EXPANDING THE PUBLIC DOMAIN AFTER *GEORGIA V. PUBLIC.RESOURCE.ORG., INC.*

DEBORA HALBERT*

ABSTRACT

In 2020, the U.S. Supreme Court in Georgia v. Public.Resource.Org., Inc., sided with Carl Malamud in his ongoing fight to assure that access to the law remains free and in the public domain. By finding for Public.Resource.Org, the Court established that the law and its ancillary texts are indeed in the public domain, and in doing so, the Court expanded the government edicts doctrine to include virtually all official statements by judges or legislative bodies. This article discusses the Court's decision in the context of the larger political movement for open access and argues that, while the outcome is a reason to celebrate, the result is only a modest step forward in terms of protecting and accessing the public domain. The paper discusses the political context within which the Court's decision is situated, a brief review of efforts to develop a democratic movement toward open access as a counter to the privatization of the public domain in the information age; and then turns to the case itself before offering an analysis of the implications and the more permanent steps that need to be taken.

* Debora J. Halbert is a Professor of Political Science at the University of Hawai'i at Mānoa. She is also currently serving as the Associate Vice President for Academic Programs and Policy for the University of Hawai'i System. I would like to thank Professor Nicholas Mirkay at the Richardson School of Law, University of Hawai'i for reading earlier drafts of this paper.

I. INTRODUCTION

In 1991, officials at the International Telecommunication Union ("ITU") provided Carl Malamud with a magnetic tape copy of ITU's Blue Book, a 20,000-page manual covering standards for modern communication, so that he could scan the document and make it available for free online.[1] Until Malamud put the standards online, access to the technical manual cost users about one dollar per page to copy.[2] In a later interview, Malamud called putting the private standards online free for all "standards terrorism," though what exactly he meant by this term is unclear.[3] Fast-forward to 2015, when the meaning of terrorism had radically changed in the aftermath of 9/11; the State of Georgia asserted that Carl Malamud had committed an "act of terrorism" in its complaint against him for copyright infringement.[4] Malamud's answer called Georgia's

[1] Clint Hendler, *Carl Malamud, Public Printer*, COLUM. JOURNALISM REV. (Mar. 13, 2009), https://www.cjr.org/campaign_desk/carl_malamud_public_printer.php [https://perma.cc/RB2V-2ZP5].
[2] *Id.*
[3] *Id.*
[4] Amended Complaint for Injunctive Relief at 20–21, Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350 (N.D. Ga. 2017) (No. 1:15-CV-02594-MHC); Adam Liptak, *Accused of 'Terrorism' for Putting Legal Materials Online*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/us/politics/georgia-official-code-copyright.html [https://perma.cc/WNK5-L4DL].

allegation "bizarre, defamatory, and gratuitous."[5] The act of terrorism Malamud was accused of committing by the State of Georgia was that he purchased a copy of Georgia's official annotated code, scanned it, posted it for free online, and distributed copies to Georgia legislators and others.[6]

Malamud, under the auspices of his nonprofit "Public.Resource.Org." ("PRO"), is fighting a battle to ensure free access for the public to official standards incorporated by reference into public laws, legal codes, case law annotations deemed official, and any other documents produced by the government that he deems should be in the public domain.[7] His efforts put him into conflict with the State of Georgia, which had entered into a contract with Matthew Bender, a subsidiary of Lexis-Nexis ("Lexis"), to produce the State's official annotated code in exchange for the exclusive rights to distribution.[8] In filing a copyright infringement case against Malamud, Georgia argued that while the code itself was in the public domain, the annotations were the copyrighted work of the Georgia Revision Commission ("Commission").[9] The U.S. District

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[5] Elizabeth Scheibel, Note, *No Copyright in the Law: A Basic Principle, Yet a Continuing Battle*, 7 CYBARIS INTELL. PROP. L. REV. 350, 370 (2016) (citing Malamud's answer to Georgia's claim of terrorism).

[6] Steven Levy, *The Internet's Own Instigator*, WIRED (Sept. 12, 2016), https://www.wired.com/2016/09/the-internets-own-instigator/ [https://perma.cc/4JL7-DCEB]; Cory Doctorow, *The New York Times on Carl Malamud and His Tireless Battle to Make the Law Free for All to Read*, BOING BOING (May 14, 2019), https://boingboing.net/2019/05/14/grifting-the-law.html [https://perma.cc/Y59Z-ST47]; Scheibel, *supra* note 5, at 351, 368–69.

[7] *See* PUBLIC.RESOURCE.ORG, https://public.resource.org/ (last visited June 21, 2020) (archiving Malamud's scanned code projects).

[8] Amended Complaint for Injunctive Relief, *supra* note 4, at 10.

[9] *See* David E. Shipley, *Code Revision Commission v. Public.Resource.Org and the Fight over Copyright Protection for Annotations and Commentary*, 54 GA. L. REV. 111, 119–20 (2019) (describing the work made for hire process deployed by Georgia to produce the annotated code in collaboration with Lexis-Nexis).

Court for the Northern District of Georgia sided with the State of Georgia, but was reversed by the United States Court of Appeals for the Eleventh Circuit,[10] paving the way for the Supreme Court's recent decision in favor of PRO.[11]

The Supreme Court's 2020 decision in *Georgia v. Public.Resource.Org., Inc*. ("*Georgia v. PRO*") is significant because the Court established that the law and its ancillary texts are in the public domain and, in doing so, expanded the government edicts doctrine to include virtually all official statements by judges or legislative bodies.[12] In real terms, the decision will impact how states publish their official codes and how they contract with private companies to outsource the work of writing and publication, especially since only two publishers control virtually all official state code publications.[13] While the outcome of the Supreme Court's decision is generally positive, this paper contends that the result is only a modest step forward and proposes that more concrete steps need to be taken to ensure free and

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[10] Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350, 1353 (N.D. Ga. 2017), *rev'd and remanded sub nom*. Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org., Inc., 906 F.3d 1229 (11th Cir. 2018), *aff'd sub nom.* Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).

[11] *See* Corynne McSherry & Mitch Stoltz, *Supreme Court Affirms That No One Owns the Law*, ELEC. FRONTIER FOUND. (Apr. 27, 2020), https://www.eff.org/deeplinks/2020/04/supreme-court-affirms-no-one-owns-law [https://perma.cc/PR45-YF86]; Jordan S. Rubin, *Georgia Copyright Loss at High Court Could Jolt Many States*, BLOOMBERG LAW (Apr. 27, 2020), https://news.bloomberglaw.com/us-law-week/georgia-loses-legal-code-copyright-clash-at-supreme-court [https://perma.cc/ZM29-AQTE].

[12] *See* Georgia v. Public.Resource.Org., Inc., 140 S. Ct. 1498 (2020) (holding that the official Georgia annotated code was in the public domain); McSherry & Stoltz, *supra* note 11.

[13] *See* Leslie A. Street & David R. Hansen, *Who Owns the Law: Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 206, 218 (2019) (detailing that virtually all official state codes are owned by two companies: Thomson Reuters and the Dutch-owned RELX Group, which includes Lexis-Nexis).

open access to a full and accurate statement of the law. As it stands, the Court left numerous escape hatches for those who would privatize the law that could further jeopardize public access.

Section Two of this paper discusses the political context within which the Court's decision is situated: the enclosure of the public domain, the subject of legal commentary for decades. Section Three provides a brief review of efforts to develop a democratic movement toward open access as a counter to the privatization of the public domain in the information age. Section Four then analyzes the flow of the legal arguments from the District Court, the Court of Appeals for the Eleventh Circuit, and then ultimately to the U.S. Supreme Court, each of which offered a different legal analysis grounded in existing copyright law. Section Five offers an analysis of the implications of the Supreme Court's opinion in *Georgia v. PRO* and the more permanent steps that need to be taken. Finally, Section Six concludes the paper by looking briefly at the future.

II. IP MAXIMALISM: SETTING THE BACKGROUND ON THE ENCLOSURE OF THE PUBLIC DOMAIN AND SETTING THE STAGE FOR *GEORGIA V. PRO*

The enclosure of the public domain, meaning the use of copyright to limit access to otherwise public materials, has been the subject of concern and legal commentary for decades.[14] The Internet, designed as a tool to share

[14] *See generally* Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2002); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW CONTEMP. PROBS. 33 (2003); Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access through Secrecy or Intellectual Property*, 55 HASTINGS L. J. 91 (2003); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L. J. 783 (2006); Anupam Chander & Sunder Madhavi, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331

information, also sparked a movement towards increasingly restrictive copyright laws, raising the corresponding concern of reduced access to what would otherwise have been public domain materials.[15] Professor Susan Sell coined the term IP Maximalism to describe global efforts to use the law to ratchet up IP protection at the expense of the public.[16] Professor Madhavi Sunder more recently expressed concern that the maximalist approach will undermine what she calls "fair culture." [17] While the struggle between expanding intellectual property law and resistance to that expansion is both global and ongoing, this section focuses on the United States and the decisions made to enclose the public domain under the auspices of protecting copyright, along with the corresponding resistance to that enclosure. This section outlines the larger political context that clarifies why the decision in *Georgia v. PRO* is important.

(2004); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008).

[15] *See generally* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001); Ochoa, *supra* note 14; Lee, *supra* note 14; Chander & Madhavi, *supra* note 14; Samuelson, *supra* note 14; DEBORA HALBERT, RESISTING INTELLECTUAL PROPERTY (2005); THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW (Lucie Guibault & P. Bernt Hugenholtz, eds., 2006); Randal C. Picker, *Access and the Public Domain*, 49 SAN DIEGO L. REV. 1183 (2012).

[16] Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*, P2P FOUND. (2010), http://p2pfoundation.net/IP_Maximalist [https://perma.cc/4BW7-LRJJ] (arguing that, at a global level, IP maximalists have worked diligently to expand intellectual property well beyond what is required by international agreements and have mounted an anti-access campaign to limit access to materials).

[17] *See* MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 84, 85, 88–89 (2012).

A. Expanding Statutory Control in the Information Age

Technology has always had a disruptive effect on copyright law, whether that technology was a printing press, a camera, a photocopy machine, a computer, or an MP3 player. Technologies that enable people to share copyrighted work without permission require the creation of new copyright protections, so those asserting ownership over copyrighted materials have legal protection from possible infringement.[18] Policymakers are thus constantly faced with adapting copyright law so that those who hold the copyrights can control all aspects of those items fixed in a "tangible medium of expression"[19] as technology makes sharing easier.

Since the passage of the 1976 Copyright Act, the last major overhaul of copyright in the U.S., and especially through the 1990s as computer technology advanced quickly, most changes to the law have expanded copyright protection.[20] Even as it became easier to access and share

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[18] *See generally* DEBORA J. HALBERT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE: THE POLITICS OF EXPANDING OWNERSHIP RIGHTS (1999) (outlining the expansion of copyright laws in reaction to new technology making copyright infringement easier).

[19] Copyright Act of 1976, 17 U.S.C. §102(a).

[20] *See* Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (extending the term of copyright protection to life of the author plus seventy years, significantly reducing the public domain); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (1998) (addressing access to copyrighted materials by making anti-circumvention devices illegal as well as establishing the protocol for addressing copyright infringement on the internet). *See generally* U.S. COPYRIGHT. OFF., Circular 92: Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code (2020), (this publication contains the text of Title 17 of the United States Code, including all amendments enacted by Congress through March 27, 2020; showing the reduction of the public

copyrighted works via the Internet, content owners used the law to secure additional protection, including enhanced criminal protection against copyright infringement.[21] The resulting legal implications were made especially visible by music industry efforts to control digital filesharing and shut down what they called "pirate" websites.[22] Those who seek expansive control of copyrighted works have more recently argued that copyright infringement is done by terrorists, a move that has significant implications for how those who had committed what is generally understood as a civil offense is now demonized as a national security threat.[23] While copyright has been expanding and the consequences for infringement have become more severe, the corollary of the expansion of copyright law, both in terms of the range of what is protected and the length of protection, is the enclosure of the public domain.

