EFFECTIVE ACCESS TO THE LAW

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The public's ability to know the laws by which it is governed stems in large part from the accessibility of those laws and from the form in which the government chooses to publish its laws and regulations. Two recent court of appeals cases, *Building Officials and Code Administrators v. Code Technology, Inc.*[1] and *Cervase v. Office of the Federal Register*,[2] appear to assume that there is a right of effective access to the law and a concomitant duty of the government to facilitate such access.[3] Although the basic legal premises of these two cases are contrary to well-established precedents, the holdings are sound, nonetheless, in their perceptions of the underlying public policy: effective access rights are inherent in the nature of due process. The most difficult aspect of a principle of effective access to the law is the accommodation of that principle with other important rights.

A RIGHT OF EFFECTIVE ACCESS

The United States Court of Appeals for the First Circuit, in *Building Officials and Code Administrators v. Code Technology, Inc.*,[4] reversed a district court's preliminary injunction barring Code Technology from publishing an edition of the Massachusetts building code. The Massachusetts code was based in large part on a model code for which the plaintiff BOCA claimed copyright protection as author. The Court of Appeals cited established law for the proposition that statutes and judicial opinions could not be copyrighted and are in the public domain. It also noted, however, that there was no case law on the copyrightability of administrative regulations or of model or uniform codes.[5]

BOCA observed a growing trend toward adoption of such privately generated model codes, and refused to rule out some future accommodations between the copyright owner's interests and the public's access rights. The court was adamant, however, in its declaration of a due process access right, and cautioned:

> [I]t is hard to see how the public's essential due process right of free

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1. Building Officials & Code Adm. v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980).
2. Cervase v. Office of the Federal Register, 580 F.2d 1166 (3d Cir. 1978).
3. The corollary to a right of effective access would be a duty of the government to publicize the law. An analysis of that duty, and a further exposition of the issues associated with promulgation of the law, are set forth in Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255 (1982).
4. 628 F.2d 730 (1st Cir. 1980).
5. *Id.* at 733-34.

> access to the law (including a necessary right freely to copy and circulate all or part of a given law for various purposes), can be reconciled with the exclusivity afforded a private copyright holder . . . .[6]

The *BOCA* court, however, did not offer a final resolution of the issues before it.

While the First Circuit sailed on a relatively uncharted sea, the Court of Appeals for the Third Circuit, in *Cervase v. Office of the Federal Register*,[7] was called upon to interpet a mundane portion of the Federal Register Act requiring preparation of an index for the Code of Federal Regulations.[8] The court held that the existence of a table of contents did not meet this requirement, and that mandamus would lie to force the production of a usable index. In interpreting the statute, the court perceived that:

> The basic object of [the Federal Register Act] was to eliminate secret law. We think that the indexing obligation is a central and essential feature of this congressional plan.[9]

BOCA, then, reads the previous copyright cases on statutes and judicial opinions to acknowledge a due process access right, while *Cervase* provides extraordinary relief to enforce a perceived congressional policy favoring effective access to Federal administrative law.

Surprisingly, a strong case can be made that the underlying premises of *BOCA* and *Cervase* are contrary to well-established precedents. The earliest Anglo-American case on making the law known, *Rex v. Bishop of Chichester*,[10] established a principle which has remained almost unchallenged for six hundred years: statutes need not be published to be effective. According to the opinion of Chief Justice Thorpe, everyone is on notice of what is done in Parliament because that body represents the whole realm. Thus, whether there is a right of access *vel non*, it is access by presumption with no further effort required by the state.

Bishop of Chichester has formed the core of American law on questions of access and promulgation. In 1812 it was applied by Circuit Justice Story in *The Ann*[11] to justify confiscating a ship under an embargo act, the passage of which had been unknown and effectively unknowable to the operators of the vessel. Shortly thereafter the Supreme Court concluded that acts of Congress take effect when signed by the President, with no prior requirement of publication or notice.[12] This position evidences no concern for a citizen's effective access to the law in time to conform his or her behavior to such law, and no indication of

