

COPYRIGHT IN A GLOBAL INFORMATION ECONOMY

2020 Case Supplement

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Chapter 3. Authorship

E. Government Works

Pages 172-76. Replace the material on these pages with the following:

On its face, subsection (1) of the “works made for hire” definition makes governments the authors of works created by their employees within the scope of their employment. However, §105 (a) of the Act contains an express exclusion:

§105. Subject matter of copyright: United States Government works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

Section 101 defines a “work of the United States Government” as “work[s] prepared by an officer or employee of the United States government as part of that person’s official duties.” The legislative history makes clear that Congress intended courts to use a work made for hire type of analysis in this context. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 59 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5672.

The rule codified in §105 has a long history and is based on several justifications. The legislative history indicates Congress was concerned that the public should not be required to pay twice - first to create the work and second to obtain it at a higher price than otherwise, given its copyright. *Id.* Congress also expressed a concern that copyright could be used as a tool for censorship if U.S. government works were subject to copyright protection. *Id.* (explaining that with U.S. government works in the public domain “as far as the copyright law is concerned, the Government [can]not restrain the employee or official from disseminating the work if he or she chooses to do so.”)

There are, however, several types of government documents that §105(a) does not address. First, the Act does not directly address the copyright status of works prepared by non-governmental entities pursuant to a contract with the federal government. The legislative history explains that omission:

The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the

need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

Id.

Second, §105(a) does not apply to works created by employees or officials of state, local, or foreign governments. However, a longstanding judicial doctrine holds that laws, including both statutory laws and judicial decisions, are not eligible for copyright protection. Recall from Chapter 1.B that in 1834, in litigation between two Supreme Court reporters over the reproduction of annotated volumes of the Court's opinion, the Court observed, "[N]o reporter has or can have any copyright in the written opinions delivered by this Court." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834). This judicial exclusion applies to all laws created by any government body. In fact, the U.S. Copyright Office will not register any "government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials." Compendium (Third) §313.6(C)(2).

The exclusion of government edicts from copyright eligibility has recently been the subject of litigation. *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 906 F.3d 1229 (11th Cir. 2018), *aff'd*, 140 S. Ct. 1498 (2020), concerned the copyrightability of annotations to Georgia's statutory code drafted by Lexis pursuant to an express agreement with the state of Georgia. Georgia's Code Revision Committee oversaw and reviewed the drafting of the annotations and their final form. Also, each year the Commission presented the completed annotated code for adoption by the legislature.

In addressing the copyrightability of the annotations, the Eleventh Circuit had focused on the question of authorship:

To navigate the ambiguities surrounding how to characterize this work, we resort to first principles. Because our ultimate inquiry is whether a work is authored by the People, meaning whether it represents an articulation of the sovereign will, our analysis is guided by a consideration of those characteristics that are the hallmarks of law. In particular, we rely on the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created. These are critical markers. Where all three point in the direction that a work was made in the exercise of sovereign power -- which is to say where the official who created the work is entrusted with delegated sovereign authority, where the work carries authoritative weight, and where the work was created through the procedural channels in which sovereign power ordinarily flows -- it follows that the work would be attributable to the constructive authorship of the People, and therefore uncopyrightable. . . .

[W]e conclude that the People are the ultimate authors of the annotations. As a work of the People the annotations are inherently public domain material and therefore uncopyrightable.

Id. at 1232–33.

The Supreme Court agreed with the Eleventh Circuit's conclusion that the annotations were uncopyrightable, but adopted a different reasoning. *See Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). Invoking the government edicts doctrine, the majority opined that the Court's 19th century precedents established a

“straightforward” rule that judges cannot be considered authors of works they produce in the course of their official duties. *Id.* at 1507. Applying the doctrine to Georgia’s annotations, it reasoned:

[J]ust as the [government edicts] doctrine applies to “whatever work [judges] perform in their capacity as judges,” it applies to whatever work legislators perform in their capacity as legislators. That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills. These materials are part of the “whole work done by [legislators],” so they must be “free for publication to all.” Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.”

Id. at 1508.

