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Public Records Group Countersues Georgia in Copyright Fight

R. Robin McDonald, Daily Report

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A California public records organization has countersued Georgia's Code Revision Commission, seeking a ruling that the group's free distribution and publication of the Official Code of Georgia Annotated does not infringe any state copyright.

In July the state commission sued California-based Public.Resource.Org, claiming the nonprofit had infringed a state-held copyright by publishing the annotated—and only official—version of the state code on various websites and making it available to the general public free of charge.

Lawyers representing the state commission have asked a federal judge in Atlanta to order Public.Resource to remove 240 volumes that constitute the annotated code from public websites and to stop distributing free digital copies without financially compensating the state.

California public records activist Carl Malamud, the president of Public.Resource.Org, is fighting back. In a Sept. 14 counterclaim, Alston & Bird lawyers representing the nonprofit contended that laws enacted by government entities such as the Georgia General Assembly are not copyrightable and fall well within the public domain.

Public.Resource published and distributes Georgia's state code for free as part of its stated mission to protect and promote the right of the public to know the laws that govern it and to make those laws available to the citizenry on a noncommercial basis. "The people are the authors of the law, regardless of who first pens the words that later become law through enactment by a legislature or public agency," the counterclaim contends. "The legal principle that ignorance of the law is no defense presumes that all citizens have access to the laws."

Malamud's organization has asked U.S. District Judge Mark Cohen to find that the state holds no valid copyright of any portion of the state code or of annotations that include summaries of state judicial opinions, attorney general opinions and other commentary

included to clarify the statutes. Public.Resource has also asked for a ruling that the organization's copying, posting and distribution of the Georgia code does not infringe any copyright either directly or indirectly.

Malamud told the Daily Report that the Georgia infringement suit is the first time his organization has been sued by a government entity, although he said it has been threatened with litigation by the state of Oregon, which eventually led to legislative hearings in that state. Malamud also said he has been served with "take-down" notices by the states of Mississippi and Idaho for publishing their respective state codes online.

Malamud said he decided to file a counterclaim in Georgia because, "If we don't, Georgia is likely to continue to assert a copyright."

Alston & Bird attorneys Jason Rosenberg and Elizabeth Rader are defending Public.Resource pro bono. Rosenberg on Tuesday declined to comment and referred questions to Malamud.

Georgia Attorney General Sam Olens' spokesman, Daryl Robinson, would not comment. Anthony Askew with Atlanta's Meunier Carlin & Curfman, who is representing the Code Revision Commission, declined to comment on the case or the allegations in the counterclaim.

At the heart of the litigation is the state's decision to contract with a publisher designated by the information giant LexisNexis to publish an annotated version of the Official Code of Georgia, according to the suit. Through the state's contract with LexisNexis publisher Matthew Bender and Co., LexisNexis is allowed to sell annotated copies of the code in both hardbound book and electronic format, according to the state's complaint. In return, Lexis makes an unannotated version of the state code available online free of charge.

The state claims that if its publisher for hire cannot recoup the cost of developing the annotations included in the official version of the legal code, the state will have to either stop publishing annotated editions of the state code or pay for those annotations with state tax dollars, "and citizens of the state of Georgia will face losing valuable analysis and guidance regarding their state laws."

State lawyers also claim that LexisNexis makes additions to the statutory text of the state laws, the "succinctness and accuracy" of which make them "valuable to attorneys and others researching the code."

While attorneys for the state acknowledged in the complaint that the actual text of the state laws "are and should be free to the public," they argue that those annotations are copyrightable—even though they acknowledge that they are largely summaries of public documents written by public officials—because the "analysis and guidance" that make up each annotation "is an original and creative work of authorship" owned by the state.

They also contend that Malamud's free publication of the annotated code is part of a "strategy of terrorism" to force governments to publish public documents and make them

freely available on "Malamud's terms."

In a formal answer to the state suit, Public.Resource lawyers said the organization "vehemently denies the bizarre, defamatory and gratuitous allegation that it has a 'strategy of terrorism.'"

For more than three decades, Malamud has fought to give the public unfettered access to the laws, regulations and legal decisions by which they are governed and to make them easily available in accessible formats free of charge. He founded Public.Resource in 2007.

Malamud also helped to persuade the U.S. Securities and Exchange Commission to make EDGAR, its database of corporate filings, free to the general public, according to the counterclaim. In 2014, Malamud testified before the U.S. House of Representatives and the House Judiciary Committee in favor of an amendment to federal copyright laws that would make state and local official legal documents uncopyrightable as a matter of public policy.

In its answer, Public.Resource repeatedly rejected the notion that the state holds any valid copyright to its official code of laws, including the disputed annotations, or that anyone requires authorization in order to copy and distribute it. It acknowledged that it had enabled and encouraged the public to view, download, print, copy and distribute the annotated code through the permanent online library www.archive.org.

Public.Resource lawyers also argued that the state cannot copyright works that government entities have enacted as law because the law should be free to the public. State law governing enactment of the official code of Georgia states that the codification of state laws prepared by the Code Revision Commission in 1978 included a merger of the statutes with annotations, captions, catchlines, history lines, editorial notes, cross-references and all analyses that would be known as and cited as the "Official Code of Georgia Annotated," or O.C.G.A., and that any lawyers who cited unofficial versions of the code "do so at their peril."

Yet, according to the counterclaim, the only version of the state code that LexisNexis makes available to the public free of charge under its state contract is not the annotated version and, therefore, by definition, "is not the official code of Georgia."

LexisNexis charges for access to or copies of the annotated code. "Scholarship, analysis and other public engagement with the law is not possible without access to the complete official code, including summaries of judicial opinions and attorney general opinions," the counterclaim states.

In addition, according to the counterclaim, in order to get access to the free version of the state code, a member of the public must first agree to terms and conditions of use that are "onerous" and subject to the jurisdiction of the New York courts.

The counterclaim also contends that summaries of state judicial decisions that interpret particular statutes in the state code, often no more than a paragraph in length, are "derivative works of the judicial decisions themselves, which are not copyrightable subject matter."

"Even if copyright law protected authorship by private parties after it is incorporated into law, which it does not, Public.Resource's use of the complete O.C.G.A. is fair use and therefore not copyright infringement," the counterclaim contends. The state, through the Code Revision Commission—in asserting copyright claims over annotations—is assuming "the power to inhibit public discourse about and public use of the official code," the counterclaim said.

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