

The Blue Wars: A Report from the Front

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The Harvard Law Review Association (Harv. L. Rev. Ass'n) has been paying lawyers from the white-shoe law firm of Ropes & Gray LLP to read my tweets. Letter from Peter M. Brody, Partner, Ropes & Gray LLP, to Carl Malamud, President, Public Resource & Christopher Jon Sprigman, Professor of Law, N.Y. Univ. Sch. of Law (Dec. 24, 2015) ([on file with the Internet](#)) (“I write concerning Mr. Malamud’s recent Twitter postings.”). In Fiscal Year 2014, Harv. L. Rev. Ass’n paid Ropes & Gray LLP \$193,611 in legal fees, presumably only a small portion of which went to their [@carlmalamud](#)-tweet-reading task force. Harv. L. Rev. Ass’n, Return of Organization Exempt from Income Tax, [Form 990](#), Internal Revenue Service (Feb. 15, 2015).

The subject of this legal inquisition is a work you all know well: *The Bluebook: A Uniform System of Citation*. A series of letters from Ropes & Gray LLP firmly asserted and repeatedly reminded me of the legal protections surrounding this work including trademark and copyright protections. THE BLUEBOOK A UNIFORM SYSTEM OF CITATION, [Registration No. 3,886,986](#); THE BLUEBOOK, [Registration No. 3,756,727](#); The Bluebook A Uniform System of Citation, 20th edition, Copyright Registration No. TX0008140199 (June 5, 2015).

The Blue Wars started in 2009 when Frank Bennett, a law professor at Nagoya University in Japan, was working on some open source software for legal citation. Professor Bennett wanted to build in a resolution mechanism for common abbreviations, for example mapping the court name “Temporary Emergency Court of Appeals” to the designated abbreviation (“Temp. Emer. Ct. App.”). *The Bluebook: A Uniform System of Citation* 234 tbl.T.1 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

Professor Bennett applied to the Harv. L. Rev. Ass'n for permission to use the rudimentary Bluebook web site and grab the abbreviations. He was firmly rebuffed. Being an open source acolyte, Professor Bennett felt he was entitled to use those common and obvious abbreviations, so he wrote to his spiritual leader for help:

*When I wrote to Professor Lessig with news of this conundrum, he was equally puzzled, and kindly agreed to test the waters in a direct conversation with the editors. That did not go well: in addition to reconfirming that I was not welcome to subscribe to the online version, the editors apparently doubted whether readers of any copy of *The Bluebook* were free to cast its rules in software.*

Frank Bennett, [The Bluebook: A Plot Summary](#), CitationStylist (May 16, 2014); *see also* Cory Doctorow, [Five Years of Being Intimidated by the Harvard Bluebook's Copyright Policies](#), Boing Boing (May 16, 2014, 10:00 PM).

Professor Bennett also approached me about his conundrum, and I was equally puzzled. After investigating the issue and consulting with colleagues, I became convinced that those abbreviations were indeed simple facts incapable of being expressed in any other fashion, and certainly not subject to copyright protection. I published those abbreviations on my web site in JavaScript Object Notation (JSON) format so they could be easily ingested into his software.

I also sent a letter to Dean Minow about the situation, and included a George Washington USB thumb drive with an HTML version of *The Bluebook* to demonstrate to her how much better *The Bluebook* could be with modern markup. Letter from Carl Malamud, President, Public Resource to Martha Minow, Dean, Harvard Law Sch. (July 18, 2013) ([on file with the Internet](#)); *see also* Carl Malamud, [Blue Book, Red Tape](#), Flickr (June 14, 2013).

My letter to Dean Minow evidently brought me to the attention of the Blue Authorities and resulted in the first of many “keep off the grass” letters from counsel at the law firm. Letter from Peter M. Brody, Partner, Ropes & Gray LLP, to Carl Malamud, President, Public Resource (July 22, 2013) ([on file with the Internet](#)); *see also* Blue Code Repository, Public Resource, <https://law.resource.org/pub/us/code/blue/> (last visited Mar. 21, 2016).

