



School of Law
UNIVERSITY OF GEORGIA

Prepare.
Connect.
Lead.

Journal of Intellectual Property Law

Volume 26 | Issue 1

Article 4

July 2019

Will You Have to Pay for the O.C.G.A.?: Copyrighting the Official Code of Georgia Annotated

Elizabeth Holland
University of Georgia School of Law

Follow this and additional works at: <https://digitalcommons.law.uga.edu/jipl>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

Elizabeth Holland, *Will You Have to Pay for the O.C.G.A.?: Copyrighting the Official Code of Georgia Annotated*, 26 J. INTELL. PROP. L. 99 (2019).

Available at: <https://digitalcommons.law.uga.edu/jipl/vol26/iss1/4>

This Notes is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact tstriepe@uga.edu.

**WILL YOU HAVE TO PAY FOR THE O.C.G.A.?:
COPYRIGHTING THE OFFICIAL CODE OF
GEORGIA ANNOTATED**

*Elizabeth Holland**

I. INTRODUCTION 100

II. BACKGROUND 101

 A. COPYRIGHTING THE LAW 101

 B. APPROACHES TO PROTECTING STATUTES
 AROUND THE COUNTRY 105

 C. THE O.C.G.A. 109

III. ANALYSIS..... 115

 A. CARL MALAMUD AND HIS EFFORT TO INCREASE
 PUBLIC ACCESS TO THE LAW 115

 B. RELEASING THE O.C.G.A..... 116

 C. THE COMMISSION CHALLENGES PUBLIC RESOURCE..... 118

IV. CONCLUSION 130

*J.D. Candidate 2019, University of Georgia School of Law. The author would like to thank Professor David E. Shipley for his direction and feedback on this project. The author would also like to thank former Representative Larry Walker, former deputy legislative counsel Terry McKenzie, and former Representative Stacey Evans for sharing their perspectives about a process that impacts Georgia citizens and lawyers every day.

I. INTRODUCTION

In the 1970s, the Georgia General Assembly set out to perfect the organization of the laws of the state.¹ The State worked with a publishing company to not only codify the statutory portions but also create additional annotations to explain the application of the law in practice.² When enacting the code, the State merged the statutory portion with the annotations to create the Official Code of Georgia Annotated (O.C.G.A.).³ Georgia sought to retain the copyright in the O.C.G.A.⁴

Years later, Carl Malamud and Public.Resource.Org, Inc. (Public Resource) challenged this construction. He alleged merging the statutory code with the annotated version transformed the annotations into government edicts, which are uncopyrightable.⁵ After scanning every page of the O.C.G.A., Malamud placed the entire code online and sent letters to Georgia's Code Revision Commission informing them of his endeavor.⁶ The ensuing litigation challenged the balance between states' authority to own rights to the work the states create and citizens' rights to access the laws that govern them.⁷ While ignorance of the law is said to be no defense, this dispute teed up the question of just how much and what parts of the law citizens are entitled to access. In fact, days before press time for this note, the U.S. Court of Appeals for the Eleventh Circuit, which heard Public Resource's appeal, issued an opinion transforming Georgia's ownership interest in the O.C.G.A.⁸

Part II of this publication provides an overview of the evolution of the judicial analysis regarding the copyrightability of judicial opinions and statutory text and examines the status of federal copyright law regarding the copyrightability of statutory material. Part II also includes a state survey describing various state approaches to protecting the laws and annotations that

¹ Terry McKenzie, *The Making of a New Code*, 18 GA. ST. B. J., 102 (1982).

² *Id.*

³ *Id.* at 103.

⁴ *Id.* at 106.

⁵ See Defendant Public.Resource.Org, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment at 1, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 29-2) [hereinafter Motion for Summary Judgment], *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018).

⁶ *Id.* at 1; Greg Bluestein, *Georgia's legal battle with public records advocate deepens*, ATLANTA J. CONST. (Sept. 15, 2015), <https://politics.myajc.com/blog/politics/georgia-legal-battle-with-public-records-advocate-deepens/k2iyIVoIIINi7ukdzh6h0IN/>.

⁷ Code Revision Comm'n v. Public.Resource.Org, Inc., 906 F.3d 1229 (11th Cir. 2018).

⁸ *Id.*

states create. Part II concludes with a discussion of the legislative history of codification in Georgia and the litigation the state has already faced regarding the O.C.G.A.

Part III explains Carl Malamud's effort to create greater public access to government documents around the country and Georgia. Additionally, Part III includes a discussion of the litigation in Georgia brought by the Code Revision Commission against Public Resource. In light of the Eleventh Circuit's recent decision, Part III concludes by arguing that Georgia should amend O.C.G.A. § 1-1-1 to comply with the decision while avoiding losing all rights to the annotations.

II. BACKGROUND

A. COPYRIGHTING THE LAW

1) *Judicial Analysis*. Not long after the birth of the United States, the Supreme Court addressed Congressional copyright requirements in a case concerning the opinions that the Court itself produced and reporters compiled.⁹ During the early 1800s, Henry Wheaton compiled the reports of the Supreme Court of the United States, and he believed he registered his work and transferred his rights to another party.¹⁰ Wheaton and the owner of the rights to the report brought suit against the defendant for selling a condensed version of Supreme Court reports which included portions of Wheaton's work.¹¹ The Court concluded, "[N]o reporter has or can have any copyright in the written opinions delivered by the court; and that the judges thereof cannot confer on any reporter any such right."¹²

Decades later, the Supreme Court addressed whether this copyright limitation applied to state court decisions in *Banks v. Manchester*.¹³ The Ohio legislature enacted a statute authorizing a reporter to prepare the Ohio Supreme Court's decisions and secure a copyright for the state.¹⁴ The legislature also authorized the secretary of state to enter into a contract with a publisher to produce the reports which bestowed "the ... exclusive right to publish such reports."¹⁵ These provisions contributed to the dispute between the company with the rights to the state contract and another company attempting to publish the decisions.¹⁶ The Court embraced the principle it first established in *Wheaton*, explaining

⁹ See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 662 (1834).

¹⁰ *Id.* at 591, 612-13, 619.

¹¹ *Id.* at 617.

¹² *Id.* at 668.

¹³ 128 U.S. 244 (1888).

¹⁴ *Id.* at 245.

¹⁵ *Id.* at 246.

¹⁶ See *id.* at 247.

neither the reporter nor the state could hold a copyright in the work because the work was the opinion of the court.¹⁷ The Court determined work exclusively authored by judges has no proprietary interest because, “The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.”¹⁸ The Court affirmed the circuit court’s holding, including the distinction between the opinions themselves, which could not be protected, and “the indexes, the tables of cases, and the statements of points made and authorities cited by counsel,” which could be protected.¹⁹

The Court soon further refined what material could be protected in *Callaghan v. Myers*.²⁰ Norman L. Freeman prepared and later sold his rights in the Illinois Reports for the Supreme Court of Illinois, which included his original additions of headnotes and syllabi to supplement the judicial opinions themselves.²¹ The Court clarified that there was no public policy basis for preventing a reporter himself, not the state, from obtaining a copyright in the independent contributions he made to the volumes of law reports.²² After considering *Wharton* and the reasons the Court could have remanded that case, the Court in *Callaghan* noted the reporter’s “arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases . . . and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references” could be protected.²³

Courts have crafted a similar distinction for statutes. Copyright cannot be used to protect statutes or legislation, but if editors or compilers make creative, original additions, those can garner protection.²⁴ With both judicial opinions and statutes, the line between pure “law” and creative additions began to form.

2) *Statutory Provisions*. The United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for

¹⁷ See *id.* at 253.

¹⁸ *Id.*

¹⁹ *Id.* at 250.

²⁰ 128 U.S. 617 (1888).

²¹ *Id.* at 620–21.

²² See *id.* at 647.

²³ *Id.* at 649.

²⁴ See *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866) (explaining the Minnesota General Statutes were “public records, subject to inspection by everyone” but that “[some] compilation[s] may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the combination and analysis”). See also *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886). Even though the Court was addressing a case about protecting judicial opinions in *Nash*, the court expressed similar policy concerns about free access to statutes.

limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁵ The Copyright Act of 1976 took effect in 1978 and establishes what is required to gain copyright protection.²⁶

The Copyright Act preempts state laws in conflict with the federal act and creates different rights for the federal and state governments regarding holding copyrights.²⁷ The Copyright Act provides, “Copyright protection . . . is not available for any work of the United States Government . . .,” but the federal government can hold copyrights when the rights are transferred to the government.²⁸ In determining what copyrights the federal government can hold, the issues amount to determinations about what type of employee is working for the creation to constitute “work of the United States government.”²⁹

States do not have an equivalent restriction in the Copyright Act.³⁰ However, the United States Copyright Office will not copyright a state law.³¹ Therefore, the federal government *and* states are prohibited from copyrighting laws.³² In enabling legislation, some states attempt to clarify which part of the “statutory law” is enacted as the official law of a state compared to the annotations and creative additions which are not.³³

No matter what a citizen or government is attempting to copyright, the general requirements of copyright law must still be satisfied. The Copyright Act provides protection for “[1] original, [2] works of authorship, [3] fixed in any tangible medium . . . [4] from which they can be perceived.”³⁴ Determining whether something is original is a major source of contention in copyright litigation.

In *Feist Publications, Inc. v. Rural Telephone Service, Co.*, the Court evaluated whether a phone book organized in alphabetical order was sufficiently creative to qualify for copyright protection.³⁵ The Court addressed questions concerning the copyrightability of facts, compilations, and originality.³⁶

Feist provides an important framework to analyze the structure in which many states base their right to copyright statutory compilations. Quite simply, facts,

²⁵ U.S. CONST. art. I, § 8, cl. 8.

