US Supreme Court Rejects Attempt To Copyright Annotated Version of State Laws

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On April 27, 2020, the U.S. Supreme Court ruled in a 5-4 vote in *Georgia v. Public. Resource.Org, Inc*., 590 U.S. ____, that pursuant to the "government edicts" doctrine, annotations to Georgia's state code could not be protected under the Copyright Act.

Background

The U.S. Copyright Act grants exclusive rights to the creators of "original works of authorship," including the right to reproduce works. For well over a century, however, the Supreme Court has recognized that these rights do not extend to certain types of works created by the government itself for failure to satisfy the "authorship" requirement. This so-called "government edicts" doctrine is rooted in the concept that officials empowered to speak with the force of law cannot be considered "authors" of the works they create in the course of their official duties. Accordingly, the Supreme Court previously held that judicial decisions, including nonauthoritative portions of decisions such as statements of the case, syllabi or headnotes, cannot be copyrighted. *See Banks v. Manchester*, 128 U.S. 244 (1888). Instead, these works are in the public domain and can be freely copied, published and distributed.

The current case arose out of a copyright infringement lawsuit brought by the state of Georgia against Public.Resource.Org (PRO), a nonprofit organization that aims to facilitate public access to government records and legal materials. PRO published a digital version of the Official Code of Georgia Annotated (OCGA) without Georgia's permission and distributed several copies of it to other organizations and Georgia officials. While an unannotated version of the code is publicly available for free online, the OCGA is only officially available for purchase, with a hard copy retailing for $412.

The OCGA is assembled by a state entity called the Code Revision Commission (the Commission). Although the Commission is technically distinct from the Georgia Legislature, a majority of its members must be legislators, and the Commission receives funding through state appropriations. The Commission submits the proposed statutory text and annotations to the Georgia Legislature for approval, which then votes to enact the statutory portion, "merge" the statutory portion with the annotations and publish the final merged product as the OCGA. Accordingly, the Georgia Supreme Court has held that the Commission's role in compiling the OCGA falls "within the sphere of legislative authority." *Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325, 330, 260 S.E. 2d 30, 34 (1979).

In the lawsuit against PRO, there was no dispute that the Georgia statutes themselves were not copyrightable; the only issue was whether the separate *annotations* were subject to protection. In that regard, the annotations are initially prepared by a third party at the Commission's behest pursuant to a work-for-hire agreement stating that any copyright in the OCGA vests exclusively in "the State of Georgia, acting through the Commission." The annotations are comprised primarily of summaries of judicial decisions and opinions of the state attorney general that concern a given provision, as well as a list of relevant law review articles and similar reference material.

The U.S. District Court for the Northern District of Georgia sided with the Commission, finding that because the annotations were "not enacted into law," they lacked the force of law and were thus eligible for copyright protection. The U.S. Court of Appeals for the Eleventh Circuit reversed, employing a three-factor test to answer the "ultimate inquiry" of whether the work "is attributable to the constructive authorship of the People" and thus not eligible for copyright protection.

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The Supreme Court's Ruling

In the majority opinion by Chief Justice John G. Roberts Jr., joined by Justices Sonia Sotomayor, Elena Kagan, Neil M. Gorsuch and Brett M. Kavanaugh, the Court affirmed the Eleventh Circuit's holding, albeit on distinct grounds. After reviewing the precedent addressing the government edicts doctrine, the majority reasoned that in order to qualify as a government edict, a work must be (1) created by judges and/or legislators (2) in the course of their judicial/legislative duties.

With respect to the first prong, the majority concluded that the purported author of the annotations did qualify as a legislator based on the nature of the Commission, its relationship to the Georgia Legislature and the formal vote by the Legislature to approve and "merge" the annotations prior to publication in the OCGA. The majority further highlighted that the Commission had brought the lawsuit "on behalf of and for the benefit of" the Georgia Legislature. With respect to the second prong, the majority recognized that although the annotations were not enacted through a "traditional" legislative process of bicameralism and presentment, they still represented work performed by the Commission in its official capacity as "legislators." The majority analogized the annotations to the "statement of the case and the syllabus or head note" prepared by judges, which the Court has previously held fall within the "work they perform in their capacity as judges."

The majority addressed a number of arguments by Georgia and the dissent. For example, the majority rejected Georgia's textual arguments that Section 101 of the Copyright Act specifically includes "annotations" in the definition of protectable works, noting that annotations — like all other works — are only protectable to the extent that they are original works of "authorship," which is a predicate inquiry. Further, the majority was unpersuaded by Georgia's public policy arguments, including the contention that the application of the government edicts doctrine to the annotations would make it more difficult for states to induce private entities to assist in preparing affordable annotated codes. The majority noted that such concerns are more appropriately addressed by Congress.

Justice Clarence Thomas, joined by Justice Samuel A. Alito Jr. and joined in part by Justice Stephen G. Breyer, dissented on the grounds that the majority failed to appropriately examine the roots of the government edict doctrine and apply it to the annotations. In his view, the annotations should not fall outside the ambit of copyright protection because they do not represent the will of the people, are created by private parties who may need incentives to continue to do so and do not impede fair notice of the laws (because they do not carry the binding force of law).

Justice Ruth Bader Ginsburg also wrote a separate dissent, joined by Justice Breyer, on much narrower grounds. Agreeing with the majority's analytical framework and the conclusion that the Commission was a "legislator," Justice Ginsburg disagreed that the annotations were created in a legislative capacity because annotations are not extensions of the legislative role of *creating* the laws, but rather only constitute summaries or discussions of those laws.

Looking Ahead

As Justice Thomas pointed out in his dissent, the most immediate consequence of this decision will likely be felt by the regions that rely on arrangements similar to Georgia's to produce annotated codes, which include 22 states, two territories and the District of Columbia. Those jurisdictions, as well as the entities that have contracted with them to publish their annotated codes, will likely need to reexamine the structure of their publishing agreements. Beyond these parties, anyone involved with publishing government materials generally should pay particular attention to the majority's two-pronged analysis of what constitutes a "government edict" and who may be considered "legislators" for purposes of this analysis. Government entities, too, should carefully examine what "quasi" legislative or judicial functions they may be undertaking (either on their own or through the use of a third party), to determine whether such actions could be considered the exercise of judicial or legislative duties, thus impacting copyrightability.