

Protecting Standards: General Public License (Copyleft) Versus Public Domain

By Winchel “Todd” Vincent, III,
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Executive Summary

This document answers the questions raised at the September 17th, 1999, Legal XML meeting regarding Legal XML intellectual property policy and, specifically, “copyleft.” *Part I* is an introduction and short reminder of what transpired at the Legal XML meeting.

Part II is a layman’s introduction to the concepts of “legal person” and “rights.” *Part II* explains that Legal XML is not a “legal person” and that it cannot, as a result, hold or assert intellectual property rights as it is currently organized.

Part III is an cursory overview of copyright and patent law. *Part III, A. Introduction* explains that “copyleft” is a type of license and applies both to copyright and to patent and is more appropriately termed “General Public License.” *Part III, B. Copyright* makes clear that state government employees can assert copyright and that, while federal government employees cannot assert copyright, they can still contribute to a standards effort as coauthors and have their work protected by “General Public License” or “Copyleft.”

Part IV, A. explains the concept of a license. *Part IV, B.* explains that a General Public License usually grants the public free use of intellectual property embodied in a standard. Under a General Public License, documentation is usually not allowed to be altered, but software code is allowed to be altered, provided it remains “open.” *Part IV, C.* explains how standards organizations use General Public Licenses to protect standards.

Finally, *Part V, A.* concludes that Legal XML members must form a legal entity or associate themselves with a legal entity to create a manageable legal infrastructure supporting a workable intellectual property policy. *Part V, B.* briefly notes that Legal XML is concerned primarily with writing documentation, but that there should be no reason why a member cannot contribute software as well. *Part V, C.* highlights again the point that both federal and state government employees can contribute to a standards process under a “GPL” or “copyleft” regime. *Part V, D.* concludes that failure to “copyleft” is dangerous and unwise for anyone wishing to contribute to an open standards process.

Special Thanks to Commentators

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I. Introduction

At the Legal XML face-to-face meeting in Los Angeles, there was lively debate over the proposed Legal XML intellectual property policy. In particular, John Greacen from New Mexico raised questions about the appropriateness of a “copyleft” policy where government contributed intellectual property to a standards effort. His contention was the intellectual property should be in the “public domain.”¹ Mr. Greacen’s objection is particularly significant because he is head of the Joint Technology Committee (“JTC”) that recently announced plans to meet in November to establish Legal XML standards for court filings. Whether JTC decides to collaborate with Legal XML or not, developers who consider working with either group should pay careful attention to the intellectual property under which they contribute. This paper is meant to answer the questions of Mr. Greacen and others about “copyleft” or “General Public License” and “public domain.”

Because laymen will read this document, it is important to overview the concepts of a “legal person” and “intellectual property” generally. Readers with legal education may wish to skip these initial sections.² Note as well, legal and intellectual property concepts vary somewhat internationally. American concepts are used below.

II. Legal Person and Rights

A legal person can be a “natural person” (a human being) or a “legal entity.” “Legal entities,” include, but are not limited to, corporations, partnerships, limited liability companies, trusts, and various government subdivisions. A “legal person,” whether a natural person or a legal entity, generally has the ability to enter into contracts.³ A “legal person” generally has the ability to sue and be sued.⁴

Only a “legal person” can own or assert a “right.” A “right” can be, among other things, a contract right or an intellectual property right. A “right” can be tangible or intangible.

The relationship between a “legal person” and “rights” is important to understand because having a right in something⁵ is usually legally meaningful and valuable only if the holder of the right (the “legal person”) has the ability to sue an infringer. For instance, a random group of people standing on a street corner cannot *collectively* assert and enforce a right to a newspaper laying on the ground because a random group of people standing on a street corner does not constitute a recognized “legal person” that can either hold rights, sue, or be sued. Note, however, any of the people on the street corner could *individually* assert a right in the newspaper, because a “natural person” is a “legal person” with legal capacity.⁶ Furthermore, if the group of people were to agree to join together to form a legal entity, the legal entity could assert a right in the newspaper.

In America, most legal entities, such as corporations or limited liability companies, come into existence in accordance with state laws. Generally, but not always, legal persons (whether natural persons or legal entities) who want to come together to form a new legal entity must act affirmatively under state law. For instance, in Georgia and in other U.S.

states, to form a limited liability company, organizers must file articles of organization with the Secretary of State and pay a fee.

Some legal entities come into existence “by default” under state law – i.e., without the organizers taking formal action. For instance a partnership is formed when two or more legal persons enter into a business endeavor for profit.⁷ In this case, there is no need for legal agreements between partners in order to create an entity subject to partnership law, because “default” provisions create the legal infrastructure absent agreements.⁸

“Legal XML,” as it is currently organized, is not a partnership because its members are not engaged in an endeavor “for profit.” Indeed, Legal XML is not a legal entity at all. It cannot be a legal entity without formal organization under appropriate law. Accordingly, Legal XML cannot assert rights, it cannot sue, and it cannot be sued. “It” also cannot enter into contracts. It cannot hold intellectual property rights.

III. Intellectual Property: Overview

A. Introduction

There are various types of intellectual property rights, including “copyright,” “patent,” “trademark,” and “trade secret.” Intellectual property rights are “intangible” rights as opposed to “tangible” rights. Unlike a right to a tangible thing, such as a pile of grain or an automobile, a right to an intangible thing is somewhat “slippery.”⁹ Indeed, it is often difficult to identify, assert, own, and control an intangible right, especially on the Internet.

