

---

# MAY STATUTORY ANNOTATIONS BE COPYRIGHTED?

WEDNESDAY NOVEMBER 13, 2019

1:00 PM ET / NOON CT / 11 AM MT / 10:00 AM PT

Featuring: **Max Etchemendy, Josh Johnson, Andy Pincus, Othni Lathram, and Evan Powell**



# ABOUT THE WEBINAR

- This is a joint event of the National Conference of State Legislatures and the State and Local Legal Center
- Speakers' bios. Links to SCOTUS, and a PDF of the slides at the top of the page
- During the presentation, you may ask questions by typing them in the question box on the bottom left hand side of your screen
- A recording of the webinar will be available on the NCSL and SLLC websites about a week after the webinar
- The views expressed in this webinar do not necessarily reflect the views of NCSL or the SLLC members
- Please complete the survey!

## ABOUT NCSL

- Since 1975, NCSL has been the champion of state legislatures. We've helped states remain strong and independent by giving them the tools, information and resources to craft the best solutions to difficult problems. We've fought against unwarranted actions in Congress and saved states more than \$1 billion. We've conducted workshops to sharpen the skills of lawmakers and legislative staff in every state. And we do it every day.



# ABOUT THE SLIC

- National Governors Association
- National Conference of State Legislatures
- Council of State Governments
- National League of Cities
- National Association of Counties
- International City/County Management Association
- U.S. Conference of Mayors
- International Municipal Lawyers Association
- Government Finance Officers Association



# ABOUT THE SPEAKERS

- Max Etchemendy, Vinson & Elkins
- Josh Johnson, Vinson & Elkins
- Andy Pincus, Mayer Brown
- Othni Lathram, Alabama Legislative Service Agency
- Evan Powell, Office of the Revisor of Statutes, Minnesota Legislature



## THE FACTS OF THE CASE

Max Etchemendy  
Vinson & Elkins



Josh Johnson  
Vinson & Elkins



# GEORGIA V. PUBLIC.RESOURCE.ORG INC.: THE ISSUE

- Question Presented (rephrased): When can annotations to a state statutory code book be copyrighted?
- Copyrighting legal annotations, commentary, etc. is commonplace and unquestioned.
- The Copyright Act forbids copyrighting *federal* government works, but not *state* government works.
- Nineteenth-century precedents hold that judicial opinions and the text of state statutes cannot be copyrighted.
- Lower courts have struggled in applying these early precedents (which are written in a very different style than modern cases) to different fact patterns—county tax maps, privately produced model codes adopted by law, etc.



## FACTS AND PROCEDURAL HISTORY

- Many states work with private publishers to create official annotated code books.
- Georgia is an example: its Code Revision Commission has a contract with Lexis to produce and publish the Official Code of Georgia Annotated (“OCGA”) in print, CD-ROM, and Internet formats.
- The OCGA contains both the text of Georgia’s statutes and various kinds of annotations.
- Public.Resource.Org (“PRO”) scanned and posted the OCGA online; Georgia asked it to stop on grounds that the annotations were subject to copyright, and PRO disagreed.
- The district court ruled in Georgia’s favor on grounds that the annotations are not part of the law, but just research tools, as Georgia law expressly provides.
- The Eleventh Circuit reversed.



## ELEVENTH CIRCUIT'S OPINION

- The court of appeals acknowledged that the issue was difficult and other courts had struggled with the “government edicts doctrine.”
- Resorting to “first principles,” the court held that the issue of copyrightability turns on whether a work is “*sufficiently law-like*” that it should be deemed to have been constructively authored by the people.
- The court adopted a three-factor test based on what it saw as features “that make the law what it is”:
  - Who created the work?
  - Is the work “authoritative”?
  - What is the process by which the work was produced?
- The court of appeals held that no part of the OCGA was copyrightable.