²⁶ See LYDIA P. LOREN & JOSEPH S. MILLER, *INTELLECTUAL PROPERTY LAW: CASES AND MATERIAL* 296 (Semaphore Press 2016).

²⁷ *Id.* at 609.

²⁸ 17 U.S.C. § 105 (2012).

²⁹ See CRAIG JOYCE et. al., *COPYRIGHT LAW* 130 (10th ed. 2016).

³⁰ *Id.* at 131.

³¹ See U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §313.6(C)(2) (3d ed. 2017).

³² See, e.g., *id.* at § 313.6(C)(1), (2).

³³ E.g., O.C.G.A. § 1-1-1 (2017).

³⁴ 17 U.S.C. § 102 (2012).

³⁵ 499 U.S. 340, 342, 344 (1991).

³⁶ See *id.* 344-345.

like the telephone numbers in *Feist*, are not copyrightable, but “[C]ompilations of facts generally are.”³⁷ In the Copyright Act, Congress defines a compilation as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”³⁸

In *Feist*, the Court explained that simply compiling facts does not generate copyright protection.³⁹ To be considered original, the Court determined that the work must be “independently created by the author” and “possess[] . . . some minimal degree of creativity.”⁴⁰ However, the originality required to obtain a copyright in a compilation can be found in the author’s “selection, coordination, and arrangement.”⁴¹ Originality has a low standard.⁴²

Statutory codes might qualify as compilations because of the originality in organizing and arranging the statutes.⁴³ However, the underlying statutes could not be subject to copyright, leaving the creation with limited protection.⁴⁴ States take the position and Georgia’s Code Revision Commission argued that while the “law” may be unprotectable, other *original* additions can be copyrighted by the state.⁴⁵ The U.S. Copyright Office recognizes this principle:

A work that does not constitute a government edict may be registered, even if it was prepared by an officer or employee of a state, local, territorial, or foreign government while acting within the course of his or her official duties Likewise, the Office may register annotations that summarize or comment upon legal materials issued by a federal, state, local, or foreign government, *unless the annotations themselves have the force of law*.⁴⁶

³⁷ *Id.* at 344.

³⁸ 17 U.S.C. §101 (2012).

³⁹ See *Feist Publ’ns, Inc.*, 499 U.S. at 362 (explaining that Rural’s decision to compile telephone user’s numbers using alphabetical order was not sufficiently creative to garner copyright protection).

⁴⁰ *Id.* at 345.

⁴¹ *Id.* at 358.

⁴² *Id.* at 362.

⁴³ See *id.* 358; see also L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 724 (1989).

⁴⁴ See *Feist Publ’ns, Inc.*, 499 U.S. at 350-51 (“[T]he copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves.”); see also U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §313.6(C)(2) (3d ed. 2017).

⁴⁵ See Plaintiff’s Memorandum of Law in Support of Its Motion for Partial Summary Judgment at 13, *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 30-1) [hereinafter Motion for Partial Summary Judgment], *rev’d and remanded*, 906 F.3d 1229 (11th Cir. 2018).

⁴⁶ *Compendium (Third)* §313.6(C)(2) (emphasis added).

Therefore, the Commission argued that Public Resource's argument was completely invalid.⁴⁷ However, Public Resource's argument was more nuanced. Since Georgia adopted the statutory provisions *and* the added creative material, Public Resource argued the annotations have *the force of law* and are unprotectable.⁴⁸

The Supreme Court has consistently held that judicial opinions are never copyrightable.⁴⁹ However, other creative additions including annotations, headnotes, and the arrangement of reports can be copyrighted because they are original contributions not made by the court.⁵⁰ The Court has made similar distinctions between statutes and the annotations that publishers add to explain the Court's interpretation of particular laws.⁵¹ These additions must still satisfy the requirements established in the Copyright Act.⁵² Statutory compilations require originality in the "selection, coordination, and arrangement" to be copyrightable,⁵³ and the original annotations, which are added to the uncopyrightable statutes, may be copyrighted.⁵⁴ With this judicial and statutory framework, states use unique approaches to create, publish, and enact their codes.

B. APPROACHES TO PROTECTING STATUTES AROUND THE COUNTRY

State commissions often work independently or with outside publishers to create statutory "codes" or annotated statutory compilations which include uniform ordering, headings, and explanations of the law a state legislature enacts.⁵⁵ Frequently, states adopt these codes and explicitly provide that the statutory portions (the laws enacted by their state legislatures), but not the annotations, are the laws of the state.⁵⁶ Other states approach the issue by attempting to hold a copyright in the text or releasing the work to the public.⁵⁷

⁴⁷ See Motion for Partial Summary Judgment, *supra* note 45 (arguing that annotations, like those in the O.C.G.A., are copyrightable).

⁴⁸ See Motion for Summary Judgment, *supra* note 5, at 8 (arguing the General Assembly included the annotations in the state's only official code).

⁴⁹ *E.g.* *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834).

⁵⁰ See *Callaghan v. Myers*, 128 U.S. 617, 649 (1888).

⁵¹ See *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866).

⁵² See 17 U.S.C. § 102 (2012).

⁵³ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

⁵⁴ See U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §313.6(C)(2) (3d ed. 2017).

⁵⁵ See, e.g., KAN. STAT. ANN. § 77-133 (2017); *The Making of a New Code*, *supra* note 1, at 102.

⁵⁶ *E.g.*, O.C.G.A. § 1-1-1 (2017); COLO. REV. STAT. ANN. § 2-5-113 (2017).

⁵⁷ See, e.g., MISS. CODE ANN. § 1-1-9 (2017); *State Statutes/ Code: Holder of Copyright*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/documents/lss/Copyright_Statutes.pdf (last visited Jan. 10, 2019); Ed Walters, *Tear Down This (Pay)Wall: The End of Private*

Below, some of the different approaches that states utilize are explained, and public access to the law granted to citizens by the respective states is explored.

1) *Arizona*. The Director of Arizona's legislative council is responsible for preparing every session's laws for publication.⁵⁸ The director has the authority to make decisions regarding the documents but does not have the obligation to add annotations or references.⁵⁹ Public access to Arizona's statutes is preserved since no additional annotations are incorporated into the Arizona Revised Statutes, which are enacted into law.⁶⁰ Further, Arizona has no copyright in the Arizona Revised Statutes.⁶¹

2) *California*. California does not utilize a code revision organization.⁶² However, Legislative Counsel is charged with making all of the California Codes available to the public in electronic form.⁶³ The State explicitly provided that the information which Legislative Counsel was required to release to the public was within the public domain, and the State retained no copyright interest.⁶⁴

3) *Colorado*. The Revisor of Statutes compiles the Colorado Revised Statutes, including specific non-statutory provisions such as annotations and cross references.⁶⁵ The Colorado legislature explicitly provided that these non-statutory provisions should not be understood as legislative text and that no legal presumption should be construed from them.⁶⁶ The State unequivocally reserved the copyright of the Colorado Revised Statutes.⁶⁷

4) *Washington, D.C.* Washington, D.C., enacted the Uniform Electronic Legal Material Act, which went into effect in 2017.⁶⁸ This endorsed legislation "requires that official electronic legal material be: (1) authenticated, by providing a method to determine that it is unaltered; (2) preserved, either in electronic or print form; and (3) accessible, for use by the public on a permanent basis."⁶⁹ In

Copyright in Public Statutes, LEGAL INFORMATION INSTITUTE (July 11, 2011, 12:08 AM), <https://blog.law.cornell.edu/voxpath/2011/07/15/tear-down-this-paywall/>.

⁵⁸ ARIZ. REV. STAT. ANN. § 41-1304.01 (2017).

⁵⁹ ARIZ. REV. STAT. ANN. § 41-1304.02 (2017).

⁶⁰ ARIZ. REV. STAT. ANN. § 1-101 (2017).

⁶¹ See *State Statutes/Code: Holder of Copyright*, *supra* note 57.

⁶² *Statute/Code Revision Organization*, NATIONAL CONFERENCE OF STATE LEGISLATURES (December 2012), <http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/statute-code-revision-organization.aspx>.

⁶³ CAL. GOV'T. CODE § 10248(a)(9) (West 2017).

⁶⁴ CAL. GOV'T. CODE § 10248.5 (West 2017).

⁶⁵ COLO. REV. STAT. §§ 2-5-101, 2-5-102 (2017).

⁶⁶ COLO. REV. STAT. § 2-5-113 (2017).

⁶⁷ COLO. REV. STAT. § 2-5-115 (2017).

⁶⁸ D.C. CODE § 2-651.02 (2017).

⁶⁹ Electronic Legal Material Act, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, <https://my.uniformlaws.org/committees/community-home?CommunityKey=02061119-7070-4806-8841-d36afc18ff21> (last visited Jan. 6, 2019).

fact, on the District's website where a version of the code is located, there is a disclaimer that the code and laws on the website are part of the public domain.⁷⁰

5) *Florida*. Florida's Office of Legislative Services is responsible for editing and compiling the Florida Statutes.⁷¹ Previously, Florida held the copyright to all editions of the Florida Statutes, but that provision has since been repealed.⁷²

6) *Idaho*. The Idaho Code Commission maintains the Idaho Code and has the authority to contract with publishers for publication as well as creating annotations.⁷³ The publishing company is required to copyright its compilation and assign the rights to Idaho.⁷⁴ Interestingly, Idaho is one of the states that enacted a version of the Uniform Electronic Legal Material Act.⁷⁵ This publication includes the Idaho Code.⁷⁶ Idaho does not have a similar provision to Washington, D.C., on its website that releases the published information to the public domain.⁷⁷

7) *Illinois*. The Legislative Reference Bureau compiles and revises statutes in Illinois.⁷⁸ However, the Illinois Legislature explicitly released the Bureau's compilation to the public domain.⁷⁹ This release included the statutes as well as the "organizational and numbering scheme."⁸⁰

8) *Kansas*. The Office of Revisor of Statutes is responsible for preparing and publishing the Kansas Statutes Annotated.⁸¹ The Revisor is responsible for preparing case annotations addressing courts' decisions regarding Kansas statutes, statutory history, and cross references.⁸² The Revisor contracted with West Publishing to create an index of the work the Revisor.⁸³ In the contract, Kansas reserved the copyright in the index to itself.⁸⁴

9) *Maryland*. The Department of Legislative Services compiles and prints the laws enacted after each legislative session in Maryland.⁸⁵ The Department holds

⁷⁰ CODE OF THE DISTRICT OF COLUMBIA, <https://beta.code.dccouncil.us/dc/council/code/> (last visited Dec. 13, 2018).

