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# Who Owns the Law? How to Restore Public Ownership of Legal Publication

Leslie A. Street

*William & Mary Law School*, [lstreet@wm.edu](mailto:lstreet@wm.edu)

David R. Hansen

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# WHO OWNS THE LAW? WHY WE MUST RESTORE PUBLIC OWNERSHIP OF LEGAL PUBLISHING

*Leslie A. Street & David R. Hansen*<sup>1</sup>

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<sup>1</sup> Leslie Street is Director of the Law Library and Associate Professor of Law, Mercer University School of Law. She can be contacted at [street\\_l@law.mercer.edu](mailto:street_l@law.mercer.edu). Dave Hansen is the Associate University Librarian for Research, Collections & Scholarly Communications at Duke University Libraries. He can be contacted at [david.hansen@duke.edu](mailto:david.hansen@duke.edu).

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Who owns the law? In the United States, most law is published by a handful of companies. Among the largest are Thomson Reuters, a Canadian mass-media information firm, and RELX Group, a Dutch analytics and information company. With very few exceptions, almost all “official” versions of state statutory codes and regulations are published by those two companies. Thomson Reuters also controls the National Reporter System, the caselaw reporters which are the required version for citation before most U.S. courts.

Publication, of course, is not synonymous with “ownership.” Or at least it should not be.<sup>2</sup> But, in the U.S. legal system, those two concepts have begun to merge; publishers now use powerful legal tools to control who has access to the text of the law, how much they must pay, and under what terms. This paper is about how that transfer of control occurred, and how it is harmful.

Meaningful access to the law is a fundamental prerequisite for due process, and ultimately the rule of law, yet the problem of private control is longstanding<sup>3</sup> and growing worse in the advent of electronic publishing and publisher consolidation. Part I of this article explains why effective access to the law is so important. Part II explains some of the challenges with control over official, authentic legal publications and how control over that content has come to rest with a handful of private companies. Part III reviews how those companies assert control over published law through threat of legal actions based on copyright, contract law, website terms of use, and even criminal statutes. Part IV concludes with several practical and aspirational steps for information intermediaries, such as libraries, the courts, and state legislatures to take. Ultimately, government bears responsibility for adequately publishing its law in formats that are accessible and useable by the public. In 2019, that means free, unrestricted online access to official, authenticated, and reliably preserved primary legal texts. Short of that ideal, we suggest ways to at least remove barriers for trustworthy, beneficent third parties—of which there are many, eager and willing—to collect, preserve, and make available official copies of the law to the public for free online.

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<sup>2</sup> The Eleventh Circuit recently opined that the People are the owners of the law: “Under democratic rule, the People are sovereign, they govern themselves through their legislative and judicial representatives, and they are ultimately the source of our law. Under this arrangement, lawmakers and judges are draftsmen of the law, exercising delegated authority, and acting as servants of the People, and whatever they produce the People are the true authors.” *Code Revision Commission v. Public Resource.Org, Inc.*, 906 F.3d 1229, 1239 (11th Cir. 2018).

<sup>3</sup> *See* *Wheaton v. Peters*, 33 U.S. 591, 593 (1834) (copyright dispute regarding private publication of U.S. Supreme Court opinions); *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

## I. WHY OWNERSHIP OF THE LAW MATTERS

## A. IGNORANCE OF THE LAW IS NO EXCUSE

Anyone vaguely familiar with the U.S. legal system knows that ignorance of the law is no excuse. The ancient concept, that citizens have the obligation to understand and comply with the law, is an almost absolute presumption across the American legal system.<sup>4</sup> Wrapped up in that presumption are several assumptions about the ability of citizens to understand the law, and thus necessarily about the ability of citizens to access the law.

The concept of notice of the law through publication has a long history. The Greeks did it;<sup>5</sup> the Romans famously practiced it by posting the Twelve Tables of Law in the forum, in response to the demands of the *plebs*.<sup>6</sup> In the Middle Ages, Thomas Aquinas spent considerable space questioning whether “law” was actually “law” at all if not published for the notice of the governed.<sup>7</sup> Modern commentators have even proposed that public access to legal information deserves universal recognition as a human right.<sup>8</sup> In America, the basic principle of notice is embodied in the Constitution through its *ex post facto* clauses<sup>9</sup> and prohibition on vague laws.<sup>10</sup> U.S. courts have consistently articulated the simple principle:

Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices.<sup>11</sup>

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<sup>4</sup> See Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671 (1976).

<sup>5</sup> Roscoe Pound, *Theories of Law*, 22 YALE L.J. 114, 117 (1912).

<sup>6</sup> FREDERICK PARKER WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 109 (1903).

<sup>7</sup> THOMAS AQUINAS, SUMMA THEOLOGICA, Question 90, art. 4, in SAINT THOMAS AQUINAS, THE TREATISE ON LAW 145 (R. J. Henle, S.J., ed. & trans., 1993).

<sup>8</sup> Leesi Ebenezer Mitee, *The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right*, 18 GERMAN L.J. 1429, 1431 (2017).

<sup>9</sup> U.S. CONST., art 1 § 9, cl. 3; *id.* art. 1, § 10, cl. 1.

<sup>10</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

<sup>11</sup> *Nash v. Lathrop*, 6 N.E. 559, 560 (1886).

Although it “needs no argument,” courts have explained the rationale:

Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.<sup>12</sup>

Given this constitutional commitment, it is unsurprising that government efforts to restrict access to the law, for example, through “secret law” produced in sensitive Foreign Intelligence Surveillance Court proceedings, have resulted in significant criticism and legal action.<sup>13</sup> Less visible efforts—for example, the slow surrender of control over publication of the law to commercial publishers—has resulted in relatively quiet criticism and very little legal action.<sup>14</sup>

#### B. MEANINGFUL NOTIFICATION MEANS ONLINE PUBLICATION

If publication of the law is necessary to give citizens adequate notice of their obligations, what kind of publication is sufficient? In 2019, adequate publication should include online publication, accessible to the majority of the population subject to the law.

Publication of primary legal materials (cases, statutes, and administrative regulations) in an electronic format on the internet is a growing norm expected of government institutions, both in the United States and abroad.<sup>15</sup> A variety of legal scholars and free law advocates now argue that the public has a right to access electronic legal information.<sup>16</sup> Some go so far as to state there is, for example, a qualified First Amendment right of public access to all court records,

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<sup>12</sup> *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980).

<sup>13</sup> For an extraordinarily thorough review of the debate concerning FISA “secret law,” see Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 Harv. Nat'l Sec. J. 241, 242 (2015).

<sup>14</sup> *But see* *Fastcase v. Lawriter LLC*, 907 F.3d 1335 (11th Cir. 2018).

<sup>15</sup> See IFLA Statement on Government Provision of Public Legal Information in the Digital Age (2016), <https://www.ifla.org/publications/node/11064> (last visited May 10, 2018) (recommending all governments provide access to legal information in a digital format for free to the public and that such information be authentic and preserved).

<sup>16</sup> See Ralph Nader, *The Law Must be Free and Accessible to All – Not Secret and Profitable*, HUFFINGTON POST BLOG (Feb. 7, 2014, 4:31 PM) [https://www.huffingtonpost.com/ralph-nader/the-law-must-be-free-and-accessible\\_b\\_4747745.html](https://www.huffingtonpost.com/ralph-nader/the-law-must-be-free-and-accessible_b_4747745.html).

even beyond court decisions.<sup>17</sup> At least one international scholar has argued that the public's right to free online legal information should be considered a human right, arguing that anything less than freely available online legal information does not meet the needs of citizens in today's world.<sup>18</sup>

Online publication is necessary, but not all online publication is sufficient. While publishing online can be inexpensive and easy, the law is a unique material that raises unique challenges regarding safeguarding and reliability. Users need to know that the text they see is authentic and official in the same way as they did when governments provided official print publications that reliably made available the law in previous generations.<sup>19</sup>

#### THE LAW MUST ALSO BE PRESERVED AND PROTECTED

A major but often overlooked aspect of access of the law is preservation. While law currently in force is critical, the half-life of statutes, regulations, and cases is significant. Litigants regularly come to law libraries seeking past versions of codes to understand the law that governed at the time a contract became effective, a deed was recorded, or when a conviction was entered.

With online publication of the law, preservation is a particular concern. Because of restrictive terms of use, traditional memory institutions like libraries and public archives are unable to retain and preserve materials. If material is privately published and wholly privately owned, rather, the government allowing such private ownership is relying on the commercial entity to preserve and maintain the record of the law in perpetuity. One need only look over the history of legal publication, which we outline below, to see why such reliance may be problematic. The history of consolidation in the publishing industry, as well as the reality that technology companies can go out of business overnight, indicates that it may be unwise to identify them as stewards of the record of the law.

In contrast, traditional memory institutions like libraries and archives have decades of experience in preserving the record of the law. When law was exclusively published in print, libraries and archives became experts in preserving printed materials. Not only is digital preservation still a work in progress, but any

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<sup>17</sup> See David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385 (2017).

<sup>18</sup> Mitee, *supra* note 8, at 1468 (“Only comprehensive, up-to-date, and free official online legal information databases of the various jurisdictions can meet the need for reliable national and transnational legal research in today's technology-driven world.”).

<sup>19</sup> See IFLA Statement, *supra* note 15 (stating that mere public access is not sufficient to meet the need for online information but rather, “Government providers also need to take responsibility for ensuring that the content they post is available to all, at no fee, that the content is authentic and trustworthy, and that it is preserved for public use over time in cooperation with memory institutions.”).

attempt by memory organizations to digitally preserve law restricted by terms of use may violate the contractual agreement of the user who accesses the material. This sets up the uneasy concern that no one is adequately preserving the record of the law, as any commercial entity may determine that it is not in their commercial interest to continue to preserve older versions of legal documents.<sup>20</sup>

## II. LEGAL PUBLISHING

If one accepts that citizens' knowledge of the law is fundamental presumption of our legal system, and that meaningful access is an important prerequisite to that knowledge, it's helpful to understand how "the law" is defined (it's not so clear-cut), and how the American legal system has gone about providing access to that law over time. We address both below.

### A. DEFINING "THE LAW"

As first year law students learn, the "law" largely comes from appellate courts, legislatures, and administrative agencies who have been delegated rule-making authority. Particularly in a common law system like ours, the process and the outcomes of those institutions raise interesting questions about how exactly to define the substance of the law—the rules, precedents, and doctrines—at any fixed moment in time. But while that substance is critical, it's also insufficient by itself. The law is not ethereal. For all practical purposes, "the law" is the cumulative embodiment of those institutions' decision making as reflected in particular documents: statutes, regulations, and cases.

To understand modern challenges with access to "the law", it's critical to focus on the particular embodiments of the law—the documents that make up published law, and the methods used to communicate the status. This is a basic but important point. While there is substantial literature on challenges with private control over "the law," most scholars and courts have tended (without saying so explicitly) to focus on the substance of "the law" as a set of rules or precedents, without much attention at all to the characteristics of the particular documents that come to embody these rules as published law. The particular documents matter.

The documents that make up published law are meaningful because they communicate to readers information about three key attributes—*officialness*, *authenticity* and *authority*—that assure readers that what they are seeing is truly the law. These attributes have always mattered but are particularly important today

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<sup>20</sup> See Margaret Maes Axtmann, *The Role of Commercial Publishers in Preservation*, 96 LAW LIB. J. 619 (2004) stating "First, commercial publishers have played a huge role in preserving legal information, but then as now marketability and profitability motivate many of the commercial ventures."

because digital text can be easily versioned, manipulated, copied, and reorganized. These words have significance when discussing who owns the law, because only an official, authentic and authoritative source is accorded the full weight of “the law.”

In the post-print electronic world, legislatures have begun to recognize that issues of “officialness” and “authenticity” have special significance. Both the law being “official” and “authentic” have legal significance in their meaning in the Uniform Electronic Legal Material Act (“UELMA”), pertaining to states that forgo print publication of the law and purchase online-only electronic versions of the law.<sup>21</sup> “Officialness” is generally designated in statute, as UELMA requires states to define who is the “official publisher” of the law.<sup>22</sup>

UELMA also requires “authentication,” meaning that the publisher “shall provide a method for a user to determine that the record received by the user from the publisher is unaltered from the official record published by the publisher.”<sup>23</sup> At the federal level, the United States Government Publishing Office provides official, authenticated public laws using digital signatures.<sup>24</sup> States like California also authenticate with digital signatures.<sup>25</sup> Authentication of electronic legal materials has also been widely discussed at the international level.<sup>26</sup> What the comments to UELMA make clear is that official publishers must “designate a ‘baseline’ copy of all published legal material that constitutes

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<sup>21</sup> UNIF. ELEC. LEGAL MATERIAL ACT (Unif. Law Comm’n 2011) (with prefatory note and comments 2011), available at <http://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d25c697d-9ff9-1460-5eaf-41bee40fc1e&forceDialog=0>. See Section 3. APPLICABILITY Comment stating “The UELMA applies to legal material designated as official and first published in an electronic record on or after the act’s effective date in the enacting state.”

