

Prepared Statement

Statement of Karl Olson, Levy, Ram & Olson
Before the Legislative Counsel Committee, Oregon State Legislature
June 19, 2008

Mr. Chairman, Honorable Members of the Committee:

Thank you for the opportunity to testify before you today. My name is Karl Olson, I am counsel for Public.Resource.Org and Justia, Inc., and have specialized in copyright and media law for 25 years.

I am writing on behalf of my clients, Public.Resource.Org and Justia, Inc., in advance of the June 19, 2008 hearing at which we are informed the Committee will reconsider its position on the assertion of copyright in the Oregon Revised Statutes (ORS).

My clients will write separately to explain in more detail the uses they have made and intend to make in the future of the Oregon Revised Statutes and how such use fits within their mission of making the law freely available to the public and informing the public. The purpose of this letter is to set forth the law in this area and, based upon that legal background, to explain why in our view the Committee cannot assert copyright over the Oregon Revised Statutes ("ORS") as they are now made available by the Committee.

I. THE BASIC PRINCIPLE: THE LAW CANNOT BE COPYRIGHTED

We start from the fundamental principle that the law cannot be copyrighted. That principle was established by the U.S. Supreme Court 174 years ago in Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834), when the Court interpreted the first federal copyright laws and unanimously held that "no reporter has or can have any copyright in the written opinions delivered by this Court. . ."

Later that century, the U.S. Supreme Court in Banks v. Manchester, 128 U.S. 244, 253 (1888) reaffirmed, "there has always been a judicial consensus, from the time of the decision in the case of Wheaton v. Peters . . . that no copyright could, under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The 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 statute."

These bedrock principles have very recently been cited and reaffirmed. In Veeck v. Southern Building Code Congress Intl., 293 F.3d 791, 796 (5th Cir. 2002), the Court cited the above passages and concluded, “Banks represents a continuous understanding that ‘the law,’ whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright. Modern decisions have followed suit.” (Id. at 796.) The Court in Veeck went on to explain, “we read Banks, Wheaton, and related cases consistently to enunciate the principle that ‘the law,’ whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.” (Id. at 800.) Thus, when the plaintiff in that case copied only “the law” of two Texas towns, which he obtained from the defendant’s publication, he didn’t infringe the defendant’s copyrights in its model building codes. “The basic proposition was stated by Justice Harlan, writing for the Sixth Circuit: ‘any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book. . . .’” (293 F.3d at 800, citing Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898), emphasis added.)

Stated another way, laws are “facts,” and facts cannot be copyrighted; they are part of the public domain available to every person. (Veeck, 293 F.3d at 801, citing Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).)

II. THE MATERIAL AS TO WHICH THE COMMITTEE CLAIMS A COPYRIGHT INTEREST DOES NOT POSSESS SUFFICIENT ORIGINALITY TO BE COPYRIGHTABLE

The Legislative Counsel stated in an April 7, 2008 letter to Tim Stanley, the chief executive officer of my client Justia, Inc., “Although the Committee does not claim a copyright in the text of the law itself, the Committee does claim a copyright in the arrangement and subject-matter compilation of Oregon statutory law, the prefatory and explanatory notes, the leadlines and numbering for each statutory section, the tables, index and annotations and such other incidents as are the work product of the Committee in the compilation and publication of Oregon law.”

We respectfully submit that the Legislative Counsel Committee’s present assertion of copyright cannot be squared with either the U.S. Supreme Court precedents set forth above or other U.S. Supreme Court and lower court copyright decisions.

In Feist Publications, supra, the U.S. Supreme Court considered and rejected the assertion of copyright over the white pages in a telephone book. The Court explained: “The sine qua non of copyright is originality. To qualify for copyright, a work must be original to the author.” (499 U.S. at 345.) “Originality is a constitutional requirement,” id. at 346, and one cannot claim originality as to facts. (Id. at 347.) Even when “facts” – such as the law – are selected and arranged, “No matter how original the format . . . the facts themselves do not become original through association.” (Id. at 349.)

A. Feist: No Copyright Protection for a Collection of Facts

The Supreme Court in Feist went on to say, “This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works.” (Id. at 350.) It noted the rejection of the old “sweat of the brow” doctrine, a notion that copyright is a reward for the hard work that goes into compiling facts. (Id. at 352-54.) Thus, the Court concluded, the white pages at issue there lacked the requisite originality. “[C]opyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. Rural’s white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. 17 U.S.C. section 101 does not afford protection from copying to a collection of facts that are selected, coordinated and arranged in a way that utterly lacks originality.” (Id. at 363-364.)