⁷¹ FLA. STAT. ANN. § 11.242 (West 2017).

⁷² FLA. STAT. ANN. § 11.245 (repealed 1969).

⁷³ IDAHO CODE § 73-205 (2017).

⁷⁴ IDAHO CODE § 73-210 (2017).

⁷⁵ IDAHO CODE § 60-301 (2017).

⁷⁶ IDAHO CODE § 60-302 (2017).

⁷⁷ IDAHO STATUTES, <https://legislature.idaho.gov/statutesrules/idstat/> (last visited Dec. 27, 2017).

⁷⁸ 25 ILL. COMP. STAT. ANN. 135/§ 5.04 (West 2017).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ KAN. STAT. ANN. § 46-1211 (West 2017).

⁸² KAN. STAT. ANN. § 77-133 (West 2017).

⁸³ KAN. STAT. ANN. § 77-134 (West 2017).

⁸⁴ *Id.*

⁸⁵ MD. CODE ANN., STATE GOV'T § 2-1243 (LexisNexis 2017).

no copyright in the statutory publication.⁸⁶ Maryland also passed its own version of the Uniform Electronic Legal Materials Act, which ensures greater access to Maryland's laws for citizens of the state.⁸⁷

10) *Mississippi*. Mississippi's code creation and enactment provisions are some of the most restrictive laws in the country. The Joint Legislative Committee on Compilation, Revision and Publication of Legislation contracts with a publisher that edits, indexes, annotates, and prints the laws passed by the legislature.⁸⁸ The joint committee also has the authority to grant exclusive publication and sales rights.⁸⁹ Mississippi enacted "Mississippi Code of 1972 Annotated" as the official code of the state and specifies that this code constitutes evidence of the public laws of the state.⁹⁰ The State claims that:

All parts of any act passed by the Mississippi Legislature, or of any code published or authorized to be published by the Joint Committee on Compilation, Revision and Publication of Legislation . . . shall become and remain the exclusive property of the State of Mississippi, to be used only as the joint committee may direct.⁹¹

The statute imposes civil penalties for violators who use "any part of any act passed by the Mississippi Legislature."⁹² Mississippi's statutes seem to contradict U.S. Copyright Office practices and restrict access to the laws that govern the people of the state.⁹³

11) *Oregon*. The Legislative Counsel Committee "establish[es] policies for . . . codification, annotation, [and] . . . copyrighting" the Oregon Revised Statutes.⁹⁴ The Oregon Legislature authorized the Legislative Counsel Committee, in its discretion, to publish the Oregon Revised Statutes in electronic form, but the statute does not alter the copyright the state holds in the publication.⁹⁵ Oregon faced opposition to holding the copyright and subsequently waived the copyright in two specific cases.⁹⁶ However, Oregon did not completely relinquish its copyright.⁹⁷

⁸⁶ See *State Statutes/Code: Holder of Copyright*, *supra* note 57.

⁸⁷ MD. CODE ANN., STATE GOV'T § 10-1607 (West 2017).

⁸⁸ MISS. CODE ANN. § 1-1-107 (2017).

⁸⁹ *Id.*

⁹⁰ MISS. CODE ANN. § 1-1-8 (2017).

⁹¹ MISS. CODE ANN. § 1-1-9 (2017).

⁹² *Id.*

⁹³ See U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §313.6(C)(2) (3d ed. 2017).

⁹⁴ OR. REV. STAT. ANN. § 171.275 (West 2017).

⁹⁵ OR. REV. STAT. ANN. § 173.763 (West 2017).

⁹⁶ See Walters, *supra* note 57.

⁹⁷ See *id.*

12) *South Carolina*. The Code Commissioner, who is elected by Legislative Council, is responsible for compiling the code and creating the annotations that correspond to important state and federal cases.⁹⁸ The State claims to hold a copyright in the code through Legislative Council, and a copyright symbol is listed under every code section on legal research resources, including the code sections without annotations.⁹⁹ South Carolina claims this material even though the General Assembly provided the code should be adopted as the general permanent statutory law of the state, but the State did clarify the catch line headings and captions were not part of the law.¹⁰⁰

13) *Wyoming*. The Legislative Service Office, under the direction of the Management Council, compiles the laws of Wyoming.¹⁰¹ The Management Council negotiates with a publisher to edit and print the compilation of statutes and session laws.¹⁰² The State of Wyoming holds the copyright to specifically the text of this version but not the annotations.¹⁰³

The variety of state approaches to compiling the laws legislators enact, annotating the statutes, and creating access for the public reflects the importance legislators attribute to open records. Legislators must find ways to fund the production of these resources and also must consider the audience for whom they are producing the documents. While arguments over the ability to freely access the annotated law mainly focus on the average citizen, policy makers are aware the people who truly rely on the annotated law are members of the legal profession. Thus, when deciding whether to hold or release copyrights, lawmakers consider the practical reality that an average citizen is not searching the internet or library for annotated versions of the law. These considerations weighed heavy in the minds of the drafters of the legislation that created Georgia's commission.¹⁰⁴ The audience remained important as Georgia faced opposition to the copyright the state retained in the O.C.G.A.¹⁰⁵

C. THE O.C.G.A.

1) *The Creation of the Commission*. For over forty years, Georgia operated on borrowed intellectual property.¹⁰⁶ During the Great Depression, the state was low on resources, and the Harrison Company volunteered to codify and annotate

⁹⁸ See S.C. CODE ANN. §§ 2-13-10, 2-13-60 (2017).

⁹⁹ See *State Statutes/Code: Holder of Copyright*, *supra* note 57;

¹⁰⁰ S.C. CODE ANN. §§ 2-13-170, 2-13-175 (2017).

¹⁰¹ See WYO. STAT. ANN. §§ 28-8-101, 28-8-102 (2017).

¹⁰² WYO. STAT. ANN. § 28-8-105 (2017).

¹⁰³ *State Statutes/Code: Holder of Copyright*, *supra* note 57.

¹⁰⁴ Telephone Interview with Terry McKenzie, Former Deputy Legislative Counsel of the Ga. Gen. Assembly (Oct. 3, 2017).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

the laws of the state for the General Assembly.¹⁰⁷ In 1976, legislators and legislative counsel wanted to modernize the code and shorten the time required to draft bills by providing a centralized, organized code.¹⁰⁸ To determine the best way to accomplish this task, the General Assembly passed a resolution authorizing the Code Revision Study Committee.¹⁰⁹ The Study Committee determined the Commission would be the driving force to plan the logistics needed for this looming undertaking.¹¹⁰

On February 15, 1977, House Resolution 217-838 was introduced and read for the first time in the Georgia House of Representatives.¹¹¹ This resolution was designed to create the Commission and put the Study Committee findings into action.¹¹² The resolution was drafted in part by Terry McKenzie, Deputy Legislative Counsel and staff attorney for the committee.¹¹³ Representatives Wayne Snow, Allen Thompson, and Randolph Karrh joined Representative Larry Walker and Speaker Thomas B. Murphy in sponsoring the legislation.¹¹⁴ These sponsors were some of the most powerful forces in the Georgia Legislature.¹¹⁵ The resolution was assigned to the Judiciary Committee, chaired by Representative Snow with Representative Walker serving as vice-chair.¹¹⁶ The committee recommended the resolution should pass.¹¹⁷ Finally, the Rules Committee placed the resolution on the House Calendar, and the proposal came before the entire House of Representatives.¹¹⁸

This resolution laid the foundation for the broad authority eventually codified.¹¹⁹ The Commission was given the authority to “formulate . . . all the

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ GA. J. OF THE H.R., 134th Leg., 1st Sess., at 1036–37 (1977).

¹¹² McKenzie, *supra* note 104.

¹¹³ *Id.*

¹¹⁴ GA. J. OF THE H.R., 134th Leg., 1st Sess., at 1037 (1977).

¹¹⁵ Speaker Murphy would go on to be among the longest serving speakers of the house of any state. Brenda Goodman, *Tom B. Murphy, a Longtime Power in Georgia, Dies at 83*, N.Y. TIMES (Dec. 20, 2007), <http://www.nytimes.com/2007/12/20/us/20murphy.html>. Representative Larry Walker would go on to be Floor Leader for Governor Joe Frank Harris and Majority Leader of the Georgia House of Representatives. *Larry Walker*, WHGM ATTORNEYS AT LAW, <http://www.whgmlaw.com/attorney/larry-walker/> (last visited Oct. 3, 2017).

¹¹⁶ Telephone Interview with Larry Walker, Former Representative, Ga. House of Representatives and Former Vice-Chairman, Judiciary Comm. (Oct. 16, 2017).

¹¹⁷ GA. J. OF THE H.R., 134th Leg., 1st Sess., at 1281 (1977).

¹¹⁸ *Id.* at 1490.

