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The Uncopyrightability of Edicts of Government

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October 16, 2019

The Uncopyrightability of Edicts of Government

*Shyamkrishna Balganesh, * and Peter S. Menell***

This amicus brief filed in the Supreme Court appeal of *Georgia, et al., v. Public.Resource.Org.*, explores the interplay of copyright law and the edicts of government doctrine. The “edicts of government” doctrine was first validated by the U.S. Supreme Court in a series of nineteenth century cases. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Meyers*, 128 U.S. 617 (1888). While the doctrine has never been directly recognized in the express wording of the copyright statute, it is nevertheless firmly rooted in foundational copyright principles that are themselves reflected in the text of the statute.

Three foundational copyright principles buttress the doctrine. *First*, copyrightable authorship does not extend to official announcements of law, the hallmark of edicts of government. Authorship as requires personalization, an attribute that is antithetical to official pronouncements of law, which are generated in an impersonal and *ex officio* manner. *Second*, all edicts of government, as legal texts, are methods of operation, rendering them uncopyrightable. *Third*, authentic statements of law entail the merger of idea and expression insofar as the expression underlying edicts of government are capable of being expressed in only a limited number of ways in order to preserve its authenticity.

Consequently, the Official Code of Georgia (O.C.G.A.) is not copyrightable. Petitioners concede that the statutory content of the O.C.G.A. is uncopyrightable. The annotations incorporated into the O.C.G.A. by the state legislature bear the imprimatur of the state and are therefore produced under the ostensible authority of the state, which renders them an edict of government. Contrary to Petitioners’ argument, an edict does not need to have the force of law to qualify as an uncopyrightable edict of government. The Supreme Court’s precedents contradict this position. Instead, faithful reading of these precedents suggest that something becomes an uncopyrightable edict of government when it is produced under the ostensible authority of the state and thus receives a presumptively official status, owing to its endorsement by the state. The process by which the annotations contained in the O.C.G.A. are adopted and merged with the statutory content therein constitutes the exercise of such ostensible authority, rendering the O.C.G.A. an uncopyrightable edict of government.

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No. 18-1150

In The
Supreme Court of the United States

—◆—
GEORGIA, ET AL.,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

—◆—
**BRIEF OF PROFESSORS SHYAMKRISHNA
BALGANESH AND PETER S. MENELL AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

—◆—
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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE “EDICTS OF GOVERNMENT” DOCTRINE IS FIRMLY ROOTED IN FUNDAMENTAL COPYRIGHT PRINCIPLES	3
A. The Official Announcement of Law Is Not Copyrightable Authorship	3
B. Legal Texts Are Methods of Operation that Constrain Expressive Choice and Are Ineligible for Copyright	6
C. Authentic Statements of Law Entail the Merger of Idea and Expression	9
II. THE OFFICIAL CODE OF GEORGIA ANNOTATED (O.C.G.A.) IS AN UNCOPY- RIGHTABLE EDICT OF GOVERNMENT....	11
A. An Edict of Government Does Not Need to Have the Force of Law	12
B. Annotations Produced under the Osten- sible Authority of the State Qualify as Edicts of Government	19
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page
CASES	
<i>Baker v. Selden</i> , 101 U.S. 99 (1880).....	6
<i>Banks v. Manchester</i> , 128 U.S. 244 (1888)	<i>passim</i>
<i>Bleistein v. Donaldson Lithographing Co.</i> , 188 U.S. 239 (1903)	4
<i>Burrow-Giles Lithographic Co. v. Sarony</i> , 111 U.S. 53 (1884)	3, 4
<i>Callaghan v. Myers</i> , 128 U.S. 617 (1888).....	<i>passim</i>
<i>Computer Assocs. Int'l, Inc. v. Altai, Inc.</i> , 982 F. 2d 693 (2d Cir. 1992)	7
<i>Herbert Rosenthal Jewelry Corp. v. Kalpakian</i> , 446 F. 2d 738 (9th Cir. 1971).....	9
<i>Howell v. Miller</i> , 91 F. 129 (6th Cir. 1898).....	22, 23
<i>Little v. Gould</i> , 15 F. Cas. 604 (C.C.N.D.N.Y. 1851).....	17, 18
<i>Lotus Dev. Corp. v. Borland Int'l, Inc.</i> , 49 F. 3d 807 (1st Cir. 1995)	6, 7
<i>Morrissey v. Procter & Gamble Company</i> , 379 F. 2d 675 (1st Cir. 1967)	9
<i>Nash v. Lathrop</i> , 6 N.E. 559 (Mass. 1886).....	15, 16
<i>Sega Enterps. Ltd. v. Accolade, Inc.</i> , 977 F. 2d 1510 (9th Cir. 1992).....	7
<i>Urantia Foundation v. Maaherra</i> , 114 F. 3d 955 (9th Cir. 1997).....	4
<i>Wheaton v. Peters</i> , 33 U.S. 591 (1834).....	1, 3, 12

