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Case No. M2024-01139-COA-R3-CV

IN THE
Court of Appeals of Tennessee
AT NASHVILLE

CLATA RENEE BREWER, THE TENNESSEAN, and RACHEL WEGNER,
Petitioners-Appellees,

and

JAMES HAMMOND, THE TENNESSEE FIREARMS ASSOCIATION INC., MICHAEL P. LEAHY, STAR NEWS DIGITAL MEDIA INC., and TODD GARDENSHIRE,
Petitioners-Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,
Respondent-Appellee,

and

PARENTS OF MINOR COVENANT STUDENTS JANE DOE AND JOHN DOE; THE COVENANT SCHOOL; and COVENANT PRESBYTERIAN CHURCH,
Intervening Respondent-Appellees.

On appeal from the Circuit Court for the Twentieth Judicial District,
Nos. 23-538-III, 23-542-III, 23-636-III, 23-640-III
Chancellor I'Ashea Myles

BRIEF OF INTELLECTUAL PROPERTY AND FIRST AMENDMENT SCHOLARS AND ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS

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INTEREST OF *AMICI CURIAE*

Amici are intellectual property and First Amendment scholars and advocates with a vested interest in ensuring the sound development of copyright and public records law. *Amici* scholars and advocates have written, taught, and practiced in the fields of copyright, intellectual property, the First Amendment, public records, and media law.

- Patricia Aufderheide, American University
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- Rebecca Tushnet, Harvard Law School
- Eugene Volokh, Hoover Institute, Stanford University and UCLA School of Law
- First Amendment Coalition
- Freedom of the Press Foundation
- National Freedom of Information Coalition
- Reporters Committee for Freedom of the Press
- Society of Professional Journalists
- Tennessee Coalition for Open Government

INTRODUCTION

The tragic shooting at the Covenant School in Nashville resulted in the deaths of three students, three staff members, and the perpetrator. This event has raised significant questions of public interest as mass shootings continue to pose severe threats to community safety and influence political discourse. The shooting inspired student-led protests at the Tennessee Capitol, and the Covenant families and others have demanded legislative action from the Tennessee General Assembly.[1]

This appeal raises the question of what information about the shooting the public may access through the Tennessee Public Records Act ("TPRA"). The TPRA serves the important role of "promot[ing] public awareness and knowledge of governmental actions," which "encourages governmental officials and agencies to remain accountable to the citizens

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[1] *See, e.g.*, Rachel Wegner, Melissa Brown, Molly Davis, Diana Leyva & Kelly Puente, *Students Walk out of Schools Across Nashville, Demand Gun Reform in Covenant's Wake*, The Tennessean (Apr. 3, 2023, 7:13 PM), https://www.tennessean.com/story/news/local/2023/04/03/covenant-school-protests-week-after-the-deadly-nashville-school-shooting/70076073007/; J. Holly McCall, *Tennessee Community and Gun Safety Groups Organize Special Legislative Session Activities*, Tennessee Lookout (Aug. 19, 2023, 1:25 PM), https://tennesseelookout.com/briefs/tennessee-community-and-gun-safety-groups-organize-special-legislative-session-activities/.

of Tennessee." *Schneider v. City of Jackson*, 226 S.W.3d 332, 339 (Tenn. 2007). To further this policy goal, the General Assembly has declared that the TPRA "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10-7-505(d).

In the aftermath of the Covenant School shooting, as part of its criminal investigation, the Metropolitan Nashville Police Department ("MNPD") gathered materials authored and owned by the perpetrator, including journals, photographs, artwork, writings, and videos (collectively, "perpetrator's documents"). This lawsuit arose when Petitioners sought to inspect and copy records held by the MNPD related to the shooting, including the perpetrator's documents, but the MNPD denied the requests. During the trial court proceeding, the parents of the Covenant School students, who were assigned the intellectual property rights to the perpetrator's documents, asserted that the federal Copyright Act ("Act"), 17 U.S.C. § 101, *et al.*, also barred disclosure. The Chancery Court upheld the MNPD's denial, concluding that the TPRA's school security exception ("TPRA exception"), Tenn. Code Ann. § 10-7-504(p), and Tennessee Rule of Criminal Procedure 16(a)(2) ("Rule 16 exception") barred release. The Chancery Court additionally held that

the Copyright Act preempted the TPRA, barring release of the perpetrator's documents. *Amici* address only the copyright issue and take no position on the state law exceptions or the ultimate disclosure of the perpetrator's documents.

The Chancery Court's blanket ruling that the Act preempts the TPRA erred as a matter of law and, if left standing, will gravely undermine government transparency and access to public records. First, the Chancery Court denied the release of the records on state law grounds—pursuant to the TPRA and Rule 16 exceptions—so it should not, based on well-established principles of judicial restraint and constitutional avoidance, have reached the constitutional question of whether the Act preempts the TPRA. Second, even if the Chancery Court was justified in reaching the preemption question, it erred in holding that the Act preempts the TPRA because Congress neither expressly nor implicitly preempted state public records laws. Finally, even assuming the Act preempts the TPRA, the Chancery Court erred in categorically blocking the release of all documents without addressing numerous factual issues, including whether fair use permits the inspection or use

of any of the documents for criticism, comment, news reporting, or research.

Applying the Chancery Court's analysis, a records custodian may deny a request for any documents in the custodian's possession on copyright grounds if a non-government third party authored or created the document, including emails, reports, photographs, letters, responses to inquiries, and countless other records. Such a result would impermissibly allow the Act to supplant the TPRA. And with lengthy copyright protection, the public could be denied access in many cases for more than a hundred years. Such an outcome undermines public records law and the purposes of the Copyright Act, including the Act's First Amendment safeguards.

ARGUMENT

I. THE CHANCERY COURT DENIED RELEASE OF THE PERPETRATOR'S DOCUMENTS ON STATE LAW GROUNDS, SO IT SHOULD HAVE AVOIDED THE CONSTITUTIONAL QUESTION OF WHETHER THE COPYRIGHT ACT PREEMPTS THE TPRA.

It is a longstanding principle that courts do not "decide 'questions of a constitutional nature unless absolutely necessary to a decision of the case' or 'formulate a rule of constitutional law broader than is required

by the precise facts to which it is to be applied.'" *Torres v. Precision Indus., Inc.*, 938 F.3d 752, 754 (6th Cir. 2019) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Courts must refrain from deciding constitutional questions "if there is also present some other ground upon which the case may be disposed of," so "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring). Relatedly, courts do not resolve hypothetical questions. *See Savel v. MetroHealth Sys.*, 96 F.4th 932, 939 (6th Cir. 2024) ("Article III gives us the power to adjudicate 'Cases' and 'Controversies,' not hypothetical disputes." (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016)).

The U.S. Supreme Court has recognized that the doctrines of judicial restraint and constitutional avoidance require courts to decide only actual cases and controversies, preventing needless interpretations of constitutional issues and ensuring that courts do not overstep their judicial role. *See Torres*, 938 F.3d at 755; *see also Ala. State Fed'n of Lab. v. McAdory*, 325 U.S. 450, 461 (1945) (instructing courts to exercise

restraint by refusing "to decide any constitutional question in advance of the necessity for its decision"). The U.S. Supreme Court's mandate is unambiguous: "Prior to reaching any constitutional questions, [] courts must consider nonconstitutional grounds for decision. . . . This is a fundamental rule of judicial restraint." *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (internal quotations and citations omitted). The Tennessee Supreme Court has been equally clear: "[U]nder Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case . . . . If issues in a case can be resolved on non-constitutional grounds, courts should avoid deciding constitutional issues." *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995) (internal citations omitted).

More than two hundred years ago, the U.S. Supreme Court recognized that federal law preempts conflicting state law because of the Supremacy Clause of the United States Constitution. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824); U.S. Const. art. VI, cl. 2. A preemption analysis "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the *constitutional question* whether they are in conflict." *Perez v.*

Campbell, 402 U.S. 637, 644 (1971) (emphasis added). Thus, a court should avoid addressing preemption—a constitutional question arising under the Supremacy Clause—if a case can be decided on other grounds. *See Torres*, 938 F.3d at 755.

Courts have regularly "applied avoidance principles to questions of preemption." *Id.*; *see, e.g.,* Q*west Corp. v. City of Santa Fe,* 380 F.3d 1258, 1267 n.7 (10th Cir. 2004) ("[F]ederal preemption of a state or local law is premised on the Supremacy Clause . . . [and] courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided." (internal citation omitted)); *Ehlis v. Shire Richwood, Inc.*, 367 F.3d 1013, 1019 (8th Cir. 2004) (declining to consider preemption arguments when recovery was statutorily barred); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1176 (11th Cir. 2001) ("decid[ing] whether the ordinances are preempted by [] state law before considering whether they are federally preempted"). Failure to adhere to these principles is "reversible error." *Bell Atl. Md., Inc. v. Prince George's Cnty.*, 212 F.3d 863, 866 (4th Cir. 2000). Furthermore, adherence to constitutional avoidance and judicial restraint principles aligns with federalism and separation of power principles. *See Wyeth v.*

Levine, 555 U.S. 555, 604 (2009) (Thomas, J., concurring in judgment) (cautioning that broad application of purposes and objectives preemption risks "facilitat[ing] freewheeling, extratextual, and broad evaluations" and could improperly give "effect to judicially manufactured policies, rather than to the statutory text enacted by Congress," thereby "lead[ing] to the illegitimate—and thus, unconstitutional—invalidation of state laws").

The U.S. Court of Appeals for the Sixth Circuit recently explained the proper approach for resolving a case that could be decided on either state or federal law grounds. In *Torres*, the plaintiff brought an employment retaliation claim under both the Tennessee Workers' Compensation Act and the federal Immigration Reform and Control Act. *See* 938 F.3d at 754. The defendant argued that it had not violated the state law and, even if it had, the federal statute preempted any remedy. *See id.* The district court ruled for the defendant on preemption grounds, without any findings or decision on the state law claim. *See id.* The Sixth Circuit concluded that the district court erred because it ruled on preemption before first determining whether the state statute would have resolved the case. As the Sixth Circuit explained, the error would

"'require us to resolve a constitutional question that may be entirely hypothetical' as applied to the facts of this case." *Id.* at 756 (quoting *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (per curiam)). The Sixth Circuit instructed that on remand the district court "should decide what remedies are available under Tennessee law *before* resolving whether federal law preempts any of those remedies. That sequence will allow the district court to 'formulate a rule of constitutional law [no] broader than is required by the precise facts to which it is to be applied.'" *Id.* at 757 (emphasis added) (quoting *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring)).

The Chancery Court's error was even more significant than the district court's error in *Torres*. Although the Chancery Court considered the state court claims first, it ignored the whole point of constitutional avoidance: not to reach preemption if state law resolves the case. The Chancery Court ruled that the perpetrator's documents were exempt from disclosure under state law and upheld the MNPD's refusal to allow Petitioners to inspect or copy them. Specifically, the Chancery Court held that two state law grounds—the TPRA and Rule 16 exceptions—barred the release of the requested documents. *See Brewer v. Metro. Gov't of*

Nashville and Davidson Cnty., No. 23-0538-III, slip. op. at 20, 32 (Tenn. Ch. Ct. July 4, 2024). Once it ruled on these state law grounds that the documents were exempt from disclosure, the Chancery Court fully resolved the case: Petitioners would not have access to the requested documents. *Id.* That should have ended the matter. Yet, the Chancery Court also ruled that the Copyright Act preempted the TPRA. In other words, the Chancery Court unnecessarily resolved a hypothetical constitutional question and formulated a constitutional rule, despite the well-established principles not to do so. Therefore, this Court should vacate the Chancery Court's holding that the Copyright Act preempts the TPRA.

II. THE CHANCERY COURT ERRED IN RULING THAT THE FEDERAL COPYRIGHT ACT PREEMPTED THE TPRA.

Although constitutional avoidance and judicial restraint principles resolve this matter, the Chancery Court additionally erred in its application of the preemption doctrine. There are two types of preemption: express and implied. Regardless of which "type of preemption is at issue, 'the purpose of Congress is the ultimate touchstone.'" *Lake v. Memphis Landsmen, LLC*, 405 S.W.3d 47, 56 (Tenn. 2013) (quoting *Wyeth*, 555 U.S. at 565).

The Tennessee Supreme Court has stated that "courts should start with the presumption that Congress does not intend to supplant state law . . . unless preemption was the clear and manifest purpose of Congress." *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 605 (Tenn. 2013); *see also N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) ("[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law."). This canon erects a "high threshold" for a federal law to block a state law. *Morgan Keegan & Co.*, 401 S.W.3d at 605; *see Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part) ("Our decisions establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act. Any conflict must be 'irreconcilable. . . . The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.'" (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)). The U.S. "Supreme Court has cautioned[] courts must remain mindful 'that it is Congress rather than the courts that preempts state law.'" *Lake*, 405

S.W.3d at 56 (quoting *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011)).

Even assuming the Chancery Court's state law holdings did not resolve this case, it erred in holding that the Copyright Act preempts the TPRA because the Act fails to meet this high threshold. The purposes of the Copyright Act and the TPRA are complementary, and the two do not conflict with each other.

A. The Copyright Act Does Not Expressly Preempt the TPRA.

Express preemption exists when Congress explicitly states in a statute its clear intent to preempt state law. *Bibbo v. Dean Witter Reynolds, Inc.*, 151 F.3d 559, 562 (6th Cir. 1998). The Act contains an express preemption provision that applies only to state law claims of "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as defined by [S]ection 106" of the Act. 17 U.S.C. § 301; *compare Stromback v. New Line Cinema*, 384 F.3d 283, 302 (6th Cir. 2004) (holding that a commercial misappropriation claim under state law was qualitatively equivalent to exclusive Section 106 rights) *with Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001) (holding that state law implied-in-fact contract claim was not

preempted because it was not qualitatively equivalent to exclusive Section 106 rights). Section 106 grants a copyright owner the exclusive rights to make copies of works, prepare derivative works, distribute copies, and display works publicly.

Section 301 of the Copyright Act does not expressly preempt state open records laws, including the TPRA. *See Bd. of Chosen Freeholders of Cnty. of Burlington v. Tombs*, 215 F. App'x. 80, 82 (3d Cir. 2006) ("[F]ederal copyright law does not wholly displace state statutory or common law rights to public records."); *cf. Weisberg v. U.S. Dep't of Just.*, 631 F.2d 824, 825 (D.C. Cir. 1980) ("[T]he mere existence of copyright, by itself, does not automatically render [the federal Freedom of Information Act] inapplicable to materials that are clearly agency records."). Notably, every state currently has some version of an open records law with many, including Tennessee, predating the enactment of the Copyright Act. *See* Reporters Committee for Freedom of the Press, Open Records Guide, https://www.rcfp.org/open-government-guide/ (collecting laws from all fifty states) (last visited Apr. 2, 2025). Given that public records statutes predate the Act, Congress's decision not to include explicit preemption of those state law rights is purposeful. *See Royal Truck & Trailer Sales &*

Serv., Inc. v. Kraft, 974 F.3d 756, 760 (6th Cir. 2020) ("[W]here Congress knows how to say something but chooses not to, its silence is controlling." (internal quotation and citation omitted)). In addition, the TPRA's rights to access and inspect records do not mirror the rights under the Copyright Act. Therefore, Section 301 does not expressly preempt the TPRA.

