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Official Code, Locked Down: An Analysis of Copyright as it Applies to Annotations of State Official Codes

Shellea Diane Crochet

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OFFICIAL CODE, LOCKED DOWN: AN ANALYSIS OF COPYRIGHT AS IT APPLIES TO ANNOTATIONS OF STATE OFFICIAL CODES

*Shellea Diane Crochet**

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* J.D. Candidate 2017, University of Georgia School of Law; B.A., University of Georgia, 2014.

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I. INTRODUCTION

In 2015, for the first time in history, a party filed a counterclaim challenging state-held copyright protection of annotated codes in court.¹ The annotations of state codes are specifically grouped portions of judicial decisions relating to a specific code section that identify how courts have interpreted the statutory text in practice. To state supporters (supporters of copyright protection), copyright protection ensures the integrity of invaluable legal research aids by assuring compensation for those creating annotations. For challengers (public access supporters), prohibiting public access to annotated codes is a violation of a basic constitutional right to knowledge of the law. At the center of the two arguments is one fundamental issue: what makes up the law?

Notably, in May 2016, both parties to the aforementioned Georgia suit filed for summary judgment on the notion that there is no genuine issue of material fact.² If the court determines the issue the way my research leads me to believe that it will, both motions should be rejected. To accept that there is no genuine dispute of material fact is to ignore the central issue of this case: whether the annotations are “the law.” The parties disagree on this central element and should have the chance to take their case to a Judge or Jury. The parties are awaiting the court’s decision in spring of 2017. If the court rules that one of the two motions be granted, then I assert that the court has erred in the sense that it will have essentially foregone due process for efficiency. This is a case that should go before the court for the fact-finder to determine whether the annotations are part of “the law.”³

If the substantive case reaches the court and the supporters of copyright protection win in the current Georgia case, more than half of the States will be affected and could face future litigation. While states will be judged on a case-by-case basis, the decision in the pending Georgia case can drastically influence the future of state-held copyright to annotated codes.

¹ Answer to Amended Complaint and Counterclaim of Defendant Public.Resource.Org, Inc., Code Revision Comm’n v. Public.Resource.Org, Inc., 1:15cv2594 LEXIS, at *1, Doc. 16 (N.D. Ga. 2015).

² See generally Defendant Public.Resource.Org, Inc.’s Memorandum of Law in Support of Its Motion for Summary Judgment, Code Revision Commission v. Public.Resource.Org, 1:15cv2594 LEXIS, at *1, Exhibit 4, Doc. 29-2 (N.D. Ga. 2015); Plaintiff’s Memorandum of Law in Support of Its Motion for Summary Judgment, Code Revision Commission v. Public.Resource.Org, 1:15cv2594 LEXIS, at *1, Exhibit 4, Doc. 30-1 (N.D. Ga. 2015).

³ Bill Donahue, *Georgia Law Annotations Copyrightable*, LAW360 (Mar. 27, 2017, 1:52 PM), <https://www.law360.com/articles/906378/georgia-law-annotations-copyrightable-court-says>.

As of 2011, approximately twenty-eight states required courts to reference copyrighted official codes.⁴ As of 2014, two states alone, Montana and Illinois, had state statutes outlawing the copyright protection of state primary code material.⁵ After legislative hearings in Oregon, cases regarding primary materials in California, and constitutional analysis, the Supreme Court ultimately held that states may not hold the copyright to their statutory codes.⁶ However, many states still hold copyrights to their *official* codes by asserting that the annotations of the codes are subject to copyright protection.

There are two ways states hold copyright to annotated codes. First, state legislators or staffers may create the annotations granting the author, the state, the copyright. Second, the state may create a work-for-hire contract with a private company, such as LexisNexis or Westlaw. A work-for-hire contract is a written contract by which the private company gains profits for their work in exchange for the state holding the copyrights to the annotations.

Notably, there are areas other than annotated codes where states have been granted copyright protection of government-created and work-for-hire products. For example, the State of Florida holds the copyrights to Florida.Org, a government-created website that helps individuals find particular agencies or online government services.⁷ Additionally, in *County of Suffolk v. First American Real Estate Solutions*, the Second Circuit found that counties, like states, can hold the copyright to their tax maps created in a work-for-hire contract.⁸

This Note seeks to identify whether states can constitutionally hold copyright to annotated codes either as authors or through work-for-hire contracts. First, this Note will review the background of copyright law as it applies to copyright of state primary law. Second, this Note will analyze the arguments set out by supporters and rejecters of copyright protection for state annotated codes. Third, this Note will delve into the ideological question at hand and why defining the term “law” is the root of the entire issue. Following, this Note will explain different theoretical approaches to defining “the law.”

⁴ National Conference of State Legislature, State Statutes/Code: Holder of Copyright (Mar.–July 2011), http://www.ncsl.org/documents/lss/Copyright_Statutes.pdf (surveying and explaining that out of the thirty-two states that responded to the survey, twenty-eight had copyrighted official codes, many of which likewise held official code annotations subject to copyright).

⁵ *CoCommonLaw, States Who Assert a Copyright in State Statutes* (July 23, 2014), <http://cocommonlaw.com/2014/07/states-assert-a-copyright-state-statutes/> (stating that by 2014 Montana and Illinois were the only two states that outlawed the right to copyright state law material).

⁶ *See, e.g., Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002), *cert. denied*, 539 U.S. 969 (2003).

⁷ MyFlorida.com, <http://www.myflorida.com/myflorida/copyright.html> (last visited Jan. 3, 2016).

⁸ *See Cnty. of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 17, 188 (2d Cir. 2001).

When applicable, the Note uses the current Georgia case as an analogy to explain the application of the analysis in a work-for-hire scenario and the Oregon case for application of the analysis to circumstances in which legislative staff create annotations. Finally, this Note explains why the court is currently more likely to find in favor of the state where the state holds copyright to its annotated code through a work-for-hire contract but not in a case where the state legislative staffers create the annotations.

II. COPYRIGHT LAW PERTAINING TO STATE PRIMARY LAW

Copyright law originates in Article I of the United States Constitution and has been amended, narrowed and broadened through legislation and interpretation.⁹ The Patent and Copyright Clause of the United States Constitution grants the national legislature the power to protect works of art and science for those who created them.¹⁰ The purpose of the clause is “to encourage people to devote themselves to intellectual and artistic creation,”¹¹ by offering guaranteed protection of their creative works.

By the necessary and proper clause,¹² Congress has the power to pass legislation for the purpose of facilitating constitutional copyright in arts and sciences. In so doing, Congress passed the Copyright Act of 1909 and later the Copyright Act of 1976. Throughout the amending of the Copyright Act, Congress has not added any explicit language regarding state government works.

The lack of explicit language has not stopped the Court from interpreting the statute to apply to states at least in some instances. For example, courts have long held that the law of the land is not protected under the Copyright Act, regardless of whether the land in question is a state and not the country as a whole.¹³ That fact, however, is not founded upon the text of the Copyright Act. Instead, it is a prime example of statutory silence suggesting a lack of statutory authority.

There are a few sections of the Copyright Act of 1976 that are vital to understanding the issue that this work intends to resolve. Section 105 of the

⁹ U.S. CONST. art. I, § 8, cl. 8.

¹⁰ *Id.* (“To promote the progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

¹¹ *Goldstein v. California*, 412 U.S. 546, 555 (1972).

¹² U.S. CONST. art. I, § 8, cl. 18 (granting the power to do what is necessary and proper to enforce the U.S. Constitution to the U.S. Congress).

¹³ *See* ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY APPROACH (INTERACTIVE CASEBOOK SERIES) 593 (2012).

Act exempts works created by the federal government from receiving copyright protection.¹⁴ Section 105 is important because it, along with Section 101, prohibits the federal government from copyrighting its laws, codes, or judicial opinions.¹⁵ Notably, section 105 does not expressly prohibit copyright protection for products created for the federal government through work-for-hire agreements with private entities.¹⁶

Section 105 is also silent on state governments' authority to copyright legal materials.¹⁷ In fact, no section of the copyright act precludes states from copyrighting works of their own government.¹⁸ However, courts have determined through precedent and interpretation that, like the federal government, "states [too] cannot claim copyright in primary legal materials such as judicial opinions and statutes."¹⁹ The finding is largely based in due process under the Constitution because access to primary law is considered a fundamental right.

In 1992, the House of Representatives heard member Barney Frank's push to amend section 105 of the copyright act, but his amendment was never put to a vote.²⁰ Frank's proposed amendment, H.R. 4426, could have prohibited the copyright protection of official state codes.²¹ The proposed amendment focused on compilations of law or legal materials such as judicial opinions and was novel in that it explicitly prohibited state governments from holding copyrights to compilations of their laws or judicial opinions.²² The amendment was never voted on.

¹⁴ Irina Y. Dmitrieva, *State Ownership of Copyrights of Primary Law Materials*, 23 HASTINGS COMM. & ENT. L.J. 81, 82 (2000) (referencing 17 U.S.C. § 105 (2000 Supp.)).

