

## Open Wide the Gates of Legal Access

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*Laws are the sovereigns of sovereign.*<sup>1</sup>

#### INTRODUCTION

What we refer to as “the law” is a complex, multifaceted web of court decisions, legislative enactments, and administrative regulations that set the parameters for how Americans interact. It seems natural that this complicated body of work, both common and statutory law, belongs to the people; the people—through legislators—created it, the people have shaped it and given it context, and the people are ultimately responsible for abiding by it. However, in many instances, the people do not own the law. In fact, the people may not even have complete access to it.

The law is complicated. Jurisdictions may have competing precedent and interpret statutes differently; the statutes themselves may be “inartfully drafted”; and advocates frequently call for laws to change. Lawyers and lawmakers toil for years to understand the law as it develops. Private publishing companies negotiate contracts with states to create annotations, summaries, and methods of organization to make laws simpler to digest. Advocates have called for open access to the annotated versions of the law so that the public may read, search, compare, organize, and simplify it. In many instances, though, the most useful permutations of state statutes—those with annotations—are sacrosanct for the companies that contract with states to codify them. In other words, the companies value the annotations to these statutes so much that they are unwilling to share these interpretations of the law with the people that must abide by those annotations, which are sometimes considered a part of the “official” law of a state.

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<sup>1</sup> This quote is commonly attributed to King Louis XIV of France. *Louis XIV of France*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Louis\\_XIV\\_of\\_France](http://en.wikipedia.org/wiki/Louis_XIV_of_France) (last visited Nov. 20, 2014).

Who owns the law? “In some sense, the answer to the question is very easy . . . . We all do.”<sup>2</sup> Practically, however, ownership of the law—or rather, those entities and people that have complete access to the law—is more complicated. Ed Walters, CEO of legal research company Fastcase, points out that in many instances, the law is owned by just two companies: West<sup>3</sup> and LexisNexis. “Overbroad protection for legal information compilers, in tandem with the high level of industry concentration, may threaten public access to essential legal information.”<sup>4</sup> Shouldn’t the people “own” the law that they must abide by? Activist Ralph Nader warns that “[t]he inability of citizens to know the law poses a very large problem in our democracy.”<sup>5</sup> If access to the most useful versions of the law is limited, how can we possibly be expected to follow it?

This Comment will explore the problem of copyrighting various aspects of state statutes, explain the precedent of this copyrighting conundrum, and analyze its detrimental effects. Part I summarizes relevant case law and statutory history that provide the authority (or lack thereof) for copyrighting the law; Part II explains the codification process; Parts III and IV describe how impediments to access have manifested across the country; Part V analyzes how limiting public access to the law can be problematic and why citizens should not tolerate it; and Part VI offers a workable solution providing access to the law so that more may understand it.

## I

### A BRIEF HISTORY

While many of the issues presented in this Comment center on state statutes, the history of copyright regarding federal case law and statutes provides instructive background.

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<sup>2</sup> ReInvent Law Channel, *Ed Walters—Who Owns the Law?*, VIMEO, <http://vimeo.com/63123518> (last visited Nov. 5, 2014).

<sup>3</sup> Throughout this Comment, I use “West” to refer to the publishing company and “Westlaw” to refer to the legal research service. *See generally Legal Solutions*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/> (last visited Sept. 7, 2014).

<sup>4</sup> Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 175 (1998).

<sup>5</sup> Ralph Nader, *The Law Must Be Free and Accessible to All—Not Secret and Profitable*, HUFFINGTON POST: THE BLOG (Feb. 7, 2014, 4:31 P.M.), [http://www.huffingtonpost.com/ralph-nader/the-law-must-be-free-and-accessible\\_b\\_4747745.html](http://www.huffingtonpost.com/ralph-nader/the-law-must-be-free-and-accessible_b_4747745.html).

### A. Precedent

#### 1. *Wheaton v. Peters*<sup>6</sup>

This cornerstone American copyright law case pitted an original Supreme Court reporter, Henry Wheaton, against his successor, Richard Peters, Jr.<sup>7</sup> Peters republished Wheaton's *Reports* in his own condensed reporter—*Condensed Reports of Cases in the Supreme Court of the United States*—without permission, and Wheaton sued.<sup>8</sup> Wheaton alleged that Peters violated Wheaton's rights of publication.<sup>9</sup> As scholars explain, the Court determined that granting copyright protection for a statute “is a monopoly grant *awarded primarily for the benefit of the public* rather than the author and, for that reason, is attended by appropriate limitations and conditions regulating both its length and scope.”<sup>10</sup> In this decision, the Court implicitly recognized the integral importance of statutes to an informed populace. At the end of the opinion, the Court noted that no reporter may have copyright over written opinions of the Supreme Court.<sup>11</sup> Wheaton lost the case, and Peters—along with the public, who had gained broader access to the law as a result—were the victors.

#### 2. *Banks v. Manchester*<sup>12</sup>

*Banks v. Manchester* extended *Wheaton*'s principle of open access to the written decisions of state court judges by “recognizing the public's right of access” to these opinions.<sup>13</sup> In *Banks*, a publisher reprinted decisions issued by the Ohio Supreme Court and the Ohio Supreme Court Commission without permission.<sup>14</sup> Competing publishers with what they thought was the exclusive printing and

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<sup>6</sup> 33 U.S. 591 (1834).

<sup>7</sup> L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 731 (1989).

<sup>8</sup> *Wheaton*, 33 U.S. at 595; *see also id.*

<sup>9</sup> *Wheaton*, 33 U.S. at 595.

<sup>10</sup> Patterson & Joyce, *supra* note 7, at 732–33 (emphasis added).

<sup>11</sup> *Wheaton*, 33 U.S. at 668 (“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.”).

<sup>12</sup> 128 U.S. 244 (1888).

<sup>13</sup> Patterson & Joyce, *supra* note 7, at 734.

<sup>14</sup> *Id.*

publishing rights to these decisions sued.<sup>15</sup> The Court ruled that copyright protection does not extend to the work of judicial officers working in their official capacities: “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 . . . .”<sup>16</sup> The Court also held that portions of state reports are not eligible for copyright protection because they have no author, “[b]ut that does not preclude copyright for a volume of reports, taken as a whole, because other portions of the volume *may* satisfy the requirement of authorship.”<sup>17</sup>

### 3. Callaghan v. Myers<sup>18</sup>

The Supreme Court later narrowed the rulings of *Wheaton* and *Banks* in *Callaghan v. Myers* by allowing a reporter to copyright aspects of a judicial opinion that did not constitute the opinion itself, but included added content, such as the headnotes.<sup>19</sup> This decision paved the way for private companies, through their contracts with individual states, to copyright material added to statutes during codification. Thus, companies could create valuable explanatory material for statutes, and reserve all ownership rights to the companies themselves. *Callaghan* established that “no public policy precluded the reporter from obtaining a copyright covering those parts of the volume which were the results of his ‘intellectual labor.’”<sup>20</sup> Thereafter, a compiler of the law could procure copyright protections in the fruits of his or her labor, but could not have copyright over the texts of the law themselves.<sup>21</sup> According to the court in *Davidson v.*

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<sup>15</sup> *Banks*, 128 U.S. at 253.

<sup>16</sup> *Id.*

<sup>17</sup> *Patterson & Joyce*, *supra* note 7, at 735. The Court explained:

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, . . . 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, . . . as the assignee of the author or proprietor.

*Banks*, 128 U.S. at 253.

<sup>18</sup> 128 U.S. 617 (1888).

<sup>19</sup> *Id.* at 645, 647.

<sup>20</sup> *Tussey*, *supra* note 4, at 196.

<sup>21</sup> *Id.* at 194. Indeed, reporters have this right “unless it is affirmatively forbidden or taken away; and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary under the governments both of States and of the United States.” *Callaghan*, 128 U.S. at 647.

