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ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. S-1070

APPROPRIATIONS:
Meaning of An Appropriation;
Copyright by the State

Joseph M. Cronin
State Superintendent of Education
Illinois Office of Education
100 North First Street
Springfield, Illinois 62777

Dear Mr. Cronin:

This responds to your request for an opinion in which you ask two questions, each containing two parts. You state your first question as follows:

> "1. If a line item of a state agency's annual appropriation bill provides that a certain sum of money is appropriated to the agency 'for the purpose of' contracting for the development of a certain technique which constitutes intellectual property (and there is no other enabling legislation which mandates such a contract) then:
>
> (a) Must the agency enter a contract for such purpose when said agency determines it to be inadvisable to do so? Or may the agency permit the appropriation to lapse?

(b) If the agency enters a contract for such purpose in a given fiscal year, and the development of such intellectual property will take three or four years, with additional fiscal year appropriations, does the recipient of the first contract award have a vested interest in receiving the subsequent contract awards?"

You have cited no act containing an appropriation to your office which specifically provides for contracting for the development of intellectual property. I understand from your question that while your agency has authority to enter into the contract, it is not required by substantive legislation to enter into such a contract. You have again cited no specific provisions. I am able, therefore, only to answer your question in general terms.

The discretion of an agency to allow an appropriation to lapse depends on the language of the authorization and the appropriation acts. In general, however, an agency has the discretion to spend its appropriation as it deems necessary and may allow at least a part of its appropriation to lapse. The Supreme Court of Washington in Island Cty. Com. on Assess. Rat. v. Department of Rev., 500 P. 2d 756 (1972), stated at page 763 that "an appropriation of public monies by the legislature is not a mandate to spend, rather it is an authorization given by

the legislature to a designated agency to use not to exceed a stated sum for specified purposes." It noted in its footnote that legislative acts customarily, though not necessarily, contain language reflecting this characteristic. The appropriation act for your agency specifically contains language reflecting this, i.e. "the following named sums, or so much thereof as may be necessary respectively, for the objects and purposes hereinafter named". See also Attorney General v. Baldwin, 279 N.E. 2d 710 (Mass. 1972); State v. Hartman, 367 P. 2d 918 (New Mex. 1961); and Arkansas State Highway Commission v. Mabry, 315 S.W. 2d 900 (Ark. 1958).

The answer to the second part of your first question depends on specific statutory authority. Under section 30 of "AN ACT in relation to State finance" (Ill. Rev. Stat. 1975, ch. 127, par. 166) the State or any officer thereof may not enter into a contract which binds the State in excess of the amount of money appropriated, unless expressly authorized by law. For a detailed discussion of the meaning of this provision, and particularly "expressly authorized by law", see my predecessor's opinion No. 208 dated March 7, 1951. (1951 Ill. Att'y. Gen. Op. 52.) If you would provide me with the specific statutory provision

which authorizes the development of the intellectual property, I will advise you whether it is an express authorization by law under which you could enter into a contract for which money has not been appropriated.

Frequently, the General Assembly appropriates at one time the total amount necessary to complete a project even though it is anticipated that all will not be spent before the appropriation lapses under section 25 of "AN ACT in relation to State finance". (Ill. Rev. Stat. 1975, ch. 127, par. 161.) The appropriation of the total anticipated cost provides the authority to enter into a contract for the complete project. The funds which lapse must, of course, be reappropriated.

You state your second question as follows:

> "2. If intellectual property is developed as a result of the circumstances described in question one, then:
>
> (a) Does the State agency have a right to assert an exclusive copyright to such property?
>
> (b) Does the state agency have authority to agree to share a copyright with, or to grant an exclusive copyright to, the recipient of the contract award who developed the property?"

Whether a State agency has a right to assert an exclusive copyright to intellectual property depends on Federal copyright law and the authority of the State agency.

