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Modern Copyright Law Meets its Match in 19th Century Government Edicts Doctrine

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In an interesting 5–4 split,[1] the Supreme Court ruled on April 27, 2020, that annotations contained in a state's official code are not entitled to copyright protection. The Supreme Court's *Georgia v. Public.Resource.Org, Inc*.[2] decision upheld the 19th century doctrine, known as the "government edicts doctrine," recognizing 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 Supreme Court's Decision & Reasoning

The State of Georgia has one official code known as the "Official Code of Georgia Annotated," or "OCGA," which contains the text of every statute currently in force and various non-binding supplementary materials, including annotations that appear beneath each statutory provision. The annotations at issue in this case were first prepared by Matthew Bender & Co., a division of the LexisNexis Group, pursuant to a work-for-hire agreement stating that any copyright in the OCGA vests exclusively with the State of Georgia. Under the agreement, Lexis enjoyed the exclusive right to publish, distribute, and sell the OCGA. Public.Resource.Org ("PRO"), a nonprofit organization dedicated to providing the public free access to legal materials, posted a digital version of the OCGA on various websites where it could be downloaded by the public free of charge. In response, Georgia's Code Revision Commission ("the Commission") sued PRO, alleging PRO's actions constituted unlawful copyright infringement. PRO counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the public domain. The District Court sided with the Commission, reasoning the annotations were eligible for copyright protection because they lacked the force of law. The Eleventh Circuit reversed, finding the annotations were attributable to the legislators and fell in the public domain. The Supreme Court agreed.

The Copyright Act, 17 U.S.C. § 102(a), grants monopoly protection for "original works of authorship." However, this copyright protection is limited for certain government work product. The Supreme Court previously held in a series of 19th century cases that non-binding, explanatory legal materials were not copyrightable when created by *judges* acting in their official capacity.[3] This limitation on copyright protection came to be known as the "government edicts doctrine," which stands for the principle that no one can own the law and all citizens should have free access to the law.

In its decision, the Court now has extended this doctrine to non-binding, explanatory legal materials created by *a legislative body* acting in its official capacity. The Court thus emphasized that copyright protection does not vest in works that are (1) created by judges or legislators (2) in the course of their judicial and legislative duties.

In applying the first step of this framework, the Court first considered whether the purported author qualified as a legislator. Since Lexis prepared the annotations pursuant to a work-for-hire agreement with Georgia's Code Revision Commission, the Court deemed the Commission the sole "author" of the work. Moreover, the Court found the Commission served as an extension of the Georgia Legislature in preparing and publishing the annotations. Thus, the Court found the first element satisfied—the annotations were created by legislators. The Court then turned to the second step of this framework and considered whether the Commission created the annotations in the course of its legislative duties. In its analysis, the Court stressed that the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. As such, the Court deemed the Commission's preparation of the annotations an act of "legislative authority" that fell within the work legislators perform in their official capacity. Therefore, the Court found both elements of the framework satisfied and held copyright protection did not extend to the annotations contained in Georgia's OCGA.

Justice Thomas argued in his dissent that while statutes and regulations cannot be copyrighted, accompanying notes can be. Justice Thomas stressed that allowing copyright protection would not conflict with any of the justifications behind the government edicts doctrine, since annotations do not carry the force of law. Similarly, in her dissent, Justice Ginsburg took issue with the second step of the majority's framework. Since annotations are not created in a legislator's law-shaping capacity, Justice Ginsburg maintained the annotations were copyrightable. [4]

Implications

The outcome of this decision will have an impact on private sector publishing companies that prepare supplementary materials for judiciaries or legislatures. Commentary and analyses prepared with guidance from the legislature and judiciary now appear to fall within the scope of the government edicts doctrine. However, materials prepared entirely independent of this guidance are likely not within the reach of this decision. The precise impact of the Supreme Court's decision remains unclear, but one thing is certain—companies should consider their contracts with governmental entities and the potential impact these relationships may have on their copyright portfolios.

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[1] Chief Justice John Roberts penned the majority opinion, joined by Justices Sonia Sotomayor, Elena Kagan, Neil Gorsuch, and Brett Kavanaugh. Justice Clarence Thomas prepared the first dissenting opinion, joined by Justice Samuel Alito in full and Justice Stephen Breyer in part. Justice Ruth Bader Ginsburg prepared the second dissenting opinion, also joined by Justice Stephen Breyer.
[2] 590 U.S. ___ (2020).
[3] *See Wheaton v. Peters*, 8 Pet. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).
[4] For more information on this topic, please read an article prepared by one of our colleagues, Andrew McElligott, entitled "SCOTUS' 131-year itch: Georgia v. Public.Resource.Org, Inc."