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No Copyright in the Law: A Basic Principle, Yet a Continuing Battle

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NO COPYRIGHT IN THE LAW: A BASIC PRINCIPLE, YET A
CONTINUING BATTLE
ELIZABETH SCHEIBEL¹

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I. INTRODUCTION

It is a long established principle that “the law”— judicial opinions, statutes, and administrative regulations—is not copyrightable. This may seem like an intuitive principle or an obvious requirement in a society committed to democracy and the rule of law: if citizens are to

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participate in creating law through democratic systems, they must be informed about the law. Furthermore, due process of law dictates that those subject to the rule of law must have access to the law if they are to be held responsible for complying with it.²

However, the uncopyrightable nature of the law has been challenged many times in copyright infringement lawsuits. Even after many cases addressing the issue, the boundaries between what constitutes the law and is, therefore, uncopyrightable, and what is additional and, therefore, copyrightable, is not always clear. These issues are exacerbated by the history of legal publishing: various branches of the federal government and state governments have relied on private entities to publish public domain material.³ This created, and continues to create, a clash of interests between those private entities, who desire copyright protection for their works, and the public, who need access to the law that governs them.

Currently, the state of Georgia is suing a non-profit, Public.Resource.org,⁴ for copyright infringement because the organization published an annotated version of the state's code on its website.⁵ Public.Resource.org is arguing that since the annotated version is the state's "official code," the entirety of that code is the law and cannot be copyrighted.⁶ The issues are further complicated by a

² One scholar sees additional constitutional problems at the intersection of the government and copyright in allowing the copyrighting of works that were commissioned and funded by the government. See generally Andrea Simon, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425 (1984).

³ See Sarah Glassmeyer, *State Legal Information Census: An Analysis of Primary State Legal Information*, 23–27 (2016), <http://www.sarahglassmeyer.com/StateLegalInformation/wp-content/uploads/2014/04/GlassmeyerStateLegalInformationCensusReport.pdf> (surveying publication of official state codes and court reporters by private entities and noting the frequent reliance on private entities for official publications).

⁴ See *About Us*, PUBLIC.RESOURCE.ORG, <https://public.resource.org/about/index.html> (last visited May 14, 2016); *Bylaws of Public.Resource.Org, Inc.*, PUBLIC.RESOURCE.ORG § 2.1, <https://public.resource.org/public.resource.bylaws.html> (last visited May 14, 2016) ("The objectives and purposes of Public.Resource.Org, Inc. shall be: to create, architect, design, implement, operate and maintain public works projects on the Internet for Educational, Charitable, and Scientific Purposes to the benefit of the general public and the public interest . . .").

⁵ Compl. at 2, *Code Revision Commission v. Public.Resource.org, Inc.*, No. 1:15CV02594 (N.D. Ga. July 21, 2015).

⁶ Answer at 24, 27, 28, *Code Revision Commission v. Public.Resource.org, Inc.*, No. 1:15CV02594 (N.D. Ga. Sept. 9, 2015); see also Bill Donahue, *Nonprofit Group Says Georgia Code Can't Be Copyrighted*, LAW360 (Sept. 15, 2015, 4:56 PM),

private entity, LexisNexis (not currently a party to the lawsuit), that publishes and creates the annotations in the official code.⁷

This Note will begin by surveying the history of the principle that the law is not copyrightable by looking at copyright of statutes and judicial opinions,⁸ copyright of material supplementing the text of the law,⁹ and, more recently, copyright of privately developed material adopted or incorporated into law.¹⁰ The Uniform Electronic Legal Materials Act (UELMA) will also be introduced as one way for states to move forward in providing authoritative access to the law without requiring the use of a private publisher's product.¹¹ Next, this Note will discuss the differing legal bases used in that history as a grounding for discussing the Public.Resource.org litigation.¹² The allegations and arguments at issue in the Public.Resource.org litigation will then be described.¹³ Finally, a resolution to that litigation in favor of Public.Resource.org will be proposed, while recognizing that such an outcome is unlikely.¹⁴

II. HISTORY OF COPYRIGHT AND "THE LAW"

A. *Copyright of Statutes and Judicial Opinions*

In the United States, the text of the law has long been considered to be in the public domain. The issue first reached the Supreme Court in 1834 in *Wheaton v. Peters*.¹⁵ Though the central issue of the case centered around who properly held the copyright in the content of reports of the Supreme Court's decisions, the Court, at the very end of the majority opinion, and after disposing of the issues presented stated, "[i]t may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright

<http://www.law360.com/articles/702797/nonprofit-group-says-georgia-code-can-t-be-copyrighted>.

⁷ Compl. at 6, Code Revision Commission v. Public.Resource.org, Inc., No. 1:15CV02594 (N.D. Ga. July 21, 2015).

⁸ See *infra* Part II.A.

⁹ See *infra* Part II.B.

¹⁰ See *infra* Part II.C.1.

¹¹ See *infra* Part II.C.2.

¹² See *infra* Part III.A.

¹³ See *infra* Part III.B.1.

¹⁴ See *infra* Part III.B.2.

¹⁵ See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”¹⁶

The issue was more squarely confronted by the Court in *Banks v. Manchester*.¹⁷ A publisher, having received by contracting with the state of Ohio the exclusive right to publish reports of state court decisions, sought to prevent another from copying and publishing the decisions.¹⁸ The Court rejected the possibility of copyright in judicial decisions:

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 head notes 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. The whole work done by the judges constitutes the authentic exposition and interpretation

¹⁶ *Id.* at 668. Many later opinions and other commentators have described this as the holding of the case. See *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 795 (5th Cir. 2002) (introducing the *Wheaton* Court’s statement on copyright of judicial opinions by saying “the Supreme Court interpreted the first federal copyright laws and unanimously held . . .”); Marvin J. Nodiff, *Copyrightability of Works of the Federal and State Governments Under the 1976 Act*, 29 ST. LOUIS L. J. 91, 99 (1984) (“In the historic case of *Wheaton* . . . , the Supreme Court held that federal court opinions are in the public domain.”). However, since the Court’s statement was made after disposing of the case at hand and was not essential to its decision about the necessity of following the formalities required by copyright statutes, it must be classified as dictum rather than a holding. See Irina Y. Dmitrieva, *State Ownership of Copyrights in Primary Law Materials*, 23 HASTINGS COMM. & ENT L.J. 81, 84 (2000) (classifying the statement on copyright of the law as dictum and noting that the Court did not cite any legal authority for its proposition). The widespread adoption of the statement as a settled legal principle after *Wheaton*, however, shows that the principle is not open to dispute, despite its misunderstood beginning as a mere aside.

¹⁷ See *Banks v. Manchester*, 128 U.S. 244 (1888).

¹⁸ *Id.* at 247–48.

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.¹⁹

The *Banks v. Manchester* court referred to a Massachusetts Supreme Court decision that made a similar public policy determination:

[J]ustice 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.²⁰

Soon after these early cases, Congress considered various proposals and recommendations about specifically excluding both federal and state judicial opinions, laws, and similar categories of legal material from being available for copyright. However, many of these recommendations were not adopted in the Copyright Act of 1909.²¹ The 1909 Act only provided that “[n]o copyright shall subsist . . . in any publication of the United States Government,”²² therefore excluding state and local material and leaving open difficulties with the use of the word “publication.”²³

The current Copyright Act says that “[c]opyright protection under this title is not available for any work of the United States Government.”²⁴ This retains the general principle of prohibition of

¹⁹ *Id.* at 253–54 (citing *Nash v. Lathrop*, 142 Mass. 29, 35 (1886)). The *Banks v. Manchester* decision also emphasized that copyright could only belong to a citizen or resident of the United States, so the State did not qualify as an “author” under then-current copyright statutes. *Id.* at 253.

