

## **The General Assembly's Role in Making the Indiana Rules and Statutes Available to the Public**

*This article examines the Indiana General Assembly's recent move to eliminate the Indiana Register, and assesses the General Assembly's custodianship of the Indiana statutes.*

### **THE INDIANA REGISTER**

Just two issues short of completing its 29<sup>th</sup> volume, representing 29 consecutive years of publication, the familiar *Indiana Register* has been eliminated, in a move that will come as a surprise to most of Indiana's legal community and others reliant on the *Indiana Register* for information about Indiana's administrative rules.

On July 1, 2006, the last issue of the *Indiana Register*, Volume 29, Number 10, was published by the Indiana Legislative Services Agency (LSA), the staff agency for the General Assembly.

The issue was posted only online; printed issues of the *Indiana Register* have not been made available, except to legislators, their staff, and federal depository libraries in Indiana, for a number of years.

### **The Legislative changes**

In 2005 the General Assembly enacted HEA 1135, amending the then-existing IC 4-22-8-2, which had provided:

Sec. 2. The publisher shall publish a serial publication with the name Indiana Register at least six (6) times each year.

to read instead:

Sec. 2. (a) The publisher shall publish a serial publication with the name Indiana Register at least six (6) times each year.

(b) Notwithstanding any law, after June 30, 2006, the publisher shall publish the Indiana Register in electronic form only. However, the publisher shall distribute a printed copy of the Indiana Register to each federal depository library in Indiana.

(c) The publisher may meet the requirement to publish the Indiana Register electronically by permanently publishing a copy of the Indiana Register on the Internet.

This year (2006) the General Assembly amended this section again, via SEA 379, to eliminate, effective July 1, 2006, any requirement that *printed copies* of the *Indiana Register* be distributed to depository libraries.

### **The LSA changes go beyond the statute**

With the requirement to distribute printed copies to depository libraries deleted, the LSA announced, in a box on the cover of each recent month's issue of the online *Indiana Register*, that "Under HEA 1135 (P.L.215-2005), after July 1, 2006, the *Indiana Register* will be published only on the Internet and on a more frequent basis." People were invited to submit comments.

It is unlikely that many people did submit comments, however, as those who noticed the announcement were reading the online version of the *Register*, and likely already knew it was not available to them in any printed form. Further, few would object to the *Register* being published twice a month, or weekly, rather than monthly.

LSA's actual changes, however, go far beyond what was announced, and far beyond the statutory authorization. The *Indiana Register*, a serial publication, has been replaced by a webpage<sup>1</sup> containing links, not to the various pages of the *Register*, but to the individual rulemaking documents submitted by the various state agencies to LSA.

### **Effect of eliminating the monthly, paginated *Indiana Register***

This move by the LSA may be an enormous step backward for the State of Indiana and its citizens. A concerned law librarian has furnished me with the result of her recent survey of the status of administrative register publishing for the 50 states and the District of Columbia. Currently:

- Monthly publication of a paginated Register - 19 (including Indiana, at the time of the survey)
- Weekly publication of a paginated Register - 15 (includes D.C.)
- Semi-monthly publication of a paginated Register - 14
- Quarterly publication - 1 (Alaska)
- No register- electronic updates only - 2 (North Dakota and Nebraska)

The law librarian concludes

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Since the federal government and all states except two still publish a hardcopy or electronic register in a volume/page citable format, I strongly feel that Indiana should continue the time-tested method in current use. An electronic register that could be downloaded as a full document published either monthly, weekly or every two weeks could substitute for the paper copies.

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<sup>1</sup> <http://www.in.gov/legislative/register/irtoc.htm>

The best of the bad news is that the LSA has revised its initial plan to use the URLs (the Internet links to the documents) as the official method of identifying *Indiana Register* documents. They have replaced these with a semi-intuitive document identification number (DIN), that at least has a basis in dates and document numbers, rather than being tied to the location of a file on the current website.

Of course, this new DIN<sup>2</sup> would not be necessary if the LSA had not elected to summarily dump the "paged" format of the current *Indiana Register*. This was done in spite of the requirement of the law (see IC 4-22-8-2(a), above) that the "publisher shall publish a *serial publication* with the name *Indiana Register*."

That serial format allowed ready citation to any rulemaking document published in the past 29 years by a simple citation such as "26 IR 3270", which meant Volume 26, page 3270 of the *Indiana Register*.

