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INTERVIEW

THE INDIGO BOOK: A MANUAL OF LEGAL CITATION

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In this interview, NYU Law Professor Christopher Sprigman discusses his experience conceiving, drafting and producing the Indigo Book, a manual of legal citation that replicates the uniform system of citation expressed by Harvard Law Review's Bluebook. Formerly known as "Baby Blue," the Indigo Book is published by Public.Resource.Org under a creative commons license and may be freely modified or distributed without restriction under copyright law. Professor Sprigman details his vision for the Indigo Book, the legal copyright and trademark uncertainties the project faced, and his plans for the citation manual's future.

Christopher Sprigman has been a professor at NYU School of Law since 2013. Sprigman teaches intellectual property law, antitrust law, competition policy, and comparative constitutional law. His research focuses on how legal rules affect innovation and the deployment of new technologies. Sprigman's widely cited works have had an influence on important aspects of copyright law, and often belie the conventional wisdom about intellectual property rights. He was an appellate counsel from 1999 to 2001 in the Antitrust Division of the US Department of Justice, where *US v. Microsoft* was among his cases, and later was elected partner in the Washington, DC, office of King & Spalding. In 2003, Sprigman left private practice to become a residential fellow at Stanford Law School's Center for Internet and Society, and joined the faculty at the University of Virginia School of Law in 2005. Sprigman received his BA in history magna cum laude from the University of Pennsylvania in 1988, and a JD with honors from the University of Chicago Law School in 1993. He subsequently clerked for Judge Stephen Reinhardt of the US Court of Appeals for the Ninth Circuit and Justice Lourens H. W. Ackermann of the Constitutional Court of South Africa. Sprigman also taught at the University of the Witwatersrand's law school in Johannesburg.

Daryl Steiger is a student at NYU School of Law graduating in May 2016 and an Articles Editor for the NYU Journal of Intellectual Property and Entertainment Law. Daryl has focused her studies on intellectual property and entertainment law, and worked as a team lead on Professor Sprigman's project developing the Indigo Book, formerly known as Baby Blue. Daryl received her BA in women, gender and sexuality studies from Washington University in St. Louis in 2012, with a second major in psychology and a minor in film.

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DS: Hi Professor Sprigman. Thank you for taking the time to do this. First, we were wondering if you would give us a brief overview of the Baby Blue project?

CS: Sure. It was back in late 2014 that I started discussing the possibility of this project with Carl Malamud, who is the head of something called Public Resource. Carl's mission in life is to bring law to the people that law regulates. He wants to make the laws of various states, as well as private codes, like building codes – all things that are often locked up in libraries and only available by subscription – he wants to make these things available online to people free of

charge. The feeling behind this is that both state laws and private codes that have been adapted as law regulate people's behavior, people are subject to their authority. So people should have the right to access these things and indeed courts have held that the law is not copyrightable and that edicts of law can be accessed free of copyright restrictions by the people who are subject to those edicts. So that's Carl's aim in life.

The Bluebook is something came to Carl's attention and he started thinking and, when he started talking to me, I also started thinking, that the Bluebook was kind of like a law, in that it ran a lot of people's lives. Associates at law firms, law students in law schools, academics in law schools; they all cite legal documents and they are obliged to do so according to the Bluebook's form. But the Bluebook isn't free – actually, it isn't free in two senses. First, it's expensive, and second, the system of citation that the Bluebook expresses is not open and is developed under the control of a small number of people at the Harvard Law Review. So we decided to think about whether we could do something about both of those problems. What we hit on was that the Bluebook is first of all a *system*, a system of legal citation. Systems are not in fact copyrightable. So we thought, well, let's see if we can express this same citation system in our own words. That is, we won't copy the expression but in fact re-express the system by explaining its rules differently. If we do that, then people can use our version of the Bluebook system to make legal documents that look exactly as if they were using the Bluebook. So we set out to try to do that.

