightable statements of the law and other components that lack sufficient originality to be copyrightable. Nor is the compilation of these uncopyrightable materials sufficiently original to merit copyright protection.

### 2.c.1. The Jury Instructions Lack Sufficient Originality to Be Copyrightable Because They Communicate the Law.

The Jury Instructions are not sufficiently original for copyright protection because they constitute “a statement or compendium of the law.” (Judicial Council of Cal., Civil Jury Instructions (2020) p. 1.)

Copyright is prohibited for works where there are only a few ways of expressing an idea, so that the idea merges with the expression of it. This merger doctrine holds that, “[w]hen the ‘idea’ and its ‘expression’ are thus inseparable, copying the ‘expression’ will not be barred.” (*Herbert Rosenthal Jewelry Corporation v. Kalpakian* (9th Cir. 1971) 446 F.2d 738, 742; see also 1 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* (2019) § 2A.05.) Because an “authoritative copy” of the law requires the “precise wording” given, law can be expressed in only a few ways, rendering it uncopyrightable under the merger doctrine. (*Veeck, supra*, 293 F.3d at p. 801.) Here, the Jury Instructions are not original enough to be eligible for copyright because the expression of the law merges together with “the ‘idea’ that constitutes . . . law.” (*ibid.*) The instructional components of the Jury Instructions—that is, the individual instructions themselves, along with the components used to apply the instructions, including the Directions for Use, User Guides, Verdict Forms, and Disposition Tables—describe the law as stated in statutes and judicial opinions. There are only limited ways in which the law encapsulated in the Jury Instructions can be organized and restated while remaining accurate and authoritative.

Nor does it matter, for purposes of copyrightability, that the JCC undertook to develop “plain English” Jury Instructions from an earlier, less-user-friendly version. (Judicial Council of Cal., Criminal Jury Instructions (2020) p. ix.) It matters only that there are very limited ways in which the Jury Instructions can be expressed and remain accurate statements of the law. (See, e.g., *Morrissey v. Procter & Gamble Co.* (1967) 379 F.2d 675, 678–679.) And as the Jury Instructions explain, “plain English” instructions retain “their status as an accurate statement of the law.” (Judicial Council of Cal., Civil Jury Instructions (2020) p. 1.)

The components used by litigants and courts to employ the Jury Instructions also lack originality. The Verdict Forms, for example, “generally track the elements of the applicable cause of action . . . to obtain the jury’s finding on the elements defined in the instructions” (Judicial Council of Cal., Civil Jury Instructions (2020) p. 4), and the Disposition Tables are used to facilitate courtroom proceedings. Because they must so closely track the law, components like the Verdict Forms and Disposition Tables may only be expressed in a limited number of ways and are not sufficiently original to be eligible for copyright.

### 2.c.2. Organizational Components of the Jury Instructions also Lack Sufficient Originality to Be Copyrightable.

In addition to the components of the Jury Instructions that directly express the law, the Jury Instructions also include organizational components, such as Tables of Contents, Tables of Cases, and Indices. (See Judicial Council of Cal., Civil Jury Instructions (2020); Judicial Council of Cal., Criminal Jury Instructions (2020).) These components also lack the originality required for copyrightability.

“[O]riginality requires independent creation and a modicum of creativity.” (*Feist Publications, Inc. v. Rural Telephone Service Co.* (1991) 499 U.S. 340, 346.) Should a work fail to exceed this originality threshold, it does not qualify for copyright protection. (§ 102(a).) The tables and indices contained within the Jury Instructions alphabetically or numerically organize uncopyrightable material, such as Instruction titles, Instruction numbers, Verdict Form numbers and titles of cases. None of these contains copyrightable subject matter. Instead, they contain a mix of unoriginal facts, short phrases, titles, listings of contents, and the like. (See 17 U.S.C. § 102; *Feist*, at p. 363; 37 C.F.R. § 202.1(a) [stating that “[w]ords and short phrases such as names, titles, and slogans . . . [and] mere listing of ingredients or contents” are ineligible for copyright registration].) Nor do the tables and indices qualify as copyrightable compilations of uncopyrightable material, because they do not “select[], coordinate[], or arrange[]” material in an original manner. (17 U.S.C. § 101.) Rather, they merely arrange uncopyrightable elements using “entirely typical” alphabetical and numerical organization that does not pass the originality threshold. (*Feist*, at p. 362.) Similar to *Feist*, where resident names, towns, and telephone numbers were organized alphabetically in a phone book, components including the Table of Cases and Index are organized alphabetically, and the Table of Contents is organized numerically. (See *id.* at p. 362.) These organizational components are therefore ineligible for copyright protection.

### 2.c.3. The Jury Instructions Are Compilations of Uncopyrightable Materials That also Lack Sufficient Originality to Be Copyrightable.

The Jury Instructions as a whole also are ineligible for copyright protection as compilations.

