

January 15, 1993

Mr. Max M. Sheils, Jr.
Idaho Code Commission
State of Idaho
707 North 8th Street
STATEHOUSE MAIL
Boise, ID 83701

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Publication of Materials Contained in the Idaho Code

Dear Mr. Sheils:

On August 12, 1992, you requested a formal Attorney General Opinion concerning the publication of the materials contained in the Idaho Code. Your letter raises the following questions:

1. Is the compilation known as the Idaho Code owned by the State of Idaho? If so, are these materials owned solely by the State of Idaho?
2. If yes, may/should the State of Idaho authorize the publication and sale of an "unofficial" compilation of any materials contained in the Idaho Code? If so, is a charge or fee appropriate?
3. May any entity publish or market, in written or electronic form, any version of the materials contained in the Idaho Code, whether annotated or not, with or without approval of the Code Commission?

Ownership of the copyright to the compilation known as the Idaho Code is governed by Idaho Code § 73-210. It states:

Copyright of all compilations shall be taken by and in the name of the publishing company which shall thereupon assign the same to the state of Idaho, and thereafter the same shall be owned by the state of Idaho.

The State of Idaho, therefore, owns the copyright to the compilations known as the Idaho Code. However, the fact that a work is copyrighted does not mean that every element of the work may be protected. A copyright can not protect the text of state statutes or court rules. See Wheaton v. Peters, 33 U.S. 591 (1983). The rationale of this

rule is set forth in Building Officials and Code Administration v. Code Technology, 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.

What is in the public domain, therefore, may not be copyrighted. As such, the State of Idaho's copyright to the compilations known as the Idaho Code does not protect the text of the Idaho statutes or the Idaho Court Rules. Title headings in the compilation are also not protected by copyright if taken verbatim from the title headings in the Idaho Session Laws.

Pagination may become an issue with the advent of the electronic publication of statutes on CD-ROM. The leading case on pagination, West Publishing Co. v. Mead Data Central, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987), holds that the arrangement of judicial decisions, including internal page citations, are protected by copyright. The logic of the holding in West Publishing could easily be extended to the compilation of statutes. However, West Publishing has received severe criticism, and a bill has been introduced in the U. S. Congress to exclude copyright protection for certain legal compilations. See 1991 U.S. House Bill H.R. 4426. One result of this bill would be to repudiate West Publishing. Thus, although the state of the law is in question, an argument can be made based upon the holding in West Publishing that pagination is protected by the copyright.

Factual compilations are eligible for copyright protection if they feature an original selection or arrangement of the facts. Section 101 of the Copyright Act of 1976 (17 U.S.C. § 101) defines "compilation" as a work formed by the collection and assembly of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

The State of Idaho's copyright, therefore, protects all original works contributed by the Michie Company in compiling the Idaho Code. It follows that the following are protected by the copyright: the compilers' notes, section to section references, citation references, analysis sections, indexes, tables, and, arguably, the pagination. The State of Idaho is the sole owner of the copyright to these provisions of the compilations known as the Idaho Code.

Whether the Code Commission should authorize the publication and sale of an "unofficial" compilation of the materials contained in the Idaho Code is governed in part by the copyright laws discussed above. Because the text of the statutes and court rules is

in the public domain and, therefore, not protected by the state's copyright, the Code Commission has no control over the republication of the statutes or court rules. Any party may publish the text of the Idaho statutes or court rules. However, the Code Commission has exclusive authority over the use of the copyright covering the portions of the compilation discussed above. Section 73-210 of the Idaho Code provides:

The commission is authorized and empowered to grant the use of the copyrights of the Idaho Code published pursuant to Session Laws of 1947, Chapter 224, and of all compilations authorized by this act, in connection with the performance of its said duties and obligations.

In Idaho Code § 73-210, the legislature provides the intent and purpose of the act empowering the Code Commission with the exclusive authority to grant use of the copyright:

The intent and purpose of this act is to keep current so far as practicable the compilation known as the Idaho Code, by authorizing publication of pocket parts to the volumes of the Idaho Code, or as necessary, the republication of single or more volumes, or the addition of volumes, or by other devices designed and intended to maintain the Idaho Code up to date, and especially after each session of the legislature, indicating therein existing laws, repealed laws or parts of laws, substitute laws, additional laws, and constitutional provisions and changes, rules of the Supreme Court of Idaho, additional notes, annotations and indexing
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Idaho Code § 73-201.

The latitude of such power is governed by § 73-201. It states in part: "This act shall be so interpreted as to grant the commission hereby created all power and authority necessary to accomplish such intent and power."

The Code Commission, by virtue of the above cited statutes, has the requisite power necessary to ensure the appropriate publication of the code. The Code Commission accomplishes this goal by contracting and executing contracts for the publication of the Idaho Code as provided in § 73-205 and examining the publication for the purpose of determining whether the compilation meets the requirements of § 73-205 as provided in § 73-208. By following the detailed process by which the legislature has specified the Idaho Code be published, the Code Commission ensures the accuracy and quality of the compilation and publication of the Idaho Code.

Interpreting the authority to grant use of the copyright in conjunction with the intent of the legislature in granting this power, it becomes clear that use of this power by the Code Commission must be at the Code Commission's discretion, but in furtherance of the intent of the legislature.

Whether a fee may be charged for use of the copyright is not expressly provided for in either the Session Laws or in Idaho Code, title 73, ch. 2. Due to a lack of legislative intent or statutory authority, it would not be appropriate to charge a fee for use of the copyright. Any authority to charge such a fee must be expressly provided by the legislature.

The third question is whether any entity may publish or market, in written or electronic form, any version of the materials contained in the Idaho Code, whether unannotated or not, with or without approval of the Code Commission. Based upon our analysis above, any entity may publish the text and title headings of the Idaho Statutes or Idaho Court Rules. Apart from the actual text and title headings, no entity may publish or market any version of the materials contained in the Idaho Code without the approval of the Code Commission.

I hope this adequately addresses your questions. If I can be of further assistance, please let me know.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division