The other thing we thought was, in the process, we could set the legal citation system free of copyright. One good thing that might come out of that is that people other than a tiny group of Harvard Law Review editors might work with this system, and ultimately simplify it and make it better. All interested members of the legal community would have a crack at modifying the system, improving it, updating it.

I agreed with Carl that I should take this on. I recruited a team of students here at the law school who worked with me, who carried the load on this and really did pull this system apart, understand it from the inside, and basically re-describe it in the way that I told you we would try to do. That's the project in a nutshell. The product is something that we first referred to as Baby Blue but now we're calling the Indigo Book. It is a Bluebook-compatible system of citation. Again – and this is crucial – people who use Indigo are using the Bluebook's system of citation. From the outside, no one will ever know they used the Indigo Book to produce their citations. For all intents and purposes, documents produced using the Indigo Book will look like a document that's been Bluebooked.

DS: Aside from Carl mentioning this to you, what personally motivated you to get so involved in this project?

CS: Part of it was just the copyright question. Could we take this system, which is not copyrightable – Section 102(b) of the Copyright Act says that copyright does not extend to systems – and could we understand it well enough to re-express it, to express it in different words? Now, sometimes rules are written the way they are and there's no way to really rewrite them. To make them understandable, you have to write the rule very similarly. That's interesting. That situation would lead you, as a copyright lawyer, to say that the expression of the rule has merged with the rule itself. You have to be able to express it the same way, because otherwise the rule would have a backdoor copyright, and rules don't have copyrights. So, I just thought as a copyright scholar this was a very interesting project.

And then I thought of people in jail. I thought of solo practitioners out there struggling to make ends meet. Then I thought, you know, the Bluebook's expensive and we should be able to bring a version of the system, Bluebook's system of citation, for free. And I also thought about all the people who had an interest in citations - practicing lawyers, academics, law students - who had no ability, if they're not on the Harvard Law Review, to actually say what the rules should be. I thought that's odd. By what authority does the Harvard Law Review get to proscribe rules for the rest of the lawyers in society? Not only lawyers, but pro se litigants: people filing briefs in criminal or civil cases who are not represented by lawyers. Who anointed the Harvard Law Review, right? So, this system is something I thought it something we can bring to people more efficiently, more cost effectively, and also in a way that they can work with it, to change it, to streamline it, to improve it. That was the reason why I decided to do this.

DS: So, as you just touched upon, one of the exciting things about the Indigo Book is that it's open source. How did you become involved with open source law generally? How did Carl know to approach you?

CS: So, I just want to be clear on what the licensing terms are for the Indigo Books. So the Indigo book has been released under something called a CC0 license, which is a creative commons public domain license. This means that the Indigo Book is in the public domain. People can copy it, they can distribute it, they can modify it, they can distribute their modifications. They can essentially do what they wish to do with it. The idea here again is that people can proliferate copies of this book cheaply and this will spread the book to other people. But also the idea is

that if people have thoughts on how to make a better citation system, how to reduce the complexity of legal citation – which would be a good thing, legal citation is incredibly complex – they should and they are permitted to do that. They are permitted to make their modifications and to distribute them. And we’re hoping over time that this will result in a lot more creative and helpful input into what legal citations should look like.

In terms of how I got involved in this, I’m a board member of creative commons, an organization I’ve supported for a long time and really believe in. I think creative commons brings to copyrighted works what the open source movement has brought to software, which is the ability for people to participate in determining the direction of some tools that all of us use, that some of us as lawyers use every day. Up until now, we have had no voice in what legal citation rules look like. Now we do. I think this is the genius of open source. It democratizes participation in the production and the maintenance of these tools – software tools, legal citation tools. That is something I think is just very good for all of us.

DS: So how did you approach drafting baby blue with your student team?

CS: The student team would meet with me on a regular basis and we’d think about, you know, what are the rules we need to express? We set the scope of the project. We understand what part of the Bluebook, that is the “Bluepages” that we were going to work from. We made a decision at some point that we wouldn’t try to mess with the international part of the Bluebook. That part of the Bluebook was something that most lawyers in America don’t really use. It’s of limited utility, it lends a lot to the Bluebook’s bulk, and if we try to restate that, then the thing we were producing, which eventually became the Indigo Book, would be similarly huge, and we wanted that not to happen.