Taken as whole documents, CACI and CALCRIM each compile uncopyrightable materials: the text of the jury instructions; corresponding forms and other tools for users; and the uncopyrightable names, titles, and lists of contents that make up the organizational materials. These compilations are also not sufficiently original to be separately eligible for copyright protection. Rather, the organization of the Jury Instructions is dictated by their functionality. The instructions themselves are numbered and organized numerically within the Jury Instructions—just as they must be cited in court filings and referred to in court proceedings. (See Cal. Style Manual (4th ed. 2000) § 3:5.) Similarly, the placement of the various tables, indices and forms reflects their purpose for users of the Jury Instructions during court proceedings. Such a functional arrangement is not eligible for copyright.<sup>4</sup>

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<sup>4</sup> (See, e.g., *Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.* (2d Cir. 1991) 936 F.2d 671, 673 [holding that numerical horse race data chart, arranged functionally, was insufficiently original to be copyrightable]; *Nat. Nonwovens, Inc. v. Consumer Products Enterprises, Inc.* (D. Mass. 2005) 397 F. Supp. 2d 245, 256 [holding that wool-boiling instructions uncopyrightable where, “[e]ven when the work is viewed as a whole, the instructions remain purely functional. The decision to divide the directions into steps and to number each step is hardly a creative choice, but rather a standard method of providing clarity in instructions.”]; *Decorative Aides Corp. v. Staple Sewing Aides Corp.* (S.D.N.Y. 1980) 497 F. Supp. 154, 157 [finding that similarity between drapery instruction sheets “cannot be the basis of an infringement charge” because similarity “dictated by functional considerations”].)

In sum, the Jury Instructions are not eligible for copyright protection; they are in the public domain. The Jury Instructions state the law, which may not be copyrighted. The Jury Instructions are also uncopyrightable government edicts, authored by the JCC in its judicial capacity. In addition, the Jury Instructions are not sufficiently original to be protected by copyright, whether they are broken down into separate components or viewed as a whole. As a result, the language of Rule 2.1050(c), and the various copyright notices on the Jury Instructions documents and web pages, are improper.

### **3. Proposed Solution**

As described above in section 1, Public Resource proposes that the JCC revise Rule 2.1050(c) to eliminate any suggestion that the JCC claims a copyright in the Jury Instructions, and that it remove all copyright assertions from the Jury Instructions themselves and from the corresponding web sites.

#### **3.a. The Proposed Solution Is Necessary Because the Jury Instructions Are in the Public Domain.**

As explained above in section 2, the Jury Instructions are not eligible for copyright; they are in the public domain. Yet Rule 2.1050(c) implies, and notices on the Jury Instructions and corresponding web sites claim, that the Jury Instructions are covered by copyright. To solve this problem, it is necessary to modify Rule 2.1050(c) and remove the copyright notices.

#### **3.b. The Proposed Solution Would Further the JCC’s Goal of Increasing Public Access to the Law.**

The proposed changes also further the JCC’s commendable goal of increasing public access to the law to the benefit of all Californians. Rule 2.1050(c) and the Notice to Users both affirm the JCC’s intention to make the Jury Instructions accessible to the public. (Cal. Rules of Court, rule 2.1050, subd. (c) [“The Judicial Council intends that the instructions be freely available for use and reproduction by parties, attorneys, and the public . . . .”]; Cal. Jury Instructions, *Home*, <<https://perma.cc/M465-S2QZ>> [as of Oct. 8, 2020] [“the Judicial Council seeks to make the instructions available to the public . . . .”].) This reflects the JCC’s priority of lowering barriers to the law, also identified in, for example, the JCC’s “recommended best practices” for increasing access to California law and judicial institutions. These recommended best practices include:

1. Identify and work to eliminate all barriers to access.
2. Broaden and facilitate access to, understanding of, and trust and confidence in the judicial branch and court-connected programs and services for all persons and entities served by the judicial branch.
3. Work to prevent bias, and the appearance of bias, in all parts of the judicial branch.
4. Work to achieve procedural fairness in all types of cases.
- ...
6. Implement, enhance, and expand multilingual and culturally responsive programs, including educational programming, self-help centers, and interpreter services.
- ...

10. Ensure that judicial branch facilities are accessible to all court users and accommodate the needs of persons with disabilities.
11. Increase public access to court information and services.

(Judicial Council of Cal., *The Strategic Plan for California's Judicial Branch*, pp. 5–6 <<https://perma.cc/J9MH-MKS9>> [as of Oct. 8, 2020] (hereafter Strategic Plan).) The JCC developed these best practices because “the [judicial] branch should reflect the diversity of the state and continue efforts to enhance public trust and confidence.” (*Id.* at p. 5.)

Public Resource agrees that unencumbered access to the law is essential; it also agrees that this is particularly true for jury instructions. Jury instructions “are important because together they state the law that [jurors] will use” to decide cases that affect the lives of their fellow Californians. (CACI No. 5000.) Public Resource applauds the effort the JCC undertook to develop instructions that are “both legally accurate and understandable to the average juror.” (Judicial Council of Cal., *Civil Jury Instructions* (2020) p. xxiii.)

