State Ownership of Copyrights in Primary Law Materials

Irina Y. Dmitrieva

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State Ownership of Copyrights in Primary Law Materials

by

IRINA Y. DMITRIEVA*

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Introduction

Copyright law protects not only works created by individuals and commercial entities, but also some governmental works. Under section 105 of the Copyright Act of 1976, copyright protection is not available for works of the United States government. However, no similar prohibition exists for works of state and local governments.

In fact, under existing principles of international copyright law, copyright subsists in works of state governments unless state statutes or statutory interpretations provide otherwise. The Berne Convention for the Protection of Literary and Artistic Works, joined by the United States in 1989, removes registration requirements for copyright protection. This means that copyright exists in literary or artistic works, including governmental works, from the moment of their inception, unless statutory or common law provides to the contrary.

Copyright of state governments in primary law materials, such as statutory compilations and court reports, have the potential to restrict public access to legal documents of vital importance. For instance, if a state claims a copyright interest in its statutory code, citizens would not be able to reproduce the statutory text with notes and annotations without first securing permission from a governmental body and possibly having to pay royalties to the state.

Many state governments now make their statutory and legislative materials accessible on the Internet. However, if protected by copyright, these materials could not be freely reproduced or downloaded from the Internet. Copyright protection of state codes would prevent Internet users from posting parts of the code on their own Internet sites, and it could even prohibit hyper-linking to specific statutory provisions within the code.

Meanwhile, there are no comprehensive studies of state laws

1. The United States Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I § 8, cl. 8. Therefore, the Constitution’s copyright clause does not exclude governmental works from copyright protection.

2. 17 U.S.C. § 105 (2000 Supp.). "Copyright protection under this article is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."

providing for copyright protection of primary law materials. In fact, legal scholar John A. Kidwell spoke of “an almost astonishing lack of authority to guide one to an answer.” Authors of copyright treatises say in unison that copyright protection should not be available for state statutes and judicial opinions because of public policy considerations. However, none of the authors cite or interpret specific provisions from state laws that claim copyright interest in statutory compilations and court reports.

This article presents results of a comprehensive study of state laws providing for copyright in primary law materials. The research findings demonstrate that statutory codes in at least half of the fifty states provide for state copyright in official statutory compilations, court reports, or administrative regulations. The author found specific statutory provisions by using a keyword search in the Lexis database of state codes. In addition, the author searched through the table of contents in individual state codes. Where available, the article provides interpretation of statutory provisions by federal and state courts, and in the state attorney general’s opinions.

The article begins with an overview of the common law and

4. John A. Kidwell, Open Records Laws and Copyright, 1989 Wis. L. Rev. 1021 (1989). Kidwell raised the question of potential conflict between state copyright ownership and state open records laws. However, he did not answer the question saying that copyright and open records laws differ dramatically from state to state, and it would be virtually impossible to analyze them comprehensively.

5. For instance, Melville Nimmer writes in his authoritative treatise that, “it has long been held that no copyright may be claimed in state court opinions” and state statutes. Melville Nimmer, Nimmer on Copyright § 5.06[c] (Matthew Bender 2000). He reasons that public has a due process right to have notice of what the law requires. Nimmer argues that failure to observe such notice requirements would constitute a defense for one charged with violation of the unpublicized law. See id.

Paul Goldstein writes that official legal documents, such as judicial opinions and legislative enactments, are not copyrightable. He argues that the public must have free access to official legal materials if the legal process is to function efficiently. Goldstein also claims that government should not be allowed to use copyright as a tool for censoring the publication of embarrassing information that appears in governmental documents. In addition, Goldstein writes that, by securing copyright in its publications, government may gain an unfair competitive advantage over commercial entities in the marketplace. Paul Goldstein, Stella W. & Ira S. Lillick, Copyright: Principles, Law and Practice vol. 1, § 2.5.2, 87-98 (Little, Brown and Co. 1989). Similarly, William Patry admits that there is a public policy prohibition against copyright in state statutes, judicial opinions and other government edicts. See William F. Patry, Copyright Law and Practice vol. 1, ch. 3 (BNA 1994).

6. Most of the research was conducted in the spring of 2000.

7. The author searched the text of state statutes in all 50 states by using keywords “copyright,” “publication AND property.” The author acknowledges the possibility that this keyword search may not have identified all the relevant provisions in state laws.
federal statutory law regarding copyright protection of state primary law materials. Part II presents the results of the statutory research, accompanied by judicial interpretations of specific provisions, where applicable. The article concludes with an analysis of findings and suggestions for changes in the law.

I
Common Law and Public Policy on Copyright in Primary Law Materials

A. Early Cases

The United States courts first confronted the question of whether copyright exists in state laws and judicial opinions in the mid-19th century. In the first copyright case decided by the United States Supreme Court in 1834, *Wheaton v. Peters*, the Justices stated in dicta, that "no reporter has or can have any copyright in the written opinions delivered by the court." The Court did not cite any legal authority for such a prohibition. It ruled that a Supreme Court reporter could not claim copyright in the Court reports without following statutory formalities established by Congress for securing a copyright.

In later cases, courts qualified this statement by holding that, while no copyright exists in the basic text of judicial opinions and state laws, publishers may claim copyright in the volumes of court reports and annotated statutes. In the 1851 case of *Little v. Gould*, a federal trial court in New York enjoined unauthorized publication of state court decisions despite the state constitutional provision that "judicial decisions shall be free for publication by any person." The court reasoned that while no copyright existed in judicial opinions of the New York Court of Appeal, the state still could secure copyright in the volumes of court reports. In particular, the state statute provided protection for "notes and references," which included, in the opinion of the court, the summary of cases, head-notes, footnotes, and arguments of counsel. In holding so, the court protected a commercial publisher’s investment in printing a volume of reports. The court stressed that no person was at liberty "to intercept and

8. 33 U.S. 591 (1834).
9. Id. at 668.
10. 15 Fed. Cas. 604 (N.D.N.Y. 1851).
11. Id. at 604.
12. Id.
appropriate, or destroy, the just rewards of the enterprise, by
rapaciously seizing upon the book and re-printing it."\(^{13}\)

In the 1886 case Davidson v. Wheelock, a federal trial court in
Minnesota announced the same principle for state statutes.\(^ {14}\) The
court stated that while state laws are "public records, subject to
inspection by every one," copyright could subsist in the original
elements of statutory compilations, such as marginal notes and
references.\(^ {15}\) The court cited no legal authority for this rule.

In Banks & Bros. v. West Publg. Co., the same court relied on its
Davidson decision to hold that an official publisher of state court
reports could not prevent a competing company from printing state
court decisions.\(^ {16}\) The court held that the public should have free
access to both state statutes and judicial opinions because judicial
opinions are binding upon all citizens as official interpretations of the
law.\(^ {17}\) The court relied on a "maxim of universal application that every
man is presumed to know the law" and therefore, everyone should
have free access to the law and its official interpretation.\(^ {18}\) The court
also stated, in the United States, "[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 interpretation thereof."\(^ {19}\) These maxims
were so obvious to the court that it did not support them with any
legal authority. In fact, the court recognized that all the common law
authority from England spoke to the contrary.\(^ {20}\)

In 1886 - the same year Banks & Bros. was decided - two courts
in other jurisdictions came to different conclusions regarding public
access to state judicial opinions. In Nash v. Lathrop, the Supreme
Court of Massachusetts held that a company publishing an authorized
series of Massachusetts Reports did not have the right to prevent
others from making copies of the state judicial opinions.\(^ {21}\) The court
followed the reasoning of the Minnesota court, ruling that citizens
should have uninhibited access to the laws in stating that "[t]he

\(^{13}\) Id. at 607.
\(^{14}\) 27 F. 61 (D. Minn. 1886).
\(^{15}\) Id. (refusing to enjoin publication of the constitution and the laws of Minnesota as revised and re-enacted by the legislature, the court held that an exclusive state contract for publication of statutory law did not entitle the publisher to copyright in the text of the laws.)
\(^{16}\) 27 F. 50 (D. Minn. 1886).
\(^{17}\) Id. at 57.
\(^{18}\) Id. at 57.
\(^{19}\) Id.
\(^{20}\) Id.
\(^{21}\) 6 N.E. 559 (Mass. 1886).
decisions and opinions of the justices are the authorized expositions and interpretations of the laws which are binding upon all citizens.” In addition, the court stressed that it has always been customary for a court reporter to allow free public access to the opinions and to furnish copies upon reasonable compensation.

