

## COPYRIGHT DEVELOPMENTS

### U.S. Supreme Court Finds No Copyright Protection for Works Prepared by Legislators or Judges in the Course of Official Duties

May 1, 2020

By [Dasha Chestukhin](#)

In *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. \_\_\_\_ (2020), the U.S. Supreme Court held (5-4) that any works (including non-binding annotations to a State code) authored by or for the State's legislature in the course of its legislative duties are ineligible for copyright protection.

Under the government edicts doctrine, officials (particularly judges and legislators) empowered to speak with the force of law cannot be authors of works created in the course of their official duties, regardless of whether a particular work carries the force of law. Accordingly, though the annotations at issue were explanatory materials, rather than binding statutes, they were held to be outside the reach of copyright protection because they were created by a legislative body in the course of its legislative duties.

Although this ruling puts annotated state codes in the public domain, which seems as if it should expand access, there is some concern that it may ultimately reduce availability. Annotations are typically prepared by private vendors under an agreement with a State's legislative or judicial branch. Such vendors are incentivized by copyright law to produce works that will earn them a profit, but if statutory annotations are no longer subject to copyright, vendors may decline to expend time and money on creating such works, which will need to be made available to the public free of charge. (Indeed, Justice Thomas' dissent warns that many States may stop producing annotated codes altogether.)

However, because the Court's ruling extends the government edicts doctrine only to works created by legislators in the course of their legislative duties, clever State legislations may opt to create independent entities, removed from the legislative process, that are tasked with preparing annotations. Whether such arrangements would pass muster is an open question, as the Court failed to specify what factors determine whether a particular entity is (or is not) part of a State's legislature.

This case involved the State of Georgia's claim that Public.Resource.Org had infringed Georgia's copyright in the annotations to the State's one official code, the "Official Code of Georgia Annotated" or OGCA. In connection with each official statute's text, the OGCA provides annotations that summarize materials like relevant judicial decisions, state attorney general opinions and law review articles. The OGCA's annotations are prepared by a private company (a division of the LexisNexis Group) under the supervision of Georgia's Code Revision Commission pursuant to a work-for-hire agreement, which provides that any copyright in the OGCA vests in the State of Georgia, through the Commission. Each year, the Commission submits the proposed OGCA to the State legislature, which then enacts the

statutory portion, merges it with the annotations and publishes the final merged document by the State's authority. Per the Commission's agreement with Lexis, an unannotated version of Georgia's statutory text is available to the public for free and the price of the annotated OGCA is capped.

PRO, a nonprofit organization aiming to facilitate public access to legal materials, posted a free digital copy of the annotated OGCA across various websites. Though the Commission sent a number of cease-and-desist letters asserting its copyright in the OGCA's annotations, PRO refused to stop distributing the OGCA on the grounds that it was in the public domain. The Commission then sued PRO for infringing the Commission's copyright in the OGCA's annotations.

Distilling the holdings of three 19th-century cases,<sup>1</sup> the Court concluded that judges, because they are vested with the authority to make and interpret the law, cannot be the "author" of any works prepared in their judicial capacity. This long-standing rule, known as the government edicts doctrine, denies copyright protection to both binding works (such as opinions) and non-binding works (such as dissents or headnotes). The Court reasoned that this doctrine applies with equal force to legislators acting in their legislative capacity and therefore bars copyright protection not only for binding, final legislation, but also for explanatory and procedural materials.

The Court therefore held that copyright does not vest in any works that are (1) created by legislators or judges (2) in the course of their legislative or judicial duties. Notably, whether particular works carry the force of law is irrelevant to this analysis.

Applying this reasoning to the facts before it, the Court found that the first factor was met because the annotations were created by the State legislature. Although the OGCA's annotations were prepared by a private company, this was done under a work-for-hire agreement with Georgia's Commission, thereby rendering the Commission the sole "author" of the annotations. Acknowledging that the Commission is not identical to Georgia's legislature, the Court nevertheless held that the Commission functions as the legislature's arm in producing the annotations, citing the fact that the Commission is created by and for the legislature, consists largely of legislators, and receives funding and staff designated for the legislative branch. The Court also found it significant that the Commission's annotations, though not enacted into law, are approved by Georgia's legislature before being merged with the OGCA's statutory text. However, the Court did not specify which, if any, of the foregoing factors was dispositive or if any other relevant factors weigh in favor of (or against) a finding that a particular body acts under legislative authority.

The Court found that the second factor was met because the Commission's preparation of the annotations is an act of legislative authority under Georgia law, namely, a Georgia Supreme Court decision in a case involving state separation of powers. Further, analogizing to syllabi and headnotes prepared by judges, the Court concluded that the explanatory annotations, which are deemed relevant by the legislature and published alongside statutory text, fall within the work performed by legislators in their legislative capacity.

Because the OGCA's annotations were prepared by a legislative body in the course of its legislative duties, the Court concluded that they were not copyrightable.

---

<sup>1</sup> *Wheaton v. Peters*, 8 Pet. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

Justice Thomas and Justice Ginsberg both penned dissents calling into question both the basis for and the final holding of the Court's decision, revealing a passionate split amongst the Justices on this question.

If you have any questions about this case or any other copyright law issue, contact [Dasha Chestukhin](#) or your CLL attorney.

---

## [Dasha Chestukhin](#)



**Associate**

[Email](#) | [212.790.9251](tel:212.790.9251)

Dasha's practice encompasses a broad range of intellectual property matters, including trademarks, copyrights, domain names, unfair competition and patents.