ARE Copyright Law Alert: Supreme Court Holds That Official State Codes Are in the Public Domain and Not Copyrightable

Author(s): Chester Rothstein, Charles R. Macedo, Douglas A. Miro, David P. Goldberg,

In a 5-4 decision on April 27, 2020, the U.S. Supreme Court found that the government edicts doctrine (which generally holds that works authored by certain federal public officials in the course of their official duties are in the copyright public domain) applies to the States, territories, and the District of Columbia. *Georgia v. Public.Resource.Org, Inc.*, No. 18-1150, slip op. at 1, 5 (U.S. Apr. 27, 2020).

This decision further clarified that the doctrine applied even to "annotated" versions of the law text, to prevent a situation where there is "first class" versus "economy class" access to the law. To be clear, this decision will not stop those states and territories that currently charge for access to such materials from doing so. However, those states and territories will not now be able to prevent third-parties from providing free access to such materials by bringing copyright infringement actions.

Background

The State of Georgia has one official code called the Official Code of Georgia Annotated ("OCGA"). The OCGA includes the text of all current Georgia statutes as well as annotations to the text. The annotations, which are not officially binding, typically include summaries of judicial opinions construing the provisions of the statutes. The annotations to the current OCGA were produced as a work for hire by Matthew Bender & Co., Inc., a third-party publisher of law books, for the Georgia Code Revision Commission ("CRC").

The CRC is a state-entity composed mostly of state legislators, funded by legislative branch appropriations, and staffed by Georgia's Office of Legislative Counsel.

In 2013, the non-profit organization Public.Resource.Org, Inc. ("PRO") purchased a full copy of the OCGA and posted it online, allowing free public access to the OCGA on various website. After sending PRO several cease-and-desist letters, the CRC filed an action for infringement of its copyright in the OCGA annotations in the U.S. District Court for the Northern District of Georgia.

The Northern District ruled in favor of the CRC, reasoning that the annotations were eligible for copyright protection because they were not enacted by the legislature. The U.S. Court of Appeals for the Eleventh Circuit reversed, rejecting the CRC's argument under the government edicts doctrine, whose animating principle is that no one person can own the law. The U.S. Supreme Court affirmed.

The Supreme Court's Majority Opinion

Chief Justice Roberts delivered the majority opinion of the Court, which was joined by Justices Sotomayor, Kagan, Gorsuch and Kavanaugh.

The Court found that the annotations in the OCGA were not eligible for copyright protection under the government edicts doctrine, which holds that "officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties." Slip op. at 1.

The doctrine, based on the Court's prior decisions in *Wheaton v. Peters*, 8 Pet. 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888), derives from the basic principle that, in a democracy, the people are "the constructive authors" of the law and judges and legislators are merely draftsmen "exercising delegated authority." Slip op. at 5 (quoting *Georgia v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1239 (11th Cir. 2018)).

The Court here clarified that the appropriate test is "based on the identity of the author . . . . judges—and, we now confirm, legislators—may not be considered the 'authors' of works that they produce in the course of their official duties as judges and legislators." Slip op at 5-6. Just as judges who have the authority to interpret the law cannot claim copyright in their decisions under *Banks*, the same holds true for legislative bodies who have the authority to make the law. In short, "copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties." Slip op. at 9.

Applying this two-step test to the facts of the case, the Court found that Georgia's annotations are not copyrightable. First, the Court determined that the CRC "is not identical to the Georgia Legislature, but functions as an arm of it for the purpose of producing the

annotations." *Id*. This, thought the Court, was eminently clear from the membership, staffing, funding, and procedure followed by the CRC in approving the annotations, as well as from state law precedent that the CRC "is within the sphere of legislative authority." *Id*. at 10 (quoting *Harrison Co. v. CRC*, 24 Ga. 325, 330 (1979)).

Second, the Court found that, although the annotations are not enacted into law, their preparation is an act of "legislative authority" and they provide "commentary and resources that the legislature has deemed relevant to understanding its laws."

The Court rejected Georgia's argument that by listing "annotations" as copyrightable works in Section 101 of the Copyright Act, Congress exempted this type of work from the government edicts doctrine. The majority ruled that Section 101 only applied to "annotations . . . which . . . represent an original work of authorship."

The Court also rejected Georgia's argument that a negative inference should be made from the fact that the Copyright Act explicitly precludes copyright protection for the works of federal officials but not for state officials. Instead, the Court opined, "the federal rule does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States." *Id*. at 12.

Finally, the Court noted its concern with Georgia's argument in favor of limiting the government edicts doctrine based on content and not authorship. Taken strictly, such an argument would exclude not just annotations but also consenting and dissenting opinions, headnotes and syllabi prepared by judges, proposed bills and committee reports prepared by legislators, and other materials supplementary materials that "do not have the force of law, yet . . . are covered by the doctrine." *Id*. at 15. These materials, although they are without the force of law, are greatly important. "Imagine a Georgia citizen" reading an unannotated copy of Georgia's Code "criminalizing broad categories of consensual sexual conduct . . . with no hint [from annotations] that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court." *Id*. at 17. Adopting Georgia's argument, the court concluded, might lead to an unfair justice system based on the ability to pay for copyrighted material.

Thomas Dissent

Justice Thomas filed a dissenting opinion, joined in full by Justice Alito and joined in part by Justice Breyer.

Justice Thomas objected to the majority's interpretation of the 19th Century cases that form the basis of government edicts doctrine, due to the narrower understanding of authorship and copyright protection current at the time, and agreed with Georgia's arguments that the annotations should be eligible for copyright protection under the terms of the Copyright Act because they were not enacted by the legislature. In response to the majority's policy concerns, he noted that the practical effect of the majority's decision may well be that states would stop producing annotated codes altogether, which would render obtaining quality legal assistance even more expensive than it is now.

Ginsburg Dissent

Justice Ginsburg issued a separate dissenting opinion, joined in full by Justice Breyer.

Justice Ginsburg agreed with the two-part test set forth in the Majority Opinion as to whether the government edicts doctrine should apply. However, she disagreed with the majority's finding that the OCGA's annotations were drafted by legislators "in the course of their . . . legislative duties." She argued that since the annotations were not created contemporaneously with the statutes, are descriptive rather than prescriptive, and were drafted for the convenience of the public, that they should not satisfy the second prong of the test.

Practical Effect

This decision makes it clear that under the government edicts doctrine, official statutes (and their annotations) promulgated by the U.S. States, territories, and the District of Columbia are in the public domain and not copyright-eligible, even if annotated. Accordingly, those states and territories that currently charge for access to such materials may no longer do so. This decision will directly affect those states and territories that have negotiated contracts with legal publishers regarding the issuance of official annotated copies of their statues. Additionally, the Supreme Court's reasoning would seem to extend beyond annotated codes to more broadly reach and impact similar arrangements by the states with respect to other public documents, such as state zoning or flood maps.

We note Justice Thomas' dissenting policy concern that states may stop producing annotated codes altogether, thus hindering quality judicial access to both rich and poor. Time will tell if such concerns are justified and whether high-quality annotated state codes continue to be written.

We will continue to monitor cases regarding this and similar copyright issues. Please feel free to contact us if you have any questions about how this decision may impact your rights.

*Chester Rothstein, Charles R. Macedo and Douglas A. Miro are partners and David P. Goldberg is an associate at Amster, Rothstein & Ebenstein LLP. Their practice specializes in all aspects of Intellectual Property Law, including copyrights, trademarks and patents. They can be reached at crothstein@arelaw.com , cmacedo@arelaw.com, dmiro@arelaw.com and dgoldberg@arelaw.com.