

Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*

Katie Fortney**

An informed democratic society needs open access to the law, but states' attempts to protect copyright interests in their laws are a major roadblock. Ms. Fortney urges broader access, analyzes the implications and legal arguments for and against copyright in the law, and considers strategies for access advocacy.

Introduction

¶1 Nearly 175 years ago, the Supreme Court unanimously agreed that it would be impossible for a reporter of judicial decisions to have any copyright in the opinions written by the Court.¹ Appellants in that case, while arguing for copyright in judicial opinions, acknowledged that “[i]t would be absurd for a legislature to claim the copyright” in the laws it wrote.² Fast forwarding to the Fifth Circuit just a few years ago, it seems little has changed. “[T]he law, whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.”³ If *Nimmer on Copyright* states that it is “clearly the case” that state statutes are regarded as being in the public domain,⁴ surely this is not a controversial issue. Yet if you look at state statutes, you may run into statements such as these:

- “Colorado Revised Statutes . . . are copyrighted by the state of Colorado (please see §2-5-115, C.R.S.). In addition, any person wishing to reprint and distribute all or a substantial part of the statutes . . . must obtain prior permission of the Committee on Legal Services . . .”⁵

* © Katie Fortney, 2010.

** Student, San Jose State University School of Library and Information Science & Library Assistant and Docketing Clerk, Simpson Thacher & Bartlett LLP, Palo Alto, California.

1. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834).

2. *Id.* at 616 (Brief of the Appellants).

3. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 800, ¶ 37 (5th Cir. 2002). Most of the cases cited in this article are freely available to the public from web sites such as Google Scholar, Justia, Public Library of Law, Public.resource.org, the Cornell Legal Information Institute, Altlaw, Findlaw, or Hyperlaw. The best method for searching for freely accessible case law is by using the West reporter citation; where available, paragraph numbers for cases cited to West reporters are included for internal references, since many web sites use them instead of internal page numbers from the West reporters.

4. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.12[A] (2009).

5. *Michie's Legal Res.*, Colorado [Revised Statutes], <http://www.michie.com/colorado> (last visited Oct. 21, 2009).

- “This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.”⁶ “The Idaho Code is the property of the state of Idaho, and the state of Idaho and the taxpayers shall be deemed to have a copyright on the Idaho Code.”⁷
- “The [Wyoming] statutes are copyrighted by the State of Wyoming. Pursuant to contract, Matthew Bender & Company . . . has been granted the exclusive right to publish, distribute and sell the Wyoming Statutes Annotated in all forms and media”⁸

¶2 State statutes are generally made publically available on the Internet, although the quality of the interfaces varies. Problems range from HTML errors and noncompliance with section 508 accessibility requirements to difficult navigation and files that block access by search engines.⁹ State administrative law (like building and fire codes) and local ordinances, though, may not be online at all or the online versions may not be free, which means that citizens who want to know the law must buy a copy or find a library that can afford one.

¶3 Furthermore, even when online sources are deemed official, they are not authenticated and do not allow for standard methods of authentication,¹⁰ nor do they address “preservation and permanent public access.”¹¹ Various organizations are attempting to provide free and better access to legal materials online, but as long as government bodies and publishers continue to claim copyright over the law and employ strict licensing terms for use of their electronic versions, risk-averse institutions like libraries and universities, which could be providing valuable services in this area, are likely to shy away from this.

¶4 State and local governments that claim copyright in the law they promulgate must be made to see that the law, public policy, and their own self-interest dictate that access to the law—all the law—has to be unrestricted. People who have questions about the law should be able to answer them. People who have ideas about how to make the law more accessible and understandable should be able to implement them. Opening up the content of the law to everyone to freely copy and redistribute it is the best way to achieve an informed public and a truly participatory democracy.

6. State of Idaho, Idaho Statutes, <http://www3.state.id.us/idstat/TOC/idstTOC.html> (last visited Oct. 21, 2009).

7. IDAHO CODE ANN. § 9-350(1) (2004).

8. Wyoming State Statutes, <http://legisweb.state.wy.us/titles/statutes.htm> (last visited Oct. 21, 2009).

9. See, e.g., Letter from Carl Malamud, President & CEO, Public.Resource.Org, Inc., to Dexter A. Johnson, Legislative Counsel, Or. Legislative Council Comm. (Apr. 15, 2008), available at <http://www.scribd.com/doc/2543980/The-Honorable-Dexter-Johnson-Redux>.