¹⁵ 15 U.S.C. § 290e(a) (2012) (identifying an exception to § 105 of the Copyright Act of 1976 which allows the Secretary of Commerce to "secure copyright and renewal thereof on behalf of the United States . . . in . . . standard reference data").

¹⁶ 17 U.S.C. § 105 (2012).

¹⁷ *Id.*

¹⁸ See Dmitrieva, *supra* note 14, at 82.

¹⁹ BRAUNEIS & SCHECHTER, *supra* note 13, at 589; see *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888).

²⁰ Katie Fortney, *Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*, 102 LAW LIBR. J. 59, 65 (2010) (citing H.R. 4426, 102d Cong. (1992)).

²¹ *Id.*

²² H.R. 4426, 102d Cong. (1992). H.R. 4426 never came to a vote before Congress adjourned at the end of the session. It was never brought before Congress again. At the very least, the passing of the bill would have made the argument stronger that states cannot copyright the annotations to state codes. However, it would not explicitly deny the annotations per se. If the annotations are derivative works versus compilations, H.R. 4426, while broad, was not broad enough to expressly deny copyrights to the materials.

Similarly, in 2014, Carl Malamud appeared before the United States House Judiciary Committee to push elimination of state copyright in official legal works.²³ Specifically, he pushed to add “the edicts of government . . . are not copyrightable for reasons of public policy” to the Copyright Act.²⁴ No amendment was added pertaining to his testimony.²⁵ No similar amendment has ever been voted on in Congress.

Section 101 defines terms within the Copyright Act.²⁶ Section 101 defines a derivative work in part as “[a] work consisting of editorial revisions, annotations [to a pre-existing work] . . . which, as a whole, represent an original work of authorship. . . .”²⁷ The annotations of state codes take pre-existing judicial decisions and compile them in a new way to explain how statutory codes have been interpreted.

Also notable is section 103 of the Copyright Act of 1976. Section 103 allows copyright protection for derivatives and compilations.²⁸ It is important because the focus of this Note is not whether a state may copyright its code sections per se. Instead, the focus is on whether a state can copyright the annotated version of its code. Namely, are the annotations themselves protectable under the Copyright Act of 1976.

Since section 103 holds that derivative works and compilations are protectable under copyright law, without the section, there would be no option to copyright a work, such as the annotations to an official code, which is made up of pieces of other works that may not otherwise be subject to copyright.²⁹

Derivatives and compilations under the Copyright Act are fairly similar; they rearrange existing ideas into a new product. Both are copyrightable if they reach the requisite minimum creativity. Compilations can become derivatives if

²³ Answer to Amended Complaint and Counterclaim of Defendant Public.Resource.Org, Inc., Code Revision Comm’n v. Public.Resource.Org, Inc., 1:15cv2594 LEXIS *1, Doc. 16 (N.D. Ga. Oct. 22, 2015).

²⁴ *The Scope of Copyright Protection: Hearing Before the Subcomm. on Courts, Intel. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (video clip beginning at 41:51), <https://archive.org/details/gov.house.judiciary.20140114>.

²⁵ *Id.*

²⁶ 17 U.S.C. § 101 (2015).

²⁷ *Id.*; see, e.g., *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 674, 680 (2d Cir. 1998).

²⁸ 17 U.S.C.A. § 103 (LexisNexis 1978).

²⁹ Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 192–93 (1998) (referencing 17 U.S.C.A. § 103 (quoting 17 U.S.C.A. § 101 (defining derivative works as “‘a work consisting of editorial revisions, [or] annotations . . . which, as a whole, represent an original work of authorship’” and compilations as a work resulting “‘from ‘a process of selecting . . . and arranging previously existing materials of all kinds . . . ’”))).

the product “sufficiently transform[s] the underlying data,” although doing so is not necessary to qualify for copyright protection.³⁰

Since *Banks v. Manchester*, judicial opinions are not subject to copyright protection.³¹ The *Banks* court held that judicial opinions as a whole cannot be copyrighted because they are binding law governing the people as precedent.³² Further, the court held that “whatever work the judges perform in their official capacity cannot be regarded as authorship under the copyright law.”³³ Since *Banks*, copyright protection has been interpreted to exclude “‘the law’ whether articulated in judicial opinions or legislative acts or ordinances”³⁴

So far, no court has ever ruled on whether or not states are allowed to hold the copyrights to their respective annotated codes under the Copyright Act or the Constitution. Since many states claim copyright of the annotated versions of their codes, and Georgia has become the first state to file a claim against infringing on such a copyright, the issue is of particular importance. This Note seeks to answer the question of whether or not states have the right to do so.

III. COPYRIGHT PROTECTION ARGUMENTS

A court has never decided or heard evidence as to whether a state can hold the copyright to the annotations of its official codes. While some states have avoided litigation by allowing websites such as Public.Resource.Org to reproduce their annotated codes for free, many states have continuously requested unauthorized publishers to remove their official codes from free access sources.³⁵

On July 25, 2015, the State of Georgia filed a claim against Carl Malamud for copyright infringement of the Official Code of Georgia Annotated, O.C.G.A. The State of Georgia argues in the claim that while the code itself is

³⁰ *Id.* at 194.

³¹ 128 U.S. 244 (1888).

³² *Id.* at 293–94 (holding that Ohio Supreme Court judicial opinions could not be protected under copyright law).

³³ See BRAUNEIS & SCHECHTER, *supra* note 13, at 593.

³⁴ *Id.*; see *Veck v. So. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 798 (5th Cir. 2002), *cert. denied*, 539 U.S. 969 (2003) (holding that Veck did not infringe on copyright because the code it published was enacted into law beforehand).

³⁵ R. Robin McDonald, *Public Records Group Countersues Georgia in Copyright Fight*, DAILY REP. (Sept. 23, 2015), <http://www.dailyreportonline.com/id=1202737942438/Public-Records-Group-Georgia-in-Copyright-Fight?slreturn=20160004125807> (explaining Idaho, Mississippi, and Oregon have all asked Carl Malamud to take down their codes from Public.Resource.Org as well). (Twenty-six states have asked for copyrights to at least a portion of their code section.)

not subject to copyright, the annotations of the code are.³⁶ This is the first time a state has ever filed a claim against an unauthorized publisher of a state annotated code. Georgia claims that the unannotated code is available to the public free of charge and the public does not have the right to free access to the annotations.³⁷ The arguments Georgia and other copyright protection supporters have for allowing copyright of annotations of the codes have four major components.

A. SILENT PERMISSION

The first argument for copyright protection of annotated codes is text based; there is nothing in the Copyright Act prohibiting it. In *Suffolk*, a Second Circuit Court stated that the text of the Copyright Act permits the governments to have copyright over its own works by leaving out a limitation on state governments.³⁸ Supporters of state copyright protection view the annotations as derivative works acting as a research guide. To that extent, the annotations are covered by the Copyright Act as long as they fulfill the requirement of an original work.³⁹

Section 102 of the Copyright Act of 1975 requires a work be original for protection under the Act. The term itself is vague, but has largely been defined through common law. Today, the Court requires “a modicum of creativity” for purposes of fulfilling the originality requirement.⁴⁰

In *Feist*, the Supreme Court held that a compilation of purely factual material such as phone numbers and addresses could not be protected under copyright because the work did not satisfy the “minimum constitutional standard” for originality.⁴¹ In *American Registry of Radiologic Technologists v. Bennett*, a fifth district court held that an entire test and the questions individually can be protected under copyright.⁴² While simple compilations of facts are not protected under the act, the *American Registry* court found that the questions themselves were more creative than mere compilations of facts, and compilations of facts that

³⁶ Complaint & Cease and Desist, Code Revision Commission Et Al v. Public.Resource.Org, Inc., 1:15cv2594 LEXIS *1, Exhibit 4 (N.D. Ga. 2015).

³⁷ *See id.*

³⁸ Cnty. of Suffolk v. First Am. Real Estate Solutions, 261 F.3d 179, 187 (2d Cir. 2001).

³⁹ *See infra* note 44.

⁴⁰ *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

⁴¹ *Id.* at 364 (explaining that a phone book was not protected under the Copyright Act even though the work was not copied from another because the “respondent has not selected, coordinated, or arranged the uncopyrightable facts in any original way”).

⁴² *Am. Registry of Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695, 702–03 (W.D. Tex. 2013).

are placed together in a way that is minimally creative could fall within the realm of copyright-ability.⁴³

To be original, a work need not be novel. In *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*,⁴⁴ the Second Circuit Court used a three-prong test to determine whether originality existed. The Court held that a work could only be protected under copyright law if the three prongs were met; to wit:

- (1) the collection and assembly of preexisting data;
 - (2) the selection, coordination, or arrangement of that data;
- and
- (3) a resulting work that is original, by virtue of the selection, coordination, or arrangement of the data contained in the work.⁴⁵

In *Key*, the Court found that some phone books could reach the prerequisite requirement of originality under the Copyright Act.⁴⁶

The term “original” has been interpreted to also mean that the work is not copied from another author. Prong four, as I refer to this interpretation for the purposes of this Note, is a more commonsensical requirement that, that which is copyrightable is not plagiarized. That is, that the author must have put his or her own effort or mark into a finished product.⁴⁷ A product cannot be copied completely from another author and granted protection under the statute. To be original in the context of the Copyright Act, then, both interpretations must be satisfied.