¹¹⁹ *Id.*

details associated with the project” and contract with a publisher.¹²⁰ The resolution passed the House of Representatives with 141 votes in favor and five votes against it.¹²¹

McKenzie explained the Commission then worked with the different publishing companies which had worked in other states to determine the powers the Commission needed.¹²² The powers ranged from the ability to strike obsolete laws to renumbering provisions.¹²³ Representative Walker also spoke of the dedication of Chairman Snow to this often-thankless endeavor. Walker described times when he would go into the Judiciary Committee room and find Chairman Snow surrounded by sheets of paper, making edits to the proposed code.¹²⁴

A large part of the original discussions involved determining whether to create an annotated or unannotated code.¹²⁵ Legislators, especially those that were lawyers, and legislative counsel were particularly concerned about and in favor of an annotated version.¹²⁶ An annotated code has corresponding explanations to the statutory provisions which interpret judicial opinions, attorney general guidance documents, and law review and journal articles that relate to the statute.¹²⁷ “You really need an annotated Code to practice law,” said McKenzie.¹²⁸ McKenzie believed creating only an unannotated version would force lawyers to purchase both versions.¹²⁹ Representative Walker concurred, adding that, in his opinion, “We could have an official code that wasn’t annotated . . . but you would have to have some annotations to find how to apply the law to your case.”¹³⁰

McKenzie said that his and the legislature’s main concern was maintaining control over the code to ensure accuracy.¹³¹ Walker agreed that this was one of the legislature’s main concerns.¹³² The legislators wanted control over the annotations to ensure that the explanations of the law reflected what the General

¹²⁰ *Id.* In separate interviews, McKenzie and Walker explained one of the important details they had to decide. Both credited the colors of their alma mater, the University of Georgia School of Law, for the colors chosen for the covers of the Code books. McKenzie, *supra* note 104; Walker, *supra* note 116.

¹²¹ See GA. J. OF THE H.R., 134th Leg., 1st Sess., at 1492 (1977).

¹²² McKenzie, *supra* note 104.

¹²³ *Id.*

¹²⁴ Walker, *supra* note 116.

¹²⁵ *Id.*

¹²⁶ McKenzie, *supra* note 104.

¹²⁷ Walker, *supra* note 116.

¹²⁸ McKenzie, *supra* note 104.

¹²⁹ *Id.*

¹³⁰ Walker, *supra* note 116.

¹³¹ McKenzie, *supra* note 104.

¹³² Walker, *supra* note 116.

Assembly, as the entity that had the constitutional authority to enact the law, actually meant.¹³³ The fruits of these discussions became O.C.G.A. § 28-9-3.¹³⁴

2) *Resistance to the O.C.G.A.* Ultimately, the Commission chose to contract with the Michie Company.¹³⁵ The contract provided that the code would be considered a work made for hire by the Michie Company, and the Michie Company would sign the copyright over to the state.¹³⁶ In exchange, the Michie Company was given the exclusive right to sell a print version of the official code at a price set by the state.¹³⁷ To create the new official code, legislative counsel, members of the Commission, and representatives from the Michie Company conducted a title-by-title examination of the statutory material in the Harrison Code and all of the other legislative material passed since 1933.¹³⁸ Also, the Michie Company was required to annotate the “decisions of the appellate courts of Georgia plus applicable federal cases construing state law and federal and state constitutions.”¹³⁹

Legislators supported this effort.¹⁴⁰ However, the Harrison Company, which profited from the lack of an official code, unsuccessfully attempted to persuade the company’s friends at the Capitol to resist this change to which lawyers and judges would have to adapt.¹⁴¹ The Harrison Company sued the Commission, alleging the composition of the Commission and the contract with the Michie Company were invalid.¹⁴² The Harrison Company argued that granting the Michie Company the exclusive right to sell the code created a monopoly.¹⁴³ The Supreme Court of Georgia disagreed, explaining that Harrison was allowed to release a competitive product because “a state’s laws are public records open to . . . compiling by anyone.”¹⁴⁴

Also, the Harrison Company argued that the Code Revision Commission was not given the authority to create an *annotated* code.¹⁴⁵ Again, the court sided with

¹³³ McKenzie, *supra* note 104.

¹³⁴ H.B. 161, 138th Gen. Assemb., Reg. Sess. (Ga. 1985).

¹³⁵ *The Making of a New Code*, *supra* note 1, at 102.

¹³⁶ See *Georgia v. Harrison Co.*, 548 F. Supp. 110, 112 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983) (vacated because the parties settled the case).

¹³⁷ See *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 33 (Ga. 1979).

¹³⁸ *The Making of a New Code*, *supra* note 1, at 103.

¹³⁹ *Harrison Co.*, 260 S.E.2d at 33.

¹⁴⁰ Walker, *supra* note 116.

¹⁴¹ *Id.*

¹⁴² See *Harrison Co.*, 260 S.E.2d at 33–34 (arguing that the contract violated an anti-monopoly constitutional provision and the composition of the commission violated a constitutional provision).

¹⁴³ See *id.* at 34.

¹⁴⁴ *Id.* (citing *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866)).

¹⁴⁵ See *id.* at 35.

the Commission and explained the language “to take such action as is necessary to effectuate the Code revision” permitted an interpretation that the Commission could make its own decision regarding whether to annotate the code or not.¹⁴⁶ This case established that the Commission had the authority to create an annotated code.¹⁴⁷

3) *The Adoption of the O.C.G.A.* During a special session of the General Assembly in 1981, Representatives Snow, Walker, and Karrh and Speaker Murphy were joined by Representative J.C. Daugherty in proposing House Bill 2.¹⁴⁸ This legislation was designed to enact the code prepared by the Commission and the Michie Company.¹⁴⁹ Representative Snow’s Judiciary Committee approved the bill, and the House of Representatives and Senate passed the bill.¹⁵⁰ The language of O.C.G.A. § 1-1-1 now provides that:

The *statutory portion* of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company . . . *is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia.* The statutory portion of such codification *shall be merged* with annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials . . . [and] shall be known and may be cited as the “Official Code of Georgia Annotated.”¹⁵¹

The Georgia Constitution vests power to make the laws of the state in the General Assembly.¹⁵² The Commission and drafters of this provision intended for that constitutional foundation to be the backdrop in interpreting this code section.¹⁵³ However, in merging the statutory portion with the annotations and other creative additions to become the O.C.G.A., differing interpretations of the code section have contributed to the challenge the state faced from Carl Malamud.¹⁵⁴

4) *The Commission’s Authority.* In 1985, House Bills 161 and 162 amended the Commission’s authority to edit and publish granted in the original authorizing legislation.¹⁵⁵ The bills were reported favorably to the House by the Judiciary Committee.¹⁵⁶

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See GA. J. OF THE H. R., 136th Leg., Spec. Sess. at 8 (1981).

¹⁴⁹ See *id.*

¹⁵⁰ *Id.* at 10, 17, 294.

¹⁵¹ O.C.G.A. § 1-1-1 (2018) (emphasis added).

¹⁵² Ga. Const. art. 3, §. 1, para. I.

¹⁵³ McKenzie, *supra* note 104.

¹⁵⁴ See Motion for Summary Judgment, *supra* note 5, at 8 (“[T]he Court’s analysis should instead focus on the Georgia Assembly’s decisions to include annotations in the State’s only official Code.”)

¹⁵⁵ GA. J. OF THE H.R., 138th Leg., 1st Sess., at 62 (1985).

¹⁵⁶ *Id.* at 196.

House Bill 161 passed the House unanimously.¹⁵⁷ This bill created a new “chapter 9” which included what would become O.C.G.A. § 28-9-3.¹⁵⁸ In this bill, the General Assembly authorized the Commission to select and contract with a publisher to conduct a codification of the laws of Georgia and prepare “annotations, historical notes, research references, notes on law review articles, cross-references, [and] summaries of the opinions of the Attorney General of Georgia”¹⁵⁹ Further, the bill authorized the Commission to provide for the publication of annotated or unannotated versions of the code, grant publications and sales rights, and register and enforce the copyright claim in the Code.¹⁶⁰ In this chapter, the definition of the Code includes “the O.C.G.A. and any unannotated version thereof.”¹⁶¹

House Bill 162, however, passed with an amendment authored by Representative Denmark Groover, another institution in the Georgia House of Representatives, and Representative Walker.¹⁶² Their amendment clarified that while the Commission was authorized to make changes to the Code, these alterations did not have the authority to alter the substantive meaning of the laws created by the Georgia General Assembly, regardless of whether the changes were made purposefully or accidentally.¹⁶³ The Senate also passed these bills by the requisite constitutional majority.¹⁶⁴

5) *The Commission Claims Too Much.* Having failed in dismantling the Commission, the Harrison Company took the Supreme Court of Georgia’s advice and incorporated the new codification system into its own annotated code.¹⁶⁵ The Harrison Company used several headings of the new official code as well as the statutory portion.¹⁶⁶ The State sued, claiming the Harrison Company committed copyright infringement.¹⁶⁷ This dispute ultimately turned into a legal battle that would shape not only copyright law regarding statutes and annotations in the State of Georgia but also throughout the country.

The State argued that the court should overlook the long-established rule that statutes were uncopyrightable because it was the state, not a person, seeking to

¹⁵⁷ *Id.* at 253.

¹⁵⁸ H.B. 161, 138th Gen. Assemb., Reg. Sess. (Ga. 1985).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² GA. J. OF THE H.R., 138th Leg., 1st Sess., at 253 (1985).

¹⁶³ *See id.* Rep. Groover’s amendment provided that “any change or correction . . . shall not become the law of the State of Georgia. . . .”

¹⁶⁴ *Id.* at 865–66.

