IP Law News

INSIGHT: High Court Copyright Ruling Raises Law Access Questions

By Bashar H. Malkawi

May 13, 2020, 12:01 PM

The Supreme Court's invalidation of Georgia's copyright on its annotations in state code will have a huge impact on copyright for government works for decades to come, writes Bashar H. Malkawi, dean and professor of law at University of Sharjah, UAE.

Against the current trend we have seen over the past decades, copyright can and should be curtailed in some circumstances against monopoly. The U.S. Supreme Court just did that when, on April 20, in *Georgia vs. Public.Resource.org* it held that the official version of the law cannot be copyrighted.

By this decision, free access to law and open knowledge redeemed themselves by returning legislation where it belongs; the public domain.

The uniqueness in *Georgia vs. Public.Resource.org* is the fact that state of Georgia hired a commercial publisher—LexisNexis—to create the annotated Georgia code, known as the Official Code of Georgia Annotated (OCGA). Those annotations were produced under the direction of the Code Revision Commission. The interesting issue is that the Georgia Legislature passes each law, and then after annotation, the annotated code is presented to the Legislature, which re-enacts it as the official Georgia code.

The decision will have a huge impact on copyright for government works for decades to come. State codes, such as OCGA, serve public good in making informational equity and not for commercial use. Ordinary citizens should be able to access freely the laws they are supposed to follow and abide by. Government works fall in the public domain.

So what happens next? Any copyright interests there are in the annotations are lost due to merging with the state law. Private entities such as LexisNexis can sue the state for copyright violations.

There are different classes of annotations. These types of copyright interests include the work of commercial publishers such as summaries of judicial opinions construing each provision, lists of related law review articles, and other reference materials. Going forward, publishers will have to slice up the different types of annotations that carry copyright interests and those that do not carry such interests—e.g., they will have to determine which type of information they are willing to supply state legislatures.

'Official' v. 'Unofficial' Codes

There can be two versions of the state codes—the "official version" and the "unofficial version." The "official version" of the law will be free to the public. On the other hand, there could be the "unofficial version" of the code with annotation which can be the result of collaboration between the state legislators and commercial publishers such as LexisNexis.

The use of the "unofficial version" comes with a financial cost. Obviously, the "official version" of the code is worth more money than the "unofficial version." However, people would value the "unofficial version" since it contains in one place all the relevant information to a particular provision.

To avoid any conflicts between the two versions of the code, the usual exceptions available in copyright law arsenal can be used. These could include exhaustion of rights, fair use, and use for educational purposes.

Of course, practice can prove that there can be cases on the edge involving the "official version" and the "unofficial version" of the code.

Privacy Concerns

There is another twist to the court decision that seems to be forgotten with so much focus on copyright law. This issue involves privacy concerns. The "unofficial version" of state code may expose search results by individuals to monitoring by commercial entities.

For example, an individual could search the annotation of a state code looking for previous judicial opinions and statements made by officials on avoiding paying income taxes. The search results would expose that individual. Therefore, the state legislature should provide adequate privacy protection to individuals using the "unofficial version" of the code. Privacy protection is needed in whatever future arrangements can be worked out between state legislators and commercial publishers.

The other point that seems to be overlooked is the issue of "privatizing" legislation. Many private standards find their way in the final texts of state legislation. These standards could include, for example, the level of residues of plant protection products in food or levels for pesticides or some other technical standards. These standards, mostly developed by private entities and intended to protect consumer health and product quality, can be complicated and expensive to produce.

Anything that is adopted by the government and has the effect of legislation or regulation is not copyrighted. These include, for example, manuals to build houses and electrical wiring guidelines. If a state is adopting the manual as the official document then that document becomes un-copyrightable.

Drawing example from the legal sphere, commercial publishers such as LexisNexis can be hesitant to share materials and resources that can be helpful for state legislators and individuals since these materials fall in the public domain if mixed with state legislation. In sum, the case will create chilling effect for commercial entities.

The implications of the Supreme Court decision should not be underestimated. There are still many ambiguities on how states and publishers will react and develop alternative ways. No matter what the future holds, free access to law, privacy, and the role of private entities in publishing and setting standards should be balanced against each other.

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