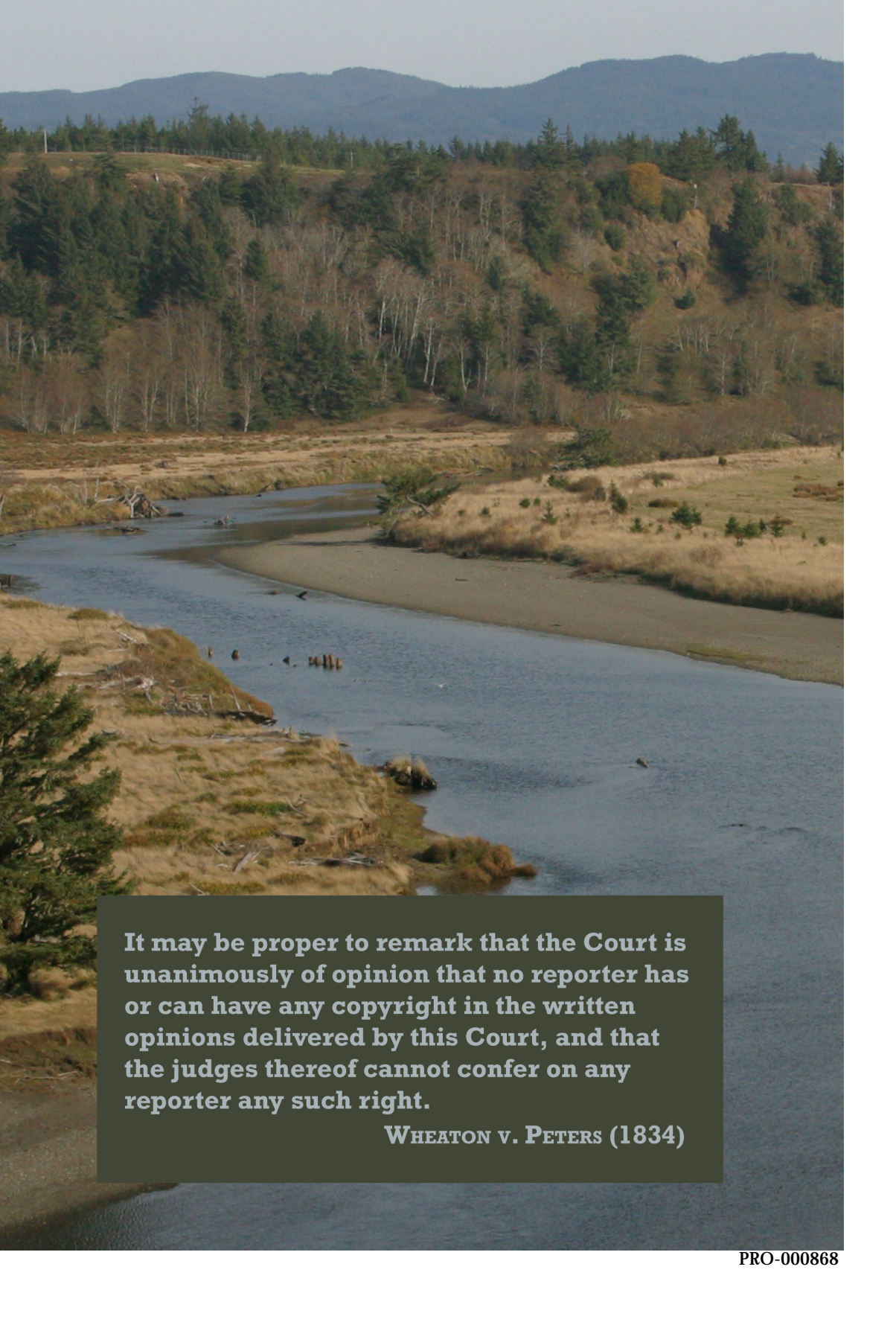




THREE REVOLUTIONS IN AMERICAN LAW

CARL MALAMUD



It may be proper to remark that the Court is unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court, and that the judges thereof cannot confer on any reporter any such right.