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONAL PROVISIONS	
U.S. CONST., Art. I, § 8, Cl. 8	3
STATUTES	
Copyright Act	4, 7, 10
O.C.G.A. § 1-1-1.....	11, 12, 19
O.C.G.A. § 1-1-7.....	11
17 U.S.C. § 102(a).....	3
17 U.S.C. § 102(b).....	6
17 U.S.C. § 505	8
17 U.S.C. § 507	10
RULES	
Sup. Ct. R. 37.6	1
OTHER AUTHORITIES	
2 HOWELL'S ANNOTATED STATUTES OF MICHIGAN iv (1883).....	23
Hector T. Fenton, <i>Mr. Justice Blatchford. In Memoriam</i> , 41 Am. L. Reg. 882 (1893)	16

INTEREST OF *AMICI CURIAE*¹

The authors of this brief are law professors at the University of Pennsylvania and the University of California who study and teach intellectual property law. Their research explores the interaction between statutory law and judge-made law in the evolution of U.S. copyright law.

**SUMMARY OF ARGUMENT**

The “edicts of government” doctrine was first validated by this Court in a series of nineteenth century cases. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Meyers*, 128 U.S. 617 (1888). While the doctrine has never been directly recognized in the express wording of the copyright statute, it is nevertheless firmly rooted in foundational copyright principles that are themselves reflected in the text of the statute.

Three foundational copyright principles buttress the doctrine. *First*, copyrightable authorship does not extend to official announcements of law, the hallmark of edicts of government. Authorship as understood in this Court’s jurisprudence requires personalization, an

¹ Pursuant to Sup. Ct. R. 37.6, *amici* note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Petitioner and Respondents have consented to the filing of this brief.

attribute that is antithetical to official pronouncements of law, which are generated in an impersonal and *ex officio* manner. *Second*, all edicts of government, as legal texts, are methods of operation, rendering them uncopyrightable. *Third*, authentic statements of law entail the merger of idea and expression insofar as the expression underlying edicts of government are capable of being expressed in only a limited number of ways in order to preserve its authenticity.

Consequently, the Official Code of Georgia (O.C.G.A.) is not copyrightable. Petitioners concede that the statutory content of the O.C.G.A. is uncopyrightable. Pet. Br. at 20. The annotations incorporated into the O.C.G.A. by the state legislature bear the imprimatur of the state and are therefore produced under the ostensible authority of the state, which renders them an edict of government.

Contrary to Petitioners' argument, an edict does not need to have the force of law to qualify as an uncopyrightable edict of government. This Court's own precedents contradict this position. Instead, faithful reading of these precedents suggest that something becomes an uncopyrightable edict of government when it is produced under the ostensible authority of the state and thus receives a presumptively official status, owing to its endorsement by the state. The process by which the annotations contained in the O.C.G.A. are adopted and merged with the statutory content therein constitutes the exercise of such ostensible authority,

rendering the O.C.G.A. an uncopyrightable edict of government.