So we set the scope of the project, then we split up assignments. We had different teams. We had teams named after animals. We had team Koala, Team Puma. Different teams would start working away on different pieces of this. And then the teams would start checking each other’s work. Over time and many, many versions, we started working out a draft that was stable and then we started refining it. So this took a long time, this took more than a year of work, very hard work on behalf of a lot of students, with me organizing and then checking on all this work and going through and refining it.

Then we delivered it to Carl Malamud, who is the publisher, and he put this into HTML, and got this set up online and really made it look nice. This is the

product that we gave to people to comment on in a beta version. So that's how this actually happened.

DS: So, there were other people who were involved in the project besides Carl, yourself and the student members. What roles did they play and how did you get them involved in the project?

CS: We had a group of advisors. These were copyright experts – people like Pam Samuelson, for example, who was one of our advisors. She's a professor at Berkeley and really I think the figurative dean of the copyright professoriate. Pam gave us a fair amount of input, and others did as well, designed to make sure that when we made decisions about what our understanding of rules was like and how we express that understanding, that these decisions made sense. So we had a bunch of people who kept tabs on us and we could go to them with questions and they would give us input.

Also, we had Joe Gratz, who's a lawyer at Durie Tangri in San Francisco. Joe took a look at our work. He was one of the people advising us on our legal issues and then later on he represented us when we had discussions with the Harvard Law Review.

DS: So, if you feel comfortable discussing it, how did you approach the legal copyright concerns posed by the Indigo Book, what was formally known as Baby Blue, and how did you address these concerns when you were drafting it?

CS: So the concerns came in two varieties, mainly. One was copyright and the second was trademark. With respect to copyright, the overarching idea that I had from the beginning, which I think is right, was that the uniform system of citation, which is this legal citation system that the bluebook articulates, is a system. It's billed as such on the cover of the Bluebook, which says "uniform system of citation." Systems are simply not copyrightable. Section 102(b) of the Copyright Act rules them out of copyright. Systems you might be able to patent. The Bluebook is not a system you can patent. It's not a novel system. It's been on sale forever. It would fail if they tried to patent it.

So it's not a patentable system and systems are not copyrightable. If that's the case, then the rules, the structure of rules that makes up the uniform system of citation is basically free for all of us to use. The copyright question isn't really about the rules. The copyright question is really about how you express them. Really what the project was about was understanding what the rules are and trying to re-express them in language that made the rules clear without being identical to the language in the Bluebook. Now, when we needed to express a rule in a certain

way, we did. And we would depend on the merger doctrine to shelter us. It gives us the ability to do that because if you can't have a copyright on a rule and there's only one way to express the rule, you got to be able to express it. So where we needed to rely on the merger doctrine, we did.

We also replaced all of the examples. The Bluebook is full of examples. We tried to make them better where we could. We picked different examples and we tried to make the examples a little bit better, sometimes a little bit funny. We added a bunch of material trying to clue people into the real meaning of the rules – what we first called Baby Blue clues and then we ended up calling the Indigo Inklings. So these were little hints we dropped into the book at different points to help people understand how the rule works and how to use the rule. If you read the Indigo Book, it just reads very different than the Bluebook. It's more succinct. I think it's more entertaining. I think it's sleeker and more efficient and just a better citation manual for what it does.

The second issue is trademark. Now, I wanted this book to be called Baby Blue for a reason. The Bluebook is Harvard Law Review Association's version of the uniform system of citation. Most people, if you talk to them, they don't know what the uniform system of citation is, they only know the Bluebook. It was important to me that we find a way to signal that what we were doing was compatible with the Bluebook, that it was in fact an expression of the same uniform system of citation that the Bluebook is an expression of. Therefore, if you used our manual, your documents would look just like you were using the Bluebook. No one would be able to tell. I thought this was important because, you know, lawyers are very conservative. The Bluebook is the standard. We wanted to recreate the standard. We wanted to give people a choice in how they used the standard – the uniform system of citation. They could use it by using the Bluebook or they could employ that system by using what we called Baby Blue.