Using the annotations of the Official Code of Georgia Annotated, the works easily satisfy the test provided by the Second Circuit. While judicial opinions are not subject to copyright, case outcomes are not necessarily exempt from protection. In the Georgia case for instance, the annotations restate case outcomes without reproducing the judicial opinion as a whole. Supporters of copyright protection do not contend that the judicial opinions or even the case

⁴³ *Id.*

⁴⁴ 945 F.2d 509, 509 (2d Cir. 1991).

⁴⁵ *Id.* at 512.

⁴⁶ *Compare id.* at 515 (explaining that the arrangement of businesses into categories and the selections of businesses was enough creativity to allow copyright of the compilation), *with Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) (holding that the arrangement of a phonebook by alphabetical order is not enough creativity for copyright protection). It should be noted that the two cases are not in conflict, and show creativity exists in compilations somewhere between alphabetical listing, which I assert is similar to a timeline, and selecting of certain businesses and dividing them up into certain categories.

⁴⁷ BRAUNEIS & SCHECHTER, *supra* note 13, at 63.

outcomes themselves are subject to copyright, but that the exact annotations, the exact compilations of case outcomes, as they appear in and relate to state codes are subject to copyright.⁴⁸ Further, like the compilation in *Key*, and unlike in *Feist*, the O.C.G.A. annotations are often divided into different issues, and the judicial outcomes are selected and placed into the different issue categories.⁴⁹

The first prong of the Second Circuit test is fulfilled because the annotations are largely made up of short explanations of pre-existing judicial opinions collected by independent research on the part of LexisNexis. The second prong is satisfied because the judicial decisions are arranged by how they reflect portions of respective code sections which is, at the very least, arguably as creative as arranging exam questions in a specific way and more creative than alphabetizing names.⁵⁰ The third prong is not an issue either because the annotations themselves are different from any other published annotations corresponding to Georgia's code sections. The annotations are not plagiarized, so the fourth prong is not an issue for purpose of defining original. While this test is not analyzed in much depth, the standard, again, is only a "modicum of creativity," meaning that this is a low hurdle for the State to get over.

The annotations undoubtedly reach the minimal creativity standard of copyright protection under *Feist* and *Key*. In analogizing the Second Circuit's opinion on copyright of maps in *Streetwise*, facts, such as judicial opinions and cases, may not reach the level of creativity themselves, but the way in which the judicial opinions or case outcomes are summarized and compiled can.⁵¹

The importance of the originality test in this area of law is simple. While public access supporters argue that meeting the threshold level of originality is insufficient for the purposes of copyright protection because of the Due Process Clause of the Constitution, supporters of copyright protection disagree.

⁴⁸ *Suffolk*, 261 F.3d 179, 187–88 (2d Cir. 2001) (explaining that under the Copyright Act the claim of infringement was valid as long as FOIL was not violated. FOIL is beyond the scope of this Note and is irrelevant to the conclusion. It is merely a specified New York law mentioned in the *Suffolk* case.).

See supra note 22. Had H.R. 4426 been enacted or Malamud's push for an amendment succeeded, the circumstances could be different, but again, the bill was never voted on and is therefore a moot point in this analysis.

⁴⁹ *See, e.g.*, O.C.G.A. § 16-13-30(a) (2015) (showing annotations which have judicial outcomes divided into different issues relevant to the ambiguities within the statute); *see also supra* note 46 and the analysis following.

⁵⁰ *Compare supra* note 40, *with supra* note 42.

⁵¹ *Streetwise Maps, Inc. v. VanDam, Inc.*, 159 F.3d 739, 747–48 (2d Cir. 1998) (explaining that while physical facts on a map are not subject to copyright, the colors used on the map can meet the creativity requirement to allow copyright protection).

Supporters of copyright protection find that because of the silence of the Copyright Act on annotations of state codes, as long as the annotations reach the threshold level of creativity, states may hold the copyright. Further, if annotations are written purely in chronological quotes of judicial opinions or in alphabetic order, unlike the case in Georgia, annotations may fail to meet the threshold level of creativity. If the annotations in question fail to meet the requisite level of creativity, the analysis stops there and the state may not hold copyright to the annotations under the law. Originality, therefore, is a central point for analyzing copyright protection of annotated codes even though it does not prohibit protection for the Georgia Code specifically.

B. ECONOMIC INNOVATION ARGUMENT

A second argument in favor of copyright protection for annotated codes centers on profit bred innovation. The economic innovation argument contends that without copyright protection, private annotators will have no way to make money for their creations and therefore have no incentive to continue creation of the valuable resource.⁵²

No one could produce equivalently enforceable codes and statutes if the statutes and codes were protected through copyright. Conceptually, however, anyone can do research and create annotations based on publically available judicial opinions. As long as the judicial opinions are applied accurately, someone else's annotations may well be as useful as those produced by another entity. Copyright of annotations protects only those specific annotations, not the ability to create annotations using similar judicial opinions and code sections.⁵³

The economic innovation theory encapsulates the notion that entities, private or public, will only create the annotations when the "difference between the expected revenue and the cost of the duplication of the work exceeds the cost of creation" the original author(s) endured in creating the annotations in the first place.⁵⁴ The implication being that if a secondary entity grants public

⁵² See Fortney, *supra* note 20, at 66.

⁵³ See *Mazer v. Stein*, 347 U.S. 201, 218 (1954) ("Copyright protects originality rather than novelty or invention — conferring only the 'sole right of multiplying copies.' Absent copying there can be no infringement of copyright. Thus, [the copyright owners] may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article." (citing *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83, 94 (2d Cir. 1922))).

⁵⁴ Claudia Schmidt, *Is Copyright Protection Necessary to Promote Innovation?*, *International Association for the Advancement of Teaching and Research in Intellectual Property* (Nov. 13, 2007), <http://www.atrip.org/Content/Essays/Claudia%20Schmid.pdf>.

access to the original annotated work, the entity creating the work will gain no profit and therefore receive no incentive to continue quality production.

The strongest counterpoint to the economic incentive argument in the annotated code scenario is that profit and incentives, such as the first mover advantage, still exist without copyright at all.⁵⁵ The theory considers the idea that people inevitably seek to obtain the original form and not a duplicated form of a work, think of original versus copied artwork for instance, resulting in profit for the original author.⁵⁶

However, the economic access argument ultimately cuts in favor of the copyright protection advocates. Notably, the second producer of the official annotated codes is not seeking profit from the reproduction. The non-profit nature of the republication means that as soon as the second group publishes an exact copy of the original work, the authors of the original annotations may see little to no profit of their work. Copyright protection supporters may therefore have a strong argument that because of the lack of profit after the non-profit group republishes the entire original annotated code, the entity creating the original annotations will lose the incentive to create, harming the future of the valuable resource.

C. AVAILABILITY OF UN-ANNOTATED CODE

Additionally, supporters of copyright protection believe that the identification of the for-profit annotated code as the *official*, and only official, state code is insufficient to prove that the annotations are part of the law and therefore not subject to copyright protection. The title of *official* does not itself mean there is misuse of copyright. LexisNexis has the exact version of the code, which exists with the annotations, online for free without the annotations.⁵⁷

This argument is best analyzed through looking at the O.C.G.A. The code sections of the free un-annotated code correspond correctly and are updated to reflect the precise code sections of the annotated *official* code. For example, O.C.G.A. § 9-14-1(c) states: “Any person restrained of his liberty as a result of a sentence imposed by any state court of record may seek a writ of habeas corpus to inquire into the legality of the restraint.”⁵⁸ The unannotated version of § 9-14-1(c) reads exactly the same.⁵⁹

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See LEXISNEXIS, <http://www.lexisnexis.com> (last visited Nov. 17, 2016).

⁵⁸ O.C.G.A. § 9-14-1(c) (2015).

⁵⁹ Compare *id.* (annotated version), with *id.* (unannotated version).

Further, the unannotated version tells the reader which citation to use. The citation is still to the O.C.G.A. as the words in the code section are exactly the same. The code also shows the history of the section. The only difference is the lack of annotations.⁶⁰

The above point is critical for analyzing whether the annotations are subject to copyright and should be analyzed on a case-by-case basis. If a state updates the unannotated version and makes sure the unannotated version reflects the annotated version verbatim, as Georgia does, then it is worth it to continue on through an analysis to determine whether copyright protection is constitutional and statutorily appropriate. However, if the unannotated version is exceptionally difficult to obtain, does not reflect accurately the annotated version of the code, and/or bares a separate citation than the annotated code, copyright protection of the annotated code is more than likely a violation of the constitution.