# GEORGIA'S ARGUMENTS

- Statutory Text: The Copyright Act provides that “annotations” are copyrightable “derivative works.” 17 U.S.C. §§ 101, 103. Nothing in the Act supports exempting the OCGA’s annotations from that protection.
- Legislative History: Congress in enacting the Copyright Act of 1909 rejected a proposal to exclude from copyright protection “any publication of ... any State government.” Copyright Office reports prepared in the run up to the modern Copyright Act favor Georgia.
- Precedent: The Supreme Court’s key nineteenth-century precedents—*Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888)—collectively hold that while judicial opinions are not copyrightable, annotations added to opinions by a court’s official reporter are copyright eligible. Similarly, while statutory text is not copyrightable, statutory annotations are.



# UNITED STATES' AND PRO'S ARGUMENTS

- United States as *Amicus* Supporting Georgia: Works created by judges in their judicial capacity or by legislators in their lawmaking capacity are not copyrightable. But the OCGA's annotations are copyrightable because they are not created by legislators operating in a lawmaking capacity.
- PRO: "Legal materials adopted by or published under the authority of the State" are not copyrightable.



## POSSIBLE OUTCOMES

- Affirmance
- Reversal on the government edicts doctrine, with remand for further proceedings on PRO's other defenses
- Vacatur, with remand for further proceedings to apply any new standard the Court might articulate for determining whether a work is an uncopyrightable government edict



## WHY DID THE COURT GRANT CERT?

- PRO acquiesced in cert and *amici* on both sides urged the Court to grant review.
- There is significant confusion and disagreement among the courts of appeals regarding how to apply the government edicts doctrine.
- The Eleventh Circuit's decision threatened to upend the established regimes of the numerous states that, like Georgia, rely on copyright's economic incentives to persuade commercial publishers to assist with preparing and publishing annotated official codes.



# THE AMICUS BRIEFS

Andy Pincus  
Mayer Brown



# AMICUS BRIEFS

- Large number of amicus briefs
  - 6 supporting Georgia
  - 2 supporting neither party
  - 19 supporting PRO
- United States government
  - Annotations protected by copyright
  - Brief signed by Copyright Office and PTO – the two relevant government agencies
  - No copyright protection for “actual sources of law that judges interpret and apply”
  - “[M]aterials that are created by nonlegislators to summarize or explain materials concerning statutory law are eligible for copyright protection, even though the underlying statutes themselves are not”



# AMICUS BRIEFS

- Briefs supporting Georgia
  - Software & Information Industry Ass'n, Copyright Alliance, Matthew Bender & Co.
  - Government edicts exception to copyrightability should be limited to materials that have the force of law
  - Adverse practical consequences of eliminating copyright protection or creating uncertain rule
    - Bright-line rule promotes investment needed to create works – and legal informational works (such as case annotations) are particularly expensive to maintain year after year
    - Eliminating copyright protection would force governments to spend scarce public funds or eliminate annotations – and either result would harm the public at large



# AMICUS BRIEFS

- Briefs supporting neither party
  - Filed by private organizations that develop industry standards – such as American Society for Testing and Materials, National Fire Protection Association, Underwriters Laboratories, and many similar organizations
  - Standard-setting organizations fund their work through sale and licensing of standards, which are protected by copyright
  - Public.Resource.Org has filed suit challenging copyrightability of private standards – argues that if a government body references a privately developed standard in a statute or regulation, that standard immediately becomes “the law,” and its copyright protection is forfeited
  - Urge Supreme Court not to address that issue in this case



# AMICUS BRIEFS

- Briefs supporting Public.Resource.Org
  - Signed by Internet organizations, public interest groups, law professors, American Intellectual Property Association, media organizations, librarians, former government officials, and others
  - Variety of legal arguments
    - All government-created or government-adopted works not copyrightable
    - Providing on-line access to Georgia Code via a private website cannot substitute for access via a government website
    - Inclusion of the annotations within the official code transforms them into “government edicts” that are not copyrightable
    - “Official speech” of a State is not copyrightable