²⁰ *Nash v. Lathrop*, 142 Mass. 29, 35 (1886).

²¹ Nodiff, *supra* note 16, at 94–95.

²² Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077 (codified at 17 U.S.C. § 7 (1946)).

²³ See Nodiff, *supra* note 16, at 94–95 (reviewing the legislative history of the 1909 Act and finding that “publication” was neither defined in the Act nor clarified by the legislative history).

²⁴ 17 U.S.C. § 105 (2012). Though the current text of § 105 effectively codifies that material such as federal statutes and judicial opinions is not copyrightable, it does not shed light on what effect that has on material added to the text of the law itself, such as annotations or page numbers.

copyright from the 1909 Act while switching to the concept of “work,” instead of “publication.”²⁵

Despite the absence of state and local law in the federal statute excluding government works from copyright protection,²⁶ the common law principle that the law itself is not copyrightable is firmly established and has been since the late nineteenth century. Therefore, the principle that the words of a judicial opinion or statute are in the public domain would be safe from challenge regardless of whether a state has a statute parallel to the federal law embodied in § 105.²⁷

B. *Copyright of Material Beyond the Text of Statutes and Judicial Opinions*

Although judicial decisions stating that the law is not copyrightable have been consistent with regard to the text of the law,²⁸ decisions about material beyond the text are more varied.²⁹ However, it

²⁵ See Nodiff, *supra* note 16, at 94–95 (contrasting the 1909 Act with the 1976 Act, which used the term “work” instead of “publication” and defined “work of the United States Government”).

²⁶ State statutes vary greatly in addressing copyright of state government works. See generally Dmitrieva, *supra* note 16 (surveying state laws providing for copyright of primary law materials).

²⁷ As of 2000, according to one study reviewing state statutory provisions related to copyright of primary legal materials, Illinois was the only state explicitly placing its statutes in the public domain. *Id.* at 97. A more recent study reviewed copyright notices on websites containing such material and found that only Massachusetts specified that it claimed no copyright in the text of its case law. Glassmeyer, *supra* note 3, at 20. Of note to those interested in Georgia’s suit against Public.Resource.org, Georgia is last in Glassmeyer’s “Openness of Legal Information” rankings. *Id.* at 34–36; see *infra* Part III.B.1.

²⁸ One early case came to an opposite conclusion. See *Gould v. Banks*, 2 A. 886, 896 (Conn. 1885) (“The judges and the reporter are paid by the state; and the product of their mental labor is the property of the state The courts and their records are open to all. The reasons given by the supreme court . . . constitute no part of the record therein.”). However, very soon after, another court refused to follow the decision. See *State of Connecticut v. Gould*, 34 F. 319, 320 (C.C.N.D.N.Y. 1888). The Connecticut court then concluded in 1892 that *Gould* could not be good law in light of *Banks v. Manchester*. See *Peck v. Hooker*, 23 A. 741, 742 (Conn. 1892).

²⁹ Compare *W. Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1226–27 (8th Cir. 1986) (concluding that West’s arrangement of judicial opinions is the result of considerable labor, talent, and judgment and thus meets the standard for intellectual-creation), with *Matthew Bender & Co. v. W. Pub. Co.*, 158 F.3d 693, 699 (2d Cir. 1998) (concluding that since “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”).

is generally established that copyright can subsist in elements that are original and additional to the uncopyrightable text itself, though what qualifies as original or additional has been contested.

The history of copyright in material beyond the text of the law stretches back almost as far as the history of the lack of copyright in the law. In 1851, in *Little v. Gould*, the court acknowledged that no copyright existed in the judicial opinions themselves,³⁰ but found that the state could copyright the volumes of court reports that included summaries of cases, headnotes, and other material.³¹

A different court, in *Davidson v. Wheelock*, reached a parallel conclusion with regard to state constitutions and statutes, noting that such materials “are open to the world. They are public records, subject to inspection by every one.”³² Yet, a compilation or digest of those records “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.”³³

Later, that same court relied on *Davidson* to arrive at the same conclusion about state court reports³⁴ that *Little v. Gould*³⁵ had. The court further expounded on the policy basis for its decision by noting its importance in a just society:

[I]t 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.³⁶

As further justification, the court called attention to the democratic system of government by describing citizens as “part owner[s]” of the laws: “[e]ach citizen is a ruler,—a law-maker,—and as such has the right of access to the laws he joins in making and to any official

³⁰ *Little v. Gould*, 15 F. Cas. 604, 606 (C.C.N.D.N.Y. 1851).

³¹ *Id.* at 612.

³² 27 F. 61, 62 (C.C.D. Minn. 1866).

³³ *Id.*

³⁴ *Banks & Bros. v. W. Pub. Co.*, 27 F. 50, 59 (C.C.D. Minn. 1886).

³⁵ *Little v. Gould*, 15 F. Cas. 604, 612 (C.C.N.D.N.Y. 1851); *see supra* notes 30–31 and accompanying text.

³⁶ *Banks & Bros.*, 27 F. at 57.

interpretation thereof.”³⁷ Several other courts subsequently reiterated the rule that although no copyright exists in statutes and judicial opinions, copyright can exist in original compilation and annotation materials added to those texts.³⁸

Although the precise scope of the availability of copyright in compilations of and material added to the law has been litigated many times, the suits generally center on whether the additional material or method of compilation was sufficiently original or creative to meet standards of copyrightability.³⁹ These questions, unfortunately, do not directly shed light on the conflicted status of an annotated code that is also a state’s official code, which is at the heart of the suit between Georgia and Public.Resource.org.⁴⁰

C. *Recent Issues: Laws Adopting Text Copyrighted by Private Parties and the Uniform Electronic Legal Materials Act*

1. *Laws Adopting Text Copyrighted by Private Parties: Veeck*

³⁷ *Id.* It is interesting to notice that in this section of the opinion, the court does not provide any legal authority for the stated principles, other than observing that “[t]he laws of Rome were written on tablets and posted, that all might read, and all were bound to obedience” and acknowledging that “English courts generally sustain the crown’s proprietary rights in judicial opinions.” *Id.*

³⁸ See Callaghan v. Myers, 128 U.S. 617, 647–49 (1888); Howell v. Miller, 91 F. 129, 138 (6th Cir. 1898); Ex Parte Brown, 78 N.E. 553, 558 (Ind. 1906). *Harrison Co. v. Code Revision Commission*, which is especially notable in light of the suit against Public.Resource.org for copying Georgia’s annotated code, see *infra* Part III.B, notes that even if the state had contracted for publication of an annotated version its code, the contracted publisher did not have an exclusive right to publish the laws since they were public records. 260 S.E.2d 30, 34 (Ga. 1979). In a related case, the state of Georgia argued that that it should be able to copyright its statutes so that it could insure accuracy in any published statutes, but the court rejected this argument and noted that “anyone citing the [unofficial version] will do so at his peril if there is any inaccuracy in that publication or any discrepancy between [the official version] and [the unofficial version]. A person takes the same risk, of course, whenever he cites the [unofficial versions of the United States code]; 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.” *Georgia v. Harrison Co.*, 548 F. Supp. 110, 114–15 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983).

