Playing Fast and Loose with Copyright Law: Casemaker and Fastcase Don’t Fight Over the Right to Copyright the Law

When I started writing about the lawsuit between Casemaker and Fastcase, I was interested to see how the case would unfold. A lawsuit between two up and coming legal research databases, each of which is trying to leave their mark on the industry, was likely to be fascinating. I was excited to read how Casemaker would answer Fastcase’s complaint. The law couldn’t be copyrightable, could it? How could they defend themselves? There had to be something I was missing, something I was not aware of. Then Casemaker announced they would not fight the suit. That meant it was all over, right? Time to go home, nothing to see here. No. In fact, it makes it all the more interesting.

First a little bit of background, both for those who might not have heard about the lawsuit and those who may want more details. Georgia’s Secretary of State has an agreement with Lawriter, Casemaker’s parent company, designating them the exclusive publisher of Georgia Rules and Regulations with the right to license that content to other publishers. In return, Casemaker publishes the Rules and Regulations online free to the public. Fastcase sources state materials for its database from the state websites. Their online database contains both federal and state administrative rules and regulations, including Georgia’s. On December 21 of last year, after realizing Fastcase was publishing the materials without license, Lawriter sought to enforce their rights and sent Fastcase a take-down notice. The take-down notice warned that if Fastcase did not either pay for a license or cease publishing the files, they would “take those steps Lawriter deems necessary to protect its rights, which may include litigation.”

Fastcase did respond. On February 3 of this year, Fastcase filed suit in the U.S. District Court in Atlanta asking for a declaratory judgment. In their complaint, Fastcase stated that sourcing research materials from state websites hosted by private publishers is a common practice and they went on to claim that Casemaker engages in the very same practice as well. They also argued, “It is well established in American law that state laws, including administrative rules and regulations, are not copyrightable, and must remain public as a matter of due process.”

On this last point Casemaker agrees. CEO David Harriman told Lawsites the company is “all in favor of that, of having state law declared not copyrightable.” For this reason, they’ve decided not to fight the suit. This leaves the court free to enter a declaratory judgment in Fastcase’s favor. Casemaker’s choice not to respond to the suit raises the question, “How might this affect Lawriter and Georgia’s agreement?” However, the greater question that begs to be asked is, “How will this case affect the remaining contracts around the country?” Fastcase CEO Ed Walters hit the nail on the head when he told Lawsites, “[T]he implications are much bigger [than this case.] There are claims of copyright in almost every state.”

Free State Government Information (FSGI) is a project run by librarians and copyright experts working towards the goals of educating librarians and getting clearer state copyright on government publications. According to FSGI, each state has the discretion to copyright their publications or to place them in the public domain, but “most state laws are ambiguous and often unknown, even by agencies within their state.” The differences and ambiguities FSGI mentions impede the work of archivists, librarians, and researchers. They complicate digitization projects and limit efforts to make the law available for free online.

Some state laws are very explicit about protecting their copyright, claiming copyright over everything the state produces. Colorado claims copyright over everything it produces, even over Colorado Revised Statutes despite the fact that such a claim would not likely stand up in court. The Colorado statutes are a clear example of a state’s view that they feel they have full right to prosecute all but fair use of their works. Some states are vague and provide limited guidance about what the state views as protected by copyright. Idaho claims copyright over all “compilations,” though there is little guidance as to what that means. Other states are completely silent. If you want to know more about your particular state, Harvard’s Office for Scholarly Communication created the State Copyright Resource Center, “to help identify the relevant laws in each state.”

Historically, state laws and judicial opinions were copyrightable. According to Andrea Simon in her article “A Constitutional Analysis of Copyrighting Government-Commissioned Work,” states did not have government printers, and getting private publishers to print the materials required an incentive. So it made sense as a public policy to allow copyright
to help bolster citizen access to the law. Are we once again in an analogous situation? As evidenced by the fact that so many of these exclusive publication contracts exist, private publishers require incentive to publish the material online for free. With citizens expecting access to everything online and governments failing to have the resources to make administrative rules and regulations accessible this way, is it actually in the public interest to provide for copyright in this one area? Probably not.

Not all state edicts are copyrightable anymore. The law has changed since it made policy sense to allow states to copyright all of their labor. The cases Fastcase cited in their complaint stands for the principle that some law is not copyrightable, but not the principle that all law is copyrightable. *Wheaton v. Peters*, 33 U.S. 591 (1834) only references Supreme Court cases; *Banks v. Manchester*, 128 U.S. 244 (1888) holds that there can be no copyright on work of judges; and *Howell v. Miller*, 91 F. 129 (6th Cir. 1898) stands for the principle that “no one can obtain the exclusive right to publish the laws of a state,” by which the court meant statutes. As such there is now a general prohibition against private copyrights of state court opinions and statutes, but there is not much guidance on administrative rules and regulations.

While Fastcase and Casemaker might agree that administrative rules and regulations should not be copyrighted, that is not the current state of the law. According to the FSGI, government documents meet the requirements for protection offered by Section 102(a) of the Copyright Act that automatically copyrights all law. Section 105 of the U.S. Copyright Act creates an exception preventing the United States Government from obtaining copyright over any of its works. Section 105 says nothing about state governments, and the rest of the Copyright Act is equally silent about copyright and the states.

