

# No Copyright for Law in the USA

Copyright 2009 by Ronald B. Standler

No copyright claimed for works of the U.S. Government.

No copyright claimed for quotations from any source, except for selection of such quotations.

## Keywords

copyright, copyrightability, copyrights, government, federal, judicial opinions, law, pagination, paging, public-domain citation, regulations, reporter, state, statutes, *Wheaton v. Peters*, *West v. Mead Data Central*, *Matthew Bender v. West*

## Table of Contents

- Introduction ..... 3
- Works of Federal Government ..... 4
  - Wheaton v. Peters ..... 4
  - Heine v. Appleton ..... 6
  - Banks Law Pub. v. Lawyer’s Co-Operative Pub. .... 7
  - Garfield v. Palmieri ..... 8
  - federal statutes ..... 9
  - due process ..... 10
- Works of a State Government ..... 11
  - Davidson v. Wheelock ..... 11
  - Gould v. Banks ..... 12
  - Nash v. Lathrop ..... 13
  - Banks v. West Pub. .... 14
  - Banks v. Manchester ..... 16
  - Callaghan v. Myers ..... 17
  - Howell v. Miller ..... 18
  - Nebraska v. State Journal ..... 19
  - Montana v. Mitchell ..... 20
  - Harrison Co. v. Georgia ..... 21
  - BOCA v. Code Technology ..... 21
  - Georgia v. Harrison Co. .... 24
  - Veeck v. SBCCI ..... 26
  - city/county tax maps ..... 31
  - state statutes ..... 31
    - Colorado ..... 31
    - Idaho ..... 33

Mississippi .....	34
Montana .....	35
copyright for benefit of the citizens of the state? .....	35
copyright of state judicial opinions .....	36
examples of good state statutes .....	38
discussion of state statutes .....	39
Pagination Copyrightable? .....	42
domination by West .....	42
precedent on pagination .....	43
Myers v. Callaghan .....	43
Banks v. Lawyer's Co-Op .....	44
Eggers v. Sun Sales Corporation .....	45
cases involving West .....	45
West Publ. v. Mead Data Central .....	45
court's errors .....	46
Oasis v. West Pub. ....	50
contract with state and public records .....	52
antitrust litigation against West Pub. ....	53
Matthew Bender v. West Pub. ....	56
no copyright for some of West's additions .....	58
unfairness to West .....	59
what remains? .....	61
unfair competition .....	62
cost .....	64
Why citing pagination is not copyright infringement .....	64
fair use analysis for citations .....	66
fair use analysis for copies of entire opinions .....	67
Public-Domain Citations .....	68
Conclusions .....	70
Bibliography .....	72

## Introduction

Law (e.g., statutes, judicial opinions, and government regulations) in the USA is *not* protected by copyright, although — bizarrely — for-profit companies publish most of the law used in the USA. This essay traces the history of copyright for law in the USA, and explains the recent rise of public-domain citation formats for judicial opinions.

In the context of deciding whether photocopies of copyrighted medical or scientific journals are copyright infringement, several judges have mentioned that attorneys routinely photocopy statutes, judicial opinions, regulations, and law review articles. For example,

Trial Judge James F. Davis, who considered the use now in dispute not to be “fair,” nevertheless agreed that a library could supply single photocopies of entire copyrighted works to attorneys or courts for use in litigation. It is, of course, common for courts to be given photocopies of recent decisions, with the publishing company's headnotes and arrangement, and sometimes its annotations.

*Williams & Wilkins v. U.S.*, 487 F.2d 1345, 1353 (Ct.Cl. 1973).

Such a mention of photocopying statutes, judicial opinions, and regulations is *not* relevant to discussing photocopying of copyrighted material, because judicial opinions are *uncopyrightable* matter that is in the public domain. There are few law review articles that mention this issue.<sup>1</sup>

In November 2008, when I was preparing an annotated version of the opinions in the above-mentioned *Williams & Wilkins* case,<sup>2</sup> I included the pagination from the published reporter, so that I — and my readers — could cite to specific pages in the published reporter. I remembered a case<sup>3</sup> from my copyrights class in 1997 in which pagination of judicial opinions was held to be copyrightable subject matter. So I asked permission of both the Bureau of National Affairs (publisher of the trial court's opinion) and West (publisher of the most commonly cited version of the appellate court's opinion) to include their pagination in my version of the judicial opinions. Asking permission motivated me to do the legal research that is mentioned in this essay.

This essay began as a history of courts declaring that there is no copyright for law (e.g., statutes, judicial opinions, and government regulations) in the USA. That seems like an obscure detail in copyright law — but, in December 2008, at least 17 states have current statutes requiring

---

<sup>1</sup> A notable exception is: Steven D. Smit, “ ‘Make a Copy For The File ...’: Copyright Infringement by Attorneys,” 46 BAYLOR LAW REVIEW 1 (Winter 1994).

<sup>2</sup> Posted at <http://www.rbs2.com/ww1.pdf> and <http://www.rbs2.com/ww2.pdf> (12 Nov 2008).

<sup>3</sup> *West Publ. v. Mead Data Central*, 799 F.2d 1219 (8thCir. 1986), which is discussed later in this essay, beginning at page 45.

either their state statutes or judicial opinions to be copyrighted.<sup>4</sup> Further, this topic leads to litigation by West Publishing during the years 1985-1997 to use its allegedly copyrighted enhancements (including an assertion that pagination in West's reporters was copyrighted) to prevent competitors from copying anything added by West to the public-domain judicial opinions.<sup>5</sup> Law librarians retaliated against West's misuse of its alleged copyrights by introducing public-domain citations.<sup>6</sup> And, in Nov 1998, the Second Circuit held that West had no valid copyright in many of its editorial enhancements, not only stripping West nude, but also raising legitimate concerns about legally protections for labor and expense in creating a database of public-domain material that is *not* protected by copyright.<sup>7</sup> This essay is really about making law easily accessible to everyone who is affected by that law.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

### **Works of Federal Government**

Since 1834, the common law in the USA denies copyright protection to judicial opinions from federal courts. Since 1895, the statutory law in the USA denies copyright protection to any work written by an employee of the federal government, as part of his/her assigned work.

#### *Wheaton v. Peters*

Wheaton was the reporter (i.e., editor) of U.S. Supreme Court opinions from 1816 until 1827. Peters was the successor to Wheaton. Peters condensed some of WHEATON'S REPORTS, and republished them. Wheaton sued Peters for copyright infringement. In 1834, the U.S. Supreme Court tersely held that federal court opinions are *not* copyrightable subject matter, and are always in the public domain:

---

<sup>4</sup> See quotations from statutes and my discussion, beginning at page 31, below.

<sup>5</sup> See quotations from cases and my discussion, beginning at page 45, below.

<sup>6</sup> See below, beginning at page 68.

<sup>7</sup> See quotations from cases and my discussion, beginning at page 58, below.

It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.

*Wheaton v. Peters*, 33 U.S. 591, 668 (1834). This was the first copyright case decided by the U.S. Supreme Court.

This terse quotation from *Wheaton v. Peters* continues to be cited in recent cases, which shows the continuing validity of *Wheaton v. Peters*:

- *Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730, 733 (1stCir. 1980) (quoted sentence in *Wheaton*);
- *West Publ. v. Mead Data Central*, 799 F.2d 1219, 1223, n. 2 (8thCir. 1986) (“West does not and could not claims any copyright in the judicial opinions themselves. [citing *Wheaton*]”), *cert. den.*, 479 U.S. 1070 (1987).
- *Veeck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d 791, 795 (5thCir. 2002) (“Excluding ‘the law’ from the purview of the copyright statutes dates back to this nation's earliest period. In 1834, the Supreme Court interpreted the first federal copyright laws and unanimously held that ‘no reporter has or can have any copyright in the written opinions delivered by this Court ...’ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668, 8 L.Ed. 1055 (1834).”), *cert. den.*, 539 U.S. 969 (2003).

There is some interesting history behind *Wheaton v. Peters*. The first two reporters of U.S. Supreme Court cases, Dallas and Cranch, held *unofficial* positions without a salary during 1790 to 1815.<sup>8</sup> They expected to be paid for their efforts by sales of volumes that they edited, so the reporter *needed* a copyright on the features he added to the opinions.

In 1816, the third reporter, Wheaton, was the first official reporter appointed by the U.S. Supreme Court. The U.S. Senate proposed a salary of \$1000/year and the duty to give 50 copies of his REPORTS (worth approximately \$5 each) to the Government for distribution, but the House of Representative failed to agree.<sup>9</sup> After Chief Justice Marshall intervened with Congress, a statute was passed in March 1817, giving the reporter a salary of \$1000/year, but with the duty to give 80 free copies of his REPORTS to the Government.<sup>10</sup> Wheaton sold the manuscript and copyright to Volume 1 of WHEATON’S REPORTS for \$1200, the last time that Wheaton sold his copyright.<sup>11</sup> Wheaton’s gross income as reporter during 1817-27, including both salary and income from

---

<sup>8</sup> Craig Joyce, “The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy,” 83 MICHIGAN LAW REVIEW 1291, 1307(March 1985).

<sup>9</sup> *Ibid.* at 1343-45.

<sup>10</sup> *Ibid.* at 1347.

<sup>11</sup> *Ibid.* at 1326 and n. 216.

publishers, was between \$1500/year and \$1800/year.<sup>12</sup> (\$1500/year in 1833 corresponds to \$46,000/year in Jan 2007, if we use the price of gold as an index.) Because of his weak income as reporter, Wheaton resigned in 1827 to become chargé d'affaires to Denmark. The meager salary of Wheaton as the reporter of the U.S. Supreme Court is just one of many examples of how the U.S. Government has abused intellectuals and scholars.

Given both his meager salary and the tradition or custom of reporters to copyright their work, it was realistic by the standards of the early 1800s for a reporter to own a copyright in not only his work, but also own a copyright in the judicial opinions.<sup>13</sup> After the U.S. Supreme Court decision in *Wheaton v. Peters* in 1834, the litigation continued: a trial court held in 1838 that Peters had infringed Wheaton's copyrights. Wheaton and Peters both died in 1848. Their heirs settled the litigation in 1850, with Peters' heirs paying \$400.<sup>14</sup>

Incidentally, it was not until the year 1922 that the U.S. Government Printing Office began to publish and to distribute U.S. REPORTS.<sup>15</sup> The Government has never published opinions of the lower federal courts (e.g., the U.S. District Courts and the U.S. Courts of Appeals). This is in contrast to statutes and regulations, where the U.S. Government Printing Office publishes STATUTES-AT-LARGE<sup>16</sup> and the CODE OF FEDERAL REGULATIONS.

### *Heine v. Appleton*

Heine was a professional artist who enlisted as a seaman in the U.S. Navy to accompany Commodore Perry's visit to Japan during 1852-54. Part of Heine's official duties was to prepare sketches showing events of this famous trip. Heine, in June 1856, registered his copyright in his sketches. Heine then asked a federal court for an injunction prohibiting Appleton, a commercial publisher, from printing and distributing Heine's copyrighted sketches. The court refused to issue the injunction, because the copyright was invalid, because Heine's was a government employee who produced the sketches as part of his official duties. The trial judge wrote:

---

<sup>12</sup> *Ibid.* at 1340; at 1352, n. 375; at 1362, nn. 414-415. Note that Wheaton contracted with his publishers that the publisher would bear the expense of providing 80 free copies of the Reports to the Government. *Ibid.* at 1347, n. 341.

<sup>13</sup> *Ibid.* at 1373, 1377-78.

<sup>14</sup> *Ibid.* at 1385.

<sup>15</sup> 42 STATUTES-AT-LARGE 816 (July 1922).

<sup>16</sup> The first 17 volumes of STATUTES-AT-LARGE were published by Little, Brown in Boston during 1848-1873. Beginning with volume 18 in 1875, the U.S. Government Printing Office published STATUTES-AT-LARGE.

Under these circumstances, the plaintiff was not such author of the prints and engravings in question, as to be able to acquire an exclusive right to the same as author or proprietor, by virtue of the certificate of copyright which he obtained. The sketches and drawings were made for the government, to be at their disposal; and congress, by ordering the report, which contained those sketches and drawings, to be published for the benefit of the public at large, has thereby given them to the public.

*Heine v. Appleton*, 11 F.Cas. 1031, 1033 (S.D.N.Y. 1857).

This case establishes a rule, included in federal statute in 1895, that an employee of the U.S. Government could not obtain a copyright for work prepared as part of his official duties.

*Banks Law Pub. v. Lawyer's Co-Operative Pub.*

In another case involving copyright for opinions of the U.S. Supreme Court, the U.S. Circuit Court (i.e., trial court) in New York City wrote:

Coming now to the question of infringement of the copyrights which are the subject of this controversy, and the right of the official reporter of the Supreme Court to secure to himself such copyrights and privileges, it may be helpful to set out the act of Congress passed August 29, 1842 (5 STAT. 545, c. 264), defining the duties of the reporter. The act as amended (Rev. St. Sec. 681 (U.S. Comp. St. 1901, p. 560)) reads as follows:

‘Sec. 681. The reporter shall cause the decisions of the Supreme Court made during his office to be printed and published within eight months after they are made; and, within the same time, shall deliver three hundred copies of the volumes of said Reports to the Secretary of the Interior. And he shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver, in like manner and time, three hundred copies.’

The amendatory act passed August 5, 1882 (22 Stat. 254, c. 389, Sec. 1 (U.S. Comp. St. 1901, p. 561)), increasing the compensation of the reporter, does not expressly require him to print and publish the volumes of decisions, but requires him to furnish such volumes to the public at the price therein provided and to the Secretary of the Interior without charge. Section 681 was not repealed by the amendment, and, read in connection therewith, it still remains the duty of the reporter to print, publish, and furnish the volumes. According to the defendant, under such amendatory act the reporter cannot have a copyright for any of the work produced by him in his official capacity. It is broadly suggested that such labor is that of a paid employe and accordingly vests in the employer. The official reporter of the Supreme Court, though a sworn public officer, is not, however, confined to this strict rule. There is abundant precedent for holding that a salaried reporter of the court, unless forbidden by statute, 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. **The opinions or decisions of the judges, and the syllabuses if prepared by the court, are not the subject of copyright interest. Neither the court nor the reporter, from motives of public policy, can have any exclusive rights in the written or oral opinions of the court.**<sup>17</sup> *Banks v. Manchester*, 128 U.S. 244, 9 Sup.Ct. 36, 32 L.Ed. 425. The case at bar is analogous to *Callaghan v. Myers*, 176 U.S. 617, 9 Sup.Ct. 177, 32 L.Ed. 547, where the Supreme Court says: ....

*Banks Law Pub. v. Lawyer's Co-Operative Pub.*, 169 F. 386, 387-388 (2dCir. 1909).

---

<sup>17</sup> Boldface added by Standler.

The trial judge also said:

This unequivocal holding upon this point was not obiter, as claimed by the defendant, although the reporter held office under a state statute. In view of the existence of the federal statute (section 681), which, as stated, is not essentially different from the later enactment, defining the duties of the reporter of the Supreme Court, the *Callaghan* Case must be regarded as authoritative of this point. It had been held in the federal courts previous to the date of that decision that an official court reporter is entitled to copyright protection for his marginal notes or synopsis of case, statement of cases, abstract of arguments of counsel, and indexes to volumes. See *Wheaton v. Peters*, 8 Pet. 591, 8 L.Ed. 1055; *Gray v. Russell*, 1 Story, 11 Fed.Cas.No. 5,728.

*Banks Law Pub. v. Lawyer's Co-Operative Pub.*, 169 F. 386, 388 (2dCir. 1909).

The appellate court tersely affirmed. *Banks Law Pub. v. Lawyer's Co-Operative Pub.*, 169 F. 386, 391 (2dCir. 1909), *appeal dismissed per stipulation*, 223 U.S. 738 (1911).

In the 1800s, tradition held that the official reporter of judicial opinions held a privilege that he could personally hold a copyright in any text that he added to the judicial opinion.<sup>18</sup> This traditional rule was abolished by statute in 1895, when the U.S. Congress enacted a statute forbidding copyright on anything written by an employee of the U.S. Government.

#### *Garfield v. Palmieri*

Garfield, an attorney, represented plaintiff in a case reported at 180 F.Supp. 717. Garfield sued Judge Edmund Palmieri for submitting the allegedly defamatory opinion to West for publication in the FEDERAL SUPPLEMENT. The defamation case was dismissed, because the judge had absolute immunity. *Garfield v. Palmieri*, 193 F.Supp. 137 (D.C.N.Y. 1961), *aff'd*, 297 F.2d 526 (2dCir. 1962) (per curiam), *cert. den.*, 369 U.S. 871 (1962). The trial judge wrote:

There are no official published reports of the opinions of the federal district courts. The FEDERAL SUPPLEMENT published by West, as part of its reporter system, furnishes the only comprehensive compilation of such opinions and is recognized as authoritative by the courts and the profession. In a system of law based on stare decisis it is not enough that opinions of the court be available only to litigants and their counsel. It is essential that such opinions be readily accessible to the legal profession generally and to the courts for purposes of research, citation and general information as to the state and development of the law, as well as to others who may wish to refer to them. The sound and efficient administration of federal justice requires that such publication in a reporter system of the nature of the FEDERAL SUPPLEMENT be unfettered. This is in the interest not only of litigants, the legal profession and the courts themselves, but of the public generally. Such unfettered publication is a matter of public policy and outweighs and overrides any injury to an individual which might result from the application of such a rule.

---

<sup>18</sup> Jerry E. Smith, "Government Documents: Their Copyright and Ownership," 5 TEXAS TECH. LAW REVIEW 71, 82 (Fall 1973) (Quoting Prof. Melville B. Nimmer's 1973 treatise on copyright law). The current edition of NIMMER ON COPYRIGHT, at § 5.12 [B], says: "This result [allowing official reporter to personally copyright his headnotes and synopses] may be rationalized only on the basis of a time-honored practice, whereby such rights are accorded to reporters."



....

Moreover, it may be noted that when Judge Palmieri filed his opinion in the office of the clerk of the district court on July 15, 1959 it became part of the official record of the *Fleischer* case and a public record. Thereafter the opinion was freely available to any member of the public who chose to copy it or to obtain a copy from the clerk upon payment of the requisite fee. West could have obtained the opinion from the clerk's office at any time had it chosen to do so.

*Garfield v. Palmieri*, 193 F.Supp. 137, 143 (D.C.N.Y. 1961).

The U.S. Court of Appeals tersely affirmed and remarked at the end of their opinion:

Bar and Bench alike rely upon the West Reporter volumes as sources in which to find the decisions of the U.S. Courts of Appeals and of the U.S. District Courts; and we take judicial notice that an opinion of a federal circuit or district judge is considered 'not reported' until it appears in FEDERAL REPORTER or FEDERAL SUPPLEMENT.

*Garfield v. Palmieri*, 297 F.2d 526, 527-528 (2dCir. 1962) (per curiam).

#### federal statutes

In 1895, Congress enacted a new statute about printing of Government publications. One section allowed the Government to sell electrotype printing plates of U.S. Government works. The final sentence says:

... and provided further, That no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.

28 STATUTES-AT-LARGE 601, 608, § 52 (1895).

The common-law doctrine of *Wheaton v. Peters*, 33 U.S. 591, 668 (1834) was explicitly included in The Copyright Act of 1909:

That no copyright shall subsist in the original text of any work which is in the public domain, ... or in any publication of the United States Government, or any reprint, in whole or in part, thereof ....

17 U.S.C. § 7 (enacted 1909), 35 STATUTES-AT-LARGE 1075, 1077 (1909).

A new § 6 was inserted in this Act around the year 1940, so that the original § 7 then became § 8.

In 1922, the U.S. Congress required the U.S. Reports to be published by the Government Printing Office.<sup>19</sup> The current version of that statute, which was last amended in 1952, is codified at 28 U.S.C. § 411.

In 1968, the 1895 statute was revised to say:

A publication reprinted from these plates and other Government publications may not be copyrighted.

44 U.S.C. § 505 (enacted 1968, repealed effective 1 Jan 1978), 82 STATUTES-AT-LARGE 1244.

This sentence was deleted by the Copyright Act of 1976 and replaced with the still current 17 U.S.C. § 105.

---

<sup>19</sup> 42 STATUTES-AT-LARGE 816 (July 1922).

This rule of law was continued in The Copyright Act of 1976:

Copyright protection under this title is not available for any work of the United States Government, ....

17 U.S.C. § 105 (enacted 1976, still current Dec 2008), 90 STATUTES-AT-LARGE at 2546 (1976). Works of the U.S. Government is defined as “a work prepared by an officer or employee of the United States Government as part of that person’s official duties.”<sup>20</sup> Such works include all federal statutes (U.S. Code), opinions of judges in federal courts, and all federal government regulations. The legislative history says: “The effect of § 105 is intended to place all works of the United States Government, published or unpublished, in the public domain.”<sup>21</sup>

due process

In the cases quoted above, federal courts declared that judicial opinions of the U.S. Supreme Court were in the public domain, and were *not* copyrightable. There is another reason why these decisions were correct. Suppose only one proprietary publisher could print judicial opinions or statutes, and volumes of those opinions or statutes sold at a high price because of a monopoly conferred by copyright law, then the law in those opinions or statutes would *not* have the widest possible distribution. A criminal defendant, who is charged with violation of a statute, could then claim a due process violation, in that the defendant could not reasonably know the law before he allegedly violated the law. Therefore, the due process clause in the Fifth Amendment to the U.S. Constitution requires that law have the widest possible distribution.

A leading treatise on copyright law says

Certainly failure to allow widespread access to governing law could readily constitute a defense for one charges with violation of the nonpublicized provisions.

NIMMER ON COPYRIGHT, § 5.12[A], p. 5-92 (Dec 2004).