Another intellectual property concept is “public domain.” “Public domain” is not a “right” at all, but instead a lack of a right. That is, when intellectual property is “in the public domain” it is not “owned” by anyone – i.e., no one can assert a “right” to it. Anyone can use public domain intellectual property, copy it, distribute it, change it, or create derivative works from it.¹⁰

Legal XML is concerned with both “copyright” and “patent” rights. Legal XML is less concerned with “trademark” and “trade secret” rights. That is, for instance, Legal XML does not seek to obtain “trade secrets” in proprietary software. Legal XML only seeks enough intellectual property to create a standard that will reside in between proprietary software.¹¹ As a result, this paper focuses on “copyright” and “patent.”

Indeed, the term “copyleft” is somewhat misleading because it leads one to believe that “copyright” alone is implicated. This is not correct. Both “patent” and “copyright” are implicated by “copyleft.” A synonym for “copyleft” is “general public license” or “GPL.” In fact, “copyleft” is not a type of intellectual property right, but a type of license, explained below.¹² Intellectual property owners can grant licenses for both copyrighted and patented work.¹³ This document will use the term “GPL” instead of “copyleft” because GPL more generically and accurately describes the intellectually property policy Legal XML seeks to achieve – i.e., a policy that fosters open communication in the pursuit of open, non-proprietary, technical standards.¹⁴

B. Copyright

The U.S. Copyright Act, 17 U.S.C. § 102(a), extends copyright protection to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . .”¹⁵ A work is protected by copyright law *automatically* when it is created and fixed in a tangible medium of expression.¹⁶ That is, the author owns the work and obtains rights to it by “default.” The “©” symbol and the words “All Rights Reserved” are no longer required in America,¹⁷ although it is prudent to use them because they are still required in other countries.

A copyright owner has the following rights:

- Reproduction Right
- Adaptation Right
- Distribution Right
- Public Performance Right
- Public Display Right¹⁸

Section 102(a) of the Copyright Act protects eight categories of works, including “literary works.”¹⁹ Computer programs, code, documentation, and database are considered “literary works.” Most, if not all, of what Legal XML will produce are “literary works.”

In a collaborative standards effort, it is important to understand the concepts of “compilation”, and “derivative” works. Section 101 of the Copyright Act defines a *compilation* as “a work formed by the collection and assembling of preexisting materials in such a way that the resulting work as a whole constitutes an original work of authorship.” Thus, directories (such as a GOPHER directory) and databases are types of compilations. A *derivative work* is a work that is based upon one or more preexisting works,²⁰ such as multi-media. Copyright law protects the author of a compilation or derivative to the extent that the author contributed to the work. Thus, both compilations and derivative works implicate the copyrights of two (or more) authors: (1) the author of the compilation or derivative work and (2) the author(s) who created the preexisting works. Significantly, the copyright protection given to the author(s) of preexisting works that have been incorporated within a compilation or derivative work is not superseded by the copyright of the compiler.²¹ This final point is important because it serves as a legal rational for why a General Public License, described more fully below, can be enforced.²²

Federal government employees cannot copyright works.²³ However,

under this definition a Government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee.” The effect of section 105 “is intended to place all works of the United States Government, published or unpublished, in the public domain. This means that the individual Government official or employee who wrote the work could not secure copyright in it or

restrain its dissemination by the Government or anyone else, but it also means that, as far as the copyright law is concerned, the Government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term "work of the United States Government" does not mean that a work falling within the definition of that term is the property of the U.S. Government.²⁴

However, coauthors of the same work jointly own the work.²⁵ This is important to realize because it serves as a rational for why federal government employees can participate in standards organizations without fear that their work will fall into the public domain. To the extent that federal government employees coauthor works with non-federal government contributors, the work is jointly owned and is copyrightable (and "copyleftable") by the non-federal government contributor. It is, therefore, safe from the public domain.

Unlike Federal government employees, state government employees can copyright works; however, this ability is subject to a public policy exception that traditionally applies only to statutes, regulations, and judicial opinions.²⁶ Case law supports the notion that the public policy exception does not apply to privately developed standards, even those standards that are not given away for free,²⁷ but especially those standards subject to a General Public License that *are* given away for free. Indeed, the rationale for the public policy exception is (1) the public owns the statutes, regulations, and opinions because it pays the salaries of the government officials who create them and (2) as a matter of public policy, the work of legislators, regulators, and judges is the law, which, binding every citizen, should be free for publication to all.²⁸ Because standards licensed under a General Public License (explained below) are both free and open, a state government copyright in them would not run afoul of the public policy exception.

C. Patent

In the United States, a person may patent any invention that is new, useful and, nonobvious.²⁹ Unlike copyrights, the inventor must register the patent with the United States Patent Office. If the Patent Office determines that the patentability requirements have been satisfied, then a patent will be granted.³⁰

The owner of a patent has the right to exclude all others from *making, using, selling, or importing* the invention.³¹ This exclusive right is granted for 20 years for most patents.³² However, patent rights are enforceable only in the jurisdiction where the inventor received a patent. Thus, a patent granted in one country has no effect in another country unless the inventor obtained a patent in the second country as well either directly through another national filing or indirectly through a treaty or other international mechanism agreed to by the various participating countries.³³

Both federal and, presumably, state government employees can patent qualified inventions.³⁴

IV. General Public License (Copyleft)

A. License

A “license” is a “contract” in which a party with proper authority (“licensor”) grants permission for another party to do something that would otherwise be prohibited.³⁵ Thus, a license is an agreement by the licensor not to enforce its legal rights.

