A Research Tool is Not Law: A Response to *Code Revision Commission v. Public.Resource.Org, Inc.*

Caroline L. Osborne[1]

Table of Contents

This article explores how the recent Eleventh Circuit decision, Code Revision

[1] Associate Professor of Law and Director of the William J. Farmer, Jr. Law Library, West Virginia University College of Law and a member of the State Bar of Georgia, inactive status. I also recognize the support of the West Virginia College of Law for their support and contribution through an Arthur B. Hodges Summer Research Grant to Caroline L. Osborne. I extend my thanks to Laura N. Gasaway, Anne Klinefelter, Shine Tu, and Sally Wiant for their counsel in writing this article.

Commission v. Public.Resource.Org, Inc., should be treated on appeal to the Supreme Court. The Court of Appeals held that a state could not claim copyright in the state's statutes nor in the value-added materials the commercial publisher included in a state's codification of its laws.

This article considers questions of what is law, who is the author, and the legislative process in which all states' laws are made. This article concludes that the democratic foundation of state legislatures requires recognition of the electorate as owners and authors of the law but distinguishes research tools created by commercial publishers in a work for hire arrangement dictated by statute as a delegation a step too far to constitute law or "law like" for denial of copyright protection.

The question of copyrightability of value-added annotations to the law is currently pending review by the Supreme Court. This article examines the copyrightability of value-added content, considering the factors of author, authority, and process in the context of the creation of such content and concludes that this information, when assembled and selected by publishers, even when presented as part of a code with official status is copyrightable.

I. Introduction

In the recent Eleventh Circuit decision of *Code Revision Commission v. Public.Resource.Org, Inc*., (herein "Commission v. Pro"; herein also Code Revision Commission is "Commission")[2] the question raised is the copyrightable of a research tool, an annotation. This article concludes that the value-added annotations contained in the O.C.G.A. are not *law like*, are not created by public officials pursuant to an equivalent exercise of sovereign power, not constructively authored by the People, and not part of the public domain.

Specifically, the Eleventh Circuit addresses the question of if a state may assert copyright in the value-added research tool of an annotation (i) created through a work for hire arrangement with a commercial publisher as supervised by a statutorily created code revision commission comprised of a combination of elected and un-elected members, (ii) created pursuant to a detailed statutory dictate, and (iii) presented as part of the annual bill approved by the legislature resulting in the enactment of the Georgia statutes into positive law. The decision in *Commission v. PRO* is based on an analysis of three factors described as hallmarks of law or "[p]ut simply, there are certain things that make the law what it is."[3] The three factors, or hallmarks of a law, examine:

---

[2] *Code Revision Commission v. Public.Resource.Org, Inc.*, 906 F.3d 1229 (11th Cir. 2018), *cert. granted*, 2019 WL 1047486 June 24, 2019) (No. 18-1150).

[3] *Commission*, 906 F.3d at 1242.

1. Authority - Is the work authoritative as a law?
2. Process - Is the work created through a prescribed process that confirms its legal effect or the derivation from which deprives it of legal effect?
3. The Author - Who is the author and, if the author is a public official, is that author a public official entrusted with the exercise of legislative or sovereign power?[4]

The Eleventh Circuit examined each of these three factors in the context of the State of Georgia's assertion of copyright in the value-added annotations included as part of the Official Code of Georgia (herein "O.C.G.A.") concluding that the annotations are constructively authored by the People pursuant to an exercise of sovereign power through the agents of the Georgia legislature and are authoritative as merged into the O.C.G.A. This article explores the question of what constitutes law for purposes of copyright in light of the three factors identified as hallmarks of law and confirms that all three factors fail.

Copyright benefits the People in important ways, encouraging creative investment and the creation of original works.[5] Copyright is a substantial obstacle to access to the law. Conflict between the desire to make information widely available and accessible and the need to protect and encourage the creation of new works opens an opportunity for dialogue to improve both access to the law and copyright. Conflict between the creator and the user is a long running philosophical debate in copyright.[6] In a discussion of the 1909 Copyright Act, the House Report sets out the philosophy for U.S. copyright law.

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings . . . [but rather that] the welfare of the public will be served, and the progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.[7]

Balancing the competing interests is difficult- even more difficult to balance between the public's right to access the law and a large, profitable, commercial publisher' right to claim copyright and earn income for original content added. It is accepted that an author owns the copyright in original material added to a work in the public domain. Providing incentive and encouraging the creation of new original work is central to copyright. Why would a for-profit-company go to the expense of

---

4 *Id*.

5 GOLDSTEIN §1.13.

6 *Id*. "Is copyright an author's right giving creators and their publishers a claim in every market in which consumers will pay? Or is copyright a user's right, entitling consumers to get a work free unless authors and publishers can show that, deprived of payment they will have no incentive to create and publish new works?" *Id*.

7 H.R. REP. NO. 2222, at 7 (1909).

> In enacting a copyright law Congress must consider two separate questions: First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the and granted be detrimental to the public? The granting of such exclusive rights under the proper terms and conditions confers a benefit upon the public that outweighs the evils of the temporary monopoly. *Id*.

adding value to the public domain if it could not hold copyright in that original work and earn money from it? Would the People be better off if commercial entities such as Lexis and Westlaw ceased creating annotations for the reason that they were no longer economically viable to produce for absence of copyright? Answering the ultimate question of facilitating greater access to the law is critical but is beyond the scope of this article. Conflating research tools designed to facilitate the discovery of relevant law or elevating selected value-added content to an authoritative position beyond its traditional status is highly problematic if not detrimental to accessing the law.

The relationship between the author of the work and the government is critical. Section 105 of the Copyright Act does not resolve this question in this case as the focus of §105 is the copyrightability of U.S. Government works and not state ownership of a copyright in materials created for a state pursuant to a work for hire relationship.[8] The ability of the U.S. Government to own copyright in a work transferred or bequeathed to them is explicit "but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."[9] By extension,

> [s]ection 105 does not, by its terms, preclude state governments from owning copyrights in works prepared by their officers and employees as part of their official duties . . . . it would seem that copyright could generally apply to works of authorship prepared by employees of state governments.[10]

In *Schnapper v. Foley*, the court concluded Section 105 of the Copyright Act permitted copyright in a film made about the Supreme Court and paid for by the U.S. Government and received by transfer to be owned by the U.S. Government.[11] *Schnapper*, thus, affirms the ability of the U.S. Government to acquire copyright in a commissioned work via a transfer of the copyright from the owner to the U.S. Government. By extension of *Schnapper* and the exclusion of §105 to state government works, the State of Georgia may assert copyright in material assigned to it by Lexis through a contract.

The *Commission v. PRO* decision asks acceptance of a blurring of the line between the work of duly elected legislators in the exercise of their sovereign power and the delegation of the power to make law to non-elected persons and a corporate entity while recognizing the corporate entity's work product as an equivalent of law. While the Eleventh Circuit was focused particularly on Georgia's claim of copyright in the value-added annotations within its code, the decision has far reaching implications for other states with similar arrangements, the research process, and how one looks at research tools. Of specific concern is the implication that an annotation

---

8 17 U.S.C. §105 (2012).

9 *Id.*

10 1 NIMMER ON COPYRIGHT §5.14 (April 2019 – Release No 1070).

11 *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981) *cert. denied* 455 U.S. 948 (1982).

might be transformed from its status as a research tool to something *law like* simply due to the enactment of an annotated code into positive law.

II. The Dispute

A. Publication of the O.C.G.A.

In 1978, the State of Georgia entered into a contract documenting a work for hire agreement with Lexis[12] for the publication of the O.C.G.A.[13] Pursuant to the agreement between Lexis and the State of Georgia, the Commission prepares the text of the law which has the effect of positive law.[14] As the copyright note at the bottom of each screen reflects and per agreement, the State of Georgia asserts copyright on the value-added portions of the O.C.G.A.[15]

A bedrock principle of copyright law is that ownership of copyright vests in the author of the original work.[16] Ownership of a copyright in a work created by an employee in the course of his employment, however, vests in the employer as the author.[17] Similarly, §201(b) of the Copyright Act makes clear that in the instance of a work for hire situation it is the "person for whom the work was prepared is considered the author."[18] The relationship between Lexis, as official publisher of the O.C.G.A., is clearly accepted as a work for hire relationship. Such conclusion is based on the contract for publication which provides that

> [a]ll the contents of the Code . . . shall be copyrighted in the name of the State of Georgia . . . [and] [t]he copyrights shall cover all copyrightable parts of the Code." The Commission asserts a copyright in all portions of the [O.C.G.A.] text except for the statutory text, which it recognizes cannot be copyrighted.[19]

This clearly satisfies the definition of "work made for hire" as defined in §101 of the Copyright Act.[20] It is through the work for hire doctrine that the State of

---

12 For continuity within this article, Lexis is used to refer to The Michie Company and LexisNexis and West is used to refer to Thomson Reuters and West Publishing Company, Inc.

