The Florida Senate

Interim Project Report 00-79 *September 1999*

Committee on Governmental Oversight and Productivity Senator Daniel Webster, Chairman

COPYRIGHT OF GOVERNMENTAL SOFTWARE

SUMMARY

Section 119.083, F.S., regulates the use of electronic storage and data retrieval systems by governmental entities. The section imposes general standards on use of these systems by agencies. It also authorizes any state or local governmental entity to copyright data processing software that it develops, to sell or license this copyrighted software based upon market conditions, and to enforce its rights pertaining to copyrighted software. Finally, it provides a fee structure for access to electronic public records. The section will expire October 1, 2000, unless the Legislature reviews and reenacts it.

It is recommended that s. 119.083, F.S., be revived but that subsection (2) be made subject to automatic repeal in 5 years.

BACKGROUND

Section 119.083, F.S., imposes standards on agency use of electronic storage and data retrieval systems. The section also authorizes any state or local entity to copyright data processing software that it develops, to sell or license this copyrighted software based upon market conditions, and to enforce its rights pertaining to copyrighted software. The section also establishes a fee structure for agency-created copyrighted software that is required for accessing electronic public records. Section 119.083, F.S., will expire on October 1, 2000, unless it is reviewed and revived by the Legislature prior to the expiration date. The purpose of this report is to determine whether the section should be revived or permitted to expire.

METHODOLOGY

The methodology for this report included conducting a survey of 159 affected governmental entities, including 33 agencies, 49 cities, 67 counties, and 10 universities regarding s. 119.083, F.S. Of the 159 entities surveyed, 106 returned surveys, for a response rate of 66%. Additionally, staff researched applicable case law, law review articles, and federal copyright law, and conducted interviews with experts on public records law, copyright law, and technology.

FINDINGS

The capabilities of computers have greatly increased during the past few decades. During the same period, costs for computer systems have decreased relative to their abilities. As a result, computers have become basic instruments in offices and homes. Technology has changed the way business is transacted, as well as affected the manner in which people communicate.

Government has also been affected by computers. Technology has changed the manner in which public meetings are held, the ways in which information is provided, and the methods in which records are kept. As a result, issues relating to government and technology are becoming increasingly important.

One of the most important issues affecting Florida relates to the impact of technology on the constitutional right of access to public records. The ability to access public records is a long-standing tradition in Florida. The first state law on the subject passed in 1909. The statutory right of access was raised to a constitutional level in 1992. Article I, s. 24(a) of the State Constitution, states:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The State Constitution does not explicitly contain a definition for the term *public record*, but the term was defined broadly by the Legislature in s. 119.01(1), F.S., to include:

> All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, *data processing software, or other material, regardless of the physical form, characteristics, or means of transmission*, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency *[emphasis added]*.

Based upon their review of the statute, the courts have also defined the term *public record*. The Florida Supreme Court held in *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So.2d 633, 640 (Fla.1980) that

> . . . a public record . . . is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.

Additionally, it has been held that information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet . . . ." *Siegle v. Barry*, 422 So.2d 63 (Fla. 4th DCA 1982). As a result, a public record in Florida can include not only the data that is stored in a computer, but the agency-created data processing software that stores, retrieves or manipulates the data.

Section 119.07(1)(a), F.S., requires a person with custody of a public record to permit it to be examined by any person at reasonable times and under reasonable circumstances. The custodian of a record must respond to a request whether it is in writing, over the telephone, or in person. A person requesting access may not be required to disclose the purpose for which he or she wants the record. Further, an agency may not require the requestor to disclose his or her name, address, or telephone number unless the custodian is specifically required by law to do so for a particular record. *See, Bevan v. Wanicka*, 505 So. 2d 1116 (Fla. 2d DCA 1987).

Article I, s. 24(c) of the State Constitution and the Public Records Law authorize the Legislature to create exemptions to public records requirements pursuant to specified limitations. An exemption that is relative to this report is found in s. 119.07(3)(o), F.S. That section provides that data processing software obtained by an agency under a licensing agreement which prohibits its disclosure and which is a trade secret, and agency-produced data processing software which is sensitive, are exempt. The term *sensitive* is defined to mean only those portions of data processing software, including the specifications and documentation, used to: (a) collect, process, store, and retrieve information which is exempt; (b) collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or (c) control and direct access authorizations and security measures for automated systems.

