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Supreme Court to Rule on Copyright Protection of State Annotated Legal Codes

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On June 24, 2019, the U.S. Supreme Court granted *certiorari* to decide whether states can claim copyright protection in annotated codes. *State of Georgia v. Public.Resource.Org, Inc.*, No. 18-1150. Annotated codes, in addition to the text of the statute, include summaries of judicial opinions, regulations, and attorney general opinions related to the statute. Georgia, like many states, offers a free version of the statute but charges a fee for the annotated version.

In October of 2018, in *Georgia v. Public.Resource.Org, Inc.*, the Eleventh Circuit Court of Appeals unanimously ruled that the Official Code of Georgia Annotated (the "OCGA") is not protected under copyright law and should be made available for free to the public. The Court explained that the annotations to the OCGA are different from "annotations created by a private party [which] generally can be copyrighted because [they] are an original work created by a private publisher." The Court reasoned that "the People, as the reservoir of all sovereignty, are the source of our law," and thus, "the People are the constructive authors" of the annotated code for copyright purposes. The Court found that "because they are the authors, the People are the owners of these works, meaning that the works are intrinsically public domain material and, therefore, uncopyrightable."

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Georgia sought review. In the petition for a writ of *certiorari*, Georgia argued that the Eleventh Circuit's decision conflicts with decisions by other circuits and exacerbates a split of authority on the issue. Specifically, the Second (*County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179 (2001)), Sixth (*Howell v. Miller*, 91 F. 129 (1898)), and Ninth (*Practice Management Corp. v. American Medical Ass'n*, 121 F.3d 516 (1997), amended, 133 F.3d 1140 (1998)) Circuits allowed copyright protection for privately developed, government-adopted work, while the Fifth (*Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (2002) (*en banc*)) and Eleventh Circuits (this case) have rejected copyright claims. Additionally, as Georgia's *cert.* petition points out, the Supreme Court in its last statement on the issue, "recognized the copyrightability of annotations" documented by an official reporter in Illinois Supreme Court (*see Callaghan v. Myers*, 128 U.S. 617 (1888)). Georgia also argued that the Copyright Act exempts only "'work[s] of the United States Government' – not of state governments – from '[c]opyright protection.'" Interestingly, Public.Resource.Org, Inc. did not oppose review, although arguing that there was no Circuit split and that the decision below was correct. Rather, it asserted that review was "warranted because under [the] 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."

Clearly, the decision will have an impact on commercial publishers that prepare annotations, such as Matthew Bender & Co., a part of the Lexis Nexis Group ("Lexis Nexis"). In fact, Lexis Nexis has already filed its Amicus Brief in support of the petition for *certiorari*, arguing that annotations are "privately generated works ...creat[ed] and generate[d] at considerable expense to Lexis Nexis and at no expense to the State" and that "the

Eleventh Circuit's approach destroys economic incentive to create these publicly valuable works."

We will continue to follow proceedings in this matter on this blog.