13 GA. CODE ANN. § 1-1-1 (Lexis current through the 2019 Extra Session of the General Assembly).

14 Positive law is a term of art in research designating the law in the O.C.G.A. as the "law". This matters when the text of the law an attorney or person relies upon differs from that of the session law or the text of the positive law. In the event of a difference, positive law will control. *See* Georgia ex rel. Gen. Ass'y v. Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982) (order vacated 559, F. Supp. 37 (1983)). *See also* 1981 GA. LAWS 8, "The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and [Lexis] which is on file in the office of the Secretary of State is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia." *Id*. In the absence of enactment of a code into positive law, the code remains prima facie evidence of the law and the session law the positive and controlling law. ROY M. MERSKY AND DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 222 (8th ed 2002).

15 Certificate of registration number TXU 86-254 and TXU 87-341 were issued to the Commission registering the initial copyright in the legislation edition of the Code of Georgia and a supplementary registration intended to correct errors in the original certificate.

16 GOLDSTEIN, §4.0.

17 *Id*.

18 17 U.S.C. §201(b) (2012).

19 *Commission*, 906 F.3d at 1234.

20 17 U.S.C. §101.

Georgia become *author* of the original work created by Lexis and holder of copyright in the annotations.

Lexis, as publisher, publishes an annotated code routinely updated to incorporate changes and additions to the text of the laws of the State of Georgia enacted by the Georgia legislature.[21] Reflecting the annotated nature of the O.C.G.A., included is both the text of the law and value-added annotations. Per the terms of the contract, Lexis also publishes online via the internet a free unannotated version of the O.C.G.A.[22] The free online version includes the same arrangement, statutory text, numbering, titles, chapters, articles, parts, subparts, captions, headings and history references but excludes other value-added materials including the annotations.[23] In the fee version, online instance of the O.C.G.A. available through Lexis Advance, the value-added content (history references, notes reflecting the history and amendments of the statute, case notes detailing interpretative judicial decisions, research references, and practice aids noting cross-references, and secondary sources identified by the publisher as relevant to the interpretation of the statute) typical for a Lexis annotated statute is included.

B. PRO and Distribution of the Georgia Code

Public.Resource.Org, Inc. is a 501(c)(3) nonprofit organization (herein "PRO").[24] According to its articles of incorporation on file with the Secretary of the State of California, its purpose is

> to create, architect, design, implement, operate and maintain public works projects on the Internet for Educational, Charitable, and Scientific Purposes to the benefit of the general public and the public interest; to increase and diffuse knowledge about the Internet in its broadest sense; to promote and facilitate the expansion, development, and growth of the public infrastructure of the Internet by any means consistent with the public interest through other activities, including, but not limited to, publications, meetings, conferences, training, educational seminars, and the issuance of grants and other financial support to educational institutions, foundations and other organizations exclusively for Educational, Charitable, and Scientific Purposes.[25]

Consistent with its stated purpose, PRO purchased a print copy of the O.C.G.A. copied all 186 volumes in their entirety, digitized the copies for electronic access, and systematically distributed the digital copy on thumb drives and through postings on

---

[21] Code Revision Comm'n Complaint for Injunctive Relief at 6.
[22] Code Revision Comm'n Complaint for Injunctive Relief at 8.
[23] Code Revision Comm'n Complaint for Injunctive Relief at 8.
[24] Public.Resource.Org, Inc., *Articles of Incorporation*, PUBLIC.RESOURCE.ORG, https://public.resource.org/public.resource.articles.html (last visited Nov. 20, 2019).
[25] *Id*.

various websites.[26] The copies distributed and otherwise made available by PRO included the text of the statutes of the State of Georgia and other value-added content including statutory annotations. Specifically, the distribution and copying of the value-added material of annotations in which the State of Georgia claimed copyright set up the court battle over the property interest in the annotations and ultimately the decision by the Eleventh Circuit in *Commission v. PRO*.

III. Hallmarks of Law – Three Factors

It is long accepted that laws uncopyrightable. The law is part of the public domain as a work of the People. *Commission v. PRO* identifies the rule for deciding if a work is attributable to the People as:

> [That] legislative codifications are uncopyrightable derives from the understanding of the nature of the law and the basic idea that the People, as reservoir of all sovereignty, are the source of or law. For purposes of the Copyright Act, this means the People are the constructive authors of those official legal promulgations of government that represent an exercise of sovereign authority. And because they are the authors, the People are the owners of these works, meaning that the works are intrinsically public domain materials and, therefore uncopyrightable.[27]

Each question must be answered in the affirmative to conclude the People are the constructive author placing the work into the public domain thus denying copyright.

1. Is the creation of value-added content, specifically the annotations, done pursuant to exercise of sovereign authority?
2. Is merger of the annotations, required pursuant to O.C.G.A. §1-1-1 as accomplished by the annual presentation of the bill enacting the code into positive law, sufficient to represent "an articulation of sovereign will"[28]
3. Is the official who created the work entrusted with delegated sovereign authority?

These questions focus on the sovereign process, the identity of our lawmakers, and an analysis of those characteristics that indicate a work is law, or bear the indicia of law or the "hallmarks of law."

> Put simply, there are certain things that make the law what it is. The law is written by particular public officials who are entrusted with the exercise of legislative power; the law is, by nature, authoritative; and the law is created through certain prescribed processes the deviation from which would deprive it of legal effect. Each of these attributes is a hallmark of law. These characteristics distinguish written works that carry the force of law from all other works. Since we are concerned here with whether a work is attributable to the

---

[26] *Commission*, 906 F.3d at 1235.
[27] *Commission*, 906 F.3d at 1232.
[28] *Id*.

> constructive authorship of the People, these factors guide our inquiry into whether a work is law or sufficiently law-like so as to be subject to the rule in *Banks*.[29]

Broken down more succinctly, the three factors for analysis are:

1. Authority - Is the work authoritative as a law?
2. Process - Is the work created through a prescribed process that confirms its legal effect or the deviation from which deprives it of legal effect?
3. Author - Who is the author and, if the author is a public official, is that author a public official entrusted with the exercise of legislative or sovereign power?

Each of these factors is considered in detail in the context of the O.C.G.A. annotations.

A. Factor One – Authority – Are Annotations Contained in the O.C.G.A. Authoritative as Law?

Are the annotations included in the O.C.G.A. unique, differentiated from other annotations authored by Lexis, simply due to the guidelines imposed by §29-9-5 of the O.C.G.A. and their inclusion and merger in the O.C.G.A.? Legal research is replete with value-added content and tools. Consider research without headnotes, annotations, cross-references, historical notes, syllabi, comments, citators, and, generally, explanatory material. Research without such tools is the equivalent to a walk in the desert without water. Such value-added material is curated in an editorial and publication process which differs from publisher to publisher and ultimately incorporated into the universe of research materials as secondary sources, research tools, headnotes, annotations, and the like. That publication process relies on the presence of persons[30] to read, synthesize, create, and author specific content for insight and access to legal information. Its status as authority ranges from persuasive in a secondary source such as a comment, treatise or law review article to simply a tool to find other relevant information as in a headnote or annotation. Content from some secondary sources like the Restatements is appropriate for citation; content from other secondary sources, research tools, headnotes, and annotations, for example, is not.

Legal research sources divide into primary and secondary authorities. Constitutions, judicial opinions, statutes, and regulations are the law and primary

---

[29] *Id*. at 1242-43. The rule articulated in *Banks* inquired "whether the work is attributable to the constructive authorship of the People, which is to say where it was created by an agent of the People in the direct exercise of sovereign authority." *Id*. at 1242.

[30] Recognizing the advances in artificial intelligence, *persons* should be read to include systems designed by publishers to identify material of potential relevance. The specific implication is the ability of a publisher to use an algorithm to create or assist in the creation of value-added content.

authorities.[31] Everything else is considered secondary authority.[32] The distinction between the law and everything else, depends on if the final product is the result of the actions of a public official engaged in the individual's law-making capacity.[33] Sources further divide into mandatory authority and persuasive authority.[34] A primary authority may be mandatory or persuasive based upon jurisdiction; however, secondary authorities are always persuasive. Some use the additional subcategory of *finding tool* as a further classification of certain secondary sources. Finding aids or tools such as annotations and digests are examples of this further classification of secondary sources fail to rise to even persuasive authorities. Their sole purpose is to assist the researcher in identifying other relevant materials.[35]

1. The Annotation

> Annotations – (1) statutory: brief summaries of the law and facts of cases interpreting statutes passed by Congress or state legislatures that are included in codes; or (2) Textual: expository essays of varying length on significant legal topics chosen from selected cases published with the essays.[36]

Most states and the federal government have an annotated instance of their law, some two by different publishers, typically West and Lexis. Typical features of an annotated code include notes of decision and research references to secondary and primary sources of law. Good researchers utilize the annotations or notes of decision to ensure comprehensive and competent research. The case annotations are critical in highlighting judicial decisions that interpret, explain, or, even, overrule the statutory provision. Context is key here; however, in assessing the value and appropriate role of the annotation.