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6. *Id.* at 736.
7. 580 F.2d 1166 (3rd Cir. 1978).
8. 44 U.S.C.A. § 1510 (1969).
9. 580 F.2d at 1169.
10. Y.B. 39 Edw. 3, Pasch. 7 (1365). 4 E. COKE, THE INSTITUTES OF THE LAWS 26 (5th ed. 1671) provides the authoritative translation and interpretation of this case.
11. 1 F. Cas. 926, 927 (No. 397) (C.C.D. Mass. 1812).
12. Arnold v. United States, 13 U.S. (9 Cranch) 104 (1815).

any duty in the government to make the law known or knowable before it takes effect. This early doctrine has extended from *Bishop of Chichester* through a number of Supreme Court opinions on the effective date of statutes[13] and executive orders.[14] It has been equally accepted by most state courts,[15] federal courts,[16] and authorities on the subject.[17]

This laissez-faire approach is not merely a matter of Eighteenth Century jurisprudence. As recently as 1970 the United States Court of Appeals for the District of Columbia Circuit, in *United States v. Casson*,[18] reaffirmed the concept of immediate effectiveness for acts of Congress, supporting that conclusion by reference to the earlier English and American authorities. In *Casson*, a defendant was convicted for actions in Washington, D.C., which violated an act signed by the President in Texas, but before news of the signing was released to the press.

Where do *Cervase* and *BOCA* fit in this precedential background? *Cervase* gave full force to an access policy and statutory language implementing that policy. Other courts, guided by the traditional Anglo-American doctrines, have not. The Supreme Court, in *Federal Crop Insurance Corp. v. Merrill*,[19] read the Federal Register Act to limit the government's promulgation duty simply to publishing its regulations in the Federal Register. In other cases, state[20] and federal[21] courts have eviscerated, by construction, otherwise straightforward publication requirements. Prior to the era of the Federal Register Act it could well be argued that there was no policy favoring access to or publication of

13. *See* Matthews v. Zane, 20 U.S. 164 (1822); Gardner v. Collector, 73 U.S. 499 (1868) (dicta); Burgess v. Salmon, 97 U.S. 381 (1878); Robertson v. Bradbury, 132 U.S. 491 (1889); Jacob Ruppert v. Caffey, 251 U.S. 264 (1920).

14. *See* Lapeyre v. United States, 84 U.S. 191 (1873); United States v. Norton, 97 U.S. 164 (1878).

15. *See, e.g.*, Administrators of Weatherford v. Weatherford, 8 Port. 171 (Ala. 1838); People v. Clark, 1 Calif. 406 (1851); Smets v. Weatherbee, 1 Ga. 308 (1837); Goodsell v. Boynton, 1 Ill. 555 (1839); Temple v. Hays, 1 Iowa 12 (1839); Parkinson v. State, 14 Md. 184 (1859); *Ex parte* De Hay, 3 S.C. 564 (1872). *See also* State v. Maccioli, 110 N.J.S. 352, 265 A.2d 561, 565 (L. Div. 1970) ("Lack of publication can never rob a [state] Supreme Court ruling of its efficacy.").

16. *See, e.g.*, United States v. Gavrilovic, 551 F. 2d 1099, 1103 (8th Cir. 1977) (dicta); United States v. Clizer, 464 F.2d 121, 123 n.2 (9th Cir. 1972), *cert. denied*, 409 U.S. 1086, *reh. denied*, 410 U.S. 948; Smith v. Draper, 22 F. Cas. 523 (No. 13,037) (C.C.E.D.N.Y. 1865); Central Md. Lines, Inc. v. United States, 240 F. Supp. 254 (D. Md. 1965); United States v. Chong Sam, 47 F. 878 (D. Mich. 1891); *In re* Welman, 20 Vt. 653 (F. Cas. No. 17,407) (U.S.D. Vt. 1844).

17. *See, e.g.*, 11 Op. Att'y Gen. 436 (1866); T. COOLEY, CONSTITUTIONAL LIMITATIONS 188 (5th ed 1883); 1 J. KENT, COMMENTARIES ON AMERICAN LAW 426 (1826); Thornton, *Arrowsmith v. Hormening*, 32 AM. L. REG. 249, 253-54 (1884).

18. United States v. Casson, 434 F.2d 415 (D.C. Cir. 1970).

19. 332 U.S. 380 (1947). The Court took this position notwithstanding the fact that a government employee had misstated the regulation at issue to the claimant.