To the contrary, in Gould v. Banks, the Supreme Court of Connecticut ruled that a state court reporter was under no obligation to furnish copies of court opinions to a weekly law magazine publisher because doing so would breach a state contract for exclusive publication of Connecticut Law Reports. Following English common law, the court held that the state can lawfully hold a copyright in opinions of the judges, since “[t]he judges and the reporter are paid by the state, and the product of their mental labor is the property of the state, and the state, as it might lawfully do, has taken to itself the copyright.”

In 1888, a federal trial court in New York disagreed with the decision of Connecticut’s highest state court. In the State of Connecticut v. Gould, the New York court refused to issue an injunction restraining publication of judicial opinions of the Connecticut Supreme Court of Errors, holding that judicial opinions were free to the publication by “any person who chooses to use them.” The court relied on public policy considerations, that “in the country where every person is presumed and required to know the law,... the fullest and earliest opportunity of access to the expositions of the judicial tribunals should be afforded to all.”

The United States Supreme Court brought clarity to the question of whether copyright existed in judicial opinions in two 1888 cases. In Banks v. Manchester, the publisher of Ohio State Reports sought to enjoin unauthorized publication of decisions of the Supreme Court of Ohio and the Supreme Court Commission of Ohio. The Supreme Court upheld the decision of the Ohio federal circuit court that neither the State, nor the publisher could claim copyright in the judicial opinions. The Court stressed that, under the federal Copyright Act of 1873, copyright could belong only to “a citizen of

22. Id. at 560.
23. Id. at 561.
24. 2 A. 886, 896 (Conn. 1886).
25. Id.
26. 34 F. 319 (C.C.N.Y. 1888).
27. Id.
28. 128 U.S. 244, 247 (1888).
29. Id. at 252.
the United States or a resident therein." The Court ruled that the State did not qualify as "author" under the federal statute and, therefore, could not secure copyright in its works. At the time, the statutory definition of "author" did not include employers who hired employees to produce copyrightable works.

The Court also relied on the public policy principle announced earlier by federal courts in Minnesota, New York, and Ohio, that the public should have access to laws that govern it: "The whole work done by the judges constitutes the authentic exposition and interpretation of law, which, binding every citizen, is free for publication to all . . . ." In addition, the Court stated that the judges could not have any pecuniary interest in their decisions, because the States compensated them for their work. The Supreme Court thus settled the question that copyright does not protect opinions of either federal or state judges.

In *Callaghan v. Myers*, the Court re-iterated its stance that no copyright exists in the opinions of judges, or "in the work done by them in their official capacity as judges." At the same time, the Court recognized that copyright could subsist in the original compilation materials added by publishers to the basic text of judicial opinions. In *Callaghan*, the Court enjoined unauthorized publication of Illinois state court decisions because a publisher copied head-notes, indices, arrangement of cases, table of cases, and even errors from several volumes of Illinois Reports. The Court held that a publisher of court reports can secure copyright protection in "the matter which is the result of his intellectual labor," such as the "division of the reports into volumes, the numbering and paging of the volumes, the table of cases cited in the opinions . . . and the subdivision of the index into appropriate, condensed titles . . . ."

30. *Id.* at 253.
31. *Id.* ("The State cannot properly be called a citizen of the United States or a resident therein . . . 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 to the State").
32. *Id.*
33. *Id.*
34. 128 U.S. 617, 647 (1888).
35. *Id.*
36. *Id.* at 667.
37. *Id.* at 649 (referring with approval to the lower court's decision and stating that "as a general thing, there is but a small part of the report of a case which is the subject of copyright.").
In 1898, the U.S. Court of Appeals for the Sixth Circuit applied the principles announced by the Supreme Court in Manchester and Callaghan to decide a case concerning copyright protection of Michigan's annotated statutes. In Howell v. Miller, a publisher of three volumes of Howell's Annotated Statutes claimed that state officials and a competing publisher violated his exclusive rights in the statutory compilation by printing new volumes of the general laws of Michigan. The court confirmed that Howell was entitled to a copyright in the volumes of Annotated Statutes and that such copyright covered "all in his books that may fairly be deemed the result of his labors." This would include marginal references, notes, memoranda, table of contents, indices, digests of judicial opinions, and head-notes.

However, the court ruled that the competing publisher did not infringe Howell's copyright, because he copied only "the bare text of the statutes and side-notes" without appropriating Howell's annotations, index of statutes, or consecutive section numbering. The court stated that, "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual."

In the 1906 case Ex parte Brown, the Supreme Court of Indiana relied on the U.S. Supreme Court's decision in Manchester and Callaghan to hold that the state could not monopolize publication of court decisions by preventing a court clerk from distributing uncertified, carbon copies of judicial opinions. The court stressed that "any person could print, publish, and sell the reports of the decisions of this court by purchasing the transcripts ... from the clerk." The court also ruled that, although copyright did not subsist in judicial opinions, the state could claim copyright in the syllabi and head-notes prepared by the official court reporter.

38. Howell v. Miller, 91 F. 129 (6th Cir. 1898).
39. Id. at 130-31.
40. Id. at 138.
41. Id.
42. Id. at 140.
43. Id. at 137.
44. 78 N.E. 553 (Ind. 1906).
45. Id. at 558. See also Moore v. Sheppard, 192 S.W. 2d 559 (Tex. 1946) (holding that clerks of Courts of Civil Appeals could supply uncertified, unofficial copies of court opinions to commercial publishers without depositing their profits into the state treasury).
Thus, by the end of the 19th century, courts in this country established a common law rule that no copyright existed in the text of statutes and judicial opinions, both on federal and state levels. In its infancy, this rule did not rely either on English common law, or on domestic legal authority. Instead, courts based their decisions on the public policy principle that citizens should have uninhibited access to the laws that govern them. In addition, in *Banks v. Manchester*, the Supreme Court employed a statutory argument that the States did not qualify as "authors" for purposes of copyright protection. This argument was weakened when, at the turn of the century, U.S. courts embraced the doctrine of "works made for hire" that granted employers copyright in the original works of their employees. The doctrine allowed states to claim copyright in works of state employees. If the latter include state legislators and members of the judiciary, the state arguably may claim copyright in their works.

B. The Doctrine of Works Made for Hire

The U.S. Supreme Court recognized the "works made for hire" doctrine in 1903, when it held that certain advertisements created by an employee during the course of his employment belonged to his employer. The 1909 Copyright Act codified the doctrine, providing that authorship in works made for hire would vest in an employer. The federal statute did not define "works made for hire," but one of the draft bills suggested that the term should include all works "produced by an employee during the hours for which his salary is paid, subject to any agreement to the contrary."

The statutory definition emerged decades later, when the Copyright Act of 1976 defined "works for hire" as (1) works prepared by an employee within the scope of his or her employment, or (2) works commissioned for use in several specified categories. In the absence of the statutory definitions for "employee" and "the scope of employment," courts have applied the common law of agency to determine whether the master-servant relationship existed between the parties, giving rise to the "works made for hire" doctrine. Courts have considered a number of factors including the degree of control exercised by the employer over the manner in which the work was

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produced, the nature and amount of compensation received by the employee, and whether the work was created during work hours and with the use of employer's facilities.

It can be argued that, as long as state legislators and members of the judiciary receive salaries from the state and produce most of their works within the scope of their defined duties, the state may claim copyright in state legislative enactments and judicial decisions. In fact, this approach has been adopted in the United Kingdom, where the Crown owns copyright in the Acts of Parliament and, arguably, in judicial opinions. However, U.S. copyright law has expressly rejected this idea. The 1909 Copyright Act -- the same statute that codified the "works made for hire" doctrine -- explicitly prohibited copyright in any U.S. government publications. This statutory ban was later incorporated into the Copyright Act of 1976 that defined U.S. government works as works "prepared by an officer or employee of the United States Government as part of that person's official duties." In other words, the copyright law exempted federal government works from the scope of the "works for hire" doctrine.

Even though the statutory ban applies only to federal government works, the reasons underlying it could be convincingly applied to state governments. During discussion of the copyright revision bill in the 1960s, Melville Nimmer stated that copyright does not exist in U.S. government works because they are produced with public money. The same could be said about works created by state employees. In addition, a representative of the American Bar Association, John Schulman, claimed that the government does not own copyright in its works because, in democratic states, the government is the people, while "the very essence of the copyright theory is that it is the property of individual persons."