This is how I was enlisted as a soldier in the Blue Wars. But, I want to make sure everybody understands what we were not fighting for. *The Bluebook*® is a spiral-bound, 6 x 9" printed document with a cover and type ornamentation in Royal Blue and is available for [\\$38.50 plus shipping](#) as hardcopy or for [\\$39.99 as an iPad](#) app. The revenues from the sale of these commercial products has been used since 1934 to sustain the long tradition of independence and high-quality work at the Harv. L. Rev. Ass'n, a tradition I admire and support.

The product is, of course, not just the work of the Harv. L. Rev. Ass'n; it is a joint effort with Columbia, Yale, and the University of Pennsylvania with additional contributions from volunteers around the globe. In an early skirmish over the proceeds of the commercial enterprise, the Harv. L. Rev. Ass'n kept all the revenues until they were confronted by Yale in 1973 for a fairer distribution of the takings. Adam Liptak, [Yale Finds Error in Legal Stylebook: Harvard Did Not Create It](#), N.Y. Times (Dec. 7, 2015) ("They were yakking it up about how they had all this money . . . And I'm thinking, 'Money? Where do they get all this money?"); Fred R. Shapiro & Julie Graves Krishnaswami, [The Secret History of The Bluebook](#), 100 Minn. L. Rev. (forthcoming 2016). *But cf.* Erin N. Griswold, [The Harvard Law Review—Glimpses of Its History as Seen by an Aficionado](#), Harv. L. Rev. Centennial Album 1 (1987).

When I look at *The Bluebook*, I see two things. One is that spiral-bound book, in which I have no interest. But, underlying that commercial product is a Uniform System of Citation: a collection of rules, abbreviations, and algorithms that may only be expressed one way. *The Bluebook* enjoys some copyright protection as a literary work, but the Copyright Act about the limitations on copyright:

*In no case does copyright protection for an original work of authorship extend to any idea, procedure, **SYSTEM**, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work.*

[17 U.S.C. § 102\(b\)](#) (2012) (emphasis added).

The abbreviations that Professor Bennett wanted to use are part of that underlying system but paid counsel for the Harv. L. Rev. Ass'n aggressively

told him he couldn't use them. To me, this was a lawyer bluffing, using the baseless claims of copyright, trademark, and terms of use to keep what he perceived to be a potential market threat to a revenue stream. This is what I would term a *brutum fulmen*, an indefensible thunderbolt that tries to scare people into doing things they don't have to do.

In 2014, I was contacted by my friend, [Professor Christopher Jon Sprigman](#) of NYU School of Law. He had decided to reimplement that system of citation as a new and different and creative work, one that would be made available at no cost and with no restrictions on use. Professor Sprigman worked with a team of seventeen students for a year, and in December 2015, he delivered a manuscript.

Professor Sprigman is no ordinary law professor—he is a star of the world of intellectual property. Indeed, the American Law Institute has asked him to serve as the Reporter for the *Restatement of the Law, Copyright*, where he is coordinating the work of 107 of the leading lights of copyright law. This is a subject that he knows a little something about. This was no fly-by-night scan-and-run job. He worked with his students for a year to carefully and deliberately create an original expression of the underlying rules.

The work he submitted to me was then transformed into modern HTML and extensively reworked into what we ended up calling *Baby Blue's Manual of Legal Citation*. It was while I was working on the HTML formatting that outside counsel at Ropes & Gray LLP became alarmed and sent me that Christmas Eve takedown notice, demanding that I deliver onto him within four days a copy of the book. Mike Masnick, [Harvard Law Review Freaks Out, Sends Christmas Eve Threat Over Public Domain Citation Guide](#), TechDirt (Dec. 28, 2015, 6:24 AM).

This writ of *habeas codex* outside counsel was attempting to exercise on me—while clearly a *brutum fulmen*—was alarming. There was a clear and present danger of potential litigation, so I called [Mr. Joseph C. Gratz](#) of Durie Tangri LLP and he agreed to represent me and Public Resource on a pro bono basis. His other clients include Google, which he represents in the Google Book Search cases.