The proposed rule changes would further the JCC’s goals to, for example, “eliminate all barriers to access” and “achieve procedural fairness.” (Strategic Plan, *supra*, pp. 5–6.) Clarifying that the Jury Instructions are in the public domain would encourage the public to reproduce, translate, and reformat the Jury Instructions to best serve California’s diverse populace.

Public Resource’s proposed solution would facilitate the creation of more usable, free versions of the Jury Instructions. The current Jury Instruction PDFs are thousands of pages long, making them difficult to read, index, and use. A pro se litigant preparing for trial, for example, will often need to refer to multiple different instructions quickly and repeatedly, something that cannot be done easily with the available PDFs. Parties that rely on publicly available jury instructions, including some criminal defendants, pro se litigants, activists, journalists, and others, would benefit from the removal of all copyright claims, so that private parties—non-profit or commercial—could innovate and create versions that are easier to use and free.

Removing all copyright claims and notices would also support translating the Jury Instructions into multiple languages and formats. As stated in the Strategic Plan guiding principles, “[T]here is an increased need for services for non-English speaking users and for the elderly, as well as for cultural sensitivity and culturally appropriate programs and services that yield more effective outcomes.” (Strategic Plan, *supra*, at p. 3.) As Chief Justice Tani Cantil-Sakauye has pointed out, more than 200 languages and dialects are spoken in California, and “roughly 20 percent of us (nearly 7 million) have English language limitations.” (Judicial Council of Cal., *Strategic Plan for Language Access in the California Courts* (2015) p. 5.) Adopting this Proposal would make it easier for third parties to translate the Jury Instructions into non-English languages. This would expand opportunities for members of the public to have access to the Jury Instruction materials in languages or dialects relevant to their communities.

The proposed rule changes would further the JCC’s strategic goals by encouraging the public to reproduce, translate, and reformat the Jury Instructions in ways that better serve California’s diverse populace.

### **3.c. The Proposed Solution Is the Only Adequate Solution.**

The proposed solution—taking steps to clarify that the Jury Instructions are in the public domain—is the only way to adequately resolve the legal and policy problems identified in this Proposal.

First, apparent claims of copyright in the Jury Instructions are inaccurate and improper under United States copyright law, so no partial solution will suffice. Public domain materials are free for anyone to use, unfettered by copyright limitations. Today, however, the Jury Instructions are not yet fully available to the public. Although they are available on the JCC’s web site, the limitations contemplated by Rule 2.1050(c) and the associated copyright notices give the impression that the JCC and Matthew Bender control their use.

Second, the current inaccurate notices likely deter third parties from disseminating the Jury Instructions and from creating better, more accessible versions. Even though the current copyright notices are improper, the consequent threat of liability may deter those who wish to modify or reproduce the Jury Instructions. When a copyright is infringed, the copyright holder may be entitled to steep statutory damages and injunctive relief; in some cases, even criminal penalties apply. (See §§ 504–506.) This may chill members of the public, especially those who lack resources or access to counsel, from using and reproducing the Jury Instructions in ways that would be valuable to the public.

Third, the purported public license contained in the Notice to Users is an inadequate solution. Public Resource commends the JCC for communicating that the Jury Instructions should be relatively free to use through the Notice to Users, which purports to limit only commercial uses. The Notice to Users is not, however, sufficient for true public access.

As an initial matter, the Notice to Users and other copyright notices are inconsistent, confusing, and difficult to follow. The Notice to Users, for example, states that the JCC intends to make the Jury Instructions available to the public, and purports to grant “members of the public a nonexclusive license to reproduce or modify the jury instructions . . .” (Cal. Jury Instructions, *Home*, <<https://perma.cc/M465-S2QZ>> [as of Oct. 8, 2020].) But neither the statement supporting public availability, nor the purported license is present on the Jury Instructions themselves. Instead, the CACI and CALCRIM PDFs contain the copyright notices described above. Members of the public might see the blanket copyright claims on the PDFs and reasonably assume that they cannot use the Jury Instructions without risking infringement. Or members of the public might *not* see some of the notices; given the many notices scattered throughout the PDFs and web pages, it would be difficult for someone who wished to use the Jury Instructions to find all the different copyright notices that appear to apply. And even if potential users were to locate all the different copyright notices, they would find it difficult to



understand what the notices claim to prohibit. Some of the copyright notices on the web site and on the CACI materials, for example, are outdated;<sup>5</sup> others conflict with one another.<sup>6</sup>

The Notice to Users also purports to prohibit unlicensed commercial uses of the Jury Instructions. This is incorrect: public domain material may be used freely by all, including commercial users. States do not and should not have the power to control the distribution and use of the law, upon which everyone, including private entities, depends. Further, the provided definition of commercial publishers is broad, unclear, and could capture even non-profits that seek to recoup the cost of creating accessible versions of the Jury Instructions by offering them for sale. (Cal. Jury Instructions, *Home*, <<https://perma.cc/M465-S2QZ>> [as of Oct. 8, 2020] [“For purposes of this license, ‘commercial publishers’ means entities that publish works for sale, whether for profit or otherwise.”].) As a result, it is unclear what actions individuals or organizations may take with regard to using or reproducing the Jury Instructions. A non-profit, for instance, that translated the Jury Instructions for the community it served and then sold the work only to recoup costs would seem to violate the non-exclusive license described in the Notice to Users.

