

# The Arkansas Code and *Georgia v. Public.Resource.Org*

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## I. Introduction

The United States Supreme Court decided *Georgia v. Public.Resource.Org, Inc.* (“*PRO*”) in late April, 2020,<sup>1</sup> a case with major implications for those who rely on the Arkansas statutes. The case addressed whether extra materials Georgia includes in its official statutes, the annotations, can be copyrighted, or if they are in the public domain and can be freely distributed without permission.<sup>2</sup>

The case and its prior phases in the lower courts pitted two important competing interests against each other: the ability of citizens to freely access the official versions of laws of their state, versus the interests of a third-party publisher in being compensated for its work. The Court extended the holdings of a series of cases from the 19<sup>th</sup> century which created the “government edicts doctrine,” and held that the explanatory materials accompanying Georgia’s official statutes could not be copyrighted.<sup>3</sup>

Arkansas produces its code<sup>4</sup> in a process which is nearly identical to Georgia’s. Also, like the fact situation in *PRO*, the organization Public.Resource.Org (“*PRO*”) maintains a free copy of the Arkansas code on the internet without the State’s

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1. 140 S. Ct. 1498 (2020).

2. *Id.* at 1503-04.

3. *Id.* at 1504.

4. ARK. CODE ANN. § 1-2-123 (2003).

permission.<sup>5</sup> This article will examine *PRO* and look at how the ruling might apply to Arkansas's own official code. The article concludes the ruling does apply to Arkansas's situation for now, but the effects of it are uncertain.

## II. Background

### A. Codes

Legislatures in all fifty states write and pass laws.<sup>6</sup> The laws are usually published online and in various print services in the order in which they are passed, without regard to their subject.<sup>7</sup> These “session laws,” as they are called, which are of a continuing and permanent nature, are then reorganized by subject, and that form is called a “code.”<sup>8</sup> The code makes it easier for a researcher to find all the laws on a particular subject.<sup>9</sup>

This useful reorganization of the session laws into a code requires maintenance, and most states have a procedure or entity to perform the maintenance.<sup>10</sup> Sometimes the legislature does not designate where in the code a new law should appear, or they designate the wrong place in the code, or pass duplicative legislation.<sup>11</sup> Issues may also arise when a new statute conflicts with pre-existing laws, or when older laws need to be changed to fit newer terminology.<sup>12</sup> Georgia and Arkansas happen to both call the entity responsible for code maintenance the Code Revision Commission.<sup>13</sup>

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5. *Arkansas Code of 1987 (Bulk Data)*, PUBLIC.RESOURCE.ORG, [https://perma.cc/3PK8-4MRA] (last visited July 13, 2021).

6. STEVEN M. BARKAN, BARBARA A. BINTLIFF & MARY WHISNER, *FUNDAMENTALS OF LEGAL RESEARCH* 215 (10th ed. 2015).

7. *Id.* at 216.

8. *Id.*

9. *Id.*

10. See generally Laura C. Tharney & Samuel M. Silver, *Legislation and Law Revision Commissions: One Option for the Management and Maintenance of Ever-Increasing Bodies of Statutory Law*, 41 SETON H. LEGIS. J. 329 (2017).

11. See Powers and Duties, ARK. CODE ANN. § 1-2-303(c)(1) (2017) (listing the types of maintenance a revisor might encounter); 2006 OK AG 3, ¶ 6, [https://perma.cc/NA8Y-NSSY] (asking which session law controls when a statute has been amended twice in the same legislative session, with identical effective dates but irreconcilable differences).

12. See ARK. CODE ANN. § 1-2-124 (2021) (directing the Arkansas Code Revision Commission to find and change instances of outdated terms in the Arkansas Code).

13. GA. CODE ANN. § 28-9-2 (1985); ARK. CODE ANN. § 1-2-301 (2001).

Once a commission has organized the session laws into a coherent code, they work with a publisher to prepare the code for publication.<sup>14</sup> The print edition is kept current with newly-printed volumes, pocket parts, and print supplements as the legislature passes new laws.<sup>15</sup> This printed code is often designated by the legislature to be the “official” code and serves as prima facie evidence of the content of the session laws.<sup>16</sup> The code is the law which most practitioners cite daily rather than the session laws.<sup>17</sup>

Commercial publishers often create competing, unofficial codes.<sup>18</sup> Some codes are designated “annotated” codes because the publisher adds extra features.<sup>19</sup> Besides reprinting the code itself, the annotated codes include richer notes on the history of the statute, cross references to relevant law reviews, bar journals, and legal encyclopedias, and most importantly for the practitioner, short summaries of court opinions which have interpreted the statute.<sup>20</sup>

Many states follow a pattern of one official unannotated code published either by or under the auspices of the government, and one commercial annotated code.<sup>21</sup> Georgia, Arkansas, and a few other states publish official codes which are annotated, and which they copyright.<sup>22</sup> The *Official Code of Georgia Annotated* (“OCGA”) is published by contract between Georgia and the Matthew Bender Company, a division of LexisNexis (“Lexis”).<sup>23</sup> The annotations are created by Lexis, and the Georgia Code

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14. See ARK. CODE ANN. § 1-2-303(a)(1) (describing the process in Arkansas).

