

POLICY RATIONALE FOR AMENDMENTS TO IDAHO CODE SECTIONS 9-352 & 73-210

The principle that ignorance of the law is no defense can only be fair if the laws by which members of the public are bound are readily available to them.¹ As a matter of due process, people must have meaningful notice of the laws by which they are bound. Accordingly, those laws must be made available to the public with the least possible obstruction. The United States Fifth Circuit Court of Appeals recognized that “to say... that the law is ‘free for publication to all’ is to expand, not factually limit, the extent of its availability.”² Further, citizens’ ability to know and read the law is an essential element of a functioning democracy.³

It has been well-settled for over one-hundred years that the law, including statutes, is in the public domain and thus not amenable to copyright.⁴ This is because laws are facts, and facts are not copyrightable.⁵ Facts are ineligible for copyright protection to ensure that no person or entity can “impede that harvest of knowledge so necessary to a democratic state.”⁶ In a democracy, lawmakers enact rules and regulations only with the consent of those governed by those rules. In performing their duties, lawmakers represent the public, and the public is the ultimate “author” of the law.⁷ If the true “authors” of the laws of Idaho—the State’s citizens, acting through their elected representatives—are to have ownership of the laws that govern them, those laws must be placed in the public domain and not claimed as the exclusive property of the State. It is impossible to reconcile Idaho citizens’ due process right of free access to the law with the exclusivity afforded by copyright. Moreover, an assertion of copyright by the State of Idaho is not necessary to establish that the State of Idaho is the only official source of the Idaho Code. Dedicating the Idaho Code to the public domain for copyright purposes in no way compromises the authority of the government of the State of Idaho to say what the law in Idaho is.

Currently, access to the official version of the Idaho Code and the statutory annotations, even for non-commercial purposes, is impeded by the State’s assertion of copyright in those materials. If one wishes to view the Idaho Code, one has three options to choose from. The first option is the State’s free website, which is not the annotated, official version of the Idaho Code.⁸ The website contains a disclaimer that the version of the statutes provided may not be up-to-date

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1. *See* *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) (“The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.”).
 2. *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002).
 3. The law includes not only the statutes, but also statutory annotations that are part of Idaho’s official state laws.
 4. *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (“[N]o one can obtain the exclusive right to publish the laws of the state in a book prepared by him”).
 5. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) (“Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted.”).
 6. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 545 (1985).
 7. *Building Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) (“The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.”).
 8. Site Disclaimer, STATE OF IDAHO, idaho.gov/disclaimer.htm (last visited January 30, 2015).

and directs citizens to their second option, which is the print version of Idaho's official code, the *Idaho Code Annotated*. The print version will cost the citizen \$547 to purchase,⁹ roughly the price that a University of Idaho student spends on all of his or her books each semester.¹⁰ Third, the citizen may use a commercial database, such as LexisNexis, to access the Idaho Code and pay a fee of \$20 per link.¹¹ The *Idaho Code Annotated* is effectively hidden behind a paywall. Considering the fact the *Idaho Code Annotated*, including its notes and annotations, is the only official version of the law in Idaho, the three options to access the code are hardly sufficient notice of the law to the citizens of Idaho.

In addition, recognition that the Idaho Code belongs in the public domain represents an opportunity to invite Idaho's innovators to make the code more accessible and available in new formats. Allowing citizens to reproduce the official code, which includes both the statutes and the annotations, will allow civic-minded volunteers to provide things such as searchable, better organized, and more easily accessible websites and mobile apps to other citizens of the State. Volunteers may even be able to provide more frequent updates. Legal research no longer takes place solely in libraries. Technology and mobile devices allow research to be done from anywhere in the world. In order for this research to be effective, however, people must have access to laws that are easily navigable and searchable. If the State of Idaho wishes to have a knowledgeable and functioning democracy, the State must allow its citizens to innovate and make the law more accessible.

If the law is truly to belong to the citizens of Idaho, and because those citizens are expected to abide by the law, then the law must be in the public domain.

9. LexisNexis Publishing publishes the only official version of the Idaho Code. See *Idaho Code*, LEXISNEXIS <http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?prodId=6981> (last visited January 30, 2015).

10. Cost of Attendance, UNIVERSITY OF IDAHO, <http://www.uidaho.edu/financialaid/universityofidahotuition>.

11. Price Schedule, LEXISNEXIS, <http://www.lexisnexis.com/terms/21/pricing/> (last visited January 30, 2015).