B. The Enclosure of the Public Domain

A critical concept that defines what is outside the scope of copyright protection is the idea of the public

domain through the enactment of additional copyright protections and extensions since 1976).

[21] *See* No Electronic Theft (Net) Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (establishing criminal prosecution even if the copyright infringement was not for commercial benefit).

[22] *See generally* MATTHEW DAVID, PEER TO PEER AND THE MUSIC INDUSTRY: THE CRIMINALIZATION OF SHARING (2010); Sarah Jacobsson Purewal, *RIAA Thinks LimeWire Owes $75 Trillion in Damages*, PC WORLD (2011), http://www.pcworld.com/article/223431/riaa_thinks_limewire_owes_75_trillion_in_damages.html [https://perma.cc/EF4R-CH9X] (describing the surreal claim made by the music industry that the filesharing service LimeWire owed them seventy-five trillion dollars in damages).

[23] *See* Debora Halbert, *Intellectual Property Theft and National Security: Agendas and Assumptions*, 32 INF. SOC'Y. 256, 264 (2016).

domain.[24] While copyright gives an author certain controls over their creative work, that control is not perpetual. In 1996, Congress expanded the term of copyright protection from the life of the author plus 50 years to the life of the author plus 70 years.[25] The 20-year extension of copyright sparked an ultimately unsuccessful challenge when the Supreme Court held that the extension was constitutional in *Eldrid v. Ashcroft.*[26] While the copyright term is now the life of the author plus 70 years, when copyright ends, the copyrighted work transitions into the public domain where anybody is free to use it, to create derivative works, to distribute it, or to perform the work without the permission of the original author.[27] The balance between copyright control and the public domain exists so that everyone can contribute to and share in a common culture.[28]

The Supreme Court's decision in *Eldrid* limits the public's access to what would have been public domain materials for an additional 20 years, but it also is part of the transformation of copyright into a private property right that

[24] *See generally* Boyle, *supra* note 14 (comparing the enclosure caused by expansive copyright to the enclosure of previously public land during the British Enclosure Movement); Samuelson, *supra* note 14 (describing multiple copyright-focused public domains discussed in the legal literature).

[25] Sonny Bono Copyright Term Extension Act, 112 Stat. 2827.

[26] *See* Eldred v. Ashcroft, 537 U.S. 186, 199–200 (2003) (holding that the Copyright Term Extension Act was constitutional and did not violate the "for a limited time" language when Congress expanded copyright to life of the author plus seventy years).

[27] Rich Stim, *Welcome to the Public Domain*, STANFORD UNIVERSITY LIBRARIES: COPYRIGHT AND FAIR USE, (Oct. 2016), https://fairuse.stanford.edu/overview/public-domain/welcome/ [https://perma.cc/LR67-MDGY] (describing the scope of the public domain and how works enter the public domain).

[28] *See* Lee, *supra* note 14, at 162 (arguing that the public domain ensures "access to our common culture and knowledge.").

does not facilitate the free flow of information.[29] Such a free flow of information is not only critical for cultural production,[30] but is also the heart of innovation within scientific and academic communities. While copyright protects all creative work, in this paper, the focus will be on the enclosure of work funded by or produced by the government or individuals acting in the capacity of government officials.

1. Privatization of Government-Funded Research

While the United States has always been driven by "free-market" ideology, with the election of Ronald Reagan in the 1980s, an even more concerted effort to privatize public functions began.[31] One avenue of privatization was to replace government work with contracts awarded to private corporations under the ideological assumption that the market was more efficient than government.[32] As part of

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[29] *See* Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 388–89, 452 (2003) (arguing that copyright has, over time, become a private right rather than articulating a limited monopoly to balance public access with a private incentive structure).

[30] *See generally* RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996); KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, & INTELLECTUAL PROPERTY LAW (2001); LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (2004); HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (2006); MATT MASON, THE PIRATE'S DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM (2009).

[31] *See* Michal Laurie Tingle, *Privatization and the Reagan Administration: Ideology and Application*, 6 YALE L. POL'Y REV. 229, 256 (1988) (arguing that President Reagan sought efficiency through privatization but that, while shifting government functions to the private sector was ideologically motivated, its impact on efficiency is inconclusive).

[32] Steve R. Letza et al., *Reframing Privatisation: Deconstructing the Myth of Efficiency*, 37 POL'Y SCIENCES 159, 162-64 (2004) (describing the ideology of efficiency as a foundational component of privatization).

this larger ideological shift, Congress passed the Bayh-Dole Act, designed to allow recipients of publicly-funded grant money to use the findings of their research to create privately owned innovation and technologies.[33] Bayh-Dole focused on patentable subject matter funded by the federal government rather than copyright.[34] However, it is indicative of the general ideological effort to privatize what might otherwise have been understood as public. Despite being credited with sparking innovation spin-offs from publicly funded university research, it could equally be argued that opening all such publicly funded research to the public domain would have had an even more substantive impact and that outside of a few elite institutions, there have been serious unintended consequences for public universities including a loss of trust due to the perception that such privatization is a predatory practice.[35]

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[33] For the literature on the privatization of public research under the Bayh-Dole Act and its assessment, see generally David C. Mowery et al., *The Growth of Patenting and Licensing by U.S. Universities: an Assessment of the Effects of the Bayh–Dole Act of 1980*, 30 RSCH. POL'Y 99 (2001); Richard R. Nelson, *Observations on the Post-Bayh-Dole Rise of Patenting at American Universities*, 26 J. TECH. TRANSFER 13 (2001); Bhaven N. Sampat, *Patenting and US Academic Research in the 20th Century: The World Before and After Bayh-Dole*, 35 RSCH. POL'Y 772 (2006); Wei-Lin. Wang, Technology Transfer from Academia to Private Industry: A Critical Examination of the Bayh-Dole Act (2004) (S.J.D. dissertation, Washington University in St. Louis) (on file with the Washington University Libraries, Washington University in St. Louis); and DAVID MOWERY ET AL., IVORY TOWER AND INDUSTRIAL INNOVATION: UNIVERSITY-INDUSTRY TECHNOLOGY TRANSFER BEFORE AND AFTER THE BAYH-DOLE ACT (2015).

[34] Bayh-Doyle Act, 35 U.S.C. §§ 200–212 (2010).

[35] *See* Rafael A. Corredoira ET AL., *The Impact of Intellectual Property Rights on Commercialization of University Research* (Apr. 5, 2020) (manuscript at 17–18), https://papers.ssrn.com/abstract=3399626 [https://perma.cc/2J5C-U82J] (finding that the public domain performed better than privatized university research in commercializing products); David Orozco, *Assessing the Efficacy of the Bayh-Dole Act Through the Lens of University Technology Transfer Offices (Ttos)*, 21 N.C. J. L. &

2. Privatization of Access to the Law

Private publishers have played a role in publishing legal texts since the first published volumes of case law, and they continue to be the primary vehicle for access to the law as these writings are digitized. The very first copyright case, *Wheaton v. Peters*, was about copyrighting the law.[36] In *Wheaton*, the Court held that there could be no copyright in judicial opinions, and so there was no copyright to grant to the publisher of those opinions.[37] The Court several decades later extended *Wheaton* to apply to state court decisions.[38] However, after declaring that the law itself could not be the subject of copyright, the Court held that pagination and headings added to the public domain text were sufficiently original to be copyrighted by a reporter's author.[39] Thus, a private publisher could take the legal text, typeset it into a specific page range, add some additional materials, and copyright the final product. While a competitor could also use the original text, they could not copy the pagination and formatting wholesale from a different publisher, even when the court required quotation to specific pages in specific reporters. To cite appropriately to a case, one must use the proper pagination for the relevant reporter. Although a

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TECH. 115, 162–64, 167 (2019) (commenting that aside from about twenty high-performing technology transfer offices, the vast majority of universities do not capitalize on their government-funded research and are open to criticisms of predatory practices that undermine public trust).

[36] *See* Wheaton v. Peters, 33 U.S. 591, 593–94 (1834).

[37] *Id.* at 668; *see* Joseph Scott Miller, *Brandeis's IP Federalism: Thoughts on* Erie *at Eighty*, 52 AKRON L. REV. 367, 375–76 (2018).

[38] *See* Christina M. Frohock, *The Law as Uncopyrightable: Merging Idea and Expression Within the Eleventh Circuit's Analysis of "Law-Like" Writing*, 73 U. MIAMI L. REV. 1269, 1278–79 (2019) (describing the outcome of *Banks v. Manchester*, 128 U.S. 244 (1888), where the court denied copyright protection to state judicial opinions).

[39] *Id.* at 1279–80 (describing the outcome of *Callaghan v. Meyers*, 128 U.S. 617 (1888), which held that, outside the law itself, copyright could cover the work of the reporter as original).

company cannot own the law itself, they can and have successfully asserted copyright over the pagination, claiming that the layout of cases in a given reporter is original, and so page numbers must be protected.[40]

The issue of copyright over pagination was litigated beginning in the 1990s, with mixed results. West Publishing won an early victory to control its star pagination against Lexis in *West Publishing Co. v. Mead Data Central, Inc.* where the U.S. Court of Appeals for the Eighth Circuit held that arrangement and pagination could be copyrightable.[41] Following the Eighth Circuit decision, a Minnesota district court affirmed the copyrightability of star pagination in *Oasis Publishing Co. v. West Publishing Co.*[42] However, a district court in New York found the opposite in *Matthew Bender v. West Publishing Co.*, holding that West's star pagination was not copyrightable, an opinion affirmed by the U.S. Court of Appeals for the Second Circuit.[43] Pagination, according to the Second Circuit, is not sufficiently creative to justify copyright protection, despite the earlier ruling in the Eighth Circuit.[44] West appealed, arguing that copyright

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[40] *See* Vito Petretti, *Matthew Bender & Co. v. West Publishing Co.: The End of West's Legal Publishing Empire?*, 43 VILL. L. REV. 873, 891–95 (1998) (describing the outcome of the Eight Circuit Court of Appeals decision).

[41] *See* West Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1223 (8th Cir. 1986).

[42] *See* Petretti, *supra* note 40, at 896–97; Oasis Publ'g Co., Inc. v. West Publ'g. Co., 924 F. Supp. 918, 925 (D. Minn. 1996) (holding that pagination was sufficiently creative to justify its copyright).

[43] *See* Katie Fortney, *Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*, 102 LAW LIBR. J. 59, 63 (2010) (describing the outcome of Matthew Bender & Co. v. W. Pub. Co., 158 F.3d 693 (2d Cir. 1998)); Petretti, *supra* note 40, at 917–18 (arguing that the outcome in *Matthew Bender* is appropriate because it will allow for additional publishers to enter the legal market).

[44] *See* Ed Walters, *Georgia v. Public.Resource.org: Ending Private Copyright in Public Statutes*, MEDIUM (June 27, 2019),

over the pagination is important because without protection anyone could copy the digital versions of caselaw and continue to cite to West's published reporters.[45] The Supreme Court declined to hear Matthew Bender leaving the circuit split intact.[46] That a copyright could be asserted in page numbering strikes some as problematic because page numbering should not rise to the level of creativity necessary to achieve copyright protection.[47] Furthermore, at the time, extending copyright to West's page numbering system effectively gave them a monopoly over access to the law.[48]

Rejecting copyright over star pagination may allow smaller companies to enter the legal market while also reducing what West can charge for licensing fees.[49] However, the consolidation of the legal publishing industry leaves little room for small players and poses its own set of concerns regarding access to the law.[50] While highlighting

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https://medium.com/@ejwalters/who-owns-the-law-5e356ea5b5f8 [https://perma.cc/M724-JN2F].

