High Court Copyright Ruling Expands Gov't Edicts Doctrine

By **Eleanor M. Lackman and Craig Bradley** (April 29, 2020)



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On April 27, the U.S. Supreme Court for the first time in 130 years addressed the government edicts doctrine, a court-made rule holding that state government edicts having the force of law are not eligible for copyright protection.

The doctrine provides that state and local government officials acting in their governmental capacity are not considered "authors" as that term is understood in copyright law. Without authorship, no copyright protection is available for the work. This principle has made judicial opinions and statutes freely available to publish and review free from claims of copyright infringement.

The decision in Georgia v. Public.Resource.Org Inc. raised a new issue: not whether the law itself was copyrightable, but whether annotations and other analytical materials accompanying the law were also barred from copyright protection under the government edicts doctrine.

The Code and the Copyright Claim

The work at issue in the case was the Official Code of Georgia Annotated, or OCGA, which includes the text of every Georgia statute in force, as well as various nonbinding supplementary materials, including a set of annotations below each statutory provision. The annotations generally include summaries of judicial decisions, summaries of relevant opinions of the state attorney general, a list of related reference materials, and editor's notes about the origins of the statutory text.

The Code Revision Commission is responsible for the assembly of the OGCA. Most of the members of the commission are members of the Georgia Legislature, and the commission receives funding from the legislative branch. For the version at issue, a division of LexisNexis and "its army of researchers" performed most of the work in drafting the annotations, although they did so under the close supervision and direction of the commission.

LexisNexis prepares the OGCA for the commission on a work-for-hire basis, vesting ownership ab initio in the commission although, under the parties' agreement, LexisNexis is granted the exclusive right to publish, distribute and sell the OGCA. The unannotated version of the statutory text is available for free, while the OGCA retails for approximately $400, a negotiated discounted rate.

Nonetheless, respondent Public.Resource.Org, or PRO, posted the full OGCA — all 186 volumes — online for free. The commission sued for copyright infringement and won at the district court level, securing a ruling that because the annotations were not enacted in the law and did not enjoy the force of law, they were protected by copyright.

The U.S. Court of Appeals for the Eleventh Circuit disagreed, finding that because works created by judges in the performance of their official duties fall into the public domain, so do works created by (or, evidently, in conjunction with) legislators. Applying a multifactor test, the circuit court concluded that the people were the "constructive authors" of the

OGCA.

The Supreme Court Leans Pro-PRO

A 5-4 majority split sharply on a generational rather than a political divide, sided with PRO. However, they did so for reasons different from the Eleventh Circuit.

Taking a straightforward approach, the majority, in an opinion written by Chief Justice John Roberts and joined by Justices Sonia Sotomayor, Elena Kagan, Neil Gorsuch, and Brett Kavanaugh, extended the government edicts doctrine from depriving judges of author status when performing official duties, to depriving legislators of such status in the course of their official duties. According to the majority, the doctrine applies regardless of whether those works are binding (e.g., judicial opinions), or nonbinding (e.g., headnotes and syllabi).

The court broke down the question of authorship into two steps: (1) Is the author of the annotations a legislator? (2) If so, is that legislator carrying out official duties in creating the annotations?

The court answered both questions in the affirmative.

First, it found that LexisNexis creates the annotations under a work-for-hire agreement with the commission, which in the court's view is an arm of the Georgia Legislature in that the commission was created by the Legislature, for the Legislature, and consists mainly of legislators. The court also noted that the Georgia Supreme Court has held that the work of the commission is "within the sphere of legislative authority."

Second, the court explained that the commission is carrying out its official duties in creating the annotations because that work is performed in the commission's "capacity as legislators."

The court rejected Georgia's arguments about annotations in general being copyrightable, an argument that dissenting Justices Clarence Thomas, Samuel Alito and Stephen Breyer also made.

In the court's view, what matters is the "who" rather than the "what" — in other words, the relevant distinction under the government edicts doctrine revolves around the identity and purpose of the author. Noting that the 1888 Supreme Court case Callaghan v. Myers held that a court reporter had a copyright interest in explanatory materials that the reporter had created himself, including headnotes and syllabi, the deciding factor in this court's view was that the copyright claimants here were vested with the authority to speak with the force of law.

