

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PHYLLIS GATSON, in her capacity as the	)	
KANAWHA COUNTY TAX ASSESSOR,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 08-C-136
v.	)	Honorable Charles King, Judge
	)	
SENECA TECHNOLOGIES, INC.,	)	
	)	
Defendant.	)	

**MEMORANDUM IN OPPOSITION TO PRELIMINARY INJUNCTION**

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In this action, a government official seeks a prior restraint to enjoin defendant from exercising free speech on its web site by providing to the public truthful information obtained from public tax records, on the supposed ground that dissemination of such information violates a state regulation. However, the regulation does not support the requested injunction; if it did apply, it would be preempted by federal copyright law; and, if the Court reaches the First Amendment issue, the requested injunction would violate the First Amendment. Accordingly, the request for a preliminary injunction should be denied.

## **STATEMENT OF THE CASE**

### **1. Tax Maps and Their Uses**

This case involves the right of defendant Seneca Technologies to distribute to the public, free of charge, electronic tax maps that it obtained from the West Virginia State Department of Tax and Revenue (“Tax Department”) under the Freedom of Information Act (“FOIA”). In each county, the county assessor maintains tax maps in paper form that show the boundaries of each parcel of land in that county, along with a parcel number. To monitor the taxation and assessment process within the state, as well as to perform its own assessments and other tasks, the state has scanned these paper maps into Tagged Image Format (“TIF”) files, being careful to maintain uniform resolution so that they can be opened together and ultimately used to create a uniform, seamless map of large areas of the state. In addition, the Tax Department has created ESRI shapefiles, which cover about half of the state and do not exist at all at the county level.<sup>1</sup> These shapefiles were created by the Tax Department for its own internal use in mineral reassessment and cover the counties with the most mining activity and/or mineral reserves. The files are in a uniform format, regardless of county, and

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<sup>1</sup>A shapefile is a data format, originally developed by a company called ESRI, for geographic information systems software. See <http://en.wikipedia.org/wiki/Shapefile>. Shapefiles exist only for counties covering roughly half of the state, including only the counties that have the most mining activity or mineral reserves. There are no shapefiles for Kanawha County.

in a uniform scale. They were all created in the same software, digitized using the same projections, and stored in the same file type. Therefore they can be opened together, creating a seamless map covering all the counties that were digitized. Because the dates on these files are from 2003, and the files do not appear to be kept current, they are not currently on Seneca's web site; they are mentioned here because plaintiff appears to be seeking an injunction that would bar their posting as well.

The public has many uses for this information. All property tax tickets, deed books, mineral leases, and most wills reference the maps and parcel number depicted on them. Land owners can use the maps to see their property in relation to other property and roads, and to better understand the way in which property has been treated for tax purposes. For example, Will White, President of Seneca Technologies, was able to determine that his father's farm is actually made up of three separate parcels of land, which are taxed separately because they were at one time owned by different people.

In the extraction industries, tax maps serve as a way to identify surface and mineral owners in general locations. The research required for obtaining leases for development requires many trips to courthouses all over the state in an effort to determine availability and specific ownership. An ability to cover as much detail as possible before making the trip will expedite the process and also create new opportunities. Currently, the West Virginia Independent Oil & Gas Association, as well as the West Virginia Surface Owner's Rights Organization (opposing sides on many issues) have links to Seneca's site on their sites. Anyone involved in property leasing, timber, coal, or right-of-way agreements will find these maps invaluable. Similarly, hikers can use the files to make sure that they are not crossing private property, and environmentalists can use them to assess the status of private ownership in the vicinity of areas in need of protection.

By maintaining a complete library of forms in electronic format, Seneca can add enormous

value because the files can be combined into a single, searchable database that can be combined with other data to produce a significant public information resource. When combined with text of other files that contain the entire state's property assessment data, including the owner's name, address, parcel identification number, assessed value, and other pertinent information, the maps provide a new level of transparency to the assessment process, thus enabling citizens to monitor the adequacy of plaintiff's performance of her public duties. For example, does an influential person or company, such as a particular public official or campaign contributor, have land that is assessed at significantly lower value than bordering properties? Can any differences in assessment be explained by differing size of parcel, topographical configuration, and the like?