15. ARK. CODE ANN. § 1-2-303(a)(1).

16. ARK. CODE ANN. § 1-2-303(a)(6) (designating supplements to be prima facie evidence of the law contained in the session laws); ARK. CODE ANN. § 1-2-102(a) (1987) (enacting the Arkansas Code Annotated of 1987 as the basic law itself).

17. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12.2.1, at 121 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020) [hereinafter BLUEBOOK].

18. BARKAN ET AL., *supra* note 6 at 217.

19. *Id.* at 217-18.

20. *Id.*

21. See BLUEBOOK, *supra* note 17, T1.3 (providing examples by state).

22. Brief of the States of Arkansas, Alabama, Idaho, Kansas, Mississippi, South Carolina, South Dakota, & Tennessee as Amici Curiae in Support of Petitioners at 1, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150) [hereinafter Brief].

23. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1505 (2020) [hereinafter *PRO*].

Revision Commission has editorial control.<sup>24</sup> According to the contract, copyright in the OCGA rests with the State of Georgia.<sup>25</sup>

Copyright, in its simplest form, is the right of creators to control whether copies can be made of their work. Its foundations are established in the United States Constitution,<sup>26</sup> and provisions giving detail to the Constitution's requirements are in the Copyright Act (the "Act").<sup>27</sup> Georgia included copyright notices on the OCGA in print and put online users on notice that unauthorized copying of its code was prohibited.<sup>28</sup>

PRO is a non-profit company whose goal is to maintain public works projects on the internet for "Educational, Charitable, and Scientific Purposes."<sup>29</sup> One of its major projects, Law.Resource.Org, works to make primary legal materials in the United States free to all on the internet.<sup>30</sup> In the pursuit of this mission, PRO began scanning and posting the official, print codes on its website for several jurisdictions and distributing flash drives with the entire annotated code.<sup>31</sup> PRO invoked the government edicts doctrine to justify the copying.<sup>32</sup> The doctrine, examined below, stands broadly for the idea that a maker of law, working ultimately for the people, cannot be considered an author for purposes of the Act, and thus their works cannot be copyrighted.<sup>33</sup>

In 2015, Georgia's Code Revision Commission sued PRO in the Northern District of Georgia for injunctive relief.<sup>34</sup> The complaint alleged copyright infringement of the annotations in

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24. *Id.*

25. *Id.*

26. U.S. CONST. art. I, § 8, cl. 8.

27. Copyright Act, 17 U.S.C. §§ 101-122.

28. Code Revision Comm'n. v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350, 1354 (N.D. Ga. 2017).

29. *Articles of Incorporation*, PUBLIC.RESOURCE.ORG, [https://perma.cc/EL3U-RN3Z]

(last visited June 23, 2021).

30. *Law is the Operating System of Our Society . . . So Show Me the Manual*, PUBLIC.RESOURCE.ORG, [https://perma.cc/YB5L-JLYN] (last visited June 23, 2021).

31. See *Code Revision Comm'n*, 244 F. Supp. 3d at 1354.

32. Defendant Public.Resource.Org, Inc.'s Memorandum of Law in Support of Its Motion of Summary Judgment at 2, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017), (No. 1:15-CV-2594-RWS), 2016 WL 8792618.

33. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1506 (2020).

34. Complaint for Injunctive Relief, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 1:15-cv-2594-MHC), 2015 WL 4999975.

the OCGA.<sup>35</sup> It specifically did not allege a copyright in the statutes themselves.<sup>36</sup> Both parties motioned for summary judgment.<sup>37</sup> The court found in favor of Georgia.<sup>38</sup>

PRO appealed to the United States Court of Appeals for the Eleventh Circuit.<sup>39</sup> The Eleventh Circuit reversed, holding that there was no valid copyright in the statute's annotations.<sup>40</sup> It ruled that the annotations were written under the supervision of the state and sufficiently "law-like" that their authorship could be attributed to the state—and thus the People—making them uncopyrightable.<sup>41</sup> Georgia's Commission appealed to the Supreme Court and was granted certiorari.<sup>42</sup>

### B. Prior Law—Government Edicts Doctrine

Three cases in the 1800s serve to articulate and draw the initial borders of the government edicts doctrine.

In *Wheaton v. Peters* the plaintiffs were publishers who asserted ownership of the copyright in earlier volumes of the Supreme Court's decisions.<sup>43</sup> Plaintiffs were awarded the contract to publish the decisions of the Court and believed that the Court had assigned the copyright to them.<sup>44</sup> They sought an injunction to enforce their copyright by stopping Peters from republishing the decisions.<sup>45</sup> After a lengthy discussion, the Court held for the defendant, concluding that, "[i]t may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."<sup>46</sup>

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35. *Id.* at 1-2.

36. *Id.* at 8. ("Plaintiff 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.")

37. Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350, 1352 (N.D. Ga. 2017).

38. *Id.* at 1361.

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

40. *Id.* at 1255.

41. *Id.* at 1233, 1243, 1248, 1255.

42. Georgia v. Public.Resource.Org, Inc., 139 S. Ct. 2746 (2019).

43. 33 U.S. (8 Pet.) 591, 593-94 (1834).

44. *Id.* at 594.