In any case, commercial publishers should also be able to access the law freely. Private entities often create materials that help explain the law and enrich the legal universe in ways that assist legal practitioners and those they serve. The public domain supports free competition among commercial publishers; clarifying that the Jury Instructions are free to use would generate opportunities for publishers to create more accessible and usable versions of the Jury Instructions, including versions tailored for markets that are ignored currently. The JCC itself could, in theory, create accessible versions of the Jury Instructions and translate them into California’s 200-plus languages. But it would be much more efficient to eliminate confusion and encourage third parties to innovate by clarifying that the Jury Instructions are in the public domain. Limiting commercial publishers’ ability to use and modify the Jury Instructions only serves to deter private innovation and reduce competition in legal research services.

Public Resource’s proposed solution would fix these problems. Clarifying that the Jury Instructions are in the public domain would address all of these issues—liability fears, confusion, and lack of competition—at once. And removing copyright claims from the Judicial Branch web site and from the Jury Instructions themselves would address the liability fears and confusion

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<sup>5</sup> (See, e.g., Civil Jury Instructions, *Home*, <<https://perma.cc/GK6H-756N>> [as of Oct. 8, 2020] [“© 2018-2019 by the Judicial Council of California.”]).

<sup>6</sup> (Compare Cal. Jury Instructions, *Home*, <<https://perma.cc/M465-S2QZ>> [as of Oct. 8, 2020] [Notice to Users purportedly granting the public “a nonexclusive license to reproduce or modify the jury instructions . . . .”] with Judicial Council of Cal., Civil Jury Instructions (2020) p. 1 [footer attribution claiming “Copyright Judicial Council”]; compare also Judicial Council of Cal., Civil Jury Instructions (2020) p. ii [notifying “No copyright is claimed by the Judicial Council of California to the Table of Contents, *Life Expectancy Tables*, Table of Statutes, Table of Cases, Index, or the Tables of Related Instructions,” *italics added*] with Judicial Council of Cal., Civil Jury Instructions (2020) p. 970 [notifying “Copyright Judicial Council of California” at bottom of page entitled “Life Expectancy Table — Male”].)



that currently could arise for users who wish to reproduce the instructions. Consequently, the proposed solution would encourage competition, stimulate innovation, and increase access to California law.

#### **4. Any Likely Implementation Problems**

Public Resource does not foresee likely implementation problems. Any potential implementation challenges posed by the Proposal are minimal and reasonable. To make the proposed changes, the JCC would need to modify the digital and print versions of the Jury Instructions to remove any copyright claims or notices. It would also need to remove any such claims or notices from the Jury Instructions web site. Public Resource respectfully submits that this burden is reasonable, given the significant societal costs of the JCC claiming copyright in the Jury Instructions, and given that such claims are not permitted under copyright law.

Additionally, the JCC would maintain the ability to certify an official version of the Jury Instructions. There is therefore no need for concern that implementing this Proposal would lead to the distribution of inaccurate versions of the Jury Instructions or versions falsely attributed to the JCC.

#### **5. Any Need for Urgent Consideration**

The COVID-19 pandemic demonstrates the urgent need for the JCC to address Public Resource's request. During the pandemic, access to legal materials has become even more difficult than usual. In response to the pandemic, nearly all courts in California have had to limit public access, restrict hearings, and limit civil and criminal jury trials. Law libraries across the state have been closed to the public due to state and local health orders, including the Los Angeles County Law Library, the San Francisco City and County Law Library, and the Santa Clara County Law Library.<sup>7</sup> The digital versions of the Jury Instructions on the JCC web site are now the only easily accessible versions for some attorneys, pro se litigants, journalists, and others.<sup>8</sup> Public Resource therefore respectfully submits that it is urgent to make the Jury Instructions freely accessible and to clear away barriers for third parties that wish to create and distribute new versions.

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<sup>7</sup> (Los Angeles Law Library, *Locations and Hours* <<https://perma.cc/6X82-WARC>> [as of Oct. 8, 2020]; San Francisco Law Library, *Home* <<https://perma.cc/3Z6J-5CSF>> [as of Oct. 8, 2020]; Santa Clara County Law Library, *Home* <<https://perma.cc/VJC8-VPCM>> [as of Oct. 8, 2020].)

<sup>8</sup> LexisNexis Matthew Bender's official print editions of CACI and CALCRIM cost \$297.00 and \$293.00, respectively. This cost is a barrier for many individuals and groups. (LexisNexis Store, *Judicial Council of California Civil Jury Instructions (CACI) Purchase Page* <<https://perma.cc/5CBM-FWGY>> [as of Oct. 8, 2020]; LexisNexis Store, *Judicial Council of California Criminal Jury Instructions (CALCRIM) Purchase Page* <<https://perma.cc/95WP-EHBC>> [as of Oct. 8, 2020].)