For instance, when a person “buys” software from a software company, the person is not buying the intellectual property rights (patent or copyright) in the software.³⁶ The person is buying a “license” to *use* the software. The license may or may not grant other rights to the user. Recall, as owner of a copyright, an author has the exclusive right to reproduce, distribute, alter, display, and perform the software. As an owner of a patent, an inventor has the exclusive right to make, use, and sell the invention. Software companies generally sell licenses to the public to *use* software, but they retain the exclusive right to copy, distribute, alter, or resell copies of the software.

B. What is a General Public License?

Generally, a General Public License (GPL) is a license granted by a copyright or patent holder to the public to use, copy, and distribute either *documentation* or *software and documentation*.³⁷ A GPL, at a minimum, usually grants permission to use, copy, and distribute, without fee or royalty and without warranty, provided that the copyright and the license terms are perpetuated in copies or derivative works.³⁸ Additionally, a GPL generally requires the GPL to be perpetuated in new copies or derivatives. Thus, granting a GPL is similar to publishing into the public domain, except that the owner retains certain rights in the work. The retained rights are generally kept to preserve the openness of the work.

A documentation GPL and a software GPL are slightly different. A documentation GPL usually allows the public to use, copy, and distribute the documentation. However, a documentation GPL usually does not allow the work to be altered.³⁹ Conversely, a software GPL sometimes allows, among other things, code to be altered.⁴⁰ The idea is that if someone wants to “hack” the code, they may, but new code must remain open.

Although the validity of a GPL has never been challenged in court,⁴¹ there are good arguments based on analogous shrinkwrap and shareware case law that suggest a GPL would be enforceable.⁴² Whether or not a GPL would be enforceable, it would be risky to violate the terms of a GPL both because of the threat of litigation and because of the risk of damaged goodwill.⁴³

C. Standards Organizations Use General Public License to Protect Standards

Standards organizations often harness the international collaborative power of the Internet to create standards quickly and promote them broadly.⁴⁴ Standards organizations that create either *documentation* or *software with accompanying documentation*⁴⁵ are not usually interested in selling intellectual property rights to the public. Instead, a standards

organization creates standards so the public can *use* them for free. Standards organizations use General Public License to ensure that intellectual property is distributed to the public for free and remains free.⁴⁶

Equally important to a standards organization is that the standard *not be altered*. Obviously, if the standard is altered, it is no longer a standard.⁴⁷ GPL protects standards from alteration by stating in the license that the intellectual property cannot be altered and that the GPL must be perpetuated to prevent future alterations. In this way, the standard is preserved.

V. Final Analysis

A. Legal XML Must Become a Legal Entity or Associate Itself With a Legal Entity

The analysis regarding “legal persons” was done to highlight the fact that Legal XML, as it now exists – a group of individuals on a mailing list, is not a legal entity and cannot own or assert intellectual property rights. Legal XML, as it now exists, cannot sue or be sued. It cannot grant a General Public License. Individual members can own intellectual property rights and can grant a GPL. However, it would be unmanageable for members to agree among themselves to individually own our respective contributions but to promise to grant a GPL. If this were the case, we would each be required to sign bilateral agreements with each other and with all new members as they joined. Otherwise, we would be forced to rely on trust alone, which, unfortunately, reflects the current situation.

Trust is not enough and manageability is essential. To be manageable, one entity should hold Legal XML intellectual property rights. That entity should warrant (promise) to contributing members that it will grant a GPL. That same entity should, in fact, grant a GPL. To effectuate this scheme, membership should enter into a contract with the legal entity – the Intellectual Property Steward. Under the contract, the Steward should not have a right to use the intellectual property for its own purposes or financial gain. Further, it should be obligated to follow the direction of membership. Because the Steward is the only legal entity that can sue an infringer (i.e., the only legal entity that has standing – a legal term of art), the Steward would have the obligation to write demand letters and litigate, if necessary. To defer potential costs to the Steward, Sponsors and Membership would have parallel obligations to support the Steward financially in case of litigation.

The Steward can be any legal entity. Legal XML membership is, therefore, faced with two possibilities: (1) Membership can form a legal entity, such as a corporation, limited liability company, unincorporated association, or trust, and then contract with that legal entity as described above. Or, Legal XML membership can solicit an existing legal entity to act as Steward and contract with that legal entity. The advantage of the latter option is that it is administratively easier not to form a new entity, pay fees, or jump through other legal and administrative hoops to form a new legal entity. Furthermore, it makes sense to

leverage the organization, infrastructure, and reputation of an existing legal entity such as a recognized legal association or a university.⁴⁸

B. Documentation Versus Software

Legal XML is likely to produce documentation, not software. Documentation is normally covered by copyright, not patent. However, if a member wants to produce software, then the member should be able to donate the software to Legal XML so that it will be subject to the Legal XML intellectual property policy.

C. Federal and State Government Employees Can Participate Under a “Copyleft” Regime

It is important to emphasize that General Public License (“copyleft”) is a license and applies to both copyrighted works and patented works. State government employees can copyright works. Federal government employees are prohibited from copyrighted works. However, to the extent that federal government employees coauthor work, the work can be protected by the copyright asserted by the non-federal government contributor and subject to a GPL. There is, therefore, no reason why any government employee cannot participate in a standards process based on GPL or “copyleft.”