# ARKANSAS AMICUS BRIEF

Othni Lathram  
Legislative Service Agency  
Alabama



NATIONAL CONFERENCE OF STATE LEGISLATURES

# ARKANSAS AMICUS BRIEF

- Joined by 13 States and the District of Columbia
- Arguments Advanced
  - Annotations are copyrightable
  - Affirming the decision below would up-end States' code-production practices and deprive the public of a valuable research tool
    - Affirmance would likely invalidate every copyright in an official annotated state code
    - Copyrightability is vital for an enhanced public understanding of the law



# BENEFITS OF OFFICIAL CODE CONTRACTS

- Additional editorial review of acts during codification process
- Increased availability of legal research tools
  - Online access for legislative employees
  - Online access for legislators
- Decreased pricing for governmental purchases of the Code
  - Allows for greater distribution to public officials and employees
  - Allows for greater distribution to points of public access
- Credits for product supplements and updates



# MINNESOTA LEGISLATURE'S PERSPECTIVE

Evan Powell

Office of the Revisor of Statutes

Minnesota



NATIONAL CONFERENCE OF STATE LEGISLATURES

# COPYRIGHT FOR STATE CODES NOT DIRECTLY IMPLICATED IN THE CASE: STATUTORY CODE COMPILIATION IN MINNESOTA

## How does code compilation work in Minnesota compared to Georgia and other states?

- The Minnesota Revisor's Office is *directed by law to compile and publish* Minnesota Statutes.
- Statutes publication *includes editorial materials that do not have the force of law.*
- Our office *submits for federal copyright.*

# COPYRIGHT FOR STATE CODES NOT DIRECTLY IMPLICATED IN THE CASE: THE EFFECT OF DIFFERENT POSSIBLE OPINIONS

## Considerations in filing an amicus brief?

- ***Scope of the opinion*** – narrow vs. broad and sweeping
- ***Procedural and practical differences*** – both in code compilation and legislative practice
- ***Legal distinctions*** – identify how Minnesota’s publication could be distinguishable based on the 11<sup>th</sup> Circuit opinion framework or prior precedent:
  - *Authorship*
  - *Authoritativeness*
  - *Process*

# COPYRIGHT FOR STATE CODES NOT DIRECTLY IMPLICATED IN THE CASE: PUBLICATION PRACTICES AND COPYRIGHT IN MINNESOTA

## What editorial materials are created for Minnesota Statutes?

### What materials might be subject to copyright?

- Editorial notes for clear constitutional issues and unique effective dates
- Legislative history
- Tables
- Indexes
- User's guide and additional front matter
- Indication of most recent publication to find repealed law
- Headnotes, first grade headers, chapter tables of contents and other guiding/organizational information



# COPYRIGHT FOR STATE CODES NOT DIRECTLY IMPLICATED IN THE CASE: PUBLICATION PRACTICES AND COPYRIGHT IN MINNESOTA

## What concerns exist outside the framework of the 11<sup>th</sup> Circuit opinion?

- Thinking deeper about the justifications for the government edicts doctrine led us to concerns about clear *access to the law*:
  - Defending copyright protection can protect the status quo of (1) providing a product that exceeds due process notice and (2) striving to enhance access to and transparency of the law
- supports the integrity of the law
- Without protection, it may be less clear to the public what is an official and correct publication of the law.

# COPYRIGHT FOR STATE CODES NOT DIRECTLY IMPLICATED IN THE CASE: THE FUTURE OF PUBLICATION AND COPYRIGHT FOR STATUTORY CODES

## What work are we undertaking?

- Form a better understanding of *history and current practices* – view our publication in light of copyright developments
- Create *internal legal research documents* – inform the legislature’s decision-making on statutory code publication processes
- Document *practical concerns* – plan our work for now and the future



## READ THE PROCEEDINGS AND ORDERS

- <https://www.scotusblog.com/case-files/cases/georgia-v-public-resource-org-inc/>



---

# Questions?

Contact

[Kae.warnock@ncsl.org](mailto:Kae.warnock@ncsl.org)



NATIONAL CONFERENCE OF STATE LEGISLATURES