B. The Copyright Act Does Not Implicitly Preempt the TPRA.

Courts have recognized three types of implied preemption. First, "[f]ield preemption occurs when federal regulation" in an area of law "is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Lake*, 405 S.W.3d at 56 (internal quotations and citation omitted). Second, direct conflict preemption occurs when there is "an inescapable contradiction between state and federal law—for example, where it is impossible for a [] party to comply with both state and federal law." *Id.* (internal quotations and citation omitted). Third, purposes and objectives preemption "occurs when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law." *Id.* (internal quotations and citation omitted). None apply here. Importantly, "courts must guard against implied preemption analysis devolving into a 'freewheeling

judicial inquiry into whether a state statute is in tension with federal objectives.'" *Id.* at 56-57 (quoting *Whiting*, 563 U.S. at 607).

The Copyright Act does not supplant the field of public records law. The U.S. Supreme Court has cautioned against inferences that Congress has occupied a field and implicitly preempted state laws. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (declining to "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed[, as] matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law"). The Chancery Court did not conclude there was field preemption.

Direct as well as purposes and objectives conflict preemption also are inapplicable here. Compliance with both the Copyright Act and the TPRA is possible, and state public records law does not stand as an obstacle to the accomplishment and execution of the full objectives of Congress. To determine whether the TPRA conflicts with the Copyright Act or Congress's objectives first requires understanding the provisions and intent of each statute.

1. An Underlying Purpose of Both the Copyright Act and the TPRA Is to Expand Public Access to Knowledge and Information.

The General Assembly enacted the TPRA almost seventy years ago to promote government transparency by providing the public access to records maintained and held by the government. To that end, "[t]he General Assembly [] declared that the [TPRA] 'shall be broadly construed so as to give the fullest possible public access to public records.'" *Memphis Publ'g Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002) (quoting Tenn. Code Ann. § 10-7-505(d)). Additionally, the Tennessee Supreme Court has noted that "our courts have been vigilant in upholding this clear legislative mandate, *even in the face of serious countervailing considerations*." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 684 (Tenn. 1994) (emphasis added). The General Assembly has exercised its legislative authority to create many exceptions to TPRA disclosures. Notably, despite all the documents authored by third parties and received by the government, it appears to have created only one narrow exception concerning copyright for state-sponsored research. *See* Tenn. Code Ann. § 49-7-120(b).

Copyright law also seeks to provide public access to knowledge and information. The U.S. Constitution grants Congress the power "[t]o

promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. The "Progress of Science" means "the creation and spread of knowledge and learning." *Golan v. Holder*, 565 U.S. 302, 324 (2012). To achieve this goal, the Act grants certain exclusive rights to authors, including making copies of works, "prepar[ing] derivative works," "distribut[ing] copies," and displaying works publicly. 17 U.S.C. § 106. However, this grant is not solely or even primarily for the benefit of the authors. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit."). As one court explained:

> The monopoly created by the Copyright Act "rewards the individual author in order to benefit the public"; . . . the public will benefit from both restricted access to those works in the short term and unfettered access in the long term, once the period of exclusive control expires. The Act therefore "reflects a balance of competing claims upon the public interest . . . promoting broad public availability of literature, music, and the other arts."

Hatchette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 178 (2d Cir. 2024) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) and *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)). "Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship." *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015).

A critical component of this balancing act is fair use. Section 106 of the Copyright Act granting authors exclusive rights is "[s]ubject to [S]ection[] 107," which is entitled "Limitations on exclusive rights: Fair Use." 17 U.S.C. §§ 106–107. Section 107 provides that "the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified by that section, for purposes such as criticism, comment, news reporting, . . . scholarship, or research, is not an infringement of copyright." *Id.* § 107. Thus, in determining whether a person may copy or use a work, the "exclusive" rights of the copyright owner must be balanced with any claim of fair use. Indeed, "[t]he ultimate test of fair use . . . is whether the copyright law's goal of

'promoting the Progress of Science and useful Arts' 'would be better served by allowing the use than by preventing it.'" *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (quoting U.S. Const., art. I, § 8, cl. 8 and *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992)). Importantly, "[t]he scope of the fair use doctrine is wider when the use relates to issues of public concern." *Nat'l Rifle Ass'n v. Handgun Control Fed'n*, 15 F.3d 559, 562 (6th Cir. 1994).

Fair use also plays a critical role in protecting and accommodating First Amendment rights, ensuring "the balance between the First Amendment and copyright is preserved." *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001). Indeed, "[t]he Copyright Clause and the First Amendment . . . were drafted to work together to prevent censorship; copyright laws were enacted in part to prevent private censorship and the First Amendment was enacted to prevent public censorship." *Id.* The "Copyright Clause bolsters the First Amendment by acting as an engine of free expression. . . . [by] permit[ting] the use of copyrighted work for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research." *Green*

v. U.S. Dep't of Just., 111 F.4th 81, 87 (D.C. Cir. 2024) (internal quotations and citations omitted).

"[T]he Supreme Court has described fair use as one of two 'traditional First Amendment safeguards' designed to strike a balance in copyright law." *Id.* at 88 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)). Moreover, it has noted that fair use "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances." *Eldred*, 537 U.S. at 219. Additionally, fair use "affords considerable 'latitude for scholarship and comment[.]'" *Id.* at 220 (quoting *Harper & Row Publishers*, 471 U.S. at 560). The legislative history of the Copyright Act and its amendments also demonstrates a commitment to furthering these First Amendment objectives.

> The issue in a nutshell is this: How do we balance the interests of accurate scholarship and journalism against the right of authors and other copyright owners to control the publication or use of their unpublished work? . . . . That balance has already been struck under the fair use clause of the Copyright Act of 1976 at section 107. By enacting that clause, Congress in effect ratified a doctrine that the courts have long recognized: That there can be limited fair use of copyrighted material for purposes such as scholarship or news

> reporting without infringing on the author's copyright.

137 Cong. Rec. S5648 (daily ed. May 9, 1991) (statement of Senator Simon for himself and Senators Leahy, Hatch, DeConcini, Kennedy, Kohl, and Brown).[2] Simply put, "[t]he fair use doctrine balances the rights that copyright confers on an author against the public's first amendment interest in the dissemination of ideas." *Id.* at S5649 (statement of Senator Leahy).

2. The TPRA Does Not Directly Conflict with the Copyright Act.

After conducting its preemption analysis, the Chancery Court held that "*Tennessee Code Annotated* § 10-7-503(a)(2)(A) and 10-7-503(a)(2)(B)(i) is in direct conflict with the exclusive rights copyright owners possess under 17 *United States Code Annotated* §106. Compliance with both the TPRA and federal copyright law cannot be accomplished, therefore state law must cede to federal law." *Brewer*, slip op. at 56. However, the TPRA is neither an obstacle to accomplishing Congress's full purposes and objectives in passing the Copyright Act nor is it impossible to comply with both the TPRA and the Act.

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[2] Copies of the cited Congressional Record and State Attorneys General Opinions, *see infra* pp. 28-30, are reproduced in the Appendix to this brief.

First, as discussed above, a central purpose and objective of both statutes is to provide information and to increase knowledge for the public benefit. "Copyright law ultimately serves the purpose of enriching the general public through access to creative works." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). And the TPRA "facilitate[s] the public's access to government records." *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 864 (Tenn. 2016).

Second, it is not impossible for a records custodian to comply with both statutes. Tennessee Code Ann. §§ 10-7-503(a)(2)(A) and 10-7-503(a)(2)(B)(i) state in relevant part:

> (2)(A) All state, county and municipal records shall . . . be open for personal *inspection* by any citizen of this state, and those in charge of the records shall not refuse such *right of inspection* to any citizen, unless otherwise provided by state law.
>
> (B) The custodian of a public record . . . shall promptly make available for *inspection* any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for *inspection*, the custodian shall, within seven (7) business days:
>
> (i) Make the public record requested available to the requestor[.]

(emphasis added). These sections grant a requestor a right to *inspect* records. The Copyright Act, by contrast, does not prohibit inspecting or reviewing any documents. *See Ali v. Phila. City Planning Comm'n*, 125 A.3d 92, 105 (Pa. Commw. Ct. 2015) ("The Copyright Act limits the level of access to a public record only with respect to duplication, not inspection."). For instance, a person could sit in a bookstore and read a copyrighted book without violating the Act. Additionally, allowing inspection does not implicate the right to make or distribute copies or derivative works. Thus, even if the Chancery Court barred copying the requested documents, its opinion should not preclude a requestor from inspecting copyrighted documents.[3]

Nor does inspection of public records conflict with a copyright owner's exclusive right to publicly display a work. For a work to be displayed "publicly," it must be displayed "at a place open to the public or at any place where a substantial number of persons outside of a normal

[3] The Chancery Court stated that each Petitioner requested copies, and "[n]o Petitioner asked to come in to inspect the materials." *Brewer*, slip op. at 45. The rights to inspect and request copies, however, are independent. Regardless, at least one Petitioner requested to inspect the copies in person. *See* R.10 at 1421, Request of Michael Patrick Leahy (dated Apr. 27, 2023) ("I request to inspect all these documents at the locations where they are held by the [MNPD].").

circle of a family and its social acquaintances is gathered." 17 U.S.C. § 101. Neither of these requirements is met in the context of public records, which are kept in files and on computers within government offices such as the MNPD. To access these documents, a request must be made and granted, and a time and place must be designated for inspection. Thus, public records are not maintained or inspected in places open to the public. Additionally, public records are not displayed to a substantial number of persons. Rather, individual requests to inspect are required. In the current case, fewer than ten requests to inspect were made, hardly a "substantial" number.

Copying public records also does not conflict with the Copyright Act. Although a copyright owner has exclusive rights, including the right to make copies, those rights are not absolute. Rather, they are explicitly limited by the rights of others to copy and publicly display copyrighted material for news reporting, criticism, public comment, research, and other fair uses. *See* 17 U.S.C. § 107. For example, scholars studying gun violence may be permitted to inspect, copy, and reproduce public records for their research and scholarship. Similarly, if a newspaper wants to report on a recent school shooting, it may be allowed to review, display,

and comment on public records. These are quintessential examples of fair use authorized by the Copyright Act.

The Chancery Court barely addressed fair use, dismissing it in a few sentences: "[T]he fair use doctrine is a defense reserved for the federal courts in a copyright infringement action. . . . These nuanced arguments lodged by the Petitioners regarding copyright exceptions are defenses to be brought in a federal copyright infringement action, and not arguments [for] this Court for its analysis of state law." *Brewer*, slip op. at 49. Although fair use most frequently arises as a defense in infringement lawsuits, it is not limited to such contexts. *See, e.g.*, 17 U.S.C. § 512(c)(3)(A)(v) (requiring copyright owner to consider whether potentially infringing material constitutes fair use under Section 107 before issuing a takedown notification); *Lenz v. Universal Music Grp.*, 815 F.3d 1145, 1153 (9th Cir. 2016) ("We conclude that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is 'authorized by the law' and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c)."). As one court explained:

> Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer:
>
> . . . "Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right."

Lenz, 815 F.3d at 1152-53 (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir.1996) (Birch, J.)).[4]

Open records requests present an analogous situation. Before restricting access to requested materials, fair use must be considered. Either the copyright owner should make a good faith evaluation or, more likely, the records custodian or a court will do so. At least one state Attorney General has concluded that copying such public records is fair use. *See* Ohio Att'y Gen. Op. 93-010, at 2-57 (May 14, 1993) (concluding that "the copying and dissemination of public records by governmental officials and employees pursuant to requests for such public records

[4] Now-retired Judge Stanley Birch co-authored a book on copyright law. *See* L. Ray Patterson & Stanley F. Birch, Jr., A Unified Theory of Copyright (Craig Joyce ed. 2009), *printed in* 46 *Hous. L. Rev.* 215 (2009).

constitute a 'fair use' under federal copyright law"). Additionally, multiple state Attorneys General have opined that when a public records request is made for copyrighted materials, the custodian should allow the requester to inspect the materials and to make copies at the requestor's own risk unassisted by the custodian. *See, e.g.*, Tex. Att'y Gen. Op. JM-672, at *2 (Apr. 8, 1987) (affirming that "members of the public have the right to make copies of copyrighted materials held as public records 'unassisted by the state'" (citing Tex. Att'y Gen. Op. MW-307 (Mar. 18, 1981)); Nev. Att'y Gen. Op. 96-09, at 44 (Apr. 9, 1996) (directing that custodians should make copyrighted works available for inspection and permit copying at requesters' own risk, but should not evaluate fair use); Fla. Att'y Gen. Op. 2003-26, at 5 (June 6, 2003) (advising that copyrighted manuals be made available for inspection and that custodians advise requestors of copyright law limitations, including fair use). A Tennessee Attorney General Opinion concluded the "non-commercial use of images depicting cruelty to livestock during the course of the law enforcement investigation of a crime amounts to fair use" and that "[p]ersons who may receive the images . . . through a public records request to the government would be subject to any applicable copyright restrictions regarding the

display, reproduction, or distribution of those images." Tenn. Att'y Gen. Op. 13-39, at 1 (May 9, 2013). This opinion explicitly contemplates the disclosure of potentially copyrighted materials acquired during a police probe and the application of fair use principles in the dissemination of those records.

According to the Chancery Court, fair use does not have to be considered until a federal infringement suit arises. However, an infringement suit is highly unlikely if the documents are not first released because without access, the documents usually cannot be copied, used, or allegedly infringed. Although a party may sue for a declaratory judgment of fair use without an infringement suit, a party may not obtain a declaratory judgment without a case or controversy, which is often the threat of an infringement lawsuit. *See, e.g.,* A*ndy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,* 598 U.S. 508, 522 (2023); *see also Paramount Pictures Corp. v. Replay TV*, 298 F. Supp. 2d 921, 926 (C.D. Cal. 2004) (assessing case or controversy requirement in copyright action where a covenant not to sue "was sufficient to put an end to a case or controversy, moot the claim, and divest the court of jurisdiction") (discussing *Prudent Publ'g Co., Inc. v. Myron Mfg. Corp.*, 722 F. Supp. 17,

21-22 (S.D.N.Y.1989)). Thus, denying access based on Copyright Act preemption, as a practical matter, may be unreviewable.

But by ruling that the Copyright Act preempts the TPRA, the Chancery Court essentially concluded that allowing the requesters to obtain copies of the public records would infringe the copyright owner's rights. However, in doing so, it considered only half of Section 106 and part of the Act's purposes and objectives. It ignored the public's right to access and the non-infringing uses of copyrighted materials, including fair use for purposes of criticism, comment, news reporting, scholarship, or research. A court cannot determine whether a state law directly conflicts with a federal law and warrants preemption if it does not consider all of the federal law's purposes and objectives.

Additionally, the Chancery Court's approach makes it virtually impossible for the public to ever gain access to copyrighted records despite the TPRA. The decision would allow a custodian to deny any request for records in its possession such as emails, reports, photographs, and letters if the document was authored or created by a non-government third party, despite the General Assembly's directive to give the fullest possible access to public records. And that decision, as explained, may be

unreviewable. Moreover, because the current copyright term is the life of the author plus seventy years, the documents at issue in this case will not enter the public domain until the year 2093. Such an outcome undermines Tennessee's public records law and prevents the exercise of the fair use rights contained in the Copyright Act.

III. THE CHANCERY COURT'S DECISION RAISES NUMEROUS LEGAL ISSUES CONCERNING COPYRIGHT, GOVERNMENT TRANSPARENCY, AND ACCESS TO RECORDS THAT COURTS WILL BE FORCED TO GRAPPLE WITH IN FUTURE CASES.