[45] *West asks Supreme Court to Rule on Copyrightability of Pagination System: West Publishing Co. v. Hyperlaw Inc.*, 5 No. 18 ANDREWS INTELL. PROP. LITIG. REP. 5 (Apr. 28, 1999).

[46] *See* West Publ'g Co. v. Mead Data Ctr., Inc., 799 F.2d 1219, 1223 (8th Cir. 1986) (holding that West's arrangement of legal decisions was entitled to copyright protection); Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999) (holding that West's pagination was not copyrightable).

[47] *See* Eman H. Jarrah, *Victory for the Public: West Publishing Loses Its Copyright Battle over Star Pagination and Compilation Elements*, 25 U. DAYTON L. REV. 163, 165 (1999) (arguing that "compilations of judicial opinions consisting of individual case reports with additional information such as parallel citations, identification of counsel, and facts on procedural history are not sufficiently original or creative to merit copyright protection.").

[48] *See* Petretti, *supra* note 40, at 891–95.

[49] *See id.* at 917–19 (arguing that rejecting pagination copyright will be beneficial for competition).

[50] *See* Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 824–25 (2006) (discussing the consolidation of the

how companies privatize the law, seeking access to pagination also demonstrates that sometimes efforts to achieve public access may prevail, at least when it is a battle between major private actors operating in their own self-interest.

While an uneasy truce exists regarding star pagination, until the outcome in *Georgia v. PRO*, copyright over headnotes, annotations, and other ancillary texts had remained unchallenged since the nineteenth century.[51] The current Copyright Act only explicitly exempts works authored by the federal government, but States are not mentioned, suggesting they are free to copyright any number of government materials.[52] In fact, 22 states, two territories, and the District of Columbia assert copyright over their official codes and have arrangements like Georgia with private companies to publish these works.[53] States assert copyright over a range of other publications as well.[54] The law itself is not the only area where privatization has made it difficult for citizens to ascertain what they might need to know to be in compliance with official rules. The next

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legal publishing industry from eighteen to twelve with only three major publishers controlling 90% of the legal materials, sparking anti-trust concerns).

[51] *See* Callaghan v. Myers, 128 U.S. 617, 647 (1888).

[52] *See* Scheibel, *supra* note 5, at 354–55; 17 U.S.C. §105 (2019) (describing the limitations on copyright for the federal government).

[53] *See* Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1513, 1519 (2020) (Thomas, J., dissenting) (arguing that the ruling will come as a shock to those jurisdictions with arrangements like the one found in Georgia); Eric E. Johnson, *The Misadventure of Copyrighting State Law*, 107 Ky. L. J. 593, 604–05 (2019) (describing the efforts of Mississippi to enforce its copyright over state law. Public.Resource.org has also scanned and placed Mississippi's code on its website but aside from sending a cease and desist letter, Mississippi has not yet litigated).

[54] *See* State Copyright Res. Ctr., *Copyright at Harvard Library*, http://copyright.lib.harvard.edu/states/ [https://perma.cc/H7PW-A5JP] (providing a state-by-state assessment of what is copyrighted in each state).

section addresses another facet of privatization that impacts the public's ability to know what the law requires of them—private standards incorporated by reference into public law.

3. The Privatization of Standards Incorporated by Reference

Yet another area where privatization has meant the public has diminished access to the official regulatory structure is in the area of uniform codes, which are most often written by private rather than public entities.[55] Ronald Reagan was the first to direct agencies to use private voluntary standards instead of government created ones, a practice that was more broadly mandated in 1996.[56] Known as "incorporation by reference," uniform codes written by private associations are often incorporated into local, state, and federal regulations, effectively giving them the authority of the law.[57] Private codes incorporated by reference pose a challenge for accessing the official law because the full text of the private standard is not always published in an official government publication.[58] To access these private codes incorporated by reference, an interested party would have to either view a hard copy in a public reading room, in which sometimes only a single copy is available and housed in Washington DC; or purchase the text from the private association that published the standards, for hundreds or

[55] *See* Ghosh, *supra* note 29, at 455–56 (describing the complexity of public and private code drafting and the need for uniform codes produced by experts).

[56] *See* James M. Sweeney, *Copyrighted Laws: Enabling and Preserving Access to Incorporated Private Standards*, 101 MINN. L. REV. 1331, 1337–38 (2017).

[57] Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 280–81 (2014) (stating that over 10,000 codes have been incorporated by reference at the federal level alone).

[58] *Id.* at 287–88 (describing that while such private codes incorporated into federal law are ostensibly publicly available, they must only be "reasonably available.").

even thousands of dollars.[59] Sometimes the official version incorporated by reference is out of date, but the private standard has been revised and updated, but because the official rule making process means new versions cannot be updated automatically, the older and now out-of-date standard that is the law becomes difficult to find.[60] Such limited access in the Internet age means that without purchasing the high-priced private codes, or a subscription to the *Federal Register*, the public which is required to adhere to these rules may not be able to readily access them.

The U.S. Court of Appeals for the Fifth Circuit in *Veeck v. Southern Building Code Congress* held that such private codes once incorporated by reference into municipal law are in the public domain so that citizens can know what the law is.[61] Municipal law, including these incorporated private standards, could not be copyrighted because building codes were "facts."[62] However, a definitive conclusion regarding whether materials incorporated by reference are in the public domain has not been reached.[63] Interestingly, Carl Malamud is also central to the copyright claims regarding incorporation by reference—he is being sued for purchasing,

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[59] *Id.* at 286.

[60] Sweeney, *supra* note 56, at 1340.

[61] Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002).

[62] *Id.* at 794–95, 800–01.

[63] Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc., 906 F.3d 1229, 1238–39 (11th Cir. 2018) (describing the ongoing circuit split on the issue of copyrightability over privately authored codes); Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J. L. PUB. POL'Y 131, 168–69 (2013) [hereinafter *Incorporation by Reference in an Open-Government Age*] (describing that both the Second Circuit and the Ninth Circuit have rejected arguments that would place private standards incorporated by reference into the public domain).

scanning, and making available free online private codes that have been incorporated by reference.[64]

As this section demonstrates, government-funded research and the law itself has faced ongoing privatization, especially as companies seek to define their property rights in the information age. Even as the Internet made sharing easier, new legislation was passed to restrict the possibility of free access. However, as the next section demonstrates, there are those who sought to create and enhance the public domain.

III. THE MOVEMENT FOR OPEN ACCESS

The preceding section tracked how privatization has limited what can go into the public domain, either through the expansion of copyright as the architecture of the information age or through asserting copyright over government writings. This section turns to how that expansion sparked a corresponding resistance to

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[64] Tim Cushing, *Public.Resource.Org Sued (Again) For Publication Of A Document Incorporated Into Federal Regulations [Update]*, TECHDIRT (May 29, 2014, 3:29 AM), https://www.techdirt.com/articles/20140526/17193727368/publicresourceorg-sued-again-publication-document-incorporated-into-federal-regulations.shtml [https://perma.cc/9U5S-A6DF]; Simon Reichley, *A Federal Appeals Court has Ruled in Favor of Carl Malamud's Public.Resource.Org, Ordering a Trial Court to Reconsider His Fair Use Claims*, MELVILLE HOUSE BOOKS (2018), https://www.mhpbooks.com/a-federal-appeals-court-has-ruled-in-favor-of-carl-malamuds-public-resource-org-ordering-a-trial-court-to-reconsider-his-fair-use-claims/ [https://perma.cc/C2JM-CPJC] (providing the best—and snarkiest—analysis of the issue: "Malamud's been a tireless advocate for transparency and open access to legal and civic documents, publishing thousands and thousands of pages of material online at public.resource.org and law.resource.org. Since we live in a cartoonish dystopia, where utterly shameless—and incompetent—corporations more or less dictate public policy to a craven political class, Malamud has been repeatedly sued for this activity.").

privatization under the heading of open access. Earlier expansion of the laws governing intellectual property was met with little resistance, or even public awareness. However, when Congress sought to pass the Stop Online Piracy Act ("SOPA") and the Protect Intellectual Property Act ("PIPA"), the legislation was met with unprecedented public resistance.[65] General public awareness of what SOPA and PIPA meant for Americans was made possible in part because platforms such as Google had a competing interest in continued flexibility for online sharing and helped frame a resistance to the legislation.[66] Furthermore, the litigation around peer-to-peer networks starting with Napster and the subsequence RIAA suites against end-users meant copyright became increasingly negatively perceived by many in the public.[67] Also critical to the growing resistance of enhanced IP laws is the development and framing of a counter-narrative to expansive intellectual property—the movement towards open access.

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[65] Josh Constine, *SOPA Protests Sway Congress: 31 Opponents Yesterday, 122 Now*, TECHCRUNCH, (Jan. 19, 2012, 8:37 PM), http://techcrunch.com/2012/01/19/sopa-opponents-supporters/ [https://perma.cc/U4QE-SQ4W]; Vlad Savov, *The SOPA blackout: Wikipedia, Reddit, Mozilla, Google, and many others protest proposed law*, THE VERGE (Jan. 18, 2012, 12:10 AM), https://www.theverge.com/2012/1/18/2715300/sopa-blackout-wikipedia-reddit-mozilla-google-protest [https://perma.cc/5WEK-KS56]; Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21, 22 (2013).

[66] Savov, *supra* note 65.

[67] Peter S. Menell, *This American Copyright Life: Reflections on Re-equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 201, 235 (2014) (showing the downward spiral of copyright approval post Napster and SOPA using a graph).

A. The Open Access Movement

The open-access movement is a multifaceted effort to resist the privatization of knowledge, technologies, ideas, and life-saving medicines, arguing that such privatization is harmful to global development, culture, scientific progress, and democracy. The struggle of the information age is in advocating for access to information, a new kind of "product" privatized through the use of intellectual property.[68] Advocates for open-access and the public domain argue that the privatization of knowledge, culture, and science threatens a future of innovation and even democracy itself.[69] While providing access to knowledge was the original intent of the U.S. constitutional language, U.S. intellectual property law has instead evolved to undermine this intent.[70]

The modern-open access movement can be traced to efforts of activist software engineers to create an alternative to copyright law for computer code, because they saw copyright law as a threat to the culture of sharing intrinsic to

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[68] *See generally* MCKENZIE WARK, A HACKER MANIFESTO (2004) (providing a rewrite of Marxist analysis of property for the information age); CHRISTOPHER MAY & SUSAN K SELL, INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY (2006) (offering a political economy of intellectual property framing privatization as a key node in efforts to own the property of the future).

[69] *See generally* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283 (1996); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2002); RICHARD M. STALLMAN, LAWRENCE LESSIG & JOSHUA GAY, FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN (2002); Malla Pollack, *The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (A.K.A. Copyright and Patent Clause)*, 45 JURIMETRICS J. 23 (2004).

[70] Pollack, *supra* note 69, at 39 (arguing that the original meaning of progress was to disseminate information and using this definition would revolutionize American intellectual property laws).

coding.[71] Open-access to software code sparked the idea of open access to culture generally, including the call to access knowledge.[72] Building on the ideas of free software, and in the aftermath of the Supreme Court's decision in *Eldred*, the Creative Commons emerged as an alternative to copyright.[73] The Creative Commons recognized that not all creative work was well suited to the one-size-fits-all copyright statute. Thus, it uses copyright law to help copyright owners license the type of sharing they are willing to grant.[74]

The Creative Commons continues to innovate, providing new ways to enhance open-access. In 2005 the Science Commons Open-Access Law Program was announced.[75] Built on the same assumptions as the broader Creative Commons, the Open-Access Law Program works with law journals to assure that access to legal texts is

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[71] *See generally* ERIC S. RAYMOND, THE CATHEDRAL & THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY (2001) (developing an early theoretical framework of open-source software); STALLMAN, *supra* note 69 (providing writings by the computer scientist generally understood to have sparked the free software movement).