The court bolstered its conclusion with a policy argument, pointing to the practical significance of the annotations in understanding Georgia's statutes and fearing that, if armed with copyright protection for such materials, states could provide subscription pay-per-law services offering tiered access to their laws and/or legislative histories. According to the court, such an outcome would be inconsistent with the central tenet of the government edicts doctrine.

The Dissents' "Force of Law" Approach

The two dissenting opinions, one authored by Justice Thomas, joined by Justices Alito and Breyer, and the other authored by Justice Ruth Bader Ginsburg and joined by Justice Breyer, sharply criticized the "authorship" approach.

The Thomas dissent rejected the concept that the government edicts doctrine can be so neatly extended from its judicial origins to the legislative context. As an example of the distinction, the dissent noted that the annotations do not carry the same weight or authority as dissenting and concurring opinions.

In Justice Thomas' view, the better analogy for annotations that do not carry the force of law is to "other copyrighted research tools provided by private parties" such as ALR and Westlaw. This is the line that lower courts and 25 other jurisdictions have drawn, believing that commentary on the law maintains copyright protection while any material with the force of law does not.

Under the dissent's reading of the government edicts doctrine, the emphasis is on "edicts," not "government" — it is the force of law that puts material outside the scope of protection, not who authored it and in what capacity.

The justices also offered an ominous warning that the rule announced in the majority opinion will prove difficult to administer, raising questions about which extra-legislative bodies will qualify as "legislators" under the doctrine. They also warned that arrangements, like Georgia's, with private publishers will ultimately have the opposite of the intended effect, because current arrangements allow states to offer annotated editions of their statutes for far less money than independent publishers who do not partner with a state. The majority view, the dissent argues, will therefore result in a greater cost to the public.

Justice Ginsburg, mirroring the bright line taken by the majority, argued in a short dissent that the annotations are copyrightable simply because they are not produced or adopted in a "legislative capacity." Unlike the headnotes and syllabi that accompany judicial opinions: (1) the annotations are not made contemporaneously with the statutes, (2) do not represent legislators' opinions or guidance, and (3) are given solely for the purpose of convenience of reference.

The Impact of Georgia v. Public.Resource.Org

The court's decision creates clarity in some ways but not in others.

There now is no question that commentary and analysis stemming from legislation and judicial rulings are potentially within the scope of the government edicts doctrine. Nor can states monetize their analyses of laws, at least to the extent the states are considered the author of such analyses.

However, the invocation of a new test leaves questions about how the test will be applied.

For example, the majority relied on the work-for-hire relationship to make the commission, rather than LexisNexis, the author under the first prong of the majority's two-pronged test. Indeed, even the petitioner did not dispute that the commission was the "author." But if the contract had been formulated differently, making LexisNexis the author, the result on the first prong may have been far less certain.

Also unclear is whether private entities that may be contracted to work on other materials pertaining to the myriad state and local codes might find their work subject to the government edicts doctrine simply because a government representative is involved, and where the work relates in some way to that representative's governmental function. As Justice Thomas' dissent pointed out, the majority's assessment of the second factor of its two-pronged test is fact-specific, which in turn can create unpredictability about whether or not work that relates to official duties yields the conclusion that the work results from the "carrying out" of those official duties.

The justices' various policy concerns may also be borne out. While the majority opinion notes that copyright law provides a type of monopoly, absent from the discussion is any recognition of the purpose of such a monopoly: the financial incentive to create. Without the ability to license or sell the fruits of their analysis, commentary and observations about the law, it may make little business sense for a publisher to enlist an "army of researchers" to create something that will be given away for free simply because it may bear too many fingerprints of a judge or legislator.

In contrast, those who prepare commentary without the valuable guidance of the legislature need not worry about the effects of the ruling; as noted by the Thomas dissent, Westlaw makes a version available for six times the price that Georgia mandated LexisNexis charge as a condition to the commission's involvement. In that sense, Justice Roberts' concern about a level playing field may be worsened: With the elimination of the ability to monetize the lower-priced LexisNexis version, the public may face the decision of having access to the existing law without comment, or paying a higher price for commentary prepared primarily or solely by private entities.

What is guaranteed is that publishers who work with governmental representatives will be looking closely at their contracts and relationships, with the court's new ruling in hand, to assess the structure and incentives that surround the creation of annotations, summaries and other analysis of the law.

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[1] Under 17 U.S.C. §105, works prepared by U.S. government are not copyrightable under Section 105. The government edicts doctrine is therefore not applicable to those works.