The government possesses many documents owned or created by non-government third parties. They could be as mundane as emails or as detailed as a developer's construction drawings. When a public records request is made, a custodian reviews the request and discloses the documents regardless of who created and owned the document, unless a specific exception to the TPRA or another law prevents disclosure. Some non-government third-party documents are disclosed, and others are not. The Chancery Court's broad decision that the Copyright Act preempts the TPRA effectively creates a copyright exception to the TPRA for all non-government third-party documents that upends public records law.

Following the Chancery Court's reasoning, all non-government third-party documents may not be disclosed because to do so presumptively infringes the rights of the copyright holder. Parties are now incentivized to use copyright to "game" public records law to prevent disclosures and scrutiny. For example, a developer who provided a government agency or official false information or a bribe in writing could claim the letter was protected by copyright, barring disclosure and copying by a newspaper reporter.

Furthermore, if the Copyright Act could potentially be invoked in each case where non-government third-party documents are requested, the Chancery Court's decision raises numerous legal issues that it failed to address or resolve. Custodians or, more likely, courts must still evaluate the disclosure of requested documents under the Act in this case and in any future public records case involving non-government third-party documents. For instance, may a party inspect a document, even if it cannot copy it? The Copyright Act does not prevent inspection, but the Chancery Court's decision preempted Tennessee Code Annotated §§ 10-7-503(a)(2)(A) and 10-7-503(a)(2)(B)(i), which allow inspection.

Additionally, as discussed above, an owner's copyright is subject to fair use, which evaluates

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. This review would need to be on a document-by-document basis to determine which records will be released.

Who will conduct a fair use review? The custodian, who might not have any legal training, could conduct a review, though various state Attorneys General have warned against the custodian copying any documents itself so as not to risk an infringement suit. *See supra* p. 29. State courts have reviewed fair use issues in the context of public records cases. *See, e.g.*, *ACLU of Utah Found. v. Davis Cnty.*, No. 180700511, 2021 WL 1215891, at *6 (Utah Dist. Ct. Mar. 25, 2021) (applying fair use factors in deciding that the county improperly denied a state public records request for copyrighted jail standards owned by a third party); *Ali*, 125 A.3d at 96, 101-02 (holding that a requestor's intended use "to ensure that the developers comply with all relevant

federal, state and local laws and to ensure that the proposed development will actually result in direct and tangible benefits for the surrounding community' . . . fall within the scope of the 'fair use' exception"); *Lindberg v. Cnty. of Kitsap*, 948 P.2d 805, 814 (Wash. 1997) (concluding that the use of public records "in preparation for their comments and criticism in public hearings and appeals on proposed residential developments . . . is a reasonable 'fair use' qualifying as an exception to the exclusive right of the copyright owner of the materials"). The Chancery Court ignored those options and instead stated that the review must occur in a federal court because fair use is an affirmative defense in an infringement suit. *See Brewer*, slip op. at 49.

If the Chancery Court is correct, how would a fair use determination reach the federal court? As discussed above, if documents are not disclosed, it is highly unlikely that the requester could infringe them. So, the copyright owner would not bring an infringement suit, and the requester would not be able to raise a fair use defense. Additionally, if the copyright owner has not registered the copyright, the owner cannot maintain a federal copyright infringement suit. *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296, 301 (2019).

Furthermore, it may be difficult for a requester to file a federal declaratory judgment suit for non-infringement based on fair use because there might not be an actual case or controversy. *See Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 242-43 (1952).

If the Chancery Court had not ruled on Copyright Act preemption or ruled that the Act did not preempt the TPRA, many of these complex issues could be avoided. The requested documents would have been released or withheld based on the TPRA and recognized exceptions. If the copyright owner believed that the requestor's copying and use of the documents violated copyright law, it could file an infringement lawsuit in federal court. No constitutional preemption issues would be implicated. No declaratory judgment and case or controversy issues would arise. No question about who should perform a fair use analysis would require resolution. Instead, a federal court would handle the case as a routine copyright lawsuit.

CONCLUSION

The Chancery Court resolved this case on state law grounds and should not have reached the constitutional preemption issue. Furthermore, the Copyright Act does not preempt the TPRA, and this

Court should vacate that holding. Failing to do so will lead to numerous, unnecessary TPRA lawsuits in Tennessee state courts and will restrict access to public records, subverting the purposes of the TPRA.

Respectfully submitted,

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*Vanderbilt Legal Clinic students and Ryan Riedmueller, Clinical Legal Fellow, substantially aided with the development of this brief

CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the requirements of Tennessee Rule of Appellate Procedure 30(e) and Tennessee Supreme Court Rule 46 because it is typed in fourteen-point Century Schoolbook font and contains 6,947 words.

/s/ Michael B. Bressman
Michael B. Bressman

/s/ Jennifer Safstrom
Jennifer Safstrom

APPENDIX

1. 137 Congressional Record S5648-49 (1991)
2. Ohio Attorney General Opinion 93-010 (1993)
3. Texas Attorney. General Opinion. JM-672 (1987)
4. Florida Attorney General Opinion 2003-26 (2003)
5. Nevada Attorney General Opinion 96-09 (1996)
6. Tennessee Attorney General Opinion 13-39 (2013)

137 Congressional Record S5648-49 (1991)

United States General Accounting Office

GAO

Congressional Record, 102nd Congress, Senate

1. Bill	2. Date	3. Pages
S.1035	May 9, 1991 (70)	S5648-50

4. Action:

INTRODUCED BY MR. SIMON, ET.AL.

By Mr. SIMON (for himself, Mr. LEAHY, Mr. HATCH, Mr. DECONCINI, Mr. KENNEDY, Mr. KOHL, and Mr. BROWN):

S. 1035. A bill to amend section 107 of title 17, United States Code, relating to fair use with regard to unpublished copyrighted works; to the Committee on the Judiciary.

FAIR USE WITH REGARD TO UNPUBLISHED COPYRIGHTED WORKS

● Mr. SIMON. Mr. President, today I introduce a bill important to scholarly research and the preservation of history, involving both constitutional first amendment rights and copyright law. I am pleased to be joined in this effort by Senators LEAHY, HATCH, DECONCINI, KENNEDY, KOHL, and BROWN. The issue in a nutshell is this: How do we balance the interests of accurate scholarship and journalism against the right of authors and other copyright owners to control the publication or use of their unpublished work? Some Federal courts appear to have adopted a rule that would tip the scales against critical historical analysis. This bill is an attempt to restore the appropriate balance.

Mr. President, one of the fundamental tenets of sound scholarly research is this command: Go to the original source. As an amateur historian and author myself, I know how important it is for scholars to cite directly from authentic documents. Sometimes only a person's actual words can adequately convey the essence of a historical event.

Of course, there can be abuse of this kind of citation. No one would argue that I could publish a stolen draft of Scott Turow's next novel on the pretext of reporting the results of my research. Thre has to be a balance.

That balance has already been struck under the fair use clause of the Copyright Act of 1976 at section 107. By enacting that clause, Congress in effect ratified a doctrine that the courts have long recognized: That there can be limited fair use of copyrighted material for purposes such as scholarship or news reporting without infringing on the author's copyright. The courts have developed a complex and sophisticated test for interpreting whether a particular use is fair. Under that test, the fact that a work is unpublished is relevant and important—but not necessarily dispositive—in the determination of whether or not a particular use is fair.

Unfortunately, the Court of Appeals for the Second Circuit, which has jurisdiction over many of the Nation's major publishing houses, has recently issued decisions that begin to upset this careful balance. The case of New Era Publications versus Henry Holt involves the use of unpublished letters and diaries in a critical biography of L. Ron Hubbard, founder of Scientology. In that case, the court suggests that virtually any quotation of unpublished materials is an infringement of copyright and not a fair use.

This is an unfortunate interpretation of language from Harper & Row versus Nation Enterprises, an earlier case in which the Supreme Court held extensive quotation from the unpublished memoirs of President Ford to be an infringement of copyright. However, Harper & Row involved quotes from a purloined manuscript, that was soon to be published, in an article that was intended to scope the scheduled authorized publication of excerpts from the book in a competing news magazine.

In Salinger versus Random House, the second circuit expanded on the Supreme Court's decision in Harper & Row, barring the publication of an unauthorized biography of writer J.D. Salinger that quoted extensively from unpublished letters written by Salinger that were collected in university libraries. The Supreme Court declined to hear an appeal of either Salinger or New Era.

As chair of the Judiciary Committee Subcommittee on the Constitution, I am particularly concerned about the impact these cases will have on the first amendment right to free speech. These decisions have created something of an uproar in the academic and publishing communities. The specter of historical and literary figures and their heirs exercising an effective censorship power over unflattering portrayals has already had a chilling effect. Books that quote letters, even those written directly to the authors, have been changed to omit those quotations. Other lawsuits have been filed against biographers. If scholars and historians can be prohibited from citing primary sources, their work would be severely impaired. Ultimately, I think it no exaggeration to state that if this trend continues, if could cripple the ability of society at large to learn from history and thereby to avoid repeating its mistakes.

Mr. President, this is a straightforward bill which would direct the courts to apply the full fair use analysis to all copyrighted works, rather than peremptorily dismissing any and all citation to unpublished works as infringements. This bill is not intended to allow unlimited pirating of unpublished materials.

Nor is the bill intended to render the fact that a work is unpublished irrelevant to fair use analysis under the statutory factors. In assessiong any particular use of an unpublished work, courts would still consider the fact that the work is unpublished as "an important element which tends to weigh against a finding of fair use * * *." Courts should generally retain full flexibility in applying the fair use test to various particular situations that may arise. The bill simpy makes it clear that the unpublished nature of a work should not create a virtual per se bar to its use.

It may be that the Supreme Court, or the second circuit itself, will eventually modify these decisions by limiting their application. I would welcome that development. Nonetheless, we should not rely on the possibility that they will act. The language in this legislation can help direct their actions.

At a joint hearing held in the last session before the Senate and House Subcommittees on Intellectual Property, we heard testimony from J. Anthony Lukas and Taylor Branch—authors, respectively, of "Common Ground" and "Parting the Waters," both prizewinning and important historical works. Each spoke convincingly of the damage that the courts' rulings could do and are doing to the practice of historical research and writing. A broad coalition of authors, publishers, and trade organizations supports this effort. As they have strong interests in protecting authors' copyrights as well as in encouraging scholarly research, I believe that this legislation is balanced.

Also testifying at the hearing were computer industry representatives concerned about the unintended consequences this bill might have on certain unpublished works such as computer source codes. As I noted upon introduction last year, this bill is not intended to provide new fair use access to those works through decompilation, and I have worked closely with those who have concerns to see that it does not.

Senator LEAHY and I have worked with interested parties for well over a year now on legislative language that

will provide the necessary protection that our Nation's historians and biographers urgently need, while at the same time not doing unintended damage to the computer industry. I am pleased to announce that through the conscientious efforts of a broad range of industry representatives, we have reached an agreement that accomplishes those goals. I congratulate all involved for their hard work on this issue. With each passing day, the livelihood of scholars around the Nation remains in peril. I hope and expect that this legislation will pass in a timely manner, and I urge my colleagues to join me in supporting it.

I ask unanimous consent that the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1035

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 107 of title 17, United States Code, is amended by adding at the end thereof the following:

"The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use, if such finding is made upon full consideration of all the above factors."●

●Mr. LEAHY. Mr. President, I am pleased to join the distinguished Senator from Illinois in the introduction of this important amendment to the fair use provision of the Copyright Act. That act, grounded in the Constitution, assures that "contributors to the store of knowledge (receive) a fair return for their labors." *Harper & Row* v. *The Nation Enterprises,* 471 U.S. 539, 546 (1985). The fair use doctrine balances the rights that copyright confers on an author against the public's first amendment interest in the dissemination of ideas.

Section 107 of the Copyright Act sets forth the factors to be considered in evaluating whether the use made of copyrighted materials is fair. In recent years, certain courts have applied this doctrine in an overly rigid manner to the use of unpublished materials, such as letters and diaries.

The seminal statement on the fair use of unpublished works is the Supreme Court's 1985 decision in the case of Harper & Row versus The Nation. In that case, the Nation magazine, using a leaked manuscript, published an article quoting from the soon-to-be released memoirs of President Ford, scooping an authorized article planned for Time magazine. The Supreme Court held that the Nation infringed Harper & Row's copyright and rejected the Nation's claim of fair use. In so doing, the Court said that the unpublished nature of a work is an important factor that "narrows the scope" of fair use and "tend[s] to negate" a fair use defense. At the same time, the Court underscored the importance of other section 107 factors and emphasized that courts considering fair use claims must consider all the factors listed in section 107.

These statements by the Court are fair and proper. Nothing in this legislation is designed to alter the Court's opinion in Harper & Row. The problem we face arose from two decisions of the Second Circuit Court of Appeals issued in the aftermath of Harper & Row.

In the first case, Salinger versus Random House, the court held that a biography quoting and paraphrasing J.D. Salinger's unpublished letters infringed Salinger's copyright. The Court said that "[unpublished works] normally enjoy complete protection against copying any protected expression." *Salinger* v. *Random House, Inc.,* 811 F.2d 90, 97 (2d Cir. 1987). Two years later, in a case involving a biographer's use of the unpublished letters and diaries of Scientology founder L. Ron Hubbard, the court repeated its "complete protection" formula. *New Era Publications Intern.* v. *Henry Holt & Co.,* 873 F.2d 576 (2d Cir. 1989).

This formulation goes too far. It creates a virtual per se rule against the fair use of unpublished material. It has provoked genuine turmoil in the publishing industry. Witnesses at the joint hearing we held last July in the Senate Patents Subcommittee and the House Intellectual Property Subcommittee made it clear that publishers and authors are now walking on eggshells, hesitant to quote the very unpublished material that is often the soul of first rate history and biography. We heard, for example, compelling testimony from Taylor Branch, author of "Parting the Waters" and Anthony Lukas, author of "Common Ground," Pulitzer Prize winners whose works underscore the importance of the first amendment values embodied in the fair use doctrine. Works like theirs educate us, enrich us, and enliven our national spirit. A formulation of the fair use doctrine for unpublished works that cripples the ability of writers like these to do their work cannot be right.

At the same time, we are mindful that a creator's rights of privacy and first publication deserve vigilant protection.

In particular, we heard from and have worked extensively with members of the computer software industry who were concerned that their unpublished source codes could be inadvertently jeopardized by fair use legislation. Computer software is an American success story and one of the few industries where American business is still head and shoulders above the pack. So I am pleased that we were able to craft a bill that will not put our software at risk. Nothing in this legislation is intended to broaden the fair use of unpublished computer software and I am confident that that will not be its effect.

The aim of this legislation, in brief, is to return the fair use doctrine to the status quo of Harper & Row. In that case, the Supreme Court struck the proper balance between encouraging the broad dissemination of ideas and safeguarding the rights to first publication and privacy. Thus, we intend to roll back the virtual per se rule of Salinger and New Era, but we do not mean to depart from Harper & Row.

Our bill makes clear that the absence of publication is an important element which tends to weigh against a finding of fair use, but does not bar such a finding. In addition, our bill underscores that, in discussing the importance of nonpublication, we do not mean to diminish the importance that courts have traditionally accorded to any of the section 107 factors. For example, in discussing factor No. 1—the purpose of the use—the Court in Harper & Row states that "every commercial use of copyrighted material is presumptively * * * unfair." And the Harper court refers to the fourth factor—the effect of the use on the market—as the most important element of fair use.