I will spare you the details of the frankly surreal negotiations. Suffice it to say that the lawyer for Ropes & Gray LLP anticipated that we would be signing an agreement that had clauses that I did not consider appropriate

under the circumstances. Ropes & Gray LLP, Draft Agreement (Jan. 15, 2016) ([on file with the Internet](#)). Mr. Gratz informed Mr. Brody that his client declined to sign any such agreement, at which point I sent a copy of the draft manuscript with no strings attached and a letter to the Harv. L. Rev. Ass'n saying I'd be more than happy to hear any comments or suggestions they might have. Letter from Carl Malamud, President, Public Resource to Jonathan S. Gould, President, Harv. L. Rev. Ass'n (Jan. 25, 2016) ([on file with the Internet](#)); Letter from Carl Malamud, President, Public Resource to Jonathan S. Gould, President, Harv. L. Rev. Ass'n (Feb. 9, 2016) ([on file with the Internet](#)).

Meanwhile, despite the imminent threat of legal action, Professor Sprigman and I continued our work on the manuscript. I sent the document out to open source experts Professor Bennett and his colleague Dr. Rintze Zelle, copyright experts such as Professor Pamela Samuelson of Berkeley Law School, and to citation experts such as Professor Peter Martin of Cornell Law School. As with Professor Sprigman, these are some of the leading lights in the field, and after their review, I felt confident that the work that we were preparing to publish did not violate the copyright or trademarks of *The Bluebook*. We had received no feedback from the Harv. L. Rev. Ass'n, which continued to communicate with us through outside counsel.

On February 5, 2016, I published *Baby Blue's Manual of Legal Citation* on the net as part of a public Request for Comment process with a deadline of March 15, 2016. We received a large number of comments, which have been incorporated into a revised version of the document, which is now online. Christopher Jon Sprigman et al., *Baby Blue's Manual of Legal Citation*, Public Resource (2016), <https://law.resource.org/pub/us/code/blue/BabyBlue.html>, <https://law.resource.org/pub/us/code/blue/BabyBlue.pdf>.

The threat of litigation was still very real, however. We simply could not get the attorneys to say that they weren't going to sue us for publishing this document. Even worse, we couldn't get anybody to state clearly and unequivocally that they wouldn't be suing the students at NYU who had worked on the project. This was scary. The press was all over the issue, hundreds of students from all over the country (including Harvard!) signed petitions begging the Blue People to drop the threat of litigation. I had nightmares for weeks about being dragged into a U.S. District Court for the next few years litigating the issue of who gets to talk about legal citation.

Kendra Albert, [Harvard Law Review Should Welcome Free Citation Manual, Not Threaten Lawsuits](#), Harv. Law Rec. (Feb. 12, 2016); Kathryn Rubino, [Law Student Support For Open-Source Citation System Grows](#), Above the Law (Feb. 10, 2016, 2:32 PM); David Post, [The New \(and Much improved\) 'Bluebook' Caught in the Copyright Cross-Hairs](#), Wash. Post: Volokh Conspiracy (Feb. 9, 2016).

After we posted Baby Blue's Manual of Legal Citation on the net, I was pleased to get email from Michael Zuckerman, the incoming president of the Harv. L. Rev. Ass'n. I've had several productive conversations with Mr. Zuckerman and, based on his feedback, have made several changes to the manuscript. These changes were not made at the behest of attorneys threatening litigation, they were based on a dialogue between people who care about the future of legal citation. We didn't make all the changes Mr. Zuckerman and his colleagues had requested, but it was good to hear his perspective and I appreciate the time he has put into talking with me about the issues.

However, I hope this becomes a broader conversation. It is imperative that we move beyond the current Blue War confrontations and all start working together and thinking about the future of legal citation. I've proposed to Mr. Zuckerman that we jointly organize the First Global Citation Congress and bring together people from around the world who care about how we communicate the law to each other. Letter from Carl Malamud, President, Public Resource to Michael Zuckerman, President, Harv. L. Rev. Ass'n (Feb. 15, 2016) ([on file with the Internet](#)).

There are some strong views out there on citation, and I suggested we invite people with strong views so we can have a big tent. Why not invite Judge Posner, for example, somebody who has written about *The Bluebook* in the past? Richard A. Posner, [The Bluebook Blues](#), 120 Yale L.J. 850 (2011). Or, perhaps we can invite Professor Martin, one of the world's leading citation experts? Peter W. Martin, [Bluebook \(20th ed.\) and Restatements, Model Codes, etc.](#), 461 Citing Legally (Sept. 8, 2015).