### **Legal issues raised by the elimination of *Indiana Register***

The term "serial publication" has a specific meaning in copyright law and in the publishing industry.

The U.S. Copyright Office defines "serials" as:

For copyright purposes, serials are defined as works issued or intended to be issued in successive parts bearing numerical or chronological designations and intended to be continued indefinitely. The classification "serial" includes periodicals, newspapers, magazines, bulletins, newsletters, annuals, journals, proceedings of societies, and other similar works.<sup>3</sup>

The ISSN International Centre, an intergovernmental organization that maintains a database of all ISSNs (international standard serial numbers) assigned worldwide and that issues ISSN numbers to serial publications, provides this information:

What is a "serial publication"?

A precise definition, which allows agreement on the exact field of application of the ISSN can be found in the ISO 3297 standard (ISSN): "A publication, in any medium, issued in successive parts, usually having numerical or chronological designations and intended to be continued with no predetermined end. NOTE : this definition excludes works intended to be published in a finite number of parts.(...) The ISSN is applicable to the entire population of serials, whether past, present or to be published in the foreseeable future. Serials include periodicals,

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<sup>2</sup> For an explanation of the DIN, see the explanation on page 8 of the LSA's "USER'S GUIDE TO THE - IR- DATABASE" at: <http://www.in.gov/legislative/register/faqs.pdf>

<sup>3</sup> <http://www.copyright.gov/circs/circ62.html#serials>

newspapers, annuals (reports, yearbooks, directories, etc.), the journals, series, memoirs, proceedings, transactions, etc. of societies."

Are ISSN assigned to electronic publications?

Yes, ISSN are assigned to electronic publications as far as they are serials or other continuing resources. However commercial web sites, personal weblogs and web pages, web pages which contain only links to other URLs are not eligible for ISSN.<sup>4</sup> [emphasis added]

In short, the new LSA webpage, a page that contains only links to other URLs, does not meet the universal definition of a "serial publication." Why is this important?

Because the LSA's posting of the documents individually online, rather than in "a *serial publication* with the name *Indiana Register*," as required by law, may be deemed noncompliant rulemakings, leading to unenforceable rules. A review of the relevant statutes demonstrates how this result could be reached.

First, IC 4-22-8-22 requires that the LSA "shall publish a *serial publication* with the name *Indiana Register* at least six (6) times each year."

Second, a number of sections of IC 4-22-2, the law setting out the general procedure for the adoption of administrative rules, require the publication of documents in the *Indiana Register*. These include IC 4-22-2-23, which requires the publication in the *Indiana Register* of notices of intent to adopt a rule, and IC 4-22-2-24, which requires the full text of an agency's proposed rule and a notice of public hearing to be published in the *Indiana Register*.

Third, IC 4-22-2-44 provides in relevant part:

A rulemaking action that does not conform with this chapter is invalid, and a rule that is the subject of a noncomplying rulemaking action does not have the effect of law until it is adopted in conformity with this chapter.

Thus, after July 1, 2006, rulemaking documents, including Notices of Intent and Proposed Rules, are not being published<sup>5</sup> in "a serial publication with the name *Indiana Register*." Rather, they are being posted individually online. The result may be "rules" not adopted in compliance with IC 4-22-2, and thus invalid.

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<sup>4</sup> <http://www.issn.org/en/node/64>

<sup>5</sup> Note that whether the documents are published in an online edition of the *Indiana Register*, or in a printed edition, does not matter. What matters is whether or not the documents are part of a "serial publication", as required by law.

## THE INDIANA CODE AND THE ACTS OF INDIANA

The LSA has announced plans to make the online versions of the *Indiana Register*, Indiana Administrative Code, and the Indiana Code, the "official versions" of the Indiana rules and statutes. Given the current state of the LSA's online efforts with the Indiana Code, that news is cause for concern. Here are some of the issues.

### **The current online Indiana Code is accompanied by no explanatory materials.**

A printed copy of the Indiana Code tells you right up front the date it is current through. Plus it has introductory material telling you that the headnotes are not to be considered part of the law. The online version of the Indiana Code does not contain any of the preliminary, explanatory material the printed publication did. It does not say "These documents are current through \_\_\_\_." It does not explain the significance of headnotes and history lines.