10. See RICHARD J. MATTHEWS & MARY ALICE BAISH, AM. ASS'N OF LAW LIBRARIES, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 13 (2007).

11. RICHARD J. MATTHEWS ET AL., AM. ASS'N OF LAW LIBRARIES, STATE-BY-STATE REPORT ON PERMANENT PUBLIC ACCESS TO ELECTRONIC GOVERNMENT INFORMATION *passim* (2003).

Copyright Law for State and Local Government Works

¶5 To be fair to all the states that claim copyright in their laws and regulations, the law in this area is complex, contested, and sometimes varies by circuit. States, unlike the federal government, can have copyright in some of their works; the complicated question is which of their works and how much of them. This section briefly explains the background for copyright claims in the law and then attempts to show why they are misguided. The next section discusses the importance of open access to the law and how to best discourage inappropriate claims of copyright protection from interfering with that access.

¶6 There seems to be a popular misconception that all government works are in the public domain. While there are certainly those who advocate for that position,¹² what the pertinent section of the Copyright Act of 1976 actually says is that copyright protection “is not available for any work of the United States Government.”¹³ State government works are not mentioned anywhere in the Copyright Act, and the Act by its terms preempts their being covered by any other source, such as state law.¹⁴ States may view the potential intellectual property in their laws as a valuable revenue source they have a duty to preserve—as the deputy director of California’s Office of Administrative Law, Linda Brown, recently said: “We exercise our copyright to benefit the people of California.”¹⁵ States have also argued that copyright protection is necessary so that they can control the integrity of statutory publication for the benefit of the public.¹⁶

¶7 In a way, these arguments put the cart before the horse. The needs and interests of a copyright holder can only be considered after it is determined that there is some fixed expression entitled to copyright protection.¹⁷ Although states can be copyright holders, “facts are not copyrightable,”¹⁸ and “for copyright purposes, laws are ‘facts’”¹⁹ Many cases over the years have also reflected the related rule that statutes and judicial opinions cannot be copyrighted because all citizens should have free access to the laws that govern them and that they are presumed to know.²⁰

¶8 This much, at least, seems clear: the essential content of statutes and judicial opinions drafted by state judges and legislatures—“the law”—cannot be copyrighted, by the states or anyone else. This does not prevent some states from making

12. See, e.g., Kris Tells Us Why We Should Care, Posting of Daniel Cornwall to Free Government Information, <http://freegovinfo.info/node/1955> (Aug. 2, 2008, 08:25).

13. 17 U.S.C. § 105 (2006).

14. *Id.* § 301.

15. Nathan Halverson, *He’s Giving You Access, One Document at a Time*, PRESS DEMOCRAT (Santa Rosa, Calif.), Sept. 3, 2008.

16. See *Georgia v. Harrison Co.*, 548 F. Supp. 110, 114 (N.D. Ga. 1982), *vacated* 559 F. Supp. 37 (N.D. Ga. 1983) (case settled upon parties’ unanimous request).

17. See 17 U.S.C. § 102(a) (2006).

18. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 344 (1991).

19. *Veeck v. S. Bldg. Code Congress Int’l, Inc.*, 293 F.3d 791, 801, ¶ 44 (5th Cir. 2002).

20. See, e.g., *Banks v. Manchester*, 128 U.S. 244, 252–53 (1888); *Veeck*, 293 F.3d at 801, ¶ 44; *Bldg. Officials & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730, 734, ¶ 27 (1st Cir. 1980); *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886).

sweepingly broad claims like “[a]ll copyrights and other rights to statutory text are reserved by the State of Maine,”²¹ but when pressed, states are more likely to claim rights in published compilations or content that they consider supplemental to the law itself.