³⁹ See generally Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173 (1998).

⁴⁰ See *infra* Part III.

What happens when the government adopts copyrighted material into law through incorporating the copyrighted text into law? This has been the question in more recent cases in the area of copyright and the content of the law.

The First Circuit Court of Appeals addressed the topic in dictum when addressing a suit of Building Officials and Code Administrators (BOCA), a private organization that creates regulations for building construction.⁴¹ The BOCA Code was adopted in Massachusetts, and then the defendant published its own version of the State Code without recognition of BOCA's copyright.⁴² The court reviewed the relevant cases⁴³ and found that the differing lines of reasoning used in these opinions was significant enough to describe in detail:

BOCA's argument implies that the rule of *Wheaton v. Peters* was based on the public's property interest in work produced by legislators and judges, who are, of course, government employees. This interpretation of the cases is not without foundation; there is language in some of them that emphasizes the inconsistency of private ownership of the law with its creation under government sponsorship.

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*, "Each citizen is a ruler,-a law-maker." The citizens are the authors of the law, and therefore its owners

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

⁴¹ Bldg. Officials & Code Adm. v. Code Tech., Inc., 628 F.2d 730 (1st Cir. 1980).

⁴² *Id.* at 732.

⁴³ *See id.* at 733-34. Many of the cases cited by the court are discussed previously in this Note. *See supra* Parts II.A-B.

policy is, at bottom, based on the concept of due process.⁴⁴

This detailed examination of the case law of the uncopyrightable nature of the law illustrates that, despite the consistency of the general rule of prohibition of copyright for such material, the reasoning behind the rule is not agreed upon among legal authorities.

The status of copyrighted material adopted into law was again at issue in *Veeck v. Southern Building Code Congress International, Inc.*⁴⁵ (“SBCCI”). The matter involved an individual who copied and distributed, via a free website, building codes that had been incorporated into municipal codes but were originally created by a private entity that owned the copyright in the codes.⁴⁶ After receiving a cease-and-desist letter, Veeck sought a declaratory judgment declaring that he did not infringe SBCCI’s copyright.⁴⁷

The court held that privately drafted model codes lose their copyright protection when adopted by municipal or state governments.⁴⁸ The court relied on the Supreme Court precedents in *Wheaton*⁴⁹ and *Banks v. Manchester*.⁵⁰ The court additionally relied on the merger doctrine—that the idea of the specific municipal building codes at issue can be expressed only through the precise words of the enacted code, rendering the words of the code uncopyrightable⁵¹—and

⁴⁴ *Bldg. Officials & Code Adm.*, 628 F.2d at 734 (citations omitted). The inconsistent nature of the reasoning provided by courts in this area means that the law of copyright of primary legal information is less settled and less predictable than it first appears. See *infra* Part III.A.

⁴⁵ *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003). See generally Shubha Ghosh, *Copyright As Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653 (2004) (discussing the *Veeck* case in detail).

⁴⁶ *Veeck*, 293 F.3d at 793–94.

⁴⁷ *Id.* at 794.

⁴⁸ *Id.* at 800.

⁴⁹ *Id.* at 795, 798, 800 (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834)); see *supra* notes 15–16 and accompanying text (discussing *Wheaton*).

⁵⁰ *Veeck*, 293 F.3d at 795–800; see *supra* notes 17–19 and accompanying text (discussing *Banks v. Manchester*).

⁵¹ *Veeck*, 293 F.3d at 801. “In some circumstances, . . . a given idea is inseparably tied to a particular expression. In such instances, rigorously protecting the expression would confer a monopoly over the idea itself, in contravention of the statutory command. To prevent that consequence, courts have invoked the merger doctrine.” 4-13 Nimmer on Copyright § 13.03 (LexisAdvance, 2016). The merger doctrine is usually traced to *Baker*

on viewing the content of the codes as facts, which are uncopyrightable.⁵² Finally, the court resolved apparent conflicts between precedents in different circuits by distinguishing between standards and codes, saying that when standards were found to be copyrightable, the cases involved private standards that were incorporated by reference and “were created by private groups for reasons other than incorporation into law.”⁵³

The future of copyright in content created by private parties and subsequently incorporated into law is uncertain; one commentator noted that there is an unresolved circuit split.⁵⁴ These cases have not brought much clarity to the field of copyrightability and the law when the official source of the law includes copyrighted material,⁵⁵ but they do suggest that courts deciding such issues need to consider policy concerns about public access to the law.⁵⁶

2. *The Uniform Electronic Legal Materials Act: Making Authoritative Versions of the Law Accessible and Able to be Authenticated*

v. *Selden*. 101 U.S. 99, 103 (1879); see also 1-2 Nimmer on Copyright § 2.18 (LexisAdvance, 2016) (discussing *Baker* and noting that its discussion had drawn criticism in the scholarly literature).

⁵² *Veeck*, 293 F.3d at 801. The touchstone cases for the rule that facts are uncopyrightable are *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 344–45 (U.S. 1991), and *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

⁵³ *Veeck*, 293 F.3d at 805.

⁵⁴ Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 300–07 (2005) (discussing the BOCA suit, *Veeck*, and others, while noting the limitations of the judiciary in addressing this area).

⁵⁵ These cases will likely be important in any decisions on the merits in suits involving Public.Resource.org’s copying of materials incorporating privately developed standards. See *infra* Part III.B.2.

⁵⁶ See Cunningham, *supra* note 54, at 297–98 (noting that the majority and dissent decisions in *Veeck* emphasized different aspects of competing policy objectives and the need for balancing of public policies in such cases); see generally also Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014) (arguing, in the context of private standards incorporated into regulatory schemes, that access to the law needs to be better and easier for reasons beyond public policy concerns, such as that regulatory beneficiaries need notice of the contents of standards and that the public needs to be able to invoke mechanisms of accountability, including voting, contacting Congress, participating in agency procedures, and seeking judicial review).

Although the law is not copyrightable, it is sometimes only available in its official⁵⁷ form through a product that contains additional copyrightable material, such as a print volume of a court reporter⁵⁸ or state statutes⁵⁹ that includes annotations. Another hurdle to the public accessing the law is the potential for confusion about whether a particular version is official, and can be relied on as authoritative, or not.⁶⁰

⁵⁷ “The word ‘official’ means that the text of the statutes is the legal evidence of the law in a court of law.” NATIONAL CONFERENCE OF STATE LEGISLATURES, OFFICIAL VERSION OF THE STATE STATUTES/CODE (March–July 2011),

http://www.ncsl.org/documents/lsss/Official_Version_Statutes.pdf.

⁵⁸ Every volume of West’s National Reporter System is an example of this. See THOMSON REUTERS, USING WEST’S NATIONAL REPORTER SYSTEM (2010),

<http://lscontent.westlaw.com/images/content/nationalreporter10.pdf>.

⁵⁹ Note, for example, that both official and unofficial print versions of Minnesota’s state code exist. A set of books entitled *Minnesota Statutes* is published by the Minnesota Revisor’s office and is an official version. *Minnesota Statutes: Official Versions of Minnesota Statutes*, OFFICE OF THE REVISOR OF STATUTES, <https://www.revisor.mn.gov/statutes?view=info> (last visited May 14, 2016). *Minnesota Statutes Annotated* is published by Thomson Reuters. *Minnesota Statutes Annotated*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/Statutes/Minnesota-Statutes-Annotated-Annotated-Statute--Code-Series/p/100028621> (last visited May 14, 2016). *Minnesota Statutes Annotated* is not listed as an official version of Minnesota Statutes. See *Minnesota Statutes: Official Versions of Minnesota Statutes*, OFFICE OF THE REVISOR OF STATUTES, <https://www.revisor.mn.gov/statutes?view=info> (last visited May 14, 2016).