In a recent news article Georgia's sodomy law was used as a suggestion of the critical nature and role of the annotation.[37]Georgia's sodomy law[38] remains in the code notwithstanding the subsequent Supreme Court decision declaring the law unconstitutional.[39] The suggestion is that the case annotations alone which make the unconstitutional status of the law evident to the researcher. While the notes of decision are one tool that should ultimately guide the researcher to this conclusion,

---

31 AMY E. SLOAN, BASIC LEGAL RESEARCH TOOLS AND STRATEGIES 16 (7th ed. 2018).

32 *Id.*

33 In explaining the distinction to my class, I frequently use the example of a judicial opinion written by a judge is an action done in the judge's law-making capacity and thus "law" versus a speech to a law school class, an activity not undertaken in the law-making capacity and thus not law.

34 SLOAN at 16.

35 Annotations and digests are not appropriate for citation due to the absence of expertise in their creation and their role as finding aids.

36 MERSKY at xviii.

37 Adam Liptak, *Accused of "Terrorism" for Putting Legal Materials Online*, May 13, 2019. https://www.nytimes.com/2019/05/13/us/politics/georgia-official-code-copyright.html?searjResiltPosition=3.

38 GA. CODE. ANN. §16-6-2 (Lexis Current through the 2019 Extra Session of the General Assembly).

39 *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (reconsideration denied December 17, 1998). *See also*, Lawrence v. Texas 123 S.Ct. 2471, 2484 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) a Texas statute making it a crime for two persons of the same sex to engage in consensual acts of sodomy in the privacy of the home was unconstitutional).

current validity of the statutory provision is best determined by the use of a different tool, that of a citator, not the annotation.

One must acknowledge the role of the author/publisher in the creation of case annotations. Annotations vary based on the publisher and may differ from publisher to publisher. Based on guidelines and a publisher specific created and detailed decision matrix, West may include a headnote or annotation to a case or statute, respectively, where Lexis choses to omit. In part, this is why law students are instructed to check both versions of an annotated code where they are available and time and budget permit. The suggestion that the annotations to the O.C.G.A. are better and deserving of special treatment than those included in the West version of the Georgia Code because they have the imprimatur of the Commission is disturbing. Equally concerning is the suggestion that an annotation be transformed from its status as a research tool to something *law like* simply due to an expansive reading of the merger language in O.C.G.A. §1-1-1. The annotation is and remains an annotation notwithstanding the language of §1-1-1. It is a tool to aid the attorney in conducting comprehensive and thorough research. The annotations included in the O.C.G.A. are neither unique nor differentiated from other annotations authored by Lexis or West, simply due to the guidelines imposed by §29-9-5 of the O.C.G.A. and their inclusion and merger in the O.C.G.A.

2. Comments Distinguished from Annotations

Commission v. PRO suggests that annotations hold an authoritative position in Georgia as suggested by their treatment by Georgia courts.

> [T]he annotations are not simply adopted by the legislature as an official reference work, but also, in a very meaningful sense are written by the General Assembly – a fact that further accentuates their legal significance. The annotations are not merely expositions on the meaning of statutes, but rather are official comments authored by the same body that wrote the statutes. Thus, it would be only natural for the citizens of Georgia to consider the annotations as containing special insight into the meaning of the statutory text, and to therefore confer upon the annotations special status.[40]

In support of this argument the opinion lists ten decisions in which a comment is cited to in support of an argument. Comments are distinguishable from annotations. Consider, by way of example, comments to the model Uniform Commercial Code ("U.C.C."). A project of the American Law Institute, the U.C.C. is drafted by experts and includes commentary on the provisions. An initial draft of the comments to the U.C.C. included extensive commentary considered by the drafters to be "an indispensable part of the UCC framework."[41] The drafters even went so far as to

---

[40] *Commission*, 906 F.3d at 1250.

[41] Sean Michael Hannaway, *Jurisprudence and Judicial Treatment of Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 967 (1990).

identify the comments to the model code as interpretive aids.[42]Despite the clear indication by the drafters of the comments of their value and importance, the interpretative aids nomenclature was omitted in subsequent drafts. Omission of such designation does not diminish the value of the comments to the researcher. They remain a valuable tool written by experts that may be cited to a court in support of an argument. "While reliance by the legal community does not of itself make the Comments authoritative, the Comments do provide a common frame of reference and understanding of the Code, a factor which should not be ignored when considering their authority."[43] Comments join with committee reports and legislative histories as examples of persuasive sources given high deference but not treated as law. In part, this is due to the expertise of the drafters of the comment and the specific, yet, unique relationship of the comment to the rule or model provision. It is in those important details that a comment is distinguishable from a statutory annotation.

The identity of the author of the comment is critical. In the example of the comments to the U.C.C. the actual authors are the ones writing the model provision. In every way imaginable they are immersed in the crafting of the provision, the wordsmithing of the language, the final product. They are the experts on the topic, the intent of the provision, and the model language. The analogy to the Commission and by extension the Office of Legislative Counsel and Lexis does not hold. For the analogy to work, the true members of the Georgia General Assembly, as the ones proposing draft legislation, crafting the provisions, and carefully debating the language are the experts, not an employee of Lexis or the Commission. It is those actual legislators who must craft the annotation for the annotation to be equivalent of a comment.

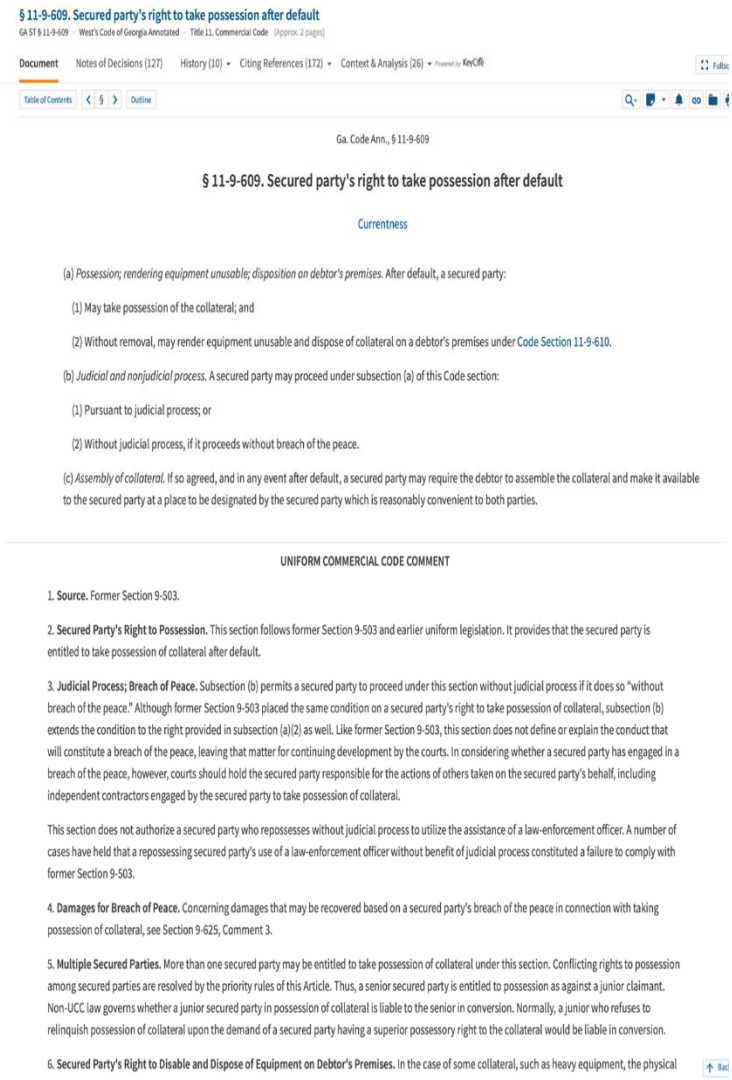
It is interesting that the O.C.G.A. omits the comments to the Georgia U.C.C. while such comments are included in the West version of the Georgia code. For a researcher attempting to understand a provision of the Georgia U.C.C. the comments are no less useful in grasping an understanding of the provision simply because they appear in the West version of the code and lack the stamp of the Commission.

---

42 *Id*. at 968, note 37. "The Official Joint Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application." *Id*.

43 *Id*. at 971.

Image 1 - Excerpt of Provision from the Georgia Uniform Commercial Code from Westlaw showing inclusion of comments.



§ 11-9-609. Secured party's right to take possession after default

GA ST § 11-9-609 · West's Code of Georgia Annotated · Title 11. Commercial Code (Approx. 2 pages)

Document | Notes of Decisions (127) | History (10) | Citing References (172) | Context & Analysis (26) | Powered by KeyCite

Table of Contents | § | Outline

Ga. Code Ann., § 11-9-609

§ 11-9-609. Secured party's right to take possession after default

Currentness

(a) *Possession; rendering equipment unusable; disposition on debtor's premises.* After default, a secured party:

(1) May take possession of the collateral; and

(2) Without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Code Section 11-9-610.

(b) *Judicial and nonjudicial process.* A secured party may proceed under subsection (a) of this Code section:

(1) Pursuant to judicial process; or

(2) Without judicial process, if it proceeds without breach of the peace.

(c) *Assembly of collateral.* If so agreed, and in any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.

UNIFORM COMMERCIAL CODE COMMENT

1. **Source.** Former Section 9-503.

