

Code Commission et. al. v. Public.Resource.Org, Inc.

Oral Argument Before the U.S. Court of Appeals for the Eleventh Circuit
November 16, 2017, Edward B. Tuttle Federal Courthouse, Atlanta, Georgia

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[recording begins]

Judge Marcus: Answer to our question, let me just turn to each of the parties first for the appellate. Please.

Elizabeth Rader: We have no issue, your honor.

Judge Marcus: And if you could just state your name for the record, please, as you probably know, we have an electronic recording system where we record all of the arguments. You'll have to come up to the podium, it's sort of triggered from the microphone, and if you'd just state your name and appearance [00:00:30] on the record please.

Elizabeth Rader: Elizabeth Rader from Austin & Bird on behalf of the appellate, Public.Resource.Org, inc.

Judge Marcus: And how would you like to answer that question, can we answer that question of whether they're an interested party?

Elizabeth Rader: We don't think they're an interested party, certainly not from our point of view.

Judge Marcus: And you wish for us to proceed now?

Elizabeth Rader: Yes, we wish to proceed.

Judge Marcus: Okay. Let me turn to the state of Georgia, the code revision commission.

Lisa Pavento: Yes your honor, Lisa Pavento [00:01:00] for the Code Revision Commission and the State of Georgia. It is our position that the board of regents is not an interested party in this matter.

Judge Marcus: Alright, then you would have us proceed as well with the panel as it has been constituted?

Lisa Pavento: Yes, your honor.

Judge Marcus: Again, just so I'm clear, Ms. Rader you would have us proceed as well with the panel as it has been constituted?

Elizabeth Rader: That's correct, your honor.

Judge Marcus: Alright, then we will proceed. Valerie, would you ask Judge Hull if she could join us?

[00:02:00] Please be seated again and make yourselves comfortable. We will proceed. Before we do, I just wanted to be clear for appellate, Ms Rader you had broken up your argument, and you're going to do five minutes initially, and Ms Eidelman will be representing and speaking for the ACLU for five minutes, and then you've reserved five [00:02:30] for rebuttal.

Elizabeth Rader: That's correct, your honor.

Judge Marcus: Okay, thank you, and with that you may proceed.

Elizabeth Rader: Good morning, Elizabeth Rader on behalf of Public.Resource.org Inc, with me, at council table is my colleague, Sara LaFantono and also Ms Eidelman of the American Civil Liberties Union. I am going to focus my argument on the copyright law issues, and Ms Eidelman will address the first amendment and due process issues. I'd like to thank the [00:03:00] court for hearing oral argument in this case.

Every act of the Georgia legislature begins with these words: "An act to amend the official code of Georgia, annotated." The official code of Georgia, annotated, is an edict of government. It is the law. Public Resource, in an effort to better inform its fellow citizens of the law posted a more useful version of the official code. Public [00:03:30] Resource did so without permission from the state, and it was enjoined by the district court for speaking the law without a license.

This case is about the right to speak and distribute edicts of government, and about whether a court can enforce copyright to enjoin a citizen from speaking and distributing the law. Edicts

of government are not subject to copyright under federal common law, and that's been the law for over 100 years. It's part of the role [00:04:00] of the judiciary to enforce the edicts of government exception to copyright.

Georgia's general assembly enacts the statutes in the OCGA, but it does so acting for the people of Georgia, who are themselves the author of the statutes. In 1976, the general assembly created a code revision study committee to conduct a study of the subject of code revision, and that committee recommended to the assembly that they create a code revision commission, [00:04:30] which it did. That's one of the plaintiffs in this action.

In that way, the general assembly decided that the only official code of Georgia should be annotated. The statutory materials and numbers, without the ...

Judge Marcus: Ms Rader, let me ask you a question this way. When I looked at the code itself ...

Elizabeth Rader: Mm-hmm (affirmative)

Judge Marcus: 1-1-1, right through the balance of it, in 1-1-7, one provision of the code says the following. [00:05:00] It says, "Unless otherwise provided in the code, the descriptive, headings, catch lines immediately preceding, etc, do not constitute part of the law and shall in no manner limit or expand the construction of any code section. All historical citations, title chapter analysis, and notes set out in this code are given for the purpose [00:05:30] of convenient reference and do not constitute part of the law." What are we supposed to take from this disclaimer by the legislative body, that the annotations are not part of the law and do not bind anyone as law?

Elizabeth Rader: It's a correct statement that the annotations are not themselves laws, and that they are not enacted [00:06:00] by the legislature, but the issue here is not just whether it's law. It's whether it's an edict of the government and therefore since the government decided there should be annotations to the code, and because the government and through the code commission, supervises the appropriation of the annotations very closely and very

carefully has complete authority over them and has the authority to reject them if it doesn't like them. It makes the whole work an edit of government.

Judge Marcus: Notwithstanding [00:06:30] that it's simply an annotation, a collection of head notes, cases, citations to statutes, cross reference to statutes, cross references that have no binding effect. Does it cast any legal shadow where the state of Georgia, through its legislative body says, it isn't the law, and has no binding effect?

Elizabeth Rader: The statutes have a binding effect and you need the annotations to actually use the [00:07:00] code effectively. Without the indexes, you might not be able to find the relevant law. Additionally, not all the laws are organized so that all of the subject matter is under the same heading or even in the same title. The cross references are absolutely necessary to find all the relevant parts of law.

Judge Marcus: Let me ask a slightly different question. What should we make of the fact that the copyright act itself expressly carves out publications [00:07:30] of the federal government in section 105, but says nothing about state governments? Is there any inference we ought to draw from that?

Elizabeth Rader: I think the inference, and I believe is the fact, is that the legislature thought that went without saying because of the hundred or more years of common law.

Judge Marcus: What would you say to the fact that the copyright office's compendium seems to support the state's view?

Elizabeth Rader: The copyright [00:08:00] office ...