⁶⁰ See CODE OF GEORGIA - FREE PUBLIC ACCESS, <http://www.lexis-nexis.com/hottopics/gacode/Default.asp> (last visited May 14, 2016). This portal to Georgia’s code is entitled “Code of Georgia – Free Public Access”; it states that the “website is maintained by LexisNexis®, the publisher of the Official Code of Georgia Annotated, to provide free public access to the law.” *Id.* But this language does not make it clear whether or not this online version is designated as an official version, and so lawyers needing an official version because they will use the text in legal proceedings should be wary. See *id.* This website formerly included language that specified that only the print version was authoritative, but this author was unable to locate that language; perhaps it has been removed in light of the litigation described in this Note. See Answer at 24, Code Revision Commission v. Public.Resource.org, Inc., No. 1:15CV02594 (N.D. Ga. Sept. 14, 2015) (referring to Exhibit F, a screenshot of a previous version of the portal’s entry page); see also *infra* Part III.B.1. Once a user clicks the “I Agree” button and begins to view the material, the beginning search page refers to the material as “Official Code of Georgia,” but when viewing a specific code section, the heading on the page only mentions the code’s “official” status through the presence of O.C.G.A. citations, which are followed by a heading that merely says “Georgia Code.” See CODE OF GEORGIA - FREE PUBLIC ACCESS, <http://www.lexis-nexis.com/hottopics/gacode/Default.asp> (last visited May 14, 2016) (noting that the search page and specific code sections not available via direct link and a user of any of these pages must begin at this cited portal and accept the Terms & Conditions). The text

The Uniform Electronic Legal Materials Act (“UELMA”) is an attempt to fix these problems by requiring states that adopt such legislation to provide online versions of legal material that are as authoritative as the print versions historically relied on.⁶¹ “The Act requires that official electronic legal material be: (1) authenticated, by providing a method to determine that it is unaltered; (2) preserved, either in electronic or print form; and (3) accessible, for use by the public on a permanent basis.”⁶² The authentication aspect is key; some states previously offered official versions online, but these versions were not authenticated and therefore were open to question about their accuracy.⁶³ The authentication aspect may seem unimportant to the lay user, but attorneys downloading copies of statutes, or receiving such downloaded copies from others, and using the documents in legal proceedings should be able to know, through the authentication process, that the text on which they are relying is accurate.⁶⁴

of Georgia’s code does not provide further clarity; the only provision about publishing an official code is that “[t]he Code Revision Commission shall provide for the publication of the Official Code of Georgia Annotated” O.C.G.A. § 28-9-5(a), current through the 2015 Regular Session. This is in contrast to a state like Minnesota, which is more explicit about how one knows whether a version is authoritative and can be used in legal proceedings: “Any volume of Minnesota Statutes, supplement to Minnesota Statutes, and Laws of Minnesota certified by the revisor according to section 3C.11, subdivision 1, is prima facie evidence of the statutes contained in it in all courts and proceedings.” MINN. STAT. § 3C.13 (2014).

⁶¹ *Electronic Legal Material Act: Description*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Electronic+Legal+Material+Act> (last visited May 14, 2016).

⁶² *Id.*

⁶³ RICHARD J. MATTHEWS & MARY A. BAISH, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 3 (Am. Ass’n of Law Libraries 2007) (“A significant number of the state online legal resources are official but none are authenticated or afford ready authentication by standard methods. State online primary legal resources are therefore not sufficiently trustworthy.”). Authenticated, and therefore trustworthy, sources are important for those engaging with the legal system; recall the warning in *Georgia v. Harrison Co.* that one citing an unofficial version “[did] so at his peril if there is any inaccuracy . . . or any discrepancy between [official and unofficial versions].” 548 F. Supp. 110, 114 (N.D. Ga. 1982) *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983).

⁶⁴ See, e.g., *Document Authentication*, OFFICE OF THE REVISOR OF STATUTES, https://www.revisor.mn.gov/pubs/publish_hash.php?type=statutes&id=3E.02 (last viewed Jan. 9, 2016) (providing an example of an authentication process in which a user can upload the document she is using as her source of the law and find out whether it is an authentic copy).

UELMA has been adopted in twelve states and has been introduced in two more.⁶⁵ UELMA is quite flexible⁶⁶: states can include or exclude certain categories of legal information,⁶⁷ there is no specific technology designated by the Act, and, though only a unit or employee of the state government can be the official publisher, states can still contract with commercial publishers to produce official versions.⁶⁸ There does not appear to have been any litigation as of yet about whether or not a state's implementation properly complies with the legislation or what ramifications a state's adoption of UELMA has on copyright issues.⁶⁹

Depending on how a state implements UELMA,⁷⁰ it can avoid clashes between the interests of private publishers of legal information and the public with respect to the availability of official versions of the state's laws because the public does not have to use a private

⁶⁵ *Electronic Legal Material Act: Description*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Electronic+Legal+Material+Act> (last visited May 14, 2016).

⁶⁶ *See Uniform Electronic Legal Material Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Legal%20Material%20Act> (last visited May 14, 2016).

⁶⁷ Minnesota, for example, includes its Constitution, session laws, codified statutes, and administrative rules in its adoption of UELMA, but does not include judicial opinions. *See* MINN. STAT. 3E.02 (2014).

⁶⁸ *Uniform Electronic Legal Material Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Electronic%20Legal%20Material%20Act> (last visited May 14, 2016).

⁶⁹ This author did not check each statute derived from UELMA in each adopting state for citing court cases. However, WestlawNext searches by this author on January 28, 2016, of all state and federal cases for the terms and phrases "UELMA," "electronic legal materials act," and "electronic legal material" did not return any relevant cases; in all searches but the last phrase, there were no cases.

⁷⁰ The argument has been made that UELMA may turn out to be ineffective and that Georgia's current online statutes could be found to meet UELMA's requirements of authentication, preservation, and accessibility. Beth Ford, Note, *Open Wide the Gates of Legal Access*, 93 OR. L. REV. 539, 562–63 (2014). However, before concluding that a state like Georgia has met the Uniform Act's requirements even without adopting it, a more detailed analysis would be required, especially on the question of whether Georgia's online code is authenticated, since authenticated is different from official, *see supra* note 63, and there are not currently any statements or functions related to authentication on the O.C.G.A. website. *See supra* note 60 (describing the information presented to a user of the O.C.G.A. online). However, the fact remains that despite the promotion of access to legal information through the creation of UELMA and despite its adoption in some states, there are still significant barriers to access to reliable legal information, even in states that have adopted UELMA. *See* GLASSMEYER, *supra* note 3, at 1, 3.

publisher's product to access version that is both official and authenticated. Georgia has not adopted UELMA⁷¹ and continues to have a close relationship with a private entity for publication of its official code,⁷² so the state has created confusion and issues for itself and users of its code by outsourcing its publishing and designating an annotated code as the official version.