My quick search of Westlaw shows only a few cases have made this argument:

- *Building Officials & Code Adm. [BOCA] v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) (“... the cases go on to emphasize the very important and practical policy that citizens must have free access to the laws which govern them. This policy is, at bottom, based on the concept of due process.”).
- *Georgia v. Harrison Co.*, 548 F.Supp. 110, 114 (D.C.Ga. 1982) (quoting *BOCA*), *case settled*, 559 F.Supp. 37 (N.D.Ga. 1983);

---

<sup>20</sup> 17 U.S.C. § 101 (enacted 1976, still current Dec 2008).

<sup>21</sup> U.S. House of Representatives Report Nr. 94-1476 at page 59, reprinted in 1976 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 5659, 5673.

- *NADA Services Corp. v. CCC Information Services Inc.*, Not Reported in F.Supp., 1991 WL 287961 at \*3 (N.D.Ill. 1991) (“The defendant argues that, since due process requires that the public must have free access to the laws by which they are bound, NADASC cannot enforce a copyright over the numbers which have been incorporated by reference into the statutes.” Judge denied preliminary injunction.);
- *Practice Management Information Corp. v. American Medical Ass’n*, 121 F.3d 516, 519 (9thCir. 1997) (“The second consideration underlying *Banks* [ *v. Manchester*, 128 U.S. 244] — the due process requirement of free access to the law — may be relevant but does not justify termination of the AMA’s copyright.”), *cert. den.*, 524 U.S. 952 (1998);
- *Veeck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (*en banc*), *cert. den.*, 539 U.S. 969 (2003).

But see,

- *Veeck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d 791, 813 (5th Cir. 2002) (Wiener, J., **dissenting**) (“Veeck can copy and publish judicial opinions and statutes on his website with impunity. He can do so, however, not because of his due process rights, but rather because — as judicial opinions and legislatively drafted statutes have never enjoyed copyright protection, could never enjoy such protection, and are in the public domain from the moment of their inception — such works are entitled to no copyright protection or restrictions.”).

### Works of a State Government

Since 1895, there is a federal statute forbidding copyright on works of the federal government, but there is no similar statutory prohibition for works of a state government. In 1980, a U.S. Court of Appeal wrote:

Works of state governments are therefore left available for copyright protection by the state or the individual author, depending on state law and policy, and “subject to exceptions dictated by public policy with respect to such publications as statutes and judicial opinions.” Latman, *THE COPYRIGHT LAW* 43 (5th ed. 1979).

*Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730, 735-736 (1stCir. 1980). In the following cases, judges have held that judicial opinions of a state court, state statutes, and state regulations are all part of the public domain, which can *not* be monopolized by copyright.

#### *Davidson v. Wheelock*

Plaintiff had a contract with the state of Minnesota to publish the state statutes, and the copyright on those statutes was also awarded to plaintiffs. Plaintiffs then sued defendant for publishing a copy of the state statutes. The federal trial court denied plaintiff’s motion for an injunction against defendant’s sale of their book:

[Plaintiff] obtained no exclusive right to print and publish and sell the laws of the state of Minnesota, or any number of legislative acts. The materials for such publication are open to the world. They are public records, subject to inspection by every one, under such rules and regulations as will secure their preservation. They may be digested or compiled by any one,

and it is true such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him.

*Davidson v. Wheelock*, 27 F. 61, 62 (C.C.Minn. 1866).

This is apparently the first reported case to hold that state statutes are in the public domain, and can *not* be copyrighted.

#### *Gould v. Banks*

Gould, along with West and Lawyer's Co-Operative, sought a writ of mandamus to force the state of Connecticut to give copies of state supreme court opinions to plaintiffs before those opinions were published by Banks & Brothers in CONNECTICUT REPORTS, the state's official reporter. An 1882 Connecticut state statute required the CONNECTICUT REPORTS "to be copyrighted in the name of the secretary, for the benefit of the people of the state." (Previously, the reporter could copyright the decisions. 2 A. at 894.) The Connecticut Supreme Court denied the writ, and tersely wrote:

.... The judges and the reporter are paid by the state; and the product of their mental labor is the property of the state, and the state, as it might lawfully do, has taken to itself the copyright. ....

It is for the state to say when and in what manner it will publish these volumes; and the taking of the copyright in no sense offends the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the supreme court of errors for its determination in a given cause constitute no part of the record therein. The judgment stands independently of these. Moreover, these are accessible to all who desire to use them in the enforcement of their rights.

*Gould v. Banks*, 2 A. 886, 896 (Conn. 1885).

When Gould, et al., published Connecticut judicial opinions, the state sought an injunction against the publishers in federal court in New York City, which denied the injunction sought by the state of Connecticut. The federal court refused to enforce the state's copyright on its judicial opinions. In a hideously long paragraph, the federal judge wrote:

... in view of the serious question often debated, but never authoritatively decided by the courts of this country, whether such opinions can be copyrighted by the state, it would seem that the statute would have been so framed as to leave no doubt of the legislative will, if such an intention had been entertained. The opinion has been expressed in several adjudications by judges whose opinions are entitled to the highest respect, that the judicial decisions of the courts are not the subject of copyright, but should be regarded as public property to be freely published by any one who may choose to publish them. This view has been taken upon considerations of public policy which, it is said, demand, in a country where every person is presumed and required to know the law, that the fullest and earliest opportunity of access to the expositions of the judicial tribunals should be afforded to all.

*State of Connecticut v. Gould*, 34 F. 319, 319 (C.C.N.Y. 1888).

Six years after *Gould v. Banks*, Peck sought a writ of mandamus compelling Hooker, the reporter, to give copies of unpublished Connecticut Supreme Court opinions to Peck. The state court denied the writ of mandamus.

It is of public concern that the judicial reports should not be published until they are "prepared by the reporter, and ready for publication." Until that time, the opinion, as well as the statement of the case, and the syllabus, ought to be open for any correction that may be necessary for the correct understanding of the case. Until that time they cannot be relied on as necessarily expressing the final voice of the court, and therefore as entitled to be published. At any rate, it cannot be the duty of the reporter, directly or indirectly, to contravene the policy of the state in this behalf, — a policy which it is not claimed has ever prevented any one from obtaining a copy of any judicial opinion as soon as filed, who wanted it for his own information, or to gratify his curiosity, and which has helped to secure the accuracy of the published reports. We might have contented ourselves by simply referring to the case of *Gould v. Banks*, 53 Conn. 415, 2 Atl. Rep. 886, and holding that case as deciding this; for if it is true, as contended by the plaintiff, that the supreme court of the United States, in *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. Rep. 36, have decided that no copyright can be had in judicial opinions, yet it still remains true that it is for the state to say when and in what manner the decisions of its courts shall be published. But the present case is an interesting one. The effort to expedite the publication of judicial opinions is commendable. It needs, however, only an examination of our statutes, and a careful consideration of the policy upon which they are founded, to show that the defendant was justified in refusing the demand of the plaintiff upon which the application for the writ is predicated. The demurrer was properly sustained. No error.

*Peck v. Hooker*, 23 A. 741, 751 (Conn. 1892).

#### *Nash v. Lathrop*

In 1879, the state of Massachusetts issued a contract to Little, Brown & Co. to be have "the exclusive right to publication" of judicial opinions of the Massachusetts Supreme Court. Nash, the publisher of the Daily Law Record, petitioned the court for a writ of mandamus to force the reporter of decisions to provide copies to Nash. The Massachusetts Supreme Court wrote:

The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public. It is its duty to provide for promulgating them; while it has the power to pass reasonable and wholesome laws regulating the mode of promulgating them, so as to give accuracy and authority to them. We are not called upon to consider what is the extent or the limitation of this power, because we are satisfied that it was not the intention of the legislature, in the statute upon which the respondent relies, to limit the previously existing right of the citizen to have full access to the opinions, or to confer upon Little, Brown & Co.

the right to restrain any persons from procuring copies of them, whether for their own use, or for publication in the newspapers or in law magazines or papers. The policy of the state always has been that the opinions of the justices, after they are delivered, belong to the public. *Nash v. Lathrop*, 6 N.E. 559, 560-561 (Mass. 1886).

The court construed the contract:

They do not in terms confer upon Little, Brown & Co. the power to interfere with the public and common right to examine and procure copies of the opinions of the justices, and they do not, upon any reasonable construction, confer such a power by implication.

*Nash v. Lathrop*, 6 N.E. 559, 562 (Mass. 1886).

The [contract] construction claimed by the respondent is in derogation of the right of the public, and ought not to be adopted unless such was clearly the intention of the legislature. It was its intention, without doubt, that Little, Brown & Co. should have the exclusive right of publishing the authorized series of Massachusetts Reports, but we cannot see in the statute any intention to give to that firm the right to suppress and keep from the public the opinions of the justices until they should print them in the Reports. We are therefore of opinion that the claim of the respondent cannot be sustained.

*Nash v. Lathrop*, 6 N.E. 559, 562-563 (Mass. 1886).

The Massachusetts Supreme Court issued the writ of mandamus. Note that Little, Brown & Co. was still the publisher of the only officially *authorized* version of the judicial opinions, but other companies could publish their unofficial versions.

#### *Banks v. West Pub.*

Banks had a contract with the state of Iowa since 1880 to publish judicial opinions of the Iowa Supreme Court. When West began publishing those opinions in 1879 in West's Northwest Reporter, Banks sued for an injunction prohibiting publication by West. The trial judge wrote:

Has the state, either by virtue of the common law or the copyright acts of congress, any property right in the opinions of the judges of the supreme court? If this question was submitted to me as a new question independent of prior adjudications, I should unhesitatingly answer it in the negative. If such right exists, it carries with it the right of withholding publication. But it is a maxim of universal application that every man is presumed to know the law, and it would seem inherent that freedom of access to the laws, or the official interpretation of those laws, should be co-extensive with the sweep of the maxim. Knowledge is the only just condition of obedience. .... [Bank's] claim seems to rest upon the idea that the state, as an entity independent of its citizens, or as a whole combined of all its individuals, has a property right in the laws and judicial opinions outside of and beyond that vested separately in each citizen. I conceive this to be an error. Each citizen is a ruler, — a law-maker,<sup>22</sup> — and as such has the right of access to the laws he joins in making and to any official interpretation thereof. If the right of property enters into the question, he is a part owner, and as such cannot be deprived of equal access by his co-owners. Could a majority of a legislative assembly debar the minority from participation in the deliberations or a knowledge of the action of the assembly? The majority may bind the minority to the action it

---

<sup>22</sup> I criticize this statement later in this essay, during the discussion of the *BOCA v. Code Technologies* case.

determines, but cannot withhold knowledge thereof. .... The opinions, at least those of the highest tribunal, are always considered as official interpretations of law, both statute and common, and as such binding upon all citizens. The state pays the judges, and therefore owns the product of their official toil. The same is true as to legislators. But though such would be my views in the absence of prior adjudications, I find that the English courts generally sustain the crown's proprietary rights in judicial opinions.

*Banks & Bros. v. West Pub. Co.*, 27 F. 50, 56-57 (C.C.Minn. 1886).

The judge reviewed the cases in England, then wrote:

In view of this consensus of opinion on the other side of the waters, of the fact that the common law is in force in this country so far as compatible with our system of government and the condition and wants of society, and that a mere change in the locus of the governing power from the crown to the people ought not to work material change in the extent of that power, it may be that due regard for settled law forbids a decision in accord with the views I have expressed.

It is worthy of remark, however, that on this side of the waters the proprietary right of the state in statutes or judicial opinions has never been affirmed, unless in a late case in the supreme court of errors of Connecticut. In it the court says: "The judges and the reporter are paid by the state, and the product of their mental labor is the property of the state, and the state, as it might lawfully do, has taken to itself the copyright." On the other hand, in the case of *Davidson v. Wheelock*, post, 61, decided in this district in 1866 by Judge NELSON, the court refused an injunction to restrain the publication of the constitution and laws of Minnesota as revised and re-enacted by the legislature. In the course of his opinion the learned judge uses this language: "It is true that such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis; but such compiler could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him." When we bear in mind the fact that for years law magazines have been constantly printing in advance of official reports opinions of the various courts, the silence of judicial decision is significant of a doubt, at least, whether the doctrine as recognized in England obtains under our system of government.

But I forbear further comment upon this question, and pass to the second.

*Banks & Bros. v. West Pub. Co.*, 27 F. 50, 59 (C.C.Minn. 1886).

Note that the judge personally recognizes the correct result and correct reasoning, but then the judge strangely defers to English law that applies in *neither* Iowa *nor* Minnesota.

The trial judge interpreted the contract between Banks and the State of Iowa and concluded:

How, then, can complainants claim the exclusive right to the publication of the opinions separately? I think the state has made them the common property of all. I indorse fully the language of the learned district judge of the Southern district of Ohio in the case of *Banks v. Manchester*, reported in 23 Fed.Rep. 143, and think it pertinent to the case at bar:

It is in accordance with sound public policy, in a commonwealth where every person is presumed to know the law, to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them, and such publications may be of everything which is the work of the judges, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication. It protects only the work of the reporter; that is to say, the indexes, the tables of cases, and the statement of points made and the authorities cited by counsel. *Wheaton v. Peters*,

8 Pet. 653; *Little v. Gould*, 2 Blatchf. 165, 362; *Chase v. Sanborn*, 4 Clif. 306; *Myers v. Callaghan*, 5 Fed.Rep. 726; S.C. 10 Biss. 139; *Myers v. Callaghan*, 20 Fed.Rep. 441. *Banks & Bros. v. West Pub. Co.*, 27 F. 50, 60-61 (C.C.Minn. 1886).

The trial judge then denied the request for an injunction against West. I can find no appellate opinion in this case, so apparently Banks did not appeal.

*Banks v. Manchester*

The opinion of the trial court is reported at *Banks v. Manchester*, 23 F. 143 (C.C.Ohio 1885). In 1888, the U.S. Supreme Court considering a case involving copyright on opinions of the Ohio Supreme Court. The final paragraph of that opinion says:

We are of opinion that these provisions of the statute do not cover the case of the state of Ohio in reference to what Mr. De Witt [the reporter for Ohio Supreme Court] undertook to obtain a copyright for, for the benefit of that state, in the present instance. Mr. De Witt, although he may have been a citizen of the United States, or a resident therein, was not the author, inventor, designer, or proprietor of the syllabus, the statement of the case, or the decision or opinion of the court. The state, therefore, could not become the assignee of Mr. De Witt, as such author, inventor, designer, or proprietor. The state cannot properly be called a citizen of the United States, or a resident therein, nor could it ever be in a condition to fall within the description in section 4952, or section 4954. The copyright claimed to have been taken out by Mr. De Witt in the present case, being a copyright 'for the state,' is to be regarded as if it had been a copyright taken out in the name of the state. Whether the state could take out a copyright for itself, or could enjoy the benefit of one taken out by an individual for it, as the assignee of a citizen of the United States, or a resident therein, who should be the author of a book, is a question not involved in the present case, and we refrain from considering it, and from considering any other question than the one above indicated. In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as their author or their proprietor, in the sense of section 4952, so as to be able to confer any title by assignment on the state, sufficient to authorize it to take a copyright for such matter, under that section, as the assignee of the author or proprietor. Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591, that **no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties.**<sup>23</sup> The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. *Nash v. Lathrop*, 142 Mass. 29, 35, 6 N. E. Rep. 559. In *Wheaton v. Peters*, at page 668, it was said by this court, that it was "unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this

---

<sup>23</sup> Boldface added by Standler.



court; and that the judges thereof cannot confer on any reporter any such right.” What a court or a judge thereof cannot confer on a reporter as the basis of a copyright in him, they cannot confer on any other person or on the state. The decree of the circuit court is affirmed.

*Banks v. Manchester*, 128 U.S. 244, 253-254 (1888).

One wonders why the Court did not directly hold that opinions of a state court were in the public domain and were *not* copyrightable. Instead, the U.S. Supreme Court held that the Ohio Supreme Court opinions were written by the state, who was neither a citizen nor a resident of the USA, and therefore the state could not claim copyright.<sup>24</sup> I suggest that the Court decided the result it wanted and then found some technicality in the copyright statute to justify that result.

Applying modern law, the Court could hold that these opinions were “works made for hire” and thus the author, for purposes of copyright law, was the employer of the judge(s), namely the state of Ohio. The concept of a state (or corporation) as a fictitious person, who can own property and who can litigate, seems to have been beyond the understanding of the U.S. Supreme Court in 1888.

#### *Callaghan v. Myers*

In 1888, the U.S. Supreme Court held that a reporter could copyright his original contributions to state judicial opinions:

... the only matter in Wheaton's Reports which could have been the subject of the copyrights in regard to which the jury trial was directed was the matter not embracing the written opinions of the court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index. Such work of the reporter, which **may be**<sup>25</sup> the lawful subject of copyright, comprehends also the order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions, (where such table is made,) and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist. A publication of the mere opinions of the court, in a volume, without more, would be comparatively valueless to any one.

*Callaghan v. Myers*, 128 U.S. 617, 649 (1888).

Incidentally, the quoted remark about “paging of the volumes ... may be the lawful subject of copyright” disagrees with the holding in the same case,<sup>26</sup> which is quoted later in this essay, beginning at page 43.

---

<sup>24</sup> The Copyright Act of 1873 required that an author be either a citizen or resident of the USA, before the U.S. Government would issue a copyright.

<sup>25</sup> Boldface added by Standler.

<sup>26</sup> L. Ray Patterson & Craig Joyce, “Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations,” 36 UNIV. CALIFORNIA AT LOS ANGELES LAW REVIEW 719, 737-738, 744 (April 1989).

*Howell v. Miller*

Plaintiff prepared Howell's Annotated Statutes of Michigan, which was copyrighted by plaintiff. "In 1882-83 Howell published the first and second volumes of his compilation; and in 1883 the legislature of Michigan passed an act providing that the general laws of the state, as collected and arranged in those volumes, should be received and admitted in all courts and proceedings, and by all officers, 'as evidence of the existing laws thereof, with like effect as if published under and by the authority of the state.'" Defendants were preparing an edition of the same laws, "printed by direction of the legislature", under authority of an 1895 state statute. Howell asked the federal court for an injunction prohibiting defendants from distributing their books, which allegedly infringed Howell's copyright. The U.S. Court of Appeals for the Sixth Circuit wrote a hideously long paragraph:

We are, then, to inquire whether it appears from the record before us that the plaintiff has rights, under the laws of the United States, which the defendants, acting under legislative sanction, will violate, unless restrained by injunction. It was suggested in argument that no one can obtain the exclusive right to publish the laws of a state in a book prepared by him. This general proposition cannot be doubted. And it may also be said that any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual. If Miller had cut from Howell's books, delivered to him by the state, the general laws of Michigan as therein printed, and the pages so cut out had been used when his compilation was printed, — if this had been done, and nothing more, — there would have been no ground of complaint. But it is said that he did more than this, and that he appropriated such parts of Howell's books as were the result of the latter's labor and industry. In *Banks v. Manchester*, 128 U.S. 244, 9 Sup.Ct. 36, it was held that the reporter of the decisions of a court could not copyright the opinions of the court, or the statements and headnotes of cases as prepared by the court or by any member thereof. But in *Callaghan v. Myers*, 128 U.S. 617, 645, 650, 9 Sup.Ct. 177, it was held that "the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published"; citing numerous authorities. Upon like grounds we are of opinion that Howell was entitled to have copyrighted his volumes of Annotated Statutes, and that such copyright covers all in his books that may fairly be deemed the result of his labors. Speaking generally, this would include marginal references, notes memoranda, table of contents, indexes, and digests of judicial decisions prepared by him from original sources of information; also such headnotes as are clearly the result of his labors. We do not perceive any difficulty in holding that his copyright would embrace all such matters, for they constitute no part of that which is public property, and are plainly produced by the compiler. The motion for an injunction was heard in the circuit court upon the evidence furnished by a comparison of the first printed volume of the Miller compilation with Howell's Annotated Statutes, and by the affidavits of the several defendants. It would have been more satisfactory if the case had gone to a special master for a report as to all those parts of the Miller compilation which were alleged to have been substantially appropriated from Howell's Annotated Statutes. The court below was left to make such comparison for itself, and the labor required in that way has fallen upon this court. Under ordinary circumstances, we should remand the cause, with directions to send the case to a master, before the application for an injunction was finally disposed of. But we refrain from

adopting that course in deference to the suggestion on behalf of the state that the public interests might be injured by any serious delay in determining the case.

*Howell v. Miller*, 91 F. 129, 137-138 (6thCir. 1898).

The Court of Appeals then affirmed the trial court's order denying an injunction against Miller.

*Nebraska v. State Journal*

The defendant in this case had a contract to prepare volumes of Nebraska Supreme Court Reports. The state sued the defendant for printing extra copies and selling them privately for additional profit. The Nebraska Supreme Court dismissed the case, because the opinions had been published without federally registering the copyright, which — according to federal copyright law before 1978 — automatically put the opinions in the public domain.

It will be noticed that there is no allegation in the petition that these Reports were copyrighted, or that any steps were taken on the part of the state, either through the action of the Legislature or its contracts with the defendant, to protect the state in its right of authorship of the matter contained in the Reports. If the object of the state was to prevent other parties from publishing the Reports and selling them to the public, that object does not appear from any positive enactment of the Legislature, nor from any provision of the contracts into which the state entered with the defendant.

*State v. State Journal Co.*, 106 N.W. 434, 436 (Neb. 1905).

The state then moved for a new trial, which motion was denied by the Nebraska Supreme Court, which reiterated and expanded its previous explanation:

The position taken by the state upon this point is stated in the brief in these words: "It is correctly stated in the opinion that all persons have a right to publish the decisions of this court. The West Publishing Company does so. It buys copies of the opinions from the reporter of this court. It edits its own manuscripts, sets its own type, makes its own plates, prints its own copies, binds them, and sells them openly to the public." We do not think that the counsel for the state have fully appreciated the quality and force of this admission. The importance of the fact so admitted must be continually borne in mind in the investigation and determination of the questions involved. The literary matter involved in these reports became the property of the public before the manuscripts, or any other property of the state, were placed in the hands of the defendant to enable it to carry out the terms of its contract with the state. The syllabi of the opinions are regularly published in the newspapers of the state as soon as the decisions are rendered, and frequently extracts from the opinions, and sometimes the opinions themselves, are also so published. Copies of the opinions as well as the syllabi are furnished to any and all parties desiring them upon payment for copying them, and no attempt is made to preserve any claim on the part of the state in these syllabi or opinions. It was therefore impossible that the defendant should cause any injury to the state by making this matter public.