2. **Secured Party's Right to Possession.** This section follows former Section 9-503 and earlier uniform legislation. It provides that the secured party is entitled to take possession of collateral after default.

3. **Judicial Process; Breach of Peace.** Subsection (b) permits a secured party to proceed under this section without judicial process if it does so "without breach of the peace." Although former Section 9-503 placed the same condition on a secured party's right to take possession of collateral, subsection (b) extends the condition to the right provided in subsection (a)(2) as well. Like former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts. In considering whether a secured party has engaged in a breach of the peace, however, courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral.

This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer. A number of cases have held that a repossessing secured party's use of a law-enforcement officer without benefit of judicial process constituted a failure to comply with former Section 9-503.

4. **Damages for Breach of Peace.** Concerning damages that may be recovered based on a secured party's breach of the peace in connection with taking possession of collateral, see Section 9-625, Comment 3.

5. **Multiple Secured Parties.** More than one secured party may be entitled to take possession of collateral under this section. Conflicting rights to possession among secured parties are resolved by the priority rules of this Article. Thus, a senior secured party is entitled to possession as against a junior claimant. Non-UCC law governs whether a junior secured party in possession of collateral is liable to the senior in conversion. Normally, a junior who refuses to relinquish possession of collateral upon the demand of a secured party having a superior possessory right to the collateral would be liable in conversion.

6. **Secured Party's Right to Disable and Dispose of Equipment on Debtor's Premises.** In the case of some collateral, such as heavy equipment, the physical

Bac

3. Codification

Much is made of the unique status of the O.C.G.A. as the official code of Georgia and the process by which the O.C.G.A. is created. This begs the question of just how unique the process creating O.C.G.A. is from that of other codes?

a. Generally

Black's Law Dictionary defines the terms of code and codification, respectively, as:

> *code* - A complete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules, or regulations . . . . Strictly, a code is a compilation not just of existing statutes, but also of much of the unwritten law on a subject, which is newly enacted as a complete system of law.[44]
>
> *codification* - The process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code . . . . The code that results from this process.[45]

Codes are intended to facilitate the research process and finding the law, thus the subject matter arrangement.[46] Each jurisdiction has a single set of statutes *in force* but the text of the law is often published in multiple places in print and online providing multiple access points and should not vary from source to source.[47]

Historically, "official" meant published by the government entity itself. And "unofficial meant commercially published. Today, this has changed and, often a government will designate the publication of the law as *official* bestowing such designation on a specific instance of the publication of the law.[48] Many jurisdictions have both an official and an unofficial code. The distinction of official is little more than a citation preference; however, if a government arranges for the publication via either a government or commercial printer, the designation of official will attach regardless of the nature of the publisher.[49] An official code may be either annotated or, as is the instance with the *United States Code*, unannotated.[50] Instances of a code may differ in two ways: (1) a different source as the base [51] and (2) inclusion of "value-added" content created and added to the publication by the publisher resulting in an annotated code.[52] Irrespective of these two factors, for research purposes, a researcher may rely upon any instance of an authenticated annotated or unannotated, official or unofficial, code.

The distinction between an annotated code and an unannotated code is based on the existence of the value-added content created and provided by the publisher. Annotated codes are the preference of most researchers because they provide additional content that aids the researcher in locating additional legal sources to assist in the understanding, interpretation, analysis, and application of the law to the

---

44 *Code*, BLACKS LAW DICTIONARY (10 th ed. 2014).

45 *Codification*, BLACKS LAW DICTIONARY (10 th ed. 2014).

46 Mersky & Dunn, *supra* note 14, at 150.

47 *Id*. at 151.

48 *Id*. at 152.

49 *Id*. at 151.

50 Unannotated codes contain only the text of the law with references to public law numbers and limited historical information regarding the law. In contrast, an annotated code contains the text of the law, historical references, and research references. *Id*. at 156.

51 For example, the base source for the U.S.C.A. as published by West is the U.S.C. while the base source for the U.S.C.S. as published by Lexis is the Statutes at Large. *Id*. at 159.

52 Thomson Reuters, more commonly known as West Publishing, Lexis, Wolters Kluewer, and Commerce Clearing House are the large legal publishing houses. Value-added content is a reference to the unique content, usually explanatory in nature or directing the reader to additional material, produced by the publisher in an attempt to explain and make the law accessible.

resolution of a legal problem. This value-added content is not the law. It is the work product of editors and others with varying levels of expertise employed by a publisher that may vary by publisher based on the guidelines and individual insight of the writer of that content. The value-added content is a tool for the researcher to employ in developing an understanding of a law.

b. The Federal Example - Codification of the Federal Statutes

At the federal level, the Office of the Law Revision Counsel is charged with the preparation of the United States Code, "a consolidation and codification by subject matter of the general and permanent laws of the United States."[53] It is the Law Revision Counsel who has the initial responsibility for determining the structure, titles, and classification of laws. The Law Revision Counsel reviews a new law and parses it to fit into the overall subject matter arrangement of the United States Code resulting in a systematic organization of the general and permanent laws of the United States or a code.

There are multiple codifications of our federal law. The U.S. Code is the official code acting as prima facie evidence of any law not otherwise enacted into positive law.[54] The U.S. Code, however, is not the only code available. Two other codes, the United States Code Annotated, published by West and the United States Code Service, published by Lexis are annotated codes principally used for research purposes by attorneys and others researching the law throughout the country and the world.[55]

c. The State Example - Codification of the Virginia Statutes

The Commonwealth of Virginia is an example of the typical publication process for state codes. The Virginia Code Commission is established by statute as existing within the legislative branch of the Commonwealth.[56] The Virginia Code Commission is comprised of thirteen members, two members from each the Senate and the House of Delegates, two circuit court judges, one prior member from each of the Senate and the House of Delegates, the Governor or his designees, the Attorney General, the Director of the Division of Legislative Services, and up to two non-legislative citizen members as recommended by the Commission.[57] It is this group that is charged with the publication and maintenance of "a Code of the general and permanent statutes of the Commonwealth."[58] The Virginia Code Commission has the power to arrange for the Virginia Code to be

> [p]rinted and published by or at the expense of the Commonwealth and sold and otherwise distributed by the Commonwealth or (ii) privately printed and published, under the direction and supervision

---

53 OFFICE OF THE LAW REVISION COUNSEL (2019), http://uscode.house.gov.
54 1 U.S.C. §204(a) (2012).
55 FUNDAMENTALS, *at* 145-46.
56 VA. CODE ANN. §30-145 (Lexis current through the 2019 Regular Session of the General Assembly).
57 *Id.*
58 VA. CODE ANN. §30-146.

> of the Commission and upon such terms as the Commission may provide and sold and distributed by the publisher upon such terms, including terms as to price, as the Commission may provide.[59]

The Virginia Code Commission is also empowered with the discretion to arrange for publication of an annotated or unannotated code, determine the arrangement, title, prefaces, annotations, indexing, table of contents, supplementation of the code and[60]

> [to enter into contracts for] editorial work, . . . annotations and other work as may be necessary. All parts of any code published or authorized to be published by the Commission, including statute text, . . . catchlines, historical citations numbers of sections, articles, chapters and titles, frontal analyses and revisor's notes, shall become and remain the exclusive property of the Commonwealth to be used only as the commission may direct. However, the Commission shall acknowledge a property right in and the right to copyright materials prepared and added to any code by the person preparing it. Such materials may include inter alia case annotations, indices, various notes concerning sections and reference tables. [61]

Virginia lawyers may elect to use the unannotated version of the Virginia Code made available at the Virginia General Assembly web site,[62] or one of the annotated versions of the Virginia code published by Lexis and West. Interestingly, and as part of a pattern, the code of preference for Virginia lawyers for generations is the [Lexis] Code[63], the annotated version of the Virginia Code. The Virginia Code Commission is also charged with updating and supplementing the code with any changes or new laws enacted since the last regular session of the Virginia General Assembly.[64]

d. Georgia - Publication of the O.C.G.A

The Commission's role in the publication process as set out in Chapter 28 is detailed and involved. The specific intent of the legislature regarding the O.C.G.A. is spelled out in §1-1-2

> The enactment of this Code is intended as a recodification, revision, modernization, and reenactment of the general laws of the State of Georgia which are currently of force and is intended, where possible,

---

59 *Id.*

60 *Id.*

61 VA. CODE ANN. §30-147.

62 LIS VIRGINIA LAW (2019), https://law.lis.virginia.gov/vacode.

63 The Code of Virginia as published by Lexis as successor to Michie's and sometimes referred to as the Michie's Code.

64 VA. CODE ANN. §30-148.*See also* S.C. CODE ANN. §2-13-60 (current through Ch. 1-27 of session 123) (describing duties of the South Carolina Code Commissioner including

(3) note by annotation decisions of the State Supreme Court, the State Court of Appeals, and the federal District Court of South Carolina and decisions relevant to the State from the federal Fourth Circuit Court of Appeals and the United States Supreme court under the appropriate sections of the codified statutes the State Constitution of 18905, the United States Constitution, and the state rules of court;

(4) note by annotation all unpublished opinions sent to the Code Commissioner by a federal District Judge of the South Carolina District, which in the Code Commissioners opinion, affect or invalidate a South Carolina statute, act or resolution.) *Id.*

> to resolve conflicts which exist in the law and to repeal those laws which are obsolete as a result of the passage of time or other causes, which have been declared unconstitutional or invalid, or which have been superseded by the enactment of later laws. Except as otherwise specifically provided by particular provisions of this Code, the enactment of this Code by the General Assembly is not intended to alter the substantive law in existence on the effective date of this Code.[65]

The specific legislative intent identified is the recodification and reenactment of the general laws of Georgia.[66] The powers and duties of the Commission as set out in §28-9-3 must be read to be consistent with the intent proscribed by the legislature.[67]

O.C.G.A §1-1-1 governs enactment of the code. Consisting of two complex sentences, the provision attempts to acknowledge the routine publication process of a code.

