Georgia v. Public.Resource.Org, Inc.: Works Produced by Judges or Legislators in the Course of Their Official Duties Are Not Protected by Copyright, Including the Annotations in Georgia's Official Code

by David R. Todd

On April 27, 2020, the U.S. Supreme Court issued its ruling in *Georgia v. Public.Resource.Org, Inc.* addressing whether the "government edicts doctrine" precludes Georgia from claiming copyright in the annotations found in its official code. In a 5-4 decision, the Court held that any work produced by a judge or a legislator in the course of their judicial or legislative duties is not copyrightable, and that the annotations in Georgia's official code were produced by legislators in the course of their legislative duties.

The State of Georgia has one official code, which is entitled "Official Code of Georgia Annotated" ("the OCGA"). The OCGA includes the text of Georgia's statutes, as well as annotations that appear with each of those statutes. For any given statute, the annotations include summaries of judicial decisions involving the statute, summaries of relevant opinions by the state attorney general regarding the statute, and a list of articles and other reference materials addressing the statute. The annotations also include information about the origins of the statutory text.

The compilation of the OCGA is overseen by an entity called the Code Revision Commission. The Commission has fifteen members, a majority of which must be members of the Georgia legislature. It is funded through appropriations for the legislature, and is staffed by the Office of Legislative Counsel, which provides services for the legislature. The Commission's job is (1) to consolidate separately enacted bills into a single code for reenactment by the legislature and (2) to produce the annotations. The Georgia Supreme Court has stated that under the Georgia Constitution, the Commission's role falls "within the sphere of legislative authority." Each year, the Commission submits its proposed statutory text and the accompanying annotations to the Georgia legislature, who votes to enact the statutory portion, merge the statutory portion with the annotations, and publish the combination as the OCGA. The Commission has hired Matthew Bender, a division of LexisNexis, to prepare the annotations pursuant to a work-for-hire agreement, which means that under 17 U.S.C. § 201(b), Georgia is deemed the "author" of the annotations. Thus, the agreement states that any copyright in the annotations vests in "the State of Georgia, acting through the Commission." Under the agreement, LexisNexis has the exclusive right to publish and sell

the OCGA, but it has agreed to limit the price which it charges and to make an unannotated version available online for free.

Public.Resource.Org (PRO) is a nonprofit organization that posted a digital version of the OCGA online, where it could be downloaded for free. Georgia sued PRO for copyright infringement. Georgia did not assert copyright in the statutory text, but did assert copyright in the annotations.

The Court began its analysis by synthesizing three of its 19th century cases: "A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered the 'authors' of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law." Thus, the Court derived a two-part test: "Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties."

The Court explained that its case law regarding judges shows that the rule "applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi)" but does not apply "to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters." The Court then reasoned that "[i]f judges, acting as judges, cannot be 'authors' because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either." And "just as the doctrine applies to 'whatever work [judges] perform in their capacity as judges,' it applies to whatever work legislators perform in their capacity as legislators." "That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills."

Applying its two-part test, the Court concluded the government edicts doctrine applied to the

annotations at issue here "because they are authored by an arm of the legislature in the course of its official duties."

The Court first explained why it concluded that the Commission was an arm of the Georgia legislature: "The Commission is not identical to the Georgia Legislature, but functions as an arm of it for the purpose of producing the annotations. The Commission is created by the legislature, for the legislature, and consists largely of legislators. The Commission receives funding and staff designated by law for the legislative branch. Significantly, the annotations the Commission creates are approved by the legislature before being 'merged' with the statutory text and published in the official code alongside that text at the legislature's direction." The Court then pointed to the Georgia Supreme Court's decision that under the Georgia Constitution, the Commission's role falls "within the sphere of legislative authority."

The Court next concluded that the Commission created the annotations in the discharge of its legislative duties: "Although the annotations are not enacted into law through bicameralism and presentment, the Commission's preparation of the annotations is under Georgia case law an act of "legislative authority," and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws."

The Court then addressed Georgia's numerous counterarguments. Georgia first argued that 17 U.S.C. § 101 specifically lists "annotations" among the kinds of works eligible for copyright protection and therefore its annotations should eligible for copyright protection. The Court rejected that argument because section 101 refers only to "annotations . . . which . . . represent an original work of *authorship*" and because "[t]he whole point of the government edicts doctrine is that judges and legislators cannot serve as *authors* when they produce works in their official capacity."

Georgia next argued that it should prevail because the Copyright Act specifically excludes from copyright protection "work[s] prepared by an officer or employee of the United States Government as part of that person's official duties" but does not establish a similar rule for the States. The Court responded by observing that "the bar on copyright protection for

federal works sweeps much more broadly than the government edicts doctrine does" and that "[w]hatever policy reasons might justify the Federal Government's decision to forfeit copyright protection for its own proprietary works, that federal rule does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States." The Court explained that the government edicts doctrine "does not apply to non-lawmaking officials, leaving States free to assert copyright in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on."