[72] *See generally* PETER DRAHOS & RUTH MAYNE, GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT (2002) (discussing the global issues of access to knowledge).

[73] *See generally* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

[74] *Frequently Asked Questions*, CREATIVE COMMONS, https://creativecommons.org/faq/#what-are-creative-commons-licenses [https://perma.cc/9ZSE-M2GS] (last visited Oct. 23, 2019).

[75] Raul, *Creative Commons and Science Commons Announce Open Access Law Program*, CREATIVE COMMONS (2005), https://creativecommons.org/2005/06/06/creativecommonsandsciencecommonsannounceopenaccesslawprogram/ [https://perma.cc/3NE8-55RQ].

available to all.[76] State-wide initiatives to broaden access to the law, including access to legal materials, are also underway. Washington State in 2006, for example, promulgated Access to Justice Principles in an effort to establish an open framework for its citizens to access the law.[77] Another example is the Free Law Project, which, among other things, has developed a web app called RECAP that allows users to access court documents that they would otherwise have to pay for free using PACER.[78] Such access to the law is positioned as being critical for due process and democracy.[79]

As attention focused on access to knowledge, it became apparent that access to knowledge was hampered by the increasing privatization and high cost of educational materials, journal articles, and a business model where the public was charged to access the research funded by their tax dollars.[80] Two permutations of the global call for access to

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[76] Michael W. Carroll, *The Movement for Open Access on Law*, 10 LEWIS & CLARK L. REV. 741, 754–55 (2006) (describing the scope of the Open Access Law Program).

[77] Arewa, *supra* note 50, at 833; *Washington State Access to Justice Technology Principles*, WASH. STATE CT. 1, https://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=amatj02principles&pdf=1 [https://perma.cc/PB9C-SEHK].

[78] *About Free Law Project*, FREE L. PROJECT, https://free.law/about [https://perma.cc/7MXA-Z8ZR] (last visited July 22, 2020); Timothy K. Armstrong, *Crowdsourcing and Open Access: Collaborative Techniques for Disseminating Legal Materials and Scholarship*, 26 SANTA CLARA COMPUT. HIGH TECH. L. J. 591, 604 (2010).

[79] Johnson, *supra* note 53, at 624, 627.

[80] *See* UC Office of the President, *UC Terminates Subscriptions with World's Largest Scientific Publisher in Push for Open Access to Publicly Funded Research*, U. C. (Feb. 28, 2019), https://www.universityofcalifornia.edu/press-room/uc-terminates-subscriptions-worlds-largest-scientific-publisher-push-open-access-publicly [https://perma.cc/6JXP-DNZG]; Julie L. Kimbrough & Laura N. Gasaway, *Publication of Government-Funded Research, Open Access, and the Public Interest*, 18 VAND. J. OF ENT. & TECH. L. 267,

knowledge can be found in the United States.[81] First, is the Open Educational Resources ("OER") movement now building at college campuses across the world and in the U.S. It is one response to the monopoly pricing of textbooks that have made them all but unaffordable for students.[82] Second, is a corresponding effort by libraries and academics to create open-access repositories designed to make academic research more easily available without expensive paywalls.[83]

Libraries have been active in securing access to knowledge and, as a result, became a central player in yet another case out of Georgia, this time between the major corporate publishers and Georgia State University over the use of electronic reserves. In *Cambridge University Press v. Becker*, the major publishing companies took issue with Georgia State's e-reserve system where electronic book selections were made available to students as part of an electronic course reserve system.[84] Georgia State argued for fair use of these copyrighted materials, and the most recent decision in this decade-long battle was issued in March of

269-270 (2016) (describing the argument that taxpayers should not have to pay twice for access to publicly funded research).

[81] *See generally* GAËLLE KRIKORIAN & AMY KAPCZYNSKI, ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY (2010) (the two permutations include: First, the high cost of textbooks and second is access to publicly funded research, both resulting in new efforts to expand access and take on the private controllers of information).

[82] OER COMMONS, https://www.oercommons.org/ [https://perma.cc/GML2-MZQ8] (last visited June 13, 2020); *see also* Jacob J. Jenkins et al., *Textbook Broke: Textbook Affordability as a Social Justice Issue*, 2020 J. OF INTERACTIVE MEDIA IN ED., Issue 1, Art. 3, 3 (2020) https://doi.org/10.5334/jime.549 (demonstrating that OER is a response to the high price of textbooks as well as enhancing equity for underrepresented populations).

[83] Armstrong, *supra* note 78, at 595–96 (discussing the role played by academics and libraries in expanding the open access model and developing options to access scholarship).

[84] Cambridge Univ. Press v. Becker, No. 1:08-CV-1425-ODE, 2020 WL 998763, at *2 (N.D. Ga. 2020).

2020.[85] After having the decision reversed and remanded twice, the district court again largely sided with Georgia State, when for a third time, it had to calculate which of the 48 copyright infringement claims constituted fair use.[86] While each time the district court found for Georgia State on the vast majority of the fair use challenges (in the most recent 37 of 48),[87] what is illuminating about the decades-long litigation is twofold. First, the decision clarifies just how unhelpful fair use is as a doctrine for identifying what can and cannot be used without costly litigation. Second, that the interests of academic authors to be read, cited, and contribute to knowledge, as well as the interest in educators to provide easy and affordable access to their students, is at odds with their publisher's interests in making money. To date, it is unclear if the publishers will appeal this third ruling, but the outcome, while generally supporting fair use, has not contributed any bright lines to understanding what fair use actually entails.[88]

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[85] *District Court Finds Majority of Uses to be Fair in Georgia State E-Reserves Case*, AUTHORS ALL. (Mar. 4, 2020), https://www.authorsalliance.org/2020/03/04/district-court-finds-majority-of-uses-to-be-fair-in-georgia-state-e-reserves-case/ [https://perma.cc/9LKX-3GBH].

[86] *Id.*

[87] *Id.* (arguing for fair use by claiming "[w]e explained that the primary motivation of academic authors to write scholarly book chapters is generally to share the knowledge and insights they have gained, and the type of reward that academic authors have generally sought and hoped to attain through writing scholarly book chapters is enhancement of their reputations. Bolstering the case for fair use, we discussed how the use of fact-, method-, and theory-intensive scholarly book chapters assigned primarily because of the originality of ideas, theses, research, data, and methods they contain, rather than on originality of expression, should tip in favor of fair use.").

[88] Lindsay McKenzie, *Georgia State and Publishers Continue Legal Battle over Fair Use of Course Materials*, INSIDE HIGHER ED (Oct. 30, 2018), https://www.insidehighered.com/news/2018/10/30/georgia-state-and-publishers-continue-legal-battle-over-fair-use-course-materials

The complications of the fair use analysis aside, the push for open access to academic scholarship, especially scholarship funded by the U.S. federal government has met with some success. In 2013, the Obama administration issued a statement that research funded with federal dollars would be made available a year after publication as part of a commitment to open access, a move widely criticized by publishers.[89] In February 2020, the Trump Administration issued a request for comments to take Obama's rule one step further and require immediate free access to government-funded research, a move also widely criticized by publishers.[90] This federal trend toward more access rather than less suggests that calls for open-access have been at least somewhat successful.

There is yet another dimension in the push for broader and more expansive open access to academic work that has taken a more direct approach to securing access to knowledge. The next section describes the acts of civil disobedience, what publishers would call "piracy," taken as activists for open access have engaged in resistance to copyright law. These efforts at extralegal resistance demonstrate how the law is shaped in favor of a status quo of privatization.

[https://perma.cc/VRG2-Y64J] (arguing that the publishers should have dropped the suit years ago).

[89] Michael Stebbins, *Expanding Public Access to the Results of Federally Funded Research*, WHITE HOUSE: BLOG (Feb. 22, 2013, 12:04 PM), https://obamawhitehouse.archives.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research [https://perma.cc/DLZ2-6GZJ].

[90] Kelsey Brugger, *White House Formally Invites Public Comment on Open-Access Policies*, SCIENCE (Feb. 21, 2020, 2:15 PM), https://www.sciencemag.org/news/2020/02/white-house-formally-invites-public-comment-open-access-policies [https://perma.cc/GT2Z-XUDQ].

B. Extralegal Resistance: Pirate Utopias and Public Sharing

Two examples tell the story of how the power of the State to enforce copyright laws is used to stifle access to privatized knowledge and also serves to demonstrate why the Supreme Court decision in favor of even a small de-privatization effort is significant.

1. Aaron Swartz and JSTOR

By all accounts, Aaron Swartz was a brilliant coder and, at an early age, had become part of the movement to ensure everyone could access knowledge.[91] As part of this effort, Swartz illegally downloaded the contents of JSTOR, a repository of academic articles, including many already in the public domain, and posted them on the Internet for free access.[92] JSTOR typically charges universities around $50,000 per year for access to their journal repository, and Swartz accessed their database by tapping into MIT's network. Swartz violated JSTOR's licensing agreement and, at one point, broke into a closet on MIT's campus to tap directly into their system.[93] For these acts, Swartz was arrested and charged with a variety of crimes ranging from wire and computer fraud to unauthorized access.[94] Federal prosecutors sought penalties of up to 30 years in prison for the array of crimes they continued to pursue against Swartz.[95] Faced with the federal charges and a legal battle,

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[91] Aaron Swartz, *Guerilla Open Access Manifesto*, PASTEBIN (July 20, 2011), http://pastebin.com/cefxMVAy [https://perma.cc/J2ZD-HHGJ].
[92] Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 1: The Law)*, VOLOKH CONSPIRACY (Jan. 14, 2013, 2:50 AM), http://www.volokh.com/2013/01/14/aaron-swartz-charges/ [https://perma.cc/TU5A-7WNV].
[93] *Id.*
[94] Picker, *supra* note 15, at 1208; VOLOKH CONSPIRACY, *supra* note 92.
[95] Nathan Robinson, *Prosecutors Sought 30 Years for Swartz's JSTOR Download, 35 for Headley's Mumbai Massacre*, HUFFINGTON POST

the 26-year-old Swartz committed suicide.[96] His tragic death galvanized public opinion in opposition to the State of the law and inspired a documentary about Swartz's commitment to the question of access to information.[97] His actions outside the law, inspired by his belief in access to information as a social justice issue, helped shed light on how the law is used to protect owners of knowledge against those who would seek access.

2. Sci-Hub, Filesharing, and the Piracy of Academic Scholarship

A second activist has also taken up the call for open access to knowledge by confronting the legal structure that prohibits such access directly. Using similar technologies as those used for sharing music online, Alexandra Elbakyan created a global database of scientific research called Sci-Hub, which is, as the copyright owners would call it, a massive piracy site.[98] Elbakyan developed Sci-Hub.org as a graduate student when she was unable to access the vast majority of peer-reviewed articles she needed for her studies

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(Jan. 30, 2013, 11:41 AM), http://www.huffingtonpost.com/nathan-robinson/headley-mumbai-massacre-conviction_b_2571156.html [https://perma.cc/76UA-YKTH].

[96] Tony Cartalucci, *In Memory of Aaron Swartz: Here are 14 Ways to Fight Back Against the "Intellectual Property" Racket*, FILMS FOR ACTION (Jan. 13, 2013), http://www.filmsforaction.org/takeaction/in_memory_of_aaron_swartz_here_are_14_ways_to_fight_back_against_the_intellectual_property_racket/ [https://perma.cc/7JJN-NS9A].

[97] Brian Knappenberger, *The Internet's Own Boy* (2014), AMAZON, https://www.amazon.com/Internets-Own-Boy-Aaron-Swartz/dp/B00L89QCPE [https://perma.cc/H3ZY-WNFE] (documenting Swartz's efforts to expand access to information as part of a larger commitment to social justice).