The bill we introduce today—supported by Senators DECONCINI, HATCH, KENNEDY, BROWN, and KOHL—is the product of extended efforts to work with interested parties toward the common goal of fixing a very real problem for authors and publishers without creating a new one for the creators of computer programs.

I am confident that this carefully crafted legislation accomplishes that goal and I look forward to working with Senator SIMON and our Judiciary Committee colleagues to ensure swift action in the Judiciary Committee and on the Senate floor. I also look forward to working with our colleagues on the House Intellectual Property Subcommittee.

Finally, let me add my appreciation for the determined efforts of the staff members who have worked on this legislation: Susan Kaplan and Brant Lee with Senator SIMON; Karen Robb and Geoff Cooper with Senator DECONCINI; Darrell Panethiere with Senator HATCH; and Carolyn Osolinik with Senator KENNEDY. I also want to thank Todd Stern and Ann Harkins on my staff for all their efforts to develop this fine piece of legislation.●

Mr. HATCH. Mr. President, I am pleased to be an original cosponsor of this bill to amend section 107 of the Copyright Act with respect to the fair use quotation of unpublished works. The negotiations that have led to the compromise language embodied in this bill have been arduous and long, but they have also been thoughtful, thorough, fair, and, ultimately, fruitful.

The bill that we introduce today clarifies an important area of copyright law, responds to legitimate concerns of scholars and authors of secondary texts, protects the common law property rights of original authors,

and guards against unintended consequences that might otherwise adversely affect the ability of computer software and other high-technology industries to preserve the integrity of their copyrights. That all of this is accomplished in a one-sentence-long bill says much about the delicate intricacy of the Copyright Act of 1976 and the careful draftsmanship that has gone into this compromise language. I would also note that the bipartisan support behind the introduction of this bill further attests to the reasonableness of the compromise that it embodies.

I look forward to swift action by the Subcommittee on Patents, Copyrights, and Trademarks on this important legislation.

Ohio Attorney General Opinion 93-010 (1993)

individual, a traffic violations bureau established by a mayor's court pursuant to Traf. R. 13, in which an individual appears in person to pay the total amount of the fine and costs or mails the ticket and a check or money order for the total amount of the fine and costs to the traffic violations bureau, is required to impose the mandatory court costs of R.C. 2743.70 and R.C. 2949.091.

2. A "blanket waiver of indigency" that determines, without regard to the individual's financial condition, that an individual is indigent because that individual is a member of a specified group or class of individuals is impermissible.

OPINION NO. 93-010

Syllabus:

Blueprints submitted to the Wood County Building Inspection Department for approval under R.C. 3791.04 are, while in the possession of the Department, public records within the meaning of R.C. 149.43, which requires the department to make such blueprints "available for inspection to any person at all reasonable times during regular business hours" and, upon request, to "make copies available at cost, within a reasonable period of time."

To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio
By: Lee Fisher, Attorney General, May 14,1993

You have asked the following question: "Are blueprints or building plans submitted to a building inspection department by a property owner or his agent or representative subject to inspection or duplication under the Ohio Public Records Law?" Your letter sets forth the following background information:

> The Wood County Building Inspection Department was recently requested by members of a labor union, not involved in construction, to provide copies of 45 pages of the blueprints for a discount department store.
>
> In the past, it has been the practice of the Wood County Building Inspection Department, the Ohio Board of Building Standards and its Division of Factories and Buildings to allow inspection of blueprints but not to make copies upon request. The position of the County Building Inspection Department and the Board of Building Standards was that even when attached to an application for building inspection permits, there existed a proprietary interest in the blueprints and copies should not be released pursuant to a public records or other request.
>
> Blueprints are essential to a Building Inspection Department in the performance of its statutory duties. Hence, it can be argued that O.R.C. §149.43(B) requires such an inspection and duplication given (1) the definition of "records" in O.R.C. §149.011, (2) the definitions of "public records" in §149.43 and (3) the liberal interpretation to be accorded to the Public Records Law.

> However, on the other hand, blueprints and drawings for residential, commercial or industrial property frequently represent a sizeable investment on the part of the owner and carry some proprietary right or interest protected by state or federal law - - e.g. Federal Copyright Law, 17 USC 101 et seq.

Based upon these circumstances, you question whether blueprints in the possession of the county building department constitute public records under R.C. 149.43.

Public Records Law - R.C. 149.43

The availability of public records is governed by R.C. 149.43(B), which states:

> All public records shall be promptly prepared and *made available for inspection* to any person at all reasonable times during regular business hours. *Upon request, a person responsible for public records shall make copies available* at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in such a manner that they can be made available for inspection in accordance with this division. (Emphasis added.)

For purposes of R.C. 149.43, tne term "public record" means:

> *any record that is kept by any public office*,[1] including, but not limited to, state [and] county...units, *except* medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under [R.C. 2151.85] and to appeals of actions arising under that section, records listed in [R.C. 3107.42(A)], trial preparation records, confidential law enforcement investigatory records, and *records the release of which is prohibited by state or federal law.* (Footnote and emphasis added.)

R.C. 149.43(A)(1). As used in R.C. Chapter 149, the word "records" is broadly defined as including, "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G).

Accordingly, if the blueprints or building plans in the possession of a county office, as described in your request, constitute a "record that is kept by [a] public office" and do not fall within one of the exceptions listed in R.C. 149.43, not only must they must be made available for inspection at reasonable times during regular business hours, but also, upon request, the person responsible for the blueprints or plans would be required to make copies available at cost, within a reasonable period of time.

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[1] R.C. 149.011(A) defines the term "public office," for purposes of R.C. Chapter 149, as including "any state agency, public institution, *political subdivision*, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government" (emphasis added).

A County Building Department Is a Public Office for Purposes of R.C. 149.43

R.C. 307.37 provides, among other things, for the board of county commissioners to "adopt, amend, rescind, administer, and enforce regulations pertaining to the erection, construction, repair, alteration, redevelopment, and maintenance of single-family, two-family, and three-family dwellings within the unincorporated territory of the county...." R.C. 307.37(E) expressly authorizes a board of county commissioners to:

> provide for a building regulation department and [to] employ such personnel as it determines to be necessary for the purpose of enforcing such regulations. Upon certification of the building department under [R.C. 3781.10], the board may direct the county building department to exercise enforcement authority and to accept and approve plans pursuant to [R.C. 3781.03 and R.C. 3791.04] for any other kind or class of building in the unincorporated territory of the county.

Thus, a building department, such as the Wood County Building Inspection Department, established by the board of county commissioners under R.C. 307.37 is a unit of county government and, as such, a public office for purposes of R.C. 149.43. *See generally* 1969 Op. Att'y Gen. No. 69-148 (concluding that a county building department, as an entity of county government, is entitled to representation by the county prosecutor pursuant to R.C. 309.09).

Use of Blueprints by A County Building Department

Whether blueprints or building plans submitted to a county building department constitute a "record," as defined in R.C. 149.011(G), of that department, depends upon whether the blueprints or building plans are submitted to the county building department in connection with that department's functions.

R.C. 3781.10(E) empowers the Board of Building Standards to certify, among others, county building departments "to exercise enforcement authority, *to accept and approve plans and specifications*, and to make inspections, pursuant to [R.C. 3781.03 and R.C. 3791.04]." (Emphasis added.) R.C. 3781.03, in part, authorizes the building inspector or commissioner of buildings in counties whose building departments are certified under R.C. 3781.10 to enforce certain building regulations in unincorporated areas of the county.

Pursuant to R.C. 3791.04, before entering into a contract for, or beginning the construction of, a building, as defined in R.C. 3781.06,[2] the owner must submit the plans or drawings, specifications, and other data to the county building department, if certified, or other appropriate public entity for approval. Thus, where the county building department has been certified under R.C. 3781.10, R.C. 3791.04 requires that, prior to construction of a building, the owner submit the blueprints or building plans to that department for approval. The blueprints or building plans, once so submitted to the county building department, constitute a "record that is kept by [a] public office," within the meaning of R.C. 149.43.

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[2] R.C. 3781.06(B) defines the word "building" as meaning, "any structure consisting of foundations, walls, columns, girders, beams, floors, and roof, or a combination of any number of these parts, with or without other parts or appurtenances."

Public Records Exception - Release Prohibited by State or Federal Law

While such blueprints and building plans thus are records, not all records kept by a public office constitute public records for purposes of R.C. 149.43(A). You have asked whether the blueprints or building plans in the possession of the county building department are "records the release of which is prohibited by...federal law" under R.C. 149.43(A)(1), and, as such, would not be "public records" subject to public access under R.C. 149.43.[3] *See generally* 1992 Op. Att'y Gen. No. 92-005 (a copy of federal income tax form W-2, prepared by a township as employer, is a public record for purposes of R.C. 149.43); 1991 Op. Att'y Gen. No. 91-053 (discussing circumstances in which federal tax returns are confidential under 26 U.S.C. §6103, and concluding that the release of such returns filed in a common pleas court by a litigant in connection with a child support determination or modification proceeding is not prohibited by federal law).[4] In particular, your letter questions whether the owner's copyright or other similar proprietary interest under state or federal law in such blueprints and building plans may be viewed as prohibiting their release so as to prevent their disclosure under the public records law.

Federal Copyright Law

17 U.S.C. §102 states, in pertinent part:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> ...
>
> (8) architectural works.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Thus, 17 U.S.C. §102(a)(8) extends copyright protection to an architectural work, which is defined as: "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not

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[3] In *State ex rel. White v. City of Cleveland*, 34 Ohio St. 2d 37, 295 N.E.2d 665 (1973), the court left undisturbed the lower court's finding that building plans filed with a city building department in conjunction with an application for a building permit are public records, subject to disclosure under R.C. 149.43; however, the court did not address whether any provision of federal law may prohibit the building department's release of such plans, nor whether such plans may be subject to protection under state law as trade secrets.

[4] According to information submitted in connection with your request, no assertion of protection as a trade secret has been made with respect to the blueprints about which you ask nor has there been any assertion that the blueprints are in any way subject or entitled to confidential treatment. This opinion does not, therefore, address the provisions of R.C. 1333.51, relating to trade secrets, or any other provisions of law relating to confidential materials.

include individual standard features." 17 U.S.C. §101. For purposes of discussion, it is assumed, therefore, that the blueprints or building plans about which you ask constitute architectural works for purposes of U.S.C. Title 17 or are otherwise original works of authorship subject to copyright protection.

Protections Granted to Copyright Owner

17 U.S.C. §106 establishes the exclusive rights of a copyright owner, as follows:

> Subject to sections 107 through 120,[5] the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.... (Footnote added.)

Further, 17 U.S.C. §106A establishes the rights of certain authors to attribution and integrity.

As explained in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546-47 (1985):

> The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors. *Twentieth Century Music Corp. v. Aiken*, 422 U.S.151, 156 (1975).
>
> Article I, §8, of the Constitution provides:
>
> "The Congress shall have Power... to Promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
>
> As we noted last Term: "[This] limited grant is a means by which an important public purpose may be achieved. *It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after*

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[5] Specifically concerning architectural works, 17 U.S.C. §120 states:

> (a) PICTORIAL REPRESENTATION PERMITTED. - The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.
>
> (b) ALTERATIONS TO AND DESTRUCTION OF BUILDINGS. - Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

> *the limited period of exclusive control has expired." Sony Corp. of America v. Universal City Studios, Inc,* 464 U.S. 417, 429 (1984)....
>
> Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright. Under the Copyright Act, these rights - to publish, copy, and distribute the author's work - vest in the author of an original work from the time of its creation.[6] (Emphasis and footnote added. Footnote in original deleted.)

Thus, it is clear that federal copyright law does not provide for any right of confidentiality with respect to a copyrighted work; rather, the policy behind the copyright laws is to encourage the broad dissemination of copyrighted works, albeit in a manner which protects the economic interest of the author.

Copyright Law Does Not Generally Prohibit the Release of Records

Since the federal copyright laws do not protect the confidentiality of copyrighted materials, it would appear to follow that such laws would not properly be characterized as prohibiting the *release* of records so as to keep such records from becoming "public records" within the meaning of R.C. 149.43(A)(1). As your letter implicitly acknowledges with respect to the blueprints in question, the fact that the blueprints may be subject to copyright does not in any way protect them from *inspection* by members of the public. Accordingly, under the plain language of R.C. 149.43(A), it appears inappropriate to characterize blueprints in the possession of a public office as a record "the release of which is prohibited by ... federal law," based on the fact that they may be subject to a copyright.[7] Therefore, it necessarily follows that such blueprints are "public records" under R.C. 149.43(A)(1).

As noted above, the Ohio public records law provides that once a record is determined to be a "public record," it becomes subject both to inspection and to copying for the purpose of making copies available upon request.[8] Since the blueprints you describe are public records, R.C. 149.43(B) requires that, upon request, the person responsible for the blueprints make copies available at cost, within a reasonable period of time.

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[6] Pursuant to 17 U.S.C. §411(a), with certain exceptions, however, "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title."

[7] In this regard, it should be noted that under the federal copyright laws, numerous documents submitted to the government by third parties would appear to be subject to a copyright. A determination that materials subject to copyright protection were not public records would create a large body of information, used by public offices in carrying out their duties, that would be wholly inaccessible to the public, a result clearly not contemplated by the General Assembly in the enactment of R.C. 149.43.

[8] R.C. 149.43(B) clearly states that once a record is determined to be a public record, "[u]pon request, a person responsible... *shall* make copies available at cost, within a reasonable period of time." (Emphasis Added.) Thus, the General Assembly has imposed a mandatory duty upon those responsible for public records not only to allow inspection, but also to provide copies upon request. *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "shall" in a statute generally indicates that the duty so described is mandatory).

It is apparent, however, that such a conclusion arguably results in a situation in which compliance by governmental officials and employees with the requirements of state law would result in a violation of federal law, if the copying and dissemination of a copyrighted public record were determined to violate the exclusive rights of the copyright holder under U.S.C. Title 17. This apparent conflict, however, appears to be resolved by the "fair use" exception in the copyright laws.

Fair Use Exception to Rights of Copyright Holder

U.S.C. Title 17 provides certain exceptions to the statutory rights conferred upon a copyright owner. *See, e.g.*, 17 U.S.C. §107 ("fair use" exception); 17 U.S.C. §108 (permissible reproduction by libraries and archives); and 17 U.S.C. §110 (exemption of certain performances and displays). Particularly relevant to the situation about which you ask is 17 U.S.C. §107, which establishes the "fair use" exception to the exclusive rights granted to a copyright holder, in part as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, *including such use by reproduction in copies* or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work. (Emphasis added.)

