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Ms. Donna P. Suchy, Section Chair
Ms. Mary Rasenberger, Division Vice-Chair
Copyrights Division
Section of Intellectual Property Law
American Bar Association

Dear Ms. Suchy and Ms. Rasenberger:

Thank you for your comments of June 1 on the **Resolution and report** concerning works of the U.S. government. I will try and address each of your concerns in turn.

You began by saying the report “fails to disclose a significant conflict of interest,” specifically a case before the Eleventh Circuit of the United States Court of Appeals in the matter of Code Revision Commission, for the Benefit of and on behalf of General Assembly of Georgia and the State of Georgia versus Public.Resource.Org, Inc. (**Docket 17-11589**). As a matter of regular practice, Public Resource maintains a list of all of our activities at the following location:

<https://public.resource.org/pro.docket.html>

While I am happy to disclose our activities, I believe you are mistaken in characterizing this matter as a conflict. The Georgia case is about a state government which asserts copyright over state law and about a private contractor which conducts work for hire on behalf of the state. This is an area of copyright law known as “edicts of government,” which is a long-standing common law doctrine that states that the law in the United States—including the laws of the federal, states, and local governments—are not eligible for copyright. For a review of this concept, you may wish to consult a very helpful document the U.S. Copyright Office maintains, the Compendium of U.S. Copyright Office Practices (Third Edition), **§ 313.6(C)(2)**.

The exception to copyright known as “works of the U.S. government,” by contrast, applies only to federal employees or officers acting in the course of their official duties. In contrast to the common law doctrine of edicts, works of the U.S. government are statutorily exempt from copyright. See **17 U.S.C. § 105**; see also **H.R. Rep. No. 94-1476**. These two concepts are entirely different and as neither the State of Georgia nor their private contractor are a federal agency, employee, or officer, I fail to see how this becomes a “significant conflict.”

The first substantive objections raised are in regards to the first RESOLVED clause. You indicated that it was unclear that it would be the responsibility of the agency and not the private publisher to deposit the work with the Government Publishing Office (formerly known as the Government Printing Office). Under **Title 44**, all agencies deposit works with GPO on a regular basis as part of a long-established program for distribution to the Federal Depository Library System (FDLP). For example, if the Department of Agriculture authors a pamphlet on growing peaches, they send copies over to GPO for further distribution, including the FDLP, GPO bookstores, the GPO web site, and distribution within government. The RESOLVED clause simply proposes using the existing mechanism. I would be happy to clarify that it is government agencies not private publishers that are responsible for the deposit, though I would point out that GPO has never had depository authority over any private parties.

The second part of the objection to the first RESOLVED clause states that “the Resolution must also clearly state that the work be distributed in its state of original authorship and not as modified or supplemented by the publisher.” I believe this misstates how copyright law works. For each of the books I authored, I had copyright in my book, both the initial draft I submitted to the publisher and the book as published, even after extensive modification by the publisher such as a developmental edit, copy edit, proofreading, indexing, and many other steps. As the owner of the copyright in my book, I had the choice of assigning the copyright to the publisher or giving the publisher a license to use my work on an exclusive basis for a period of time. After the books went out of print, my agreement called for the copyright on all my books to revert back to me.

My point is that copyright resides in the work, and in the case of a work authored by a federal employee or officer in the course of his or her official duties there is no copyright in that work. That includes the article that is published. I will note clearly that the publisher does indeed retain a compilation right to the full issue of the journal, but the specific article by the federal employee or officer does not have copyright under U.S. law.

The third objection to the first RESOLVED clause is that this issue is perhaps one of education but does not need a legislative solution. As you will see in reading the report, we disagree because a pervasive practice of ignoring the legal requirements for U.S. government works has been documented in a number of private publishers and a large number of articles that are clearly works are simply not made available. This is why the Resolution proposes a deposit requirement so that the purpose of this portion of copyright law—keeping America informed—may be properly carried out.

Next, the Copyrights Division expressed concern with the second RESOLVED clause, saying “the Government Ethics Office [sic] should not be developing advice” under the Copyright Law. The key question is what constitutes “in the course of his or her official duties.” This is the area which some agencies have developed guidance (some examples are detailed in the report) but that guidance is sporadic. The Office of Government Ethics is the agency that handles these types of issues involving the proper use of government resources through the process of Legal Advisories. For

example, OGE has issued advisories on how to determine who the “sponsor” of a conference is under gift rules for purposes of free attendance (LA-17-04) and on when it is appropriate for an employee of the executive branch from serving in an official capacity as a member of the board of a private voluntary standards organization (DO-98-025). While OGE would of course consult with the U.S. Copyright Office in the course of developing such a legal advisory, as it consults with agencies throughout the government for domain-specific knowledge, this is clearly a matter that falls within the proper scope of an OGE Legal Advisory.

Next, the Copyrights Division objects to the third RESOLVED clause, which urges publishers (including the ABA) to ask employees or officers if a work is in the course of their official duties, to properly label such a work upon publication, and to make it freely and broadly available the public. One objection is that only the “original versions” of the work be made available, not the final published article as that would violate private “rights in the compilations and in any additional material they add to the government work.”