III. THE PUBLIC.RESOURCE.ORG SUIT: AN OPPORTUNITY TO SUPPORT PUBLIC ACCESS TO THE LAW

A. Differing Legal Bases of Uncopyrightability of the Law

The history of copyright in the text of statutes, judicial opinions, and in material added to those texts, along with recent developments in cases like *Veeck* and in legislation like UELMA, shows that copyright of the law is still unsettled territory, even amidst general consistency about the principle that the law is uncopyrightable.

Another layer of complication is that courts discussing the uncopyrightability of the law are not entirely consistent in how they ground that principle,⁷³ making predicting the outcome of suits on the subject even more difficult than usual.⁷⁴

Some courts emphasize the fact that the government is like the employee of the people, and thus the law (and sometimes government works more generally) belongs to the people under principles reminiscent of work made for hire.⁷⁵ A work made for hire exists when

⁷¹ *Electronic Legal Material Act: Description*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Electronic+Legal+Material+Act> (last visited May 14, 2016).

⁷² Compl. at 7–8, Code Revision Commission v. Public.Resource.org, Inc., No. 1:15CV02594 (N.D. Ga. July 21, 2015). As discussed below, it is interesting that the state of Georgia has brought suit to protect the copyright owned by LexisNexis, a private entity. See *infra* Part III.B.1.

⁷³ Additionally, some of the early cases that became important precedents in this area, see *supra* Parts II.A and II.B, are lacking in any reasoning on which to base their conclusions. See *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

⁷⁴ An additional consideration is the more fundamental problem, from a constitutional separation of powers perspective, of judicial branches making public policy judgments, when “public policy pronouncements are a unique prerogative of the legislative branch.” Dmitrieva, *supra* note 16, at 117.

⁷⁵ See 17 U.S.C. § 101 (“A ‘work made for hire’ is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use [in specific categories of works], if the parties expressly agree in a

an employee who creates a copyrightable work does not own the copyright; instead, the employer owns it.⁷⁶ The Court in *Banks v. Manchester* calls out this idea, noting that judges are paid out of the public treasury.⁷⁷

Other courts focus on public policy, democratic ideals of an informed populace, and due process concerns that require people to have access to the laws that govern them, while stating that the law is not copyrightable and exists in the public domain. The court in *Nash v. Lathrop* simply thought that “justice requires” such access.⁷⁸ In *Banks & Brothers v. West Publishing Co.*, the court noted the “maxim” that all are presumed to know the law, so it is only just that all have access to the law.⁷⁹ The court also called attention to each citizen’s role as a “law-maker,” which is the result of a democracy dependent on the participation of the public.⁸⁰

Some courts discuss both lines of reasoning and are unclear about which is the main basis for their holdings. Even in its description of the relationship between the work product of government officials and the public, *Banks v. Manchester*, when it highlighted that the law is “binding [on] every citizen,” seemed to suggest that due process principles are at play.⁸¹ The cases dealing with privately created codes adopted into law acknowledge the varying reasonings used in the relevant precedents but do little to resolve whether one or another is superior.⁸²

written instrument signed by them that the work shall be considered a work made for hire.”); *see also* 1-5 NIMMER ON COPYRIGHT § 5.13 (LexisAdvance 2016) (summarizing the law of copyright and works of the United States government and the work made for hire concepts involved).

⁷⁶ *See* 1-5 NIMMER, *supra* note 75.

⁷⁷ *Banks v. Manchester*, 128 U.S. 244, 253 (1888); *see also supra* notes 17–20 and accompanying text.

⁷⁸ 142 Mass. 29, 35 (1886).

⁷⁹ 27 F. 50, 57 (C.C.D. Minn. 1886); *see also supra* notes 34 and accompanying text.

⁸⁰ *Banks & Bros. v. W. Pub. Co.*, 27 F. at 57; *see also supra* notes 37 and accompanying text. This statement could also be interpreting as conjuring work made for hire principles, with the citizen as employer and the government as employee, so it could be argued that this reasoning fits in the first category. *See supra* notes 75–76 and accompanying text (discussing the use of work made for hire-like principles in cases concerning copyright of the law).

⁸¹ *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888) (citing *Nash v. Lathrop*, 142 Mass. 29, 35 (1886)) (noting that the law is “binding on every citizen”).

⁸² *See Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980); *Veeco v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 800–05 (5th Cir. 2002) (en

Of these differing foci of reasoning, the second, emphasizing democratic ideals and due process principles, is the better one; it upholds the central importance of having the law in the public domain in the United States and avoids possible loopholes in the work made for hire analogy. Grounding the uncopyrightability of the law in due process and democratic principles means that government units, such as state legislatures, must consider their official, authoritative versions of laws as being in the public domain.

The varied reasoning used by courts suggests that the reasoning is not important. Perhaps courts assume that the principle is so obvious and, at this point, firmly established that it is not necessary to carefully identify the legal basis for the proposition. However, the reasoning used to place the law in the public domain could have implications for whether or not certain material is determined to be in the public domain.

For example, if work made for hire principles are used,⁸³ and judges and legislators are considered employees, and the public are viewed as employers for works created by government officials in their official capacities, the public owns the copyright in such works. However, this reasoning could have unintended limits. A United States citizen who is not a resident or tax-payer in a particular state might not be considered as included in the public owning the copyrights to government works created by that state's judges and legislators, and that person, unlike a person who lives in that state, would be infringing on the copyright of that state if he engaged in infringing conduct.⁸⁴

Additionally, whether or not a corporation would be included in "the public" that owns the copyrights could be another source of problems. If corporations are people for such purposes, in what state do the corporations participate in the ownership of government works? Could they claim such ownership in more than one state? Can human persons who pay taxes in several states do so? Which taxes trigger such ownership? Many benefits of governments are only given to residents or other specific members of the public; use of the law could be argued to be no different.

banc), *cert. denied*, 539 U.S. 969 (2003); see also *supra* notes 44, 48–53 and accompanying text (discussing reasoning in *Bldg. Officials & Code Adm.* and *Veeck*).

⁸³ See *supra* notes 75–76 and accompanying text.

⁸⁴ See Dmitrieva, *supra* note 16, at 113–14 (arguing that this "metaphorical concept of citizen authorship" is not the best model and is impractical in the United States of today).

What happens if the government, the employee of the people, did not write the law? Is the public's rightful access to the law lessened when government representatives only did the work of enacting a particular law, but did not create it? This is the issue in the BOCA and *Veck* cases, but the answers to these questions still are not clear.⁸⁵ The public policy concern shown in these cases could be a justification for why Georgia should lose its lawsuit⁸⁶: if the state is designating material as its official law, even if that material would otherwise be copyrightable, then it is not subject to copyright, as in *Veck*.

All of these issues suggest that the public domain status of statutes and judicial decisions is more safely maintained by the public policy and due process reasoning used by the Court in *Nash v. Lathrop*⁸⁷ and like cases.⁸⁸ That reasoning more reliably promotes public access of the law and other government information. It also places the burden on states and other would-be copyright owners, such as publishers of legal information, to show why denying public domain status of the law and material associated with the text of the law does not offend principles of democracy and due process. The alternative is to place the burden on the public to show why particular material is of the type of material that the public has a right to have through a work made for hire relationship with the government.

B. *Resolving Code Revision Commission v. Public.Resource.org, Inc.*

1. *Facts and Allegations of Case.*

*Code Revision Commission v. Public.Resource.org, Inc.*⁸⁹ is an opportunity for a court to provide greater support of public access to the law and greater clarity in the reasoning underlying that policy. The suit highlights the problems and confusion that can arise when a state offers an official version of its code only through using a private publisher's products or services and designates an annotated code as its official code.