*Wheelock*, a state could not provide copyright protection to a compiler, either.<sup>22</sup>

#### 4. Davidson v. Wheelock<sup>23</sup>

At least one court has held that the public has a right to access the laws. The plaintiff publishers in *Davidson* sued to stop the defendant publishers from selling books containing Minnesota state statutes and statutory amendments.<sup>24</sup> The state had awarded publication rights for this content to the bidder who promised to offer the text for sale at the lowest rate per copy; the plaintiffs were the winning bidders, and thus received copyright protection for the Minnesota statutes.<sup>25</sup> The case turned on what precisely the winning bidder's grant of copyright included.<sup>26</sup> The court determined that the plaintiffs did not obtain an exclusive right to print and publish the Minnesota statutes themselves: "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."<sup>27</sup> The legislature, according to the court, could never confer on any entity the exclusive right to publish the text of the statutes.<sup>28</sup> Because the defendants only published the text of the statutes themselves, and none of the headnotes or added references, the plaintiffs' request for an injunction was denied.<sup>29</sup> Twenty years later, the Supreme Court of Massachusetts explicitly stated, "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."<sup>30</sup>

One of the final concepts of *Davidson* foreshadowed the freedom of access battles to come decades later: the opinions "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

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<sup>22</sup> Tussey, *supra* note 4, at 194; Davidson v. Wheelock, 27 F. 61, 62 (C.C.D. Minn. 1866).

<sup>23</sup> Davidson, 27 F. 61.

<sup>24</sup> *Id.* at 61.

<sup>25</sup> *Id.* at 62.

<sup>26</sup> *Id.* ("Now, what is the exclusive right which the complainants are entitled to under the acts of the legislature of the state of Minnesota above referred to?").

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886).

and judgment displayed in the combination and analysis . . . .”<sup>31</sup> Thus, the court explained it could be possible for so much work to be expended in compiling the law that it would warrant copyright protection.<sup>32</sup> Today, commercial publishers are making this same argument.<sup>33</sup>

5. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*<sup>34</sup>

A century later, the Supreme Court held in *Feist* that a “modicum of creativity”<sup>35</sup> and originality are required for a work to be eligible for copyright protection.<sup>36</sup> To comply with Kansas regulation, Rural Telephone compiled a telephone directory annually.<sup>37</sup> Rural Telephone obtained subscriber phone numbers because the company provided the phone service; Feist, alternatively, did not have independent access to subscriber information.<sup>38</sup> To obtain white pages listing information, Feist solicited this information from eleven different phone companies operating in the region, including Rural Telephone; Rural Telephone refused to provide its listings to Feist.<sup>39</sup> Feist then used the Rural Telephone listings without permission, and Rural Telephone sued for copyright infringement.<sup>40</sup>

The Court first noted that although facts may not be copyrighted, compilations of facts may qualify for copyright protection.<sup>41</sup> For a work to be eligible for copyright protection, the work must be original, but the “requisite level of creativity is extremely low; even a slight amount will suffice.”<sup>42</sup> A work is original if it is “independently created . . . and . . . possesses at least some minimal degree of creativity.”<sup>43</sup> The Court determined that factual

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<sup>31</sup> *Davidson*, 27 F. at 62.

<sup>32</sup> *See id.*

<sup>33</sup> *See infra* Part III.

<sup>34</sup> 499 U.S. 340 (1991).

<sup>35</sup> After describing that originality is the crux of copyright law, the Court in *Feist* suggested that the standard for a “modicum of creativity” is low: “Originality requires only that the author make the selection or arrangement independently . . . and that it display *some minimal level* of creativity.” *Id.* at 358 (emphasis added).

<sup>36</sup> *See id.* at 364.

<sup>37</sup> *Id.* at 342.

<sup>38</sup> *Id.* at 343.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 343–44.

<sup>41</sup> *Id.* at 344–45.

<sup>42</sup> *Id.* at 345.

<sup>43</sup> *Id.*

compilations could have sufficient originality to warrant copyright protection.<sup>44</sup> The Court reasoned that the “selection, coordination, and arrangement of Rural’s white pages do not satisfy the minimum constitutional standards for copyright protection.”<sup>45</sup> Moreover, the coordination and arrangement of facts—listing the subscribers in alphabetical order—was simply not creative enough to warrant copyright protection.<sup>46</sup>

*Feist*’s legacy is an analysis for compilation work: first, “originality is the touchstone for copyright protection”;<sup>47</sup> second, collecting data alone is not sufficient to warrant copyright protection without some degree of originality in the placement and arrangement of that data; and third, compilations will receive “thin” protection, but only for the parts of the compilation that are original.<sup>48</sup> Thus, under *Feist*, to establish a copyright infringement claim, the plaintiff must prove that (1) they have actual ownership over the copied material and (2) the defendant copied “constituent elements of the work that are original.”<sup>49</sup>

### B. Westlaw, LexisNexis, and JURIS

In 1963, the United States government launched the first electronic legal database, Finding Legal Information Through Electronics (FLITE).<sup>50</sup> The project began two years earlier when the United States Air Force contracted with the University of Pittsburgh to create a method for government employees to retrieve legal documents.<sup>51</sup> FLITE was first used in 1964,<sup>52</sup> and the program provided federal government employees access to complete Supreme Court decisions from 1937 to the present.<sup>53</sup> The Department of Justice (DOJ) integrated content from FLITE into its own system, the Justice

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<sup>44</sup> *Id.* at 348.

<sup>45</sup> *Id.* at 362.

<sup>46</sup> *Id.* at 363–64.

<sup>47</sup> *Id.* at 347.

<sup>48</sup> Tussey, *supra* note 4, at 202 (internal quotation marks omitted).

<sup>49</sup> *Feist*, 499 U.S. at 361.

<sup>50</sup> Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. APP. PRAC. & PROCESS 275, 279 (2000).

<sup>51</sup> See *id.*; see also Marie-Francine Moens, *Improving Access to Legal Information: How Drafting Systems Help*, in INFORMATION TECH. & LAWYERS 131, 141 (Arno R. Lodder & Anja Oskamp eds., 2006), available at <http://dare.uvu.vu.nl/bitstream/handle/1871/19019/Information?sequence=2>.

<sup>52</sup> *Id.*

<sup>53</sup> Foster & Kennedy, *supra* note 50.



Retrieval and Inquiry System (JURIS); JURIS was operational by 1971 and contained federal case law.<sup>54</sup> The public had no access to either FLITE or JURIS as both databases were limited to government use.<sup>55</sup>

Commercial publisher LexisNexis began as a military contractor in 1966; by 1979, the company provided news and business information.<sup>56</sup> Westlaw was born in 1975,<sup>57</sup> and the tool progressed from only providing headnotes of judicial decisions to providing complete opinions with synopses, headnotes, filings, appellate history, and citing references.<sup>58</sup> Both LexisNexis and Westlaw would eventually provide full cases, statutes, and administrative law.<sup>59</sup> During the 1990s, LexisNexis and Westlaw transitioned online, making statutory and case law available to the public by subscription.<sup>60</sup> Both Westlaw and LexisNexis are still two of the “largest providers of legal information offering interactive retrieval through terminals . . . and have gained widespread acceptance by the legal profession.”<sup>61</sup>

To supplement federal case law on the JURIS database, the DOJ initially contracted with LexisNexis.<sup>62</sup> In 1975, the relationship ceased when LexisNexis and the DOJ could not agree on contract terms.<sup>63</sup> In 1983, West was hired to enter case law on JURIS, and “the Department of Justice neglected to secure the right to reclaim their database should West ever decide not to renew the contract.”<sup>64</sup> West and JURIS worked in tandem for a decade; between 1983 and

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; see generally CHARLES P. BOURNE & TRUDI BELLARDO HAHN, A HISTORY OF ONLINE INFORMATION SERVICES, 1963–1976, 334–36 (MIT Press, 1st ed. 2003), available at <https://public.resource.org/scribd/3107975.pdf>.

<sup>56</sup> *Company History*, LEXISNEXIS, <http://www.lexisnexis.com/presscenter/mediakit/history.asp> (last visited Mar. 20, 2014).

<sup>57</sup> *Westlaw*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Westlaw#History> (last visited Aug. 14, 2014); Erin Carlyle, *Westlaw Rises to Legal Publishing Fame by Selling Free Information*, CITYPAGES (Apr. 29, 2009), <http://www.citypages.com/2009-04-29/news/westlaw-rises-to-legal-publishing-fame-by-selling-free-information/>.