.... We do not coincide with the [state's] view that the main purpose of the statute is to establish a printing and publishing business to make profits with which to replenish the library funds. The purpose would seem rather to be to make the opinions of the court easily accessible to all the citizens. ....

*Nebraska v. State Journal Co.*, 110 N.W. 763, 764 (Neb. 1906).

*Montana v. Mitchell*

A bid for publishing opinions of the Montana Supreme Court required that the vendor be able to supply bound copies of old reports, back to Volume 1. At the time of the decision of this case, the current MONTANA REPORTS was in Volume 105. Clearly, this requirement favored continuation of the contract with the publisher of the previous volumes, Bancroft-Whitney. A local publisher in a bidding dispute attempted to argue that the requirement to supply old volumes was improper. The Montana Supreme Court wrote:

Relators' contention that others than Bancroft-Whitney Company are prohibited by the copyright laws from publishing the old Montana Reports is entirely without merit. Anything contained in an opinion prepared and published by the court cannot be copyrighted. This has been the law since the Supreme Court of the United States said in *Wheaton v. Peters*, 8 Pet. 591, 11 Curtis Dec. 223, 237, 8 L.Ed. 1055, that "the court are unanimously of the opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." In *Banks v. Manchester*, 128 U.S. 244, 253, 9 S.Ct. 36, 40, 32 L.Ed. 425, where the court had under consideration the right of the reporter of the Ohio Supreme Court to copyright that court's decisions, it was said: "The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591 [8 L.Ed. 1055] that no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."

The question of copyrighting court decisions was ably discussed and the rule in *Wheaton v. Peters*, supra, reiterated in *Callaghan v. Myers*, 128 U.S. 617, 9 S.Ct. 177, 32 L.Ed. 547, where it is said, in substance, that the reports of court decisions cannot be copyrighted by any one, but the publisher may copyright any part of a published decision that represents his own labor in the production, such as headnotes, statements of each case, and arguments of counsel. No part of a decision as handed down by the court, or anything made a part of the decision when it is sent to the publisher by the court, can be copyrighted. This confines the part that may be copyrighted by the publisher to such matter as is usually found on the unnumbered sheets in the forepart of each volume, the comments contained in footnotes made by the publisher, and such matter would be valueless to any other publisher who chose to publish court decisions. The question is too clearly established contrary to the contention of relators to warrant further consideration.

*State ex rel. Helena Allied Printing Council v. Mitchell*, 74 P.2d 417, 424 (Mont. 1937).

It is not clear if Bancroft-Whitney would have sold Mitchell a license to reproduce the copyrighted matter in Montana Reports that had been previously published by Bancroft-Whitney. It is also not clear why Montana could not continue to purchase old volumes from Bancroft-Whitney, while giving the contract for publishing current and future volumes to the local publisher.

*Harrison Co. v. Georgia*

The Harrison Company had been publishing unofficial versions of Georgia statutes since 1933. In 1978, Georgia contracted with the Michie Company to publish the official version of Georgia statutes, which were then being recodified, but the state would own the copyright in the statutes. The Harrison Company sued in Georgia state court, alleging that parts of a Georgia statute about recodifying the statutes were unconstitutional. The Georgia Supreme Court wrote one paragraph that is relevant to this essay:

The second aspect of Harrison's claim that the contract tends to create a monopoly revolves around the clause in the contract which grants to Michie "the exclusive right to distribute and sell sets and volumes of the Code for a 10 year period extending from the date of the initial publication of the Code, as well as the exclusive right to publish annual supplements and periodic replacement volumes to the Code for the same 10 year period . . ." The exclusive right referred to is the exclusive right to publish the "Official Code of Georgia Annotated," the copyright for which will be in the name of the state. Both Michie and the state, however correctly concede that this provision does not prevent Harrison from publishing a competitive product; i. e., a Code with annotations by Harrison. As was said in *Davidson v. Wheelock*, 27 F. 61 (D.Minn. 1866), a state's laws are public records open to inspection, digesting and compiling by anyone. Michie is not being given an exclusive franchise as to the publication of laws in Georgia. Thus the contract does not bar Harrison from the market, as was the case in *Macon Ambulance Service, Inc. v. Snow Properties, Inc.*, 218 Ga. 262(2), 127 S.E.2d 598 (1962). Nor does the contract show an intent to drive plaintiff out of business and thereby create a monopoly as was alleged in *Blackmon v. Gulf Life Ins. Co.*, 179 Ga. 343(1), 175 S.E. 798 (1933). The trial court did not err in granting summary judgment to all defendants on Count 4.

*Harrison Co. v. Code Revision Commission*, 260 S.E.2d 30, 34 (Ga. 1979).

*BOCA v. Code Technology*

A private nonprofit organization, Building Officials & Code Administration (BOCA), wrote most of the building code that was adopted by the state of Massachusetts. BOCA then published the Massachusetts building code in book form, which was sold for \$22. Another company, Code Technology, copied the code from the official version in the Massachusetts secretary of state's office, and then published the Massachusetts building code in book form, which was sold for \$35. BOCA then sued Code Technology for copyright infringement. BOCA asked the U.S. District Court for a preliminary injunction prohibiting Code Technology from selling its book. The District Court granted the preliminary injunction, but the U.S. Court of Appeals reversed. *Building Officials & Code Administration v. Code Technology, Inc.*, 628 F.2d 730 (1stCir. 1980), *on remand*, 210 USPQ 289 (D.Mass. 1980).

As cited in this essay, it was already well established that both statutes and judicial opinions are law that is *not* protectable by copyright. This case is critically important because it is apparently the first case in the nation to declare that state administrative regulations are also law that is *not*

protectable by copyright. The U.S. Court of Appeals reviewed the existing case law on statutes and judicial opinions:

To evaluate these competing contentions, it is necessary to examine the cases which have established the rule and to try to identify the policies on which it is based.

The rule was first enunciated in *Wheaton v. Peters*, 33 U.S. 591 (8 Peters), 8 L.Ed. 1055 (1834). In an action for infringement of a copyright on Wheaton's volumes of Supreme Court opinions, the Court observed,

The Court are unanimously of the opinion, that no reporter has or can have any copyright in the written opinions delivered by this Court; and that the judges thereof cannot confer on any reporter any such right.

*Id.*, at 668, 8 L.Ed. 1055. The Court did not express its reasoning underlying this observation. However, subsequent cases explain and expand the rule.

In *Banks v. Manchester*, 128 U.S. 244, 9 S.Ct. 36, 32 L.Ed. 425 (1888), the Supreme Court held invalid an Ohio law which authorized the official reporter for the Ohio Supreme Court to obtain, in his own name, a copyright on the opinions of the Ohio Supreme Court. The Court reasoned that the reporter could not claim authorship of the opinions, and that the state was not a "citizen or resident" under the copyright law and therefore could not obtain a copyright for itself, even though as the employer of the judges it held property rights in the opinions. The Court stated,

The whole work done by judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.

*Id.*, at 253, 9 S.Ct. at 40.

In *Nash v. Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886), the Massachusetts Supreme Judicial Court followed these precedents in interpreting a contract between the Commonwealth and Little Brown Publishing Company which was claimed to give Little Brown the exclusive right to publish opinions of the SJC. In ordering the reporter of decisions to permit a competing publisher to examine and copy the opinion, the court articulated the policies underlying the rule:

Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices.

*Id.*, 6 N.E. at 560. The court observed that, for the same reasons, a legislature could not constitutionally keep statutes out of public access although it could regulate the manner of publication so as to insure accuracy.

In *Gould v. Banks*, 53 Conn. 415, 2 A. 886 (1886), the Connecticut Supreme Court addressed a nearly identical fact situation and reached the opposite conclusion. The U. S. Circuit Court for the Northern District of New York, however, refused to enforce the copyright which the Connecticut Supreme Court had thus upheld. *Connecticut v. Gould*, 34 F. 319 (1888). See also *Banks v. West*, 27 F. 50 (C.C.D.Minn. 1886).

In *Davidson v. Wheelock*, 27 F. 61 (1866), the U. S. Circuit Court for the District of Minnesota rejected a claimed contractual grant of an exclusive right to publish the constitution and statutes of Minnesota. The court held that, although the reporter could obtain a valid copyright on his compilation and analysis, anyone could freely copy the laws themselves. In *Howell v. Miller*, 91 F. 129 (1898), the Sixth Circuit reached the same conclusion with regard to the statutes of Michigan.

The law thus seems clear that judicial opinions and statutes are in the public domain and are not subject to copyright. The question is whether this principle likewise covers state-promulgated administrative regulations which are modelled on a privately developed [footnote omitted] code that was copyrighted by the service-oriented organization responsible for its creation and updating. The issue appears to be one of first impression at the circuit level; no cases have been cited to us concerning copyrightability of administrative regulations or of model codes or uniform codes.[footnote omitted]

*BOCA v. Code Technology, Inc.*, 628 F.2d 730, 733-734 (1stCir. 1980).

BOCA argued that statutes and judicial opinions were not copyrightable only because the public pays the salaries of those legislators and judges. The U.S. Court of Appeals rejected that argument, and also developed a clear due process argument for access to law:

But BOCA's argument overlooks another aspect of the ownership theory discussed in these cases. The cases hold that the public owns the law not just because it usually pays the salaries of those who draft legislation, but also because, in the language of *Banks v. West*, 27 F. 50, 57 (C.C.D.Minn. 1886), "Each citizen is a ruler, — a law-maker." The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.

Along with this metaphorical concept of citizen authorship, the cases go on to emphasize the very important and practical policy that citizens must have free access to the laws which govern them. **This policy is, at bottom, based on the concept of due process.**<sup>27</sup> Regulations such as the Massachusetts building code have the effect of law and carry sanctions of fine and imprisonment for violations, e. g., Mass.G.L. c. 23B s 17(a), P 3. Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them. CT points out that the holder of a copyright has the right to refuse to publish the copyrighted material at all and may prevent anyone else from doing so, thereby preventing any public access to the material. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 52 S.Ct. 546, 76 L.Ed. 1010 (1932). We cannot see how this aspect of copyright protection can be squared with the right of the public to know the law to which it is subject.

We are, therefore, far from persuaded that BOCA's virtual authorship of the Massachusetts building code entitles it to enforce a copyright monopoly over when, where, and how the Massachusetts building code is to be reproduced and made publicly available. While we do not rule finally on the question, we cannot say with any confidence that the same policies applicable to statutes and judicial opinions may not apply equally to regulations of this nature.

*BOCA v. Code Technology, Inc.*, 628 F.2d 730, 734-735 (1stCir. 1980).

I am troubled at judges in *Banks v. West* and in *BOCA* declaring that citizens are the "authors" of the law, because that statement is not literally true. Legislators write statutes, judges write judicial opinions, but most citizens never write anything that becomes law. Moreover, the issue is

---

<sup>27</sup> Boldface added by Standler.

not about who is the *author* of the law, instead (assuming that law can be copyrighted) the real issue is who owns the copyright in the law. Instead, I see several simple reasons for why the law is not copyrightable:

- (1) Legislators and judges are employees of the state, and — *assuming* that official works of the state are copyrightable — then the state owns any copyright in their official work, such as statutes or judicial opinions. If this were the only relevant issue, then the state would hold the copyright in trust for the benefit of the people.
- (2) In a democracy, the citizens “own” or control the government, so the state’s work should be in the public domain, free for all citizens to use.<sup>28</sup> This is a public policy argument.
- (3) Because of due process concerns, the law should have the widest possible distribution, and any copyright in the law only interferes with that goal, therefore the law should *not* be copyrightable subject matter.

The U.S. Court of Appeals emphasized that their rejection of the preliminary injunction was based on a preliminary review of the law, and that a definitive ruling would need to wait until after discovery and trial had revealed all of the relevant facts.

We do not agree with the district court's conclusion that BOCA's probability of success on the merits justifies preliminary relief. We stop short, however, of ruling definitely on the underlying legal issues, since we feel that our final judgment should await the more complete hearing on the merits which may be anticipated in due course.

*BOCA v. Code Technology, Inc.*, 628 F.2d 730, 732 (1stCir. 1980).

While 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, we cannot altogether rule out the possibility that the simple rule of *Wheaton v. Peters* should be adapted in some as yet unknown manner to accommodate modern realities.

*BOCA v. Code Technology, Inc.*, 628 F.2d 730, 735 (1stCir. 1980).

I have found no further published opinions in this case, so apparently the parties settled this litigation. In 2002, the *en banc* U.S. Court of Appeals for the Fifth Circuit, in *Veeck v. SBCCI*, adopted the rule from *BOCA* that municipal regulations were law that was *not* copyrightable.

#### *Georgia v. Harrison Co.*

The Harrison Company published the 1981 version of the Georgia statutes and, when Harrison refused to stop selling those books, Georgia sued the Harrison Company in U.S. District Court, alleging copyright infringement, unfair competition, and false advertising. In the only reported opinion on the merits in this case, the U.S. District Court denied Georgia's motion for a preliminary injunction prohibiting the sale of Harrison’s books. The judge held that Georgia was unlikely to prevail on the merits:

---

<sup>28</sup> With the obvious exceptions for military secrets, private information on citizens discovered by law enforcement personnel, trade secrets that are disclosed to the government, etc.



The courts of this country have long held that neither judicial opinions nor statutes can be copyrighted. See *Wheaton v. Peters*, 33 U.S. 591, 8 Peters, 8 L.Ed. 1055 (1834); *Howell v. Miller*, 91 F. 129 (6th Cir. 1898); *Davidson v. Wheelock*, 27 F. 61 (C.C.D.Minn. 1866). The rationale of this rule is set forth in *Building Officials and Code Administration v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980):

The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.

Along with this metaphorical concept of citizen authorship, the cases go on to emphasize the very important and practical policy that citizens must have free access to the laws which govern them. This policy is, at bottom, based on the concept of due process.

The state argues that this court should not follow this well-established rule because (1) it is the state, not an individual, which seeks to copyright the statutes and (2) the 1981 code exists only in an unpublished form and will not be published or become law until its effective date of November 1, 1982.

The court recognizes that in most, if not all, cases dealing with the copyrightability of state statutes, it is an individual, not the state, which has sought to obtain a copyright. However, Justice Harland, sitting as a circuit justice, recognized that a state's "ownership" of its statutes does not preclude anyone from publishing those statutes:

It was suggested in argument that no one can obtain the exclusive right to publish the laws of a state in a book prepared by him. This general proposition cannot be doubted.

And it may also be said that any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book is the property of the state or the property of an individual.

*Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898).

In *Howell*, the plaintiff had for several years published Howell's Annotated Statutes of Michigan, each volume having been copyrighted by Howell and the work being recognized through act of the Michigan legislature "as evidence of the existing laws thereof, with like effect as if published under and by the authority of the state." However, the state legislature contracted with Miller to recompile existing state statutes, with annotations; the state specified the size of type and kind of paper to be used and even furnished the paper through the Board of State Auditors. The legislature further provided for the number of copies to be printed and specified that the Board of State Auditors would fix the cost of printed volumes. Howell sought to enjoin the publication and distribution of the new compilation, but the circuit court for the Eastern District of Michigan refused to issue the injunction, and this decision was upheld on appeal to the circuit court of appeals. The court of appeals specifically held that laws of Michigan as passed by the state legislature were not copyrightable but were public property.

The plaintiff argues that the cases which hold that statutes may not be copyrighted mean only that individuals cannot copyright the statutes. In support of this position the plaintiff points to 17 U.S.C. § 105 which specifically provides that copyright protection is not available for any work of the United States government and argues that if Congress had wanted to preclude states from having copyright protection it should have so provided in the Copyright Act. This court does not hold that copyright protection is not available to the states; the court holds only that states, like individuals, may not copyright what is in the public domain.

The rationale behind the rule that statutes cannot be copyrighted applies with equal force regardless of whether it is the state or an individual who seeks to obtain a copyright in those statutes. **The public must have free access to state laws, unhampered by any claim of copyright, whether that claim be made by an individual or the state itself.**<sup>29</sup>  
*State of Georgia v. Harrison Co.*, 548 F.Supp. 110, 113-114 (D.Ga. 1982).

The judge rejected Georgia's assertion that copyright allows Georgia to prevent the sale of inaccurate editions of its statutes.

The court is unpersuaded by the state of Georgia's argument that it should be able to copyright its statutes so as to insure the accuracy of any publication of its statutes. If the defendants choose to print what the Georgia General Assembly has adopted as the 1981 code (instead of simply reprinting the language found in its prior codifications), the defendants may do this, and courts may accept citations to that publication. However, anyone citing the defendants' work will do so at his peril if there is any inaccuracy in that publication or any discrepancy between what Michie has published and what the defendants have published. A person takes the same risk, of course, whenever he cites the United States Code Annotated (published by West Publishing Company) or the United States Code Service (published by the Lawyers Co-operative Publishing Company and Bancroft-Whitney Company); since both of these codifications are unofficial, the language in the statutes-at-large (or the official codifications) published by the Government Printing Office would control.  
*State of Georgia v. Harrison Co.*, 548 F.Supp. 110, 114-115 (D.Ga. 1982).

Georgia later settled with the Harrison Company, and the court vacated its previous orders denying motions by the parties. *Georgia v. Harrison Co.*, 559 F.Supp. 37 (D.Ga. 1983).

#### *Veeck v. SBCCI*

This case has a series of three opinions: *Veeck v. Southern Bldg. Code Congress Intern., Inc.*, 49 F.Supp.2d 885 (E.D.Tex. 1999), *aff'd*, 241 F.3d 398 (5thCir. 2001), *rev'd en banc*, 293 F.3d 791 (5th Cir. 2002), *cert. den.*, 539 US 969 (2003). Because the name of the copyright owner, Southern Bldg. Code Congress International, is so long, everyone calls it by its initials, SBCCI.

Veeck was the owner of a noncommercial website that published, amongst other things, copies of building codes for two towns in Texas. Those two towns had adopted SBCCI's model codes by reference. "SBCCI sent him a cease and desist order, accusing him of infringing its copyrights." 241 F.3d at 401. In response, Veeck sued SBCCI, seeking declaratory judgment that he had not violated SBCCI's copyrights.

The early history of this case includes a grant of defendant's motion for summary judgment by the trial court (including \$2500 statutory damages, ordering Veeck to pay attorney's fees of SBCCI, plus a permanent injunction against Veeck copying and displaying SBCCI's model code),

---

<sup>29</sup> Boldface added by Standler.

which was affirmed by a vote of two-to-one by a three-judge panel of the U.S. Court of Appeals. 49 F.Supp.2d 885 (E.D.Tex. 1999), *aff'd*, 241 F.3d 398 (5thCir. 2001).

The case was then heard by an *en banc* U.S. Court of Appeals, which — by a vote of 9 to 6 — reversed the trial court's grant of summary judgment and remanded the case to the trial court. The *en banc* majority summarized the law and concluded that government regulations, as law, can *not* be copyrighted:

Excluding “the law” from the purview of the copyright statutes dates back to this nation's earliest period. In 1834, the Supreme Court interpreted the first federal copyright laws and unanimously held that “no reporter has or can have any copyright in the written opinions delivered by this Court ...” *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668, 8 L.Ed. 1055 (1834). ....

The same broad understanding of what constitutes “the law” for copyright purposes underlies the Court's later decision in *Banks v. Manchester*, 128 U.S. 244, 9 S.Ct. 36, 32 L.Ed. 425 (1888). The Court there denied a copyright to a court reporter in his printing of the opinions of the Ohio Supreme Court. The Court first noted that whatever work the judges perform in their official capacity cannot be regarded as authorship under the copyright law.

As a question of “public policy,” the Court stated that,

there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, 8 Pet. 591, 8 L.Ed. 1055, that no copyright could, under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute.

*Banks*, 128 U.S. at 253, 9 S.Ct. at 40. (emphasis added). At this point, *Banks* relied upon a decision of the Massachusetts Supreme Judicial Court, which stated,

[I]t needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the Justices.

*Nash v. Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886). The court in *Nash* further observed that a legislature likewise could not deny public access to statutes.

*Banks* represents a continuous understanding that “the law,” whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright.[FN4] Modern decisions have followed suit.[FN5] Significantly, the 1976 Copyright Act specifically denies protection to federal statutes and regulations.

17 U.S.C. § 105. Given the state law foundation of *Banks* and its progeny, there is no reason to believe that state or local laws are copyrightable. See generally L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. REV. 719, 751-58 (1989); 1 Melville B. Nimmer & David Nimmer, *NIMMER ON COPYRIGHT* § 5.06[c] at 5-92 (2000) (“state statutes, no less than federal statutes, are regarded as being in the public domain”); 1 Patry, *COPYRIGHT LAW AND PRACTICE* 351, 357 (1994).

FN4. In *Davidson v. Wheelock*, for example, the court stated that a compiler of state statutes “could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him.” *Davidson v. Wheelock*, 27 F.

61, 62 (D.Minn. 1886). More famously, Justice Harlan, riding circuit, denied an injunction sought for the compiler of Michigan statutes, holding that “no one can obtain the exclusive right to publish the laws of the state in a book prepared by him.” *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898).

FN5. *Harrison Co. v. Code Revision Commission*, 244 Ga. 325, 260 S.E.2d 30, 34 (1979); *State of Ga. v. The Harrison Co.*, 548 F.Supp. 110, 114-15 (N.D.Ga. 1982), *vacated per stipulation*, 559 F.Supp. 37 (N.D.Ga. 1983).