<sup>22</sup> See UNIF. ELEC. LEGAL MATERIAL ACT (Unif. Law Comm’n 2011) (with prefatory note and comments 2011), available at <http://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d25c697d-9ff9-1460-5eaf-41bee40fc1e&forceDialog=0>.

<sup>23</sup> *Id.* at § 5. (comment noting, “[a]s matters of public policy, a state should make its official legal material available in trustworthy form and citizens should be able to ascertain the trustworthiness of electronic official legal material. Reliable and accurate government legal material is necessary to allow those who use the information to make informed decisions based on it.”).

<sup>24</sup> *Authentication*, govinfo, <https://www.govinfo.gov/about/authentication> (last visited Mar. 15, 2019).

<sup>25</sup> CAL. CODE REGS. tit. 2 § 22000 et. seq. (2019).

<sup>26</sup> See *Guiding Principles to be Considered in Developing a Future Instrument*, Hague Conference on Private Int’l law, <https://assets.hcd.net/docs/h0938152-a4b3-4530-949e-65c1089cda0d8> (2008) (stating “State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form. 5. State Parties are encouraged to take all responsible measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).”).

the definitive document against which all others are compared for the purposes of authenticating the legal material.”<sup>27</sup>

The lack of a uniform publishing system for state laws (as discussed in the following section) means that there is no single answer about which sources publish and make available as the law. This variation is particularly true as it pertains to statutory publication and designation of statutes as “the law.” Although all states codify their statutes, many consider codified versions of statutes *prima facie* evidence of the law, but not “the law” itself.<sup>28</sup> For example, in Minnesota, the “actual laws of Minnesota as passed by the legislature ... are contained in the session laws.”<sup>29</sup> Of the states that do officially codify, there is no uniform process for codification. For example, Washington has a statute law committee made up of government officials,<sup>30</sup> but defines the code reviser to be “any lawyer or law publisher employing competent lawyers” deemed by the statutory committee “to be qualified . . . .”<sup>31</sup> The reviser is actually responsible for codifying into the Revised Code of Washington all laws of a general and permanent nature.<sup>32</sup> Under Washington law, the reviser even has the ability to “[c]reate new code titles, chapters, and sections of the Revised Code of Washington ... as may be required from time to time to effectuate the orderly and logical arrangement of the statutes.”<sup>33</sup> These new sections and organizational revisions are given equal footing as those originating with the legislature.<sup>34</sup> The Revised Code of Washington that contains the certificate of the statute law commission “shall be deemed official, and shall be *prima facie* evidence of the laws contained therein.”<sup>35</sup> Other states, such as Colorado, follow a similar pattern.<sup>36</sup>

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<sup>27</sup> See UNIF. ELEC. LEGAL MATERIAL ACT, *supra* note 21.

<sup>28</sup> See *State v. Boeckeri*, 893 N.W.2d 348, 353 (Minn. 2017) (citing Minn. Stat. § 3C 13 (2016)).

<sup>29</sup> *Id.* (quoting *Granville v. Minneapolis Pub. Schol., Special Sch. Dist. 1*, 732 N.W.2d 201, 108 (Minn. 2007)).

<sup>30</sup> WASH. REV. CODE § 1.08.001 (LexisNexis 2017).

<sup>31</sup> WASH. REV. CODE § 1.08.013 (LexisNexis 2017). (requiring the statutory committee to select a lawyer or law publisher “qualified to compile the statutory law of the state of Washington as enacted by the legislature into a code or compilation of laws by title, chapter and section, without substantive change or alteration of purpose or intent.”)

<sup>32</sup> WASH. REV. CODE § 1.08.015 (LexisNexis 2017).

<sup>33</sup> WASH. REV. CODE § 1.08.015 (3) (LexisNexis 2017).

<sup>34</sup> *Id.* at § 1.08.015 (3) (LexisNexis). (new code sections “shall have the same force and effect as the ninety-one titles originally enacted and designated as the ‘Revised Code of Washington’ pursuant to the code adoption acts codified”).

<sup>35</sup> WASH. REV. CODE § 1.08.040 (LexisNexis 2017).

<sup>36</sup> COLO. REV. STAT. ANN. § 2-5-101 (West 2017) (Colorado allows an independent reviser “under the supervision and direction of the committee on legal services” to arrange and publish all laws of the state of Colorado of a general and permanent nature.) By contract, the legislature designates a publisher to produce the “official statutes” of Colorado, which “shall

In contrast to Washington and Colorado, Pennsylvania has an official government entity publish its statutory and administrative laws. The legislature designated the Legislative Reference Bureau to directly work with the Legislative Printing Clerk for the “compilation, editing, publishing, printing, supplementation, or revision of an official publication of the Pennsylvania Consolidated Statutes and amendments thereto.”<sup>37</sup> However, Pennsylvania does not have an official, complete codification of its statutes, as it has been undergoing an official codification for more than thirty years, with only two-thirds of the codification complete.<sup>38</sup> Commercial publishers have stepped in to produce unofficial codifications.<sup>39</sup> Pennsylvania demonstrates the downside of using an official government publisher as opposed to a commercial publisher: the speed of organization and publication is significantly slower with a poorly-resourced government publisher than it can be than with a commercial publisher. For this reason, as well as reasons of cost and convenience, Pennsylvania is in the minority of states choosing to self-publish the law; most states opt to use commercial publishers.<sup>40</sup>

Thus, scholars, attorneys, judges, and other legal researchers, in order to have confidence they are citing the correct official sources of the law, must first locate the statutes for that particular state that authoritatively state who has the authority to produce and publish the law and which version of the law has the “stamp” of officialness from the government. For any electronic versions consulted, additional steps must be taken to ensure the electronic version is deemed to be an authentic representation of the law.

The legal landscape for understanding what constitutes “the law” when looking at judicial decisions has similarly changed. For centuries, judicial opinions were the primary sources of the law, before the flowering of legislative

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be the only publication of the statutes entitled to be considered as evidence in Colorado courts.” COLO. REV. STAT. ANN. § 2-5-118 (West 2017).

<sup>37</sup> 1 PA. STAT. AND CONS. ANN. § 501 (West 2017).

<sup>38</sup> See PENNSYLVANIA RESEARCH: PRIMARY SOURCES – LEGISLATIVE AND ADMINISTRATIVE MATERIALS, <http://lawpitt.edu/pennsylvania-research-primary-sources-legislative-and-administrative-materials> (last visited Dec. 7, 2017).

<sup>39</sup> See *Purdon’s Pennsylvania Statutes and Consolidated Statutes* (Thomson Reuters) as an unofficial compilation.

<sup>40</sup> See Appendix indicating official publisher for statutes for each state. The Appendix was compiled using the American Association for Law Libraries’ State Online Legal Information website, <https://community.aallnet.org/digitalaccessstolegalinformationcommittee/stateonlinelegalinformation> (last visited September 13, 2018) as a starting point to evaluate official publication for the state statutory code, state administrative code, and highest state court opinions for each of the fifty states. From there, we sought to obtain information from each state with regard to their official publication status for each of these three legal sources.

and administrative practice.<sup>41</sup> Before widespread electronic publication of court opinions, legal practitioners understood that only appellate cases constituted mandatory authority when reported in official reporters for a particular court.<sup>42</sup> Formal court practice dictated which cases were designated for official publication.<sup>43</sup> At the federal level, the U.S. Courts now release records indicating that the large majority of cases terminated on the merits are still not designated for publication.<sup>44</sup> However, these unpublished opinions, which are designated as non-precedential, are widely available through electronic resources.<sup>45</sup> Technically, these “unpublished” opinions lack precedential effect,<sup>46</sup> yet are increasingly cited by practitioners in official contexts.<sup>47</sup> Questions of precedent and what constitutes law from the judicial branch of government are more complex in this new information environment.

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<sup>41</sup> Robert Berring, *The Crumbling Infrastructure of Legal Research*, in LEGAL INFORMATION AND THE DEVELOPMENT OF AMERICAN LAW 272, 284 (Richard A. Danner & Frank Houdek, eds. 2008).

<sup>42</sup> See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008) for a discussion about the evolving notion of authority for purposes of citation in US Law.

<sup>43</sup> *Id.* at 283.

<sup>44</sup> For 2016, approximately 88.7% of disposed cases in the U.S. Courts of Appeals were designated as unpublished. See Table B-12 U.S. Courts of Appeals – Types of Opinions or Orders Filed in Cases Terminated on the Merits, By Circuit, During the 12-Month Period Ending September 30, 2016, UNITED STATES COURTS, [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b12\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2016.pdf) (last visited, Oct. 19, 2018).

<sup>45</sup> However, unpublished opinions may not always be available freely through all electronic sources. Lexis, Westlaw, and Bloomberg independently make unpublished opinions available on their websites, which may or may not be available on each other’s platforms and also which may or may not be available through court websites or other sources on the free web. Berring notes, “LexisNexis and Westlaw were involved in a heated competition for the loyalty of users and one appealing claim was that they made more opinions available. Loading these non-precedential decisions into the database was a selling point.” Berring, *supra* note 37 at 287.

<sup>46</sup> The issue of whether or not technically “unreported” cases lack precedential effect is worthy of its own, separate article. See Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L. REV. 621 (2009). Now, some states have gone to vendor neutral citation format, and publish all judicial opinions online. Questions of stare decisis and precedent in this new information environment are too numerous to discuss at length in this article.

<sup>47</sup> See THE COMMITTEE FOR THE RULE OF LAW, <http://www.nonpublication.com/> (last visited Feb. 15, 2019) (arguing that “full citation and publication of appellate opinions is necessary to allow the democracy to supervise application of the laws it maintains, correct error, assure equal and uniform application, reconcile inconsistencies, and continually improve the logic, purpose, consistency and justness of our laws, procedures and jurists.” The website lists a number of law review articles arguing for the need for unpublished cases to be considered precedential legal authority.).

Additionally, in recent years, the emergence of the concept of “secret law” has arisen in the national security context.<sup>48</sup> Even with the increase in electronic publication of unpublished, non-precedent decisions, recent research suggests that many decisions made by the federal courts of appeals are unavailable to the public.<sup>49</sup>

This formalistic approach to defining what constitutes “the law” according to legal texts and pronouncements of officialness overlooks the reality that for many practitioners, judges, and others; citations to “the law” may be to easily accessible forms of legal information that do not carry certainties of “officialness.” Robert Berring has noted that the infrastructure of formal legal research has crumbled, unlocking the floodgates of questioning traditional sources of legal authority.<sup>50</sup>

Despite this, many question whether a guarantee of “officialness” matters for the everyday realities of use and citation. Many legal texts lack official status as authoritative “law” but are practicably used as a legal text by lawyers and courts. For example, in *Code Revision Commission v. Public.Resource.Org, Inc.*, the Eleventh Circuit held that official annotations to a statutory code are “sufficiently law-like as to implicate the core policy interests undergirding” prior judicial pronouncements about due process and access to the law.<sup>51</sup> Likewise, jury instructions are not considered a primary legal text, but draw their authority from statutes, regulations, and cases, as instructions attempt to simplify complex legal language to juries. Should jury instructions thus be considered a legal text as a practical reality, even if they lack the formal designation of “the law”? What if jury instructions are written by state court judges who use governmental resources to draft and compile jury instructions? Even if pattern jury instructions lack the formalities of being “the law,” should they nonetheless be made freely available to the public if they are drafted in such a manner?

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<sup>48</sup> See Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, at 810 (2018). (Manes defines confidential administrative law texts as constituting secret law “if they articulate rules or principles of general applicability that are regarded by the relevant officials as binding on their conduct.” Manes goes on to note, that for some these types of internal rules, practices and precedents may not be thought of as the “law”, but that others consider these types of documents to constitute an “internal law.”).

<sup>49</sup> Michael Kagan, Rebecca Gill, Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeal*, 106 GEO. L.J. 683 (finding that in immigration cases, many cases are not available, even as unpublished decisions).

<sup>50</sup> See Berring, *supra* note 37.

<sup>51</sup> *Code Revision Commission v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1242 (11th Cir. 2018) (describing the three factors the court considered in determining whether the annotations, “while not having the force of law, are part and parcel of the law.” The three factors are whether the law is “written by particular public officials who are entrusted with the exercise of legislative power; whether the law is, by nature, authoritative; and whether the law is created through certain, prescribed processes, the deviation of which would deprive it of legal effect.”).