Rights in Compilations and Supplemental Material

¶9 Louisiana is an example of a state that claims copyright not in the text of the law, but in its arrangement of regulations and the accompanying text. Louisiana law states that information in its administrative code “which includes, but is not limited to, cross references, tables of cases, notes of decisions, tables of contents, indices, source notes, authority notes, numerical lists, and codification guides, other than the actual text of rules or regulations” is protected.²²

¶10 Oregon, until recently, took a similar view regarding its statutes. Justia and Public.Resource.Org, two organizations dedicated to increasing free access to legal information, posted copies of Oregon’s laws on their web sites. In April 2008, Oregon sent Justia a cease and desist letter demanding that the statutes be taken down. The letter said that Oregon claimed copyright not “in the text of the law,” but “in the arrangement and subject-matter compilation . . . the prefatory and explanatory notes, the leadlines and numbering for each statutory section, the tables, index and annotations and such other incidents as are the work product of the Committee in the compilation and publication of Oregon law.”²³

¶11 Compilations are eligible for copyright protection.²⁴ This is true even if none of the individual components of the compilation are copyrightable,²⁵ but the protection only covers “the material contributed by the author of such work . . .”²⁶ Contributions such as summaries and headnotes are generally protected.²⁷ Whether the compiler’s arrangement or other contributions are protected depends on how creative they are: if the parts are arranged in chronological, alphabetical, or some other “mechanical or routine” order, then there has been no original expression

21. Maine Legislature, Disclaimer, <http://www.mainelegislature.org/legis/statutes/disclaimer.htm> (last visited Nov. 2, 2009).

22. LA. ADMIN. CODE tit. 1, § 315 (2008).

23. Letter from Dexter Johnson, Legislative Counsel, Or. Legislative Counsel Comm., to Tim Stanley, CEO, Justia Inc. (Apr. 7, 2008), *available at* <http://www.scribd.com/doc/2526821/Notice-of-Copyright-Infringement-and-Demand-to-Cease-and-Desist>. Before receiving the letter, the only guidance Justia had was that Oregon claimed copyright protection “in those parts of Oregon Revised Statutes that are legally subject to copyright protection.” Archive of Oregon Revised Statutes—2005 Edition, *available at* <http://web.archive.org/web/20070111041020/http://www.leg.state.or.us/ors/> (last visited Nov. 2, 2009). *See also* OR. REV. STAT. § 171.275(2) (2007) (authorizing the Legislative Counsel Committee to establish policies for, among other things, the copyrighting of the Oregon Revised Statutes).

24. 17 U.S.C. §§ 101, 103 (2006).

25. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 348 (1991); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985).

26. 17 U.S.C. § 103(b).

27. *Banks Law Publ’g Co. v. Lawyers’ Co-operative Publ’g Co.*, 169 F. 386, 388, ¶ 6 (2d Cir. 1909) (“[A reporter] may secure copyright of the headnotes, statements of cases, title of the volume, arrangement or grouping of cases, index digest, synopsis of the arguments, and in short, such portions of his compilation or authorship as requires the exercise of intellectual thought and skill.”).

contributed by the compiler and the arrangement does not meet the threshold level of creativity to merit protection.²⁸ The same should be true for anything flowing mechanically from that arrangement, such as pagination.²⁹

¶12 This rule has played out in court for publishers and states seeking copyright protection for compilations of legal materials in a variety of ways. In *Oasis Publishing Co. v. West Publishing Co.*, for example, a district court judge in Minnesota held that West Publishing's arrangement of *Florida Cases* was copyrightable, and that someone republishing the text of the opinions could not include indications of West's page numbers without infringing on West's copyright.³⁰ But in *Matthew Bender & Co., Inc. v. West Publishing Co.*, a New York district court and the Second Circuit disagreed.³¹ The Second Circuit held that star pagination—the indication of where West's page breaks occur—did not “create a ‘copy’ of any protected elements of West's compilations or infringe West's copyrights.”³² In a companion case, the court also held that West's arrangement and selection of information about parties, court, date of decision, attorneys, and procedural developments were not protectable.³³ The cases drew the attention of the Department of Justice and a coalition of library associations, including the American Association of Law Libraries and the American Library Association, both of which filed amicus briefs describing the copyrightable contribution in West's case compilations as “trivial,” and warning against the dangerous implications and bad policy of letting a dominant publisher hold public domain legal information hostage.³⁴

¶13 The District Court of the District of Columbia has agreed with the Second Circuit that, especially because of the Supreme Court's denial of copyright protection to elements of a telephone directory in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* in 1991,³⁵ elements like pagination are likely not subject to copyright protection.³⁶ Even before *Feist*, at least one court had found that a state could not claim copyright in the title, chapter, and article headings of its statutes.³⁷

28. *Feist*, 499 U.S. at 362.

