No One Can Own the Copyright to Annotated State Statutes

Georgia, et al., Petitioners v. Public.Resource.Org, Inc., 590 U.S. __ (2020)

By: Lisa Holubar & Adam Reis | May 8, 2020

On April 27, 2020, in a 5-4 decision with two dissenting opinions, the United States Supreme Court held that the annotations included in Georgia's official statute are not copyrightable. The ruling, authored by Chief Justice Roberts, was based on the majority's conclusion that work performed in official legislative capacity does not qualify as "authorship" under the Copyright Act, thereby precluding the vesting of copyright protection.

The State of Georgia has one official code—the "Official Code of Georgia Annotated," or OCGA—which includes the text of every Georgia statute currently in force, as well as various non-binding supplementary materials. Those non-binding supplementary materials, specifically annotations providing summaries and listing related materials, were at issue in the case. Georgia employs a "Code Revision Commission" to assemble the OCGA. The Commission in turn contracts with LexisNexis, who performs the bulk of the work, pursuant to a work-made-for-hire agreement granting Lexis the exclusive right to publish, distribute, and sell the OCGA.

Georgia and the Commission sued Public.Resource.Org ("PRO"), a nonprofit organization, after PRO posted the OCGA online and distributed copies of the OCGA to third parties. The District Court concluded that the annotations were eligible for copyright protection and thus granted summary judgment and permanent injunction in favor of the State. On appeal, the Eleventh Circuit reversed, finding the work "attributable to the constructive authorship of the People" and thus not subject to copyright protection.

The Supreme Court affirmed the opinion of the Eleventh Circuit, although for different reasons. The Supreme Court found the Eleventh Circuit's test was not necessary given the straightforward application of the "the government edits doctrine." Under this doctrine, "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." Extending century-old precedent in which the Court held that judges cannot be authors of the works they prepare "in the discharge of their judicial duties," the Court held that legislators likewise cannot be authors of works created in discharge of their legislative duties. Because the Court found that the Commission "functions as an arm" of the Georgia legislature and the annotations were prepared under Georgia law as an act of legislative authority, the Court held that the Commission could not be an author of the annotations entitled to copyright protection. The Court warned of the implications of creating an "economy-class" version of the code, which may not contain come of the clarifying aspects of what the Court called the "first-class" version of the law. Specifically, the Court noted:

> If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today's digital tools, States might even launch a subscription or pay-per-law service.

Notably, two dissenting opinions were offered. In the first, Justices Thomas and Alito disagreed with the majority's reading of precedent, finding it a conclusory "magic wand of *ipse dixit*." According to this dissent, the factors warranting public accessibility of judicial opinions and official legislative history—most notable, the force of law—were not present for the annotations at issue. And countering the majority, they noted "[p]erhaps, to the detriment of all, many States will stop producing annotated codes altogether. Were that to occur, the majority's fear of an "economy-class" version of the law will truly become a reality." Justice Ginsburg also issued a dissenting opinion, in which Justice Breyer joined, on the grounds that the annotations do not fall within the realm of lawmaking: "the placement of annotations in the OCGA does not alter their auxiliary, nonlegislative character."