> The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and [Lexis] pursuant to a contract entered into on June 19, 1978, is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion of such codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials pursuant to the contract and shall be published by authority of the state pursuant to such contract and when so published shall be known and may be cited as the "Official Code of Georgia Annotated.[68]

The first sentence establishes the positive law position of the O.C.G.A. and acknowledges the work for hire relationship with Lexis. The second sentence acknowledges that it is this version of the Georgia statutes that is considered official and that the code to be produced is an annotated code replete with the content customary for an annotated code. Much is made of the use of the word "merge" in the second sentence. In *King v. Burwell*, the Supreme Court states that if the statutory language is plain, it must be enforced according to its terms.[69] Is the language plain? On its face it would appear so, but is the reading of the second sentence dependent upon the reader? Is the language deceptively not plain?

In *Commission v. PRO* a detailed discussion of the definition of the word "merge" is undertaken with the prevailing definitions from:

> (1) *Random House Dictionary of the English Language* highlighted as "to lose or to cause to lose identity by uniting or blending" and "to

---

65 GA. CODE ANN. §1-1-2.
66 *Id.*
67 *See* GA. CODE ANN. §29-9-3 and specifically GA. CODE ANN. §28-9-3(9).
68 GA. CODE. ANN. §1-1-1.
69 *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

> combine or to unite into a single unit,"[70] (2) *Webster's Third New International Dictionary's* definition of "to become combined into one' and to lose identity by absorption or intermingling'," [71] and (3) the Oxford English Dictionary definition of "to be absorbed and disappear, to lose character or identity by absorption into something else; to join or blend,' and 'to combine to form a single entity'

considered.[72] The court focuses on the nature of the item created by the merger of the annotations with the statutory text thus creating the O.C.G.A. as published under the authority of the State of Georgia.[73] What is created is an annotated code not distinct from any other annotated code even given the existence of O.C.G.A. §1-1-1 and title 28 which prescribe a detailed process that outlines a high degree of involvement by the Commission and the status of the O.C.G.A. as positive law. But does that level of detail and involvement transform the authority of the annotation into something more?

The explicit choice of the Georgia General Assembly to create an annotated code, the preferred style of code for research purposes, is not inherently the choice to transform the simple annotation into something more in the process. Georgia easily could have elected to create an unannotated code and, in fact, did. The state's arrangement with Lexis resulted in multiple options designed to facilitate access to the law. The law, as in the actual text of the statutes, is made readily available online and with no claim of copyright. Print versions of the annotated code were also made available at a minimal cost.[74] Finally, the online version of the annotated code is made available solely by subscription to Lexis Advance. In any of these permutations, the law is available in a range of options from no cost to expensive. The presence or absence of the annotations does not distinctly alter the text or meaning of the law nor, as suggested, does inclusion of the annotation make them anything other than what they are, an annotation, a tool, a direction to read the explanatory case or source. It is the underlying case that is of potential significance. Finding that case, also, is not uniquely limited to the annotation. As illustrated in the sodomy example, a citator search not only reports the continued validity of the law (or not) but also provides references to additional sources of potential interest and relevance, including pending legislation.

4. The O.C.G.A. on the Authority of the Annotation

The authority question is directly answered by the language of the code itself. §1-1-7 states that annotations are not law:

> Unless otherwise provided in this Code, the descriptive headings or catchlines immediately preceding or within the text of the individual Code sections of this Code, except the code section numbers included in the headings or catchlines immediately preceding the text

---

70 *Commission*, 906 F.3d at 1249.

71 *Id.*

72 *Id.*

73 *Id.*

74 A print copy of the O.C.G.A. is available for $444 versus the cost of the West Virginia Code published by Lexis at $1,590.

> of the Code sections, and title and chapter analyses 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 and chapter analyses, and notes set out in this Code are given for the purpose of the convenient reference and do not constitute part of the law.

In *State of Georgia v. Harrison Company*,[75] decided at the time of the original creation of the O.C.G.A. by Lexis, the question of Georgia's right to copyright the statutes (law), title, chapter, and article headings of the new code is addressed. The decision details the division of work between the Commission and Lexis in the creation of the new code.

> Immediately following the execution of the contract between the Commission and [Lexis], the Commission adopted the rules of style that were to be used in the revised code, including a new, three-unit numbering system, division of the code into titles, chapters, articles, parts, and subparts, and adoption of rules for capitalization and punctuation.
>
> Following adoption of the rules of style, the Commission submitted them to [Lexis]. The editorial staff of [Lexis] then arranged the statutes into the 53 titles which had previously been selected by the Commission. This was done by actually cutting and pasting copies of the 1933 code as enacted by the General Assembly and all Georgia laws enacted since that time. In addition, statutes enacted prior to 1933 that were inadvertently omitted from the 1933 code were also included.
>
> When the Commission felt that a substantive change to the law had to be made, it caused separate bills to be introduced in the General Assembly to accomplish that change; over 40 of these bills were enacted during the 1980 and 1981 regular sessions of the General Assembly. Other changes in the new code include the resolution of conflicts in the law, the deletion of laws that had been repealed, superseded, duplicated, or judicially declared unconstitutional, the inclusion of language to carry out the various major reorganization acts of state government, and giving effect to the numerous statutes and constitutional amendments that have changed the titles of public officials.[76]

In *Harrison*, the court considered the question of what is considered the statutory portion of the code. Excluded were the arrangement, title, chapter, and article headings.[77] Providing alternative theories for this rational the court found the absence

---

[75] *Georgia v. Harrison Co.*, 548 F. Supp. 110 (1982) (order vacated 559 F. Supp. 37 N.D. Ga 1983).
[76] *Id.* at 112.
[77] *Id.* at 115-116.

of reference to these in the language in O.C.G.A §1-1-1 determinative.[78] It concluded such elements were assumed to be part of the statutory provisions of the code and, thus, in the public domain.[79] In the alternative, such elements were merely descriptive language sufficiently brief and used in a descriptive manner such that it is the equivalent of a label.[80] The court specifically declined to address whether a caption was part of the statute.[81]

Harrison makes no mention of annotations in its discussion of what is considered a statute. Following the reasoning stated in Harrison, however, an annotation is more than a mere descriptive label. Further focusing on the merger language in O.C.G.A. §1-1-1,

> The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company pursuant to a contract . . . is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion of such codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials pursuant to the contract and shall be published by the authority of the state pursuant to such contract and when so published shall be known and may be cited as the "Official Code of Georgia "Annotated"[82]

the fact that an annotation is specifically listed is a suggestion that they are not routinely considered part of the statutory portion of a code, not part of the public domain and, thus, distinguished from law and copyrightable.

B. Factor Two - Process - Is the work created through a prescribed process that confirms its legal effect or the derivation from which deprives it of legal effect?

Everyone is familiar with the Schoolhouse Rock version of "How a Bill Becomes a Law."[83] An idea is captured in the form of a bill, considered in committee where it dies or is voted out to be considered by the chamber as a whole. Passed by one chamber it must be considered and passed by the other chamber. Once passed by both chambers the legislation becomes an Act and awaits signature or veto by the executive. The question in *Commission v. PRO* is whether or not annotations are created and adopted in a prescribed fashion sufficiently the same as the law-making process which entitles the annotation to be treated as authoritative and *law like*.

1. Bicameralism and Presentment

Article III of the Georgia Constitution specifies that legislative power is vested in the General Assembly composed of a Senate and House of Representatives.[84] This

---

78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.* at 116.
82 GA. CODE ANN. § 1-1-1.
83 *Schoolhouse Rock: I'm Just a Bill* (ABC television broadcast Mar.27, 1976).
84 GA CONST. art. III, §1, para. 1.

clearly affirms bicameralism, but the Georgia Constitution is more specific regarding delegation of the People's voice and the creation of law. Article II of the Georgia Constitution speaks to whom the citizens of the State of Georgia delegate their power and voice. Members of the General Assembly are elected pursuant to and by those entitled to vote all as detailed in Article II of the Georgia Constitution. [85] Article II speaks to persons ineligible to hold office, recall from public office, and removal from public office.[86] Article II, Section III, paragraph I also defines 'public official' in the context of 'procedures for and effect of suspending or removing public officials upon felony indictment'.[87]

> As used in this Paragraph, the term "public official" means the Governor, the Lieutenant Governor, the Secretary of State, the Attorney General, the State School Superintendent, the Commissioner of Insurance, the Commissioner of Agriculture, the Commissioner of Labor, and any member of the General Assembly.[88]

Citizens do not delegate or entrust simply anyone with their voice or the power to speak for them. They exercise their constitutionally protected and granted right to speak to elect representatives to exercise sovereign power. Use of the term public official is with care and not to be accorded generally. Notably absent from that list are staffers, members of the state bar, and corporate entities.