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ARGUMENT

I. THE “EDICTS OF GOVERNMENT” DOCTRINE IS FIRMLY ROOTED IN FUNDAMENTAL COPYRIGHT PRINCIPLES

The edicts of government doctrine, which denies copyright protection to all official expositions of law, remains a well-established rule of copyright law affirmed by this Court’s jurisprudence. *See Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834); *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888); *Callaghan v. Myers*, 128 U.S. 617, 646-50 (1888). While the doctrine conforms to longstanding “public policy,” *Banks*, 128 U.S. at 253, its roots lie in three fundamental copyright principles reflected in the copyright statute. Contrary to what Petitioners imply, Pet. Br. 21-24, the edicts of government doctrine are therefore fully consistent with the text of the copyright statute. Indeed, it is demanded by copyright law principles.

A. The Official Announcement of Law Is Not Copyrightable Authorship

Copyright protection subsists in “original works of authorship.” 17 U.S.C. § 102(a). Copyright’s requirement of authorship derives from the text of the Constitution, U.S. CONST., Art. I, § 8, Cl. 8, a reality that this Court has long recognized. *Burrow-Giles Lithographic*

Co. v. Sarony, 111 U.S. 53, 56-58 (1884). All the same, the text of the copyright statute has never defined the terms “author” or “authorship,” leaving it to courts to construe the term consistent with the Constitution and the Copyright Act.

This Court has understood the “author” in copyright as the actor to whom a work “owes its existence” and as the “effective cause” of the work. *Burrow-Giles*, 111 U.S. at 61. Authorship thus entails a causal relationship between the actor and the work. Additionally, authorship has been understood to entail the “personal imprint” of an actor upon the work. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903). *Personalization* is therefore an essential component of copyright authorship. This personalization implies that the personal identity of the actor responsible for original expression is a critical consideration in treating it as a work of authorship. It is for this reason that original expression, however creative when fixed in a tangible medium, but nevertheless without an identifiable individual as the cause for its production, is ineligible for copyright protection as lacking authorship. See, e.g., *Urantia Foundation v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997).

By contrast, the official announcement of laws—otherwise referred to as the act of “promulgation”—is an action performed *ex officio*. The personal, as opposed to official, identity of the agent undertaking the action is irrelevant to the formal status and validity of the announcement as law. When a legislative body enacts a law, the identities of the individual legislators

responsible for its passage do not matter. Their personal identities are subsumed under their official role as validly elected legislators entitled to vote on the passage of the legislation. So it is with the exposition of law in judicial opinions, where the personal identity of the judge is irrelevant to the status and validity of the opinion. The work emanates from the judiciary as the product of constitutional and legislative authority. The promulgation of law is therefore a fundamentally *impersonal* action that is at odds with the idea of copyright authorship. This remains true of both promulgation by statutes and regulations as well as the exposition of the laws in judicial opinions.

It is this basic disconnect between the impersonal act of promulgation and the personal nature of authorship that formed the principal basis of the Court's opinion in *Banks*: “[i]n no proper sense can the judge who, *in his judicial capacity*, prepares the opinion or decision, the statement of the case and the syllabus or head note, be regarded as their author.” *Banks*, 128 U.S. at 253 (emphasis supplied). The reference to “judicial capacity” is crucial here, since in it lies the fundamental distinction. When acting in an official judicial capacity, the judge's personal identity is rendered irrelevant since the judge is speaking as a member of the court, thereby precluding a valid claim of copyrightable authorship. Conversely, when those very portions of a case report are prepared by an individual *not* acting in a formal judicial capacity and therefore not speaking for the court, i.e., the court reporter, they become fully eligible for copyright protection provided they meet

copyright's other eligibility criteria. *Callaghan*, 128 U.S. at 650.

B. Legal Texts Are Methods of Operation that Constrain Expressive Choice and Are Ineligible for Copyright

Methods of operation are ineligible for copyright protection under the terms of the copyright statute. See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any . . . method of operation . . . , regardless of the form in which it is described, explained, illustrated, or embodied in such work.”). This rule reflects copyright law’s exclusion of functional expression, explained by the Court in *Baker v. Selden*. 101 U.S. 99 (1880). According to the rule and principles explained therein and since codified in the statute, a method of operation refers to the “means by which a person operates something.” *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995). In other words, it refers to the functional aspect of text that is directed at realizing an identifiable result.