In holding that the government edicts doctrine extends to legislators, the Supreme Court reoriented the doctrine to include *all* materials that could be viewed as expressions of the legislative function whether or not the materials constitute authoritative statements of law. The majority reasoned that:

Although the annotations are not enacted into law through bicameralism and presentment, the Commission’s preparation of the annotations is under Georgia law an act of “legislative authority,” *Harrison Co.*, 244 Ga. at 330, 260 S.E.2d at 34, and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. Georgia and Justice Ginsburg emphasize that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law review articles. But that does not take them outside the exercise of legislative duty by the Commission and legislature. Just as we have held that the “statement of the case and the syllabus or head note” prepared by judges fall within the “work they perform in their capacity as judges,” *Banks*, 128 U.S. at 253, 9 S. Ct. 36, so too annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators.

Id. at 1509.

Laws sometimes are drafted by private organizations; examples include model statutes created by the Uniform Law Commission (ULC) and the American Law Institute (ALI). Additionally, other organizations work to create a wide variety of standards for industry use. Such written standards may resolve technical problems, ensure compatibility across products, or be designed to promote public safety. Sometimes those standards are expressly referenced by legislative enactment or government regulations. Do those privately drafted documents have copyright protection even after they have been adopted as a component of a law?

In *Veeck v. Southern Building Code Congress Int’l* (SBCCI), 293 F.3d 791 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003), the Fifth Circuit held that when a state adopts a privately drafted code as law, such law is not copyrightable. Citing *Wheaton v. Peters*, 33 U.S. (Pet.) 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888), and their progeny, the *Veeck* court held those cases represent “a continuous understanding that ‘the law,’ whether articulated in judicial opinions or legislative acts or ordinances, is in the

public domain and thus not amenable to copyright.” *Veeck*, 293 F.3d at 796. The court also held that the enacted codes were facts, ineligible for copyright protection: “The codes are ... the unique, unalterable expression of the ‘idea’ that constitutes local law.... It should be obvious that for copyright purposes, laws are ‘facts’: the U.S. Constitution is a fact; the Federal Tax Code and its regulations are facts; the Texas Uniform Commercial Code is a fact....” *Id.* at 801-02.

NOTES AND QUESTIONS

1. Do you agree with the majority’s reasoning extending the government edicts doctrine to legislatures? What about the extension to *all* works created by judges and legislatures in their official capacities *regardless* of whether they have legal force? In defence of its decision, the majority emphasized the importance of equal access to the same quality of legal information:

If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today’s digital tools, States might even launch a subscription or pay-per-law service. . . . [C]itizens, attorneys, nonprofits, and private research companies would have to cease all copying, distribution, and display of those works or risk severe and potentially criminal penalties. §§ 501–506. Some affected parties might be willing to roll the dice with a potential fair use defense. But that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial. Cf. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552, 560–561, 105 S. Ct. 2218, 85 L.Ed.2d 588 (1985). The less bold among us would have to think twice before using official legal works that illuminate the law we are all presumed to know and understand.” *Id.* at 1512-1513.

What do you make of these concerns?

2. When should the government employ contractual provisions, regulations, or other means to require that the author of a commissioned work either dedicate it to the public domain or waive some rights under copyright? *See, e.g.*, 2 CFR § 2900.13 (Department of Labor regulation requiring intellectual property developed under a competitive federal award process be licensed under a Creative Commons Attribution license; *see page 757, infra*, for a description of Creative Commons licenses).

3. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) involved a website, PublicResources.org, that seeks to make the law more accessible by posting freely available copies of statutes and regulations. Such a free database affects the value of commercial databases like Lexis and Westlaw. Should the interests of commercial providers be factored into a court’s analysis in determining whether certain works of the legislative branch are “laws”? Note that the agreement between Georgia and Lexis expressly permitted Lexis to assert a copyright in the annotation, but this fact did not sway the Eleventh Circuit or the Supreme Court.

If you represented a company that develops commercial databases, what advice would you give the next time a state wants to retain your client to create a database

consisting of annotated statutes, regulations and ordinances? Revisit this question after you have covered Chapters 12 and 15.

