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IP NewsFlash

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Copyright Protection Not Available for Georgia's Annotated State Law Code

The State of Georgia sought to enforce its copyright in its annotated state law code, the Official Code of Georgia Annotated (OCGA), against Public.Resource.Org (PRO), a nonprofit which facilitates public access to government records and legal materials. PRO posted the OCGA online and distributed copies to organizations and Georgia officials. The issue before the U.S. Supreme Court was whether copyright protection extends to the annotations contained in Georgia's official annotated code.

In *Georgia v. Public.Resource.Org, Inc.*, No. 18-1150 (April 27, 2020), the U.S. Supreme Court held in a 5-4 decision that copyright protection did not extend to the annotations within Georgia's official annotated code, rejecting the infringement lawsuit brought by the State of Georgia against PRO.

By way of background, the OCGA is the official code of the State of Georgia, which includes all of Georgia's statutes in force and a set of non-binding annotations appearing beneath each statute. The OCGA is assembled by a state commission composed mainly of Georgia state legislators, funded by the legislature appropriations, and staffed by Georgia's Office of Legislative Counsel. The State of Georgia entered into a work-for-hire agreement with Matthew Bender & Co., Inc., a division of LexisNexis Group, to draft the annotations under the supervision of the Commission. The agreement states that any copyrights in the OCGA vest in the State of Georgia, via the state commission.

The Georgia state commission sued PRO for copyright infringement after repeated demands that PRO stop posting the OCGA online and distributing copies to various organizations and Georgia officials. PRO counterclaimed and sought declaratory judgment that the entire OCGA, including annotations, is part of the public domain. The district court held that the annotations were eligible for copyright protection as they had not been enacted into law. The U.S. Court of Appeals for the Eleventh Circuit reversed, based on the government edicts doctrine.

Chief Justice Roberts, delivering the opinion of the Court, agreed with the Eleventh Circuit's reasoning that citizens must have "unfettered access" to state law and its annotations as they are "government edicts." The Court has long held that government edicts, or those works authored by public officials, cannot be protected by copyright. The government edicts doctrine, which evolved through 19th century case law, is a limitation on copyright protection for certain government-authored works. Thus, "officials empowered to speak with the force of the law cannot be the authors of – and therefore cannot copyright – the works they create in the course of their official duties." Based on precedent, judges cannot assert copyright in "whatever work they perform in their

capacity as judges," with the "animating principle" behind the government edicts doctrine, explained by Justice Roberts, "that no one can own the law."

The Court applied this framework to the Georgia state legislators, as the "author" of the annotations. Because the annotations are created and authored by legislators in the course of their legislative duties, they are not copyrightable. Georgia's argument that the annotations do not have the "force of law," for they are non-binding and non-authoritative, did not persuade the Court. In fact, Justice Roberts and the majority were clearly concerned about Georgia's arguments for the different categories of content, considering the "force of law," and the creation of "first class" and "economy class" versions of the law and access to it. If a citizen is unable to pay for the "first class" access to the annotations, then that citizen might miss certain nuances or explanations of a law available only in the annotations or the "first class" version.

In dissenting, Justice Thomas, joined by Justices Alito and Breyer, argued that the annotations are indeed copyrightable, and Justice Thomas emphasized that Congress may need to make a legislative fix for this situation. Justice Thomas mused that this decision would be a jolt to the 22 other states which rely on licensing revenues for their state code annotations. Also, in a separate dissenting opinion, Justice Ginsburg, joined by Justice Breyer, argued that the annotations in the OCGA are not done in a legislative capacity and are copyrightable.

Takeaways: Will some states no longer provide annotations if the state cannot continue to derive revenue from access to the annotations? Will the "economy class" version of the law be the only version available in the future?

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