The introductory language of 17 U.S.C. §107 sets forth the general proposition that when a copyrighted work is used for such purposes as "criticism, comment,...or research," such use, "including such use by reproduction in copies," is not an infringement of copyright. The statute then lists a number of factors to be considered in determining whether a use is a "fair use." The factors enumerated in 17 U.S.C. §107 are not, however, meant to be exclusive. *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, 471 U.S. at 560. The determination of whether a particular use constitutes a fair use under 17 U.S.C. §107 is a mixed question of law and fact, dependant upon evaluation of each of the factors set forth in 17 U.S.C. §107. *Id.*

Inspection and Copying of Public Records under R.C. 149.43 as "Fair Use"

No judicial decisions have specifically addressed the issue of whether, in response to a public records request, a county building department's copying of building plans that have been filed with it as part of its statutory duties constitutes a fair use of such building plans within the meaning of 17 U.S.C. §107.[9] As noted above, the determination of whether a particular use of

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[9] For a discussion of issues similar to those involved in your opinion request, concerning the availability of copyrighted material in the possession of a governmental entity,

copyrighted material constitutes a fair use under 17 U.S.C. §107 is a mixed question of law and fact. *Id.* Accordingly, the specific factual circumstances must in each case be analyzed in determining whether a particular use is a fair use. Certain characteristics common to all records kept by public offices within the state, however, strongly support the position that the copying of public records by the government pursuant to a public records request would generally be for purposes such as "comment, criticism, and...research," within the meaning of 17 U.S.C. §107 and, as such, would constitute a fair use under that statute.[10] *See generally* 57 Fed. Reg. 61,013 (1992) (to be codified in 10 C.F.R. 2.790) (suggesting fair use as basis for Nuclear Regulatory Commission's copying activities, and proposing specific procedures governing the submission of copyrighted material to, and the handling of such material by, the Commission in conjunction with its regulatory and licensing procedures, including the making of copies in response to public requests).

Purposes Served by Ohio Public Records Law and Balancing of Competing Interests Thereunder

In *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 172-73, 527 N.E.2d 1230, 1232 (1988), the court described the General Assembly's intent in the enactment of R.C. 149.43, as follows: "The Act represents a legislative policy in favor of the open conduct of government and free public access to government records," and concluded that, "[b]ecause the law is intended to benefit the public through access to records, this court has resolved doubts in favor of disclosure." *See, e.g., State ex rel. Fox v. Cuyahoga County Hospital System*, 39 Ohio St. 3d 108, 529 N.E.2d 443 (1988). *See also State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 65 Ohio St. 3d 258, 602 N.E.2d 1159 (1992). The rationale behind this legislative policy was explained in *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 109-10, 341 N.E.2d 576, 577-78 (1976), as follows:

> "The rule in Ohio is that *public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people*; therefore anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same."....
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> ....

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see *Ass'n of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 184 (1991).

[10] Without addressing the precise issue of whether federal copyright law prohibits a governmental entity from releasing copies of copyrighted material submitted to it in connection with a permit or licensing procedure, a number of copyright infringement actions assume, without discussion, that if state law permits public inspection of governmental records generally, such right of inspection extends as well to copyrighted material in the governmental entity's possession. *See, e.g., Joseph J. Legat Architects, P.C. v. United States Development Corp.*, 625 F. Supp. 293 (N.D. Ill. 1985)(architectural plans filed with HUD and local building regulation authority); *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132 (D.D.C. 1984)(engineering report filed with FCC as part of application to construct broadcasting facilities).

> ...[W]e believe that doubts should be resolved in favor of disclosure of records...held by governmental units. Aside from the exceptions mentioned in R.C. 149.43, records should be available to the public *unless* [(emphasis in original)] the custodian of such records can show a legal prohibition to disclosure. (Citation and footnote omitted; emphasis added.)

Thus, in order to assure the greatest possible public access to matters concerning the operations of government, the courts have consistently applied R.C. 149.43 to require the disclosure of information to the public. To further facilitate public access to information in the government's possession, not only does R.C. 149.43(B) make public records available for inspection - it also requires a public office to provide copies of such records upon request.

In the *University of Toledo Foundation* case, *supra*, the court recognized that in certain instances there may be competing interests involved in the decision whether to release records in possession of a public body. The court explained the process by which the General Assembly has accommodated these competing interests, stating:

> It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code.

65 Ohio St. 3d at 266, 602 N.E.2d at 1164-65.

Purposes Served by Federal Copyright Law and Balancing of Competing Interests Thereunder

As the General Assembly has done in enacting and amending R.C. 149.43, Congress, in formulating the law of copyright, has considered the availability of information to the public to be a fundamental consideration. As stated in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984):

> In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:
>
> > "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of

> authors.' When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." (Citations omitted.)

Balancing of Competing Interests Between Public Records Law and Copyright Law

From the foregoing it appears that the governmental interest in allowing broad access to public records is sufficiently compelling to conclude that, as a general rule, the copying and dissemination of public records by governmental officials and employees pursuant to requests for such public records constitute a "fair use" under federal copyright law. As noted above, since the United States Supreme Court has determined that whether a particular use of copyrighted materials constitutes a "fair use" is a mixed question of law and fact which must be determined on the specific facts in each case, *see Harper & Row Publishers, Inc., supra,* whether the copying of copyrighted material in the possession of a public body in response to a public records request will ultimately be found by a court to constitute a fair use of that material will depend, in part, on the specific facts before the court.[11] In light of the legislative policy strongly favoring public access to information in the possession of public bodies, however, until a court has decided this matter, the better view is that the material constitutes a public record, particularly under the circumstances outlined in your opinion request. Allowing public access to such records accommodates the similar ends served by both the fair use exception and by the public records law, *i.e.*, the encouragement of an informed public through liberal access to information, whether contained in copyrighted material or public records.[12]

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, blueprints submitted to the Wood County Building Inspection Department for approval under R.C. 3791.04 are, while in the possession of the Department, public records within the meaning of R.C. 149.43, which requires the department to make such blueprints "available for inspection to any person at all reasonable times during regular business hours" and, upon request, to "make copies available at cost, within a reasonable period of time."

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[11] In circumstances involving the purely voluntary submission of copyrighted materials to a public body, the copying and distribution of such copyrighted materials might also be allowed on the theory that such a voluntary submission constitutes the grant of an implied license to the governmental body to make and distribute copies pursuant to a public records request. However, because the submission of the blueprints in the circumstances described in your letter is mandated by R.C. 3791.04 as a precondition to the construction of a building, it is questionable whether it would be reasonable to conclude that the submission created such an implied license.

OPINION NO. 93-011

Syllabus:

1. Pursuant to R.C. 4123.411(B), for all injuries and disabilities occurring on or after January 1, 1987, the Administrator of Workers' Compensation

Texas Attorney General Opinion JM-672 (1987)

Tex. Atty. Gen. Op. JM-672 (Tex.A.G.), 1987 WL 269462

Office of the Attorney General

State of Texas
Opinion No. JM–672
April 8, 1987

***1** Re: Availability of computer programs and data bases under the Open Records Act and whether a government body must perform computer searches for information

Honorable Bob Bullock
Comptroller of Public Accounts
L.B.J. State Office Building
Austin, Texas 78774

Dear Mr. Bullock:
You received a request under the Texas Open Records Act, article 6252–17a, V.T.C.S., for "all documents produced by ... Chase Econometrics, in the possession of the state comptroller's office which deal with the economic future of the Austin, Texas area." You indicate that you have a subscription contract with the Chase Econometrics Division of Interactive Data Corporation for economic services for use in the comptroller's revenue estimating and economic analysis activities. The terms of this contract purport to prohibit your office from duplicating or releasing substantial portions of reports, computer programs, or documents received from Chase Econometrics pursuant to the contract. The contract attempts to protect Chase Econometrics' "copyright and other commercial property rights" in this information.

Your concerns arise primarily from the fact that the contract with Chase Econometrics (CE) states, in part:
Customer agrees that, as to any matter, including (but not limited to) reports, data bases, computer programs, documentation and any other information, made known to him by CE pursuant to this Subscription Agreement or any Service supplied pursuant hereto, Customer shall not duplicate such matter for use outside of its own organization without the prior written consent of CE; however, the Customer may publish, without such consent analyses and reports of the Services in amounts which in the aggregate are totally insignificant relative to the portion of the report, database, program, or documentation containing the information, and so long as no fee is charged for such CE analyses and reports. Customer shall take all reasonable precautions to keep such matter confidential and, with the exception of such insignificant excerpts, to use such analysis for the sole internal use of Customer and its employees, both during the term of this Subscription Agreement and thereafter. (Emphasis added).

Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 677 (Tex.1976), cert. denied, 430 U.S. 931 (1977). The law charges persons dealing with state agencies and officers with notice of the legal limits on the agencies' and officers' powers. State v. Ragland Clinic–Hospital, 159 S.W.2d 105, 107 (Tex.1942); Fazekas v. University of Houston, 565 S.W.2d 299, 304–306 (Tex.Civ.App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.), appeal dism'd, 440 U.S. 952 (1979). In other words, a contract cannot overrule or repeal the Texas Open Records Act. A contract may, however, be evidence of a private party's attempt to keep information confidential. See art. 6252–17a, § 3(a)(1), (a)(10). You do not ask nor do we address whether the trade secret exception applies to the information in question.

***2** Your questions are general: (1) whether copyrighted material must be released for inspection, (2) whether you must allow the requestor to make copies unassisted by your office, and (3) whether you must perform computer searches to obtain information sought by the requestor. Because of the vast amount of information involved and because of the general nature of your questions, you have not submitted specific documents for review by this office. If you wish to withhold access to specific

documents, you must submit representative copies of them to this office for review, stating which exceptions to disclosure under the Open Records Act apply, within 10 days of receipt of this decision. See Open Records Decision No. 325 (1982).

This office has addressed whether the Open Records Act protects material, for which a third party holds a copyright, from disclosure under various exceptions to disclosure in a number of prior opinions. See, e.g., Open Records Decision Nos. 426 (1985); 401 (1983); 180 (1977); 109 (1975); Attorney General Opinion MW–307 (1981). In Attorney General Opinion MW–307, this office stated:

The custodian of public records must comply with the copyright law and is not required to furnish copies of such records that are copyrighted. Members of the public have the right to examine copyrighted materials held as public records and to make copies of such records unassisted by the state. Of course, one so doing assumes the risk of a copyright infringement suit.

Consequently, you must allow members of the public to inspect copyrighted material unless other exceptions to the Open Records Act protect the material. You need not furnish copies.

All of the information held by your office, however, may not be protected by copyright. Copyright law protects the expression and form of ideas, not the underlying facts and ideas which form the basis for the particular expression. See 17 U.S.C. § 102(b); Atari, Inc. v. North American Philips Consumer Electric Corp., 672 F.2d 607 (7th Cir.1982); see also Mazer v. Stein, 347 U.S. 201 (1954). The request you received is very broad; all of the information requested may not be covered by copyright protection. If you wish to claim that copyrighted material or other material is protected from disclosure by other exceptions, you must indicate which sections protect it and submit representative samples to this office for review. You should also note that you may require a requestor to identify the particular kind of information sought if you cannot reasonably understand what information is sought. See Open Records Decision No. 304 (1982).

Your second question is whether you must allow the requestor to make copies unassisted by your office. Attorney General Opinion MW–307, as quoted above, provides that members of the public have the right to make copies of copyrighted materials held as public records "unassisted by the state." Your concern is that the contract with Chase Econometrics requires your office to take "all reasonable precautions" to keep material confidential. Reasonable precautions cannot logically include violating the Texas Open Records Act. As indicated, persons dealing with state agencies are charged with notice of the legal limits on the agencies' powers.

***3** Your final set of questions are:

(3) Are we required to make inquiry through our computer equipment for information sought by the requestor or to make our equipment available to the requestor for such purpose? If so, must he bear the expense of the inquiry time?

If the requestor seeks specific information stored in computer form and the information itself is not protected by copyright or by any of the specific exceptions to disclosure under the act, you must disclose it. Information does not fall outside the act merely because it is stored by means of magnetic tape or disks rather than paper documents. Open Records Decision Nos. 401 (1983); 352 (1982).

On the other hand, the Open Records Act does not require a complex computer search to create new information. It is well-established that the act does not require a government body to prepare new information. Open Records Decision Nos. 452 (1986); 342 (1982). For example, in Open Records Decision No. 452, this office determined that the act does not require a school district to prepare a survey of the location of school desks and chairs recently repainted with leaded paint. Although this information was technically obtainable from the individual schools by the school district, neither the district nor the individual schools had performed a location survey at the time they received the request for a survey. This office determined that the Open Records Act does not require a governmental body to perform this kind of search. Open Records Decision No. 452. Information stored in computers, however, presents different questions.

It would be inconsistent with the spirit of the Open Records Act to deny access to information simply because obtaining the

information requires a minimal computer search. Performing a sequence of operations on a computer will, in many instances, require no more effort than physically locating a file in a particular file cabinet. In Open Records Decision No. 65 (1975), this office addressed a request received by the Department of Public Safety for a magnetic tape containing the names, addresses, zip codes, dates of birth, and license expiration dates of all Texas drivers over the age of 64 with licenses issued or renewed after January 1, 1973. The decision concluded:

We understand that the programming effort required to comply with the instant request would not be unduly onerous, that such programming can be done without danger to your department's system or files, and that the required program can be run simultaneously with other Department of Public Safety systems without degradation of those other systems. To comply with the mandate of the Open Records Act, your department can either use a program prepared by the requestor and reviewed by DPS personnel, or prepare in-house a program to retrieve the information sought by the requestor. It is not necessary that your department build and maintain files of data which it needs in a format dictated by a requesting party. The statute's requirement that the agency supply the information requested 'within a reasonable time' allows your department to utilize its computer system on a priority basis. See sections 4 and 7(a) of article 6252–17a. (Emphasis added).

***4** The suggestion that the Open Records Act requires the actual preparation of a program to retrieve information, however, requires clarification.

In 1976, the Texas Supreme Court reinforced part of the conclusion in Open Records Decision No. 65 when the court addressed a request for a massive amount of computer-stored information held by the Texas Industrial Accident Board. See Industrial Foundation of the South, Inc. v. Texas Industrial Accident Board, 540 S.W.2d at 687. In the Industrial Foundation case, the court addressed the Industrial Accident Board's concern that, because of the magnitude of the information requested, it would be virtually impossible to furnish the requested information without hiring additional personnel and disrupting the activities of the board. See 540 S.W.2d at 686–87. The court stated that "the Act does not allow either a custodian of records or a court to consider the cost or method of supplying requested information in determining whether such information should be disclosed." 540 S.W.2d at 687. The court also indicated that the act requires some compilation, at least in the area of computer-stored information: "We are aware that the Board may incur substantial costs in its compilation and preparation of the information...." Id. (Emphasis added.)

There exists an important distinction, however, between the "compilation" of computer-stored information and the preparation of a new computer program designed to perform a survey or a compilation of a specific set of facts. The Open Records Act does not require a custodian of records to prepare information in a form or on a schedule dictated by a requesting party. Open Records Decision No. 145 (1976). In most cases, the act does not require the preparation of an extensive new computer program to obtain particular sets of information. Whether certain programming constitutes the creation of new material must be determined on a case-by-case basis. This is an area under the Open Records Act that must ultimately be addressed by the legislature. To the extent that Open Records Decision No. 65 suggests otherwise, it is modified. The act may also, in some instances, require the preparation of a program to protect or delete confidential information. See Industrial Foundation, 540 S.W.2d at 687. If public information sought in a particular instance may be "called up" under an existing program, a governmental body must perform this search. The timing of the search may reasonably take into consideration whether the search can be performed without degradation of the government agency's overall computer file system. See Open Records Decision No. 65; see also Open Records Decision Nos. 148, 121 (1976) (information may be withheld temporarily while in immediate active use).