D. Conclusion: Failure to “Copyleft” is Dangerous

The question facing Legal XML is what intellectual property policy should membership adopt. That is, should XML standards for the legal industry be promulgated under an intellectual property policy based on “general public license”, on “public domain” or on the basis of “trust” (i.e., everyone keeps their intellectual property rights and promises, without legal agreement, not to exclude others from using their donation)? This author takes the position, based on unfortunate experience, that an intellectual property policy based on trust is unrealistic and unworkable. Furthermore, publishing into the public domain is dangerous because an author or inventor cannot assure that an intellectual property contribution will be used for its intended purpose: open, non-proprietary standards. Thus, not only is GPL or “copyleft” the appropriate policy, but to do anything else is unrealistic, unworkable and, simply, dangerous.

The following two paragraphs expand the above arguments somewhat further:

As described above, the problem with publishing into the public domain is that anyone can take the work, alter it slightly, and then assert intellectual property rights in it. In essence, the intellectual property can be “hijacked.” It is true; asserting an intellectual property right in the new work does not take the original, preexisting work out of the public domain. So, everyone can continue to use the preexisting work. However, the new work is not in the public domain and can be controlled or sold, therefore, by the new author or inventor. If the new author or inventor builds on the public domain work and creates really “cool” extensions to it, then it is likely that people will use the new, non-standard, really “cool” technology. After all, there will always be users who are less interested in a standard and more interested in really “cool” technology. The extensions adulterate the standard and, importantly, inhibit or make it impossible for “standard” application to “talk” to the application with the extensions. Of course, the purpose of a

standard is to ensure that all applications can “talk” to each other. Thus, the result of publishing into the public domain is that the community no longer benefits from open, non-proprietary standards. Examples of how this has happened in “real life” are the Netscape-Microsoft Browser Wars and the current Microsoft-Sun Java Wars.

It is useful, as well, to examine what happens when a contributor to a standard technology chooses not to vest rights in contributed intellectual property in the standards organization (the Intellectual Property Steward). If, during the standards process, the “rogue” contributor decides that it does not like the way the development process is going, the contributor can pull out of the process and take its intellectual property with it (i.e., it can assert rights to the intellectual property, so that no one else can use it). In this case, the standard must be reworked to exclude the protected work, the standard must be abandoned, or those using the standard must pay royalties to the disgruntled “rouge.”⁴⁹ In “real life” this has happened and is happening within the Internet Engineering Task Force.⁵⁰ Indeed, all contributors, to whatever effort, should be wary of contributing intellectual property to an effort that does not require all donated intellectual property to be put “in the same pot” and licensed under a GPL. If a “rogue” becomes angry and leaves the process, the intellectual property goes too and the standards may have to be completely reworked.

To conclude, general public license or “copyleft” is the intellectual property policy employed by both the Internet Engineering Task Force and the World Wide Web Consortium. This type of intellectual property policy is also favored by Massachusetts Institute of Technology’s E-Commerce Architecture Project (ECAP)⁵¹ and Harvard’s Berkman Center for Internet and Society’s Open Code Project.⁵² These policies, while not flawless and sometimes varied, work well for both organizations. Both the IETF and the W3C have been and continue to be extremely successful in creating Internet standards.⁵³ The W3C intellectual property policy and its accompanying legal agreements create a somewhat “tighter” legal infrastructure than the IETF. The Legal XML Draft Operating Rules borrow from both models, but tends to follow the W3C model more closely. Whatever model or policy is adopted, it is clear that Legal XML should adopt an intellectual property policy based on general public license to ensure not only that its work is not “hijacked” or adulterated, but also to ensure that contributors to the process are not able to simply walk away if and when they are not happy with how the standards are developing.

¹ Version 0.2 of this document was circulated among several people for comment before released to the Legal XML list. One commentator, who was at the Legal XML face-to-face meeting, was concerned that the cited text does not capture John Greacen’s objections. My interpretation of John’s statement at the meeting is that John objected to the idea of “copyleft” and, specifically, that he thought it was an inappropriate policy for government employees. That is, John felt that government employees were obligated by law to publish into the public domain and that they *should* publish into the public domain. The commentator’s interpretation of John’s statement is that he did not necessarily object to the idea of “copyleft” but that as a state government employee he was *obligated* to publish into the public domain, therefore, he could not agree. As will be shown below, federal government employees are not able to copyright. However, state government employees are able to copyright, subject to a public policy exception. Both federal and state government employees are able to patent. See citations below.

² The introductory sections on “legal person” and “intellectual property” do not contain, and should not be considered, full legal analysis of this area of the law. These sections are purposefully general. They state the general rule, but do not consider exceptions or jurisdictional variances. For instance, one commentator noted that there have been exceptional cases where a “goat” or a “boat” had been deemed “legal persons.” For the sake of brevity and speed, this paper does not consider such exceptions. Otherwise, this author believes that the information is accurate and notes that none of the commentators argued that the general rules of law were stated incorrectly, but that such general statements could easily be attacked.

³ Exceptions exist, for instance, for juveniles and, probably, for goats and boats.

⁴ Again, exceptions exist. Most notably, the notion of “sovereign immunity” sometimes precludes suit against governments.

⁵ For example, asserting a contract right or an intellectual property right.