The above analysis of the 19th century cases also demonstrates

54. British copyright expert W.R. Cornish writes that, because judges are appointed by royal authority, they are officers of the Crown, and therefore their judgments may be subject to Crown copyright. See W.R. Cornish, Intellectual Property 367 (1989).
55. "No copyright shall subsist in any publication of the United States Government or any reprint, in whole or in part, thereof . . . ." Copyright Act of 1909 §7.
58. Id. at 1715 (statement of John Schulman, ABA).
that U.S. courts routinely rejected copyright in state and federal laws on the public policy grounds. Courts routinely held that people should have uninhibited access to laws governing them—whether these are state or federal laws. In the early and mid-20th century, courts have accepted the common law rule against copyright in statutes and judicial opinions without much argument or scrutiny. The issue has been rarely litigated.  

The latest development in the history of copyright protection for statutory materials came in a series of cases regarding private ownership of model codes incorporated into state and federal law. Plaintiffs in these cases argued that privately created model codes should fall into public domain when adopted by federal or state agencies. However, to date, federal courts in several jurisdictions were reluctant to strip private organizations of copyright in their model codes.

C. Private Copyrights in State-Adopted Model Codes

In 1980, the U.S. Court of Appeals for the First Circuit vacated a preliminary injunction on unauthorized publication of a privately created model building code that became part of the Massachusetts law. In Building Code Officials & Code Administration v. Code Tech., Inc., the court stated that a model building code copyrighted by a private organization might fall into public domain when adopted by the state as its official code. The court advanced the "metaphorical concept of citizen authorship," according to which state residents are 'authors' of state laws, regardless of who actually drafts statutory provisions. "The law derives its authority from the consent of the public, expressed through the democratic process," the court

59. See State v. Mitchell, 74 P.2d 417 (Mont. 1937). The lawsuit was brought on behalf of the State Publishing Company that lost a bid to publish Montana state court reports. The suit alleged that the bidding terms were unlawful because they included the requirement to furnish the state legislature with a complete set of the old, back numbers of the Montana Reports. The plaintiffs claimed that this requirement effectively eliminated the competition because only the company that held copyright in old volumes of the Montana Reports could answer the terms of the bid. Id. at 419.

The court rejected this argument, saying, "[a]nything contained in an opinion prepared and published by the court cannot be copyrighted." Id. at 424. "No part of a decision as handed down by the court, or anything made a part of the decision when it is sent to the publisher by the court, can be copyrighted." Id. Therefore, nothing precluded other publishing companies from extending their labor and investments to make matrices of previous court decisions.

60. 628 F.2d 730 (1st Cir. 1980).
61. Id. at 734.
62. Id.
reasoned. The court also wrote that state administrative regulations, like state statutes and judicial opinions, should be in the public domain to secure citizens' due process rights including the right to know the laws that govern them. However, the court did not invalidate the private copyright in the building code, remanding the case to a lower court for further hearing.

Fourteen years later, a similar case came to the attention of the U.S. Court of Appeals for the Second Circuit. In CCC Info. Services, Inc. v. MacLean Hunter Market Reps., the federal appellate court refused to invalidate a private copyright in the Red Book of used car valuations despite the fact that several states referred to it in their insurance codes. The court explained that invalidation of private copyright in model codes could raise "very substantial problems under the Takings Clause of the Constitution." In addition, the court stressed that, without copyright protection, private organizations will lack economic incentive to engage in creation of model codes.

In 1997, the U.S. Court of Appeals for the Ninth Circuit relied on the Second Circuit's decision to uphold private copyright in a code of medical procedures adopted by several federal agencies and the state of California. In Practice Mgt Info. Corp. v. AMA, the Ninth Circuit rejected the argument that a privately created medical coding system lost its copyright protection by virtue of becoming the part of federal and state regulations. The court stated that non-profit organizations creating model codes would lose incentive to continue their activity, if the codes fall into public domain when adopted by public agencies.

The court also pointed to the lack of evidence that the public had difficulty obtaining access to the medical coding system. In the absence of a "realistic threat to public access," the court deemed it against public policy interests to deprive the American Medical Association of its copyright in the code.

The most recent case on point involved an unauthorized Internet posting of a model building code that was adopted by several towns in

63. Id. at 734-735.
65. Id. at 74.
66. Id. at 74.
67. Practice Management Information Corp. v. AMA, 121 F. 3d 516 (9th Cir. 1997).
68. Id. at 518-519.
69. Id. at 519.
70. Id. at 519.
Peter Veeck, who operated a non-profit website with information about Northern Texas, posted online the texts of local building codes including the code created by the Southern Building Code Congress International. The latter sued Veeck claiming that he violated the group’s copyright in the code. In response, Veeck argued that the model code lost its copyright protection upon enactment into public law. The U.S. Court of Appeals for the Fifth Circuit upheld copyright in the code, ruling that the public had reasonable access to the code and that copyright was necessary to encourage private organizations “to craft and update model codes.” However, the court limited its decision to “the narrow set of facts” in the case, stressing that, under different circumstances, the balance of interests may tip in favor of invalidating copyright in the state-adopted codes.

Consequently, while the courts agree that no copyright exists in the text of laws promulgated by state legislatures, several cases indicate that privately created model codes retain copyright protection even upon adoption into state laws. At the same time, federal appellate courts in the First and Fifth Circuits stated that the public has the right of reasonable access to state laws. If, in the future, a private copyright in a model code creates obstacles to the reasonable public access to law, courts might invalidate such copyright for public policy reasons.

D. Copyright Act of 1976 and Protection of Compilations

Despite a common law rule against copyright protection of primary law materials, collections of state statutes and judicial opinions can still be protected under federal copyright law. The Copyright Act of 1976, section 103, provides copyright protection for compilations of preexisting material and derivative works. The Copyright Act, section 101, defines a ‘compilation’ as “a work formed by the collection and assembling of preexisting material or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of

72. Id. at *22.
73. Id. at *39.
74. In his dissent, Judge Little argued that adoption of the model code as state law places this code into the public domain, so it could be readily accessible by all citizens. He also argued that, upon enactment, “the law transforms into an idea that is no longer distinguishable from its expression,” thus losing copyright protection. Id. at *40.
authorship. Most collections of state statutes and judicial decisions, together with the publisher's notes, references, and annotations, would constitute compilations for purposes of copyright law.

The Copyright Act defines a 'derivative work' as a "work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship." Depending on a number and significance of editorial revisions performed by commercial publishers prior to publishing state codes, their collections of state statutes may also fall under the definition of derivate works.

The law provides that "the copyright in a compilation or derivative work extends only to the material contributed by the author of such work, and does not imply any exclusive right in the preexisting material." In other words, copyright law protects only original contributions of a compiler, or, as in Callaghan v. Myers, only the matter resulting from the compiler's intellectual labor. A compiler cannot claim copyright in any preexisting material, but only in its arrangement, selection, and any additional features. The question is which elements of compilations meet the requirements of originality under the copyright law.

In the 1909 case Banks Law Publg. Co. v. Lawyers Co-operative Publg. Co., the U.S. Court of Appeals for the Second Circuit held that a publisher could not claim copyright in official state reports, because his sequential arrangement of cases, pagination and distribution of cases into volumes did not meet requirements of originality under copyright law.

The U.S. Court of Appeals for the Eighth Circuit came to an opposite conclusion in 1985, holding that West's arrangement of cases in the National Reporter System, including volume pagination, deserved copyright protection under the Copyright Act of 1976. In West Publg. Co. v. Mean Data Central, the Eighth Circuit prevented Mead Data from using West's "star pagination" system in the LEXIS computer database. The court ruled that a work does not have to be

76. Id.
77. Id.
80. 159 F. 386 (2d Cir. 1909), (per curiam), appeal dismissed, 223 U.S. 738 (1911).
81. See id.
“novel or unique” to satisfy originality requirements under copyright law. Instead, it has to merely originate with the author, or in other words, to be “independently created.”

The requirements of originality became more stringent after the U.S. Supreme Court’s decision in *Feist Publications Inc. v. Rural Telephone Serv. Co.* In this case, the Court held that alphabetical arrangement of telephone numbers in the white pages directory was commonplace and trivial and did not deserve copyright protection. The Court ruled that, in order to be original, compilation has to attain “some minimum level of creativity.”

But even after the *Feist* decision, federal courts in different jurisdictions fail to apply uniform standards in deciding the scope of copyright protection for various compilation features. For instance, in *Oasis Publg. Co. v. West Publg. Co.*, a Minnesota federal district court supported West’s claim of copyright in the case arrangement and pagination system. To the contrary, in *Matthew Bender & Co. v. West Publg. Co.*, a federal district court in New York ruled that the West’s pagination system did not deserve copyright protection for lack of originality.