[98] Ernesto Van der Sar, *Sci-Hub Tears Down Academia's "Illegal" Copyright Paywalls*, TORRENTFREAK (June 27, 2015), https://torrentfreak.com/sci-hub-tears-down-academias-illegal-copyright-paywalls-150627/ [https://perma.cc/QF22-XP2M].

because they all resided behind expensive paywalls.[99] Sci-Hub was the solution. It makes available globally and for free over sixty-four million academic papers.[100] As the Sci-Hub website notes, it is "the first website in the world to provide mass & public access to research papers."[101]

Elbakyan's website did not go unnoticed by the major for-profit publishers who charge monopoly prices for access to the scientific literature published in their journals. In 2015 one of those publishers, Elsevier, sued Elbakyan and another academic filesharing service, Library Genesis in U.S court.[102] Elbakyan is from Kazakhstan and did not respond to the complaint, nor did she appear in court to face charges. As a result, the District Court sided with Elsevier, and issued a permanent injunction against Sci-Hub and a $15 million fine, the maximum amount the law allows for copyright infringement of each of the 100 articles Elsevier used in its complaint.[103] Had Elsevier included additional articles, they could have claimed a ridiculous sum of money for sharing academic research that, because of the existing paywall structure, most users would never have accessed or read. To illustrate how skewed the law is towards copyright owners, consider the fine the RIAA claimed that music filesharing

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[99] *Id.*

[100] Ian Graber-Stiehl, *Meet the Pirate Queen Making Academic Papers Free Online*, VERGE (Feb. 8, 2018), https://www.theverge.com/2018/2/8/16985666/alexandra-elbakyan-sci-hub-open-access-science-papers-lawsuit [https://perma.cc/95F2-C4RB].

[101] SCI-HUB, https://sci-hub.se/ (last visited June 21, 2020).

[102] Ernesto Van der Sar, *Elsevier Cracks Down on Pirated Scientific Articles*, TORRENTFREAK (June 9, 2015), https://torrentfreak.com/elsevier-cracks-down-on-pirated-scientific-articles-150609/ [https://perma.cc/6LKN-PJME].

[103] Ernesto Van der Sar, *Sci-Hub Ordered to Pay $15 Million in Piracy Damages*, TORRENTFREAK (June 23, 2017), https://torrentfreak.com/sci-hub-ordered-to-pay-15-million-in-piracy-damages-170623/ [https://perma.cc/RW7G-EYYE] (reporting that the court fined Sci-Hub for the copyright infringement of 100 articles at $150,000 an article).

service LimeWire owed them—$75 trillion dollars—ultimately settling for $105 million dollars.[104]

Sci-Hub remains available, and as research has shown, it is used by people across the world, including the United States and throughout Europe.[105] One reason Sci-Hub is popular, even when a researcher may have access to peer-reviewed articles legitimately through their university library, is that it offers an easy way to access the world's academic literature.[106] However, despite its superior access model for those wanting to read scientific papers, Sci-Hub is illegal because it violates copyright law and threatens the business model of some of the largest corporations in the world. As a result, Elbakyan faces "financial ruin, extradition, and imprisonment," and keeps her current whereabouts unknown.[107] Such are the stakes in the ongoing efforts to make access to knowledge a reality.

The push to expand access to knowledge through means that violate the law illuminates how privatized knowledge has become. The law provides copyright owners with a range of protective measures such that even if Elbakyan had chosen to appear in U.S. court to defend herself, she would have no grounds under current law to do so. Ironically, academics tend to want to be read and cited, yet when their scholarship is housed behind a paywall, it is unlikely their ideas will gain full exposure. Sci-Hub thus

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[104] *See* Greg Sandoval, *Lime Wire Settles with RIAA for $105 Million*, CNET (May 12, 2011), https://www.cnet.com/news/lime-wire-settles-with-riaa-for-105-million/ [https://perma.cc/39DC-J7WH].

[105] John Bohannon, *Who's Downloading Pirated Papers? Everyone*, SCIENCE (Apr. 28, 2016, 2:00 PM), https://www.sciencemag.org/news/2016/04/whos-downloading-pirated-papers-everyone [https://perma.cc/Y49V-7TAN].

[106] *Id.* ("It is as simple to use as Google's search engine, and as long as you know the DOI or title of a paper, it is more reliable for finding the full text. Chances are, you'll find what you're looking for.").

[107] *Id.*

promotes "[p]rogress of [s]cience and useful [a]rts,"[108] the constitutional mandate justifying the limited monopoly of copyright, far better than the concentrated publishing industry does.

Understanding the larger political context of privatization and open access helps communicate why this Supreme Court's decision is important. The next section traces *Georgia v. PRO* from the District Court's decision in favor of the State of Georgia to the Supreme Court's decision in favor of Public.Resource.org. Privatization of the materials surrounding judicial opinions has meant over time that the law itself has become difficult to access. Furthermore, because many states assert copyright over their official codes so that they can contract with a private company to help produce them, access to the law varies from state to state. The Supreme Court's finding for the public domain within this broader context will potentially impact how law is accessed across the United States.

IV. *GEORGIA V. PRO*

According to interviews, Malamud believes his quest for open law and open standards is essential to a democratic society.[109] From his early project putting the ITU code online for free, he learned "the power of open standards," and the importance of "putting large document archives online."[110] Malamud has used his small, primarily grant-funded nonprofit Public.Resource.org to scan documents he believes should be public domain materials and ensure they

[108] U.S. CONST. art. I, §8, cl. 8.
[109] Hendler, *supra* note 1.
[110] *Id.*; Priyanka Pulla, *The Plan to Mine the World's Research Papers*, 571 NATURE 316, 316–18 (2019) (describing Malamud's efforts to create a data mining site for researchers to access the world's published research for meta data analysis).

are available online for free access.[111] Georgia's copyright infringement claims are not the first he has encountered. Before Georgia filed its complaint, Malamud, along with the website Justia, had been involved in a similar clash with the State of Oregon over the ability to copyright the Oregon Revised Statutes.[112]

In Oregon, like Georgia, while the State did not claim copyright to the law, it did assert copyright over all ancillary text, including annotations, explanatory notes, numbering, indexing, and more.[113] Upon learning that the Oregon Revised Statutes had been scanned and put online, Oregon sent a cease and desist letter requesting that their copyrighted annotated statute be taken down.[114] The ensuing controversy led the State to instead publicly revoke their cease and desist request and invite the CEO of Justia, Tim Stanley, and Malamud to Oregon to work out a compromise.[115] While Oregon did not rescind their copyright, they did grant Public.Resource.org and Justia a limited license to publish the Oregon statute. The agreement resolved the immediate controversy but not the larger question about the copyrightability of the text associated with a state's official law.[116] Georgia, it turned out, was not open to sharing their official code.

A. An Early Pre-Cursor to Georgia v. PRO

The case against Malamud was not Georgia's first attempt to defend its official code from copyright

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[111] Doctorow, *supra* note 6.
[112] Walters, *supra* note 44.
[113] Fortney, *supra* note 43, at 62.
[114] Johnson, *supra* note 53, at 603–04 (describing the Oregon cease and desist letters to Justia).
[115] Walters, *supra* note 44.
[116] *Id.*; Carroll, *supra* note 76, at 759 (arguing for enhanced public domain access to state official codes as part of the movement for open access to the law).

infringement. In the early 1980s, Georgia had just revised its official code and gave the Michie Company a ten-year exclusive right to publish the official code while retaining copyright ownership.[117] In *Georgia v. Harrison Co.* the State asserted copyright ownership over the newly revised Georgia code when it was copied by the defendant publisher.[118] The District Court sided with the defendants and held that Georgia could not copyright the law because it was not sufficiently original, but the case ultimately settled, making the current litigation decades later possible.[119]

B. The District Court Decision

The District Court began by describing the agreement between Georgia and Matthew Bender, the subsidiary of Lexis that worked on the code, that would allow the company to publish and sell the official version in print and CD-ROM while providing for the public an unannotated version online for free.[120] The Court did not discuss the authorship of Georgia or Lexis in the opinion. The analysis of the Court began with determining the rights the authors had over their work. Specifically, the District Court pointed to the fact the Copyright Act itself and the Copyright Office list annotations as copyrightable subject matter.[121] The Court acknowledged that a government edict

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[117] Georgia v. Harrison Co., 548 F. Supp. 110, 112 (N.D. Ga. 1982), *vacated sub nom. on different grounds*, State of Ga. on Behalf of Gen. Assembly of Ga. By & Through Code Revision Comm'n v. Harrison Co., 559 F. Supp. 37 (N.D. Ga. 1983).
[118] *Id.* at 113.
[119] *Id.* at 115–16; *see Harrison Co.*, 559 F. Supp. at 37.
[120] Code Revision Comm'n v. Public.Resource.Org. Inc., 244 F. Supp. 3d 1350, 1353–54 (N.D. Ga. 2017), *rev'd and remanded sub nom*. Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc., 906 F.3d 1229 (11th Cir. 2018), *aff'd sub nom*. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).
[121] *Id.* at 1356.

is not copyrightable, but because annotations are not government edicts and thus do not have the force of law, they are not included in public domain materials.[122] The Court sided with Georgia that the annotations were not enacted into law and thus cannot have the force of law required to be a government edict.[123]

The Court then rejected each of PRO's claims. First, they rejected PRO's argument that the merger doctrine, a doctrine that limits copyright if there are no other ways to express an idea, applied.[124] Instead, the Court held that, "[t]here is no question that there are a multitude of ways to write a paragraph summarizing a judicial decision, and further, a multitude of ways to compile the different annotations throughout the O.C.G.A."[125]

Second, the Court rejected PRO's argument that copyrighting the code was fair use for several reasons. First, according to the Court, directly copying the code and annotations was not transformative.[126] Second, although PRO is a nonprofit that distributed the code for free, it gained reputation from its actions and thus "profited" for the purposes of the fair use analysis.[127] Third, the District Court found that because Lexis recoups the cost of writing the annotations through its sales, the impact on the market is significant and PRO's free copy is not a fair use because it "destroy[ed] Lexis/Nexis's ability to recover these costs."[128]

In finding for Lexis, the District Court took the authorship of Lexis as a given because the Copyright Act includes "annotations" as one possible copyrightable

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[122] *Id.*
[123] *Id.* at 1357.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 1358.
[127] *Id.* at 1359.
[128] *Id.* at 1360–61.

item.[129] As a copyrightable text, the Court applied a conventional fair use analysis to the wholesale copying of the code rather than looking at alternative explanations raised by the defense, like the government edicts doctrine or the merger doctrine.[130] The Court did not dwell on the relationship between Lexis and the Commission, tasked with coordinating the annotated code, nor did it spend much time analyzing what constituted a government edict. For the Court, the outcome was straightforward: Georgia held a copyright in the annotated code, and when PRO copied the entire annotated code and distributed it for free it was not protected by fair use.[131] The U.S. Court of Appeals for the Eleventh Circuit, however, arrived at a different decision.