This can confuse even the most sophisticated user. In a Court of Appeals opinion from earlier this year, the judge's opinion interprets a *headnote* in "the official version of I.C. § 24-4.5-7-409 on www.in.gov." From *Michael Neidow v. Cash in a Flash, Inc.* (2/6/06) :

In support of their argument, CIF directs us to Burns Indiana Statutes Annotated version of I.C. § 24-4.5-7-409, where the title of the section reads "Applicability of other statutory provisions – Penalty for violations of chapter – Equitable relief – Remedies not exclusive." However, the official version of I.C. § 24-4.5-7-409 on www.in.gov lists the title of section 409 as, "Restrictions, penalties, and enforcement." Regardless of the title, the text of section 409 is the same and there is no language indicating that the remedies provided under the statute are non-exclusive to the lender.

Burns is, of course, a private publication and its section headings are written by a Burns' editor. I also believe they are copyrighted by the Burns' publisher. They certainly are not a part of the law adopted by the General Assembly.

And neither are the brief headings added to what the Court terms "the official version of" IC 24-4.5-7-409 on the General Assembly's website. As provided in IC 1-1-1-5(f):

(f) The headings of titles, articles, and chapters as they appear in the Indiana Code, as originally enacted or added by amendment, are not part of the law and may be altered by the lawful compilers, in any official publication, to more clearly indicate content. These descriptive headings are intended for organizational purposes only and are not intended to affect the meaning, application or construction of the statute they precede.

The makeup of the Ind. Code is Title > Article > Chapter > Section. Section headings are not mentioned in IC 1-1-1-5(f) because (with minor exceptions) there are no section

headings in bills passed by the General Assembly. Whenever you see section headings, in Burns or West or online, they have been added by an editor and have no official standing.

From the LSA Bill Drafting Manual, Chapter 3, G(2):<sup>6</sup>

Section headings, which do become a part of the law, are not to be used in bills, even when a new section is being added to a chapter that has sections with existing headings. Furthermore, when an existing section that contains a heading is amended, the heading should be stricken, even in uniform laws.

### **Error-ridden?**

Take a look online at IC 34-8, the rules of civil procedure, to see what is soon to become the "official law" looks like. Parts of it, like the following example, are full of printing codes:

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&DNM.IC 34-8
&YENC.
&YAMD.
ARTICLE 8. RULES OF PROCEDURE
&DNM.IC 34-8-1
&YENC.
&YAMD.
Chapter 1. Authority of Courts to Adopt Rules of Procedure
&DNM.IC 34-8-1-1
&YENC.1998
&YAMD.1998
Purpose of chapter
IC 34-8-1-1 Sec. 1. The purpose of this chapter is to enable the supreme court to:
(1) simplify and abbreviate the pleadings and proceedings;
(2) expedite the decision of causes;
(3) remedy abuses and imperfections that exist in the practice;
(4) abolish unnecessary forms and technicalities in pleading and practice; and
(5) abolish fictions and unnecessary process and proceedings.
&HST.As added by P.L.1-1998, SEC.3.&EHST.7
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As is evident from the example of the printing codes, little care goes into the public online version of the Code. The LSA staff has its own online system for bill drafting and research. On the public system, items appear and disappear, links are broken, links lead to nothing (try looking at the Journals).

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<sup>6</sup> <http://www.in.gov/legislative/session/manual/chap03/index.html#codegenerally>

<sup>7</sup> <http://www.in.gov/legislative/ic/code/title34/ar8/ch1.html>. This section was last amended in 1998, so presumably has been online in this format for 8 years. The problem was brought to the attention of the LSA several months ago, but remains the same as of this writing, July 6, 2006.

### **For much of the year, the Indiana Code is not current.**

An additional concern is that the top of the web page displaying this section gives the current date, leading many users reasonably to conclude that the material is current as of that date.

However, the online Code generally is not updated with new laws until the fall of each year.

There seems no reason why the language of the online Indiana Code could not be revised as the new laws take effect each year. Laws taking effect July 1 could be incorporated into the online Indiana Code on that date, others as they become effect.

At a minimum, immediately after the end of each session, notations should be posted preceding each section amended or repealed, indicating that a change has been made and referencing the enrolled act. The same for the addition of new laws to the Code.

### **Retention Issues.**

With printed sets of rules and statutes, librarians (and many attorneys) retain the old volumes when new editions or replacement volumes come out. Why do this? Because how else will you know, in 6 months or 50 years, what the repealed or prior version of a rule or statute was?