D. HISTORICAL CONSISTENCY/PROGRESS ARGUMENT

Another factor cutting in favor of copyright protection supporters is an argument of historical consistency/progress. The argument focuses on the pre-internet world where the legality of copyrighting annotations of state official codes was never challenged. Official annotated codes were bound into books and sold throughout the mid-to-late 1900s, but until the books became available over the Internet as a result of the digital age, the legality of the copyrighted annotations were not at issue.⁶¹

Conventional wisdom holds that if no problem existed with profiting from annotated codes before use of the internet, private annotators will stop using the internet to provide access to the good in order to avoid legal trouble.⁶² Copyright law exists to promote advancement of knowledge.⁶³ Those supporting copyright protection argue that allowing free public access could in turn limit progress. As stated in the constitution, the purpose of copyright law is to “Promote the Progress of Science and useful Arts,”⁶⁴ and access to

⁶⁰ Compare *id.* (annotated version), with *id.* (unannotated version).

⁶¹ See E-Mail from David A. Collins, Dir., Product Planning, Eastern U.S. Codes and International Primary Law, LexisNexis, to Mark S. Thompson, Account Exec. & Research Attorney, LexisNexis, forwarded to Shellea D. Crochet, Law Student, University of Georgia School of Law (Jan. 8, 2016, 3:33 PM) (on file with Shellea Crochet: crochesh@uga.edu) [hereinafter E-Mail from David A. Collins, to Mark Sebastian Thompson].

⁶² Jessica Litman, *Revising Copyright for the Information Age*, 75 OR. L. REV. 19, 32 (1996).

⁶³ U.S. CONST. art. I, § 8, cl. 8. The exact phrase as stated later in this paragraph is to “Promote the Progress of Science and the useful Arts,” which I assert is essentially promoting knowledge.

⁶⁴ *Id.*

technology advancement, not public access to the annotations themselves, is mandatory to achieve such progress.

The historical consistency/progress argument is strong for copyright protection supporters. However, there is a valid counterpoint. Public access supporters can argue, that while annotated codes were produced before the digital age, the digital age brought to light an ongoing constitutional violation and did not create a new one. Further, as technology increases, copyright law must change to effectively deal with the issues present.⁶⁵

Ultimately, the historical consistency argument cuts in favor of those supporting copyright protection because the argument against conventional wisdom is largely non-judiciable in nature. It is the duty of the legislature, not the court to change the current law in order to update it to reflect societal advancements. Two states as of 2014 have outlawed copyrighting of annotated codes through the law-making process.⁶⁶ Therefore, at least two states, the only two states to outlaw copyrighted annotations, find the issue a political one versus a judiciable one. The court is likely to find its job is to identify how the law currently stands on the issue of copyrighting annotated codes and not how the law *should* be changed.

Notably, the above paragraph says “the court is likely to” and not “the court will.” The final outcome still depends on whether or not the court finds the annotations as part of the law. If the annotations are enforceable as the law, then the constitution trumps the above analysis and the annotations should not be subject to copyright protection. However, if the annotations are not enforceable as the law, the above analysis cuts strongly in favor of the supporters of copyright protection.

IV. PUBLIC ACCESS ARGUMENTS

Carl Malamud, the leader of PublicResource.Org, has become a major face in fighting copyright of annotated state codes. He has successfully argued against copyright of official codes in the past and is now focused on the annotations. Supporters of his view have multiple arguments for outlawing the practice of copyrighting annotated codes centered on the value of public access.

⁶⁵ See Litman, *supra* note 62, at 26–27.

⁶⁶ See *CoCommonLaw*, *supra* note 5.

A. SILENT PROHIBITION

Public access supporters argue that, as a general rule, silence on a matter is not indicative of legislative intent.⁶⁷ The Supreme Court has held that in order for silence on a specific action within a statute to imply legality of that specific action, there must be extenuating circumstances beyond those occurring in this instance.⁶⁸ To show that silence yields permission, the party attempting to show such must prove that prohibiting copyright protection has been proposed and turned down on numerous occasions during various congressional sessions to win.

In *Bob Jones University*, the Court held that silence in a statute was an explicit permission of an action. *Bob Jones University* was an exception to the general rule because legislation against the IRS's interpretation of a congressional statute had been debated and proposed thirteen times in Congress and each time rejected alluding to congressional rejection of the IRS's interpretation.⁶⁹ The issue as to copyright of state code annotations, on the other hand, has been debated only twice in congress as a proposed amendment and has never gone to court.⁷⁰ There is virtually no similarity between the two cases, meaning that copyrighting state annotated codes is subject to the general rule that silence does not imply permission.

Views favoring copyright protection argue silence as indicative of intent in two ways. First, the Copyright Act itself does not expressly prohibit what state governments have done in this scenario. Second, when proposed with the opportunity to amend the copyright in a way which could influence the issue, Congress never put the proposal to a vote.⁷¹ The argument ultimately cuts against those favoring copyright protection because the amendment itself was only proposed once and, as a general rule, silence in a statute does not imply permission.

Silence does not necessarily prohibit copyright protection, but it does take away supporters' argument that silence explicitly permits protection. While silence does not necessarily cut in favor of the public access supporters, it is an

⁶⁷ John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737 (1984).

⁶⁸ *Bob Jones Univ. v. United States*, 103 S. Ct. 2017, 2032 (1983) (stating "courts are slow to attribute significance to the failure of Congress to act on particular legislation").

⁶⁹ See *id.* at 2032–33.

⁷⁰ See *supra* notes 22, 24.

⁷¹ See *supra* notes 22–23. See H.R. 4426, 102d Cong. (1992); Answer to Amended Complaint and Counterclaim of Defendant Public.Resource.Org., *supra* note 23.

important argument because it stops the supporters of copyright protection from winning on a silent permission argument.

B. FAIR USE DOCTRINE

Another statutory argument public access supporters rely on is the fair use doctrine.⁷² Codified in § 107 of the Copyright Act of 1976, the fair use doctrine allows public access to fact and decision summaries of judicial opinions and makes musical parodies and classroom lectures legal.⁷³ There lies a Public Access argument that like classroom lectures, publicizing the annotated codes promotes an informed society through non-profit seeking and therefore non-discriminatory methods.

Federal courts look to the four factors of § 107 to analyze whether a use is a *fair use* as protected under the Act.⁷⁴ The factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.⁷⁵

To argue fair use, all four prongs must be analyzed using an approach similar to totality of the circumstances.⁷⁶ To win on a fair use argument, supporters must

⁷² See Answer to Amended Complaint and Counterclaim of Defendant Public.Resource.Org., *supra* note 23.

⁷³ U.S. Copyright Office *Fair Use Index*, UNITED STATES COPYRIGHT OFFICE, <http://copyright.gov/fair-use/> (last visited Oct. 16, 2016); *Measuring Fair Use: The Four Factors*, STANFORD UNIVERSITY LIBRARIES, <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited Nov. 17, 2016); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–77 (1994).

⁷⁴ See U.S. Copyright Office *Fair Use Index*, *supra* note 73 (stating the four factors look at amount copied, the way the copied material was transformed or used, the potential economic effect of the use, and the nature of the original work).

⁷⁵ 17 U.S.C.S. § 107(1)–(4) (approved 2015); see, e.g., *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1345 (Ct. Cl. 1973) (showing an example of how the different elements are analyzed with a specific set of facts).

⁷⁶ See *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 313 (4th Cir. 2010) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (explaining the fair use test as a test in which “the results of every factor’s analysis are weighed together in determining whether there is fair use”)).

show that the nature of the annotations requires public access to the *entirety* of the state codes and annotations.⁷⁷

Under the first prong, courts typically look for a transformation of the copyrighted work in question. In *Bouchat v. Baltimore Ravens Limited Partnership*, the court found that where the Baltimore Raven's logo was used as another team's logo, the purpose was substantially similar to the original use.⁷⁸ Since the logo was used as an identical sports logo for another team, the work was not transformed, going against the likelihood of the court ruling the use of the logo as a fair use.⁷⁹

Like *Bouchat*, in the case of reproducing a state annotated code, there is also no transformation. The original annotated code is reproduced as an identical document for people to rely on as an official annotated code. Therefore, the lack of transformation of the original document cuts against public access argument in regards to annotated codes as it did to sports logos in *Bouchat*.

Under the second prong, reproducing state annotated codes is more likely covered under fair use than is the reproduction of sports logos under *Bouchat*.⁸⁰ For the second prong, the court looks to the nature of the original work. Most notably, if the work is published and reproduced for the public good, the court tends to be more lenient.⁸¹ Reproduction of an annotated legal code is done, according to public access supporters, solely for the public good.⁸² Therefore, prong two cuts more in favor of reproduction as a fair use of the work.

Under the third prong, the public access supporters have a tough argument to make. Courts look for the extent to which the copyrighted product is taken verbatim.⁸³ The court typically only allows fair use arguments to succeed when the product reproduced is not taken in its entirety.⁸⁴ In the case of publishing free state annotated codes, publishers are taking the entire document without

⁷⁷ George Carr, *Copyright Misuse: An Overview*, *Litigation News: Intellectual Property Litigation*, A.B.A., https://apps.americanbar.org/litigation/litigationnews/practice_areas/072810-intellectual-property-copyright-misuse-overview.html (last visited Nov. 17, 2016). (The test itself is not the central argument of this Note, so I summarize what the supporters of fair use in this instance need to prove for a successful case.)