4. What are the implications of *Veeck* and *Public Resource.Org* for proposed uniform laws and accompanying reporters' notes drafted by the ULC and ALI? For example, ULC and ALI jointly promulgate the Uniform Commercial Code (UCC), which includes both proposed legislative text and comments by the relevant drafting committee. Some states adopt only the text as law; some also adopt the comments as law. Do the ULC and the ALI have a copyright in anything? If not, would that result undermine the incentive to create model uniform laws?

5. In 2019, Congress amended § 105 of the Copyright Act to allow civilian faculty members of "covered" federal institutions to assert copyright in their literary works "produced . . . in the course of employment . . . for publication by a scholarly press or journal." The new subsection (c) lists the covered institutions: (A) National Defense University; (B) United States Military Academy; (C) Army War College; (D) United States Army Command and General Staff College; (E) United States Naval Academy; (F) Naval War College; (G) Naval Post Graduate School; (H) Marine Corps University; (I) United States Air Force Academy; (J) Air University; (K) Defense Language Institute; (L) United States Coast Guard Academy. All the covered institutions are military educational establishments. What might justify this amendment to §105? Had you been a member of Congress when this amendment was introduced, would you have voted in favor? Why or why not?

Chapter 5. The Reproduction Right and the Right to Prepare Derivative Works

A. Reproduction

Page 264. *In the Notes and Questions, add a new Note and Question 3 and re-number existing Notes and Questions 3-6 as 4-7:*

3. In establishing copying in fact, should courts consider access and similarity to be in an inverse relationship – i.e., the more access, the less similarity required and vice versa? In *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc), the Ninth Circuit reversed prior precedent (including a part of *Three Boys Music Corp.* not reproduced in the casebook) that had adopted the so-called “inverse ratio rule.” *Id.* at 1066. The *Led Zeppelin* court described the rule as one that “is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties” *Id.* What considerations do you think led the court to this conclusion? Do you agree with the court? Why, or why not?

Page 305-06. *In the Notes and Questions, replace Note and Question 5 with the following:*

5. Are jury trials desirable (or even appropriate) in music copyright infringement cases? The history of *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc), illustrates just some of the challenges jury trials present. There, the jury concluded that the opening bars of Led Zeppelin’s “Stairway to Heaven” did not infringe the copyright in an earlier composition, “Taurus.” Among the issues on appeal were the appropriateness of a number of the district court’s jury instructions. The plaintiff challenged as unfairly prejudicial: (i) instruction number 16 on originality, providing that “common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes” are not protected by copyright; (ii) instruction number 20 on originality, noting that “any elements from prior works or the public domain are not considered original . . . and [are] not protectable by copyright”; and (iii) refusal to give a jury instruction concerning the copyrightability of selection and arrangement of uncopyrightable elements. *Id.* at 1070-76. After a 3-judge panel agreed with the plaintiff, the en banc court reversed:

Jury Instruction No. 16 correctly listed non-protectable musical building blocks that no individual may own, and did not, as Skidmore claims, exclude the particular use of musical elements in an original expression. . . .

Reading [Jury Instruction No. 20 in its entirety, including the following -] an ‘original work may include or incorporate elements taken from prior works or works from the

public domain’ – we conclude that Jury Instruction No. 20 correctly instructed the jury that original expression can be the result of borrowing from previous works or the public domain. . . .

[Regarding the lack of instruction on a selection and arrangement theory, b]ecause Skidmore did not preserve his objection to the omission, we review for plain error. . . .

. . . Under plain error review . . . we consider whether ‘(1) there was an error; (2) the error was obvious; and (3) the error affected substantial rights.’ Even where these demanding requirements are met, ‘the decision whether to correct a plain error under Federal Rule of Civil Procedure 51(d)(2) is discretionary,’ typically invoked only . . . ‘to prevent a miscarriage of justice.’

Even [assuming plain error,] we cannot conclude that it produced a miscarriage of justice. . . . A selection and arrangement instruction would not have convinced the jury that *Stairway to Heaven* was substantially similar to . . . *Taurus*. . . . We may also take ‘into consideration ‘the costs of correcting [the] error,’” and that factor clearly supports letting the jury verdict stand. This case involved a lengthy trial, and there is little reason to have another trial that Skidmore cannot win. . . .

[W]e [also] conclude that the district court did not commit any error [because Skidmore] did not present [copyright in the selection and arrangement] as a separate theory at trial.