In *Lotus v. Borland*, the First Circuit concluded that the plaintiff’s “command menu hierarchy” was an uncopyrightable method of operation insofar as it did “not merely explain and present” the functionality but instead represented the very “method by which” that functionality was realized. *Id.* at 815-16. Even though the hierarchy embodied “some expressive choices,” the court concluded that those choices were subsumed in

its overall functionality, thereby rendering it ineligible for copyright. *Id.* at 816. That case illustrates how the functionality underlying a method of operation may constrain the choice of expression, rendering such expression unprotectable. The case determined that the method of operation constrained the plaintiff's choice of expression, rendering it additionally uncopyrightable. *Id.* at 816 ("The 'expressive' choices of what to name the command terms and how to arrange them do not magically change the uncopyrightable menu command hierarchy into copyrightable subject matter."). Similar considerations can pertain to situations where "external factors" influence and dictate an actor's range of expression. See *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F. 2d 693, 710-11 (2d Cir. 1992); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F. 2d 1510, 1522 (9th Cir. 1992) ("functional requirements for compatibility . . . are not protected by copyright. 17 U.S.C. § 102(b)").

Legal texts are methods of operation, much like an instruction manual. They attempt to bring about particular results by controlling the behavior of citizens through the obligatory nature of the law. And, unlike ordinary text that has few external constraints, legal text dictates how citizens (and other relevant actors—e.g., government officials or courts) understand particular language and modify their behavior accordingly. The choice of specific terms in a legal text and their arrangement represent choices motivated *entirely* by the functional purpose behind the law.

As an illustration, consider the text of a provision in the Copyright Act dealing with attorney's fees:

“Except as otherwise provided by this title, the court may also award a reasonable attorney’s fees to the prevailing party as part of the costs.” 17 U.S.C. § 505. The text of this provision contains expression. Yet, its verbiage and structure are dictated entirely by the result that it seeks to communicate, defining a court’s discretion in awarding attorney’s fees. The first part of the sentence renders the provision subject to the rest of the statute, and its use of the term “may” (instead of “shall”) confirms a court’s discretion in making awards. To be sure, each of the provision’s terms and phrases has English language synonyms, but as choices made in creating a *legal directive* they reflect the constraints of external purpose—communicating the grant of this power to courts—rather than any literary flourish. Those circumstances render such expression ineligible for copyright.

This Court in *Banks* recognized both the functional nature of the expression at issue as well as the constraint on expressive choices that it produced. As the opinion captured the matter, “[t]he whole work done by the judges constitutes the *authentic* exposition and interpretation of the law, which, *binding every citizen*, is free for publication to all.” *Banks*, 128 U.S. at 253-54 (emphasis supplied). Petitioners misinterpret the reference to “binding” to mean that a legal text must have the “force of law” to qualify as a government edict. *See infra* pp. 12-18. The reference to the law “binding every citizen” is instead a recognition of the innately functional nature of government edicts, regardless of their precise source. The judge’s work in

ensuring the “authentic exposition” of the law in turn implies a constraint—on form and verbiage—that accompanies the production of government edicts, rendering them ineligible for copyright protection.

C. Authentic Statements of Law Entail the Merger of Idea and Expression

As a related matter, the “authentic[ity]” in “exposition” of the law accompanying a government edict entails the merger of expression and idea, rendering it further ineligible for copyright protection. A natural corollary to copyright’s rule disfavoring protection for functional expression, the merger doctrine denies protection “when the uncopyrightable subject matter is very narrow, so that ‘the topic necessarily requires,’ . . . if not only one form of expression, at best only a limited number.” *Morrissey v. Procter & Gamble Company*, 379 F. 2d 675, 678-79 (1st Cir. 1967). “When the ‘idea’ and its ‘expression’ are thus inseparable, copying the ‘expression’ will not be barred.” *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F. 2d 738, 742 (9th Cir. 1971).