WHEATON V. PETERS (1834)

**THREE REVOLUTIONS
IN
AMERICAN LAW**

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**THREE REVOLUTIONS
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CARL MALAMUD

1. Based on lectures presented at several Oregon universities, this pleading is respectfully addressed to the Honorable John Kroger, Attorney General of the State of Oregon.
2. Edmund Burke, *Speech of Edmund Burke, Esq. on Moving His Resolutions for Conciliation With the Colonies*, Macmillan (Mar. 22, 1775, reprinted 1917).
3. The definitive Burke can be found in F.P. Lock, *Edmund Burke: Volume 1 (1730-1784)*, Oxford University Press (1999) and F.P. Lock, *Edmund Burke, Volume II (1784-1797)*, Oxford University Press (2006).
4. To smatter is “to have a slight taste; to have a slight, superficial, and imperfect knowledge,” e.g., to dabble. Samuel Johnson, *A Dictionary of the English Language*, Volume II, 6th Edition (1785).
5. William Blackstone, *Commentaries on the laws of England*, 13th Ed., A. Strahan (1800).
6. Burke, *On Conciliation*, p. 22.

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1 There were three revolutions in American
jurisprudence, three revolutions in the mechanics of our
legal system. The first is the American Revolution itself,
and we start in England.

2 On March 22, 1775, the Right Honorable Edmund Burke,
a leading member of the British Parliament, gave the
speech of a lifetime, “On Conciliation With the Colonies.”

3 He gave a half-dozen reasons why fighting America was
not the right course of action. The reasons were quite
persuasive. For example, he argued that there were
already a couple million Americans. That’s a lot of people
to fight. Furthermore, these Americans were all on the
other side of an ocean. It is hard to fight a people a couple
of months away. He went on to assert that these Americans
were very clever, and seemed to be making lots of money.
Maybe England could make money too if they weren’t
trying to blow the Americans up?

4 The last reason was the corker. “In no country perhaps
in the world is the law so general a study ... the greater
number of the deputies sent to the Congress were lawyers.
But all who read, and most do read, endeavor to obtain
some smattering in that science.”

5 As evidence, Burke cited the fact that “they have sold
nearly as many of Blackstone’s Commentaries in America
as in England.” The effect of this widespread study of the
law by the general populace was profound.

6 “This study renders men acute, inquisitive, dexterous,
prompt in attack, ready in defence, full of resources. In
other countries, the people, more simple, and of a less
mercurial cast, judge of an ill principle in government only

7. We focus here on the specific issues of reporting the law. For a more general description of the evolution of American jurisprudence, see Morton J. Horwitz, *The transformation of American Law, 1780-1860*, Oxford University Press (1992).
8. See Craig Joyce, *Reporters of Decisions of the Supreme Court of the United States*, University of Houston Law Center No. 2005-A-11 and Craig Joyce, 'A Curious Chapter in the History of Judicature': *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, *Houston Law Review*, Vol. 42, p. 325 (2005) from which much of this history of the early reporters is drawn. For more on Dallas, see Alexander James Dallas, *Life and writings of Alexander James Dallas*, J.B. Lippincott & Co. (1871).
9. Even when reports were timely, they were notoriously inaccurate. In 1762, the eminent British reporter Michael Foster remarked that "hasty and indigested Reports" had "become the burden and scandal of the profession." Quoted in John William Wallace, *The Reporters Arranged and Characterized With Incidental Remarks*, Soule and Bugbee (1882).
10. William F. Carne, *Life and Times of William Cranch, Judge of the District Circuit Court, 1801-1855*, *Records of the Columbia Historical Society*, Vol. 5, pp. 294-310 (1902).

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by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze.”

7

The first revolution was thus one of attitude, a new country with a general interest in reading the law. The second revolution was one of mechanics, a 200-year path to create a new jurisprudence for the United States.

8

The law had a degree of informality at first. Even the Supreme Court didn't issue written opinions in the early days. They just said what they thought. In 1790, a gentleman named Alexander J. Dallas started issuing reports on all the local Philadelphia courts. In 1791, when the new federal government moved to Philadelphia, Dallas started reporting them as well. Of course, the Supreme Court wasn't doing very much, so his first volume, Volume 1 of the United States Reports, actually doesn't have any Supreme Court opinions.

9

Dallas was slow, and he had a tough time catching the extemporaneous ramblings of the justices. By slow, it took him 5 years after the last case was decided to issue 2 Dallas. And, after he retired as reporter in 1800 it took him 7 years to publish 4 Dallas!

10

In 1800, the new government moved to Washington, D.C., and William Cranch, nephew of President John Adams, had just moved to the city where he failed spectacularly in a real estate speculation. Needing some income, he appointed himself the reporter of the Supreme Court.