At trial, Skidmore’s copyright infringement claim was based on the combination of five elements: minor chromatic line and associated chords; duration of pitches . . . ; melody . . . ; rhythm . . . ; and pitch collection.

. . . Skidmore never argued how these musical components related to each other to create the overall design, pattern, or synthesis. Skidmore simply presented a garden variety substantial similarity argument. . . .

Id. at 1070-74. Do you agree with the en banc court that the instructions correctly stated the law and did not prejudice the plaintiff? Should the cost of correcting an error be relevant to the analysis?

Chapter 8. Moral Rights and Performers' Rights

A. Moral Rights in the United States

Page 474. Replace Notes and Questions 3 and 4 with the following:

3. Should the plaintiffs' acknowledgement that even the works on the long-term walls were likely to be removed at some point in the future change the analysis under §113(d)? The answer to this question appears to be "no." On appeal, the Second Circuit observed: "[w]e see nothing in VARA that excludes temporary artwork from attaining recognized stature. . . . The statute does not adopt categories of 'permanent' and 'temporary' artwork, much less include a definition of these terms." *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167 (2d Cir. 2020).

4. Finding that the defendant's behavior in destroying the plaintiffs' artwork was "the epitome of willfulness," *Cohen v. G&M Realty L.P.*, 125 U.S.P.Q.2d 1708, *17 (E.D.N.Y. 2018), *aff'd sub nom. Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), the court applied §§504(a)-(c) and awarded each artist the statutory maximum of \$150,000 in damages per work destroyed, totaling \$6,750,000 in statutory damages for the artists. In your opinion, do the facts of this case merit such a high award? Why or why not? You will learn more about damages for copyright violations in Chapter 13 of the casebook.

Chapter 9. Fair Use

C. Other Productive Uses

Page 571. In the Notes and Questions, insert new Note and Question 6:

6. In 2006, the Internet Archive began its Open Library program, which aspires to create a comprehensive online catalog listing every book ever published and to make as many full text books as possible available to the public. The Open Library acquires hard copies of the books to be digitalized from participating libraries and from individuals, who may donate either books or money to purchase specific titles. It scans the books, prepares the digital files, and makes them available online. So far, the program has digitalized over 1.5 million books. It makes public domain titles available without restrictions. For titles under copyright, it uses Controlled Digital Lending (CDL) technology to ensure that each digitalized book can be checked out to only one person at a time. Members of the public who sign up for Open Library accounts can check out a limited number of CDL books at a time and may keep each book for up to two weeks. If an account holder requests a book that is already checked out to someone else, they are placed on a waiting list to receive that title.

In March 2020, after many states and cities had imposed stay-at-home orders in response to the COVID-19 pandemic, the Internet Archive announced that it would create a National Emergency Library by temporarily removing the CDL controls to permit unlimited access to the digitalized books in its collection. Subsequently, four book publishers—Hachette Book Group, HarperCollins Publishers, John Wiley & Sons and Penguin Random House—sued the Internet Archive for “conducting and promoting copyright infringement on a massive scale.” The Internet Archive announced an immediate end to the National Emergency Library program. As of this writing, however, the publishers have not dropped their lawsuit, and the complaint also includes infringement allegations pertaining to the Open Library/CDL system. Was the National Emergency Library program a fair use of the books involved? Is the Open Library/CDL system a fair use?

Chapter 13. Copyright Litigation

F. Civil Remedies

a. The Basics of Statutory Damages

Page. 836. In the Notes and Questions, insert a new Note and Question 4:

4. In *Cohen v. G&M Realty L.P.*, 125 U.S.P.Q.2d 1708, *17 (E.D.N.Y. 2018), *aff'd sub nom. Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2d Cir. 2020), which you read in Chapter 8.A.3., the Second Circuit upheld the district court's award of the maximum amount of statutory damages available—\$6,750,000. Noting that district courts enjoy wide discretion in setting statutory damages, the court of appeals determined that the district court had not abused its discretion but rather had “carefully considered the six factors relevant to a determination of statutory damages ‘(1) the infringer’s state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer’s cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.’ *Bryant [v. Media Right Prods., Inc.]* 603 F.3d 135, 144, (2d Cir. 2010)].” *Id.* at 171.