

**NOTE: THIS DRAFT STATEMENT WAS NOT DELIVERED AS
RESOLUTION 101 WAS WITHDRAWN FOR FURTHER CONSIDERATION**

American Bar Association
House of Delegates
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Closing Remarks of Carl Malamud (Revised 8/3/17)

You have heard a slew of reasons the sky will fall if you vote yes on Resolution 101. I'm going to address those each in turn. But the sky will not fall. This is a simple truth-in-labelling Resolution.

Sections 105 and 403 of the Copyright Act are very clear: works of the U.S. government are not eligible for copyright and should be properly labeled as such if they are included in a larger work. That's the law.

This report presents conclusive evidence that here in the ABA—in the course of our publishing practices—we do not conform with the law. This report presents conclusive evidence that this non-conformity is widespread in scholarly publishing.

Here in the American Bar Association—an organization dedicated to the rule of law—we cannot ignore the fact that works of the U.S. government are not subject to copyright simply because we find the provision inconvenient.

I may be the only person in this room who has not spent considerable time as a Westlaw user. You may have also noticed at the bottom of every page on that service there is a copyright notice that reads something like: "Copyright 2017 Thomson Reuters. No claim to original U.S. Government Works."

Look at any ABA journal and you will see a much broader assertion: "Copyright 2017 American Bar Association. All rights reserved." That's perhaps fine for the normal course of business, but when an included article is a work of government, that assertion is not correct.

If an article is a work of government, § 403 says that the copyright notice should “affirmatively or negatively” indicate which portions are subject to copyright and which are not. Where a federal government employee has written something as part of his or her official duties, the copyright notice should indicate that those portions are not subject to copyright. If there are portions in which the ABA claims copyright, the notice should indicate which portions those are. That is the law, and we should follow it.

The point is a simple one. If we in the ABA wish to avail ourselves of the considerable legal advantages that assertions of copyright in print give the publisher—such as statutory damages—we must properly label those copyright assertions. Today, we do not. And, as the report shows, this practice is far too widespread in scholarly publishing.

Another objection we have heard is that—irrespective of the law—this will hurt publishers. That is mere speculation, and it is unfounded. I’ve spent 30 years making government-produced information more broadly available and every single time this has ended up helping the private publishers. The public component is just a small piece of the much bigger private publishing enterprise.

Sure, you can copy that journal article by the Chair of the FTC. But, wouldn’t you rather read the whole issue? Or go the Administrative Law Institute and learn more? Or register for the Antitrust Law Symposium and perhaps even meet the Chair face-to-face?

On the flip side, federal employees own their work, we should allow them to say so. This Resolution will make it easier for federal employees to participate in forums such as the ABA by clearing the now-murky waters of whether or not their submission is a work of government or a private work.

This tiny issue has tremendous relevance to our world today. In this time of federal web sites being destroyed, in this time when the rule of law is threatened by rulers of whim and caprice, in this time when science and scholarship are under siege, today we have an opportunity to stand up and say the ABA stands for the rule of law, to say that the ABA stands for the propagation and diffusion of knowledge.

Resolution 101 is a simple step. Resolution 101 will cost us nothing. Resolution 101 will be good for government authors, good for publishers, and good for the public.

Resolution 101 will affirm that public information is public.

I hope you will affirm and thank you for your time.