29. *Banks*, 169 F. at 390–91, ¶ 25–29.

30. See *Oasis Publ'g Co. v. West Publ'g Co.*, 924 F. Supp. 918, 931, ¶ 32 (D. Minn. 1996).

31. *Matthew Bender & Co., Inc. v. West Publ'g Co.*, No. 94 Civ. 0589, 1997 WL 266972 (S.D.N.Y. May 19, 1997), *aff'd*, 158 F.3d 693 (2d. Cir. 1998). Opinions and pleadings in the *Matthew Bender* case are available from HyperLaw, <http://www.hyperlaw.com/westlit/hlvwest-pleadings.html> (last visited Nov. 3, 2009).

32. *Matthew Bender*, 158 F.3d at 696, ¶ 2.

33. *Id.*

34. See Brief for American Ass'n of Law Librarians et al. as Amici Curiae Supporting Appellees, *Matthew Bender*, 158 F.3d 693 (No. 97-7430), reprinted in 91 LAW LIBR. J. 385 (1999); Brief for United States of America as Amicus Curiae Supporting Appellees, *Matthew Bender*, 158 F.3d 693 (No. 97-7430), available at <http://www.usdoj.gov/atr/cases/fl100/1191.pdf> (last visited Nov. 3, 2009).

35. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 364 (1991). “The [*Feist*] Court expressly rejected the ‘sweat of the brow’ doctrine, which had justified the extension of copyright protection to the facts and other non-original elements of compilations on the basis of the labor invested in obtaining and organizing the information.” *Matthew Bender*, 158 F.3d at 699, ¶ 12.

36. See *United States v. Thomson Corp.*, 949 F. Supp. 907, 926, ¶ 91 (D.D.C. 1996).

37. See *Georgia v. Harrison Co.*, 548 F. Supp. 110, 115, ¶ 21 (N.D. Ga. 1982), *vacated* 559 F. Supp. 37 (N.D. Ga. 1983) (case settled upon parties' unanimous request).

¶14 The *Oasis* case, like *West Publishing Co. v. Mead Data Central, Inc.*,³⁸ which was decided in the same circuit, but before *Feist*, appears to be an outlier. The majority view is that “the law” is not copyrightable, and copyright in compilations of the law extends only to the parts of the compilation that are expressions of sufficient originality.³⁹ Section numbers, titles, headings, and page numbers should not qualify. This view complements the long-standing tradition of favoring access to the law because such access is essential to due process and because citizens are considered to be the authors and owners of the law.⁴⁰

¶15 *Oasis* is still out there, and states will continue claiming broad copyright in their primary legal materials (and licensing those claimed rights to private publishers) as long as they see it as being in their best interests to do so. In the case of the Oregon statutes, the Oregon Legislative Counsel Committee ended up changing their policy, and for the time being will not enforce any copyright in the Oregon Revised Statutes.⁴¹ Had Justia simply removed the Oregon content from their web sites as ordered, nothing would have changed. Because there was resistance (and a flurry of furor on the Internet⁴²), the committee reevaluated its position because of the wish to avoid negative press, the potential for costly litigation, the desire to provide access to the law, and the realization that many users, including themselves, could benefit from new technologies with free, centralized, improved access to legal materials.⁴³ Oregon’s revised stance has opened up vast possibilities for improved packaging and access to its laws, one of which has already arrived in the form of

38. 799 F.2d 1219 (8th Cir. 1986) (holding that West’s case arrangements were entitled to copyright protection and the “star pagination” references used by Mead Data Central (now LexisNexis) infringed that copyright). See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 728–31 (1989), for a thorough analysis of the *Mead Data Central* case and its predecessors, finding that the Eighth Circuit arrived at a wrong and dangerous holding based on consequentialist reasoning that was unduly concerned with charges of unfair competition. The article also provides an illuminating history of the efforts of Illinois and Texas to assert that the numbering of their statutes was part of the public domain, rather than property of West. *Id.* at 725 n.16.

39. However, as pointed out by Peter Martin, the existence of the case creates enough of a litigation risk to deter risk-averse parties regardless of its continued viability. Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 99 LAW LIBR. J. 329, 345, 357, 2006 LAW LIBR. J. 19 ¶¶ 34, 66.

40. *Bldg. Officials & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730, 734, ¶¶ 26–27 (1st Cir. 1980).