B. A BRIEF HISTORY OF LEGAL PUBLISHING WITH PARTICULAR REGARD TO  
STATE LEGAL PUBLISHING

Legal publication practices in the United States evolved out of the traditions of legal publishing in England. Around 1841, William de Machlinia was the first to publish a collection of English court decisions dating from the latter part of the 13<sup>th</sup> century.<sup>52</sup> In the period that followed from 1580-1516, roughly 125 law books were published by the English presses.<sup>53</sup> The first publication of statutes, Machlinia's *Nova Statuta*, a compilation of statutes beginning in 1327, first appeared in 1485.<sup>54</sup>

During the American colonial era, legal publishing in the American colonies was insignificant in comparison to that in England; American bar members tended to rely on English, not American, legal precedent.<sup>55</sup> Even after the Revolutionary War, virtually no American case law publication existed until Ephraim Kirby's *Reports of Cases Adjudged in the Superior Court of the State of Connecticut* (1785 – May 1788) appeared in 1789.<sup>56</sup> Statutory law publication fared somewhat better during the colonial era, although printing of session laws and codifications was not uniform nor consistent amongst the colonies.<sup>57</sup>

In the early nineteenth century, official legal publishing began in a number of states, gradually replacing nominative reporters over time.<sup>58</sup> Along with the development of “official” case publishing, statutory publishing continued with a greater movement toward codification.<sup>59</sup> The most significant development of the nineteenth century came later – the emergence of the West Publishing Company with its “comprehensive system of case reporting and digesting.”<sup>60</sup> Digesting of cases by legal subject was a major leap forward for both lawyers and judges that provided greater access to cases before published chronologically only. West also introduced the National Reporter System, publishing cases

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<sup>52</sup> KEN SVENGALIS, *LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL*, 7 (2017).

<sup>53</sup> *Id.*

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

<sup>55</sup> *Id.* at 7.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* Nominative reporters in the 18<sup>th</sup> century were published by printers who “depended upon a variety of commissions and publishing opportunities. By the beginning of the 19<sup>th</sup> century, some specialized legal publishers like Butterworth in the UK and Stephen Gould (later Banks-Baldwin) in the United States began to emerge. With the emergence of “official” state publishing of cases, nominative reporters were absorbed in the numbering scheme of official reports.

<sup>59</sup> *Id.*

<sup>60</sup> Taryn Marks, *John West and the Future of Legal Subscription Databases*, 107 *LAW LIBR. J.* 377 (2015).

bound together with others in geographic proximity.<sup>61</sup> West's publishing revolution did not only confine itself to case law; it began releasing annotated statutory codes, including the first United States Code Annotated in 1927.<sup>62</sup>

Other legal publishers emerged in the late nineteenth century, including Michie Company, which became a leading publisher of state statutory codes.<sup>63</sup> Others developed to provide greater commentary and analysis of primary legal sources including Matthew Bender and Company, Shepard's Company, and the Lawyers Cooperative Publishing Company.<sup>64</sup> In the early part of the twentieth century, several additional legal publishers emerged.<sup>65</sup>

Two major events in the latter part of the twentieth century reshaped the legal publishing world: the introduction of computer-assisted legal research and the merger and consolidation of several major legal publishers. In 1973, "the first computer-assisted legal research system," Lexis-Nexis, was introduced by Mead Data Central.<sup>66</sup> Two years later, the West Publishing Company introduced Westlaw.<sup>67</sup> Now, for many students and practitioners, their only encounters with legal information may come through the electronic interfaces of Westlaw or Lexis. Additionally, with the advent of the internet, courts and other entities aside from traditional legal publishers have found it easier than ever to publish cases, statutes, and regulations directly to the Internet. Renowned scholar on legal publishing and information, Bob Berring, noted that the advent of computer assisted legal research has changed legal publishing, practice, and thought in a number of profound ways.<sup>68</sup>

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<sup>61</sup> *Id.* at 381. ("Until John West, not all courts published their opinions and those that did frequently delegated publication to the court's reporter... John West changed this by releasing court opinions quickly and at consistent intervals, and sold the opinions at a relatively inexpensive price.")

<sup>62</sup> Svengalis, *supra* note 47, at 8.

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

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* Some of these companies included Commerce Clearing House (now CCH) (1913), Bureau of National Affairs (1993), the Practising Law Institute (1933), Research Institute of America (1935) and later the William S. Hein Company.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Robert Berring, *Ring Dang Do*, 1 GREEN BAG 2D 3, 5 (Fall 1997) ("Publishing cases is now easy. They are loaded by more and more courts directly onto the internet. Speed of distribution is a problem that my 13-year-old son can solve. The value of editing, still powerful in my mind, has been set aside in the rush of enthusiasm for homemade delivery systems and snazzy search engines. Probably more crucial, there is now ten years worth of law students who have graduated with little knowledge of the Topics and Key Numbers as part of their universe, but with an irresistible desire to search with Boolean connectors, or even natural language style engines, on-line. Since in many firms it is the young lawyers who do the research, much of the research is operating with a conceptual system that is vastly different than that of their older colleagues. The new researcher does not think in subject categories with sharply

In the past thirty years, a wave of corporate mergers changed the landscape of legal publishing.<sup>69</sup> The merger and consolidation wave kicked off in 1996 when Thomson Corp. announced plans to acquire West Publishing Co., combining two of the nation's largest legal publishers.<sup>70</sup> Since that time, many other mergers occurred. Although new publishers continue to enter the market (including a range of new publishers in the online legal publishing market), the dominance of Reed Elsevier, which owns Lexis Nexis, and Thomson Reuters, which owns West, continues because of their continued acquisition of other legal publishing products. Thomson Reuters alone has acquired over twenty smaller legal publishers including West, Research Institute of America (RIA), Barclays Law Publishers, Findlaw and Gale.<sup>71</sup> Ninety-three percent of Thomson Reuters revenues are derived from electronic publishing, compared to only seven percent for continued print publications.<sup>72</sup> In the Legal Division specifically, print subscriptions continue to decline.<sup>73</sup> In 1994, Reed Elsevier (now RELX Group) purchased three large legal publishers: LexisNexis, Michie and Butterworths.<sup>74</sup> In 1998, it added Matthew Bender and Shepard's to its Legal Publishing holdings.<sup>75</sup> More recently, it bought the online legal research start-up Lex Machina, which focuses on intellectual property research.<sup>76</sup>

The consolidation wave which struck legal publishing did not go unchallenged. In 1996, when Thomson announced its plans to purchase West for \$3.425 billion, law librarians and small legal publishers loudly protested the acquisition on antitrust grounds.<sup>77</sup> The Department of Justice's Antitrust Division announced a consent decree which largely overlooked concerns expressed by aggrieved consumers, and only required that Thomson-West divest itself from 51 print titles.<sup>78</sup> Few national law titles of significance were included

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delineated subdivisions like those in the Key Number system, instead they think in terms of key words and connectors.”)

<sup>69</sup> SVENGALIS, *supra* note 47, at 8.

<sup>70</sup> Richard C. Reuben, *Merger to Yield Legal Publishing Giant*, 82 A.B.A. J. 34 (May 1996).

<sup>71</sup> SVENGALIS, *supra* note 47, at 8.

<sup>72</sup> *Id.* at 9.

<sup>73</sup> *Id.* at 9-10.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> *Id.*

<sup>76</sup> *LexisNexis Acquires Premier Legal Analytics Provider Lex Machina*, Lex Machina, <https://lexmachina.com/media/press/lexisnexis-acquires-lex-machina/>, last visited Mar. 8, 2019.

<sup>77</sup> *Id.* at 11-12.

<sup>78</sup> *Id.* at 12. Interestingly, many of the titles required to be divested by Thomson-West included annotated primary law sources including *United States Reports, Lawyers Edition; United States Code Service; Deering's Annotated California Code; Annotated Laws of Massachusetts; Michigan Statutes Annotated*; and the *New York Consolidated Laws Service* among others.

in this divestiture, signaling that regulating entities preferred to take a light touch to consolidation among the legal publishing industry.<sup>79</sup>

Although continued objections have been raised by law librarians and consumers of legal information, the consolidation trend in the legal publishing market has continued.<sup>80</sup> Even with the emergence of new legal publishers, the cost of large-scale consolidation has had a significant impact on the prices consumers of legal information must pay for access and ownership of legal titles. As Ken Svengalis, editor of the *Legal Information Buying Guide* notes, “[f]rom the perspective of the legal information consumer, the future, at least on the cost front, appears relatively bleak, as exemplified by the recent double-digit price increase from both Thomson Reuters and LexisNexis Matthew Bender. While the Internet offers new opportunities for the exchange of legal information, it had only limited impact on the world of value-added legal information which will remain under the control of the big three for the foreseeable future.”<sup>81</sup>

Accompanying consolidation of large legal publishers, electronic publishing of legal information has begun to shift primary methods of publication for legal materials from print to electronic-only publication.<sup>82</sup> These shifts to electronic publication mean that in some states, there is no print publication, either from a government source or a commercial publisher.<sup>83</sup>

These developments in traditional publishing are significant in a world where primary legal information, both in official and unofficial formats, is found online. As this brief history illustrates, at no time were primary legal materials published in a unified, consistent manner. Rather, the introduction of online publishing has only further complicated an already complicated print publishing environment. As this brief history demonstrates, in state legal publishing, publishing primary law has been accomplished through contractual relationships with for-profit

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<sup>79</sup> *Id.* at 12-13.

<sup>80</sup> *Id.* at 13-15.

<sup>81</sup> *Id.* at 15. The big three publishers Svengalis includes are RELX Group, Wolters Kluwer (publisher of Aspen Law & Business, CCH, and Wiley Law Publications among others), and Thomson Reuters. According to Svengalis’s research, Thomson Reuters Worldwide Sales in 2016 came to \$11.2 billion, versus \$8.689 billion for RELX Group and \$4.679 billion for Wolters Kluwer.

<sup>82</sup> See the author-created “Fifty State Survey Addendum to Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing” available at <https://libraries.mercer.edu/ursa/handle/10898/9937> for a complete view of current publishing patterns for the fifty states. The 50 State Survey includes information about whether state statutes, administrative codes, and the highest court opinions are officially published in print or online

<sup>83</sup> See *id.* The 50 state survey indicates which states have ceased to publish official versions of statutory codes, administrative codes, or the highest court opinions in print and rely on online only publication.

private publishers. In the online publishing environment, frequently these public-private relationships are unchanged.

The shift in publication patterns from print to electronic poses a number of challenges. Advocates of the online publication of legal information celebrate the internet as a tool that makes government information more widely available.<sup>84</sup> Instead of trekking to a library or government office to access a print version of a statutory or administrative code, most citizens can access the same information at their fingertips, wherever they are. Access no longer requires traditional gatekeepers of information, like librarians or lawyers.

Although many states continue to publish “official” versions of the law in print, an increasing number of states “are eliminating certain print publications altogether.”<sup>85</sup> For example, in Georgia, the state no longer contracts with a publisher to produce an official print publication of the Georgia Administrative Code.<sup>86</sup> While the increasing availability of legal information in an electronic format has disseminated legal materials to a wider audience, it also presents a new set of challenges, particularly when considering vanishing print publications in favor of electronic-only materials. In the world of online legal information, new questions about authenticity, access to and preservation of legal information also emerge. Stakeholders of online legal information correctly identified some of these important issues in the crafting of the Uniform Electronic Legal Material Act (UELMA), now the law in 18 states and the District of Columbia.<sup>87</sup> UELMA mandates at a high level that all official electronic legal materials 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.”<sup>88</sup> The Act itself does not specify a particular means of accomplishing these aims, but instead leaves to each state adopting UELMA to determine how the goals of the Act will be achieved.

Because UELMA only addresses online access, authenticity, and permanence in a general sense, it does not confront the thornier issues. In fact, Uniform Law Commissioners intentionally navigated around some of these conflicts in their

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<sup>84</sup> See “Declaration on Free Access to the Law” from the Free Access to the Law Movement, available at <http://falm.info/declaration/> (last visited Mar. 25, 2019).

<sup>85</sup> UNIF. ELEC. LEGAL MATERIAL ACT, *supra* note 21.

<sup>86</sup> See “Rules and Regulations of the State of Georgia” available at [http://sos.ga.gov/index.php/General/rules\\_and\\_regulations](http://sos.ga.gov/index.php/General/rules_and_regulations) (last visited Mar. 25, 2018).

<sup>87</sup> See *id.* The law has been adopted in Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Maryland, Minnesota, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Washington, and West Virginia.

