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Open Source America's Operating System

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

May 22, 2014

Mr. Peter M. Brody
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Washington, D.C. 20005-3948

Ms. Arwyn Carroll
Ropes & Gray LLP
Prudential Tower
800 Boylston Street
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Dear Mr. Brody and Ms. Carroll:

I am in receipt of your letter of **May 20, 2014** concerning THE BLUEBOOK. In your previous letter of **July 18, 2013**, you had asked me to take a number of steps to demonstrate "good faith" so that we might have a "productive dialogue." After I took those steps, I did not hear from you or your client for the last 10 months.

In your most recent letter, you outlined a program of "study" concerning "possible means of expanding access to THE BLUEBOOK" which would expand "the availability of THE BLUEBOOK conventions" including "facilitating access to THE BLUEBOOK conventions for those who do not seek to use them for commercial purposes."

I must say I am puzzled by your use of the term "conventions." I am also troubled by your continued insistence in both letters as well as your letter of **July 31, 2013** that you are reserving your rights with respect to the so-called "developers" directory. This dialogue was originally set off by the refusal of THE BLUEBOOK to grant permission to Professor Frank Bennett for his use of common abbreviations and citation formats in his open source software for citation analysis. Indeed not only was permission not granted, he was sternly admonished not to use these materials.

First, I want to be very clear, contrary to your assumption of July 31, 2013, that I am the person who created the files in the developers directory. I personally typed the material into the files and then made that data available to Professor Bennett for his use in his Zotero modules. As you may have noted from Professor Bennett's **recent blog post** and **my followup** with Boing Boing, we both believe THE BLUEBOOK has vastly

overreached by asserting control over “conventions” and attempting to stop perfectly legitimate efforts.

Your attempts to stop these perfectly legitimate efforts is not supported by the law. THE BLUEBOOK has copyright in a specific text. You have not patented “conventions” nor have you created any system or software that licensees have accessed via terms and conditions that would limit their use. Your attempts to imply otherwise are what we on the Internet refer to by the term of art “Fear, Uncertainty, and Doubt” or “FUD.” You own copyright in the expression of ideas in a specific work and nothing more.

The use that Professor Bennett and I made of common abbreviations and other facts is almost surely not covered under copyright. In addition to the fact that such items are inherently not appropriate for copyright protection, even if that material were to be covered under copyright, there is substantial support for the proposition that the materials fall under the category of an edict of government and thus cannot be covered by copyright.

Even if none of that were to be true, your nonprofit clients are stewards of an important piece of the American legal system, the rules of citation that are used in all law schools, law firms, and our courts. Your failure to address this issue appropriately does not rise to the high moral and ethical grounding that lawyers, scholars, researchers, and donors expect from the Harvard Law School. Your position is, to be frank, small-minded and self-centered. Our legal system and our democracy deserve better.

At the very least, you must understand that if your client insists on controlling how your purported property is to be used by developers, doing so on a case-by-case basis (with multi-year delays in response times) has a huge chilling effect. A Creative Commons license is the very least that THE BLUEBOOK should have put in place long ago so that developers are not faced with the runaround that we have experienced. I would urge you to spend a few minutes with Professor Lessig to learn about the Creative Commons licenses and how the [Attribution 3.0 United States](#) license would serve your client’s purposes.

The fact that nobody from the Harvard Law Review or other owners of THE BLUEBOOK has seen fit to discuss this important issue with me or with Professor Bennett is particularly disturbing. We have both submitted well-considered, well-reasoned arguments for why the current policies do not make any sense. Professor Bennett has tried for 3 years to have a conversation with your clients. I’ve been trying for over a year, including reaching out to the Dean of the Harvard Law School and a number of professors. That your clients have delegated this issue to your ever-expanding legal team at Ropes & Gray is counterproductive and the issue should be directly addressed by the members of the Harvard Law Review, not by outside counsel.

Your most recent letter seems to have been prompted by what you refer to as the posting of “an access-restricted XHTML version of THE BLUEBOOK” and you asked for assurances that I will maintain the status quo ante. Your statement is incorrect. I have not posted an access-restricted version, the version is access-disabled. Nobody has access to my personal copy of THE BLUEBOOK but myself. As you know from the [original Boing Boing post](#) and my letter to Dean Minow, I did make a limited number of copies and placed them on George Washington thumb drives which I enclosed in the

correspondence which was sent to selected members of the Harvard Law School faculty. You are of course free to write directly to the faculty and ask them for their assurances in regards to the status quo ante as I cannot speak on their behalf.

I would like to raise one additional issue on which quite a few law professors and students have commented. The Harvard Law Review and your other clients are all nonprofit organizations, but there is absolutely no transparency as to the finances of THE BLUEBOOK. It is particularly disturbing that the Harvard Law Review does not file a **Form 990-T**, which is required by 501(c)(3) nonprofits with unrelated business income. Even if your client is not in violation of the Internal Revenue Code, it is puzzling that your client has not been more forthcoming on this issue given the central role of THE BLUEBOOK in our legal system.

Sincerely yours,



Digitally signed by Carl
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