As governing law, pursuant to *Banks*, the building codes of Anna and Savoy, Texas cannot be copyrighted.

*Veck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d 791, 795-796 (5th Cir. 2002), *cert. den.*, 539 U.S. 969 (2003)

The court then addressed due process arguments in considerable detail. SBCCI argued that the building codes of the two towns in Texas were available for reading or copying in the municipal offices of the towns, and that was enough to satisfy due process concerns. The majority of the *en banc* court disagreed with SBCCI:

The second “holding” of *Banks*, which requires “the law” or its exposition to be “free for publication to all,” is recharacterized by SBCCI as a “due process” argument. That argument devolves into a factual question concerning public “access” to the law. Because SBCCI contends that there is no dispute about the adequacy of public “access” to its model codes, after their enactment as the building codes of Anna and Savoy, *Banks* is inapplicable. *Veck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d at 797.

The majority of the *en banc* court concluded its discussion of due process:

*BOCA* described free access as a policy “based on the concept of due process,” the people’s right to know what the law requires so that they may obey it and avoid its sanctions. SBCCI and the dissent contend that this “due process” reasoning involves nothing more than the factual issue of “sufficient” public access to the building codes of Anna and Savoy. Since a copy of the codes is available for inspection and individual copying in a public office, SBCCI contends that the obligations of due process are fulfilled.

**We disagree that the question of public access can be limited to the minimum availability that SBCCI would permit.**<sup>30</sup> *Banks* does not use the term “due process.” There is also no suggestion that the *Banks* concept of free access to the law is a factual determination or is limited to due process, as the term is understood today. Instead, public ownership of the law means precisely that “the law” is in the “public domain” for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its complexities, it would seem that he could do so. In our view, to say, as *Banks* does, that the law is “free for publication to all” is to expand, not factually limit, the extent of its availability.

---

<sup>30</sup> Boldface added by Standler.

Moreover, as the *BOCA* decision observed, it is difficult to reconcile the public's right to know the law with the statutory right of a copyright holder to exclude his work from any publication or dissemination. SBCCI responds that due process must be balanced against its proprietary rights and that the fair use doctrine as well as its honorable intentions will prevent abuse. Free availability of the law, by this logic, has degenerated into availability as long as SBCCI chooses not to file suit.[FN12]

FN12. SBCCI does not permit governmental entities to publish its model codes when they are enacted. Instead, it permits their adoption by reference and furnishes a copy of the adopted code to the entity. SBCCI also generously allows that if a governmental entity were to publish the building code on an Internet site to meet its due process obligation, that would be a fair use. But when the North Carolina Building Officials were permitted to publish a model code on their non-public access website, SBCCI expressly reserved its rights.

For these reasons, we reject SBCCI's deconstruction of *Banks* into merely utilitarian and factual issues. Instead, we read *Banks*, *Wheaton*, and related cases consistently to enunciate the principle that "the law," whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.

To sum up this section, we hold that when Veeck copied only "the law" of Anna and Savoy, Texas, 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. The basic proposition was stated by Justice Harlan, writing for the Sixth Circuit: "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book ..." *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898). [footnote omitted] See Jerry E. Smith, Government Documents: Their Copyright and Ownership, 22 COPYRIGHT SYMPOSIUM 147, 174 (ASCAP 1977), reprinted in 5 TEX. TECH L. REV. 71, 92 (1973).

*Veeck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d at 799-800.

The *en banc* majority adopted the holding in *BOCA* that "the citizens are the authors of the law". *Veeck*, 293 F.3d at 799. As explained above, in my discussion of *BOCA*, I am troubled at judges declaring that citizens are the "authors" of the law, because that statement is not literally true. Moreover, the issue is not about who is the *author* of the law, instead the real issue is who owns the copyright in the law.

The majority opinion of the *en banc* court goes on to declare that municipal building codes are "facts" as the word is used in copyright law.<sup>31</sup> Facts are in the public domain, *not* subject to copyright, according to *Feist*, 499 U.S. 340 (1991). I think due process and public policy reasons are better reasons for why law, including building codes, are in the public domain.

The court held that SBCCI owned a valid copyright in its model code. However, the municipal building code is in the public domain, and *not* protected by copyright, because the

---

<sup>31</sup> *Veeck v. Southern Bldg. Code Cong. Int'l*, 241 F.3d 398, 416 (5thCir. 2001) (Little, J., dissenting) ("An individual wishing to publish the text of a law cannot develop his own, unique version and still publish an authoritative copy."), quoted with approval by the *en banc* majority, 293 F.3d 791, 801 (5thCir. 2002).

building code is law. The incorporation of SBCCI's model code by reference stripped the copyright from the text of the model code. This transformation of a private copyright on the model code into law that is in the public domain raises an issue of a taking by the municipal government. The majority of the *en banc* court tersely disposed of the taking issue, by recognizing that SBCCI invited governments to use its model code:

This is not, however, a "takings" case, not least because SBCCI urged localities to adopt its model codes. The issue in the case is not the voluntariness of the appropriation but the legal consequences flowing from the permission that SBCCI gave.

*Veeck v. Southern Bldg. Code Congress Intern., Inc.*, 293 F.3d at 803.

Incidentally, the building codes at issue in this case were *not* easy to obtain locally.

Veeck attempted to obtain a copy of the building codes of his hometown of Denison, Texas, after learning that Denison had adopted SBCCI's model code as its own. Failing to locate Denison's building code at local bookstores or libraries, Veeck ordered from SBCCI copies of its codes in electronic format.[footnote omitted] According to Veeck, he later visited approximately twenty towns in North Texas, including Anna and Savoy, in an effort to obtain copies of their local building codes, not all of which had been produced by SBCCI. Veeck was not able to buy complete copies at any of the cities he visited.[FN2] He apparently never attempted to view or copy the SBCCI codes in any city clerk's or other municipal office.

FN2. Some of the cities apparently did not have the correct version of their building code available at alternative locations. For instance, Sherman, Texas, had adopted the 1997 version of the building code, but the local library had only the 1994 version on hand.

*Veeck v. Southern Bldg. Code Congress Intern. Inc.*, 241 F.3d 398, 401 (5thCir. 2001).

From these facts, one could easily argue that Veeck was doing a public service by making building codes more easily accessible to people who were affected by these municipal regulations.

However, such a public service is *not* relevant in determining fair use in copyright law.

*If* SBCCI's copyright in the municipal building codes were valid, then Veeck's good intentions or public service would *not* protect him from copyright infringement. I mention this, because some readers may erroneously believe that good intentions will protect them from copyright infringement.

## city/county tax maps

As discussed above, statutes, judicial opinions, and government regulations are in the public domain and can not be copyrighted. However, there are a few cases that hold that a city or county tax map can be copyrighted:

- *Del Madera Properties v. Rhodes and Gardner, Inc.*, 637 F.Supp. 262, 263-264 (N.D.Cal. 1985), *aff'd*, 820 F.2d 973 (9thCir. 1987) (zoning map approved by city is copyrightable).
- *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 142 (5thCir. 1992) (real estate tract maps are copyrightable);
- *County of Suffolk v. Experian*, 54 USPQ2d 1924 (S.D.N.Y. 2000) (county's tax maps are *not* in public domain);
- *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001) (county's tax maps are protected by copyright);
- *City of New York v. Geodata Plus, LLC*, 537 F.Supp.2d 443 (E.D.N.Y. 2007) (New York City sued proprietary database for copyright infringement for tax and real estate information).

Generally, state and local governments in the U.S.A. do not attempt to enforce copyrights on their documents, but there have been a few recent exceptions involving tax maps, plus the litigation against Harrison Company by the state of Georgia.

## state statutes

Irina Dmitrieva reported her survey<sup>32</sup> of state statutes in the USA for copyright of state law. In December 2008, I looked at some of the state statutes that she identified and I also did a few searches of unannotated state statutes in all fifty states in Westlaw. In the following paragraphs, I quote four of the more egregious state statutes:

## Colorado

Like several other states, Colorado owns a federal copyright on its statutes:

Colorado Revised Statutes and ancillary publications thereto, as published, shall be the sole property of the state of Colorado as owner and publisher thereof and shall be copyrighted for and in behalf of the state of Colorado by the secretary of state or the committee. The committee shall use its best efforts to assure that the appropriate federal copyright is maintained. Any prior actions of the committee and the revisor in securing such federal copyright are hereby validated.

Colorado Revised Statutes § 2-5-115 (current Dec 2008).

---

<sup>32</sup> Irina Y. Dmitrieva, "State Ownership of Copyrights in Primary Law Materials," 23 HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL 81, 97-119 (Fall 2000).

A Colorado state statute fines a publisher or distributor of *unauthorized* editions of Colorado state statutes \$500 per book.

(1)(c) Publication, reprinting, or distribution of all or a substantial part of the statutes<sup>33</sup> of the state of Colorado and annotations thereto, other than pursuant to sections 2-5-101 to 2-5-116, may be made only as provided for in this section. ....

(2)(a) Any person, agency, or political subdivision desiring to publish, reprint, or distribute, whether by use of printed matter or by use of computer or other electronic means, all or a substantial part of the statutes of the state of Colorado, with or without the annotations thereto, must make prior written application to the committee, in which the applicant:

(I) Specifies the parts of the statutes and annotations and the number of copies the applicant desires to publish, reprint, or distribute;

(II) States generally the purpose for the publication, reprinting, or distribution and the persons or classes of persons to receive copies thereof;

(III) Agrees to pay the costs and fees required by the committee; and

(IV) Provides such other information as the committee reasonably requires.

(2)(b) Any person, agency, or political subdivision who wishes to publish, reprint, or distribute all or a substantial part of the statutes shall also demonstrate to the satisfaction of the committee that the statutes will be accurately reproduced.

(2)(c)(I) In addition to any other requirement, the committee may require that an applicant who wishes to publish, reprint, or distribute all or a substantial part of the statutes pay a fee to the state and any direct costs of preparation of any material provided by the state. Such fee and costs shall be determined by the committee, and any fee shall be in an amount that the committee determines is necessary to pay for state property interests in the statutes, to pay for the use of any material copyrighted by the state, and to pay for expenses incurred by the committee to assure the accuracy of the statutes.

....

(5)(b) Any person, agency, or political subdivision who publishes, reprints, or distributes all or a substantial part of the statutes of this state without obtaining the permission of the committee as required by this section shall forfeit to the state the sum of **five hundred dollars for each and every book, volume, computer representation, or pamphlet so published, printed, or distributed**<sup>34</sup> or the amount of any fee and costs imposed pursuant to paragraph (c) of subsection (2) of this section, whichever is greater.

---

<sup>33</sup> "A 'substantial part of the statutes' means two hundred or more sections of the Colorado Revised Statutes." Colorado Revised Statutes § 2-5-118(6).

<sup>34</sup> Boldface added by Standler.



(5)(c) Any such forfeitures shall be recovered by an action in the name of the state that may be authorized by the committee. An action to enforce the notice requirement set out in paragraph (d) of this subsection (5) may be joined with the appropriate forfeiture action or brought on its own merits.

(5)(d) If any person, agency, or political subdivision publishes, reprints, or distributes all or a substantial part of the statutes of this state without the permission of the committee, the committee may require such person, agency, or political subdivision to send a notice to all persons who have previously received the unapproved publication, reprinting, or distribution that indicates that such publication was an unapproved and unofficial publication of the statutes.

....

Colorado Revised Statutes § 2-5-118 (current Dec 2008).

### Idaho

Idaho intends to charge a copyright royalty fee for any commercial reproduction of state statutes. Idaho enacted its own statutory damages for copyright infringement, instead of using applicable federal statutory copyright law.

(1) 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. If a person reproduces or distributes the Idaho Code for the purpose of direct or indirect commercial advantage, the person shall owe to the Idaho code commission, as the agent of the state of Idaho, a royalty fee in addition to the fee charged for copying the Idaho Code. Any person who reproduces or distributes the Idaho Code in violation of the provisions of this section, shall be deemed to be an infringer of the state of Idaho's copyright. The Idaho code commission, through the office of the attorney general, is entitled to institute an action for any infringement of that particular right committed while the Idaho code commission or its designated agent has custody of the Idaho Code.

(2) A court having jurisdiction of a civil action arising under this section may grant such relief as it deems appropriate. At any time while an action under this section is pending, the court may order the impounding, on such terms as it deems reasonable, of all copies claimed to have been made or used in violation of the Idaho code commission's copyright pursuant to this section.

(3) An infringer of the state of Idaho's copyright pursuant to this section is liable for any profits the infringer has incurred by obtaining the Idaho Code for commercial purposes or is liable for statutory damages as provided in subsection (4) of this section.

(4) The Idaho code commission, as agent of the copyright owner, may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to the Idaho Code for which any one (1) infringer is liable individually, or for which any two (2) or more

infringers are liable jointly and severally, in a sum of not less than two hundred fifty dollars (\$250) or more than ten thousand dollars (\$10,000), as the court considers just.

(5) In any civil action under this section, the court may allow the recovery of full costs by or against any party and may also award reasonable attorney's fees to the prevailing party as part of the costs.

(6) The Idaho code commission is hereby authorized to license and charge fees for the use of the Idaho Code. The Idaho code commission may grant a license for the use of the Idaho Code to a public agency in the state and waive all or a portion of the fees. All fees recovered by the Idaho code commission shall be deposited in the general account.

Idaho Code § 9-350 (enacted 1993, still current Dec 2008).

### Mississippi

Mississippi intends to assert copyright on section numbers and titles of state statutes, amongst other items. The state also intends to fine a person \$1000/day for each *unauthorized use* of those statutes. Criminalizing an *unauthorized use* of statutes is really scary.

(1) Copyrights of the Mississippi Code of 1972 and the notes, annotations, and indexes thereof, shall be taken by and in the name of the publishers of the compilation who shall thereafter promptly assign the same to the State of Mississippi and be owned by it.

(2) All parts of any act passed by the Mississippi Legislature, or of any code published or authorized to be published by the Joint Committee on Compilation, Revision and Publication of Legislation, including, without limitation, catchlines or frontal analyses; numbers assigned to sections, articles, chapters and titles; historical citations or source lines; editor's notes; amendment notes; cross references; annotations; and summaries of judicial decisions and Attorney General's opinions, shall become and remain the exclusive property of the State of Mississippi, to be used only as the joint committee may direct.

(3)(a) If any person or entity uses any part of any act passed by the Mississippi Legislature, or any part of any code published or authorized to be published by the joint committee, in any manner other than as authorized by the committee, the person or entity shall be subject to a civil penalty of not less than One Thousand Dollars (\$1,000.00) for each violation, and each day upon which a violation occurs shall be deemed a separate and additional violation.

(3)(b) If the joint committee suspects that any person or entity is violating or has violated this section, the Attorney General shall investigate the matter upon the request of the joint committee. If the Attorney General determines, after investigation, that the person or entity is violating or has violated this section, the Attorney General shall institute an action to impose a civil penalty against the person or entity, or seek injunctive relief against the person or entity to prevent further violations of this section, or both, as requested by the joint committee.

....

Mississippi Code § 1-1-9 (subsections (1) and (2) were created in 1996, subsection (3) was created in 1998, still current Dec 2008).

## Montana

Montana statute explicitly disclaims copyright on state statutes, while contradictorily asserting that the statutes are the sole property of the state:

The Montana Code Annotated, supplements, or other publications ancillary thereto, as published, are the sole property of the state of Montana and may not be copyrighted. Montana Code Annotated § 1-11-304 (enacted 1975, amended 1993, current Dec 2008).

One wonders how the state can assert that the code is its “sole property” after the statute explicitly disclaimed copyright in the code. The *only* purpose of copyright is to give property rights to owners of original expression in text. Without copyright, the state statutes are in the public domain, meaning that they are *not* the property of anyone.

copyright for benefit of the citizens of the state?

A Nebraska statute requires copyright of the state statutes for the benefit of people of that state:

The Revisor of Statutes shall cause the supplements and reissued volumes to be copyrighted under the copyright laws of the United States for the benefit of the people of Nebraska. .... Nebraska Revised Statutes § 49-707 (current Dec 2008).

Idaho copyrights its state statutes:

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. Idaho Code § 9-350(1) (enacted 1993, still current Dec 2008).

A literal reading of this Idaho statute is that people in Idaho who do not pay taxes do *not* own the Idaho statutes. To prevent the exclusion of poor people, the statute should have said “people of Idaho”, instead of “taxpayers”.

Such statutes are criticized later in this essay (see page 41) for possibly allowing discriminatory treatment of citizens of other states, perhaps by charging a greater license fee to citizens of other states.

Alabama has a statute that requires its statutes to be copyrighted for the benefit of the state (i.e., *not* for the benefit of the citizens of the state).

The Code Commissioner shall have each volume of the pamphlet acts of the Legislature at each session thereof and each volume of the code copyrighted for the use and benefit of the state. Alabama Code 1975 § 36-13-5 (current Dec 2008).

Several other state’s statutes require copyrighting of state statutes:

The [Code Revision] commission is authorized: .... To register the copyright claim in all materials in the Code and any supplements thereto, to protect, enforce, and preserve all claims in such materials, to bring and defend actions in any court in connection therewith, and to

negotiate and grant licenses or rights, on behalf of the state, to use such material upon such terms and conditions as the commission shall determine to be in the best interest of the state; Georgia Code § 28-9-3 (15) (enacted 1985, current Dec 2008).

Minnesota Statute § 3C.12(2)(m) requires the revisor of statutes to “send the appropriate number to the Library of Congress for copyright and depository purposes”. This statute was enacted in 1984 and is still current in Dec 2008.

The South Dakota Code Commission shall provide the material authorized for publication by § 2-16-6 will be copyrighted by the State of South Dakota, in the name of the State of South Dakota.  
South Dakota Codified Laws § 2-16-8 (enacted 1966, current Dec 2008).

And a Vermont statute says:

The legislative council, on behalf of the state of Vermont, shall hold the copyright to the Vermont Statutes Annotated.  
2 Vermont Statutes § 421(b) (enacted 2001, current Dec 2008).

Virginia asserts ownership and copyright in both its state statutes and state administrative code:

All parts of any code published or authorized to be published by the Commission, including statute text, regulation text, catchlines, historical citations, numbers of sections, articles, chapters and titles, frontal analyses and revisor's notes, shall become and remain the exclusive property of the Commonwealth to be used only as the Commission may direct. However, the Commission shall acknowledge a property right in and the right to copyright materials prepared and added to any code by the person preparing it.  
Virginia Code § 30-147 (A) (enacted 2001, current Dec 2008).

#### copyright of state judicial opinions

The following states, in alphabetical order, have state statutes requiring copyright on reports of the state supreme court.

The reports shall be copyrighted and the copyright shall belong to the state.  
Georgia Code § 50-18-34 (enacted 1920, current Dec 2008).

An Illinois statute requires copyright of parts of the reports of judicial decisions of the state courts, although *not* copyrighting the decisions written by judges, for benefit of the people of Illinois:

The copyright of the statement of facts, of the syllabi, of the index and of all other notes or references prepared by the reporter of decisions or the contractor hereunder, must be taken by and shall be vested in the Supreme Court and in the Reporter of Decisions for the benefit of the People of the State of Illinois. The Reporter of Decisions is authorized by writing filed in his office to license the use of such copyrighted materials by any person, firm, or corporation.

....  
705 Illinois Compiled Statutes 65 / §5 (enacted 1971, current Dec 2008).

Kansas copyrights its judicial opinions for the benefit of the state of Kansas:

The reporter shall cause each volume of [Kansas Supreme Court] reports hereafter published to be copyrighted for the use and benefit of the state of Kansas; ....

Kansas Statutes § 20-206 (enacted 1889, still current Dec 2008).

.... The Reporter, in the usual manner of authors, shall superintend the proofreading, correction, and publication of the reports and secure copyright for the State of Maryland as its property. ....

Maryland Code, Courts and Judicial Proceedings, § 13-203 (enacted 1973, current Dec 2008).

Minnesota copyrights its judicial opinions for the benefit of the people.

.... The reporter shall have no pecuniary interest in such reports, which shall be copyrighted by the secretary of state in trust for the people.

Minnesota Statutes § 480.11(3) (enacted 1965, current Dec 2008).

Nebraska mandates copyrights of its judicial opinions in both the state constitution and in a state statute:

.... The copyright of the state reports shall forever remain the property of the state.

Nebraska Constitution, Article 5, § 8 (enacted 1875, current Dec 2008).

.... The copyright of each volume shall be entered by the reporter for the benefit of the state, and all papers relating thereto shall be filed and recorded in the office of the Secretary of State.

....

Nebraska Revised Statutes § 24-212 (current Dec 2008).

A New York state statute requires copyright of parts of the reports of judicial decisions of the state courts, although *not* copyrighting the decisions written by judges, for the benefit of the people of New York:

The copyright of the statement of facts, of the head notes and of all other notes or references prepared by the law reporting bureau must be taken by and shall be vested in the secretary of state for the benefit of the people of the state. The secretary of state is authorized by a writing filed in his office to grant to any person, firm or corporation, under such terms and conditions as he and the chief judge of the state of New York may determine to be for the best interests of the state, the right to publish the above mentioned copyrighted matter.

New York Judiciary Law § 438 (enacted 1938, amended 1965, current Dec 2008).<sup>35</sup>

.... The reporter of the supreme court shall secure a copyright for the use of the state for each volume of reports published.

Ohio Revised Code § 2503.23 (enacted 1953, current Dec 2008).

Notice that this statute is invalid, according to the famous case of *Banks v. Manchester*, 128 U.S. 244 (U.S. 1888), which case originated in Ohio.

---

<sup>35</sup> Quoted in *Lenz & Riecker, Inc. v. Fitzpatrick*, 500 N.Y.S.2d 929, 934 (N.Y.Sup. 1986).

The attorney general and reporter has the right to select a printer, and has the exclusive control of the publication and binding of all reports. After five (5) years from the publication of each report, the copyright of the same shall revert to the state of Tennessee.  
Tennessee Code § 8-6-204 (current Dec 2008).

