



Smithsonian Institution

April 28, 2008

By Federal Express

Carl Malamud
President & CEO
Public.Resource.Org, Inc.
1005 Gravenstein Highway North
Sebastopol, CA 95472

Dear Mr. Malamud,

Please find enclosed your copies of the unexecuted gift agreement between Public.Resource.Org, Inc. and the Smithsonian Institution and your organization's check to the Smithsonian for \$50,000.

As you know, the Smithsonian has been posting digital images on its website for many years, through the Office of Photographic Services and other museums and offices throughout the Institution. We have sought to increase the amount of digital content on our website to make it available for educational, scholarly, personal and other uses consistent with the Smithsonian's mission.

In furtherance of those goals, we have elected to expand access in a new arena by posting at least 2,000 digital images with no known copyright restrictions on a public website such as Flickr. We expect to launch this project in the very near future. However, because this project involves a departure from the manner in which Smithsonian images have been posted in the past, we must proceed according to criteria that we define to ensure that the right balance is struck between access and stewardship of Smithsonian resources. For these reasons, and those explained below, we have concluded that it is best to continue this project without the funds offered by your organization.

As we discussed by telephone on several occasions, the Smithsonian was uncertain of its ability or desire to adhere to the central stipulation of your gift regarding the resolution of the digital images to be posted. For that reason, we delayed sending you a draft gift agreement until we could determine internally how best to proceed with this project. When I sent you the draft, my transmittal e-mail made it clear that it was a draft only and not intended for execution until the Smithsonian resolved these issues. I reiterated these concerns during our phone conversation, yet you signed the draft agreement, returned it with a check and a cover letter delineating additional terms not reflected in the agreement. You did this even after I informed you that the Smithsonian had not yet accepted the gift and would not do so until we had finalized our selection of images, reviewed your additional terms and formally accepted them.

Office of General Counsel
100 Jefferson Drive SW
P.O. Box 23286
Washington, DC 20026-3286

Further, you announced the gift by posting the unexecuted agreement on a website without consultation or permission. Your announcement violated Section 3 of the gift agreement which prohibits any press release, announcement or reference to the gift unless reviewed and approved by the Smithsonian in advance of its release. In addition, although the gift agreement is not itself confidential, you were apprised by Richard Kurin, Acting Undersecretary for History, Art and Culture that your posting of the agreement without redacting private bank account information resulted in potential financial risk to the Institution. Next, your unfortunate public statements appearing to take credit for the Smithsonian's relationship with Flickr came at a sensitive period during our negotiations on this project and put both parties in an awkward position.

For all the reasons stated above, we have concluded that it is in the Smithsonian's best interest to proceed with this project without the gift offered by your organization.

Sincerely,



Lauryn H. Guttenplan
Associate General Counsel

cc: Richard Kurin

VOID

**GIFT AGREEMENT
BETWEEN
PUBLIC.RESOURCE.ORG
AND
THE SMITHSONIAN INSTITUTION**

THIS GIFT AGREEMENT is entered into this 16 day of April, 2008, by and between Public.Resource.Org, a non-profit organization created to establish public work projects on the internet, whose address is 1005 Gravenstein Highway North, Sebastopol, California 95472 (hereinafter, "Donor") and the SMITHSONIAN INSTITUTION, a trust instrumentality of the United States, whose address is 1000 Jefferson Dr., SW, Washington, DC 20560. (hereinafter "Smithsonian").

WHEREAS, Smithsonian is interested in posting digital images from its collections on the Flickr photo-sharing website as part of a pilot project initiated between the Library of Congress and Yahoo! called "The Commons;" (the "Project") and

WHEREAS, Public.Resource.Org is willing to provide funds to assist the Smithsonian in identifying, preparing, posting, and monitoring 2,000 digital images on the internet;

NOW, THEREFORE, the parties agree as follows:

1. THE PROJECT

1.1 The Project is part of a recent initiative by the Library of Congress and Yahoo! to create "The Commons," a collection of photographs posted on Flickr.com for public access to photographic images with "no known copyright restrictions." Smithsonian intends to participate by posting no fewer than 2,000 digital images from its collections at medium resolution with an emphasis on American history and culture, the selection of specific images to be in the sole discretion of the Smithsonian.

1.2 The contents and presentation of any activity, exhibition or program, the management of the Smithsonian's collections, and the interpretation of the Smithsonian's mission to "increase and diffuse knowledge," remain exclusively within the sole discretion of the Smithsonian.