Judge Marcus: Not binding, there's no question it doesn't bind this court. I'm simply asking whether it is illuminative or whether it's persuasive in any way?

Elizabeth Rader: We don't find it persuasive in any way. I think it simply reflects the general rule that annotations by a private publisher are protectable, it's just wrong to the extent that it implies a state sponsored, state supervised, state mandated [00:08:30]

collection of annotations, is copyrightable by that state and enforceable by that state against a citizen speaking.

Judge Marcus: Would there be some government authorized documents that would be copyrightable, in your view? If this isn't, tell me what the difference might otherwise be.

Elizabeth Rader: There have been examples, I think, in the state's brief of official government issued documents, a tourist map, maybe the design on a license plate, that don't have to do with the law.

Judge Marcus: [00:09:00] That would be copyrightable? Even though it's put out by the state?

Elizabeth Rader: Yeah. It's put out by the state ...

Judge Marcus: It's an edict, if you will, in some form, or a decree in some manner of the state. That would be copyrightable by your lights, would it not?

Elizabeth Rader: We haven't considered them edicts, but if the court decides they're edicts, then they would not be copyrightable by the state.

Judge Marcus: Let me give you a different example.

Elizabeth Rader: Okay.

Judge Marcus: Suppose the state of Georgia were to create a public [00:09:30] broadcasting system and were to produce some shows for children, like Sesame Street or whatever. Is there any doubt in your mind that the state could copyright those shows? If the answer is, yeah they could do that, just tell me what the essential difference is between what I'm asking about, and what you have here.

Elizabeth Rader: The state can copyright that because it's not an edict, [00:10:00] it's just a provision of an extra service for the citizens. Now, if it were a show about civics, that was meant to instruct children on the official law of Georgia, that might be another matter, but I don't think that's the hypothetical.

Judge Marcus: I've got it, thank you, and you've reserved your full period of time for rebuttal.

Elizabeth Rader: Thank you, your honor.

Vera Eidelman: May it please ...

Judge Marcus: [00:10:30] Good morning.

Vera Eidelman: Good morning, may it please the court.

Judge Marcus: I guess I should say Good afternoon, perhaps.

Vera Eidelman: It's still morning. It counts. May it please the court, I am Vera Eidelman, appearing on behalf of Amici, American Civil Liberties Union and a group of nonprofit organizations that want to make sure that this court considers the rights [00:11:00] of the public in this case. The public, which is left only with the unannotated, unofficial version of the code, unless they pay more than \$400 to access the code that the OCGA itself says they must use, or else appear and live in life at their own peril, without knowing the true law. The public, who would be led to believe ...

Judge Marcus: That language is taken from a district court opinion.

Vera Eidelman: That's right, and that decision was ...

Judge Marcus: How would that have any effect at all, [00:11:30] on any subsequent party in any subsequent case, citing to the code? It might be binding in that judge's courtroom, in that particular case, but it certainly doesn't have any transcending force of law, does it?

Vera Eidelman: This goes to your honor's previous questions about whether the annotations are themselves the law, and our position is that they are, and here are the two factors that matter, are both the state authorship approval, editorial capacity and publication of the contents, and also the contents [00:12:00] themselves because courts rely on the annotations, the comments, the editorial notes as binding authoritative law.

They look to those annotations to understand what the law means and what it reaches. For example, on page nine of our brief, we offer a string site of supreme court of Georgia cases that rely specifically on the annotations and not simply the statutory text ...

Judge Marcus: This opinion from this district court is annotate in the official code is the point?

Vera Eidelman: Yes, it is. Yes. [00:12:30] I should have made that clear. The public has a real interest in accessing the law here, because the only freely available version misleads them. It misrepresents what the true law is. An individual reading that version would be led to believe that there are such offenses as sodomy and private possession of pornography, when, if they then spent more than \$400 to read the annotated version, they would learn that courts have protected those rights and held those Georgia statutes [00:13:00] to be unconstitutional.

We are here to make sure that the court considers the public's due process and first amendment rights to access the law.

Judge Marcus: Let's start with first amendment. Spin out the first amendment argument for me. Suppose this court were to hold that the state of Georgia can copyright this annotation as we construe the meaning of the statute at issue. What then is the first amendment implication of that?

Vera Eidelman: The [00:13:30] first amendment implication is first that people cannot access the law that governs them, and second, that they can't discuss it. They can't ...

Judge Marcus: Why can't they access the law? Hasn't the state of Georgia made pretty substantial efforts to disgorge this law widely, both in print and online? Haven't they made a real effort here? It's not as if they buried this in the night to make it hard for the citizens to know what the law is, to the extent somebody [00:14:00] wanted to know what all 186 volumes contained.

Vera Eidelman: No, but they've put it behind a pay wall, a copyrighted payroll of more than \$400, and the first amendment cannot allow that. An individual cannot be forced to pay for the law that governs

them, both to know what it is and then to be able to discuss it and to try to change it.

Judge Marcus: If they had a compelling interest, could they do it? If they had narrowly tailored it?

Vera Eidelman: Within the first amendment lens, yes, but ...

Judge Marcus: Right, to the extent we're looking at first amendment law. Starting with [00:14:30] the assumption and the question that it passes the statutory test. You say it runs afoul of the first amendment, and I'm just trying to get you to spell out specifically, presumably, you'd say we use strict scrutiny, and there'd have to be a compelling reason, and it would have to be narrowly tailored, although I don't find any of that in the brief, which is why I'm asking the question.

Vera Eidelman: That's correct, and here, far from a compelling state interest, we believe there's no valid interest [00:15:00] at all, because what the court, what the state is doing is profiting from the law. It claims that it's created this compendium for the benefit of the public, but then it places ...