Article III, Section V, Enactment of Laws, specifies the process in which a bill becomes a law detailing the legislative process and signature by the governor.[89] These provisions make it clear that the process requires presentment affirming it as a hallmark of making law. A deeper look at the requirements to create a law, requires consideration of the provisions on amendment and reading set out in paragraphs IV and VII of the Georgia Constitution.

> Paragraph IV. ***Statutes and sections of Code, how amended.*** No law or section of the Code shall be amended or repealed by mere reference to its title or to the number of the section of the Code; but the amending or repealing Act shall distinctly describe the law or Code section to be amended or repealed as well as the alteration to be made.
>
> Paragraph VII. ***Reading of general bills.*** The title of every general bill and of every resolution intended to have the effect of general law or to amend this Constitution or to propose a new Constitution shall be read three times and on three separate days in each house before such bill or resolution shall be voted upon; and the third reading of such bill and resolution shall be in their entirety when ordered by the

---

85 GA CONST. art. II, §1, para. 1.
86 GA CONST. art. II.
87 GA. CONST. art. II, § III, par. I (a).
88 *Id.*
89 GA. CONST. art. III, § V, par. xii and xiii.

> presiding officer or by a majority of the members voting on such question in either house. [90]

If an annotation is to be considered law or *law like* because it is the result of an exercise of sovereign power, is the fact that it is included in the annual bill enacting the O.C.G.A. into positive law sufficient? In order for an annotation to be *law like* must it follow the same process as any other legislation or is the process it does follow, although distinct, sufficient? *Commission v. PRO* suggests that the Georgia annotations "bear the hallmarks of legislative process, namely bicameralism and presentment" suggesting that inclusion in the annual bill enacting the O.C.G.A. is sufficient to satisfy the process requirements.[91]

Consider the 2013 Georgia Senate Bill No. 340[92] which is the Senate bill titled:

> To amend the Official Code of Georgia Annotated, so as to revise, modernize, correct errors or omissions in, and reenact the statutory portion of said Code, as amended, in furtherance of the work of the Code Revision Commission; to repeal portions of said Code, or Acts in amendment thereof, which have become obsolete, have been declared to be unconstitutional, or have been preempted or superseded by subsequent laws, to provide for matters relating to revision, reenactment, and publication of said Code; to provide for effect in event of conflicts; to provide for effective dates; to repeal conflicting laws; and for other purposes.

Further examination of the text of 2013 GSB 240 reflects a detailed description and language for changes in the statutory language to be included as the law in the O.C.G.A. but notably absent is the text of any annotation.[93] Also notably absent, as required pursuant to Article III, Section V, Paragraph IV of the constitution, is a distinct description of the alteration to be made.

Adoption, if there is any adoption of annotations, is, as noted in *Commission v. PRO*, outside the normal legislative channels.

> By contrast, the annotations are prepared by the Commission outside of the normal channels of the legislative process in the manner we have detailed and are not voted on individually in the way that Georgia session laws are.
>
> However, it is also the case that the Georgia General Assembly voted to adopt the annotations as prepared by the Commission as an integral part of the official Code. [citation omitted] Further it did so through a legislative act that necessarily passed both houses of the legislature and was signed into law by the Governor.[94]

---

90 GA. CONST. art. III § V, para. iv and vii.

91 *Commission*, 906 F.3d at 1248.

92 The 2013 Senate Bill No. 340 is used as an exemplar of the typical bill used annually to enact the changes to the O.C.G.A. into positive law.

93 2013 Ga Senate Bill 340.

94 *Commission*, 906 F.3d at 1253.

If the annotations are to bear the hallmark of the legislative process and specifically, presentment, must they not be presented in some manner to the elected officials of the General Assembly as with the text of the changes in the statute? Given the omission of the text of the annotations it appears that the requirement of Article III, Section V, Paragraph III of the Georgia Constitution are unmet. Also problematic is that there is no suggestion that the text of the annotations is considered *at any point* during the legislative process absent the delegation of the charge to create the code. Unless presentment may be satisfied by absolute delegation to the Commission with further delegation to a commercial company pursuant to a work for hire arrangement, the concept of presentment and the factor of process must fail.

Image 2 - Excerpt of 2013 Georgia Senate Bill 340

SECTION 25.

Title 25 of the Official Code of Georgia Annotated, relating to fire protection and safety, is amended in:

(1) Code Section 25-9-13, relating to penalties for violations of the chapter, bonds, enforcement, advisory committee, dispose of settlement recommendations regarding blasting or excavating near utility facilities, in subparagraph (h)(2)(A), by deleting the subsection (h) designation preceding the subparagraph (2)(A) designation.

SECTION 26.

Reserved.

SECTION 27.

Reserved.

This raises further questions as to the status of annotations and the practical impact of making annotations "law like." Statutory compilations, in print, are traditionally and routinely updated once a year with annual pocket parts and/or cumulative supplements. Transition to an online environment, however, speeds up this process. Content available on Westlaw or Lexis Advance is updated more frequently, in some instances within hours of a new decision. This begs the question, if a court issues a decision impacting the validity of a Georgia statutory provision, resulting in an annotation as determined by Lexis but the decision and/or authoring of the annotation occur after the annual bill enacting the new code provisions into law, what is the status of the annotation? That annotation would have to wait the remainder of the year to achieve "law like" status. How is the researcher to differentiate between those annotations that are law like from those that are not? Annotations are not dated. Similarly, are the annotations to be reviewed and revised on some regular basis to ensure their continued relevance in the context of evolving laws?

2. Constitutional Concerns - The Guaranty Clause and Delegation of Lawmaking to Nonelected Officials

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence.[95]

The Guarantee Clause is aptly named for its role to guarantee to each state a republican form of government. Perhaps better named the dormant guarantee clause, the Supreme Court routinely dismisses cases questioning what a republican form of government is as nonjusticiable political questions.[96] Justice O'Connor, questioned this practice in *New York v. United States* and suggesting that potentially, there are questions appropriate for consideration by the court that fall within the purview of the Guarantee Clause.

> The view that the Guarantee clause implicates only nonjusticiable political questions has its origin in Luther v. Borden, [citation omitted] in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that "it rests with Congress not the judiciary, "to decide what government is the established one in a State."
>
> This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of nonjusticiability the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable
>
> More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.[97]

If the hurdle of the nonjusticiable political question is set to the side, what is the role of the guarantee clause as to guaranteeing a republican form of government to every state? Chermerinsky in his article, *Cases Under the Guarantee Clause Should be Justiciable*, argues that the Guarantee Clause "should be regarded as a protector of basic individual rights and should not be treated as being solely about the structure of government."[98]

> The Guarantee Clause is best understood as protecting basic rights of political participation within state governments. The discussion at

---

95 U.S. CONST. art. IV § 4.

96 *See, e.g. City of Rome v. United States*, 446 U.S. 156 (1980); *Mountain Timber v. Washington*, 243 U.S. 219 (1917); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916); *Marshall v. Dye*, 231 U.S. 250 (1913).

97 *New York v. United States*, 505 U.S. 144, 184 (1992).

98 Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 Univ. Colorado L. Rev, 849, 851 (1994).

> the Constitutional Convention certainly supports the view that the Guarantee Clause should be regarded as originally being about political rights . . . .'[A] republican government must be the basis of our national union; and no state in it out to have it in their power to change its government into a monarch.' . . . In a monarchy, citizens do not get to choose their rulers, power is fixed and inherited; in a republican form of government, the people ultimately retain sovereignty and choose their officeholders. In other words, the key features of a republican form of government are the right to vote and a right of political participation.[99]

Chemerinsky also highlights Madison's contention that a key characteristic of a republican form of government is the election of representatives by the people and the making of laws that comply with state and federal constitutional provisions by the representatives.[100]

How laws are made and, more specifically, who is making them is at the heart of the dispute over the copyrightability of the O.C.G.A. annotations placing it directly within the protection of the Guarantee Clause as protecting basic individual rights. What is more basic than the question of the validity of a law made by delegation to a non-elected person or, even worse, a commercial entity?

The Commission is comprised of fifteen members. Of those fifteen members, five are members of the state bar appointed by the President of the Georgia Bar and not elected in any arrangement. Other key persons are members of the Office of Legislative Counsel, again not elected but employed by the state, and the corporate entity Lexis. While the legislature pays the salary of at least some of the non-elected members that factor alone as seen in *Callaghan v. Meyers* is insufficient to bestow special status on their work product[101] How does an annotation that is the product of a work for hire arrangement between a Commission created by statute to exist within legislative branch and a commercial publisher satisfy either being made by an elected representative or the larger prescription of a republican form of government specified by the Guarantee Clause? Is the delegation not too far removed from the traditional work of the legislature?