There is no question that a copyright is property (Fox Film Corp. v. Doyal, 286 U.S. 123), or that the State has power to acquire property. (1953 Ill. Att'y. Gen. Op. 157.) There

are numerous specific provisions granting power to the State Board of Education to acquire intellectual property. For instance, the State Board of Education is responsible for the educational policies and guidelines for public and private schools and shall analyze the present and future aims, needs and requirements of education in Illinois. (Ill. Rev. Stat. 1975, ch. 122, sec. 1A-4.) In addition, it is authorized to maintain a research department to secure, publish and preserve information and data relative to the public school system of Illinois (Ill. Rev. Stat. 1975, ch. 122, par. 2-3.31), to provide consultant service to school districts (Ill. Rev. Stat. 1975, ch. 122, par. 2-3.35), and to define urban school needs and to develop responsive models, projects and programs for meeting the needs of urban school districts. (Ill. Rev. Stat. 1975, ch. 122, par. 2-3.37.) In fulfilling any of these responsibilities it could be necessary for the State Board of Education to develop and own intellectual property.

The Federal copyright law (17 U.S.C. sec. 1 et seq.) contains no express provision relating to the right of a State to take out for itself a copyright or to enjoy the benefit of one taken out for it by an individual, but merely provides

that the "author or proprietor" of any work which is the subject of copyright may secure a copyright therefor. (17 U.S.C. sec. 9.) Under the early statutes the benefit of the copyright laws was limited solely to citizens and residents of the United States, and a State, being neither a citizen nor a resident, could not obtain a copyright. Since the removal of that restriction, there appears no reason why a State may not be entitled to a copyright as a "proprietor" or even as an "author" under the provision that the word "author" shall include an employer in case of works made for hire. (17 U.S.C. sec. 26.) In fact, the records of the copyright office show many claims registered in the name of a State, a State agency or an official in behalf of a State. 18 Am. Jur. 2d Copyright and Literary Property, sec. 30; 18 C.J.S. Copyright and Literary Property, sec. 61.

It is the general rule that the employer has the right to assert an exclusive copyright in material produced by either his employee or an independent contractor, and further, the presumption is that the copyright will belong to the employer unless the intent of the parties is otherwise. Such intent will usually be expressed in the contract. In Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F. 2d 565, the United States Court of Appeals for the Second Circuit stated as follows:

> "* * * Section 26 of the Copyright Act, 17 U.S.C. §26, provides that the 'author' of a work 'shall include an employer in the case of works for hire.' Moreover, Professor Nimmer, in his treatise on copyright law, states that there is a presumption in the absence of an express contractual reservation to the contrary, that the copyright shall be in the person at whose instance and expense the work is done. Nimmer on Copyright 238 (1964). This so-called 'works for hire' doctrine was recognized earlier by the Supreme Court in Bleistein v. Donaldson Lithography Co., 188 U.S. 239, 248, 23 S.Ct. 298, 47 L.Ed. 460 (1903), and was later codified in the Copyright Act. In Bleistein, the Court held that the copyright to certain advertisements created by an employee during the course of his employment, belonged to his employer. While the 'works for hire' doctrine has been invoked most frequently in instances involving music publishers, see, e.g. [cites omitted] it is applicable whenever an employee's work is produced at the instance and expense of his employer. In such circumstances, the employer has been presumed to have the copyright. [cites omitted]
>
> We see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor. 'Whether the copyright resides in the person thus commissioning the work or in the independent contractor creating the work will always turn on the intention of the parties where that intent can be ascertained.' Nimmer, supra, at 244. Where that intent cannot be determined, the presumption of copyright ownership runs in favor of the employer. * * * "

See also Lin-Brook Builders Hardware v. Gertler, 352 F. 2d 298.

Therefore, I am of the opinion that a State agency has a right to assert an exclusive copyright unless the intent,

which is usually expressed in the contract, is otherwise.

I am also of the opinion that a State agency, as part of its authority to negotiate and enter into contracts, may allow an independent contractor either to use the State's exclusive copyright, or to obtain his own exclusive copyright, to intellectual property developed pursuant to the original contract. I would assume that if an independent contractor will have the right either to obtain his own exclusive copyright or to use the State's copyright, he would develop the property at a lower cost to the State.

Your request does not concern the authority of the State to sell its copyrights or to license their use other than as part of an original contract to develop copyrightable material, and this opinion should not be interpreted to relate to that authority.

Very truly yours,

ATTORNEY GENERAL