Judge Marcus: But doesn't it? Doesn't it benefit the people to have the state put out an annotated version, so it says that anybody who wants to look at it, here's the statute, and here are relevant annotated things you must look at, or ought to look at [00:15:30] in understanding the meaning of the statute, including cases, history, and so on. Doesn't that enlighten and increase the understanding of anyone in the public who wants to understand the law of Georgia?

Vera Eidelman: I see that my time is up, your honor, may I take ...

Judge Marcus: Take your time.

Vera Eidelman: That, it is ... I'm not contending that this isn't a beneficial compendium, but it doesn't benefit the public if it's not truly available to the public without paying more than \$400, [00:16:00] and it in fact hurts the public if the only freely available version differs materially, from the OCGA and misleads the public. It's effectively like false advertising. They

say, "We have this wonderful product available for you, but you have to pay more than \$400 and in fact, the only way to know the law, is to access that version, but if you can't pay, here are these misrepresented versions of what the law is as it applies to you."

Judge Marcus: Does it matter what falls into the annotations? Whether [00:16:30] it's an annotation to a case, or whether it's simply a statement of the historical movement of the statute in 1970, they passed a statute that says, "Thou shalt not do A," and in 1975 they said, "Thou shalt not do A and B," and then in 1980 said, "Thou shalt not do A, B, and C." That just, reflect the history of the statute itself.

Vera Eidelman: [00:17:00] Here, because the state adopts the entire thing as the law, yes. The constants don't matter. The contents matter to the effect that they represent the law.

Judge Marcus: Your position has to be that you can't tease out the annotated part from the rest?

Vera Eidelman: That's correct.

Judge Marcus: And my question to you is, why not?

Vera Eidelman: Because the state doesn't ...

Judge Marcus: [inaudible 00:17:19] the reason I say that is, courts and copyright do it all the time. Regularly holding a side where it's the state involved, private company A [00:17:30] sues to enjoin the publication by another publishing house of B, on the grounds that he ripped off our stuff, putting it in the vernacular.

The court comes back and says, Aye, that's true about these items, it's not true about those items. This is something that courts regularly do sitting in copyright, and sitting in equity and copyright, fashioning an equitable decree. Why couldn't the court do just that [00:18:00] here, which is of course what the district court did?

Vera Eidelman: Because here, the state is the author and the publisher of the law, not a private party, and the state has adopted the entire

thing as the law. The state has not chosen to go through that parsing, and in fact, in the contract ...

Judge Marcus: But you concede, your colleague conceded a moment ago when I asked the question that the totality of the question doesn't simply turn on who the author is, because she had to concede and it's obviously right that there are things the state can put out [00:18:30] as the author, and yet can copyright it, whether it's a map or they put on a production of Sesame Street on a public broadcasting. They can do that and they could copyright that. You don't dispute that.

Vera Eidelman: I don't dispute that, I believe there are two things.

Judge Marcus: The mere fact that they are the authors standing alone cannot be reason sufficient.

Vera Eidelman: That's correct.

Judge Marcus: Okay, what else is there, if anything, that takes you over the line here?

Vera Eidelman: It is the content of the [00:19:00] thing that is being claimed to have copyright?

Judge Marcus: Okay, tell me about that.

Vera Eidelman: Here, it is the official state of the law, and that includes, under the contract of LexisNexis, the state has authority over everything from the level of factual detail in the annotations to the type of paper that Lexis is using. The state control here is astounding. The state holds the pen, it is the state's code, and it is therefore the official law of the state. It is both ...

Judge Marcus: And what do you [00:19:30] say about the fact that the state chose to tell everybody that it is not the law and doesn't bind anybody? It has no binding effect.

Vera Eidelman: That one law cannot change the factual reality, and it is in fact this court's job and ability to decide what the law is. The fact that the state writes something that then enables it to profit from the law doesn't change the reality that the law [00:20:00] is the official state of Georgia.

Judge Marcus: Do you suppose the state of Georgia did this because they were seeking to profit financially? I rather suspect their profit was pretty modest in this case. I saw somewhere, in someone's pleading, and you can help me with it, I don't remember where, that the totality of the sum was 85 grand or something like that, in a year. Did I have that right?

Vera Eidelman: I am not sure, your honor, but I regard ...

Judge Marcus: If that were correct, whatever else one could say about the state of Georgia, with a multi [00:20:30] billion dollar budget, that this is such a modest sum, that you could hardly look to it to say their motive was profit.

Vera Eidelman: That is true, and I did not mean to impugn the motives of ...

Judge Marcus: Whatever their motive was, it sure wasn't to make money. If they wanted to make money, they could have done it a whole lot more effectively than they did here.

Vera Eidelman: That is fair, and I did not mean to impugn the motives of the state.

Judge Marcus: Okay, you accept A, that the mere fact that they're the author isn't enough [00:21:00] to allow you to prevail on your claim. You have to look at what it is that they're actually explicating, and it's the law, you said, and that's different. Tell me why.

Vera Eidelman: Because courts rely on the annotations as the binding, official authority on what the law means. For example, in *Shorter college versus Baptist Convention of Georgia*, the supreme court of Georgia relied [00:21:30] on an OCGA comment to determine the meaning of the statute, which in fact, was "the issue that the case depended upon." It relied on the OCGA, which is not freely available to the public, to make a decision about what the law means. The state itself edits and fully approves the entirety of the OCGA.

Every year, it enacts the OCGA into law. As council [00:22:00] mentioned, every law that is new in Georgia amends the OCGA. There is no unofficial, unannotated version of the code

that functions as law. There is only the version that is published for citizens to be misled by, for free, online.

Judge Marcus: Let me ask you a final question. You've gone way over, but you've been answering my questions, so you'll have your rebuttal time. I just want to know, how you make a due process argument [00:22:30] here. That seems to me, just speaking for myself, to be the weakest of the claims, and the reason it seems to me to be weak, and you can comment about it and tell me what I'm misapprehending here, is whatever else happened here, this stuff was pretty well published by Georgia. I don't think folks are walking around in the dark here about what the law is. This is not a case where Georgia looks like it's buried anything in the night. Where's the due process claim?