⁸⁵ See *supra* Part II.C.2; see also generally Ghosh, *supra* note 45.

⁸⁶ See *infra* Part III.B.2.

⁸⁷ *Nash v. Lathrop*, 142 Mass. 29, 35 (1886).

⁸⁸ See *Banks & Bros. v. W. Pub. Co.*, 27 F. 50, 57 (C.C.D. Minn. 1886); see also *supra* notes 78–90 and accompanying text (discussing reasoning in *Nash* and *Banks*).

⁸⁹ No. 1:15CV02594 (N.D. Ga. filed July 21, 2015).

This is not Public.Resource.org's first time in court, or its first time in court over an alleged copyright infringement of legal materials. The organization has recently been in litigation to obtain Internal Revenue Service records and to defend against infringement actions arising out of publishing federal and state regulations online.⁹⁰

On July 21, 2015, the Code Revision Commission, on behalf of the State of Georgia, filed suit against Public.Resource.org, claiming violations of the Copyright Act,⁹¹ because of Public.Resource.org's "systemic, widespread and unauthorized copying and distribution of the copyrighted annotations in the Official Code of Georgia Annotated."⁹²

⁹⁰ Public.Resource.org v. U. S. Internal Revenue Serv., 78 F. Supp. 3d 1262, 1268 (N.D. Cal. 2015) (granting summary judgment to Public.Resource.org and requiring the government to produce requested documents); Am. Educ. Research Ass'n, Inc. v. Public.Resource.org, Inc., 78 F. Supp. 3d 542, 551 (D.D.C. 2015) (striking Public.Resource.org's demand for a jury trial in suit for infringement of plaintiffs' copyright in educational and psychological testing standards incorporated into the Code of Federal Regulations and state laws; suit is ongoing); Am. Soc'y for Testing & Materials v. Public.Resource.org, Inc., 78 F. Supp. 3d 534, 542 (D.D.C. 2015) (striking Public.Resource.org's demand for a jury trial in suit for infringement of plaintiffs' copyright in safety codes and standards incorporated by state and local governments into statutes, regulations, and ordinances; suit is ongoing); *see also* Tim Cushing, *Public.Resource.Org Sued (Again) For Publication Of A Document Incorporated Into Federal Regulations [Update]*, TECHDIRT (May 29, 2014, 3:29 AM), <https://www.techdirt.com/articles/20140526/17193727368/publicresourceorg-sued-again-publication-document-incorporated-into-federal-regulations.shtml> (discussing the American Education Research Association suit and providing links to articles about other Public.Resource.org suits); Victor Li, *Who Owns the Law? Technology Reignites the War Over Just How Public Documents Should Be*, ABA J. (Jun. 2014), available at http://www.abajournal.com/magazine/article/who_owns_the_law_technology_reignites_the_war_over_just_how_public_document (reviewing the career of Public.Resource.org founder Carl Malamud and discussing differing viewpoints on Malamud's tactics and recent litigation).

⁹¹ Compl. at 14, Code Revision Commission v. Public.Resource.org, Inc., No. 1:15CV02594 (N.D. Ga. July 21, 2015) (claiming violations "of one or more of Sections 106, 501–503, and 505 of the Copyright Act"). The Commission had previously sent Public.Resource.org a "Cease and Desist" letter, *id.* Exhibit 4, to which Public.Resource.org responded and stated that it "respectfully reject[ed] 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, such material constituting the official law as published by the State." *Id.* Exhibit 5.

⁹² Compl. at 2, *Code Revision Commission*, No. 1:15CV02594. Note that the content provided by Public.Resource.org therefore goes beyond what is provided online for free through the Georgia legislature's portal to the O.C.G.A., which, despite often using O.C.G.A. as its title, does not provide any of the annotations, so it is the annotations that are at the center of this dispute. *See* sources cited *supra* note 60. The Complaint specifies that the Commission does not and could not assert copyright in the statutory text itself.

Specifically, the Commission alleges that Public.Resource.org has “copied at least 140 volumes/supplements containing the O.C.G.A. Copyrighted Annotations” and posted these works “on at least one of its websites.”⁹³ Further copying was alleged through posting of the material on another website, to which Public.Resource.org indicated that it was the owner of the works, resulting in many downloads of the annotations,⁹⁴ and through distribution of USB drives containing copies of the annotations.⁹⁵ The Commission additionally alleged that Public.Resource.org has created unauthorized derivative works in a manner that “encourg[es] the creation of further [such] works.”⁹⁶ The Commission is seeking injunctive relief, as well as attorneys’ fees and costs.⁹⁷

The Complaint describes Public.Resource.org and its founder, Carl Malamud, as engaged in “a larger plan designed to challenge the letter of U.S. copyright law and force government entities . . . to expend tax payer dollars in creating annotated codes and making those annotated codes easily accessible.”⁹⁸

The Commission’s view of the problem is that if the annotations to its code are freely available online, the publisher, LexisNexis, will not be able to sell copies of the annotated code, causing “Georgia [to] be required to either stop publishing the annotations altogether or pay for development of the annotations using state tax dollars.”⁹⁹ In this way, the Commission has framed itself as the defender of the public, who will eventually lose the annotations as a

Compl. at 8, *Code Revision Commission*, No. 1:15CV02594. The Complaint further describes the free online access that is available and states that LexisNexis is required to publish that resource by the terms of its contract with the State. *Id.*

⁹³ *Id.* at 9.

⁹⁴ *Id.* at 9–10.

⁹⁵ *Id.* at 12–13.

⁹⁶ *Id.* at 2, 9.

⁹⁷ *Id.* at 16–17.

⁹⁸ *Id.* at 10–11; see also Mike Masnick, *State Of Georgia Sues Carl Malamud For Copyright Infringement For Publishing The State’s Own Laws*, TECHDIRT (Jul. 24, 2015, 6:10AM), <https://www.techdirt.com/articles/20150723/17125231743/state-georgia-sues-carl-malamud-copyright-infringement-publishing-states-own-laws.shtml> (complaint available for viewing). The Complaint and Exhibits also detail Malamud’s previous copying of government and legal information. *Id.* at 11.

⁹⁹ Compl. at 2–3, *Code Revision Commission v. Public.Resource.org, Inc.*, No. 1:15CV02594 (N.D. Ga. July 21, 2015).

resource if Public.Resource.org is allowed to continue its posting of annotations.¹⁰⁰

The Complaint specifies that the annotations are only added in the annotated publication and are not enacted law.¹⁰¹ The Complaint also details the process of creating the annotations¹⁰² and the specifics of the contractual arrangement between the State of Georgia and LexisNexis, which include that the annotations and other original works are works made for hire and the copyright in them is owned by the Commission.¹⁰³

Public.Resource.org's Answer admitted many of the allegations about what it had done with the annotations in the O.C.G.A. but denied that the Commission owns a valid copyright in the annotations¹⁰⁴ and further denied "the bizarre, defamatory, and gratuitous allegation that it has a 'strategy of terrorism.'"¹⁰⁵ The Answer raised ten affirmative defenses.¹⁰⁶ The second defense stated that the O.C.G.A. is in the public domain and not copyrightable subject matter and further reiterated Public.Resource.org's position that the State "has no copyrights in works that government entities have enacted as law" and that "[t]he O.C.G.A. including annotations, regardless of how they were authored, is the law of Georgia, and the law should be free to the public."¹⁰⁷ The ninth and tenth defenses directly addressed the Commission's request for an injunction by stating that there should be no injunction because of a lack of irreparable injury and because it would be against the public interest.¹⁰⁸

Public.Resource.org went on to counterclaim and seek a declaratory judgment that its actions do not infringe any copyright.¹⁰⁹ The counterclaim outlined Mr. Malamud's contributions to public

¹⁰⁰ See *id.* at 2–3.