C. The Eleventh Circuit Reversal

Unlike the district court, the Eleventh Circuit focused on the concept of authorship and the role sovereign power played in the construction of the annotations.[132] The code itself cannot be copyrighted because, according to the Eleventh Circuit, it is a document authored by the people as "constructive authors" who are the "reservoir of all sovereignty[,]" making legal texts "intrinsically in the public domain."[133] In an opinion that sometimes reads as an exegesis on the political philosophy of sovereignty, the Eleventh Circuit created a three-part test to determine if the sovereignty of the people could be found in the challenged work. First, it looked to the identity of public officials who had authored the work, second, it assessed the

[129] *Id.* at 1356.
[130] *Id.* at 1357–58.
[131] *Id.* at 1361.
[132] Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org. Inc., 906 F.3d 1229, 1232 (11th Cir. 2018), *aff'd sub nom*. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).
[133] *Id.*

authoritativeness of the work, and finally, it evaluated the process used to create the text.[134]

Unlike the district court that clearly demarcated annotations from public domain code, the Eleventh Circuit found Georgia's official annotations to be "sufficiently law-like" to "be properly regarded as a sovereign work."[135] To support its argument, the Eleventh Circuit pointed to the fact that Georgia, itself, makes the annotations part of its official code, that the Commission tasked with directing the production of the annotations is primarily made up of public officials, and that Lexis takes explicit instructions from the Commission in what annotations will be included, rather than writing them independently.[136] As a result, when looking at the Georgia Official Code the Court located authorship within the People, and by doing so, removed the code from being subject to the Copyright Act at all; instead, they placed it squarely in the public domain.[137] Because it is in the public domain, PRO could not have infringed the copyright, nor was there a need to apply a fair use analysis. As the Court opined rather poetically, "[w]hen the legislative or judicial chords are plucked it is in fact the People's voice that is heard. Not surprisingly, then, for purposes of copyright law, this means that the People, as the constructive authors are also the owners of the law."[138] The court saw important public policy reasons for the law to be in the public domain and was willing to extend this principle even when the "creator of the work was a private sector actor."[139]

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[134] *Id.*
[135] *Id.* at 1233.
[136] *Id.* at 1234.
[137] *Id.* at 1236.
[138] *Id.* at 1239.
[139] *Id.* at 1241 (applying the logic of the Fifth Circuit Court of Appeals in *Veeck* that held private standards incorporated by reference into public statute became part of the public domain to the annotations at issue here).

The Eleventh Circuit still had to grapple with the fact that the annotations were not written by the state but by a private actor. To get around this, the Court acknowledged that while in a "zone of indeterminacy," materials like these annotations are "sufficiently law-like" to be comprehended as emanating from the constructive authorship of the state.[140] Essentially, the Eleventh Circuit defined Lexis's authorship out of existence by relying upon the notion of constructive authorship. Lexis may have written the annotations, but the product was something law-like and thus technically authored by the state. Furthermore, Lexis, the Court stated, may have been a scribe, but they were merely following directions because Georgia had provided "punctiliously specific instructions" on what to write, how much to write, and how to organize it.[141] According to the Court, the Commission, not Lexis, was the author, and the Commission acted as a virtual arm of the legislature, a body that ultimately votes the official annotated code into law.[142]

The Eleventh Circuit did not have to address the fair use arguments that were a substantial part of the district court ruling because the work at issue was not subject to copyright protection to begin with. As a work in the public domain, the official code and its annotations can be copied because it was authored by the people themselves, channeling their sovereignty through the Georgia State Legislature to the Commission, which then directed the hand of Lexis employees to write these law-like annotations. It is like the automatic writing of the occult—something beyond the actual writer is directing the writing, in this case, the sovereign citizen.

The decision vindicated Malamud's quest for access to the law and was a decision that open access advocates

[140] *Id.* at 1242.
[141] *Id.* at 1243.
[142] *Id.* at 1245.

could embrace.[143] However, not all commentators supported the outcome of the Eleventh Circuit.[144] While it was the State of Georgia that appealed the ruling, Malamud also supported the appeal, stating that, "[r]epeating the laws of our country should not be considered a crime … I would like the Supreme Court to tell us which laws we are allowed to speak."[145]

The Supreme Court of the United States needed to speak, in part because even after the Eleventh Circuit ruling, the State resisted providing a copy of the official code to Malamud. After the district court issued summary judgment in favor of Georgia, Malamud immediately removed Georgia's code from his website. However, once the Eleventh Circuit found in his favor, he sought to purchase the code so that he could digitize it again. However, the State refused to sell him a copy, as did Lexis.[146] Even in the

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[143] Street & Hansen, *supra* note 13, at 226 (arguing the decision was good for open access because there isn't a clear dividing line between the law and the annotations and in the case of the official code, citizens were required to go through Lexis to access the official code).

[144] *See* Shipley, *supra* note 9, at 115 (arguing the Eleventh Circuit wrongly decided the case); Caroline L. Osborne, *A Research Tool is not Law: A Response to Code Revision Commission v. Public.Resource.Org, Inc.*, 28 TEX. INTELL. PROP. L. J. 53, 60–61 (2019) (arguing that much like a headnote, annotations are a research tool and are thus considered a secondary source that cannot be cited as part of an official document); *but see* Frohock, *supra* note 38, at 1299 (arguing the Eleventh Circuit's outcome was correct but that it should have based its decision on the merger doctrine).

[145] Liptak, *supra* note 4 (ellipses added).

[146] Mike Masnick, *Despite Losing Its Copyright Case, The State of Georgia Still Trying to Stop Carl Malamud from Posting Its Laws*, TECHDIRT (Jan. 7, 2019, 10:45 AM), https://www.techdirt.com/articles/20190106/22250741346/despite-losing-copyright-case-state-georgia-still-trying-to-stop-carl-malamud-posting-laws.shtml [https://perma.cc/NK6B-UW8W]; Letter from Carl Malamud, President and Founder, Public.Resource.Org, Inc., to Richard C. Ruskell, Legislative Counsel, Office of Legislative Counsel, and Anders Ganten, Director of Government Content Acquisition, The RELX Group (Jan. 2,

face of a circuit court ruling, the state of Georgia continued to exert ownership and control over access to the law rather than let it be freely available to all.

D. The Supreme Court Decision

In April 2020, Chief Justice Roberts writing for a 5-4 majority that included Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh, handed down a victory for Carl Malamud's single-handed efforts to ensure that official legal materials are in the public domain.[147] Affirming the Eleventh Circuit's conclusion, the Supreme Court agreed that copyright did not extend to the annotations included in Georgia's official annotated code.[148] In doing so, the Court expanded the government edicts doctrine that had previously applied only to judges and judicial opinions to include "non-binding, explanatory legal materials created *by a legislative body* vested with the authority to make law."[149] While affirming the Eleventh Circuit ruling, the Supreme Court did so on slightly different grounds by setting forth what it called a "straightforward rule."[150] The Court declared that those "vested with the authority to make and interpret the law" are not "authors" as understood by the Copyright statute, and anyone, judge or legislator, who speaks with the authority of the state, cannot hold a copyright in their written work.[151] The conclusion was simply made: "no one can own the law."[152]

2019), https://assets.documentcloud.org/documents/5676251/Ga-Gov-20190102-1.pdf [https://perma.cc/F25T-Y43].

[147] *See* Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1506 (2020).

[148] *Id.* at 1503–04.

[149] *Id.* at 1504.

[150] *Id.* at 1506.

[151] *Id.* at 1507.

[152] *Id*.

While easy to declare, when applied to the trickier case in Georgia, the Court had some legal maneuvering to do. First, the Court explained why even though the annotations were written by a private company, they could still be declared government edicts. The answer was that while the Commission is not the legislature, it acts for them and with their authority.[153] Thus, as the Court concluded, "[a]lthough Lexis expend[ed] considerable effort preparing the annotations, for purposes of copyright that labor [sic] redounds to the Commission as the statutory author."[154] Since the Commission was the author and not Lexis, the Court then asked if the annotations were written as part of the Commission's legislative duties, and without much fanfare, decreed that it was so.[155]

The remainder of the opinion responded to the arguments made by Georgia and Justice Thomas's dissent. First, Georgia argued that because annotations are specifically mentioned in §101 of the Copyright Act, they should be understood as appropriate subject matter for copyright.[156] The Court quickly dispatched this argument by noting that once the possibility of judges or legislators being authors is done away with, the works of authorship described in §101 are not relevant.[157] Despite Foucault's claims to the contrary, authorship, it turns out, is a statutory construct that can be legally reasoned away so that copyright does not apply to these annotations.[158]

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[153] *Id.* at 1508 (stating that this logic is supported by the Georgia Supreme Court that held the work of the Commission "*is within the sphere of legislative authorit*y.") (italics in original).
[154] *Id*.
[155] *Id.* at 1509.
[156] *Id*.
[157] *Id*.
[158] *See generally* MICHELE FOUCAULT, *What is an Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 113, 130 (1977).

Second, Georgia claimed that the government edicts doctrine does not apply to the states, but only to the federal government.[159] The Court did not choose to comment on state's rights or federalism, but held that while the federal government does have a more sweeping approach to what is in the public domain, such broad federal application was not applied here.[160] Rather, the Court explained, it is a "much narrower government edicts doctrine" that is at work—one that only applies to law making officials.[161] The states can continue to assert copyright "in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on."[162] It isn't entirely clear how this analysis answers Georgia's claim about the Court's extension of the government edicts principle to state officials and their written works, but the Court did not rise to protect federalist principles.

Third, Georgia argued that the Court should not apply the nineteenth-century precedents to this case because those decisions made public policy declarations rather than "statutory interpretations" as the "modern era" is more prone to do.[163] Georgia's policy making argument hints at the ongoing tension between what conservatives call "judicial activism," or policy making from the bench without appropriate deference to the legislative branch, and a more limited judicial interpretation of statutory meaning.[164]

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[159] *Public.Resource.Org, Inc.*, 140 S. Ct. at 1509.
[160] *Id.* at 1509–10.
[161] *Id.* at 1510.
[162] *Id*.
[163] *Id.*
[164] Warren S. Grimes, *Judicial Activism in the First Decade of the Roberts Court: Six Activism Measures Applied*, 48 SW. L. REV. 37, 41 (2019) (arguing that an unelected court should not be a policy maker); *see also* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 557–71 (2010) (detailing the political rhetoric of conservative judicial activism as a failure to show deference to legislatures).

Without delving into the politicized morass of judicial interpretation, much like it did with the issue of federalism, the Court sidestepped the issue and instead claimed that it was "particularly reluctant to disrupt precedents interpreting language that Congress has since reenacted."[165] Basically, because Congress has used these prior cases as the basis for its own copyright revisions, it clearly intended for the law to be in the public domain.[166] As a result, because Congress has let the centuries roll by without removing the government edicts doctrine from the interpretation of the statute, the Court wasn't going to do that for them.[167] The Court found that the Compendium of practices produced by the Copyright Office, while only persuasive, was further evidence that government edicts are not copyrightable and instead the Court's precedents should prevail.[168]

The Court then moved to Georgia's argument that the government edicts doctrine should be narrowly construed to only those items that have the "force of law."[169] The Court addressed Justice Thomas's dissenting argument that the Court should go to the "root" of the government edicts precedents of which Thomas locates somewhere in history, but the majority locates this in the text of the Copyright statute itself.[170] It is in response to Justice Thomas'

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[165] *Public.Resource.Org, Inc.*, 140 S. Ct. at 1510.

[166] *See* Shubha Ghosh, *Copyright As Privatization: The Case of Model Codes*, 78 TUL. L. REV. 653, 675 (2004) ("'[P]ublic ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it.'" (quoting Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 799 (5th Cir. 2002))).

[167] *Public.Resource.Org, Inc.*, 140 S. Ct. at 1510.

[168] *Id.* at 1510–11

[169] *Id.* at 1511–12.

