

The Public Servant

The newsletter of the Illinois State Bar Association's Committee on Government Lawyers

Code Revision Commission v. Public.Resource.Org: Copyright of laws and public works

BY PETER J. ORLOWICZ

When legislators write laws and judges issue decisions, it is not usually a controversial principle that the text of these laws and decisions are not protected by copyright. In fact, section 105 of the Copyright Act specifically states, in part, that “[c]opyright protection under this

title is not available for any work of the United States Government...” The law has not been so clear, however, when state legislatures or governmental bodies have incorporated copyrightable third-party

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How the state can help pension funds collect delinquent pension contributions from municipalities

BY ROBERT P. OSGOOD

In 2011, the Illinois Pension Code (the “Pension Code”) was amended to allow pension funds to “garnish” delinquent municipalities with the help of the state. The funds can certify to the State Comptroller that a municipality is delinquent and the amount of that delinquency.¹ The Pension Code then

requires the comptroller to withhold (or “offset”) state payments, which usually take the form of tax distributions, and remit the money to the pension fund. Section 3-125(c) of the Pension Code, relating to police officer pensions, states:

If a participating municipality fails to transmit to the fund

contributions required of it under this Article for more than 90 days after the payment of those contributions is due, the fund may, after giving notice to the municipality, certify to the State Comptroller the amounts

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standards or editorial material into the official laws and regulations. Recently, the U.S. Court of Appeals for the Eleventh Circuit considered a version of this question in *Code Revision Commission, State of Georgia v. Public.Resource.Org, Inc.*, No. 17-11589 (11th Cir. Oct. 19, 2018) and identified three factors to consider in determining “whether a written work is attributable to the constructive authorship of the People” and not copyrightable as a result. The factors which the eleventh circuit identified as characteristics of a document that represent the law as constructively authored by the public are:

1. The law is written by particular public officials who are entrusted with the exercise of legislative power;
2. The law is, by its nature, authoritative; and
3. The law is created through certain, prescribed processes and deviating from these processes deprive it of legal effect.

Factual Background

Georgia's official state code (the “official code” or “O.C.G.A.”) includes not only statutory text enacted by the legislature, but also annotations that include commentaries, advisory opinions from the state bar and attorney general, and other reference notes. Although the annotations are considered part of the official code, the annotations do not generally carry the force of law. The annotations were initially prepared by Matthew Bender & Co., Inc., an operating division of LexisNexis, in exchange for, in part, the exclusive right of publication. However, final editorial control of the annotations rests with the Code Revision Commission, a governmental body established by the Georgia General Assembly, and the state of Georgia claimed copyright in the annotations (but not the statutory text) in its own name. In 2013, Public.Resource.Org (“Public Resource”), a non-profit organization headed by Carl Malamud, purchased a

full set of the printed O.C.G.A. for the purpose of republishing the official code to the public, free of charge. The Code Revision Commission (acting on behalf of the state and its legislature) argued that this republication infringed on the state's copyright and eventually sued for injunctive relief in the U.S. District Court for the Northern District of Georgia. Public Resource counterclaimed, seeking a declaratory judgment that the State of Georgia could not hold a valid copyright in any part of the O.C.G.A. The district court found in favor of Georgia, concluding that the annotations lacked the force of law and, therefore, were not in the public domain. The district court also rejected Public Resource's defense of fair use. Public Resource then appealed to the eleventh circuit.

The People as “Author”

The eleventh circuit reversed, finding “that the People are the ultimate authors of the annotations. As a work of the People the annotations are inherently public domain material and therefore uncopyrightable.” In reaching this conclusion, the court acknowledged that the foundations of this rule were “generally implicit and unstated,” but emphasized the lengthy history and line of authority resulting from the U.S. Supreme Court's cases that establish, with respect to certain governmental works, the “author” of the work should be treated as the general public when the work represents an exercise of the people's sovereignty. In particular, the court relied on *Banks v. Manchester*, a Supreme Court decision that held state court judges could not be considered the “author” of a judicial decision for copyright purposes because judges receive a fixed public salary and can have no pecuniary interest in the fruits of their judicial labors, even as the Supreme Court acknowledged that the issue was fundamentally a public policy question. The Eleventh Circuit pointed out that other courts of appeals have extended the principle to apply to state statutes

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OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS

Mary L. Milano

PUBLICATIONS MANAGER

Sara Anderson

✉ sanderson@isba.org

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and municipal building codes enacted into binding regulations, but not to private listings of motor vehicle values or coding systems incorporated into or required by regulation, tax maps created by a county assessor's office, or terms of a restrictive covenant entered into by a municipality.