<sup>58</sup> See generally *Getting Started with Online Research*, WESTLAW, <http://lscontent.westlaw.com/images/content/GettingStarted10.pdf> (last visited Nov. 6, 2014).

<sup>59</sup> Foster & Kennedy, *supra* note 50, at 279–80.

<sup>60</sup> *Id.* at 281–82.

<sup>61</sup> Moens, *supra* note 51, at 142.

<sup>62</sup> BOURNE & HAHN, *supra* note 55, at 335.

<sup>63</sup> *Id.* at 336.

<sup>64</sup> Gary Wolf, *Who Owns the Law?*, WIRED (May 1994), [http://archive.wired.com/wired/archive/2.05/the.law\\_pr.html](http://archive.wired.com/wired/archive/2.05/the.law_pr.html).

1993, West provided JURIS and the DOJ with a limited amount of federal case law, and West organized and added synopses, headnotes, and its Key Number system to the judicial decisions issued by federal courts.<sup>65</sup> “West ‘leased’ the legal information to DOJ for the term of the contract. West obtained a clause that limited access to the records it provided for the JURIS database . . . and required DOJ to erase the records at the conclusion of the contracts.”<sup>66</sup> In this way, West’s work product was integrated into the JURIS database on every case through the synopses, headnotes, and Key Numbers.<sup>67</sup> The stamp of West’s work thereby blanketed every page of every decision within the JURIS database.<sup>68</sup> JURIS grew to be the largest database of federal legal information at that time.<sup>69</sup> The DOJ and West operated under the understanding “that if the data vendor ever withdrew it could take the case law with it.”<sup>70</sup>

The working relationship between JURIS and West ended in 1993, leaving the DOJ “with a gap in its legal records that stretched over ten years.”<sup>71</sup> By contract, all of the content that West provided to JURIS belonged to West.<sup>72</sup> West offered to renew the contract with DOJ, but for a substantially higher price.<sup>73</sup> In a statement, West’s executive vice president noted, “West first licensed data to the Department, at the Department’s request, at a time when today’s incredible variety of private information services did not exist. West believes that the Department will be better served by using WESTLAW and the

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<sup>65</sup> Xiaohua Zhu, *Who Had Access to JURIS?: A Failed Case of Open Access*, at 2, available at [http://www.asis.org/asist2011/posters/144\\_FINAL\\_SUBMISSION.pdf](http://www.asis.org/asist2011/posters/144_FINAL_SUBMISSION.pdf) (last visited Oct. 19, 2014); Press Release, West Publ’g Co., West Won’t Seek Renewal of JURIS Contract with Department of Justice (Sept. 30, 1993), available at <http://www.thefreelibrary.com/WEST+WON’T+SEEK+RENEWAL+OF+JURIS+CONTRACT+WITH+DEPARTMENT+OF+JUSTICE-a013296767>.

<sup>66</sup> James Love, *West Publishing Will Require the Department of Justice (DOJ) to Erase Caselaw West Provided for JURIS Over the Past Decade*, TAXPAYER ASSETS PROJECT (Oct. 6, 1993), <http://list.uvm.edu/cgi-bin/wa?A3=ind9310A&L=COMMUNET&E=0&P=134498&B=—&T=text%2Fplain>.

<sup>67</sup> Zhu, *supra* note 65.

<sup>68</sup> *See id.*

<sup>69</sup> *Id.*

<sup>70</sup> Wolf, *supra* note 64.

<sup>71</sup> *Id.*

<sup>72</sup> Zhu, *supra* note 65, at 3 (“When the DOJ lost the contract with West, JURIS lost the data provided by West Publishing due to the license terms about withdrawing the content once the contracts were terminated.”).

<sup>73</sup> Walters, *supra* note 2.

variety of other information services available from the private sector.”<sup>74</sup>

Because the original contract provided that any document in JURIS that was comingled with West work product belonged to West, the commercial publisher “metaphorically put [JURIS] under [its] arm and walked out the front door with it.”<sup>75</sup> Even though the DOJ still owned some case law, the weight of content lost to West made JURIS “economically nonviable,” and JURIS ceased operations on January 1, 1994.<sup>76</sup>

### C. United States Copyright Act of 1976

The United States Copyright Act of 1976 (1976 Act), 17 U.S.C. § 105, was enacted for multiple purposes, primarily to “foster the creation and dissemination of intellectual works for the public welfare.”<sup>77</sup> The 1976 Act states unambiguously that federal law or “any work of the United States Government” cannot be copyrighted.<sup>78</sup> This prohibition extends to works that are “prepared by an officer or employee of the United States Government as part of that person’s official duties.”<sup>79</sup> Certainly, federal statutes fall under this broad definition. But the 1976 Act is silent as to works of state governments, and states are left to determine what aspects of state law may be copyrighted.

The 1976 Act was not the first statute governing copyright law. In fact, the first copyright statute in the United States in 1790 protected maps, charts, and books.<sup>80</sup> The law was revised in 1831, 1870, and 1909.<sup>81</sup> Drafters of the 1909 Copyright Act attempted to extend the copyright prohibition to not only federal works, but also to any judicial opinions or laws “enacted or adopted by governments at any

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<sup>74</sup> Press Release, *supra* note 65.

<sup>75</sup> Walters, *supra* note 2; *see also* Zhu, *supra* note 65.

<sup>76</sup> Zhu, *supra* note 65, at 3. “Without a budgetary appropriation to reenter the missing data, and without confidence that the data, even if reentered, would be usable to its attorneys, the Department of Justice had no choice but to shut the system down.” Wolf, *supra* note 64.

<sup>77</sup> U.S. COPYRIGHT OFFICE, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 1:1 (Sept. 1977) [hereinafter GENERAL GUIDE], <http://www.copyright.gov/reports/guide-to-copyright.pdf>.

<sup>78</sup> 17 U.S.C. § 105 (2012).

<sup>79</sup> *Id.* § 101.

<sup>80</sup> GENERAL GUIDE, *supra* note 77.

<sup>81</sup> *Id.*

level.”<sup>82</sup> However, this sweeping proscription failed after “staunch opposition,” and the copyright prohibition was limited to the context of federal material.<sup>83</sup>

Despite the 1976 Act’s silence regarding copyright claims in state law, “early American courts addressed the question several times, thereby establishing a legal framework for evaluating these claims.”<sup>84</sup> One authority writes that even though states are not specifically mentioned in the 1976 Act, “it is well established that state judicial opinions and statutes are in the public domain and cannot be copyrighted although compilations of those materials can be copyrighted to the extent that they contain original material.”<sup>85</sup>

The 1976 Act specifically encompasses compilations and derivative works.<sup>86</sup> Section 103 of the 1976 Act states: “The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”<sup>87</sup> Additions to statutory law, like headnotes or annotations, can constitute “derivative” material.<sup>88</sup> Derivative works include those “consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.”<sup>89</sup> For derivative or compilation works, only the authored work may be copyrighted; the “preexisting material” may not be copyrighted.<sup>90</sup> When companies annotate any state code, the result constitutes “derivative” work, whereas the preexisting text—the statutes themselves—may not be copyrighted. Even though the 1976 Act does not mention state or local government documents, “it is well established that state judicial opinions and statutes . . . cannot be

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<sup>82</sup> Patterson & Joyce, *supra* note 7, at 753.

<sup>83</sup> *Id.*

<sup>84</sup> Ed Walters, *Tear Down This (Pay)wall: The End of Private Copyright in Public Statutes*, VOXPOPULII (July 15, 2011), <http://blog.law.cornell.edu/voxpath/tag/ed-walters/>.

<sup>85</sup> Tussey, *supra* note 4, at 193–94.

<sup>86</sup> 17 U.S.C. § 103(a) (2012).

<sup>87</sup> *Id.* § 103(b).

<sup>88</sup> Tussey, *supra* note 4, at 192–93.

<sup>89</sup> 17 U.S.C. § 101.