Commission v. PRO emphasizes the relationship of the Commission as a part of the legislative branch. Many people facilitate the work of the legislature without engaging in the exercise of sovereign power or directly speaking for the People. The existence of the modern administrative state at both the federal and state levels implicitly and explicitly accepts the concept of a delegation of legislative authority and the ability to delegate law making, subject to limits. The nondelegation doctrine at the federal level prohibits excessive delegation of power. "Delegation becomes

---

[99] Chemerinsky, at 868.
[100] *Id*. at 867-868.
[101] *Callaghan v. Meyers*, 128 U.S. 617 (1888).

excessive when Congress transfers legislative powers without providing adequate guidance about how those powers are to be exercised."[102]

As in article I to the Constitution, granting the power of legislation to Congress, Article III, Section 1, Legislative Power, of the Georgia Constitution vests the legislative power in the General Assembly.[103]

> Paragraph 1. Power vested in General Assembly. The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.[104]

At the federal level, the Supreme Court places limits on the power to delegate legislative powers to non-congressional actors.[105] In *Panama Refining Co. v. Ryan* the Supreme Court clearly found some limitation on the delegation of legislative power.[106]

> The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions without which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of acts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. The constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations for the authority to delegate, if our constitutional system is to be maintained.[107]

The State of Georgia has similarly embraced the concept of an administrative state.[108] In a lengthy discussion of the legislative process in *Glustrom v. State,* the Georgia Supreme Court recognized both that it is the "expressed will of the people of this State that the lawmaking power shall be exercised only within defined limits"

---

[102] Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L. J. 657 (1988).

[103] *See also*, *Bohannon v. Duncan*, 196 S.E. 897, 899 (Ga. 1938) ("By Constitution of this State, . . . all lawmaking power is lodged in the legislative department and is not permitted to relieve itself of such power by a delegation of it to any person, instrumentality or board.").

[104] GA CONST. art. III, § 1, para. 1.

[105] Dripps, supra, at 660 n.15.

[106] *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

[107] *Id*. at 421.

[108] *Crawly v. Seignious*, 213 GA 810 (1958) ("But after a legislative enactment has plainly set forth its provisions and marked its limits, it may then authorize designated administrative officers to promulgate rules a regulation within the scope of the legislation to administer fully and give effect to it.").

and "an administrative agency of government . . . can have only the administrative or policing powers expressly or by necessary implication conferred upon it."[109] *In Georgia Real Estate Commission v. Accelerated Courses in Real Estate, Inc*., a two part test regarding the validity of an administrative rule is articulated.[110] Prong one asks - is the rule authorized by statute and, prong two, is the rule reasonable? Both prongs must be satisfied. Failure to either be authorized by statute or reasonable defeats the rule.

Glustrom and *Georgia Real Estate Commission* clearly address and sanction delegation from the legislative branch to the executive branch but is the process a parallel argument with the legislative design of the creation of the Commission and the delegation to the Commission to create the O.C.G.A? The larger question, remains, is the delegation of the creation of the annotations an exercise of sovereign power or is it one bridge too far? Delegation is permitted but only as needed per *Panama Refining* or within defined limits or necessary implication conferred per *Glustrom*. Even if one accepts the structure of Chapter 9 of Title 28 of the O.C.G.A. as sufficiently detailed to create a Commission as the recipient of delegated legislative authority, the stated exclusion of

> [a]nnotations; editorial notes; code Revision Commission notes; research references; notes on law review articles, opinions other Attorney General of Georgia, indexes; analyses; title, chapter, article, part, and subpart captions or headings, except as otherwise provide in the Code; catchlines of Code sections or portions thereof, except as otherwise provided in the Code; and rules and regulations of state agencies departments, boards, commissions, or other entities which are contained in the Official Code of Georgia Annotated are not enacted as statutes by the provisions of this Act [111]

is a specific limitation on the Commission's work. The specific exclusion of the annotations as law is sufficient to make the delegation one delegation too far. Alternatively, *Glustrom* second prong - is the rule reasonable - must fail given the express exclusion of the annotations by the session laws from the O.C.G.A.

C. Factor Three - The Author – Who is the Author of the Annotations in the O.C.G.A.?

Identity of the author is central to the concept of copyright. It is the author who holds the property interest and in which copyright vests.[112] In the creation of the O.C.G.A. the Georgia legislature formed, within the legislative branch, the Commission delegating to it the responsibility for the publication of the O.C.G.A. The Commission, in part, accomplishes its mandate using a work for hire arrangement

---

[109] *Glustrom v. State*, 206 GA 734, 737-38 (1950).

[110] *Georgia Real Estate Commission v. Accelerated Courses in Real Estate, Inc.*, 234 GA 30, 33 (1975) (citing *Eason v. Morrison*, 181 GA 322 (1935)).

[111] 2014 GA Laws 866, 2015 GA Laws 5 §54.

[112] 17 U.S.C. 102.

with Lexis. Pursuant to work for hire doctrine, the work for whom it was prepared is the owner absent a written agreement to the contrary thus vesting the copyright for non-law provisions in the State of Georgia.[113]

1. Copyrightability of Content Created by State Employees – Banks *and* Callaghan

As previously noted, not at issue is the exclusion of the law, specifically judicial decisions, statutes, and regulations from copyright protection. By long and well-established law, works of the United States Government are not protected under the copyright statute.[114] Similarly the Supreme Court decision in *Banks v. Manchester* clearly articulates the exclusion of law from copyright to state law.[115]

In dictum, the decision in *Callaghan v. Meyers* alludes to the issue of a state's ability to own copyright in a work produced by an employee.[116] In discussing the ability of the reporter to possess copyright in his work the court considers that where there is no legislation that forbids the reporter from claiming copyright or directing him to pass along or assign such property right to the state.[117] This language supports both the right of a state to claim copyright in value-added material produced by an employee or through a work for hire arrangement and for a state employee to retain a property interest protectible by copyright. As section 105 of the United States Code does not reference state governments, it is the *Banks* and *Callaghan* decisions which address copyrightability of state law. Reading *Banks* and *Callaghan* together makes it clear that states may claim copyright in works authored by state employees with the exception of those edicts having the force of law (judicial opinions, statutes, and regulations).[118] Also clear is that state "law" is not copyrightable.[119]

Goldstein also weighs in on this topic recognizing that the independent contributions fall within the penumbra of copyright and acknowledging that the

---

[113] *See generally*, GOLDSTEIN at §4.3.

[114] 17 U.S.C. §105. *See generally*, NIMMER §5.14; I GOLDSTEIN §2.5.2(a).

[115] *Banks v. Manchester*, 128 U.S. 244 (1888).

[116] *Callaghan v. Meyers*, 128 U.S. 617 (1888).

[117] *Id*. at 647.

> In the present case there was no legislation of the State of Illinois which forbade the obtaining of such a copyright by Mr. Freeman, or which directed that the proprietary right which would exist in him should pass to the State of Illinois, or that the copyright should be taken out for or in the name of the State, as the assignee of such proprietary right Even though a reporter may be a sworn public officer, appointed by the authority of the government which creates the court of which he is made the reporter, and even though he may be paid. a fixed salary for his labors, yet, in the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government as the assignee of his work, he is not deprived of the privilege of taking out a copyright, which would otherwise exist. There is, in such case, a tacit assent by the government to his exercising such privilege. The universal practical construction has been that such right exists, unless it is affirmatively forbidden or taken away; and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary under the governments both of States and of the United States. *Id.*

[118] 17 U.S.C. §105; *Banks v. Manchester*, 128 U.S. 244 (1888); *see also* 1 NIMMER ON COPYRIGHT §5.14.

[119] *Banks v. Manchester*, 128 U.S. 244.

copyright act bars copyright in works of the United States government not the state governments.[120]

> Private firms publish a great proportion of the state and federal statutes and law reports available for reference in the United States. Because courts withhold copyright protection from the text of such privately printed official documents, these firms if they are not directly subsidized by the state must seek their profit in the original copyrightable subject matter that they contribute to the works – headnotes syllabi, annotations, organization tables and arrangements of cases.[121]

2. Veeck v. Southern Building Code Congress International, Inc.

In *Veeck v. Southern Building Code Congress International, Inc*.[122] the Fifth Circuit addressed the key issue of the ability of a private party to assert copyright protection over model codes where language of the model code was subsequently adopted by a legislature becoming law.[123] In controversy was the ability of a private organization whose purpose was to write model codes and who held copyright in the model code to protect its work from being posted on the web after the language of the model code was adopted as law by a jurisdiction.[124] *Veeck* reaffirms the position that law is excluded from copyright protection.[125] It is clear that the law is to be available to the public and is not an appropriate subject for copyright. To the extent a work is subsequently enacted into law entering the public domain that work loses any copyright protection it held prior to becoming law.[126] If there was any doubt, in the Sixth Circuit decision of *Howell v. Miller*[127], Justice Harlan provides a succinct statement of the law, "any person desiring to publish the statutes of a state may use any copy of such statues to be found in any printed book."[128] Copyright on the text of the Georgia statutes, however, is not the issue rather it is the annotation; the stuff distinctly not the law in which the State of Georgia claims copyright, that is at issue.

