

Arkansas Code Revision Commission, Meeting of 9/29/2021

Transcript Prepared by CastingWords, Inc. with manual corrections by Carl Malamud of Public Resource. This is NOT an official transcript. The beginning of the meeting, starting at 1:33:50pm, through 1:46:28 is transcribed. The Arkansas Code Revision Commission record of meetings may be found at:

<https://www.arkleg.state.ar.us/Committees/MeetingsPast?code=630&ddBienniumSession=2021%2F2021R#>

Chairman: Arkansas Code Revision Commission is called to order. The chairman sees a quorum. I appreciate everybody being here today and participating either in person or by telephone.

We will look to our agenda. The first item of business is the approval of the minutes of the June 16th, 2021 meeting. That is exhibit B to your packet.

Are there any questions, corrections, comments? If not, without objection the minutes of the meeting will be approved. That brings us to item C, which is a proposed contract amendment. That is exhibit C. I'll recognize Mr. Henderson to provide more detail.

Vincent Henderson: Vincent Henderson, code reviser. This amendment has been drafted in light of the Supreme Court decision of [publicresource.org vs. Georgia](https://www.supremecourt.gov/opinions/19-541). I explained it a little bit. Mr. Ganten with Lexis is here to also explain and answer questions.

What it does is it takes the case note annotations in the Arkansas Code 1987 annotated and essentially turns that over to the publisher Lexis for copyright purposes. We're continuing to use those in the Arkansas Code Annotated, but they would own them.

Exhibit C2 is the paragraph in the contract that is being amended by this.

All, in this case, material prepared for the commission pursuant to the contract belongs exclusively to the commission. The successful [inaudible 2:07] this case with Lexis registers the copyright claim on all materials in the official edition on behalf and in the name of the commission as the copyright owner.

In this particular case, this amendment would except out the case on annotations.

Chairman: Any questions?

Man 1: Bob, I guess I would have a question on this. Right now, I take it the annotations are part of what belongs to the state. Is that correct?

Mr. Henderson: Yes, sir. That's correct.

Man 1: And so, currently if we move to a different publisher those annotations could be used by that new publisher for future editions of the code. Is that correct?

Mr. Henderson: That I don't know would be correct under this amendment.

Man 1: That would be the only question I have is, is this something that, if we were to...I know periodically we do let the code out for contract. We have, depending on years, we can have varying degrees of interest. I would like to understand better what we're giving up.

Does that mean that in the future that other publishers would have to start from scratch. That may already be the case. I don't know. Could we have comment from Lexis on that?

Anders Ganten: Sure. Thank you, Mr. Chairman. I'm Anders Ganton with LexisNexis.

A couple of things. As Mr. Henderson correctly noted, this is driven by the decision, Georgia versus Public Resource to clarify the treatment of annotations following that court decision. We've already negotiated a similar amendment with another state.

Really, the purpose here is twofold, in my mind. I will get to your question in just a second. Number one, is to clarify the treatment of the annotations in the production of the code, the day-to-day. There was some confusion about that in the Supreme Court decision. It's also clarified that they have no legal way to mandate.

The Supreme Court did veer into the authoritative nature of annotations. To be clear, case annotations is a research tool to help people understand or to get them pointed towards cases that are relevant for further research. You would not necessarily ever quote a case note in a court brief.

That's the other one. The second one, when you look at the ownership as things stand today after Georgia versus Public Resource...Essentially, it means that nobody owns them today. It's not entirely accurate to say that the state owns them because the state can actually not hold a copyright in press in the annotations anymore under the edict of government principle.

The challenge then becomes, when you have a publishing arrangement like this, where we, as the publisher of the Arkansas Code...Essentially, we do not get compensated for all the work that goes into creating the code and doing all the mechanics that create the code itself.

Historically, that always worked out well because we got the exclusive right to publish and sell the resultant materials. Now, in effect, and very simply put, the state can no longer grant that exclusivity because the state can, in effect, not enforce its copyright as it is today.

What happens if there is a change in publisher? A couple of things, another publisher can and do create these themselves. We would certainly also be open to license it. We've been the publisher for a long time. We are very committed to remaining the publisher, but we also have no real interest in making that difficult for you to decide to in a different direction.