## **6. Known Proponents and Opponents**

Public Resource's proposal enjoys strong support. Proponents are detailed in the following attachments:

**Attachment A** is a letter of support from 11 public interest organizations that seek to improve public access to the law: the Electronic Frontier Foundation, Fix the Court, Public Citizen, the First Amendment Coalition, Public Knowledge, Free Law Project, Creative Commons, the American Civil Liberties Union Foundation of Northern California, the American Civil Liberties Union Foundation of San Diego & Imperial Counties, the American Civil Liberties Union Foundation of Southern California, and the Wikimedia Foundation.

**Attachment B** is a letter of support from the Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project.

**Attachment C** is a statement of support signed by 342 law professors, law librarians, and legal practitioners, the East Bay Community Law Center, and the San Francisco Public Defender's Office.

**Attachment D** is a statement of support signed by 120 law students, as well as 12 California law student organizations: the Berkeley Law Wage Justice Clinic, the Berkeley Journal of Gender, Law & Justice; the Berkeley Technology Law Journal; the Hastings Law Journal; the Intellectual Property and Technology Law Journal at the University of San Francisco School of Law; the King Hall Intellectual Property Law Association at the University of California, Davis; the Law and Political Economy Society at the University of California, Berkeley School of Law; Law Students of African Descent at the University of California, Berkeley School of Law; Middle Eastern & North African Law Students Association at the University of California, Berkeley School of Law; Post-Conviction Advocacy Project at the University of California, Berkeley School of Law; Pilipinx American Law Society at the University of California, Berkeley School of Law; the Public Interest Law & Technology Society at the University of California, Berkeley School of Law.

**Attachment E** is a letter of support from Edward H. Schulman, former Chief Assistant State Public Defender and member of the CALJIC Committee in Los Angeles from 1985–89.

Public Resource is not aware of any opponents of this Proposal.

## **7. Any Known Fiscal Impact**

Public Resource is not aware of any cognizable fiscal impact that would result from adopting the proposed rule changes, which are necessary to comply with copyright law.

## **8. Any Known Previous Action by the Council**

Public Resource is not aware of any previous action by the JCC or Advisory Committees regarding this Proposal.

## **Conclusion**

California's Jury Instructions are not copyrightable; they belong to the public domain. Yet Rule 2.1050(c) implies otherwise, and notices throughout the Jury Instructions and on the corresponding web pages assert copyright claims. This risks public confusion, and potentially chills beneficial uses of the Jury Instructions. Public Resource respectfully requests that the JCC

address this problem by modifying Rule 2.1050(c) to reflect the uncopyrightable nature of the Jury Instructions and by taking the corresponding step of removing copyright notices from the Jury Instruction materials and related web sites. Granting Public Resource's request will ensure compliance with federal copyright law and protect the public's fundamental right to access the law.

Thank you for considering this Proposal. Please do not hesitate to contact Jennifer Urban at [jurban@clinical.law.berkeley.edu](mailto:jurban@clinical.law.berkeley.edu) or (510) 642-7338 with any questions regarding the proposed rule changes.

Sincerely,

/s/

Jennifer M. Urban

Clinical Professor of Law, Samuelson Law, Technology & Public Policy Clinic

University of California, Berkeley, School of Law

*Attorney for Public.Resource.Org*

Pronouns: she, her, hers

/s/

Jennifer A. Hewitt

Law Student, Samuelson Law, Technology & Public Policy Clinic

Pronouns: she, her, hers

/s/

Blaine Valencia

Law Student, Samuelson Law, Technology & Public Policy Clinic

Pronouns: he, him, his

**ATTACHMENT A: LETTER OF SUPPORT FROM  
11 PUBLIC INTEREST ORGANIZATIONS**

November 20, 2020

Judicial Council of California  
Attention: Chief Counsel (Rule/Form Proposal)  
455 Golden Gate Avenue  
San Francisco, California 94102-3688  
E-mail: legal-services@jud.ca.gov

**Subject: Proposal to the Judicial Council for Changes to California Rule of Court 2.1050**

Dear Chief Counsel:

We are public interest organizations that seek, in various capacities, to improve public access to information. We write in support of a proposed rule change concerning the status of the California Civil Jury Instructions and the California Criminal Jury Instructions (collectively, the “Jury Instructions”). We would like to first congratulate the Judicial Council of California for the creation and promulgation of award-winning plain language civil and criminal jury instructions that convey the law using language that is understandable to jurors. We also commend the Judicial Council of California for taking steps to make the Jury Instructions “freely available” on the Internet.

However, we are concerned that the Council is continuing to assert copyright in those instructions. Under the government edicts doctrine, law and legal materials belong to the people and are not eligible for copyright protection. *See Georgia v. Public.Resource.Org, Inc.* (2020) 140 S.Ct. 1498, 1506–1507. In particular, the law and related legal materials created by judges, lawmakers, and other government officials working in their official capacities, which clearly includes the work of the Judicial Council of California, must not be subject to copyright restrictions.

We urge the Judicial Council of California to remove all public assertions of copyright, respecting both the limits of copyright law and the mission of the California Judicial Branch: to “improve the administration of justice” (Cal. Const. art. I, § 6, subd. (d)).