45. *Id.* at 595.

46. *Id.* at 667-68.

Fifty-four years later, *Banks v. Manchester* extended *Wheaton*.<sup>47</sup> While *Wheaton* held that judges could hold no copyright in their opinions, the issue in *Banks* was whether extra materials written by the judges—such as syllabi and headnotes—which were *not* part of the official opinion (or “the law”) could be copyrighted.<sup>48</sup> The Court held as a matter of public policy,

[N]o copyright could[,] under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. 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.<sup>49</sup>

In the same term, *Callaghan v. Meyers* ruled that extra materials prepared by the *publisher* such as headnotes, indexes, and other explanatory materials *could* be copyrighted.<sup>50</sup> Distinguishing this case from *Wheaton* and *Banks*, Justice Blatchford wrote that while no copyright could exist in the law or its explanation by those able to make the law, it would take some affirmative act by the legislature to strip copyright from someone who does not have the authority to make law.<sup>51</sup> He explained, “[t]his seems to us to be a proper view of the decision in *Wheaton v. Peters*; and that decision is as applicable where a reporter receives a compensation or salary from the government, as where he does not, in the absence of any restriction against his obtaining a copyright.”<sup>52</sup>

The Supreme Court did not have occasion to re-examine the government edicts doctrine until 132 years later in *PRO*.<sup>53</sup>

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47. *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888).

48. *Id.* at 250, 253-54.

49. *Id.* at 253.

50. *Callaghan v. Myers*, 128 U.S. 617, 647, 649 (1888).

51. *Id.* at 647-49.

52. *Id.* at 650.

53. The doctrine has not been ignored by lower courts and has been extended to state statutes and building codes. See Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 223, 226-31 (2019).

### III. Analysis in *Georgia v. Public.Resource.Org*

Chief Justice Roberts delivered the majority opinion.<sup>54</sup> He began by reviewing the facts and the three government edict cases, adding, “The animating principle behind this rule is that no one can own the law. ‘Every citizen is presumed to know the law,’ and ‘it needs no argument to show . . . that all should have free access’ to its contents.”<sup>55</sup> Roberts continued, stating that the logic of the three cases regarding judges, opinions, and supplementary materials written by judges applied equally to legislatures, statutes, and the explanatory materials directly created by them in their official duties.<sup>56</sup>

Extending the reasoning in the government edicts doctrine to apply to legislatures, the question then became whether Georgia’s annotations fell under the doctrine.<sup>57</sup> Were the annotations created by a legislator, and if so, were they part of the legislator’s official duties?<sup>58</sup> He looked at the process by which the statutes and annotations are created in Georgia and concluded they were.<sup>59</sup>

First, are the annotations created by the legislature? Georgia, through its commission, contracted with Lexis to create the annotations through a work-for-hire agreement.<sup>60</sup> Roberts noted that under the Act, this would make the commission the sole author and copyright holder.<sup>61</sup> The commission, funded by the legislature and composed primarily of Georgia legislators, has editorial control over the annotations.<sup>62</sup> Once assembled, the annotations and statutes are submitted to the legislature for

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54. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1502 (2020).

55. *Id.* at 1505-07 (quoting *Nash v. Lathrop* 6 N.E. 559 at 560 (Mass. 1886)).

56. *Id.* at 1507.

57. *Id.* at 1508.

58. *Id.* at 1508-09.

59. *PRO*, 140 S. Ct. at 1509.

60. *Id.* at 1508.

61. *Id.* (citing 17 U.S.C. §201(b)) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”)

62. *Id.* at 1508.

approval and are then “merged” by statute and published as the OCGA.<sup>63</sup>

Next, are the annotations created as part of the legislature’s duties? Justice Roberts first noted a 1979 case, which held under Georgia law the creation of the annotations *is* an act of legislative authority, and the annotations provide extra materials the legislature has deemed relevant to understanding the law.<sup>64</sup> Last, he noted that the annotations prepared under the eye of the legislature and commission are directly analogous to the judge-written headnotes and syllabi in *Banks*: both are resources written by a lawmaker to help the public understand the law.<sup>65</sup>

Justice Roberts concluded that the commission was an “adjunct” of the legislature and wrote the annotations as part of the legislature’s duties; therefore, the annotations in the OCGA were not subject to copyright protection.<sup>66</sup>

#### IV. Other Claims

The Court addressed several of Georgia’s other claims, which should be briefly discussed. First, which was crucial to the trial court’s holding, is section 101 of the Act specifically lists annotations as being original works of authorship, and thus eligible for copyright protection.<sup>67</sup> Roberts countered that the core of the government edicts doctrine is that judges and legislators cannot *be* authors under the Act when producing works as part of their duties.<sup>68</sup>

Second, Georgia pointed out that the Act specifically excludes protection for works prepared by officers and employees of the federal government but does not mention state governments.<sup>69</sup> Justice Roberts responded that the Act broadly

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63. *Id.* at 1509 (citing GA. CODE. ANN. § 1-1-1 (1982), amended by Act of May 10, 2021, No. 306, sec. 1, 2021 Ga. Code Ann. Adv. Legis. Serv. (West), see discussion *infra* note 124).

