

Submission of Professors of Intellectual Property
on the Subject of Edicts of Government

1) **Wheaton v. Peters and the Birth of the “Government Edicts” Exclusion**. The U.S.

Supreme Court has held, in a series of opinions dating from the early Nineteenth Century to just last year, that the law cannot be copyrighted. The underpinnings of the so-called “government edicts” doctrine were first laid down in the U.S. Supreme Court’s decision in *Wheaton v. Peters*, 33 U.S. 591 (1834). In that case, Wheaton, who between 1816 and 1827 served as the official Reporter of Decisions of the Supreme Court of the United States, sued his successor in office, who removed the summaries and annotations Wheaton had added to opinions and published his own cheaper volumes containing certain of the opinions Wheaton had first reported. Wheaton asserted, first, that the Justices of the Supreme Court were the authors of their opinions, and therefore the owners of copyright in those opinions. Wheaton further asserted that the Justices had assigned their ownership interests to him through an informal gift--a claim that is less far-fetched it may seem given that at the time the Supreme Court reporter’s compensation was, in part, based on the sale of volumes containing the Court’s opinions. On this basis, Wheaton charged that Peters’ re-publishing of the opinions was copyright infringement. *Id.* at 614.

2) The bulk of the Supreme Court’s opinion in *Wheaton* concerns whether Wheaton could have a common law copyright in the volumes he had published, or whether in the United States copyright in *published* works is solely a creation of statutory law. The Court held that there was no common law copyright in published works, that the sole source of copyright protection for such work arises from the copyright statute, and that copyright protected Wheaton’s volumes

only if Wheaton had in fact complied with the formalities the statute prescribed as a condition precedent to protection.

3) On the basis of that holding, the *Wheaton* Court remanded for a determination whether Wheaton had complied with the statutory formalities. And in the final sentence of its opinion, the Court made clear that whatever the answer to that question might be, Wheaton's copyright could not extend to the content of the Court's opinions: "It may be proper to remark," the *Wheaton* Court stated, "that the Court is unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court, and that the judges thereof cannot confer on any reporter any such right." *Id.* at 668. This sentence has been understood as a straightforward statement that judicial opinions cannot be copyrighted.

4) **Banks v. Manchester and the Expansion of the Government Edicts Exclusion to Nonbinding Explanatory Materials Prepared by Judges**. A half-century after *Wheaton*, the Court both confirmed and extended its prior determination that judicial opinions cannot be copyrighted. In *Banks v. Manchester*, 128 U.S. 244 (1888), the Court reviewed a claim of copyright ownership in the opinions of the Supreme Court of Ohio. In 1882, the state of Ohio purported to establish copyright in the opinions of the Supreme Court of Ohio, and to establish ownership of those copyrights in the court's reporter. That reporter subsequently transferred the putative copyright to a private company which in turn transferred the rights to Banks, a printer. When a rival printer, Manchester, published various opinions of the Supreme Court of Ohio in its own journal, Banks sued, claiming copyright infringement. The U.S. Supreme Court rebuffed Banks' claim, holding that both judicial opinions and non-binding explanatory materials prepared by the judges were ineligible for copyright protection. *Id.* at 249-251. The Court held that "the

judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note” cannot “be regarded as their author or their proprietor, in the sense of [the Copyright Act].” *Id.*, at 253. “No one,” the *Banks* Court stated, “can own the law.” *Id.*

5) **Georgia v. Public.Resource.Org and the Further Expansion of the Government Edicts**

Exclusion to Nonbinding, Explanatory Legislative Materials. Finally, just last year the Supreme Court re-affirmed and again expanded the government edicts exclusion in its decision in *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498 (2020). In that case, the Court confronted a claim by the State of Georgia that it owned copyright in the annotations in the Official Code of Georgia Annotated. The Court rejected that claim. In doing so, the Court identified “a judicial *consensus*” that “judges could not assert copyright in ‘whatever work they perform in their capacity as judges.’” *Public.Resource*, 140 S. Ct. at 1506-1507 (citing *Banks*, 128 U.S. at 253) (emphasis in original). And the *Public.Resource* Court, citing *Banks* for the proposition “that non-binding, explanatory legal materials are not copyrightable when created by judges who possess the authority to make and interpret the law,” concluded “that the same logic applies to non-binding, explanatory legal materials created by a *legislative* body vested with the authority to make law.” *Id.* at 1504 (emphasis added).

