

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN SOCIETY FOR TESTING AND
MATERIALS d/b/a ASTM INTERNATIONAL;

NATIONAL FIRE PROTECTION
ASSOCIATION, INC.; and

AMERICAN SOCIETY OF HEATING,
REFRIGERATING, AND AIR CONDITIONING
ENGINEERS,

Plaintiffs/Counter-defendants,

v.

PUBLIC.RESOURCE.ORG, INC.,

Defendant/Counterclaimant.

Case No. 1:13-cv-01215-TSC

PUBLIC RESOURCE’S SECOND MOTION FOR SUMMARY JUDGMENT

Defendant-Counterclaimant Public.Resource.Org, Inc. (“Public Resource”) respectfully moves for summary judgment against Plaintiffs American Society for Testing and Materials d/b/a ASTM International, National Fire Protection Association, Inc., and American Society of Heating, Refrigerating, and Air Conditioning Engineers because Public Resource’s reproduction, display, and distribution of the works listed in Appendix A to Plaintiffs’ motion (Dkt. 198-2) does not constitute copyright infringement and because the Plaintiffs have not met their burden for obtaining a permanent injunction under the Supreme Court’s standard in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

As Public Resource describes in the accompanying memorandum of law in support of its motion for summary judgment and opposition to Plaintiffs’ motion for summary judgment and

permanent injunction, there are no genuine issues of material fact that would preclude summary judgment in favor of Public Resource. Public Resource's use of the incorporated standards is a non-infringing fair use. Moreover, Plaintiffs have not articulated any facts to meet all requirements for a permanent injunction under *eBay* and thus conclusively fail to show any right to the relief they seek in the case.

Public Resource further asserts that the Plaintiffs cannot assert copyright in the laws by incorporation at issue because the complete works they claim are binding laws of the United States and at least one state; because they are not copyrightable subject matter, excluded by 17 U.S.C. § 102(b); because the merger doctrine precludes enforcement of copyright in the works that the Plaintiffs assert, which have become government edicts and political facts as laws by incorporation; and because enforcement of the copyrights through the prior restraint that the Plaintiffs seek in this case would violate the First, Fifth, and Fourteenth Amendments of the United States Constitution. Because the United States Court of Appeals for the District of Columbia Circuit reserved a ruling on these issues in the recent appeal and remanded the case to this Court for re-evaluation of the fair use doctrine, and because Public Resource wishes to preserve these issues for a further appeal if necessary, Public Resource formally reasserts its earlier arguments on these points and incorporates here by reference the filings in support of its first motion for summary judgment at Docket Nos. 120-126, 146-147, 149, 151, 160-161, and 163-168.

Public Resource requests an oral hearing on its motion and its opposition to Plaintiffs' second motion for summary judgment and motion for a permanent injunction.

This motion relies on the attached memorandum of points and authorities; the declarations of Carl Malamud and Matthew Becker; Public Resource's request for judicial notice; the index of consolidated exhibits and the exhibits accompanying this motion; Public Resource's proposed

order, the pleadings and papers on file, specifically including Public Resource's filings on its earlier summary judgment motion; and any further material and argument that the parties may present to the Court at the hearing.

Dated: November 12, 2019

Respectfully submitted,

/s/ Andrew P. Bridges

Andrew P. Bridges (USDC-DC AR0002)
abridges@fenwick.com
Matthew B. Becker (admitted *pro hac vice*)
mbecker@fenwick.com
Armen N. Nercessian (pending *pro hac vice*)
anercessian@fenwick.com
Shannon E. Turner (pending *pro hac vice*)
sturner@fenwick.com
FENWICK & WEST LLP
801 California Street
Mountain View, CA 94041
Telephone: (650) 988-8500
Facsimile: (650) 938-5200

Corynne McSherry (admitted *pro hac vice*)
corynne@eff.org
Mitchell L. Stoltz (D.C. Bar No. 978149)
mitch@eff.org
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

David Halperin (D.C. Bar No. 426078)
davidhalperindc@gmail.com
1530 P Street NW
CSRL 2nd Floor
Washington, DC 20005
Telephone: (202) 905-3434

Attorneys for Defendant-Counterclaimant
Public.Resource.Org, Inc.