11. Richard Rush was just 34 when he was appointed Attorney General. His distinguished career includes diplomatic postings and appointments as Secretary of the Treasury, Comptroller of the Treasury, and acting Secretary of State. See *Richard Rush of Pennsylvania, Political Portraits with Pen and Pencil*, Democratic Review (1840) reprinted by William H. Colyer (1840).
12. Henry Wheaton, *A Digest of the Law of Maritime Captures and Prizes*, M'Dermut & D.D. Arden (1815). Justice Story joined the Supreme Court at the age of 32 in 1812 and served until 1845. His *Commentaries on the Constitution of the United States*, Little (1873) is still considered to be a definitive and relevant treatise.
13. Alfred J. Beveridge, *The Life of John Marshall, Volume III*, Houghton Mifflin (1919) quoted in Joyce, Curious Case, note 87.
14. See Henry Wheaton, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States, February Term, 1819*, R. Donaldson (1819).
15. *M'Culloch v. State of Maryland et al.*, 17 U.S. 316, 4 L.Ed. 579, 4 Wheat. 316 (1819) and *Gibbons v. Ogden*, 22 U.S. 1, 6 L.Ed. 23, 9 Wheat. 1 (1824).
16. William Vail Kellen, *Henry Wheaton: An Appreciation, Being the Address Delivered Before the Alumni of Brown University on the Occasion of the One Hundredth Anniversary of His Graduation*, Merrymount Press (1902).

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11 Cranch was just as slow and just as inaccurate as Dallas.
By 1815, the court had had enough and decided to take
matters into their own hands. It was so bad that Attorney
General Rush, who needed the precedents to argue before
the court, said the Reporter “ought to be supplanted as
some penalty for his inexcusable delays.”

12 Justice Story and Attorney General Rush had their eye
on a young New York Lawyer named Henry Wheaton, who
had impressed them with his “Digest of the Law of
Maritime Captures and Prizes.”

13 Wheaton, anxious to make a name for himself (and a
living for himself) was persuaded to move to Washington,
D.C., a primitive place described as “a picture of
sprawling aimlessness, confusion, inconvenience, and utter
discomfort.” The Justices all roomed together and ate
together in the same boarding house, and Wheaton moved
down and became their roommate.

14 From 1816-1827, Wheaton did an amazing job. His
reporting was accurate, he attended every session and got
the Justices to give him their notes. His books were
beautiful, they had lots of white space and handsome
bindings. In addition to the opinions, he prepared
abstracts, handy reference aides, even printed the
arguments of counsel. Within 2 months of the end of the
1816 term, he had the report ready for publication.

15 During this period Wheaton presided over the “golden
book of American law,” reporting on landmark cases such
as *McCulloch v. Maryland* and *Gibbons v. Ogden*.

16 The reports were so good that no less an eminence than
Daniel Webster proclaimed his “high opinion of the

17. *An Act to Provide for Reports of the Decisions of the Supreme Court*, 3 U.S. Statutes at Large 376, 14th Congress (March 3, 1817) quoted in Joyce, Curious Case, note 95.
18. By all accounts, Wheaton settled quickly into the life of a diplomat in Europe. He gained early reknown for his compelling history of his new home. See Henry Wheaton, *History of the Northmen: Or, Danes and Normans, from the Earliest Times to the Conquest of England*, J. Murray (1831).
19. Upon receiving his volume, Justice Story promptly complained “that the text is so compact & small.” Joyce, Curious Case, note 108.
20. Artisans made an average weekly wage of \$7 in 1920, rising to \$10 in 1860. See Leonard P. Ayres, *Price Changes and Business Prospects*, The Cleveland Trust Company (1921). Chief Justice Marshall received an annual salary of \$4,000, considered a princely sum. See John Forrest Dillon, *John Marshall*, Callaghan & Company (1903).
21. The Peters business plan, was Exhibit A for the Appellants in the subsequent litigation. See Joyce, Curious Case, note 109.

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general manner in which the Reporter has executed his duty” and Justice Story wrote “I am exceedingly pleased with the execution of the work...In my judgment your reports are the very best in manner that have ever been published in our country, and I should not be surprised if the whole profession does not pay you voluntary homage.”

17 Wheaton was so effective, the Court urged, and the Congress agreed, to give him a salary of \$1,000 (on the condition that he deliver 80 copies of his reports for government use).

18 But, the beautiful books were expensive, and Wheaton wasn’t making much of a living. In 1827, he resigned and accepted a State Department appointment to Denmark, at 4 times his reporting income. In 1828, the court appointed Richard Peters, Jr. Unlike the previous reporters, Peters was a businessman. He aimed to make it pay.

19 Like his predecessors, he issued his annual reports. But, the type was smaller, the paper cheaper, the bindings not nearly as nice. And, more importantly, the reporting wasn’t nearly as good. But, they were cheaper.

