COURT OF APPEALS DECISION DATED AND FILED

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Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1307

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

LAW OFFICE INFORMATION SYSTEMS, INC., A/K/A LOIS, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. The State of Wisconsin appeals from a judgment dismissing its breach of contract action against LOIS, Inc., and granting judgment

in favor of LOIS on its counterclaim. The main issues relate to the material produced by the Revisor of Statutes to accompany the text of the statutes and administrative code in the official publications. The issues are whether this material is copyrightable and, if it is, whether it should nonetheless be held in the public domain as a matter of state law. We conclude that at least a portion of the Revisor's material is copyrightable, and that there is no basis in state law to hold it in the public domain. Therefore, we reverse the judgment.

In LOIS's cross-appeal, we consider whether LOIS was entitled to judgment on its counterclaim when the State failed to timely reply. We conclude that prior case law precludes the granting of a default judgment on a counterclaim.

I. BACKGROUND

The State sued LOIS for breach of contract. LOIS raised affirmative defenses and counterclaimed. Each party moved for summary judgment. The court granted judgment to LOIS. Summary judgment methodology is well-established, and need not be repeated here. *See, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980). We apply the same method as the circuit court, without deferring to its conclusion. *See* ***In re Cherokee Park Plat***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct. App. 1983).

The State's complaint alleged that it entered into a contract with LOIS in 1995. The contract was attached to the complaint. The core of the agreement provided that LOIS would pay $72,000 for the right to reproduce certain material for sale on CD-ROM for a specific two-year period from 1995 to 1997. The material to be reproduced was described in the contract as "all editorial material added to all chapters of the Wisconsin Statutes ('value-added statutes') and to all chapters of the Wisconsin Administrative Code ('value-added

administrative code') by the Revisor of the Statutes Bureau." The payment was to be made in two equal installments. The complaint alleged that the State performed all of its obligations, but LOIS did not make its second payment. The complaint states a claim for breach of contract.

LOIS's answer admitted to not paying the second installment, but asserted in defense that the material provided by the State is in the public domain. This defense was based on the following provision of the contract: "In the event that the value-added statutes and the value-added administrative code being licensed by LOIS are declared by competent authority to be in the public domain, then this agreement is terminable by either party." The answer joins issue. LOIS's counterclaim sought return of the first contractual payment, based on the same theory of terminating the contract. This states a counterclaim.

Before turning to the legal issues, we note that neither party appears to have placed a copy of the Revisor's material in the record. Given the issues involved, we would ordinarily expect to see the exact material in dispute. However, the briefs do not direct us to a location in the record where we can find it, and we have not found it in our own review. The State's brief, apparently recognizing this omission, directs our attention to certain portions of the "1995-96 bound volumes." However, the bound volumes are not the material at issue, and neither party cites to anything in the record to establish that the bound volumes and the actual material at issue are identical.[1] However, because LOIS has not

[1] The contract did not give LOIS permission to simply copy the bound volumes. Rather, the State agreed to provide LOIS with "an 8 millimeter SYTOS tape containing a tagged ASCII file ("*Folio* flat file") of the value-added statutes. The *Folio* flat file shall be identical to the *Folio* flat file used by [the Revisor] to create the value-added statutes infobase which the State publishes on [its own CD-ROM]."

objected or offered an alternative record citation, we will use the bound volumes of the 1995-96 Wisconsin Statutes and Annotations.

The parties appear to agree that the text of the statutes themselves is not copyrightable, and therefore this case presents no issue about whether statutes are in the public domain. Even if the parties did not agree, no issue about the statutes is presented because the contract granted LOIS the right to copy only the Revisor's additional material, not the statutes themselves.

In our view, LOIS argues two separate theories for holding the Revisor's material in the public domain. One theory is that the material cannot be copyrighted, which is a question of federal law. The other is that even if the material is copyrightable, it should nonetheless be held in the public domain as a matter of state law, based on certain statutes and public policy grounds.

II. FEDERAL LAW COPYRIGHT ISSUES

For purposes of copyright law, the Revisor's publication "Wisconsin Statutes and Annotations" is a "literary work" that is entitled to copyright protection if it otherwise meets the requirements for that protection. *See* 17 U.S.C. §§ 101 and 102. Although works of the federal government cannot be copyrighted, no similar provision exists for state governments. *See* 17 U.S.C. § 105.