Moreover, educational institutions will be able to make use of the maps in conducting wide-area research, and emergency response systems can match ownership and location information. For example, staff at West Virginia University's West Virginia GIS Technical Center have expressed interest in using the maps and shapefiles for statewide research.

The electronic files are more useful than regular maps because they can be combined with other graphical material, or with each other, to create master maps of large areas of a county or state. The files can be overlaid on aerial photos or USGS topographical maps, so the mapper can see where property lines fall in relation to surface features, fencelines, treelines, roads, streams, buildings, and the like. In the long run, Seneca plans to develop software that allows a combined database of tax maps and other data to be queried to generate significant information that may be useful to the general public, academic researchers, and businesses. The single sheet maps that are maintained by Kanawha County, as by most of the other county tax assessors in West Virginia, do not afford these varied capabilities that are now possible through Seneca's web site.



## 2. The Statutory Scheme

Section 11-1C-7(e)(1) of the West Virginia Code requires the county assessor in each county to establish and maintain tax maps of the entire county, drawn to scale, and further provides that “the sale or reproduction of microfilm, photography and maps shall be in accordance with legislative rules promulgated by the [Valuation] Commission.” Subsections 11-1C-7(e)(2)(A), (B) and (C) specify the fees that are to be charged for “map sheets,” depending on the size of the paper on which they are reproduced. Unlike maps in paper, microfilm and photographed form, the statute does not provide for the sale or reproduction of maps in electronic form. Several administrative rules were propounded by the Valuation Commission pursuant to section 11-1c-7(e)(1), and incorporated into the Code of State Regulations. 189 CSR § 5-1.2.4 provides that “tax maps may be copied, reproduced, distributed or sold, only by the Assessors of the fifty-five (55) counties and their agents.” Under § 5-5.1, “No person may reproduce, copy, distribute or sell copies of tax maps prepared by the counties without having first obtained the written permission of the County Assessor.” A fee schedule for the sale of paper maps has been established under which each paper map may be purchased of \$8.00.

By contrast, a different statute, the West Virginia state FOIA, governs public records generally. Under West Virginia Code § 29B-1-3(1), “every person has the right to inspect or copy any public record of a public body in this state,” and § 29B-1-3(3) provides, “If the records exist in magnetic, electronic or computer form, the custodian of the records **shall** make such copies available on magnetic or electronic media if so requested.” And, when records are requested under the FOIA, a public body may charge no more than a fee “reasonably calculated to reimburse it for its actual cost in making reproductions of such records.” § 29B-1-3(5).

### **3. The Prior Litigation Over Electronic Versions of Tax Maps**

Defendant Seneca Technologies sent the Tax Department a FOIA request seeking copies of all electronic versions of tax maps. The Department refused on the ground that tax maps are available for sale to the public at a cost of \$8.00 per map, and that in this regard the Department was acting as an agent for the various tax assessors who were entitled to collect the \$8 per map. Accordingly, the Department declined to provide any of the requested copies without payment of \$8 for each of the 20,936 maps that were available in TIF format, for a total cost of \$167,488.<sup>2</sup> Accordingly, Seneca sued the Department under the FOIA in the Circuit Court of Kanawha County. Steve Sluss, Chief Deputy and Legal Counsel for the Kanawha County Assessor, sat at counsel table for the Tax Department during the hearing on Seneca's motion for judgment on the pleadings.

Judge Irene Berger squarely rejected the claim that the statutory regime established under Section 11-1C-7(e)(1) of the West Virginia Code applies to electronic records in the possession of the State Tax Department. To the contrary, she ruled, "While the State Legislature has provided for specific fees for tax maps in paper format, no such fee has been set for maps in the electronic format." Order at page 4. Accordingly, Seneca was able to obtain the complete set of tax maps from the Tax Department for the actual reproduction cost of \$20.