20 Peters’ plan had a second component. If you wanted to buy a copy of the 2 volumes of Dallas, the 9 volumes of Cranch, and the 12 volumes of Wheaton, that would set a lawyer back \$130, a very significant sum in those days.

21 Peter proposed to published the collected “Condensed Reports of Cases in the Supreme Court” for \$36, just 27 percent of the current price if you bought the cases from the previous reporters. The Condensed Reports wouldn’t be nearly as nice as the original volumes: arguments of counsel and scholarly notes were eliminated and Peters

22. See Craig Joyce and L. Ray Patterson, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the US Constitution*, Emory Law Journal, Vol. 52, No. 909 (2003). The principle of universal diffusion was further advanced with the passage of the “works of the United States Government” clause of the Copyright Act of 1976, *17 U.S.C. § 105* declaring all works from the federal government to be in the public domain.
23. Joyce, Curious Case, note 116.
24. Reporters of the law were early proponents of long tail theory. See Chris Anderson, *The Long Tail*, Hyperion (2006).
25. See Richard Peters, *Condensed reports of cases in the Supreme court of the United States, Volume 3*, John Grigg (1831).
26. *Wheaton v. Peters*, 29 Fed. Cases. 862, E.D. Pennsylvania (1832).
27. Letter from Richard Peters to Thomas [John?] Sergeant (Jan. 15, 183[4]) quoted in Joyce, Curious Case, note 136.

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proposed to slash out any concurring and dissenting opinions as well. But, they would have the opinions.

22 The Justices, intent on building a national jurisprudence, were supportive. But what about the reporters?

23 Dallas was dead and his copyright had expired, so he didn't mind. Cranch, a sitting judge in the District of Columbia and still out of pocket \$1,000 for his service to the country, objected strongly. Peters and Cranch settled, Peters giving Cranch 50 copies of the Condensed Reports which he could sell.

24 Wheaton, on the other hand, was counting on his Reports to be his retirement fund. They hadn't made him much money yet, but over time he figured the sales would trickle in, building his nest egg.

25 Peters started publishing. In 1829, he published the first condensed reports of Dallas. He curried favor with the justices, sent copies to Justice Story, dedicated the work "most respectfully and affectionately" to Chief Justice Marshall. They were a huge success. By 1831, when Volume 3 appeared, he had printed 1,500 copies and had sold 900 already by advance subscription. And, in 1831, the first of the Wheaton opinions were published by Peters.

26 Wheaton sued. There were injunctions, and injunctions were dismissed, and it was a mess. Everybody appealed, this was clearly going to the top.

27 By 1834, the case was ready for the Supreme Court. Wheaton came back from Denmark, and he was pissed. Peters saw him in DC and wrote back to a friend that Wheaton appeared "very mad." Wheaton in turn wrote

28. *Argument of Mr. Ingersoll, for the Defendants*, Wheaton v. Peters, 33 U.S. 591 (1934).
29. Story wrote later “I am sorry for the controversy between Mr. Wheaton and Peters, and did all I could to prevent a public discussion of the delicate subject of copyright. Joseph Story, Letter to James Kent (May 17, 1834) quoted in William W. Story, *Life and Letters of Joseph Story, Volume II*, John Chapman (1851).
30. Story suggested to Wheaton in a letter that he might be operating under the delusion “that [his] rights were more extensive than they might turn out to be.” Quoted in Joyce, Curious Case, note 199.
31. Joseph Story, Letter from Story to Peters (Mar. 31, 1832), quoted in Joyce, Curious Case, note 204.

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about Peters that “his conduct has been shameful. But he bears it off with brazen impudence.” Wheaton hired Daniel Webster as his lawyer, and prepared his argument. He said the Reporter was an Author, had the exclusive right to the Copy, and he had performed a huge public service.

28 Peters fought tactically, saying Wheaton had failed to obtain copyright by proper filing. And, Peters advanced a somewhat novel argument: “It is therefore the true policy, influenced by the essential spirit of government, that laws of every description should be universally diffused. To fetter or restrain their dissemination must be to counteract this policy.”

29 The court really didn’t want to settle this, they wanted the parties to handle the matter themselves. Remember, they lived with Wheaton for twelve years, worked with Peters every day. Justice Story called all the living reporters in to his chambers on March 18, 1834. He was friendly, said he was acting “entirely on his own hook.” He informed the reporters that if the court had to rule on this, they would say there is no right of property in opinions of the court. But, he also said he believed strongly that the matter was “a fit subject for honorable compromise between the parties.”