We thank you in advance for your careful consideration of this matter.

Respectfully,

Electronic Frontier Foundation  
Fix the Court  
Public Citizen  
First Amendment Coalition  
Public Knowledge  
Free Law Project  
Creative Commons  
American Civil Liberties Union Found. of Northern California  
American Civil Liberties Union Found. of San Diego &  
Imperial Counties  
American Civil Liberties Union Found. of Southern California  
Wikimedia Foundation

**ATTACHMENT B: LETTER OF SUPPORT FROM THE OFFICE OF THE STATE  
PUBLIC DEFENDER, THE HABEAS CORPUS RESOURCE CENTER, AND THE  
CALIFORNIA APPELLATE PROJECT**

## Office of the State Public Defender

1111 Broadway, 10<sup>th</sup> Floor  
Oakland, California 94607-4139  
Telephone: (510) 267-3300  
Fax: (510) 452-8712



November 23, 2020

Judicial Council of California  
Attention: Chief Counsel (Rule/Form Proposal)  
455 Golden Gate Avenue  
San Francisco, California 94102-3688  
E-mail: legal-services@jud.ca.gov

Subject: Proposal to the Judicial Council for Changes to California Rule of Court 2.1050

Dear Chief Counsel:

We write in support of the request by Public.Resource.Org (Public Resource) to the Judicial Council of California (JCC) to revise California Rule of Court, Rule 2.1050(c) (Rule 2.1050(c)) to clarify that California Jury instructions, including the California Criminal Jury Instructions (CALCRIM) are in the public domain and that the JCC remove all copyright claims and notices from CALCRIM, and from related web pages on the Judicial Branch web site.

The Office of the State Public Defender (OSPD) has represented indigent defendants in their direct appeals, primarily from capital convictions, since 1976. OSPD is committed to protecting the constitutional and statutory rights of those who have been convicted of crimes and has been charged by the Legislature to “engage in efforts for the purpose of improving indigent defense.”<sup>1</sup>

The California Appellate Project in San Francisco (CAP-SF) is a non-profit corporation established by the State Bar of California in 1983 to implement the constitutional right to counsel for indigent persons facing execution. CAP-SF assists private counsel appointed by the California Supreme Court to represent indigent defendants and assists unrepresented death row inmates, including by providing advocacy as needed before counsel is appointed. CAP-SF also consults, at the request of the judiciary, on policy matters regarding indigent defense representation in capital cases.

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<sup>1</sup> Govt. Code, § 15420, subd. (b).

The Habeas Corpus Resource Center (HCRC) was established in 1998 to accept appointments in state and federal habeas corpus proceedings and to provide training and support for private attorneys who are appointed to these cases. The HCRC was created as a part of the judicial branch of the State of California.<sup>2</sup>

As Public Resource discusses in its request, the requested amendment to Rule 2.1050(c) and removal of copyright notices and warning from the Jury Instructions will increase access to those instructions. Currently indigent criminal defendants seeking access to jury instructions for their own defense must either purchase them from Matthew Bender, which is almost certainly beyond the means of an indigent defendant,<sup>3</sup> or obtain access to the instructions on the court's website, something that is impossible for an incarcerated defendant, and often very difficult for even non-incarcerated indigent defendants. For example, in 2017 45 percent of low income California's lacked home broadband access<sup>4</sup>

Whether incarcerated or not, access to critical legal materials is a fundamental need for criminal defendants. While there is a constitutional right to counsel at trial and on direct appeal, there is no such right in non-capital habeas corpus proceedings unless a court issues an order to show cause.<sup>5</sup> Moreover, while there is a right to counsel at trial, there is also a right to self-representation.<sup>6</sup> Whether unrepresented by choice or due to the lack of provision for counsel in habeas corpus proceedings, access to jury instructions is a critical tool for any self-represented defendant as errors in such instructions are a frequent issue in a direct appeal or a habeas corpus petition.

Defendants who are monolingual non-English speakers are at a particular disadvantage in this regard. As Public Resource discusses in its request, one of the potential benefits of the total removal of copyright claims from California Jury Instructions is the increased likelihood that those instructions will be translated into other languages.

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<sup>2</sup> Govt. Code, § 68660, et. seq.

<sup>3</sup> A copy of CALCRIM costs \$293. (<https://store.lexisnexis.com/categories/shop-by-jurisdiction/california-157/judicial-council-of-california-criminal-jury-instructions-calcrim-sku57779>)

<sup>4</sup> Public Policy Institute of California, "California's Digital Divide," <https://www.ppic.org/publication/californias-digital-divide/>

<sup>5</sup> See California Rules of Court, Rule 4.551(c)(2) (providing for appointment of counsel if an order to show cause is issued); Penal Code, § 68662 (providing for appointment of counsel in capital cases). See also Appointed Counsel., 6 Witkin, Cal. Crim. Law 4th, Crim Writs, § 83 (2020) ("California . . . has no constitutional provision conferring a right to counsel for those seeking collateral relief via state habeas proceedings").

<sup>6</sup> *Faretta v. California* (1975) 422 U.S. 806.