6) Notably, the Court in its *Public.Resource* decision offered a rationale for the exclusion of government edicts from copyright that focuses on *authorship*. The *Public.Resource* Court stated that judges and legislators “may not be considered the ‘authors’ of the works they produce in the course of their official duties as judges and legislators.” *Public.Resource*, 140 S. Ct. at 1506. The Court explained that the principle, first articulated in *Banks*, that “no one can own the law” is given effect “in the copyright context through construction of the statutory term ‘author.’” *Id.* at

1507. The Court stated that it would interpret “the word ‘author’ to exclude officials empowered to speak with the force of law.” *Id.* at 1510. And so for legislators, “*whatever work* they perform in their capacity” as lawmakers is excluded from copyright protection. *Id.* at 1507 (citing *Banks*, 128 U.S. at 253) (emphasis in original). “Because these officials are generally empowered to make and interpret law, their ‘whole work’”, the *Public.Resource* Court held, “is deemed part of the ‘authentic exposition and interpretation of the law’ and must be ‘free for publication to all.’” *Id.* (quoting *Banks*, 128 U.S. at 253). The “whole work” of the legislators, the Court held, “includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties.” *Id.* at 1508.

7) The *Public.Resource* Court’s holding excluding from copyright protection “the whole work” produced by judges and legislators in the course of their official judicial or legislative duties is a marked confirmation of the government edicts doctrine. It makes clear both that the government edicts exclusion applies to legislative as well as judicial materials, and that it “applies regardless of whether a given material carries the force of law.” *Id.* at 1506 (referring to this approach as “a straightforward rule based on the identity of the author”). The *Public.Resource* Court made clear that “[i]nstead of examining whether given material carries ‘the force of law,’ we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable.” *Id.* at 1513.

8) In its Compendium of U.S. Copyright Office Practices, the Copyright Office states that it will not register any “government edict that has been issued by any federal, state, local, or territorial government, including legislative enactments, judicial decisions, administrative rulings, public

ordinances, or similar types of official legal materials.” Compendium (Third) § 313.6(C)(2). The Copyright Office also “will not register a government edict issued by any foreign government or any translation prepared by a government employee acting within the course of his or her official duties.” Id.

9) This formulation makes clear that the Copyright Office understands the government edicts exclusion to apply not just to legislative and judicial materials, but to *executive and administrative edicts* as well. This understanding is consistent with the rationale for the exclusion set out by the Court in *Public.Resource*. If legislators and judges are not the “authors” of the works they produce while carrying out their legislative or judicial duties, there is no reason to treat any differently the works created by executive branch officials carrying out their executive duties.

10) **Allegations Regarding Assertions of Copyright Inconsistent with the Government**

Edicts Exclusion. Various states, as well as a number of private vendors, have asserted copyright in certain materials in a manner that may be inconsistent with the government edicts exclusion. We will detail three of the principal allegations and discuss briefly why each allegation, if it is taken as true (which we are doing for our purposes here), raises serious questions regarding whether copyright rights are being claimed in materials that are properly treated as uncopyrightable government edicts.

a) ***Twenty-four states assert copyright rights in, and apply copyright notices to, their official annotated codes.*** Law librarians have estimated that 24 states claim copyright in and apply copyright notices to their official annotated codes. The annotated codes in these states are prepared using third-party vendors, but are approved or otherwise

supervised by the states' respective legislatures--in other words, a process similar to that followed in Georgia for the Official Code of Georgia Annotated.¹ These statements raise serious questions regarding whether these 24 states, and the vendors to which they have awarded exclusive marketing rights, are advancing copyright assertions that are inconsistent with the government edicts exclusion.

The use of third-party vendors to prepare annotations, the Supreme Court made clear in its *Public.Resource* decision, cannot circumvent the exclusion. Legislators are often aided by third parties in drafting laws, and although the annotations in the Georgia code at issue in the *Public.Resource* case were drafted by a private contractor, the Court held that the annotations were the work of the Georgia legislature created in the furtherance of official legislative duties. The annotations were therefore within the scope of the government edicts exclusion and no copyright could be asserted in them. *Id.* at 1508-1509.

b) Private parties assert copyright in model codes and standards that they have authored but which have subsequently been adopted as law. In many instances, private vendors have asserted copyright claims in model codes and standards which they have authored but which subsequently revised and then have been adopted as law. See, for example copyright claims asserted by private parties in the California Electrical Code, Title 24, Part 3 of the California Code of Regulations. Any such statements again raise serious

¹ The annotations in Georgia were prepared by a private firm under a work made for hire agreement with the Georgia Code Revision Commission, which then submitted the annotations and revised code to the Georgia Legislature. The Legislature then voted to do three things: (1) “enact[]” the “statutory portion of the codification of Georgia laws”; (2) “merge[]” the statutory portion “with [the] annotations”; and (3) “publish[]” the final merged product “by authority of the state” as “the ‘Official Code of Georgia Annotated.’” OCGA §1–1–1 (2019).” See *Public Resource*, 140 S. Ct. at 1504-05, citing *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F. 3d 1229, 1245, 1255 (11th Cir. 2018).