I'm not a lawyer; I dropped out of Georgetown Law School in 1984 because computers were beginning to consume my life. I spent the rest of that decade writing professional reference books about computer networks and relational databases (I've placed all eight of my books into the [public domain](#)). My books made heavy use of the underlying standards that define

networks. I made money on my books, but fought very hard to make sure that any standards that we needed to build the Internet were easily accessible and could be used without restrictions, such as my efforts to make the standards governing the underlying telephone networks available for the first time on the net. Carl Malamud, [Exploring the Internet: A Technical Travelogue](#) (1993); *see also* Carl Malamud, [Petition From 500 Engineers to ANSI](#) (Oct. 9, 1992); Carl Malamud, [It's Time to Let ANSI Know What the Real World Thinks](#), *Comm. Week*, July 27, 1992, at 20.

Access to standards is an important issue, but there's something even more important, and this is directly relevant to the Blue Wars. That is the question of governance of how a standard evolves. My work on Internet standards was as a participant in the Internet Engineering Task Force (IETF). I was very lucky to join that group during a key moment in the evolution of the Internet. I got to work with and became friends with many of the people who made fundamental contributions to the net. It was a humbling experience and a real thrill to be able to work with people like Jon Postel, the man who administered the Domain Name System, invented the FTP protocol, edited the Request for Comment (RFC) series, and made so many other fundamental contributions. When Jon passed away in 1998, it hit many of us very hard. Carl Malamud, [An Internet Prayer Wheel](#), *Mappa.Mundi Magazine* (Aug. 1999); BBC News, ["God of the Internet" Is Dead](#) (Oct. 19, 1998, 1:30PM); Vinton G. Cerf, [I Remember IANA](#), Internet Engineering Task Force, RFC 2468 (Oct. 17, 1998).

In the late 1980s and early 1990s, the Internet Engineering Task Force was governed by an Internet Architecture Board (IAB) (known at the time as the "Internet Activities Board"), a group with the final say on which protocols would become standards and which working groups were to convene. As the net grew, our task force grew from dozens of people to hundreds of people meeting three times per year, and the IAB in turn appointed an Internet Engineering Steering Group to do day-to-day management of our activities. This was a top-down process, and we didn't always agree with all the decisions of the IAB, but for the most part we respected their guidance. Vinton G. Cerf, [The Internet Activities Board](#), Internet Engineering Task Force, RFC 1120 (Sept. 1989).

In 1991, we all began to realize that we were going to run out of Internet Addresses sooner rather than later. That led to an intensive effort to

conserve address space, but it also accelerated the push to develop a next generation Internet protocol that would have enough addresses for a network that people were beginning to bluster might have billions of nodes. [Summary of Internet Architecture Discussion](#), Internet Activities Bd. (Jan. 1, 1991).

We hadn't heard of the Internet of Things, but we knew this thing was on a hyper growth curve. One of the key technical controversies in our world was what the net core protocol would look like, and there were several efforts competing to be the Internet Protocol, The Next Generation (IPng). (As you might guess, many of our participants were Star Trek fans!) Phill Gross & Philip Almquist, [IESG Deliberations on Routing and Addressing](#), Internet Engineering Task Force, RFC 1380 (Nov. 1992); Peter Ford & Phill Gross, *Routing and Addressing Report*, in [Proceedings of the Twenty-Third Internet Engineering Task Force](#) 507 (Mar. 1992).

In 1992, the Internet Architecture Board had a meeting in Kobe, Japan because they were all attending the Internet Society's annual conference. They had been thinking about the fight on which protocol would be IPng; some felt that a decision had to be made very soon and that it was their job to be decisive. They were sitting in a bar in Kobe talking about the issue when I wandered in and had a seat. In those days, if you ran across the elders of the Internet having a meeting, they'd tell you to have a seat and buy you a beer.

They explained the issue to me and Jon looked at me and said, "What do you think? Should we make a decision?" I told Jon if he felt strongly about this, they should move boldly, even though I wasn't a big fan of the direction they were going to take. By moving boldly, they would soon hear what the community thought. Jon smiled wryly. I think he knew what was going to happen. [Meeting Minutes](#), Internet Activities Bd. (June 19, 1992) ("The IAB does not take this step lightly, nor without regard for the Internet traditions that are unavoidably offended by it. We look forward to a lively discussion of these conclusions during the upcoming IETF meeting in Boston.").

