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NOV 23 92

November 18, 1992

Mr. Mark Johnson, Legal Counsel
Legislative Service Bureau
State Capitol Building
Des Moines, Iowa 50319

Dear Mark:

Enclosed is our check in the amount of \$3500.00 in payment for printouts of the complete 1993 Iowa Code, with separate listings of the Table of Contents and the Chapter Disposition tables, as well as hard copies of the Corresponding Sections list and Code Editor Notes.

If there are any other materials that would normally be included that we have neglected to enumerate, please send them along. We trust the check will be sufficient to cover any such additions.

See you in Jacksonville!

Sincerely,

WEST PUBLISHING COMPANY

Nancy Q. Truax /jf
Nancy Q. Truax
Senior Associate Editor

NQT:jef



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EAGAN, MINNESOTA

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Memorandum

To: Mr. John Pollak

From: Joe Royce, staff, Administrative Rules Review Committee

Date: 14 December 1992

Subject: PUBLICATION OF ADMINISTRATIVE RULES

1. MAY THE TEXT OF THE IOWA ADMINISTRATIVE CODE BE COPYRIGHTED? NO. Items eligible for copyrights are specified in federal law, 17 United States Code section 102. There are seven specific categories: literary works; music and lyrics; dramatic works; pantomimes and dance; pictorial works; motion pictures and sound. Cases dating from 1866 hold that the text of statutory enactments cannot be copyrighted. See: Davidson v. Wheelock, 27 F 61 (D Minn., 1866), State of Georgia v. The Harrison Company, 548 F.Supp. 110 (ND Ga. 1982). Similar cases have held that the text of court opinions cannot be copyrighted, Callaghan v. Myers, 128 U.S. 617, 9S.Ct. 177, 32 L.Ed. 547 (1888). Although there are no cases specifically dealing with rules, the implication is inescapable that the text of the administrative code, which is the functional equivalent of a statutory code, cannot be copyrighted.

2. MAY THE EDITORIAL NOTES IN THE ADMINISTRATIVE CODE BE COPYRIGHTED? YES, IN PART. A work consisting of editorial revisions, annotations, etc. is considered to be a derivative work under 17 United States Code section 101. Such material is not part of the laws themselves and may be copyrighted as *commercial* literature. The work must be "original", but only in the slightest degree. "...[A]lmost any ingenuity in selection, combination or expression, no matter how crude, humble or obvious, will be sufficient..." M. Nimmer, 1 Nimmer on Copyright, ss 1.08 (1985). In West Publishing Co. v. Mead Data Cent., Inc., 799 F2d. 1219 (CA Minn. 1986) the federal appeals court noted that the West keynote system could be copyrighted although the text itself (caselaw) could not. In Iowa, statutory headnotes are not part of the statutes themselves, they are created by the code editor, State v. Chenoweth, 226 Iowa 217, 284 N.W. 110 (Iowa, 1939). Thus under the West doctrine such editorial additions could be copyrighted.

One caveat must be noted; in 1909 a federal appeals court ruled that an official reporter could not copyright material which was required to be prepared as part of the reporters official duties. Banks Law Pub. Co. v. Lawyers Co-operative Publishing Co., 169 F. 386 (2 CA 1909). In that case federal law required the official reporter to publish copies of court opinions. The circuit court held that the reporter was precluded from obtaining a copyright on the arrangement of the cases and the

pagination. However, the court did note that even an official reporter could obtain a copyright on such things as indexes or marginal notes, since those items were not part of the statutory mandate. The implication of Banks is that an editorial action, performed as a result of a specific statutory requirement, cannot be copyrighted. Its applicability in this issue is questionable because 1) the age of the case; 2) the lack of subsequent litigation on point; 3) the fact that 29 statutes claim some level of copyright, without judicial challenge. For these reasons I do not think Banks is controlling or conclusive; it does remain as precedent and future deliberations should at least be mindful of its' holding.

In any event, regardless of Banks, the numbering system and headnotes in the rule-making process are fundamentally different than those found in statute, and probably cannot be copyrighted. In rulemaking, numbering and headnotes are created as part of the drafting process, they are an integral part of the rule and are adopted through the the rule-making process. The Administrative Code Editor plays no role in assigning the actual number or the headnote. For this reason, I believe the only part of the Administrative Code that can be copyrighted is that portion which is added by the Administrative Code Editor, such as the history, explanatory notes, and index.

3. SHOULD AN "OFFICIAL" VERSION OF THE IOWA ADMINISTRATIVE CODE BE ESTABLISHED IN STATUTE? YES. Iowa has long had an "official" version of the Code of Iowa (see: Acts of the 74th General Assembly, 1st Session, Chapter 258, section 14). The true "official" version of legislation is the enrolled bill; however, the legislature can choose to confer official status on a codification, Widney v. Hess, 242 Iowa 342, 45 NW2d. 233 (Iowa 1950). Without "official" versions of law, introducing statutes into evidence becomes problematical. A copy of the Act itself, certified by the Secretary of State would be ideal. But too often a statute is made up of *several* different Acts. For simplicity and uniformity, it made good sense to designate the Code of Iowa and its' supplements to be "official" versions.

The need for an "official" copy of the Iowa Administrative Code is even more pressing. Rules appear in many different forms: the permanent copy on file in the Governor's office; the version published in the Iowa Administrative Bulletin; the codified version published in the Iowa Administrative Code; supplementary pamphlets issued by the agency; et cetera. For simplicity and accuracy an "official" version should be specified. The crucial problem is version control. Unlike the Code of Iowa, the Iowa Administrative Code is constantly amended, with supplementary pages being added every two weeks. For this reason a rule must be identified both by its number and its date of publication in the Iowa Administrative Code, to ensure that the proper version is used.