<sup>88</sup> *Id.*

drafting of UELMA.<sup>89</sup> This article largely focuses on two issues that remain in a post-UELMA world that were purposely not addressed in UELMA: copyright<sup>90</sup> and the “contractual relationship between a state and a commercial publisher with which the state contracts for the production of its legal material.”<sup>91</sup>

Although these issues are unaddressed in UELMA, they play crucial roles in determining whether or not the goals of UELMA can truly be met. This article sets out these additional challenges of an electronic-only legal publication environment unaddressed in UELMA, but crucially affecting the public’s right to access legal information and the dual government and library responsibility to preserve legal information. In particular, having ceded any position on issues of copyright, private publication of legal information, and restrictive uses of online information, UELMA ignores issues of private publication of government information. It is hard to see how the goals of UELMA can be met if these additional challenges of the online legal information environment are not addressed.

### III. HOW COMMERCIAL PUBLISHERS EXERCISE CONTROL OVER THE LAW

Our central premise is that today, official and authentic published law is not adequately accessible online in ways that most people can access. There are many policy, definitional, and technical challenges that stand in the way. However, legal protections that favor private publishers pose some of the most significant barriers. Some of the legal tools that publishers use are well known; many cases and law review articles address the arguments regarding copyright protection over the law.<sup>92</sup> More recently, in the face of pervasive terms of use that are nearly

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<sup>89</sup> See UNIF. ELEC. LEGAL MATERIAL ACT (Unif. Law Comm’n 2011), *supra* note 20, at 2-3 (discussing why the act did not require specific technologies for authentication and preservation.).

<sup>90</sup> *Id.* at 3 (“[T]his act does not deal with copyright issues, leaving those to federal law and state practice.”).

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719 (1989) (addressing copyright protection in the context of the legal contest between LexisNexis and Westlaw over the copyrightability of West’s reporters); Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 174 (1998); Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 742 (2006); Beth Ford, Comment, *Open Wide the Gates of Legal Access*, 93 OR. L. REV. 539, 540 (2014); Elizabeth Scheibel, Note, *No Copyright in the Law: A Basic Principle, Yet a Continuing Battle*, 7 CYBARIS AN INTELL. PROP. L. REV. 350 (2016) (discussing recent developments, including the *Georgia v. Public.Resource.Org* lawsuit regarding copyright in the Georgia Annotated Code, and the impact of the Uniform Electronic Legal Materials Act); Katie Fortney, Note, *Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*, 102 LAW LIBR. J. 59 (2010);

always present and required for access online content, breach of contract claims have become an even bigger complication. On the horizon are yet other more severe legal controls, such as computer crime claims, which are just beginning to weigh on potential reuses of the law. We address each in turn, below.

#### A. COPYRIGHT LAW

Copyright law is amongst the most frequently litigated controls over legal information. Starting in the early nineteenth century, a body of law developed articulating the basic principle that copyright does not extend to edicts of government. In the 1834 case *Wheaton v. Peters*, the U.S. Supreme Court delivered a straightforward rule in determining a reporter's privilege in printing Supreme Court cases: "[n]o reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court; and the judges of the court cannot confer on any reporter any such right."<sup>93</sup> In 1888, the Supreme Court again held in *Banks v. Manchester* that the same rule applies to state court opinions: "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."<sup>94</sup>

Lower courts have since applied the same basic rule to "the law" as embodied in the text of statutes and statutory compilations,<sup>95</sup> and local codes and ordinances.<sup>96</sup> The Copyright Office has refused to register claims of copyright in what it terms "government edicts," specifically excluding from registration eligibility "legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials."<sup>97</sup>

Despite what appears to be a clear rule against copyright protection over the law, publishers continue to assert copyright to effectively prevent free access to official legal publications. In modern cases, copyright is asserted in two different ways. First, rights are asserted over secondary materials—annotations, headnotes, etc.—which are inextricably linked to the legal publication in which the law is communicated. Courts have generally held that these surrounding

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Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls over Government Information*, 45 SYRACUSE L. REV. 999, 1000-01 (1995).

<sup>93</sup> *Wheaton v. Peters*, 33 U.S. 591, 593 (1834). See also Craig Joyce, *Wheaton v. Peters: The Untold Story of the Early Reporters*, 1985 S. CT. HISTORICAL SOC'Y YEARBOOK 35.

<sup>94</sup> *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

<sup>95</sup> *Davidson v. Wheelock*, 27 F. 61, 61 (C.C.D. Minn. 1866) (finding no copyright protection for statutory compiler of Minnesota state statutes).

<sup>96</sup> *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002); *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980).

<sup>97</sup> U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.6(c)(2) (3d ed. 2017).

materials are distinguishable from the core legal text and are in many cases protectable. For example, judicial opinions authored by the court are generally not protectable, but “the publisher [of a volume of law reports] may copyright any part of a published decision that represents his own labor in the production, such as headnotes, statements of each case, and arguments of counsel.”<sup>98</sup>

Similarly, annotations added to statutes, and perhaps even the arrangement and selection of statutes into codes themselves, have been treated as copyrightable.<sup>99</sup> Some secondary additions to legal texts are minimal—West has claimed copyright over the page numbers that it added to the text of judicial opinions printed in West reporters<sup>100</sup>—while others make for a more robust case that their additions to the text of the law are creative and therefore copyrightable, including enhancements designed to make the substance of the law more readable and more easily findable.<sup>101</sup>

It has long been the case that private legal publishers independently undertake creation of these additional, surrounding materials, to publish and sell their own versions of state statutes or administrative codes.<sup>102</sup> But when publishers of the original source publication—i.e., the official, authentic legal publication—include as integral parts of those publications secondary materials, how should copyright law protect those expressions? A recent case highlights the issue: Georgia, in 2015, through the Georgia Code Revision Commission, brought a copyright infringement lawsuit against Public.Resource.org for copying and distributing online the Official Code of Georgia (OCGA).<sup>103</sup> The Commission had contracted with LexisNexis to produce this OCGA, complete with annotations and other integrated legal research tools such as legislative history references.<sup>104</sup> It also required Lexis to post an unannotated version of the OCGA

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<sup>98</sup> State ex rel. Helena Allied Printing Council v. Mitchell, 105 Mont. 326, 340 (1937); see also Callaghan v. Myers, 128 U.S. 617, 649 (1888) (“such work of the reporter, which may be the lawful subject of copyright, comprehends . . . that order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of volumes. . .”).

<sup>99</sup> See e.g., Bldg. Officials & Code Adm. Intern., Inc. v. Code Tech., Inc., 79-2472-MA, 1980 WL 1169, at \*3 (D. Mass. Oct. 27, 1980) (“compilation and analysis” treated as copyrightable).

<sup>100</sup> Compare W. Publ’g. Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1226-27 (8th Cir. 1986) (noting that the arrangement of judicial opinions is sufficiently creative to justify copyright protection), with Matthew Bender & Co. v. W. Publ’g. 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”).

<sup>101</sup> See, e.g., West Pub. Co. v. Lawyer’s Cooperative Pub. Co., 79 F. 756 (2d Cir. 1887) (upholding a judgment in favor of West against Lawyer’s Cooperative for the unauthorized copyright of West’s headnotes and digests, both tools used to aid discovery of the law).

<sup>102</sup> E.g., compare West Annotated General Statutes of North Carolina (private, unofficial) vs. North Carolina General Statutes (Lexis; official).

<sup>103</sup> Code Rev. Comm’n. v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017).

<sup>104</sup> *Id.* at 1354.

online for free access, which Lexis did subject to a website terms of use.<sup>105</sup> Public.Resource.org copied from the print all 186 volumes of the OCGA and posted them on its website for free download.<sup>106</sup> The suit was before the District Court for the Northern District of Georgia, the OCGA prevailed, and PublicResource.org appealed to the Eleventh Circuit.

The District Court concluded that such annotations are protectable by copyright. The Court explained that the “official code publication controls over unofficial compilation” and that attorneys who cite the unofficial versions “do so at their peril,”<sup>107</sup> the court carefully parsed the OCGA for its protectable surrounding elements and unprotectable core legal text. “The entire O.C.G.A. is not enacted into law by the Georgia legislature and does not have the force of law.”<sup>108</sup> Thus, the Court concluded without difficulty that the annotations and other creative additions were copyright-protected. Like those cases involving headnotes and other annotated additions,<sup>109</sup> the court concluded that those additional materials were separable from unprotectable text of the law and independently protected by copyright.<sup>110</sup>

The Eleventh Circuit Court of Appeals took a more practical approach, looking less at the formal status of each element of the text, and instead focusing on the attributes and intent of those who created it.<sup>111</sup> The Court summarized its approach:

[O]ur ultimate inquiry is whether a work is authored by the People, meaning whether it represents an articulation of the sovereign will, our analysis is guided by a consideration of those characteristics that are the hallmarks of law. In particular, we rely on the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created. These are critical markers. Where all three point in

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<sup>105</sup> *Id.* at 1353-54. Reviewed in more detail in Part XX.

<sup>106</sup> *Id.* See Plaintiff’s Memorandum of law in Support of its Motion for Partial Summary Judgment, Code Rev. Comm’n. V. Public.Resource.Org, Inc., No 1:15-cv-02594 (N.D. Ga. May 17, 2016). In the Agreement for Publication, Lexis/Matthew Bender is specifically required to post an unannotated version of the OCGA to the web that can be accessed by the public (See Agreement for Publication at 2.5)

<sup>107</sup> O.C.G.A. § 1-1-1 (2018) (Lexis case note for Georgia ex rel. Gen. Ass’y v. Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982), orders vacated, 559 F. Supp. 37 (N.D. Ga. 1983)).

<sup>108</sup> Code Rev. Comm’n, *supra* note 90, at 1356.

<sup>109</sup> *Id.* (citing W.H. Anderson Co. v. Baldwin Law Pub. Co., 27 F.2d 82 (6th Cir. 1928); Lawrence v. Dana, 15 F.Cas. 26 (C.C.D. Mass. 1869); Callaghan v. Myers, 128 U.S. 617 (1888)).

<sup>110</sup> *Id.*

<sup>111</sup> See Code Rev. Comm’n for Gen. Assemb. Of Ga. V. Public.resource.org, Inc., 906 F.3d 1229 (11th Cir. 2018).

the direction that a work was made in the exercise of sovereign power—which is to say where the official who created the work is entrusted with delegated sovereign authority, where the work carries authoritative weight, and where the work was created through the procedural channels in which sovereign power ordinarily flows—it follows that the work would be attributable to the constructive authorship of the People, and therefore uncopyrightable.<sup>112</sup>

In analyzing the O.C.G.A., the Eleventh Circuit identified several factors that led it to conclude that “the annotations are legislative works created by Georgia’s legislators in the exercise of their legislative authority,” and therefore uncopyrightable.<sup>113</sup>

The first factor is the close identification of the authorship with the legislature.<sup>114</sup> Although Lexis prepared the annotations, the court explained that the legislature was in control and the annotations were created pursuant to a detailed contract under “punctiliously specific instructions.”<sup>115</sup> It also states that the annotations are to be prepared under the “direct supervision” and with the “intimate involvement” of the Georgia Code Revision Commission, which the Court viewed as an arm of the state legislature.<sup>116</sup>

The second factor is the close association of the annotations with the legally-binding text of the statutes. As a matter of law, the annotations were to be “merged” with the statutory text to produce the O.C.G.A.<sup>117</sup> “While this does not mean that annotations, by virtue of appearing alongside statutory text, are suddenly possessed of binding legal effect, it does mean that their combination with the statutory text imbues them with an official, legislative quality.”<sup>118</sup> “[A] full understanding of the laws of Georgia necessarily includes an understanding of the contents of the annotations. In this way, the annotations are clearly laden with legal significance.”<sup>119</sup>

With the third factor, the court found that the process used to adopt the annotations—that the “Georgia General Assembly voted to adopt the annotations as prepared by the Commission as an integral part of the official Code”—was highly significant as evidence that the annotations were in fact

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<sup>112</sup> *Id.* at 1232-33 (emphasis omitted).

<sup>113</sup> *Id.* at 1233.

<sup>114</sup> *Id.* at 1248.

<sup>115</sup> *Id.* at 1243.

<sup>116</sup> *Id.* at 1243-44.

<sup>117</sup> *Id.* at 1248.

<sup>118</sup> *Id.* at 1249.