Again, the focus of the Resolution and report is on the specific article authored by the employee or officer in the course of their official duties, not the compilation. For “additional material” added to the government work, I would point out that it is certainly possible for the government employee or officer to have a co-author, but the mere fact that an article has been edited or even if it has had additional material added does not obviate the fact that the government employee or officer is an author of the work.

The objection states private publishers should not bear the burden of determining when a work is a work of the U.S. government. That is precisely the issue that was discussed at length in the report and precisely the problem that the Resolution hopes to address. Today, authors are asked to sign a copyright release, but these releases are quite vague, sometimes providing a check box for “federal government employees” but not always. It is common practice for federal employees to scrawl a note on the bottom of a preprinted form or otherwise attempt to indicate they have no copyright to assign. But, the forms almost never ask the simple question: was this work authored by a federal employee or officer in the course of your official duties?

Likewise, as our audit of publications in the ABA and throughout the scholarly literature has documented, a number of publishers simply do not address the issue upon publication. That leads to confusion: some works by federal employees published by the ABA are most certainly private works. For example, Mr. Sean Croston of the Board of Governors of the Federal Reserve System examined the ABA audit and wrote to me indicating he had authored those pieces at home. These are clearly not works of government. On the other hand, there are a large number of articles that clearly are works, but it took a detailed examination to determine this. The Resolution says we can do a better job of labeling.

Next, the Copyrights Division expresses some confusion on the text of the Resolution and report on the question of “in the course of official duties.” We tried to be very

clear both in the report and the Resolution that this is the key determination, which is why we reviewed early case law and legislative language to show the factors that are used to help determine when a work is indeed authored in the course of official duties. One of the factors is use of government resources to write the article, but there are other factors that may be taken into consideration, such as whether this article was a required part of the employee's work (as in the case of a military officer who is paid to go to school and writes a dissertation as part of that assigned task). Neither the Resolution nor the report are in conflict with existing law, but current publishing practices are, which is why the Resolution proposes three simple and concrete steps.

The Copyrights Division next states that the Resolution and report are "in conflict with existing copyright laws because they would call on Congress to permit infringement of and forgo the ability to protect compilation works, including any new material added by the publisher." I do not believe this assertion is accurate. The Resolution certainly does not call on Congress to permit infringement because current law is very clear: works of the U.S. government are simply not available for copyright. That is the law and it has been so since the 1860s and was explicitly codified and clarified in the 1976 Copyright Act. The Resolution urges both government and private publishers to carry out the law.

The Copyrights Division next states that the Resolution and report "ignore the benefits to the government, long recognized by Congress, of authorizing government works to be published by highly regarded and widely distributed publications." Again, I do not believe that assertion to be accurate. It is precisely because this activity is so important that we took the time to conduct this intensive audit and analysis and draft the Resolution and report. As you can see, the issue involves only a few hundred articles in the case of the ABA but there are hundreds of thousands of important articles in the general scientific literature that are not being distributed widely as the law intends.

Finally, the Copyrights Division suggests that the ABA "could bear some financial loss, given the value of its publications." I believe that is speculative. I've spent 30 years putting large government databases online for free access and in almost every case there have been private publishers already in the field. When I put the SEC's EDGAR database on the net, the financial services industry was adamant that this would destroy their business. Yet, two years later, when I donated my code to the SEC, several CEOs of financial services firms approached me and let me know that their business had actually increased. The reason was they did things that we didn't do and when people saw what was in EDGAR, many of them decided it was worth the money to subscribe to private services.

Likewise, I think if a few articles are made broadly available to the public, that can only help the ABA. If you read a fascinating antitrust article by a Department of Justice employee, you may decide you really want to read all the other articles in the Antitrust Law Journal. If you see a fascinating piece on civil rights by a Department of

Education Employee, you realize you can get a wealth of information by joining the Section of Civil Rights and Social Justice as an associate member.

In summary, we would be happy to make a few precise point edits, such as clarifying that it is the government agency not the private publisher that should make the deposit to the GPO. However, we decline to make changes such as specifying that only the original draft work is a work of government because we do not believe that meets the requirements of existing and long-standing copyright law.

The Resolution and report address an established area of the law that has been ignored or implemented in an ambiguous fashion. We can take some simple steps to clarify when a work is indeed a work of the U.S. government and, when it is, do the right thing to properly label the work and make it available. This is not a big leap, but it is important that we stand up. It is a moral issue. We have not been properly labeling our publications and the ABA should make it clear that the work of our government belongs to all the people. It is a matter of leadership.

I hope you will reconsider your objections, but if they stand, this is exactly why we have a process of Resolutions and reports, discussions prior to the meeting, and consideration by the House of Delegates. This is an important issue and it deserves to be considered. I would welcome further discussion and look forward to seeing you in New York.