Subsequently, a heated discussion about copyright protection of primary law compilations unfolded among legal scholars. Deborah Tussey, a former Michie’s editor-in-chief of state codes, criticized a recent trend in several federal circuits to afford copyright protection to technical elements of primary law compilations, such as pagination, section headings, and subject categories. Tussey claimed that under the ‘merger doctrine,’ copyright law does not protect features that are inseparable from the basic legal texts. She also called for adoption of a universal citation system as an alternative to West’s pagination.

At the same time, Tussey admitted that some elements of compilations, including head-notes, annotations, digests, and commentaries, deserve full copyright protection as long as they are

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83. *Id.* at 1223.
85. *Id.*
86. 924 F. Supp. 918 (D. Minn. 1996).
87. *Id.* at 925.
89. *Id.*
90. Tussey, *supra* n. 78, at 234.
91. *Id.* at 218-19.
92. *Id.* at 209.
original and non-trivial.\textsuperscript{93} She argued that, under \textit{Feist}, comprehensive compilations lack originality because they are mostly arranged by alphabetical, chronological, or geographical order.\textsuperscript{94} To the contrary, topical arrangements of legal materials may deserve more protection.

Law professors Ray Patterson and Craig Joyce argued that trivial elements of compilations, such as page numbers in court reports and section headings in statutory compilations, do not deserve protection under both federal copyright law and the relevant case law.\textsuperscript{95} The authors criticized the outcome of \textit{West Publg. Co. v. Mead Data}, explaining that the Minnesota court “fatally confused copyright infringement with unfair competition,” and that section 301 of the Copyright Act pre-empted state action against unfair competition.\textsuperscript{96}

Citing a series of the 19th century cases, Patterson and Joyce argued that the public should have unfettered access to the law in both printed and electronic form, and that copyright should not protect technical elements of primary law compilations.\textsuperscript{97} “Copyright should not be used to subject ideas or public domain expression to captivity, regardless of the effort and investment made to combine such matter into utilitarian products,” the authors wrote.\textsuperscript{98}

Legal librarian Francine Biscardi summarized the argument about copyright in legal compilations by saying that this area of law was “unsettled and controversial.”\textsuperscript{99} After a thorough analysis of the prior case law, she came to conclusion that, while law itself is not copyrightable, literary works embodying it are subject to copyright protection.\textsuperscript{100} Exactly how much protection courts afford to particular compilations is decided on a case-by-case basis.

However, disagreements among courts pale in comparison to different approaches adopted by state governments regarding copyright in their primary law materials. The next section describes the results of the author's 50 state study, which sought to identify

\textsuperscript{93} Id. at 220.  
\textsuperscript{94} Id. at 221.  
\textsuperscript{95} Ray Patterson & Craig Joyce, \textit{Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations}, 36 UCLA L. Rev. 719 (1989). Justice O'Connor cited this article in the \textit{Feist}'s majority opinion.  
\textsuperscript{96} Id. at 731, 777-781.  
\textsuperscript{97} Id. at 731-45.  
\textsuperscript{98} Id. at 808.  
\textsuperscript{100} Id.
specific statutory provisions providing for state copyright in statutory codes, court reports, and administrative regulations.

II
State Statutes Providing for Copyright in Primary Law Materials

A. Statutory Compilations and Other Legislative Materials

Many states protect compilations of their state laws, with four states claiming very broad rights in their statutory codes. Only one state, Illinois, expressly places its statutes in the public domain.

For instance, Colorado, Georgia, Mississippi, and Virginia claim very broad copyright protection for compilations of state statutes. Under Colorado law, the state claims copyright in Colorado Revised Statutes and any ancillary publications including softbound volumes of newly enacted laws. Another provision of Colorado state law extends this protection to “all or any part” of official statutes by prohibiting their publication, reprinting and distribution without a prior permission from the committee on legal services. The state penalizes unauthorized reproduction of state statutes by imposing a $500 fine per each unauthorized book, volume, or computer representation. The law provides exceptions to this strict rule by allowing copying of parts of its statutes for personal use and for bona fide teaching or educational purposes.

Georgia also claims a broad copyright protection for its statutory code. The official Code of Georgia authorizes the state Code Revision Commission to “register the copyright claim in all materials in the Code and any supplements thereto.” Under the state law, the Code Revision Commission is responsible for preparation of additional compilation features, such as cross-references, editor’s

101. Colo. Rev. Stat. Ann. § 2-5-115 (West 1999). “Colorado Revised Statutes and ancillary publications thereto, as published, shall be the sole property of the state of Colorado as owner and publisher thereof and shall be copyrighted for and in behalf of the state of Colorado by the secretary of state or the committee.” Id.
102. Id. § 2-5-117.
103. Id. § 2-5-118(2)(a). “Any person, agency, or political subdivision desiring to publish, reprint, or distribute, whether by use of printed matter or by use of computer or other electronic means, all or any part of the statutes of the state of Colorado, with or without the annotations thereto, must make prior written application to the committee [on legal services].” Id.
104. Id. § 2-5-118 (5)(b).
105. Id. § 2-5-118 (1)(c).
notes, and historical notes. It is authorized to license government and private entities to reprint and distribute excerpts of the Code. Because the state claims copyright in its statutory code, the commission has the power to license publication of the official code, including annotations, in electronic format to a publisher other than the book publisher of the Official Code of Georgia Annotated.

Despite the broad statutory language, state courts have narrowed the copyright protection of Georgia's official code. In the 1982 case *Georgia v. Harrison*, a federal district court in Georgia refused to enjoin publication of unauthorized statutory compilation, holding that basic texts of state laws are in the public domain. In addition, the court ruled that the state could not claim copyright in statutory titles, chapters, and article headings because they are brief and descriptive elements that do not meet requirements of originality under the copyright law. In 1979, the Supreme Court of Georgia also held that the exclusive state contract for publication of official annotated code did not prevent another publisher from printing a competitive product. The court ruled that a competing publisher was free to publish the state statutory code with his own original annotations.

Mississippi also claims a sweeping copyright protection of its official code. Under the Mississippi Code of 1972, the state retains exclusive property rights in "all parts of any act" passed by the state legislature and of any official code including, "without limitation," section numbers, articles, chapters, and titles. The state law provides that commercial publishers of the code shall take copyrights in the statutory compilation and promptly assign copyright to the state of Mississippi.

The state law prohibits not only unauthorized copying, but also a

107. *Id.* § 28-9-3 (9).
108. *Id.* § 28-9-3 (14).
111. *Id.* at 114. "[S]tates, like individuals, may not copyright what is in the public domain." *Id.*
112. *Id.* at 115. "Brief, descriptive language used merely to designate or describe something may not be copyrighted." *Id.*
114. *Id.* at 34.
116. *Id.* § 1-1-9(1). State contract for publication of supplement and replacement volumes of the Mississippi Code provides that the publisher shall register the copyright claim in all materials in supplements, indexes, replacement volumes, and tapes of the Code on behalf and in the name of the state. Supplements shall include new statutory material, judicial decisions construing the statutes, indexes, and references to secondary materials.
mere use of state statutory materials without prior permission from the joint legislative committee on compilation, revision and publication of legislation. According to the state attorney general, the code also is exempt from the state public records law. The penalty for unauthorized use of any part of the state code is a minimum of $1,000 per day for each violation.

By trying to exercise exclusive control over the use of its statutory materials, Mississippi legislature claims rights that exceed the scope of protection granted to copyright owners under federal copyright law. Under the broad statutory language of the Mississippi code, even practicing attorneys would have to secure permission prior to citing statutory provisions in court papers or arguments before the judge. In 1998, to avoid this confusion, the joint legislative committee adopted a statement declaring that any person is allowed to cite or refer to the Code section numbers, articles, chapters or titles without prior permission of the joint committee.

Virginia is the only state that explicitly claims copyright in the text of its statutes. Under state law, the Commonwealth of Virginia retains exclusive property interest in "all parts of any code published or authorized to be published by the State Code Commission, including statute text, regulation text, catch lines, historical citations, numbers of sections, articles, chapters and titles, frontal analyses and revisor's notes."

The state law provides that the text of the Virginia Code and the state administrative code shall be available on the Internet. At the same time, the law provides that, notwithstanding online publication, a commercial publisher shall retain copyright in annotations, cross-reference notes, editor's notes and other materials that the publisher independently prepared and added to the code.