[170] *Id.* at 1512 ("Furthermore, despite Georgia's and Justice Thomas's purported concern for the text of the Copyright Act, their conception of the government edicts doctrine has *less* of a textual footing than the traditional formulation. The textual basis for the doctrine is the Act's 'authorship' requirement, which unsurprisingly focuses on – the author. Justice Thomas urges us to dig deeper to 'the root' of our government

argument regarding the root of the government edicts doctrine that the majority frames access to the law as an issue of democracy and equity, albeit in relatively shallow terms.[171] As Chief Justice Roberts stated, without access to the official annotated version of Georgia's statutes, a citizen of Georgia who can only access the "economy-class version" will not be in a position to understand how the law has evolved, while "first-class readers" will understand how the law is currently interpreted and applied.[172] To allow Georgia to copyright and control access to everything but the statutes and opinions would place everyone at risk of severe penalties, including criminal sanctions, for accessing the law.[173]

Given that the Court stripped copyright away by removing the possibility of the Commission being an author for the purposes of copyright, there was no need to delve into the possible fair use defenses that made up a substantive part of the district court opinion.[174] The larger issues of authorship and state authors as voices of the sovereign raised by the Eleventh Circuit were also not central to the Supreme

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edicts precedents. But, in our view, the text *is* the root. The Court long ago interpreted the word 'author' to exclude officials empowered to speak with the force of law, and Congress has carried that meaning forward in multiple iterations of the Copyright Act.") (internal cross-reference omitted).

[171] *Id.*

[172] *Id.*

[173] *Id.* at 1513.

[174] *Compare id.* at 1512–13 (holding that how just as the government edicts doctrine, under which judges cannot be the author of and cannot copyright the works they produce in the course of their official duties as judges, applies to whatever work legislators perform in their capacity as legislators; Georgia's Code Revision Commission, discharged legislative duties and authored annotations contained in Georgia's official annotated code, qualified as legislator), *with* Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1350, 1357-61 (N.D. Ga. 2017) (the District Court discusses fair use for four consecutive pages).

Court's analysis.[175] Additionally, while the Eleventh Circuit found the annotations "sufficiently law like," the Supreme Court simply declared them to be government edicts outright.[176] The next section will discuss the importance of the decision in terms of current interpretations of copyright, authorship, and the public domain.

V. THE IMPORTANCE OF *GEORGIA V. PRO*

A. Impact on the Incorporation by Reference Debate

The victory in *Georgia v. PRO* may be helpful in Malamud's ongoing litigation to assure the public has free access to private standards "incorporated by reference" into official codes.[177] As Malamud's case in Georgia was heading to the Supreme Court, he was also involved in litigation over the publication on his website of private

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[175] *Compare Public.Resource.Org, Inc.*, 140 S. Ct. at 1512-13 (the Supreme Court did not include authorship and state authors as voices of the sovereign as a central part of its analysis), *with* Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc., 906 F.3d 1229, 1232, 1239-40, 1247-55 (11th Cir. 2018) (the Eleventh Circuit discussed authorship and state authors as voices of the sovereign extensively).

[176] *Compare Public.Resource.Org, Inc.*, 140 S. Ct. at 1506, 1509, *with Code Revision Comm'n*, 906 F.3d at 1233.

[177] Mike Masnick, *Appeals Court Says Of Course Georgia's Laws (Including Annotations) Are Not Protected by Copyright and Free to Share*, TECHDIRT (Oct. 19, 2018), https://www.techdirt.com/articles/20181019/12232640876/appeals-court-says-course-georgias-laws-including-annotations-are-not-protected-copyright-free-to-share.shtml [https://perma.cc/3AV6-K6YX]; Cathy Gellis, *Appeals Court Tells Lower Court to Consider if Standards 'Incorporated Into Law' Are Fair Use; Could Have Done More*, TECHDIRT (July 20, 2018), https://www.techdirt.com/articles/20180719/13434440270/appeals-court-tells-lower-court-to-consider-if-standards-incorporated-into-law-are-fair-use-could-have-done-more.shtml [https://perma.cc/7UWQ-A4XW].

standards incorporated by reference into public law.[178] The timing was such that the litigants in *American Society for Testing and Materials et. al. v. Public.Resource.Org., Inc.*,[179] did not want any decision by the Supreme Court to influence the outcome of their case.[180]

In 2018, the D.C. Circuit Court of Appeals reversed and remanded the incorporation by reference controversy on the issue of fair use.[181] However, the Court's majority specifically noted that they were not addressing the "far thornier question of whether standards retain their copyright after they are incorporated by reference into law."[182] Because the Court did not address the copyright implications, the American Society for Testing filed an amicus brief in *Georgia v. PRO* requesting that even if the Supreme Court found for Malamud, that the Court not apply the outcome to the ongoing litigation against PRO on the issue of incorporation by reference.[183] Some commentators,

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[178] Brief of Amici Curiae American Society for Testing and Materials et al., in Support of Neither Party, Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020) (No. 18-1150), 2019 WL 4192161 ("In 2013, ASTM, NFPA, and ASHRAE filed a copyright infringement action against Public.Resource.Org challenging Public.Resource.Org's unauthorized online posting of their copyrighted works. That litigation remains pending in the District Court for the District of Columbia and is discussed further in this brief.").

[179] *See* Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d 437 (D.C. Cir. 2018).

[180] Brief of Amici Curiae American Society for Testing and Materials et al., *supra* note 178, at *7 ("Whatever this Court decides in this case, *amici* respectfully request that the Court's holding not cast doubt upon longstanding and critically important copyright protection for private standards that are subsequently incorporated by reference. Those copyright questions should be resolved in the litigation directly addressing them, based on the complete record and arguments the involved parties develop.").

[181] Gellis, *supra* note 177.

[182] *Am. Soc'y for Testing and Materials,* 896 F.3d at 441.

[183] Brief of Amici Curiae American Society for Testing and Materials et al., *supra* note 178, at *6–7.

who believed the *Veeck* decision was overbroad, will interpret the outcome of *Georgia v. PRO* as setting a bad precedent because it disrupts what had been understood as a positive public-private partnership between states and private publishing companies when incorporating private standards by reference.[184] However, others see such public-private partnerships as simply shifting costs to fund private entities without actually demonstrating savings on the part of the State.[185] Private standard setters have numerous methods to recoup the costs associated with developing such standards, even without copyright protection.[186]

The Supreme Court did not specifically mention the incorporation by reference issue in its *Georgia v. PRO* decision. However, the underlying logic of ensuring citizen access to the law could easily be applied to the incorporation by reference debate. Thus, despite concern on the part of private standard setters, the Court's decision could mean that the incorporation by reference cases will also turn in favor of the public domain.

The Supreme Court's analysis in *Georgia v. PRO* offers a clearer path forward than the more complicated D.C. Circuit Court of Appeal's conclusion regarding the application of fair use. The Supreme Court bypassed the

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[184] Bremer, *supra* note 57, at 282; *Incorporation by Reference in an Open-Government Age*, *supra* note 63, at 136–37 (arguing that requiring standards be made public if they are incorporated by reference will mean private standards setting organizations will refuse, ultimately harming the public); Daniel J. Russell, *Veeck v. Southern Building Code Congress International, Inc.: Invalidating the Copyright of Model Codes upon Their Enactment into Law*, 5 TUL. J. TECH. INTELL. PROP. 131, 139 (2003) (arguing *Veeck* was overbroad and sweeping).

[185] Johnson, *supra* note 53, at 614–19 (describing why public-private partnerships should be viewed critically because claims regarding cost savings must be actually demonstrated, not asserted).

[186] Pamela Samuelson, *Questioning Copyrights in Standards*, 48 B.C. L. REV. 193, 222–23 (2007) (providing reasons why removing copyright protection for standards will not harm their ability to profit).

question of fair use by decreeing that even aspects of the law written by private companies can be included in the public domain because states and those writing at the behest of states are not authors and are not protected by copyright.[187] The D.C. Circuit, in contrast, relied upon the fair use criteria and stated that the fair use factors need to be applied case-by-case, standard-by-standard, establishing a nearly impossible future of ongoing and constant litigation given that there are tens of thousands of standards incorporated by reference across the United States.[188] However, by specifically leaving out the controversy surrounding incorporation by reference, not only did the Supreme Court keep its decision narrow, but it also left the issue decidedly unclear. While one case addressing the issue of incorporation by reference was remanded by the D.C. Circuit Court of Appeals and dismissed in October of 2020, another case remains pending, and so the issue has not yet been definitively concluded.[189]

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[187] *Public.Resource.Org, Inc.*, 140 S. Ct. at 1506.

[188] Am. Soc'y for Testing & Materials, et al. v. Public.Resource.Org, Inc., 896 F.3d 437, 451 (D.C. Cir. 2018) ("Faithfully reproducing the relevant text of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value, but whether PRO's specific use serves that value must be assessed standard by standard and use by use.").

[189] Stipulation And Order Of Voluntary Dismissal at 1, American Educational Research Association, Inc. et al v. Public.Resource.Org, inc., No. 1:14-cv-00857 (D.D.C. Oct. 14, 2020) ("Plaintiffs, American Educational Research Association, Inc., American Psychological Association, Inc. and National Council on Measurement in Education, Inc., voluntarily dismiss their claim and this action against defendant, Public.Resource.Org, Inc. with prejudice."); *see* Cathy Gellis, *We Interrupt This Hellscape With A Bit Of Good News On The Copyright Front*, TECHDIRT (Oct. 15, 2020), https://www.techdirt.com/articles/20201015/14111445510/we-interrupt-this-hellscape-with-bit-good-news-copyright-front.shtml [https://perma.cc/8HZP-V8KT] ("One case still remains pending – ASTM v Public.Resource.Org – but the other one, American Educational Research Association et al. v. Public.Resource.Org, has now been dismissed by the plaintiffs with

B. Contributions to our Understanding of the Relationship Between Copyright and the Public Domain

The Supreme Court, unlike the Eleventh Circuit, did not spend much time theorizing about copyright and its relationship to authorship, ownership, creativity, or fair use. As a result, the decision did not contribute much to our theoretical understanding of the public domain. However, by broadening the scope of the public domain to include what were original works of authorship (annotations) into public domain materials, the decision will have real-world policy impacts.

First, the logic of the decision meant that the Court spent no time on a fair use analysis because fair use is only relevant for copyrighted works, not those in the public domain. While there is no need to spend time discussing fair use, a clearer understanding of what fair use is and how the standards for ascertaining fair use should be applied would be of considerable help in the copyright litigation arena. The district court failing to find PRO's activities to be fair use demonstrates how little ground there is for fair use claims under circumstances where the privatization of knowledge may impact access and progress.

Second, the decision demonstrated how reliant the idea of authorship is on the statutory construction of the concept. A claim of authorship can easily be denounced, and an author can be stripped of protection with a few choice sentences. By expanding the government edicts doctrine to cover all aspects of Georgia's code, including the annotations written by the Commission, the Court helped

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prejudice. Effectively that means that Public Resource wins and can continue to host these standards online. Which is good news for Public Resource and its users. But it does still leave anyone else's ability to repost standards incorporated into law up in the air.").

demonstrate just how fragile the concept of authorship can be. Authorship, as this decision demonstrates, is a statutory construct, and once removed, all the protections of the Copyright Act are removed with it.[190] The fact that statutory authorship can be granted and taken away so easily has implications for the future of authorship and who will be deemed an author.[191]

Third, the future of government edicts was also raised in the Court's decision. After more than 100 years, the Court expanded the government edicts doctrine to cover annotations. However, the Court specifically noted that other types of government communications beyond official codes were not included in the government edicts doctrine. States, for example, remain able to assert copyright over tourist materials, products created by their universities, and any other state-written documents.[192] However, if all works produced by the U.S. federal government are understood as the work of "the People," it is not entirely clear why the 50 states should not also be seen as the voice of the people producing public domain documents. The question

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[190] *See Public.Resource.Org, Inc*., 140 S. Ct. at 1507 (highlighting that authorship is a statutory construction which means judges and legislative officials cannot be authors).