### **4. Defendant's Web Site at Issue in This Case**

Following this victory, Seneca added pages to its web site advising the general public of Judge Berger's ruling and stating that, just as Seneca had done, any member of the public could now make a request under the FOIA and obtain the complete set of electronic tax maps from the state Tax Department. <http://www.senecatechnologies.com/tm.asp>; <http://foiamaps.senecainfo.com/>. The

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<sup>2</sup>The Department also said that it would charge \$8 for each of 7270 shapefiles, for a total charge of \$58,160.00.

latter web page contained a series of hyperlinks to the electronic tax maps from each county in the state, which can now be obtained free of charge from Seneca's own web site. Thus, for example, the 1400 electronic files for tax maps of Kanawha County may be accessed at <http://foiamaps.senecainfo.com/20%20Kanawha%20County/contents.html>. The Tax Department did not appeal, but rather complied with the judgment. Recently, however, Phyllis Gatson, the plaintiff in this case, and the West Virginia Courthouse Facilities Improvement Authority, filed a motion for leave to intervene for the purpose of pursuing an appeal even though the judgment has already been satisfied.

## **5. This Action**

On January 22, 2008, plaintiff Phyllis Gatson, in her official capacity as tax assessor for Kanawha County, filed this action seeking a preliminary and permanent injunction against Seneca for maintaining electronic files containing tax maps of Kanawha County on its web site and allowing members of the public to download those maps free of charge. Plaintiff alleges that dissemination of these electronic files violates the provision of the Code of State Regulations that forbids any person to "reproduce, copy, distribute or sell copies of tax maps prepared by the counties . . ." 189 CSR § 5-5.1. Plaintiff has sought a preliminary injunction, and the hearing on that request is set for February 8, 2008.

## **ARGUMENT**

### **I. The Preliminary Injunction Should Be Denied Because It Would Be an Unconstitutional Prior Restraint on Speech.**

Although constitutional issues should generally not be the first resort in deciding how to resolve a case, the doctrine of avoiding unnecessary constitutional decisions should impel the Court to construe the applicable statutes and regulations in a way that avoids the need to reach the ultimate question of constitutionality. Accordingly, we begin this brief with the First Amendment.

The requested preliminary injunction would be an unconstitutional prior restraint. Even when obtained by a private party, an injunction constitutes government action by a court, subject to scrutiny under the First Amendment, as well as Article III, Section 7 of the West Virginia Constitution. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *see also Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224-225 (6th Cir. 1996); *see also Pauley v. Kelly*, 162 W.Va. 672, 679, 255 S.E.2d 859, 864 (1979) (state constitution may be more protective than comparable provisions of federal constitution). When obtained by a government body seeking to enforce the purported command of a statute, the application of First Amendment scrutiny is particularly necessary. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Moreover, the Supreme Court has repeatedly held that injunctions barring defendants from speaking, printing, or broadcasting statements are prior restraints that require the most extraordinary justifications before they may be approved. *Id.*; *Near v. Minnesota*, 283 U.S. 697 (1931). When an injunction is entered based on a finding of likelihood of success in establishing illegal speech, instead of a final adjudication, it is a prior restraint subject to strict First Amendment scrutiny. *State by and Through McGraw v. Imperial Marketing*, 196 W. Va. 346, 361-362, 472 S.E.2d 792, 807-808 (1996); *State ex rel. Register-Herald v. Canterbury*, 192 W. Va. 18, 449 S.E.2d 272 (1994); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993). *See also Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968). The law is clear and unequivocal – prior restraints are not permitted except in the most exceptional circumstances, involving “a grave threat to a critical government interest or to a constitutional right.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). No such circumstance is present here. Indeed, the courts are clear that injury to “commercial self-interest” does not justify a prior restraint, *id.*, and yet the only injury of which plaintiff complains in this case is the loss of the profits that she hoped to make from the sale

of tax maps at \$8 per sheet of paper.