⁶ Whether or not any particular individual could *successfully* prevail in asserting a right to the newspaper is a related, but different, legal question.

⁷ See e.g., O.C.G. A. § 14-8-6(a) A partnership is an association of two or more persons to carry on as co-owners a business for profit and includes, for all purposes of the laws of this state, a limited liability partnership; see also O.C.G.A. § 14-9A-111.

⁸ Please note, it is always wise to have formal partnership agreements, especially if partners seek to alter the “default” state law partnership rules.

⁹ See e.g., Thomas J. Smedinghoff, Editor, *ONLINE LAW* (Addison-Wesley Developers Press, 1996) 126 (the term “slippery” is not used in the cited work, but captures the concept found in it).

¹⁰ “To the extent that information is in the public domain, it may be freely used, copied, adapted, distributed, and displayed without fear of copyright infringement.” Thomas J. Smedinghoff, Editor, *ONLINE LAW* (Addison-Wesley Developers Press, 1996) 177.

¹¹ See Legal XML Poll 1, Question 9. Point total was 1.5 where 2.0 is “strong agreement” and 1.0 is “agreement.”
See http://e-ct-file.gsu.edu/LegalXML/Polls/Poll01/Poll_May_06_1999_ConsensusMeter_Average_with_Questions.asp.

¹² Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997).

¹³ Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997). (For example, the GNU GPL states that any relevant patent must be "licensed for everyone's free use or not licensed at all." Thus, if a user cannot distribute derivative software covered by the GNU GPL without a patent, then the user may not distribute the software at all.) (This agreement [GPL] prevents a programmer from establishing copyright or patent rights in the software.)

¹⁴ See Legal XML Poll 1, Question 1. Point total was 1.75 where 2.0 is “strong agreement” and 1.0 is “agreement.”

¹⁵ See also, *Copyright for Computer Authors*, Thomas G. Field, Jr., <http://www.fplc.edu/field/COPYSOF.htm>.

¹⁶ Thomas J. Smedinghoff, Editor, *ONLINE LAW* (Addison-Wesley Developers Press, 1996) 137.

¹⁷ Thomas J. Smedinghoff, Editor, *ONLINE LAW* (Addison-Wesley Developers Press, 1996) 137, 144 (Proof of copyright infringement requires proving the existence of a copyright owned by the author, access by the purported infringer to the copyrighted material, and a substantial similarity between the author's material and the infringer's material. The term of copyright protection is the length of the author's life plus fifty years.) (Registration of copyrighted material is also not required. However, the U.S. Copyright Act grants authors addition rights if a work is registered.); *Copyright for Computer Authors*, Thomas G. Field, Jr., <http://www.fplc.edu/field/COPYSOF.htm>.

¹⁸ Thomas J. Smedinghoff, Editor, *ONLINE LAW* (Addison-Wesley Developers Press, 1996) 155.

¹⁹ 17 U.S.C. § 102(a). See also, Thomas J. Smedinghoff, Editor, ONLINE LAW (Addison-Wesley Developers Press, 1996) 139. (Other types of works include musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.)

²⁰ 17 U.S.C. § 101 (definition of derivative work).

²¹ 17 U.S.C. § 103(a), (b). See also, 17 U.S.C. 201(c) Contributions to Collective Works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

²² That is, because the author of the preexisting work still controls his or her work and can preclude the owner of the compilation or derivative work from using the preexisting part. This is especially important for standards, because it is important not only to protect intellectual property contributed to a standard, but also to ensure that the standard is not adulterated.

²³ 17 U.S.C. § 105. See also, Thomas J. Smedinghoff, Editor, ONLINE LAW (Addison-Wesley Developers Press, 1996) 179.

²⁴ 1976 Acts. Notes of Committee on the Judiciary, House Report No. 94-1476.

²⁵ 17 U.S.C. § 200(a). (Initial Ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.)

²⁶ *Rand McNally & Company, v. Fleet Management Systems, INC.*, 591 F.Supp.726 (1983) (The law in this area is old and well settled. It has remained limited to statutes and opinions promulgated by government officials for general application. No great expansions in scope have occurred since the major decisions of the late 1890's. The court sees no reason to extend this body of law to a privately published distance guide that is used as a tariff reference publication.); *Building Officials & Code Adm. v. Code Technology, Inc.*, 628 F.2d 730, 735-736 (1980) (Works of state governments are therefore left available for copyright protection by the state or the individual author, depending on state law and policy, and "subject to exceptions dictated by public policy with respect to such publications as statutes and judicial opinions." Latman, *The Copyright Law* 43 (5th ed. 1979)); Thomas J. Smedinghoff, Editor, ONLINE LAW (Addison-Wesley Developers Press, 1996) 179 (citing *Building Officials & Code Adm. V. Code Technology, Inc.*, 628 F.2d 730, 733-735 (1st Cir. 1980) (However, certain works by state and local governments may be found not copyrightable for public policy reasons.))