Georgia next suggested that the Court should avoid applying its government edicts cases because those cases "interpreted the statutory term 'author' by reference to 'public policy'" and that approach to interpretation is inconsistent with modern-day statutory interpretation. The Court replied by relying on *stare decisis*. The Court stated that it has always been "reluctant to disrupt precedents interpreting language that Congress has since reenacted" and that because "[a] century of cases have rooted the government edicts doctrine in the word 'author,'" and because "Congress has repeatedly reused that term without abrogating the doctrine," Georgia's argument was best made to Congress, not to the courts.

Georgia next pointed to the Compendium of U.S. Copyright Office Practices, issued by the U.S. Copyright Office. The Compendium states that "the Office may register annotations that summarize or comment upon legal materials . . . unless the annotations themselves have the force of law." Georgia argued that the Compendium supported its position that the proper inquiry was whether its annotations had "the force of law," not whether they were written by legislators in the course of their official duties. The Court explained that the Compendium was not binding and that other portions of the Compendium actually supported its position in any event.

The Court then more squarely addressed Georgia's argument that the annotations were subject to copyright protection because they did not have "the force of law." The Court explained that such a standard was inconsistent with the reasoning and the results of its cases, because such a rule would not except "concurrences and dissents" from copyright protection or "headnotes and syllabi produced by judges," contrary to what the Court had

held in one of its early cases. The Court also explained that a force-of-law standard would have even less textual support in the statute than the Court's rule.

Justice Thomas filed a dissenting opinion, joined by Justice Alito and, for the most part, by Justice Breyer. Justice Thomas viewed the Court's 19th century cases as establishing that "statutes and regulations cannot be copyrighted, but accompanying notes lacking legal force can be." Justice Thomas viewed the majority opinion as improperly extrapolating from the court's 19th century cases and expanding the reach of the government edicts doctrine. He would have left it to Congress to decide whether such an expansion was appropriate. More specifically, Justice Thomas reasoned that the Court's 19th century decisions "do not provide any extended explanation of the basis for the government edicts doctrine," argued that the Court should not apply 130-year-old precedents without "explor[ing] the origin of and justification for them," noted that the cases "suggest three possible grounds supporting their conclusion," and concluded that "[a]llowing annotations to be copyrighted does not run afoul of any of these possible justifications." Justice Thomas argued that the majority's position "fails to account for the critical differences between the role that judicial opinions play in expounding upon the law compared to that of statutes" and that "these differences also demonstrate that the same rule does not *a fortiori* apply to all legislative duties." Finally, Justice Thomas argued that "the majority's rule will prove difficult to administer" because the majority's analysis for ascertaining whether a commission is an arm of the legislature "raises far more questions than it answers."

Justice Ginsburg also filed a dissenting opinion, joined by Justice Breyer. Justice Ginsburg agreed with the majority that copyright does not extend to "materials created by state legislators in the course of performing their lawmaking responsibilities, e.g., legislative committee reports, floor statements, unenacted bills," even though some of those materials do not have the force of law. However, Justice Ginsburg would have concluded that the annotations at issue in this case were not created in the course of performing legislative duties. Justice Ginsburg began her analysis with common ground extracted from the Court's 19th century cases: "All agree that headnotes and syllabi for judicial opinions—both a kind of

annotation—are copyrightable when created by a reporter of decisions, but are not copyrightable when created by judges." She then posited a question and gave her answer: "One might ask: If a judge's annotations are not copyrightable, why are those created by legislators? The answer lies in the difference between the role of a judge and the role of a legislator." Justice Ginsburg explained that "[t]he OCGA annotations, in my appraisal, do not rank as part of the Georgia Legislature's lawmaking process for three reasons": (1) "First, the annotations are not created contemporaneously with the statutes to which they pertain; instead, the annotations comment on statutes already enacted." (2) "Second, the OCGA annotations are descriptive rather than prescriptive. Instead of stating the legislature's perception of what a law conveys, the annotations summarize writings in which others express *their* views on a given statute." (3) "Third, and of prime importance, the OCGA annotations are "given for the purpose of convenient reference" by the public; they aim to inform the citizenry at large, they do not address, particularly, those seated in legislative chambers."

The majority's response to Justice Ginsburg's opinion was to argue that the function and nature of the annotations "does not take them outside the exercise of legislative duty by the Commission and legislature." The majority explained: "Just as we have held that the 'statement of the case and the syllabus or head note' prepared by judges fall within the 'work they perform in their capacity as judges,' so too annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators."

It will be interesting to see what follow-on issues the Court's decision spawns, both in Georgia's case and in other cases. Justice Thomas's dissent highlights amicus briefs filed by a number of other states that apparently rely on arrangements similar to Georgia's to produce annotated codes. And the Court's reasoning suggests that the result in this case might have been different if Georgia had simply entered into a license agreement with LexisNexis instead of entering into a work-for-hire agreement. Only time will tell.

The full text of the opinions in this case can be found here:

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https://www.supremecourt.gov/opinions/19pdf/18-1150_new_d18e.pdf