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INTELLECTUAL PROPERTY LITIGATION

Expert Analysis

# SCOTUS To Decide Copyrightability Of Georgia Code Annotations

The "government edicts" doctrine precludes copyright protection for certain government works, such as state and federal statutes and judicial decisions. The Supreme Court has not addressed the doctrine in over 100 years, and lower courts have struggled with it, calling it "difficult to apply when the material in question does not fall neatly into the categories of statutes or judicial opinions." *John G. Danielson v. Winchester-Conant Props.*, 322 F.3d 26, 38 (1st Cir. 2003). In its upcoming October Term, the court will decide whether the doctrine precludes Georgia from copyrighting the annotations in the Official Code of Georgia Annotated (OCGA). *State of Georgia v. Public.Resource.Org*, No. 18-1150 (2019). The court's holding may affect not only the state of Georgia but the 20 other states that have registered copyrights in all or part of their state codes, and

By **Lewis R. Clayton**

And **Eric Alan Stone**

may have implications for the copyright status of other government-approved works.

## The Government Edicts Doctrine

The Supreme Court considered the government edicts doctrine in three 19 century decisions: *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888) and *Callaghan v. Myers*, 128 U.S. 617 (1888).

In *Wheaton*, the court rejected copyright protection for its own opinions, holding that "no reporter has or can have any copyright in the written opinions delivered by this court; and the judges thereof cannot confer on any reporter any such right." 33 U.S. at 668. In *Banks*, the court extended that holding to decisions of the Supreme Court of Ohio because "no copyright could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties." 128 U.S. at 253. Rather, the "whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." Id.

> Although the Copyright Act now expressly excludes copyright protection "for any work of the United States Government," 17 U.S.C. §105, no analogous provision exists for state-government-created works.

In *Callaghan*, however, the court held that copyright protection applied to annotations to Illinois Supreme Court decisions that were prepared by a salaried Illinois official whose duties included preparing such annotations and compiling reports of those decisions. The

LEWIS R. CLAYTON *and* ERIC ALAN STONE *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.* MICHAEL F. MILEA, *an associate at the firm, assisted in the preparation of this column.*

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court explained that "there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume which will cover the matter which is the result of his intellectual labor." 128 U.S. at 647.

The Fifth Circuit has since applied the government edicts doctrine to bar copyright protection for model building codes adopted by municipalities. *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791 (5th Cir. 2002). The Second, Sixth, and Ninth Circuits, on the other hand, have extended copyright protection to government-approved works such as county-created tax maps, a medical coding system created by the American Medical Association and adopted by a federal regulatory agency, a privately created automobile valuation system incorporated by reference by certain state regulations, and privately prepared, government-approved annotations to Michigan statutes. *Cty. of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179 (2d Cir. 2001) (tax maps); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997) (medical coding system); *CCC Info. Servs. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61 (2d Cir. 1994) (automobile valuation system); *Howell v. Miller*, 91 F. 129 (6th Cir. 1898) (annotations to state statutes).

Notably, although the Copyright Act now expressly excludes copyright protection "for any work of the United States Government," 17 U.S.C. §105, no analogous provision exists for state-government-created works.

### District Court and 11th Cir. Opinions in 'State of Georgia'

The OCGA is the official published version of Georgia's laws. It contains not only statutory text but also annotations such as commentaries, editor's notes, excerpts from law review articles, and summaries of opinions of the Georgia Attorney General. The OCGA is updated and edited under the supervision of Georgia's Code Revision Commission, which was established by the Georgia General Assembly and comprises the lieutenant Governor and members of the Georgia Senate and House of Representatives. The Commission contracts with the LexisNexis Group to maintain, publish, and distribute the OCGA and to prepare the annotations. Lexis has an exclusive license to publish and sell the OCGA in print and online, and must publish the unannotated statutory text online, free of charge, and make the CD-ROM version of the OCGA, containing annotations, available for free at certain state- and county-operated facilities in Georgia. Each year, the Georgia legislature adopts the annotations through an act passed by both Houses of the legislature and signed into law by the Governor.

> Affirming the Eleventh Circuit's decision "would create substantial uncertainty regarding the copyrightability of a wide range of state-created works, state-adopted works, and 'law-adjacent' materials" held copyrightable by the Second, Sixth, and Ninth Circuits.