117. Id. § 1-1-9 (3)(a) (2000).
118. Miss. Atty. Gen. Op., 1995 Miss. AG LEXIS 674, (Aug. 14, 1995). (The Mississippi Code is exempt from the Public Records Act, because the law sets up a comprehensive scheme for publication and distribution of the code to the public. In addition, the law provides for public access to the code by requiring distribution of the code to country libraries and the state law library. The public also has access to all papers and records of the chancery clerk "during reasonable hours on business days.").
120. See 17 U.S.C. § 106 (Supp. 2000). Copyright Act of 1976 §106 grants authors exclusive rights to reproduce, to distribute, to prepare derivative works, to perform, and to display the work to the public. Federal copyright law does not grant copyright owners the exclusive right to control the use of a copyrighted work. Id.
123. Id.
Two states, Nevada and Pennsylvania, claim copyright in all publications issued by the state, which may include both official statutory compilations and court reports. Nevada law authorizes the superintendent of state printing to secure copyright “under the laws of the United States in all publications issued by the State of Nevada.” In 1971, the state attorney general explained in an advisory opinion that only state publications copyrighted in compliance with the federal copyright law have a legally binding copyright. This means that state materials published prior to 1978 without copyright notice are in the public domain and can be copied without restrictions.

In addition, Nevada authorizes the state legislative counsel to secure copyright in all publications issued by the legislative counsel bureau. These publications include opinions of the legislative counsel upon questions of law including existing law and pending legislation which has become a matter of public record.

Similarly, Pennsylvania claims copyright in “all publications of the Commonwealth [of Pennsylvania], or of any department, board, or commission or officer thereof, including the State Reports . . . .” In addition, the state law authorizes the superintendent of public printing and binding to purchase from a copyright owner all copyrights in the Smull’s Legislative Hand Book and Manual of the State of Pennsylvania and to legally assign the copyright to the state.

Several states including Idaho, Minnesota, Nebraska, and South Dakota claim copyright in a specifically titled compilation of their statutes. For instance, Idaho law provides that “the Idaho Code is the property of the state of Idaho, and the state of Idaho and the taxpayers shall be deemed to have a copyright on the Idaho Code.” This provision reflects the “metaphorical” theory of authorship invoked in the Building Code case, under which the state citizens are authors of the laws that govern them. Another statutory provision specifies that a publishing company shall take copyright in “all compilations” of the Code and assign the same to the state of Idaho.

127. Id. § 218.695.
Under Idaho law, if a person reproduces the Code for "the purpose of direct or indirect commercial advantage," he or she owes a royalty payment to the Idaho Code commission in addition to any copying fees. The law provides that infringers shall be liable for actual damages and profits or for statutory damages not to exceed $10,000.

Minnesota law instructs the revisor of statutes to send copies of the Minnesota Statutes and supplements to the Library or Congress "for copyright and depositary purposes." Similarly, Nebraska law instructs the revisor of statutes to copyright the statutory supplements and reissued volumes of Nebraska statutes "under the copyright laws of the United States for the benefit of the people of Nebraska." The state law also empowers the constitutional convention to secure a copyright for publication of its proceedings.

Under South Dakota law, neither state agencies nor individuals may print or distribute copyrighted material from the South Dakota Codified Laws without express permission of the state code commission. Violation of state copyright is classified as a misdemeanor. However, the state law does not specify which material from the statutory compilation shall be considered copyrightable.

Four states — California, Kentucky, Michigan, and Oregon — enacted similar provisions that secure the copyright interest of the state in statutory and legislative materials posted on the Internet. For instance, California law provides that the legislative counsel shall make available to the public in electronic form the legislative calendar, text of the bills, history, status, veto messages, and analyses of the bills, vote information, the California Codes, the state constitution, and all statutes enacted since 1993.

Under Kentucky law, the legislative research commission shall post online the state constitution, the Kentucky Revised Statutes, the Kentucky Acts, and the state administrative regulations. However,
under another statutory provision, state agencies are authorized to charge fees for online access to their electronic records. This provision applies to materials posted on the official state website.

Michigan law provides that the legislative council shall provide the public with free Internet access to the Michigan Compiled Laws, the text of the Michigan Register, the text of the house and senate journals, the text of bills and fiscal bill analysis.

Similarly, Oregon law requires the legislative administration committee to make available on the Internet the legislative calendar, the text, history and status of each bill, vote information, the state constitution, and all state laws enacted on or after September 9, 1995. In addition, Oregon law gives the committee discretion to decide whether to release the text of the Oregon Revised Statutes in electronic form.

All of the above state laws contain an identical provision according to which online posting of the legislative materials does not “alter or relinquish any copyright or other proprietary interest” of the state in them. While this provision does not explicitly say whether the states claim copyright in official compilations of their statutes. However, the provision does indicates that the states do not intend to forgo their copyright interests in the statutory and legislative materials by making them available free of charge on the Internet.

A court in at least one state, Wisconsin, ruled in an unpublished opinion that the state may claim copyright in features added by the revisor of statutes to the official collection of Wisconsin laws. In

142. Ky. Rev. Stat. Ann. § 61.874 (6) (2000) “Online access to public records in electronic form ... may be provided and made available at the discretion of the public agency. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, a public agency may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements.” The official government website of Kentucky explicitly refers to this section. See http://www.lrc.state.ky.us/home.htm (last visited Feb. 16, 2001).
144. Id. § 4.1203(5).
145. Id. § 4.1204(a)(1).
146. Id. § 4.1204(b)(1).
147. Id. §§ 4.1204(d)(1), (g)(1).
149. Id. § 173.763(2)(c). Oregon law also authorizes the legislative administration committee to secure a copyright in “copyrightable materials developed, published or produced by committee staff.” Id. § 173.770.
151. State of Wisconsin v. LOIS, Inc., 603 N.W.2d 748, 230 Wis. 2d 185 (Wis. App. 4th
State of Wisconsin v. LOIS, Inc., the state court of appeals held that material produced by the revisor of statutes, to accompany the text of the statutes and administrative code, was not in the public domain under either federal or state laws. In this case, the state of Wisconsin and LOIS, Inc. signed a contract that obliged LOIS, Inc. to pay $72,000 for the right to reproduce revisor’s compilation materials on a CD-ROM. However, the commercial publisher failed to make the second payment, claiming that the compilation material fell into the public domain. The court disagreed with the publisher saying that the literary matter at issue, including the preface to the statutory code, met “the extremely low” requirement of originality under federal copyright law.

The court also ruled that the absence of explicit statutory language providing for the copyright of the revisor’s compilation materials did not necessarily imply the lack of copyright protection. To the contrary, since the statute provided for the sale of the statutory compilation, the state intended to profit from the sale, the court held. According to the court, this goal would be negated if the statutes were in the public domain and anyone could reproduce them. Therefore, the Wisconsin court hinted that the state’s copyright interest in its statutes might be implied by the statutory provision for the sale of statutory compilations.

One state, Illinois, denies copyright protection to the texts of state statutes and accompanying compilation materials. Illinois law explicitly provides that, “the Illinois Compiled Statutes, including the statutes themselves and the organizational and numbering scheme. . . shall be entirely in the public domain for purposes of federal copyright law.” Similarly, Illinois holds in the public domain the official compilation of the state administrative rules including its codification system, indexes, tables, and other information location aids.
At the same time, Illinois may hold copyrights in other state legislative materials. Illinois is one of the states that require online publication of specified government materials, such as the schedule of legislative floor sessions, text of bills, rules of the house and the senate, text of public acts, the Illinois Compiled Statutes, the state constitution, and the state administrative rules.\(^{163}\) Like other similar state statutes, Illinois law provides that online posting of the legislative material shall not "alter or relinquish any copyright or other proprietary interest or entitlement of the state relating to any of the information" made available under the law.\(^{162}\)

Like Illinois, Texas does not favor copyright in state statutory materials. In the late 1980s, the state launched an unsuccessful attack on the copyright claimed by West Publishing Co. in the compilation features of the state revised statutes. West and its predecessor, Vernon Law Book Company, have collected, arranged, and published Texas statutory law since 1914, claiming copyright in the article numbers, headings, and arrangement of the Vernon's Annotated Revised Civil Statutes.\(^{163}\) From 1941 to 1985, West also published the state session laws.\(^{164}\) However, in 1985, Texas awarded the bid contract for the printing of the session laws to the Bancroft-Whitney Company.\(^{165}\) The latter challenged West's copyright in the article numbers and headings of the state statutory compilation.

