Kluwer Copyright Blog

Georgia vs. Public.Resource.org: State Codes Belong to the Public

Bashar H. Malkawi (University of Sharjah (UAE)) · Wednesday, June 10th, 2020

Copyright is an engine for knowledge. Although copyright creates monopolies, it should not be considered as a good in itself, but as a tool which can be used to achieve societally desirable objectives. The U.S. Supreme Court, in a non-traditional 5-4 vote, did just that when – on 20 April 2020, in *Georgia vs. Public.Resource.org* – it held that the official version of the law cannot be copyrighted. With this decision, the importance of access to knowledge and free expression were reaffirmed and legislation was returned where it belongs: the public domain.

The case involved the State of Georgia, which has one official code – the Official Code of Georgia Annotated (OCGA) – and Public.Resource.org, a non-profit organisation dedicated to facilitating public access to government records and legal materials through the Internet. The OCGA includes the text of every Georgia statute currently in force, as well as a set of non-binding annotations that appear beneath each statutory provision. The annotations typically include summaries of judicial opinions construing each provision, summaries of pertinent opinions of the state attorney general, and a list of related law review articles and other reference materials. The annotations in the OCGA were produced by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the Code Revision Commission, a state entity composed mostly of legislators, funded through legislative branch appropriations, and staffed by the Office of Legislative Counsel. The respondent, Public.Resource.Org, posted the OCGA online and distributed copies to various organisations and Georgia officials.

Georgia vs. Public.Resource.org is an interesting case in that it sits at the intersection of two well-

established principles of U.S. copyright law. The first principle is that the author of state legislative text i.e. state code is the public, speaking through the legislator. This in turn means that legislative texts are in the public domain and cannot be protected by copyright. The second standard is that derivative works – such as annotations – can be attached to public domain content. The copyright in these derivative works is owned by private authors. The position in *Georgia vs. Public.Resource.org* was that the state of Georgia hired a publisher – LexisNexis – to create the annotated Georgia code. Those annotations were produced under the direction of the Code Revision Commission. An interesting element is that the legislator in Georgia passes the law and then, following annotation, the annotated code is represented to the Georgia legislative which re-enacts it as the official Georgia code. So, the *Georgia vs. Public.Resource.org* case sits right on the border of the two principles and the relevant precedents.

The government edicts doctrine provides that works created by the U.S. government are generally not subject to copyright in the U.S. and thus can be freely copied. However, in the OCGA case, the work included annotations that were created by the LexisNexis Group. These required effort and time to compile after each provision and included the following: 1) summaries of judicial opinions construing each provision; 2) summaries of pertinent opinions of the state attorney general; and 3) a list of related law review articles and other reference materials. In the author's opinion, these are "original works of authorship" and the way these annotations were compiled involves originality. Even assuming, for the sake of argument, that the OCGA cannot be copyrighted, there are portions of the OCGA that contain copyrighted materials from non-government sources i.e. the LexisNexis Group.

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 U.S. Supreme Court upheld the Eleventh Circuit decision.

The U.S. Supreme Court relied on the government edicts doctrine, citing examples of reporters, who cannot have copyright in court opinions. The U.S. Supreme Court also stated that judges cannot assert copyright in the work they perform in their capacity as judges. In simple terms, there is no copyright in laws themselves. It is the legislator's function to create laws. The U.S. Supreme Court did not rely on the economic theories of copyright that see copyright as an incentive mechanism, designed to encourage creators to produce material so as to recover costs and make a profit. According to the Court, the economic theories of copyright do not apply to legislation, as the legislator does not require incentives to copyright. Likewise, the government is not an author who can have any form of natural rights over its labour. State legislation serves public good by allowing individuals to access information for free without commercial considerations. Ordinary citizens should be able to access freely the legislation they are supposed to follow and abide by. Government works therefore fall in the public domain.

The U.S. Supreme court took the approach of looking at the capacity of the person – not the person himself – authoring the legislative text. So, if the person does this in his official capacity as a lawmaker then the text loses its copyright. Although LexisNexis had acted as a commentator on the code and compiled sources and information, which meant in theory that these annotations should be subject to copyright, the acts of LexisNexis had been carried out under the direction of the legislature. It therefore concluded that because the annotations were "*authored by an arm of the legislature in the course of its legislative duties*" they fell under the government edicts doctrine and were ineligible for copyright. Copyright should not be applied to every single original thing that

has ever been written, recorded, or otherwise affixed to a medium. It is the government's job to create laws. People should not be expected to pay the government to view these laws.

This judgment produces two questions to answer in order to draw the line between different scenarios based on Georgia vs. Public.Resource.org. First, is the text a legislative text? Second, is the legal text official? When it is official i.e. enacted by the legislative body, then it loses its copyright status. In this case, the Georgia legislative published the "official version" of the code. It is the "officialness" that causes the text to fall in the public domain. It seems that the U.S. Supreme Court could not slice up the legislative text into pieces, whereby the legislative text was not copyrighted while the annotations, such as listing law reviews or other resources, could be copyrighted.

I believe that based on the decision in the case, the arrangement made between the Code Revision Commission and LexisNexis will have to change. This could result in an "unofficial" version of the Georgia code as a result of collaboration between the Code Revision Commission and LexisNexis. The official version (without annotations) would be available for free to everyone, and the unofficial version which carries annotations would come at a price.

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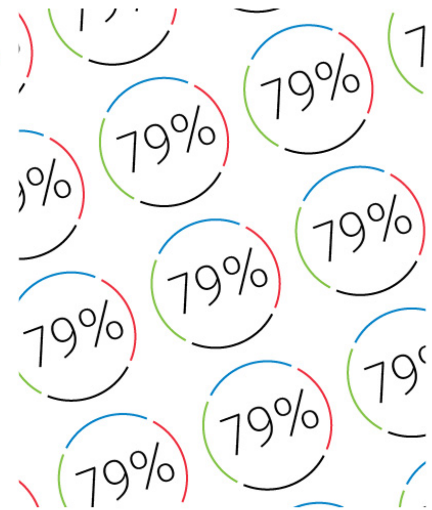

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