questions as assertions of copyright made in the materials adopted as law are inconsistent with the government edicts doctrine. Privately-authored model codes and standards can qualify for copyright protection. However, when a state or municipal government adopts a privately authored work as part of the law--whether in the form of a judicial opinion, legislation, legal code, or municipal ordinance--that work as embodied in the work of the government official with the power to make law becomes a government edict that is excluded from copyright protection. The Fifth Circuit so held in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). *Veeck* involved copyright claims in a building code created initially by a private standard-setting organization and promoted by that organization as suitable for adoption by cities as municipal law. After the model code was adopted by several cities in Texas, Veeck, the owner of a private website that provides information about Texas local government, posted the codes to his site, and the standard-setting organization sued. The Fifth Circuit, in an *en banc* majority opinion, framed the issue in the case as “the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become ‘the law.’” The Fifth Circuit made clear that copyright could not be asserted in such an instance: “Our short answer is that as law, the model codes enter the public domain and are not subject to the copyright holder’s exclusive prerogatives.” *Id.* at 793. See also *Building Officials & Code Adm. v. Code Technology, Inc.* (“BOCA”), 628 F.2d 730, 735 (1st Cir. 1980) (reversing grant of preliminary injunction prohibiting publication of a state’s official building code that adopts a privately-authored code: “We are...far from persuaded that BOCA's virtual authorship of the Massachusetts building code entitles it to enforce a copyright monopoly over when,

where, and how the Massachusetts building code is to be reproduced and made publicly available. While we do not rule finally on the question, we cannot say with any confidence that the same policies applicable to statutes and judicial opinions may not apply equally to regulations of this nature.”); *American Society for Testing and Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437 (D.C. Cir. 2018) (reversing and remanding district court copyright judgment in favor of standards organizations to determine whether Public Resource’s publication of numerous technical standards constituted fair use and stating that Public Resource “raises a serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations”).

The result in *Veeck* is consistent with the Supreme Court’s understanding in *Public.Resource* of the scope of the government edicts exclusion. The adoption into law of a privately-authored code is accomplished through the work of legislators discharging their official legislative duties. As with the annotations that were originally created by private contractors in the *Public.Resource* case, the content of a law originally created by a private contract is nonetheless the work of the legislature and the privately-authored content, as embodied in the law, is therefore ineligible for copyright protection.

c) ***Copyright assertions in jury instructions.*** Copyright has been asserted in jury instructions used by state courts, such as Minnesota’s Jury Instructions Guides published by Thomson-West and in the California jury instructions. For jury instructions that are drafted by judges themselves, it is clear that the instructions are judicial materials drafted in the discharge of those judges’ judicial duties. These jury instructions are squarely

within the scope of the government edicts exception, and therefore copyright claims may not be asserted in those materials. Jury instructions may also be drafted by private groups. However, if courts adopt such privately-drafted jury instructions for their use, there is no reason to treat jury instructions differently than the *Veeck* court treated a privately-authored building code. For juries and litigants, jury instructions are “the law”; they are both the expression of the law that the jury must follow in rendering a verdict, and also, as a consequence, the law that may determine which side in a dispute will prevail. In every respect, once privately-authored jury instructions have been adopted and put to use by a court, they are the law, and therefore fall squarely within the scope of the government edicts exclusion from copyright.

11) With respect to each of these allegations, serious questions have been raised regarding whether state and local governments--and, perhaps more relevantly, the private publishers, standard-setting bodies, and information service providers who have entered into exclusive distribution agreements with those governments based on the assertion of copyright rights--are acting consistently with the law regarding the exclusion of government edicts from copyright protection.

12) Assertions of copyright protection inconsistent with the government edicts exception would raise serious public policy concerns. In a democracy, it is a matter of basic fairness that people have access to the law they are expected to know and to obey. The First Circuit referred to that basic fairness requirement in *BOCA*, and framed it as a matter of due process of law:

“Regulations such as the Massachusetts building code have the effect of law and carry sanctions of fine and imprisonment for violations Due process requires people to

have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.”

BOCA, 628 F.2d at 734 (internal citations omitted).

No one should disrespect or burden through the assertion of invalid copyright claims every American’s foundational due process interest in access to the law that governs them. The assertion of invalid copyright claims in government edicts is very likely to deter people who are free under the law to copy and use these materials from exercising their legal rights. Such a result would be inimical to the principle that the Supreme Court identified most concisely in *Banks* as undergirding the exclusion of government edicts from copyright: No one can own the law.

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