The eleventh circuit's opinion strongly asserted the role of popular sovereignty in the principle that laws cannot be copyrightable because lawmakers and judges are acting as the People's agents in drafting laws and decisions. As a result, the people must be considered the constructive author of such documents for purposes of copyright law, and any document that falls into this classification must be inherently in the public domain and not subject to copyright. With this principle established, the eleventh circuit identified three essential characteristics that "make the law what it is," and thereby would make a particular writing or work noncopyrightable:

The law is written by particular public officials who are entrusted with the exercise of legislative power; the law is, by nature, authoritative; and the law is created through certain, prescribed processes, the deviation from which would deprive it of legal effect. Each of these attributes is a hallmark of law. These characteristics distinguish written works that carry the force of law from all other works. Since we are concerned here with whether a work is attributable to the constructive authorship of the People, these factors guide our inquiry into whether a work is law or sufficiently law-like so as to be subject to the rule in *Banks*.

In comparing these characteristics to the annotations in the O.G.C.A., the eleventh circuit concluded that the annotations possessed all three. Specifically, the court identified the fact that the Code Revision Commission held final editorial control of the annotations, provided highly detailed instructions to LexisNexis for what materials must be included and how they are prepared, and exercised direct supervision of LexisNexis during the process. The court also noted how the Georgia General Assembly must formally vote annually to adopt the O.G.C.A. as the official state code, including the annotations. Although the annotations do not purport to carry the force of law in

the way that the statutory text does, the court placed weight on the annotations being made an inextricable part of the code and given the state's approval and authority. The court also noted that Georgia state courts favorably cite to annotations as authoritative sources on statutory meaning and legislative intent, and that the act of the legislature to adopt the code with its annotations transforms them into official comments authored by the same body that wrote the statutes, conferring special significance and meaning on them in comparison to an unofficial annotated code or interpretive document. Finally, the court noted the process by which the Georgia legislature reviews and approves the work of the Code Revision Commission and adopts the code (with annotations) as official is very similar (though not identical) to the legislative process for enacting statutes, insofar as both houses of the Georgia General Assembly must vote on a legislative act which is signed into law by the Governor. This process of bicameralism and presentment, the court found, was an essential element of lawmaking and the exercise of sovereign power, which was present in the adoption of the official code.

Because the annotations in the official code are authored by the right state officials, in the right manner to exercise sovereign power, and have authoritative legal significance, the court held that no part of the O.C.G.A. was copyrightable, and therefore reversed and remanded to the district court with instructions to enter judgment for public resource.

Significant Lessons

The eleventh circuit's decision should not be interpreted to mean that all works of a state or local government employee are inherently non-copyrightable; in fact, the court took pains to distinguish its three essential characteristics from the bright-line rule enacted by Congress against copyright for any work of the United States government in 17 U.S.C. § 105. Rather, the rule in *Banks* as applied in *Code Revision Commission* "is concerned with works created by a select group of government employees, because only certain public officials are empowered with the direct exercise of the sovereign power." Only

those works which meet the three factors identified by the Eleventh Circuit would be uncopyrightable. Although the eleventh circuit's decision is not binding on Illinois federal courts, the analysis is based in federal copyright law, not in any substantive state law (other than the factual circumstances surrounding the drafting and adopting of the annotations at issue in the case). Finally, municipalities that incorporate third-party standards for building codes, fire protection, or other areas into local ordinances may wish to consider the three factors in deciding how best to adopt the standards in a way that will be most easily accessible to the public. ■

General attorney, United States Railroad Retirement Board, Office of General Counsel. The statements and views expressed in this article are entirely Mr. Orlowicz's own, and do not represent the views of the Railroad Retirement Board or the United States Government.

1. See *Wheaton v. Peters*, 33 U.S. 591 (1834) (holding that the Reporter of the Supreme Court could not hold copyright in the written opinions of the Court) and *Banks v. Manchester*, 128 U.S. 244 (1888) (holding that neither a state court judge nor the reporter who compiled the opinions were an "author" of the work under the Copyright Act).
2. 17 U.S.C. § 105.
3. *Code Revision Commission, State of Georgia v. Public.Resource.Org, Inc.*, No. 17-11589 (11th Cir. Oct. 19, 2018), slip op. at *28.
4. *Id.* at *28.
5. O.C.G.A. § 1-1-7.
6. *Code Revision Commission, supra* note 3 at *5.
7. *Id.* at *20.
8. *Banks v. Manchester*, 128 U.S. 244, 253 (1888).
9. *Howell v. Miller*, 91 F. 129 (6th Cir. 1898).
10. *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002) (*en banc*).
11. *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2nd Cir. 1994).
12. *Practice Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997), amended, 133 F.3d 1140 (9th Cir. 1998).
13. *City of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 193 (2nd Cir. 2001).
14. *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26 (1st Cir. 2003).
15. *Code Revision Commission, supra* note 3 at *28.
16. *Id.*
17. *Id.* at *38.

