akerman

Blog Post

States Cannot Copyright Annotated Versions of Legal Codes

May 4, 2020
By Evelina Gentry

On April 27, 2020, the United States Supreme Court held, in *Georgia et al. v. Public.Resource.Org., Inc.,* in a 5-4 decision, that copyright law does not protect annotations contained in the official annotated compilation of Georgia statutes.

As explained in our prior blog, Georgia, like many states, offers a free version of its official statute, but charges a fee for the annotated version, Official Code of Georgia Annotated (OCGA). Annotated codes, in addition to the text of the statute, include summaries of judicial opinions, regulations, and attorney general opinions related to the statute. The annotations in the current OCGA were produced by Matthew Bender & Co., Inc., a division of the LexisNexis Group (Lexis), pursuant to a work-for-hire agreement with the Georgia Revision Commission (Commission), a state entity composed mostly of legislators. Under the agreement, Lexis drafts the annotations under the supervision of the Commission. The agreement also states that any copyright in the OCGA vests in the State of Georgia, acting through the Commission.

The nonprofit group Public.Resource.Org, Inc. (PRO) purchased a copy of the OCGA and made it available online for free. The Commission sued PRO for copyright infringement related to the annotations. PRO counterclaimed seeking a declaratory judgment

Related People

Evelina Gentry

Related Work

Copyrights
Intellectual Property
Intellectual Property Litigation

Related Offices

Los Angeles
New York

Marks, Works, and Secrets

Akerman Perspectives on the Latest Developments in Intellectual Property Law

Visit this Akerman blog

that the OCGA with the annotations fell in the public domain. The District Court sided with the Commission, holding that the annotations were eligible for copyright protection because they had not been enacted into law. The Eleventh Circuit reversed, rejecting the Commission's copyright assertion under the government edicts doctrine. The Supreme Court, in a majority opinion by Chief Justice Roberts, joined by Justices Sotomayor, Kagan, Gorsuch and Kavanaugh, affirmed the Eleventh Circuit's holding, but for different reasons.

The Court's opinion began with an analysis of precedent relating to the government edicts doctrine, which traces back to the 19th century, and discerned a "straightforward rule" that judges "cannot be the [statutory] 'author' [for copyright purposes] of the works they prepare 'in the discharge of their judicial duties.'" The Court further explained that because judges cannot be "authors" based on their authority to make and interpret the law, it follows that legislators, acting as legislators, also cannot be statutory authors for copyright purposes.

The Court further explained that the government edicts doctrine applies to whatever work judges perform in their capacity as judges and legislators perform in their capacity as legislators, including explanatory and procedural materials created in the discharge of their legislative duties. Thus, the Court concluded, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties. Applying this framework, the Court held that annotations to the OCGA are not copyrightable because the author of the annotations under the Copyright Act is the Commission, which functions as an arm of the Georgia legislature in creating the annotations in the discharge of its legislative duties.

The Court rejected Georgia's argument that excluding the OCGA annotations from copyright protection conflicts with the text of the Copyright

Act, which, under § 101, lists "annotations" among the kinds of works eligible for protection. The Court found that the relevant provision refers only to "annotations... which... represent an original work of authorship." However, the Court reasoned, the OCGA annotations do not fit that description because they are prepared by a legislative body that cannot be deemed a statutory "author" of the works it creates in its official capacity.

The Court also noted that Georgia "draws a negative inference from" the fact that the Act excludes from copyright protection works prepared by Federal Government officials, without establishing a similar express exclusion for State officials. However, the Court explained, that rule applies to all federal officials, regardless of the nature and scope of their duties and it does not suggest an intent to displace the much narrower government edicts doctrine with respect to the States.

The Court further rejected Georgia's attempt to frame the government edicts precedent to focus exclusively on whether a particular work has "the force of law," the view that Justice Thomas also endorsed in dissent. The Court explained that such an interpretation cannot be squared with precedent.

Additionally, the Court found that Georgia's conception of the government edicts doctrine as distinguishing between different categories of content with different effects has less of a textual footing than the traditional formulation, which focuses on the identity of the author. Indeed, the Court noted, Georgia's characterization of the OCGA annotations as non-binding and non-authoritative undersells the practical significance of the annotations to litigants and citizens, where it would allow states to make certain non-binding judicial and legislative work product available only to the "first-class" readers paying for the service.

The Court then concluded that there is only one clear path forward that avoids the above mentioned

concerns, which is that courts should not "examin[e] whether given material carries 'the force of law,'" but instead should "ask only whether the author of the work is a judge or legislator," because "whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable."

Justice Thomas dissented, joined by Justice Alito and joined in part by Justice Breyer. At the outset, the Thomas dissent pointed out that the most immediate consequence of the majority decision will likely be felt by the regions that rely on arrangements similar to Georgia's to produce annotated codes, which include 22 states, two territories, and the District of Columbia. Additionally, while Justice Thomas acknowledged that the 19th century precedent analyzed by the majority establishes that judicial opinions cannot be copyrighted, he pointed out that the precedent does not exclude from copyright protection notes that are prepared by an official court reporter and published together with the reported opinions. Justice Thomas then concluded that there is no apparent reason why the same logic would not apply to statutes and regulations so while statutes and regulations cannot be copyrighted, accompanying notes lacking legal force can be protected.

The Thomas dissent also reasoned that allowing annotations to be copyrighted does not run afoul of justifications for the government edicts doctrine for several reasons. It explained that, first, unlike judicial opinions and statutes, these annotations do not embody the will of the people because they are not law. Second, unlike judges and legislators, the creators of annotations are incentivized by the copyright laws to produce a desirable product that will eventually earn them a profit. And lastly, the annotations do not impede fair notice of the laws. The Thomas dissent further concluded that its reading of the precedent is supported by the text of the Copyright Act, which does not define the term "author," excludes from copyright protection works

prepared by federal government officials but contains no similar prohibition against works of state governments, specifically notes that annotations are copyrightable derivative works, and provides that an author may hold a copyright in "material contributed" in a derivative work, "as distinguished from the preexisting material employed in the work." For these reasons, Justice Thomas concluded that Georgia's statutory annotations at issue are copyrightable.

Justice Ginsburg, joined by Justice Breyer, also dissented, and argued that annotations to the OCGA are not written by the Commission in its legislative capacity. This dissent argued that annotations are not part of the lawmaking process because (1) the annotations are not created contemporaneously with the statutes to which they pertain and, instead, are comments on statutes already enacted; (2) the OCGA annotations are descriptive rather than prescriptive, *i.e.*, they summarize writings in which others express *their* views on a given statute; and (3) they aim to inform the citizenry at large and do not address, particularly, those seated in legislative chambers.

The most immediate impact of the Court's decisions will be, as Justice Thomas pointed out, on the jurisdictions that have arrangements similar to Georgia's to produce annotated codes. However, as with most Supreme Court decisions, even those that are 5-4, this pronouncement will reach further, including all works of alleged authorship that are created by judges and legislators in the course of their judicial and legislative duties. It is likely to be next extended to works created by the executive branch in the course of its duties.

---

opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.