Chairman: Is this kind of a situation where if we...As it stands now, anybody can publish and put anything out there. They could basically take what we let LexisNexis produce by the authority of the Code Revision Commission. Somebody could copy that and put it out right now, [inaudible 6:30] of this decision.

In this case, if we exclude the annotations, that is giving you that...Basically allowing you to own that copy. You'll have that copyright. I guess the tradeoff is that that's what makes it worth your while to be the publisher. In other words, if you don't have that exclusivity, we may be in need of...

It's probably not in your interest to continue down that road, or certainly not at the level that you're at this point. Would that be fair to say?

Anders Ganten: Mr. Chairman, that's exactly right. The trouble is, obviously, that print as a medium is declining. More and more use it online. Exclusivity does definitely help to do that because we...

Essentially, when you look at the outcomes after the ruling of the Supreme Court, it did definitely upend the business model that, in my mind, has worked rather well. The other alternative is that you either create all this work in house, which I think there's only one state that does that at a comparable level, Colorado. They have a staff of 30 people that just do that in house.

It's not super efficient to do it because you're in session every two years. Fundamentally, we...It doesn't make a lot of economic sense to have that staff on hand.

Or, you do a different model, a fee for services where you hire somebody to do all this work and you pay them a fixed amount to do the work because, at the end of the day, there's a lot of work that goes in. We have a team that works on it, the same folks year in and year out. At some point, we've got to pay the bills, too.

Chairman: Any other questions? Representative Gazaway, you're recognized.

Representative Jimmy Gazaway: I'm trying to understand exactly [inaudible 8:33] of where we are and where we're going.

Chairman: My understanding is that the annotations that currently exist have been produced by the Bureau of Legislative Research. Is that correct?

Mr. Henderson: They've been produced as work made for hire by the publisher on behalf of the commission on behalf of the state.

Chairman: Who has that been historically?

Mr. Henderson: Excuse me?

Chairman: Who has that been historically? The person who has put...

Mr. Henderson: The publisher.

Chairman: The publisher. Who has been the publisher.

Mr. Henderson: Lexis.

Chairman: Lexis, OK.

I think I have a few more questions, but I'll pass for now.

[pause]

Man 2: ...to this, but I'm not sure. How does this...this only applies to case note annotations. What effect would it have on official comment to the statute? I'm particularly thinking, I know that UCC has official comment. It's associated with almost every statute in the UCC. Who owns the copyright to that? How does this affect that?

Mr. Henderson: We have an agreement of some years ago with respect to the Uniform Commercial Code. We have a two volume commentaries volume. It's not been updated in quite literally decades.

We have an agreement with the American Law Institute and the Uniform Law Commission because I think they jointly own the commentary on that. We haven't updated those. With respect to some of the other comments or commentaries, we've had a whole raft of uniform laws that have come through that we haven't put the commentaries in that yet at this point.

Also in that volume are the commentaries from the Arkansas Criminal Code Revision Commission. We've also placed those in there. There's no copyright on those at that point. Those are in a separate volume. Those are not incorporated, at this point, into the volume, say, of Title IV, for example.

Man 2: What we're doing today does not affect the official comment. Is that...?

Mr. Henderson: That's correct. This is just the case note annotations.

Chairman: Any other questions or comments? Sure, you're recognized.

Man 3: Just to verify [inaudible 11:20] .

Anders Ganten: I think it's generally understood, at this point, the official commentary is different. Like Mr. Henderson said, that's owned by the Uniform Law Commission. We have a separate license. In fact, we have to license the content, too, to reproduce it in print. That would not be affected at all. We do not own that. We licensed that. That are a non-governmental body, so it is definitely copyrightable.

The annotations are probably the only things in the code volumes today that are properly copyrightable. The other things are more like enumerations. Those, as such, don't meet the criteria for level of artistic expression.

Chairman: Any other questions? What's the will of the commission? We have a motion to approve the amendment. I'm trying to remember if here we require a second, right? Is there a second? Second by Senator Thompson.

Is there any discussion? All in favor say aye.

Commissioners: Aye.

Chairman: Any opposed? The ayes have it. The amendment is adopted.

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