20. *See, e.g.*, Jones v. State, 336 So. 2d 59 (La. App. 1976), *writ denied*, 336 So. 2d 515 (La. 1976) (interpreting the word "promulgated" in the Civil Code, art. 4., to mean filing with the Secretry of State).

21. *See, e.g.*, ASG Industries, Inc. v. United States, 467 F. Supp. 1200, 1241-45 (Cust. Ct. 1979) (interpreting the words "after the date of publication of the court's decision" in the Tariff Act of 1930, 19 U.S.C. § 1516(g), to mean only the day following the entry of the court's order, notwithstanding the availability of the weekly Customs Bulletin for publication purposes).

administrative law in American jurisprudence.[22] Moreover, even now after enactment of the Federal Register Act, there remain jurisdictions in which publication or notice of the existence of new regulations is not a condition precedent to their effectiveness.[23]

BOCA's concern for effective access drew precedential support only from other copyright and related cases. Those cases include Supreme Court precedent rejecting copyright claims on judicial opinions,[24] and state courts,[25] and lower federal courts[26] reaching similar conclusions. The *BOCA* court cited no Supreme Court case recognizing a due process or other constitutional right regarding effective access. To the contrary, the case law indicates that laws become effective before they are known or knowable. Therefore, it would not seem to matter that a law or regulation, which everyone is already presumed to know, is not subsequently available for copying. Indeed, the copyright law's requirement for filing of materials for use of the Library of Congress[27] arguably exceeds the recognized common law[28] or constitutional requirements for access.

SHOULD EFFECTIVE ACCESS BE REQUIRED?

Due Process Requirements

The *BOCA* court's reference to a due process right reflects the Supreme Court's pronouncement that certain requirements of notice are inherent in the nature of due process. In *Mullane v. Central Hanover Bank and Trust Co.*,[29] the Court reviewed this concept of notice in

22. *See* Nagle v. United States, 145 F. 302, 306 (2d Cir. 1906); Griswold, *Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204 (1934); Cohen, *Publication of State Administrative Regulations — Reform in Slow Motion*, 14 BUFF. L. REV. 410, 410, 414 (1965); Fairlee, *Administrative Legislation*, 18 MICH. L. REV. 181, 197 (1920); Hutton, *Public Information and Rule Making Provisions of the Administrative Procedure Act of 1946*, 33 TEMP. L.Q. 58, 59 (1959). *But see* United States v. Louisville & N.R.R., 165 F. 936 (W.D. Ky. 1908), and cases cited *infra* note 28.

23. *See, e.g.*, Nestle Products, Inc. v. United States, 310 F. Supp. 792 (Cust. Ct. 1970) (Puerto Rico). The State of Delaware has no administrative code and no publication requirement; New Jersey provides for a code, N.J.S.A. § 52:14B-7 (Supp. 1981), but does not require publication before a rule takes effect. *Id.* § 14B-5(b).

24. Callahan v. Myers, 128 U.S. 617 (1888); Banks v. Manchester, 128 U.S. 244 (1888); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

25. *Ex parte* Brown, 116 Ind. 593, 78 N.E. 553 (1906); Nash v. Lathrop, 142 Mass. 29, 6 N.E. 559 (1886). *Contra In re* Gould & Co., 53 Conn. 415, 2 A. 886 (1886).

26. Connecticut v. Gould, 34 F. 319 (C.C.N.D.N.Y. 1888); Banks & Bros. v. West Publ. Co., 27 F. 50 (C.C.D. Minn. 1886); Banks v. Manchester, 23 F. 143 (C.C.S.D. Ohio 1885); Gould v. Hastings, 10 Fed. Cas. 877 (No. 5639) (C.C.S.D.N.Y. 1840). *Accord* Georgia v. Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982) (state legislation).

27. 17 U.S.C. § 407 (Supp. I 1977).