.... The reporter shall secure the copyright of each volume for the benefit of the state. The reports shall be styled "West Virginia Reports." ....  
West Virginia Code § 5A-3-23 (enacted 1990, current Dec 2008).

#### examples of good state statutes

In contrast with the egregious examples quoted above, Illinois has particularly good statutes that explicitly place their statutes and administrative regulations in the public domain under federal copyright law:

.... The Illinois Compiled Statutes, including the statutes themselves and the organizational and numbering scheme, shall be an official compilation of the general Acts of Illinois and shall be entirely in the public domain for purposes of federal copyright law.  
25 Illinois Compiled Statutes 135/ § 5.04(a) (revised 1992, current Dec 2008).

And another Illinois statute says:

The codification system, the indexes, tables, and other aids for locating rules prepared by the Secretary of State, notes, and other materials developed under this Section in connection with the publication of the Illinois Administrative Code and the Illinois Register shall be the official compilations of the administrative rules of Illinois and shall be entirely in the public domain for purposes of federal copyright law.  
5 Illinois Compiled Statutes 100/ § 5-80(h) (amended 1994, still current Dec 2008).

However, as quoted above, Illinois does copyright parts of the reports of its judicial opinions, although the statute does *not* authorize copyright of the opinion themselves.

Oregon was one of the first states to require distribution of its statutes as computer files.

A 1995 Oregon statute requires state law to be “available to the public ... in electronic form”, including “All Oregon Laws enacted on and after September 9, 1995.” Oregon Revised Statutes § 173.763 (1)(a)(H).

The information identified in subsection (1) of this section shall be made available to the public through the largest nonproprietary, nonprofit cooperative public computer network. The information shall be made available in one or more formats and by one or more means in order to provide the general public in this state with the greatest feasible access. Any person who accesses the information may access all or any part of the information. The information may also be made available by any other means that would facilitate public access to the information.

Oregon Revised Statutes § 173.763 (2)(a).

In practice, “the largest nonproprietary ... public computer network” is the Internet.

Michigan was one of the first states to require their statutes to be posted on the Internet for free access by everyone:

(5) .... beginning July 1, 1999, the council shall make the Michigan Compiled Laws database search and retrieval system available to the public on the Internet. This subsection does not alter or relinquish any copyright or other proprietary interest or entitlement of this state relating to any of the information made available under this subsection.

(6) Beginning July 1, 1999, the council shall not charge a fee to provide the Michigan Compiled Laws database search and retrieval system to the public on the Internet as provided in subsection (5).

Michigan Compiled Laws § 4.1204 (enacted Dec 1998, current Dec 2008).

#### discussion of state statutes

Irina Dmitrieva wrote an interesting article that reported her survey and discussion of state statutes in the USA for copyright of state law (i.e., statutes, judicial opinions, and regulations).<sup>36</sup> She identified at least seven issues with various state statutes:

1. **overbroad copyright**<sup>37</sup> Several states assert legal rights in the use or copying of state law that are greater than those given by federal copyright law. Some state statutes deny the possibility of fair use under 17 U.S.C. § 107. A few state statutes contain criminal penalties for unauthorized copying of state statutes. I believe that such statutes are invalid under federal law, as a violation of the Supremacy Clause of the U.S. Constitution<sup>38</sup> and federal preemption of state copyright law in 17 U.S.C. § 301(a). Incidentally, such overbroad assertions of copyright are common in the commercial publishing industry.<sup>39</sup>

---

<sup>36</sup> Irina Y. Dmitrieva, "State Ownership of Copyrights in Primary Law Materials," 23 HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL 81, 97-119 (Fall 2000).

<sup>37</sup> Dmitrieva, *op. cit.* at 99, 114.

<sup>38</sup> U.S. Const., Art. VI, cl. 2.

<sup>39</sup> Paul J. Heald, "Payment Demands for Spurious Copyrights: Four Causes of Action," 1 JOURNAL OF INTELLECTUAL PROPERTY LAW 259 (Spring 1994); Jason Mazzone, "Copyfraud," 81 NEW YORK UNIV. LAW REVIEW 1026 (June 2006).

2. **state law *not* copyrightable**<sup>40</sup> In view of the substantial common law quoted above, and in view of people's due process rights described above, at page 10 — state and local governments should *not* copyright their statutes, judicial opinions, or regulations. States may wish to go further and enact a state statute that mirrors 17 U.S.C. § 105, which would deny copyright to *any* work of an officer or employee of the state government that is within the scope of their official duties.

I suggest that states should enact statutes that both (1) require full text of statutes and state supreme court opinions to be posted on the Internet for free access by everyone and (2) explicitly disclaim copyright in statutes, judicial opinions, and regulations for the state and all of its political subdivisions (e.g., counties and cities). Explicitly disclaiming copyright will firmly put these items in the public domain and prevent a commercial entity from attempting to copyright state law. The alternative is for a government to copyright its law and then hold the copyright in trust for the benefit of the people of that state, but this alternative has at least two serious disadvantages: (1) the reader may misunderstand the scope of the copyright notice<sup>41</sup> and (2) government bureaucrats could use such copyright to discriminate against citizens of other states.

In each of items 3-6 below, an additional reason to reject these possible arguments for copyright of law is that law should be in the public domain, for which no copyright is possible.

3. **ensurance of accuracy**<sup>42</sup> The state could attempt to use copyright of its law to ensure that its licensees accurately copy the law.<sup>43</sup> While having only accurate copies is a laudable goal, I believe that such supervision and approval of publishers by state governments is a violation of the First Amendment to the U.S. Constitution.
4. **limit competition amongst publishers**<sup>44</sup> By enforcing copyrights on state law, states can encourage licensed publisher(s) to produce high-quality editions, by limiting competition and thereby increasing profits for licensed publisher(s). I believe that such supervision and

---

<sup>40</sup> Dmitrieva, *op. cit.* at 111, 115.

<sup>41</sup> Dmitrieva, *op. cit.* at 116.

<sup>42</sup> Dmitrieva, *op. cit.* at 109.

<sup>43</sup> One court has specifically rejected this argument: *State of Georgia v. Harrison Co.*, 548 F.Supp. 110, 114-115 (D.Ga. 1982).

<sup>44</sup> Dmitrieva, *op. cit.* at 110.



approval of publishers by state governments is a violation of the First Amendment to the U.S. Constitution.

5. **royalties payable to state**<sup>45</sup> While a state may wish to receive income from publishers of copyrighted documents prepared by state employees, the purpose of publishing state law is to make the law accessible to the public.<sup>46</sup> The state's imprimatur on the "official" edition of the state statutes or judicial opinions is enough to assure sales to attorneys in that state.
6. **discrimination against citizens of other states**<sup>47</sup> A state could copyright its law on behalf of the citizens of that state, and then charge a greater license fee to citizens of other states who wish to copy or use the state's law. I believe that such an attempt would be a violation of the privileges and immunities clause of the U.S. Constitution.<sup>48</sup> Because of the obvious possibilities of a citizen of one state traveling to another state, or a manufacturer in one state selling allegedly defective goods in another state, citizens in all fifty states *need* access to the state law in all fifty states.
7. **use of privately copyrighted materials by the state**<sup>49</sup> Some nongovernmental organizations prepare model codes that are copyrighted by the nongovernmental entity. A government may be committing copyright infringement if it copies substantial parts of a copyrighted model code into a government statute or a government regulation. Moreover, if statutes and regulations are in the public domain, then the government has committed a taking in violation of the Fifth Amendment of the U.S. Constitution by converting copyrighted work to the public domain. Governments should pay license fees to owners of copyrighted text, in exchange for a license to use such text in law or other government works.

As described above, beginning at page 31, ten states have statutes requiring copyright on their state statutes:

Alabama, Colorado, Georgia, Idaho, Minnesota, Mississippi, Nebraska, South Dakota, Vermont, Virginia

---

<sup>45</sup> Dmitrieva, *op. cit.* at 110.

<sup>46</sup> *Nebraska v. State Journal Co.*, 110 N.W. 763, 764 (Neb. 1906) ("We do not coincide with the [state's] view that the main purpose of the statute is to establish a printing and publishing business to make profits with which to replenish the library funds. The purpose would seem rather to be to make the opinions of the court easily accessible to all the citizens.").

<sup>47</sup> Dmitrieva, *op. cit.* at 113-114.

<sup>48</sup> U.S. Constitution, Art. IV, § 2, cl. 1.

<sup>49</sup> Dmitrieva, *op. cit.* at 91-93, 117-118.

Further, at least ten states have statutes requiring copyright on at least parts of the state supreme court's reports:

Georgia, Illinois, Kansas, Maryland, Minnesota, Nebraska, New York, Ohio, Tennessee, West Virginia

I think these above-criticized state statutes show an ignorance of law by state legislators. While the copyrightability of law is an obscure, tiny topic in the specialized area of intellectual property law, any lawyer will remind you of the cliché — which is nevertheless true — that ignorance of the law is no excuse. Such unconstitutional state statutes could have been avoided if the legislators had asked the state attorney general for a legal opinion about the copyrightability of law.

Why would state legislatures attempt to copyright state statutes? Perhaps legislators have the erroneous belief that copyright protects effort (“sweat of the brow”), given that legislators are personally aware of the effort that they put into writing and revising statutes. Or perhaps legislators are attempting to prevent private publishers of statutes from copyrighting the state statutes.

### **Pagination Copyrightable?**

During 1985-1998, West Publishing attempted to assert copyright on pagination in its reporters, to maintain West's dominant position in reporting state and federal judicial opinions. Before discussing these cases, I quickly review how West came to dominate reporting of judicial opinions in the USA. Then, beginning at page 43, I review the precedents that establish that pagination is *not* copyrightable. Beginning at page 45, I review the reported cases involving West.

domination by West

In 1885, there were at least three proprietary reporters of state cases in the northeastern USA: (1) Gould in Albany, NY, published the EASTERN REPORTER which covered nine states; (2) Lawyer's Co-Operative in Rochester, NY published the NEW ENGLAND REPORTER, which covered six states and (3) West Publishing in St. Paul, Minn. published the ATLANTIC and NORTH EASTERN REPORTERS.<sup>50</sup> These three proprietary reporters were in addition to the official state reporters published under contract with each state. I can't see any advantage in so much competition: parallel cites to four reporters would be a nightmare, further library budgets and shelf space would be wasted by this duplication amongst four reporters.

---

<sup>50</sup> Thomas J. Young, Jr., “A Look at American Law Reporting in the 19th Century,” 68 LAW LIBRARY JOURNAL 294, 301 (Aug 1975).

By the early 1900s, West had become the dominant proprietary publisher of judicial opinions in the USA, because West published a DIGEST that was an easily usable index to opinions, and West had a popular “key number” system for organizing topics in law.<sup>51</sup> West also had a nationwide scope of reporting cases from state courts and many federal courts, giving West more complete coverage than any of its competitors. Further, West was relatively prompt in getting new opinions into print. In short, West succeeded, because they had a superior product to the competition.

While some of West’s competitors in the 1880s continued to publish legal treatises, law textbooks, and/or publish official versions of state statutes or state judicial opinions under contract to a state, all of the competing proprietary reporters ceased publication, except for the Lawyer’s Co-Op edition of the U.S. Supreme Court cases. One no longer sees citations to the long-defunct proprietary reporters of the 1880s, because West did not parallel cite to competing proprietary reporters and because West’s volumes are all that one finds in a modern law library.

West publishes the *only* reporter for recent state supreme court opinions in 22 states: Alabama, Alaska, Colorado, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, and Wyoming.<sup>52</sup>

Similarly, West publishes the *only* reporters for the U.S. District Courts and U.S. Courts of Appeal. Apparently, the U.S. Government is content to allow one proprietary reporter to be the *only* source for opinions of the lower federal courts.

precedent on pagination

*Myers v. Callaghan*

In a case involving published opinions of the Illinois Supreme Court, the trial judge wrote in his final paragraph:

The fact appears to be, and indeed it is not a subject of controversy, that in arranging the order of cases, and in the paging of the different volumes, the Freeman edition has been followed by the defendants; but, while this is so, I should not feel inclined, merely on that account and independent of other matters, to give a decree to the plaintiff, although it is claimed that the arrangement of the cases and the paging of the volumes are protected by a copyright. Undoubtedly in some cases, where are involved labor, talent, judgment, the classification and disposition of subjects in a book entitle it to a copyright. But the arrangement of law cases and the paging of the book may depend simply on the will of the

---

<sup>51</sup> Thomas J. Young, Jr., “A Look at American Law Reporting in the 19th Century,” 68 LAW LIBRARY JOURNAL 294, 305 (Aug 1975).

<sup>52</sup> THE BLUEBOOK, Table 1, (17<sup>th</sup>ed. 2000).

printer, of the reporter, or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. Here the object on the part of the defendants seems to have been that there should not be confusion in the references and examination of cases; **but the arrangement of cases and the paging of the volumes is a labor inconsiderable in itself**,<sup>53</sup> and I regard it, not as an independent matter, but in connection with other similarities existing between the two editions, when I say, taking the whole together, the Freeman volumes have been used in editing and publishing the defendants' volumes.<sup>54</sup> It should be borne in mind that, as a general thing, there is but a small part of the report of a case which is the subject of copyright. Many of the cases contain nothing but the opinions of the court, with the simple remark that the facts are stated in the opinion; and the head-notes are nothing more than a repetition, in a condensed form, of what is in the opinion, and therefore it is often very difficult to select distinct points of comparison between the same case in the corresponding volumes of the parties, because there is so little which can be called the work of the reporter. *Myers v. Callaghan*, 20 F. 441, 442 (C.C.Ill. 1883), *quoted with approval on appeal*, 128 U.S. 617, 661-662 (1888) (“... we concur with the conclusions of Judge Drummond ...”). This quotation makes clear that pagination is *not* copyrightable, even if copyright were to protect labor.

*Banks v. Lawyer's Co-Op*

In a case involving published opinions of the U.S. Supreme Court, the trial judge wrote:

True, the statute prescribing [the reporter's] duties does not point out how the cases shall be arranged into volumes and printed, but to fittingly reproduce the decisions and opinions in volumes it is necessary to supply pagings, together with an orderly arrangement of the cases. It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing) and paging the volumes — things essential to be done to produce the volumes — are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter. A different question would be presented if, for instance, infringement of the headnotes, or syllabuses, index digest, synopses of arguments or statements of the cases, or an abridgment thereof were claimed.

....

No authority is cited which supports the contention that complainant is entitled to be protected in its pagination and arrangement of cases where the substance of the origination is not pirated, and in the absence of such authority I hesitate to hold that the scope of the copyright act protects the reporter in the details of his employment mentioned.

*Banks Law Pub. v. Lawyer's Co-Operative Pub.*, 169 F. 386, 390 (2dCir. 1909).

---

<sup>53</sup> Boldface added by Standler.

<sup>54</sup> This is the final sentence quoted by the U.S. Supreme Court.

The Circuit Court of Appeals tersely affirmed the trial judge's decision:

We concur with Judge Hazel in his reasoning and conclusion that the arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.

*Banks Law Pub. v. Lawyer's Co-Operative Pub.*, 169 F. 386, 391 (2dCir. 1909) (per curiam), *appeal dismissed per stipulation*, 223 U.S. 738 (1911).

*Eggers v. Sun Sales Corporation*

In a case involving publication of a public-domain work (i.e., "General Pershing's official report, that being a public document") by two commercial publishers, one publisher sued the other for copyright infringement. The trial court dismissed the litigation and the U.S. Court of Appeals in New York City affirmed, with a terse mention that pagination was not copyrightable:

This conduct may be called mean, but it is not punishable under the Copyright Act (Comp. St. Secs. 9517 et seq.). It is even possible that defendants' printers set up the official report from a copy of plaintiff's book; identity of pagination leads to that suspicion; but legally that is not of sufficient importance to constitute infringement of copyright. *Banks, etc., Co. v. Lawyers', etc., Co.*, 169 Fed. 386, 94 C.C.A. 642, 17 Ann.Cas. 957.

But, however unattractive in a business or moral sense defendants' conduct has been, it was open to any one to print and publish the public document in question, ....  
*Eggers v. Sun Sales Corporation*, 263 F. 373, 375 (2dCir. 1920).

cases involving West  
*West Publ. v. Mead Data Central*

LEXIS was publicly released in 1973 as the first searchable on-line database of statutes and judicial opinions in the USA. In 1975, West Publishing released WESTLAW, the second online legal database. During the 1970s and 1980s, LEXIS was generally superior to WESTLAW. In June 1985, LEXIS announced it would begin including star pagination to printed volumes of West's reporters.<sup>55</sup> West quickly filed litigation to obtain an injunction against LEXIS including the pagination from the West reporters. In decisions that have been highly criticized,<sup>56</sup> the trial court granted a preliminary injunction, the U.S. Court of Appeals affirmed, and the U.S. Supreme Court declined to hear an appeal. *West Publ. v. Mead Data Central*, 616 F.Supp. 1571 (D.Minn. 1985), *aff'd*, 799 F.2d 1219 (8thCir. 1986), *cert. den.*, 479 U.S. 1070 (1987). After trial, but before the trial court issued its opinion, the defendant settled with West Publishing Company on 21 July 1988. Note that the settlement prevented the courts from making a final determination of the merits in this case.

---

<sup>55</sup> *West v. Mead Data Central*, 616 F.Supp. at 1575.

<sup>56</sup> See bibliography beginning at page 72, below, for articles and comments by Patterson & Joyce, Locke, Dahl, Khalil, Yen, Atlas, and Jarrah. In addition, David Nimmer has been highly critical of these decisions, see NIMMER ON COPYRIGHT § 3.03 [B] [2].

## court's errors

1. The trial court and appellate court ignored precedent that pagination of reporters was *not* copyrightable subject matter. In the one case that they did cite, *Myers v. Callaghan*, 128 U.S. 617, the judges misunderstood the opinion. The majority on the appellate court distinguished *Banks v. Lawyer's Co-Op.*, 169 F. 386 (2dCir. 1909), because Banks was the official reporter,<sup>57</sup> and then the majority ignored that relevant case.
2. The trial court and appellate court both repeatedly emphasized the *labor* that West had expended on the arrangement and pagination of its cases.<sup>58</sup> For example, the trial court said: "West's laboriously prepared, voluntary arrangement of cases."<sup>59</sup> However, five years after the Eighth Circuit's decision in *West v. Mead Data Central*, the U.S. Supreme Court ended copyright protection for "sweat of the brow" in *Feist*.<sup>60</sup> Several commentators have concluded that the result in *West v. Mead Data Central* is no longer valid after the U.S. Supreme Court's decision in *Feist*.<sup>61</sup>

Moreover, the appellate court in *West v. Mead Data Central* cited *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8thCir. 1985).<sup>62</sup> *Hutchinson* and *Feist* both involved copyrightability of telephone directories. *Hutchinson* was overruled by *Feist*, as recognized in *Bellsouth Advertising & Pub. Corp. v. Donnelley Information Pub., Inc.*, 933 F.2d 952, 957 (11thCir. 1991), *vacated and on rehearing*, 999 F.2d 1436 (11thCir. 1993) (no mention of *Hutchinson*); *Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851, 854 (6thCir. 1991) ("... although courts have also held telephone directories to be copyrightable, see *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985), the Supreme Court in *Feist Publications* found a telephone directory to be unprotected by copyright law

---

<sup>57</sup> *West v. Mead Data Central*, 799 F.2d at 1239 (Oliver, J., dissenting).

<sup>58</sup> I searched the text of the opinions on Westlaw and found that the trial court's opinion mentioned the word *labor* 6 times, and the majority opinion of the appellate court mentioned the word *labor* 14 times. The trial and majority opinions each mention the word *effort* 2 times.

L. Ray Patterson & Craig Joyce, "Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations," 36 UNIV. CALIFORNIA AT LOS ANGELES LAW REVIEW 719, 729-731 (April 1989) ("unfair competition in the guise of copyright infringement").

<sup>59</sup> *West Publ. v. Mead Data Central*, 616 F.Supp. at 1578.

<sup>60</sup> *Feist Pub. v. Rural Telephone*, 499 US 340 (1991).

<sup>61</sup> See bibliography beginning at page 72, below, for articles and comments by Khalil, Yen, Atlas, and Jarrah. In addition, David Nimmer has been highly critical of *West v. Mead Data Central*, see NIMMER ON COPYRIGHT § 3.03 [B] [2].

<sup>62</sup> *West v. Mead Data Central*, 799 F.2d at 1223, 1228.

because the process of taking the data provided by the subscribers and listing it alphabetically by surname was ‘devoid of even the slightest trace of creativity.’ *Feist Publications*, 111 S.Ct. at 1296.”); *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 708 (2dCir. 1998) (“... classic ‘sweat of the brow’ cases that were overruled in *Feist*.”).

3. On this application for a preliminary injunction, the facts known to the court were sparse. In particular, West said neither how nor by whom their pagination was determined.<sup>63</sup> In a later case, West admitted that the pagination was determined automatically by a computer program,<sup>64</sup> which means that there was *no* creativity and *no* originality involved in pagination — mechanical application of rules by a computer program is *not* authorship — hence pagination was *not* copyrightable. Even if copyright were to reward authors for their effort, West spent no human effort on assigning page numbers, so LEXIS would *not* unfairly compete with West in copying those page numbers.<sup>65</sup>
4. It is a *fact* that certain words appear on a specific page of a West reporter.<sup>66</sup> It is well known that copyright protection does *not* extend to facts.<sup>67</sup>
5. Copyright law is primarily statutory. The majority opinion of the appellate court gave little consideration to the current copyright statute that explains what is eligible for copyright.<sup>68</sup> There is nothing either creative or original in a sequence of integer numbers: every published book and every periodical numbers their pages in the same way. Profs. Patterson and Joyce

---

<sup>63</sup> *West v. Mead Data Central*, 799 F.2d at 1237 (Oliver, J., dissenting).