A general statement regarding Florida's policy on electronic records in found in s. 119.01, F.S. While subsection (2) encourages agencies to provide access to public records by remote electronic means to the extent feasible, subsection (3) states:

> The Legislature finds that providing access to public records is a duty of each agency and that automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must ensure reasonable access to records electronically maintained.

In addition to the foregoing standards, the Legislature has confronted a number of issues related to the impact of technology on public records in s. 119.083, F.S. The section contains general standards to ensure reasonable access to electronic records, as well as provides authorization to agencies to copyright software that they create.

General Standards - The term *agency* is defined for the purposes of s. 119.083, F.S., to have the same meaning as provided in s. 119.011(2), F.S., except that a private agency, person, partnership, corporation, or business entity are excluded. Thus, the section under review applies to any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel.

Section 119.083(4), F.S., places a duty on an agency to consider the type of format it is using when designing or acquiring an electronic recordkeeping system. The proliferation of computer languages and programs could pose a threat to public access if this issue is not taken into consideration by governmental entities. As a result, the Legislature has required agencies to consider whether a system is capable of providing data in a

common format. The statute provides as an example of a common format the American Standard Code for Information Interchange (ASCII), but the format is not intended to be exclusive.

Additionally, s. 119.083(5), F.S., requires an agency that uses an electronic recordkeeping system to provide to any person a copy of any non-exempt public record in that system. Further, the section requires an agency to provide a copy of the record in the medium requested *if the agency maintains the record in that* medium. If the agency does not maintain the record in the requested medium, it is not prohibited from converting the record into the specified medium and can convert it at its discretion. The cost to the requestor is, however, affected by the conversion, and is discussed later in this report.

Additionally, s. 119.083(6), F.S., prohibits an agency from entering into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of that agency, including records that are on-line or stored in an electronic recordkeeping system used by the agency.

Finally, s. 119.083(3), F.S., takes into consideration the impact of the use of proprietary software on the right of access to public records. The term *proprietary software* is defined by s. 119.083(1)(c), F.S., to mean

> data processing software that is protected by copyright or trade secret laws.

The section provides that, subject to the restrictions of copyright and trade secret laws and public records exemptions, agency use of proprietary software must not diminish the right of the public to inspect and copy a public record.

Copyright of Agency-Created Software - Probably the most controversial portion of s. 119.083, F.S., is in subsection (2). The subsection provides:

> Any agency is authorized to hold copyrights for data processing software created by the agency and to enforce its rights pertaining to such copyrights, provided that the agency complies with the requirements of this section.

The term *data processing software* is defined to have the same meaning found in s. 282.303, F.S., which is

> . . . the programs and routines used to employ and control the capabilities of data processing hardware, including, but not limited to, operating systems, compilers, assemblers, utilities, library routines, maintenance routines, applications, and computer networking programs.

Once an agency obtains a copyright for its data processing software, s. 119.083(2)(a), F.S., authorizes it to sell or license it to any other public or private entity based upon market considerations.

Section 119.083(2)(b), F.S., states that the provisions of the subsection are *supplemental* to other statutes that extend copyright authority to an agency. The subsection does not supplant or repeal any of the other numerous copyright provisions in the *Florida Statutes*.

While Florida law grants agencies the ability to copyright their software, historically, there was a question regarding whether data processing software could be copyrighted. Further, there have been questions raised regarding whether works of governments are or should be copyrightable. Copyright is controlled by the federal government, however, and it is necessary to look to the Federal Copyright Act of 1976 to determine the answers to these questions.

The Federal Copyright Act of 1976, 17 U.S.C. s. 102(a), protects

> original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

To be subject to copyright, a work must be original, an independent creation of the author, and "fixed in any tangible medium," such as the written word, sound recordings, and visual images. Copyright protection is available only for an *expression* of an idea and not for the idea itself. Though there was some debate early in the development of computers whether a computer program was a copyrightable work, it is now clear that software may be copyrighted. Section 117 of the Copyright Act applies specifically to computer programs.

While works created by an officer or employee of the United States Government as a part of his or her duties are in the public domain and may not be copyrighted under 17 U.S.C., s. 5, there is no corresponding federal prohibition on copyrighting most works of other governmental entities. As a result, state and local

governments are not constrained from copyrighting works created by public employees as part of their official duties. The U.S. Copyright Office, nevertheless, states in *The Compendium of Copyright Office Practices* that legislative enactments, judicial opinions and administrative rulings, whether federal or state, are ineligible for federal copyright protection for public policy reasons.