28. Although they will not be explored here, there are cases which would support an argument for imposing a promulgation standard under the common law. *See* Lessee of Albertson v. Robeson, 1 Dall. 9 (Pa. 1764) (repeal of an act by king and counsel); The Cotton Planter, 6 F. Cas. 620 (No. 3270) (C.C.D.N.Y. 1810) (act of Congress); Railroad Comm'n v. Kansas City S. Ry., 111 La. 134, 35 So. 487 (1903) (state administrative law); Johnson v. Sargant & Sons, [1918] 1 K.B. 101 (English administrative law); Rex v. Ross, [1945] 3 D.L.R. 574 (Canadian administrative law); Harla v. State of Rajasthan, 1951 A.I.R. (S.C.) 467 (Indian administrative law); Lanham, *Delegated Legislation and Publication*, 37 MOD. L. REV. 510 (1974).

29. 339 U.S. 306 (1950).

the context of a civil proceeding. There the only notice given to affected parties was by publication in a local newspaper. The Court advised that notice of an adjudication must be reasonably calculated to apprise interested parties of the proceeding and afford them an opportunity to be heard. If no method would produce a reasonable certainty of informing all of those affected, the method chosen must not be "substantially less likely to bring home notice than other of the feasible and customary substitutes."[30] In that case, newspaper notice was not adequate for "those who could easily be informed by other means at hand."[31]

At least one Supreme Court decision[32] and one Federal district court[33] have applied *Mullane* to require a notice of the existence of certain legislative restrictions.[34] Given that the due process clause protects one from being punished or losing property in litigation without prior notice, it would be a logical extension of this principle to require some notice before the very law on which the latter adjudication is based goes into effect. The opportunity to conform one's behavior to the law appears to be at least as fundamental an entitlement as the opportunity to defend one's behavior after the fact.

In addition to the teachings of *Mullane* and the analogy of required notice in the litigation context, there is the related due process doctrine that "persons have a right to fair warning of that conduct which will give rise to criminal penalties."[35] This "fair warning" concept bars judicial action that would have an ex post facto effect[36] and criminal statutes that are too vague to be understood by men of common intelligence.[37] If, as the Supreme Court stated in *Marks v. United States*, the fair warning notice is "fundamental to our concept of constitutional liberty,"[38] then due process could be expected to require that some warning be provided before new laws, at least new criminal statutes, take effect. It would follow logically that if due process prohibits statutes from being so vague that one would have to guess at their meaning, it would not permit laws to take effect before one could even guess that they existed.

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30. *Id.* at 315.
31. *Id.* at 319.
32. Lambert v. California, 355 U.S. 225 (1957) (reversing defendant's conviction for failure to register as a convicted person with the Los Angeles authorities; either actual knowledge or proof of the probability of such knowledge was required by the Court for a conviction).
33. Armstrong v. Maple Leaf Apartments, Ltd., 436 F. Supp. 1125, 1145-46 (N.D. Okla. 1977), *aff'd on other grounds*, 622 F.2d 466 (10th Cir. 1980), *cert. denied*, 449 U.S. 901 (1980) (refusing to void a deed of Indian land for noncompliance with a Federal statute which had not been included in the United States Code).
34. A determinative factor in both cases was probably the otherwise innocuous conduct of the parties claiming lack of notice.
35. Marks v. United States, 430 U.S. 188, 191 (1977).
36. *Id.* State v. Moyer, 387 A.2d 194 (Del. 1978).
37. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 674, 680 (1976).
38. 430 U.S. at 191.

Public Policy

Promulgation increases the effectiveness of law. Providing information about the law to those who are regulated by that law will enhance the efficiency of the regulatory effort and may decrease administrative and enforcement costs. Clearly a law whose existence is not known cannot serve a useful purpose as a guide to conduct.

Openness in lawmaking and openness in availability of the law are associated with the democratic values of American society. Widespread and immediate publication of a law opens the law to scrutiny and criticism. This increases the opportunity for public comment on the law's defects and for increased awareness of the need to improve a particular law. Requiring promulgation may also add an incentive to the lawmakers to make the laws less abstruse and, therefore, more understandable to the affected constituencies.