The Commission does not claim a copyright in the OCGA's statutory text. It does claim a copyright in the annotations, which "do not constitute part of the law," but are "merged" with the statutory text: "The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission … shall have the effect of statutes enacted by the General Assembly of Georgia" and "shall be merged with annotations … and may be cited as the 'Official Code of Georgia Annotated.'" OCGA §§1-1-1, 1-1-7.

Public.Resource.Org (PRO), a non-profit organization with a mission of improving public access to government records, purchased and scanned all 186 volumes of the OCGA, made them available online for free, and mailed digital copies on USB drives to Georgia legislators.

The Commission sued PRO for copyright infringement. The district court granted partial summary judgment in favor of the Commission, holding that the annotations were copyrightable.

The Eleventh Circuit reversed, holding that the annotations in the OCGA are not copyrightable because they are "sufficiently law-like so as to be properly regarded as a sovereign work. Like the statutory text itself, the annotations are created by the duly constituted legislative authority of the State of Georgia" and "clearly have

authoritative weigh in explicating and establishing the meaning and effect of Georgia's laws." *Code Revision Comm'n v. Public.Resource. Org, Inc.*, 906 F.3d 1229, 1233 (11th Cir. 2018). In so holding, the court examined three factors: (1) who created the annotations; (2) the nature of the annotations; and (3) the process by which the annotations were created. Id. at 1254.

As to the first factor, the court concluded that the Commission, which "for all intents and purposes [is] an arm of the Georgia General Assembly," "exercises direct, authoritative control over the creation of the OCGA annotations [by Lexis] at every stage of their preparation." Id. at 1244. As to the second factor, according to the court, "while not carrying the force of law in the way that the statutory portions of the OCGA do, the annotations are 'law-like' in the sense that they are 'authoritative' sources on the meaning of Georgia statutes" and "[h]aving been merged by the General Assembly with the statutory text into a single, unified edict, and stamped with the state's imprimatur … the annotations have been suffused with powerful indicia of legal significance that is impossible to ignore." Id. at 1248. Additionally, as the court explained, "the OCGA favorably cites to a court case that warns that '[a]ttorneys who cite unofficial publication[s] of [the OCGA] do so at their peril.'" Id. at 1250. With respect to factor three, the court held that "the Georgia legislature's use of bicameralism and presentment to adopt the annotations as their own and merge them with statutory text indicates that the work was created by the legislators in the discharge of their official duties." Id. at 1254. Thus, the court concluded, "the Georgia General Assembly has made the connection between the [annotations and statutory text] inextricable and, thereby, ensured that obtaining a full understanding of the laws of Georgia requires unfettered access to the annotations." Id. at 1255.

## Supreme Court Appeal

The Supreme Court granted the Commission's petition for certiorari. Notably, PRO did not oppose certiorari, stating that, "[w]hile [PRO] adamantly defends the Eleventh Circuit's decision … [t]he Court should grant certiorari to clarify, authoritatively, how courts should analyze whether a given work is an uncopyrightable government edict." PRO Opposition at 2. Although it denied the existence of a "square circuit conflict," PRO explained that the "Court's review is warranted because under this Court's existing precedent the government edicts doctrine is difficult to apply when a work does not fall neatly into a category, like statutes or judicial opinions, already held to be edicts. As a result, the case law is confusing and outcomes are difficult to predict." Id. at 9. Additionally, as PRO argued, the court's holding may implicate the practices of not only Georgia, but the twenty other states have registered copyright in all or part of their codes: Arkansas, Colorado, Connecticut, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming. Id. at 11-12.

At the merits stage, the Commission argues that the "Eleventh Circuit's decision conflicts with a straightforward application of the Copyright Act's text and this court's precedents. Those authorities establish that while the law itself is not copyrightable, works summarizing or discussing the law are eligible for copyright protection," and "the Eleventh Circuit's decision threatens to upend the longstanding arrangements of Georgia and numerous other states, which rely on copyright's economic incentives to make useful research aids available at little or no cost to taxpayers." Commission Br. at 2-3, 4-5. In addition, as the Commission points out, affirming the Eleventh Circuit's decision "would create substantial uncertainty regarding the copyrightability of a wide range of state-created works, state-adopted works, and 'law-adjacent' materials" held copyrightable by the Second, Sixth, and Ninth Circuits. Id. at 57.

PRO's merits brief is due on Oct. 9, 2019. Oral argument has not yet been scheduled.

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