<sup>90</sup> *Id.* § 103(b).

copyrighted although compilations of those materials can be copyrighted to the extent that they contain original material.”<sup>91</sup>

#### *D. Oregon Public Access Act*

Nearly two decades ago, the state of Oregon recognized the possibilities that the Internet provided for disseminating data and information. In 1995, Oregon mandated that all laws enacted after September 9, 1995, must be available to the public online.<sup>92</sup> The statute further requires that this information be available to the public in a format that provides “the greatest feasible access.”<sup>93</sup> However, the statute’s scope is limited regarding proprietary aspects of law: “Action taken pursuant to this section may not be deemed to alter or relinquish any copyright or other proprietary interest or entitlement of the State of Oregon relative to any of the information made available pursuant to [the subsections that mandate public access to the laws].”<sup>94</sup> Thus, while Oregon provides the public with online access to all state laws enacted after 1995, this access presumably only encompasses the text of the statutes, not the clarifying annotations, indexes, or headnotes.

## II

### CODIFICATION

Bills that become laws are not identical to what is ultimately published as code; work is expended organizing the newly enacted statutes by classifying them by means of titles, chapters, and sections. Codified law is arranged by subject matter and published accordingly.<sup>95</sup> Both West and LexisNexis publish commercial versions of the United States Code, which include references to applicable cases, regulations, and statutory interpretations.<sup>96</sup>

Each individual statute is categorized accordingly to one of dozens of different titles, with each title being dedicated to one subject area.<sup>97</sup>

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<sup>91</sup> Tussey, *supra* note 4, at 193–94 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06(C) (3d ed. 1985)).

<sup>92</sup> OR. REV. STAT. § 173.763(2)(a) (2013).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* § 173.763(6).

<sup>95</sup> *Federal Statutes*, LIBRARY OF CONG., <http://www.loc.gov/law/help/statutes.php> (last updated Feb. 28, 2014).

<sup>96</sup> *Id.*

<sup>97</sup> *United States Code*, U.S. GOV’T PRINTING OFFICE, <http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE> (last visited Sept. 7, 2014).

Since the last organizational overhaul of the United States Code in 1926, statutory topics have emerged without an applicable title because the subject may not have existed in 1926 when the titles were organized.<sup>98</sup> Different aspects of bills may even conflict.<sup>99</sup>

Thus, editors act as the cleanup crew. How a bill is codified may be dictated in the bill, or editors may make this determination at a later time.<sup>100</sup> Editors also add “catchlines” to the codified bills to provide a very brief description of what the section contains. When a bill is passed and set to become part of a section of existing law, conflicts may arise between the prior law and the new portion, for example, in definitions that apply to certain sections of the code.<sup>101</sup> In this instance, an editor resolves the conflicts, which can include changing a statute.<sup>102</sup> The U.S. Office of the Law Revision Counsel describes four typical scenarios when editors will change the law, though only slightly: (1) changing the section number, or designation, of the statute; (2) adding or modifying a section or subsection heading; (3) including bracketed citations to reference other portions of the United States Code; and (4) translating aspects of the statute to correctly cross reference other pieces of the Code.<sup>103</sup>

The process of fitting new statutes into existing law, resolving conflicts, and providing context through organization is time consuming and expensive. Some states pay their own lawyers to sort through this process, while some states hire companies like LexisNexis and West to do the job.<sup>104</sup> State contracts with LexisNexis and West often provide full intellectual property rights in the codes resulting from the codification process.<sup>105</sup>

While some state codes are proprietary products of the publisher, many are produced by publishers as works-for-hire under detailed contracts that require considerable interaction between government and publisher staffs and grant long-term exclusive selling rights as compensation for the publisher’s efforts. These relationships

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<sup>98</sup> *What Happens After a Bill Becomes a Law*, SUNLIGHT FOUND., <http://sunlightfoundation.com/blog/2009/05/14/what-happens-after-a-bill-becomes-a-law/> (last visited Jan. 26, 2014).

<sup>99</sup> *Id.*

<sup>100</sup> Walters, *supra* note 84.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Detailed Guide to the United States Code Content and Features*, U.S. HOUSE OF REPRESENTATIVES OFFICE OF THE LAW REVISION COUNSEL, [http://uscode.house.gov/detailed\\_guide.xhtml](http://uscode.house.gov/detailed_guide.xhtml) (last visited July 29, 2014).

<sup>104</sup> Walters, *supra* note 84.

<sup>105</sup> *Id.*

historically buttressed the exclusivity of a publisher's control over the data, though publisher-switching has become more common in recent years.<sup>106</sup>

The fact that companies create user-friendly annotations is important: “In many states, it is virtually impossible for a competing publisher to provide the official text of the statutes without access to the many corrections and changes proposed by the official publisher and authorized by state officials.”<sup>107</sup>

### III

#### MANIFESTATIONS OF THE PROBLEM

##### *A. Mississippi Code of Law*

The state of Mississippi contracts with LexisNexis to publish both the annotated version of the Mississippi Code and an unannotated version; the unannotated version is free for the public, but the annotated version is not.<sup>108</sup> When public information activist Carl Malamud<sup>109</sup> published the annotated version of the code on his website, Public.Resource.Org, the Mississippi Office of the Attorney General took issue.<sup>110</sup> A state lawyer instructed Malamud to “immediately remove the annotated version of the Mississippi Code of 1972 Annotated from any and all of your website(s) and from all sites and all types of written and electronic media over which you have control.”<sup>111</sup> According to the state, the unannotated version of the code, which is provided to the public for free, is “a complete, current, and official version of the law itself,” while the annotated version includes copyrighted material, including annotations, summaries, and analyses.<sup>112</sup>

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<sup>106</sup> Tussey, *supra* note 4, at 181 (footnote call numbers omitted).

<sup>107</sup> *Id.* at 182.

<sup>108</sup> Letter from Larry A. Schemmel, Special Assistant Attorney Gen., State of Miss., to Carl Malamud, President and Founder, Public.Resource.Org 1 (Oct. 7, 2013) [hereinafter Schemmel Letter], *available at* <https://www.documentcloud.org/documents/804617-ms-gov-20131007.html>.

<sup>109</sup> Carl Malamud founded Public.Resource.Org and serves as the website president. *See generally* Kate Murphy, *Carl Malamud*, N.Y. TIMES (Jan. 26, 2013), [http://www.nytimes.com/2013/01/27/opinion/sunday/catching-up-with-carl-malamud.html?\\_r=0](http://www.nytimes.com/2013/01/27/opinion/sunday/catching-up-with-carl-malamud.html?_r=0). He publishes local, state, and federal documents for free on his website so that the public may have access to them. *Id.*

<sup>110</sup> *See* Schemmel Letter, *supra* note 108.

<sup>111</sup> *Id.* at 3.

<sup>112</sup> *Id.* at 2 (emphasis in original).

Malamud responded and first pointed out that before a public user can truly gain access to the unannotated version of the code, she must agree to terms and conditions, “spanning 5 pages of exceedingly technical language in fine print.”<sup>113</sup> Among the “draconian” terms are restrictions against copying, modifying, distributing, or displaying the code “for commercial, non-profit or public purposes.”<sup>114</sup>

Only after navigating her way through the lengthy license agreement, does a public user encounter the Mississippi Code.<sup>115</sup> But Malamud discovered still another problem: users cannot share the site’s content with others.<sup>116</sup> E-mailing the link to another does not produce the portion of the code the initial viewer was reading; instead, the recipient gets marketing information regarding LexisNexis.<sup>117</sup>

But that’s not all, according to Malamud. Web display errors abound, and a user cannot perform a search “crawl” on the website, making it difficult to find a pertinent portion of the code.<sup>118</sup> This is not the most daunting problem according to Malamud; LexisNexis’ terms and conditions bar other sites from formatting the code in more effective ways.<sup>119</sup> LexisNexis’ proprietary literature implies that the unannotated version of the code is not even the official law: “Because it’s official, you can rely on LexisNexis’ Mississippi Code of 1972 *Annotated* for the correct statement of the law.”<sup>120</sup> Thus, any user, thinking that only the Mississippi Code of 1972 *Annotated* was the *most* official version of the statute might be surprised to learn that she cannot access the code without accepting the restrictive terms and conditions imposed by LexisNexis.