Government edicts purport to be authentic pronouncements of law, whether they be judicial opinions, legislative statutes, or administrative regulations. Judicial opinions expounding or interpreting “the law” choose expression that reflect the judge’s understanding of the law, be it statutory or common law. Statutes and regulations, in turn, declare “the law” in their very text. This commitment to authenticity severely

circumscribes the value in any expressive variation that might be introduced in subsequent expositions of the law. Any restatement of the law using expression that is different from the words used in the government edict risks undermining its meaning and authenticity as a binding statement of law.

Consider another section of the Copyright Act: “No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507. A creative and perhaps more efficient restatement of this provision reads: “A maintainable civil action under this title must be commenced within three years from the accrual of the claim.” To most people reading the restatement, it may well communicate the same meaning as the actual statutory text. Nonetheless, the restatement is no longer an authentic statement of the law. By altering the wording and structure of the original provision, it introduces new terminology and therefore abandons its authenticity as an authoritative statement of the law. It thereupon loses its formal status as such. This Court is intimately familiar with the importance of statutory and jurisprudential wording to the explication of law.

It is this analytic dimension that the merger doctrine captures in relation to government edicts. An edict’s commitment to authenticity in exposition, a prerequisite for its binding nature as “law,” necessitates verbatim wording, implying that the “law” contained in the edict is only ever capable of expression in one or a

limited number of ways, effectively merging the law and its exposition.

* * *

Consequently, the government edicts doctrine finds support in fundamental copyright doctrines. Copyright's authorship, functionality, and merger collectively buttress the government edicts doctrine by rendering edicts of government uncopyrightable.

II. THE OFFICIAL CODE OF GEORGIA ANNOTATED (O.C.G.A.) IS AN UNCOPYRIGHTABLE EDICT OF GOVERNMENT

The Official Code of Georgia Annotated is published by the State of Georgia and is the only compilation of the state's official statutory code that is publicly available. It consists of the state code enacted by the legislature along with annotations prepared by the publisher, both of which are merged into a common volume. O.C.G.A. § 1-1-1. The annotations comprise "such materials as summaries of judicial decisions interpreting or applying particular statutes." Pet. Br. at 2.

Petitioners concede that the statute itself is uncopyrightable as an edict of government. *Id.* at 2-3. At issue is the copyrightability of the annotations. While created by a private party under direction from the state, the annotations do not have the force of law as such. *See* O.C.G.A. § 1-1-7. They are nevertheless adopted through a formal vote of the state legislature,

merged with the statute, and collectively published “by authority of the state.” O.C.G.A. § 1-1-1.

Although the annotations do not have the force of law and are therefore not binding as such, they nonetheless fall within the edicts of government doctrine. They are prepared under the direction of the legislature, and their adoption and merger into the enacted statute reveals that they are created under the ostensible authority of the state, making them uncopyrightable edicts of government.

A. An Edict of Government Does Not Need to Have the Force of Law

Without any basis in precedent or the statute, Petitioners contend that in order to qualify as an edict of government under the doctrine as developed by this Court, the edict must have the “force of law.” Pet. Br. at 32. As Respondent rightly notes, this argument flies in the face of the very precedent upon which Petitioners rely and introduces an artificial constraint into the working of the doctrine, leading to absurd results. Resp. Br. at 40.

While Petitioners rightly note that the Court’s opinion in *Wheaton* has been understood as recognizing that the annotations at issue in the case were copyrightable, it mistakenly concludes that this was because those annotations lacked binding effect. Pet. Br. at 33. As Respondent correctly argues in its account of the history surrounding *Wheaton* and the parties’ positions therein, the reason had to do with the

manner in which those notes and annotations were prepared in the case. Insofar as they were not prepared by the judges themselves but instead independently by the court reporter, they were seen as the legitimate result of the reporter's own creative effort, despite lacking any binding effect as law. Resp. Br. at 24-26.