You also ask whether the act requires you to allow a requestor to perform his own computer search on your computer equipment. The Open Records Act provides "for inspection or duplication, or both," of public information. V.T.C.S. art. 6252–17a, § 4. In Open Records Decision No. 152 (1977), this office indicated that the act gives the requesting party the option of taking notes from or paying for the duplication of public records or of doing both. The option of access to the records or information does not, however, include the right to access through direct computer searches. An important distinction exists between access to public information and access to computer banks which may contain both public and protected information.

***5** In fact, if a requestor-conducted search cannot be effected without giving the requestor access to information to which the

requestor is not entitled, the act prohibits the search. See Industrial Foundation of the South, Inc. v. Texas Industrial Accident Board, 540 S.W.2d at 687; see also Open Records Decision No. 401 (1983). In the Industrial Foundation case, the court stated:
The means of access to information in government records may be controlled by the determination of what records must be disclosed, insofar as the procedure must adequately protect information deemed confidential from improper disclosure. If a direct computer tie-in could not be effectuated without giving the Foundation access to information to which it is not entitled, then of course the procedure would not be acceptable.

540 S.W.2d at 687. An individual requestor-conducted computer search raises the same problems raised by the direct computer tie-in addressed in Industrial Foundation.

Your final question is whether the requestor must bear the expense of computer search time necessitated by his request. In the Industrial Foundation case, the Texas Supreme Court stated with regard to computerized information:
We are aware that the Board may incur substantial costs in its compilation and preparation of the information, especially in light of the case-by-case review and redaction of the files necessitated by Section 3(a)(1). Section 9 of the Act makes clear that all costs incurred in providing access to public records must be borne by the requesting party.

540 S.W.2d at 687. Thus, the requestor must bear the expense of providing information stored by means of computers. Attorney General Opinion JM–292 (1984); see also Open Records Decision No. 352 (1982); cf. Attorney General Opinion JM–114 (1983).

Charges for access to information in computer banks must be set in consultation with the State Purchasing and General Services Commission "giving due consideration to the expenses involved in providing the public records making every effort to match the charges with the actual cost of providing the records." V.T.C.S. art. 6252–17a, § 9(b); see Open Records Decision No. 352 (1982). These costs may include, for example, the cost of developing a search pattern to edit out confidential information maintained in computer record banks. See Attorney General Opinion JM–292. Additionally, requestors may be required to post bond for payment of costs as a condition precedent to the preparation of records when the preparation of records is "unduly costly" and its reproduction would cause "undue hardship" to the agency. Art. 6252–17a, § 11; see Industrial Foundation, 540 S.W.2d at 687–88.

SUMMARY

A custodian of public records under the Texas Open Records Act, article 6252–17a, V.T.C.S., must allow members of the public to inspect copyrighted material unless other exceptions to the Open Records Act protect the material. The custodian need not, however, furnish copies. The custodian must allow the requestor to make copies "unassisted by the state."

***6** The Open Records Act does not require the preparation of an extensive new computer program to obtain particular sets of information. Whether certain programming constitutes the creation of new material must be determined on a case-by-case basis.

Very truly yours,

Jim Mattox
Attorney General of Texas
Jack Hightower
First Assistant Attorney General
Mary Keller
Executive Assistant Attorney General
Judge Zollie Steakley
Special Assistant Attorney General
Rick Gilpin

Chairman

Opinion Committee

Prepared by

Jennifer Riggs
Assistant Attorney General

Tex. Atty. Gen. Op. JM-672 (Tex.A.G.), 1987 WL 269462

End of Document

Florida Attorney Opinion 2003-26 (2003)

Florida Attorney General
Advisory Legal Opinion

Number: AGO 2003-26
Date: June 6, 2003
Subject: Records, status of copyrighted voting system manuals

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Mr. Gerard T. York
Acting General Counsel
Department of State
R.A. Gray Building
500 South Bronough Street, Room 123
Tallahassee, Florida 32399-0250

RE: DEPARTMENT OF STATE-PUBLIC RECORDS-COPYRIGHT- COMPUTERS -VOTING SYSTEMS-public record status of maintenance manuals for voting systems. ss. 101.015, 101.017 and 119.07(1), Fla. Stat.

Dear Mr. York:

You have asked for my opinion on substantially the following question:

Are maintenance manuals for voting systems that are supplied to the Department of State, Bureau of Voting Systems Certification, pursuant to the Florida Voting Systems Standards and Chapter 101, Florida Statutes, public records subject to inspection and copying under section 119.07(1), Florida Statutes?

Section 101.017, Florida Statutes, creates a Bureau of Voting Systems Certification (bureau) within the Division of Elections (division) of the Department of State. The bureau provides technical support to the supervisors of elections and is responsible for voting system standards and certification.

Section 101.015, Florida Statutes, requires the Department of State to adopt rules establishing minimum standards for "hardware and software for electronic and electromechanical voting systems." The statute requires that these rules contain standards for:

"(a) Functional requirements;
(b) Performance levels;
(c) Physical and design characteristics;
(d) Documentation requirements; and
(e) Evaluation criteria."[1]

As set forth in Rule 1S-5.001, Florida Administrative Code, the Florida Voting Systems Standards, Form DS-DE-101, contains "the minimum standards, procedures for testing to determine if those standards have been met, and procedures for certifying and provisionally certifying compliance with the minimum standards." These standards are available in booklet form from the Division of

Elections, Bureau of Voting System Certification.

Pursuant to this rule, an application for certification of a voting system must be accompanied by supporting materials including a "[t]echnical data package." The package must include a "[s]ystem operator's manual;" "[e]nvironmental requirements for storage, transportation, and operation, including temperature range, humidity range and electrical supply requirements;" "[u]ser manuals detailing system functionality;" and "[t]he Approved Parts List (APL) for all elements of the system".[2] The division examines the submitted documentation and other material accompanying the application to determine whether the voting system is in compliance with the Florida Voting Systems Standards.[3] Further, the standards require the applicant for certification to "identify all corrective and preventive maintenance tasks and the level at which they shall be performed."[4] These include operator tasks, maintenance personnel tasks, and factory repair.[5] As described by the standards, maintenance personnel tasks include

"all field maintenance actions, which require access to internal portions of the equipment. They shall include the conduct of tests to localize the source of a malfunction; the adjustment, repair, or replacement of malfunctioning circuits or components; and the conduct of tests to verify restoration to service."[6]

As noted in communications with your office, this information would typically be included in a user or maintenance manual.

The Department of State recently received a public records request to copy a system maintenance manual submitted to the Bureau of Voting Systems Certification as required by the Florida Voting Systems Standards. Vendors submitting materials to the bureau have expressed objections to the bureau providing copies of such material in response to public records requests, pointing out that the copyright on the material has been recorded with the United States Copyright Office. Thus, you ask whether, under such circumstances, the Department of State may reproduce and distribute copies of a system maintenance manual made part of a data package submitted by a vendor to the Bureau of Voting Systems Certification, pursuant to Chapter 101, Florida Statutes, and the Florida Voting Systems Standards.

Florida's Public Records Law, Chapter 119, Florida Statutes, requires that all public records made or received pursuant to law or in connection with the transaction of official business by any public agency must be open for personal inspection by any person.[7] For purposes of the law, a "[p]ublic record" is any document, paper, letter, map, book, tape, photograph, film, sound recording or other material, regardless of the physical form or characteristic, which is "made or received pursuant to law . . . or in connection with the transaction of official business by any agency."[8] Thus, the form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business.

It is unquestionable that system maintenance manuals submitted to the Bureau of Voting Systems Certification, as required by the Florida

Voting Systems Standards, are records received by the Department of State in its official capacity for official state business. Thus, these manuals are public records subject to the requirements of the Public Records Law.

However, your question also involves the application of the federal copyright law to this material. The federal copyright law vests in the owner of a copyright, subject to certain limitations, the exclusive right to do or to authorize, among other things, the reproduction of the copyrighted work in copies and the distribution of the copyrighted work to the public by sale or other transfer of ownership.[9] The unauthorized reproduction of copyrighted work in copies constitutes an infringement of such copyright. Copyright infringement is a tort and all persons concerned therein are jointly and severally liable as joint tort-feasors.[10] In 1990, Congress amended the federal copyright law to specifically provide that relief for infringement is available against "'anyone' includ[ing] any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity.'"[11]

Where a federal statute such as the copyright law expressly preempts a field and operates to bar specified acts or conduct, the Supremacy Clause of the United States Constitution, Article VI, U.S. Constitution, provides that the federal law will prevail and exclusively control such matters.[12] Consequently, the state is prohibited from enacting or enforcing any state law or regulation that conflicts or interferes with, curtails, or impairs the operation of the federal law.[13] Thus, state law may not operate to authorize or permit that which the federal law proscribes - in this case, the unauthorized reproduction of copyrighted work in copies and the unauthorized distribution of copies of the copyrighted work to the public.

A distinction must be made, however, between the custodian of public records reproducing and distributing copies of copyrighted work and the custodian permitting public access to the records for inspection and examination.[14] It has generally been the position of this office that nondisclosure of records that would otherwise be public under state law may be effected only when there is an absolute conflict between state and federal disclosure provisions.[15] While Florida law would permit the disclosure of the maintenance manuals pursuant to section 119.07(1)(a), Florida Statutes, for both inspection and copying purposes, federal law limits only the copying of these materials. However, the federal copyright law provides the owner of a particular copy the right to display that copy publicly to viewers present at the place where the copy is located without the authority of the copyright owners.[16]

This office, in a line of opinions dating from 1982, has counseled records custodians that while copyrighted material may be available to the public for inspection and examination, the unauthorized reproduction and distribution of copies of copyrighted material to the public may be prohibited under the federal copyright law.[17]

Attorney General's Opinion 82-63 is particularly close factually to

the issue you have presented. In that opinion, the Secretary of a state agency asked whether safety plans or manuals required by statute to be submitted to the agency would be available to the public under Chapter 119, Florida Statutes, if they were protected under the federal copyright law. This office recognized that the records involved were very expensive to produce, valuable, and thereby susceptible to plagiarism. There was also no question that these records, required by statute to be submitted to the department, were public records.

Reading the federal copyright law together with Florida's Public Records Law, the opinion acknowledges that Chapter 119 requires the custodian to allow access to records but distinguishes between permitting access to the records and reproducing or distributing copies of the records. The opinion concludes:

"[A]gencies should not reproduce, or permit the reproduction of, or distribute copies of copyrighted work to the public but may permit the public access to copyrighted work in their possession for examination and inspection purposes only."

In fact, the opinion recommends that the department should not permit the reproduction or copying of copyrighted work by the public without the express authorization of the copyright owner.

A more recent opinion by this office, Attorney General's Opinion 97-84, struck a balance between the copyright law and Florida's Public Records Law that recognized the doctrine of "fair use," that is, even if a record is copyrighted, federal law permits copying under certain conditions. For example, notwithstanding the exclusive rights of the copyright owner, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[18]

In an effort to avoid making records custodians the guarantors of compliance with "fair use," the 1997 opinion suggests that records be made available and that individuals seeking to make copies for their own use be informed of the requirements of the federal copyright law. [19] The opinion counsels records custodians that they "should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions." The opinion does not advise a records custodian to reproduce copyrighted material for distribution but suggests measures to be taken to protect the custodian from liability in the event that materials which are subject to the copyright law and the public records law are copied for unauthorized purposes.

Based on these considerations, it is my opinion that the federal copyright law, when read together with Florida's Public Records Law, authorizes and requires the custodian of records of the Department of State to make maintenance manuals supplied to the Bureau of Voting Systems Certification, as required by the Florida Voting Systems Standards and Chapter 101, Florida Statutes, available for

examination and inspection purposes. With regard to reproducing, copying, and distributing copies of these maintenance manuals which are protected under the federal copyright law, state law must yield to the federal law on the subject. The Department of State, as the custodian of these records, should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions; such notice may take the form of a posted notice that the making of a copy may be subject to the copyright law. However, as this office has advised previously, it is advisable for the custodian to refrain from copying such records himself or herself.

Sincerely,

Charlie Crist
Attorney General

CC/tgh

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[1] Section 101.015(1)(a)-(e), Fla. Stat.

[2] *See*, Form DS-DE-101, eff. 4/02, p. 9.

[3] *Id.* at p. 11.

[4] Form DS-DE-101, *supra*, at p. 44.

[5] *Id.*

[6] Form DS-DE-101, *supra*, at n. 4.

[7] Section 119.01, Fla. Stat., and s. 119.07(1)(a), Fla. Stat.

[8] Section 119.011(1), Fla. Stat.

[9] *See*, 17 U.S.C.A. s. 106.

[10] *Id.*, s. 501(a) and (b) (anyone who violates any of the exclusive rights of the copyright owner is an infringer and the owner of the exclusive right under a copyright is entitled to institute an action for infringement). *And see, Leo Feist v. Young*, 138 F. 2d 972 (7th Cir., 1943), *Ted Browne Music Co. v. Fowler*, 290 F. 751 (2d Cir., 1923) (for the proposition that copyright infringement is a tort and all persons concerned therein are jointly and severally liable as joint tort-feasors). *See also, Mills Music, Inc. v. State of Arizona*, 591 F.2d 1278 (9th Cir., 1979), holding that suits are authorized against states for infringement of the exclusive rights of a copyright holder under the federal copyright act; and s. 768.28, Fla. Stat., which waives the state's immunity for liability for torts for itself, its agencies and its officers and employees. *But see, Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1185 fn. 16 (1996), in which the U.S. Supreme Court, in a footnote,

discusses the authority of Congress to abrogate the sovereign immunity of states through such laws as the copyright, bankruptcy and antitrust laws. It is noted in that discussion that the Court never "has awarded relief against a State under any of those statutory schemes[.]"

[11] *See,* 17 U.S.C.A. s. 511(a)(added 1990). *And see,* 17 U.S.C.A. s. 511(b) which provides:

"In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of infringing articles under section 503, actual damages and profits and statutory damages under section 504, costs and attorney's fees under section 505, and the remedies provided in section 510."

And see, Unix System Laboratories, Inc. v. Berkeley Software Design, Inc., 832 F.Supp. 790 (D.N.J. 1993).

[12] *See,* 17 U.S.C.A. s. 301.

[13] *Chicago and North Western Transportation Company v. Kalo Brick & Tile Company,* 450 U.S. 311,101 S.Ct. 1124, 67 L.Ed.2d 258 (1981); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *Bonito Boats, Inc., v. Thunder Craft Boats, Inc.* 489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) (involving a discussion of preemption and patent law); *State v. Stepansky,* 761 So.2d 1027 (Fla. 2000).

[14] This office initially made this distinction in Op. Att'y Gen. Fla. 82-63 (1982), in which it was concluded that agencies should not reproduce, or permit the reproduction of, or distribute copies of, copyrighted work to the public but may permit the public access to copyrighted work in their possession for examination and inspection purposes only.

[15] *See,* Ops. Att'y Gen. Fla. 82-63 (1982) and 80-31 (1980).

[16] 17 U.S.C.A. s. 109(b). *See also,* 17 U.S.C.A. s. 101, which provides that a public display of a work does not of itself constitute "publication."

[17] *See,* Ops. Att'y Gen. Fla. 82-63 (1982); 90-102(1990), 95-37 (1995), 97-84 (1997); and 97-87(1997).

[18] *See,* 17 U.S.C.A. s. 107, which states that in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

"(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work."

[19] *Cf.*, 17 U.S.C.A. s. 108(f)(1), stating that nothing in the section "shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law[.]"