In 1987, the state attorney general Jim Mattox supported the challenge to West's copyrights by stating in his advisory opinion that West could not claim copyright in the article numbers of the compiled laws of Texas.\(^{166}\) Mattox referred to the "established principle of federal common law," according to which primary law materials lie in the public domain.\(^{167}\) He also wrote that West's copyright in article numbers was against the public interest, because citizens needed "sensible access to Texas law."\(^{168}\)

The same year, Mattox and Bancroft-Whitney lobbed the state legislature for official "adoption" of the Vernon's arrangement.\(^{169}\) The

\(^{162}\) Id. §145/5.09 (11).
\(^{164}\) Id. at 174.
\(^{165}\) Id.
\(^{167}\) Id. at 3.
\(^{168}\) Id. at 4.
Senate Bill 644 would have allowed other companies to use the numbers and headings West has compiled for the state. After the Texas legislature failed to pass the bill, Mattox filed suit in a federal court seeking invalidation of the West's copyright in the statutory compilation features.  

Mattox argued that the state has an obligation under the due process clause to provide its residents with access to its laws and that West's copyright impinges on this obligation. However, both federal district and appellate courts refused to consider the case for the lack of "actual controversy." In State of Texas v. West Publishing Co., the U.S. Court of Appeals for the Fifth Circuit explained that it lacked a subject-matter jurisdiction over the case because the parties were not in adversarial conflict with each other. In fact, West has never indicated its intention to sue the state of Texas for infringement of West's copyrights. Consequently, the state's attempts to invalidate West's copyright in the statutory compilation featured proved to be unsuccessful.

B. Court Reports

Statutes in at least 14 states provide copyright protection for state court reports. Most of the states claim copyright in volumes or compilations of the court reports; none of the states claim copyright in the opinions of judges. At least one state, Kentucky, specifically provides in its statutes that "there shall be no copyright of the Supreme Court opinions."  

Seven states – Kansas, Michigan, Minnesota, Nebraska, Ohio, Rhode Island, and West Virginia – claim copyright in the bound volumes of court reports. For instance, Kansas's law requires the state supreme court reporter to secure copyright in each volume of court reports "for the use and benefit of the state of Kansas." In 1981, the state attorney general explained in the written opinion that copyright protection of court reports is limited to "the parts which represent the reporter's or publisher's own work and labor in production and does not cover the opinions or other material prepared by the judges in the

171. 882 F. 2d at 177.
172. 882 F. 2d at 171.
discharge of their judicial duties.\textsuperscript{175}

The attorney general wrote that reports can be copyrighted only as compilations and derivative works under section 103(b) of the federal Copyright Act. The copyrightable material would include indexes, tables, and the actual compilation of cases. The opinion also stated that reports published without copyright notice prior to 1978 had forfeited their copyright and fell into the public domain.

Michigan law provides that a publisher of the state supreme court reports "shall take out no copyright except to the secretary of state for the use and disposal of the state, upon any volume published" under the contract.\textsuperscript{176} In 1955, the state attorney general explained that, under this law, decisions of the supreme court are free to publication by all, but the text of the syllabi, head-notes, footnotes, indexes and references prepared by the court reporter and the publisher are protected by copyright.

Under Minnesota law, printed volumes of the supreme court reports "shall be copyrighted by the secretary of state in trust for the people."\textsuperscript{177} The volumes shall include indexes, tables of cases, and "other matter necessary to complete the volume."\textsuperscript{178}

In Nebraska, the state constitution provides that "the copyright of the state reports shall forever remain the property of the state."\textsuperscript{179} In addition, the state statute, dating back to 1879, requires the supreme court reporter to copyright for the benefit of the state volumes of the Nebraska Supreme Court reports and the Court of Appeals reports.\textsuperscript{180}

In the 1906 case \textit{State of Nebraska v. State Journal Co.,}\textsuperscript{181} the Supreme Court of Nebraska held that a publisher did not breach the contract with the state by printing extra copies of court reports for its own profit, because reports were in the public domain and free to copying by all. The court held that the supreme court opinions entered the public domain before their publication by the state contractor because the state newspapers regularly published the syllabi and excerpts of the opinions as soon as the decisions were rendered. The court also stressed that the state's primary purpose in


\textsuperscript{178} \textit{Id.}

\textsuperscript{179} Neb. Const., art. 5 § 8.


\textsuperscript{181} 77 Neb. 752 (Neb. 1906).
publishing court opinions was to make them "easily accessible to all the citizens," not to receive profit upon sale to benefit the state library.

Ohio law provides that the supreme court reporter shall secure a copyright for the use of the state in bound volumes of the reports of the supreme court, the court of appeals, and of inferior courts.\textsuperscript{182} The reports shall contain an index, a table of cases, a list of citations, and other proper tabulation.\textsuperscript{183}

The Rhode Island law requires the supreme court reporter to assign to the secretary of state, for the use of the state, the copyright of each volume of the supreme court reports.\textsuperscript{184} Similarly, under West Virginia law, the official reporter of the supreme court of appeals shall secure copyright of the bound volumes and advance sheets of the West Virginia Reports.\textsuperscript{185} The volumes shall contain an index and a table of cases.\textsuperscript{186}

Two states, Illinois and New York, provide in their statutes a non-exhaustive list of the compilation features protected by state copyright. For example, Illinois law provides that the state supreme court shall take copyright "of the statements of facts, of the syllabi, of the index and of all other notes and references prepared by the reporter of decisions."\textsuperscript{187}

The New York law provides that the secretary of state must take copyright in the statements of fact, head-notes and "all other notes and references prepared by the law reporting bureau" in court reports.\textsuperscript{188} In 1964, the attorney general explained that the text of court opinions is in the public domain and free for copying by all.\textsuperscript{189} At the same time, additional features, such as statements of fact, head-notes and other matter prepared by the law reporting bureau, are copyrighted and cannot be used for commercial purposes.\textsuperscript{190}

The statutory codes of other states, such as Georgia, Maryland, New Hampshire, and Tennessee, provide a general copyright

\textsuperscript{183} Id.
\textsuperscript{184} "[H]e or she [the reporter]... shall assign to the secretary of state, for the use of the state, the copyright of the volume, if it shall have been copyrighted." R.I. Gen. Laws § 8-1-8 (1997).
\textsuperscript{185} W. Va. Code § 5A-3-23 (2000).
\textsuperscript{186} Id.
\textsuperscript{187} 705 Ill. Comp. Stat. § 65/5 (1999).
\textsuperscript{188} N.Y. Jud'ry Laws § 438 (1999).
\textsuperscript{190} Id.
protection for court reports, without specifying whether the state claims copyright in bound volumes as a whole, or only in specific compilation features added by a court reporter. For instance, under Georgia law, "[t]he [court] reports shall be copyrighted and the copyright shall belong to the state."\textsuperscript{191} Maryland law requires the state court reporter to "secure copyright for the state of Maryland" in reports of cases decided by the state court of appeals and in the court of special appeals.\textsuperscript{192}

New Hampshire authorizes the state court reporter to dispose of the copyright of court reports "as he shall deem expedient."\textsuperscript{193} Tennessee law provides that after five years from the publication of reports, their copyright shall revert to the state.\textsuperscript{194} No court interpretations of the above statutes were available at the time of research.

C. Administrative Rules

At least five states – Florida, Kentucky, Minnesota, Oklahoma, and Oregon – claim copyright interest in the compilations of their administrative rules. For instance, Florida requires the state department to retain the copyright in the Florida Administrative Code.\textsuperscript{195} The Code is an official compilation of the state administrative rules and comprises all rules adopted by each agency, history notes, and complete indexes to the rules.

In a similar vein, Kentucky law provides for exclusive publication of the state administrative regulations by the state legislative research commission.\textsuperscript{196} Minnesota requires the state revisor of statutes to copyright compilations and supplements of all permanent agency rules in the name of the state.\textsuperscript{197} The compilations of agency rules shall include the rules and appropriate tables, annotations, references, explanatory notes, and indexes.

Oklahoma law is very specific about the elements of the state administrative code that are protected by copyright. Under state law, the state owns a property interest in the codification system of the administrative code, derivations, cross references, notes of decisions, source notes, authority notes, numerical lists, and codification

\begin{itemize}
\item \textsuperscript{194} Tenn. Code Ann. § 8-6-204 (1993).
\item \textsuperscript{195} Fla. Stat. § 120.55 (1)(a) (2000).
\end{itemize}
To the contrary, there is no copyright in the actual text of administrative rules, indexes, tables, and other aids relevant to the publication of the code and register. The law also allows incidental reproduction of copyrighted material together with the text of the rule for private use of an individual, but not for resale.