30 Wheaton would have none of it. No compromise. He wanted the court to rule.

31 The court in 1834 was not happy. It was the last days of the Marshall court, indeed this was the last great opinion. Andrew Jackson was President and he was hostile to the court, having installed new Justices that disagreed with their seniors. People were not getting along: Justice Story

32. Charles Sumner, *Letter from Sumner to Story* (Mar. 19, 1834) quoted in Joyce, *Curious Case*, notes 227–234.
33. Charles Sumner, *Letter from Sumner to Story* (March 19, 1834) quoted in Joyce, *Curious Case*, note 235.
34. *Wheaton v. Peters*, 33 U.S. 591, 8 Pet. 591, 8 L.Ed. 1055 (1834).

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remarked on the noticed decline in the “dignity, character, and courtesy.” Older judges were sickly and deaf, suffered from severe indisposition, Justice Baldwin, a new appointee was known as an eccentric, occasionally violent.

32

On March 19, the court met. Justice Story, who was close to both the reporters, took the 8 AM stage out of town and missed the melee. Justice McLean read the opinion of the court. Wheaton became “strongly excited during its reading.” Thompson and Baldwin delivered dissents, and McLean rejoined that the dissents were misplaced, and Thompson responded “with intemperate warmth.” Marshall tried to make peace and made a statement of statutory construction, which of course, everybody listened to with respect. But, McLean wouldn’t leave well enough alone, gloated that was he had meant in the first place, and re-read the part of the opinion on statutory construction commenting pointedly that “this dialogue across from one to another was very unpleasant.” Thompson rejoined “in a perfect boil,” and Baldwin showed in no uncertain terms by “looks and motions and whispers” that he was not pleased either and had a “strong passion at his back.”

33

Justice Duvall sat utterly dumbstruck by the “grotesqueness of the scene” and wrote later that “a large number of the bar” looked on “in anxiety and grief.”

34

In short, all hell broke loose. While the ruling was complicated, the very end contained a new piece of jurisprudence, a sharp break from past practice. The last sentence of the opinion is a classic statement of the law: “It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copyright in

35. Henry Wheaton, *Elements of International Law*, Stevens & sons (1878).
36. *Banks v. Manchester*, 128 U.S. 244, 9 S.Ct. 36, 32 L.Ed. 425 (1888).
37. A detailed exposition of this line of reasoning can be found in L. Ray Patterson and Craig Joyce, *Monopolizing The Law: The Scope of Copyright. Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719 (1989).
38. *Howell v. Miller*, 91 F. 129 (6th Circuit, 1898).

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the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter such right.”

35 Wheaton went back to Denmark, served 6 presidents, wrote the classic treatise on International Law. By 1843, the Justices had enough of the inaccuracies of the Peters reporting, and they summarily fired him.

36 This policy, that access to the law of the land shall be unfettered by property claims and copyrights, is one that has been consistently stated by the court. In *Banks v. Manchester*, in 1888, the court ruled that this principle applied to state opinions as well as federal, stating:

37 “Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters* it was said by this Court that it was ‘unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court, and that the judges thereof cannot confer on any reporter any such right.’”

38 This policy has very clearly applied not only to state court opinions, but to state statutes. In *Howell v. Miller*, in 1898, Justice Harlan stated that “no one can obtain the exclusive right to publish the laws of a state in a book

39. See *West Publishing Company v. Mead Data Central*, 799 F.2d 1219 (8th Circuit, 1986).
40. For more on the building codes, see Carl Malamud, *Welcome to Code City: Home of the World-Famous \$100 Document*, Public.Resource.Org (2008).
41. For example, the 2006 International Fire Code which is incorporated verbatim into the 2007 Oregon Fire Code contains this text: "The International Fire Code is available for adoption and use by jurisdictions internationally. Its use within a governmental jurisdiction is intended to be accomplished through adoption by reference in accordance with proceedings establishing the jurisdiction's laws. At the time of adoption, jurisdictions should insert the appropriate information in provisions requiring specific local information, such as the name of the adopting jurisdiction. These locations are shown in bracketed words in small capital letters in the code and in the sample ordinance. The sample adoption ordinance on page v addresses several key elements of a code adoption ordinance, including the information required for insertion into the code text." State of Oregon, *2007 Oregon Fire Code*, Authorized by *ORS 476.030*, Adopted by *OAR 837 Division 40* (Apr. 1, 2007).
42. For more on the availability of primary legal materials, see Carl Malamud, *By the People*, Government 2.0 Summit (Sep. 10, 2009).

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prepared by him.” The core principle is very clear: while states may own a copyright, they may not own a copyright in the law.