B. Committee’s Efforts “Praiseworthy,” But Not Protectable

We respectfully submit that Feist, and the above cases holding that the law cannot be copyrighted, defeat the Committee’s assertion of copyright here. Our position, in the words of the Supreme Court in Feist, “should not be construed as demeaning [the Committee’s] efforts . . . but rather as making clear that copyright rewards originality, not effort.” (Id. at 364.) Similarly, as the Supreme Court declared more than a century ago and reaffirmed in Feist, ““great praise may be due to the [Committee] for their industry and enterprise in publishing . . . yet the law does not contemplate their being rewarded in this way.”” (Feist, 499 U.S. at 364, citing Baker v. Selden, 101 U.S. at 105.)

C. Creativity Here “Can Only Proceed in a Narrow Groove”

The basic problem confronting the Committee in any attempt to claim copyright over Oregon Revised Statutes or the arrangements and “tweaks” set forth in the April 7 letter is simple and was explained thusly by the Second Circuit Court of Appeals: “[C]reativity in the task of creating a useful case report can only proceed in a narrow groove. Doubtless, that is because for West or any other editor of judicial opinions for legal research, faithfulness to the public domain original is the dominant editorial value, so that the creative is the enemy of the true.” Matthew Bender & Co., Inc. v. Hyperlaw, Inc., 158 F.3d 674, 688 (2d Cir. 1998).

Those words ring true here. The arrangements and subject-matter compilation of ORS, the leadlines and numbering and the other incidents cited in the Committee’s April 7 letter are no more copyrightable than the law itself; any effort put into them “can only proceed in a narrow groove” of creativity that lacks sufficient originality to be copyrightable. The Legislative Counsel Committee’s on-line version of the Oregon Revised Statutes, in the words of the Court in Matthew Bender, exhibits little creative

insight; moreover, as the Court explained in that case, there are few options available for presenting and arranging the text of the law. See Matthew Bender, 158 F.3d at 685 [“Almost never will these decisions present more than one or two realistic or useful options, and almost always the choice among them will be dictated . . . Given the few practical options available to West, and the fact that the choice among these narrow options will be dictated by the timing and nature of the court’s action, we do not think the district court clearly erred in determining that this element of West’s case reports does not demonstrate sufficient creativity to be protectable”].

In short, we respectfully submit that the copyright claim asserted by the Committee in its April 7 does not pass muster under the above authorities and should be reconsidered. A numerical arrangement of statutes, or a brief summary of cases under those statutes such as appears on the Committee’s website, is not copyrightable.

III. ASSERTION OF COPYRIGHT IS INCONSISTENT WITH OREGON’S POLICY OF MAKING THE LAW FREELY AVAILABLE

The Legislature has set forth a general goal of public access to Oregon’s law in ORS section 173.763(2)(a), which states that the law “shall be made available to the public through the largest nonproprietary, nonprofit cooperative public computer network. The information shall be made available in one or more formats and by one or more means in order to provide the general public in this state with the greatest feasible access.” The assertion of copyright by the Legislative Counsel Committee is inconsistent with this mandate and detracts from the goal of providing the public with “the greatest feasible access.”

IV. MY CLIENTS’ USE OF OREGON REVISED STATUTES IS A FAIR USE

Even if the Legislative Counsel Committee could assert copyright over its publication of Oregon Revised Statutes – an assumption which, as set forth above, cannot be made under existing law – my clients’ present and proposed use of ORS is a fair use under the Copyright Act, 17 U.S.C. section 107. The factors used in determining whether a use is fair under section 107 include (1) the purpose and character of the use, including whether it is of commercial or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Analysis of those factors can yield only one conclusion: the use is fair. First, my clients make ORS available on the Internet for educational purposes: to enable citizens to know the law which governs them, and to enable them to know it without having to spend a lot of money on a lawyer. Second, the “nature of the work” in this case is published: it is made freely available on the Internet by the Legislative Counsel Committee itself, which

seriously undercuts any ability to claim copyright over other users. Finally, there is no indication that my clients' use of the Oregon Revised Statutes – even wholesale posting of the entirety of ORS – has any effect upon the “potential market for or value of the copyrighted work.” We question whether Oregon – in contrast to the vast majority of other states, including its neighbor to the south – should be viewing publication of ORS as a money-maker, but even if Oregon does view ORS as a money-maker, the warning that the only “official” text is the one made available for \$390 would seem to rebut any assertion that publication of “unofficial” versions on the Internet will interfere with the revenue stream.

In short, even if the Oregon Revised Statutes as published by the Committee are copyrightable – a point which we contest – we respectfully submit that the use of ORS made by my clients is a fair use under copyright law.

CONCLUSION

We hope this exposition of the law and of our clients' views is helpful to the Committee and we look forward to discussing this important matter at the June 19 hearing. We respectfully submit that at the June 19 hearing the Committee should vote to disclaim any assertion of copyright over the Committee's publication of Oregon Revised Statutes.