<sup>119</sup> *Id.*

communications from the legislature speaking as representatives of the public in their official capacity.<sup>120</sup>

The Eleventh Circuit's approach in *Public.Resource.Org* is helpful to advocates for public access to the law because while annotations and statutory text are theoretically easy to separate from the core legal text, they are not practically. The public who seeks access to the official, authenticated code of Georgia must go through Lexis or have no access at all. If such content were protectable, it would mean either paying Lexis for a copy or, at a minimum, agreeing to contractual terms of use that limit what the user can do with the law.<sup>121</sup> Similarly, libraries and other information intermediaries that seek to post online free copies of the O.C.G.A. would not be able to because they could not practically separate the core text from the additions. Moreover, even if they could, by virtue of changing the document—removing text, altering formatting—the resulting document would no longer be the “Official Code of Georgia Annotated” with all the markers of authenticity and officialness that imbue the O.C.G.A. with value as “the law” to begin with. The resulting derivative material would just be another unofficial compilation that users should cite at their peril.

While the Eleventh Circuit decision in *OCGA* is undoubtedly positive for would-be users of that text, it does not mean that all “official” legal publications containing third-party materials are necessarily free from copyright. Many such publications in other states are not created with such “intimate involvement” from their respective government agency sponsors, nor are many enacted with a process that involves the legislature to the extent required in Georgia.<sup>122</sup> Many are also not required, as a matter of law, to be “merged” with the statutory text in the same way as the State of Georgia requires for the O.G.C.A.<sup>123</sup> As noted above, the process for creation of official state legal publications varies significantly. *Public.Resource.Org* may provide a persuasive rationale to conclude that legal publications in some states are, as whole publications, unprotectable, while in other states the same rationale could indicate that the third-party content incorporated into “official” citable publications remains protected by copyright and therefore cannot be reproduced.

Beyond third-party additive content such as annotations, the second situation in which copyright raises challenges is with privately developed content, such as technical standards, incorporated either directly or by reference as part of binding law.<sup>124</sup> In recent years the development of law outside of legislatures and courts

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<sup>120</sup> *Id.* at 1253.

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

<sup>122</sup> *Id.* at 1244.

<sup>123</sup> *Id.* at 1248.

<sup>124</sup> See Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193, 219 (2007) (stating that standards raise broader questions about the scope of copyright protection as well);

has become common place.<sup>125</sup> For reasons of efficiency, technical expertise, and standardization, much of the substance of modern law was developed first by private entities. Across both state and federal law, everything from basic contract law under the Uniform Commercial Code<sup>126</sup> to highly technical material safety standards<sup>127</sup> can be traced back to private actors. For the most part, the benefits of private development of the law are viewed as significant and are encouraged,<sup>128</sup> though not without critics.<sup>129</sup>

Because we are primarily concerned with access to publication of authentic, official legal texts, we focus on texts incorporated directly into official legal texts. However, materials incorporated by reference pose significant challenges as well. In some circumstances it may be that those texts *should* be incorporated into official legal publications, but aren't. For directly incorporated content, two cases provide the clearest guidance. The first involves a copyright infringement suit brought by the Building Officials and Code Administrators International, Inc. (BOCA), a private non-profit organization that had for many years worked to develop the BOCA Basic Building Code.<sup>130</sup> The code was developed by BOCA jointly with representatives from industry, code enforcement officials, designers and other stakeholders, and was intended to be adopted by state and local jurisdictions.<sup>131</sup> Massachusetts was one such adopter, which contracted with

Shubha Ghosh, *Legal Code and the Need for A Broader Functionality Doctrine in Copyright*, 50 J. COPYRIGHT SOC'Y. U.S.A. 71, 82 (2003).

<sup>125</sup> As of August 2016, the National Institute of Standards and Technology, U.S. Department of Commerce, lists over 23,000 standards that have been largely created by private organizations and incorporated by reference into federal law. NIST, *Standards Incorporated by Reference (SIBR) Database*, (Aug. 16, 2016), <https://www.nist.gov/standardsgov/what-we-do/federal-policy-standards/sibr>

<sup>126</sup> Developed by a joint committee of the American Law Institute and the Uniform Law Commission. See *Permanent Editorial Board for the Uniform Commercial Code*, AMERICAN LAW INSTITUTE, <https://www.ali.org/about-ali/governance/committees/joint-committees/>. ALI asserts copyright over the UCC and requires permission for reuse.

<sup>127</sup> See *Am. Socy. for Testing and Materials v. Public.Resource.org, Inc.*, 13-CV-1215 (TSC), 2017 WL 473822, at \*1 (D.D.C. Feb. 2, 2017).

<sup>128</sup> See Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 499 (2013); see also Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 145–47 (2013); see also 5 U.S.C. § 552 (speaking to incorporation by reference in federal regulations); *Approval Procedures for Incorporation by Reference*, 47 Fed. Reg. 34,107 (Aug. 6, 1982) (codified at 1 C.F.R. § 51.1 *et seq.*); 79 Fed. Reg. 66,267 (Nov. 7, 2014); 58 Fed.Reg. 57643, 57644–45 (1993) (directing federal agencies to adopt private standards “whenever practicable” so as to “eliminate[ ] the costs to the Government of developing its own standards”).

<sup>129</sup> Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 458 (2003) (“Privatizing law making ignores the values of deliberative democracy.”).

<sup>130</sup> *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980).

<sup>131</sup> *Id.* at 732.

BOCA for distribution of its code.<sup>132</sup> The defendant in the suit, Code Technology (CT), copied the text and republished it in its own print edition.<sup>133</sup> The district court granted a preliminary injunction against CT, which CT appealed to the First Circuit Court of Appeals.<sup>134</sup>

On appeal, CT argued that the text of the code, insofar as it had been adopted into law by the Massachusetts legislature, was in the public domain.<sup>135</sup> Citing the line of cases noted above that statutes and judicial opinions are not protectable by copyright, the court agreed.<sup>136</sup> Notably, the court focused its analysis on the source of authority for the code, and though it did not use the term "official" or "authentic," it clearly indicated that the value in the code comes not just from what it says, but who it is that says it and how that actor communicates it.<sup>137</sup>

Rejecting the argument that prior cases had found edicts of government to be in the public domain merely because their authors are employees of the government,<sup>138</sup> the court observed that,

The cases hold that the public owns the law not just because it usually pays the salaries of those who draft legislation, but also because, in the language of *Banks v. West*, 27 F. 50, 57 (C.C.D.Minn.1886), "Each citizen is a ruler,-a law-maker." The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.<sup>139</sup>

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<sup>132</sup> *Id.*

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

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

<sup>135</sup> *Id.* at 733

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

<sup>137</sup> *Id.* at 734.

<sup>138</sup> *Id.* ("BOCA argues that the Massachusetts building code, unlike judicial opinions and statutes, is principally the work not of government employees, but of itself-a private organization operating with little or no government support which serves the needs both of the state and its citizens by preparing and updating the code, and furnishing copies as needed. 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.").

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

The court went on to reason that more fundamental principles of due process should also drive the analysis:

Along with this metaphorical concept of citizen authorship, the cases go on to emphasize the very important and practical policy that citizens must have free access to the laws which govern them. This policy is, at bottom, based on the concept of due process. Regulations such as the Massachusetts building code have the effect of law and carry sanctions of fine and imprisonment for violations. (citation omitted) Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them. CT points out that the holder of a copyright has the right to refuse to publish the copyrighted material at all and may prevent anyone else from doing so, thereby preventing any public access to the material. . . . We cannot see how this aspect of copyright protection can be squared with the right of the public to know the law to which it is subject.<sup>140</sup>

Nevertheless, the court in *BOCA* recognized that incentives for the development of private standards were important as well. In reversing the preliminary injunction and sending the case back to the district court, the court explained that,

[g]roups such as BOCA serve an important public function; arguably they do a better job than could the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available. Since the rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances than do these technical regulatory codes, we think BOCA should at least be allowed to argue its position fully. . . .<sup>141</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 736.

In 2002, the Fifth Circuit in *Veeck v. Southern Building Code Congress*,<sup>142</sup> directly addressed the issue that *BOCA* avoided: the copyright status of a model building code created by the Southern Building Code Congress, International (SBCCI) and adopted by two north Texas municipalities, Anna and Savoy.<sup>143</sup> The defendant in that suit, Peter Veeck, copied the municipalities' building code and posted it online to his website, RegionalWeb, a noncommercial website that provided information about north Texas. SBCCI sued, claiming copyright infringement.<sup>144</sup> Accepting without discussion that SBCCI had a valid copyright interest in its model code standing alone,<sup>145</sup> the court framed the key question as whether SBCCI retains "the right wholly to exclude others from copying the model codes after and only to the extent to which they are adopted as 'the law' of various jurisdictions?"<sup>146</sup>

The *Veeck* court concluded that Veeck could copy the code<sup>147</sup> for two reasons: (1) enacted laws are unprotectable "facts" under copyright because they are the "unique, unalterable expression of the 'idea' that constitutes local law,"<sup>148</sup> and (2) *Banks* and other Supreme Court cases (as well as persuasive precedent from the First Circuit in *BOCA*) require that "the law," whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law."<sup>149</sup>

With respect to the latter of the reasons, the court spent considerable space limiting its holding to a specific definition of "the law." The court held that "when Veeck copied only 'the law' of Anna and Savoy, Texas, which he obtained from SBCCI's publication, and when he reprinted only 'the law' of those municipalities, he did not infringe SBCCI's copyrights."<sup>150</sup> Indeed, the court said, "[o]ur decision might well be the opposite, if Veeck had copied the model codes as model codes, or if he had indiscriminately mingled those portions of 'the law' of Anna and Savoy adopted by their town councils with other parts of the model codes not so adopted."<sup>151</sup>

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<sup>142</sup> 293 F.3d 791 (5th Cir. 2002).

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

<sup>144</sup> *Id.*

<sup>145</sup> *Veeck v. S. Bldg. Code Cong. Intern., Inc.*, 293 F.3d 791, 794 (5th Cir. 2002).

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

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 801-02 ("SBCCI is creating copyrightable works of authorship. When those codes are enacted into law, however, they become to that extent 'the law' of the governmental entities and may be reproduced or distributed as 'the law' of those jurisdictions.").

<sup>149</sup> *Id.* at 800.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 800 n. 14.

The court focused, with somewhat conflicting statements, on the authorship of the code. Citing *BOCA*, the court held that mere public employment of the authors had little to do with who is attributed authorship of the law:

[e]ven when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of 'the law.' In performing their function, the lawmakers represent the public will, and the public are the final 'authors' of the law.<sup>152</sup>

Yet later, the court felt compelled to distinguish negative precedent from the Second and Ninth Circuits by asserting that those cases were different because the third party material at issue was "created by private groups for reasons other than incorporation into law," and for which copyright incentives may have different effects.<sup>153</sup>

A series of cases from the Second, Ninth, and D.C. Circuits have addressed the issue of material incorporated by reference but not reproduced itself in an official legal publication. In 1994, the Second Circuit in *CCC Information Services, Inc. v. Maclean Hunter Mkt. Reports, Inc.*, addressed the copyright status of an automobile valuation book, *The Red Book*, that was identified as a standard of reference in several states' insurance laws.<sup>154</sup> The Court declined to find that *The Red Book* entered the public domain because it had been so incorporated:

We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright. While there are indeed policy considerations that support CCC's argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution. We note also that for generations, state education systems have assigned books under copyright to comply with a mandatory school curriculum. It scarcely extends CCC's argument to require that all such assigned books lose their

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<sup>152</sup> *Id.* at 799.

<sup>153</sup> *Id.* at 805.

<sup>154</sup> 44 F.3d 61, 74 (2d Cir. 1994).

copyright—as one cannot comply with the legal requirements without using the copyrighted works.<sup>155</sup>

Next in the Ninth Circuit came *Practice Management Information Corp. v. American Medical Association*.<sup>156</sup> That case addressed whether a medical procedure coding system developed by the American Medical Association (AMA) and incorporated by reference into regulations promulgated by a federal agency regarding requirements for Medicare and Medicaid billing.<sup>157</sup> The regulation required physicians to exclusively use the AMA system.<sup>158</sup> The court's analysis was similar to that in *BOCA*. It first examined the authorship of the standard, though in this case the court apparently did not find relevant the metaphorical "citizen-author"; it concluded that most significant was that the AMA authors were not employees of the government.<sup>159</sup> The court also addressed the due process arguments, but concluded that they did not foreclose copyright protection because "[t]here is no evidence that anyone wishing to use the [AMA code] has any difficulty obtaining access to it," and that AMA's right under the Copyright Act to forego publication was not realistic because the AMA would have no incentive to do so.<sup>160</sup>

Later, in *County of Suffolk, New York v. First American Real Estate Solutions*,<sup>161</sup> the Second Circuit addressed copyright in county-produced tax maps that were copied and republished by First American. Interpreting *Banks* and drawing from *CCC Information Services* and *Practice Management*, it developed a two-factor analysis for whether a given work is in the public domain: "(1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law."<sup>162</sup> The court concluded that tax maps did require incentives, and that for the notice question, the current availability was satisfactory.<sup>163</sup> It concluded so for two reasons: (1) the tax maps created no independent legal obligation on anyone and (2) the taxes were required to be disclosed upon request the maps to a requester under the state's freedom of information law, and relatedly, there was no allegation of any person owing property tax having difficulty obtaining access to the maps.<sup>164</sup>

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

<sup>156</sup> 121 F.3d 516, 518 (9th Cir. 1997), amended, 133 F.3d 1140 (9th Cir. 1998).