Indeed, this understanding informed this Court's twin opinions in *Banks* and *Callaghan*, authored by the same justice within the same month. In the latter of the two cases, Justice Samuel Blatchford's opinion allowed the court reporter to assert a copyright claim in parts of the report that went beyond the "opinions of the judges". *Callaghan*, 128 U.S. at 647. That case read *Wheaton* and its subsequent remand to stand for the proposition that the elements of the reports "not embracing the written opinions of the court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index . . . may be the lawful subject of copyright." *Id.* at 649. Yet some weeks earlier, Justice Blatchford's opinion denied the copyrightability of not just the judicial opinions themselves, but also the statements of cases, syllabi, and headnotes. *Banks*, 128 U.S. at 253. The reasoning was simple: Unlike in *Callaghan*, the statements of cases, syllabi, and headnotes that went into the reports in *Banks* were prepared by the judges themselves rather than by the court reporter. *Id.* at 251.

Banks underlines this point through its repeated emphasis on the work actually performed by a judge. This Court considered the point obvious when it

emphasized that “[in] no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note, be regarded as their author or their proprietor.” *Id.* at 253. The work of a judge was the key determinant.

Judges . . . can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. *This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves.*

Id. (emphasis supplied).

Banks specifies that, in its answer to plaintiff’s bill, the defendant elaborated on the role of the court reporter in the state of Ohio at the time. The answer averred that the opinions constituting the reports

were exclusively the work of the judges composing those courts; that the reporter performed no work in preparing the said opinions and decisions; that it is the universal custom and practice of those courts that the judge to whom the duty is assigned of preparing the opinion, prepares not only the opinion but also the statement of the case and the syllabus, the latter being subject to revision by the judges concurring in the opinion; that the reporter takes no part, and performs no labor, in preparing the syllabus, the statement of the case and the opinion.

Id. at 250. *Banks* based its decision on the uncopyrightability of the opinions in principal part on these facts, which have all to do with the judicial origins of the uncopyrightable elements and nothing whatsoever to do with their binding nature. *See id.* at 251.

Petitioners base its argument on the sole use of the phrase “binding every citizen” used by *Banks* in conjunction with “the authentic exposition and interpretation of the law.” *Id.* at 253; Pet. Br. at 40. By cherry-picking this phrase and using it out of context, Petitioner ignores its origins altogether. As the opinion in *Banks* makes clear through citation, this phrase originates in the Massachusetts case of *Nash v. Lathrop*, 6 N.E. 559 (Mass. 1886), decided two years before *Banks* and *Callaghan*.

While *Nash* raised questions about the copyrightability of judicial opinions and the scope of such copyright, the court chose to decide the case on “a narrower question” of interpreting the contract between the state and the publisher to see if that contract had conferred upon the publisher the right to prevent others from making the opinions public until they were first published by them. *Nash*, 6 N.E. at 560. And to inform its analysis, *Nash* observed:

The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no

argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. . . . It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public.

Id.

The reference to “binding” was therefore an explanation for the court’s conclusion that the legislature had an obligation to publicize its laws, both judge-made and statutory. Indeed, Justice Blatchford uses it as such in *Banks*, since it follows on the heels of his reference to “public policy,” which was precisely the basis for the court’s non-copyright decision in *Nash*. *Banks*, 128 U.S. at 253. Petitioners miss this lineage altogether in its simplistic attempt to bootstrap the idea of “binding law” into the edicts of government doctrine.

Appreciating this nuance is critical to understanding Justice Blatchford’s opinions in *Banks* and *Callaghan*, since he was acutely aware of the role that court reporters played in the preparation of case reports. Justice Blatchford himself served as a court reporter to the courts in the U.S. Circuit Court for the Second Circuit and simultaneously published *Blatchford’s Circuit Court Reports* between 1852 and 1888. See Hector T. Fenton, *Mr. Justice Blatchford. In Memoriam*, 41 Am.

L. Reg. 882, 882-83 (1893). And in this capacity, he produced the report for the leading New York decision on the copyrightability of judicial opinions, *Little v. Gould*, 15 F. Cas. 604, 612 n.1 (C.C.N.D.N.Y. 1851) (“Reported by Samuel Blatchford, Esq., and here reprinted by permission.”).