Oregon also claims copyright in its administrative rules by authorizing the secretary of state to copyright the compilation of agency rules, called the Oregon Administrative Rules. In addition, under state law, the secretary of state shall make administrative rules available to the public on the Internet. The statute says, this electronic posting shall not relinquish any copyright interest the state may have in its administrative rules.

Research of state statutes has revealed that many states claim copyright interest in their primary law materials, such as statutory compilations, court reports, and administrative regulations. The scope of copyright protection differs from state to state. It ranges from broad copyright claims in all and any parts of statutory codes to protection of specific compilations features, such as indexes, tables of cases, and references.

III
Analysis of Findings

State governments have several incentives to claim copyright in primary law materials. First, copyright allows States to ensure accurate reproduction of their laws. In other words, copyright protection could help in preventing unauthorized alterations of state statutes. Georgia's government made this argument in trying to prevent Harrison Publishing Company from printing an unauthorized compilation of Georgia state statutes. However, a federal district court in Georgia did not find this argument compelling, holding that it is up to the people to decide whether they want to take a risk of using unofficial compilation of state laws. The court stressed that any person citing the U.S. Code Annotated and the U.S. Code Service

199. Id.
200. Id.
202. Id. § 183.365 (1).
203. Id. § 183.365 (7).
205. Id. at 115.
takes the same risk because both of these codifications are unofficial and published by private commercial publishers.\textsuperscript{206}

Second, copyright provides economic incentive for commercial publishers to engage in publication of state legal materials. Publishers need some type of reimbursement for their considerable efforts and financial investments in collecting, editing, arranging, and publishing state legal materials. If any person can appropriate free of charge the results of their labor, commercial publishers, arguably, will have no incentive to engage in the business of publishing state legal materials. As a result, the public would be denied access to state statutes and judicial opinions altogether.

Third, by licensing reproduction and distribution of their official law compilations, states can generate revenue in the form of royalty payments, copying fees, and hefty fines imposed on those who violate state copyright interests. For instance, in 1906, Nebraska tried to persuade its Supreme Court that copyrighting court reports was necessary to raise money for the state library fund.\textsuperscript{207} The court denied this argument saying that the state's primary purpose in publishing court decisions is to make them accessible to the public, not to generate revenue.\textsuperscript{208}

The development of new technologies, including CD-ROM and the Internet, provided new incentives for state governments to claim copyright in their legal materials. Compilations of state legal materials become even more valuable when presented in electronic form. Private companies and individuals are often willing to pay for the right to use electronic products because they make it easier to find and access various legal data. The state of Kentucky makes it unlawful to use information available on its website for commercial purposes without agreement with the Legislative Research Commission.\textsuperscript{209} California, Michigan, and Oregon have adopted laws safeguarding the state's property interest in their primary law materials published on the Internet.\textsuperscript{210} Other states put a copyright sign at the bottom of their web pages, which could mean that they claim copyright in the online display of their legal materials.\textsuperscript{211}

\textsuperscript{206} Id.
\textsuperscript{207} Nebraska v. State Journal Co., 110 N.W. 763, 764 (Neb. 1906).
\textsuperscript{208} Id.
\textsuperscript{209} See <http://www.lrc.state.ky.us/home.htm> (last visited Feb. 16, 2001).
\textsuperscript{211} See, e.g., Alabama Legislative Information Home Page at <http://www.legislature.state.al.us/ALISHome.html>; see also State of Wyoming home
Finally, states may seek to control the use of their primary law materials. For instance, several states require third parties to obtain permission of special legislative commissions prior to reproducing portions of the statutes. At the same time, state laws do not provide for compulsive licensing – a system under which the state would be obliged to license reproduction of its statutes upon payment of reasonable fees. In the absence of compulsive copyright licensing, the state legislative commissions have sole discretion to approve, deny, or impose restrictions on the third-party use of state statutes. Therefore, at least in theory, there is an opportunity for abuse of discretion, when legislative commissions would license the use of state statutes to some companies and deny requests of others.

However, there are strong constitutional and statutory arguments why state primary law materials should be in the public domain. Under the constitutional copyright clause, Congress has the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” It has been widely acknowledged that the U.S. copyright law promotes the progress of science and the arts by providing authors with economic incentives to engage in creative activities. It can be argued that state governments and courts do not need economic incentives to promulgate new laws or write judicial opinions. State legislators and judges will continue performing their duties – enacting new laws and rendering judgments – regardless of whether they receive copyright royalties or not. The U.S. Supreme Court stated this principle more than a century ago in Callaghan v. Myers, holding that copyright could not exist in the work done by judges “in their official capacity as judges.”

In addition, the state’s control over the use of its primary law

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materials may violate the constitutional due process clause. In *Building Code Officials*, the First Circuit stated that state citizens have the due process right of access to statutes and judicial opinions. The court said, "due process requires people to have notice of what the law requires of them so they may obey it and avoid its sanctions." By claiming exclusive control over reproduction and distribution of their primary law materials, state may hinder public access to important legal documents. According to Melville Nimmer, "failure to observe such due process notice requirements would certainly constitute a defense for one charged with violation of the nonpublicized law."

The federal copyright law also may preclude state copyright in primary law materials. For instance, under the Copyright Act of 1976 copyright could exist only in "original works of authorship fixed in any tangible medium of expression . . . ." In regard to a state's ownership of copyright, the question may arise - who is the author of a state statute or administrative regulation? Many people participate in the process of drafting and passing a statute - citizens, lobbyists, and interest groups come up with proposals for changes in law, legislative staff drafts initial text of a bill, individual legislators and legislative committees negotiate the bill's provisions, and, finally, members of state legislature have to vote to enact a bill into law. Likewise, many people participate in drafting administrative regulations - staff members of administrative agencies may write the initial text of a regulation, which is then presented for comment to the public at large. Since there are many people involved in the process of legislating or rulemaking, who should be considered an author for purposes of copyright law?

Alternatively, should legislative enactments be considered works of joint authorship, defined in the Copyright Act as works "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"? However, legislative enactments often present a compromise among various political entities that have different agendas. People who initially proposed a change in law may disprove

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216. U.S. Const., amend. V "No person shall... be deprived of life, liberty, or property, without due process of law."
218. *Id.*
of the final language adopted by the legislature. In this context, parties may not have the initial intention "that their contributions be merged into inseparable or interdependent parts of a unitary whole." Absent this initial intention, legislative works might not qualify as "joint works" under the Copyright Act.

The authorship of state judicial opinions is unclear as well. Courts in the United States have held repeatedly that neither judges nor court clerks can claim copyright in judicial opinions because they are employees of the state, and the state compensates them for their labors. Under the "works made for hire" doctrine, the State, as an employer, could claim copyright in works produced by its employees including state judges. However, this notion would threaten judicial independency and run afoul of the fundamental principle of separation of powers.

Some courts tried to address the question of authorship in primary law materials by embracing a "metaphorical concept of citizen authorship." For instance, in *Building Code Officials*, the First Circuit ruled that state citizens are "authors" of state laws, regardless of who actually drafts statutory provisions. As "authors," citizens can freely reproduce and distribute state laws. A federal trial court in Minnesota expressed the same idea a century ago in *Banks v. West Publ'g Co.*, holding that, in the United States, "each 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 interpretation thereof." However, the "metaphorical concept of citizen authorship" may not be the best answer to the question of state copyright ownership. Under this concept, authorship belongs to citizens of the state because they participate in the state election process, pay taxes, and have to abide by state laws. This necessarily means that citizens of other states and foreigners could not claim authorship in the state's legislative enactments. Therefore, while state citizens would have unfettered access to the state's primary law materials, citizens of other states and foreigners would have to secure the state's permission to reproduce these materials. For instance, Idaho codified the concept of citizen authorship by providing in its statute that, "the state of Idaho and the taxpayers shall be deemed to have a copyright on the Idaho

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222. *Id.*


225. 27 F. at 57.
The literal reading of the Idaho law could mean that all Idaho taxpayers, as "authors" of the state code, can reproduce it free of charge. However, others – citizens of other states and foreigners – would have to secure the state's permission prior to reproducing the Idaho Code. This solution does not seem practical in a country such as the United States where the population is very mobile. Americans travel for personal and business purposes all over the country and may need access to laws in other states as well as they need access to the laws in their own state of residence.