The State's brief lists several parts of the bound statute volumes that it believes are eligible for copyright protection, such as the preface, table of contents and index. However, we do not believe it is necessary for us to decide whether each part of the Revisor's added material is copyrightable. The contract is terminable if the Revisor's material is declared in the public domain. The most

reasonable reading of this provision is that the contract is terminable only if *all* of that material is in the public domain. If the parties intended otherwise, the contract would say it was terminable if "any part" or "a substantial part" is declared in the public domain. Therefore, if one part of the material is not in the public domain, the contract is not terminable, and we have resolved the dispute before us.

A. Statutory Nature of the Revisor's Material

LOIS argues that the Revisor's added material is not copyrightable because it is statutory in nature. LOIS relies on two cases in support of this argument.

The first is ***State of Georgia v. Harrison Co.***, 548 F. Supp. 110 (N.D. Ga. 1982), *vacated per stipulation*, 559 F. Supp. 37 (N.D. Ga. 1983). In ***Harrison Co.***, the State of Georgia sought to enjoin defendant Harrison Company from copying a recodification of Georgia's statutes. Georgia argued that it held a copyright on the material, including the title names (such as "Agriculture" and "Banking and Finance") and the chapter and article headings. LOIS cites ***Harrison Co.*** for the proposition that material added to the statutes upon the requirement of the legislature is in the public domain and not copyrightable. However, we find no such broad holding.

LOIS relies on the part of ***Harrison Co.*** that deals with the title names and the chapter and article headings. In that part of the opinion, the court rejected Georgia's copyright claim with two alternative conclusions. The first was based on an act of the Georgia legislature. It provided that "the statutory portion of the codification … is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia." Applying this provision, the court concluded that

if the legislature thought the title names and chapter and article headings were part of "the statutory portion" of the codification, these items could not be copyrighted because they had been enacted by the legislature and published. This holding has little bearing on the present case, because the Revisor's material has not been "enacted" in any way as the law of Wisconsin.

The court's second conclusion was that the title names and chapter and article headings were not copyrightable because they were brief, descriptive language used to describe something, and "mere labels" cannot be copyrighted. ***Harrison Co.***, 548 F. Supp. at 115. This conclusion does not support LOIS's argument because some of the Revisor's material goes well beyond mere labels. For example, the preface consists of several pages of text written in complete sentences.

The other case LOIS relies on is ***Building Officials & Code Adm. v. Code Technology, Inc.***, 628 F.2d 730 (1st Cir. 1980). In that case, the enacted Massachusetts building code was based in large part on a model code prepared by a private organization. The organization brought a copyright claim against another company that sought to publish its own edition of the enacted code. The appellate court did not rule definitely on the issue because this was a review of a preliminary injunction. ***Id.*** at 732. However, in considering the likelihood of success on the merits, the court concluded that once the model code material was enacted as law, it was in the public domain and not copyrightable. As in the preceding case, this conclusion provides little support to LOIS because the Revisor's material has not been enacted as law.

LOIS has provided no authority for the proposition that material produced by a state agency to accompany statutes cannot be copyrighted. LOIS

has shown only that a copyright would be in doubt for material which is actually controlling law.

B. Originality

As a separate copyright theory, LOIS also argues that the Revisor's material cannot be copyrighted because it is either: (a) a simple compilation of facts, or (b) lacks sufficient originality. The parties generally agree on the law related to these issues, and they dispute only its application to this material. The relevant legal standards are thoroughly discussed in ***Feist Publications v. Rural Tel. Serv.***, 499 U.S. 340, 344-61 (1991).

To be copyrightable, a work must be "original." This means that the work possesses at least some minimal degree of creativity and was independently created by the author, as opposed to copied from other works. ***Feist***, 499 U.S. at 345. The requisite level of creativity is "extremely low," and even a slight amount will suffice, no matter how crude, humble or obvious it might be. ***Id***. Facts themselves cannot be copyrighted, but compilations of facts can be, if the selection and arrangement of them satisfies the test for originality by being made independently by the compiler and by entailing the necessary minimal degree of creativity. ***Id***. at 347-48. The determination of originality is usually for the fact finder. *See* **Matthew Bender & Co. v. West Pub. Co.**, 158 F.3d 674, 681 (2d Cir. 1998).