Other key language included in the *Veeck* decision is a finding that Veeck copies "only 'the law' of Anna and Savoy, Texas . . . and when he reprinted only the law of

---

[120] GOLDSTEIN at §2.5.2(b) ("[The copyright statute] does not ban copyright in the work of a state government or its political subdivision, at least if the work does not constitute an official legal document".) The phrase "official legal document" as read in the context of the text, is read to mean, statutes, law reports, regulations and legislative enactments.

[121] GOLDSTEIN at §2.5.2(a).

[122] *Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791, (2002),*cert denied*, 2003 U.S. Lexis 5186 (U.S. June 27, 2003).

[123] *Id*. at 793.

[124] *Id*.

[125] *Id*. at 795. *See also* Wheaton v Peters, 33 U.S. 591 (1834) (holding that Supreme Court opinions are the appropriate subject matter of copyright.); Banks v. Manchester 128 U.S. 244, 252-254 (1888) (determining that the law as it exists in the form of a judicial opinion or legislative act is in the public domain and excluded form copyright).

[126] *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 735-736 (1st Cir. 1980).

[127] *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898).

[128] *Id*. at 137.

those municipalities he did not infringe SCCI's copyrights in its model building codes."[129] Alternatively and dispositive, the court agreed with Veeck's argument that upon enactment of the model code into positive law the model law became a fact and thus not eligible for copyright protection under *Feist*.[130] The most insightful language in *Veeck*, is not that which discusses whether the model code is the appropriate subject of copyright but rather that which discusses copyright protection for the value-added material. In response to the concerns of SBCCI regarding its own economic viability and longevity, the court suggested

> to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with "value-added" in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves "the Progress of Science and useful Arts.[131]

3. Identity of the "author" of the O.C.G.A.

The identity of the author, in this case the identity of the public officials, responsible for the creation of the annotations in the O.C.G.A. is determinative. It is undisputed that the People are the authors of the law as found in the O.C.G.A. But is the author of the annotations one who qualifies as an agent of the People in the direct exercise of sovereign authority?[132] Or, as initially framed, is the creation of the annotations, done pursuant to exercise of sovereign authority? The resulting rule from *Banks* and *Callaghan* invokes the policy notion that works created by the court in the course of performance of official duties were part of the public domain and by definition not protected by copyright.[133] The Eleventh Circuit drew upon this concept stating:

> Under democratic rule, the People are sovereign, they govern themselves through their legislative and judicial representatives and they are ultimately the source of our law. Under this arrangement, lawmaker and judges are draftsmen of the law, exercising delegated authority, and acting as servants of the People and whatever they produce, the People are the true authors. . . . Not surprisingly, then, for purposes of copyright law, this means the People, as constructive authors are also the owners of the law. And in this way, any work of which the People are the constructive authors is intrinsically public

---

[129] *Veeck*, 293 F.3d at 800.

[130] *Id*. at 801. *See also* Feist Publ'ns, Inc, v. Rural Tel. Serv. Co., 499 U.S. 340, 344-345 (1991) (facts are an impermissible subject for copyright protection).

[131] *Veeck*, 293 F.3d at 806.

[132] *Commission*, 906 F.3d at 1242.

[133] *See generally*, *Banks and Callaghan*, 128 U.S. 244 (1888); *Callaghan v. Meyers*, 128 U.S. 617 (1888).

> domain material and is freely accessible to all so that no valid copyright can ever be held in it.[134]

In applying the "metaphorical concept of the citizen author," the court suggests that the correct reading of *Banks* is to determine if a work was created by an agent of the People in the direct exercise of sovereign authority.[135] The court also expands the reach of the exclusion from copyright beyond those edicts that "carry the clear force of the law" rejecting the district court's bright line test between law and not the law.[136] Instead, the court found that there is a

> zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not. [citation omitted] In this small band of cases a government work may not be characterized as law, and yet still be so sufficiently law like as to implicate the core policy interests undergirding *Banks*.[137]

Building on *Banks* by applying the rational in *Veeck*, it would seem once text becomes law then the People are the authors. This sets up two fundamental questions for consideration here. The first question is whether the value-added annotations are adopted as law? This question is explored previously and answered in the negative suggesting the process of adopting the annotations falls short of that set out in the Georgia Constitution.[138]

The second question regarding identity of the author remains. Is a statutorily created body comprised of elected and appointed members as supplemented by state employees and a commercial publisher an agent of the People and is such work done in the exercise of their sovereign authority? In part, this question is answered in the exploration of the process discussion.[139] Article II of the Georgia constitution is clear about who constitutes a public official elected by the People as their voice. The composition of the Commission is flawed if it is to act as an agent of the People vested with sovereign powers. The composition of elected public officials - the Speaker of the House of Representatives, four members from the House, the President of the Senate, four Senators is fine but the non-elected five members of the State Bar appointed by the president of the State Bar and the arrangement with Lexis stretch the definition of "public official."[140]

The most interesting inquiry regarding the creation of the annotation is who actually creates the annotations? By analogy to legislative history, consider the exchange between Senators Dole and Armstrong made famous by the late Supreme Court Justice Anton Scalia. Mr. Dole is asked if he wrote the committee report or if

---

134 *Commission*, 906 F.3d at 1239 -40.
135 *Id*. at 1241.
136 *Id*. at 1242.
137 *Id*.
138 *See supra* Part III, B.
139 *See supra* Part III, B.
140 GA. CODE ANN §28-9-2 (2017).

any Senator wrote the committee report or vote on the committee report or read the entire committee report. During such exchange Senator Dole conceded it is the committee staffers who write the committee reports.[141] The point being that it makes a difference who does the work. So, who here does the work? Is it the President of the Senate and Speaker of the House who write the annotations, is it the staff of the Office of Legislative Counsel, or is it Lexis pursuant to an established work for hire arrangement? According to the complaint, one of the duties of Lexis under the contract is the creation of

> a summary of a judicial decision that relates to a particular Code section and illustrates and informs as to an interpretation of that Code section. This judicial summary is added at the end of the relevant Code section under the heading. 'Judicial Decisions' . . . . The judicial summary is only added in the annotated publication and is not enacted as law."[142]

Taking guidance from the Georgia Constitution as to the appropriate construction of "public official" as those empowered to speak for the people and exercise sovereign power, the identity of the author of the annotations included in the O.C.G.A. must fail. Non-elected persons selected to the Commission by the State Bar and employees of a corporate entity are sufficiently distanced from the People as a voice and lack the authority to wield sovereign power.

IV. Conclusion

The test articulated in *Commission v. PRO* poses three questions as indicia of a work carrying the hallmarks of law. If each of the three questions is answered in the affirmative the conclusion must be that the People are the author, the work is in the public domain as 'law', and not subject to copyright. If any question is answered in the negative, the work is not 'law' and may be protected under copyright. The factors as previously identified and discussed in Part III of this article are:

1. Authority - Is the work authoritative as a law?
2. Process - Is the work created through a prescribed process that confirms its legal effect or the derivation from which deprives it of legal effect?
3. The Author - Who is the author and, if the author is a public official, is that author a public official entrusted with the exercise of legislative or sovereign power?

As suggested, there are challenges to answering any of these questions in the affirmative. The authority prong fails by the language of the O.C.G.A. §1-1-1 and §1-1-7 which is clear on its face the annotations are not law. This alone could be dispositive; however, there are more fundamental issues with the process prong.

---

[141] Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justice Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQUETTE L. REV. 161, 186 n.159 (1996).

[142] Complaint for Injunctive Relief at 6-7, *Code Revision Commission v. Public.Resource.Org, Inc.*, 906 F.3d 1229 (11th Cir. 2018) (No. 1:15-cv-2594-MHC) 2015 WL 4999975, at *6-7.

The delegation of sovereign power to a Commission comprised of a mix of elected, non-elected, and a corporate entity under a work for hire arrangement even with detailed prescriptions of that delegation is a stretch of legislative power given the language of the Georgia Constitution. The Georgia Constitution is clear on who speaks for the People of Georgia and who is considered a public official. Even giving due consideration to the practicality of the modern-day administrative state, it is too far of a reach to credit the Georgia legislature as the author of the work product of a corporate entity pursuant to a work for hire arrangement. It remains true even when you consider that the work product is produced under detailed statutory instructions and highly supervised by a commission created by the legislature. Bootstrapping unseen and not presented text created outside the normal legislative process and deeming it an exercise of sovereign power is a step too far.

The absence of presentment of the annotations is also a hurdle too high to overcome given the specificity of the lawmaking process in the Georgia Constitution. While there may be some acceptable variation on the legislative process, the whole scale delegation of such process as is a delegation too far in light of the Guarantee Clause and *Panama Refining*.

The final prong of the inquiry that of the identity of the author must also fail for want of the legislative process. This leaves the conclusion that the value-added annotations contained in the O.C.G.A. are not authoritative, not created pursuant to an equivalent sovereign process by a public official, not constructively authored by the People, and not part of the public domain. Accordingly, they are an appropriate subject of a copyright registered and held by the State of Georgia.