There is also an issue of essential fairness in the question of accessibility. In the words of the Massachusetts Supreme Judicial Court in *Nash v. Lathrop*,[39] in speaking of the law as construed in judicial opinions:

> Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices.[40]

The significance of the access concept and the value of effective promulgation efforts are magnified with the growth of law in modern American life. Estimates place the number of new enactments from legislative bodies ranging from city councils to Congress at 150,000 per year.[41] There are substantially more administrative rules and regulations at every level of government, many in the nature of malum prohibitum and thus less likely to be known in the absence of a publication effort. As their numbers and complexity expand, their effectiveness depends increasingly on the attention devoted to making them known.[42]

Alternative Forms of Access

If there is a right to effective access to the law and a duty of the

39. 142 Mass. 29, 6 N.E. 559 (1886).
40. *Id.* at 35, 6 N.E. at 560.
41. Attorney General William French Smith's Remarks to District of Columbia Bar, ANTITRUST & TRADE REG. REP. (BNA) H-1 (July 2, 1981); *Too Much Law*, NEWSWEEK, Jan. 10, 1977, at 42, 43.
42. In this respect, government needs to be responsive to the changes in information technology and willing to utilize that technology to enhance access to the law. Individuals may have access on home videotex terminals to meet their special needs in such subject areas as airline schedules and stock prices. *See, e.g.*, *The Home Information Revolution*, BUS. WEEK, June 29, 1981, at 74. Providing equally timely access to such information as local building code requirements or the most recent restrictions on asbestos would aid the public in dealing with the growing bodies of law.

government to publicize the law and facilitate such access, how should this be implemented? The first step is to give the subject of promulgating the law serious review and analysis.[43] This analysis should include consideration of the effectiveness of the existing methods, their advantages and defects. Several questions should be part of this process including: Should a law ever take effect before it is known or knowable? Would lack of public access make a law ineffective? What protection and enforcement remedies would an individual have if deprived of his or her right of access?

Among the alternatives available to the government to afford notice of the law, there are three formal methods frequently used: fixed wait; record deposit; and record publication. The fixed wait can be a constitutional[44] or statutory[45] provision delaying the effective date of a new law to allow time for public review. Under the record deposit approach, a new law may be required to be deposited in one centralized office[46] or at a number of more local offices,[47] there to be accessible to the public. Record publication would consist of an official state journal, such as the *Federal Register* or the *London Gazette*, containing new laws and regulations as they are enacted. The most effective system would combine the advantages of each of these methods, placing new rules in the official record, making that record accessible at known locations, and deferring effective dates until a set time after publication.[48]

Formal systems set a legal performance minimum, but effective access requires more innovative efforts to direct promulgation to the particular constituencies affected by the law. Probably the most ambitious example of this exists in the New Jersey Truth-in-Renting Act.[49] Under that act the state has produced a statement of established rights and responsibilities of residential landlords and tenants in that state. The statement covers such subjects as rent increases, discrimination, crime insurance, eviction, condition of the premises, and rent-withholding remedies. Landlords are required by law to provide a copy to each tenant and post a copy on the property. This experiment shows

43. *See* Murphy, *supra* note 3, at 256 n.5.

44. *See, e.g.*, ALASKA CONST. art. II, § 18; CAL. CONST. art. 4, § 8; FLA. CONST. art. III, § 9; LA. COSNT. art. III, § 19; MICH. CONST. art. IV, § 27; MO. CONST. art. III, § 29; UTAH CONST. art. VI, § 25 (amended 1972); W. VA. CONST. art. VI, § 30.

45. *See, e.g.*, 1 PA. CONS. STAT. ANN. § 1701(a)(5) (Purdon Supp. 1981) (statutes); CONN. GEN. STAT. § 2-32 (1958) (same); 5 U.S.C.A. § 553(d) (1976) (administrative regulations); DEL. CODE ANN. tit. 29, § 10118(b) (Supp. 1980) (same); COLO. REV. STAT. ANN. § 24-4-103(5) (Supp. 1979) (same); WIS. STAT. ANN. § 227.026(1) (West Supp. 1981) (same).

46. *See, e.g.*, 1 U.S.C.A. § 106a (1977) (statutes); CONN. GEN. STAT. ANN. § 4-172(b) (Supp. 1981) (administrative regulations); *see* 1 F. COOPER, STATE ADMINISTRATIVE LAW 209 (1965).