Malamud closed his response to the Mississippi Attorney General’s Office by reaffirming his commitment to open access. “[W]e believe that the Official Code . . . falls squarely in the category of the law,

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<sup>113</sup> Letter from Carl Malamud, President and Founder, Public.Resource.Org, to Larry A. Schemmel, Special Assistant Attorney Gen., State of Miss. 1 (Oct. 11, 2013), *available at* <https://www.documentcloud.org/documents/804618-ms-gov-20131011.html>.

<sup>114</sup> *Id.* (internal quotation marks omitted).

<sup>115</sup> *Id.* at 2.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (“This means that other sites, which might provide better formatting or accessibility, are prohibited from providing this service by the terms of use.”).

<sup>120</sup> *Id.* at 3 (emphasis added).



which all citizens have the right to read, know and speak. . . . We therefore respectfully decline to remove the materials.”<sup>121</sup>

### B. Georgia Code

Malamud encountered similar impediments to access in Georgia.<sup>122</sup> The state issued Malamud a cease and desist letter in July 2013, demanding that he remove the Official Code of Georgia Annotated from Public.Resource.Org.<sup>123</sup> The chair of the Georgia Code Revision Commission warned Malamud that, unless he removed the annotated version of the code from his site, Georgia would “use [this] failure to comply as evidence of willful infringement and seek monetary damages and equitable relief for [this] copyright infringement.”<sup>124</sup> Like Mississippi, Georgia distinguished between the annotated and unannotated versions of the official code and instructed Malamud not only to remove the annotated version from Public.Resource.Org, but to “destroy any and all files containing the Official Code of Georgia Annotated from the internet.”<sup>125</sup>

Malamud refused to accede to the state’s demands, stating that his organization “respectfully decline[s] to remove the Official Code of Georgia Annotated and respectfully reject[s] the distinction between ‘the statutory text itself’ and additional materials, as both are integral part and parcel of the only Official Code of Georgia Annotated.”<sup>126</sup> In his reply, Malamud asked, “If citizens are required to obtain a permission before repeating the law, does that not strike at the very heart of our rights of free speech under the First Amendment?”<sup>127</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> See generally Greg Lambert, *Malamud “Respectfully Declines” Georgia’s Request to Remove Official State Code*, 3 GEEKS AND A LAW BLOG (July 30, 2013), <http://www.geeklawblog.com/2013/07/malamud-respectfully-declines-georgias.html>.

<sup>123</sup> Letter from Josh McKoon, Chairman, Ga. Code Revision Comm’n, to Carl Malamud, President and Founder, Public.Resource.Org 1 (July 25, 2013), *available at* <https://law.resource.org/pub/us/code/ga/ga.gov.20130725.pdf>.

<sup>124</sup> *Id.* at 2.

<sup>125</sup> *Id.* at 1.

<sup>126</sup> Letter from Carl Malamud, President and Founder, Public.Resource.Org, to Josh McKoon, Chairman, Ga. Code Revision Comm’n; David Ralston, Speaker of the House, House of Representatives of Ga.; and David Shafer, President Pro Tempore, Ga. State Senate 1 (July 30, 2013) [hereinafter Letter from Malamud to McKoon, Ralston & Shafer], *available at* <https://www.documentcloud.org/documents/741994-ga-gov-20130730.html>.

<sup>127</sup> *Id.* at 2.

Malamud took issue with how Georgia categorized the version of the Georgia Code that Malamud published; in his view, if a company were to take state statutes, compile them all into a document with analysis and summary on a commercial basis, “we understand and respect that this material would be their private property.”<sup>128</sup> In this instance, however, the work at issue was the product of the Official Georgia Code Revision Commission.<sup>129</sup> Thus, a state body created the product, the product belonged to the people, and the state could not limit the public’s access to this document.

Georgia considers its annotated version of the code to be the “official” statement of the law.<sup>130</sup> “The Official Code of Georgia Annotated is a publication of the State and it is the definitive statement by the State of the law,”<sup>131</sup> and yet, public access to the unannotated version of the Georgia code requires users to accept multiple terms of use, including forbidding the reprinting of statutes in “newsletters” and “articles.”<sup>132</sup> Based on this language, it seems apparent that any citizen would presume that the annotated version of the code, the proprietary version, is the official version that binds the people of Georgia. And as in Mississippi, this creates the presumption that the *most* official version of the state’s code is held under lock and key.

In his letter to Georgia declining the state’s takedown instruction, Malamud noted that if it were not for the lack-of-license needed to publish the law, West “could never have built that magnificent edifice of American jurisprudence, the Federal Reporter, if each court had imposed restrictions on promulgation.”<sup>133</sup> Malamud concluded his letter with gusto: “Our publication of the Official Code of Georgia Annotated should be encouraged, not threatened. Our publication of the Official Code of Georgia Annotated is [sic] unimpeachable act, not one that should be prosecuted.”<sup>134</sup>

Georgia also asserts an economic rationale for its copyright stance. According to the Georgia Code Revision Commission Chair, Senator

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<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *Id.* Malamud points this out in the letter by quoting LexisNexis marketing materials: “The Official Code of Georgia Annotated (OCGA) provides users with the official Georgia statutes . . .” *Id.*

<sup>131</sup> Letter from Malamud to McKoon, Ralston & Shafer, *supra* note 126, at 2.

<sup>132</sup> *Id.* at 3 (internal quotation marks omitted).

<sup>133</sup> *Id.* at 2.

<sup>134</sup> *Id.* at 3.

Josh McKoon, the state avoids spending taxpayer money to publish the code by giving LexisNexis exclusive rights to the code.<sup>135</sup> And according to Senator McKoon, the state is not claiming copyright over the text of the laws themselves. Moreover, since the non-statutory material is protected, the publisher's compensation for arranging and managing the code is the exclusive distribution right of this material.<sup>136</sup> "This arrangement was set up to avoid the necessity of having to spend taxpayer funds to compensate the publisher," Senator McKoon explains.<sup>137</sup> Otherwise, the state would be required to shoulder the burden of updating the state code and paying for its publication, and the state could lose royalties from sublicensing the Official Code of Georgia Annotated to others.<sup>138</sup> "It would therefore be shirking our duty both under existing contracts as well as our fiduciary duty to taxpayers to get the most value for every tax dollar entrusted to us not to fully prosecute our copyright to the copyrightable aspects of the [Official Code of Georgia Annotated]."<sup>139</sup>

### C. Idaho

The state of Idaho owns the copyright to the Idaho Code, "accompanying analyses, summaries and reference materials," and the state described the collection of these materials as the "Idaho Code."<sup>140</sup> Public.Resource.Org posted these documents online.<sup>141</sup> Letters followed, and Idaho's legal counsel asserted copyright on *both* the statutory language and the analyses and summaries appended to the "Idaho Code."<sup>142</sup> Idaho's lawyers stated simply that this infringement "will not be tolerated."<sup>143</sup> In typical form, Malamud

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<sup>135</sup> Mike Hassinger, *Who Owns the Copyright to the OCGA?*, PEACH PUNDIT (July 31, 2013, 11:30 AM), <http://www.peachpundit.com/2013/07/31/who-owns-the-copyright-to-the-ocga/>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Letter from Bradlee R. Frazer, Attorney, Hawley Troxell Ennis & Hawley LLP, to Carl Malamud, President, Public.Resource.Org 1 (July 12, 2013), *available at* <https://law.resource.org/rfcs/id.gov.20130712.pdf>.

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.* ("To be clear, Idaho claims copyright in both the native statutory content and the analyses, summaries and reference materials contained in the linked directories (defined above as the Idaho Code) . . .").