Nevada Attorney Opinion 96-09 (1996)

OPINION NO. 96-09 COPYRIGHT; PUBLIC RECORDS; ENVIRONMENTAL PROTECTION: Data in environmental consultant report is not subject to copyright though a compilation that includes data might be if it meets criteria. Protected material can be copied without infringement if use is limited in circumstances described in the *fair use doctrine*. Absence of copyright mark does not invalidate copyright under certain conditions.

Carson City, April 9, 1996

Mr. Lew Dodgion, Administrator, Department of Conservation and Natural Resources, Division of Environmental Protection, Capitol Complex, Carson City, Nevada 89710

Dear Mr. Dodgion:

You have asked this office for an opinion related to environmental reports routinely submitted to the Division of Environmental Protection (Division), and the federal copyright law. You desire to know how the copyright law comports with NRS 239.010, Nevada's public records law. These reports describe environmental conditions of private and public real property, typically prepared by an environmental consultant for the facility owner or operator, and filed with the Division.

The environmental reports are often reviewed, cited, and copied by other private interests, including environmental professionals, to document conditions of adjacent or nearby property. In some cases, pertinent excerpts are reproduced in the offices of the Division by staff as a service to the public.

In the context of the foregoing, you have asked the following questions:

QUESTION ONE

Can environmental data obtained from public and private real property be copywritten by a consultant?

ANALYSIS

It is not relevant to our analysis whether the data was obtained from public or private real property. Regardless of the status of the real property, the data in the report may *not* be protected by copyright.

A constitutional requirement for copyright protection is originality of authorship. U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. § 102(a) (1995). Because facts do not owe their origin to an act of authorship, no one may claim originality as to facts. *Feist Publications v. Rural Telephone Service*, 499 U.S. 340, 346 (1991). The consultant, through inspection and laboratory testing of soil taken from a site, may *discover* information about the metal or organic material in the soil but he or she is not the author of the fact. The copyright act provides that its protection does not extend to any discovery. 17 U.S.C. § 102(b) (1995); 37 C.F.R. § 202.1(d) (1995); *Feist Publications*, 499 U.S. at 354; *Suid v. Newsweek Magazine*, 503 F. Supp. 146 (D.C. 1980) (discovery of quotations from unpublished letters written by others does not justify copyright by the discoverer.); 1 M. Nimmer, D. Nimmer, *Nimmer on Copyright*, § 2.11(A) (1995) However, our analysis does not rest here.

Because the consultant reports may be a *compilation* of data, the report as a whole may be subject to copyright. The seminal case to decide the issue is *Feist Publications v. Rural Telephone Service*. Prior to *Feist*, two theories developed among the federal circuit courts. The seventh, eighth, and tenth circuits followed the "sweat of the brow" theory. These courts were reluctant to preclude copyright protection for the person who spent the time and resources to gather facts and produce them in a list or catalog such as a telephone directory. While the list consists of facts, those courts were loath to allow competitors to take those facts from the compiled source and reproduce them for their own gain with little more trouble than it took to copy them from the first producer. The "sweat of the brow" cases lost sight of the standard of originality of authorship as it had been understood in copyright law.

The "selection or arrangement" theory looks for the presence of originality as the basis for application of copyright protection. This theory was followed by four circuits; the second, fifth, ninth, and eleventh. *See Worth*

v. Selchow and Righter Co., 827 F.2d 569, 574 (9th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

The United States Supreme Court in the *Feist* decision reconciled the split in the circuits and affirmed that copyright law requires application of the selection or arrangement theory regarding compilations.

> The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship.

Feist, 499 U.S. at 357.

The *Feist* decision concerned a telephone "white pages" directory produced by a telephone company. It included in part, names, addresses, and telephone numbers copied from Rural Telephone's directory. The court examined whether there was the minimum level of originality in the compilation. It noted that as to white pages, the arrangement in alphabetical order was hardly an act of originality, it was an inevitable arrangement for a telephone directory! The requirement of originality is not met in an arrangement that is obvious, commonplace, traditional, expedient or inevitable. *Feist*, 499 U.S. at 363. However, the requisite amount of originality or creativity is a minimal amount. *Feist*, 499 U.S. at 345; *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).

It is immaterial for copyright eligibility that an environmental consultant expended time or money gathering the facts. What is material is whether compilation of those facts was independently assembled and contains a minimum of originality or creativity.

CONCLUSION TO QUESTION ONE

Facts or data in the consultant's report are not eligible for copyright. However, whether the report as a whole may be copied depends on whether arrangement or selection of the facts demonstrates originality of authorship as that term is used in the law of copyright. The originality standard is a low one. Bear in mind that even if the compilation is protected by

copyright, it is never an infringement for someone to inspect or read the compilation or to copy just the facts.

QUESTION TWO

Assuming that a report, as a compilation of facts, meets the standard of originality of authorship, under what circumstances may it be copied?

ANALYSIS

The copyrighted material may be copied without infringement under certain limited circumstances. These circumstances are known as the *fair use doctrine*. The law specifies that copying may be done for use in research, criticism, comment, news reporting, teaching, or scholarship. The statute spells out the factors to be considered to determine whether the use is within the doctrine. The factors are: (1) whether the purpose and character of the use is commercial or non profit; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; and (4) effect of the use upon market or value of the copyrighted work. 17 U.S.C. § 107 (1995).

A copyrighted report may be copied if the intended use fits within the *fair use doctrine*. Copying only facts or data, without copying the arrangement or compilation, is not an infringement of copyright protection and does not have to fit within the *fair use doctrine*. However, Division personnel would be in a difficult position if asked to analyze each report against the legal criteria for *fair use* or to analyze each report to determine if a particular report has minimum creativity or originality to meet the threshold for copyrightability of the report itself, albeit the facts in the report are never subject to copyright. This office suggests that the Division personnel not attempt the analysis for the benefit of those who request a copy.

The public record law does not require the Division provide a copy or perform copying of the consultant reports. The law only requires that the public record be made available for inspection and copying. NRS 239.010. Division staff may allow a person who requests a copy to make for themselves a copy of a report that purports to be copyrighted. The Division staff should make the record available for copying, inform requesters of the possibility that the report as a whole may be protected by the copyright act, and assume no responsibility for infringement, if any, done by the person who copied the document. In the alternative, if integrity of the file is an

issue, the requester may designate the pages to be copied and clerical staff may make the copies provided that the requester is informed of possible copyright protection and that the public records law is not a defense against any infringement. We suggest the Division prepare highly visible signs to this effect and the signs be posted prominently in the area where reports are to be viewed.

CONCLUSION TO QUESTION TWO

A copyrighted work may be copied without infringement under the *fair use doctrine.* Division staff should not attempt to determine if the requester's intended use is within the *fair use doctrine.* The requester may make copies at his or her own risk of infringement.

QUESTION THREE

If the data can be copied, how should the Division proceed with providing the data given the requirements of NRS 239.010?

ANALYSIS AND CONCLUSION TO QUESTION THREE

Though data or facts may not be copyrighted, we recommend the Division not copy the data for requesters, but allow them to do it as described above. This removes the Division from the difficult position of deciding whether, in copying data, original elements of the work have also been copied impermissibly or perhaps permissibly copied under the *fair use doctrine.*

QUESTION FOUR

If an environmental report may legally be copyrighted, must it state in writing that it is copyrighted?

ANALYSIS

Your question reaches to issues of notice and defenses to infringement of copyright. The outright omission of notice of copyright (the copyright symbol or other words specified in the statute) does not automatically forfeit copyright protection. 17 U.S.C. § 405(a) (1995). Since the Berne Convention in 1988, statutory protection is secured automatically when a work is created and is not lost even if the copyright notice is omitted. Section 405

of the Copyright Act provides that, with respect to copies publicly distributed by authority of the copyright owner, omission of the copyright notice or symbol does not invalidate the copyright of a work if: (1) the notice has been omitted from a relatively small number of copies; or (2) registration of the work was made before or within five years after publication provided a reasonable effort is made to add notice after the omission is discovered.

Furthermore, a person acting in good faith with no reason to think otherwise is ordinarily able to assume that the work is in the public domain if there is no notice whereby the infringer is shielded from liability as an "innocent infringer." 17 U.S.C. § 405(a) and (b) (1995).

The thrust of your question is undoubtedly related to liability concerns if Division staff innocently copy an environmental report which does not give notice that it is copyrighted. While the innocent infringer defense would be available, we recommend the best course of action is to allow public inspection and allow requesters to make their own copy after informing them that a copy of the full report might be protected by the copyright law.

CONCLUSION TO QUESTION FOUR

An environmental report does not have to state in writing that it is copyrighted. For works published after March 1988, the author does not automatically lose protection of copyright if the work is published without notice of the copyright. However, a person who copies the work without any reason to know it is copyrighted may assert the defense of "innocent infringer" and generally will not be liable in damages for the infringement. An innocent infringement does not result in the work being in the public domain.

FRANKIE SUE DEL PAPA
Attorney General

By: MELANIE MEEHAN-CROSSLEY
Deputy Attorney General

Tennessee Attorney General Opinion 13-39 (2013)

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
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May 9, 2013

Opinion No. 13-39

Constitutionality of Requirement to Produce Evidence in Animal Cruelty Case

QUESTIONS

1. Does House Bill 1191/Senate Bill 1248 of the 108th Tennessee General Assembly, 1st Session (2013) as amended, (hereinafter "HB1191") violate the United States Constitution?

2. Does HB1191 impair a protected property interest in media work product such as video or photographs taken as part of an undercover investigation?

OPINIONS

1. HB1191 is constitutionally suspect under the First Amendment on three grounds: 1) the scope of HB1191's requirements is underinclusive relative to the governmental interest in preventing cruelty to livestock; 2) HB1191's requirement to provide any recordings of livestock cruelty to law enforcement could be an impermissible prior restraint; and 3) HB1191's reporting requirement could be found to constitute an unconstitutional burden on news gathering. In addition, HB1191 could be held to violate a person's Fifth Amendment right against self-incrimination.[1]

2. The more persuasive position is that the circumscribed, non-commercial use of images depicting cruelty to livestock during the course of the law enforcement investigation of a crime amounts to fair use. Persons who may receive the images depicting cruelty to livestock through a public records request to the government would be subject to any applicable copyright restrictions regarding the display, reproduction, or distribution of those images.

[1] This Office cannot anticipate all possible factual situations in which HB1191 might be applied or "as applied" constitutional challenges that might develop therefrom. *See generally Waters v. Farr,* 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges).

ANALYSIS

1. HB1191[2] amends Tenn. Code Ann. § 39-14-202, relating to cruelty to animals, by adding the following new subsection:

> (1) A person who intentionally records by photograph, digital image, video or similar medium for the purpose of documenting a violation of subsection (a) committed against livestock shall, within forty-eight (48) hours, or by the close of business the next business day, whichever is later:
>
> (A) Report such violation to a law enforcement agency with jurisdiction over the alleged offense; and
>
> (B) Submit any unedited photographs, digital images or video recordings to law enforcement authorities.
>
> (2) A violation of this subsection is a Class C misdemeanor punishable by fine only.

HB1191, 108th Tenn. Gen. Assem., 1st Sess. (2013). By its terms, HB1191 will take effect on July 1, 2013. *Id.* § 2.

HB1191, Section 1, applies only to animal cruelty committed against "livestock." "Livestock" is defined in Tenn. Code Ann. § 39-14-201(2) to mean "all equine as well as animals which are being raised primarily for use as food or fiber for human utilization or consumption including, but not limited to, cattle, sheep, swine, goats, and poultry." Cruelty to animals prohibited by Tenn. Code Ann. § 39-14-202 is a Class A misdemeanor, with second or subsequent convictions being a Class E felony. *Id.* § 39-14-202(g)(1) & (2).

The stated purpose of the bill according to its legislative history is to ensure the prompt reporting of animal cruelty committed against livestock and the submission of any unedited documentary evidence to a law enforcement agency so that the suspected animal cruelty may be expeditiously investigated and addressed by law enforcement. *See generally* House Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 17, 2013) (statements of Rep. Holt and other supporters) (available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1191). HB1191 does not require everyone with knowledge of animal cruelty committed against livestock to report the violation to a law enforcement agency with jurisdiction over the alleged offense; rather it requires only "a person who intentionally records by photograph, digital image, video, or similar medium for the purpose of documenting a violation" to report the violation. HB1191, § 1. The person intentionally recording this documentary evidence is required to make a determination whether the images recorded show a violation of the livestock

[2] Amendment 1 to HB1191 deleted the language of the bill as originally filed and substituted the language ultimately approved by the General Assembly. *See* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1191.

cruelty statute for the duty to report to apply. The duty to report requirement in HB1191 does not apply to a person who views, has knowledge of, or comes into possession of the recorded documentary evidence, but is not the person who recorded the documentary evidence. The duty to report requirement also does not apply to a person who did not "intentionally" record the evidence "for the purpose of documenting a violation"; for example, if a person inadvertently recorded an animal cruelty violation while taking photographs for other purposes, then the requirement would not apply.

Requiring the reporting of a criminal offense is not unprecedented in Tennessee law. For example, abuse, neglect, or exploitation of an adult, as well as child injury or abuse, must be reported. As to an adult, "[a]ny person . . . having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made . . . [and such] report shall be made immediately to the department [of human services] upon knowledge of the occurrence of the suspected abuse, neglect, or exploitation of an adult." Tenn. Code Ann. § 71-6-103(b)(1) & (c). A person who knowingly fails to report adult abuse, neglect, or exploitation commits a Class A misdemeanor. Tenn. Code Ann. § 71-6-110. The identity of a person who reports abuse, neglect, or exploitation of an adult is confidential and may not be revealed unless ordered for good cause by a court with jurisdiction; that person is also afforded immunity from civil and criminal liability. Tenn. Code Ann. §§ 71-6-105, -118. Similarly, as to a child, Tenn. Code Ann. § 37-1-403(a)(1) provides: "Any person who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately . . . ." The failure to report the child injury or abuse is a Class A misdemeanor. Tenn. Code Ann. § 37-1-412. Generally, the reports of harm and the identity of the reporter are confidential, and the reporter is provided with immunity from civil and criminal action. Tenn. Code Ann. §§ 37-1-409, -410.

HB1191 differs in several important respects from the mandatory child or adult abuse reports required by state law. First, HB1191 does not require the immediate report to law enforcement agencies by all persons with knowledge of livestock cruelty. It only requires the report of livestock cruelty when the person has intentionally recorded the acts of cruelty. If a person knows or has evidence of cruelty but has not recorded the acts of cruelty or has done so unintentionally, then the requirements of HB1191 do not apply. HB1191's reporting requirement does not apply to anyone who views or receives a copy of the recordings and who would then also have knowledge of the cruelty. Second, the child and adult abuse reporting statutes list with specificity the judicial, executive or law enforcement officials to whom the mandatory reports must be submitted. HB1191 states only that the report be made "to a law enforcement agency with jurisdiction over the alleged offense." There presumably are a significant number of federal, state, and local officials and entities who exercise some law enforcement jurisdiction over animal cruelty; it is unclear whether a report to any one of those entities would satisfy HB1191's requirements. In fact, the law enforcement agency to which recordings are to be submitted under HB1191 is not limited to "a law enforcement agency with jurisdiction" but rather is more generally described as "law enforcement authorities." Therefore, the recordings could arguably be given to any law enforcement authority, even if it had no jurisdiction over animal cruelty, although reading the statute *in pari materia* would suggest the contrary. Third, in contrast to the child and adult abuse reporting statutes, HB1191 provides neither confidentiality nor immunity to the person reporting livestock cruelty.