Authorization to copyright agency-created software has been assailed for numerous public policy reasons. One argument against copyright of works by state and local governments is that works of state and local governmental employees, like those of their federal counterparts, should be considered to be in the public domain. The term *public domain* has been defined as a ". . . true commons comprising elements of intellectual property that are ineligible for private ownership."[1] Under copyright law, works that are in the public domain are not copyrightable and may be freely used by any member of the public.

Those who oppose copyrighting agency-created data processing software argue that public records are by their very nature in the public domain and that public policy should preclude copyright protection for public records, which agency-created software is defined to be. Further, it is argued that provisions in s. 119.083, F.S., conflict with standards that apply to all other public records. For example, it is not permissible to inquire for what purpose a person wants a public record, yet such an inquiry must be made to determine if a person is going to use agency-created software to view public records or use the software for some other purpose. The cost of the copy is determined by this inquiry. Cost for the copy is also different than other public records as a "market based" price is authorized to be charged if the agency-created software is not going to be used to view other public records.

Another argument raised by opponents of copyright by governmental entities relates to the purpose of copyright. Copyright law attempts to balance the rewards provided to the creator with the benefits provided to society at large. As noted in a 1993 report by the Joint Committee on Information Technology Resources entitled *Agency-Created Data Processing Software as a Public Record*:

> Focusing 'on the right of the individual to reap the reward of his endeavors,' copyright law seeks to protect an author's economic incentive to create by granting a monopoly limited in both time and scope, yet 'sufficient to ensure . . . adequate opportunity to realize an economic return, thereby' encouraging production of new and innovative work. However, '[a] competing concern is the recognition that free and unrestrained access to the works of others encourages a greater dispersion of knowledge . . . and greatly enhances the public welfare.

If the incentive of personal reward is one of the fundamental purposes of copyright, it has been argued that this incentive should be inapplicable to governmental entities because their primary purpose is to promote the general welfare, independent of any need for economic benefit. Further mitigating against government copyright is the lack of need for compensation for government works because tax-supported salaries both induce and compensate government employees for their efforts. Opponents also opine that governmental entities should only produce software which is necessary for the agency to perform its public duties regardless of the potential for profit.

Proponents of extending copyright to works of governmental entities, however, argue that permitting agencies to copyright and sell their software at market costs permits them to recoup development costs and generate revenue. It is argued that additional sources of agency income not only benefit the public by lowering the cost the public must pay to support the agency, but result in the creation of improved computer systems and data compilations.

Survey responses show that most agencies do not copyright or sell their software. Though almost 60% of the agencies who responded to the survey have at some time produced their own software, only a small percent (13%) indicated that they had ever bothered to copyright their product. Agencies indicated that they held about 120 copyrights, with the majority being held by counties (41) and universities (41). Significantly, less than one-half of 1% of respondents (.050) indicated that they had sold agency-created software for more than the cost of duplication. Nevertheless, survey responses show that a few agencies received income from sales based upon market-based prices. Specifically, departments reported sales totaling $107,000; cities reported sales totaling $1,500; counties reported sales totaling $683,000. By far the largest amount reported was by universities, who reported sales of $11,037,025.75. The amounts reported, however, often span a period covering ten or more years.

[1]Litman, The Public Domain, 39 Emory L.J. 965 at 974 (No. 4 Fall 1990).

Another issue raised by opponents of government copyright involves enforcement. In order to protect its product from piracy, an agency must be willing to expend resources to enforce its copyright. It was noted in the publication *Information Week* (October 21, 1991) that litigating a complex intellectual property claim can cost from $260,000 to $2 million, or more. Proponents of governmental copyright, however, note that local governments and state agencies often employ staff attorneys who might be able to litigate these claims. While it is not clear whether costs of litigation for a governmental entity would be as high as those of a private entity that would have to hire an attorney, neither is it clear based upon reported sales that profits from sales of agency-created software would outweigh the costs of litigation incurred by in-house staff, except possibly at universities.

Liability is another issue raised by opponents of governmental copyright. Under 17 U.S.C. s. 511, a state and its officers and employees are no longer immune from damages for copyright infringement, and they are now subject to the same remedies for copyright violation as private persons or entities. This is a serious concern, but the argument would discourage agencies from creating software even if they had no intention of copyrighting it. A stronger argument against copyright of government-created software might be that agencies could be held liable for programs that do not function as warranted. Successful suits could negatively impact agency coffers, though in cases of these sort, sovereign immunity would appear to apply and could act to limit losses.