So I thought Baby Blue was a good name in that it communicated to people that this book was "blue." That you could use this book and your documents would be consistent with the Bluebook's uniform system of citation. I thought of an example. If you think of artificial sweetener packets, "Equal" is the blue one, "Splenda" is the yellow one, and "Sweet 'N Low" is the pink one. People don't know the substance in that blue packet is aspartame, right? People don't remember aspartame. They remember either the brand name, "Equal," or they remember the color of the package, blue. So competitor generic aspartame packets are often blue. The reason is because people are looking for the blue sweetener. In the same way that competition in artificial sweeteners depends on the use of a color that people have come to associate with a particular product, I think competition, to my mind,

in the market for legal citation systems requires a reference to this color, which has become the color of a particular form of legal citation. That's why I thought "Baby Blue" was a good name.

Now, I didn't think Baby Blue would be confusing to people. I thought people would understand that Baby Blue was a very different thing than the Bluebook. We had a disclaimer on the cover that said that this is not sponsored by or affiliated with the Harvard Law Review or the Bluebook. But the Harvard Law Review people threatened to sue. They were adamant that we not use the word "blue" in our title. Eventually, we decided that we would rather this book come out and have people start using it than spend a couple of years fighting this out with Harvard. Although I'm confident we would have beaten them, I didn't want to spend a couple years with Harvard fighting it out.

So we changed the name to the "Indigo Book," which I don't think, under anybody's account of trademark law, would be a trademark violation. I can't imagine people being confused between the Indigo Book and the Bluebook. Now indigo of course is the plant that is used to make a form of blue dye. It is a dark, kind of purplish-blue color. We are trying to signal to people that this is blue. I'm not sure if it's as effective a signal as "Baby Blue" was. We'll see. But I do need people to understand that this book is compatible with the Bluebook. That's the message that we're trying to send.

DS: Going back to your motivation, were you inspired in any way by Richard Posner's article, "Bluebook Blues"?

CS: Yeah, so, Richard Posner really hates the Bluebook. Recently he actually said that he believes the Bluebook should be burned, which I think is fairly extreme. I'm generally anti-book burning. So, you know, the University of Chicago has some experience with this. When I was a student there – I went to law school there – there was something that Chicago published called the Maroonbook. The Maroonbook was an elegant little book of legal citation. Very skinny. Not really too many rules. There were just the right number of rules and then there was a standard, which was, you know, when a rule doesn't cover a situation, try to make yourself understood. Try to construct a citation that will allow people with some reasonable effort to locate the source, which I think is a great way to think about citation.

Like a lot of things University of Chicago does, it was very terrific, and I think very thoughtful, and it failed. It gained basically no traction. And the reason again I think is the deep conservatism of lawyers. Generations of lawyers have been educated to use the Bluebook. That's the resource they know how to use, they

don't want to switch. Even though I think the Maroonbook is a much better resource, it didn't gain any ground. So this really did inform us. Judge Posner has been agitating for a simpler form of legal citation. I very much agree with him but I think this is a goal that's best approached in two steps.

The first step is to set the Bluebook free of copyright. That's what I think we've done with the Indigo Book. This is an implementation of the uniform system of citation that anyone can work with. By "work with" I mean do what Judge Posner thinks should be done: simplify dramatically. There's no reason that there should be a rule articulated for every circumstance. You could probably cover the majority of citation questions within a dozen rules. Then everything else could be left to a standard, which is to construct a citation that would allow a reasonably smart person to find the resource reasonably well. We can get there. Before we do that, we need to get to step one, which is to break the monopoly that Bluebook has had over the uniform system of citation, which is the underlying citation system, which is not copyrightable. There has to be some other way that people can access this system – a way they can, not simply access, but that they can work with, that they can change, that they can streamline, that they can improve, that they can expand. This is the strategy.