<sup>143</sup> *Id.* at 3.

responded by explaining that the official code should be available for all Idahoans.<sup>144</sup> “The Idaho Code is a publication of the State and it is the definitive statement by the State of the law. Any lawyer would ignore this publication . . . at his or her peril.”<sup>145</sup> Accordingly, Malamud offered to discuss the matter in person instead of taking down his copy of the Idaho Code.<sup>146</sup>

#### IV

#### ALMOST SOLUTIONS

##### A. Oregon

Advocates of complete statutory access have found some limited success in opening access to annotated statutory compilations, but the success is limited. In April 2008, the state of Oregon sent Justia.com a cease and desist letter, demanding that the site either remove the Oregon Revised Statutes from its website or pay to publish it.<sup>147</sup> Justia.com would be charged \$30,000 to publish the law on the site for two years.<sup>148</sup> Justia.com provides free access to laws, court opinions, and various public records.<sup>149</sup> The “takedown” notice was of the kind familiar to Napster, BitTorrent, and Limewire—websites that provided free music downloads to the public without authorization from artists or owners.<sup>150</sup> In its demand to Justia.com, the state of Oregon claimed a copyright in “the arrangement and subject-matter compilation of Oregon statutory law, the prefatory and explanatory notes, the leadlines and numbering for each statutory section, the tables [of] the index and annotations and such other incidents as are work product of the Committee in the compilation

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<sup>144</sup> See Letter from Carl Malamud, President and Founder, Public.Resource.Org, to Ben Ysura, Sec’y of State, State of Idaho; Brent Hill, President Pro Tempore of the Senate, Idaho State Legislature; and Scott Bedke, Speaker of the House, Idaho State Legislature 2 (July 15, 2013), available at <https://law.resource.org/images/rfcs/id.gov.20130715.pdf>.

<sup>145</sup> *Id.* at 3.

<sup>146</sup> *Id.*

<sup>147</sup> Tim Stanley, *Cease, Desist & Resist—Oregon’s Copyright Claim on the Oregon Revised Statutes*, JUSTIA: LAW, TECH. & LEGAL MARKETING BLOG (Apr. 19, 2008), <http://onward.justia.com/2008/04/19/cease-desist-resist-oregons-copyright-claim-on-the-oregon-revised-statutes/>.

<sup>148</sup> *Id.*

<sup>149</sup> See generally *Justia Company*, JUSTIA.COM, <http://company.justia.com> (last visited Nov. 6, 2014).

<sup>150</sup> Walters, *supra* note 84.

and publication of Oregon law.”<sup>151</sup> Clearly, this broad list encompasses a wide variety of useful features of Oregon law.

In response, the website called on former Oregonian Malamud for help in gaining free access to Oregon laws.<sup>152</sup> “Oregon is trying to protect the \$390 book they sell . . . . They, like all states, are short on funds and trying to raise money however you can, but you can’t do it on the back of the public domain,” says Malamud.<sup>153</sup> Eventually, a legislative committee conducted a hearing to discuss the legal and policy implications of copyrighting the law and invited the public to weigh in.<sup>154</sup> Justia.com explained its case for allowing the website to provide state laws in a searchable, user-friendly format that allows students, academics, researchers, attorneys, and others easy access and use.<sup>155</sup> In Justia.com CEO Timothy Stanley’s view, if all states required a \$30,000 licensing fee, the website would be forced to raise \$1.5 million to continue to provide the law to the public for free.<sup>156</sup> As Stanley noted, “The true meaning of public access involves structuring and presenting the law in a format that the public can readily understand and digest.”<sup>157</sup>

Oregon eventually waived the copyright fee to publish the Oregon Revised Statutes, and this material is freely available on a number of different platforms.<sup>158</sup> When the publication barriers came down, innovation ramped up. Robb Shecter, a former law student at the Lewis and Clark Law School, created OregonLaws.org,<sup>159</sup> which is “a wonderful example of how legal information can be made dramatically better once the fences around the public domain have

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<sup>151</sup> Stanley, *supra* note 147.

<sup>152</sup> *Id.*

<sup>153</sup> *Oregon Claims State Law Copyrighted*, WASH. TIMES (Apr. 19, 2008), <http://www.washingtontimes.com/news/2008/apr/19/oregon-claims-state-law-copyrighted/?page=all>.

<sup>154</sup> See Timothy Stanley, CEO, Justia.com, Remarks Before the Legislative Counsel Committee, Or. State Leg. (June 19, 2008), available at <https://public.resource.org/scridd/3426059.pdf>.

<sup>155</sup> *Id.* at 2

<sup>156</sup> *Id.* at 3.

<sup>157</sup> *Id.* at 4.

<sup>158</sup> Walters, *supra* note 84; see also OREGONLAWS.ORG, <http://www.oregonlaws.org> (last visited Nov. 6, 2014).

<sup>159</sup> See OREGONLAWS.ORG, *supra* note 158 (“We’re making this [website] in order to: Increase access to the legal system by publishing accessible legal content and lowering the cost of legal research.”).

been removed.”<sup>160</sup> The website is a repository of state laws, and the entire site is searchable.

However, “the compromise was an uneasy one. Oregon did not disclaim copyright in the statutes—it merely agreed not to enforce its copyright claim against Justia and Public.Resource.org.”<sup>161</sup> Thus, others who opt to publish any portion of the Oregon Revised Statutes risk legal action if Oregon chooses to enforce its copyright to prohibit such publication.

### *B. Washington, D.C.*

When “civil hacker” Tom MacWright sought to make the city code of the nation’s capital accessible on his website, he was stymied by his inability to obtain a complete copy of the city’s statutes.<sup>162</sup> The city council declined to provide a copy of the code because of copyright concerns; the council contracted with LexisNexis, and West before that, to codify and publish the law.<sup>163</sup> Public users may access the code on the city’s official website, administered by West, “but copying any part of the Code off of that website might violate West’s copyright or terms of service, or both. Sharing the law might have been illegal.”<sup>164</sup> All of the documents containing the city code displayed the Westlaw logo, which could not be removed; “Informally speaking, West owned the DC Code.”<sup>165</sup> As one blogger described it, because the city has paid commercial entities to codify the laws for years, the city government itself now lacks the ability to maintain those laws.<sup>166</sup> “The only way that D.C. can find out what their laws say is to pay LexisNexis to tell them. This is consequently true for the public, as well.”<sup>167</sup>

MacWright writes that restricting access to a complete version of the code is not only a problem for lawyers and open-access advocates.

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<sup>160</sup> CARL MALAMUD, THREE REVOLUTIONS IN AMERICAN LAW ¶ 51, available at [https://public.resource.org/oregon.gov/3revolutions\\_pamphlet.pdf](https://public.resource.org/oregon.gov/3revolutions_pamphlet.pdf). This pamphlet was based on lectures presented at Lewis and Clark Law School, University of Oregon, and Oregon State University in 2009.

<sup>161</sup> Walters, *supra* note 84.

<sup>162</sup> Joshua Tauberer, *DC Opens Its “Code,” Embracing Principles of Open Laws*, JOSHUA TAUBERER’S BLOG (Apr. 4, 2013), <http://razor.occams.info/blog/2013/04/>.

<sup>163</sup> *Id.* (“This became a little and very geeky controversy.”).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Waldo Jaquith, *Washington D.C. and the Work Ahead*, THE STATE DECODED (Mar. 29, 2013), <http://www.statedecoded.com/2013/03/dc-work-ahead/>.

<sup>167</sup> *Id.*

“The DC government can’t make a pocket copy of the code, or a smartphone app to better inform policemen, because it doesn’t have a copyright-free copy.”<sup>168</sup> MacWright is specific on where the blame lies for the access restrictions, and says the failure is not by the council, but in the compiling and de facto ownership by the private contractors.<sup>169</sup> Washington, D.C.’s general counsel maintained that the city was not hoarding the law in order to keep citizens in the dark, but instead was merely complying with its legal obligations under the commercial contracts.<sup>170</sup>

MacWright sought Malamud’s assistance, who devised a creative response. Malamud purchased a physical copy of each volume of the city code, scanned the documents, then mailed thumb drives—in the shapes of U.S. presidents—containing the D.C. Code to the masses.<sup>171</sup> A colorful “proclamation” accompanied each copy, stating that any copyright claim on the city’s laws is “NULL AND VOID as a matter of law and public policy as it is the right of every person to read, know, and speak the laws that bind them.”<sup>172</sup> As blogger Joshua Tauberer noted, the general counsel for the city “removed the West [intellectual property] from their electronic copy of the Code . . . [and] posted the file on the Council’s website.”<sup>173</sup>

### C. Yes We Scan

Harnessing the power of the public, Public.Resource.Org launched “Yes We Scan,” a crowdfunding campaign to raise money to scan and provide free access to the codes of Washington, D.C., Georgia, Idaho, and Mississippi.<sup>174</sup> The campaigns sought three thousand dollars at a minimum, and each surpassed this goal.<sup>175</sup> Funds raised, according to the campaign, are spent converting the codes into electronic versions,

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<sup>168</sup> Tom MacWright, *You Cannot Have the DC Code* (Feb. 20, 2013), <http://www.macwright.org/2013/02/20/you-cannot-have-the-code.html>.