The only case that addresses them according to the FSGI, is *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir 1980). In *Bldg. Officials & Code Adm.,* Massachusetts had adopted a model code into their building code. The company who drafted and copyrighted the original model code wanted to prevent any other publishers from publishing the Massachusetts code because they in turn would be publishing the company’s work. The court did not find any of the plaintiff’s arguments convincing, finding their copyright in the code was void once it was adopted into law by Massachusetts. This case was interesting because while the court acknowledged that when government works have the force of law they should be available to the public it affects, it held that states, falling outside section 105 of the copyright act, can determine their own copyright. The court was only concerned with preventing private publishers from having the right to keep the law from the public. So currently, all state produced materials, except statutes and judicial decisions, are automatically copyrighted under U.S. copyright law and are governed exclusively by individual state laws. Only the states themselves can likely exert a copyright in state administrative rules and regulations.

The Fastcase/Casemaker suit is not the first case where Georgia law has been entangled in a copyright suit. In 1982, Georgia attempted to claim a copyright over the Georgia Code. Georgia had a contract with The Michie Company to revise, compile, and print a new code. When The Harrison Company compiled their own version of the Georgia Code using the prerelease Michie code for reference, Georgia filed suit. In the decision denying Georgia’s motion for preliminary judgment, the court said “[t]he public must have free access to state laws, unhampered by any claim of copyright . . . .” The court declined to examine if Georgia could have a copyright in the captions of the code compilation, since the defendant had not copied the captions in their compilation of the code. The case was later settled.

More recently, Georgia sued Public Resource, a site run by Carl Malamud, for putting scanned copies of the *Official Code of Georgia Annotated* on their website. The difference with this case and the one previous was that Public Resource displays not just the statutory language, but also the annotations that Georgia contracted LexisNexis to draft. The Copyright Office may be on Georgia’s side as it takes no qualms with registering “annotations that summarize or comment upon legal materials.” The Copyright Office has one caveat: those annotations cannot have the force of law.

This is actually the point of contention between Malamud and Georgia. The *Official Code of Georgia Annotated* is the official version of Georgia’s Code. For this reason, Malamud argues that Georgia can have no copyright in it. Georgia disagrees, noting that the statutory text is available online for free, but claiming copyright in the annotations. This case is indicative of just how unresolved so much of our intellectual property law is. Eventually, the court must decide whether Georgia has a copyright in captions, and the decision will likely turn on whether the court finds that they have the force of law.

There are the two main theories used to justify preventing states from claiming copyright in the law. The theory the court in *Bldg. Officials & Code Adm.* used was “that citizens must have free access to the laws which govern them . . . . Due process requires people to have notice of what the law requires of . . . .
them so that they may obey it and avoid its sanctions.” Another theory of why there should be no copyright of any government publication is, according to Simon, the idea that “public sponsorship implies public ownership.” That is to say our tax dollars paid the salaries of those who created the material, so those individuals cannot have a “pecuniary interest or proprietorship, as against the public at large, in the fruits of their . . . labors” *Banks v. Manchester*, 128 U.S. 244, 253 (1888). It is this same argument that Fastcase ultimately makes in their complaint.

Regardless of the theory, even the Copyright Office seems to believe: anything that has the force of law should be in the public domain. Their *Compendium of U.S. Copyright Office Practices* states, “As a matter of longstanding public policy, the U.S. Copyright Office will not register a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials” (emphasis added).

The Copyright Office will not register anything that has the force of law, and in this they include administrative law.

It pains the brain to think that any government edicts carrying the force of law would not be in the public domain. Administrative rules have the force of law. Laws effect and control the lives of citizens, and due process requires citizens have access to the laws that govern them. As such, they should not be copyrighted by states. If more cases like the Fastcase/Casemaker lawsuit start being filed, it very well could force a change in the way states are allowed to copyright their works. Nevertheless, we should not sit idly by. If we want things to change, we are going to have to reach out to our state legislatures, maybe even Congress, and ask for change or at the very least clarification. For now, I’ll be making popcorn to eat as I watch history unfold in a way that could change the way many librarians do business, hopefully for the better.

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**Thomson Reuters Westlaw: Platform Formerly Known as WestlawNext**

With the sunsetting of Westlaw Classic finally complete, Thomson Reuters made the decision to change their platform’s name to “Thomson Reuters Westlaw” starting in February of this year. Some librarians have expressed concern about the rebranding and what it might mean for the future. Is Thomson Reuters possibly looking into restructuring the content available or current subscription contract terms or models? Other librarians have more immediate needs they would like addressed, such as will Thomson Reuters provide teaching and reference librarians with any promotional or educational materials to update their “WestlawNext” handouts and lessons. In order to get some answers, I contacted Thomson Reuters and here is what I was able to gather.

- The name change from “WestlawNext” to “Thomson Reuters Westlaw” was only a name change. Thomson Reuters has no intentions of altering plans, content, or subscriptions as part of the rebranding.
- “Thomson Reuters Westlaw” will still be accessible using the next.westlaw.com web address, as well as westlaw.com. In addition, any “WestlawNext” shortcuts or links in your OPACs, library research pages, etc., will still work and route to the correct webpage.
- Thomson Reuters is not planning on issuing any marketing or materials around the name change or to accommodate for the name change. Libraries are welcome to continue to use any “WestlawNext” branded items, handouts, etc., they have until Thomson Reuters needs to change them for another reason.

If you still have questions or concerns about this change, please feel free to contact CRIV or your Thomson Reuters sales executive or client manager as well as their reference attorneys (1-800-REF-ATTY).