The first item on the State's list of copyrightable sections is the preface, which appears as the first part of the bound volume. It covers slightly more than three pages and consists of text, mostly in complete sentences, describing the Wisconsin statutes, the revision system used by the Revisor, some methods of using the book, the statute numbering system, and various other

matters relating to the book. We conclude that no reasonable fact finder could find that the preface lacks sufficient originality. It is not merely a compilation of facts. It is an essay combining facts, description and instruction, written with coherent organization and style. It contains sufficient creativity to meet the "extremely low" threshold necessary to establish originality.[2]

C. Effect of State Statutes on Copyright

As a final copyright theory, LOIS contends that no copyright exists because of various state statutes promoting openness in government. However, the existence of a copyright is a matter of federal law. LOIS cites no federal statute or case law that makes these state statutes relevant to whether a copyright exists. Therefore, we reject this argument as a basis for deciding the copyright issues.

III. STATE LAW ISSUES

We turn now to LOIS's argument that the Revisor's material should be held in the public domain as a matter of state law. The argument is that even if a copyright may exist under federal law, the State should be prevented under state law from holding or exercising that right. There is no Wisconsin statute directly controlling on this issue. No statute expressly states whether this material is in the

[2] In their briefs the parties discussed a particular federal district court case we have not cited above, and in letters after briefing the parties noted the issuance of two appellate decisions arising from that case: ***Matthew Bender & Co., Inc. v. West Pub. Co.***, 158 F.3d 674 (2d Cir. 1998) and ***Matthew Bender & Co., Inc. v. West Pub. Co.***, 158 F.3d 693 (2d Cir. 1998). We have reviewed those opinions and do not find in them any new and relevant statements of law. The federal court's application of law to the material before it in that case is not significant to our analysis of the Revisor's material.

public domain, or whether the State may require a commercial user such as LOIS to pay for the use of the Revisor's material.

LOIS's argument relies in part on general principles of public access to the law, on cases from other jurisdictions, and on its own opinion of the better public policy. However, we do not believe these arguments are applicable here. The decision about whether this material should be in the public domain is most properly a legislative one, for two reasons. First, outside certain areas of common law and judicial administration, declaring public policy is usually a legislative function. Second, we are dealing here with a product of the legislative branch itself, because the Revisor is a bureau supervised by the legislature. *See* §§ 13.90 and 13.93, STATS.

Although no separation of powers argument has been made in these briefs, and we do not reach any conclusion about whether such a decision would be beyond the power of the judiciary, we are reluctant to inject our own views of public policy into the decision. Therefore, rather than considering general principles, foreign jurisdictions, or our own view of the best public policy, we focus on determining the legislature's intent in this area, to the extent we are able to glean that intent from existing statutes and declarations of legislative policy. In other words, more than anything else, it is a question of statutory interpretation. Statutory interpretation is a question of law we review de novo. *See* ***State v. Corey J.G.***, 215 Wis.2d 395, 411, 572 N.W.2d 845, 851 (1998).

The first source, although not statutory, is the contract at issue in this litigation. The contract begins as follows:

> On this ____ day of December, 1995, the State of Wisconsin Legislature ("the State") and Law Office Information Systems, Inc. ("LOIS") enter into the

> following agreement. The Wisconsin Legislature is represented by Donald J. Schneider, Senate Chief Clerk, designated for this purpose by the Joint Committee on Legislative Organization as the agent of the Wisconsin Legislature.

If the legislature thought the Revisor's material should be in the public domain, pursuant either to statute or general public policy, it would be inconsistent with that belief to enter into this contract requiring LOIS to pay for using the material. The fact that the legislature made this agreement strongly suggests that it does not believe the material is or should be in the public domain. If it did, it would have simply let LOIS use the material without change.