<sup>169</sup> *Id.*

<sup>170</sup> See Tauberer, *supra* note 162.

<sup>171</sup> *Id.*

<sup>172</sup> *Proclamation of Digitization*, PUBLIC.RESOURCE.ORG, <https://law.resource.org/pub/us/code/dc/dc.proclamation.pdf> (last visited Mar. 15, 2014).

<sup>173</sup> Tauberer, *supra* note 162. The code is now available by linking through the city council’s website, though users are connected to the code via the LexisNexis webpage. *Legislation and Laws*, COUNCIL OF THE DIST. OF COLUM., <http://dccouncil.us/legislation> (last visited Nov. 6, 2014) (click “View the DC Code”).

<sup>174</sup> See generally YES WE SCAN, <https://yeswescan.org> (last visited July 24, 2014).

<sup>175</sup> *Id.*

and “posting it on the Internet Archive for all to read.”<sup>176</sup> As the Idaho crowdfunding website describes to potential donors,

Believe it or not, the State of Idaho does not make the Official Code available on the Internet! Instead, they make an unofficial unannotated version available and only sell the official version on their vendor’s site. The site is really bad and the terms of use prohibit you from doing anything useful with it.<sup>177</sup>

The success of these crowdfunding campaigns is positive, but such campaigns should not be required to enable access to the official law.

#### *D. Uniform Electronic Legal Material Act*

The Uniform Law Commission (ULC) is comprised of state commissions that create uniform and understandable bodies of law that may be adopted by individual states.<sup>178</sup> Recently, the ULC promulgated a body of law, the Uniform Electronic Legal Material Act (UELMA).<sup>179</sup> This new act provides that official electronic legal material is (1) authenticated to make sure it is an accurate reflection of the law it purports to be, (2) preserved either electronically or in print, and (3) accessible to the public permanently.<sup>180</sup> Under the UELMA, states are required to back-up legal materials for the “integrity and continued usability of the material.”<sup>181</sup> The ULC describes this approach as “outcome-based,” meaning there is no specific mandate on the “how,” only the “what”; states that adopt the UELMA are able to determine for themselves how the state will satisfy the three tenets of the UELMA.<sup>182</sup>

Under the UELMA, only a state entity may be the official publisher of legal materials, but “state policy may allow a commercial entity to produce an official version of the state’s legal material.”<sup>183</sup>

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<sup>176</sup> *The Laws of Idaho*, INDIEGOGO, <https://www.indiegogo.com/projects/the-laws-of-idaho> (last visited July 29, 2014).

<sup>177</sup> *Id.*

<sup>178</sup> *About the ULC*, UNIFORM LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title>About%20the%20ULC> (last visited Jan. 26, 2014).

<sup>179</sup> *Electronic Legal Material Act*, UNIFORM LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Electronic%20Legal%20Material%20Act> (last visited Jan. 26, 2014).

<sup>180</sup> *Id.*

<sup>181</sup> *Uniform Electronic Legal Material Act: Summary and Frequently Asked Questions*, AM. ASSOC. OF LAW LIBRARIES 1 (Aug. 2014), <http://www.aallnet.org/Documents/Government-Relations/UELMA/UELMAFAQs.pdf>.

<sup>182</sup> *See id.*

<sup>183</sup> *Uniform Electronic Legal Material Act (UELMA) Summary*, UNIFORM LAW COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Legal%20Material%20Act> (last visited Oct. 20, 2014).



Further, the ULC writes that the UELMA does not “interfere” with contracts between states and third-party publishers, like LexisNexis or West.<sup>184</sup> At the time of this writing, the UELMA has been enacted in only twelve states including Oregon.<sup>185</sup> While the goals of the UELMA are necessary, the act itself may be ineffective because of the broad discretion for determining how the state will meet its obligations under the act. A state could satisfy the language of the UELMA without truly improving public access; for example, Georgia could meritoriously argue it satisfies all three prongs of the UELMA. After all, the state code is “accessible to the public permanently,” that access just comes after the public accepts numerous terms of service; the code has been preserved electronically; and the code has been authenticated. In this way, the UELMA is not specific enough to require the type of access that truly benefits the public and that open-access advocates strive for. With only twelve states currently adopting the UELMA, it is too soon to determine how effective this outcome-based approach will be.

## V

### ANALYSIS

#### A. Principles of Open Access

Few would deny that open, complete, and free access to the law is of paramount importance to an informed and law-abiding populace. So important is this requirement that a working group<sup>186</sup> comprised of open-access advocates developed the “8 Principles of Open Government Data” in 2007.<sup>187</sup> What does open government data entail? The group crystallized the points into a concise list:

1. Data must be complete.
2. Data must be primary.
3. Data must be timely.
4. Data must be accessible.

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<sup>184</sup> *Id.*

<sup>185</sup> *Legislative Enactment Status: Electronic Legal Material Act*, UNIFORM LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Electronic%20Legal%20Material%20Act> (last visited Nov. 6, 2014).

<sup>186</sup> Free software advocate Tim O’Reilly and Malamud coordinated the meeting in which the working group devised the 8 Principles of Open Government Data. *About the 2007 Workshop, OPEN GOV’T DATA*, <http://opengovdata.org> (last visited July 27, 2014). The Sunlight Foundation, Google, and Yahoo sponsored the event. *Id.*

<sup>187</sup> *Id.*

5. Data must be machine processable.
6. Access must be non-discriminatory.
7. Data formats must be non-proprietary.
8. Data must be license-free.<sup>188</sup>

Copyrighting state codes implicates a number of these principles. Data is not complete if it is only available in an unannotated version and thereby is not the “official” version of the state code (as Georgia’s code makes clear in its “public” version of the code). Data is not primary for this same reason, as some states do not consider the unannotated version of the code to be the “official” version. Data is not accessible if it is available only to those that can afford to pay for the version that provides analysis, summaries, and context. Data is not machine processable if the user cannot perform a simple crawl. Access is discriminatory when the *most* official version is only available to those who can pay for it. And, through outsourcing, many state codes are proprietary material.

The Georgia, Mississippi, Idaho, Washington, D.C., and Oregon examples demonstrate that governing bodies recognize a distinction between the text of the law itself and the manner in which it is organized. But what is the value of the words if no context is provided? When the state deems that the annotated version of the state code is in fact the “official” state law, thereby prohibiting reproduction, dissemination, or even organization, how is this open access?

### B. Legality

Some commentators question whether a state can legally copyright its own laws. Legal blogger Tim Armstrong writes that Supreme Court precedent like *Feist* makes it difficult to advance the argument that copyrighting state law is legal.<sup>189</sup> “The fact that ‘section 102’ follows ‘section 101,’ although indisputably an aspect of the code’s ‘arrangement,’ shows absolutely none of the creative originality that the Supreme Court held was, at a constitutional minimum, indispensable to any claim for copyright protection.”<sup>190</sup> As the Court noted in *Feist*, there must be at least some modicum of creativity for

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<sup>188</sup> *Id.*

<sup>189</sup> Tim Armstrong, *Can States Copyright Their Statutes?*, INFO/LAW (Apr. 16, 2008), <http://blogs.law.harvard.edu/infolaw/2008/04/16/can-states-copyright-their-statutes/>.