¹⁶⁵ *See Georgia v. Harrison Co.*, 548 F. Supp. 110, 113 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 111.

copyright the statutes.¹⁶⁸ The court denied this argument, relying on the rule that “[t]he citizens are the authors of the law, and therefore its owners . . . because the law derives its authority from the consent of the public, expressed through the democratic process.”¹⁶⁹

The court also rejected the State’s argument that it needed to hold the copyright to the statutes to ensure the statutes remained accurate.¹⁷⁰ While the court reasoned that lawyers could use other annotated or unannotated versions of the code, the court concluded, “[A]ny one citing the defendant’s [an unofficial, annotated code] would do so at his peril if there is any inaccuracy”¹⁷¹

The court determined that as “brief, descriptive language,” the title, chapter, and article headings that the Harrison Company copied from the official code were not subject to copyright.¹⁷² The court also turned to the enabling legislation to decide this question. These three descriptive terms were not listed as additions that merged with the statutory portion to become the Official Code of Georgia Annotated.¹⁷³ The court concluded that the General Assembly likely assumed that terms were included with the statutory portion and not copyrightable.¹⁷⁴

Members of the General Assembly and the chosen publisher combed through every page of Georgia’s laws on the (unorganized) books to create a product that would be easier to use for legislators, lawyers, and citizens alike.¹⁷⁵ However, questions over what the state could exclusively control were painstakingly answered along the way. While the Commission worked quietly in the background for many years, a new dispute emerged when Carl Malamud challenged the copyright and again plunged the Commission into litigation over the O.C.G.A.

III. ANALYSIS

A. CARL MALAMUD AND HIS EFFORT TO INCREASE PUBLIC ACCESS TO THE LAW

Many states view Malamud as a perpetual thorn in the side. But other people view him as a visionary, bent on increasing access to the laws that govern citizens all over the world. From opening the first internet connection at the White

¹⁶⁸ *Id.* at 114.

¹⁶⁹ *Id.* (quoting *Bldg Officials & Code Adm. v. Code Tech., Inc.* 628 F.2d 730, 734 (1st Cir. 1980)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 114-15.

¹⁷² *Id.* at 115.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *The Making of a New Code*, *supra* note 1, at 103.

House to helping create free accessibility to SEC required disclosure documents, Malamud is an internet innovator.¹⁷⁶

Malamud founded Public.Resource.Org (Public Resource), a non-profit corporation, and has published thousands of regulations incorporated by reference in statutes as well as other codes.¹⁷⁷ His quest to free the code in Georgia was not his first challenge. After the website Justia published Oregon's Revised Statutes and received a cease and desist letter from the State, officers at Justia called on Carl Malamud to fight the restriction.¹⁷⁸ Oregon's Legislative Counsel Committee eventually decided against enforcing the copyright against Justia.¹⁷⁹ Malamud's crusade has taken him around the world, but he eventually began actively resisting Georgia's Commission.¹⁸⁰

B. RELEASING THE O.C.G.A.

Malamud purchased a copy of the Official Code of Georgia Annotated and placed a scan of the contents of the code on the internet.¹⁸¹ The scanned copy included the annotations and other creative additions for which the state does claim the copyright.¹⁸² Additionally, Malamud sent members of the Commission, including Speaker David Ralston and Senator Josh McKoon, copies on USB drives and letters.¹⁸³ As a member of the Commission, former Representative Stacey Evans was also involved in responding to Malamud's challenge.¹⁸⁴

Evans explained that commission tasks regularly include working with legislative counsel to bring needed code amendments to the General Assembly and to approve contracts with LexisNexis.¹⁸⁵ In his original letter, Malamud

¹⁷⁶ E.g. Steven Levy, *The Internet's Own Instigator*, WIRED (Sept. 12, 2016, 12:00 AM), <https://www.wired.com/2016/09/the-internets-own-instigator/>.

¹⁷⁷ *Id.*

¹⁷⁸ E.g. Tim Stanley, *Cease, Desist & Resist-Oregon's Copyright Claim on the Oregon Revised Statutes*, JUSTIA: LAW, TECH. & LEGAL MARKETING BLOG (Apr. 19, 2008), <http://onward.justia.com/2008/04/19/cease-desist-resist-oregons-copyright-claim-on-the-oregon-revised-statutes/>.

¹⁷⁹ E.g. Tim Stanley, *Oregon decides not to enforce any copyright claims on the Oregon Revised Statutes*, JUSTIA: LAW BLOG (June 19, 2008), <https://lawblog.justia.com/2008/06/19/oregon-decides-not-to-enforce-any-copyright-claims-on-the-oregon-revised-statutes/>.

¹⁸⁰ Levy, *supra* note 176.

¹⁸¹ Bluestein, *supra* note 6.

¹⁸² Amended Complaint for Injunctive Relief at 9, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 11) [hereinafter Amended Complaint], *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018).

¹⁸³ Bluestein, *supra* note 6.

¹⁸⁴ Telephone Interview with Stacey Evans, Former Representative, Ga. House of Representatives and Former Member, Code Revision Comm'n (Oct. 7, 2017).

¹⁸⁵ *Id.*; Amended Complaint, *supra* note 182, at 6 ("The Legislature contracts with a publisher, currently Matthew Bender and Company, Inc., a member of the LexisNexis Group

explained that his purpose was to promote access for citizens “to the laws that govern them” because, “[A]ccess to the law is a fundamental aspect of our system of democracy, an essential element of due process, equal protection, and access to justice.”¹⁸⁶

The Commission did not agree, asserting the state’s exclusive copyright in the O.C.G.A.¹⁸⁷ Chairman McKoon responded with a letter instructing Malamud to cease and desist all unlawful copying of the O.C.G.A., remove the files he placed on the internet, and destroy any copies located on the internet.¹⁸⁸ Malamud did not concede defeat.¹⁸⁹ In his response, Malamud rejected Senator McKoon’s contention that there was a distinction between the statutory portion and the additions to which the state claimed a copyright.¹⁹⁰ Because the *entire* O.C.G.A. is the law of the State of Georgia, Malamud asserted the citizens of the state have the right to the additions as well.¹⁹¹ Malamud further rejected McKoon’s contention that the unofficial, unannotated version available online sufficiently provided public access.¹⁹² He said the unofficial version is plagued with technical difficulties and requires agreeing to a restrictive terms of service agreement.¹⁹³ With Malamud’s response, Representative Evans explained the committee decided to pursue litigation after consulting with legislative counsel.¹⁹⁴

(“LexisNexis”), a division of Reed Elsevier Properties, Inc., to publish an annotated version of the State laws as the O.C.G.A.”).

¹⁸⁶ Letter from Carl Malamud, President and Founder, Public.Resource.Org, to David Ralston, Speaker of the House, House of Representatives of Ga.; Wayne R. Allen, Legislative Counsel, Ga. Gen. Assembly (May 30, 2013) (available at <https://law.resource.org/pub/us/code/ga/ga.gov.20130530.pdf>).

¹⁸⁷ Letter from Senator Josh McKoon, Chairman, Ga. Code Revision Comm’n, to Carl Malamud, President and Founder, Public.Resource.Org. (July 25, 2013) (available at <https://law.resource.org/pub/us/code/ga/ga.gov.20130725.pdf>).

¹⁸⁸ *Id.*

¹⁸⁹ Letter from Carl Malamud, President and Founder, Public.Resource.Org, to Senator Joshua McKoon, Chairman, Ga. Code Revision Comm’n; David Ralston, Speaker of the House, House of Representatives of Ga.; and David Shafer, President Pro Tempore, Ga. State Senate (July 30, 2013) (available at <https://www.documentcloud.org/documents/741994-ga-gov-20130730.html>).

¹⁹⁰ *See id.*

¹⁹¹ *See id.* (“The O.C.G.A., every component of it, is the official law.”)

¹⁹² *Id.* (“In addition to numerous technical and usability deficiencies, this site is subject to two different terms of use.”).

¹⁹³ *Id.*

¹⁹⁴ Evans, *supra* note 184.

C. THE COMMISSION CHALLENGES PUBLIC RESOURCE

The Commission filed a complaint seeking injunctive relief for Public Resource's direct and indirect copyright infringement.¹⁹⁵ The Commission claimed Public Resource committed "mass publication terrorism" when it directly infringed the Commission's copyright by copying the O.C.G.A. and making it available to the public online.¹⁹⁶ By encouraging others to use and alter the O.C.G.A., the Commission alleged that Public Resource also committed indirect copyright infringement.¹⁹⁷

The State explained the annotations are "original and creative work[s]" which are lawfully copyrighted.¹⁹⁸ The Commission further contended that the publisher was given the exclusive right to sell the O.C.G.A. in order to recoup costs which otherwise would be passed on to taxpayers.¹⁹⁹ The Commission explicitly stated, "[The] [p]laintiff does not assert copyright in the O.C.G.A. statutory text itself since the laws of Georgia are and should be free to the public."²⁰⁰ The Commission cast Malamud as a renegade attempting to fundamentally change U.S. copyright law by using Georgia's perfectly lawful scheme as a pawn in his game.²⁰¹

Public Resource answered, flatly denying that Georgia "holds any valid copyright in the O.C.G.A., including the annotations."²⁰² However, Public Resource admitted to copying and posting copies of the O.C.G.A. online but affirmed its contention that the "judicial summaries, notes, and other components of the O.C.G.A." could not be protected by a copyright.²⁰³

¹⁹⁵ Complaint for Injunctive Relief at 13, 15-16, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 1), *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018). The complaint was later amended but contains the same original allegations. Amended Complaint, *supra* note 182.

¹⁹⁶ Amended Complaint, *supra* note 182, at 12.

¹⁹⁷ *Id.* at 16.

¹⁹⁸ *Id.* at 2.

¹⁹⁹ *Id.* at 2-3.

²⁰⁰ *Id.* at 8.

²⁰¹ See *id.* at 10 ("Defendant's ongoing and widespread copying and distribution of Plaintiff's Copyrighted Annotations are deliberate and willful acts of copyright infringement that are part of a larger plan designed to challenge the letter of U.S. copyright law . . .").