Software development is not complete upon delivery of the product. Software purchasers expect technical support and software upgrades. In order to have a product that is viable in the market, agencies that copyright and market software must be willing to provide support for that software. Opponents of copyright authority for agencies argue that provision of technical support and upgrade services may detract from the fundamental duty of governmental entities to serve the public. On the other hand, proponents of government copyright point out that a governmental agency is likely to create upgrades to software that it creates for its own benefit, regardless of whether it is being used by others. Further, upgrades may result in additional sales which pay for the costs associated with upgrades.

Opponents of copyright by governmental entities also argue that government should not compete with the private sector and that authorizing governmental entities to copyright and sell their works results in competition with the private sector. This competition has been described as unfair because the government has certain advantages over the private sector, including exemption from taxation and public support of overhead costs through the tax rolls. Proponents, however, point out that the software that is being created often is likely to have a limited market and, as a result, is unlikely to directly compete with the private sector.

Regardless of the foregoing arguments against copyright of works by state and local entities in general, and of agency-created software in particular, Florida has historically authorized the copyright of governmental works. Some examples of state statutory copyright authorization include:

- Permitting the Department of Citrus to hold legal title and interest to patents, trademarks, copyrights, certification marks in s. 601.101, F.S.;
- Authorizing universities to secure copyright, letters of patent, and trademarks on their works and to enforce their rights in s. 240.229, F.S.;
- Authorizing the community college board of trustees to copyright work products which relate to educational endeavors in s. 240.319(3)(j), F.S.;
- Permitting the Department of the Lottery to hold copyrights, trademarks, and service marks and enforce its rights in s. 24.105, F.S.;
- Authorizing the Spaceport Florida Authority to hold copyrights and patents in s. 331.355, F.S.;
- Permitting the Department of State to secure letters of patent, copyrights, and trademarks and to enforce its rights in them in s. 286.031, F.S.; and
- Authorizing the Department of Transportation to secure letters of patent, copyrights, and trademarks on any legitimately acquired work products, and to enforce its rights therein in s. 334.049, F.S.

Florida also has a general provision regarding ownership of copyrights by the state. Section 286.021, F.S., provides that the

> . . . legal title and every right, interest, claim or demand of any kind in and to any patent, trademark or copyright, or application for the same, now owned or held, or as may hereafter be acquired, owned and *held by the state, or any of its boards, commissions or agencies*, is hereby granted to and vested in the Department of State for the use and benefit of the state; and no person, firm or corporation shall be entitled to use the same without the written consent of said Department of State [*emphasis added*].

A list obtained from the Florida Department of State shows that copyrights and patents have been obtained by state agencies in Florida at least since 1949. A few examples on the list include: (a) Patent No. 777,416 for Improvement in Direction Finder Equipment by the Board of Institutions in 1949; (b) copyright by the Florida State University on "Proceedings of the International Conference on the Nuclear Optical Model" in 1959; and (c) 1985 copyright on Department of Transportation maps of northern Florida counties.

Furthermore, Florida is not unique among the states in authorizing the copyright of agency-created software. The State of Minnesota authorizes state agencies, statewide systems, and political subdivisions to obtain copyrights or patents on computer software programs or components of a program created by that governmental entity. This authorization is contained in a chapter of law entitled *Government Data Practices* which defines all government data collected, created, received, maintained or disseminated by a state agency, political subdivision, or statewide system to be public unless classified by statute or federal law as nonpublic or protected nonpublic.

At least four other states, Alaska, Utah, Texas, and California were identified that authorize certain governmental entities to obtain copyrights on the software they create or have developed by a private contractor. The State of California also regulates agency-created software in a chapter of law dealing with public records. California, contrary to Florida, specifically *excludes* computer software developed by a state or local agency from the definition of *public record* and authorizes agencies to sell, lease, or license the software for commercial or noncommercial use, pursuant to s. 6254.9 *Cal. Gov. Code*. Computer software in California includes computer mapping systems, computer programs, and computer graphics systems. California law also provides, however, that

> [n]othing in this section is intended to affect the public record status of information merely because it is stored in a computer. Public records stored in a computer shall be disclosed as required by this chapter.