<sup>190</sup> *Id.*

work product to warrant copyright protection.<sup>191</sup> Armstrong is skeptical that commercial publishers satisfy this modicum of creativity, and points to appellate decisions in which publishers—that select and arrange judicial opinions—have been unsuccessful in copyright claims after *Feist*.<sup>192</sup>

The Copyright Act of 1976 prohibits copyrighting federal statutes.<sup>193</sup> The text of state statutes themselves does not have copyright protection, either, according to the logic of *Davidson*.<sup>194</sup> Further, “[c]ourts consider them to have been written (constructively) by the people, and due process requires that people have unimpeded access to the laws that govern them.”<sup>195</sup> Ed Walters further argues that, according to agency law, even if a state outsourced the codification of state law to private companies, the companies could still not copyright the product of its work; the private company is an agent of the state while it codifies the statutes, “[s]o if the state cannot claim copyright in its code, it cannot circumvent the copyright law by contracting the work to a private publisher.”<sup>196</sup>

### C. Impediment to Innovation

“As a policy matter, allowing a state (or anybody else) to monopolize publication and distribution of statutes is a terrible idea,” Armstrong writes.<sup>197</sup> This sort of monopoly discourages, even downright stamps out, any innovation in presenting laws in a digestible, searchable, valuable way. Walters argues that the problem with limiting the power to disseminate to only the states—in accordance with their contracts with West and LexisNexis—is that the state code websites are outdated and clunky.<sup>198</sup> States may not be

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<sup>191</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

<sup>192</sup> Armstrong, *supra* note 189 (citing *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998); *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g*, 999 F.2d 1436, 1442–43 (11th Cir. 1993)). In *Matthew Bender & Co.*, defendant West asserted a copyright claim over the star pagination on judicial decisions. 158 F.3d at 695–96. Matthew Bender & Co. produced judicial opinions including West's star pagination system on CD-ROMs for distribution. *Id.* The Second Circuit rejected West's claim, noting star pagination was not original nor creative, thereby failing the second prong of the *Feist* analysis. *Id.* at 699. *BellSouth* did not involve copyright claims over either judicial opinions or statutes. *See* 999 F.2d at 1438.

<sup>193</sup> *See supra* Part I.C.

<sup>194</sup> *Davidson v. Wheelock*, 27 F. 61 (C.C.D. Minn. 1866).

<sup>195</sup> Walters, *supra* note 84.

<sup>196</sup> *Id.*

<sup>197</sup> Armstrong, *supra* note 189.

<sup>198</sup> Walters, *supra* note 2.

equipped to provide the law in a manner that is usable. After all, state governments did not create Facebook or Google, highly interactive websites with simple interfaces. The fact that innovators who could provide access to the public must ask for permission prevents beneficial dissemination. Put simply, “[i]t chills innovation and blocks the widespread publication of the law.”<sup>199</sup>

#### *D. Shirking Duties*

Walters also argues that when states outsource codification to private companies, the result is a type of corporate welfare. “Taxes are well spent to create public infrastructure, such as highways (or statutes). But taxpayers would revolt if states financed toll roads owned by foreign transportation conglomerates. Public financing of copyright statutes is no different,” Walters writes.<sup>200</sup> So while Senator McKoon maintains that Georgia owes a fiduciary duty to the citizens of Georgia to spend tax dollars appropriately,<sup>201</sup> his application of this duty may not be beneficial to the public.

“Do we care if a state has to license back its laws from a commercial publisher? I think we care about that,” says Walters.<sup>202</sup> We are all responsible for knowing the law and abiding by its letter, and yet access to it is in some sense only for the few. What happens when only those with means have access to the *most* official version of the law? According to Walters, “big companies push small ones around using the law; innocent people go to jail; and people see these results over and over and over again, they know who’s going to win the case—whoever’s got the most money.”<sup>203</sup>

Walters argues that the problem may not be the business acumen of West and LexisNexis but the lack of advocacy on the part of states and the federal government. Senator McKoon’s letter to Malamud is a demonstration of deficient advocacy by the states. Armstrong writes that the arrangement whereby the Official Code of Georgia Annotated maintained exclusive distribution rights protected the state from “having to spend taxpayer funds to compensate the publisher.”<sup>204</sup> Even despite dwindling state revenue streams and an economy that is

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<sup>199</sup> Walters, *supra* note 84.

<sup>200</sup> *Id.*

<sup>201</sup> *See supra* Part III.B.

<sup>202</sup> Walters, *supra* note 2.

<sup>203</sup> *Id.*

<sup>204</sup> Hassinger, *supra* note 135.

only just turning the corner on recovery, there seems to be few worthier tax dollar expenditures. Senator McKoon contends that allowing Malamud to publish the code would be “shirking” state duties under the existing contract and fiduciary duties with taxpayers, but perhaps the state is shirking its duties by failing to provide a means for Georgia residents to understand the law.

## VI

### A WORKABLE SOLUTION

State governments have taken some strides toward free and complete access, but the fact that open access advocates are receiving takedown threats, after posting annotated versions of state codes on their websites—so that they may be searched, read, and understood—shows the work is not complete. The solution is two-fold: liberal license agreements and a threshold determination for unfettered access to the statutes.

#### *A. Liberal Licensing Agreements*

States should advocate for its licensing agreements with either LexisNexis or West to contain provisions that the annotated version of the state code be available to third parties for free. Of course, to be commercially practical for either West or LexisNexis to agree to such a liberal licensing agreement, the cost of the annotation services by the commercial enterprise would likely be greater for the state. In the midst of dwindling state resources, this could be a substantial hurdle to surmount. However, by not requiring the states to enforce a more limited licensing policy, the state would save valuable resources on legal costs. Perhaps if state statutes were made readily available, other companies, besides publishing giants West and LexisNexis, could create a product that better codifies the law, and does so at a lower cost to the state. Innovation could be possible on multiple platforms. Further, while indirect and difficult to quantify, the cost of a more liberal licensing agreement would pay off in regard to a populace that has access to the law and is thereby knowledgeable about the laws of its sovereign.

#### *B. Threshold Determination for Unfettered Access to Statutes*

To keep the costs for the liberal licensing agreements reasonable, states should allow organizations unfettered access to the annotated statutes after satisfying a threshold determination that the statutes are

being posted and used in a way that promotes public understanding of the law. The state could:

1. Require organizations to provide its purposes in publishing the state code;
2. Explain safeguards that ensure accuracy in the text (both statutory material and the annotations/proprietary information from LexisNexis or West);
3. Explain the manner the text will be provided to users; and
4. Explain how dissemination satisfies goals of open access and universal statutory understanding.

By utilizing this checklist, states would still be responsible stewards of taxpayer funds and would be assuring that statutory material is provided to citizens in effective ways. Imagine the result: open access prompts a race for developers and tech gurus to create the most useful versions of the state code. In this scenario, everyone wins, even West and LexisNexis, who may still maintain a contractual relationship with the states to codify law. In providing the annotated versions of the statute to third-party organizations and websites, after clearing a threshold determination that the text is being used for legitimate purposes, the state is subsidizing projects that aim to keep citizens informed. This result is a noble one, and one that should not have taken this long to be realized. Open access should be an obvious governmental objective.

### *C. An Effective Edict?*

Malamud seeks a simpler solution: amending the United States Code. The open-access advocate suggests, in a petition circulating through the legal community, that the U.S. Copyright Act should be amended to read:

Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments.<sup>205</sup>

At the time of this writing, more than one hundred scholars, attorneys, and law professors have signed on to this petition.<sup>206</sup> This

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<sup>205</sup> *The Edicts of Government Amendment: A Proposed Amendment to the United States Copyright Act*, PUBLIC.RESOURCE.ORG, <https://law.resource.org/pub/edicts.html> (last visited Oct. 20, 2014).

<sup>206</sup> *Id.*

amendment to the Copyright Act seems perhaps overdue; it stands to reason that federal, state, and local “edicts of government” should be treated similarly and codified as such. The likelihood this amendment will become law is unclear.

#### CONCLUSION

When considering open access to the law, it seems there is no more important goal than to provide citizens with the law in an unfettered and understandable manner. A two-fold approach described above could achieve this, and an amendment to the Copyright Act would most certainly open access to the law. “These are moral documents. They contain the fabric of our ethics. They are some of the most important things we do. Our law is a cathedral, and we are its stewards. Who owns the law? We do, and it’s about damn time we started acting like it.”<sup>207</sup>

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<sup>207</sup> Walters, *supra* note 2.