¹⁰¹ *Id.* at 7.

¹⁰² *Id.* at 6–7.

¹⁰³ *Id.* at 7–8. The state's ownership of the copyrights explains why the publisher is not the complaining party in this litigation, as it has been in other cases. See *infra* Part II.B.

¹⁰⁴ See generally, Answer and Counterclaims, Code Revision Commission v.

Public.Resource.org, Inc., No. 1:15--2594 (N.D. Ga. Sept. 14, 2015).

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Id.* at 10–11.

¹⁰⁷ *Id.* at 10.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.* at 12.

access to government information,¹¹⁰ as well as the non-profit contributions of Public.Resource.org.¹¹¹

The counterclaim also describes language in the O.C.G.A.'s annotations that warned against using a different, unofficial version of Georgia's statutes.¹¹² Public.Resource.org then describes the restrictive conditions of using the online version of the O.C.G.A. and again calls attention to its unofficial status,¹¹³ including providing an exhibit showing the website portal to the O.C.G.A. with language specifying that the print version is the authoritative version.¹¹⁴

Public.Resource.org further outlines a view of the law that relies on authorship by the people and requires public availability under principles of the rule of law generally, the lack of a defense of ignorance of the law, and the Constitution's protections of people reading and communicating the law.¹¹⁵ Public.Resource.org argues that Georgia has incorporated the annotations and other material beyond the legislatively enacted text by incorporating that material in its official version of the Code, and thus use of that material by others "is lawful through the doctrine of merger."¹¹⁶ Additionally, Public.Resource.org claims that "[e]ven if copyright law protected authorship by private parties after it is incorporated into law, . . . [its] use of the complete O.C.G.A. is fair use."¹¹⁷

The Commission answered the counterclaim¹¹⁸ and filed an Amended Complaint; the only substantive difference from the first Complaint is that, at allegation 18, the Commission alleged that Public.Resource.org has "copied at least 52 different volumes/supplements containing the 2015 O.C.G.A. Copyrighted

¹¹⁰ *Id.* at 14–18.

¹¹¹ *Id.* at 19–21.

¹¹² *Id.* at 22–23.

¹¹³ *Id.* at 23–24.

¹¹⁴ *Id.* at 24 (referring to Exhibit F, a screenshot of a previous version of the portal's entry page); *see also supra* note 60.

¹¹⁵ *Id.* at 25–26.

¹¹⁶ *Id.* at 26–27; *see also supra* note 51 (discussing the merger doctrine).

¹¹⁷ *Id.* at 27. "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use" four factors will be considered. 17 U.S.C. § 107.

¹¹⁸ Answer to Affirmative Defenses and Counterclaim, Code Revision Commission v. Public.Resource.org, Inc., No. 1:15-cv-2594 (N.D. Ga. Oct. 8, 2015).

Annotations” since the initial filing of the suit.¹¹⁹ Public.Resource.org has filed an Answer to the Amended Complaint incorporating a response to the new allegation that mirrors its previous assertions of having done the copying alleged but denying that the material at issue was protected by copyright.¹²⁰

There has been no substantive filings beyond the pleadings; as of this writing, the parties had begun discovery in the midst of filing the amended pleadings.¹²¹

2. *How the Case Should Be Decided*

As of March 23, 2016, the parties in *Code Revision Commission v. Public.Resource.org, Inc.* have not yet filed any motions that would resolve any of the claims, so it is currently unknown exactly how they will frame their arguments and what legal authorities they will rely on.¹²²

It seems likely that the Commission will largely rely on cases that distinguish between the text of the law and supplemental material and specify that the former is not copyrightable but the latter is.¹²³ Narrowly focusing on and following the cases that hold supplemental material copyrightable¹²⁴ has an appealing simplicity and would avoid sending states that have arrangements like Georgia’s¹²⁵ scrambling to

¹¹⁹ Amended Complaint, *Code Revision Commission v. Public.Resource.org, Inc.*, No. 1:15CV02594 (N.D. Ga. Oct. 8, 2015).

¹²⁰ Answer to Amended Complaint and Counterclaim, *Code Revision Commission v. Public.Resource.org, Inc.*, No. 1:15CV02594 (N.D. Ga. Oct. 22, 2015).

¹²¹ See *Code Revision Commission v. Public.Resource.org, Inc.*, No. 1:15CV02594 (N.D. Ga.) (including docket entry 12, Joint Preliminary Report and Discovery Plan; entry 13, a Scheduling Order for discovery to end on March 18, 2016; entries 14 and 15, Certificates of Service of initial disclosures by each party; and entries 20 through 25, Certificates of Service by both parties of responses and objections to interrogatories and requests for production of documents).

¹²² See *Code Revision Commission v. Public.Resource.org, Inc.*, No. 1:15CV02594 (N.D. Ga.).

¹²³ See *supra* Part II.B.

¹²⁴ See *supra* Part II.B.

¹²⁵ For example, it appears that South Dakota also uses a private publisher for its official version of its print code. See *South Dakota Codified Laws*, LEGALSOLUTIONS.THOMSONREUTERS.COM, <http://legalsolutions.thomsonreuters.com/law-products/Primary-Law-Materials-CasesC-Codes-/South-Dakota-Codified-Laws-Annotated-Statute--Code-Series/p/100001432> (last visited May 14, 2016) (specifying that the books are published “under an exclusive contract with the South Dakota Code Commission”). South Dakota does publish its

address the implications of needing to provide versions beyond what they currently provide and the implications of having contractual obligations with private publishers that are irreconcilable with the court's holding.

In countering the Commission's precedent-based argument, Public.Resource.org would likely be successful if it analogized this litigation to cases holding that material adopted into a code, even if privately created and otherwise copyrightable, is not copyrightable.¹²⁶

The most difficult part of the Commission's argument will be carefully defining the meaning of the term "official" in light of Georgia's code publication arrangements and addressing the implications of the State of Georgia having designated an annotated version as its official version.

To highlight the importance of the meaning of "official" and to offer its own appealingly simple conclusion, Public.Resource.org will likely argue that designating a version of a legal code as "official" encompasses the entirety of that version, thus putting it into the public domain. Further, Public.Resource.org may try to draw attention to the uncomfortable position that the Commission is inescapably supporting: that the onus is on a reader of the O.C.G.A. to differentiate between which bits of text are official and uncopyrightable and which are not official and are copyrightable. This position gives a bad taste in a country where the law is not copyrightable, which may cause a judge or jury to be very hesitant to accept the Commission's position.