HB1191's requirements related to both the reports and the recordings impact speech rights protected by the First Amendment. In that regard, there are three potential objections on the validity of the restrictions and requirements contained in HB1191. First, the provisions in HB1191 are arguably underinclusive relative to the governmental interests that the bill seeks to protect. Second, the requirement to provide any recordings to law enforcement authorities could be construed by the courts as an unconstitutional prior restraint. Third, the reporting requirements could be found to constitute an unconstitutional burden on news gathering.[3] In addition, HB1191 raises Fifth Amendment concerns related to self-incrimination.

Underinclusiveness

In *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), the United States Supreme Court struck down a state regulation restricting access of minors to "violent video games" as being violative of the First Amendment. The Court found that California's law prohibiting the sale of violent video games to minors was a content-based restriction on speech subject to strict scrutiny review. The Court was not persuaded that the state's interest in protecting children from alleged damaging effects of exposure to violent images supported upholding the over- and underinclusive law, which focused solely on "violent video games." In so holding, the Court explained the issue of "underinclusiveness" as follows:

> The consequence is that [the state's] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Here, [the state] has singled out the purveyors of video games for disfavored treatment—at least when compared to [others also exhibiting violent images]—and has given no persuasive reason why.

Brown, 131 S. Ct. at 2740.

As noted above, in contrast to the requirements that anyone with knowledge of suspected child or adult abuse must report such information, HB1191 imposes a reporting duty only on persons who are seeking to engage in speech by creating communicative recordings for the

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[3] In some circumstances, the First Amendment also protects against compelled speech just as it protects the right to speak. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-801 (1988) (finding the First Amendment interest in compelled speech and compelled silence is equivalent in the context of fully protected expression and striking down a compelled disclosure regarding a professional fundraiser's fees); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (invalidating a state statute that compelled a newspaper to print an editorial reply thereby exacting "a penalty on the basis of the content [the] newspaper"). "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97. The right of freedom of thought protected by the First Amendment against state action "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714 (1977).

purpose of documenting animal cruelty committed against livestock.[4] The underinclusiveness of HB1191's reporting duty, which applies to recordings but not to other documentary or eyewitness evidence of abuse, creates an issue about whether the government is disfavoring particular persons who seek to communicate by creating recordings of livestock cruelty, rather than pursuing its stated interest in having immediate reporting of livestock cruelty in order to facilitate law enforcement investigations. If HB1191 were subject to strict scrutiny review as in *Brown*, then the legislation's sole focus on recordings of livestock cruelty would fail to satisfy the narrow tailoring requirement of the strict scrutiny test. But in contrast to *Brown*, HB1191 does not attempt to regulate commercial video game sales and rentals but rather purports to assist law enforcement with the investigation and prosecution of livestock cruelty. As a general rule, "the public has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (internal quotation marks omitted); *see Austin v. Memphis Publ'g Co.*, 655 S.W.2d 146, 150 (Tenn. 1983) (noting the "time-honored rule that the public has a right to every man's evidence"). Yet given HB1191's impact on First Amendment interests, courts would likely apply an enhanced level of scrutiny to the legislation such that its narrow scope would be constitutionally suspect.

Prior Restraint

The scope of subsection (1)(B) of HB1191 is unclear insofar as it requires the person recording an instance of livestock cruelty to "[s]ubmit *any* unedited photographs, digital images or video recordings to law enforcement authorities." HB1191, § 1(1)(B) (emphasis added). The word "any" has as one of its ordinary meanings "every" or "all." *See, e.g., Webster's New Collegiate Dictionary* 51 (1981). The Tennessee Supreme Court adopted this broad and

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[4] Courts have recognized that photography intended to communicate a message to its audience, especially when it involves matters of public interest, is a form of expression, which is entitled to First Amendment protection just as the written or spoken word is protected. The First Amendment has been found to protect the filming of matters of public interest, such as government officials in public spaces whether by the press or by private individuals. *See, e.g., Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (finding that videotaping police in performance of duties may be a protected First Amendment activity); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest"); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (finding it "highly probable" that filming of a public official on street by contributors to public access cable show was protected by the First Amendment, and noting that, "[a]t base, plaintiffs had a constitutionally protected right to record matters of public interest"); *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005) (holding that arrest of individual filming police activities from private property violated First Amendment); *Porat v. Lincoln Towers Cmty. Ass'n*, 2005 WL 646093, at *4 (S.D.N.Y. Mar. 21, 2005) (noting that photography for more than mere aesthetic or recreational purposes enjoys some First Amendment protection); *Cirelli v. Town of Johnston School District*, 897 F. Supp. 663 (D.R.I. 1995) (holding that teacher had a right under the First Amendment to videotape potentially hazardous working conditions at school, which were a matter of public concern); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (holding that police interference with television newsman's filming of crime scene and seizure of video camera constituted unlawful prior restraint under First Amendment); *cf. Connell v. Town of Hudson*, 733 F. Supp. 465, 471-72 (D.N.H. 1990) (denying qualified immunity from First Amendment claim to police chief who prevented freelance photographer from taking pictures of car accident).

inclusive definition of "any" in a related context construing Tennessee's Shield Law. *See Austin v. Memphis Publ'g Co.*, 655 S.W.2d at 149 (finding in a facial statutory construction context that "[t]he non-specific adjective 'any' means 'all.'"); *see also Roddy Mfg. Co. v. Olsen*, 661 S.W.2d 868, 871 (Tenn. 1983) (the word "any" in a statute is synonymous with the word "all"). Construed in this sense, HB1191's requirement to submit "any" unedited recordings would require the surrender of all images to law enforcement and would prohibit the person who made the recordings from retaining them in any form. This requirement would appear to prevent the person making the recording from publishing the images once they have been given to law enforcement authorities. Under many circumstances, forty-eight hours may not be sufficient time to prepare and publish recordings subject to HB1191. Accordingly, HB1191 could be held to be a presumptively unconstitutional prior restraint on expression. *See, e.g., CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (staying injunction of telecast of videotape asserted to have been obtained through "calculated misdeeds" of broadcaster); *see also United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010) (holding that depictions of animal cruelty are not categorically outside the protection of the First Amendment).

In order to avoid this constitutional infirmity, a court may adopt an alternative construction and interpret HB1191 as not requiring the submission of *all* existing copies. *See State v. Burkhart*, 58 S.W.3d 694, 697-98 (Tenn. 2001) (holding that courts have a duty to construe a statute to avoid constitutional conflict). While an alternative construction would run contrary to the state Supreme Court precedent described above, it could be argued that, since HB1191's stated purpose is to prevent ongoing livestock cruelty and to obtain convictions, construing it to require only the submission of copies to law enforcement is consistent with its general purpose. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010) (holding that statutory language must be construed in light of the statute's general purpose). Furthermore, there are statements in the legislative history that are supportive of this construction. Senate Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 16, 2013) (statement of Sen. Gresham) (stating that HB1191 does not prohibit retention of copies by the recorder); House Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 17, 2013) (statement of Rep. Holt) ("There's nothing here that says . . . a third party cannot have a copy of this tape or recording, whatever it is") (both statements available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1191). Unless a court adopts the narrower construction of "any," HB1191 would likely be found unconstitutional on First Amendment grounds.[5]

[5] The ambiguity over whether HB1191 requires that "all" recordings be submitted to law enforcement authorities would also give rise to a challenge against the legislation under federal due process standards as being "void for vagueness," since HB1191 on its face fails to adequately define its prohibitions and what constitutes a violation. As the United States Supreme Court observed:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . First, . . . laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned v. City of Rockford, 408 U.S. 104, 108-10 (1972); *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

News Gathering Privilege

The Court in *Branzburg* recognized that news gathering qualifies for First Amendment protection, *see Branzburg,* 408 U.S. at 681, 707. While this principle has been recognized primarily in the context of the press, it has also been acknowledged that the concept of news gathering is very broad and can encompass a wide scope of activity outside what is recognized as the traditional press. *Id.* at 703 ("The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public.").

In *Branzburg*, the United States Supreme Court considered whether the First Amendment affords reporters a conditional privilege against responding to grand jury subpoenas and answering questions relevant to an investigation into the commission of a crime, including revealing confidential sources. *Branzburg*, 408 U.S. at 680, 682. The Court rejected the existence of a unique testimonial privilege for reporters before a grand jury:

> We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. . . . [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Id. at 690-91 (footnote omitted). Notwithstanding this holding, a majority of federal courts of appeal appear to interpret *Branzburg* as establishing a qualified privilege of varying scope for journalists to resist compelled discovery. *See Keefe v. City of Minneapolis*, No. 09–2941 DSD/SER, 2012 WL 7766299, at *3 n.3 (D. Minn. May 25, 2012) (so stating, and collecting cases). The Sixth Circuit—in which Tennessee resides— is not part of this majority. *See Storer Communications, Inc. v. Giovan* (*In re Grand Jury Proceedings*), 810 F.2d 580, 583-84 (6th Cir. 1987) (concluding that acceptance of a reporter's First Amendment privilege would be tantamount to substituting the dissent for the majority opinion as the holding of *Branzburg*).[6]

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[6] The Tennessee Supreme Court has not addressed the foregoing question, in all likelihood because the General Assembly enacted Tennessee's Shield Law, Tenn. Code Ann. § 24-1-208, nine months after the decision in *Branzburg*. *See Austin*, 655 S.W.2d at 149; Tenn. Code Ann. § 24-1-208(a). Tennessee's Shield Law, Tenn. Code Ann. § 24-1-208(a), expressly provides:

> (a) A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand

In light of the *Branzburg* decision, a statute that mandates reporting of incidents of animal cruelty and requires the submission of photographic evidence of the violations to law enforcement may be defensible against a First Amendment challenge based on the news gathering privilege. This Office notes, however, some significant qualifications to this observation.

The operation of HB1191 is distinguishable in several respects from that of the grand jury subpoenas at issue in *Branzburg*. *Branzburg* relied, in part, on "the ancient role of the grand jury" in Anglo-American jurisprudence. *See Branzburg*, 408 U.S. at 686-87. The procedures spelled out by HB1191 enjoy no such historical pedigree. In response to the concern that confidential sources would be deterred from furnishing publishable information, *Branzburg* pointed out that grand juries characteristically conduct secret proceedings. *See id.* at 695, 700. HB1191 contains no corresponding commitment to secrecy on the part of law enforcement authorities; in contrast to the statutory reporting requirements for child and adult abuse, HB1191 does not protect the confidentiality of the person making the report, nor does it expressly create an exception from the state public records law for the documentary material submitted to law enforcement. Finally, *Branzburg* observed that the fact that "[g]rand juries are subject to judicial control and subpoenas to motions to quash" helped safeguard First Amendment values inherent in news gathering. *See id.* at 707-08 (noting that "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth," that "grand jury investigations if instituted or conducted other than in good faith" would pose First Amendment issues, and that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."). HB1191, by contrast, requires that recorders of livestock cruelty turn over their evidence without judicial intermediation, within a relatively short time frame (forty-eight hours or by the close of business the next business day, whichever is later), and to undefined "law enforcement authorities" (leaving the determination of the appropriate agency to the recorder of the information). *See* HB1191, § 1, (1). HB1191 also makes the failure to submit this documentation within the relatively short time frame a crime. One who wishes to raise and test First Amendment concerns relative to HB1191 must first subject himself or herself to criminal liability. *Id.* § 1, (2). All of these factors raise the concern expressed by the dissent in *Branzburg* that authorities not "annex" news gatherers as "an investigative arm of government." *See id.* at 725 (Stewart, J., dissenting). Thus, while the State has a significant interest in preventing cruelty to livestock, *Branzburg* leaves room for a challenge that the means chosen do not bear an appropriate relation to that goal.

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jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

It is not clear whether HB1191 conflicts with the Shield Law. According to the House sponsor of HB1191, the legislation is not intended to amend the Shield Law. House Debate on HB1191, 108th Tenn. Gen. Assem., 1st Sess. (Apr. 17, 2013) (statement of Rep. Holt) (in response to inquiry from Rep. Lynn on how HB1191 relates to the Shield Law, responding that HB1191 is not intended to nullify the Shield Law, while indicating that he believes the Shield Law has already in many ways nullified itself due to the difficulty in defining its scope) (available at http://wapp.capitol.tn.gov/apps/BillInfo/ Default.aspx?BillNumber=HB1191). However, if HB1191 is not intended to encompass recordings of livestock cruelty that are generated in the process of "gathering information for publication or broadcast," then HB1191 would have little practical applicability. For purposes of this opinion it is assumed that HB1191 applies at least to some activities covered by the Shield Law.

Self-incrimination

Branzburg noted in the context of compelled speech related to criminal investigations that the courts will require grand juries to operate within the limits of the Fifth Amendment to the United States Constitution, which in pertinent part provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* at 708; *see Johnson v. United States*, 228 U.S. 457, 458 (1913) (noting that pursuant to the Fifth Amendment a party is personally privileged from producing evidence). Similarly, HB1191 cannot not be implemented to override the constitutional right against compelled self-incrimination that is guaranteed by the Fifth Amendment to the United States Constitution. In certain instances, unedited documentary evidence of suspected animal cruelty violation may also reveal a possible violation of the law by the person recording that cruelty, such as trespass. The Fifth Amendment right could be asserted to protect that person from being required by HB1191 to submit documentary evidence to law enforcement which may incriminate that person in a crime.

2. A recorder of livestock cruelty might have two property interests respecting the images taken: ownership of the physical medium in which the images are embodied and, provided that the pictures meet minimal standards of originality, a copyright interest in the images themselves. If the courts construe HB1191 as requiring only the submission of unedited copies to law enforcement, the law is not likely to significantly invade the former interest. The Copyright Act, 17 U.S.C. §§ 101 to 1332, grants to copyright holders the exclusive rights to, *inter alia*, display, reproduce, and distribute their works, 17 U.S.C. § 106, and creates a cause of action for infringements of those rights, 17 U.S.C. § 501. The fair use doctrine permits others to reproduce copyrighted works for approved purposes such as criticism, reporting, and education. *See* 17 U.S.C. § 107. A non-exhaustive four-factor test is employed to determine whether a use is a fair use in any given case: "[T]he factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.* "Using this analysis, courts have repeatedly held that the reproduction of copyrighted works as evidence in litigation is fair use." *Scott v. WorldStarHipHop, Inc.*, No. 10 Civ. 9538(PKC)(RLE), 2011 WL 5082410, at *7 (S.D.N.Y. Oct. 25, 2011) (citing, among other authorities, *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406–07 (9th Cir. 1982), and 4 M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.05[D] (2011) (stating that "[I]t seems inconceivable that any court would hold such reproduction to constitute infringement either by the government or by the individual parties responsible for offering the work in evidence.")). Thus, while each case will turn on its own facts, law enforcement authorities are likely to be able to argue that a circumscribed, noncommercial use of images depicting cruelty to livestock in the course of an investigation of a crime amounts to a fair use.

HB1191 does not make the documentary evidence confidential nor does it create an exception to the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-101 to -702, regarding whether a citizen may request the production the documentary evidence required to be submitted to law enforcement authorities. To the extent that this documentary evidence is subject to production under a public records request, the citizen receiving that documentary evidence

apparently would be bound by any applicable copyright laws regarding the display, reproduction, and distribution of that material.

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