64. *PRO*, 140 S. Ct. at 1508-09 (citing *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 34 (Ga. 1979)).

65. *Id.* at 1509.

66. *Id.*

67. *Id.*

68. *Id.*

69. *PRO*, 140 S. Ct. at 1509.



excludes federal government works from copyright protection, not just statutes and opinions.<sup>70</sup> The broader exclusion does not imply an intent to do away with the government edicts doctrine, and states do enjoy copyright protection for their non-law works.<sup>71</sup>

Georgia also argued that the government edicts doctrine, created by the Court as a matter of public policy, is more than one hundred years old and at odds with how statutes are interpreted in the modern era.<sup>72</sup> Roberts dismissed the argument, noting that when Congress reenacted the Act it used identical language, which presumably includes the construction the Court has made.<sup>73</sup> Congress had the opportunity to reject the Court's interpretation of the doctrine and did not.<sup>74</sup> Roberts concludes, "critics of our ruling can take their objections across the street, [where] Congress can correct any mistake it sees."<sup>75</sup>

Georgia argued that the *Compendium of U.S. Copyright Office Practices* (the "*Compendium*")—a guidance document published by the United States Copyright Office—states that legal annotations can be copyrighted *unless* the annotations have the force of law, and the annotations in the OCGA do not have the force of law.<sup>76</sup> This claim was dismissed by Roberts, noting that the relevant section of the *Compendium* does not address the situation where judges or legislators create the annotations in their official capacities.<sup>77</sup> Justice Roberts similarly dismissed Georgia's claim that to deny the annotations protection would work against the Act's purpose by discouraging private publishers from working with states.<sup>78</sup> Roberts held that the Court was the wrong forum in which to bring the claim, again leaving it up to Congress.<sup>79</sup> Roberts concludes by summing up the government edicts doctrine:

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70. *Id.* at 1509-10.

71. *Id.* at 1510.

72. *Id.*

73. *Id.* (citing *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 634 (2019)).

74. *See PRO*, 140 S. Ct. at 1510.

75. *Id.* (quoting *Kimble v. Marvel Ent., L.L.C.*, 576 U.S. 446, 456 (2015)).

76. *Id.* at 1510-11.

77. *Id.* at 1511.

78. *Id.*

79. *PRO*, 140 S. Ct. at 1511 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003)).

Instead of examining whether given material carries “the force of law,” we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.<sup>80</sup>

## V. Applying *Georgia v. Public.Resource.Org* to Arkansas

Does the *PRO* ruling apply to Arkansas? Probably. Arkansas even noted in the amicus brief to the Supreme Court that the facts in the case were not specific to Georgia and were “largely present” in the case of every copyrighted, annotated official code (the brief counts twenty-two states with the same situation).<sup>81</sup>

The new government edicts doctrine looks first at whether the annotations were created by the legislature.<sup>82</sup> To do that, *PRO* looked at the ties between the legislature and the annotations.<sup>83</sup> Arkansas uses an almost identical process to Georgia’s in the production of its official code, the *Arkansas Code of 1987 Annotated* (the “ACA”).<sup>84</sup> The state code is overseen by Arkansas’s Code Revision Commission (the “Commission”).<sup>85</sup> The Commission was created by the legislature and is composed primarily of legislators.<sup>86</sup> It is charged with overseeing the maintenance of the ACA, contracting with a publisher to arrange publication, setting the price, and keeping the code up-to-date

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80. *Id.* at 1513.

81. Brief, *supra* note 22, at 4.

82. *PRO*, 140 S. Ct. at 1508.

83. *Id.*

84. *See infra* notes 85-102 and accompanying text.

85. *See* ARK. CODE ANN. § 1-2-303 (2017).

86. ARK. CODE ANN. § 1-2-301(a)(1), (b)(1) to (b)(2)(A) (2001). Arkansas’s Commission is composed of seven voting members, four of whom are legislators (two from the Arkansas Senate and two from the Arkansas House of Representatives) and three non-legislators (members of the Arkansas Bar appointed by the state Supreme Court). Four non-voting members of the committee include the Dean of the University of Arkansas at Fayetteville School of Law, the Dean of the University of Arkansas at Little Rock William H. Bowen School of Law, the Attorney General or her designee, and the Director of the Bureau of Legislative Research.

through pocket parts, supplemental paperbacks, and replacement volumes.<sup>87</sup> After the initial creation of the ACA in 1987, replacement volumes and supplements “published under the supervision of the commission shall be prima facie evidence of the law . . . .”<sup>88</sup>

The Commission is assisted in maintaining the code by the Bureau of Legislative Research (the “Bureau”).<sup>89</sup> The Bureau is under the direction and control of the Legislative Council,<sup>90</sup> an ad interim committee of the Arkansas State Legislature.<sup>91</sup>

Like Georgia’s system, the annotations of the ACA are prepared for the Commission by a private company, Matthew Bender, a division of Lexis, pursuant to a work-for-hire contract.<sup>92</sup> The Bureau and Commission work with Lexis to create and approve annotations.<sup>93</sup> The title page of each volume and the supplements contain a note that the State holds the copyright to the volume’s contents.<sup>94</sup> The work-for-hire contract reserves copyright in all materials to the Commission.<sup>95</sup> Arkansas

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87. ARK. CODE ANN. § 1-2-303(a)(2), (a)(5)(A), (a)(6), (b)(2).