How the state can help pension funds collect delinquent pension contributions from municipalities

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of the delinquent payments in accordance with any applicable rules of the Comptroller, and the Comptroller must, beginning in fiscal year 2016, deduct and remit to the fund the certified amounts or a portion of those amounts from the following proportions of payments of State funds to the municipality: (1) in fiscal year 2016, one-third of the total amount of any payments of State funds to the municipality; (2) in fiscal year 2017, two-thirds of the total amount of any payments of State funds to the municipality; and (3) in fiscal year 2018 and each fiscal year thereafter, the total amount of any payments of State funds to the municipality.

The State Comptroller may not deduct from any payments of State funds to the municipality more than the amount of delinquent payments certified to the State Comptroller by the fund.

Section 4-118(b-5), relating to firefighters, states:

If a participating municipality fails to transmit to the fund contributions required of it under this Article for more than 90 days after the payment of those contributions is due, the fund may, after giving notice to the municipality, certify to the State Comptroller the amounts of the delinquent payments in accordance with any applicable rules of the Comptroller, and the Comptroller must, beginning in fiscal year 2016, deduct and remit to the fund the certified amounts or a portion of those amounts from the following proportions of payments of State funds to the municipality:

(1) in fiscal year 2016, one-third of the total amount of any payments of State funds to the municipality; (2) in fiscal year 2017, two-thirds of the total amount of any payments of State funds to the municipality; and (3) in fiscal year 2018 and each fiscal year thereafter, the total amount of any payments of State funds to the municipality.

The State Comptroller may not deduct from any payments of State funds to the municipality more than the amount of delinquent payments certified to the State Comptroller by the fund.

How the Law Works

In practice, a pension fund calculates, with the help of an actuary, the amount of property tax for which the municipality should have levied and contributed to the fund. After notifying the municipality, the fund notifies the comptroller of the shortfall, and the comptroller offsets any payments the municipality is due to receive. The municipality may then protest the offset within 60 days. If the outcome of the protest is in the fund's favor, the comptroller remits the money to the fund.

The City of Harvey

In Harvey, a south-Chicago suburb with a population of about 25,000, the pension problem started decades ago, with the fire pension fund suing for contributions as far back as the '90s. In 2006, the Harvey Police Pension Fund sued the city for delinquent contributions. The case settled in February of 2008, with Harvey agreeing to pay the Fund more than \$550,000 and to levy taxes to cover its contributions. The Fund filed a motion to compel enforcement of the settlement, in December of 2010, and the city was ordered to pay more than \$7 million in employer contributions. The same year, the Harvey Fire Pension Fund sued the city once again. Harvey was ordered to pay more than \$12 million in

contributions.

In February of this year, the Police Pension Fund, in the first ever use of the amended Pension Code, went to the comptroller to collect the city's delinquent contributions. In April, when the comptroller offset approximately \$1.3 million of tax revenues earmarked for the city, Harvey sued for injunctive relief. The city lost this case, forcing it to lay off several fire and police employees. On interlocutory appeal, the first district granted the TRO sought by the city and ordered that the money be remitted to the city pending the litigation. The city's win was short-lived when, 10 days later, the Supreme Court vacated the first district order and remanded to the circuit court.

In late April, the Fire Pension Fund certified its debt of \$12.4 million to the comptroller. The comptroller's legal opinion was that it was required to pay the Police Pension Fund first, who had priority of claim, and not pay the Fire Pension Fund until the claim was satisfied. And so, in May, the Fire Pension Fund intervened, and a TRO was granted in their favor, preventing disbursement to the Police Pension Fund. In June, a tentative deal was reached, in which the city would get \$1.3 million being held, and the remainder would go to the two pension funds, bondholders, and the Illinois Municipal Retirement Fund. In July, a global deal was struck, in which the intercepted funds and future tax revenues would go to the various stakeholders, while leaving enough for the city to operate.

Looking Forward

The litigation in Harvey has been closely watched as similar situations exist in several other financially troubled municipalities. Legislation has been introduced to make this law a little easier on economically distressed municipalities like Harvey. Senate floor Amendment 1 to Senate Bill 370, filed April 24 of this year, aims to curb the amount the comptroller

may withhold. It would only allow the state to offset one quarter, as opposed to all, of the payments due the municipality. For so-called distressed cities, two other amendments to the bill seek to apply more gradual withholding rates and double the time a fund has to wait before making a claim to the comptroller. If the situation in Harvey is any indication of things to come, municipalities are well advised to begin negotiating with the pension funds to reach funding agreements, rather than risk litigation in which the state may be entitled to withhold vital revenues. ■

The author is senior counsel and ethics officer for the Illinois Department of Central Management Services.