Vera Eidelman: It perhaps hasn't buried it in the [00:23:00] night, but it has hidden it behind a pay wall. Individuals have to pay more than \$400 to access it, and in building officials for circuit case, the court specifically held on due process grounds, that the reason that maintaining copyright in official law is it offends the concept of due process because where content has the effect of law and carries sanctions, the public has a right to freely [00:23:30] access that content.

Similarly in Veeck the fifth circuit sitting en banc, was motivated by due process concerns relying on ...

Judge Marcus: Right, but the difference in Vic was you're talking about a building code, which obviously has the force of law, and here you have something that is maybe somewhere in between. It's not a statute, it's not an opinion, it's an annotation. Which, admittedly, they've adopted.

Vera Eidelman: That they've adopted and the courts have applied and relied upon.

Judge Marcus: [00:24:00] Okay. I've got it, thank you very much.

Vera Eidelman: Thank you.

Judge Marcus: Good morning Ms Pavento.

Lisa Pavento: Good morning. Lisa Pavento for the code revision commission and the state of Georgia, your honor. I also have Mr. Tony Askew with me. May it please the court, there are two main issues on appeal here. The copyrightability of the annotations and fair use. I hope to make three points [00:24:30] with respect to those two issues. Two points with respect to copyrightability, and one point with respect to fair use.

The first point I'd like to make is that there is no edict of government doctrine that is well established. The well established doctrine at issue here is that the laws are not copyrightable. Since the district court directly found that the annotations are not the law, that doctrine is at ...

Judge Marcus: What are they [00:25:00] then, when they become the official part of what the state of Georgia, through its legislative body, puts out?

Lisa Pavento: Yes, your honor.

Judge Marcus: It's not the law, and it's not part of the law. What are they doing here?

Lisa Pavento: We assert that those annotations are merely helpful directionals. That they direct the person purchasing or reading the OCGA to official interpretations of the law, such as case law decisions or even [00:25:30] informal interpretations of the law such as law reviews. Those annotations are merely helpful pointers to the people reading the OCGA. They are not required to understand the law, those judicial decisions themselves are freely available for any person to read.

Judge Marcus: What are we to make of the fact that the legislative body itself, at the very beginning, in 1-1-1 [00:26:00] says the following: "The statutory portion of the codification of Georgia laws prepared by the code revision commission and the MICI company pursuant to a contract entered into, blah, blah, blah, is enacted and shall have the effect of statutes enacted by the general assembly of Georgia."

They don't just say, hey, by the way folks, there's an annotation here that we attach for your [00:26:30] help. They say, it's

enacted and shall have the effect of statutes enacted by the general assembly, and then it goes on to say the statutory portion of such codification shall be merged. The verb is merged, with annotations, captions, history lines, editorial notes, blah, blah, blah, and shall be known and may be cited as the official code of Georgia, annotated. [00:27:00] How are we to read what the Georgia had in mind when they tell us right at the beginning of the statute that the statute and the annotations shall be merged?

Lisa Pavento: Yes, your honor.

Judge Marcus: What does merged mean to you?

Lisa Pavento: Merged means to be combined in the same document or work. It does not [00:27:30] mean that they are merged into one uncopyrightable unit. Looking at 1-1-7 ...

Judge Marcus: Why not? You assert that as if it was as clear as the night and the day, and I'm not sure it's quite that clear. You accept that the term merge means to combine, to bring together, to create a single unit of some kind. Marry together, those would be fair definitions, right?

Lisa Pavento: Yes, your honor.

Judge Marcus: State legislature tells us [00:28:00] they have married together, they have combined to create a single unitary object, the code, and this other stuff. The other stuff being the annotations, and they not only tell us that, it says it shall have the effect of statutes enacted by the general assembly of Georgia. How am I to read that together?

Lisa Pavento: Yes, your honor.

Judge Marcus: They didn't mean what they said, or they took it back when they later said, in a different portion [00:28:30] of the code, but by the way, this other stuff doesn't have the effect of law? I'm trying to read the whole thing as a whole, and I see this first paragraph telling me maybe one thing, and some other portions arguably saying something different, and I'm asking you to tell me, how do I read them in pari materia?

Lisa Pavento: Yes, your honor. We read the first sentence of 1-1-1 to say [00:29:00] that the statutory portion, which is the statutes, are that which has the effect of statutes and is enacted. That that's the totality of the meaning of that first sentence. The second sentence, as you mentioned, states that that statutory portion that's enacted, is merged with the annotation pursuant to the contract with an entity such as Lexis. We believe that that language [00:29:30] pursuant to the contract is important in that the contract dictates that the copyright in the annotations remains with the state and then is transferred via license, to that entity.

We believe that informs the definition of merge, that it doesn't mean that it's merged into one uncopyrightable unit, and then we would also look to 1-1- ...

Judge Marcus: Even though they unambiguously tell me in 1-1- [00:30:00] 1 it is merged?

Lisa Pavento: Yes, your honor. Merged for, but not for the purposes of copyright protection.

Judge Marcus: It doesn't say that. As I read it, it does not say, unless otherwise provided in the code, the descriptive headings, catch lines, etc, that it shall be merged except for the purposes of annotation. They would have known how to say that if they wanted to. You would have me read that in?

Lisa Pavento: I would, [00:30:30] your honor, based on the fact that when the state decided that it would add the annotations, the state only made that decision that the annotations would be added as being created by a nongovernmental entity and subject to copyright that could be licensed to that entity so that we could get the benefits of the no cost to tax payers, and have those costs borne by the publisher.

When the state legislature decided [00:31:00] to add the annotations, it was with that entire strategy or scheme in mind. When they're discussing the merger of the annotations and the statutory portion, they mentioned that that is to be done pursuant to the contract and the legislative history here

indicated that that contract would require that those annotations be subject to the copyrights ...