<sup>157</sup> 121 F.3d at 517.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 519.

<sup>161</sup> 261 F.3d 179, 194 (2d Cir. 2001).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 194-195.

<sup>164</sup> *Id.* at 195.

Finally, in *ASTM v. Public.Resource.Org*, the D.C. Circuit Court of Appeals most recently addressed a case involving use of technical standards produced by ASTM and several other SSOs that had been incorporated by reference into federal regulations.<sup>165</sup> Public.Resource.Org posted copies of those standards online to fulfill its mission “to make the law and other government materials more widely available.”<sup>166</sup> On appeal, the D.C. Circuit accepted, at least as a matter of argument, that incorporation by reference of third-party content into “the law” raises a “serious constitutional concern.”<sup>167</sup> Ultimately, though, the court declined to address them, instead opting to avoid those questions in favor of first looking to Public.Resource.org’s fair use defense which the court suggested, but did not decide, may be viable (the court remanded to the district court for further development of the facts).<sup>168</sup>

Third-party content raises special challenges. Surely, not everything referenced by a legislature or court should immediately be stripped of copyright protection. For example, if a court takes judicial notice of a fact in a local newspaper, should that paper now enter the public domain? Just as surely, if a legislature enacts and republishes a model code, giving it the same force and effect of law that the legislature as if it created it itself, the public should be able to use that law on the same terms as any other law. From the public’s due process perspective, the identity or incentives of the original creator do not matter much; if the work referenced is given authority by a valid lawmaking body, it should be treated as such.

These cases deserve a more complete critique than we can give them here. Our purpose in reviewing them is to highlight how they add yet another layer to the uncertainty and risk of accessing and using authentic, official law. The obstacle to users for accessing their legal obligations can in some cases be especially severe for materials that are propriety and expensive. So, although there some clear guideposts marking out the application of copyright to things such as statutory text or judicial opinions, modern legal publishing, which is highly reliant on third-party publishers and third-party content, has, as a result, led to copyright law posing a significant barrier to preservation and access of “the law” both narrowly and broadly defined.

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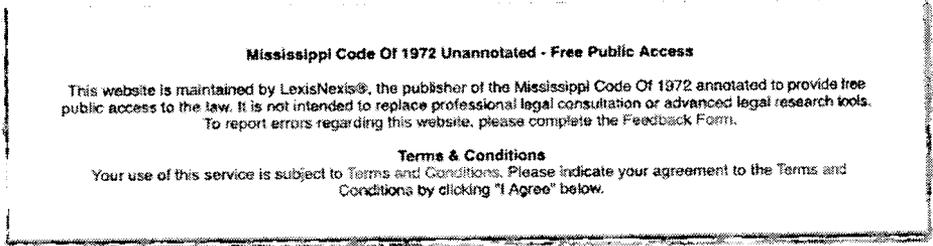
<sup>165</sup> *Am. Socy. for Testing and Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 444 (D.C. Cir. 2018).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 447.

<sup>168</sup> *Id.* at 448-54.

## B. CONTRACTS AND TERMS OF SERVICE



Perhaps even more problematic than copyright are the contractual terms of use that attach to many commercially-contracted online access portals.<sup>169</sup> Users are faced with terms of service on almost every website that they visit, including websites owned by private publishers responsible for publishing the official record of the law.<sup>170</sup> As Bradley E. Abruzzi pointed out with regard to website Terms of Service, “[t]his is the crux of it: the delicate balance that Congress and the courts have undertaken with respect to copyrights comes to nothing if state contract law empowers content purveyors to impose their own rewrites on the law of consumers.”<sup>171</sup>

Many cases address the validity of these agreements.<sup>172</sup> Issues of assent and the enforceability of mandatory arbitration clauses have been heavily litigated in “browsewrap” and “clickwrap” contracts.<sup>173</sup> Because most commercial websites that publish official versions of the law contain terms of use agreements, this forces any user of the law to submit to contractual obligations that restrict their rights to use the official record of the law. For example, to access the free,

<sup>169</sup> See 50 State Survey *supra* note 82, as 50 state survey contains information on which websites with primary lay maintain terms of use for those websites.

<sup>170</sup> *Id.*

<sup>171</sup> Bradley E. Abruzzi, *Copyright, Free Expression, and the Enforceability of “Personal Use-Only” and Other Use-Restrictive Online Terms of Use*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 85, 120 (2009).

<sup>172</sup> See Kurtis A. Kemper, Annotation, *Validity, Construction, and Application of Browsewrap Agreements*, 95 A.L.R. 6th 57 (Originally published in 2014); *In re Zappos.com, Inc., Customer Data Sec. Breach Litigation*, 893 F. Supp. 2d 1058 (D. Nev. 2012) (applying Nevada law).

<sup>173</sup> “Clickwrap” contracts, where the user must click-through a terms of service “contract” affirmatively, have generally been found to be enforceable by the courts. “Browsewrap” contracts, where a website user must visit a separate link in order to view the terms of use for a website and do not require the user to affirmatively assent to their terms. Their enforceability as contracts has been the subject of more dispute among the courts.

unannotated code of Mississippi, Georgia, and many other states, one must assent to the exclusive jurisdiction of the courts of New York for the resolution of any disputes.<sup>174</sup>

It is noteworthy that this creation of potential contractually-based legal liability for users of the record of the law is entirely created because of the online environment. When users of the record of the law relied on print publication, no “terms of use” existed.<sup>175</sup> Nonetheless, this type of litigation has largely been successful for content owners, even when users of websites have argued that terms of use are used to preempt federal copyright law. One seminal case on this issue is *ProCD v. Zeidenberg*.<sup>176</sup> Although this case addressed the validity of a shrinkwrap license from the sale of software, it stood for the principle that the enforcement of the contract under state law was not preempted by federal copyright law.<sup>177</sup> In Judge Easterbrook’s opinion, to support his determination that state law contract claims for software licenses are not pre-empted by copyright law, he offered the example of a student using law on Lexis “containing public domain documents” opining that the student couldn’t resell his access to the documents at a much higher rate.<sup>178</sup> Of course, unaddressed in Judge Easterbrook’s decision is the situation we are currently confronted with – when the “public domain documents” themselves are only published and locked behind a strict terms of use agreement. In Judge Easterbrook’s world, the records of the law were also available in their official forms in print. Although other courts have concluded that there may be some instances in which copyright law is not preempted by state contract law, the parameters of the decision in *ProCD* have largely stood.<sup>179</sup>

This threat to the free use of the official record of the law is currently the subject of active litigation involving the Rules and Regulations of the State of Georgia involving the official publisher of the Rules, Lawriter, (under contract with the Secretary of State of Georgia to comply with its statutory obligation to

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<sup>174</sup> See Terms and Condition, LEXISNEXIS, <https://www.lexisnexis.com/terms/Default.aspx> (last visited Oct. 19, 2018).

<sup>175</sup> As is true with law, this is also true with other types of publications, like newspapers. The online editions of the New York Times is sold with a “personal use-only” Terms of Use, which adds, “copying or storing of any Content for other than personal use is expressly prohibited.” See Abruzzi, *supra* note 133, at 94.

<sup>176</sup> 86 F.3d 1447 (7th Cir. 1996).

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

<sup>178</sup> *Id.* at 1454.

<sup>179</sup> See *Wrench, LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001). In *Wrench*, the Sixth Circuit found that state contract law does not always preempt federal copyright law but does so when “(1) the work is within the scope of the ‘subject matter of copyright,’ as specified in 17 U.S.C. §§ 102, 103; and, (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106.” *Wrench*, 256 F.3d at 453. Applying this legal standard, in *Wrench*, the court found that preemption did not apply.

publish the Rules), and Fastcase, a low cost legal research platform, currently before the Northern District of Georgia.<sup>180</sup> In the case filed in the Northern District of Georgia, Fastcase seeks declaratory judgment that enjoins Lawriter from impeding Fastcase's own online publication of the Georgia Administrative Rules and Regulations, and argues Lawriter cannot claim any exclusive right to publish Georgia Regulations.<sup>181</sup> This case is a refiled federal case after an earlier version of this case was dismissed on jurisdictional grounds.<sup>182</sup>

In the original case, instead of asserting a copyright claim over Rules and Regulations of the State of Georgia, Lawriter conceded that it could not copyright the law, stating, "Lawriter agrees with Plaintiff that public law must remain public as a matter of due process. Plaintiff goes to great lengths to describe how the statutes and regulations adopted as law are not subject to copyright, and Lawriter does not dispute this contention."<sup>183</sup> Lawriter asserted that Fastcase had in fact breached its contract, because they had violated the Terms of Use on the website that required affirmative consent to access the Rules and Regulations of the State of Georgia.<sup>184</sup>

"On April 7, 2016, Lawriter began requiring persons accessing the Website to consent to an express contract entitled "Terms of Use" on their website.<sup>185</sup> The Terms of Use agreement has changed a number of times since it was created. Originally, the contract stated that "You Agree that you will not copy, print, or download anything from this website other than for your personal use." When checked on April 18, 2017, that language had changed to "You agree that you will not copy, print, or download anything from this website for any commercial use."<sup>186</sup> Consistently, the Terms of Use has maintained,

You agree that you will not copy, print, or download any portion of the regulations posted on this site exceeding a single chapter of regulations for sale, license, or other transfer to a third party,

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<sup>180</sup> *Fastcase, Inc. v. Lawriter LLC*, No. 1:17-cv-00414 (N.D. Ga.) is the current docket after Fastcase's appeal was successful in *Fastcase, Inc. v. Lawriter, LLC*, No. 17-14110-AA (11th Cir. 2017).

<sup>181</sup> Complaint for Declaratory Judgment, *Fastcase, Inc. v. Lawriter LLC*, No. 1:17-cv-00414 (N.D. Ga. Feb. 2, 2017).

<sup>182</sup> See *Fastcase, Inc. v. Lawriter, LLC*, No. 1-16-cv-00327 (N.D. Ga.).

<sup>183</sup> Defendant Lawriter, LLC's Response to Plaintiff's Motion for Summary Judgment at 9, *Fastcase, Inc. v. Lawriter, LLC*, No. 1:16-CV-00327-TCB (ND Ga. June 9, 2016).

<sup>184</sup> *Id.* at 12. Lawriter has a "clickwrap" contract that requires affirmative consent. A user must check that they have read the terms of use and enter their name in order to be permitted to see the rules and regulations.

<sup>185</sup> *Id.*

<sup>186</sup> See Rules and Regulations of the State of Georgia, Terms and Conditions of Agreement for Access to Rules and Regulations of the State of Georgia Website, <http://rules.sos.state.ga.us/cgi-bin/page.cgi> (last visited April 18, 2017).

except that you may quote a reasonable portion of the regulations in the course of rendering professional advice.”<sup>187</sup> Thus, Lawriter admits that, “in exchange for access to the Website, and before obtaining access to the Website, the user agrees to an express contract not to copy certain information and to restrict certain potential uses of any information obtained through the website.”<sup>188</sup>

To state it plainly, Lawriter did not make a copyright claim to the laws it was providing on its website, but rather asserted a contract claim to restrict a user’s ability to utilize the laws found on its website. Expressly stated, Lawriter believed it was giving people the opportunity to view the regulations, while simultaneously restricting their ability to use the information found there in any way that violated the Terms of Use.

On January 26, 2017, the Northern District of Georgia dismissed Fastcase’s case against Lawriter, asserting that without the copyright claim, there was no longer clear federal jurisdiction to hear the suit.<sup>189</sup> The court noted that Lawriter never registered a copyright of the materials at issue, and thus, there was no federal copyright claim.<sup>190</sup> In regard to the court having diversity jurisdiction to hear the remaining contract-based claim, the court noted there was not enough evidence to show that the amount in controversy exceeded \$75,000.<sup>191</sup> Fastcase refiled the case in the same court alleging more particular facts to argue that diversity jurisdiction exists and that the amount in controversy exceeded \$75,000.<sup>192</sup> Again, even with more particular facts alleged, the district court dismissed Fastcase’s claim for lack of jurisdiction.<sup>193</sup> The case has now been remanded back to the District Court after its dismissal on jurisdictional grounds was overturned on appeal.<sup>194</sup> Therefore, there is no final court ruling on the merits of Lawriter’s claim that they can protect the uses of the administrative code that they display on their webpage, including restricting the ability for any user to “copy, print, or download,” any portion of the regulations that exceed a

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

<sup>188</sup> Response to Motion for Summary Judgment, *supra* note 144, at 12.