41. A video of the Council’s motion, discussion, and vote on this issue can be seen on YouTube, <http://www.youtube.com/watch?v=bNEPdJ3FCys&feature=Playlist&p=E14385788360606C&index=4> (last visited Nov. 2, 2009). The statutes have not, however, been dedicated to the public domain, and Oregon could choose to attempt to restrict use in the future. OR. REV. STAT. § 173.763 (2007).

42. See, e.g., Oregon: Publishing Our Laws Online is a Copyright Violation, Posting of Nate Anderson to Ars Technica, <http://arstechnica.com/tech-policy/news/2008/04/oregon-publishing-our-laws-online-is-a-copyright-violation> (Apr. 16, 2009, 20:29); Oregon Goes Wacka Wacka Huna Kuna, The Patry Copyright Blog, <http://williampatry.blogspot.com/2008/04/oregon-goes-wacka-wacka-huna-kuna.html> (Apr. 17, 2008, 22:12); Oregon: Our Laws are Copyrighted and You Can’t Publish Them, Posting of Cory Doctorow to BoingBoing, <http://www.boingboing.net/2008/04/15/oregon-our-laws-are.html> (Apr. 15, 2008, 22:26).

43. See *Copyright Policy on Oregon Revised Statutes: Hearing Before the Legis. Counsel Comm.* (Or. 2008) (video available at <http://public.resource.org/oregon.gov>).

OregonLaws.org, an easy-to-read, browsable, annotated, free site recently created by a second-year law student at Lewis & Clark Law School.⁴⁴

¶16 Carl Malamud of Public.Resource.Org will continue posting law that he believes is in the public domain, and doesn't seem afraid of being sued—he thinks he has a good case.⁴⁵ Perhaps, bit by bit, all of the law will become uncontested public domain matter just as the Oregon Revised Statutes did; then again, maybe it won't, or maybe there's a better way.

How the Law Could be Changed

¶17 There are three main avenues to open up more legal materials to broad free access: legislation, litigation, and persuasion.

Legislation

¶18 The quickest, and theoretically the clearest, way to remove copyright roadblocks to access to primary legal materials would be an amendment to the copyright law. To this end, in 1992, Representative Barney Frank of Massachusetts introduced a bill that would have amended 17 U.S.C. § 105 to explicitly exclude from copyright protection “any name, number, or citation by which the text of State and Federal laws or regulations are, or ever have been, identified; or for any volume or page number by which State or Federal laws, regulations, judicial opinions, or portions thereof, are, or ever have been, identified.”⁴⁶ There was a hearing, but Congress adjourned without voting on it. A new iteration of the bill could add the text of state laws to the list.

¶19 One potential complication to changing the law is the question of what happens when a model code is drafted by a private organization, which clearly holds the copyright in it, and then is adopted as law by a state or local government. The Fifth Circuit has held that the city building codes resulting from such a scenario are part of the public domain.⁴⁷ The First Circuit, some twenty years earlier, refused to rule on the issue on the record before it, leaving it open on remand back to the district court, saying that “it is hard to see how the public's essential due process right of free access to the law (including a necessary right freely to copy and circulate all or part of a given law for various purposes), can be reconciled with the exclusivity afforded a private copyright holder”⁴⁸

¶20 If model codes are adopted as law and the resulting law is a fact and part of the public domain, a few issues arise. First, the original copyright holder may claim such action ran afoul of 17 U.S.C. § 201(e), which aims to protect copyright holders

44. OregonLaws.org, <https://www.oregonlaws.org> (last visited Nov. 4, 2009).

45. Matthew B. Stannard, *Sebastopol Man Puts Code Manuals Online*, S.F. CHRON., Sept. 27, 2008, at B1.

46. H.R. 4426, 102d Cong. (1992).

47. See *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 293 F.3d 791, 800, ¶ 38 (5th Cir. 2002) (“We hold that when Veeck copied *only* ‘the law’ . . . which he obtained from SBCCI’s publication, and when he reprinted *only* ‘the law’ of those municipalities, he did not infringe SBCCI’s copyrights in its model building codes.”).