Beyond that, the legislature has directed that the official version of the Wisconsin statutes shall be sold for a price. Section 35.91(1), STATS. That statute provides that the Department of Administration shall fix a price "based on cost plus 75% of the revisor's expenditures under s. 20.765(3) during the preceding biennium." In other words, approximately three-quarters of the Revisor's budget is to be recovered through sale of the official statute volumes.

The State argues that placing the Revisor's material in the public domain is inconsistent with this statute because it would allow commercial users to simply copy the material and distribute it at a price lower than the State's, thereby making it more difficult for the Revisor's costs to be recovered, as directed by statute. We conclude that placing the material in the public domain has at least the potential to conflict with the current policy of recovering the Revisor's costs. Therefore, it is most consistent with this statute to conclude that the material is not in the public domain.

LOIS argues that the material should be held in the public domain because of certain other statutes that show the intent of the legislature to provide

"the broadest publication" of Wisconsin law to Wisconsin residents. These statutes include §§ 13.92, 13.93, 35.15, 35.18 and 35.23, STATS., and they impose on the Revisor and Legislative Reference Bureau various duties such as publication of Acts of the legislature, the Laws of the state, and the statutes.

These provisions unquestionably show a clear legislative intent that this material be created and officially published, but there is no law providing that the statutes should be given without charge to all residents who ask for them. To the contrary, there is a statute setting a method for fixing their price, as we discussed above. Thus, the legislature's intent is that the broadness of the publication should be limited by the willingness of the public to pay the established price. This intent is better served by not having the material in the public domain.

LOIS also points out that Bruce Munson, the Revisor of Statutes, stated in a deposition that he recommended to the co-chairs of the legislature's Joint Committee on Legislative Organization that the State register its copyright in the Revisor's material.[3] However, they took no action on his proposal. LOIS also asserts that legislation was introduced, but not enacted, that would have authorized the Revisor to register the copyright.[4]

We draw no inference from either of these events. LOIS does not provide any explanation for why no action was taken. Failure to act does not necessarily indicate opposition to a proposal, because there may be other reasons

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[3] We note that according to Munson the committee co-chairs were legislators "Rude and Prosser."

[4] This was 1995 Senate Bill 637, § 59, according to LOIS.

action was not taken. And, while these bodies did not act to authorize copyright registration, apparently they also did not act to waive the copyright and place the material in the public domain.

In summary, the legislature has shown no intent to have the Revisor's material in the public domain, but it has shown significant indication that the State be compensated for the preparation and use of the official statutes. Under these circumstances, and considering the proper role of the court and the basic premise of copyright law, we conclude that there is no basis for this court to hold the Revisor's material in the public domain.

IV. CROSS-APPEAL

LOIS raises two issues in its cross-appeal. It argues first that it should have been awarded pre-judgment interest. Because we reverse the judgment, we need not address that issue. The other issue is whether the trial court erred by denying LOIS's motion for judgment when the State failed to file a timely reply to LOIS's counterclaim. There is no dispute that the State's reply was untimely.

In ***Pollack v. Calimag***, 157 Wis.2d 222, 235, 458 N.W.2d 591, 598 (Ct. App. 1990), we held that a defendant may not obtain a default judgment based on a plaintiff's failure to reply to a counterclaim. Our reasoning was based on the default judgment statute, § 806.02(2), STATS., which provides that a "plaintiff" may move for a default judgment. There is no provision for a defendant to move for a default judgment, and we found no indication that the terms "plaintiff" and "defendant" in the statute may be reversed for purposes of a counterclaim. ***Id.***

LOIS attempts to distinguish ***Pollack*** by arguing that its motion was not for a default judgment, but was instead a motion for judgment on the pleadings pursuant to § 802.02(4), STATS. That statute provides that certain averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. A counterclaim requires a responsive pleading. *See* § 802.01(1), STATS. LOIS argues that it sought judgment on the ground that the averments in its counterclaim were admitted by the State's failure to deny, and therefore LOIS was entitled to judgment based on those averments. However, we see no practical difference between this argument and a default judgment. A default judgment is essentially nothing more than the granting of judgment as if the complaint's averments were conceded. Therefore, we regard ***Pollack*** as controlling, and conclude that the trial court was correct in denying the motion.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.