2. DONATION

2.1 Donor agrees to donate \$50,000 to the Smithsonian for expenses related to the Project.

2.2 Donor will make this donation within 30 days following the signing of this agreement by check made payable to "Smithsonian Institution" (1000 Jefferson Dr., SW,

NOT APPROVED

Washington, DC 20560), or by wire transfer as follows:

ABA:
Bank Name:
Bank Address:

Account:
Account Name:



2.3 Donor represents to the Smithsonian that it considers this a binding commitment. Donor understands that the Smithsonian will rely upon this commitment, including but not limited to making financial and/or other commitments in reliance upon it.

2.4 The Internal Revenue Service requires that donors obtain specific acknowledgments from donees, including a valuation of goods and services provided by the donee in return for the gift, if the Donor intends to take a charitable contribution tax deduction for the gift. The amount of a charitable contribution that is deductible for federal income tax purposes is limited to the excess of the value of the cash or property contributed over the value of the goods or services provided. If Donor will require such an acknowledgment, it will so notify the Smithsonian in writing.

3. RECOGNITION

The Smithsonian will acknowledge the gift from Donor on the Smithsonian website on the page that describes the Project. Any press release, announcement or reference to this Gift which includes the name or logo of either Donor or the Smithsonian shall be reviewed and approved by both parties in advance of release or publication.

4. PUBLICITY AND PROMOTION

4.1 The names of the "Smithsonian Institution," the Smithsonian sunburst logo, and certain other Smithsonian names and marks are registered trademarks. Except as specifically provided for herein, Donor may not use these names and marks in advertising, promotion, publicity, or fund-raising, including but not limited to Donor's website, without the prior written approval of the Smithsonian.

5. INDEMNIFICATION

5.1 To the extent permitted by law, the Smithsonian agrees to indemnify and hold harmless Donor from all claims or damages asserted by third parties caused by or arising out of Smithsonian's participation in the Project.

6. FORCE MAJEURE

Neither party shall have any liability to the other for any failure to perform, or for any cancellation in connection with performance of any obligations hereunder, if such failure or cancellation is due to, or in any manner caused by, the laws, regulations, acts, demands, orders or interpositions of any government, or by acts of God, strikes, fire, flood, weather, war, terrorism, rebellion, insurrection or any other causes beyond the control of either party, whether similar or dissimilar to the foregoing.

7. AUTHORIZED REPRESENTATIVES

7.1 Smithsonian Representative. For the purposes of liaison, direction and coordination of daily operational matters, the Smithsonian shall be represented by: Ann T. Speyer, Smithsonian Institution, Chief Information Officer, 380 Herndon Parkway, Herndon VA 20170, 202-633-1688.

7.2 Donor Representative. For the purposes of liaison, direction and coordination of daily operational matters, Donor shall be represented by:

Carl Malamud
President & CEO
Publicresource.org
1005 Gravenstein Highway North
Sebastopol, California 95472

8. OTHER PROVISIONS

8.1 Recitals. The recitals herein constitute an integral part of the Agreement and are to be considered as such.

8.2 Captions. The captions and headings contained in this Agreement have been inserted for reference and convenience only and in no way define, limit, or describe the text of this Agreement or the intent of any provision.

8.3 Association. The parties, by this Agreement, do not intend to create a partnership, principal/agent, master/servant, or joint venture relationship, and nothing in this Agreement shall be construed as creating any such relationship between the parties.

8.4 Confidentiality. In consideration of the public nature of the Smithsonian and in order to protect its public image and the public trust, Donor acknowledges that the Smithsonian will not treat this Agreement or its contents as confidential information. The Agreement and its

VOID

contents will be released if requested by organizations or individuals with a legitimate interest in the matter or who make such a request in a manner consistent with Smithsonian policy or applicable law.

8.5 Modification. Neither party shall be bound by any definition, condition, warranty, representation, modification, consent, or waiver, other than as expressly stated herein, unless set forth in a writing executed by the party to be bound thereby.

8.6 Assignment. This Agreement and the rights granted hereunder may not be assigned by either party, except with the express written permission of the other party.

8.7 Disputes. The terms and conditions of this Agreement will be construed in accordance with the law of the District of Columbia.

8.8 Entire Agreement. This Agreement constitutes the entire legal agreement between the parties relating to the subject matter hereof. All prior negotiations, representations, agreements, and understandings are ineffective and are superseded by this Agreement.

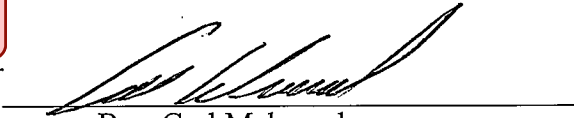
ACCEPTED AND AGREED TO BY THE AUTHORIZED
REPRESENTATIVES OF THE PARTIES

SMITHSONIAN INSTITUTION

DONOR

NOT APPROVED

By



By: Carl Malamud

Date:

Date: 4/10/08

By: Virginia B. Clark
Director, Office of External Affairs

Date: _____