39 That principle has sometimes become confused when external vendors are commissioned to become reporters, and those vendors add value to the basic laws. For statutes, they might create an index or annotations. For laws, the vendors may create “headnotes.” But, even here, the courts have been very careful and have repeatedly ruled that the law itself has no copyright.

40 Indeed, even if the law is created by a private party, once it is enacted as the law of the land, anybody can make copies. A good example of this are our public safety codes: the building codes, fire codes, electrical, plumbing, boiler, fuel & gas, and the other codes that govern our daily lives.

41 Most of these public safety codes are developed by nonprofit organizations, such as the National Fire Protection Association and the International Code Consortium. These standard model codes are then “incorporated by reference” by states and cities, declaring them to be the law in a given jurisdiction. Indeed, these model codes are meant to be the law: they typically contain a Sample Resolution beginning: “We the people of [insert name of jurisdiction here].”

42 We now turn to the third revolution, a revolution in legal affairs. Since the turn of the century, a movement has sprung up around the country to make access to the raw materials of our democracy more readily available to all Americans.

43. *Veeck v. Southern Building Code Congress International*, 293 F.3d 791 (5th Circuit, 2002). The court was quoting *Building Officials & Code Adm (BOCA) v. Code Technology, Inc.*, 628 F.2d 730 (1st Circuit, 1980).
44. The sums involved are not inconsiderable. See National Fire Protection Association, *Form 990*, I.R.S. (2007), total revenue of \$94 million and CEO compensation of \$740,960.
45. Granting copyright in the law to private authors would be a steep slippery slope. As an example, the court cited 3 law professors who were responsible for drafting legislation on supplemental federal court jurisdiction in *28 U.S.C. §1367* saying if the dissent had it's way, "these professors, had they so desired, could have asserted a copyright in their 'model supplemental jurisdictional provision.'"
46. The court is citing Paul Goldstein, *Goldstein on Copyright*, 4th ed., Aspen (2005).
47. Groups such as the International Code Council (www.iccsafe.org) operate extensive and diverse commercial operations, including certification, testing, education, document sales, and meeting programs. ICC operates a number of subsidiary organizations such as ICC Evaluation Services (2007 income \$14,968,352), International Code Council, Inc. (2007 income \$56,667,168), International Code Council Foundation (2007 income \$669,450) as well as numerous state chapters.

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43 In 1997, Peter Veeck spent \$74 and bought and posted on the Internet a model building code, the one in effect in his Northern Texas community. The Southern Building Code Congress sued him for copyright infringement. The District Court granted the code people an injunction, and monetary damages, and Pete appealed. The 5th Circuit of the Court of Appeals reversed. They were clear, and they cited their brethren in the 1st Circuit: “it is hard to see how the public's essential due process right of free access to the law (including a necessary right freely to copy and circulate all or part of a given law for various purposes), can be reconciled with the exclusivity afforded a private copyright holder.”

44 But what about the right of the code people to make money? After all, they claim that they need the money to create high-quality codes. The court had 3 answers:

45 First, although building codes had existed for 60 years, no court had ever ruled that the building codes as enacted at law were copyright. To do so would break new ground, something courts are loathe to do.

46 Second, these codes would exist without copyright. As the court said: “it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.”

47 Third, the code people were in a favored position to create value-added products and “could easily publish them as do the compilers of statutes and judicial opinions,

48. "Due process requires that before a criminal sanction or significant civil or administrative penalty attaches, an individual must have fair warning of the conduct prohibited by the statute or the regulation that makes such a sanction possible." *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179 (2nd Circuit, 2001). Likewise, attaching a monetary requirement to access to law is no different than other monetary requirements, such as poll taxes, which have been struck down as coming between individuals and their constitutional rights. See *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).
49. See Cory Doctorow, *Oregon: our laws are copyrighted and you can't publish them*, Boing Boing (Apr. 15, 2008), Cory Doctorow, *Oregon continues to insist that its laws are copyrighted and can't be published*, Boing Boing (Apr. 30, 2008), Cory Doctorow, *Oregon to hold hearings on whether its laws are copyrighted*, Boing Boing (May 21, 2008), Cory Doctorow, *Oregon folds: Legislative Counsel's Committee says Oregon's laws aren't copyrighted*, Boing Boing (June 19, 2008), Cory Doctorow, *Begging states to try to enforce ridiculous assertion that the law is copyrighted*, Boing Boing (Sept. 3, 2008).
50. Karl Olson, *Complaint for Declaratory Relief re Non-Infringement of Copyright (DRAFT)*, Public.Resource.Org (May 14, 2008).