Gatson may point to copyright cases to suggest that injunctions against copying are often entered without being considered as invalid prior restraints, but that is only because copyright law embodies several significant limitations which, in most cases, make it unnecessary to pay special attention to the First Amendment. *Eldred v. Ashcroft*, 537 U.S. 186, 219-221 (2003); *Harper & Row v. Nation Enterprises*, 471 US 539, 560 (1985). The limits include the limited term of a copyright, distinction between copyrightable expression and uncopyrightable facts and ideas, and the related requirement of “originality,” the latitude for fair use that allows copying for purposes that meet traditional equitable principles, and the “first-sale” doctrine that allows one who lawfully obtains a copyrighted work to freely transfer to others, or even sell, the copy that he has obtained. As the Supreme Court said in *Eldred*, it is only when a statute has “not altered the traditional contours of copyright protection [that] further First Amendment scrutiny is unnecessary.” 537 U.S. at 221. By contrast, the state statute on which plaintiff here relies contains none of the traditional protections for free speech that copyright embodies, all of which would apply if plaintiff were relying on copyright. The maps here contain only facts and not expression, the rule against copying is unlimited in time, and Seneca is making a non-commercial and transformative fair use of the electronic copies that any member of the public could obtain for \$20 from the State Tax Department. Accordingly, the First Amendment protections for the public’s right to see and to obtain their own copies of public records come into the fore, and the requested prior restraint against dissemination of these public records should be denied.

## **II. The Injunction Should Be Denied on State and Federal Statutory Grounds.**

The Court will have no need to reach the constitutional issues presented in the first part of this brief if it decides that the requested injunction would violate both federal and state statutes. The

state law claims are preempted because the rule prohibiting other parties from copying documents is a species of state copyright law, while section 301 of the Copyright Act bars any state copyright laws and, indeed, reserves exclusive control of copyright enforcement to the federal courts. Second, the state rule against copying or selling tax maps without the consent of a county assessor extends only to the paper maps that plaintiff herself sells, but does not include electronic copies that were obtained from the State Tax Department, and in any event an attempt to enjoin a successful FOIA litigant from freely disseminating documents that were held to be disclosable runs directly counter to the purposes of the state FOIA.

**A. Plaintiff's Claim Is Preempted by the Federal Copyright Statute.**

The first statutory reason why plaintiff's requested injunction against making copies of the electronic tax maps should be denied is that the administrative regulation that she is trying to enforce is a state copyright law that is preempted by 17 U.S.C. § 301. Under the Supremacy Clause of the United States Constitution, Article VI, Clause 2, "the Laws of the United States . . . shall be the supreme Law of the land," and thus any preemption provision properly adopted by Congress is binding in state courts. *Davis v. Eagle Coal and Dock Co.*, 220 W.Va. 18, 640 S.E.2d 81, 87 (2006) *Cutright v. Metropolitan Life Ins. Co.*, 201 W.Va. 50, 57, 491 S.E.2d 308, 315 (1997).

The Copyright Code's preemption provision, Section 301, provides as follows:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Plaintiff in this case relies on §189-5-5 of the CSR, which provides that "No person may reproduce, copy, distribute or sell copies of tax maps prepared by the counties without having first obtained the

written permission of the County Assessor.” This regulation falls plainly within the preemptive scope of section 301(a). The electronic tax maps obtained from the state are “works of authorship that are fixed in a tangible medium of expression,” and they come “within the subject matter of copyright” under sections 102 and 103 of the Copyright Code, which include “graphical . . . works.” Section 102(5). Moreover, the rights “to reproduce copies” and “to distribute copies . . . by sale or other transfer of ownership” are among the exclusive rights conferred by sections 106(1) and 106(3) of the Copyright Code. It follows that §189-5-5 limits a “legal . . . right that is equivalent to” a right conferred by the Copyright Code and that therefore section 301 preempts § 189-5-5.

In this regard, it is irrelevant that the maps themselves are noncopyrightable matter because they simply reflect facts and lack original, creative expression. *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 455 (6th Cir. 2001) (“The Second, Fourth, and Seventh Circuits have held that the scope of the Copyright Act’s subject matter [and hence its preemptive effect] extends beyond the tangible expressions that can be protected under the Act to elements of expression which themselves cannot be protected.”); *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1462-63 (4th Cir.1997); *National Basketball Ass’n v. Motorola*, 105 F.3d 841, 849 (2d Cir. 1997). It would make little sense to say that federal copyright law, which strikes a delicate balance between protecting the rights of authors while preserving both expression and innovation by others, wholly preempts state law, while still giving force to state copyright rules that goes beyond federal copyright, in the sense of being more restrictive of uses by others.