The IAB announced their decision and the reaction was not pretty. The choice they had made was for an overly institutional variant of networking protocols, one advanced by standards professionals working out of Geneva and by a few big corporations. But it wasn't, in the view of many people, a

protocol that remained true to the Internet's roots. More importantly, people didn't like the idea that a huge decision about the future could be made by a small group of people.

The twenty-fourth meeting of the IETF was in Cambridge, Massachusetts in July, 1992, and we turned into a mob. There were angry speeches about autocrats and corporate pressure and technical integrity. People were getting red in the face and sputtering into the microphones during the plenary sessions. There was an inspirational talk by David Clark about taking our future into our own hands. David D. Clark, *A Cloudy Crystal Ball: Visions of the Future*, in [Proceedings of the Twenty-Fourth Internet Engineering Task Force](#) 543 (July, 1992) ("We reject: kings, presidents and voting. We believe in: rough consensus and running code.").

By the twenty-fifth meeting in Washington DC in November, 1992, it had become an all-out revolt. Steve Crocker, *Minutes of the Process for Organization of Internet Standards Working Group (POISED)*, in [Proceedings of the Twenty-Fifth Internet Engineering Task Force](#) 595 (Nov. 1992). I served as one of the ringleaders arguing for a democratic process and the end of royal rule, and helped draft a framework for governance. Steve Crocker & Carl Malamud, [Possible Changes in the Standards Development Process \(Draft 5.1\)](#), Internet Engineering Task Force, Internet-Draft (Oct. 1992).

At the end of the day we came up with a totally new system of governance, one based on a nominating committee drawn from a random selection of IETF participants, a technique based on the Greek practice of using sortition to randomly selected citizens to serve on bodies such as the *archai* (the body of chief magistrates). We had become a democracy, and the system is what let us grow the Internet standards to meet ever-harder challenges. Aristotle, [Politics](#), bk. IV at 4.1294b, 165 (B. Jowett trans., Oxford Univ. Press, 1908) (c. 350 B.C.E.) ("The appointment of magistrates by lot is democratical."); Paulina Borsook, [How Anarchy Works](#), Wired (Oct. 1, 1995).

One aspect of the IETF worth pointing out is that all our participants were volunteers, just as the people from all over the country who have worked on *The Bluebook* for a century have all been volunteers, gaining their daily bread through other activities, but working on Internet standards (or citation standards) because of their dedication to public service. Internet standards were about a broad public good for us, just as legal citation is not about earning money for banquets, it is about the functioning of our legal

system. We worked on standards because we used them in our day jobs, which in my case was running an Internet cyberstation. Carl Malamud, *Internet Talk Radio*, in [Proceedings of the Twenty-Sixth Internet Engineering Task Force 625](#) (Apr. 1993); John Markoff, [Turning the Desktop PC into a Talk Radio Medium](#), N.Y. Times, Mar. 4, 1993 at A1; Carl Malamud, [A World's Fair for the Global Village](#) (1997).

On the issue of governance, I believe *The Bluebook* (or at least the uniform system of citation) is at a similar juncture today. If the Uniform System of Citation is to evolve, it must do so as an open standard. Claiming ownership over simple facts like abbreviations or systems such as citation rules is improper. As with the Internet Architecture Board decisions in 1992, I believe the Harv. L. Rev. Ass'n lost sight of their role as a steward for a broader community when they told an open-source developer he could not use common abbreviations.

The evolution of *The Bluebook* (or at least the uniform system of citation) has become very opaque. Arbitrary declaration of norms without proper input from a broad community is no basis for forging a broad-based standard. The evolution of a uniform system of citation should be the goal, not the defense of a revenue stream. A community consensus—not the looming threat of litigation—should be how decisions are made.

My proposal for a First Global Citation Congress is proffered in the belief we can build a big tent with all views properly represented. This can't be a process that results in top-down proclamations. Consensus standards need a seat at the table for everybody. The Uniform System of Citation needs to be freely available for all to implement and use, and there must be a community consensus as to how this standard will evolve.

These are the challenges in front of us all. What is at stake is not the future of a \$38.50 book, it is the question of how we communicate the law so that we all understand each other; so that our system of justice can be transparent and clear; so that we all know what we're talking about when we refer to a source. I hope we can do this together.

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