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with 'value-added' in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves 'the Progress of Science and useful Arts.'"

48 The principle that nobody owns the law is one that meshes deeply with the fundamental principles of the Constitution. How can we say we are a nation of laws, not a nation of men, if we hide the law? How can there be equal protection under the law if the law becomes private property? How can there be due process if ignorance of the law is built into how it is distributed? How can there be free speech if we cannot speak the law?

49 This fundamental principle of our system of jurisprudence is honored mostly in the breach. Many of you may remember a year ago, Public.Resource.Org and Justia, one of the leaders in the free law movement, received a take-down notice from the Oregon legislature, saying we had violated their copyright in the Oregon Revised Statutes.

50 We stood our ground, indeed prepared to go to court. But, in what I have many times called a shining example of democracy at work, the Oregon Legislative Counsel Committee called hearings, heard us out, heard the citizens of Oregon out, and unanimously voted to waive any assertions of copyright.

51. Erika Wayne, *OregonLaws.Org—Nifty!*, Stanford Law Legal Research Plus (Apr. 27, 2009), Todd Ito, *OregonLaws.org step in the right direction*, D'Angelo Law Library Blog (Apr. 27, 2009), Laura Orr, *Oregon Revised Statutes (ORS): New, Free, Legal Research Database*, Oregon Legal Research (Mar. 17, 2009).
52. CJ Ciaramella, *Professor fights state over records manual*, Oregon Daily Emerald (Oct. 2, 2009), CJ Ciaramella, *Internet advocate argues for open access to law*, Oregon Daily Emerald (Oct. 26, 2009). The *Attorney General's Public Records and Meeting Manual* (2008) in addition to stating "All rights reserved" quotes Madison on the cover: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." James Madison, Letter to William T. Barry (Aug. 4, 1822), quoted in Gaillard Hunt, *The Writings of James Madison, Vol. 9, 1819-1836*, G.P. Putnam's Sons (1910), p. 103. (Note that the quote is incorrectly rendered on the front of the manual.)
53. Secretary of State, *Oregon Administrative Rules and Oregon Bulletin Terms and Conditions of Use*, State of Oregon (undated). The terms state "The Oregon Administrative Rules Compilation and the Oregon Bulletin are copyrighted by the Oregon Secretary of State. Use of these publications is subject to copyright law." and "Users may not modify the Oregon Administrative Rules Compilation and the Oregon Bulletin or create derivative works without the written consent of the Oregon Secretary of state."
54. International Code Consortium, *Oregon Fire Code* (Jan. 2007), "You will be able to view the new 2007 Oregon Fire Code in an Adobe® Reader® format. The files found on this site are in a read only format and are not available for printing."

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51 What happened when these barriers to publication were removed? Robb Shecter of the Lewis & Clark Law School came out with OregonLaws.Org, a wonderful example of how legal information can be made dramatically better once the fences around the public domain have been removed.

52 But, despite clear national public policy, copyright continues to be asserted. When Professor Bill Harbaugh of the University of Oregon decided he wanted to make available the Oregon Attorney General's Public Meeting and Public Record Manual, he was faced with a copyright assertion and a stern warning that this material could not be deployed without explicit permission of the purported owner, the State of Oregon.

53 The Attorney General's Public Meeting Manual is only one example in Oregon. The Secretary of State has a similar chilling warning prohibiting re-use of the Oregon Administrative Rules and Bulletin, the system by which the regulations of the executive branch are promulgated.

54 And, there are more examples. The Oregon Fire Marshall is responsible for enacting a fire code, but if you look on their web site, if you want the Oregon Fire Code, the only place to get it is by paying money to code people. What about public access? The code people, in a cursory nod to their public access responsibilities, have put a site together for the Oregon Fire Marshall so people can see the code, as long as they know exactly what section they want. No search, you can't print, you can't download, you can't email. In the technical community, we call this type of site "crippleware."