Yet, from a broader perspective of anticipating similar issues in the future, Public.Resource.org would benefit more from concentrating on convincing a judge or jury to take a broader view of the case and focus on the reasoning behind the uncopyrightability of the law. This could be a difficult path if the judge is not receptive to public policy arguments, but Public.Resource.org may have an easier time

statutes online, but it is unclear from the website whether or not it is an official version. *See Codified Laws*, SOUTH DAKOTA LEGISLATURE LEGISLATIVE RESEARCH COUNCIL, http://legis.sd.gov/statutes/Codified_Laws/ (last visited May 14, 2016). Chapter 2-16, "Codes and Compilations," of South Dakota Codified Laws does not appear to provide for the online publication of its code. *See S.D. CODIFIED LAWS §§ 2-16-3 et seq.* (West, WestlawNext through 2015 Regular Session). *See also Statutes/Code: Publisher and Frequency of Printing*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jul. 2011), http://www.ncsl.org/documents/lss/Publisher_Printed_Statutes.pdf (listing publishers of each state's printed code: legislature, state, revisor, Lexis/Nexis, and/or Thompson [sic] Reuters (West)).

¹²⁶ *See supra* Part II.B.1.

bringing in such arguments because arguments about public policy and democratic ideals have previously influenced decisions about copyright and the law.¹²⁷

Even a judge not otherwise responsive to public policy arguments could reach a result that takes the various public policy concerns into account because the BOCA case and *Veeck* both discussed and placed significant importance in these arguments. Although those cases are not in the same federal appellate circuit as Georgia,¹²⁸ they have persuasive value both as cases decided in federal appellate courts and as issues that involved the intersection of copyright of material created by a private entity and copyright of the law.

Public.Resource.org should additionally attack the Commission's description of the way it and the public will be harmed if Public.Resource.org is allowed to continue; the Commission's pleading that it needs to prevail because otherwise it will have to stop publishing annotations or spend taxpayer money to do so is strange when the annotations are not freely available to the public anyway. Though details of the contract between the State of Georgia and LexisNexis have not been publicly disclosed in the litigation, it seems that LexisNexis is already recouping the costs of creating the annotations and other supplemental material by selling print and online copies of the (actually annotated, unlike the free online version) O.C.G.A.; even if LexisNexis doesn't retain ownership of that material under the contract, it is still profiting from producing it.

The necessity that the Commission is claiming becomes more dubious in light of the publishing practices of some other states. Consider Minnesota, where a private publisher creates and sells an annotated version of the statutes¹²⁹ while the State publishes an official version both in print¹³⁰ and online,¹³¹ without any copyrighted material

¹²⁷ See *supra* Part III.A.

¹²⁸ Georgia is in the 11th Circuit. *Court Role and Structure*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited May 14, 2016).

¹²⁹ *Minnesota Statutes Annotated*, LEGALSOLUTIONS.THOMSONREUTERS.COM, <http://legalsolutions.thomsonreuters.com/law-products/Statutes/Minnesota-Statutes-Annotated-Annotated-Statute--Code-Series/p/100028621> (last visited May 14, 2016) (stating the retail cost as \$8,323.00).

¹³⁰ *Statutes-2014 Full Set*, MINNESOTA'S BOOKSTORE, <http://www.comm.media.state.mn.us/bookstore/mnbookstore.asp?page=viewbook&BookID=81734&stocknum=14347&CatId=280> (last visited May 14, 2016) (stating the retail cost as \$255). The State of Minnesota specifies that this is one of two official versions. *About Statutes*, OFFICE OF THE REVISOR

confusingly mixed in. Either way, the public does not have free access to the annotations, but in the case of Minnesota, the public does have access to an official version.

Despite the various arguments available to Public.Resource.org, it seems likely that, should the litigation proceed to judgment, the Commission will prevail and the matter will result in a decision with a narrow scope based on applying cases that hold supplemental material copyrightable.¹³² Public.Resource.org has demanded a jury trial,¹³³ and it is possible that public policy arguments about what ordinary citizens should be able to expect when seeking legal information might resonate with a jury, but if the judge thinks that the law compels a resolution in the Commission's favor, jury-friendly arguments may not be enough. A judge, even if sympathetic to public policy arguments and larger implications of democratic and constitutional principles, may find the thrust of precedent inescapable and may prefer to leave the policy determinations to appellate courts and legislatures.

Even if the matter is resolved in Public.Resource.org's favor, it would remain to be seen whether the court would use reasoning that focuses on the idea of governments as creating works made for hire, with the people as the owner of the law, or on broader democratic ideals of an informed populace and due process requiring that people have access to the laws that govern them. The latter would be the better reasoning because it would be based on foundational democratic and constitutional principles and it would not leave the uncopyrightability of the law open to new creative attacks.¹³⁴ This case should be seen not as a run-of-the-mill copyright infringement case but as an important challenge to the scope of the principle of the people as the source of government and law.

OF STATUTES, <https://www.revisor.leg.state.mn.us/statutes/?view=info> (last visited May 14, 2016).

¹³¹ 2015 Minnesota Statutes, OFFICE OF THE REVISOR OF STATUTES, <https://www.revisor.leg.state.mn.us/statutes/> (last visited May 14, 2016). The State of Minnesota specifies that this is one of two official versions. *About Statutes*, OFFICE OF THE REVISOR OF STATUTES, <https://www.revisor.leg.state.mn.us/statutes/?view=info> (last visited May 14, 2016).

¹³² See *supra* Part II.B.

¹³³ Answer at 1, Code Revision Commission v. Public.Resource.org, Inc., No. 1:15CV02594 (N.D. Ga. Sept. 14, 2015).

¹³⁴ See *supra* Part III.B.2.

In addition, a finding for Public.Resource.org could push states like Georgia¹³⁵ to change publishing practices in ways that would avoid suits like this in the future. Until Georgia creates an official, authenticated version of its code that is accessible to the public, preferably online pursuant to a UELMA-based law, it cannot claim that the annotated code at issue in this case is protected by copyright. As the official version of the state's code, it is in the public domain, even though it contains additional material that might *otherwise* be copyrightable. Georgia is not complying with the due process and democratic public policy concerns underlying the principle of the law as in the public domain. This is an unnecessary situation in today's world, where websites are commonplace and some states have shown that it's possible to provide this information without relying on private publishers who have competing interests.¹³⁶

IV. CONCLUSION

It is generally settled that the law is not subject to copyright, and yet, even in a time of proliferation of governmental and legal material online, provided directly by governmental bodies, copyright is used by governments and private entities to restrict access to the law. This is an access-to-justice issue that can be solved with little fuss; many state governments have already done so by adopting UELMA and putting official, authenticated primary law online. This means that an organization like Public.Resource.org would have no reason to copy the material, and if it did copy the material, it would not be subject to an infringement action.

The Public.Resource.org case illustrates the ongoing issues in this area. The case ought to come out in favor of Public.Resource.org because the public policy principles of democracy and due process behind exclusion of the law from copyright protection are extremely important, and the State of Georgia is pushing against such policies by continuing to publish its official code as it does. However, it seems

¹³⁵ See generally GLASSMEYER, *supra* note 3 (surveying the state of access to state primary legal material).

¹³⁶ See *supra* note 59 (describing the availability of official and unofficial Minnesota statutes in print), 130–31 (describing the availability of official Minnesota legal information in print and online, without the involvement of a private entity); see also, GLASSMEYER, *supra* note 3, at 6 (finding that most, yet not all, of the reviewed online versions of the law were unofficial).

likely that the court will follow precedents holding that annotations to primary legal material are copyrightable and so find that Public.Resource.org is infringing by copying and distributing them. Such a decision would be to the detriment of the public, which needs to have reliable access to accurate versions of the laws that govern it. To have otherwise flies in the face of ideals of democracy and due process.