88. ARK. CODE ANN. § 1-2-303(a)(6).

89. See ARK. CODE ANN. § 1-2-303(c).

90. ARK. CODE ANN. § 10-3-303(a) (2017).

91. ARK. CODE ANN. § 10-3-301(a) (2007).

92. Report of the Committee on Policy Making of the Arkansas Legislative Council, *Publishing and Editing of Statutory Materials Services Agreement*, ARK. STATE LEG. (Sept. 21, 2018), [<https://perma.cc/9ZXY-4ZD4>] [hereinafter Report of the Committee]; see also Bureau of Legislative Research, *RFP Number: BLR-180001*, ARK. STATE GOV’T (Feb. 15, 2018),

[http://www.arkansas.gov/dfa/procurement/bids/get\\_document.php/popup?doc\\_id=12484&doc\\_type=PDF&usg=AOvVaw1wAc6cUacNC6t7iPIy1Tb-](http://www.arkansas.gov/dfa/procurement/bids/get_document.php/popup?doc_id=12484&doc_type=PDF&usg=AOvVaw1wAc6cUacNC6t7iPIy1Tb-) [hereinafter Request for Proposal] (supplementing the Report of the Committee).

93. Report of the Committee, *supra* note 92, at 1.

94. This includes the newest supplements, 2021-4 Ark. Code Ann. Adv. Code. Serv. (LexisNexis).

95. Request for Proposal, *supra* note 92, at § 1.32 reads:

All data, material, and documentation prepared for the Commission pursuant to the Contract shall belong exclusively to the Commission. The Successful Vendor shall register the copyright claim in all materials in the Arkansas Code of 1987 Annotated (the “A.C.A.”), Official Edition, and all supplements and revisions to it, including the indices, tables, commentaries, and Court Rules volumes, and shall register the copyright claim in all materials contained in any electronic format or database prepared by the Successful Vendor pursuant to the resulting Contract, on behalf and in the name of the Commission as copyright owner by making the necessary notices required by statute and performing any other acts necessary to register the copyright claims reserved to the Commission.

and Lexis make available an online, *unannotated*, and unofficial Arkansas code free of charge.<sup>96</sup> Accessing it requires clicking through an agreement which reminds the user that copyright rests with the State of Arkansas, and readers agree to comply with narrow usage restrictions.<sup>97</sup>

There is at least one difference between Georgia's and Arkansas's annotated codes. Under the OCGA § 1-1-1, as it read when the case was decided,<sup>98</sup> Georgia's Commission submitted its work annually to the Georgia legislature for three purposes: to enact new and changed statutes in their codified form, to "merge" the statutes with the annotations, and to publish the revised parts.<sup>99</sup> Arkansas has an almost identical provision.<sup>100</sup> But, while

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The Arkansas Code of 1987 Annotated, Official Edition, and all supplements and revisions to it, including the indices, tables, commentaries, and Court Rules volumes, are works made for hire and the Commission owns and retains all rights appraised in the copyrights therein and owns and retains all rights appraised in the copyright in any electronic format or database prepared by the Successful Vendor pursuant to any resultant Contract.

96. *Code of Arkansas Public Access*, LEXISNEXIS, [https://perma.cc/5K5V-PVFR] (last visited June 22, 2021).

97. *Id.* Restrictions include:

Neither the Arkansas Code of 1987 nor any portions thereof shall be reproduced without the written permission of the Arkansas Code Revision Commission, except for fair use under the copyright laws of the United States of America, and except that Arkansas Code of 1987 section text, numbering, lettering, and forms may be copied from this website by the user and reproduced in copyrightable works where the portions of such section text, numbering and lettering reproduced are germane to the intellectual content of such work.

98. GA. CODE ANN. § 1-1-1 (amended effective July 1, 2021, removing the merger language). *See infra* note 124.

99. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (citing GA. CODE ANN. § 1-1-1 (2021)); *see* GA. CODE ANN. § 1-1-1 (2021) which previously read:

The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company pursuant to a contract entered into on June 19, 1978, 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 pursuant to the contract and shall be published by authority of the state pursuant to such contract and when so published shall be known and may be cited as the "Official Code of Georgia Annotated."

*See also* 2020 Ga. Laws Act 521 (S.B. 429) for an example of an omnibus enactment.

100. ARK. CODE ANN. § 1-2-102 (1987) reads:

(a) The statutory portion of the codification of Arkansas laws prepared by the Arkansas Code Revision Commission and the Michie Company pursuant to a

the language is similar, the process differs. Arkansas does not engage in an annual approval by the legislature.<sup>101</sup>

In summary, the Georgia and Arkansas annotated codes are produced nearly identically. The legislatures, working through commissions primarily composed of legislators, both hire a third party to create the annotations, both retain ultimate control and approval of the work produced through their commissions, and both states retain the copyright in the annotations.<sup>102</sup> Under *PRO*'s extension of the government edicts doctrine, the authorship of the annotations can be directly attributed to the legislature.