Judge Marcus: I take it the commission, though, has the final word on what goes in? They [00:31:30] have the whip hand on the front end and the whip hand on the back end of this process?

Lisa Pavento: Yes, your honor.

Judge Marcus: They've hired Lexis to help them out, like a law clerk might help me out, but Lexis doesn't control what this commission does or does not put in there any more than a law clerk would control what a judge says?

Lisa Pavento: Yes, your honor. The state is the author of these annotations, certainly.

Judge Marcus: Let me ask the question in a slightly [00:32:00] different way. Although it all basically revolves around the same issue, it seems to me, just speaking for myself. If the state of Georgia has chosen to merge the annotations with the statutes, and then characterize the totality of that union as being the annotated laws of the state of Georgia, [00:32:30] why should we say, they didn't mean what they did, and we're going to tease the pieces apart and say, yeah, this is copyrightable, but no, that's not? Why should we do what the state of Georgia quite intentionally chose not to do?

Lisa Pavento: Your honor, we believe that the state of Georgia did intend to create a single work with both the official code and the annotations in it, but [00:33:00] that they also intended for those annotations to be encompassed by copyright, the state felt that they could achieve both due process access, and in fact does achieve due process access to the official code that is in the OCGA, by providing the entire OCGA for free viewing at over 60 public institutions.

They can accomplish due process access to the official code, while at the same time [00:33:30] retaining copyright protections in the annotations themselves. That's because those interests are very different. The interest in having due process

access to the code and the interest that is protected or valued by copyright, is different.

Judge Marcus: If I want access to the code as John Q Citizen, I have to pay 400 bucks for it?

Lisa Pavento: No, your honor, you do not.

Judge Marcus: How do I get the annotated version without paying?

Lisa Pavento: The OCGA, the full, entire OCGA, including the annotations is freely [00:34:00] available at over 60 public institutions throughout the state.

Judge Marcus: I'd have to go to a library or something like that?

Lisa Pavento: Yes, your honor. You would need to go to the library. The state also published ...

Judge Marcus: How about if I went online, can I look up the unannotated portion, I thought I read somewhere that there was, at least at some point, a pop up where I'm informed that ... by the way, Marcus, if you're looking at this unannotated version, that ain't the law. You've got to look at the [00:34:30] annotated version, or something like that. Do I have that right?

Lisa Pavento: I believe you're referring to the pop up being that the link on the Georgia legislature's websites to the Georgia Code takes you through the LexisNexis website, and there is an opening page that states that LexisNexis claims copyright in some of the elements of the webpage itself, but it [00:35:00] explicitly excludes the code from any copyright assertions. There is that page, but it explicitly states that copyright is not being asserted in the code or in the numbering of the code.

Judge Marcus: As I looked the case law, to try to find some guidance here for this, the best I could do was looking back at some old supreme court cases that may still be good law, and there's [00:35:30] one in particular I want to ask you about and have you help me with. The case was Banks, it was decided in 1888 by the Supreme Court of the United States, and in that case, the issue was whether a reporter could, on behalf of the state of Ohio,

obtain a copyright on volumes of judicial decisions that were exclusively the work of the judges.

What he had in [00:36:00] it were the decisions, but notably as part of the decisions, which were created by the judges, you also had head notes, syllabi and things like that. Everybody recognized that the head notes, the syllabi, the summary, if you will, did not have the effect of law. The judicial imprimatur was the holding found in the decision of [00:36:30] the court.

Lisa Pavento: Mm-hmm (affirmative)

Judge Marcus: And the question was whether the reporter could copyright in a bound book the judge's decisions, and the Supreme Court said no, that the material was exclusively the work of the judges, comprising not only the opinion or decisions of the court, but also the statement of the case and the syllabus and the [00:37:00] headnote, and they went on to explain, and I want you to tell me, whether that case illuminates this one, or if it's different, why.

"In no proper sense," the supreme court tells us, albeit a long time ago, "can the judge in his judicial capacity preparing an opinion or a decision, the statement of the case, the syllabus, the head notes, be regarded as their author or their proprietor in the sense of the statute." They're talking about that version of the copyright law. "So as to [00:37:30] be able to confer any title by assignment on the state sufficient to authorize it to take a copyright for such matter. The question is one of public policy. There has always been a judicial consensus from the time of *Wheaton v. Peters*, no copyright could, under the statutes passed by congress be secure in the products done by judicial officers. The whole work done by the judges constitutes the authentic exposition and [00:38:00] interpretation of the law, which binding on every citizen, is free for publication to all."

Why is that case not on point with what we have here?

Lisa Pavento: Yes, your honor. We believe that that case is different than what we have here because this court is discussing judge made law,

that is law, I understand your point that it also covered parts of the case such as the head notes that are not the law ...

Judge Marcus: Right, it's not as if the supreme court was unaware that it had the actual [00:38:30] holding of the court and addition had this other stuff.

Lisa Pavento: Correct. Correct, your honor.

Judge Marcus: What would fall into annotations, a headnote, a syllabus, that kind of thing.

Lisa Pavento: Yes, your honor.

Judge Marcus: And said nevertheless, the totality of it because it was put out by a judge, in his official duties of interpreting and explicating the law was not copyrightable. It belonged, if you will, to the people.

Lisa Pavento: Yes, your honor.

Judge Marcus: Why is that not [00:39:00] pretty close to what we have here? The only difference being that it's the legislative body rather than the court, that pronounces the law, calls it A, B, and C, what's the difference between Banks and what I have here?

Lisa Pavento: We believe that the distinguishing factor here is that in this case, Banks v. Manchester, the court was considering [00:39:30] the fact that there is no need for copyright incentive there. The judges have to render these decisions. They have to formulate these opinions as a part of their official job. The supreme court, when looking at whether something is copyrightable that is not the law, that is not the part of a decision, in Calhan v. Meyer, did [00:40:00] decide that those elements could be copyrightable, could be copyrighted by an official state reporter.

