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"It's Not Just A Good Idea—It's The Law!"

May 1, 2014

Honorable Jeffrey W. Bullock
Secretary of State
401 Federal Street
Dover, DE 19901

Via Certified Mail 9414 7118 9956 0424 6046 19

Dear Secretary Bullock:

I am writing in regards to Title 8 of the Delaware Code, and specifically in regards to **8 Del. Code §397**, "Penalty for unauthorized publication of chapter," which reads:

"Whoever prints or publishes this chapter without the authority of the Secretary of State of this State, shall be fined not more than \$500 or imprisoned not more than 3 months, or both."

I mentioned this penalty in **recent testimony** before the House Judiciary Committee of the U.S. House of Representatives along with a series of similar provisions and takedown notices from Georgia, Idaho, and Mississippi. However, given the wonderful job that your office has done on the Internet with the Delaware Code, e-filing for corporations, and other modern services, I must confess that I thought that the provision was simply a typo or an artifact of the July 3, 1967 law (**56 Del. Laws, c. 50**) that you had not yet got around to removing.

It was thus somewhat of a shock after speaking to staff at the Legislative Council's office and to your own Chief of Community Relations that Delaware is indeed serious about enforcing these provisions and requiring anybody who wishes to copy Title 8 of the Delaware Code to first request and obtain permission.

Long-standing precedent of the United States Supreme Court holds that copyright claims cannot prevent citizens from reading and speaking the law. See *Wheaton v. Peters*, **33 U.S. 591** (1834); *Banks v. Manchester*, **128 U.S. 244** (1888). Chief Judge Edith H. Jones of the 5th Circuit expressed this principle clearly in her opinion in *Veck v. Southern Building Code Congress*, which concerned a model building code incorporated in the law of two Texas towns:

"Public ownership of the law means precisely that "the law" is in the "public domain" for whatever use the citizens choose to make of it. Citizens may

reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse." 293 F.3d 791 (5th Cir. 2002) (en banc).

The matter is so clear that the U.S. Copyright Office has incorporated it into the standard operating procedures:

"Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy. This applies to such works whether they are Federal, State, or local as well as to those of foreign governments." Compendium of Office Practices II, §206.01, U.S. Copyright Office (1984)

The problem with your assertion of control over Title 8 is not only that it is clearly against long-standing public policy in the United States, it is a significant brake on innovation. When some students at a major law school wanted to use these materials in coursework, §397 proved to be so scary that their professors insisted that they ask for permission first. Imagine what it would have been like if WestLaw had been forced to ask for and obtain permission from each of the states and each of the federal courts before being able to embark on their creation of the National Reporter System?

Assertions of control are a slippery slope and they are unfounded because in the United States the law belongs to the people. The rule of law requires that the law be promulgated freely, a principle deeply embedded in our constitutional provisions of freedom of speech, equal protection, and due process. We have accordingly made a copy of Title 8 without requesting prior authorization and made it available at the following location:

<https://law.resource.org/pub/us/code/de/>

It is our intention to continue to develop these materials, encouraging both for-profit and non-profit entities to work with the code to make it available as pamphlets, and in modern formats such as States Decoded. We have clearly labeled the material as public domain and we assert no rights. Nor should you.

In discussing this issue with staff at the Legislative Council's office, two concerns were raised in an attempt to justify the current policy. The first was that educational uses would be routinely approved once your office received a look at the intended use and that commercial or inappropriate uses were being looked for. Needless to say, there are significant free speech considerations in requiring a license before people are able to speak the law.

The second issue that was raised was a desire to insure the authenticity of the materials. Copyright is an inappropriate instrument for such a consideration, particularly given the clear statement of the courts that the law has no copyright. A better tool would be providing digital signatures at the source so anybody presented with a document that purports to contain the text of the law is able to reach your web site and verify the authenticity of the original documents you publish. This is the approach that, for example, the Government Printing Office uses to sign the Official Journals of the federal government.

In addition, if your site were to offer standard security services, such as a secure HTTP connection and modern services such as DNSSEC, people visiting your site would have additional assurances of the integrity of the materials they read.

In the meantime, we respectfully refuse to request permission for our publication activities and will not accept a license if one is proffered. I would be happy to travel to Delaware to discuss this matter with you. I believe if you consider the matter further and hear the views of the citizens of Delaware and those schooled in constitutional and copyright law, you will quickly come to the conclusion reached by other states, such as the State of Oregon, that have reversed similar unconstitutional prohibitions against access to their laws.

Sincerely yours,



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