²⁰² Answer and Counterclaim of Defendant Public.Resource.Org, Inc. at 1, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 6), *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018). Public Resource also responded to the Plaintiff's amended complaint. See also Answer to Amended Complaint and Counterclaim of Defendant Public.Resource.Org, Inc. at 1, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 16) [hereinafter Answer to Amended Complaint], *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018).

²⁰³ Answer to Amended Complaint, *supra* note 202, at 4.

Additionally, Public Resource proffered ten affirmative defenses.²⁰⁴ Public Resource claimed that its use of the O.C.G.A. was fair use, the Commission made registration failures, and the proposed injunction would be “inimical to the public interest,” among others.²⁰⁵ Public Resource asserted a counterclaim against the Commission and demanded a declaratory judgment that it had not infringed any copyright because, “[L]aws enacted by government entities . . . are not copyrightable subject matter”²⁰⁶

1) *Public Resource’s Motion for Summary Judgment and the Commission’s Response.* On the same day, Public Resource filed a motion for summary judgment, and the Commission filed a motion for partial summary judgment.²⁰⁷ Public Resource began by asserting, “The O.C.G.A., including its annotations, is Georgia’s only official Code.”²⁰⁸ Public Resource directly addressed the state’s requirement that LexisNexis provide a free, unannotated version online. The organization argued that this version was difficult to use, and at least one person refused to access this version because the overbearing terms of service required users to agree to jurisdiction in New York in cases of dispute.²⁰⁹

While annotations are copyrightable, Public Resource argued it is established law that annotations *with the force of law* cannot be copyrighted.²¹⁰ Public Resource explained the court should not focus on the fact that annotations are subject to copyright but on the General Assembly’s incorporation of the annotations into the only official code.²¹¹ This inclusion meant that the *whole* O.C.G.A. was one work, created by the General Assembly as the official law of the state and could not be copyrighted.²¹²

Next, Public Resource argued the annotations were unprotectable because, “Under the merger doctrine, copyright does not protect expression when there is only one way, or so few ways to express an idea, that protecting the expression would effectively protect—and remove from the public domain—the idea itself.”²¹³ Lawyers focus on the same case components to create case comparisons to convince judges to rule in their favor.²¹⁴ For this reason, Public

²⁰⁴ *Id.* at 10-11.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 12.

²⁰⁷ Motion for Summary Judgment, *supra* note 5; Motion for Partial Summary Judgment, *supra* note 45.

²⁰⁸ O.C.G.A. §1-1-1 (2017); Motion for Summary Judgment, *supra* note 5, at 2.

²⁰⁹ Motion for Summary Judgment, *supra* note 5, at 4.

²¹⁰ *Id.* at 8 (citing U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.6(C)(2) (3d ed. 2014)).

²¹¹ *Id.* at 8.

²¹² *Id.* at 10.

²¹³ *Id.* at 11 (first citing *Bellsouth Advert. & Publ’g Corp. v. Donnelly Info. Publ’g, Inc.*, 999 F.2d 1436, 1442 (11th Cir. 1993) (en banc); then citing *Warren Publ’g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1518 n. 27 (11th Cir. 1997) (en banc)).

²¹⁴ *See id.* at 12.

Resource maintained that even unofficial annotations “home in on the same facts, language, and holdings” as the official version.²¹⁵ Creatively veering too far from the facts would not be helpful in creating accurate annotations, limiting how original an editor could be.²¹⁶

Finally, Public Resource argued its use of the code constituted fair use.²¹⁷ The factors a court considers for determining fair use of a work include:

(1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work²¹⁸

For the first factor, Public Resource suggested that its use was not commercial and was for educational use.²¹⁹ Further, Public Resource contended that its use was transformative, even though the code was an exact copy, because Public Resource’s version made using the code easier and provided more compatibility features.²²⁰

Next, Public Resource asserted the purpose of the O.C.G.A. was to convey informational facts in the law and was entitled to a smaller degree of protection.²²¹ For factor three, even though Public Resource copied the code in its entirety, Public Resource asserted that it copied “no more than necessary.”²²² Public Resource explained it could not achieve the same purpose of promoting

²¹⁵ *See id.* at 13.

²¹⁶ *Id.* at 12 (“[F]aithfulness to the public domain original is the dominant editorial value, so that the creative is the enemy of the true.” (quoting *Matthew Bender & Co., Inc. v. West Publ’g Co.*, 158 F.3d 674, 688 (2d Cir. 1998))).

²¹⁷ *Id.* at 13.

²¹⁸ 17 U.S.C. §107 (2012).

²¹⁹ Motion for Summary Judgment, *supra* note 5, at 14.

²²⁰ *See id.* at 14, 17 (“[T]he critical inquiry is ‘whether the work merely supersedes the objects of the original or instead adds something new, with a further purpose or different character.’” (quoting *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994))).

²²¹ *See id.* at 18 (“Copyright in a factual compilation is ‘thin’ and does not extend to the facts themselves.” (first citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-51 (1991); then citing *Bellsouth Advert. & Publ’g Corp. v. Donnelly Info. Publ’g, Inc.*, 999 F.2d 1436, 1445 (11th Cir. 1993) (en banc))).

²²² *Id.* at 19; *see also* *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014) (“For some purposes, it may be necessary to copy the entire copyrighted work, in which case Factor Three does not weigh against a finding of fair use.”).

“scholarship, analysis, and other public engagement” if it was not allowed to publish the full text.²²³

Finally, Public Resource asserted its publication did not detract from the market value of the O.C.G.A. or create a substitute for it.²²⁴ Public Resource did not divert sales from the state because the state did not profit from print royalties anyway, and Public Resource offered no showing that the copying would cause a decrease in other royalties.²²⁵ Additionally, Public Resource suggested that the students and citizens who would likely be utilizing its version would have never bought the O.C.G.A. in the first place.²²⁶

The Commission attacked Public Resource’s contention that the entire code was the law. The Commission pointed to three statutory provisions where the General Assembly indicated additions like the chapter analyses and annotations are not enacted as statutes and do not constitute law.²²⁷ Further, the Commission asserted that the entire O.C.G.A. could not be the law because there would be no way to enforce the annotations since they are interpretations of the law themselves.²²⁸

Additionally, to defeat the merger argument, the Commission explained that annotating the law in one way does not prevent others from focusing on the same important facts to create another copyrightable expression.²²⁹ Public Resource was never prevented from focusing on the same important factors of the statutory portions to create an independently copyrightable work.²³⁰

Finally, the Commission asserted that fair use did not absolve Public Resource of its infringement.²³¹ The Commission argued that factor one favored its position because Public Resource’s purpose was not truly educational.²³² The Commission insisted that providing a free copy to the public does not automatically create an educational purpose.²³³ Additionally, profits can include

²²³ Motion for Summary Judgment, *supra* note 5, at 20.

²²⁴ *Id.* at 20-21.

²²⁵ *Id.* at 21.

²²⁶ *Id.* at 23.

²²⁷ Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 5–6, Code Revision Comm’n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 34) [hereinafter Opposition to Motion for Summary Judgment] (first citing O.C.G.A. §1-1-1 (2017); then citing O.C.G.A. §1-1-7 (2017); and then citing 2014 Ga. Laws 866, 2015 Ga. Laws 5, §54), *rev’d and remanded*, 906 F.3d 1229 (11th Cir. 2018).

²²⁸ *See id.* at 7.

²²⁹ *See id.* at 13 (“[T]here is no merger because each of the OCGA’s and West’s summaries regarding the same judicial decision are different and can be separately copyrightable as such.”).

²³⁰ *Id.* (explaining “homing in on the same facts” is not the same as “preclud[ing] another’s expression of the entire broad idea”).

²³¹ *Id.* at 16.

²³² *Id.* at 17.

²³³ *Id.*

non-monetary benefits, transforming Public Resource's noble mission into a selfish allegation.²³⁴ The Commission further argued increasing internet accessibility was not transformative.²³⁵

The Commission categorized the annotations as a mix of facts and opinions when evaluating factor two.²³⁶ Pure factual information, unlike opinion, is entitled to less protection.²³⁷ For factor three, the Commission argued that Public Resource's copying of the entire code weighed heavily in its favor.²³⁸

The Commission argued Public Resource failed to carry its burden and prove that the Commission's market for the copyrighted material would not be harmed.²³⁹ The Commission proved that a relevant market exists for its work in the form of "printed publications, CD-ROMS, and subscription services."²⁴⁰ Therefore, Public Resource failed on factor four, and the Commission argued the balancing of the fair use factors weighed in its favor.²⁴¹

In Public Resource's response, the organization clarified its position about the status of the O.C.G.A. as an edict of the government.²⁴² Public Resource argued the distinction the Commission attempted to make between the annotations and statutory portion was futile because the *General Assembly* determined that the official code should include both.²⁴³ Public Resource believed it was asking the court to answer a different question than what the Commission presented: "This Court need only decide whether Georgia, having long ago decided that its only *official* Code should be annotated, should be able

²³⁴ *Id.* (citing *Weismann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989)).

²³⁵ *Id.* at 19-20. When courts held that a use was transformative when a work was copied in its entirety, something had been added, like a plagiarism detection feature. *See A.V. ex rel v. iParadigms*, 562 F.3d 630, 636 (4th Cir. 2009).

²³⁶ Opposition to Motion for Summary Judgment, *supra* note 227, at 21.

²³⁷ Motion for Summary Judgment, *supra* note 5, at 18 (first citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-51 (1991); then citing *Bellsouth Advert. & Publ'g Corp. v. Donnelly Info. Publ'g, Inc.*, 999 F.2d 1436, 1445 (11th Cir. 1993) (en banc)).

²³⁸ Opposition to Motion for Summary Judgment, *supra* note 227, at 22.