47. *See, e.g.*, IND. CONST. art. 8, § 28 (statutes); ALASKA STAT. § 44.62.140 (1980) (administrative regulations); CAL. GOV'T CODE §§ 11,343.6, 11,344.2 (1980) (same); N.D. CENT. CODE § 28-32-03.2.1.e (Supp. 1979) (same).

48. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 553(d) (1976) (combining a record publication and fixed wait requirement for administrative regulations); Federal Register Act, 44 U.S.C. § 1503 (Supp. IV 1980) (requiring record deposit of administrative regulations).

49. N.J. STAT. ANN. §§ 46:8-43 – 8-49 (West Supp. 1981).

what can be done to advance awareness of the law, if innovative thought is applied to the process.

THE APPLICATION OF THE EFFECTIVE ACCESS PRINCIPLE

To be effective, any law or regulation needs to be findable. Applying this principle to *Cervase*, and applying the due process test of *Mullane*, there is strong support for the conclusion that an index is a reasonably calculated method of apprising interested parties of the law and that a table of contents is "not reasonably calculated to reach those who could easily be informed by other means at hand."[50] This conclusion, when applied to the interpretation of a specific statutory directive to produce such an index, appears to be beyond challenge.[51]

Also at issue in *Cervase* was the availability of mandamus as a remedy. Given the evidently ministerial nature of the indexing function, there is ample precedential support for the invocation of this remedy to facilitate access to the law.[52]

BOCA provides a much more difficult setting for applying the effective access concept, because of the collision in that case of substantial, competing interests. Weighing against the public's interest in access to the law is the private property right in the creation of intellectual property. The Copyright Act[53] must be allowed its full strength to protect that right and to promote the creative activity which results in such publicly beneficial products as model codes and uniform statutes.

It is possible to protect both interests and still have the advantage of private authorship of laws. Legislatures and administrative agencies can negotiate with and purchase from authors the full duplication rights associated with a particular code. This could impose on the first adopting jurisdiction a disproportionate cost, since succeeding jurisdictions would then have free access to the materials in the public domain. This could be partially obviated by joint purchase by more than one such jurisdiction. What is more likely, however, is that private authors will obtain economic advantage in the same way that private court reporters and statute compilers do: the author would have the best claim as an authoritative commentator, annotator, compiler, indexer, and the like, and would exploit that position to full economic advantage. It has repeatedly been held that such annotations, comments and other works

50. 339 U.S. at 319.

51. The background of the passage of the Federal Register Act and the later Administrative Procedure Act strongly support the *Cervase* court's statement of the congressional policy supporting its interpretation. *See* Griswold, *supra* note 22; Cohen, *supra* note 22, at 413-14; Hutton, *supra* note 22, at 59-62.

52. *See* State *ex rel.* Browning v. Blankenship, 175 S.E.2d 172 (W. Va. 1970) (publication of statutes); Capito v. Topping, 65 W. Va. 587, 64 S.E. 845 (1909) (same); State *ex rel.* Martin v. Zimmerman, 233 Wis. 16, 288 N.W. 454 (1939) (same); Nash v. Lathrop, 142 Mass. 29, 6 N.E. 559 (1886) (access to judicial opinions); People *ex rel.* Waller v. Board of Supervisors, 56 N.Y. 249 (1874) (publication of session laws by county supervisors).

53. 17 U.S.C. §§ 101 *et seq.* (Supp. I 1977).

of private authors are copyrightable.[54]

If an author refused to sell his or her rights, there may be an argument that the state could assert eminent domain principles for the obtaining of such intellectual property. This could raise serious first amendment[55] concerns and enormously difficult issues in determining the market value of such writings. For both policy and practical reasons, in the unlikely event that an author would refuse to sell his or her copyright,[56] it is preferable for the government to write its own laws or commission someone else to do so. It bears repeating in this regard that the copyright protects only forms of expression, and not ideas.

BOCA, of course, is past the stage of initial purchase negotiations. The court there has the option of holding BOCA's materials to be in the public domain, on the theory that the copyright owner waived its rights. But there are also alternatives consistent with protecting the copyright. The court could take the dramatic step of upholding the copyright, and then declaring the law ineffective because of the limits on its accessibility. Alternatively, it could determine that there has been infringement, but refuse an injunction on public policy and due process grounds. It would then appropriately hold the state responsible for all the infringement which occurs from copying the state's code and assess a reasonable charge against the state to compensate the copyright owner. If this were done it is predictable that Congress would quickly amend the Copyright Act to establish a procedure for this arrangement.