[191] The issue is far from theoretical. Already courts have established that animals cannot be authors and are increasingly called upon to determine if an AI can be an author for the purposes of copyright. *See generally* Elizabeth Carbone, *No, Animals Cannot Claim Authorship Under the Copyright Act*, COLE SCHOTZ IP BLOG (May 23, 2018), https://www.csipblog.com/2018/05/23/no-animals-cannot-claim-authorship-copyright-act/ [https://perma.cc/6GFB-APBS]; Edward Klaris, *Copyright Laws and Artificial Intelligence*, A.B.A. (Dec. 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/copyright-laws-and-artificial-intelligence/ [https://perma.cc/ZDJ5-C6QR].

[192] *Public.Resource.Org, Inc*., 140 S. Ct. at 1510 ("That doctrine does not apply to non-lawmaking officials, leaving States free to assert copyright in the vast majority of expressive works they produce, such as those created by their universities, libraries, tourism offices, and so on.").

remaining is whether a state should be able to issue a copyright on any publication it produces at all, and if so, under what conditions.

All told, while the decision will impact how citizens access the official code in states currently asserting copyright, it provides a limited understanding of the relationship between state-constructed works and the public domain. The next section looks at what may, and in some cases should, happen next. Given the policy considerations, the fact that numerous states assert copyright in their annotated code, and Malamud's ongoing attempt to ensure access to the law is free for everyone; it is likely that the Court's decision has only set in motion a new round of political maneuvering.

C. Possible Next Steps

While a win for public access to the law and its annotations, the Court's majority decision provides a number of ways out for Georgia and other states should they seek to pursue ongoing private control over their statutes. First, but for Georgia's official Commission writing the annotations and giving them the force of law, copyright would still vest in the annotations.[193] While the Court acknowledged Matthew Bender & Co. does "the lion's share of the work in drafting the annotations," the process was micromanaged by the Georgia Code Revision Commission, a state-authorized entity charged with writing and revising Georgia's official statutes, including the annotations.[194] For its part, Lexis, the parent company of Matthew Bender, compiles the official code and, in exchange for its work, has the exclusive right to "publish, distribute, and sell the

[193] *See id.* at 1504 (clarifying that Georgia itself sets up the conclusion that annotations are in the public domain because Georgia specifically asserts that the annotated code is the "official Code" of Georgia).
[194] *Id.* at 1504–05.

OCGA" for a set price of $412.00.[195] Lexis agreed to make an unannotated copy available for free, but the official annotated code is only legally available for purchase.[196]

Had the Court wanted to firmly establish annotations as part of the public domain, they could have ruled that all such materials were "facts" using the merger doctrine and not eligible for copyright protection, even if the author was a private individual. The merger doctrine holds that the law and "law-like" annotations are facts, rather than ideas, and as such, cannot be protected by copyright because under the conventional idea/expression analysis because facts are not protectable.[197] Such a solution would be a promising method of ensuring that the law and its interpretations are in the public domain that does not rely upon a theory of sovereignty in the people.[198]

Given the logic of the Court in *Georgia v. PRO*, states who assert copyright over an official annotated code may still be able to do so. As the Court reminded Georgia, even though §101 of the Copyright Act covers annotations written by private actors, the point here is that the annotations are not works of authorship, but rather

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[195] *Id.* at 1505, 1509 ("But that provision refers only to 'annotations . . . which . . . represent an original work of *authorship*.' The whole point of the government edicts doctrine is that judges and legislators cannot serve as authors when they produce works in their official capacity.") (citation omitted).

[196] Jason B. Binimow, Annotation, *Copyright in and Fair Use of Statutory Annotations and Case Headnotes*, 38 A.L.R. Fed. 3d Art. 6 (2019) ("First, the agreement requires that Lexis create a free, unannotated, online version of the Code for use by the general public.").

[197] Frohock, *supra* note 38, at 1272 ("Copyright law protects expressions rather than ideas. The law, along with law-like writing, is uncopyrightable because its idea and its official expression are inseparable. Application of the merger doctrine here is unconventional, but promising."); *see* Samuelson, *supra* note 177, at 215 (arguing that the merger doctrine should be used to avoid copyright claims in standards incorporated by reference).

[198] Frohock, *supra* note 38, at 1288.

government edicts issued by the State. Dividing official annotations written by the State from those written by private individuals leaves plenty of room to copyright private annotations.[199] Minnesota, for example, publishes its official code free online but also has an unofficial annotated code produced for purchase by a private publisher if individuals want access to the annotations associated with Minnesota's official code.[200] Therefore, even from the jaws of public domain victory, there are options for ensuring that annotations remain copyrightable; they simply must be written without the official sanction of the State.

Second, the Court proscribed the policy approach Georgia should take quite clearly—get Congress to change the law.[201] Georgia claimed that without copyright protection, a for-profit corporation like Lexis would not produce affordable annotated codes.[202] It then asserted that the Court was engaged in policymaking if it were to declare annotations part of the public domain.[203] The Court did not rise to the claim that making annotations public domain materials is policymaking, but rather tossed "[the ball] into Congress's court."[204] If a solution is to be had, it is up to Congress to make one by changing the scope of the Copyright Act.[205] While, as of this writing, no legislation

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[199] *See Public.Resource.Org, Inc.*, 140 S. Ct. at 1509.

[200] Scheibel, *supra* note 5, at 374–75.

[201] *Public.Resource.Org, Inc.*, 140 S. Ct. at 1510 ("A century of cases have rooted the government edicts doctrine in the word 'author,' and Congress has repeatedly reused that term without abrogating the doctrine. The term now carries this settled meaning, and 'critics of our ruling can take their objections across the street, [where] Congress can correct any mistake it sees.") (alteration in original and citation omitted).

[202] Scheibel, *supra* note 5, at 369–70 (describing Georgia's argument that without privatizing the code, there will be no incentive for Lexis to publish it).

[203] *Public.Resource.Org, Inc.*, 140 S. Ct. at 1510.

[204] *Id.* at 1511 (alteration in original and citation and quotations omitted).

[205] Congress could also add official codes to the list of exclusions in §102 to clarify the issue of incorporation by reference. *See* Sweeney, *supra*

has been introduced, it is not outside the realm of possibility that some measure will be introduced that would secure copyright protection in official state codes.

Third, an alternative and hopefully more likely outcome is that more states will pass, and should pass, the Uniform Electronic Legal Materials Act ("UELMA").[206] While access to the law has tended to be pushed by activists rather than representing a change in state philosophy, there is a slow trend in favor of open access.[207] The UELMA, already law in 22 states and the District of Columbia, creates an online accessible official repository for State law that is "reasonably available" to the public.[208] Developed by the Uniform Law Commission in 2011, the UELMA is intended to provide better access to citizens via electronic means to the law.[209] Illinois and Massachusetts both have legislation pending that could mean the adoption of the model law bringing the state total to 24.[210] Notably, Georgia is not among the states who have adopted the model regulations.[211]

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note 56, at 1361 (arguing for changes in the Copyright Act to help clarify that official codes incorporated by reference are in the public domain).

[206] Walters, *supra* note 44; Street & Hansen, *supra* note 13, at 243.

[207] Johnson, *supra* note 53, at 605 (arguing that there is a shift to open access despite states efforts to retain copyright over their code).

[208] *Electronic Legal Material Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=02061119-7070-4806-8841-d36afc18ff21&tab=librarydocuments&LibraryFolderKey=&DefaultView= [https://perma.cc/MF45-AKPA] (including model legislation for state use in developing the UELMA where §8 covers public access and is reasonably available).

[209] *Id.*

[210] *Uniform Electronic Legal Material Act: State Legislation*, NAT'L CONF. ST. LEGIS. (Mar. 31, 2020), https://www.ncsl.org/research/about-state-legislatures/uniform-electronic-legal-material-legislation.aspx, [https://perma.cc/YH9G-J72U] (covering the legislative history of adoption of the model rule since 2012).

[211] *Electronic Legal Material Act*, UNIF. L. COMM'N (Jan. 22, 2021), https://www.uniformlaws.org/committees/community-home?CommunityKey=02061119-7070-4806-8841-d36afc18ff21

Finally, it is important to push for an even more open-access future. Mere access to the law is not sufficient because in order to appropriately understand the law, one must also access the interpretive materials associated with it.[212] Including annotations associated with the official code is one small step, but access to all judicial decrees should be free.[213] Professor Bartow suggests pushing the bar higher and requiring compulsory licensing for all proprietary legal materials.[214] She argues that access to the law isn't meaningful unless it also includes case law summaries, secondary sources, and specialized collections.[215] While the victory in *Georgia v. PRO* is important, it is just one small step towards a legal system that could really be open to all.

VI. CONCLUSION

The politics of copyright defy conventional ideological categorization. The U.S. District Court for the Middle District of Florida and the Eleventh Circuit panel judges were Clinton appointees, while the Supreme Court majority was a combination of Obama, Bush, and Trump appointees.[216] Democratic and Republican Presidents alike

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[https://perma.cc/6NKP-KNKB] (listing states that have signed on to the Electronic Legal Material Act).

[212] Ann Bartow, *Open Access, Law, Knowledge, Copyrights, Dominance and Subordination*, 10 LEWIS & CLARK L. REV. 869, 874 (2006).

[213] Street & Hansen, *supra* note 13, at 244 (arguing for access to all relevant materials online for free to citizens).

[214] Bartow, *supra* note 212, at 869–70.

[215] *Id.* at 874.

[216] *About the Judges: Susan Bucklew*, U. S. DIST. Ct. M.D. FLA., https://www.flmd.uscourts.gov/judges/susan-bucklew [https://perma.cc/X9HX-MECQ] (last visited Dec. 4, 2020) (providing Susan Bucklew's biography and information regarding her appointment by President Clinton); *Judges: Hull, Frank M.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/hull-frank-m [https://perma.cc/9GKA-A7MD] (last visited May 22, 2020) (providing Frank Hull's biography and information regarding his appointment by

have advocated for IP maximalist positions.[217] Early resistance to expansive copyright protection included the "cyber-libertarian" and former Grateful Dead musician John Perry Barlow.[218] Two decades into the 21st century, the ideological lines of the information age continue to be negotiated and tested, with the clear line of demarcation being privatization versus open access.

This paper framed the recent Supreme Court decision *Georgia v. PRO* in the context of public access versus privatization because, while ultimately the outcome is a small concession to the public domain with several avenues for further privatization left open, it marks an important contribution on the part of an ideologically mixed set of justices for greater public access. While the language of democracy, public policy, and social justice is only alluded to in the majority opinion when Justice Roberts referenced the "economy-class version" of the law, this decision upholds the notion that there is a public domain collectively owned by the American citizenry that cannot be privatized. It is a small win in the otherwise massive privatization of

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President Clinton); Lee Peifer, *Judge Stanley Marcus to Take Senior Status*, EVERSHEDS SUTHERLAND 11TH CIR. BUS. BLOG (Sept. 6, 2019), https://www.11thCircuitBusinessBlog.com/2019/09/judge-stanley-marcus-to-take-senior-status/ [https://perma.cc/S92P-9D6N] (providing information regarding Judge Marcus' appointment by President Clinton); Edward A Marshall, *Hon. Richard W. Story: U.S. District Judge, Northern District of Georgia*, FED. LAW. 36–37 (Aug. 2017) (providing information regarding Judge Story's appointment by President Clinton).

[217] DEBORA HALBERT, THE STATE OF COPYRIGHT: THE COMPLEX RELATIONSHIPS OF CULTURAL CREATION IN A GLOBALIZED WORLD 29–33 (2014) (outlining the similarity of approaches to intellectual property from President Reagan to President Obama).

[218] Richard Gonzalas, *Cyber-Libertarian and Pioneer John Perry Barlow Dies At Age 70*, NPR (Feb. 7, 2018, 7:08 PM), https://www.npr.org/sections/thetwo-way/2018/02/07/584124201/cyber-libertarian-and-pioneer-john-perry-barlow-dies-at-age-70 [https://perma.cc/783T-DW7S].

America's prisons, military, road systems, educational systems, and so much more, but it is a win nonetheless.