48. *Bldg. Officials & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730, 736, ¶ 34 (1st Cir. 1980).

from government appropriation, and provide compensation from the government body.⁴⁹ Second, to the extent that groups or individuals writing model codes do so for financial reasons, knowing that loss of copyright could occur may remove the incentive for writing them. Third, courts have already struggled with the issue of exactly where to draw the line. Incorporation into statutes and code is just one place on the continuum; what about regulations that refer to a particular classification scheme or valuation guide by reference, or textbooks officially adopted as part of a state's mandatory curriculum?⁵⁰

¶21 On the issue of government appropriation, some commentators have proposed a mandatory licensing scheme,⁵¹ which would have to be judicially or statutorily crafted; it could be done at the same time as an amendment to Section 105. As for incentives, model codes are often written with the intent that they become law, out of a sense of professional pride or public service.⁵² Where to draw the line could be worked out at the same time as a potential licensing scheme, giving consideration to the incentives of particular works' creators. This is a highly fact-specific issue that would likely end up being wrestled with in the courts. So long as that is the case, perhaps it would be better to skip an amendment to Section 105 and settle the matter in the courts in the first place.

Litigation

¶22 The primary advantage of litigation as a route to increasing or clarifying public domain status of primary legal materials is that a lawsuit would presumably be thoroughly briefed on both sides and a court would have to address implicated issues, providing guidance to states, publishers, and citizens. A case decided by the Supreme Court would set a precedent that would have to be followed by every jurisdiction in the country. Another advantage of this route is that it would not be subject to the vagaries of the legislative process: there would be no lobbying by publishers like West, or the nonresult of a bill like H.R. 4426 that ended up dying before it was ever voted on.

¶23 The potential downsides, however, are many. Cases take years to work their way through the court system. The Supreme Court hears only a tiny fraction of the cases that are appealed to it. Holdings may be narrowly construed depending on the facts of the particular case. Last, but certainly not least, litigation is extremely expensive and can be unpredictable. For example, in *Practice Management Information Corp. v. American Medical Ass'n*, the Ninth Circuit held that the *Physician's Current Procedural Terminology*, developed by the AMA, did not lose its

49. See *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 520, ¶ 18 (9th Cir. 1997), amended by 133 F.3d 1140 (9th Cir. 1998).

50. See, e.g., *Veeck*, 293 F.3d at 973, ¶ 1; *Practice Mgmt.*, 121 F.3d 516, 517, ¶ 4; *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 64, ¶ 8 (2d Cir. 1994); *Bldg. Officials*, 628 F.2d 730, 731, ¶ 1.

51. See Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007), for a discussion of how such a scheme might work. Hughes finds that such a scheme is called for in light of the law being "created facts," and calls for different levels of protection depending on whether incentives are required for a type of "fact" to be created. He places the model code at issue in *Building Officials* on the less-protected end of the scale, observing that "professional prestige and public service seem to be the driving forces." *Id.* at 94.

52. *Id.*

copyright protection when a federal agency adopted it as the exclusive code for identifying physicians' services for Medicare and Medicaid.⁵³ Public.Resource.Org, based in California and therefore within the Ninth Circuit, recently posted California's public safety codes, most of which are based on model codes, and all of which the state currently claims copyright in.⁵⁴ The *Practice Management* decision makes it less than clear that the Ninth Circuit would agree with the Fifth Circuit that the codes are in the public domain. Either way, the law would remain in dispute in other jurisdictions and for sufficiently different sets of facts. There are so many sub-issues—types of law, parts of law, sources of law, what constitutes “access” to the law—that it is nearly impossible that litigation alone would settle the question anytime soon.

¶24 Legislation requires having a legislator propose the right bill; successful litigation requires waiting for the right parties and circumstances to come along (and ideally, to be heard by the Supreme Court). In the meantime, and perhaps ultimately, persuasion is the best option.

Persuasion

¶25 While many states and publishers strive for maximum copyright protection of the law, not all states do. Illinois, for example, has explicitly dedicated its statutes and administrative code to the public domain.⁵⁵ Many other states are either mute on the issue or explicitly allow unlimited noncommercial use. As already discussed, the state of Oregon recently started allowing broader use of its statutes, but only after being forced to consider the issue at length; hopefully more states will follow. The road to persuading states, one by one, category by category, to give up copyright claims in their law—and to persuade them to stop aiding publishers in doing so, and then to fight publishers on pagination and other issues—is a long one. Some litigation is probably unavoidable, and some legislation would be helpful, but cooperation of state and local governments is essential.