The supreme court even then distinguished between elements created by a judge in his official capacity where he needs no copyright incentive, and another entity that is creating annotations to judge made law and found that those were uncopyrightable. I'd also like to point out that the annotations

are not created by the [00:40:30] legislature. They're created by the code revision commission, which is not a law making body. That commission has legislative council on it, it has private practice attorneys on it. That the code revision commission cannot interpret the law, cannot make the law, and thus the annotations are distinguishable from the judge made law.

Judge Marcus: Let me ask you a final question ...

Judge Hull: [inaudible 00:40:53]

Judge Marcus: Yeah. We didn't, really I didn't give you a chance to discuss [00:41:00] this fair use thing, why don't you say a couple words about that if you would, thanks.

Lisa Pavento: Yes, thank you very much, your honor. We just wanted to make the point that public resource at best, makes a more user friendly version of the OCGA and making something user friendly, this court has found in Peter letter S, that making something user friendly is not a transformation under the first factor, the first fair use factor. [00:41:30] Accordingly, public resource's use of the OCGA should not be considered transformative.

Judge Marcus: Let me ask you just one question. How we review the findings of the trial court judge? Do we review them for clear error?

Lisa Pavento: Portions ...

Judge Marcus: What he's doing, it's sort of a tricky question, because when you look at affirmative, this is an affirmative defense, they've got to prove it by preponderance, but you go to a whole bunch of things including the purpose and the nature. The [00:42:00] judge makes a finding on each of those subheadings, are they reviewed for clear error, as fact finding, or are they reviewed alternatively, de novo by this court?

Lisa Pavento: Yes, your honor. We believe that, as you've mentioned, the fair use analysis in particular, is a mixed question. In fact, in law there's certainly underlying facts that the parties have agreed on and stipulated to, and [00:42:30] that's why both parties filed

motion for summary judgment. The ultimate findings for each factor ...

Judge Marcus: Let me ask the question this way. To the extent the trial court says, the purpose was not nonprofit or educational. Am I to review that for clear error, giving deference cause it's plainly arguable, or do I look at that determination de novo as you read the controlling law?

Lisa Pavento: [00:43:00] You're honor, we believe that the subheading decisions, the decisions on factor one, factor two, that those are questions of law that should be reviewed de novo. That's where the party's disagree ...

Judge Marcus: But the determination of what the specific purpose was that is to say, whether or not it was for profit or for some other reason, we review that de novo, too, as you see it?

Lisa Pavento: We do your honor, in that those are [00:43:30] our legal determinations, the parties agree on those facts, but they disagree on the definition of those terms in the legal fair use sense.

Judge Marcus: Let me ask you just my last question that's bothered me in reviewing this. To the extent there is fact finding involved in what the trial court did on fair use, and there are also legal conclusions, the fact finding I'd review for clear error, the legal conclusions, [00:44:00] I would review de novo. That's easy, but we're here on summary judgment.

Lisa Pavento: Yes, your honor.

Judge Marcus: If there's any principle that's clear in the law on summary judgment, it is, is there a material question of fact an issue? If the answer is yes, then the trial judge doesn't get to say, I accept her version of the facts and reject his, or vice versa. [00:44:30] Is that what the trial judge did here, and can he do it using summary judgment on the issue of fair use? You followed my question?

Lisa Pavento: I am following your question, your honor, and we believe that the district court on the issue of fair use in particular, that there

were no disagreements as to the underlying facts, and where the disagreements were between the parties were with decisions of law. If [00:45:00] the court did make any decisions that were finding of facts, for example on originality, that same analysis applies there. That the parties agreed on the underlying facts and that the district court did correctly ...

Judge Marcus: Got it, thank you.

Judge Hull: I want to go back to the copyright threshold issue.

Lisa Pavento: Yes, your honor.

Judge Hull: Because I dealt with the code of Georgia 1933, there was no [00:45:30] annotated, for many years, the code of Georgia, 1981 or whatever it was. It went on, and on, and on, and on, but we had the official code of Georgia annotated, and this is just a practical question, because to me, section 1-1-1, is pretty key to this case. Now, section 1-1-1 is not a code matter, that's a legislative act, is that correct?

Lisa Pavento: Yes, your honor.

Judge Hull: Okay, that was enacted by the legislator?

Lisa Pavento: Yes, your honor.

Judge Hull: 1- [00:46:00] 1-1, and I know that 1-1-7, that helps you, but 1-1-1 is a problem. Why couldn't the legislator very easily amend 1-1-1 and say, "The official code of Georgia is that version that Lexis is putting up there with no annotations, and everybody just cite to that?"

Okay, that's the official code of Georgia. [00:46:30] However, we have a contract with Lexis, you can still, everybody can still just keep the same products here, you just need an amendment to 1-1-1 that says, This is official code. It's already out there, online, and so forth, and then you take that black book with the appendices and all that, this really big ... I've got four rows of them in my office, [00:47:00] and it's got law review cites, research notes, opinions of the attorney general, all lawyers use it. They could even cite it to any court, and we used to do that,

it could be like citing federal practice and procedure west, you know, because you'd had annotated to the federal law or what have you.

Why can't, I'm not saying they have to, must, or should, but wouldn't that solve the problem? What [00:47:30] is the down side to that? You're making this the official code. Let me give you a statement in that brief, opening brief, page 20. "Public resource agrees that such annotations and unofficial codes are copyrightable by their private publishers." Okay, the problem here is the naming of it as the official code, as opposed to an unofficial code. [00:48:00] The case goes away, I would say. I'm trying to understand, what is the practical problem with doing that?

Lisa Pavento: One practical problem with saying that the, what is put out online is the official code ...