Nor can plaintiff ask this court to issue an injunction based on a claim of copyright in the maps, for several reasons. First, the federal courts have exclusive jurisdiction of copyright claims, 28 U.S.C.A. § 1338(a); *Rosciszewski v. Arete Associates*, 1 F.3d 225, 232 (4th Cir. 1993). Second, plaintiff has not registered any copyright in the maps, and yet no suit can be brought to enforce an

unregistered copyright. 17 U.S.C. § 411(a). Third, the maps are uncopyrightable because they simply convey information about the location of property lines and the identity of owners, and are created without the exercise of creativity and discretion. Although maps can be copyrightable in certain circumstances – they are within the subject matter of copyright – maps are frequently refused registration, *Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007), for reasons that would apply equally here if plaintiff were to try to invoke federal copyright law.<sup>3</sup>

**B. Plaintiff’s Claim Is Not Supported by the Cited Statute or Regulations, and Runs Directly Contrary to the Freedom of Information Act.**

The preliminary injunction should also be denied because plaintiff’s claim fails under state law. As Judge Berger ruled in the underlying FOIA case, the administrative regulation forbidding the making or distribution of copies without permission of a county tax assessor is part of a statutory and regulatory scheme that contemplates only paper copies and not the electronic maps that Seneca obtained from the State Tax Department. Indeed, plaintiff’s separate lawsuit seeking an injunction against the dissemination of public documents that were properly obtained under the FOIA not only runs counter to the FOIA, but also constitutes an impermissible end run around this Court’s judgment in *Seneca Technologies v. State Tax Department*. The proper forum in which to obtain a determination of whether Judge Berger’s construction of the statute was wrong is by a proper and timely appeal to the Supreme Court of West Virginia, not by instituting a separate action before a coordinate judge of the same court and seeking an injunction against the winner of the other case.

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<sup>3</sup>There is substantial debate among the courts about whether official government documents of this sort are ever copyrightable. Compare *Veeck v. Southern Bldg. Code Congress Int’l*, 293 F.3d 791 (5th Cir. 2002) (*en banc*) (building code cannot be copyrighted), and *Microdecisions v. Skinner*, 889 So.2d 871, 874 (Fla. App. 2 Dist. 2004) (local tax maps cannot be copyrighted) with *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001) (complaint alleging copyright in local tax maps stated cause of action under Copyright Code; originality sufficiently alleged to allow factual development).



Assuming that this Court is ready to revisit the question decided by Judge Berger in the FOIA case, her construction of the applicable state statutes was correct. Plaintiff admits that the administrative regulation was adopted to implement Section 11-1C-7(e) of the West Virginia Code, which provides for the sale of tax maps and regulates the fees to be charged for them. The text of paragraph (2) of subsection (e) contemplates the sale of **paper** copies of those maps. For example, § 11-1C-7(e)(A) provides for revenue from the sale of “a full map sheet”; § 11-1C-7(e)(B) provides for revenue from the sale of “a parcel reproduction on 8 ½ x 11” or 8 ½ x 14” paper”; and § 11-1C-7(e)(C) governs revenue from the sale of “all other map sizes.” Nothing in the statute purports to regulate the sale or other provision of electronic tax maps.

The regulations themselves echo the assumption that they apply only to paper copies of the maps. Section 189-5-2.3 provides, “**Full map sheet** cost shall not be less than five dollars (\$5.00). Parcel reproduction on **8 1/2 ” X 11” or 14” paper** shall be one dollar and fifty cents (\$1.50) each.” (emphasis added). Similarly, § 189-5-2.4, contains this sentence: “The State Department of Tax and Revenue may withhold an amount for each map copy, which shall cover the cost of materials, sales tax and postage.” The reference to “each map copy” and to the cost of “materials” implies that the regulation applies to sales of single maps on sheets of paper, not to electronic versions that can be attached to an email and transmitted without any “materials” or postage. The assumption that the regulation applies only to paper copies continues in § 189-5-2.5, which provides that “Counties and/or their agents may sell copies of master maps at **the prescribed price per sheet**” (emphasis added), and § 189-5-6, under which “In order **to provide current map copies** to the general public, each assessor shall provide, free of charge, one reproducible copy **of each revised map sheet** to the Department of Tax and Revenue.” (emphasis added). The persistent references to the prices of

