

Not So Peachy in Georgia: Supreme Court Holds Annotated Code Not Eligible for Copyright Protection

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by Jeffrey R. Cadwell

In a 5-4 decision with the majority opinion delivered by Chief Justice Roberts, the Supreme Court held that copyright protection does not extend to annotations in Georgia's official annotated code. The Code Revision Committee of the State of Georgia (the "Commission") had sued a company called Public.Resource.Org for posting a digital version of the annotated Georgia code for free on its website. The Commission prevailed in District Court, but the decision was reversed by the Eleventh Circuit, thus setting the stage for the Supreme Court's decision.



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The Commission, which is funded with public tax money, compiles the Georgia code along with annotations that include summaries of relevant judicial decisions, summaries of state attorney general opinions, and other reference materials, such as law review articles. The annotations were drafted by Matthew Bender & Co, which is a division of LexisNexis, pursuant to a work for hire agreement that vests any copyright in the State of Georgia.

The Court's holding is rooted in the government edicts doctrine, which states 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." The basis for this doctrine is that no one party should be able to own the law and arises out of a trio of 19th century Supreme Court decisions that together establish that judges who are carrying out their duty of making and interpreting law cannot be considered the

authors of their opinions, including head notes and syllabi, for purposes of copyright ownership.

The Court applied a two part test to determine whether the Commission can claim copyright protection in the annotations to the Georgia code: (1) whether the author qualifies as a legislator; and (2) whether the annotations were created in the discharge of legislative duties. The first question was answered in the affirmative, because the Commission serves as an extension of the Georgia legislature. The second question was likewise answered in the affirmative, because the Commission authors the annotations as part of its legislative responsibilities.

Justice Thomas dissented, noting that the “ruling will come as a shock to the 25 other jurisdictions” who produce annotated codes in a similar manner as Georgia. In his view, allowing copyright protection for annotations does not violate the government edicts doctrine, because: (1) the annotations are not in and of themselves law; (2) the creators of annotations (e.g., Lexis) are incentivized by copyright law to produce quality work product that can earn them a profit; and (3) the annotations are not required for fair notice of the law. Justice Thomas also asserted that the majority’s rule is difficult to administer, because the first prong (whether the author qualifies as a legislator) is difficult to define. For example, if a body similar to the Commission is made up of legislators and non-legislators, how many legislators must there be for it to become a legislative adjunct?

Justice Ginsburg also dissented. While she appeared to accept the majority’s test for application of the government edicts doctrine, she offered three reasons why the annotations do not constitute part of Georgia’s lawmaking process (the second prong of the majority’s test): (1) the annotations are not contemporaneously created and comment on statutes already enacted; (2) the annotations summarize writings in which other parties opine on a given statute; and (3) the annotations are to inform the public and are not addressed to those seated in the legislature.

Notwithstanding the dissenting opinions, the key takeaway from the majority opinion is that authorship matters. If legislators produce work product (either on their own or by virtue of a work for hire agreement that deems the legislators or another state entity to be the author) when acting within their legislative capacity, then the government edicts doctrine applies, and there is no copyright protection for that work product. But if a private party produces the work product, then the government edicts doctrine does not apply, and copyright protection is available. Perhaps those 25 other jurisdictions Justice Thomas cites will now look for a way to contract with companies such as Lexis so that Lexis remains the author but still offers the same benefits, such as making a lower-cost version of the annotations available. The majority’s holding does not disturb the fact that works prepared by non-lawmaking officials employed by public universities, libraries, and tourism offices, for example, can still benefit from copyright protection.