Judge Hull: You could put it in a book, you could put it in these libraries, 60 places like you've already done. It's no different, you're just calling one the official code. That's the law, that's the official law, cause you are saying [00:48:30] all these other things over here that you're now call official. YOU're saying they're official, but you're saying they have no binding effect of law, but yet you're saying they're official? Let's just focus on practicality. What is the problem with doing that?

Lisa Pavento: I would start by saying that the term official applies to the official code, that it's the official code of Georgia, annotated, and so calling the official code ... the [00:49:00] reason that the official, the code is termed official, is because the state has had issues in the past with people taking drafts of the code, what later became the code and printed that as the code when it later changed a thousand times before it was actually the official code.

Judge Hull: Yeah, but you can still, I assume, the online version that's without the annotations is accurate?

Lisa Pavento: It is accurate, your honor it's accurate ...

Judge Hull: And it pairs, I mean, Lexis could do the work to make the code right and just copy it over [00:49:30] to the official code, are you following what I'm saying?

Lisa Pavento: Yes I am, your honor.

Judge Hull: Because you say here, demonstrating the official status, an annotation within the code, well that's an annotation, I don't like focusing on what annotations say. I'm just focusing on what the legislator says, not the code commission, because I agree. The code commission is not a legislative body, it's not a law maker, but the problem is, is the law by the legislature which says, "this is it."

Lisa Pavento: [00:50:00] Yes, your honor. The state could certainly publish a book with only the official code in it.

Judge Hull: Right, and so that's the official code. I'm not sure anybody would buy it, everybody would probably still buy the official code annotated. Everybody would still buy the official code, the case goes away. It's not an issue anymore.

Lisa Pavento: It does, your honor, but our position is there is no issue with combining the official code with annotations.

Judge Hull: There's no issue with combining, it's an issue of calling [00:50:30] it the official law, you can't cite anything else but this. Georgia Supreme Court cites it all the time, you have OCGAA, it used to be we didn't have OCGAA. You did OCG. You actually said the code, I mean, you did it different ways. I'm just trying to understand, what is the practical problem with doing it the other way?

Lisa Pavento: The practical problem would be that the state would then need to pay for the publication of just the OCG, [00:51:00] and I believe that the state wanted to try to save the taxpayer's money by also providing them with the annotations at the same time, the state really ...

Judge Hull: Why can't they then just amend 1-1-1 then, and say, you've still got the same book? The only part of this that's the official code is these, that are the statute in there. Nothing else is the official

code, okay? They could amend and say 1-1-1 to make it consistent with it has no force of the law, it would be a lot clearer, [00:51:30] but say, you can keep the same book. Just say, this is the statutes, are the official laws, the rest is just ... you could clean it up, and not merge it. Why does it need to merge? It can be in the same document, but you don't have to say it's merged and have all this language in 1-1-1.

Judge Bucklew: [inaudible 00:51:49]

Lisa Pavento: I believe that the state wasn't considering the term merged as indicating a single copyrightable unit.

Judge Hull: You've answered my questions, [00:52:00] I mean, they could rewrite it.

Lisa Pavento: They could rewrite it, but that would be because ... it wouldn't be because there's no due process access to the official code. That's being provided.

Judge Hull: It would be because what they created is not subject to copyright, because it's an official legislative, maybe dealing with the code by the direction of the legislature in power then. It's like the code, I agree, the commission's [00:52:30] not a legislative, lawmaker, they're just a body. They're a commission. Legislators delegated the authority to do what they did and said, "Here's what we want you to do."

Lisa Pavento: Yes, your honor, but the statutes themselves are not subject to copyright, and ...

Judge Hull: Everybody agrees about that. The question is whether this merged document is all one entity, or is it, we should tease it apart, as Judge Marcus ... but you've answered my question, thank you very much.

Judge Marcus: I have just one follow up question from what Judge Hull asked.

Lisa Pavento: [00:53:00] Sure.

Judge Marcus: The legislative body chose to do this in this way, why? What am I supposed to infer from the way they did it? What was the

purpose of merging it and making the totality of this combine the official code of Georgia annotated?

Lisa Pavento: The legislature was trying to assist the citizens of Georgia by providing them with the annotations, and really providing [00:53:30] those annotations at a much lower cost, six times lower ...

Judge Marcus: But couldn't they have done it in the manner that Judge Hull suggested without merging and without characterizing it as the official code of Georgia, annotated?

Lisa Pavento: They could have, but then there would be a cost to the taxpayers. A lot of this was the state was trying to lower the cost to the taxpayers or ...

Judge Marcus: This falls under the heading of, no good deed goes unpunished?

Lisa Pavento: I truly believe that the state was ...

Judge Marcus: That would be [00:54:00] your suggestion, I suppose?

Lisa Pavento: I truly believe the state was trying to be as helpful as possible by producing the annotations, by producing them at a very low cost which levels the playing field, and not charging the taxpayers for it.

Judge Hull: But couldn't they do that without calling it the official code?

Lisa Pavento: The most certainly could decide not to call ...

Judge Hull: Produce it, just don't call it the official code.

Lisa Pavento: ... any code the official code, but again, there they were trying to ...

Judge Hull: They can say, [00:54:30] you can cite the annotated if you want to, you can cite the laws, we don't care, actually cite law, and then if it's been annotated ... because some of these statutes don't have any annotations, there's not much there. There's very little there. A lot of them have hearsay, if you want to look that up. It goes on forever on the annotations.

Lisa Pavento: Yes, your honor. They could decide to create a code that is not called official, but again, they did that to try to help the citizens know what is approved [00:55:00] by the state and what is not.

Judge Hull: I don't know if copyright law goes to what the motive behind or not behind. It goes to whether it's copyrightable, is the problem here ...

Judge Bucklew: Yes, your honor.