This is absolutely essential when you are reading case law and need to know what the statute referenced said at the time of the decision, or when you are reading a case construing a section of the Indiana Constitution and need a copy of the version of that constitutional section then in effect.

This is also important in other areas, such as interpreting environmental permits, which incorporate by reference the rules and statutes in existence at the time they were issued. This is important with insurance policies. All this history is lost when each year the LSA takes down the last year's version of the Indiana Code and all you have to look at is the current online version. Where do you go to look for the old version? And where will you go in 6 months, or 50 years?

### **The Public Bill system.**

Something done well be the General Assembly and its staff is the online public bill system, allowing users to access legislation as it goes through the session, along with committee reports, vote sheets, and items.

I have nothing but praise for this part of the system. It is good, I think, because it is intensively used during the session by people who know who to talk to if they run into problems.

The materials from each session are retained online and can be readily accessed. Even here, however, I have a suggestion. Why should it be necessary for the researcher to continually reference tables going back and forth between enrolled act numbers and public law numbers? Why not either facilitate this electronically, or implement a public law number that incorporates the enrolled act number.

**Security should be an issue, particularly with the plan to make the online version of the Indiana Code the "official" version.**

With a printed volume of the Acts of Indiana, or the Indiana Code, what is on a page will stay the same, forever. You do not have to worry that a page in the Acts of 1941 has been changed, inadvertently or intentionally. You can not say the same about the current online documents. It is hard to see how a court could take judicial notice of such material.

**WHAT TO DO? SOME OVERALL SUGGESTIONS**

It is, in my opinion, the responsibility of the General Assembly to maintain the laws and rules of the State and to make those laws and rules available and accessible to Indiana's citizens.

Here is a quote from an article I wrote for *Res Gestae* in 1969<sup>8</sup>, when I headed the staff of the Statute Revision Commission, the group responsible for producing the Indiana Code of 1971, the first official codification in Indiana since 1852. It describes what can happen when the General Assembly fails in its duties to the public:

The Indiana statutes are in such poor order that the only possible way to find something in the Acts is by first finding it in the privately published, unofficial compilation of the Indiana statutes and checking the cross-references back to the Acts.

In practical effect, then, the Indiana General Assembly has placed itself and the Indiana bench and bar in the position of having become completely dependent upon a private publishing company for the only usable source of the Indiana statute law. ...

[T]he Legislature [has] the duty to keep the statute law in order and to make it available and accessible to the persons who desire to use it.

My suggestions in 2006 would be: The creation of a committee: (1) to look at resolving concerns raised by the elimination of the serial, paginated *Indiana Register*, and (2) to look at where we are in Indiana, and where we should be, with respect to making the state's laws and rules available to its citizens.<sup>9</sup>

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<sup>8</sup> "Statute Revision in the State of Indiana", <http://www.indianalawblog.com/documents/12-1969.pdf>

<sup>9</sup> One approach to the latter is the following, submitted to LSA by the author on June 28, 2006:

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“The new LSA site has many new features and improvements. Here is an approach that would combine both the old *Register* and the new site, and would address the objections.

“The LSA is planning to post documents each week, beginning with Wed., July 5th. It will be posting a list of individual PDF documents. Why not instead arrange the documents the same way as now (i.e. final rules first, etc.), merge the documents (i.e. electronically put them all together into one stack), place a cover on the result, similar to the July 1 IR cover, and number the resultant pages consecutively rather than treating them individually?

“The cover page to the July 1, 2006 IR (the last issue of the IR) says: Volume 29, Number 10, Pages 3327-3596, July 1, 2006. The new July 5 ‘Weekly Issue’ would say: Volume 29, Number 10.1, Pages 3597-xxxx, July 5, 2006. (10.1 for the first week of the month)

“Via the LSA site, the user would be able to open or print out the entire July 5 ‘Issue’ (as one can do now to the July issue), or the individual documents. The only difference would be that the individual documents would bear the page numbers of Volume 29, Number 10.1, and the July 5, 2006 date. Otherwise the new LSA site would remain the same.

“What would be achieved? (1) No need for the new DIN numbers, and no need to cite any differently than in the past. (2) The old and new *Register* formats would be neatly bridged. (3) The new, paginated ‘Weekly Issue’ would indeed meet the requirements of a ‘serial publication.’”