¶26 No statute or case can clearly and thoroughly cover every circumstance. Only when states support public domain status for their primary legal materials can they be true allies in the pursuit of maximum access to the law rather than potential adversaries. More importantly, the states are the source of the law. Many exciting tools are being developed, and will continue to be developed, for finding and using the law, but from an archiving and authenticity perspective, much responsibility properly resides with the states themselves. Most online statute collections hosted by state legislatures include disclaimers that the online version is not official, and only the print (i.e., not free) version should be relied upon for legal research.⁵⁶

53. *Practice Mgmt.*, 121 F.3d at 517, 520, ¶ 20.

54. See, e.g., 1 CAL. BLDG. STANDARDS COMM'N, 2007 CALIFORNIA BUILDING CODE: CALIFORNIA CODE OF REGULATIONS TITLE 24, PART 2 (2007) (copyright page); Stannard, *supra* note 45.

55. 5 ILL. COMP. STAT. ANN. 100/5-80(h) (West 2005); 25 ILL. COMP. STAT. ANN. 135/5.04(a) (West 2008).

56. See, e.g., Alaska State Legislature, Bills & Laws Infobase, <http://www.legis.state.ak.us/folhome.htm> (last visited Nov. 5, 2009); Ark. State Legislature, Arkansas Code, <http://www.arkleg.state.ar.us/SearchCenter/Pages/arkansascode.aspx> (last visited Nov. 5, 2009); Conn. Gen. Assembly, Disclaimer, <http://www.cga.ct.gov/asp/menu/Disclaimer.asp> (last visited Nov. 5, 2009). See also MATTHEWS & BAISH, *supra* note 10.

Ideally, with all the technology available today, a person reading the law—official and public domain content that they are presumed to know at their peril—should either be able to rely on the authenticity of what they are reading or verify it by clicking through to an official version.

¶27 States interested in improving access do not need to look far to find examples and guidance. Summarizing the state of neutral citation and state court web sites in 2007, Martin described the successful efforts of several states in improving access to their case law.⁵⁷ North Dakota, for example, began using neutral case citation starting in 1997 (rendering it unnecessary to consult West or other printed reporters), and posts new decisions to the court's web site as well as working backward to archive decades of old decisions.⁵⁸ Oklahoma—no doubt partially inspired by the large (and unpaid) bills from West for their county law libraries⁵⁹—embarked on a similar project. Both sites archive final decisions; include metadata like author, party names, and date; and are fully searchable by search engines and commercial and nonprofit publishers.⁶⁰ In the future, states looking to move beyond access to opinions and codes could add access to briefs. Briefs are not primary legal materials and therefore face different copyright issues, but the policy interest is the same and courts have a historical role in providing access to them.⁶¹

¶28 As for guidance, AALL's Electronic Legal Information Access and Citation Committee has developed web site evaluation criteria and worksheets to address content, organization and accessibility issues for government and legal information providers.⁶²

Conclusion

¶29 The problem of copyright in the law is as old as copyright. New wrinkles are constantly arising, but the fundamental rule remains the same: the law is in the public domain. Justia, Public.Resource.Org, AALL, and myriad others are already pursuing increased access and clarity through persuasion as a preference, litigation when necessary, and legislation when possible. In a market where state agencies and employees can only afford limited access to the sites that traditionally host their own laws and where public opinion tends to favor open access, it should become easier to win over governments that currently claim copyright in their laws. There are also strong legal and ethical arguments that are persuasive both in their own right and because they make potential copyright plaintiffs more hesitant to pursue litigation.

¶30 Hopefully it won't take another 175 years to get there.

57. Martin, *supra* note 39.

58. *Id.* at 337, ¶ 15.

59. *Id.* at 339, ¶ 17.

60. *See id.* at 343, ¶ 29; 346, ¶¶ 36–39.

61. *See* Michael Whiteman, *Appellate Court Briefs on the Web: Electronic Dynamos or Legal Quagmire?*, 97 LAW LIBR. J. 467, 479, 2005 LAW LIBR. J. 27, ¶¶ 35–36.

62. These documents are available on the AALL web site. Am. Ass'n of Law Libraries, Access to Electronic Legal Information Committee, <http://www.aallnet.org/committee/aelic/evaluations.html> (last visited Nov. 5, 2009).