²³⁹ *Id.* at 24 ("PR has the ultimate burden of proof under factor four and must demonstrate that that Commission's market would not be substantially adversely impacted." (citing *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1279 (11th Cir. 2014))).

²⁴⁰ *Id.* ("Commission has . . . established . . . that there are three existing markets for the OCGA: printed publications, CD-ROM, and subscription services. . . .")

²⁴¹ *Id.* at 25.

²⁴² Reply Brief of Defendant Public.Resource.Org, Inc. in Support of Its Motion for Summary Judgment at 1, *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 41) [hereinafter Reply Brief of Defendant], *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018).

²⁴³ *Id.* at 2; *see also* O.C.G.A. § 1-1-1 (2017). This provision says that the statutory portion is enacted, but in the next sentence, it says that that statutory portion shall be merged with the annotations to create the O.C.G.A., leading to the textual dispute at issue.

to use copyright law to enjoin anyone but its official publisher from distributing it.”²⁴⁴

The General Assembly’s supervision and incorporation of the annotations into the official code made Georgia’s copyrighted annotations different than other commercial publishers’ annotations.²⁴⁵ Also, Public Resource responded to the Commission’s contention that the merger doctrine was inapplicable by explaining “that [the] idea[s] [of providing some information about the statutes] can only be expressed accurately so many ways.”²⁴⁶

Public Resource maintained that its copying of the code constituted fair use. Public Resource disagreed that providing information to the public did not create an educational purpose and argued that the incidental, non-monetary benefits did not weigh against its scholarly purposes.²⁴⁷ For the third factor, Public Resource pointed out that courts have held that copying the entire work is permissible if it is necessary to serve its purpose.²⁴⁸ Finally, Public Resource alleged that if it had harmed the Commission’s market, there would have been some evidence for the Commission to produce since Public Resource published its version in 2014.²⁴⁹

2) *The Commission’s Motion for Partial Summary Judgment and Public Resource’s Response.* The Commission filed a motion for partial summary judgment to address that the annotations are copyrightable and that Public Resource’s use of the O.C.G.A. constituted infringement. To prove direct copyright infringement, the “Commission must demonstrate that 1) it owns a valid copyright in the allegedly infringing works and 2) PR copied the protected elements of the works.”²⁵⁰ The Commission relied on the Compendium of Copyright Office Practices to demonstrate that “annotations and compilations are copyrightable when they possess a sufficient amount of originality.”²⁵¹ The Commission asserted that the annotations created by Lexis were sufficiently creative because many statutes and cases were read and analyzed to determine how to summarize the important information.²⁵² This, the Commission contended, is what Public

²⁴⁴ Reply Brief of Defendant, *supra* note 242, at 1–2.

²⁴⁵ *Id.* at 2 (explaining that because the General Assembly supervises the creation of the annotations the O.C.G.A. is different than other annotated codes prepared by outside publishers).

²⁴⁶ *Id.* at 7.

²⁴⁷ *Id.* at 9–10.

²⁴⁸ *Id.* at 12–13.

²⁴⁹ *Id.* at 13–14.

²⁵⁰ Motion for Partial Summary Judgment, *supra* note 45, at 12.

²⁵¹ *Id.* at 13 (citing U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §3163.6(C)(1) (3d ed. 2014)); see also U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §717.1 (3d ed. 2017).

²⁵² See *id.* at 5.

Resource copied.²⁵³ These annotations are not the law because they were not created through the legislative process, and the General Assembly is the only entity that has the power to create laws in Georgia.²⁵⁴ Since the annotations are not created by the General Assembly, the annotations could not be law.²⁵⁵ Combining the annotations and the statutory portions did not transform the annotations into law.²⁵⁶

Public Resource's response revolved around the same main arguments discussed above concerning why the O.C.G.A. was not copyrightable and why its copying constituted fair use.²⁵⁷ The Commission presented substantially the same arguments against Public Resource's alleged fair use as it did in responding to Public Resource's motion for summary judgment.²⁵⁸

3) *The Commission's Initial Victory.* The district court found that annotations in the O.C.G.A. were copyrightable.²⁵⁹ The court relied on the Copyright Act's provision that "lists 'annotations' in works entitled to copyright protection"²⁶⁰ and the Compendium's approval of the registration of annotations of government edicts.²⁶¹ While acknowledging that Georgia's process of merging the annotations into the official code was unique, the court did not find that this transformed the annotations into law.²⁶² The court sided with the Commission and found that the General Assembly did not inadvertently enact the annotations in merging the statutes and creative additions.²⁶³ The Court easily dismissed the applicability of the merger doctrine by explaining, "[T]here is no question that

²⁵³ *Id.* at 15–16.

²⁵⁴ *Id.* at 16; *see also* Ga. Const. art. III, § 1, para. 1 ("The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.").

²⁵⁵ *See* Motion for Partial Summary Judgment, *supra* note 45, at 16.

²⁵⁶ *Id.* at 17 (citing *Callaghan v. Myers*, 128 U.S. 617, 647 (1888)).

²⁵⁷ *See* Defendant Public.Resource.Org, Inc.'s Memorandum of Law in Opposition to the Commission's Motion for Partial Summary Judgment at 4–21, *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 33), *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018).

²⁵⁸ *See* Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment at 10–15, *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 40), *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018).

²⁵⁹ *See* *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1357 (N.D. Ga. 2017), *rev'd and remanded*, 906 F.3d 1229 (11th Cir. 2018).

²⁶⁰ *Id.* at 1356 (citing 17 U.S.C. § 101 (2012)).

²⁶¹ *Id.* at 1356 (*U.S. Copyright Office, Compendium of U.S. Copyright Office Practices* §313.6(C)(2), 717.1 (3d ed. 2014)).

²⁶² *Id.*

²⁶³ *See id.* ("The entire O.C.G.A. is not enacted into law by the Georgia legislature and does not have the force of law.")

there are a multitude of ways to write a paragraph summarizing a judicial decision [or] . . . compile the different annotations.”²⁶⁴

The court again sided with the Commission in deciding Public Resource’s fair use defense. In evaluating factor one, the Court found Public Resource’s use was not transformative because it did not add anything new or create a new purpose, and providing wider distribution of the annotations is not a valid argument for transformative use.²⁶⁵ Further, the court explained that “‘profit’ [could] take the form of an indirect economic benefit or . . . professional benefit” when determining whether the use of a copyrighted work was for an educational or commercial use.²⁶⁶ The court determined that the grants, contributions, attention, and recognition given to Public Resource because of these efforts constituted a use that was for a “profit.”²⁶⁷

The second factor, the nature of the copyrighted work, was also not as clear-cut as Public Resource asserted.²⁶⁸ Even though the statutory text was factual, the annotations required creativity and originality and went beyond pure fact, garnering more protection.²⁶⁹ In addition, since the court did not accept Public Resource’s transformative work argument for factor one, the court unsurprisingly found that Public Resource’s copying of the entire official code weighed against it for factor three.²⁷⁰

Finally, the court accepted the Commission’s proof of its markets and concluded Public Resource’s copying would harm those markets because people would be more likely to use Public Resource’s free version.²⁷¹

4) *Public Resource Ultimately Prevails.* This note was originally written in the Fall of 2017, shortly after the Northern District of Georgia ruled in favor of the Code Revision Commission. While in the final stages of publication, the Eleventh Circuit reversed the decision, vacated the injunction, and remanded the case to the lower court for “proceedings consistent with this opinion.”²⁷² The District Court analyzed Public Resource’s defenses to use of the state’s copyrighted work.²⁷³ In contrast, the appeals court based its decision on whether the O.C.G.A. could be copyrighted at all.²⁷⁴ The Eleventh Circuit explained that

²⁶⁴ *Id.* at 1357.

²⁶⁵ *Id.* at 1358 (citing *Author’s Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014)).

²⁶⁶ *Id.* at 1359.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *See id.* at 1360.

²⁷¹ *Id.*

²⁷² *See Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1255 (11th Cir. 2018).

²⁷³ *See Code Revision Comm’n*, 244 F. Supp. 3d at 1357–60 (analyzing Public Resource’s arguments the merger doctrine applied or its use of the O.C.G.A. constituted fair use).

²⁷⁴ *Code Revision Comm’n*, 906 F.3d at 1232.

works constructively authored by “the People” through their representatives as an exercise of sovereign power are not subject to copyright.²⁷⁵ Further, whether a work is authored by the People turns on the “identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created.”²⁷⁶

In analyzing authorship, the court expanded on the distinction between *Banks v. Manchester* and *Callaghan v. Myers*, as discussed earlier in this note.²⁷⁷ The reporter in *Banks* was not entitled to a valid copyright because he compiled the material written by judges, who have authority to interpret law, and secured the copyright for the state.²⁷⁸ On the other hand, the reporter in *Callaghan* possessed no authority to interpret law, prepared the additional material himself, and secured the copyright for his own benefit.²⁷⁹ If a judicial or legislative work is “created by an agent of the People in the direct exercise of sovereign authority,” the People are constructive authors of the work, and the work is in the public domain.²⁸⁰

The court concluded the General Assembly is ultimately the creator of the O.C.G.A. because it “is the driving force behind [its] creation.”²⁸¹ The Eleventh Circuit determined the Commission acted as an extension of the legislature because of its membership, funding, and staff.²⁸² Since this “arm of the General Assembly” has control over the content of the annotations, the annotations were fundamentally created by the General Assembly.²⁸³ The court also heavily weighed the General Assembly’s practice of approving the O.C.G.A. by enacting the O.C.G.A. into law, particularly the clause that incorporates the annotations.²⁸⁴ Similar to the judicially created material compiled in *Banks*, agents of the government, who possess the authority to create binding law, direct codification and then adopt the entire product.²⁸⁵

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 1237–38.