<sup>64</sup> *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 699 (2dCir. 1998).

<sup>65</sup> William L. Anderson, Case Comment, “Copyright Protection for Citations to a Law Reporter: *West Publishing Co. v. Mead Data Central, Inc.*,” 71 MINNESOTA LAW REVIEW 991, 1024, n. 120 (April 1987).

<sup>66</sup> L. Ray Patterson & Craig Joyce, “Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations,” 36 UNIV. CALIFORNIA AT LOS ANGELES LAW REVIEW 719, 758, n. 137, 766, n. 165 (April 1989).

<sup>67</sup> See, e.g., *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 344-345 (1991) (“The most fundamental axiom of copyright law is that [n]o author may copyright his ideas or the facts he narrates.’ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556, ... (1985).”).

<sup>68</sup> Deborah Tussey, “Owning the Law: Intellectual Property Rights in Primary Law,” 9 FORDHAM INTELLECTUAL PROPERTY, MEDIA, & ENTERTAINMENT LAW JOURNAL 173, 197 (Autumn 1998).

say that “pagination, by its nature, is ... mechanical, ....”<sup>69</sup> and, therefore, pagination is not copyrightable.

6. In the trial court, West argued that pagination was copyrightable. In the appellate court, West argued that the *arrangement* of cases in its reporters was copyrightable, and the pagination reflected the arrangement. The argument about arrangement is bogus: reporters are reference books, *not* intended to be read from cover to cover, so the arrangement of cases in a volume is irrelevant to the reader. Readers usually have no interest in the case reported *before* or *after* a cited case.<sup>70</sup> It is *not* significant whether a case appears near the beginning or near the end in one volume.
7. Pagination was *not* listed as part of the copyright claim on any Certificate of Registration that West had filed with the U.S. Copyright Office.<sup>71</sup>
8. The trial court and majority opinion in the appellate court ignored the fact that star paging (i.e., marking page numbers from competing editions) had been a common practice for a long time. Beginning in the mid-1800s, star pagination was used to show the original pagination in reprints of old law books.<sup>72</sup> The dissenting judge on the U.S. Court of Appeals noted<sup>73</sup> that West used star pagination in West’s SUPREME COURT REPORTER,<sup>74</sup> in West’s NEW YORK SUPPLEMENT, and in West’s CALIFORNIA REPORTER. The sources of all of these star paginations are official reporters, so there is apparently no copyright infringement for West to copy the pagination from these official reporters.<sup>75</sup>

---

<sup>69</sup> L. Ray Patterson & Craig Joyce, “Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations,” 36 UNIV. CALIFORNIA AT LOS ANGELES LAW REVIEW 719, 769 (April 1989).

<sup>70</sup> Lawrence A. Locke, “A Critical Analysis of *West Publishing Company v. Mead Data Central, Inc.*,” 36 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 182, 197 (April 1989).

<sup>71</sup> *West v. Mead*, 799 F.2d at 1233 (Oliver, J., dissenting); Lawrence A. Locke, “A Critical Analysis of *West Publishing Company v. Mead Data Central, Inc.*,” 36 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 182, 189 (April 1989).

<sup>72</sup> See, e.g., 52 Pa. 219 (Pa. 1866) (Kent’s COMMENTARIES ON AMERICAN LAW); 46 Ind. 331 (Ind. 1874) (Blackstone’s COMMENTARIES ON THE LAWS OF ENGLAND).

<sup>73</sup> *West v. Mead Data Central*, 799 F.2d at 1235, n. 16 (Oliver, J., dissenting in part).

<sup>74</sup> The first volume of West’s S.Ct. Reporter in the year 1882 has star paging to the official U.S. REPORTS, a practice that continues today.

<sup>75</sup> See, e.g., *Oasis v. West Pub.*, 924 F.Supp. 918, 930 (D.Minn. 1996) (“West concedes that where it publishes the official reports of a state, publishers are free to star paginate to those reports.”).



The U.S. Court of Appeals for the Second Circuit criticized the Eighth Circuit's opinion in *West v. Mead Data Central*:

The Eighth Circuit in *West Publishing Co.* adduces no authority for protecting pagination as a “reflection” of arrangement, and does not explain how the insertion of star pagination creates a “copy” featuring an arrangement of cases substantially similar to West's — rather than a dissimilar arrangement that simply references the location of text in West's case reporters and incidentally simplifies the task of someone who wants to reproduce West's arrangement of cases. It is true that star pagination enables users to locate (as closely as is useful) a piece of text within the West volume. But this location does not result in any proximate way from West's original arrangement of cases (or any other exercise of original creation) and may be lawfully copied. So any damage to the marketability of West's reporters resulting from such copying is not cognizable under the Copyright Act. It is interesting that the Eighth Circuit's quotation from the Senate Report on supplanting use is drawn from the Report's discussion of the fair use doctrine, which applies only when the copyright holder has first demonstrated infringement of a protectable element of its work.

At bottom, *West Publishing Co.* rests upon the now defunct “sweat of the brow” doctrine. That court found that LEXIS had infringed West's copyright simply because it supplanted much of the need for West's case reporters through wholesale appropriation of West's page numbers. In reaching this conclusion, the court (i) noted that LEXIS's appropriation would deprive West of a large part of what it “[had] spent so much labor and industry in compiling,” *West Publ'g Co.*, 799 F.2d at 1227, and (ii) cited *Hutchinson Telephone v. Fronteer Directory Co.*, 770 F.2d 128 (8th Cir. 1985), see *West Publ'g Co.*, 799 F.2d at 1228, which in turn relied on *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937), and *Jeweler's Circular Pub Co v. Keystone Pub Co*, 281 F. 83 (C.C.A.Cir. 1922) — classic “sweat of the brow” cases that were overruled in *Feist*. Thus, the Eighth Circuit in *West Publishing Co.* erroneously protected West's industrious collection rather than its original creation. Because *Feist* undermines the reasoning of *West Publishing Co.*, see *United States v. Thomson Corp.*, 949 F.Supp. 907, 926 (D.D.C. 1996), we decline to follow it.

*Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 708 (2dCir. 1998), *cert. den.*, 526 U.S. 1154 (1999). I find the Second Circuit's reasoning more valid than the Eighth Circuit for four reasons:

1. the Second Circuit had the opportunity to consider the U.S. Supreme Court's holding in *Feist* that copyright does *not* protect “sweat of the brow”.
2. the reasoning of the Second Circuit in *Bender v. West* makes more sense to me than the reasoning in *West v. Mead Data Central*.
3. the Eighth Circuit rendered a “tentative and provisional” opinion on the granting of a preliminary injunction,<sup>76</sup> while the Second Circuit rendered a final judgment on the merits.

---

<sup>76</sup> *West v. Mead Data Central*, 799 F.2d at 1229. Also the holding is “subject to reexamination after the record has closed” at 1227.

4. the Second Circuit<sup>77</sup> hears more copyright cases than the Eighth Circuit, therefore the Second Circuit has more copyright expertise.

*Oasis v. West Pub.*

*Oasis v. West Pub.*, 924 F.Supp. 918 (D.Minn. 1996) is a strange opinion of little importance. Oasis was a small publisher in Lincoln, Nebraska who wished to copy Florida judicial opinions, including pagination, from West's FLORIDA CASES, which is simply West's SOUTHERN reporter without the non-Florida cases. Oasis sued West in the U.S. District Court for the Southern District of Florida on six counts, including creating a monopoly under both federal and Florida law, the Florida public records statute, and for declaratory judgment that West has no valid copyright in pagination of the SOUTHERN reporter. West moved that the case be transferred to the U.S. District Court for Minnesota. "Without providing its analysis," the U.S. District Court in Florida granted West's motion.<sup>78</sup> The transfer is strange, because a court in Minnesota would not be in a good position to consider questions of Florida state law that were raised by Oasis. Given the U.S. District Court in Minnesota's holdings in *West v. Mead Data Central* (1985), the transfer probably doomed Oasis to unfair proceedings.

The reported opinion in *Oasis* granted summary judgment for West on two courts:

(1) no violation of the Florida public records law and (2) West does have a valid copyright in pagination of the SOUTHERN reporter. In the second item, the court in *Oasis* essentially followed the earlier case of *West v. Mead Data Central*, which was binding precedent<sup>79</sup> on the U.S. District Court in Minnesota. I find the following errors in the court's opinion in *Oasis*:

1. The court misapplied the U.S. Supreme Court's decision in *Feist*.
2. The judge ignored precedent that pagination of reporters was *not* copyrightable subject matter. In the one case on pagination that he did cite — *Myers v. Callaghan*, 128 U.S. 617 — the judge misunderstood the opinion.<sup>80</sup>

---

<sup>77</sup> Many book publishers and record producers have their headquarters in New York City, in the Second Circuit. The only other circuit with many copyright decisions is the Ninth Circuit, in California, where motion picture studios are located.

<sup>78</sup> *Oasis v. West Pub.*, 924 F.Supp. at 921.

<sup>79</sup> Perhaps *West v. Mead Data Central* is **not** binding precedent, since the Eighth Circuit only issued a "tentative and provisional" opinion on appeal of a preliminary injunction. 799 F.2d at 1229.

<sup>80</sup> *Oasis v. West Pub.*, 924 F.Supp. at 925.

3. Pagination was *not* listed as part of the copyright claim on any Certificate of Registration that West had filed with the U.S. Copyright Office.<sup>81</sup>
- And all of the other reasons give above (beginning at page 46) for why *West v. Mead Data Central* was wrongly decided.

The district court's opinion in *Oasis v. West* was rejected by *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 701-702, 708 (2nd Cir. 1998) and *U.S. v. Thomson Corp.*, 949 F.Supp. 907, 926 (D.D.C. 1996).

Oasis appealed on 19 July 1996 to the U.S. Court of Appeals for the Eighth Circuit,<sup>82</sup> which assigned case number 96-2887. There were three amicus briefs filed in this appeal: Prof. L. Ray Patterson filed a brief for the American Association of Legal Publishers, David Nimmer and two others filed a brief for Matthew Bender, and the U.S. Department of Justice Anti-Trust Dept. filed a brief<sup>83</sup> — all three in support of Oasis. The court heard oral arguments on 10 March 1997. West and Oasis settled, and the court dismissed the case on 30 July 1997, without issuing an opinion on the merits of the case. Without a decision by the U.S. Court of Appeals, *Oasis v. West* has no precedential value, and was only an initial skirmish during incomplete litigation.

It is interesting that West and Oasis settled *after* the U.S. District Court in New York City issued its opinions in a similar case there,<sup>84</sup> which raised the dangerous possibility for West that the Eighth Circuit in *Oasis* might agree with the S.D.N.Y., which could invalidate West's copyrights on pagination and more. By settling the *Oasis* case, West also preserved the favorable decision by the Eighth Circuit in *West v. Mead Data Central*. Two different legal journals published news articles that mentioned the confidential terms of the settlement:

The July 30 Oasis settlement is based on a stipulation of the parties. In press statements, West reveals it paid some of Oasis' legal costs, gave the small CD-ROM publisher a "not insignificant" money settlement and entered into a licensing deal so Oasis can use West book and page numbers at a favorable rate. Thomas Scheffey, "A Cagey Move?" 23 CONNECTICUT LAW TRIBUNE 1 (11 Aug 1997).  
... the agreement provides for West to grant Oasis a license at a reasonable fee to include Star Pagination from West's Southern Reporter.

---

<sup>81</sup> *Oasis v. West Pub.*, 924 F.Supp. at 921.

<sup>82</sup> Information in this paragraph is taken from my reading of the Eighth Circuit's docket in the online PACER database on 23 Dec 2008.

<sup>83</sup> <http://www.usdoj.gov/atr/cases/f0800/0860.htm> (9 Sep 1996).

<sup>84</sup> *Matthew Bender v. West Publ.*, 41 USPQ2d 1321 (S.D.N.Y. 22 Nov 1996) and 42 USPQ2d 1930 (S.D.N.Y. 19 May 1997). See page 56, below.

West also agreed to pay “a small amount” to partially cover Oasis’ legal fees, says [Oasis’ attorney] ....  
Laura Gatland, “West Settles Copyright Suit,” 83 AMERICAN BAR ASSOCIATION JOURNAL 37 (Oct 1997).

contract with state and public records

There is an intriguing argument in *Oasis* that the contract between the state of Florida and West allows West to have a copyright on the arrangement of the cases, and other additions by West, in FLORIDA CASES.<sup>85</sup> Subsequent opinions<sup>86</sup> have held that the pagination and some other additions by West are *not* protected by copyright. Does the Supremacy Clause of the U.S. Constitution<sup>87</sup> invalidate state contracts like the one cited in *Oasis* that attempt to give copyright protection to features that are *not* protectable under federal copyright statutes, which preempts<sup>88</sup> state law? I think the answer is yes.

There is a long history in the USA of having government proceedings — legislative, judicial, and administrative — open to the public, to avoid the abuses of secret proceedings.<sup>89</sup> Judicial opinions and court files are public records and anyone can obtain copies. See, e.g., *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060 (D.C.Cir. 1988), *aff'd*, 492 U.S. 136 (U.S. 1989); *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7thCir. 2006) (“We have insisted that litigation be conducted in public to the maximum extent consistent with respecting trade secrets, the identities of undercover agents, and other facts that should be held in confidence. [citations to four cases omitted] This means that both judicial opinions and litigants' briefs must be in the public record, if necessary in parallel versions — one full version containing all details, and another redacted version with confidential information omitted.”). Both the federal government and many state governments have enacted statutes allowing public access to copies of most documents in the possession of the government. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (U.S. 1978) (denying request for presidential tape recordings, because Presidential Recordings Act was proper federal statute, and discussing common-law right to inspect and copy judicial records); *University System of Maryland v. Baltimore Sun Co.*, 847 A.2d 427 (Md. 2004). That law is in

---

<sup>85</sup> *Oasis*, 924 F.Supp. at 929-931.

<sup>86</sup> E.g., *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 696 (2dCir. 1998) (pagination *not* copyrightable), *cert. den.*, 526 U.S. 1154 (1999) and *Matthew Bender & Co., Inc. v. West Pub. Co.*, 42 USPQ2d 1930 (S.D.N.Y. 1997), *aff'd*, 158 F.3d 674 (2dCir. 1998), *cert. den. sub nom. West v. HyperLaw*, 526 U.S. 1154 (1999).

<sup>87</sup> U.S. Const., Art. VI, cl. 2. See the terse mention in *Oasis v. West Pub.*, 924 F.Supp. at 931.

<sup>88</sup> 17 U.S.C. § 301(a) (enacted 1976).

<sup>89</sup> See cases cited in: *In re NBC Universal, Inc.* 426 F.Supp.2d 49 (E.D.N.Y. 2006).

the public domain, having been written by employees of the government — and also the due process argument — is the basis for requiring the widest possible distribution of law. However, the distrust of government secrecy, as shown in open records laws, is an additional argument supporting the widest possible distribution of law.

Prof. Kidwell wrote a short essay that exposes the issue of the conflict between copyright and open-records statutes.<sup>90</sup> He mentions “that the public has already paid once for the information through taxation, and should not be charged again” for copyright royalties.<sup>91</sup>

#### antitrust litigation against West Pub.

When Thompson, a corporation that already owned several publishers of law in the USA, planned to also purchase West Publishing Co., the U.S. Attorney General — joined by state attorney generals of California, New York, Illinois, Massachusetts, and three other states — filed antitrust litigation against Thompson. The parties proposed a consent decree, which would settle the case without a trial. The draft consent decree was rejected by a judge in December 1996, because the portion about West’s assertion of copyright in pagination in its reporters was against public interest. The judge described the problem:

West has long claimed a copyright in a page reference system it has developed called “star pagination.” Star pagination is the insertion of symbols in the text of judicial decisions to indicate where internal page breaks occur in West’s National Reporter System, and the placement nearby of the corresponding West reporter page numbers. Prior to the merger, West granted few, if any, licenses to employ star pagination to anyone other than Lexis-Nexis and has asserted copyright infringement claims against others. Complaint ¶ 32. As a condition of the merger, the government has required Thomson/West to grant a license to anyone who wants to star paginate to West’s National Reporter System publications for a fee. .... Lexis-Nexis and many of the commentators maintain that the government should have required West to abandon its copyright claim altogether as a condition of the merger since it was a major anticompetitive factor in all three areas highlighted in the complaint. West’s copyright claim in star pagination is controversial and has been the subject of litigation. The United States has consistently maintained that the use by others of star pagination does not constitute copyright infringement, but some courts have ruled to the contrary. [citations to *West v. Mead* and *Oasis v. West* omitted]

*U.S. v. Thomson Corp.*, 949 F.Supp. 907, 925 (D.D.C. 1996).

The judge indicated that he believed that West had no valid claim to copyright in page numbers:

... this Court has serious doubts about the continuing vitality of the Eighth Circuit’s 1986 opinion in *Mead Data* in view of the subsequent decision of the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282,

---

<sup>90</sup> John A. Kidwell, “Open Records Laws and Copyright,” 1989 WISCONSIN LAW REVIEW 1021 (1989).

<sup>91</sup> Kidwell, *op. cit.*, at 1022.

113 L.Ed.2d 358 (1991),<sup>92</sup> and it finds unpersuasive the reasoning in *Oasis Publishing*. In rejecting the “sweat of the brow” doctrine of copyright, the Supreme Court emphasized that the “sine qua non of copyright is originality” and that only those components of a compilation that qualify as an “original work of authorship” can be copyrighted. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. at 345, 357, 111 S.Ct. at 1287, 1293-94. The “selection, coordination and arrangement” of a set of facts can be copyrighted only if they are “sufficiently original to merit protection.” *Id.* at 358, 111 S.Ct. at 1294. Thus, in order to prevail on its star pagination copyright claim, West would have to demonstrate that its reporter page numbers and their placement themselves represent an original, creative decision about selection or arrangement, a “thin” copyright claim at best. *Id.* at 349, 111 S.Ct. at 1289. ....

Like many of the commentators, the Court is concerned that including the star pagination license provision in the Final Judgment might be construed as an endorsement by the government or by the Court of West's dubious copyright claim. While as plaintiffs point out, the Proposed Final Judgment expressly states that the license provisions will have no formal bearing, in any forum, on West's intellectual property claim or on the government's right to challenge it, the consent decree does legitimize Thomson/West's ability to profit from the licenses for use of star pagination while the copyright issue is litigated in the Second and Eighth Circuits and, in all likelihood, before the Supreme Court. [footnote omitted] That fact alone is troublesome in view of the weakness of West's claim and the limited market power of many of those who must pay the license fee, particularly now that the most economically powerful critic of West's position, Thomson, has lost its incentive to contest the claim and joins West in advancing it. [footnote omitted]

*U.S. v. Thomson Corp.*, 949 F.Supp. 907, 926 (D.D.C. 1996).

The trial judge was especially critical of the proposed consent decree in that licensing use of allegedly copyrighted material would effectively force smaller competitors of West to subsidize West's litigation of its “dubious” copyright claim.

The star pagination license agreement and fee schedule do not effectively remedy the anticompetitive effects of the merger alleged in the complaint. Nor do they satisfactorily answer the concern that the license agreement puts the Court's imprimatur on West's copyright claim. The license agreement places the cost of the star pagination copyright dispute squarely on those with the better of the legal argument after *Feist* and primarily on the shoulders of small publishers who will have to continue to pay, either via licensing fees or litigation, for access to star pagination.[footnote omitted] Since this lawsuit was filed precisely because the Department of Justice concluded that the merger of Thomson and West would harm competition in markets in which it is already difficult for small publishers to flourish, in the circumstances the Court must conclude that the licensing fee provision is not a sufficient remedy for the allegations of the complaint.

If the new Thomson/West entity wishes to preserve its ability to maintain and pursue West's copyright claim, it should bear the costs of doing so. It is not appropriate for West to profit from the pursuit of its claim until it is judicially resolved and for potential competitors to the new merged company, primarily small publishers, to effectively finance the litigation. The Court cannot conclude that it is in the public interest for the costs of litigation to be shifted to

---

<sup>92</sup> Later, the trial judge says: “The Supreme Court's decision in *Feist*, however, casts a long shadow over defendants' legal claim, rendering the maintenance of these barriers even more suspect.” *U.S. v. Thomson*, 947 F.Supp at 928.

small publishers and for the Court to sanction this cost-shifting based entirely on a copyright claim that is dubious at best. ....

*U.S. v. Thomson Corp.*, 949 F.Supp. 907, 929 (D.D.C. 1996).

The litigation was settled without a trial by a consent decree on 23 March 1997 that said in relevant part:

AND WHEREAS, defendants acknowledge that plaintiffs' consent to the entry of this decree should not be read to suggest that plaintiffs believe that a license is required before a legal publisher may star paginate to defendants' products and that plaintiffs expressly reserve the right to assert their views concerning the extent, validity, or significance of any intellectual property right claimed by defendants, in judicial proceedings or in any other form. Plaintiffs and defendants further agree that this Final Judgment shall have no impact whatsoever on any adjudication concerning these matters. Defendants have agreed that they will not use the model license contained in this Final Judgment, or the fact that any such license was included in the Final Judgment, in any litigation or negotiations with third parties to support the validity of their position on star pagination;

*U.S. v. Thompson Corp.*, Not Reported in F.Supp., 1997 WL 226233 at \*1 (D.D.C. 1997).

The Model License said in relevant part:

Beginning no later than ten (10) business days after the entry of the Final Judgment, defendants shall grant to any third party a license in the form attached as Exhibit B to star paginate to West's National Reporter System publications subject to license fees not to exceed the price indicated below per format per year per 1,000 Characters (as defined in Exhibit B) contained in the material being star paginated:

First year of license: \$0.04

....

Seventh and later years of license: \$0.09

....

Any existing star pagination licensee may elect to modify its existing license on star pagination by substituting the terms and conditions of the license contained in Exhibit B on 120 days' notice.