At issue in *Little* was a New York statute that forbade any assertions of copyright in the judicial decisions of the court of appeals, and further vested the copyright in “any notes or references made by the state reporter” in the state, for public benefit. *Id.* at 608. The question in the case revolved around understanding what these “notes and references” could be and whether it encompassed content produced by a court reporter entirely gratuitously, and without obligation. The court in *Little* answered this question in the negative, concluding that the phrase “notes and references” was limited to those portions of the reports “constituting an essential ingredient of their integral composition, and which the state reporter, as such, was therefore bound to supply.” *Id.* at 609. These included the “summary of the points decided by the court,” “the footnotes” therein, and the summary of the parties’ arguments—all prepared by the court reporter. *Id.* Outside of this phrase were the “abstracts of the pleadings and statements of facts,” which formed the basis of the opinions themselves and anything else that the reporter included. *Id.* at 610.

While *Little* was based on a state statute, the court’s attempt to differentiate between the copyrightable and uncopyrightable parts of a reporter’s work

was driven entirely by the *official function* of the court reporter. Nowhere does the court tie the copyrightability of a part of the report, or indeed its lack thereof, to the question of whether that part is binding. Gratuitously, as opposed to obligatorily, produced elements of the court report were copyrightable by the court reporter because they were in no sense part of the opinion, nor of the “notes and references” accompanying it.

The demarcation at issue in *Little* formed the basis of Justice Blatchford’s reasoning in *Callaghan*, allowing the copyrightability of those parts of the reports prepared entirely by a court reporter. This influence is borne out in the *Callaghan* opinion’s reference to the “absence of a prohibitory statute” which was being interpreted in *Little*. See *Callaghan*, 128 U.S. at 647. Without such a prohibition, all elements of a case report produced by a court reporter are rendered copyrightable, including those generated in the exercise of the reporter’s official functions. Nothing whatsoever turns on whether the elements are binding and have the force of law as such.

Petitioner’s argument about the need for an edict of government to have the “force of law” is therefore clearly contradicted by the reasoning in *Banks* and *Manchester*. Consequently, the mere fact that the annotations merged into the O.C.G.A. lack the force of law has no bearing whatsoever on the conclusion that the O.C.G.A. as a whole constitutes an uncopyrightable edict of government.

B. Annotations Produced under the Ostensible Authority of the State Qualify as Edicts of Government

While the annotations merged into the O.C.G.A. are declared by the terms of the O.C.G.A. to lack the force of law, they are nevertheless merged into the statute through a formal vote of the Georgia legislature. O.C.G.A. § 1-1-1. Petitioners argue that this vote and adoption is functionally meaningless in relation to the edicts of government doctrine since the annotations were not individually voted on, and thus never go through the formal legislative process. Pet. Br. at 40. While the process does not convert the annotations into law, it nonetheless implicates the edicts of government doctrine, which applies to all annotations and statements of law produced under the *ostensible* authority of the state.

In its brief, the United States clearly recognizes the flaw in Petitioners' argument that a work must have the "force of law" to qualify as an edict of government. U.S. Br. at 24 n.6. In its place, it suggests an alternative formulation: to qualify as a government edict, the expression at issue must have been prepared by the individual in "his capacity as a *lawmaker*." *Id.* at 21. The United States further suggests adopting an expansive framework encompassing the "whole work" of the individual in order to make this determination, thereby covering not just a legislator's immediate actions in voting to pass a bill, but also "materials produced as a legislator discharging his lawmaking

duties.” *Id.* While this approach fares better than Petitioners’ argument, it too is fraught with difficulties.

The government’s test effectively boils down to determining whether the expression at issue was produced in a *lawmaking capacity*. In illustrating the working of the test, the government chooses easy examples. *Id.* at 21. In applying its test to the O.C.G.A., the government nevertheless concludes that the O.C.G.A. was not produced by the legislature in a lawmaking capacity because of differences between the process through which the O.C.G.A. is formally adopted and the process of enacting legislation in Georgia. *Id.* at 23-31.