In terms of goals, I'm completely with Judge Posner. In terms of strategy, I think we would differ a bit.

DS: So now that the Indigo Book is out, and it's out to the public, what feedback have you received from the legal community and what impact do you hope it will have on the legal profession as a whole?

CS: I mean, people like it. They like it a lot. We've gotten a lot of feedback from people who are using it and enjoying using it. I think now, truthfully, the work has just started. We have the resource. It's available to most people. A whole bunch of work needs to be done. Whether I'm the one to do it is unclear. This is a job probably for a lot of people with a lot of different talents, bringing a lot of different ideas to the task.

So, it's important that the next generation of law students knows that there is a choice available to them. They can use the Bluebook, they can use the Indigo Book, and they'll get their job done either way. It's important that lawyers out in the marketplace know this too. There's going to be a lot of evangelism that goes into making sure that they do know this.

Equally important is the task of attracting developers to the Indigo Book; people who are going to think about how to make citation better. And how to

revise this book and circulate the revisions in a way that makes the process of determining our legal citation rules more democratic. This work all needs to be done and we've just gotten to the first step. We're going to be busy.

DS: So, going beyond that step, what's next for the Indigo Book? Do you have any plans to support and update it?

CS: We're trying to figure that out right now. Like any open source project, it's not really about us. It's about all the people who want to be involved. So, part of the challenge moving forward would be to attract people to the task of developing extensions, changes to the Indigo book. That's something we can do using open source tools.

So, it's to be determined. There are a bunch of different ways to think about the development of this resource and we're just trying to figure out what's the right way to do it at this point. We don't have yet a firm plan, but we're working on it. A lot of that thinking will be done this summer.

DS: I'm excited to hear what goes on then. So, where else could the legal profession benefit from an open source approach?

CS: Well, case law. You know a lot of the legal profession accesses case law through Westlaw and Lexis. They pay for the privilege. There's no reason that these government works, which we pay for the production of through our tax dollars, should be locked up in a Lexis / Westlaw duopoly. A lot of case law is now available on the web, but not nearly all. Making case law more widely available will open up the law to people who don't have access to it through the expensive, traditional means. People are working on this, that's a project that's ongoing, and there's a lot of hands on that, so I think there will be progress over time.

DS: What about court filings? Do you think that would be an area that also needs it?

CS: Yes. So, PACER is the service that the federal courts use for access to court filings. I know a lot of people who use PACER to gain access to court filings and they get their credit card bills at the end of the month. It's shocking how quickly your credit card bills mount when using PACER. Again, I understand that the federal court system needs to recover its costs – the cost of providing court filings to the public – but PACER just seems like an extraordinarily complex and expensive way to do that.

DS: In all, what lessons do think the Indigo Book poses for copyright reform generally?

CS: Yeah, so I haven't really thought about that. I don't think of this as a copyright reform project. I think of this more of a project that attempts to make some infrastructure that's very important to the public available to the public. Not simply available to use, but available to change, to work with, to govern. So I don't have a broader copyright reform idea in terms of how the Indigo Books relates to this topic. It's really a project that has to do with a specific piece of infrastructure that is important to lawyers.

DS: Finally, before we close, how did this project or open source law in general relate to your professional or academic work?

CS: I write a lot about areas in which there isn't a lot of copyright, but there's a lot of innovation, so the fashion industry is a great example of that, open source software is another. I think, in our legal citation system, there hasn't been a lot of innovation. There's been a lot of growth in the number of rules, but the number of rules is not how you judge a legal citation system. Its flexibility, its suitability to the task, its accessibility by lawyers and by law students—that's how you judge it. I think we could have a lot of innovation in all those areas. I actually think that an open source approach is more likely to bring us that innovation than continued control by one unrepresentative and small group of elite law students.