⁷⁸ *Bouchat*, 619 F.3d at 313.

⁷⁹ *Id.*

⁸⁰ See generally *id.*

⁸¹ See U.S. Copyright Office Fair Use Index, *supra* note 73.

⁸² See generally Defendant Public.Resource.Org, Inc.'s Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 2.

⁸³ See U.S. Copyright Office Fair Use Index, *supra* note 73.

⁸⁴ See *Kienitz v. Scornie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

transforming any details.⁸⁵ Therefore, the third prong also cuts against the public access supporters' fair use argument.

The fourth prong is arguably the most important and scrutinized prong. The Seventh Circuit has a standardized approach to the prong: if a work is used as a substitute for the copyrighted work, it is not a valid fair use under the doctrine.⁸⁶ The purpose of the prong is to protect the original creator's profit from his/her copyrighted material but allowing others to create derivatives or complements to the work.

In cases of republishing a state's copyrighted annotated code, there is no question as to whether the copy of the work is intended as a substitute of the official code. It is an exact replica of the work, and the purpose is to allow those who cannot afford the work to circumvent the cost. Further, the United States District Court for the Northern District of Georgia has held that if a plaintiff can show that the allegedly infringing product could breed customer confusion as to which is the original piece, that is enough to win on the fourth prong.⁸⁷

In a parade of horrors approach, taking the code in its entirety and giving it to the public for free may result in no future purchasing of the original documents and no compensation for the original authors. Copyright protection supporters have a better argument here. If the court looks to the standard § 107 prong test presented above, then the court is likely to find no valid fair use argument.

Notably, though, fair use issues are determined on a case-by-case basis.⁸⁸ A case about the publishing of a copyrighted annotated code for purposes of public access has never come before a court. It is not a given that the case will be determined by quasi-bright line rules and common law. However, the copyright holder has a strong argument against fair use regardless of factors in § 107.

C. DUE PROCESS

Where the Copyright Act may allow protection for certain works, substantive due process may preempt. Those supporting public access argue

⁸⁵ Compare the publication of the entire state annotated codes, available at <http://www.LexisNexis.com>, with *Kienitz*, 766 F.3d at 75B.

⁸⁶ See *Kienitz*, 766 F.3d at 758 (stating that the Seventh Circuit looks at "whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited)" (citing *Ty, Inc. v. Publ'ns Int'l*, 292 F.3d 512 (7th Cir. 2002))).

⁸⁷ *CCA & B, LLC v. F + W Media Inc.*, 819 F. Supp. 2d 1310, 1315 (N.D. Ga. 2011) (holding that the plaintiff publisher could have won if it had "met its burden of showing a substantial likelihood of such consumer confusion").

⁸⁸ *Bouchat*, 619 F.3d at 308 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

that the annotations are part of the *Official Code* and therefore are part of the public domain as the law of the state.⁸⁹

1. *Copyright Misuse*. One due process argument rests with copyright misuse doctrine. Copyright misuse is an affirmative defense to copyright infringement used when the amount of copyright protection claimed is “contrary to public policy.”⁹⁰ The portion of the misuse doctrine that is most applicable in cases of state annotations is an argument that the material is “at least partially in the public domain.”⁹¹ The public access argument here relies on the annotation as part of the law and therefore within the public domain.

The misuse doctrine is typically used for noncompetition/monopoly copyright claims.⁹² Supporters of copyright protection have a rebuttal to the misuse doctrine argument; they are not claiming that others cannot create annotations based on the same judicial opinions, just that the annotations as they appear are not to be plagiarized. Further, supporters of copyright protection argue that the code itself only, and not the annotations, is within the public domain. Therefore, public access supporters have a tough argument to make for copyright misuse.

Additionally, a problem exists with testing whether or not annotated codes monopolize judicial opinion citations. According to *The Bluebook, A Uniform System of Citation*, legal citations to Georgia code sections, and most other states’ codes, must use an annotated version of the code be it LexisNexis or Westlaw.⁹³ The citations dictated by the unannotated version are the same citations dictated by the annotated version.⁹⁴ Therefore, it cannot be determined through the citations alone as to whether or not judicial opinions cite to the annotated or unannotated version of the code. If an individual cannot afford to pay for LexisNexis or Westlaw codes, that individual must cite to the official code without access to the code he or she is citing to. The Bluebook notates that citing to the official code, only, is sufficient, making a copyright misuse argument that much more difficult for public access supporters.

2. *Introduction of Substantive Due Process*. Due process in the scenario of access to state annotated codes is best understood by looking at the indigent defendant. The public access argument is not focused on those who can afford

⁸⁹ See Answer to Amended Complaint and Counterclaim of Public.Resource.Org., *supra* note 23.

⁹⁰ Ass’n of Am. Med. Colls. v. Princeton Review, Inc., 332 F. Supp. 2d 11, 17 (D.C. Cir. 2004); see Carr, *supra* note 77.

⁹¹ See Carr, *supra* note 77.

⁹² *Id.*

⁹³ See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 258 tbl.T.1 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

⁹⁴ See *id.*

the annotated code but on those who cannot. The argument holds that the indigent, pro se defendant, who only has access to the unannotated version is at a disadvantage because he or she does not have the same information going into a trial or hearing as do those with enough money to purchase the annotated version. The copyright protection is therefore discriminatory against those in lower socioeconomic standing.

As will be discussed later, the due process argument also involves another issue. Because socioeconomic classes are not traditionally protected classes, the substantive due process analysis comes down to whether access to the annotations is a fundamental right. Ultimately, public access supporters believe access is a fundamental right and copyright protection cannot overcome strict scrutiny.⁹⁵

D. PRIMARY PURPOSE ARGUMENT

The primary purpose of copyright protection is not about protecting the author's right to compensation as much as it is about promoting innovation and creativity.⁹⁶ When protection is given to the state for its annotated code, innovative and novel approaches to the law are arguably hindered in the courtroom. Supporters of public access could argue that indigents have less of an ability to create compelling arguments because of inefficient research without the annotations.

Although a possible argument, this is not the argument that the public access supporters necessarily want to rely on. Supporters of copyright can easily argue the opposite: equal access to annotations inhibits innovation by giving everyone involved the same starting point for research. Furthermore, before annotations existed, people still won cases by using effective arguments.

E. WORK-FOR-HIRE VERSUS STATE ACTION

Although no case focusing on copyrighting annotated codes has gone before a state or district court, debate has occurred at the state level. Two states have outlawed copyrighted annotated codes altogether, and Oregon's legislature has backed off its desire to copyright annotated codes.⁹⁷ Oregon argued for

⁹⁵ *See supra* pp. 142–43.

⁹⁶ *Functions of the Copyright Office, United States Copyright Office: A Brief Introduction and History*, UNITED STATES COPYRIGHT OFFICE, <http://copyright.gov/circs/circ1a.html> (last visited Nov. 19, 2016).

⁹⁷ *See* Answer to Amended Complaint and Counterclaim of Defendant Public.Resource.Org, *supra* note 1; Defendant Public.Resource.Org., Inc.'s Memorandum of Law in Support of Its

copyright of state code annotations largely on the basis of accuracy.⁹⁸ Ultimately, the legislature backed off of copyright infringement claims to avoid litigation. The Oregon case differs from the Georgia case in that legislative staffers created Oregon's annotations whereas a private company created Georgia's annotations through a work-for-hire contract.⁹⁹ The distinction between Oregon and Georgia will be important in future litigation. If annotations are created by legislative staffers rather than through a work-for-hire contract with a private company, then there is a larger state action problem at issue.

As will be discussed later, the central question is whether the annotations are part of the law. In a work-for-hire contract, as done in Georgia, the annotations are more easily separated from the legislative process than annotations written by the staffers, as was the case in Oregon, because a third-party creates them.¹⁰⁰ Because work-for-hire contracts are more easily separated from the lawmaking process as set forth through state and federal constitutions, the issue is better for analyzing deeper.

The state action problem, meaning the fact that state workers themselves are creating the annotations, in situations such as was the case in Oregon, leads to a more difficult distinction between what is the law and what is an annotation. Therefore, the court is ultimately less likely to find copyright protection for annotations created by legislatures, such as those in Oregon, than annotation created through work-for-hire contracts, such as those in Georgia.

V. GETTING TO THE FUNDAMENTAL ARGUMENT

All arguments presented for and against the copyright protection of state code annotations center around a single, fundamental disagreement. Both sides have persuasive arguments as long as their definition of "law" is correct. As a black letter rule, the law itself "is in the public domain" and is not protected under copyright.¹⁰¹ Neither side disagrees with the bright-line rule.¹⁰² Rather,

Motion for Summary Judgment, *supra* note 2; Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 2.

⁹⁸ See *State Statutes/Code: Holder of Copyright*, *supra* note 4; *CoCommonlaw*, *supra* note 5.