²⁷⁸ *Id.* at 1237–38, 1247 (citing *Banks v. Manchester*, 128 U.S. 244, 245, 249 (1888)).

²⁷⁹ *See id.* at 1238, 1247 (citing *Callaghan v. Myers*, 18 U.S. 617, 620–21, 645–46 (1888)).

²⁸⁰ *Id.* at 1242.

²⁸¹ *Id.* at 1243.

²⁸² *See id.* at 1244–45 (explaining the Commission is comprised in part of Georgia legislators, funded by legislative branch appropriations, and staffed by an office of the General Assembly).

²⁸³ *See id.* at 1243–44 (explaining the Commission instructs the publisher on what material to include, directly supervises the work that is produced, and possesses ultimate editorial control).

²⁸⁴ *Id.* at 1245.

²⁸⁵ *See id.* at 1245–46. The court explained an important difference between a state-paid employee and government official is the power to create law. The reporter in *Banks* compiled work made by judges who possess the power to interpret law. Georgia legislators in the Commission possess the power to create law.

The Eleventh Circuit also determined the annotations are “‘authoritative’ sources on the meaning of Georgia statutes.”²⁸⁶ Even though the General Assembly included provisions stating annotations are not law, the legislature chose to merge the annotations with the statutory text.²⁸⁷ This discussion of “merging” the statutory provisions and annotations is not the same as the district court’s analysis of Public Resource’s merger argument.²⁸⁸ The appeals court said that “merge” means “to combine or unite, often in such a way that the constituent elements of the merger lose their distinct identity or characteristics and become one.”²⁸⁹ The General Assembly chose to identify this new merged creation as the only *official* code of Georgia.²⁹⁰ While the appeals court conceded the merging clause did not give the annotations the same status as an enacted law, Georgia courts treat “comments as conclusive statements about statutory meaning.”²⁹¹ The Eleventh Circuit also found an interpretation of Georgia law would be incomplete without referencing the annotations.²⁹² The annotation’s authority in Georgia courts contributed to the conclusion that the annotations were constructively authored by the People.²⁹³

Finally, the process by which the annotations are created demonstrates the annotations are constructively authored by the People.²⁹⁴ The Eleventh Circuit explained “the essential hallmarks of [the] legislative process are bicameralism and presentment.”²⁹⁵ No annotation is enacted individually.²⁹⁶ However, both houses voted to adopt and the governor signed the law that merged the statutes with the annotations to become the Official Code of Georgia Annotated.²⁹⁷ Through this process, the court concluded the annotations did go through

²⁸⁶ *Id.* at 1248.

²⁸⁷ *Id.* at 1248–49 (citing O.C.G.A. §1-1-1 (2018)).

²⁸⁸ Compare *id.* (explaining that the merging of the statutes and the annotations gave the annotations legal significance) with *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1350, 1357 (N.D. Ga. 2017) (“Under the merger doctrine, ‘expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself.’” (quoting *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1142 (11th Cir. 2007))), *rev’d and remanded*, 906 F.3d 1229 (11th Cir. 2018).

²⁸⁹ *Code Revision Comm’n*, 906 F.3d at 1249.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1248, 1250.

²⁹² *Id.* at 1249.

²⁹³ *Id.* at 1250.

²⁹⁴ *Id.* at 1252.

²⁹⁵ *Id.* at 1253 (first citing *I.N.S. v. Chadha*, 462 U.S. 919 (1983); then citing Ga. Const. art. V, § II, para. IV; and then citing Ga. Const. art. III, § V, para. V).

²⁹⁶ *Id.* at 1252.

²⁹⁷ *Id.* at 1253.

Georgia's legislative process which "represents an exercise of sovereign power."²⁹⁸

Finding the General Assembly was the creator of the annotations, the annotations carried authoritative weight, and they went through the legislative process, ultimately led the Eleventh Circuit to conclude the people of Georgia are the constructive authors of the annotations.²⁹⁹ The State of Georgia could not copyright the annotations that belonged to the People.³⁰⁰

5) *Compliance (and Defiance?)*. The Eleventh Circuit's analysis of the role the Commission plays and the analysis of the adoption of the annotations diverges from accounts of members of the Commission and those active in the creation of the Commission. Representative Evans explained the commission worked with legislative counsel to bring amendments and approve publishing contracts.³⁰¹ Further, McKenzie, who served as deputy legislative counsel during the Commission's creation, stressed the General Assembly has never voted on a case annotation.³⁰² Nevertheless, the Eleventh Circuit seems to depict a Commission that intensely exercises its authority to control the annotations and a process that gives the annotations authority without a legislator, outside of members in the Commission, having ever read the text.

In addition to the great weight the appeals court places on the identity of the creator and process, the merger clause in O.C.G.A. § 1-1-1 appeared throughout the court's analysis of whether the annotations were authoritative sources.³⁰³ Authority was just one factor the Eleventh Circuit considered, and it weighed in favor of classifying the People as the constructive authors of the O.C.G.A.³⁰⁴ Since *all three* factors weighed in favor of the People's authorship, the court found the O.C.G.A. could not be copyrighted.³⁰⁵ However, the court might not have determined the People were the constructive authors of the annotations if the identity of the authors, authoritativeness of the work, and creation process had not all weighed in Public Resource's favor.³⁰⁶

²⁹⁸ *Id.* at 1254 (explaining the legislature's use of use of bicameralism and presentment to adopt the annotations and merge them with the statutory text in the discharge of legislators' official duties represents an exercise of sovereign power).

²⁹⁹ *Id.* at 1254-1255.

³⁰⁰ *Id.* at 1255.

³⁰¹ Evans, *supra* note 184.

³⁰² McKenzie, *supra* note 104.

³⁰³ *Code Revision Comm'n*, 906 F.3d at 1248-49.

³⁰⁴ *Id.* at 1248.

³⁰⁵ *Id.* at 1254.

³⁰⁶ See *id.* at 1248 ("This is not to say that every work produced by a legislative body is automatically uncopyrightable.").

Malamud wants the O.C.G.A. free to all because the annotations are part of the official code.³⁰⁷ The Eleventh Circuit held the O.C.G.A. was uncopyrightable in part because of the authority of the annotations.³⁰⁸ The Commission and the state are concerned that without a copyright in the annotations, paying for their creation will be passed to taxpayers.³⁰⁹ But if the annotations of the O.C.G.A. were not authoritative, could Malamud, the Eleventh Circuit, *and* the State of Georgia all “win?”

This dispute is ultimately one of statutory interpretation. The argument amounts to different interpretations of the second sentence of O.C.G.A. § 1-1-1. In providing that the statutory portion is merged with the annotations to become the “Official Code of Georgia Annotated,” the first sentence, which enacts the “statutory portion” into law, carries with it the merging clause of the second sentence. To attempt to clarify and eliminate the authority of the annotations, the General Assembly should pass the following amendment to O.C.G.A. § 1-1-1.

The second sentence of O.C.G.A. §1-1-1 should be amended as follows:

This statutory portion may be cited as the Official Code of Georgia. The matter included in the Official Code of Georgia shall be prima facie evidence of such law in all courts of the state. In addition, there is created the Annotated Code of Georgia. The statutory portion of the Official Code of Georgia shall be included alongside the annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials pursuant to the contract and shall be published by authority of the state pursuant to such contract to become the Annotated Code of Georgia. The Code Revision Commission shall retain the copyright over the annotations in the Annotated Code of Georgia.

Perhaps demonstrating how the legislators and members of the Commission actually view these additions would convince the courts to take another look. However, considering the Eleventh Circuit’s treatment of works with generally low authorship, this amendment may not be enough to distinguish the

³⁰⁷ Letter from Carl Malamud, President and Founder, Public.Resource.Org, to Senator Joshua McKoon, Chairman, Ga. Code Revision Comm’n; David Ralston, Speaker of the House, House of Representatives of Ga.; and David Shafer, President Pro Tempore, Ga. State Senate (July 30, 2013) available at <https://www.documentcloud.org/documents/741994-ga-gov-20130730.html>.

³⁰⁸ *Code Revision Comm’n*, 906 F.3d at 1248.

³⁰⁹ Amended Complaint, *supra* note 182, at 11.

annotation's authority.³¹⁰ If the amendment was successful, this version might alleviate Public Resource's concerns about the annotations being law because the merging of the annotations with the statutory portions would no longer be subject to debate; they would be separate.

IV. CONCLUSION

When citizens think of the laws that govern them, they likely do not think of the history that went into determining that judicial opinions and statutes are not copyrightable by the federal or state governments. Due process could have been severely affected in this country without this simple foundation. It is easy to take fair notice of the law for granted in America today.

Malamud's promises to appeal were not empty. Prior to October of 2018, it seemed federal law granted Georgia and other states the right to copyright annotations of the law. However, with the Eleventh Circuit's decision, states' copyrights in code annotations may no longer be safe. States which still claim to retain a copyright in the statutes themselves should be the first to prepare legislation to release those claims in order to avoid litigation fueled by Malamud's new-found firepower.

As Malamud said in a tweet proclaiming victory, "This law is your law. This law is my law . . . This law was made for you and me."³¹¹ And as of October 19, 2018, this law is available to all for free. For now, Malamud and the Eleventh Circuit have answered the question presented in this note in the negative, and the citizens of Georgia do not have to pay for the O.C.G.A.

³¹⁰ Cf. CRAIG JOYCE et. al., COPYRIGHT LAW 1 (10th ed. 2016) ("The aggressive application of the *Feist* principle in the Eleventh circuit has helped to fuel the complaints of database producers that they currently receive insufficient legal protection . . .").

³¹¹ Carl Malamud (@carlmalamud), TWITTER (Oct. 19, 2018, 11:55 AM), <https://twitter.com/carlmalamud/status/1053359050375684096>.