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High Court Rules Works Authored by Legislators in Their Legislative Capacity Ineligible for Copyright Protection

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A divided Supreme Court has held that works authored by legislatures or legislators in their legislative capacity are ineligible for copyright protection *(**Georgia v. Public.Resource.Org, Inc.**)*. The Copyright Act protects original works of authorship. An exception exists, however, for certain government work product authored by government officials in the course of their official duties. The so-called government edicts doctrine embodies the principle that no one can own the law and has long been applied to ensure that judges, who possess the authority to interpret the law, cannot assert copyright protection over works created in their judicial capacity. In this decision, the court extends this doctrine to cover legislatures and legislators.

Background

Georgia's legislature created and funds a Code Revision Commission, staffed by the state's Office of Legislative Counsel, that oversees the periodic revisions of the Official Code of Georgia Annotated (OCGA). The commission contracted with a division of LexisNexis (Lexis) to draft the annotations under the commission's supervision and direction, with the resulting copyright in the OCGA vesting in the State of Georgia. While the state owned the copyright to the OCGA, the state granted Lexis the exclusive right to publish, distribute and sell the work. The license agreement required Lexis to limit the price it charged for the OCGA and to make a free unannotated version available to the public.

Public.Resource.Org (PRO), a nonprofit organization that facilitates public access to government records and legal materials, provoked the litigation. By publicly distributing – for free and without authorization – copies of the OCGA, PRO essentially challenged the State of Georgia to sue it. The commission obliged, suing PRO for infringing its asserted copyright in the OCGA annotations. PRO then counterclaimed, seeking declaratory judgment that the entire OCGA was in the public domain. The district court held that the OCGA annotations, which did not constitute enacted law and therefore lacked the force of law, were eligible for copyright protection. The Eleventh Circuit reversed, holding that the OCGA annotations were government edicts and thus ineligible for protection.

Analysis

Writing for a 5–4 majority, Chief Justice John Roberts noted that "[b]ecause legislators, like judges, have the authority to make law, it follows that they, too, cannot be 'authors'" of works created in the discharge of their official duties. The court concluded that "[u]nder the government edicts doctrine, judges – and, we now confirm, legislators – may not be considered the 'authors' of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the [OCGA] annotations because they are authored by an arm of the legislature in the course of its official duties."

Georgia sought to characterize the OCGA annotations as non-binding and non-authoritative, but the court stressed the OCGA annotations' practical significance to any citizen interested in learning his or her legal rights and duties. By charging for access to

such annotations and additional commentary, states could be allowed to create an economy-class version of law while reserving a first-class version of premium content "for those who can afford the extra benefit," permitting states to launch what the court tartly called a "subscription or pay-per-law service."

The test for whether a work constitutes an unprotected government edict focuses less on the status of content itself – i.e., whether the disputed work has the force or effect of law – and instead focuses on the identity of the author, i.e., judges, legislators and arms of legislatures acting in their judicial or legislative capacity.

Key takeaways

The ruling has obvious implications for the way that states compile their official and semi-official codes, and how they will be able to monetize such codes in the future. The case also has implications for other organizations, such as technical standards-setting bodies whose standards may subsequently be incorporated into law by state legislatures or by Congress, and which often rely on revenue from selling access to their standards.

In addition, the logic of the court's reasoning presumably would render annotations and commentary by (1) state regulatory agencies and (2) municipal, county, or other local lawmaking or regulatory bodies similarly ineligible for copyright protection to the extent that such material is authored by those legislative or regulatory bodies, or their legislators or regulators, in their official capacity, although the facts of this case did not require the court to address that issue.

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