⁹⁹ See generally Beth Ford, *Open Wide the Gates of Legal Access*, 93 OR. L. REV. 539, 539 (2014); see also Amended Complaint for Injunctive Relief, Code Revision Comm'n v. Public.Resource.Org, Inc., 1:15cv2594 LEXIS *1, Doc. 11 (N.D. Ga. 2015).

¹⁰⁰ Amended Complaint for Injunctive Relief, Code Revision Comm'n v. Public.Resource.Org, Inc., 1:15cv2594 LEXIS *1, Doc. 11 (N.D. Ga. 2015) (explaining the work-for-hire contract between LexisNexis and the Georgia Code Revision Commission).

¹⁰¹ See Fortney, *supra* note 21, at 68.

the sides disagree on whether the annotations themselves are law.¹⁰³ Therefore, the one major issue is whether the annotations themselves are law.

If the annotations are part of the law, then supporters of public access can win on a due process argument. Courts have long held that primary law itself is not protected under the Act.¹⁰⁴ Importantly, defining the law as encompassing annotations eliminates the possibility that the private entity *or* the state can hold the copyright. Therefore, if the annotations are relied upon as law, the supporters of public access win.

If the annotations are not part of the law, the copyright protection supporters can win on a statutory claim. The annotations meet that standard of minimal creativity and can be protected as derivatives or compilations under the statute.¹⁰⁵ Further, there is likely no fair use exception for annotated state codes as those using it use the entire document without any changes.¹⁰⁶ On the basis that the annotations are merely guidelines to help with research, states and copyright protection supporters win.

There are different theoretical approaches for determining what makes up the law. As will be examined, one theory may lead to the state winning this argument and one may lead to the public access supporters winning the argument.

VI. WHAT IS THE LAW?

A. TEXTUALISM

“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.”¹⁰⁷ I reference this quote because I think it encapsulates perfectly

¹⁰² See Answer to Amended Complaint and Counterclaim of Defendant Public.Resource.Org., Inc., *supra* note 23, at *22 (explaining that the state agrees that laws are not subject to copyright protection).

¹⁰³ Compare Defendant Public.Resource.Org., Inc.’s Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 2, with Plaintiff’s Memorandum of Law in Support of Its Motion for Summary Judgment, *supra* note 2.

¹⁰⁴ See BRAUNEIS & SCHECHTER, *supra* note 13, at 593.

¹⁰⁵ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (discussing modicum of creativity standards).

¹⁰⁶ See Answer to Amended Complaint & Counterclaim of Defendant Public.Resource.Org., Inc., *supra* note 23, at *5.

¹⁰⁷ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, The Tanner Lectures on Human Values Delivered at Princeton University (Mar. 8–9, 1995), UNIVERSITY OF UTAH 85, http://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf (citing THE FEDERALIST NO. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961)).

the textualist perspective. Textualists hold that while common law is good and not an infringement on the separation of powers, common law should be held for what it is, adjudication.¹⁰⁸

The idea is that a court, an adjudicative body, takes a case at its specific facts. How the law applies to that set of facts should therefore be limited to those specific facts. In that sense, the common law is limited because in reality, every case differs to a certain degree. No case is binding, and every case can be compared and contrasted with every other case.

Further, common law is by nature *ex post facto* in that the judgment comes after the violation has occurred.¹⁰⁹ If the judgment is suddenly construed as a generalized law, the Constitution is violated and separation of powers is ignored.

For example, in using the O.C.G.A. for misdemeanor possession of marijuana, the statute states, “it is unlawful for any person to purchase, possess, or have under his or her control any controlled substance.”¹¹⁰ From a textualist perspective, the meaning of the statute is straightforward and needs no annotation to define it.

First, the textualist principle starts with the text itself. The idea is that the text itself is the best way to examine the legislative intent with the law. If there are no ambiguities, then the analysis is done and facts fit either within or without the law.

In looking at context clues, the word “possession” is largely clarified. By using the words “possess, or have under his or her control . . .,” the legislature shows that possession does not mean “have under his or her control.”¹¹¹ If the terms meant the same thing, the statutory language would be superfluous.¹¹² Therefore, under a textualist argument, possession must mean something broader—that an individual can be guilty of possession without necessarily holding marijuana in his or her hand. “Possession” has a spectrum of meaning, as do most words. From a textualist perspective, still, there need not be any more information given than the facts of the case and the text of the statute; if an analysis “goes beyond that range” of possibilities, the interpretation is impermissible.¹¹³

¹⁰⁸ *See id.* at 85–86.

¹⁰⁹ *See id.* at 86.

¹¹⁰ O.C.G.A. § 16-13-30(a) (2015).

¹¹¹ *Id.*

¹¹² CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014).

¹¹³ *See* Scalia, *supra* note 107, at 99.

Textualists look at an “objectified intent” and not a subjective one.¹¹⁴ The subjective alternative, Scalia says, “is simply incompatible with democratic government” because it expects the common citizen to understand a legislator’s mindset rather than to comprehend what was actually portrayed in the text of the statute.¹¹⁵ The point is that a judge and jury need look at how a common individual reasonably could interpret the statute and not how a scholar in the field would analyze it.¹¹⁶

1. *Applying Textualism to Annotated Codes.* Under a textualist approach, annotations of state codes are subject to state copyright protection. A textualist perspective holds that the code sections themselves are the law and that the annotations are mere derivatives compiling and analyzing common law adjudications to explain how courts have applied the law in certain sets of facts.¹¹⁷ Textualists more than likely see the incorporation of annotations into the law as dangerous. They share the idea that common law adjudications are individualized decisions not to be generalized into a binding rule.¹¹⁸ Doing so could create confusion and reliance on that which does not determine the outcome of a case.¹¹⁹

Further, textualists believe that whether or not it is good law to have annotations protected by copyright is up to the legislature; it is not up to the court to determine what the legislature intended for this presumably unanticipated issue under the copyright act.¹²⁰ The courts must interpret the law in the context of the constitution and the facts.¹²¹ This is not to negate that a new law may be better or that federal or state subsidies could grant access while still providing private authors with funds. Rather, this illustrates that judges have only the authority to interpret what is in front of them; the rest is left for the legislature.¹²²

¹¹⁴ *Id.* at 92.

¹¹⁵ *Id.*

¹¹⁶ *See id.* at 99; *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (stating statutory terms “ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law . . .”).

¹¹⁷ *See* Scalia, *supra* note 107, at 89 (stating “[b]efore the wish becomes a binding law, it must be embodied in a bill that passes both Houses and is signed by the President”).

¹¹⁸ *Id.* at 85–86.

¹¹⁹ *Id.*

¹²⁰ *See id.* at 97–98.

¹²¹ *See generally, id.*

¹²² *See id.* at 98; *see also* *Harris v. McRae*, 448 U.S. 297, 318 (1980) (explaining the issue of whether a right or choice “warrants federal subsidization is a question for Congress to answer”). Here, the choice is whether to prepare well for a trial or hearing with the help of privately created annotations.

As the legislature proposed an amendment in 1992, it can again. If the judgment leads to what is not the intention of the legislature, subjectively, the legislature has the power to change the law. As long as what is before the court is not prohibited under the Copyright Act as it is written currently, and that non-prohibition is not contrary to any portion of the Constitution, the court must allow copyright protection for annotations of state codes.

Notably, the outcome under a textualist approach could be different in situations where the annotations are created through a work-for-hire contract than where they are instead created by a state legislature. In the later instance, such as was the case in Oregon, the same body tasked with creating and passing the law is the body creating the annotations and holding the copyrights.¹²³ While the annotations are compilations or derivatives or judicial opinions, once they are fit together to justify a law by the legislature, they arguably become the objective intention of the legislature. On the other hand, where there is a work-for-hire contract, the annotations are creations of a private company.¹²⁴ The private company creates and is paid for the annotations; the state may fact check the citations, or perhaps only hold the copyright.

Under textualist analysis, legislature/legislative staff-created annotations may be per se unconstitutional. The only way for legislature-created annotations to be valid under state constitutions is for the annotations to go through the same process as a bill goes through to become a law.¹²⁵ Once the annotations go through the specified process as dictated through the respective state constitution, then the annotations become law. Such annotations are not subject to copyright protection.¹²⁶ However, under a textualist approach,

¹²³ See Scalia, *supra* note 107, at 89 (stating “[b]efore the wish becomes a binding law, it must be embodied in a bill that passes both Houses and is signed by the President”). The argument here is that the more the creation of the annotations resembles the passing of a law within the legislature, the stronger the argument that the annotations are part of and treated as the law itself.

¹²⁴ Proposed Brief of Amicus Curiae Matthew Bender & Company, Inc., In Support of Plaintiff at 2-6, Code Revision Comm’n v. Public.Resource.Org, Inc., 1:15cv2594 LEXIS, at *1, Document 38 (N.D. Ga. 2015), https://docs.justia.com/cases/federal/district-courts/georgia/ga_ndce/1:2015cv02594/218354/38 (explaining the work for hire contract between the State of Georgia and LexisNexis). It should be noted that at times the annotations are edited for accuracy by outside Georgia Legal Analysts. This is an insubstantial fact as far as analyzing whether or not the annotations are part of the law. However, if the stated editors are/were members of the state legislature, that fact could substantially alter the analysis of whether or not the annotations are part of the law.