Improving and reducing the cost of access to jury instructions will also benefit the many sole or small practitioners who represent indigent defendants as court appointed counsel at trial and are virtually the sole source of representation for indigent defendants in non-capital direct appeals.

In short, removing all claims of copyright from CALCRIM will improve the ability of indigent defendants and their counsel to access legal materials critical to the defense of their cases. This will also serve the goal of the Judicial Council, stated in Rule 2.1050(c), to make jury instructions available to the public. It is also consistent with the goals set forth in the Judicial Council's strategic plan which include eliminating barriers and improving access, achieving procedural fairness, enhancing multilingual programs, and increasing public access to court information and services.<sup>7</sup>

For all of these reasons we strongly support the request by Public Resource to amend Rule 2.1050(c) and to remove all references to copyright from California Jury Instructions.

Sincerely,

/s/

Mary McComb  
State Public Defender

/s/

Joseph Schlesinger  
Executive Director  
California Appellate Project

/s/

Michael Hersek  
Executive Director  
Habeas Corpus Resource Center

/s/

Andrew Shear  
Supervising Deputy State Public Defender

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<sup>7</sup> Judicial Council of Cal., *The Strategic Plan for California's Judicial Branch*, pp. 5–6  
<https://perma.cc/J9MH-MKS9>.

**ATTACHMENT C: STATEMENT OF SUPPORT FROM LAW PROFESSORS, LAW  
LIBRARIANS, AND LEGAL PRACTITIONERS**

## **ATTACHMENT C: STATEMENT OF SUPPORT FROM LAW PROFESSORS, LAW LIBRARIANS, AND LEGAL PRACTITIONERS**

The undersigned support Public Resource's proposal to revise California Rule of Court 2.1050, subdivision (c), and remove all copyright claims and notices from the California Civil Jury Instructions, California Criminal Jury Instructions, and each volume's related web pages on the Judicial Branch web site. The Judicial Council should take these steps to clarify that California's Jury Instructions are in the public domain.

All affiliations are for identification purposes only and do not imply institutional endorsement.

### ***Law Professors and Law Librarians***

Jonathan Abel, *Associate Professor*, University of California, Hastings College of the Law

Kendra Albert, *Clinical Instructor (CA Bar #314839)*, Harvard Law School

Robin Allan, *Professor of Legal Writing*, University of California, Berkeley School of Law

Ty Alper, *Clinical Professor of Law*, University of California, Berkeley School of Law

W. David Ball, *Professor*, Santa Clara University School of Law

Jordan Barry, *Professor of Law*, University of San Diego School of Law

Cheryl Berg, *Professor of Legal Writing*, University of California, Berkeley School of Law

Mario Biagioli, *Professor*, University of California, Los Angeles

Mark G. Bilby, *Scholarly Communication Librarian*, California State University, Fullerton

Dr. Annemarie Birdy, *Copyright Counsel*, Google Inc.; *Nonresidential Fellow*, Stanford Law School Center for Internet and Society

Joanne Bloom, *Photographic Resources Librarian*, Harvard University

Dan L. Burk, *Chancellor's Professor of Law*, University of California, Irvine

Brandon Butler, *Director of Information Policy*, University of Virginia

Chris Byrne, *Head of Research & Instructional Services Wolf Law Library*, William & Mary School of Law

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Kyle K. Courtney, *Copyright Advisor*, Harvard University

Catherine Crump, *Clinical Professor of Law*, University of California, Berkeley School of Law

Gabrielle Daley, *Clinical Teaching Fellow*, University of California, Berkeley School of Law

Ben Depoorter, *Professor of Law*, University of California, Hastings College of the Law

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Statement of Support from Law Professors, Law Librarians, and Legal Practitioners, *continued*

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**ATTACHMENT D: STATEMENT OF SUPPORT FROM LAW STUDENTS  
AND LAW STUDENT ORGANIZATIONS**

## **ATTACHMENT D: STATEMENT OF SUPPORT FROM LAW STUDENTS AND LAW STUDENT ORGANIZATIONS**

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Jade Harvey, University of California, Los Angeles, School of Law, '22