Sincerely yours,



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enc.: "Comments of the Copyright Division of the Intellectual Property Law Section of the ABA to The Proposed HOD Resolution and Report on Works of Government Drafted by The Ad Hoc Committee on Promulgation** (not an ABA entity)"

Comments of the Copyright Division of the Intellectual Property Law Section of the ABA
to
The Proposed HOD Resolution and Report on Works of Government
Drafted by
The Ad Hoc Committee on Promulgation** (not an ABA entity)

The Resolution and accompanying report raise significant concerns for the Copyright Division. At a minimum, having just received this, the Copyright Division will require additional time to study this proposal before we would be in a position to recommend an official Section position listing all of objections. That said, here are our main concerns based on an initial reading of the Resolution and report which we believe must be addressed for this to go forward without our strong objection:

- Carl Malamud of Public.Resource.Org, Inc. is listed as the point of contact and the person who will be presenting this Resolution to the House of Delegates. This report fails to disclose a significant conflict of interest. The Resolution would have the ABA adopt policy to urge Congress to require all government works to be published by the GPO online and without copyright, even where a publisher had added its own material. Mr. Malamud has been a party to a litigation directly on point on the issue of protection for materials added by publishers to government works. He was sued for posting copies of the annotated version of Georgia's laws in violation of federal copyright laws, and lost. The state allows the unannotated version of their laws to be posted online and accessed for free, and the district court in his case held that his posting of the annotated version of the statutes was not a fair use. Please see the articles below describing the case and on his arguments.

<http://www.mintpressnews.com/georgia-copyrights-state-laws-pursues-those-who-publish-them-in-court/226772/>

<https://www.usnews.com/news/best-states/georgia/articles/2017-03-28/judge-annotations-to-georgia-law-are-protected-by-copyright>

- The first RESOLVED clause in the Resolution is objectionable to the Copyright Division. First, we are not convinced that the problem described is in need of a legislative solution. To the extent it may not be clear to some what is or is not covered by a publisher's claim of copyright in a work that includes a government work, the law is not to blame, but lack of knowledge of the law or confusing practices regarding copyright notice may be; and if so that should be the focus.
- The first RESOLVED clause calls on the ABA to establish policy urging Congress to pass legislation that would require that all works of the U.S. government that are published by private parties "also be deposited with the Government Printing Office and subsequently distributed on the Internet, to the member libraries of the Federal Depository Library System, to the Library of Congress, and to the National Archives." But the resolution fails to identify the entity that is responsible for depositing the work with the GPO or other agency, and who is to distribute it on the Internet. The Resolution should expressly require that the government agency for which the government work

was written be responsible for the required deposit and distribution, and not the publisher. The Resolution must also clearly state that the work be distributed in its state of original authorship and not as modified or supplemented by the publisher.

- The second RESOLVED clause in the Resolution is objectionable to the Copyright Division. While the Copyright Division would likely support dissemination of carefully drafted guidance on determining when a work by a government employee is a government work or not, the Government Ethics Office should not be developing that advice on what constitutes a U.S. government work under the U.S. copyright law. The Copyright Office has subject matter expertise over these matters and should be responsible for that determination. This clause must be revised accordingly.
- The third RESOLVED clause in the Resolution is objectionable to the Copyright Division. It is unreasonable to request that the ABA and other publishers be required to make all government works that they publish “freely and broadly available to the public” in violation of their rights in the compilations and in any additional material they add to the original government work. The burden should be left to government agencies to police their own employees and to forward the original versions of any government work to the GPO, etc. to make it available. Moreover, it should be the responsibility of government agencies to ensure that any government works created by its employees are clearly labelled as government works before they are sent to the publisher. This responsibility should not be shifted to the publisher who has no way to determine whether a particular work is a government work or not. This clause must be revised accordingly.
- The Resolution and the accompanying report appear to seek to redefine “government works” to capture many articles and other publications that are not recognized as “government works” under existing law. As just one example, on the first page in the third paragraph, the report gives the impression that all works authored by federal employees on subjects related to their duties but published privately are “government works,” but that is not the law. On page two, the report states, “The idea that works by federal employees are not eligible for copyright...” That is not the law. Ownership of the copyright in a work by a government employee is not determined by his or her status as a government employee or the fact that it related to his or her employment. So long as a government employee writes on their own time, at home in the evenings or weekends or on sabbatical, the government employee will retain the copyright in the works they create, even if the subject of the work is related to their employment. Works by government employees are not always works of the government. Each of these references in the report is misleading and should be removed and the Resolution language clarified. The discussion regarding works authored by government contractors also needs to be clarified.
- The Resolution and the accompanying report are in conflict with existing copyright laws because they would call on Congress to permit infringement of and forgo the ability to protect compilation works, including any new material added by the publisher. For example, Lexis and Westlaw add relevant cases and legal analysis to the statutes and

rules of the federal government and the fifty states. Similarly, the ABA often publishes the works of government employees with photographs, artwork, and other material that is not the property of the government employee's employer.

- The Resolution and the accompanying report ignore the benefits to the government, long recognized by Congress, of authorizing government works to be published by highly regarded and widely distributed publications.
- The proposed resolution should be reviewed and considered by the ABA publishing division and all ABA publications; if the legislation requested is enacted, the ABA could bear some financial loss, given the value of its publications.