¹²⁵ At the federal level, the prerequisites are bicameralism and presentment. The same is true in most instances at the state level. However, interpretations of what the terms mean vary slightly from state to state. Since there is not one particular mechanism, this portion of the analysis is purposefully left broad.

¹²⁶ See BRAUNEIS & SCHECHTER, *supra* note 13, at 589.

annotations created through a work-for-hire contract with a private company are not the law and are therefore protectable under the Copyright Act as long as they meet the requisite standard of creativity.

2. *Equal Protection Clause.* Another route to understanding the textualist frame is in the rational basis test under the equal protection clause because the textualist perspective realizes no fundamental right or protected class at issue in the matter of copyrighting annotated codes. In this analysis the textualist assumption holds that the annotations are not the law and access to them is therefore not a fundamental right as protected under the equal protection clause of the Fourteenth Amendment.¹²⁷ The issue of limited access to annotations created by a private entity is purely an economic one. The group of people discriminated against in that regard is the lower socio-economic classes, the indigent defendants, who cannot afford an attorney or access to the annotations. Under the Fourteenth Amendment's equal protection clause, the impoverished class is not considered a protected class.¹²⁸ Further, this is a neutral regulation, as it does not directly prohibit a specific class from accessing the annotations, so in order to get out of rational basis territory, there must be intent and purpose on the part of the state to discriminate against the class.¹²⁹ The intent and purpose of the copyright is to allow Lexis to recoup its publication and research costs. While public access supporters may argue there is discrimination here, effect is not enough and under the textualist approach, the appropriate standard of review is, therefore, rational basis.¹³⁰

The rational basis test is extremely deferential.¹³¹ States could likely sustain the rational basis test in arguing only that there are limited state funds available and they are necessary elsewhere.¹³² Perhaps, the state could even win on the basis that the private entity must be funded in some way.

Because there is limited information on the subject matter, as the issue has never gone before a court, there is more work to be done in the future. To have a satisfactory rational basis test, the state must explain the basis for keeping the law the same. Georgia, for instance, seems to hold that the rational basis is to fund the private entity (LexisNexis) who authored the work. But the explanation does not explain why the state rather than LexisNexis should hold the copyright to the works.

¹²⁷ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, n.4 (1938).

¹²⁸ U.S. CONST. amend. XIV, § 1.

¹²⁹ See *Washington v. Davis*, 426 U.S. 229, 229 (1976).

¹³⁰ See, e.g., *McClesky v. Kemp*, 481 U.S. 279, 279 (1987).

¹³¹ *Maher v. Roe*, 432 U.S. 464, 478 (1977).

¹³² See *id.* (explaining that use of public funding in a different constitutional way is enough to satisfy the extremely deferential rational basis test).

The take home message is that if the annotations are not “the law,” then states producing annotations through a work for hire contract have a good chance of overcoming the rational basis test. While all individuals have a right to a fair trial and counsel, the state is not obligated to provide the resources needed for efficient research.¹³³ If the annotations are considered research guidelines, then there should be no duty to provide access to all helpful documents, just the code itself and judicial opinions. Therefore, if the annotations are not “the law,” then states may receive copyright protection for the annotated codes created and published by a third party.

B. FIT AND JUSTIFICATION

The overarching purpose of fit and justification is to figure out a resolution to a certain set of facts that not only fits the legal landscape but also creates the best legal landscape possible. In a case before a judge or multiple judges, the role of the court is to interpret the law and apply it to the facts at bar. As Sunstein explains, that is not a simple determinacy of reading a statute and applying it. Instead, courts fit particular facts into the legal landscape and then choose one of several/a few possible outcomes by justifying the solution that gives the law the most integrity.¹³⁴

Supporters of public access, which may win under a fit and justification approach, strive for “maximum access to the law.”¹³⁵ Striving for maximum access is striving for a big picture of the law as it stands. Dworkin theorizes that the law goes beyond mere statutory language because legislatures cannot possibly imagine every instance to which the law may need to be applied.¹³⁶ Instead, it is up to the judge to fit the facts into the world of the law and justify his decision as if each possible outcome could be the next chapter in a chain novel of law but one possible outcome would make the novel the best it can be.¹³⁷

Dworkin would argue that the code sections “include [generalities] that invite moral reasoning from judges” to apply the law to the cases in front of them.¹³⁸ For example, in Georgia, the statutory code section regarding

¹³³ *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963).

¹³⁴ CASS R. SUNSTEIN, *There Is Nothing that Interpretation Just Is*, DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD 1, n.*, https://dash.harvard.edu/bitstream/handle/1/16145974/interp8_30.pdf (last visited Oct. 18, 2016) (expanding CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 19–33 (2009)).

¹³⁵ See Fortney, *supra* note 21, at 67.

¹³⁶ See Sunstein, *supra* note 134, at 10–11.

¹³⁷ *Id.*

¹³⁸ *Id.* at 10.

misdemeanor possession of marijuana does not define “possession.”¹³⁹ The annotations below the section on the annotated LexisNexis official code clarify what evidence is sufficient to prove possession. For instance, the annotations explain when proximity to marijuana is and is not enough to show possession beyond a reasonable doubt.¹⁴⁰

Under a fit and justification analysis, the annotations are part of the law because they fit a single code section into the landscape of the law. Without the annotations, it is not clear what the statute means or where the current facts land in the spectrum of the law. For an indigent defendant without access to the annotations, it is not clear that he or she could be charged with possession without having the marijuana in his or her hand at the time of arrest. Therefore, under Dworkin’s fit and justification analysis, the annotations are part of the law and should not be subject to copyright protection.

The analysis for equal protection or due process is unnecessary using a Dworkinian approach. Both sides concede that it is settled that the law is not subject to copyright protection.¹⁴¹ Assuming annotations are part of the law, the analysis ends.

VII. ANALYSIS

A. DEFINING “THE LAW”

A “statutes alone” definition is too narrow a definition of *law*.¹⁴² Courts have held that laws, whether streaming from judicial opinions or statutory codes, are not subject to federal copyright protection because they are law.¹⁴³ However, *Veeck* also notes that building codes, like statutes, become the law once enacted. The question is whether a work-for-hire contract can bring about law created by a third party.¹⁴⁴ Since the law was defined there as including

¹³⁹ O.C.G.A. § 16-13-2(b) (2015).

¹⁴⁰ *Id.* (looking at the annotations on LexisNexis copyrighted material which *compare* *Kier v. State*, 663 S.E.2d 832, 832 (Ga. App. 2008) (explaining when proximity to marijuana is not enough to show possession), *with* *Davis v. State*, 607 S.E.2d 924, 924 (2004) (explaining when proximity to marijuana is enough to show possession).

¹⁴¹ 1-5 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.12 (2015).

¹⁴² *See supra* note 33.

¹⁴³ Tim Armstrong, *Can States Copyright Their Statutes?*, INFO/LAW (Apr. 16, 2008), <https://blogs.law.harvard.edu/infolaw/2008/04/16/can-states-copyright-their-statutes/> (citing *Veeck v. S. Bldg. Code Cong. Int’l Inc.*, 293 F.3d 791, 180 (5th Cir. 2002) (en banc)).

¹⁴⁴ *Id.*

judicial opinions, a general rule throughout the United States today, courts do not limit law to that which is passed as a bill through the legislature.¹⁴⁵

Like judicial opinions, annotations shape the way statutory codes are read in the context of specific sets of facts. Unlike judicial opinions, there is no evidence published that annotated codes are cited to in court cases as relied upon law. Future research could shed light on this aspect. Notably, however, the cases in the annotations tend to be landmark decisions often cited as precedent in judicial opinions. Ideally, future research should focus on whether the citations to cases exist because they are in annotations or because they refer to landmark cases that simply happen to be in annotations.¹⁴⁶ Evidence that in a majority of cases the opinions cited to are those in the annotations could result in a determination that the annotations are more than a mere research guideline and are actually part of the laws. Since the research is yet to be done and highly complex, it is important to note that just because the evidence is not published yet does not mean it is non-existent. Therefore, it would be foolish to conclude that that annotations are not the law and end the analysis there. It is best to analyze further at a more neutral level. The rest of the analysis will not rely on any one theoretical perspective as correct. Instead, the issue will focus on how a due process claim would/could result from both angles and propose a way to resolve the issue without having to determine whether the annotations are part of the law.

B. SUBSTANTIVE DUE PROCESS

The question for the substantive due process analysis is whether state-held copyright to annotated codes infringe on the constitutional rights of the citizens within the state. There are multiple possibilities for the outcome of a substantive due process analysis for the issue. In analyzing each way, we will look first to whether the right is fundamental and second to the states' interests in the matter.