“sheets,” to the size of the “paper,” and to the disposition of “sheets,” shows that regulations were adopted with paper tax maps in mind. Moreover, it is a well-settled canon of construction that when the same word is used throughout a statute or rule, it has the same meaning throughout. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). Accordingly, when § 189-5-5(a) uses the term “tax maps prepared by the County Assessor,” the reference is to copying the paper maps that are prepared by the County Assessor, not the electronic files that can be obtained from the State Tax Department. At the very least, there is sufficient reason to construe the rule not to apply to electronic records that the Court should adopt that construction to avoid the need to consider the constitutional questions raised above.

Nor does § 189-5-5 provide any authority for a civil action seeking an injunction against the sale of tax maps by unauthorized persons; indeed, it is not at all clear that an administrative regulation **can** provide authority for a civil action. Instead, § 189-5-5(b) sets forth its own remedy for violation of the prohibition of § 189-5-5(a):

Any person who, without the written permission of the County Assessor, reproduces, copies, distributes or sells, or who allows the reproduction, copying, distribution or sale of tax maps prepared by the County Assessor, shall be refused permission by the County Assessor or Assessor’s agent to purchase tax maps in the future.

When a rule sets forth a specific remedy, and does not provide generally for “other appropriate relief,” the implication is that other remedies are not permitted. *Karahalios v. NFFE Local 1263*, 489 U.S. 527, 533 (1989); *International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934, 940 (4th Cir. 1986). So, here, if plaintiff believes that Seneca has violated § 189-5-5(a), she needs to persuade the State Tax Department to deny Seneca any further access to electronic maps. If plaintiff’s persuasion is successful, of course, Seneca will then pursue appropriate litigation against the Tax Department.

Moreover, the proposition that a member of the public who has properly obtained public records by making a Freedom of Information request, and indeed by bringing a successful lawsuit to enforce the FOIA, can be enjoined by an agency from making copies of that FOIA'd document or otherwise distributing it to the public, runs counter to the FOIA. Section 29B-1-3 of the West Virginia Code provides, "Every person has a right to inspect **or copy** any public record . . . except as otherwise expressly provided by section four of this article." Unlike the provision for the sale of tax maps, which addresses only paper copies, the FOIA deals expressly with the subject of electronic records, and requires the state to make records available in electronic form if they exist in that form and are thus requested.

Moreover, the whole theory of the FOIA is that it can be used to better inform the general public, not just the particular FOIA requester. *E.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Citizens who exercise their rights under the FOIA will then be able to make free use of the documents to inform their fellow citizens, including the making of copies of what they have obtained for the enlightenment of their fellow citizens. *See NTEU v. Griffin*, 811 F.2d 644, 649 (D.C. Cir. 1987) (construing the fee waiver provisions of the federal FOIA). Publication of information is far more likely to produce the intended benefits of the FOIA than the mere availability of documents in a single reading room. *Fitzgibbon v. Agency for Int'l Devel.*, 724 F. Supp. 1048, 1051 (D.D.C. 1989). Thus, it is implicit that the right to copy public records is not limited to the right to obtain a copy from a public body in the first instance, but also includes the right to copy those documents after they have been obtained for the purpose of informing the public. And when a legislative rule conflicts with a statute, it is the statute that controls. *Kessel v. Monongalia Cy.*

*Gen. Hosp.*, 220 W. Va. 602, 648 S.E.2d 366, 382 (2007).<sup>4</sup>

Indeed, Seneca has already litigated and won this issue, in a suit brought against the State Tax Department which claimed that it was acting as an agent of the various county assessors. *Seneca Technologies v. State Tax Department*, Civil Action 07-C-837 (Cir. Ct. Kanawha Cy.). Seneca prevailed in that action, and even though the defendant there has not appealed, the plaintiff in this case, Ms. Gatson, has intervened in the West Virginia Supreme Court for the purpose of pursuing her own appeal from that judgment. However, Ms. Gatson did not seek a stay of the judgment ordering the Tax Department to turn over the records to Seneca, and accordingly the judgment was obeyed. And, although she sought unsuccessfully to intervene in the Circuit Court proceeding there, for the purpose of participating in any appeal, she did not ask for reconsideration. Assuming that any appeal from the decision is proper, the proper forum in which to determine whether Judge Berger erred in that case is by appeal to the state Supreme Court, not by initiating this duplicative action, filed before a different trial judge, and seeking an injunction the practical effect of which would be to reverse Judge Berger's decision about the interplay between the FOIA and the state tax code.