A LEGISLATIVE SOLUTION

A legislative solution to the *BOCA* dilemma should start with a statement of Congress' commitment to the effective access concept.[57] This statement would guide the judiciary in its interpretation of the statute. The *Nash*[58] opinion provides an appropriate source for such a statement. It should be clearly stated that no law or regulation can be limited in its public availability by the Copyright Act. The reasonable regulation referred to in *Nash*, to ensure the accuracy of published

54. *See, e.g.*, Callahan v. Myers, 128 U.S. 617 (1888) (copyright protection of headnotes, etc., in court reports); West Publ. Co. v. Lawyers' Coop. Publ. Co., 64 F. 360 (C.C.N.D.N.Y. 1894) (same); W.H. Anderson Co. v. Baldwin Law Publ. Co., 27 F.2d 82 (6th Cir. 1928) (copyright protection of annotations, etc., in statute books). *See* Note, *Copyright of Statute Compilations*, 32 KY. L.J. 76 (1943); Patterson, *On Copyrighting "Law"*, 13 GA. ST. B.J. 60 (1976) (arguing that the practical effect of permitting copyright protection for headnotes, indices, etc., is to provide an exclusive right over something that should be in the public domain). *But see* Georgia v. Harrison Co., 548 F. Supp. 110, 115 (N.D. Ga. 1982) (no copyright in title, chapter, and article headings).

55. U.S. CONST. amend. I. *Cf.* Alamo Motor Lines v. International Bhd. of Teamsters Local 657, 229 S.W.2d 112, 117 (Tex. Civ. App. 1950) (First amendment would prevent court from prohibiting publication of an opinion by newspapers, publishing firms and others).

56. As one who has written a proposed statute for publication in a copyrighted journal, this author can think of no good reason for refusing such an offer. *See* Murphy, *The Self-Evaluative Privilege*, 7 J. CORP. LAW 489, appendices "A" and "B" (1982).

57. The appendix to this article is a draft of one such proposal. The author waives any copyright claim for that appendix.

58. Nash v. Lathrop, 142 Mass. 29, 6 N.E. 559 (1886).

laws, would be permitted. The effect of this would be to codify the common law standard.

Balancing the governmental interest against the copyright interests would be the most critical step. Here an analogy can be drawn to the mandatory licensing provisions applicable to cable television's retransmission of signals.[59] A governmental body could incorporate copyrighted material in its published materials, thereby placing the incorporated materials in the public domain. The parties could agree to an appropriate charge, or be subject to a fee to be set by an independent tribunal. Payment should not be required where the incorporated material would otherwise be subject to the fair use exception.

59. 17 U.S.C.A. § 111(d) (1976).

APPENDIX

A BILL

To provide for effective access to the law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. It is the intent of Congress that all people should have free and full access to the statutes, regulations, laws and orders which govern them, and to the decisions and opinions of the judiciary.

SECTION 2. No act of Congress, or of any legislature, nor any opinion or order of any court, nor any rule, regulation, order or opinion of any executive, administrative agency or commission, nor any other rule, regulation, interpretative opinion, law, ordinance, order, code of conduct or ethics, or the like, of any government or governmental body or agency, shall be subject to registration or protection under the Copyright Act of 1976, nor be subject to any other restrictions on copying under any law, except for such reasonable laws as are necessary to regulate the mode of promulgation so as to give such acts, opinions, rules, etc., accuracy and authority.

SECTION 3. Any governmental body or other entity barred from claiming copyright protection in material subject to section 2 above, may nevertheless include in such material, material created by others which is otherwise subject to copyright protection. In such cases, only that specific portion and language as is published by such body or entity shall not be subject to copyright protection. The owner of the copyright in such included material shall be entitled to payment by such body or entity, of a reasonable royalty to be determined by the Copyright Royalty Tribunal, unless the parties have agreed to other terms. This payment requirement shall not apply to brief inclusions subject to a right of fair use, which do not significantly diminish the value of the copyright owner's rights in such material.