Thus, while there are numerous reasons of public policy why governmental entities in Florida should not copyright their works, it nevertheless appears that a prohibition on governmental copyright is not the traditional standard in Florida. Furthermore, Florida is not unique in permitting copyright of government works in general or of agency-created software in particular. Finally, while authorization for agencies to copyright their software results in some anomalies, the Legislature has provided numerous methods to ensure such authorization does not limit access to public records. In addition to requiring agencies: (a) to consider the type of format they use when designing or acquiring an electronic recordkeeping system; (b) to provide copies of electronically-stored records; (c) to refrain from entering into contracts that impair the ability of the public to inspect or copy public records; and (d) to abstain from using proprietary software that would diminish the right of the public to inspect and copy a public record, the Legislature has also restricted the fees that may be charged for agency-created and copyrighted software when that software is required to access public records.

Fee Structures - Section 119.083, F.S., establishes two fee structures. First, it establishes fees for the sale or licensing of agency-created data processing software that has been copyrighted. When an agency offers its copyrighted software for sale, s. 119.083(2)(a), F.S., authorizes the agency to set the price based on market considerations.

The market based price that is established, however, is subject to one considerable caveat. When an individual or entity needs the software *solely* for application to data or information maintained or generated by the agency that created it, the fee is determined by general public records law requirements in s. 119.07(1), F.S. That section provides that if a specific fee is prescribed by law, such as $1 per page, then the custodian of the record is required to furnish the copy of the record upon payment of the prescribed fee. If a fee is not prescribed by law, an agency may not charge more than 15 cents per one-sided copy for pages that are not more than 14 inches by 8 ½ inches. For all other copies, an agency may charge for the actual cost of duplication.

Section 119.07(1)(a), F.S., defines the term *actual cost of duplication* to mean

> . . . the cost of the material and supplies used to duplicate the record, but it does not include the labor cost or overhead cost associated with such duplication. If copies of county maps or aerial photographs are supplied, then a reasonable charge for labor and overhead associated with duplication may be assessed.

A special service charge, in addition to the actual cost of duplication, may be assessed if the nature or volume of public records requested requires extensive use of

information technology resources or extensive clerical or supervisory assistance by agency personnel. The term *information technology resources* is defined to mean

> . . . data processing hardware and software and services, communications, supplies, personnel, facility resources, maintenance, and training.

The special service charge which is authorized must be reasonable and must be based on the cost incurred for the extensive use of information technology resources, the labor cost of the personnel providing the service that is actually incurred, or both.

Proceeds from the sale or licensing of copyrighted data processing software are required to be deposited by an agency into an agency trust fund. Counties, municipalities, and other political subdivisions are authorized to designate how such sale and licensing proceeds are to be used.

The second fee structure that s. 119.083, F.S., establishes is contained in subsection (5). The subsection requires an agency to provide a copy of the electronically-stored record in the medium requested if the agency maintains the record in that medium. In these cases, the fee to be charged is the standard fee established by ch. 119, F.S. If the agency elects to provide a copy of a public record in a medium not routinely used by the agency, or if it elects to compile information not routinely developed or maintained by the agency or that requires a substantial amount of manipulation or programming, the fee must comply with s. 119.07(1)(b), F.S., which is the section relating to extensive use of information technology resources or extensive clerical or supervisory assistance discussed above.

Agencies, by a 3 to 1 ratio, indicated that the current statutory fee structure was clear and fair. By a ratio of about 2 to 1, survey respondents recommended no changes to the current fee structure.

RECOMMENDATIONS

Section 119.083, F.S., establishes general standards for agencies that use computer systems which help to ensure access to electronic public records. Given the increasing reliance on computers by government, it is recommended that these standards be continued. Further, it is recommended that subsection (2), which authorizes agencies to copyright software that they create, be continued. While the provision does not appear to be used frequently, there have been instances when the provision was useful and copyright authorization is generally supported by agencies. Further, the subsection does not appear to have limited access to public records. Given the evolutionary nature of computer technology and its potential impact on public records, however, it is recommended that subsection (2) be subject to repeal in five years unless reviewed and reauthorized by the Legislature. Finally, even though a few agencies indicated that the fee structure is confusing, the fee structure is narrowly tailored to permit agencies to sell copyrighted software, while protecting access to public records. Thus, it is also recommended that the fee structure be continued.

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
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MEMBER OVERSIGHT
Senators Mario Diaz-Balart and Jim Horne