²⁷ *Peter Veeck, v. Southern Building Code Congress International, Inc.*, 49 F.Supp.2d 885, 887-887 (1999) (Mr. Veeck asserts that SBCCI's standardized codes became law and thus entered the public domain when the municipalities by adoption as local law required their enforcement. This argument rests ultimately upon *Banks v. Manchester*, 128 U.S. 244, 9 S.Ct. 36, 32 L.Ed. 425 (1888), which held that judicial opinions are uncopyrightable. Banks in turn rests upon two grounds, neither of which would justify invalidation of SBCCI's copyright protection. See *Practice Management Information Corporation v. The American Medical Association*, 121 F.3d 516, 518 (9th Cir.1997), cert. den. --- U.S. ----, 118 S.Ct. 339, 139 L.Ed.2d 263 (1997). The Ninth Circuit, in *Practice Management*, explained those two grounds and why the Banks Court held that judicial opinions are not subject to copyright: (1) the public owns the opinions because it pays the judge's salaries, and (2) as a matter of public policy, the whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all. *Practice Management*, 121 F.3d at 518.

With regard to factor number one, there is no question that SBCCI is a private non-profit corporation which carries out research, compiles data, drafts standardized codes, and then prints them in a usable fashion for its customers. Further, SBCCI offers services in conjunction with the printing of its codes to assist the reader in better understanding its codes. SBCCI bears the financial weight of this process. The only public money used to facilitate SBCCI's work is that income derived from the sale of SBCCI's product. As such, the public does not own SBCCI or its works. Further, the copyright system's goal of promoting the arts and

sciences by granting temporary monopolies to copyright holders was not at stake in Banks. Practice Management, 121 F.3d at 518. In contrast, the production of the standardized codes provides the economic incentive for SBCCI to produce and maintain the standardized codes. Id. As the Ninth Circuit stated, "To vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity, a matter of particular significance in this context because of the increasing trend toward state and federal adoptions of model codes." Practice Management, 121 F.3d at 518 (citations omitted). As SBCCI and National Fire Protection Association point out, invalidating or not enforcing these copyrights on the ground that the standardized codes entered the public domain when the municipalities adopted them as law would expose copyrights on a wide range of privately authored model codes, standards, and reference works to jeopardy. Id. at 519. As the Ninth Circuit stated, "Non-profit organizations that develop these model codes and standards warn they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency." Id. Agreeing with these assertions, the Court finds that the first Banks element is not met in the present case.

The second element, one of public policy, also dictates that SBCCI's copyright in its standardized codes are enforceable. Banks and Mr. Veeck rely upon the due process requirement of free access to the law. Mr. Veeck argues that it is necessary to publish the standardized codes on the Internet in order to provide free access of the law to the public. Mr. Veeck states that the codes in question are not otherwise generally available. The Court finds these assertions without merit.); See also *Practice Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516, 518 (1997).

²⁸ *Practice Management Information Corporation v. The American Medical Association*, 121 F.3d 516, 518 (1997).

²⁹ 35 U.S.C. §§ 100-104; Thomas J. Smedinghoff, Editor, ONLINE LAW (Addison-Wesley Developers Press, 1996) 243.

³⁰ In order to pass the nonobvious, or novel, requirement, the invention must not be "prior art." Prior art is defined as the body of public knowledge that predates the date of invention. That is, the invention would not have been obvious to a person skilled in the art with which the invention is concerned at the time the invention was made. Prior art includes prior patents and publications and common knowledge in a field.

³¹ See Patents for Software-Related Inventions, Jeffrey R. Kuester, Ann Moceyunas, and Bethew B. Jennings III, <http://www.tkhr.com/articles/pat4sof.html>. Thomas J. Smedinghoff, Editor, ONLINE LAW (Addison-Wesley Developers Press, 1996) 241.

³² In the U.S. the 20-year term begins when the patent application is filed with the Patent Office. Thomas J. Smedinghoff, Editor, ONLINE LAW (Addison-Wesley Developers Press, 1996) 241.

³³ In the United States, an application must be filed within one year of the date of first sale or offer of sale or the sale of anything incorporating the invention, within one year of a description of the invention, or within one year of a public or commercial use of the invention. This grace period may, however, cause problems for the inventor who wishes to patent his invention in foreign countries. Most other countries require "absolute novelty." This means that a patent will not be granted if the invention has been disclosed in any way.

³⁴ Thomas Lizzi, *From Benevolent Administration To Government Employee Inventions, Human Genomes, And Exclusive Licensing: Is Governmental Ownership Of Patents Constitutional?*, 34 Duq. L. Rev. 299 (1996); See e.g., 35 § U.S.C.A. 209.

³⁵ Thomas J. Smedinghoff, Editor, ONLINE LAW (Addison-Wesley Developers Press, 1996) 285.

³⁶ Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997) (Therefore, a customer who has a license to use a copy of a program is a rightful possessor but not an owner of his or her copy).

³⁷ Documentation, as a literary work, can be copyrighted, but not patented. Software may be either copyrighted as a "literary work" or patented if it is new, useful, and nonobvious. See *Patents for Software-Related Inventions*, Jeffrey R. Kuester, Ann Moceyunas, and Bethew B. Jennings III, <http://www.tkhr.com/articles/pat4sof.html>.

³⁸ See <http://www.w3.org/Consortium/Legal/copyright-documents.html>.

³⁹ See <http://www.w3.org/Consortium/Legal/copyright-documents.html>.