1. P.A. 96-1495.
2. Although the Pension Code encompasses several types of pension funds, this article is limited to the police and firefighters' pension systems, 40 ILCS 5/3-125(c) and 40 ILCS 5/4-118(b-5).
3. 40 ILCS 5/3-125(c), 40 ILCS 5/4-118(b-5).
4. 74 Ill. Admin. Code 295.300(c). Such notice is effectuated by remitting to the Comptroller a Statement of Notification, with prescribed information, that is certified by the municipality's CEO.
5. 74 Ill. Admin. Code 295.600(b).
6. 74 Ill. Admin. Code 295.600(e).
7. Cook County Circuit Court, 2006 CH 15468.
8. 2017 Il App (1st) 153095 at ¶ 9.
9. *Id.* at ¶14.

10. Cook County Circuit Court, 2010 CH 53364.
11. Cook County Circuit Court, 2018 CH 04443.
12. 2018 Il App (1st) 180726.
13. Jonathan Bilyk, *IL Supreme Court Strikes Appellate Order Requiring Comptroller to Release Hold on City of Harvey's Funds*, Cook County Record, April 26, 2018.
14. Zak Koeske, *Harvey Cuts Deal for \$1.3M in withheld Taxes, Escapes Financial Crisis for now—but City Still Owes Millions*, Daily Southtown, June 7, 2018.
15. Cook County Circuit Court, 2018 CH 04443.
16. Koeske, *supra* note 14.
17. Zak Koeske, *Harvey Reaches Pension Fund Repayment Agreement; State to Cease Withholding Tax Revenues*, Daily Southtown, July 24, 2018.
18. Ill. Sen. 370, Sen. Fl. Amend. 1, 100th Gen. Ass., April 24, 2018.
19. Ill. Sen. 370, Sen. Fl. Amend. 2, 100th Gen. Ass., May 9, 2018 and Ill. Sen. 370, Sen. Fl. Amend. 3, 100th Gen. Ass., May 9, 2018.

How I work

BY JUSTIN L. LEINENWEBER

To say that *life* as an attorney can be hectic and overwhelming at times may qualify as a modest understatement. I chose the word *life* instead of *work* because being an attorney seeps into most aspects of our daily lives. Phone calls or texts from friends (some close, others not so close) may lead to discussions about significant life issues involving requests for legal advice. Our families may come to rely on our advice and counsel on issues we never imagined, such as aging parents, calls from creditors, or power-of-attorney forms. Being an attorney means being someone that your friends, family, and co-workers can count on when they need a hand or to “just run something by you.” It is an honor to be thought of in this way, but it can come at the cost of feeling like you are being pulled in a million different directions at once. Below are a few things that have helped me navigate these waters in the last couple of years:

To Do Lists – I use a program called **Things** that allows me to keep one list on my computer that syncs with my phone, so I always have an up to date list of things that I need to do. Things is expensive, but there are other free apps that are just as good, like Wunderlist.

Calendars – If it's not on my calendar, then I will almost never remember to do it. I use **Microsoft Outlook** and I put everything

on it – both personal and business. I don't like paper calendars. And my phone is always on me, so it may as well be the central repository.

Note Taking – I recently bought an **iPad** and **Apple Pencil** and now take notes almost exclusively on my iPad. I use a program called **Notability** that was cheap and performs wonders. I really like the search function because it will scan through my chicken scratch and do a pretty good job of finding whatever search term I'm looking for. This app has greatly reduced my use of paper, led to a cleaner office, and now I carry all my case notes wherever I go.

Music – If you look in my office, I'm likely to have headphones on any given day. In fact, no day goes by without me putting on my headphones and listening to music on my computer or iPhone. I have a **Spotify** membership which gives me access to more music than I could have ever dreamed for a few bucks a month.

Scanning – The single best piece of technology I've ever owned is my iPhone. The second best piece of technology I've ever owned is my scanner—a **Fujitsu ScanSnap ix500**, which is expensive but worth every penny. It has never let me down.

Driving & Parking – **Lyft** for when I don't drive; **Spothero** for when I do.

You can really get lost in the dozens and dozens of options available in the “Productivity” field—just google “to do lists,” and you'll be amazed at the number of options. These are just the apps that work for me and help me keep the balls in the air on any given day. I still drop them occasionally, but I'm working on it. ■