In addition, statutes securing the state’s exclusive control over its legal materials may violate the fair use provision of the federal copyright law. The doctrine of fair use, codified in section 107 of the Copyright Act, permits unauthorized use of copyrighted works for special purposes, such as teaching, research, criticism, and news reporting. Under federal law, courts have to take into consideration several factors in deciding whether the use of a copyrighted work in any particular case is a fair use. These factors include: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the copied portion, and (d) the effect of the use upon the potential market for the copyrighted work.

The fair use doctrine requires the states to allow unauthorized reproduction of portions of their copyrighted materials in particular circumstances, including reproduction for purposes of scholarship, news reporting, and comment. Colorado incorporated the fair use provision in its statutes by allowing unauthorized copying of portions of its code for personal use and for bona fide teaching and educational purposes. At the same time, Virginia and Mississippi claim very broad copyright protection of their statutes, but do not provide for fair use of their primary law materials. For instance, Virginia claims copyright in the very text of its statutes and regulations without providing for any fair use exceptions. Likewise, Mississippi prohibits the mere use of its statutory materials without prior permission from the legislative committee.

However, federal copyright law takes precedence over any state copyright provisions. Section 301 of the Copyright Act provides that federal copyright law applies to all works of authorship that are

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228. Id.
subject to copyright. The statute provides, "Thereafter, no person is entitled to any such [exclusive] right or equivalent right in any such work [work of authorship] under the common law or statutes of any states." This means that federal copyright law supersedes both common law and the state copyright provisions. Therefore, even though a state may not provide for fair use of its primary law materials, federal copyright law mandates the state to allow fair use in particular circumstances. As a result, the statutes of Virginia and Mississippi may violate the fair use provision of the Copyright Act.

Even more importantly is that the state's ownership of copyright in primary law materials runs afoul of the fundamental public policy principle that citizens in a democratic society must have uninhibited access to the laws. For more than 100 years, U.S. courts relied on the public policy considerations to deny the states copyright ownership in the texts of state statutes and judicial opinions. In Georgia, a federal district court went as far as denying on public policy grounds copyright protection for elements of statutory compilation, such as section headings and titles. The First Circuit stated in Building Code Officials, that even administrative regulations should lay in the public domain. Legal scholars also have argued that public policy considerations require free reproduction of technical features including arrangement of statutes and cases, as well as page and section numbering. So far, only two states have responded statutorily to these concerns. Illinois law provides that the Illinois Code and administrative regulations are in the public domain for purposes of the federal copyright law. In addition, Kentucky law provides that, "there shall be no copyright of the Supreme Court opinions."

Most states still claim some copyright interest in their statutory codes, court reports, or administrative regulations. Many states do not specify which elements of statutory codes and court reports are protected by copyright. For instance, Georgia law contains a short provision that "[court] reports shall be copyrighted and the copyright

233. Id.
234. See Part I of the article, "Common Law and Public Policy on Copyright in Primary Law Materials."
236. 628 F.2d at 734.
237. See generally Tussey, supra n. 78; Patterson and Joyce, supra n. 95, at 736-39.
shall belong to the state.” Similarly, Pennsylvania copyrights “all publications of the Commonwealth [of Pennsylvania], or any department, board, or commission or officer thereof, including the State Reports.” The constitution of Nebraska also provides that, “copyright of the state reports shall forever remain the property of the state.”

These broad pronouncements of the states’ copyright interest in the primary law materials shall be interpreted narrowly to comply with the requirements of constitutional due process and the common law. The well-established common law principle denies copyright protection to basic legal texts. Under common law, states can claim copyright only in original elements of their legal compilations, which reflect intellectual labor on the part of a compiler. These elements would include annotations, editor’s notes, and references, but would not include basic texts of statutes or judicial opinions.

Meanwhile, a layperson unfamiliar with 19th century common law would not know this principle and could possibly think that, by claiming copyright interest in its code, a state was attempting to protect all the materials in the code, including the text. There are at least three ways to avoid this confusion. First, the state statute may be challenged in court. This happened in Georgia, where a federal district court held the basic texts of state laws to be in the public domain. However, in the absence of a judicial decision, the broad statutory provisions remain the law of the state and govern the public use of state laws. This creates an undesirable situation when citizens have to comply with statutory provisions that would be considered invalid if challenged in court.

Second, state legislatures could amend their laws by providing explicitly that the basic texts of state statutes, regulations, and judicial opinions are in the public domain. Arguably, unoriginal elements of legal compilations, such as chronological and geographical case arrangement, page numbering, and title headings, also should be exempt from copyright protection.

Finally, Congress can amend section 105 of the Copyright Act of 1976 to provide that copyright protection is not available for texts of state statutes, judicial opinions, and possibly administrative regulations. This amendment would not change existing law – it

would merely codify the common law principle applied by the courts since the 19th century. Congress also may consider enacting a prospective statute prohibiting copyright in those elements of primary law compilations that are indispensable to the use of basic legal texts. This would include section numbers and title headings in statutory compilations, and page numbers in court reports.

Such amendment would remedy a somewhat ‘anomalous’ situation in federal copyright law, when courts rely on the common law precedent, rather than on the federal statutory law in deciding cases of state copyright ownership. In its first copyright case, *Wheaton v. Peters*, the U.S. Supreme Court held that copyright exists in the United States not as a common law right, but as a statutory privilege:

> It is clear, there can be no common law of the United State. . . . There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption. 244

This means that, in deciding copyright questions, courts should be guided by federal copyright statutes. However, when it comes to the state ownership of copyrights, federal law provides little guidance, and courts repeatedly turn to the common law authority.

The common law authority on state ownership of copyrights is not entirely satisfactory either. The key argument employed by the courts throughout the 19th and 20th century is a public policy consideration that, in a democratic society, citizens should have unfettered access to the laws. But public policy pronouncements are a unique prerogative of the legislative branch. In addition, public policy is not cast in stone—what was considered a sound public policy in the 19th century may not be as sound two hundred years later. A series of cases involving privately created model codes present a perfect example of how public policy priorities change over time. When deciding the copyright status of state-adopted model codes, courts were balancing two public interests—"on the one hand, encouraging innovation through copyright and, on the other hand, ensuring free access to the law." 245

Departing from the 19th century precedent, federal appellate courts in the First, Fifth and Ninth Circuits upheld private copyrights in the model codes that became an integral part of state law. The courts justified their policy judgment on the ground that private organizations save governments time and money by creating model codes. However, it is not entirely clear why

245. Peter Veeck v. SBCCI, 2001 U.S. App. LEXIS 1428 at *17 (5th Cir. 2001)
governments cannot provide monetary compensation to creators of model codes instead of granting them private ownership in public laws. Consequently, if uninhibited public access to laws remains an important public policy consideration, Congress is best equipped to codify this principle making it legally binding on state legislatures and courts.

In addition, the change in federal copyright laws would bring uniformity to state laws on copyright. Currently, different states claim various degrees of protection in their legal materials. For instance, Mississippi protects "all parts of any act" passed by the state legislature, while New York specifically protects the statements of fact, head-notes, notes, and references in its court reports. The lack of uniformity in state copyright laws may deter some creative activity. For instance, an author may wish to publish a comprehensive study of state laws regulating public access to government documents. In order to include all relevant statutory provisions in the book, the author would have to ask each of the 50 states whether they claim copyright in section numbers and title headings of their codes. If some states protect these elements, the author would have to secure permission for their use from designated legislative bodies and possibly pay copyright royalties. If the author ventures to include statutory provisions without the states' authorization, she may face hefty fines. For instance, Mississippi imposes a $1,000 daily fine on unauthorized uses of its code. The daunting task of securing copyright permission from each state for the use of its statutory provisions could deter an author from undertaking and publishing her research.

The same problem would arise if an Internet user were to decide to place hyperlinks to the text of state laws on that user's website. If the state protects the online display of its laws, Internet users may need to secure the state's permission prior to downloading excerpts of the code.

By amending section 105 of the federal Copyright Act, Congress would promote uniformity in state ownership of copyright, providing incentive for publication of comprehensive studies of state laws. The amendment would also ensure free public access to primary law

246. Id. at *40 "It is antithetical to our nation's concept of public participation for a private entity to monopolize the public laws." (District Judge Little, dissenting)
materials in the states and would prevent possible abuse of discretion by state authorities with copyright licensing power.