⁴⁰ Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997). (The GNU GPL gives users permission to copy, modify, and distribute GNU software conditioned on the user's agreement to license all derivative versions under the same terms. Further, users must agree (1) not to establish proprietary rights in the software; (2) to provide the source code to anyone to whom they give the object code; (3) to include in the software notice of the applicability of the GNU GPL; and (4) to accept the software without warranties of any kind.); See Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2b*, 36 Hous. L. Rev. 179 (Spring 1999). (This article lists elements of an "open source" GPL: (1) Unencumbered Redistribution (2) Source Code Form (3) Derivative Works (4) The Author's Attribution and Integrity (5) No Warranties (6) Self-Perpetuating License Terms (7) Non-Discriminatory and (8) Non-Contamination. See e.g., Sun Community Source Licensing, [http://www.sun.com/software/communitysource/java2/\\$sessionid\\$5XGIQNAAB4ZI5AMUVFZE45Q](http://www.sun.com/software/communitysource/java2/$sessionid$5XGIQNAAB4ZI5AMUVFZE45Q)

(This is not an example of a General Public License, but shows how licenses can be structured to serve particular purposes when distributing source code. For example, the Sun web page points out that "modified source code cannot be distributed without the express written permission of Sun and binary programs built using modified Java 2 SDK source code may not be distributed, internally or externally, without meeting the compatibility and royalty requirements described in the License Agreement). The Sun License agreement can be found at <http://www.sun.com/software/communitysource/java2/licensing.html>.

⁴¹ Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997). (Footnote 137: "See Email from Richard Stallman to Ira V. Heffan (Feb. 20, 1996) (on file with the Stanford Law Review) ("We have sent letters demanding compliance, several times a year I'd estimate. We have never had to sue."))

⁴² Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997). (The enforceability of the GNU GPL has not been litigated. However, enforceability of the GNU GPL can be evaluated by analogy to shrinkwrap and shareware license agreements.)

⁴³ Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 Berkeley Tech. L.J. 759 (Spring 1999). (Distinguish between two sorts of standards: coordinating and regulating. A coordinating standard is a rule that facilitates an activity that otherwise would not exist. A regulating standard restricts behavior within that activity, according to a policy set by the regulators. A coordinating standard can be imposed from the top down, or emerge from the bottom up; a regulating standard is ordinarily imposed only from the top down. Driving on the right side of the road is a coordinating standard. A speed limit is a regulating standard. Coordinating standards limit liberty (drive on the right) to make an activity possible (driving); regulating standards limit liberty within that activity (speeding) to advance a regulatory end (safety or fuel conservation). We understand why an individual would want to deviate from a regulating standard; it is (often) hard to make sense of a desire to deviate from a coordinating standard.) Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 Berkeley Tech. L.J. 115 (1997). (By its own terms, the copyleft agreement is an unusual license; at the most basic level consider the problem of determining damages when the licensee frustrates the licensor's expectation of zero profits under the contract. But what is most significant about the agreement is that it purports to restrict subsequent transferees who receive software from a licensee, presumably even if the licensee fails to attach a copy of the agreement. As this new transferee is not in privity with the original copyleft licensor, the stipulation seems unenforceable. Even so, copyleft no doubt carries some moral force in the on-line community. It therefore serves as an example of a non-binding, informal norm in cyberspace. The copyleft license in this community is the equivalent of a statement of good practices. Surely some programmers dutifully pass along the license and police cases where subsequent transferees receive code without such a license. In short, the notice is aimed at the perpetuation and enforcement of a norm that holds some force in this community, and it is therefore worth mentioning in a catalogue of rights in digital content.)

⁴⁴ Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997) (On numerous occasions the author mentions the idea of “collaboration.” For instance, in conclusion the author states “Copyleft was created as a weapon against copyright. But there are reasons besides a complete disagreement with proprietary rights for ensuring public use of a work without abandoning it to the public domain. The GNU GPL encourages the development of collaborative works by ensuring that they will always be available to the public. It can be applied to other works to provide an island of collaboration and public access in a sea of proprietary rights.”); Lawrence Lessig, The Limits in Open Code: Regulatory Standards and the Future of the Net, 14 Berkeley Tech. L.J. 759 (Spring 1999). (Standards on a computer network are similarly coordinating and regulating. TCP/IP is a coordinating standard—it is a convention that makes exchange of information over the Internet possible. Space allocation on a network server is a regulating standard—it limits the storage space assigned to a particular user to allow many users to use the same storage resource. Most of the important Internet standards to date have been coordinating standards—standards such as TCP/IP, FTP, and HTML. The Internet community has demonstrated well its ability to develop and deploy coordinating standards; this is the genius in organizations such as the Internet Engineering Task Force (“IETF”)); See also, Robert W. Gomulkiewicz, How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2b, 36 Hous. L. Rev. 179 (Spring 1999) (Mentioning “collaboration” several times).

⁴⁵ The W3C generally produces “documentation.” However, it also produces software with accompanying documentation. See, <http://www.w3.org/Status.html>. The W3C has two separate licenses for documentation (<http://www.w3.org/Consortium/Legal/copyright-documents.html>) and software with accompanying documentation (<http://www.w3.org/Consortium/Legal/copyright-software.html>). The Internet Engineering Task Force (IETF) only produces documentation. Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997). (The copyleft mechanism is useful for other works besides software. As traditional works are transformed into digital works, they are increasingly easy to copy, modify, and distribute. Digital technology is useful for speakers who have a message they would like to make available to a large audience at little cost. The digital technologies are ideal media for people who are not selling content, but are only creating and providing it. Authors no longer need publishers to disseminate their thoughts and opinions. Many people will want to develop works collaboratively and allow those that come later to add or change them, thereby standing “on ye shoulders of Giants” instead of on their toes. But they will also want to ensure that their work and all future versions thereof remain available for the benefit of others. Therefore, they will want to do more than merely dedicate their work to the public domain.) (A simplified version of copyleft would permit users to copy but not modify works. This form of agreement could be useful where one wishes to maintain the integrity of a work by preventing modification while allowing free public copying and distribution.)