Judge Hull: And [inaudible 00:55:12] laws can't be copyrightable and we agree annotations can be copyrightable, they say that, and then what happens when you put them together and say these are the official laws, and you can only cite it? That's what makes it harder, but you've answered my questions, thank you very much.

Lisa Pavento: You're welcome, your honor.

Judge Marcus: Thank you council. [00:55:30] And Ms Rader, you've reserved five minutes.

Elizabeth Rader: Thank you, your honor. One point I wanted to make in response to Judge Hull's question about whether the code commission is the right body to make the law, or to make the annotations and if that makes it an edict of government, I'd like to point out that the official code of Georgia annotated is ratified every year by [00:56:00] the legislature. It isn't as though the annotations are out there unendorsed, every year the legislature ...

Judge Hull: Well, there's ratification and then there's ratification, what is the ratification say?

Elizabeth Rader: That it reenacts the official code, the whole thing.

Judge Hull: Hm.

Elizabeth Rader: I wanted to respond to the idea that the legislature made this deal to save the taxpayers money. [00:56:30] One problem with this ...

Judge Hull: Before you do that, because that doesn't ... I mean, save money, not save, this is copyright law, it is what it is. Go back, reenacts

the official thing, the whole thing, where do we find that? Is that cited in your brief, where they do that? Is there a legislative separate piece of legislation they do that in?

Elizabeth Rader: I believe there is, and I believe it's in our brief.

Judge Hull: Okay. There's a statute, [00:57:00] or I guess a bill or act in that say, "We hereby ..." why do they have to do that every year? Because I guess it gets combined, new bills change, or if there's new laws and old ones are repealed or something?

Elizabeth Rader: Yes, codification is a continuous process.

Judge Hull: Okay. Do you agree the code commission is not a law maker? You really need that new, that reenactment to have it be the law, because the commission's not a lawmaker.

Elizabeth Rader: They are not [00:57:30] a lawmaker, but they are an edict emanating body.

Judge Hull: Okay, what does that mean?

Judge Bucklew: I don't know.

Elizabeth Rader: They are acting as agents for the legislature in making sure the annotations get prepared and that they are the annotations the legislature wanted to be in the official code.

Judge Marcus: On the issue of fair use, you've got the burden, it's an affirmative defense to the extent the trial judge made findings of fact. [00:58:00] We would review them only for clear error, would we not?

Elizabeth Rader: That's correct.

Judge Marcus: Could he make findings of fact on summary judgment?

Elizabeth Rader: Not where the facts were disputed.

Judge Marcus: Did he make any findings of fact that were disputed?

Elizabeth Rader: I think he did, in finding that there was a legally recognizable profit for public resource, in that ...

Judge Marcus: That's legal error, is it not?

Elizabeth Rader: It's legal error in the way that he interpreted the law [00:58:30] to hold that reputational benefit or other nonmonetary benefits could make an otherwise nonprofit use commercial use. Those cases are outliers, they're not binding on this court, and frankly, the court should clarify that that's not the law in the 11th circuit.

Judge Hull: Let me go to 1-1-7, I've focused on 1-1-1. 1-1-7 is also [00:59:00] a legislative act which I think has to be read with 1-1-1, do you agree with that?

Elizabeth Rader: Yes.

Judge Hull: Right, and this makes it abundantly clear that the annotations, the editorial notes, the citation law review articles, all of that is not, has no force of effect of law.

Elizabeth Rader: Yes.

Judge Hull: Okay. Therefore, other than saying it's labeling the official code, if they [00:59:30] put out, if they didn't label it in a law the official code, and they said, they put out that book, and they say it's a compilation of Georgia statutes, annotations and relevant legal, and they put it out, would not clearly, and they don't make it the official code, but for the fact is made the official code, that would be okay as I understand your brief?

Elizabeth Rader: That would be a much tougher case ...

Judge Hull: [01:00:00] You say here in your brief, you say, "Public resource agrees that annotations and unofficial codes are copyrightable by their publishers. The issue here, is whether ..." that's where I got this question from, because your brief, "the state of Georgia can register, in its own annotations, in its only official code."

If they put this, I don't know whether they need to have an official code, how they do an official code, whether it can be online, [01:00:30] what the, how much available they have to make it, or they just have to have the laws, I don't know about all of that, but I'm just taking the, that book I've got. If they take off "Official Code," on it, it's copyrightable. Everything in it

except the laws themselves, is that not correct? [inaudible 01:00:51] produces it, puts all the laws in it, they don't call it the official code. The official code is the official code of Georgia and they just make it available. [01:01:00] They can make it in hard copy, they can make it online, they can do it however they want to do, are you with me?

Elizabeth Rader: Yes.

Judge Hull: They take off official, they amend 1.1, and just say, the official code of Georgia is this, and then we have this annotated, it's not the official code, but it may also be cited in addition to the official code.

Elizabeth Rader: Yes, if ...

Judge Hull: They're fine, then? That's what your brief said.

Elizabeth Rader: Just taking off the word official [01:01:30] would go a long ...

Judge Hull: No, I'm talking about, they've got to amend 1-1-1.

Elizabeth Rader: They have to make it clear the annotations are not part of an edict of government, yes.

Judge Hull: Right. Okay, and they didn't do that by expressly saying in 1-1-7, they have no force of law?

Elizabeth Rader: No.

Judge Hull: How could that be clearer, that that's not an edict of government?

Elizabeth Rader: Because elsewhere, they repeat that the OCGA is what controls over any unofficial publication.

Judge Hull: Okay.

Judge Marcus: What's critical [01:02:00] to you is that the legislature has pronounced this to be the law, even though they say a piece of it doesn't have a binding effect?

Elizabeth Rader: Yes.

Judge Marcus: These are the annotated laws of the state. Alright, thank you very much, thank you all for your efforts, it's an interesting case, we will take it under advisement and this court will be in recess until 9 A.M. tomorrow morning. Thank you all.

Speaker 7: All rise.