<sup>189</sup> Order, *Fastcase, Inc. v. Lawriter, LLC*, No 1:16-cv-327-TCB (N.D. Ga. Jan. 26, 2017).

<sup>190</sup> *Id.* at 5.

<sup>191</sup> *Id.* at 11.

<sup>192</sup> See Complaint for Declaratory Judgment, *Fastcase, Inc. v. Lawriter LLC*, 1:17-cv-00414 (N.D. Ga. Feb. 2, 2017). Fastcase alleged in its pleadings that the amount in controversy exceeded \$75,000 noting that it was under contract with the Georgia Bar Association to provide electronic access to all of its members with Georgia primary law, including the Georgia Administrative Code.

<sup>193</sup> See Order Granting Motion for Dimissal, No. 1:17-cv-00414 (N.D. Ga. Jul. 17, 2017).

<sup>194</sup> See *Fastcase, Inc. v. Lawriter, LLC*, 907 F.3d 1335 (11th Cir. 2018).

third party in order to transfer that information to any third party.<sup>195</sup> This restriction on use directly affects libraries, archives, or any other memory institution from preserving the law of Georgia.

In its argument that such restrictions in the Terms of Use are allowable under the law, Lawriter asserted that the breach of contract is a basic state law claim.<sup>196</sup> They further asserted and continue to assert on appeal, that they had not registered a copyright and thus, no copyright claim could preempt the application of state contract law.<sup>197</sup> In addition to arguing the right to dictate the terms of use for the Official Rules and Regulations of the State of Georgia, Lawriter also made the argument that the Terms of Use “do not purport to prohibit or restrict any copies of the Georgia regulations, other than those obtained from the Website maintained and published by Lawriter.”<sup>198</sup> Of course, this in effect restricts the ability for anyone to copy the Georgia regulations, because Georgia does not publish an administrative code independently of its contract with Lawriter and states that Lawriter is the official publisher on its own website. In fact, in Georgia’s Contract for Services with Georgia, the parties note that the publication by Lawriter is publishing a compilation of the Georgia Administrative Rules and Regulations “in order to satisfy the duties of GASOS in the Official Code of Georgia Annotated Section 50-13-7.”<sup>199</sup> That section of the Georgia Code requires the Secretary of State to “compile, index, and publish in print or electronically all rules adopted by each agency and remaining in effect.”<sup>200</sup> In its contract with Lawriter, the Secretary of State effectively delegates its responsibility for publishing the compiled rules and regulations of Georgia, and pays Lawriter \$20,000 to carry-out this statutory responsibility.<sup>201</sup> Thus, there is no independent compilation of state rules and regulations apart from those put together by Lawriter, since the Secretary of State has ceded its statutory obligation to provide a compilation to the public to Lawriter, a private entity. Not only does that mean that the official law is locked behind a paywall, but it also means that no user can access the Official Rules and Regulations of the State of Georgia without giving up rights of use to what should be in the public domain.

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1339.

<sup>197</sup> *Id.*

<sup>198</sup> Response to Motion for Summary Judgment, *supra* note 144, at 13.

<sup>199</sup> See Contract for Services, Exhibit A, Affidavit of David Harriman, Fastcase, Inc. v. Lawriter, LLC, 1:16-CV-00327-TCB (June 9, 2016).

<sup>200</sup> GA. CODE ANN. § 50-13-7 (2017).

<sup>201</sup> See Contract for Services, *supra* note 157.

## C. COMPUTER FRAUD AND ABUSE ACT

Users who seek official electronic versions of the law guarded by private publishers who limit access and use to that information with strict terms of use and click contracts additionally must be wary of civil liability or criminal prosecution under the Computer Fraud and Abuse Act. The Computer Fraud and Abuse Act creates a federal criminal cause of action as well as a civil action for intentional unauthorized access or exceeding authorized access to any information from any protected computer.<sup>202</sup> Although the Act was created primarily to combat computer hacking, it is controversial because of its vast scope.<sup>203</sup> At first glance, this statute may not seem to affect seekers of legal information online, and has most specifically been applied in the context of employees accessing company or client information via work computers.<sup>204</sup> However, as an increasing number of laws are available online only behind click terms of use contracts and maintained by private publishers, questions emerge about whether the reach of the CFAA could potentially affect online users of legal information if they violate terms of use contracts. Some precedent exists for the use of the CFAA as a prosecutorial tool against individuals who exceed terms of use when engaged in research.<sup>205</sup> To that end, the question of what “exceeds authorized use” becomes relevant; circuits are split on this question for purposes of violating the criminal statute.<sup>206</sup> The narrow reading of the CFAA adopted by the Ninth and Fourth Circuits potentially would not be as problematic to users of what should be freely available digital legal information, since courts would not be concerned with “use” to determine if access was unauthorized or exceeded authorization. The broader views taken by other courts could potentially be problematic for users of legal information confronting privately published websites with strict terms of use policies.

The Ninth and Fourth Circuits have argued for a narrow reading of the CFAA, specifically to not include prosecutions that target the “misuse or

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<sup>202</sup> 18 U.S.C. § 1030 (2018).

<sup>203</sup> *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751 (2013).

<sup>204</sup> See Stephanie Greene & Christine Neylon O'Brien, *Exceeding Authorized Access in the Workplace: Prosecuting Disloyal Conduct Under the Computer Fraud and Abuse Act*, 50 AM/ BUS. L.J. 281, 281-82 (2013).

<sup>205</sup> The case of Aaron Schwartz, a prominent computer programmer charged with violating the CFAA for downloading millions of articles from JSTOR, a non-profit subscription database of academic journals, illustrates an aggressive use of the CFAA to bring criminal charges for unauthorized use of a research database. See Allison D. Burroughs, Benjamin L. Mack & Heather B. Repicky, *When is Hacking a Crime? Potential Revisions to the CFAA*, 58 BOSTON BAR J. 13 (Summer 2014).

<sup>206</sup> See RAYMOND T. NIMMER, INFORMATION LAW §9:42 Federal Computer Fraud and Abuse Act – Unauthorized Access and Exceeding Access (2018).

misappropriation” of computer information.<sup>207</sup> Specifically, the Ninth Circuit in *Nosal* ruled “that the phrase ‘exceeds authorized access’ in the CFAA does not extend to violations of use restrictions.”<sup>208</sup> Under a *Nosal* reading, it is unlikely that a user of online legal information who takes content from a website in violation of the stated terms of use would be prosecuted under the CFAA. Any misuse of information that results from authorized access is not actionable under this reading of the CFAA, rather “exceeding unauthorized use” only results when a user did not have access to the underlying information to which he or she obtained access.<sup>209</sup>

However, in other jurisdictions, courts have taken a broader view of the CFAA, arguing that each time the statute has been amended, it has been amended to expand the reach of the CFAA, not narrow it.<sup>210</sup> The Seventh Circuit has argued for a broader view, articulating that the moment that an employee’s actions exceed the authorization given by the employer at the same moment that the employee “acquires a [subjectively adverse] interest to [the employer].”<sup>211</sup> Under this view, misappropriation of data indicates that an employee exceeded authorized access under the CFAA.<sup>212</sup> Such a view could be problematic for users of legal information who could be limited in how they use legal information on websites governed by strict terms of use.

Still, other jurisdictions, like the First Circuit adopt the “contract” view of the CFAA, in which an employee exceeds authorized access “if he or she accesses information and uses it for purposes that are explicitly prohibited by the employer or computer owner.”<sup>213</sup> In the case *EF Cultural Travel BV v. Zefer Corp.*, the First Circuit held that a travel website could have explicitly stated “what is forbidden” with regard to the use of scrapers by rival websites and thus give “fair

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<sup>207</sup> See *U.S. v. Nosal*, 676 F.3d 854, 862-3 (9th Cir. 2012) (citing *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 965 (D. Ariz. 2008) (“[T]hese courts recognize that the plain language of the CFAA ‘target[s] the unauthorized procurement or alteration of information, not its misuse or misappropriation.’”) (internal quotation marks omitted)). The Fourth Circuit similarly decided to invoke the rule of lenity when interpreting the CFAA concluding “that an employee ‘exceeds authorized access’ when he has approval to access a computer, but uses his access to obtain or alter information that falls outside the bounds of his approved access.” *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012).

<sup>208</sup> *Id.* at 863.

<sup>209</sup> See Robert Brownstone, Tyler G. Newby 1 DATA SEC. & PRIVACY LAW § 9:14 (2017).

<sup>210</sup> See Audra A. Dial and John M. Moye, *The Computer Fraud and Abuse Act and Disloyal Employees: How Far Should the Statute Go to Protect Employers from Trade Secret Theft* 64 HASTINGS L.J. 1447, 1462 (2013).

<sup>211</sup> *International Airport Centers, L.L.C. v. Citrin*, 440 F.3d 418, 421 (7th Cir. 2006).

<sup>212</sup> *Forge Indus. Staffing, Inc. v. De La Fuente*, 2006 WL 2982139 (N.D. Ill. 2008).

<sup>213</sup> Brownstone and Newby, *supra* note 165.

warning.”<sup>214</sup> The Fifth Circuit and Eleventh Circuits have also signaled their adoption of this view.<sup>215</sup> This view could be particularly problematic for users of legal information who obtain legal information from websites guarded with a Terms of Use notice that restricts how they can use the legal information that they obtain from that website.

Unfortunately, some of the problematic electronic publications of law highlighted in this article are found in jurisdictions with a broader view of what “exceeds authorized access” under the CFAA.<sup>216</sup> This means users who have no other option but to obtain the law through restricted websites potentially could be subject to criminal or civil action for violations of a publisher’s electronic terms of use depending upon in which jurisdiction, they find themselves.

Researchers in other disciplines have confronted the possibility of CFAA actions because of differing interpretations by the circuits. Most notably in 2016, four professors and a media organization involved in studies of racial discrimination in online real estate, finance, and employment transactions filed suit in the DC District to determine the reach of the CFAA and whether or not the CFAA violates the 1<sup>st</sup> Amendment.<sup>217</sup> In March 2018, Judge John D. Bates entered a memorandum order dismissing the majority of the researchers’ claims on a 12(b)(1) motion by the government.<sup>218</sup> The court did not dismiss the researchers’ as-applied First Amendment claim, and litigation on this claim is ongoing at the time that this article is being drafted. In its Memorandum Order, the court noted that courts are split as how to read the “exceeds authorized access” provision of the CFAA and the DC Circuit had never opined in regard

<sup>214</sup> 318 F.3d 58, 63-4 (1st Cir. 2003). (denying the need for a “reasonable expectations” standard, instead stating that “public website providers ought to say just what non-password protected access they purport to forbid.”)

<sup>215</sup> *United States v. John*, 597 F.3d 263 (5th Cir. 2010) (holding that the defendant’s conviction of the CFAA did not constitute manifest miscarriage of justice when defendant exceeded her authorized use of employer’s computer to perpetuate a fraud in violation of her employer, Citigroup’s employee policies, of which she was aware). *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010) (holding that a federal employee did exceed his authorized access and thus violated the CFAA when he used his authorization to look up personal details in the Social Security Database which violated the Social Security Administration’s written policies that prohibited employee access to the database without a business reason).

<sup>216</sup> For example, the Rules and Regulations of the State of Georgia is jurisdictionally in the Eleventh Circuit, a contract view state.

<sup>217</sup> Complaint, *Sandvig v. Sessions*, No. 1:16-cv-01368-JDB (D. DC June 29, 2016).

<sup>218</sup> Memorandum Opinion, *Sandvig v. Sessions*, No. 1:16-cv-01368-JDB (D. DC Mar 30, 2018). Specifically, the judge dismissed the researchers’ First Amendment claims based under the Petition Clause, based on facially overbreadth claims, and based upon vagueness claims. The court also dismissed the researchers’ claims under the private nondelegation doctrine, which they said courts can avoid by giving “narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.” (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989)).

to that circuit split.<sup>219</sup> Because the controlling DC Circuit had never weighed in regarding the correct reading of the CFAA, Judge Bates opined that the “narrow interpretation adopted by the Second, Fourth, and Ninth Circuits – and by numerous other district judges in this Circuit – to be the best reading of the statute.”<sup>220</sup> The fact that Judge Bates adopted the narrow interpretation of the CFAA weighed critically in the dismissal, as he wrote “This case raises important questions about the government’s ability to criminalize vast swaths of everyday activity on the Internet. However, the court need not answer all of them today, because it concludes that the CFAA prohibits far less than the parties claim (or fear) it does.”<sup>221</sup> Had the case been brought in a jurisdiction with a more sweeping interpretation of the CFAA, the outcome may not have been the same.