*U.S. v. Thompson Corp.*, Not Reported in F.Supp., 1997 WL 226233 at \*7 (D.D.C. 1997).

As mentioned above at page 43, West publishes the *only* edition of state court opinions in 22 states. Further, West publishes the *only* reporters for the U.S. District Courts and U.S. Courts of Appeal. West is now owned by Thomson, a Canadian corporation. The only other significant law publisher in the USA is the LEXIS group, which is owned by Reed-Elsevier. Reed is a British company, Elsevier is a Dutch company. I do not wish to be xenophobic, but it seems strange to me that, in a major nation like the USA, most of the statutes and judicial opinions are published by foreign-owned corporations. How would we react if Thomson or Reed-Elsevier were purchased by a wealthy group of investors from communist China, or a prince from Saudi Arabia?

*Matthew Bender v. West Pub.*

Legal publisher Matthew Bender sued West for declaratory judgment that pagination in West's Reporters was *not* copyrightable. Another legal publisher, Hyperlaw, intervened as a second plaintiff. The U.S. District Court and the U.S. Court of Appeals in New York City both held that West's pagination was *not* protected by copyright, and the U.S. Supreme Court refused to hear the case. *Matthew Bender & Co., Inc. v. West Pub. Co.*, 41 USPQ2d 1321 (S.D.N.Y. 1996), *aff'd*, 158 F.3d 693 (2dCir. 1998), *cert. den.*, 526 U.S. 1154 (1999). Furthermore, *if* pagination were protected by copyright, then copying the pagination would be permitted under the fair use doctrine.<sup>93</sup>

The U.S. Court of Appeals wrote:

Even if plaintiffs' CD-ROM discs (when equipped with star pagination) amounted to unlawful copies of West's arrangement of cases under the Copyright Act, (i) West has conceded that specification of the initial page of a West case reporter in plaintiffs' products ("parallel citation") is permissible under the fair use doctrine, (ii) West's arrangement may be perceived through parallel citation and thus the plaintiffs may lawfully create a copy of West's arrangement of cases, (iii) the incremental benefit of star pagination is that it allows the reader to perceive West's page breaks within each opinion, which are not protected by its copyright, and (iv) therefore star pagination does not create a "copy" of any protected elements of West's compilations or infringe West's copyrights.

In any event, under a proper reading of the Copyright Act, the insertion of star pagination does not amount to infringement of West's arrangement of cases. *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 696 (2dCir. 1998), *cert. den.*, 526 U.S. 1154 (1999).

The U.S. Court of Appeals noted that some courts, and legal style manual, *require* citation to reporters published by West:

Cases appearing in West's case reporters are universally cited by the volume and page number of the case reporter series in which they appear. One citation guide recommends — and some courts require — citation to the West version of federal appellate and trial court decisions and New York State court decisions. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION at 165-67, 200-01 (16th ed. 1996); see, e.g., Third Cir. R. 28.3(a); Eleventh Cir. R. 28-2(k); see also THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION 15 (1989) ("When citing to a state case, indicate the volume and first page of the case for both the official and commercial reporters.").

*Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 696-697 (2dCir. 1998), *cert. den.*, 526 U.S. 1154 (1999). The court seems to me to be setting up a "necessity" defense to copyright infringement: because citing of West's page numbers is required, then the copyright infringement is excusable (or may be fair use). I think this is a backwards argument.

---

<sup>93</sup> *Matthew Bender v. West*, 41 USPQ2d at 1330 ("Even if the Court were to find that this matter were entitled to protection, the use of star pagination would in the Court's view constitute fair use.").



As explained in the next quotation, West's pagination is *not* copyrightable matter, therefore there is no copyright infringement to excuse. However, *if* the pagination were copyrightable, then style manuals would not have the authority to authorize copying of copyrighted matter. And *if* the West's pagination were copyrightable, then it would be a taking under the Fifth Amendment for courts to require copying of West's copyrighted matter. For these reasons, I believe this section of the Court of Appeals opinion is irrelevant to the decision.

The U.S. Court of Appeals then addressed the heart of the matter:

West concedes that the pagination of its volumes — i.e., the insertion of page breaks and the assignment of page numbers — is determined by an automatic computer program, and West does not seriously claim that there is anything original or creative in that process. As Judge Martin noted, “where and on what particular pages the text of a court opinion appears does not embody any original creation of the compiler.” Because the internal pagination of West's case reporters does not entail even a modicum of creativity, the volume and page numbers are not original components of West's compilations and are not themselves protected by West's compilation copyright.[FN9] See *Feist*, 499 U.S. at 363, 111 S.Ct. at 1297 (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.”).

FN9. The same conclusion can be arrived at using a different chain of reasoning. There is a fundamental distinction under the Copyright Act between the original work of authorship and the physical embodiment of that work in a tangible medium. See H.R.Rep. No. 94-1476, at 53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666 (noting “a fundamental distinction between the ‘original work’ which is the product of ‘authorship’ and the multitude of material objects in which it can be embodied. Thus, in the sense of the [Act], a ‘book’ is not a work of authorship, but is a particular kind of ‘copy.’ Instead, the author may write a ‘literary work,’ which in turn can be embodied in a wide range of ‘copies’ and ‘phonorecords’....”). The embedding of the copyrightable work in a tangible medium does not mean that the features of the tangible medium are also copyrightable. Thus, here, the original element of West's compilation, its arrangement of cases, is protectable, while the features of the physical embodiment of the work, i.e., the page numbers, are not.

Because the volume and page numbers are unprotected features of West's compilation process, they may be copied without infringing West's copyright. *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 699 (2dCir. 1998), *cert. den.*, 526 U.S. 1154 (1999).

no copyright for some of West's additions

After the courts declared that pagination was *not* protected by copyright, plaintiff Matthew Bender was finished with litigation against West Publishing. However, Hyperlaw, the intervening plaintiff, continued this litigation against West, seeking a declaratory judgment that some of the text added by West to its copyrighted reporters was not protectable by copyright. There is a series of opinions: *Matthew Bender & Co., Inc. v. West Pub. Co.*, 42 USPQ2d 1930 (S.D.N.Y. 1997), *aff'd*, 158 F.3d 674 (2dCir. 1998), *cert. den. sub nom. West v. HyperLaw*, 526 U.S. 1154 (1999). While these opinions are outside the scope of whether pagination is copyrightable, I mention these opinions anyway, because they limit the extent of copyright protection for West's proprietary reporters. The following additions by West were held as *not* copyrightable:

- changes to the title or caption of the case are a mechanical application of rules, *not* "original work of authorship" 42 USPQ2d at 1933.
- docket number and dates argued and decided are facts 42 USPQ2d at 1933.
- subsequent history (e.g., "rehearing denied") are facts 42 USPQ2d at 1933.
- identification of attorneys and their addresses are facts 42 USPQ2d at 1934.
- correction of misspellings or punctuation have "no element of creativity or originality" 42 USPQ2d at 1934. The U.S. Court of Appeals said:

West initially claimed some creativity in its corrections to the text of opinions, but it has abandoned this claim, presumably because these corrections either are trivial ( i.e., punctuation or spelling), or else (nearly always) approved by the courts by order or informal means.

158 F.3d 674, 681, n. 4 (2dCir. 1998).

It is true that some types of editing require little creativity. See, e.g., *Grove Press, Inc. v. Collectors Publication, Inc.*, 264 F.Supp. 603, 605 (C.D.Cal. 1967) ("Plaintiff made approximately forty thousand changes from the Verlag copy in producing its edition. These changes consisted almost entirely of elimination and addition of punctuation, changes of spelling of certain words, elimination and addition of quotation marks, and correction of typographical errors. These changes required no skill beyond that of a [1967] high school English student and displayed no originality. These changes are found to be trivial."). In addition, convention and external forces may, as here, limit the practical choices available so as to eliminate any creativity.

158 F.3d 674, 689, n. 13 (2dCir. 1998).

- filling in blank citations left by the judge (e.g., "\_\_\_ U.S. \_\_\_") "This mechanical search for and addition of facts is clearly not protected by copyright." 42 USPQ2d at 1934.
- insertion of parallel citations "basically mechanical .... does not reflect even a modicum of originality" 42 USPQ2d at 1934.

The U.S. Court of Appeals affirmed all of the trial judge's holdings:

All of West's alterations to judicial opinions involve the addition and arrangement of facts, or the rearrangement of data already included in the opinions, and therefore any creativity in these elements of West's case reports lies in West's selection and arrangement of this information. In light of accepted legal conventions and other external constraining factors, West's choices on selection and arrangement can reasonably be viewed as obvious, typical, and lacking even minimal creativity. Therefore, we cannot conclude that the district court clearly erred in finding that those elements that HyperLaw seeks to copy from West's case reports are not copyrightable, and affirm.

*Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674, 677 (2dCir. 1998)  
*cert. den. sub nom. West v. HyperLaw*, 526 U.S. 1154 (1999).

One way of saying that West's "choices" are obvious and typical is that a competitor would have difficulty creating a useful case report without using many of the same citations. Affording these decisions copyright protection could give West an effective monopoly over the commercial publication of case reports (at least those containing supplemental citations).

....

West's editorial work entails considerable scholarly labor and care, and is of distinct usefulness to legal practitioners. Unfortunately for West, however, creativity in the task of creating a useful case report can only proceed in a narrow groove. Doubtless, that is because for West or any other editor of judicial opinions for legal research, faithfulness to the public-domain original is the dominant editorial value, so that the creative is the enemy of the true. [footnote about idea/expression merger doctrine omitted]

*Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674, 688 (2dCir. 1998)

#### unfairness to West

The trial judge repeatedly noted that West exerted effort to collect facts and to do editing that made its reporters a better product than the raw judicial opinion:

There is no question that West invests substantial time in reviewing each opinion, checking the citations, adding parallel citations, modifying the caption to conform to its style and adding information concerning the attorneys involved and subsequent history of the case.[footnote omitted] The issue presented here is whether the changes West makes to an opinion, either singly or in combination, represent a sufficient creative effort to warrant copyright protection.

[two paragraphs omitted]

The determination of the legal issues presented involve the balancing of competing policy considerations. Since as children we all had drilled into our heads the maxim: "Thou shall not copy," it seems fundamentally unfair to allow Hyperlaw to take advantage of the substantial time and expense West has invested in its reporters by engaging in wide-ranging copying of the opinions published by West. On the other hand, the opinions published by West are written, not by West, but by federal judges and it seems unfair to say that West can preclude anyone from copying what is basically a government document.

*Matthew Bender & Co., Inc. v. West Pub. Co.*, 42 USPQ2d 1930, 1932 (S.D.N.Y. 1997).

West next claims a protectible [sic] interest in its publication of the names of the attorneys. While in many cases it takes some effort for West to gather the names and to identify the city where the defendant practices, these are facts which West cannot copyright. *Feist*, 499 U.S. at 360, 111 S.Ct. at 1295; *Financial Information v. Moody's Investors Serv.*, 808 F.2d 204, 208 (2d Cir. 1986) (copyrightability is “not determined by the amount of effort the author expends, but rather by the nature of the final result.”). .... While Hyperlaw's blatant copying of this material may offend one's sense of basic fairness, it does not mean that West has an interest in the attorneys' names that the copyright laws were designed to protect.

....

.... While West clearly expends considerable time and money on this effort and performs a valuable service to the bench and the bar, there is no element of creativity or originality involved in these corrections.

*Matthew Bender & Co., Inc. v. West Pub. Co.*, 42 USPQ2d 1930, 1934 (S.D.N.Y. 1997).

The dissenting judge at the U.S. Court of Appeals wrote:

The copyright granted West is thin, but it is sufficient to protect against the verbatim digital copying proposed by Hyperlaw. This result protects the advancement of science and the arts, while not permitting Hyperlaw to undermine any incentive for West to annotate judicial opinions selectively. If West's competitors were authorized to scan West's editorial enhancements systematically and, in effect, to copy its citation system, the economic incentive to engage in this kind of original and productive enterprise would largely evaporate.

*Matthew Bender v. West Pub. Co.*, 158 F.3d 674, 692 (2dCir. 1998) (Sweet, J., dissenting).

To the extent that the West selection of factual annotation may seem obvious to anyone familiar with legal sources, it may be because of West's success in the market.[FN3] There is no support for the proposition that West's success in achieving an “industry standard” citation arrangement obligates them to donate the material to the public domain. Cf. *BellSouth*, 999 F.2d at 1444 (industry standard copied from industry association).

FN3. The contention that all of West's enhancements are trivial is somewhat ironic given that what motivates this litigation, it is assumed, is the desire to make money by copying West's valuable editorial work.

*Matthew Bender v. West Pub. Co.*, 158 F.3d 674, 692-693 (2dCir. 1998) (Sweet, J., dissenting).

what remains?

After this brutal application of copyright law in *Matthew Bender v. West* that stripped West naked, it seems that West only has a valid copyright remaining in their synopses, headnotes,<sup>94</sup> and key numbers.

One can easily imagine an attack on West's synopses, because the contents are facts taken from the judicial opinion and court docket. And each synopsis is only a terse paragraph, hardly enough to support a copyright, especially when attached to the beginning of many pages of public-domain judicial opinion. West's synopses appear to be vulnerable to attack.

One can imagine an attack on West's key numbers, since the basic system was in place in West's reporters published in the early 1900s, for which copyrights have now expired.<sup>95</sup> Furthermore, there is no copyright protection for a *system* of organizing information. 17 U.S.C. § 102(b). And — as the trial judge noted in *Matthew Bender v. West Pub. Co.*, 42 USPQ2d 1930 — application of rules is a mechanical process that is devoid of originality and creativity, which are necessary for copyright. Furthermore, manufacturer's part numbers have repeatedly been denied copyright protection.<sup>96</sup> So West's key numbers appear to be vulnerable to attack.

What is the scope of copyright protection for the headnotes in a proprietary reporter? Most reporters, including West's, use text in the headnotes that is either a direct quotation from the uncopyrightable judicial opinion, or a close paraphrase of the judicial opinion. The use of a quotation or close paraphrase is necessary to make the headnote accurate. Such quotations or close paraphrases makes the headnotes *unoriginal*, and may appear to be uncopyrightable. However, it is not always a trivial task to identify holdings in a judicial opinion.<sup>97</sup> So it would appear that a

---

<sup>94</sup> *Matthew Bender & Co., Inc. v. West Pub. Co.*, 42 USPQ2d 1930, n. 1 (S.D.N.Y. 1997) (“There is no claim in this case that West is not entitled to copyright protection with respect to headnotes.”).

<sup>95</sup> West printed a “This is a key numbered volume.” notice on the page before the title page of the FEDERAL reporter, beginning with Vol. 188 in the year 1911. The key symbol first appeared in headnotes in 219 F. in the year 1915.

<sup>96</sup> *Toro Co. v. R & R Products Co.*, 787 F.2d 1208 (8thCir. 1986); *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3dCir 2004) (en banc majority opinion by Alito, J.), *cert. den.*, 546 U.S. 813 (2005); *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts*, 402 F.3d 700 (6thCir. 2005).

<sup>97</sup> Even legal scholars with tens of years of experience can argue whether a statement is a holding or *obiter dictum*. In this connection, note that preparation of headnotes is *not* some low-level chore (e.g., arranging telephone numbers alphabetically by the subscriber's last name — the issue in *Feist*). West advertises that its editors are attorneys, which means they have at least seven years of full-time

commercial publishers can have a valid copyright in *selection* of quotations or paraphrases to include in the headnotes. This topic seems to have been generally ignored in law review articles on the subject of West's copyrights, but at least one article mentions it.<sup>98</sup>

#### unfair competition

If state and federal governments in the USA *really* wanted maximum public availability of law, those governments *should* have published<sup>99</sup> official versions of statutes and judicial opinions. Instead, state and federal governments let West do much of the publishing. Then the U.S. Supreme Court in *Feist* killed legal protection for industrious collection of facts, a legal doctrine going back 70 years.<sup>100</sup> The concept that copyright protects labor or effort of an author goes back more than 160 hundred years.<sup>101</sup> West may have relied on these old cases in making business decisions. Law is supposed to be stable, so that people and corporations can justifiably rely on the stability of law. With the decisions in *Feist* and *Matthew Bender v. West*, 158 F.3d 674, the federal government — unfairly in my view — has abolished copyright protection for West's previously valid copyrights for its proprietary enhancements.

Law is supposed to be based on morality and ethics. As quoted above, the judge in the U.S. District Court repeatedly indicated in his opinion at 42 USPQ2d 1930 that West had invested money and labor in producing reporters that were “a service to bench and bar”, but now HyperLaw was going to be allowed to copy West's valuable work without paying any royalties to West and even without giving any credit to West. The judge correctly applied the law in *Feist* to the case, but the judge seems bothered that the result was unfair to West. I suggest that when rigid application of the law produces a result that seems unfair, one ought to consider changing the law,

---

university education. Such a job requirement makes preparation of headnotes at least “intellectual labor”, presumed requiring significant skill and thought.

<sup>98</sup> Deborah Tussey, “Owning the Law: Intellectual Property Rights in Primary Law,” 9 FORDHAM INTELLECTUAL PROPERTY, MEDIA, & ENTERTAINMENT LAW JOURNAL 173, 220 (Autumn 1998).

<sup>99</sup> The editing, printing, and distribution could have been under contract with a private corporation, which corporation would never own any copyright in its work, by the terms of the contract.

<sup>100</sup> *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1922). See the discussion a few paragraphs below in this essay.

<sup>101</sup> *Blunt v. Patten*, 3 F.Cas. 762, 763 (C.C.N.Y. 1828) (Map maker had a valid copyright as “a proper reward for his labor provided by law, and ... the plaintiff ... had a right to the results of his labors and surveys.”). A more precise formulation is that copyright protects original, creative expression by an author. However, anyone familiar with the process of writing knows that considerable skill and effort is necessary to produce good writing, so any valuable copyright is likely the product of skill and considerable intellectual labor.

to obtain a better result. What kind of society are we, when we allow a for-profit competitor to pirate an original author's efforts in collecting and checking factual information? Of course, the facts — like the text of statutes and judicial opinions — remain in the public domain, but the author who compiles and checks facts *ought* to have legal protection against wholesale copying of the compilation by a competitor. Under both copyright law and unfair competition law, a competitor is free to expend labor and expense to *independently* compile and check those facts, because there can be no monopoly on facts or ideas, and also because independent creation is necessary to be *original* under the copyright law.<sup>102</sup>

Prior to *Feist*, the tort of unfair competition by misappropriation of the plaintiff's skill, labor, and/or expense was established by the U.S. Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918). The tort was extended by the Second Circuit in *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83, 88 (2d Cir. 1922) (“The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection.”), *cert. den.*, 259 U.S. 581 (1922). The reasoning in *Jeweler's Circular* was approved by the Second Circuit and Ninth Circuit in several major cases:

- *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484, 486 (9th Cir. 1937);
  - *College Entrance Book Co v. Amsco Book Co.*, 119 F.2d 874, 876 (2d Cir. 1941) (“Both plaintiff's and defendant's books met exactly the same demand on the same market, and defendant's copying was unquestionably to avoid the trouble or expense of independent work. This is an unfair use.”);
  - *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F.Supp. 686 (S.D.N.Y. 1974), *aff'd*, 500 F.2d 1221 (2d Cir. 1974) (per curiam);
  - *Financial Information, Inc. v. Moody's Investors Service, Inc.*, 751 F.2d 501, 505 (2d Cir. 1984), *cert. denied*, 484 U.S. 820 (1987).
- Jeweler's Circular* and *Leon* were explicitly overruled by *Feist*.

---

<sup>102</sup> See, e.g., *Dun v. Lumbermen's Credit Ass'n*, 144 F. 83 (7th Cir. 1906); *G. R. Leonard & Co. v. Stack*, 386 F.2d 38 (7th Cir. 1967); *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977); *Rockford Map Publishers, Inc. v. Directory Service Co. of Colorado Inc.*, 768 F.2d 145, 149 (7th Cir.) *cert. denied*, 474 U.S. 1061 (1986); *Illinois Bell Telephone Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1086 (7th Cir. 1990), *vacated in light of Feist*, 499 U.S. 944 (1991); *Yale University Press v. Peterson*, 40 F.2d 290 (S.D.N.Y. 1930).

Even *Feist* agrees with my assertion: *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 348 (1991) (“Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.”). The problem is that *Feist* abolished legal protection for labor or effort (i.e., “sweat of the brow”) and also required “a minimal degree of creativity”.

cost

*Matthew Bender & Co., Inc. v. West Pub. Co.*, seems like a simple matter, because it initially involved only a request for a declaratory judgment that pagination was *not* copyrightable. However, the intervening plaintiff, HyperLaw, expanded the request for declaratory judgment. In the end, this one case produced *four* opinions of the trial court published in the U.S PATENTS QUARTERLY<sup>103</sup> and *two* opinions of the U.S. Court of Appeals.<sup>104</sup> At the end of the litigation, HyperLaw sought reimbursement of its attorney's fees from West, and the court ordered West to pay \$ 813,724, but the U.S. Court of Appeals reversed.<sup>105</sup> This colossal waste of money on litigation by three litigants might have been partly avoided if the Eighth Circuit had correctly decided *West Pub. v. Mead Data Central*.

My search of Westlaw in December 2008 found no further cases involving copyright of West's reporters.

### **Why citing pagination is not copyright infringement**

West has repeatedly conceded that citation to the *first* page of a judicial opinion in a West reporter is fair use.<sup>106</sup> Further, West once conceded that a pinpoint citation to a page number inside the opinion is fair use.<sup>107</sup> The Eighth Circuit held that pagination is copyrightable and the Second Circuit held that pagination is *not* copyrightable. As explained above, I believe the Second Circuit has the better argument, but there is still the *possibility* that pagination is copyrightable. That leads me to make the following discussion of citation or copying page numbers within an opinion in a proprietary reporter.