The first question is whether or access to annotated codes is a fundamental right. Those supporting a public access theory would say undoubtedly yes. The

¹⁴⁵ NIMMER & NIMMER, *supra* note 141 (explaining that law created through a work for hire agreement is not an exception to the general rule that the law is not subject to copyright protection).

¹⁴⁶ See, e.g., *Kennedy v. State*, 277 Ga. 588, 588 (2004) (standing as a landmark case in felony murder law in Georgia cited in twenty-one other cases and located in an O.C.G.A. annotation). Compare O.C.G.A. § 16-5-1 (Supp. 2006), and O.C.G.A. § 16-5-1 (2007), with O.C.G.A. § 16-5-1 (2003) (showing that the first time the 2004 case was published in the O.C.G.A. was in 2006). See *Ward v. State*, 292 Ga. 637, 640 (2013); *Chapa v. State*, 288 Ga. 505, 507 (2011). *But see* *Folson v. State* 278 Ga. 690, 694 (2004) (showing citations to the *Kennedy* case in court opinions occurred both before and after the case was published in the annotations of the O.C.G.A.).

reasoning behind this conclusion is that annotations are part of the law and that procedural due process requires all individuals to have adequate notice of the law.

If there is a fundamental right to access of the annotations, then the court will apply strict scrutiny. To overcome strict scrutiny, the state must have a compelling interest and the copyright of the annotations must be a narrowly tailored to meet a compelling state interest.¹⁴⁷ Keeping taxes low to protect political candidates does not rise to the level of a compelling state interest.¹⁴⁸ Therefore, nothing states have argued thus far seems to satisfy a strict scrutiny test. Under a strict scrutiny analysis, the public access supporters would likely win.

There are other ways besides ideological interpretation of what makes up the law to determine whether access to the annotations is a fundamental right. Some judges look further than the text of the Constitution to history and tradition to find fundamental rights.¹⁴⁹ Cutting in favor of copyright supporters, history has shown that until the digital media age the legality of copyright protection for state annotated codes were not challenged. Georgia first published copyrighted annotated codes in 1935 and involved LexisNexis beginning in 1978.¹⁵⁰ Around 1992, the codes were published online.¹⁵¹ It was not until approximately thirteen years after LexisNexis granted access to the annotated code online for a fee that the first challenge against state-copyrighted annotated codes was filed in 2015. Therefore, history and tradition do not support a conclusion that access to annotated codes is a fundamental right.

From the perspective of copyright supporters, the issue has not changed and the problem has not changed; the only difference is the medium. If no problem of access to the law existed because of copyrighted annotations since they began, there should not be a problem now. Therefore, there is no reason it should be treated any differently than if the annotations were still only published in book form. If the Court accepts this argument, then access to the annotated codes is not a fundamental right.

¹⁴⁷ Health and safety have been held to be compelling state interests; however, avoiding a raise in taxes for political purposes is not a compelling state interest. See JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 4.27 (2016–2017 ed.).

¹⁴⁸ See *Commonwealth v. Suplee*, 387 A.2d 85, 91–92 (Pa. Super. Ct. 1978) (stating “protecting the reputation of candidates for public office is clearly not a compelling state interest” (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 722 (1964))); see also *Leger v. Sailer*, 321 F. Supp. 250, 252 (E.D. Pa. 1970) (explaining “saving or preserving public funds — is not compelling” specifically when balanced with “the severity of the deprivation imposed upon the excluded group”).

¹⁴⁹ See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 304 (1990); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

¹⁵⁰ E-Mail from David A. Collins, to Mark Sebastian Thompson, *supra* note 61.

¹⁵¹ See *id.*

If access is not a fundamental right, then the appropriate test is a very deferential, rational-basis test. The state interest for protection could be paying the creators of the annotations back for their work by allowing them to sell the material. The Court would ultimately defer to the states in such a scenario.

However, it may not be so cut and dry. Courts tend to lean more towards indigents when money stands as a barrier to a significant benefit.¹⁵² This is where the analysis gets interesting. Even if the Court holds, as those arguing for protection believe, that the right to annotations is not a fundamental one, the court may apply a heightened standard. The Court tends to apply intermediate scrutiny to classes such as gender and sexual orientations that may not reach the level of protected class but have still faced discrimination in the past.¹⁵³ Although it may not reach strict scrutiny, there is a good argument for it being some form of intermediate scrutiny between rational basis and strict scrutiny.

With this potential increase in scrutiny, the Court should look to a two-part analysis. First, the Court should look to the means and the ends and decide whether the means are reasonably calculated to reach the goal. The first prong is largely a recap of the rational basis test. Whether the right at issue is a fundamental one is irrelevant for the purposes of the analysis of the first prong. The questions for the prong would be: (1) What is the state interest? And (2) How does the copyright protection allow the state to obtain the interest?¹⁵⁴ The state interest is accurate annotations to facilitate legal research. The interest is obtained through copyright protection because the protection allows the authors of the annotations to receive compensation for their work. Therefore, the first prong cuts in favor of copyright supporters.

In the second prong, the Court should look to reasonable alternatives for how to reach the goal. The second prong leans more toward the strict scrutiny approach, but does not go so far as to say that a viable alternative avoiding the usurpation of the right will always override the route chosen to achieve the state's goal. Instead, it looks to available alternatives and how those alternatives burden the state. If the alternatives burden the state any more than the option chosen, then the Court should lean more towards deferring to the state on the second prong.

¹⁵² See, e.g., *Leger*, 321 F. Supp. at 252.

¹⁵³ Brett Snider, *Challenging Laws: 3 Levels of Strict Scrutiny Explained*, FINDLAW (Jan. 27, 2014, 9:05 AM), http://blogs.findlaw.com/law_and_life/2014/01/challenging-laws-3-levels-of-scrutiny-explained.html.

¹⁵⁴ See *id.* (explaining the intermediate scrutiny approach as determining the existence of an “important government objective” and whether the state action “substantially related to achieving the objective”).

Consider the second prong a sliding scale between rational basis and strict scrutiny. To clarify the analysis, look at the pending Georgia case. Georgia holds the copyright to provide the private annotators payment for their work. The state may have other reasons for doing so, but regarding the information currently available, this is the primary reason.

There are two conceptually simple alternatives. First, Georgia could open access, completely eliminating the copyright protection, and raise tax revenue to fund the private company. Raising taxes is burdensome on the state by forcing political change and forcing those who may never use the goods to pay for them via tax dollars. Therefore, the alternative is not a viable one.

Second, Georgia could change the agreement they have with LexisNexis to allow LexisNexis to hold the copyright and sell its product. Allowing LexisNexis to hold copyright could eliminate the legal issue, but it would not satisfy public access supporters. Without the state-held copyright, it is a much harder argument to make that the annotations are the law. True public access supporters would be unsatisfied with the alternative because if annotations are not the law, they may receive copyright protection. With a lack of viable alternatives, the second prong also cuts in favor of copyright protection supporters.

Ultimately, using a sliding scale approach and a history and tradition analysis to the due process issue, the state may have a better argument over all. However, if the court finds that the annotations are explicitly the law, the issue could change.

VIII. CONCLUSION

The first major distinction this Note makes is between annotated codes made through work-for-hire contracts and those created by legislative staffers and legislators. From both a textualist and Dworkinian perspective, where legislative staffers and legislators create annotations for state codes, the state may not hold the copyright to the code.

For work-for-hire contracts granting the state the copyright and the private entity the profit, the question is more complex. Under the textualist perspective, states have a strong argument that they can hold copyrights to their annotated codes. Under the Dworkinian approach, the annotated codes are not subject to copyright protection even under a work-for-hire contract. Both perspectives agree that annotations created by legislative staffers are not subject to state copyright protection but disagree on how to handle situations where a work-for-hire contract exists between a state and a private entity.

Determining whether the annotations are part of the law will determine the future of copyrighting annotated codes. Rejecting the theory that annotations are part of the law through a textualist perspective, the state wins as long as unannotated versions of the code are free, reliable, and accessible, and as long as the annotations reach the threshold level of creativity. Where the court takes a Dworkinian approach on the other hand, the annotations are not subject to copyright. If the annotations are part of the law, and the law cannot be copyrighted without infringing on the constitution, then the annotations cannot be copyrighted.

As the law currently stands, the supporters of copyright protection will likely win where a state holds copyright to annotations that reach the threshold of creativity through a work-for-hire contract. Analyzing through a rational basis and proposed intermediate scrutiny test, copyright protection supporters win. Only under strict scrutiny do the public access supporters win. Subjecting the case to a strict scrutiny approach is to express one ideology and subjecting the case to rational basis analysis is to accept an alternative ideology. To avoid becoming a political/ideological body versus a neutral decision maker, the court should apply an intermediate approach looking at means end analysis and viable alternatives. In an intermediate approach, copyright supporters likely win.

In the end, the subject of state-held copyright of official annotated codes is one that will continue to be scrutinized as more challenges come to light. The law has room to change and room to grow. Ultimately, as the law stands today, copyright protection supporters will likely win as long as the circumstances are substantially similar to that of the Georgia case and an unannotated version is accurate and available to the public.