The CFAA, as currently written and interpreted across jurisdictions, leaves troubling questions about the ability of citizens across the country to access their states’ laws when access to those laws is governed by terms of use maintained by private publishers in contractual relationships with state governments. In the following section, possible fixes to the uncertainty created by the present state of the law are discussed.

#### IV. RETURNING OWNERSHIP OF THE LAW TO THE PUBLIC

The purpose of this article is to shine a light on the legal publishing system in the United States and how it has evolved to provide inefficient, insufficient access to the public. The problem is not *just* a copyright problem, nor is it *just* a problem with the legal publishing marketplace, online licensing norms, or government funding. One of the things that makes this problem especially complex is that each state has its own unique publication scheme, making it difficult to propose complete solutions to confront every challenge facing public access to the law. Nevertheless, there are clear areas where progress is needed, and the variety of actors who can work to facilitate ensuring the public has access to the law.

Firstly, state governments should confront the reality that publishing models for print laws do not readily translate to publishing laws in an electronic-only environment. In a print world with physical products, partnerships with private publishers to defray the costs of publication made sense. The public could have access to the law through distribution of print laws to public libraries across a particular state, so the cost of access to the public was free (aside from the cost of transportation to a public library and the time it may take to access the law

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<sup>219</sup> *Id.* at 24-25.

<sup>220</sup> *Id.* at 27. (noting “the statutory context buttresses the narrower reading of the text.”).

<sup>221</sup> *Id.* at 44.

there). Private publishers could recoup costs through sales to libraries, law firms, courts, and other legal institutions.

In an online world, requiring users to purchase access to the law violates the norms of access to the law. By restricting online access, no longer can libraries provide free access to members of the public. State governments choosing to contract with private publishers to provide online access to the law should recognize that private publishers limiting access to the law through click contracts, requirements for payment, or any other means violate the legal expectation that the law should be freely accessible to all who are expected to abide by it.

Based on this recognition, there are several possible fixes for state governments, state courts, private publishers, libraries, and other freedom of information advocates to bring the law back to the public domain.

#### A. STATE GOVERNMENTS

State governments have the largest role to play in ensuring the public has access to official law in an electronic format.<sup>222</sup> In an ideal world, state governments would fully adapt and enforce UELMA as well as adapt laws that go beyond UELMA to explicitly state legal materials in their state could not be copyrighted nor access to them be limited by the use of contracts. Ideally, all laws would be published by the state governments themselves (functioning as a state version of the federal Government Publishing Office) and financed adequately with state government funding to ensure that information is kept reliable, up-to-date, and previous versions are preserved. Reprinting, copying, and sharing files would be freely permissible across different legal research platforms and on the open web, while the government would maintain safeguards to the reliability of an “official” version that could authoritatively be used in legal disputes.

Governments that seek to simplify their work by “adopting” or “incorporating by reference” standards produced by private organizations should compensate the private organizations for their work, and then make any adopted legal standard freely available to the public.

Although it is unlikely that all states will publish all of their laws in an official format available online, at a bare minimum, state governments should ensure that they designate, by law, which version of a code is official. If a code is not designated as official, disclaimer language should clearly indicate this on the code’s webpage. If the “official” version of a statute or a regulation can only be

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<sup>222</sup> See “Principles & Core Values Concerning Public Information on Government Websites,” AMERICAN ASSOCIATION OF LAW LIBRARIES, <https://www.aallnet.org/wp-content/uploads/2018/07/Principles-Core-Values-Concerning-Public-Information-Govt-Websites-2007.pdf> (last visited Oct. 18, 2018).

found in a session law or in a version of a “register”, then the disclaimer should indicate this as well. If an online version is designated as official, then the official version should be made freely available to the public with no terms of use to restrict usage of the law.<sup>223</sup> Official online versions should have adequate preservation plans in place, or state governments should partner with memory institutions like state archives or libraries to ensure that preservation is achieved. This is particularly true for states that have not passed UELMA. Currently, at least twenty states publish only electronic official codes of regulations. Of those, ten states have not passed UELMA, meaning that there is no statutory obligation to preserve the official version of the regulatory code. Even in states that have passed UELMA, preservation of electronic administrative codes is not always clear. For example, Colorado publishes its official regulations online, but it lacks a mechanism to view historical regulations required under UELMA.<sup>224</sup>

There are some good examples of state efforts to publish law online in an official format that is preserved. For example, Connecticut publishes its code of regulations through its eRegulations website, which as of July 1, 2017 became the official version of the *Regulations of Connecticut State Agencies*.<sup>225</sup> The current version of the regulations is available, as well as a database that allows users to search regulatory history back to 2015.

#### B. STATE COURTS

State courts should make all judicial decrees, and especially any judicial decisions and opinions, freely available through their own court websites. This would alleviate the problem that users face where, depending on the electronic database they pay to use, they may have access to different and exclusive opinions. One additional possibility previously discussed is that state courts could partner with state or academic libraries to archive and preserve all electronic court opinions. For example, in New Jersey the state courts partner with Rutgers University Law Library to preserve and make available to the public official court opinions. Large libraries have the expertise to help courts preserve opinions electronically and also make them searchable and findable to the public.<sup>226</sup>

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<sup>223</sup> See discussion below under “Private Publishers.”

<sup>224</sup> CODE OF COLORADO REGULATIONS, <https://www.sos.state.co.us/CCR/Welcome.do> (last visited Feb. 12, 2019).

<sup>225</sup> See “Official Version Statement,” CONNECTICUT EREGULATIONS SYSTEM, <https://eregulations.ct.gov/eRegsPortal/Information/Index/BetaNote> (last visited Feb. 12, 2019).

<sup>226</sup> See *New Jersey Courts Search Page*, RUTGERS, <http://njlaw.rutgers.edu/collections/courts/search.php> (last visited Feb. 12, 2019).

Additionally, when different versions of a court opinion appear online, it should be clear to the reader which version is the official, final opinion. Disclaimers should clearly indicate when opinions are not final and are still being reviewed. A thornier issue that should be resolved with clear direction from the courts is the issue of designating cases as precedential. In a world where all cases are published electronically and freely available online, should certain cases still be designated as precedential? We are aware there are two competing views to this issue that pit judicial economy arguments against arguments over due process. It is certainly beyond the scope of this article to resolve this issue, but insofar as the public has a right to know and understand which cases are “the law” and have precedential value, this is an argument that needs resolution. In our common law tradition, a clear understanding of judicial authority has shaped the development of the law. Without resolution, these questions will only become more complex in the future with more and more case decisions available to legal practitioners, scholars, and the general public.

### C. LAW LIBRARIES

Even in the absence of legislative solutions to the problems described in this article, there are a myriad of steps law libraries, particularly state law libraries and large, academic law libraries, can take with regard to ensuring that legal information is accessible and preserved. In addition to advocacy efforts librarians may take to push their governments towards more accessible law and legal information, libraries can involve themselves in digitization efforts, efforts to preserve digital content, and provide metadata and other finding tools for electronic legal information.

Because some private publishers of state legal information maintain they possess copyright over legal information they publish, this can inhibit some library actors from feeling empowered to do anything with online legal information. Libraries, particularly those supported by the state, or instruments of state institutions, should feel little hesitation when it comes to copying, storing, or making available the law that is restricted by private publishers.<sup>227</sup>

Librarians can assist in preservation of online legal information by independently storing versions of the law, keeping previous versions for themselves, and not relying on private publishers (who may go out of business

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<sup>227</sup> Libraries should take into account the legal restrictions noted earlier in this article, but in general the risk of legal action against libraries acting in good faith to provide public access is less than for many others. *See* DAVID R. HANSEN, *DIGITIZING ORPHAN WORKS: LEGAL STRATEGIES TO REDUCE RISKS FOR OPEN ACCESS TO COPYRIGHTED ORPHAN WORKS*, 111 (Kyle K. Courtney & Peter Suber Eds., Harvard Library 2016), <https://dash.harvard.edu/handle/1/27840430> (last visited Feb. 12, 2019).

or change approaches to publishing at any time) or state actors (whose priorities and funding may change over time) to keep all versions of the law indefinitely. Law libraries already preserve old copies of print legal materials; it is not a stretch of a library's workflow to imagine similar practices in the world of online legal information.

One ongoing problem with electronically-published law is that it is often unaccompanied by the tools that make it usable to people who are not practiced in understanding the law. In the past, seekers of legal information would need to go to a law library in order to access the law where they might also speak with a trained reference librarian who could help them find law most applicable to their questions and understand the organization and authority of the law they were referencing. Although it is now seemingly easier to access the law electronically, it may be more difficult for an untrained person to find the law most relevant to their legal needs or understand how it is structured. Law libraries could assist in making the law more approachable and understandable by building search tools, explainers, and research assistance meant to complement freely available online legal databases. Technical services librarians are masters of metadata and database design.

#### D. PRIVATE PUBLISHERS

Private publishers contracting with state governments to electronically publish primary law have a responsibility to ensure that the law is freely accessible to members of the public, as they are acting as an arm of the state. To that end, publishers should provide a free official (if contracted with the state government to do so) version that is up to date and complete. Prior official versions of the law should similarly be available freely with no usage restrictions. When private publishers enter into contracts to publish laws for a state, states should pay the full cost of publication to the publisher. Private publishers should not have to recoup the costs of publication, either in print or electronic format, by charging members of the public for access to their laws. Taxpayers have already paid for the laws that govern them to be created through legislative, administrative, and judicial processes. Members of the public should not be charged again by private publishers who have not been adequately compensated by state governments for their publishing efforts.

Additionally, when private publishers contract with the state to publish official versions of the laws, the contract should explicitly state that terms of use to restrict access and use of free versions of the law shall not be permitted. Downloading laws, copying, printing, and other uses should be freely allowed to give users full rights. Private publishers should not create private markets to public information nor should they become gatekeepers to the law.

To the extent that private publishers seek to profit from the publication of public law, it should only be for “value-added” features beyond the publication of the law in its original organization and format that is used for citation in the courts. Such “value-added” features that a publisher could charge additional funds for include: citators, unofficial annotations, or research finding aids and tools. Legal publishers can profit from added features created through their own innovation; they should not profit from providing basic access to the law.

#### E. ACCESS TO GOVERNMENT INFORMATION ADVOCATES

There is a continued need for access to government information advocates to seek redress for information that is kept from being freely available to the public through the courts. This article has highlighted some ongoing litigation that does just that. Until we live in an information environment where all states provide free access to official, authentic laws, then such litigation should continue to create a body of law that makes clear that in the new information environment, the obligation of states to publish the law is unchanged.

Additionally, advocates and interest organizations for access to government information need to continue to push their elected officials to modify laws which restrict access to the law. This article has highlighted a number of problematic legal areas where modification of existing statutes would ease access and use issues.

For example, because of the varied interpretations of CFAA, advocates should push for the law to be amended in particular with regard to the problematic “exceeds authorized use” language. In response to the death of Aaron Schwartz, advocates of changes to the CFAA begin pushing “Aaron’s Law” which would eliminate the “exceeds authorized access” language in the CFAA.<sup>228</sup> The revisions to the CFAA “would decriminalize violations of an agreement, policy, duty, or contractual obligation regarding Internet or computer use,” and bring the language of the statute in line with court readings of the statute like *Nosal* in the Ninth Circuit.<sup>229</sup> Unfortunately, these proposed amendments have been stalled in committee with no momentum in Congress in many years. Advocates for free access to law should make a renewed push for Congress to reconsider these amendments.

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<sup>228</sup> See Burroughs et al., *supra* note 163. (Contending the bill would also amend the CFAA to define “access without authorization” to include only obtaining “information on a protected computer” that the “accesser lacks authorization to obtain” by “knowingly circumventing one or more technological or physical measures that are designed to exclude or prevent unauthorized individuals from obtaining or altering that information.”).

<sup>229</sup> *Id.*

## V. CONCLUSION

The advent of online publication of the law has not necessarily changed the relationship between private publishers and state governments. However, it has changed the dynamic for the public in accessing the law. The Internet holds the promise of greater access to the law, but at the same time, also holds the peril of restricting access to the law. We stand at a crossroads: it is time for state governments to reaffirm the democratic principles that underlie public access to the law and ensure that citizens of today and the future have robust access to the laws that govern them.