The second part of the government edicts doctrine asks whether the annotations were created by the legislature “in the ‘discharge’ of its legislative ‘duties.’”<sup>103</sup> As noted above, *PRO* pointed out that the annotations have not been enacted into law, but *are* an act of “legislative authority,” especially considering the opinion in *Harrison Co. v. Code Revision Comm’n*.<sup>104</sup> Arkansas does not seem to have a state case analogous to Georgia’s. However, this was only part of Justice Robert’s analysis and is not strictly necessary under the government edicts analysis. *PRO* draws a parallel from the headnotes and syllabus in *Banks* to the annotations in the OCGA, saying definitively, “. . . annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators.”<sup>105</sup>

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contract entered into on August 1, 1984, is enacted and shall have the effect of statutes enacted by the General Assembly of the State of Arkansas.

(b) The statutory portion of the codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross references, indices, title, chapter, and subchapter analyses, and other materials pursuant to the contract and shall be published by authority of the state pursuant to the contract.

101. However, the Commission does submit bills each year to the legislature with their proposed corrections to keep the code up-to-date. For an example, *see* Minutes of Arkansas Code Revision Commission Meeting Dec. 1, 2020, Exhibit B, ARK. STATE LEGISLATURE, [<https://perma.cc/DC58-EV3K>] (last visited June 23, 2021).

102. *See supra* Part V.

103. *PRO*, 140 S. Ct. at 1509 (citing *Banks v. Manchester*, 128 U.S. 244, 253 (1888)).

104. *Id.* (citing *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 34 (Ga. 1979)).

105. *Id.*

Arkansas's process seems to satisfy both requirements of the new government edicts doctrine. Following *PRO*, it seems clear the annotations in the ACA are not subject to copyright.

## VI. Current State

Nothing has changed in Arkansas in the year since *PRO* was decided. The complete, updated ACA is still available for free to the public on *PRO*'s website Law.Resource.Org.<sup>106</sup> Lexis continues to sell the ACA in print<sup>107</sup> and online through its research platform and makes an unofficial, unannotated version of the code available free online.<sup>108</sup>

The current status quo might not last much longer. First, Lexis must make a profit if they are going to continue making the ACA. We do not have insight into whether or how much Lexis is profiting or what effect, if any, *PRO*'s online ACA is having. Under the current arrangement, Arkansas does not pay Lexis to produce the ACA.<sup>109</sup> Instead, Lexis faces substantial costs making sure the ACA is accurate, keeping it updated, and creating the annotations, all while keeping the print set affordable.<sup>110</sup> The Commission negotiates the selling price for the code,<sup>111</sup> and Lexis recoups the costs through an exclusive license to sell the ACA online and in print.<sup>112</sup> Lexis supplies fifty free copies of the print volume to the state,<sup>113</sup> and the unannotated version online free for

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106. See *Law is the operating system of our society*, PUBLIC.RESOURCE.ORG, [https://perma.cc/QX9X-Y85Q] (last visited June 23, 2021) (directing users to states' codes, including Arkansas's at [https://perma.cc/LL8F-AUXQ]). It is only current to May 2020, however, in thirty-two rich text format files which are compatible with most word processors. The collection also includes Arkansas Attorney General Opinions. The page has been visited one hundred and fifty-four times as of June 23, 2021.

107. *Arkansas Code of 1987 Annotated*, LEXISNEXIS, [https://perma.cc/KY7B-W4HC].

108. *Code of Arkansas Public Access*, *supra* note 96.

109. See Request for Proposal, *supra* note 92, at 5.

110. Brief for Matthew Bender & Co., Inc. as Amicus Curiae Supporting Petitioners at 1, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150); Report of the Committee, *supra* note 92, at 1; see generally Request for Proposal, *supra* note 92 (demonstrating the many tasks performed).

111. Request for Proposal, *supra* note 92, at 13.

112. *Id.* at 12.

113. The contract allows the fifty sets to be any combination of print or electronic access. *Id.* at 13.

all.<sup>114</sup> The contract runs from January 1, 2019, to December 31, 2025, and either side may terminate the contract at any time, for any reason.<sup>115</sup>

Lexis and Arkansas's Code Revision Commission met to discuss the possible effects of *PRO* at the Commission's December 1, 2020 meeting.<sup>116</sup> A representative of Lexis was virtually present at the meeting and summarized the decision.<sup>117</sup> Lexis's position is that the ruling in *PRO* is not broadly applicable and is fact-specific to Georgia due to the annual merging of the code with the annotations.<sup>118</sup> Georgia's legislature did this; Arkansas and many other states with official annotated codes do not.<sup>119</sup> After further discussion, Lexis said it will continue as it has been and submit new volumes of the ACA to the Copyright Office for registration, then wait to see whether the Copyright Office approves the application.<sup>120</sup> Lexis's representative stated that if the Copyright Office finds the ACA is not subject to copyright, then at some point, Lexis may look at other options.<sup>121</sup> Lexis has no plans to make any changes to the process of creating the ACA until it knows more, probably later in 2021.<sup>122</sup>

One alternative briefly mentioned in the meeting was to somehow separate the annotations from the code.<sup>123</sup> In December this sounded speculative, but in the spring of 2021, Georgia passed an amendment to its statute which attempts to do just that.<sup>124</sup>

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114. *Id.* at 11-12.