Arielle Hernandez, University of California, Berkeley, School of Law, '23

**Statement of Support from Law Students and Law Student Organizations, *continued***

Meredith Huang, University of California, Berkeley, School of Law, '23  
Loc Hoang, University of California, Davis, School of Law, '22  
Parker Johnson, University of California, Los Angeles, School of Law, '22  
Ryan Jorgensen, University of California, Berkeley, School of Law, '21  
Gia Jung, University of California, Berkeley, School of Law, '21  
Natalie Kaliss, University of California, Berkeley, School of Law, '23  
Sean Kolkey, University of California, Berkeley, School of Law, '22  
Raja Krishna, University of California, Berkeley, School of Law, '21  
Joseph Kroon, University of California, Berkeley, School of Law, '22  
Fatima Ladha, University of California, Berkeley, School of Law, '23  
Joshua Laroya, University of California, Hastings College of the Law, '22  
Pauline Le, University of California, Berkeley, School of Law, '23  
Samson Lim, University of California, Berkeley, School of Law, '21  
Angela Luh, University of California, Berkeley, School of Law, '21  
Natasha Mangham, University of California, Berkeley, School of Law, '23  
Matt Menezes, University of California, Berkeley, School of Law, '23  
Jasjit Mundh, University of California, Berkeley, School of Law, '21  
Elana Muroff, University of California, Berkeley, School of Law, '23  
Samantha Murray, University of California, Berkeley, School of Law, '21  
Eliza Meredith, University of California, Berkeley, School of Law, '21  
Meet Mehta, University of California, Berkeley, School of Law, '22  
Katie Melnick, University of California, Berkeley, School of Law, '23  
Alex Mesher, University of California, Berkeley, School of Law, '22  
Henry Metro, University of California, Berkeley, School of Law, '23  
Rudi-Ann Miller, University of California, Berkeley, School of Law, '22  
Taliah Mirmalek, University of California, Berkeley, School of Law, '23

**Statement of Support from Law Students and Law Student Organizations, *continued***

Paulina Montez, University of California, Berkeley, School of Law, '23

Erin Moore, University of California, Berkeley, School of Law, '21

William MacKinnon Morrow, University of California, Berkeley, School of Law, '23

Shalev Netanel, University of California, Berkeley, School of Law, '22

Joy Navarro, University of California, Berkeley, School of Law, '22

Dante O'Connell, University of California, Berkeley, School of Law, '22

Knychelle Passmore, University of California, Berkeley, School of Law, '22

Kelsey Peden, University of California, Berkeley, School of Law, '21

Amy Reavis, University of California, Berkeley, School of Law, '22

Kelsey Reid, University of California, Berkeley, School of Law, '23

Angelika Robertson, University of California, Davis, School of Law, '23

Matthew Santos, University of California, Davis, School of Law, '22

Arman Sharif, University of California, Berkeley, School of Law, '22

Evvy Archibald Shulman, University of California, Berkeley, School of Law, '22

Carmen Sobczak, University of California, Berkeley, School of Law, '21

Samuel Ezra Sokolsky, University of California, Berkeley, School of Law, '22

Tal Ratner Solovey, University of California, Berkeley, School of Law, '22

Veronica Stoeber, University of California, Berkeley, School of Law, '22

Etele Stephan, University of California, Davis, School of Law, '23

Jennifer Sun, University of California, Berkeley, School of Law, '23

Tyler Takemoto, University of California, Berkeley, School of Law, '22

Rachel Thompson, University of California, Berkeley, School of Law, '22

Stephanie Tilden, University of California, Berkeley, School of Law, '21

Lauren Trambley, University of California, Hastings College of the Law, '21

Seth Tuthall, University of California, Berkeley, School of Law, '23

Kimberly Valladares, University of California, Berkeley, School of Law, '23

**Statement of Support from Law Students and Law Student Organizations, *continued***

Audrey E. Valli, University of California, Hastings College of the Law, '21

Ana Urgiles, University of California, Berkeley, School of Law, '22

Alexander Joel Watson, University of California, Davis, School of Law, '22

Cindy West, University of Miami School of Law, '22

Melody Wong, University of California, Berkeley, School of Law, '23

Rachel Wu, University of California, Berkeley, School of Law, '21

Jessica Williams, University of California, Berkeley, School of Law, '21

Sylvia Woodmansee, University of California, Berkeley, School of Law, '23

Maggie Woods, University of California, Berkeley, School of Law, '22

Jane Yang, University of California, Berkeley, School of Law, '23

Angela Zhao, University of California, Berkeley, School of Law, '23

**ATTACHMENT E: LETTER OF SUPPORT FROM  
EDWARD H. SCHULMAN, ATTORNEY AT LAW**

Edward H. Schulman

Attorney at Law

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#530  
Northridge, California 91324  
Telephone: 818-363-6906  
Fax: 818-349-2558  
email: [reverse@bigisland.com](mailto:reverse@bigisland.com)

Of Counsel: Mark Alan Hart, Esq.

November 20, 2020

Jennifer M. Urban  
Clinical Professor of Law  
Director of Policy Initiatives, Samuelson Law, Technology & Public Policy Clinic  
Faculty Co-Director, Berkeley Center for Law and Technology  
UC Berkeley, School of Law  
342 Boalt Hall (N. Addition)  
Berkeley, California 94720-0001  
Email: [jurban@law.berkeley.edu](mailto:jurban@law.berkeley.edu)

Re: Keep CAJIC Public

Dear Professor Urban:

I responded to your on-line request through CACJ in support of your petition efforts to the Judicial Council of California. Having practiced law for more than 48 years as criminal defense attorney, four of which as a member of the CALJIC Committee in Los Angeles (1985-1989) during my tenure as Chief Assistant State Public Defender, I can attest to the critical role CALJIC instructions play in the administration of justice. They are the heart and sole of the jury's deliberative process and serve to inform not only practitioners but the public at large in matters of law.

They must remain in the public domain.

Best wishes,

*Edward H. Schulman*

Edward H. Schulman  
State Bar Number 51523

EHS:sam