55. Building Codes Division, *Ordering Codebooks*, State of Oregon, states:
“Many of the links below lead to information that is not controlled by the Building Codes Division or the Oregon Department of Consumer and Business Services. These links are provided as a courtesy to our visitors. We take no responsibility for the views, content, or accuracy of this information.” This statement seems highly misleading as the Building Code Division manages the process of incorporating these codes as law, carefully verifying each and every code provision before enacting them.
56. In examining the issue of state assertions of copyright over statutes, the Oregon Legislative Counsel testified that 26 states had such assertions. Assertions of copyright over public safety codes is the norm with very few exceptions. *Statement of the Honorable Dexter Johnson*, Oregon Legislative Counsel Committee Hearing (June 19, 2008).
57. The thicket of copyright assertions around primary legal materials at the state level makes it impossible for academic and public interest groups to create new ways of accessing legal information. These barriers to entry have resulted in a marketplace dominated by 3 large vendors and a set of products that have not kept up with the startling advances in information dissemination made possible by the Internet.
58. The executive branch spends \$50 million simply to access district court records maintained by the federal judiciary, and the Administrative Office of the Courts has spent \$150 million on West and Lexis contracts. See James C. Duff, *FOIA Response to Public.Resource.Org*, Administrative Office of the U.S. Courts (June 19, 2009). A survey of 66 major law libraries indicated that 63 of them carefully ration PACER use. Erika V. Wayne, *Survey of Law Libraries*, Stanford University Law Library (Aug. 17, 2009).
59. Carl Malamud, *Law.Gov: A Proposed Registry and Repository of All Primary Legal Materials of the United States*, Public.Resource.Org (Oct. 13, 2009).

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55 The same is true of the Building Safety Division, part of
the ironically named Department of Consumer and
Business Services. Again, the state serves as an agent of
private actors, encouraging people to purchase code
books from designated vendors, not acknowledging that
we have the right to read these materials. Again, a nod to
public access with a crippled web site with no search and
no print, no email, no download.

56 This is not an Oregon problem, this is a national
problem, both at the state and federal level.

57 At the state level, many states have such copyright
assertions, and we believe this is a situation where Oregon
can exert national leadership, explicitly rejecting policies
that were set in place decades ago, policies that are
counter to public policy and the law, policies that have
created barriers to entry and resulted in decades of lost
innovation for the legal profession.

58 At the national level, there is also a huge opportunity.
The federal government spends hundreds of millions of
dollars accessing primary legal materials, a small fraction
of the \$10 billion/year Americans spend access the raw
materials of our democracy.

59 Recently, Public.Resource.Org, working with our
colleagues at law schools around the country, have
launched an effort to change this situation. We have
posited that the U.S. government should create Law.Gov, a
distributed, authenticated, open-source registry and
repository of all primary legal materials of the United
States. We believe such a system is technically possible,
would save the federal government \$1 billion, and would

60. The effort has met with strong support from government officials. See for example, Senator Joseph Lieberman, *Letter to Carl Malamud*, Senate Committee on Homeland Security and Governmental Affairs (Oct. 13, 2009), inviting the Law.Gov task force to submit a copy of the final report to the attention of the Senate.
61. Louis Brandeis, *The Opportunity in the Law*, Address delivered before the Harvard Ethical Society (May 4, 1905), reprinted in Louis Brandeis, *Business—A Profession*, Small, Maynard (1914).

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have dramatic spin-off effects promoting innovation in the legal marketplace, would promote legal research and education, and make our system of justice a better one.

60

We will be conducting workshops at law schools including Berkeley, Columbia, Cornell, Duke, Harvard, Stanford, Texas, and Yale. John Podesta will be co-convening a workshop at the Center for American Progress, and Tim O'Reilly will be co-convening key figures from the open source world. Our aim is to draft detailed technical specifications, detailed lists of materials, a budget, and enabling legislation. This effort will kick off in the new year, and I hope all of you will join with us in building a national movement to make the rules of our society, America's Operating System, open source.

61

Here in Oregon, there is an opportunity. We are reminded of the famous speech by Louis Brandeis in 1905, a speech which inspired a young Felix Frankfurter to devote his live to public service: "It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.' The great opportunity of the American Bar is and will be to stand again as it did in the past, ready

62. Attorney General Opinions “are signed by the Attorney General as chief legal officer of the State and typically respond to questions concerning constitutional issues and other matters of statewide concern.” The Attorney General may only render an opinion when requested by “the Governor, any officer, agency, department, board or commission of the state or any member of the legislature.” *ORS 180.060(2)*. Private citizens may not request opinions, however the Attorney General may certainly request an opinion from himself if he feels an issue is at stake. Since the state asserts copyright, but several organizations have simply ignored those assertions and posted materials and have indicated plans to post even more, an issue is certainly on the table.

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to protect also the interests of the people.”

62

It is our contention that the practice of asserting copyright over the primary legal materials of Oregon—fire codes, building codes, administrative regulations, and Attorney General opinions—is contrary to the law. We are confident that a thorough examination of this issue by those skilled in the law will yield this conclusion. Our request, respectfully submitted, is that Attorney General John Kroger—the People’s Lawyer—prepare an Attorney General Opinion on the topic of when the state may assert copyright and when it may not.