115. Report of the Committee, *supra* note 92, at 1.

116. Recorded Meeting of the Arkansas Code Revision Commission, ARK. STATE LEGISLATURE, at 2:36 PM (Dec. 1, 2020), Item F. Video available at <https://www.arkleg.state.ar.us/Committees/MeetingsPast?code=630&ddBienniumSession=2021%2F2021R> [<https://perma.cc/2QWU-A989>] [hereinafter Recorded Meeting].

117. *Id.* at 2:37 P.M.

118. *Id.* at 2:38 PM.

119. *Id.* at 2:39 PM.

120. *Id.* at 2:45 PM.

121. Recorded Meeting, *supra* note 116, at 2:45 PM.

122. Recorded Meeting, *supra* note 116, at 2:46 PM. A search of copyright registrations does not show any registrations granted for the ACA newer than April 2020. *Public Catalog*, U.S. COPYRIGHT OFF., <https://cocatalog.loc.gov> [<https://perma.cc/RX3B-54BN>] (last visited Oct. 15, 2021) (search "Arkansas Code of 1987 Annotated"; then choose "Date (descending)" from dropdown).

123. Recorded Meeting, *supra* note 116, at 2:44 PM.

124. 2021 Ga. Laws 216-17, § 1-1-1. The act amends other sections as well, reiterating that only the statutory language should be considered law, as well as removing oversight of the annotations from the Code Revision Commission.

Presumably in response to *PRO*, Georgia added a list to § 1-1-1 of the OCGA detailing which parts of the OCGA are law and which parts are not:

(c) The following matter contained in the Official Code of Georgia Annotated, including all supplements and revised volumes thereof, shall not be considered enacted by the General Assembly, shall bear no additional weight or effect, and shall not be construed to have the imprimatur of the General Assembly by virtue of such inclusion in the Official Code of Georgia Annotated:

- (1) Case annotations;
- (2) Research references, including, but not limited to:
  - (A) Law reviews . . .<sup>125</sup>

The amendment goes on to list more than twenty other categories of material which it says should not be considered as enacted by the legislature and should carry no weight.<sup>126</sup>

Perhaps most importantly, the amendment also states that the commission shall have no oversight of Lexis's annotations.<sup>127</sup> This could arguably make the situation more closely aligned with the facts in *Callaghan v. Meyers*,<sup>128</sup> where a private publisher's annotations were able to be copyrighted, by virtue of not being written by the lawmaker.

The change to § 1-1-1 went into effect July 1, 2021.<sup>129</sup> Neither Lexis nor the Code Revision Commission appear to have complaints in federal or state court against *PRO* yet.<sup>130</sup> Additionally, the Copyright Office's guidance document, the *Compendium*, has been updated for 2021 to reflect *PRO*.<sup>131</sup>

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125. 2021 Ga. Laws 217, § 1.

126. 2021 Ga. Laws 217-28, § 1-1-1(c)(1) to (21).

127. 2021 Ga. Laws 919-20, § 28-9-3(12) (stating that "the commission shall have no oversight of the work of the publisher in preparing, supplementing, indexing, or revising supplementary content included by the publisher in accordance with the contract between the publisher and the commission . . .").

128. See *supra* text accompanying notes 50-52.

129. 2021-306 Ga. Code Ann. Adv. Legis. Serv. (LexisNexis).

130. *Dockets Search*, BLOOMBERG L., [<https://perma.cc/RQ24-R2SY>] (last visited Oct. 15, 2021).

131. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.6(C) (3d ed. 2014, rev. Jan. 28, 2021), [<https://perma.cc/BX28-RUM9>].



## VII. Looking Forward

What will happen going forward? We should see in the next few months whether the Copyright Office grants Arkansas's copyright of the ACA. If the Copyright Office decides to grant the copyright application, then things could presumably go on as before with Lexis publishing the code the same way it has for decades. Considering the Supreme Court's holding in *PRO* and the Copyright Office's adoption of the language, this seems unlikely.<sup>132</sup>

If the Copyright Office decides that *PRO* does apply to Arkansas, then Lexis and the Arkansas Code Revision Commission will be looking to Georgia and its recent amendment to see what happens next. Whether amendments like Georgia's *can* successfully separate the letter of the law from the annotations for purposes of the government edicts doctrine is beyond the scope of this article. However, if a court holds that Georgia's amendment separates the statutes and annotations, it is likely that an Arkansas legislator would introduce a similar change to Arkansas's statutes.

Ultimately, if official annotations continue to be deemed edicts of government, Lexis will have to decide whether to continue publishing the ACA without the benefit of copyright protection. This will depend largely on whether it continues to recoup its costs selling the ACA; it may decide it has to raise prices to offset losses due to the annotations being free online. So far though, Lexis still creates the Georgia code with annotations a year later, despite the ruling in *PRO*, at a price comparable to the ACA.<sup>133</sup> If there is still a profitable market for the Georgia code and its annotations, it would follow that could also be true for the ACA.

If, for whatever reason, Lexis was to cease publishing the annotations, it would be a major disruption to how the public, attorneys, state courts, and agencies access the law in Arkansas. The State would have to decide how to manage making the

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132. *See id.* at § 313.6(C)(2) (directly quoting *PRO*'s holding). *But see id.* at ¶ 7 (admitting the possibility of a *Callaghan*-like separation).