⁴⁶ Ira V. Heffan, *Copyleft: Licensing Collaborative Works in The Digital Age*, 49 Stan. L. Rev. 1487 (July 1997) (Authors who wish to dedicate their works to the public may think they have no need for copyright or other intellectual property rights. However, if subsequent authors make contributions to an original author's work, those subsequent authors might be entitled to assert proprietary rights in their contributions, thereby defeating the intent of the original author to dedicate his work to the public.) (At first glance, dedication to the public seems like it would be easy to accomplish by simply abandoning copyright and donating the work to the public domain. However, when a work is in the public domain, others can establish their own proprietary rights in new versions to which they contribute. For example, when an old song falls into the public domain after its copyright has expired, a performer can own a copyright in a new arrangement based on the old song. Similarly, when a computer programmer modifies software that is in the public domain, that programmer owns a copyright in the changes he made, even though the underlying work is still in the public domain.) (Footnote 119: When a programmer modifies software developed by someone else, he usually creates a derivative work. For copyright purposes, a derivative work is one which “substantially borrows the expression of ideas from an existing work.” *Apple Computer, Inc. v. Microsoft Corp.*, 759 F. Supp. 1444, 1454 (N.D. Cal. 1991) (citing M. Nimmer, 1 *The Law of Copyright* § 3.01 (1990)), on reconsideration, 779 F. Supp. 133 (N.D. Cal. 1991), aff'd, 35 F.3d 1435 (9th Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995). According to the Copyright Act, a derivative work based on an underlying work in which copyright has not expired must be made with permission from the owner of the copyright in

the underlying work. Copyright in the derivative work does not extend to any preexisting material used in the derivative work: [Copyright extends] only to the material contributed by the author of [the derivative] work, as distinguished from the preexisting material employed in the work.... The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material. 17 U.S.C. § 103(b) (1994).); Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2b*, 36 Hous. L. Rev. 179 (Spring 1999) (Hackers license software, rather than place it in the public domain, because they want to control what is done with their code. Licensing allows hackers to perpetuate their particular software development and distribution model. Without licensing, the open source software development model would be nothing more than an honor system.)

⁴⁷ Consider, for example, two well-known deviations from "standards." The first example is HTML. Anyone who has ever coded HTML knows that the HTML must be viewed in both Internet Explorer and Netscape, because the browsers do not interpret the code in the same way. Netscape tends to reject HTML that does not conform to the standard, while Internet Explorer tends to be more forgiving by rendering even very sloppy HTML. Further, in the early "browser wars" both Netscape and Internet Explorer used browser-specific tags that were only understood by one browser, but not both. This made, and still makes, coding HTML a nightmare. An analogous example of "code wars" is the battle between Sun and Microsoft over Java. See e.g., <http://news.cnet.com/news/0-1003-200-344210.html>; <http://news.cnet.com/news/0-1003-200-342897.html?tag=st.ne.1003-200-344210>; <http://news.cnet.com/news/0-1003-200-342897.html?tag=st.ne.1003-200-342897>. See PC Week, Michael Moeller, July 25, 1997, <http://www.bristol.com/~SarahF/072597.htm>. (Excerpts from the article: "JavaSoft's "write once, run anywhere" mantra has lost some of its allure, as ISVs and users are having trouble smoothly deploying cross-platform Java applications . . ."; "The reasons for the lack of true portability flow from one primary source: ISVs and platform vendors have gone too far in tuning Java and its run-time environment for their own platforms and applications. . ."; "For now we have to tell people that it only works with Netscape [Communications Corp. products] and not [Internet Explorer]," said Asfin Goodarzi, a vice president at the White Plains, N.Y., company." See <http://www.bristol.com/~SarahF/071597.htm>. "Sun has done a great job at selling the market on a load of baloney about Java's cross-platform capabilities," said Cornelius Willis, Microsoft's director of platform marketing. "You are seeing a honeymoon with the Java language. When customers realize that promise is bankrupt, we will provide the best services to Java programmers."

⁴⁸ The W3C, for instance, is not a legal entity. The W3C is a name. The legal entities with which W3C members contract are Massachusetts Institute of Technology, Institut National de Recherche en Informatique et en Automatique (France), Keio University (Japan).

⁴⁹ See <http://www.ietf.org/ipr.html>. Under the IETF process, contributors make intellectual property disclaimers and then promise (through disclosure) to license the technology according the IETF general public license. The promise is based on IETF "tradition" but is not legally binding. As a result, some contributors have left the process and have asserted rights in their intellectual property, thereby excluding others from using it. The W3C intellectual property policy is different in that members are required to vest intellectual property used in W3C standards to MIT and two other universities. In turn, the W3C backers promise to grant a GPL (and, in fact, grant the GPL). The Legal XML operating rules are based on the W3C policy, not the IETF policy.

⁵⁰ Personal knowledge of this author as well as email on file with author from source in another standards organization.

⁵¹ See <http://ac.mit.edu/> and <http://ac.mit.edu/LegalXML/>.

⁵² See <http://www.opencode.org/>.

⁵³ See <http://www.ietf.org/> and <http://www.w3.org/>.