### **III. Plaintiff Lacks Standing to Seek an Injunction Barring Dissemination of Tax Maps from Counties Other Than Kanawha.**

Even if the injunction were otherwise justified, plaintiff asks the Court to enjoin Seneca from distributing any electronic tax maps on its web site "statewide," not just tax maps for Kanawha County. There are only 1400 electronic tax map files for Kanawha County (in TIF format), among the total of nearly 21,000 electronic map files in TIF format. Seneca also has more than 7000

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<sup>4</sup>Indeed, given the fact that any other member of the public can exercise the same right that Seneca did to FOIA the documents from the state for the duplication fee of \$20, the requested injunction would be pointless.

shapefiles, which are not yet on Seneca's web site but which would be barred by the injunction. None of those shapefiles is from Kanawha County. Moreover, although the TIF files were created by scanning the State Tax Department's paper copies of tax maps, the shapefiles were created entirely by the Department, and thus have no nexus with the theory of plaintiff's complaint. Indeed, the complaint does not allege any violation other than with respect to Kanawha County tax maps, and as County Assessor for Kanawha County, even if plaintiff Gatson has standing to seek an injunction pertaining to electronic files provided by the State Tax Department in the first place, she has standing to seek relief only with respect to her county's maps.

#### **IV. The Balance of Irreparable Injury Strongly Favors Seneca.**

Even apart from the lack of merit of plaintiff's claim in this case, the motion for a preliminary injunction should be denied because plaintiff has made no showing that she would be irreparably injured if an injunction is denied, while the injunction would cause severe irreparable injury to Seneca. Plaintiff complains that if Seneca is allowed to continue to sell electronic tax maps, she will be deprived of profits from tax map sales to the general public. This argument suffers from several flaws. First and most important, the loss of revenue is not irreparable injury, because if plaintiff can show damages, those damages can be collected at the end of the litigation. But there are **no** damages here, for two reasons. First, even if Seneca were to stop making electronic tax maps available on its web site tomorrow, the public could still make FOIA requests for the electronic records from the State Tax Department and obtain their own copies for the price of \$20, just as Seneca has done. Second, plaintiff's apparent assumption that she would be entitled to collect \$8 per map for the sales of electronic copies is erroneous because § 11-1C-7(e) of the West Virginia Code and CSR § 189-5-2.3 establish prices only for the sale of **paper** copies, and CSR § 189-5-2.3 specifically provides authority for County Assessors and their agents to sell only "at the prescribed price." There is no

“prescribed price” for electronic records, and hence no lost profits at all.

On the other hand, entry of a preliminary injunction in this case will cause irreparable injury to Seneca. First of all, the denial of First Amendment rights, even for a moment, constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). When First Amendment rights are violated by the entry of a preliminary injunction against protected speech, the irreparable injury to the enjoined party cannot be outweighed unless the threatened injury to the plaintiff is overwhelming.

Issuance of a preliminary injunction also threatens loss of business to Seneca. Although Seneca does not sell the maps, the presence of the maps on its web site has encouraged many potential clients for its services to visit and/or link to its web site. For example, both the West Virginia Independent Oil & Gas Association and the West Virginia Surface Owner’s Rights Organization have links to Seneca’s web site on their sites. When people come to Seneca’s web site to find maps, they will be encouraged to learn more about Seneca and may be motivated to do business with it. The loss of such business prospects would be very difficult to quantify, and thus to compensate through an award of damages for improper entry of an injunction, and hence qualifies as irreparable injury.

### **CONCLUSION**

The motion for a preliminary injunction should be denied.

Respectfully submitted,

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