Indeed, the government’s application of its own test to the O.C.G.A. illustrates the problems with its test. While the process through which the O.C.G.A. is voted on, adopted as official, and merged into the rest of the statute may be formally distinct from the state’s standard legislative process, the difference is meaningless to readers and users of the O.C.G.A. attempting to determine the relevant statutory rule of the state, and reproduce it if and when needed. To users of the O.C.G.A., the work on its face bears the imprimatur of the state, epitomized in the annotations being contained in a volume captioned “Official.”

To have ordinary citizens distinguish between the legislature’s different processes in assessing the copyrightability of an edict would impose an undue hardship on the public and users of the law. This is especially the case given the absence of any common

understanding of “lawmaking capacity,” as assumed by the government. The question of copyrightability (of a government edict) would now come to be tied to an awareness of the lawmaking body’s different procedures, and the differential effects of those procedures on the product coming out of that body. The government’s proposed test is therefore unworkable in practice.

Respondent recognizes the deficiencies in both Petitioners’ and the government’s tests and in its place offers an alternative: to qualify as an edict of government, the work must be prepared in the exercise of “state legal authority.” Resp. Br. at 17, 22. Respondent’s test represents a workable formulation in large part, but it can be read as requiring the exercise of *actual* legal authority granted to the creator of the edict by the state. In this reading, once again the informational burden on users of the edict would be high, who would have to now investigate the scope and extent of such authority.

A minor modification to Respondent’s proposed rule represents a fully workable alternative and is compatible with the precedents at hand: edicts of government are prepared in the exercise of *ostensible* authority of the state. In situations where an edict holds itself out as having been created under the authority of the state, regardless of whether it was actually produced under the authority of the state, it qualifies as an uncopyrightable edict of government. This rule would cover both situations where there is actual authority, as well as those where such formal authority is

lacking but the state nevertheless acquiesces in the work representing itself as having the imprimatur of the state, as is the case with the O.C.G.A.

Both *Banks* and *Callaghan* are consistent with this approach. As evidenced by the language of the Court in *Callaghan*, the work of the reporter was readily identifiable in case reports and understood widely to carry no authority of the state. *Callaghan*, 128 U.S. at 645 (referring to the “usual form” of law reports). It was only in the rare case that judges—carrying the authority of the state—produced parts of the report other than the opinions, which altered this understanding and rendered the work uncopyrightable as an edict. *See, e.g., Banks*, 128 U.S. at 251.

Howell v. Miller, 91 F. 129 (6th Cir. 1898) was the first case extending the edicts of government doctrine to statutes and is also consistent with this understanding. The case involved an annotated compilation of Michigan state statutes prepared by the plaintiff, Howell. *Id.* at 130. Shortly after its compilation, the state legislature passed a law declaring that “the general laws of the state, as collected and arranged in those volumes, should be received and admitted in all courts and proceedings, and by all officers, ‘as evidence of the existing laws thereof, with like effect as if published under and by the authority of the state.’” *Id.* at 131. As Respondent notes in its brief, the legislature merely issued its imprimatur to the general laws of the state contained in the plaintiff’s compilations, and not to everything contained therein, including the additional material prepared by the plaintiff. Resp. Br. at 34-35.

The court concluded that the plaintiff's annotations were copyrightable works, even though the statutory component of the compilation was an uncopyrightable government edict. *See Howell*, 91 F. at 138.

On the facts of *Howell*, the state legislature was circumspect to only authenticate the "general laws" as "collected and arranged" by the plaintiff, even though it noted that the book contained those laws "compiled and annotated." 2 HOWELL'S ANNOTATED STATUTES OF MICHIGAN iv (1883). The state, in other words, consciously disavowed authenticating the plaintiff's annotations. Neither the state of Michigan, nor Howell, therefore held out the annotations as ever garnering the imprimatur of the state. Indeed, Howell accurately reproduced the exact wording of the authenticating statute in his volume, thereby effectively avoiding the possibility of any exercise of ostensible authority.

The annotations in the O.C.G.A., by contrast, do just the opposite. They hold themselves out as having obtained the endorsement of the state legislature, even while disclaiming any binding status as law. In so doing, they should be treated as uncopyrightable.



CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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