---

<sup>103</sup> 37 USPQ2d 1402, 39 USPQ2d 1079, 41 USPQ2d 1321, 42 USPQ2d 1930.

<sup>104</sup> 158 F.3d 674, 158 F.3d 693.

<sup>105</sup> *Matthew Bender & Co., Inc. v. West Pub. Co.*, 53 U.S.P.Q.2d 1436, 1440 (S.D.N.Y. 1999), *vacated*, 240 F.3d 116 (2dCir. 2001), *on remand*, 59 U.S.P.Q.2d 1785 (S.D.N.Y. 2001), *rev'd*, 41 Fed.Appx. 507 (2dCir. 2002).

<sup>106</sup> *West Publ. v. Mead Data Central*, 616 F.Supp. 1571, 1579 (D.Minn. 1985), *aff'd*, 799 F.2d 1219, 1222 (8thCir. 1986); *Oasis Pub Co. v. West Pub. Co.*, 924 F.Supp. 918, 926 (D.Minn. 1996); *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 696, 700-701 (2dCir. 1998).

<sup>107</sup> *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 706 (2dCir. 1998) ("West concedes that use of its volume and page numbers for pinpoint citation purposes is at least a fair use (if it even amounts to actionable copying).").



If pagination in published judicial opinions is copyrightable, then lawyers writing briefs to a court, judges writing opinions, and legal scholars writing articles for publication, may all be committing copyright infringement whenever they cite to a proprietary reporter. Such a result seems astounding, and motivates a search for some kind of legal justification for such copying of pagination. On the other hand, deciding the result first and then finding reasons to support that result is a corrupt legal analysis.

Some state supreme courts and the U.S. Supreme Court have an official reporter, which is published by the government. Judicial opinions in those official reporters are *not* subject to copyright, because those books are law that is published under the authority of a government. Therefore, there should be no problem in copying pagination from an official reporter.<sup>108</sup>

As mentioned above at page 43, West is the *only* reporter of court opinions in 22 states. Because there is no alternative in these jurisdictions to citing a judicial opinion published by West — and especially if there is a contract between the state and West — then one wonders if judicial opinions from these jurisdictions in West’s proprietary reporters become a *de facto* official reporter, which would put the text into the public-domain.

In his law review article on the subject of photocopying by attorneys, Smit was concerned with attorneys copying an entire opinion from a proprietary reporter, including copying all of the proprietary text added by the publisher to the public domain opinion. The article by Smit lists three possible reasons why citing pagination is not copyright infringement:

1. **fair use**<sup>109</sup> Copying only the pagination seems to me to be a *de minimis* use that is appropriate under the doctrine of fair use, as explained below.
2. **necessity**<sup>110</sup>
3. **estoppel and laches**<sup>111</sup> Citation of pages in proprietary reporters has been common practice by attorneys and judges for more than 150 years, but there apparently have been no cases of a publisher suing an author for alleged copyright infringement over pagination in a citation.

---

<sup>108</sup> See, e.g., *Oasis v. West Pub.*, 924 F.Supp. 918, 930 (D.Minn. 1996) (“West concedes that where it publishes the official reports of a state, publishers are free to star paginate to those reports.”).

<sup>109</sup> Steven D. Smit, “ ‘Make a Copy For The File ...’: Copyright Infringement by Attorneys,” 46 BAYLOR LAW REVIEW 1, 35 (Winter 1994).

<sup>110</sup> *Ibid.* at p. 36, n. 182.

<sup>111</sup> *Ibid.* at 37-39.

## fair use analysis for citations

Assuming for the purpose of argument that pagination is copyrightable, it is a simple matter to apply the four factors in the fair use test 17 U.S.C. § 107 to the problem of copying pagination from a proprietary reporter of judicial opinions for use in a pinpoint citation to a case.

The first factor in the fair use test in 17 U.S.C. § 107 considers the purpose and character of the use. Citations in a scholarly article or in a judicial opinion are transformative, as the phrase was used by Judge Leval in his famous article,<sup>112</sup> so this factor favors fair use by the author.

The second factor in the fair use test in 17 U.S.C. § 107 considers the nature of the copyrighted work. Pagination should have a weak copyright — indeed pagination may *not* be copyrightable subject matter, as explained above — because of the lack of creativity in assigning page numbers to a copyrighted work. Thus, the second factor favors fair use by the author.

The third factor in the fair use test in 17 U.S.C. § 107 considers the quantitative and qualitative significance of the copied material. Pagination is not more than four digits, truly a *de minimis* copying. Because there is little creativity or expression in the pagination, copying these digits is not qualitatively significant. Thus, the third factor favors fair use by the author.

The fourth factor in the fair use test in 17 U.S.C. § 107 considers the effect on the potential market of the copyrighted material. Because the citations refer to the reader to the proprietary reporter, such citations enhance the market value of the reporter. Thus, the fourth factor favors fair use by the author.

Therefore, *if* pagination of proprietary reporters is copyrightable, then citation to those pages is probably fair use. I emphasize that this conclusion is *not* free legal advice on which people are entitled to rely.

---

<sup>112</sup> Pierre N. Leval, “Toward a Fair Use Standard,” 103 HARVARD LAW REVIEW 1105 (March 1990). [This article by a judge in the U.S. District Court was cited more than ten times in the majority opinion in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576, et. seq. (1994). Judge Leval is principally concerned with quotations in biographies.]

## fair use analysis for copies of entire opinions

Assuming for the purpose of argument that pagination is copyrightable, it is a more complicated matter to apply the four factors in the fair use test 17 U.S.C. § 107 to the problem of copying pagination from a proprietary reporter of judicial opinions in a copy of the entire opinion in either a database, reporter printed by a competitor, or at a website.

The first factor in the fair use test in 17 U.S.C. § 107 considers the purpose and character of the use. If the opinion contains annotations or commentary, such use may be transformative, so this factor would favor fair use. Having alternative sources of judicial opinions publicly available increases availability of the opinions to people, which is in the public interest, therefore favoring fair use. But a for-profit motive (e., copying by a commercial publisher) in the copying of pagination would weaken the finding of fair use under this factor.

The second and third factors in the fair use test in 17 U.S.C. § 107 favors fair use, for the same reasons as mentioned above in connection with fair use of citations by authors.

The fourth factor in the fair use test in 17 U.S.C. § 107 considers the effect on the potential market of the copyrighted material. Copying pagination from an entire case may make the copy a substitute or replacement for the proprietary reporter, and thus decreasing the market for the proprietary reporter. Thus, the fourth factor does *not* favor copying.

Therefore, *if* pagination of proprietary reporters is copyrightable, then copying pagination in alternative versions of the judicial opinion may *not* be fair use. Although I have searched, I have not found any reputable judicial opinion that has explicitly considered these four factors of the fair use test in the context of copying pagination from a proprietary reporter.<sup>113</sup> I suggest that people seeking to copy the pagination from a proprietary reporter in a new version of an entire opinion should ask permission of the publisher of that reporter.

---

<sup>113</sup> *West Publ. v. Mead Data Central*, 616 F.Supp. 1571, 1580-81 (D.Minn. 1985) did consider the four factors, but this opinion has been discredited, see my discussion beginning at page 46, above. See also *Oasis Pub Co. v. West Pub. Co.*, 924 F.Supp. 918, 926-928 (D.Minn. 1996), which was discredited, beginning at page 50, above.

## Public-Domain Citations

The familiar citations to F.Supp. and F.2d, as well as the familiar citations to the seven regional reporters (e.g., A.2d, N.E.2d, N.W.2d, P.2d, S.2d, S.E.2d, S.W.2d), *all* cite to proprietary reporters published by West. During 1985-1998, West Publishing Company aggressively tried to enforce its alleged copyrights to proprietary enhancements to public-domain judicial opinions.<sup>114</sup> In retaliation for both West asserting copyright on pagination in its reporters and the U.S. Court of Appeals decision in *West v. Mead Data Central*, 799 F.2d 1219 (8th Cir. 1986)<sup>115</sup> — many law professors, law librarians, and others in the early 1990s began advocating a new citation format that would be independent of any medium,<sup>116</sup> and independent of any vendor/publisher.<sup>117</sup> The new citation format uses the names of the parties, year, name of the court, opinion number issued in that year, and paragraph number. Because judges determine the paragraph number when they write the opinion, the paragraph number can *not* be copyrighted. My quick search in Westlaw found the following cases were the first to use the new public-domain citation format:

---

<sup>114</sup> *Matthew Bender & Co., Inc. v. West Pub. Co.*, 39 USPQ2d 1079, 1084 (S.D.N.Y. 1996) (“Plaintiffs also point to six cases filed between 1988 and 1993 in which West claimed a copyright violation in connection with the use of star pagination as well as other West reporter features, ....”).

<sup>115</sup> Wendy J. Gordon, “A Property Right in Self-Expression,” 102 *YALE LAW JOURNAL* 1533, 1600 (May 1993) (“Some form of citation must be in the public domain if the law’s public domain status is to be meaningful.”); Nazareth A. M. Pantaloni, “Legal Databases, Legal Epistemology, and the Legal Order,” 86 *LAW LIBRARY JOURNAL* 679, 696 (Fall 1994) (New bibliographic citations are “in response to the West Publishing Company’s claim of copyright protection on its pagination — i.e., copyright arrangement.”); Robert Berring, “On Not Throwing Out the Baby,” 83 *CALIFORNIA LAW REVIEW* 615, 630 (March 1995) (“In an attempt to remedy this perceived iniquity [i.e., *West Pub. v. Mead Data Central*], some have proposed that citation requirements be changed to eliminate any favoritism toward West reporters.”); American Association of Law Libraries Task Force on Citation Formats, “Final Report,” 87 *LAW LIBRARY JOURNAL* 582, 595, ¶ 42 (Summer 1995).

<sup>116</sup> A medium-neutral format must be equally applicable to book and electronic publications, so can cite *neither* volume numbers *nor* page numbers. See, e.g., American Association of Law Libraries Task Force on Citation Formats, “Final Report,” 87 *LAW LIBRARY JOURNAL* 582, 587, ¶ 17 (Summer 1995).

<sup>117</sup> A vendor-neutral citation format must not cite to any commercially published books (e.g., West’s reporters), but can cite to any official reporter. See, e.g., American Association of Law Libraries Task Force on Citation Formats, “Final Report,” 87 *LAW LIBRARY JOURNAL* 582, 587, ¶ 18 (Summer 1995).

1. <b>Ohio:</b> <sup>118</sup>	<i>Ohio v. Sowald</i> , 1992-Ohio-1	in Dec 1992
2. <b>South Dakota:</b>	<i>Erickson v. Cty. of Brookings</i> , 1996 SD 1	in Jan 1996
3. <b>North Dakota:</b>	<i>North Dakota v. Kenner</i> , 1997 ND 1	in Jan 1997
4. <b>Maine:</b>	<i>Dutil v. Burns</i> , 1997 ME 1	in Jan 1997
5. <b>Oklahoma:</b>	<i>Currens v. Hampton</i> , 1997 OK 58	in May 1997
6. <b>Montana:</b>	<i>Montana v. Brummer</i> , 1998 MT 11	in Jan 1998
7. <b>Pennsylvania:</b>	<i>Pennsylvania v. Feaser</i> , 1999 PA SUPER 1	in Jan 1999
8. <b>Utah:</b>	<i>Utah v. Jaeger</i> , 1999 UT 1	in Jan 1999
9. <b>Wisconsin:</b> <sup>119</sup>	<i>in re Wells</i> , 2000 WI 1	in Jan 2000
10. <b>Wyoming:</b>	<i>Amoco v. Wyoming</i> , 2001 WY 1	in Jan 2001
11. <b>Vermont:</b>	<i>Vermont v. Velez</i> , 2003 VT 1	in Jan 2003

Only two groups of federal courts use the public-domain citations for their cases. My quick search in Westlaw found the following federal cases were the first to use the new citation format:

1. *Rice v. Ohio*, 1994 Fed.App. 0021P (6thCir) in Jan 1994
2. *U.S. v. Scott*, 1996 DSD 37 in Oct 1996

Some of the U.S. Court of Appeals for the Sixth Circuit opinions are published in West's FEDERAL Reporter, others are published in West's FEDERAL APPENDIX. Only a few of the U.S. District Court for South Dakota opinions are published in West's FEDERAL SUPPLEMENT, a few more are included in Westlaw.

As I write this essay 22 years after the Eighth Circuit's wrong decision in *West v. Mead Data Central*, most states still have not adopted a public-domain citation format. The federal courts have also not adopted a public-domain citation format. This shows the glacial rate of progress in the legal profession. By contrast, I remember when Hewlett-Packard introduced battery-powered electronic calculators in the mid-1970s, causing scientists and engineers to quickly abandon slide rules during the next few years.

As more courts begin to post their opinions at their Internet websites, I expect to see an increase in public-domain citations.

---

<sup>118</sup> The Ohio label includes *both* cases from the Ohio Supreme Court and Ohio's intermediate appellate court, making it difficult to identify which court issued the opinion. By being an early adopter of the public-domain format, Ohio did not have the advantage of the citation rules in American Association of Law Libraries Task Force on Citation Formats, "Final Report," 87 LAW LIBRARY JOURNAL 582, 599-600, ¶¶ 66-69 (Summer 1995).

<sup>119</sup> See also Wisconsin Supreme Court Rule 80.02 (effective 1 Jan 2000).

## Conclusions

Statements of law in the USA (e.g., statutes, judicial opinions, government regulations) are in the public domain from the moment that they are adopted as law, and such items can *not* be copyrighted. There are several reasons for this denial of copyright:

- (1) (a) All works of the federal government are in the public domain, *not* protected by copyright.<sup>120</sup>
- (b) It is possible that a state government could own a copyright. State legislators and state judges are employees of the state, and — *assuming* that official works of the state are copyrightable — then the state owns any copyright in their official work, such as statutes or judicial opinions. If this were the only relevant issue, then the state would hold the copyright in trust for the benefit of the people.
- (2) In a democracy, the citizens “own” or control the government, so the government’s work should be in the public domain, free for all citizens to use.<sup>121</sup> This is a public policy argument.
- (3) Because of due process concerns, the law should have the widest possible distribution, and any copyright in the law only interferes with that goal, therefore the law should *not* be copyrightable subject matter.

However, the author of either a book or scholarly article on the law can have a valid copyright in: (1) any text that is original with the author, (2) the selection of quotations, and (3) the editing of quotations to remove irrelevant parts. Original, critical commentary or annotations are definitely protected by copyright. Again, the quoted statutes, judicial opinions, or regulations remain in the public domain, *not* affected by the author’s copyright.

The pagination of reported cases published by a commercial publisher is probably *not* the subject of a valid copyright, although there is *one* U.S. Court of Appeals opinion<sup>122</sup> that holds a contrary conclusion. *If* the pagination is protected by copyright, then I argue that a pinpoint citation to specific pages is probably fair use. *If* the pagination is protected by copyright, then copying pagination from a proprietary reporter into a copy of the entire judicial opinion *might not* be fair use.

---

<sup>120</sup> 17 U.S.C. § 105.

<sup>121</sup> With the obvious exceptions for military secrets, private information on citizens discovered by law enforcement personnel, trade secrets that are disclosed to the government, etc.

<sup>122</sup> *West Publ. v. Mead Data Central*, 616 F.Supp. 1571 (D.Minn. 1985), *aff’d*, 799 F.2d 1219 (8th Cir. 1986), *cert. den.*, 479 U.S. 1070 (1987). See the criticism of this case, beginning at page 45, above.

In the 1980s and 1990s, West Publishing Company aggressively tried to enforce its alleged copyrights of proprietary enhancements to public-domain judicial opinions. Law librarians retaliated by introducing a public-domain citation format that avoids citing to volumes published by West. Then a federal court declared that some of West's proprietary enhancements were *not* protected by copyright.<sup>123</sup> This history should be a lesson to companies who attempt to misuse copyright law to create a monopoly on public-domain materials, such as statutes, judicial opinions, or government regulations — after spending more than a million dollars in legal fees, a company can be in a *worse* position than before the litigation.

In my opinion, states should enact statutes that both (1) require full text of statutes and state appellate court opinions to be posted on the Internet and (2) explicitly disclaim copyright in statutes, judicial opinions, and regulations for the state and all of its political subdivisions (e.g., counties and cities). See my discussion above, at page 40.

I firmly agree with the court in *Matthew Bender v. West*, 158 F.3d 693, that pagination is *not* protectable by copyright. However, I disagree with the courts in *Matthew Bender v. West*, 42 USPQ2d 1930 (S.D.N.Y. 1997), *aff'd*, 158 F.3d 674 (2dCir. 1998), because there should be some kind of legal protection to prevent for-profit competitors from wholesale copying of West's reporters and grabbing the fruits of West's labors for free. See my discussion above, beginning at page 62. By killing copyright protection for industrious collection of facts, *Feist* is not just a problem for West Publishing, but also is a problem for authors and publishers of reference books in science and engineering, which not only collect facts, but also the authors have great monetary expense and labor in checking those facts. And *Feist* is a serious problem for *all* online databases, not just legal databases. As our economy evolves from sales of manufactured goods to sales of information, law will need to develop new protections for collections for facts in online databases. Ironically, suitable "new protections" were developed in 1922 by the judges in *Jeweler's Circular*, but discarded in 1991 by the justices in *Feist*.

---

<sup>123</sup> *Matthew Bender & Co., Inc. v. West Pub. Co.*, 42 USPQ2d 1930 (S.D.N.Y. 1997), *aff'd*, 158 F.3d 674 (2dCir. 1998), *cert. den. sub nom. West v. HyperLaw*, 526 U.S. 1154 (1999).

## Bibliography

William L. Anderson, Case Comment, "Copyright Protection for Citations to a Law Reporter: *West Publishing Co. v. Mead Data Central, Inc.*," 71 MINNESOTA LAW REVIEW 991 (April 1987). One of a few authors to agree with the Eighth Circuit's decision in *West v. Mead Data Central*.

David Y. Atlas, "Taming the Wild West: The Scope of Copyright Protection for Compilations After *Matthew Bender & Co., Inc. v. West Publishing Co.*," 38 IDEA 491 (1998).

Brian A. Dahl, Comment, "Originality and Creativity in Reporter Pagination: A Contradiction in Terms?," 74 IOWA LAW REVIEW 713 (March 1989). Criticizes *West Pub. v. Mead Data Central*.

Irina Y. Dmitrieva, "State Ownership of Copyrights in Primary Law Materials," 23 HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL 81 (Fall 2000). Contains results of search of state statutes in the USA.

Eman H. Jarrah, Comment, "Victory For the Public: West Publishing Loses Its Copyright Battle Over Star Pagination and Compilation Elements," 25 UNIV. OF DAYTON LAW REVIEW 163 (Fall 1999).

Craig Joyce, "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy," 83 MICHIGAN LAW REVIEW 1291 (March 1985).

Carl J. Khalil, "Are Page Numbers Really Copyrightable? The Effect of *Feist* on the *West Publishing v. Lexis* Case," 76 JOURNAL OF THE PATENT AND TRADEMARK OFFICE SOCIETY 807 (Nov 1994).

Lawrence A. Locke, "A Critical Analysis of *West Publishing Company v. Mead Data Central, Inc.*," 36 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 182 (April 1989). Concentrates on the opinions of the trial court and the appellate court, and does *not* cite precedent in copyright law.

Marvin J. Nodiff, "Copyrightability of Works of the Federal and State Governments Under the 1976 Act," 29 ST. LOUIS UNIV. LAW JOURNAL 91 (Dec 1984).

L. Ray Patterson & Craig Joyce, "Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations," 36 UNIV. CALIFORNIA AT LOS ANGELES LAW REVIEW 719 (April 1989). Very important article that reviews classic U.S. Supreme Court decisions on this topic during the 1800s and then explains why the decision in *West Publishing v. Mead Data Central*, 799 F.2d 1219 (8th Cir. 1989) is wrong. This article was cited six times by the U.S. Supreme Court in *Feist*, 499 U.S. 340, 347, et seq. (1991).



Henry H. Perritt, Jr., "Sources of Rights to Access Public Information," 4 WILLIAM & MARY BILL OF RIGHTS JOURNAL 179 (Summer 1995).

Steven D. Smit, "'Make a Copy For The File ...': Copyright Infringement by Attorneys," 46 BAYLOR LAW REVIEW 1 (Winter 1994).

Jerry E. Smith, "Government Documents: Their Copyright and Ownership," 5 TEXAS TECH. LAW REVIEW 71 (Fall 1973). Mostly concerned with ownership of papers created by the president and other high-ranking government officials.

Deborah Tussey, "Owning the Law: Intellectual Property Rights in Primary Law," 9 FORDHAM INTELLECTUAL PROPERTY, MEDIA, & ENTERTAINMENT LAW JOURNAL 173 (Autumn 1998).

Deborah Tussey, "The Creative as Enemy of the True: The Meaning Of Originality in the *Matthew Bender* Cases," 5 RICHMOND JOURNAL OF LAW AND TECHNOLOGY 10 [law.richmond.edu/jolt/v5i3/tussey.html](http://law.richmond.edu/jolt/v5i3/tussey.html) (Spring 1999).

James H. Wyman, Note, "Freeing the Law: Case Reporter Copyright and the Universal Citation System," 24 FLORIDA STATE UNIV. LAW REVIEW 217 (Fall 1996).

Alfred C. Yen, "The Danger of Bootstrap Formalism in Copyright," 5 JOURNAL OF INTELLECTUAL PROPERTY LAW 453 (Spring 1998). Criticism of *West Pub. v. Mead Data Central*, in a Symposium on "the worst intellectual property opinion ever written," a collection for four articles, each on a different case.

---

This document is at **[www.rbs2.com/cgovt.pdf](http://www.rbs2.com/cgovt.pdf)**

My most recent search for court cases on this topic was in December 2008.

begun 3 Dec 2008, revised 14 Jan 2009

return to my homepage at <http://www.rbs2.com/>