Keyword(s): copyright, annotated code, authorship

General: Protection from the Copyright Act does not extend to annotations contained in Georgia's official annotated code.

Georgia et al. v. Public.Resource.Org, Inc.
590 U.S. ____ (2020) Supreme Court No. 18-1150
Decided: April 27, 2020

I. Facts

The State of Georgia has one official code: the "Official Code of Georgia Annotated" or the OCGA. The OCGA includes the text of every Georgia statute, and also includes various non-binding supplementary materials. The OCGA is assembled by a state entity called the Code Revision Commission, and this Commission is composed of members of the Georgia Senate or House of Representatives. Every year, the Commission presents its proposed statutory text and accompanying annotations for the legislature's approval. The annotations in the current OCGA were prepared by Matthew Bender & Co., Inc., a division of the LexisNexis Group, according to a work-for-hire agreement with the Commission. The agreement states that any copyright in the OCGA vests exclusively in the State of Georgia, acting through the Commission, and LexisNexis has the exclusive right to publish, distribute, and sell the OCGA. LexisNexis performs the majority of the work in drafting with the Commission supervising the work and specifying what the annotations must include in exact detail.

Public.Resource.Org (PRO) is a nonprofit organization whose goal is to give the public access to government records and legal materials. PRO posted a digital version of the OCGA, without permission, on various websites, where the public could download it without charge and distributed copies of the OCGA to different organizations and Georgia officials. In response, the Commission sent PRO several cease-and-desist letters asserting that PRO's actions constituted unlawful copyright infringement, but PRO refused to halt its distribution. The Commission then sued PRO on behalf of the Georgia Legislature and the State of Georgia for copyright infringement but limited its assertion to the annotations described above.

The district court sided with the Commission, concluding that annotations were eligible for copyright protection because they were "not enacted into law" and lacked "the force of law." The court granted partial summary judgment to the Commission and entered a permanent injunction requiring PRO to cease its distribution activities and remove the digital copies of the OCGA from the internet. On appeal, the Eleventh Circuit reversed, citing three factors in making their decision: the identity of the public official who created the work, the nature of the work, and the process by which the work was produced. The circuit court found that each of these factors favored the OCGA being viewed as government edicts authored by the people and rejected the Commission's assertion of copyright, vacated the injunction against PRO, and directed judgment for PRO. The Supreme Court granted *certiorari*.

II. Issue

Does protection from the Copyright Act extend to the annotations contained in Georgia's official annotated code?

III. Discussion

No. The Court stated that under the government edicts doctrine, judges and legislators could not be considered authors of the work they produce in their official duties. Their work is, therefore, not copyrightable.

The Court referred to the government edicts doctrine, established by three prior Supreme Court precedents, to help make their determination. In *Wheaton v. Peters,* the Court's third Reporter of Decisions sued the fourth Reporter of Decisions, asserting a copyright interest in the Justices' opinions. The Court concluded that no reporter has or can have copyright in the written opinions delivered by the Court. *Wheaton v. Peters,* 33 U.S. 591, 617, 668 (1834). In the second case covering the government edicts doctrine, *Banks v. Manchester,* was concerned with whether the Ohio Supreme Court's official reporter held a copyright in judges' opinions and non-binding explanatory materials prepared by the judges. *Banks v. Manchester,* 128 U.S. 244, 249 (1888). The Court concluded that there was no copyright because judges cannot be authors of what they produce in a judicial capacity in the sense of the Copyright Act. *Id.* at 253. In the third case on the government edicts doctrine, *Callaghan v. Meyers,* the Court identified an important limiting principle. While the an official reporter did not have a copyright interest in judges' opinions, the Court upheld the reporter's copyright interest in several explanatory materials that the reporter had created himself because although these works mirrored the judge-made materials rejected in *Banks,* they came from an author who had no authority to speak with the force of law. *Callaghan v. Meyers,* 128 U.S. 617, 645, 647 (1888).

The Supreme Court reasoned that these three cases establish a straightforward rule: because judges are vested with the authority to make and interpret the law, they cannot be the author of the works they prepare in discharge of their judicial duties. The principle behind this rule is that no one can own the law; every citizen should know the law and have free access to its contents. The Court also reasoned that rather than attempting to catalog the materials that constitute the law, the doctrine bars the officials responsible for creating the law from being considered the authors of whatever work they perform in their capacity as lawmakers. The Court extended this conclusion to legislators, reasoning that if judges, acting as judges, can't be authors of the law, then legislators, acting as legislators, cannot be either because of their authority to make and interpret the law. Therefore, the Court found that under their precedents, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.

The Court proceeded to apply this test to the facts of the case at hand. In connection with the first step of the test, the Court determined whether the purported author qualifies as a legislator. The Court noted that the annotations were prepared by Lexis according to a work-for-hire agreement, but the annotations were overseen by Georgia's Code Revision Commission. Therefore, the Copyright Act deems the Commission the sole author of the work because although Lexis expended effort preparing the codes, for purposes of copyright, labor redounds to the Commission as the statutory author. The Court also determined that the Commission functions as an extension of the legislature to produce the annotations. It is created by the legislature and consists mostly of legislators, and the legislature approves the annotations the Commission creates before the annotations are merged with the statutory text and published in

the official code. The Court also noted that the Georgia Supreme Court had also previously held that the work of the Commission is within the sphere of legislative authority. Therefore, the Court held that the Commission serves as an extension of the Georgia Legislature.

In connection with the second step of the test, the Court determined whether the Commission created the annotations in the discharge of its legislative duties. The Court found that the Commission's preparation of the annotations is an act of legislative authority under Georgia law and provide commentary and resources that the legislature deemed relevant in understanding its laws. While the Court recognized that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law review articles, the Court determined that this does not take them outside of the exercise of legislative duty, instead concluding that the annotations published by legislators alongside statutory text fall within the work legislators perform in their capacity as legislators.

Given the Commission's role as an adjunct to the legislature and the fact that the Commission authors the annotations in the course of its legislative duties, the annotations in Georgia's Official Code were found by the Court to fall within the government edicts doctrine and are not copyrightable.

IV. Conclusion

If a judge or legislator authors a work, then the work is not copyrightable if created in the course of their judicial or legislative duties.

V. Dissent

Justice Thomas, joined by Justices Alto and Breyer, dissented finding that while that statutes and regulations cannot be copyrighted, accompanying notes lacking legal force can be. Justice Thomas particularly argued that the construction of "authorship" by the Majority is not well established by precedent nor is it incorporated into the multiple revisions of the Copyright Act as evidenced by the lower courts not applying the government edicts doctrine in the manner suggested by the majority and in view of the 25 jurisdictions have agreements similar to Georgia with respect to the production of annotated codes. Justice Thomas found no statutory grounds for extending the government edicts doctrine and noted that Congress, not the courts, has been assigned the task of defining the scope of the limited monopoly that should be granted to authors.

Justice Ginsburg, joined by Justice Breyer, dissented arguing that the annotations in the Official Code of Georgia Annotated are not done in a legislative capacity. Justice Ginsberg argued that the annotations are not part of the lawmaking process because they are not created contemporaneously with the statutes to which they pertain (they are instead generated subsequent to a law's enactment), because the annotations are descriptive rather than prescriptive, and because the annotations are given for the purpose of convenient reference by the public.