133. *Official Code of Georgia Annotated*, LEXISNEXIS, [<https://perma.cc/5GDA-KJ4G>] (last visited Oct. 15, 2021).

official Arkansas Code available, annotated or not. There is no replacement for the ACA in the same price range. Lexis charges \$650 for the complete print set, with a variable per-year maintenance cost,<sup>134</sup> while the competing title, *West's Arkansas Code Annotated*, costs \$4,984 to purchase the print set and \$490 per month for maintenance.<sup>135</sup> Westlaw's narrowest online basic plan for one attorney is \$89.70 per month, which would include its unofficial but annotated version of the ACA,<sup>136</sup> while the closest equivalent plan from Lexis is \$85 per month for one attorney.<sup>137</sup> Neither, however, are official versions of the code.

The alternative to keeping the annotations would be publishing an unannotated code either with Lexis or another publisher. Many states already do this, including neighboring states Missouri<sup>138</sup> and Oklahoma.<sup>139</sup> While this could be done, the changeover would create a sudden new burden on state agencies, practitioners, and the public, and would remove most casual users' access to needed annotations.

## VIII. Conclusion

The Supreme Court's holding in *PRO* is relatively straightforward, and likely means that the ACA is not subject to copyright. Removing copyright protection potentially reduces the market for the ACA and increases the chances that Lexis will be forced to raise the price for the ACA, separate the annotations in some way from the official code, or discontinue them

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134. *Arkansas Code of 1987 Annotated*, *supra* note 107.

135. *West's Arkansas Code Annotated (Annotated Statute & Code Series)*, THOMSON REUTERS, [https://perma.cc/N8BY-JNZK] (last visited Oct. 15, 2021).

136. *Westlaw Plans and Pricing*, THOMAS REUTERS, [https://perma.cc/334D-PAL9] (last visited Oct. 15, 2021).

137. *Lexis Packages for Online Legal Research*, LEXISNEXIS, [https://perma.cc/UVP7-PG8E] (last visited Oct. 15, 2021).

138. BLUEBOOK, *supra* note 17, at 266. Missouri publishes an official, unannotated code through West, and West also publishes a more expensive annotated version. The state self-publishes an unofficial version of their code free for the public. MISSOURI REVISOR OF STATUTES, [https://perma.cc/6MSQ-8VB5] (last visited Oct. 10, 2021).

139. BLUEBOOK, *supra* note 17, at 280. Oklahoma publishes an official, unannotated code through West. West also publishes a more expensive unofficial, annotated version. Oklahoma self-publishes the code free for the public with a citator and links to cases. *Oklahoma Statutes Citationized*, OKLA. STATE CTS. NETWORK, [https://perma.cc/UCZ9-PA8U] (last visited Oct. 10, 2021).

altogether. Any of these three choices will affect Arkansas practitioners. However, if Georgia's recent efforts to separate the annotations from the statutes succeed, we can expect a similar law to be proposed in Arkansas, aiming for the status quo to continue.

It is uncertain, at least for the next few months (or years, if a new battle begins over the Georgia-style amendments), what the effects will be, or which road Arkansas and Lexis will take.

## IX. Update Following September 29, 2021 Meeting

After this article was finalized for publication, the Arkansas Code Revision Commission met on September 29, 2021, and approved changes to their existing contract with Lexis.<sup>140</sup> The changes are an amendment to the January 1, 2019, contract and original Request for Purchase.<sup>141</sup> The new amendment is the predicted attempt to separate annotations from the black letter law. The amendment does this by:

1. Changing paragraph 1.32 of the original RFP<sup>142</sup>, Ownership of Materials and Copyright, to exclude case annotations from state ownership;
2. Saying that Lexis has sole editorial control over case annotations;
3. Asserting that case annotations have no legal effect;
4. Including a clause that says the Code Revision Commission and Bureau of Legislative Research will have no responsibility for previewing case annotations;
5. And establishing that Lexis will have sole rights to copyright the case annotations and is solely responsible for initiating copyright actions regarding case annotations.<sup>143</sup>

These changes to side-step *PRO* parallel the changes made earlier this year by the State of Georgia, albeit by a different

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140. Meeting of the Arkansas Code Revision Commission, Sept. 29, 2021. Agenda item C. [<https://perma.cc/PB3J-PLMG>]. Video available at <http://sg001-harmony.sliq.net/00284/Harmony/en/PowerBrowser/PowerBrowserV2/20210929/-1/21851?viewMode=1> [<https://perma.cc/3UP3-XBUE>]. Discussion of item C begins at 1:34:34 P.M.

141. See Report of the Committee and Request for Proposal, *supra* note 92.

142. Report of the Committee and Request for Proposal, *supra* note 92.

143. Exhibit C1, Amendment, available at [<https://perma.cc/M4G3-WPSW>].

method than statute. It will remain to be seen whether this will be challenged by PRO. The fact remains, however, that the only set of Arkansas statutes deemed to be official and a reliable statement of the law is the print *Arkansas Code Annotated of 1987*, which inextricably contains the case annotations.